Federal Courts

CASES AND MATERIALS ON JUDICIAL FEDERALISM AND THE LAWYERING PROCESS

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Chapter 3
Justiciability and the Case or Controversy Requirement

A. Standing

[1] The Basic Doctrine

Page 83: ***insert after Note 8:***

9. One challenge for the plaintiffs in *Allen* is the fact that the real source of the injury comes from racially segregated schools, but the plaintiffs are suing the federal government in order to remedy that injury. That problem persists in other cases.

In *Murthy v. Missouri*, 603 U.S. __ (2024), plaintiffs alleged that social media platforms like Facebook and Twitter engaged in content moderation policies for speech the platforms deemed were false or misleading. The platforms targeted speech relating to the 2020 COVID-19 pandemic and the 2020 election. Federal government officials publicly and privately called for the platforms to address such misinformation. The plaintiffs allege the government helped censor speech.

Justice Barrett, in an opinion on behalf of six justices, concluded that none of the plaintiffs had standing. In particular, her opinion focused on one user, Jill Hines, who had her social media posts removed. and the relationship to the relief sought, a permanent injunction. Traceability was weak, Justice Barrett's explained, because of a "loose match" between the posts that were removed and content moderation policies. For example, most of the content moderation happened before federal officials even contacted Facebook. in November 2021, Facebook worked with the Centers for Disease Control and Prevention to identify false claims, including "the COVID vaccine is not safe for kids." Facebook notified Hines that in April 2023 about a content policy violation for a post about children and vaccines. But Hines's posts were about the World Health Organization and the pharmaceutical industry, which were, at best, loosely linked to the policy.

Additionally, because the plaintiff sought an injunction, she must show that the wrongful behavior was "likely" to occur. But there was no evidence of an ongoing pressure campaign—most government communication with the social media platforms has subsided by 2022, even before the plaintiffs filed the complaint. Plaintiffs must show a risk traceable to the particular defendants. And while the social media platforms may continue to censor speech, that decision is not redressable in an action against the government.

Justice Alito in dissent argued that the pressure campaign by government officials has lingering effects on social media platforms that the majority was too quick to dismiss. Additionally, he argued that the majority's application of the standard for demonstrating that wrongful behavior was "likely" to occur verged on a "new and elevated standard" approaching near certainty.

10. Can a plaintiff's "self-inflicted" injury still be "fairly traceable" to a defendant? Yes. In *Federal Election Commission v. Ted Cruz for Senate*, 596 U.S. 289 (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*, 594 U.S. 413 (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 names, 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 the matter. 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 a 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) *and certiorari denied*, 143 S. Ct. 775 (2023) (mem.).

Food and Drug Administration v. Alliance for Hippocratic Medicine

Supreme Court of the United States, 2024.

602 U.S. 367

JUSTICE KAVANAUGH delivered the opinion of the Court.

In 2016 and 2021, the Food and Drug Administration relaxed its regulatory requirements for mifepristone, an abortion drug. Those changes made it easier for doctors to prescribe and pregnant women to obtain mifepristone. Several pro-life doctors and associations sued FDA, arguing that FDA's actions violated the Administrative Procedure Act. But the plaintiffs do not prescribe or use mifepristone. And FDA is not requiring them to do or refrain from doing anything. Rather, the plaintiffs want FDA to make mifepristone more difficult for other doctors to prescribe and for pregnant women to obtain. Under Article III of the Constitution, a plaintiff 's desire to make a drug less available for others does not establish standing to sue. Nor do the plaintiffs' other standing theories suffice. Therefore, the plaintiffs lack standing to challenge FDA's actions.

I

A

Under federal law, the U. S. Food and Drug Administration, an agency within the Executive Branch, ensures that drugs on the market are safe and effective. For FDA to approve a new drug, the drug sponsor (usually the drug's manufacturer or potential marketer) must submit an application demonstrating that the drug is safe and effective when used as directed. 21 U.S.C. §355(d). The sponsor's application must generally include proposed labeling that specifies the drug's dosage, how to take the drug, and the specific conditions that the drug may treat. 21 CFR §§201.5, 314.50 (2022).

If FDA determines that additional safety requirements are necessary, FDA may impose extra requirements on prescription and use of the drug. 21 U.S.C. §355–1(f)(3). For example, FDA may require that prescribers undergo specialized training; mandate that the drug be dispensed only in certain settings like hospitals; or direct that doctors monitor patients taking the drug. *Ibid.*

In 2000, FDA approved a new drug application for mifepristone tablets marketed under the brand name Mifeprex. FDA approved Mifeprex for use to terminate pregnancies, but only up to seven weeks of pregnancy. To help ensure that Mifeprex would be used safely and effectively, FDA placed further restrictions on the drug's use and distribution. . . .

In 2015, Mifeprex's distributor Danco Laboratories submitted a supplemental new drug application seeking to amend Mifeprex's labeling and to relax some of the restrictions that FDA had imposed. In 2016, FDA approved the proposed changes. FDA deemed Mifeprex safe to terminate pregnancies up to 10 weeks rather than 7 weeks. FDA allowed healthcare providers such as nurse practitioners to prescribe Mifeprex. And FDA approved a dosing regimen that reduced the number of required in- person visits from three to one—a single visit to receive Mifeprex. In addition,

FDA changed prescribers' adverse event reporting obligations to require prescribers to report only fatalities—a reporting requirement that was still more stringent than the requirements for most other drugs.

In 2019, FDA approved an application for generic mifepristone. FDA established the same conditions of use for generic mifepristone as for Mifeprex.

In 2021, FDA again relaxed the requirements for Mifeprex and generic mifepristone. Relying on experience gained during the COVID–19 pandemic about pregnant women using mifepristone without an in-person visit to a healthcare provider, FDA announced that it would no longer enforce the initial in-person visit requirement.

B

Because mifepristone is used to terminate pregnancies, FDA's approval and regulation of mifepristone have generated substantial controversy from the start. In 2002, three pro-life associations submitted a joint citizen petition asking FDA to rescind its approval of Mifeprex. FDA denied their petition.

In 2019, two pro-life medical associations filed another petition, this time asking FDA to withdraw its 2016 modifications to mifepristone's conditions of use. FDA denied that petition as well.

This case began in 2022. Four pro-life medical associations, as well as several individual doctors, sued FDA in the U. S. District Court for the Northern District of Texas. Plaintiffs brought claims under the Administrative Procedure Act. They challenged the lawfulness of FDA's 2000 approval of Mifeprex; FDA's 2019 approval of generic mifepristone; and FDA's 2016 and 2021 actions modifying mifepristone's conditions of use. Danco Laboratories, which sponsors Mifeprex, intervened to defend FDA's actions. The plaintiffs moved for a preliminary injunction that would require FDA to rescind approval of mifepristone or, at the very least, to rescind FDA's 2016 and 2021 actions.

The District Court agreed with the plaintiffs and in effect enjoined FDA's approval of mifepristone, thereby ordering mifepristone off the market. . . .

. . .

. . . This Court stayed the District Court's order in its entirety pending the disposition of FDA's and Danco's appeals in the Court of Appeals and ultimate resolution by this Court. As a result of this Court's stay, Mifeprex and generic mifepristone have remained available as allowed by FDA's relaxed 2016 and 2021 requirements.

A few months later, the Court of Appeals issued its decision on the merits of the District Court's order, affirming in part and vacating in part. 78 F.4th 210, 222–23 (CA5 2023). The Court of Appeals first concluded that the individual doctors and the pro-life medical associations had standing. The Court of Appeals next concluded that plaintiffs were not likely to succeed on their challenge to FDA's 2000 approval of Mifeprex and 2019 approval of generic mifepristone. So the Court of Appeals vacated the District Court's order as to those agency actions. But the Court of Appeals agreed with the District Court that plaintiffs were likely to succeed in showing that FDA's 2016 and 2021 actions were unlawful.

. . .

II

The threshold question is whether the plaintiffs have standing to sue under Article III of the Constitution. Article III standing is a "bedrock constitutional requirement that this Court has applied to all manner of important disputes." *United States v. Texas*, 599 U.S. 670, 675 (2023). Standing is "built on a single basic idea—the idea of separation of powers." *Ibid.* (quotation marks omitted). Importantly, separation of powers "was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 422–23 (2021) (quotation marks omitted). Therefore, we begin as always with the precise text of the Constitution.

Article III of the Constitution confines the jurisdiction of federal courts to "Cases" and "Controversies." The case or controversy requirement limits the role of the Federal Judiciary in our system of separated powers. As this Court explained to President George Washington in 1793 in response to his request for a legal opinion, federal courts do not issue advisory opinions about the law—even when requested by the President. 13 Papers of George Washington: Presidential Series 392 (C. Patrick ed. 2007). Nor do federal courts operate as an open forum for citizens "to press general complaints about the way in which government goes about its business." *Allen v. Wright*, 468 U.S. 737, 760 (1984) (quotation marks omitted); *see California v. Texas*, 593 U.S. 659, 673 (2021); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 487 (1982); *United States v. Richardson*, 418 U.S. 166, 175 (1974); *Ex parte Levitt*, 302 U.S. 633, 634 (1937) (per curiam); *Massachusetts v. Mellon*, 262 U.S. 447, 487–88 (1923); *Fairchild v. Hughes*, 258 U.S. 126, 129–30 (1922).

As Justice Scalia memorably said, Article III requires a plaintiff to first answer a basic question: "'What's it to you?'" A. Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 882 (1983). For a plaintiff to get in the federal courthouse door and obtain a judicial determination of what the governing law is, the plaintiff cannot be a mere bystander, but instead must have a "personal stake" in the dispute. *TransUnion*, 594 U.S., at 423. The requirement that the plaintiff possess a personal stake helps ensure that courts decide litigants' legal rights in specific cases, as Article III requires, and that courts do not opine on legal issues in response to citizens who might "roam the country in search of governmental wrongdoing." *Valley Forge*, 454 U.S., at 487; *see, e.g.*, *Schlesinger v. Reservists Comm. To Stop the War*, 418 U.S. 208, 227 (1974); *Richardson*, 418 U.S., at 175; *Tyler v. Judges of Court of Registration*, 179 U.S. 405, 406 (1900). Standing also "tends to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge*, 454 U.S., at 472. Moreover, the standing doctrine serves to protect the "autonomy" of those who are most directly affected so that they can decide whether and how to challenge the defendant's action. Id., at 473.

By limiting who can sue, the standing requirement implements "the Framers' concept of the proper—and properly limited—role of the courts in a democratic society." J. Roberts, *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1220

(1993) (quotation marks omitted). In particular, the standing requirement means that the federal courts decide some contested legal questions later rather than sooner, thereby allowing issues to percolate and potentially be resolved by the political branches in the democratic process. *See Raines v. Byrd*, 521 U.S. 811, 829–30 (1997); *cf. Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 420–22 (2013). And the standing requirement means that the federal courts may never need to decide some contested legal questions: "Our system of government leaves many crucial decisions to the political processes," where democratic debate can occur and a wide variety of interests and views can be weighed. *Schlesinger*, 418 U.S., at 227; *see Campbell v. Clinton*, 203 F.3d 19, 23 (CADC 2000).

A

The fundamentals of standing are well-known and firmly rooted in American constitutional law. To establish standing, as this Court has often stated, a plaintiff must demonstrate (i) that she has suffered or likely will suffer an injury in fact, (ii) that the injury likely was caused or will be caused by the defendant, and (iii) that the injury likely would be redressed by the requested judicial relief. *See Summers v. Earth Island Institute*, 555 U.S. 488, 493 (2009); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–561 (1992). Those specific standing requirements constitute "an essential and unchanging part of the case-or- controversy requirement of Article III." *Id.*, at 560.

The second and third standing requirements—causation and redressability—are often "flip sides of the same coin." *Sprint Communications Co. v. APCC Services, Inc.*, 554 U.S. 269, 288 (2008). If a defendant's action causes an injury, enjoining the action or awarding damages for the action will typically redress that injury. So the two key questions in most standing disputes are injury in fact and causation.

First is injury in fact. An injury in fact must be "concrete," meaning that it must be real and not abstract. *See TransUnion*, 594 U.S., at 424. The injury also must be particularized; the injury must affect "the plaintiff in a personal and individual way" and not be a generalized grievance. *Lujan*, 504 U.S., at 560, n. 1. An injury in fact can be a physical injury, a monetary injury, an injury to one's property, or an injury to one's constitutional rights, to take just a few common examples. Moreover, the injury must be actual or imminent, not speculative—meaning that the injury must have already occurred or be likely to occur soon. *Clapper*, 568 U.S., at 409. And when a plaintiff seeks prospective relief such as an injunction, the plaintiff must establish a sufficient likelihood of future injury. Id., at 401. By requiring the plaintiff to show an injury in fact, Article III standing screens out plaintiffs who might have only a general legal, moral, ideological, or policy objection to a particular government action. For example, a citizen does not have standing to challenge a government regulation simply because the plaintiff believes that the government is acting illegally. *See Valley Forge*, 454 U.S., at 473, 487. A citizen may not sue based only on an "asserted right to have the Government act in accordance with law." *Allen*, 468 U.S., at 754; *Schlesinger*, 418 U.S., at 225–27. Nor may citizens sue merely because their legal objection is accompanied by a strong moral, ideological, or policy objection to a government action. *See Valley Forge*, 454 U.S., at 473.

The injury in fact requirement prevents the federal courts from becoming a "vehicle for the vindication of the value interests of concerned bystanders." *Allen*, 468 U.S., at 756 (quotation marks omitted). An Article III court is not a legislative

assembly, a town square, or a faculty lounge. Article III does not contemplate a system where 330 million citizens can come to federal court whenever they believe that the government is acting contrary to the Constitution or other federal law. *See id.*, at 754. Vindicating "the public interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive." *Lujan*, 504 U. S., at 576.

In sum, to sue in federal court, a plaintiff must show that he or she has suffered or likely will suffer an injury in fact. Second is causation. The plaintiff must also establish that the plaintiff 's injury likely was caused or likely will be caused by the defendant's conduct.

Government regulations that require or forbid some action by the plaintiff almost invariably satisfy both the injury in fact and causation requirements. So in those cases, standing is usually easy to establish. *See Lujan*, 504 U.S., at 561–62; *see, e.g.*, *Susan B. Anthony List v. Driehaus*, 573 U. S. 149, 162–63 (2014).

By contrast, when (as here) a plaintiff challenges the government's "unlawful regulation (or lack of regulation) of someone else," "standing is not precluded, but it is ordinarily substantially more difficult to establish." *Lujan*, 504 U.S., at 562 (quotation marks omitted); *see Summers*, 555 U.S., at 493. That is often because unregulated parties may have more difficulty establishing causation—that is, linking their asserted injuries to the government's regulation (or lack of regulation) of someone else. *See Clapper*, 568 U.S., at 413–14; *Lujan*, 504 U.S., at 562; *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 74 (1978); *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41–46 (1976); *Warth v. Seldin*, 422 U. S. 490, 504–508 (1975).

When the plaintiff is an unregulated party, causation "ordinarily hinge[s] on the response of the regulated (or regulable) third party to the government action or inaction—and perhaps on the response of others as well." *Lujan*, 504 U.S., at 562. Yet the Court has said that plaintiffs attempting to show causation generally cannot "rely on speculation about the unfettered choices made by independent actors not before the courts." *Clapper*, 568 U.S., at 415, n. 5 (quotation marks omitted); see also *Bennett v. Spear*, 520 U.S. 154, 168–69 (1997). Therefore, to thread the causation needle in those circumstances, the plaintiff must show that the "'third parties will likely react in predictable ways'" that in turn will likely injure the plaintiffs. *California*, 593 U.S., at 675 (quoting *Department of Commerce v. New York*, 588 U.S. 752, 768 (2019)).

As this Court has explained, the "line of causation between the illegal conduct and injury"—the "links in the chain of causation," *Allen*, 468 U.S., at 752, 759—must not be too speculative or too attenuated, *Clapper*, 568 U.S., at 410–11. The causation requirement precludes speculative links—that is, where it is not sufficiently predictable how third parties would react to government action or cause downstream injury to plaintiffs. *See Allen*, 468 U.S., at 757–59; *Simon*, 426 U.S., at 41–46. The causation requirement also rules out attenuated links—that is, where the government action is so far removed from its distant (even if predictable) ripple effects that the plaintiffs cannot establish Article III standing. *See Allen*, 468 U.S., at 757–59; *cf. Department of Commerce*, 588 U.S., at 768.

The causation requirement is central to Article III standing. Like the injury in fact requirement, the causation requirement screens out plaintiffs who were not

injured by the defendant's action. Without the causation requirement, courts would be "virtually continuing monitors of the wisdom and soundness" of government action. *Allen*, 468 U.S., at 760 (quotation marks omitted).

Determining causation in cases involving suits by unregulated parties against the government is admittedly not a "mechanical exercise." *Id.*, at 751. That is because the causation inquiry can be heavily fact-dependent and a "question of degree," as private petitioner's counsel aptly described it here. Tr. of Oral Arg. 50. Unfortunately, applying the law of standing cannot be made easy, and that is particularly true for causation. Just as causation in tort law can pose line-drawing difficulties, so too can causation in standing law when determining whether an unregulated party has standing.

That said, the "absence of precise definitions" has not left courts entirely "at sea in applying the law of standing." *Allen*, 468 U. S., at 751. Like "most legal notions, the standing concepts have gained considerable definition from developing case law." Ibid. As the Court has explained, in "many cases the standing question can be answered chiefly by comparing the allegations of the particular complaint to those made in prior standing cases." *Id.*, at 751–52. Stated otherwise, assessing standing "in a particular case may be facilitated by clarifying principles or even clear rules developed in prior cases." *Id.*, at 752.

Consistent with that understanding of how standing principles can develop and solidify, the Court has identified a variety of familiar circumstances where government regulation of a third-party individual or business may be likely to cause injury in fact to an unregulated plaintiff. For example, when the government regulates (or under-regulates) a business, the regulation (or lack thereof) may cause downstream or upstream economic injuries to others in the chain, such as certain manufacturers, retailers, suppliers, competitors, or customers. *E.g.*, *National Credit Union Admin. v. First Nat. Bank & Trust Co.*, 522 U.S. 479, 488, n. 4 (1998); *General Motors Corp. v. Tracy*, 519 U.S. 278, 286–87 (1997); *Barlow v. Collins*, 397 U.S. 159, 162–64 (1970); *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U. S. 150, 152 (1970). When the government regulates parks, national forests, or bodies of water, for example, the regulation may cause harm to individual users. *E.g.*, *Summers*, 555 U.S., at 494. When the government regulates one property, it may reduce the value of adjacent property. The list goes on. *See, e.g.*, *Department of Commerce*, 588 U.S., at 766–68.

As those cases illustrate, to establish causation, the plaintiff must show a predictable chain of events leading from the government action to the asserted injury—in other words, that the government action has caused or likely will cause injury in fact to the plaintiff.[2]

B

Here, the plaintiff doctors and medical associations are unregulated parties who seek to challenge FDA's regulation *of others*. Specifically, FDA's regulations apply to

[2] In cases of alleged future injuries to unregulated parties from government regulation, the causation requirement and the imminence element of the injury in fact requirement can overlap. Both target the same issue: Is it likely that the government's regulation or lack of regulation of someone else will cause a concrete and particularized injury in fact to the unregulated plaintiff?

doctors prescribing mifepristone and to pregnant women taking mifepristone. But the plaintiff doctors and medical associations do not prescribe or use mifepristone. And FDA has not required the plaintiffs to do anything or to refrain from doing anything.

The plaintiffs do not allege the kinds of injuries described above that unregulated parties sometimes can assert to demonstrate causation. Because the plaintiffs do not prescribe, manufacture, sell, or advertise mifepristone or sponsor a competing drug, the plaintiffs suffer no direct monetary injuries from FDA's actions relaxing regulation of mifepristone. Nor do they suffer injuries to their property, or to the value of their property, from FDA's actions. Because the plaintiffs do not use mifepristone, they obviously can suffer no physical injuries from FDA's actions relaxing regulation of mifepristone.

Rather, the plaintiffs say that they are pro-life, oppose elective abortion, and have sincere legal, moral, ideological, and policy objections to mifepristone being prescribed and used *by others*. The plaintiffs appear to recognize that those general legal, moral, ideological, and policy concerns do not suffice on their own to confer Article III standing to sue in federal court. So to try to establish standing, the plaintiffs advance several complicated causation theories to connect FDA's actions to the plaintiffs' alleged injuries in fact.

The first set of causation theories contends that FDA's relaxed regulation of mifepristone may cause downstream conscience injuries to the individual doctor plaintiffs and the specified members of the plaintiff medical associations, who are also doctors. (We will refer to them collectively as "the doctors.") The second set of causation theories asserts that FDA's relaxed regulation of mifepristone may cause downstream economic injuries to the doctors. The third set of causation theories maintains that FDA's relaxed regulation of mifepristone causes injuries to the medical associations themselves, who assert their own organizational standing. As we will explain, none of the theories suffices to establish Article III standing.

1

We first address the plaintiffs' claim that FDA's relaxed regulation of mifepristone causes conscience injuries to the doctors.

The doctors contend that FDA's 2016 and 2021 actions will cause more pregnant women to suffer complications from mifepristone, and those women in turn will need more emergency abortions by doctors. The plaintiff doctors say that they therefore may be required—against their consciences—to render emergency treatment completing the abortions or providing other abortion-related treatment.

The Government correctly acknowledges that a conscience injury of that kind constitutes a concrete injury in fact for purposes of Article III. . . .

But in this case—even assuming for the sake of argument that FDA's 2016 and 2021 changes to mifepristone's conditions of use cause more pregnant women to require emergency abortions and that some women would likely seek treatment from these plaintiff doctors—the plaintiff doctors have not shown that they could be forced to participate in an abortion or provide abortion-related medical treatment over their conscience objections.

That is because, as the Government explains, federal conscience laws definitively protect doctors from being required to perform abortions or to provide other treatment that violates their consciences. . . .

Not only as a matter of law but also as a matter of fact, the federal conscience laws have protected pro-life doctors ever since FDA approved mifepristone in 2000. The plaintiffs have not identified any instances where a doctor was required, notwithstanding conscience objections, to perform an abortion or to provide other abortion-related treatment that violated the doctor's conscience. Nor is there any evidence in the record here of hospitals overriding or failing to accommodate doctors' conscience objections.

In other words, none of the doctors' declarations says anything like the following: "Here is the treatment I provided, here is how it violated my conscience, and here is why the conscience protections were unavailable to me." . . .

In response to all of that, the doctors still express fear that another federal law, the Emergency Medical Treatment and Labor Act or EMTALA, might be interpreted to override those federal conscience laws and to require individual emergency room doctors to participate in emergency abortions in some circumstances. See 42 U.S.C. §1395dd. But the Government has disclaimed that reading of EMTALA. And we agree with the Government's view of EMTALA on that point. EMTALA does not require doctors to perform abortions or provide abortion-related medical treatment over their conscience objections because EMTALA does not impose obligations on individual doctors. . . .

The doctors say, however, that emergency room doctors summoned to provide emergency treatment may not have time to invoke federal conscience protections. But as the Government correctly explained, doctors need not follow a time-intensive procedure to invoke federal conscience protections. A doctor may simply refuse; federal law protects doctors from repercussions when they have "refused" to participate in an abortion. . . .

In short, given the broad and comprehensive conscience protections guaranteed by federal law, the plaintiffs have not shown—and cannot show—that FDA's actions will cause them to suffer any conscience injury. Federal law fully protects doctors against being required to provide abortions or other medical treatment against their consciences—and therefore breaks any chain of causation between FDA's relaxed regulation of mifepristone and any asserted conscience injuries to the doctors.[3]

2

In addition to alleging conscience injuries, the doctors cite various monetary and related injuries that they allegedly will suffer as a result of FDA's actions—in

[3] The doctors also suggest that they are distressed by others' use of mifepristone and by emergency abortions. It is not clear that this alleged injury is distinct from the alleged conscience injury. But even if it is, this Court has long made clear that distress at or disagreement with the activities of others is not a basis under Article III for a plaintiff to bring a federal lawsuit challenging the legality of a government regulation allowing those activities. See, *e.g.*, *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 473, 485–86 (1982); *United States v. Richardson,* 418 U.S. 166, 175 (1974); *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972).

particular, diverting resources and time from other patients to treat patients with mifepristone complications; increasing risk of liability suits from treating those patients; and potentially increasing insurance costs.

Those standing allegations suffer from the same problem—a lack of causation. The causal link between FDA's regulatory actions and those alleged injuries is too speculative or otherwise too attenuated to establish standing.

To begin with, the claim that the doctors will incur those injuries as a result of FDA's 2016 and 2021 relaxed regulations lacks record support and is highly speculative. The doctors have not offered evidence tending to suggest that FDA's deregulatory actions have both caused an increase in the number of pregnant women seeking treatment from the plaintiff doctors *and* caused a resulting diversion of the doctors' time and resources from other patients. Moreover, the doctors have not identified any instances in the past where they have been sued or required to pay higher insurance costs because they have treated pregnant women suffering mifepristone complications. Nor have the plaintiffs offered any persuasive evidence or reason to believe that the future will be different.

In any event, and perhaps more to the point, the law has never permitted doctors to challenge the government's loosening of general public safety requirements simply because more individuals might then show up at emergency rooms or in doctors' offices with follow-on injuries. Stated otherwise, there is no Article III doctrine of "doctor standing" that allows doctors to challenge general government safety regulations. Nor will this Court now create such a novel standing doctrine out of whole cloth.

Consider some examples. EPA rolls back emissions standards for power plants—does a doctor have standing to sue because she may need to spend more time treating asthma patients? A local school district starts a middle school football league—does a pediatrician have standing to challenge its constitutionality because she might need to spend more time treating concussions? A federal agency increases a speed limit from 65 to 80 miles per hour—does an emergency room doctor have standing to sue because he may have to treat more car accident victims? The government repeals certain restrictions on guns—does a surgeon have standing to sue because he might have to operate on more gunshot victims?

The answer is no: The chain of causation is simply too attenuated. Allowing doctors or other healthcare providers to challenge general safety regulations as unlawfully lax would be an unprecedented and limitless approach and would allow doctors to sue in federal court to challenge almost any policy affecting public health.

And in the FDA drug-approval context, virtually all drugs come with complications, risks, and side effects. Some drugs increase the risk of heart attack, some may cause cancer, some may cause birth defects, and some heighten the possibility of stroke. Approval of a new drug may therefore yield more visits to doctors to treat complications or side effects. So the plaintiffs' loose approach to causation would also essentially allow any doctor or healthcare provider to challenge any FDA decision approving a new drug. But doctors have never had standing to challenge FDA's drug approvals simply on the theory that use of the drugs by others may cause more visits to doctors.

And if we were now to invent a new doctrine of doctor standing, there would be no principled way to cabin such a sweeping doctrinal change to doctors or other healthcare providers. Firefighters could sue to object to relaxed building codes that increase fire risks. Police officers could sue to challenge a government decision to legalize certain activities that are associated with increased crime. Teachers in border states could sue to challenge allegedly lax immigration policies that lead to overcrowded classrooms.

We decline to start the Federal Judiciary down that uncharted path. That path would seemingly not end until virtually every citizen had standing to challenge virtually every government action that they do not like—an approach to standing that this Court has consistently rejected as flatly inconsistent with Article III.

We recognize that many citizens, including the plaintiff doctors here, have sincere concerns about and objections to others using mifepristone and obtaining abortions. But citizens and doctors do not have standing to sue simply because others are allowed to engage in certain activities— at least without the plaintiffs demonstrating how they would be injured by the government's alleged under-regulation of others. . . . Citizens and doctors who object to what the law allows others to do may always take their concerns to the Executive and Legislative Branches and seek greater regulatory or legislative restrictions on certain activities.

In sum, the doctors in this case have failed to establish Article III standing. The doctors have not shown that FDA's actions likely will cause them any injury in fact. The asserted causal link is simply too speculative or too attenuated to support Article III standing.[5]

3

That leaves the medical associations' argument that the associations themselves have organizational standing. Under this Court's precedents, organizations may have standing "to sue on their own behalf for injuries they have sustained." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379, n. 19 (1982). In doing so, however, organizations must satisfy the usual standards for injury in fact, causation, and redressability that apply to individuals. *Id.*, at 378–79.

According to the medical associations, FDA has "impaired" their "ability to provide services and achieve their organizational missions." Brief for Respondents 43. That argument does not work to demonstrate standing.

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[5] The doctors also suggest that they can sue in a representative capacity to vindicate their patients' injuries or potential future injuries, even if the doctors have not suffered and would not suffer an injury themselves. This Court has repeatedly rejected such arguments. Under this Court's precedents, third-party standing, as some have called it, allows a narrow class of litigants to assert the legal rights of others. *See Hollingsworth v. Perry*, 570 U.S. 693, 708 (2013). But "even when we have allowed litigants to assert the interests of others, the litigants themselves still must have suffered an injury in fact, thus giving them a sufficiently concrete interest in the outcome of the issue in dispute." *Ibid.* (quotation marks and alterations omitted). The third-party standing doctrine does not allow doctors to shoehorn themselves into Article III standing simply by showing that their patients have suffered injuries or may suffer future injuries.

Like an individual, an organization may not establish standing simply based on the "intensity of the litigant's interest" or because of strong opposition to the government's conduct, *Valley Forge*, 454 U.S., at 486, "no matter how longstanding the interest and no matter how qualified the organization," *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972). A plaintiff must show "far more than simply a setback to the organization's abstract social interests." *Havens*, 455 U.S., at 379. The plaintiff associations therefore cannot assert standing simply because they object to FDA's actions.

The medical associations say that they have demonstrated something more here. They claim to have standing not based on their mere disagreement with FDA's policies, but based on their incurring costs to oppose FDA's actions. They say that FDA has "caused" the associations to conduct their own studies on mifepristone so that the associations can better inform their members and the public about mifepristone's risks. Brief for Respondents 43. They contend that FDA has "forced" the associations to "expend considerable time, energy, and resources" drafting citizen petitions to FDA, as well as engaging in public advocacy and public education. Id., at 44 (quotation marks omitted). And all of that has caused the associations to spend "considerable resources" to the detriment of other spending priorities. Ibid.

But an organization that has not suffered a concrete injury caused by a defendant's action cannot spend its way into standing simply by expending money to gather information and advocate against the defendant's action. An organization cannot manufacture its own standing in that way.

The medical associations respond that under *Havens Realty Corp. v. Coleman*, standing exists when an organization diverts its resources in response to a defendant's actions. 455 U.S. 363. That is incorrect. Indeed, that theory would mean that all the organizations in America would have standing to challenge almost every federal policy that they dislike, provided they spend a single dollar opposing those policies. *Havens* does not support such an expansive theory of standing.

The relevant question in *Havens* was whether a housing counseling organization, HOME, had standing to bring a claim under the Fair Housing Act against Havens Realty, which owned and operated apartment complexes. *Id.*, at 368, 378. Havens had provided HOME's black employees false information about apartment availability—a practice known as racial steering. *Id.*, at 366, and n. 1, 368. Critically, HOME not only was an issue-advocacy organization, but also operated a housing counseling service. *Id.*, at 368. And when Havens gave HOME's employees false information about apartment availability, HOME sued Havens because Havens "perceptibly impaired HOME's ability to provide counseling and referral services for low- and moderate-income homeseekers." *Id.*, at 379. In other words, Havens's actions directly affected and interfered with HOME's core business activities—not dissimilar to a retailer who sues a manufacturer for selling defective goods to the retailer.

That is not the kind of injury that the medical associations have alleged here. FDA's actions relaxing regulation of mifepristone have not imposed any similar impediment to the medical associations' advocacy businesses.

At most, the medical associations suggest that FDA is not properly collecting and disseminating information about mifepristone, which the associations say in turn makes it more difficult for them to inform the public about safety risks. But the

associations have not claimed an informational injury, and in any event the associations have not suggested that federal law requires FDA to disseminate such information upon request by members of the public. *Cf. Federal Election Comm'n v. Akins*, 524 U. S. 11 (1998).

Havens was an unusual case, and this Court has been careful not to extend the *Havens* holding beyond its context. So too here.

Finally, it has been suggested that the plaintiffs here must have standing because if these plaintiffs do not have standing, then it may be that no one would have standing to challenge FDA's 2016 and 2021 actions. For starters, it is not clear that no one else would have standing to challenge FDA's relaxed regulation of mifepristone. But even if no one would have standing, this Court has long rejected that kind of "if not us, who?" argument as a basis for standing. *See Clapper*, 568 U.S., at 420–21; *Valley Forge*, 454 U.S., at 489; *Richardson*, 418 U.S., at 179–80. The "assumption" that if these plaintiffs lack "standing to sue, no one would have standing, is not a reason to find standing." *Schlesinger*, 418 U.S., at 227. Rather, some issues may be left to the political and democratic processes: The Framers of the Constitution did not "set up something in the nature of an Athenian democracy or a New England town meeting to oversee the conduct of the National Government by means of lawsuits in federal courts." *Richardson*, 418 U.S., at 179; *see Texas*, 599 U.S., at 685.

* * *

The plaintiffs have sincere legal, moral, ideological, and policy objections to elective abortion and to FDA's relaxed regulation of mifepristone. But under Article III of the Constitution, those kinds of objections alone do not establish a justiciable case or controversy in federal court. Here, the plaintiffs have failed to demonstrate that FDA's relaxed regulatory requirements likely would cause them to suffer an injury in fact. For that reason, the federal courts are the wrong forum for addressing the plaintiffs' concerns about FDA's actions. The plaintiffs may present their concerns and objections to the President and FDA in the regulatory process, or to Congress and the President in the legislative process. And they may also express their views about abortion and mifepristone to fellow citizens, including in the political and electoral processes.

"No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Simon*, 426 U.S., at 37. We reverse the judgment of the U. S. Court of Appeals for the Fifth Circuit and remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE THOMAS, concurring.

I join the Court's opinion in full because it correctly applies our precedents to conclude that the Alliance for Hippocratic Medicine and other plaintiffs lack standing. Our precedents require a plaintiff to demonstrate that the defendant's challenged actions caused his asserted injuries. And, the Court aptly explains why plaintiffs have failed to establish that the Food and Drug Administration's changes to the regulation of mifepristone injured them.

The Court also rejects the plaintiff doctors' theory that they have third-party standing to assert the rights of their patients. Our third-party standing precedents allow a plaintiff to assert the rights of another person when the plaintiff has a "close relationship with the person who possesses the right" and "there is a hindrance to the possessor's ability to protect his own interests." *Kowalski v. Tesmer*, 543 U. S. 125, 130 (2004) (internal quotation marks omitted). Applying these precedents, the Court explains that the doctors cannot establish third-party standing to sue for violations of their patients' rights with- out showing an injury of their own. But, there is a far simpler reason to reject this theory: Our third-party standing doctrine is mistaken. As I have previously explained, a plaintiff cannot establish an Article III case or controversy by asserting another person's rights. . . . So, just as abortionists lack standing to assert the rights of their clients, doctors who oppose abortion cannot vicariously assert the rights of their patients.

I write separately to highlight what appear to be similar problems with another theory of standing asserted in this suit. The Alliance and other plaintiff associations claim that they have associational standing to sue for their members' injuries. Under the Court's precedents, "an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977). If an association can satisfy these requirements, we allow the association to pursue its members' claims, without joining those members as parties to the suit.

Associational standing, however, is simply another form of third-party standing. And, the Court has never explained or justified either doctrine's expansion of Article III standing. In an appropriate case, we should explain just how the Constitution permits associational standing. . . .

Note: Causation

1. The Court here assumes the plaintiffs have asserted injuries in fact—the doctors' conscience injury, the doctors' monetary injury, and an injury to the organizations in their ability to fulfill their mission. But causation is lacking in all three instances, according to the Court, because the injury is not caused by the government's action. The Court in *Allen* noted that causation inquiry, which looked at whether the injury was "fairly traceable" to the government, and the redressability inquiry, were "two facets of a single causation requirement." The Court in *Allen* focused on redressability, while the Court in *FDA* focused on causation. Is there any meaningful distinction between the two?

2. In *Lujan*, the case arrived before the Court on a motion to dismiss stage. In *FDA v. AHM*, the case arrived at the preliminary injunction stage. What evidence is available in the "record" at these stages of the case? What are the plaintiffs' incentives in building a record at these stages?

3. Suppose the plaintiffs' claims about the adverse side effects of Mifeprex are true, at least at this stage of the proceedings. They argued that "it may be that no one would have standing to challenge FDA's 2016 and 2021 actions." Is this true? Can

you think of anyone who might have standing? What barriers might there be to finding such plaintiffs?

4. Justice Thomas expressed concerns about "associational" standing and linked it to "third-party" standing. For more, *see infra*, pp. 107–21.

Page 101: ***insert after Note 2:***

The Court has left open the question of whether an injury to a state legislator can be considered as an injury to the State such that the State may sue. *Murthy*, 603 U.S. __.

Page 101: ***insert after Note 5:***

6. States have increasingly sought to challenge the actions of the federal government in federal court. Why might this be the case?

In turn, the Supreme Court has been asked with increasing regularity to decide whether states have standing to bring challenges against the federal government. States have had mixed success. Consider three decisions issued in June 2023.

a. In *Haaland v. Brackeen*, 599 U.S. 255 (2023), a birth mother, foster and adoptive parents, and the State of Texas challenged the Indian Child Welfare Act (ICWA), a federal law. If an Indian child is involved in adoption or foster care proceedings in state court, ICWA gives preference to Indian tribes, a right of notice to custody proceedings, and an opportunity to intervene. The challengers argued that ICWA exceeded Congress's constitutional authority; they asserted federalism-based arguments and an equal protection violation.

In an opinion by Justice Barrett, the Court held that Texas had standing to raise some of the claims (those grounded in federalism), and it rejected those claims on the merits by a vote of 7-2. But the Court found the state lacked standing to assert that ICWA violated the Equal Protection Clause. As a state, Texas has no equal protection rights, and it could not bring claims *parens patriae* against the federal government. Texas also argued that it cost the state money to keep records and handle foster care issues in ICWA cases. But the Court found that the state would incur those costs regardless of ICWA. (The individual plaintiffs lacked standing, too.) The Justices who dissented from the federalism holdings did not challenge the standing conclusions of the majority.

Justice Kavanaugh wrote separately to emphasize that the "equal protection issue remains undecided" but "is serious" because foster care or adoption may be denied "because of the child's race." Nevertheless, he would only address the issue when "properly raised by a plaintiff with standing." Does standing simply delay decisions when members of the Court already have ideas of how they would decide the case?

b. In *United States v. Texas*, 599 U.S. 670 (2023), the Court found that Texas and Louisiana lacked standing to challenge a federal immigration policy. The states claimed that federal law required the arrest of noncitizens in certain circumstances. States would incur additional costs of providing social services like healthcare to those noncitizens who should have been arrested by the federal government (under the state's view of the law). Eight Justices agreed that the states lacked standing—only Justice Alito dissented. But there was disagreement about the reasoning. In an opinion by Justice Kavanaugh on behalf of five justices, the Court held that while financial costs can be an injury, "the States' suit here is not the kind redressable by a federal court." Federal courts have "not traditionally entertained" lawsuits against the executive about whom to arrest or to prosecute. The Court identified some exceptions to this principle—for instance, a claim that selective prosecution violated the Equal Protection Clause—but those exceptions did not apply here.

Justice Gorsuch, joined by Justices Thomas and Barrett, agreed that there was no standing, but he concluded that the case was not redressable by the federal courts. In particular, Justice Gorsuch noted that a federal statute prohibits lower federal courts from restraining operation of certain immigration laws, which he found applicable here.

Justice Barrett concurred in the judgment, joined by Justice Gorsuch. She rejected the majority's approach because she concluded that the states had demonstrated a "judicially cognizable injury." While claims against the executive branch may raise issues under Article II of the Constitution, Justice Barrett was skeptical that there was an Article III barrier to such claims.

Did Justice Kavanaugh add something new to the "injury in fact" analysis by examining whether the injury was one "not traditionally entertained" in the federal courts?

c. In *Biden v. Nebraska*, 600 U.S. 477 (2023), a group of states challenged the Secretary of Education's proposal to cancel over $400 billion in student loan debt held by millions of borrowers. The Secretary of Education pointed to a provision of a federal statute that gave him the power to "waive or modify" debt in certain circumstances. While six states sued under a variety of theories, the only one the Court accepted was Missouri's. Missouri created the Missouri Higher Education Loan Authority (MOHELA) to participate in the student loan market. MOHELA services billions of dollars of federal loans. It also receives administrative fees for servicing them. While MOHELA earned $88.9 million in revenue in 2022, Missouri estimated that the Secretary's plan would cost MOHELA around $44 million a year.

In a 6-3 decision by Chief Justice Roberts, the Court found that Missouri had standing to challenge the debt cancelation plan. MOHELA was a "public instrumentality" of the state. The Court cited precedent that found a state-run university was an instrumentality of the state. *Arkansas v. Texas*, 346 U.S. 368 (1953). If a government corporation has been created to fulfill a public function, that corporation was a part of the state government itself. Missouri could then assert the injuries of its instrumentality.

Justice Kagan dissented, joined by Justices Sotomayor and Jackson. She argued that MOHLEA is "legally and financially independent" from Missouri. MOHELA could have sued and defended its own interests, but it did not. And if they are separate entities, Missouri could not assert MOHELA's rights or interests. *Arkansas v. Texas* differed, Justice Kagan argued, because the university lacked "financial and legal separateness MOHELA has."

The Missouri Supreme Court was not asked whether MOHELA was independent from the State of Missouri under Missouri law or simply an instrumentality of the state. Should it have been asked? See Chapter 7, section B.

C. Mootness

Page 148: *insert after Note 2:*

The government voluntarily ceasing its conduct likewise cannot moot a case. In *Federal Bureau of Investigation v. Firke*, 601 U.S. 234 (2024), the federal government

had placed Firke, a U.S. citizen, on the "No Fly List." The list has opaque criteria for barring suspected terrorists and other individuals from flying in the United States. Firke lived in Eritrea and Sudan before becoming a U.S. citizen. On a trip to East Africa in 2009, the FBI questioned him about his involvement in a mosque he attended in Portland, Oregon, and the FBI invited him to serve as an informant, which Firke refused. It was there that Firke learned he had been placed on the No Fly List.

Firke sued. The government removed him from the list without explanation. It represented that it would not place Firke on the No Fly List in the future "based on the currently available information." The government moved to dismiss in the district court and argued the case was moot.

Relying on *Laidlaw*, the unanimous opinion written by Justice Gorsuch emphasized the "formidable burden" in demonstrating that voluntary cessation of a practice cannot "reasonably be expected to recur." The government might relist Firke for similar conduct in the future. Even though the parties had been litigating the case for many years after Firke had been removed from the list, that time did not change the government's burden: "In all cases, it is the defendant's 'burden to establish' that it cannot reasonably be expected to resume its challenged conduct—whether the suit happens to be new or long lingering, and whether the challenged conduct might recur immediately or later at some more propitious moment."

But the Court emphasized that its decision was "provisional." It was possible for the government to carry its burden to show that it could not reasonably be expected to list Firke again. And because the case was in a "preliminary posture" at the motion to dismiss stage, "different facts may emerge that may call for a different conclusion."

Chapter 5
Supreme Court Review of State-Court Decisions

A. Evolution of Statutory Jurisdiction

[2] Adequacy of State "Substantive" Grounds

Page 211: ***insert after C.*** **Lucas*****, and the Takings Clause:***

D. Election Law and the "Legislature Thereof" Clauses

The Elections Clause in Article I provides, "The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof . . . ." The Presidential Electors Clause in Article II states, "Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors . . . ." In federal elections, then, the "legislature" in each state is expressly tasked with the responsibility for developing the rules.

What happens when state courts are asked to intervene in election disputes and interpret state law? Typically, of course, errors of state law are not reviewable by a federal court. *Murdock v. City of Memphis*, 87 U.S. 590 (1875), pp. 183–89. But what if the allegation is that the state court has effectively usurped the role of the state legislature?

In 2000, the Supreme Court decided *Bush v. Gore*, 531 U.S. 98. The *per curiam* opinion held that a Florida recount in a closely contested presidential election violated the Equal Protection Clause. Chief Justice Rehnquist, joined by Justices Scalia and Thomas, joined the *per curiam* but also concurred on a separate ground. Chief Justice Rehnquist argued that the Florida Supreme Court infringed upon the state legislature's authority to determine the manner of holding elections. While federal courts "generally defer to state courts on the interpretation of state law," the Presidential Electors Clause was different. It vests power in the state legislature to set the rules for presidential elections. The state court, Chief Justice Rehnquist argued, changed deadlines set by the legislature and "plainly departed from the legislative scheme" in setting the rules for the recount. Here, the three justices agreed that the rules governing the recount were inappropriate because the state court "significantly departed from the statutory framework." And a federal court could review the state court's interpretation of state law.

Bush v. Gore was a contentious case for a variety of reasons, not the least of which was a 5-4 division on the Supreme Court in a dispute that would effectively resolve the 2000 presidential election. But Chief Justice Rehnquist's opinion would form the basis of the Court's decision in *Moore v. Harper*, 600 U.S. 1 (2023).

Plaintiffs in North Carolina challenged a congressional redistricting map as a partisan gerrymander. They sued in state court and alleged that the map violated the state constitution because it improperly entrenched Republicans at the expense of Democrats in the state. The state supreme court construed four provisions of the state constitution, none of which mentioned redistricting, as embodying a right to equal voting power and found that the map in question violated the state constitution.

In asking the United States Supreme Court to reverse that judgment, the legislature invoked the Elections Clause and argued that the state constitution could not bind the state legislature when it exercised its power to draw maps under the

federal Constitution. The Court, in an opinion by Chief Justice Roberts on behalf of six justices, rejected this argument. But it accepted the proposition that in some cases, a state court could go too far in construing state law and "circumvent federal constitutional provisions." Citing *Bush v. Gore*, the Court held that "state courts may not transgress the ordinary bounds of judicial review such that they arrogate to themselves the power vested in state legislatures to regulate federal elections." State courts may not interpret state law in such a fashion to "evade federal law." In this case, however, the majority concluded that the legislature conceded that the state court did not exceed these bounds.

Justice Kavanaugh wrote a concurring opinion to highlight some additional standards he thought federal courts could use to review state court decisions. He cited Chief Justice Rehnquist's opinion in *Bush v. Gore*, which looked to whether the state court "impermissibly distorted" state law "beyond what a fair reading required." He also looked to Justice Souter's dissenting opinion in *Bush v. Gore*, which asked whether a state court exceeded "the limits of reasonable" interpretation of state law. And the United States in *Moore* argued that a state court decision could be reversed if it reached a "truly aberrant" interpretation of state law. In his view, "all three standards convey essentially the same point: Federal court review of a state court's interpretation of state law in a federal election case should be deferential, but deference is not abdication." He would adopt Chief Justice Rehnquist's articulation. The majority opinion, however, concluded, "We do not adopt these or any other test by which we can measure state court interpretations of state law in cases implicating the Elections Clause."

Justice Thomas, joined by Justices Alito and Gorsuch, dissented because they believed the case had become moot. But in a separate part of his opinion joined only by Justice Gorsuch, Justice Thomas noted "serious trouble" with the majority's approach. Justice Thomas distinguished *Bush v. Gore*, which involved interpretation of a statute enacted by the legislature, from state constitutional provisions, which here were designed to constrain the legislature. He worried that federal courts are not equipped to determine what the ordinary bound of judicial review are, particularly in "quickly evolving, politically charged controversies."

These cases (sometimes invoking the phrase the "independent state legislature doctrine") resemble the other "adequate and independent" state ground cases, but they have a distinct difference. Other cases draw from a distinct body of state law, such as property or contract, as the antecedent for whether property is taken or contracts impaired under the Constitution These cases, however, turn on whether the "legislature" has exercised authority under the Constitution and empower a federal court to review whether the power of the legislature has been improperly abridged.

What are the "ordinary bounds of judicial review"? Does a state court moving too quickly to change precedent or developing novel interpretation of state law count? Are any of the more specific articulations that Justice Kavanaugh cites more useful? If a state court can point to a series of precedents that lead step by step inexorably to its conclusion in the present case, would that decision, even if novel or a departure from existing case law, be appropriate? In other words, how far is too far in these cases involving federal elections?

Chapter 8
Federal Common Law

C. Other Matters of National Concern

Page 456: ***after Note 5:***

Great Lakes Insurance SE v. Raiders Retreat Realty Co., LLC

Supreme Court of the United States, 2024.

601 U.S. 65

JUSTICE KAVANAUGH delivered the opinion of the Court.

Maritime contracts often contain choice-of-law provisions that designate the law of a particular jurisdiction to control future disputes. The enforceability of those choice-of-law provisions is governed by federal maritime law. Applying federal maritime law in this case, we conclude that choice-of-law provisions in maritime contracts are presumptively enforceable, with certain narrow exceptions not applicable here.

I

To insure its boat, Raiders Retreat Realty, a Pennsylvania business, purchased a policy from Great Lakes Insurance, a company organized in Germany and headquartered in the United Kingdom. The insurance contract included a choice-of-law provision that, as relevant here, selected New York law to govern future disputes between the parties.

Years later, Raiders' boat ran aground near Fort Lauderdale, Florida. After Raiders submitted an insurance claim, Great Lakes denied coverage. Great Lakes asserted that Raiders breached the insurance contract by failing to maintain the boat's fire-suppression system. According to Great Lakes, the breach voided the insurance contract in its entirety, even though the boat's fire-suppression system did not contribute to the accident.

Great Lakes sued Raiders for declaratory relief in the U. S. District Court for the Eastern District of Pennsylvania. Great Lakes alleged that Raiders breached the insurance contract and that the breach allowed Great Lakes to deny insurance coverage.

In response, Raiders advanced contract claims under Pennsylvania law. Great Lakes countered that Pennsylvania law did not apply to this dispute; rather, New York law applied under the choice-of-law provision in the parties' insurance contract.

The District Court agreed with Great Lakes. The court reasoned that federal maritime law regards choice-of-law provisions as presumptively valid and enforceable. . . .

The U. S. Court of Appeals for the Third Circuit vacated [, holding] that choice-of-law provisions in maritime contracts are presumptively enforceable as a matter of federal maritime law, but nonetheless must yield to a strong public policy of the State in which suit is brought—here, Pennsylvania's public policy regarding insurance.

II

Under the Constitution, federal courts possess authority to create and apply maritime law. Article III of the Constitution extends the federal judicial power to "all Cases of admiralty and maritime Jurisdiction." That grant of jurisdiction contemplates a system of maritime law " 'coextensive with, and operating uniformly in, the whole country.' " The purposes of that uniform system include promoting "the great interests of navigation and commerce" and maintaining the United States' "diplomatic relations." 3 J. Story, Commentaries on the Constitution of the United States § 1666, p. 533 (1st ed. 1833).

To maintain that uniform system, federal courts "make decisional law" for maritime cases. When a federal court decides a maritime case, it acts as a "federal common law court, much as state courts do in state common-law cases." "Subject to direction from Congress," the federal courts fashion maritime rules based on, among other sources, "judicial opinions, legislation, treatises, and scholarly writings."

Exercising that authority, federal courts follow previously "established" maritime rules. . Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310, 314 (1955). No bright line exists for determining when a federal maritime rule is "established," but a body of judicial decisions can suffice. In the absence of an established rule, federal courts may create uniform maritime rules. When no established rule exists, and when the federal courts decline to create a new rule, federal courts apply state law.

A

The initial question here is whether there is an established federal maritime rule regarding the enforceability of choice-of-law provisions. The answer is yes.

Longstanding precedent establishes a federal maritime rule: Choice-of-law provisions in maritime contracts are presumptively enforceable.

Courts of Appeals have consistently decided that choice-of-law provisions in maritime contracts are presumptively enforceable as a matter of federal maritime law.

Although no recent case of this Court has addressed the issue, the Court has traditionally enforced choice-of-law provisions in maritime contracts. The Court has recognized, for example, that the parties to a maritime contract may select the governing law by "clearly manifest[ing]" an intent to follow that law "when entering into the contract."

The Court's traditional enforcement of choice-of-law provisions in maritime contracts corresponds to the Court's precedents in the analogous forum-selection context. The Court has pronounced that forum-selection clauses in maritime contracts are "prima facie valid" under federal maritime law and "should be enforced unless" doing so would be " 'unreasonable' under the circumstances." The Bremen v. Zapata Off-Shore Co., 407 U. S. 1, 10 (1972). Like choice-of-law

provisions, forum-selection clauses respect "ancient concepts of freedom of contract." And like choice-of-law provisions, forum-selection clauses have "the salutary effect of dispelling any confusion" on the manner for resolving future disputes, thereby slashing the "time and expense of pretrial motions."

For those reasons, as Courts of Appeals have explained, this Court's decisions . . . on the enforceability of forum-selection clauses dictate the same conclusion for choice-of-law provisions. That is especially true given that courts historically have expressed more skepticism of forum-selection clauses than of choice-of-law clauses because forum-selection clauses can force parties to litigate in inconvenient places.

As courts and commentators have recognized, the presumption of enforceability for choice-of-law provisions in maritime contracts facilitates maritime commerce by reducing uncertainty and lowering costs for maritime actors. Maritime commerce traverses interstate and international boundaries, so when a maritime accident or dispute occurs, time-consuming and difficult questions can arise about which law governs. . . . By identifying the governing law in advance, choice-of-law provisions allow parties to avoid later disputes—as well as ensuing litigation and its attendant costs. Choice-of-law provisions also discourage forum shopping, further cutting the costs of litigation.

Moreover, by supplying some advance assurance about the governing law, choice-of-law provisions help maritime shippers decide on the front end "what precautions to take" on their boats, and enable marine insurers to better assess risk. Choice-of-law provisions therefore can lower the price and expand the availability of marine insurance. In those ways, choice-of-law provisions advance a fundamental purpose of federal maritime law: the " 'protection of maritime commerce.' "

[The Court then held that, as a matter of federal maritime law, choice-of-law provisions in maritime contracts are presumptively enforceable, with certain narrow exceptions, and no exception to the presumption applied in the case.]

[Justice Thomas's concurrence is omitted.]

Notes:

1. Although recent decisions such as *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017) (discussed in Chapter 8, Part D) by the Court have indicated reluctance to create federal common law, maritime law is an exception. As the Court says in *Great Lakes Insurance v. Raiders Retreat Realty Co.*, maritime law has long been deemed an area in which federal courts may create federal common law. The theory is that the conferral of federal jurisdiction over maritime cases implicitly confers the power on the federal courts to create federal maritime common law because of the federal commercial interest in a uniform body of maritime law. Does that reasoning also support the creation of federal common law over matters involving interstate commerce?

2. Does the federal interest in establishing a uniform body of maritime law extend to maritime insurance contracts? After all, contracts are not inherently part of the law of the sea, and state law ordinarily controls contract law. Should a

different body of law apply to maritime insurance contracts than to other types of insurance contracts?

3. In its opinion, the Court states that federal maritime law displaces state law when "there is an established federal maritime rule." The Court then concludes that decisions of the courts of appeals created the "established" practice. Does this mean that the courts of appeals, instead of the Supreme Court, in some instances have the ultimate say over the content of federal maritime law?

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

1

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 preenforcement 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,

[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.

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 preenforcement 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

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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 preenforcement 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

[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.

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

D

While this interlocutory appeal focuses primarily on the Texas official defendants' motion to dismiss on grounds of sovereign immunity and justiciability, before we granted certiorari the Fifth Circuit also agreed to take up an appeal by the sole private defendant, Mr. Dickson. In the briefing before us, no one contests this decision. In his appeal, Mr. Dickson argues that the petitioners lack standing to sue him because he possesses no intention to file an S. B. 8 suit against them. Mr. Dickson has supplied sworn declarations so attesting. 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 mid20th 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 statelaw 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.[3]

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,

[3] 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*."

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

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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.[4]

* * *

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.

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[4] 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.

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

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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 preenforcement 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 postenforcement 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.[5]

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

[5] 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.

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]."

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 preenforcement 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

[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.

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

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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 preenforcement 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 federalcourt 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 preenforcement 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

preenforcement 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?

Chapter 14
The Section 1983 Cause of Action

C. Section 1983 and Statutory Claims

Page 814: ***insert after Note 2:***

These cases remain contested in front of the Supreme Court. In *Health and Hospital Corporation of Marion County v. Talevski*, 599 U.S. 166 (2023), the Court considered a § 1983 claim that sought damages under the Federal Nursing Home Reform Act (FHNRA). Ivanka Talevski believed nursing home employees were mistreating her husband, Gorgi, including using powerful medications to sedate him and ultimately attempting to forcibly transfer him to another facility without notifying his family. The Talevskis sued.

Justice Jackson wrote an opinion on behalf of seven justices and found the Talevskis could sue. Justice Jackson noted that plaintiffs must clear a "demanding bar": a statute must unambiguously confer individual rights. Justice Jackson quoted the plain text of the FHNRA to note an express "right to be free from" chemical restraints that are not required by "the resident's medical symptoms." Likewise, there were "transfer and discharge rights" about discharging a "resident." These statutory cues plainly spoke of individual rights for individual residents.

The defendant, however, sought to rely on *Rancho Palos Verdes* by arguing that Congress created a comprehensive enforcement scheme incompatible with individual enforcement under § 1983. Justice Jackson emphasized that the statutory scheme might be "inconsistent" with the text or "thwart" Congress's purpose. While FHNRA included administrative processes for addressing non-compliant nursing homes, nothing in the text suggested that it would be incompatible to permit enforcement through § 1983. The statute contained no requirements to comply with specific procedures or to exhaust administrative procedures.

The victory for plaintiffs in *Talevski* may well be limited in scope. Justice Barrett wrote a concurring opinion, joined by Chief Justice Roberts, emphasizing that while FNRHA clears the high bar, "many federal statutes will not," and that § 1983 actions "are the exception—not the rule—for violations of Spending Clause statutes." A more comprehensive scheme, a centralized review mechanism that could be undermined by piecemeal litigation, and statutes that empower government officials to sue could all be contextual clues in a statute that § 1983 is not available. Courts must "tread carefully," in Justice Barrett's words. Justice Gorusch briefly concurred expressing agreement with Justice Barrett's opinion, meaning three of the seven justices in the majority highlighted the limitations of the holding.

Justices Alito dissented, joined by Justice Thomas. He emphasized a narrow point of disagreement—he believed the FHNRA created a sufficiently comprehensive remedial regime and that § 1983 claims would "upend this careful balance." If individuals may sue to enforce FHNRA and seek damages, "§ 1983 will swallow the centralized state and federal review mechanisms the Act imposes."