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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 82: ***insert after Note 7:***

The Supreme Court recently examined the scope of the judicial remedy in *Trump v. CASA Inc.*, 606 U.S. __ (2025). President Donald Trump issued an executive order asserting that the certain persons born in the United States are not citizens and should not be issued documentation of citizenship. Plaintiffs—various individuals, organizations, and states—sued, alleging that the order violated both the Fourteenth Amendment and a federal statute. Federal district courts issued "universal" injunctions that enjoined various federal officials from applying the executive order to anyone in the United States, regardless of whether they were a part of the suit.

In an opinion by Justice Barrett on behalf of six Justices, the Court concluded that the preliminary injunction was too broad. The Judiciary Act of 1789 empowered federal courts to hear "all suits . . . in equity." The Court said that, historically, individual parties filed suits in equity for relief on their own behalf. Relief could not extend to non-parties. While the opinion heavily focused on doctrines governing judicial remedies, it acknowledged analogies in standing doctrine. For instance, federal courts lack power to issue relief for harms shared among the public generally. See *Frothingham v. Mellon*, 262 U.S. 447 (1923). See also Note 8, below.

The Court acknowledged that a court of equity "may administer complete relief *between the parties*." and that "complete relief" could benefit non-parties in some circumstances. For instance, if one neighbor is playing music too loudly in a neighborhood, another neighbor as plaintiff might win an injunction to have the neighbor turn down the stereo. The relief would benefit non-parties, but only incidentally to affording complete relief to the plaintiff.

In what circumstances could a plaintiff seek relief on behalf of non-parties? The Court noted that one possible device is a class action, in which a plaintiff represents a group of individuals who are not present. Another possibility could be a suit under the Administrative Procedure Act, which authorizes federal courts to "hold unlawful and set aside agency action." A third possibility would be situations where a plaintiff can assert the interests of third parties. See *infra* pp. 107–21. Justices Alito and Thomas concurred separately to express skepticism that class actions or third-party standing could easily permit a broad remedy.

Justice Sotomayor, joined by Justices Kagan and Jackson, dissented. She argued that the majority was overly narrow in its reading of the equitable powers of the federal courts. She pointed to the circumstances in which relief could benefit non-parties as evidence that federal courts historically had broader authority to redress injuries beyond those attributable to the plaintiff.

Some of the parties in *CASA* were states. If a state alleges an injury, what is an appropriate remedy that is redressable in the federal courts? See Note: State

Standing, *infra* pp. 98–101. May Congress authorize relief that benefits non-parties, as some have argued the Administrative Procedure Act does? See infra p. 98 nn. 6–7.

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. 43 (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. 43.

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 because the recount lacked standards that would ensure that identically marked ballots would be counted identically. Chief Justice Rehnquist, joined by Justices Scalia and Thomas, joined the *per curiam* opinion 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. Although federal courts "generally defer to state courts on the interpretation of state law," Chief Justice Rehnquist argued that such deference should not apply when a state court's interpretation of state law implicates the state legislature's power under the Presidential Electors Clause. 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. Accordingly, the concurring justices argued that a federal court could review the state court's interpretation of state law to ensure that the state court did not violate the Presidential Electors Clause by usurping the authority that the Clause grants to the state legislature.

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 effectively resolved the 2000 presidential election. But Chief Justice Rehnquist's opinion would also inform the Court's decision more than two decades later in *Moore v. Harper*, 600 U.S. 1 (2023).

In *Moore*, 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" for all voters 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 impose any substantive limits on the state legislature's power to draw

congressional districts. The Court, in an opinion by Chief Justice Roberts on behalf of six justices, rejected this argument and held that state constitutions could impose constraints on districting, such as the limit on partisan gerrymandering that the North Carolina Supreme Court found in its state constitution.

Nevertheless, the U.S. Supreme Court's opinion asserted that the Elections Clause imposed a limit on the power of state courts when interpreting their state constitutions or other laws. 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 failed to argue that the state supreme court's decision transgressed that limit.

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 he 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 that were designed to constrain the legislature. Justice Thomas also criticized the Court's "ordinary judicial review" standard, suggesting that it raised "questions of the most far-reaching scope" about how to determine what the ordinary bounds of judicial review are, and whether those bounds would be different in each state based on its own jurisprudence. Justice Thomas also noted a practical concern: Cases applying the "ordinary judicial review" standard would "arise haphazardly, in the midst of quickly evolving, politically charged controversies," making it all the more difficult to apply such a vague standard consistently.

These cases (sometimes said to involve the "independent state legislature doctrine") resemble the other "adequate and independent" state ground cases, but there is a significant distinction: 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 are impaired in violation of the Constitution. These cases, however, turn on whether the "legislature" has exercised authority under the Constitution, meaning that a federal court has the authority to review whether the power of the state legislature has been improperly abridged by the state judiciary.

What are the "ordinary bounds of judicial review"? There are two aspects to that question. The first is definitional: Is it possible to explain what separates "ordinary" from "extraordinary" exercises of judicial review? Are any of the more specific articulations cited by Justice Kavanaugh an improvement on the Court's phrase?

The second aspect, noted by Justice Thomas in his dissent, involves the application of the standard: How should a federal court go about assessing the degree to which a state court adhered to "ordinary" principles of judicial review? For example, should an originalist federal court place any limits on a state supreme court's ability to interpret the state constitution in an evolving manner? What if a state supreme court interprets its constitution contrary to the constitutional text but in furtherance of values that the state court discerns in the whole document or the state's tradition?

Further, is a federal court supposed to determine the bounds of "ordinary judicial review" just in election cases, or in all areas? And is "ordinary" to be determined on a state-by-state basis, or is there a national standard? Suppose that a particular state court, over decades, has repeatedly used vague and aspirational language in the state constitution as the basis for imposing significant policy obligations on the other branches with respect to, for example, school financing, environmental protection, healthcare, or affordable housing. Does that pattern establish that judicial review in that state is "ordinar[il]y" more activist than it would be in other states?

Does a state court exceed the bounds of "ordinary judicial review" if it overturns precedent or develops novel interpretation of state law? 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 sufficiently "ordinary" to be constitutional?

Chapter 6
Litigating Federal Claims in State Courts

C. State Law and the Enforcement of Federal Rights

Page 300: ***insert after note 1:***

In *Williams v. Reed*, 604 U.S. __, 145 S. Ct. 465 (2025), the Court relied on *Felder*, *Howlett*, and *Haywood* in holding another state rule preempted by § 1983. Alabama law required exhaustion of administrative remedies before a plaintiff could challenge the denial of unemployment benefits in state court. The exhaustion requirement applied even when a plaintiff challenged the state agency's refusal to issue a decision on the basis that the delay violated federal statutory and constitutional law. The result of the exhaustion requirement in this context was that if the agency refused to act on a claim, that refusal could never be challenged in state court. (As discussed in Chapter 14, exhaustion is not required before § 1983 suits may be brought in federal court. *See Patsy v. Board of Regents of the State of Florida*, 457 U.S. 496 (1982)).

In *Williams*, the Supreme Court held the exhaustion requirement to be preempted because it effectively immunized the agency from any potential § 1983 suit in state court based on its allegedly unlawful delay. The Court reasoned that *Felder*, *Howlett*, and *Haywood* had invalidated state rules, even ones appearing to be procedural or jurisdictional, if their effect was to interfere with § 1983's policy of holding state officials accountable for violations of federal rights. Likewise here, the Alabama exhaustion requirement prevented claimants from bringing a suit in state court against administrative officials to remedy violations of federal rights caused by the administrators' delays in processing claims. The exhaustion requirement therefore contravened federal policy and was preempted. For further discussion, see Chapter 14 of this Supplement.

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 12
Special Problems of Removal Jurisdiction

B. Federal-Question Removal and State-Law Claims

[1] Supplemental Jurisdiction

Page 628, omit the case, the Note, and the Problem, and replace them with the following case, Note, and Problem:

Royal Canin U.S.A., Inc. v. Wullschleger

Supreme Court of the United States, 2025.
604 U.S. 22.

JUSTICE KAGAN delivered the opinion of the Court.

If a complaint filed in state court asserts federal-law claims, the defendant may remove the case to federal court. See 28 U.S.C. § 1441(a). And if the complaint also asserts state-law claims arising out of the same facts, the federal court may adjudicate those claims too, in the exercise of what is called supplemental jurisdiction. See § 1367.

This case presents a further question: What happens if, after removal, the plaintiff amends her complaint to delete all the federal-law claims, leaving nothing but state-law claims behind? May the federal court still adjudicate the now purely state-law suit? We hold that it may not. When an amendment excises the federal-law claims that enabled removal, the federal court loses its supplemental jurisdiction over the related state-law claims. The case must therefore return to state court.

I

A

[Here Justice Kagan summarized the law of federal question jurisdiction.]

B

Before raising issues demanding a jurisdictional primer, this case was all about the marketing of dog food. Petitioner Royal Canin U.S.A., Inc., manufactures a brand of dog food available only with a veterinarian's prescription — and thus sold at a premium price. Respondent Anastasia Wullschleger purchased the food, thinking it contained medication not found in off-the-shelf products. She later learned it did not. Her suit, initially filed in a Missouri state court, contends that Royal Canin's dog food is ordinary dog food: The company sells the product with a prescription not because its ingredients make that necessary, but solely to fool consumers into paying a jacked-up price. Her original complaint asserted claims under the Missouri Merchandising Practices Act and state antitrust law. It also alleged violations of the Federal Food, Drug, and Cosmetic Act (FDCA), 21 U.S.C. § 301 *et seq.*

And so began the procedural back-and-forth that eventually landed Wullschleger's case in this Court. Royal Canin went first: It removed the case to federal court based on the asserted violations of the FDCA. That removal properly brought to the District Court not only Wullschleger's FDCA claims, but also her factually intertwined state-law claims. The parties were thus set to litigate the entire suit in federal court. But that is not where Wullschleger wanted the case to be resolved. So she countered Royal Canin's move: She amended her complaint to delete its every mention of the FDCA, leaving her state claims to stand on their own.

And with that amended, all-state-law complaint in hand, she petitioned the District Court to remand the case to state court.

Although the District Court denied Wullschleger's request, the Court of Appeals for the Eighth Circuit reversed that decision and ordered a remand. See 75 F.4th 918, 924 (2023). In the Eighth Circuit's view, Wullschleger's amendment had eliminated any basis for federal jurisdiction. An amended complaint, the court reasoned, "[supersedes] an original complaint and renders the original complaint without legal effect." And nothing in the amended complaint supported federal-question jurisdiction: It was, after all, now based entirely on state law. Nor could the District Court now exercise supplemental jurisdiction over Wullschleger's state-law claims. "[T]he possibility of supplemental jurisdiction," the court reasoned, "vanished right alongside the once-present federal questions." And that analysis held good even though it was Royal Canin, rather than Wullschleger, that had brought the suit to the District Court: "It makes no difference," the Eighth Circuit stated, that the case "end[ed] up in federal court through removal."

Other Courts of Appeals have reached the opposite conclusion, holding that a post-removal amendment cannot divest a federal court of jurisdiction On that view, "[t]he existence of subject matter jurisdiction is determined by examining the complaint as it existed at the time of removal." *Harper v. AutoAlliance Int'l, Inc.*, 392 F.3d 195, 210 (CA6 2004). So the District Court here would have retained supplemental jurisdiction over Wullschleger's state-law claims even after she amended her complaint to delete all her federal-law ones.

We granted certiorari to resolve the Circuit split, and we now affirm the decision below.

II

When a plaintiff amends her complaint following her suit's removal, a federal court's jurisdiction depends on what the new complaint says. If (as here) the plaintiff eliminates the federal-law claims that enabled removal, leaving only state-law claims behind, the court's power to decide the dispute dissolves. With the loss of federal-question jurisdiction, the court loses as well its supplemental jurisdiction over the state claims. That conclusion fits the text of § 1367, governing supplemental jurisdiction. And it accords with a bevy of rules hinging federal jurisdiction on the allegations made in an amended complaint, because that complaint has become the operative one. Royal Canin argues that our precedent makes an exception for when an amendment follows a lawsuit's removal, but that is to read two bits of gratuitous language for a good deal more than they are worth.

A

Begin with § 1367, entitled "Supplemental jurisdiction." Subsection (a) states the basic rule:

> "Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution."

. . .

Skip down a bit and subsection (c) explains that the supplemental jurisdiction just conferred is in some measure discretionary. That subsection provides that a district court "may decline to exercise supplemental jurisdiction" in three specific situations: (1) if the supplemental claim "raises a novel or complex issue of State law"; (2) if the supplemental claim "substantially predominates" over the claims within the court's original jurisdiction; and (3) if the district court "has dismissed all claims over which it has original jurisdiction."[4] In all those contexts, federal law is not where the real action is. So although supplemental jurisdiction persists, the district court need not exercise it: Instead, the court may (and indeed, ordinarily should) kick the case to state court. See *Gibbs* [Casebook p. 568].

In addressing the text of § 1367, Royal Canin argues primarily from the first subsection's grant of jurisdiction. The language there is "broad," the company says: Section 1367(a) grants "supplemental jurisdiction over '*all* other claims' within the case or controversy, *unless* Congress 'expressly provided otherwise.' " And Congress did not expressly provide that an amendment deleting federal claims eliminates supplemental jurisdiction. The upshot, Royal Canin says, is the rule it espouses: The amendment of a complaint following removal of a suit to federal court cannot divest that court of supplemental jurisdiction.

But that position founders on an undisputed point: Nothing in § 1367's text — including in the text Royal Canin highlights — distinguishes between cases removed to federal court and cases originally filed there. Whatever that text says about removed cases, it also says about original ones, and vice versa. That means if (as Royal Canin urges) § 1367(a)'s language prevents an amendment from ousting supplemental jurisdiction in removed cases, then so too it does in original ones. But here is the rub: In original cases, this Court has already reached the opposite conclusion. The pertinent rule comes from *Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 473–74 (2007): "[W]hen a plaintiff files a complaint in federal court and then voluntarily amends the complaint, courts look to the amended complaint to determine jurisdiction." So when the plaintiff in an original case amends her complaint to withdraw the federal claims, leaving only state claims behind, she divests the federal court of adjudicatory power. See *ibid.* Royal Canin concedes that result, as it must. The position it adopts — applying only in removed cases — is indeed designed not to collide with *Rockwell*'s ruling. But once § 1367(a) is taken as consistent with *Rockwell*, it cannot say what the company posits. Under that provision — as under *Rockwell* — an amendment excising all federal claims divests a court of supplemental jurisdiction over the remaining state claims in an original case. And if in an original case, then also in a removed case — because, again, § 1367(a) draws no distinction between the two.

The exclusion from § 1367(a) of such post-amendment state-law claims is reflected in the text of § 1367(c). . . . If § 1367(a) conferred supplemental jurisdiction over the claims here, § 1367(c) would make that jurisdiction discretionary. That § 1367(c) does not do so — that even while it addresses, for example, dismissals of federal claims, it makes no mention of amendments deleting them — shows that § 1367(a) does not extend so far. Or otherwise said, there is no discretion to decline supplemental jurisdiction here because there is no

[4] A fourth, more general provision, which neither party thinks relevant here, allows a court to decline supplemental jurisdiction "in exceptional circumstances," for "other compelling reasons." 28 U.S.C. § 1367(c)(4).

supplemental jurisdiction at all. Once the plaintiff has ditched all claims involving federal questions, the leftover state claims are supplemental to nothing — and § 1367(a) does not authorize a federal court to resolve them.

That result accords with Congress's usual view of how amended pleadings can affect jurisdiction. On that view, apparent in varied federal statutes, an amendment can wipe the jurisdictional slate clean, giving rise to a new analysis with a different conclusion. . . . [For example,] take the statute laying out procedures for removal. It provides that even "if the case stated by the initial pleading is not removable," an amendment may make it so: The defendant can remove the case after receiving "an amended pleading" establishing that the case is newly subject to federal jurisdiction. § 1446(b)(3) . . . . ; . . . Section 1367 [similarly] contemplates that when an amended complaint is filed, the jurisdictional basis for the suit is reviewed anew. If nothing in the amended complaint now falls "within [the federal court's] original jurisdiction," then neither does anything fall within the court's "supplemental jurisdiction." § 1367(a). In the superseding pleading, the state-law claims are just state-law claims, outside § 1367(a)'s purview.

B

That reading of § 1367 also parallels a slew of other, mainly judge-made procedural rules linking jurisdiction to the amended, rather than initial, complaint. In multiple contexts — involving both cases brought in federal court and cases removed there — courts conceive of amendments to pleadings as potentially jurisdiction-changing events. The amended complaint becomes the operative one; and in taking the place of what has come before, it can either create or destroy jurisdiction. Section 1367, as laid out above, fits hand in glove with — indeed, embodies — that familiar approach. A post-removal amendment can divest a federal court of its supplemental jurisdiction because — as the usual procedural principle holds — jurisdiction follows from (and only from) the operative pleading. . . .

[The] rule for original federal cases has a host of variations, each tying jurisdiction to an amended pleading. [Details omitted.] . . . In short, the rule in original cases that jurisdiction follows the amended (*i.e.*, now operative) pleading applies across the board.

And still more: Similar rules have long applied in the removal context. Not across the board, of course, else this case would not have arisen: The very issue here is whether, in a removed case (as in an original one), an amended complaint dropping federal claims destroys jurisdiction. But in two of the other situations discussed above, the rule in removed cases is the same as the rule in original ones. First, in removed cases too, amending a complaint to add a federal claim creates federal jurisdiction when it did not previously exist. So even if removing a case was improper because the initial complaint did not contain a federal claim, the plaintiff's later assertion of such a claim establishes jurisdiction going forward. See *Pegram v. Herdrich*, 530 U.S. 211, 215–16, and n.2 (2000). The federal court can thus resolve both the newly added federal-law claim and the now supplemental state-law ones. And second, in removed cases too, amending a complaint to join a non-diverse party destroys diversity jurisdiction. So if such a joinder occurs after removal, the federal court must remand the case to the state court it began in. See § 1447(e). Once again, federal jurisdiction — or its absence — follows from the amended complaint.

The uniformity of that principle, as between original and removed cases, is not surprising. The appropriateness of federal jurisdiction — or the lack thereof — does not depend on whether the plaintiff first filed suit in federal or state court. Rather, it

depends, in either event, on the substance of the suit — the legal basis of the claims (federal or state?) and the citizenship of the parties (diverse or not?). . . .

On top of § 1367, a panoply of procedural rules shows that a post-removal amendment excising all federal claims destroys federal jurisdiction. Under those rules, the presence of jurisdiction, in removed as in original cases, hinges on the amended, now operative pleading. By adding or subtracting claims or parties, and thus reframing the suit, that pleading can alter a federal court's authority. And so it is here. When a plaintiff, after removal, cuts out all her federal-law claims, federal-question jurisdiction dissolves. And with any federal anchor gone, supplemental jurisdiction over the residual state claims disappears as well. The operative pleading no longer supports federal jurisdiction, and the federal court must remand the case to the state court where it started.

C

Royal Canin contends that this Court has twice before reached the opposite conclusion — first, in *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343 (1988), and next in *Rockwell* . . . But in each case, the relied-on passage is extraneous to the Court's holding and reasoning, and so cannot bear the weight of Royal Canin's argument. [Discussion of *Cohill* omitted.]

That leaves the *Rockwell* footnote Royal Canin cites. As earlier explained, the body of *Rockwell* examines what happens in an original case when a plaintiff amends a complaint to expunge federal claims. The federal court, *Rockwell* held, loses jurisdiction. But in a two-sentence footnote, the *Rockwell* Court said that the opposite rule applies in removed cases. "[W]hen a defendant removes a case to federal court based on the presence of a federal claim," the footnote stated, "an amendment eliminating the original basis for federal jurisdiction generally does not defeat jurisdiction." That is because "removal cases raise forum-manipulation concerns that simply do not exist when it is the *plaintiff* who chooses a federal forum and then pleads away jurisdiction through amendment." The footnote thus sets out exactly the rule Royal Canin wants — and, in so doing, gives the company its best argument.

But still, the footnote is dictum, and does not control the outcome here. *Rockwell* was an original federal case, not a removed one. So the footnote's assertion of a special rule for removed cases was outside the issue being decided — or more colloquially put, beside the point. . . . We therefore need not follow the *Rockwell* footnote just because it exists; our adherence instead depends on whether it withstands analysis.

And it does not, for all the reasons already given. A recap here fittingly begins with *Rockwell*'s own core insight, which points the opposite way. Federal courts, *Rockwell* stated, "look to the amended complaint to determine jurisdiction." That rule, as earlier described, explains a host of jurisdictional outcomes. It operates in federal-question cases and diversity cases, both to destroy and to create jurisdiction. And it cannot give way, in a case like this one, just because the case was removed from state to federal court. When, as here, a complaint asserts both federal and state claims, and an amendment strips out the federal ones, a district court's jurisdiction depends on § 1367. And § 1367, as earlier shown, makes no distinction between cases beginning in federal court and cases removed there. If in the former the amendment "defeat[s] jurisdiction," as *Rockwell* rightly held, then so too in the latter. Regardless of removal, the plaintiff's excision of her federal-law claims deprives the district court of its authority to decide the state-law claims remaining.

III

For those reasons, the District Court here should have remanded Wullschleger's suit to state court. The earliest version of that suit contained federal-law claims and therefore was properly removed to federal court. The additional state-law claims were sufficiently related to the federal ones to come within that court's supplemental jurisdiction. But when Wullschleger amended her complaint, the jurisdictional analysis also changed. Her deletion of all federal claims deprived the District Court of federal-question jurisdiction. And once that was gone, the court's supplemental jurisdiction over the state claims dissolved too. Wullschleger had reconfigured her suit to make it only about state law. And so the suit became one for a state court.

We accordingly affirm the judgment of the Court of Appeals for the Eighth Circuit.

It is so ordered.

Note: Dropping Federal Claims After Removal

A. *Royal Canin*: Six Years of Fighting Over the Forum

1. *Royal Canin v. Wullschleger* had a complex procedural history that implicates several aspects of removal jurisdiction. It also provides a dramatic illustration of the lengths to which lawyers will go to get their cases into federal court — or keep them out. As you read the narrative that follows, take note of how the various rules and doctrines intersect with one another — and how the lawyers on both sides made use of them.

The original complaint, filed in Missouri state court in February 2019, asserted only state-law claims, but the defendants argued that some of those claims satisfied the *Grable-Gunn* test for federal question jurisdiction based on "incorporated" federal law — the federal law being the Food, Drug and Cosmetic Act (FDCA). See Casebook Chapter 10, section B. On that ground, they removed the case to federal court. But the district court rejected the argument and remanded the case to state court.

Ordinarily, an order remanding a case to state court "is not reviewable on appeal or otherwise." See 28 U.S.C. § 1447(d); Casebook Chapter 12, section D[3]. But Wullschleger filed her complaint as a class action, and that brought into play the provision in the Class Action Fairness Act of 2005 (CAFA) allowing review of remand orders in class action cases. See 28 U.S.C. § 1453(c)(1). On appeal, the Eighth Circuit disagreed with the district court's analysis and held that Wullschleger's antitrust and unjust-enrichment claims had important federal ingredients that would require "explication of federal law." That was enough to satisfy *Grable-Gunn*, and the Eighth Circuit vacated the district court's order of remand. *Wullschleger v. Royal Canin, Inc.*, 953 F.3d 519 (8th Cir. 2020). Wullschleger asked the Supreme Court to review that decision, arguing (inter alia) that the Eighth Circuit had misapplied "the *Grable-Gunn* test." The Supreme Court denied certiorari.

Denial of certiorari meant that the case returned to the district court. There, the plaintiff quickly amended the complaint as of right pursuant to FED. R. CIV. 15(a)(1)(B); the amended complaint purported to eliminate all references to federal law. The plaintiffs argued that with all of the federal matter removed, the only basis for keeping the case in federal court was supplemental jurisdiction — and that the court should exercise its discretion under 28 U.S.C. § 1367(c) to remand the action

to state court. But the district court found that the complaint still contained vestiges of federal law sufficient to satisfy *Grable-Gunn*, and on May 21, 2021, it denied the motion to remand. The defendants then filed a motion to dismiss for failure to state a claim. The court granted that motion on March 22, 2022. The court summarized its ruling:

> Plaintiffs have not pled with particularity the causal connection element of a [Missouri Merchandising Practices Act] deceptive practice claim. Nor have Plaintiffs plausibly alleged a civil conspiracy claim. Accordingly, Defendants' Motion to Dismiss is GRANTED.

The denial of a motion to remand is not ordinarily appealable, but here a final judgment had been entered against the plaintiffs, and they did appeal. The appeal challenged only the dismissal, not the denial of the motion to remand. But the Eighth Circuit, sua sponte, raised the question whether the district court had subject-matter jurisdiction. (Recall that challenges to subject-matter jurisdiction may be raised at any time, even by the court. See Casebook Chapter 9.)

After receiving supplemental briefing, the Eighth Circuit held that jurisdiction was lacking, as described in the Supreme Court opinion.[1] The court vacated the district court's judgment of dismissal and sent the case back to district court with directions to remand it to the Missouri state court.[2] The defendants then filed their petition for certiorari in the Supreme Court, and the Court granted it.

2. You might wonder why the parties fought over removal based on federal question jurisdiction. This was a class action, and CAFA provides for jurisdiction based on "minimal diversity": it is enough that "*any* member of a class of plaintiffs is a citizen of a State different from *any* defendant. 28 U.S.C. § 1332(d)(2)(A) (emphasis added); see Casebook Chapter 2, section A.

The defendants did indeed invoke CAFA as well as § 1331 in their notice of removal. But plaintiffs had carefully crafted their complaint to foil removal under CAFA.

First, Wullschleger and a second named plaintiff were both citizens of Missouri, and the proposed classes were defined to contain only "Missouri citizens."

Second, the complaint alleged that Royal Canin conspired "with other manufacturers of dog and cat food, including Mars Petcare US, Inc." in the challenged conduct. Mars Petcare was a citizen of Delaware and Tennessee, so its joinder as a defendant would have satisfied CAFA's minimal-diversity requirement. But Mars Petcare was not named as a defendant. And, as the district court ruled in its initial order granting remand, "even after CAFA, plaintiffs remain the masters of their claims and can choose whom they want to sue." So the court rejected defendants' argument "that Mars Petcare's citizenship [could] be used to establish minimal diversity as required by CAFA." See Casebook pp. 553–54 (discussing the "master of the complaint" rule).

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[1] The court rejected the district court's conclusion that the amended complaint retained sufficient vestiges of federal law to support incorporated federal question jurisdiction.

[2] The Eighth Circuit's opinion was written by Judge David Stras, a co-author of this Casebook.

As for Royal Canin, that corporation had its principal place of business in Missouri, but it was incorporated in Delaware.[3] Section 1332(c) provides:

> For purposes of this subsection, . . . a corporation shall be deemed to be a citizen of every State . . . by which it has been incorporated *and* of the State . . . where it has its principal place of business. (Emphasis added.)

See Casebook Chapter 11. Defendants argued that this dual citizenship allowed it to meet the minimal diversity requirement of CAFA. There was no Eighth Circuit decision on point, but other circuits had uniformly rejected the argument, and the district court agreed. When the Eighth Circuit accepted the appeal from the remand order, it limited its review to removal based on a federal question. Royal Canin did not raise the CAFA issue in its petition for certiorari in the Supreme Court.

3. Plaintiff filed her complaint in state court in February 2019, and the Supreme Court handed down its decision in January 2025. That is (for all practical purposes) six years, and at the end of that period, the case was back in state court where it started, and the parties could begin litigating the merits (again). Is something wrong here? Does this history suggest reconsideration of any of the applicable law? Or was this just a "perfect storm" that led to this result?

4. Whatever the implications for reform of the law of removal jurisdiction, the history of the litigation in *Royal Canin* makes clear the importance that lawyers can attach to the choice between federal and state courts. What differences between the state forum (the circuit court of Jackson County, Missouri) and the federal forum (the U.S. District Court for the Western District of Missouri) might account for this? Here's one possible clue: consider what happened in the district court after the court denied the second motion to remand (summarized above).

B. Implications of *Royal Canin* for Litigation Strategy

1. The Supreme Court decision in *Royal Canin* substantially changed the law governing federal question removal. A district court opinion explains:

> Before *Royal Canin*, both removal and supplemental jurisdiction were thought to outlive the federal question triggering removal. Excising the federal claim afterward did "not defeat the original removal" because jurisdiction turned on "the complaint as it existed at the time the petition for removal was filed." *Gossmeyer v. McDonald*, 128 F.3d 481, 487–88 (7th Cir. 1997). Supplemental jurisdiction survived too, and courts had discretion on whether "to retain jurisdiction over, or dismiss, [supplemental] state law claims after federal claims [we]re dismissed." *Shekoyan v. Sibley Int'l*, 409 F.3d 414, 423 (D.C. Cir. 2005); see also *Edmondson & Gallagher v. Alban Towers Tenants Ass'n*, 48 F.3d 1260, 1265–66 (D.C. Cir. 1995).
>
> But *Royal Canin* changed all that. It clarified that the jurisdictional rules are the same for removed federal-question cases and those originating in federal court. In both instances, jurisdiction is not trapped in amber. When a plaintiff amends his

[3] A second named defendant was incorporated in Missouri and had its principal place of business in that state, so it was clearly not diverse from any member of the plaintiff class.

> complaint, the new complaint — not the original complaint — "become[s] the operative one" and controls jurisdiction. So if a plaintiff "cuts out all her federal-law claims, federal-question jurisdiction dissolves." And once that happens, it "divests a court of supplemental jurisdiction over the remaining state claims." Thus, if an amended complaint includes only state-law claims, "[t]he operative pleading no longer supports federal jurisdiction, and the federal court must remand the case to the state court where it started."

Williams v. Georgetown Univ. Alumni & Student Federal Credit Union, 2025 WL 1639711 (D.D.C. June 30, 2025).

2. The Court in *Royal Canin* acknowledges one exception to its rule that "jurisdiction follows the amended complaint." The exception applies in diversity cases.

> In both original and removed cases, an amendment reducing the alleged amount-in-controversy to below the statutory threshold — like a post-filing development that makes recovering the needed amount impossible — will usually not destroy diversity jurisdiction.

That exception is associated with the decision in *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283 (1938). For discussion, see Casebook pp. 642-43.

3. The Supreme Court opinion in *Royal Canin* notes that the footnote in *Rockwell* distinguished between original and removal jurisdiction on the basis that "removal cases raise forum-manipulation concerns that simply do not exist when it is the *plaintiff* who chooses a federal forum and then pleads away jurisdiction through amendment." Does the decision in *Royal Canin* give plaintiffs too much leeway to engage in "forum manipulation"? The Eighth Circuit — whose judgment was affirmed by the Supreme Court — addressed this concern:

> There is a straightforward procedural answer to curbing potential forum manipulation. Unless amendments to the complaint happen quickly, a district court can withhold "leave" to amend if the only reason for the changes is to destroy federal jurisdiction. FED. R. CIV. P. 15(a)(1) (explaining when a party may amend as of right), (a)(2) (allowing a district court to deny leave to amend "when justice so requires"); see *Brown v. Wallace*, 957 F.2d 564, 566 (8th Cir. 1992) (per curiam) (pointing to "undue delay," "bad faith," and "undue prejudice to the non-moving party" as reasons to deny leave to amend); see also *Bailey v. Bayer CropScience L.P.*, 563 F.3d 302, 309 (8th Cir. 2009) [Casebook p. 671] (directing district courts "to consider the extent to which the joinder of [a] nondiverse party is sought to defeat federal jurisdiction in deciding whether to grant leave to amend").

The Supreme Court makes no mention of the fact that Wullschleger amended her complaint to delete all federal matter before a responsive pleading had been served. Does that silence cast any doubt on the Eighth Circuit's "straightforward procedural answer" to concerns about forum manipulation?

4. Assume that the Supreme Court has not rejected the Eighth Circuit's "straightforward procedural answer." As the Eighth Circuit points out, Rule 15(a)(2)

provides that after the time for amendment as of right has passed, "[t]he court should freely give leave [to amend] *when justice so requires*." (Emphasis added.) How does that general directive apply in a removed case when the plaintiff seeks leave to amend the complaint to delete all federal claims and secure a remand to state court? Before *Royal Canin*, courts took different approaches to this question. Some courts saw not "manipulation" but "a legitimate tactical decision." Thus, the Ninth Circuit, in *Baddie v. Berkeley Farms, Inc.*, 64 F.3d 487, 491 (9th Cir. 1995), said:

> The defendant is not obligated to remove; rather, he has the choice either to submit to state court resolution of his claims, or to assert his right to a federal forum. If the defendant rejects the plaintiff's offer to litigate in state court and removes the action, the plaintiff must then choose between federal claims and a state forum. Plaintiffs in this case chose the state forum. They dismissed their federal claims and moved for remand with all due speed after removal. There was nothing manipulative about that straightforward tactical decision, and there would be little to be gained in judicial economy by forcing plaintiffs to abandon their federal causes of action before filing in state court.

The contrary view was expressed by the Fifth Circuit in *Boelens v. Redman Homes, Inc.*, 759 F.2d 504, 507 & n.2 (5th Cir. 1985):

> "When a plaintiff chooses a state forum, yet also elects to press federal claims, he runs the risk of removal. A federal forum for federal claims is certainly a defendant's right. If a state forum is more important to the plaintiff than his federal claims, he should have to make that assessment before the case is jockeyed from state court to federal court and back to state court. The jockeying is a drain on the resources of the state judiciary, the federal judiciary and the parties involved; tactical manipulation [by the] plaintiff . . . cannot be condoned." The rule that a plaintiff cannot oust removal jurisdiction by voluntarily amending the complaint to drop all federal questions [also] serves the salutary purpose of preventing the plaintiff from being able to destroy the jurisdictional choice that Congress intended to afford a defendant in the removal statute. (citing cases).

Which of these positions do you find more persuasive? Must a court adopt one or the other in order to decide a particular case? Consider the Problem that follows.

Problem: Discord in the Police Department

Discord has been simmering in the Bayport Police Department, and on February 10 of last year, four current and former police officers filed suit in Oceana state court against the City of Bayport and Police Chief Ezra Collig. The plaintiffs alleged many forms of wrongful conduct by the defendants, including wrongful termination, alteration of personnel files, favoritism, retaliation, and harassment. The complaint asserted seventeen causes of action, including three claims arising under federal law: "violation of First Amendment," "violation of Fourteenth Amendment due process," and "violation of section 1983."

On February 16, the defendants filed a notice of removal based on federal question and supplemental jurisdiction. On March 1, the plaintiffs filed a motion to remand. The rationale for their request was that the Oceana state court "is

authorized and is capable of adjudicating and providing remedies to Plaintiffs on all claims asserted by Plaintiffs in this action." The motion did not attack the removal procedurally or substantively. On March 15, the plaintiffs filed an amended complaint that continued to assert the federal claims.

Two weeks after the filing of the amended complaint, the defendants filed an answer and a motion for partial judgment on the pleadings. They also filed their opposition to the motion to remand. The supporting memorandum stated: "The existence of concurrent jurisdiction in the state court does not justify remand if, as here, the case has been properly removed." The district court agreed with the memorandum and denied the motion to remand.

The plaintiffs did not respond to the defendants' motion for partial judgment on the pleadings. Instead, the parties began to engage in discovery.

Discovery proved to be lengthy and contentious. The court was called upon to resolve numerous motions, including eight filed by the plaintiffs. Of those motions, the court denied four in full and two in part. Most recently, on March 11 of this year, the district court reproved plaintiffs' counsel for improperly directing a third-party witness not to answer questions from opposing counsel at a deposition, and for failing to produce counsels' discoverable written communications with the witness.

Plaintiffs have now filed a motion to further amend the complaint under F.R.C.P. 15(a)(2) to dismiss all of the federal claims. The motion also asks the court to decline to assert jurisdiction over the remaining state-law claims and remand the matter back to state court as requested in the motion filed on March 1 of last year. Plaintiffs explain in an accompanying memorandum that "through information learned in discovery, Plaintiffs no longer believe that their federal claims are viable, and they anticipate that those claims will be dismissed on summary judgment."

In making their motion, Plaintiffs principally rely on the Supreme Court decision in *Royal Canin*. They argue that under *Royal Canin*, they are entitled to amend the complaint to remove the federal claims, and that "with the amendment the court would be stripped of subject matter jurisdiction, requiring remand of their state-law claims. That would enable the plaintiffs to litigate those claims in state court, where they belong."

Should the court grant the plaintiffs' motion? Consider not only the Supreme Court opinion in *Royal Canin* but also the decision in *Bailey v. Bayer CropScience L.P.*, cited in the Eighth Circuit's opinion in *Royal Canin* (see above) and excerpted at page 671 of the Casebook.

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 again followed 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*, 594 U.S. 482 (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. The Act grants private parties, when authorized by FERC, 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*, 589 U.S. 248 (2020), suits by other States, *South Dakota v. North Carolina*, 192 U.S. 286 (1904), and suits by the Federal Government, *United States v. Texas*, 143 U.S. 621 (1892). * * *
>
> As the cases discussed [earlier] show, the States consented in the plan of the Convention to the exercise of federal eminent domain power, including in condemnation proceedings brought by private delegatees. The plan of the Convention reflects the "fundamental postulates implicit in the constitutional design." *Alden*. And we have said regarding the exercise of federal eminent domain within the States that one "postulate of the Constitution [is] that the government of the United States is invested with full and complete power to execute and carry out its purposes." *Cherokee Nation* (quoting *Stockton*). Put another way, when the States entered the federal system, they renounced their right

to the "highest dominion in the lands comprised within their limits." * * *

The respondents and the dissent do not dispute that the Federal Government enjoys a power of eminent domain superior to that of the States. Nor do they dispute that the Federal Government can delegate that power to private parties. They instead assert that the only "question is whether Congress can authorize a private party to bring a condemnation suit against a State." And they argue that because there is no founding-era evidence of such suits, States did not consent to them when they entered the federal system.

The flaw in this reasoning is that it attempts to divorce the eminent domain power from the power to bring condemnation actions—and then argue that the latter, so carved out, cannot be delegated to private parties with respect to state-owned lands. But the eminent domain power is inextricably intertwined with the ability to condemn. Separating the eminent domain power from the power to condemn—when exercised by a delegatee of the Federal Government—would violate the basic principle that a State may not diminish the eminent domain authority of the federal sovereign.

If private parties authorized by the Federal Government were unable to condemn States' property interests, then that would leave delegatees with only one constitutionally permissible way of exercising the federal eminent domain power: Take property now and require States to sue for compensation later. It is difficult to see how such an arrangement would vindicate the principles underlying state sovereign immunity. Whether the purpose of that doctrine is to "shield[] state treasuries" or "accord the States the respect owed them as joint sovereigns," *Fed. Maritime Comm'n v. South Carolina Ports Authority*, 535 U.S. 743 (2002), it would hardly be served by favoring private or Government-supported invasions of state-owned lands over judicial proceedings. * * *

[T]he federal eminent domain power is "complete in itself," *Kohl* [*v. United States*, 91 U.S. 367, 374 (1876)], and the States consented to the exercise of that power—in its entirety—in the plan of the Convention. The States thus have no immunity left to waive or abrogate when it comes to condemnation suits by the Federal Government and its delegatees.

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? Although *PennEast* dealt specifically with the eminent-domain power rather than Congress's article I powers as a whole, is there a meaningful distinction between the majority's mode of analysis and the repudiated analysis of the *Union Gas* plurality? Recall, as Justice Barrett pointed out in dissent, that Congress has no eminent domain power as such; rather, Congress has the authority to exercise eminent domain because doing so is necessary and proper to the carrying out of its other powers, most notably the commerce power.

The *PennEast* 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 that choose to initiate legal action against others. Should that affect the Court's calculus when assessing the strength of a state's interest?

6. 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 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 Justice Gorsuch'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."

7. 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*, 597 U.S. 580 (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." The commerce power was different, the Court argued: "[F]ederal regulation of commerce (at issue in *Seminole Tribe*) involves goods that, before they travel between States or outside a tribe, are subject to regulation by a sovereign other than the Federal Government (a State or

tribe). That feature of commerce arguably makes the federal regulatory power less than 'complete.'" Are you convinced by the distinction?

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.

595 U.S. 30.

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

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

[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.

II * * *

A

[W]e 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 statecourt 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.

C

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

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

D

[T]he sole private defendant, 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. . . .

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

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

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

IV

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

authority over medical licensees, including the petitioners. (5) Every Member of the Court accepts that the only named private-individual defendant, Mr. Dickson, should be dismissed.

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

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

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

Texas has passed a law banning abortions after roughly six weeks of pregnancy. 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.[2]

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

[2] 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*, 591 U.S. 299, 336-339 (2020) (opinion of BREYER, J.). The provision, after all, is entitled "Undue Burden Defense *Limitations*."

Safety Code, which includes S.B. 8. See 22 Tex. Admin. Code § 190.8(7) ("the Board shall take appropriate disciplinary action against a physician who violates . . . Chapter 171, Texas Health and Safety Code"). Under Texas law, then, the Attorney General maintains authority to "take enforcement actions" based on violations of S.B. 8. He accordingly also falls within the scope of *Young*'s exception to sovereign immunity.

The same goes for Penny Clarkston, a court clerk. Court clerks, of course, do not "usually" enforce a State's laws. But by design, the mere threat of even unsuccessful suits brought under S.B. 8 chills constitutionally protected conduct, given the peculiar rules that the State has imposed. Under these circumstances, the court clerks who issue citations and docket S.B. 8 cases are unavoidably enlisted in the scheme to enforce S.B. 8's unconstitutional provisions, and thus are sufficiently "connect[ed]" to such enforcement to be proper defendants. *Young*. The role that 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.

* * *

The clear purpose and actual effect of S.B. 8 has been to nullify this Court's rulings. . . ."If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery." *United States v. Peters*, 9 U.S. 115 (1809). The nature of the federal right infringed does not matter; it is the role of the Supreme Court in our constitutional system that is at stake.

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

For nearly three months, the Texas Legislature has substantially suspended a constitutional guarantee: a pregnant woman's right to control her own body. In open defiance of this Court's precedents, Texas enacted Senate Bill 8 (S.B. 8), which bans abortion starting approximately six weeks after a woman's last menstrual period, well before the point of fetal viability. Since S.B. 8 went into effect on September 1, 2021, the law has threatened abortion care providers with the prospect of essentially unlimited suits for damages, brought anywhere in Texas by private bounty hunters, for taking any action to assist women in exercising their constitutional right to choose. . . .

[F]ederal 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. * * *

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.

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. * * *

In addition, state-court clerks are proper defendants in this action. * * * S.B. 8's formidable chilling effect, even before suit, would be nonexistent if not for the state-court officials who docket S.B. 8 cases with lopsided procedures and limited defenses. Because these state actors are necessary components of that chilling effect and play a clear role in the enforcement of S.B. 8, they are proper defendants.

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

Moreover, the Court has emphasized that "the principles undergirding the *Ex parte Young doctrine*" may "support its application" to new circumstances, "novelty notwithstanding." *Stewart*. No party has identified any prior circumstance in which a State has delegated an enforcement function to the populace, disclaimed

official enforcement authority, and skewed state-court procedures to chill the exercise of constitutional rights. Because S.B. 8's architects designed this scheme to evade *Young* as historically applied, it is especially perverse for the Court to shield it from scrutiny based on its novelty.[3]

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

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

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

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

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

deputizes anyone to sue without establishing any pre-existing personal stake (i.e., standing) and then skews procedural rules to favor these plaintiffs. * * *

In its finest moments, this Court has ensured that constitutional rights "can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes . . . whether attempted 'ingeniously or ingenuously.'" *Cooper v. Aaron*, 358 U.S. 1 (1958). Today's fractured Court evinces no such courage. While the Court properly holds that this suit may proceed against the licensing officials, it errs gravely in foreclosing relief against state-court officials and the state attorney general. By so doing, the Court leaves all manner of constitutional rights more vulnerable than ever before, to the great detriment of our Constitution and our Republic.

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

1. Two postscripts 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 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.*, 597 U.S. 215 (2022). Overturning *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 there were no procedural barriers to reaching the merits.

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 chill constitutionally protected conduct for years—perhaps indefinitely—with no opportunity for federal court review.

Indeed, other States have taken notice and are already following Texas's playbook. Most prominently, California has enacted sweeping new restrictions on firearms, including a prohibition against the manufacture, distribution, or sale of assault weapons. Cal. SB-1327 (enacted July 22, 2022). Ordinarily, restrictions like

these would prompt an immediate pre-enforcement challenge based on the Second Amendment's right to bear arms.

Like S.B. 8, however, California's restrictions on firearms may be enforced only through civil actions filed by private parties against any person who violates the law, or who aids and abets a violation. And like S.B. 8, the law creates significant risks for firearm owners, with minimum damages of $10,000 per weapon, plus attorney fee shifting for prevailing plaintiffs but never for prevailing defendants. Upon signing the bill, California Governor Gavin Newsom tweeted: "If states can shield their laws from review by federal courts, then CA will use that authority to help protect lives."

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

3. Should it matter that the enforcement mechanisms of S.B. 8 and SB-1327 were *intended* to frustrate federal constitutional review? The drafters of the law plainly had a deep understanding of the constitutional and equitable limits on federal-court authority described in this Chapter. (They no doubt excelled in their Federal Courts class!) Then they exploited those limits to circumvent *Ex parte Young*, a form of review that the Supreme Court has described as essential to ensure the supremacy of federal law. Moreover, they did so in service of laws that (when enacted) were brazenly unconstitutional, yet which carried such daunting penalties that many people would have no choice but to forgo constitutionally protected conduct. When evaluating this kind of novel state-law enforcement scheme, should the Supreme Court take into account whether state legislators' purpose was to prevent the exercise of federal constitutional rights?

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

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

The second is through Congress, which could create an express cause of action expanding upon *Ex Parte Young* and granting plaintiffs an "unqualified" right to pre-enforcement constitutional review in federal court. To the extent *Whole Woman's Health* rests on traditional principles of equity, Congress certainly could override its reasoning and direct courts to grant relief in new circumstances. But is

that the sole basis for the Court's decision? Suppose, for example, that Congress enacted a statute providing that federal district courts shall review constitutional challenges to any state law filed against the state attorney general (or some other state officials) regardless of whether the defendant plays any role in enforcing the challenged law. Could a federal court exercise jurisdiction in such a case, consistent with Article III? Is there any other way that Congress by statute could prevent other states from deploying the strategy devised by Texas in S.B. 8?

Chapter 14
The Section 1983 Cause of Action

B. Section 1983 and Constitutional Claims

Page 789: ***replace the second-last paragraph and the first sentence of the last paragraph with the following:***

How broadly should this statement be read? Does it foreclose any requirement that a person challenging state official action pursue state *administrative* remedies before filing suit under § 1983? In *Patsy v. Board of Regents of the State of Florida*, 457 U.S. 496 (1982), the Supreme Court appeared to say "yes": "[E]xhaustion of state remedies is not a prerequisite to an action under § 1983." *Id*. at 501; *see also Felder v. Casey*, 487 U.S. 131 (1988) (holding that § 1983 preempts a state requirement that plaintiffs provide defendants in § 1983 cases with a notice of the claim before filing suit).

While *Patsy* makes it clear that states may not require exhaustion before a § 1983 case is brought in *federal* court, it is not as clear whether states can require exhaustion before a § 1983 claim is brought in *state* court. *Williams v. Reed*, 604 U.S. __, 145 S. Ct. 465 (2025), raised that issue but the Supreme Court decided the case on a narrower ground. In *Williams*, several unemployed workers in Alabama filed for unemployment benefits. Rather than either grant or deny the claims, however, the Alabama Department of Labor failed to take any action. The claimants brought a § 1983 action in state court against the secretary of the department, arguing that the delay in processing the applications violated federal statutory law as well as the Constitution's Due Process Clause. The state courts refused to entertain the action because the administrative processes had not concluded, and Alabama law did not allow its courts to hear an appeal from administrative action until administrative remedies had been exhausted.

This exhaustion requirement placed the claimants in a catch-22. As the Supreme Court noted, "Alabama has said that to challenge delays in the administrative process under § 1983, you first have to exhaust the administrative process. Of course, that means that you can *never* challenge delays in the administrative process." 145 S. Ct. at 471.

In a 5-4 decision authored by Justice Kavanaugh, the Supreme Court held that Alabama's exhaustion requirement was preempted by § 1983. Because the exhaustion requirement made it impossible for plaintiffs to challenge administrative delays, the requirement "in effect immunize[d] state officials" from such challenges, contrary to Congress's policy of making them liable for violating federal rights. *Id*.

Justice Thomas dissented in an opinion that was joined in part by Justices Alito, Gorsuch, and Barrett. The dissenters argued that a statute limiting state courts' jurisdiction should be invalidated only if it is motivated by a disagreement with federal policy. *Id*. at 479 (Thomas, J., dissenting) (discussing *Haywood v. Drown*, 556 U.S. 729, 735 (2009)). Thus, while the dissenters believed that a limitation on state-court jurisdiction was consistent with § 1983 as long as it had a "neutral" *purpose* (*i.e.*, a purpose other than to obstruct federal policy), the Court held that a limitation on state-court jurisdiction would be preempted, regardless of its purpose, if it "*operates* to immunize state officials from a . . . class of claims brought under § 1983." 145 S. Ct. at 471 (opinion of the Court) (emphasis added).

Even though § 1983 itself does not require exhaustion of state remedies (at least in federal court), however, sometimes the federal right that is enforced via § 1983 requires exhaustion. Specifically, plaintiffs who claim to have been deprived of life, liberty, or property without due process are required to take advantage of the processes that are available to them. [Continue from this point with the remainder of the Note in the main volume.]

C. Section 1983 and Statutory Claims

Page 808: ***insert before the last paragraph of Note 3:***

After years of uncertainty in the lower courts, the Supreme Court has formally abandoned *Blessing*'s approach. In *Medina v. Planned Parenthood South Atlantic*, 606 U.S. __, 145 S. Ct. 2219 (2025), the Court announced that courts "should not" "consult *Wilder*, *Wright*, [or] *Blessing* when asking whether a spending-power statute creates an enforceable individual right." 145 S. Ct. at 2234. Rather, *Gonzaga* provides the governing test and does not "'permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983.'" *Id*. (quoting *Gonzaga*, 536 U.S. at 283).

Page 814: ***insert after Note 4:***

The Supreme Court continues to hear cases on the *Sea Clammers* doctrine. In *Health and Hospital Corporation of Marion County v. Talevski*, 599 U.S. 166 (2023), the Court considered a § 1983 claim that sought damages for a violation of the Federal Nursing Home Reform Act (FNHRA). Ivanka Talevski believed nursing home employees were mistreating her husband, Gorgi, including by using powerful medications to sedate him and ultimately by attempting to transfer him to another facility without notifying his family. The Talevskis sued.

Justice Jackson wrote an opinion on behalf of seven justices and held that the Talevskis could sue. The Court noted that plaintiffs in § 1983 cases must clear a "demanding bar"—a statute must unambiguously confer individual rights to be enforceable via § 1983—but held that the FNHRA satisfied that standard. In particular, the Court looked to the plain text of the FNHRA, which granted 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" that applied to 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. The Court was unpersuaded. While the FNHRA included administrative mechanisms for addressing non-compliant nursing homes, nothing in the text suggested that enforcement through § 1983 would be incompatible with those mechanisms. The statute contained no requirements that plaintiffs comply with, or exhaust, specific administrative procedures.

The victory for plaintiffs in *Talevski* may well be the exception that proves the rule of how difficult it is for plaintiffs to use § 1983 to recover for statutory violations. Justice Barrett wrote a concurring opinion, joined by Chief Justice Roberts, suggesting that *Talevski* would apply only in rare circumstances. She emphasized that while

FNHRA cleared the high bar of an unambiguously conferred individual right, "many federal statutes will not." She also stated her view 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 indicating that § 1983 should not be available to enforce a statutory violation. Courts must "tread carefully," in Justice Barrett's words. Justice Gorsuch briefly concurred, expressing agreement with Justice Barrett's opinion, meaning three of the seven justices in the majority highlighted the limitations of the holding.

Justice Thomas dissented, arguing that Congress's conditional expenditures could not create individually enforceable rights because such expenditures were akin to contractual offers that the states had the power to refuse. Accordingly, Justice Thomas thought that funding programs could not create a "right" to have states comply with a funding condition when there was no obligation for the states to participate in the program at all.

Justice Alito also dissented, in an opinion joined by Justice Thomas. He emphasized a narrow point of disagreement—he believed the FNHRA created a comprehensive remedial regime and that § 1983 claims would "upend th[e] careful balance" struck by Congress in crafting that regime. If individuals were permitted to enforce FNHRA and seek damages through § 1983, "§ 1983 will swallow the centralized state and federal review mechanisms the Act imposes."

Only two years later, Justice Barrett's view about the limited scope of *Talevski* became a holding when the Court decided *Medina v. Planned Parenthood South Atlantic*, 606 U.S. __, 145 S. Ct. 2219 (2025). In *Medina*, Planned Parenthood and one of its patients brought a § 1983 action alleging that South Carolina had violated federal law when the state refused to permit Planned Parenthood to participate in Medicaid. Medicaid requires participating states (all fifty states have chosen to participate) to ensure that "any individual eligible for medical assistance (including drugs) may obtain such assistance from any [provider] who undertakes to provide him such services." 42 U.S.C. § 1396a(a)(23)(A). Nevertheless, because state law prohibited the use of public funds for abortion, South Carolina refused to permit Planned Parenthood to participate in Medicaid (even for services other than abortion).

The key question for the Court was whether the any-qualified-provider provision could be enforced through a § 1983 action. In a 6-3 opinion written by Justice Gorsuch, the Court held that it could not. The Court stressed the distinctions between the Medicaid provision at issue here and the FNHRA provision at issue in *Talevski*, and held that the Medicaid provision did not "unambiguously" confer an individual right as required by *Gonzaga*. Whereas the FNHRA repeatedly referred to nursing-home residents' "rights," the Medicaid provision instead lacked "anything like FNHRA's clear and unambiguous 'rights-creating language.'" 145 S. Ct. at 2235 (quoting *Talevski*, 599 U.S. at 186).

The Court acknowledged that some earlier cases had applied a more liberal standard,[3] but it argued that *Gonzaga* and subsequent cases had "'reject[ed]' any

[3] *See* pp. 799-802 and 806-08 of the main volume (discussing *Wright v. Roanoke Redevelopment and Housing Auth.*, 479 U.S. 418 (1987), *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498 (1990), and *Blessing v. Freestone*, 520 U.S. 329 (1997)).

reading of our prior cases that would 'permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983.'" 145 S. Ct. at 2234 (quoting *Gonzaga University v. Doe*, 536 U.S. 273, 283 (2002)). The unambiguous language was necessary, the Court explained, because "[o]nly that kind of 'unmistakable' notice . . . suffices to alert grantees that they might be subject 'to private suits . . . whenever they fail to comply with a federal funding condition.'" 145 S. Ct. at 2233 (quoting *Gonzaga*, 536 U.S. at 286-87 & n.5).

The Court also noted additional indications that Congress did not intend the Medicaid provision to be privately enforceable. First, the provision demands that states permit individuals to receive treatment from any qualified provider, but it allows states to determine which providers are qualified. If that provision were enforceable in a § 1983 action, therefore, "that would mean Congress sought to convey a right against the States in one breath but let States control its scope in the next." 145 S. Ct. at 2235. Second, although the Medicaid provision mandates that states allow any qualified provider to perform covered services, a state is subject to losing its Medicaid funding only if it falls short of substantial compliance. Because the statute appeared to focus on the state's "aggregate" compliance, it did not mean to guarantee an individually enforceable right to each Medicaid beneficiary. *Id*. at 2235-36. Third, the provision was situated in the middle of eighty-seven similar requirements for states to satisfy to receive federal funding. If those provisions were all individually enforceable, "instead of remaining 'atypical' exceptions, as our cases have said they are, rights-creating provisions might more nearly become the rule." *Id*. at 2236.

Justice Thomas wrote a concurring opinion in which he reiterated his *Talevski* dissent and suggested that the Court should simply declare that conditions on congressional expenditures do not create individually enforceable "rights." Further, he argued that the Court had construed § 1983's language too broadly in allowing plaintiffs to recover for harms that would not have been considered "rights" at the time that § 1983 was enacted: "Case law from the period surrounding § 1983 [until the 1960s and 1970s] emphasized a distinction between rights and mere government benefits." *Id*. at 2245 (Thomas, J., concurring).

Justice Jackson, writing also for Justices Sotomayor and Kagan, dissented. She argued that, even though the Medicaid provision did not use the word "right," it "easily satisfie[d]" the requirement that Congress "unambiguously confer individual federal rights." *Id*. at 2252 (Jackson, J., dissenting). The most important reason for that conclusion was that the provision, in Justice Jackson's view, was "phrased in terms of the persons benefited" and "focus[ed] on the benefited class." *Id*. Although the provision spoke about what stated had to do to obtain Medicaid funding, the provision in question required the states to ensure that "any individual eligible for medical assistance" be able to "obtain such assistance" from any qualified provider willing to render it.

Does *Medina* effectively create a "magic words" requirement? That is, will any spending program clearly and unambiguously create a right enforceable through § 1983 if it does not use the word "right"? Would such a rule provide admirable clarity, or would it impose too much of an obstacle to achieving congressional intent where Congress wishes a provision to be enforceable but uses different language? On the other hand, was the majority right that the dissent's approach would allow conditions on spending legislation to be privately enforced far more often than *Gonzaga* and even *Talevski* seemed to say?

Note that § 1983 does not merely allow plaintiffs to sue to remedy deprivations of "rights," but "any rights, privileges, or immunities secured by the Constitution and laws." Even if Medicaid did not create a *right* to obtain care from one's preferred provider, did it create a *privilege* to that effect?

Chapter 15
Federal Habeas Corpus

B. The Scope and Standard of Review on Collateral Attack

Page 906: *insert after Note 5:*

The Court's internal debate about the line between dicta and holdings continued in *Andrew v. White*, 604 U.S. __, 145 S. Ct. 75 (2025) (*per curiam*). Brenda Andrew and her paramour were convicted of killing Andrew's husband. At Andrew's trial, the prosecution introduced evidence of Andrew's extramarital sex life and her history of seducing men. Andrew argued that she was deprived of due process because the evidence was "so unduly prejudicial that it render[ed] the trial fundamentally unfair." *Payne v. Tennessee*, 501 U.S. 808, 825 (1991). The Tenth Circuit, applying the AEDPA standard, denied habeas relief on the ground that there was no "clearly established" due process right to be free of prejudicial evidence, despite the language in *Payne*. Summarily reversing the Tenth Circuit, the Court held that the right was "clearly established" because it was part of *Payne*'s holding and other Supreme Court cases had referenced a due-process right to be free from fundamentally unfair procedures. No Supreme Court case, however, had invoked *Payne* to reverse a conviction because of the admission of prejudicial evidence.

Payne concerned the admission of victim-impact evidence (evidence about how the defendant's crime affected the victim's family). Before *Payne*, the Supreme Court had barred victim-impact evidence in capital sentencing. *Payne* overturned that doctrine and held that victim-impact evidence *could* be offered. In explaining why it was not necessary to bar all victim-impact evidence, the Court noted that "[i]n the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." *Id*.

In *Andrew*, the Court concluded that the language from *Payne* was a holding because it stated a "principle" that was "indispensable to the decision." 145 S. Ct. at 81. The Court explained that *Payne* "removed one protection for capital defendants (the *per se* bar on victim impact statements) in part *because* another protection (the Due Process Clause) remained available against evidence that is so unduly prejudicial that it renders the trial fundamentally unfair." *Id*.

In dissent, Justice Thomas (joined by Justice Gorsuch) did not see *Payne* that way. For Justice Thomas, "a far more plausible [interpretation of *Payne*'s statement] is that the Court simply wanted to make clear that its rejection of a categorical rule against victim-impact evidence did not rule out future fact-specific challenges." *Id*. at 91 (Thomas, J., dissenting).

Andrew also held that, while the "reasonable application" prong of the AEDPA standard requires deference to state courts, no deference should be paid on the question whether a point of law is "clearly established" by Supreme Court precedent. *Id*. at 83 (*per curiam*).

Page 907: *insert at the end of the partial paragraph at the top of the page:*

See Andrew v. White, 604 U.S. __, __, 145 S. Ct. 75, 90 (2025) (Thomas, J., dissenting) (arguing that qualified immunity does not apply to a decision that is obviously wrong, even if there is no on-point precedent, but that AEDPA "permits relief only when a

state-court decision undeniably 'conflicts with this Court's precedents.'" (quoting *Harrington v. Richter*, 562 U.S. 86, 102 (2011))). *But cf. Andrew*, 604 U.S. at __, 145 S. Ct. at 82 (*per curiam*) ("Although this Court has not previously relied on *Payne* to invalidate a conviction for improperly admitted prejudicial evidence, . . . 'certain principles are fundamental enough that when new factual permutations arise, the necessity to apply the earlier rule will be beyond doubt.'") (citations omitted).

Appendix B

The Justices of the United States Supreme Court, 1946-2023 Terms

U.S. Reports	Term*	The Court**
329-332[1]	1946	**Vinson**, Black, Reed, Frankfurter, Douglas, Murphy, Jackson, Rutledge, Burton
332[1]-335[2]	1947	"
335[2]-338[3]	1948	"
338[3]-339	1949	Vinson, Black, Reed, Frankfurter, Douglas, Jackson, Burton, Clark, Minton
340-341	1950	"
342-343	1951	"
344-346[4]	1952	"
346[4]-347	1953	**Warren**, Black, Reed, Frankfurter, Douglas, Jackson, Burton, Clark, Minton
348-349	1954	Warren, Black, Reed, Frankfurter, Douglas, Burton, Clark, Minton, Harlan[5]
350-351	1955	"
352-354	1956	Warren, Black, Reed,[6] Frankfurter, Douglas, Burton, Clark, Harlan, Brennan, Whittaker[7]
355-357	1957	Warren, Black, Frankfurter, Douglas, Burton, Clark, Harlan, Brennan, Whittaker
358-360	1958	Warren, Black, Frankfurter, Douglas, Clark, Harlan, Brennan, Whittaker, Stewart
361-364[8]	1959	"
364[8]-367	1960	"

* Rule 3 of the Supreme Court's Rules provides in part: "The Court holds a continuous annual Term commencing on the first Monday in October and ending on the day before the first Monday in October of the following year."

** Justices are listed in order of seniority. Boldface indicates a new Chief Justice.

[1] The 1947 Term begins at 332 U.S. 371.

[2] The 1948 Term begins at 335 U.S. 281.

[3] The 1949 Term begins at 338 U.S. 217.

[4] The 1953 Term begins at 346 U.S. 325.

[5] Participation begins with 349 U.S.

[6] Participation ends with 352 U.S. 564.

[7] Participation begins with 353 U.S.

[8] The 1960 Term begins with 364 U.S. 285.

U.S. Reports	Term	The Court*
368-370	1961	Warren, Black, Frankfurter,[9] Douglas, Clark, Harlan, Brennan, Whittaker,[10] Stewart, White[11]
371-374	1962	Warren, Black, Douglas, Clark, Harlan, Brennan, Stewart, White, Goldberg
375-378	1963	"
379-381	1964	"
382-384	1965	Warren, Black, Douglas, Clark, Harlan, Brennan, Stewart, White, Fortas
385-388	1966	"
389-392	1967	Warren, Black, Douglas, Harlan, Brennan, Stewart, White, Fortas, Marshall
393-395	1968	Warren, Black, Douglas, Harlan, Brennan, Stewart, White, Fortas,[12] Marshall
396-399	1969	**Burger**, Black, Douglas, Harlan, Brennan, Stewart, White, Marshall, [vacancy]
400-403	1970	Burger, Black, Douglas, Harlan, Brennan, Stewart, White, Marshall, Blackmun
404-408	1971	Burger, Douglas, Brennan, Stewart, White, Marshall, Blackmun, Powell,[13] Rehnquist[13]
409-413	1972	"
414-418	1973	"
419-422	1974	"
423-428	1975	Burger, Brennan, Stewart, White, Marshall, Blackmun, Powell, Rehnquist, Stevens[14]
429-433	1976	"
434-438	1977	"
439-443	1978	"
444-448	1979	"
449-453	1980	"
454-458	1981	Burger, Brennan, White, Marshall, Blackmun, Powell, Rehnquist, Stevens, O'Connor
459-463	1982	"
464-468	1983	"
469-473	1984	"
474-478	1985	"
479-483	1986	**Rehnquist**, Brennan, White, Marshall, Blackmun, Powell, Stevens, O'Connor, Scalia
484-487	1987	"

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[9] Participation ends with 369 U.S. 422.

[10] Participation ends with 369 U.S. 120.

[11] Participation begins with 370 U.S.

[12] Participation ends with 394 U.S.

[13] Participation begins with 405 U.S.

[14] Participation begins with 424 U.S.

U.S. Reports	Term	The Court*
488-492	1988	Rehnquist, Brennan, White, Marshall, Blackmun, Stevens, O'Connor, Scalia, Kennedy
493-497	1989	"
498-501	1990	Rehnquist, White, Marshall, Blackmun, Stevens, O'Connor, Scalia, Kennedy, Souter
502-505	1991	Rehnquist, White, Blackmun, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas
506-509	1992	"
510-512	1993	Rehnquist, Blackmun, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg
513-515	1994	Rehnquist, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer
516-518	1995	"
519-521	1996	"
522-524	1997	"
525-527	1998	"
528-530	1999	"
531-533	2000	"
534-536	2001	"
537-539	2002	"
540-542	2003	"
543-545	2004[15]	Rehnquist, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer
546-548	2005	**Roberts**, Stevens, O'Connor,[16] Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer, Alito[17]
549-551	2006	Roberts, Stevens, Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer, Alito
552-554	2007	"
555-557	2008	"
558-561	2009	Roberts, Stevens, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor
562-564	2010	Roberts, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan
565-567	2011	"
568-570	2012	"
571-573	2013	"
574-576	2014	"

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[15] Chief Justice Rehnquist died on Sept. 3, 2005, shortly before the 2004 Term officially concluded, but after all opinions from that Term had been delivered.

[16] Participation ends with 546 U.S. 417.

[17] Participation begins with 547 U.S.

U.S. Reports	Term	The Court*
577-579	2015	Roberts, Scalia,[18] Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan
580-582	2016	Roberts, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan, Gorsuch[19]
583-585	2017	Roberts, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan, Gorsuch
586-588	2018	Roberts, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh
589-591	2019	"
592-594	2020	Roberts, Thomas, Breyer, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, Barrett
595-597	2021	"
598-600	2022	Roberts, Thomas, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, Barrett, Jackson
601-603	2023	"

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[18] Justice Scalia died on February 13, 2016, before most of the cases argued in the 2015 Term were decided. His participation ended with 136 S. Ct. 760.

[19] Justice Gorsuch joined the Court on April 10, 2017. He took no part in any of the cases from the 2016 Term discussed in this Supplement.

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355-357	1957	Warren, Black, Frankfurter, Douglas, Burton, Clark, Harlan, Brennan, Whittaker
358-360	1958	Warren, Black, Frankfurter, Douglas, Clark, Harlan, Brennan, Whittaker, Stewart
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393-395	1968	Warren, Black, Douglas, Harlan, Brennan, Stewart, White, Fortas,[12] Marshall
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404-408	1971	Burger, Douglas, Brennan, Stewart, White, Marshall, Blackmun, Powell,[13] Rehnquist[13]
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444-448	1979	"
449-453	1980	"
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459-463	1982	"
464-468	1983	"
469-473	1984	"
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479-483	1986	**Rehnquist**, Brennan, White, Marshall, Blackmun, Powell, Stevens, O'Connor, Scalia
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[12] Participation ends with 394 U.S.

[13] Participation begins with 405 U.S.

[14] Participation begins with 424 U.S.

U.S. Reports	Term	The Court*
488-492	1988	Rehnquist, Brennan, White, Marshall, Blackmun, Stevens, O'Connor, Scalia, Kennedy
493-497	1989	"
498-501	1990	Rehnquist, White, Marshall, Blackmun, Stevens, O'Connor, Scalia, Kennedy, Souter
502-505	1991	Rehnquist, White, Blackmun, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas
506-509	1992	"
510-512	1993	Rehnquist, Blackmun, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg
513-515	1994	Rehnquist, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer
516-518	1995	"
519-521	1996	"
522-524	1997	"
525-527	1998	"
528-530	1999	"
531-533	2000	"
534-536	2001	"
537-539	2002	"
540-542	2003	"
543-545	2004[15]	Rehnquist, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer
546-548	2005	**Roberts**, Stevens, O'Connor,[16] Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer, Alito[17]
549-551	2006	Roberts, Stevens, Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer, Alito
552-554	2007	"
555-557	2008	"
558-561	2009	Roberts, Stevens, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor
562-564	2010	Roberts, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan
565-567	2011	"
568-570	2012	"
571-573	2013	"
574-576	2014	"

* Justices are listed in order of seniority. Boldface indicates a new Chief Justice.

[15] Chief Justice Rehnquist died on Sept. 3, 2005, shortly before the 2004 Term officially concluded, but after all opinions from that Term had been delivered.

[16] Participation ends with 546 U.S. 417.

[17] Participation begins with 547 U.S.

U.S. Reports	Term	The Court*
577-579	2015	Roberts, Scalia,[18] Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan
580-582	2016	Roberts, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan, Gorsuch[19]
583-585	2017	Roberts, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan, Gorsuch
586-588	2018	Roberts, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh
589-591	2019	"
592-594	2020	Roberts, Thomas, Breyer, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, Barrett
595-597	2021	"
598-600	2022	Roberts, Thomas, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, Barrett, Jackson
601-603	2023	"
604-606	2024	"

* Justices are listed in order of seniority. Boldface indicates a new Chief Justice.

[18] Justice Scalia died on February 13, 2016, before most of the cases argued in the 2015 Term were decided. His participation ended with 136 S. Ct. 760.

[19] Justice Gorsuch joined the Court on April 10, 2017. He took no part in any of the cases from the 2016 Term discussed in the Casebook.