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.,
Respondents.

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

REPLY BRIEF FOR PETITIONERS

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October 29, 2021

CORPORATE DISCLOSURE STATEMENT

The Rule 29.6 disclosure statement in the brief for Petitioners remains accurate.

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REPLY BRIEF FOR PETITIONERS

Respondents' briefs make clear that the ultimate aim of Senate Bill 8 ("S.B. 8" or "the Act") goes far beyond blocking effective federal-court review of the law before enforcement. Rather, S.B. 8 seeks to block *any* judicial review in state or federal court that could provide meaningful relief to Petitioners, and it does so with the clear purpose and effect of violating an established constitutional right.

According to Respondents, Petitioners' claims in this pre-enforcement challenge against state-agency officials, courthouse clerks, and judges are all barred. Clarkston Br. 19–21; State Br. 16–21. Nor can Petitioners sue Respondent Dickson, given his limited and conditional disavowals of an intent to sue. Dickson Br. 31–32. And to hear Respondents tell it, relief against any private person would be meaningless anyway because every other member of the public could still enforce S.B. 8. *Id.* at 40–41; Clarkston Br. 37–39; State Br. 26.

But this is only half the story. S.B. 8 also imposes immunity for any government official sued in *state* court in a challenge to the law's constitutionality. S.B. 8 conspicuously does so despite the legislature's waiver of such immunity in other declaratory-judgment actions. Tex. Health & Safety Code § 171.211. And Section 1983 claims against state officials in state courts would be barred to the same extent as in federal court. *See Howlett ex rel. Howlett v. Rose*, 496 U.S. 356, 365 (1990).

Respondents say that, if abortion providers and supporters of abortion patients want to challenge S.B. 8 in court, they have only one "option": violate the law and raise their constitutional defenses in a state-court

enforcement proceeding. But that proposal is illusory, too.

S.B. 8 is intended to, and in fact does, impose an overwhelming chill on its targets' activity. Physicians, nurses, ultrasound technicians, and anyone else aiding a patient in obtaining even a single prohibited abortion could all be sued in hundreds of duplicative suits, in courts in every Texas county, by an unlimited number of people with no personal connection to the abortion. Even one day of abortion services could result in years of litigation and millions of dollars in legal fees and costs, not to mention the threat of liability that starts at $10,000 per abortion, per defendant.

If abortion providers or patient supporters nevertheless violate S.B. 8 and are sued, they would enter a court system that the Texas legislature intentionally weaponized against its own citizens to prevent both speedy adjudication and finality. At every turn, S.B. 8's rules for enforcement proceedings sharply diverge from those normally applicable to Texas litigants and make a fair defense impossible. Among other things, S.B. 8:

- allows claimants to file lawsuits in their home counties and then veto transfer to a more appropriate venue, including for purposes of consolidation, Tex. Health & Safety Code § 171.210(a)(4), (b);
- prohibits S.B. 8 defendants from relying on non-mutual issue or claim preclusion or on any court decision that is not directly binding on the trial court, *id.* § 171.208(e)(4), (5);

- prohibits people sued under S.B. 8 from defending on the ground that they believed S.B. 8 was unconstitutional, *id.* § 171.208(e)(2), (3);
- purports to narrow the scope of a federal constitutional defense based on a right to abortion, *compare id.* § 171.209(d)(2), *with Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2312–13 (2016);
- permits prevailing claimants who succeed in suppressing constitutional activity to recover costs and attorney's fees not only from defendants, Tex. Health & Safety Code § 171.208(b)(3), but also in some cases from the defendants' attorneys, Tex. Civ. Prac. & Rem. Code § 30.022(a); and
- bars abortion providers and patient supporters sued under the Act from ever recovering costs or attorney's fees, Tex. Health & Safety Code § 171.208(i).

If an abortion provider or patient supporter somehow wins in state trial court, despite the rigged proceedings, the battle with S.B. 8 still is not won. Because S.B. 8 says that this favorable judgment means nothing in any other case in Texas, another S.B. 8 claimant (or *1,000* other claimants simultaneously) can just come along and sue the provider or supporter again, all for the very same abortion.

At bottom, S.B. 8's drafters ensured that statewide relief through defensive proceedings in state court would be next to impossible to obtain, as it would require (1) an adversary willing to appeal any loss, (2) a grant of discretionary review from the Texas

Supreme Court or this Court, and (3) a resulting decision that is general in application and thus sufficient to thaw S.B. 8's chill. Any statewide relief could take years, leaving federal constitutional rights wholly unprotected in the meantime. Meanwhile supporters of S.B. 8, pointing to the dramatic chilling effect it has already had on abortion in Texas, are urging their allies to avoid filing a test case, and emphasizing the fact that the Act has a four-year statute of limitations.

In light of these barriers to meaningful and timely review, it is no answer to Petitioners that they may eventually be victorious in S.B. 8's game of constitutional whack-a-mole. To the contrary, the threat of being haled into these rigged, coercive, and duplicative proceedings is a core part of the harm that S.B. 8 imposes on Petitioners by commandeering the State's own court system. This harm is a cognizable Article III injury, redressable by Petitioners' requested relief, since it would prevent the commencement of S.B. 8 actions in Texas courts. And that injury cries out for federal-court intervention under the principle established in *Ex parte Young*, 209 U.S. 123 (1908), even though Texas has rigged its law in an attempt to evade such review.

Because S.B. 8 is a truly aberrant law, recognizing the propriety of federal review here will not open any floodgates. On the contrary, allowing such a transparent scheme to withstand review would invite copycat legislation across the nation, targeting any federal right a state legislature does not like. Under the abnormal circumstances presented in this case, federal-court intervention is not only appropriate, but imperative.

ARGUMENT

I. Because S.B. 8 Is Unlike Any Other Law, This Is The Rare Case In Which Clerks Are Proper Defendants

If Petitioners obtain injunctive relief against the putative clerk class, their claim for declaratory relief against the Texas judges is, for practical purposes, not strictly necessary to redress their injuries. Indeed, in light of Respondents' weak defense of the clerk class, permitting Petitioners' suit to proceed against the clerks without reaching relief against the judges may offer the most straightforward path.[1]

Respondents claim that S.B. 8 is just like any other civil law providing a private right of action and that, if clerks are proper defendants here, they could be sued in any federal challenge to a private cause of action. They insist that, to prevent overburdening federal courts, Petitioners must raise their constitutional defenses in state court once they are sued.

But S.B. 8 is no ordinary law. With this Act, Texas delegated enforcement of the State's own interests to an unlimited number of uninjured private parties and conscripted its state-court system into facilitating this

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[1] If the Court concludes that Clarkston, on behalf of the clerk class, is not an appropriate defendant, it would of course still need to authorize suit against Judge Jackson and the judge class or the attorney general, for all the reasons given in Petitioners' brief and *infra* Parts II.C–D & III.B–C. Relief against the state-agency Respondents based on their collateral enforcement authority remains necessary in either event because that enforcement authority does not require that a court first find in a private-enforcement action that a violation of S.B. 8 has occurred. *See, e.g.*, Tex. Occ. Code § 164.053(b).

unconstitutional scheme through rules that make the effective and timely protection of constitutional rights impossible. *See supra* pp.2–4; Legal Scholars *Amici* Br. 16–19.

Permitting this case to proceed against courthouse clerks—state officials whose ministerial acts of docketing S.B. 8 litigation are essential to the operation of Texas's illegal scheme—would recognize a right to federal relief only in these unique circumstances. Where, as here, a State law (1) deliberately seeks to evade federal judicial review by outsourcing enforcement of the law to private individuals without any personal stake, while forbidding state executive officials from direct enforcement; and (2) creates special rules for state-court adjudication to maximize harassment and make timely and effective protection of constitutional rights impossible, federal relief against clerks is warranted.

A. Exercising jurisdiction over state-court clerks who effectuate the State's scheme is not only proper but imperative.

1. Petitioners agree that suits against court clerks are not typically an appropriate means of challenging the constitutionality of a state statute. But this case is "unprecedented." *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2496 (2021) (Roberts, C.J., dissenting). In these circumstances, it is necessary for those injured by S.B. 8 to seek relief by suing the state officials involved in effectuating their injury: here, the State's court clerks.

In the normal course, suits against clerks are improper because a plaintiff can secure an injunction binding "the enforcement official authorized to bring suit under the statute" if the law is unconstitutional.

Id. at 21; *see Young*, 209 U.S. at 163. But here Texas sought to "box[] out" federal courts by outsourcing enforcement to an unlimited number of private parties, Intervenors' Reply Br. 3, *United States v. Texas*, No. 21-50949 (5th Cir. Oct. 14, 2021), Doc. 00516055058, and by prohibiting direct enforcement by the executive branch, thus leaving court personnel as the only ones involved in S.B. 8's direct enforcement. *See* Tex. Health & Safety Code § 171.207(a). The only plausible explanation for this structure is that Texas seeks to evade the review this Court identified as critical in *Young*. Accordingly, for the same reasons the Court employed a legal "fiction" in *Young*, it should recognize the propriety of suing state-court clerks in these limited circumstances. Doing so is essential to the meaningful protection of federal rights.

Clarkston objects that under Texas law, she "lacks authority to refuse * * * a pleading presented for filing." Clarkston Br. 25 (citation omitted). But that makes clerks particularly appropriate defendants. Clerks have a stake in defending their state-law obligation to docket S.B. 8 enforcement petitions—just like any other official whose state-law duties include implementing a challenged law. *Id.* at 27–28. If Clarkston prevails she can carry out her Texas-imposed obligation to docket S.B. 8 cases. If Petitioners prevail, she will have to conform her conduct to the requirements of federal law. *See* Pet'rs' Br. 43–44; *id.* at 15–16 (referencing State's advisory regarding compliance with *United States v. Texas* preliminary injunction).

2. Nor need the Court be concerned that allowing this suit to proceed will "force[] [the clerks] to take on

roles contradictory" to their duties as "neutral arbiters." Clarkston Br. 27; *accord* State Br. 21–26.

Clarkston is not in any sense an "arbiter"; as she concedes, she performs a "ministerial duty," App. 52a, in docketing cases, Clarkston Br. 7, and that duty flows directly from state law, *infra* Parts II.A & III.A.[2] Far from acting in an adjudicative capacity, clerks play an essential role in S.B. 8's sinister, bureaucratic machinery. Enjoining clerks, like enjoining executive officials, does not interfere with any adjudicatory role.

In any event, there is no indication this suit has forced Clarkston into a role with which she disagrees. Clarkston, after all, was hardly "forced" to file a conditional cross-petition for certiorari arguing that *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S 833 (1992), should be overruled. *See generally* Conditional Cross-Pet., *Clarkston v. Whole Woman's Health*, No. 21-587 (U.S. filed Oct. 21, 2021).

There is thus no question that the parties to this proceeding are sufficiently adverse to provide the Court with the requisite sharp presentation of the issues, including with respect to Petitioners' claims against the clerks. Pet'rs' Br. 44–45; *see also INS v. Chadha*, 462 U.S. 919, 940 (1983) (finding concerns about level of adversity obviated where parties agreed on constitutionality of law because court of appeals accepted briefs from Congress).

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[2] Citations to the appendix are to the appendix to the petition for certiorari before judgment.

B. S.B. 8's unique features make it distinct from private torts and other laws.

Respondents argue that S.B. 8 is akin to tort laws, other laws with private rights of action, and criminal laws. Clarkston Br. 36–38, 43–44; State Br. 56–57; Dickson Br. 1–3, 8–10. In their view, because the only way to challenge those laws is to raise constitutional claims after being sued in state court, the targets of S.B. 8 should be similarly limited.

Most of the cases Respondents cite show only that constitutional claims *can* be raised defensively, not that they *must*. *Young* itself refutes the latter proposition. 209 U.S. at 165. It is axiomatic that a person need not first violate laws with criminal or civil penalties to challenge them. Pet'rs' Br. 24–25 (collecting cases). For instance, those with a religious objection to anti-discrimination laws regularly bring pre-enforcement challenges. *See, e.g.*, *303 Creative LLC v. Elenis*, 6 F.4th 1160, 1170, 1181 (10th Cir. 2021), *pet. for cert. filed*, No. 21-476 (U.S. Sept. 24, 2021); *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 769 (8th Cir. 2019).

Moreover, the private-enforcement laws to which Respondents point grant a cause of action to an injured person to redress their own injury. S.B. 8, by contrast, empowers uninjured strangers throughout the country to sue, in effect creating a backdoor method for the State to enforce *the State's* interests in its abortion ban. Tex. Health & Safety Code § 171.202(3) (asserting that "*Texas* has compelling interests" in S.B. 8's ban (emphasis added)).

For this reason, Respondents' attempt to liken S.B. 8 to other statutes subjecting abortion providers to civil liability, Clarkston Br. 36–38, is inapt. Those

statutes authorize discrete classes of individuals who have been personally harmed to sue for compensatory damages, consistent with traditional tort-law principles. None delegates enforcement of an unconstitutional abortion ban to the populace, so none creates the same chilling effect that causes Petitioners' Article III injury here.[3]

Respondents are also incorrect to argue that, just as federal constitutional claims are generally adjudicated as defenses to defamation suits in state court, the same course should be followed here. S.B. 8 is not analogous to a typical defamation law. If a State took an S.B. 8-approach to defamation—passing a law that authorized private citizens throughout the country to sue local newspapers any time the newspapers criticized the government, offered a $10,000 bounty, and skewed state procedures to ensure that newspapers could be sued limitless times for a single statement—pre-enforcement federal-court review would be appropriate. In that circumstance, the existence of the legal scheme would chill the exercise of constitutional rights, and a remedy against

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[3] Despite Clarkston's quibbles (at 10–12), S.B. 8 unquestionably bans most pre-viability abortions. *See* Tex. Health & Safety Code § 171.204(a). Highlighting this point, a recent research brief shows a 50% decrease in the number of abortions in Texas in September and explains that this figure will continue to grow, including because the extraordinary measures that Petitioners took in September—working overtime and burning through financial reserves—are neither practically nor financially sustainable. Kari White et al., *Research Brief: Initial Impacts of Texas' SB8 on Abortions in Texas and Out-of-State Facilities* 1–2 & fig. 1, 5, Tex. Pol'y Evaluation Project (Oct. 29, 2021), http://sites.utexas.edu/txpep/files/2021/10/sb-8-initial-impact-oct-28-txpep-brief.pdf; *see also* Emergency Appl. App. 8a, 81a–83a, *United States v. Texas*, No. 21A85 (U.S. Oct. 18, 2021).

the state officials involved in effectuating that scheme, including court clerks, would be warranted. *See City of Houston v. Hill*, 482 U.S. 451, 467–68 (1987).

Moreover, in a defamation or other tort suit, once the controversy between the injured party and the defendant is resolved, the case is over. In contrast, under S.B. 8, one can be sued an unlimited number of times for four years after an abortion, with suits in far-flung counties by uninjured people throughout the state. And each time the person sued will face monumental costs, including under the law's draconian attorney's-fees provisions, and will still gain no preclusive effect through a victory in one court. As one Respondent conceded, "no rational abortion provider or abortion fund * * * would subject itself to the risk of civil liability under Senate Bill 8." Dickson Br. 33 (quoting Record 665).

C. Failing to exercise jurisdiction in the unique circumstances here would invite States to eviscerate constitutional rights they disfavor.

If this Court shuts the door to meaningful review of S.B. 8, abortion will be the first, but certainly not the last, constitutional right attacked in this way. Pet'rs' Br. 49–50; Firearms Pol'y Coal. *Amicus* Br. 10–12; NAACP *Amicus* Br. 15–16; Current & Former Prosecutors *Amici* Br. 10–11.

Respondents attempt to deny this reality by suggesting that no other right is at risk of being revisited by the Court. Dickson Br. 10. But there is nothing about S.B. 8's approach that need be limited to abortion. As the architect of S.B. 8 himself recognizes, it would be folly to suggest that the right to abortion will be the only constitutional right to be

questioned by at least some Members of the Court. Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 Va. L. Rev. 933, 969 (2018) (arguing "[n]o one knows which [] future directions the Supreme Court will take, but it is certain that the Court will overrule *some* decisions," and discussing, *e.g.*, *Citizens United v. FEC*, 558 U.S. 310 (2010)).

II. Respondents Are Properly Sued Under *Young*

A. *Young* permits equitable relief against court clerks' commencement of a suit to enforce an unconstitutional law.

Clarkston contends (at 44) that she is immune from suit because her state-prescribed duties are not "illegal acts," and (at 41) that relief directed at judicial officials would implicate "special" sovereignty concerns. Neither is true.

1. For the *Young* exception to apply, a defendant need only have "some connection with the enforcement" of the challenged law. 209 U.S. at 157. Clarkston, however, seeks to engraft a further requirement onto *Young* that the requisite connection be an "illegal act" that would strip the official of sovereign immunity. Clarkston Br. 44–45. This misapprehends the nature of *Young*'s fiction: that state officials act unlawfully whenever their state-law duties conflict with the Federal Constitution. 209 U.S. at 155–56.

This Court has never required that an official's act itself be illegal. Rather, suits against officials may be brought to obtain relief from "some positive act" to enforce an unconstitutional law. *Fitts v. McGhee*, 172 U.S. 516, 530 (1899). Under the *Young* fiction, where, as here, "an unconstitutional legislative enactment is

'void,' a state official who enforces that law 'comes into conflict with the superior authority of [the] Constitution,' and therefore is 'stripped of his official or representative character.'" *Va. Off. for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 254 (2011) (quoting *Young*, 209 U.S at 159–60).

Were Clarkston's proposed limitation correct, some of this Court's significant cases would have been wrongly decided. *See, e.g.*, *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 972–73 (S.D. Ohio 2013), *rev'd sub nom. DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), *rev'd sub nom. Obergefell v. Hodges*, 576 U.S. 644 (2015) (plaintiffs sued "local and state officers responsible for death certificates" for declaratory relief).

And as *Young* made clear, part of Petitioners' injury—the "commencement of a suit," and in fact even the *threat* of such commencement—can "be regarded as an actionable injury to another" and "enjoined by a Federal court of equity." 209 U.S. at 153, 156. It makes no difference that Clarkston performs purely ministerial duties: "[T]he clerk of the court issues the summons," and thus is the direct cause that "sets in motion the machinery whereby" S.B. 8 defendants are subjected to the State's illegal scheme of harassing, burdensome, and patently unconstitutional proceedings. *Sniadach v. Fam. Fin. Corp. of Bay View*, 395 U.S. 337, 338–39 (1969); 42 U.S.C. § 1983 (prohibiting actions "caus[ing] [Petitioners] to be subjected" to a deprivation of their constitutional rights").

2. Respondents contend that Section 1983 bars injunctive relief against Clarkston and her fellow clerks because they are "judicial officers." This is

wrong. Clerks are not "judicial officers." *See* Pet'rs' Br. 22–23 (collecting statutes and legislative history). And the ministerial act of filing S.B. 8 petitions does not involve the exercise of "independent judgment about the merits of a case" to warrant judicial immunity. *Dennis v. Sparks*, 449 U.S. 24, 31 (1980); *see also United States v. Heller*, 957 F.2d 26, 29 (1st Cir. 1992) (per curiam) (holding that the term "judicial officer" "mean[s] a judge, not an employee in the office of the clerk"); *Rezzonico v. H & R Block, Inc.*, 182 F.3d 144, 152 (2d Cir. 1999) (same); *Sonicraft, Inc. v. NLRB*, 814 F.2d 385, 387 (7th Cir. 1987) (same, and referring to clerks as "nonjudicial personnel"); *accord United States v. Unger*, 700 F.2d 445, 453 (8th Cir. 1983) ("the clerk of the court who is not a judicial officer").

Thus, the principles underlying the *Young* doctrine—that effective federal-court review must be available to challenge unconstitutional state action that chills constitutional rights—authorize relief against the clerks here, where they play an essential role in effectuating the State's illegal scheme, and the State has gerrymandered its law to preclude *Young* relief against other officials.

3. Clarkston argues (at 49) that there is a "special sovereignty interest[]," akin to that identified in *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 281 (1997), and that this interest bars injunctive relief against clerks that would prohibit the institution of state-court enforcement actions.

But a suit against a state official like Clarkston does not—on its own—offend sovereign interests. "Denial of sovereign immunity, to be sure, offends the dignity of a State; but not every offense to the dignity of a State constitutes a denial of sovereign immunity."

Stewart, 563 U.S. at 258–59. This Court's "cases reasonably conclude" that sovereign interests are implicated "when (for example) the object of the suit against a state officer is to reach funds in the state treasury or acquire state lands." *Id.* But that is because those cases would threaten "[t]he specific indignity against which sovereign immunity protects." *Id.* at 258. By contrast, the State has no sovereign interest in the enforcement of an unconstitutional law. *Young*, 209 U.S. at 159–60. Because a "state has no power to impart to [an official] any immunity" under this circumstance, *id.* at 160, a clerk's "asserted dignitary harm" to the state judiciary "is simply unconnected to the sovereign-immunity interest," *Stewart*, 563 U.S. at 259; *cf. id.* at 262 (Kennedy, Thomas, JJ., concurring).

In any event, this Court's decisions allow that under "extraordinary circumstances," *Younger v. Harris*, 401 U.S. 37, 53–54 (1971), as here, a federal court may restrain even an ongoing state-court proceeding, *Mitchum v. Foster*, 407 U.S. 225, 242–43 (1972); *Dombrowski v. Pfister*, 380 U.S. 479, 484 n.2 (1965); *see also Bowen v. Doyle*, 230 F.3d 525, 526–27 (2d Cir. 2000) (affirming preliminary injunction against New York state-court judges preventing further decisions in actions filed against Seneca Nation President).

B. State judges may be sued under *Young*.

Judge Jackson argues (State Br. 25) that subjecting judges to suit in federal courts would "upend[] the structure of the judicial system." To the contrary, allowing such suits is necessary to preserve the supremacy of federal law, *Edelman v. Jordan*, 415 U.S. 651, 664 (1974), and it has long been contem-

plated by this Court. *Young* itself involved—and upheld the use of—anti-suit injunctions, which affect the operation of the judiciary. 209 U.S. at 132, 149, 159; *see also Younger*, 401 U.S. at 46.

C. Petitioners' suit against the attorney general and other state-agency officials is also proper under *Young*.

1. As Petitioners have explained, because the state-agency Respondents retain indirect enforcement authority with respect to S.B. 8's prohibitions, *infra* Part III.C, they have "some connection [to] the enforcement of the [A]ct" and are properly named as defendants. *Young*, 209 U.S. at 157. These Respondents do not dispute that if Petitioners are correct about the scope of that authority for all the reasons set forth in their opening brief, then these Respondents are proper defendants under *Young*. Pet'rs' Br. 11–12, 33–36. Likewise, the state-agency Respondents do not dispute that they are proper defendants under *Young* with respect to S.B. 8's fee-shifting provision. *Id.* at 11–12, 36, 43; Tex. Civ. Prac. & Rem. Code § 30.022(a)–(c).

2. Injunctive relief against the clerks would protect Petitioners' constitutional rights, but if this Court were to conclude otherwise, the principles of *Young* would authorize, in the alternative, a suit against the attorney general in these unusual circumstances.

Texas has delegated to private parties the traditional power of the government to ensure compliance with its laws for the transparent purpose of evading federal review. As this Court has recognized, however, "the choice of how to prioritize and how aggressively to pursue legal actions against

defendants who violate the law" generally falls within the discretion of the executive branch, not "within the purview of private plaintiffs (and their attorneys)," who "are not accountable to the people." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2207 (2021).

S.B. 8, on the other hand, delegates to so-called "private attorneys general" authority that originates from and is necessarily retained by Texas executive officials, including the actual attorney general. And *Young*'s principle of preserving federal-court review of constitutional claims would, under these circumstances, authorize suit against the attorney general because he is an appropriate party to defend the State's actions. This conclusion is confirmed by the attorney general's robust defense of S.B. 8, which he is duty-bound to undertake in both this case (in which he is a Respondent) and *United States v. Texas*, No. 21-588 (in which the State itself is a Respondent, but he is not). *See* Tex. Gov't Code § 402.021 (charging attorney general with "defend[ing] all actions in which the state is interested before the supreme court and courts of appeals").

Because enforcement of S.B. 8 is contingent on the attorney general's delegated authority, the attorney general has "some connection [to] the enforcement of the [A]ct." *Young*, 209 U.S. at 157. Thus, relief against the attorney general in this case would bind private enforcers, whose authority is derivative of his.

III. Petitioners Have Article III Standing

A. Clerks

1. Clarkston argues (at 34) that Petitioners lack standing to bring claims against her because there was no pending S.B. 8 action in Smith County at the

time this litigation began. Of course there was not. Petitioners filed their suit in July to enable relief *before* the law took effect September 1.

But it was plain even then, as Petitioners properly alleged and then demonstrated through record evidence, that pre-enforcement relief against the state officials who would effectuate S.B. 8's campaign of harassment was necessary to prevent immediate constitutional injury. *E.g.*, App. 12a–14aa, 35a–36a, 48a–54a. Petitioners face a credible threat that an S.B. 8 enforcement action will be filed in *every* Texas county—Smith County included. Pet'rs' Br. 39–40. Texas incentivizes that result with $10,000+ bounties and a special venue provision. And when S.B. 8 claimants file such suits, it is undisputed that clerks will docket their lawsuits, as state law requires. Tex. R. Civ. P. 99(a); App. 52a. Indeed, the fact that Clarkston has already docketed an S.B. 8 action confirms the non-speculative nature of Petitioners' harm. Pet'rs' Br. 28.

Where, as here, the State has incentivized burdensome and repetitive lawsuits to deprive individuals of their constitutional rights and has established special rules that will thwart any meaningful protection of those rights in state court, it is the docketing of such suits and the threat of limitless defensive litigation that causes direct, immediate injury. *See supra* pp. 2–4; *Susan B. Anthony List v. Driehaus* ("*SBA List*"), 573 U.S. 149, 164 (2014). Petitioners have thus established that they suffer an injury-in-fact.

2. It is undisputed that clerks are "instrumental" to the initiation of an S.B. 8 action. Clarkston Br. 25. For "if one cannot file their lawsuit or summon the defendant to court, one cannot obtain" relief. *Id.* at 26.

Accordingly, Petitioners' injuries are directly traceable to the clerks' state-law duties. *See, e.g.*, *Finberg v. Sullivan*, 634 F.2d 50, 53–54 (3d Cir. 1980) (en banc) (finding plaintiff's injury traceable to a clerk and sheriff because performance of their ministerial duties in post-judgment garnishment proceedings was "the immediate cause[]" of plaintiff's injury); *Kitchen v. Herbert*, 755 F.3d 1193, 1201–02 (10th Cir. 2014) (holding that a clerk responsible for issuing marriage licenses was a proper defendant in a suit challenging a same-sex-marriage ban).

Contrary to Respondents' contentions, *see* State Br. 40, it is irrelevant that private-party claimants would *also* contribute to Petitioners' injury. *See SBA List*, 573 U.S. at 152–53, 157–67; *Strickland v. Alexander*, 772 F.3d 876, 885–86 (11th Cir. 2014) (finding traceability satisfied where a plaintiff sued a clerk to prevent the filing of a garnishment affidavit and summons, although garnishment proceedings could only be initiated by creditors not before the court). A defendant need not be the only step in a causal chain to satisfy Article III. *Bennett v. Spear*, 520 U.S. 154, 168–69 (1997).

Respondents' reliance on *Simon v. East Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976), State Br. 40, also is misplaced. There, it was "purely speculative" whether plaintiffs' alleged injury "result[ed] from" the agency's rule or "*instead* result[ed] from decisions made by hospitals without regard to the tax implications." *Id.* at 42–43 (emphasis added). Here, private parties cannot unilaterally initiate litigation against Petitioners.

3. If clerks are barred from docketing S.B. 8 lawsuits, Petitioners' injuries will be redressed. An

injunction against Clarkston and the clerk class would nearly or fully eliminate the enforcement threat that has coerced Petitioners into compliance with S.B. 8. Redressability of Petitioners' injuries through the clerks was confirmed during the two-day period in which the preliminary injunction in *United States v. Texas*, No. 1:21-cv-00796-RP, 2021 WL 4593319 (W.D. Tex. Oct. 6, 2021), was in effect: during that time, Petitioners resumed providing abortions otherwise prohibited by S.B. 8, Pet'rs' Br. 15–16.

An injunction against Clarkston alone would also satisfy redressability by eliminating the threat of S.B. 8 litigation costs in Smith County, thus relieving a "discrete injury" to Petitioners. *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982) (plaintiff "need not show that a favorable decision will relieve his *every* injury"); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 n.5 (1998) (redressability is met as long as "plaintiff 'personally would benefit in a tangible way from the court's intervention.'" (quoting *Warth v. Seldin*, 422 U.S. 490, 508 (1975))).

B. Judges

Petitioners need not "demonstrate that an adverse judgment from any particular judge is 'certainly impending'" to establish injury-in-fact. State Br. 23 (emphasis omitted) (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013)). Petitioners alleged, *see* Record 42–43, 70, that their injuries flow from the threat that they will be repeatedly summoned into skewed state-court proceedings. *E.g.*, Tex. Health & Safety Code § 171.208(e)(4), (5) (eliminating collateral estoppel as a defense to suit), not solely the threat of losing before a particular judge. These injuries are traceable to the judges, who hold, among other

authority, the coercive power of entering default judgments against Petitioners who fail to mount a defense. *See* Pet'rs' Br. 30, 41. A declaratory judgment against Jackson establishes redressability. *See id.* at 41–42; *In re Justs. of Sup. Ct. of P.R.*, 695 F.2d 17, 23 (1st Cir. 1982) (Breyer, J.); *Steffel v. Thompson*, 415 U.S. 452, 470 (1974).

C. State-agency Respondents

1. The district court properly found a credible threat of indirect or collateral enforcement by the state-agency Respondents based in part on Respondents' prior history of disciplinary proceedings against abortion providers, including Petitioners. App. 29a–30a. Declaratory and injunctive relief against the state-agency Respondents would redress Petitioners' injuries because it would prevent indirect enforcement by the state-agency Respondents or because, at a minimum, it would deter enforcement by private parties. Dickson Br. 10 ("[Where] there is zero chance that the plaintiff will prevail, * * * there is zero incentive for a litigant or attorney to waste their time pursuing a futile enforcement lawsuit.").

2. Petitioners' claims against the attorney general satisfy Article III's requirements for an additional reason. Private parties' authority to enforce S.B. 8 derives from the attorney general's executive authority. *Supra* Part II.C. As a result, relief issued against the attorney general would bind private parties exercising delegated authority. *See* Fed. R. Civ. P. 65(d)(2).

3. The state-agency Respondents assert (at 19) they can "fatally undermine[]" Petitioners' standing by taking the position on appeal that they lack indirect enforcement authority. But Respondents did

not disavow their indirect enforcement authority at the outset of the case or at any time in the district court. App. 29a. Their late-breaking, self-serving tactic before this Court is effectively a promise of voluntary cessation of challenged conduct, which ordinarily does not divest a federal court of Article III jurisdiction after litigation has commenced. *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012) ("Such postcertiorari maneuvers designed to insulate a decision from review by this Court must be viewed with a critical eye."). Given that litigation positions taken by the attorney general do not bind the State or its officials under Texas law, Pet'rs' Br. 35–36; and that the state-agency Respondents continue to defend S.B. 8's constitutionality, there remains a live controversy between the parties. *Cf. Knox*, 567 U.S. at 307 ("[S]ince the union continues to defend the legality of the [challenged] fee, it is not clear why the union would necessarily refrain from collecting similar fees in the future.").

D. Dickson

Petitioners also have standing to sue Dickson, the private Respondent. Pet'rs' Br. 42–43. At best, Dickson's limited and conditional disavowals of intent to sue have raised a factual dispute. As he acknowledges (at 35–36), the appropriate response in that circumstance is a hearing, not the dismissal of Petitioners' claims on the pleadings.

If, however, this Court should determine that Petitioners lack standing to sue Dickson, it should remand to the district court to permit Petitioners to add certain Intervenor-Respondents in *United States v. Texas*, No. 21-588, as defendants in this case, given

their stated intent to bring private-enforcement actions under S.B. 8. *See* Fed. R. Civ. P. 21.

CONCLUSION

The Court should affirm the district court's denial of the motions to dismiss and remand forthwith for further proceedings in the district court.

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