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

BRIEF FOR RESPONDENT MARK LEE DICKSON

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QUESTION PRESENTED

The Texas Heartbeat Act, also known as SB 8, bans abortion after a fetal heartbeat is detectable, but it prohibits state officials from enforcing the ban. *See* Tex. Health & Safety Code § 171.207. Instead, the statute creates a private right of action that allows individuals to sue anyone who violates the law. *See* Tex. Health & Safety Code § 171.208. The statute allows abortion providers to avoid liability by showing that an "undue burden" would be imposed on their patients, and it allows any defendant to avoid liability by asserting their own constitutional rights. *See* Tex. Health & Safety Code § 171.209.

The plaintiffs want to challenge the constitutionality of this statute in a pre-enforcement lawsuit, rather than assert their constitutional claims in a defensive posture after they are sued. So they sued Austin Reeve Jackson, a state district judge, along with Penny Clarkston, a court clerk, before SB took effect and before any SB 8 enforcement lawsuits had been filed. And the plaintiffs are asking the federal judiciary to prevent Judge Jackson from hearing any civil-enforcement lawsuits that might be brought under SB 8, and enjoin Ms. Clarkston from accepting or filing any papers submitted in those cases. The question presented is:

> Can a litigant challenge the constitutionality of a private right of action by suing a state-court judge and a court clerk, in an attempt to prevent the state's judiciary from hearing or filing lawsuits that might be brought under an allegedly unconstitutional law?

PARTIES TO THE PROCEEDING

Petitioners 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 were plaintiffs-appellees in the court of appeals.

Respondents 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 were defendants-appellants in the court of appeals.

A corporate disclosure statement is not required because Mr. Dickson is not a corporation. *See* Sup. Ct. R. 29.6.

STATEMENT OF RELATED CASES

Counsel is aware of no directly related proceedings arising from the same trial-court case as this case other than those proceedings appealed here.

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Private rights of action will often enable people to sue over conduct that is protected (or arguably protected) by the Constitution. The tort of defamation, for example, has subjected people to lawsuits for engaging in constitutionally protected speech. *See New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *see also Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988). Anti-discrimination laws subject business owners to private civil lawsuits if they refuse to participate in same-sex weddings or provide services that violate their religious beliefs. *See* Nico Lang, *Masterpiece Cakeshop owner in court again for denying LGBTQ customer*, NBC News (April 15, 2020), https://nbcnews.to/3pm2xb3 ("Christian business

owner Jack Phillips is being sued by a transgender woman who tried to order a trans-themed birthday cake from his Colorado bakery."). And anti-gun activists use state tort law to sue gun dealers and manufacturers, in an attempt to deter them from marketing a constitutionally protected product. *See, e.g.*, Mike Robinson, *Chicago Targets Gun Industry in $433 Million Public Nuisance Lawsuit*, Associated Press (November 13, 1998).

In all of these situations, the persons or entities who are sued for engaging in constitutionally protected behavior have a remedy: They can assert their constitutional claims as a defense to liability, and ask for review in this Court if the state judiciary rejects their constitutional arguments. *See New York Times*, 376 U.S. at 256–65. They can also seek legislation that preempts or amends the private right of action that is deterring the exercise of constitutionally protected rights. The gun industry, for example, persuaded Congress to enact the Protection of Lawful Commerce in Arms Act, Pub. L. 109-92, 119 Stat. 2095 (2005) (codified at 15 U.S.C. §§ 7901–7903), which put a stop to many of the private civil lawsuits against gun dealers and manufacturers. Supporters of religious liberty have successfully lobbied for religious-freedom statutes that shield businesses from some (though not all) of the private civil lawsuits that they face under anti-discrimination laws. *See* Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. § 2000bb through 42 U.S.C. § 2000bb-4); *Bostock v. Clayton County*, 140 S. Ct. 1731, 1754 (2020) ("RFRA operates as a kind of super statute, displacing the normal operation of

other federal laws"); Tex. Civ. Prac. & Rem. Code §§ 110.001–110.011 (Texas RFRA). And free-speech advocates have worked for the enactment of anti-SLAPP statutes, which allow for a quick dismissal and fee-shifting when a defendant is sued for engaging in constitutionally protected speech. *See, e.g.*, Tex. Civ. Prac. & Rem. Code §§ 27.001–27.011; 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").

But no one can challenge the constitutionality of a private right of action by bringing a pre-enforcement lawsuit against state officials under 42 U.S.C. § 1983 or *Ex parte Young*, 209 U.S. 123 (1908). The reason for this is obvious. A private right of action—by its very definition—is enforced by the private individual who sues. It is not enforced by the state's Attorney General, or by any other executive or administrative official. An "injunction" that restrains one of these officers from "enforcing" a private right of action is meaningless, because it does not alter the defendant's behavior and does nothing to stop private lawsuits from being filed. There cannot be an Article III case or controversy in these situations. *See Babb v. Wilkie*, 140 S. Ct. 1168, 1177 (2020) ("It is bedrock law that 'requested relief' must 'redress the alleged injury.'" (quoting *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 103 (1998)).

Sovereign immunity presents an equally insurmountable obstacle, because the *Ex parte Young* exception applies only when a named defendant has "some connection with the enforcement of the act." *Young*, 209 U.S. at 157.

So it has long been settled that private rights of action cannot be challenged by suing the state's Attorney General, or any of the state's executive or administrative officers. *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) (Easterbrook, J.); *Digital Recognition Network, Inc. v. Hutchinson*, 803 F.3d 952, 958 (8th Cir. 2015); *Summit Medical Associates, P.C. v. Pryor*, 180 F.3d 1326, 1341-42 (11th Cir. 1999).

Whole Woman's Health[1] is trying get around all of this by suing a state-court judge and court clerk as putative class representatives, and demanding relief that would prevent every state-court judge and court clerk in Texas from hearing or filing lawsuits that might be brought under SB 8. But there is no conceivable basis for subject-matter jurisdiction over those claims. This Court has made unmistakably clear that a federal court cannot enjoin a state court from hearing or adjudicating cases—no matter how unconstitutional the underlying statute may be:

> [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.

1. For simplicity and ease of exposition, we will refer to the petitioners collectively as "the plaintiffs" or "Whole Woman's Health."

Young, 209 U.S. at 163. The reasons for this are obvious: A judge who acts in an adjudicatory capacity serves as an impartial arbiter of the law, and has no adversity to a plaintiff who is challenging the constitutionality of a statute. *See Bauer v. Texas*, 341 F.3d 352 (5th Cir. 2003) ("The requirement of a justiciable controversy is not satisfied where a judge acts in his adjudicatory capacity."); *Allen v. DeBello*, 861 F.3d 433, 440 (3d Cir. 2017) ("[A] judge who acts as a neutral and impartial arbiter of a statute is not a proper defendant to a Section 1983 suit challenging the constitutionality of the statute."). The rules of judicial ethics also prohibit a judge from defending a statute's constitutionality as a partisan litigant when he will be called upon to resolve those same constitutional challenges in a judicial capacity.[2] It is absurd to put a judge in a position where he is forced to defend the merits of a legislative enactment and litigate against the individuals who intend to challenge the constitutionality of that statute in his courtroom. It is equally untenable to put the court's employees in that position, as they serve as officers of the court and have no stake in the constitutional disputes over a legislative enactment. Article III does not permit litigants to challenge the constitutionality of a statute by suing judges who might hear

2. *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.

cases that get filed under the allegedly unconstitutional law.

Sovereign immunity presents an equally insuperable barrier to the claims brought against Judge Jackson and Ms. Clarkston. The *Ex parte Young* exception to sovereign immunity applies only when a state officer is violating or intends to violate federal law; that is what "strips" the officer of his sovereign authority and allows him to be sued as a rogue individual rather than as a component of a sovereign entity. *See Young*, 209 U.S. at 159–60; *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 *Young*, 209 U.S. at 160). It is preposterous to claim that Judge Jackson is violating the Constitution—and has forfeited his sovereign immunity—by sitting in his office waiting to see if someone files a lawsuit under SB 8, and federal courts must presume that state judges will follow federal law when deciding cases brought before them. *See Middlesex County Ethics Commission v. Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982) ("Minimal respect for the state processes, of course, precludes any *presumption* that the state courts will not safeguard federal constitutional rights."). It is equally groundless to claim that Ms. Clarkston would be breaking federal law by accepting or filing documents submitted by litigants or lawyers. A court clerk does not violate federal law by accepting a court filing under an unconstitutional statute, no matter how unconstitutional the underlying statute may be. So the plaintiffs' claims against Judge Jackson and Ms.

Clarkston are unequivocally foreclosed by Article III's case-or-controversy requirement and sovereign immunity, as well as the binding precedent of this Court. *See Young*, 209 U.S. at 163.

None of this means that SB 8 is "insulated from federal-court review,"[3] and Whole Woman's Health can still challenge the constitutionality of SB 8 in both state and federal court. The most obvious way (as we have mentioned) is for Whole Woman's Health to violate the statute and assert its constitutional claims after being sued, which would allow this Court to review the eventual state-court judgment. *See* 28 U.S.C. § 1257. One Texas abortion provider has already violated the Act in the hope of triggering private-enforcement lawsuits that he can use to challenge the constitutionality of SB 8, and three individuals have already sued him. *See* Alan Braid, *Why I violated Texas's extreme abortion ban*, Wash. Post (Sept. 18, 2021), https://wapo.st/3DUx4ki. Whole Woman's Health can also present its constitutional grievances to Congress and seek preempting legislation that shields abortion providers from lawsuits under SB 8. *See* H.R. 3755, 117th Congress, §§ 4–5, § 8 (2021) (Women's Health Protection Act), available at https://bit.ly/3mbnh3v. And Whole Woman's Health can work to elect legislators in Texas who will amend or repeal the disputed law. But neither Whole Woman's Health—nor any other litigant—can challenge the constitutionality of a private right of action by suing state officials pre-enforcement under 42 U.S.C. § 1983 or *Ex*

3. Pet. at i.

parte Young. That remains the case regardless of whether a private right of action deters or threatens the right of free speech, the right of religious freedom, the right to keep and bear arms, or the right to abortion. And it remains the case without regard to whether the statute establishing the private right of action violates the Constitution.

This has *always* been the law—and Whole Woman's Health has not cited any case in the 245-year history of the United States in which a litigant has been allowed to challenge a private right of action by filing a pre-enforcement lawsuit against state officials. The New York Times had no way of challenging Alabama's defamation laws in a pre-enforcement lawsuit; it had to wait to be sued and present its constitutional arguments as a defense. *See New York Times*, 376 U.S. at 256–65. Christian wedding vendors who fear lawsuits over their unwillingness to participate in same-sex weddings have no means of obtaining pre-enforcement relief that prevents lawsuits brought by private litigants; they must wait to be sued and hope that the courts will accept their constitutional defenses. *See Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2017) (wedding vendor asserting his First Amendment claims defensively); *State v. Arlene's Flowers, Inc.*, 441 P.3d 1203, 1209 (Wash. 2019), *cert. denied*, 141 S. Ct. 2884 (2021) (same). And the gun industry had no means of enjoining the initiation of lawsuits under state tort law; it had to beat back each lawsuit and lobby Congress for preempting legislation. Texas abortion providers find themselves in the same boat under SB 8, and they have the same set

of remedies available to them: (1) assert their constitutional claims after being sued; or (2) persuade Congress (or the Texas legislature) to enact legislation to shield them from SB 8 enforcement lawsuits. But Article III and sovereign immunity unequivocally foreclose this pre-enforcement lawsuit that Whole Woman's Health has brought against state officials.

Whole Woman's Health claims that a ruling that acknowledges these constitutional limitations on pre-enforcement review will trigger a wave of SB 8–type laws directed at other constitutional rights and judicial precedents. Pet. at 5. That is nonsense. Both Congress and state legislatures have *always* had the prerogative to immunize their laws from pre-enforcement challenges, yet they have used this power sparingly. It has long been settled, for example, that Congress may strip the lower federal courts of jurisdiction to consider pre-enforcement challenges to statutes. *See Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850) (Congress holds plenary power to control jurisdiction of the inferior federal courts). *Sheldon* has been settled law for almost two centuries, yet Congress hardly ever attempts to limit the federal courts' jurisdiction to consider pre-enforcement challenges to its statutes—even when Congress enacts legislation that is certain to be challenged in court. *See, e.g.*, Partial-Birth Abortion Ban Act of 2003, Pub. L. 108-105, 117 Stat. 1201 (Nov. 5, 2003), codified at 18 U.S.C. § 1531 (no jurisdiction-stripping provision); Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. 109-246, 120 Stat. 577 (July 27, 2006) (same); Patient Protection and Affordable Care Act, Pub.

L. 111-148, 124 Stat. 119 (Mar. 23, 2010) (same). It has also been settled law for decades that private rights of action are immune from pre-enforcement challenge 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 none of these decisions produced a race to enact SB 8–type legislation regarding abortion or any other topic.

More importantly, SB 8 deters violations only because abortion providers perceive that the future of *Roe v. Wade* is uncertain. *See Dobbs v. Jackson Women's Health Organization*, No. 19-1392. And any decision that overrules *Roe* will apply retroactively. *See Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 96 (1993) ("[A] rule of federal law, once announced and applied to the parties to the controversy, must be given full retroactive effect by all courts adjudicating federal law."). No abortion provider can take that risk—even if it is confident that it could defeat SB 8 enforcement lawsuits today—because the law could change while the case is on appeal.

But if a state tried to use an SB 8–type law to deter the right of free speech, or some other right that has clear majority support on this Court, then the prospect of private-enforcement lawsuits will have little deterrent effect because there is zero chance that the plaintiff will prevail, and there is zero incentive for a litigant or attorney to waste their time pursuing a futile enforcement lawsuit. It would be akin to filing a defamation lawsuit over speech that is clearly constitutionally protected. Such a lawsuit can be brought in theory, but no one will

bother because the case is a dead loser, and the prospect of being sued does not deter constitutionally protected speech in this situation. There is no reason to believe that SB 8–type laws will proliferate (or even work) outside the abortion context. And even if there were, that is not a justification to disregard the constitutional constraints on judicial power imposed by Article III and sovereign immunity.

OPINIONS BELOW

The opinion of the district court is reported at 2021 WL 3821062, and reprinted at Pet. App. 1a–68a. There is no opinion of the court of appeals to review because the Court granted certiorari before judgment. The opinion of the Fifth Circuit motions panel, which explains its refusal to issue an emergency injunction against the respondents pending appeal, is reported at *Whole Woman's Health v. Jackson*, 13 F.4th 434 (5th Cir. 2021), and reprinted at Pet. App. 83a–105a.

JURISDICTION

The federal district court lacked subject-matter jurisdiction because each of the plaintiffs' claims is barred by Article III's case-or-controversy requirement. In addition, each of the claims against respondents Jackson, Clarkston, Carlton, Thomas, Young, Benz, and Paxton is barred by sovereign immunity.

The Fifth Circuit's appellate jurisdiction is secure because the respondents appealed an order denying a sovereign-immunity defense. *See Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993). This Court has jurisdiction under 28 U.S.C.

§ 1254 because it is reviewing a case in the court of appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. III, § 2 provides, in relevant part:

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority . . . .

The text of the Fourteenth Amendment is reprinted at Pet. App. 106a. The text 42 U.S.C. § 1983 is reprinted at Pet. App. 107a. The Texas Heartbeat Act, also known as SB 8, is reprinted at Pet. App. 108a–132a.

STATEMENT

On May 19, 2021, Governor Abbott signed the Texas Heartbeat Act, also known as SB 8, which prohibits abortion after a fetal heartbeat can be detected. Pet. App. 108a–132a. The Heartbeat Act does not impose criminal sanctions or administrative penalties on those who violate the statute, and it specifically prohibits state officials from enforcing the law. *See* Tex. Health & Safety Code § 171.207(a) (Pet. App. 113a). Instead, the Heartbeat Act authorizes private civil lawsuits to be brought against those who violate the statute, and it provides that these private-enforcement suits shall be the sole means of enforcing the statutory prohibition on post-heartbeat abortions:

> Notwithstanding Section 171.005 or any other law, the requirements of this subchapter shall be enforced exclusively through the private civil actions described in Section 171.208. No enforcement of this subchapter, and no enforcement of Chapters 19 and 22, Penal Code, in response to violations of this subchapter, may be taken or threatened by this state, a political subdivision, a district or county attorney, or an executive or administrative officer or employee of this state or a political subdivision against any person, except as provided in Section 171.208.

Tex. Health & Safety Code § 171.207(a) (Pet. App. 113a). The Heartbeat Act took effect on September 1, 2021. Pet. App. 132a.

On July 13, 2021, Whole Woman's Health filed this lawsuit in an attempt to enjoin the enforcement of the Heartbeat Act. It sued Judge Austin Reeve Jackson, a state district judge in Smith County, as a putative defendant class representative of every non-federal judge in the State of Texas. It also sued Penny Clarkston, the clerk for the district court of Smith County, as a putative defendant class representative of every Texas court clerk. In addition to these judicial defendants, Whole Woman's Health sued Attorney General Paxton and several state agency officials, as well as Mark Lee Dickson, a pastor and anti-abortion activist. The complaint demands relief that would prohibit Judge Jackson—and every non-federal judge in the state of Texas—from hearing or considering any lawsuits that might be filed

under the Heartbeat Act. It also demands an injunction that would prohibit Ms. Clarkston (and every Texas court clerk) from accepting or filing any papers in these lawsuits. And it demands an injunction that would restrain Mr. Dickson from filing any private-enforcement lawsuits under SB 8. ROA.84–85. Later that day, the petitioners filed a motion for summary judgment, and they moved for class certification on July 16, 2021.

The defendants moved to dismiss for lack of subject-matter jurisdiction.[4] Each of the government defendants raised sovereign-immunity defenses and argued that the plaintiffs lacked Article III standing to sue them. But Mr. Dickson asserted only Article III standing objections to the claims against him, as Mr. Dickson is a private citizen and cannot assert a sovereign-immunity defense.[5]

On August 25, 2021, the district court issued an order denying the motions to dismiss for lack of subject-matter jurisdiction. Pet. App. 1a–68a. Each of the defendants immediately appealed. The next morning, the defendants informed the district court that their notice of appeal had automatically divested it of jurisdiction, and they asked the district court to cancel the preliminary-injunction hearing scheduled for August 30, 2021, and stay all further proceedings in the case. ROA.1540–1542; *see also Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) ("The filing of a notice of appeal . . . divests the

4. ROA.599–618 (state agency defendants); ROA.623–632 (Judge Jackson); ROA.636–661 (Mr. Dickson); ROA.670–692 (Ms. Clarkston).

5. ROA.642–651.

district court of its control over those aspects of the case involved in the appeal."); *Williams v. Brooks*, 996 F.2d 728, 730 (5th Cir. 1993) ("[T]he filing of a non-frivolous notice of interlocutory appeal following a district court's denial of a defendant's immunity defense divests the district court of jurisdiction to proceed against that defendant."). The defendants also informed the district court that they would seek emergency relief from the Fifth Circuit if it did not cancel the preliminary-injunction hearing and vacate all deadlines by close of business on August 26, 2021. ROA.1547. When the district court did not take these steps by the end of the day on August 26, the defendants filed an emergency motion with the Fifth Circuit, asking it to stay the district-court proceedings pending appeal, and asking for a temporary administrative stay pending consideration of that motion.

On August 27, 2021—after the defendants had filed their emergency motion with the Fifth Circuit—the district court issued an order acknowledging that the notice of appeal had divested it of jurisdiction over the claims against the government defendants, and ordered the proceedings stayed with respect to those defendants only. ROA.1571–1572. But the district court insisted that it retained jurisdiction over the claims against Mr. Dickson, even though Mr. Dickson had joined the appeal, because it held that Mr. Dickson has "no claim to sovereign immunity," and that "the denial of his motion to dismiss is not appealable." ROA.1572. So the district court refused to vacate the preliminary-injunction hearing or stay proceedings with respect to the claims against Mr. Dickson. *See id.* Later that day, the Fifth Circuit issued an admin-

istrative stay of all district-court proceedings, including the preliminary-injunction hearing that had been scheduled to proceed against Mr. Dickson, pending its disposition of the defendants' motion for emergency relief.

In the meantime, Whole Woman's Health responded to the notice of appeal by launching a flurry of motions in an effort to quickly return this case to the district court. First, it asked the district court to reclaim jurisdiction over the case by certifying the defendants' appeal as "frivolous." ROA.1551–1560. The district court denied this request. ROA.1571–1572. Then it asked the Fifth Circuit to adopt a hyper-expedited briefing schedule that would require the defendants to file their opening appellants' brief by Saturday, August 28 at noon central time, with the plaintiffs' answering brief due on Sunday, August 29, at 5:00 p.m. central time, and a ruling that would resolve the appeal "on the papers" by September 1, 2021. The court of appeals summarily denied this request. *See Whole Woman's Health v. Jackson*, 13 F.4th 434, 441 & n.7 (5th Cir. 2021). Then Whole Woman's Health asked the Fifth Circuit for an injunction that would prevent the defendants from enforcing SB 8 during the appeal. It also asked the Fifth Circuit to vacate the administrative stay that it had issued on August 27, 2021, as well as the stay of proceedings that the district court had entered with respect to the government defendants. And in a last-ditch effort, it asked the Fifth Circuit to vacate the district court's order denying the defendants' Rule 12(b)(1) motions and dismiss the appeal as moot. The court of appeals denied all these requests. *See id.* at 441 & n.7.

Whole Woman's Health then sought emergency relief from this Court, asking it to enjoin the respondents from enforcing the Heartbeat Act and to vacate the stays of the district-court proceedings. This Court denied both requests on September 1, 2021, holding that Whole Woman's Health had failed to make a "strong showing" of likely success on the jurisdictional issues, while cautioning that it was not definitively resolving "any jurisdictional or substantive claim in the applicants' lawsuit." *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2495 (2021).

Finally, on September 10, 2021, the Fifth Circuit issued an opinion explaining why it had denied Whole Woman's Health's emergency request for an injunction pending appeal. *See Whole Woman's Health v. Jackson*, 13 F.4th 434 (5th Cir. 2021). The court of appeals held that Whole Woman's Health had failed to establish a "strong likelihood of success on the merits," which is needed to obtain an injunction pending appeal. *See id.* at 441. More specifically, the court of appeals held that Whole Woman's Health had no conceivable claims against Attorney General Paxton or any of the state-agency defendants (Carlton, Thomas, Young, and Benz) because each of these officials is statutorily barred from enforcing the Heartbeat Act. *See id.* at 443 ("[T]he Texas Attorney General has no official connection whatsoever with the statute."); *id.* at 443 ("The agency officials sued here have no comparable 'enforcement' role under S.B. 8."). The court of appeals also held that the claims against Judge Jackson and Ms. Clarkston were "absurd" and "specious" because *Ex parte Young*, 209 U.S. 123

(1908), "explicitly excludes judges from the scope of relief it authorizes," and because "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." *Whole Woman's Health*, 13 F.4th at 443. The court of appeals also held that Mr. Dickson could pursue his Article III standing objections as part of the interlocutory appeal, and it granted Mr. Dickson's motion to stay the district-court proceedings pending appeal. *See id.* at 445–47. Finally, the Fifth Circuit expedited the appeal to the next available oral-argument panel. *See id.* at 448.

On September 23, 2021, Whole Woman's Health petitioned for certiorari before judgment, and the Court granted the petition on October 22, 2021.

SUMMARY OF ARGUMENT

There are many reasons why this case should be dismissed under Rule 12(b)(1), but Mr. Dickson's brief will focus on two of them: (1) The absence of subject-matter jurisdiction with respect to the claims against Judge Jackson and Ms. Clarkston; and (2) The absence of any Article III case or controversy with respect to the claims against Mr. Dickson.

The plaintiffs' claims against Judge Jackson and Ms. Clarkston are barred by Article III for three separate and independent reasons. First, neither Judge Jackson nor Ms. Clarkston is inflicting any "injury" on the plaintiffs, as no SB 8 lawsuit has been filed in Smith County and no one is threatening to do so. Second, any "injury" that might be inflicted by a future or threatened lawsuit will result from the independent actions of third parties

not before the Court. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) ("[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)). Third, judicial officers who act in an adjudicatory capacity are serving as impartial arbiters of the law, and they have no "adversity" to a plaintiff who is challenging the constitutionality of a statute. The defendants must overcome all three of these obstacles to establish an Article III case or controversy, yet they come nowhere close to surmounting *any* of them. And if that were not enough, the precedent of this Court specifically forbids lawsuits to enjoin judicial officers from hearing or adjudicating cases. *See Young*, 209 U.S. at 163 ("[A]n injunction against a state court would be a violation of the whole scheme of our government."); *Whole Woman's Health*, 13 F.4th at 443.

The defendants' claims against Judge Jackson and Ms. Clarkston are also barred by sovereign immunity. The *Ex parte Young* exception to sovereign immunity applies only to officers who violate or intend to violate federal law, and neither a judge nor a court clerk becomes a federal lawbreaker by *hearing* a case (or by filing papers in a case) that is brought under an allegedly unconstitutional statute.

The plaintiffs also lack Article III standing to sue Mr. Dickson because he has disclaimed any intention of suing them under SB 8's private civil-enforcement mechanism. Mr. Dickson has submitted sworn declarations to that

effect,[6] and the plaintiffs do not allege and have no produced no evidence that Mr. Dickson is lying in these declarations. These unrebutted declarations preclude any possible "injury in fact" that is: (1) traceable to Mr. Dickson; and (2) redressable by an injunction that restrains Mr. Dickson from suing the plaintiffs. The plaintiffs also lack standing to sue Mr. Dickson over SB 8's fee-shifting provision because Mr. Dickson has not attained "prevailing party" status that would allow him to seek a fee award, and because Mr. Dickson has declared under oath that he currently has no intention of seeking fees under SB 8 if he prevails in this litigation.[7]

ARGUMENT

I. THE DISTRICT COURT ERRED BY REFUSING TO DISMISS THE CLAIMS AGAINST JUDGE JACKSON AND MS. CLARKSTON

The claims brought against Judge Jackson and Ms. Clarkston are unequivocally barred by Article III and sovereign immunity, and the district court erred in refusing to dismiss these claims under Rule 12(b)(1).

A. There Is No Article III Case Or Controversy Between The Plaintiffs And Judge Jackson And Ms. Clarkston

Article III does not allow the plaintiffs to sue a state-court judge and court clerk to prevent them from hear-

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6. ROA.664 ("I have no intention of suing any of the plaintiffs under the private civil-enforcement lawsuits described in SB 8."); ROA.664–665; ROA.965–968.

7. ROA.666 ("I currently have no intention of suing the plaintiffs under section 30.022").

ing cases that might be filed under an allegedly unconstitutional statute. There are many reasons for this.

First, Judge Jackson and Ms. Clarkston have done nothing to any of the plaintiffs in this case, and they have not threatened them with any harm. A judge does not inflict Article III "injury" on a future litigant by sitting in his office and waiting to see if someone will file a lawsuit against that individual. And Ms. Clarkston is not inflicting "injury" on the plaintiffs when no one has sued or threatened to sue any of the plaintiffs in Smith County.

The complaint never alleges that anyone will sue or intends to sue the plaintiffs in Smith County. ROA.39–87. Mark Lee Dickson, the only person from whom the plaintiffs allege a "credible threat" of suit, resides in Gregg County, not Smith County, and he is incapable of suing the plaintiffs in Judge Jackson's court or in any court where Ms. Clarkston serves as the clerk.[8] So the plaintiffs have failed to allege or describe *any* injury that they will suffer at the hands of Judge Jackson or Ms. Clarkston. *See Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) ("Where, as here, a case is at the pleading stage, the plaintiff must 'clearly . . . allege facts demonstrating' each element [of Article III standing.]" (citation omitted)). And any such injury that they might try to allege would rest on nothing but rank speculation. *See Lujan*, 504 U.S. at 560 (holding that an injury in fact must be "actual or imminent, not conjectural or hypothetical" (ci-

8. ROA.667 ("I am a resident of Gregg County, not Smith County, and I have no intention of changing my residence to Smith County at any time in the future.").

tation and internal quotation marks omitted)). A person who fears that a future litigant might sue him has no Article III case or controversy with the judge who might someday preside over that hypothetical future lawsuit.

Second, any "injury" that might be inflicted by a future or threatened lawsuit will result from the independent actions of third parties not before the Court—and a litigant cannot establish Article III standing when the alleged injury rests on the conduct of independent third-party actors. *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)); *Clapper v. Amnesty International USA*, 568 U.S. 398, 414 (2013) ("We decline to abandon our usual reluctance to endorse standing theories that rest on speculation about the decisions of independent actors."). The *only* people who might sue the plaintiffs in Smith County are "third parties not before the court."[9] So Whole Woman's Health's theory of standing rests on speculation that some independent actor—who is not before the court—will not only choose to sue one of the plaintiffs, but will choose to sue *in Smith County*. That injury is not "fairly traceable" to Judge Jackson or Ms. Clarkston, because it cannot exist unless an independent third-party actor chooses to bring an SB 8 enforcement lawsuit in Smith County.

Third, there is also no adversity when an individual challenges the constitutionality of a statute by suing a

9. See note 8 and accompanying text.

judge who might adjudicate future lawsuits under that statute.[10] A judge serves as an impartial arbiter of the law—and he is ethically precluded from defending the constitutionality of a statute as a private litigant when he will be called upon to resolve those same constitutional challenges in the cases that litigants bring before him.[11] As the Fifth Circuit explained in *Bauer v. Texas*, 341 F.3d 352 (5th Cir. 2003):

> The requirement of a justiciable controversy is not satisfied where a judge acts in his adjudicatory capacity. Similarly, a section 1983 due process claim is not actionable against a state judge acting purely in his adjudicative capacity because he is not a proper party in a section 1983 action challenging the constitutionality of a state statute.

Id. at 359; *Whole Woman's Health*, 13 F.4th at 443 ("[I]t 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."). The

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10. *See Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227, 240-41 (1937) ("The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests.").

11. *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.

Fifth Circuit has similarly recognized that there is no Article III case or controversy when lawsuits are filed against court clerks engaged in judicial responsibilities:

> Because of the judicial nature of their responsibility, the chancery clerks and judges do not have a sufficiently "personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues on which the court so largely depends for illumination of difficult constitutional questions."

Chancery Clerk of Chickasaw County v. Wallace, 646 F.2d 151, 160 (5th Cir. 1981) (citation omitted). The holdings of these cases are unassailable.

The district court acknowledged the holdings of *Bauer* and *Wallace* but insisted that they should apply only when there are other government officials who can be sued in a pre-enforcement lawsuit. Pet. App. 40a ("While in *Wallace* and *Bauer* the Fifth Circuit found that state judges were not the proper defendants because other state officials were more appropriately named as defendants due to their enforcement activities, here S.B. 8 forecloses Plaintiffs' ability to name anyone in the State's legislature or executive branch in this challenge.").[12] But

12. The district court seemed to have forgotten that its opinion had already held that the plaintiffs *could* sue the state agency defendants for pre-enforcement relief under Article III and *Ex parte Young*. Pet. App. 21a–32a; *see also* Pet. App. 25a ("The Court finds that the Provider Plaintiffs have sufficiently alleged a demonstrated willingness on the part of the [state-agency de-

(continued…)

there will *never* be an Article III case or controversy between a person who fears that he might be sued and a judge who might preside over that yet-to-be-filed lawsuit, or a clerk who might accept the paperwork in that hypothetical future court proceeding. That is because: (1) The judge and court clerk are not inflicting Article III injury when no lawsuit has been filed in their court; (2) Any "injury" that might result from a future or threatened lawsuit will be caused by the independent actions of third parties not before the Court; and (3) There is no adversity when a plaintiff challenges the constitutionality of a statute by suing judicial officers that adjudicate lawsuits, because these individuals serve as neutral arbiters of the law and have no interest in defending the constitutional merits of a legislative enactment, and state-court judges are ethically precluded from doing so. The presence or absence of these Article III obstacles has nothing to do with whether other state officials are subject to pre-enforcement lawsuits.

Finally, the precedent of this Court categorically forbids lawsuits to restrain a state's judicial officers from hearing cases:

> [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

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fendants] to enforce abortion restrictions through administrative actions and that such actions are likely imminent here."). It is hard to comprehend how the district court could produce an opinion that so obviously contradicts itself in this manner.

> 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 district court never explained how it could enjoin or prevent a state court from hearing a case in the teeth of this prohibition. The district court observed that post-*Young* cases have allowed judicial officers to be sued and enjoined over policies that they have actually adopted and are enforcing, and it appeared to believe that these rulings have somehow overruled *sub silentio* the quoted passage from *Young*. Pet. App. 46a–47a (citing *Supreme Court of Virginia v. Consumers Union of United States, Inc.*, 446 U.S. 719, 737 (1980), and *Pulliam v. Allen*, 466 U.S. 522, 541–43 (1984)). But *Young* did not hold—and the respondents are not contending—that state judges can *never* be enjoined by a federal court. What *Young* prohibits is an injunction that would restrain a judge or a court *from hearing a case*—which is exactly what the plaintiffs are seeking here. *See Young*, 209 U.S. at 163 (denying any power "to restrain a court *from acting in any case brought before it*, either of a civil or criminal nature" (emphasis added)); *id.* (denying any "power to enjoin courts *from proceeding in their own way to exercise jurisdiction*" (emphasis added)). That type of injunction

would, in the words of *Young*, "be a violation of the whole scheme of our Government," *id.*, because it would restrain a court from adjudicating a dispute and reaching a decision. No court can ever enjoin another court from hearing a case, because a judge does *nothing unlawful* by presiding over a lawsuit, even when the lawsuit is seeking to enforce an unconstitutional statute.

B. The Claims Against Judge Jackson And Ms. Clarkston Are Barred By Sovereign Immunity

The claims against Judge Jackson and Ms. Clarkson must be dismissed for a separate and independent reason: Sovereign immunity forbids courts to assert jurisdiction over claims brought against non-consenting state officers sued in their official capacity, unless the claim fits within the *Ex parte Young* exception to sovereign immunity. *See Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 269-70 (1997); *Kentucky v. Graham*, 473 U.S. 159, 166 (1985) ("[A]n official-capacity suit is, in all respects other than name, to be treated as a suit against the entity.").[13] But the *Ex parte Young* exception authorizes lawsuits only against a state officer who is violating or intends to violate federal law; that is what "strips" the officer of his sovereign authority and allows him to be sued as a rogue individual rather than as a component of a sovereign entity. *See Young*, 209 U.S. at 159–60;

13. A state district judge in Texas is a state officer and shares in the sovereign immunity of the state. *See Clark v. Tarrant County*, 798 F.2d 736, 744 (5th Cir. 1986) (holding that district judges in Texas "are undeniably elected state officials" for purposes of state sovereign immunity).

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 *Young*, 209 U.S. at 60 (1908)). That means the *Ex parte Young* exception can be used only to sue a federal lawbreaker or would-be lawbreaker; a state officer who is not violating federal law (and has no plans to do so) retains his sovereign immunity and cannot be subjected to suit.

It is preposterous to claim that Judge Jackson is violating the Constitution—and has forfeited his sovereign immunity—by sitting in his chambers waiting to see if someone files a lawsuit under SB 8 that winds up getting assigned to him. And Whole Woman's Health has not even alleged (let alone produced evidence) that any resident of Smith County plans to file an SB 8 enforcement lawsuit in Judge Jackson's court, so it is nothing but rank speculation to assert that Judge Jackson is about to violate federal law. And even if the plaintiffs could prove that someone is about to file an SB 8 enforcement action in Judge Jackson's Court, a state judge does not violate the Constitution merely by presiding over a lawsuit between private litigants—even if the lawsuit is brought under an allegedly unconstitutional statute. A judge that adjudicates a case does not become a federal lawbreaker unless and until he enters an actual ruling that violates someone's federally protected rights. Then (and only then) can a state judge be stripped of his sovereign character and regarded as a rogue individual actor. Yet federal courts must presume that state judges will respect federal rights when adjudicating cases. *See Steffel v.*

Thompson, 415 U.S. 452, 460–61 (1974) ("State courts have the solemn responsibility, equally with the federal courts 'to guard, enforce, and protect every right granted or secured by the constitution of the United States. . . .'" (quoting *Robb v. Connolly*, 111 U.S. 624, 637 (1884)); *Middlesex County Ethics Comm'n*, 457 U.S. at 431 ("Minimal respect for the state processes, of course, precludes any *presumption* that the state courts will not safeguard federal constitutional rights.").

It is even more untenable to claim that Ms. Clarkston would be breaking federal law by accepting petitions or documents for filing. A court clerk is not responsible for judging the merits of a lawsuit, and must file documents submitted by litigants even when the filing is frivolous, malicious, or based on an unconstitutional statute. It is the responsibility of the litigant—not the court clerk—to ensure that his court filings respect the constitutional rights of an opposing party. And it is the responsibility of the judge (not the clerk) to evaluate the merits of a legal filing and dispose of it in accordance with law. The clerk does nothing wrong—and certainly nothing illegal—by accepting a court filing that seeks to enforce an unconstitutional statute, no matter how unconstitutional the underlying statute may be.

There is no authority supporting the idea that a state judge forfeits his sovereign immunity whenever a private litigant *might* file a lawsuit in his courtroom that seeks to enforce an allegedly unconstitutional statute. On the contrary, existing law makes clear that state-court judges are *not* permissible defendants in this situation. *See Bauer*, 341 F.3d at 357; *Wallace*, 646 F.2d at 160; *Allen v.*

DeBello, 861 F.3d 433, 440 (3d Cir. 2017) ("[A] judge who acts as a neutral and impartial arbiter of a statute is not a proper defendant to a Section 1983 suit challenging the constitutionality of the statute."). There is also no authority to support the idea that a state-court clerk is "stripped" of her sovereign immunity or violates 42 U.S.C. § 1983 by accepting filings from private litigants who seek to enforce an unconstitutional statute. *See Wallace*, 646 F.2d at 160; *Mendez v. Heller*, 530 F.2d 457 (2d Cir. 1976) (state-court judges and clerks could not be sued as defendants in a lawsuit challenging New York's durational residence requirement for divorce). And the district court's opinion does not even attempt to explain how Judge Jackson or Ms. Clarkston can be considered federal lawbreakers who have forfeited their sovereign immunity.

II. THE DISTRICT COURT ERRED BY REFUSING TO DISMISS THE CLAIMS AGAINST MR. DICKSON

The plaintiffs are asserting seven claims against Mr. Dickson. ROA.77–84. Five of these claims challenge the constitutionality of section 3 of the Heartbeat Act, which prohibits abortion after fetal heartbeat and authorizes private civil-enforcement lawsuits against those who violate this statutory prohibition. ROA.77-82. The remaining two claims concern section 4 of the Heartbeat Act, which allows prevailing defendants in abortion-related litigation to recover costs and attorneys' fees from unsuccessful plaintiffs. ROA.82-84. The plaintiffs lack Article III standing to pursue any of these claims against Mr. Dickson.

A. The Plaintiffs Lack Standing To Sue Mr. Dickson Over Section 3 Because Mr. Dickson Has No Intention Of Suing Them

The plaintiffs have no standing to sue Mr. Dickson over section 3 because Mr. Dickson has no intention of suing them (or anyone else) under the Heartbeat Act's private civil-enforcement mechanism, and he has said so in unrebutted declarations. ROA.664 ("I have no intention of suing any of the plaintiffs under the private civil-enforcement lawsuits described in Senate Bill 8."); *see also* ROA.664–665 (¶¶ 4–7); ROA.965–968 (¶¶ 5–15).[14] So the plaintiffs are not suffering an injury caused by Mr. Dickson. *See TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021) ("If the plaintiff does not claim to have suffered an injury *that the defendant caused* and the court can remedy, there is no case or controversy for the federal court to resolve." (emphasis added) (citation and internal quotation marks omitted)).

The plaintiffs' standing to sue Mr. Dickson is determined by the facts that existed when the complaint was filed,[15] and it is undisputed that Mr. Dickson had no in-

14. It is appropriate for a court to consider affidavits or declarations when resolving a Rule 12(b)(1) motion. *See Carmichael v. United Technologies Corp.*, 835 F.2d 109, 114 n.7 (5th Cir. 1988).

15. *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)); *Davis v. Federal Election Comm'n*, 554 U.S. 724, 734 (2008) ("[T]he standing inquiry remains focused on whether the party invoking jurisdiction had the requisite stake in the outcome when the suit was filed.").

tentions, thoughts, or plans of suing any of the plaintiffs at that time. The complaint alleges that the plaintiffs were facing a "credible threat" that Mr. Dickson might sue them when the Heartbeat Act takes effect. ROA.54 (¶ 50). But Mr. Dickson's sworn declarations conclusively refute that allegation. Mr. Dickson has declared:

> I have no intention of suing any of the plaintiffs under the private civil-enforcement lawsuits described in Senate Bill 8.

ROA.664 (¶ 5).

> I have never threatened to sue any of the plaintiffs under the private civil-enforcement lawsuits described in Senate Bill 8, either publicly or privately, and I have never told anyone that I intend to sue any of the plaintiffs under the private civil-enforcement lawsuits described in Senate Bill 8. Nor have I ever formed an intention to sue any of the plaintiffs under the private civil-enforcement lawsuits described in Senate Bill 8.

ROA.665 (¶ 6).

> I have never threatened to sue anyone under the private civil-enforcement mechanism provided in section 3 of Senate Bill 8, and I have no intention of suing any of the plaintiffs under that provision when the law takes effect on September 1, 2021.

ROA.965 (¶ 6). Neither the plaintiffs nor the district court claims that Mr. Dickson is lying in these declara-

tions, and the plaintiffs failed to produce any evidence or declaration that contradicts Mr. Dickson's statements. So Mr. Dickson's declarations are unrebutted, and they compel a jurisdictional dismissal of the claims against him.

The district court tried to get around these declarations by seizing on Mr. Dickson's statement that he "is expecting each of the plaintiffs to comply with the statute rather than expose themselves to private civil-enforcement lawsuits." Pet. App. 62a. And Mr. Dickson indeed stated in his declarations that he expects each of the plaintiffs to comply with the Heartbeat Act rather than subject themselves to private civil-enforcement lawsuits:

> I have no intention of suing any of the plaintiffs under the private civil-enforcement lawsuits described in Senate Bill 8, because I expect each of the plaintiffs to comply with the Texas Heartbeat Act when it takes effect on September 1, 2021. I expect that the mere threat of civil lawsuits under section 171.208 will be enough to induce compliance.

ROA.664 (¶ 5).

> I continue to believe that the plaintiffs will comply with Senate Bill 8 and obviate the need for private civil-enforcement lawsuits. Indeed, no rational abortion provider or abortion fund (in my view) would subject itself to the risk of civil liability under Senate Bill 8, especially when the Supreme Court could overrule *Roe v.*

> *Wade* next term in *Dobbs v. Jackson Women's Health Organization*, No. 19-1392.

ROA.665 (¶ 7).

> I continue to expect the plaintiffs to comply with Senate Bill 8 when it takes effect, and if the plaintiffs comply it will be impossible for anyone to sue the plaintiffs for non-compliance. That is 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). Yet none of that changes the fact that Mr. Dickson has no intention of suing the plaintiffs and has never threatened to do so. Mr. Dickson's expectation of compliance is merely one of the *reasons* that he has no interest in suing the plaintiffs. The *fact* that Mr. Dickson has no intention of suing the plaintiffs remains undisputed.

Mr. Dickson is not arguing—and he has never argued at any stage of these proceedings—that the plaintiffs "must 'specifically allege' their intent to violate S.B. 8 in order to establish standing." Pet. App. 63a. The district court attributed this contention to Mr. Dickson, *see id.*, but the district court is attacking a straw man. The law is abundantly clear that a litigant is not required to expose himself to penalties before seeking relief to prevent the enforcement of a statute,[16] and the mere chilling

16. *See, e.g.*, *Steffel v. Thompson*, 415 U.S. 452, 459 (1974) ("[I]t is not necessary that petitioner first expose himself to actual ar-

(continued…)

effect imposed by the *threat* of enforcement is enough to establish Article III injury. But a litigant still must show that the threat of enforcement is "fairly traceable" to the *person* that he has sued. This requirement is almost always satisfied when a litigant sues a government official charged with enforcing the disputed law,[17] because it is the government official's duty to enforce the law if the plaintiff violates it. But matters are different when a litigant sues a private citizen who is authorized (but not required) to bring lawsuits against those who violate a statute. In these situations, enforcement (or threatened enforcement) by the defendant cannot be presumed—and the plaintiffs must produce evidence that the defendant will sue them if they violate the statute, or that the defendant is threatening to sue in a manner that deters the exercise of constitutional rights. And when a defendant has submitted sworn declarations disclaiming any intention of suing the plaintiffs under the disputed statute, the plaintiffs must produce evidence sufficient to refute those declarations to survive a Rule 12(b)(1) motion. *See Williamson v. Tucker*, 645 F.2d 404, 416 (5th

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rest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights.").

17. Unless, of course, the government official explicitly disavows an intent to prosecute or enforce. *See, e.g.*, *Commodity Trend Service, Inc. v. Commodity Futures Trading Comm'n*, 149 F.3d 679, 687 (7th Cir. 1998) ("The Supreme Court has instructed us that a threat of prosecution is credible when a plaintiff's intended conduct runs afoul of a criminal statute and the Government fails to indicate affirmatively that it will *not* enforce the statute." (citing *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988)).

Cir. 1981) ("[A] Rule 12(b)(1) motion can be based on the court's resolution of disputed facts as well as on the plaintiff's allegations and undisputed facts in the record.").

The plaintiffs produced no evidence that Mr. Dickson will sue them if they violate the Heartbeat Act, and they produced no evidence that Mr. Dickson has threatened to bring such lawsuits under SB 8.[18] The district court quoted four statements from Mr. Dickson and claimed that these statements "demonstrated his intent to enforce S.B. 8 if Plaintiffs violate the law." Pet. App. 64a. But these statements come nowhere close to showing that Mr. Dickson intends to sue the plaintiffs if they violate the statute—and they certainly do not refute his sworn declarations to the contrary.

Consider the first of these statements, taken from Mr. Dickson's declaration, in which he says: "I expect that the mere threat of civil lawsuits under section 171.208 will be enough to induce compliance" with SB 8. ROA.664. The district court claimed this statement "demonstrated" Mr. Dickson's "intent to enforce S.B. 8 if

18. The plaintiffs tried to argue that Mr. Dickson's efforts to enact local ordinances that subject abortion providers and their enablers to private civil-enforcement lawsuits was somehow evidence that Mr. Dickson intends to become a plaintiff in an SB 8 enforcement action. ROA.773. The plaintiffs also claimed that Mr. Dickson's threats to sue Planned Parenthood under a Lubbock ordinance that outlaws abortion could somehow show that Mr. Dickson intends to sue under SB 8 when he has explicitly renounced any intention to do so. ROA.773. These arguments are non sequiturs, and the district court did not attempt to rely on any of this.

Plaintiffs violate the law,"[19] but it does nothing of the sort. This statement is merely a prediction that the plaintiffs will comply with the Heartbeat Act rather than violate the statute and subject themselves to lawsuits. It says nothing at all about what Mr. Dickson will do if a plaintiff unexpectedly decides to violate the law.

The district court also relied on three of Mr. Dickson's Facebook postings, which informed individuals about SB 8's private civil-enforcement regime and encouraged others to bring enforcement lawsuits against abortion providers. Pet. App. 64a. The text of these statements is as follows:

> [B]ecause of [S.B. 8] you will be able to bring many lawsuits later this year against any abortionists who are in violation of this bill. Let me know if you are looking for an attorney to represent you if you choose to do so. Will be glad to recommend some.[20]
>
> [B]ecause of this bill you will be able to bring many lawsuits later this year against any at WWH [Whole Woman's Health] who are in violation of this law . . .[21]
>
> The Heartbeat Bill is being said to make everyone in Texas an attorney general going after abortionists.[22]

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19. Pet. App. 64a.
20. ROA.804.
21. ROA.801.
22. ROA.706.

Pet. App. 64a. But statements that truthfully relate the contents of SB 8—and that offer to recommend attorneys to *others* who might be interested in bringing private civil-enforcement lawsuits—do not in any way show that Mr. Dickson himself intends to sue the plaintiffs. And in all events, Mr. Dickson's unrebutted declarations prevent the Court from drawing any such inferences from these social-media statements. ROA.664 ("I have no intention of suing any of the plaintiffs under the private civil-enforcement lawsuits described in Senate Bill 8."); *see also* ROA.664–665 (¶¶ 4–7); ROA.965–968 (¶¶ 5–15).

Finally, Mr. Dickson's statements that describe SB 8 and that offer to connect individuals with attorneys are constitutionally protected speech, and the plaintiffs have not alleged that there was anything unlawful about Mr. Dickson's social-media postings. So even if the plaintiffs could plausibly allege that these statements have injured them by increasing the likelihood that others might sue them if they violate SB 8, that *still* cannot establish Article III standing because the plaintiffs must show an injury caused by Mr. Dickson's "allegedly unlawful" conduct. *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*" (emphasis added) (citation and internal quotation marks omitted)); *id.* at 2116 ("[P]laintiffs have similarly failed to show that they have alleged an 'injury fairly traceable to the defendant's allegedly *unlawful* conduct.'" (citation omitted)). The plaintiffs have never alleged that Mr. Dickson acted unlawfully by describing SB 8's civil-enforcement provision on Facebook or by of-

fering to recommend attorneys to those who might be interested in suing abortion providers. ROA.39–87 (complaint). And they are not asking the courts to enjoin Mr. Dickson from uttering statements of this sort or posting them on social media. ROA.84–85 (request for relief). So none of Mr. Dickson's social-media statements can serve as a basis for Article III standing. The plaintiffs must show that Mr. Dickson himself intends to sue them if they violate the Heartbeat Act, and they cannot make this showing when Mr. Dickson has disclaimed any such intention in sworn declarations. ROA.664–665; ROA.965–968.

None of this is to deny that the plaintiffs are suffering "injury in fact" under Article III. But the plaintiffs' injuries are harms that arise from the *existence* of the Heartbeat Act, rather than any action taken by Mr. Dickson. The plaintiffs, for example, complain that section 3 presents them with a "Hobson's choice": They must either comply with the requirements of section 3 or else subject themselves and their employees to private civil-enforcement lawsuits. ROA.70 (¶ 102). But this "dilemma injury" cannot support Article III standing unless it is "fairly traceable" to Mr. Dickson. *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 the undesirable choice that has been foisted upon the plaintiffs is not "traceable" to Mr. Dickson; it was imposed by the legislature that enacted SB 8. *See id.* at 2113–14.

B. The Plaintiffs Lack Standing To Sue Mr. Dickson Over Section 3 Because The Requested Relief Will Not Redress Their Injuries

There is a separate and independent obstacle to the plaintiffs' standing to sue Mr. Dickson over section 3. Even if the plaintiffs had alleged that they will violate SB 8 and that Mr. Dickson will sue them in response, the Court cannot "redress" that injury by enjoining Mr. Dickson from suing the plaintiffs. SB 8 allows anyone[23] to sue a person that performs or assists a post-heartbeat abortion. *See* Tex. Health & Safety Code § 171.208(a). And if Mr. Dickson is enjoined from suing, there are others who may sue. ROA.665–666 (Declaration of Mark Lee Dickson ¶ 8); ROA.668 (Declaration of John Seago ¶¶ 5–6). An injunction that stops only Mr. Dickson from suing—while leaving the door open for everyone else in the world to sue the plaintiffs for their violations of SB 8—does not redress any injury that the plaintiffs are suffering on account of the statute.

SB 8 allows only a single recovery for each post-heartbeat abortion that a defendant performs or assists,[24] so an injunction that prevents Mr. Dickson (and

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23. Except Texas government officials and individuals who impregnated the mother of the fetus through rape or some other illegal act. *See* Tex. Health & Safety Code §§ 171.208(a); 171.208(j).

24. *See* Tex. Health & Safety Code § 171.208(c) ("Notwithstanding Subsection (b), a court may not award relief under this section in response to a violation of Subsection (a)(1) or (2) if the defendant demonstrates that the defendant previously paid the full amount of statutory damages under Subsection (b)(2) in a previous action for that particular abortion performed or induced in violation of this subchapter, or for the particular con-

(continued…)

only Mr. Dickson) from suing does nothing to reduce the monetary exposure that the plaintiffs face under the statute. It also does nothing to reduce the deterrent effect of SB 8's private civil-enforcement regime. Someone will still sue the plaintiffs to collect the statutory damages; taking Mr. Dickson out of the mix does nothing to eliminate (or even alleviate) the injuries described in the complaint.

The district court tried to get around this problem by claiming that an injunction against Mr. Dickson will reduce the plaintiffs' litigation costs at the margin by eliminating any possibility of lawsuits from Mr. Dickson—even as the plaintiffs deal with enforcement lawsuits filed by other individuals. Pet. App. 65a ("Plaintiffs have alleged that an injunction preventing Dickson from bringing enforcement actions under S.B. 8 would redress their injuries, at least in part, by preventing Dickson from 'suing and imposing significant litigation costs on Plaintiffs.'"). But there are two problems with this argument.

First, Mr. Dickson has specifically disclaimed any interest in "piling on" with a "me-too lawsuit" if others are willing to sue the plaintiffs—and it is undisputed that there *are* numerous other individuals who will sue the plaintiffs if they defy SB 8. ROA.968 (¶ 15) ("My time is better spent on other matters than pursuing redundant litigation against the plaintiff abortion providers and the

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duct that aided or abetted an abortion performed or induced in violation of this subchapter.").

plaintiff abortion funds.").[25] So the plaintiffs will not reduce their litigation costs by *any* amount if Mr. Dickson is enjoined.

Second, the plaintiffs' complaint does not plead facts concerning this theory of redressability, and that alone requires dismissal of their claim against Mr. Dickson. This Court has held more times than we can count that complaints must allege facts necessary to establish each element of Article III standing—and that complaints that fail to allege these facts *must* be dismissed. *See, e.g.*, *See Spokeo*, 578 U.S. at 338 ("Where, as here, a case is at the pleading stage, the plaintiff must "clearly . . . allege facts demonstrating" each element [of Article III standing]."); *Clapper*, 568 U.S. at 414 n.5 ("[P]laintiffs bear the burden of pleading and proving concrete facts showing that the defendant's actual action has caused the substantial risk of harm."); *Whitmore v. Arkansas*, 495 U.S. 149, 155-56 (1990) ("The litigant must clearly and specifically set forth facts sufficient to satisfy these Art. III standing requirements. A federal court is powerless to create its own jurisdiction by embellishing otherwise deficient allegations of standing."); *Warth v. Seldin*, 42 U.S. 490, 518 (1975) ("It is the responsibility of the complainant clearly to allege facts demonstrating that he is a

25. *See also* ROA.665–666 (¶ 8) ("I have personal knowledge that there are many other individuals who intend to sue the abortion-provider plaintiffs and the abortion-fund plaintiffs if they defy Senate Bill 8"); ROA.668 (¶ 6) ("I have personal knowledge that there are several individuals who intend to sue the abortion-provider plaintiffs and the abortion-fund plaintiffs if they defy Senate Bill 8.").

proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers."). Litigants in abortion cases are not an exception to this rule. The factual allegations surrounding the district court's theory of redressability are nowhere to be found in the complaint, so the Court should reject the district court's redressability argument for that reason alone.

The district court also claimed that a declaratory judgment against Mr. Dickson would "redress" the plaintiffs' alleged injuries by "discouraging others" from suing the plaintiffs. Pet. App. 65a. But a judgment against Mr. Dickson has no binding effect on other courts or litigants. *See Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011) ("A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case."); *Hansberry v. Lee*, 311 U.S. 32, 40 (1940) ("[O]ne is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process."). So there is nothing that relief against Mr. Dickson can do to prevent other litigants from suing the plaintiffs.

The district court appeared to recognize this, as it was careful to assert only that a judgment against Mr. Dickson would "discourag[e]" and "deter[]" others from filing civil-enforcement lawsuits—rather than prevent them from doing so. Pet. App. 65a. But that argument proves too much; if the mere persuasive force of a nonbinding judicial opinion were enough to "redress" a plaintiff's injuries, then advisory opinions would meet

the criteria for Article III standing. And this Court has never allowed a litigant to establish redressability by arguing that judicial relief might change the behavior of individuals who are not legally bound by the court's judgment. *See Lujan*, 504 U.S. at 568, 570 & n.5 (plurality opinion).

C. The Plaintiffs Lack Standing To Sue Mr. Dickson Over Section 4 Because Mr. Dickson Has No Intention Of Suing The Plaintiffs Under That Provision

The plaintiffs have no standing to sue Mr. Dickson over SB 8's fee-shifting provisions because their complaint fails to allege any "injury in fact" traceable to Mr. Dickson—and no such injury is apparent. Mr. Dickson has no ability to sue the plaintiffs under section 4 because he has not been adjudged a "prevailing party" in any lawsuit that the plaintiffs have brought to prevent the enforcement of an abortion statute. ROA.666 (¶ 11) ("I am not a party to any other lawsuit that seeks to prevent the enforcement of any Texas abortion law, and I have not been a party to any such lawsuit in the past."). And the plaintiffs do not allege that Mr. Dickson will acquire "prevailing party" status in this litigation, as any such prediction would amount to a confession that their claims against Mr. Dickson should lose. Indeed, the complaint makes no allegations of *any* Article III injury traceable to Mr. Dickson, and is entirely bereft of factual allegations involving Mr. Dickson's role in "enforcing" this provision against the plaintiffs. That alone requires dismissal of the section 4 claims, because a complaint must "clearly . . . allege facts demonstrating" each element of Article III standing to survive a motion to dis-

miss. *Spokeo*, 578 U.S. at 338 (citation and internal quotation marks omitted)); *see also Clapper*, 568 U.S. at 414 n.5; *Whitmore*, 495 U.S. at 155–56; *Warth*, 42 U.S. at 518.

Mr. Dickson has declared that he has no intention of suing the plaintiffs under section 4 even if he prevails in this litigation, because he plans to seek recovery of his attorneys' fees under 42 U.S.C. § 1988(b) rather than section 4's fee-shifting provision. ROA.666 (¶ 9) ("I currently have no intention of suing the plaintiffs under section 30.022 because I expect to recover fees from the plaintiffs under 42 U.S.C. § 1988(b) at the conclusion of this litigation."). The law of the Fifth Circuit is clear that a private litigant does not act "under color of state law" by filing a lawsuit authorized by a state statute,[26] and Mr. Dickson is confident that this precedent is enough to show that the claims against him are "unreasonable" and "without foundation." *See id.* (quoting *Christiansburg*

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26. *McCartney v. First City Bank*, 970 F.2d 45, 47 (5th Cir. 1992) ("If a state merely allows private litigants to use its courts, there is no state action within the meaning of § 1983 unless 'there is corruption of judicial power by the private litigant.'" (quoting *Earnest v. Lowentritt*, 690 F.2d 1198, 1200 (5th Cir. 1982)); *Howard Gault Co. v. Texas Rural Legal Aid, Inc.*, 848 F.2d 544, 555 (5th Cir. 1988) ("The growers cannot be held liable in a § 1983 suit simply because they filed suit under Texas statutes and obtained a temporary restraining order."); *Hollis v. Itawamba County Loans*, 657 F.2d 746, 749 (5th Cir. 1981) ("[N]o state action is involved when the state merely opens its tribunals to private litigants."); *Gras v. Stevens*, 415 F. Supp. 1148, 1152 (S.D.N.Y. 1976) (Friendly, J.) ("[W]e know of no authority that one private person, by asking a state court to make an award against another which is claimed to be unconstitutional, is violating 42 U.S.C. § 1983.").

Garment Co. v. EEOC, 434 U.S. 412, 418 (1978)). Mr. Dickson has not yet decided, however, whether he will sue the plaintiffs under section 4 if he is unsuccessful in recovering fees under 42 U.S.C. § 1988(b). ROA.666 (¶ 10) ("If I am unsuccessful in recovering fees under 42 U.S.C. § 1988(b) at the conclusion of this litigation, then I will consider at that time whether to sue the plaintiffs under section 30.022 of the Texas Civil Practice and Remedies Code, in consultation with my attorneys.").

The plaintiffs have no standing to sue Mr. Dickson under these circumstances. Any possibility that Mr. Dickson might someday sue them under section 4 is "conjectural" and "hypothetical"—and speculative injuries of that sort are insufficient to confer Article III standing. *See Lujan*, 504 U.S. at 560 (injury in fact must be "actual or imminent, not conjectural or hypothetical" (citation and internal quotation marks omitted)); *Whitmore*, 495 U.S. at 158 ("Allegations of possible future injury do not satisfy the requirements of Article III" because "[a] threatened injury must be 'certainly impending' to constitute injury in fact."); *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974) ("It must be alleged that the plaintiff has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged statute or official conduct. The injury or threat of injury must be both real and immediate, not conjectural or hypothetical." (citations and internal quotation marks omitted)). And the complaint has not even *alleged* the facts needed to establish Article III standing to sue Mr. Dickson over section 4, which is fatal to their claims. *See Spokeo*, 578 U.S. at 338; *Clapper*, 568 U.S. at 414 n.5;

Whitmore, 495 U.S. at 155-56; *Warth*, 42 U.S. at 518. Indeed, the complaint says nothing at all about how the plaintiffs might have standing to sue Mr. Dickson over the fee-shifting provision.

The district court entirely ignored the plaintiffs' failure to allege facts relevant to standing in their complaint. And the district court rejected Mr. Dickson's standing objections by: (1) Prematurely ruling that Mr. Dickson will be unable to recover fees under 42 U.S.C. § 1988;[27] and (2) Declaring that "Dickson has demonstrated his intent to recover attorney's fees in this action, and in the absence of relief available to him under Section 1988, he will necessarily need to rely on Section 4 in making such a request." Pet. App. 67a. That is a mischaracterization of Mr. Dickson's declaration. Mr. Dickson did *not* say that he would unconditionally pursue attorneys' fees from the plaintiffs. Mr. Dickson said *only* that he would pursue fee-shifting under 42 U.S.C. § 1988, and that he had *made no decision* on whether he would seek fees under section 4 if his efforts to recover fees under section 1988 are unsuccessful:

> The plaintiffs also seek to enjoin me from filing a lawsuit to recover attorneys' fees under section 30.022 of the Texas Civil Practice and Remedies Code. I currently have no intention of suing the plaintiffs under section 30.022 because I expect to recover fees from the plain-

27. Pet. App. 66a ("[T]he Court finds that Dickson will not be able to rely on Section 1988 to recover fees in this action.").

> tiffs under 42 U.S.C. § 1988(b) at the conclusion of this litigation. . . .
>
> If I am unsuccessful in recovering fees under 42 U.S.C. § 1988(b) at the conclusion of this litigation, *then I will consider at that time whether to sue the plaintiffs under section 30.022 of the Texas Civil Practice and Remedies Code, in consultation with my attorneys.*

ROA.666 (¶ 9–10) (emphasis added). For the district court to claim that Mr. Dickson expressed an unconditional intention to pursue a fee recovery is nothing short of misrepresentation. It was also improper for the district court to declare Mr. Dickson ineligible for fee-shifting under 42 U.S.C. § 1988(b) when Mr. Dickson has never filed a motion or had an opportunity to present his arguments for a fee recovery, and it was premature to do so before the conclusion of this litigation. Only at the conclusion of a lawsuit can a court accurately assess whether the action was "frivolous, unreasonable, or without foundation." *Christiansburg Garment*, 434 U.S. at 421.

The plaintiffs cannot sue a private litigant for a declaratory judgment or anti-suit injunction when he made no threat to sue them under the disputed statutory provision and when he denies any present-day intention to do so—and that is especially true when Mr. Dickson is not even *capable* of suing the plaintiffs because he has never attained "prevailing party" status in any abortion-related lawsuit. *See Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941) ("[T]he question in each case is whether the facts alleged, under all the

circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment."); *International Longshoremen's and Warehousemen's Union, Local 37 v. Boyd*, 347 U.S. 222, 224 (1954) (a declaratory-judgment action may not be used "to obtain a court's assurance that a statute does not govern hypothetical situations that may or may not make the challenged statute applicable."); *id.* ("Determination of the scope and constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function."). The plaintiffs have no standing to sue Mr. Dickson over SB 8's fee-shifting provisions, and these claims against Mr. Dickson must be dismissed.

* * *

The plaintiffs' constitutional grievances with SB 8 do not permit this Court—or any other court—to disregard the jurisdictional rules imposed by Article III and state sovereign immunity. *See Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2495 (2021). The federal courts "are not roving commissions assigned to pass judgment on the validity of the Nation's laws." *Broadrick v. Oklahoma*, 413 U.S. 601, 611 (1973); *see also TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021) ("Federal courts do not possess a roving commission to publicly opine on every legal question. Federal courts do not exercise general legal oversight of the [political] branches, or of private entities."). The judiciary may rule on constitutional challenges to statutes only when resolving an

Article III case or controversy—which is transparently lacking here. *See Spokeo*, 578 U.S. at 337 ("[N]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies" (citation and internal quotation marks omitted)).

The case-or-controversy requirement will occasionally delay or hinder the judiciary's ability to remedy constitutional violations. *See, e.g.*, *Raines v. Byrd*, 521 U.S. 811 (1997). That is an inevitable byproduct of Article III and the Framers' refusal to establish the judiciary as a Council of Revision. But the understandable zeal to remedy a perceived constitutional violation can never justify a ruling that flouts the constitutional boundaries on judicial power. The courts must obey the constitutional limits on their own powers when they enforce the Constitution against others; any other regime would exalt the judiciary to a status higher than the Constitution itself.

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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