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Recent Case Development

Whole Woman's Health v. Jackson: One Texas Law's Procedural Peculiarities and its Monolithic Threat to Abortion Access — Abortion is a medically recognized[1] and legally sanctioned[2] form of health care in the United States. And abortion occupies a heavily trafficked sector of the U.S. health care industry: an estimated twenty-five percent of American women[3] will obtain an abortion by the end of their childbearing years.[4] Abortion rates trail not far behind the rates of two other extraordinarily common surgeries performed on Americans with uteruses: Caesarean sections (which occur in around thirty-three percent of birthing people)[5] and hysterectomies (which have occurred in around thirty percent of all uterus-bearing people aged fifty or older).[6]

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[1]*See, e.g.*, *Abortion*, Am. Coll. Obstetricians & Gynecologists, https://www.acog.org/topics/abortion [https://perma.cc/DN2V-XACT] (last visited Apr. 11, 2022); Travis Loller, *Amid abortion rights threat, OB-GYNs more vocal with support*, ABC News (Mar. 8, 2022, 8:35 PM), https://abcnews.go.com/Health/wireStory/amid-abortion-rights-threat-ob-gyns-vocal-support-83319403 [https://perma.cc/DB5N-ZDW7]; *Abortion* in *Ethics*, Am. Med. Ass'n, https://www.ama-assn.org/delivering-care/ethics/abortion [https://perma.cc/B5EN-ZSSY] (last visited Apr. 11, 2022) ("The Principles of Medical Ethics of the AMA do not prohibit a physician from performing an abortion in accordance with good medical practice and under circumstances that do not violate the law."); Mara Gordon, *Doctors Say Federal Rules on Discussing Abortions Inhibit Relationships with Patients*, NPR (Sept. 9, 2019, 5:00 AM), https://www.npr.org/ sections/health-shots/2019/09/09/756103421/doctors-say-federal-rules-on-discussing-abortions-inhibit-relationships-with-pat [https://perma.cc/Z8GX-RA5N]; Harvard Medical School, *Abortion (Termination of Pregnancy)*, Harvard Health Publishing (Jan. 9, 2019), https://www.health.harvard.edu/medical-tests-and-procedures/abortion-termination-of-pregnancy-a-to-z [https://perma.cc/93XH-EWC8].

[2]*See Abortion is Health* Care, Nat'l Health L. Program, https://healthlaw.org/abortion-is-health-care/#:~:text=Abortion%20is%20health%20care [https://perma.cc/D59N-JRRP] (last visited Apr. 11, 2022). *See also* Roe v. Wade, 410 U.S. 113 (1973), Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833 (1992). Note, however, that while the Supreme Court in *Roe* and *Casey* affirmed the right to obtain pre-viability abortions without undue state interference, the Court did not in either case explicitly articulate abortion as a form health care.

[3]Please note that this Recent Case Development attempts to use inclusive language wherever possible ("pregnant person" versus "pregnant woman," for example). Studies and statistics concerning abortion volume have traditionally been framed using gender-specific language, however. Thus, to accurately convey the statistic cited here, the word "woman" is used in the stead of the more optimal and inclusive "pregnant person."

[4]Margot Sanger-Katz, Claire Cain Miller, & Quoctrung Bui, *Who Gets Abortions in America?* N.Y. Times: The Upshot (Dec. 14, 2021), https://www.nytimes.com/interactive/2021/12/14/upshot/who-gets-abortions-in-america.html [https://perma.cc/R6BA-7PED]; *Abortion Is a Common Experience for U.S. Women, Despite Dramatic Declines in Rates*, Guttmacher Inst. (Oct. 19, 2017), https://www.guttmacher.org/news-release/2017/abortion-common-experience-us-women-despite-dramatic-declines-rates [https://perma.cc/35KV-KG2E]; Katherine Kortsmit, et al., *Abortion Surveillance—United States, 2019,* Ctrs. Disease Control & Prev. (Nov. 26, 2021), https://www.cdc.gov/mmwr/volumes/70/ss/ss7009a1.htm#suggestedcitation [https://perma.cc/2ZPK-UNX3]. Notably, however, studies like the CDC Surveillance likely fail to capture accurate abortion rates, in part because states are not required to report data to the CDC for inclusion in its annual reports. The Associated Press, *Abortions may be inching up in the U.S. after decades of decline, CDC reports,* NBC News (Nov. 24, 2021), https://www.nbcnews.com/health/health-news/abortions-may-be-inching-u-s-after-decades-decline-cdc-n1284584 [https://perma.cc/EH3U-V9BW].

[5]*Cesarean Delivery Rate by State,* Ctrs. Disease Control & Prev. (Feb. 25, 2022), https://www.cdc.gov/nchs/pressroom/sosmap/cesarean_births/cesareans.htm [https://perma.cc/DHB2-USQ3] (providing C-section rates by state, which range from 22.9% of live births in Alaska to 38.2% of live births in Mississippi).

[6]QuickStats: *Percentage of Women Aged > 50 Years Who Have Had a Hysterectomy, by Race/Ethnicity and year—National Health Interview Survey, United States, 2008 and* 2018, Ctrs. Disease Control & Prev. (Oct. 18, 2019), https://www.cdc.gov/mmwr/volumes/68/wr/mm6841a3.htm [https://perma.cc/QK95-6PVH].

Recent state legislation, however, discords with abortion's ubiquity in American medicine and American culture. In 2021, state legislatures enacted exactly 106 abortion restrictions.[7] Twelve of these restrictions exist in the form of outright bans on abortion procedures.[8] Claims that 2021 was the "worst year" for abortion access since 1973 proliferate.[9]

The law that perhaps most poignantly represents 2021's erosive impact on abortion access is the Texas Heartbeat Act, or Senate Bill No. 8 ("S.B. 8"), which was passed in May 2021 and effectuated in September 2021.[10] S.B. 8 self-describes as "[a]n act relating to abortion, including abortions after detection of an unborn child's heartbeat [which] authoriz[es] a private right of action."[11] This recent case development discusses the substantive aspects of S.B. 8's provisions, some of which mirror other heartbeat bills', and some of which are quite distinctive. It next guides the reader through *Whole Woman's Health v. Jackson*, the primary stream of litigation that sprang from S.B. 8's passage and effectuation.

I. A PORTRAIT OF S.B. 8 AND ITS HERITAGE

There exists a legal fiction in American law called a "fetal heartbeat."[12] The fiction is bipartite: firstly, it asserts that the pregnancy tissue in a pregnant person's uterus is identifiable as "a fetus" throughout the entirety of the pregnancy.[13] This assertion

[7]Elizabeth Nash, *For the First Time Ever, U.S. States Enacted More Than 100 Abortion Restrictions in a Single Year,* Guttmacher Inst. (Oct. 4, 2021), https://www.guttmacher.org/ article/2021/10/first-time-ever-us-states-enacted-more-100-abortion-restrictions-single-year [https://perma.cc/6DKG-CQC6].

[8]*Id.*

[9]Kaia Hubbard, *States Enact Record Number of Abortion Restrictions in 2021,* U.S. News (Oct. 5, 2021, 4:25 PM), https://www.usnews.com/news/national-news/articles/2021-10-05/states-enact-record-number-of-abortion-restrictions-in-2021 [https://web.archive.org/web/20220503193711/https://www.usnews.com/news/national-news/articles/2021-10-05/states-enact-record-number-of-abortion-restrictions-in-2021]; Brandon Richards, *ICYMI: Worst Year For Abortion Restrictions Emphasizes Need for California to Build on Reproductive Freedom Status*, Planned Parenthood (Oct. 7, 2021), https://www.plannedparenthoodaction.org/planned-parenthood-affiliates-california/media/icymi-worst-year-abortion-restrictions-emphasizes-need-californi [https://perma.cc/LE3T-2CC4].

[10]Tex. Health & Safety Code Ann. §171.204(a) (West 2021). The "Legislative Findings" upon which SB 8's passage is apparently predicated are listed in §171.202 of the act. There, for example, the Texas legislature declares that the basis for the law is rooted in the state of Texas's "compelling interests from the outset of a woman's pregnancy in protecting the health of the woman and the life of the unborn child." §171.202 also provides that S.B. 8 serves to further the pregnant woman's "compelling interest in knowing the likelihood of her unborn child surviving to full-term birth based on the presence of cardiac activity" by allowing her to make "an informed choice about whether to continue her pregnancy." §171.202 further justifies S.B. 8's passage as called for by "contemporary medical research" which establishes that "the fetal heartbeat has become a key medical predictor than an unborn child will reach live birth [and that] cardiac activity begins at a biologically identifiable moment in time, normally when the fetal heart is formed in the gestational sac."

[11]*Id.*

[12]Professor Andrew Koppelman provides that laws do not need to rely on accurate medical premises to survive constitutional challenges, however. "Legislatures are free to define things any way they want and give it the force of law. The reality of medical science is not a constraint on what a legislature can do. What is a constraint on what a legislature can do are the constitutional rights of women." Julie Carr Smyth & Kimberlee Kruesi, *'Fetal heartbeat' in abortion law taps emotion, not science,* Daily J. (Apr. 30, 2021), https://www.djournal.com/print-features/fetal-heartbeat-in-abortion-laws-taps-emotion-not-science/article 7f3133fa-6f0a-5ce0-b12d-0b535b64c759.html [https://perma.cc/XVG3-Q6W6].

[13]Selena Simmons-Duffin & Carrie Feibel, *The Texas Abortion Ban Hinges on 'Fetal Heartbeat.' Doctors Call That Misleading*, NPR (Sept. 3, 2021), https://www.npr.org/sections/healthshots/ 2021/09/02/1033727679/fetal-heartbeat-isnt-a-medical-term-but-its-still-used-in-laws-on-abortion [https://perma.cc/DP9W-JY5Q]; Adam Rogers, *'Heartbeat' Bills Get the Science of Fetal Heartbeats All Wrong*, Wired (May 14, 2019, 6:00 AM), https://www.wired.com/story/heartbeat-bills-get-the-science-of-fetal-heartbeats-all-wrong/ [https://perma.cc/EKJ4-4ZC2]; Asher Stockler, *What is a "Fetal Heartbeat"? As Louisiana Passes Latest*

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constitutes a legal fiction because medical consensus provides that pregnancy tissue is not considered a "fetus" until after their eighth week of pregnancy.[14]

Secondly, the fiction asserts that when a health care provider performs an ultrasound on a pregnant person, and the resulting ultrasound imaging feed "flutters," that ultrasound imaging is revealing a *heartbeat*. Put another way, the ultrasound is picking up on a heartbeat emitting from the pregnancy tissue. In many circumstances, this assertion also discords with modern medical understanding. A completely discernible heart (the human organ, identified primarily by its the presence of chambers, cardiac valves, and vessels) is not fully formed within pregnancy tissue until nearly halfway through a pregnancy, around seventeen weeks at the earliest.[15] Instead, flutters detected prior to the complete development of a fetal heart represent the electrical activity—or "early stage cardiac activity"—that is being rapidly emitted by the developing pregnancy tissue's dividing and multiplying cardiovascular cells.[16]

Thus, although a true "fetal heartbeat" can certainly be detected during the later stages of pregnancy where the pregnancy tissue is (1) identifiable as a fetus and (2) contains a formed, identifiable heart, the flutters revealed via ultrasound prior to this time cannot represent a fetal heartbeat (the rhythmic opening and shutting of a fetus's cardiac valves) because neither the *fetus* nor the *fully formed heart* yet exists.

Relatively recently,[17] however, state lawmakers aiming to restrict abortion access began promulgating the fetal-heartbeat fiction in pieces of legislation called "heartbeat

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Anti-Abortion Law, Doctors Say Term is a Misnomer*, Newsweek (May 30, 2019, 6:32 PM), https://www.newsweek.com/what-fetal-heartbeat-doctors-say-thats-misnomer-1440178 [https://perma.cc/KP55-8FAW]; Jessica Glenza,* Doctors' organization: calling abortion bans 'fetal heartbeats' is misleading*, Guardian (June 5, 2019, 2:00 PM), https://www.theguardian.com/world/2019/jun/05/abortion-doctors-fetal-heartbeat-bills-language-misleading [https://web.archive.org/web/20220503200036/https://www.theguardian.com/world/2019/jun/05/abortion-doctors-fetal-heartbeat-bills-language-misleading].*

[14]*E.g.*, Mayo Clinic Staff, *Pregnancy week by week*, Mayo Clinic (Sept. 17, 2021), https://www.mayoclinic.org/healthy-lifestyle/pregnancy-week-by-week/in-depth/prenatal-care/art-20045302 [https://perma.cc/2C86-SKTU]. For context, pregnancy tissue begins as a zygote, a single-celled entity created by the union of a sperm cell and egg cell. *Id.* Approximately three weeks into a pregnancy, the zygote develops into a morula (a cluster of cells), and soon thereafter into an embryo. *Id.* The pregnancy tissue is identified as an embryo for around seven weeks before it develops into a fetus. *Id.*

[15]"Until the chambers of the heart have been developed and can be detected via ultrasound (roughly 17-20 weeks of gestation, it is not accurate to characterize the embryo's or fetus's cardiac development as a heart." *ACOG Guide to Language and Abortion*, Am. Coll. Obstetricians & Gynecologists, https://www.acog.org/contact/media-center/abortion-language-guide [https://perma.cc/4GVB-UXFY] (last visited Apr. 11, 2022).

[16]*See, e.g.*, Simmons-Duffin & Fiebel, *supra* note 13 ("'At six weeks of gestation, [heart] valves don't exist. The flickering that we're seeing on the ultrasound that early in the development of the pregnancy is actually electrical activity, and the sound that you 'hear' is actually manufactured by the ultrasound machine'….'What we're really detecting is a grouping of cells that are initiating some electrical activity…In no way is this detecting a functional cardiovascular system or a functional heart.'"); *see also How Your Fetus Grows During Pregnancy: Frequently Asked Questions*, Am. Coll. Obstetricians & Gynecologists (Aug. 2020), https://www.acog.org/womens-health/faqs/how-your-fetus-grows-during-pregnancy [https://perma.cc/W473-ZP7P] (describing fetal development and noting that the cardiovascular system *begins forming* during the first eight weeks of pregnancy).

[17]America's first heartbeat bill, HB 125, was introduced in the Ohio state legislature on February 24, 2011, almost exactly ten years prior to S.B.'s introduction in the Texas legislature. In what has become typical fashion for heartbeat bills, HB 125 set forth two primary requirements. Firstly, it required physicians intending to provide abortions to check pregnant women's pregnancy tissue for such so-called "fetal heartbeats" before proceeding with abortion services. Secondly, if those physicians detected fetal heartbeat[s] upon such examinations, HB 125 required those physicians to refrain from providing abortion services, except in the event of medical necessity or emergency. As the first of its kind, HB 125 garnered national media attention and generated significant public scrutiny. HB 125 seemed to openly reject the viability standard set forth in *Planned Parenthood v. Casey*, the case in which the Supreme Court essentially held that states are constitutionally prohibited from unduly interfering with a woman's access to abortion care before her pregnancy tissue becomes "viable" (able to survive outside of the uterus). Although the position of the viability line differs in each individual pregnancy, it typically measures at around twenty-three or twenty-four weeks. On the other hand, pregnancy tissue typically

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bills."[18] Heartbeat bills prohibit abortion wherever pregnancy tissue emits electrical activity that is detectable via ultrasound. These bills term that electrical activity a "fetal heartbeat" regardless of when during a pregnancy the activity is detected (*i.e.*, regardless of whether the pregnancy tissue emitting the activity is technically a fetus, and regardless of whether the activity is emitted from a fully formed heart).[19]

The Texas legislature numbers among the several state legislatures that have introduced (and passed) heartbeat bills over the last decade or so, despite these bills' rather unpromising survival rates.[20] Texas passed its first heartbeat bill in 2013, though the bill was quickly struck down after being deemed unconstitutional.[21] The Texas legislature introduced another heartbeat bill in 2019, which failed to survive even to passage.[22] S.B. 8 thus marks the Texas legislature's third attempt to restrict abortion access based on early cardiac activity detection.

To an extent, S.B. 8 is structured much like its several predecessors, in-state and out-of-state alike. Substantively, S.B. 8 first and foremost requires abortion providers to perform ultrasounds on pregnant people seeking abortions.[23] The law then provides that if

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begins emitting detectable electrical activity six or seven weeks into a pregnancy. Because viability and detectable cardiac activity occur at such diametrically different points during a pregnancy, the limitations that HB 125 imposed on abortion access were widely disparaged as unquestionably constitutional, and the Ohio legislature shelved HB 125 in 2012, disallowing its passage. *See* Am. Sub. H.B. 125, 129th Gen. Assemb., Reg. Sess. (Ohio 2011); *see also* Tara Culp-Ressler, *Ohio Lawmakers Give Up On Anti-Choice Legislation*, ThinkProgress (Nov. 28, 2012, 10:45 AM), https://thinkprogress.org/ohio-lawmakers-give-up-on-anti-choice-legislation-5523c8152f6e/ [https://perma.cc/F57D-XBMF].

[18] *See, e.g.*, S.C. Code Ann. § 44-41-680; Okla. Stat. Ann. tit. 63, § 1-731.3 (West); Miss. Code. Ann. § 41-41-34.1 (West); N.D. Cent. Code Ann. § 14-02.1-05.2 (West) (held unconstitutional by MKB Mgt. Corp. v. Stenehjem, 795 F.3d 768 (8th Cir. 2015); Iowa Code Ann. § 146C.2 (West) (held unconstitutional by Planned Parenthood of the Heartland, Inc. v. Reynolds, 2019 WL 312072 (Iowa Dist.).

[19] *See, e.g.*, S.C. Code Ann. § 44-41-610 ("'Fetal heartbeat' means cardiac activity, or the steady and repetitive rhythmic contraction of the fetal heart, within the gestational sac"); Okla. Stat. Ann. tit. 63, § 1-731.3 (West) ("A 'detectable heartbeat' shall mean embryonic or fetal cardiac activity or the steady or repetitive rhythmic contract of the heart within the gestational sac"); Miss. Code. Ann. § 41-41-34.1 (West) ("'fetal heartbeat' means cardiac activity or the steady and repetitive rhythmic contraction of the fetal heart within the gestational sac").

[20] Just two years after HB 125's rise and fall, the North Dakota legislature introduced *and* successfully passed its own heartbeat bill: HB 1456. Like H.B. 125, H.B. 1456 rendered illegal the performance of abortion procedures on pregnant women if, upon medical examination, the pregnant woman's embryo or fetus (or, in the words of H.B. 1456's text, her "unborn child") was found to emit a "detectable heartbeat." H.B. 1456 was short-lived despite its successful passage in March 2013. During the summer of 2013, the Center for Reproductive Rights brought suit in district court against then-North Dakota Governor Jack Dalrymple, seeking a pre-enforcement injunction of H.B. 1456 The District Court issued a permanent injunction against H.B. 1456, and the 8th Circuit affirmed. Notably, the Center for Reproductive Rights filed this suit on behalf of Red River Woman's Clinic, which was then—and remains today—the only operative abortion clinic in the state of North Dakota). *See* H.B. 1456, 63rd Leg. Assemb., Reg. Sess. (N.D. 2013); *see also Federal Appeals Court Permanently Blocks Most Extreme Abortion Ban in the U.S.*, Ctr for Reproductive Rights (July 22, 2015), https://reproductiverights.org/federal-appeals-court-permanently-blocks-most-extreme-abortion-ban-in-the-u-s/ [https://perma.cc/PME7-UYDX].

[21] H.B. 59, 83rd Leg. Assemb., Reg. Sess. (Tex. 2013); Tara Culp-Ressler, *Texas Legislators File Radical 'Fetal Heartbeat' Bill to Ban Abortion After Just Six Weeks*, ThinkProgress (July 18, 2013, 9:27 PM), https://archive.thinkprogress.org/texas-legislators-file-radical-fetal-heartbeat-bill-to-ban-abortion-after-just-six-weeks-e641c8c7cbd1/ [https://perma.cc/Z3G4-YAMK].

[22] H.B. 1500, 86th Leg. Assemb., Reg. Sess. (Tex. 2019); *see also*, *e.g.*, John Engel, *Texas Republicans eye heartbeat bill reboot amid SCOTUS transition*, KXAN (Sept. 21, 2020, 8:57 PM), https://www.kxan.com/news/texas-politics/texas-republicans-eye-heartbeat-bill-reboot-amid-scotus-transition/ [https://perma.cc/K7KZ-BQGH] (discussing H.B. 1500's failure to survive committee in 2019).

[23] The two most common ultrasound methods used during pregnancy are the abdominal ultrasound and the transvaginal ultrasound. Abdominal ultrasounds require the practitioner to apply gel to the pregnant person's abdomen before gliding the ultrasound transducer over the gelled abdomen to create an ultrasound image. Especially in early pregnancy, women often need to have full bladders for abdominal ultrasounds to

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the ultrasound yields a "fetal heartbeat," the abortion provider is legally prohibited from performing the requested abortion, subject to minimum fines of $10,000 if they choose to provide regardless.[24] Exceptions for medically necessary abortions exist, although the text of S.B. 8 itself does not make clear what constitutes a medically necessary abortion.[25] S.B. 8 does not provide exceptions to its restrictions where the pregnant person seeking an abortion knows or believes that it is a result of rape or incest. As is typical of most abortion legislation, S.B. 8 specifically relieves those who seek or obtain abortions from liability. These substantive provisions roughly mirror S.B. 8's heartbeat-bill predecessors: pared down, liability attaches to abortion providers if they perform abortions after detecting cardiac activity, and not to those seeking or obtaining those abortions.

However, S.B. 8 diverges substantively from its predecessors in a few crucial ways. It prohibits plaintiffs from suing individuals seeking abortions or those who have previously obtained abortions—a relatively typical feature of a heartbeat bill—but allows plaintiffs to sue (1) abortion providers who have or *plan to* perform an abortion, *as well as* (2) any person who

> …knowingly engages in conduct that aids or abets the performance of inducement of an abortion, including paying for or reimbursing the costs of an abortion through insurance or otherwise, if the abortion is performed in violation of this subchapter [*i.e.*, if the abortion is not performed out of medical necessity], regardless of whether the person knew or should have known that the abortion would be performed or induced in violation of this subchapter… [or who intends to engage in such conduct].[26]

This unique provision ultimately extends liability to any and all parties involved in the *process of obtaining* an abortion: a partner who drives someone to an abortion appointment (indeed, an Uber driver who transports an individual to their abortion appointment), an employee at an insurance agency who approves coverage for an abortion, a friend who lent an encouraging ear to a pregnant person before they chose to seek an abortion, etc.[27]

S.B. 8's procedural provisions, though, are where the law diverges most sharply from its predecessors. Where an abortion provider proceeds with the requested abortion procedure despite detecting a fetal heartbeat via ultrasound, S.B. 8 provides that *a member of the Texas public* can bring a private civil action against that provider.[28] This procedural

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reveal accurate imaging. Transvaginal ultrasounds are more commonly used during the early stages of pregnancy. To perform a transvaginal ultrasound, the practitioner inserts an ultrasound transducer into the pregnant person's vagina and rests it against the far vaginal wall. The inducer then reveals an image. Many describe transvaginal ultrasounds as uncomfortable. *Ultrasound in Pregnancy,* Stan. Children's Health, https://www.stanfordchildrens.org/en/topic/default?id=ultrasound-in-pregnancy-90-P02506 [https://perma.cc/52LG-YWPA] (last visited April 11, 2022). Notably, heartbeat bills and other abortion-related laws often require practitioners to perform ultrasounds before allowing these practitioners to proceed with abortion services and require practitioners to reveal the imaging to their patients, even if their patients expressly wish not to behold the imaging. Ultrasounds are not medically necessary to the performance of effective abortion procedures, however, and both abdominal and transvaginal ultrasounds increase the costs of abortion procedures, sometimes quite significantly. Jen Russo, *Mandated Ultrasound Prior to Abortion*, 16 Am. Med. Assoc. J. Ethics 240, 240-44 (Apr. 2014), https://journalofethics.ama-assn.org/article/mandated-ultrasound-prior-abortion/2014-04 [https://perma.cc/J8FA-7QQR].

[24]Tex. Health & Safety Code Ann. § 171.208 (West).

[25]*Id.* at § 171.206.

[26]*Id.* at § 171.208.

[27]*See id.*

[28]*Id.* at § 171.207.

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structure is quite distinct from other heartbeat bills because typically, state officials—not members of the public—are charged with bringing actions against providers who violate these types of abortion laws. S.B. 8's creation of a private right of action is totally unique.

Moreover, unlike other heartbeat bills on record, S.B. 8 specifically prohibits two classes of people from bringing actions against S.B. 8 defendants: governmental sovereigns and people who, via rape, incest, or other assault, impregnated the persons upon which the S.B. 8 defendant[s] performed the abortion procedure[s].[29] By explicitly prohibiting governmental sovereigns from bringing S.B. 8 actions against violators of the law, S.B. 8 situates itself squarely within the private sector, resulting in the effective deputization of the entirety of the Texas public.

If the private civil action is successful, courts must award plaintiffs damages amounting to no less than $10,000, as well as attorneys' fees and injunctive damages against defendants when deemed necessary.[30] Additionally, S.B. 8 provides that a successful private suit against one abortion provider (or other type of defendant) does not have any preclusive effect: in other words, a single defendant can be sued limitlessly in the state of Texas for continued violation of the statute, and could be subject to equally limitless levels of damages. The law thus threatens to serve as a financial drain on abortion providers.

Defenses are available to defendants sued under S.B. 8, although they are bound up by significant limitations. Specifically, S.B. 8 abortion-provider-defendants can assert as defenses to liability the third-party rights of individuals seeking abortions *if* the Supreme Court holds that Texas states courts must allow defendants to assert such defenses, or if the defendant can establish proper standing to do so.[31]

Additionally, S.B. 8 provides that a defendant can assert an *affirmative* defense to liability if (1) the defendant can establish the requisite standing as described above and (2) if the defendant can demonstrate that the relief sought by the claimant will impose an undue burden on the individuals on behalf of whom the defendant asserts standing.[32] The bill provides that an undue burden can only be established if the S.B. 8 defendant shows that the relief sought by the plaintiff will prohibit pregnant people from being able to access abortion or that the relief would place a substantial obstacle in the way of seeking abortions.[33] Rather puzzlingly, the bill further specifies that an undue burden will *not* be found to exist if the S.B. 8 defendant "merely" demonstrates that the relief sought by the plaintiff would "prevent women from obtaining support or assistance, financial or otherwise, from others in their effort to obtain an abortion." Why financial hardship would not constitute a "substantial obstacle" for a person seeking an abortion is unclear at present.

II. UNWINDING *JACKSON'S* COMPLEX PROCEDURAL ROOTS

S.B. 8's passage in May 2021 and its September 2021 effectuation sent shockwaves across the country,[34] including through the Texas judiciary and Texas's medical

[29] *Id.*
[30] *Id.*
[31] *Id.* at § 171.209.
[32] *Id.*
[33] *Id.*
[34] *See* Tierney Sneed, *Texas' 6-week abortion ban lets private citizens sue in an unprecedented legal approach*, CNN (Sept. 1, 2021), https://www.cnn.com/2021/08/31/politics/texas-six-week-abortion-ban-supreme-court-explainer/index.html [https://perma.cc/8XHM-QPQD]; Byron Tau, *Texas Abortion Ban: What to Know About the New Law*, WALL ST. J. (Sept. 3, 2021, 10:56 AM), https://www.wsj.com/articles/texas-abortion-law-what-to-know-as-supreme-court-allows-it-to-take-effect-11630606238 [https://perma.cc/7F98-S3H9];

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communities. For illustration, consider the fourteen lawsuits filed in state court by various Texan abortion providers following the S.B.'s passage, all of which in essence alleged that S.B. 8 was inconsistent with both the Federal Constitution and Texas Constitution. These suits, which were eventually consolidated into a single case in Travis County District Court—*Van Stean v. Texas Right to Life*—sought various forms of pre-enforcement relief, including injunctive and declaratory varieties. The named defendants included several state officials and, as indicated by the case's name, the Texas Right to Life organization, an enormous Texas-based anti-abortion nonprofit.

On July 13, 2021, a separate, larger group of abortion-provider plaintiffs[35] ("Whole Woman's Health" or "WWH") also filed suit in *federal* court following S.B. 8's passage. These plaintiffs, like those in *Van Stean*, sought a pre-enforcement injunction against S.B. 8's enforcement.[36] Whole Woman's Health named several different defendants in their suit, all of whom they sought to enjoin from enforcing S.B. 8.

The distinctions between these defendants are central to understanding the complexities of *Whole Woman's Health v. Jackson.* The named defendants were (1) Austin Jackson, a state-court judge; (2) Penny Clarkston, a state-court clerk; (3) Ken Paxton, Texas's Attorney General; (4) Stephen Carlton, the executive director of the Texas Medical Board; (5) Katherine Thomas, the executive director of the Texas Board of Nursing; (6) Allison Benz, the executive director of the Texas Board of Pharmacy; (7) Cecile Young, the executive commissioner of the Texas Health and Human Services Commission; and (8) Mark Lee Dickson, the sole private party amongst the defendants.

Jia Tolentino, *S.B. 8 and the Texas Preview of a World Without Roe v. Wade*, N.Y. Times (Sept. 5, 2021), https://www.newyorker.com/news/news-desk/sb-8-and-the-texas-preview-of-a-world-without-roe-v-wade [https://perma.cc/FX4X-9J5R]; Laurence H. Tribe, *What the Justice Department should do to stop the Texas abortion law*, Wash. Post (Sept. 5, 2021, 2:29 PM) https://www.washingtonpost.com/opinions/2021/09/05/justice-department-stop-texas-abortion-law-laurence-tribe/ [https://perma.cc/NW6T-CVZK]; Editorial Board, *The best way to fight the Texas abortion law*, Wash. Post (Sept 9, 2021, 5:13 PM) https://www.washingtonpost.com/opinions/2021/09/09/best-way-fight-texas-abortion-law/ [https://perma.cc/C2HD-DLLW]; Jessica Cisneros, *Texas Abortion Laws Largely Ban the Procedure and Put Women at Risk*, Teen Vogue (Aug. 31, 2021), https://www.teenvogue.com/story/texas-abortion-laws-six-week-ban [https://perma.cc/S2YK-ZX6L]; Gerald E. Harmon, *AMA statement on Texas SB8*, Am. Med. Ass'n (Sept. 1, 2021), https://www.ama-assn.org/press-center/press-releases/ama-statement-texas-sb8 [https://perma.cc/SXU2-R3VV]; Maureen G. Phipps, *Statement on Texas SB8*, Am. Coll. Obstetricians & Gynecologists (Sept. 1, 2021), https://www.acog.org/news/news-releases/ 2021/09/statement-on-texas-sb8 [https://perma.cc/5VEM-SGDM]; Akayla Galloway, *SisterLove Inc's Statement on Texas Abortion Law SB8*, SisterLove Inc. (Sept. 3, 2021), https://www.sisterlove.org/post/texas-abortion-law [https://perma.cc/4JDE-69DZ]; *YWCA Statement on Texas Law S.B. 8*, YWCA (Sept. 2, 2021), https://www.ywca.org/blog/2021/09/02/ywca-statement-on-texas-law-s-b-8/ [https://perma.cc/2P4E-ACWD]. However, unified corporate response—indeed, any corporate response—to S.B. 8's effectuation was notably absent from the collective outcry illustrated above; *see* Emma Hinchliffe, *Where is the business backlash on Texas's abortion law?*, Fortune (Sept. 2, 2021), https://fortune.com/2021/09/02/texas-abortion-law-business-backlash-match-group-bumble-sb8/ [https://perma.cc/SP6L-WRZA]; David Gelles, *Companies Stay Quiet on Texas' New Abortion Law*, N.Y. Times (Sept. 3, 2021), https://www.nytimes.com/2021/09/03/business/companies-texas-sb8-abortion-law.html [https://perma.cc/N9FK-7XLJ].

[35]The full list of plaintiffs to the case included the following: Whole Woman's Health; Alamo City Surgery Center PLLC d/b/a Alamo Women's Reproductive Services; Brookside Women's Medical Center Pa d/b/a Brookside Women's Health Center And Austin Women's Health Center; Houston Women's Clinic; Houston Women's Reproductive Services; Planned Parenthood Center For Choice; Planned Parenthood Of Greater Texas Surgical Health Services; Planned Parenthood South Texas Surgical Center; Southwestern Women's Surgery Center; Whole Woman's Health Alliance; Allison Gilbert, M.D; Bhavik Kumar, M.D; The Afiya Center; Frontera Fund; Fund Texas Choice; Jane's Due Process; Lilith Fund; North Texas Equal Access Fund; Reverend Erika Forbes; Reverend Daniel Kanter; and Marva Sadler. *See* Complaint at 1, Whole Woman's Health et al. v. Jackson et al., No. 1:21-cv-00616 (W.D. Tex. Jul. 13, 2021).

[36]Whole Woman's Health alleged in their suit only that the law violated the Federal Constitution, rather than both the Federal and Texas Constitutions. *See* id. at 2.

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Not long after WWH's July 13 filing, the defendants (referred to collectively as "Jackson") moved to dismiss.[37] Jackson alleged that the plaintiffs were barred by the sovereign immunity doctrine (discussed below) from suing the named defendants in federal court.[38] Presiding District Court Judge Pitman denied the defendants' motion to dismiss, citing the *Ex Parte Young* exemption (the *Ex Parte Young* doctrine is also detailed below).

The defendants then filed an interlocutory appeal with the Fifth Circuit under the collateral order doctrine, which allows parties to appeal for immediate appellate review of an order—such as Judge Pitman's choice to deny the defendants' motion to dismiss—denying the protections granted by sovereign immunity. The Fifth Circuit responded favorably to the defendants' interlocutory appeal, agreeing to review the case, and issuing a temporary stay over the District Court proceedings until it (the Fifth Circuit) could resolve the sovereign immunity and *Ex Parte Young* doctrine issues at hand.

As September 1 drew nearer, WWH fortified its efforts to enjoin S.B. 8 from going into effect. First, it sought an emergency injunction of S.B. 8's effectuation and enforcement at the Fifth Circuit, which the Fifth Circuit denied on August 27, 2021. Turning to another court for aid, WWH made another request for emergency relief on August 30, 2021, this time to the Supreme Court.

The Supreme Court denied the emergency request for instant relief after midnight on September 1, thus allowing S.B. 8 to take effect on that date as originally intended.[39] The Court cited "complex and novel antecedent procedural questions" as the reason for denying the emergency request.[40] The Court also explicitly noted that in denying the emergency request, it was not making "any conclusion[s] about the constitutionality of Texas's law;" *i.e.*, the Court noted in its denial that the constitutionality of S.B. 8's substance remained unsettled.[41]

Whole Woman's Health v. Jackson then entered its "post-effectuation" phase. After the Supreme Court denied WWH's emergency relief request and ultimately allowed S.B. 8 to go into effect, the Fifth Circuit returned to Jackson's interlocutory appeal against Judge Pitman's decision. The Fifth Circuit agreed with Jackson and held that Whole Woman's Health had improperly named its defendants.[42]

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[37]Defendants' Motion to Dismiss at 1, Whole Woman's Health et al. v. Jackson et al., No. 1:21-cv-00616 (W.D. Tex. Aug. 4, 2021).

[38]*Id.*

[39]Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2495 (2021) ("To prevail in an application for a stay or an injunction, an applicant must carry the burden of making a 'strong showing' that it is 'likely to succeed on the merits,' that it will be 'irreparably injured absent a stay,' that the balance of the equities favors it, and that a stay is consistent with the public interest….The applicants now before us have raised serious questions regarding the constitutionality of the Texas law at issue. But their application also presents complex and novel antecedent procedural questions on which they have not carried their burden. For example, federal courts enjoy the power to enjoin individuals tasked with enforcing laws, not the laws themselves.").

[40]*Id.*

[41]*See id.* ("In reaching this conclusion we stress that we do not purport to resolve definitively any jurisdictional or substantive claim in the applicants' lawsuit. In particular, this order is not based on any conclusion about the constitutionality of Texas's law, and in no way limits other procedurally proper challenges to the Texas law, including in Texas state courts.")

[42]The Fifth Circuit addressed the impropriety of the state defendants by providing that because S.B. 8 "emphatically precludes enforcement by any state, local, or agency officials," no state entity was able to enforce the law, and so wouldn't fall under the Young exception (remember, to be captured by the *Young* exception, the state official[s] being sued must have some meaningful connection to the enforcement law in question; here, the Fifth Circuit found none). The Fifth Circuit also decided that Whole Woman's Health's inclusion of the private citizen in the defendant consortium was improper, finding that Whole Woman's Health's lacked standing to sue that defendant. Whole Woman's Health et al. v. Jackson et al., 13 F4th 434 (5th Cir. 2021).

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In response to the Fifth Circuit's holding, WHH again petitioned to the Supreme Court, this time for certiorari.[43] WWH also requested a preliminary injunction against enforcement of S.B. 8; a stay of the Fifth Circuit proceedings; and a motion to expedite its certiorari petition given the "urgency of the harm to residents of Texas and neighboring States" posed by S.B. 8's effectuation.[44]

On October 22, the Supreme Court rejected WWH's request to stay the Fifth Circuit proceedings but granted certiorari and agreed to fast track the case's oral argument to November 1, 2021.[45]

III. *JACKSON'S* CENTRAL ARGUMENTS: THE CASE'S PRIMARY QUESTIONS AND THE CORRESPONDING APPLICABLE LEGAL STANDARDS

From the start, the Supreme Court made clear that their decision to grant certiorari in *Whole Woman's Health v. Jackson* was based solely on the procedural question that arose shortly after the case was first filed in District Court: whether Judge Pitman's decision to deny Jackson's motion to dismiss, which alleged the impropriety of the named defendants, was correct or incorrect.[46] Consideration of two legal questions became central to discerning whether Judge Pitman had correctly refused to grant the defendant's motion to dismiss in August 2021. The first was whether the defendants that WWH named were protected by the sovereign immunity doctrine, and whether the *Ex Parte Young* exception applied to those defendants. The second was whether WWH's suit against Jackson satisfied Article III case-or-controversy requirements.

IV. SOVEREIGN IMMUNITY AND THE *EX PARTE YOUNG* DOCTRINE

To determine whether Judge Pitman's denial of the defendants' motion to dismiss was proper, the Court needed to address whether an action could be properly maintained against the defendants given the sovereign immunity doctrine. The sovereign immunity doctrine is a long-standing common law doctrine derived from British law; in simple terms, the doctrine provides that governments and governmental officials are generally immune from lawsuits because of their sovereignty, or because they occupy positions of power (*i.e.*, "the King can do no wrong").[47]

The protections provided by the sovereign immunity doctrine to state and federal governments are not absolute. In 1908, the Supreme Court carved out an exception to the sovereign immunity doctrine known as the *Ex Parte Young* exception.[48] The *Ex Parte Young* exception provides that state sovereigns *can* properly be sued in federal court where the purpose of the suit is to prevent the state sovereigns, such as police officers and attorneys general, from enforcing a state law that violates the Federal Constitution.[49]

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[43]Petition for a Writ of Certiorari Before Judgment, Whole Woman's Health et al. v. Jackson et al., 2021 WL 4463052 (No. 21-463).

[44]*Id.* at *13.

[45]Whole Woman's Health v. Jackson, 152 S. Ct. 415 (2021).

[46]Whole Woman's Health v. Jackson, 142 S. Ct. 522 (2021) ("Because the Court granted certiorari before judgment, the Court effectively stands in the shoes of the Court of Appeals and reviews the defendants' appeals challenging the District Court's order denying their motions to dismiss…")

[47]Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201 (2001).

[48]*See* Ex Parte Young, 209 U.S. 123 (1908)

[49]*Id.*

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The Ex Parte Young doctrine is not without its limits, however. Justice Peckham provided in the *Young* opinion itself that in order for suit to be proper, the state official being sued must "have some connection" to the enforcement of the law being challenged.[50] Additionally, the *Ex Parte Young* doctrine is not typically found to apply to state court judges or state court clerks, because these entities are generally not accepted as "enforcers" of state law.[51] The exception *has* been found applicable to entities such as state agency directors and state legal officials, many of whom are charged with enforcing or otherwise acting in perpetuation of state law.

WWH asserted that the *Ex Parte Young* doctrine and its underlying principles protected the propriety of the plaintiffs' suit against all named defendants, because each and every named defendant had "some connection" to the enforcement of S.B. 8, the allegedly unconstitutional law in question.[52] The respondents suggested otherwise: that the petitioners' argument was flawed because the *Ex Parte Young* doctrine did not permit suits against state judges or state clerks, or against state officials who were explicitly prohibited from enforcing the law at issue.[53] Rather, the defendants argued, the *Ex Parte Young* exception only allowed for suits against officials with "actual" authority to enforce a law.[54]

V. ARTICLE III CASE-OR-CONTROVERSY REQUIREMENT

Another determination necessary to discerning whether Judge Pitman's dismissal was proper was whether a "case or controversy" existed between "adverse litigants" in the case, as required by Article III. This Article III requirement essentially prevents courts from needlessly hearing and deciding legal questions that are not under contention between two parties; *i.e.*, from issuing "advisory" opinions. For the Court to find that an Article III case or controversy exists, petitioners must demonstrate that they have been injured: more specifically, they must establish an injury-in-fact, or an injury that is "fairly traceable" to the named defendants. To satisfy the Article III requirements, the injury alleged must extend beyond an "imaginary or wholly speculative" threat.[55]

WWH asserted in its briefs and at oral argument that S.B. 8's proscriptions[56] and the threat of its enforcement constituted injury-in-fact to the petitioners because S.B. 8's enforcers threatened to (1) chill the petitioners' exercise of constitutionally protected activity (performing abortions); (2) impede their hiring capabilities; and (3) significantly impair the petitioners' financial interests.[57] Thus, WWH argued, Article III's injury requirement was satisfied, rendering the requisite case-or-controversy element intact.[58]

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[50] *Id.*; *see also* Georgina Yeomans, Ordering Conduct yet Evading Review: A Simple Step Toward Preserving Federal Supremacy, 131 Yale L.J. F. 513, 525 (2021).

[51] Ex Parte Young, 209 U.S. at 176.

[52] Brief for Petitioner at 25, Whole Woman's Health et al. v. Jackson et al., 142 S. Ct. 522 (2021) (No. 21-463).

[53] Brief for Respondents at 16, Whole Woman's Health et al. v. Jackson et al., 142 S. Ct. 522 (2021) (No. 21-463)

[54] *Id.*

[55] Muskrat v. United States, 2019 U.S. 345, 361 (1911).

[56] *I.e.*, the law's prohibitions against performing, or assisting in the performance, of an abortion procedure.

[57] Brief for Petitioner at 29, Whole Woman's Health et al. v. Jackson et al., 142 S. Ct. 522 (2021) (No. 21-463).

[58] Transcript of Oral Argument at 26, Whole Woman's Health et al. v. Jackson et al., 142 S. Ct. 522 (2021) (No. 21-463).

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Jackson, on the other hand, asserted that WWH failed to establish requisite Article III injury because all named respondents were either expressly prohibited from enforcing S.B. 8 or had no immediate intention to do so.[59] A defendant's legal inability or express reticence to sue a plaintiff, Jackson argued, rendered WWH uninjured for the purposes of Article III's requirements.[60]

VI. THE SEVERAL LAYERS OF *JACKSON* OPINION: THE MAJORITY, THE CONCURRENCES, AND THE DISSENTS

The Supreme Court handed down the *Jackson* decision on December 10, 2021.[61] Like the case's procedural history, the *Jackson* decision was many-layered. Justice Gorsuch delivered the Court's majority opinion, joined in full by Justices Alito, Kavanagh, and Barrett and joined in part by Justice Thomas. The majority ultimately found that Judge Pitman's decision to deny the defendants' motion to dismiss was improper in the case of most defendants but was proper for other defendants.[62]

The only defendant about which the Court made a unanimous decision was private individual Mark Lee Paxon: it decided, 9-0, that Judge Pitman's refusal to deny Paxton's motion to dismiss was improper, because no Article III case or controversy existed between Paxton and the petitioners.[63] Paxton testified specifically that he had no intention of bringing a suit under SB8 against any of the petitioners; the threat of Paxton's litigation was thus deemed wholly speculative.[64]

The Court also found 8-1 (with Justice Thomas as the sole dissenter) that Judge Pitman had properly denied the defendant's motion to dismiss as to state officials Carlton, Thomas, Benz, and Young.[65] These defendants, as heads of executive agencies, were explicitly charged with enforcing S.B. 8 under Texas's Health Code, so an existing Article III injury was indeed discernible.[66] The majority also agreed that the *Ex Parte Young* exception applied to these state officials, stripping them of their sovereign immunity protections.[67]

The majority was more divided, however, on whether Judge Pitman's decision was proper as to the state-court judge and state-court clerk defendants, as well as to the Texas Attorney general. A five-Justice majority decreed Pitman's denial improper as to these defendants.[68] The majority asserted that the *Ex Parte Young* exception did not apply to state court clerks and judges, and that they remained insulated by their sovereign immunity from WWH's suit.[69] Regarding the Attorney General: the majority found that he posed no threat of injury to the plaintiffs because he was specifically barred from enforcing S.B. 8 by the text of the law itself.[70]

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[59]Transcript of Oral Argument at 45-46, Whole Woman's Health et al. v. Jackson et al., 142 S. Ct. 522 (2021) (No. 21-463).
[60]*Id.*
[61]Whole Woman's Health v. Jackson, 142 S. Ct. 522 (2021).
[62]*Id.* at 530.
[63]*Id.* at 539.
[64]*Id.*
[65]*Id.* at 535.
[66]*Id.*
[67]*Id.*
[68]*Id.* at 531.
[69]*Id.*
[70]*Id.* at 539.

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The justices who declined to join in full the majority opinion's multiple facets also filed concurring and dissenting opinions. Justice Thomas, concurring in part and dissenting in part, asserted that Pitman's denial was improper as to the state agency defendants.[71] Justice Roberts, joined in his concurrence and dissent by Justices Kagan and Breyer, stated that disallowing further S.B. 8 litigation against state court clerks and judges was, ultimately, a disservice to the judicial branch, a direct undermine its power to ensure the constitutionality of laws passed at the state level, and a jeopardization to the role of the Supreme Court in the American constitutional system.[72] "The clear purpose and actual effect of S.B. 8," Roberts wrote, "has been to nullify this Court's rulings….'if the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery.'"[73]

Justice Sotomayor's dissent, also joined by Justices Kagan and Breyer, echoed the sentiment set forth in Roberts', if a bit more explicitly. "For nearly three months," Sotomayor wrote, "the Texas Legislature has substantially suspended a constitutional guarantee: a pregnant woman's right to control her body."[74] She elaborates that "[b]y foreclosing suit against state-court officials and the state attorney general, the Court effectively invites other states to refine S.B. 8's model for nullifying federal rights. The Court thus betrays not only the citizens of Texas, but our constitutional system of government."[75] Sotomayor further added that "[her] disagreement with the Court[']s opinion] runs far deeper than a quibble over how many defendants these petitioners may sue. The dispute is over whether States may nullify federal constitutional rights by employing schemes like the one at hand. The Court indicates that they can…."[76] She concluded that the Court's decision to foreclose suit against the plaintiffs' named defendants "leaves all manner of constitutional rights more vulnerable than ever before to the great detriment of our Constitution and our Republic."[77]

VII. AFTERMATH

After the Supreme Court issued its December 2021 opinion, *Whole Woman's Health v. Jackson* litigation perpetuated. The Supreme Court remanded the case to the Fifth Circuit for further proceedings consistent with their holding. On January 17, 2022, the three-judge Fifth Circuit panel made the decision to send the case to the Texas Supreme Court, citing "[t]he unresolved questions of state law" that necessitated certification at the state court—rather than the federal court—level.[78] On March 11, 2022, the Texas Supreme Court effectively concluded *Whole Woman's Health v. Jackson* litigation, finding that even the plaintiffs' suit against Carlton, Thomas, Benz, and Young could not proceed.

[71] *Id.* at 539-40 (Thomas, J., concurring in part).
[72] *Id.* at 545 (Roberts, Chief J., concurring in part).
[73] *Id.*
[74] *Id.* (Sotomayor, J., concurring in part).
[75] *Id.* at 546.
[76] *Id.* at 550.
[77] *Id.* at 552.
[78] In the panel's ruling, Judge Edith Jones wrote, "The unresolved questions of state law must be certified to the Texas Supreme Court … With no limit placed by the Supreme Court's remand, this court may utilize the ordinary appellate tools at our disposal to address the case—consistent with the Court's opinion." Jones was joined in her ruling by Judge Stuart Kyle Duncan. Whole Woman's Health v. Jackson, 23 F.4th 380 (5th Cir. 2022), *certified question accepted* (Jan. 21, 2022), *certified question answered*, 22-0033, 2022 WL 726990 (Tex. Mar. 11, 2022).

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The Court explained that S.B. 8's prohibition against *any* state enforcement barred suit against *any* state officials:

> Senate Bill 8 provides that its requirements may be enforced by a private civil action, that no state official may bring or participate as a party in any such action, that such an action is the exclusive means to enforce the requirements, and that these restrictions apply notwithstanding any other law. Based on these provisions, we conclude that Texas law does not grant the state-agency executives named as defendants in this case any authority to enforce the act's requirements, either directly or indirectly.[79]

By foreclosing Whole Woman's Health's suit against the named state agency officials—the only defendants against whom SCOTUS allowed WWH's suit to proceed—the Texas Supreme Court also foreclosed the possibility of WWH's continued federal challenge against S.B. 8.[80] The contemporaneous unfolding and failure of another federal challenge to the law—seen in *United States v. Texas*—renders crucial the question of whether another, future federal challenge to S.B. 8 will even come to pass.

After *Whole Woman's Health v. Jackson* met its definitive end, the question lurking in the case's shadow since its origin—that is, if S.B. 8 is permitted to stand due to its procedural sealants despite its inconsistency with recognized constitutional rights, will the formation of other unconstitutional yet procedurally "insulated" state laws follow?—emerged in full. The answer to that question, it seems, is a resounding "yes." David Cohen, a law professor at Drexel University, noted on March 11 that "[t]he combination of the U.S. Supreme Court and Texas Supreme Court rulings on this unique law means that other states are going to see this as a way to insulate their own laws from judicial review."[81] Mary Zeigler, a law professor at Florida State university, agreed:

> [i]f conservative states want to do things that may not look constitutional…they can use a bounty system to achieve that. The message sent by the Texas litigation was that if you have concerns that you might lose a constitutional challenge, that shouldn't hold you back. Because you can use this road map to keep the case out of federal court entirely.[82]

Indeed, nearly a dozen states have actively engaged in this type of foreseen legislation since *Whole Woman's Health* litigation began, and momentum has only increased since the Texas Supreme Court's decision.[83] Many states continue to announce

[79]Whole Woman's Health v. Jackson, No. 22-0033, 2022 WL 726990 (Tex. Mar. 11, 2022).

[80]Belynn Hollers, *Federal challenge of Texas SB 8 abortion law doomed in wake of new state Supreme Court ruling*, Dallas Morning News (Mar. 11, 2022, 10:00 AM), https://www.dallasnews.com/news/politics/2022/03/11/texas-supreme-court-say-state-regulators-cant-be-sued-to-challenge-states-restrictive-abortion-law/ [https://perma.cc/ZDV7-2X4U]. Additionally, although not discussed in this Recent Case Development, the federal challenge brought against S.B. 8 by the federal government failed as well, coming to a definitive end in December 2021. *See* United States v. Texas, 142 S. Ct. 522 (2021).

[81]Kate Zernike & Adam Liptak, *Texas Supreme Court Shuts Down Final Challenge to Abortion* Law, N.Y. Times (Mar. 11, 2022), https://www.nytimes.com/2022/03/11/us/texas-abortion-law.html [https://perma.cc/WH6T-NGVN].

[82]*Id.*

[83]Alison Durkee, *Texas Supreme Court Deals Blow To Abortion Law Challenge—Likely Killing Providers' Case*, Forbes (Mar. 11, 2022, 12:10 PM), https://www.forbes.com/sites/alisondurkee/2022 /03/11/texas-supreme-court-deals-blow-to-abortion-law-challenge---likely-killing-providers-case/?sh=4b9fd 95f1daf [https://perma.cc/NFQ8-D42D].

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plans to introduce "copycat" S.B. 8 bills,[84] and some have done so already.[85] Idaho was the first state to pass its copycat bill in late March.[86]

VIII. CONCLUSION

As of the date of this writing, S.B. 8 has been in effect for over seven months. Thousands of Texas residents continue to exit the state and travel across the country to obtain their abortions,[87] while others without the ability to do so proceed with unwanted pregnancies and birthing processes,[88] or endeavor to self-manage their abortions at home.[89] Daily, while growing numbers of individuals in Texas grapple with the very real consequences of their clipped reproductive autonomy, debate rages on about the impact that S.B. 8 has had—and will continue to have—on constitutional protections over bodily; federal supremacy; and the principles premising judicial review. Although future litigation (likely at the Texas state court level) may eventually reconcile these questions, it will do little to alleviate the harm already imposed by S.B. 8 on the Texas public since September 2021.

Katrina Morris

[84] *See, e.g.*, Caroline Kitchener, *Lawmakers are racing to mimic the Texas abortion law in their own states. They say the bills will fly through.*, LILY (Oct. 19, 2021), https://www.thelily.com/lawmakers-are-racing-to-mimic-the-texas-abortion-law-in-their-own-states-they-say-the-bills-will-fly-through/ [https://perma.cc/HC85-KS6H] (noting that shortly after S.B. 8 went into effect, legislators in West Virginia, Florida, Ohio, Missouri, Arkansas, South Dakota, and Indiana publicly announced their plans to use S.B. 8 as a stencil for similar abortion bans in their own states.)

[85] *E.g.*, S.B. 1339, 55th Gen. Assemb., Reg. Sess. (Ariz. 2022); H.B. 1477-FN, 2022 Leg., Reg Sess. (N.H. 2022); H.B. 800, 2022 Leg., Reg Sess. (La. 2022).

[86] H.B. 366, 66th Gen. Assemb., Reg Sess. (Idaho 2021).

[87] *E.g.*, Rachel K. Jones et al., *New Evidence: Texas Residents Have Obtained Abortions in at Least 12 States That Do Not Border Texas*, GUTTMACHER INST. (Nov. 9, 2021), https://www.guttmacher.org/article/2021/11/new-evidence-texas-residents-have-obtained-abortions-least-12-states-do-not-border [https://perma.cc/6X5Y-HGN3].

[88] Claire Cain Miller, Quoctrung Bui, & Margot Sanger-Katz, *Abortions Fell by Half in Month After New Texas Law*, UPSHOT (Oct. 29, 2021), https://www.nytimes.com/interactive /2021/10/29/upshot/texas-abortion-data.html [https://perma.cc/7N6L-LH4Z].

[89] Abigail R. A. Aiken, et al., *Association of Texas Senate Bill 8 With Requests for Self-managed Medication Abortion*, JAMA NETWORK (Feb. 25, 2022), https://jamanetwork.com/journals/jamanet workopen/fullarticle/2789428 [https://perma.cc/TDP8-A2GV].

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