No. 21-463

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 WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR RESPONDENT MARK LEE DICKSON

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The petitioners' grievances are with the *existence* of SB 8 and the legislature's decision to enact it. But they have not been harmed in any way by the named defendants, and there is no threat of imminent harm that will be inflicted by the allegedly unlawful conduct of those individuals. Courts do not grant relief against statutes; they review only the conduct and behavior of the named defendants to a lawsuit. *See Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2495 (2021) ("[F]ederal courts enjoy the power to enjoin individuals tasked with enforcing laws, not the laws themselves." (citing *California* v. *Texas*, 141 S. Ct. 2104, 2115–16 (2021)). None of the defendants who have been sued are injuring the plaintiffs

or acting in a manner that forfeits their sovereign immunity.

RESPONSE TO THE PETITIONERS' STATEMENT OF THE CASE

The petitioners' description of SB 8 is inaccurate in several respects. First, the petitioners claim that SB 8 categorically prohibits abortion providers from recovering fees and costs if they prevail in an SB 8 lawsuit. Pet. Br. 10 (citing Tex. Health & Safety Code § 171.208(b)(3)). That is untrue; section 171.208(b)(3) merely prohibits SB 8 defendants from recovering costs and fees under Rule 91a of the Texas Rules of Civil Procedure, which allows a defendant to recover costs and fees if it obtains dismissal under the state-law equivalent of a Rule 12(b)(6) motion. *See* Tex. R. Civ. P. 91a.7 ("Except in an action by or against a governmental entity or a public official acting in his or her official capacity or under color of law, the court may award the prevailing party on the motion all costs and reasonable and necessary attorney fees incurred with respect to the challenged cause of action in the trial court."). SB 8 does not disturb or limit other bases for fee-shifting under Texas law, and SB 8 defendants may still recover costs and fees if a lawsuit is frivolous, vexatious, or brought for purposes of harassment. *See* Tex. Civ. Prac. & Rem. Code §§ 10.001–10.006.[1]

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1. The United States' brief in *United States v. Texas*, No. 21-588, repeats this mischaracterization of section 171.208(b)(3). *See* U.S. Br. 22 (incorrectly stating that a successful SB 8 defendant "has no way to recover the attendant litigation expenses").

Second, the petitioners imply that section 4 of SB 8 subjects litigants to fee-shifting whenever they challenge the validity of an abortion restriction—even if they challenge the constitutionality of the law in a defensive posture. *See* Pet. Br. 10 ("S.B. 8 provides that if someone challenges any law that 'regulates or restricts abortion,' such as S.B. 8 itself, the challenger can be held liable for the opposing party's attorney's fees and costs." (citing Tex. Civ. Prac. & Rem. Code § 30.022(a)–(b)). This, too, is inaccurate. Section 4's fee-shifting regime is triggered only if a litigant:

> *seeks declaratory or injunctive relief to prevent* this state, a political subdivision, any governmental entity or public official in this state, or any person in this state from enforcing any statute, ordinance, rule, regulation, or any other type of law that regulates or restricts abortion or that limits taxpayer funding for individuals or entities that perform or promote abortions, in any state or federal court.

Tex. Civ. Prac. & Rem. Code § 30.022(a) (emphasis added). A litigant who challenges the constitutionality of a statute as a *defense* to civil liability or criminal prosecution is not seeking "declaratory or injunctive relief," and is not subject to fee-shifting under section 4.

Third, SB 8 does not preclude *all* constitutional challenges to the statute in the Texas courts, as the plaintiffs claim. Pet. Br. 9 ("S.B. 8 attempts to close *all* courthouse doors to challenges."). SB 8 merely prevents *pre-enforcement* challenges to the validity of the statute in the state-court system; it does not in any way prevent a

litigant from challenging the constitutionality of the statute in a defensive posture. *See* Tex. Health & Safety Code § 171.211(a)–(b). Indeed, SB 8 specifically preserves the right of SB 8 defendants to assert constitutional claims as a defense to liability. *See* Tex. Health & Safety Code § 171.211(b), (f).

ARGUMENT

The issues before this Court are limited to questions of subject-matter jurisdiction. The defendants took an interlocutory appeal from a district-court order that denied a sovereign-immunity defense, and the Fifth Circuit's appellate jurisdiction is limited to issues of sovereign immunity and subject-matter jurisdiction. *See Hospitality House, Inc. v. Gilbert*, 298 F.3d 424, 429 (5th Cir. 2002) ("[W]here, as in the instant case, we have interlocutory appellate jurisdiction to review a district court's denial of Eleventh Amendment immunity, we may first determine whether there is federal subject matter jurisdiction over the underlying case."); *Whole Woman's Health v. Jackson*, 13 F.4th 434, 445–47 (5th Cir. 2021). This Court's authority to "review" that "case" under 28 U.S.C. § 1254 is likewise limited to those issues within the Fifth Circuit's appellate jurisdiction. *See Forsyth v. City of Hammond*, 166 U.S. 506, 513 (1897).

I. THE PETITIONERS' DISCUSSION OF 42 U.S.C. § 1983 AND THE DECLARATORY JUDGMENT ACT IS IRRELEVANT

The petitioners begin their argument by claiming that Congress authorized them to sue the defendants under 42 U.S.C. § 1983 and the Declaratory Judgment

Act. Pet. Br. 21–25. That does nothing to overcome the jurisdictional obstacles that they confront. Congress cannot authorize lawsuits that violate Article III's case-or-controversy requirement,[2] and neither 42 U.S.C. § 1983 nor the Declaratory Judgment Act purports to abrogate state sovereign immunity. *See Will v. Michigan Dep't of Police*, 491 U.S. 58, 64 (1989).

In addition, none of these issues are properly before this Court. The Fifth Circuit's appellate jurisdiction is limited to whether the federal judiciary can assert subject-matter jurisdiction over the petitioners' claims and whether the petitioners can overcome sovereign immunity, and those are the only issues that this Court may consider in "reviewing" that "case" under 28 U.S.C. § 1254. Whether the petitioners have a *cause of action* to sue under either 42 U.S.C. § 1983 or the Declaratory Judgment Act has nothing with subject-matter jurisdiction. *See Davis v. Passman*, 442 U.S. 228, 239 n.18 (1979); *Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 89 (1998) ("[T]he absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction").

Finally, the petitioners' argument is a non sequitur. They claim that they must be allowed to sue Jackson and Clarkston under 42 U.S.C. § 1983 because that statute was enacted in response to "the Klan's 'reign of terrorism and bloodshed' directed toward Black Americans during Reconstruction." Pet. Br. at 23. But the Ku Klux Klan didn't sow terror during Reconstruction *by filing*

2. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 571–78 (1992).

lawsuits, so there's no reason to think that Congress "intended" to authorize federal judges to prevent state judges from even *hearing* lawsuits, let alone prevent state court clerks from docketing complaints.

II. THE CLAIMS AGAINST JACKSON AND CLARKSTON ARE BARRED BY SOVEREIGN IMMUNITY

The petitioners insist that their claims against Jackson and Clarkston fall within the *Ex parte Young* exception to sovereign immunity. Pet. Br. 25–33. But the *Ex parte Young* exception can apply only when the named defendant is violating or about to violate federal law—as it is those unlawful acts that "strip" the officer of his sovereign status and leave him to be regarded as a rogue individual rather than a sovereign that enjoys immunity from suit. *See Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 104 (1984) ("[A]n official *who acts unconstitutionally* is 'stripped of his official or representative character'" (emphasis added) (quoting *Ex parte Young*, 209 U.S. 123, 160 (1908)). The petitioners appear to acknowledge this fact when they say that "a state official *who performs an unconstitutional act* 'proceed[s] without the authority of * * * the state.'" Pet. Br. 26 (quoting *Young*, 209 U.S. at 159–60) (emphasis added). But they never attempt to explain how Jackson "performs an unconstitutional act" by merely *hearing* a case that is filed under an allegedly unconstitutional statute. Nor do they explain how Clarkston "performs an unconstitutional act" by merely docketing a complaint or other papers that get filed in SB enforcement lawsuits.

Instead, the petitioners misstate the test for *Ex parte Young* by claiming that they need only to allege "an ongoing violation of federal law and seek[] relief properly characterized as prospective." Pet. Br. 27 (quoting *Verizon Maryland, Inc. v. Public Service Comm'n of Maryland*, 535 U.S. 635, 645 (2002)). A litigant that invokes *Ex parte Young* must allege an "ongoing violation of federal law" *committed by the person being sued. See Pennhurst*, 465 U.S. at 104. It is only *that individual's* violation of federal law that can deprive him of sovereign immunity. That requirement is implicit in the statement from *Verizon Maryland*, and the petitioners do not even present an argument for how Jackson and Clarkston are federal lawbreakers—or how they would become federal lawbreakers by hearing or docketing cases under SB 8.

The petitioners' argument, if accepted by this Court, would mean that state judges and court clerks may be sued under 42 U.S.C. § 1983 whenever they hear or docket cases under *any* statute that is alleged to be unconstitutional.[3] And it would subject court clerks to suits for damages under section 1983 if they docket complaints

3. Later in their brief, the petitioners suggest (although they do not say this explicitly) that lawsuits against judges and clerks should be allowed only in cases in which the statute fails to give "executive-branch officials enforcement authority." Pet. Br. 31. But the *Ex parte Young* doctrine does not in any way depend on whether *other* state officials are subject to suit. It turns on whether the named defendant has forfeited his sovereign immunity by violating (or attempting to violate) federal law. In all events, even this contrived limitation would leave judges and court clerks liable to suit over *any* common-law doctrine or any other statute that is enforced through private civil remedies.

that seek to enforce an unconstitutional statute. That is beyond preposterous. A clerk does nothing wrong (and certainly nothing illegal) by docketing a court filing, no matter what the substance of that court filing might contain. And a judge does not violate the Constitution by merely *hearing* a lawsuit that has been filed under an allegedly unconstitutional statute. Neither Jackson nor Clarkston has done anything that forfeits their sovereign immunity under *Ex parte Young*, and the claims against each of them must be dismissed for that reason alone.

III. EX PARTE YOUNG CATEGORICALLY FORBIDS RELIEF THAT PREVENTS STATE COURTS FROM HEARING CASES THAT HAVE YET TO BE FILED

The petitioners' claims against Jackson and Clarkston face a separate and independent obstacle: A federal court is categorically forbidden to restrain or prevent a state court from hearing a case. As this Court explained in *Young*:

> [T]he right to enjoin an individual, even though a state official, from commencing suits . . . does not include the power to restrain a court from acting in any case brought before it, either of a civil or criminal nature . . . . [A]n injunction against a state court would be a violation of the whole scheme of our Government. . . . The difference between the power to enjoin an individual from doing certain things, and the power to enjoin courts from proceeding in their own way to exercise jurisdiction, is plain, and no

> power to do the latter exists because of a power to do the former.

Young, 209 U.S. at 163. The petitioners claim that this passage "does not help" Jackson or Clarkston because "because *Young* expressly allows an injunction against 'commencing suits.'" Pet. Br. 31 (quoting *Young*, 209 U.S. at 163). But the injunction in *Young* was directed to the *litigant*, not to the judge or the clerk, and no one is contending that *Young* abolished anti-suit injunctions.

The petitioners' next move is to note that recent cases interpreting section 1983 have allowed judges to be sued notwithstanding this passage from *Young*. Pet. Br. 32 ("[I]n the decades since *Young*, both Congress and this Court have acknowledged on multiple occasions that state judges may be sued under Section 1983 for prospective relief."). But *Young* does not hold that judges can never be sued for prospective relief—and the defendants have never argued that *Young* categorically forbids injunctions against judges or court officials. Judges may *still* be sued over policies that they have adopted or are enforcing—and injunctions of that sort are entirely consistent with *Young*. *See Supreme Court of Virginia v. Consumers Union of United States, Inc.*, 446 U.S. 719, 737 (1980) (allowing a state supreme court and its chief justice to be sued over their enforcement of the state's disciplinary rules for lawyers, which were issued and enforced by the state's judiciary); *Pulliam v. Allen*, 466 U.S. 522, 541–43 (1984) (enjoining a state magistrate's policy of imposing bail on individuals arrested for nonjailable offenses and incarcerating those who could not meet the bail). The injunctions prohibited by

Young are those that would "restrain a court *from acting in any case brought before it*, either of a civil or criminal nature" and those that would "enjoin courts *from proceeding in their own way to exercise jurisdiction*." *Young*, 209 U.S. at 163 (emphasis added). These statements from *Young* leave no room for relief that would prevent a court from even *hearing* a case that has yet to be filed—which is what the petitioners are demanding. And the petitioners cannot identify *any* case in which an injunction (or a declaratory judgment) of that sort has been allowed.

The petitioners remaining efforts to escape this prohibition from *Young* can be quickly dispatched. They claim that it shouldn't apply to private rights of action that cannot otherwise be challenged pre-enforcement,[4] but that cannot be squared with the sweeping and categorical language of the passage, nor with the fact that no court has ever allowed a private right of action to be challenged pre-enforcement by suing a judge who *might* hear a hypothetical future lawsuit that has yet to be filed in his court and cannot even be identified.

The petitioners also claim that it shouldn't protect clerks,[5] but the opinion in *Young* states that *no part of* "the machinery" of a court could be enjoined from adjudicating, including even a "grand jury," and a clerk is *a fortiori* part of the court's "machinery." *Young*, 209 U.S. at 163. Finally, they try to escape Young by seeking only a declaratory judgment rather than an injunction against

4. Pet. Br. at 31.

5. Pet. Br. at 31.

Jackson, but that violates the rule that declaratory judgments cannot expand federal jurisdiction—which means that a declaratory judgment cannot be available if a coercive lawsuit couldn't be brought. *See* 28 U.S.C. § 2201; *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671–72 (1950).

IV. THERE IS NO ARTICLE III CASE OR CONTROVERSY BETWEEN THE PETITIONERS AND THE NAMED DEFENDANTS

The petitioners claim that they are suffering injury in fact from the "threat of enforcement,"[6] but it is not enough to show a "threat of enforcement" generally. The petitioners must show a threat of enforcement from the individual defendants that they have sued—and there is *no* threat of enforcement from *these* individuals. Standing is assessed at the time the complaint is filed,[7] and the petitioners cannot identify anything showing that Jackson, Clarkston, or Dickson was threatening to enforce SB 8 against any of the petitioners when they sued on July 13, 2021. The prospect that someone would have sued the plaintiffs in Smith County or Judge Jackson's court is nothing but rank speculation. *See Lujan*, 504 U.S. at 560 (injury in fact must be "actual or imminent,

6. Pet. Br. 20 ("The threat of enforcement is a well-recognized Article III injury"); *id.* at 39.

7. *See Carney v. Adams*, 141 S. Ct. 493, 499 (2020) ("[S]tanding is assessed 'at the time the action commences'" (quoting *Friends of the Earth, Inc.* v. *Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 191 (2000)).

not conjectural or hypothetical" (citation and internal quotation marks omitted)).

More importantly, the petitioners must show that their "injury" is not only traceable to the named defendants, but is traceable to the "allegedly unlawful conduct" of those defendants. *See California v. Texas*, 141 S. Ct. 2104, 2113 (2021) ("A plaintiff has standing only if he can 'allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.'" (citation omitted)). The petitioners entirely ignore this requirement, and they never explain how any of the actions that they seek to enjoin are "allegedly unlawful." A judge does not act unlawfully by hearing a case, and a clerk does not unlawfully by docketing a complaint. Even if these future actions—or the possibility of these future actions—inflict injury on the petitioners by imposing litigation costs or deterring them from performing abortions, there is nothing conceivably "unlawful" about these acts. Nor is there anything "allegedly unlawful" about Mr. Dickson suing the plaintiffs. Mr. Dickson is a private citizen, not a state actor, so he cannot violate the petitioners' constitutional rights, and a private citizen does not violate the law by filing a lawsuit against someone, even if the lawsuit is ultimately unsuccessful or based on an unconstitutional statute.

The petitioners also ignore the fact that any "injuries" that might be inflicted by Jackson or Clarkston will be caused by independent actions of third parties not before the Court—namely, the litigants who choose to file suit. That defeats the petitioners' efforts to establish

traceability. *See Lujan*, 504 U.S. at 560 ("[T]he injury has to be fairly . . . traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." (cleaned up)). And the petitioners' theory of standing—if accepted by this Court—would allow litigants to sue state judges and court clerks to prevent the filing of defamation lawsuits, or *any* lawsuit that they think *might* be brought against them for conduct that they believe to be constitutionally protected.

As for Mr. Dickson: We have never "conceded" that the petitioners satisfied the pleading standard by alleging a "credible threat" that Mr. Dickson would sue. Pet. Br. 42. The mandamus petition they cite merely quotes from the complaint, which asserts a "credible threat," without conceding that it satisfies the plausibility standard of *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In all events, Mr. Dickson's sworn declarations trump mere allegations in a complaint, and the petitioners must rebut those with evidence to survive a Rule 12(b)(1) motion.

The petitioners also misrepresent the content of Mr. Dickson's declarations. Mr. Dickson did not say that his unwillingness to sue was "contingent" on the petitioners' compliance with SB 8. Pet. Br. 42. He said that he expected the petitioners to comply with the law, and that this was "*one of many reasons* why I have no intention of suing the plaintiffs under Senate Bill 8—and why I have made no plans and no threats to do so." ROA.966 (¶ 7). It is undisputed that Mr. Dickson had no intention of suing the petitioners when they filed their complaint on July

13, 2021, and that is all that is needed to defeat the petitioners' claims against Mr. Dickson.

Finally, the petitioners try to overcome the adversity problem with Judge Jackson by proclaiming that each of the defendants has "vigorously defended the Act,"[8] but that is untrue. Judge Jackson refused to defend the constitutionality of SB 8 in the district court because the canons of judicial ethics preclude him from doing so.[9] Judge Jackson has contested the courts' jurisdiction, but has not (and will not) defend the constitutionality of SB 8 on the merits.

V. THERE IS NO CONSTITUTIONAL RIGHT TO OBTAIN PRE-ENFORCEMENT REVIEW OF AN ALLEDGELY UNCONSTITUTIONAL STATUTE

The petitioners insist throughout their brief that there *must* be some way, somehow, for someone to challenge the constitutionality of SB 8 pre-enforcement in federal court. *See* Pet. Br. 19 ("Where, as here, a State enacts a blatantly unconstitutional statute, assigns enforcement authority to everyone in the world, and weaponizes the state judiciary to obstruct those courts' ability to protect constitutional rights, the federal courts must be available to provide relief."). And the petitioners

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8. Pet. Br. 20.

9. *See* Canon 3(B)(10), Texas Code of Judicial Ethics ("A judge shall abstain from public comment about a pending or impending proceeding which may come before the judge's court in a manner which suggests to a reasonable person the judge's probable decision on any particular case."), available at https://www.txcourts.gov/media/1452409/texas-code-of-judicial-conduct.pdf.

claim that this Court *must* therefore find a way to allow their pre-enforcement lawsuit to proceed, regardless of any jurisdictional obstacles that might stand in the way. *See id.* at 45 ("This Court *Must* Stop Texas's Open Attack On Federal Supremacy" (emphasis added)); *id.* at 48 ("'[E]very right, when withheld, must have a remedy, and every injury its proper redress.'" (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 147 (1803)).

This is nonsense. The judicial power of the United States is limited to deciding "cases" or "controversies." U.S. Const. art. III. The federal judiciary was not established as a Council of Revision,[10] and it does not hold a preclearance power over legislative enactments. *See Broadrick v. Oklahoma*, 413 U.S. 601, 610–11 (1973) ("[U]nder our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws."). It is inevitable that the case-or-controversy requirement will sometimes delay or prevent the federal judiciary from reviewing the constitutionality of a statute. *See, e.g.*, *Raines v. Byrd*, 521 U.S. 811, 819–20 (1997); *see also Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 489 (1982) ("[T]he assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing."); *Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615, 1621 (2020) (same). It also enables the political branches to enact statutes that

10. *See Arizona Christian School Tuition Organization v. Winn*, 563 U.S. 125, 145–46 (2011).

limit or eliminate opportunities for pre-enforcement judicial review.

Pre-enforcement litigation over the constitutionality of statutes has become so common that it may *seem* as though abortion providers have a constitutional entitlement to invoke the federal judicial power as soon a governor signs a disputed abortion restriction into law. But there is nothing untoward or improper about Congress or the States enacting legislation that deprives abortion providers (and others) of this option. It has long been settled that Congress, for example, holds plenary control over the jurisdiction of the federal district courts, which allows Congress to strip the lower federal courts of jurisdiction over pre-enforcement challenges to any category of laws. *See Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850) (Congress holds plenary power to control jurisdiction of the inferior federal courts); John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 U. Chi. L. Rev. 203 (1997); Raoul Berger, *Insulation of Judicial Usurpation: A Comment on Lawrence Sager's "Court-Stripping" Polemic*, 44 Ohio St. L.J. 611, 642 (1983) ("[T]he unbroken string of Supreme Court pronouncements, stretching from 1796 to the present day, . . . recognize the plenary power of Congress over the lower federal courts' jurisdiction"). Congress may preclude litigants from challenging agency action pre-enforcement, and relegate them to post-adjudication review of an agency's order. *See Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994). Congress may also amend or limit the scope of available relief under 42 U.S.C. § 1983, the

Declaratory Judgment Act, or the Administrative Procedure Act, and it may curtail the equitable cause of action provided in *Ex parte Young*, 209 U.S. 123, 147 (1908). *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 73–74 (1996). Congress has not used this prerogative very often, but its *power* to do so is undisputed—and it remains a crucially important component of the system of checks and balances. The lower federal courts cannot consider *any* pre-enforcement challenge to a statute unless Congress affirmatively authorizes them to do so, and the mechanisms for pre-enforcement review in federal court exist as a matter of legislative grace, not constitutional command.[11]

The states likewise have tools at their disposal to limit the availability of pre-enforcement challenges to the laws that they enact. Of course, the States do not share Congress's power to formally deprive the federal district courts of jurisdiction over pre-enforcement lawsuits. But the States *can* structure their laws in a manner that reduces or eliminates opportunities for pre-enforcement challenges. State laws that are enforced solely through private rights of action cannot be challenged pre-enforcement under 42 U.S.C. § 1983 or *Ex parte*

11. Indeed, Congress did not even confer general federal-question jurisdiction on the district courts until 1875. *See Mims v. Arrow Financial Services, LLC*, 565 U.S. 368, 376 (2012) ("Congress granted federal courts general federal-question jurisdiction in 1875. See Act of Mar. 3, 1875, § 1, 18 Stat. 470."). Would the petitioners insist that the federal courts "must" provide pre-enforcement relief if a litigant sought to challenge the constitutionality of an abortion statute in *that* scenario?

Young—and this has been settled law for decades. *See Okpalobi v. Foster*, 244 F.3d 405, 426–27 (5th Cir. 2001) (en banc); *Hope Clinic v. Ryan*, 249 F.3d 603, 605 (7th Cir. 2001) (en banc); *Digital Recognition Network, Inc. v. Hutchinson*, 803 F.3d 952, 958 (8th Cir. 2015); *Nova Health Systems v. Gandy*, 416 F.3d 1149, 1152–53 (10th Cir. 2005); *Summit Medical Associates, P.C. v. Pryor*, 180 F.3d 1326, 1341–42 (11th Cir. 1999). That is the inevitable byproduct of a Constitution that limits the judiciary's powers to the resolution of "cases" or "controversies," and that requires a cause of action before a plaintiff can bring its constitutional grievances before a judicial tribunal.

There is also nothing unusual about a private right of action that chills or deters the exercise of constitutional rights. The tort of defamation, for example, has long been criticized for allowing the mere threat of private civil lawsuits to chill constitutionally protected speech, as danger of subjecting oneself to a potential lawsuit can result in self-censorship, even if the speaker is confident that he can ultimately defeat any defamation claim that might be brought. *See* David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. Pa. L. Rev. 487, 488 (1991).

In these situations, there are two possible remedies. The first is to assert one's constitutional claims defensively after being sued, which allows the courts to establish and announce constitutional limitations on the private right of action. *See, e.g.*, *New York Times Co. v. Sullivan*, 376 U.S. 254, 276–77 (1964). The second is to seek a legislative solution that deters or eliminates private lawsuits over constitutionally protected conduct.

With defamation, this takes the form of anti-SLAPP statutes enacted at the state level, which allow defendants to obtain a quick dismissal and recovery of attorneys' fees when sued over constitutionally protected activities. *See* Reporters Committee for Freedom of the Press, *Overview of Anti-SLAPP Laws*, https://bit.ly/3Ca96RL ("As of June 2021, 31 states and the District of Columbia have anti-SLAPP laws"). With SB 8, this would take the form of preemptive congressional legislation. The House of Representatives passed the Women's Health Protection Act (H.R. 3755) with alacrity after SB 8 took effect, which would preempt the statute and establish causes of action that would allow the Attorney General and abortion providers to sue Texas directly over its abortion laws. *See* H.R. 3755, 117th Congress (2021). The bill has not passed the Senate, but this is how abortion providers (and others) must seek redress against private rights of action that deter conduct that they believe to be constitutionally protected. Publishers who are unhappy with a State's defamation laws do not get to sue a defendant class of judges and court clerks in an effort to stop the state judiciary from hearing defamation cases or accepting them for filing.

Finally, the cases that the petitioners cite hold only that pre-enforcement challenges are *allowed* under Article III. Pet Br. 24 (citing *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 155, 163 (2014); *Steffel v. Thompson*, 415 U.S. 452, 475 (1974)). They do not hold or imply that a pre-enforcement challenge is constitutionally "necessary" in any situation, as the petitioners assert throughout their brief. Pet. Br. 24.

VI. THE PETITIONERS' SLIPPERY-SLOPE CONCERNS ARE MERITLESS

The petitioners and some amici raise fears that a jurisdictional dismissal here will trigger a wave of SB 8–type laws that deter other rights protected by the Constitution or this Court's precedents. Pet. Br. 48–50. Like most slippery-slope arguments, this is sophistry. *See generally* Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 Harv. L. Rev. 1026 (2003). There is no reason to believe that state or local jurisdictions will enact laws like SB 8 outside the abortion context. And even if they do, there is no reason to believe that the remedies for counteracting such laws will be ineffective.

First. Statutes such as SB 8 are unlikely to deter the exercise of rights when there is clear and unequivocal support on this Court for the right at issue. Suppose that a State enacted an SB 8–type law that authorizes private civil lawsuits against anyone who criticizes the government. Anyone who reads that statute would know that these lawsuits will be quickly thrown out of court, and there is no chance that this Court would overrule its previous decisions protecting that conduct. It is also hard to imagine that any plaintiff or attorney would waste their time pursuing such a lawsuit when there is zero chance of success, which should eliminate most if not all of the *in terrorem* effects. With SB 8, by contrast, the statute has been effective in deterring post-heartbeat abortions primarily because the future of *Roe v. Wade* is uncertain. Even critics of SB 8 recognize this fact. *See* Michael C. Dorf, *The Cloud Cast by SCOTUS Conservatives Over Roe Distinguishes the Texas Law From Most Procedur-*

ally Similar Ones, Dorf on Law (September 2, 2021, 7:48 A.M.), https://bit.ly/3C40kVf (last visited on October 29, 2021); Harper Neidig, *Court Fight Over Texas Abortion Restriction Tests Limits of State Laws*, The Hill, October 13, 2021, https://bit.ly/3aV0m5M ("'I would hasten to point out that this only works in areas where the constitutional law is uncertain,' Dorf said. 'So if the Supreme Court had not indicated that it's thinking about overruling the right to abortion, it would not be a big deal that Texas did this because a clinic's lawyers would tell the clinic, "Just perform the abortions, and if you're sued in Texas court, you'll just have the lawsuit struck down."'").

Second. There is no other right that even remotely triggers the intensity of opposition surrounding abortion and this Court's abortion-related jurisprudence. The anti-abortion movement regards abortion as an act of violence akin to murder, and critics of *Roe* regard the decision as not merely wrong but borderline illegitimate. *See* John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920, 947 (1973) ("*Roe v. Wade* . . . is *not* constitutional law and gives almost no sense of an obligation to try to be."). It was the combination of that legal and moral opposition to pre-enforcement judicial review of abortion statutes—along *w*ith the intensity of that opposition—that produced a statute such as SB 8. SB 8 is the heavy artillery, akin to an Act of Congress that formally strips the federal district courts of jurisdiction to entertain pre-enforcement challenges to a statute. And just as Congress has used its jurisdiction-stripping power sparingly, one should expect

the States to enact SB 8–like statutes only in rare and extraordinary circumstances, and only when they believe that pre-enforcement judicial review is producing outcomes that are (in their view) both unlawful and morally reprehensible.

Indeed, the States have *always* had the ability to do what Texas did in enacting SB 8, as it has been settled law for decades that private rights of action cannot be challenged pre-enforcement in federal court. *See Okpalobi*, 244 F.3d at 426–27; *Hope Clinic*, 249 F.3d at 605; *Digital Recognition Network*, 803 F.3d at 958; *Summit Medical Associates*, 180 F.3d at 1341–42. Yet no State has enacted a statute like this before, in large part because a private cause of action would not have been effective in deterring abortions at a time when *Roe* was perceived to enjoy unequivocal majority support on the Supreme Court. Texas enacted SB 8 in response to the most controversial decision that this Court has issued in the past 50 years, and at a time when this Court is currently considering whether to scale back or overrule that decision. That does not portend that the states will use this tactic with regard to less controversial rights, or with regard to rights that enjoy strong and unflagging support on the Court.

Third. Congress will always have the prerogative to preempt laws that emulate SB 8. Members of Congress are bound by oath to defend the Constitution, and if a state is violating its citizens' constitutional rights, then legislators will be constitutionally obligated to enact preempting legislation. *See* U.S. Const. amend. XIV, § 5. Congress has not done so with respect to SB 8, although the Women's Health Protection Act (which would

preempt SB 8) has passed the House of Representatives. But Congress would swiftly enact preempting legislation if a State created a private civil-enforcement action to censor the news media or trample other established constitutional rights. The States remain subject to checks and balances when enacting laws such as SB 8, even if a pre-enforcement challenge is off the table.

CONCLUSION

The district court's order denying the defendants' motions to dismiss should be vacated, and the case should be remanded with instructions to dismiss for lack of subject-matter jurisdiction.

Respectfully submitted.

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