Federal Courts

Cases and Materials on Judicial Federalism and the Lawyering Process

Fifth Edition

2022 Supplement

Arthur D. Hellman

David R. Stras

Ryan W. Scott

F. Andrew Hessick

Derek T. Muller

Carolina Academic Press
Durham, North Carolina

Carolina Academic Press
700 Kent Street
Durham, North Carolina 27701
Telephone (919) 489-7486
Fax (919) 493-5668
E-mail: cap@cap-press.com
www.cap-press.com

Chapter 3
Justiciability and the Case or Controversy Requirement

A. Standing

[1] The Basic Doctrine

Page 83: *insert after Note 8:*

9. Can a plaintiff's "self-inflicted" injury still be "fairly traceable" to a defendant? Yes. In *Federal Election Commission v. Ted Cruz for Senate*, 142 S. Ct. 1638 (2022), a political candidate loaned his campaign money, and the campaign attempted to repay the loan after the election. Federal regulations allowed repayment within 20 days after the election with funds raised before the election. But after 20 days, repayments can only total $250,000, and any loan exceeding that cannot be repaid. The candidate had loaned his campaigned $260,000, and the campaign waited more than 20 days to repay, leaving a $10,000 balance unpayable. When the candidate challenged the regulation, the agency argued that any injury to the candidate or the campaign was self-inflicted and so was not traceable to any Government conduct.

Although the Court divided on the merits, the dissenting Justices did not dispute the majority's conclusion that the plaintiff had standing. The Court emphasized, "[W]e have made clear that an injury resulting from the application or threatened application of an unlawful enactment remains fairly traceable to such application, even if the injury could be described in some sense as willingly incurred." The Court distinguished self-inflicted injuries that did not derive from the threatened application of a law. For example, it said, a plaintiff's expenditure of money to avoid being subject to government surveillance would not provide a basis for standing if the plaintiff could not show that he would be subject to the surveillance had he not made the expenditure.

Cruz permits standing based on a wide range of self-inflicted injuries. A plaintiff, for instance, may deliberately subject himself to racial discrimination and still have standing to challenge the discriminatory practice. The harm still arises from the defendant's conduct, even if the plaintiff could have found a way to avoid the injury.

[2] Standing Under Congressional Statutes

Page 98: *insert after Note 6:*

7. The Supreme Court built upon *Spokeo* in *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021). Credit-reporting agency TransUnion developed what proved to be a rather unsophisticated system to determine whether a consumer's name appeared on the U.S. Treasury Department's list of terrorists, drug traffickers, and other serious criminals—a listing that is consequential, as it is generally unlawful to do business with these individuals. The system looked at first and last name, but nothing else, a procedure that generated a significant number of false positives. When Ramirez attempted to buy a car, the dealership ran a credit check, and the TransUnion report asserted that he was on a "terrorist list." Ramirez's wife had to purchase the car in her name. Ramirez contacted a lawyer and canceled a planned trip to Mexico to address this and other concerns. Ramirez sued on behalf of a class, alleging, among other things, that TransUnion failed to follow reasonable procedures to ensure accurate information in its files.

Justice Kavanaugh wrote the opinion for the Court and found that most of the class members lacked standing to pursue the claims asserted. First, the Court looked back to *Lujan* and emphasized that while Congress can create a cause of action, there must still be a "concrete harm" under Article III. Congress cannot authorize "citizen suits," which would enable it to recognize any harm it wanted and transfer enforcement of the law to the judiciary. Without a concrete-harm requirement, the Court said, Congress might "provide that everyone has an individual right to clean air and can sue any defendant who violates any air-pollution law." Such a scheme "not only would violate Article III but also would infringe on the Executive Branch's Article II authority."

Second, the Court looked to whether the harm had a "close relationship" with a common law harm. The closest analogy was defamation, but the Court noted that defamation requires publication to a third party. Because most of the class members did not have their reports disclosed to potential creditors during a 7-month period of alleged injury, these class members lacked a concrete injury. Ramirez and the remaining class members, however, did suffer a concrete injury.

Third, the Court rejected the argument that the risk of future harm is sufficient. The class members here sought damages, not injunctive relief. While the material risk of future harm is sometimes sufficient to confer standing for injunctive relief, the Court concluded that it is not sufficient in a damages action. Plaintiffs must wait for harm to materialize before they have a concrete injury to proceed with a damages action.

Justice Thomas dissented, joined by Justices Breyer, Sotomayor, and Kagan. He focused on the scope of the judicial power as understood at the founding, which led him to distinguish between private rights and public rights that could amount to an "injury in fact." Plaintiffs could "enforce a right held privately by an individual" simply by asserting a violation of the right, with no showing of actual damages. Any violation of a private right, including a right created by statute, would be sufficient to demonstrate an "injury in fact." In contrast, a violation of a "duty owed broadly to the whole community" required the showing of injury and damages. *Lujan*, for example, was a public rights case, and plaintiffs needed to demonstrate a concrete injury beyond the mere violation of the statute.

Justice Thomas argued that the Court had never declared that a legal injury is inherently insufficient to establish standing. He contended, "In the name of protecting the separation of powers the Court has relieved the legislature of its power to create and define rights." Justice Thomas concluded:

> Ultimately, the majority seems to pose to the reader single rhetorical question: Who could possibly think that a person is harmed when he requests and is sent an incomplete credit report, or is sent a suspicious notice informing him that he may be a designated drug trafficker or terrorist, or is not sent anything informing him of how to remove this inaccurate red flag? The answer is, of course, legion: Congress, the President, the jury, the District Court, the Ninth Circuit, and four Members of this Court.

Justice Kagan also wrote a dissenting opinion, largely agreeing with Justice Thomas's opinion.

Who has the better argument after *Lujan* and *Spokeo*? Justice Thomas also suggested that one consequence of the Court's decision is that "state courts will

exercise exclusive jurisdiction over these sorts of class actions." Is he right about that? See Chapter 4, section C.

8. When can "intangible harms," like emotional distress, rise to the level of a "concrete" injury? Consider, for example, a recent case involving a claim arising under the Fair Debt Collection Practices Act. The plaintiff opened a letter that erroneously asserted that she had outstanding unpaid debts. This "surprised" and "confused" her and prompted her to contact (but not pay for) a lawyer. After TransUnion, are those "real harms"? *See Pierre v. Midland Credit Management, Inc.*, 29 F.4th 934 (7th Cir. 2022), *reh'g en banc denied*, 36 F.4th 728 (7th Cir. 2022).

Chapter 8
FEDERAL COMMON LAW

D. Implied Remedies for Violation of Constitutional Rights

Page 478: *insert after the Note (the Note starts on 477)*

Egbert v. Boule

Supreme Court of the United States 2022
__S. Ct. __

JUSTICE THOMAS delivered the opinion of the Court.

In *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971), this Court authorized a damages action against federal officials for alleged violations of the Fourth Amendment. Over the past 42 years, however, we have declined 11 times to imply a similar cause of action for other alleged constitutional violations. Nevertheless, the Court of Appeals permitted not one, but two constitutional damages actions to proceed against a U. S. Border Patrol agent: a Fourth Amendment excessive-force claim and a First Amendment retaliation claim. Because our cases have made clear that, in all but the most unusual circumstances, prescribing a cause of action is a job for Congress, not the courts, we reverse.

I

[Robert Boule operated a bed-and-breakfast called "Smuggler's Inn" on the U.S.-Canadian border. He would occasionally arrange transportation for individuals. Boule also served as a confidential informant who would help federal agents identify and apprehend persons engaged in unlawful cross-border activity on or near his property.]

On March 20, 2014, Boule informed Agent Egbert that a Turkish national, arriving in Seattle by way of New York, had scheduled transportation to Smuggler's Inn later that day. Agent Egbert grew suspicious, as he could think of "no legitimate reason a person would travel from Turkey to stay at a rundown bed-and-breakfast on the border." …

Later that afternoon, Agent Egbert observed one of Boule's vehicles … returning to the Inn. Agent Egbert suspected that Boule's Turkish guest was a passenger and followed the SUV into the driveway so he could check the guest's immigration status. On Boule's account, the situation escalated from there. Boule instructed Agent Egbert to leave his property, but Agent Egbert declined. Instead, Boule claims, Agent Egbert lifted him off the ground and threw him against the SUV. After Boule collected himself, Agent Egbert allegedly threw him to the ground. Agent Egbert then checked the guest's immigration paperwork, concluded that everything was in order, and left. … In January 2017, Boule sued Agent Egbert in his individual capacity in Federal District Court, alleging a Fourth Amendment violation for excessive use of force and a First Amendment violation for unlawful retaliation. Boule invoked *Bivens* and asked the District Court to recognize a damages action for each alleged constitutional violation. The District Court declined to extend a *Bivens* remedy to Boule's claims and entered judgment for Agent

Egbert. The Court of Appeals reversed. … We granted certiorari.

II

In *Bivens*, the Court held that it had authority to create "a cause of action under the Fourth Amendment" against federal agents who allegedly manacled the plaintiff and threatened his family while arresting him for narcotics violations. Although "the Fourth Amendment does not in so many words provide for its enforcement by an award of money damages," *id.*, at 396, the Court "held that it could authorize a remedy under general principles of federal jurisdiction," *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017). Over the following decade, the Court twice again fashioned new causes of action under the Constitution—first, for a former congressional staffer's Fifth Amendment sex-discrimination claim, see *Davis* v. *Passman*, 442 U.S. 228 (1979); and second, for a federal prisoner's inadequate-care claim under the Eighth Amendment, see *Carlson* v. *Green*, 446 U.S. 14 (1980).

Since these cases, the Court has not implied additional causes of action under the Constitution. Now long past "the heady days in which this Court assumed common-law powers to create causes of action," we have come "to appreciate more fully the tension between" judicially created causes of action and "the Constitution's separation of legislative and judicial power." At bottom, creating a cause of action is a legislative endeavor. Courts engaged in that unenviable task must evaluate a "range of policy considerations … at least as broad as the range … a legislature would consider." Those factors include "economic and governmental concerns," "administrative costs," and the "impact on governmental operations systemwide." Unsurprisingly, Congress is "far more competent than the Judiciary" to weigh such policy considerations. And the Judiciary's authority to do so at all is, at best, uncertain.

Nonetheless, rather than dispense with *Bivens* altogether, we have emphasized that recognizing a cause of action under *Bivens* is "a disfavored judicial activity." *Abbasi*. When asked to imply a *Bivens* action, "our watchword is caution." *Id*. "[I]f there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy[,] the courts must refrain from creating [it]." *Id.* "[E]ven a single sound reason to defer to Congress" is enough to require a court to refrain from creating such a remedy. Put another way, "the most important question is who should decide whether to provide for a damages remedy, Congress or the courts?" *Hernández*, 140 S. Ct. 735. If there is a rational reason to think that the answer is "Congress"—as it will be in most every case—no *Bivens* action may lie. Our cases instruct that, absent utmost deference to Congress' preeminent authority in this area, the courts "arrogat[e] legislative power." *Hernández*.

To inform a court's analysis of a proposed *Bivens* claim, our cases have framed the inquiry as proceeding in two steps. First, we ask whether the case presents "a new *Bivens* context"—*i.e.*, is it "meaningful[ly]" different from the three cases in which the Court has implied a damages action. *Abbasi*. Second, if a claim arises in a new context, a *Bivens* remedy is unavailable if there are "special factors" indicating that the Judiciary is at least arguably less equipped than Congress to "weigh the costs and benefits of allowing a damages action to proceed." *Id.* If there is even a single "reason to pause before applying *Bivens* in a new context," a court may not recognize a

Bivens remedy. *Hernández*.

While our cases describe two steps, those steps often resolve to a single question: whether there is any reason to think that Congress might be better equipped to create a damages remedy. For example, we have explained that a new context arises when there are "potential special factors that previous *Bivens* cases did not consider." *Abbasi*. And we have identified several examples of new contexts—*e.g.*, a case that involves a "new category of defendants"—largely because they represent situations in which a court is not undoubtedly better positioned than Congress to create a damages action. We have never offered an "exhaustive" accounting of such scenarios, however, because no court could forecast every factor that might "counse[l] hesitation." *Id*. Even in a particular case, a court likely cannot predict the "systemwide" consequences of recognizing a cause of action under *Bivens*. That uncertainty alone is a special factor that forecloses relief.

Finally, our cases hold that a court may not fashion a *Bivens* remedy if Congress already has provided, or has authorized the Executive to provide, "an alternative remedial structure." *Abbasi*. If there are alternative remedial structures in place, "that alone," like any special factor, is reason enough to "limit the power of the Judiciary to infer a new *Bivens* cause of action." *Id.* Importantly, the relevant question is not whether a *Bivens* action would "disrup[t]" a remedial scheme, or whether the court "should provide for a wrong that would otherwise go unredressed." Nor does it matter that "existing remedies do not provide complete relief." Rather, the court must ask only whether it, rather than the political branches, is better equipped to decide whether existing remedies "should be augmented by the creation of a new judicial remedy."

III

Applying the foregoing principles, the Court of Appeals plainly erred when it created causes of action for Boule's Fourth Amendment excessive-force claim and First Amendment retaliation claim.

A

The Court of Appeals conceded that Boule's Fourth Amendment claim presented a new context for *Bivens* purposes, yet it concluded there was no reason to hesitate before recognizing a cause of action against Agent Egbert. That conclusion was incorrect for two independent reasons: Congress is better positioned to create remedies in the border-security context, and the Government already has provided alternative remedies that protect plaintiffs like Boule. We address each in turn.

1

In *Hernández*, we declined to create a damages remedy for an excessive-force claim against a Border Patrol agent who shot and killed a 15-year-old Mexican national across the border in Mexico. We did not recognize a *Bivens* action there because "regulating the conduct of agents at the border unquestionably has national security implications," and the "risk of undermining border security provides reason to hesitate before extending *Bivens* into this field." This reasoning applies here with full force. During the alleged altercation with Boule, Agent Egbert was carrying out Border Patrol's mandate to "interdic[t] persons attempting to illegally enter or exit the

United States or goods being illegally imported into or exported from the United States." 6 U. S. C. §211(e)(3)(A). Because "[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention," we reaffirm that a *Bivens* cause of action may not lie where, as here, national security is at issue.

The Court of Appeals thought otherwise. In its view, Boule's Fourth Amendment claim is "conventional," and, though it arises in a new context, this Court has not "'cast doubt'" on extending *Bivens* within the "'common and recurrent sphere of law enforcement'" in which it arose.

While *Bivens* and this case do involve similar allegations of excessive force and thus arguably present "almost parallel circumstances" or a similar "mechanism of injury," these superficial similarities are not enough to support the judicial creation of a cause of action. The special-factors inquiry—which *Bivens* never meaningfully undertook—shows here, no less than in *Hernández*, that the Judiciary is not undoubtedly better positioned than Congress to authorize a damages action in this national-security context. That this case does not involve a cross-border shooting, as in *Hernández*, but rather a more "conventional" excessive-force claim, as in *Bivens*, does not bear on the relevant point. Either way, the Judiciary is comparatively ill suited to decide whether a damages remedy against any Border Patrol agent is appropriate.

The Court of Appeals downplayed the national-security risk from imposing *Bivens* liability because Agent Egbert was not "literally 'at the border,'" and Boule's guest already had cleared customs in New York. The court also found that Boule had a weightier interest in *Bivens* relief than the parents of the deceased Mexican teenager in *Hernández*, because Boule "is a United States citizen, complaining of harm suffered on his own property in the United States." Finding that "any costs imposed by allowing a *Bivens* claim to proceed are outweighed by compelling interests in favor of protecting United States citizens on their own property in the United States," the court extended *Bivens* to Boule's case.

This analysis is deeply flawed. The *Bivens* inquiry does not invite federal courts to independently assess the costs and benefits of implying a cause of action. A court faces only one question: whether there is *any* rational reason (even one) to think that *Congress* is better suited to "weigh the costs and benefits of allowing a damages action to proceed." *Abbasi*. Thus, a court should not inquire, as the Court of Appeals did here, whether *Bivens* relief is appropriate in light of the balance of circumstances in the "particular case." A court inevitably will "impai[r]" governmental interests, and thereby frustrate Congress' policymaking role, if it applies the "'special factors' analysis" at such a narrow "leve[l] of generality." Rather, under the proper approach, a court must ask "[m]ore broadly" if there is any reason to think that "judicial intrusion" into a given field might be "harmful" or "inappropriate." If so, or even if there is the "*potential*" for such consequences, a court cannot afford a plaintiff a *Bivens* remedy. As in *Hernández*, then, we ask here whether a court is competent to authorize a damages action not just against Agent Egbert but against Border Patrol agents generally. The answer, plainly, is no.

The Court of Appeals' analysis betrays the pitfalls of applying the special-

factors analysis at too granular a level. The court rested on three irrelevant distinctions from *Hernández*. First, Agent Egbert was several feet from (rather than straddling) the border, but cross-border security is obviously implicated in either event. Second, Boule's guest arrived in Seattle from New York rather than abroad, but an alien's port of entry does not make him less likely to be a national-security threat. And third, Agent Egbert investigated immigration violations on our side of the border, not Canada's, but immigration investigations in *this* country are perhaps *more* likely to impact the national security of the United States. In short, the Court of Appeals offered no plausible basis to permit a Fourth Amendment *Bivens* claim against Agent Egbert to proceed.

2

Second, Congress has provided alternative remedies for aggrieved parties in Boule's position that independently foreclose a *Bivens* action here. … The U. S. Border Patrol is statutorily obligated to "control, direc[t], and supervis[e] … all employees." 8 U. S. C. §1103(a)(2). And, by regulation, Border Patrol must investigate "[a]lleged violations of the standards for enforcement activities" and accept grievances from "[a]ny persons wishing to lodge a complaint." 8 CFR §§287.10(a)–(b). …

Boule nonetheless contends that Border Patrol's grievance process is inadequate because he is not entitled to participate and has no right to judicial review of an adverse determination. But we have never held that a *Bivens* alternative must afford rights to participation or appeal. That is so because *Bivens* "is concerned solely with deterring the unconstitutional acts of individual officers"—*i.e.*, the focus is whether the Government has put in place safeguards to "preven[t]" constitutional violations "from recurring." And, again, the question whether a given remedy is adequate is a legislative determination that must be left to Congress, not the federal courts. So long as Congress or the Executive has created a remedial process that it finds sufficient to secure an adequate level of deterrence, the courts cannot second-guess that calibration by superimposing a *Bivens* remedy. That is true even if a court independently concludes that the Government's procedures are "not as effective as an individual damages remedy." …

B

We also conclude that there is no *Bivens* cause of action for Boule's First Amendment retaliation claim. While we have assumed that such a damages action might be available, "[w]e have never held that *Bivens* extends to First Amendment claims." Because a new context arises when there is a new "constitutional right at issue," the Court of Appeals correctly held that Boule's First Amendment claim presents a new *Bivens* context. Now presented with the question whether to extend *Bivens* to this context, we hold that there is no *Bivens* action for First Amendment retaliation. There are many reasons to think that Congress, not the courts, is better suited to authorize such a damages remedy.

Recognizing any new *Bivens* action "entail[s] substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." *Anderson* v. *Creighton*, 483 U. S. 635, 638 (1987). Extending *Bivens* to alleged First Amendment violations would pose an acute risk of increasing

such costs. A plaintiff can turn practically any adverse action into grounds for a retaliation claim. And, "[b]ecause an official's state of mind is easy to allege and hard to disprove, insubstantial claims that turn on [retaliatory] intent may be less amenable to summary disposition." Even a frivolous retaliation claim "threaten[s] to set off broad-ranging discovery in which there is often no clear end to the relevant evidence."

…

Boule responds that any hesitation is unwarranted because this Court in *Passman* already identified a *Bivens* cause of action under allegedly similar circumstances. There, the Court permitted a congressional staffer to sue a congressman for sex discrimination under the Fifth Amendment. In Boule's view, *Passman*, like this case, permitted a damages action to proceed even though it required the factfinder to probe a federal official's motives for taking an adverse action against the plaintiff.

Even assuming the factual parallels are as close as Boule claims, *Passman* carries little weight because it predates our current approach to implied causes of action and diverges from the prevailing framework in three important ways. First, the *Passman* Court concluded that a *Bivens* action must be available if there is "no effective means other than the judiciary to vindicate" the purported Fifth Amendment right. Since then, however, we have explained that the absence of relief "does not by any means necessarily imply that courts should award money damages." Second, *Passman* indicated that a damages remedy is appropriate unless Congress "explicit[ly]" declares that a claimant "may not recover money damages." Now, though, we defer to "congressional inaction" if "the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms." Third, when assessing the "special factors," *Passman* asked whether a court is competent to calculate damages "without difficult questions of valuation or causation." But today, we do not ask whether a court can determine a damages amount. Rather, we ask whether "there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy" at all. *Abbasi*.

[Reversed.]

JUSTICE GORSUCH, concurring in the judgment.

Our Constitution's separation of powers prohibits federal courts from assuming legislative authority. As the Court today acknowledges, *Bivens* crossed that line by "impl[ying]" a new set of private rights and liabilities Congress never ordained.

… To create a new cause of action is to assign new private rights and liabilities—a power that is in every meaningful sense an act of legislation. If exercising that sort of authority may once have been a "'proper function for common-law courts'" in England, it is no longer generally appropriate "'for federal tribunals'" in a republic where the people elect representatives to make the rules that govern them. Weighing the costs and benefits of new laws is the bread and butter of legislative committees. It has no place in federal courts charged with deciding cases and controversies under existing

law.

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

[The dissent argued that plaintiff's Fourth Amendment claim did not arise in a new context and that, even if it did arise in a new context, no special factors counseled against extending *Bivens* to this context. It agreed, however, that the First Amendment claim should not proceed because it arose in a new context and there were special factors counseling against extending *Bivens* to this context.]

III

If the legal standard the Court articulates to reject Boule's Fourth Amendment claim sounds unfamiliar, that is because it is. Just five years after circumscribing the standard for allowing *Bivens* claims to proceed, a restless and newly constituted Court sees fit to refashion the standard anew to foreclose remedies in yet more cases. …

A

Today … the Court [announces] that "[t]he *Bivens* inquiry does not invite federal courts to independently assess the costs and benefits of implying a cause of action;" instead, courts must "only" decide "whether there is *any* rational reason (even one) to think that *Congress* is better suited to 'weigh the costs and benefits of allowing a damages action to proceed.'"

That approach contrasts starkly with the standard the Court announced in *Ziglar* and applied in *Hernández*. This Court regularly has considered whether courts are "well suited … to consider and weigh the costs and benefits of allowing a damages action to proceed," and have never held that such weighing is categorically impermissible, contrary to the Court's analysis today. …

The Court further declares that "a plaintiff cannot justify a *Bivens* extension based on 'parallel circumstances'" with previous cases that have recognized a *Bivens* remedy. To the extent these statements suggest an exacting new-context inquiry, they are in serious tension with the Court's longstanding rule that trivial differences alone do not create a new *Bivens* context." Indeed, until today, the Court has never so much as hinted that courts should refuse to permit a *Bivens* action in a case involving facts substantially identical to those in *Bivens* itself.

…

C

[T]he Court plainly modifies the *Bivens* standard in a manner that forecloses Boule's claims and others like them that should be permitted under this Court's *Bivens* precedents. That choice is in tension with the Court's insistence that "prescribing a cause of action is a job for Congress, not the courts." Faithful adherence to this logic counsels maintaining *Bivens* in its current scope but does not support changing the status quo to constrict *Bivens*, as the Court does today. Congress, after all, has recognized and relied on the *Bivens* cause of action in creating and amending other remedies, including the FTCA. By nevertheless repeatedly amending the legal standard that applies to *Bivens* claims and whittling down the number of claims that remain viable, the Court itself is making a policy choice for Congress.

Whatever the merits of that choice, the Court's decision today is no exercise in judicial modesty.

Note: What's left of Bivens*?*

1. *Egbert* is the latest in the Court's decisions curtailing *Bivens*. Two years earlier, in *Hernandez v. Mesa*, 140 S. Ct. 735 (2020), the Court had made clear that expanding *Bivens* is a "disfavored" judicial activity. *Egbert* continues that trend, but like *Hernandez*, it stops short of formally overruling *Bivens*.

2. In *Egbert*, the Court repeats the two-step test articulated in *Hernandez* to determine whether to recognize a *Bivens* action: (1) a court should ask whether the *Bivens* action arises in a new context and (2) if the claim is in a new context, the court must ask if there are special factors indicating that Congress is better equipped than the judiciary to determine whether to allow the new action. But *Egbert* breaks new ground in suggesting that these two prongs are not independent. It says that, if there is reason to think that Congress would be better suited than the judiciary to determine whether to recognize a particular *Bivens* action, that fact alone suggests the *Bivens* claim arises in a new context. By the same token, if a claim arises in a new context, the inability of the courts to predict the "systemwide consequences" of recognizing an action in that new context may be a special factor counseling against recognizing the *Bivens* action. In this light, the *Egbert* Court states that the two "steps often resolve to a single question: whether there is any reason to think that Congress might be better equipped to create a damages remedy."

3. The "single question" that *Egbert* identifies is akin to the rational basis test seen in other areas of constitutional law. Under the *Egbert* test, a court should not recognize a *Bivens* action if "there is any rational reason" to think that Congress is better suited to weigh the costs and benefits of a new action. Does this test preclude all *Bivens* actions? If not, then in what situation is there reason to think that Congress is not better suited than the courts to determine whether to recognize an action?

Chapter 13
State Sovereign Immunity

C. Congressional Power and State Sovereign Immunity

[1] Injunctive Relief: The Scope of the *Ex Parte Young* Exception

Page 749: ***insert before Part B of the Note:***

5. Fifteen years later, the Court returned to the reasoning of *Katz*, concluding in another context that the assertion of state sovereign immunity is inconsistent with "the plan of the Convention." In *PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244 (2021), the Court held that state sovereign immunity affords no protection against the federal government's power of eminent domain, even if that power is delegated to private parties who exercise it by initiating judicial proceedings to condemn state property.

The case involved the Natural Gas Act, which authorizes the Federal Energy Regulatory Commission (FERC) to approve the construction and extension of interstate natural gas pipelines. When authorized by FERC, the Act grants private parties the power to obtain any necessary right-of-way from reluctant property owners "by the exercise of the right of eminent domain." In *PennEast*, a joint venture by energy companies filed an action in federal district court, relying on a FERC certificate of public convenience and necessity and seeking to condemn various parcels in which the State of New Jersey held property interests.

In a 5-4 decision authored by Chief Justice Roberts, the Court rejected the state's assertion of state sovereign immunity as a defense. More than a century earlier, the Court had recognized the federal government's power to exercise eminent domain over state lands, and to delegate that power to private parties by an Act of Congress. *See Cherokee Nation v. Southern Kan. R. Co.*, 135 U.S. 641 (1890); *Stockton v. Baltimore & N.Y. R. Co.*, 32 F. 9 (C.C.N.J. 1887) (Bradley, J., riding circuit). The majority therefore viewed this action as falling within a recognized exception to the general rule that states may not be sued without their consent:

> [In addition to other exceptions,] a State may be sued if it has agreed to suit in the "plan of the Convention," which is shorthand for "the structure of the original Constitution itself." *Alden*; see The Federalist No. 81 (A. Hamilton). The "plan of the Convention" includes certain waivers of sovereign immunity to which all States implicitly consented at the founding. See *Alden*. We have recognized such waivers in the context of bankruptcy proceedings, *Katz*; see *Allen v. Cooper*, 140 S. Ct. 994 (2020), suits by other States, *South Dakota v. North Carolina*, 192 U.S. 286 (1904), and suits by the Federal Government, *United States v. Texas*, 143 U.S. 621 (1892). * * *
>
> As the cases discussed [earlier] show, the States consented in the plan of the Convention to the exercise of federal eminent domain power, including in condemnation proceedings brought by private delegatees. The plan of the Convention reflects the "fundamental postulates implicit in the constitutional design." *Alden*. And we have said regarding the exercise of federal eminent domain within the States that one "postulate of the Constitution [is] that the government of the

> United States is invested with full and complete power to execute and carry out its purposes." *Cherokee Nation* (quoting *Stockton*). Put another way, when the States entered the federal system, they renounced their right to the "highest dominion in the lands comprised within their limits." * * *
>
> The respondents and the dissent do not dispute that the Federal Government enjoys a power of eminent domain superior to that of the States. Nor do they dispute that the Federal Government can delegate that power to private parties. They instead assert that the only "question is whether Congress can authorize a private party to bring a condemnation suit against a State." And they argue that because there is no founding-era evidence of such suits, States did not consent to them when they entered the federal system.
>
> The flaw in this reasoning is that it attempts to divorce the eminent domain power from the power to bring condemnation actions—and then argue that the latter, so carved out, cannot be delegated to private parties with respect to state-owned lands. But the eminent domain power is inextricably intertwined with the ability to condemn. Separating the eminent domain power from the power to condemn—when exercised by a delegatee of the Federal Government—would violate the basic principle that a State may not diminish the eminent domain authority of the federal sovereign.
>
> If private parties authorized by the Federal Government were unable to condemn States' property interests, then that would leave delegatees with only one constitutionally permissible way of exercising the federal eminent domain power: Take property now and require States to sue for compensation later. It is difficult to see how such an arrangement would vindicate the principles underlying state sovereign immunity. Whether the purpose of that doctrine is to "shield[] state treasuries" or "accord the States the respect owed them as joint sovereigns," *Fed. Maritime Comm'n v. South Carolina Ports Authority*, 535 U.S. 743 (2002), it would hardly be served by favoring private or Government-supported invasions of state-owned lands over judicial proceedings.

The principal dissent, written by Justice Barrett and joined by Justices Thomas, Kagan, and Gorsuch, maintained that "[a] straightforward application of our precedent resolves this case." In passing the Natural Gas Act, Congress relied on its power to regulate interstate commerce, and "we have repeatedly held that the Commerce Clause does not permit Congress to strip the States of their sovereign immunity." In the dissenters' view, the Court had "recognized but one exception to this general limit on Congress's Article I powers: the Bankruptcy Clause"; indeed, the Court previously had described *Katz* as announcing a "good-for-one-clause-only holding." And the dissent saw no reason to extend the "plan of the Convention" exception here:

> According to the Court, the States surrendered their immunity to private condemnation suits in the "plan of the Convention." Making this showing is no easy task. We will not conclude that States relinquished their sovereign immunity absent "compelling evidence that the Founders thought such a surrender inherent in the constitutional

compact." *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991). * * *

[T]he Constitution enumerates no stand-alone "eminent-domain power." The Court recognizes—as does our precedent—that the Federal Government may exercise the right of eminent domain only "so far as is necessary to the enjoyment of the powers conferred upon it by the Constitution." *Kohl v. United States*, 91 U.S. 367 (1876); see *McCulloch v. Maryland*, 4 Wheat. 316 (1819). Any taking of property provided for by Congress is thus an exercise of another constitutional power—in the case of the Natural Gas Act, the Commerce Clause—augmented by the Necessary and Proper Clause. So when Congress allows a private party to take property in service of a federally authorized project, it is choosing a means by which to carry an enumerated power into effect. * * *

The Court relies exclusively on the fact that Congress and the States, like the Colonies before them, have consistently authorized private parties to exercise the right of eminent domain to obtain property for mills, roads, and other public improvements. * * * But the question before us is not whether Congress can authorize a private party to exercise the right of eminent domain against another private party, which is the proposition this history supports. Nor is it whether Congress can authorize a private entity to take state property through means other than a condemnation suit. The question is whether Congress can authorize a private party to bring a condemnation suit against a State. And on that score, the Court comes up dry. The Court cannot muster even a single decision involving a private condemnation suit against a State, let alone any decision holding that the States lack immunity from such suits. * * *

While the Court cloaks its analysis in the "plan of the Convention," it seems to be animated by pragmatic concerns. Congress judged private condemnation suits to be the most efficient way to construct natural gas pipelines, and to this point, States have cooperated. But now that New Jersey has chosen to object, it threatens to "thwart" federal policy. If the Court sided with New Jersey and Congress did not amend [the Natural Gas Act], New Jersey (not to mention other States) could hold up construction of the pipeline indefinitely. * * *

Our precedents provide a ready response: The defense of sovereign immunity always has the potential of making it easier for States to get away with bad behavior—like copyright infringement, *Allen*, patent infringement, *Florida Prepaid*, and even reneging on debts, *Chisholm v. Georgia*, 2 Dall. 419 (1793). Indeed, concern about States using sovereign immunity to thwart federal policy is precisely why many Justices of this Court have dissented from our sovereign immunity jurisprudence. See, *e.g.*, *Seminole Tribe* (Stevens, J., dissenting). The availability of the defense does not depend on whether a court approves of the State's conduct.

The Court also brushes past New Jersey's interests by failing to acknowledge that [these] actions implicate state sovereignty. PennEast has haled a State into court to defend itself in an adversary proceeding

> about a forced sale of property. * * * * [I]t is difficult to see how the initiation of a judicial proceeding that seeks to wrest title to state property from the State does not subject the State to coercive legal process.

A central disagreement between the majority and dissent concerns the nature of federal eminent domain, and how it fits into the "plan of the Convention." Which account do you find more persuasive? As to the strength of the state's interest, the dissent is surely correct that states have a strong sovereign interest in their own real property. Consider, however, the majority's contention that if state sovereign immunity were available as a defense, private parties acting with delegated federal eminent-domain authority would have no alternative but to physically seize state lands and wait to be sued. Sovereign immunity, after all, would not assist states who choose to initiate legal action against others. Should that affect the Court's calculus when assessing the strength of a state's interest?

6. The following year, the Court doubled down on *PennEast*, once again holding that states had surrendered their sovereign immunity with respect to a class of claims as part of the "plan of the Convention." In *Torres v. Texas Department of Public Safety*, 142 S. Ct. 2455 (2022), a military veteran sued the Texas Department of Public Safety based on a federal law, the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), that authorizes private damages actions against state and local governments that refuse to rehire and accommodate military veterans who return from service. The Department asserted that, as an arm of the state, it enjoyed sovereign immunity from suit and could not be sued without its consent.

In another 5-4 decision, this time authored by Justice Breyer, the Court again rejected the claim. The Court described *PennEast* as "defin[ing] the test for structural waiver as whether the federal power at issue is 'complete in itself'" such that "the states consented to the exercise of that power—in its entirety—in the plan of the Convention." Congress enacted USERRA pursuant to its constitutional power "[t]o raise and support Armies" and "[t]o provide and maintain a Navy." U.S. Const. art. I, § 8, cls. 12-13. Based on an analysis of the Constitution's text and history, especially provisions that expressly forbid States from taking military action independently, the majority concluded that upon entering the federal system States "renounced their right to interfere with national policy in this area."

7. In *PennEast*, Justice Gorsuch joined the principal dissent in full. Separately, however, he wrote an additional dissent joined only by Justice Thomas. That opinion floated an alternative ground for dismissal—and one with far-reaching implications:

> States have two distinct federal-law immunities from suit.
>
> The first—"structural immunity"—derives from the structure of the Constitution. Because structural immunity is a constitutional entitlement of a sovereign State, it applies in both federal tribunals, *Seminole Tribe*, and in state tribunals, *Alden*. And it applies regardless of whether the plaintiff is a citizen of the same State, *Allen*, a citizen of a different State, or a *non*-citizen—like a foreign nation, *Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934), or an Indian tribe, *Blatchford*. Structural immunity sounds in personal jurisdiction, so the sovereign can waive that immunity by "consent" if it wishes.
>
> The second—what is properly termed "Eleventh Amendment immunity"—derives from the text of the Eleventh Amendment. In light

> of its swift adoption in response to *Chisholm v. Georgia*, this Court has read the Eleventh Amendment as pointing to the structural principle just discussed. But the Eleventh Amendment can do two things at once. In addition to pointing us back to the States' structural immunity, it also provides an ironclad rule for a particular category of diversity suits:
>
> > "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U. S. Const., Amdt. 11.
>
> This text "means what it says. It eliminates federal judicial power over one set of cases: suits filed against states, in law or equity, by diverse plaintiffs." Baude & Sachs, *The Misunderstood Eleventh Amendment*, 169 U. Pa. L. Rev. 609 (2021).
>
> The Eleventh Amendment sometimes does less than structural immunity: It applies only in federal court ("the Judicial power *of the United States*"). And it applies only to diversity suits ("by Citizens of *another State*"). But sometimes the Amendment does more: It imposes an Article III subject-matter jurisdiction barrier ("The judicial Power ... *shall not* be construed to *extend*"), not a mere privilege of personal jurisdiction. And it admits of no waivers, abrogations, or exceptions ("to *any suit* in law or equity").
>
> This case appears to present "the rare scenario" that comes within the Eleventh Amendment's text. Because PennEast sued New Jersey in federal court, this suit implicates "the Judicial power of the United States." This condemnation suit, by any stretch, is "a[] suit in law or equity." PennEast "commenced" this suit "against" New Jersey. It named the State in its complaint as a defendant as required by the Civil Rules. Fed. Rule Civ. Proc. 71.1(c)(1). And it asked the court for an injunction permitting it to take "immediate possession" of New Jersey's soil. Because the parties agree that PennEast is a citizen of Delaware, this suit is brought "by [a] Citizen[ ] of another State."
>
> If that's all true, then a federal court "shall not" entertain this suit. The Eleventh Amendment's text, no less than the Constitution's structure, may bar it. This Court, understandably, does not address that issue today because the parties have not addressed it themselves and "there is no mandatory sequencing of jurisdictional issues." *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422 (2007). The lower courts, however, have an obligation to consider this issue on remand before proceeding to the merits.

Based on the Court's existing precedent, should the lower courts on remand accept Justice Gorsuch's invitation to dismiss the suit as barred by the Eleventh Amendment? Regardless, do you find the separate dissent's approach attractive? Does it effectively reconcile the text of the Eleventh Amendment with the Court's decisions holding that state sovereign immunity is implicit in the Constitution's structure? If the Court were to accept it, what practical consequences would follow? Note, as Justice Gorsuch did, that the Eleventh Amendment by its terms "admits of no waivers, abrogations, or exceptions."

E. The Future of the Immunity

[1] Injunctive Relief: The Scope of the *Ex Parte Young* Exception

Page 766: *insert following the Note:*

Whole Woman's Health v. Jackson

Supreme Court of the United States, 2021.
142 S. Ct. 522.

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

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

I

Earlier this year Texas passed the Texas Heartbeat Act, also known as S. B. 8. The Act prohibits physicians from "knowingly perform[ing] or induc[ing] an abortion on a pregnant woman if the physician detected a fetal heartbeat for the unborn child" unless a medical emergency prevents compliance. Tex. Health & Safety Code Ann. §§ 171.204(a), 171.205(a). But the law generally does not allow state officials to bring criminal prosecutions or civil enforcement actions. Instead, S. B. 8 directs enforcement "through ... private civil actions" culminating in injunctions and statutory damages awards against those who perform or assist prohibited abortions. §§ 171.207(a), 171.208(a)(2), (3). The law also provides a defense. Tracking language from *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), the statute permits abortion providers to defeat any suit against them by showing, among other things, that holding them liable would place an "undue burden" on women seeking abortions. §§ 171.209(a)–(b).[1]

After the law's adoption, various abortion providers sought to test its constitutionality. Not wishing to wait for S. B. 8 actions in which they might raise their arguments in defense, they filed their own pre-enforcement lawsuits. In all, they brought 14 such challenges in state court seeking, among other things, a declaration that S. B. 8 is inconsistent with both the Federal and Texas Constitutions. A summary judgment ruling in these now-consolidated cases arrived last night, in which the abortion providers prevailed on certain of their claims.

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

[1] Justice SOTOMAYOR suggests that the defense described in S. B. 8 supplies only a "shell of what the Constitution requires" and effectively "nullif[ies]" its guarantees. But whatever a state statute may or may not say, applicable federal constitutional defenses always stand fully available when properly asserted. See U. S. Const., Art. VI.

judge, Austin Jackson; a state-court clerk, Penny Clarkston; Texas attorney general, Ken Paxton; executive director of the Texas Medical Board, Stephen Carlton; executive director of the Texas Board of Nursing, Katherine Thomas; executive director of the Texas Board of Pharmacy, Allison Benz; executive commissioner of the Texas Health and Human Services Commission, Cecile Young; and a single private party, Mark Lee Dickson.

Shortly after the petitioners filed their federal complaint, the individual defendants employed by Texas moved to dismiss, citing among other things the doctrine of sovereign immunity. The sole private defendant, Mr. Dickson, also moved to dismiss, claiming that the petitioners lacked standing to sue him. The District Court denied the motions. Ibid.

The defendants employed by Texas responded by pursuing an interlocutory appeal in the Fifth Circuit under the collateral order doctrine. Mr. Dickson also filed an interlocutory appeal. . . .

Separately, the petitioners also sought relief from the Fifth Circuit. Citing S. B. 8's impending effective date, they asked the court to issue an injunction suspending the law's enforcement until the court could hear and decide the merits of the defendants' appeals. The Fifth Circuit declined the petitioners' request. Instead, that court issued an order staying proceedings in the District Court until it could resolve the defendants' appeals.

In response to these developments, the petitioners sought emergency injunctive relief in this Court. In their filing, the petitioners asked us to enjoin any enforcement of S. B. 8. And given the statute's approaching effective date, they asked us to rule within two days. The Court took up the application and, in the abbreviated time available for review, concluded that the petitioners' submission failed to identify a basis in existing law sufficient to justify disturbing the Court of Appeals' decision denying injunctive relief.

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

II

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

A

Turning to the matters that are properly put to us, we begin with the sovereign immunity appeal involving the state-court judge, Austin Jackson, and the state-court

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

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

Nor is that the only problem confronting the petitioners' court-and-clerk theory. Article III of the Constitution affords federal courts the power to resolve only "actual controversies arising between adverse litigants." *Muskrat v. United States*, 219 U.S. 346 (1911). Private parties who seek to bring S. B. 8 suits in state court may be litigants adverse to the petitioners. But the state-court clerks who docket those disputes and the state-court judges who decide them generally are not. Clerks serve to file cases as they arrive, not to participate as adversaries in those disputes. Judges exist to resolve controversies about a law's meaning or its conformance to the Federal and State Constitutions, not to wage battle as contestants in the parties' litigation. As this Court has explained, "no case or controversy" exists "between a judge who adjudicates claims under a statute and a litigant who attacks the constitutionality of the statute." *Pulliam v. Allen*, 466 U.S. 522 (1984).

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

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

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

Our colleagues writing separately today supply no answers either. They agree that state-court judges are not proper defendants in this lawsuit because they are "in no sense adverse" to the parties whose cases they decide. At the same time, our colleagues say they would allow this case to proceed against clerks like Ms. Clarkston. But in doing so they fail to address the many remedial questions their path invites. They neglect to explain how clerks who merely docket S. B. 8 lawsuits can be considered "adverse litigants" for Article III purposes while the judges they serve cannot. And they fail to reconcile their views with *Ex parte Young*. THE CHIEF JUSTICE acknowledges, for example, that clerks set in motion the "'machinery'" of court proceedings. Yet he disregards *Ex parte Young*'s express teaching against enjoining the "machinery" of courts.

JUSTICE SOTOMAYOR seems to admit at least part of the problem. She concedes that older "wooden" authorities like *Ex parte Young* appear to prohibit suits against state-court clerks. Still, she insists, we should disregard those cases in favor of more "modern" case law. . . . But even overlooking all the other problems attending our colleagues' "clerks-only" theory, the authorities they cite do not begin to do the work attributed to them.

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

If anything, the remainder of our colleagues' cases are even further afield. *Mitchum v. Foster*, 407 U.S. 225 (1972), did not involve state-court clerks, but a judge, prosecutor, and sheriff. When it came to these individuals, the Court held only that the Anti-Injunction Act did not bar suit against them. Once more, the Court did not purport to pass judgment on any sovereign immunity defense, let alone suggest

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

B

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

Start with perhaps the most straightforward. While *Ex parte Young* authorizes federal courts to enjoin certain state officials from enforcing state laws, the petitioners do not direct this Court to any enforcement authority the attorney general possesses in connection with S. B. 8 that a federal court might enjoin him from exercising. Maybe the closest the petitioners come is when they point to a state 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." Tex. Occ. Code Ann. § 165.101. 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 . . . . The Act thus does not fall within "this subtitle." Nor have the petitioners identified for us any "rule or order adopted by the" Texas Medical Board related to S. B. 8 that the attorney general might enforce against them. To be sure, some of our colleagues suggest that the Board might in the future promulgate such a rule and the attorney general might then undertake an enforcement action. But this is a series of hypotheticals and an argument even the petitioners do not attempt to advance for themselves.

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

Our colleagues offer no persuasive reply to this problem. THE CHIEF JUSTICE does not address it. Meanwhile, JUSTICE SOTOMAYOR offers a radical answer, suggesting once more that this Court should cast aside its precedents requiring federal courts to abide by traditional equitable principles. This time, however, JUSTICE SOTOMAYOR does not claim to identify any countervailing authority to support her proposal. Instead, she says, it is justified purely by the fact that the State of Texas in S. B. 8 has "delegat[ed] its enforcement authority to the world at large." 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. In some sense all of these laws "delegate" the enforcement of public policy to private parties and reward those who bring suits with "bount[ies]" like exemplary or statutory damages and attorney's fees. Nor does Justice SOTOMAYOR explain where her novel plan to overthrow this Court's PRECEDENTS and expand the equitable powers of federal courts would stop—or on what theory it might plausibly happen to reach just this case or maybe those exactly like it.[2]

C

While this Court's precedents foreclose some of the petitioners' claims for relief, others survive. The petitioners also name as defendants Stephen Carlton, Katherine Thomas, Allison Benz, and Cecile Young. On the briefing and argument before us, it appears that these particular defendants fall within the scope of *Ex parte Young*'s historic exception to state sovereign immunity. Each of these individuals is an executive licensing official who may or must take enforcement actions against the petitioners if they violate the terms of Texas's Health and Safety Code, including S. B. 8. Accordingly, we hold that sovereign immunity does not bar the petitioners' suit against these named defendants at the motion to dismiss stage. . . .

[JUSTICE THOMAS concludes that the claims against the licensing-official defendants must be dismissed as well.] He stresses that to maintain a suit consistent with this Court's *Ex parte Young* and Article III precedents, "it is not enough that petitioners 'feel inhibited'" or "'chill[ed]'" by the abstract possibility of an enforcement action against them. Rather, they must show at least a credible threat of such an action against them. [W]e agree with these observations in principle and disagree only on their application to the facts of this case. The petitioners have plausibly alleged that S. B. 8 has already had a direct effect on their day-to-day operations. And they have identified provisions of state law that appear to impose a duty on the licensing-official defendants to bring disciplinary actions against them if they violate S. B. 8. In our judgment, this is enough at the motion to dismiss stage to suggest the petitioners will be the target of an enforcement action and thus allow this suit to proceed.

D

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

While this interlocutory appeal focuses primarily on the Texas official defendants' motion to dismiss on grounds of sovereign immunity and justiciability, before we granted certiorari the Fifth Circuit also agreed to take up an appeal by the sole private defendant, Mr. Dickson. In the briefing before us, no one contests this decision. In his appeal, Mr. Dickson argues that the petitioners lack standing to sue him because he possesses no intention to file an S. B. 8 suit against them. Mr. Dickson has supplied sworn declarations so attesting. The petitioners do not contest this testimony or ask us to disregard it. Accordingly, on the record before us the petitioners cannot establish "personal injury fairly traceable to [Mr. Dickson's] allegedly unlawful conduct." No Member of the Court disagrees with this resolution of the claims against Mr. Dickson.

III

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

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

The truth is, too, that unlike the petitioners before us, those seeking to challenge the constitutionality of state laws are not always able to pick and choose the timing and preferred forum for their arguments. This Court has never recognized an unqualified right to pre-enforcement review of constitutional claims in federal court. In fact, general federal question jurisdiction did not even exist for much of this Nation's history. And pre-enforcement review under the statutory regime the petitioners invoke, 42 U.S.C. § 1983, was not prominent until the mid-20th century. See *Monroe v. Pape*, 365 U.S. 167 (1961). To this day, many federal constitutional rights are as a practical matter asserted typically as defenses to state-law claims, not in federal pre-enforcement cases like this one. See, *e.g.*, *Snyder v. Phelps*, 562 U.S. 443 (2011) (First Amendment used as a defense to a state tort suit).

Finally, JUSTICE SOTOMAYOR contends that S. B. 8 "chills" the exercise of federal constitutional rights. If nothing else, she says, this fact warrants allowing further relief in this case. Here again, however, it turns out that the Court has already and often confronted—and rejected—this very line of thinking. As our cases explain, the "chilling effect" associated with a potentially unconstitutional law being "'on the books'" is insufficient to "justify federal intervention" in a pre-enforcement suit. *Younger v. Harris*, 401 U. S. 37 (1971). Instead, this Court has always required proof

of a more concrete injury and compliance with traditional rules of equitable practice. See *Muskrat*; *Ex parte Young*. The Court has consistently applied these requirements whether the challenged law in question is said to chill the free exercise of religion, the freedom of speech, the right to bear arms, or any other right. The petitioners are not entitled to a special exemption.

Maybe so, JUSTICE SOTOMAYOR replies, but what if other States pass legislation similar to S. B. 8? Doesn't that possibility justify throwing aside our traditional rules? It does not. If other States pass similar legislation, pre-enforcement challenges like the one the Court approves today may be available in federal court to test the constitutionality of those laws. Again, too, further pre-enforcement challenges may be permissible in state court and federal law may be asserted as a defense in any enforcement action. To the extent JUSTICE SOTOMAYOR seems to wish even more tools existed to combat this type of law, Congress is free to provide them. In fact, the House of Representatives recently passed a statute that would purport to preempt state laws like S. B. 8. See H. R. 3755, 117th Cong., 1st Sess. (2021). But one thing this Court may never do is disregard the traditional limits on the jurisdiction of federal courts just to see a favored result win the day. At the end of that road is a world in which "[t]he division of power" among the branches of Government "could exist no longer, and the other departments would be swallowed up by the judiciary." 4 Papers of John Marshall 95 (C. Cullen ed. 1984).

IV

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

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

[The opinion of JUSTICE THOMAS, concurring in part and dissenting in part, is omitted.]

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

Texas has passed a law banning abortions after roughly six weeks of pregnancy. See S. B. 8, 87th Leg., Reg. Sess. (2021). That law is contrary to this Court's decisions in *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of*

Southeastern Pa. v. Casey, 505 U.S. 833 (1992). It has had the effect of denying the exercise of what we have held is a right protected under the Federal Constitution.[1]

Texas has employed an array of stratagems designed to shield its unconstitutional law from judicial review. To cite just a few, the law authorizes "[a]ny person," other than a government official, to bring a lawsuit against anyone who "aids or abets," or intends to aid or abet, an abortion performed after roughly six weeks; has special preclusion rules that allow multiple lawsuits concerning a single abortion; and contains broad venue provisions that allow lawsuits to be brought in any of Texas's 254 far flung counties, no matter where the abortion took place. See Tex. Health & Safety Code Ann. §§ 171.208(a), (e)(5), 171.210. The law then provides for minimum liability of $10,000 plus costs and fees, while barring defendants from recovering their own costs and fees if they prevail. §§ 171.208(b), (i). It also purports to impose backward-looking liability should this Court's precedents or an injunction preventing enforcement of the law be overturned. §§ 171.208(e)(2), (3). And it forbids many state officers from directly enforcing it. § 171.207.

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

In my view, several other respondents are also proper defendants. First, under Texas law, the Attorney General maintains authority coextensive with the Texas Medical Board to address violations of S. B. 8. The Attorney General may "institute an action for a civil penalty" if a physician violates a rule or order of the Board. Tex. Occ. Code Ann. § 165.101. The Board's rules—found in the Texas Administrative Code—prohibit licensed physicians from violating Texas's Health and Safety Code, which includes S. B. 8. See 22 Tex. Admin. Code § 190.8(7) ("the Board shall take appropriate disciplinary action against a physician who violates ... Chapter 171, Texas Health and Safety Code"). 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*'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. *Young*. The role that

---

[1] The law states that abortion providers may raise an "undue burden" defense, but that defense is no more than a distorted version of the undue burden standard set forth in *Casey*. The defense in the statute does not, for example, allow defendants to rely on the effect that an award of relief would have on others throughout the State, even though our precedents specifically permit such reliance. *June Medical Services L. L. C. v. Russo*, 140 S.Ct. 2103 (2020) (opinion of BREYER, J.). The provision, after all, is entitled "Undue Burden Defense *Limitations*."

clerks play with respect to S. B. 8 is distinct from that of the judges. Judges are in no sense adverse to the parties subject to the burdens of S. B. 8. But as a practical matter clerks are—to the extent they "set[ ] in motion the machinery" that imposes these burdens on those sued under S. B. 8. *Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337 (1969).

The majority contends that this conclusion cannot be reconciled with *Young*, pointing to language in *Young* that suggests it would be improper to enjoin courts from exercising jurisdiction over cases. Decisions after *Young*, however, recognize that suits to enjoin state court proceedings may be proper. See *Mitchum v. Foster*, 407 U.S. 225 (1972); see also *Pulliam v. Allen*, 466 U.S. 522 (1984). And this conclusion is consistent with the entire thrust of *Young* itself. Just as in *Young*, those sued under S. B. 8 will be "harass[ed] ... with a multiplicity of suits or litigation generally in an endeavor to enforce penalties under an unconstitutional enactment. Under these circumstances, where the mere "commencement of a suit," and in fact just the threat of it, is the "actionable injury to another," the principles underlying *Young* authorize relief against the court officials who play an essential role in that scheme. Any novelty in this remedy is a direct result of the novelty of Texas's scheme.[2]

* * *

The clear purpose and actual effect of S. B. 8 has been to nullify this Court's rulings. It is, however, a basic principle that the Constitution is the "fundamental and paramount law of the nation," and "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137 (1803). Indeed, "[i]f the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery." *United States v. Peters*, 9 U.S. 115 (1809). The nature of the federal right infringed does not matter; it is the role of the Supreme Court in our constitutional system that is at stake.

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

For nearly three months, the Texas Legislature has substantially suspended a constitutional guarantee: a pregnant woman's right to control her own body. See *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992). In open defiance of this Court's precedents, Texas enacted Senate Bill 8 (S. B. 8), which bans abortion starting approximately six weeks after a woman's last menstrual period, well before the point of fetal viability. Since S. B. 8 went into effect on September 1, 2021, the law has threatened abortion care providers with the prospect of essentially unlimited suits for damages, brought

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

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.

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

I

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

S. B. 8 authorizes any person—who need not have any relationship to the woman, doctor, or procedure at issue—to sue, for at least $10,000 in damages, anyone who performs, induces, assists, or even intends to assist an abortion in violation of Texas' unconstitutional 6-week ban. See Tex. Health & Safety Code Ann. § 171.208(a). Those vulnerable to suit might include a medical provider, a receptionist, a friend who books an appointment, or a ride-share driver who takes a woman to a clinic.

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

S. B. 8 further purports to limit the substantive defenses that defendants may raise. It permits what it calls an "undue burden" defense, but redefines that standard to be a shell of what the Constitution requires: Rather than considering the law's

cumulative effect on abortion access, see *Whole Woman's Health v. Hellerstedt*, 579 U. S. 582 (2016), it instructs state courts to focus narrowly on the effect on the parties, §§ 171.209(b)(2), (d)(2). It further purports to impose retroactive liability for abortion care provided while the law is enjoined if the injunction is later overturned on appeal, § 171.208(e)(3), as well as for abortion care provided while *Roe* and *Casey* are in effect if this Court later overrules one of those cases, § 171.209(e).

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

II

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

In 1908, this Court decided *Ex parte Young*, 209 U.S. 123. In *Young*, the Court considered a Minnesota law fixing new rates for railroads and adopting high fines and penalties for failure to comply with the rates. The law purported to provide no option to challenge the new rates other than disobeying the law and taking "the risk ... of being subjected to such enormous penalties because the railroad officers and employees "could not be expected to disobey any of the provisions ... at the risk of such fines and penalties," the law effectively resulted in "a denial of any hearing to the company."

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

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

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

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

In addition, state-court clerks are proper defendants in this action. This Court has long recognized that "the action of state courts and judicial officers in their official capacities is to be regarded as action of the State." *Shelley v. Kraemer*, 334 U.S. 1 (1948). In *Shelley*, private litigants sought to enforce restrictive racial covenants designed to preclude Black Americans from home ownership and to preserve residential segregation. The Court explained that these ostensibly private covenants involved state action because "but for the active intervention of the state courts, supported by the full panoply of state power," the covenants would be unenforceable. Here, there is more. S. B. 8's formidable chilling effect, even before suit, would be nonexistent if not for the state-court officials who docket S. B. 8 cases with lopsided procedures and limited defenses. Because these state actors are necessary components of that chilling effect and play a clear role in the enforcement of S. B. 8, they are proper defendants.

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

Moreover, the Court has emphasized that "the principles undergirding the *Ex parte Young doctrine*" may "support its application" to new circumstances, "novelty notwithstanding." *Stewart*. 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 as historically applied, it is especially perverse for the Court to shield it from scrutiny based on its novelty.[3]

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

Finally, the Court raises "the question of remedy." For the Court, that question cascades into many others about the precise contours of an injunction against Texas court clerks in light of state procedural rules. Vexing though the Court may find these fact-intensive questions, they are exactly the sort of tailoring work that District Courts perform every day. The Court should have afforded the District Court an opportunity to craft appropriate relief before throwing up its hands and declaring the task unworkable. For today's purposes, the answer is simple: If, as our precedents make clear (and as the question presented presumes), S. B. 8 is unconstitutional, contrary state rules of civil procedure must give way. See U.S. Const., Art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land").

In the midst of its handwringing over remedy, the Court also complains that the petitioners offer no "meaningful limiting principles for their theory." 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." The petitioners do not argue that pre-enforcement relief against state-court clerks should be available absent those two unique circumstances, and indeed, those circumstances are why the petitioners are threatened with a multiplicity of suits and face a constitutionally intolerable choice under *Young*.

The Court further observes that "no court may 'lawfully enjoin the world at large.'" But the petitioners do not seek such relief. It is Texas that has taken the unprecedented step of delegating its enforcement authority to the world at large without requiring any pre-existing stake. Under the Court's precedents, private actors who take up a State's mantle "exercise ... a right or privilege having its source in state authority" and may "be described in all fairness as ... state actor[s]."

---

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

Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991). This Court has not held that state actors who have actual notice of an injunction may flout its terms, even if it nominally binds other state officials, and it errs by implying as much now. The Court responds by downplaying how exceptional Texas' scheme is, but it identifies no true analogs in precedent. S. B. 8 is no tort or private attorneys general statute: It deputizes anyone to sue without establishing any pre-existing personal stake (i.e., standing) and then skews procedural rules to favor these plaintiffs.

III

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

The State's concessions at oral argument laid bare the sweeping consequences of its position. In response to questioning, counsel for the State conceded that pre-enforcement review would be unavailable even if a statute imposed a bounty of $1,000,000 or higher. Counsel further admitted that no individual constitutional right was safe from attack under a similar scheme. Counsel even asserted that a State could further rig procedures by abrogating a state supreme court's power to bind its own lower courts. Counsel maintained that even if a State neutered appellate courts' power in such an extreme manner, aggrieved parties' only path to a federal forum would be to violate the unconstitutional law, accede to infringement of their substantive and procedural rights all the way through the state supreme court, and then, at last, ask this Court to grant discretionary certiorari review. All of these burdens would layer atop S. B. 8's existing manipulation of state-court procedures and defenses.

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

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 42 U.S.C. § 1983. "Proponents of the legislation noted that state courts were being used to harass and injure individuals, either because the state courts were powerless to stop deprivations or were in league with those who were bent upon abrogation of federally protected rights." *Mitchum*. Thus, § 1983's "very purpose," consonant with the values that motivated the *Young* Court some decades later, was "to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.'" *Mitchum* (quoting *Ex parte Virginia*, 100 U.S. 339 (1880)).

S. B. 8 raises another challenge to federal supremacy, and by blessing significant portions of the law's effort to evade review, the Court comes far short of

meeting the moment. The Court's delay in allowing this case to proceed has had catastrophic consequences for women seeking to exercise their constitutional right to an abortion in Texas. These consequences have only rewarded the State's effort at nullification. Worse, by foreclosing suit against state-court officials and the state attorney general, the Court clears the way for States to reprise and perfect Texas' scheme in the future to target the exercise of any right recognized by this Court with which they disagree.

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

* * *

In its finest moments, this Court has ensured that constitutional rights "can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes ... whether attempted 'ingeniously or ingenuously.'" *Cooper v. Aaron*, 358 U.S. 1 (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.

Note: Pre-Enforcement Constitutional Challenges After Whole Woman's Health

1. Two post-scripts to the Court's decision in *Whole Woman's Health* deserve mention. First, although the Supreme Court narrowly allowed the plaintiffs to pursue their constitutional challenges against a few state licensing officials, that victory was short-lived. On remand, the U.S. Court of Appeals for the Fifth Circuit

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

sought clarification of those defendants' enforcement authority under state law, certifying the question to the Texas Supreme Court. That court, in turn, replied that none of the defendant officials had power to enforce S.B. 8 in any way, directly or indirectly. *Whole Woman's Health v. Jackson*, 642 S.W.3d 569 (Tex. 2022). Thus, less than five months after the Supreme Court's decision, the Fifth Circuit ordered all challenges to S.B. 8 to be dismissed.

Second, as Chief Justice Roberts observed, the restrictions on abortion imposed by S.B. 8 were plainly unconstitutional under the Court's precedents at the time of its enactment. Later in the same Term, however, the Court reached the merits of a similar constitutional challenge and dramatically reshaped the legal framework governing abortion. *See Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022). Reversing *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), the Court held that the Constitution does not confer a right to abortion, freeing states to adopt such restrictions as they see fit. Ironically, then, the decision in *Whole Woman's Health* will have little effect in abortion cases, at least in the short term. With a constitutional right to abortion no longer recognized, pre-enforcement constitutional challenges to abortion restrictions cannot succeed even if they are allowed to move forward.

2. Nonetheless, *Whole Woman's Health* could radically alter the way federal courts review the constitutionality of state laws. With S.B. 8, Texas crafted a novel enforcement scheme that neatly—indeed, rather ingeniously—thwarted the possibility of pre-enforcement constitutional challenge. By assigning enforcement authority entirely to private parties, state law deprived the plaintiffs of any executive official who could serve as a proper defendant under *Ex Parte Young*. The result is that patently unconstitutional state laws may remain on the books, chilling constitutionally protected conduct for years—perhaps indefinitely—with no opportunity for federal court review.

Indeed, as the dissenting Justices noted, other States have taken notice and are already following Texas's playbook. Most prominently, California has enacted sweeping new restrictions on firearms, including a prohibition against the manufacture, distribution, or sale of assault weapons. Cal. SB-1327 (enacted July 22, 2022). Ordinarily, restrictions like these would prompt an immediate pre-enforcement challenge based on the Second Amendment's right to bear arms. Like S.B. 8, however, California's restrictions on firearms may be enforced only through civil actions filed by private parties against any person who violates the law, or who aids and abets a violation. And like S.B. 8, the law creates significant risks for firearm owners, with minimum damages of $10,000 per weapon, plus attorney fee shifting for prevailing plaintiffs but never for prevailing defendants. Upon signing the bill, California Governor Gavin Newsom tweeted: "If states can shield their laws from review by federal courts, then CA will use that authority to help protect lives."

Do copycat efforts like California's firearms law confirm Justice Sotomayor's prediction that the Court has handed States the power effectively to nullify constitutional rights?

3. Should it matter that the enforcement mechanisms of S.B. 8 and SB-1327 were *intended* to frustrate federal constitutional review? The drafters of the law plainly had a deep understanding the constitutional and equitable limits on federal-court authority described in this Chapter. (They no doubt excelled in their Federal Courts class!) Then they exploited those limits to circumvent *Ex parte Young*, a form of review that the Supreme Court has described as essential to ensure the

supremacy of federal law. Moreover, they did so in service of laws that (when enacted) were brazenly unconstitutional, yet which carried such daunting penalties that many people would have no choice but to forego constitutionally protected conduct. When evaluating this kind of novel state-law enforcement scheme, should the Supreme Court take into account whether state legislators' purpose is to prevent the exercise of federal constitutional rights?

On the other hand, even if the Court is troubled by a State's deliberate effort to undermine federal law, how should it respond? Should it abandon constitutional and equitable limits on the power of federal courts that it has recognized, no matter how well-reasoned and well-settled? Should it simply announce that pre-enforcement challenges to state laws are always permitted? And if so, against which defendants? The state attorney general, state-court judges or clerks, or someone else? In a portion of the opinion not reproduced above, Justice Thomas noted that many state-court judges and clerks personally support the right to abortion and believe that S.B. 8 is unconstitutional. Does it make sense to compel people in that position to defend the law against a pre-enforcement challenge?

4. Offering assurances that its holding will not enable states to "nullify" state laws by shielding them from pre-enforcement challenge, the majority points to two alternative paths to review. The first is through state court, where federal law is binding under the Supremacy Clause. Does that possibility assuage concerns that states might insulate laws from review and thereby chill constitutionally protected conduct? Consider, for example, that many state courts have adopted standing and equity rules that mirror their federal counterparts. Moreover, a state legislature could directly prohibit any action modeled on *Ex parte Young*, short-circuiting any pre-enforcement review. That would leave only *post*-enforcement litigation, in which defendants exercise their rights, wait to be sued in state court, and then interpose their federal defense. If you were a state legislator who wished to forestall even that type of challenge to a state law, could you devise changes to state-court procedures that close off that path—or perhaps slow progress along the path to a crawl?

The second is through Congress, which could create an express cause of action expanding upon *Ex Parte Young* and granting plaintiffs an "unqualified" right to pre-enforcement constitutional review in federal court. To the extent *Whole Woman's Health* rests on traditional principles of equity, Congress certainly could override its reasoning and direct courts to grant relief in new circumstances. But is that the sole basis for the Court's decision? Suppose, for example, that Congress enacted a statute providing that federal district courts shall review constitutional challenges to any state law filed against the state attorney general (or some other state officials) regardless of whether the defendant plays any role in enforcing the challenged law. Could a federal court exercise jurisdiction in such a case, consistent with Article III? Is there any other way that Congress by statute could prevent other states from deploying the strategy devised by Texas in S.B. 8?