AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 12: The Contemporary Era – Individual Rights/ Personal Freedom and Public Morality/Abortion

**Whole Woman’s Heath v. Jackson II, \_\_\_ U.S. \_\_\_** (2021)

*Whole Woman’s Health provides abortion services in Texas. The Texas state legislature in 2021 passed the Texas Heartbeat Act, otherwise known as S.B. 8. That measure permitted any private citizen to sue for damages aby person who performed or assisted an abortion where the unborn had a detectable heartbeat. The unborn (fetuses to pro-choice advocates, unborn children to pro-life advocates) have detectable heartbeats very early in pregnancies, long before they are viable outside the womb. The instant S.B. 8 became law, Whole Woman’s Health filed a lawsuit against Austin Jackson, a Texas state judge, Penny Clarkston, a state-court clerk, Ken Paxton, the attorney general of Texas, Stephen Carlton, the executive director of the Texas Medical Board, Mark Lee Dickson, a private person, and others. The suit asked courts for an injunction against S.B. 8 on the ground that the law violated the right to an abortion protected by the due process clause of the Fourteen Amendment, as interpreted by* Roe v. Wade *(1973), and* Planned Parenthood of Southeastern Pa. v. Casey *(1992). The district court issued a temporary injunction, barring implementation of S,B. 8, but that injunction was removed by the Court of Appeals for the Fifth Circuit. When Whole Women’s Health appealed to the Supreme Court, the justices refused to restore the injunction, but did take certiorari and ordered expeditious briefing and argument on whether the lawsuit was barred by sovereign immunity.*

*The Supreme Court by an 8-1 vote held that the lawsuit against Texas health officials was not barred by sovereign immunity, but that sovereign immunity barred the lawsuits against, state law clerks and the state attorney general. The justices unanimously agreed that sovereign immunity barred the lawsuit against state judges and that the lawsuit against private parties who had not yet filed lawsuits were not ripe. What is the argument that all Texas officials enjoy sovereign immunity in this case? What is the argument that sovereign immunity does not bar lawsuits against particular offenders? Who has the better of the argument? The dissents correctly point out that the Texas law was designed to make lawsuits difficult to file. Does that concern influence the majority? Should that concern have influenced the justices?*

*In* United States v. Texas *(2021) decided the same day as* Whole Woman’s Health v. Jackson*, the Supreme Court dismissed as improvidently granted a writ of certiorari that would have enabled the justices to adjudicate the Biden Administration’s attack on the Texas abortion law.*

Justice [GORSUCH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0183411701&originatingDoc=I7b24cefe597811ec9e17fa7c2d1398ea&refType=RQ&originationContext=document&transitionType=DocumentItem&ppcid=ea335d3a9203467780bb45ff7855e4ae&contextData=(sc.Search)&analyticGuid=I7b24cefe597811ec9e17fa7c2d1398ea) delivered the opinion of the Court. . .

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Turning to the matters that are properly put to us, we begin with the sovereign immunity appeal involving the state-court judge, Austin Jackson, and the state-court clerk, Penny Clarkston. . . . Generally, States are immune from suit under the terms of the Eleventh Amendment and the doctrine of sovereign immunity. See, *e.g.*, *Alden v. Maine* (1999). To be sure, in [*Ex parte Young*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1908100273&pubNum=0000708&originatingDoc=I7b24cefe597811ec9e17fa7c2d1398ea&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=ea335d3a9203467780bb45ff7855e4ae&contextData=(sc.Search)) (1908), this Court recognized a narrow exception grounded in traditional equity practice—one that allows certain private parties to seek judicial orders in federal court preventing state executive officials from enforcing state laws that are contrary to federal lawBut as [*Ex parte Young*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1908100273&pubNum=0000708&originatingDoc=I7b24cefe597811ec9e17fa7c2d1398ea&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=ea335d3a9203467780bb45ff7855e4ae&contextData=(sc.Search)) explained, this traditional exception does not normally permit federal courts to issue injunctions against state-court judges or clerks. Usually, those individuals do not enforce state laws as executive officials might; instead, they work to resolve disputes between parties. If a state court errs in its rulings, too, the traditional remedy has been some form of appeal, including to this Court, not the entry of an *ex ante* injunction preventing the state court from hearing cases. . . .

. . . . Article III of the Constitution affords federal courts the power to resolve only “actual controversies arising between adverse litigants.”  Private parties who seek to bring S. B. 8 suits in state court may be litigants adverse to the petitioners. But the state-court clerks who docket those disputes and the state-court judges who decide them generally are not. Clerks serve to file cases as they arrive, not to participate as adversaries in those disputes. Judges exist to resolve controversies about a law's meaning or its conformance to the Federal and State Constitution, not to wage battle as contestants in the parties’ litigation.. . .

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Troubling, too, the petitioners have not offered any meaningful limiting principles for their theory. If it caught on and federal judges could enjoin state courts and clerks from entertaining disputes between private parties under *this* state law, what would stop federal judges from prohibiting state courts and clerks from hearing and docketing disputes between private parties under *other*state laws? . . .

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Our colleagues writing separately today supply no answers either. They agree that state-court judges are not proper defendants in this lawsuit because they are “in no sense adverse” to the parties whose cases they decide.  . . . They neglect to explain how clerks who merely docket S. B. 8 lawsuits can be considered “adverse litigants” for [Article III](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000583&cite=USCOARTIII&originatingDoc=I7b24cefe597811ec9e17fa7c2d1398ea&refType=LQ&originationContext=document&transitionType=DocumentItem&ppcid=ea335d3a9203467780bb45ff7855e4ae&contextData=(sc.Search)) purposes while the judges they serve cannot. . . . .

Most prominently, our colleagues point to [*Pulliam*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1984123332&pubNum=0000780&originatingDoc=I7b24cefe597811ec9e17fa7c2d1398ea&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=ea335d3a9203467780bb45ff7855e4ae&contextData=(sc.Search)) *v. Allen* (1984). But that case had nothing to do with state-court clerks, injunctions against them, or the doctrine of sovereign immunity. Instead, the Court faced only the question whether the suit before it could proceed against a judge consistent with the distinct doctrine of judicial immunity.  As well, the plaintiff sought an injunction only to prevent the judge from enforcing a rule of her own creation. . . .

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. . . . While [*Ex parte Young*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1908100273&pubNum=0000708&originatingDoc=I7b24cefe597811ec9e17fa7c2d1398ea&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=ea335d3a9203467780bb45ff7855e4ae&contextData=(sc.Search)) authorizes federal courts to enjoin certain state officials from enforcing state laws, the petitioners do not direct this Court to any enforcement authority the attorney general possesses in connection with S. B. 8 that a federal court might enjoin him from exercising. Maybe the closest the petitioners come is when they point to a state statute that says the attorney general “may institute an action for a civil penalty of $1,000” for violations of “this subtitle or a rule or order adopted by the [Texas Medical B]oard.”  But the qualification “this subtitle” limits the attorney general's enforcement authority to the Texas Occupational Code. . . . By contrast, S. B. 8 is codified in the [Texas Health and Safety Code at §§ 171.201](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000672&cite=TXHSS171.201&originatingDoc=I7b24cefe597811ec9e17fa7c2d1398ea&refType=LQ&originationContext=document&transitionType=DocumentItem&ppcid=ea335d3a9203467780bb45ff7855e4ae&contextData=(sc.Search))–[171.212](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000672&cite=TXHSS171.212&originatingDoc=I7b24cefe597811ec9e17fa7c2d1398ea&refType=LQ&originationContext=document&transitionType=DocumentItem&ppcid=ea335d3a9203467780bb45ff7855e4ae&contextData=(sc.Search)). The Act thus does not fall within “this subtitle.” . . . To be sure, some of our colleagues suggest that the Board might in the future promulgate such a rule and the attorney general might then undertake an enforcement action. But this is a series of hypotheticals and an argument even the petitioners do not attempt to advance for themselves.

. . . . Supposing the attorney general did have some enforcement authority under S. B. 8, the petitioners have identified nothing that might allow a federal court to parlay that authority, or any defendant's enforcement authority, into an injunction against any and all unnamed private persons who might seek to bring their own S. B. 8 suits. . . . Consistent with historical practice, a federal court exercising its equitable authority may enjoin named defendants from taking specified unlawful actions. But under traditional equitable principles, no court may “lawfully enjoin the world at large,” or purport to enjoin challenged “laws themselves.”

. . . . Justice SOTOMAYOR does not claim to identify any countervailing authority to support her proposal. Instead, she says, it is justified purely by the fact that the State of Texas in S. B. 8 has “delegat[ed] its enforcement authority to the world at large.”  But somewhat analogous complaints could be levied against private attorneys general acts, statutes allowing for private rights of action, tort law, federal antitrust law, and even the Civil Rights Act of 1964. . . .

. . . .The petitioners also name as defendants Stephen Carlton, Katherine Thomas, Allison Benz, and Cecile Young. On the briefing and argument before us, it appears that these particular defendants fall within the scope of [*Ex parte Young*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1908100273&pubNum=0000708&originatingDoc=I7b24cefe597811ec9e17fa7c2d1398ea&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=ea335d3a9203467780bb45ff7855e4ae&contextData=(sc.Search))’s historic exception to state sovereign immunity. Each of these individuals is an executive licensing official who may or must take enforcement actions against the petitioners if they violate the terms of Texas's Health and Safety Code. Accordingly, we hold that sovereign immunity does not bar the petitioners’ suit against these named defendants at the motion to dismiss stage.[3](https://1.next.westlaw.com/Document/I7b24cefe597811ec9e17fa7c2d1398ea/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad740120000017db521e18415d08989%3Fppcid%3Db5bbfda94a964917baf60df317c5f104%26Nav%3DCASE%26fragmentIdentifier%3DI7b24cefe597811ec9e17fa7c2d1398ea%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=38e51653b9f0cbbf961c706f663de6a9&list=CASE&rank=1&sessionScopeId=d621c6523a8e48d97074c2c0a066cb4554171d611f88332ca450be935a6ad5e2&ppcid=b5bbfda94a964917baf60df317c5f104&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00042055158630)

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Justice THOMAS suggests that the licensing-official defendants lack authority to enforce S. B. 8 because that statute says it is to be “exclusively” enforced through private civil actions “[n]otwithstanding ... any other law.” But the same provision of S. B. 8 *also* states that the law “may not be construed to ... limit the enforceability of any other laws that regulate or prohibit abortion.”  This saving clause is significant because, as best we can tell from the briefing before us, the licensing-official defendants *are* charged with enforcing “other laws that regulate ... abortion.” Accordingly, it appears Texas law imposes on the licensing-official defendants a duty to enforce a law that “regulate[s] or prohibit[s] abortion,” a duty expressly preserved by S. B. 8's saving clause. . . .

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

While this interlocutory appeal focuses primarily on the Texas official defendants’ motion to dismiss on grounds of sovereign immunity and justiciability, before we granted certiorari the Fifth Circuit also agreed to take up an appeal by the sole private defendant, Mr. Dickson. . . . Mr. Dickson argues that the petitioners lack standing to sue him because he possesses no intention to file an S. B. 8 suit against them. . . . Accordingly, on the record before us the petitioners cannot establish “personal injury fairly traceable to [Mr. Dickson's] allegedly unlawful conduct.”  No Member of the Court disagrees with this resolution of the claims against Mr. Dickson.

. . . . [M]any paths exist to vindicate the supremacy of federal law in this area. Even aside from the fact that eight Members of the Court agree sovereign immunity does not bar the petitioners from bringing this pre-enforcement challenge in federal court, everyone acknowledges that other pre-enforcement challenges may be possible in state court as well.  . . . Separately, any individual sued under S. B. 8 may pursue state and federal constitutional arguments in his or her defense. . . . Given all this, Justice SOTOMAYOR's suggestion that the Court's ruling somehow “clears the way” for the “nullification” of federal law along the lines of what happened in the Jim Crow South not only wildly mischaracterizes the impact of today's decision, it cheapens the gravity of past wrongs.

. . . . This Court has never recognized an unqualified right to pre-enforcement review of constitutional claims in federal court. In fact, general federal question jurisdiction did not even exist for much of this Nation's history. . . . To this day, many federal constitutional rights are as a practical matter asserted typically as defenses to state-law claims, not in federal pre-enforcement cases like this one. . . . As our cases explain, the “chilling effect” associated with a potentially unconstitutional law being “ ‘on the books’ ” is insufficient to “justify federal intervention” in a pre-enforcement suit.  Instead, this Court has always required proof of a more concrete injury and compliance with traditional rules of equitable practice. . . . If other States pass similar legislation, pre-enforcement challenges like the one the Court approves today may be available in federal court to test the constitutionality of those laws. Again, too, further pre-enforcement challenges may be permissible in state court and federal law may be asserted as a defense in any enforcement action. To the extent Justice SOTOMAYOR seems to wish even *more* tools existed to combat this type of law, Congress is free to provide them. . . .

Justice [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=I7b24cefe597811ec9e17fa7c2d1398ea&refType=RQ&originationContext=document&transitionType=DocumentItem&ppcid=ea335d3a9203467780bb45ff7855e4ae&contextData=(sc.Search)&analyticGuid=I7b24cefe597811ec9e17fa7c2d1398ea), concurring in part and dissenting in part.

In my view, petitioners may not maintain suit against any of the governmental respondents under *Ex parte Young* (1908).[1](https://1.next.westlaw.com/Document/I7b24cefe597811ec9e17fa7c2d1398ea/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad740120000017db521e18415d08989%3Fppcid%3Db5bbfda94a964917baf60df317c5f104%26Nav%3DCASE%26fragmentIdentifier%3DI7b24cefe597811ec9e17fa7c2d1398ea%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=38e51653b9f0cbbf961c706f663de6a9&list=CASE&rank=1&sessionScopeId=d621c6523a8e48d97074c2c0a066cb4554171d611f88332ca450be935a6ad5e2&ppcid=b5bbfda94a964917baf60df317c5f104&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00082055158630) I would reverse in full the District Court's denial of respondents’ motions to dismiss and remand with instructions to dismiss the case for lack of subject-matter jurisdiction.

To begin, there is no freestanding constitutional right to pre-enforcement review in federal courtSuch a right would stand in significant tension with the longstanding [Article III](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000583&cite=USCOARTIII&originatingDoc=I7b24cefe597811ec9e17fa7c2d1398ea&refType=LQ&originationContext=document&transitionType=DocumentItem&ppcid=ea335d3a9203467780bb45ff7855e4ae&contextData=(sc.Search)) principle that federal courts generally may not “give advisory rulings on the potential success of an affirmative defense before a cause of action has even accrued.”  That said, a party subject to imminent threat of state enforcement proceedings may seek a kind of pre-enforcement review in the form of a “negative injunction.” . . . In [*Ex parte Young*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1908100273&pubNum=0000708&originatingDoc=I7b24cefe597811ec9e17fa7c2d1398ea&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=ea335d3a9203467780bb45ff7855e4ae&contextData=(sc.Search)), this Court recognized that use of this negative injunction against a governmental defendant provides a narrow exception to sovereign immunity. That exception extends no further than permitting private parties in some circumstances to prevent state officials from bringing an action to enforce a state law that is contrary to federal law.

The negative injunction remedy against state officials countenanced in [*Ex parte Young*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1908100273&pubNum=0000708&originatingDoc=I7b24cefe597811ec9e17fa7c2d1398ea&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=ea335d3a9203467780bb45ff7855e4ae&contextData=(sc.Search)) is a “standard tool of equity,” that federal courts have authority to entertain under their traditional equitable jurisdiction. . . . [A] federal court's jurisdiction in equity extends no further than “the jurisdiction in equity exercised by the High Court of Chancery in England at the time of the adoption of the Constitution and the enactment of the original Judiciary Act.” . . .

. . . . I part ways with the principal opinion only in its conclusion that the four licensing-official respondents are appropriate defendants under [*Ex parte Young*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1908100273&pubNum=0000708&originatingDoc=I7b24cefe597811ec9e17fa7c2d1398ea&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=ea335d3a9203467780bb45ff7855e4ae&contextData=(sc.Search)). First, an [*Ex parte Young*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1908100273&pubNum=0000708&originatingDoc=I7b24cefe597811ec9e17fa7c2d1398ea&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=ea335d3a9203467780bb45ff7855e4ae&contextData=(sc.Search)) defendant must have “some connection with the enforcement of the act”—*i.e.*, “the right and the power to enforce” the “act alleged to be unconstitutional.” The only “act alleged to be unconstitutional” here is S. B. 8. And that statute explicitly denies enforcement authority to any governmental official. . . .

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Second, even when there is an appropriate defendant to sue, a plaintiff may bring an action under [*Ex parte Young*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1908100273&pubNum=0000708&originatingDoc=I7b24cefe597811ec9e17fa7c2d1398ea&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=ea335d3a9203467780bb45ff7855e4ae&contextData=(sc.Search)) only when the defendant “threaten[s] and [is] about to commence proceedings.”  Our later cases explain that “the prospect of state suit must be imminent.”  Here, none of the licensing officials has threatened enforcement proceedings against petitioners because none has authority to bring them. Petitioners do not and cannot dispute this point. Rather, petitioners complain of the “chill” S. B. 8 has on the purported right to abortion. But as our cases make clear, it is not enough that petitioners “feel inhibited” because S. B. 8 is “on the books.” [*Younger* v. *Harris* (1971)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1971127015&pubNum=0000708&originatingDoc=I7b24cefe597811ec9e17fa7c2d1398ea&refType=RP&fi=co_pp_sp_708_42&originationContext=document&transitionType=DocumentItem&ppcid=ea335d3a9203467780bb45ff7855e4ae&contextData=(sc.Search)#co_pp_sp_708_42).

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Chief Justice [ROBERTS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0258116001&originatingDoc=I7b24cefe597811ec9e17fa7c2d1398ea&refType=RQ&originationContext=document&transitionType=DocumentItem&ppcid=ea335d3a9203467780bb45ff7855e4ae&contextData=(sc.Search)&analyticGuid=I7b24cefe597811ec9e17fa7c2d1398ea), with whom Justice [BREYER](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254766801&originatingDoc=I7b24cefe597811ec9e17fa7c2d1398ea&refType=RQ&originationContext=document&transitionType=DocumentItem&ppcid=ea335d3a9203467780bb45ff7855e4ae&contextData=(sc.Search)&analyticGuid=I7b24cefe597811ec9e17fa7c2d1398ea), Justice [SOTOMAYOR](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0145172701&originatingDoc=I7b24cefe597811ec9e17fa7c2d1398ea&refType=RQ&originationContext=document&transitionType=DocumentItem&ppcid=ea335d3a9203467780bb45ff7855e4ae&contextData=(sc.Search)&analyticGuid=I7b24cefe597811ec9e17fa7c2d1398ea), and Justice [KAGAN](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0301239401&originatingDoc=I7b24cefe597811ec9e17fa7c2d1398ea&refType=RQ&originationContext=document&transitionType=DocumentItem&ppcid=ea335d3a9203467780bb45ff7855e4ae&contextData=(sc.Search)&analyticGuid=I7b24cefe597811ec9e17fa7c2d1398ea) join, concurring in the judgment in part and dissenting in part.

Texas has passed a law banning abortions after roughly six weeks of pregnancy. That law is contrary to this Court's decisions in *Roe v. Wade* (1973), and *Planned Parenthood of Southeastern Pa. v. Casey* (1992). It has had the effect of denying the exercise of what we have held is a right protected under the Federal Constitution.

Texas has employed an array of stratagems designed to shield its unconstitutional law from judicial review. . . . . These provisions, among others, effectively chill the provision of abortions in Texas. . . . Given the ongoing chilling effect of the state law, the District Court should resolve this litigation and enter appropriate relief without delay.

In my view, several other respondents are also proper defendants. First, under Texas law, the Attorney General maintains authority coextensive with the Texas Medical Board to address violations of S. B. 8. The Attorney General may “institute an action for a civil penalty” if a physician violates a rule or order of the Board. . . . Under Texas law, then, the Attorney General maintains authority to “take enforcement actions” based on violations of S. B. 8.  He accordingly also falls within the scope of [*Young*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1908100273&pubNum=0000780&originatingDoc=I7b24cefe597811ec9e17fa7c2d1398ea&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=ea335d3a9203467780bb45ff7855e4ae&contextData=(sc.Search))’s exception to sovereign immunity.

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

. . . . Decisions after [*Young*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1908100273&pubNum=0000780&originatingDoc=I7b24cefe597811ec9e17fa7c2d1398ea&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=ea335d3a9203467780bb45ff7855e4ae&contextData=(sc.Search)), however, recognize that suits to enjoin state court proceedings may be proper. And this conclusion is consistent with the entire thrust of [*Young*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1908100273&pubNum=0000780&originatingDoc=I7b24cefe597811ec9e17fa7c2d1398ea&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=ea335d3a9203467780bb45ff7855e4ae&contextData=(sc.Search))itself. Just as in [*Young*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1908100273&pubNum=0000780&originatingDoc=I7b24cefe597811ec9e17fa7c2d1398ea&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=ea335d3a9203467780bb45ff7855e4ae&contextData=(sc.Search)), those sued under S. B. 8 will be “harass[ed] ... with a multiplicity of suits or litigation generally in an endeavor to enforce penalties under an unconstitutional enactment.”  Under these circumstances, where the mere “commencement of a suit,” and in fact just the threat of it, is the “actionable injury to another,” the principles underlying [*Young*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1908100273&pubNum=0000780&originatingDoc=I7b24cefe597811ec9e17fa7c2d1398ea&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=ea335d3a9203467780bb45ff7855e4ae&contextData=(sc.Search)) authorize relief against the court officials who play an essential role in that scheme.  Any novelty in this remedy is a direct result of the novelty of Texas's scheme.

The clear purpose and actual effect of S. B. 8 has been to nullify this Court's rulings. It is, however, a basic principle that the Constitution is the “fundamental and paramount law of the nation,” and “[i]t is emphatically the province and duty of the judicial department to say what the law is.” [*Marbury v. Madison* (1803)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1801123932&pubNum=0000780&originatingDoc=I7b24cefe597811ec9e17fa7c2d1398ea&refType=RP&fi=co_pp_sp_780_177&originationContext=document&transitionType=DocumentItem&ppcid=ea335d3a9203467780bb45ff7855e4ae&contextData=(sc.Search)#co_pp_sp_780_177). Indeed, “[i]f the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery.” [*United States v. Peters* (1809)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1800107529&pubNum=0000780&originatingDoc=I7b24cefe597811ec9e17fa7c2d1398ea&refType=RP&fi=co_pp_sp_780_136&originationContext=document&transitionType=DocumentItem&ppcid=ea335d3a9203467780bb45ff7855e4ae&contextData=(sc.Search)#co_pp_sp_780_136). The nature of the federal right infringed does not matter; it is the role of the Supreme Court in our constitutional system that is at stake.

Justice [SOTOMAYOR](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0145172701&originatingDoc=I7b24cefe597811ec9e17fa7c2d1398ea&refType=RQ&originationContext=document&transitionType=DocumentItem&ppcid=ea335d3a9203467780bb45ff7855e4ae&contextData=(sc.Search)&analyticGuid=I7b24cefe597811ec9e17fa7c2d1398ea), with whom Justice [BREYER](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254766801&originatingDoc=I7b24cefe597811ec9e17fa7c2d1398ea&refType=RQ&originationContext=document&transitionType=DocumentItem&ppcid=ea335d3a9203467780bb45ff7855e4ae&contextData=(sc.Search)&analyticGuid=I7b24cefe597811ec9e17fa7c2d1398ea) and Justice [KAGAN](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0301239401&originatingDoc=I7b24cefe597811ec9e17fa7c2d1398ea&refType=RQ&originationContext=document&transitionType=DocumentItem&ppcid=ea335d3a9203467780bb45ff7855e4ae&contextData=(sc.Search)&analyticGuid=I7b24cefe597811ec9e17fa7c2d1398ea) join, concurring in the judgment in part and dissenting in part.

For nearly three months, the Texas Legislature has substantially suspended a constitutional guarantee: a pregnant woman's right to control her own body. See *Roe v. Wade* (1973); *Planned Parenthood of Southeastern Pa. v. Casey* (1992). . . . Since S. B. 8 went into effect on September 1, 2021, the law has threatened abortion care providers with the prospect of essentially unlimited suits for damages, brought anywhere in Texas by private bounty hunters, for taking any action to assist women in exercising their constitutional right to choose. The chilling effect has been near total, depriving pregnant women in Texas of virtually all opportunity to seek abortion care within their home State after their sixth week of pregnancy. Some women have vindicated their rights by traveling out of State. For the many women who are unable to do so, their only alternatives are to carry unwanted pregnancies to term or attempt self-induced abortions outside of the medical system.

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Like the stockholders in [*Young*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1908100273&pubNum=0000780&originatingDoc=I7b24cefe597811ec9e17fa7c2d1398ea&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=ea335d3a9203467780bb45ff7855e4ae&contextData=(sc.Search)), abortion providers face calamitous liability from a facially unconstitutional law. To be clear, the threat is not just the possibility of money judgments; it is also that, win or lose, providers may be forced to defend themselves against countless suits, all across the State, without any prospect of recovery for their losses or expenses. Here, as in [*Young*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1908100273&pubNum=0000780&originatingDoc=I7b24cefe597811ec9e17fa7c2d1398ea&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=ea335d3a9203467780bb45ff7855e4ae&contextData=(sc.Search)), the “practical effect of [these] coercive penalties for noncompliance” is “to foreclose all access to the courts,” “a constitutionally intolerable choice.” . . .

. . . .

[S]tate-court clerks are proper defendants in this action. This Court has long recognized that “the action of state courts and judicial officers in their official capacities is to be regarded as action of the State.” [*Shelley v. Kraemer* (1948)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1948118404&pubNum=0000780&originatingDoc=I7b24cefe597811ec9e17fa7c2d1398ea&refType=RP&fi=co_pp_sp_780_14&originationContext=document&transitionType=DocumentItem&ppcid=ea335d3a9203467780bb45ff7855e4ae&contextData=(sc.Search)#co_pp_sp_780_14). In [*Shelley*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1948118404&pubNum=0000780&originatingDoc=I7b24cefe597811ec9e17fa7c2d1398ea&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=ea335d3a9203467780bb45ff7855e4ae&contextData=(sc.Search)), private litigants sought to enforce restrictive racial covenants designed to preclude Black Americans from home ownership and to preserve residential segregation. The Court explained that these ostensibly private covenants involved state action because “but for the active intervention of the state courts, supported by the full panoply of state power,” the covenants would be unenforceable.  S. B. 8's formidable chilling effect, even before suit, would be nonexistent if not for the state-court officials who docket S. B. 8 cases with lopsided procedures and limited defenses. . . .

. . . . Modern cases have recognized that suit may be proper even against state-court judges, including to enjoin state-court proceedings. see also *Pulliam v. Allen* (1984). The Court responds that these cases did not expressly address sovereign immunity or involve court clerks. If language in [*Young*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1908100273&pubNum=0000780&originatingDoc=I7b24cefe597811ec9e17fa7c2d1398ea&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=ea335d3a9203467780bb45ff7855e4ae&contextData=(sc.Search)) posed an absolute bar to injunctive relief against state-court proceedings and officials, however, these decisions would have been purely advisory. Moreover, the Court has emphasized that “the principles undergirding the [*Ex parte Young*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1908100273&pubNum=0000708&originatingDoc=I7b24cefe597811ec9e17fa7c2d1398ea&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=ea335d3a9203467780bb45ff7855e4ae&contextData=(sc.Search))doctrine” may “support its application” to new circumstances, “novelty notwithstanding.”  No party has identified any prior circumstance in which a State has delegated an enforcement function to the populace, disclaimed official enforcement authority, and skewed state-court procedures to chill the exercise of constitutional rights. Because S. B. 8's architects designed this scheme to evade [*Young*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1908100273&pubNum=0000780&originatingDoc=I7b24cefe597811ec9e17fa7c2d1398ea&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=ea335d3a9203467780bb45ff7855e4ae&contextData=(sc.Search))as historically applied, it is especially perverse for the Court to shield it from scrutiny based on its novelty.[3](https://1.next.westlaw.com/Document/I7b24cefe597811ec9e17fa7c2d1398ea/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad740120000017db521e18415d08989%3Fppcid%3Db5bbfda94a964917baf60df317c5f104%26Nav%3DCASE%26fragmentIdentifier%3DI7b24cefe597811ec9e17fa7c2d1398ea%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=38e51653b9f0cbbf961c706f663de6a9&list=CASE&rank=1&sessionScopeId=d621c6523a8e48d97074c2c0a066cb4554171d611f88332ca450be935a6ad5e2&ppcid=b5bbfda94a964917baf60df317c5f104&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00162055158630)

. . . .

With S. B. 8's extreme alterations to court procedure and substantive defenses, the Texas court system no longer resembles a neutral forum for the adjudication of rights; S. B. 8 refashions that system into a weapon and points it directly at the petitioners. Under these circumstances, the parties are sufficiently adverse.

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. . . . [T]he Court also complains that the petitioners offer no “meaningful limiting principles for their theory.”  That is incorrect. The petitioners explain: “Where, as here, a State law (1) deliberately seeks to evade federal judicial review by outsourcing enforcement of the law to private individuals without any personal stake, while forbidding state executive officials from direct enforcement; and (2) creates special rules for state-court adjudication to maximize harassment and make timely and effective protection of constitutional rights impossible, federal relief against clerks is warranted.” . . .

This is a brazen challenge to our federal structure. It echoes the philosophy of John C. Calhoun, a virulent defender of the slaveholding South who insisted that States had the right to “veto” or “nullif[y]” any federal law with which they disagreed. . . . .The Nation fought a Civil War over that proposition, but Calhoun's theories were not extinguished. They experienced a revival in the post-war South, and the violence that ensued led Congress to enact Rev. Stat. § 1979, [42 U.S.C. § 1983](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=42USCAS1983&originatingDoc=I7b24cefe597811ec9e17fa7c2d1398ea&refType=LQ&originationContext=document&transitionType=DocumentItem&ppcid=ea335d3a9203467780bb45ff7855e4ae&contextData=(sc.Search)). . . . Thus, [§ 1983](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=42USCAS1983&originatingDoc=I7b24cefe597811ec9e17fa7c2d1398ea&refType=LQ&originationContext=document&transitionType=DocumentItem&ppcid=ea335d3a9203467780bb45ff7855e4ae&contextData=(sc.Search))’s “very purpose,” consonant with the values that motivated the [*Young*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1908100273&pubNum=0000780&originatingDoc=I7b24cefe597811ec9e17fa7c2d1398ea&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=ea335d3a9203467780bb45ff7855e4ae&contextData=(sc.Search))Court some decades later, was “to protect the people from unconstitutional action under color of state law, ‘whether that action be executive, legislative, or judicial.’”

S. B. 8 raises another challenge to federal supremacy, and by blessing significant portions of the law's effort to evade review, the Court comes far short of meeting the moment. The Court's delay in allowing this case to proceed has had catastrophic consequences for women seeking to exercise their constitutional right to an abortion in Texas. These consequences have only rewarded the State's effort at nullification. Worse, by foreclosing suit against state-court officials and the state attorney general, the Court clears the way for States to reprise and perfect Texas’ scheme in the future to target the exercise of any right recognized by this Court with which they disagree.

. . . .

In its finest moments, this Court has ensured that constitutional rights “can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes ... whether attempted ‘ingeniously or ingenuously.’ ” *Cooper v. Aaron*, (1958). Today's fractured Court evinces no such courage. While the Court properly holds that this suit may proceed against the licensing officials, it errs gravely in foreclosing relief against state-court officials and the state attorney general. By so doing, the Court leaves all manner of constitutional rights more vulnerable than ever before, to the great detriment of our Constitution and our Republic.