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Ducking the System: Examining the Efficacy of Bounty Hunting Statutes that Stifle the Free Exercise of Constitutional Rights

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DUCKING THE SYSTEM: EXAMINING THE EFFICACY OF BOUNTY HUNTING STATUTES THAT STIFLE THE FREE EXERCISE OF CONSTITUTIONAL RIGHTS

Allie Zunski*

INTRODUCTION

In 1973, the Supreme Court's landmark decision in *Roe v. Wade* established a woman's right to obtain a pre-viability abortion under the Fourteenth Amendment's substantive due process jurisprudence.[1] While abortion had long been hotly contested on both sides,[2] the decision sparked large-scale anti-abortion efforts to pressure the Court to overturn the decision, such as annual March for Life demonstrations.[3] Despite increasing pressure, in 1992, the Court reaffirmed the right, its substantive due process basis, and the viability framework in *Casey*.[4]

But activists were not alone in mounting *Roe* resistance efforts. States with sizeable pro-life constituencies attempted to indirectly limit abortions by passing conditional bans, called "trigger" laws, that would flatly ban (most) abortions should *Roe* ever be overturned and by instituting attendant regulatory requirements, called "TRAP" laws.[5] Such TRAP laws included requirements that abortion providers have

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[1] Roe v. Wade, 410 U.S. 113, 163–64 (1973); U.S. CONST. amend. XIV, § 1; *see also* Lawrence v. Texas, 539 U.S. 558, 565 (2003) (discussing *Roe*'s Due Process Clause footing). *Roe* set the viability threshold at approximately twenty-eight weeks of pregnancy, but it was later reduced to twenty-three to twenty-four weeks in *Planned Parenthood of Southeastern Pennsylvania v. Casey*. *Roe*, 410 U.S. at 160; *Casey*, 505 U.S. 833, 860 (1992).

[2] Julie Rovner, Roe v. Wade *Turns 40, but Abortion Debate Is Even Older*, NPR (Jan. 22, 2013, 3:37 AM), https://www.npr.org/sections/health-shots/2013/01/22/169637288/roe-v-wade-turns-40-but-abortion-debate-is-even-older [https://perma.cc/BA7G-4EC6].

[3] *See, e.g.*, *Mission*, *About Us*, MARCH FOR LIFE, https://marchforlife.org/about-the-march-for-life/ [https://perma.cc/5PTC-UCWJ] (last visited Oct. 18, 2022) (detailing March's history as an effort to overturn *Roe*); *Casey*, 505 U.S. at 868–69 ("[P]ressure to overrule the decision, like pressure to retain it, has grown only more intense.").

[4] 505 U.S. at 868–69, 870–71.

[5] Jake Epstein, Oma Seddiq, & Taiyler Simone Mitchell, *13 States Have 'Trigger' Laws that Would Automatically Outlaw Abortion if the Supreme Court Overturns* Roe v. Wade,

emergency room admitting privileges, that facilities meet surgical center building codes, and that patients notify spouses of their intent to abort.[6] While they did not directly prohibit the exercise of the right, TRAP laws were designed to make it logistically impossible or prohibitively expensive for abortion providers to operate, thereby reducing overall access.[7] Thereafter, states began utilizing private torts as a means of restricting abortion rights, discouraging doctors with the threat of lawsuits. For example, Louisiana's Act 825 created a strict liability cause of action that patients could bring against abortion providers for emotional harms arising from an abortion, regardless of patient consent.[8]

Eventually, states began passing statutes that directly contravened the viability framework, ostensibly to invite constitutional challenges from providers and patients with the hope that the Court's increasing conservative majority would overturn *Roe*.[9] While these statutes cut into *Casey*'s viability timeline,[10] they initially did so in moderation—at least to the extent that passing what was, at the time, plainly unconstitutional legislation could be considered moderation.[11] For example, Mississippi

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BUS. INSIDER (May 2, 2022, 10:16 PM, https://www.businessinsider.com/states-trigger-laws-outlaw-abortion-supreme-court-roe-v-wade-2021-9 [https://perma.cc/ED6J-P2HW]. "TRAP" is an acronym for "Targeted Regulation of Abortion Providers." *Targeted Regulation of Abortion Providers (TRAP) Laws*, GUTTMACHER INST. (Jan. 22, 2020), https://www.guttmacher.org/evidence-you-can-use/targeted-regulation-abortion-providers-trap-laws; *see, e.g.*, June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2112–13 (2020); Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2300 (2016).

[6] Ashoka Mukpo, *TRAP Laws Are the Threat to Abortion Rights You Don't Know About*, ACLU (Mar. 3, 2020), https://www.aclu.org/news/reproductive-freedom/trap-laws-are-the-threat-to-abortion-rights-you-don't-know-about/ [https://perma.cc/8BAJ-F3RZ]; *What Are TRAP Laws?*, PLANNED PARENTHOOD, https://www.plannedparenthoodaction.org/issues/abortion/types-attacks/trap-laws [https://perma.cc/KS9X-QH29] (last visited Oct. 18, 2022); *see June Med. Servs. L.L.C.*, 140 S. Ct. at 2112–13; *Hellerstedt*, 136 S. Ct. at 2299; *Casey*, 505 U.S. at 844.

[7] Mukpo, *supra* note 6; PLANNED PARENTHOOD, *supra* note 6.

[8] Maya Manian, *Privatizing Bans on Abortion: Eviscerating Constitutional Rights Through Tort Remedies*, 80 TEMP. L. REV. 123, 131 (2007).

[9] *See* Brief for Petitioners at 1–2, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392); Adeel Hassan, *What to Know About the Mississippi Abortion Law Challenging* Roe v. Wade, N.Y. TIMES (May 6, 2022), https://www.nytimes.com/article/mississippi-abortion-law.html?smid=url-share [https://perma.cc/GP2H-BUSS]; Debbie Lord, Roe v. Wade *Faces Challenges in Several States. Here They Are*, ATLANTA J. CONST. (May 15, 2019), https://www.ajc.com/news/national/roe-wade-faces-challenges-several-states-here-they-are/29szaNyoqnuMm1ykGXQOKP/ [https://perma.cc/LYM2-497Y].

[10] *Compare Casey*, 505 U.S. at 860, *with* Hassan, *supra* note 9 (discussing Mississippi's fifteen-week ban later challenged in *Dobbs*).

[11] Emily Caldwell, *Some States Move Away from Proposals to Copycat Texas Abortion Law While Others Pursue in Full Force*, DALL. MORNING NEWS (Feb. 8, 2022, 6:00 AM), https://www.dallasnews.com/news/politics/2022/02/08/some-states-move-away-from-proposals-to-copycat-texas-abortion-law-while-others-pursue-in-full-force/ [https://perma.cc

passed a fifteen-week ban that imposed professional licensing sanctions for violations.[12] However, after this provision was invalidated in district court, Mississippi enacted a more drastic six-week ban which imposed criminal penalties for violations.[13] This effort to effectively "test the waters" of the Court's conservative lean was more forthcoming in its aims than the more shrouded motivations behind TRAP laws—as it was overtly intended to bring *Roe* before the Court[14] and was seemingly undeterred by the Court's continued adherence to *Casey* in *June Medical*, which was decided in 2020.[15]

In 2021, the Texas legislature pushed the trend of defiance one step further when it passed the Texas Heartbeat Act, otherwise known as Texas SB 8.[16] Like Mississippi's ban, the statute effectively banned abortions after detection of a fetal heartbeat, which the legislative history suggested occurs at about six weeks of pregnancy.[17] However, SB 8 was constructed in a way that was truly novel. Rather than criminalizing post-heartbeat abortions as Mississippi did,[18] SB 8 uniquely authorized a cause of action for private citizens to sue anyone facilitating an abortion, despite having suffered no injury.[19] Moreover, the liability for facilitation was broad, including even minor participators like rideshare drivers, regardless of whether the aid was provided knowingly or unknowingly.[20] While the statute was also similar to Louisiana's prior tort method, it expanded the concept even further by effectively discarding any pretense of plaintiff injury, expressly prohibiting state involvement, and preserving sovereign immunity explicitly.[21] In short, the statute banned post-heartbeat abortions by creating a bounty and incentivizing the public at large to sue to enforce it.[22]

/X8NP-JC2N] (describing state rejections of heartbeat timeline in favor of fifteen-week ban as "more reasonable and 'generous'").

[12] MISS. CODE. ANN. § 41-41-191 (West 2018).

[13] Brief for Respondents at 6, Dobbs, 142 S. Ct. 2228 (No. 19-1392); MISS. CODE. ANN. § 41-41-39 (West 2014).

[14] *See* Brief for Petitioners, *supra* note 9, at 1–2 (arguing for overturning *Roe*); Brief for Respondents, *supra* note 13, at 5–6.

[15] June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2120 (2020).

[16] Texas Heartbeat Act, S.B. 8, 87th Leg. Reg. Sess. (Tex. 2021).

[17] TEX. HEALTH & SAFETY CODE ANN. §§ 171.207–171.208 (West 2021); Texas House of Representatives, House Committee Report Version, Bill Analysis, H.R. 87, 87th Legislature Regular Session (Tex. 2021). *But see* Bethany Dawson, *The "Fetal Heartbeat" that Defines Texas' New Abortion Laws Doesn't Exist, Say Doctors*, BUS. INSIDER (Sept. 5, 2021, 8:10 AM), https:// www.businessinsider.com/texas-abortion-fetal-heartbeats-don't-exist-at-6-weeks-doctors-2021-9 [https://perma.cc/9YX8-73QH].

[18] MISS. CODE. ANN. §§ 41-41-34.1, 41-41-39 (West 2019), *invalidated by* Jackson Women's Health Org. v. Dobbs, 951 F.3d 246, 248 (5th Cir. 2020).

[19] Brief for Petitioners at 8, Whole Woman's Health v. Jackson (*Whole Woman's Health II*), 142 S. Ct. 522 (2021) (No. 21-463).

[20] HEALTH & SAFETY §§ 171.207–171.208.

[21] *See infra* Part I.

[22] Reva Lalwani, *The Future of "Bounty Hunting" Laws*, MICH. DAILY (Apr. 19, 2022),

While *qui tam* actions authorizing citizens to enforce laws without injury have existed for quite a while,[23] the citizen plaintiffs act on behalf of the government: private plaintiffs, incentivized by a prospective reward, help the government achieve its enforcement interests, and the government can also enforce those interests.[24] Together, the citizens and the government are joint enforcers. But SB 8 modified the parallel enforcement options seen in *qui tam* actions: while authorizing citizens to sue, the statute also forbade government officials from bringing suit,[25] cutting off any representative role that citizens might otherwise be playing on behalf of the government's interests.[26]

At first glance, SB 8 would appear to have been an exercise in futility. There was clear consensus among legal scholars that SB 8's burden on the abortion right was facially unconstitutional so long as *Roe* stood,[27] and the Court had already granted certiorari to decide whether to overturn *Roe* when SB 8 went into effect,[28] obviating the need for a state to create another avenue to question its prudence. The Constitution's Supremacy Clause is a renowned cornerstone of the American federalist system, so, if *Roe* survived, SB 8 would seemingly not be long for this world.[29]

However, SB 8's otherwise innocuous combination of authorization and prohibition had dire implications in practice, and designedly so.[30] The statute's combined provisions creating a bounty cause of action but disallowing government enforcement thereof were designed to insulate it from invalidation, even while *Roe* survived.[31] In

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https://www.michigandaily.com/opinion/columns/the-future-of-bounty-hunting-laws/ [https://perma.cc/WP43-8VN2]. Note, however, that the statute's architect reportedly designed it only to *appear* to incentivize enforcement, but that actual enforcement is undesirable because it creates potential avenues for challenge. Stephen Paulsen, *The Legal Loophole That Helped End Abortion Rights*, COURTHOUSE NEWS SERV. (July 30, 2022), https://www.courthousenews.com/the-legal-loophole-that-helped-end-abortion-rights/ [https://perma.cc/FMM2-HDC2].

[23] Evan Caminker, *The Constitutionality of* Qui Tam *Actions*, 99 YALE L.J. 341, 341–42 (1989).

[24] Sharon Finegan, *The False Claims Act and Corporate Criminal Liability: Qui Tam Actions, Corporate Integrity Agreements and the Overlap of Criminal and Civil Law*, 111 PENN ST. L. REV. 625, 627–28 (2007).

[25] HEALTH & SAFETY §§ 171.207(a), 171.208(a), 171.208(h).

[26] *See* Caminker, *supra* note 23, at 341–42; Finegan, *supra* note 24, at 627–28.

[27] *See* Jacob Gershman, *Behind Texas Abortion Law, an Attorney's Unusual Enforcement Idea*, WALL ST. J. (Sept. 4, 2021, 9:38 AM), https://www.wsj.com/articles/behind-texas-abortion-law-an-attorneys-unusual-enforcement-idea-11630762683 [https://perma.cc/8ENC-FWQX]; *see also* Reese Oxner, *Texas Lawmakers' Novel Approach to Skirting* Roe v. Wade *Leaves Abortion Rights Advocates Without a Legal Playbook*, TEX. TRIB. (Sept. 10, 2021), https://www.texastribune.org/2021/09/10/texas-abortion-ban-legal-challenges/ [https://perma.cc/4LP8-GTLK].

[28] *See* Petition for Writ of Certiorari, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392); Dobbs v. Jackson Women's Health Org., 141 S. Ct. 2619 (2021).

[29] *Cf.* June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2112–13, 2120 (2020).

[30] *See* Gershman, *supra* note 27.

[31] *See id.*

fact, the legislative history directly acknowledged the holding in *Roe* but nevertheless implemented the restriction, noting the state's strong interest in preserving unborn life,[32] and the State Senator who sponsored the bill directly stated that it was designed to circumvent reversal.[33] In sum, the drafters did not design the statute to surreptitiously flout constitutional demands through deceptive drafting that appears facially constitutional, like TRAP laws, or to forcibly create an avenue to challenge *Roe* on its merits.[34] Rather, the statute was designed to utilize three well-established justiciability and jurisdictional principles as a unified "loophole," shielding the statute from challenge: standing, sovereign immunity, and the state action doctrine.[35] In general, these doctrines either block challenges from being heard at all or provide defenses that the named defendants are improper.[36] Because they are all mandatory threshold questions that courts must resolve, either when raised or in general, before hearing a case, the statute ensures that adjudication is blocked before its constitutionality can be argued on the merits—thereby allowing it to survive simply because it cannot be questioned.[37]

SB 8's potential to evade constitutional review sparked concern that other states might repurpose its framework to infringe other rights.[38] These concerns were soon realized: both conservative and liberal legislatures introduced copycat bills targeting abortion and gun control, respectively.[39] In March 2022, Idaho became the first state to pass a bill derived from SB 8, enacting a slightly modified abortion restriction

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[32] Texas House of Representatives, Texas Bill Analysis, H.R. 87, 87th Legislature Regular Session (Tex. Apr. 28, 2021); Texas House of Representatives, Texas Bill Analysis, H.R. 87, 87th Legislature Regular Session (Tex. Mar. 16, 2021).

[33] *See* Gershman, *supra* note 27.

[34] *See id.*

[35] *See id.*; *cf.* Stephen N. Scaife, *The Imperfect but Necessary Lawsuit: Why Suing State Judges Is Necessary to Ensure That Statutes Creating a Private Cause of Action Are Constitutional*, 52 U. RICH. L. REV. 495 (2018) (analyzing the role of these principles in the context of statutory precursors to SB 8).

[36] *See* Scaife, *supra* note 35.

[37] *See* Gershman, *supra* note 27; *cf.* Scaife, *supra* note 35.

[38] Julia Kaye & Marc Hearron, *Even People Who Oppose Abortion Should Fear Texas's New Ban*, WASH. POST (July 19, 2021, 8:58 AM), https://www.washingtonpost.com/outlook/2021/07/19/texas-sb8-abortion-lawsuits/ [https://perma.cc/UTV7-J5FC].

[39] *See* Michael Smith & Jonathan Levin, *Florida Lawmaker Proposes Abortion Ban that Mimics Texas SB-8 Law*, TIME (Sept. 22, 2021, 11:24 PM), https://time.com/6100983/florida-abortion-bill-texas-sb8/ [https://perma.cc/M3PM-FAFF]; Alison Durkee, *California Moves Forward with Gun Control Bill that Mimics Structure of Texas Abortion Ban*, FORBES (last updated Feb. 18, 2022, 3:22 PM), https://www.forbes.com/sites/alisondurkee/2022/02/18/california-moves-forward-with-gun-control-bill-that-mimics-structure-of-texas-abortion-ban/?sh=1464f1907897 [https://perma.cc/42PF-QT43]; *see also* Kimberly Kindy & Alice Crites, *The Texas Abortion Ban Created a 'Vigilante' Loophole. Both Parties Are Rushing to Take Advantage*, WASH. POST (Feb. 22, 2022, 6:00 AM), https://www.washingtonpost.com/politics/2022/02/22/texas-abortion-law-vigilante-loophole-supreme-court/ [https://perma.cc/B3Q9-ZH76].

that narrowed the enforcement pool to family members.[40] In May 2022, Oklahoma passed two SB 8–styled abortion bills.[41] In July 2022, California passed SB 1327, an SB 8–styled gun control bill that created a cause of action against those who sell federally unregulated gun components and against gun dealers who sell firearms of any kind to persons under twenty-one years of age.[42] Although the constitutional right to an abortion was recently overturned in *Dobbs v. Jackson Women's Health Organization*,[43] SB 8 is still operational,[44] and California SB 1327 demonstrates the potential to reuse the structure for other purposes.[45] In light of these copycat bills, an even wider proliferation of what this Note will refer to as "citizen deputy" statutes is likely on the horizon. Given the structure's potential to evade constitutional review, such a proliferation could have widespread implications for the free exercise of quintessential constitutional rights fundamental to our democracy, such as free speech and equal protection.[46]

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[40] BeLynn Hollers, *Idaho Becomes First State to Enact Abortion Restrictions Modeled After Texas' Senate Bill 8*, DALL. MORNING NEWS (Mar. 23, 2022, 9:25 PM), https://www.dallasnews.com/news/politics/2022/03/23/idaho-becomes-first-state-to-enact-abortion-restrictions-modeled-after-texas-senate-bill-8/ [https://perma.cc/F55H-F7PW]; William L. Spence, *Idaho Senate Passes 6-Week Abortion Ban Allowing Texas-Style Lawsuits*, SEATTLE TIMES (Mar. 4, 2022, 4:25 PM), https://www.seattletimes.com/nation-world/nation-politics/idaho-senate-passes-6-week-abortion-ban-allowing-texas-style-lawsuits/ [https://perma.cc/KL2P-GXKC].

[41] Thomas Fuller, *Oklahoma Bans Abortions After About Six Weeks of Pregnancy*, N.Y. TIMES (May 3, 2022), https://www.nytimes.com/2022/05/03/us/oklahoma-abortion-ban.html [https://perma.cc/L4FG-W8BT]; Luke Vander Ploeg & Kate Zernike, *Oklahoma Governor Signs Bill that Bans Most Abortions*, N.Y. TIMES (May 25, 2022), https://www.nytimes.com/2022/05/25/us/oklahoma-abortion-ban-law-governor.html [https://perma.cc/78LS-87DQ].

[42] Soumya Karlamangla, *What to Know About California's Head-Turning Gun Control Law*, N.Y. TIMES (July 25, 2022), https://www.nytimes.com/2022/07/25/us/california-gun-control-law.html [https://perma.cc/7STQ-5CFD]; S.B. 1327, 2022 Cal. Legis. Serv. Ch. 146, Regular Session (Cal. 2022).

[43] 142 S. Ct. 2228 (2022).

[44] Karen Brooks Harper, *Texas Abortion Foes Use Legal Threats and Propose More Laws to Increase Pressure on Providers and Their Allies*, TEX. TRIB. (July 18, 2022, 12:00 PM), https://www.texastribune.org/2022/07/18/texas-abortion-laws-pressure-campaign/ [https://perma.cc/R3G6-5Z6H].

[45] Cal S.B. 1327. Note that the prohibition that SB 1327 implements arguably complies with the Second Amendment, and California Governor Gavin Newsom, who signed the bill, has argued as such. Lalwani, *supra* note 22; Erwin Chemerinsky, Opinion, *Is California's New Gun Law, Modeled After the Texas Abortion Law, Constitutional?*, L.A. TIMES (July 23, 2022, 9:03 AM), https://www.latimes.com/opinion/story/2022-07-23/gun-restrictions-newsom-private-lawsuits-texas-law [https://perma.cc/AL64-BWZM] (arguing that the SB 1327 age restriction is constitutional).

[46] Brief for the Lawyers' Committee for Civil Rights Under Law and 11 Civil Rights Organizations as Amici Curiae Supporting Petitioners at 4, *Whole Woman's Health II*, 142 S. Ct. 522 (2021) (No. 21-463) ("A decision here that would permit Texas to continue to frustrate federal court review of a flagrantly unconstitutional statute . . . would also provide

However, because of SB 8's novelty, concerns about the constitutional loophole it created were merely speculative and theoretical.[47] It was by no means certain that it would effectively evade constitutional review in practice.[48] After its unveiling, state and federal courts heard challenges to the framework's constitutionality in the first instance.[49] This Note examines the legal hurdles surrounding the novel "citizen deputy" statute—including its structure, the attendant legal doctrines, and its broader implications—using SB 8 as a test case for the analysis. While SB 8's prohibition is no longer unconstitutional, the divisive history of the abortion debate that gave rise to the structure sheds light on the reasons why states may be motivated to infringe on constitutional rights and whether such efforts can succeed in practice. SB 8 is thus a useful test case to examine the structure and its potential for reuse. For purposes of this analysis, this Note will examine SB 8 through a pre-*Dobbs* lens, focusing on the period when the statute's prohibition was unconstitutional.

Part I examines the statute's language, focusing on the provisions designed to evade constitutional review, thereby presenting SB 8's abstract "citizen deputy model" as a structure that other states might repurpose to infringe on rights. Part II examines the current doctrinal posture of SB 8's three "shields"—standing, sovereign immunity, and the state action doctrine—identifying questions the Court has answered thus far and flagging those that remain outstanding. Notably, Part II analyzes a key doctrinal development produced by SB 8 litigation in the merits decision *Whole Woman's Health II*. Part III examines the methods by which parties whose free exercise of rights are burdened by the structure would mount a challenge to test its constitutionality on the merits. Specifically, Part III will examine the selection of the proper plaintiffs and defendants and apply the three "shields" as they currently stand to those potential plaintiffs and defendants, using SB 8 as a test case for the analysis. Part IV returns to the doctrinal questions the Court has not yet answered and proposes a rule therefor. Part IV also examines the possible broader implications of the citizen deputy structure and whether such implications should inform the Court's thinking while resolving these doctrinal questions.

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a straightforward roadmap for states and local governments to employ the same stratagem in order to thwart the exercise of any federal right that might be locally unpopular."); Christine Vestal, *Citizen Enforcement of Texas Abortion Ban Could Spread to Other Laws*, PEW (Sept. 23, 2021), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/09/23/citizen-enforcement-of-texas-abortion-ban-could-spread-to-other-laws [https://perma.cc/9HD7-T7UQ].

[47] *See* Jacob Gershman, *Supreme Court Abortion Ruling Brings New Uncertainty to Decades-Old Fight*, WALL ST. J. (Sept. 2, 2021, 7:12 PM), https://www.wsj.com/articles/supreme-court-abortion-ruling-brings-new-uncertainty-to-decades-old-fight-11630621820?mod=article_inline [https://perma.cc/H6KF-PZ64].

[48] *Id.*

[49] *Cf. Whole Woman's Health II*, 142 S. Ct. at 530 (summarizing the various constitutional challenges to the statute currently being adjudicated in courts); Whole Woman's Health v. Jackson (*Whole Woman's Health I*), 141 S. Ct. 2494, 2496 (2021) (Roberts, C.J., dissenting) (remarking that the structure of SB 8 is "unprecedented").

I. THE MECHANICS OF THE TEST CASE: TEXAS SB 8

This Note will begin by analyzing the language and structure of Texas SB 8 to identify an abstract "citizen deputy model."

First, the statute requires doctors to perform an examination: "[A] physician may not knowingly perform or induce an abortion on a pregnant woman unless the physician has determined, in accordance with this section, whether the woman's unborn child has a detectable fetal heartbeat."[50] Next, depending on the outcome of this examination, the statute prohibits conduct:

> [A] physician may not knowingly perform or induce an abortion on a pregnant woman if the physician detected a fetal heartbeat . . . or failed to perform a test to detect a fetal heartbeat. A physician does not violate this section if the physician performed a test for a fetal heartbeat as required by Section 171.203 and did not detect a fetal heartbeat.[51]

Then, the statute announces a civil cause of action to enforce violations of these provisions:

> Any person, other than an officer or employee of a state or local governmental entity in this state, may bring a civil action against any person who: (1) performs or induces an abortion in violation of this subchapter; (2) knowingly engages in conduct that aids or abets the performance or inducement of an abortion, including paying for or reimbursing the costs of an abortion through insurance or otherwise, if the abortion is performed or induced in violation of this subchapter, regardless of whether the person knew or should have known that the abortion would be performed or induced in violation of this subchapter; or (3) intends to engage in the conduct described by Subdivision (1) or (2).[52]

Importantly, this provision explicitly prohibits government officials from bringing suit and allows actions to be brought against facilitators who unknowingly aided an abortion, so long as they knowingly engaged in the conduct that facilitates it.[53] For example, an action could be brought against an Uber driver who drove an abortion patient to an office complex of which one business was an abortion provider, even

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[50] TEX. HEALTH & SAFETY CODE ANN. § 171.203(b) (West 2021). The provision includes an exception for medical emergencies. *See id.* §§ 171.203, 171.205.

[51] *Id.* § 171.204(a)–(b).

[52] *Id.* § 171.208(a).

[53] *Id.*

if the driver is unaware that that business is the intended destination, so long as the act of driving was done knowingly.[54] However, the statute stipulates that pregnant women who obtain an abortion are not proper defendants for these suits.[55]

Next, the statute further elaborates on its preeminently novel feature, prohibiting government officials from bringing suit to enforce the conduct required by Section 171.208(a) or enforcing it through any other methods:

> Notwithstanding Section 171.005 or any other law, the requirements of this subchapter shall be enforced exclusively through the private civil actions described in Section 171.208. No enforcement of this subchapter, and no enforcement of Chapters 19 and 22, Penal Code, in response to violations of this subchapter, may be taken or threatened by this state, a political subdivision, a district or county attorney, or an executive or administrative officer or employee of this state or a political subdivision against any person, except as provided in Section 171.208.[56]

The provision seems idiosyncratic in that it creates state law but prohibits the state from having any power to enforce its own law.[57] Absent the private cause of action provision, this would otherwise render the statute useless at stopping the conduct the state seeks to deter, but combined with the private cause of action provision, the statute has hereby created a mechanism for deterring the unwanted conduct while entirely insulating the government from any involvement in doing so.[58] While statutorily authorized torts operate similarly, the language appears even to prevent enumerated state employees from bringing suit in their private capacities as citizens.[59] Tying government officials' hands in this way has implications that will be discussed shortly.

The statute then proceeds to set the remedies available to citizen deputies, including a bounty "of not less than $10,000 for each [violative] abortion," an injunction preventing further violations by the defendant, and "costs and attorney's fees."[60] The statute does impose a cap whereby a defendant who has already paid a bounty to a claimant for a particular abortion cannot be required to pay subsequent bounties

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[54] *See id.*; Connor Perrett, *Uber and Lyft Will Pay the Legal Fees of Drivers Sued Under Texas' New Abortion Law*, BUS. INSIDER (Sept. 4, 2021, 10:12 AM), https://www.businessinsider.com/uber-lyft-legal-fees-of-drivers-texas-abortion-ban-2021-9 [https://perma.cc/QK9S-HNQ9].

[55] HEALTH & SAFETY § 171.206(b). A later subsection also prohibits claimants who caused the pregnancy through rape, sexual assault, and incest, among other crimes. *Id.* § 171.208(j).

[56] *Id.* § 171.207(a). Section 171.005 authorizes government officials to enforce other laws contained in chapter 171 of Texas's Health and Safety Code. *See id.* § 171.005.

[57] *Id.* § 171.207(a).

[58] *See* Gershman, *supra* note 27.

[59] HEALTH & SAFETY § 171.207(a).

[60] *Id.* § 171.208(b).

for that same abortion, thereby preventing infinite liability.[61] However, the statute prohibits defendants from being awarded attorney's fees, even when their defenses prevail.[62] SB 8 also amended a provision of the Texas Civil Practice and Remedies Code, making attorneys and law firms liable to cover the cost of opposing counsel's attorney's fees for any constitutional challenges to the state's abortion laws, even if the matter is dismissed due to the justiciability doctrines previously discussed,[63] thereby making it more difficult for challengers to obtain representation in order to test the statute's constitutionality.

Next, SB 8 circumscribes the defenses that are and are not available to defendants. For example, it prohibits defendants from asserting the following defenses, among others:

> (3) a defendant's reliance on any court decision that has been overruled on appeal or by a subsequent court, even if that court decision had not been overruled when the defendant engaged in conduct that violates this subchapter; . . . (5) non-mutual issue preclusion or non-mutual claim preclusion; . . . or (7) any claim that the enforcement of this subchapter or the imposition of civil liability against the defendant will violate the constitutional rights of third parties, except as provided [under *Casey*'s undue burden test].[64]

Additionally, it prohibits patient consent to the procedure, a defendant's belief that the statute is unconstitutional, and a defendant's reliance on a concurrent jurisdiction's nonbinding decision as defenses.[65]

These prohibitions are notably pro-plaintiff for several reasons. First, while the preceding section prevented defendants from paying bounties to multiple claimants for the same abortion when the defendant loses, item five prohibits defendants who have previously *won* their claim from asserting preclusion against future claimants on the basis of that victory.[66] In short, defendants who won the first action against them can be subjected to unlimited unsuccessful suits over the same abortion until a claimant eventually wins (or the statute of limitations bars further litigation).[67] Furthermore, the statute prohibits expanded third-party assertions of constitutionality beyond the

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[61] *Id.* § 171.208(c).

[62] *Id.* § 171.208(i).

[63] TEX. CIV. PRAC. & REM. CODE ANN. § 30.022 (West 2021).

[64] HEALTH & SAFETY §§ 171.208(e), 171.209. However, the statute's articulation might not give full credence to *Casey*'s framework. *See* Oral Argument, *Whole Woman's Health II*, 142 S. Ct. 522 (2021) (No. 21-463), https://www.oyez.org/cases/2021/21-463 [https://perma.cc/U448-DFCY].

[65] HEALTH & SAFETY § 171.208(e).

[66] *See id.* § 171.208(c), (e).

[67] *See id.*

scope of its provision carving out the *Casey* defense and preserves the ban on conduct even during periods when the statute has been invalidated by a court.[68]

For affirmative defenses, the statute articulates the *Casey* undue burden test. First, it states that a defendant does not have standing to assert the rights of women seeking abortions as a defense unless the Supreme Court has established such standing under third-party standing tests, or the Supreme Court expressly holds that Texas must confer standing on that particular defendant.[69] Subsection (b) proceeds by articulating when the defense can be asserted, namely when:

> (1) the defendant has standing to assert the third-party rights of a woman or group of women seeking an abortion in accordance with Subsection (a); and (2) the defendant demonstrates that the relief sought by the claimant will impose an undue burden on that woman or that group of women seeking an abortion. (c) A court may not find an undue burden under Subsection (b) unless the defendant introduces evidence proving that: (1) an award of relief will prevent a woman or a group of women from obtaining an abortion; or (2) an award of relief will place a substantial obstacle in the path of a woman or a group of women who are seeking an abortion.[70]

Note that this section constructs (to the extent possible under *Casey*) the first "shield" of the citizen deputy model: standing.[71] Additionally, while the section purports to articulate the *Casey* undue burden test, it might arguably narrow the test compared to prior applications of it. For example, in *Whole Woman's Health v. Hellerstedt*, the Court held that several TRAP laws that were prohibitively expensive to comply with created an undue burden on free exercise of the right because abortion facilities had been forced to close.[72] Arguably, this collective access analysis incorporates patient harm into an action brought by a third party. However, the implications of any effort to narrow the test are likely negated anyway: as was noted during oral argument in *Whole Woman's Health II*, state court judges are still bound to allow constitutional defenses, and clever statutory drafting cannot be utilized to circumvent them.[73]

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[68] *See id.* § 171.208(e).

[69] *Id.* § 171.209(a).

[70] *Id.* § 171.209(a)–(c). Note, however, that Section 171.209(f) clearly acknowledges an individual's ability to assert one's personal constitutional rights as a defense. *Id.* § 171.209(f).

[71] *See id.* § 171.209.

[72] *See* 136 S. Ct. 2292, 2312, 2318 (2016).

[73] *See* Oral Argument, *Whole Woman's Health II*, 142 S. Ct. 522 (2021) (No. 21-463), https://www.oyez.org/cases/2021/21-463 [https://perma.cc/2N4K-BHUM]; *see also* Oral Argument, United States v. Texas, 142 S. Ct. 522 (2021) (No. 21-588), https://www.oyez.org/cases/2021/21-588 [https://perma.cc/74UT-YXA2].

Next, the statute solidifies the state's sovereign immunity from constitutional challenges to, or actions under, the act:

> This state has sovereign immunity, a political subdivision has governmental immunity, and each officer and employee of this state or a political subdivision has official immunity in any action, claim or counterclaim or any type of legal or equitable action that challenges the validity of any provision or application of this chapter, on constitutional grounds or otherwise. (c) A provision of state law may not be construed to waive or abrogate an immunity described by Subsection (b) unless it expressly waives immunity under this section.[74]

This section introduces another of the three "shields" to challenge: sovereign immunity. As will be discussed, it preserves sovereign immunity not in federal courts, which are covered by the Eleventh Amendment, but in state courts, in which such immunity might otherwise have been available depending on state law.[75]

Finally, the statute institutes several ancillary requirements and prohibitions. First, it establishes proper venue in effectively any county with a connection to the parties on either side and prohibits transfer without joint consent,[76] making the actions difficult to defend because a defendant could be subject to suit anywhere in the state. Curiously, however, it does not appear to give Texas state courts exclusive subject matter jurisdiction over SB 8 actions,[77] even though Texas judges would presumably be less critical of Texas law than federal judges. Nevertheless, defendants might find themselves forced to appear before any court in the state where a deputized plaintiff lives,[78] which is expensive and increases the risk of default judgments.[79]

The statute also clearly articulates a legislative intent to preserve severability should certain provisions of the statute be declared unconstitutional for any reason, including vagueness.[80] It further articulates an intent to preserve any constitutionally possible application or interpretation of a provision, even if the provision is declared facially unconstitutional, as well as an intent for judgments declaring unconstitutionality to be reversable should a later court interpret the statute differently.[81] It limits

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[74] *Id.* § 171.211.

[75] *See infra* Part I.

[76] HEALTH & SAFETY § 171.210.

[77] *See id.*

[78] *See id.*

[79] *See* Erin Douglas, *Texas Abortion Law a "Radical Expansion" of Who Can Sue Whom, and an About-Face for Republicans on Civil Suits*, TEX. TRIB. (Sept. 3, 2021, 5:00 AM), https://www.texastribune.org/2021/09/03/texas-republican-abortion-civil-lawsuits/ [https://perma.cc/5EPX-8BG8].

[80] HEALTH & SAFETY § 171.212.

[81] *Id.*

the opportunity for such judgments, however, by abrogating the applicability of the state's Uniform Declaratory Judgments Act.[82]

Having reviewed these provisions, an abstract model has begun to emerge. First, the statute prohibited conduct that was unquestionably an articulated constitutional right.[83] Next, the statute created a cause of action that citizens may pursue, creating a method of enforcement that acts as a deterrent to free exercise of the protected conduct.[84] Then, the statute began constructing its three "shields." It first severed government officials' enforcement of or participation in the causes of action.[85] This constructed the first of the three "shields": the state action doctrine.[86] Additionally, it partially constructed the second "shield," standing, by preventing proper standing against government officials.[87] It then limited standing for constitutional defenses to the greatest extent possible,[88] thereby constructing the remainder of the second "shield": standing. Finally, the statute preserved the state's sovereign immunity, constructing the third "shield."[89]

Together, this model employs these doctrines as a complicated and interconnected technique to evade constitutional review. Because private actors cannot violate constitutional rights, the state action shield aims to insulate the statute from constitutional challenge with citizen deputies as the adverse party.[90] Because the state has preserved its sovereign immunity, this shield aims to prevent challenges against the state as an entity, its agencies, or its government officials in state court.[91] Behind the scenes, the Eleventh Amendment provides this same shield in federal court.[92] Also behind the scenes, absolute judicial and legislative immunity, which are similar to sovereign immunity but maintain their common law bases, shield certain government officials from actions in federal court.[93] Because citizen deputies cannot bring bounty suits against abortion patients, the field of potential challengers is reduced and the standing that can be used to mount a challenge is thereby cabined to third-party standing.[94] The third-party standing provision, in turn, operates as a shield by limiting the extent to which constitutionality can be asserted as a defense.[95] Note,

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[82] *Id.* § 171.211(a); TEX. CIV. PRAC. & REM. CODE ANN. § 37.004 (West 2021); s*ee, e.g.*, Allstate Ins. Co. v. Irwin, 627 S.W.3d 263, 269 (Tex. 2021).

[83] *See* HEALTH & SAFETY § 171.204(a)–(b).

[84] *See id.* § 171.208(a).

[85] *See id.* §§ 171.207(a), 171.208(a), (h).

[86] *See* discussion *infra* Part II.

[87] *See* HEALTH & SAFETY §§ 171.207(a), 171.208(a), (h).

[88] *See id.* § 171.209.

[89] *See id.* § 171.211.

[90] *See* discussion *infra* Part II.

[91] *See* discussion *infra* Part II.

[92] *See* discussion *infra* Part II.

[93] *See* discussion *infra* Part II. For the purposes of the abstract citizen deputy model presented in this Part, absolute immunity is part of the sovereign immunity "shield."

[94] *See* HEALTH & SAFETY § 171.206(b).

[95] *See id.* § 171.209(a)–(c).

too, that the third-party standing provision's Supreme Court order clause seemingly invites lower courts to incorrectly apply an overly narrow interpretation of the doctrine by implying that the Supreme Court should be the ultimate arbiter, despite the remote likelihood that all cases where errors are made will be granted certiorari.[96] Furthermore, while this provision expressly mentions standing, the standing shield has other components that quietly operate behind the scenes like its state action counterpart. Specifically, the provisions prohibiting government officials' involvement prevent state actors from causing the harm.[97] This, in turn, prevents the causation requirement for Article III standing in federal court from being satisfied, blocking an avenue to circumnavigate state court standing doctrine, and solidifies the protective effect of the state action shield by blocking an avenue to satisfy it. All the while, burdensome attorney's fees provisions and the potential for statewide venue make it difficult to obtain representation or to appear to defend oneself, decreasing the likelihood that the statute will face high-quality constitutional challenges, and the prohibition on declaratory judgments cuts off the sole method of challenge that might survive the justiciability hurdles.[98]

This complicated doctrinal interplay will be discussed in more detail in subsequent parts of this Note. For now, however, the above analysis presents an abstract model of the citizen deputy statutory structure. Until the Supreme Court decides to address the SB 8 structure, various constitutional rights can, in theory, be "plugged in" to this template to create a workaround for states to evade constitutional obligations.[99] The structure might be more effective for some rights than for others. For example, the layer of protection afforded by the provisions preventing suit against abortion patients and limiting third-party standing defenses would not graft onto a free speech restriction with relative ease because a third party does not "provide" speech to those whose right it is to exercise it.[100] By contrast, California's copycat bill, SB 1327, which creates a cause of action against gun retailers arguably retains the degree of separation feature, with the retailers serving as third parties to the citizens who have the right to bear arms.[101]

II. LEGAL HURDLES TO MOUNTING A CHALLENGE TO A CITIZEN DEPUTY STATUTE

As seen with SB 8, once a state has passed a citizen deputy statute banning exercise of a constitutional right, the threat of enforcement produces an immediate

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[96] *See id.* § 171.209(a)(1)–(2).

[97] *See id.* §§ 171.207(a), 171.208(a), (h).

[98] TEX. CIV. PRAC. & REM. CODE ANN. § 30.022 (West 2021).

[99] *See* discussion *infra* Part III.

[100] *See* discussion *infra* Part IV.

[101] *See* Karlamangla, *supra* note 42; S.B. 1327, 2022 Cal. Legis. Serv. Ch. 146, Regular Session (Cal. 2022). As mentioned, SB 1327's restrictions may be constitutional, but gun manufacturers and retailers could similarly serve as protective third parties in a copycat bill that implements unconstitutional prohibitions.

chilling effect. This threat primarily chilled the operations of abortion providers, as the parties that most frequently engage in the constitutionally protected conduct.[102] Abortion providers immediately began complying with the statute, denying abortion procedures to women when a fetal heartbeat was detected.[103] As a result, many women could not obtain an abortion at all, and the widespread burden on the right soon gave rise to constitutional challenges.[104]

As an initial matter, three basic methods exist to challenge the constitutionality of a statute: asserting its unconstitutionality as a defense in an action brought by a plaintiff or prosecutor, bringing a § 1983 action as a plaintiff to assert a violation of a constitutional right, and bringing an action as a plaintiff for a declaratory judgment under the federal Declaratory Judgment Act (hereinafter DJA) or a state analog.[105] Defenses only arise after a statute has been enforced against the challenger (post-enforcement), whereas § 1983 and DJA actions can be brought either pre-enforcement or post-enforcement.[106] Furthermore, because federal and state courts often have concurrent jurisdiction, many challenges can be mounted in either federal or state court.[107]

With SB 8, several of these avenues for challenge were pursued when the statute went into effect.[108] For example, the Department of Justice sued Texas in federal court;[109] abortion providers filed numerous suits in Travis County, Texas, trial courts;[110] and the ACLU represented providers in a challenge in federal court and petitioned for emergency relief on the U.S. Supreme Court's shadow docket.[111] Following

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[102] *See* Caroline Kitchener, *Texas Patients Are Rushing to Get Abortions Before the State's Six-Week Limit. Clinics Are Struggling to Keep Up*, WASH. POST (Feb. 14, 2022, 5:00 AM), https://www.washingtonpost.com/politics/2022/02/14/texas-abortion-sb8/ [https://perma.cc/48ZF-BTG3].

[103] *See id.* This Note occasionally uses the term "women" when discussing cited news reports which detail specific patients' stories. Of course, lack of access to abortion care affects many persons, irrespective of gender identity.

[104] *See id.*

[105] *See infra* Part III. For an example of a § 1983 and DJA challenge, see Brief for Petitioners at 21, *Whole Woman's Health II*, 142 S. Ct. 522 (2021) (No. 21-463).

[106] *See infra* Part III.

[107] *See, e.g.*, Complaint, Braid v. Stilley, 1:21CV05283 (N.D. Ill. Oct. 5, 2021).

[108] *See* Heidi Pérez-Moreno, *Twenty Abortion Providers Sue Texas Officials over Law that Bans Abortions as Early as Six Weeks*, TEX. TRIB. (July 13, 2021, 4:00 PM), https://www.texastribune.org/2021/07/13/texas-heartbeat-bill-lawsuit/ [https://perma.cc/TAS7-ZDRL].

[109] *See* Press Release, *Justice Department Sues Texas over Senate Bill 8*, DOJ (Sept. 9, 2021), https://www.justice.gov/opa/pr/justice-department-sues-texas-over-senate-bill-8 [https://perma.cc/J45F-R7FR]; Complaint at 1, United States v. Texas, No. 1:21-cv-796 (W.D. Tex. Sept. 9, 2021).

[110] *See, e.g.*, TRO, Tuegel v. Texas, No. D-1-GN-21-004316 (261st Dist. Ct., Travis County, Tex. Aug. 25, 2021); TRO, The Bridge Collective v. Texas, No. D-1-GN-21-004303 (126th Dist. Ct., Travis County, Tex. Aug. 25, 2021); TRO, Van Stean v. Texas, No. D-1-GN-21-004179 (98th Dist. Ct., Travis County, Tex. Aug. 23, 2021).

[111] *See Whole Woman's Health I*, 141 S. Ct. 2494, 2495–96 (2021).

denial of the emergency petition, the ACLU petitioned for certiorari before judgment on the merits docket.[112]

However, these challenges soon began colliding with the shields inherent in the statute's design, raising questions about whether the actions would survive dismissal to reach a substantive ruling on the statute's constitutionality.[113] Specifically, the challengers faced significant difficulty in meeting the threshold requirements to mount a challenge in court: standing, sovereign immunity, and the state action doctrine.[114] In general, the biggest struggle that arises when attempting to satisfy these threshold doctrines is finding proper adverse parties.[115] In other words, these three requirements foreclose several, if not all, viable adverse parties that can be named in a challenge, thereby making it more difficult to bring a challenge.[116] This Note will now examine the offensive and defensive methods for challenging the constitutionality of a statute and analyze the way each method impacts the three shields.

If constitutionality is asserted as a defense, the Supreme Court's unique role as the ultimate authority in constitutional interpretation, combined with the Supremacy Clause, would force both state and federal trial courts to apply the constitutional framework that applies to a right, such as the *Casey* framework, and ultimately rule that the constitutionality defense was met.[117] While this seems desirable, a trial court's judgment would reach the issue of whether the defendant satisfied the affirmative defense, not the constitutionality of the statute itself.[118] This analysis is pigeonholed to only the matter at hand because the adverse party is a citizen deputy: because private citizens cannot infringe upon constitutional rights, the defense serves merely to prevent penalties from being imposed upon constitutional conduct, as it does in private tort actions like libel.[119] Furthermore, even if a trial court did reach the issue of constitutionality for the statute as a whole, unless the judge issues an injunction, such judgments have no downward binding force, so sister trial courts could reach conflicting opinions on the constitutionality of a statute as often happens in the federal circuit courts.[120] It would be risky for abortion providers to resume operations in reliance on this injunction, however, as SB 8 specifically makes liability retroactive during the period of an injunction should it ever be lifted going forward.[121]

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[112] *See* Petition for Writ of Certiorari Before Judgment, *Whole Woman's Health II*, 142 S. Ct. 522 (2021) (No. 21-463); *Whole Woman's Health II*, 142 S. Ct. at 529, 531.

[113] Oxner, *supra* note 27.

[114] *See generally Whole Woman's Health I*, 141 S. Ct. 2494.

[115] Manian, *supra* note 8.

[116] *See infra* Part III.

[117] *See infra* Part III.

[118] *See infra* Part III.

[119] GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 1555 (7th ed. 2013).

[120] *See infra* Part III.

[121] TEX. HEALTH & SAFETY CODE ANN. § 171.208(e)(3) (West 2021).

These defensive hurdles are more pragmatic than theoretical. Defendant-challengers sued by citizen deputies cannot assert the protection of the shields that they would have to overcome as plaintiffs: defendants do not establish standing,[122] and neither state action nor sovereign immunity is relevant to tort suits between private parties. As such, this Note will now focus on the doctrinal posture of offensive challenges and later returns to examine the combined effect of all the hurdles.

First, to bring an action as plaintiff-challengers, the plaintiffs must have standing. Article III of the Constitution restricts federal courts' jurisdiction to "[c]ases" and "[c]ontroversies."[123] The doctrine of standing is derived from principles that underlie this language: the parties generally need to have a genuine controversy between one another, for which a loss of the claim would result in hardship for either side.[124] In other words, courts cannot issue opinions that are "hypothetical, abstract, or speculative," such as advisory opinions, and thereby cannot strike down a law as facially unconstitutional unless it appears before the courts in the context of an actual, factual dispute between parties.[125] In *Lujan v. Defenders of Wildlife*, the Supreme Court announced a tripartite test for constitutional standing:

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."[126]

This test inherently limits the field of potential defendants for a challenge. For example, under the causation requirement, one might logically conclude that the citizen deputies filing suit to obtain the bounty under a statute are the "cause" of a plaintiff's harm. However, under the state action doctrine, private parties generally cannot violate one's constitutional rights; rather, our constitutional rights bind the

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[122] In the case of citizen deputy statutes, while the deputies normally would not be able to establish the harm required for standing, two factors override this problem: first, the statute expressly establishes standing for the deputies despite the lack of harm; and second, the standing doctrine discussion that follows is a jurisdictional limitation on federal courts, whereas states can create their own standing principles in state courts.

[123] U.S. CONST. art. III, § 2, cl. 1.

[124] STONE ET AL., *supra* note 119, at 82–83, 106–07.

[125] *Id.* at 82–83, 106–07.

[126] 504 U.S. 555, 560–61 (1992) (internal citations omitted).

hands of the government, not citizens.[127] As such, private actors cannot be held responsible for harms suffered due to infringements of rights. Given that private actors are generally unbeholden to constitutional mandates, they arguably cannot even cause constitutional injury, thereby negating the second prong of the standing test.[128] So, to properly name a deputy as a defendant, a plaintiff would need to satisfy one of the exceptions under the Court's state action jurisprudence, which allows constitutional infringements to be asserted against private parties in certain circumstances.[129] Specifically, private actors have been held to constitutional mandates when the government has approved, encouraged, or facilitated the conduct giving rise to the infringement; the government's involvement with the private party has become so closely related as to become entangled; or the private party provides functions normally provided by the government.[130]

Should imputation of state action fail, other possible defendants would need to be identified. To satisfy the state actor hurdle posed by the deputy defendants, the state, its agencies, and its employees appear to be good options. However, these defendants would trigger various principles of immunity. For example, sovereign immunity protects the state itself, and absolute immunity protects certain types of state employees as individuals.[131]

As discussed, Article III, Section 2 establishes the types of cases and controversies that federal courts have the power to exercise jurisdiction over.[132] The doctrine of sovereign immunity comes from the Eleventh Amendment, which modified this jurisdiction: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[133] Despite its plain language, the Amendment has been interpreted to also apply to citizens suing their own state.[134] Generally, sovereign immunity protects states from suits filed by citizens unless the state chooses to waive its immunity.[135] Congress has a limited power to abrogate that immunity when it passes a statute enforcing the Fourteenth Amendment[136] if it articulates a clear intention to do so in the statute.[137]

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[127] STONE ET AL., *supra* note 119, at 1555.

[128] *Id.*; *see Lujan*, 504 U.S. at 560–61.

[129] STONE ET AL., *supra* note 119, at 1562.

[130] *See, e.g.*, Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961); Pub. Utils. Comm'n v. Pollak, 343 U.S. 451 (1952); Marsh v. Alabama, 362 U.S. 501 (1946); *see also* STONE ET AL., *supra* note 119, at 1562.

[131] SARAH E. RICKS & EVELYN M. TENENBAUM, CURRENT ISSUES IN CONSTITUTIONAL LITIGATION: A CONTEXT AND PRACTICE CASEBOOK 518 (3d ed. 2020).

[132] U.S. CONST. art. III, § 2.

[133] U.S. CONST. amend. XI.

[134] *See* Hans v. Louisiana, 134 U.S. 1, 11 (1890).

[135] RICKS & TENENBAUM, *supra* note 131, at 877.

[136] Fitzpatrick v. Bitzer, 427 U.S. 445 (1976); Dellmuth v. Muth, 491 U.S. 223, 227 (1989).

[137] Edelman v. Jordan, 415 U.S. 651 (1974).

However, the Court has held that § 1983 does not satisfy the clear statement rule.[138] One could not merely name "State of Texas" as a defendant to a § 1983 challenge. Similarly, agencies that function as an "arm" of the state retain the state's sovereign immunity, as determined by the statute that creates the agency; however, municipal and local governments do not.[139] As a result, the state's agencies and branches of government would be invalidated as proper defendants. Since local governments did not play a role in enacting the statute, this exception is of little help to a prospective challenger.

Additionally, while state sovereign immunity is normally available to state (executive) officials, such officials can be named in their official capacities in certain circumstances.[140] Whether this avenue is made available depends upon the pre-enforcement or post-enforcement posture of the case at hand. Specifically, an unconstitutional statute causes harm both before and after it is enforced against the person wishing to exercise the right: pre-enforcement and post-enforcement.[141] Post-enforcement harm arises from the penalty imposed by the enforcement or the hardship suffered during enforcement; pre-enforcement harm occurs because free exercise of the right is chilled due to fear of the threat of liability.[142] An unconstitutional statute does not need to be enforced to bring an action and obtain a remedy, but pre-enforcement actions are subject to a more stringent layer of fact-bound analysis: unlike in post-enforcement contexts, the pre-enforcement analysis speculates on the likelihood that the official will enforce the law.[143] However, in either circumstance, sovereign immunity allows only one remedy against state officials named in their official capacities: injunctions.[144] In *Ex parte Young*, the Supreme Court held that challengers could bring *pre-enforcement* official capacity suits against officials without it being considered a suit against the state, defining pre-enforcement by the *remedy* sought rather than a fact-intensive analysis to determine when "enforcement" begins.[145] In other words, *Young* held that officials retained the immunity of their state agencies unless the relief sought was a forward-looking injunction.[146] In doing so, *Young* created the "well-recognized irony" that the state official's conduct met the state action requirement necessary for a constitutional violation to have occurred,

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[138] Quern v. Jordan, 440 U.S. 332, 342 (1979).

[139] Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977); Northern Ins. Co. of N.Y. v. Chatham County, 547 U.S. 189 (2006); Regents of the Univ. of Cal. v. Doe, 519 U.S. 425, 429 (1997).

[140] *Ex parte* Young, 209 U.S. 123, 167 (1908).

[141] Caitlin E. Borgmann, *Holding Legislatures Constitutionally Accountable Through Facial Challenges*, 36 HASTINGS CONST. L.Q. 563, 570 (2009); Manian, *supra* note 8, at 126; Scaife, *supra* note 35, at 495–96.

[142] Scaife, *supra* note 35, at 495–96.

[143] *See Ex parte* Young, 209 U.S. 123, 167 (1908).

[144] Edelman v. Jordan, 415 U.S. 651, 651 (1974); RICKS & TENENBAUM, *supra* note 131, at 910–12.

[145] *See Ex parte* Young, 209 U.S. 123, 159–60 (1908).

[146] *Id.* at 155–57.

while concluding that the action was "not attributable to the state," making the Eleventh Amendment protection unavailable to the official.[147] *Young* resolves an inherent tension between Congress's ability to enforce the Fourteenth Amendment, under which it created § 1983 to curb states' infringements of constitutional rights, and the Eleventh Amendment, which protects states from suit.[148]

Young is largely limited to executive branch officials, but this was not necessarily clear at the time SB 8 was passed.[149] In *Whole Woman's Health II*, an SB 8 challenge, the Court addressed whether the principle of *Young* extended to state court judges and clerks, as well as whether a *Young* pre-enforcement action would be effective against the Texas Attorney General in his executive official capacity.[150] First, the Court declined to extend *Young* to judges or clerks.[151] While the Court did not expressly classify its holding as a standing test, it mentioned Article III and evaluated the causation prong: namely, the Court reasoned that the judges and clerks were improper defendants because courts act as neutral arbiters and court employees' interests, therefore, are not adverse to the challenger-plaintiffs in order to establish a case or controversy.[152] This analysis also resolved whether a *Young* injunction, which is rooted in sovereign immunity jurisprudence, can be pursued against judges and clerks as state officials: in fact, the Court expressly articulated that its analysis fell under the sovereign immunity doctrine in *Young* rather than absolute judicial immunity at common law.[153]

The Court also held that injunctive relief under *Young* could not be pursued against the Attorney General, even though *Young* itself was an action against an attorney general.[154] The Court reasoned that the Texas Attorney General had no power to enforce SB 8 and that an injunction against the Attorney General nevertheless would not bind the private citizens authorized to enforce it.[155] In essence, the Attorney General is not the cause of the abortion providers' harm, which would impermissibly render the case advisory. Implicitly, this also addresses the redressability prong of the standing test because an injunction binding the Attorney General would not redress the abortion providers' injuries.[156] Consequently, the Attorney General was held to be an improper defendant for the challenge,[157] and attorneys general will thus be precluded as defendants in citizen deputy challenges going forward.

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[147] Fla. Dept. of State v. Treasure Salvors, Inc., 458 U.S. 670, 685 (1982).

[148] *See* RICKS & TENENBAUM, *supra* note 131, at 915–19.

[149] Brief for Petitioners at 25–38, *Whole Woman's Health II*, 142 S. Ct. 522 (2021) (No. 21-463).

[150] *See Whole Woman's Health II*, 142 S. Ct. at 531–32, 534 (2021).

[151] *Id.* at 539.

[152] *Id.* at 532–33.

[153] *Id.* at 532; *Ex parte* Young, 209 U.S. 123, 149–50 (1908).

[154] *Whole Woman's Health II*, 142 S. Ct. at 539; *Ex parte* Young, 209 U.S. at 126, 161.

[155] *Whole Woman's Health II*, 142 S. Ct. at 534–35.

[156] *See id.* at 535.

[157] *Id.*

In short, the Court heavily implied that an extension of *Young* to the foregoing state officials in the citizen deputy statute context would impermissibly produce an advisory opinion, inherently rooting its holding in both sovereign immunity and standing principles.[158]

Separate from, but closely related to, the Eleventh Amendment sovereign immunity doctrine for states are the doctrines of judicial immunity and legislative immunity.[159] Judges are protected by absolute immunity,[160] even when there is malice or corruption,[161] with one limited exception.[162] Namely, immunity is not available when the judge acts without any basis for asserting jurisdiction.[163] However, there is a distinction between acting *without* jurisdiction and acting *in excess of* jurisdiction; the exception only applies to the former.[164] For citizen deputy cases, state courts have general jurisdiction, so state judges would plausibly have proper subject matter jurisdiction over Texas causes of action.[165] Furthermore, § 1983 provides judicial immunity from injunctions, in addition to the pre-existing common law immunity from suits for monetary damages.[166] Consequently, state court judges would likely be eliminated as proper defendants in mounting a challenge to a citizen deputy statute, even in the absence of the *Whole Woman's Health II* decision.

Prior to SB 8, the circuit courts were divided on whether court clerks were also protected by judicial immunity for their role in filing complaints and docketing cases.[167] While the Court addressed the availability of court clerks as defendants in

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[158] *See id.* at 532–35.

[159] *See* Pierson v. Ray, 386 U.S. 547 (1967) (noting that judicial immunity is a common law rule); *see also* RICKS & TENENBAUM, *supra* note 131, at 518 (noting that absolute immunity applies to individuals, not states). Note, too, that judicial immunity is a federal common law rule that is applicable to § 1983, which is a federal law. Curiously, the Court expressly distinguished its holding in *Whole Woman's Health II*, declining to even partially base its rationale on the doctrine. *See* 142 S. Ct. at 533.

[160] J. Randolph Block, Stump v. Sparkman *and the History of Judicial Immunity*, 1980 DUKE L.J. 879, 913–14 (1980).

[161] *Pierson*, 386 U.S. 547. Note that this immunity only applies to judicial acts. Stump v. Sparkman, 435 U.S. 349 (1978). There is no question that presiding over SB 8 bounty suits is a judicial act, so the test to determine that distinction is beyond the scope of this Note.

[162] Brittney Kern, *Giving New Meaning to "Justice For All": Crafting an Exception to Absolute Judicial Immunity*, 2014 MICH. ST. L. REV. 149, 163 (2014).

[163] Mireles v. Waco, 502 U.S. 9, 11–12 (1991) (per curiam); Kern, *supra* note 162, at 163; Stump v. Sparkman, 435 U.S. 349, 356 n.6, 357 n.7 (1978) (the jurisdiction in question is subject matter jurisdiction).

[164] *Stump*, 435 U.S. 349.

[165] Limited exceptions to state courts' general jurisdiction, like probate matters in which probate courts have exclusive jurisdiction, are beyond the scope of this Note.

[166] 42 U.S.C. § 1983. Curiously, while *Whole Woman's Health II* was a § 1983 suit and the relief requested was injunctive, the Court did not cite this language in holding that the state court judges were not proper defendants. Instead, the Court declined to extend the *Young* doctrine to judges.

[167] RICKS & TENENBAUM, *supra* note 131, at 511; *see* Petition for Writ of Certiorari Before Judgment, *Whole Woman's Health II*, 142 S. Ct. 522 (2021) (No. 21-463).

Whole Woman's Health II, as discussed, the opinion appears to draw its rationale from both sovereign immunity and standing, but not common law absolute immunity.[168] In holding that court clerks were not proper defendants, the Court reasoned that their function as facilitators of the adjudicative process is neutral just as it is for judges, and that clerks are therefore not adverse to defendants in actions that they docket, as is required by Article III.[169] This appears to be a causation analysis under the second prong of the standing test which is derived from Article III. As such, it is unclear whether court clerks are afforded this additional doctrinal protection. In any event, *Whole Woman's Health II* nevertheless precludes another group of possible defendants.

The legislators who wrote and passed an unconstitutional citizen deputy statute might also appear to be the cause of plaintiffs' harms. However, the doctrine of absolute legislative immunity bars this group of potential defendants. In *Tenney v. Brandhove*, the Court articulated the contours of legislative immunity: legislators have absolute immunity when "acting in the sphere of legitimate legislative activity" and "[t]he claim of an unworthy purpose does not destroy the privilege."[170] The act of writing and passing a statute is a clear legislative activity; in fact, it is even more closely related to core legislative functions than the legislative investigation in *Tenney*, in which the immunity applied.[171] While passing a citizen deputy statute with an intent to invalidate constitutional rights might aptly be described as an "unworthy purpose," under *Tenney*, this does not negate the privilege.[172]

The state action doctrine and the immunity doctrines arguably speak to whether the defendants implicated are the cause of a plaintiff's injury as required by the second prong of the standing test. However, the doctrines also bar suit independently. In fact, the immunity doctrines are threshold questions that merit immediate dismissal as soon as the matter is raised and determined rather than affording a defense.[173] Together, the convergence of these three doctrines potentially precludes challenger-plaintiffs from properly naming *any* defendants to reach a disposition on the merits of a citizen deputy statute.

III. ANALYZING THESE HURDLES THROUGH THE LENS OF THE TEST CASE

This Note will now examine the above doctrinal hurdles using the pre-*Dobbs* posture of SB 8 as a test case.

With SB 8, there were easily identifiable parties harmed by the statute's chilling effect with vested interests in proactively seeking reversal. As discussed, constitutionality

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[168] *Whole Woman's Health II*, 142 S. Ct. at 532.

[169] *Id.*

[170] Tenney v. Brandhove, 341 U.S. 367, 376–77 (1951).

[171] *Id.* at 377–79.

[172] *Id.* at 377.

[173] *See* Mireles v. Waco, 502 U.S. 9, 11 (1991); *cf.* Mitchell v. Forsyth, 472 U.S. 511, 526 (1985).

can be challenged in two ways: by asserting unconstitutionality as a defense,[174] or by proactively suing to vindicate constitutional rights. Offensive challenges can be brought either under § 1983, which creates a cause of action for constitutional violations,[175] or under the DJA to obtain a declaratory judgment that would leave SB 8 in place but would create an automatic defense.[176] While defenses only occur post-enforcement, § 1983 and DJA claims can be brought in pre-enforcement[177] or post-enforcement[178] contexts. To pursue a post-enforcement challenge, one must first violate the statute by electing to engage in the conduct despite the potentially vast liability.[179] An interested party could theoretically choose to do so to open post-enforcement avenues, both defensive and offensive.[180] By contrast, a pre-enforcement action would not require a violation.[181] This determines whether the challenging parties are plaintiffs or defendants for the sake of this case-building exercise.

A. Section 1983 and DJA Challenges

As discussed, in the pre-enforcement § 1983 and DJA challenge brought in *Whole Woman's Health II*, the harmed abortion providers were the plaintiffs.[182] First, standing is typically addressed as a threshold question before a court considers other preliminary questions or the merits.[183] Under *Lujan*'s three-prong standing test, any party who might face liability in a citizen deputy lawsuit—such as an abortion provider—likely satisfies the first prong of the test[184]: harm that is concrete and particularized, as well as actual and imminent.[185] For example, abortion providers experienced an exodus of staff in anticipation of the law, leaving facilities operating

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[174] Scaife, *supra* note 35, at 501; *Whole Woman's Health II*, 142 S. Ct. at 530 n.1 ("[W]hatever a state statute may or may not say, applicable federal constitutional defenses always stand fully available when properly asserted.").

[175] RICKS & TENENBAUM, *supra* note 131, at 497.

[176] Brief for Petitioner at 25, *Whole Woman's Health II*, 142 S. Ct. 522 (2021) (No. 21-463).

[177] *Whole Woman's Health II*, 142 S. Ct. at 538 (noting that pre-enforcement § 1983 actions became prominent in the mid-20th century).

[178] *Cf.* Monell v. Dep't of Soc. Servs. of New York, 436 U.S. 658 (1978).

[179] Alexi Pfeffer-Gillett, *Civil Disobedience in the Face of Texas's Abortion Ban*, 106 MINN. L. REV. HEADNOTES 203, 206 (2021).

[180] Alan Braid, Opinion, *Why I Violated Texas's Extreme Abortion Ban*, WASH. POST (Sept. 18, 2021, 4:01 AM), https://www.washingtonpost.com/opinions/2021/09/18/texas-abortion-provider-alan-braid/ [https://perma.cc/95BE-RJG7]; Pfeffer-Gillett, *supra* note 179, at 206.

[181] Scaife, *supra* note 35, at 495–96, 501.

[182] Brief for Petitioner at 25, *Whole Woman's Health II*, 142 S. Ct. 522 (2021) (No. 21-463).

[183] STONE ET AL., *supra* note 119, at 106.

[184] *Id.* at 107–09; Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992).

[185] *Lujan*, 504 U.S. at 560–61; *see, e.g.*, Meredith Deliso, *DOJ Documents Impacts of Texas Abortion Ban in New Court Filings*, ABC NEWS (Sept. 15, 2021, 7:39 PM), https://abcnews.go.com/US/doj-documents-impacts-texas-abortion-ban-court-filings/story?id=80041729 [https://perma.cc/W4DL-N425] (describing harms resulting from SB 8 restrictions).

with understaffed "skeleton crew[s]."[186] This, in turn, created appointment backlogs longer than two weeks, thereby exhausting what was effectively a two-week window for patients to get the procedure, because a patient would be unaware of a pregnancy for approximately four weeks of the statute's six-week time frame.[187] Some of these patients, including many low-income and minority women,[188] presumably have been forced to carry to term as a result of being turned away, as well as rape victims who are not exempted under the law.[189] Finally, some abortion providers' operations were so directly impacted that they were forced to close their doors.[190] In *Hellerstedt*, the closure of abortion facilities and the resulting lack of patient access was impliedly found to be a sufficient harm, as the Court's holding granted relief by invalidating portions of the challenged statute.[191] This outcome also speaks to the third prong of the *Lujan* test, as the invalidation of the portions of the statute that were found to infringe access to the constitutional right, as was done in *Hellerstedt*, would similarly redress the harms suffered by abortion providers facing closures due to SB 8.[192] As such, the third prong would likely be satisfied for a citizen deputy statute as well.

The above analysis speaks to which parties can serve as proper plaintiffs with standing, regardless of whom the plaintiffs name as defendants. However, the analyses of the second prong of the *Lujan* test, the state action doctrine, and sovereign immunity vary with the defendants named.

1. Applying the Tests with the Citizen Deputies as the Named Defendants

To bring a constitutional claim against the citizen deputies, a would-be defendant needs to violate the statute and a deputy needs to bring suit, thus creating a post-enforcement situation. This is so because, otherwise, the field of prospective defendants would comprise everyone in the world, most of whom would have no intent to bring suit. Under two of the "shields," such a defendant pool is impermissibly large: first, the harm must be causally attributable to the deputy under the standing doctrine; and second, pre-enforcement injunctions, whether under *Young* or in general, cannot enjoin everyone in the world.[193]

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[186] Kitchener, *supra* note 102.

[187] *Id.*

[188] Emily Wagster Pettus & Leah Willingham, *Minority Women Most Affected if Abortion Is Banned, Limited*, ABC NEWS (Feb. 1, 2022, 2:30 PM), https://abcnews.go.com/US/wireStory/minority-women-affected-abortion-banned-limited-82599673 [https://perma.cc/34JR-DZWU].

[189] See Suzanne Gamboa, *'We Are Seeing a New Level of Despair': Latinas Decry Impact of Texas Abortion Law*, NBC NEWS (Jan. 26, 2022, 6:03 PM), https://www.nbcnews.com/news/latino/-are-seeing-new-level-despair-latinas-decry-impact-texas-abortion-law-rcna12961 [https://perma.cc/4E4M-9HVG].

[190] Deliso, *supra* note 185.

[191] Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2312, 2318 (2016).

[192] *See id.*

[193] *Whole Woman's Health II*, 142 S. Ct. 522, 535 (2021); *Ex parte* Young, 209 U.S. 123, 157 (1908); RICKS & TENENBAUM, *supra* note 131, at 899–900.

Under the causation prong of the *Lujan* standing test, the deputy's suit triggers the burden of legal expenses and prospective liability that abortion providers improperly face during their exercise of a constitutional right.[194] However, as discussed above, for a claim asserting that plaintiffs have been harmed because their constitutional rights have been infringed, private citizens arguably cannot cause the harm asserted unless they meet the exceptions to the state action doctrine.[195] As such, the plaintiff must show that the infringement of the constitutional right is a harm that can, in fact, be caused by a private party under the state action doctrine.

When a statute is challenged, state action is typically presumed because the state passed and enforced the statute that is infringing the right. As such, in cases challenging a statute's constitutionality, a government body or official is typically the named defendant and the cause of the harm. For example, in *Loving v. Virginia*, the anti-miscegenation statute that was challenged as unconstitutional under the Fourteenth Amendment was passed and enforced by the state of Virginia, and the couple faced criminal charges for violating it.[196] In that case, the state was the named party, and the state's involvement in the complained-of constitutional infringement was obvious.[197] However, with citizen deputy statutes, state actors do not enforce the statute, and legislative bodies are typically protected by sovereign immunity for the passage component.[198] As a result, the Texas legislators who passed the statute would not constitute appropriate defendants to satisfy the state action doctrine.[199] Rather, the plaintiffs would need to show that the citizen deputy meets either the facilitation, entanglement, or public function exceptions to the state action doctrine, under which constitutional infringements can be imputed to private parties.[200] Note that while § 1983, by its plain language, creates a cause of action against any person who, under color of state law, subjects a person to a deprivation of rights,[201] the Court has interpreted "under color of state law" as synonymous with the requirements of the state action doctrine.[202]

Under the facilitation exception of *Shelley v. Kraemer*, the Court imputed constitutional mandates to private parties, ruling that the judicial enforcement of racially restrictive covenants between private parties constituted state action because, but for such enforcement, rights would not be infringed.[203] However, *Shelley* has since been limited and is largely labeled an outlier case.[204] Nevertheless, there

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[194] Douglas, *supra* note 79.

[195] *See supra* text accompanying notes 127–30.

[196] 388 U.S. 1, 2–5 (1967).

[197] *See id.*

[198] Michael L. Shenkman, *Talking About Speech or Debate: Revisiting Legislative Immunity*, 32 YALE L. & POL'Y REV. 351, 352 (2014).

[199] *See id.*

[200] STONE ET AL., *supra* note 119, at 1562.

[201] 42 U.S.C. § 1983.

[202] Lugar v. Edmondson Oil Co., 457 U.S. 922, 928–29 (1982).

[203] 334 U.S. 1 (1948).

[204] Richard Frankel, *The Disappearing Opt-Out Right in Punitive-Damages Class Actions*,

are a few similarities between the racially restrictive covenants in *Shelley* and SB 8's ban on constitutionally protected conduct. First, both the equal protection right in *Shelley* and the substantive-due-process-based abortion right in *Roe* are Fourteenth Amendment rights.[205] Second, in many other constitutional cases, an arguably private actor has engaged in some form of affirmative, harmful conduct before resorting to the judicial branch for relief; as such, the state action analysis only determines whether an action for relief from that harm can proceed.[206] With citizen deputy statutes, citizens could disregard the statute as unconstitutional and continue to freely exercise their rights but for judicial enforcement of the bounty suits, as was the case in *Shelley*.[207] In fact, after *Shelley*, the unconstitutional racially restrictive covenants at issue did not cease to exist, but merely became unenforceable in court.[208] In other words, as in *Shelley*, the potential adjudication of these deputy suits after a violation occurs is what stops the exercise of the conduct—either by fear that an action will be brought in court, giving rise to self-imposed deterrence, or by the commencement of court actions—rather than a precipitating event like the fine that was expected to be imposed in *Ex parte Young*. However, given the outlier nature of *Shelley* and the Court's hesitancy to infer state action from judicial oversight,[209] the Court would likely be unwilling to expand the precedent to the citizen deputy context.

The entanglement exception to the state action doctrine is the more likely candidate for imputation to private actors. In *Burton v. Wilmington Parking Authority*, the Court found sufficient entanglement between the Wilmington Parking Authority, a state entity, and Eagle Coffee Shop, which leased a storefront in the Parking Authority's parking garage and refused to serve black customers, for the state action

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2011 WIS. L. REV. 563, 611–12 (2011) ("Outside of the Supreme Court's holding in Shelley v. Kraemer that judicial enforcement of a racially restrictive covenant was state action, a holding that has been regarded as an outlier and as generally confined to its facts, the general rule is that judicial enforcement of neutral private agreements is not state action.").

[205] *Compare Shelley*, 334 U.S. at 19, *with* Roe, 410 U.S. at 164.

[206] *See* Marsh v. Alabama, 326 U.S. 501 (1946) (analyzing state action where person was charged with trespass for distributing religious pamphlets on sidewalk of privately owned town); *see also* Jackson v. Metro. Edison Co., 419 U.S. 345, 346 (1974); Burton v. Wilmington Parking Auth., 365 U.S. 715, 716 (1961).

[207] *Shelley*, 334 U.S. at 19 ("The undisputed facts disclose that petitioners were willing purchasers of properties upon which they desired to establish homes. The owners of the properties were willing sellers; and contracts of sale were accordingly consummated. It is clear that but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint . . . . The difference between judicial enforcement and nonenforcement of the restrictive covenants is the difference to petitioners between being denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing.").

[208] *Racial Restriction and Housing Discrimination in the Chicagoland Area*, DIGIT. CHI. LAKE FOREST COLL., https://digitalchicagohistory.org/exhibits/show/restricted-chicago/restrictive_covenants [https://perma.cc/YVF7-R9DD].

[209] Frankel, *supra* note 204, at 611–12, 612 n.182.

doctrine to be satisfied.[210] The Court reasoned that the financial relationship between the state and the coffee shop was the source of such entanglement.[211] While citizen deputies have no financial relationship with the state in connection to the bounty suits,[212] the underlying principle of state endorsement of the infringement of constitutional rights is possibly analogous, especially in light of other entanglement cases. In *Public Utilities Commission v. Pollak*, the Court found that state action applied to a private corporation that operated transit services because it was supervised by a government regulatory agency which chose to initiate an investigation about the complained-of practice and then dismissed said investigation.[213] Again, the underlying principle of entanglement and endorsement by a government body was the basis of the state action attributed to a private entity.[214]

The underlying principles in these state action cases are analogous to the citizen deputies as defendants in a constitutional challenge. Specifically, the Texas legislature passed, and the Governor signed, a bill that actively authorizes citizens to file suits that infringed the free exercise of a constitutional right.[215] In this sense, the state of Texas endorsed this infringement, similar to the implied endorsement derived from the government subsidization in *Burton*.[216] To be sure, Texas's role as an endorser is even more explicit than the Wilmington Parking Authority's, as the Court in *Burton* noted that its failure to include an anti-discrimination clause in the lease was merely a good faith oversight.[217]

Given the state's endorsement of, and expressly articulated interest in, advancing a facially unconstitutional policy, the citizen deputies might be bound to comply with the constitutional mandates of the Fourteenth Amendment; in other words, their behavior could be considered so explicitly authorized by the state that their suits constitute action on its behalf.[218] While other torts like negligence also serve a state interest, but are not state action, this attribution could be achieved by applying a test that effectively examines the state's intent—an analysis that the Court is not unfamiliar with, as it is the underlying principle of the test applied to Equal Protection

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[210] 365 U.S. 715, 725–26 (1961).

[211] *Id.* at 724 ("Neither can it be ignored, especially in view of Eagle's affirmative allegation that for it to serve Negroes would injure its business, that profits earned by discrimination not only contribute to, but also are indispensable elements in, the financial success of a governmental agency.").

[212] As mentioned, the statute explicitly prohibits state actors from independently pursuing or joining the bounty suits. TEX. HEALTH & SAFETY CODE ANN. §§ 171.207(a), 171.208(a), (h) (West 2021).

[213] 343 U.S. 451, 462 (1952).

[214] *See id.*

[215] *Id.* §§ 171.207–171.208.

[216] *See* 365 U.S. at 724.

[217] *Id.* at 725. This contrasts with the legislative intent underpinning Texas SB 8, which clearly contemplated the statute's non-compliance with constitutional precedent. *See* Texas Senate Research Center, Bill Analysis, S.B. 8, 87th Legislature Regular Session (Tex. July 6, 2021).

[218] *See Burton*, 365 U.S. 715.

Clause cases. However, because of the novelty of the citizen deputy structure, the Court has not answered this question under the foregoing circumstances, so it is unclear whether the Court would, in fact, rule this way.[219]

Finally, under the public function exception, the deputies could arguably be performing an action that typically is exclusively performed by government, like the privately owned town in *Marsh v. Alabama*.[220] In *Marsh*, constitutional mandates were imputed to a town owned by a private corporation.[221] While the holding in *Marsh* is somewhat distinguishable because the Court based its reasoning on long-standing property principles,[222] other cases have similarly imputed state action to private organizations exercising traditionally public functions or controlling access to public rights.[223]

This principle might also be applicable to the citizen deputies, as law enforcement is typically reserved for the executive branch. In this sense, private citizens could be seen as exclusively exercising a traditionally public function by enforcing SB 8. Again, this could be determined with an intent test, as in Equal Protection Clause cases. It would proceed thusly: although not facially apparent, did the state intend to delegate its enforcement authority over an interest that it would otherwise choose to regulate with the goal of circumventing constitutional obligations? Such a test, under either exception, could be a path to impute state action.

In sum, the most likely candidate under the state action doctrine for imputing constitutional mandates to the citizen deputies is entanglement, such as under *Burton* and *Pollak*, but it remains to be seen whether the uniquely factually distinguishable circumstance of a citizen deputy statute will be held to constitute such entanglement. This question will presumably remain unanswered for the near future, as SB 8's prohibition is no longer unconstitutional, and California's SB 1327 has only recently been challenged, and might nevertheless be constitutional.[224] As the sovereign immunity analysis is not applicable to the deputy defendants, an answer to the state action question, and the implications it has for the second prong of the *Lujan* test, would determine of its own accord whether the deputies can properly be named as defendants in a challenge to a citizen deputy statute.

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[219] *See Whole Woman's Health I*, 141 S. Ct. at 2496 (Roberts, C.J., dissenting) (remarking that the structure of SB 8 is "unprecedented").

[220] 326 U.S. 501 (1946).

[221] *Id.*

[222] *Id.* at 506 ("The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."). This reflects a long-standing principle in property law that the absolute right to exclude gives way to the constitutional rights of public citizens when property owners knowingly invite the public to access their property.

[223] *See, e.g.*, Smith v. Allwright, 321 U.S. 649 (1944).

[224] *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022); Christian Martinez, *Firearms Groups Challenge California Gun Law Modeled After Texas Abortion Ban*, L.A. TIMES (Sept. 28, 2022, 5:00 AM), https://www.latimes.com/california/story/2022-09-28/lawsuit-targets-california-gun-law-modeled-after-texas-abortion-ban [https://perma.cc/X7AZ-M2R5]; Chemerinsky, *supra* note 45.

2. Applying the Tests with the Court Officials as the Named Defendants

Because of the uncertainty surrounding deputy defendants, challengers of citizen deputy statutes would need to identify other possible defendants to prevent dismissal. We saw this play out with SB 8, as challengers sought to name court clerks and judges who play procedural, administrative, and oversight roles in courts—and thereby in the bounty suits—as defendants.[225] At first glance, naming court employees as defendants appears to solve the state action problem posed by the citizen deputy defendants.[226] However, such defendants pose problems with the standing requirements and with circumventing the sovereign immunity shield.[227]

The court officials who most directly facilitate lawsuit filings are judges and court clerks. However, the clerks and judges overseeing deputy suits arguably are not the cause of the plaintiffs' harms. Judges operate as neutral oversight in a courtroom rather than affirmatively or directly pursuing actions against the plaintiffs. Court clerks' role in filing lawsuits is similarly neutral. Given that, the plaintiffs challenging a citizen deputy statute potentially do not have valid standing against court official defendants under the second prong of *Lujan*—namely, that defendants caused the concrete and particularized harm.[228] As previously discussed, plaintiffs also might not have standing against citizen deputy defendants under the second prong of *Lujan*,[229] solidifying the first layer of protection that allows citizen deputy statutes to potentially violate constitutional rights with impunity: there appear to be no valid defendants against whom plaintiffs have standing. In fact, the Court in *Whole Woman's Health II* analyzed the named judge and court clerk defendants and found that they were neutral and not adverse to the plaintiffs, reasoning which impliedly speaks to the standing analysis.[230]

Even if judges and court clerks could be seen to have caused plaintiffs harms to satisfy standing, the doctrine of sovereign immunity, which also applies to court clerks,[231] still serves as an obstacle toward finding a valid defendant against whom a plaintiff can bring the challenge.[232] As we saw in *Whole Woman's Health II*, the Court ruled that court clerks were subject to the same immunity as judges because

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[225] Petition for Writ of Certiorari Before Judgment, *Whole Woman's Health II*, 142 S. Ct. 522 (2021) (No. 21-463) [hereinafter Petition for Writ of Certiorari, *Whole Women's Health II*] (discussing the sovereign immunity questions surrounding the judicial and court clerk defendants named in Petitioners' challenges).

[226] *See supra* Section III.A.

[227] Petition for Writ of Certiorari, *Whole Woman's Health II*, *supra* note 225 (discussing the standing and sovereign immunity questions surrounding the judicial and court clerk defendants named in Petitioners' challenges).

[228] Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992).

[229] *See supra* Section III.A.

[230] *See Whole Woman's Health II*, 142 S. Ct. at 532, 539.

[231] *Id.* at 532–33.

[232] Petition for Writ of Certiorari, *Whole Woman's Health II*, *supra* note 225.

they serve the same neutral functions.[233] Additionally, neither of the exceptions to judicial immunity would apply: presiding over cases is a clear judicial act and judges in courts of general jurisdiction are given the jurisdiction to hear SB 8 bounty cases because the statute creates a cause of action.[234]

These hurdles in naming judges and court clerks as defendants hold true in both a pre-enforcement and post-enforcement context. Section 1983 itself, and the Court's decision in *Whole Woman's Health II* not to extend *Young*, block pre-enforcement injunctions against judges.[235] Furthermore, the applicability of the absolute judicial immunity doctrine as it currently stands does not vary in the pre-enforcement or post-enforcement contexts.[236] To be sure, the exceptions articulated in *Mireles* did not include post-enforcement as an exception,[237] and the *Pierson* rule that malice and corruption do not invalidate the privilege clearly contemplates the post-enforcement context, as there cannot be malice or corruption until enforcement has occurred.[238] Given this standard, the judges overseeing citizen deputy statutes would almost certainly have immunity. However, the Court has yet to address the doctrine for a citizen deputy statute such as SB 8 in a post-enforcement setting. Curiously, though, the Court has briefly implied during oral argument that the act of entering a judgment that imposes harm on the defendant might cure the immunity issue,[239] even though in *Pierson*, the judgment did not override the immunity.[240]

3. Applying the Tests with Other Named Defendants

As discussed previously, legislative immunity is absolute for legislative acts, even when legislators act with an improper purpose. As the drafting and passing of SB 8 clearly fall within the contours of a legislative act, especially when compared to cases finding that less quintessentially legislative functions were nevertheless entitled to the immunity,[241] the legislators who pass a citizen deputy statute could not properly be named as defendants in an action. In fact, some of the challenges to SB 8 did not try to do so,[242] presumably because this principle is so doctrinally well-established. Furthermore, the Court's holding in *Whole Woman's Health II* prevents state attorneys general from being properly named as defendants in challenges to

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[233] *Whole Woman's Health II*, 142 S. Ct. at 532, 539.

[234] *See* Mireles v. Waco, 502 U.S. 9, 11–12 (1991) (per curiam).

[235] *See Whole Woman's Health II*, 142 S. Ct. 522; 42 U.S.C. § 1983.

[236] Kern, *supra* note 162, at 163; *see supra* Part II.

[237] 502 U.S. at 11–12.

[238] Pierson v. Ray, 386 U.S. 547 (1967).

[239] *See* Transcript of Oral Argument, *Whole Woman's Health II*, 142 S. Ct. 522 (No. 21-463), https://www.oyez.org/cases/2021/21-463 [https://perma.cc/5NFN-ND42].

[240] *Pierson*, 386 U.S. 547.

[241] *See* Tenney v. Brandhove, 341 U.S. 367 (1951).

[242] *See, e.g.*, *Whole Woman's Health II*, 142 S. Ct. at 530.

citizen deputy statutes because the *Young* injunctions that attorneys general are subject to do not bind the citizens who are the sole enforcers of such statutes.[243]

Finally, the plaintiffs in *Whole Woman's Health II* named state licensing officials as defendants in the action.[244] This was because, while SB 8 had a provision barring enforcement through any means other than citizen deputy suits, it also had a "saving clause," which stipulated that the statute did not "limit the enforceability of any other laws that regulate or prohibit abortion."[245] Under the Texas Occupational Code, licensing officials were responsible for disciplining medical professionals who violated the state's Health and Safety Code, which included SB 8.[246] In holding that the licensing officials could serve as proper defendants, the Court reasoned that the saving clause empowered them to impose discipline for SB 8 violations and that they consequently were permitted to enforce the statute's prohibition.[247] The Court further reasoned that SB 8 "prohibit[ed] collateral enforcement mechanisms" for other Texas laws that might apply, indicating that the drafters knew how to exempt SB 8 but chose not to do so.[248] As executive officials, this enforcement power brought the licensing officials within the *Young* exception, rendering them proper defendants.[249] Note, however, that the Court directly emphasized that, as the ultimate arbiter of Texas law, the Texas Supreme Court might interpret the provisions differently and invalidate even the licensing officials as proper defendants.[250] Ultimately, the defendants used this dictum to pursue certification to the Texas Supreme Court, which in turn interpreted the language as prohibiting licensing officials' enforcement.[251] As a result, all of the named defendants in Whole Woman's Health's challenge to SB 8 were eliminated, illustrating the structure's efficacy.[252]

In any event, the licensing official defendants likely would not have closed the citizen deputy loophole. Presumably, the action against the licensing officials would not necessarily redress the plaintiffs' harms, as the *Young* injunction would enjoin only the officials, not the citizen deputies, and would only enjoin licensing discipline rather than bounty suits. This follows from the reasoning in *Whole Woman's Health II* analyzing the efficacy of an injunction against the Attorney General.[253]

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[243] *See id.* at 535.

[244] *Id.* at 530.

[245] *Id.* at 536 (quoting TEX. HEALTH & SAFETY CODE ANN. § 171.207(a), (b)(3) (West 2021)).

[246] *See, e.g.*, TEX. OCC. CODE ANN. § 164.055 (West 2021).

[247] *Whole Woman's Health II*, 142 S. Ct. at 536 (quoting HEALTH & SAFETY § 171.207 (b)(3)).

[248] *Id.* at 536 n.4.

[249] *Id.* at 536–37.

[250] *Id.* at 536.

[251] Whole Woman's Health v. Jackson, 642 S.W.3d 569 (Tex. 2022).

[252] BeLynn Hollers, *Federal Challenge of Texas SB 8 Abortion Law Doomed in Wake of New State Supreme Court Ruling*, DALL. 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/U6J2-DNBP].

[253] *Whole Woman's Health II*, 142 S. Ct. at 534–35.

Furthermore, while the Court implied that there had likely not been a drafting mistake, the Texas Supreme Court's exceedingly different interpretation indicates that the statutory language was not drafted as clearly as it could have been. In any event, copycat drafters intentionally seeking to circumvent constitutional obligations likely would not, in hindsight, keep this avenue for judicial review open, as such review is contrary to the purpose of the statute.[254] Finally, this "mistake" might not even arise in non-abortion contexts, like California SB 1327 which creates a cause of action against gun retailers,[255] since the medical sector is much more heavily professionally regulated than other industries.

B. Defensive Challenges

Section 1983 actions are not the only means by which those harmed by the inability to exercise rights can challenge the constitutionality of statutes. Defendants can also challenge a statute's constitutionality.[256] While there are hurdles to defensive challenges, they are mostly practical rather than doctrinal. To be sure, some doctrinal issues would arise. For example, if an abortion provider appealed from a judgment awarding a bounty to a deputy on the grounds that the statute was unconstitutional, a deputy would certainly raise the state action doctrine as a counter-argument, contending that the imposition of the bounty cannot have infringed the defendant's constitutional rights because private citizens are not obligated to comply with them. However, the analysis of the state action doctrine would not differ from that discussed for § 1983 actions above.[257]

But defensive challenges raise other, practical hurdles that § 1983 claims do not. For example, as noted during oral argument in *Whole Woman's Health II*, judges presiding over deputy suits are still obligated to apply constitutional law and honor Supreme Court precedent, regardless of what the statute affords as a defense.[258] To that end, all defendants sued by citizen deputies should obtain judgments in their favor for statutes that directly target conduct that is, as a matter of well-settled, clearly articulated law, unquestionably constitutional—as was the conduct prohibited by SB 8. As a result, the victorious defendant cannot then appeal the decision to seek invalidation of the law.

Even assuming that the defendant loses, can appeal, and the statute is invalidated as unconstitutional, its language enshrines liability for abortions performed during periods of invalidation in the event that the statute is later reinstated on

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[254] *See* Lalwani*, supra* note 22.

[255] Durkee, *supra* note 39.

[256] *Whole Woman's Health II*, 142 S. Ct. at 534; *see, e.g.*, Lawrence v. Texas, 539 U.S. 558 (2003); Snyder v. Phelps, 562 U.S. 443 (2011).

[257] *See supra* Section III.A.1.

[258] *See* Transcript of Oral Argument at 5–6, *Whole Woman's Health II*, 142 S. Ct. 522 (No. 21-463), https://www.oyez.org/cases/2021/21-463 [https://perma.cc/9TRT-QFFW].

appeal.[259] Consequently, the only authority that can truly invalidate the statute with finality is the U.S. Supreme Court because it is the court of last resort and the ultimate arbiter of federal constitutional law.[260] To do so, both parties must be willing and able to appeal through all the courts below and be successful on a petition for certiorari, all while the statute remains effectively valid, a process which takes many years.[261] Effectively, then, the citizen deputy statute's blockade on the exercise of constitutional rights is also achieved through delay. In fact, we saw such delay efforts by state officials after *Whole Woman's Health II*.[262]

IV. REMAINING QUESTIONS AND IMPLICATIONS

Although all of the *Whole Woman's Health II* defendants have been eliminated, challengers likely will not stop pursuing invalidation as citizen deputy statutes continue to proliferate in other states.[263] As such, citizen deputy litigation is by no means over and will likely continue for years to come.[264] As the SB 8 challenges progressed, the statute's fate often reversed course on a weekly, or even daily, basis.[265] This uncertainty is unquestionably the result of its cunning design and the difficulties it poses, rendering reliance on any adjudication short of a Supreme Court decision on its post-enforcement merits effectively impossible.

In the meantime, however, the constitutional right to an abortion—which had not yet been overturned[266]—was successfully suffocated in Texas and elsewhere. Even in the narrow context of abortion, it should be extremely concerning that citizens

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[259] TEX. HEALTH & SAFETY CODE ANN. § 171.208(e)(3).

[260] *See* Cooper v. Aaron, 358 U.S. 1, 18–19 (1958).

[261] *Supreme Court Procedures*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1#:~:text=Writs%20of%20Certiorari,grant%20a%20writ%20of%20certiorari [https://perma.cc/6HRV-9YH7].

[262] BeLynn Hollers, *SB 8 Abortion Law Stands as 5th Circuit Sends Case to Texas Supreme Court, Plaintiffs Expect Delays*, DALL. MORNING NEWS (Jan. 18, 2022, 1:06 PM), https://www.dallasnews.com/news/politics/2022/01/18/texas-abortion-law-stands-as-5th-circuit-sends-case-to-state-supreme-court-delays-expected/ [https://perma.cc/2V3V-43C8]; *In re* Whole Woman's Health, 142 S. Ct. 701, 702, 704 (2022) (Sotomayor, J., dissenting).

[263] Alison Durkee, *Idaho Enacts Law Copying Texas' Abortion Ban—And These States Might Be Next*, FORBES (Mar. 23, 2022, 4:22 PM), https://www.forbes.com/sites/alisondurkee/2022/03/23/idaho-enacts-law-copying-texas-abortion-ban---and-these-states-might-be-next/?sh=7911fd9b25c0 [https://perma.cc/8LHZ-2SJL]; Karlamangla, *supra* note 42; S.B. 1327, 2022 Cal. Legis. Serv. Ch. 146, Regular Session (Cal. 2022); Chemerinsky, *supra* note 45.

[264] *See In re* Whole Woman's Health, 142 S. Ct. at 702, 704, 705 (Sotomayor, J., dissenting); Hollers, *supra* note 262.

[265] *See infra* Introduction.

[266] *Compare Whole Woman's Health I*, 141 S. Ct. 2494, 2495 (2021) (denying request to enjoin SB 8 on September 1, 2021), *with* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (overturning *Roe* on June 24, 2022).

were, for a time, successfully prevented from exercising their constitutional right, but this problem becomes even more alarming when one considers the potential for widespread proliferation to other constitutional rights, like gun rights, free speech, equal protection, and other substantive due process rights like birth control and same-sex marriage. This potentially devastating effect begs the question: should the Court announce a rule to plug this gap simply out of practicality or constitutional necessity, or not at all?

When posed generally, many might argue yes, while many might argue no. To do so, it may seem, would be to "invent" a law to defeat a statute that, although oxymoronic, can lawfully circumvent the Constitution. By contrast, others might argue that the supremacy clause facially contemplates the supremacy of federal law, without concern for whether procedural "mechanisms" or "channels" for getting through courts exist to land such challenges before the forum with the ultimate authority to protect these rights and mitigate state attempts to infringe such rights—the Supreme Court. Both of these lines of reasoning are compelling, but the doctrinal posture of the three justiciability shields, as they currently stand, presents another possibility: a method for challenging this statutory structure is already reasonably related to pre-existing doctrine, without need for any major modifications, specifically under the state action doctrine.

First, as previously discussed, the Court's state action doctrine currently contemplates the imputation of government obligations to comply with constitutional restrictions to private parties in certain circumstances, including the exceptions for enabled action and facilitated action. Like the *Burton* and *Pollak* principles, the citizen deputies in SB 8 actions were exactly that: deputies.[267] Not unlike police deputies, the citizen deputies perform the function of enforcing an expressly articulated state interest. In fact, SB 8's language directly articulated the state's interest in curbing, or more likely, stopping abortions.[268] California SB 1327, while arguably constitutional, does the same, and future copycat bills that do overtly target constitutionally protected conduct probably will as well.[269] On its face, SB 8 did so in anticipation of a Fourteenth Amendment challenge, under which state interests are effectively placed on a balancing scale against the infringement of rights.[270] However, the language serves the (potentially unintended) function of emphasizing the role the state plays and the interest it has in both facilitating and enabling the privately performed conduct of initiating these bounty lawsuits.[271] Both the abstract and specific precepts underlying the *Burton* and *Pollak* exceptions to the state action

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[267] *See* Burton v. Wilmington, 365 U.S. 715 (1961); Pub. Util. Comm'n v. Pollak, 343 U.S. 451 (1952).

[268] *See* TEX. HEALTH & SAFETY CODE ANN. § 171.202(3) (West 2021).

[269] *See* Cal. S.B. 1327.

[270] *See, e.g.*, Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016) (weighing state interest in imposing TRAP laws against burden on collective access to abortion facilities).

[271] *See* HEALTH & SAFETY § 171.202(3).

requirement make one thing, above all, clear: state action is imputed to private parties when the state has given what effectively amounts to its "stamp of approval" on the conduct, whether the state did or did not intend to express a sentiment of support for such conduct.[272] In this regard, a test that examines whether a state intended to surreptitiously defy constitutional mandates would distinguish "stamps of approval" from state interests in creating common statutory torts like negligence or battery.

To be sure, the Court has never addressed the state action doctrine in the context of a citizen deputy statute, as there had never been a statute constructed in the same fashion as SB 8 prior to its passage. However, a solution to the problems posed by citizen deputy statutes appears to already have a doctrinal roadmap that can be derived from precepts of the Court's current state action jurisprudence.

One might argue, however, that constitutional circumvention might still prevail because would-be defendants would not dare engage in the violative conduct necessary to create the citizen deputy defendants against which this solution could be applied. However true that may be, sovereign immunity appears to present no clear path to pre-enforcement mollification of constitutionally infringing citizen deputy statutes either.

While the Court in *Whole Woman's Health II* ruled that a pre-enforcement *Young* challenge could proceed against the state licensing officials as defendants, this appears to have been a drafting accident when examined in hindsight.[273] To be sure, the Court examined the text of the statute and determined that the legislature instituted other minute prohibitions on licensing enforcement and therefore knew how to limit these state actors from acting.[274] However, under the Court's interpretation, it appeared the drafters intentionally declined to include this particular prohibition, thereby permitting this enforcement—presumably because they did not anticipate that licensing actions would sustain a challenge.[275] Copycat states will be more careful to avoid that from now on or will utilize the structure to infringe constitutional rights that are unlikely to have collateral enforcement statutes that would create possible defendants, thereby resolving this problem.

Notably, however, the Court has hinted during oral argument that post-enforcement relief might be available, even as against the defendants precluded as pre-enforcement defendants in *Whole Woman's Health II*.[276] Additionally, this is not the first time that states have attempted to directly violate the Court's proclamations of federal constitutional law, and the Court has been heavy-handed in its assertion of authority over blatant defiance before.[277] To be sure, previous defiance has never been so

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[272] *See supra* text accompanying notes 212–21.

[273] *See supra* text accompanying notes 246–57.

[274] *Whole Woman's Health II*, 142 S. Ct. 522, 536–37 (2021).

[275] *See id.*; HEALTH & SAFETY § 171.202(3) (West 2021).

[276] *See* Oral Argument, *Whole Woman's Health II*, 142 S. Ct. 522 (No. 21-463), https://www.oyez.org/cases/2021/21-463 [https://perma.cc/LT9Z-MJNQ]; *Whole Woman's Health II*, 142 S. Ct. 522.

[277] *See* Cooper v. Aaron, 358 U.S. 1 (1958).

cleverly constructed to evade intervention. But, even so, the Court is not without constitutional language supporting an assertion of authority here.[278] While standing is derived from Article III's "cases and controversies" language, the Supremacy Clause can be, and was, directly violated if states can simply use evasive construction to override federal law.[279] The Privileges and Immunities Clause, while effectively rendered a jurisprudential dead letter for many decades except in rare instances, would also be directly violated by citizen deputy statutes that prohibit the exercise of constitutional rights.[280] The problem, of course, is that standing is a threshold question of the Court's ability to hear a case at all,[281] so there arguably is no way to modify that requirement to give way to the interests of other constitutional provisions because any decision rendered in violation of the standing language would effectively be invalid. Because standing is a threshold question, the constitutional language that it is derived from is sequentially triggered before an evaluation of constitutionality as a substantive matter can be undertaken.[282] Furthermore, the Court arguably cannot strip a state of sovereign immunity that it has a right to because, as a core principle of our federalist system, the states only gave a limited amount of authority to the federal government, and the retained sovereignty would be infringed if the judicial branch were to override that protection.[283] This sovereignty argument is undercut, however, by the Eleventh Amendment's delayed passage, its plain language, and perhaps the precedent interpreting it depending on who is challenging a citizen deputy law.[284] For example, in *United States v. Texas*, the United States brought suit against Texas, and the Court granted certiorari to determine whether the United States as a party could bring suit against the same categories of plaintiffs that the abortion providers attempted to name in *Whole Woman's Health II*.[285] As the Eleventh Amendment's language only applies to suits by citizens—thereby precluding an abortion provider from naming the "State of Texas" as a defendant—the state arguably would have no protection from suits by other states or the federal government, the latter of which arguably could bring suit to enforce its interests in the effective operation of its supreme law.[286] Curiously, however, during oral argument the Justices questioned how the argument that the government was making was different from that of the parties in *Whole Woman's Health II*, which was argued right before

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[278] *See* U.S. CONST. art. VI, cl. 2.

[279] *See* U.S. CONST. art. III, § 2; U.S. CONST. art. VI, cl. 2.

[280] *See* U.S. CONST. amend. XIV.

[281] Lujan v. Defs. of Wildlife, 504 U.S. 555, 569 (1992).

[282] *Id.*

[283] RICKS & TENENBAUM, *supra* note 131, at 916–17. The only branch that can exercise such authority is Congress, under its power to enforce the Fourteenth Amendment. *See supra* text accompanying notes 137–38, 149.

[284] *See* U.S. CONST. amend. XI; *see also* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793).

[285] 142 S. Ct. 14 (2021).

[286] Brief for Petitioners at 12–17, United States v. Texas, 142 S. Ct. 522 (2021) (No. 21-588); *In re* Debs, 158 U.S. 564 (1895).

it on the same day.[287] Subsequently, the Court dismissed the case as improvidently granted, signaling that the Court saw the questions presented as too similar.[288] However, without a holding on the merits, the reason for the dismissal cannot be definitively determined. To that end, it is possible that the Court might find this avenue of challenge to be available for citizen deputy statutes in the future.

CONCLUSION

The citizen deputy statute is an unprecedented structure designed to purposefully evade constitutional review, and the difficulty posed by attempting to mount a constitutional challenge to invalidate it demonstrates how effective the structure can be.[289] However, if the structure is permitted to effectively operate, the widespread consequences could be potentially devastating. For example, as recently as 2000, Alabama still had an unconstitutional anti-miscegenation provision enshrined in its state constitution, and—at the time—only sixty percent of voters voted in favor of overturning it.[290] If a citizen deputy structure is genuinely effective at preventing constitutional review, a state that chooses to do so could theoretically implement a citizen deputy anti-miscegenation ban.[291] The possibilities are endless: states could defy *Obergefell v. Hodges* by implementing deputized same-sex marriage bans or *District of Columbia v. Heller* by implementing blanket firearm bans.[292] Such copycat bills could even achieve third-party separation by creating a cause of action only against wedding officiants or venues and firearm retailers or manufacturers. Birth control copycats could create a cause of action against pharmacies and doctors that provide them. The potential for blatant defiance of constitutional rights is terrifying for a number of reasons.[293]

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[287] Transcript of Oral Argument at 2, United States v. Texas, 142 S. Ct. 522 (2021) (No. 21-588), https://www.oyez.org/cases/2021/21-588 [https://perma.cc/2VYB-SZB3].

[288] United States v. Texas, 142 S. Ct. 522 (2021).

[289] Oxner, *supra* note 27; *Whole Woman's Health I*, 141 S. Ct. at 2495–96; Hollers, *supra* note 262.

[290] Duncan Campbell, *Alabama Votes on Removing Its Ban on Mixed Marriages*, GUARDIAN (Nov. 2, 2000, 10:52 PM), https://www.theguardian.com/world/2000/nov/03/uselections2000.usa7 [https://perma.cc/BBD4-32WS]; Aaron Blake, *Alabama Was a Final Holdout on Desegregation and Interracial Marriage. It Could Happen Again on Gay Marriage.*, WASH. POST (Feb. 9, 2015, 1:00 PM), https://www.washingtonpost.com/news/the-fix/wp/2015/02/09/alabama-was-a-final-holdout-on-desegregation-and-interracial-marriage-it-could-happen-again-on-gay-marriage/ [https://perma.cc/E8PT-APHC].

[291] Brief for the Lawyers' Committee for Civil Rights Under Law and 11 Civil Rights Organizations as Amici Curiae Supporting Petitioners at 4, *Whole Woman's Health II*, 142 S. Ct. 522 (2021) (No. 21-463); Vestal, *supra* note 46.

[292] *See* Obergefell v. Hodges, 576 U.S. 644 (2015); *see also* District of Columbia. v. Heller, 554 U.S. 570 (2008).

[293] Kaye & Hearron, *supra* note 38.

But the Court cannot create law with impunity where it does not otherwise exist simply because of the severity of the potential consequences.[294] However, as discussed, imputing constitutional obligations to citizen deputies is clearly contemplated by the existing state action doctrine precedents.[295] In fact, the state's role in enabling and facilitating the citizen deputies to pursue bounties penalizing the exercise of a constitutional right clearly constitutes the approval and endorsement that the Court found persuasive in cases like *Burton* and *Pollak*.[296] This is a troubling solution, however, because citizen deputies can only be named as the adverse party in post-enforcement contexts. As such, a citizen deputy statute would effectively chill or halt the exercise of constitutional rights unless or until a challenger willingly subjects oneself to massive liability in order to produce an avenue for challenge—with no guarantees, especially from the standpoint of a defensive challenge, that a constitutional disposition on the merits will be produced or that the challenger will prevail if one is. If no challenger does so, the law will continue to prohibit constitutional conduct through fear.

The best avenue for challenge appears to be a § 1983 action brought against a post-enforcement citizen deputy, as the state action doctrine is the only area where the law, as it currently stands, has a pre-existing avenue that arguably closes the loophole.[297] To be sure, though, pre-existing avenues are not the only avenues available. This Note argues that the Court can, and should, create a judicial rule which provides an avenue to challenge the proliferating citizen deputy statutes. Far from ruling by fiat, to do so would be logical constitutionally, for it defies logic that certain provisions of the Constitution are rendered impotent and meaningless through subordination to the interests of other provisions. This argument is both doctrinal and commonsense. It is doctrinal in that it is an intratextualist approach to constitutional interpretation[298]: the Supremacy Clause, and the clauses from which the citizen deputy structure's shields are derived all use "shall" or "shall not" to mandate compliance with their provisions.[299] Presumably, they were all intended to be complied with, but balance arguably should and must be struck between them when they directly conflict with one another, as this language does not inflect any inferiority between or among them. The argument is commonsense in that no hierarchy of importance

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[294] District of Columbia v. Heller, 554 U.S. 570, 634–36 (2008). *But see* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 778 (1999) (noting that many critics viewed *Roe*'s "elaborate trimester framework . . . as visibly (indeed, nakedly) ad hoc—more legislative than judicial").

[295] *See supra* text accompanying notes 212–21.

[296] *See* 365 U.S. 715, 725–26 (1961); 343 U.S. 451, 462 (1952); *see also supra* text accompanying notes 212–21.

[297] *See supra* Part III.

[298] *See* Amar, *supra* note 294, at 757, 788–93.

[299] U.S. CONST. art. VI, cl. 2; *id.* art. 3, § 2; *id.* amend. XI; *id.* amend. XIV, § 1. Note that the "[n]o State shall" language of the Fourteenth Amendment is but one example of state action doctrine language in the amendments. U.S. CONST. amend. XIV, § 1.

should be read into the Constitution for other, non-textual reasons, rendering certain provisions superior to others. Instead, constitutional law normally balances the competing interests between two competing provisions.[300] As in statutory interpretation, where provisions should not be interpreted to negate others or render them superfluous,[301] it would be illogical on the whole to interpret the Constitution in such a way that other portions of the document are effectively rendered invalid and unenforceable even when on point.

This is an applicable principle for examining all the doctrines contributing to the tripartite loophole. For example, while one could argue that standing simply cannot be changed because it addresses whether the Court is able to hear the matter at all and whether any subsequent decisions would therefore be valid,[302] the *Lujan* test is largely judge-created.[303] It is derived from the "cases and controversies" language, but it is more specific, and sets a higher bar of satisfaction, than that language.[304] In fact, we have seen modifications of the judicial conception of standing, progressing gradually from more particularized harms to more generalized and collective harms, in environmental cases.[305] Just as standing—a threshold question of a decision's validity—can be balanced, all three doctrines can and should be balanced in light of the competing considerations of the Supremacy Clause and the Privileges and Immunities Clause.

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[300] *See* RICKS & TENENBAUM, *supra* note 131, at 900, 916–17.

[301] Williams v. Taylor, 529 U.S. 362, 404 (2000) (quoting United States v. Menasche, 348 U.S. 528, 538–39 (1955)).

[302] *See infra* Part IV.

[303] 504 U.S. 555, 560–61 (1992).

[304] *Compare* U.S. CONST. art. III, § 2, *with Lujan*, 504 U.S. at 560–61.

[305] *See, e.g.*, Rocky Mountain Peace & Just. Ctr. v. U.S. Fish & Wildlife Serv., 40 F.4th 1133, 1151 (10th Cir. 2022) (discussing Tenth Circuit standing precedent for environmental plaintiffs).