

# SOLVING THE PROCEDURAL PUZZLES OF THE TEXAS HEARTBEAT ACT AND ITS IMITATORS: THE LIMITS AND OPPORTUNITIES OF OFFENSIVE LITIGATION

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*The Texas Heartbeat Act, enacted in 2021 as Senate Bill 8 (S.B. 8), prohibits abortions following detection of a fetal heartbeat, a constitutionally invalid ban under current Supreme Court precedent. But the method of enforcement in the Texas law is unique—it prohibits enforcement by government officials in favor of private civil actions brought by “any person,” regardless of injury. Texas sought to burden reproductive-health providers and rights advocates with costly litigation and potentially crippling liability.*

*In a series of articles, we explore how S.B. 8's reliance on exclusive private enforcement at the expense of public enforcement creates procedural and jurisdictional hurdles to challenging the law's constitutional validity and obtaining judicial review. This Article focuses on "offensive" litigation, in which a rights holder sues government officials, usually in federal court, seeking to enjoin enforcement of the law against that rights holder. The Article considers how the law stymies the typical approach of suing the responsible executive officer*

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*because no executive officer is responsible for enforcing the law; reproductive-health providers attempted that path and met with limited success before a divided Supreme Court. The Article identifies alternative paths into federal court, including suits against private “any person” S.B. 8 plaintiffs who act under color of state law. A suit by the United States against the State of Texas to vindicate federal interests and the constitutional rights of U.S. citizens offers a limited alternative, but not one likely to succeed.*

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## INTRODUCTION

The Texas Heartbeat Act,<sup>1</sup> enacted in 2021 as Texas Senate Bill 8 (S.B. 8), prohibits abortions after detection of a fetal heartbeat.<sup>2</sup> This effectively prohibits abortions after five-to-six weeks of pregnancy (often before a person is aware of the pregnancy), a category comprising as much as ninety percent of abortions in the state.<sup>3</sup> The law is clearly constitutionally invalid under the Supreme Court's prevailing reproductive-freedom jurisprudence, under which states cannot prohibit abortions prior to fetal viability,<sup>4</sup> at twenty-three to twenty-six weeks. Unless the Supreme Court overrules *Roe v. Wade*<sup>5</sup> and *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>6</sup> or modifies the scope of reproductive freedom, this is not a close question as a matter of judicial precedent.

Texas was not an outlier in enacting strict and constitutionally dubious restrictions on reproductive freedom. States raced to impose the stiffest restrictions, including fetal-heartbeat bans<sup>7</sup> and other laws prohibiting pre-viability abortions.<sup>8</sup> Each envisioned a newly aligned Court ready to narrow (if not overrule) controlling abortion doctrine and increase state power to limit reproductive freedom; each sought to create the case providing the Court the opportunity to limit or

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1. Texas Heartbeat Act, S.B. 8, 87th Leg., Reg. Sess. (Tex. 2021) (to be codified at TEX. HEALTH & SAFETY CODE ANN. §§ 171.201-212 (West 2021)).

2. *Id.* § 3.

3. Complaint for Declaratory Judgment and Injunctive Relief—Class Action at 30, Whole Woman’s Health v. Jackson, No. 21-CV-616, 2021 WL 3821062 (W.D. Tex. July 13, 2021) [hereinafter *WWH Complaint*]; *see also* Christina Caron, *What Does It Really Mean to Be 6 Weeks Pregnant?*, N.Y. TIMES (May 18, 2019), <https://www.nytimes.com/2019/05/18/parenting/abortion-six-weeks-pregnant.html> [<https://perma.cc/7C3K-S4PE>].

4. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992); *see Roe v. Wade*, 410 U.S. 113, 162–63 (1973).

5. 410 U.S. 113 (1973).

6. 505 U.S. 833 (1992).

7. *Jackson Women’s Health Org. v. Dobbs*, 951 F.3d 246, 248 (5th Cir. 2020) (per curiam) (Mississippi); *Planned Parenthood S. Atl. v. Wilson*, 527 F. Supp. 3d 801, 806 (D.S.C. 2021) (South Carolina); *SisterSong Women of Color Reprod. Just. Collective v. Kemp*, 472 F. Supp. 3d 1297, 1314 (N.D. Ga. 2020) (Georgia); *see MARY ZIEGLER, ABORTION AND THE LAW IN AMERICA: ROE V. WADE TO THE PRESENT 205–06* (2020).

8. *See, e.g.*, *Bryant v. Woodall*, 1 F.4th 280, 283 (4th Cir. 2021) (North Carolina); *Little Rock Fam. Plan. Servs. v. Rutledge*, 984 F.3d 682, 686 (8th Cir. 2021) (Arkansas); *Robinson v. Marshall*, 415 F. Supp. 3d. 1053, 1055, 1057–58 (M.D. Ala. 2019) (Alabama); *ZIEGLER, supra* note 7, at 205.

eliminate constitutional protection for abortion.<sup>9</sup> The Court heard argument in December on the constitutional validity of Mississippi's fifteen-week ban in *Dobbs v. Jackson Women's Health Organization*.<sup>10</sup>

Courts adjudicate constitutional questions and decide on a law's constitutional validity in two postures: offensive (which we might label pre-enforcement, preemptive, or anticipatory) or defensive (which we might label as enforcement or coercive).<sup>11</sup>

Constitutional challenges to typical abortion restrictions and regulations follow the offensive process. Reproductive-health providers (doctors, nurses, clinics), patients, reproductive-rights advocacy organizations, or reproductive-freedom supporters<sup>12</sup> bring a lawsuit in federal district court as soon as, if not before, an abortion restriction takes effect; the defendant is the state executive officer responsible for enforcing the law (such as the head of the state's department of health and human services); and the suit seeks a declaratory judgment that the law is constitutionally invalid and an injunction prohibiting the defendant officer from enforcing the law against the plaintiff.<sup>13</sup> *Dobbs* followed this path through the federal judiciary.

Texas tried a different tack. S.B. 8 disclaims public enforcement of the new ban—no state or local government or officer can bring an enforcement action for a violation of the law.<sup>14</sup> The law creates a private cause of action empowering “any person,” regardless of injury or personal connection to any abortion, to sue a provider or other person who performs or aids or abets any post-heartbeat abortion.<sup>15</sup> This “any person” can recover statutory damages of not less than

9. *Jackson Women's Health Org. v. Dobbs*, 945 F.3d 265, 268–69 (5th Cir. 2019) (per curiam), *cert. granted in part*, 141 S. Ct. 2619 (2021); S.B. 6, 93rd Gen. Assemb., Reg. Sess. (Ark. 2021); *see also* Howard M. Wasserman, *A Court with No Names: Anonymity and Celebrity on the “Kardashian Court.”* 106 IOWA L. REV. ONLINE 47, 59 (2021).

10. 141 S. Ct. 2619 (2021) (granting certiorari in part); Transcript of Oral Argument, *Dobbs v. Jackson Women's Health Org.*, 141 S. Ct. 2619 (2021) (No. 19-1391) [hereinafter *Dobbs* Argument].

11. *Infra* Section II.B.

12. For simplicity, we use “Providers” to cover patients, rights holders, reproductive-health providers, and reproductive-freedom advocates and supporters who might be subject to S.B. 8 suits and who might seek to challenge the constitutional validity of the heartbeat ban.

13. *Juno Med. Servs. LLC v. Russo*, 140 S. Ct. 2103, 2112–13, 2117 (2020); *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2300–01 (2016).

14. Texas Heartbeat Act, S.B. 8, 87th Leg., Reg. Sess. § 3 (Tex. 2021) (to be codified at TEX. HEALTH & SAFETY CODE ANN. § 171.207(a) (West 2021)).

15. S.B. 8 § 3 (to be codified at TEX. HEALTH & SAFETY CODE ANN. § 171.208(a)–(b) (West 2021)).

\$10,000 per prohibited abortion, attorney's fees, and injunctive relief.<sup>16</sup>

In July 2021—after the law's enactment but before its effective date—a collection of reproductive-health providers, doctors, and reproductive-rights advocates (advocacy groups and activists providing information, guidance, and funding to women seeking reproductive-health care) pursued the ordinary litigation strategy, suing numerous government officials and others in federal court. Following a series of procedural rulings through multiple levels of the federal judiciary, the Supreme Court granted certiorari before judgment; on expedited briefing and argument, a divided Court in *Whole Woman's Health v. Jackson*<sup>17</sup> ("WWH") allowed offensive claims against one set of government officials while rejecting others.<sup>18</sup>

S.B. 8 raises substantive and procedural problems. The substantive problem is obvious—a ban on pre-viability abortions contradicts prevailing judicial precedent. A court following *Roe* and *Casey* as binding precedent must declare the heartbeat ban constitutionally invalid and prohibit enforcement.

The procedural problem is obvious but less understood—finding ways to litigate and vindicate the constitutional rights established in *Roe* and *Casey*. The law's unique structure creates a jurisdictional and procedural morass and a host of complex hurdles that providers must clear to gain judicial resolution of the (obvious) substantive constitutional question.

But many S.B. 8 critics allowed themselves to be "hypnotized" by that procedural morass<sup>19</sup> or to conflate the law's obvious substantive problems with procedural objections. The rhetoric surrounding the law confirms this conflation. Advocates complained of a "brazen defiance of the rule of law and the federal constitutional rights to which Texans are entitled."<sup>20</sup> S.B. 8 thwarts "traditional mechanisms of federal judicial review,"<sup>21</sup> evades "effective judicial protection of that

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16. *Id.*

17. 142 S. Ct. 522 (2021).

18. *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 531, 538–39 (2021); *infra* notes 87–98 and accompanying text.

19. See Anthony J. Colangelo, *Suing Texas Senate Bill 8 Plaintiffs Under Federal Law for Violations of Constitutional Rights*, 74 SMU L. REV. F. 136, 137 (2021).

20. *WWH* Complaint, *supra* note 3, at 7–8.

21. Complaint at 2, United States v. Texas, No. 21-CV-796, 2021 WL 4099545 (W.D. Tex. Sept. 9, 2021) [hereinafter DOJ Complaint].

right in federal or state court,”<sup>22</sup> and strips “citizens of the ability to invoke the power of the federal courts to vindicate their rights.”<sup>23</sup> The law represents a “deliberate attempt to thwart ordinary mechanisms of federal judicial review,”<sup>24</sup> while “transform[ing] the state courts from a forum for the protection of rights into a mechanism for nullifying them.”<sup>25</sup>

The *WWH* dissenters furthered these themes. Chief Justice Roberts complained that “Texas has employed an array of stratagems designed to shield its unconstitutional law from judicial review,”<sup>26</sup> its purpose and effect to “nullify this Court’s rulings.”<sup>27</sup> Justice Sotomayor argued that S.B. 8 “is structured to thwart review and result in ‘a denial of a hearing.’”<sup>28</sup> She criticized the majority for “reward[ing] the State’s efforts at nullification,”<sup>29</sup> thereby “betray[ing] not only the citizens of Texas, but also our constitutional system of government.”<sup>30</sup> The result is a “disaster for the rule of law.”<sup>31</sup>

S.B. 8 upends traditional constitutional litigation strategy. In eliminating public enforcement and delegating enforcement authority to random private citizens with no injury other than a political or ideological ax to grind, Texas eliminated one process for vindicating rights—the process that is more direct, less burdensome, usually speedier, and thus more favorable to rights holders.

But it overstates matters to claim the law insulates itself from constitutional challenge, nullifies constitutional rights, betrays the constitutional order or the rule of law, thwarts judicial review, undermines the Court, or ensures that federal courts cannot pass on the constitutional validity of the heartbeat ban. S.B. 8 does not

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22. Transcript of Oral Argument at 3, *Whole Woman’s Health*, 142 S. Ct. 522 (No. 21-463) [hereinafter *WWH* Argument].

23. DOJ Complaint, *supra* note 21, at 5.

24. United States’ Emergency Motion for a Temporary Restraining Order or Preliminary Injunction at 25, *United States v. Texas*, No. 21-CV-796 (W.D. Tex. Sept. 14, 2021) [hereinafter DOJ TRO Motion].

25. *WWH* Argument, *supra* note 22, at 4.

26. *Whole Woman’s Health*, 142 S. Ct. at 543 (Roberts, C.J., concurring in the judgment in part and dissenting in part).

27. *Id.* at 545.

28. *Id.* at 548 (Sotomayor, J., concurring in the judgment in part and dissenting in part).

29. *Id.* at 551.

30. *Id.* at 546.

31. *In re Whole Woman’s Health*, No. 21-962, 2022 WL 176939, at \*4 (Jan. 20, 2022) (Sotomayor, J., dissenting) (mem.).

eliminate ordinary mechanisms of constitutional litigation or thwart federal judicial review. It channels constitutional challenges into different courts and different procedural and jurisdictional postures. But “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.”<sup>32</sup> Judicial review of S.B. 8—and judicial vindication of substantive constitutional rights that it violates under existing constitutional jurisprudence—remains available within ordinary judicial structures and within traditional operations and limitations of the federal and state judiciaries.

This Article explores how reproductive-health providers can and cannot use offensive litigation in federal court to challenge S.B. 8 and to vindicate their rights in the face of a clearly substantively invalid prohibition on reproductive freedom. Federal district and appellate courts cannot issue typical pre-enforcement injunctive relief through typical offensive actions against one or a collection of responsible executive officers. With creativity and patience as to the timing and targets of litigation, however, rights holders can pursue offensive litigation and obtain injunctive relief from a federal district court.<sup>33</sup>

The benefits of this analysis extend beyond Texas and S.B. 8. Other states have introduced, considered, or threatened copycat laws on abortion,<sup>34</sup> firearm possession,<sup>35</sup> and a range of issues:

Today it is abortion providers and those who assist them; tomorrow it might be gun buyers who face liability for every purchase. Churches could be hauled into far-flung courts to defend their religious practices because someone somewhere disagrees with them. Same-sex couples could be sued by neighbors for obtaining a

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32. *Id.* at 537 (majority opinion).

33. We separately explore how rights holders can challenge S.B. 8 through defensive litigation. See Charles W. “Rocky” Rhodes & Howard M. Wasserman, *Solving the Procedural Puzzles of the Texas Heartbeat Act and Its Imitators: The Potential for Defensive Litigation*, 75 SMU L. Rev. (forthcoming 2022), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3943555](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3943555).

34. Florida Heartbeat Act, H.B. 167 (Fla. 2022); Eric Lutz, *Florida Is Already Cooking Up a Texas-Style Abortion Ban*, VANITY FAIR (Sept. 3, 2021), <https://www.vanityfair.com/news/2021/09/florida-already-cooking-up-texas-style-abortion-ban> [<https://perma.cc/54TX-44QT>].

35. *California’s Governor Pledges to Model an Assault Weapons Ban on Texas Abortion Law*, NPR (Dec. 12, 2021), <https://www.npr.org/2021/12/12/1063489922/california-governor-gavin-newsom-assault-weapons-ban-texas-abortion-law> [<https://perma.cc/G3R3-B2H3>].

marriage license. And Black families could face lawsuits for enrolling their children in public schools.<sup>36</sup>

Justice Kavanaugh worried during argument about an explosion of such statutes.<sup>37</sup> As Justice Sotomayor closed her *WWH* dissent:

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. 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.<sup>38</sup>

Justice Sotomayor’s dire warnings about “this madness”<sup>39</sup> aside, proper understanding and resolution of the underlying procedural issues demonstrates that neither S.B. 8 nor its imitators succeed in avoiding judicial review or insulating themselves from judicial determinations of constitutional invalidity.

## I. A HISTORY OF THE TEXAS HEARTBEAT ACT

### A. S.B. 8

S.B. 8 does not represent the first attempt to utilize private civil litigation to stop or limit abortion. Some states allow a patient who obtains an abortion to sue the provider for damages resulting from the abortion.<sup>40</sup> In the 1990s, anti-choice activists organized campaigns to bring medical malpractice, wrongful death, informed consent, and similar civil claims against abortion providers.<sup>41</sup> The goal was to impose

36. *WWH* Complaint, *supra* note 3, 7–8.

37. *WWH* Argument, *supra* note 22, at 72–75 (highlighting the questions from Justice Kavanaugh).

38. *Whole Woman’s Health v. Jackson*, 142 S. Ct. 522, 551 (2021) (Sotomayor, J., concurring in the judgment in part and dissenting in part) (footnote omitted).

39. *Id.* at 545 (Sotomayor, J., concurring in the judgment in part and dissenting in part).

40. E.g., LA. STAT. ANN. § 9:2800.12 (2021); OKLA. STAT. tit. 63, § 1-740 (2021); see Maya Manian, *Privatizing Bans on Abortion: Eviscerating Constitutional Rights Through Tort Remedies*, 80 TEMP. L. REV. 123, 125 (2007).

41. ZIEGLER, *supra* note 7, at 130, 173–74; Mary Ziegler, *The Deviousness of Texas’s New Abortion Law*, ATLANTIC (Sept. 1, 2021), <https://www.theatlantic.com/ideas/archive/2021/09/deviousness-texass-new-abortion-law/619945> [https://perma.cc/4NNN-4AMP].

civil liability and damages and to use actual or threatened litigation to increase malpractice-insurance costs, making it prohibitively expensive to provide abortion services or driving providers from the field.<sup>42</sup> These efforts involved ordinary tort claims, in which the plaintiff was the injured patient or the patient's survivor. But they did not achieve the desired comprehensive restriction on abortion and advocates abandoned them in favor of direct attacks on *Roe* and *Casey*.<sup>43</sup>

Nor does S.B. 8 represent the first use of expansive citizen standing in authorizing "any person" to sue, regardless of any personal injury or connection to the challenged conduct. California tried this in its consumer-protection statutes, although as a supplement to rather than replacement for public enforcement.<sup>44</sup>

S.B. 8 combines exclusivity, private enforcement, and broad citizen standing. By melding exclusive private enforcement with an unbounded "any person" cause of action, Texas sought to achieve three things: prevent providers from seeking offensive pre-enforcement injunctive relief; allow the threat of massive litigation and liability to chill the exercise of constitutional rights; and compel compliance with a clearly constitutionally invalid law pending the initiation and completion of defensive litigation.<sup>45</sup>

The following key provisions of S.B. 8 inform this Article:

### *1. Substantive provisions*

S.B. 8 requires a reproductive-health provider to examine a patient for a "detectable fetal heartbeat," then prohibits the provider from performing the abortion if either a fetal heartbeat is detected or the test has not been performed, except in cases of medical emergency.<sup>46</sup> Liability extends to those who (1) perform or induce a prohibited

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42. Ziegler, *supra* note 41.

43. ZIEGLER, *supra* note 7, at 144–45.

44. See, e.g., CAL. BUS. & PROF. CODE §§ 17204, 17535 (repealed 2004); Nike, Inc. v. Kasky, 539 U.S. 654, 661 (2003) (Stevens, J., concurring) (per curiam).

45. See Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933, 1000–03 (2018); Emily Wax-Thibodeaux, *Mark Lee Dickson Paved the Way for the Texas Abortion Ban, One Small Town at a Time*, WASH. POST (Sept. 16, 2021, 9:29 AM), [https://www.washingtonpost.com/national/mark-dickson-texas-abortion-ban/2021/09/16/bb773a0a-0c02-11ec-a6dd-296ba7fb2dce\\_story.html](https://www.washingtonpost.com/national/mark-dickson-texas-abortion-ban/2021/09/16/bb773a0a-0c02-11ec-a6dd-296ba7fb2dce_story.html) [https://perma.cc/F2E8-EXM9].

46. Texas Heartbeat Act, S.B. 8, 87th Leg., Reg. Sess. § 3 (Tex. 2021) (to be codified at TEX. HEALTH & SAFETY CODE ANN. §§ 171.203–205 (West 2021)). S.B. 8 also provides associated recordkeeping requirements regarding these determinations. See *id.*; *id.* § 7 (to be codified at HEALTH & SAFETY § 171.008).

abortion; (2) knowingly engage “in conduct that aids or abets the performance or inducement of an abortion,” including through financial support; and (3) “intend” to perform, induce, or aid a prohibited abortion.<sup>47</sup> It is irrelevant whether an individual engaging in, or intending to engage in, aiding-or-abetting conduct “knew or should have known that the abortion would be performed or induced in violation” of the prohibition on post-heartbeat abortions.<sup>48</sup>

### *2. No public enforcement*

The law prohibits enforcement of the law by the state, any political subdivision of the state, district and county attorneys, and any executive or administrative officer or employee of the state or a political subdivision.<sup>49</sup> The ban “shall be enforced exclusively through private civil actions.”<sup>50</sup>

### *3. Private enforcement*

S.B. 8 deputizes “[a]ny person, other than an officer or employee of a state or local governmental entity in this state,” to bring a civil action against any person who performs, aids or abets, or intends to perform or aid a prohibited abortion.<sup>51</sup> The plaintiff need not allege or prove personal injury to obtain a remedy.<sup>52</sup> The plaintiff can obtain injunctive relief to prevent future violations (that is, future post-heartbeat abortions), an award of statutory damages of at least \$10,000 per prohibited abortion, and costs and attorney’s fees.<sup>53</sup> One person may recover for one abortion; “a court may not award” further relief for one abortion when the defendant has paid the full statutory damages for that abortion.<sup>54</sup>

47. S.B. 8 § 3 (to be codified at HEALTH & SAFETY § 171.208(a)).

48. HEALTH & SAFETY § 171.208(a)(2).

49. HEALTH & SAFETY § 171.207(a). A state official or local district or county attorney cannot intervene in a pending action, although they may file amicus curiae briefs. HEALTH & SAFETY § 171.208(h).

50. HEALTH & SAFETY § 171.207(a).

51. HEALTH & SAFETY § 171.208(a). Suit cannot be brought by a male who impregnates a person through rape, sexual assault, incest, or other sexual crimes. HEALTH & SAFETY § 171.208(j).

52. HEALTH & SAFETY § 171.208.

53. HEALTH & SAFETY § 171.208(b).

54. HEALTH & SAFETY § 171.208(c).

#### *4. Procedural limitations*

S.B. 8 establishes unique procedures for the private civil action, which Justice Sotomayor criticized as “anomalies” designed to “make litigation uniquely punitive for those sued.”<sup>55</sup>

Venue is proper in a Texas plaintiff’s county of residence, regardless of the defendant’s location,<sup>56</sup> expanding ordinary Texas rules placing venue in a defendant’s county of residence or the county in which a substantial part of the events giving rise to the claim occurred. The plaintiff’s venue choice cannot be changed without written consent of all parties, including the plaintiff.<sup>57</sup> These venue provisions may add to the cost and burden by requiring providers to defend themselves hundreds of miles from home.

The statute eliminates common law defenses of non-mutual issue and claim preclusion.<sup>58</sup> If X sues Planned Parenthood over one abortion and loses because the heartbeat ban is constitutionally invalid, Whole Woman’s Health cannot gain the preclusive effect of that judgment to defeat X’s subsequent lawsuit against it for a different abortion.

Finally, the statutory fee-shifting runs one way. An S.B. 8 defendant cannot recover attorney’s fees or costs from a plaintiff as a sanction for filing an unsuccessful, groundless, or baseless lawsuit.<sup>59</sup>

#### *5. Limitations on defenses*

S.B. 8 purports to limit the defenses available to providers, leading the providers in the *WWH* litigation to deride the state proceedings as “rigged”<sup>60</sup> and a “mechanism for nullifying” constitutional rights.<sup>61</sup>

The statute denies provider and advocate defendants standing to assert the rights of women seeking an abortion unless the U.S. Supreme Court either specifically holds that Texas courts must confer

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55. *Whole Woman’s Health v. Jackson*, 142 S. Ct. 522, 546 (2021) (Sotomayor, J., concurring in the judgment in part and dissenting in part).

56. Texas Heartbeat Act, S.B. 8, 87th Leg., Reg. Sess. § 3 (Tex. 2021) (to be codified at HEALTH & SAFETY § 171.210(a)).

57. HEALTH & SAFETY § 171.210(b).

58. HEALTH & SAFETY § 171.208(e)(5).

59. HEALTH & SAFETY § 171.208(i). By preventing awards to defendants of “costs or attorney’s fees under the Texas Rules of Civil Procedure or any other rule adopted by the supreme court,” this provision does not appear to cover statutory sanctions available for signing a “frivolous pleading or motion.” See TEX. CIV. PRAC. & REM. CODE ANN. §§ 10.001–.006 (West 2021).

60. *WWH* Complaint, *supra* note 3, at 26.

61. *WWH* Argument, *supra* note 22, at 4.

such standing under the U.S. Constitution or the defendant has standing to assert women's rights under the tests established by the Supreme Court.<sup>62</sup> This provision capitalizes on Justice Thomas's recent argument that providers should not have standing to challenge the validity of abortion regulations that violate the constitutional rights of their pregnant patients.<sup>63</sup>

Defendants cannot avoid liability through their belief that S.B. 8 is constitutionally invalid or their reliance on a then-existing judicial decision establishing its invalidity that is overruled.<sup>64</sup> The "undue burden" test governing the validity of abortion restrictions is relegated to an affirmative defense that considers whether an award of relief against that defendant will prevent or impose a substantial obstacle on the ability to obtain an abortion.<sup>65</sup>

### *B. Litigating S.B. 8*

#### *1. Early litigation*

S.B. 8 passed in June with an effective date of September 1. In July, a collection of reproductive-health clinics, doctors, and abortion-rights advocacy groups, led by Whole Woman's Health ("WWH"), filed suit in the Western District of Texas, seeking a declaration of the law's constitutional invalidity and an injunction stopping enforcement.<sup>66</sup> It named as defendants a state judge (on behalf of a proposed defendant class of state judges); a state court clerk (on behalf of a proposed defendant class of clerks); Mark Lee Dickson, the head of East Texas Right to Life and a leading anti-choice advocate; the heads of the state medical, pharmacy, and nursing boards; the executive commissioner of the state Health and Human Services Commission; and the attorney general.<sup>67</sup>

In late August, the district court denied a motion to dismiss, finding the plaintiffs had standing to sue all defendants and that none enjoyed

62. Texas Heartbeat Act, S.B. 8, 87th Leg., Reg. Sess. § 3 (Tex. 2021) (to be codified at HEALTH & SAFETY § 171.209(a)).

63. June Med. Servs. Inc. v. Russo, 140 S. Ct. 2103, 2143 (2020) (Thomas, J., dissenting); Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2321–22 (2016) (Thomas, J., dissenting).

64. S.B. 8 § 3 (to be codified at HEALTH & SAFETY § 171.208(e)(2), (3)).

65. HEALTH & SAFETY § 171.209(c), (d); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992).

66. See generally WWH Complaint, *supra* note 3.

67. *Id.* at 1–2.

sovereign immunity.<sup>68</sup> The defendants appealed to the Fifth Circuit, which administratively stayed district court proceedings,<sup>69</sup> causing the district court to cancel a planned hearing on a preliminary injunction. On September 1, the Supreme Court refused to enjoin enforcement of the law pending appeal or to vacate the Fifth Circuit stay,<sup>70</sup> with Chief Justice Roberts and Justices Breyer, Sotomayor, and Kagan dissenting from the denial.<sup>71</sup> One week later, the Fifth Circuit denied a motion to dismiss the appeals and stayed the district court proceedings pending appeal.<sup>72</sup>

## *2. After the first trip to the Supreme Court*

The Court's denial of emergency relief prompted swift and loud outrage.<sup>73</sup> President Biden called for "a whole-of-government effort to respond to this decision."<sup>74</sup> The Department of Justice (DOJ) filed an unusual lawsuit against the State of Texas, seeking to enjoin enforcement of the law by any part of the state, covering "all of its officers, employees, and agents, including private parties who would bring suit under S.B. 8."<sup>75</sup> Reproductive-rights groups enjoyed an increase in nationwide "rage giving" fundraising to support litigation and other efforts to provide reproductive-health services.<sup>76</sup>

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68. Whole Women's Health v. Jackson, No. 21-CV-616, 2021 WL 3821062, at \*10 (W.D. Tex. 2021).

69. Whole Woman's Health v. Jackson, 13 F.4th 434, 438 (5th Cir. 2021) (per curiam).

70. Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2495 (2021).

71. *Id.* at 2496 (Roberts, C.J., dissenting); *id.* at 2496–98 (Breyer, J., dissenting); *id.* at 2498–99 (Sotomayor, J., dissenting); *id.* at 2499–500 (Kagan, J., dissenting).

72. *Whole Woman's Health*, 13 F.4th at 438.

73. J. David Goodman et al., *Confusion in Texas as 'Unprecedented' Abortion Law Takes Effect*, N.Y. TIMES (Oct. 7, 2021), <https://www.nytimes.com/2021/09/02/us/supreme-court-texas-abortion-law.html> [https://perma.cc/D9GD-7VFS].

74. Statement by President Joe Biden on Supreme Court Ruling on Texas Law SB8, WHITE HOUSE (Sept. 2, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/09/02/statement-by-president-joe-biden-on-supreme-court-ruling-on-texas-law-sb8> [https://perma.cc/74WH-JYHQ].

75. DOJ Complaint, *supra* note 21, at 3.

76. See Charles Passy, *How the Supreme Court Texas Abortion Ruling Could Spur a Wave of 'Rage Giving'*, MARKETWATCH (Sept. 4, 2021, 10:04 AM), <https://www.marketwatch.com/story/when-charity-is-fueled-by-anger-how-the-supreme-court-texas-abortion-ruling-could-spur-a-wave-of-rage-giving-11630683595> [https://perma.cc/5ZQJ-Y4HR].

Most providers complied with the law, ceasing or limiting abortions to those in which no heartbeat was or could be detected.<sup>77</sup> As Dickson, a leading proponent of the law argued, “[n]o rational abortion provider would violate this law.”<sup>78</sup> He was correct, as abortions after the sixth week of pregnancy became largely unavailable in the state<sup>79</sup> and the number of abortions performed in the state dropped by approximately half.<sup>80</sup>

The absence of prohibited post-heartbeat abortions meant the absence of S.B. 8 lawsuits. Litigation gives providers an opportunity to raise the constitutional defense and the court an opportunity to declare the heartbeat ban invalid and prohibit enforcement. But if no one violates the law, “any person” cannot sue over any violation. The absence of suits thus denied providers the opportunity to litigate and obtain a judicial pronouncement on the constitutional validity of a suspect law. And that might have been the point. It was better for the anti-choice movement if no one filed suit, as the risk of a barrage of lawsuits, liability, and substantial damages kept providers from performing business as usual. Activists suggested that their S.B. 8 strategy was not to bring lawsuits and recover damages, but for the inchoate threat of lawsuits, liability, and damages to chill providers into ceasing abortion services.<sup>81</sup>

That changed after several weeks. Dr. Alan Braid, a Texas physician, published an op-ed in the *Washington Post* announcing that he had performed one first-trimester, post-heartbeat abortion.<sup>82</sup> Three

77. Paul J. Weber & Jessica Gresko, *Explainer: The Texas Abortion Law’s Swift Impact, and Future*, ASSOCIATED PRESS (Sept. 16, 2021), <https://apnews.com/article/health-austin-texas-lawsuits-coronavirus-pandemic-e4352ad8f095612ac249bb8477ddc637>.

78. WWH Argument, *supra* note 22, at 4.

79. Whole Woman’s Health v. Jackson, 142 S. Ct. 522, 545 (2021) (Sotomayor, J., concurring in the judgment in part and dissenting in part); Transcript of Oral Argument at 67, United States v. Texas, 142 S. Ct. 14 (2021) (No. 21-588) [hereinafter United States v. Texas Argument] (statement of Justice Kagan).

80. United States v. Texas Argument, *supra* note 79, at 66–67.

81. Ruth Graham et al., *Lawuits Filed Against Texas Doctor Could Be Best Tests of Abortion Law*, N.Y. TIMES (Nov. 1, 2021), <https://www.nytimes.com/2021/09/21/us/texas-abortion-lawsuits.html> [<https://perma.cc/YC9B-JF92>].

82. Alan Braid, Opinion, *Why I Violated Texas’s Extreme Abortion Ban*, WASH. POST (Sept. 18, 2021, 4:01 PM), <https://www.washingtonpost.com/opinions/2021/09/18/texas-abortion-provider-alan-braid> [<https://perma.cc/43RT-XUMM>]; see also Michael Levenson, *Texas Doctor Says He Performed an Abortion in Defiance of New State Law*, N.Y. TIMES (Oct. 15, 2021), <https://www.nytimes.com/2021/09/18/us/texas-abortion-alan-braid.html> [<https://perma.cc/FFA7-D3SY>].

lawsuits followed in Texas state court;<sup>83</sup> these provide the necessary test cases, the opportunity to present S.B. 8's constitutional invalidity as a defense to liability, and an alternative path to offensive litigation in federal court.

In early October, the district court in *United States v. Texas*<sup>84</sup> held that the United States could sue Texas, declared the heartbeat ban constitutionally invalid, and preliminarily enjoined enforcement, including enjoining private individuals from filing suits to the extent they would cause Texas officials to violate the injunction.<sup>85</sup> The Fifth Circuit stayed the injunction pending appeal.<sup>86</sup>

The Supreme Court granted certiorari before judgment<sup>87</sup> in the U.S. suit<sup>88</sup> (without vacating the Fifth Circuit's stay of the preliminary injunction, drawing a partial dissent from Justice Sotomayor)<sup>89</sup> and in *WWH*,<sup>90</sup> with expedited briefing and argument less than two weeks later.<sup>91</sup>

In December, less than six weeks after argument, the Court decided both cases. Justice Gorsuch wrote the main opinion for a fractured Court in *WWH*. A group of eight (all but Justice Thomas) allowed claims to proceed against the heads of the licensing bodies, although without a majority opinion;<sup>92</sup> all Justices rejected claims against Dickson;<sup>93</sup> all Justices rejected claims against state judges;<sup>94</sup> and a 5-4 majority rejected claims against state court clerks and the attorney

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83. See generally Texas Heartbeat Project v. Braid, No. 21-2276-C (Tex. 241st D. Ct. Sept. 22, 2021); Plaintiff's Complaint, Stilley v. Braid, No. 2021CI19940 (Tex. 438th D. Ct. Sept. 20, 2021); Complaint, Gomez v. Braid, No. 2021CI19920 (Tex. 224th D. Ct. Sept. 23, 2021).

84. No. 21-CV-796, 2021 WL 4593319 (W.D. Tex. Oct. 6, 2021).

85. *Id.* at \*22–24.

86. *United States v. Texas*, No. 21-50949, 2021 WL 4786458, at \*1 (5th Cir. Oct. 14, 2021) (per curiam).

87. 28 U.S.C. § 1254(1).

88. *United States v. Texas*, 142 S. Ct. 14 (2021) (mem.).

89. *Id.* at 14 (Sotomayor, J., concurring in part and dissenting in part).

90. *Whole Woman's Health v. Jackson*, 142 S. Ct. 415 (2021) (mem.).

91. *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 531 (2021).

92. *Id.* at 535–36, 538–39; *id.* at 544 (Roberts, C.J., concurring in the judgment in part and dissenting in part). But see *id.* at 541 (Thomas, J., concurring in part and dissenting in part).

93. *Id.* at 537, 538–39.

94. *Id.* at 539; see *id.* at 531–33 (arguing that sovereign immunity, standing, and remedy issues prevented the Court from allowing claims against the state judges to proceed).

general,<sup>95</sup> with Chief Justice Roberts and Justices Breyer, Sotomayor, and Kagan dissenting.<sup>96</sup> The Court remanded to the Fifth Circuit for further proceedings.<sup>97</sup> The Court dismissed certiorari in *United States v. Texas* as improvidently granted, over Justice Sotomayor's noted objection.<sup>98</sup>

## II. LITIGATING CONSTITUTIONAL RIGHTS

### A. S.B. 8 and Its Critics

The foundational error in much of the S.B. 8 conversation is the belief that S.B. 8 violates the constitutional rights of reproductive-health providers, pregnant patients, and reproductive-rights activists by existing as a law of Texas and obligating rights holders to defend against potential enforcement while restricting pre-enforcement review.

That presumption runs throughout the rhetoric of S.B. 8 critics. Advocates complained of a “brazen defiance of the rule of law and the federal constitutional rights to which Texans are entitled.”<sup>99</sup> They argued that S.B. 8 thwarts “traditional mechanisms of federal judicial review,”<sup>100</sup> evades “effective judicial protection of rights in federal and state court,”<sup>101</sup> and strips “citizens of the ability to invoke the power of the federal courts to vindicate their rights.”<sup>102</sup>

That rhetoric carried to the *WWH* dissenters. Dissenting from the denial of emergency relief, Justice Breyer suggested that “[t]he very bringing into effect of Texas’s law may well threaten the applicants

95. *Id.* at 534–35, 539.

96. *Id.* at 543 (Roberts, C.J., concurring in the judgment in part and dissenting in part); *id.* at 545 (Sotomayor, J., concurring in the judgment in part and dissenting in part).

97. Whole Woman’s Health v. Jackson, Nos. 21A220 & 21-463, 2021 WL 5931622 (Dec. 16, 2021) (mem.) (Gorsuch, J.). On remand, the Fifth Circuit certified to the Texas Supreme Court whether the heads of the licensing boards had state-law power to take direct or indirect disciplinary actions for violations of the heartbeat ban, and the Supreme Court denied a writ of mandamus from Whole Woman’s Health seeking a remand to the district court to avoid this certification. *In re Whole Woman’s Health*, No. 21-962, 2022 WL 176939 (Jan. 20, 2022) (mem.); Whole Woman’s Health v. Jackson, No. 21-50792, 2022 WL 142193 (5th Cir. Jan. 17, 2022).

98. *United States v. Texas*, 142 S. Ct. 522 (2021) (mem.) (per curiam).

99. *WWH* Complaint, *supra* note 3, at 7–8.

100. DOJ Complaint, *supra* note 21, at 2.

101. *WWH* Argument, *supra* note 22, at 3.

102. DOJ Complaint, *supra* note 21, at 5.

with imminent and serious harm.”<sup>103</sup> Chief Justice Roberts objected that S.B. 8 “effectively chill[s] the provision of abortions in Texas”<sup>104</sup> by “employ[ing] an array of stratagems designed to shield its unconstitutional law from judicial review,”<sup>105</sup> with the purpose and effect to “nullify this Court’s rulings.”<sup>106</sup> Justice Sotomayor argued that the law’s “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.”<sup>107</sup> S.B. 8 “is structured to thwart review” and to deny “any hearing.”<sup>108</sup> She criticized the majority for “reward[ing] the State’s efforts at nullification,”<sup>109</sup> thereby “betray[ing] not only the citizens of Texas, but also our constitutional system of government.”<sup>110</sup> And she labeled S.B. 8’s procedural framework a “disaster for the rule of law.”<sup>111</sup>

None of this reflects how constitutional litigation operates. As the Supreme Court explained in *Massachusetts v. Mellon*<sup>112</sup>:

We have no power per se to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act.<sup>113</sup>

A law violates a constitutional right and causes a constitutional injury through its enforcement. A violation arises not from the “mere enactment” or existence of a constitutionally violative law, but from the attempted, threatened, or actual enforcement of that constitutionally violative law and imposition of liability, punishment, or sanction

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103. Whole Woman’s Health v. Jackson, 141 S. Ct. 2494, 2497 (2021) (Breyer, J., dissenting).

104. Whole Woman’s Health v. Jackson, 142 S. Ct. 522, 544 (2021) (Roberts, C.J., concurring in the judgment in part and dissenting in part).

105. *Id.* at 543.

106. *Id.* at 545.

107. *Id.* (Sotomayor J., concurring in the judgment in part and dissenting in part).

108. *Id.* at 548 (quoting *Ex parte Young*, 209 U.S. 123, 146 (1908)).

109. *Id.* at 551.

110. *Id.* at 546.

111. *In re Whole Woman’s Health*, No. 21-962, 2022 WL 176939, at \*4 (Jan. 20, 2022) (Sotomayor, J., dissenting) (mem.).

112. 262 U.S. 447 (1923).

113. *Id.* at 488; see also *California v. Texas*, 141 S. Ct. 2104, 2113–14 (2021); Mitchell, *supra* note 45, at 936; Howard M. Wasserman, *Precedent, Non-Universal Injunctions, and Judicial Departmentalism: A Model of Constitutional Adjudication*, 23 LEWIS & CLARK L. REV. 1077, 1083–84 (2020).

against a rights holder through adjudicative proceedings.<sup>114</sup> A rights holder cannot prevail on the “naked contention” that a law violates rights “by the mere enactment of the statute, though nothing has been done and nothing is to be done” to enforce that law.<sup>115</sup>

The mere existence of a law, absent a genuine risk or actual enforcement, does not violate anyone’s rights or, in the language of § 1983, deprive any person of a right, privilege or immunity secured by the Constitution.<sup>116</sup> Constitutional litigation cannot ask the court to repeal, eliminate, or erase a statute, something courts lack power to do.<sup>117</sup> Despite common rhetoric, courts in offensive litigation do not “strike down” or “block” laws or prevent them from taking effect. Courts enjoin not laws, but enforcement of laws.<sup>118</sup> The court issues an order prohibiting the opposing litigant from enforcing the challenged law against the rights holder at present and in the future.<sup>119</sup>

The Constitution protects rights holders against ultimate liability and sanction under that invalid law. Judicial review consists of declaring the invalidity of the law applicable in deciding a judicial controversy<sup>120</sup> and the “negative power to disregard an unconstitutional enactment” by not allowing that invalid rule to serve as a rule of decision to impose liability on the rights holder.<sup>121</sup>

114. *Mellon*, 262 U.S. at 483; *Poe v. Ullman*, 367 U.S. 497, 507 (1961); *Support Working Animals, Inc. v. Governor of Fla.*, 8 F.4th 1198, 1203 (11th Cir. 2021); *Whole Woman’s Health*, 142 S. Ct. at 535; Wasserman, *supra* note 113, at 1083–85.

115. *Mellon*, 262 U.S. at 483.

116. 42 U.S.C. § 1983.

117. Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 451–52 (2017); Mitchell, *supra* note 45, at 935–36; Wasserman, *supra* note 113, at 1089–90; see *Whole Woman’s Health*, 142 S. Ct. at 535; Seila Law LLC v. Consumer Fin. Protection Bureau, 140 S. Ct. 2183, 2220 (2020) (Thomas, J., concurring in part and dissenting in part).

118. *Whole Woman’s Health*, 142 S. Ct. at 535; *California*, 141 S. Ct. at 2115–16.

119. *Pool v. City of Houston*, 978 F.3d 307, 309 (5th Cir. 2020); *Hartnett v. Pa. State Educ. Ass’n*, 963 F.3d 301, 309 (3d Cir. 2020); John Harrison, *Section 706 of the Administrative Procedure Act Does Not Call for Universal Injunctions or Other Universal Remedies*, YALE J. ON REGUL. ONLINE BULL. 37, 38, 40 (2020), <https://www.yalejreg.com/bulletin/section-706-of-the-administrative-procedure-act-does-not-call-for-universal-injunctions-or-other-universal-remedies> [<https://perma.cc/KK57-49YN>]; John Harrison, *Severability, Remedies, and Constitutional Adjudication*, 83 GEO. WASH. L. REV. 56, 87–88 (2014); Mitchell, *supra* note 45, at 936; Wasserman, *supra* note 113, at 1090–91.

120. See *California*, 141 S. Ct. at 2115–16; Mitchell, *supra* note 45, at 936; Charles W. “Rocky” Rhodes, *Loving Retroactivity*, 45 FLA. ST. U. L. REV. 383, 417–18 (2018); Wasserman, *supra* note 113, at 1083–84; Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1273–74 (1996).

121. *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923).

But the Constitution does not immunize rights holders from having to litigate attempted enforcement of even a blatantly invalid law. Once the law is declared invalid, the court will not allow that law to be used as an applicable rule of decision or as a basis for liability and sanction.<sup>122</sup> Judicial review requires litigation in which the court can adjudicate the constitutional question, declare the validity of the law, and proclaim its enforceability.

### *B. Offensive Litigation and Defensive Litigation*

Courts adjudicate constitutional questions and decide on a law's constitutional validity in two postures—offensive (which we might label pre-enforcement, preemptive, or anticipatory) or defensive (which we might label enforcement or coercive).<sup>123</sup>

#### *1. Offensive litigation*

In an offensive or preemptive posture, a rights holder initiates litigation to prevent ongoing and future enforcement or to remedy past enforcement.

Pre-enforcement offensive litigation seeks to stop enforcement of the law against the rights holder while enforcement is ongoing or before it has been initiated. From the standpoint of the actors enforcing the challenged law, these actions anticipate or seek to preempt enforcement. The rights holder brings an action under § 1983 and the *Ex parte Young*<sup>124</sup> equitable cause of action,<sup>125</sup> typically in federal district court, against the government or (more commonly) the executive officers responsible for enforcing the law. The rights holder seeks a declaratory judgment<sup>126</sup> that the law is constitutionally invalid and/or an injunction prohibiting enforcement of that law by this defendant against this plaintiff.<sup>127</sup>

Alternatively, a rights holder can bring a post-enforcement § 1983 action following state enforcement and a constitutional injury; the

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122. Wasserman, *supra* note 113, at 1089.

123. *Id.* at 1086, 1088.

124. 209 U.S. 123 (1908).

125. *Id.* at 155–56; *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 326–27 (2015).

126. 28 U.S.C. §§ 2201–2202.

127. *See Obergefell v. Hodges*, 576 U.S. 644, 675–76 (2015); *Reno v. ACLU*, 521 U.S. 844, 861–62 (1997); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975); *Steffel v. Thompson*, 415 U.S. 452, 454–55 (1974); *see also Ex parte Young*, 209 U.S. at 148–49, 155–56; 42 U.S.C. § 1983.

rights holder seeks a retroactive remedy such as damages for injuries suffered from past and completed enforcement.<sup>128</sup>

## *2. Defensive litigation*

Defensive or coercive litigation occurs within proceedings enforcing the challenged law. Proceedings are initiated against a rights holder, who raises the constitutional defect in the law as a defense to enforcement, arguing for dismissal or favorable judgment in that proceeding because the law being enforced is constitutionally invalid and cannot form the basis for liability.<sup>129</sup> These actions are coercive, because the party initiating the action seeks to enforce and secure a remedy under the challenged law against the rights holder, who wields the Constitution as a defensive shield against liability.<sup>130</sup>

Government-initiated enforcement proceedings might be criminal,<sup>131</sup> civil,<sup>132</sup> or administrative.<sup>133</sup> Alternatively, many laws are enforced through private civil litigation—a private individual sues to enforce a statutory or common law right and the rights holder defends by challenging the constitutional validity of that law. This includes private claims for defamation,<sup>134</sup> intentional infliction of emotional

128. Wasserman, *supra* note 113, at 1088–89; *see* City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 267–68 (1981); Owen v. City of Indep., 445 U.S. 622, 651 (1980).

129. John Harrison, *Jurisdiction, Congressional Power, and Constitutional Remedies*, 86 GEO. L.J. 2513, 2516–17 (1998).

130. Whole Woman’s Health v. Jackson, 142 S. Ct. 522, 538 (2021).

131. Bond v. United States, 564 U.S. 211, 214 (2011); United States v. Stevens, 559 U.S. 460, 466–67 (2010); Lawrence v. Texas, 539 U.S. 558, 562 (2003); United States v. Lopez, 514 U.S. 549, 551 (1995); Texas v. Johnson, 491 U.S. 397, 399 (1989); Griswold v. Connecticut, 381 U.S. 479, 481 (1965).

132. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 176, 195 (2012); Huffman v. Pursue, Ltd., 420 U.S. 592, 604–05 (1975).

133. Masterpiece Cakeshop, Inc. v. Colo. Civ. Rts. Comm’n, 138 S. Ct. 1719, 1723 (2018); Ohio Civ. Rts. Comm’n v. Dayton Christian Schs., Inc., 477 U.S. 619, 621 (1986); Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass’n, 457 U.S. 423, 432 (1982).

134. Milkovich v. Lorain J. Co., 497 U.S. 1, 3 (1990); Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 768 (1986); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 256 (1964).

distress,<sup>135</sup> other torts,<sup>136</sup> right of publicity,<sup>137</sup> breach of contract,<sup>138</sup> privacy rights,<sup>139</sup> property rights,<sup>140</sup> and employment discrimination.<sup>141</sup>

### *3. Judgments and opinions*

Offensive and defensive postures share one trait—they produce retail judgments and remedies. The judgment in a defensive case resolves that enforcement action against that rights holder. The judgment in an offensive case prohibits ongoing and future enforcement of the invalid law by the enforcer against that rights holder. The injunction binds the parties, their officers and agents, and “other persons who are in active concert or participation” with the parties.<sup>142</sup> The injunction “should be no more burdensome . . . than necessary to provide complete relief to the plaintiff[]” and should be commensurate with and match the constitutional violation.<sup>143</sup> It therefore protects the plaintiff rights holders from future enforcement of the constitutionally invalid law, but should not extend beyond that to protect the universe of non-parties who share similar rights or interests with the parties and who may be subject to future enforcement of that law.<sup>144</sup>

Any judgment, offensive or defensive, is accompanied by an opinion, an essay explaining and justifying the judgment.<sup>145</sup> That opinion has

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135. *Snyder v. Phelps*, 562 U.S. 443, 450 (2011); *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 47–48 (1988); *Gerber v. Herskovitz*, 14 F.4th 500, 506 (6th Cir. 2021).

136. See, e.g., *Thunder Studios, Inc. v. Kazal*, 13 F.4th 736, 740 (9th Cir. 2021).

137. Robert C. Post & Jennifer E. Rothman, *The First Amendment and the Right(s) of Publicity*, 130 YALE L.J. 86, 95–96 (2020).

138. *Cohen v. Cowles Media Co.*, 501 U.S. 663, 665 (1991); *Barrows v. Jackson*, 346 U.S. 249, 251 (1953).

139. *Fla. Star v. B.J.F.*, 491 U.S. 524, 528 (1989); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 471 (1975).

140. *Shelley v. Kraemer*, 334 U.S. 1, 4 (1948); *Animal Legal Def. Fund v. Vaught*, 8 F.4th 714, 717 (8th Cir. 2021); *Mason v. Adams Cnty. Recorder*, 901 F.3d 753, 755–56 (6th Cir. 2018).

141. *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2055 (2020); *Skrzypczak v. Roman Cath. Diocese of Tulsa*, 611 F.3d 1238, 1240 (10th Cir. 2010); *DeAngelis v. El Paso Mun. Police Officers Ass’n*, 51 F.3d 591, 592 (5th Cir. 1995); *Jew v. Univ. of Iowa*, 749 F. Supp. 946, 947 (S.D. Iowa 1990).

142. FED. R. CIV. P. 65(d)(2).

143. *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979); *accord Lewis v. Casey*, 518 U.S. 343, 357 (1996); *Hills v. Gautreaux*, 425 U.S. 284, 293–94 (1976); *Wasserman, supra* note 113, at 1094.

144. *Wasserman, supra* note 113, at 1094.

145. Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43, 62 (1993).

precedential value, compelling or persuading (depending on the level of court) the court in future proceedings to reach the same conclusion about the law's constitutional invalidity and enjoining enforcement against a new set of rights holders.<sup>146</sup> The law of the opinion and precedent, rather than the current judgment in the first action, protects non-party rights holders and governs non-party enforcers in actual or threatened future enforcement. The Supreme Court has established major constitutional precedents in offensive<sup>147</sup> and defensive<sup>148</sup> postures.

### C. Benefits and Limits of Offensive Litigation

S.B. 8 critics presume that offensive litigation is constitutionally essential and that the inability to challenge the validity and enforcement of S.B. 8 in that posture reflects an independent constitutional defect and defies the rule of law.<sup>149</sup> Offensive litigation offers rights holders—those claiming a constitutional violation from the actual or threatened enforcement of the challenged state law—several advantages. It also carries several limitations.

But the Constitution does not guarantee offensive litigation. Rights holders are not constitutionally entitled to choose the time, forum, and posture in which they litigate their constitutional rights through an “unqualified right to pre-enforcement review of constitutional claims in federal court.”<sup>150</sup> The Court has never recognized such a right, consigning much constitutional litigation to a defensive posture.<sup>151</sup>

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146. William Baude, *The Judgment Power*, 96 GEO. L.J. 1807, 1844 (2008); Richard H. Fallon, Jr., *Fact and Fiction About Facial Challenges*, 99 CALIF. L. REV. 915, 923 n.31 (2011); Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1339 (2000); Randy J. Kozel, *The Scope of Precedent*, 113 MICH. L. REV. 179, 185–86 (2014); Lawson & Moore, *supra* note 120, at 1327; Merrill, *supra* note 145, at 43, 44–45, 62; Wasserman, *supra* note 113, at 1108–09.

147. Cases cited *supra* notes 127–28.

148. Cases cited *supra* notes 131–41.

149. *In re Whole Woman’s Health*, No. 21-962, 2022 WL 176939, at \*4 (Jan. 20, 2022) (Sotomayor, J., dissenting) (mem.); Whole Woman’s Health v. Jackson, 142 S. Ct. 522, 551–52 (2021) (Sotomayor, J., concurring in the judgment in part and dissenting in part); Whole Woman’s Health v. Jackson, 141 S. Ct. 2494, 2499 (2021) (Sotomayor, J., dissenting); *supra* notes 98–125 and accompanying text.

150. *Whole Woman’s Health*, 142 S. Ct. at 537–38.

151. *Id.*; *supra* notes 141–48.

### *1. Benefits of offensive litigation*

Offensive litigation provides the sole mechanism for challenging a subset of laws enforced through unilateral real-world executive action rather than through judicial or quasi-judicial proceedings.<sup>152</sup> That includes, for example, laws prohibiting Black students from enrolling in certain schools;<sup>153</sup> laws prohibiting clerks from issuing marriage licenses to same-sex couples;<sup>154</sup> laws denying entry to the United States for people in certain countries;<sup>155</sup> laws controlling the content and method of analysis in the census;<sup>156</sup> or laws withholding federal funds from state and local governments.<sup>157</sup> Enforcement occurs when the Black student is denied enrollment or when the census is published with an objectionable question. Rights holders initiate offensive litigation to enjoin executive officials from pursuing real-world actions authorized by those constitutionally defective laws.

Offensive litigation allows rights holders to control the time, forum, and posture. Rights holders can litigate in federal court because the lawsuit seeks to vindicate federal constitutional rights through a federal cause of action.<sup>158</sup> This provides the benefits of expertise and solicitude for federal rights that comes in a federal forum before a federal judge with Article III protections.<sup>159</sup> It also allows rights holders to establish their constitutional rights without having to act “at their peril” by engaging in protected-but-statutorily-prohibited conduct,

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152. *But see* John Harrison, *Ex Parte Young*, 60 STAN. L. REV. 989, 1022 (2008).

153. *Brown v. Bd. of Educ.*, 347 U.S. 483, 487 (1954).

154. *Obergefell v. Hodges*, 576 U.S. 644, 652 (2015).

155. *Trump v. Hawaii*, 138 S. Ct. 2392, 2404 (2018).

156. *Trump v. New York*, 141 S. Ct. 530, 534 (2020) (per curiam); *Dep’t. of Com. v. New York*, 139 S. Ct. 2551, 2561–62 (2019).

157. *City of Chicago v. Barr*, 961 F.3d 882, 887 (7th Cir. 2020).

158. 42 U.S.C. § 1983; *Va. Off. for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 255–56 (2011).

159. *Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.*, 545 U.S. 308, 312 (2005); MARTIN H. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 83, 153, 346 (2d ed. 1990); Matthew I. Hall, *Asymmetrical Jurisdiction*, 58 UCLA L. REV. 1257, 1264–65 (2011); Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1119–20, 1124–25 (1977); John F. Preis, *Reassessing the Purposes of Federal Question Jurisdiction*, 42 WAKE FOREST L. REV. 247, 250 & n.6 (2007); Gil Seinfeld, *The Federal Courts as a Franchise: Rethinking the Justifications for Federal Question Jurisdiction*, 97 CALIF. L. REV. 95, 102–03 (2008); Howard M. Wasserman, *A Jurisdictional Perspective on New York Times v. Sullivan*, 107 NW. U. L. REV. 901, 908–09 (2013).

violating the law, and subjecting themselves to the risks of arrest, prosecution, liability, and sanction.<sup>160</sup>

Douglas Laycock identifies three unique remedial and procedural benefits to offensive litigation. First, a court considering a pre-enforcement offensive suit in equity can grant preliminary or interlocutory relief, freezing the status quo and protecting the rights holder from the harm of enforcement of the law pending litigation.<sup>161</sup> This represents a significant issue surrounding S.B. 8, as the law remains enforceable after months of litigation.<sup>162</sup> Justice Sotomayor criticized the Court's denial of interim relief and refusal to stop enforcement despite the law's glaring constitutional defects.<sup>163</sup> Second, prospective relief protects the party rights holder against future enforcement of the constitutionally invalid law, beyond the defensive remedy of dismissing the current enforcement effort.<sup>164</sup> Third, the court can establish a class action and grant class-wide relief to stop enforcement against all class members, a broader remedy than dismissal of one enforcement action against one rights holder.<sup>165</sup>

Early injunctive relief offers the further advantage of speedy litigation. The grant or denial of a preliminary injunction is immediately appealable to the court of appeals<sup>166</sup> and to the Supreme Court.<sup>167</sup> Rather than having to litigate to final judgment in the trial

160. Susan B. Anthony List v. Driehaus, 573 U.S. 149, 158–59 (2014); Steffel v. Thompson, 415 U.S. 452, 459 (1974).

161. Douglas Laycock, *Federal Interference with State Prosecutions: The Need for Prospective Relief*, 1977 SUP. CT. REV. 193, 202–04 (1977); see FED. R. CIV. P. 65; Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 24 (2008).

162. Except for the two-day period of the preliminary injunction in *United States v. Texas*, prior to the Fifth Circuit stay. See Karen Brooks Harper, *At Least One Major Texas Abortion Provider Resumes Procedure Lawmakers Tried to Prohibit, After Judge Blocks Near-Total Ban*, TEX. TRIBUNE (Oct. 7, 2021, 4:00 PM), <https://www.texastribune.org/2021/10/07/texas-abortion-law-providers> [https://perma.cc/KZL9-2CA4]; Neelam Bohra, *Fearful of Being Sued Under New Law, Three of Four San Antonio Abortion Facilities Stop Offering the Procedure*, TEX. TRIBUNE (Sept. 7, 2021, 6:00 PM), <https://www.texastribune.org/2021/09/07/texas-abortion-law-san-antonio> [https://perma.cc/55AC-K8GW]; *supra* notes 69–90.

163. Whole Woman's Health v. Jackson, 142 S. Ct. 522, 545 (2021) (Sotomayor, J., concurring in the judgment in part and dissenting in part); United States v. Texas, 142 S. Ct. 14, 14 (2021) (Sotomayor, J., concurring in part and dissenting in part); Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2498 (2021) (Sotomayor, J., dissenting).

164. Laycock, *supra* note 161, at 214.

165. *Id.* at 220.

166. 28 U.S.C. § 1292(a)(1).

167. *Id.* § 1254.

court, rights-holder plaintiffs move for preliminary relief early in the case; the immediate appeal of the grant or denial of preliminary relief becomes the vehicle for resolving the constitutional issue on appeal.<sup>168</sup> Moreover, failing to obtain preliminary relief in the trial court does not expose rights-holder plaintiffs to immediate enforcement; they can request an injunction prohibiting enforcement of the law pending appeal.<sup>169</sup>

*Ex parte Young*<sup>170</sup> established offensive litigation on the presumption that defensive litigation may not provide an adequate remedy or opportunity to protect constitutional rights. No one may have been willing to violate and risk prosecution under the challenged state railroad rate law, fearing harsh penalties,<sup>171</sup> no violation meant no prosecution, no opportunity to raise the Constitution as a defense, and no opportunity to have the court determine the law's validity. Or the state might not prosecute a single violation, leaving the rights holder in the same position.<sup>172</sup> Only consistent, regular, open, and notorious disregard of the rate law, with its inherent risks, could trigger enforcement and the opportunity to litigate the constitutional issues. The hypothetical opportunity to disobey the law, await enforcement proceedings, and risk financial loss or imprisonment should the court determine the law to be valid did not protect rights holders or their constitutional interests.<sup>173</sup>

## 2. Limits of offensive litigation

While strategically beneficial and procedurally straightforward, offensive litigation is neither systemically preferable nor constitutionally compelled.<sup>174</sup> Constitutional challenges to numerous laws are adjudicated only in a defensive posture.<sup>175</sup> Rights holders are not

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168. See, e.g., *June Med. Servs. LLC v. Russo*, 140 S. Ct. 2103, 2113–14 (2020); *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2300–01 (2016); *Reno v. ACLU*, 521 U.S. 844, 851 (1997).

169. See *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (per curiam); William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U.J.L. & LIBERTY 1, 7 (2015); Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 128 (2019).

170. 209 U.S. 123 (1908).

171. *Id.* at 163–64.

172. *Id.* at 163.

173. *Id.* at 165.

174. See *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 537–38 (2021).

175. *Id.* at 538; *supra* Section II.B.2.

entitled to a federal forum for vindicating federal rights<sup>176</sup>—and certainly not a federal district court as an original forum in an offensive posture,<sup>177</sup> distinct from ultimate Supreme Court review of state court judgments in the defensive action.<sup>178</sup>

Offensive litigation is limited in that a plaintiff must show that “the threatened injury is certainly impending” or that “there is a substantial risk” it will occur<sup>179</sup>—that is, enforcement of the constitutionally defective law is certainly impending or substantially likely. Imminence requires an executive officer who is responsible for enforcing the challenged law and threatens to do so; this provides the rights holder with a target to sue and the federal court a target to enjoin.<sup>180</sup> Absent such a target, offensive adjudication is impossible; no official enforces or threatens to enforce the law, and a federal court cannot enjoin an official from engaging in conduct he is not otherwise empowered nor threatening to undertake.

We might frame this problem in three ways, all leading to the conclusion that offensive litigation is impossible without an enforcing official to name as defendant. One is that a plaintiff lacks Article III standing without a proper responsible executive officer as defendant.<sup>181</sup> A plaintiff lacks standing to sue any state or local officer if no state or local officer is responsible for enforcing the challenged law.<sup>182</sup> A plaintiff’s constitutional injury must be fairly traceable to the defendant, and a court order must redress the injury.<sup>183</sup> A non-enforcing officer does not cause the constitutional injury by enforcing the challenged law, and an injunction prohibiting a non-enforcing officer from doing anything cannot remedy the injury.

A second framing, at least for constitutional challenges to enforcement of state laws, is that sovereign immunity bars the suit. *Ex*

176. *Whole Woman’s Health*, 142 S. Ct. at 537–38; *San Remo Hotel, L.P. v. City of San Francisco*, 545 U.S. 323, 342 (2005); *Allen v. McCurry*, 449 U.S. 90, 103–04 (1980); *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 606 & n.18 (1975).

177. See Michael Wells, *Why Professor Redish Is Wrong About Abstention*, 19 GA. L. REV. 1097, 1100 (1985).

178. 28 U.S.C. § 1257(a).

179. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (internal quotation marks omitted).

180. Wasserman, *supra* note 113, at 1084–85.

181. See, e.g., *Whole Woman’s Health v. Jackson*, 142 S. Ct. 522, 532–33 (2021); *Support Working Animals, Inc. v. Governor of Fla.*, 8 F.4th 1198, 1204–05 (11th Cir. 2021); *Common Cause v. Biden*, 748 F.3d 1280, 1284–85 (D.C. Cir. 2014).

182. See Wasserman, *supra* note 113, at 1084.

183. *Susan B. Anthony List*, 573 U.S. at 157–58.

*parte Young* establishes an exception to state sovereign immunity for actions for prospective relief against a responsible executive officer.<sup>184</sup> That exception does not apply if the plaintiff sues an executive officer who is not responsible for enforcing the challenged law.<sup>185</sup>

A third framing, normatively preferable but not grounded in current doctrine, recognizes “standing” as a merits question of what legal injuries are recognized and enforceable at law; to say the plaintiff lacks standing is to say the plaintiff has not suffered a remediable violation of recognized legal rights.<sup>186</sup> The absence of public enforcement means no government officer violates any rights holder’s constitutional liberties by enforcing or threatening to enforce the challenged law, therefore no rights holder suffers a constitutional injury because of an officer’s actions that creates an entitlement to a legal remedy.<sup>187</sup>

However framed, the point is that a rights holder cannot obtain relief from the government or executive officers through offensive litigation when no government or executive officer enforces the challenged law. *California v. Texas*<sup>188</sup> confirms this point. Plaintiffs challenged the constitutional validity of the Affordable Care Act’s<sup>189</sup> “individual mandate,” as amended, which required individuals to purchase insurance or to pay a penalty of zero dollars.<sup>190</sup> The absence of an enforceable provision eliminated any injury to the plaintiff fairly traceable to any federal official.<sup>191</sup> Because no government official could enforce the mandate by collecting a zero-dollar penalty, no

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184. U.S. CONST. amend. XI; Va. Off. for Prot. & Advoc. v. Stewart, 563 U.S. 247, 260 (2011); Edelman v. Jordan, 415 U.S. 651, 664 (1974); *Ex parte Young*, 209 U.S. 123, 163–64 (1909).

185. See, e.g., *Whole Woman’s Health*, 142 S. Ct. at 531–32; C.M. *ex rel* Marshall v. Bentley, 13 F. Supp. 3d 1188, 1205–06 (M.D. Ala. 2014); Brenner v. Scott, 999 F. Supp. 2d 1278, 1285–86 (N.D. Fla. 2014).

186. William A. Fletcher, *Standing: Who Can Sue to Enforce a Legal Duty?*, 65 ALA. L. REV. 277, 282 (2013); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 223, 232–33 (1988); Wasserman, *supra* note 113, at 1084–85; see *Sierra v. City of Hallandale Beach, Fla.*, 996 F.3d 1110, 1129–30 (11th Cir. 2021) (Newsom, J., concurring).

187. See, e.g., *Bentley*, 13 F. Supp. 3d at 1205–06; *Brenner*, 999 F. Supp. 2d at 1285–86.

188. 141 S. Ct. 2104 (2021).

189. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

190. *California*, 141 S. Ct. at 2112.

191. *Id.* at 2113–14.

government official's conduct could injure the plaintiffs and there was no enforcing official for a federal court to enjoin.<sup>192</sup>

### III. OFFENSIVE LITIGATION AND S.B. 8

Most reproductive-rights litigation occurs offensively. A member of the reproductive-rights community (doctors, nurses, clinics, patients, and other advocates) brings a lawsuit in federal court against the state officer responsible for enforcing the law (such as the governor, attorney general, or head of the state's department of health and human services), seeking a declaratory judgment that the abortion regulation is constitutionally invalid and an injunction prohibiting the officer from enforcing the law against the rights-holder plaintiffs (and thus their patients).<sup>193</sup> The court grants remedies after determining that the challenged law is constitutionally invalid under binding judicial precedent. This explains Whole Woman's Health's lawsuit and other efforts to challenge this law through ordinary offensive, straightforward pre-enforcement processes.<sup>194</sup>

One might argue that S.B. 8 replicates the situation in *Ex parte Young*—offensive litigation is necessary because defensive litigation is inadequate to protect providers' constitutional rights. S.B. 8 imposes such crippling sanctions that no one will risk violating the law, getting sued, and incurring liability.<sup>195</sup> Or enforcers may choose not to pursue isolated violations.<sup>196</sup> Chief Justice Roberts urged this point in imagining a law such as S.B. 8 imposing statutory damages of a million dollars per violation.<sup>197</sup>

The state of play in Texas since S.B. 8's September 1 effective date confirms this concern. Providers complied with the law and ceased performing post-heartbeat abortions, unwilling to risk suit and liability; abortions after six weeks of pregnancy became largely unavailable.<sup>198</sup>

192. *Id.*

193. *Juno Med. Servs. LLC v. Russo*, 140 S. Ct. 2103, 2113 (2020); *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2301 (2016).

194. *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 551 (2021) (Sotomayor, J., concurring in the judgment in part and dissenting in part); *supra* Section I.B.

195. *Ex parte Young*, 208 U.S. 123, 163–64 (1908).

196. *Id.* at 163.

197. *WWH Argument*, *supra* note 22, at 50 (statement of Chief Justice Roberts); *see also Whole Woman's Health*, 142 S. Ct. at 550 (Sotomayor, J., concurring in the judgment in part and dissenting in part).

198. *Supra* notes 70–78 and accompanying text.

Compliance meant no violations, no lawsuits, and no opportunity to challenge the validity of the heartbeat ban.

*Ex parte Young* recognized the importance of offensive litigation to protect rights holders in this situation—the threat of a barrage of lawsuits, liability, and crippling damages keeps providers from performing business as usual, while the absence of enforcement suits denies them the opportunity to litigate and obtain a judicial determination on the constitutional validity of a suspect law. The situation in Texas “substantially suspended” the exercise of the right to reproductive freedom within the State of Texas.<sup>199</sup>

But *Ex parte Young* and S.B. 8 litigation operate at different points. *Ex parte Young* identified defensive litigation as an inadequate alternative after identifying the attorney general as the responsible executive officer and an appropriate and permissible target for offensive litigation and injunctive relief.<sup>200</sup> Inadequacy of defensive litigation does not provide an independent basis for offensive litigation; it supports offensive litigation after identifying that proper responsible enforcer. Absent such a responsible enforcer to target in offensive litigation, the court never considers the adequacy of defensive litigation.

More broadly, a preferred litigation posture is not a constitutionally guaranteed litigation posture. The *WWH* plaintiffs sued everyone they could think of in search of that proper target. But the principal *WWH* opinion properly recognized that “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.”<sup>201</sup>

That said, offensive litigation is not impossible in challenging S.B. 8. The attempted offensive action in *WWH* produced a mixed bag—some potentially proper targets, some improper targets, and some targets who may become proper at a different time following different events. Providers may pursue offensive constitutional litigation, but they must

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199. *Whole Woman’s Health*, 142 S. Ct. at 543 (Roberts, C.J., concurring in the judgment in part and dissenting in part); *id.* at 545 (Sotomayor, J., concurring in the judgment in part and dissenting in part).

200. *Ex parte Young*, 209 U.S. at 159–60; Barry Friedman, *The Story of Ex parte Young: Once Controversial, Now Canon*, in *FEDERAL COURTS STORIES* 247, 267 (Vicki C. Jackson & Judith Resnik eds., 2010).

201. *Whole Woman’s Health*, 142 S. Ct. at 537–38; *id.* at 539 (Thomas, J., concurring in part and dissenting in part).

be creative as to whom to sue, when to sue, and what to expect from those suits.

#### *A. Stopping Direct Executive Enforcement*

The ordinary target of offensive litigation is the executive officer responsible for directly enforcing the challenged law—the governor or attorney general for most prohibitions, the head of the health department for medical regulations such as restrictions on abortion procedures and providers.<sup>202</sup> By eliminating public enforcement of the substantive fetal-heartbeat provision, S.B. 8 eliminates this option.<sup>203</sup> Providers cannot sue Texas, any Texas agency or municipality, or any Texas or local official to stop them from enforcing the law because no state or local government and no state or local official possesses the power to enforce the law.

This mirrors the situation in *California v. Texas*. Although charged with enforcing federal tax law, federal officials could not enforce the insurance mandate because it was factually and practically impossible to collect a zero-dollar tax or penalty.<sup>204</sup> Although charged with enforcing Texas laws related to health care (including abortion), Texas officials are legally prohibited to “take[] or threaten[]” enforcement of this abortion law.<sup>205</sup> S.B. 8 and the zero-dollar mandate produce the same outcome—no executive officer can enforce the challenged law, therefore no executive officer can cause a constitutional injury and no executive officer can be enjoined from enforcing a law that he cannot, whether legally or practically, enforce.<sup>206</sup>

During *WWH* argument Justices Breyer, Sotomayor, and Kagan offered a unique path to offensive litigation against executive officials. They suggested that while S.B. 8 disperses direct enforcement among thousands or millions of deputized private “any persons,” rights holders can direct offensive litigation at one government official holding “residual” authority to enforce the challenged law.

This theory has two analogues. The first is the railroad rates law at issue in *Ex parte Young*. That law did not identify a particular state

202. See Wasserman, *supra* note 113, at 1084.

203. Texas Heartbeat Act, S.B. 8, 87th Leg., Reg. Sess. § 3 (Tex. 2021) (to be codified at TEX. HEALTH & SAFETY CODE ANN. § 171.207(a) (West 2021)).

204. *California v. Texas*, 141 S. Ct. 2104, 2113–14 (2021); *supra* notes 192–95 and accompanying text.

205. S.B. 8 § 3 (to be codified at HEALTH & SAFETY § 171.207(a)).

206. *Whole Woman’s Health*, 142 S. Ct. at 534.

officer charged with enforcement,<sup>207</sup> yet the Court recognized the attorney general as the ultimate responsible executive officer to be sued and enjoined, based on his general right, power, and duty to enforce state law, disconnected from any specific law.<sup>208</sup> The second analogue is challenges to state criminal laws. Power to prosecute individual violations of state criminal laws is dispersed among local prosecutors, yet offensive pre-enforcement litigation to stop enforcement of criminal laws targets the attorney general as the head of the state law-enforcement apparatus.

These Justices suggested that a federal court can enjoin one executive officer, such as the attorney general, based on his residual power to enforce all state law; that injunction stops enforcement by dispersed deputized individual enforcers.<sup>209</sup> On this theory, states cannot eliminate or prohibit public enforcement of their laws as S.B. 8 purports to do. If a state delegates primary enforcement to private individuals, some executive officer holds, even if he never exercises, residual enforcement power. Rights holders can sue and obtain an injunction against that officer, regardless of the challenged law's enforcement scheme, and that injunction captures those exercising dispersed primary enforcement power.

The *WWH* majority rejected this theory. Even if the attorney general were a proper target, which the Court denied, it refused to allow a federal court to parlay its authority to enjoin one executive officer from enforcing a law "into an injunction against any and all unnamed private persons who might seek to bring their own S.B. 8 suits."<sup>210</sup> Moreover, the analogy to *Ex parte Young* fails. Whatever ambiguity in the enforcement mechanisms of Minnesota's rate laws, the law did not preclude the attorney general from enforcing, which he did by filing suit. S.B. 8 precludes attorney-general enforcement, eliminating that officer as a litigation target.

#### B. Stopping Indirect Executive Enforcement

State laws and regulations, enforced by various executive officials and agencies, may require compliance with other state laws. This

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207. Friedman, *supra* note 200, at 261.

208. *Whole Woman's Health*, 142 S. Ct. at 547–48 (Sotomayor, J., concurring in the judgment in part and dissenting in part).

209. *WWH* Argument, *supra* note 22, at 66–68 (statement of Justice Sotomayor); *id.* at 68–70 (statement of Justice Kagan); *id.* at 77–78 (statement of Justice Breyer).

210. *Whole Woman's Health*, 142 S. Ct. at 535.

creates the potential for “indirect” enforcement, where violation of an underlying law provides the predicate for enforcement of a broader law.

For example, the Texas Medical Board pursues civil, administrative, and licensure actions against physicians who violate the state Health and Safety Code,<sup>211</sup> including an express directive regarding violations of the chapters in which S.B. 8’s substantive provisions are codified.<sup>212</sup> The Board of Nursing and Board of Pharmacy impose administrative penalties or license suspensions and restrictions for violating state laws related to their regulated practices.<sup>213</sup> The violation of the heartbeat ban, as one law that licensees must follow, provides the predicate for the agencies to sanction licensed providers. To the extent the heartbeat ban is constitutionally invalid, using it as the basis for suspending a provider’s license is constitutionally invalid.

This offers doctors, nurses, and health providers an opportunity to pursue offensive litigation against the regulatory officials. Providers intend to violate S.B. 8 by performing post-heartbeat abortions, thereby violating licensure regulations. Board officials are responsible for pursuing administrative and licensure actions against providers for violations of their obligations to follow relevant state laws, including S.B. 8. A federal court remedies the providers’ threatened injury by enjoining these officials from using S.B. 8 violations as the predicate for administrative or licensure actions against providers, where using the violation of the constitutionally invalid S.B. 8 as a basis for an administrative sanction violates the providers’ constitutional rights. Providers gain an opening to federal court, a basis for the court to declare S.B. 8’s constitutional invalidity, interim relief, and a possible fast-track to final Supreme Court review.

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211. TEX. OCC. CODE ANN. § 164.055(a) (West 2021).

212. *See id.* The licensing sanctions for violating Chapter 171 are in addition to other applicable powers of the Texas Medical Board. OCC. § 164.055(b). These include the power to administer a public reprimand or suspend, limit, or restrict a licensee’s authority to practice medicine for any act connected to the practice of medicine that violates any state law. OCC. §§ 164.001(b)(2)–(3), 164.052(a)(5), 164.053(a)(1). Board regulations also require reporting of all lawsuits filed against a medical provider and mandate a competency review if three or more lawsuits have been filed in a five-year period. 22 TEX. ADMIN. CODE §§ 176.2(a)(3), 176.8(b) (2021).

213. OCC. §§ 301.452(b)(1), 301.453(a), 301.457(e)(2), 301.501 (Texas Board of Nursing); OCC. §§ 565.001(a)(1) & (12), 565.002, 566.001(1) (Texas Board of Pharmacy).

Eight Justices accepted this theory, at least at the motion to dismiss stage.<sup>214</sup> Chief Justice Roberts highlighted their broad agreement on the availability of this path to pre-enforcement federal judicial review.<sup>215</sup> Justice Gorsuch's lead opinion was more circumspect, emphasizing that it found enough for the motion to dismiss stage, without committing to the ultimate success of such a claim.<sup>216</sup> Four Justices also would have allowed providers to proceed against the attorney general on the same theory, given his coextensive authority to pursue civil penalties for violations of medical-practice laws.<sup>217</sup>

In fact, the theory raises more questions than it answers and offers a limited solution.

These offensive claims depend on what S.B. 8 means by "no enforcement" by public officials, governments, or agencies. That language may include indirect enforcement, prohibiting any public action imposing any sanction under any law based on a violation of the heartbeat ban. The Fifth Circuit insisted that "[e]xclusive means exclusive" private enforcement,<sup>218</sup> and Justice Thomas agreed that licensing officials, like other executive officials, have no authority to enforce any violations of this law.<sup>219</sup> If an S.B. 8 violation cannot, as a matter of state law, form the predicate for licensure enforcement, a federal court cannot enjoin state officials from using an S.B. 8 violation as a predicate for licensure enforcement—the court cannot enjoin officials from doing what they lack power to do. On remand, the Fifth Circuit certified to the Texas Supreme Court whether the boards and officials had state-law power to take direct or indirect disciplinary actions for violations of the heartbeat ban,<sup>220</sup> and the Supreme Court

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214. *Whole Woman's Health*, 142 S. Ct. at 535–36, 538–39; *id.* at 544 (Roberts, C.J., concurring in the judgment in part and dissenting in part). *But see id.* at 541 (Thomas, J., concurring in part and dissenting in part).

215. *Id.* at 544 (Roberts, C.J., concurring in the judgment in part and dissenting in part).

216. *Id.* at 537 (plurality opinion).

217. *Id.* at 544 (Roberts, C.J., concurring in the judgment in part and dissenting in part); Occ. § 165.101.

218. *Whole Woman's Health v. Jackson*, 13 F.4th 434, 443 (5th Cir. 2021).

219. *Whole Woman's Health*, 142 S. Ct. at 541 (Thomas, J., concurring in part and dissenting in part).

220. *Whole Woman's Health v. Jackson*, No. 21-50792, 2022 WL 142193, at \*6 (5th Cir. Jan. 17, 2022).

denied a writ of mandamus ordering the court to return the case to the district court.<sup>221</sup>

Events on the ground may test this theory further. Operation Rescue urged the Medical Board<sup>222</sup> to investigate and suspend Dr. Braid for performing the prohibited abortion that he announced in the *Washington Post*.<sup>223</sup> Although the Board has not acted on the letter, the prospect opens it to suit. A rights holder cannot bring an offensive action where state law, properly interpreted, does not apply to particular rights holders, eliminating any risk of enforcement.<sup>224</sup> But a rights holder can pursue offensive litigation when a law authorizes public enforcement and allows a random person to submit an administrative complaint or request to trigger public enforcement.<sup>225</sup> The ease of the private complaint makes enforcement easy and likely and an offensive suit proper.<sup>226</sup>

If S.B. 8 permits indirect enforcement sufficient to enable federal offensive litigation, however, the scope of relief is limited.<sup>227</sup> An injunction could prohibit licensing agencies and agency officials from pursuing administrative or licensure proceedings or from imposing licensure sanctions against regulated reproductive-health providers. That injunction accords those providers complete relief and is commensurate with the constitutional violation they seek to prevent—losing their licenses for performing constitutionally protected post-heartbeat abortions.

But the remedy goes no further. Because the constitutional violation is the administrative or licensure sanction against the provider based on an invalid law, the remedy must be limited to stopping that violation. An injunction prohibiting boards and officials from enforcing professional licensing regulations cannot stop private “any persons” from filing private S.B. 8 suits or protect providers from such

221. *In re Whole Woman’s Health*, No. 21-962, 2022 WL 176939 (Jan. 20, 2022) (mem.).

222. Letter from Cheryl Sullenger, Senior Vice President, Operation Rescue, to Texas Med. Bd. (Sept. 20, 2021), <https://www.operationrescue.org/wp-content/uploads/2021/09/2-Complaint-Narrative-Alan-Braid-9-20-2021-Letterhead.pdf> [https://perma.cc/DKN3-5QCN].

223. *Supra* notes 81–82 and accompanying text.

224. See, e.g., Pac. Cap. Bank, N.A. v. Connecticut, 542 F.3d 341, 350 (2d Cir. 2008); Vt. Right to Life Comm., Inc. v. Sorrell, 221 F.3d 376, 382–83 (2d Cir. 2000) (internal quotation marks omitted).

225. See Susan B. Anthony List v. Driehaus, 573 U.S. 149, 164–65 (2014).

226. *Id.*

227. *Supra* notes 146–48 and accompanying text.

suits; “any person” is not party to the offensive litigation, does not cooperate with the boards, and cannot be subject to the federal court’s remedial power. Nor can the injunction protect advocacy organizations and other non-providers who aid and abet prohibited abortions; they are not licensed medical professionals, are not regulated by these licensing agencies, and are not subject to enforcement at their hands. A federal injunction against the licensing agency cannot protect non-regulated professionals against enforcement that the agency is powerless to pursue.

If providers succeed in obtaining an injunction stopping indirect enforcement, the opinion in that case establishes precedent as to S.B. 8’s constitutional invalidity, which persuades or dictates (depending on the court issuing the opinion) the outcome in any future efforts to enforce against any rights holders, including future private “any person” S.B. 8 enforcement actions in state court. But the judgment and injunction in the case extends no further than the boards, medical providers, and licensure proceedings.

### C. Stopping Courts and Clerks

Justice Gorsuch labeled the third approach the “court-and-clerk theory,”<sup>228</sup> under which the federal court would enjoin state clerks of court from accepting and filing S.B. 8 actions and state judges from adjudicating those actions. The *WWH* suit included claims against one state trial judge and one clerk of a trial court, seeking certification of a defendant class of each.<sup>229</sup> The resulting injunction would stop private enforcement—if clerks cannot accept S.B. 8 lawsuits and judges cannot adjudicate them, private “any person” plaintiffs are practically, if not legally, prevented from pursuing and recovering on private claims under the law.

This represents the most unique, controversial, and divisive attempt to get to federal court. The district court in *WWH* refused to dismiss these claims, although the Fifth Circuit derided the theory as “specious.”<sup>230</sup> In denying interim relief, the Supreme Court recognized the uncertainty over whether a federal court can enjoin a state judge to stop adjudication of a state lawsuit.<sup>231</sup> On plenary review, the Court

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228. Whole Woman’s Health v. Jackson, 142 S. Ct. 522, 532, 534 (2021).

229. *Id.* at 531–32.

230. Whole Woman’s Health v. Jackson, 13 F.4th 434, 443 (5th Cir. 2021).

231. Whole Woman’s Health v. Jackson, 141 S. Ct. 2494, 2495 (2021).

unanimously rejected the theory as to judges,<sup>232</sup> while dividing 5-4 in rejecting the theory as to court clerks.<sup>233</sup> Justice Gorsuch denied any “amorphous” federal judicial power to “supervise ‘the operations of government’ and reimagine from the ground up the job description” of state clerks, judges, and court personnel.<sup>234</sup>

This Section explains why the majority reached the right conclusion.

### *1. Judges*

All Justices agreed that state judges are not proper defendants in offensive litigation challenging constitutional validity and seeking to enjoin enforcement of state laws.

#### *a. Why claims fail*

##### *i. The limits of *Ex parte Young**

This is obvious from the source. While recognizing offensive litigation against responsible executive officers, *Ex parte Young* rejected claims against judges:

It is proper to add that the right to enjoin an individual, even though a state official, from commencing suits under circumstances already stated, does not include the power to restrain a court from acting in any case brought before it, either of a civil or criminal nature.<sup>235</sup>

The “difference between the power to enjoin an individual from doing certain things, and the power to enjoin courts from proceeding in their own way to exercise jurisdiction, is plain, and no power to do the latter exists because of a power to do the former.”<sup>236</sup> That is, the federal court’s power to enjoin an individual (the responsible executive officer) from commencing an enforcement action does not empower the federal court to enjoin the judge from adjudicating that enforcement action once commenced.

This makes sense if *Ex parte Young* originates in historic equity’s anti-suit injunction, in which the potential defendant in an action in a court of law asks a court of equity to enjoin the action at law.<sup>237</sup> Anti-suit

232. *Whole Woman’s Health*, 142 S. Ct. at 538–39.

233. Compare *id.* at 532–33, with *id.* at 544 (Roberts, C.J., concurring in the judgment in part and dissenting in part); *id.* at 548–49 (Sotomayor, J., concurring in the judgment in part and dissenting in part).

234. *Id.* at 532.

235. *Ex parte Young*, 209 U.S. 123, 163 (1908).

236. *Id.*

237. Harrison, *supra* note 152, at 996.

injunctions ran to the parties to the proceedings in other courts—the defendant in the equitable action and the party bound by the anti-suit injunction is the potential plaintiff in the action in law, not the judge in the court of law.<sup>238</sup> Allowing federal courts to issue anti-suit injunctions stopping state-court enforcement proceedings does not allow anti-suit injunctions against the judges to those state-court enforcement proceedings.

*Shelley v. Kraemer*<sup>239</sup> is not to the contrary. *Shelley* found state action in the “action[s] of state courts and judicial officers” whose conduct through their judgments and orders allowed enforcement of a racially restrictive covenant and prevented the property owners from occupying their home.<sup>240</sup> But *Shelley* did not authorize offensive pre-enforcement federal constitutional claims against the state judges to stop them from considering whether to enforce that covenant.<sup>241</sup> *Shelley* involved private state-court enforcement litigation. One private property owner sued the Black purchasers of another property to enforce the restrictive covenant, void the sale, and dispossess the purchasers; the purchasers raised equal protection as a defense to defeat the claim.<sup>242</sup>

The point of *Shelley* is that the Fourteenth Amendment provides a federal defense and a basis for Supreme Court review and reversal of the judgment in a private state-court action to enforce the covenant. *Shelley* requires state judges to reject private claims to enforce restrictive covenants and establishes reversible error if they do not reject them. But federal district courts do not use *Shelley* to enjoin judges from exercising their power to hear and rule on cases within their jurisdiction.<sup>243</sup> A federal court “stripping down a state court docket[] is extraordinary, possibly unprecedented” relief.<sup>244</sup>

### *ii. Not “enforcers”*

Judges do not “enforce” laws.<sup>245</sup> Judges adjudicate and resolve disputes between adverse parties when one party (whether government, executive officer, or private plaintiff) performs the

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238. Pulliam v. Allen, 466 U.S. 522, 529 (1984).

239. 334 U.S. 1 (1948).

240. *Id.* at 14, 18–19.

241. Whole Woman’s Health v. Jackson, 142 S. Ct. 522, 534 (2021).

242. *Id.*

243. KC Tenants v. Byrn, 504 F. Supp. 3d 1026, 1033–34 (W.D. Mo. 2020).

244. *Id.* at 1034.

245. *Whole Woman’s Health*, 142 S. Ct. at 532.

executive function of enforcing legal rules established by statute or common law. Although that enforcement occurs in court, that does not make the judge or court the enforcing authority. *Shelley* confused this point by repeating the word “enforcement.”<sup>246</sup> But that loose language should be read to mean a plaintiff (such as the rival property owner in *Shelley*) enforces the law by going to court and seeking a judgment and resolution from the judge.

*iii. Not “adverse”*

Judges are not adverse to the rights-holder defendant, unlike the enforcing opposing party (whether government, executive officer, or private plaintiff) who initiates litigation against an enforcement target. Judges function as neutral decisionmakers, resolving the enforcement dispute between those adverse parties.<sup>247</sup> *Shelley* (the Black property purchaser) and Kraemer (the white owner of neighboring property subject to the restrictive covenant) were adverse; the state judges who adjudicated the lawsuit, however erroneously, were not.

*iv. No causation*

A judge adjudicating a dispute between a private plaintiff and a private defendant does not “cause” a constitutional injury or a deprivation of a right secured by the Constitution in a manner actionable in federal court. Several doctrines preclude offensive federal litigation challenging state judges’ work. The *Rooker-Feldman* doctrine strips federal district courts of jurisdiction to hear § 1983 claims challenging the constitutional propriety of state-court judgments.<sup>248</sup> A rights holder claiming a constitutional defect in the outcome of state litigation or the state judge’s decision must seek appellate review of the judgment through the state judiciary and to the Supreme Court of the United States.<sup>249</sup> Federal courts also cannot “intervene to establish the basis for future intervention” by enjoining future state judicial proceedings.<sup>250</sup> If a federal district court cannot overrule an actual or predicted state judgment in adjudicating a § 1983

246. *WWH* Argument, *supra* note 22, at 20–22 (statements of Justice Kavanaugh); *id.* at 62 (statement of Justice Kavanaugh).

247. *Whole Woman’s Health*, 142 S. Ct. at 532; *Whole Woman’s Health v. Jackson*, 13 F.4th 434, 444 (5th Cir. 2021) (per curiam).

248. See *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 285 (2005); *D.C. Ct. of Appeals v. Feldman*, 460 U.S. 462, 476 (1983).

249. 28 U.S.C. § 1257(a); *Feldman*, 460 U.S. at 476.

250. *O’Shea v. Littleton*, 414 U.S. 488, 500 (1974).

claim, it should follow that a federal district court cannot enjoin the state judge from the opportunity to exercise the power to hear the case and render that judgment.

*v. Parity*

Finally, federal claims against state judges run afoul of the presumption of “parity” between federal and state judges. State judges follow federal law and Supreme Court precedent interpreting federal law.<sup>251</sup> Federal and state judges are bound by the same oath, follow the same judicial precedent, and are presumed equal in their willingness and ability to follow federal law and federal judicial precedent and protect and vindicate federal rights.<sup>252</sup>

The presumption is not without critics.<sup>253</sup> Indeed, Texas lawmakers enacted S.B. 8 under the contrary presumption (or hope) as to the constitutional right to reproductive freedom—that Texas judges adjudicating S.B. 8 actions would ignore unpopular (in Texas) judicial constitutional precedent and follow legislative preferences as to the unlawfulness of abortion. But the presumption of parity and state judges’ jurisprudential obligations are sufficiently established that a federal judge should not enjoin a state judge from the opportunity to follow her oath and properly adjudicate a case within her jurisdiction. If the state judge fails to act as she should, Supreme Court review (and reversal) waits at the end of the process.

*b. Lack of precedential support*

Cases seeming to allow federal courts to enjoin state judges prove the opposite point—judges are not proper targets for offensive litigation to stop enforcement of state law.

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251. James v. City of Boise, 577 U.S. 306, 306–07 (2016) (per curiam); James E. Pfander, *Federal Supremacy, State Court Inferiority, and the Constitutionality of Jurisdiction-Stripping Legislation*, 101 NW. U. L. REV. 191, 201–02, 229–30 (2007).

251. See TEX. CIV. PRAC. & REM. CODE ANN. § 51.012 (West 2009).

252. See REDISH, *supra* note 159, at 1–3; Neuborne, *supra* note 159 at 1105, 1116–17; Preis, *supra* note 159, at 291.

253. REDISH, *supra* note 159, at 1–3; Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 235–36 (1985); Neuborne, *supra* note 159, at 1105–06, 1121–22. But see William B. Rubenstein, *The Myth of Superiority*, 16 CONST. COMMENT. 599, 599–600 (1999).

*i.* Pulliam

*Pulliam v. Allen*<sup>254</sup> held that state judges do not enjoy judicial immunity from an action for injunctive relief and a subsequent award of attorney's fees.<sup>255</sup> But context matters. The plaintiffs in *Pulliam* challenged the state judge's courtroom practice of imposing bail for non-jailable offenses and of detaining those who could not post bail.<sup>256</sup> For purposes of these internal courtroom policies, the judge was the responsible executive officer enforcing her courtroom policy.<sup>257</sup> That is different from a federal court prohibiting state judges from adjudicating cases brought before them by individuals attempting to enforce legislatively established rules.<sup>258</sup>

*ii.* Supreme Court of Virginia

*Supreme Court of Virginia v. Consumers Union of the United States*<sup>259</sup> permitted First Amendment claims against the state supreme court and its chief justice.<sup>260</sup> But those claims targeted the court and chief's executive role in initiating and prosecuting proceedings to enforce constitutionally defective bar regulations; they did not target their judicial role of adjudicating and rendering judgment in proceedings enforcing those regulations.<sup>261</sup>

*iii.* Mitchum

Justice Sotomayor seized on a third case, *Mitchum v. Foster*,<sup>262</sup> as suggesting a modern extension of *Ex parte Young* in cases to enjoin state-court proceedings.<sup>263</sup> The plaintiff, a bookstore owner, asked the federal court to enjoin a pending state-court public-nuisance proceeding; he named as defendants the county prosecutor, the state

254. 466 U.S. 522 (1984).

255. *Id.* at 524–25, 543–44. *Pulliam* was overruled in part by 1996 amendments to § 1983, which allowed plaintiffs to sue judges but required them to first obtain declaratory relief. 42 U.S.C. § 1983 (as amended by Federal Courts Improvements Act of 1996, Pub. L. 104-317, § 309, 110 Stat. 3847 (1996)).

256. *Id.* at 525–26.

257. *Id.* at 526.

258. *Cf. id.* at 539.

259. 446 U.S. 719 (1980).

260. *Id.* at 736.

261. *Id.* at 734–36.

262. 407 U.S. 225 (1972).

263. *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 548–49 (2021) (Sotomayor, J., concurring in the judgment in part and dissenting in part).

judge hearing the case, and the county sheriff.<sup>264</sup> The Supreme Court held that the Anti-Injunction Act,<sup>265</sup> which bars federal courts from enjoining pending state proceedings,<sup>266</sup> did not bar this federal action because § 1983 qualifies as an expressly congressionally authorized exception to the Act.<sup>267</sup> The Court remanded for consideration of whether the federal court must abstain under *Younger v. Harris*.<sup>268</sup>

*Mitchum* does not establish state judges as appropriate targets for offensive litigation. The judge was not the sole defendant. The plaintiff sued the local prosecutor—the proper executive officer responsible for enforcing state law who commenced and litigated the state-court action, the person adverse to Mitchum, and the real target of the federal suit and injunction. *Mitchum* cannot establish the propriety of judges as § 1983 defendants because neither the Supreme Court nor the district court parsed or resolved the issue of the proper defendants; both courts focused on the Anti-Injunction Act and whether it categorically barred any federal § 1983 action to enjoin any pending state proceeding against any defendant, including against the responsible executive officer.<sup>269</sup>

## 2. Clerks of court

The claims are weaker against court clerks, with no precedent hinting at them as proper targets of offensive litigation. It thus is surprising that the *WWH* plaintiffs targeted them before the Supreme Court<sup>270</sup> and disappointing that four Justices adopted the idea.<sup>271</sup>

Clerks of court in no sense “enforce” S.B. 8, even less than judges do.<sup>272</sup> They perform a ministerial task of accepting the lawsuit, without considering its content or merit or deciding whether it is substantively acceptable. Under Texas law, a civil action is commenced by filing a

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264. *Mitchum*, 407 U.S. at 227–28; *Mitchum v. Foster*, 315 F. Supp. 1387, 1388 (N.D. Fla. 1970) (3-Judge Court) (per curiam).

265. 28 U.S.C. § 2283.

266. *Id.*

267. *Mitchum*, 407 U.S. at 242.

268. *Id.* at 243 (discussing *Younger v. Harris*, 401 U.S. 37 (1971)); *infra* notes 379–400 and accompanying text.

269. *Mitchum*, 407 U.S. at 242–43; *Mitchum*, 315 F. Supp. at 1389–90.

270. *WWH Argument*, *supra* note 22, at 4–6, 20–21, 28–29.

271. Whole Woman’s Health v. Jackson, 142 S. Ct. 522, 544 (2021) (Roberts, C.J., concurring in the judgment in part and dissenting in part); *id.* at 548–50 (Sotomayor, J., concurring in the judgment in part and dissenting in part).

272. *Whole Woman’s Health*, 142 S. Ct. at 532.

petition with the clerk.<sup>273</sup> Clerks must accept papers; place the case number, date of filing, and time of filing on the document; and sign the document.<sup>274</sup> They cannot refuse to file the petition or prevent the action from being commenced. At no point do or can they review, evaluate, or opine on the document, its substance, or its merits. They have no opportunity or power to determine whether a particular lawsuit was brought under S.B. 8 or to decline to file it for that reason.

### *3. Sheriffs*

Sheriffs offer a third target within the court-and-clerk machinery. Sheriffs enforce issued state-court judgments—by seizing and selling a judgment debtor’s non-exempt real and personal property under a writ of execution,<sup>275</sup> serving writs of garnishment,<sup>276</sup> receiving property under turnover orders,<sup>277</sup> and carrying out a judge’s contempt order against a party who fails to comply with an injunction. The theory remains the same—by stopping the judicial machinery, the federal court deters private “any person” S.B. 8 plaintiffs from pursuing litigation, without controlling their conduct. “Any person” will not bother bringing a lawsuit if the clerk is unable to accept the pleading and the judge is unable to adjudicate the action. “Any person” will not bother bringing a lawsuit if the sheriff is unable to enforce whatever judgment “any person” receives.

Providers did not include sheriffs in their attempted offensive action. Given their expansive litigation net, that omission suggests something about the theory’s merits. Nevertheless, commentators offer the strategy as an alternative worth exploring.<sup>278</sup>

The sheriff theory fails for the reasons the judge and clerk theories fail. The sheriff and the litigation loser are not adverse, independent of the judgment. The adverseness remains between the defendant and the plaintiff who successfully sued him for violating the law. Sheriffs

273. TEX. R. CIV. P. 22.

274. TEX. R. CIV. P. 24.

275. TEX. CIV. PRAC. & REM. CODE ANN. §§ 34.001–.076 (West 2021); TEX. R. CIV. P. 629, 637.

276. CIV. PRAC. & REM. § 63.001; TEX. R. CIV. P. 662–63.

277. CIV. PRAC. & REM. § 31.002(b)(1). Turnover orders, however, may also be accomplished without the involvement of a sheriff or constable if the court appoints a receiver. *Id.* § 31.002(b)(3).

278. Ilya Somin, *How Narrow is the Pathway the Supreme Court Left for Suits Challenging SB8 and Other Similar State Laws*, VOLOKH CONSPIRACY (Dec. 10, 2021, 8:01 PM), <https://reason.com/volokh/2021/12/10/how-narrow-is-the-pathway-the-supreme-court-left-for-suits-challenging-sb8-and-other-similar-state-laws> [https://perma.cc/QUT6-6BQM].

operate the state machinery in which parties' adverseness plays out, at the opposite end of the process from clerks—clerks act at commencement, while sheriffs act at the conclusion. But the sheriff remains neutral between the parties and the rights, claims, and defenses asserted, other than as they have been adjudicated and resolved by the court. Sheriffs also perform a minimal and ministerial function. They act at the court's direction without notice, knowledge, or review of the underlying basis or substance of the judgment and with no discretion to evaluate, disagree with, or decline to enforce that judgment.

The sheriff theory suffers several additional defects. First, the injury is speculative. Rights holders pursue pre-enforcement offensive suits on a simple chain—a rights holder intends to engage in constitutionally protected activity and the responsible official will respond by enforcing the challenged law prohibiting that activity.<sup>279</sup> Rights holders are less able to proceed where the constitutional injury requires a series of intervening potential or hypothetical third-party actions between the rights holder's activity and the defendant's enforcement efforts.<sup>280</sup>

Clerks fit the first category. They act (by accepting and filing an S.B. 8 petition, thereby commencing the action) in the simple chain that providers will perform prohibited-but-constitutionally protected procedures and an authorized "any person" plaintiff will commence a lawsuit to enforce state law by filing a complaint with the clerk. Sheriffs fit the second. They cannot act or cause the injury (by enforcing the judgment) unless and until the third-party conduct of a state judge in entering judgment in favor of "any person" and against the provider. That may not happen, rendering any injury or violation of providers' rights unlikely to occur. In fact, the injury of sheriff enforcement will never occur if the state court adheres to its judicial oath, follows controlling judicial precedent, declares the heartbeat ban invalid and unenforceable, and enters judgment in favor of the providers. Like the judge theory, the sheriff theory ignores the presumption of parity and the expectation that state judges adhere to binding Supreme Court precedent.

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279. Susan B. Anthony List v. Driehaus, 573 U.S. 149, 159 (2014).

280. E.g., United States v. Sanchez-Gomez, 138 S. Ct. 1532, 1541 (2018); Clapper v. Amnesty Int'l USA, 568 U.S. 398, 410–14 (2013); Whitmore v. Arkansas, 495 U.S. 149, 157–58 (1990); O'Shea v. Littleton, 414 U.S. 488, 497 (1974).

Second, the underlying presumption that “any person” will not pursue S.B. 8 claims if the state-court machinery is unavailable may not hold with sheriffs and post-judgment enforcement. An injunction prohibiting sheriffs from enforcing judgments does not stop plaintiffs from initiating litigation, clerks from filing pleadings, or judges from litigating and entering adverse judgments (however legally erroneous such judgments would be). “Any person” may choose to litigate an S.B. 8 claim to judgment, regardless of whether they can recover statutory damages or attorney’s fees. They may achieve their political objectives by forcing providers to incur the costs, burdens, and distractions of having to defend these lawsuits in far-flung regions of Texas, even knowing they cannot collect the judgment.

Third, the theory carries less force in Texas, where enforcing a judgment may not require sheriff involvement. Under the most common mechanism for collecting judgments, a judgment creditor files an abstract of judgment with the county clerk; this creates an automatic judgment lien on any non-exempt real property the judgment debtor has in the county, precluding its sale or disposition without paying the judgment.<sup>281</sup> An injunction prohibiting sheriffs from enforcing future S.B. 8 judgments does not stop a successful S.B. 8 plaintiff from enforcing a judgment via this common mechanism. And knowing an alternative mechanism exists, “any person” might bring an S.B. 8 action believing he can recover on the judgment through this alternative approach.

#### *4. Flaws in courts-and-clerks theories*

The court-and-clerk theory—directed at judges, clerks, sheriffs, or other personnel—suffers from several additional fatal flaws.

##### *a. Erroneous constitutional vision*

###### *i. The constitutional theory*

The argument for the court-and-clerk theory rests on an erroneous constitutional vision—that having to defend against attempted enforcement of an existing-but-invalid law violates constitutional rights.<sup>282</sup> Chief Justice Roberts and Justice Sotomayor advanced this vision in their *WWH* dissents, demanding broader offensive litigation because the heartbeat ban “effectively chill[s] the provision of

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281. TEX. PROP. CODE ANN. §§ 52.001–002 (West 2007).

282. *Supra* Section II.A.

abortions in Texas,”<sup>283</sup> and its “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.”<sup>284</sup>

An injunction stopping clerks from accepting, judges from adjudicating, or sheriffs from enforcing judgments resulting from any possible cases under that invalid law relieves rights holders of the constitutionally violative burden of having to litigate against the law. The theory requires federal courts to protect rights holders against initiation or commencement of enforcement proceedings and against the burden of defending their rights in court. And if offensive litigation is unavailable to enjoin the enforcer from pursuing enforcement proceedings, it must be available to stop the clerk or judge from allowing the enforcement proceeding to commence and continue and from forcing rights holders to defend.<sup>285</sup>

### *ii. Why the theory fails*

The Court rejects this framing of constitutional rights and constitutional litigation. The *WWH* majority insisted that a “‘chilling effect’ associated with a potentially unconstitutional law being ‘on the books’ is insufficient to ‘justify federal intervention’ in a pre-enforcement suit,” regardless of the constitutional rights at issue.<sup>286</sup> The mere existence of a law, absent a genuine risk of enforcement, does not violate anyone’s rights<sup>287</sup> or, in the language of § 1983, deprive any person of a right, privilege or immunity secured by the Constitution.<sup>288</sup> Neither does having to defend against attempted enforcement of that existing law and to litigate constitutional rights to a favorable judgment.

The demand for constitutionally required offensive litigation further presumes that constitutional analysis differs in federal and state court or in offensive and defensive postures. Remedies differ. A state court in a coercive action enters judgment in favor of the defendant rights holder in the ongoing action based on the rights holder’s

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283. Whole Woman’s Health v. Jackson, 142 S. Ct. 522, 544–45 (2021) (Roberts, C.J., concurring in the judgment in part and dissenting in part).

284. *Id.* at 545 (Sotomayor J., concurring in the judgment in part and dissenting in part).

285. *WWH* Argument, *supra* note 22, at 5–7.

286. *Whole Woman’s Health*, 142 S. Ct. at 538.

287. *Supra* Section II.A.

288. 42 U.S.C. § 1983.

constitutional defense. A federal court in an offensive anticipatory action enjoins the would-be state plaintiff (e.g., the responsible executive officer or private plaintiff) from initiating that enforcement action against the rights holder. But constitutional decision-making does not differ. All courts engage in the same analysis in any litigation posture prior to issuing a judgment—determine whether the challenged law is constitutionally valid and whether it can be enforced against that rights holder. Nor does the scope of the remedy differ. Whether entered in an offensive or defensive posture, any court’s judgment stops enforcement against the party rights holders by the enforcing parties in that case; neither posture produces a judgment that protects beyond those parties.<sup>289</sup>

That S.B. 8 purports to limit the defenses that rights holders can raise in state enforcement proceedings<sup>290</sup> does not change this analysis. Constitutional defects in the procedures governing state proceedings can be raised and adjudicated in those state proceedings.<sup>291</sup> They do not provide a basis for suing the state judge, state clerk, or county sheriff in federal court to stop the state litigation. To the extent the limitations on defenses are constitutionally invalid, state judges must disregard them in S.B. 8 litigation and allow rights holders to raise all defenses they are constitutionally entitled to pursue, just as state judges must disregard an invalid claim-creating law. That is, if the provision banning post-heartbeat abortions is constitutionally invalid, a state court cannot impose liability under it. Similarly, if provisions eliminating preclusion as a defense to liability, allowing statewide venue, or limiting providers in raising the ban’s constitutional defects are constitutionally invalid, a state court must ignore those limitations and allow defendants to raise those defenses. The court’s failure to properly resolve those invalid defenses provides a basis for appellate review in the Supreme Court of the United States.

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289. *Supra* notes 145–48 and accompanying text.

290. Texas Heartbeat Act, S.B. 8, 87th Leg., Reg. Sess. § 3 (to be codified at TEX. HEALTH & SAFETY CODE ANN. § 171.209(a) (West 2021)); *id.* at § 171.209(c), (d); *WWH Argument, supra* note 22, at 8–9; *id.* at 13–15 (statement of Justice Barrett); *id.* at 31 (statement of Justice Breyer); *supra* Section I.A.5.

291. See, e.g., Nelson v. Colorado, 137 S. Ct. 1249, 1252 (2017); Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 768–69 (1986); Mullane v. Cent. Hanover Bank, 339 U.S. 306, 307, 320 (1950).

*b. Boundless*

The courts-and-clerks theory is boundless and without an obvious limiting principle.<sup>292</sup>

Federal courts have no “power to supervise ‘the operations of government’ and reimagine from the ground up the job description of Texas state-court clerks.”<sup>293</sup> To order clerks to review and refuse to accept documents containing S.B. 8 claims is to order clerks to do something they are not authorized to do. And the injunction places clerks in an impossible bind. A petition might join an ordinary tort claim to an S.B. 8 claim, forcing a clerk to parse the pleading, uncertain as to what parts must be accepted under state law, what parts must be rejected, and what parts might violate a federal injunction.

Nor can the courts-and-clerks theory be limited to S.B. 8 or copycat laws. Constitutional rights are adjudicated in a defensive posture in a range of cases.<sup>294</sup> Nothing would stop defendants from asking federal judges to enjoin state clerks from docketing or state judges from adjudicating actions under other state laws in which constitutional rights may provide a defense to liability. If state clerks and judges are adverse to S.B. 8 defendants and violate their rights by allowing state litigation to proceed, they are adverse to all state-court defendants with constitutional defenses against all claims and violate their rights by allowing all state litigation to proceed.<sup>295</sup>

If an injunction against a state clerk, state judge, or county sheriff is a litigation option, every defendant in every private civil action will pursue that course. Any speaker or media outlet threatened with or subject to a state-court defamation action will run to federal court with a claim against the judge, clerk, or sheriff, asking the federal court for a declaration that the challenged speech is constitutionally protected and that the defamation action cannot be filed, commenced, adjudicated, or enforced. Rather than defend a private state-court suit seeking to enjoin it from gathering and publishing certain documents and information,<sup>296</sup> the newspaper will ask a federal court to enjoin the clerk from accepting and the judge from adjudicating that suit.

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292. *Whole Woman’s Health*, 142 S. Ct. at 532.

293. *Id.*

294. *Id.* at 538; *supra* Section II.B. See generally Rhodes & Wasserman, *supra* note 33.

295. *Whole Woman’s Health*, 142 S. Ct. at 532–33.

296. Project Veritas v. New York Times, No. 63921/2020, slip op. at 1 (N.Y. Sup. Ct. Dec. 24, 2021).

Justice Sotomayor attempted a limiting principle: *Ex parte Young* claims can proceed in federal court against clerks where 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.”<sup>297</sup>

But this begs the constitutional question. It presumes that offensive pre-enforcement litigation in federal district court is the only way to vindicate constitutional rights, such that state law can “evade” judicial review in channeling litigation into a defensive posture. It presumes that rules eliminating non-mutual preclusion or expanding venue<sup>298</sup> are subject to constitutional limitations. It presumes that any defects in those procedural rules cannot be vindicated while defending in state court. And those presumptions depend on the overarching belief that having to defend against constitutionally defective laws in state court triggers constitutional concerns that open federal district courts. None of those presumptions is true, and the Court has never suggested it is.

#### *D. Stopping Private Enforcement*

The best target for federal offensive litigation is “any person” private individuals authorized or deputized to bring private actions to enforce S.B. 8. A § 1983 claim against a private individual requires that the private individual act under color of state law.<sup>299</sup> The *WWH* plaintiffs pursued this idea in suing Mark Dickson, the executive director of East Texas Right to Life, who pushed for enactment of S.B. 8 and urged people to bring actions under it.<sup>300</sup> The Supreme Court unanimously dismissed the claims against Dickson, given undisputed evidence that he did not intend to file or pursue S.B. 8 actions.<sup>301</sup>

The success of this strategy depends on questions of whom to sue and when. And it requires rights holders to exercise patience and creativity in those litigation choices. It is not the simple process

297. *Whole Woman’s Health*, 142 S. Ct. at 549–50 (Sotomayor, J., concurring in the judgment in part and dissenting in part) (quoting Reply Brief for Petitioner at 6, *id.* (No. 21-463)).

298. *Supra* Section I.A.4.

299. U.S. CONST. amend. XIV § 1; 42 U.S.C. § 1983; *United States v. Price*, 383 U.S. 787, 794–95 n.7 (1966).

300. *WWH* Complaint, *supra* note 3, at 16, 33.

301. *Whole Woman’s Health*, 142 S. Ct. at 537.

followed in the typical offensive pre-enforcement case, which explains why the *WWH* plaintiffs resist it, do not regard it as sufficient, and did not focus on it before the Supreme Court.

### *1. Whom to sue*

#### *a. The unavailable road*

It helps to begin with the argument that does not work. That constitutional rights can be asserted as defenses in private civil litigation does not mean an offensive action is available against the private would-be civil plaintiff.

This is a common misreading of *Shelley v. Kraemer*. The Court found state action and an equal protection violation when the state judiciary applied state contract and property law in litigation initiated by a private property owner to dispossess a Black purchaser of neighboring property under a racially restrictive covenant.<sup>302</sup> *Shelley* involved private state-court enforcement litigation—one private property owner suing a purchaser for civil remedies, with the purchaser raising equal protection as a defense to liability.<sup>303</sup> That is, *Shelley* authorizes a rights holder to assert and litigate constitutional rights in a defensive posture as a way to avoid private liability. But *Shelley* does not permit the constitutional rights holder to pursue offensive litigation against the state-court opponent. The Court never suggested that Kraemer acted under color of state law in attempting to enforce the covenant or that Shelley could have pursued an offensive action against Kraemer.

The Court repeated this idea fifteen years later in *New York Times v. Sullivan*,<sup>304</sup> albeit without citing *Shelley*. The Court found state action where Alabama courts adjudicating a private defamation action applied Alabama statutory and common law defamation rules in a manner that abridged the defendants' First Amendment rights by imposing civil liability.<sup>305</sup> Again, however, the Court never suggested that Sullivan acted under color by suing or that The Times could pursue offensive § 1983 litigation against him or anyone. The common availability of a constitutional defense to a private litigant's claim<sup>306</sup> does not alter that litigant's private status.

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302. *Shelley v. Kramer*, 334 U.S. 1, 18–20 (1948).

303. *Id.* at 5–6, 19–21.

304. 376 U.S. 254 (1964).

305. *Id.* at 265.

306. *Snyder v. Phelps*, 562 U.S. 443, 451 (2011).

Neither *Shelley* nor *New York Times* authorizes offensive federal litigation.<sup>307</sup> We can frame those cases as involving “state action without a state actor.” The enactment of substantive legal rules and the creation and use of state judicial institutions for adjudicating enforcement of those rules constitutes state action and triggers constitutional protections against liability under those rules.<sup>308</sup> But there is no state actor, no person acting under color of state law to trigger § 1983 as the remedial vehicle to vindicate those constitutional protections in an offensive posture.<sup>309</sup>

*b. A workable option*

Private individuals act under color of state law where they perform traditional public functions, those traditionally and exclusively performed by the government.<sup>310</sup> These are functions essential to sovereignty, functions government has a constitutional obligation to perform as part of its sovereign authority.<sup>311</sup> Recognized public functions include administering elections,<sup>312</sup> providing basic municipal services in a privately owned town,<sup>313</sup> providing “municipal services,” such as police<sup>314</sup> and fire protection<sup>315</sup> in private spaces, and providing medical care to prisoners.<sup>316</sup> Enforcing a statutory prohibition for the direct benefit of the public should qualify as a traditional and exclusive function, one that the state must perform as part of its sovereign authority.

But mere statutory authorization to bring suit does not mean “any person” acts under color of state law. Pursuing private litigation—even when seeking to recover under a constitutionally invalid state law through state systems and regulations—does not render the typical

307. Whole Woman’s Health v. Jackson, 142 S. Ct. 522, 534 (2021).

308. Daniel J. Solove & Neil M. Richards, *Rethinking Free Speech and Civil Liability*, 109 COLUM. L. REV. 1650, 1696 (2009).

309. *Id.* at 1694–95.

310. See *Manhattan Cnty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928–29 (2019); *Blum v. Yaretsky*, 457 U.S. 991, 1004–05 (1982).

311. *Flagg Bros. v. Brooks*, 436 U.S. 149, 160 (1978); Solove & Richards, *supra* note 308, at 1695.

312. *Terry v. Adams*, 345 U.S. 461, 469–70 (1953); *Smith v. Allwright*, 321 U.S. 649, 666 (1944).

313. *Marsh v. Alabama*, 326 U.S. 501, 506, 509 (1946).

314. *Fleck v. Trs. of the Univ. of Pa.*, 995 F. Supp. 2d 390, 400 (E.D. Pa. 2014).

315. *Goldstein v. Chestnut Ridge Volunteer Fire Dep’t*, 218 F.3d 337, 345 (4th Cir. 2000).

316. *West v. Atkins*, 487 U.S. 42, 54 (1988).

private litigant a state actor.<sup>317</sup> This is important because government often authorizes individuals to enforce private rights through private civil litigation<sup>318</sup> under tort law,<sup>319</sup> the Constitution,<sup>320</sup> anti-discrimination statutes,<sup>321</sup> consumer-protection laws,<sup>322</sup> and environmental statutes.<sup>323</sup> Such plaintiffs are regarded as “private attorneys general” who, by vindicating their personal private interests and remedying personal private injuries, enforce the laws and benefit the broader public.<sup>324</sup>

Treating any private attorney general as performing a traditional public function, thus as acting under color of state law, undermines this legislative enforcement strategy. Three features make S.B. 8 claims and S.B. 8 plaintiffs unique; those unique features alter the state-action analysis.

*i. Exclusivity of private enforcement*

S.B. 8 delegates responsibility for enforcing a public law to private individuals, while stripping government officials of enforcement authority. The law makes private litigation the exclusive statutory enforcement mechanism.

In *Flagg Bros. v. Brooks*,<sup>325</sup> the Court held that a private participant in commercial dispute resolution did not act under color of law, emphasizing the absence of exclusivity—state law provided other mechanisms for resolving that commercial dispute.<sup>326</sup> S.B. 8 delegates to private individuals an “exclusive prerogative of the sovereign”<sup>327</sup>—enforcing a state statutory ban on some conduct. The only way to stop a provider from performing a prohibited post-heartbeat abortion—or

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317. See *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 622 (1991); *Dennis v. Sparks*, 449 U.S. 24, 28 (1980).

318. *Whole Woman’s Health v. Jackson*, 142 S. Ct. 522, 535 (2021).

319. William B. Rubenstein, *On What a Private Attorney General Is—And Why It Matters*, 57 VAND. L. REV. 2129, 2140 (2004).

320. 42 U.S.C. §§ 1983, 1988.

321. *Id.* § 2000e-5(f)(3).

322. 15 U.S.C. § 1681n(a); *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2205 (2021). Compare *Kasky v. Nike, Inc.*, 45 P.3d 243, 249–50 (Cal. 2002), with CAL. BUS. & PROF. CODE §§ 17204, 17535 (West 2004).

323. 33 U.S.C. § 1364; *Friends of the Earth, Inc. v. Laidlaw Env’t Servs. (TOC), Inc.*, 528 U.S. 167, 173–74 (2000).

324. Trevor W. Morrison, *Private Attorneys General and the First Amendment*, 103 MICH. L. REV. 589, 603–04 (2005); Rubenstein, *supra* note 319, at 2130–31; see *Whole Woman’s Health v. Jackson*, 142 S. Ct. 522, 535 (2021).

325. 436 U.S. 149 (1978).

326. *Id.* at 159–60.

327. *Id.* at 160.

to sanction them if they engage in that prohibited conduct—is if “any person” brings a civil action. If no private individual sues, the statutory prohibition, and thus Texas public policy, remains unenforced.

Exclusivity distinguishes the typical private attorney general. Private attorneys general offer secondary enforcement complementing government efforts. By pursuing private remedies for violations of their private rights, they ensure enforcement without “taxing state resources” and without the executive’s political preferences and attitudes constraining enforcement.<sup>328</sup> But government agencies and officers retain primary power to enforce those laws for the broader public good through public criminal, civil, and administrative proceedings.

Exclusivity also distinguishes S.B. 8 from its nearest analogue, California’s pre-2004 consumer-protection law. The state authorized private litigation by “any person acting for the interests of . . . the general public” against false advertising and other consumer-harming behavior.<sup>329</sup> But government officials, agencies, and entities retained enforcement authority; private litigation supported rather than displaced the power to enforce state law for general-public benefit.<sup>330</sup> Leaving space for government enforcement left room for offensive § 1983 litigation against state officials over constitutionally defective government enforcement, while leaving rights holders to raise the Constitution as a defense in private suits and seek Supreme Court review of an adverse judgment.<sup>331</sup>

Justice Sotomayor’s *WWH* dissent identified exclusivity as one of S.B. 8’s distinguishing features,<sup>332</sup> but drew the wrong conclusion. Exclusivity does not open the door to offensive suits against non-adverse court personnel who do not enforce the law.<sup>333</sup> Exclusivity opens the door to offensive suits against potential “any person” S.B. 8 plaintiffs by converting them into persons acting under color of law in performing the traditional public function of enforcing state law for the public interest.

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328. *Morrison*, *supra* note 324, at 608–09; Rubenstein, *supra* note 319, at 2134, 2148.

329. CAL. BUS. & PROF. CODE §§ 17204, 17535 (repealed 2004).

330. *Id.*

331. See *Kasky v. Nike, Inc.*, 45 P.3d 243, 249 (Cal. 2002), *cert dismissed as improvidently granted*, 539 U.S. 654 (2003) (per curiam); *id.* at 263 (Chin. J., dissenting).

332. *Whole Woman’s Health v. Jackson*, 142 S. Ct. 522, 549–50 (2021) (Sotomayor, J., concurring in the judgment in part and dissenting in part).

333. *Supra* Section III.C.

*ii. Public interest, not personal injury*

The typical private attorney general enforces private rights, seeks to remedy personal injuries, and must show a personal connection to proceed; the public benefit of the judicial remedy is incidental to private relief for private injury.<sup>334</sup> But S.B. 8 plaintiffs do not enforce their private rights, as they need not show any personal injury, stake, or connection to the abortions over which they sue.<sup>335</sup> They replace the executive in vindicating a purely public, non-personal policy goal—enforcing a statutory prohibition on post-heartbeat abortions.<sup>336</sup>

Texas is not alone in prohibiting pre-viability, including post-heartbeat, abortions.<sup>337</sup> But state executives enforce parallel laws in other jurisdictions, suggesting that enforcing this type of abortion prohibition is the ordinary province and duty of government and government officials, not disconnected private individuals. Anthony Colangelo goes a step further, arguing that a ban on pre-viability abortion procedures is a penal law, such that Texas has delegated to private individuals the traditional public function of prosecuting violations of criminal law.<sup>338</sup>

*iii. Singularity of recovery*

S.B. 8 prohibits multiple plaintiffs from recovering for one proscribed abortion; a provider can defeat one lawsuit by showing it paid statutory damages for the challenged abortion in a prior lawsuit.<sup>339</sup> This highlights the purely public, government-centric remedial function S.B. 8 plaintiffs perform.

Government punishes, sanctions, or recovers from an individual one time for one unlawful act. Government can prosecute and convict a person only once for a criminal act.<sup>340</sup> Similarly, having recovered a civil penalty for one act, government cannot seek a new penalty for the same act. By contrast, every private person injured by one unlawful act

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334. Morrison, *supra* note 324, at 608.

335. *But see WWH Argument*, *supra* note 22, at 47–50 (counsel for Texas analogizing an S.B. 8 action to a claim for the tort of “outrage”).

336. *Cf. Lujan v. Defs. of Wildlife*, 504 U.S. 555, 576 (1992); Morrison, *supra* note 324, at 623–24; Rubenstein, *supra* note 319, at 2156–57.

337. Cases cited *supra* notes 7–8.

338. Colangelo, *supra* note 19, at 138.

339. TEX. HEALTH & SAFETY CODE ANN. § 171.208(c) (West 2021); *supra* text accompanying note 54.

340. U.S. CONST. amend. V.

can sue on and recover for distinct personal injuries caused by that defendant and that act.

S.B. 8 plaintiffs resemble the former rather than the latter. Each “any person” plaintiff does not seek a unique personal remedy for a unique personal injury resulting from the provider misconduct; each seeks the singular societal remedy that benefits and furthers the public interest. Each plaintiff collectively performs the government’s traditional-and-exclusive function of enforcing the law, but not all receive the personal benefit of enforcement. The first plaintiff to prevail sanctions the provider and recovers for one statutory violation one time for all of society; no other plaintiff can sanction or recover from that provider for that violation.

#### *iv. History*

A final historical point makes S.B. 8 unique.

The most obvious traditional public function is election administration.<sup>341</sup> No function is more tied to a state’s sovereign authority than controlling the process through which the people, the real sovereign in a republican form of government,<sup>342</sup> choose representatives who exercise sovereignty on their behalf.

The leading cases establishing election administration as a traditional public function arose from lawsuits against Jim-Crow-Era Texas Democratic organizations that prohibited African Americans from voting in primary elections.<sup>343</sup> The Court had declared constitutionally invalid a series of publicly enforced state laws prohibiting African Americans from participation in primaries.<sup>344</sup> Texas responded by delegating control over primaries to the political parties, which enacted private regulations precluding African American participation. That is, Texas attempted to insulate racially restrictive voter restrictions from constitutional scrutiny by deputizing private actors to enact and enforce restrictions in lieu of public officials. Finding that the delegee political parties acted under color in

341. *Terry v. Adams*, 345 U.S. 461, 469 (1953); *Smith v. Allwright*, 321 U.S. 649, 663 (1944).

342. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); Akhil Reed Amar, *The Central Meaning of a Republican Form of Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 COLO. L. REV. 749, 749 (1994).

343. *Terry*, 345 U.S. at 476–77; *Smith*, 321 U.S. at 662–63.

344. *Nixon v. Condon*, 286 U.S. 73, 82–83, 89 (1932); *Nixon v. Herndon*, 273 U.S. 536, 540–41 (1927).

performing that traditional public function prevented the state's constitutional gambit.

No one doubts that Texas lawmakers sought to do the same with S.B. 8—deputizing private actors to perform the traditional public function of enforcing state law and policy to avoid offensive pre-enforcement federal judicial review. As the political parties acted under color in exercising their new election-related powers, so do “any person” S.B. 8 plaintiffs in exercising their new powers to enforce abortion restrictions, preventing the state’s gambit of eliminating offensive constitutional review of the heartbeat ban.

## *2. When to sue*

The inquiry does not end with the conclusion that “any person” performs a traditional-and-exclusive government function and becomes subject to a § 1983 suit by providers. Courts must consider when providers can bring those suits, an additional inquiry that complicates offensive constitutional challenges to S.B. 8.

### *a. Pre-enforcement*

Rights holders generally pursue offensive litigation prior to government enforcement of the constitutionally invalid law, anticipating and seeking to stop enforcement before it commences (often before the law has taken effect). A rights holder must show “an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.”<sup>345</sup> This is relatively easy as to an ordinary abortion restriction with government enforcement. Providers show that their practice is to perform some abortion that is constitutionally protected but statutorily proscribed; they identify the government officials authorized to enforce the law; and they show that the defendant officials plan to perform their legal duties and enforce the law when they violate it.

But providers cannot make that showing as to S.B. 8 unless “any person” acting under color of state law—which could be any of millions of people in Texas and the nation—reveals himself by threatening or expressing his intent to file a lawsuit. Until then, even if every authorized would-be S.B. 8 enforcer acts under color, providers lack

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345. Susan B. Anthony List v. Driehaus, 573 U.S. 149, 159 (2014) (quoting Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298 (1979)).

an identifiable target defendant for offensive litigation and a federal injunction.

In suing a high-profile anti-choice activist in Dickson, the *WWH* plaintiffs emphasized his role as a prominent supporter of S.B. 8, his encouragement and support for people who file suits, his statutory authorization to bring suit, and his stated hope that the threat of civil litigation would deter providers and stop abortion in the state.<sup>346</sup> But statutory authority to pursue private litigation is insufficient, absent some indication that Dickson intended to exercise that authority—that he intended to file an enforcement action and that his enforcement action was imminent or substantially likely. Dickson never expressed an intent to sue, let alone imminently; to the contrary, he stated that he had no such intent.<sup>347</sup> Dickson encouraged the universe of authorized “any person[s]” to sue and described the benefits of such suits; that does not establish that he or any identifiable individual would do so.

*Susan B. Anthony List v. Driehaus*<sup>348</sup> (“SBA”) considered a First Amendment challenge to an Ohio law prohibiting false statements during political campaigns. A complaint filed by any person triggered state election-commission proceedings; the commission could impose an administrative reprimand or refer the matter to a county prosecutor for criminal proceedings.<sup>349</sup> The Court found the threat sufficiently substantial and enforcement likely because it was easy for “any person,” including political opponents, to file a complaint with the commission.<sup>350</sup>

If authorizing “any person” to bring an administrative complaint was sufficient in *SBA*, perhaps S.B. 8’s authorization for “any person” to bring a civil action is sufficient. The difference is the form of enforcement. The law challenged in *SBA* was enforced by two known, identifiable public actors—the commission and a county prosecutor—who stood ready to exercise governmental enforcement authority should any person complain about some speech.<sup>351</sup> The *SBA* lawsuit targeted those responsible public officers, including as defendants the

346. *Whole Women’s Health v. Jackson*, No. 21-CV-616, 2021 WL 3821062, at \*24 (W.D. Tex. Aug. 25, 2021); *WWH* Complaint, *supra* note 3, at 7, 16, 33; *WWH* Argument, *supra* note 22, at 4.

347. *Whole Woman’s Health*, 142 S. Ct. at 537.

348. 573 U.S. 149 (2014).

349. *Id.* at 152–53.

350. *Id.* at 164–65.

351. *Id.* at 152–53.

commission, commission members, commission counsel, and the Ohio Secretary of State.<sup>352</sup> Those officials held a general legal obligation, and thus were substantially likely, to enforce the false-statements law upon request.<sup>353</sup>

Under S.B. 8, “any person”—unknown and random at the outset and carrying no legal obligation to bring suit or otherwise enforce the law—initiates, pursues, and controls the enforcement lawsuit. No state executive official is involved in the lawsuit or any enforcement efforts, and no state official can be sued alongside a private S.B. 8 plaintiff.<sup>354</sup> Standing requires some reasonable certainty that the target defendant in the offensive action will pursue enforcement against the rights holder.<sup>355</sup> A random potential plaintiff—authorized but not obligated to act, not having sued, and not having indicated an intent to sue—does not cause an impending violation or injury. Enjoining that random person does not redress any imminent constitutional violation arising from actual or threatened enforcement.

*b. Eve of enforcement*

The standing problem resolves if a private individual announces his intent or threatens to bring an S.B. 8 action. A high-profile S.B. 8 plaintiff looking for press attention might do this through a press release, web site,<sup>356</sup> social media post,<sup>357</sup> or other public pronouncements. A plaintiff might serve something akin to a cease-and-desist letter commanding providers to stop performing or aiding prohibited post-heartbeat abortions on threat of suit. Perhaps in sending a letter to the state medical board urging licensure action against Dr. Braid for performing a prohibited abortion,<sup>358</sup> Operation Rescue evinced a broader intent to enforce S.B. 8.

A litigation-focused plaintiff (and attorney) would avoid this, knowing it opens the door to federal court. A media-or publicity-focused plaintiff might seek the attention or might not care.<sup>359</sup> As

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352. *Id.* at 156 n.4.

353. *Id.* at 163–67.

354. *Supra* Section I.A.

355. *Susan B. Anthony List*, 573 U.S. at 158.

356. *Van Stean v. Texas Right to Life*, No. D-1-GN-21-004179, slip op. at 22 (Tex. 98th D. Ct. Dec. 9, 2021).

357. *WWH Complaint*, *supra* note 3, at 16 n.4; *Whole Women’s Health v. Jackson*, No. 21-CV-616, 2021 WL 3821062, at \*24 (W.D. Tex. Aug. 25, 2021).

358. *Supra* note 222 and accompanying text.

359. *Jackson*, 2021 WL 3821062, at \*24.

might a friendly plaintiff—one who supports reproductive rights and sues to create the litigation allowing providers to litigate the constitutional issues and get a court to declare the heartbeat ban invalid.<sup>360</sup>

*c. Actual enforcement*

The standing problem dissolves if “any person” files an S.B. 8 action as a traditional-and-exclusive public function. The constitutional injury, violation, and deprivation has occurred and is ongoing—actual enforcement of a constitutionally invalid law by a known person acting under color of state law and seeking to impose liability and sanction on a rights holder for constitutionally protected conduct. An identifiable person acts under color in filing suit, the rights holder can sue that identifiable person, and the federal court can enjoin that identifiable person from pursuing that action.

But the pending enforcement presents a new obstacle—abstention under *Younger v. Harris*.<sup>361</sup> Federal district courts abstain from exercising jurisdiction in cases that stay pending or ongoing enforcement proceedings where the rights holder (would-be federal plaintiff, enforcement defendant) can raise constitutional issues as defenses in the ongoing enforcement proceeding.<sup>362</sup> That is, federal courts will not allow rights holders to proceed in an offensive posture in federal court if they stand in a defensive posture in a pending proceeding in which they can assert and vindicate their constitutional rights.<sup>363</sup>

Abstention would be obvious if S.B. 8 were publicly enforceable. Imagine the simple case—a provider performs a statutorily prohibited post-heartbeat abortion, a responsible Texas official initiates a state enforcement action (e.g., criminal prosecution) against the provider, and the provider brings a § 1983 action asking the federal court to enjoin the officer from continuing with that proceeding. *Younger* would bar the federal court from adjudicating that case.<sup>364</sup> The same is true for indirect enforcement.<sup>365</sup> If a licensing body initiates an administrative proceeding to strip a doctor of her license because she

360. See Rhodes & Wasserman, *supra* note 33 (manuscript at 24–25).

361. 401 U.S. 37 (1971).

362. *Sprint Communications, Inc. v. Jacobs*, 571 U.S. 69, 72 (2013); *Younger*, 401 U.S. at 45–46.

363. *Younger*, 401 U.S. at 43–44.

364. See *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 928 (1975); *Steffel v. Thompson*, 415 U.S. 452, 455–56 (1974); *Younger*, 401 U.S. at 38–39.

365. *Supra* Section III.B.

performed a statutorily prohibited abortion, the federal court would abstain from the offensive action in deference to the ongoing administrative proceeding.<sup>366</sup> This explains why reproductive-rights advocates file suit as soon as, if not before, abortion restrictions take effect—they go on the offensive and pursue federal litigation before the executive places them on the defensive by initiating a state enforcement proceeding.<sup>367</sup>

The question is whether and how *Younger* applies in this novel context of pending civil litigation by a private plaintiff deemed to act under color of law in enforcing substantive state law. Unsurprisingly, courts have not addressed this issue because states have never delegated exclusive enforcement power to private individuals to convert them into state actors. The odd fit between *Younger* and the procedural posture of these cases offers providers several paths around abstention.

First, *Sprint Communications, Inc. v. Jacobs*<sup>368</sup> limits *Younger* (that is, the obligation to abstain) to three classes of state litigation—criminal prosecutions, state-initiated civil enforcement (or quasi-criminal) actions, and ordinary private civil litigation involving certain court orders uniquely in furtherance of the state court’s ability to perform judicial functions (such as contempt or appellate bonds).<sup>369</sup> The second class would include indirect enforcement through civil or administrative proceedings such as licensure actions against providers.<sup>370</sup>

But an S.B. 8 action by a private “any person” does not fit any category. A federal court would have to extend the second class to include civil enforcement proceedings by deputized private attorneys general performing a traditional public function and therefore acting under color of state law. On one hand, *Sprint* insisted that abstention is the exception reserved for extraordinary cases,<sup>371</sup> so courts should hesitate to extend *Younger*’s reach. On the other hand, a provider can

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366. *Ohio Civ. Rts. Comm’n v. Dayton Christian Schs., Inc.*, 477 U.S. 619, 621 (1986); *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass’n*, 457 U.S. 423, 426–27, 435–36 (1982).

367. See *Hicks v. Miranda*, 422 U.S. 332, 348–50 (1975); *Doran*, 422 U.S. at 929.

368. 571 U.S. 69, 72 (2013).

369. *Sprint*, 571 U.S. at 78.

370. *Whole Woman’s Health v. Jackson*, 142 S. Ct. 522, 535–36, 538–39; *id.* at 544 (Roberts, C.J., concurring in the judgment in part and dissenting in part). *But see id.* at 541 (Thomas, J., concurring in part and dissenting in part); *supra* Section III.B.

371. *Sprint*, 571 U.S. at 77–78.

bring a § 1983 action because the “any person” private plaintiff has been delegated exclusive power to enforce S.B. 8. “Any person” stands in the government’s shoes, rendering the private lawsuit functionally a government enforcement action. If the S.B. 8 action is equivalent to government enforcement for § 1983 purposes,<sup>372</sup> it should be equivalent for *Younger* purposes.

If this case fits the middle *Sprint* category, the federal rights holder must have an adequate opportunity to raise constitutional challenges in the pending state proceeding.<sup>373</sup> This reflects *Younger*’s equitable underpinning—a federal court of equity should not act where the rights holder has an adequate remedy in raising the constitutional defense in the underlying legal proceeding.<sup>374</sup> But S.B. 8 purports to limit providers’ ability to litigate their patients’ rights as a defense to liability or to argue that the law imposes an undue burden on pregnant individuals seeking abortions.<sup>375</sup> That may overcome *Younger*. If S.B. 8 limits providers in raising S.B. 8’s constitutional invalidity as a defense in the state proceeding, that state proceeding does not provide an adequate opportunity to raise the constitutional challenge, making the federal forum necessary. In another example of Texas lawmakers outsmarting themselves, the attempt to “rig” the state proceedings by limiting defenses undermines an otherwise-available abstention argument.

Third, *Younger* is subject to several exceptions. Abstention is not warranted if the enforcement action is brought in bad faith, without any hope of obtaining a valid judgment.<sup>376</sup> Given that the fetal-heartbeat prohibition is unquestionably invalid under current binding Supreme Court precedent, any plaintiff (and plaintiff’s attorney) must know that the enforcement action cannot produce a valid judgment that would be affirmed on appeal absent a change to constitutional jurisprudence.

Consider a recent comparison. In *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission*,<sup>377</sup> the Supreme Court held that baker Jack

372. *Supra* notes 319–61 and accompanying text.

373. *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass’n*, 457 U.S. 423, 432 (1982).

374. *Younger v. Harris*, 401 U.S. 37, 43–44 (1971).

375. Texas Heartbeat Act, S.B. 8, 87th Leg., Reg. Sess. § 3 (to be codified at TEX. HEALTH & SAFETY CODE ANN. § 171.209(a) (West 2021)); *id.* at § 171.209(c), (d); *supra* Section I.A.5.

376. *Middlesex Cnty.*, 457 U.S. at 435; *Younger*, 401 U.S. at 48–50, 56.

377. 138 S. Ct. 1719 (2018).

Phillips could not be administratively sanctioned under a state public-accommodations law for refusing (on First Amendment grounds) to bake a custom wedding cake for a same-sex wedding; the Court relied on expressions of religious animus within administrative proceedings.<sup>378</sup> Following that decision, the Colorado Civil Rights Commission initiated a new proceeding against Phillips for refusing to bake a different custom cake for a different customer celebrating her gender transition.<sup>379</sup> Phillips responded to the new administrative action by going on offense, filing an action in federal court to enjoin the commission from proceeding with the new complaint, arguing it violated his First Amendment rights.<sup>380</sup> The district court applied the bad-faith exception and declined to abstain, emphasizing the continued targeting of Phillips and the Supreme Court's signal that the First Amendment protected Phillips against having to make custom cakes expressing messages contrary to his religious and political views.<sup>381</sup>

S.B. 8 offers a stronger case for bad faith. *Masterpiece Cakeshop* did not establish a categorical speech or religion carve-out to public-accommodations law or declare that such laws cannot be enforced; it found the specific application of the law against Phillips tainted by religious animus within Colorado's administrative process.<sup>382</sup> By contrast, S.B. 8 contravenes *Roe* and *Casey* by banning a class of pre-viability abortion and cannot be enforced or used as the basis for imposing civil liability against any provider.

A final *Younger* exception allows federal litigation where the challenged law is "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it."<sup>383</sup> It is not clear whether anything meets that exception. If anything does, a law banning a substantial swath of pre-viability abortions is it, at least under current constitutional jurisprudence.

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378. *Id.* at 1723.

379. *Masterpiece Cakeshop, Inc. v. Elenis*, 445 F. Supp. 3d 1226, 1236–37 (D. Colo. 2019).

380. *Id.* at 1237–38.

381. *Id.* at 1240–42.

382. *Colo. Civ. Rts. Comm'n*, 138 S. Ct. at 1732.

383. *Younger v. Harris*, 401 U.S. 37, 53–54 (1971).

*d. Post-enforcement*

Providers can wait until (successful) completion of defensive state civil litigation, then bring an offensive § 1983 action against the (under-color) “any person” plaintiff, alleging that person deprived the provider of federal constitutional rights through past and completed enforcement of a constitutionally invalid law. The rights holder seeks retroactive remedies, such as damages reflecting the costs of defending the state litigation and other miscellaneous expenses,<sup>384</sup> as well as attorney’s fees if they prevail in the federal litigation.<sup>385</sup> This strategy might deter S.B. 8 litigation. The prospect of a subsequent federal suit for substantial damages and attorney’s fees may check “any person’s” willingness to pursue doomed enforcement of an obviously invalid law.

This strategy counters one of S.B. 8’s problematic-but-hidden procedural traps. A state court in an S.B. 8 action cannot award attorney’s fees or costs against an “any person” plaintiff as a sanction for bringing a failed, meritless, or frivolous suit.<sup>386</sup> This eliminates a key deterrent to abusive litigation. Not fearing sanction, “any person” can file and lose repeated frivolous S.B. 8 lawsuits against providers; that plaintiff imposes the cost, burden, and expense of defending never-ending litigation on providers, without risking adverse consequences. A post-enforcement § 1983 action imposes those adverse consequences; a provider can recover as damages in federal court the value of the attorney’s fees, costs, and burdens incurred defending in state court.

Recovery in this § 1983 action is not guaranteed even if S.B. 8 is constitutionally invalid.

A private person who acts under color of state law enjoys “good-faith” immunity, protecting him from liability if he subjectively believed the state law he was authorized to wield and enforce was valid.<sup>387</sup> Providers

384. See *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 924–25 (1982). Providers need not file this as a compulsory counterclaim in the state-court S.B. 8 litigation, as it arises from the S.B. 8 plaintiff’s litigation conduct rather than from the underlying abortion that violated S.B. 8 and prompted the state-court claim. See, e.g., *Leasure v. Peat, Marwick, Mitchell & Co.*, 722 S.W.2d 37, 39 (Tex. Ct. App. 1986); *Venable v. Keever*, 61 F. Supp. 2d 552, 556 (N.D. Tex. 1999).

385. 42 U.S.C. § 1988(b).

386. TEX. HEALTH & SAFETY CODE ANN. § 171.208(a)(i) (West 2021); *supra* note 59 and accompanying text.

387. See *Wyatt v. Cole*, 504 U.S. 158, 168–69 (1992). This immunity has helped public-sector unions avoid liability in recent actions to recover mandatory non-member agency fees collected prior to the Supreme Court declaring that such fees violate the First Amendment. *Janus v. AFSCME*, 138 S. Ct. 2448, 2459–60 (2018). Under the prevailing judicial understanding of the First Amendment prior to *Janus*,

can respond that under no understanding of binding judicial precedent could S.B. 8 be valid and enforceable. Just as S.B. 8's obvious constitutional infirmity might preclude *Younger* abstention, it might overcome good-faith immunity.

S.B. 8 plaintiffs also might argue that the First Amendment right to petition for redress of grievances protects their right to access the courts by filing lawsuits;<sup>388</sup> imposing § 1983 damages liability over a failed attempt to petition violates their constitutional rights. But any petition right must be “for redress of alleged wrongs,” which requires that a suit redress an actual or “legally protected injury.”<sup>389</sup> An “any person” plaintiff does not seek to redress a private or personal wrong or injury; he seeks to enforce a public law on the government’s behalf for public benefit under exclusive state-delegated authority. The First Amendment does not create a “judicially cognizable interest in procuring enforcement” of public laws.<sup>390</sup> Nor does the First Amendment grant government a right to sue to enforce its laws. It follows that the state cannot delegate exclusive enforcement authority to private individuals and clothe those private individuals with a constitutional right that the state lacks.

### *3. Limits of the § 1983 route*

Providers cannot pursue offensive litigation in the simplest posture—after enactment of the law and before a potential S.B. 8 “any person” plaintiff revealing himself or filing suit. They can pursue offensive litigation in federal district court at three points—an injunction to prevent state litigation after a potential “any person” announces intent to sue but prior to filing; an injunction to stop state litigation after “any person” has sued; and damages following successful defense of “any person’s” S.B. 8 suit.

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collecting such fees was constitutionally valid, so the unions had no reason to believe they violated the First Amendment. *See, e.g.*, *Diamond v. Pa. State Educ. Ass’n*, 972 F.3d 262, 265 (3d Cir. 2020); *Lee v. Ohio Educ. Ass’n*, 951 F.3d 386, 377–78 (6th Cir. 2020); *Danielson v. Inslee*, 945 F.3d 1096, 1097 (9th Cir. 2019); *Janus v. AFSCME*, 942 F.3d 352, 354 (7th Cir. 2019).

388. *BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 525 (2002); *Bill Johnson’s Rests., Inc. v. NLRB*, 461 U.S. 731, 741–42 (1983); *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972).

389. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 897 (1984) (quoting *Bill Johnson’s Rests., Inc.* at 741).

390. *Id.* at 897.

But providers may not regard these options as a panacea. While in an offensive posture and in federal court, these cases do not place providers in a different or procedurally preferable position than defensive litigation. Pursuing this strategy requires them to incur the same burdens, costs, and risks as litigating defensively.

All require providers to perform a prohibited abortion to shake “any person” out of the woodwork and cause him to threaten or file a civil action. They must “act at their peril” and violate the law and risk substantial liability and sanction, undermining the ordinary goal of offensive litigation.<sup>391</sup> They also lose control over litigation timing; they either must wait for potential S.B. 8 plaintiffs to file (or announce or publicly threaten) a civil action in state court or must bear the cost, burden, distraction, and expense of defending the private state-court action to victory before getting to federal court. And if no S.B. 8 plaintiff comes forward—the best (and perhaps deliberate) strategy for opponents of reproductive freedom<sup>392</sup>—federal court never opens.

Providers (and their patients) bear the chill on their constitutionally protected conduct from waiting for the litigation shoe to drop. That chill limits the availability of abortions in the state. Providers’ self-imposed moratorium on post-heartbeat (that is, post-six-week) abortions following S.B. 8’s September 1 effective date<sup>393</sup> demonstrates the undue and unacceptable risks.<sup>394</sup> “No rational abortion provider would violate this law,”<sup>395</sup> meaning no one threatens or files an S.B. 8 suit, meaning no provider gains a target for offensive litigation.

This sharpens the point. Providers prefer not only litigating offensively in federal court, but litigating offensively in federal court before any attempted or threatened enforcement, without having to violate the law. The goal is to litigate in their preferred federal forum and at their preferred time. S.B. 8 removes that control, except perhaps for providers’ limited claims to stop licensing-board proceedings. As Justice Sotomayor argues, “the Court finally tells the

391. Susan B. Anthony List v. Driehaus, 573 U.S. 149, 158–59 (2014); Steffel v. Thompson, 415 U.S. 452, 459 (1974); *supra* notes 179–85, 208–15 and accompanying text.

392. *Supra* notes 76–81 and accompanying text.

393. *Supra* notes 76–81 and accompanying text.

394. Whole Women’s Health v. Jackson, 142 S. Ct. 522, 545–46 (2021) (Sotomayor, J., concurring in the judgment in part and dissenting in part).

395. *WWH* Argument, *supra* note 21, at 4.

nation that . . . the State's gambit worked"<sup>396</sup> and "effectively invites other States to refine S. B. 8's model for nullifying federal rights."<sup>397</sup>

Whatever its broader limitations, however, the § 1983 route is open and available for challenges to S.B. 8. Three lawsuits are pending against Dr. Braid over the post-heartbeat abortion he performed and announced in the *Washington Post*.<sup>398</sup> Braid went on offense, suing those three "any person" plaintiffs in federal district court, alleging that they act under color of state law in performing a law-enforcement function and seeking a declaration that the heartbeat ban is constitutionally invalid.<sup>399</sup> Critics rightly decry the many months in which fear of suit and liability and the inability to pursue offensive federal litigation through ordinary channels have, for practical purposes, limited abortion in Texas.<sup>400</sup> But state-court actions having been filed against him, Braid has and can press the proper opportunity to seek effective offensive federal litigation, to stop the suits against him, and to create precedent establishing the invalidity and unenforceability of the heartbeat ban.

#### IV. GOVERNMENT LITIGATION

*United States v. Texas* is the DOJ lawsuit challenging the heartbeat ban's constitutional validity in furtherance of President Biden's promised "whole of government" response to S.B. 8.<sup>401</sup> It adds a new wrinkle to this controversy and debate.

The lawsuit gave reproductive-freedom providers, advocates, and supporters a glimmer of hope in the first month under the law, when

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396. *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2499 (2021) (Sotomayor, J., dissenting).

397. *Whole Woman's Health*, 142 S. Ct. at 545–46 (Sotomayor, J., concurring in the judgment in part and dissenting in part).

398. *Supra* notes 81–82 and accompanying text.

399. Complaint at 12, *Braid v. Stilley*, 21-CV-05283 (N.D. Ill. Oct. 5, 2021). Braid's complaint includes a new procedural wrinkle designed to get to federal district court—an interpleader action, alleging that three S.B. 8 plaintiffs assert competing claims to the single *res* of the \$10,000 statutory damages award for that one abortion. *Id.* at 9, 16–17, 50–54; 28 U.S.C. § 1335. We doubt the efficacy of this procedural move, but a full discussion is beyond the scope of this paper.

400. *Whole Woman's Health*, 142 S. Ct. at 543–44, 545 (Roberts, C.J., concurring in the judgment in part and dissenting in part); *id.* at 545–46 (Sotomayor, J., concurring in the judgment in part and dissenting in part); *supra* notes 18–29, 97–122 and accompanying text.

401. Statement by President Joe Biden on Supreme Court Ruling on Texas Law SB8, *supra* note 74.

the district court declared the heartbeat ban constitutionally invalid and preliminarily enjoined enforcement.<sup>402</sup> That glimmer proved fleeting when the Fifth Circuit stayed the injunction pending appeal,<sup>403</sup> and the Supreme Court dismissed certiorari as improvidently granted.<sup>404</sup> The Court likely did so because *WWH* allowed limited private offensive litigation against licensing officials,<sup>405</sup> thus obviating the need to resolve trickier litigation issues surrounding the federal government's suit. The Court did not lift the stay of the district court injunction, over Justice Sotomayor's noted dissent, leaving S.B. 8 enforceable and the federal government's case on appeal in the Fifth Circuit.

Federal-government litigation against states offers a third option for vindicating constitutional rights against constitutionally violative state laws. But this option is limited by law and politics. It requires authorization or a unique federal interest and must align with the presidential administration's enforcement priorities. *United States v. Texas* has the latter, but the absence of the former likely dooms the effort.

#### *A. Benefits and Limits of Federal Litigation*

##### *1. Litigating individual rights*

The United States enjoys certain advantages over private rights holders in pursuing offensive relief against enforcement of constitutionally invalid state laws and practices. States cannot claim sovereign immunity against the United States, allowing the suit to be filed against the state rather than the responsible executive officials charged with enforcing the law.<sup>406</sup> And the United States faces no statutory bar to obtaining an injunction staying state proceedings.<sup>407</sup> But as with a private plaintiff, the United States must demonstrate the

402. *United States v. Texas*, No. 21-CV-00796, 2021 WL 4593319, at \*51–52 (W.D. Tex. Oct. 6, 2021).

403. *United States v. Texas*, No. 21-50949, 2021 WL 4786458 (5th Cir. Oct. 14, 2021).

404. *See United States v. Texas*, 142 S. Ct. 522 (2021) (mem.).

405. *Whole Woman's Health*, 142 S. Ct. 522, 535–36 (2021); *id.* at 544 (Roberts, C.J., concurring in the judgment in part and dissenting in part); *supra* Section III.B.

406. *See United States v. Mississippi*, 380 U.S. 128, 140–41 (1965).

407. *Leiter Mins., Inc. v. United States*, 352 U.S. 220, 225–26 (1957).

requisite injury, some “interest in the relief sought as entitles it to move in the matter.”<sup>408</sup>

The United States may sue to vindicate its citizens’ rights when acting pursuant to congressional authorization.<sup>409</sup> Acting under its power to enforce the civil rights amendments, Congress may authorize the United States to assert citizens’ rights and to challenge the validity of state laws and practices on their behalf.<sup>410</sup>

Absent statutory authorization, however, federal suits have been limited to vindicating unique federal interests beyond the constitutional rights of individuals within the United States. This includes the federal government’s pecuniary or proprietary interests, its sovereign or quasi-sovereign interests, and threats to the public welfare.<sup>411</sup> For example, the United States can sue to stop racial segregation in transportation facilities that interferes with and burdens interstate commerce.<sup>412</sup> It can sue to stop state interference with federal prerogatives such as the power to regulate immigration.<sup>413</sup> But absent harm to identifiable federal interests, lower courts have rejected a broad authority to litigate the federal constitutional interests of individual rights holders.<sup>414</sup>

## 2. Political limitations

When the United States has the necessary legal authority, political and practical constraints limit its efforts. The United States lacks the resources to pursue every constitutional violation or to prevent enforcement of every state law that infringes on constitutional rights.

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408. *United States v. San Jacinto Tin Co.*, 125 U.S. 273, 285 (1888).

409. *E.g.* *Gen. Tel. Co. of the Nw., Inc. v. EEOC*, 446 U.S. 318, 326 (1980); *Mississippi*, 380 U.S. at 136–38; *United States v. Raines*, 362 U.S. 17, 27 (1960).

410. *See, e.g.*, 42 U.S.C. §§ 2000b(a), 2000c-6(a) (authorizing federal government to “initiate and maintain appropriate legal proceedings” to protect equal protection rights of vulnerable parties); 52 U.S.C. §§ 10101(a)(1)–10101(c), 10308(d), 10504, 20510(a) (authorizing federal suits for voting rights).

411. 14 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3651 (4th ed. 2021).

412. *E.g.*, *United States v. City of Jackson*, 318 F.2d 1, 4 (5th Cir. 1963); *United States v. City of Shreveport*, 210 F. Supp. 36, 37 (W.D. La. 1962), *aff’d per curiam*, 316 F.2d 928 (5th Cir. 1963); *United States v. U.S. Klans, Knights of Ku Klux Klan, Inc.*, 194 F. Supp. 897, 901–02 (M.D. Ala. 1961).

413. *See Arizona v. United States*, 567 U.S. 387, 405 (2012).

414. *E.g.*, *United States v. City of Philadelphia*, 644 F.2d 187, 201–03 (3d Cir. 1980); *United States v. Mattson*, 600 F.2d 1295, 1297 (9th Cir. 1979); *United States v. Solomon*, 563 F.2d 1121, 1123 (4th Cir. 1977).

The United States intervenes when it “deem[s] the case of sufficient importance to take action against the State.”<sup>415</sup> It seeks cases that provide “more bang for the buck,” involving widespread or systemic wrongdoing, an obvious constitutional violation, or another feature that creates a unique case. Absent those features, preservation of resources counsels staying out of court and allowing private rights holders to vindicate their constitutional interests through private litigation.<sup>416</sup>

Political considerations guide the federal government’s litigation choices.<sup>417</sup> A Republican administration would not have challenged S.B. 8’s constitutional validity. And the political fault lines will sharpen if S.B. 8 spawns the feared slippery slope of copycat laws over religion, firearms, and a range of constitutional rights.<sup>418</sup> Political and ideological preferences inform which rights a Republican administration would seek to protect and which a Democratic administration would seek to protect.

#### *B. The Pitfalls and Limited Promise of United States v. Texas*

S.B. 8 creates the perfect storm, the ideal opportunity for the United States to overcome legal, political, and practical restraints. The law affects, and undermines, the right to reproductive freedom, the most salient political issue for a Democratic administration and “the Left’s ‘darling privilege.’”<sup>419</sup> The law is “unprecedented,”<sup>420</sup> the first attempt to delegate exclusive enforcement power to uninjured and unconnected private plaintiffs to protect general public interests. The law is also “flagrantly”<sup>421</sup> or “patently”<sup>422</sup> invalid, contradicting existing judicial precedent and judicially unenforceable so long as that precedent remains unchanged.

The United States pursued two legal theories: a broader theory that was the focus of the district court’s opinion and the argument before

415. *Alden v. Maine*, 527 U.S. 706, 759–60 (1999).

416. *Morrison*, *supra* note 324, at 608.

417. *Id.* at 609.

418. *Supra* notes 33–38 and accompanying text.

419. Mark A. Graber, *Rethinking Equal Protection in Dark Times*, 4 U. PA. J. CONST. L. 314, 332 (2002); *see also* ZIEGLER, *supra* note 7, at 135–38.

420. *Whole Woman’s Health v. Jackson*, 141 S. Ct. 2494, 2496 (2021) (Roberts, C.J., dissenting).

421. *Id.* at 2498 (Sotomayor, J., dissenting).

422. *Id.* at 2500 (Kagan, J., dissenting).

the Supreme Court and a narrower theory that was not vigorously pressed. S.B. 8's procedural oddities limit both options.

### *1. Vindicating individual constitutional rights*

Under the broader litigation theory, the United States may obtain relief on behalf of United States citizens against a state scheme such as S.B. 8—one that employs private, exclusive enforcement to circumvent private pre-enforcement offensive litigation under § 1983 in a “deliberate attempt to thwart ordinary mechanisms of federal judicial review.”<sup>423</sup> S.B. 8’s “brazen attack” on both the judiciary’s authority and congressional authorization for pre-enforcement review empowers the federal government to protect the supremacy of federal law.<sup>424</sup> On this theory, the United States can obtain relief on behalf of its citizens when state law violates the Constitution and has widespread effects on the public and on interstate commerce.<sup>425</sup>

#### *a. Procedural defects*

The government’s theory rests on two erroneous premises.

The first is that due process limits state power to decide how to enforce state laws, including by authorizing tort- or tort-like litigation. The Constitution limits the substantive rights states can establish; it does not limit the processes states establish to enforce those substantive rights, unless those enforcement processes violate basic due process norms of notice and an opportunity for hearing.<sup>426</sup>

Texas’s Solicitor General pushed the analogy between private S.B. 8 litigation and tort claims.<sup>427</sup> The obvious response is that S.B. 8 is not tort law because tort law is about remedying personal injuries, whereas an S.B. 8 plaintiff can be a random “any person” who need not show any personal injury, effect, burden, or connection with the challenged abortion. That response leads to the second false premise—that due process incorporates Article III’s personal-injury requirement and thereby limits state power to decide who can sue to enforce state-created rights, such that states can authorize private suits only by those

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423. DOJ TRO Motion, *supra* note 24, at 23–27.

424. *United States v. Texas Argument*, *supra* note 79, at 4–9 (quoting Solicitor General, Elizabeth B. Prelogar).

425. DOJ TRO Motion, *supra* note 24, at 25–27.

426. *Nelson v. Colorado*, 137 S. Ct. 1249, 1252 (2017); *Mullane v. Cent. Hanover Bank*, 339 U.S. 306, 313 (1950); *supra* note 309 and accompanying text.

427. *United States v. Texas Argument*, *supra* note 79, at 69–72; *WWH Argument*, *supra* note 22, at 61.

who have suffered injury in a “personal and individual” manner as in federal court.<sup>428</sup>

But this never has been the case. State courts are not governed by federal justiciability doctrines.<sup>429</sup> This principle is so settled that it passes unmentioned. Recall S.B. 8’s closest analogue—California authorizing “any person” to sue in the public interest over false advertising.<sup>430</sup> Five Justices recognized that such a random plaintiff would not have standing in federal court.<sup>431</sup> But none suggested that California overstepped constitutional bounds or ran afoul of due process by authorizing random, non-injured, disconnected individuals to sue in state court to enforce state law.

#### *b. Remedial scope*

That the United States brought this lawsuit against the State of Texas does not overcome the limited scope of injunctive relief and the federal court’s remedial powers. Regardless of the plaintiff, a court cannot enjoin a law, only its enforcement.<sup>432</sup> A court must identify a target to enjoin and the conduct from which the target is enjoined from engaging. That remains true when the state is the target. In *Arizona v. United States*,<sup>433</sup> the Court did not enjoin Arizona in the abstract; it enjoined Arizona from enforcing a constitutionally invalid state law through its executive branch acting as part of “Arizona.”<sup>434</sup>

The United States can succeed against Texas only if the court determines who qualifies as “Texas” and what “Texas” is enjoined from doing. But S.B. 8 disaggregates who and what, preventing a properly scoped remedy even in this public, inter-governmental action.

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428. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 & n.1 (1992).

429. ASARCO Inc. v. Kadish, 490 U.S. 605, 617 (1989); CHARLES W. “ROCKY” RHODES, THE TEXAS CONSTITUTION IN STATE AND NATION: COMPARATIVE STATE CONSTITUTIONAL LAW IN THE FEDERAL SYSTEM 91–97 (2014).

430. Nike, Inc. v. Kasky, 539 U.S. 654, 655 (2003) (per curiam) (dismissing certiorari as improvidently granted); *supra* notes 345–47 and accompanying text.

431. *Nike*, 539 U.S. at 656, 661 (Stevens, J., concurring); *id.* at 667 (Breyer, J., dissenting).

432. *California v. Texas*, 141 S. Ct. 2104, 2115–16 (2021).

433. 567 U.S. 387 (2012).

434. *Id.* at 393–94, 416.

The United States pushed the courts-and-clerks theory,<sup>435</sup> which prevailed in the district court.<sup>436</sup> But this fails for the reasons the theory failed in *WWH*.<sup>437</sup> Judges and clerks are unquestionably part of “Texas.” But because they do not “enforce” state law, their conduct cannot be enjoined as a way to stop Texas from enforcing its laws.

An alternative is to include within “Texas” the deputized “any person” plaintiffs to whom the state delegated exclusive enforcement authority; enjoining “Texas” enjoins these private “any persons” whom Texas authorized to sue. But several Justices balked at this broad conception of private individuals acting in concert with the state or of an injunction against Texas binding all private persons, none a party to the lawsuit, based on state authorization to sue.<sup>438</sup>

## 2. *Vindicating federal interests*

The narrower theory focuses on aspects of S.B. 8 conflicting with, and allegedly preempted by, federal law. The United States seeks to protect federal employees and non-employee contractors working in federal prisons, military bases, immigration and resettlement facilities, and job-corps centers located in Texas, whose conduct on behalf of the federal government could violate the state statute.<sup>439</sup> For example, S.B. 8 does not contain an exception for cases of rape or incest, which might subject federal employees and nongovernmental partners to suit when federal programs assist the procurement of abortions for rape and incest victims as required by federal law.<sup>440</sup>

While a sounder basis for standing, this runs aground on the same remedial constraints.

The injunction and judgment in such an action will be limited to stopping S.B. 8 enforcement as it affects federal employees and federal programs. It cannot protect other providers from private suits not affecting federal programs; the opinion provides precedent for future

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435. *United States v. Texas* Argument, *supra* note 79, at 10–11. The United States also suggested that state officials could be enjoined from enforcing any judgments resulting from a private S.B. 8 suit. *Id.*

436. *United States v. Texas*, No. 21-CV-796, 2021 WL 4593319, \*51 (W.D. Tex. Oct. 6, 2021).

437. *Whole Woman’s Health v. Jackson*, 142 S. Ct. 522, 531–34 (2021); *see supra* Section III.C.

438. *United States v. Texas* Argument, *supra* note 79, at 31–36 (statements of Justice Alito); *id.* at 40–44 (statements of Justice Gorsuch).

439. DOJ TRO Motion, *supra* note 24, at 17–22.

440. *Id.* at 17–21.

private enforcement suits, but no binding judgment.<sup>441</sup> And courts must determine who constitutes “Texas” and what “Texas” is stopped from doing. Equitable remedies may be imposed against “the governmental powers and agencies possessed by the State” necessary to vindicate the judgment.<sup>442</sup> Protecting federal programs may require a judgment to reach and to limit state power. But this principle has never allowed a court to reach every private person within the United States, all of whom are potential S.B. 8 enforcers.

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*United States v. Texas*’s first trip through the federal judiciary ended with a whimper—the Court dismissed certiorari as improvidently granted while leaving in place the Fifth Circuit’s stay on the district court preliminary injunction. S.B. 8 remains enforceable pending further litigation in this action and in the parallel private offensive action.

If any unconstitutional law calls for the intervention of the federal government, S.B. 8 is it. That the suit fails shows the limitations, absent congressional authorization, of the United States’ power to enforce citizens’ rights against states. And it shows the necessary reliance on private litigation, including defensive private litigation, in protecting individual constitutional rights against invalid state laws.

#### CONCLUSION: LIMITS TO OFFENSIVE LITIGATION AND THE TURN TO DEFENSIVE LITIGATION

The preference for offensive litigation among providers, advocates, a supportive presidential administration, and reproductive-freedom supporters is understandable, given the benefits of that posture. Interim or emergency relief is central to this desire. Providers wanted to stop enforcement of S.B. 8 pending litigation, allowing them to continue providing constitutionally protected reproductive-health services while the constitutional and procedural issues were adjudicated and resolved.

But the desire for offensive litigation, and the singular focus on it, has its drawbacks. Consider the state of play after more than six months of litigating weak offensive cases. S.B. 8 remains enforceable. No interim relief is in effect because of the stay of the *United States v. Texas* injunction. The lone offensive option, against licensing officials,

441. *Supra* Section II.C.

442. *Virginia v. West Virginia*, 246 U.S. 56, 593–600 (1918).

produces a limited remedy beyond its precedential effect and remains in procedural limbo, pending before the Texas Supreme Court on a certified state-law question. Two trips to the Supreme Court produced this position—S.B. 8 is enforceable, its constitutional validity has not been judicially resolved, and providers must violate the law and defend a lawsuit to adjudicate and vindicate their substantive constitutional rights.

Perhaps that persistent status quo shows that the Court has failed to perform its constitutional function; Justice Sotomayor accused the majority of failing to evince the “courage” of the Court’s finest moments, leaving “all manner of constitutional rights more vulnerable than ever before, to the great detriment of our Constitution and our Republic.”<sup>443</sup> Or perhaps it shows the proper result of pursuing procedurally questionable offensive strategies to the exclusion of alternatives.

And alternative options exist. One is litigating offensively against “any person” who enforces or threatens to enforce S.B. 8 and thus acts under color of state law, subject to injunctive relief and post-enforcement damages.<sup>444</sup> Another is litigating defensively.<sup>445</sup> Both are procedurally certain, historically established, potentially efficient, and effective in vindicating federal constitutional rights against enforcement of constitutionally invalid state laws. Three lawsuits have been filed against one doctor over one statutorily prohibited abortion, so both are in play. While neither is the preferred posture, each offers a surer procedural path to an open court, resolution of the constitutional merits of the heartbeat ban, and the creation of constitutional jurisprudence showing S.B. 8’s constitutional invalidity.

To be sure, S.B. 8 is extreme compared with other laws. Its substantive rule blatantly contradicts prevailing judicial precedent; the universe of potential plaintiffs is unbounded; procedural rules are unfavorable; and potential liability is steep. The chilling effect of having to violate the law and await enforcement to pursue either path imposes a genuine burden on providers, advocates, and their pregnant patients. But the difference is of degree, not kind. S.B. 8’s extremity

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443. Whole Woman’s Health v. Jackson, 142 S. Ct 522, 551–52 (2021) (Sotomayor, J., concurring in the judgment in part and dissenting in part).

444. *Supra* Sections III.B, III.D.

445. Our forthcoming companion article considers the details of defensive litigation. *See generally* Rhodes & Wasserman, *supra* note 33.

affects its constitutional validity; it should not affect the process through which that validity is litigated and adjudicated.