No. _____

In The
Supreme Court of the United States

WHOLE WOMAN'S HEALTH, ET AL., PETITIONERS,

v.

AUSTIN REEVE JACKSON, IN HIS OFFICIAL CAPACITY AS JUDGE OF THE 114TH DISTRICT COURT, ET AL.,

ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT

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QUESTION PRESENTED

The State of Texas adopted a law banning abortions at approximately six weeks of pregnancy, in clear violation of this Court's precedents holding that a State cannot prohibit abortion at a point before viability. To try to insulate this unconstitutional prohibition from a federal challenge, the legislature crafted the law to prohibit government officials from directly enforcing it and instead delegated enforcement to the general public via civil actions that "any person" can file in Texas state court. Petitioners—Texas abortion providers and individuals and organizations that support abortion patients—brought suit in federal court against, among others, the clerks and judges of the courts where enforcement actions can be brought and the Texas attorney general. The district court denied Respondents' motions to dismiss on standing and sovereign-immunity grounds. Although Respondents' appeal is pending in the Fifth Circuit, that Court has now issued an order that effectively forecloses Petitioners' claims against the government officials.

The question presented is whether a State can insulate from federal-court review a law that prohibits the exercise of a constitutional right by delegating to the general public the authority to enforce that prohibition through civil actions.

PARTIES TO THE PROCEEDING

Petitioners in this Court (plaintiffs-appellees in the court of appeals) are Whole Woman's Health; Alamo City Surgery Center, P.L.L.C. d/b/a Alamo Women's Reproductive Services; Brookside Women's Medical Center, P.A. d/b/a Brookside Women's Health Center and Austin Women's Health Center; Houston Women's Clinic; Houston Women's Reproductive Services; Planned Parenthood Center for Choice; Planned Parenthood of Greater Texas Surgical Health Services; Planned Parenthood South Texas Surgical Center; Southwestern Women's Surgery Center; Whole Woman's Health Alliance; Allison Gilbert, M.D.; Bhavik Kumar, M.D.; The Afiya Center; Frontera Fund; Fund Texas Choice; Jane's Due Process; Lilith Fund for Reproductive Equity; North Texas Equal Access Fund; Reverend Erika Forbes; Reverend Daniel Kanter; and Marva Sadler.

Respondents in this Court (defendants-appellants in the court of appeals) are Judge Austin Reeve Jackson, in his official capacity as Judge of the 114th District Court; Penny Clarkston, in her official capacity as Clerk for the District Court of Smith County; Mark Lee Dickson; Stephen Brint Carlton, in his official capacity as Executive Director of the Texas Medical Board; Katherine A. Thomas, in her official capacity as Executive Director of the Texas Board of Nursing; Cecile Erwin Young, in her official capacity as Executive Commissioner of the Texas Health and Human Services Commission; Allison Vordenbaumen Benz, in her official capacity as Executive Director of the Texas Board of Pharmacy; and Ken Paxton, in his official capacity as Attorney General of Texas.

CORPORATE DISCLOSURE STATEMENT

Whole Woman's Health is the doing business name of a consortium of limited liability companies held by a holding company, the Booyah Group, which includes Whole Woman's Health of McAllen, LLC and Whole Woman's Health of Fort Worth, LLC d/b/a Whole Woman's Health of Fort Worth and Whole Woman's Health of North Texas. Whole Woman's Health has no parent corporation, and no publicly held corporation holds 10% or more of its shares.

Planned Parenthood of Greater Texas Surgical Health Services is a subsidiary of Planned Parenthood of Greater Texas. No publicly held corporation holds 10% or more of shares in either organization.

Planned Parenthood South Texas Surgical Center discloses that Planned Parenthood South Texas is its sole member. No publicly held corporation holds 10% or more of shares of either organization.

Alamo City Surgery Center, P.L.L.C. d/b/a Alamo Women's Reproductive Services; Brookside Women's Medical Center, P.A. d/b/a Brookside Women's Health Center and Austin Women's Health Center; Houston Women's Clinic; Houston Women's Reproductive Services; Planned Parenthood Center for Choice; Southwestern Women's Surgery Center; Whole Woman's Health Alliance; The Afiya Center; Frontera Fund; Fund Texas Choice; Jane's Due Process; Lilith Fund for Reproductive Equity; and North Texas Equal Access Fund have no parent corporations, and no publicly held corporation holds 10% or more of their shares.

STATEMENT OF RELATED PROCEEDINGS

Petitioners are not aware of any directly related proceedings in this or any other Court within the meaning of Rule 14.1(b)(iii).

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PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT

Petitioners Whole Woman's Health, et al., respectfully petition for a writ of certiorari before judgment to the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The district court's order denying Respondents' motions to dismiss (App. 1a–68a) is at 2021 WL 3821062.

The Fifth Circuit's order denying the petition for a writ of mandamus filed by Respondents Clarkston and Dickson (App. 69a–70a) is unreported.

The district court's order granting in part and denying in part Respondents' motion to stay (App. 71a–76a) is unreported.

The Fifth Circuit's order granting an administrative stay of the district court proceedings and denying Petitioners' emergency motion to expedite the appeal (App. 77a–79a) is unreported.

The Fifth Circuit's order denying Petitioners' emergency motion for an injunction pending appeal and emergency motion to vacate the stays of the district court's proceedings, or in the alternative to vacate the district court's denial of the motions to dismiss and remand (App. 80a–82a) is at 2021 WL 3919252.

The Fifth Circuit's opinion explaining its previous denial of Petitioners' emergency motions, denying Petitioners' motion to dismiss Respondent Dickson's appeal, granting Dickson's motion to stay, and expediting the appeal (App. 83a–105a) is at 2021 WL 4128951.

JURISDICTION

The district court denied Respondents' motions to dismiss on August 25, 2021. Respondents filed a notice of appeal the same day. *See P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993) (denial of sovereign-immunity defense immediately appealable under collateral-order doctrine); App. 99a–104a (concluding that private Respondent Dickson can also appeal). Respondents' appeal is pending in the Fifth Circuit. This petition is filed under Supreme Court Rule 11, and the Court's jurisdiction is invoked under 28 U.S.C. §§ 1254(1) and 2101(e).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Texas Senate Bill 8, 87th Leg., Reg. Sess. (Tex. 2021) ("S.B. 8" or the "Act"); the Fourteenth Amendment; and 42 U.S.C. § 1983 are reprinted in the appendix. App. 106a–132a.

INTRODUCTION

Defying nearly fifty years of this Court's precedent, the State of Texas prohibited abortion at approximately six weeks of pregnancy and delegated enforcement to the general public in order to evade federal-court review. This patently unconstitutional ban was previously before this Court on the eve of its September 1 effective date. The Court concluded that it could not issue emergency relief at the time because of "complex and novel antecedent procedural questions" about federal courts' ability to block enforcement of a state-law prohibition that is enforced through private civil actions. *Whole Woman's Health v. Jackson*, No. 21A24, slip op. at 1 (U.S. Sept. 1, 2021).

The Fifth Circuit has since issued an opinion setting forth its views on the questions identified by this Court. In its view, under circuit precedent, federal courts are powerless to preemptively block enforcement of a privately enforced state-law prohibition. Although that opinion did not definitively resolve Respondents' appeal, which remains pending, the writing is on the wall. And although the Fifth Circuit expedited the appeal, it will not hold argument until December at the earliest.

Meanwhile, Texans are in crisis. Faced with the threat of unlimited lawsuits from the general populace and the prospect of ruinous liability if they violate the ban, abortion providers have been forced to comply. As a result, Texans with means must now travel hundreds of miles each way to other States during a pandemic, just to exercise a clearly established federal right. The surge of Texans seeking out-of-state appointments for this time-sensitive medical care is

causing backlogs in those States, delaying abortions by weeks for Texans and non-Texans alike.

Many Texans, however, lack the financial means to travel out of state or are unable to secure childcare or the necessary time off work to do so. Some are unable to travel for fear that it will reveal their pregnancy or decision to end it to an abusive partner or disapproving family member, who may retaliate. Others are non-U.S. citizens who are unable to leave the Texas-Mexico border region to travel to other States for health care. All these individuals must carry to term or seek ways to induce an abortion without medical assistance, as reports now suggest more Texans are doing.

Although this Court noted that its opinion did not "limit[] other procedurally proper challenges to the Texas law, including in Texas state courts," No. 21A24, slip op, at 2, the few cases pending in state court could take months, if not years, to wend through the state-court system before they could provide statewide relief. And if someone sued under S.B. 8 prevails and the claimant chooses not to appeal, Petitioners will have no opportunity to receive a statewide ruling.

It is a foundational principle of our federal constitutional system that "the federal judiciary is supreme in the exposition of the law of the Constitution," and States may not nullify federal rights through "evasive schemes" designed to foreclose federal judicial review. *Cooper v. Aaron*, 358 U.S. 1, 17–18 (1958). Had a State after *Brown v. Board of Education*, 349 U.S. 294 (1955), enacted a similar law authorizing private citizens to sue anyone integrating a school, there can be little question that this Court would have immediately

stopped that act of lawlessness. That S.B. 8 seeks to frustrate the right to abortion rather than the right to equal protection cannot justify different treatment. Already, legislators in other States are taking notice and vowing to adopt copycat laws. Nor is there any reason to think abortion is the only constitutional right that will be targeted; other fundamental rights disfavored by local majorities could be next.

The gravity of the circumstances and the paramount importance of the question presented warrant this Court's intervention under Rule 11, without waiting for further proceedings in the Fifth Circuit. The Court should act now to resolve the question presented on an expedited basis, with the benefit of briefing and argument that was impossible when Petitioners filed their emergency application.

STATEMENT

A. Senate Bill 8

S.B. 8 provides that "a physician may not knowingly perform or induce an abortion * * * if the physician detect[s]" a "fetal heartbeat," a term that S.B. 8 defines to include embryonic cardiac activity. S.B. 8 § 3 (adding Tex. Health & Safety Code § 171.204(a)); *see ibid.* (adding Tex. Health & Safety Code §§ 171.201(1), (3), (7)).[1] Cardiac activity is typically detectable by approximately six weeks in pregnancy, App. 6a n.3, when many patients do not even realize they are pregnant, D.Ct. Dkt. 19-1 at 5–6. Six weeks of pregnancy is indisputably months before viability, *ibid.*, the point in pregnancy before which the State may not prohibit a patient from deciding whether to

[1] Hereinafter, citations to S.B. 8 § 3 are to the newly added provisions of the Texas Health & Safety Code.

have an abortion. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 879 (1992); *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2120 (2020) (plurality opinion); *id.* at 2135 (Roberts, C.J., concurring). The ban has no exception if the pregnancy results from rape or incest, nor is there an exception for a fetal health condition incompatible with sustained life after birth.

In a sense, S.B. 8 is like other unconstitutional laws that States have enacted in recent years to ban abortion at various stages of pregnancy before viability. Every federal court of appeals to consider a law prohibiting abortion before viability has enjoined its enforcement as a violation of the Fourteenth Amendment.[2]

But in other ways, S.B. 8 is "unprecedented." No. 21A24, slip op. at 2 (Roberts, C.J., dissenting). The Texas legislature "essentially delegated enforcement of [the] prohibition to the populace at large" to try "to insulate the State from responsibility for implementing and enforcing" it. *Ibid.* As the legislative director for Texas Right to Life explained during S.B. 8's legislative proceedings, every other six-week ban "has been enjoined" before it could take effect, and "it's because

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[2] *See, e.g.*, *MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 772–73 (8th Cir. 2015); *McCormack v. Herzog*, 788 F.3d 1017, 1028–29 (9th Cir. 2015); *Edwards v. Beck*, 786 F.3d 1113, 1116–17 (8th Cir. 2015) (per curiam); *Isaacson v. Horne*, 716 F.3d 1213, 1217 (9th Cir. 2013); *Women's Med. Pro. Corp. v. Voinovich*, 130 F.3d 187, 201 (6th Cir. 1997); *Jane L. v. Bangerter*, 102 F.3d 1112, 1114, 1117–18 (10th Cir. 1996); *Sojourner T v. Edwards*, 974 F.2d 27, 29, 31 (5th Cir. 1992); *Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 962 F.2d 1366, 1368–69, 1373 & n.8 (9th Cir. 1992).

of the [government] enforcement mechanism[]" in those laws. Hr'g on S.B. 8 Before the S. Comm. on State Affairs, 87th Leg., Reg. Sess., video at 7:30–45 (Tex. 2021) (statement of John Seago).[3] Respondent Dickson's counsel, who participated in drafting S.B. 8, described the Act as a "way[] to counter the judiciary's constitutional pronouncements." Michael S. Schmidt, *Behind the Texas Abortion Law, a Persevering Conservative Lawyer*, N.Y. Times (Sept. 12, 2021);[4] *see also* App. 40a n.15.

S.B. 8 is thus designed both to interfere with a federal constitutional right, and to insulate its law-defying purpose from federal court challenges. To achieve those goals, S.B. 8 bars executive-branch officials—such as local prosecutors or the health department—from enforcing it directly. S.B. 8 §§ 171.207(a), 171.208(a). Instead, S.B. 8 may be enforced by state courts via civil-enforcement actions that "[a]ny person" can bring against anyone alleged to have (1) provided an abortion that violates the ban, (2) engaged in conduct that "aids or abets" an abortion that violates the ban (regardless of whether they knew or had any reason to know that the abortion they assisted was unlawful under S.B. 8), or (3) intended to do any of those things. *Id.* § 171.208(a), (e)(1). The law does not require that the claimant have any connection to the person sued or be injured by the abortion in any way. Any person can sue to enforce S.B. 8 so long as they are not a government official and did

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[3] https://tlcsenate.granicus.com/MediaPlayer.php?view_id=49&clip_id=15469.

[4] https://www.nytimes.com/2021/09/12/us/politics/texas-abortion-lawyer-jonathan-mitchell.html.

not "impregnate[] the abortion patient through an act of rape, sexual assault, [or] incest." *Id.* § 171.208(j).

When an S.B. 8 claimant demonstrates a "violation" of the Act, the state court is required to issue an injunction to prevent further prohibited abortions from being performed, aided, or abetted. *Id.* § 171.208(b)(1). In addition, the court must award the claimant a minimum bounty (there is no statutory maximum) of $10,000 per abortion, payable by the person sued. *Id.* § 171.208(b)(2).

S.B. 8's enforcement mechanism "obviously skew[s] in favor of claimants" seeking to enforce the prohibition. App. 43a. As former Texas judges and legal scholars have observed, S.B. 8 "weaponizes the judicial system by exempting the newly created cause of action from the normal guardrails that protect Texans from abusive lawsuits and provide all litigants a fair and efficient process in our state courts."[5]

For example, "S.B. 8 bucks the usual rules in Texas," App. 8a n.6, by providing that persons sued under the Act can be forced into any of Texas's 254 counties to defend themselves and by prohibiting transfer of the cases to any other venue without the parties' joint agreement, S.B. 8 § 171.210(a)(4), (b). Thus, a nurse who works for an abortion provider in Houston could be dragged into court in El Paso to defend herself over an abortion performed for a Houston resident.

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[5] Letter from Texas attorneys to Dade Phelan, Speaker of the Tex. House of Representatives (Apr. 28, 2021), available at https://npr.brightspotcdn.com/d5/51/a2eac3664529a017ade7826f3a69/attorney-letter-in-opposition-to-hb-1515-sb-8-april-28-2021-1.pdf.

S.B. 8 also "purport[s] to dictate how state courts hear S.B. 8 enforcement actions," App. 44a (footnote reference omitted), including by stating that a person sued under the Act may not point to the fact that the claimant already lost an S.B. 8 lawsuit against someone else on equally applicable grounds, or that a court order permitted an abortion provider's conduct at the time it occurred, if that court order was later overruled, S.B. 8 § 171.208(e)(3)–(5). The Act also attempts to "severely limit[]" defendants in S.B. 8 actions from interposing a federal constitutional defense. App. 41a (citing S.B. 8 §§ 171.208(e)(2), (3), 171.209(b)). Specifically, S.B. 8 purports to replace the federal constitutional protections recognized by this Court in the abortion context with a distorted version of the "undue burden" test. *See* S.B. 8 § 171.209 (titled "Civil Liability: Undue Burden Defense *Limitations*" (emphasis added)).

S.B. 8 also imposes draconian one-sided fee-shifting provisions designed to punish abortion providers and anyone else who dares risk a possible S.B. 8 violation. First, S.B. 8 claimants can recover fees and costs if they win—that is, if they are successful in blocking constitutionally protected abortions—but abortion providers and others sued cannot recover fees and costs if they prevail, no matter how many times they are sued. *Id.* § 171.208(b)(3), (i). Second, S.B. 8 provides that if someone challenges the Act or any other law that "regulates or restricts abortion," that person *and their lawyers* can be held jointly and severally liable for the opposing party's attorney's fees and costs if any of their claims are dismissed for any reason, including for mootness or due to alternative pleading. S.B. 8 § 4 (adding Tex. Civ. Prac. & Rem. Code § 30.022(a)–(b)). That is so even if the challenger

ultimately succeeds in obtaining full relief against the challenged restriction. This provision threatens any attorneys who might consider representing individuals sued under S.B. 8, since zealous advocacy for the client might require inclusion of counterclaims or other requests for declaratory or injunctive relief to which this fee penalty applies.

Because of these provisions and other skewed rules set by S.B. 8, abortion providers cannot provide abortions banned under S.B. 8 because even if they ultimately prevailed in all S.B. 8 suits, the lawsuits would still have accomplished the Act's goal of authorizing costly, and potentially bankrupting, harassment. Abortion providers have, therefore, been forced to comply with S.B. 8, and as a result, access to care has been decimated throughout the state.

B. Proceedings in the District Court

Petitioners include Texas abortion providers and individuals and organizations that support abortion patients by defraying the cost of abortion, assisting with transportation and other travel logistics, and providing counseling. App. 12a–14a. On July 13, Petitioners filed this pre-enforcement challenge seeking to block S.B. 8 in advance of its September 1 effective date.

Petitioners named as putative defendant classes the government officials integral to S.B. 8's private-enforcement mechanism: (1) the clerks of the courts in which S.B. 8 enforcement actions are brought, represented by Respondent Penny Clarkston, and (2) the judges of those courts, represented by Respondent Judge Austin Reeve Jackson. App. 4a, 15a.

Petitioners also sued Respondent Ken Paxton, alleging that, as the Attorney General of Texas and

Texas's chief law-enforcement officer, he is a proper defendant in a challenge to this state law. Petitioners acknowledged, however, that this argument is currently foreclosed by Fifth Circuit precedent. D.Ct. Dkt. 1 at 20 n.5; D.Ct. Dkt. 19 at 21 n.4. Additionally, Petitioners sued Attorney General Paxton and certain state licensing officials on the ground that they can enforce S.B. 8 indirectly through other laws that are triggered by violations of S.B. 8. App. 11a–12a, 15a–16a.

Petitioners also named as a defendant Respondent Mark Lee Dickson, a private party authorized to enforce S.B. 8 who has credibly threatened to sue Petitioners who violate the Act. App. 16a.

Petitioners moved for summary judgment and certification of the defendant classes. Petitioners then moved for a preliminary injunction after it became clear that Respondents' delay efforts, including a meritless mandamus petition that some filed, would prevent the district court from entering a final judgment before the law's effective date. The district court set a preliminary-injunction hearing for August 30. Meanwhile, Respondents opposed the motions for class certification and preliminary-injunctive relief and moved to dismiss for lack of jurisdiction. App. 4a–5a.

On August 25, the district court denied Respondents' motions to dismiss, concluding that Petitioners have standing to bring their claims and that the claims against the government-official Respondents fit within the exception to sovereign immunity recognized in *Ex parte Young*, 209 U.S. 123 (1908). The court explained that the State's clerks and judges "are integral in executing S.B. 8 enforcement measures by

coercing [Petitioners] to participate in such suits and issuing relief against those who violate S.B. 8." App. 54a.

The district court rejected Respondents' argument that Petitioners must "wait to be sued in state court" before challenging the Act. App. 41a. As the court explained, not only does S.B. 8 "severely limit[]" a person's ability to raise constitutional defenses, but the opportunity to raise defenses once sued is no answer to Petitioners' claim that S.B. 8 "cannot be enforced against them at all without violating the Constitution." App. 41a–42a.

As to the agency-official Respondents, the court held that S.B. 8 does not preclude their "ability to enforce violations of other state laws triggered by a violation of S.B. 8, such as the Medical Practice Act, Nursing Practice Act, and Pharmacy Act." App. 22a. Because of their residual enforcement authority, the court concluded that the agency officials are "within the *Ex parte Young* exception to sovereign immunity." App. 27a.

Finally, the district court concluded that Respondent Dickson is a proper defendant, finding that he "has demonstrated his intent to enforce S.B. 8 if Plaintiffs violate the law." App. 64a (citing record evidence).

The same day, August 25, Respondents appealed from the district court's order denying their motions to dismiss. Respondents moved for a stay of proceedings, arguing that an appeal of a denial of sovereign immunity divests the district court of jurisdiction to resolve claims subject to the immunity defense. On August 27, the district court stayed the case as to the government officials but denied the stay motion as to

Dickson, who—as a private defendant—had not asserted sovereign immunity. App. 73a–75a. The court thus ordered the August 30 preliminary-injunction hearing to proceed as to Respondent Dickson.

C. Proceedings in the Court of Appeals and This Court

After filing the notice of appeal, but before the district court's stay order, Respondents filed an emergency motion in the court of appeals to stay the district-court proceedings. Petitioners opposed the motion and also moved to dismiss Dickson's appeal because he has no claim to sovereign immunity and thus no right to appeal the interlocutory denial of his motion to dismiss. In addition, Petitioners filed an emergency motion to expedite the appeal so that relief might be possible in advance of the Act's effective date, even with a stay. Respondents' stay motion in the Fifth Circuit was largely mooted by the district court's own stay, but the propriety of a stay as to Dickson remained at issue.

On August 27, the court of appeals entered a temporary administrative stay of all district-court proceedings, including the August 30 preliminary-injunction hearing. App. 79a. The court denied Petitioners' motion to expedite and ordered Dickson to respond to the motion to dismiss his appeal in a longer timeframe than he had requested. *Ibid.*

On August 29, Petitioners filed an emergency motion for an injunction pending appeal and to vacate the stays of the district-court proceedings. The court of appeals denied those motions the same day without opinion. App. 82a.

On August 30, Petitioners submitted an emergency application to Justice Alito for injunctive relief or, in

the alternative, to vacate the stays of the district-court proceedings or the underlying district-court order that precipitated the appeal. The Court denied the application on September 1, stating that Petitioners had "raised serious questions regarding the constitutionality of" S.B. 8, but that injunctive relief was not warranted at that time because of "complex and novel antecedent procedural questions." No. 21A24, slip op. at 1. The Court clarified that its order was "not based on any conclusion about the constitutionality of Texas's law, and in no way limits other procedurally proper challenges to the Texas law." *Id.* at 2.

The court of appeals maintained its administrative stay of the district-court proceedings until September 10, when it issued a published opinion denying Petitioners' motion to dismiss Dickson's appeal and granting Dickson's motion to stay the district-court proceedings. Although the court also ordered that the appeal be expedited, App. 105a, briefing will not even begin until mid-October, and no argument will be heard before December.

In its opinion, the court of appeals also explained that it previously denied Petitioners' emergency motion for an injunction because Petitioners' claims against Texas clerks and judges are "specious" and "absurd." App. 86a, 96a, 97a. Citing Fifth Circuit precedent, the court stated that "clerks are improper defendants against whom injunctive relief would be meaningless," because they "act under the direction of judges" and "[t]heir duty within the court is to accept and file papers in lawsuits, not to classify 'acceptable' pleadings." App. 98a (citing *Chancery Clerk of Chickasaw Cnty. v. Wallace*, 646 F.2d 151, 160 (5th Cir. 1981)).

The court of appeals also stated that *Ex parte Young* "explicitly excludes judges from the scope of relief it authorizes" and that "judges acting in their adjudicatory capacity are not proper Section 1983 defendants in a challenge to the constitutionality of state law." App. 96a. The court stated there is no adversity between Petitioners and the judicial defendants because "judges are disinterested neutrals who lack a personal interest in the outcome of the controversy." App. 97a.[6]

The court of appeals concluded that the Texas Attorney General was not a proper defendant because he "has no official connection whatsoever with the statute," and under circuit precedent "state law enforcement officials' general duty to enforce state law cannot render them suable under *Young*." App. 95a. Additionally, the court determined that Petitioners "have no *Young* claim against the state licensing officials," *ibid.*, concluding that S.B. 8 is enforced "exclusively" through private civil-enforcement actions and cannot be enforced in any manner by agency officials, App. 94a (emphasis omitted).

Finally, the court of appeals made clear that the pending appeal encompasses both sovereign-immunity and standing issues. App. 102a, 103a n.18. As to standing, the court of appeals inexplicably suggested in a footnote that Petitioners "have no present or imminent injury from the enactment of S.B. 8." App.

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[6] The district court had observed that Respondent Judge Jackson's assertion that he is a disinterested adjudicator "is belied by Jackson's own statements at an August 4, 2021 press conference indicating that he is not a neutral arbiter because he is 'one hundred percent committed to seeing * * * the voice and vote of pro-life Texans defended' regardless of 'what some leftist judge down in Austin may do.'" App. 39a n.14.

98a n.14. It did not acknowledge the extensive record evidence that abortion providers would be forced to stop providing services after six weeks of pregnancy, which they in fact did as of September 1. *See infra* pp. 18–21.

REASONS FOR GRANTING THE PETITION

I. THE IMPERATIVE PUBLIC IMPORTANCE OF THIS CASE JUSTIFIES IMMEDIATE REVIEW

The Texas legislature has openly defied federal law and has done so in a way purposely designed not only to deprive Texans of their constitutional right to abortion but also to forestall federal judicial protection of that right. Such state-law defiance of federal constitutional rights is not unprecedented; several States engaged in similar defiance after *Brown v. Board of Education*. At that time, this Court intervened in no uncertain terms to defend federal rights. The Court should do the same here.

Under Rule 11, if a question on appeal "'is of such imperative public importance as to justify the deviation from normal appellate practice and to require immediate settlement in this Court,' * * * certiorari review can be obtained before the court of appeals renders judgment." *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 350 (1985) (quoting 29 U.S.C. § 2021(e)). Where necessary, the Court "has not hesitated to exercise this power of swift intervention in cases of extraordinary constitutional moment." *Ibid.* It has recognized in particular "'the vital importance of the time element' in constitutional challenges involving the granting or denial of interlocutory relief." *Id.* at 351 (quoting *Aaron v. Cooper*, 357 U.S. 566, 567 (1958)). The Court has also considered

whether intermediate appellate review would be helpful or delay or complicate matters unnecessarily. *Clinton v. City of New York*, 524 U.S. 417, 455 (1998) (Scalia, J., concurring in part and dissenting in part); *Mistretta v. United States*, 488 U.S. 361, 371 (1989); *Turner v. City of Memphis*, 369 U.S. 350, 353–54 (1962) (per curiam).

Some of the most important constitutional cases in the Nation's history were reviewed on a grant of certiorari before judgment. *E.g., Brown v. Bd. of Ed.* , 344 U.S. 1, 3 (1952) (per curiam) (racially segregated schools); *Turner*, 369 U.S. at 353 (racially segregated municipal airport); *United States v. Nixon*, 418 U.S. 683, 691–92 (1974) (presidential subpoena); *Dames & Moore v. Regan*, 453 U.S. 654, 667–68 (1981) (executive order seizing all Iranian assets in the United States); *Mistretta*, 488 U.S. at 371 (Federal Sentencing Guidelines).

Petitioners' challenge to S.B. 8 presents another such exceptional case. Texas intentionally outsourced enforcement of S.B. 8's blatantly unconstitutional six-week abortion ban "to the populace at large" as a ploy to "insulate the State from responsibility" for enacting a law that violates a clearly established federal right. No. 21A24, slip op. at 2 (Roberts, C.J., dissenting). Resolution of the question "whether a state can avoid responsibility for its laws in such a manner," *ibid.*, is of the utmost public importance and should not be delayed.

A. Immediate Review Is Warranted Because Irreparable Harm Is Ongoing While Awaiting the Fifth Circuit's Judgment

Petitioners seek this Court's immediate review, before judgment in the court of appeals, because of the

urgency of the harm to residents of Texas and neighboring States, because the court of appeals has already made clear that it will not provide relief, and because the law at issue is patently unconstitutional.

The court of appeals has issued a published opinion stating that, under circuit precedent, Petitioners' "claims against a state judge and court clerk are specious," and Petitioners have no "claim against the state licensing officials" or attorney general. App. 95a–96a. It has also declined to dismiss Respondent Dickson's appeal, despite his inability to assert sovereign immunity and the well-established rule that denial of a motion to dismiss is not immediately appealable. *Catlin v. United States*, 324 U.S. 229, 236 (1945). Although the court of appeals ordered the appeal expedited, it will not hear argument until at least December 7, and of course there is no deadline for the Court's judgment. *Cf. Planned Parenthood Gulf Coast, Inc. v. Phillips*, 5 F.4th 568 (5th Cir. 2021) (delay of 2.5 years for Fifth Circuit decision in sovereign-immunity appeal over denial of an abortion license). Petitioners' claims are thus stalled, with little doubt as to their ultimate fate in the Fifth Circuit.

Meanwhile, since September 1, S.B. 8 has had its intended effect, and every day it is inflicting irreparable harm on Petitioners and countless others. Although S.B. 8 unabashedly defies this Court's precedents, the serious threat that performing even one violative abortion could result in numerous enforcement actions, ruinous liability, and limitless attorney's fees and costs *even if* the abortion provider

ultimately prevails, has stopped nearly all abortions in Texas.[7]

Thousands of Texans are now unable to exercise their federal constitutional right to obtain an abortion. Those with the means to do so are being forced to travel hundreds of miles out of State to exercise a constitutional right. Because clinics in neighboring States cannot accommodate the surge of Texas patients, many Texans are being forced to travel nearly a thousand miles or more, each way, to other States. *See United States v. Texas*, No. 21-cv-00796 (W.D. Tex., Sept. 15, 2021), Dkt. 8-6, Decl. of Rebecca Tong ¶¶ 12–13, 21–22, 28. Many patients, including victims of rape, incest, and domestic violence, can make these journeys only at great personal expense and hardship. *See, e.g.*, *id.* Dkt. 8-9, Decl. of Joshua Yap ¶ 19 (describing Texas woman who drove through the night to Oklahoma for a morning appointment and

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[7] To Petitioners' knowledge, only one abortion has been provided in violation of S.B. 8. *See* Alan Braid, *Why I Violated Texas's Extreme Abortion Ban*, Wash. Post (Sept. 19, 2021), https://www.washingtonpost.com/opinions/2021/09/18/texas-abortion-provider-alan-braid/. Any enforcement actions brought in response to that violation (to date, Dr. Braid has not been served with any) could take months or years to wend through the Texas courts, and those cases could avoid statewide rulings as to S.B. 8's constitutionality if claimants lose in the lower courts and decline to appeal. *See also* Ed Whelan, *Texas Abortionist Seeks Test Lawsuit Under Heartbeat Act*, National Review (Sept. 20, 2021), https://www.nationalreview.com/bench-memos/texas-abortionist-seeks-test-lawsuit-under-heartbeat-act/ (discouraging immediate lawsuits against Dr. Braid to avoid providing a "test case" for S.B. 8). The same outcome may obtain for any affirmative cases filed by abortion providers and others in state court. *E.g.*, *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Tex. Right to Life*, No. D-1-GN-21-004632 (Tex. Dist. Ct., Travis Cnty.).

then drove back the same day), ¶ 22 (describing "Texas minor who had been raped by a family member" and endured "a 7- to 8-hour drive" each way to Oklahoma); *id.* Dkt. 8-7, Decl. of Vicki Cowart ¶ 10 (describing Texas woman facing violence at the hands of her abusive husband and attempting to "scrape together funds" by "selling personal items" to afford an "out-of-state trip"), ¶ 12 (describing Texas woman who "drove alone out and back to her appointment [in New Mexico]—over 1000 miles round trip—because she didn't have paid time off work and couldn't afford to miss the hours"); *id.* Dkt. 8-8, Decl. of Anna Rupani ¶ 26 (describing Texas woman who "piled her children into her car and drove over 15 hours overnight" to Kansas "rather than struggle to patch together the money needed for air-fare and childcare").

Still more pregnant Texans are unable to travel out of State for care, and in most cases "will be forced to carry those pregnancies to term and face the risks—medical and financial—attendant with childbirth." *Id.* Dkt. 8-4, Decl. of Amy Hagstrom Miller ¶ 32. Others will attempt to take matters into their own hands. *Id.* Dkt. 8-5, Decl. of Melaney A. Linton ¶ 34 (describing a patient who reported taking an "abortion tea" she found on the internet); Abby Vesoulis, *How Texas' Abortion Ban Will Lead to More At-Home Abortions*, Time (Sept. 21, 2021) (visits to online resource for accessing abortion pills went from 500 to 25,000 daily).[8]

These harms are spilling over to residents of other States. Patients from Texas now take up about two-thirds of appointments at one of the few abortion

[8] https://time.com/6099921/texas-self-managed-abortions/.

clinics in Oklahoma, and about half of the appointments at one of the few Kansas clinics. *United States v. Texas*, Dkt. 8-6, Tong Decl. ¶¶ 11, 20. As a result, the Oklahoma clinic is having to schedule appointments three weeks out, a significant delay for a time-sensitive medical procedure. *Id.* ¶ 13. Inevitably, this means first-trimester abortion patients across multiple States are now being delayed until later in pregnancy to obtain abortion care, with no end to these delays in sight. Even a herculean effort to increase capacity in other States could not accommodate the influx of patients attempting to escape Texas's extreme abortion ban. *Id.* Dkt. 8-7, Cowart Decl. ¶ 18 (55,966 abortions in Texas in 2019, compared to 2,735 in New Mexico in 2019 and 10,368 in Colorado in 2020); *ibid.* Dkt. 8-6, Tong Decl. ¶¶ 32–33 (describing difficulties in hiring physicians and staff to meet increased demand).

The law is also harming clinic staff and physicians. Not only are they forced to turn away patients desperate for care, *id.* Dkt. 8-5, Linton Decl. ¶ 40, but they are facing increased threats and harassment. *Id.* ¶ 37 (physician received messages calling him a murderer and saying that he should be killed); *id.* Dkt. 8-2, Gilbert Decl. ¶ 44 (describing threats, including caller threatening to "tie up staff in chains and torture them"); *see also* Pls.' Mot. Summ. J., Declaration of Melaney A. Linton ¶ 32, *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Tex. Right to Life*, No. D-1-GN-21-004632 (Tex. Dist. Ct., Travis Cnty. Sept. 20, 2021) (describing protestors who set up a camera to record patients' license plates and who blocked a health center driveway with his vehicle, requiring police response); *id.* Decl. of Polin Barraza

¶ 15 (describing caller who "demanded the last name of a [staff] representative so that they could sue her").

All of this is happening because of a patently unconstitutional law. There is no argument under existing precedent that a ban on abortion at six weeks is constitutional, and that is true regardless of how it is enforced. Only this Court's immediate intervention will ensure that Texans' federal constitutional rights are protected from this brazen effort to subvert a constitutional right.

B. This Case Presents a Fundamental Question About Federal Courts' Power to Protect Constitutional Rights in the Face of a State's Effort to Frustrate Federal Review

1. Individual States cannot be permitted to decide whether federal rights can be exercised within their borders. As this Court explained not long after our Nation's founding, "[i]f the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery." *United States v. Peters*, 5 Cranch 115, 136 (1809).

This Court has consistently rejected States' efforts to avoid review by authorizing private entities to do what state officials themselves could not. The most prominent examples come from the Jim Crow era, when numerous States adopted laws attempting to preserve unconstitutional discrimination in defiance of this Court's pronouncements. This Court repeatedly blocked those laws, applying its precedent in a practical way to head off States' efforts to subvert constitutionally guaranteed equal protection.

In *Terry v. Adams*, for example, the Court considered whether Texas violated the Fifteenth Amendment by "circumvention" when it permitted a political organization to hold white-only primaries that effectively dictated who held office in a particular county. 345 U.S. 461, 469 (1953). The Court found it "immaterial that the state [did] not control" the part of the elective process that it left for the organization to manage. *Ibid.* It was apparent that the primaries were "purposefully designed to exclude" Black people from voting "and at the same time to escape the Fifteenth Amendment's command." *Id.* at 463–64. The Court ultimately held that the primaries constituted reviewable state action and admonished Texas for its "flagrant abuse of [election] processes to defeat the purposes of" the Constitution. *Id.* at 469.

The Court took the same practical approach in numerous other cases of the time. *See, e.g.*, *Gilmore v. City of Montgomery*, 417 U.S. 556, 568–69 (1974) (affirming injunction against a city policy granting segregated private schools "exclusive access to public recreational facilities"); *Reitman v. Mulkey*, 387 U.S. 369, 380–81 (1967) (holding unconstitutional a law providing as "one of the basic policies of the State" a private right to racially discriminate in the housing market because such a policy would "significantly encourage and involve the State in private discriminations"); *Anderson v. Martin*, 375 U.S. 399, 404 (1964) (enjoining requirement that a political candidate's race be listed on the ballot and emphasizing "that which cannot be done by express statutory prohibition cannot be done by indirection").

As in those cases, S.B. 8's private-enforcement scheme is purposefully designed to violate federal

constitutional rights recognized under binding precedent, but with which Texas disagrees. Texas has so far succeeded in this gambit, reviving a long-rejected strategy and openly flouting the Court's authority to "say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Respect for the Constitution, the rights it protects, and this Court's decisions demands that the Court step in and reassert its constitutional authority.

2. The Court's review before judgment in the court of appeals is also warranted to ensure that an adequate remedy for vindication of a federal right is available to Petitioners and their patients. S.B. 8 was designed to avoid pre-enforcement relief in order to put abortion providers and supporters of patients to the choice of two untenable options: comply with this unconstitutional ban or "bet the farm, so to speak, by taking the violative action." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007). The Fifth Circuit's recent opinion approves of this outcome. App. 104a ("potential S.B. 8 defendants will be able to raise defenses before state courts"). The Court should grant review to make clear that S.B. 8 is no exception to the bedrock principle that a person facing irreparable harm need not violate an unconstitutional law to challenge it.

That principle was central to the Court's decision in *Ex parte Young*. In *Young*, Minnesota's attorney general argued that railroad shareholders could not bring a federal pre-enforcement challenge to the constitutionality of a state rate-setting statute. 209 U.S. at 163. He urged that railroads must "disobey it, at least once," await enforcement proceedings, and only then raise federal constitutional defenses. *Ibid.*

This Court rejected that course because it would not protect the shareholders' federal rights:

> To await proceedings against the company in a state court, grounded upon a disobedience of the act, and then, if necessary, obtain a review in this court by writ of error to the highest state court, would place the company in peril of large loss and its agents in great risk of fines and imprisonment if it should be finally determined that the act was valid. This risk the company ought not to be required to take.

Id. at 165.

The Court has consistently adhered to this fundamental principle of our judicial system. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) ("When an individual is subject to [threatened enforcement], an actual arrest, prosecution, or other enforcement action is not a prerequisite to challenging the law." (citations omitted)); *Steffel v. Thompson,* 415 U.S. 452, 459 (1974) ("[I]t is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights."); *Doe v. Bolton*, 410 U.S. 179, 188 (1973) (physicians had standing to challenge abortion restriction "despite the fact that the record does not disclose that any one of them has been prosecuted, or threatened with prosecution").

And this principle has been just as potent when a person is "coerced by threatened enforcement action of *a private party* rather than the government." *MedImmune*, 549 U.S. at 130. Yet Texas has sought

to defeat any meaningful protection of that right by assigning literally *anyone, anywhere* a right to sue. A single abortion could give rise to dozens or even hundreds of enforcement actions in hundreds of separate venues.

Texas's ploy of unconstitutionally prohibiting abortions after six weeks and handing over the State's enforcement authority to "any person" willing to exercise it therefore calls for immediate federal court intervention.

3. This Court's review is also urgently needed because, if successful, S.B. 8 will set a dangerous precedent that other States will be sure to follow. The drafters of S.B. 8 are being credited for their success in circumventing the Constitution. *See* Michael S. Schmidt, *supra* p. 7. Already, legislation modeled on S.B. 8 has been introduced in Florida, and other States are considering it. H.B. 167, 2022 Sess. (Fla. 2021); Ewan Palmer, *Florida and 5 other GOP-Led States Consider Texas-Style Curbs on Abortion*, Newsweek (Sept. 3, 2021) (noting that lawmakers in Arkansas, Florida, Indiana, North Dakota, Mississippi, and South Dakota are considering parallel laws).[9]

Nor is there any reason to think that this scheme will be limited to abortion bans. It could just as easily be used by States and municipalities with respect to other rights they disfavor. Today, it is abortion providers and those who assist them who are targeted. Tomorrow, it might be gun buyers who face private, civil liability for firearm purchases. Same-sex couples could be sued by neighbors for trying to obtain a

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[9] https://www.newsweek.com/republican-states-texas-style-restrictive-curbs-legislation-abortion-florida-1625876.

marriage license. States could give citizens a right to sue any newspaper that criticized the incumbent government. Unpopular political groups could be barred from gathering under threat of vigilante lawsuits. The possibilities are limitless.

If use of a private-enforcement scheme can allow "an act, repugnant to the constitution, [to] become the law of the land," *Marbury*, 5 U.S. at 176, and preclude the exercise of constitutional rights for any significant period of time, this gambit could be used to attack any number of other contentious individual liberties. It could effectively render provisions of the Bill of Rights a dead letter in jurisdictions where they are disfavored. That concern is of special force here, where significant delay in vindicating federal rights will eviscerate them permanently. *See Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2313 (2016) (abortion restriction permanently closed half of Texas's clinics before being ruled unconstitutional); *Roe v. Wade*, 410 U.S. 113, 125 (1973) ("[H]uman gestation period is so short that the pregnancy will come to term before the usual appellate process is complete.").

This Court should grant certiorari now—before legislators expend any more time and resources on copycat bills; before the lower courts face additional emergency challenges; and, most urgently, before any further violations of federal rights occur—to reject Texas's defiantly unconstitutional scheme.

II. CERTIORARI SHOULD BE GRANTED TO CORRECT CONFLICTS BETWEEN THE FIFTH CIRCUIT'S VIEWS IN THIS CASE AND THE DECISIONS OF OTHER CIRCUITS AND PRECEDENT OF THIS COURT

The Fifth Circuit has now construed Section 1983, Article III, and *Ex parte Young* in cramped ways that directly conflict with this Court's decisions. And the Fifth Circuit's suggestion that Petitioners' claims in this case are foreclosed is directly at odds with the law of numerous other circuits. The Court should grant review and hold that relevant state officials are proper defendants in a federal challenge to a patently unconstitutional state law with a private-enforcement mechanism.

A. The Fifth Circuit's Opinion Deeming Court Clerks Improper Defendants Conflicts with Decisions of the Third, Sixth, Tenth, and Eleventh Circuits

There is no genuine dispute that Texas's court clerks are integral to S.B. 8's enforcement. The mere filing of a private enforcement action is meaningless without the involvement of government officials to coerce those sued to appear and defend themselves in such actions. Indeed, Respondent Clarkston conceded "that she will docket cases and issue citations filed under S.B. 8 as is required by her under state law." App. 53a; *see* Tex. R. Civ. P. 99(a) ("Upon the filing of the petition, the clerk * * * shall forthwith issue a citation[.]"). Akin to federal summonses, citations "direct the defendant to file a written answer to the plaintiff's petition" for enforcement and notify them that failure to respond may result in a default judgment. Tex. R. Civ. P. 99(b). As the district court recognized, the harm to Petitioners of having to defend

themselves in private-enforcement actions (regardless of whether they ultimately prevail) "could not occur absent the clerks' involvement." App. 54a; *cf. Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 622 (1991) ("It cannot be disputed that, without the overt, significant participation of the government, the peremptory challenge system * * * simply could not exist.").

Nevertheless, the Fifth Circuit opined that because a clerk's "duty within the court is to accept and file papers in lawsuits, not to classify 'acceptable' pleadings," clerks "are improper defendants against whom injunctive relief would be meaningless." App. 98a. That conclusion conflicts with decisions of other courts of appeals, which have held that court clerks' duties to process court filings make them proper defendants in materially indistinguishable cases.

The Third and Eleventh Circuits have held that court clerks are proper defendants in challenges to state post-judgment garnishment laws. In *Finberg v. Sullivan*, the Third Circuit explained that performance of clerks' ministerial duties is "the immediate cause[]" of the plaintiff's injury in a garnishment action. 634 F.2d 50, 53–54 (3d Cir. 1980) (en banc). The Third Circuit "note[d] that courts often have allowed suits to enjoin the performance of ministerial duties in connection with allegedly unconstitutional laws." *Id.* at 54 (citing, *inter alia*, *Powell v. McCormack*, 395 U.S. 486, 494 (1969)). Similarly, in *Strickland v. Alexander*, the Eleventh Circuit reasoned that clerks can be sued because of their "responsibility to process garnishments" filed by private creditors, including by "docketing the garnishment affidavit" and "issuing the summons of garnishment." 772 F.3d 876, 879–81, 885 (11th Cir. 2014). The court concluded that these procedures, which the clerk was

"required to follow," meant that the plaintiff's future "inability to access his exempt funds [would] be 'fairly traceable' to [the clerk's] actions." *Id.* at 886. And the plaintiff's injury "would be redressed by a favorable decision" because "[a] federal court could declare the Georgia garnishment process unconstitutional or enjoin any future similar actions that lacked adequate due process protections." *Ibid.*

Likewise, the Tenth Circuit concluded that clerks were proper defendants in a challenge to Utah's marriage law because "clerks are responsible under Utah law for issuing marriage licenses and recording marriage certificates," and the plaintiffs' injuries "would be cured by an injunction" against the clerks. *Kitchen v. Herbert*, 755 F.3d 1193, 1201–02 (10th Cir. 2014).

The Fifth Circuit's rationale that clerks cannot be sued because they "act under the direction of judges," App. 98a, is also directly at odds with the Sixth Circuit's decision in *McNeil v. Community Probation Services, LLC*, 945 F.3d 991 (6th Cir. 2019). There, alleged probation violators challenged Tennessee's bail system by suing the sheriff who detained them according to judge-issued orders. *Id.* at 992–94. The Sixth Circuit rejected the sheriff's argument that he could not be sued under *Ex parte Young* because the sheriff merely "implements" a judge's order setting bail. *Id.* at 995–96. The court explained that "sovereign immunity does not stand in the way of a lawsuit against a public official actively involved with administering the alleged violation," and "Tennessee statutes command that involvement when they place the sheriff in charge of keeping detainees in the county jail." *Id.* at 995 (internal quotation marks and citation omitted).

At a minimum, where, as here, a State has enacted a patently unconstitutional law and authorized private citizens to enlist the courts into violating clearly established constitutional rights, federal intervention against the clerks is warranted. This Court's intervention is urgently needed to correct the Fifth Circuit's mistaken view of the law, which is out of step with the holdings of its sister circuits.

B. The Fifth Circuit's Opinion Deeming State Judges Improper Defendants Conflicts with This Court's Precedent

According to the Fifth Circuit, "it is well established that judges acting in their adjudicatory capacity are not proper Section 1983 defendants in a challenge to the constitutionality of state law." App. 96a. That statement directly conflicts with this Court's decisions and thus warrants review.

As the Court explained in *Pulliam v. Allen,* Congress intended Section 1983 "to reach unconstitutional actions by all state actors, including judges." 466 U.S. 522, 540 (1984). Section 1983 relief against judges "was considered necessary because 'state courts were being used to harass and injure individuals, either because the state courts were powerless to stop deprivations or were in league with those who were bent upon abrogation of federally protected rights.'" *Ibid.* (quoting *Mitchum v. Foster*, 407 U.S. 225, 240 (1972)). *Pulliam* also held that federalism concerns do not give judges any special immunity from Section 1983 suits. *Id.* at 539–40.

The Fifth Circuit's rejection of Petitioners' claims against judges cannot be reconciled with *Pulliam*—which perhaps explains why the court of appeals nowhere mentioned *Pulliam* in its decision. Nor can it

be justified in light of Congress's post-*Pulliam* amendment to Section 1983, which confirms that suits may be "brought against a judicial officer for an act or omission taken in such officer's judicial capacity." 42 U.S.C. § 1983.

To the extent the Fifth Circuit's rejection of claims against judges operates as a prudential-standing rule, it also cannot survive this Court's precedent. Where, as here, the Article III standing criteria are met, "a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging." *Susan B. Anthony List*, 573 U.S. at 167 (cleaned up). New prudential-standing rules cannot be invented under this Court's precedent, particularly not when they would block suits that are critical to enjoining a patently unconstitutional law.

The Fifth Circuit went further astray in concluding that sovereign immunity blocks prospective relief against state-court judges. App. 96a. This Court's decisions have consistently maintained that state courts and judges are not immune from suit for prospective relief. *Mireles v. Waco*, 502 U.S. 9, 10 n.1 (1991) (per curiam); *Pulliam*, 466 U.S. at 536–43; *Sup. Ct. of Va. v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 736–37 & n.16 (1980). Indeed, the Court "long ago recognized that federal injunctive relief against a state court proceeding can in some circumstances be essential to prevent great, immediate, and irreparable loss of a person's constitutional rights." *Mitchum*, 407 U.S. at 242.

The Fifth Circuit also misread this Court's precedent when it wrongly relied on *Ex parte Young,* which it believed requires Petitioners to violate the law and

then "raise defenses before state courts" after being sued. App. 104a.

The Fifth Circuit's reading turns *Young* on its head. The *Young* doctrine is an "important limit on the sovereign-immunity principle"—a legal "fiction" necessary to "permit the federal courts to vindicate federal rights." *Va. Off. for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 254–55 (2011) (citations omitted). It cannot accurately be read to *preclude* the vindication of federal rights. Indeed, the Court in *Young* specifically rejected the argument that a person must disobey a law, await enforcement, and only then raise constitutional defenses in the enforcement proceedings. 209 U.S. at 163–65.

Overlooking *Young*'s core holding, the Fifth Circuit focused myopically on a passage suggesting that federal courts lack "'the power to restrain a court from acting in any case brought before it.'" App. 96a (quoting *Young*, 209 U.S. at 163). But that passage was expressly premised on the presence of "a state official" who would "commenc[e]" enforcement actions, *Young*, 209 U.S. at 163, which does not exist here by design. And as discussed, in the decades since *Young*, this Court has interpreted Section 1983 as allowing suits against judges for prospective equitable relief. Certiorari should be granted to correct the Fifth Circuit's error.

C. The Fifth Circuit's Opinion Deeming Texas's Attorney General an Improper Defendant Conflicts with This Court's Precedent

Certiorari is also warranted to correct the Fifth Circuit's misapprehension that *Ex parte Young* precludes suits against Texas's attorney general, the

State's chief law-enforcement official, to block patently unconstitutional laws like S.B. 8.[10]

The Fifth Circuit has repeatedly held that sovereign immunity bars suits for prospective relief against Texas's attorney general because a "general duty to enforce the law is insufficient for *Ex parte Young*." *Tex. Dem. Party v. Abbott*, 978 F.3d 168, 181 (5th Cir. 2020). Remarkably, the Fifth Circuit has held that *Young* did not apply even where "the State concede[d] in its brief that the Attorney General ha[d] the authority to enforce" the challenged law, because the court of appeals' "*Young* caselaw requires a higher showing of 'enforcement' than the City ha[d] proffered" in that case. *City of Austin v. Paxton*, 943 F.3d 993, 998, 1000 (5th Cir. 2019), *cert. denied* 141 S. Ct. 1047 (2021).

The Fifth Circuit's *Young* jurisprudence is plainly inconsistent with this Court's statement in *Young* that the Minnesota attorney general's "power by virtue of his office sufficiently connected him with the duty of enforcement to make him a proper party." 209 U.S. at 161. Like the Minnesota Attorney General in *Young*, the Texas Attorney General is the State's chief law-enforcement officer with broad authority to enforce and defend state laws. *Agey v. Am. Liberty Pipe Line Co.*, 172 S.W.2d 972, 974 (Tex. 1943); Tex. Gov't Code § 402.010. The Minnesota attorney general in *Young* had authority "to cause proceedings to be instituted against any corporation whenever it shall have offended against the laws of the state." 209 U.S. at 160–61. The Texas Attorney General has essentially

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[10] Petitioners preserved this argument below, D.Ct. Dkt. 1 at 20 n.5; D.Ct. Dkt. 19 at 21 n.4, which is distinct from Petitioners' contention that Texas officials can indirectly enforce S.B. 8's abortion ban, *see* App. 11a–12a, 15a–16a.

identical power under the Texas constitution to "take such action in the courts as may be proper and necessary to prevent any private corporation from exercising any power * * * not authorized by law." Tex. Const. art. IV, § 22. S.B. 8 does not, and could not, abrogate that authority under the Texas constitution. *See City of Denison v. Mun. Gas Co.*, 3 S.W.2d 794, 798 (Tex. 1928).

Moreover, the Fifth Circuit's narrow, technical reading of *Young* does not serve legitimate sovereign-immunity interests. As *Young* explained, "the use of the name of the state to enforce an unconstitutional act * * * is a proceeding without the authority of, and one which does not affect, the state in its sovereign or governmental capacity." 209 U.S. at 159. Granting prospective relief against an unconstitutional statute that Texas had no authority to enact would not infringe on its sovereignty.

This Court's review is urgently needed to ensure that the Fifth Circuit's constricted view of *Young* does not continue to preclude federal courts from vindicating federal constitutional rights.

CONCLUSION

The petition for a writ of certiorari before judgment should be granted.

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