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The Weaponization of Attorney's Fees in an Age of Constitutional Warfare

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The Weaponization of Attorney's Fees in an Age of Constitutional Warfare

ABSTRACT. If you want to win battles in the culture war, you enact legislation that regulates firearms, prohibits abortions, restricts discussion of critical race theory, or advances whatever other substantive policy preferences represent a victory for your side. But to win the war decisively with an incapacitating strike, you make it as difficult as possible for your adversaries to challenge those laws in court. Clever deployment of justiciability doctrines will help to insulate constitutionally questionable laws from judicial review, but some of the challenges you have sought to evade will manage to squeak through.

To fully disarm your opponents in an age of cultural and constitutional warfare, you must cut off their access to counsel. Here is how to do it in three easy steps: (1) delineate an entire area of law, such as abortion, in which proponents of the state-favored view may obtain attorney's fees upon prevailing in litigation while proponents of the opposing view may not; (2) impose joint and several liability on the attorneys for the disfavored side, so that attorneys cannot bring challenges to state law without being personally responsible for what could amount to millions of dollars in the opposing party's legal fees; and (3) define "prevailing party" so broadly that this shared liability is triggered by the dismissal of even a single claim.

This is what the Texas legislature did in S.B. 8, the Texas Heartbeat Law, pioneering a model that several other states have now followed. The extraordinary nature of this scheme has been overshadowed by both the private enforcement mechanism at the core of S.B. 8, intentionally designed to evade judicial review, and by the Supreme Court's decision to overrule *Roe v. Wade*, ending constitutional protection for the right to terminate a pregnancy. As this Article shows, it would be a grave mistake to think that S.B. 8's weaponization of attorney's fees has lost its relevance. The end of *Roe* ushered in a new era of legal challenges to abortion regulation, for which Texas and its imitators have already stacked the deck. But perhaps even more significantly, there is little reason to think that the weaponization of attorney's fees is limited to the abortion context or to conservative causes more broadly. California has already repurposed Texas's strategy in an effort to deter Second Amendment challenges to its new firearm law, implementing an identical attorney's fee regime for different ideological purposes. And why should the embrace of this strategy stop there? Can all state legislatures insulate their most troubling laws from judicial scrutiny by making it prohibitively risky for attorneys to challenge them?

This Article reveals that the attorney's fee scheme woven into S.B. 8 is unprecedented and deeply threatening to our legal culture's ideals of fair play, access to courts, and legitimate contestation of bitterly disputed issues. Accepting its proliferation will result in a profound aggrandizement of state power that is inconsistent with federalism and separation-of-powers principles, as well as due process, equal protection, and First Amendment rights.

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INTRODUCTION

Novel experiments are underway in the oft-vaunted laboratories of democracy, but the work seems motivated by something other than the spirit of scientific inquiry applied to self-governance.[1] Emboldened by—or perhaps reacting against—swift changes in the composition of the Supreme Court and working in an era of extraordinary polarization, state legislatures are churning out laws that flout constitutional boundaries and expand the acceptable targets and instruments of regulation.[2] Aware that this kind of innovation makes the laws susceptible to challenge, legislatures are seeking to insulate their work product from judicial review with a range of mechanisms that warrant our close attention. As this Article demonstrates, access to courts is quickly becoming a casualty of the escalating culture wars.

A pivotal moment in the story was the enactment of the Texas Heartbeat Law—commonly known as S.B. 8—in August 2021, which prohibits abortions after a detectable heartbeat.[3] S.B. 8 clearly violated the constitutional principles governing abortion law at the time, but it was deliberately engineered to avoid

1. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (explaining that our system of federalism allows states to "try novel social and economic experiments without risk to the rest of the country").

2. *See* Kimberly Kindy & Alice Crites, *The Texas Abortion Ban Created a 'Vigilante' Loophole. Both Parties Are Rushing to Take Advantage*, WASH. POST (Feb. 22, 2022, 6:00 AM ET), https://www.washingtonpost.com/politics/2022/02/22/texas-abortion-law-vigilante-loophole-supreme-court [https://perma.cc/4KQF-3LZW] ("[A]t least 35 copycat laws have been introduced across the country . . . . The laws focus on a wide variety of polarizing issues . . . ."). In addition to "book banning, gun control and transgender athletics," *id.*, examples might include the recent spate of laws banning the teaching of "divisive concepts" in schools, a category sometimes defined as "any doctrine or theory promoting a negative account or representation of the founding and history of the United States of America," which have left teachers in a state of "widespread confusion" over what they can say and do in their classrooms. Sarah Schwartz, *Map: Where Critical Race Theory Is Under Attack*, EDUC. WK. (Sept. 28, 2022), https://www.edweek.org/policy-politics/map-where-critical-race-theory-is-under-attack/2021/06 [https://perma.cc/LZ9G-KSJB]. A Florida bill in this genre would give parents a private right of action if they believe that their children have been taught a prohibited concept. *Id.* In the realm of abortion regulation, legislators in Texas are planning to introduce a law that would require mandatory disbarment for any attorney that provides funds or other assistance to an individual seeking an abortion and would allow any member of the public to seek a writ of mandamus against state bar officials to carry out the sanction—an extraordinary and unprecedented commandeering of the state's professional-discipline system. *See* Debra Cassens Weiss, *Texas GOP Group Warns that Sidley Partners Could Be Prosecuted if the Firm Pays Abortion Travel Costs*, ABA J. (July 11, 2022, 10:25 AM CDT), https://www.abajournal.com/news/article/texas-gop-group-warns-sidley-partners-could-be-prosecuted-if-the-firm-pays-abortion-travel-costs [https://perma.cc/UQB7-TM69].

3. Texas Heartbeat Act, 2021 Tex. Gen. Laws ch. 62 (codified at TEX. HEALTH & SAFETY CODE ANN. §§ 171.201-.212 (West 2021), and other scattered sections of the Texas Code).

intervention from state or federal courts that might rectify the error. Because the ban is enforceable only by private parties, not by the state, it has been extremely difficult to challenge.[4] In the absence of a suitable defendant, reproductive-rights advocates struggled to meet the justiciability requirements that would allow them to proceed to a decision on the merits regarding the law's constitutionality.[5] After the Supreme Court declined to repudiate the maneuver,[6] Oklahoma enacted a fetal-heartbeat law modeled upon S.B. 8 with identical language in key provisions.[7]

California has repurposed for gun control what Texas pioneered for abortion control.[8] In July 2022, the state enacted S.B. 1327, a law prohibiting the manufacture and distribution of a wide variety of assault rifles, unserialized firearms, and other weapons.[9] The ban is enforceable only by private parties, who are entitled to statutory damages of $10,000 per firearm, injunctive relief, and the recovery of attorney's fees.[10] Although it is unclear whether the law complies with the Second Amendment,[11] its challengers face the same barriers to judicial review

4. *See* Whole Woman's Health v. Jackson, 142 S. Ct. 522, 543 (2021) (Roberts, C.J., concurring in part and dissenting in part) (noting that "Texas has employed an array of stratagems designed to shield its unconstitutional law from judicial review," including the private enforcement mechanism). Jonathan Mitchell, one of the bill's authors, has candidly acknowledged that "the entire point of S.B. 8 was to prevent the judiciary from ruling on the constitutionality of the statute . . . . There is nothing wrong with a state enacting a law to evade judicial review." Stephen Paulsen, *The Legal Loophole that Helped End Abortion Rights* (July 30, 2022), https://www.courthousenews.com/the-legal-loophole-that-helped-end-abortion-rights [https://perma.cc/ZQY8-FHFJ].

5. *See* Luke P. Norris, *The Promise and Pitfalls of Private Enforcement*, 108 VA. L. REV. 1483, 1485-86 (2022) (explaining that "a legal maelstrom is developing over private enforcement litigation" and that Texas's S.B. 8 is "at the center").

6. *See* Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2495 (2021) (refusing to enjoin enforcement of S.B. 8); *see also* Ilya Somin, *California Enacts Gun Control Law Modeled on Texas' S.B. 8 Anti-Abortion Law*, VOLOKH CONSPIRACY (July 23, 2022, 10:35 AM), https://reason.com/volokh/2022/07/23/california-enacts-gun-control-law-modeled-on-texas-sb-8-anti-abortion-law [https://perma.cc/S6FG-33DJ] (explaining that the private enforcement mechanism makes it difficult for those burdened by the law to obtain preenforcement review of the law's constitutionality).

7. Oklahoma Heartbeat Act, 2022 Okla. Sess. Laws ch. 190 (codified at OKLA. STAT. tit. 63, §§ 1-745.31 to 1-745.44, OKLA. STAT. tit. 12, § 1439, and OKLA. STAT. tit. 51, § 255).

8. Somin, *supra* note 6 ("California enacted SB 1327, a gun control law deliberately modeled on Texas' S.B. 8 anti-abortion law.").

9. S.B. 1327, 2022 Cal. Legis. Serv. Ch. 146 (West) (codified at CAL. BUS. & PROF. CODE §§ 22949.60-.71 and CAL. CIV. PROC. CODE § 1021.11).

10. *Id.*

11. *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2122, 2126 (2022) (announcing a tradition-based test for determining whether a firearm regulation complies with the Second Amendment).

that abortion-rights advocates have faced in Texas.[12] Other states are poised to repeat this approach, recognizing that reliance on an exclusively private enforcement mechanism is a highly effective way to keep their ideological adversaries out of court.[13]

While the implications of exclusive private enforcement have been mined by other scholars,[14] virtually no attention has been paid to an even more troubling set of review-impairing innovations woven into the Texas Heartbeat Law and spreading quickly to other states, including California.[15] In S.B. 8, Texas implemented an unprecedented attorney's fee regime—what we call the "Texas Three

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12. *See* Somin, *supra* note 6.

13. Letter from Kevin G. Baker, Dir. of Gov't Rels., ACLU Cal. Action, to Bob Hertzberg, Cal. State Sen. & Anthony Portantino, Cal. State Sen. (May 2, 2022), https://aclucalaction.org/wp-content/uploads/2022/05/SB-1327-5.2.22.pdf [https://perma.cc/7R42-UJ3M] (objecting to the "unconstitutional" structure of S.B. 1327). In addition to Oklahoma, Idaho has also enacted an S.B. 8 copycat law, and legislators in Alabama, Missouri, Tennessee, Louisiana, and Ohio have introduced S.B. 8 copycat bills. Of these, the law enacted in Oklahoma and the bills introduced in Alabama and Louisiana contain the weaponized fee-shifting that we examine here. *See infra* Section I.C.

14. *See, e.g.*, Aziz Huq, *The Private Suppression of Constitutional Rights*, 101 TEX. L. REV. (forthcoming 2023) (manuscript at 1-2), https://ssrn.com/abstract=4072800 [https://perma.cc/W6E3-GTRQ]; Anthony J. Colangelo, *Suing Texas State Senate Bill 8 Plaintiffs Under Federal Law for Violations of Constitutional Rights*, 74 SMU L. REV. F. 136, 136 (2021) ("Many people are deriding (or celebrating) the exceptional—and exceptionally deceptive—device of the Texas legislature to so-called 'deputize' private individuals as government enforcement agents to carry out a state anti-abortion law that, at present, violates the U.S. Constitution."); Charles W. "Rocky" Rhodes & Howard M. Wasserman, *Solving the Procedural Puzzles of the Texas Heartbeat Act and Its Imitators: The Potential for Defensive Litigation*, 75 SMU L. REV. 187, 189-91 (2022) [hereinafter Rhodes & Wasserman, *Defensive Litigation*]; Charles W. "Rocky" Rhodes & Howard M. Wasserman, *Solving the Procedural Puzzles of the Texas Heartbeat Act and Its Imitators: The Limits and Opportunities of Offensive Litigation*, 71 AM. U. L. REV. 1029, 1035 (2022) [hereinafter Rhodes & Wasserman, *Offensive Litigation*] ("In eliminating public enforcement and delegating enforcement authority to random private citizens with no injury other than a political or ideological ax to grind, Texas eliminated one process for vindicating rights—the process that is more direct, less burdensome, usually speedier, and thus more favorable to rights holders.").

15. *See New California Law Holds Gun Makers Liable: "The Gun Industry Can No Longer Hide,"* OFF. GOVERNOR GAVIN NEWSOM (July 12, 2022), https://www.gov.ca.gov/2022/07/12/new-california-law-holds-gun-makers-liable-the-gun-industry-can-no-longer-hide [https://perma.cc/DV3L-UR4F]. The lone exceptions appear to be three short articles in the legal media. *See* John Connolly, *Can Texas Force Lawyers to Pay the Prevailing Party's Legal Fees in Federal Litigation?*, JD SUPRA (Oct. 4, 2021), https://www.jdsupra.com/legalnews/can-texas-force-lawyers-to-pay-the-9582754 [https://perma.cc/7XSH-ZCU7]; Leah Godesky & Kendall Turner, *The Texas Abortion Law Sleeper Issue: It Limits Access to Counsel*, BLOOMBERG L. (Sept. 10, 2021, 4:00 AM), https://news.bloomberglaw.com/us-law-week/the-texas-abortion-law-sleeper-issue-

Step." It has three distinct features that work together to target a category of disfavored litigants with special obstacles on their way to the courthouse door.[16] S.B. 8 requires that *challengers*, but not *defenders*, of anti-abortion laws pay the costs and attorney's fees of the prevailing party.[17] These provisions reach far beyond the particular type of private lawsuit authorized by S.B. 8—indeed, they apply to anyone seeking declaratory or injunctive relief against *any* Texas abortion law, making it a comprehensive scheme that insulates state law from judicial review by discouraging challengers with the threat of catastrophic fee awards.[18] Most consequentially, the law makes attorneys and law firms jointly and severally liable for those awards, a provision clearly intended to deter attorneys from taking affected cases.[19] And because the law includes an incredibly broad definition of "prevailing party," this shared fee liability is triggered if an abortion-law challenger has even a single claim dismissed for any reason.[20]

The combined effect of these provisions is to impose prohibitively risky fee liability upon attorneys who represent a certain kind of litigant raising a certain kind of claim. As we explain, the burdens on access to counsel imposed by the Texas Three Step are so severe that they impair access to courts for the targeted

it-limits-access-to-counsel [https://perma.cc/5CYQ-8BE4]; Holly Barker, *Lopsided Fee-Shifting Provisions Cross Ideological Divides*, BLOOMBERG L. (Oct. 4, 2022, 12:09 PM), https://news.bloomberglaw.com/litigation/lopsided-fee-shifting-provisions-cross-ideological-divides [https://perma.cc/3WPA-NVP5]. There is also a brief mention of the topic in one scholarly article. *See* Richard D. Rosen, *Deterring Pre-Viability Abortions in Texas Through Private Lawsuits*, 54 TEX. TECH L. REV. 115, 124-25 (2021) ("[T]he Act contains what has been described as a 'one-way fee-shifting penalty[,]' under which 'civil-rights plaintiffs who challenge [the Act] can be held liable for their opponents' attorney's fees and costs *unless* they sweep the table by prevailing on every single claim they bring.'" (quoting Complaint for Declaratory & Injunctive Relief at 5, Whole Woman's Health v. Jackson, 556 F. Supp. 3d 595 (W.D. Tex. 2021) (No. 21-cv-616), 2021 WL 2945846)). Richard D. Rosen's critique focuses on S.B. 8's private enforcement mechanism; he does not further address the attorney's fee provisions we analyze here.

16. *See* Godesky & Turner, *supra* note 15 (noting that the last abortion case to reach the Supreme Court involved nearly $9 million in attorney's fees and asserting that the drafters of S.B. 8 hoped the bill "would scare off lawyers and law firms that might want to help challenge Texas's abortion restrictions").

17. TEX. HEALTH & SAFETY CODE ANN. § 171.208 (West 2021).

18. TEX. CIV. PRAC. & REM. CODE ANN. § 30.022 (West 2021).

19. *See* Connolly, *supra* note 15 ("[I]t seems beyond doubt that one purpose of § 30.022(c) is to impede a litigant's attempt to obtain counsel to challenge Texas abortion law.").

20. TEX. CIV. PRAC. & REM. CODE ANN. § 30.022 (West 2021).

litigants.[21] California recreates each of these weaponized attorney's fee provisions in its new assault-weapons law, illustrating the ease with which they can be deployed against rights with a different political valence.

We must understand these previously overlooked elements of S.B. 8 and appreciate the full range of implications both within the abortion context and beyond.[22] Although the Supreme Court has now overruled *Roe v. Wade*[23] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[24] these review-impairing innovations are hardly mooted by the end of the constitutional right to terminate a pregnancy.[25] First, the idea that abortion litigation has ended is false: the trigger laws enacted in anticipation of *Roe*'s demise, the new crop of evermore punitive laws emerging in state legislatures that burden the right to travel or receive information about abortion,[26] the interjurisdictional conflicts between states that protect abortion rights and states that do not, and the potential for intervention by the federal government all promise a virtually endless churn of cases, many of which are already underway.[27] Texas has endeavored to stack the deck for all of these cases so that anyone seeking declaratory or injunctive relief

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21. As scholars have observed in many contexts, lawyers "have historically functioned as gatekeepers to courts." Judith Resnik, Comment, *Fairness in Numbers: A Comment on* AT&T v. Concepcion*,* Wal-Mart v. Dukes*, and* Turner v. Rogers, 125 HARV. L. REV. 78, 99 (2011).

22. Lawsuits have been filed challenging the fee-shifting provisions in both S.B. 8 and S.B. 1327. *See* Plaintiffs' Original Class Action Complaint for Declaratory and Injunctive Relief at 48-49, Fund Tex. Choice v. Paxton, No. 22-cv-859 (W.D. Tex. Aug. 23, 2022), 2022 WL 3645109 (challenging S.B. 8 by asserting that the provisions are both unconstitutional and preempted by 42 U.S.C. § 1988 (2018) for those claims brought pursuant to 42 U.S.C. § 1983 (2018)); Complaint for Declaratory, Injunctive, or Other Relief, Miller v. Bonta, No. 22-cv-1446 (S.D. Cal. Sept. 26, 2022), 2022 WL 18492889 (challenging California's S.B. 1327 as both unconstitutional and preempted).

23. 410 U.S. 113 (1973).

24. 505 U.S. 833 (1992).

25. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2279 (2022) ("We . . . hold that the Constitution does not confer a right to abortion. *Roe* and *Casey* must be overruled . . . .").

26. *See* Jeremy W. Peters, *First Amendment Confrontation May Loom in Post-Roe Fight*, N.Y. TIMES (June 30, 2022), https://www.nytimes.com/2022/06/29/business/media/first-amendment-roe-abortion-rights.html [https://perma.cc/GPH6-HCQG].

27. *See* Chris Strohm, *DOJ Will Protect Right to Get Abortion Out-of-State, Attorney General Garland Says*, BLOOMBERG (June 24, 2022, 12:39 PM EDT), https://www.bloomberg.com/news/articles/2022-06-24/garland-says-doj-will-protect-right-to-get-abortion-out-of-state [https://perma.cc/DW65-ZJ3J]. Of particular relevance here, a coalition of plaintiffs filed suit in August 2022 seeking declaratory and injunctive relief against the application of Texas anti-abortion laws, including both pre-*Roe* statutes and the post-*Dobbs* trigger laws. Plaintiffs' Original Class Action Complaint for Declaratory and Injunctive Relief at 1-2, *Fund Tex. Choice*, 2022 WL 3645109. Plaintiffs assert a variety of constitutional challenges, including First Amendment claims and the right to travel, along with ex post facto and due process violations. *Id.* at 35-49.

against any Texas abortion law not only faces the threat of paying their opponent's legal fees but must also convince their lawyer to share this risk with them. Even if this regime operated only in the context of abortion, we would want to fully understand its implications as we begin a new era of reproductive-rights litigation.

But as California has demonstrated, the Texas Three Step is enormously attractive and versatile. If Texas and California can proceed in this vein, then why cannot all state legislatures insulate their most constitutionally questionable laws from judicial scrutiny simply by making it prohibitively risky for attorneys to challenge them? As this Article demonstrates, attorney's fee provisions intentionally designed to keep a state's ideological adversaries out of court not only threaten individual liberties but also undermine the very structure of our constitutional democracy.

The Article begins with a close examination of the review-impairing mechanisms in S.B. 8 that implicate the right to civil counsel, demonstrating the combined force of each element in the Texas Three Step. Part II contextualizes this unprecedented scheme with a summary of the American approach to attorney's fees. It explains the default common-law approach and surveys state and federal statutes that have departed from the "American rule," which requires that each side pay their own costs and fees. This Part shows that the Texas Three Step is categorically unlike previous statutory fee-shifting provisions — provisions carefully crafted to enhance, not impair, access to courts.[28] The clear conflict with federal law is sufficiently pronounced to trigger the application of preemption principles. In Part III, we directly confront the constitutional significance of a state's attempt to insulate its own law from legal challenge, exploring the extent to which such a gambit is prohibited by federalism and separation-of-powers principles, First Amendment and Equal Protection rights, and due process protections for access to civil counsel.

We conclude the Article by emphasizing the destructive potential reach of the Texas Three Step for our entire democratic system. The power to prevent one's political adversaries from obtaining counsel is potent and attractive, and it can cross many fields of cultural battle — nothing limits it to the abortion or firearm contexts where it has so far appeared. If any universal norms remain in our hyperpolarized political environment, this ought to be one: certain kinds of litigants should not be targeted for special obstacles on their way to the courthouse simply because the position they seek to vindicate is politically unpopular.

28. *See infra* Section II.A.

Twenty years ago, David Luban wrote that "taking out your adversary's lawyers is dirty law."[29] In the contemporary version on display in S.B. 8 and its imitators, the attempt to take out the adversary's lawyers also reveals a profoundly troubling view of consolidated government power—one in which those at odds with state lawmakers lose access to both state and federal courts. Notwithstanding their many shortcomings and imperfections,[30] courts remain important channels for dissent, contestation, and public resolution of demands for accountability and redress. As Judith Resnik has observed, we should understand courts "as a constitutionally-obliged substantive entitlement" that is essential to democracy because adjudication has the potential to "impose robust constraints on both public and private power."[31] A decade ago, in arguing that "courts are vulnerable," Resnik warned that "the durability of courts as active sites of public exchange before independent jurists ought not to be taken for granted."[32] Our goal in this Article is to illustrate how weaponized fee-shifting poses a major threat to the vitality of courts both as "sites of public exchange" and as sources of constraint on the raw exercise of legislative power.

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29. David Luban, *Taking Out the Adversary: The Assault on Progressive Public-Interest Lawyers*, 91 CALIF. L. REV. 209, 211 (2003).

30. *See, e.g.*, Matthew A. Shapiro, *Distributing Civil Justice*, 109 GEO. L.J. 1473, 1482 (2021) (describing access to justice as a scarce resource "because no legal system could realistically grant everyone who wishes to use it unlimited access to its institutions"). For a small sampling of literature examining various deficiencies in state and federal courts, see Daniel Wilf-Townsend, *Assembly-Line Plaintiffs*, 135 HARV. L. REV. 1704, 1707 (2022), which examines trends in state courts and observes that the "emerging dominance of unrepresented litigation raises serious concerns about the adequacy of our civil justice systems for reaching accurate results, their ability to provide due process for litigants, and the distributive consequences of systems that place significant burdens on poor and otherwise marginalized communities"; and Rebecca L. Sandefur & James Teufel, *Assessing America's Access to Civil Justice Crisis*, 11 U.C. IRVINE L. REV. 753, 756 (2021), which describes various facets of the "access to justice crisis," including lack of access to lawyers as well as the "denial of just or lawful resolution to problems that are endemic to contemporary life."

31. Judith Resnik, *Constitutional Entitlements to and in Courts: Remedial Rights in an Age of Egalitarianism: The Childress Lecture*, 56 ST. LOUIS U. L.J. 917, 921, 937 (2012).

32. *Id.* at 938; *see also* Resnik, *supra* note 21, at 80 ("[T]he constitutional concept of courts as a basic public service provided by government is under siege.").

I. THE OTHER REVIEW-IMPAIRING PROVISIONS OF S.B. 8

The enactment of the Texas Heartbeat Law, which included a private enforcement mechanism designed to insulate the law from review, prompted extensive litigation and commentary.[33] Because cardiac activity as defined by the law is often detectable well before fetal viability, the law's core prohibition clearly violated *Roe* and *Casey*, which were still good law when S.B. 8 was enacted.[34] To protect the law against constitutional challenges, the drafters of S.B. 8 specified that it would be enforced exclusively through private civil actions incentivized by significant financial bounties.[35] Successful claimants are entitled to statutory damages of at least $10,000 for each abortion performed in violation of the law, as well as costs and attorney's fees.[36] Because only private parties are authorized to enforce the law, providers and reproductive-rights advocates have had trouble finding a proper defendant to sue in order to obtain preenforcement review of the law's constitutionality.[37]

The scholarly commentary on this core feature of the law has been prodigious and erudite; the purpose here is not to retread any of that ground. Instead, we focus on several provisions woven into the law that are review-impairing innovations of a different kind. Through a series of moves that we call the Texas Three Step, S.B. 8 creates a viewpoint-specific fee-shifting regime that insulates anti-abortion laws from legal challenge by making litigation prohibitively risky

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33. *See supra* note 14; *see also* Michael S. Schmidt, *Behind the Texas Abortion Law, a Persevering Conservative Lawyer*, N.Y. TIMES (Nov. 1, 2021), https://www.nytimes.com/2021/09/12/us/politics/texas-abortion-lawyer-jonathan-mitchell.html [https://perma.cc/RNC7-YRA6] (explaining that S.B. 8 was part of a "new iteration" of anti-abortion campaigns focusing on a "strategy of writing laws deliberately devised to make it much more difficult for the judicial system—particularly the Supreme Court—to thwart them."). Dissenting from the Court's denial of emergency relief in *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494 (2021), Chief Justice Roberts explained that S.B. 8 "is not only unusual, but unprecedented," *id.* at 2496 (Roberts, C.J., dissenting). Justice Sotomayor described it as a "breathtaking act of defiance." *Id.* at 2499 (Sotomayor, J., dissenting).

34. Just two years prior, in fact, the Supreme Court had applied the undue burden test created by *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), to strike down a Louisiana abortion law that burdened abortion providers but did not prohibit abortion outright. June Med. Servs., L.L.C. v. Russo, 140 S. Ct. 2103, 2112 (2020), *abrogated by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

35. The law authorizes "any person, other than an officer or employee of a state or local governmental entity in this state," to bring a civil action "against any person who . . . performs or induces an abortion," "aids or abets the performance or inducement of an abortion," or intends to do the above. TEX. HEALTH & SAFETY CODE ANN. § 171.208(a) (West 2021).

36. *Id.* § 171.208(b).

37. *See* Whole Woman's Health v. Jackson, 142 S. Ct. 522, 525-29 (2021).

for both clients and attorneys. By replicating this innovation in its assault-weapons ban, California has illustrated the ideological versatility of this gambit. While the private enforcement mechanism discourages judicial review by making it hard to find a defendant to sue, the attorney's fee provisions discourage judicial review by making it hard to find an attorney to bring the suit. To understand how these states have used the threat of catastrophic fee awards to deter legal challenges to their favored policies—and, thereby, to infringe upon disfavored rights—we must identify the core components of the Texas Three Step and the statutory provisions that operationalize them.

A. Understanding the Texas Three Step

As its name suggests, the Texas Three Step has three primary components. First, it delineates an entire area of law in which proponents of the state-favored view may obtain attorney's fees upon prevailing in litigation, while proponents of the opposing view may not. Second, it imposes joint and several liability on attorneys for the disfavored side, so that attorneys cannot represent the targeted litigants in challenges to state law without being personally responsible for what could amount to millions of dollars in the opposing party's legal fees. Finally, it defines "prevailing party" so broadly that the dismissal of any claim brought by the disfavored litigant entitles the opposing party to attorney's fees. In this Section, we examine the statutory provisions in S.B. 8 that work together to create this dramatic and underappreciated scheme, noting for each the analogue in California's law.

1. Viewpoint-Specific Fee-Shifting for All Abortion Litigation

S.B. 8 mandates the award of attorney's fees to a plaintiff who successfully brings an action under the law against a doctor or anyone else aiding and abetting an abortion.[38] If, on the other hand, the defendant doctor prevails—perhaps

38. TEX. HEALTH & SAFETY CODE ANN. § 171.208(b)(3) (West 2021) ("If a claimant prevails in an action brought under this section, the court shall award . . . costs and attorney's fees."). As Justice Sotomayor explained, those vulnerable to suit under S.B. 8 "might include a medical provider, a receptionist, a friend who books an appointment, or a ride-share driver who takes a woman to a clinic." *Whole Woman's Health*, 142 S. Ct. at 546 (Sotomayor, J., concurring in part and dissenting in part). The range of assistance targeted by S.B. 8 includes even those who provide financial assistance to patients seeking an abortion. *See* Eleanor Klibanoff, *Anti-Abortion Lawyers Target Those Funding the Procedure for Potential Lawsuits Under New Texas Law*, TEX. TRIB. (Feb. 23, 2022, 2:00 PM CT), https://www.texastribune.org/2022/02/23/texas-abortion-sb8-lawsuits [https://perma.cc/TM7V-S46Z].

by invoking one of the affirmative defenses that S.B. 8 itself sets forth[39]—the court may not award costs or attorney's fees to the defendant doctor.[40] Because the provision seems designed to override the Texas Rules of Civil Procedure and any other court-adopted rules that allow a prevailing defendant to obtain attorney's fees where the suit is groundless or brought in bad faith, it appears that the prohibition on awarding fees to a prevailing defendant would even apply to suits that are frivolous or brought maliciously.[41] This provision of S.B. 8 therefore strips the doctor of the protection that every other civil defendant has against groundless or bad-faith filings, making it profoundly different than other one-sided fee-shifting arrangements.[42]

Having set forth this one-sided fee-shifting arrangement for causes of action brought under S.B. 8, the statute then widens its scope to "any other type of law

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39. *See* TEX. HEALTH & SAFETY CODE ANN. § 171.208(f) (West 2021) (setting forth affirmative defenses, such as the defendant's reasonable belief after investigation that the abortion was performed consistent with the terms of the law).

40. *Id.* § 171.208(i) ("Notwithstanding any other law, a court may not award costs or attorney's fees under the Texas Rules of Civil Procedure or any other rule adopted by the supreme court under Section 22.004, Government Code, to a defendant in an action brought under this section."). California follows this pattern in S.B. 1327, allowing plaintiffs but not defendants to recover attorney's fees in private actions brought against anyone sued for violations of the assault-weapons law, "[n]otwithstanding any other law." CAL. BUS. & PROF. CODE §§ 22949.65(b)(3), (j) (West 2022).

41. TEX. HEALTH & SAFETY CODE ANN. § 171.208(i). It seems that the intent is to supersede the many provisions in Texas law that would allow a prevailing defendant to obtain attorney's fees. *E.g.*, TEX. R. CIV. P. 13 (allowing award of attorney's fees as sanction for groundless, bad-faith, or harassing filings); *see also id.* r. 91a.7 (providing that a court "may award the prevailing party on the motion all costs and reasonable and necessary attorney fees incurred with respect to the challenged cause of action in the trial court"); *id.* r. 215.2(b)(8) (allowing attorney's fee awards as sanctions for discovery abuse); Rohrmoos Venture v. UTSW DVA Healthcare, LLP, 578 S.W.3d 469, 475-76 (Tex. 2019) (assessing the reasonability of an attorney's fees provision in a commercial lease agreement). The provision does not seem intended to override the Texas anti-SLAPP law, which allows defendants who are sued for exercising constitutional rights to bring a motion to dismiss and to obtain attorney's fees. The anti-SLAPP attorney's fee provision is codified in a statute and is therefore not "under the Texas Rules of Civil Procedure or any other rule adopted by the supreme court." TEX. HEALTH & SAFETY CODE ANN. § 171.208(i) (West 2021). It might well violate Texas state separation-of-powers principles for the legislature to attempt to deprive the judiciary of the authority to police groundless or bad-faith filings. *See* Eichelberger v. Eichelberger, 582 S.W.2d 395, 398 (Tex. 1979) (explaining the inherent powers of the Texas judiciary as those which "aid in the exercise of its jurisdiction, in the administration of justice, and in the preservation of its independence and integrity").

42. Even with regards to federal civil-rights actions, "vindicating a policy that Congress considered of the highest priority," the Supreme Court has expressed skepticism that Congress would want to prevent a successful defendant from recovering attorney's fees in a groundless action. *See* Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 416, 419 (1978) (quoting Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 402 (1968)).

that regulates or restricts abortion."[43] Amending the Texas Civil Practice and Remedies Code, Section 30.022(a) provides the following:

> Notwithstanding any other law, any person, including an entity, attorney, or law firm, who seeks declaratory or injunctive relief to prevent this state, a political subdivision, any governmental entity or public official in this state, or any person in this state from enforcing any statute, ordinance, rule, regulation, or any other type of law that regulates or restricts abortion or that limits taxpayer funding for individuals or entities that perform or promote abortions, in any state or federal court, or that represents any litigant seeking such relief in any state or federal court, is jointly and severally liable to pay the costs and attorney's fees of the prevailing party.[44]

This Section has two significant features that form the first and second steps of the Texas Three Step: the categorical application of one-sided, viewpoint-specific fee-shifting to an entire range of litigation defined by subject matter and the inclusion of attorneys as liable parties.[45]

First, this provision applies to anyone who seeks declaratory or injunctive relief against the enforcement of *any* Texas abortion law.[46] It would clearly apply to an advocacy organization like Planned Parenthood bringing suit as a plaintiff against S.B. 8 or any other abortion-related statute.[47] But because the provision aims its operative force against a person's intention to restrict abortion-law enforcement, rather than their status as plaintiff or defendant in any given lawsuit,

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43. TEX. CIV. PRAC. & REM. CODE ANN. § 30.022(a) (West 2021).

44. *Id.* Again, California follows this same template in its new firearm law, set forth in the California Code of Civil Procedure:

> Notwithstanding any other law, any person, including an entity, attorney, or law firm, who seeks declaratory or injunctive relief to prevent this state, a political subdivision, a governmental entity or public official in this state, or a person in this state from enforcing any statute, ordinance, rule, regulation, or any other type of law that regulates or restricts firearms, or that represents any litigant seeking that relief, is jointly and severally liable to pay the attorney's fees and costs of the prevailing party.

CAL. CIV. PROC. CODE § 1021.11 (West 2022).

45. TEX. CIV. PRAC. & REM. CODE ANN. § 30.022(a)-(c) (West 2021).

46. *Id.* § 30.022(a).

47. Rhodes & Wasserman, *Offensive Litigation*, *supra* note 14, at 1036 (explaining how "reproductive-health providers can and cannot use offensive litigation in federal court to challenge S.B. 8").

it could also apply to doctors defending against a lawsuit brought under S.B. 8 and asserting claims for declaratory or injunctive relief in a defensive posture.[48]

One might wonder whether S.B. 8 will continue to have any significance now that the Supreme Court has overruled *Roe* and *Casey*, eliminating constitutional protection for the termination of pregnancy.[49] As other scholars have noted, these developments have hardly mooted S.B. 8: while there is no longer the threat that S.B. 8 would be invalidated for its obvious conflict with those precedents, its private enforcement mechanism might continue to serve as an attractive vehicle for Texas to advance its anti-abortion objectives, and S.B. 8 could continue to operate alongside whatever laws develop in the wake of *Dobbs*.[50]

The litigation spawned by S.B. 8 is only a subset of the terrain that the Texas legislature has marked off for this special treatment of attorney's fees. Because the provision applies to anyone seeking injunctive or declaratory relief against *any* Texas abortion law, it will apply to the entire swath of cases—many of which are already underway—that challenge the new post-*Roe* legal regime.[51] The *Dobbs* majority announced that by eliminating constitutional protection for the right to terminate a pregnancy, it was returning abortion to the states.[52] As the dissent pointed out, however, that hardly means an end to abortion litigation, as the post-*Roe* landscape will simply reflect new "interjurisdictional conflicts."[53]

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48. Rhodes & Wasserman, *Defensive Litigation*, *supra* note 14, at 248 (explaining how providers can "vindicate their constitutional rights in a defensive posture").

49. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242, 2283 (2022).

50. *See* Julián Aguilar & Gabrielle Muñoz, *Texas 'Trigger Law' to Ban Abortion Will Soon Go into Effect. Here Are the Details*, TEX. STANDARD (June 24, 2022, 9:27 AM), https://www.texasstandard.org/stories/texas-trigger-law-abortion-ban-details [https://perma.cc/SKH9-RXK3] (quoting Professor Caroline Mala Corbin's explanation that S.B. 8 can coexist alongside the state's trigger law). The trigger law itself specifies that it "does not abolish or impair any remedy for the conduct that is available in a civil suit." TEX. HEALTH & SAFETY CODE ANN. § 170A.006 (West 2021).

51. *See* Erik Larson, *Texas Sued by ACLU over 'Antiquated' Pre-*Roe *Abortion Ban*, BLOOMBERG (June 27, 2022, 6:30 PM EDT), https://www.bloomberg.com/news/articles/2022-06-27/aclu-sues-to-block-texas-trigger-law-banning-abortion [https://perma.cc/WWD6-QNLM]; Nate Raymond, *U.S. Abortion Ruling Ignites Legal Battles over State Bans*, REUTERS (June 29, 2022, 6:18 AM EDT), https://www.reuters.com/world/us/abortion-clinic-challenges-louisiana-trigger-ban-after-us-supreme-court-ruling-2022-06-27 [https://perma.cc/QGJ3-P2FD] (revealing how much litigation was already initiated within two days of the *Dobbs* decision).

52. *Dobbs*, 142 S. Ct. at 2259.

53. *Id.* at 2337 (Breyer, Sotomayor & Kagan, JJ., dissenting) (describing the "interjurisdictional abortion wars" coming in the wake of *Dobbs*). For a sampling of actions taken by blue states to protect abortion access, see Maya Yang, *Pro-Choice States Rush to Pledge Legal Shield for Out-of-State Abortions*, GUARDIAN (May 11, 2022, 4:00 PM EDT), https://www.theguardian.com/world/2022/may/11/abortion-pro-choice-states-safe-havens-funding-legal-protection

Given the continued legality of abortion in states just across the border from Texas and other abortion-prohibiting states—not to mention the availability of medication abortion and telehealth services that were unavailable when *Roe* was decided—there will be plenty to fight about in the new era.[54] Although abortion laws are no longer susceptible to invalidation on the basis that they impose an "undue burden" on the right to terminate a pregnancy prior to fetal viability, the coming years will see pervasive contestation over a range of other constitutional questions: the right to travel and the extraterritorial reach of state law,[55] due process vagueness principles,[56] and thorny First Amendment questions about publicizing abortion services out of state or providing telehealth instructions on medicinal abortion.[57]

Texas in particular has taken a maximalist approach to post-*Roe* regulation and will be at the forefront of many of these battles. In addition to S.B. 8, it has a trigger law that went into effect thirty days after the judgment in *Dobbs* was issued.[58] The trigger law prohibits all abortions from the moment of fertilization, defined as "the point in time when a male human sperm penetrates the zona pellucida of a female human ovum," and is enforced by the state via criminal prosecution.[59] An additional layer of regulation arises from the fact that Texas never rescinded its pre-*Roe* abortion ban, enacted in 1925 and still on the books.[60]

[https://perma.cc/TA8S-ZDCT]; and Amy Simonson, *Delaware Governor Signs Bill Expanding Abortion Access and Provider Protection*, CNN (June 29, 2022, 9:02 PM EDT), https://www.cnn.com/2022/06/29/politics/delaware-governor-signs-abortion-access-law/index.html [https://perma.cc/BT7Y-8NJA].

54. *See generally* Richard H. Fallon, Jr., *If* Roe *Were Overruled: Abortion and the Constitution in a Post-*Roe *World*, 51 ST. LOUIS U. L.J. 611 (2007) (arguing that complex constitutional issues would remain for courts to address, even in a post-*Roe* world); Susan Frelich Appleton, *Gender, Abortion, and Travel After* Roe*'s End*, 51 ST. LOUIS U. L.J. 655 (2007) (examining the constitutional issues surrounding extraterritorial criminal abortion bans).

55. *See* David S. Cohen, Greer Donley & Rachel Rebouché, *The New Abortion Battleground*, 123 COLUM. L. REV. 1, 22-52 (2023).

56. *See, e.g.*, Isaacson v. Brnovich, No. CV-21-01417, 2022 WL 2665932, at *1 (D. Ariz. July 11, 2022) (granting a preliminary injunction against Arizona's fetal-personhood law on unconstitutional vagueness grounds).

57. A bill introduced in South Carolina, for example, would prohibit providing information to a pregnant woman about the means to obtain an abortion and hosting or maintaining a website that contains information about how to obtain an abortion—provisions of questionable validity under current First Amendment doctrine. *See* S.B. 1373, 124th Gen. Assemb., Reg. Sess. (S.C. 2022).

58. *See, e.g.*, Zach Despart, *Texas Can Enforce 1925 Abortion Ban, State Supreme Court Says*, TEX. TRIB. (July 2, 2022, 10:00 AM CT), https://www.texastribune.org/2022/07/02/texas-abortion-1925-ban-supreme-court [https://perma.cc/Z26H-2R7A].

59. TEX. HEALTH & SAFETY CODE ANN. § 170A.001(2) (West 2021).

60. Despart, *supra* note 58.

The day that *Dobbs* was released, but before the issuance of the judgment activating the operation of the trigger law, Texas Attorney General Ken Paxton announced that "[u]nder these pre-Roe statutes, abortion providers could be criminally liable for providing abortions starting today."[61] Texas Republicans are planning to introduce additional legislation, including laws that would prohibit any Texas employer from "reimbursing abortion-related expenses—regardless of where the abortion occurs, and regardless of the law in the jurisdiction where the abortion occurs."[62]

The one-sided fee-liability provision buried within S.B. 8, but reaching well beyond it, will apply to litigants seeking declaratory or injunctive relief against *any of these laws*—past, present, and future. It could potentially even apply to a criminal defendant moving to dismiss the indictment or challenging a conviction on the grounds that the statute under which he is being prosecuted is facially invalid, perhaps on vagueness grounds.[63] In any of these instances, a person seeking declarative or injunctive relief against any Texas abortion law is liable for the costs and attorney's fees of the prevailing party, but anyone deploying S.B. 8 or defending the validity of Texas abortion law faces no such threat. Moreover,

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61. *Id.*

62. Letter from Rep. Mayes Middleton, Chairman, Tex. Freedom Caucus, to Yvette Ostolaza, Chair, Sidley Austin LLP (July 7, 2022), https://freedomfortexas.com/uploads/blog/3b118c262155759454e423f6600e2196709787a8.pdf [https://perma.cc/H3U8-EFQM].

63. It might seem inapt to envision a criminal defendant who would qualify as a person seeking injunctive or declaratory relief. To be sure, most criminal defendants challenging a constitutional defect in their prosecution will simply be seeking to dismiss the indictment, a form of relief that probably does not qualify as declaratory or injunctive within the meaning of S.B. 8. And references to "declaratory relief" typically reflect the assumption that this comes in the form of a judgment prior to the offending conduct or the initiation of criminal proceedings. *See, e.g.*, *Declaratory Relief in the Criminal Law*, 80 HARV. L. REV. 1490, 1503 (1967) ("The modern declaratory action to construe or invalidate a penal statute bears the important distinction that it does not disrupt a pending prosecution, but seeks to resolve legal issues to prevent prosecution. Whereas prosecution can only follow conduct, the modern declaratory action precedes it, and in that difference lies its cardinal function."). But consider cases like *United States v. Stevens*, 559 U.S. 460 (2015), in which the Supreme Court struck down a federal criminal statute on the grounds that it was unconstitutionally overbroad, and *City of Chicago v. Morales*, 527 U.S. 41 (1999), in which the Court invalidated a criminal anti-loitering ordinance on vagueness grounds. *See also* R.A.V. v. City of St. Paul, 505 U.S. 377, 396 (1992) (striking down a hate-speech ordinance as facially invalid due to viewpoint discrimination). These decisions could be characterized as providing declaratory relief as to the constitutionality of these criminal prohibitions. Ultimately, it is yet another question of statutory construction that S.B. 8 presents: does the term "declaratory relief" include only those actions brought under the Declaratory Judgment Act or the Texas equivalent? Perhaps, but there is a plausible argument that it could also encompass a criminal defendant's claim that the statute under which she is being prosecuted is invalid—recall that there is nothing in this provision limiting its reach to offensive litigation.

as will be our focus in the next Section, this viewpoint-specific fee liability is borne jointly by attorneys for the targeted litigants.

2. *Joint and Several Liability for Attorneys of Reproductive-Rights Litigants*

Remarkably, it is not only the parties who challenge S.B. 8 or other anti-abortion laws that must potentially shoulder the cost of their opponent's attorney's fees when seeking declaratory or injunctive relief. The law also imposes this threat on the challengers' *counsel*: the statutory language specifies that any "attorney, or law firm, who seeks declaratory or injunctive relief" against any Texas abortion law, "or that represents any litigant seeking such relief in any state or federal court, is jointly and severally liable to pay the costs and attorney's fees of the prevailing party."[64] There is no modifier clarifying that recovery is limited to "reasonable" attorney's fees, a specification found in many fee-shifting regimes,[65] and the law allows attorney's fees to be collected in a separate recovery action up to three years after the judgment in the original challenge, even if the fees were not sought in the underlying suit.[66] The law further specifies that it is not a defense to an action for attorney's fees that "the court in the underlying action held that any provisions of this section are invalid, unconstitutional, or preempted by federal law, notwithstanding the doctrines of issue or claim preclusion."[67]

A person who wishes to challenge a Texas abortion law, therefore, must find an attorney who is willing to be personally responsible for the opposing party's legal fees, regardless of whether the fees are reasonable and even if the attorney succeeded in having a portion of the law deemed invalid. Although not further defined within S.B. 8, joint and several liability as generally understood would allow the prevailing party to recover the full amount of the fee award from either the attorney or the client, leaving them to sort out between themselves whether the paying party has a right of contribution from the other.[68] Given that attorney's fees in abortion litigation can easily reach into the millions of dollars, this

64. TEX. CIV. PRAC. & REM. CODE ANN. § 30.022(a) (West 2021).

65. *See, e.g.*, Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 263 (1975) (explaining that where Congress has chosen to depart from the general rule that litigants pay their own attorney's fees, the fee-shifting statutes provide for "the allowance of reasonable fees").

66. TEX. CIV. PRAC. & REM. CODE ANN. § 30.022(c) (West 2021).

67. *Id.* § 30.022(d)(3).

68. *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT LIAB. § 10 (AM. L. INST. 2000) ("When, under applicable law, some persons are jointly and severally liable to an injured person, the injured person may sue for and recover the full amount of recoverable damages from any jointly and severally liable person."). If the prevailing party chose to recover the fee award

alone will have an unmistakable impact on the ability of reproductive-rights litigants to find counsel.[69] Attorneys can hardly be expected to proceed undeterred with a representation that could culminate in bankruptcy.

Even assuming that an attorney might be willing to contemplate such an engagement, she would need to determine how to divvy up financial responsibility between herself and her client in the event of such an award. As a condition of accepting the representation, the attorney might consider requiring the client to agree at the outset that the client would be responsible for the payment of any fee award to the opposing party. But the attorney labors under a host of ethical obligations and considerable ambiguity that constrain and complicate her ability to enter into agreements with her clients in advance of the imposition of a fee award.[70] A full examination of the ethical rules that may govern such agreements is beyond the scope of this Article, in part because the novelty of subjecting an attorney to joint and several liability where there has been no misconduct requires navigation of unsettled terrain in the realm of professional responsibility.[71] We make a few preliminary observations here to highlight the uncertainty an attorney would confront in contemplating such an agreement.

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from the attorney, the attorney would likely then have a right of contribution from the client, either on the basis of pro rata share or comparative fault. *See* Lewis A. Kornhauser & Richard L. Revesz, *Settlements Under Joint and Several Liability*, 68 N.Y.U. L. Rev. 427, 437 (1993). Texas law provides for a right of contribution between jointly and severally liable defendants where one "pays a larger proportion of those damages than is required by his percentage of responsibility." TEX. CIV. PRAC. & REM. CODE ANN. § 33.015 (West 2021).

69. *See* Godesky & Turner, *supra* note 15.

70. Such an arrangement might be regulated by the principles that govern ordinary fee agreements, which include a reasonableness assessment and require the lawyer to communicate the "basis or rate of the fee and expenses for which the client will be responsible." MODEL RULES OF PRO. CONDUCT r. 1.5(b) (AM. BAR ASS'N 2020). It is uncertain, however, that an agreement indemnifying the attorney against liability for the opposing party's legal fees would be treated as simply an ordinary fee agreement. It might instead be considered an arrangement by which the lawyer acquires a "pecuniary interest adverse to a client," in which case it would come within the confines of Rule 1.8(a). *Id.* r. 1.8(a). Rule 1.8(a) heavily regulates such arrangements and imposes multiple requirements, including that the "transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client." Rule 1.8(a) does not apply to "ordinary fee arrangements between client and lawyer," but, as noted above, it is not clear that an agreement indemnifying the attorney for liability for the opposing party's legal fees would qualify for this exclusion. *Id.* r. 1.8 cmt. 1; *cf.* GEOFFREY C. HAZARD JR., W. WILLIAM HODES, PETER R. JARVIS & TRISHA THOMPSON, LAW OF LAWYERING § 9.14 (4th ed. Supp. 2022) (suggesting that, because the modification of a fee agreement is "closely analogous to entering into a new 'business transaction' with an *existing* client, the more exacting requirements of Rule 1.8(a) may apply").

71. Significant attention has been paid to sanctions awarded for litigation misconduct, which can be imposed jointly and severally against parties and attorneys. Rule 11 of the Federal Rules of

We start by noting that certain kinds of agreements between attorneys and clients are closely scrutinized and heavily regulated because they present the potential for lawyer overreach.[72] Business transactions are included in this category, and prospective agreements limiting the attorney's malpractice liability are so disfavored that they are not permitted "unless the client is independently represented in making the agreement," a requirement that effectively prohibits such arrangements.[73] Other kinds of agreements between lawyers and clients receive less scrutiny. As one ethics opinion observes, there is no rule that "directly prohibits an attorney from obtaining a client's advance agreement to indemnify the attorney on matters that do not constitute legal malpractice."[74] Another opinion,

Civil Procedure authorizes sanctions against attorneys and parties for frivolous pleadings, *see* FED. R. CIV. P. 11, and Rule 37 authorizes sanctions for discovery misconduct, *see id.* 17. Courts and scholars have explored in depth the difficulties that can arise where sanctions are imposed jointly and severally on lawyer and client. *See, e.g.*, Alan E. Untereiner, *A Uniform Approach to Rule 11 Sanctions*, 97 YALE L.J. 901, 910-11 (1988) (noting that Rule 11 sanctions should be imposed on the person responsible for the frivolous pleading, but that "judges, not wanting to make a more detailed inquiry into relative fault, often leave apportionment to attorney and client . . . joint and several sanctions both encourage private reallocation or 'shifting' of sanctions, which can undercut deterrence, and damage the attorney-client relationship by creating conflict over how to apportion sanctions unapportioned by the court"); Eastway Const. Corp. v. City of New York, 637 F. Supp. 558, 570 (E.D.N.Y. 1986), *order modified and remanded*, 821 F.2d 121 (2d Cir. 1987) ("If attorney and client disagree about who is at fault and point their fingers at each other, the interests of the two are now clearly adverse."); William W Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181, 199 (1985) ("If counsel seeks to vindicate himself personally by relying on directions from his client, the client may need independent representation and the attorney-client relationship may become so tainted as to jeopardize the representation for the remainder of the litigation.").

These observations reveal the conflicts that can emerge where attorneys and clients share joint and several liability for the opposing party's legal fees, and yet provide limited illumination here, where a fee award would be imposed not as sanctions for misconduct but simply because a party challenging an abortion law had a claim dismissed "for any reason." Sanctions imposed for litigation misconduct can be avoided by conforming one's behavior to the requirements of the applicable rules, and once imposed, they can be allocated (or reallocated) on the basis of comparative fault.

72. *See* MODEL RULES OF PRO. CONDUCT r. 1.8 cmt. 1 (AM. BAR ASS'N 2020) ("A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client . . . .").

73. *Id.* r. 1.8(h)(1).

74. State Bar of Utah, Ethics Op. 18-04 (2018) (allowing an attorney to obtain a client's advance agreement to indemnify the attorney for liability arising from the client's conduct); *see also* State Bar of Cal., Formal Op. 1997-151 (opining that advance agreements between client and lawyer to allocate litigation sanctions are "not unethical per se," but noting that "it may not be possible for a client to give fully informed consent to future sanctions when their nature and amount are unknown at the time of the original retainer").

however, specifically examining an advance agreement allocating sanctions imposed by a court for litigation misconduct, views it as "inappropriate for a lawyer to agree with the client in the retainer agreement that the client will be liable for any costs and sanctions imposed. This situation is analogous to agreements prospectively limiting the lawyer's liability to the client for malpractice."[75] These opinions are not necessarily in conflict with one another: in the first, the indemnification provision approved by the committee was explicitly limited to liability "arising out of . . . any acts, omissions, negligence, or willful misconduct on the part of the *client*."[76] In the second, the ethics committee focused its attention on sanctions imposed "as a remedy for frivolous conduct," noting that provisions such as Rule 11 of the Federal Rules of Civil Procedure authorize sanctions against an attorney, a client, or both, for filings that are not well grounded in fact or law or presented for any improper purpose.[77] Both of these opinions therefore address situations that present material differences from the kind of threat inflicted by S.B. 8., where attorney and client share liability simply for challenging a Texas abortion law.

As we will see in Part II, the inclusion of attorneys as jointly liable parties for purposes of satisfying an opposing party's fee award in the absence of misconduct is unprecedented.[78] One might thus argue that an indemnification agreement would simply return the representation to the status quo prior to S.B. 8, in which fee awards made pursuant to a fee-shifting statute (rather than as sanctions for misconduct) are payable by parties, not attorneys.[79] While that is persuasive, the uncertainty about whether such an agreement would be enforceable or subject the attorney to disciplinary proceedings makes this an insufficient hedge against the deterrent effect of S.B. 8's fee arrangement.

An attorney who was willing to proceed in the absence of any such agreement, or in spite of the uncertainty that such an agreement would be enforceable, would labor under the threat of personal fee liability throughout the entire representation, a dynamic that would be sure to affect nearly every aspect of strategic decision making and could well constitute a conflict of interest between the

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75. N.Y. Cnty. Laws.' Ass'n, Ethics Op. 683-1990 ("Before a particular set of facts implicating possible sanctions arises, we believe it would be impossible for a lawyer to make full disclosure of the circumstances justifying, and for a client to give knowing consent to, a shifting of sanctions.").

76. State Bar of Utah, *supra* note 74 (emphasis added).

77. N.Y. Cnty. Laws.' Ass'n, *supra* note 75. The Committee also mentioned Rule 26(g), which permits sanctions for discovery misconduct, and 28 U.S.C. § 1927 (2018), which authorizes sanctions against an attorney who "multiplies the proceedings" vexatiously and unreasonably.

78. *See infra* notes 169-170 and accompanying text.

79. *See id.*

attorney and her client.[80] In the event that a fee award is imposed and the prevailing party chooses to go after the attorney, the attorney would then face the choice between absorbing the expense of the fee award, attempting to negotiate with the client for an ex post allocation, or suing her former client for contribution.[81]

To sketch out this landscape even in simplified form is to reveal the extraordinary impact that S.B. 8's joint and several liability provision can be expected to have on access to counsel. But the burden is even more severe when read in conjunction with the law's definition of "prevailing party." As we will see, the joint fee liability shared by abortion-law challengers and their attorneys is triggered upon the dismissal of even a single claim.

3. Expansive Definition of "Prevailing Party"

The extraordinary breadth of the law's definition of "prevailing party" means that the attorney-inclusive fee-shifting provision is triggered if a person seeking declaratory or injunctive relief loses on a single claim. To see this, we must take a closer look at the definition of prevailing party:

> For purposes of this section, a party is considered a prevailing party if a state or federal court: (1) dismisses any claim or cause of action brought against the party that seeks the declaratory or injunctive relief described by Subsection (a), regardless of the reason for the dismissal; or (2) enters judgment in the party's favor on any such claim or cause of action.[82]

This provision is confusing because it fails to clearly identify who will be considered prevailing when a court dismisses claims "brought against the party that seeks the declaratory or injunctive relief."[83] To flesh out the ambiguity, we can posit that Planned Parenthood seeks declaratory or injunctive relief as con-

80. *See infra* Section I.B.

81. The prevailing party can make this choice on the basis of solvency, but it could also make this choice on the basis of other, more pernicious reasons—like the desire to not have to litigate against the attorney in question in future matters. *See* Larry Pressler & Kevin V. Schieffer, *Joint and Several Liability: A Case for Reform*, 64 DENV. U. L. REV. 651, 652 (1988) (noting that, as a result of joint and several liability, "plaintiffs often target persons they perceive to have the greatest resources from which to pay claims").

82. TEX. CIV. PRAC. & REM. CODE ANN. § 30.022 (West 2021).

83. *Id.*

templated by the statute and is suing to block the enforcement of a Texas abortion law.[84] If a court dismisses a claim or cause of action brought *against* Planned Parenthood during the course of such a proceeding, that is a victory for Planned Parenthood. When claims or causes of action brought *against* a party are dismissed, that is the party that prevailed, because it no longer needs to defend against the now-dismissed claim or cause of action. In trying to understand who is deemed the prevailing party in the first part of the above definition, it would seem to be the party that managed to have claims against it dismissed by the court, and by this portion of the law's plain text, that is the party seeking declaratory or injunctive relief against a Texas abortion law.

This result is so puzzling as to yield the conclusion that it must be a drafting error.[85] It is in tension with the text and structure of the operative provision, discussed above, that purports to impose attorney-fee liability on anyone seeking declaratory or injunctive relief against a Texas abortion law, without any analogous exposure for the party opposing declaratory or injunctive relief. Given the extent to which the legislature was trying to deter actions for declaratory or injunctive relief against Texas abortion laws, it likely meant to define a party as "prevailing" whenever a court dismisses any claim or cause of action brought *by* the party that seeks the declaratory or injunctive relief. That would call forth the world that the Texas legislature seemed to desire, in which any time Planned Parenthood or any other reproductive-rights advocate brought a claim that was dismissed for any reason, the *other* party would be defined as prevailing and en-

84. See, for example, the complaint filed against S.B. 8, listing various plaintiffs including Planned Parenthood and Whole Woman's Health. Complaint at 1, Whole Woman's Health v. Jackson, 556 F. Supp. 3d 595 (W.D. Tex. 2021) (No. 21 Civ. 616), *aff'd in part and rev'd in part*, 142 S. Ct. 522 (2021).

85. California corrected the drafting error when it repurposed this regime for its prohibition on assault weapons. *See* CAL. CIV. PROC. CODE § 1021.11(b) (West 2022) (defining a party as prevailing if a court "[d]ismisses any claim or cause of action brought *by* the party seeking the declaratory or injunctive relief described" in the statute (emphasis added)). The California statute also differs from the Texas original in that it specifies that any person "who seeks declaratory or injunctive relief as described in subdivision (a), shall not be deemed a prevailing party under this section or any other provision of this chapter." *Id.* § 1021.11(e).

titled to attorney's fees from Planned Parenthood and the organization's attorneys.[86] The drafters of the law got so tangled up in their desire to penalize challengers of restrictive abortion laws that they lost track of which way the poisoned arrow was pointing.[87]

Given that the law as written is likely the result of a drafting error, how should we understand the current text? Even some of the law's most prominent critics, such as the coalition of plaintiffs challenging S.B. 8 in federal court, have simply proceeded as if the law does not contain the drafting error, perhaps concluding that the ambiguity generated by the error is inadequate to blunt the intended force of this scheme. Critiquing the provision in their complaint, Whole Woman's Health asserts:

> [C]ivil-rights plaintiffs and their attorneys can be forced to pay defendants' attorney's fees unless they run the table in litigation, prevailing on every claim they brought. If a court dismisses a claim brought *by* the civil-rights plaintiff, regardless of the reason, or enters judgment in the other party's favor on that claim, the party defending the abortion restriction is deemed to have "prevail[ed]."[88]

This concession reveals, first, that the law's text is in tension with what appears to be the law's intention; it also shows that even those interpreters most motivated to undermine the force of S.B. 8 have simply read the error out of the text, critiquing an alternative version of the law that is better aligned with its motivation than the version passed by the legislature. Indeed, the district court

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86. The only scholarly article that mentions this portion of S.B. 8 similarly proceeds without addressing the drafting error. *See* Richard D. Rosen, *Deterring Pre-Viability Abortions in Texas Through Private Lawsuits*, 54 TEX. TECH L. REV. 115, 124-25 (2021) (noting that challengers "can be held liable for their opponents' attorney's fees and costs unless they sweep the table by prevailing on every single claim they bring" (quoting Complaint, *supra* note 84, ¶ 11) (emphasis omitted)).

87. Perhaps the drafter's intention to penalize challengers of abortion laws is sufficiently operationalized by the second part of the prevailing-party definition, providing that a party is prevailing if a court "enters judgment in the party's favor on any such claim or cause of action." TEX. CIV. PRAC. & REM. CODE § 30.022(b)(2) (West 2021). The problem with relying only on the second provision is that it does not explain what should happen when the court rules in favor of one party on some claims and the other party on other claims. For a discussion of this regular occurrence, see *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 682-93 (1983).

88. Complaint, *supra* note 84, at 29 (emphasis added) (proceeding to explain that this would "presumably" be true even if plaintiffs had a claim dismissed on mootness grounds but nonetheless succeeded in having a law enjoined); *see also* Rosen, *supra* note 86, at 125 (explaining that joint-fee liability would kick in "even if [plaintiffs] successfully challenge the Act on some grounds (*e.g.*, due process), but the court dismisses claims pleaded in the alternative (*e.g.*, equal protection)").

accepted this reading in its ruling on the initial challenge to S.B. 8: after describing the "novel fee-shifting regime slanted in favor of S.B. 8 claimants and proponents," that court went on to explain that "plaintiffs and attorneys who participate in lawsuits challenging abortion restrictions in Texas may be liable for attorney's fees unless they prevail on all of their initial claims, regardless of the ultimate outcome of the litigation."[89]

Thus, one plausible (albeit distinctively nontextual) reading of the statute is the one proffered by the plaintiffs and accepted by the district court in the S.B. 8 litigation: in any lawsuit seeking declaratory or injunctive relief against a Texas abortion law, reproductive-rights advocates *and their attorneys* can be forced to pay the defendant's attorneys' fees *unless they succeed on every claim they bring*.[90] Prevailing parties may bring an action up to three years after the end of the proceeding to obtain declaratory or injunctive relief and, as noted above, the statute provides that it is not a defense to the action for fees that "the court in the underlying action held that any provisions of this section are invalid, unconstitutional, or preempted by federal law."[91]

B. Implications for Access to Counsel

Having worked through the key elements of the scheme, we can now appreciate the extraordinary impact it will have on the ability of reproductive-rights advocates — or anyone else wishing to challenge Texas abortion laws — to obtain counsel for this type of litigation. Lawyers considering such an engagement will have to weigh the possibility that their client will lose on one or more claims and that the lawyer will then be personally liable for the opposing party's legal fees. The more complex, contested, unusual, or unsettled the law in question, the more uncertainty lawyers will have about whether claims will succeed or fail. Given that the party defending the abortion restriction faces no such liability, and that this will regularly be an official of the state that enacted the law, the

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89. Whole Women's Health v. Jackson, 556 F. Supp. 3d 595, 605 (W.D. Tex. 2021), *aff'd in part and rev'd in part,* 142 S. Ct. 522 (2021).

90. This is completely inverted from the approach taken by federal courts in the litigation of civil-rights claims, which treats a plaintiff as a prevailing party if they have succeeded on

> any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing the suit . . . . [A]t a minimum, to be considered a prevailing party within the meaning of § 1988, the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant.

Tex. State Tchrs. Ass'n v. Garland Indep. Sch. Dist., 489 U.S. 782, 789, 792 (1989).

91. TEX. CIV. PRAC. & REM. CODE ANN. § 30.022(c), (d)(3) (West 2021).

lopsided nature of the scheme rests on a built-in moral hazard.[92] The more byzantine the law and unpredictable its validity, the more expensive it will be to litigate—and the more hesitant lawyers will be to incur the risk of accepting representation.[93] The state can thus shield its abortion laws from review simply by enacting laws that are so complex and untested that no reasonable lawyer can gauge whether a challenge will prevail—something they would have to do to manage their own exposure.[94]

Even if plaintiffs can find an attorney willing to take the risk of bringing actions for declaratory or injunctive relief, we must wonder about the impact this risk will have on the attorney's decision-making and litigation strategy.[95] Surely

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92. *See Moral Hazard*, OXFORD ENGLISH DICTIONARY (2022), https://www.oed.com/view/Entry/122086 [https://perma.cc/TD6M-B98A] (defining moral hazard as a "lack of incentive to avoid risk where there is protection against its consequences").

93. For example, there are reasonable arguments that some federal laws preempt certain aspects of state abortion law. *See* Greer Donley, Rachel Rebouché & David S. Cohen, *Existing Federal Laws Could Protect Abortion Rights Even if Roe Is Overturned*, TIME (Jan. 24, 2022, 3:21 PM EST), https://time.com/6141517/abortion-federal-law-preemption-roe-v-wade [https://perma.cc/GWZ7-FL72]. One group of scholars urges advocates to try bringing these claims, acknowledging the uncertainty in whether they will prevail:

> Though the principle of federal supremacy is unquestioned, how it applies in particular cases is complicated and contested. But if this strategy were to be successful, it would create a major hole in state abortion bans. Though the case might not win, there is little downside to trying and losing.

David S. Cohen, Greer Donley & Rachel Rebouché, *Some Things Biden Could Actually Do About Abortion (Besides Just Tell You to Vote)*, SLATE (July 6, 2022, 11:28 AM), https://slate.com/news-and-politics/2022/07/biden-abortion-vote-congress-roe-midterms.html [https://perma.cc/JWP8-6BQW]. As this Article shows, S.B. 8 changes this calculus for both clients and attorneys. The law intentionally creates an enormous downside to "trying and losing," thereby insulating state law from reasonable challenges.

94. If this seems far-fetched, consider that Texas Republicans are planning to introduce legislation that would require mandatory disbarment for any lawyer who provides assistance with abortion-related travel expenses and would authorize any member of the public to obtain a writ of mandamus against state bar officials who failed to carry out the sanction. Isabella Zavarise, *Read the Threatening Letter the Texas GOP Sent to a Law Firm that Planned to Reimburse Travel Costs for Employees Seeking an Abortion*, BUS. INSIDER (July 9, 2022, 11:20 PM), https://www.businessinsider.com/republicans-introduce-legislation-to-stop-law-firms-paying-for-abortion-2022-7 [https://perma.cc/5BBY-2D8E]. In the new era of abortion regulation, we cannot assume that there is a natural boundary on the appropriate targets or instruments of regulation.

95. We bookmark here a significant question about whether lawyers' professional-liability insurance would even cover this kind of exposure. *See generally* Mark A. Geistfeld, *Legal Ambiguity, Liability Insurance, and Tort Reform*, 60 DEPAUL L. REV. 539 (2011) (noting that where insurance companies act as risk predictors and as regulators of risky behavior, legal ambiguity coupled with liability that is not based on risky behavior makes it difficult for insurers to precisely calculate risk and, by extension, premiums). *See also* Eric Hiller & Aaron Konstam, *Treatment*

the threat of liability will shape the advice that attorneys offer their clients about which claims to bring and how to respond to motions brought by the opposing party, impairing the lawyer's ability to "exercise independent professional judgment and render candid advice."[96] The shadow this will cast over the representation could even rise to the level of a conflict of interest between the attorney and client. The Model Rules of Professional Conduct, upon which many state ethical codes are based, provide that "a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests."[97] If an attorney is not willing to incur the risk of proceeding with a reasonable yet uncertain claim, then it is difficult to see how the representation can proceed, even if the client wishes it to.[98]

The existing legal challenges to the weaponized fee-shifting regimes in both Texas and California show that these concerns rest on more than speculation. California's scheme has been challenged by a group of plaintiffs that includes both gun-rights advocates and their attorneys.[99] The attorneys named as plaintiffs in the suit alleged that California's fee-shifting regime has caused them to refrain from filing suits they are otherwise prepared to litigate and from pursuing appellate litigation in cases already underway "due to the law's threat of ruinous fee liability."[100] Agreeing that the scheme "makes any attorney understandably reluctant, if not terrified" to represent plaintiffs seeking to challenge

of Attorney's Fees Awards Under Liability Policies, KENNEDYS L. (July 29, 2022), https://kennedyslaw.com/thought-leadership/article/treatment-of-attorney-s-fees-awards-under-liability-policies [https://perma.cc/23YV-JEDF] (observing that there is "no consensus across US jurisdictions on whether, and to what extent, attorney's fees are [covered] under a liability policy").

96. MODEL RULES OF PRO. CONDUCT r. 2.1 (AM. BAR ASS'N 2020).

97. *Id.* r. 1.7 cmt. 8.

98. *Cf.* State Bar of Ariz., Ethics Op. 03-05 (2003) (opining that attorney indemnification provisions in third-party settlement agreements could create conflicts of interest between lawyer and client because they can influence the lawyer "to recommend that the client reject an offer that would be in the client's best interest because it would potentially expose the lawyer to the payment of hundreds of thousands of dollars in lien expenses, or litigation over such lien expenses"); Conn. Bar Ass'n Pro. Ethics Comm., Informal Op. 2012-06,. Thirteen state bar associations "have issued formal opinions expressly prohibiting plaintiff's counsel from entering into such indemnification agreements" and some of these have also prohibited defense counsel from requesting such indemnification. *See, e.g.*, J. Douglas McElvy, Ala. State Bar, Ethics Op. RO 2011-01.

99. Complaint for Declaratory, Injunctive, or Other Relief at 22, Miller v. Bonta, No. 22-cv-1446 (S.D. Cal. Sept. 26, 2022), 2022 WL 18492889.

100. *Id.*; *see also* Miller v. Bonta, No. 22-cv-1446, 2022 WL 17363887, at *3 (S.D. Cal. Dec. 1, 2022) (describing in detail how various Second Amendment advocates and gun-rights organizations

California firearms law, a federal district court has permanently enjoined the scheme as a violation of both the First Amendment and the Supremacy Clause.[101]

In Texas, a group of reproductive-rights litigants challenging multiple abortion laws assert in their complaint that:

> [S.B. 8's fee-shifting] provisions create an automatic conflict between a litigant and her attorney. Any attorney who agrees to present a constitutional defense or mount a proactive challenge to the constitutionality of SB8 subjects herself and her firm to joint and several liability for the attorneys' fees incurred by the opposing party in the case. These provisions force an attorney to choose between the best interests of her client and liability under SB8 or to refuse to represent a client at all. These provisions further prevent a litigant from redressing constitutional deprivations of rights by significantly burdening her ability to obtain counsel.[102]

As we have seen, these provisions obstruct access to counsel and distort the attorney-client relationship across the entire range of cases in which a California firearms law or a Texas anti-abortion law is being challenged. To gauge the magnitude of this impact, we offer in the next Section some illustrative examples of how this might play out in practice.

C. Mapping Out the Range of Applications

As we consider the impact on access to counsel for reproductive-rights litigants, it is worth reiterating the scale on which this impediment to obtaining counsel is being deployed. As revealed in the preceding Sections, S.B. 8 not only mandates the award of attorney's fees to the bounty hunters bringing lawsuits

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have "delayed, dismissed, or refrained from litigating constitutional claims" because of the risk of fees threatened by S.B. 1327). After the filing of the suit, California's Attorney General announced his commitment not to seek attorney's fees or costs under S.B. 1327 "unless and until the fee-shifting provision" in S.B. 8 was found by a court to be "constitutional and enforceable." *Miller*, 2022 WL 17363887, at *2. He asserted that the challenge to S.B. 1327 therefore was not ripe, but the district court rejected the contention and allowed the case to proceed. *Id.* at *2-4.

101. Miller v. Bonta, No. 22-cv-1446, 2022 WL 17811114, at *6 (S.D. Cal. Dec. 19, 2022). The district court explained that the law's "principal defect . . . is that it threatens to financially punish plaintiffs and their attorneys who seek judicial review of laws impinging on federal constitutional rights," thus violating the right to petition the government for redress of grievances and conflicting with federal law governing the allocation of attorney's fees in civil-rights litigation. *Id.* at *2, *4-7. We expand on both the preemption and First Amendment defects of the Texas Three Step in Section II.B and Part III, respectively.

102. Plaintiffs' Original Class Action Complaint for Declaratory and Injunctive Relief at 49, Plaintiffs Fund Tex. Choice v. Paxton, No. 22-cv-859 (W.D. Tex. Aug. 23, 2022), 2022 WL 3645109.

authorized by S.B. 8 but also creates a comprehensive fee-allocation scheme for all litigation in which a party seeks declaratory or injunctive relief against any Texas abortion law. In combination, these provisions mean that any party that deploys S.B. 8 or defends other Texas abortion laws will be awarded attorney's fees if they prevail; any party that challenges the validity or application of Texas abortion law will not, even if they prevail; and S.B. 8 defendants are not even entitled to attorney's fees if their opponent engages in the kind of vexatious or harassing conduct that has long been the predicate for the imposition of fee-shifting. Attorneys for the disfavored side share liability with their clients and fee liability attaches if an abortion-law challenger suffers the dismissal of any claim, for any reason. To understand how this scheme might play out in practice, consider the following examples.

Successful Defendants Unable to Recover Attorney's Fees for Frivolous or Malicious Suits Brought Under S.B. 8:

- An anti-abortion activist brings suit under S.B. 8 against a doctor who performed an abortion. The doctor raises an affirmative defense that the abortion was performed in compliance with S.B. 8 because the heartbeat was not yet detectable, and the doctor prevails. The doctor is not entitled to attorney's fees.

- An anti-abortion activist brings suit under S.B. 8 against a Reform Jewish congregation whose rabbi has expressed opposition to the bill. The activist openly declares that the aim of the suit is to publicly shame and harass organizations that support reproductive rights. S.B. 8 itself declares that it "may not be construed to impose liability on any speech or conduct protected by the First Amendment of the United States Constitution," so the lawsuit is dismissed.[103] The congregation is not entitled to attorney's fees, even though the Texas Rules of Civil Procedure allow attorney's fees to be awarded as a sanction for groundless suits.[104]

Plaintiffs Required to Pay the State's Attorney's Fees, Despite Successfully Obtaining an Injunction Against a Preempted Abortion Law:

103. TEX. HEALTH & SAFETY CODE ANN. § 171.208(g) (West 2021).

104. *See* TEX. R. CIV. P. 13 (allowing awards of attorney's fees as sanctions for groundless, bad-faith, or harassing filings).

- The Texas trigger law goes into effect, banning all abortions after fertilization except to save the life of the mother and making abortion a felony punishable by life in prison.[105] A group of hospital administrators bring suit in federal court to enjoin the law, arguing that the law's definition of medical emergency is unconstitutionally vague[106] and that it is preempted by federal law that requires hospitals to provide emergency medical care.[107] The court rules in the hospital's favor on the preemption claim but not the vagueness claim. The hospital's loss on the vagueness claim renders the state defendants the "prevailing party" under the definition set forth in S.B. 8, and the hospital and its attorneys are liable for the state's legal fees *despite their success in obtaining an injunction*.

Defendant Prosecuted Under Abortion Law Required to Pay the State's Attorney's Fees, Despite Obtaining Dismissal of Indictment on First Amendment Grounds:

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105. *See* Michelle Homer & Chloe Alexander, Roe v. Wade *Fallout: Texas 'Trigger Law' Will Make Abortions a Felony When It Takes Effect*, KHOU 11 (June 24, 2022, 12:45 PM CDT), https://www.khou.com/article/news/local/texas/roe-v-wade-texas-trigger-law/285-d6a132f5-9743-499c-8c86-31ab41b1a98f [https://perma.cc/QFQ2-UTA3]; Aguilar & Muñoz, *supra* note 50; *How the U.S. Supreme Court Abortion Ruling Is Already Affecting Texas*, TEX. TRIB. (June 28, 2022), https://www.texastribune.org/2022/06/24/texas-abortion-law-supreme-court-ruling [https://perma.cc/MR55-74QE].

106. *See* Isaacson v. Brnovich, No. 21-cv-01417, 2022 WL 2665932, at *6-8 (D. Ariz. July 11, 2022); Frances Stead Sellers & Fenit Nirappil, *Confusion Post-*Roe *Spurs Delays, Denials for Some Life-saving Pregnancy Care*, WASH. POST (July 16, 2022, 9:09 AM EDT), https://www.washingtonpost.com/health/2022/07/16/abortion-miscarriage-ectopic-pregnancy-care [https://perma.cc/8L2N-H887] ("While state abortion bans typically carve out exceptions when a woman's life is endangered, the laws can be murky, prompting some obstetricians to consult lawyers and hospital ethics committees on decisions around routine care."); *see also* Allie Morris, *Texas Hospitals Fearing Abortion Law Delay Pregnant Women's Care, Medical Association Says*, DALL. MORNING NEWS (July 14, 2022, 7:49 PM CDT), https://www.dallasnews.com/news/politics/2022/07/14/texas-hospitals-fearing-abortion-law-delay-pregnant-womens-care-medical-association-says [https://perma.cc/WT7G-9KKG] ("While there's a narrow exception in both laws to save the life of a pregnant patient, there's been confusion about who qualifies.").

107. *See* Jen Christensen, *Biden Administration Says Federal Law Preempts State Abortion Bans When Emergency Care Is Needed*, CNN (July 11, 2022, 4:41 PM EDT), https://www.cnn.com/2022/07/11/health/federal-abortion-law-preempts-state-law/index.html [https://perma.cc/PD5N-Y65D].

- Texas passes a new law seeking to prevent its residents from traveling out of state to obtain an abortion[108] or from receiving information via the internet about medication abortion.[109] It also prohibits employers from reimbursing abortion-related expenses.[110] The state prosecutes an employer under this law for providing information and financial assistance to pregnant employees seeking out-of-state abortions. The defendant-employer moves to have the indictment dismissed on the grounds that the law violates the First Amendment and the right to travel.[111] The state court rejects the right-to-travel contentions but agrees that the law impermissibly burdens speech protected by the First Amendment and dismisses the indictment. Two years later, the state brings an action against the employer to recover its attorney's fees, arguing that the defendant-employer sought "declaratory relief" in moving to dismiss the indictment and that the state was the "prevailing party" as defined by S.B. 8 because one of the defendant's contentions was rejected.[112] The defendant-employer could be liable for the state's attorney's fees *even though the indictment was dismissed*, if the court agrees that the employer sought "declaratory relief" within the meaning of S.B. 8.

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108. *See* Debra Cassens Weiss, *Does Right to Travel for Abortion Include Right to Avoid Penalty? Kavanaugh Concurrence Doesn't Go So Far*, ABA J. (July 13, 2022, 11:35 AM CDT), https://www.abajournal.com/news/article/does-right-to-travel-for-abortion-include-right-to-avoid-penalty-kavanaugh-concurrence-doesnt-go-so-far [https://perma.cc/C32S-KYXM]. In the current litigation over S.B. 8 and other Texas abortion laws, the district court found that the briefing submitted by Texas Attorney General Ken Paxton "showed that the Attorney General's office viewed abortions as illegal whether the Texan has one in 'Denver or Dallas, in Las Cruces or Lamesa.'" Fund Tex. Choice v. Paxton, No. 22-cv-859-RP, 2022 WL 6851755, at *1 (W.D. Tex. Oct. 4, 2022).

109. A similar provision is in the new South Carolina bill. *See* S.B. 1373, 124th Gen. Assemb., 2d Reg. Sess. § 2 (S.C. 2022). Note that the South Carolina bill would also award attorney's fees to the bounty hunter and deny it to the defendant provider, but retains the traditional fee exposure for plaintiffs who bring actions that are frivolous or brought in bad faith. *Id.*

110. Texas Republicans view existing state law as prohibiting employer reimbursement of abortion-related travel expenses and have announced the intention to introduce new laws that "will impose additional civil and criminal penalties on law firms that pay for abortions or abortion travel." *See* Letter from Rep. Middleton, *supra* note 62, at 1-2.

111. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2309 (2022) (Kavanaugh, J., concurring) ("[M]ay a State bar a resident of that State from traveling to another State to obtain an abortion? In my view, the answer is no based on the constitutional right to interstate travel.").

112. S.B. 8 allows separate actions to recover attorney's fees, even if they were not sought in the original action, up to three years after the judgment entitling the prevailing party to fees. TEX. CIV. PRAC. & REM. CODE ANN. § 30.022(c) (West 2021).

In combination, these examples not only illustrate the astounding reach of the Texas Three Step across the entire foreseeable future of abortion litigation, but also reveal that the Texas scheme is categorically distinct from prior fee-shifting regimes. The classic justification for allowing certain types of plaintiffs to recover their attorney's fees if they prevail is that it encourages private parties to bring lawsuits that vindicate the public interest.[113] Texas would surely say that this rationale applies to lawsuits brought under S.B. 8, in which it has authorized private parties to bring suits that vindicate the state's policy of prohibiting abortion. But as revealed in the foregoing examples, encouraging such lawsuits is only one piece of the overall picture—Texas has, in fact, deployed fee-shifting to encourage some lawsuits and deter others, depending on the viewpoint of the litigants on the validity of the state's abortion laws.

S.B. 8 operationalizes this viewpoint discrimination using the Texas Three Step. Several other states are following suit. Oklahoma has enacted a fetal-heartbeat law modeled directly on S.B. 8, with fee-shifting provisions identical to those that comprise the Texas Three Step.[114] Bills pending in the legislatures of Alabama and Louisiana would do the same.[115] The Texas Three Step is spreading, and it is only becoming more urgent to understand how it works and how different it is from other fee-shifting regimes.

As we've shown here, S.B. 8's viewpoint-specific attorney's fee provision goes well beyond the four corners of the particular cause of action authorized by S.B. 8. It purports to govern all litigation in which a party seeks declaratory or injunctive relief in either an affirmative or defensive posture against any Texas law relating to abortion. This quality alone should give us pause: a state legisla-

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113. 1 COURT AWARDED ATTORNEY FEES ¶ 5.13 (2021) ("[O]ne of the purposes of fee-shifting is to promote private enforcement of favored legislative policies.").

114. Oklahoma Heartbeat Act, OKLA. STAT. tit. 63, §§ 1-745.31 to .44 (2022). Section 9 of the Act provides that if the private party seeking to enforce the abortion ban "prevails in an action brought under this section, the court shall award" both "costs and attorney fees." And it specifies that "[n]otwithstanding any other law, a court shall not award court costs or attorney fees to a defendant in an action brought under this section." *Id.* § 1-745.39. The Act imposes joint and several fee liability on anyone seeking declaratory or injunctive relief against any Oklahoma abortion law, including attorneys, and provides the same astonishing definition of prevailing party we see in the Texas Three Step, including the suspected drafting error. *Id.* § 1-745.43(A)-(B).

115. H.B. 295, 2022 Leg., Reg. Sess. (Ala. 2022) was introduced on February 8, 2022, and referred to the House Judiciary Committee. The bill's text is available at: https://legiscan.com/AL/drafts/HB295/2022 [https://perma.cc/9M26-8RN6]. H.B. 800, 2022 Leg., Reg. Sess. (La. 2022) was pre-filed on March 4, 2022 and has been pending in the House Health and Welfare Committee. The bill's text is available at: https://www.legis.la.gov/legis/BillInfo.aspx?s=22RS&b=HB800&sbi=y [https://perma.cc/AK7G-4HS8]. Both bills have fee-shifting provisions identical to those in S.B. 8.

ture has delineated an entire substantive realm in which any challenge to the validity of its laws will trigger the risk of an attorney's fee award to the prevailing party. But the law goes considerably farther by making the attorneys for such challengers jointly and severally liable for those fee awards and by defining prevailing party so broadly that abortion-law challengers and their attorneys will be liable for the opposing party's fees upon the dismissal of a single claim. In the next Part, we will see how aberrational this fee-shifting regime is.

II. ONE-SIDED FEE-SHIFTING IN CONTEXT

To describe the Texas Three Step as a one-sided fee-shifting arrangement obscures its true nature. As we will see in this Part, the combined impact of its three elements, intentionally designed to keep a disfavored group of litigants from challenging state law, makes it categorically different than fee-shifting arrangements we see in any other context.

A. Understanding the Singular Nature of the S.B. 8 Fee-Shifting Regime

The default rule in the United States is for each side to pay their own costs and attorney's fees.[116] This is often described as the "American rule" to distinguish it from the English approach in which the losing party must pay the attorney's fees of the prevailing party.[117] As one court has explained, the primary rationale for the American rule is to ensure unfettered access to courts for nonfrivolous claims:

> By refusing to penalize a litigant whose judgment concerning the merits of his position turns out to be in error, the American Rule protects the right to go to court and litigate a non-frivolous claim or defense. The unsuccessful litigant is not penalized even when an injured party whose claim is upheld is not made completely whole because of the cost of litigation.[118]

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116. *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975) ("In the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser."); John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U. L. REV. 1567, 1570-90 (1993).

117. *See* Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 DUKE L.J. 651, 651; *see also* Buckhannon Bd. & Care Home, Inc., v. W. Va. Dep't of Health & Hum. Res., 532 U.S. 598, 602 (2001) (describing the American rule where "parties are ordinarily required to bear their own attorney's fees").

118. Shimman v. Int'l Union of Operating Eng'rs, Local 18, 744 F.2d 1226, 1231 (6th Cir. 1984).

We will momentarily sidestep the extensive debate about the relative merits of each system,[119] in part because it is currently most accurate to say that both Congress and state legislatures have enacted various fee-shifting provisions across different realms.[120] Congress has enacted 200 federal statutes that authorize or require fee-shifting in specified circumstances,[121] using these provisions

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119. *See, e.g.*, James H. Cheek III, *Attorney's Fees: Where Shall the Ultimate Burden Lie?*, 20 VAND. L. REV. 1216, 1230 (1967) (asserting that the English rule is superior).

120. Note, *State Attorney Fee Shifting Statutes: Are We Quietly Repealing the American Rule?*, 47 LAW & CONTEMP. PROBS. 321, 321 (1984); *see, e.g.*, Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 402 (1968) (per curiam) (explaining the fee-shifting approach of Title II of the Civil Rights Act of 1964); Northcross v. Bd. of Educ., 412 U.S. 427, 428-29 (1973) (per curiam) (holding that the fee-shifting approach of Title II of the Civil Rights Act of 1964 also applies to cases brought under the Emergency School Aid Act of 1972); *see also* David A. Root, *Attorney Fee-Shifting in America: Comparing, Contrasting, and Combining the "American Rule" and "English Rule,"* 15 IND. INT'L & COMP. L. REV. 583, 588 (2005) (noting that there are more than 200 federal statutes and close to 2000 state statutes that allow the shifting of fees); Alan Hirsch & Diane Sheehey, *Awarding Attorneys' Fees and Managing Fee Litigation*, FED. JUD. CTR. 1 (2005), https://permanent.fdlp.gov/gpo41001/attfees2.pdf [https://perma.cc/UN6C-J29G] ("Almost 200 civil statutes authorize fee awards to prevailing plaintiffs and, in some cases, prevailing defendants."); *Alyeska Pipeline*, 421 U.S. at 260-62 (noting that with regards to federal litigation, "the circumstances under which attorneys' fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine").

121. These statutes cover wide-ranging areas of law including antitrust, see, for example, Agricultural Fair Practices Act of 1967 § 6, 7 U.S.C. § 2305(a), (c) (2018); Bank Holding Company Act Amendments of 1970 § 106(e), 12 U.S.C. § 1975 (2018); Clayton Act §§ 4, 4C, 16, 15 U.S.C. §§ 15(a), 15c(a)(2), 15c(d), 26 (2018); Racketeer Influenced and Corrupt Organizations Act § 901(a), 18 U.S.C. § 1964(c) (2018); consumer safety, see, for example, 49 U.S.C. § 30116(c) (2018); 49 U.S.C. § 32710(b) (2018); Consumer Product Safety Act §§ 23(a), 24, 15 U.S.C. §§ 2072(a), 2073(a) (2018); Consumer Product Safety Commission Improvements Act of 1976 § 10(a), 15 U.S.C. § 2060(c), (f) (2018); National Mobile Housing Construction and Safety Standards Act of 1974 § 613(b), 42 U.S.C. § 5412(b) (2018); civil rights, see, for example, 52 U.S.C. § 10310(e) (2018); National Voter Registration Act of 1993 § 11(c), 52 U.S.C. § 20510(c) (2018); Civil Rights Attorney's Fees Awards Act of 1976 § 2, 42 U.S.C. § 1988(b) (2018); environmental protection, see, for example, Toxic Substances Control Act §§ 19(d), 20(c)(2), 21(b)(4)(C), 15 U.S.C. §§ 2618(d), 2619(c)(2), 2620(b)(4)(C) (2018); Endangered Species Act of 1973 § 11(g)(4), 16 U.S.C. § 1540(g)(4) (2018); Surface Mining Control and Reclamation Act of 1977 §§ 520(d), 520(f), 525(e), 30 U.S.C. §§ 1270(d), 1270(f), 1275(e) (2018); intellectual property, see, for example, Plant Variety Protection Act of 1970 § 125, 7 U.S.C. § 2565 (2018); Lanham Act §§ 34, 35, 15 U.S.C. §§ 1116(d)(11), 1117(a)-(b) (2018); Copyright Act of 1976 § 101, 17 U.S.C. §§ 412, 505 (2018); Patent Act § 285, 35 U.S.C. § 285 (2018); Atomic Energy Act § 154, 42 U.S.C. § 2184 (2018); Defend Trade Secrets Act of 2016 § 2, 18 U.S.C. § 1836(b)(3)(D) (2018); labor and employment, see, for example, Norris-LaGuardia Act § 7, 29 U.S.C. § 107 (2018); Labor-Management Reporting and Disclosure Act of 1959 § 201, 29 U.S.C. § 431(c) (2018); Back Pay Act § 702, 5 U.S.C. § 5596(b)(1)(A)(ii) (2018); Fair Labor Standards Act § 16, 29 U.S.C. § 216(b) (2018); and securities regulation, see, for example, Securities Act of 1933 § 11, 15 U.S.C. § 77k(e) (2018); Securities Exchange Act §§ 9(f), 18(a), 21(h), 15 U.S.C. §§ 78i(f), 78r(a), 78u(h) (2018); Trust Indenture Act of 1939 §§ 315, 323, 15 U.S.C. §§ 77ooo(e), 77www(a) (2018).

"to rely heavily on private enforcement to implement public policy."[122] Alongside Congress's primary role as regulator of fee allocation in federal litigation, the federal courts retain "inherent authority" to police bad faith and disobedience of court orders by requiring the culprit to pay the attorney's fees of the opposing party.[123] States also tend to reflect this pattern, following the American rule as a default, combined with some statutory exceptions and some rules of civil procedure designed to deter and correct groundless and bad-faith actions.[124] As summarized by John F. Vargo, the "major purpose of state fee-shifting legislation is to compensate the prevailing plaintiff, promote public interest litigation, punish or deter the losing party for misconduct, or prevent abuse of the judicial system."[125] A brief survey of this landscape can help illuminate just how aberrational S.B. 8 is.

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122. *Alyeska Pipeline*, 421 U.S. at 263.

123. Roadway Express, Inc. v. Piper, 447 U.S. 752, 766 (1980). *Piper* discusses the "well-acknowledged" inherent power of courts to impose fees as sanctions for abusive litigation conduct. *Id.* at 765.

124. John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 LAW & CONTEMP. PROBS. 9, 30 (1984) (noting state statutes providing for fee-shifting). Texas generally follows the American rule unless otherwise designated by statute, contract, or court ruling. *See* Maryann B. Zaki & David A. Baay, *Texas Exceptions to the American Rule*, ADVOC. 16 (Winter 2017); 1/2 Price Checks Cashed v. United Auto. Ins. Co., 344 S.W.3d 378, 382 (Tex. 2011). For a sampling of Texas provisions that depart from the American rule, see TEX. CIV. PRAC. & REM. CODE ANN. § 134.005 (West 2021), which authorizes fees for prevailing parties for theft; TEX. CIV. PRAC. & REM. CODE ANN. § 38.001(b) (West 2021), which authorizes fees against an individual or organization, except certain quasi-governmental entities, for claims related to services, labor, furnished material, freight overcharges, lost or damaged freight, killed or injured stock, a sworn account, or a contract; TEX. CIV. PRAC. & REM. CODE ANN. § 37.009 (West 2021), which authorizes fees as is "equitable and just" with regard to the Uniform Declaratory Judgments Act; TEX. FIN. CODE ANN. § 305.005 (West 2021), which authorizes fees when a creditor is found liable for usury; TEX. FIN. CODE ANN. § 392.403(b) (West 2021), which authorizes fees against a party liable for coercive, unfair, harassing, or fraudulent debt-collection practices; TEX. GOV'T CODE ANN. § 552.323 (West 2021), which authorizes fees for plaintiffs in actions related to the denial of public records unless the government actor relied on judgements from the court or decisions from the attorney general in the initial denial of access; and TEX. INS. CODE ANN. § 542.060 (West 2021), which authorizes fees for violations of the Unfair Claim Settlement Practices Act by insurers. Colorado reflects a similar pattern. *See, e.g.*, COLO. REV. STAT. § 13-17-102 (West 2023) (setting forth instances in which a court may award attorney's fees). For a sampling of state provisions allowing attorney's fees as a remedy for groundless or bad-faith actions, see TEX. CIV. PRAC. & REM. CODE ANN. § 9.012(e)(3) (West 2021), which authorizes fee awards against parties bringing groundless claims in bad faith, for the purpose of harassment, or interposed for an improper purpose; and TEX. R. CIV. P. 13, which authorizes fees as a sanction for harassing, groundless, or bad-faith pleadings.

125. Vargo, *supra* note 116, at 1588.

We may start by observing that a "vast majority of federal fee-shifting statutes are two-way, i.e., the court may award attorney's fees to either the plaintiff or the defendant."[126] In two-way fee-shifting statutes, either party may be awarded fees upon being deemed the "prevailing party," the "substantially prevailing party," or the "successful" party.[127] Two-way fee-shifting statutes vary considerably, in part because their ultimate functioning is a product of both text and interpretation.[128] Some two-way fee-shifting statutes are truly symmetrical, placing plaintiffs and defendants in an identical posture with regards to the prospect of obtaining a fee award should they prevail.[129] Courts have interpreted others in an asymmetrical manner. For example, the text of Title VII that authorizes courts to award reasonable attorney's fees to the prevailing party does not distinguish between plaintiffs and defendants, but the Supreme Court has held that the standard used to determine when a prevailing plaintiff is entitled to fees is different than when a prevailing defendant is entitled to fees. A "prevailing plaintiff ordinarily is to be awarded attorney's fees in all but special circumstances," whereas a prevailing defendant in a Title VII case must show that "the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith."[130]

As examined above, S.B. 8's fee-shifting provisions are not two-way under any of the varieties encompassed within this large and disparate category. For actions brought under S.B. 8 itself, the statute specifies that defendants may not be awarded attorney's fees — even for groundless or bad-faith actions — and the provision that applies to all abortion litigation imposes fee liability only on those

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126. 1 COURT AWARDED ATTORNEY FEES ¶ 5.14 (2021).

127. Ruckelshaus v. Sierra Club, 463 U.S. 680, 684 (1983).

128. One underlying rationale for all two-way fee-shifting statutes is the deterrence of baseless litigation. As one scholar opines, "[S]urely the possibility of having to pay fees of both litigants would encourage a plaintiff to reconsider groundless litigation, or a defendant to consider carefully defending an action justifiably brought, and would consequently encourage compromises and settlements." Cheek, *supra* note 119, at 1222.

129. *See, e.g.*, Fogerty v. Fantasy, Inc., 510 U.S. 517, 534 (1994) (ruling that under the fee-shifting provisions of the Copyright Act "[p]revailing plaintiffs and prevailing defendants are to be treated alike").

130. Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 417, 421 (1978) (emphasis omitted). For an endorsement of the *Christiansburg Garment Co.* approach in the context of a discussion of how attorney's fee awards can violate the First Amendment right to petition, see Deborah J. La Fetra, *Fee Awards Turned Upside Down: A Threat to Public-Interest Litigation*, GOLDWATER INST. 8-12 (Mar. 26, 2019), https://www.goldwaterinstitute.org/wp-content/uploads/2019/04/Fee-awards-turned-upside-down_326.pdf [https://perma.cc/GT5G-ZUEY]. *See also* Dan B. Dobbs, *Awarding Attorney Fees Against Adversaries: Introducing the Problem*, 1986 DUKE L.J. 435, 448 (noting that, in spite of statutory language suggesting judicial discretion to award fees to civil-rights plaintiffs, there is "virtually no discretion to deny a fee award to a prevailing [civil-rights] plaintiff").

who seek declaratory or injunctive relief, never on those who oppose it. Given Congress's strong interest in eliminating barriers to vindicating federal civil-rights laws,[131] it is remarkable that S.B. 8 pushes beyond the civil-rights statutes in its preference for plaintiffs. Even in Title VII, Congress retained the possibility that defendants could be awarded fees for frivolous or unreasonable suits without needing to show that the suit was brought in bad faith.[132] S.B. 8, in contrast, dispenses with fee liability even for plaintiffs who file bad-faith actions.

There is a small class of statutes in which Congress has provided that only one of the parties to a suit may (or must) be awarded fees.[133] Might S.B. 8's one-sided fee-shifting regime fit into that category? In the Interstate Commerce Commission Termination Act, for example, Congress created a cause of action against rail carriers who violated the terms of the routing instructions in the bill of lading, and instructed that the "court shall award a reasonable attorney's fee to the plaintiff in a judgment against the defendant rail carrier."[134] No such provision entitles the defendant rail carrier to reasonable attorney's fees in a judgment against the plaintiff.[135] In the Clayton Act, Congress created a private cause-of-action and authorized an award of attorney's fees to anyone "injured in his business or property by reason of anything forbidden in the antitrust laws," providing a one-way fee award in favor of antitrust plaintiffs.[136] As these examples suggest, most of the one-way fee-shifting statutes work in favor of plaintiffs and reflect Congress's judgment that the would-be plaintiffs in these areas need special encouragement to bring forth the suits that vindicate federal policy. In these areas, contemplating litigation against the railroad or monopolistic companies, plaintiffs need reassurance that they will recover attorney's fees if they

131. *See* Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 402 (1968) ("[Plaintiffs bringing suit under the Civil Rights Act are] vindicating a policy that Congress considered of the highest priority. If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts." (footnote omitted)).

132. *Christiansburg Garment Co*., 434 U.S. at 419 (declining to conclude that "Congress intended to distort" a fair adversary process "by giving the private plaintiff substantial incentives to sue, while foreclosing to the defendant the possibility of recovering his expenses in resisting even a groundless action unless he can show that it was brought in bad faith").

133. *See, e.g.*, Railway Labor Act § 3(p), 45 U.S.C. § 153(p) (2018) (allowing fees only for prevailing petitioner); 46 U.S.C. § 58106(c)(2) (2018) (allowing fees only for the person injured by violations of maritime law); Communications Act of 1934 § 206, 47 U.S.C. § 206 (2018) (providing that common carriers are liable for the fees of injured parties); 47 U.S.C. § 407 (2018) (allowing fees only for prevailing petitioner).

134. 49 U.S.C. § 11707(b) (2018).

135. Fulfillment Servs. Inc. v. United Parcel Serv. Inc., 528 F.3d 614, 624 (9th Cir. 2008) (holding that fee-shifting in § 14704(e) is applicable only to successful plaintiffs).

136. 15 U.S.C. § 15(a) (2018) (allowing a person injured to recover a "reasonable attorney's fee").

win but not be liable for their opponent's fees if they lose.[137] State fee-shifting statutes tend to reflect this one-sided approach: one survey of nearly 2,000 state attorney's fee provisions found that over fifty-four percent designate the prevailing plaintiff as the beneficiary of the fee shift rather than the prevailing party.[138]

In rare instances, a one-way fee-shifting provision works in favor of defendants. The Norris-LaGuardia Act, enacted to prevent courts from breaking strikes and pickets, makes only a prevailing defendant eligible for a fee award.[139] This is consistent with the federal policy that the Norris-LaGuardia Act advances: preventing employers whose employees are unionizing from running to management-friendly courts to enjoin labor actions, thereby dampening anti-labor behavior.[140]

Why not place S.B. 8 in this class of statutes? A spokesperson for the law might well make the following argument: legislatures use one-sided fee-shifting to promote a particular public policy. Just as Congress sought to provide a remedy for people injured by violations of the antitrust laws and wanted to ensure that victims could be made whole by recovering the amount expended on attorney's fees, so, too, does S.B. 8 vindicate Texas's public policy against abortion. Setting aside the dubious analogy between "a person injured in his business or property" by violations of the antitrust law and the unbounded group comprised of "any person" authorized to bring suit under S.B. 8, we will stipulate that an S.B. 8 plaintiff is harmed by the affront to his moral sensibilities caused by illegal abortion, and that the policy of Texas is to correct that injury.

The problem, again, is that this analogy only runs as far as the bounty suits brought under S.B. 8 itself. It does not explain or account for the fee-shifting imposed upon parties in abortion litigation other than S.B. 8 suits—such as those examples set forth above, in which a party seeks declaratory or injunctive relief against the current Texas trigger law or hypothetical future abortion statutes enacted in the wake of *Dobbs*. The Texas policy is simultaneously for and against abortion litigation depending on which side the abortion provider (or supporter) is on. It is a coherent policy in the sense that we can see the logic in

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137. *See* Harold J. Krent, *Explaining One-Way Fee Shifting*, 79 VA. L. REV. 2039, 2040 (1993) ("Less litigation should ensue under two-way fee-shifting than under one-way fee-shifting because potential litigants may be deterred from litigating by the prospect of paying their adversaries' fees.").

138. Note, *supra* note 120, at 330-31.

139. 29 U.S.C. § 107 (2018).

140. *See* Daniel Belke, Note, *Blitzing* Brady*: Should Section 4(A) of the Norris-LaGuardia Act Shield Management from Injunctions in Labor Disputes?*, 113 COLUM. L. REV. 53, 54 (2013) (explaining that the Norris-LaGuardia Act was enacted "to remedy a long history of employee abuse in federal court, specifically the judiciary's liberal grants of injunctive relief in favor of management in labor disputes to halt worker strikes").

it, yet it is a discriminatory one that fundamentally differs from a scheme that seeks to encourage antitrust litigation by distinguishing antitrust plaintiffs from antitrust defendants.

A proponent of the Texas Three Step might respond that we have failed to appreciate the extent to which the state's policy is precisely to support anti-abortion actors in all litigation regardless of posture, and that such a policy is largely analogous to the objectives underlying existing fee regimes that are not only accepted as unproblematic, but also crucial to the vindication of the public interest. In other words, Texas might argue that legislatures are allowed to identify favored parties whose success in litigation vindicates the public interest and to support these parties with benefits that their opponents do not enjoy. What we are doing for anti-abortion actors, Texas might say, is not meaningfully different from what Congress has done for civil-rights and antitrust plaintiffs or organized-labor defendants.[141]

But this response fails for three independent reasons. First, even under the one-sided and asymmetrical fee regimes noted above, defendants may obtain attorney's fee awards where the suit was groundless. By deliberately overriding the prospect of an attorney's fee award against plaintiffs who bring suit vexatiously or in bad faith—something that existed at common law and has been codified in both state and federal statutes—S.B. 8 surpasses the asymmetry of the federal civil-rights statutes and the Clayton and Norris-LaGuardia Acts.[142]

Second, and even more consequentially, other fee-shifting statutes do not specifically penalize efforts to obtain declaratory or injunctive relief against the *government*. Recall that S.B. 8 not only allocates fee liability between the private parties who are the litigants in actions brought under S.B. 8 itself, but also imposes fee liability on any person "who seeks declaratory or injunctive relief to prevent this state, a political subdivision, any governmental entity or public official in this state, or any person in this state from enforcing any statute, ordinance, rule, regulation, or any other type of law that regulates or restricts abortion."[143] With this provision, Texas uses the threat of fee awards to deter challenges to the validity of its own law. By emphasizing this feature, we can see

141. *See* Krent, *supra* note 137, at 2040-41 (explaining that, with one-way fee-shifting, "[n]o pretense at equal treatment is maintained, for Congress has intervened to confer advantage on one particular side of the controversy").

142. *See* Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 417, 419 (1978) (noting that "even under the American common-law rule attorney's fees may be awarded against [litigants] who [have] proceeded in bad faith").

143. TEX. CIV. PRAC. & REM. CODE ANN. § 30.022 (West 2021).

that there is simply nothing analogous in the other one-sided fee-shifting statutes found in state or federal law.[144] In fact, Congress has sought to do the *opposite*: it adopted robust fee-shifting *against* the federal government "as an instrument to monitor government regulation and to deter unjustifiable government policies and enforcement actions."[145]

In 1980, Congress enacted the Equal Access to Justice Act (EAJA), which "significantly expanded the federal government's liability to pay the attorney's fees of parties that prevail against the government in litigation or administrative proceedings."[146] The EAJA, "[m]otivated in part by a desire to deter government overreach and wrongdoing," [147] creates an asymmetrical fee regime slanted against the federal government. First, it makes the United States liable for fee awards to the same extent as any other party.[148] It then mandates fee awards against the United States where its position was not "substantially justified," while exempting the United States from eligibility to receive an award in the same circumstances.[149] In a provision that the Congressional Research Service describes as "unique in the law of attorneys' fees,"[150] the EAJA allows even a losing party to obtain a fee award against the United States if the government

144. In fact, Congress explicitly waived sovereign immunity in the Equal Access to Justice Act, allowing attorney's fee awards against the United States. 28 U.S.C. § 2412(b) (2018) (allowing fee awards to be assessed against the federal government to the same extent as any other party); *see also* 5 U.S.C. § 504, 28 U.S.C. § 2412(d) (2018) (providing that in specified agency adjudications and civil actions other than tax and tort cases brought by or against the United States, the United States shall be liable for the attorney's fees of prevailing parties, unless it proves that its position was "substantially justified or that special circumstances make an award unjust").

145. Gregory C. Sisk, *The Essentials of the Equal Access to Justice Act: Court Awards of Attorney's Fees for Unreasonable Government Conduct (Part One)*, 55 LA. L. REV. 217, 220 (1994); *see also* Astrue v. Ratliff, 560 U.S. 586, 599 (2010) (Sotomayor, J., concurring) ("[T]he specific purpose of the EAJA is to eliminate for the average person the financial disincentive to challenge unreasonable governmental actions." (quoting Comm'r v. Jean, 496 U.S. 154, 163 (1990))).

146. JOANNA R. LAMPE, CONG. RSCH. SERV., IF11246, ATTORNEY'S FEES AND THE EQUAL ACCESS TO JUSTICE ACT: LEGAL FRAMEWORK 1 (2019).

147. *Id.*; *see also* Equal Access to Justice Act, Pub. L. No. 96-481, § 202(c)(1), 94 Stat. 2321, 2325 (1980) (explaining that the Equal Access to Justice Act was enacted "to diminish the deterrent effect of seeking review of, or defending against, governmental action by providing in specified situations an award of attorney's fees, expert witness fees, and other costs against the United States").

148. *See* 28 U.S.C. § 2412(b) (2018).

149. *Id.* § 2412(d)(1)(A); *see also* Gregory C. Sisk, *A Primer on Awards of Attorney's Fees Against the Federal Government*, 25 ARIZ. ST. L.J. 733, 788 (1993) ("Subsection (d) not only waives the sovereign immunity of the United States, but also creates a new basis for an award of attorney's fees beyond other common law or statutory exceptions to the American Rule.").

150. HENRY COHEN, CONG. RSCH. SERV., RL 94-970, AWARDS OF ATTORNEYS' FEES BY FEDERAL COURTS AND FEDERAL AGENCIES 8 (2008).

brings suit and its demand is unreasonable and substantially in excess of the final judgment obtained.[151]

There are dozens of other specific statutory provisions that authorize one-way fee-shifting against the federal government in particular causes of action. Notable examples include several titles of the Civil Rights Act,[152] the Fair Housing Act,[153] the Voting Rights Act,[154] and the Americans with Disabilities Act.[155] In fact, nearly half of the one-way fee-shifting statutes enacted by Congress involve "private litigants suing federal or state governments."[156] In each of these instances, Congress used one-way fee-shifting to encourage litigation against government actors rather than deter it.[157]

S.B. 8's penalty for seeking declaratory or injunctive relief against state law is also an outlier among the fee-shifting provisions that existed in Texas state law prior to S.B. 8. As noted earlier, Texas follows the American rule, except where fee-shifting is provided by contract, statute, or court ruling.[158] The state has enacted numerous statutes allowing for fee-shifting, including Section 38.001 of the Texas Civil Practice and Remedies Code, a frequently invoked provision[159] that allows for fee-shifting in eight circumstances, such as claims based on breach of contract.[160] Unlike the federal approach seen in the EAJA, the statute does not allow for the recovery of fees against a government entity unless the government is performing proprietary rather than governmental functions,

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151. *See* 28 U.S.C. § 2412(d)(1)(D) (2018).

152. *See* Civil Rights Act of 1964, 42 U.S.C. § 2000a-3(b) (2018); *id.* § 2000e-5(k).

153. *See* 42 U.S.C. § 3612(p) (1988).

154. *See* 52 U.S.C. § 10310(e) (2018).

155. *See* 42 U.S.C. § 12205 (2018). One-way fee-shifting against the federal government is also found in the Freedom of Information Act and the Privacy Act. *See* Krent, *supra* note 137, at 2041.

156. *See* Krent, *supra* note 137, at 2041.

157. *See* Dobbs, *supra* note 130, at 449 ("The Equal Access to Justice Act presents a different form of one-way fee-shifting: the government may be held liable, but may not assert the liability of others, for the costs of litigation conducted without substantial justification. This is not a distinction between plaintiff and defendant, but a distinction between government and citizen. The citizen who prevails can recover attorney fees, whether that citizen is a prevailing plaintiff or a prevailing defendant; the government, in contrast, can never recover attorney fees." (footnote omitted)).

158. *See* MBM Fin. Corp. v. Woodlands Operating Co., 292 S.W.3d 660, 669 (Tex. 2009) ("Texas has long followed the 'American Rule' prohibiting fee awards unless specifically provided by contract or statute.").

159. *See, e.g.*, Carlos R. Soltero, *General Principles of Recovery Under Texas Law on Attorneys' Fees*, 2016 TXCLE BUS. DISPS. 19.I [1], [2] (describing TEX. CIV. PRAC. & REM. CODE ANN. § 38.001 as "one of the most widely pervasive fee statutes in Texas").

160. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 38.001 (West 2021).

but neither does it *inflict* fee liability on a party for trying to obtain declaratory or injunctive relief against state law.[161] The Texas Declaratory Judgment Act[162] specifically allows a person whose rights are affected by a statute to "have determined any question of construction or validity" and to "obtain a declaration of rights."[163] It further provides that "[i]n any proceeding under this chapter, the court may award costs and reasonable and necessary attorney's fees as are equitable and just,"[164] and the Texas Supreme Court has interpreted this provision to allow fee awards against government entities.[165]

Perhaps most revealing is a fairly recent addition to the Texas fee-shifting landscape, Texas Rule of Civil Procedure 91a.[166] Adopted in 2013, it allows a party to recover its attorney's fees if it successfully demonstrates that a plaintiff's causes of action have "no basis in law or fact."[167] The rule specifically exempts parties litigating against a government entity or public official.[168] Whatever one might say about the overall merits of Rule 91a as a form of civil justice reform,

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161. *See* Wheelabrator Air Pollution Control, Inc. v. City of San Antonio, 489 S.W.3d 448, 451-52 (Tex. 2016) (explaining that "should [the court] determine the action arose out of the municipality's performance of a governmental function, immunity applies and it must be overcome by a claimant establishing a valid waiver").

162. TEX. CIV. PRAC. & REM. CODE ANN. § 37.009 (West 2021).

163. *Id.* § 37.004(a).

164. *Id.* § 37.009.

165. *See* Tex. Educ. Agency v. Leeper, 893 S.W.2d 432, 446 (Tex. 1994) ("We conclude that by authorizing declaratory judgment actions to construe the legislative enactments of governmental entities and authorizing awards of attorney fees, the DJA necessarily waives governmental immunity for such awards."). We acknowledge the extent of discretion granted to courts under this provision—a court could conceivably find it "equitable and just" to award attorney's fees against a plaintiff who unsuccessfully sought declaratory relief, for example, Wells Fargo Bank, N.A. v. Murphy, 458 S.W.3d 912, 915 (Tex. 2015), and there is no requirement that a party prevail in order to receive attorney's fees under the Texas Declaratory Judgment Act. *See* Barshop v. Medina Cnty. Underground Water Conservation Dist., 925 S.W.2d 618, 637 (Tex. 1996) (explaining that an attorney-fee award under the Act is "not dependent on a finding that a party 'substantially prevailed'").

166. *See* Zaki & Baay, *supra* note 124, at 18.

167. TEX. R. CIV. P. 91a.

168. *Id.* r. 91a.7 ("Except in an action by or against a governmental entity or a public official acting in his or her official capacity or under color of law, the court may award the prevailing party on the motion all costs and reasonable and necessary attorney fees incurred with respect to the challenged cause of action in the trial court."); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 30.021 (West 2021) ("In a civil proceeding, on a trial court's granting or denial, in whole or in part, of a motion to dismiss filed under the rules adopted by the supreme court under Section 22.004(g), Government Code, the court may award costs and reasonable and necessary attorney's fees to the prevailing party. This section does not apply to actions by or against the state, other governmental entities, or public officials acting in their official capacity or under color of law.").

we can observe that Texas sensibly sought to ensure that it would not chill litigation against government actors.[169]

The third and final independent reason to reject the proponent's response is that none of these other statutes make a party's attorney jointly and severally liable for a fee award.[170] Attorney liability for the opposing party's legal fees is limited to situations in which the attorney herself has engaged in misconduct, having "either willfully disobeyed a court order or acted in bad faith, vexatiously, wantonly, or for oppressive reasons."[171] The inclusion of attorneys as liable par-

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169. For a discussion of Rule 91a's underpinnings in tort reform, see George Hayek, Comment, *TRCP 91a: Resolving the Confusion*, 54 HOUS. L. REV. 775, 783-85 (2017).

170. *See* 2 COURT AWARDED ATTORNEY FEES ¶ 17.41 (2022) ("The fee award, of course, is made payable by the opposing party or parties . . . fee-shifting statutes are designed to shift the cost of the litigation to the losing *party*, not that party's *attorney* . . . no portion of a fee award under a federal fee-shifting statute may be made payable by an attorney, though an attorney may be liable for attorney's fees as sanctions based on rules of court, statutes, or the court's inherent equitable powers" (footnote omitted)).

The lower federal courts have repeatedly ruled that unless a fee-shifting statute expressly permits a fee award against counsel, it must be read to prohibit it. *See, e.g.*, *In re* Crescent City Ests., LLC, 588 F.3d 822, 825 (4th Cir. 2009) ("The proper presumption is that when a fee-shifting statute does not explicitly permit a fee award against counsel, it prohibits it."); Hyde v. Midland Credit Mgmt., Inc., 567 F.3d 1137, 1140-41 (9th Cir. 2009) ("[T]here is a general 'presumption that an attorney is generally not liable for fees unless that prospect is spelled out.'" (quoting Heckethorn v. Sunan Corp., 992 F.2d 240, 242 (9th Cir. 1993))).

None of the 200 federal fee-shifting statutes identified by the Congressional Research Service include the requisite express statement, except in limited circumstances where the attorney has been engaged in some form of misconduct. *See* COHEN, *supra* note 150, at 2. Where Congress has expressly made attorneys personally liable for fee awards, the assessment is linked to attorney misconduct. A notable example is 28 U.S.C. § 1927 (2018), which provides that

> [a]ny attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

Additional examples are found in the Federal Rules of Civil Procedure, which includes rules that link the fee liability to misconduct or noncompliance. *See* FED. R. CIV. P. 11, 26, 37. In sum, Congress has shown both that when it wants to make attorneys liable under fee-shifting statutes it will do so expressly and that it will only do so when the attorney has engaged in misconduct.

171. Durrett v. Jenkins Brickyard, Inc., 678 F.2d 911, 919 (11th Cir. 1982); *see* 28 U.S.C. § 1927 (2018). Lower courts have since emphasized that Section 1927 is limited to misconduct, specifically "the attorney's unreasonable and vexatious multiplication of the proceedings." *See* Browning v. Kramer, 931 F.2d 340, 344-46 (5th Cir. 1991); *see also* Roadway Express v. Piper, 447 U.S. 752, 763 (1979) (providing that "[b]oth parties and counsel may be held personally liable for expenses, 'including attorney's fees,' caused by the failure to comply with discovery

ties for purposes of satisfying an opposing party's fee award, without any showing of misconduct by the attorney, would itself be sufficient to make the Texas Three Step a novel fee-shifting mechanism. A regime in which attorneys are personally liable for fee awards without any misconduct, as one court has explained, "could begin to transform what it means to practice law. A lawyer should not be required to risk personal liability merely for acting in a representational capacity."[172] In no other fee regime does the prospect of an adverse fee award cast a shadow over a litigant's ability to obtain counsel.

The combined force of these three features makes the Texas Three Step an extraordinary and unprecedented departure from long-standing notions about the appropriate goals and parameters of fee-shifting regimes. Fee-shifting regimes, in all their varieties, have not been deployed as shields to insulate laws from judicial scrutiny, and they have not been structured to deter attorneys from participating in matters that the state wishes not to litigate. S.B. 8, in contrast, intentionally obstructs access to the courthouse for litigants with whom the state has a fundamental ideological disagreement while simultaneously allowing its allies to bring frivolous or bad-faith suits without sanction. As a descriptive matter, Texas has clearly forged new ground.

Novelty alone, of course, is not necessarily a sufficient basis upon which to reject a legal framework. After all, we celebrate state-level experimentation in the "laboratories of democracy."[173] Does Texas not have the prerogative to innovate in the allocation of attorney's fees to advance its policy against abortion? It does—but only to a point. One of S.B. 8's most remarkable features is its attempt to impose attorney's fee liability not only in state court but in federal court as well, and regardless of whether litigants are seeking to vindicate state or federal

orders" (citing FED. R. CIV. P. 37)). A similar approach is found in state law. *See* Alan Stephens, Annotation, *Attorney's Liability Under State Law for Opposing Party's Counsel Fees*, 56 A.L.R. 4th 486 Art. 1 § 2(a) (1987) (noting that "an increasing number of jurisdictions permit, by court decision or by statute, the recovery of fees from the opposing attorney in cases where the proceedings have been initiated or protracted due to that attorney's bad faith or misconduct").

COLO. REV. STAT. § 13-17-102(3) (2009) allows Colorado courts to assess reasonable attorney's fees and to "allocate the payment thereof among the offending attorneys and parties, jointly or severally, as it deems most just, and may charge such amount, or portion thereof, to any offending attorney or party." *See also* Lees v. James, 435 P.3d 345, 352 (Colo. App. 2018), (affirming a fee award assessed against an attorney who made the "critical legal decisions in this case. . . . [I]t would be difficult to contemplate the deterrent effect intended by the legislature were fees to be awarded solely against [the plaintiff]").

172. *Crescent City Ests.*, 588 F.3d at 830.

173. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory . . . .").

claims against Texas abortion law.[174] But as we have just seen, Congress has spoken extensively on the allocation of attorney's fees in the litigation of federal claims. To the extent that S.B. 8 is not only different from, but in conflict with, these laws, it must of course give way.[175] As we explain in the next Section, the clear conflict with federal fee-shifting law is so pronounced that, at least for claims brought pursuant to 42 U.S.C § 1983, the fee-shifting provisions in S.B. 8 are most likely preempted.[176]

B. Preemption Concerns

S.B. 8 is not only categorically different from the various forms of fee-shifting that Congress has used to advance federal policy. It also conflicts with federal law in a way that triggers the application of preemption principles. By penalizing litigants who seek declaratory or injunctive relief against Texas abortion law, S.B. 8 attempts to refashion a framework that Congress has already established for the allocation of attorney's fees in constitutional litigation.

42 U.S.C § 1983 creates a federal cause of action for violations of constitutional rights and is the primary mechanism for seeking relief from unconstitutional state action.[177] A litigant who wishes to challenge a Texas abortion law on the grounds that it violates the First Amendment, or who intends to challenge a California firearms law on Second Amendment grounds, will most likely bring

174. TEX. CIV. PRAC. & REM. CODE ANN. § 30.022(a) (West 2021).

175. *See* PLIVA, Inc. v. Mensing, 564 U.S. 604, 617 (2011) (explaining that the Supremacy Clause requires federal law to prevail over state law when there is a direct conflict); *see also* Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 228 (2000) ("Everyone agrees that even if a federal statute contains no express preemption clause, and even if it does not impliedly occupy a particular field, it preempts state law with which it 'actually conflicts.'").

176. *See, e.g.*, Collins v. Thomas, 649 F.2d 1203, 1205 (5th Cir. Unit A July 1981) (holding that a Texas state law forbidding execution on judgments against counties was preempted by 42 U.S.C. § 1988 (2018)); Ruiz v. Estelle, 553 F. Supp. 567, 575 (S.D. Tex. 1982) (holding that 42 U.S.C. § 1988 (2018) preempts Texas state law purporting to limit the amount of state funds expendable in payment of attorney's fees to plaintiffs bringing actions against the Department of Corrections); *see also* Connolly, *supra* note 15 (describing statutory preemption arguments that could be brought against S.B. 8). The pending challenges to both California's S.B. 1327 and Texas's S.B. 8 assert that the fee-shifting schemes are preempted by 42 U.S.C. § 1988 (2018). *See supra* note 22.

177. STEVEN H. STEINGLASS, 1 SECTION 1983 LITIGATION IN STATE AND FEDERAL COURTS § 1:1 (2022).

suit under 42 U.S.C § 1983.[178] All such suits are subject to the fee-shifting provisions in 42 U.S.C. § 1988, which authorizes courts to award a reasonable attorney's fee to prevailing parties in § 1983 suits. "Congress viewed the fees authorized by § 1988 as 'an integral part of the remedies necessary to obtain' compliance with § 1983," and the Supreme Court has interpreted the fee regime accordingly.[179] The Court has held that prevailing plaintiffs "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust,"[180] whereas prevailing defendants must show that the suit was vexatious, frivolous, or brought to harass or embarrass the defendant.[181] The Court has further made clear that plaintiffs do not need to win every claim in order to be considered prevailing: they must only obtain "meaningful relief."[182]

Where a plaintiff brings an action under § 1983 seeking declaratory or injunctive relief against a Texas abortion law, these are the fee-shifting principles

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178. The pending challenges to S.B. 8 and S.B. 1327 have both been brought under 42 U.S.C. § 1983 (2018). *See In re* Paxton, 53 F.4th 303, 312 (5th Cir. 2022) (Higginbotham, J., concurring) (noting that plaintiffs challenging S.B. 8 and other Texas abortion laws seek injunctive and declaratory relief and are proceeding under § 1983); Complaint for Declaratory, Injunctive, or Other Relief, Miller v. Bonta, No. 22-cv-01446 (S.D. Cal. Sept. 26, 2022), 2022 WL 18492889.

    A litigant seeking to sue a party who is not a "person" under § 1983 could bring a suit for equitable relief under *Ex parte Young*, 209 U.S. 123 (1908). *See* Note, *Interpreting Congress's Creation of Alternative Remedial Schemes*, 134 HARV. L. REV. 1499, 1505-06 (2021) ("One might wonder when a plaintiff would even invoke *Young*, given that § 1983 provides for injunctive relief against state actors. One instance is where a plaintiff seeks to sue a party that is not a "person" under § 1983."); *see also* Rhodes & Wasserman, *Offensive Litigation*, *supra* note 14, at 1048 (explaining that a litigant seeking to prevent ongoing or future enforcement of a law would bring an action under § 1983 and *Ex parte Young*). The Supreme Court has made clear that a litigant bringing claims for purely injunctive relief is also entitled to attorney's fees under § 1988. *See* Missouri v. Jenkins, 491 U.S. 274, 280 (1989) (affirming an award of attorney's fees under § 1988 to plaintiffs granted prospective injunctive relief); *see also* Lefemine v. Wideman, 568 U.S. 1, 4 (2012) (clarifying that a litigant awarded injunctive relief but not damages does qualify as a prevailing party for purposes of awarding attorney's fees under § 1988).

179. Maine v. Thiboutot, 448 U.S. 1, 11 (1980) (quoting S. REP. NO. 94-1011, at 5 (1976)).

180. Hensley v. Eckerhart, 461 U.S. 424, 429 (1983) (quoting S. REP. NO. 91-1011, at 4 (1976)).

181. Hughes v. Rowe, 449 U.S. 5, 14-15 (1980).

182. Fox v. Vice, 563 U.S. 826, 834 (2011) ("[P]laintiffs may receive fees under § 1988 even if they are not victorious on every claim. A civil rights plaintiff who obtains meaningful relief has corrected a violation of federal law and, in so doing, has vindicated Congress's statutory purposes.").

that would apply.[183] To see why S.B. 8's fee-shifting provisions are preempted, let's imagine a plaintiff bringing a § 1983 suit to enjoin the Texas abortion law that we hypothesized earlier: the law seeks to prevent its residents from traveling out of state to obtain an abortion or from receiving information via the internet about medication abortion. Such a plaintiff might reasonably assert both First Amendment and right to travel contentions against the challenged law, and might succeed in having the law enjoined on First Amendment grounds while the alternative claim is dismissed as moot.[184] In this situation, § 1988 would entitle the plaintiff to a reasonable attorney's fee award and foreclose fee recovery for the defendant, while S.B. 8 would mandate that the government defendant be entitled to a fee award and foreclose fee recovery for the plaintiff.[185]

Even a glancing reference to basic preemption doctrine reveals that Texas does not have the power to impose a result that is directly contradictory to what federal law requires. As the Court has repeatedly said, "state law is pre-empted to the extent that it actually conflicts with federal law."[186] The Court has found such a conflict to exist where "either (1) compliance with both the state and federal law is 'a physical impossibility' or (2) state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"[187] As to the first category, one might be tempted to argue that it is not physically impossible for a court to apply both of these fee regimes: the plaintiff gets her reasonable attorney's fees for prevailing on the First Amendment claim, as § 1988 requires, and the government defendant recovers its attorney's fees, as S.B. 8 requires, because the plaintiff's right-to-travel contentions were dismissed. The assertion fails because § 1988 does more than merely instruct that the plaintiff in this scenario is entitled to fees; it also instructs that the government defendant is *not*. That is the plain holding of *Hughes v. Rowe*, in which the Court reversed an award of attorney's fees to a government defendant because

183. These principles apply in state court as well as federal court. State courts have concurrent jurisdiction over § 1983 claims, and the Court has made it very clear that state courts adjudicating § 1983 suits are bound by the same fee-shifting principles as federal courts. *See Thiboutot*, 448 U.S. at 11-12; James v. City of Boise, 577 U.S. 306, 306-07 (2016) (summarily reversing the Idaho Supreme Court's conclusion that it was not bound by the U.S. Supreme Court's interpretation of the fee-shifting provision in § 1988); *see also* STEINGLASS, *supra* note 177, § 22:12 ("States may adopt broad fee-shifting policies for state law claims, but state courts cannot apply such policies to § 1983 claims on which § 1988 is the governing standard.").

184. We emphasize a key stipulation here that neither of these claims would be frivolous or groundless.

185. 42 U.S.C. § 1988 also would prohibit the imposition of fee liability on the party's attorneys. *See* Roadway Express v. Piper, 447 U.S. 752, 761 (1980).

186. English v. Gen. Elec. Co., 496 U.S. 72, 79 (1990) (explaining that the Court has found preemption where it is "impossible" to "comply with both state and federal requirements").

187. Nelson, *supra* note 175, at 228.

the § 1983 suit, while unsuccessful, was not groundless or without foundation.[188]

S.B. 8's fee-shifting regime also falters against a series of rulings in which the Court has held that state law is preempted, even in the absence of a direct conflict, where the state law acts as an obstacle to the accomplishment of federal objectives.[189] Congress made very clear the federal objectives it sought to advance with the enactment of § 1988: as it stated in the Senate Report, "civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain."[190] The Report goes on to specify that litigants "should not be deterred from bringing good faith actions to vindicate the fundamental rights here involved by the prospect of having to pay their opponent's counsel fees should they lose" and that defendants are, therefore, only entitled to fees where it is shown that the suit "was clearly frivolous, vexatious, or brought for harassment purposes."[191] Against this backdrop, the Court has said very plainly that "assessing attorney's fees against plaintiffs simply because they do not finally prevail would substantially add to the risks inhering in most litigation and would undercut the efforts of Congress to promote the vigorous enforcement" of the civil rights laws.[192]

Imposing fee liability on reproductive-rights litigants and their attorneys for the dismissal of even a single claim, with no showing that the claim was frivolous, vexatious, or harassing, interferes with the federal objectives underlying § 1988. But the Texas Three Step does not only conflict with federal statutory provisions that govern fee-shifting in federal litigation; it is at odds with constitutional principles that guarantee access to courts.

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188. 449 U.S. 5, 14-15 (1980); *see also James*, 577 U.S. at 306-07 (reversing the state supreme court's award of attorney fees to the prevailing defendant without a determination that the plaintiff's action was "frivolous, unreasonable, or without foundation").

189. *See* Nelson, *supra* note 175, at 228-29 (discussing this line of cases and explaining that the obstacle preemption doctrine "potentially covers not only cases in which state and federal law contradict each other, but also all other cases in which courts think that the effects of state law will hinder accomplishment of the purposes behind federal law").

190. S. REP. NO. 94-1011, at 2 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5908, 5910; *see also* Catherine R. Albiston & Laura Beth Nielsen, *The Procedural Attack on Civil Rights: The Empirical Reality of* Buckhannon *for the Private Attorney General*, 54 UCLA L. REV. 1087, 1088 (2007) ("Fee-shifting statutes are an integral part of the civil rights enforcement system in the United States. The U.S. Congress enacted fee-shifting statutes to encourage private enforcement of civil rights laws by making it easier for victims of civil rights violations to find lawyers willing to represent them.").

191. S. REP. NO. 94-1011, at 5 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5908, 5913.

192. *Hughes*, 449 U.S. at 14-15 (quoting Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 422 (1978)).

C. An Exclusionary Regime with Constitutional Implications

As we have seen, S.B. 8's attorney-fee arrangement reflects a type of viewpoint discrimination, exposing litigants to fee liability on the basis of their alignment with, or divergence from, the state-favored view. By imposing joint and several liability on attorneys, it obstructs access to counsel for litigants who seek to challenge the state-favored view. And by burdening any effort to seek declaratory or injunctive relief against Texas abortion law, it endeavors to shield legislative enactments from judicial scrutiny in either state or federal court. This combination raises serious due process, equal protection, and First Amendment concerns, as well as questions of federalism and separation of powers, as we will explore in detail in Part III. We pause here to note that none of these principles depend on constitutional protection for the right to an abortion and thus none of them are mooted by the end of *Roe*. In comparing the Texas Three Step and California's repurposed version—where the burdened litigants have a very different political valence—one might be tempted to defend the former and reject the latter by relying on the Second Amendment's protection for the right to bear arms, a textual commitment for which reproductive rights have no analogue. We note that access to abortion was also protected by the Constitution at the time S.B. 8 was enacted, making it evident that in shielding anti-abortion laws from review, Texas sought to evade clearly applicable constitutional obligations. But even as we move forward into an era in which the right to keep firearms is constitutionally protected while the right to an abortion is not, it is untenable to suggest that the Texas Three Step may freely be used against advocates for abortion but not gun rights.

States face a range of constraints on the validity of their lawmaking that are independent of the constitutional status of the particular conduct being burdened. Even as it sets forth to regulate abortion, Texas must still comply with the First Amendment and respect the right to travel. It must not enact irrational or ex post facto laws, or laws that fail to provide adequate notice of what is prohibited, or impose punishments that are cruel and unusual.[193] Can Texas really try to deter all these potential challenges by making attorneys jointly and severally liable for the opposing party's legal fees upon the dismissal of a single claim? Even where legislatures are regulating activity that is not itself a fundamental right, constitutional principles prevent them from shielding their work product from any judicial scrutiny by making it virtually impossible to obtain counsel.

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193. *See, e.g.*, Connally v. Gen. Constr. Co., 269 U.S. 385, 393 (1926) ("A criminal statute cannot rest upon an uncertain foundation. The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue.").

We now turn to the constitutional infirmities of the truly singular fee-shifting arrangement that we see in S.B. 8.[194]

III. CONSTITUTIONAL DEFECTS IN THE TEXAS THREE STEP

Because the Texas Three Step comes disguised as ordinary fee-shifting, and has multiple components that are each troubling and unprecedented in distinctive ways, its constitutional implications can initially be difficult to discern. With asymmetrical fee-shifting widely accepted as not only legitimate, but also essential for the effective implementation of important government policies, it requires careful parsing to identify what makes S.B. 8 constitutionally defective.[195] We have laid the groundwork for that analysis in the preceding Parts and are thus in a position to differentiate S.B. 8 by characterizing it as a regime that impairs rather than enhances access to courts for the targeted litigants. Whereas Congress has used the prospect of attorney-fee awards to ameliorate financial impediments to bringing suit in various areas of law, S.B. 8 uses the threat of attorney's fee awards not only to deter litigation but also to ensure that even if clients are willing to proceed in the face of this risk, attorneys will be reluctant or unable to represent the targeted litigants because of their own exposure. In articulating why this is problematic, we can draw on a rich literature that has explored the significance of access to courts[196] and the role of lawyers in making

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194. *See, e.g.*, Risa E. Kaufman, *Access to the Courts as a Privilege or Immunity of National Citizenship*, 40 CONN. L. REV. 1477, 1477 (2008) (contending that "the right to court access for civil litigants, particularly the right to access the federal courts, is a privilege or immunity of national citizenship protected by the Fourteenth Amendment").

195. Scholars have carefully explained how the erosion of robust fee-shifting undermines access to courts for plaintiffs vindicating rights important to the public interest. *See* Albiston & Nielsen, *supra* note 190, at 1095 (explaining that fee-shifting provisions "address structural disincentives inherent in decentralized enforcement that might otherwise discourage public interest litigation"); Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 205-06, 209 (emphasizing the centrality of the "private attorney general" to the realization of "some of our most fundamental constitutional and political values"; explaining that "[a]ttorney's fees are the fuel that drives the private attorney general engine"; and critiquing the Court's "parsimonious fees decisions" as contributing to "an ever-greater regulation-remedy gap"); Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839, 1854 (2014) (identifying "the retrenchment on the recovery of attorneys' fees by plaintiffs" as among a long list of developments that constrict access to courts). For work arguing that fee-shifting should be expanded to further promote equality concerns, see Issachar Rosen-Zvi, *Just Fee Shifting*, 37 FLA. ST. U. L. REV. 717, 717, 752 (2010).

196. *See, e.g.*, Judith Resnik, *A2J/A2K: Access to Justice, Access to Knowledge, and Economic Inequalities in Open Courts and Arbitrations*, 96 N.C. L. REV. 605, 617, 621 (2018) ("Litigation is a social

that access meaningful.[197] As Judith Resnik has explained, "Litigation contributes to democracy through its public processes in which the government is required to demonstrate its commitments to equal and dignified treatment, to commit itself to forms of self-restraint and explanation, and to reveal its exercise of authority in the face of conflicting claims of right . . . ."[198] Other scholars have elaborated on the connection between litigation and deliberative democracy.[199] And an extensive literature endeavors to explain that meaningful access to courts, and their effective functioning, requires the assistance of lawyers.[200]

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practice that forces dialogue upon the unwilling (including the government) and momentarily alters configurations of authority. . . . [C]ourts support the flourishing not only of individuals but also of the governments that deploy them. States rely on courts to justify their power, to implement their norms, and to protect their economies."); *see also* Shapiro, *supra* note 30, at 1498 (noting that "the ability of individuals to bring their legal claims before a court, regardless of their social status, has long been considered an essential demand of the rule of law," and observing that, in addition to dispute resolution, courts provide norm articulation and rights enforcement).

197. An extensive access-to-justice literature focuses on the unmet legal needs of people who cannot afford adequate—or any—legal assistance. *See* Deborah L. Rhode, *Access to Justice*, 69 FORDHAM L. REV. 1785, 1785 (2001) ("Millions of Americans lack any access to the system, let alone equal access. An estimated four-fifths of the civil legal needs of the poor, and the needs of an estimated two- to three-fifths of middle-income individuals, remain unmet. Governmental legal services and indigent criminal defense budgets are capped at ludicrous levels, which make effective assistance of counsel for most low-income litigants a statistical impossibility." (internal citations omitted)); Pamela K. Bookman & Colleen F. Shanahan, *A Tale of Two Civil Procedures*, 122 COLUM. L. REV. 1183, 1199 (2022) (describing how unrepresented parties must "prepare for, navigate, and sometimes resolve their cases in the hallways, drawing on guidance from informal and formal sources of assistance, and facing either represented, more powerful opponents or just an inscrutable system"); Diego A. Zambrano, *Missing Discovery in Lawyerless Courts*, 122 COLUM. L. REV. 1423, 1424 (2022) (identifying scholarship that has explored the ways in which litigation involving unrepresented parties "fails to vindicate full access to justice").

198. Resnik, *supra* note 31, at 947.

199. *See* Alexandra D. Lahav, *The Roles of Litigation in American Democracy*, 65 EMORY L.J. 1657, 1667 (2016) (describing the ways in which "litigation is a process through which individuals in the polity perform self-government," including "the production of reasoned arguments about legal questions," the promotion of transparency, and the assistance in enforcing the law both "by requiring wrongdoers to answer for their conduct to the tribunal and by revealing information that is used by other actors to enforce or change existing regulatory regimes"); Stephen B. Burbank & Stephen N. Subrin, *Litigation and Democracy: Restoring A Realistic Prospect of Trial*, 46 HARV. C.R.-C.L. L. REV. 399, 401 (2011) ("Since the founding of our country, trials in open court resulting in decisions by either a judge or a jury have been thought to be constitutive of American democracy.").

200. *See, e.g.*, Laura K. Abel & David S. Udell, *If You Gag the Lawyers, Do You Choke the Courts? Some Implications for Judges When Funding Restrictions Curb Advocacy by Lawyers on Behalf of the Poor*, 29 FORDHAM URB. L.J. 873, 874 (2002) (describing how "restrictions on legal services

But as much as we can draw on a widely shared and well-theorized conviction that obstructing access to courts is normatively troubling, we encounter difficulty as we attempt to locate with precision the constitutional provisions that guarantee such access and the scope of the protection they offer. Access to courts is a stipulation of the American constitutional order.[201] But its promise has been evaded in so many ways[202] that we might both confidently invoke the right and yet be unable to predict when it has been violated.[203]

Part of the challenge is in where to find that right. As Resnik has observed, the commitment to courts is made expressly in many state constitutions but only implicitly in the Federal Constitution.[204] Identifying the extent to which access

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lawyers interfere with core functions of the courts"); Shapiro, *supra* note 30, at 1488 (observing that party resources are a primary focus in discussions of what is needed to make access to courts "meaningful or effective").

201. *See* Resnik, *supra* note 31, at 954.

202. The literature chronicling these failures has become vast, in part because it encompasses work that examines multiple different phenomena, including the high cost of legal services and the resulting unavailability of lawyers for most Americans, as well as a wide range of anti-access reforms in civil procedure, including changes in pleading standards, arbitration, class actions, and the like. For work focusing on the lack of counsel, see Rhode, *supra* note 197, at 1788; and Jessica K. Steinberg, *Demand Side Reform in the Poor People's Court*, 47 CONN. L. REV. 741, 757 (2015). For discussion of the importance of providing counsel to indigent litigants in particular types of high-stakes proceedings, see, for example, Bruce A. Boyer, *Justice, Access to the Courts, and the Right to Free Counsel for Indigent Parents: The Continuing Scourge of* Lassiter v. Department of Social Services of Durham, 15 TEMP. POL. & CIV. RTS. L. REV. 635, 636 (2006), regarding parents facing loss of custody of their children; and Kathryn A. Sabbeth, *Housing Defense as the New* Gideon, 41 HARV. J.L. & GENDER 55, 60 (2018), on low-income tenants in eviction proceedings. For work examining the ways in which civil procedure has changed to the detriment of access-to-justice values, see Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 286 (2013), which describes a shift toward "increasingly early procedural disposition of cases prior to trial"; Theodore Eisenberg & Kevin M. Clermont, *Plaintiphobia in the Supreme Court*, 100 CORNELL L. REV. 193, 193-94 (2014), which describes the negative effects of summary judgment and pleading standards on plaintiffs; and Myriam Gilles, *Class Warfare: The Disappearance of Low-Income Litigants from the Civil Docket*, 65 EMORY L.J. 1531, 1536 (2016), which describes a variety of "procedural and substantive constraints on legal access."

203. One partial explanation lies in what Judith Resnik has identified as the "unaided access" premise of the civil justice system, which "takes litigants as they come, neither offering anything by way of assistance or subsidy nor regulating the relationship between client and attorney. Civil litigants are free to find lawyers (or not) and then to make their way through the adversarial processes as best they can, on their own." Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. PA. L. REV. 2119, 2130 (2000).

204. Resnik, *supra* note 31, at 940; *see also id.* at 953 (arguing that "one could read the 1789 creation of the federal court system that inscribed a Supreme Court and gave Congress authority to

to courts is protected requires working through a variety of different doctrinal mechanisms in both the Federal Constitution and state constitutions, including due process,[205] First Amendment rights to petition,[206] and equal protection.[207] Courts sometimes emphasize one and other times apply another, and often mix and match doctrinal principles in ways that allow for inconsistent results and make it difficult to anticipate a future trajectory.[208]

For example, in *Boddie v. Connecticut*—surely a high watermark for judicial recognition of the idea that access to courts is constitutionally protected—the Supreme Court ruled that states must provide fee waivers for indigent parties seeking divorce.[209] Emphasizing that "marriage involves interests of basic importance in our society" and that marriages cannot be dissolved without judicial decree, the Court grounded the right in the particular interests at stake when

'from time to time ordain and establish' inferior courts, coupled with the limitation on congressional power to suspend the writ of habeas corpus and the reference in the Supremacy Clause that federal law 'bound' judges in every state, to reflect the assumption of access rights for common law remedies").

205. *See* Tennessee v. Lane, 541 U.S. 509, 523 (2004) (explaining that "the right of access to the courts" is protected by the Due Process Clause of the Fourteenth Amendment). For examples of state constitutional provisions guaranteeing due process, see, for example, FLA. CONST. art. I, § 9; N.Y. CONST. art. I, § 6; and TEX. CONST. art. I, § 19.

206. *See* Carol Rice Andrews, *After* BE & K*: The "Difficult Constitutional Question" of Defining the First Amendment Right to Petition Courts*, 39 HOUS. L. REV. 1299, 1300 (2003) ("Most legal observers now agree that the First Amendment guarantees some form of access to court and that the right does not extend to baseless suits."). Andrews has also argued that the "Petition Clause invalidates, or at least limits, the diverse set of laws, ranging from Federal Rule of Civil Procedure 11 to the civil rights statutes, that potentially penalize plaintiffs for having improper motives in bringing a civil suit." Carol Rice Andrews, *Motive Restrictions on Court Access: A First Amendment Challenge*, 61 OHIO ST. L.J. 665, 666 (2000). Right to petition clauses can also be found in state constitutions. *See, e.g.*, CAL. CONST. art. I, § 3(a); FLA. CONST. art. I, § 5; N.Y. CONST. art I, § 9; TEX. CONST. art. I, § 27.

207. Resnik, *supra* note 31, at 954 (noting that "modern federal constitutional court doctrines identify the First Amendment's petition rights as well as the Fifth, Sixth, and Fourteenth Amendment as sources of court access for both litigants and their audience—the public"). Examples of state constitutional equal protection clauses include FLA. CONST. art. I, § 2; N.Y. CONST. art. I, § 11; and TEX. CONST. art. I, § 3.

208. Resnik, *supra* note 203, at 2133, 2135-36 (describing how after *Boddie*, the Court re-asserted the view "that the system takes litigants as it finds them, and if litigants cannot make their own way into the system, that problem is not one that the Constitution solves," with the result that she could "catalogue a series of rulings in which the Court, citing equal protection and due process doctrine, has concluded that state subsidies are required, and [could] identify certain forms of family life as specially protected, but [could not] recount the theoretical bases through which the Court distinguished among arguably comparable contexts to order state subsidies for some subsets of litigants but not for others").

209. 401 U.S. 371 (1971).

litigants are facing "exclusion from the only forum effectively empowered to settle their disputes."[210] The concurring Justices understood that the due process ramifications of the state's monopoly on divorce would not exist in other contexts, and that this reasoning would therefore limit the potential scope of the ruling. They urged that the filing fees should instead be viewed as "invidious discrimination" on the basis of poverty, in contravention of equal protection principles.[211] Sure enough, when subsequent litigants claimed constitutional entitlements to fee waivers in other contexts, such as bankruptcy proceedings and denials of welfare benefits, the Court reached the opposite conclusion,[212] eventually clarifying that a "constitutional requirement to waive court fees in civil cases is the exception, not the general rule."[213] The current approach to fee waivers seems to be one that draws on both equal protection and due process principles to "set apart from the mine run of cases those involving state controls or intrusions on family relationships."[214] The difficulty in leveraging a doctrinal framework that depends on the fundamental nature of the rights at issue should be immediately clear. After *Dobbs*, reproductive-rights advocates will struggle to argue that the right to obtain an abortion still fits within the realm of choices related to marriage, parenting, and family structure that are considered fundamental.[215]

Adding more complexity still, the case law exploring the contours of the right to access courts has examined burdens of considerable variety. In *Tennessee v. Lane*, the Court was confronted with a literal, physical impediment for which drawing an analogue here might be difficult.[216] Many of the obstacles in the

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210. *Id.* at 376.

211. *Id.* at 386 (Douglas, J., concurring); *see also id.* at 387 (Brennan, J., concurring) (critiquing the fact that the Court's "holding is made to depend upon the factor that only the State can grant a divorce and that an indigent would be locked into a marriage if unable to pay the fees required to obtain a divorce").

212. *See* United States v. Kras, 409 U.S. 434, 443 (1973) (finding no right to a fee waiver in bankruptcy discharge proceedings); Ortwein v. Schwab, 410 U.S. 656, 659 (1973) (finding no right to a fee waiver in proceedings to review an agency denial of welfare benefits).

213. M.L.B. v. S.L.J., 519 U.S. 102, 114 (1996).

214. *Id*. at 116.

215. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2261 (2022). And even before *Dobbs*, when abortion was still considered a fundamental right, courts seeking to limit the scope of *Boddie* and *M.L.B*. might have drawn a distinction between a litigant seeking to dissolve her own marriage or to defend against the termination of her own parental rights as opposed to a litigant challenging the validity of laws *related* to such matters.

216. Tennessee v. Lane, 541 U.S. 509, 513-514, 523 (2004) (identifying some manifestations of the due process right to access courts in the context of a suit brought by an individual who had to crawl up two flights of stairs to answer criminal charges in a courtroom that was not wheelchair accessible).

Court's access cases are of the sort examined in *Boddie*: financial burdens that operate directly on impoverished litigants, such as filing fees,[217] transcript costs,[218] or genetic testing expenses necessary to participate in a paternity proceeding.[219]

Putting aside the inconsistent nature of the results within this category, it is not immediately obvious which of these precedents offer convincing analogues to the weaponized fee-shifting we see in S.B. 8. The objection to S.B. 8 is not that any group of litigants is entitled to a subsidy, but rather that they should not be subject to a punitive tax. The Supreme Court's invalidation of a double-bond requirement imposed only on one group of litigants suggests some principle against a targeted tax.[220] Here we have the added complication that the penalty is structured to deter participation of counsel. We will thus need to consider cases in which the Court examined restrictions on access to courts in the form of constraints on lawyer behavior, such as anti-solicitation rules,[221] prohibitions on accepting payment from certain types of litigants,[222] or restrictions on the type of arguments that federally funded lawyers can make on behalf of clients.[223]

Lastly, the Texas Three Step invites the application of principles that have force well beyond the context of adjudication, such as the First Amendment's bar on viewpoint discrimination[224] or the anti-animus principle found in the equal protection guarantee.[225] In invoking these principles, however, we will want to maintain focus on the particular evils presented when it is access to courts, itself a paramount value, that is being burdened by laws infected with viewpoint discrimination or animus.

In sum, both because of the intricate and multifaceted quality of the Texas Three Step and because of the roving and diffuse nature of the constitutional principles that support access to courts and prohibit discriminatory obstacles,

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217. *See* Boddie v. Connecticut, 401 U.S. 371, 373 (1971).

218. *See M.L.B.*, 519 U.S. at 119.

219. *See* Little v. Streater, 452 U.S. 1, 17 (1981).

220. *See* Lindsey v. Normet, 405 U.S. 56, 79 (1972).

221. *See* NAACP v. Button, 371 U.S. 415, 438 (1962); *see also In re* Primus, 436 U.S. 412, 439 (1978).

222. *See* Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 335 (1985).

223. *See* Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 549 (2001).

224. *See* Kent Greenawalt, *Viewpoints from Olympus*, 96 COLUM. L. REV. 697, 698 (1996) ("The Supreme Court has indicated that viewpoint discrimination, i.e., allowing speech that adopts one point of view while prohibiting speech that takes a contrary position, is particularly hard to justify because it poses the greatest danger to liberty of expression."); Leslie Kendrick, *Content Discrimination Revisited*, 98 VA. L. REV. 231, 242 (2012) ("[A] great deal of agreement that viewpoint discrimination is at the core of what the First Amendment forbids.").

225. For scholarly discussion of the anti-animus principle, see Dale Carpenter, Windsor *Products: Equal Protection from Animus*, 2013 SUP. CT. REV. 183.

we can simultaneously be struck by S.B. 8's affront to constitutional values and yet lack a readymade, unified doctrinal framework against which to test it.

Against this complex backdrop, how might we begin to better understand the constitutional implications of S.B. 8's viewpoint-specific assault on the right to retain counsel in civil proceedings? We must start by reiterating that Texas and California are not just allocating fee liability between private litigants: they have attempted to burden efforts to seek declaratory or injunctive relief against their own enactments. As described above, this makes the arrangement categorically different than fee-shifting provisions in litigation between private parties where the validity of state law is not at issue, or fee-shifting provisions that attempt to encourage litigation against government entities as a means of ensuring government compliance with the law. This categorical difference has profound constitutional significance: it requires us to confront whether states may insulate their enactments from judicial review by making them difficult to challenge.[226] While S.B. 8 and its imitators use attorney's fees as the instrument of difficulty, we miss the full import of the scheme if we focus too myopically on fee-shifting. The appropriate question is not simply whether fee-shifting schemes are constitutionally acceptable. The full question that S.B. 8 poses is whether states may insulate their laws from judicial scrutiny by deterring counsel participation through the targeted deployment of punishing fee awards.

To fully answer this question, we must break it down into its component parts. Let us thus imagine four different ways in which a state might endeavor to shield its enactments from review:

- Scenario One: No state laws of any sort may be challenged in court.
- Scenario Two: No abortion laws may be challenged in court.
- Scenario Three: Litigants challenging abortion laws may not be represented by attorneys.
- Scenario Four: Litigants wishing to challenge these laws must find attorneys who are willing to share fee liability.

Ordered along a continuum, these scenarios will help to flesh out our intuition about how much a state can do to cut off access to courts by restricting access to counsel.[227] We consider each scenario in turn, with the goal of discerning where we can draw a meaningful line.

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226. This implicates what Alexandra Lahav has described as the value of "answerability," namely, "the capacity of individuals or institutions to call others who they believe have wronged them to account." Lahav, *supra* note 199, at 1690.

227. Careful readers will note that this continuum does not include the lawsuits brought by the private bounty hunters against providers. That is true: to understand the ramifications of

A. Scenario One: No State Laws of Any Sort May Be Challenged in Court

We start with the most outlandish hypothetical, precisely because it is so far-fetched that it provides us with a firm foundation from which to proceed. Can state legislatures enact laws that specify that they cannot be reviewed in either state or federal courts? The explicit and inferred limits on state power expressed in the Federal Constitution in Article I, Article IV, Article VI, the Reconstruction Amendments, including the Fourteenth Amendment and its incorporation of the Bill of Rights against the states, the Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments, combined with Article III's express grant of judicial power to the federal courts to hear all cases and controversies arising under the Constitution and the laws of the United States, together forestall the proposition that states can prevent federal courts from reviewing state law. Federal judicial review of state legislation has been established at least since *McCulloch v. Maryland*,[228] and one would be hard-pressed to find any serious argument that state legislatures can shield their enactments from scrutiny in federal court.

The principle is illustrated by *Constantin v. Smith*, a remarkable case arising out of a dispute between Texas oil producers and the State of Texas about the state's authority to impose limits on daily oil production.[229] The governor, instead of complying with temporary restraining orders that directed the state to stop enforcing the contested limits, declared martial law in the East Texas oil fields and began issuing military orders designed to do what the temporary injunctions had prohibited.[230] The governor and his brigadier general defended against the subsequent legal challenge by asserting that "by the force of these proclamations a state of war exists . . . placing them presently above judicial inquiry and restraint."[231] The governor asserted that he had thus insulated himself and the other defendants "from present accountability in the courts" and that "the United States courts are therefore without jurisdiction to inquire at all into his conduct, or the conduct of his subordinates."[232] Emphatically rejecting the state's claims, the federal court concluded that the defendants were unable "to point to any provision of the Federal Constitution" which "subordinates the federal courts, acting within their spheres, to the authority of the officers of the

S.B. 8 burdening attempts to seek declaratory or injunctive relief against state law, we sideline for the moment that S.B. 8 authorized bounty suits, although we will reference them occasionally.

228. 17 U.S. 316, 319 (1819).

229. 57 F.2d 227 (E.D. Tex. 1932).

230. *Id.* at 229-30.

231. *Id.* at 230.

232. *Id.*

state."[233] The court found it to be "opposed to the very conceptions upon which this government was founded" to contend that a state officer may "erect himself above the jurisdiction of the federal courts, withdraw his actions affecting private property from judicial inquiry, and insulate himself from judicial process and the consequences of disobedience to judicial decree."[234] The U.S. Supreme Court affirmed, observing that if the governor's position was accepted "the restrictions of the Federal Constitution upon the exercise of state power would be but impotent phrases . . . . Under our system of government, such a conclusion is obviously untenable. There is no such avenue of escape from the paramount authority of the Federal Constitution."[235] In sum, state governments simply lack the authority to prevent federal courts from reviewing their enactments.[236]

Whether state legislatures can block their enactments from state-court review will turn on separation-of-powers principles set forth in state constitutions.[237] While a detailed engagement with state constitutional principles requires more voluminous treatment than is possible here, we can say at a general level that most state constitutions reflect separation-of-powers principles and indeed have constitutionalized these principles more explicitly than what we see in the Federal Constitution.[238] Forty state constitutions, including those of Texas[239] and California,[240] contain express separation-of-powers requirements.[241] As the Texas Supreme Court has said, a constitutional problem arises when "the functioning of the judicial process in a field constitutionally

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233. *Id.* at 236.

234. *Id.*

235. Sterling v. Constantin, 287 U.S. 378, 397-98 (1932).

236. Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859, 904 (2021) (noting that it is "widely assumed" that "the tyranny of the majority at the state level may be checked by the federal Constitution").

237. *Id.* at 903 ("Viewing state and federal constitutions as parts of a whole . . . provides a more complete view of American constitutionalism.").

238. G. Alan Tarr, *Interpreting the Separation of Powers in State Constitutions*, 59 N.Y.U. ANN. SURV. AM. L. 329, 337 (2003).

239. Harold H. Bruff, *Separation of Powers Under the Texas Constitution*, 68 TEX. L. REV. 1337, 1337 (1990) (noting that "[a] strong separation-of-powers tradition is a prominent feature" of Texas constitutional law).

240. CAL. CONST. art. III, § 3 ("The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution.").

241. *See* Tarr, *supra* note 238, at 337.

committed to the control of the courts is interfered with by the executive or legislative branches."[242] Judicial review of state legislation by state supreme courts is well-established[243] and has long been recognized as "a fundamental tenet in the American judicial system, providing a safety device to dissuade elected persons from temptations to abuse power."[244] Moreover, the vast majority of states, including Texas, have open-courts clauses in their constitutions that explicitly guarantee access to courts and provide a "remedy" for those who have been injured.[245] The Texas provision is illustrative, requiring that "[a]ll courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law."[246] The "right to a remedy through open access to the courts" has been described as perhaps "the most important" of all the rights "guaranteed by state constitutions but absent from the federal Bill of Rights."[247]

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242. State Bd. of Ins. v. Betts, 308 S.W.2d 846, 851-52 (Tex. 1958); *see also* Bruff, *supra* note 239, at 1352 (discussing cases in which Texas courts invalidated Texas legislation on grounds that a challenged statute "invad[ed]" or "usurped" judicial power).

243. Bulman-Pozen & Seifter, *supra* note 236, at 908 ("Judicial review is a longstanding feature of state constitutional systems . . . ."); *see also* Robert F. Williams, *State Constitutional Law Processes*, 24 WM. & MARY L. REV. 169, 207 (1983) [hereinafter Williams, *State Constitutional Law Processes*], ("[S]tate supreme courts developed the concept of judicial review of the constitutionality of statutes long before *Marbury v. Madison*."); Robert F. Williams, *State Constitutional Limits on Legislative Procedure: Legislative Compliance and Judicial Enforcement*, 48 U. PITT. L. REV. 797, 798 (1987) ("[T]he legislative articles of virtually all state constitutions contain a wide range of limitations on state legislative processes.").

244. LAURA LANGER, JUDICIAL REVIEW IN STATE SUPREME COURTS: A COMPARATIVE STUDY 8 (2002) (footnote omitted); *see also* Bruff, *supra* note 239, at 1356-66 (discussing judicial review in Texas); Robert S. Peck, *In Defense of Fundamental Principles: The Unconstitutionality of Tort Reform*, 31 SETON HALL L. REV. 672, 678 (2001) ("It is undeniable that the single and most constant theme in state constitutional history is the restraint of legislative power. These principles are detailed much more in state constitutions than we see in the federal Constitution.").

245. At least forty states have open-courts clauses in their constitutions. Patrick John McGinley, *Results from the Laboratories of Democracy: Evaluating the Substantive Open Courts Clause as Found in State Constitutions*, 82 ALB. L. REV. 1449, 1455 (2018) (identifying forty states that include an open-courts clause in their constitutions). Judith Resnik's count would add Michigan, for a total of forty-one states. Resnik, *supra* note 31, at 978 n.249.

246. TEX. CONST. art. I, § 13; *see also* JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS AND DEFENSES § 6.02 (4th ed. 2006) (setting forth typical elements of state remedies clauses).

247. Thomas R. Phillips, *The Constitutional Right to a Remedy*, 78 N.Y.U. L. REV. 1309, 1309 (2003). Notably, this observation was made by one of the longest-tenured chief justices of the Texas Supreme Court. *See* McGinley, *supra* note 245, at 1454 (identifying Texas Supreme Court Chief Justice Thomas R. Phillips as such).

Setting forth exactly what the clauses protect and what they prohibit is not so simple—the clauses themselves vary,[248] and even among states with similar language, courts have interpreted the scope of protection in a wide range of ways.[249] While scholars have labored to offer a taxonomy of this variegated landscape,[250] we can sidestep much of this complexity in assessing whether a state legislature may prohibit judicial review of all of its laws. The attempt would clearly violate the core requirement of open-courts clauses that "courts must actually be open and operating."[251] While the state might counter that in Scenario One the courts continue to be open for disputes between private parties, that would not be sufficient to rectify the violation of the open-courts clause, as illustrated in the dispute over Texas oil production in *Constantin v. Smith*.[252] The federal district court observed that the governor's issuance of military orders as a mechanism to evade judicial review of limits on oil production was in conflict with federal constitutional principles and also the Texas open-courts provision, and therefore, "contrary to the genius of the two governments, federal and state."[253] There, too, the courts were otherwise "open and transacting their ordinary business," but the case forestalls the suggestion that open-courts clauses are only implicated where there is a total closure.[254] On the contrary, given the number of lesser obstacles that have also been struck down as incompatible with state

248. FRIESEN, *supra* note 246, § 6.01; *see also* Phillips, *supra* note 247, at 1310-13 (stating that there are "thirty-two different versions among the forty states" and describing the "two major variants" (footnote omitted)).

249. Resnik, *supra* note 31, at 981 ("[S]tate courts have reached widely different conclusions (sometimes within the same jurisdiction in different eras) about whether litigants can rely on open courts/remedy clauses as support for, or as a shield against, limitations on access and on the kinds of cases that can be pursued."). One commentator has remarked that "[t]he courts are in total disarray over how to interpret [Oregon's open-courts clause]." Johnathan M. Hoffman, *By the Course of the Law: The Origins of the Open Courts Clause of State Constitutions*, 74 OR. L. REV. 1279, 1282 (1995). Disputes about the scope of protection offered by open-courts clauses have been particularly pronounced in the realm of tort reform. *See* Robert F. Williams, *Foreword: Tort Reform and State Constitutional Law*, 32 RUTGERS L.J. 897, 897-98 (2001).

250. *See* McGinley, *supra* note 245, at 1460-61 (describing and comparing various modern interpretations of open-courts clauses); *see also* Phillips, *supra* note 247, at 1335 (describing the efforts scholars have made "to classify or systematize the various approaches" to state constitutional provisions protecting access to courts).

251. Resnik, *supra* note 31, at 980 (citing Cent. Appraisal Dist. of Rockwell Cnty. v. Lall, 924 S.W.2d 686, 689 (Tex. 1996)).

252. 57 F.2d 227, 236 (E.D. Tex. 1932).

253. *Id.*; *see also id.* at 239 ("[U]nder the Constitution of Texas, courts may not be closed, or their processes interfered with by military orders . . . .").

254. Sterling v. Constantin, 287 U.S. 378, 388 (1932). That was, in fact, a mark of the weakness of the state's assertion of military exigency.

constitutional guarantees of open courts,[255] we can safely conclude that a legislature's attempt to completely avoid judicial review would be ruled unconstitutional in most states.[256]

Judicial review of state legislation in both state and federal courts is clearly a bedrock principle of structural constitutionalism, but it is also an essential component of protecting individual liberty.[257] Access to courts implicates both due process concerns and a complex of rights secured in the First Amendment, including the right to petition the government for redress of grievances.[258] The Supreme Court has explained that access to the courts "is part of the right of petition protected by the First Amendment."[259] As one constitutional law treatise elaborates, "Everyone has a right to institute non-baseless litigation. A lawsuit is a form of a petition for the redress of grievances."[260] Emphasizing the functional importance of this right, one state supreme court has explained that "collective activity undertaken to obtain meaningful access to the courts has been recognized as 'a fundamental right within the protection of the First Amendment.'"[261] And where the contemplated litigation involves the "cooperative, organizational activity" of advocacy groups such as the NAACP or the ACLU, litigation is not merely "a technique of resolving private differences" but is "a form of political

255. *See* FRIESEN, *supra* note 246, at § 6.07(1) (recounting a range of financial barriers to court access that have been invalidated, including filing fees, especially those used for revenue generation rather than for actually offsetting court-related costs, as well as prepayment and bond requirements); *see also* Phillips, *supra* note 247, at 1311-13 (explaining the variety of laws that state supreme courts have invalidated on the basis that they burden the state's constitutional open-courts guarantee).

256. 12B TEX. JUR. 3D *Constitutional Law* § 267, Westlaw (database updated Sept. 2022) (explaining that charter provisions that impose "unreasonable restrictions on the right to sue a municipality for damages or injuries caused by it are invalid").

257. Chambers v. Balt. & Ohio R.R. Co., 207 U.S. 142, 148 (1907) ("The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each State to the citizens of all other States to the precise extent that it is allowed to its own citizens.").

258. Benjamin Plener Cover, *The First Amendment Right to a Remedy*, 50 U.C. DAVIS L. REV. 1741, 1745-46 (2017) ("Scholars, lower courts, and the Supreme Court have repeatedly recognized lawsuits as petitions." (footnotes omitted)). *But see* Boivin v. Black, 225 F.3d 36, 44 (1st Cir. 2000) (upholding the Prison Litigation Reform Act's cap on attorney's fees and noting that "the prison setting is *sui generis*, and Congress's choice to treat prisoners differently than nonprisoners is plainly justified by the idiosyncratic characteristics of that setting").

259. Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 513 (1972); *see also* McDonald v. Smith, 472 U.S. 479, 484 (1985) (specifying that "filing a complaint in court is a form of petitioning activity").

260. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 16.54 (6th ed. 2000).

261. Protect Our Mountain Env't, Inc. v. Dist. Ct., 677 P.2d 1361, 1365 (Colo. 1984).

expression" and potentially the "sole practicable avenue open to a minority to petition for redress of grievances."[262] Synthesizing these various qualities of the right to petition, Tamara Kuennen explains that it "protects a value lying at the core of the First Amendment: self-governance."[263]

While the scope of the right to petition has been hotly contested by scholars and perhaps underdeveloped by courts,[264] it at least protects the right to file winning claims in court.[265] James Pfander's historical analysis indicates that the Petition Clause was meant to provide "a guaranteed right to pursue judicial remedies for unlawful government conduct" and should even be read to invalidate sovereign immunity.[266] While other scholars have disagreed, calling for a narrower view of the Petition Clause that has no effect on the doctrine of sovereign immunity,[267] their responses presuppose that courts are open. Scholars who have called for "downsizing" the right to petition acknowledge that it "guarantees a right to petition the federal courts . . . [and] this even includes an obligation on the part of the courts to consider and respond to the petitions."[268] Given the stipulated right to petition the federal courts that comprises the more modest view, it would obviously foreclose the intersovereign and interbranch gambit depicted in Scenario One, whereby a state legislature attempts to close off review

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262. NAACP v. Button, 371 U.S. 415, 429-30 (1963); *see also In re* Primus, 436 U.S. 412, 426 (1978) ("Subsequent decisions have interpreted *Button* as establishing the principle that 'collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment.'" (quoting United Trans. Union v. Michigan Bar, 401 U.S. 576, 585 (1971))).

263. Tamara L. Kuennen, *Recognizing the Right to Petition for Victims of Domestic Violence*, 81 FORDHAM L. REV. 837, 852 (2012).

264. *See* Carol Rice Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 OHIO ST. L.J. 557, 560 (1999) (explaining that for nearly two hundred years the Court did not recognize the Petition Clause as a basis for a right of access to court and identifying several competing concerns that have frustrated "proper development and application of the right").

265. *Id.* at 657. Andrews's analysis does not distinguish between suits against private defendants and suits against the government, and in some instances assumes the former:

> Each petition to the court consumes judicial resources that otherwise could be spent on other petitions. The defendant feels a unique impact. He cannot ignore the petition or simply issue public denials. He must formally participate at considerable cost to himself, just to try to prevent further loss of property. Moreover, unlike most speech, the government is a participant in this 'harm' to the defendant.

Id. at 675-76.

266. James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 NW. U. L. REV. 899, 899 (1997).

267. *See, e.g.*, Gary Lawson & Guy Seidman, *Downsizing the Right to Petition*, 93 NW. U. L. REV. 739, 764 (1999).

268. *Id.*

in both state and federal court. We can thus safely say that even in its narrowest formulation the First Amendment right to petition would invalidate the total ban on challenges to state law hypothesized in Scenario One.[269]

If all this seems not only straightforward but an excessive amount of attention to lavish on an admittedly extreme hypothetical, then let's move down the list to Scenario Two: a state legislature delineates a specific area of law, such as abortion, in which none of its enactments can be challenged in court.

B. Scenario Two: No Abortion Laws May Be Challenged in Court

Closing the courthouse doors only to a certain type of litigation presents a significant modification: rather than giving itself carte blanche across all domains, the legislature has identified a particular area in which its work product is immune from review. Here, the attempt to cut off access to courts is the exception rather than the rule, suggesting a less severe aggrandizement of legislative power and perhaps allowing for the supposition that there is a legitimate state policy underlying the selection of the targeted area.[270] But which of the principles laid out above would yield a different result in this scenario? The idea that a state legislature could deprive federal courts of the authority to hear cases presenting questions of federal law remains as suspect as it was in Scenario One, and state constitutional separation-of-powers principles similarly remain affronted by the attempt to sideline state courts from review of abortion litigation.[271]

Because it depicts a legislative effort to keep courts from reviewing cases of a particular kind, Scenario Two bears a superficial resemblance to the scenarios

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269. *Id.*; *see also* Bank of Jackson Cnty. v. Cherry, 980 F.2d 1362, 1370 (11th Cir. 1993) ("The First Amendment right to petition the government for a redress of grievances includes a right of access to the courts.").

270. Arguments that the public interest is served by restraints on certain types of litigation are seen in defense of the Prison Litigation Reform Act (PLRA). *See* Eleanor Umphres, *150% Wrong: The Prison Litigation Reform Act and Attorney's Fees*, 56 AM. CRIM. L. REV. 261, 265 (2019) (explaining that the stated purpose of the PLRA was to "provide for appropriate remedies for prison condition lawsuits, to discourage frivolous and abusive prison lawsuits, and for other purposes" (quoting 141 CONG. REC. 26548 (1995))); *see also* Boivin v. Black, 225 F.3d 36, 44 (1st Cir. 2000) (upholding the PLRA cap on attorney's fees, noting that the "prison setting is *sui generis*, and Congress's choice to treat prisoners differently than non-prisoners is plainly justified by the idiosyncratic characteristics of that setting").

271. *See* Williams, *State Constitutional Law Processes*, *supra* note 243, at 201-02 (noting the profound distrust for legislatures shown in state constitutions and observing that state courts have interpreted even those constitutional provisions that appear to be grants of authority as limits on state legislative power).

spawning the extensive academic debate about jurisdiction-stripping.[272] In those instances, commentators had as their model a specific law or proposal seeking to limit the jurisdiction of federal courts in a particular realm,[273] and thus did not need to confront the specter of a wholesale sidelining of the judiciary across all domains.[274] The literature frequently invokes abortion specifically as an area where jurisdiction-stripping has been considered, suggesting an analogue to Scenario Two.[275] But when we look more closely we see that the qualities that make jurisdiction-stripping arguably constitutional in some contexts are completely missing from our hypothetical.

First, it is important to recognize that the debate about jurisdiction-stripping has been entirely about Congress's power,[276] and primarily with regards to the federal courts.[277] The focus has been on the precise language of Article III that regulates this relationship.[278] Scholars have queried whether the "ordain and establish" text of Article III allows Congress to eliminate the jurisdiction of lower

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272. The debate is so exhaustive that the literature in this area has been described as "a cottage industry" and "choking on redundancy." Martin J. Katz, *Guantanamo,* Boumediene*, and Jurisdiction-Stripping: The Imperial President Meets the Imperial Court*, 25 CONST. COMMENT. 377, 380 n.13 (2009) (quoting RICHARD H. FALLON, JR., HENRY MELVIN HART, HERBERT WECHSLER, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 322 (5th ed. 2003); Scott Moss, *An Appeal by Any Other Name: Congress's Empty Victory over Habeas Rights*, 32 HARV. C.R.-C.L. L. REV. 249, 250 (1997).

273. *See, e.g.*, Laurence Claus, *The One Court That Congress Cannot Take Away: Singularity, Supremacy, and Article III*, 96 GEO. L.J. 59, 62 (2007) (considering legislation "purporting to remove from the Supreme Court's jurisdiction challenges by writ of habeas corpus to the legality of aliens' detention by the United States military at Guantánamo Bay, Cuba").

274. *See* Katz, *supra* note 272, at 379-80 (identifying jurisdiction-stripping proposals in specific controversial areas like national security, school prayer, and abortion).

275. *Id.*; *see also* Michael C. Dorf, *Congressional Power to Strip State Courts of Jurisdiction*, 97 TEX. L. REV. 1, 28 n.87 (2018) (noting that "members of Congress have shown special interest in stripping courts of jurisdiction" for abortion and other "divisive social issues").

276. *See* Dorf, *supra* note 275, at 6 (endeavoring to clarify "the nature and scope of the limits on Congress's power to allocate decision-making authority among the state and federal courts").

277. *See id*. at 2 ("[F]or all of the writing on jurisdiction stripping, virtually no scholarship addresses the question of what *affirmative power* Congress exercises when it strips the jurisdiction of *state* courts.").

278. *See, e.g.*, Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043, 1048 (2010) (describing the jurisdiction-stripping debate as an inquiry into "Congress's power to withdraw jurisdiction from the federal courts as a means of shielding questions about the legality of official conduct from judicial review"); *see also* Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 271-72 (1985) (describing the way the Constitution limits Congress's power to shift judicial power from federal to state courts). To be sure, scholars have also proposed that constraints external to Article III limit Congress's power to strip jurisdiction. *See* Christopher Jon Sprigman, *Congress's Article III Power and the Process of Constitutional Change*, 95 N.Y.U. L. REV. 1778, 1792-93 (2020) (gathering such sources).

federal courts.[279] The consensus is that Congress can do this, but this conclusion rests on the premise that both the original and appellate jurisdiction of the Supreme Court remains intact, and that state courts remain available to hear cases.[280] Scholars have also wrestled with a second, distinct question: given that Article III confers upon Congress the authority to make "exceptions" to the Supreme Court's appellate jurisdiction, can Congress strip the Supreme Court of its appellate jurisdiction in particular kinds of cases?[281] Here, commentators have assumed that "the lower federal courts, as well as the Supreme Court's original jurisdiction, remain open" and have again assumed that state courts remain open to hear cases.[282] These two contexts, filled with careful debate about Article III and the relationship between Congress and the federal courts, are inapposite for a number of reasons, including the degree to which alternative forums remain available both within the federal judiciary and in state courts—a feature absent from our scenario.[283]

We get closer to our hypothetical second scenario with the scholarship that has explored "the most difficult question" in jurisdiction-stripping, which is whether Congress can eliminate all federal jurisdiction in both the lower courts and the Supreme Court.[284] Scholars have asserted several limits on Congress's power to do so, including the principle that Congress cannot preclude federal

279. *See* Katz, *supra* note 272, at 382.

280. *See id.* at 382-85.

281. *Id.* at 384.

282. *Id.* at 384 & n.27; *see also* Sprigman, *supra* note 278, at 1793-95 (canvassing the jurisdiction-stripping literature and concluding that "virtually all commentators assert, or simply assume, that whatever power Congress has to restrict federal jurisdiction would leave the enforcement of constitutional rules in the hands of *state* courts, thus preserving judicial supremacy, albeit in a balkanized and therefore clumsier form").

283. It should be noted that the availability of other forums as a predicate for constitutionally acceptable jurisdiction-stripping has been implied rather than explicitly stated. Its tenuousness is perhaps illustrated by *Battaglia v. General Motors Corp.*, in which the Second Circuit upheld a federal statute that prohibited either federal or state courts from reviewing due process challenges to substantive provisions of the Portal-to-Portal Act. 169 F.2d 254 (2d Cir. 1948). *Battaglia*'s insight, however, is limited; the Second Circuit suggested in dicta that the jurisdiction-stripping provision would have been invalid had the substantive provisions of the law violated due process, but because there was no underlying due process violation, there was no defect in the jurisdiction-stripping either. *Id.* at 257, 259-60. As Richard H. Fallon, Jr. has explained, *Battaglia* is best understood as holding "that when Congress can validly extinguish a substantive right, it can also strip courts of jurisdiction to enforce the right that it has abolished." Fallon, *supra* note 278, at 1104.

284. *See* Katz, *supra* note 272, at 386.

courts from hearing constitutional claims.[285] Several of these add heft to our intuition, operative in both Scenario One and Scenario Two, that there is something wrong when a legislature endeavors to cut off access to courts for constitutional claims.[286] To be sure, the view is not uniform: Christopher Jon Sprigman, for example, has argued that when arguments against congressional power to strip courts of jurisdiction are subjected to sustained examination, it is apparent that they rest inextricably on normative assumptions about the desirability of unqualified judicial supremacy rather than constitutional text or precedent.[287] Sprigman concludes that Congress can indeed strip both state and federal courts of jurisdiction, even over constitutional claims, and urges us to imagine the democratizing potential of robust jurisdiction-stripping as an antidote to the Court's legitimacy crisis.[288]

But still, neither Sprigman nor anyone else sympathetic to the constitutionality of jurisdiction-stripping have attempted to defend a situation in which a *state legislature* attempts to cut off review in both state and federal court, whether for all claims as explored in the first scenario or for a specific kind of claim as we consider here.[289] Even the most capacious argument in favor of Congress's jurisdiction-stripping power fails to establish what would be necessary to support the constitutionality of Scenario Two, because state legislatures do not have the same power over federal courts as Congress does.[290] That Congress might have

285. *Id.* at 388 (explaining that this limit is important to "keep government generally within the bounds of law").

286. *See also* Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 546 (2001) (invalidating a statutory restriction on federally funded legal-aid attorneys where the statute purported to prohibit attorneys from challenging existing welfare law on statutory or constitutional grounds and critiquing this effort "to insulate the Government's laws from judicial inquiry").

287. Sprigman, *supra* note 278, at 1821.

288. For a defense of judicial review amid debates to reform the courts, see Douglas NeJaime & Reva Siegel, *Answering the* Lochner *Objection: Substantive Due Process and the Role of Courts in a Democracy*, 96 N.Y.U. L. Rev. 1902, 1961 (2021).

289. *See* Katz, *supra* note 272, at 387 n.39 (noting that even the commentators most disposed toward a virtually unlimited congressional power to strip the jurisdiction of federal courts have assumed that state courts remain available to hear cases "and might feel differently about Congress closing all federal courts if state courts were unavailable"). For the view that issue-specific jurisdiction-stripping is more problematic, see Claus, *supra* note 273, at 59.

290. Sprigman, *supra* note 278, at 1833 (explaining why it is problematic to insist on a view that "mandates the supremacy of *state court judges* over the national polity"). In *Testa v. Katt*, the Court held that the Supremacy Clause prevented state courts from refusing to exercise jurisdiction over federal claims. 330 U.S. 386, 394 (1947). The same reasoning would seem to apply to an effort by a state legislature to instruct state courts not to hear federal claims.

the power to eliminate jurisdiction in both state and federal courts does not establish that state legislatures have the equivalent power.[291]

In sum, despite the extraordinary care, complexity, and diversity of views that characterize the jurisdiction-stripping literature, it ultimately offers no theory that would distinguish this scenario from the first. State legislatures do not have the power to eliminate judicial review of all laws or a targeted subset.

In some ways, the targeted quality makes this jurisdiction-stripping worse. While all people suffer an impairment of their rights to access the courts in the first scenario, only a politically salient and disfavored subgroup faces such an obstacle in the second: those who are burdened by abortion laws and wish to seek declaratory and injunctive relief. With such selective deprivation, we now need to grapple with the content and viewpoint discrimination that is manifest in barring access to courts only for a certain group. The second hypothetical starts to implicate the kinds of heavy-handed but selective interference with First Amendment rights that has prompted particular concern from the Court.[292]

It is well established that government may not regulate "based on hostility—or favoritism—towards the underlying message expressed."[293] Content-based restrictions on speech—those that regulate on the basis of subject matter or communicative content—are presumptively invalid.[294] Viewpoint discrimination, "the regulation of speech based on 'the specific motivating ideology or the opinion or perspective of the speaker,'" is worse.[295] Viewpoint discrimination in the regulation of speech or expressive conduct is so disfavored under the First Amendment that even within a generally unprotected category of expression, such as fighting words, the government may not selectively regulate on the basis of viewpoint.[296]

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291. *See* Dorf, *supra* note 275, at 2 (arguing "that Congress has affirmative power to strip state courts of jurisdiction to hear federal claims in most but not all circumstances" (footnote omitted)).

292. The Court has viewed such selectively imposed burdens as implicating both the First Amendment and the Equal Protection Clause.

> [U]nder the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views . . . . Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.

Police Dep't of Chi. v. Mosley, 408 U.S. 92, 96 (1972).

293. R.A.V. v. City of St. Paul, 505 U.S. 377, 386 (1992).

294. *See* Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015).

295. *Id.* at 168 (describing viewpoint discrimination as an especially "blatant" and "egregious form of content discrimination").

296. *R.A.V.*, 505 U.S. at 386.

In foreclosing access to courts for challenges to abortion law, Scenario Two reflects content discrimination because it identifies an area of law by subject matter, regulating selectively in that specified area, and it functions as viewpoint discrimination because it affects only the litigants on one side of the abortion controversy: those seeking relief from state law.[297] If the government may not discriminate on the basis of viewpoint when regulating unprotected speech, then surely it may not regulate on the basis of viewpoint when regulating litigation activity that falls within the realm of multiple intersecting First Amendment rights: speech, assembly, and petition.[298]

We pause to note the complications inherent in suggesting that lawsuits might be treated as speech. Lawsuits involve speech, of course, but trigger a distinctive set of obligations both from the defendant and the tribunal that do not have any analogy in other kinds of speech.[299] Speech in the context of litigation is pervasively regulated: the rules of evidence, the rules of professional responsibility, the rules of civil procedure, and a range of other constraints combine to create a highly restrictive environment for what can be said in the courtroom and adjacent contexts.[300] Speech in litigation is restricted and even outright prohib-

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297. *Cf. Reed*, 576 U.S. at 174 (Alito, J., concurring) ("Limiting speech based on its 'topic' or 'subject' favors those who do not want to disturb the status quo.").

298. *See* Robert L. Tsai, *Conceptualizing Constitutional Litigation as Anti-Government Expression: A Speech-Centered Theory of Court Access*, 51 AM. U. L. REV. 835, 846 (2002).

299. This is why civil defendants enjoy a range of procedural protections under the Due Process Clause, such as the doctrine of personal jurisdiction, which protects the defendant's right not to be hauled into a forum with which they have not had minimum contacts. *See, e.g.*, Kulko v. Superior Ct., 436 U.S. 84, 91, 98 (1978). *See generally* Christopher J. Peters, *Adjudicative Speech and the First Amendment*, 51 UCLA L. REV. 705, 710 (2004) (attempting "to answer the normative question of why adjudicative and political speech are treated so differently from each other," and providing an extensive discussion of the "long tradition of restrictions" on speech in the courtroom).

300. As observed by Frederick Schauer,

> [T]he very institution we call a trial exists by virtue of an elaborate system of restrictions on the freedom of speech, restrictions whose willful violation carry the ultimate threat of imprisonment for contempt of court. The rules that constitute the trial process thus tell people what to say and tell them when to say it, and the trial that is both created and regulated by prohibitions on speech is thereby among the most constrained of all communicative environments.

Frederick Schauer, *The Speech of Law and the Law of Speech*, 49 ARK. L. REV. 687, 689-90 (1997). Schauer specifies that his point is not to "argue that the law of evidence violates the First Amendment," but instead to observe that trials are among the "vast domains that are speech in the ordinary language sense of that term but to which the doctrine and the discourse of the First Amendment are not admitted." *Id.* at 691-692.

ited for all sorts of sensible reasons that we hardly bother to subject to individualized justification.[301] Treating lawsuits as speech bumps up against a long-standing, widely accepted supposition that adjudication is a context "in which the Free Speech Clause seems not to operate, or to operate with much less than full force."[302]

Restrictions on forms of speech that are uncontrovertibly covered by the Free Speech Clause—like signs,[303] newspaper editorials,[304] leaflets,[305] letters,[306] or actual talking[307]—are closely scrutinized because such laws present the "possibility that official suppression of ideas is afoot."[308] In contrast, while the prohibition of lawsuits closes a forum for dispute resolution and eliminates an avenue to obtain relief from unlawful government conduct, it leaves undisturbed the right to express any ideas whatsoever about the disputed laws or government conduct more generally.[309] And yet, especially with regards to constitutional litigation against the *government*—precisely what is at issue in Scenario Two—scholars like Robert L. Tsai have persuasively argued that litigants can be under-

301. Peters, *supra* note 299, at 725-29 (noting the extent to which adjudicative speech is "regularly, indeed almost casually, restricted," without satisfactory explanation for why it "is not entitled to the same quantum of First Amendment protection as political speech").

302. *Id.* at 791.

303. *See* Reed v. Town of Gilbert, 576 U.S. 155, 159 (2015).

304. *See* Rosenberger v. Rector of Univ. of Va., 515 U.S. 819, 826 (1995) (describing such newspaper articles).

305. *See* Consol. Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 532, 535 (1980) (applying First Amendment analysis to bill inserts).

306. *See In re* Primus, 436 U.S. 412, 431 (1978); Williams-Yulee v. Fla. Bar, 575 U.S. 433, 452 (2015).

307. *See* Gentile v. State Bar of Nev., 501 U.S. 1030, 1033-34 (1991); McCullen v. Coakley, 573 U.S. 464, 472, 497 (2014) (holding that providing "sidewalk counseling" to persuade people not to obtain an abortion is protected under the First Amendment).

308. *Reed*, 576 U.S. at 182 (Kagan, J., concurring) (quoting Davenport v. Wash. Educ. Ass'n, 551 U.S. 177, 189 (2007)).

309. *But see* NAACP v. Button, 371 U.S. 415, 429-30 (1963) (emphasizing the importance of a "practicable avenue" for achieving "lawful objectives," and observing that litigation might be the only such mechanism for groups who have been unable to wield power through the political process). *See also* Peters, *supra* note 299, at 750-52 (critiquing the idea that there is an alternative forum for speech excluded from the courtroom by emphasizing that the purpose of such speech is to influence highly consequential government decision-making: "Once speech is confined to a time and place where it cannot influence the judge's or the jury's decision, the entire purpose of that speech is defeated").

stood as "political dissident[s]" who are engaging in "anti-government expression" by "question[ing] the legitimacy of a governmental action."[310] On this account, constitutional litigation is a distinctive form of political expression that cannot simply be rerouted to an alternative forum without significant affront to First Amendment values.[311]

The Supreme Court itself has suggested that raising claims against the government in litigation constitutes speech for purposes of the First Amendment.[312] In considering a statutory restriction that prohibited federally funded legal-aid attorneys from challenging existing welfare laws, the Court rejected the contention that the legal representations amounted to government speech because of the provision of funding and were, therefore, subject to less protection.[313] The Court firmly described the "private nature of the speech involved here"[314] and held that the litigation funded by the Act was "constitutionally protected expression."[315] Congress was not required to fund this activity, but having done so, it was not permitted "to define the scope of the litigation it funds to exclude certain vital theories and ideas."[316] The Court emphasized its concern that

> [t]he attempted restriction is designed to insulate the Government's interpretation of the Constitution from judicial challenge. The Constitution does not permit the Government to confine litigants and their attorneys in this manner. We must be vigilant when Congress imposes rules and conditions which in effect insulate its own laws from legitimate ju-

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310. Tsai, *supra* note 298, at 838; *see also* Kathryn A. Sabbeth, *Towards an Understanding of Litigation as Expression: Lessons from Guantánamo*, 44 U.C. DAVIS L. REV. 1487, 1489 (2011) (exploring the idea of "litigation as political expression"); Jules Lobel, *Courts as Forums for Protest*, 52 UCLA L. REV. 477, 479 (2004) (advancing a model in which "courts not only function as adjudicators of private disputes, or institutions that implement social reforms, but as arenas where political and social movements agitate for, and communicate, their legal and political agenda").

311. *See Button*, 371 U.S. at 429-30 (noting that for minority groups such as the NAACP, "association for litigation may be the most effective form of political association").

312. *See* Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 544 (2001) ("The limitation forecloses advice or legal assistance to question the validity of statutes under the Constitution of the United States. It extends further, it must be noted, so that state statutes inconsistent with federal law under the Supremacy Clause may be neither challenged nor questioned.").

313. *Id.* at 542-43.

314. *Id.* at 543.

315. *Id.* at 548.

316. *Id.*

> dicial challenge. Where private speech is involved, even Congress' antecedent funding decision cannot be aimed at the suppression of ideas thought inimical to the Government's own interest.[317]

Drawing on this reasoning to assess the prohibition in Scenario Two, we can observe that the state's attempt to "insulate its own laws from legitimate judicial challenge" raises concerns about "the suppression of ideas" that are meaningfully different from the many constraints on adjudicative speech that have long been thought consistent with the demands of the Free Speech Clause.[318]

As this brief discussion reveals, there are reasons to consider the application of free speech principles to lawsuits against the government, and yet the extent to which the Court's precedents on content and viewpoint discrimination transfer seamlessly to the regulation of civil lawsuits requires considerably more elaboration than is possible here.[319] Fortunately, we do not need to resolve these complexities because it is clear that lawsuits are petitions within the meaning of the First Amendment right to petition for redress, even if their status as speech remains unclear.

Ultimately, for First Amendment purposes Scenario Two can be assessed in the same way that the Court approached Virginia's ban on the solicitation of legal business, at issue in *NAACP v. Button*.[320] Invalidating the ban as an infringement of constitutionally protected activity, the Court found it unnecessary to categorize the NAACP's advocacy and litigation "under a narrow, literal conception of freedom of speech, petition or assembly" because "there is no longer any doubt

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317. *Id.* at 548-49.

318. As Robert L. Tsai observes,

> Not every law having an impact on litigation implicates free speech, associational, or petition concerns. The vast majority of the procedural rules that courts use to manage cases should not implicate First Amendment concerns if they are neutral rules of general applicability and are genuinely designed not to suppress speech but to facilitate the orderly and fair consideration of legal claims.

Tsai, *supra* note 298, at 887. Tsai goes on to propose that the "time, place, and manner" doctrine can effectively be deployed to uphold "content-neutral rules intended to facilitate where and how speech takes place, rather than suppress expression." *Id.* Christopher J. Peters similarly suggests that under conventional free-speech doctrine, the rules of evidence would be "summarily upheld" as reasonable, viewpoint-neutral constraints in a nonpublic forum. Peters, *supra* note 299, at 710-11. While we do not resolve the matter conclusively here, opting instead to rest on Scenario Two's clearly impermissible infringement on the right to petition, we note that these same principles might well yield a different result when applied to Scenario Two.

319. As readers are likely to recognize, this sidesteps considerable complexity about several areas of First Amendment doctrine, including what type of expressive conduct counts as speech and the difference between public, nonpublic, and limited-public fora.

320. 371 U.S. 415, 430 (1963).

that the First and Fourteenth Amendments protect certain forms of orderly group activity."[321] The First Amendment principles elucidated in *Velazquez* and *Button* make it implausible that the government could impose content- or viewpoint-based restrictions on the right to petition of the type we see in Scenario Two.[322]

The targeted quality of the obstruction in Scenario Two also raises equal protection concerns. In *Lindsey v. Normet*, the Supreme Court considered an Oregon law that set special judicial procedures for the eviction of tenants who had not paid rent.[323] The Court upheld two of the challenged provisions, finding no due process or equal protection defects with either a provision requiring trial within six days of the complaint nor a limitation on triable issues.[324] The Court noted the "unique factual and legal characteristics of the landlord-tenant relationship that justify special statutory treatment inapplicable to other litigants."[325] But it nonetheless struck down a third provision requiring tenants wishing to appeal an adverse decision to post a bond in twice the amount of rent expected to accrue during the pendency of the appeal. If the judgment against the tenant was affirmed, "the landlord [was] automatically entitled to twice the rents accruing during the appeal without proof of actual damage in that amount."[326] Especially in light of the fact that tenants were also subject to the general appeal-bond statute requiring all appellants to cover the value of the use and occupation of property over the period of the appeal, the Court was unable to discern any valid state objective furthered by the specialized double-bond requirements. Noting that

321. *Id.* The majority did not even reach the point, emphasized in Justice Douglas's concurring opinion, that the antisolicitation statute was "not applied across the board to all groups that use this method of obtaining and managing litigation, but instead reflects a legislative purpose to penalize the N.A.A.C.P. because it promotes desegregation of the races." *Id.* at 445 (Douglas, J., concurring).

322. This scenario is too simplistic to capture the full extent of the viewpoint discrimination inherent in the Texas scheme, which does not close the courthouse door to all abortion litigation and indeed encourages the bounty-hunter suits with inducements beyond what any other civil plaintiffs enjoy. Nonetheless, Scenario Two serves to illustrate an essential point: if, as we readily concluded, it violates constitutional principles to insulate all state law from legal challenge, the violation persists when a specific subset is targeted and possibly even raises additional concerns.

323. 405 U.S. 56, 58 (1972).

324. *Id.* at 64-69.

325. *Id.* at 72.

326. *Id.* at 76.

"[n]o other appellant is subject to automatic assessment of unproved damages,"[327] the Court concluded that the scheme was invalid under the Equal Protection Clause.[328] Particularly instructive is the Court's emphasis that the double-bond requirement imposes "a substantial barrier to appeal faced by no other civil litigant."[329] *Normet* suggests that Scenario Two's wholesale exclusion of a particular group of litigants from initiating civil action will not withstand equal protection scrutiny.

In a separate line of cases ranging far beyond the courthouse, the Supreme Court has repeatedly instructed that "a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* government interest," even under the most deferential standard of review.[330] Scenario Two invites application of this principle because the state is foreclosing access to courts for a targeted group of people with whom it has a particularly entrenched and acrimonious disagreement.[331] As scholars have explained, the anti-animus principle serves as a check on "the tendency of legislative majorities to be vindictive."[332] And "[d]iscriminations of an unusual character," as Scenario Two certainly is, "especially suggest careful consideration."[333] Scenario Two fits within the Court's instruction that a "law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense."[334]

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327. *Id.* at 78.

328. *Id.* at 79.

329. *Id.*

330. U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973); *see* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 450 (1985) (rejecting heightened scrutiny for classifications burdening people with cognitive disabilities, but nonetheless invalidating zoning decision after finding that it rested solely on "irrational prejudice").

331. *See* Anastasia Goodwin, *A History of Abortion in Texas*, HOUS. CHRON. (June 24, 2022, 10:57 AM), https://www.houstonchronicle.com/projects/timeline/texas-abortion-history [https://perma.cc/D9VL-WQ3L].

332. Carpenter, *supra* note 225, at 186.

333. United States v. Windsor, 570 U.S. 744, 768 (2013) (quoting Romer v. Evans, 517 U.S. 620, 633 (1996)).

334. Romer v. Evans, 517 U.S. 620, 633 (1996). While the Court has held that anti-abortion protestors were not manifesting "invidiously discriminatory animus" for purposes of satisfying the state-of-mind element of 42 U.S.C. § 1985(3) (2018), Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 274 (1993) (quoting Griffin v. Breckenridge, 403 U.S. 88, 102 (1971)), its supposition that there are "proper and reasonable" reasons for "favoring childbirth over abortion" does not categorically foreclose the application of animus principles to anti-abortion laws, *Bray*, 506 U.S. at 274 (quoting Maher v. Roe, 432 U.S. 464, 474 (1977)). In *Dobbs*, the Court quoted *Bray* for the proposition that "the 'goal of preventing abortion' does not constitute 'invidiously discriminatory animus' against women" and, therefore, does not trigger

To be sure, serious questions present themselves about whether litigants wishing to challenge abortion laws constitute a "class of citizens" sufficiently akin to the LGBT citizens singled out in *Romer*,[335] or the "hippies" that Congress sought to exclude from the food stamp program in *Moreno*.[336] Scholars and advocates have argued forcefully that abortion prohibitions themselves should be viewed as sex-based classifications subject to heightened scrutiny.[337] While the *Dobbs* majority rejected these arguments, asserting that "the 'goal of preventing abortion' does not constitute 'invidious discriminatory animus' against women,"[338] that cannot be read to categorically foreclose the application of animus principles across the entire area of abortion law. The precise effect of this passage is simply to insist that abortion prohibitions are gender-neutral and therefore ineligible for heightened scrutiny. That leaves intact the principle from the Court's earlier animus cases that even for groups not entitled to heightened scrutiny, the Court will gauge closely whether a law has been passed simply to make it "more difficult for one group of citizens than for all others to seek aid from the government."[339]

The question that remains is whether the class of people burdened by Scenario Two's prohibition is sufficiently discrete and identifiable to constitute a "politically unpopular group" of the sort that is usually present when the Court applies anti-animus principles.[340] The group's only defining characteristic would seem to be its opposition to the state's abortion law, suggesting that perhaps the First Amendment's viewpoint discrimination principles are better suited to this task than equal protection principles. First, we note that the Court has used ra-

heightened review as a gender classification. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2246 (2022) (quoting *Bray*, 506 U.S. at 273-74). To be sure, this narrows the path to using animus as a doctrinal principle in the abortion context—but it does not eliminate it.

335. Carpenter, *supra* note 225, at 187 ("[A]nti-animus principles have been sharpened and crystallized in response to the law's almost unrelenting hostility toward gay men and lesbians.").

336. U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973).

337. Reva B. Siegel, Serena Mayeri & Melissa Murray, *Equal Protection in* Dobbs *and Beyond: How States Protect Life Inside and Outside of the Abortion Context*, 43 COLUM. J. GENDER & L. 67 (2023); *see also* Reva B. Siegel, *Why Restrict Abortion? Expanding the Frame on* June Medical, 2020 SUP. CT. REV. 277, 282 (explaining how abortion regulation reflects "traditional sex-role-based judgments"). Scholars have also explained how people of color disproportionately bear these burdens. *See* Melissa Murray, *Race-ing* Roe*: Reproductive Justice, Racial Justice, and the Battle for* Roe v. Wade, 134 HARV. L. REV. 2025, 2044-45 (2021); Khiara M. Bridges, *The Supreme Court, 2021 Term—Foreword: Race in the Roberts Court*, 136 HARV. L. REV. 23, 53 (2022).

338. *Dobbs*, 142 S. Ct. at 2246 (quoting *Bray*, 506 U.S. at 273-74).

339. *Romer*, 517 U.S. at 633.

340. *Moreno*, 413 U.S. at 534.

tional-basis review to invalidate government action that didn't necessarily burden the sort of "discrete and insular" minority group[341] for which equal protection analysis is paradigmatic.[342] In one admittedly unusual case, the Court allowed an equal protection challenge to proceed against a town that had imposed an easement requirement only on a single individual, whose differential treatment was alleged to be "irrational and wholly arbitrary."[343] The Court explained that it had

> recognized successful equal protection claims brought by a "class of one," where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment. In so doing, we have explained that the purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination . . . .[344]

Scholars have contested the Court's characterization of Olech's claim as one cognizable "under traditional equal protection analysis,[345] and have noted its limited reach.[346] Nonetheless, *Olech* offers support for the idea that equal protection principles are available to scrutinize "intentional and arbitrary discrimination" even where the person burdened is not a member of *any* class or group.[347] *Olech* and *Normet* in combination suggest an equal protection principle against intentional and arbitrary burdens on access to courts,[348] even if the burdened group is not as well-defined as the groups at issue in *Moreno*, *Cleburne*, *Romer*, and the Court's other foundational animus cases. That the group burdened by

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341. *See* Carpenter, *supra* note 225, at 184 (tracing the roots of animus doctrine to the concerns about "prejudice against discrete and insular minorities" famously articulated in United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938)).

342. *See, e.g.*, Quinn v. Millsap, 491 U.S. 95 (1989) (invalidating a provision limiting eligibility for county board to those owning real property).

343. Vill. of Willowbrook v. Olech, 528 U.S. 562, 564 (2000). The plaintiff alleged that the town had required a 33-foot easement from her as a condition of connecting her to the municipal water supply, as opposed to the 15-foot easements required of all other property owners, and that the differential treatment was "motivated by ill will" resulting from the plaintiff's previous filing of an unrelated, successful lawsuit against the town. *Id.* at 563.

344. *Id.*

345. *See, e.g.*, Robert C. Farrell, *Equal Protection Rational Basis Cases in the Supreme Court Since* Romer v. Evans, 14 GEO. J.L. & PUB. POL'Y 441, 451 (2016) (arguing that prior to *Olech* the Court's equal protection jurisprudence was concerned with class-based discriminations).

346. For an argument that *Olech* is an example of the Court's underappreciated use of rational-basis review as a meaningful check on government power, see Katie R. Eyer, *The Canon of Rational Basis Review*, 93 NOTRE DAME L. REV. 1317, 1339 (2018).

347. *Olech*, 528 U.S. at 564.

348. Lindsey v. Normet, 405 U.S. 56, 58 (1972).

Scenario Two is united only by an intent to initiate reproductive-rights litigation, bringing it within the purview of First Amendment viewpoint discrimination principles as discussed above, does not foreclose the possibility of equal protection analysis.[349] Ultimately, the point here is a rather modest one: the targeted obstruction of access to courts that we see in Scenario Two can be analyzed under rational-basis review consistent with a number of the Court's equal protection precedents.

In considering whether Scenario Two's prohibition on abortion litigation is rationally related to a legitimate state interest, we note that the goal of preventing abortion differs from the goal of preventing any litigation about abortion. The Court in *Dobbs* endorsed the former as a legitimate state interest but did not—and could not—give its blessing to the latter. As noted above, even with its newfound power to regulate abortion, Texas must satisfy a range of independent constitutional obligations, including First Amendment and Eighth Amendment principles that remain totally unaffected by *Dobbs*. Its desire to avoid scrutiny across this entire range of challenges cannot be justified merely because it has a legitimate goal of preventing abortion. In considering the constitutionality of Scenario Two we are focused not on the state's regulation of primary conduct—the prohibition of abortion itself—but instead on the state's refusal to allow access to courts for the adjudication of abortion-related challenges. Even legitimate goals must bear a rational relationship to the means chosen by the state, and Scenario Two will fail that assessment if the state simply reiterates its interest in preventing abortion. To put the matter bluntly, abortions do not happen in the courthouse. Basic equal protection principles foreclose the suggestion that simply because Texas has a legitimate goal of preventing abortion, it can impose

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349. Indeed, the Court has previously applied a combination of equal protection and free speech principles to laws that draw distinctions in the regulation of expressive conduct.

> [Because the challenged ordinance] treats some picketing differently from others, we analyze this ordinance in terms of the Equal Protection Clause of the Fourteenth Amendment. Of course, the equal protection claim in this case is closely intertwined with First Amendment interests; the Chicago ordinance affects picketing, which is expressive conduct; moreover, it does so by classifications formulated in terms of the subject of the picketing. As in all equal protection cases, however, the crucial question is whether there is an appropriate governmental interest suitably furthered by the differential treatment.

Police Dep't of Chi. v. Mosley, 408 U.S. 92, 94-95 (1972). In making this assessment, the Court immediately went on to observe that the ordinance was defective because it "describes permissible picketing in terms of its subject matter . . . But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Id.* at 95.

any burdens whatsoever on abortion-law challengers without being subject to rationality or animus review.[350]

In sum, the targeted nature of our second scenario does not assuage the problems identified in the first one, and if anything, raises additional concerns about content and viewpoint discrimination, animus, and the suppression of political dissent. Still, one might respond, the second hypothetical is far removed from what we see in S.B. 8, which places no direct restriction on filing lawsuits. Indeed—so let us consider Scenario Three, which, like S.B. 8, allows the filing of any claims but merely constrains the role of lawyers in litigating those cases.

C. *Scenario Three: Abortion-Law Challengers May Not Be Represented by Attorneys*

In Scenario Three, claimants are free to challenge state abortion law in either state or federal court but may not be represented by lawyers in these cases. To simplify our consideration of this scenario, we will exclude the possibility that it might cover criminal cases, which would implicate Sixth Amendment rights to counsel for criminal defendants.[351] Assuming that Scenario Three does not present any violations of the Sixth Amendment, are there nonetheless constitutional defects with the attempt to require claimants to proceed without the assistance of counsel?

First, we must note that the First Amendment concerns explored in Scenario Two persist unabated in our third scenario. We continue to see the content and viewpoint discrimination inherent in targeting challengers of abortion laws for special obstacles in obtaining judicial relief. While Scenario Three improves upon Scenario Two by opening the courthouse door to such litigants, the proviso that they proceed without counsel will fail to survive constitutional scrutiny.

The Supreme Court opinions exploring the First Amendment implications of litigation activity themselves concerned limits on access to counsel rather than direct restrictions on the filing of claims. The restriction invalidated in *Velazquez*, for example, did not directly prohibit welfare recipients from challenging state or federal law: it placed no direct restrictions on litigants at all.[352] The law was

350. At least one lower court has upheld one-sided fee-shifting against an equal protection challenge, but the anti-animus principle was neither invoked nor plausibly implicated in that case. Postow v. OBA Fed. Sav. & Loan Ass'n, 627 F.2d 1370, 1387-88 (D.C. Cir. 1980) (concluding that Congress's interest in private enforcement of a statutory scheme "constitutes a rational basis for a legislative distinction to be drawn between attorneys' fee awards to successful plaintiffs but not successful defendants").

351. *See* Powell v. Alabama, 287 U.S. 45, 73 (1932); Gideon v. Wainwright, 372 U.S. 335, 344-45 (1963).

352. Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 538 (2001).

operative only on attorneys, and only on those employed by organizations receiving federal funds.[353] The restriction required such attorneys to forego representations involving constitutional or statutory challenges to welfare law and required them to withdraw if those claims became apparent after the representation was underway.[354] There was nothing that prevented the *client* from so arguing, aside from the customary expectation that a represented party speaks through counsel. Nor was there any limitation on the arguments that could be made by attorneys who did not receive federal funding. At least in theory, welfare beneficiaries who wanted to challenge the validity of existing welfare law on statutory or constitutional grounds could represent themselves or find other attorneys who were not constrained by the funding condition. But the Court did not even consider that this might be a saving grace of the arrangement,[355] and its discussion makes plain that even the partial constraint on attorney participation "threatens severe impairment of the judicial function."[356]

In *NAACP v. Button*[357] and *In re Primus*,[358] the invalidated laws also constrained attorney behavior in the initial development of the attorney-client relationship, leaving unaffected the client's ability to raise and present claims in court.[359] As the facts of these cases make clear, the access to courts protected by the First Amendment can be violated by impairments of access to counsel—even where there is no direct prohibition on filing claims. Scenario Three's prohibition on attorney representation for litigants who wish to challenge state abortion laws is very difficult to square with *Button*, *Primus*, and *Velazquez*.

Access to counsel in civil cases is further undergirded by the Due Process Clause.[360] While it is certainly a fraught time to be making assertions about what

353. *Id.*

354. *Id.* at 536-39 (explaining that attorneys were prevented "from arguing to a court that a state statute conflicts with a federal statute or that either a state or federal statute by its terms or in its application is violative of the United States Constitution").

355. The Court's discussion reflects the pragmatic and well-justified premise that welfare beneficiaries will be unable to pay prevailing market rates for private counsel and cannot be expected to reliably find pro bono counsel or other affordable representation. *See id.* at 546.

356. *Id*.

357. 371 U.S. 415 (1963).

358. 436 U.S. 412 (1978).

359. *See also* United Mine Workers of Am. v. Ill. Bar Ass'n, 389 U.S. 217, 225 (1967) (invalidating on First Amendment grounds a law that prohibited unions from employing a salaried attorney to provide legal assistance to members); Bhd. of R.R. Trainmen v. Virginia *ex rel.* Va. State Bar, 377 U.S. 1, 8 (1964) (invalidating on First Amendment grounds laws that prohibited unions from providing attorney recommendations to members).

360. Explaining the relationship between the Petition Clause and the Due Process Clause in protecting access to courts, Carol Rice Andrews proposes that

the Due Process Clause guarantees, the Supreme Court has recognized that due process encompasses a right of access to the courts.[361] It has done very little to ensure that the right of access is meaningful, especially for the poor,[362] and has characterized several of its landmark access cases as resting on the importance of the family relationships at stake for the litigants in those particular cases.[363] Nonetheless, we can ascertain some general protections for access to counsel in the Court's due process jurisprudence.

In *Walters v. National Ass'n of Radiation Survivors*,[364] the Supreme Court considered a statutory limit of ten dollars on the compensation an attorney could receive for assisting veterans in benefits-claims proceedings. Over a vigorous dissent from Justice Stevens, the Court inquired into whether the limit violated due process by using the *Mathews v. Eldridge* balancing test, which weighs the respective strengths of the individual interests at stake, the risk of erroneous deprivation of such interests and the probable value of additional safeguards, and the government's interest in adhering to a particular procedure.[365]

The Court assumed that the fee limit would render attorneys unavailable to represent claimants, but nonetheless upheld the fee on the grounds that Congress had deliberately created a system solicitous to the veteran claimants in which attorneys would be unnecessary and unlikely to meaningfully reduce the risk of error.[366] The Court emphasized the informal and nonadversarial quality of the proceedings at issue, along with the strength of Congress's interest in ensuring that only a limited portion of the benefits obtained by veterans were siphoned off as attorney's fees.[367] The Court also rejected the plaintiffs' First

> [t]he Petition Clause, with all of its attendant "strict scrutiny" protections under the First Amendment, protects the initial filing of the complaint, and the Due Process Clause, and its somewhat lower "reasonableness" standard of protection, steps in from that point forward. These due process standards, not the stricter First Amendment standards, govern responsive pleadings and motions, discovery, trial procedure, and post-trial attacks on the judgment.

Andrews, *supra* note 264, at 646-47 (footnotes omitted). A prohibition on attorney representation spans both phases because it impairs a litigant's ability to file the initial complaint as well as to navigate discovery, motions practice, and trial and appellate procedure.

361. *See, e.g.*, Boddie v. Connecticut, 401 U.S. 371, 380-81 (1971).

362. *See* Henry Rose, *Why Do the Poor Not Have a Constitutional Right to File Civil Claims in Court Under Their First Amendment Right to Petition the Government for a Redress of Grievances?*, 44 SEATTLE U. L. REV. 757, 761-67 (2021).

363. *Id.*

364. 473 U.S. 305 (1985).

365. 424 U.S. 319, 335 (1976).

366. *Walters*, 473 U.S. at 326.

367. *Id.* at 311, 326 (noting that the proceedings are ex parte and that the government party is not present at all, much less represented by counsel).

Amendment claims, finding that these were largely restatements of the due process contentions and that the statute's satisfaction of due process similarly provided the "meaningful access" required by the First Amendment.[368]

As we consider the lessons that *Walters* holds for analyzing Scenario Three, a few observations are in order. First, it is unclear whether the *Mathews v. Eldridge* balancing test would be the appropriate standard for Scenario Three's complete bar on counsel. Several of the circuit courts have concluded that the right to retained counsel in civil cases is a fundamental right protected by due process, and one of the leading cases in this area did not use the balancing test but opted instead for a test more akin to strict scrutiny.[369] That case arose out of the Texas legislature's creation of a risk-pooling entity comprised of all the private insurers in the state. Insurers were required to belong to the pool as a condition of doing business in the state, and the statutory scheme required the pool to rely exclusively on the state attorney general for legal representation.[370] The Fifth Circuit invalidated the requirement that the insurers be represented by the state attorney general instead of counsel of their choice.[371] Acknowledging that the constitutional text does not "specifically say that a state cannot deprive persons of counsel in civil trials,"[372] the court cited language from *Powell v. Alabama*[373] indicating that the Due Process Clause would forbid such a result:

> If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it

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368. *Id.* at 334-35.

369. Tex. Catastrophe Prop. Ins. Ass'n v. Morales, 975 F.2d 1178 (5th Cir. 1992); *see also* Gray v. New Eng. Tel. & Tel. Co., 792 F.2d 251 (1st Cir. 1986) (recognizing a constitutional right to retain counsel in a civil case under due process, but ultimately ruling that this right had not been violated when the judge refused to delay plaintiff's trial for more than six months regardless of whether he had retained counsel or not); United States v. Flannigan, 679 F.2d 1072 (3d Cir. 1982) (affirming a due process right to choose and retain counsel, but ultimately ruling that this choice could be overruled when counsel representing codefendants in a criminal trial had a disqualifying conflict of interest); Ind. Planned Parenthood Affiliates Ass'n v. Pearson, 716 F.2d 1127 (7th Cir. 1983) (acknowledging that due process protections generally do not require a state to provide a civil litigant with counsel, but ruling that particular circumstances might require the state to provide for civil appointment of counsel); Roberts v. Anderson, 66 F.2d 874 (10th Cir. 1933) (ruling that the defendant's due process right to counsel had been violated when her attorneys were arbitrarily dismissed and replaced by a court-appointed attorney).

370. *Morales*, 975 F.2d at 1179-80.

371. *Id.* at 1181-83.

372. *Id.* at 1180.

373. 287 U.S. 45 (1932).

> reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.[374]

Having determined that there is indeed "a constitutional right to retained counsel in civil cases," the Fifth Circuit concluded that the state was unable to show a "compelling reason" for overriding the right to retain counsel of choice.[375] As would be expected in the application of strict scrutiny, the court specified that the state bore an "extraordinary burden" that would not be satisfied by the demonstration of reasons that were merely "important."[376]

The Fifth Circuit did not cite *Walters* or otherwise explain why it was eschewing the *Mathews v. Eldridge* balancing test, but we can infer that it saw a categorical difference in the absolute ban on counsel of choice at issue in the Texas statute. One could reconcile the two by observing that under the fee limitation upheld in *Walters*, veterans were allowed to retain private counsel but were simply forbidden from offering them compensation above the fee limit, whereas the scheme struck down by the Fifth Circuit absolutely forbade representation by counsel of choice.[377] On that theory, the complete ban on hired counsel in Scenario Three would be more appropriately analyzed under the strict-scrutiny test used by the appellate courts. But even under the *Walters*/*Mathews* balancing test, it is difficult to envision what a state could proffer as a legitimate interest in support of the prohibition on attorney representation, especially without the unique nature of veterans' claims administration driving the analysis.[378] If, as we determined in the preceding Sections, litigants have a right to access the courts to bring claims against the state, then what interest might the state have in preventing them from being represented by counsel when doing so?

Contrary to the concerns that animated the Court in *Walters*, the state in this scenario has not designed a special process to be informal and nonadversarial, nor does it have the fund-allocation objectives that were central to the reasoning

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374. *Morales*, 975 F.2d at 1181.

375. *Id.* at 1181-82.

376. *Id.* at 1181.

377. That is somewhat in tension with the Supreme Court's underlying assumption in *Walters* that the fee limit was in fact operating to exclude attorneys from the proceedings. Alternatively, the Fifth Circuit may have been dissuaded from applying *Walters* because of the central and inextricable role that the special informality of veteran-benefits proceedings played in the Supreme Court's analysis.

378. Presumably the state would be represented by counsel in Scenario Three, an imbalance that would be particularly troublesome. *Cf.* Turner v. Rogers, 564 U.S. 431, 446-47 (2011) (rejecting the claim that due process requires appointment of counsel for indigent civil litigants facing jail time for contempt of a support order, in part because the opposing party—a parent entitled to receive the missing child-support orders—would also typically be unrepresented).

and result in *Walters*.[379] The idea that abortion litigation is simple enough to dispense with attorney assistance is absurd.[380] The arrangement upheld in *Walters*, where the proceedings were ex parte and no government official appeared in opposition to the veteran claimant, is categorically distinct from what we see in Scenario Three: an attempt by the state to prevent its opponents from being represented by counsel in proceedings where the state will itself be represented. The state's interest seems simply to be to gain an advantage, and perhaps thereby discourage litigants from initiating the battle. These are not the kind of interests that bear weight under either First Amendment or due process scrutiny.

Having seen the fatal constitutional defects presented by Scenarios One through Three, we are now well positioned to consider whether those are cured in Scenario Four, modeled after the actual fee-shifting regime we see in S.B. 8.

D. Scenario Four: Abortion-Law Challengers Must Find Attorneys Willing to Share Fee Liability

Scenario Four brings us to the situation created by S.B. 8. As with the previous two scenarios, the state has targeted a discrete class of litigants for burdens that others do not bear, simply on the basis of their viewpoint about the validity of state abortion law. But in Scenario Four there is no prohibition on the filing of claims for declaratory or injunctive relief against the state, nor is there any direct restriction on the participation of lawyers.[381] Individuals who wish to

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379. *See* Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 326 (1985) (describing how representation by lawyers would render the system "more adversar[ial] and more complex," with the "end result being that less Government money reaches its intended beneficiaries").

380. *See* Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2495 (2021) (denying the motion to vacate the stay of a district-court injunction against S.B. 8 because the litigation "present[s] complex and novel antecedent procedural questions").

381. In referring to claims for relief "against the state," there is a slight gloss here on the actual intricacies of S.B. 8, which targets any person seeking declaratory or injunctive relief to prevent the state or "any person" from enforcing any type of law that regulates or restricts abortion. The state may well be the defendant in many cases comprising this category, but not always, because of the way that S.B. 8 deputizes private individuals to enforce state abortion law. An abortion provider could therefore bring claims for declaratory or injunctive relief against the enforcement of state law in a proceeding between two private parties. The shorthand nonetheless captures the extent to which the constitutional validity of state law can be implicated even in a lawsuit brought against a private defendant. *See, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 256 (1964) ("We are required in this case to determine . . . the extent to which the constitutional protections for speech and press limit a State's power to award damages in a libel action brought by a public official against critics of his official conduct."); *see also* Whelan v. Abell, 48 F.3d 1247, 1254 (D.C. Cir. 1995) (applying similar analysis to common-law torts of malicious prosecution and abuse of process).

bring such claims against the state face the possibility of having to pay their opponents' legal fees, as do other categories of civil litigants.[382] The First Amendment principles explored above suggest something particularly troubling about a fee-shifting regime operative only against parties seeking declaratory or injunctive relief from state law,[383] and to that we must add that in Scenario Four, a challenger's attorney will be jointly and severally liable for the fee award. We can anticipate that this will have some discernable effect on the willingness and ability of lawyers to participate in such matters, especially given the expansive definition of "prevailing party" explored in detail above. Where Scenario Three simply bars the participation of counsel outright, Scenario Four deters it through the prospect of punishing fee liability. This joint-liability feature therefore implicates access to counsel in a way that is absent in ordinary fee-shifting regimes, where liability is borne only by parties.

Given that Scenario Four allows claimants to be represented by counsel as long as the lawyers are willing to share liability for the attorney's fees of the opposing party, is there a constitutionally material difference between Scenarios Three and Four? To draw the line there, we would have to believe that Scenario Four offers meaningfully improved access to counsel when contrasted with the absolute ban we see in Scenario Three.

One difference is that Scenario Four's joint and several liability feature would seem to have little deterrent effect on lawyers employed by the advocacy organizations they represent as clients. Scenario Four will be meaningfully different from Scenario Three for Planned Parenthood, for example, which can be represented by its in-house attorneys. If Planned Parenthood is the party in a lawsuit challenging Texas abortion law and it loses on one or more of its claims, then the

382. For an extended discussion of why ordinary fee-shifting to losing litigants is likely permissible under a narrow view of the right to petition, see Andrews, *supra* note 360, at 659-62. Andrews explains that this result is normatively desirable because depriving the government of the ability to impose attorney's fee liability on losing suits "would take away the government's ability to ever penalize and deter colorable but otherwise abusive suits," such as an employer's lawsuit filed solely to retaliate against its employees. *Id.* at 660; *see also* Octane Fitness, LLC v. ICON Health & Fitness, Inc., 572 U.S. 545, 556 (2014) (explaining that the Court crafted an exception to statutory antitrust liability "to avoid chilling the exercise of the First Amendment right to petition the government for the redress of grievances. . . . But to the extent that patent suits are similarly protected as acts of petitioning, it is not clear why the shifting of fees in an 'exceptional' case would diminish that right").

383. *Cf.* Andrews, *supra* note 360, at 645 ("In the usual case, the government is not depriving the plaintiff of a property right if it bars access to court. Another private party, by refusing to settle the dispute, frustrates that right, but the *government* does not. So long as the government does not require judicial access as the only means to resolve a dispute, it has not interfered with a plaintiff's property rights." (emphasis added)). For declaratory or injunctive relief against state law, judicial access will, of course, be the only means to resolve a dispute.

joint and several liability imposed by Scenario Four on the organization's attorneys makes little practical difference if the client and attorney are essentially one and the same.[384] But not every advocacy organization is large or wealthy enough to have its own in-house counsel. Whole Woman's Health, for example, which openly identifies "a strong commitment to an ambitious litigation strategy" as a crucial part of its mission, is represented by outside counsel.[385] And as should be evident, this functional safe harbor for organizational in-house counsel is of no help at all to any individual wishing to seek declaratory or injunctive relief against state abortion law.

We must therefore confront head-on the constitutional significance of the deterrent—but not fully preclusive—effect on access to counsel we see in Scenario Four. First, note that even narrow views of the right to petition have recognized that indirect as well as direct restraints can sufficiently burden the right so as to be invalid. In her foundational study of the right to petition, Carol Rice Andrews reads the relevant case law as imposing "a win-lose distinction" on the right to file judicial petitions. She thus concludes that "only winning claims are within the absolute protection of the Petition Clause."[386] Nonetheless, as she readily explains, indirect burdens on winning claims might well be invalid. As Professor Andrews offers by way of example, the threat of criminal penalties for filing a *losing* suit would deter all but the bravest or most irrational litigants, making that an excessive burden on the right to file *winning* suits.[387] Appellate courts have likewise recognized that substantial deterrents on the commencement of suit can violate the right to petition: "[G]overnment action designed to keep a citizen from initiating legal remedies sometimes infringes upon the First

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384. We note, however, that the deterrent effects of the other two components of the Texas Three Step apply just as forcefully. Planned Parenthood may not have trouble finding representation, because they have in-house counsel, but they continue to face the threat of catastrophic fee liability themselves if they lose on even a single claim.

385. *Our Purposeful Litigation*, WHOLE WOMAN'S HEALTH, https://www.wholewomanshealth.com/fighting-for-abortion-rights [https://perma.cc/E2J4-D53D].

386. Andrews, *supra* note 264, at 648-49.

387. *See id.* at 683. Andrews distinguishes ordinary imposition of attorney's fees as permissible not only because the deterrent effect is lower, but also because it fulfills the legitimate state interest of compensating the "victim" of the losing suit. This victim compensation rationale holds less force where the defendant is the government, as she implicitly notes when she acknowledges that the balance of interests is different for civil suits against the government or its officials. *Id.* at 685. In those instances, an actual malice standard may strike the best balance. *Id.* at 684-85. Andrews also notes the heightened concern with ex ante burdens on court access that would serve as prior restraints. *Id.* at 687-88. Although she sees ordinary attorney's fee-shifting as not implicating this concern, it is far from clear whether the imposition of liability on attorneys would similarly escape characterization as a prior restraint. *See also* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 277 (1964) (explaining that a fear of damage awards in civil litigation "may be markedly more inhibiting than the fear of prosecution under a criminal statute").

Amendment right to petition the courts. This right of court access cannot be impaired, either directly or indirectly."[388] These cases, however, have invalidated impairments distinct from what we consider here—various forms of retaliation against a person for filing a previous lawsuit,[389] for example, or an unconditional litigation penalty in which a particular type of litigant would be required to pay the state's litigation expenses regardless of which party prevailed.[390] To consider whether Scenario Four rises to a violation of the right to petition the government for redress of grievances, we will need to gauge as accurately as possible the nature and extent of the deterrent effect produced by the joint fee liability that lawyers face.

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388. *In re* Workers' Comp. Refund, 46 F.3d 813, 822 (8th Cir. 1995) (citation omitted) (noting that indirect impairment may include action designed "to intimidate or chill" a person's "exercise of that right in the future" (quoting Harrison v. Springdale Water & Sewer Comm'n, 780 F.2d 1422, 1428 (8th Cir. 1986))); *see also* Powell v. Alexander, 391 F.3d 1, 17 (1st Cir. 2004) (explaining that retaliation for the exercise of the right to petition the courts for redress is actionable because it tends to chill the exercise of constitutional rights); Poole v. Cnty. of Otero, 271 F.3d 955, 959-60 (10th Cir. 2001) (allowing claim to proceed against police officers alleged to have pursued criminal charges against someone "in retaliation for the anticipated exercise of his First Amendment right to bring a civil rights lawsuit against them"); Bradley v. Hall, 64 F.3d 1276, 1279 (9th Cir. 1995) ("A prisoner's right to meaningful access to the courts, along with his broader right to petition the government for a redress of his grievances under the First Amendment, precludes prison authorities from penalizing a prisoner for exercising those rights.").

389. *Harrison*, 780 F.2d at 1428; Gunter v. Morrison, 497 F.3d 868, 874 (8th Cir. 2007); Zar v. S.D. Bd. of Exam'rs of Psychs., 976 F.2d 459, 465 (8th Cir. 1992) ("A person's constitutional right of access to the courts cannot be impaired by threats or harassment in retaliation for filing lawsuits."); Scheeler v. City of St. Cloud, 402 F.3d 826, 830 (8th Cir. 2005) ("The right of access to the courts is well-established."); Wilson v. Northcutt, 441 F.3d 586, 592 (8th Cir. 2006) ("[I]t is clearly established that a government official may not 'punish [a citizen] for having exercised [her] right to seek judicial relief.'" (quoting *Harrison*, 780 F.2d at 1428 (alteration in original))).

390. In *In re Workers' Compensation Refund*, the Eighth Circuit invalidated a provision that required insurance companies seeking to challenge the constitutionality of an insurance regulation scheme to pay all the state's legal costs, including attorney's fees, regardless of who prevailed. 46 F.3d at 817, 822. The court found this to be impermissible, explaining:

> [The cost-shifting provision acts] at least as an indirect government impairment upon the insurance companies' right to petition the courts because it imposes a litigation penalty. Requiring one party to pay the full cost of an action, regardless of who prevails, is a substantial deterrent to commencing litigation. An unconditional litigation penalty such as this is much harder to justify than a mere assessment of costs upon a losing party.

Id. (footnote omitted).

Due process analysis similarly requires some demonstration that the challenged restriction will actually reduce attorney availability.[391] In *U.S. Department of Labor v. Triplett*, the Court considered a due process challenge to limits on attorney compensation set forth in the Black Lung Benefits Act.[392] Before considering whether attorneys were essential to the vindication of claims under that scheme, the Court required the challenger to show that the "regime made attorneys unavailable to his prospective clients at the time respondent violated the Act. That showing contains two component parts: (1) that claimants could not obtain representation, and (2) that this unavailability of attorneys was attributable to the Government's fee regime."[393]

What are the reasonable inferences we can draw about the ability of abortion-law challengers to obtain counsel in the face of the joint fee liability component? There is much we have yet to learn about how attorneys will react to this fee regime, but it borders on spurious to assume that attorneys will either be indifferent to the risk or sanguine about their ability to manage it. It bears emphasis that exposure to potentially ruinous fee liability—again, in amounts that could run into the millions of dollars—is profoundly different than the compensation limits at issue in *Walters* and *Triplett*. Deciding whether a statutorily imposed compensation amount is adequate to cover the attorney's time and opportunity costs is entirely different from deciding whether to accept the risk of having to pay the opposing party's legal fees upon the client's loss of a single claim. It is reasonable to assume that attorneys will consider their own exposure to risk before accepting representation of an abortion-law challenger, and that even if the representation is undertaken, the attorney will be reluctant to file any claims that are not virtually guaranteed to win.[394] In this new era of abortion litigation, that may well be an empty set—with so many unsettled questions about the right to travel and the extraterritorial reach of state law, there may well

391. That inquiry was already underway in the standing assessment of the S.B. 8 litigation. Whole Women's Health v. Jackson, 556 F. Supp. 3d 595, 615 (W.D. Tex. 2021) (finding persuasive plaintiffs' argument for the standing inquiry that they faced "a credible threat of a future action for fees under S.B. 8, which will immediately chill their First Amendment right to petition the courts to vindicate their constitutional rights"), *aff'd in part and rev'd in part*, 142 S. Ct. 522 (2021).

392. 494 U.S. 715, 718-19 (1990). Claimants were permitted to proceed though counsel and their attorneys were allowed "reasonable" fees, but the fees had to be approved by an appropriate agency or court. *Id.* at 725-27.

393. *Id.* at 722.

394. Because S.B. 8 allows a prevailing party to recover attorney's fees even if they did not attempt to do so in the underlying action, giving them up to three years after their initial victory to bring a separate recovery action, what is at stake for the attorney is not merely the amount of money in play but the time, hassle, and uncertainty inherent in such a scheme. TEX. CIV. PRAC. & REM. CODE ANN. § 30.022(c) (West 2021).

be a number of winning claims that cannot be identified as such at the outset of litigation. Joint fee liability, especially as combined with S.B. 8's extraordinary definition of a prevailing party, will cause some lawyers to decline representation and will indelibly distort the "ability to consider, recommend, or carry out an appropriate course of action for the client" for the lawyers that might choose to proceed.[395]

To substantiate this intuition, we might observe that the entire doctrine of qualified and absolute immunity for government officials is premised upon the assumption that people will hesitate in the exercise of professional decision-making if faced with personal liability.[396] The doctrine further assumes that the chilling effect will deter more than just the legitimately prohibited or discouraged behavior—here, the filing of losing claims, which we have posited are not protected by the right to petition.[397] The idea that overdeterrence poses a realistic threat to constitutional principles is so deeply established in First Amendment doctrine that only the most glancing summary is possible here.[398] In brief, the Court has recognized that protected activity needs "breathing space" in order to survive, and that to forestall the chilling of protected activity, the First Amendment sometimes requires a buffer zone.[399] If we allow government regulators to draw the line right at the boundary between protected and unprotected activity, people will stop short of engaging in constitutionally protected activity, to the detriment of First Amendment principles.[400] The widely accepted concept of

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395. MODEL RULES OF PRO. CONDUCT r. 1.7 cmt. 8 (AM. BAR ASS'N 2020); *see also id.* r. 2.1 (stating that in "representing a client, a lawyer shall exercise independent professional judgment and render candid advice").

396. *See, e.g.*, Alan K. Chen, *The Ultimate Standard: Qualified Immunity in the Age of Constitutional Balancing Tests*, 81 IOWA L. REV. 261, 275 (1995) (describing how the Court has justified official immunity on the basis of its "concern . . . that public officials' fear of liability for constitutional transgressions may chill or 'overdeter' them in undesirable ways, deterring them not only from unconstitutional acts, but also from performing their legitimate duties with dispatch and candor").

397. *See id.*

398. *See* Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect,"* 58 B.U. L. REV. 685, 685 (1978) (writing, in 1978, that in the sixteen years since the term "chilling effect" first appeared in a Supreme Court case the concept "has grown from an emotive argument into a major substantive component of first amendment adjudication").

399. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 271-72 (1964).

400. *See* Andrews, *supra* note 264, at 688:

> Two other speech doctrines also reflect the Court's concern about unnecessarily chilling the exercise of First Amendment freedoms. The vagueness doctrine demands an exacting clarity in statutes that regulate First Amendment activity. The overbreadth rule invalidates statutes that substantially restrict both non-pro-

overdeterrence yields the conclusion that under Scenario Four, it is not just losing claims that will be affected. Lawyers seeking to avoid the risk of incurring liability for the opposing party's legal fees are likely to resolve doubts about which claims will prevail by declining representation altogether or limiting the claims they will bring for their clients. Clients themselves—including large organizations with in-house counsel—will have to weigh whether they can afford to bring claims that are reasonable but not guaranteed to win. Under the regime sketched out in Scenario Four, we can reasonably predict that winning claims for declaratory or injunctive relief against state abortion law will not be filed, either because claimants themselves will be chilled or because they will have trouble getting lawyers to incur the personal risk of filing them.

Even on narrow formulations of the right to petition, that alone would be enough to render the arrangement suspect. Professor Carol Rice Andrews, whose work specifically defends a conception of the right that is narrowly limited only to winning claims, with some protection for losing claims as is necessary to provide "breathing room," readily provides that any restriction that burdens the right to file winning claims is suspect and triggers strict scrutiny.[401] As is familiar across many contexts, the next order of business is to examine closely the strength of the state's interest to ensure that it is compelling. Due process analysis will likewise require an assessment of the state's interest in requiring attorneys to bear liability for the legal fees of the opposing party.[402] State constitutional provisions guaranteeing access to courts have been interpreted to prohibit unreasonable financial barriers, and have similarly required an assessment of the strength of the state interest involved.[403]

We began this inquiry in Scenario Three, struggling to identify a minimally persuasive state interest in blocking counsel at the courthouse door, much less one reflecting the kind of government interests driving the result in *Walters*. The

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> tect[ed] undertakings and activity secured under the First Amendment. These canons unite in their purpose to avoid undue deterrence and have some potential application in the safeguarding of the right of court access under the Petition Clause.

Id.

401. *Id.* at 683.

402. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976). *But see* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 543, 551–55 (1949) (rejecting a federal due process challenge to a state law making unsuccessful plaintiffs in stockholder derivative suits "liable for all expenses, including attorney's fees, of the defense and requir[ing] security for their payment as a condition of prosecuting the action").

403. And when a challenged law "clearly imposes a financial requirement on access to the courts" it is *the state* that bears the burden of demonstrating "that the legislative purpose outweighs the interference with the individual's right of access." Cent. Appraisal Dist. of Rockwall Cnty. v. Lall, 924 S.W.2d 686, 689 (Tex. 1996) (quoting R Commc'ns Inc. v. Sharp, 875 S.W.2d 314, 315 (Tex. 1994)).

indirect nature of S.B. 8's restrictions on counsel does not decrease the state's need to demonstrate an interest in imposing them, and we must squarely ask why the state has an interest in saddling lawyers for certain types of litigants with fee liability upon the dismissal of even a single claim.[404] The answer cannot be to prevent or deter attorney misconduct, both because this is not a necessary predicate under S.B. 8 and also because other statutes do this work in both state and federal courts, making attorneys liable for fees incurred as a result of their own misconduct.[405]

The state might proffer an interest in ensuring that anyone, including itself, who is sued by an abortion-law challenger is fully compensated for their legal expenses. But this requires us to ask why the ordinary imposition of fee liability on the losing party, converted to a binding judgment and subject to Full Faith and Credit in every state in the union, is insufficient in this context. As with every other civil litigant, abortion-law challengers subject to a fee award face liens on property, wage garnishment, contempt penalties, accrual of interest, and the entire array of existing mechanisms for the satisfaction of civil judgments.[406] It is difficult to imagine any reason for believing that abortion-law challengers, above all civil litigants, are uniquely resistant to this long-standing system, much less that they are so uniquely resistant as to justify the burden on access to counsel.

The scheme, then, is either an irrational and arbitrary burden on a particular subset of losing litigants, or an attempt to convey the state's particular disfavor for litigants coming to court to challenge abortion laws.[407] The latter should be seen as a form of viewpoint discrimination in the regulation of access to courts, invalid even where it is operationalized through an indirect burden.

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404. Connolly, *supra* note 15 (noting that the "Supreme Court has upheld a federal statute prohibiting the use of forfeitable funds to retain defense counsel," because the government had a substantial property interest in the forfeitable funds).

405. TEX. R. CIV. P. 11, 37. Federal law provides:

> [A]ny attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

28 U.S.C. § 1927 (2018).

Additional examples are found in the Federal Rules of Civil Procedure, which includes several rules that link attorney fee liability to misconduct or noncompliance. *See* FED. R. CIV. P. 11, 26, 37.

406. TEX. CIV. PRAC. & REM. CODE ANN. § 34 (West 2021).

407. *See* Lindsey v. Normet, 405 U.S. 56, 78-79 (1972) (reversing as "arbitrary and irrational" under the Equal Protection Clause the imposition of a double-bond requirement on tenants appealing an adverse judgment, an obstacle "faced by no other civil litigant" in the state).

CONCLUSION

S.B. 8 and S.B. 1327 come disguised as ordinary fee-shifting, but they are nothing of the sort. Their three central components insulate controversial and potentially unconstitutional state laws from challenge by threatening both litigants and lawyers with ruinous fee liability upon the dismissal of a single claim. As this Article has shown, keeping ideological adversaries out of court is not among the policies that states can freely pursue in their laboratories of democracy. Congress has made very clear that litigants bringing claims under 42 U.S.C. § 1983 are not to be subjected to this kind of fee liability, and constitutional principles likewise foreclose the Texas Three Step.

We recognize that the distinctive contexts of abortion- and gun-rights litigation may color one's perception of the constitutional principles canvassed here. Some readers may be disillusioned with the Supreme Court's supposed neutrality on the issue of abortion and wonder whether it is naive to expect a dispassionate application of such principles in a context so irredeemably polarized.[408] On the other hand, some readers may not be troubled by the unique burden imposed on litigants seeking to challenge state abortion laws. As the Supreme Court observed in *Dobbs*, there are many who view abortion as the ending of innocent human life and therefore as a grave moral sin.[409] Those aligned with this view might embrace the idea that the state has a legitimate or even compelling interest in imposing special burdens upon those who seek to maintain access to abortion by challenging abortion laws in court. Conversely, readers who have lost patience with the nation's epidemic of gun violence may be unmoved by the obstacles that California has placed in the path of those who seek to challenge firearm regulations.

On these sensitive and highly polarizing subjects, it may seem unrealistic or even normatively undesirable to treat access to courts as a subordinating value. But this is precisely what the Constitution instructs. The message may at first be somewhat difficult to decode because it requires that we weave together federalism and separation of powers principles, as well as lessons from due process,

408. While the California law is undergirded by genuine gun control objectives, it also seems to have been motivated by the desire to illustrate the defects of S.B. 8 and "deter the United States Supreme Court from upholding a virtually identical law enacted in Texas to rescind abortion rights." Statement Opposing S.B. 1327 from Kevin G. Baker, Dir. of Gov't Rel., ACLU Cal. to Bob Hertzberg, Cal. Senator & Anthony Portantino, Cal. Senator (May 2, 2022), https://aclucalaction.org/wp-content/uploads/2022/05/SB-1327-5.2.22.pdf [https://perma.cc/BJS4-5JMR]. The California law has a "self-destruct" provision providing for its automatic repeal if S.B. 8 is struck down or otherwise rescinded. S.B. 1327, 2021-2022 S., Reg. Sess. (Cal. 2021).

409. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2240 (2022).

equal protection, and First Amendment doctrine. But the message should be a welcome one, regardless of one's views on the morality of abortion or firearms.

Accepting the Texas Three Step as a legitimate and constitutionally valid practice will have ramifications that go well beyond these particular controversies. After all, Texas, Oklahoma, and California are hardly the only states that will find it advantageous to develop a fee-shifting scheme that makes it prohibitively risky for certain categories of disfavored litigants to challenge state law. There is nothing at all that limits its application to abortion or gun control, and there is no reason to think that other states will be uninterested in experimenting with this exercise of raw power. Everyone should be alarmed at the prospect of a future in which only those aligned with the state's viewpoint enjoy unfettered access to courts. The idea that courts should be open for scrutiny of government action is a fundamental precept of our constitutional order, and we should be united in our defense of it.