No. 21-463

In the Supreme Court of the United States

WHOLE WOMAN'S HEALTH ET AL., PETITIONERS

v.

AUSTIN REEVE JACKSON, ET AL.

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

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT

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QUESTIONS PRESENTED

The Texas Heartbeat Law, or SB 8, creates a cause of action for private persons—but expressly not government officials—against those who perform or aid and abet the performance of an abortion after the unborn child's heartbeat can be detected. Petitioners challenge the constitutionality of the law and seek declaratory and injunctive relief against a putative class of all non-federal judges and court clerks in Texas, in addition to a private individual and numerous Texas executive officials. The issues presented are:

1. Whether a lawsuit against a state-court judge, because he could potentially hear a case brought under the challenged state law, or a court clerk, based on her potential docketing of such a case, is a case or controversy cognizable under Article III.

2. Whether, in a suit to challenge a state law, plaintiffs can establish Article III standing to sue state officials who are explicitly prohibited from enforcing that law.

3. Whether the *Ex parte Young* doctrine permits plaintiffs to challenge a state law by suing a state judge because he may hear a case brought under the challenged law, or a state-court clerk because she may docket a case brought under the challenged law.

4. Whether the *Ex parte Young* doctrine permits plaintiffs to challenge a state law by suing state officials who are explicitly prohibited from taking any action to enforce that law.

5. Whether plaintiffs have standing to challenge a state law by suing a private person who is authorized (but not required) to file lawsuits under that law when he disclaims intent to file any such lawsuits.

RELATED PROCEEDINGS

Whole Woman's Health, et al. v. Judge Austin Reeve Jackson, et al., No. 1:21-cv-00616-RP, U.S. District Court for the Western District of Texas. Order denying defendants' motions to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) entered August 25, 2021.

Whole Woman's Health et al. v. Judge Austin Reeve Jackson, No. 21-50792, U.S. Court of Appeals for the Fifth Circuit. Appeal docketed August 25, 2021, Appellants' opening briefs filed October 13, 2021, oral argument scheduled for the week of December 6, 2021.

Whole Woman's Health et al. v. Judge Austin Reeve Jackson, No. 21A24, United States Supreme Court. Emergency Application to Justice Alito for Writ of Injunction and, in the Alternative, to Vacate Stays of District Court Proceedings, application denied September 1, 2021.

In re Clarkston, No. 21-50708, U.S. Court of Appeals for the Fifth Circuit. Order denying petition for writ of mandamus entered August 13, 2021.

Whole Woman's Health, et al. v. Austin Reeve Jackson, et al., No. 21-463, United States Supreme Court. Petition for writ of certiorari before judgment filed September 23, 2021; response requested by October 21, 2021.

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INTRODUCTION

Petitioners seek certiorari before judgment of questions well underway in the Fifth Circuit over concerns that, if they manifest at all, must arise in a state-court judgment that can be reviewed in this Court in any event. Far from the rare case that justifies "deviation from normal appellate practice" and "require[s] immediate determination in this Court," Sup. Ct. R. 11, all of petitioners' arguments not only can be addressed below, but also will be argued before the Fifth Circuit in approximately a month and a half—far faster than a petitioner to this Court might ordinarily expect argument, and not much longer than the petition has already waited before this Court.

To be sure, petitioners' lawsuit is deeply flawed and must be dismissed for numerous reasons, some of which the Fifth Circuit and this Court have already discussed in denying petitioners' requests for an injunction pending appeal. *See Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2495 (2021) (per curiam) ("*Jackson II*"); *Whole Woman's Health v. Jackson*, 13 F.4th 434, 443-45 (5th Cir. 2021) (per curiam) ("*Jackson I*"). "[F]ederal courts enjoy the power to enjoin individuals tasked with enforcing laws, not the laws themselves." *Jackson II*, 141 S. Ct. at 2495 (citing *California v. Texas*, 141 S. Ct. 2104, 2115-16 (2021)). And "there is a wide difference between a suit against [State officials] to prevent them, under the sanction of an unconstitutional statute, from committing by some positive act a wrong or trespass, and a suit against officers of a state merely to test the constitutionality of a state statute." *Fitts v. McGhee*, 172 U.S. 516, 529-30 (1899); *see also Muskrat v. United States*, 219 U.S. 346, 361-62 (1911).

But these interests too will be vindicated in the Fifth Circuit and do not require the truly extraordinary remedy of certiorari before judgment. At bottom, both petitioners' lawsuit and their insistence on this Court disrupting orderly procedures depend on a fundamental misconception of the judicial power of the United States.

This Court has already noted that petitioners have failed to carry their burden on the "complex and novel antecedent procedural questions" they must address. *Jackson II*, 141 S. Ct. at 2495; *id.* at 2496 (Roberts, C.J., dissenting). Petitioners do not address them further here because they cannot be addressed; petitioners have fatal standing problems, seek to enjoin state officials with no connection to SB 8, and all but ignore the State's sovereign immunity. If the structure of Texas's Heartbeat Law requires novel applications of this Court's jurisdictional doctrines, that is all the more reason to let the Fifth Circuit consider these issues first.

Given that the Fifth Circuit is prepared to do so imminently—having already set briefing for this case on an expedited basis, with argument only 46 days away—there is no basis for eschewing the normal avenue for appellate review by granting a writ of certiorari before judgment. The Court should maintain its role as "a court of final review and not first view." *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012).

The petition should be denied.

STATEMENT

I. Petitioners Filed This Lawsuit Seeking to Have SB 8 Declared Unconstitutional.

Petitioners are abortion providers and advocates for abortion, Pet. App.12a-14a; ROA.47-52, who filed suit to enjoin Texas's Heartbeat Law, known as "SB 8," *see* Act of May 13, 2021, 87th Leg., R.S., ch. 62, 2021 Tex. Sess.

Law Serv. 125.[1] The Heartbeat Law may be enforced exclusively by private parties. Tex. Health & Safety Code §§ 171.005, 171.207(a), 171.208(a).

Nonetheless, petitioners sought relief against a swath of government officials.

They sued a Texas district judge and court clerk as putative class representatives, seeking to enjoin Texas courts from adjudicating lawsuits filed under the Heartbeat Law's private cause of action. Pet. App. 15a; ROA.523-42. Respondent Judge Austin Reeve Jackson presides over Texas's 114th District Court. Pet. App. 15a; ROA.53. The 114th District Court is one of four district courts sitting in Smith County, Texas, population 233,479. Respondent Penny Clarkston is the Smith County district clerk. Pet. App. 15a; ROA.53-54.

They likewise sought injunctive relief against an assortment of state executive officials, including the Attorney General of Texas. Pet. App. 15a-16a; ROA.53-58.[2] These executive officials are barred by Texas law from using the Heartbeat Law's private cause of action, which is its "exclusive" enforcement mechanism. Tex. Health & Safety Code §§ 171.005, 171.207(a), 171.208(a).

Finally, petitioners sued respondent Mark Lee Dickson, who petitioners allege has threatened to file lawsuits against them under the Heartbeat Law's cause of action.

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[1] The operative complaint is included at pages 1-49 of respondents' supplemental appendix in *Jackson II*.

[2] Respondents Stephen Brint Carlton is Executive Director of the Texas Medical Board; Katherine A. Thomas is Executive Director of the Texas Board of Nursing; Cecile Erwin Young is Executive Commissioner of HHSC; Allison Vordenbaumen Benz is Executive Director of the Texas Board of Pharmacy; and Ken Paxton is the Attorney General of Texas.

Pet. App. 16a. Mr. Dickson testified he does not intend to file any such actions. *See* ROA.965-69.

The Heartbeat Law creates a private cause of action that can be brought against those who perform, or aid and abet the performance of, abortions after a fetal heartbeat has been detected. Tex. Health & Safety Code § 171.208(a). It is an affirmative defense that (1) the defendant in such an action "has standing to assert the third-party rights of a woman . . . seeking an abortion," and (2) awarding relief to the claimant would impose an undue burden on that woman. Tex. Health & Safety Code § 171.209(b); *see Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992) (plurality op.).

Such a lawsuit can be brought by "[a]ny person, *other than an officer or employee of a state or local governmental entity in this state*." Tex. Health & Safety Code § 171.208(a) (emphasis added). This private cause of action is the only method of enforcing the Heartbeat Law. *See id.* §§ 171.005, 171.207(a). In the light of that clear text, the Office of the Texas Attorney General interprets the Heartbeat Law to foreclose government enforcement of that law, whether direct or indirect. *See* Gov't Resp. in Opp. to Appl., Supp. App 50-53, *Jackson II*, No. 21A24 (U.S. Aug. 31, 2021).

The abortion-provider plaintiffs are or have staff who are regulated by the Texas Health and Human Services Commission, the Texas Medical Board, the Texas Board of Nursing, and the Texas Board of Pharmacy. Petitioners sued the heads of these agencies seeking "declaratory and injunctive relief that prevents [them] 'from enforcing S.B. 8 in any way, including by applying S.B. 8 as a basis for enforcement of laws or regulations in their charge.'" ROA.746 (quoting ROA.84).

II. The District Court Rejected Defendants' Jurisdictional Defenses.

Respondents moved to dismiss under Federal Rule of Civil Procedure 12(b)(1). Raising sovereign immunity, the governmental respondents argued that because they are prohibited by Texas law from enforcing the Heartbeat Bill, *Ex parte Young*, 209 U.S. 123 (1908), was unavailable. ROA.602-06; ROA.628-30; *see also* ROA.651-55, ROA.691. Respondents also argued that petitioners lack Article III standing because, *inter alia*, petitioners' alleged injuries were not traceable to or redressable by an order against them. ROA.607-17; ROA.626-28; ROA.642-52; ROA.679-91.

A. The district court denied respondents' motions to dismiss. ROA.1485-1535. As to Judge Jackson and Ms. Clarkston, the district court declined to apply Fifth Circuit precedent holding that "[t]he [Article III] requirement of a justiciable controversy is not satisfied where a [defendant] judge acts in his adjudicatory capacity." *Bauer v. Texas*, 341 F.3d 352, 359 (5th Cir. 2003); *see also Chancery Clerk of Chickasaw County v. Wallace*, 646 F.2d 151 (5th Cir. 1981). ROA.626-28; *see* Pet. App. 37a-41a. The court did so expressly to reach the conclusion petitioners sought: that, because "there are no other government enforcers against whom Plaintiffs may bring a federal suit regarding S.B. 8's constitutionality," Pet. App. 39a-40a, Texas judges and court clerks were acceptable defendants.

The district court next found Article III's traceability requirement satisfied because "although only private parties may initiate the civil enforcement actions," Pet. App. 52a, Judge Jackson and Ms. Clarkston "will contribute to [plaintiffs' alleged] injuries by exercising coercive power over [plaintiffs] in S.B. 8's private

enforcement suits" by, for example, imposing "injunctive relief and monetary penalties," Pet. App. 52a-53a.

As to the executive officials, the district court accepted petitioners' theory that Texas law allows "indirect" enforcement authority based on the executive officials' general disciplinary powers over regulated professionals. Pet. App. 11a. The district court concluded that the lack of any threatened indirect enforcement does not matter. Pet. App. 23a-24a. It reached the same conclusion as to a provision in the Heartbeat Law that awards attorneys' fees to a governmental defendant sued to prevent him from enforcing abortion regulations. Pet. App. 26a-27a; *see* Tex. Civ. Prac. & Rem. Code § 30.022(a). Relying on that provision, the district court claimed the possibility of fee-shifting "will immediately chill [petitioners'] First Amendment right to petition the courts to vindicate their constitutional rights." Pet. App. 30a.

Finally, the district court concluded petitioners have standing to sue Mr. Dickson based on the allegation he has "demonstrated his intent to enforce S.B. 8 if Plaintiffs violate the law." Pet. App. 64a.

B. The district court also rejected the governmental respondents' sovereign immunity defenses. It concluded Texas judges and county clerks "enforce" the Heartbeat Law by adjudicating private lawsuits. Pet. App. 47a-48a The court found it irrelevant that *Ex parte Young* disclaimed any authority for a federal court to enjoin state judges from adjudicating lawsuits. Pet. App. 45a-48a (quoting *Ex parte Young*, 209 U.S. at 163). And although the Heartbeat Law contains a "prohibition on direct enforcement . . . by state officials," the district court concluded this prohibition "does not preclude the [executive officials'] ability to enforce violations of other state laws triggered by a violation of S.B. 8." Pet. App. 22a.

III. This Court and the Fifth Circuit Refused Plaintiffs' Emergency Requests for Injunctive Relief Pending Appeal.

Respondents immediately took this interlocutory appeal, which "divest[ed] the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 57 (1982) (per curiam). The district court therefore stayed all proceedings as to the governmental respondents, Pet. App. 71a-76a, and the Fifth Circuit stayed the proceedings as to Mr. Dickson, Pet. Ap. 79a. The Fifth Circuit denied plaintiffs' request for an injunction pending appeal, explaining that petitioners had not shown they were likely to overcome the governmental respondents' sovereign immunity. Pet. App. 82a; *Jackson I*, 13 F.4th at 442-45. It did not reach respondents' other jurisdictional challenges to petitioners' claims. *Jackson I*, 13 F.4th at 444 n.14.

Petitioners then asked this Court for an injunction to prevent the Heartbeat Law from taking effect on September 1. *See* Emergency Application to Justice Alito for Writ of Injunction and in the Alternative, to Vacate Stays of District Court Proceedings, *Jackson II*, No. 21A24 (U.S. Aug. 30, 2021). The Court denied their application. Petitioners were not entitled to an injunction, the Court explained:

> [Plaintiffs' application] presents complex and novel antecedent procedural questions on which they have not carried their burden. For example, federal courts enjoy the power to enjoin individuals tasked with enforcing laws, not the laws themselves. And it is unclear whether the named defendants in this lawsuit can or will seek to enforce the Texas law against the applicants in a

> manner that might permit our intervention. The State has represented that neither it nor its executive employees possess the authority to enforce the Texas law either directly or indirectly. Nor is it clear whether, under existing precedent, this Court can issue an injunction against state judges asked to decide a lawsuit under Texas's law. Finally, the sole private-citizen respondent before us has filed an affidavit stating that he has no present intention to enforce the law.

141 S. Ct. at 2495 (internal citations omitted). Dissenting justices, too, recognized the jurisdictional hurdles petitioners must clear. *See id.* at 2496 (Roberts, C.J., dissenting) ("Defendants argue that existing doctrines preclude judicial intervention, and they may be correct." (citing *California*, 141 S. Ct. at 2115-16)); *id.* at 2497 (Breyer, J., dissenting).

REASONS TO DENY THE PETITION

I. Petitioners Fail to Present a Compelling Justification for Certiorari Before Judgment.

A grant of certiorari before judgment in the Court of Appeals "is an extremely rare occurrence." *Coleman v. Paccar, Inc.*, 424 U.S. 1301, 1304 n.* (1976) (Rehnquist, J., in chambers). That is for good reason: This Court "benefit[s]" when the courts of appeals "explore a difficult question before this Court grants certiorari." *United States v. Mendoza*, 464 U.S. 154, 160 (1984). Here, petitioners ask the Court to consider a question not presented below, and therefore not passed upon below. That would make their petition a poor vehicle even in the ordinary course. Petitioners offer no compelling reason to eschew orderly appellate review.

A. Certiorari before judgment is extraordinary, and for good reason.

This case does not resemble the handful of cases in which this Court has taken the extraordinary step of granting certiorari before judgment. That step has been reserved for cases requiring urgent resolution to prevent widespread societal or monumental disruption. And the Court has taken that step after the constitutional issue had already been decided by multiple courts, and in cases without jurisdictional barriers and where the facts were either well developed or undisputed. None of those circumstances is present here.

In *Brown v. Board of Education*, 344 U.S. 1 (1952), the issue of whether school segregation violated the Fourteenth Amendment had already been decided by multiple district courts in different States and Circuits, and there were no threshold issues in the case that would have prevented the Court from reaching the ultimate constitutional question. The same was true in *Turner v. City of Memphis*, 369 U.S. 350 (1962); the facts were "undisputed," *id.* at 353, and the constitutionality of segregation in publicly operated facilities had been addressed time and time again. Here, the "complex and novel" issues of Article III standing and sovereign immunity, *Jackson II*, 141 S. Ct. at 2495, have only been considered by one district court in one State (and on a highly expedited basis at that). These issues also prevent the Court from reaching the constitutional question that petitioners argue justifies the extraordinary relief of certiorari before judgment. *See* Pet. 17.

In *Mistretta v. United States*, 488 U.S. 361 (1989), the Court granted petitions for certiorari before judgment filed by both the United States and a criminal defendant to decide the constitutionality of the federal sentencing

guidelines. *Id.* at 371. Fifty different district courts had decided the question, and further delay in final resolution of the question would have required that thousands of criminal defendants be resentenced. *See* Pet. for Writ of Certiorari at 9-11, 14, *Mistretta*, No. 87-1904 (U.S. May 19, 1988). In fact, the Court noted that it was granting certiorari before judgment "because of the disarray among the Federal District Courts." *Mistretta*, 488 U.S. at 371. Again, unlike here, there were no factual or threshold issues to prevent the Court from reaching the merits question of whether the federal sentencing guidelines violated the Constitution.

Petitioners' final two cases implicated the relationship between the President and the judiciary. In *United States v. Nixon*, 418 U.S. 683 (1974), the traditional means of resolving the legal question—whether the President was required to comply with a subpoena duces tecum requesting tape recordings and documents—was inappropriate:

> To require a President of the United States to place himself in the posture of disobeying an order of a court merely to trigger the procedural mechanism for review of [a contempt] ruling would be unseemly, and would present an unnecessary occasion for constitutional confrontation between two branches of the Government. Similarly, a federal judge should not be placed in the posture of issuing a citation to a President simply in order to invoke review. The issue whether a President can be cited for contempt could itself engender protracted litigation, and would further delay both review on the merits of his claim of privilege and the ultimate termination of the

> underlying criminal action for which his evidence is sought.

Id. at 691-92.

Finally, *Dames & Moore v. Regan*, 453 U.S. 654 (1981) implicated not only delicate questions of foreign policy, but also the safe return of 52 American hostages from Iran. "The questions presented in [*Dames*] touch[ed] fundamentally upon the manner in which our Republic is to be governed." *Id.* at 659. In *Dames*, the Court was asked to determine whether the President of the United States had the constitutional authority to nullify attachments and liens on Iranian assets in the United States, direct that the assets be transferred to Iran, and suspend claims against Iran pursuant to an Executive Agreement negotiated to obtain the release of the American hostages in Iran. *Id.* at 660, 665-66. The Court granted certiorari before judgment "because lower courts had reached conflicting conclusions on the validity of the President's actions and . . . unless the Government acted [expeditiously], Iran could consider the United States to be in breach of the Executive Agreement." *Id.* at 660. And even then, the Court was careful to decide the case on the narrowest possible grounds, recognizing that "the Framers 'did not make the judiciary the overseer of our government.'" *Id.* (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Frankfurter, J., concurring)).

This case does not merit inclusion in the small number of cases where this Court has taken the extraordinary step of granting certiorari before judgment.

B. The merits of petitioners' constitutional challenges to Texas's Heartbeat Law are not at issue in this interlocutory appeal.

Petitioners urge the Court to grant certiorari before judgment because, they say (at 3, 16-17), Texas's Heartbeat Act is unconstitutional under this Court's decisions in *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). The continued viability of *Roe* and *Casey* is certainly a question of great importance. But that issue is not presented by this interlocutory appeal from the denial of a motion to dismiss based on Texas's sovereign immunity.

1. Petitioners suggest (at 17-22) that certiorari "before judgment in the court of appeals" is justified because "[o]nly this Court's immediate intervention" could prevent "irreparable harm," but they ignore the limited scope of the order being appealed. Even if this Court affirmed the denial of the motions to dismiss, it would merely remand the case to the district court for further proceedings, leaving to the lower courts whether to issue injunctive relief. Only an injunction pending appeal would address petitioners' complaint, but they rightfully do not attempt a second bite at that apple.

2. Petitioners' constitutional grievances do not permit the federal courts to disregard the limits of their own jurisdiction. Federal "courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws." *Broadrick v. Oklahoma*, 413 U.S. 601, 610-11 (1973). Rather, "[c]onstitutional judgments . . . are justified only out of the necessity of adjudicating rights in particular cases between the litigants brought before the Court." *Id.* at 611; *see Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). A litigant cannot manufacture a

case or controversy by suing a state judge (or court clerk) merely because the judge would apply the challenged law if a lawsuit were brought in his court. Similarly, a litigant lacks standing to sue state officials who cannot enforce the challenged law or individuals who are authorized (but not required) to bring lawsuits against those who violate it. Nothing has changed since this Court rejected petitioners' request for an injunction pending appeal. *Jackson II*, 141 S. Ct. at 2495.

3. But should the Court accept petitioners' invitation to depart from normal appellate practice because Petitioners say the Texas Heartbeat Law violates *Roe* and *Casey*, the Court should also reconsider *Roe* and *Casey*. As some respondents have explained in their contemporaneously filed conditional cross-petitions for certiorari, those decisions created a supposed fundamental right out of judicial say-so. There is no right to elective abortion "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty" such that neither liberty nor justice would exist if [it was] sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (internal quotation marks omitted).

C. Petitioners' question presented was not passed upon below.

1. Until this petition, decisions in this case have turned on concrete legal principles unrelated to any putative right to abortion: whether the governmental respondents have sovereign immunity, whether petitioners have Article III standing, and whether there is a justiciable controversy between petitioners and the state judicial officers who might hear lawsuits brought under Texas's Heartbeat Act. For example, Petitioners' sole argument for avoiding sovereign immunity has been to

invoke *Ex parte Young*. *See, e.g.*, Application at 20-21, *Jackson II*, No. 21A24 (U.S. Aug. 30, 2021).

Now petitioners ask this Court (at i) to grant certiorari before judgment on an abstract question: "[w]hether a State can insulate from federal-court review a law that prohibits the exercise of a constitutional right by delegating to the general public the authority to enforce that prohibition through civil actions." Divorced from the jurisdictional doctrines implicated in respondents' interlocutory appeal, it is not at all clear what this question encompasses. If it means something other than the application of the jurisdictional doctrines raised in the district court and Fifth Circuit, however, it was forfeited in the courts below. This Court certainly should not be the very first to consider it.

D. Petitioners' argument for certiorari before judgment rests on numerous flawed premises.

Petitioners' argument for certiorari before judgment rests on at least three flawed premises.

1. Petitioners begin by saying (at i) that the structure of SB 8 "insulat[es it] from federal-court review" and go on to claim (at 24) it deprives this Court of its "authority to 'say what the law is.'" (quoting *Marbury*, 5 U.S. at 177). Not so. The Court's authority, of course, is limited deciding cases and controversies. *See Broadrick*, 413 U.S. at 610-11. But even setting that aside, there is no dispute that the constitutionality of the Texas Heartbeat Act can be brought before this Court on a petition for certiorari from the Texas Supreme Court.[3] Petitioners

[3] Indeed, some of the respondents are currently litigating challenges to the Heartbeat Law in state court, where there are at least fourteen such cases pending. *See Van Stean, et al. v. Tex. Right to*

may not want to litigate in state court, but "[s]tate courts, like federal courts, have a constitutional obligation to safeguard personal liberties and to uphold federal law." *Stone v. Powell*, 428 U.S. 465, 493 n.35 (1976) (citing *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 341-44 (1816)). And "state courts are fully competent to adjudicate constitutional claims." *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 930 (1975). Indeed, many cases petitioners cite came before this Court through state judicial systems. *See* Pet. 23 (citing *Reitman v. Mulkey*, 387 U.S. 369, 373 (1967)); ROA.897-900 (citing *Shelley v. Kraemer*, 334 U.S. 1, 14 (1948)). "[F]ederal-court review" is far from foreclosed. *Contra* Pet. at 24.

2. Petitioners' arguments also rest on the unstated premise that they are entitled to pre-enforcement review in federal court for any state law they consider unconstitutional. That, too, is not so. The Constitution does not guarantee that every state law will be subject to pre-enforcement federal review, much less review in the lower federal courts, which are not mandated by the Constitution in the first place. *See* U.S. Const. art. I, § 8, cl. 9; *id.* art. III, § 1. The federal courts can be stripped of jurisdiction to hear even cases within the judicial power vested by Article III. *See Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 513-14 (1868); *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850). They certainly cannot ignore the bounds of that vesting in order to opine on constitutional questions not presented as part of a case or controversy. *See Broadrick*, 413 U.S. at 610-11.

Petitioners identify no authority guaranteeing them a right to pre-enforcement review of state statutes in

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Life, No. D-1-GN-21-004179 (98th Dist. Ct., Travis County, Tex., Aug. 2021).

federal court. They first point (at 22-24) to cases in which this Court treated private persons as state actors for purposes of applying the Fourteenth and Fifteenth Amendments. *See Reitman*, 387 U.S. at 373; *Terry v. Adams*, 345 U.S. 461 (1953). But the question of whether a private party's conduct can be treated as state action for purposes of stating a claim under the Constitution is a merits question distinct from the jurisdictional questions at issue in this interlocutory appeal. Petitioners' state-action cases do not remedy their jurisdictional ills.[4]

Next, petitioners say (at 24) "that a person facing irreparable harm need not violate an unconstitutional law to challenge it." That doctrine provides them only a means of satisfying Article III's injury-in-fact requirement; it is not a free-floating guarantee of pre-enforcement review. A litigant is not required to expose himself to penalties before seeking relief to prevent the enforcement of a statute because the chilling effect imposed by the threat of enforcement is enough to establish Article III injury-in-fact. *See, e.g.*, *Susan B. Anthony List*, 573 U.S. 149, 158 (2014); *Steffel v. Thompson*, 415 U.S. 452, 459 (1974). But he still must show that *the defendant* has credibly threatened to enforce the statute against him. That is because Article III standing also requires

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[4] Petitioners are also wrong: the courts of appeals that have considered the question appear to unanimously agree that "there is no 'state action' to be found in the mere filing of a private civil tort action in state court." *Henry v. First Nat'l Bank of Clarksdale*, 444 F.2d 1300, 1312 (5th Cir. 1971); *see Hu v. Huey*, 325 F. App'x 436, 440 (7th Cir. 2009) (per curiam); *Slotnick v. Garfinkle*, 632 F.2d 163, 166 (1st Cir. 1980) (per curiam); *Dist. 28, United Mine Workers of Am., Inc. v. Wellmore Coal Corp.*, 609 F.2d 1083, 1086-87 (4th Cir. 1979); *Stevens v. Frick*, 372 F.2d 378, 381 (2d Cir. 1967); *see also Gras v. Stevens*, 415 F. Supp. 1148, 1152 (S.D.N.Y. 1976) (three-judge district court) (Friendly, J.).

traceability, and "the relevant inquiry is whether the plaintiffs' injury can be traced to 'allegedly unlawful conduct' *of the defendant*, not to the provision of law that is challenged." *Collins v. Yellen*, 141 S. Ct. 1761, 1779 (2021) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)). Petitioners cannot make that showing. *Cf. Jackson II*, 141 S. Ct. at 2495.

3. Finally, petitioners assume away the problem of sovereign immunity. That too is flawed. Their *Ex parte Young* theory is unavailing for the reasons respondents have explained. *See* Gov't Resp. in Opp. to Appl. at 12-19 *Jackson II*, No. 21A24 (U.S. Aug. 31, 2021), Dickson Resp. in Opp. to Appl. at 16-20, *Jackson II*, No. 21A24, (U.S. Aug. 31, 2021). Indeed, in the federal government's follow-on lawsuit (also set for December argument before the Fifth Circuit), the Department of Justice agrees that *Ex parte Young* is not available to petitioners. *See* Appl. to Vacate Stay at 22-23, *United States v. Texas*, No. 21A85 (U.S. Oct. 18, 2021).

In brief, *Ex parte Young* would have to bend past the breaking point to accommodate petitioners' claims against Texas judges and court clerks. Their theory is that because Texas executive officials do not enforce the Heartbeat Law, it must be "enforced" by the clerks who accept filings and the judges who preside over private lawsuits. Pet. App. 59a; *see* ROA.849, ROA.897-900 (citing *Shelley*, 334 U.S. at 14). That is untenable. The alleged "enforcement" actions are "paradigmatic judicial acts" like issuing injunctions, *Forrester v. White*, 484 U.S. 219, 227 (1988), not enforcement within the meaning of *Ex parte Young*.

Ex parte Young would likewise have to bend past breaking to allow petitioners' claims against the Texas executive officials. They are explicitly prohibited by law

from enforcing the Heartbeat Act. *See* Tex. Health & Safety Code §§ 171.005, .207(a), .209(b). That means an injunction prohibiting the executive officials from enforcing it would have no effect.

And to the extent petitioners are asking the Court to create a new doctrine to facilitate pre-enforcement challenges to state laws not enforced by government officials, it should assess their bold request with the benefit of review in the lower courts.

II. Petitioners' "Conflicts" Are Imaginary.

Contrary to petitioners' assertions, the lower courts are not in conflict regarding the jurisdictional issues presented in this appeal. It is well established that federal courts lack jurisdiction to decide the constitutionality of laws implemented through private causes of action in a suit brought against government officials. *Muskrat*, 219 U.S. at 361-62. Indeed, even in the area of abortion regulation, every court of appeals that has been asked to do so has recognized this jurisdictional limit. *See K.P. v. LeBlanc*, 729 F.3d 427, 437 (5th Cir. 2013); *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1157 (10th Cir. 2005); *Hope Clinic v. Ryan*, 249 F.3d 603, 605 (7th Cir. 2001) (per curiam); *Summit Med. Assocs., P.C. v. Pryor*, 180 F.3d 1326, 1342 (11th Cir. 1999); *cf. Okpalobi v. Foster*, 244 F.3d 405, 428 (5th Cir. 2001) (en banc). The Fifth Circuit's decision to deny petitioners an injunction is in line with this precedent. There is no conflict that could justify certiorari, much less certiorari before judgment.

Petitioners say at (28-35) the Fifth Circuit's decision conflicts with (A) other court of appeals decisions allowing lawsuits against clerks based on their ministerial duties, (B) this Court's decisions regarding section 1983 suits against state judges, and (C) *Ex parte Young*'s allowance of a constitutional challenge in a lawsuit against

Minnesota's attorney general. But there is no conflict: these cases come out differently because they involved a different legal question or because state law gave the defending official enforcement authority absent here.

A. Court clerks: the courts of appeals allow suits against court clerks acting outside their adjudicative capacity, but not within it.

Petitioners contend (at 28-30) that there is a circuit split on whether court clerks acting in an adjudicative capacity are proper defendants in a pre-enforcement constitutional challenge. That would be surprising, given that *Ex parte Young* specifically disclaimed "power to prevent any investigation or action by a grand jury" because it "is part of the machinery of a criminal court." 209 U.S. at 163. Court clerks are equally "part of the machinery" of state courts. *Id.* And in any event, there is no such split. The cases petitioners cite did not allow suits against court clerks performing their role in state-court adjudications. This case comes out differently than the cases cited because of distinctions between the respective clerks' challenged conduct, not the legal principles applied.

In *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014), the Tenth Circuit found standing for the plaintiffs to sue the Salt Lake County Clerk based on his role in issuing marriage licenses. But as the Tenth Circuit noted, "[i]n Utah, marriage licenses are issued *not by court clerks* but by county clerks." *Id.* at 1202 (emphasis added). Thus, the responsibility of the Salt Lake County Clerk to issue marriage licenses was not of a "judicial nature," *Wallace*, 646 F.2d at 160, nor was it done in an "adjudicatory capacity," *Bauer*, 341 F.3d at 359. By contrast, Ms. Clarkston is the Clerk for the Smith County District Court, Pet. App. 15a, and she is being sued for actions

she takes at the direction of judges, Pet. App. 98a. There is no conflict with the Fifth Circuit.

Likewise, in *McNeil v. Community Probation Services, LLC*, 945 F.3d 991 (6th Cir. 2019), the Sixth Circuit held that for purposes of *Ex parte Young*, the sheriff was *enforcing* bail requirements by detaining individuals and holding them pending payment of the required bail. *Id.* at 994-95. This too is consistent with the Fifth Circuit's rule, which considers law enforcement officers proper defendants where they detain individuals who do not comply with the challenged law. *See K.P. v. LeBlanc*, 627 F.3d 115, 124 (5th Cir. 2010) ("'Enforcement' typically involves compulsion or constraint."). A court clerk does not enforce anything by docketing a petition and Ms. Clarkston cannot enforce the Heartbeat Law by its own terms. Pet. App. 113a.

Petitioners also cite *Finberg v. Sullivan*, 634 F.2d 50 (3d Cir. 1980) (en banc), and *Strickland v. Alexander*, 772 F.3d 876 (11th Cir. 2014), but those were lawsuits against court clerks in cases to challenge *post-judgment* garnishment procedures. Garnishment is one means of executing—or enforcing—a judgment. That would make the court clerks in *Finberg* and *Strickland* appropriate *Ex parte Young* defendants in the Fifth Circuit, too. This, too, is no conflict.

Strickland also shows that petitioners lack standing to sue Ms. Clarkston. An earlier Eleventh Circuit decision concluded plaintiffs lacked standing where they failed to allege they were still judgment debtors or had funds still likely to be subject to garnishment in the future, so their injury was too speculative. 772 F.3d at 884 (citing *Malowney v. Fed. Collection Deposit Grp.*, 193 F.3d 1342, 1347 (11th Cir. 1999)). *Strickland* distinguished the case on the basis that the *Strickland* plaintiff

was still a judgment debtor and would be for some time. *Id.* at 885. Here, it was not clear at the time of filing that there would ever be a lawsuit filed under SB 8 in Smith County (which is one of 254 Texas counties), nor did petitioners plead as much. Because SB 8 "at most authorizes—but does not mandate or direct" civil lawsuits, much less in Smith County specifically, petitioners' fears regarding any lawsuits that would even tangentially involve Ms. Clarkston are "necessarily conjectural." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 412 (2013).

B. State judges: absent state-law duties outside the adjudicatory function, a suit against a state judge to challenge the constitutionality of a law is not a case or controversy.

In denying petitioners' request for an injunction pending appeal, the Fifth Circuit panel explained:

> It is absurd to contend, as Plaintiffs do, that the way to challenge an unfavorable state law is to sue state court judges, who are bound to follow not only state law but the U.S. Constitution and federal law. Plaintiffs' position is antithetical to federalism, violates the Eleventh Amendment and *Ex parte Young*, and ignores state separation of powers.

Jackson I, 13 F.4th at 444 (footnote omitted). Petitioners say (at 31) this "conflicts with this Court's precedent," but the cases they cite are inapposite. (alterations omitted)

Petitioners rely primarily on *Pulliam v. Allen*, 466 U.S. 522 (1984), which held that judicial immunity does not apply in a suit for prospective relief under section 1983. *Id.* at 540. Judicial immunity is not at issue in this case. Neither is there a conflict with *Mireles v. Waco*, 502

U.S. 9 (1991) (per curiam), another case addressing the scope of judicial immunity. *Id.* at 10-11 & n.1.

The problem for petitioners' claim against Judge Jackson is not judicial immunity, which addresses when a judge may be held retrospectively liable for money damages, but Article III. The Fifth Circuit has long recognized that, "[o]rdinarily, no case or controversy exists between a judge who adjudicates claims under a statute and a litigant who attacks the constitutionality of the statute." *Bauer*, 341 F.3d at 361 (citing *In re Justs. of Sup. Ct. of P.R.*, 695 F.2d 17, 22 (1st Cir. 1982) (Breyer, J.)). The Fifth Circuit is not alone in recognizing that federal jurisdiction does not extend to such lawsuits. *See Cooper v. Rapp*, 702 F. App'x 328, 333 (6th Cir. 2017); *Allen v. DeBello*, 861 F.3d 433, 440 (3d Cir. 2017); *Grant v. Johnson*, 15 F.3d 146, 148 (9th Cir. 1994); *Paisey v. Vitale In & For Broward County*, 807 F.2d 889, 893 (11th Cir. 1986); *Mendez v. Heller*, 530 F.2d 457, 461 (2d Cir. 1976).[5]

To be sure, sometimes state law gives judges "nonadjudicatory (enforcement)" roles. *In re Justices*, 695 F.2d at 23 (citing *Sup. Ct. of Va. v. Consumers Union of U.S., Inc.*, 446 U.S. 719 (1980)). For example, a state court may have authority to initiate disciplinary proceedings against attorneys. *See Sup. Ct. of Va.*, 446 U.S. at 21-22 & n.1. In such cases, the Court has been careful to distinguish between the capacities in which the judges are being sued, and to allow only those claims brought against them in their "enforcement capacit[y]." *Id.* at 736; *see In*

[5] Petitioners acknowledge (at 31) that the Fifth Circuit did not pass upon how *Pulliam* might apply in this case. To the extent petitioners' position is that *Pulliam* is relevant to Article III jurisdiction, the Fifth Circuit should be given the initial opportunity to address that question.

re Justices, 695 F.2d at 23. So the fact that some section 1983 lawsuits can be brought against state judges does not mean this one is proper. *See Fitts*, 172 U.S. at 529-30.

Still searching for a conflict, petitioners suggest (at 32) the Fifth Circuit panel invented a "[n]ew prudential-standing rule[]" in violation of this Court's precedent. It did not do that. It applied *Bauer*, a case finding there is no Article III jurisdiction over cases like this one. *Jackson I*, 13 F.4th at 443, 446 n.17.

C. Attorneys general: Unlike the Minnesota Attorney General in *Ex parte Young*, the Texas Attorney General lacks a connection to the enforcement of SB 8 under Texas law.

Petitioners' final attempt (at 33-35) to contrive a conflict—this time between the Fifth Circuit's denial of injunctive relief and this Court's decision in *Ex parte Young* itself—is similarly meritless. Petitioners' claimed conflict rests on the observation that in *Ex parte Young* this Court permitted a suit to go forward against Minnesota's Attorney General, but here—and in two other cases—the Fifth Circuit did *not* permit a lawsuit to go forward against Texas's Attorney General. Pet. 34 (citing *Tex. Dem. Party v. Abbott*, 978 F.3d 168 (5th Cir. 2020), *cert. denied* 141 S. Ct. 1124 (2021) (mem.), and *City of Austin v. Paxton*, 943 F.3d 993 (5th Cir. 2019), *cert. denied* 141 S. Ct. 1047 (2021) (mem.)).

This superficial discrepancy between the outcome of the Fifth Circuit's decisions and *Ex parte Young* hardly has the trappings of a split of authority warranting this Court's intervention. The argument is premised entirely upon Petitioners' misunderstanding of the scope of the Attorney General's enforcement authority under Texas law and upon their mistaken assumption that the Texas and Minnesota attorneys general have "identical"

enforcement power under their respective state laws. *Cf. Saldano v. Texas*, 70 S.W.3d 873, 880-81 (Tex. Crim. App. 2002) (describing the Texas Attorney General's authority as "unusual in comparison to that of other attorneys general").

1. Under state law, the Texas Attorney General and other state officials are expressly forbidden to enforce S.B. 8. *See* Tex. Health & Safety Code §§ 171.005, .207(a), .209(b). Notwithstanding this plain statutory text, Petitioners insist (at 34-35) that the Texas Attorney General has residual enforcement authority under article IV, section 22 of the Texas Constitution. This provision of the Texas Constitution authorizes the "Attorney General [to] represent the State in all suits and pleas in the Supreme Court of the State in which the State may be a party." Tex. Const. art. IV, § 22; *see also* Tex. Gov't Code § 402.021. That provision of the Texas Constitution also requires the Attorney General to "perform such other duties as may be required by law," Tex. Const. art. IV, § 22—a clause that provides "legislative authority to empower the [Attorney General] with other duties." *Medrano v. Texas*, 421 S.W.3d 869, 878-79 (Tex. App.—Dallas, 2014).[6]

To the extent Petitioners mean to argue the Texas Attorney General has constitutional authority to override the Texas Legislature—or that the Texas Legislature has violated the Texas Constitution's Separation of

[6] For this reason, *City of Denison v. Municipal Gas Co.*, 3 S.W.2d 794 (Tex. 1928), which concerned the authority of the Texas Legislature to expand the constitutional duties of the Texas Railroad Commission, is unhelpful to petitioners. *See* Pet. 35. In this case, unlike *City of Denison*, there is a constitutional provision allowing the Legislature to grant the relevant executive officer (the Attorney General) authority to perform additional duties.

Powers Clause, Tex. Const. art. II, § 1, by restricting the Attorney General's authority to enforce SB 8—these are important questions of state law that were not presented or considered below. This Court is certainly not the proper venue for their consideration in the first instance. Rather, such questions of state law should first be presented to, and resolved by, the Texas state courts. *See R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 499-500 (1941).

Petitioners also cite (at 35) the Texas Constitution's grant of authority to the Attorney General to:

> inquire into the charter rights of all private corporations, and from time to time in the name of the State, take such action in the courts as may be proper and necessary to prevent any private corporation from exercising any power or demanding or collecting any species of taxes, tolls, freight or wharfage not authorized by law.

Tex. Const. art. IV, § 22. If Petitioners' position is that this case implicates "the charter rights" of the incorporated Petitioners, that too is a novel state-law theory this Court should abstain from deciding.

2. Because the Texas Attorney General cannot enforce SB 8, Petitioners' effort (at 34) to analogize the scope of the Texas Attorney General's enforcement authority here to the Minnesota Attorney General's in *Ex parte Young* is inapt. In *Ex parte Young*, the Minnesota Attorney General "under his power existing at common law, and by virtue of . . . various statutes, had *a general duty* imposed upon him, which includes the right and the power to enforce the statutes of the state, including, of course, the act in question, if it were constitutional," which he had specifically accepted under the facts of that case. *Ex parte Young*, 209 U.S. at 161 (emphasis added).

But unlike the Minnesota Attorney General, the Texas Attorney General has no comparable "general duty" to enforce state law and, particularly, no specific duty to enforce the "act in question," *id.*; *see Saldano*, 70 S.W.3d at 878-83 (describing the constitutional and statutory authority of the Attorney General and the historical development of the Office). Indeed, he is precluded by law from enforcing SB 8.

Petitioners cite *Agey v. American Liberty Pipe Line Co.*, 172 S.W.2d 972, 947 (Tex. 1943), for the proposition that the Texas Attorney General has "broad authority to enforce and defend state laws." Pet. 34. That case addressed whether a statute creating penalties to be recovered "in the name of the State" allowed a private party to sue on behalf of the State without joining the Attorney General. *Agey*, 172 S.W.2d at 974. The Texas Supreme Court held that the answer was no. *See id.* at 974-75. In dicta, the court observed, "it is incumbent upon [the Attorney General] to institute in the proper courts proceedings to enforce or protect any right of the public that is violated." *Id.* at 974. Whether that principle overrides the explicit text of SB 8 is yet another state-law question not appropriate for first consideration in this Court.

The Fifth Circuit (along with the other courts of appeals) has been applying the *Ex parte Young* doctrine regularly for decades. *See, e.g.*, *Okpalobi*, 244 F.3d at 416. And this Court has declined numerous invitations to review the Fifth Circuit's *Ex parte Young* decisions. *See, e.g.*, *Tex. Democratic Party*, 141 S. Ct. 1124; *City of Austin*, 141 S. Ct. 1047. If the Court does want to consider the scope of *Ex parte Young*'s requirement that the defendant state official "ha[ve] some connection with the enforcement of the [challenged] act," 209 U.S. at 157, it should do so in a case where the issue is fully considered

below. The Court should not jettison decades of Fifth Circuit precedent in a case the Fifth Circuit never got a chance to decide.

* * *

Petitioners say (at 26) the Heartbeat Act "will set a dangerous precedent that other States will be sure to follow." Even if federal-court review of Texas's Heartbeat Law were foreclosed (though it is not), there is a remedy from another branch of the federal government. If the government is of the view that State laws violate citizens' constitutional rights, Congress can use its Fourteenth Amendment enforcement power to preempt state law. U.S. Const. amend. XIV, § 5. Breaking the bounds of the judicial power vested in Article III is not necessary to protect constitutional rights.

CONCLUSION

The petition for a writ of certiorari before judgment should be denied.

Respectfully submitted.

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