ROE V. WADE UNDER ATTACK: CHOOSING PROCEDURAL DOCTRINES OVER FUNDAMENTAL CONSTITUTIONAL RIGHTS

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I. INTRODUCTION

The reflections in this Article were prompted by the Texas litigation on abortion rights that was in and out of the U.S. Supreme Court in 2021. What puzzled me was that after several months of litigation, the questions discussed by the litigants and the courts had primarily been procedural, i.e., they focused on the standing and sovereign immunity objections that prevented the plaintiffs' claims of violation of fundamental constitutional rights to proceed to their merits, a quite predictable result of the modern Supreme Court's jurisprudence on those very doctrines.

I've been studying and writing in the area of judicial decision making,[1] particularly drawn to the Supreme Court's decision making, which is controversial, highly political, and controlling of social and economic development both within and outside the United States. Procedural doctrines have become a powerful tool in the hands of the Supreme Court used to control social and economic development. Thus procedure, originally conceived as the handmaid of justice, has become one of its main antagonists.

Max Lerner, in his article, *The Supreme Court and American Capitalism*, published by *The Yale Law Journal* in 1933,[2] called the Supreme Court an "agency of control." There Lerner observed that

> the Court has become, through its exercise of the judicial power in the intricate context of contemporary capitalist society, a crucial agency of

1. *See* SIMONA GROSSI, THE U.S. SUPREME COURT AND THE MODERN COMMON LAW APPROACH TO THE DECISION MAKING PROCESS (2015); Simona Grossi & Allan Ides, *The Modern Law of Class Actions and Due Process*, 98 OR. L. REV. 53 (2020); Simona Grossi, *A Modified Theory of the Law of Federal Courts: The Case of Arising-Under Jurisdiction,* 88 WASH. L. REV. 961 (2013); Simona Grossi, *Personal Jurisdiction: A Doctrinal Labyrinth With No Exit*, 47 AKRON L. REV. 617 (2014); Simona Grossi, *Forum Non Conveniens as a Jurisdictional Doctrine*, 75 U. PITT. L. REV. 1 (2013); Simona Grossi, Venezuela v. Helmerich*: Will Formalism Win Over Substantive Law? Again?*, 11 N.Y.U. J. L. & LIBERTY 455 (2017); Simona Grossi, *The Courts and the People in a Democratic System: Against Federal Court Exceptionalism*, 92 NOTRE DAME L. REV. ONLINE 106 (2017).

2. Max Lerner, *The Supreme Court and American Capitalism*, 42 YALE L.J. 668 (1933).

> social control. As such it is part of our fabric of statesmanship and should be judged in terms of its incidence upon American life.[3]

Lerner also noted that while capitalism is "generic to the whole western world . . . the judicial power—or more exactly, judicial supremacy—is a uniquely American institution: it could arise only in a federal state which attempts, as we do, to drive a wedge of constitutional uniformity through heterogeneous sectional and economic groupings."[4] The Court's judicial supremacy that is embodied in the power of judicial review, i.e., the power to review the validity of legislative and administrative acts and decisions, had made the Court, according to Lerner, "not only 'the world's most powerful court, but the focal point of our bitterest political and constitutional polemics."[5] This, said Lerner, had led to "the recognition that the real meaning of the Court is to be found in the political rather than the legal realm, and that its concern is more significantly with power politics than with judicial technology."[6] Yet despite this reality, the Court "in its official theory of its own function, disclaims any relation to the province of government or the formation of public policy: it pictures itself as going about quietly applying permanent canons of interpretation to the settlement of individual disputes."[7] As Lerner concluded, "the Court's quietness must be regarded as that of the quiet spot in the center of the tornado. However serene it may be or may pretend to be in itself, the Court is the focal point of a set of dynamic forces which play havoc with the landmarks of the American state and determine the power configuration of the day."[8]

At the time Lerner was writing, *Brown v. Board of Education*[9] (holding that racial segregation in public schools violated the equal protection rights of Black students, even if the segregated schools were otherwise equal in quality ("separate but equal"))—*Roe v. Wade*[10] (recognizing a woman's fundamental liberty to choose to have an abortion before viability)—*Lawrence v. Texas*[11] (holding that laws which criminally sanction those who engage in sodomy are unconstitutional, in violation of the fundamental right in sexual intimacy)— and *Obergefell v.*

3. *Id.* at 696-97.
4. *Id.* at 668.
5. *Id*. at 669.
6. *Id.*
7. *Id.*
8. *Id.*
9. 347 U.S. 483 (1954).
10. 410 U.S. 113 (1973).
11. 539 U.S. 558 (2003).

Hodges[12] (holding that same-sex marriage is a fundamental constitutional right) had not yet been decided. Each of these decisions was controversial: some welcomed them, others did not. And business was impacted too by those decisions, although economists say that it's hard to draw definitive conclusions one way or another as there are statistical issues involved in this type of analysis.[13] Yet irrespective of the moral and political preferences of the public, the Court purported to act in accordance with the Constitution in finding each of those rights to be present there. However, it is at least doubtful that the Constitution is the place where those rights were found. Instead, and in the absence of federal legislative action, the Court opted to create constitutional rights that had never existed before, even overruling precedent when necessary to do so,[14] thereby arguably sacrificing the rule of law[15] in favor of social change.

Human rights activists welcomed those opinions as a necessary act of courage, allowing American society to develop and evolve. Yet many of these same activists no doubt condemned the Court's decision in *Ashcroft v. Iqbal*,[16] dismissing after the 9/11 investigations a Pakistani Muslim's complaint of racial and religious discrimination and of cruel and unusual punishment, as being factually insufficient under the procedural doctrine of "plausibility." Nor did they applaud *Clapper v. Amnesty International*,[17] dismissing human rights activists' challenge to the

12. 576 U.S. 644 (2015).

13. *See, e.g.*, Jordan Weismann, *What Economics Can (or Can't) Tell Us About the Legacy of Legal Abortion*, THE ATLANTIC (Jan. 23, 2013), (interview with Professor Phillip Levine) https://www.theatlantic.com/business/archive/2013/01/-what-economics-can-and-cant-tell-us-about-the-legacy-of-legal-abortion/267459/.

14. *See, e.g.*, *Brown*, 347 U.S. 483 (in public school setting, abandoning "separate but equal" doctrine endorsed by *Plessy v. Ferguson*, 163 U.S. 537 (1896)); *Lawrence*, 539 U.S. 558 (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986) and its upholding of criminal sodomy laws, as applied to consensual private sexual conduct between same sex adults).

15. In the comprehensive words of the UN Secretary-General:

> [The rule of law] refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.

U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 6, U.N. Doc. S/2004/616 (Aug. 23, 2004).

16. 556 U.S. 662 (2009).

17. 568 U.S. 398 (2013).

Foreign Intelligence Surveillance Act, because plaintiffs had failed to satisfy the requirements for standing. Equally unsettling to many was *Lujan v. Defenders of Wildlife*,[18] where the Court concluded that American wildlife conservation and environmental organizations lacked standing to challenge federal regulations limiting the geographic reach of the Endangered Species Act. And many were also disturbed by the Court's decision in *District of Columbia v. Heller*,[19] interpreting the Second Amendment in accordance with the public's supposed understanding of its text at the time of its adoption in 1791, to hold that the right to bear arms applies in settings unrelated to the militia.

In each of these cases, and despite the sharply differing political, religious, and moral beliefs of those who comprise American society, the Court rendered a controversial judicial decision that in the eyes of many was difficult to square with the text of the relevant constitutional, or statutory provision applicable to the case at hand. In each case, the decision had serious consequences: society was affected, businesses were affected, and sometimes respect for the rule of law suffered. And it's not over–nor will it ever be.

As I write these lines, the country awaits the Court's decision in *Dobbs v. Jackson Women's Health Organization*,[20] a ruling that will likely overturn or severely undermine *Roe v. Wade*, and whose consequences are difficult to predict. Yet despite the sometimes unsettling and tornado-like consequences, it is clear that we need a Supreme Court that enforces equality and liberty on a national basis. Judicial intervention is essential to the survival of a constitutional system that is based on principles of separation of powers, federalism, and respect for individual rights. The key is for the Court to strike the right balance, knowing when to step in and when to stay out.

II. THE TEXAS ABORTION LAW

Introduced in Texas as Senate Bill 8 (SB8) and House Bill 1515 (HB 1515) on March 11, 2021, the Texas abortion law–"known as the Texas Heartbeat Act"–was signed by Governor Greg Abbott on May 19, 2021, and took effect September 1, 2021.[21]

18. 504 U.S. 555 (1992).

19. 554 U.S. 570 (2008).

20. Dobbs v. Jackson Women's Health Org., No. 19-1392 (U.S. S.Ct), *argued* Dec. 1, 2021. For the lower court decision in this case, see *Jackson Women's Health Org. v. Dobbs*, 945 F.3d 265 (5th Cir. 2019).

21. 2021 Tex. Sess. Law. Serv. ch. 62 (S.B. 8) (Vernon's); TEX. HEALTH & SAFETY CODE ANN. §§ 171.201-171.212 (2021).

The Texas law ("SB8"), entitled "[a]n Act relating to abortion, including abortions after detection of an unborn child's heartbeat; authorizing a private civil right of action," "finds that the State of Texas never repealed, either expressly or by implication, the state statutes enacted before the ruling in *Roe v. Wade* . . . that prohibit and criminalize abortion unless the mother's life in in danger."[22] And because the State of Texas, as if it had a choice, never "accepted" the holding in *Roe v. Wade*, it now, under Section 171.203(b), takes a position that directly conflicts with that opinion, by providing that "[e]xcept as provided by Section 171.205,[23] a physician may not knowingly perform or induce an abortion on a pregnant woman unless the physician has determined, in accordance with this section, whether the woman's unborn child has a detectable fetal heartbeat."[24] And under Section 171.204(a), the legislature provides that "[e]xcept as provided by Section 171.205, a physician may not knowingly perform or induce an abortion on a pregnant woman if the physician detected a fetal heartbeat for the unborn child as required by Section 171.203 or failed to perform a test to detect a fetal heartbeat."[25]

The conduct prohibited by the Texas law is quite broad. What is prohibited is performing or inducing an abortion,[26] knowingly aiding or abetting such performance or inducement, "including paying for or reimbursing the costs of an abortion through insurance or otherwise,"[27] or merely "intend[ing] to engage in the conduct described" above.[28] In any event, SB8 "does not create or recognize a right to abortion before a fetal heartbeat is detected."[29]

Enforcement of SB8 is "exclusively through the private civil actions."[30] Accordingly, "the state, a political subdivision, a district or county attorney, or an executive or administrative officer or employee of this state or a political subdivision" cannot sue to enforce it,[31] nor may an action be filed against a woman on whom an abortion is performed or induced or attempted to be performed or induced in violation of the law.[32]

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22. S.B. 8 at § 2.
23. TEX. HEALTH & SAFETY CODE ANN. § 171.203(b). The exception provided under Section 171.205(a) is "if a physician believes a medical emergency exists that prevents compliance with this subchapter."
24. *Id*. at § 171.203(b).
25. *Id*. at § 171.204(a).
26. *Id.* at § 171.208(a)(1).
27. *Id.* at § 171.208(a)(2).
28. *Id.* at § 171.208(a)(3).
29. *Id.* at § 171.206(a).
30. *Id.* at § 171.207(a).
31. *Id.*
32. *Id.* at § 171.206(b)(1)

The civil action, if successful, may be rewarded with "an injunctive relief sufficient to prevent the defendant from violating [the law] or engaging in acts that aid or abet the violations of [the law];"[33] and "statutory damages in an amount of not less than $10,000 for each abortion that the defendant performed or induced in violation of [the law], and for each abortion performed or induced in violation of [the law] that the defendant aided or abetted."[34] Costs and attorney's fees are also awarded to the prevailing plaintiffs.[35]

The potential defenses that a defendant may raise in such an action are quite limited. They exclude, among others, the unconstitutionality of the law,[36] as well as the doctrine of res judicata which might otherwise be applicable (e.g., the plaintiff filed and lost a similar action against a different defendant).[37] Under limited circumstances,[38] a defendant may be able to assert the third-party rights of a woman or a group of women who seek an abortion, if the relief sought against the defendant would impose an undue burden on them.[39] But to successfully invoke this defense, defendant must introduce evidence proving that "(1) an award of relief will prevent a woman or a group of women from obtaining an abortion; or (2) an award of relief will place a substantial obstacle in the path of a woman or a group of women who are seeking an abortion."[40] For these purposes a defendant cannot establish an undue burden by "(1) merely demonstrating that an award of relief will prevent women from obtaining support or assistance, financial or otherwise, from others in their effort to obtain an abortion," "(2) arguing or attempting to demonstrate that an award of relief against other defendants or other potential defendants will impose an undue burden on women seeking an abortion."[41] Finally, this undue burden affirmative defense will no longer be available if the Supreme Court overrules *Roe v. Wade*[42] or *Planned Parenthood*,[43] even if the conduct on which the cause of action is based occurred before such a Court opinion.[44]

33. *Id*. at § 171.208(b)(1).
34. *Id.* at § 171.208(b)(2).
35. *Id*. at § 171.208(b)(3).
36. *Id*. at § 171.208(e)(2), (7).
37. *Id*. at § 171.208(e)(5) ("non-mutual issue preclusion or non-mutual claim preclusion").
38. *Id*. at § 171.209(a).
39. *Id*. at § 171.209(b)(2).
40. *Id*. at § 171.209(c).
41. *Id*. at § 171.209(d).
42. 410 U.S. 113 (1973)
43. 505 U.S. 833 (1992).
44. TEX. HEALTH & SAFETY CODE ANN. § 171.209(e).

The Texas Heartbeat Act, SB8, also provides that "[n]otwithstanding any other law, a court may not award costs or attorney's fees . . . to a defendant" in an action brought to enforce the law, even if the defendant prevails in the action.[45] And, to discourage anyone from challenging the constitutionality of the Heartbeat Act, SB8 provides that any civil rights plaintiff suing to prevent the enforcement of this Texas law will be "jointly and severally liable to pay the costs and attorney's fees of the prevailing party,"[46] i.e., their own costs and attorney fees if they win, and their own costs and fees, as well as the defendant's, if they lose.[47] Finally, the Heartbeat Act gives a prevailing defendant up to three years to bring a separate suit to recover costs and attorney's fees from the plaintiff and plaintiff's attorneys, whether or not the defendant sought to recover fees in the original action.[48] In short, a potential plaintiff will think at least twice before filing a suit to challenge the validity of SB8. And yet SB8 is unconstitutional, patently violative of years of Supreme Court's jurisprudence on abortion rights.

III. ABORTION RIGHTS IN THE JURISPRUDENCE OF THE U.S. SUPREME COURT

A. Griswold v. Connecticut

The path to the current abortion rights law must be traced back to *Griswold v. Connecticut*.[49] There, the Court struck down a Connecticut law that made it illegal to use or counsel others to use contraceptives. The Court held that as applied to advice given to married couples, the statute violated the Fourteenth Amendment Due Process Clause by interfering with the "right of privacy" in marriage and by in effect allowing the government to invade "the sacred precincts of marital bedrooms."[50] The newly recognized right of marital privacy, though nowhere mentioned in the Constitution's text, was found to lie "within the zone of privacy created by several fundamental constitutional guarantees."[51] By applying an extremely strict standard of review, the Court invalidated the statute

45. *Id.* at § 171.208(i).
46. SB8, Section 4, § 30.022(a).
47. *Id.* at § 30.022(b).
48. *Id.* at § 30.022(c).
49. 381 U.S. 479 (1965). For a more extensive description of the law of abortion rights *see* ALLAN IDES, CHRISTOPHER N. MAY & SIMONA GROSSI, CONSTITUTIONAL LAW: INDIVIDUAL RIGHTS (9th ed. 2022).
50. *Id.* at 485-86.
51. *Id.* at 485.

without any consideration of the state's possible justifications for it. Speaking for the Court, Justice Douglas explained that in contrast to *Lochner v. New York,* the statute at issue in *Griswold* "operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation."[52]

The *Griswold* Court offered an unusual explanation as to the source of the newly discovered constitutional right of marital privacy. In earlier cases, such as *Allgeyer v. Louisiana*[53] and *Meyer v. Nebraska*,[54] the Court announced that certain rights were included in the "liberty" protected by the Due Process Clause. Justice Douglas, though, chose not to follow this route. Instead, he sought to link the right of privacy in marriage to specific guarantees of the Bill of Rights, and more specifically, the First, Third, Fourth, and Fifth Amendments, which, said Douglas, "have penumbras, formed by emanations from those guarantees that help give them life and substance."[55] The right of marital privacy lay within these penumbras, hidden in the shadows of the First Amendment's right of association, the Third and Fourth Amendments' protection of the home, and the Fifth Amendment's guarantee against self-incrimination.

There are several reasons why Justice Douglas may have insisted on tying the right of marital privacy to specific provisions of the Bill of Rights rather than simply declaring it a protected aspect of "liberty" under the Due Process Clause. He may have hoped to distinguish his approach from that taken by the Court during the *Lochner* era;[56] rather than inventing a new constitutional right, the *Griswold Court* was exercising judicial restraint by merely protecting a right that was derivable from the Constitution's text. Yet the penumbras and emanations approach was hardly a means of imposing judicial self-restraint. Douglas's discovery of marital privacy within the penumbras of the Bill of Rights was far from self-evident, requiring at least a small leap of judicial faith. Moreover, the penumbras and emanations approach was now capable of justifying virtually any liberty interest the Court might wish to create.

Douglas's penumbras and emanations approach may also have been designed to square *Griswold* with the framework of *United States v.*

52. *Id*. at 482.

53. 165 U.S. 578 (1897).

54. 262 U.S. 390 (1923).

55. *Griswold,* 381 U.S. at 484.

56. *See* Lochner v. New York, 198 U.S. 45 (1905), where the Court held that a New York law setting maximum working hours for bakers violated the bakers' right to freedom of contract under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.

Carolene Products.[57] In footnote four of the *Carolene Products* opinion, the Court suggested that strict scrutiny should be applied under the Due Process Clause only if a law was contrary to a "specific prohibition" of the Constitution. Though footnote four was only dictum, Justice Douglas agreed with this aspect of it, and he subscribed to Justice Black's position in dissent that under Section 1 of the Fourteenth Amendment, it is wrong for the Court to use a "natural-law-due-process" approach to create any additional rights against the states beyond those explicitly set forth in the Bill of Rights.[58]

In any event, the use of the penumbras and emanations approach to determine the scope of the Bill of Rights drains the "specific prohibitions" of the Bill of Rights of any coherent meaning, as Justice Black complained in his *Griswold* dissent. This is evident from the fact that the *Griswold* Court used this rationale to rescue and revive two *Lochner*-era personal liberty cases—*Meyer v. Nebraska* and *Pierce v. Society of Sisters*[59]—which had seemingly been discredited as due process precedents by *Carolene Products.* The decisions in *Meyer* and *Pierce* were now reinterpreted and reaffirmed as having been justified under the penumbras and emanations principle. According to *Griswold,* the liberty interests in learning German and in directing the education of one's children that were protected by those earlier rulings in fact lay within the shadows of the First Amendment.[60]

The penumbras and emanations theory did not satisfy all members of the *Griswold* majority. Justice Harlan, in a separate concurring opinion, rejected the approach. Instead, he rested the right of marital privacy squarely on the word "liberty" in the Fourteenth Amendment Due Process Clause, without linking it to any provision of the Bill of Rights. Because the right of marital privacy is "implicit in the concept of ordered liberty," it was, therefore, constitutionally protected.[61] While this approach gave

57. 304 U.S. 144 (1938). In *Carolene Products*, the Court rejected a substantive due process challenge to a federal law excluding nondairy milk products from interstate commerce. The producers of these goods complained that the law impaired the value of their property and interfered with their freedom to contract with buyers in other states. However, the Court rejected their claims, holding that a law "affecting ordinary commercial transactions" is valid as a matter of substantive due process if it "rests upon some rational basis within the knowledge and experience of the legislators." *Id.* at 152.

58. *See Adamson v. California,* 332 U.S. 46, 68-92 (1947) (Black & Douglas, JJ., dissenting); *see also Duncan v. Louisiana,* 391 U.S. 145, 162-71 (1968) (Black & Douglas, JJ., concurring).

59. 268 U.S. 510 (1925). In *Pierce*, the Court relied on *Meyer* to overturn an Oregon law that compelled parents to send their children to public rather than private school; the statute violated due process, said the Court, because it "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control." *Id.* at 534-35.

60. *Griswold*, 381 U.S. at 482.

61. *Id.* at 500 (Harlan, J., concurring).

the Court considerable leeway, Harlan noted that any "judicial 'self-restraint'" imposed by the penumbras and emanations theory "is more hollow than real."[62]

In a separate concurrence, Justice White also declined to endorse the penumbras and emanations theory and, like Harlan, relied simply on the word "liberty" contained in the Due Process Clause. Three other members of the *Griswold* majority also agreed with Justice Harlan that the right of marital privacy is an aspect of due process "liberty" but buttressed their conclusion with the Ninth Amendment. That Amendment states that "[t]he enumeration in the Constitution of certain rights shall not be construed to deny or disparage *others retained by the people*."[63]

While Douglas had referred to the Ninth Amendment in passing, Justice Goldberg, joined by Chief Justice Warren and Justice Brennan, relied on it as authority for construing the Fourteenth Amendment Due Process Clause to encompass rights not enumerated elsewhere in the Constitution. Justice Goldberg observed that "[t]he language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments."[64] While not "an independent source of rights protected from infringement by either the States or the Federal Government,"[65] the Ninth Amendment provides a rule of construction for the courts in interpreting other provisions of the Constitution, such as the word "liberty" in the Due Process Clause. On this basis, Justice Goldberg concluded that the unenumerated "right of privacy in the marital relation is . . . a personal right 'retained by the people' within the meaning of the Ninth Amendment" and that it is, therefore, among the "fundamental" personal liberties that are "protected by the Fourteenth Amendment from infringement by the States."[66]

Justice Goldberg's reliance on the Ninth Amendment drew fire from Justices Stewart and Black, who believed that "[t]he Ninth Amendment, like its companion the Tenth, . . . was . . . adopted by the States simply to make clear that the adoption of the Bill of Rights did not alter the plan that the *Federal* Government was to be a government of express and limited powers, and that all rights and powers not delegated to it were retained by the people

62. *Id.* at 501.
63. *Id.* at 488 (Goldberg, J., concurring).
64. *Id.*
65. *Id.* at 492.
66. *Id.* at 499.

and the individual States."[67] It was intended as a means to "protect state powers against federal invasion," not as a basis for recognizing unenumerated rights that may be judicially enforced against the federal or state governments.[68]

But the Stewart-Black reading rendered the Ninth Amendment synonymous with the Tenth and thus redundant. The Tenth Amendment does say that those powers not conferred on the federal government are reserved to the states or to the people. However, the Ninth Amendment says something quite different—that the people have other rights against the government besides those enumerated in the Bill of Rights. If these other rights are not judicially enforceable, if there is no remedy for their violation, then they are not rights in a strong or meaningful sense, but mere norms or platitudes that government officials may ignore with impunity. It is difficult to believe that the Founders would have troubled themselves to include the Ninth Amendment if this is all that it was intended to accomplish.

While the seven members of the *Griswold* majority offered a variety of bases for finding a fundamental right of marital privacy, they all agreed that the Court could protect liberty interests that were nowhere specifically mentioned in the text of the Constitution.

A clear majority, in other words, refused to give the Constitution a strictly literal reading that would protect only those specific liberties—such as the Third Amendment guarantee against having soldiers quartered in one's home during peacetime—that are spelled out in full by the text itself. To construe the document as Justices Black and Stewart proposed in their dissent would have given an extremely narrow reading to the "liberty" protected by the Due Process Clause. Moreover, it would have been contrary to the apparent intent of the Founders, who included the Ninth Amendment to guard against just such a crabbed reading of the Constitution's enumeration of rights.

In the years since *Griswold,* the Court has added to the personal liberties that are protected by the Due Process Clause. In doing so, the Court has disavowed Justice Douglas's penumbras and emanations explanation,[69] and candidly acknowledged that the task requires giving meaning to the "Fourteenth Amendment's concept of personal liberty."[70] Even some of the Court's more conservative members have accepted the validity of this judicial undertaking.

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67. *Id.* at 529-30 (Stewart & Black, JJ., dissenting) (emphasis in original).
68. *Id.* at 520 (Black. & Stewart, JJ., dissenting).
69. *See Whalen v. Roe,* 429 U.S. 589, 598 n.23 (1977).
70. *Roe v. Wade,* 410 U.S. 113, 152-53 (1973).

In *Thornburgh v. American College of Obstetricians & Gynecologists,*[71] Justice White, joined by Justice Rehnquist, declared that

> this Court does not subscribe to the simplistic view that constitutional interpretation can possibly be limited to the "plain meaning" of the Constitution's text or to the subjective intention of the Framers. The Constitution is not a deed setting forth the precise metes and bounds of its subject matter; rather, it is a document announcing fundamental principles in value-laden terms that leave ample scope for the exercise of normative judgment by those charged with interpreting and applying it.[72]

Similarly, in *Richmond Newspapers, Inc. v. Virginia,*[73] Chief Justice Burger, writing for the majority, noted that "[n]otwithstanding the appropriate caution against reading into the Constitution rights not explicitly defined, the Court has acknowledged that certain unarticulated rights are implicit in enumerated guaranties."[74]

The issue that has continued to divide the Justices is not the question of whether the Court should give constitutional protection to unenumerated, nontextual liberty interests, but rather what sources it should look to in doing so and how those sources should be construed. For example, should the Court consider only the Founders' specific intent, or is it permissible to consider the more general concepts the Founders hoped to protect? Are history and tradition legitimate guides, and if so, at what point and at what level of generality are they to be measured? To what extent is the Court confined to past case law? And of what relevance are principles of philosophy, political theory, or sociology?[75]

When the Court seeks to define and protect rights that are not specifically enumerated in the text of the Constitution, it takes some institutional risks. One is that the Court may lose credibility if it is perceived by the public as having simply enshrined the personal beliefs and prejudices of individual Justices. Another risk is that by operating without close textual moorings, the Court may seek to protect values that are so out of touch with those of the public that the people will refuse to accept the Court's judgment. Both of these dangers materialized during the *Lochner* era, when the Court, in the name of liberty to contract,

71. 476 U.S. 747 (1986).

72. *Id.* at 789.

73. 448 U.S. 555 (1980).

74. *Id.* at 579.

75. These important questions are explored in CHRISTOPHER N. MAY, ALLAN IDES & SIMONA GROSSI, CONSTITUTIONAL LAW: NATIONAL POWER AND FEDERALISM, ch. 1 (9th ed. 2022).

continued to impose the doctrine of laissez-faire on a nation prostrated by the Depression.

As Justice Powell wrote in *Moore v. City of East Cleveland*:[76]

> Substantive due process has at times been a treacherous field for this Court. There *are* risks when the judicial branch gives enhanced protection to certain substantive liberties without the guidance of the more specific provisions of the Bill of Rights. As the history of the *Lochner* era demonstrates, there is reason for concern lest the only limits to such judicial intervention become the predilections of those who happen at the time to be Members of this Court. That history counsels caution and restraint. But it does not counsel abandonment.[77]

Since *Griswold,* the constitutional right of privacy has expanded well beyond a married couple's freedom to decide to use birth control. This fundamental right now extends to unmarried individuals and embraces other personal decisions, most of them having to do with procreation, marriage, or family. In analyzing claimed violations of these fundamental liberty interests, the Court has adopted what might be thought of as a basic due process model. In some cases, the Court applies a variation of this model.

In contrast to *Griswold,* where Justice Douglas's opinion for the Court struck down a Connecticut law under what amounted to a per se rule of invalidity, the Court typically employs a more subtle approach in fundamental rights due process cases. That basic approach asks whether the interest in question qualifies as a *protected liberty* under the Due Process Clause; whether the protected liberty is deemed *fundamental; and whether* the challenged law *impinge on or unduly burden* that fundamental liberty interest to a degree sufficient to trigger strict scrutiny. If a fundamental liberty has been impinged on or unduly burdened, the approach asks whether the law substantially further a *compelling governmental interest, and whether* the government has chosen the *least burdensome means* of achieving its compelling interest.

The question of whether the protected liberty is deemed *fundamental* presents the difficult question of determining whether any particular liberty interest is entitled to special protection as a fundamental right. The various opinions in *Griswold* lay the foundation for that process. The question of *whether* the challenged law *impinge on* or *unduly burden* that fundamental liberty interest to a degree sufficient to trigger strict scrutiny requires an assessment of the degree to which the liberty interest is

76. 431 U.S. 494 (1977).

77. *Id.* at 502 (emphasis in original)

burdened, since de minimis infringements will not trigger strict scrutiny. Finally, the questions of whether, while impinging on or unduly burdening a fundamental interest, the law substantially furthers a *compelling governmental interest through* the *least burdensome means* of achieving that compelling interest represents an application of strict scrutiny test, which means, the challenged law or practice will be held to violate the Due Process Clause unless it is shown that the measure is necessary to achieve a compelling governmental interest. If, however, the interest in question does not qualify as a *protected liberty* under the Due Process Clause, is not deemed *fundamental, or the* law does not *impinge on* or *unduly burden* the fundamental liberty interest to a degree sufficient to trigger strict scrutiny, the court will apply only the rational basis standard of review, under which a law is upheld, when a rational legislature could reasonably conclude that this law was a good way to achieve a legitimate interest.

There are several important points to remember about the impingement or undue burden requirement. First, virtually all of the rights we enjoy under the Constitution are negative rather than positive rights. In other words, they operate as protections against governmental interference, not as guaranties of governmental assistance. As the Court explained in *DeShaney v. Winnebago County Dept. of Social Services*:[78]

> The [Due Process] Clause is phrased as a limitation on the State's power to act. . . . It forbids the State itself to deprive individuals of life, liberty, or property without "due process of law," but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means.[79]

The government has no affirmative constitutional duty to assure that each of us is able to exercise, enjoy, or realize the benefits of a particular right. For example, the freedoms to marry, to use contraceptives, and to choose an abortion are all fundamental liberties under the Due Process Clause, yet the government is not constitutionally obligated to pay for the wedding, purchase the contraceptives, or provide a free abortion for someone who cannot otherwise afford it.[80] All that the Constitution usually requires is that the government not actively interfere—whether through criminal punishment or otherwise—with our ability to exercise our constitutional rights. And even where the government does interfere with our ability to exercise a protected liberty interest, not all forms of governmental

78. 489 U.S. 189 (1989).

79. *Id*. at 195.

80. *See Poelker v. Doe,* 432 U.S. 519 (1977) (city-owned hospital need not perform abortions).

interference are serious enough to count as an impairment of a constitutional right. The purpose of the impingement or undue burden requirement is to separate insignificant governmental actions from those that are substantial enough to trigger strict scrutiny.[81] When testing the validity of a law that interferes with a woman's freedom to decide whether to have an abortion, the Court typically only asks whether the law places an "undue burden" on that right, and if it does, it is invalid; if it does not impose an undue burden, it will be upheld under a rational basis standard of review.[82]

The right of marital privacy recognized by the Court's in *Griswold* was soon extended to persons who were not married, and to conduct that did not occur in the privacy of the home. The Court held that unmarried persons,[83] including minors,[84] have the same fundamental liberty interest in using contraceptives as did the married couples protected by *Griswold.*

And the right of privacy was also held to protect a married or unmarried woman's liberty to choose an abortion even though this procedure usually takes place outside the home in a doctor's office, clinic, or hospital.[85]

With this expansion of *Griswold,* it became increasingly difficult to speak of the right in question as being one of privacy, much less of marital privacy. The Court, therefore, reformulated the liberty interest recognized in *Griswold* as one that "protects *individual decisions* in matters of childbearing from unjustified intrusion by the State."[86] What had begun as a right of privacy was thus transformed into a right of personal autonomy, "the interest in independence in making certain kinds of

81. For example, the application of a general sales tax to the purchase of contraceptives would probably not be deemed to impinge on the freedom to practice birth control, whereas a law that criminalized such sales would impose an undue burden and would be subject to strict scrutiny.

82. Another approach sometimes taken by the Court is to avoid the strict scrutiny model entirely, by finding that a challenged law or practice does not pass muster even under a rational basis standard of review, thereby making it unnecessary to decide whether the liberty interest in question is a fundamental one. The Court used this approach in *Lawrence v. Texas,* 539 U.S. 558 (2003), where it struck down a Texas statute that made it a crime for two adults of the same sex to engage in intimate sexual conduct. In holding that one of the liberties protected by the Due Process Clause is the right of adults to engage in private consensual sexual activity, the Court never addressed the question of whether this newly recognized liberty was a fundamental one. Instead, as the dissent suggested, the Court invalidated the statute under "the rational-basis test." *Id.* at 594 (Scalia, J., dissenting). While the majority in that case may have in fact applied a stricter than usual version of the rational basis test, the Court's approach allowed it to avoid having to decide whether the liberty interest in question was a fundamental one.

83. *Eisenstadt v. Baird,* 405 U.S. 438 (1972).

84. *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977).

85. *Roe v. Wade,* 410 U.S. 113 (1973).

86. *Carey, 431 U.S.* at 687.

important decisions."[87] While courts continue to speak of the constitutional *right of privacy,* this phrase is normally used to mean the same thing as the *right of personal autonomy.*

B. Roe v. Wade

The Court's first right of privacy decisions involved laws that, by barring the use of contraceptives, had the effect of forcing individuals to have children and create a family against their wishes. In striking down these laws, the Court held that one of the fundamental liberties protected by the Due Process Clause is the "decision whether to bear or beget a child."[88] This decision is as much impaired by laws outlawing abortion as by bans on the use of contraceptives.

In *Roe v. Wade*, decided in 1973, the Court recognized this fact, holding that the right of privacy in matters concerning procreation and family "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[89] *Roe* involved a Texas statute that made it illegal to have an abortion except where necessary to save the mother's life. By absolutely prohibiting most abortions, the statute impinged on a woman's fundamental liberty to choose an abortion, thus triggering strict scrutiny under the Due Process Clause. Thus Texas had to show that its interference with this right of personal privacy "was necessary to support a compelling state interest."[90] The Court agreed that the state had two compelling interests in regulating the abortion decision: the interest in protecting *maternal health* and the interest in protecting *potential life.* In an opinion written by Justice Blackmun, the Court held that neither of these interests was compelling at the outset of pregnancy. Rather, the interest in protecting the mother's health became compelling only at the end of the *first trimester*, i.e., after about three months of pregnancy; before then, the Court explained, it was as safe for a woman to have an abortion as it was to proceed with childbirth. The state's interest in potential life, on the other hand, did not become compelling until roughly the end of the *second trimester*, i.e., after about six months of pregnancy; only then was the fetus *viable*, i.e., capable of surviving outside the mother's womb.

Under this trimester framework, the state's interest in regulating abortion became stronger as the period of pregnancy lengthened. During

87. Whalen v. Roe, 429 U.S. 589, 599-600 (1977).
88. Eisenstadt v. Baird, 405 U.S. 438 (1972).
89. *Roe,* 410 U.S. at 153.
90. *Id.* at 156.

the first trimester, the state had no compelling reason to regulate abortion, though it might require that abortions be performed by a licensed physician under generally applicable professional standards. In the second trimester, the state acquired a compelling interest in protecting maternal health. This interest allowed the state to impose restrictions that were necessary to ensure that the abortion procedure was safe, but that interest was not sufficient to justify a total prohibition on abortion. During the last trimester of pregnancy, the state acquired a compelling interest in protecting the fetus. At this point, the state might "regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."[91] Once the fetus had become viable, the state might thus restrict or completely outlaw *nontherapeutic abortions*—i.e., those that were not medically necessary to protect the mother's health or life; however, the state might not prevent a woman from choosing to have a *therapeutic abortion.*

While *Roe* invalidated *prohibitions* on abortion during the first and second trimesters, the decision left room for states to *regulate* the procedures for obtaining abortions. Such regulations might be upheld under the trimester framework if they did not unduly burden the abortion decision (and thus did not trigger strict scrutiny), if they became applicable after the first trimester and were necessary to protect maternal health, or if they were limited exclusively to the third trimester.

In the years following *Roe,* state and local governments tested the limits of that decision by enacting laws that restricted the ability of women to obtain abortions. These measures were invariably challenged, forcing lower courts and the Supreme Court to apply and clarify the ruling handed down in *Roe.* The Court upheld some first and second-trimester restrictions on the abortion process, including requirements that women give written consent; that doctors keep certain records; that tissue samples be examined by a pathologist; and that immature minors obtain the consent of a parent, or that they wait 48 hours after notifying both parents, unless a judge allowed them to bypass these requirements. However, many other pre-viability restrictions were struck down, including so-called informed-consent provisions that required doctors to make specific statements to a woman concerning the fetus; 24-hour waiting periods for adults; laws limiting abortions exclusively to hospitals or licensed clinics; bans on certain inexpensive abortion methods; requirements that all minors, regardless of maturity, obtain the consent of a parent or a judge; and requirements that doctors report personal information about abortion

91. *Id.* at 165.

patients to the state. The Court also struck down a number of third-trimester restrictions that, to protect the fetus, jeopardized maternal health.

The Court was sharply divided in many of these cases. The majority typically applied a low threshold for determining whether a restriction unduly burdened or impinged on a woman's fundamental liberty interest and was thus subject to strict scrutiny.

As a rule, the Court's majority found the impingement requirement to be satisfied if a regulation had the effect of delaying, discouraging, or increasing the cost of an abortion. The dissenting Justices, on the other hand, employed a higher threshold of impingement, so that regulations that did not constitute an absolute barrier to abortion were tested and upheld under a rational basis standard.[92]

By 1989, the split within the Court had reached the point where four Justices—Rehnquist, White, Scalia, and Kennedy—had gone on record urging that *Roe v. Wade* be either overruled or limited to statutes that outlawed abortions; laws that simply regulated the abortion procedure would then be reviewed under the rational basis standard.[93] It seemed that only one more vote was needed to overrule *Roe.*

When Justices Brennan and Marshall, both supporters of *Roe*, resigned from the Court in the early 1990s, President George H.W. Bush replaced them with David Souter and Clarence Thomas. And in light of Bush's campaign promises to appoint anti-abortion judges to the federal bench, it was widely expected that these new Justices would provide the necessary votes to finally overturn *Roe.* The opportunity to do so came with *Planned Parenthood v. Casey*,[94] a case challenging the Pennsylvania Abortion Control Act.

C. Planned Parenthood v. Casey

In *Planned Parenthood v. Casey,* the Court struck down that part of Pennsylvania's abortion law that required married women, except in certain limited circumstances, to notify their husbands before having an abortion.[95] The Court upheld the rest of the law, including an informed-

92. *See, e.g., City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 461-75 (1983) (O'Connor, White, & Rehnquist, JJ., dissenting) (applying rational basis review to a law that imposed a 24-hour waiting period, required second-trimester abortions to be performed only in a hospital, and forced physicians to read a statement to pregnant women concerning the fetus).

93. *See Webster v. Reproductive Health Servs.*, 492 U.S. 490, 517-22 (1989) (opinion of Rehnquist, White, & Kennedy, JJ.); *id*. at 532 (opinion of Scalia, J.); *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists,* 476 U.S. 747, 786-97 (1986) (opinion of White & Rehnquist, JJ.).

94. 505 U.S. 833 (1992).

95. *Id.*

consent provision that required physicians to give women specific information about the fetus; a 24-hour waiting period; a parental consent requirement for immature minors; and a record-keeping and reporting requirement for facilities performing abortions.[96] To uphold these provisions, the Court had to overrule several prior decisions that had declared similar regulations to be unconstitutional. And while *Casey* preserved what it viewed as the "essential holding" of *Roe v. Wade,* it rejected *Roe*'s trimester framework and replaced it with a new "undue burden" test for analyzing the validity of all abortion restrictions.[97]

Casey was the product of a divided Court. Four Justices—Rehnquist, White, Scalia, and Thomas—voted to overrule *Roe* in its entirety and to sustain all the challenged regulations. Justice Blackmun, on the other hand, adhered fully to *Roe* and believed that all of the Pennsylvania restrictions were invalid. Justice Stevens also endorsed *Roe* and voted to invalidate most of the state's restrictions. With the Court split four to two, the outcome lay in the hands of Justices O'Connor, Kennedy, and Souter. They issued a joint opinion that staked out a middle position between completely overruling *Roe* and preserving the decision intact. Their opinion played a pivotal role in the analysis.

The authors of the joint opinion, some of whom had been quite critical of *Roe,* explained that the principle of *stare decisis* prevented them from abandoning *Roe* in its entirety. Justice Kennedy's vote was particularly surprising, since three years earlier he had joined Chief Justice Rehnquist's opinion in *Webster v. Reproductive Health Services* suggesting that *Roe* be overruled.[98]

Justices O'Connor, Kennedy, and Souter now declared that "the essential holding of *Roe v. Wade* should be retained and once again reaffirmed."[99] This essential holding was that a woman has "the right . . . to choose an abortion before viability and to obtain it without undue interference from the State,"[100] and the right to elect an abortion even after viability where it is necessary to protect her health or her life.[101]

However, the joint authors "reject[ed] the trimester framework, which [they did] not consider to be part of the essential holding of *Roe*."[102] That framework had to be rejected because "it undervalue[d] the State's

96. *Id.*
97. *Id.*
98. *See Webster,* 492 U.S. at 490 (opinion of Rehnquist, White & Kennedy, JJ.).
99. *Casey*, 505 U.S. at 846.
100. *Id.*
101. *Id.*
102. *Id*. at 873.

interest in the potential life within the woman."[103] Whereas *Roe* had held that this interest became compelling only at viability, they believed that "there [was] a substantial state interest in potential life throughout pregnancy."[104]

This upgrading of the interest in potential life gave the state a much stronger ground for regulating abortion during the first and second trimesters. It also eliminated any reason for distinguishing between the first and second trimesters, since the state now had a compelling reason for restricting abortion from the very beginning of pregnancy. On the other hand, the joint authors refused to abandon the "viability line" that divided the second and third trimesters. As they explained, part of "*Roe*'s central holding [was] that viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions."[105] Thus, prior to viability, a woman still has a fundamental right to choose an abortion—even if it is not necessary to protect her life or her health. After viability, the state may outlaw abortion except where it is necessary to preserve the health or life of the mother.

Besides abandoning the trimester framework of *Roe,* Justices O'Connor, Kennedy, and Souter refused to apply the strict scrutiny approach normally used in fundamental rights due process cases. Under the standard approach, a law that impinges upon or burdens a fundamental liberty will be upheld only if it is the least burdensome means of achieving a compelling governmental interest; the fact that the government has "unduly" burdened the right is not by itself necessarily fatal.

However, the joint opinion formulated a new undue burden test for judging the constitutionality of abortion regulations. Under this test, a law or practice that unduly burdens a woman's liberty interest in the abortion decision is invalid, whether or not it may have been the least burdensome means for achieving the government's interest. As the Court said in *Casey*, "an undue burden is an unconstitutional burden."[106]

At first, the undue burden test might appear to increase the protection afforded the abortion decision, for the government seemingly has no opportunity to justify a regulation once it is found to impose an undue burden. In fact, however, the new standard makes it much easier for the government to regulate abortion than it was under *Roe, as a*ccording to the undue burden test, a law will be found to impose an undue burden only

103. *Id*. at 875.
104. *Id*. at 876.
105. *Id*. at 860.
106. *Id.* at 877.

"if its *purpose* or *effect* is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability."[107] As far as the purpose element is concerned, a law imposes an undue burden if it is "calculated to . . . hinder" a woman's freedom of choice,[108] and this element is not violated if the state's purpose is "to persuade the woman to choose childbirth over abortion."[109] The state is thus allowed to "enact persuasive measures which favor childbirth over abortion, even if those measures do not further a health interest."[110] Since a state can almost always claim that its purpose was "to persuade" rather than "to hinder," it is hard to imagine any law being held to constitute an undue burden because of its purpose. And with respect to the effect element of the undue burden test, it is more difficult to establish that a law unduly burdens the right to choose an abortion than it was under *Roe* and its progeny. According to the joint opinion, the government can adopt measures that interfere with a woman's ability to obtain an abortion, so long as they do not "place a *substantial obstacle*" in a woman's path to obtaining an abortion—i.e., so long as they do not actually prevent or "prohibit [her] from making the ultimate decision to terminate her pregnancy before viability."[111] Thus, "[t]he fact that a law . . . has the *incidental* effect of making it more *difficult* or more *expensive* to procure an abortion cannot be enough to invalidate it."[112] Previously, though, regulations that added to the difficulty or expense of obtaining an abortion were routinely deemed to impinge on a woman's freedom of choice and were usually overturned.[113] *Casey* overruled those parts of *Akron* and *Thornburgh* that had invalidated waiting-period and informed-consent requirements that were indistinguishable from those contained in the Pennsylvania statute, for these were not deemed to pose "substantial obstacle[s]."

Though *Casey*'s undue burden test was subscribed to by only three Justices in *Casey,* it represented the holding of the Court in that case. But "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who

107. *Id*. at 878 (emphasis added).
108. *Id*. at 877.
109. *Id*. at 878.
110. *Id*. at 886.
111. *Id*. at 879.
112. *Id*. at 874 (emphasis supplied).
113. *See, e.g.*, *Akron,* 462 U.S. 416 (invalidating a waiting period, a requirement that certain abortions be performed in hospitals, and other restrictions that increased the expense of abortions or reduced access to them).

concurred in the judgments on the narrowest grounds'"[114] Since Justices Blackmun and Stevens concurred on the rationale that *Roe* should be reaffirmed in its entirety, the undue burden test was the narrowest ground for the judgment invalidating the spousal consent provision. Any doubt as to the status of the undue burden test, though, was eliminated in *Stenberg v. Carhart,* [115] where for the first time a majority of the Court[116] endorsed use of the test to evaluate the constitutionality of laws that regulate abortion.[117]

At least at first blush, *Casey* seemed to have left the government with no opportunity to defend a law that posed a substantial obstacle to women seeking an abortion. While the Court there did say that only "*[u]nnecessary health regulations* that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion pose an undue burden on that right,"[118] the post-*Casey* Court never focused on the necessity of, or the benefits derived from, the abortion restriction in question.

All of that changed in *Whole Woman's Health v. Hellerstedt*,[119] where the Court for the first time, read *Casey* as having endorsed a "balancing" test—one which "requires that courts consider the burdens a law impose on abortion access together with the benefits those laws confer."[120] As Justice Thomas noted in his dissent, the post-*Casey* Court had never before applied a balancing test in the abortion context.[121]

Under *Hellerstedt*'s balancing approach, the government can seek to defend a law that might otherwise impose an unacceptable burden on abortion access by showing that the measure produces real benefits to the state. Those benefits may have been identified in legislative findings made before the measure was enacted, which findings will receive considerable judicial deference, or they may be proven in judicial proceedings if the measure is challenged in court. However, the health problem the government sought to address must be "significant,"[122] and the benefits in terms of redressing that problem must be *shown* to be real, not merely

114. *Marks v. United States,* 430 U.S. 188, 193 (1977).
115. 530 U.S. 914 (2000).
116. Justices Breyer, Stevens, O'Connor, Souter, Ginsburg, and Kennedy. *Id.*
117. *Carhart*, 530 U.S. at 930.
118. *Casey*, 505 U.S. at 878 (emphasis added).
119. 136 S. Ct. 2292 (2016).
120. *Id*. at 2309.
121. *Id*. at 2324-26.
122. *Id*. at 2311.

conjectural.[123] If, as is usually the case, the challenged law made it harder for women to obtain an abortion, the question is whether the government derived any benefits from the new restrictions vis-à-vis those it was getting before that law was enacted. However, because it is difficult in this setting to compare benefits and burdens, a court is unlikely to strike an abortion restriction if the health benefits from it are shown to be significant. If the government can make this showing, it need not then also show that it used the least burdensome alternative, for this part of the normal strict scrutiny analysis is one that *Casey* dropped and that the current Court is unlikely to resurrect.

In short, under *Hellerstedt*'s reformulation of *Casey*, an abortion restriction will be struck down, as imposing an "undue burden," if it is found to pose a "substantial obstacle" to a woman's obtaining an abortion and the government cannot show that it produces any real health benefits.[124]

If an abortion measure does not impose a substantial obstacle, it is subject to mere rational basis review. Under that standard, "the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it;" for these purposes, "the state need not have drawn the perfect line, as long as the line actually drawn [is] a rational one."[125]

IV. THE TEXAS ABORTION LAW LITIGATION

Considering the Texas law patently violative of the above unbroken line of Supreme Court cases,[126] on July 13, 2021, Whole Woman's Health and other groups of reproductive health care providers filed an action in the United States District Court for the Western District of Texas, Austin Division, against a state judge, Austin Reeve Jackson, in his official capacity and on behalf of a class of all Texas judges similarly situated; Penny Clarkston, a county clerk for the District Court of Smith County, in her official capacity and on behalf of a class of all Texas court clerks similarly situated (together, Judge Jackson and Clerk Clarkston, also the "Judicial Defendants"); Mark Lee Dickson, a private individual who had previously expressed his intent of suing anyone who would violate the

123. *See id.* ("nothing in [state's] record evidence"); *id*. at 2317 (state "presented no such evidence").

124. *Id*. at 2318.

125. Box v. Planned Parenthood of Indiana and Kentucky, 587 U.S. ___, 139 S. Ct. 1780, 1782 (2019) (state law regulating abortion providers' disposition of fetal remains survives rational basis review).

126. *See supra* Part III.

Texas law; and state agency officials who had authority to enforce collateral penalties against plaintiffs for violating the Texas law (the "State Agency Defendants").[127]

The complaint pointed out how the Texas law, by prohibiting abortion after the sixth week of pregnancy, was trying to override binding constitutional law[128] and, more precisely, *Roe v. Wade* and *Planned Parenthood v. Casey*.[129] And although the Supreme Court never explained what a "substantial obstacle" would be, the plaintiffs noted how a complete ban on abortion before viability would clearly not meet the test. A ban is an absolute prohibition, which essentially nullifies the possibility of seeking an abortion in Texas, rather than just making it harder or substantially more complicated. Thus, the plaintiffs argued, if SB8 took effect, many Texans would suffer irreparable harm, as they would be forced to carry their pregnancies to term, to attempt to scrape together funds to obtain an abortion out of state, or possibly to attempt to self-manage their own abortions without access to accurate medical information.[130] The complaint also noted how the Texas law would be "particularly devastating for Texans of color, particularly Black and Latinx populations, as well as for Texans with low incomes and those living in rural areas—communities that already face heightened barriers to medical care."[131]

Moreover, besides violating women's rights, SB8 would cause irreparable damages to abortion providers which would either close their business or offer abortions in violation of the Texas law thus facing the myriad of potentially simultaneous lawsuits which the Texas law encouraged and rewarded.[132] Those providers would suffer monetary as well as professional disciplinary sanctions and other types of sanctions for violating the Texas law.[133]

Also, by providing that civil rights plaintiffs suing to prevent the enforcement of the Texas law cannot be awarded costs and attorney's

127. Complaint, Whole Woman's Health v. Jackson, No. 21-cv-616 (W.D. Tex. July 13, 2021) ("Whole Woman's Health II"). More specifically, although these officials cannot directly enforce the Texas law's ban on providing, aiding, or abetting abortions, they are authorized and required to bring administrative and civil enforcement actions under other laws that are triggered by violations of the Texas law. *See, e.g.,* TEX. OCC. CODE § 164.055(a) (requiring the Texas Medical Board to "take an appropriate disciplinary action against a physician who violates . . . Chapter 171, Health and Safety Code.").

128. Whole Woman's Health II Complaint, at ¶ 84.

129. 505 U.S. 833 (1992).

130. Whole Woman's Health II Complaint, at ¶ 91.

131. *Id.* at ¶ 97.

132. *Id.* at ¶ 102.

133. *Id.* at ¶ 107.

fees[134] and would be "jointly and severally liable to pay the costs and attorney's fees of the prevailing party,"[135] the Texas law violated Section 1988—providing that civil rights plaintiffs have the right to recover their fees in their Section 1983 action when prevailing on their claims, and are not liable for the fees and costs of a prevailing defendant in the same action unless a district court finds that the plaintiff's action was frivolous, unreasonable, or without foundation.[136]

Thus, among other things, plaintiffs claimed that SB8 violated (i) the Fourteenth Amendment substantive due process rights of women to seek an abortion before viability;[137] and (ii) the Fourteenth Amendment equal protection rights of abortion providers and people who "aid or abet" the right to abortion, by singling them out and, thus, by denying them, within the Texas jurisdiction, the equal protection of the laws.[138] The plaintiffs also claimed that (iii) the Texas law was void for vagueness under the Fourteenth Amendment,[139] in that it imposed quasi-criminal penalties on persons who provide an abortion or engage in aiding and abetting conduct and by "authoriz[ing] or encourage[ing] arbitrary and discriminatory enforcement, or fail[ing] to provide fair warning of its prohibitions so that ordinary people may conform their conduct accordingly."[140]

SB8 was also void for vagueness because it "fail[ed] to adequately inform regulated parties and those charged with the law's enforcement of what conduct [was] prohibited and/or [led] to penalties,"[141] which were essentially "standardless."[142] Plaintiffs further claimed that SB8 (iv) violated their First and Fourteenth Amendment rights to freedom of speech and petition, as it prevented them, without adequate justification, to engage in the educational, lobbying, and funding activities in support of the constitutional right to abortion;[143] and that (v) Section 4 of SB8 governing attorney's fees and costs was preempted by federal law, that is, by Section 1988.[144]

In addition to seeking certification of a class of judges and of a class of clerks under Rule 23(b)(1)(A) or Rule 23(b)(2), the plaintiffs sought a

134. *Id.* at ¶ 82.
135. *Id.* at ¶¶ 155-58.
136. 42 U.S.C. § 1988.
137. Whole Woman's Health II Complaint, at ¶¶ 131-33.
138. *Id.* at ¶¶ 134-38.
139. *Id.* at ¶¶ 139-45.
140. *Id.* at ¶ 141.
141. *Id.* at ¶ 143.
142. *Id.* at ¶ 142.
143. *Id.* at ¶¶ 146-49.
144. *Id.* at ¶¶ 155-58.

declaratory judgment declaring SB8 violative of the First and Fourteenth Amendments to the U.S. Constitution and the Supremacy Clause as well as of Sections 1983 and 1988; a preliminary injunctive relief to restrain defendants from enforcing the Texas law before it went into effect on September 1, 2021; and attorney's fees and costs under Section1988.[145] The defendants filed motions to dismiss the action on various grounds. Most notable were the motions filed by Judge Jackson and Dickson.

Judge Jackson argued that the federal court had no jurisdiction to hear plaintiffs' claims on justiciability and sovereign immunity grounds.[146] With regard to justiciability, Judge Jackson noted that

> the Fifth Circuit explained over forty years ago, [that] "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.'" As such "[t]he [Article III] requirement of a justiciable controversy is not satisfied where a judge acts in his adjudicatory capacity."[147]

Judge Jackson explained that "a judge's posture is simply 'not in any sense the posture of an adversary to the contentions made on either side of the case.'"[148] And Section 1983 expressly prohibits injunctive relief against "a judicial officer for an act or omission taken in such officer's judicial capacity" unless "a declaratory decree was violated or declaratory relief was unavailable."[149]

The lack of jurisdiction, according to Judge Jackson, was then confirmed when running a standing analysis. More precisely, according to Judge Jackson, the injury was not traceable to the conduct of the defendant complained of,[150] as it would be the result of third parties' action filed against the plaintiffs in state courts, which parties are not before the court, and over which Judge Jackson would have no control.[151]

The judge also argued that the jurisdiction of the federal court was barred by the sovereign immunity doctrine, as the only way for this action to proceed would be under *Ex parte Young*,[152] but "the Supreme Court

145. *Id*. at 46-47.

146. Defendant Judge Jackson's 12(b)(1) Motion to Dismiss, Whole Woman's Health v. Jackson, 2021 WL 5141227, at 2 (W.D. Tex. Aug. 4, 2021).

147. *Id*. at 4.

148. *Id*. at 5.

149. *Id*.

150. *Id.*

151. *Id*. at 6.

152. 209 U.S. 123 (1980).

expressly explained in *Ex parte Young* that 'the 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."[153]

Besides supporting and expanding on Judge Jackson's objections—as well as the related Clerk's arguments and objections—Dickson's motion to dismiss also claimed lack of plaintiffs' standing as to him. Similarly to Judge Jackson, Dickson argued that the plaintiffs had no injury in fact that could be traced to Dickson, as "Mr. Dickson has no intention of suing anyone under section 3 because he is expecting each of the plaintiffs to comply with the statute rather than expose themselves to private civil-enforcement lawsuits."[154] Thus, "there is no Article III 'case or controversy' between the plaintiffs and Mr. Dickson."[155] He further pushed that "[t]he plaintiffs cannot sue Mr. Dickson if they are unwilling to allege that they intend to violate Senate Bill 8, because Mr. Dickson cannot inflict Article III injury on the plaintiffs unless they violate the statute and expose themselves to private civil enforcement lawsuit."[156] The injury, Dickson argued, must be "certainly impending," while plaintiffs' claimed injury against Dickson is only "conjectural" and "hypothetical" because it only relates to the "possibility that Mr. Dickson might someday sue."[157] Furthermore, according to Dickson, even assuming the federal court would find that the plaintiffs had an injury sufficient to support standing and an Article III case or controversy, that injury is not redressable by the federal court. Even if the federal court enjoined Dickson from suing, there would be countless other suits that would ensue seeking to recover $10,000 for each illegal abortion the plaintiffs were to perform or assist.[158] The injury—monetary exposure—that the plaintiffs were claiming, was inflicted to them by the statute, not by Dickson, and would not be reduced by an injunction issued against Dickson.[159]

By order dated August 25, 2021, Judge Robert Pitman denied the defendants' motion to dismiss, holding that the plaintiffs had an injury sufficient to support standing, that judges and clerks were sufficiently adverse to the plaintiffs to satisfy the Article III "case or controversy"

153. Judge Jackson's Motion to Dismiss, at 7.

154. Defendant Mark Lee Dickson's Motion to Dismiss for Lack of Subject-Matter Jurisdiction, Whole Woman's Health v. Jackson, 2021 WL 8014519, at 4 (W.D. Tex. Aug. 5, 2021).

155. *Id.* at 5.

156. *Id*. at 6.

157. *Id*. at 9.

158. *Id*. at 7.

159. *Id*. at 7-8.

requirement, and that their injury was traceable to the conduct of such defendants and redressable.[160] When describing the law of justiciability, Judge Pitman noted:

> To establish Article III standing, a plaintiff must demonstrate that she has "(1) suffered an injury-in-fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." "For a threatened future injury to satisfy the imminence requirement, there must be at least *a 'substantial risk' that the injury will occur*." *Stringer v. Whitley*, 942 F.3d 715, 721 (5th Cir. 2019) (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014)). A plaintiff suffers injury-in-fact for purposes of "bring[ing] a preenforcement suit when he has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." *Susan B. Anthony List*, 573 U.S. at 160. A credible threat of enforcement exists when it is not "imaginary or wholly speculative." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 302 (1979).
>
> The purpose of these requirements is to ensure that plaintiffs have "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination." Further, "[t]he injury alleged as an Article III injury-in-fact need not be substantial; it need not measure more than an identifiable trifle." This is because the injury-in-fact requirement under Article III is qualitative, not quantitative, in nature."[161]

Thus, Judge Pitman observed:

> Initially, the Court notes that Plaintiffs have likely demonstrated that their claims against the Judicial Defendants satisfy Article III's case or controversy requirement because while Judicial Defendants have indicated that they believe they must accept and adjudicate private enforcement actions brought under S.B. 8, Plaintiffs on the other hand claim that any such action would violate their constitutional rights.
>
> Moreover, in contrast to the cases cited by the Judicial Defendants, where the Fifth Circuit found judges to be improper defendants in Section 1983 challenges to state statutes where other government defendants were more properly named, here there are no other

160. Whole Woman's Health v. Jackson, 556 F. Supp. 3d 595, 616, 622, 625-26 (W.D. Tex. 2021).

161. *Id.* at 609 (emphasis added; some internal citations omitted).

> government enforcers against whom Plaintiffs may bring a federal suit regarding S.B. 8's constitutionality. . . .
>
> Furthermore, courts have acknowledged that state judges may be proper defendants in constitutional challenges to state statutes where, as here, it is not possible to enjoin any "other parties with the authority to seek relief under the statute." Here, the naming of the Judicial Defendants is "necessary" for Plaintiffs to seek "full relief" for the alleged violations of their constitutional rights that will occur if the Judicial Defendants use their authority to force Plaintiffs to participate in S.B. 8 enforcement actions.[162]

Addressing the Judicial Defendants' objections, Judge Pitman observed:

> Recognizing that their arguments would essentially prohibit Plaintiffs from naming any state official in a federal lawsuit challenging the constitutionality of a state statute structured like S.B. 8, the Judicial Defendants suggest that Plaintiffs should instead wait to be sued in state court, and then raise the defenses available to them under S.B. 8 in such an enforcement action. This argument sidesteps the fact that if this Court were to dismiss the Judicial Defendants for lack of a case or controversy, Plaintiffs would have no avenue to challenge the constitutionality of S.B. 8 outside of an enforcement action brought against them under S.B. 8—an action Plaintiffs allege would violate their constitutional rights in the first place. Even within an enforcement action, Plaintiffs' ability to raise the defense that the law is unconstitutional is severely limited under S.B. 8's private enforcement mechanism.
>
> Although the Judicial Defendants are correct that state courts can consider constitutional issues, the Court finds troubling the Judicial Defendants' suggestion that Plaintiffs should only be allowed to challenge S.B. 8 through the "defenses available to them under the [same] statute" when Plaintiffs' claim is that S.B. 8 cannot be enforced against them at all without violating the Constitution. Because there are no other state officials against whom Plaintiffs might seek relief in federal court for S.B. 8's alleged constitutional violations and state judicial defendants may be properly named in federal suits seeking equitable relief to vindicate federal constitutional rights, the Court finds that the Judicial Defendants are sufficiently adverse to Plaintiffs in S.B. 8 actions to bring this action within Article III's case or controversy requirement.[163]

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162. *Id.* at 619-20.
163. *Id.* at 620-21.

Judge Pitman explained how here, judges were not immune from suit, as they were not acting in a pure adjudicative capacity, as SB8 had empowered them to take on an enforcement role in the law's application:

> Not only are the Judicial Defendants the only state officials tasked with directly enforcing S.B. 8 against Plaintiffs, but Jackson has even publicly stat[ed] that he is one of "the judges who enforce [S.B. 8] in east Texas." Jackson's statement regarding the enforcement power state courts wield under S.B. 8, coupled with the provisions of S.B. 8 that so obviously skew in favor of claimants, bring this case outside the scope of cases where the Fifth Circuit has found that state judicial officers acted purely in their adjudicatory roles.
>
> For example, while the *Bauer* court found that judges played a purely adjudicatory role in the statute at issue in part because of the "safeguards" built into the statute before a guardianship could be imposed, here S.B. 8 contains no such "safeguards" for defendants in S.B. 8 enforcement actions. In fact, S.B 8 does just the opposite by purporting to dictate how state courts hear S.B. 8 enforcement actions, including by eliminating non-mutual issue preclusion and claim preclusion, modifying federal constitutional defenses, and prohibiting state courts' ability to rely on non-binding precedent or even assess whether a claimant has been injured by a violation of S.B. 8.[164]

Also, according to Judge Pitman:

> Section 1983 was designed to allow individuals to challenge unconstitutional actions by members of state government, whether they be part of the "executive, legislative, or judicial" branches of that state government. In 1996, Congress even amended Section 1983 to make clear that an action brought seeking declaratory relief may be "brought against a judicial officer for an act or omission taken in such officer's judicial capacity," and injunctive relief may be brought against a judicial officer who violates a declaratory decree or against whom declaratory relief is not available. Here, as noted above, the Judicial Defendants' enforcement role in S.B. 8's private enforcement mechanism brings them within the carveouts courts have created to allow Section 1983 challenges to laws to proceed against state court officials under the *Ex parte Young* exception to sovereign immunity. Plaintiffs' claims are thus not barred by sovereign immunity.[165]

The plaintiffs' claim also satisfied the injury, causation, and redressability elements of standing, as "there need not be a pending

164. *Id.* at 621-22 (internal citations omitted).
165. *Id.* at 623.

enforcement action against Plaintiffs to confer Plaintiffs standing over claims alleging imminent constitutional harm once S.B. 8 takes effect."[166] And "[e]ven if required to allege an intent to violate S.B. 8, Plaintiffs have stated that they provide abortions that would violate the six-week ban and 'desire to continue to'" provide the medical care and other forms of support banned by S.B. 8."[167] Furthermore, also considering the entire scheme of SB8 which encourages and incentivizes plaintiffs to sue to enforce SB8, Judge Pitman held that plaintiffs had demonstrated a "credible and imminent"[168] threat of enforcement action, and an injury in fact sufficient to support standing.[169] The injury claimed by the plaintiffs was traceable to the conduct of the Judge and Clerk.[170] And the plaintiffs' injury was redressable, as an order declaring SB8 unconstitutional would deter private parties from bringing enforcement actions under the law and presumably preclude the Judicial Defendants from adjudicating lawsuits under the same.[171]

Plaintiffs' claim against Dickson was also justiciable. The judge noted that "[plaintiffs] need not allege they intend to violate a challenged statute to [have] standing."[172] Relying on *Susan B. Anthony List*,[173] the judge noted how "the Supreme Court has repeatedly stated that plaintiffs need not plead that they plan to violate a law to have standing to challenge its constitutionality,"[174] and that, in any event, Dickson had demonstrated his intent to enforce SB8 if the plaintiffs violated the law.[175] And even if enjoying Dickson from suing the plaintiffs would not prevent the countless actions other parties might file against the plaintiffs when plaintiffs would violate the Texas law in the future, an order of the federal court favorable to the plaintiffs would at least prevent the private penalties and lawsuits by Dickson, and alleviate a discrete injury to plaintiffs.[176]

While plaintiffs' motion for a temporary restraining order and preliminary injunction barring defendants from enforcing the Texas law prior to the entry of final judgment was still pending before the district court, the defendants filed a notice of appeal of Judge Pitman's order

166. *Id.* at 623-24.
167. *Id.* at 624.
168. *Id.* at 625.
169. *Id.*
170. *Id.* at 626.
171. *Id.* at 627.
172. *Id.*
173. 573 U.S. 149 (2014).
174. *Id.* at 630-31.
175. *Id.* at 631.
176. *Id.* at 631-32.

denying their Rule 12(b)(1) motion to dismiss with the Fifth Circuit, and a motion to stay proceedings and vacate the preliminary-injunction hearing. The defendants also sought emergency relief from the Court of Appeals, arguing that the filing of the notice of appeal had automatically divested the trial court of jurisdiction of the case.[177] The plaintiffs-appellees filed a letter with the Court of Appeals requesting that the Court refrain from resolving the stay motion or entering an administrative stay before they could file an opposition. They then filed opposition to the defendants-appellants' motion[178] arguing that the defendants had failed to meet their burden for the "extraordinary remedy" of a stay pending appeal. The district court granted defendants' motion to stay the proceeding as to the Judicial Defendants and the State Agency Defendants, based on their argument that the interlocutory appeal on sovereign immunity divested the court of jurisdiction, but denied a stay as to defendant Dickson and ordered the preliminary injunction hearing to proceed as scheduled with respect to the claims against the latter.[179] Later that day, plaintiffs filed an opposition to the Fifth Circuit motion to stay, combined with a motion to dismiss Dickson's appeal, as well as an emergency motion to expedite the appeal.[180] That evening, the court of appeals entered a temporary administrative stay of all district court proceedings, including the preliminary injunction hearing. Although Dickson had asked the court by letter to permit him to respond, the Fifth Circuit denied plaintiffs' motion to expedite the appeal and directed Dickson to file a combined response to plaintiffs' motion to dismiss his appeal and reply to plaintiffs' opposition to his emergency stay motion by 9 a.m. on August 31, the day after the preliminary injunction hearing was scheduled to take place, the day before the Texas law would come into effect. On August 29, 2021, plaintiffs filed emergency motions with the Fifth Circuit asking the court of appeals to (1) issue an injunction pending appeal; (2) vacate its administrative stay of the district court proceeding as to defendant Dickson; (3) vacate the district court's own stay of its proceedings as to

177. Defendants-Appellants' Opposed Emergency Motion to Stay Proceedings Pending Appeal and, alternatively, for a Temporary Administrative Stay Pending Consideration of this Motion at 5, Whole Woman's Health v. Jackson (5th Cir. Aug. 26, 2021).

178. *See* Plaintiffs-Appellees' Opposed Emergency Motion to Expedite Appeal, Whole Woman's Health v. Jackson (5th Cir. Aug. 27, 2021).

179. Order, Whole Woman's Health v. Jackson (W.D. Tex. Aug. 27, 2021) (unreported). *See also*, Motion to Dismiss Defendant-Appellant Mark Lee Dickson's Appeal and Opposition to Emergency Motion to Stay at 5, Whole Woman's Health v. Jackson.

180. *See* Plaintiffs'-Appellees Combined Motion to Dismiss Defendant-Appellant Mark Lee Dickson's Appeal and Opposition to Emergency Motion to Stay, Whole Woman's Health v. Jackson (5th Cir. Aug. 27, 2021).

government official defendants; and (4) in the alternative to vacatur of the stays, vacate the underlying district court order denying the motions to dismiss.[181] Later that day, the Fifth Circuit denied all plaintiffs' motions.[182]

A. The Plaintiffs' Emergency Application to the U.S. Supreme Court and the Court's Order of September 1, 2021

On August 30, 2021, plaintiffs-appellees filed an emergency application (the "Application") to the Honorable Samuel A. Alito, Jr., Associate Justice of the Supreme Court and Circuit Justice for the Fifth Circuit, seeking injunctive relief and order vacating the Fifth Circuit's stay of the district court proceeding.[183] More specifically, plaintiffs requested the Court to

> (1)Vacate the Fifth Circuit's administrative stay of the district court proceedings as to Respondent Mark Lee Dickson, who is not a government official, has never claimed sovereign immunity, and has no right to an immediate interlocutory appeal from an order denying sovereign immunity, and (2) vacate the district court's stay of its own proceedings as to the remaining Respondents, who are all government officials with specific authority to enforce compliance with S.B.8, because the district court incorrectly concluded that the notice of appeal necessarily divested it of jurisdiction to issue an order maintaining the status quo and preventing irreparable harm. In lieu of this court, the Court could vacate the district court order denying the motions to dismiss and remand this case to the Fifth Circuit with instructions to dismiss the appeal from that order as moot. Finally, if the Court needs additional time to consider this Application, it should enter appropriate interim relief.[184]

Under the All Writs Act, the Supreme Court has authority to issue injunctions when the applicant's claims "are likely to prevail," the denial of injunctive relief "would lead to irreparable injury," "granting relief would not harm the public interest," and the injunctive relief would be

181. *See* Plaintiffs-Appellees Emergency Motion for an Injunction Pending Appeal, Whole Woman's Health v. Jackson (5th Cir. Aug. 29, 2021).

182. Order, Whole Woman's Health v. Jackson (Fifth Cir. Aug. 29, 2021).

183. Emergency Application to Justice Alito for Writ of Injunction and, in the alternative, to Vacate Stays of District Court Proceedings (Aug. 30, 2021).

184. *Id.* at 3-4.

appropriate in aid of the Court's jurisdiction.[185] The order of the Court granting such an application doesn't need to serve as an expression of the Court's views on the merits of the case.[186]

In their Application, plaintiffs offered arguments in favor of each ground for relief. They pointed out that they were trying to enjoin the enforcement of an unconstitutional law, thus their claim presented "an indisputably clear case for relief;"[187] the denial of injunctive relief would lead to the irreparable injury to the fundamental constitutional rights of countless Texans, the All Writs Act being plaintiffs' last resort;[188] the balance of equities weighed heavily in favor of the injunction because, while the public would be irreparably harmed by the coming into effect of an unconstitutional law, defendants would face no harm from maintaining the status quo while their appeal proceeded;[189] and the injunctive relief would be in aid of the Court's jurisdiction because, considering the short duration of pregnancy and the typical length of appellate proceedings, the Court would be allowed to protect Texans' constitutional rights in between.[190] According to the plaintiffs, by maintaining the status quo, the relief requested would protect the constitutional rights of countless Texans, while the defendants would suffer no harm from an injunction pending appeal or vacatur of the stays.[191]

In the Application, plaintiffs repeated the arguments already raised before the district court and the Fifth Circuit that, with the Texas law, the State of Texas has attempted "to insulate this patently unconstitutional law from federal judicial review prior to enforcement"[192] barring government officials, such as local prosecutors and the health department, from directly enforcing the law. By deputizing private citizens to enforce the law, that is, "by outsourcing to private individuals the authority to enforce an unconstitutional law," the State of Texas had managed to adopt a law that allowed it to do precisely what the Constitution forbids.[193]

185. *See* All Writs Act, 28 U.S.C. § 1651(a); *see also* Roman Cath. Diocese of Brooklyn v. Cuomo, 592 U.S. ___, 141 S.Ct. 63, 65-66 (2020) (per curiam) (granting emergency injunctive relief to prevent likely constitutional violations from state law).

186. *See, e.g.*, Little Sisters of the Poor Home for the Aged v. Sebelius, 571 U.S. 1171, 1171 (2014).

187. Application, at 15.

188. *Id*. at 16.

189. *Id*.

190. *Id.*

191. *Id.*

192. Application, at 2.

193. *Id*. at 3.

The defendants opposed the plaintiffs' Application. Judge Jackson argued that the Application should be rejected because the injunction sought would fail to prevent any of the harm plaintiffs claimed would occur if the Texas law became effective as the Court could not expunge the law itself but only enjoin its enforcement.[194] Also, Judge Jackson repeated his arguments previously presented in support of his objection that the federal courts lacked jurisdiction over this case for lack of an Article III "case or controversy,"[195] and sovereign immunity barred the claims against the Judicial Defendants. Among other things, Judge Jackson argued[196] that plaintiffs' injury did not meet the *Clapper*[197] "certainly impending" standard,[198] plaintiffs' claims against the Judicial Defendants lacked standing,[199] and that the doctrine of sovereign immunity[200] and Section1983 barred the action.[201]

By order dated September 1, 2021, the Supreme Court denied the Application.[202] The Court's order opened up with the standard to grant an application for a stay or an injunction, the Court pointing out how, in order to prevail on such application, "an applicant must carry the burden of making a 'strong showing' that it is 'likely to succeed on the merits,' that it will be 'irreparably injured absent a stay,' that the balance of equities favors it, and that a stay is consistent with the public interest."[203] Without addressing the presence or absence of those requirements, though, the Court merely noted that the applicants had raised "serious questions regarding the constitutionality of the Texas law at issue,"[204] but their application also presented "complex and novel antecedent procedural questions on which they have not carried their burden."[205]

The complex and novel antecedent questions, according to the Court, included whether, under the circumstances, plaintiffs were asking the Court to enjoin the law itself rather than its enforcement—which would not be allowed, said the Court;[206] whether the defendants would seek to

194. Judge Jackson's Opposition to the Application, at 1.
195. *Id*. at 5.
196. *Id*.
197. *Clapper v. Amnesty Int'l*, 568 U.S. 398 (2013).
198. *Id.* at 409.
199. Judge Jackson's Opposition to the Application, at 7.
200. *Id*. at 12-16.
201. *Id*. at 19-23.
202. Whole Woman's Health v. Jackson, 141 S.Ct. 2494 (Sept. 1, 2021).
203. *Id*. at 2495.
204. *Id*.
205. *Id.*
206. *Id*.

enforce the Texas law[207] thus making plaintiffs' injury one that is "certainly impending" under *Clapper*;[208] and whether the Court could issue an injunction against state judges under *Ex parte Young*.[209] The Court pointed out, though, that the order did not intend to address the constitutionality of the Texas' law and would not preclude any other proper procedural challenge to it.

Chief Justice Roberts, joined by Justice Breyer and Justice Kagan, dissented. He would have granted preliminary relief to preserve the status quo ante—before the law went into effect—to allow courts to consider whether a state could avoid responsibility of its laws as the Texas legislature did.[210] While agreeing with the Court that the case presented antecedent novel and complex procedural questions, Chief Justice Roberts would have enjoined enforcement of SB8 to allow the district court and the Fifth Circuit the opportunity to consider such questions and the propriety of a preliminary relief pending consideration of the merits of the plaintiffs' claims.[211]

Citing *Planned Parenthood of Central Missouri v. Danforth*,[212] Justice Breyer, joined by Justice Sotomayor and Justice Kagan, dissenting, found state action on the part of Texas. Justice Breyer noted how a state cannot delegate a veto power over the right to obtain an abortion which itself is prohibited from exercising during the first trimester of pregnancy.[213] Thus, it should be possible "to permit lawsuits against a subset of delegates (say, those particularly likely to exercise the delegated powers),"[214] or "lawsuits against officials whose actions are necessary to implement the statute's enforcement powers."[215]

Justice Sotomayor, joined by Justice Breyer and Justice Kagan, dissented as well, calling the Texas law a "flagrantly unconstitutional law engineered to prohibit women from exercising their constitutional rights,"[216] through a scheme—that uses citizen bounty hunters—designed to make it more complicated for federal courts to review and enjoin the law on a statewide basis.[217] In strong disagreement with the majority's

207. *Id.*
208. 568 U.S. 398, 409 (2013).
209. 209 U.S. 123, 163 (1908); *See also Whole Woman's Health II*, 141 S.Ct. at 2495.
210. *Whole Woman's Health II*, 141 S.Ct. at 2496 (Roberts, C.J., dissenting).
211. *Id.*
212. 428 U.S. 52, 69 (1976).
213. *Whole Woman's Health II*, at 2496-97 (Breyer, J., dissenting).
214. *Id.*
215. *Id*. at 2497.
216. *Whole Woman's Health II*, 141 S.Ct. at 2498 (Sotomayor, J., dissenting).
217. *Id.*

opinion, Sotomayor pointed her fingers to the Court whom "[today] finally tells the Nation that it declined to act because, in short, the State's gambit worked."[218]

Finally, Justice Kagan, joined by Justice Breyer and Justice Sotomayor, dissented, observing how the Court's order rewarded Texas's scheme to insulate its law from judicial review by using the bounty hunters scheme.[219] Justice Kagan also criticized the use of the "shadow-docket" procedure,[220] and concluded by noting how "[t]he Court should not be so content to ignore its constitutional obligations to protect not only the rights of women, but also the sanctity of its precedents and the rule of law."[221]

B. The Department of Justice's Response Suit Against the State of Texas

On September 9, 2021, the United States filed an action against the State of Texas before the United States District Court for the Western District of Texas, Austin Division.[222] The United States sought a declaratory judgment declaring the Texas law invalid, and a preliminary and permanent injunction against the State of Texas—including its officers, employees and agents, and private parties who would enforce the Texas law—prohibiting enforcement of the law.[223] The federal government premised the legitimacy of the action on its "authority and responsibility to ensure that Texas cannot evade its obligations under the Constitution and deprive individuals of their constitutional rights by adopting a statutory scheme designed specifically to evade traditional mechanisms of federal judicial review."[224] The Texas law, the United States argued, conflicts with federal law by "purporting to prohibit federal agencies from carrying out their responsibilities under federal law related to abortion services"[225] and to subject federal employees and

218. *Id.* at 2499.

219. *Whole Woman's Health II*, 141 S.Ct. at 2500 (Kagan, J., dissenting).

220. "Shadow docket" procedure refers to the thousands of decisions that the Supreme Court hands down each term that "defy its normal procedural regularity." Unlike the 60-70 cases the Justices hear on the "merits" docket, where the Court receives full briefings, hears oral arguments, and delivers lengthy, signed opinions, cases decided by way of the "shadow docket" lack such public deliberation and transparency. William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. L. & LIBERTY J. 1 (2015).

221. *Whole Woman's Health II*, 141 S.Ct. at 2500 (Kagan, J., dissenting).

222. *See* Complaint, United States v. Texas, No. 1:21-cv-00796 (W.D. Tex. Sept. 9, 2021).

223. *Id.* at 26.

224. *Id.* at ¶ 2.

225. *Id.* at ¶ 5.

nongovernmental partners who perform their services under federal law[226] to civil liabilities and penalties.

More specifically, citing *In re Debs*,[227] the United States posed that the federal government could sue to challenge constitutional violations that affect the public at large,[228] and that such authority included the authority to seek injunctive and declaratory relief[229] against a state that infringes on such rights.[230]

By prohibiting abortion prior to viability, SB8 is "inconsistent with an 'unbroken line' of Supreme Court cases that prevent states from prohibiting abortion prior to viability without regard to the undue burden test."[231] But even if the undue-burden test were the appropriate framework, the Texas law limited range of available affirmative defense, including the limited scope of the evidence a defendant may rely on to prove undue burden,[232] thus distorting that test.[233] Furthermore, by excluding public enforcement of the law and by assigning enforcement exclusively to private citizens incentivized to do so by the statutory damages bounty and attorney's fees and cost, the Texas law "was specifically designed to evade ordinary constitutional review,"[234] and it required state courts to grant injunctive relief and statutory damages to bar constitutionally protected activity.[235] Deputizing private citizens, though, could not eliminate state action under the circumstances:

> "It is doubtless true that a State may act through different agencies" including "its legislative, its executive, or its judicial authorities; and the prohibitions of the amendment extend to all actions of the State denying equal protection of the laws, whether it be action by one of these agencies or by another." *Virginia v. Rives*, 100 U.S. 313, 318 (1879). Awarding the monetary relief that S.B.8 authorizes—to plaintiffs who need not demonstrate any injury or other connection to the underlying abortion procedure—constitutes state activity designed to violate the Fourteenth Amendment rights of women in Texas. "That the action of state courts and of judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by

226. *Id*.
227. 158 U.S. 564, 583-85 (1895).
228. Texas Complaint, at ¶ 13.
229. *Id.* at ¶ 14.
230. *Id*. at ¶ 15.
231. *Id*. at ¶ 25.
232. *Id.*
233. *Id*. at ¶ 25.
234. *Id*. at ¶ 28.
235. *Id.*

> decisions of th[e] [Supreme] Court." *Shelley v. Kraemer*, 334 U.S. 1, 14 (1948). Thus, while Texas has gone to unprecedented lengths to cloak its attack on constitutionally protected rights behind a nominally private cause of action, it nonetheless has compelled its judicial branch to serve an enforcer's role. "State action," as that phrase is understood for the purposes of the Fourteenth Amendment, refers to exertions of state power in all forms.[236]

Thus, by exercising "powers traditionally exclusively reserved to the State,"[237] the deputized private individuals were state actors engaged in conduct that would be unconstitutional if engaged in by the State or if Texas had sanctioned their conduct.[238]

According to the federal government, SB8 also violated the Commerce Clause, as the law forced women wishing to obtain an abortion to travel out of Texas to other states in order to exercise their constitutional rights, thus hindering businesses and non-profits engaged in this commercial activity.[239] Also, SB8 prohibited certain interstate commercial transactions involving Texas, as it applied to monetary transfers into the State of Texas if they might facilitate abortion. SB8 might apply to insurance companies throughout the United States that cover abortion services provided in violation of the statute, as well as banks facilitating transfers of funds to reimburse women receiving restricted abortions. And the law might also apply to medical device transactions involving out-of-state sellers, including, for example, the sale of medical equipment that could be used to perform abortions outlawed under the Texas law.[240]

Because of all the above, the United States claimed to be injured by SB8 in several respects: the law (i) deprived women in Texas of their constitutional rights while seeking to prevent them from vindicating those rights in federal courts;[241] (ii) it sought to prevent judicial review;[242] and (iii) it restricted the operations of the federal government and conflicted with federal law.[243]

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236. *Id*. at ¶ 32.
237. Manhattan Cmty. Access Corp. v. Halleck, 587 U.S. ___, 139 S.Ct. 1921, 1928-29 (2019).
238. Texas Complaint, at ¶ 35.
239. *Id*. at ¶ 36.
240. *Id*. at ¶ 40.
241. *Id*. at ¶¶ 41-44.
242. *Id*. at ¶ 45.
243. *Id*. at ¶¶ 46-79.

The State of Texas responded to the lawsuit by filing, among others, a motion to dismiss the action,[244] because "Article III does not permit courts to hear 'a proceeding against the government in its sovereign capacity' when 'the only judgment required is to settle the doubtful character of the legislation in question.'"[245] Also, according to the State of Texas, it was not true that SB8 evaded judicial review, as the law "can be reviewed in the same way that virtually all of state tort law is: State-court defendants raise constitutional defenses before neutral judges sworn to follow the U.S. Constitution and, if necessary, appeal to the U.S. Supreme Court."[246]

Furthermore, both injunctions that the federal government was seeking—one against private individuals who might enforce SB8, and another against state courts that might adjudicate those actions—were foreclosed by the precedent, as a court "cannot decide that absent third parties are subject to an injunction without letting them be heard."[247] Also, an injunction against a state court would be "a violation of the whole scheme of our government under *Ex parte Young*[248] and it would lack the required adversity of legal interests, which, as required by *Bauer v. Texas*,[249] would be missing when judges act in their adjudicatory capacity as "disinterested neutrals lacking a personal interest in the outcome of the controversy."

Furthermore, given that the federal government irreparable injury "flow[ed] from the mere prospect of future liability—a preliminary injunction would not help"[250] and the government's injury was not "certainly impending."[251] This was because "[w]hether any given state court will find the defendant liable is a matter of pure speculation. If a state-court defendant presented a meritorious constitutional defense, then the state judge would be duty-bound to dismiss the case. But the federal government presented no evidence suggesting that state judges will fail to do so."[252]

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244. Defendant's Motion to Dismiss, Response to Plaintiff's Motion for a Preliminary Injunction, and Motion for Stay Pending Appeal, United States v. Texas (W.D. Tex. Sept. 29, 2021).

245. *Id.* at 1 (citing Muskarat v. United States, 219 U.S. 346, 361-62 (1991))

246. *Id*. at 1 (citations omitted).

247. *Id*. at 2.

248. *Id.*

249. 341 F. 3d 352, 359 (5th Cir. 2003); *see also* Defendant's Motion to Dismiss at 10, United States v. Texas.

250. Texas Defendant's Motion to Dismiss, at 2.

251. *Id*. at 11.

252. *Id.*

Also, the State of Texas argued, there was no Article III case or controversy here, because the State of Texas did not have the power to enforce SB8 and the complaint merely sought to settle the character of the Texas law.[253] With reference to the federal government's Commerce Clause claim, the State of Texas argued that the government had not offered any actual evidence that SB8 burdened interstate commerce, but rather that it stimulated it, by stimulating interstate travel.[254]

Section 5 of the Fourteenth Amendment to the U.S. Constitution, posed the State of Texas, gives Congress, and not the other branches of the government, the "power to enforce, by appropriate legislation," the Fourteenth Amendment, and Congress had exercised that power by passing Section 1983, which creates a private cause of action for private individuals to sue local government as well as local and state officials to vindicate almost all federal rights. Congress has also passed 18 U.S.C. §§ 241-42, an analogous criminal statute empowering the federal government to bring criminal prosecutions. But Congress had not provided a similarly broad civil cause of action for the federal government against the states,[255] only limited causes of actions for violation of constitutional rights in limited circumstances,[256] and various statutory rights, including statutory rights related to abortion, as in 18 U.S.C. §248(c)(2)(A),[257] and 42 U.S.C. §§ 2000a-5(a), 2000e-5(f)(1).[258]

C. Judge Pitman's Order in United States v. Texas

On October 6, 2021, with a 113-page order, the federal district court granted the federal government's request for a preliminary injunction against the state, state actors, and private individuals,[259] as well as the government's request for a stay of all state court proceedings brought under the Texas law.[260] Judge Pitman observed that, "[b]y imposing

253. *Id*. at 5-6.

254. *Id*. at 29.

255. *Id*. at 31.

256. *Id.* at 31-32.

257. 18 U.S.C. §248(c)(2)(A) provides that "[i]f the Attorney General of the United States has reasonable cause to believe that any person or group of persons is being, has been, or may be injured by conduct constituting a violation of [the Freedom of Access to Clinic Entrances Act], the Attorney General may commence a civil action in any appropriate United States District Court." *Id*.

258. Texas Defendant's Motion to Dismiss, at 32.

259. United States v. Texas, 2021 WL 4593319 (W.D. Tex. Oct. 6, 2021).

260. *Id.* at *30. With reference to such stay, Judge Pitman observed how, while the Anti-Injunction Act, 28 U.S.C. §2283, generally prohibits federal courts from enjoying state court proceedings, per *In re Grand Jury Subpoena*, 866 F.3d 231, 244 (5th Cir. 2017), that restriction does not apply when the United States seeks the injunction.

damages liability of $10,000 or more on any person performing, inducing, aiding, or abetting an abortion, S.B.8 exposes the federal government, its employees, and its contractors to monetary injury,"[261] and that "[u]nder S.B.8, these employees and contractors must choose between facing this civil liability and damages or violating federal regulations, statutes, or case law."[262] The injury was "particularized" as the impacted agencies were agencies of the federal government, and the harm was "actual" as SB8 was now in effect.[263]

With reference to the United States' "sovereign interest" in ensuring that the states are not able to enact laws in plain violation of the Constitution, Judge Pitman held that "there is no doubt that harms to the exercise of Constitutional rights is a concrete harm for Article III purposes,"[264] which is actual,[265] and the federal government, like the state government, had standing to file suits as *parens patriae* for probable violations of its citizens' constitutional rights,[266] its particularized interest laying in its quasi-sovereign interest identified by that "set of interests that the State has in the well-being of its populace,"[267] and in its sovereign interest in preventing the harm that a state might inflict on its citizens by depriving them of their constitutional rights.[268] And, in the alternative, said Judge Pitman, the federal government had standing under *In Re Debs*,[269] in view of the obligations which the federal government is under to promote the interest of all, and to prevent the wrongdoing resulting in injury to the general welfare, which is often sufficient to give it standing in court.[270]

The federal judge also noted that the Texas law burdened interstate commerce "[b]y extending liability to persons anywhere in the country,"[271] as "S.B.8's structure all but ensures that it will implicate commerce across state lines—whether through insurance companies reimbursing Texas abortions, banks processing payments, medical suppliers outfitting providers, or persons transporting patients to their appointments."[272] Also, the judge observed, SB8 was pushing individuals

261. *Texas*, 2021 WL 4593319, at *13.
262. *Id.*
263. *Id.*
264. *Id*. at *14.
265. *Id.*
266. *Id*. at *15.
267. *Id.*
268. *Id*. at *16.
269. 158 U.S. 564 (1895).
270. *Id*. at 584.
271. *Texas*, 2021 WL 4593319, at *18.
272. *Id*.

seeking abortions into other states, and this stream across state lines burdened clinics in nearby states, impeding pregnant individuals in surrounding states from accessing, all of which was sufficient to support the United States' rights to sue in this case.[273] The injuries the federal government claimed were directly related to the State of Texas and the Texas law,[274] and the unavailability of redress is what made "an injunction the proper remedy—indeed, the only remedy for this clear constitutional violation."[275]

The judge also clarified that, to allow the government action to proceed, there was no need for a cause of action created by Congress as "traditional principles of equity allow the United States to seek an injunction to protect its sovereign rights, and the fundamental rights of its citizens under the circumstances present here,"[276] and "equitable remedies need not be rooted in an act of Congress either."[277] The judge added,

> this case strikes at the core function of the equitable cause of action, as, "[w]hether acting through its judiciary or through its Legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it." The American legal system cannot abide a situation where constitutional rights are only as good as the states allow—"[t]o impose on [the United States] the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments, which might disappoint its most important designs. . . . ." *M'Culloch v. Maryland*, 17 U.S. 316, 424 (1819).[278]

The United States, Judge Pitman explained, is a proper plaintiff in equity, as "the Constitution contemplates suits among the members of the federal system" including those "commenced and prosecuted against a State in

273. *Id.*
274. *Id.* at *18-19.
275. *Id.* at *20.
276. *Id.*
277. *Id.* at *26-28.
278. *Id.*

the name of the United States."[279] And the State,[280] state actors,[281] and private citizens, as state actors, are not immune from such lawsuit.[282]

The judge finally found that the government had shown the existence of the requirements for the granting of the preliminary injunction, i.e., likelihood of success on the merits of its claim—given the patent unconstitutionality of the Texas law,[283] irreparable harm,[284] and the balance of equities and public interest weighing in favor of granting the injunction.[285]

On October 6, 2021, the State of Texas appealed Judge Pitman's order before the Fifth Circuit. The states of Massachusetts, California, Colorado, Connecticut, Delaware, Hawai'i, Illinois, Maryland, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, the District of Columbia, and the Attorney General of North Carolina filed an amicus brief in support of the federal government's motion for a temporary restraining order and preliminary injunction.[286] Meanwhile, Erick Graham, Jeff Tuley, and Mistie Sharp, Texas residents interested in suing those who violate the Texas law, sought and were granted right to intervene in the action.[287]

With a per curiam opinion dated October 14, 2021, the Fifth Circuit granted the emergency motions to stay the preliminary injunction issued by Judge Pitman, pending appeal.[288]

D. The Two Petitions for Writ before the U.S. Supreme Court

In *Whole Woman's Health v. Jackson*, on September 23, 2021, plaintiffs petitioned the U.S. Supreme Court before judgment that would

279. Alden v. Maine, 527 U.S. 706, 755-56 (1999); *Texas*, 2021 WL 4593319, at *22.

280. The state doesn't enjoy sovereign immunity when sued by the federal government. *Texas*, 2021 WL 4593319, at *28-30.

281. *Id.* at *31-33.

282. *Id*. at *33-35.

283. *Id*. at *35-49.

284. *Id*. at *49-50.

285. *Id*. at *50-51.

286. *See* [Proposed] Amici Curiae Brief of Massachusetts, California, Colorado, Connecticut, Delaware, the District of Columbia, Hawai'i, Illinois, Maryland, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, the District of Columbia, and the Attorney General of North Carolina in support of Plaintiff United States of America's Motion for a Temporary Restraining Order and Preliminary Injunction, United States v. Texas.

287. *See* Motion to Intervene, United States v. Texas (W.D. Tex. Sept. 22, 2021) (motion of intervenors Erick Graham, Jeff Tuley, and Mistie Sharp).

288. United States v. Texas, 2021 WL 4786458 (5th Cir. 2021).

be rendered by the Fifth Circuit in the case pending against Judge Jackson and others, asking the Court to answer the question of "whether a State can insulate from federal court-review a law that prohibits the exercise of a constitutional right by delegating to the general public the authority to enforce that prohibition through civil actions."[289] On October 22, 2021, the Court granted the plaintiffs' petition[290] and set the case for oral arguments on November 1, 2021.[291]

In the case *United States v. Texas*, repeating the same arguments raised in the proceeding below, the federal government filed an application to the U.S. Supreme Court to vacate the Fifth Circuit's stay of the federal district court's injunction,[292] asking the Court to construe the application as petition for writ of certiorari to be set for briefing and argument for this Term.[293] The Court denied the request to vacate or stay application, but granted the petition for writ limited to the question of whether the United States "may bring suit in federal court and obtain injunctive or declaratory relief against the State, state court judges, state court clerks, other state officials, or all private parties to prohibit S.B.8 from being enforced."[294] The petition was also set for oral arguments on November 1, 2021. Again, Justice Sotomayor voiced her (partial dissent), noting how

> [f]or the second time, the Court is presented with an application to enjoin a statute enacted in open disregard of the constitutional rights of women seeking abortion care in Texas. For the second time, the Court declines to act immediately to protect these women from grave and irreparable harm. The Court is right to calendar this application for argument and to grant certiorari before judgment in both this case and *Whole Woman's Health v. Jackson*, in recognition of the public importance of the issues these cases raise. The promise of future adjudication offers cold comfort, however, for Texas women seeking abortion care, who are entitled to relief now. These women will suffer personal harm from delaying their medical care, and as their pregnancies progress, they may even be unable to obtain abortion care altogether. Because every day the Court fails to grant relief is devastating, both for individual women and for our

289. *See* Petition for Writ of Certiorari, Whole Woman's Health v. Jackson.

290. *Id.*

291. *See* Order, Whole Woman's Health v. Jackson (granting plaintiffs' petition for writ of certiorari).

292. *See* United States v. Texas, United States' Application to Vacate Stay of Preliminary Injunction Issued by the United States Court of Appeals for the Fifth Circuit.

293. *Id.* at 38-39.

294. Order at *1, United States v. Texas, 2021 WL 4928618 (granting U.S's petition for writ of certiorari).

> constitutional system as a whole, I dissent from the Court's refusal to stay administratively the Fifth Circuit's order.[295]

She also observed how the Court's delay in deciding on the constitutionality of the Texas law "enables continued and irreparable harm to women seeking abortion care and providers of such care in Texas,"[296] and every day that this law remains in effect is a day in which Texas' "patently unconstitutional"[297] legislative "tactics are rewarded,"[298] and every day the scheme succeeds increases the likelihood that it will be adapted to attack other federal constitutional rights."[299]

Blanca Telephone Company "in support of neither party"[300] filed an amicus brief in *United States v. Texas*, denouncing Texas's use of private citizens to enforce laws applicable to it, which it is litigating in a separate action;[301] and the Firearms Policy Coalition filed an amicus curiae in support of the federal government in *Whole Woman's Health v. Jackson*,[302] as it was concerned that "the approach used by Texas to avoid pre-enforcement review of its restriction on abortion and its delegation of enforcement to private litigants could just as easily be used by other States to restrict First and Second Amendment rights or, indeed, virtually any settled or debated constitutional right."[303]

On November 1, 2021, the Court held oral arguments in *Whole Woman's Health v. Jackson* and *United States v. Texas*,[304] and on

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295. *Id.*

296. *Id.* at *2 (Sotomayor, J., concurring in part and dissenting in part).

297. *Id.* at *1.

298. *Id.* at *3.

299. *Id.*

300. *See* Amicus Brief for Blanca Telephone Company, United States v. Texas.

301. *Id.* at 3.

302. Amicus Brief for Firearms Policy Coalition, Whole Woman's Health v. Jackson.

303. Firearms Policy Coalition Brief, at 1.

304. Oral argument in *Dobbs v. Jackson Women's Health Organization*, No. 19-1392, was held on December 1, 2021. There, the questions presented were: "1. Whether all pre-viability prohibitions on elective abortions are unconstitutional. 2. Whether the validity of a pre-viability law that protects women's health, the dignity of unborn children, and the integrity of the medical profession and society should be analyzed under Casey's "undue burden" standard or Hellerstedt's balancing of benefits and burdens. 3. Whether abortion providers have third-party standing to invalidate a law that protects women's health from the dangers of late-term abortions." The law under review is the 2018 Mississippi Gestational Age Act that prohibits abortions after 15 weeks' gestational age only in medical emergencies or for severe fetal abnormality. *See* Petition for Writ of Certiorari, Dobbs v. Jackson Women's Health Org., at 1-2. Also, on September 27, 2021, a three judge panel of the Eleventh Circuit decided to stay its decision as to whether overrule the district court opinion that had permanently enjoined the enforcement of a 2019 Georgia law that would have banned most abortions after a "detectable human heartbeat," which is, after six weeks into a pregnancy, like the Texas law, waiting to see what the U.S. Supreme Court decides in *Dobbs* and *Whole Woman's Health*. *See SisterSong Women of Color Rep. v. Gov. of the State of Georgia*, No. 20-13024 (11th Cir. Aug 11,

December 10, 2021, the Court decided *Whole Woman's Health v. Jackson*[305] and denied, as improvidently granted, the petition originally granted in *United States v. Texas*.[306]

In *Whole Woman's Health v. Jackson*, an opinion authored by Justice Gorsuch except as to Part II-C, the Court, answering the question of "whether certain abortion providers can pursue a pre-enforcement challenge"[307] to SB8, concluded that "such an action is permissible against some of the named defendants but not others."[308] And because "[i]n this preliminary posture, the ultimate merits question—whether S.B.8 is consistent with the Federal Constitution—[was] not before the Court,"[309] the Court turned to the matter before it, that is, the sovereign immunity objection raised by the state-court judge, Austin Jackson, and the state-court clerk, Penny Clarkston.[310]

The plaintiffs were seeking an order enjoining all state-court clerks from docketing SB8 cases and all state court-judges from hearing them, but the Court, relying on *Alden v. Maine*[311] noted that "[a]lmost immediately . . . petitioners' theory confronts a difficulty. Generally, States are immune from suit under the terms of the Eleventh Amendment and the doctrine of sovereign immunity."[312] The Court continued,

> To be sure, in *Ex parte Young*, this Court recognized a narrow exception grounded in traditional equity practice—one that allows certain private parties to seek judicial orders in federal court preventing state executive officials from enforcing state laws that are contrary to federal law. But as *Ex parte Young* explained, this traditional exception does not normally permit federal courts to issue injunctions against state court judges or clerks. Usually, those individuals do not enforce state laws as executive officials might; instead, they work to resolve disputes between parties. If a state court errs in its rulings, too, the traditional remedy has been some form of appeal, including to this Court, not the entry of an *ex ante* injunction preventing the state court from hearing cases. As *Ex*

2020). Meanwhile, at least six other states—North Dakota, Mississippi, Indiana, Florida, South Dakota, and Arkansas—seem to be considering emulating the Texas law. *See, e.g.*, https://abcnews.go.com/Politics/states-lawmakers-copy-texas-abortion-law/story?id=79818701/; https://www.theguardian.com/world/2021/sep/03/texas-abortion-republicans-six-states-arkansas-florida-indiana-mississippi-north-south-dakota/

305. 142 S.Ct. 522 (2021).
306. 142 S.Ct. 522 (2021) (cert. dismissed as improvidently granted).
307. *Whole Woman's Health II*, 142 S.Ct. 529 (2021).
308. *Id*. at 530.
309. *Id*. at 531.
310. *Id*. at 532.
311. 527 U.S. 706, 713 (1999).
312. *Whole Woman's Health II*, 142 S.Ct. at 531-32.

> *Parte Young* put it, "an injunction against a state court" or its "machinery" "would be a violation of the whole scheme of our Government."[313]

And the necessary adversity required by the "case or controversy" requirement of Article III, section 2 of the Constitution would be missing too:

> Article III of the Constitution affords federal courts the power to resolve only "actual controversies arising between adverse litigants." Private parties who seek to bring S. B. 8 suits in state court may be litigants adverse to the petitioners. But the state-court clerks who docket those disputes and the state-court judges who decide them generally are not. Clerks serve to file cases as they arrive, not to participate as adversaries in those disputes. Judges exist to resolve controversies about a law's meaning or its conformance to the Federal and State Constitutions, not to wage battle as contestants in the parties' litigation. As this Court has explained, "no case or controversy" exists "between a judge who adjudicates claims under a statute and a litigant who attacks the constitutionality of the statute."[314]

And then, observed the Court, the remedy plaintiffs were seeking was problematic, as it would require clerks to consider the substance of the filings they docket before deciding whether they can file them, and it would confer federal judges "the power to supervise 'the operations of government' and reimagine from the ground up the job description of Texas state-court clerks."[315] And, the Court observed, plaintiffs had not offered any limiting principle to their theory. If federal judges could enjoin state courts and clerks from entertaining disputes between private parties under SB8, they could also prohibit state courts and clerks from hearing and docketing disputes between private parties under other state laws.[316]

The Court stressed how *Ex Parte Young* doesn't allow actions against judges, and *Shelley v. Kraemer*[317] is not to the contrary, noted the Court, because "it did not even involve a pre-enforcement challenge against any state-official defendant," and there the defendants brought a constitutional defense against private parties seeking to enforce a restrictive covenant, like plaintiffs would do in this case in any SB8 enforcement action brought against them. Also, the jurisprudence cited by the parties and by

313. *Id.* at 532 (internal citations omitted).
314. *Id.* (internal citations omitted).
315. *Id.*
316. *Id.* at 532-33.
317. 334 U.S. 1 (1948).

the other members of the Court did not suggest that the Court could hold the judges immune while allowing the action for injunctive relief to proceed against state-court clerks.[318]

The Court continued and observed how the plaintiffs' request of an injunction against the Texas Attorney General fared no better, as the Attorney General had no enforcement authority under SB8.[319] But even "[s]upposing the attorney general did have some enforcement authority under S.B.8., the petitioners have identified nothing that might allow a federal court to parlay that authority, or any defendant's enforcement authority into an injunction against any and all unnamed private persons who might seek to bring their own S.B.8 suits,"[320] as federal courts exercising their equitable authority may only enjoin named defendants from taking specified unlawful actions, they many not "'lawfully enjoin the world at large,' or purport to enjoin challenged 'laws themselves.'"[321]

There were, however, according to the Court, some individual defendants, executive licensing officials, with authority or duty to take some enforcement actions against plaintiffs under SB8, and sovereign immunity would not bar an action against them.[322]

The Court finally held that plaintiffs had no standing to support their claim against Dickson, as Dickson had supplied sworn declarations that he had no intention to file an SB8 action against plaintiffs, and plaintiffs had not contested his testimony nor asked the Court to disregard it.[323]

In closing, to the concerns expressed by Justice Sotomayor that other states, like Texas, could pass unconstitutional laws engineered to avoid judicial review modeled after SB8, Justice Gorsuch observed that that possibility would not justify "throwing aside our traditional rules."[324]

Chief Justice Roberts, concurring in the judgment in part and dissenting in part, would find that the Attorney General had authority to enforce SB8, as he could institute actions for civil penalties if a physician violates a rule or order of the Medical Board.[325] Thus, the Attorney General could be sued. And he would also find that the clerk, Penny Clarkston, could be sued. As he pointed out, although clerks do not usually enforce state laws, "by design, the mere threat of even

318. *Whole Woman's Health II*, 142 S.Ct. at 534.
319. *Id*.
320. *Id.* at 535.
321. *Id.*
322. *Id*. at 535-36.
323. *Id.* at 537.
324. *Id.* at 538.
325. *Whole Woman's Health II*, 142 S.Ct. at 544 (Roberts, C.J., concurring in part in the judgment and dissenting in part).

unsuccessful suits brought under S.B.8 chills constitutionally protected conduct, given the peculiar rules that the State has imposed."[326] Indeed, "the court clerks who issue citations and docket S.B.8 cases are unavoidably enlisted in the scheme to enforce S.B.8's constitutional provisions, and thus are sufficiently 'connect[ed]' to such enforcement to be proper defendants. The role that clerks play with respect to S.B.8 is distinct from that of the judges. Judges are in no sense adverse to the parties subject to the burdens of S.B.8. But as a practical matter clerks are—to the extent they 'set[] in motion the machinery' that imposes these burdens on those sued under S.B.8."[327] On whether state judges would be immune under *Ex Parte Young*,[328] Chief Justice Roberts pointed out how cases like *Mitchum v. Foster*,[329] and *Pulliam v. Allen*[330] recognize that suits to enjoin state court proceedings may be proper, and how "just like in *Young*, those sued under S.B.8 will be 'harass[ed]. . . with a multiplicity of suits or litigation generally in an endeavor to enforce penalties under an unconstitutional enactment.' Under these circumstances, where the mere 'commencement of a suit,' and in fact just the threat of it, is the 'actionable injury to another,' the principles underlying *Young* authorize relief against the court officials who play an essential role in that scheme. Any novelty in this remedy is a direct result of the novelty of Texas's scheme."[331]

In her opinion, concurring in part and dissenting in part in the judgment, Justice Sotomayor, observed how, by restricting constitutional rights or defenses that the precedents recognized, or by imposing retroactive liability for constitutionally protected conduct, state courts enforcing SB8 would be violating the Supremacy Clause.[332] But "[u]nenforceable though S.B.8 may be . . . the threat of [the law's] punitive measures creates a chilling effect that advances the State's unconstitutional goals."[333] In the past, she observed, the Court "unequivocally rejected" this type of engineered state laws intended to preclude judicial review[334] and "[o]ver the years, 'the *Young* doctrine has been accepted as necessary to permit the federal courts to vindicate federal

326. *Id*. at 544.
327. *Id*.
328. 209 U.S. 123 (1908).
329. 407 U.S. 522 (1984).
330. 466 U.S. 522 (1984).
331. *Whole Woman's Health II*, 142 S.Ct. at 544-45 (Sotomayor, J., concurring in part in the judgment and dissenting in part).
332. *Id*. at 547.
333. *Id.*
334. *Ex Parte Young*, 209 U.S. at 146, 156.

rights and hold state officials responsible to 'the supreme authority of the United States.'"[335] But here, like in *Young*, "the practical effect of [SB8] is 'to foreclose all access to the courts,' 'a constitutionally intolerable choice.'"[336] And like in *Ex Parte Young*, here "[i]t would be an injury to [a] complainant to harass it with a multiplicity of suits or litigation generally in an endeavor to enforce penalties under an unconstitutional enactment, and to prevent it ought to be within the jurisdiction of a court of equity.'"[337] This case, though, continues Justice Sotomayor, presents a stronger case for pre-enforcement relief than *Ex Parte Young*, "given how S.B.8 not only threatens a multiplicity of suits, but also turns state-court procedures against providers to ensure they cannot effectively defend their rights in a suit."[338]

In agreement with Chief Justice Roberts, but relying on *Shelley v. Kraemer*,[339] Justice Sotomayor would consider the state-court clerks as proper defendants in this action. In *Shelley*, Justice Sotomayor underlined, "these ostensibly private covenants involved state action because 'but for the active intervention of the state courts, supported by the full panoply of state power,' the covenants would be unenforceable."[340] And "[b]ecause these state actors are necessary components of that chilling effect and play a clear role in the enforcement of S.B.8, they are proper defendants."[341] By designing the state court system as a "weapon,"[342] that system now appears nothing like "neutral," so the parties, including the clerks, are sufficiently adverse, and docketing doesn't appear like a neutral action.[343]

Also in agreement with Chief Justice Roberts, also relying on *Mitchum v. Foster* and *Pulliam v. Allen*, Justice Sotomayor pointed out how suits against state-court judges may be proper, and if the phrases from *Ex Parte Young* the Court relies on—"the right to enjoin an individual . . . does not include the power to restrain a court from acting in any case brought before it" and "an injunction against a state court would be a violation of the whole scheme of our Government"[344]—posed an absolute bar to injunctive relief against state court proceedings and officials, then

335. *Whole Woman's Health II*, 142 S.Ct. at 547 (Sotomayor, J., concurring in part in the judgment and dissenting in part) (citing *Pennhurst*, 465 U.S. 89 at 105 (1984)).

336. *Id.* at 548.

337. *Id*. (citing *Ex Parte Young*, 209 U.S. at 160).

338. *Id.*

339. 334 U.S. 1 (1948).

340. *Id*. at 548.

341. *Id*.

342. *Id.*

343. *Id.*

344. *Ex Parte Young*, 209 US at 163.

Mitchum and *Pulliam* would simply be advisory opinions.[345] Justice Sotomayor also observed that in *Virginia Office for Protection and Advocacy v. Stewart*,[346] the Court explained how *Ex Parte Young* can extend to new circumstances, "novelty notwithstanding."[347] Because "S.B.8's architects designed this scheme to evade *Young* as historically applied, it is especially perverse for the Court to shield it from scrutiny based on its novelty."[348]

V. THE POTENTIAL EFFECTS OF THE SUPREME COURT'S OPINION ON THE STABILITY OF THE U.S. CONSTITUTIONAL SYSTEM AND THE PROTECTION OF FUNDAMENTAL CONSTITUTIONAL RIGHTS

The decision of the Supreme Court on abortion rights will have significant consequences on the stability of the American constitutional system, continuously threatened by the tension between the federal government and the states. The Court's opinion will affect fundamental constitutional rights, the development of procedural and constitutional doctrines like standing, sovereign immunity, stare decisis, and preemption. Such doctrines, very much like the Texas law, if not properly applied, also threaten the stability of our constitutional system, for they can be turned into weapons used to nullify constitutional rights. And the Court's opinion will also affect business and the growth of our society at large.

A. Standing: The Irony of Clapper and The Bounty Hunters

The doctrine of standing governs the power of federal courts to hear "cases and controversies" under Article III, section 2 of the Constitution. The Court described the key elements of the doctrine in *Lujan v. Defenders of Wildlife*:

> Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized; and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . traceable to the

345. *Whole Woman's Health II*, 142 S.Ct. at 549 (Sotomayor, J., concurring in part in the judgment and dissenting in part).

346. 563 U.S. 247 (2011).

347. *Id.* at 549 (citing *Stewart*, 563 U.S. at 261).

348. *Id.*

> challenged action of the defendant, and not . . . the result of the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."[349]

The granular nature of the doctrine described by the *Lujan* Court provides ample opportunities to defeat a plaintiff's efforts to establish standing. Decisions applying the doctrine are notoriously serpentine, opaque, and poorly reasoned. And like the judicially imposed requirement of adversity, this doctrine finds no support in the text or original understanding of Article III. Also, if we examine the basic elements of standing—injury, causation, and redressability—we see that they do no more than describe the generic elements of a claim, as "a group of operative facts giving rise to one or more rights of action."

And yet it is not as simple as it seems, especially as far as the requirement of "injury" is concerned. In part, this follows from the Court's admonition that standing must be resolved on a case-by-case basis, albeit against the background of accepted general principles. This means that there will be cases that do not seem to follow from a traditional doctrinal analysis. *Clapper v. Amnesty International*[350] is certainly one of them.

There, plaintiffs sought a declaratory judgment that the Foreign Intelligence Surveillance Act (FISA) was unconstitutional. FISA allowed the federal government to obtain secret court approval for the surveillance of electronic communications between persons within the United States and certain persons thought to be in foreign territories. Plaintiffs in the case included lawyers who represented individuals imprisoned in Guantanamo Bay, Cuba, or who had been subject to CIA rendition, and whose communications with their lawyers might be intercepted under FISA. The suit was filed on the day FISA became law. The district court dismissed it for lack of standing because plaintiffs had not yet suffered any injury. The Court of Appeals reversed, concluding that plaintiffs had alleged a sufficient threatened injury, i.e., an "objectively reasonable likelihood" their communications with foreign contacts would be intercepted at some point in the future. The Supreme Court reversed in a 5 to 4 decision, holding that for a "threatened injury" to qualify for standing, it is not enough that there be an "objectively reasonable likelihood" of a harm occurring. Instead, plaintiffs must "demonstrate that

349. 504 U.S. 555, 560 (1992) (internal citations omitted).

350. 568 U.S. 398 (2013).

the threatened injury is *certainly impending*"[351] Here, there was no such certainty that the harms alleged by these particular plaintiffs would ever come to pass. While this "certainly impending" phrase had appeared in earlier opinions, it was not necessarily synonymous with "impending with certainty." Instead, the word "certainly" might simply mean "definitely" or "at least." Or, as the dissent suggested, "certainly" might be simply mean "reasonable probability,"[352] a standard that plaintiffs clearly met in this case.

In any event, the "certainly impending" standard was significantly relaxed in *Susan B. Anthony List v. Driehaus*,[353] where the Court held that "[a]n allegation of future injury may suffice if the threatened injury is 'certainly impending,' *or* there is a 'substantial risk' that the harm will occur."[354] If a court deemed the chances of such injury ever occurring were too speculative or remote, the injury-in-fact requirement for prospective relief would not be satisfied. Thus, differently from the more demanding *Clapper* standing standard, *Susan B. Anthony* provided a more relaxed standard, one that would most likely allow to find standing even when standing would be missing under *Clapper.*

Regardless of the choice between the *Clapper* or *Susan B. Anthony List* standard, which left the Court no specific or clearly identifiable criteria, the Court's insistence on a concrete and particularized injury to support standing has shown how dear this requirement is to the doctrine of justiciability and Article III, section 2 of the Constitution. That insistence, though, is hard to square with the bounty hunters or "qui-tam"

351. *Id.* at 401 (emphasis added).

352. *Id.* at 431-33 (Breyer, J., dissenting).

353. 573 U.S. 149 (2014). In *Susan B. Anthony List*, an Ohio statute criminalized the publication of "false statements" about political candidates. In connection with the 2010 congressional elections, Susan B. Anthony List (the List), a pro-life advocacy organization, issued a press release accusing Steven Driehaus, a member of Congress then running for reelection, of having voted for publicly funded abortions by virtue of his support for the Patient Protection and Affordable Care Act (ACA). Driehaus filed a complaint against the List with the Ohio Election Commission (OEC). An OEC panel found probable cause that the List had published a false statement against him and referred the matter to the full OEC for a hearing. If that hearing resulted in a finding of probable cause, the matter would be referred to the appropriate prosecutorial authorities. The OEC postponed its hearing until after the November 2010 election. When Driehaus then lost the election, he withdrew his complaint and the OEC proceedings were terminated. In the meantime, however, the List filed suit against the OEC in federal court, alleging that the false-statement statute violated the First Amendment. Its complaint asserted that there were several other members of Ohio's congressional delegation who also voted for the ACA and against whom it planned to make similar public accusations in the next election cycle. The defendant moved to dismiss on the ground that the List failed to assert a sufficiently imminent injury to warrant Article III standing. The Court denied the motion finding that the injury was sufficient to support standing.

354. *Id.* at 158 (internal citations omitted) (emphasis added).

practice, by which Congress (or a state legislature) may deputize private citizens to bring actions on its behalf by rewarding them with a "bounty" or with the promise of a share of any monies recovered servicing as incentive,[355] which artificially gives them a particularized injury that would otherwise be missing.

When describing several exceptions to the ordinary tripartite standing inquiry, the Court in *Lujan* noted that Article III standing would exist in "the unusual case in which Congress has created a concrete private interest in the outcome of a suit against a private party for the government's benefit, by providing a cash bounty for the victorious plaintiff."[356] The Court explicitly reaffirmed this reasoning in *Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*,[357] holding that an individual who brings suit under a structured "bounty" statute like the False Claim Act's qui tam provision, has Article III standing.[358] The *Stevens* Court reasoned that the government suffers a cognizable injury when it is defrauded, and that the False Claims Act's qui tam provision may be construed as a partial assignment of the government's claim to damages.[359] Thus, the Court, through a "representational standing" analysis, found the plaintiffs' injury sufficient to support standing. But while the presence of a cash bounty may signal the existence of an interest, does it also prove the existence of an injury? And does it do so when the action is not a qui tam one by a private party, i.e., the individual is claimed to be acting only on his own behalf? In other words, can statutory damages alone be the basis for injury in private actions? Isn't the cash bounty just the prospect of a reward, the possibility of not getting what never belonged to the plaintiff in the first place, something having no connection to any present or threatened injury to the plaintiff? If so, how can the prospect of

355. *See, e.g.,* False Claim Act (FCA), 31 U.S.C.S. Sec. 3730(b). The phrase "qui tam" is an abbreviation for "qui tam pro domino rege quam pro se ipso in hac parte sequitur," which means, "who brings the action for the King as well as for himself." While "qui tam" actions developed in thirteenth-century England, the concept was first used in the United States by the First Congress who included "qui tam" provisions in ten of the first fourteen American statutes imposing penalties. *See* John C. Kunich, *Qui Tam*: *White Knight or Trojan Horse*, 33 A.F.L. REV. 31 (1990).

356. 504 U.S. at 572-73.

357. 529 U.S. 765, 773-74 (2000).

358. *Id*.

359. "We believe, however, that adequate basis for the relator's suit for his bounty is to be found in the doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the assignor. The [False Claims Act] can reasonably be regarded as effecting a partial assignment of the Government's damages claim. . . . We conclude, therefore, that the United States' injury in fact suffices to confer standing on [the qui tam relator]." *Id. See also*, *Bauer v. Marmara*, 942 F.Supp.2d 31, 35-37 (2013).

a remedy/reward support the existence of a case or controversy for purposes of Article III?

In *Stevens*, the Court noted:

> There is no doubt, of course, that as to this portion of the recovery—the bounty he will receive if the suit is successful—a *qui tam* relator has a "concrete private interest in the outcome of [the] suit."[360] But the same might be said of someone who has placed a wager upon the outcome. An interest unrelated to injury in fact is insufficient to give a plaintiff standing. The interest must consist of obtaining compensation for, or preventing, the violation of a legally protected right. A *qui tam* relator has suffered no such invasion—indeed, the "right" he seeks to vindicate does not even fully materialize until the litigation is completed and the relator prevails. This is not to suggest that Congress cannot define new legal rights, which in turn will confer standing to vindicate an injury caused to the claimant. As we have held in another context, however, an interest that is merely a "byproduct" of the suit itself cannot give rise to a cognizable injury in fact for Article III standing purposes.[361]

Also, in *Steele Co. v. Citizens for a Better Environment,*[362] the Court held that "a plaintiff cannot achieve standing to litigate a substantive issue by bringing suit for the cost of bringing suit."[363]

Thus, it seems logical to conclude that Congress or a state legislature may not satisfy Article III standing by imposing a duty and conferring a cause of action with statutory damages, as it's only a particularized injury, personal to the individual, one that distinguishes that individual from the citizens at large, that can confer standing.

In *Warth v. Seldin*[364] the Court held that Congress can "define new legal rights, which in turn will confer standing,"[365] but "an interest that is merely a 'byproduct' of the suit itself cannot give rise to a cognizable injury in fact."[366]

Thus, the prospect of a cash bounty cannot be a substitute for the injury in federal courts, and it's quite interesting to see how the Court may approve of the cash bounty situation as an exception to the traditional tripartite standing test,[367] and yet find that the "objectively reasonable

360. *Lujan*, 504 U.S. at 573.
361. *Stevens*, 529 U.S. at 773.
362. 523 U.S. 83 (1998).
363. *Id.* at 107.
364. 422 U.S. 490 (1975).
365. *Id.* at 500.
366. *Id.*
367. *Lujan*, 504 U.S. at 572-73.

likelihood" of injury standard[368]—allowing plaintiffs "to establish standing by asserting that they suffer present [injury] based on a fear of [wrongful conduct], so long as that fear is not fanciful, paranoid, otherwise unreasonable"[369]—"improperly waters down the fundamental requirements of Article III."[370]

In *United States ex. rel. Marcus v. Hess*,[371] the Court "confessed" that, in the context of the False Claims Act and qui tam actions, "one of the means of preventing frauds on the Treasury is to make the perpetrators of them liable to actions by private persons acting, if you please, under the strong stimulus of personal ill will or the hope of gain."[372] And, in *United States v. Windsor*,[373] the Court lowered the standing standard from "certainly impending" (injury) to "stake"[374] because "[w]ere this Court to hold that [these] rules require it to dismiss the case, and, in consequence, that the Court of Appeals erred in failing to dismiss it as well, extensive litigation would ensue. The district courts in 94 districts throughout the Nation would be without precedential guidance not only in tax refund suits but also in cases involving the whole of DOMA's sweep involving over 1,000 federal statutes and a myriad of federal regulations."[375]

If considerations of practicality and necessity, though, can justify artificially relaxing or creating standing, wouldn't the need to protect fundamental constitutional rights even more justify returning the doctrine of standing to the true purpose and idea of Article III, section 2 and reading *Ex Parte Young* and the Eleventh Amendment jurisprudence to make sure it is conducive to the ideas behind the Eleventh Amendment and effective means for the enforcement of fundamental constitutional rights?

B. Sovereign Immunity of State Judges and Clerks

To make the doctrine of sovereign immunity protective of the state's sovereignty but also not a disservice to the system and to fundamental individual rights, *Ex parte Young* should be interpreted as applying to state

368. *Clapper*, 568 U.S. at 407.
369. *Id.* at 416.
370. *Id.*
371. 317 U.S. 57 (1943).
372. *Id.* at 541n.5.
373. 570 U.S. 744 (2013).
374. *Id.* at 559 ("In an appropriate case, appeal may be permitted . . . at the behest of the party who has prevailed on the merits, so long as that party retains a stake in the appeal satisfying the requirements of Art. III.")
375. *Id.* at 761.

judges too, when enforcing a law that would not be otherwise enforceable by any other state officers. *Ex parte Young* is not to the contrary.

As Justice Sotomayor pointed out, in *Shelley v. Kraemer*, "the ostensibly private covenants involved state action because 'but for the active intervention of the state courts, supported by the full panoply of state power,' the covenants would be unenforceable,"[376] and when "state actors are necessary components of that chilling effect and play a clear role in the enforcement of [an unconstitutional law], they [must be] proper defendants before the court,"[377] as that will ensure the vindication of the constitutional rights and, ultimately, the advancement of the system. Also, as pointed out by Chief Justice Roberts and Justice Sotomayor, under *Virginia Office for Protection and Advocacy v. Stewart*,[378] *Ex Parte Young* can extend to new circumstances, "novelty notwithstanding,"[379] which will make it an effective tool for the advancement of the constitutional rights and, ultimately, of the system.

C. Shadow Dockets: The Practice Should be Kept for Urgent Matters Which Should Still be Decided Through the Benefit of Reasoned Opinions

The practice of shadow dockets, which refers to the thousands of decisions that the Supreme Court hands down each term that "defy their normal procedural regularity," should be maintained as necessary to address questions of urgency. Oftentimes, though, urgent questions are also questions essential to the survival of the system and the protection of its very foundations. Thus, when addressed through the shadow docket procedure, those questions should still benefit from reasoned opinions that do not compromise an attentive analysis of the issues presented, premised on the briefs filed by the parties confronting each other on those very issues, and responding to the objections and arguments offered by the concurring and dissenting justices. This would likely reduce the risk of summary dismissals on procedural grounds to the disservice of fundamental constitutional rights.

376. *Id.* at 548.
377. *Id.*
378. 563 U.S. 247 (2011).
379. *Id.* at 549 (citing *Stewart*, 563 U.S. at 261).

D. Stare Decisis and the Useful Framework Provided by Casey

As the Court explained in *Planned Parenthood v. Casey*,[380] "the very concept of the rule of law underlying our own Constitution requires continuity over time [and thus] respect for precedent is, by definition, indispensable."[381] While overruling a precedent is something that "pinches" the constitutional system, so to speak, it is sometimes necessary to ensure that the system continues to serve the interests of its constituents.

Thus, the problem is not per se the occasional but necessary overruling of a precedent, as much as it is, or might be, the lack of clarity as to the sources and method employed to reach that outcome. In *Planned Parenthood v. Casey*,[382] when confronting the question of whether it should overrule *Roe v. Wade*, the Court noted:

> The obligation to follow precedent begins with necessity, and a contrary necessity marks its outer limit. With Cardozo, we recognize that no judicial system could do society's work if it eyed each issue a fresh in every case that raised it. See B. Cardozo, The Nature of the Judicial Process 149 (1921). Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable. At the other extreme, a different necessity would make itself felt if a prior judicial ruling should come to be seen so clearly as error that its enforcement was for that very reason doomed.
>
> Even when the decision to overrule a prior case is not, as in the rare, latter instance, virtually foreordained, it is common wisdom that the rule of *stare decisis* is not an "inexorable command," and certainly it is not such in every constitutional case. Rather, when this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case. Thus, for example, we may ask whether the rule has proved to be intolerable simply in defying practical workability; whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation; whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; or whether

380. 505 U.S. 833 (1992).
381. *Id.* at 854.
382. 505 U.S. 833 (1992).

> facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.[383]

Casey's stare decisis framework offers a careful approach to the question of overruling precedent and should provide guidance to the Court in similar instances where it is confronting the question of whether or not to reject stare decisis. The *Casey* framework, indeed, reflects a careful balance between the values of preserving the status quo so as to maintain stability of the system, and the competing need to at times respond to the demands and desiderata of an evolving system.

VI. CONCLUSION

What the Texas law reflects is Texas's conviction that the U.S. Supreme Court has no authority to review its laws, that the states are independent of—and in some respects superior to—the national government. This is a dangerous and outdated conviction, one that which harkens back to a nineteenth-century view of state rights, long rejected by the Court and the Nation. The federal courts doctrine of standing and sovereign immunity have allowed the State of Texas to pursue the violation of fundamental constitutional rights which had been upheld by an established constitutional law jurisprudence, one which the State never accepted, despite its authoritativeness and supremacy. And the Court has permitted this abuse and attack to the Constitution.

The phrase that Max Lerner used to describe the Court, "agency of control," can be read as a pejorative. But that phrase carries with it a positive aspect as well. Cases like *Brown v. Board of Education* reflect the agency of control principle, but they do so in a way which suggests that the control is appropriate, that the matter is one of national concern and, thus, that invites judicial intervention absent congressional action. Procedure and procedural doctrines cannot and should not constitute an obstacle to that necessary intervention. We have procedure to enforce constitutional rights, not for the sake of it. Procedure should be the handmaid of justice, not an obstacle to the proper and necessary exercise of the justice mission of the Court.

When the Court enforces, across the board, the Constitution's protection of individual rights, it is because the Court perceives that the matter is one of national concern, i.e., that the rights are shared by all citizens. As such, this is certainly a good intervention, or, stated differently, an appropriate and sometimes necessary exercise of the power

383. *Id.* at 854-55 (internal citations omitted).

to control. Thus, we need to be able to distinguish between those actions of control that are appropriate and those that are not. This is where constitutional jurisprudence has a void, and Lerner reminds us that on those occasions, the Court's judgment is political or, at least, it appears as such, especially when the Court uses or "abuses" procedural doctrines, giving them primacy over the enforcement of fundamental constitutional rights.