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Solving the Procedural Puzzles of the Texas Heartbeat Act and Its Imitators: The Potential for Defensive Litigation

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SOLVING THE PROCEDURAL PUZZLES OF THE TEXAS HEARTBEAT ACT AND ITS IMITATORS: THE POTENTIAL FOR DEFENSIVE LITIGATION

Charles W. “Rocky” Rhodes* & Howard M. Wasserman**

ABSTRACT

The Texas Heartbeat Act (SB8) prohibits abortions following detection of a fetal heartbeat, a constitutionally invalid ban under current Supreme Court precedent. But the law adopts a unique enforcement scheme—it prohibits enforcement by government officials in favor of private civil actions brought by “any person,” regardless of injury. Texas sought to burden reproductive-health providers and rights advocates with costly litigation and potentially crippling liability.

In a series of articles, we explore how SB8’s exclusive reliance on private enforcement creates procedural and jurisdictional hurdles to challenging the law’s constitutional validity and obtaining judicial review. This piece explores defensive litigation, in which a rights holder violates the law, gets sued (usually in state court), and raises the law’s constitutional invalidity as a defense, asking the court to dismiss the enforcement action. The article compares numerous similar situations in which constitutional rights must be litigated defensively. It then examines the processes through which SB8 challenges can be litigated defensively; these include how providers might trigger a lawsuit, the role of “friendly” plaintiffs in bringing suit, limitations on state standing, and avenues to reach the Supreme Court of the United States for final review.

TABLE OF CONTENTS

I. INTRODUCTION	189
II. A HISTORY OF THE TEXAS HEARTBEAT ACT	193

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A.	SB8	194
1.	<i>Substantive Provisions</i>	194
2.	<i>No Public Enforcement</i>	195
3.	<i>Private Enforcement</i>	195
4.	<i>Procedural Limitations</i>	195
5.	<i>Limitations on Defenses</i>	196
B.	RESPONSES TO SB8	197
III.	LITIGATING CONSTITUTIONAL RIGHTS	199
A.	SB8 AND ITS CRITICS	199
B.	OFFENSIVE LITIGATION AND DEFENSIVE LITIGATION ..	201
1.	<i>Offensive Litigation</i>	202
2.	<i>Defensive Litigation</i>	202
3.	<i>Judgments and Opinions</i>	203
C.	DEFENSIVE LITIGATION AS ORDINARY MECHANISM OF FEDERAL JUDICIAL REVIEW	204
1.	<i>Private Civil Litigation</i>	205
2.	<i>SB8 Predecessors</i>	207
3.	<i>From Offense to Defense</i>	209
a.	The Story of Connecticut's Contraception Ban	209
b.	The Story of Masterpiece Cakeshop	210
4.	<i>SB8 Imitators</i>	212
a.	Direct Imitators	212
b.	Tort Imitators	213
5.	<i>Growing Demand for Offensive Litigation</i>	215
IV.	DEFENSIVE LITIGATION	219
A.	LOOKING FOR A LAWSUIT	219
1.	<i>No Litigation, Just the Threat</i>	220
2.	<i>Medical Practice as Usual</i>	220
3.	<i>Single Abortion</i>	221
4.	<i>Single Abortion, Friendly Plaintiffs</i>	222
a.	Friendly Plaintiffs	222
b.	Limiting the Friendly Plaintiff	223
B.	DEFENDING IN FEDERAL COURT?	224
1.	<i>Federal Question Jurisdiction</i>	225
2.	<i>Diversity Jurisdiction</i>	226
3.	<i>Lack of Standing</i>	227
C.	DEFENDING IN STATE COURT	229
1.	<i>Standing in State Court</i>	229
a.	Texas Standing	229
b.	State Standing and SB8	231
i.	The Checking Function of Private Litigation	232
ii.	Exclusivity of Enforcement	232
iii.	Non-Texan Enforcement of Texas Law	233
iv.	Implied Injury	233
2.	<i>Defending in State Court</i>	234

2022]	<i>Potential for Defensive Litigation</i>	189
	a. Motion to Dismiss.....	234
	b. Appellate Review of the Motion to Dismiss ...	235
	i. Granting Dismissal	235
	ii. Denying Dismissal	235
	c. Abatement of Multiple Suits	237
	d. Suspension of Judgments	237
	3. <i>Raising Defenses in State Court</i>	238
	4. <i>Review in the Supreme Court of the United States</i> ..	239
	a. Time and Risk	239
	b. Discretionary Review	239
	c. Finality.....	241
	d. Standing in the Supreme Court.....	243
	D. THE LIMITED SCOPE OF DEFENSIVE LITIGATION	245
	E. THE PROBLEM OF NON-MUTUAL PRECLUSION.....	246
	F. THE CONSTITUTIONAL VALIDITY OF FETAL- HEARTBEAT BANS	248
	V. CONCLUSION: THE BENEFITS OF DEFENSIVE LITIGATION.....	249

I. INTRODUCTION

THE Texas Heartbeat Act,¹ enacted in 2021 as Texas Senate Bill 8 (SB8), prohibits abortions after detection of a fetal-heartbeat.² This effectively prohibits abortions after five to six weeks of pregnancy (often before a person is aware of the pregnancy), a category comprising as much as 90% of prior abortions in the state.³ The law is clearly constitutionally invalid under the Supreme Court’s prevailing reproductive-freedom jurisprudence, under which states cannot prohibit abortions prior to fetal viability,⁴ at twenty-three to twenty-six weeks.⁵ Unless the Supreme Court overrules *Roe v. Wade*⁶ and *Planned Parenthood of Southeastern Pennsylvania v. Casey*⁷ or modifies the scope of reproductive freedom—as the Court was asked in October Term 2021⁸—this is not

1. See Texas Heartbeat Act, 87th Leg., R.S., S.B. 8 (Tex. 2021) (codified at TEX. HEALTH & SAFETY CODE ANN. §§ 171.201–171.212).

2. See HEALTH & SAFETY § 171.203.

3. Complaint for Declaratory and Injunctive Relief - Class Action ¶¶ 61–62, 91, Whole Woman’s Health v. Jackson, No. 1:21-CV-616-RP, 2021 WL 3821062 (W.D. Tex. Aug. 25, 2021), *aff’d in part & rev’d in part*, 142 S. Ct. 522; see also Christina Caron, *What Does It Really Mean to Be 6 Weeks Pregnant?*, N.Y. TIMES (May 18, 2019), <https://www.nytimes.com/2019/05/18/parenting/abortion-six-weeks-pregnant.html> [https://perma.cc/7C3K-S4PE].

4. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992); *Roe v. Wade*, 410 U.S. 113, 163 (1973).

5. See Matthew A. Rysavy et al., *Between-Hospital Variation in Treatment and Outcomes in Extremely Preterm Infants*, 372 NEW ENGL. J. MED. 1801, 1804–07 (2015).

6. 410 U.S. 113 (1973).

7. 505 U.S. 833 (1992).

8. See *Dobbs v. Jackson Women’s Health Org.*, 945 F.3d 265 (5th Cir. 2019), *cert. granted*, 141 S. Ct. 2619 (mem.) (2021) (No. 19-1392); Transcript of Oral Argument at 9–11, *Dobbs*, 945 F.3d 265 (No. 19-1392) [hereinafter *Dobbs* Transcript of Oral Argument],

a close constitutional question as a matter of judicial precedent.

But courts cannot answer that not-close substantive question without solving a series of procedural puzzles. SB8 prohibits public enforcement of the new ban—no state government or officer can bring an enforcement proceeding.⁹ The law creates a private cause of action empowering “any person,” regardless of injury, stake, or personal connection to any abortion, to sue a provider or other person who performs or aids or abets any post-heartbeat abortion. “Any person” can recover statutory damages of not less than \$10,000 per prohibited abortion, attorney’s fees, and injunctive relief.¹⁰ The law imposes crippling financial consequences on reproductive-health providers and reproductive-freedom advocates who assist pregnant people in obtaining abortion services by providing information, funding, and other support. The actual or threatened financial burden—through money judgments and the cost of defending a wave of litigation—prompts them to stop providing and supporting abortion services on the risk of financial liability and bankruptcy, making it difficult for patients to obtain abortion services and information in the state.¹¹

Courts adjudicate constitutional questions, and decide on a law’s constitutional validity, in two postures: offensive (which we might label pre-enforcement, preemptive, or anticipatory) or defensive (which we might label enforcement or coercive). Challenges to most abortion regulations follow an offensive path. Reproductive-health providers (doctors, nurses, clinics), patients, reproductive-rights advocacy organizations, or reproductive-freedom supporters¹² sue in federal district court as soon as, if not before, an abortion restriction takes effect; the defendant is the state executive officer responsible for enforcing the law (such as the attorney general or the head of the state’s department of health and human services); and the suit seeks a declaratory judgment that the law is constitutionally invalid and an injunction prohibiting the defendant officer from enforcing the law against the plaintiff.¹³

SB8 upended that strategy. In July 2021—after the law’s enactment but before its effective date—a collection of reproductive-health providers, doctors, and reproductive-rights advocates led by Texas-founded Whole Woman’s Health pursued the ordinary litigation strategy, suing numerous government officials and others in federal court. Following a series of

https://www.supremecourt.gov/oral_arguments/argument_transcripts/2021/19-1392_4425.pdf [<https://perma.cc/U998-3LNP>].

9. TEX. HEALTH & SAFETY CODE ANN. § 171.207(a).

10. *See id.* § 171.208(a)–(b).

11. *See* Whole Woman’s Health v. Jackson, 142 S. Ct. 522, 545, 547–48 (2021) (Sotomayor, J., concurring in the judgment in part and dissenting in part); MARY ZIEGLER, ABORTION AND THE LAW IN AMERICA: ROE V. WADE TO THE PRESENT 207 (2020).

12. For simplicity, we use “providers” to cover reproductive-health providers, patients, rights holders, and reproductive-freedom advocates and supporters who might be subject to SB8 suits and who might seek to challenge the constitutional validity of the heartbeat ban.

13. June Med. Servs. LLC v. Russo, 140 S. Ct. 2103, 2112–13, 2117 (2020); Whole Woman’s Health v. Hellerstedt, 136 S. Ct. 2292, 2300–01 (2016).

procedural rulings through multiple levels of the federal judiciary, a grant of certiorari before judgment, and expedited briefing and argument, a divided Supreme Court in *Whole Woman's Health v. Jackson* allowed limited offensive claims against one set of government officials while rejecting others.¹⁴

Critics argue that SB8 prevents federal courts from performing their essential function of stopping “Texas’s brazen defiance of the rule of law and the federal constitutional rights to which Texans are entitled.”¹⁵ SB8 stymies “traditional mechanisms of federal judicial review,”¹⁶ evades “effective judicial protection of rights in federal and state court,”¹⁷ and strips “citizens of the ability to invoke the power of the federal courts to vindicate their rights.”¹⁸ The law represents a “deliberate attempt to thwart ordinary mechanisms of federal judicial review,”¹⁹ while “transform[ing] the state courts from a forum for the protection of rights into a mechanism for nullifying them.”²⁰

The *Whole Woman's Health* dissenters furthered these themes. Chief Justice Roberts complained that “Texas has employed an array of stratagems designed to shield its unconstitutional law from judicial review,”²¹ with its purpose and effect to “nullify this Court’s rulings.”²² Justice Sotomayor argued that SB8 “is structured to thwart review and result in ‘a denial of a hearing.’”²³ And she criticized the majority for “reward[ing] the State’s efforts at nullification,”²⁴ thereby “betray[ing] not only the citizens of Texas, but also our constitutional system of government.”²⁵

It overstates the matter to claim SB8 insulates itself from constitutional challenge. The heightened rhetoric surrounding the law illustrates how providers, advocates, and reproductive-rights supporters—and the Supreme Court dissenters—have been “hypnotized” by the law’s procedural challenges,²⁶ conflating the law’s obvious substantive defects with valid, if complex, procedural rules. In the first article in this series, we explain

14. *Whole Woman's Health v. Jackson*, 142 S. Ct. at 531, 538–39; *infra* notes 65–68 and accompanying text.

15. Complaint for Declaratory and Injunctive Relief - Class Action, *supra* note 3, ¶¶ 18–19.

16. Complaint ¶ 4, *United States v. Texas*, No. 1:21-CV-796-RP, 2021 WL 4593319 (W.D. Tex. Oct. 6, 2021), *cert. dismissed as improvidently granted*, 142 S. Ct. 522.

17. Transcript of Oral Argument at 3, *Whole Woman's Health v. Jackson*, 142 S. Ct. 522 (2021) (No. 21-463), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2021/21-463_8758.pdf [<https://perma.cc/DQ4M-2CVJ>].

18. Complaint, *supra* note 16, ¶ 15.

19. Motion for Preliminary Injunction at 24–25, *United States v. Texas*, 2021 WL 4593319 (No. 1:21-CV-796-RP).

20. Transcript of Oral Argument, *supra* note 17, at 4.

21. *Whole Woman's Health v. Jackson*, 142 S. Ct. at 543 (Roberts, C.J., concurring in part and dissenting in part).

22. *Id.* at 545.

23. *Id.* at 548 (Sotomayor, J., concurring in the judgment in part and dissenting in part).

24. *Id.* at 551.

25. *Id.* at 546.

26. Anthony J. Colangelo, *Suing Texas Senate Bill 8 Plaintiffs Under Federal Law for Violations of Constitutional Rights*, 74 SMU L. REV. F. 136, 137 (2021).

why the *Whole Woman's Health* majority was correct in rejecting most (but not all) offensive challenges to SB8, while suggesting other targets and strategies for offensive litigation having potential but requiring some patience.²⁷ SB8 limits, but does not prevent, providers from obtaining offensive pre-enforcement relief in federal court. But “those seeking to challenge the constitutionality of state laws are not always able to pick and choose the timing and preferred forum for their arguments.”²⁸

The solution is defensive litigation, a common, often required, available, and sufficient posture for vindicating some constitutional rights.²⁹ A provider performs or enables a statutorily prohibited abortion; “any person” sues that provider in state court; and the provider defends that SB8’s prohibition on post-heartbeat abortions is constitutionally invalid and an invalid law cannot provide the basis for civil liability, requiring the court to dismiss the action.

That process continues as to SB8 as of this writing. Dr. Alan Braid, a Texas physician, published an op-ed in the *Washington Post* announcing that he had performed one first-trimester, post-heartbeat abortion.³⁰ Three lawsuits followed,³¹ setting the necessary test cases and the opportunity to present SB8’s constitutional invalidity as a defense to liability.

This analysis of defensive litigation extends beyond Texas and SB8. Other states have introduced, considered, or threatened copycat laws on abortion³² and firearm possession,³³ and the structure can extend to a host of substantive rights, as Justice Kavanaugh worried during oral

27. See generally Howard M. Wasserman & Charles W. “Rocky” Rhodes, *Solving the Procedural Puzzles of Texas Heartbeat Act and Its Imitators: The Limits and Opportunities for Offensive Litigation*, 71 AM. U. L. REV. 1029 (2022).

28. *Whole Woman’s Health v. Jackson*, 142 S. Ct. at 537.

29. See Wasserman & Rhodes, *supra* note 27, at 1049–50, 1102. But see *Whole Woman’s Health v. Jackson*, 142 S. Ct. at 547 (Sotomayor, J., concurring in the judgment in part and dissenting in part).

30. Alan Braid, Opinion, *Why I Violated Texas’s Extreme Abortion Ban*, WASH. POST, (Sept. 18, 2021, 4:01 PM), <https://www.washingtonpost.com/opinions/2021/09/18/texas-abortion-provider-alan-braid> [<https://perma.cc/YTV4-596G>]; see also Michael Levenson, *Texas Doctor Says He Performed an Abortion in Defiance of New State Law*, N.Y. TIMES, (Oct. 15, 2021), <https://www.nytimes.com/2021/09/18/us/texas-abortion-alan-braid.html> [<https://perma.cc/SV6Y-X6GA>].

31. See generally Original Petition and Request for Admissions ¶¶ 17, 19, *Tex. Heartbeat Project v. Braid*, No. 21-2276-C (241st Dist. Ct., Smith County, Tex. filed Sept. 22, 2021) [hereinafter *Tex. Heartbeat Project Complaint*]; Complaint ¶¶ 13–15, *Stilley v. Braid*, No. 2021CI19940 (438th Dist. Ct., Bexar County, Tex. filed Sept. 20, 2021) [hereinafter *Stilley Complaint*]; Complaint ¶ 1, *Gomez v. Braid*, No. 2021CI19920 (224th Dist. Ct. Bexar County, Tex., filed Sept. 20, 2021) [hereinafter *Gomez Complaint*].

32. Florida Heartbeat Act, H.B. 167, 2022 Leg., Reg. Sess. (Fla.); Eric Lutz, *Florida Is Already Cooking Up a Texas-Style Abortion Ban*, VANITY FAIR (Sept. 3, 2021), <https://www.vanityfair.com/news/2021/09/florida-already-cooking-up-texas-style-abortion-ban> [<https://perma.cc/HE3K-T2VF>].

33. *California’s Governor Pledges to Model an Assault Weapons Ban on Texas Abortion Law*, NPR (Dec. 12, 2021), <https://www.npr.org/2021/12/12/1063489922/california-governor-gavin-newsom-assault-weapons-ban-texas-abortion-law> [<https://perma.cc/G3R3-B2H3>].

argument.³⁴

Today it is abortion providers and those who assist them; tomorrow it might be gun buyers who face liability for every purchase. Churches could be hauled into far-flung courts to defend their religious practices because someone somewhere disagrees with them. Same-sex couples could be sued by neighbors for obtaining a marriage license. And Black families could face lawsuits for enrolling their children in public schools.³⁵

As Justice Sotomayor closed her *Whole Woman's Health* dissent:

New permutations of S. B. 8 are coming. In the months since this Court failed to enjoin the law, legislators in several States have discussed or introduced legislation that replicates its scheme to target locally disfavored rights. What are federal courts to do if, for example, a State effectively prohibits worship by a disfavored religious minority through crushing “private” litigation burdens amplified by skewed court procedures, but does a better job than Texas of disclaiming all enforcement by state officials? Perhaps nothing at all, says this Court.³⁶

Justice Sotomayor’s dire warnings about “this madness”³⁷ aside, neither SB8 nor its imitators succeed in avoiding judicial review or determinations of their constitutional invalidity. To be sure, SB8 is extreme. Its substantive rule blatantly contradicts prevailing judicial precedent; the universe of potential plaintiffs is unbounded; the procedural rules are unfavorable; and potential liability is steep. The chilling effect of having to violate the law and await enforcement to pursue either path imposes a genuine burden on providers, advocates, and their pregnant patients.

But the difference is of degree, not kind. SB8’s extremity affects its constitutional validity; it should not affect the process through which that validity is litigated and adjudicated. A proper understanding of defensive litigation as a mechanism for judicial review, including its historical and successful use in other areas, demonstrates the point. This article shows how defensive litigation can and should proceed, successfully, in challenging SB8 and its imitators and in stopping their enforcement.

II. A HISTORY OF THE TEXAS HEARTBEAT ACT

SB8 does not represent the first attempt to utilize private civil litigation to stop or limit abortion. Some states allow a patient to sue a provider for damages resulting from her abortion.³⁸ In the 1990s, anti-choice activists

34. See Transcript of Oral Argument, *supra* note 17, at 72–75 (questions from Justice Kavanaugh).

35. Complaint for Declaratory and Injunctive Relief - Class Action, *supra* note 3, ¶ 18.

36. *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 551 (2021) (Sotomayor, J., concurring in the judgment in part and dissenting in part) (footnote omitted).

37. *Id.* at 545.

38. See, e.g., LA. STAT. ANN. § 9:2800.12 (2021); OKLA. STAT. tit. 63, § 1-740 (2021); see Maya Manian, *Privatizing Bans on Abortion: Eviscerating Constitutional Rights Through Tort Remedies*, 80 TEMP. L. REV. 123, 125 (2007).

organized campaigns to target providers with medical malpractice, wrongful death, informed consent, and similar civil claims.³⁹ The goal was to use actual or threatened litigation, liability, and damages to increase malpractice-insurance costs, making it prohibitively expensive to provide abortion services or driving providers from the field.⁴⁰ These efforts differ from SB8 in that they involved ordinary tort claims, in which the plaintiff was the patient or the patient's survivor seeking to remedy a cognizable medical injury. This strategy did not achieve the desired comprehensive restriction on abortion, and anti-choice activists abandoned it in favor of direct attacks on *Roe* and *Casey*.⁴¹

Nor does SB8 represent the first example of expansive citizen standing authorizing “any person” to sue, regardless of any personal injury, interest, or connection to the challenged conduct. California tried this in its consumer-protection statutes, although supplementing rather than displacing public enforcement.⁴²

SB8 combines exclusivity, private enforcement, and broad citizen standing. By melding exclusive private enforcement with an unbounded “any person” cause of action, Texas sought to achieve three things: prevent providers from pursuing offensive pre-enforcement injunctive litigation; allow the threat of massive litigation and liability to chill the exercise of constitutional rights; and compel compliance with a clearly constitutionally invalid law pending the initiation and completion of defensive litigation.⁴³

A. SB8

The following key provisions of SB8 inform this Article:

1. *Substantive Provisions*

SB8 requires a reproductive-health provider to examine a patient for a “detectable fetal heartbeat,” then prohibits the provider from performing the abortion if either a fetal heartbeat is detected or the test has not been performed, except in cases of medical emergency.⁴⁴ Liability extends to those who (1) perform or induce a prohibited abortion; (2) knowingly

39. ZIEGLER, *supra* note 11, at 130, 173–74; Mary Ziegler, *The Deviousness of Texas's New Abortion Law*, THE ATLANTIC (Sept. 1, 2021), <https://www.theatlantic.com/ideas/archive/2021/09/deviousness-texas-new-abortion-law/619945> [https://perma.cc/4NNN-4AMP].

40. Ziegler, *supra* note 39.

41. ZIEGLER, *supra* note 11, at 130.

42. *See, e.g.*, CAL. BUS. & PROF. CODE §§ 17204, 17535 (repealed 2004); Nike, Inc. v. Kasky, 539 U.S. 654, 661 (2003) (Stevens, J., concurring).

43. *See* Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933, 1001–02 (2018); Emily Wax-Thibodeaux, *Mark Lee Dickson Paved the Way for the Texas Abortion Ban, One Small Town at a Time*, WASH. POST. (Sept. 16, 2021, 9:29 AM), https://www.washingtonpost.com/national/mark-dickson-texas-abortion-ban/2021/09/16/bb773a0a-0c02-11ec-a6dd-296ba7fb2dce_story.html [https://perma.cc/UM2P-5UDX].

44. TEX. HEALTH & SAFETY CODE ANN. §§ 171.203–171.205. SB8 also requires physicians to keep records regarding these determinations. *See id.* §§ 171.008, 171.203(d), 171.205(b)–(c).

engage “in conduct that aids or abets the performance or inducement of an abortion,” including through financial support for the abortion; and (3) “intend” to perform, induce, or aid a prohibited abortion.⁴⁵ It is irrelevant whether an individual engaging in, or intending to engage in, aiding-or-abetting conduct “knew or should have known that the abortion would be performed or induced in violation” of the prohibition on post-heartbeat abortions.⁴⁶

2. No Public Enforcement

The law prohibits enforcement by the state, any political subdivision of the state, district and county attorneys, and any executive or administrative officer or employee of the state or a political subdivision.⁴⁷ The ban “shall be enforced exclusively” through private civil actions.⁴⁸

3. Private Enforcement

SB8 deputizes “[a]ny person, other than an officer or employee of a state or local governmental entity,” to bring a civil action against any person who performs, aids or abets, or intends to perform or aid a prohibited abortion.⁴⁹ The plaintiff need not allege or prove personal injury to obtain a remedy.⁵⁰ The plaintiff can obtain injunctive relief to prevent future violations (that is, future post-heartbeat abortions), an award of statutory damages of at least \$10,000 per prohibited abortion, and costs and attorney’s fees.⁵¹ One person may recover for one abortion; “a court may not award” further relief for one abortion when the defendant has paid the full statutory damages for that abortion.⁵²

4. Procedural Limitations

SB8 imposes unique procedures on the private civil action, which Justice Sotomayor criticized as “anomalies” designed to “make litigation uniquely punitive for those sued.”⁵³

Venue is proper in a Texas plaintiff’s county of residence, regardless of the defendants’ location,⁵⁴ expanding ordinary Texas rules placing venue in a defendant’s county of residence or the county in which a substantial part of the events giving rise to the claim occurred.⁵⁵ The plaintiff’s venue

45. *Id.* § 171.208(a).

46. *Id.* § 171.208(a)(2).

47. *Id.* § 171.207(a). Nor can a state official or local district or county attorney intervene in a pending action, although filing an amicus curiae brief is allowed. *Id.* § 171.208(h).

48. *Id.* § 171.207(a).

49. *Id.* § 171.208(a). A male impregnating the woman through rape, sexual assault, incest, or other sexual crimes cannot bring a claim. *Id.* § 171.208(j).

50. *Id.* § 171.208(a).

51. *Id.* § 171.208(b).

52. *Id.* § 171.208(c).

53. *Whole Woman’s Health v. Jackson*, 142 S. Ct. 522, 546 (2021) (Sotomayor, J., concurring in the judgment in part and dissenting in part).

54. HEALTH & SAFETY § 171.210.

55. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 15.002(a).

choice cannot be disturbed without written consent of all parties, including the plaintiff.⁵⁶ These venue provisions add to the cost and burden by requiring providers to defend themselves hundreds of miles from home.

The statute eliminates common law defenses of non-mutual issue and claim preclusion.⁵⁷ If *X* sues Planned Parenthood over one abortion and loses, Whole Woman's Health cannot gain the preclusive benefits of that judgment to defeat *X*'s subsequent lawsuit against it.

Finally, statutory fee-shifting runs one way. An SB8 defendant cannot recover attorney's fees or costs from a plaintiff as a sanction for unsuccessful, groundless, or baseless lawsuits.⁵⁸

5. *Limitations on Defenses*

SB8 purports to limit defenses available to providers, leading the plaintiffs in *Whole Woman's Health* to deride the state proceedings as "rigged"⁵⁹ into a "mechanism for nullifying" constitutional rights.⁶⁰

The statute denies provider and advocate defendants standing to assert the rights of women seeking an abortion unless the Supreme Court of the United States holds that Texas courts must confer such standing under the U.S. Constitution or the defendant has third-party standing to assert women's rights under the tests established by the Supreme Court.⁶¹ This limitation seizes on Justice Thomas's recent argument that providers should not have standing to challenge the validity of abortion regulations that violate the constitutional rights of their pregnant patients.⁶²

Defendants cannot avoid liability through their belief that SB8 is constitutionally invalid or their reliance on a then-existing judicial decision establishing its invalidity that is overruled.⁶³ The "undue burden" test governing the validity of abortion restrictions forms an affirmative defense that considers whether an award of relief against that defendant will prevent or impose a substantial obstacle on the overall ability to obtain an abortion.⁶⁴

56. See HEALTH & SAFETY § 171.210(b).

57. *Id.* § 171.208(e)(5).

58. *Id.* § 171.208(i). While prohibiting awards to defendants of "costs or attorney's fees under the Texas Rules of Civil Procedure or any other rule adopted by the supreme court," SB8 does not appear to cover statutory sanctions for signing a "frivolous pleading or motion." See CIV. PRAC. & REM. §§ 10.001–.006.

59. Complaint for Declaratory and Injunctive Relief - Class Action, *supra* note 3, ¶¶ 80–85.

60. Transcript of Oral Argument, *supra* note 17, at 4.

61. HEALTH & SAFETY § 171.209(a).

62. See *June Med. Servs., Inc. v. Russo*, 140 S. Ct. 2103, 2143 (2020) (Thomas, J., dissenting); *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2321–22 (2016) (Thomas, J., dissenting).

63. HEALTH & SAFETY § 171.208(e)(2)–(3).

64. See *id.* § 171.209(c)–(d); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992).

B. RESPONSES TO SB8

SB8 took effect on September 1, 2021.⁶⁵ Providers and reproductive-freedom supporters pursued offensive litigation efforts, in ordinary and unusual ways.

Adhering to the typical playbook, providers sued numerous government officials and others in federal court. Following a series of procedural rulings through multiple levels of the federal judiciary, the Supreme Court granted certiorari before judgment.⁶⁶ On expedited briefing and argument, a divided Court rejected most claims, allowing providers (but not other plaintiffs) to pursue limited relief against state licensing boards.⁶⁷ The Court rejected claims against state judges and state clerks⁶⁸ that would have allowed federal courts to stop SB8's primary enforcement mechanism—private suits in state court by “any person” plaintiffs.

While *Whole Woman's Health* was pending, the Biden Administration sued Texas to enjoin enforcement of the law. The district court granted a preliminary injunction prohibiting any actions by anyone connected to the State of Texas that might enforce or result in the enforcement of SB8.⁶⁹ That injunction offered two days of relief from the risk of enforcement, during which some providers resumed pre-viability, post-heartbeat abortions.⁷⁰ The Fifth Circuit stayed the injunction pending appeal.⁷¹ After granting certiorari before judgment and expedited briefing and argument, the Supreme Court dismissed the writ of certiorari as improvidently granted.⁷²

Providers also filed fourteen offensive actions in state court, seeking declaratory and injunctive relief against enforcement by named pro-life organizations and advocates.⁷³ The Texas Panel of Multi-District Litigation assigned the cases to Judge Peebles, who declared that specific procedural mechanisms in SB8 violated the Texas Constitution,⁷⁴ without

65. *Bills Effective on September 1, 2021*, TEX. LEGISLATURE, <https://capitol.texas.gov/Reports/Report.aspx?LegSess=87R&ID=effectivesept1> [<https://perma.cc/X7CL-DF9K>].

66. *Whole Woman's Health v. Jackson*, 142 S. Ct. 415, 415–16 (2021) (mem.).

67. *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 538–39 (2021); Wasserman & Rhodes, *supra* note 27, at 1060–63. Answering a certified question from the Fifth Circuit, the Texas Supreme Court held that state licensing boards had no authority to enforce SB8. *Whole Woman's Health v. Jackson*, 65 Tex. Sup. Ct. J. 625 (March 11, 2022).

68. *Whole Woman's Health*, 142 S. Ct. at 531–33; Wasserman & Rhodes, *supra* note 27, at 1064–77.

69. *United States v. Texas*, No. 1:21-CV-796-RP, 2021 WL 4593319, at *53 (W.D. Tex. Oct. 6, 2021).

70. See Karen Brooks Harper, *At Least One Major Texas Abortion Provider Resumes Procedure Lawmakers Tried to Prohibit, After Judge Blocks Near-Total Ban*, TEX. TRIB. (Oct. 7, 2021, 4:00 PM), <https://www.texastribune.org/2021/10/07/Texas-abortion-law-providers> [<https://perma.cc/4ST7-EK6B>].

71. *United States v. Texas*, No. 21-50949, 2021 WL 4786458, at *1 (5th Cir. Oct. 14, 2021).

72. *United States v. Texas*, 142 S. Ct. 522 (2021) (mem.). Justice Sotomayor noted her dissent. See *id.*

73. See *Van Stean v. Tex. Right to Life*, No. D-1-GN-21-004179, slip op. at 31–34 (98th Dist. Ct., Travis County, Tex., Dec. 9, 2021).

74. See *id.*

enjoining enforcement. Any subsequent injunctive relief remain limited to stopping enforcement by the named organizations, not by the thousands of non-party deputized “any persons.”

Without the protection of injunctive relief, most providers complied with the law, ceasing or limiting abortions to those in which no heartbeat was or could be detected.⁷⁵ Mark Dickson, the head of East Texas Right to Life and leading SB8 proponent, argued that “[n]o rational abortion provider would violate this law.”⁷⁶ He was correct, as abortion after the sixth week of pregnancy became largely unavailable in the state,⁷⁷ and the number of abortions performed in the state dropped by more than half.⁷⁸

That absence of prohibited post-heartbeat abortions prevented defensive litigation. If no one violates the law, “any person” cannot sue over any violation; if “any person” does not sue, providers cannot raise and litigate constitutional defenses and courts cannot declare the heartbeat ban invalid and stop its enforcement. And that might have been the point. The anti-choice movement stood in a better position if no one filed suit, allowing the risk of a barrage of lawsuits, judgments, and substantial damages to keep providers from performing health care as usual. Activists achieved their goals if the inchoate threat of lawsuits, liability, and damages chilled providers into ceasing abortion services.⁷⁹

That changed after several weeks. Dr. Braid published his op-ed in the *Washington Post* announcing that he had performed one first-trimester post-heartbeat abortion.⁸⁰ Three lawsuits followed in Texas state court,⁸¹ providing the necessary test cases and the opportunity to present SB8’s constitutional invalidity as a defense to liability in those actions. The

75. See Paul J. Weber & Jessica Gresko, *Explainer: The Texas Abortion Law’s Swift Impact, and Future*, AP NEWS (Sept. 16, 2021), <https://apnews.com/article/health-austin-texas-lawsuits-coronavirus-pandemic-e4352ad8f095612ac249bb8477ddc637> [https://perma.cc/CT93-QWSY]; Neelam Bohra, *Fearful of Being Sued Under New Law, Three of Four San Antonio Abortion Facilities Stop Offering the Procedure*, TEX. TRIB. (Sept. 7, 2021, 6:00 PM), <https://www.texastribune.org/2021/09/07/texas-abortion-law-san-antonio> [https://perma.cc/BA3K-97EX].

76. Transcript of Oral Argument, *supra* note 17, at 4.

77. *Whole Woman’s Health v. Jackson*, 142 S. Ct. 522, 545 (2021) (Sotomayor, J., concurring in the judgment in part and dissenting in part); Transcript of Oral Argument at 67, *United States v. Texas*, 142 S. Ct. 522 (2021) (mem.) (No. 15-674) [hereinafter *Texas* Transcript of Oral Argument] (statement of Justice Kagan), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2021/21-588_m648.pdf [https://perma.cc/WJJ2-VX7W].

78. *Texas* Transcript of Oral Argument, *supra* note 77, at 66–67; Paul J. Weber, *Abortions in Texas Fell by 60 % in 1st Month Under New Limits*, ASSOC. PRESS (Feb. 10, 2022), https://apnews.com/article/abortion-health-texas-b92eadbe4afd4d29cb6cbf00526c11b0?utm_campaign=socialFlow&utm_source=twitter&utm_medium=ap [https://perma.cc/5E2Q-RUBA].

79. See, e.g., Ruth Graham, Adam Liptak & J. David Goodman, *Lawsuits Filed Against Texas Doctor Could Be Best Tests of Abortion Law*, N.Y. TIMES, (Nov. 1, 2021), <https://www.nytimes.com/2021/09/21/us/texas-abortion-lawsuits.html?> [https://perma.cc/33TE-UDPD].

80. Braid, *supra* note 30; see also Levenson, *supra* note 30.

81. See generally *Tex. Heartbeat Project Complaint*, *supra* note 31; *Stilley Complaint*, *supra* note 31; *Gomez Complaint*, *supra* note 31.

plaintiffs formed a varied, unique, and quirky group.⁸² One was an attorney from Illinois facing disciplinary sanctions in federal and state court who supported abortion-rights and wanted to create the necessary litigation.⁸³ One was an Arkansas citizen, disbarred attorney, and federal tax convict under house arrest, who claimed to be interested in both the money (he sought \$100,000, ten times the statutory minimum) and creating the opportunity for litigation.⁸⁴ The third was an anti-choice advocacy group interested in stopping abortion and critical of other SB8 plaintiffs for co-opting SB8 in a way the legislature and activists did not intend.⁸⁵

III. LITIGATING CONSTITUTIONAL RIGHTS

A. SB8 AND ITS CRITICS

Critics' foundational error is the belief that SB8 violates constitutional rights by existing as a law of Texas, restricting pre-enforcement review and obligating rights holders and providers acting on their behalf to defend against potential enforcement.

That presumption runs throughout the rhetoric of SB8 critics. Advocates complained of a "brazen defiance of the rule of law and the federal constitutional rights to which Texans are entitled."⁸⁶ They complained that SB8 thwarts "traditional mechanisms of federal judicial review,"⁸⁷ evades "effective judicial protection of that right in federal and state court,"⁸⁸ and strips "citizens of the ability to invoke the power of the

82. See Vivia Chen, *Meet the Quirky Plaintiffs Suing Under the Texas Abortion Law*, BLOOMBERG L. NEWS (Oct. 5, 2021, 10:31 AM), https://www.bloomberglaw.com/bloomberglawnews/us-law-week/X3DOR0VK000000?bna_news_filter=US-law-week#jcite [<https://perma.cc/LJ5C-MMJA>].

83. See *In re Felipe Nery Gomez*, Synopsis of Hearing Board Report and Recommendation, ATTORNEY REGISTRATION & DISCIPLINARY COMMISSION (Jan. 2022), <http://iardc.org/File/View/1458030?FileName=IN%20re%20Felipe%20Nery%20Gomez%2C%20Attorney%20Number%206197210.pdf> [<https://perma.cc/JSL7-A5KR>]; *In re Felipe Nery Gomez Attorney Registration & Disciplinary Commission Judgment* (Apr. 8, 2021), <https://fingfx.thomsonreuters.com/gfx/legaldocs/mopanwqzlva/IL%20Supreme%20Court%20order%20on%20Gomez%20suspension.pdf> [<https://perma.cc/YH29-646P>]; Ed Kilgore, *Two Disbarred Out-of-State Lawyers Might Blow Up the Texas Abortion Law*, N.Y. MAG. (Sept. 22, 2021), <https://nymag.com/intelligencer/2021/09/ex-attorney-on-house-arrest-might-blow-up-texas-abortion-law.html> [<https://perma.cc/VFT4-5VT9>]. This plaintiff nonsuited three months after filing. Gomez Notice of Non-Suit Without Prejudice, Gomez v. Braid, No. 2021CI19920 (224th Dist. Ct. Bexar County, Tex., filed December 8, 2021); Amended Notice of Dismissal Dismissing With Prejudice, No. 2021CI19920 (224th Dist. Ct. Bexar County, Tex., filed December 20, 2021).

84. Kilgore, *supra* note 83.

85. See Plea in Intervention and Plea to the Jurisdiction as to Collusive Lawsuit by Out-of-State Plaintiff, *Stilley v. Braid*, No. 2021-CI-19940 (438th Dist. Ct., Bexar County, Tex. Sept. 21, 2021), <https://bustingthefeds.com/wp-content/uploads/2021/09/IntervenePld-Braid.pdf> [<https://perma.cc/TEL8-B5LP>]. Braid countered these lawsuits by suing those individuals in federal court. See Complaint for Interpleader and Declaratory Judgment, *Braid v. Stilley*, No. 1:21-cv-05283 (N.D. Ill. Oct. 5, 2021).

86. Complaint for Declaratory and Injunctive Relief - Class Action, *supra* note 3, ¶¶ 17–19.

87. Complaint, *supra* note 16, ¶ 4.

88. Transcript of Oral Argument, *supra* note 17, at 3.

federal courts to vindicate their rights.”⁸⁹

That rhetoric carried to the Court’s minority in *Whole Woman’s Health*. Dissenting from the denial of emergency relief on the day SB8 took effect, Justice Breyer suggested that “[t]he very bringing into effect of Texas’s law may well threaten the applicants with imminent and serious harm.”⁹⁰ Chief Justice Roberts objected that SB8 “effectively chill[s] the provision of abortions in Texas”⁹¹ by “employ[ing] an array of stratagems designed to shield its unconstitutional law from judicial review,”⁹² with the purpose and effect to “nullify this Court’s rulings.”⁹³ Justice Sotomayor argued that the law’s “chilling effect has been near total, depriving pregnant women in Texas of virtually all opportunity to seek abortion care within their home State after their sixth week of pregnancy.”⁹⁴ SB8 “is structured to thwart review and result in ‘a denial of any hearing.’”⁹⁵ And she criticized the majority for “reward[ing] the State’s effort at nullification,”⁹⁶ thereby “betray[ing] not only the citizens of Texas, but also our constitutional system of government.”⁹⁷

None of this reflects how constitutional litigation operates. As the Supreme Court explained in *Massachusetts v. Mellon*:

We have no power per se to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act.⁹⁸

The mere existence of a law, absent a genuine risk of enforcement, does not violate anyone’s rights, or in the language of § 1983, deprive any person of a right, privilege, or immunity secured by the Constitution.⁹⁹ A law violates a constitutional right and causes a constitutional injury through its enforcement.¹⁰⁰ A violation arises not from the “mere enactment” or existence of a constitutionally violative law, but from the enforcement of that constitutionally violative law and imposition of liability, punishment, or sanction against a rights holder through adjudicative pro-

89. Complaint, *supra* note 16, ¶ 15.

90. *Whole Woman’s Health v. Jackson*, 141 S. Ct. 2494, 2496 (2021) (Breyer, J., dissenting).

91. *Whole Woman’s Health v. Jackson*, 142 S. Ct. 522, 544 (2021) (Roberts, C.J., concurring in part and dissenting in part).

92. *Id.* at 543.

93. *Id.* at 545.

94. *Id.* (Sotomayor J., concurring in part and dissenting in part).

95. *Id.* at 548.

96. *Id.* at 551.

97. *Id.* at 546.

98. *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923); *see also* *California v. Texas*, 141 S. Ct. 2104, 2113–14 (2021); *see also* Mitchell, *supra* note 43, at 936; Howard M. Wasserman, *Precedent, Non-Universal Injunctions, and Judicial Departmentalism: A Model of Constitutional Adjudication*, 23 LEWIS & CLARK L. REV. 1077, 1083–84 (2020).

99. 42 U.S.C. § 1983.

100. *See* *California v. Texas*, 141 S. Ct. at 2115–16; Wasserman, *supra* note 98, at 1083–84.

ceedings.¹⁰¹ A rights holder cannot prevail in court on the “naked contention” that a law violates rights “by the mere enactment of the statute, though nothing has been done and nothing is to be done” to enforce that law.¹⁰²

Judicial review consists of adjudicating a controversy, declaring the validity of that law,¹⁰³ and the “negative power to disregard an unconstitutional enactment” by not allowing that invalid rule to serve as a rule of decision.¹⁰⁴ Courts cannot repeal, eliminate, or erase a statute.¹⁰⁵ Despite the common rhetoric, courts do not “strike down” or “block” laws or prevent them from taking effect. Courts in offensive litigation enjoin not laws but their enforcement.¹⁰⁶ The court issues an order prohibiting the opposing party from enforcing the challenged law against the party rights holder at present and in the future.¹⁰⁷

The Constitution also does not immunize rights holders from litigating attempted enforcement of even a blatantly invalid law; it protects them against liability and sanction under that blatantly invalid law. Having declared the law invalid, the court will not allow that law to be used as an applicable rule of decision.¹⁰⁸ But judicial review requires litigation, through which the court can adjudicate the constitutional question, declare the validity of the law, pronounce its enforceability, and decide whether the rights holder can be liable under that law.

B. OFFENSIVE LITIGATION AND DEFENSIVE LITIGATION

Courts adjudicate constitutional questions and decide on a law’s constitutional validity in two contexts: offensive or defensive.¹⁰⁹

101. *Whole Woman’s Health v. Jackson*, 142 S. Ct. at 535; *Poe v. Ullman*, 367 U.S. 497, 507 (1961); *Mellon*, 262 U.S. at 483; *Support Working Animals, Inc. v. Governor of Fla.*, 8 F.4th 1198, 1202–03 (11th Cir. 2021); Wasserman, *supra* note 98, at 1083–85.

102. *Mellon*, 262 U.S. at 483.

103. *See California v. Texas*, 141 S. Ct. at 2115–16; Mitchell, *supra* note 43, at 936; Charles W. “Rocky” Rhodes, *Loving Retroactivity*, 45 FLA. ST. U. L. REV. 383, 417–18 (2018); Wasserman, *supra* note 98, at 1083–84; Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1273–74 (1996).

104. *Mellon*, 262 U.S. at 488.

105. Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 451–52 (2017); Mitchell, *supra* note 43, at 935–36; Wasserman, *supra* note 98, at 1089–90; *see Whole Woman’s Health v. Jackson*, 142 S. Ct. 522, 535 (2021); *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2220 (2020) (Thomas, J., concurring in part and dissenting in part).

106. *Whole Woman’s Health v. Jackson*, 142 S. Ct. at 535; *California v. Texas*, 141 S. Ct. at 2115–16.

107. *See Pool v. City of Houston*, 978 F.3d 307, 309 (5th Cir. 2020); *Hartnett v. Pa. State Educ. Ass’n*, 963 F.3d 301, 309 (3d Cir. 2020); John Harrison, *Section 706 of the Administrative Procedure Act Does Not Call for Universal Injunctions or Other Universal Remedies*, 37 YALE J. ON REG. BULL. 37, 43 (2020); John Harrison, *Severability, Remedies, and Constitutional Adjudication*, 83 GEO. WASH. L. REV. 56, 87–88 (2014); Mitchell, *supra* note 43, at 936; Wasserman, *supra* note 98, at 1090–91.

108. Wasserman, *supra* note 98, at 1089.

109. *Id.* at 1086, 1088.

1. *Offensive Litigation*

A rights holder proceeds in an offensive posture by initiating litigation to remedy past, present, or future enforcement. To stop present or future enforcement, a rights holder brings suit under § 1983¹¹⁰ and the *Ex parte Young* equitable cause of action,¹¹¹ typically in federal district court, against the government or (more commonly) the executive officers responsible for enforcing the law. The rights holder seeks a declaratory judgment¹¹² that the law is constitutionally invalid, an injunction prohibiting enforcement of that law by this enforcer defendant against this rights holder plaintiff, or both.¹¹³ A rights holder can remedy past violations through a § 1983 action following completion of state enforcement, seeking damages or other retroactive remedies.¹¹⁴

2. *Defensive Litigation*

Defensive or coercive litigation occurs within adjudicative proceedings enforcing the challenged law. Proceedings are initiated against a rights holder, who raises the constitutional defect in the law as a defense and argues for dismissal or a favorable judgment in that proceeding because the law being enforced is constitutionally invalid and cannot form the basis for liability.¹¹⁵ These actions are coercive because the party initiating the action seeks to enforce and secure a remedy under the challenged law; the rights holder wields the Constitution as a defensive shield against liability.¹¹⁶

Government enforces laws through criminal,¹¹⁷ civil,¹¹⁸ or administrative¹¹⁹ proceedings. Alternatively, many laws are enforced through private civil litigation—a private individual sues to enforce a statutory or common law right and the defendant challenges that law's constitutional

110. 42 U.S.C. § 1983.

111. *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 326–27 (2015); *Ex parte Young*, 209 U.S. 123, 155–56 (1908).

112. 28 U.S.C. §§ 2201–2202.

113. *See June Med. Servs. LLC v. Russo*, 140 S. Ct. 2103, 2112–13, 2117 (2020); *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2300–01 (2016); *Obergefell v. Hodges*, 576 U.S. 644, 675–76 (2015); *Reno v. Am. Civ. Liberties Union*, 521 U.S. 844, 861–62 (1997); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975); *Steffel v. Thompson*, 415 U.S. 452, 454–55, 475 (1974); *see also Ex parte Young*, 209 U.S. at 191; 42 U.S.C. § 1983.

114. *Wasserman*, *supra* note 98, at 1088–89; *see City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 267–68 (1981); *Owen v. City of Independence*, 445 U.S. 622, 651 (1980).

115. *See John Harrison, Jurisdiction, Congressional Power, and Constitutional Remedies*, 86 *Geo. L.J.* 2513, 2516–18 (1998).

116. *See Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 538 (2021).

117. *See, e.g., Bond v. United States*, 564 U.S. 211, 214 (2011); *United States v. Stevens*, 559 U.S. 460, 466–67 (2010); *Lawrence v. Texas*, 539 U.S. 558, 564 (2003); *United States v. Lopez*, 514 U.S. 549, 551–52 (1995); *Texas v. Johnson*, 491 U.S. 397, 399 (1989); *Griswold v. Connecticut*, 381 U.S. 479, 480 (1965).

118. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 176 (2012); *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 594–98 (1975).

119. *See Masterpiece Cakeshop, Inc. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1725 (2018); *Ohio C.R. Comm'n v. Dayton Christian Schs., Inc.*, 477 U.S. 619, 621 (1986); *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 427–29 (1982).

validity and thus enforceability. This includes private claims for defamation,¹²⁰ intentional infliction of emotional distress,¹²¹ other torts,¹²² right of publicity,¹²³ breach of contract,¹²⁴ privacy rights,¹²⁵ property rights,¹²⁶ and employment discrimination.¹²⁷

3. *Judgments and Opinions*

Offensive and defensive postures share one trait—they produce retail judgments and remedies. The judgment in a defensive case resolves that enforcement action against that rights holder. The court denies the enforcing party (the government or private plaintiff) its requested remedy and enters judgment in favor of the defending rights holder. The court does not provide the rights-holder defendant any affirmative remedy beyond the favorable judgment declining to hold her liable under the constitutionally defective law. The injunction in an offensive case prohibits present and future enforcement of the invalid law by the enforcer defendants against the rights-holder plaintiffs. The injunction binds the parties, their officers and agents, and “other persons who are in active concert or participation” with the parties.¹²⁸ It protects the plaintiff rights holder from future enforcement, but should not extend beyond that to protect the universe of nonparties who share similar rights or interests with the parties and who may be subject to future enforcement.¹²⁹ An injunction “should be no more burdensome . . . than necessary to provide complete relief to the plaintiff[]” and should be commensurate with and match the constitutional violation.¹³⁰ An injunction protecting the plaintiff rights holder against future enforcement, regardless of future enforcement against other rights holders, provides that complete and commensurate relief.

120. *See, e.g.*, *Milkovich v. Lorain J. Co.*, 497 U.S. 1, 3 (1990); *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 768–70 (1986); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 256 (1964).

121. *See, e.g.*, *Snyder v. Phelps*, 562 U.S. 443, 448–50 (2011); *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 47–48 (1988); *Gerber v. Herskovitz*, 14 F.4th 500, 504 (6th Cir. 2021).

122. *See, e.g.*, *Thunder Studios, Inc. v. Kazal*, 13 F.4th 736, 739–40 (9th Cir. 2021).

123. *See, e.g.*, *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977); *Doe v. TCI Cablevision*, 110 S.W.3d 363 (Mo. 2003); *see also* Robert C. Post & Jennifer E. Rothman, *The First Amendment and the Right(s) of Publicity*, 130 *YALE L.J.* 86, 95–96 (2020).

124. *See, e.g.*, *Cohen v. Cowles Media Co.*, 501 U.S. 663, 666 (1991); *Barrows v. Jackson*, 346 U.S. 249, 251 (1953).

125. *See, e.g.*, *Fla. Star v. B.J.F.*, 491 U.S. 524, 526–28 (1989); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 471–74 (1975).

126. *See, e.g.*, *Shelley v. Kraemer*, 334 U.S. 1, 4–7 (1948); *Animal Legal Def. Fund v. Vaught*, 8 F.4th 714, 717–18 (8th Cir. 2021).

127. *See, e.g.*, *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2055–59 (2020); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 176–80 (2012); *Skrzypczak v. Roman Cath. Diocese*, 611 F.3d 1238, 1240–41 (10th Cir. 2010); *DeAngelis v. El Paso Mun. Police Officers Ass’n*, 51 F.3d 591, 592–93 (5th Cir. 1995); *Jew v. Univ. of Iowa*, 749 F. Supp. 946, 947, 961 (S.D. Iowa 1990).

128. *FED. R. CIV. P.* 65(d)(2).

129. Wasserman, *supra* note 98, at 1094.

130. *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979); *accord* *Lewis v. Casey*, 518 U.S. 343, 357 (1996); *Hills v. Gautreaux*, 425 U.S. 284, 293–94 (1976); Wasserman, *supra* note 98, at 1094.

Any judgment, offensive or defensive, is accompanied by an opinion, an essay explaining and justifying the judgment.¹³¹ That opinion protects nonparty rights holders and governs nonparty enforcers in actual or threatened future enforcement through its precedential value. It compels or persuades (depending on the level of court) future courts in future proceedings to reach the same conclusion about the law's constitutional invalidity and to reject enforcement against a new set of rights holders.¹³² The law of the opinion and precedent, rather than the judgment in the first action, protects future rights holders. The Supreme Court has established major constitutional precedent in offensive¹³³ and defensive¹³⁴ postures.

C. DEFENSIVE LITIGATION AS ORDINARY MECHANISM OF FEDERAL JUDICIAL REVIEW

The prevailing theme in the SB8 debate is that defensive litigation is insufficient and Texas violated the rule of law by channeling constitutional challenges to a defensive posture.¹³⁵ In insisting there must be “not-very-new procedural bottles that can also adequately hold what is, in essence, very old and very important legal wine,”¹³⁶ Justice Breyer envisioned an offensive procedural bottle, anything else being insufficient. Offensive litigation offers rights holders procedural and remedial advantages.¹³⁷ It is required as to specific laws enforced outside of adjudicative proceedings, such a law prohibiting Black students from attending public schools or prohibiting same-sex couples from obtaining marriage licenses.¹³⁸

But *Whole Woman's Health* recognized pervasive defensive litigation as constitutionally sufficient:

[T]hose seeking to challenge the constitutionality of state laws are not always able to pick and choose the timing and preferred forum for their arguments. This Court has never recognized an unqualified right to pre-enforcement review of constitutional claims in federal court. . . . To this day, many federal constitutional rights are as a

131. Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43, 62 (1993).

132. William Baude, *The Judgment Power*, 96 GEO. L.J. 1807, 1844 (2008); Richard H. Fallon, Jr., *Fact and Fiction About Facial Challenges*, 99 CALIF. L. REV. 915, 923 n.31 (2011); Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1339 (2000); Randy J. Kozel, *The Scope of Precedent*, 113 MICH. L. REV. 179, 185–86 (2014); Lawson & Moore, *supra* note 103, at 1327; Merrill, *supra* note 131, at 43–45, 62; Wasserman, *supra* note 98, at 1108–09.

133. Cases cited *supra* notes 113–114.

134. Cases cited *supra* notes 117–127.

135. See *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 546–47 (2021) (Sotomayor, J., concurring in the judgment in part and dissenting in part); *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2498 (2021) (Sotomayor, J., dissenting).

136. *Whole Woman's Health v. Jackson*, 141 S. Ct. at 2497 (Breyer, J., dissenting).

137. Wasserman & Rhodes, *supra* note 27, at 1052–54.

138. See, e.g., *Obergefell v. Hodges*, 576 U.S. 644, 652 (2015); *Brown v. Bd. of Educ.*, 347 U.S. 483, 487 (1954); Wasserman & Rhodes, *supra* note 27, at 1052.

practical matter asserted typically as defenses to state-law claims, not in federal pre-enforcement cases like this one.¹³⁹

Treating offensive litigation as the “norm” for judicially enforced laws—to say nothing of treating defensive litigation as a non-viable means for vindicating constitutional rights—is a recent phenomenon. Prior to the late 1970s, more cases reached the Supreme Court from a defensive than an offensive posture; offensive cases outnumbered defensive cases for the first time in the two-year period from 1974 to 1976.¹⁴⁰ These numbers support that defensive constitutional litigation is a “traditional mechanism of federal judicial review” through which the Court has issued several watershed constitutional opinions,¹⁴¹ such that having to litigate SB8 cases defensively is neither unheard of nor constitutionally intolerable.

SB8 is extreme. It establishes a new substantive rule that intentionally and unequivocally contradicts existing judicial precedent. The universe of potential plaintiffs is unbounded and limitless, enabling a barrage of lawsuits by random individuals without injury or connection to the challenged abortion and rendering defense prohibitively expensive. Liability is steep. But these are differences of degree, not kind. It should not affect the process through which constitutional validity is litigated and adjudicated.

Arguing that defensive litigation is inherently inadequate to challenge a statute such as SB8 rests on two false constitutional premises: that rights holders are constitutionally entitled to litigate their constitutional rights in an offensive posture and that due process incorporates Article III’s injury requirement, such that the Constitution prohibits states from creating private rights of action absent personal injury. Five situations, outside of abortion, debunk both presumptions and demonstrate why the *Whole Woman’s Health* majority was correct to reject those arguments.

1. Private Civil Litigation

Many private rights—statutory and common law—are enforced via private civil litigation subject to constitutional limitations or defenses.¹⁴² The private plaintiff brings a claim, and the defendant rights holder raises the Constitution as a defense to liability. In none of these cases could a constitutional rights holder go on the offensive to stop enforcement before it begins, as no state executive or public official enforces the law. Having

139. *Whole Woman’s Health v. Jackson*, 142 S. Ct. 522, 537–38 (2021).

140. Arthur D. Hellman, *The Supreme Court and Civil Rights: The Plenary Docket in the 1970’s*, 58 OR. L. REV. 3, 38, 39 tbl.VII, 40, 41 tbl.IX (1979) [hereinafter Hellman, *Supreme Court and Civil Rights*]; Arthur D. Hellman, *The Supreme Court, the National Law, and the Selection of Cases for the Plenary Docket*, 44 U. PITT. L. REV. 521, 577–78, 580 tbl.XI (1983) [hereinafter Hellman, *National Law*].

141. *Whole Woman’s Health v. Jackson*, 142 S. Ct. at 538; *supra* notes 117–27 and accompanying text.

142. *See supra* notes 117–27 and accompanying text.

allegedly violated the law, the rights holder must get sued and raise her constitutional rights as a defense.

*New York Times Co. v. Sullivan*¹⁴³ illustrates this procedural posture. The plaintiff, a Montgomery elected official, sued for defamation in Alabama court, winning a \$500,000 judgment; the Times raised the First Amendment as an unsuccessful defense in state litigation before prevailing on those arguments before the Supreme Court of the United States.¹⁴⁴

Sullivan's was one of five lawsuits arising from one publication, seeking \$3 million in damages.¹⁴⁵ Those lawsuits formed part of a broader campaign among southern public officials and social leaders to utilize plaintiff-friendly state defamation laws and state-court civil litigation as a tool for silencing civil rights leaders and the national press covering civil rights protests and exposing the racist face of Jim Crow.¹⁴⁶ And it worked for a time. By the early 1960s, the pile of potential southern libel judgments against media outlets approached \$300 million (more than \$2.7 billion in 2021),¹⁴⁷ and the threat of litigation prompted the Times to remove its reporters from Alabama for more than a year.¹⁴⁸

The analogy to SB8 is unmistakable.¹⁴⁹ Texas lawmakers sought to use private civil litigation in state court to deter locally unpopular-but-constitutionally protected activity through the threat of multiple big-money lawsuits and judgments. They presumed and hoped that plaintiffs would prevail in some or all these cases, breaking providers under the weight of devastating litigation costs and judgments or causing them to abandon the state rather than face the wave of lawsuits and liability. This would destroy access to reproductive-health care in the state, as Alabama officials hoped to stop media coverage of Jim Crow's racist violence.¹⁵⁰ And it has worked so far. Providers stopped performing prohibited post-heart-beat abortions, abortion after the sixth week of pregnancy became largely unavailable in Texas, and the number of abortions performed dropped by

143. See 376 U.S. 254, 262–64 (1964).

144. *Id.* at 256, 262–64.

145. ANTHONY LEWIS, *MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT* 35 (1st ed. 1991).

146. See *id.* at 35–36; LEE LEVINE & STEPHEN WERMIEL, *THE PROGENY: JUSTICE WILLIAM J. BRENNAN'S FIGHT TO PRESERVE THE LEGACY OF NEW YORK TIMES V. SULLIVAN* 21 (2014); Harry Kalven, Jr., *The New York Times Case: A Note on "the Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 200; Mary-Rose Papandrea, *The Story of New York Times v. Sullivan*, in *FIRST AMENDMENT STORIES* 229, 229, 237–38 (Richard W. Garnett & Andrew Koppelman eds., 2012); Howard M. Wasserman, *A Jurisdictional Perspective on New York Times v. Sullivan*, 107 NW. U. L. REV. 901, 909 (2013).

147. LEWIS, *supra* note 145, at 36; Papandrea, *supra* note 146, at 237.

148. LEWIS, *supra* note 145, at 36.

149. We explore the parallel in the third article in this series. See generally Howard M. Wasserman & Charles W. "Rocky" Rhodes, *Solving the Procedural Puzzles of the Texas Heartbeat Act and Its Imitators: New York Times v. Sullivan as Historical Analogue*, 60 HOUS. L. REV. (forthcoming 2022) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4029084 [<https://perma.cc/X58D-2FA5>].

150. See LEWIS, *supra* note 145, at 35–36.

more than half.¹⁵¹

Critics distinguish SB8 because the heartbeat ban facially contradicts controlling judicial precedent, whereas constitutional applications of defamation law are conceivable. But consider the privately enforced right of publicity. Robert Post and Jennifer Rothman describe the “chaos” surrounding this tort, including disputes over whether this tort can exist under the First Amendment and any applicable First Amendment limits on the basic concept.¹⁵² They survey multiple approaches, describing courts as “flailing about in a sea of inconsistent, vague, and unhelpful First Amendment tests.”¹⁵³ For our purposes, this flailing occurs in a defensive posture but never in an offensive posture—Post and Rothman describe cases in which a private person sues to vindicate its publicity rights and the speaker defends by arguing that the First Amendment insulates him from liability.

2. SB8 Predecessors

Texas is not the first state to attempt to enforce its laws through private civil litigation by private actors devoid of personal injury or connection. SB8 recalls a different historical analogue—California’s former consumer protection and false-advertising laws and the litigation of *Kasky v. Nike, Inc.*¹⁵⁴

Prior to 2004, California’s unfair competition and false advertising laws authorized “any person acting for the interests of . . . the general public” to bring an action to enforce laws against false advertising and other consumer harms. The plaintiff need not have been injured by the specific advertisement nor have any connection to the violation or the violator.¹⁵⁵ Marc Kasky, a politically active consumer advocate,¹⁵⁶ sued Nike in state court for false advertising over press releases responding to and denying reports about overseas factory working conditions; Nike defended by arguing that these statements, even if false, were noncommercial political speech enjoying full First Amendment protection.¹⁵⁷ The California Supreme Court reversed, holding that Nike’s press releases were commercial speech and subject to regulation under consumer protection laws if false.¹⁵⁸ After the Supreme Court of the United States dismissed certiorari as improvidently granted,¹⁵⁹ the case settled for more than \$1.5 mil-

151. See Weber, *supra* note 78; *supra* notes 76–79 and accompanying text.

152. Post & Rothman, *supra* note 123, at 125–32.

153. *Id.* at 132.

154. See 45 P.3d 243, 249–50 (Cal. 2002).

155. *Id.* at 249–50 (citing CAL. BUS. & PROF. CODE §§ 17204, 17535 (West 2003) (amended 2004)).

156. Ronald K.L. Collins & David M. Skover, *The Landmark Free Speech Case That Wasn't*, 54 CASE W. RESV. L. REV. 965, 971 (2004).

157. *Kasky*, 45 P.3d at 248.

158. *Kasky*, 45 P.3d at 262–63; see also Collins & Skover, *supra* note 156, at 986–87; Trevor W. Morrison, *Private Attorneys General and the First Amendment*, 103 MICH. L. REV. 589, 591 (2005).

159. *Nike, Inc. v. Kasky*, 539 U.S. 654, 655 (2003) (per curiam); Collins & Skover, *supra* note 156, at 1014.

lion and recurring program funding of \$500,000 per year.¹⁶⁰

Like the Times in *New York Times Co. v. Sullivan* or right-of-publicity defendants, Nike never contemplated or had an opportunity to pursue offensive litigation. Nor did anyone suggest that Nike had a federal right to do so or that requiring it to litigate defensively in state court thwarted judicial review. Nike defended in state court, presenting its federal constitutional arguments for state-court adjudication and seeking ultimate review of the adverse state judgment in the Supreme Court, a typical and acceptable strategy.

Similarities to SB8 remain obvious. California's law opened Nike to potential wide-ranging liability from anyone choosing to bring suit. Kasky was as well-known as a consumer activist in California¹⁶¹ as are Mark Lee Dickson or Texas Right to Life as anti-reproductive-freedom activists in Texas.¹⁶² Kasky had no more connection to Nike's statements¹⁶³ than Dickson has to any post-heartbeat abortion.¹⁶⁴ Nike issued its statements denying those labor practices having no idea who from among the millions of people in the state might sue,¹⁶⁵ just as Whole Woman's Health has no idea who from among millions across the country might seek damages for one abortion.

Many expected *Nike* to establish precedent on the line between corporate political and commercial speech and the different protections accorded to each.¹⁶⁶ That hope fizzled, partly due to the case's unusual procedural posture—it did not present the appropriate vehicle because the plaintiff had no injury and no connection to the speech at issue.¹⁶⁷ But *Nike* presented a significant First Amendment issue, no less important than the reproductive-freedom questions surrounding SB8's heartbeat ban. And some commentators believed it was as obvious that Nike had engaged in protected political speech for which it could not be liable¹⁶⁸ as it is obvious that a state cannot prohibit abortions at six-weeks of pregnancy.

Liberal and anti-corporate activists cheered Kasky's victory and the substantial monetary settlement it produced¹⁶⁹ through a law authorizing private civil litigation by "any person" absent personal injury, connection, or interest. No one questioned whether California could empower a random person to sue to stop Nike's alleged false statements or whether

160. Collins & Skover, *supra* note 156, at 1020.

161. *See id.* at 971.

162. *See* Wax-Thibodeaux, *supra* note 43.

163. *See* Collins & Skover, *supra* note 156, at 971.

164. *See* Wax-Thibodeaux, *supra* note 43.

165. *See* CAL. BUS. & PROF. CODE §§ 17204, 17535 (West 2003) (amended 2004); Morrison, *supra* note 158, at 651.

166. Morrison, *supra* note 158, at 631–32.

167. *See* Nike, Inc. v. Kasky, 539 U.S. at 658–61 (Stevens, J., concurring); *id.* at 667–68 (Breyer, J., dissenting).

168. Thomas C. Goldstein, Nike v. Kasky and the Definition of "Commercial Speech," 2003 CATO SUP. CT. REV. 63, 64–65.

169. Collins & Skover, *supra* note 156, at 988.

Nike could be compelled to defend its First Amendment interests. Everyone accepted California's law, including its enforcement, as valid.

But the propriety of a mechanism for enforcing state law cannot rest on the political valence of the constitutional right exercised or on whether one supports the interests of the target rights holders. One cannot cheer private enforcement of California's consumer protection laws and its outcome while criticizing SB8's identical enforcement mechanisms and their potential outcomes.

3. *From Offense to Defense*

Two situations—one historic and one ongoing—illustrate the common use of defensive litigation when offensive litigation becomes unavailable or impossible for various reasons. These examples demonstrate the ideological range on these procedural issues.

a. The Story of Connecticut's Contraception Ban

In *Poe v. Ullman*¹⁷⁰ in 1961, married couples and a doctor sued the Connecticut attorney general, challenging the constitutional validity of the state's ban on married couples using contraception and on providing advice and information about contraception to married couples.¹⁷¹ A Supreme Court plurality reasoned that the action was not ripe because the plaintiffs could not show that the attorney general intended to immediately enforce the law, largely because the state had enforced it once in its eighty years of existence despite open and notorious sales of contraception in the state.¹⁷² Justice Brennan concurred in the judgment and provided the controlling fifth vote.¹⁷³ He argued that the married-couple plaintiffs did not reasonably fear prosecution because the law did not target their purchase and use of contraception; the law aimed at institutional clinics providing birth control on a large scale.¹⁷⁴ The Court could address the constitutional issue when the state enforced against the large clinics with which the law was concerned, producing a real controversy for judicial resolution.¹⁷⁵

Six months after *Poe*, Estelle Griswold, executive director of the Planned Parenthood League of Connecticut, was arrested and prosecuted for providing contraception information to married couples.¹⁷⁶ The violation was intentional, designed to create a test case by triggering enforcement against the type of clinic that Justice Brennan insisted was the law's

170. 367 U.S. 497 (1961) (plurality opinion).

171. *Id.* at 498–500.

172. *Id.* at 501–02.

173. *Id.* at 509 (Brennan, J., concurring in the judgment); see also *Marks v. United States*, 430 U.S. 188, 193 (1977); Richard M. Re, *Beyond the Marks Rule*, 132 HARV. L. REV. 1932, 1950 (2019).

174. *Poe*, 367 U.S. at 509 (Brennan, J., concurring in the judgment).

175. *Id.*

176. *Griswold v. Connecticut*, 381 U.S. 479, 480 (1965); Lackland H. Bloom, Jr., *The Legacy of Griswold*, 16 OHIO N.U. L. REV. 511, 513–14 (1989).

real target.¹⁷⁷ The Court reversed Griswold's conviction on appeal from the Connecticut Supreme Court, concluding that the Fourteenth Amendment protects the right of married couples to learn about, access, and use contraception.¹⁷⁸

For our purposes, the point is that the "real controversy flare[d] up"¹⁷⁹ in a defensive posture. Griswold violated the law (for the purpose of creating defensive litigation), Connecticut initiated criminal proceedings in state court to enforce the law, Griswold defended on federal constitutional grounds, and the Court agreed with her position at the end of the process, invalidating the state's enforcement of the law and the imposition of criminal liability. In refusing to allow the offensive pre-enforcement litigation by potential clients, *Poe* forced Griswold into that defensive position. But she was able to vindicate her interests and her clients' rights four years later.

b. The Story of *Masterpiece Cakeshop*

In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, the Supreme Court held that baker Jack Phillips could not be administratively sanctioned under a state public-accommodations law for refusing to bake a wedding cake for a same-sex couple, due in part to expressions of religious animus within state civil-rights-commission proceedings.¹⁸⁰

While that case was pending before the Court, transgender attorney and activist Autumn Scardina requested a custom cake with a blue exterior and pink interior to celebrate her birthday and her male-to-female transition.¹⁸¹ Phillips refused to make the requested cake, citing his First Amendment objections to the message.¹⁸² Scardina filed a complaint with the Colorado Civil Rights Commission, which found probable cause that the bakery had discriminated because of her transgender status.¹⁸³

Following the Supreme Court decision, Phillips went on the offensive, filing an action in federal court to enjoin the Commission from proceeding with Scardina's complaint, arguing the new proceeding violated his First Amendment rights.¹⁸⁴ The district court declined to abstain under *Younger v. Harris*¹⁸⁵ or to defer to the state administrative proceeding.¹⁸⁶ The Commission dismissed the administrative action, likely recognizing that the federal court would find the new proceeding violated Phillips's

177. Bloom, *supra* note 176, at 511–12.

178. *Griswold*, 381 U.S. at 486.

179. *See Poe*, 367 U.S. at 509 (Brennan, J., concurring in the judgment).

180. *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1723–24 (2018); *see also id.* at 1736–37 (Gorsuch, J., concurring).

181. *Masterpiece Cakeshop Inc. v. Elenis*, 445 F. Supp. 3d 1226, 1236 (D. Colo. 2019).

182. *Id.*

183. *Id.* 1236–37.

184. *Id.* at 1232.

185. *Id.* at 1239–42; *see Younger v. Harris*, 401 U.S. 37 (1971).

186. *Masterpiece Cakeshop Inc.*, 445 F. Supp. 3d at 1239–42.

First Amendment rights and enjoin it.¹⁸⁷ The absence of actual or threatened enforcement of state law therefore deprived Phillips of his opportunity to pursue his constitutional rights in an offensive posture in federal court. The Commission would not enforce because the federal court likely would enjoin such proceedings. But the absence of Commission enforcement eliminated Phillips's federal offensive litigation.

With public enforcement off the table, Scardina filed a private state-court action alleging discrimination under the state public accommodations law.¹⁸⁸ Phillips defended on First Amendment free speech and free exercise grounds.¹⁸⁹ The state trial court rejected the defense and ruled for the plaintiff, imposing a \$500 penalty.¹⁹⁰ In other words, the Commission staying its hand forced Phillips into defensive litigation (not his preferred posture) in state court (not his preferred forum), where his constitutional defense failed.

Providers occupy the same procedural position as Phillips. The absence of public enforcement means the absence of preemptive pre-enforcement offensive litigation, forcing providers to raise their constitutional rights as defenses in state court. Phillips faced this situation because the government declined to enforce in one case, whereas SB8 creates this situation in all cases by precluding government enforcement in favor of exclusive private civil litigation. But they rest on a shared understanding—there is nothing procedurally improper about allowing private enforcement of state law, about making a purported constitutional rights holder litigate those rights defensively in that private civil action, or about eliminating the opportunity to litigate in a rights holder's preferred time, forum, and posture.¹⁹¹

SB8 remains extreme in the boundless universe of potential plaintiffs and the size of potential monetary liability. But a *Masterpiece Cakeshop* situation could match SB8's extremes. Imagine a coordinated campaign in which hundreds of people request custom cakes from Masterpiece Cakeshop with pro-LGBTQ+ messages and sue the bakery for \$500 (rather than going through the Civil Rights Commission, which might be enjoined from enforcement) when it refuses to fill their orders. While each plaintiff would have suffered an injury (unlike most SB8 plaintiffs) in the discriminatory denial of service, the injury is simple to establish—one phone call requesting a custom cake knowing the bakery will refuse. And where a reproductive-health provider can be liable one time to one

187. See Complaint ¶¶ 28–29, *Scardina v. Masterpiece Cakeshop Inc.*, No. 2019-CV-32214 (Dist. Ct. Colo. June 15, 2021).

188. *Id.*

189. See Defendants' Motion to Dismiss Complaint Under Colo. R. Civ. P. 12(b)(1), 12(b)(5), and 9(b) at 14–17, 23–25, *Scardina*, No. 2019-CV-32214.

190. Findings of Fact and Conclusions of Law at 27, *Scardina v. Masterpiece Cakeshop Inc.*, No. 19-CV-32214 (Dist. Ct. Colo. June 15, 2021), <https://adflegal.org/sites/default/files/2021-06/Scardina%20v.%20Masterpiece%20-%20District%20court%20findings%20of%20fact%20and%20conclusions%20of%20law%20-%202016-2021.pdf> [<https://perma.cc/C85C-9Z8V>].

191. See *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 537–38 (2021).

plaintiff for one abortion, Phillips could be liable for each cake he refuses to bake. While the available damages are less than the \$10,000 per abortion available under SB8,¹⁹² hundreds of \$500 dollar judgments accumulate.

4. SB8 Imitators

a. Direct Imitators

Two years after the Court dismissed cert in *Nike* and the case settled, California voters amended state law,¹⁹³ leaving enforcement to governments, government officials, and persons who had suffered personal injury and lost money or property from unfair competition.¹⁹⁴ This change could reflect conclusive rejection of private enforcement by uninjured and disconnected plaintiffs.

Nevertheless, SB8 has prompted predictions or fears of imitators. States have introduced, considered, or threatened copycat laws on abortion, firearms, and a range of issues.¹⁹⁵ Justice Kavanaugh worried about expanding the concept.¹⁹⁶ In its complaint, Whole Woman's Health raised the prospect of this slippery slope:

Today it is abortion providers and those who assist them; tomorrow it might be gun buyers who face liability for every purchase. Churches could be hauled into far-flung courts to defend their religious practices because someone somewhere disagrees with them. Same-sex couples could be sued by neighbors for obtaining a marriage license. And Black families could face lawsuits for enrolling their children in public schools.¹⁹⁷

As Justice Sotomayor closed her *Whole Woman's Health* dissent:

New permutations of S. B. 8 are coming. In the months since this Court failed to enjoin the law, legislators in several States have discussed or introduced legislation that replicates its scheme to target locally disfavored rights. What are federal courts to do if, for example, a State effectively prohibits worship by a disfavored religious minority through crushing "private" litigation burdens amplified by skewed court procedures, but does a better job than Texas of disclaiming all enforcement by state officials? Perhaps nothing at all, says this Court.¹⁹⁸

192. Compare COLO. REV. STAT. ANN. § 24-34-602(1)(a) (West 2021), with TEX. HEALTH & SAFETY CODE ANN. § 171.208(b)(2).

193. Henry N. Butler & Jason S. Johnston, *Reforming State Consumer Protection Liability: An Economic Approach*, 2010 COLUM. BUS. L. REV. 1, 22 (2010).

194. CAL. BUS. & PROF. CODE §§ 17204, 17535 (West 2021).

195. *Supra* notes 33–35 and accompanying text.

196. Transcript of Oral Argument, *supra* note 17, at 72–75 (questions from Justice Kavanaugh).

197. Complaint for Declaratory and Injunctive Relief - Class Action, *supra* note 3, ¶ 18.

198. *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 551 (2021) (Sotomayor, J., concurring in the judgment in part and dissenting in part) (footnote omitted).

Or consider a hypothetical law with a different political valence. A state wants to eliminate public displays and expressions of racial inequality by creating a private tort action for “any person” over the presentation of a racially derogatory or discriminatory idea; remedies include statutory damages of \$10,000 per expression, attorney’s fees, and an injunction requiring removal of the offensive racist message. This law violates the freedom of speech as judicially interpreted (which protects racist and racially offensive rhetoric outside some narrow categories)¹⁹⁹ to the same degree that SB8 violates the right to reproductive freedom.

The shared point of this law and SB8 is to threaten or sue rights holders into silence or bankruptcy for engaging in constitutionally protected but socially disfavored activity. A would-be speaker with a racially offensive message (e.g., a person who intends to post an “All Lives Matter” sign on her lawn)²⁰⁰ stands in the same position as a provider seeking to help women terminate an unwanted pregnancy after detection of a fetal heartbeat.

And the law creates identical circumstances to those under SB8. The speaker cannot bring an offensive action to declare this law invalid or stop its enforcement, as there is no responsible executive officer to sue and no one for the court to enjoin. *Whole Woman’s Health* properly rejected the “court-and-clerk” theory of suing state clerks to prevent them from filing or state judges to prevent them from adjudicating prospective cases.²⁰¹ The speaker must continue to present her racist message, get sued by a random offended person, and raise the First Amendment as a defense to tort liability. Or the speaker will refrain from posting the sign for fear of suit and liability.

b. Tort Imitators

The slippery slope is not limited to Justice Sotomayor’s feared SB8-type laws deputizing “any person” private plaintiffs to sue without personal injury. In fact, those laws may pose less of a threat, because rights holders may be able to pursue some offensive federal litigation against deputized “any persons.”²⁰² The larger problem is that states could create a range of clearly constitutionally invalid ordinary tort laws requiring injury.

199. See *Matal v. Tam*, 137 S. Ct. 1744, 1764–65 (2017); *Virginia v. Black*, 538 U.S. 343, 366–67 (2003); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 392 (1992); Zachary S. Price, *Our Imperiled Absolutist First Amendment*, 20 U. PA. J. CONST. L. 817, 824 (2018); Charles W. “Rocky” Rhodes, *The First Amendment Structure for Speakers and Speech*, 44 SETON HALL L. REV. 395, 407–18 (2014).

200. See Karen Stollznow, *Why Is It So Offensive to Say “All Lives Matter”?*, THE CONVERSATION (Jan. 13, 2021, 12:26 AM), <https://theconversation.com/why-is-it-so-offensive-to-say-all-lives-matter-153188> [https://perma.cc/SCC2-V39T].

201. See Wasserman & Rhodes, *supra* note 27, at 1064; *supra* note 68 and accompanying text.

202. Wasserman & Rhodes, *supra* note 27, at 1077–83.

Return to defamation and *New York Times Co. v. Sullivan*.²⁰³ Commentators regard it as the Court's most important free speech case and the genesis of the modern speech-protective First Amendment.²⁰⁴ The Court recognized the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."²⁰⁵

But scholars,²⁰⁶ litigants,²⁰⁷ and judges²⁰⁸ have criticized the decision and called for reconsidering or overruling it in a changing media, political, and expressive environment. Imagine that a state, observing and agreeing with these criticisms, amends its defamation law to align with its preferred policies, to expand the universe of speech that can form the basis for civil liability, to create the litigation necessary to reconsider *New York Times* and its progeny, and to establish a new First Amendment regime.

That state might begin small, requiring the defendant to prove truth by a preponderance of evidence, rather than the plaintiff prove falsity by clear and convincing evidence.²⁰⁹ It might relax the "of and concerning" element, allowing liability for speech that does not clearly identify the plaintiff by name or description²¹⁰ and expanding the universe of people who might sue over false statements about general conduct. More broadly, the state might confront the central holding of *New York Times*—limiting the actual malice standard to public officials but inappli-

203. A majority of states lack criminal defamation laws and those that do rarely enforce them; criminal defamation enforcement is thought of as "essentially dead," although some states might bring it back. See Eugene Volokh, *What Cheap Speech Has Done: (Greater) Equality and Its Discontents*, 54 U.C. DAVIS L. REV. 2303, 2313–15 (2021). Offensive litigation is possible to challenge a criminal defamation law and stop prosecution, providing judicial precedent to defeat future civil actions. But a court may not let the offensive case proceed given the unlikelihood of prosecution. Cf. *Poe v. Ullman*, 367 U.S. 497, 501–02 (1961) (plurality opinion).

204. LEVINE & WERMIEL, *supra* note 146, at 31; LEWIS, *supra* note 145, at 5–8; Kalven, *supra* note 146, at 221 n.125; Burt Neuborne, *The Gravitational Pull of Race on the Warren Court*, 2010 SUP. CT. REV. 59, 79; Papandrea, *supra* note 146, at 230.

205. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); see also LEVINE & WERMIEL, *supra* note 146, at 28; Papandrea, *supra* note 146, at 248.

206. David A. Logan, *Rescuing Our Democracy by Rethinking New York Times Co. v. Sullivan*, 81 OHIO ST. L.J. 759, 761–62 (2020); David McGowan, *A Bipartisan Case Against New York Times v. Sullivan*, 1 J. FREE SPEECH L. 509, 541 (2022); Papandrea, *supra* note 146, at 256–61.

207. *Nunes v. Lizza*, 12 F.4th 890, 899 (8th Cir. 2021); *Coral Ridge Ministries, Inc. v. Amazon.com, Inc.*, 6 F.4th 1247 (11th Cir. 2021); *Nunes v. WP Co.*, 513 F. Supp. 3d 1, 9–10 (D.D.C. 2020); *Palin v. New York Times*, 482 F. Supp. 3d 208, 214–15 (S.D.N.Y. 2020).

208. See, e.g., *Berisha v. Lawson*, 141 S. Ct. 2424, 2425 (2021) (mem.) (Thomas, J., dissenting from denial of certiorari); *id.* at 2427–30 (Gorsuch, J., dissenting from denial of certiorari); *McKee v. Cosby*, 139 S. Ct. 675, 676 (2019) (mem.) (Thomas, J., concurring in denial of certiorari); *Tah v. Glob. Witness Publ'g, Inc.*, 991 F.3d 231, 251–56 (D.C. Cir. 2021) (Silberman, J., dissenting in part).

209. See *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775–77 (1986).

210. See *Rosenblatt v. Baer*, 383 U.S. 75, 81–83 (1966); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 290–92 (1964); LEVINE & WERMIEL, *supra* note 146, at 17, 26, 28–30.

cable to people merely because of their fame,²¹¹ or replacing actual malice with a lesser state of mind,²¹² so long as the plaintiff shows some fault.²¹³

Alternatively, that state might go big in its push towards a new First Amendment. It might attempt to regulate “fake news,” proscribing (through civil litigation) “deliberate, public communication as truthful of a verifiably false and material statement of fact regarding a matter of public concern,”²¹⁴ despite First Amendment rejection of government power to define political truth.²¹⁵ It could make privately actionable expression of insulting, demeaning, or negative statements about government and public officials, regardless of truth or accuracy; such a law ignores vital First Amendment protection for utterances that do not state actual facts,²¹⁶ the rule that government cannot proscribe publication of truthful, lawfully obtained information,²¹⁷ and the First Amendment’s categorical rejection of seditious libel and actionable criticism of government.²¹⁸

As with SB8’s fetal-heartbeat ban, this revised defamation law suffers from unavoidable constitutional defects. Each “flagrantly” and “patently” runs afoul of existing judicial precedent. Each opens the door to broad liability for constitutionally protected conduct at the hands of a broad range of plaintiffs. Each has a chilling effect on rights holders fearing suit and liability. Each enables a new campaign of burdensome litigation reminiscent of 1960s Alabama.

Yet none can be challenged offensively. The altered defamation scheme would be enforced through private civil litigation, not by any public official. No one would expect federal courts to enjoin court clerks or state judges from allowing state litigation to proceed. A speaker or media outlet challenges these laws defensively—publish violative statements, get sued, and raise the First Amendment as a defense.

5. Growing Demand for Offensive Litigation

The presumption of and demand for offensive constitutional litigation is growing. Consider “ag-gag” laws,²¹⁹ which attempt to restrain animal-

211. Logan, *supra* note 206, at 812; *but see* Milkovich v. Lorain Journal Co., 497 U.S. 1, 14–15 (1990); Curtis Publishing Co. v. Butts, 388 U.S. 130, 164 (1967) (Warren, C.J., concurring in the result).

212. *N.Y. Times Co.*, 376 U.S. at 279–80; *see* Gertz v. Robert Welch, Inc., 418 U.S. 323, 347–48 (1974); Logan, *supra* note 206, at 812; McGowan, *supra* note 206, at 541.

213. McGowan, *supra* note 206, at 541.

214. Alan K. Chen, *Free Speech, Rational Deliberation, and Some Truths About Lies*, 62 WM. & MARY L. REV. 357, 367 (2020).

215. *Id.* at 379.

216. *See* Milkovich v. Lorain J. Co., 497 U.S. 1, 20–21 (1990); Hustler Mag., Inc. v. Falwell, 485 U.S. 46, 51–52 (1988).

217. *See* Fla. Star v. B.J.F., 491 U.S. 524, 541 (1989).

218. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 275–76 (1964); Kalven, *supra* note 146, at 204–05; Rhodes, *supra* note 199, at 416–17.

219. Rebecca Aviel, *Remedial Commandeering*, 54 U.C. DAVIS L. REV. 1999, 2071–72 (2021); Alan K. Chen, *Cheap Speech Creation*, 54 U.C. DAVIS L. REV. 2405, 2439 (2021).

rights activists and other critics of commercial farming and slaughterhouse practices from engaging in undercover investigations to gather and publicize those practices.²²⁰ Some states impose criminal penalties for recording on private property; groups challenge those laws via proper offensive actions to enjoin enforcement by responsible state executive officials.²²¹

Arkansas took a different approach. It prohibited knowingly gaining access to a “nonpublic area of a commercial property” and engaging in any act that “exceeds the person’s authority,”²²² prohibiting animal-rights groups from hiring investigators who obtain employment with the farm not to work there but to collect information through observation and recording of business activities.²²³ The law gave the owner or operator of that commercial property a private right of action for damages and equitable relief.²²⁴

The analogy to SB8 again should be clear. Arkansas watched states attempt to regulate activist conduct and protect agricultural producers through criminal law and it watched federal courts enjoin public enforcement through offensive litigation.²²⁵ It turned to tort law and private civil enforcement in pursuit of that goal. Arkansas limited the civil action to those whose property interests were harmed, rather than deputizing “any person” with an axe to grind against animal-rights activists. But the shared point is using the threat of civil litigation and liability to stop unwanted-but-constitutionally protected conduct.

The Animal Legal Defense Fund, an animal-welfare organization, demanded to litigate offensively and in federal court.²²⁶ It sued a chicken slaughterhouse and a pig farm (owned by the state legislator who had introduced and voted for the law); the Fund planned to send undercover investigators into employment positions to investigate those businesses and uncover evidence of wrongdoing.²²⁷ A divided Eighth Circuit held that the Fund had standing and allowed the offensive action to proceed, because the plaintiffs showed an imminent intent to investigate the defendant farms and a reasonable fear they would be sued for doing so.²²⁸

The court missed the mark in treating this as an ordinary offensive pre-enforcement action. The immediacy of the rights holder’s plans to engage in prohibited-but-constitutionally protected conduct and the likelihood of enforcement are relevant when a rights holder seeks to enjoin a responsi-

220. Aviel, *supra* note 219, at 2071–72; Chen, *supra* note 219, at 2439–40.

221. *See, e.g.*, Animal Legal Def. Fund v. Reynolds, 8 F.4th 781, 783 (8th Cir. 2021); Animal Legal Def. Fund v. Wasden, 878 F.3d 1184, 1189–90 (9th Cir. 2018); Aviel, *supra* note 219, at 2072; Chen, *supra* note 219, at 2439–40.

222. ARK. CODE ANN. § 16-118-113(b) (West 2017); Animal Legal Def. Fund v. Vaught, 8 F.4th 714, 717 (8th Cir. 2021).

223. Vaught, 8 F.4th at 717–18.

224. ARK. CODE ANN. § 16-118-113(b), (e); Vaught, 8 F.4th at 717, 721.

225. *See supra* note 221.

226. Vaught, 8 F.4th at 717–18.

227. *Id.*

228. *Id.* at 720–21; *id.* at 722 (Shepherd, J., dissenting).

ble executive-branch official from enforcing the law through public mechanisms.²²⁹ The court skipped the real and obvious problem with this suit—neither private property owner/would-be tort plaintiff acted under color of state law in pursuing civil litigation and remedies, therefore neither was a proper target for an offensive § 1983 action.²³⁰ The owners raised the issue in passing, but the majority passed this as a merits issue for the district court to address in the first instance.²³¹

Animal Legal Defense demonstrates that the presumption of offensive litigation blinds plaintiffs and courts. The Fund took as a given that constitutional litigation is offensive and occurs pre-enforcement in federal court and targets the potential enforcer, regardless of the nature of the enforcer or enforcement. The court took as a given that offensive litigation is appropriate, subject to the threshold issue of the immediacy of threatened enforcement, regardless of the nature of the enforcer or enforcement.

* * *

During argument in *Whole Woman's Health*, Texas Solicitor General Judd Stone pushed the analogy between private SB8 litigation and tort claims, including *New York Times* and *Masterpiece Cakeshop*.²³² The counter is that SB8 is not tort law, because tort law remedies personal injuries, whereas anyone can be an SB8 plaintiff regardless of personal harm or interest. But that distinction rests on two false premises.

The first is that the burden of defending private civil litigation to enforce constitutionally dubious laws is limited to SB8-type laws. The historic example of *New York Times* and the current examples of *Masterpiece Cakeshop*, publicity torts, or the Arkansas ag-gag law belie that premise.

The second is that due process incorporates Article III's personal-injury requirement—the Constitution limits state power to decide who can sue to enforce the state-law rights it creates, such that states can authorize private suits only by those who have suffered injury in a “personal and individual” manner as in federal court.²³³ But this has never been the law. State courts are not governed by federal justiciability doctrines and can allow plaintiffs to sue on broader or less personal injuries.²³⁴ This principle is so settled that it passes unmentioned. When California authorized “any person” to sue in the public interest over false advertising—the clos-

229. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159–60 (2014) (citing *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)); *Wasserman & Rhodes*, *supra* note 27, at 1055–57.

230. *See Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 622 (1991); *Dennis v. Sparks*, 449 U.S. 24, 28 (1980); *Wasserman & Rhodes*, *supra* note 27, at 1077–78.

231. *Vaught*, 8 F.4th at 721.

232. Transcript of Oral Argument, *supra* note 17, at 60–61.

233. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

234. *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989); CHARLES W. “ROCKY” RHODES, *THE TEXAS CONSTITUTION IN STATE AND NATION: COMPARATIVE STATE CONSTITUTIONAL LAW IN THE FEDERAL SYSTEM* 91–97 (2014); *infra* Part IV.C.1.

est previous analogue to SB8—Justices recognized that such a random plaintiff would not have standing in federal court.²³⁵ But the Court never suggested that California overstepped constitutional bounds by authorizing uninjured, disconnected individuals to sue in state court to enforce state law.

Constitutional rights holders prefer to litigate offensively when possible, with good reason. Controlling the time, manner, and forum and avoiding the risk of liability and sanction make it an attractive option. But it is never the sole option. The examples in this Part demonstrate that rights holders can, have, and at times must litigate significant constitutional issues in a defensive posture, including in state court. This includes cases in which states authorize suit by random interested individuals without personal injury or stake and cases in which the state eliminates public enforcement of the law or renders offensive challenges to enforcement legally impossible.

Justice Breyer insisted there must be “not-very-new procedural bottles that can also adequately hold what is, in essence, very old and very important legal wine.”²³⁶ While he did not acknowledge it, defensive litigation offers the procedural bottle to protect the old and important right to reproductive freedom. Defensive litigation is consistent with the rule of law, the Constitution, and federal judicial review. However unusual or extreme in its substantive provisions, SB8 does not burden providers in asserting constitutional rights in a way distinct from how comparable or analogous defensive situations burden other rights holders.

This debate cannot escape the political valence of the constitutional rights at issue. Political preferences may produce different reactions to SB8 imitators. Many who decry the costs, burdens, and expenses that SB8 imposes on providers and their patients in having to proceed in a defensive posture would be concerned about an animal-welfare organization having to defend a trespass claim. They may be less concerned that Nike, a racist speaker, or Masterpiece Cakeshop is compelled to litigate its constitutional rights defensively in state court in the face of substantial liability. Many concerned about providers losing in state court may be pleased that Phillips lost in state court. But procedural propriety cannot turn on the substantive rights adjudicated or on one’s views of those substantive rights.

Critics of the resolution of the *Whole Woman’s Health* litigation²³⁷ accused the Court of political hypocrisy. They presumed that the five-Justice majority would have enjoined a law with a different political valence (e.g., California banning gun purchases and authorizing private damages

235. *Nike, Inc. v. Kasky*, 539 U.S. 654, 656 (2003) (Stevens, J., concurring); *id.* at 667 (Breyer, J., dissenting).

236. *Whole Woman’s Health v. Jackson*, 141 S. Ct. 2494, 2497 (2021) (Breyer, J., dissenting).

237. *In re Whole Woman’s Health*, 142 S. Ct. 701 (2022); *Whole Woman’s Health v. Jackson*, 142 S. Ct. 522 (2021); *Whole Woman’s Health v. Jackson*, 141 S. Ct. 2494 (2021); *supra* notes 70–77 and accompanying text.

suits against gun owners) without worrying about proper defendants, proper framing, or other procedural concerns. Whether that criticism is accurate, the solution to perceived political inconsistency is not for the Court to err more often. It is not that the Court was wrong in *Whole Woman's Health*, but that the Court would be wrong to grant relief in a procedurally identical case. It should leave the similarly situated but more-favored rights holders to litigate in the same defensive posture.

IV. DEFENSIVE LITIGATION

SB8's exclusive reliance on private rather than public enforcement keeps providers in a defensive posture. Unable to pursue offensive litigation to stop enforcement of the law, other than in limited contexts,²³⁸ providers wait for "any person" to commence an enforcement action for damages and other relief. They then argue that the fetal-heartbeat ban is constitutionally invalid and the enforcement action should be dismissed or resolved in their favor; they cannot be liable for or subject to civil remedies under a constitutionally invalid law. A favorable judgment does not provide an affirmative remedy, such as an injunction protecting providers against future enforcement,²³⁹ only the end of the current enforcement effort. A possible federal forum remains at the end of this defensive process through review of the final judgment of the state's highest court by the Supreme Court of the United States.²⁴⁰

This process requires two events—a provider must violate the law and "any person" must sue that provider under the statute. In the early months of SB8's existence, neither was happening, other than Dr. Braid's single announced procedure and the three lawsuits that followed.²⁴¹ Our focus remains on SB8 and the process of defending those claims. But many state laws are enforced through similar private litigation. SB8 copycats appear inevitable.

A. LOOKING FOR A LAWSUIT

With SB8 in effect and no broad injunction prohibiting enforcement, providers had three options: obey the law and cease performing the prohibited procedures; continue medical practice as usual by performing prohibited pre-viability, post-heartbeat abortions and deal with the torrent of lawsuits; or perform one post-heartbeat abortion to set up one "test case" through which to litigate the constitutional question, while limiting potential liability.

238. Wasserman & Rhodes, *supra* note 27, at 1060–64; *see supra* note 67 and accompanying text.

239. Wasserman & Rhodes, *supra* note 27, at 1060–64.

240. *See* 28 U.S.C. § 1257.

241. *Supra* notes 83–88 and accompanying text.

1. *No Litigation, Just the Threat*

Most providers followed the first approach. Deterred by the potential for ruinous financial liability from a multitude of lawsuits and substantial judgments, most providers complied with the law and ceased performing post-heartbeat abortions, other than a brief two-day respite under the *United States v. Texas* preliminary injunction.²⁴² For anti-choice activists, that was the point. They never intended or expected anyone to sue or to enforce the law; the goal was to use the threat of expensive and burdensome litigation and liability to compel compliance with the ban and to halt all post-heartbeat abortions (and thus a substantial share of all abortions) in the state.²⁴³ This placed providers in a bind. Without the option of offensive litigation, they must litigate their rights defensively. But with no actual civil action filed, they had no opportunity to do so.

This marks an important distinction between public and private enforcement. Offensive litigation allows rights holders to establish their constitutional rights without having to act “at their peril” by engaging in protected-but-statutorily prohibited conduct, violating the law, and subjecting themselves to the risks of arrest, prosecution, liability, and sanction.²⁴⁴ In *Ex parte Young*,²⁴⁵ the case that recognized offensive constitutional litigation,²⁴⁶ the state argued that defensive litigation following a violation provided an adequate remedy at law precluding a federal suit in equity.²⁴⁷ The Court concluded that potential enforcement harmed the railroad; the railroad need not wait for actual enforcement,²⁴⁸ because the state may choose not to pursue one isolated violation.²⁴⁹

The key is that government has a general obligation to enforce the laws. It cannot avoid constitutional litigation by refusing to carry out that obligation, while allowing the existence of the law to chill protected conduct. But thousands of unidentified private litigants do not carry that general obligation. Authorization to enforce a law through a private suit does not impose a duty to enforce that law through a private suit.

2. *Medical Practice as Usual*

Anti-choice activists claim they never intended or expected lawsuits because pursuing litigation is costly and onerous for “any person” activists.²⁵⁰ But 85% to 90% of abortions in Texas prior to SB8 occurred post-

242. *Supra* notes 69–72 and accompanying text.

243. Graham, Liptak & Goodman, *supra* note 79; Mitchell, *supra* note 43, at 1002.

244. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158–59 (2014); *Steffel v. Thompson*, 415 U.S. 452, 459 (1974).

245. 209 U.S. 123 (1908).

246. See James E. Pfander & Jacob P. Wentzel, *The Common Law Origins of Ex Parte Young*, 72 STAN. L. REV. 1269, 1271 (2020).

247. *Ex parte Young*, 209 U.S. at 163.

248. *Id.* at 163–64.

249. *Id.* at 163.

250. Graham, Liptak & Goodman, *supra* note 79; *supra* note 243 and accompanying text.

heartbeat.²⁵¹ It therefore seems likely that multiple lawsuits would have followed medical practice as usual. Providers would have faced the costs and burdens of multiple lawsuits across the state and the risk of multiple judgments, damages, and attorney's fees for multiple abortions. This explains the collective choice to cease statutorily prohibited abortions.

3. *Single Abortion*

Dr. Braid followed the third option, performing a single prohibited abortion, and announced having done so.²⁵² Compared with medical practice as usual, he could control exposure and costs, committing to the necessary money for defending and funding one case over one abortion.²⁵³ “Any person” can seek more than \$10,000 in statutory damages for that abortion,²⁵⁴ but exposure for one violation remains less than exposure for twenty violations. A single abortion can be the target of multiple lawsuits but only one recovery of statutory damages. This deters multiple plaintiffs from suing over that one abortion; one “any person” may decide that the cost of a lawsuit combined with the risk that another “any person” might beat him to judgment exceeds the financial and ideological benefits of suing. The single abortion creates the venerable “test case,” in which a rights holder intentionally violates a law to trigger enforcement and create the opportunity to adjudicate the constitutional issues in a defensive posture.²⁵⁵

But anti-choice activists may resist the bait. They may recognize that refraining from suing deprives providers of the opportunity to defend and litigate the constitutional issues. SB8 gives “any person” four years to sue;²⁵⁶ potential plaintiffs may wait, hoping the Supreme Court overrules or modifies *Roe* and *Casey*,²⁵⁷ allowing them to recover without having to litigate SB8's validity or litigating on easier jurisprudential terrain. If most providers comply—that is, if the law succeeds in stopping post-heartbeat abortion in the state—opponents might wait to target isolated violators such as Dr. Braid until altered constitutional precedent supports their cause.

251. Complaint for Declaratory and Injunctive Relief - Class Action, *supra* note 3, ¶ 91.

252. Braid, *supra* note 30. A provider also could announce an intent to perform a prohibited abortion, which is actionable for injunctive relief and attorney's fees, but not statutory damages if the intended abortion is not performed. See TEX. HEALTH & SAFETY CODE ANN. § 172.208(b).

253. See Ilya Somin, *Thoughts on the Supreme Court's Texas Abortion Ruling—and How to Prevent It from Setting a Dangerous Precedent*, THE VOLOKH CONSPIRACY (Sept. 2, 2021, 3:02 PM), <https://reason.com/volokh/2021/09/02/thoughts-on-the-supreme-courts-texas-abortion-ruling-and-how-to-prevent-it-from-setting-a-dangerous-precedent> [https://perma.cc/QK7X-9F3W].

254. See Stillely Complaint, *supra* note 31, ¶ 27 (requesting \$100,000 while noting that the statutory minimum for money damages is \$10,000).

255. Bloom, *supra* note 176, at 512–13; Jules Lobel, *Losers, Fools, & Prophets: Justice as Struggle*, 80 CORNELL L. REV. 1331, 1332–32 (1995).

256. HEALTH & SAFETY § 171.208(d).

257. Cf. *Dobbs v. Jackson Women's Health Org.*, 141 S. Ct. 2619 (2021) (granting certiorari in part); *Dobbs* Transcript of Oral Argument, *supra* note 8.

4. *Single Abortion, Friendly Plaintiffs*

a. *Friendly Plaintiffs*

The solution is the friendly plaintiff—one not ideologically opposed to abortion so not strategically inclined to maintain the chilling effect on providers. “Any person,” unmodified by additional considerations or limitations, can bring a claim against anyone performing or aiding a violative abortion.²⁵⁸ The statute does not limit the cause of action to “any person ideologically opposed to reproductive freedom or otherwise wishing to stop the practice of post-heartbeat abortion in Texas.”

SB8 proponents and anti-choice activists decried friendly lawsuits as “stunts” or “plants,” abusing the cause of action²⁵⁹ in “bad faith, if not as a joke.”²⁶⁰ Texas lawmakers perhaps presumed plaintiffs would share their commitment to stopping abortion, but they did not write that presumption into the statute. “Any person’s” motivation for suing is irrelevant. A plaintiff may want money.²⁶¹ A plaintiff may want to support abortion rights by providing the test case through which providers can defend and litigate their constitutional rights.²⁶²

SB8 supporters argued that friendly plaintiffs lack standing unless they “sympathize[]” with the anti-choice movement, because they otherwise are not adverse to the provider.²⁶³ But litigation requires legal adversity, not political or ideological adversity. It requires an opposition of competing interests established by law. SB8 establishes legal adversity when the plaintiff is a person authorized to sue (that is, any natural or artificial person) and the defendant is a provider who performed or aided a prohibited abortion.²⁶⁴ Those adverse interests exist regardless of the plaintiff’s ideological position on reproductive freedom.

The friendly plaintiff must act as a legally adverse party without giving away the ideological game. She must proceed as an ordinary litigant asking the court for statutorily authorized relief, requiring the provider de-

258. HEALTH & SAFETY § 171.208(a).

259. See, e.g., Chen, *supra* note 82; Graham, Liptak & Goodman, *supra* note 79; Tierney Sweed & Ariane de Vogue, *Texas Doctor Who Said He Performed Abortion Sued in First Known Challenges Under New Law*, CNN (Sept. 20, 2021, 10:36 PM), <https://www.cnn.com/2021/09/20/politics/texas-abortion-doctor-lawsuit/index.html> [<https://perma.cc/9M6C-MSZC>].

260. Plea in Intervention and Plea to the Jurisdiction as to Collusive Lawsuit by Out-of-State Plaintiff, *supra* note 85, ¶ 3.

261. Stilley Complaint, *supra* note 31, ¶ 27.

262. See Gomez Complaint, *supra* note 31.

263. Plea in Intervention and Plea to the Jurisdiction as to Collusive Lawsuit by Out-of-State Plaintiff, *supra* note 85, ¶ 1.

264. *United States v. Windsor* offers a federal analogy. 570 U.S. 744 (2013). The Internal Revenue Service enforced the Defense of Marriage Act (DOMA), which defined marriage as between one man and one woman for purposes of federal law, by denying Windsor the marital exemption from the federal estate tax when her wife died. Windsor sued the United States for a refund. While the Obama Administration’s litigation position was that DOMA was constitutionally invalid, there was adversity in the district court because Windsor sought the tax exemption, the United States denied it, and the United States refused to provide a refund. See *Windsor*, 570 U.S. at 753–58.

pendant to litigate its interests and to challenge the constitutional validity and enforceability of the heartbeat ban. The plaintiff cannot do the provider–defendant’s job for it.²⁶⁵ One pro-reproductive-freedom SB8 plaintiff made this mistake, using his complaint to ask the court to declare the heartbeat ban invalid and illegal.²⁶⁶

It is unclear whether SB8 supporters or lawmakers anticipated the friendly plaintiff strategy. But it counters strategic and deliberate nonenforcement. Reproductive-freedom opponents cannot stand idle and rely on the law’s chilling effect to make legal abortion practically unavailable in the state. Sophisticated and ideologically committed advocates do not want SB8’s constitutional validity to be litigated by someone who does not share their anti-choice values. They must sue to ensure zealous advocacy and that the task of litigating the constitutional issue is not left to those who lack ideological commitment or legal competence.

The availability of friendly litigation distinguishes *Ex parte Young* and shows why the Constitution does not require offensive litigation.²⁶⁷ The opportunity for defensive litigation was not adequate in *Young* because a single statutory violation might not trigger government prosecution or enforcement.²⁶⁸ The railroad in *Young* had no mechanism for forcing litigation through which it could defend. Providers have that mechanism; they can guarantee enforcement and the opportunity to defend and challenge the law’s constitutional validity by collaborating with willing ideologically sympathetic but legally adverse plaintiffs.

b. Limiting the Friendly Plaintiff

Legislators might avoid the friendly plaintiff problem by limiting exclusive, private-enforcement causes of action in two ways, although neither achieves the desire goal. First, the legislature could define eligible plaintiffs as “any person ideologically opposed to reproductive freedom or otherwise wishing to stop abortion practices in the state.” But limiting the cause of action to those holding certain political views violates the First Amendment by discriminating because of political or ideological viewpoint in establishing legal rights or benefits.²⁶⁹

Ideological adverseness inheres in some statutory injuries. An environmental plaintiff likely holds environmental-protectionist political views and wants to stop mercury discharge into public waters.²⁷⁰ But those views are not necessary to the cause of action. A plaintiff could seek a

265. See *Davis v. First Nat’l Bank of Waco*, 161 S.W.2d 467, 472 (Tex. 1941); TEX. R. CIV. P. 13.

266. See Gomez Complaint, *supra* note 31, ¶ 4. This plaintiff nonsuited three months after filing. *Supra* note 83 and accompanying text.

267. Wasserman & Rhodes, *supra* note 27, at 1057–58; *supra* notes 244–49 and accompanying text.

268. *Ex parte Young*, 209 U.S. 123, 163 (1908).

269. See *Iancu v. Brunetti*, 139 S. Ct. 2294, 2299 (2019); *Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819, 829 (1995).

270. *Friends of the Earth, Inc. v. Laidlaw Env’t Servs. (TOC), Inc.*, 528 U.S. 167, 181–82 (2000).

remedy if the discharge of mercury prevents her from using and enjoying certain waters, even if she otherwise supports allowing hazardous-waste incinerators to discharge mercury without close environmental oversight.²⁷¹

This becomes more obvious when the cause of action is not limited to those suffering personal injury. In our hypothetical racist-speech law,²⁷² the likely plaintiff is offended by racist speech. But a person who agrees with the “all lives matter” message can sue, for the same goals or reasons as SB8 plaintiffs—for the money or to enable a simpatico speaker to defend and litigate his First Amendment rights. The law cannot impose an ideological or political litmus test as a condition for defining a right of action or granting a right to sue.

Second, the legislature might require that any plaintiff show some injury caused by that abortion. But narrowing the cause of action undermines the legislative strategy of creating a wave of lawsuits to bankrupt or drive out providers. Limiting the universe of potential plaintiffs limits providers’ legal exposure by removing the threatened avalanche of hundreds of lawsuits by hundreds of random people. The narrower cause of action resembles ordinary tort law²⁷³ or past attempts to target reproductive-health providers with medical malpractice and other civil litigation, which did not achieve what anti-choice advocates hoped.²⁷⁴

Texas Solicitor General Stone compared an SB8 action to a tort of “outrage,” where an individual becomes aware of a non-compliant abortion and it causes them moral or psychological harm.²⁷⁵ This establishes a unique injury that might be ideologically limited—only an opponent of reproductive freedom would suffer, and be able to plead and prove, moral harm or psychological outrage because a random doctor performed and a random person obtained a post-heartbeat abortion. But like the environmental plaintiff, “any person” could support reproductive freedom generally but assert outrage at a specific abortion, satisfying that added injury requirement

In any event, that point is moot. SB8 as drafted does not require a plaintiff to plead and prove outrage or moral harm, does not compensate for moral outrage, and does not distinguish an uninjured anti-choice plaintiff from an uninjured pro-choice plaintiff. The legislature could narrow the cause of action in this way. But it has not done so.

B. DEFENDING IN FEDERAL COURT?

Challenging a state-law defensively does not necessarily mean proceeding in state court. Having been named in a private suit in state court, defendants may remove to federal court if the federal district court would

271. *Id.* at 175–76.

272. *See supra* Section III.C.4.a.

273. *See supra* Section III.C.4.b.

274. *See* ZIEGLER, *supra* note 11, at 130, 173–74; Ziegler, *supra* note 39.

275. Transcript of Oral Argument, *supra* note 17, at 47–49.

have had jurisdiction and if the state plaintiff could have filed in federal court.²⁷⁶ Although remaining in a defensive posture, they can litigate in a potentially more favorable forum before a judge with Article III protections who has expertise in and solicitude for federal rights, while gaining a faster path to Supreme Court review.

1. Federal Question Jurisdiction

A plaintiff can sue in, and a defendant can remove to, federal court when the action arises under the Constitution, laws, or treaties of the United States.²⁷⁷ The central defense for advocates and providers in SB8 suits is that the fetal-heartbeat provision violates Fourteenth Amendment guarantees of reproductive freedom.²⁷⁸

But the “well-pleaded complaint” rule requires the federal issue enter the case as part of the plaintiff’s well-pleaded complaint; an anticipated federal defense to a state claim is insufficient to establish jurisdiction or to make the case removable.²⁷⁹ Although providers will raise SB8’s constitutional defects and its constitutional validity will determine the outcome,²⁸⁰ SB8 actions are state-law claims not within the district court’s original federal-question jurisdiction.

SB8 demonstrates a major critique of the well-pleaded complaint rule—it eliminates a species of case that, given the purposes of federal-question jurisdiction, belong in federal district court. Federal-question jurisdiction ensures a judicial forum with the necessary expertise, respect, and solicitude for federal law, rights, and interests. Federal judges, armed with Article III structural protections of life tenure and guaranteed salary and with a federal institutional orientation, better identify the appropriate level of enforcement of federal law and rights than state judges who lack those protections and who are more oriented to the local community.²⁸¹ If the goal is to provide an original judicial forum to vigorously and competently respect and enforce federal rights, the procedural posture in which the federal issue presents does not matter; these underlying policies are implicated as much when the federal issue arises as a defense

276. 28 U.S.C. § 1441(a).

277. 28 U.S.C. § 1331.

278. See Complaint, *supra* note 16, ¶ 6.

279. *Vaden v. Discover Bank*, 556 U.S. 49, 60 (2009); *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152 (1908); MARTIN H. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 106 (2d ed. 1990); Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and “The Martian Chronicles,”* 78 VA. L. REV. 1769, 1794–95 (1992); Wasserman, *supra* note 146, at 908.

280. REDISH, *supra* note 279, at 105–08; Donald L. Doernberg, *There’s No Reason for It; It’s Just Our Policy: Why the Well-Pleaded Complaint Rule Sabotages the Purposes of Federal Question Jurisdiction*, 38 HASTINGS L.J. 597, 626–27, 656 (1987); Redish, *supra* note 279, at 1796.

281. REDISH, *supra* note 279, at 83, 153, 346; Matthew I. Hall, *Asymmetrical Jurisdiction*, 58 UCLA L. REV. 1257, 1264 (2011); Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1119–20, 1124–25 (1977); Wasserman, *supra* note 146, at 908–09.

than as part of the claim.²⁸²

This reflects another way in which SB8 mirrors *New York Times Co. v. Sullivan*.²⁸³ Like the Times, providers face a coordinated campaign of state-court litigation and massive judgments, intended to chill locally disfavored-but-constitutionally protected activity. Both have meritorious and outcome-determinative federal constitutional defenses to liability, and it is clear from the outset that they will raise those defenses. And the well-pleaded complaint rule requires both to remain and defend in state court.

The well-pleaded complaint rule reflects federal courts' reluctance "to insult state courts and state judges or to distrust their ability or willingness to understand and apply"²⁸⁴ the Constitution. But *New York Times* reflected a time and place—the Jim Crow South—in which insults and distrust were warranted.²⁸⁵ The nationwide wave of restrictive abortion legislation²⁸⁶ of which SB8 is part suggests a similar time and place with regard to the right to reproductive freedom. As the Times desired a federal forum to defend its First Amendment rights against this wave of lawsuits²⁸⁷ so do providers desire a federal forum committed to vindicating the federal right to reproductive freedom. And as the Times's First Amendment defense was not sufficient to move the defamation actions into federal court,²⁸⁸ neither is the providers' Fourteenth Amendment defense sufficient to move SB8 actions into federal court.

2. Diversity Jurisdiction

A second basis for federal jurisdiction and possible removal is diversity of citizenship, where the civil action is between citizens of different states and the amount in controversy exceeds \$75,000.²⁸⁹ The first SB8 lawsuits were filed against a Texas doctor by non-Texans: one from Arkansas requesting \$100,000 and one from Illinois.²⁹⁰ A Texas provider might create federal jurisdiction by coordinating with a friendly out-of-state plaintiff to open diversity jurisdiction.

This strategy runs into several hurdles. The "forum-defendant rule" precludes removal when one defendant is from the forum state.²⁹¹ Be-

282. Wasserman, *supra* note 146, at 909.

283. See *supra* Section III.C.1.

284. Wasserman, *supra* note 146, at 909.

285. See Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 451–52 (1985); Neuborne, *supra* note 281, at 1119 & n.55; Wasserman, *supra* note 146, at 910.

286. ZIEGLER, *supra* note 11, at 205; Wasserman & Rhodes, *supra* note 27, at 1032–33, 1037–38.

287. Wasserman, *supra* note 146, at 909.

288. *Id.* at 908–09.

289. See 28 U.S.C. § 1332(a)(1).

290. *Supra* notes 83–88 and accompanying text.

291. 28 U.S.C. § 1441(b)(2); *Lincoln Prop. Co. v. Roche*, 546 U.S. 81, 84 (2005). Unless Dr. Braid removed before being served. See § 1441(b)(2); Howard M. Wasserman, *The Forum-Defendant Rule, the Mischief Rule, and Snap Removal*, 62 WM. & MARY L. REV. ONLINE 51, 54 (2021).

cause plaintiffs sued Braid, a Texan, in Texas state court, he cannot remove to a federal court in Texas after he was served. Providers might overcome this problem if the friendly out-of-stater sues in federal court, rather than beginning in state court with the defendant removing.

The diversity strategy becomes more difficult in a genuine adversarial action by a reproductive-freedom opponent. Jurisdiction requires complete diversity, meaning no party is from the same state as an adverse party.²⁹² The paradigm SB8 suit pits an anti-choice Texas “any person” against Texas doctors, nurses, and providers operating in the state. And if a Texas “any person” targeted an out-of-state provider or advocate, he could include one Texas defendant, which destroys complete diversity, adds a forum defendant, and precludes removal.²⁹³

3. Lack of Standing

Unlike in *New York Times*, the well-pleaded complaint rule, lack of complete diversity, and forum-defendant rule do not create the sole barriers to removal. SB8 actions face a second insurmountable hurdle to removal—lack of standing.

SB8 authorizes “any person” to bring a civil action.²⁹⁴ That person need not have any connection to a particular post-heartbeat abortion or to a particular woman who sought, considered, or obtained a post-heartbeat abortion. He need not have suffered any physical, monetary, or other personal injury.²⁹⁵ It is enough that he wants to file suit and obtain the available statutory relief.²⁹⁶

Such plaintiffs lack standing in federal district court.²⁹⁷ Even where a legislature creates a cause of action and authorizes a person to sue, federal plaintiffs must show they suffered an “injury in fact,” meaning some personal injury, tangible or intangible, analogous to recognized common-law injuries.²⁹⁸ A court lacks jurisdiction to hear a claim based on a mere statutory violation, absent further personal harm.²⁹⁹ And ideological objections do not constitute sufficient injuries.³⁰⁰

SB8 actions recall the California litigation in *Kasky v. Nike, Inc.*³⁰¹ State law authorized “any person acting for the interests of . . . the general public” to sue over consumer misinformation, regardless of whether

292. *Lincoln Prop. Co.*, 546 U.S. at 84.

293. This offers another analogy to *New York Times*. While the Alabama plaintiff targeted the New York-based Times, he added four non-diverse Alabama civil rights advocates as defendants to prevent removal and keep the case in Alabama state court. Papan-drea, *supra* note 146, at 237–38; Wasserman, *supra* note 146, at 905–07.

294. TEX. HEALTH & SAFETY CODE ANN. § 171.208(a).

295. *See id.* § 171.208(a)–(b).

296. *See id.*

297. *See TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203–04 (2021); *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338–341 (2016).

298. *See TransUnion*, 141 S. Ct. at 2203–04; *Spokeo*, 578 U.S. at 339–41.

299. *Spokeo*, 578 U.S. at 341.

300. *Hollingsworth v. Perry*, 570 U.S. 693, 704 (2013); *Diamond v. Charles*, 476 U.S. 54, 62 (1986).

301. 45 P.3d 243 (Cal. 2002).

the plaintiff was injured. This cause of action was as broad as the one in SB8, although it retained public action as the primary enforcement mechanism supplemented by private action.³⁰² The plaintiff, a politically active consumer advocate, sued Nike in state court for false advertising based on Nike press releases rebutting news reports about overseas factory working conditions; Nike argued that these statements, if false, were protected by the First Amendment.³⁰³ The California Supreme Court reversed dismissal of the action, holding that Nike's press releases were commercial speech subject to less constitutional protection and regulable under consumer-protection laws if false.³⁰⁴

The Supreme Court of the United States granted certiorari, then dismissed as improvidently granted, avoiding a significant First Amendment ruling.³⁰⁵ Justice Stevens, concurring in the dismissal, and Justice Breyer, dissenting from the dismissal, agreed that the plaintiff lacked Article III standing to obtain original jurisdiction in federal court, by original filing or removal, because he had not suffered any personal injury beyond the statutory violation.³⁰⁶ Like Kasky, an "any person" SB8 plaintiff lacks standing to file in federal court (not that someone ideologically opposed to abortion would want to do so) and defendants cannot remove because the action could not have originated in federal court.

The standing problem might resolve if federal courts must apply state justiciability doctrines in diversity cases.³⁰⁷ Andrew Hessick argues a state-law claim that can be brought in state court should be able to be brought in federal court because federal courts provide an alternate forum for a permissible state claim.³⁰⁸ This point gains strength if SB8 were amended to require outrage in line with a tort such as intentional infliction of emotional distress, which federal courts have long heard and resolved.³⁰⁹ Texas Solicitor General Stone proposed that some SB8 plaintiffs could have standing based on a state-law moral injury from that person's awareness of a prohibited abortion.³¹⁰

302. *Id.* at 249 (alteration in original) (citing CAL. BUS. & PROF. CODE § 17204 (West 2003) (amended 2004)); Wasserman & Rhodes, *supra* note 27, at 1081.

303. *Kasky*, 45 P.3d at 247–48.

304. *Id.* at 260–63. *See generally* Collins & Skover, *supra* note 156, at 965.

305. *Nike, Inc. v. Kasky*, 539 U.S. 654, 654 (2003) (per curiam); Collins & Skover, *supra* note 156, at 966.

306. *Nike*, 539 U.S. at 661 (Stevens, J., concurring); *id.* at 667–68 (Breyer, J., dissenting).

307. This cannot apply to federal-question cases, as SB8 actions cannot "arise under" given the well-pleaded complaint rule. *Supra* Section IV.B.1.

308. F. Andrew Hessick, *Cases, Controversies, and Diversity*, 109 NW. U. L. REV. 57, 59 (2014) [hereinafter Hessick, *Cases*]; F. Andrew Hessick, *Standing in Diversity*, 65 ALA. L. REV. 417, 418, 424 (2013) [hereinafter Hessick, *Standing*].

309. *Gerber v. Herskovitz*, 14 F.4th 500, 506 (6th Cir. 2021); Hessick, *Standing*, *supra* note 308, at 425.

310. *Supra* note 275 and accompanying text.

C. DEFENDING IN STATE COURT

Absent rare circumstances, SB8 actions will be filed and litigated in state court and providers will assert their constitutional rights in a defensive posture there. But that posture does not prevent providers from litigating and vindicating constitutional rights. Even on defense in state court, they have state and federal defenses available to defeat claims, despite SB8's intent to disadvantage them in state-court proceedings.³¹¹

1. *Standing in State Court*

Providers want to focus on the federal constitutional defects in SB8's core ban on post-heartbeat abortions; their litigation goal is a judicial declaration that SB8 is invalid as much as avoiding liability in that action (especially actions by friendly plaintiffs).

But a dispositive state-law defense looms in the individual case and as to the overall viability of SB8's enforcement scheme—whether the statutorily authorized “any person” who has suffered no injury and bears no personal connection or interest to any abortion has standing under Texas law. This is an essential piece of the procedural and jurisdictional puzzle. Texas lawmakers targeted providers with the cost, burden, and expense of defending a tidal wave of lawsuits and liability from random individuals throughout Texas state courts. If Texas standing law prohibits the legislature from authorizing random and attenuated lawsuits, that effort collapses.

a. Texas Standing

Texas, like every state, has unique standing principles applicable to its courts.³¹² These rules may be different and more forgiving than Article III's rigid “case or controversy” requirement.³¹³ While Texas purports to mostly follow federal standing jurisprudence and principles,³¹⁴ nothing in Article III or federal due process demands that it do so.

In *Texas Ass'n of Business v. Texas Air Control Board*, the Texas Supreme Court grounded state standing doctrines in two provisions of the Texas Constitution.³¹⁵ An express separation of powers provision,³¹⁶ parallel to the unenumerated structural principles of the U.S. Constitution, precludes the judiciary from exercising governmental authority vested in

311. *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 546 (2021) (Sotomayor, J., concurring in the judgment in part and dissenting in part); *supra* Section II.A.

312. See RHODES, *supra* note 234; Thomas B. Bennett, *State Rejection of Federal Law*, 97 NOTRE DAME L. REV. (forthcoming 2022) (manuscript at 30–35), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3915553 [<https://perma.cc/A2ZY-VNSS>]; Hessick, *Standing*, *supra* note 308, at 425; Hessick, *Cases*, *supra* note 308, at 65–66.

313. See, e.g., *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989); *Pennell v. City of San Jose*, 485 U.S. 1, 8 (1988); Hessick, *Cases*, *supra* note 308, at 66–67.

314. See, e.g., *Data Foundry, Inc. v. City of Austin*, 620 S.W.3d 692, 696 (Tex. 2021); *Pike v. Tex. EMC Mgmt., LLC*, 610 S.W.3d 763, 776 (Tex. 2020).

315. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 443–45 (Tex. 1993) (first citing TEX. CONST. art. II, § 1; and then citing *id.* art. I, § 13).

316. TEX. CONST. art. II § 1.

other government departments.³¹⁷ This provision supports the state judiciary's longstanding refusal to issue advisory opinions, a power vested in the executive branch.³¹⁸ An express open-courts provision guarantees that "every person for an injury done him, in his lands, goods, person, or reputation, shall have remedy by due course of law."³¹⁹ *Texas Ass'n of Business* found a personal-injury requirement "implicit" in this provision's guarantee of a remedy for those injured.³²⁰

Since *Texas Ass'n of Business*, the court has borrowed familiar standing principles from federal decisions.³²¹ It adopted the *Lujan v. Defenders of Wildlife* three-prong requirement of injury-in-fact, causation, and redressability for most state standing questions, tracing those limits to the twin state constitutional principles of separation of powers and open courts.³²² Texas Solicitor General Stone emphasized the identity between federal and Texas justiciability principles.³²³

The reality of Texas standing law is more complicated and less certain. Pre-*Texas Ass'n of Business* precedent departed federal principles and has not been pulled back into the federal line in some areas.³²⁴ Texas grants standing to political subdivisions,³²⁵ to taxpayers,³²⁶ and to plaintiffs under certain statutes.³²⁷ The legislature may confer standing on individuals lacking a particularized individual injury that differentiates them from the public at large. "Within constitutional bounds, the Legislature may grant a right to a citizen or to a taxpayer to bring an action against a public body or a right of review on behalf of the public without proof of particular or pecuniary damage peculiar to the person bringing the suit."³²⁸

For example, an early 20th-century statute authorized "any citizen" to bring an action to enjoin operation of a "bawdy or disorderly house," without requiring the citizen "to show that he is personally injured by the actions complained of"; the court allowed private litigants to pursue private actions for injunctive relief without showing specific damage to their

317. *Tex. Ass'n of Bus.*, 852 S.W.2d at 444.

318. *Id.*

319. TEX. CONST. art. I, § 13.

320. *Tex. Ass'n of Bus.*, 852 S.W.2d at 444.

321. See Bennett, *supra* note 312, at 32–35.

322. See, e.g., *In re Abbott*, 601 S.W.3d 802, 807 (Tex. 2020); *Garcia v. City of Willis*, 593 S.W.3d 201, 206–07 (Tex. 2019); *Meyers v. JDC/Firethorne, Ltd.*, 548 S.W.3d 477, 484–85 (Tex. 2018); *Heckman v. Williamson County*, 369 S.W.3d 137, 147, 154–56 (Tex. 2012); *City of Houston v. Williams*, 353 S.W.3d 128, 145 (Tex. 2011); *Tex. Dep't of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 646 (Tex. 2004).

323. Transcript of Oral Argument, *supra* note 17, at 10 (statement of Justice Alito); *id.* at 47–48.

324. RHODES, *supra* note 234, at 115.

325. *W. Orange-Cove Consol. Indep. Sch. Dist. v. Alanis*, 107 S.W.3d 558, 583–84 (Tex. 2003).

326. *Williams v. Lara*, 52 S.W.3d 171, 179 (Tex. 2001).

327. *Cf. Andrade v. NAACP of Austin*, 345 S.W.3d 1, 17 (Tex. 2011).

328. *Scott v. Bd. of Adjustment*, 405 S.W.2d 55, 56 (Tex. 1966).

person or property caused by the bawdy house.³²⁹ The state attorney general and local prosecutors retained power to enforce the law, applying the same dual-enforcement mechanism to bawdy houses that California applied to false advertising.³³⁰

Fifty years later, the court upheld standing under a statute authorizing “any taxpayer” to challenge the legality of a zoning board decision, such as granting a variance allowing the erection of a large sign.³³¹ The authorization of suit by “any taxpayer” (as opposed to anyone “aggrieved”) meant plaintiffs need not prove that the zoning decision diminished the value of their property.³³²

The Texas Supreme Court has not issued a holding on statutory standing since *Texas Ass’n of Business*. But its dicta implies that statutory standing works an exception to ordinary standing rules requiring a particularized injury.³³³ Texas appellate courts have followed that dicta and permitted legislatively conferred standing, such as “[a]ny property tax paying citizen” suing to enjoin a contract awarded in violation of the County Purchasing Act³³⁴ or “[a] citizen” bringing an action to enjoin a violation of the Antiquities Code.³³⁵

Independent statutory standing in Texas renders standing more plausible in an SB8 action brought in state court. And it makes the analysis more complicated than parroting *Lujan* and other federal standing law, as in the *Whole Woman’s Health* argument.

b. State Standing and SB8

Despite Texas’s broader rules, “any person” plaintiffs should not have standing to bring SB8 actions in state court, as the state Multi-District Litigation judge concluded.³³⁶ Again, however, state law dictates this conclusion, not the federal Constitution, Article III, or due process.

329. *Spence v. Fenchler*, 180 S.W. 597, 602–03 (Tex. 1915). A “bawdy house” was kept for prostitution, while a “disorderly house” sold liquor and employed “lewd” women or prostitutes. *Id.* at 602.

330. *See supra* Section III.C.4.a.

331. *Scott*, 405 S.W.2d at 55–57.

332. *Id.* at 57.

333. *E.g.*, *Jefferson County v. Jefferson Cnty. Constables Ass’n*, 546 S.W.3d 661, 666 (Tex. 2018); *Sneed v. Webre*, 465 S.W.3d 169, 180 (Tex. 2015); *Williams v. Lara*, 52 S.W.3d 171, 178 (Tex. 2001).

334. *Labrado v. County of El Paso*, 132 S.W.3d 581, 587 (Tex. App.—El Paso 2004, no pet.) (alteration in original).

335. *Grossman v. Wolfe*, 578 S.W.3d 250, 256–57 (Tex. App.—Austin 2019, pet. denied).

336. Order Declaring Certain Civil Procedures Unconstitutional and Issuing Declaratory Judgment at 46, *Van Stean v. Tex. Right to Life*, No. D-1-GN-21-004179 (98th Dist. Ct., Travis County, Tex., Dec. 9, 2021), <https://www.justsecurity.org/wp-content/uploads/2021/12/Van-Stean-Filemarked-Order-Declaring-Certain-Civil-Procedures-Unconstitutional.pdf> [<https://perma.cc/Q6E4-7ZU3>]. We agree with the conclusion about lack of standing under SB8, although we question the court doing so in an offensive pre-enforcement posture, rather than waiting for an SB8 action and analyzing standing then.

i. The Checking Function of Private Litigation

Prior Texas cases authorized citizens or taxpayers to sue to check government officials. Private suits ensured compliance with laws cabining government authority. Or private citizens acted where government failed or refused to act. The statute allowing private suits against the proprietors of bawdy houses began from the premise that elected officials failed to enforce the law against such places of ill repute, whether because of bribery or because officials were partaking in the services provided.

SB8 “any person” plaintiffs do not check government failure. They pursue a monetary bounty to act as the government and in the government’s stead in enforcing the law.³³⁷ No government failure or refusal created an enforcement gap—Texas’s executive branch willingly and happily enforces abortions restrictions.³³⁸ The state turned to exclusive private enforcement to make it more difficult for providers to challenge the constitutional validity of the heartbeat ban in an offensive posture, recognizing it would have been declared invalid and public enforcement enjoined under prevailing jurisprudence.³³⁹ This represents a new species of private state statutory standing, beyond anything Texas courts have allowed.

ii. Exclusivity of Enforcement

Prior grants of statutory private standing did not bar public enforcement or prohibit executive departments from pursuing their constitutional responsibilities.

The Supreme Court grounds federal standing limitations in the scope of executive power. Private enforcement of environmental laws, even to supplement public enforcement, interferes with the President’s essential constitutional duty to “take Care that the Laws be faithfully executed.”³⁴⁰ But the Texas Constitution divides the executive power among state and local officials, none subject to unilateral removal by the governor.³⁴¹ A supplemental private mechanism for checking abuse or failure by independent public officials is consistent with that divided system because the state executive department, however authority is distributed, continues the executive function of causing the laws to be faithfully executed.³⁴² Delegating enforcement power responsibility—exclusively and unchecked—to random individuals defies that executive power. It also aggrandizes the judicial power by authorizing claims by plaintiffs with no

337. See *Van Stean*, No. D-1-GN-21-004179, slip op. at 31–34.

338. See, e.g., *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2300 (2016); *Whole Woman’s Health v. Paxton*, 10 F.4th 430, 435 (5th Cir. 2021); *Whole Woman’s Health v. Smith*, 338 F. Supp. 3d 606, 615–617 (W.D. Tex. 2018); *Whole Woman’s Health v. Hellerstedt*, 231 F. Supp. 3d 218, 222 (W.D. Tex. 2017).

339. Wasserman & Rhodes, *supra* note 27, at 1038, 1059–60.

340. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 577 (1992) (quoting U.S. CONST. art. II, § 3).

341. See RHODES, *supra* note 234, at 563–68, 593.

342. TEX. CONST. art. II, § 1; *id.* art. IV, § 10.

justiciable interest. And it is boundless, allowing the legislature to follow this approach with numerous laws, eliminating state and local executive officials' constitutionally mandated enforcement power.

iii. *Non-Texan Enforcement of Texas Law*

SB8 delegates enforcement power to non-Texans—“any person” can come from anywhere, as demonstrated by the first lawsuits.³⁴³ But a non-Texan cannot perform a checking function on Texas officials. SB8 abdicates sovereign power to strangers, those without connection to Texas and with no interest in proper Texas governance or enforcement of Texas law, beyond a generalized desire for a bounty or an ideological objection (not required to sue) to abortion.

iv. *Implied Injury*

Texas' open-courts provision implies an injury requirement.³⁴⁴ Plaintiffs in prior statutory-standing cases suffered an actual (if generalized rather than particularized) potential financial or property harm—from the public nuisance of a neighborhood bawdy house,³⁴⁵ from a sign obstruction,³⁴⁶ or from an unlawful expenditure of county funds—that injunctive relief redressed.³⁴⁷ One appellate court recognized this point: “When the Legislature confers citizen standing, it waives the requirement that an injury be particularized, that is, distinct from the injury to the general public, but the Legislature does not waive the requirement that the plaintiff suffer any injury at all.”³⁴⁸ SB8 plaintiffs, whether opponents or supporters of reproductive rights, fall in the latter category of those who do not “suffer any injury at all.”³⁴⁹ “Any person” suffers nothing resembling a financial, physical, or property harm from a provider performing a post-heartbeat abortion on a random patient.

The statutory prohibition on multiple recoveries for one prohibited abortion demonstrates the absence of personal connection or injury between a statutory violation and any plaintiff.³⁵⁰ That is why Plaintiff *A* gets no remedy if Plaintiff *B* has recovered for that abortion—Plaintiff *A* needs no remedy because Plaintiff *A* suffered no injury.³⁵¹ The remedy belongs to the state, with not even a shared injury to either individual. This is not sufficient under the state open-courts provision as interpreted in *Texas Ass'n of Business*.³⁵²

343. See Chen, *supra* note 82.

344. *Supra* notes 319–23 and accompanying text.

345. See Spence v. Fenchler, 180 S.W. 597, 599–600 (Tex. 1915).

346. See Scott v. Bd. of Adjustment, 405 S.W.2d 55, 55–56 (Tex. 1966).

347. See Labrado v. County of El Paso, 132 S.W.3d 581, 587 (Tex. App.—El Paso 2004, no pet.).

348. Denucci *ex rel.* Best Buy Stores, Inc. v. Hegar, No. 03-19-00246-CV, 2021 WL 1432313, at *4 n.5 (Tex. App.—Austin April 16, 2021, no pet.).

349. See *id.*

350. See TEX. HEALTH & SAFETY CODE § 171.208(c).

351. See *id.*

352. See Tex. Ass'n of Bus. v. Tex. Air Control Bd., 852 S.W.2d 440, 448–50 (Tex. 1993).

* * *

If SB8 plaintiffs lack standing even under Texas's broader approach, providers face a strategic choice. They want a court to declare the constitutional invalidity of the fetal-heartbeat ban as a matter of federal law and they want the courts, especially the Supreme Court of the United States, to do so as quickly as possible. They might be tempted to avoid state and jurisdictional issues in favor of focusing and resolving the federal constitutional merits. But the court may not allow that because standing is a preliminary jurisdictional issue that cannot be skipped.³⁵³ And providers may choose not to skip the issue. If the state constitution prohibits the legislature from delegating enforcement authority to non-injured, disconnected individuals, SB8's basic framework and strategy fail. That defeats all SB8 lawsuits and deters future state efforts to enact copycat laws.

2. *Defending in State Court*

Offensive litigation offers rights holders the twin benefits of interim relief through an order prohibiting enforcement pending litigation and speedy resolution through immediate review of the grant or denial of the request for interim relief.³⁵⁴ Defensive litigation does not offer interim relief—because the defending rights holder does not seek a remedy (other than defeating and dismissing the enforcement action), there is no interim relief to provide.³⁵⁵ Nevertheless, Texas procedure allows for expeditious litigation and resolution of federal and state constitutional defenses in SB8 actions, without placing a judgment burden on providers. While not as procedurally favorable as offensive litigation, litigating defensively in state court is not impossible (and certainly not a distinct constitutional problem),³⁵⁶ as state procedure enables providers to minimize the costs and burdens of vindicating their rights in court.

a. Motion to Dismiss

Providers can and will move to dismiss the SB8 petition as having no basis in law under Rule 91a of the Texas Rules of Civil Procedure, the state equivalent to Federal Rule of Civil Procedure 12(b)(6).³⁵⁷ A cause of action is legally baseless “if the allegations, taken as true, together with inferences reasonably drawn from them, do not entitle the claimant to the relief sought.”³⁵⁸ The constitutional invalidity of the law being enforced provides a proper basis for a Rule 91a motion, raising a pure question of law requiring no evidence.³⁵⁹ The motion must be filed and the trial court

353. *See id.* at 443–45.

354. Wasserman & Rhodes, *supra* note 27, at 1052–54.

355. *See supra* note 115 and accompanying text.

356. *See supra* Section III.C.

357. *See* 2 ROY W. McDONALD & ELAINE A. GRAFTON CARLSON, McDONALD & CARLSON TEXAS CIVIL PRACTICE § 9:27.10 (2d ed. 2020).

358. TEX. R. CIV. P. 91a.1.

359. *See* TEX. R. CIV. P. 91a.6.

must rule quickly; providers have sixty days after service to file the motion, which must be granted or denied within forty-five days of filing.³⁶⁰ A quick motion and quick decision yield quick resolution in the trial court.

Given the heartbeat ban's clear contradiction of *Roe* and *Casey*, a state trial judge adhering to her judicial oath and obligation to follow Supreme Court precedent must grant this motion and dismiss the case. Of course, Texas lawmakers designed SB8 to push cases into state court with the hope (and perhaps expectation) that judges will not adhere to their oath and to binding precedent.

b. Appellate Review of the Motion to Dismiss

i. *Granting Dismissal*

If the trial court dismisses on either state standing³⁶¹ or federal constitutional grounds, the SB8 plaintiff can appeal the final judgment to the appropriate state court of appeals. The losing party in that court can petition the Texas Supreme Court for discretionary review;³⁶² the loser in the Texas Supreme Court can seek review in the Supreme Court of the United States.³⁶³

A trial-court dismissal reveals SB8's perverse incentive structures. Recall that anti-choice activists and organizations chose not to sue in SB8's first weeks, allowing the threat of suit and liability to chill providers unwilling to risk an adverse judgment, without giving them an opportunity to litigate SB8's constitutional validity.³⁶⁴ Having sued and lost in the trial court, "any person" may choose not to appeal the judgment, accepting the loss but depriving providers of binding precedent on the constitutional issue from the Texas Supreme Court or the Supreme Court of the United States. And that loss may be one suit in a broader campaign. That "any person" may file a new lawsuit against the same or different provider over a different post-heartbeat abortion or watch a different "any person" file a new lawsuit against that provider over the same abortion.

Friendly plaintiffs again solve this problem.³⁶⁵ As they have the incentive to sue and to create litigation, they have the incentive to pursue appellate review. If the friendly plaintiff wants to help providers establish SB8's constitutional invalidity, they will pursue that litigation to higher courts and to binding precedent on the constitutional issues, even if the result is "adverse" to the position the friendly plaintiff urges in litigation.

ii. *Denying Dismissal*

A trial-court denial of the motion to dismiss complicates matters for providers. Denial of a motion to dismiss is not a final and appealable

360. TEX. R. CIV. P. 91a.3.

361. *Supra* Section IV.C.1.

362. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.012.

363. *See* 28 U.S.C. § 1257.

364. *Supra* note 79 and accompanying text.

365. *See supra* Section IV.A.4.

order.³⁶⁶ Providers must continue in the trial court, prolonging the process and delaying resolution of the central constitutional question.³⁶⁷ Texas law provides two mechanisms for immediate review of the denial of the motion to dismiss.

One is a writ of mandamus, which is more available under Texas practice than federal practice.³⁶⁸ Mandamus is proper if the trial court clearly fails to properly apply the law and the benefits of mandamus review outweigh the costs, considering the facts and public policy.³⁶⁹ Given SB8's blatant contradiction of *Roe* and *Casey*, a decision denying dismissal and refusing to declare the fetal-heartbeat ban constitutionally invalid constitutes a clear failure to properly apply the law. Public policy favors immediate review of the denial,³⁷⁰ given the potential for numerous identical SB8 suits and the serious constitutional issues involved.

A second option, more complex and time-consuming, is a permissive interlocutory appeal on a "controlling question of law" subject to a "substantial ground for difference of opinion" when "an immediate appeal from the order may materially advance" the suit's resolution.³⁷¹ A declaration that the fetal heartbeat prohibition is valid satisfies that standard—SB8's constitutional validity is a pure question of controlling law that has not been judicially resolved, and reversal means the prohibition is invalid and the SB8 action must be dismissed. Interlocutory review is discretionary; the trial court and court of appeals must agree that the order is worthy of immediate review.³⁷²

After the court of appeals asserts jurisdiction via either mandamus or interlocutory review and decides the substantive issues, the Texas Supreme Court can review that decision and establish binding precedent for Texas courts.³⁷³ The Supreme Court of the United States can review the state supreme court decision.³⁷⁴

Texas procedure's greater receptivity to nonfinal appellate review minimizes the objection and concern that defensive litigation is slower than offensive.³⁷⁵ A quick denial of the motion to dismiss plus broad interlocutory review of an (obviously incorrect) decision allowing the action to

366. *City of Beaumont v. Guillory*, 751 S.W.2d 491, 492 (Tex. 1988); *N.E. Indep. Sch. Dist. v. Aldridge*, 400 S.W.2d 893, 895 (Tex. 1966); TEX. CIV. PRAC. & REM. CODE §§ 51.011–016.

367. Offensive litigation can be speedier than defensive litigation because the rights holder seeks preliminary injunctive relief and the grant or denial of preliminary relief is immediately appealable as of right. 28 U.S.C. § 1292(a)(1); Wasserman & Rhodes, *supra* note 27, at 1053–54.

368. See 6 McDONALD & CARLSON, *supra* note 357, § 35:1; Charles W. "Rocky" Rhodes, *Demystifying the Extraordinary Writ: Substantive and Procedural Requirements for the Issuance of Mandamus*, 29 ST. MARY'S L.J. 525, 528–30 (1998).

369. See *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135–36 (Tex. 2004).

370. Cf. *In re Essex Ins. Co.*, 459 S.W.3d 524, 528 (Tex. 2014).

371. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(d).

372. TEX. R. CIV. P. 168; TEX. R. APP. P. 28.3(a).

373. See TEX. CONST. art. V, § 3.

374. See 28 U.S.C. § 1257.

375. See Wasserman & Rhodes, *supra* note 27, at 1051–54.

continue could allow an SB8 case to move through the courts as quickly as an offensive case. On the other hand, the discretionary nature of these doctrines and the political controversy surrounding SB8 incentivize courts to slow-walk these cases.

c. Abatement of Multiple Suits

Providers worry about the risk of multiple simultaneous suits by multiple non-friendly plaintiffs across the state. Although one plaintiff can recover for one post-heartbeat abortion,³⁷⁶ multiple plaintiffs can force a provider to defend multiple suits over that abortion. And if providers continue business as usual by performing all abortions, multiple plaintiffs may target multiple abortions.³⁷⁷ Obtaining dismissal and appellate review of one lawsuit over one abortion does not relieve providers of the cost and burden of litigating a campaign of lawsuits.

Texas offers a solution in the plea in abatement,³⁷⁸ in which a court may abate one action in deference to another ongoing action, considering the practicalities and “the interrelation[ship] of the subject matter of the two suits.”³⁷⁹ Abatement is not mandatory when suits do not involve the same parties.³⁸⁰ And appellate review of denial of abatement is under an abuse of discretion standard.³⁸¹

Abatement of subsequent suits offers an appropriate response to an avalanche of SB8 lawsuits. Every suit raises the legal question of SB8’s constitutional validity and the precedent established in the first action resolves or helps resolve others. That every SB8 plaintiff litigates public rather than personal interests strengthens the argument for abatement. Abating *B*’s lawsuit in deference to *A*’s lawsuit does not deprive *B* of the opportunity to litigate and vindicate distinct personal rights, as *B* and *A* act on behalf of the same public. This process lowers costs and allows providers to focus on litigating and prevailing in one case against one enforcer, as they might in offensive litigation.

d. Suspension of Judgments

A final monetary judgment against a provider appears unlikely. The trial court will grant or deny the motion to dismiss and either decision should be immediately appealed,³⁸² if the losing “any person” does not give up. But providers may fear having to litigate to a final judgment in the trial court and incurring substantive judgments as a condition of seeking review. Following the trial in *New York Times Co. v. Sullivan* and as the case wound through the Alabama Supreme Court and to the Supreme

376. TEX. HEALTH & SAFETY CODE ANN. § 171.208(c).

377. *See id.* § 171.208(b)(2).

378. *See* 2 MCDONALD & CARLSON, *supra* note 357, at § 9:20.

379. *Dolenz v. Cont’l Nat’l Bank of Fort Worth*, 620 S.W.2d 572, 575 (Tex. 1981) (quoting *Timon v. Dolan*, 244 S.W.2d 985, 987 (Tex. App.—San Antonio 1951, no writ)).

380. *See id.*

381. *Id.*

382. *See, e.g., Kasky v. Nike, Inc.*, 45 P.3d 243, 302–04 (Cal. 2002).

Court of the United States, Sullivan sought to collect on the judgment from the four individual defendants; the state seized and auctioned their automobiles and real estate to satisfy the judgment, driving one defendant from Alabama for a ministry in Ohio.³⁸³

Providers facing adverse judgments can suspend enforcement of the judgment pending a final “adverse judgment . . . on appeal.”³⁸⁴ This eases the financial threat of defensive litigation, as providers need not pay damages or may not have to comply with an injunction until they have exhausted all appeals.

This process is not costless, however. Providers must file a supersedeas bond, post a cash deposit, obtain an order of alternate security from the court, or enter into a private supersedeas agreement negotiated by the parties.³⁸⁵ The bond or cash deposit must be in the amount of compensatory damages, costs, and anticipated interest during the course of the appeal, not exceeding the lesser of \$25 million or half the current net worth of the judgment debtor.³⁸⁶ The trial court may suspend injunctive relief pending appeal, with the defendant filing security to cover a loss or damage to the plaintiff caused by the delay on appeal.³⁸⁷ If the Texas Supreme Court affirms a judgment against providers, it can stay issuance of the mandate pending a petition for certiorari to the Supreme Court of the United States, if the state court determines “that the grounds [for review] are substantial,” and that “serious hardship” would result if the mandate issued and the Supreme Court later reversed the judgment.³⁸⁸

3. *Raising Defenses in State Court*

Channeled into a defensive posture, providers assert SB8’s constitutional defects as defenses to liability—a basis for the court to dismiss the enforcement suit or otherwise enter judgment in their favor, denying SB8 plaintiffs their sought remedies and protecting providers from liability.

SB8 purports to limit the defenses available to rights holders in state litigation.³⁸⁹ Providers cannot assert patients’ reproductive rights unless they can show third-party standing.³⁹⁰ This bars providers from raising the primary defense that the substantive ban on post-heartbeat abortion—prohibiting a large swath of pre-viability abortions—violates pregnant people’s rights under the Fourteenth Amendment as interpreted in *Roe* and *Casey*. Providers cannot avoid liability because the post-heart-

383. LEWIS, *supra* note 145, at 162; *supra* text accompanying note 148.

384. *See* TEX. R. APP. P. 24.1.

385. *See id.* 24.1(a).

386. *Id.* 24.2(a)(1). The trial court must also lower the required security to an amount that will not cause the judgment debtor “substantial economic harm” upon a finding that the full amount would cause such harm. *Id.* 24.2(b).

387. *See id.* 24.2(a)(3). These trial court orders on suspending judgments are then subject to appellate review in the court of appeals and by mandamus from the state supreme court. *See In re Smith*, 192 S.W.3d 564, 567–68 (Tex. 2006) (per curiam).

388. TEX. R. APP. P. 18.2.

389. *See* TEX. HEALTH & SAFETY CODE § 171.208(e).

390. *See supra* note 61 and accompanying text.

beat abortion was lawful at the time of performance under existing judicial precedent or court order.³⁹¹ If the Court overrules *Roe* and *Casey*, “any person” can sue and recover over an abortion performed before precedent changed. This creates practical retroactivity—a provider may be liable for conduct that at the time could not provide a basis for liability.³⁹²

Whether these limitations are constitutionally valid and whether they stymie providers and advocates in defending these suits is beyond the scope of this paper. For our purposes, it is enough that constitutional defects in state procedures can be raised and adjudicated in the defensive proceedings, with state resolution providing a federal issue for Supreme Court review.³⁹³ To the extent the limitations on defenses are constitutionally invalid, state judges must disregard them in SB8 litigation and allow rights holders to raise all defenses they are constitutionally entitled to pursue, just as state judges must disregard an invalid substantive claim-providing law.

4. Review in the Supreme Court of the United States

Pushing providers onto defense in state court does not thwart federal judicial review of the constitutional validity of the heartbeat ban and any limits on defenses. Defensive litigation delays the federal forum to the end of the process and shifts it to appellate rather than original jurisdiction, via review and reversal by the Supreme Court of the United States.³⁹⁴ But providers may not find this option satisfactory.

a. Time and Risk

Providers remain on the defensive, waiting for a random plaintiff to initiate a lawsuit at a random moment and perhaps in a far-flung Texas county. Meanwhile, they are chilled in the exercise of constitutionally protected conduct or must risk violating state law and subjecting themselves to liability as a condition of vindicating their constitutional rights. All to the detriment of patients seeking reproductive-health services. And the federal forum comes at the end of expensive and time-consuming defensive litigation through the three-tiered state judiciary, imposing the costs, burdens, and expenses of a longer state-court litigation process.

b. Discretionary Review

The federal forum is not guaranteed because all Supreme Court review is by certiorari; the Court will take the case if the Justices want to hear

391. See *supra* notes 62–63 and accompanying text.

392. See Charles W. “Rocky” Rhodes, *Loving Retroactivity*, 45 FLA. ST. U. L. REV. 383, 411–19 (2018).

393. See, e.g., *Nelson v. Colorado*, 137 S. Ct. 1249, 1252 (2017); *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 770 (1986).

394. 28 U.S.C. § 1257(a).

it.³⁹⁵ Prior to 1988, the Court exercised appellate (mandatory) jurisdiction over state-court judgments declaring state law valid in the face of a federal constitutional challenge.³⁹⁶ The legislatively desired outcome of an SB8 suit is that the Texas courts reject providers' Fourteenth Amendment defenses and find the statute constitutionally valid.

Such a case would have required Supreme Court review, making SB8 challenges a casualty of the Court's shift to an all-discretionary docket. Critics argue that change transformed the Court from a judicial body to a super-legislature, controlling its agenda and seeking out and deciding "controversial questions" at a macro level rather than resolving cases at a micro level.³⁹⁷ The Court's docket has shrunk for the past three decades, with October Term 2019 featuring the fewest argued cases since the Civil War.³⁹⁸ State-court cases declined as part of the docket following the shift to all-discretionary review,³⁹⁹ suggesting Congress and the Court succeeded in withdrawing these cases from the docket.⁴⁰⁰ The combination of all-discretionary review and the shrinking docket explains providers' imperative for offensive litigation in federal court,⁴⁰¹ with no guarantee of Supreme Court review, defensive state-court litigation does not ensure review by an Article III court.

Although discretionary, review seems likely in any SB8 case. A state-court judgment declaring valid a ban on pre-viability abortions conflicts with Supreme Court precedent in *Roe* and *Casey*, a common basis for Supreme Court review.⁴⁰² Although not obligated, the Court often exercises its discretion to hear cases challenging the constitutional validity of state law, regardless of whether the state court accepted or rejected the federal arguments.⁴⁰³

SB8's procedural uniqueness might attract the Court's attention, returning to the *New York Times Co. v. Sullivan* analogue.⁴⁰⁴ *New York Times* fit the Warren Court's larger jurisprudential project of expanding

395. 28 U.S.C. § 1257(a); Wasserman, *supra* note 146, at 912.

396. 28 U.S.C. § 1257(2) (1982) (amended 1988); Bennett Boskey & Eugene Gressman, *The Supreme Court Bids Farewell to Mandatory Appeals*, 121 F.R.D. 81, 95–96 (1988); Hellman, *National Law*, *supra* note 140, at 409.

397. Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1716–18, 1733–34 (2000); Boskey & Gressman, *supra* note 396, at 95–96; Paul D. Carrington, *Politics and Civil Procedure Rulemaking: Reflections on Experience*, 60 DUKE L.J. 597, 599–600 (2010).

398. Adam Feldman, *Empirical SCOTUS: Something We Haven't Seen in the Supreme Court Since the Civil War*, SCOTUSBLOG (Apr. 16, 2020, 5:22 PM), <https://www.scotusblog.com/2020/04/empirical-scotus-something-we-havent-seen-in-the-supreme-court-since-the-civil-war> [<https://perma.cc/4SUU-8FTJ>].

399. Hellman, *National Law*, *supra* note 140, at 411 & tbl.1; Charles W. "Rocky" Rhodes, *What Conservative Constitutional Revolution? Moderating Five Degrees of Judicial Conservatism After Six Years of the Roberts Court*, 64 RUTGERS L. REV. 1, 48–51 (2011).

400. Boskey & Gressman, *supra* note 396, at 96; Hartnett, *supra* note 397, at 1732.

401. Wasserman & Rhodes, *supra* note 27, at 1057; *supra* notes 397–400 and accompanying text.

402. SUP. CT. R. 10(c).

403. See, e.g., Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1243–44, 1260–61 (1978).

404. *Supra* notes 143–47 and accompanying text.

First Amendment liberties in disputes touching race and civil rights during a volatile historical period.⁴⁰⁵ And the case involved dubious harm to a random plaintiff from an innocuous publication that did not warrant a half-million-dollar judgment.⁴⁰⁶ The current Court does not share a jurisprudential project of expanding constitutional rights to reproductive freedom—quite the opposite, as the Court may be receptive to new limitations on abortion, if not to overruling *Roe* and *Casey*.⁴⁰⁷ But everyone recognizes SB8’s unusual structure and its obvious constitutional invalidity under current precedent.⁴⁰⁸ Assuming the Court does not overrule *Roe* and *Casey* in *Dobbs*, it is difficult to believe the Justices would not address SB8’s constitutional validity when presented with a procedurally appropriate vehicle at the appropriate time—one originating in Texas court, litigated defensively, and coming from Texas’s highest court.

c. Finality

The Court reviews “[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had.”⁴⁰⁹ This requires litigants to exhaust the state judiciary before getting to federal court. The availability of the federal forum thus may depend on how Texas courts resolve the constitutional issues and when. It also may depend on how much Texas judges and the Justices wish to expedite this unusual case.

The simplest case is the most appropriate outcome under *Roe* and *Casey*. The state court dismisses the SB8 action; the losing “any person” appeals to the state court of appeals and state supreme court; and the state supreme court’s decision affirming the lower courts is final.⁴¹⁰ Further litigation depends on the basis for the court’s decision. If the Texas Supreme Court decides the plaintiff lacks standing under state law, the case ends, as the state supreme court has the final word on state law.⁴¹¹ If the Texas Supreme Court resolves the federal issues by declaring SB8 constitutionally invalid, the Supreme Court of the United States could review this final judgment as to federal law, although some argue that the Court’s resources are not well spent on reviewing cases in which a state supreme court adopts an expansive view of the federal Constitution and

405. Blasi, *supra* note 285, at 482; Kalven, *supra* note 146, at 192; Logan, *supra* note 206, at 763–64; McGowan, *supra* note 206, at 513–14; Neuborne, *supra* note 204, at 79; Wasserman, *supra* note 146, at 836–37.

406. Wasserman, *supra* note 146, at 912; *see also* Papandrea, *supra* note 146, at 234–37; Frederick Schauer, *Harm(s) and the First Amendment*, 2011 SUP. CT. REV. 81, 105–06.

407. ZIEGLER, *supra* note 11, at 205–06; Wasserman, *supra* note 291, at 59; *see also* *Dobbs v. Jackson Women’s Health*, 141 S. Ct. 2619 (2021) (granting certiorari in part); *Dobbs* Transcript of Oral Argument, *supra* note 8, at 9–11.

408. *See, e.g.,* *Whole Woman’s Health v. Jackson*, 141 S. Ct. 2494, 2494 (2021) (per curiam).

409. 28 U.S.C. § 1257(a).

410. *See supra* notes 361–62 and accompanying text.

411. *See Michigan v. Long*, 463 U.S. 1032, 1040–42 (1983).

declares state law invalid.⁴¹²

The case becomes complicated if the Texas Supreme Court declares SB8 constitutionally valid and allows the SB8 action to proceed. The litigation is not complete if further trial-court proceedings remain on the merits of the SB8 claim.

The Court takes a “practical” approach to § 1257 finality, recognizing several categories of cases in which the Court treats a judgment of a state’s highest court as final when the federal issues (the only thing the Court can address) are final and reviewable, even if further state-court litigation on state issues remains.⁴¹³ Two categories might apply to render final and appealable a state-court decision declaring SB8 valid.

The first covers cases in which the state court renders a conclusive judgment on the federal issue and the outcome of further proceedings is preordained, as where the party seeking review has no defense other than his federal rights and cannot prevail at trial on the facts or on any nonfederal grounds.⁴¹⁴ Further state proceedings “result in a completely unnecessary waste of time,” delaying inevitable review.⁴¹⁵ A typical SB8 action fits this category if the provider admits performing the challenged post-heartbeat abortion,⁴¹⁶ as Dr. Braid did in announcing his actions in a national newspaper.⁴¹⁷ He cannot deny having performed a statutorily prohibited abortion; his only defense is that he cannot be liable under a law that is invalid under the federal Constitution, a defense the state supreme court has rejected. His liability on the state claim is preordained; further proceedings waste time and delay inevitable, dispositive federal review.

The Court established the second, more controversial⁴¹⁸ category in *Cox*. A sexual-assault victim’s father brought state-court statutory and common law privacy claims against a news station for publishing the victim’s name.⁴¹⁹ The Georgia Supreme Court held that a statute prohibiting outlets from publishing such information did not violate the First Amendment and that a common law tort claim could proceed on remand.⁴²⁰

Although further state-court proceedings remained, the Supreme Court treated the state supreme court judgment as final and review-

412. See *Kansas v. Carr*, 577 U.S. 108, 127 (2016) (Sotomayor, J., dissenting); *Long*, 463 U.S. at 1067–68 (Stevens, J., dissenting); Sager, *supra* note 403, at 1243–44, 1260–61.

413. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 477–78 & n.7 (1975).

414. *Id.* at 479 (citing *Mills v. Alabama*, 384 U.S. 214 (1966)); REDISH, *supra* note 279, at 254–55.

415. *Cox*, 420 U.S. at 479.

416. *Cf. Mills*, 384 U.S. at 215–16. In *Mills*, the newspaper editor conceded that he wrote and published an election-day endorsement in violation of state law. *Id.* at 217. Thus, although the Alabama Supreme Court “remanded the case to the trial court for further proceedings,” the decision was “final” because the trial court had no choice but to convict Mills for “wr[iting] and publish[ing] the editorial.” *Id.*

417. See *supra* note 30 and accompanying text.

418. REDISH, *supra* note 279, at 256–57.

419. *Cox*, 420 U.S. at 473–74.

420. *Id.* at 474–75.

able.⁴²¹ The state court had finally decided the federal issue of the state statute's constitutional validity and allowed claims based on publication of the name to proceed.⁴²² Further state-court proceedings would cover nonfederal issues.⁴²³ The party seeking review (the broadcaster in *Cox*) "might prevail on . . . nonfederal grounds, rendering unnecessary review of the federal issue," while immediate reversal on the federal issue precludes further state proceedings.⁴²⁴ And failing to immediately review the state-court decision might "seriously erode federal policy," by leaving in place binding (within the state) precedent on the federal issue that might chill other speakers.⁴²⁵

Cox renders final and appealable a Texas Supreme Court judgment declaring SB8 valid and allowing the action to continue. The court's determination that SB8 is constitutionally valid is final. Providers and advocates could prevail on state-law grounds in state court (such as by showing that no heartbeat had been detected or that a medical emergency existed), depriving the Supreme Court of the opportunity to review the federal constitutional question. Immediate reversal of the state court on the federal issue and immediate declaration that the fetal-heartbeat ban is constitutionally invalid ends the litigation. And allowing, even temporarily, a binding-in-Texas opinion declaring valid a prohibition on abortions at six weeks of pregnancy seriously erodes the federal constitutional rights of women in Texas and the interests of providers who serve them, who operate in the shadow of a statute whose validity is in serious doubt.

d. Standing in the Supreme Court

A potential standing problem looms for Supreme Court review. If an SB8 plaintiff lacks standing to bring the lawsuit in an Article III court,⁴²⁶ how can an Article III court review the judgment in that lawsuit. That is, if the case could not have originated in a federal district court, the state judgment should not be reviewable by any federal court. In *ASARCO v. Kadish*, the Court stated:

When a state court has issued a judgment in a case where plaintiffs in the original action had no standing to sue under the principles governing the federal courts, we may exercise our jurisdiction on certiorari if the judgment of the state court causes direct, specific, and concrete injury to the parties who petition for our review, where the requisites of a case or controversy are also met.⁴²⁷

In other words, the state-court loser, harmed by an adverse state-court judgment, has standing to obtain Supreme Court review of that judgment and the underlying federal issues. Given the state's hoped-for course of

421. *Id.* at 485.

422. *Id.*

423. *Id.*

424. *Id.* at 482–83.

425. *Id.* at 483, 485–86; REDISH, *supra* note 279, at 257.

426. *See supra* Section IV.B.3.

427. *ASARCO Inc. v. Kadish*, 490 U.S. 605, 623–24 (1989).

SB8 litigation—a plaintiff without Article III standing sues and prevails in the Texas courts—*ASARCO* gives providers Article III standing to seek review of the state-court judgment.

But *ASARCO* may not eliminate all standing problems if providers lose on the federal constitutional question in the Texas courts and jurisdiction depends on the fourth *Cox* category. Such a case repeats the procedural muddle of *Nike v. Kasky*.⁴²⁸

The California Supreme Court reversed dismissal, holding that Nike's press releases were commercial speech, did not enjoy complete First Amendment protection if false,⁴²⁹ and could form the basis for civil liability. The Supreme Court of the United States granted certiorari, then dismissed as improvidently granted.⁴³⁰

Justices Stevens and Ginsburg concurred in the dismissal,⁴³¹ while Justices Breyer, Kennedy, and O'Connor dissented.⁴³² Justice Breyer argued that Nike had standing under a synthesis of *ASARCO* and the fourth *Cox* category⁴³³—Nike was injured by a state judgment and that judgment had practical finality under *Cox*. Stevens rejected this synthesis as improperly expanding *ASARCO*. He argued that *ASARCO* creates standing in the Supreme Court because an adverse final state-court judgment works a “direct, specific, and concrete injury,” by “altering tangible legal rights.”⁴³⁴ But the denial of the motion to dismiss in *Kasky* did not alter tangible rights or cause a direct, specific, and concrete injury; it required Nike to litigate further to vindicate those rights, but without finality and thus without an injury to establish Article III standing.⁴³⁵

Their points of departure illustrate a potential problem for reviewing SB8 cases in which the Texas Supreme Court determines that the Fourteenth Amendment does not bar the lawsuit and allows the state-law claims to continue. That produces the same interaction of *ASARCO* and *Cox*—an SB8 action that could not be litigated in federal court has not caused defendant providers a “direct, specific, and concrete injury” beyond having to litigate state-law issues in state court. This might prompt the Court to deny certiorari, requiring providers to litigate to a final judgment in state court and reach the Supreme Court on the constitutional claims after complete state-court litigation down the line. That renders defensive litigation longer, more burdensome, and more costly compared with the offensive litigation SB8 precludes,⁴³⁶ to the detriment of reproductive freedom in Texas.

428. *Supra* notes 154–68 and accompanying text.

429. *Kasky v. Nike, Inc.*, 45 P.3d 243, 262 (Cal. 2002).

430. *See Nike, Inc. v. Kasky*, 539 U.S. 654, 655 (2003) (per curiam).

431. *See id.* at 656–65 (Stevens, J., concurring).

432. *See id.* at 665–84 (Breyer, J., dissenting).

433. *See id.* at 669–70.

434. *Id.* at 662 (Stevens, J., concurring) (quoting *ASARCO Inc. v. Kadish*, 490 U.S. 605, 619, 623–24 (1989)).

435. *Id.* at 662–63, 662 & n.4.

436. *See supra* Section IV.C.4.

D. THE LIMITED SCOPE OF DEFENSIVE LITIGATION

Constitutional remedies—issued through offensive or defensive litigation—are limited to the parties, contrary to common perception. Courts do not “strike down” or “block” invalid laws; courts stop their present and future enforcement.⁴³⁷ And offensive litigation enjoins future enforcement not against all rights holders who might be subject to the law, but against the parties to the offensive litigation—defendant officials cannot enforce the challenged law against the parties to the case, but remain free to enforce that law or a similar law against non-parties.⁴³⁸

This is obvious in defensive litigation. Imagine *A* sues Planned Parenthood under SB8; Planned Parenthood defends on the grounds that the law is inconsistent with the Constitution; and the court agrees with Planned Parenthood that the law is constitutionally invalid and cannot be enforced as the rule of decision or provide a basis for liability. The court dismisses *A*’s lawsuit but does nothing more.

The opinion supporting the judgment functions as precedent that influences or dictates the outcome of future cases.⁴³⁹ But judicial precedent cannot prohibit another plaintiff from initiating a future SB8 enforcement action and attempting to litigate anew; it guarantees he loses when the new court adheres to that precedent and applies it to the new case.⁴⁴⁰ If a court has declared SB8 invalid in *A v. Planned Parenthood*, other actions may follow. *B* could sue Planned Parenthood over the same or a different abortion; *A* could sue Planned Parenthood over a different abortion; and *A* or *B* could sue Whole Woman’s Health, a different provider, for a different abortion. Each suit fails before a court following precedent that SB8 is constitutionally invalid. But the provider must defend the action, with the attendant costs and burdens.

This is not unique to SB8 or private enforcement. An executive official could ignore binding precedent and bring a new action under a publicly enforceable law if willing to lose in court.⁴⁴¹ Public officials do not follow this course, deterred by political pushback,⁴⁴² the threat of attorney’s fees awarded to prevailing civil rights plaintiffs,⁴⁴³ and the ethical obligations of government attorneys.⁴⁴⁴ This represents a problem under SB8 because private plaintiffs do not operate under the political checks that deter public officials. In fact, ideological commitments to stopping abortion

437. See *supra* notes 105–08 and accompanying text.

438. See *supra* notes 128–32 and accompanying text.

439. See *supra* note 132 and accompanying text.

440. See Wasserman, *supra* note 98, at 1125.

441. See *id.* at 1125–26.

442. See Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 VAND. L. REV. 465, 498–99 (2018); Merrill, *supra* note 131, at 44; Neil S. Siegel, *Law Is Not Enough*, 45 OHIO N.U. L. REV. 197, 204 (2019); Kevin C. Walsh, *Judicial Departmentalism: An Introduction*, 58 WM. & MARY L. REV. 1713, 1719–20 (2017); Wasserman, *supra* note 98, at 1119.

443. See 41 U.S.C. § 1988(b); Miller v. Caudill, 936 F.3d 442, 445–46 (6th Cir. 2019); Wasserman, *supra* note 98, at 1128–29.

444. See Wasserman, *supra* note 98, at 1129–31.

may incentivize *A* to file repeated claims. This lends insidious force to SB8's prohibition on attorney's fees against losing plaintiffs or in favor of prevailing defendants, where the claim is meritless or groundless.⁴⁴⁵ It removes the most significant deterrent of baseless private litigation.⁴⁴⁶

E. THE PROBLEM OF NON-MUTUAL PRECLUSION

SB8's elimination of the defense of non-mutual preclusion⁴⁴⁷ merits separate commentary because the fear of this provision reflects the outrage—the hypnosis⁴⁴⁸—and error surrounding SB8 procedure.

Historically, preclusion required “mutuality,” meaning it applied in subsequent litigation involving the parties to the first case and prevented those parties from having to relitigate issues or claims on which they prevailed or from having the opportunity to relitigate filed issues or claims on which they lost.⁴⁴⁹ That changed in the mid-20th century, as courts and commentators recognized possible application of preclusion in Case 2 involving nonparties to Case 1.⁴⁵⁰ Contrary to ordinary Texas procedure,⁴⁵¹ however, non-mutuality does not apply to SB8 actions—a provider cannot benefit from judgment in Case 1 in litigating Case 2.

Justice Sotomayor identified this as one way SB8 makes litigation “uniquely punitive” for providers, because “if they prevail, they remain vulnerable to suit by any other plaintiff anywhere in the State for the same conduct.”⁴⁵² Justice Sotomayor imagined the abortion equivalent of Brainerd Currie's train wreck—instead of a train wreck injuring fifty people and each injured person filing a separate lawsuit that forces the railroad to defend each,⁴⁵³ a provider performs a single abortion on which

445. TEX. CIV. PRAC. & REM. CODE ANN. § 171.207(i). Courts might retain power to impose statutory sanctions for signing a frivolous pleading or motion. CIV. PRAC. & REM. § 10.001–.006.

446. The delegation of exclusive enforcement authority could mean SB8 plaintiffs act under color of state law and may be sued under 42 U.S.C. § 1983 for injunctive relief, damages, and attorney's fees. Wasserman & Rhodes, *supra* note 27, at 1079–84, 1092–94. “Any person” might hesitate to pursue further SB8 lawsuits, contrary to binding precedent, if in doing so he becomes a state actor subject to damages equaling the costs the provider incurred in defending that frivolous state-court lawsuit. *Id.*

447. CIV. PRAC. & REM. § 171.208(e)(5).

448. Colangelo, *supra* note 26, at 137.

449. See Zachary D. Clopton, *National Injunctions and Preclusion*, 118 MICH. L. REV. 1, 10–11 (2019); Brainerd Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281, 281 (1957); Alan M. Trammell, *Demystifying Nationwide Injunctions*, 98 TEX. L. REV. 67, 93 (2019).

450. See Clopton, *supra* note 449, at 11; Currie, *supra* note 449, at 282; Trammell, *supra* note 449, at 94; *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979); *Bernhard v. Bank of Am. Nat'l Tr. & Sav. Ass'n*, 122 P.2d 892 (Cal. 1942).

451. *Sysco Food Servs., Inc. v. Trapnell*, 890 S.W.2d 796, 801–05 (Tex. 1994); *Eagle Properties, Ltd. v. Scharbauer*, 807 S.W.2d 714, 721 (Tex. 1990); *Presidio Bridge Co. v. Tex. Dep't of Highways & Pub. Transp.*, 769 S.W.2d 720, 722 & n.2 (Tex. App.—Austin 1989, no writ).

452. *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 546 (2021) (Sotomayor, J., concurring in the judgment in part and dissenting in part).

453. Currie, *supra* note 449, at 281.

fifty “any persons” file separate *seriatim* lawsuits that force the provider to defend each.

But the provider faces this burden under ordinary preclusion rules, not unique SB8 preclusion rules. Non-mutuality never allows a party to use the preclusive effect of a judgment against a non-party to the prior case, who never had a day in court or the opportunity to litigate the issues.⁴⁵⁴ In Currie’s train wreck, if Passenger *A* loses her suit against the railroad, the railroad never can use that favorable judgment to defeat Passenger *B*’s and *C*’s separate suits, because Passengers *B* and *C* never had an opportunity to litigate their claims;⁴⁵⁵ the railroad must defend each claim. Similarly, if “any person” *X* loses his suit to Whole Woman’s Health over Amy’s post-heartbeat abortion, Whole Woman’s Health cannot use that favorable judgment to defeat “any person” *Y*’s suit over Amy’s abortion, because *Y* never had an opportunity to litigate his claim over that abortion; Whole Woman’s Health must defend each claim. This reflects ordinary preclusion rules, in which a defendant may have to defend multiple lawsuits from multiple plaintiffs arising from the same conduct;⁴⁵⁶ it neither departs ordinary Texas procedure nor deprives provider-defendants of procedural due process or effective post-enforcement of adjudication.⁴⁵⁷

The absence of non-mutual preclusion under SB8 may deprive a provider of a defense in two situations, although neither imposes an extraordinary burden on defending providers.

First, imagine “any person” *X* sues Whole Woman’s Health over Amy’s post-heartbeat abortion, the court declares the heartbeat ban constitutionally invalid and enters judgment against *X*, then *X* sues Planned Parenthood over Barb’s post-heartbeat abortion. Second, imagine “any person” *X* sues Whole Woman’s Health over Amy’s post-heartbeat abortion, the court declares the heartbeat ban constitutionally invalid enters judgment against *X*, then *X* sues Dr. Smith, the Whole Woman’s Health physician who performed the abortion.

In both cases, the nonparty to the prior case uses preclusion against a party to the prior case. Such defensive non-mutual preclusion is permissible under ordinary rules—*X* had an opportunity to litigate the legal issue of the heartbeat ban’s constitutional validity and lost, so the defendant in the second action can use that judgment to prevent *X* from relitigating the issue.⁴⁵⁸ Deprived of that preclusion defense under SB8, Planned Parenthood or Dr. Smith must litigate the constitutional issue and give *X*

454. Clopton, *supra* note 449, at 12; Currie, *supra* note 449, at 285–86; Trammell, *supra* note 449, at 94–95.

455. Currie, *supra* note 449, at 285–86.

456. Justice Sotomayor’s unstated concern is the limitless future plaintiffs, who outnumber the fifty people injured in Currie’s train wreck. That objects to the scope of the cause of the SB8 action, *supra* Section II.A.5, not preclusion defenses.

457. *Cf. Whole Woman’s Health*, 142 S. Ct. at 546–47 (Sotomayor, J., concurring in the judgment in part and dissenting in part).

458. Clopton, *supra* note 449, at 12.

the opportunity to relitigate a constitutional issue on which he failed in the first action.

But this may not impose an excessive burden. Under ordinary preclusion rules, Planned Parenthood or Dr. Smith would raise preclusion as a basis for dismissing the second action. Under SB8's special rules, either moves to dismiss, reasserting the heartbeat ban's substantive constitutional invalidity as the basis for dismissal rather than preclusion. And the decision in *X*'s prior failed suit may have precedential effect (depending on how far *X* pursued that case), persuading or compelling Court 2 to agree with Court 1 that the heartbeat ban is constitutionally invalid and to dismiss *X*'s new lawsuit.⁴⁵⁹

F. THE CONSTITUTIONAL VALIDITY OF FETAL-HEARTBEAT BANS

Providers can litigate these constitutional issues and vindicate their constitutional rights in a defensive posture. It requires an initial legal and financial risk in having to violate the law at least once to trigger a lawsuit and potential liability, a less secure position than pre-enforcement litigation. It may require them to litigate multiple cases against multiple plaintiffs, expanding those costs, burdens, and risks.

But this is not unprecedented. Providers stand in the same position as the *New York Times* or *Estelle Griswold*—compelled to violate state law, at the risk of civil or criminal liability, and to defend in state court as a step towards Supreme Court review and vindication of their constitutional positions. Insisting that operating from this procedural posture denies judicial review⁴⁶⁰ or violates procedural due process⁴⁶¹ denies this history.⁴⁶²

Providers fear defensive litigation under SB8 for a different reason—they will be unable to vindicate their constitutional rights. A decision protecting the speakers in *New York Times Co. v. Sullivan* seemed likely, part of the Court's broader project of vindicating individual rights in the milieu of challenges to Jim Crow.⁴⁶³ Four years before *Griswold*, two Justices argued that Connecticut's contraception ban was constitutionally invalid⁴⁶⁴ and a third appeared to await an appropriate application of the statute to say the same;⁴⁶⁵ *Griswold* and others could risk violating the

459. Cf. Alan M. Trammell, *Precedent and Preclusion*, 93 NOTRE DAME L. REV. 565, 567–68 (2017).

460. See *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 543 (2021) (Roberts, C.J., concurring in part and dissenting in part); *id.* at 545–46 (Sotomayor, J., concurring in the judgment in part and dissenting in part).

461. See *id.* at 547 (Sotomayor, J., concurring in the judgment in part and dissenting in part).

462. See *id.* at 538 (majority opinion).

463. See LEVINE & WERMIEL, *supra* note 146, at 12–13; Blasi, *supra* note 285, at 482; Kalven, *supra* note 146, at 192; Logan, *supra* note 206, at 763–64; McGowan, *supra* note 206, at 513–14; Neuborne, *supra* note 204, at 79; Wasserman, *supra* note 146, at 836–37; *supra* notes 143–51 and accompanying text.

464. See *Poe v. Ullman*, 367 U.S. 497, 513–14 (1961) (Douglas, J., dissenting); *id.* at 539 (Harlan, J., dissenting).

465. *Id.* at 509 (Brennan, J., concurring in the judgment).

law, correctly believing their rights would be vindicated.

Texas providers face the opposite prospect—a Supreme Court likely to declare SB8's substantive provision constitutionally valid, whether by overruling *Roe* and *Casey* or by adjusting its abortion jurisprudence to make viability less of a constitutional dividing point.⁴⁶⁶ They fear, not without reason, they will lose and face substantial liability in defensive litigation.

But this reflects a substantive rather than procedural problem. Concern that they will fail on the constitutional merits and that reproductive freedom will be lost is agnostic to the posture in which they litigate their rights. A Supreme Court determination that SB8 is constitutionally valid means that providers lack a substantive legal right to perform (and their patients a constitutional right to obtain) certain abortion services, meaning they lack constitutional protection for statutory-violative conduct and can be subject to liability and damages for that conduct. That is, if there is no constitutional right to a six-week abortion, providers lack constitutional protection from liability. The posture or forum in which that issue is litigated does not matter.

V. CONCLUSION: THE BENEFITS OF DEFENSIVE LITIGATION

Reproductive-health providers, advocates, a supportive presidential administration, and reproductive-freedom supporters do not want to litigate SB8's constitutional validity defensively. The desire for offensive litigation, especially in federal court, is understandable, given the benefits of that posture and the desire to litigate federal constitutional rights in a federal forum.

But the compelled shift to defensive litigation neither thwarts nor undermines federal judicial review. Defensive litigation of federal constitutional rights provides a common and successful recourse for constitutional review and for vindicating constitutional rights. Combined with limited offensive avenues, these strategies solve the procedural puzzles emanating from SB8 and its inevitable imitators.

466. Wasserman, *supra* note 291, at 59–60.

