

THE IMPERFECT BUT NECESSARY LAWSUIT: WHY SUING STATE JUDGES IS NECESSARY TO ENSURE THAT STATUTES CREATING A PRIVATE CAUSE OF ACTION ARE CONSTITUTIONAL

INTRODUCTION

State legislatures can indirectly, but effectively, restrict constitutional rights by enacting statutes that create a private cause of action.¹ This is possible when the cause of action creates potential damages that are so severe as to de facto compel people and entities from engaging in certain conduct. For example, if a statute allows private citizens to sue a person when that person engages in *X*, then individuals and entities may cease to engage in *X* if the possible liability arising from engaging in *X* is too significant. When the United States Constitution protects the conduct that the statute de facto, though indirectly, compels people to forgo, a serious issue arises.²

Statutes that create a private cause of action will only realistically be challenged if a pre-enforcement action is brought;³ otherwise, individuals and entities may choose not to engage in conduct that could potentially lead to liability under the cause of action created by the state statute.⁴ If no pre-enforcement action

1. A “private cause of action” refers to a cause of action that provides the basis of a lawsuit to private individuals, rather than public officials (like a prosecutor). For example, while a typical criminal statute provides a cause of action to a state prosecutor when a crime is committed, a private cause of action provides a civil cause of action only to private citizens.

2. See, e.g., Caitlin E. Borgmann, *Legislative Arrogance and Constitutional Accountability*, 79 S. CAL. L. REV. 753, 756 (2006) (“To permit defiant state legislatures to circumvent the judicial process through shrewd legislative drafting is to contemplate an entirely different form of government: one that posits that state government is equal or superior in authority to the federal government, and one in which the legislative branch is virtually unchecked by the judicial branch.”).

3. A pre-enforcement challenge to a statute involves a lawsuit that challenges the validity of the statute before it is enforced against the pre-enforcement plaintiff. See *infra* Part II.A.

4. See Borgmann, *supra* note 2, at 762 (“From a financial perspective, many organizations [and individuals] are either unwilling or unable to risk losing a constitutional challenge and incurring massive liability, however remote the risk.”).

is brought and no one engages in the conduct that can lead to liability under the private cause of action (because no one wants to risk liability), then no lawsuit can ever be brought under the cause of action. Consequently, the statute's constitutionality will never be challenged, and an unconstitutional statute can remain in effect, de facto restricting individuals and entities from engaging in certain conduct. Thus, pre-enforcement challenges are essential to ensuring that statutes that create a private cause of action are constitutional.

The key problem with challenging statutes that create a private cause of action is that the state has no enforcement role—the statute is “privately enforced” by private citizens bringing lawsuits under the cause of action the statute creates. As this comment discusses, the only possible pre-enforcement lawsuit that can challenge a statute that creates a private cause of action is a lawsuit seeking an injunction against state judges.⁵ Contrary to what previous scholars and judges have opined,⁶ suing public officials—like the state legislature, governor, and/or attorney general—of the state that enacts a statute that creates a private cause of action does not satisfy the all-important doctrine of standing.⁷ Instead, the pre-enforcement action should be brought against state judges who could potentially hear lawsuits brought under the private cause of action created by the state statute. By enjoining state judges from applying the purportedly unconstitutional statute, at least until the statute's constitutionality can be determined, constitutional rights will be protected by ensuring that no constitutional rights are illegally restricted by the statute.

Part I of this comment provides examples of state statutes that seemingly restrict, albeit indirectly, constitutional conduct by creating a private cause of action, and explains why this issue is

5. See *infra* Parts III.B–IV.

6. See, e.g., *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1160 (10th Cir. 2005) (Briscoe, J., dissenting) (opining that there is standing in a pre-enforcement action for declaratory relief against public officials); *Okpalobi v. Foster*, 244 F.3d 405, 434 (5th Cir. 2001) (en banc) (Benavides, J., dissenting); Borgmann, *supra* note 2, at 774 (arguing that suing public officials for a declaratory judgment satisfies standing); Maya Manian, *Privatizing Bans on Abortion: Eviscerating Constitutional Rights Through Tort Remedies*, 80 TEMP. L. REV. 123, 128 (2007) (arguing that a court should find standing when a pre-enforcement action is brought against the state legislators that enacted the statute).

7. See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (stating that the doctrine of standing is the doctrine that ensures that Article III of the United States Constitution is followed).

important to discuss. Part II discusses pre-enforcement actions, their importance, and the standing doctrine requirements that must be met to bring a pre-enforcement action. Part III analyzes how the standing doctrine applies to pre-enforcement actions that challenge statutes that create a private cause of action. It explains how the “typical” pre-enforcement challenge—a lawsuit against the state legislative or executive branch for injunctive or declaratory relief—is not justiciable and does not satisfy the standing doctrine, and thus, such a pre-enforcement action cannot be brought. Part IV proposes a solution, arguing that a pre-enforcement plaintiff challenging a state statute that creates a private cause of action should seek an injunction against state judges. Ironically, by suing state judges, the judiciary can ensure that constitutional rights are protected.

I. STATE STATUTES CREATING A PRIVATE CAUSE OF ACTION: EXAMPLES AND THE SIGNIFICANCE OF THEIR SCOPE

There is obvious importance in ensuring that constitutional rights are not infringed. Challenging a statute in court is a key method to protect and safeguard constitutional rights. Often, the greatest challenge for plaintiffs is proving, on the merits, that a law infringes their constitutional rights. However, when the statute creates a *private* cause of action, the greater challenge may be being able to even bring a lawsuit in the first place.⁸

A fundamental principle of United States federalism is that states cannot enact laws that facially restrict rights that the United States Supreme Court has held to be protected by the United States Constitution. Yet states can, and have, enacted laws that, while not facially restricting constitutional rights, have the de facto effect of restricting these rights.⁹ When this happens, plaintiffs seeking to have a court rule that the law is unconstitutional may be unable to bring a lawsuit to challenge the statute¹⁰ because the statute is a privately enforced statute that creates a private cause of action.¹¹ Put simply, these statutes create a pri-

8. See, e.g., *Okpalobi*, 244 F.3d at 429.

9. See, e.g., *id.* (finding that the plaintiffs lacked standing to challenge the statute’s constitutionality, even though the panel previously held that the statute was unconstitutional on the merits in *Okpalobi v. Foster*, 190 F.3d 337, 361 (5th Cir. 1999)).

10. See *Okpalobi*, 244 F.3d at 429.

11. Unless otherwise specified, when this comment references a statute or cause of

vate cause of action that imposes potential liability that is significant enough to dissuade parties from engaging in constitutionally protected conduct because they do not want to risk liability under the private cause of action. As Part III.B discusses, the doctrine of standing prevents the typical pre-enforcement challenge to these laws. Specific examples of these laws are helpful to understand their restriction on rights protected by the Constitution. Thus far, these laws mostly, if not exclusively, come in the abortion context.¹²

A. *Examples of State Statutes Creating a Private Cause of Action*

In 1997, the Louisiana legislature passed a law known as Act 825.¹³ Act 825, in relevant part, states:

Section 2800.12. Liability for termination of a pregnancy

A. Any person who performs an abortion is liable to the mother of the unborn child for any damage occasioned or precipitated by the abortion, which action survives for a period of three years from the date of discovery of the damage with a peremptive period of ten years from the date of the abortion.¹⁴

Act 825 defines “damage” as including all damages that are “recoverable in an intentional tort, negligence, survival, or wrongful death action.”¹⁵ If the mother signed a consent form prior to the abortion, the mother’s damages are limited, but not negated.¹⁶ As well, under Act 825, Louisiana’s medical malpractice laws and limitations of liability do not apply.¹⁷ In other words, Act 825 “provides to women who undergo an abortion a private tort remedy against the doctors who perform the abortion. It exposes those

action, it is this type of statute and cause of action that is being referenced.

12. See, e.g., H.B. No. 1720, Reg. Sess. (La. 1997) (codified as LA. STAT. ANN. § 9:2800.12 (1997)); Holland Phillips, *Louisiana Law Disallowing Med Mal Suits in Abortion Cases Upheld at Appeals Court*, LA. REC. (Sept. 16, 2013, 3:32 PM), <http://louisiana-record.com/stories/510583791-louisiana-law-disallowing-med-mal-suits-in-abortion-cases-upheld-at-appeals-court>. This comment is not intended to advocate any particular stance on abortion, and should not be construed as taking any stance. While this comment does discuss laws that potentially restrict abortions, it is solely in the context of the doctrines of justiciability and standing and their effect on challenging laws that may restrict rights that the Supreme Court has held to be constitutionally protected.

13. H.B. No. 1720; Phillips, *supra* note 12.

14. LA. STAT. ANN. § 9:2800.12(A) (2009).

15. *Id.* § 9:2800.12(B)(2).

16. *Id.* § 9:2800.12(C)(1).

17. *Id.* § 9:2800.12(C)(2).

doctors to unlimited tort liability for any damage,” including emotional suffering, that the mother and unborn child suffer as a result of the abortion procedure.¹⁸

In 2001, the Oklahoma legislature enacted a law similar to Louisiana’s Act 825, though more limited in nature.¹⁹ The Oklahoma statute provides that: “Any person who performs an abortion on a minor without parental consent or knowledge shall be liable for the cost of any subsequent medical treatment such minor might require because of the abortion.”²⁰

Recently, two state legislatures have proposed bills that resemble Louisiana’s Act 825 just discussed. In Iowa, the legislature is considering a bill that would allow a woman who had an abortion to sue the physician who performed the abortion for all damages resulting from the woman’s emotional distress as a result of the abortion.²¹ The woman could bring the lawsuit at any time, and her signing of a consent form prior to the abortion would not negate damages, though it would limit them.²² Similarly, in Florida, a bill was introduced that would give a woman who had an abortion a cause of action against the physician who provided the abortion if the woman suffered physical injury, or suffered emotional distress due to the physician failing to obtain informed consent.²³

While the Supreme Court in *Roe v. Wade* opined that the right to an abortion is a constitutionally protected right,²⁴ the statutes just discussed arguably threaten this right, as doctors and clinics that perform abortions in states with these statutes face potentially enormous liability if they perform abortions.²⁵ Moreover, doctors and clinics would be under a constant threat of litigation. For example, a woman who has an abortion in 2017 may change her stance on abortion twenty years later and suffer emotional distress knowing that she had an abortion in 2017. Most of the statutes just described would allow her to sue the doctor who pro-

18. *Okpalobi v. Foster*, 244 F.3d 405, 409 (5th Cir. 2001) (en banc).

19. H.B. 1727, 2001 Leg., Reg. Sess. (Okla. 2001).

20. OKLA. STAT. tit. 63, § 1-740 (2016).

21. S.F. 26, 87th Gen. Assemb., Reg. Sess. (Iowa 2017).

22. *Id.*

23. H.B. 19, 2017 Leg., 2017 Reg. Sess. (Fla. 2017) (died in Judiciary Committee on May 5, 2017).

24. 410 U.S. 113, 153–54 (1973).

25. *See supra* note 18 and accompanying text.

vided the abortion. Because of this risk, doctors and clinics may reasonably calculate that the potential liability is too much to continue providing abortions.²⁶ As such, they may simply stop providing abortions.

But before ceasing to provide abortions or being sued themselves under the private cause of action, doctors and pro-choice medical clinics have filed pre-enforcement lawsuits challenging the aforementioned statutes already enacted. In Louisiana, abortion providers filed a pre-enforcement action against the state's governor and attorney general, challenging the constitutionality of Act 825.²⁷ However, the plaintiffs ultimately lacked standing and were thus unable to challenge the lawsuit because the court lacked jurisdiction to hear the case.²⁸ Thus, Louisiana abortion providers were left with deciding whether to continue providing abortions, knowing that Act 825 created the possibility of "unlimited tort liability,"²⁹ or ceasing to provide abortions altogether to escape potential liability.

Similarly, an Oklahoma abortion provider filed a pre-enforcement action against public health officials, challenging the constitutionality of Oklahoma's statute on the grounds that the law compelled it to deny abortions to young women who sought an abortion but had not informed their parents of their decision.³⁰ The court ultimately held that the pre-enforcement plaintiff lacked standing for a pre-enforcement challenge, and thus could not bring the lawsuit.³¹ Abortion providers in Oklahoma were consequently left with choosing whether to risk liability or not provide abortions to minors whose parents did not know of or consent to the abortion. Moreover, in both Louisiana and Oklahoma, if abortion providers choose to cease providing abortions, women in these states may be unable to obtain abortions unless they travel out of state.

26. See Borgmann, *supra* note 2, at 762.

27. Okpalobi v. Foster, 981 F. Supp. 977, 979 (E.D. La. 1998).

28. Okpalobi v. Foster, 244 F.3d 405, 428–29 (5th Cir. 2001) (en banc).

29. *Id.* at 409.

30. Nova Health Sys. v. Gandy, 416 F.3d 1149, 1153 (10th Cir. 2005).

31. *Id.* at 1160; see also Hope Clinic v. Ryan, 249 F.3d 603, 606 (7th Cir. 2001) (holding that the plaintiff-medical clinic lacked standing in a pre-enforcement action challenging the constitutionality of a Wisconsin statute and an Illinois statute that created a civil cause of action for damages resulting from an abortion).

It is true that abortion providers can challenge the constitutionality of the aforementioned statutes in court once a woman who had an abortion sues them under the statute, raising the statute's unconstitutionality as a defense to their liability.³² However, at that point, doctors and clinics must win their constitutionality argument or be liable for enormous damages. Without a way to challenge the statute prior to becoming subject to the cause of action, doctors and clinics, while firmly believing the statute to be unconstitutional, may not be willing to risk millions of dollars in order to provide an abortion, be sued, and challenge the statute in the ensuing lawsuit.³³ Instead, they may simply cease to provide abortions.

B. Unlimited Possibilities of State Statutes Creating a Private Cause of Action

While these laws creating a private cause of action are seemingly limited to the abortion context today, tomorrow's laws may be used to threaten other rights that the Constitution has been held to protect. For example, a state could enact a law that creates a private cause of action that allows a person who buys a firearm to sue the seller if the buyer later suffers emotional distress or physical injury as a result of that firearm. Or, the law could provide a cause of action to a person who suffers emotional distress from witnessing the purchase of a firearm at a gun show or a firearm store, regardless of the legality of the sale. Such laws would have the real possibility of limiting those who would be willing to sell firearms, thus restricting an individual's right to "keep and bear [a]rms."³⁴ Another possibility is a state law that provides a cause of action to a person who suffers emotionally from seeing an interracial married couple. If a law allowed a person to sue the officiant of the interracial wedding for emotional distress, that could result in officiants no longer being willing to marry interracial couples due to the risk of being liable for a significant amount of damages. As such, the law may de facto result in interracial couples not being able to legally marry.

32. A statute is unconstitutional if it creates an "undue burden" for a woman to gain access to an abortion. See *infra* notes 74–75 and accompanying text.

33. See Borgmann, *supra* note 2, at 765.

34. U.S. CONST. amend. II.

There are countless possible laws that could create private causes of action that have the effect of limiting constitutional rights.³⁵ Thus, this issue should concern conservatives, liberals, and everyone in between.

II. THE IMPORTANCE AND AVAILABILITY OF PRE-ENFORCEMENT CHALLENGES

A. *The Importance of Pre-Enforcement Challenges*

As Part I explained, statutes creating a private cause of action may compel certain parties to not engage in arguably constitutionally protected conduct. While these statutes are modern, the dilemma that these statutes create is not new.

Leading up to the century-old and well-known case *Ex Parte Young*,³⁶ Minnesota passed a statute that regulated railroad rates.³⁷ In order to dissuade railroad companies from violating the statute to challenge its constitutionality in court, the Minnesota legislature imposed severe civil and criminal penalties for violating the rates.³⁸ Prior to violating the statute, the railroad companies filed suit, claiming that the statute was unconstitutional and that it forced them to comply with a purportedly unconstitutional law so as not to risk the severe penalties.³⁹ The Supreme Court agreed that the law had this effect, stating that no railroad employee could be “expected to disobey . . . [the statute] at the risk of such fines and penalties being imposed upon them, in case the court should decide that the law was valid.”⁴⁰ In other words, the Court recognized that the statute’s penalties were so severe that no railroad employee would disobey the statute due to the risk—however minimal—that a court could find the statute to be constitutional and, thus, the penalties to be valid. Indeed, the Court opined that when a statute imposes penalties that are so severe as to dissuade parties from disobeying the statute and

35. While the potential hypotheticals are endless, this comment focuses its analysis on the abortion context as that is the context that real laws and cases have concerned.

36. 209 U.S. 123, 127 (1908).

37. John Harrison, *Ex Parte Young*, 60 STAN. L. REV. 989, 991 (2008).

38. See *Ex Parte Young*, 209 U.S. at 145; Harrison, *supra* note 37, at 991–92.

39. *Ex Parte Young*, 209 U.S. at 144–45.

40. *Id.* at 146.

challenging its constitutionality in court, it has the same effect as if the statute facially restricted that conduct.⁴¹

Thus, the need arose, which the Supreme Court recognized,⁴² for pre-enforcement challenges to a statute. A pre-enforcement challenge to a statute involves a lawsuit that challenges the validity of the statute before the statute is enforced against the plaintiff. Essentially, the plaintiff requests the court for an injunction enjoining enforcement of the statute or a declaration that the statute is unconstitutional.⁴³ A pre-enforcement action remedies the dilemma of having to either cease engaging in constitutionally protected conduct or continue engaging in the liability-creating conduct in order to challenge it at the risk of being subject to extreme penalties.⁴⁴ The pre-enforcement plaintiff, before violating the statute or engaging in conduct that gives rise to potential liability, can challenge the statute without being subject to the statute's penalties, as the pre-enforcement action occurs before the pre-enforcement plaintiff actually engages in the liability-creating conduct. If the court finds the statute constitutional, then the statute is not restricting constitutional conduct, and the pre-enforcement plaintiff knows to comply with the statute; conversely, if the court finds the statute unconstitutional, the pre-enforcement plaintiff can choose not to comply with the statute without risk of liability under the cause of action created by the statute.

In the context of the abortion statutes creating a private cause of action discussed in Part I, abortion providers employed pre-enforcement lawsuits challenging the constitutionality of the statute before they stopped providing abortions or were sued under the statutes.⁴⁵

41. *See id.* at 147.

42. *See id.* at 149.

43. *See, e.g., infra* Part II.C.

44. *See, e.g.,* Susan B. Anthony List v. Driehaus, 573 U.S. __, __, 134 S. Ct. 2334, 2342 (2014) (stating that the Supreme Court has “permitted pre-enforcement review under circumstances that render the threatened enforcement [of the statute] sufficiently imminent”); Okpalobi v. Foster, 244 F.3d 405, 435 (5th Cir. 2001) (Benavides, J., dissenting) (arguing that the purpose of pre-enforcement relief, like a declaratory judgment, is to prevent the Hobson’s choice of deciding whether to cease engaging in the conduct or risk severe penalties by challenging the statute); *cf. Doe v. Bolton*, 410 U.S. 179, 188 (1973) (opining that a plaintiff “should not be required to await and undergo a criminal prosecution as the sole means of seeking relief”).

45. *See Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1154 (10th Cir. 2005) (involving plaintiffs seeking injunctive and declaratory relief on the grounds that Oklahoma’s stat-

B. *Requirements to Bring a Pre-enforcement Challenge: Standing*⁴⁶

There are requirements that a plaintiff must satisfy to bring a pre-enforcement action.⁴⁷ One such requirement, and the focus of this comment, is standing.

Article III of the United States Constitution limits the jurisdiction of federal courts to “cases” and “controversies.”⁴⁸ However, the Constitution does not define what constitutes a “case” or “controversy.”⁴⁹ Despite the lack of a definition, the Supreme Court has concluded that the “basic inquiry” of the cases and controversies requirement is “whether the ‘conflicting contentions of the parties . . . present a real, substantial controversy between parties having adverse legal interests.’”⁵⁰ To help determine if the parties have the requisite controversy and adverse legal interests, and thus, whether a case is justiciable under Article III’s cases and controversies requirement, the Supreme Court developed the doctrine of standing.⁵¹ Therefore, while the doctrine of standing is based on Article III of the Constitution, it is a court-made doctrine arising from the Supreme Court’s interpretation of Article III. Put simply, standing doctrine effectuates the cases and controversies requirement.⁵² In short, when bringing a lawsuit, before the merits of a case are even considered, standing must be satisfied.⁵³

ute, tit. 63, § 1-740, was unconstitutional); *Okpalobi v. Foster*, 981 F. Supp. 977, 979 (E.D. La. 1998) (involving plaintiffs requesting a preliminary injunction to enjoin Louisiana’s Act 825).

46. For the discussion that follows, it is important to remember that the standing analysis is not tantamount to an analysis on the merits of a claim. The standing analysis is applied before the merits are considered. If a party has standing, that does not necessarily mean that that party will win on the merits. Likewise, if a party does not have standing, that does not mean that it has a meritless claim. A party can lack standing while having a claim that would otherwise be successful.

47. For example, for a case to be justiciable, the plaintiff must have standing, the case cannot be moot, the case must be ripe, and the case cannot involve a political question. ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* 42 (7th ed. 2016).

48. U.S. CONST. art. III, § 2; *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 559 (1992).

49. See U.S. CONST. art. III, § 2; *Lujan*, 504 U.S. at 559.

50. *Babbitt v. UFW Nat’l Union*, 442 U.S. 289, 298 (1979).

51. See *Lujan*, 504 U.S. at 560; *Babbitt*, 442 U.S. at 298; see also Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C.L. REV. 1741, 1767 (1999).

52. See Bradford C. Mank, *Clapper v. Amnesty International: Two or Three Competing Philosophies of Standing Law?*, 81 TENN. L. REV. 211, 218 (2014).

53. See *Lujan*, 504 U.S. at 560.

To have standing, the plaintiff must show that three requirements are satisfied. First, the plaintiff must have suffered “an injury in fact”—i.e., a violation of a legally protected interest—that is “(a) concrete and particularized” and “(b) actual or imminent, not conjectural or hypothetical.”⁵⁴ Second, there must be a causal connection between the plaintiff’s injury and the defendant’s conduct, meaning the plaintiff’s injury is “fairly traceable” to the defendant’s conduct and not a result of “the independent action of some third party not before the court.”⁵⁵ Third, “it must be likely, as opposed to merely speculative, that the injury will be redressed” by the court ruling for the plaintiff.⁵⁶ Put simply, for there to be standing, the plaintiff must have (1) suffered an injury, (2) that was caused by the defendant, and (3) will be redressed by the court ruling in the plaintiff’s favor.

However, in the case of pre-enforcement relief, there may be no injury that has yet occurred because the plaintiff is challenging the statute *before* it is enforced against her⁵⁷—thus, while the injury may not yet be “actual,” it must still be “imminent” to satisfy standing.⁵⁸ The Supreme Court held that in order to have suffered an injury in fact that satisfies the standing requirement in a pre-enforcement action, the plaintiff: (1) must allege an “intention to engage in a course of conduct arguably affected with a constitutional interest”; (2) must intend to engage in future conduct that is “arguably . . . proscribed by [the] statute” the plaintiff wishes to challenge; and (3) must allege that the threat of future enforcement of the statute is “substantial,” such as there being a history of past enforcement of the statute at issue.⁵⁹ Furthermore, the Supreme Court has held that for the threat of future enforcement to be “substantial,” and thus satisfy the “imminent” requirement, the injury must be “certainly impending,”⁶⁰ or, at the

54. *Id.* (citations omitted).

55. *Id.* (citations omitted).

56. *Id.* at 561 (citations omitted).

57. *Cf. Babbitt v. UFW Nat’l Union*, 442 U.S. 289, 298 (1979) (holding that the plaintiff can satisfy the injury-in-fact requirement when there is simply a “credible threat of prosecution,” and he has not actually been arrested).

58. *Cf. Lujan*, 504 U.S. at 560 (holding that the injury in fact must be “actual or imminent”) (emphasis added).

59. *See Susan B. Anthony List v. Driehaus*, 573 U.S. ___, ___, 134 S. Ct. 2334, 2343–45 (2014) (citing *Babbitt*, 442 U.S. at 298–99).

60. *See Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 409 (2013).

very least, there must be a “substantial risk that the harm will occur.”⁶¹

C. Remedies in a Pre-Enforcement Action

When a plaintiff files a pre-enforcement action, the requested relief is an injunction, a declaratory judgment, or both.⁶² An injunction would enjoin the enforcement of the statute. If a declaratory judgment was requested and granted, the court would “declare” that the statute at issue is unconstitutional, though without an injunction, the statute could still technically be enforced; however, the court’s declaration could be used to later obtain an injunction enjoining enforcement of the statute.⁶³ Thus, when applied to the requirements of standing, the requested pre-enforcement relief—an injunction or declaratory judgment—must be likely to redress the plaintiff’s injury.⁶⁴

III. THE EFFECT A STATUTE THAT CREATES A PRIVATE CAUSE OF ACTION HAS ON THE AVAILABILITY OF PRE-ENFORCEMENT CHALLENGES

The abortion statutes discussed in Part I are ultimately privately enforced, meaning that none of the typical enforcement powers are given to state officials (such as a prosecutor)—the statute is “enforced” by private citizens who file lawsuits under the statute.⁶⁵ As this section discusses, the private-enforcing nature of these statutes seemingly prevents pre-enforcement actions to be brought under current standing doctrine—namely because it is unclear who the defendant should be. While standing’s inju-

61. *Id.* at 414 n.5 (internal quotations omitted). See *infra* Part III.A for a discussion on this “imminent” injury standard.

62. See, e.g., *Steffel v. Thompson*, 415 U.S. 452, 454–55 (1974) (plaintiffs initially requesting injunctive and declaratory relief); *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1152 (10th Cir. 2005) (plaintiffs requesting injunctive and declaratory relief); *Okpalobi v. Foster*, 981 F. Supp. 977, 979 (E.D. La. 1998) (plaintiffs requesting a preliminary injunction).

63. See 28 U.S.C. § 2202 (2012); Samuel L. Bray, *The Myth of the Mild Declaratory Judgment*, 63 DUKE L.J. 1091, 1110–11 (2014).

64. See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992).

65. Professor Maya Manian refers to such a statute as “self-enforcing” and defines it as a law that “imposes such a high risk of a severe penalty on constitutionally protected conduct that it freezes that conduct as effectively as a criminal or regulatory ban.” Manian, *supra* note 6, at 126.

ry-in-fact requirement focuses on the plaintiff⁶⁶—and thus will not change regardless of the defendant—the causation and redressability requirements focus on the defendant, and thus, will be affected by who the defendant is.⁶⁷ As such, this comment proceeds by first analyzing the injury-in-fact requirement and then analyzing the causation and redressability requirements based on the possible relief and the possible defendants.

A. *Injury in Fact*

To satisfy the injury-in-fact requirement of standing in a pre-enforcement action, the plaintiff (1) must allege “an intention to engage in a course of conduct arguably affected with a constitutional interest”; (2) must intend to engage in future conduct that is “arguably . . . proscribed by [the] statute” the plaintiff wishes to challenge; and (3) must allege that the threat of future enforcement of the statute is “substantial”⁶⁸ or “credible.”⁶⁹ To satisfy this third requirement that the threat be “substantial” or “credible,” the injury must be “certainly impending,”⁷⁰ or at the very least, there must be a “‘substantial risk’ that the harm will occur.”⁷¹

In the case of the abortion statutes creating a private cause of action discussed in Part I, the pre-enforcement plaintiff—the abortion provider—seeks to engage in conduct that is “arguably affected with a constitutional interest.”⁷² The plaintiff abortion providers seek to engage in the profession of their choice.⁷³ As well, the plaintiff abortion provider may have third-party standing to bring a lawsuit on behalf of his or her potential patients, who will not have in-state access to an abortion if all the abortion

66. *See Lujan*, 504 U.S. at 560 (focusing the injury-in-fact analysis on what injury the plaintiff suffered).

67. *See id.* at 560–61 (stating that to have standing, the injury must have been caused by the defendant and will be redressed by winning the lawsuit against the defendant).

68. *See Susan B. Anthony List v. Driehaus*, 573 U.S. ___, ___, 134 S. Ct. 2334, 2343–45 (2014) (citing *Babbitt v. UFW Nat’l Union*, 442 U.S. 289, 298–99 (1979)).

69. *Id.* at 2342 (citing *Babbitt*, 442 U.S. at 298).

70. *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 409–10 (2013) (citing *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)).

71. *Id.* at 415 n.5 (citing *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 141 (2010)).

72. *Susan B. Anthony List*, 573 U.S. at ___, 134 S. Ct. at 2343 (quoting *Babbitt*, 442 U.S. at 298).

73. *See, e.g., Okpalobi v. Foster*, 981 F. Supp. 977, 980 (E.D. La. 1998).

providers cease to provide abortions due to the statute.⁷⁴ The third-party standing concerns the women's constitutional right to not experience an undue burden in obtaining an abortion.⁷⁵ As such, the plaintiff abortion providers' conduct is "arguably affected with a constitutional interest."⁷⁶

Next, while the statutes do not facially prohibit providing abortions, the future conduct of providing abortions is at least "arguably . . . proscribed by [the] statute."⁷⁷ Facing the potential for "unlimited tort liability" if one provides an abortion,⁷⁸ it is quite reasonable to feel compelled to cease engaging in the conduct that could open oneself up to such liability.

The final requirement is less clear, as *Okpalobi v. Foster*⁷⁹ and *Nova Health System v. Gandy*,⁸⁰ the two chief cases addressing the standing question of pre-enforcement review of a privately enforced statute that creates a private cause of action, were decided before *Clapper v. Amnesty International USA*.⁸¹ Thus, the Fifth Circuit in *Okpalobi* and the Tenth Circuit in *Nova Health Systems* did not apply *Clapper*. As such, it is necessary to analyze and apply *Clapper*'s holding to the types of statutes this comment addresses.

The statute at issue in *Clapper* was a 2008 amendment to the Foreign Intelligence Surveillance Act, codified at 50 U.S.C. § 1881a.⁸² Section 1881a expanded the government's authority to engage in electronic surveillance.⁸³ The plaintiffs in *Clapper* were attorneys and organizations who worked with foreign individuals outside the United States.⁸⁴ The plaintiffs claimed that § 1881a forced them to stop communicating with their foreign clients via telephone and e-mail because of the risk of surveillance.⁸⁵ Moreover, the plaintiffs claimed that they had to undertake "costly and

74. See, e.g., *id.*

75. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992).

76. *Susan B. Anthony List*, 573 U.S. at ___, 134 S. Ct. at 2343 (quoting *Babbitt*, 442 U.S. at 298) (alterations in original).

77. *Id.* at 2344 (quoting *Babbitt*, 442 U.S. at 298).

78. *Okpalobi v. Foster*, 244 F.3d 405, 409 (5th Cir. 2001) (en banc).

79. *Id.*

80. 416 F.3d 1149 (10th Cir. 2005).

81. 568 U.S. 398 (2013).

82. *Id.* at 401.

83. *Id.* at 402, 404.

84. *Id.* at 406.

85. *Id.* at 406–07.

burdensome measures,” like traveling abroad to have face-to-face conversations with their clients, in order to avoid surveillance and protect the confidentiality of their communications.⁸⁶

The Supreme Court held that the plaintiffs did not suffer an injury in fact that would create standing.⁸⁷ In so concluding, the Supreme Court held that in order to suffer an “imminent” injury, the harm has to be “certainly impending.”⁸⁸ The Court stated that a plaintiff “cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending.”⁸⁹ Thus, without “certainly impending” harm, it appears that a plaintiff cannot have standing for pre-enforcement review.

In footnote 5 of the *Clapper* opinion (“Footnote 5”), however, the majority stated there could be standing “based on a ‘substantial risk’ that the harm will occur.”⁹⁰ Instead of holding that this “substantial risk” standard does not apply, the Supreme Court simply stated that the plaintiffs failed even this more lenient standard.⁹¹ Thus, the Court left open the question of what satisfies “imminent” injury.⁹² It is possible that, due to the inclusion of Footnote 5 in the majority opinion, the stricter “certainly impending” standard only applies to intelligence and foreign affairs cases.⁹³ Indeed, one year after *Clapper*, the Court stated in *Susan B. Anthony List v. Driehaus* that “[a]n allegation of future injury may suffice if the threatened injury is ‘certainly impending,’ or there is a ‘substantial risk’ that the harm will occur.”⁹⁴

Applying *Clapper*’s “imminent” injury analysis to statutes that create a private cause of action, it is likely that a pre-enforcement plaintiff can satisfy this requirement. Regarding the abortion

86. *Id.*

87. *Id.* at 422.

88. *Id.* at 409 (emphasis in original omitted).

89. *Id.* at 416.

90. *Id.* at 414 n.5.

91. *Id.* 414–15 n.5.

92. See, e.g., Mank, *supra* note 52, at 215; see also Andrew C. Sand, Note, *Standing Uncertainty: An Expected-Value Standard for Fear-Based Injury in Clapper v. Amnesty International USA*, 113 MICH. L. REV. 711, 732 (2015) (arguing that Footnote 5’s “substantial risk” standard should be used over the “certainly impending” standard).

93. See Mank, *supra* note 52, at 264 (stating that at least the Second and Federal Circuits have suggested that the “substantial risk” standard articulated in Footnote 5 is still applicable).

94. 573 U.S. ___, ___, 134 S. Ct. 2334, 2341 (2014) (citing *Clapper*, 568 U.S. at 409, 414 n.5) (emphasis added).

statutes described in Part I, these statutes creating a private cause of action are distinguishable from *Clapper*. First, in *Clapper*, the threat of surveillance applied to every individual who communicated over phone, computer, or any other electronic device⁹⁵—thus, the odds that the specific plaintiffs in *Clapper* would be subject to surveillance was statistically miniscule. However, in the state abortion statutes creating the private cause of action, only abortion providers were at risk of injury—an exponentially smaller class of parties than in *Clapper*. Additionally, in *Clapper*, one reason the Court found that there was no imminent injury was because the plaintiffs could not show that the government would specifically use § 1881a, as opposed to some other authority, to engage in electronic surveillance.⁹⁶ In the state abortion statutes, that statute alone creates the cause of action—thus, the plaintiff abortion provider could unequivocally demonstrate the source of the injury.

Moreover, the fact that these state statutes were enacted suggests an “imminent” injury. The state legislatures enacted these statutes for one or two reasons: (1) they genuinely sought to provide women a cause of action to provide women greater protection and rights in the time following their abortion, and/or (2) they knew the statute would dissuade abortion providers from offering abortions. If the first reason was the basis for the statute, the enactment of the statute shows that it was expected that women would use the newly created cause of action. If the second reason was the purpose of the statute, the statute’s enactment would only be effective if the threat of a lawsuit under the newly created cause of action was real and imminent. Either way, the statute’s enactment suggests an imminent injury sufficient to meet the “certainly impending” requirement and surely sufficient to meet Footnote 5’s “substantial risk” requirement.⁹⁷

Finally, the abortion providers’ injury cannot actually become any more “imminent” following the statute’s enactment until an actual lawsuit is brought against it, at which point, the harm converts from “imminent” to “actual.” While the more abortions a

95. *Clapper*, 568 U.S. at 402, 406.

96. *Id.* at 411, 414.

97. Cf. Joshua Newborn, Note, *An Analysis of Credible Threat Standing and Ex Parte Young for Second Amendment Litigation*, 16 GEO. MASON L. REV. 927, 933–34 (2009) (discussing how more recently enacted statutes are construed to more likely create a credible threat of injury than older statutes).

doctor provides increases the statistical probability that a patient will bring a lawsuit later, the reality is that there arose an imminent injury—an imminent threat of a lawsuit—when the statute was enacted (assuming the abortion provider had provided abortions in the past). As well, abortion providers, at the time of the pre-enforcement action, are already de facto compelled from engaging in purportedly constitutionally protected conduct. Thus, standing's injury-in-fact requirement is satisfied.

B. *Causation and Redressability*

In addition to there being an imminent injury, the doctrine of standing also requires that there be a causal connection between the plaintiff's injury and the defendant's conduct—the causation requirement—and that obtaining the requested relief from the defendant will redress the plaintiff's injury—the redressability requirement. To satisfy causation, the plaintiff's injury must be “fairly traceable” to the defendant's conduct and not a result of “the independent action of some third party not before the court.”⁹⁸ To satisfy the redressability requirement, “it must be ‘likely,’ as opposed to merely ‘speculative,’ that the injury will be ‘redressed’” by the court ruling for the plaintiff.⁹⁹

Both causation and redressability concentrate on the defendant—the analysis ultimately is focused on whether the defendant caused the injury, and whether the requested relief against the defendant will redress the injury. Thus, who the named defendant is will determine whether these requirements are satisfied. The seemingly obvious and typical defendants in a pre-enforcement action are the state legislature or state executive (often, the attorney general).¹⁰⁰ This is because the legislature enacts the statute, and the attorney general typically enforces the statute. Moreover, in regard to privately enforced statutes, the pre-enforcement action comes before any plaintiff has sued under the private cause of action. So the defendant cannot be a private citizen that could possibly sue under the statute, as she is unknown—there is simply no way of knowing which of the millions of people in the state will actually bring a lawsuit under the private cause of action.

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

99. *Id.* at 561.

100. *See, e.g., Okpalobi v. Foster*, 244 F.3d 405, 429 (5th Cir. 2001) (en banc).

In addition to the named defendant, the plaintiff's requested relief will also affect whether the redressability requirement is met because the requested relief must redress the injury. Relief by way of monetary damages does not solve the issue created by a private cause of action.¹⁰¹ Thus, as discussed in Part II.C above, the two types of relief in pre-enforcement actions are declaratory judgments and injunctions. After discussing why a declaratory judgment in this context is an improper advisory opinion and does not satisfy standing, this comment will explain why an injunction against the "typical" defendants also does not satisfy standing.

1. Declaratory Judgment Against State Public Officials Is an Advisory Opinion and Fails the Redressability Requirement

There have been heated debates as to whether a declaratory judgment would remedy the pre-enforcement plaintiff's injury regarding the creation of a private cause of action.¹⁰² But as will be discussed, a declaratory judgment against state public officials is a nonjusticiable advisory opinion. As well, it fails to redress the plaintiff's injury, so there is no standing if a declaratory judgment is sought.

The Declaratory Judgment Act states that a federal court can "declare the rights and other legal relations of any interested party seeking such declaration."¹⁰³ A declaratory judgment can be

101. This is because damages are awarded *after* an injury occurs—a pre-enforcement plaintiff cannot obtain damages before the ultimate injury occurs. Thus, to obtain damages in the abortion context, for example, the abortion provider would have to be sued under the private cause of action, and if damages were awarded against him, then the abortion provider would sue the state government for the damages it is forced to pay under the private cause of action. However, the abortion provider would only get damages from the government if the statute creating the private cause of action is unconstitutional; otherwise, the abortion provider has no claim against the state government officials. Thus, the abortion provider faces the same problem discussed throughout this comment—he is forced to decide whether to not provide abortions, or to provide abortions and hope that he convinces the court that the statute is unconstitutional.

102. Compare *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1159 (10th Cir. 2005) (holding that a declaratory judgment against the defendants would not redress the plaintiff's injury), and *Okpalobi*, 244 F.3d at 431 (Higginbotham, J., concurring) (stating that a declaratory judgment would not redress the injury), with *Nova Health Sys.*, 416 F.3d at 1163–64 (Briscoe, J., dissenting) (arguing that a declaration that the statute was unconstitutional would redress the injury), and *Okpalobi*, 244 F.3d at 436 (Benavides, J., dissenting) (arguing that a declaratory judgment would redress the injury), and Borgmann, *supra* note 2, at 780 (arguing that a declaratory judgment would redress the injury in *Okpalobi* and *Nova Health Systems*).

103. 28 U.S.C. § 2201(a) (2012).

awarded even if an injunction cannot be awarded.¹⁰⁴ Indeed, a declaratory judgment was formed to be an alternative to an injunction¹⁰⁵ and was intended to allow a party to obtain pre-enforcement relief before he or she is subject to criminal prosecution (or liability).¹⁰⁶

However, relief by way of a declaratory judgment must still meet the requirements of standing.¹⁰⁷ In deciding whether to award a declaratory judgment, the court must determine whether there is a “substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.”¹⁰⁸ As Article III only allows federal courts to hear actual “cases” and “controversies,” and the doctrine of standing determines what is a “case” or “controversy,”¹⁰⁹ the declaratory judgment against the specific defendant must still satisfy standing by redressing the plaintiff’s injury.

Furthermore, a declaratory judgment cannot be awarded if it is merely an “advisory opinion.”¹¹⁰ While there is no universal definition of an advisory opinion, an advisory opinion is essentially a judicial opinion that has “no effect in the real world.”¹¹¹ Professor

104. *Green v. Mansour*, 474 U.S. 64, 72 (1985).

105. *Steffel v. Thompson*, 415 U.S. 452, 467 (1974) (quoting *Perez v. Ledesma*, 401 U.S. 82, 115 (1971)).

106. *Id.* at 467–68, 468 n.18; see *Travelers Ins. Co. v. Davis*, 490 F.2d 536, 543 (3d Cir. 1974) (“The objectives of the Federal Declaratory Judgment Act are: . . . ‘to avoid accrual of avoidable damages to one not certain of his rights and to afford him an early adjudication without waiting until his adversary should see fit to begin suit, after damage had accrued.’” (citations omitted)).

107. See 28 U.S.C. § 2201(a) (2012) (limiting the jurisdiction of federal courts to award a declaratory judgment to instances when there is “a case of actual controversy”); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (stating that the doctrine of standing identifies what is a justiciable “case” and “controversy”); *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239–40 (1937) (holding that the Declaratory Judgment Act’s language limiting declaratory judgments to “cases of actual controversy” limit its use to the “cases and controversies” requirement articulated in the Constitution); see also Michael E. Rosman, *Challenges to State Anti-Preference Laws and the Role of Federal Courts*, 18 WM. & MARY BILL RTS. J. 709, 729 (2010).

108. *Evers v. Dwyer*, 358 U.S. 202, 203 (1958) (per curiam) (quoting *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 279, 273 (1941)).

109. *Lujan*, 504 U.S. at 560.

110. See *Hewitt v. Helms*, 482 U.S. 755, 761, 763 (1987) (holding that a proper judicial resolution of a “case or controversy” cannot be an advisory opinion); *F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 735 (1978) (“[F]ederal courts have never been empowered to issue advisory opinions.”).

111. F. Andrew Hessick, *Probabilistic Standing*, 106 NW. U.L. REV. 55, 80–81 (2012) (“[A] decision on a claim based on an extremely-low-probability injury would arguably be

Erwin Chemerinsky asserts that a case is a nonjusticiable advisory opinion if it does not involve “an actual dispute between adverse litigants” or if there is a “substantial likelihood” that the court’s decision would not “bring about some change or have some effect.”¹¹²

In reviewing whether a declaratory judgment is an advisory opinion or redresses a plaintiff’s injury, the Supreme Court stated:

Redress is sought *through* the court, but *from* the defendant
The real value of the judicial pronouncement—what makes it a proper judicial resolution of a “case or controversy” rather than an advisory opinion—is in the settling of some dispute *which affects the behavior of the defendant towards the plaintiff*.¹¹³

For this reason, when a plaintiff challenges a privately enforced statute that creates a private cause of action by suing a public official, the declaratory judgment is a nonjusticiable advisory opinion and does not redress the plaintiff’s injury.

A court’s declaration—against defendant public officials¹¹⁴—that a statute that creates a private cause of action is unconstitutional, without more, is a mere advisory opinion. It has no “effect in the real world,”¹¹⁵ and does not affect “the behavior of the defendant towards the plaintiff,” thus rendering it an advisory opinion.¹¹⁶ A court’s “declaration” that the statute creating the private cause of action is unconstitutional would only affect the defendant public officials’ behavior if they sought to bring a private lawsuit on their own behalf under the private cause of action (e.g., in the abortion context, a public official had an abortion and suffered damages) or they were to enforce the statute. Because the public officials who are sued in the pre-enforcement challenge are neither bringing a private suit under the private cause of action,

an advisory opinion because resolving the claim would require the court to provide relief from an injury that is almost certain not to occur and thus likely to have no real-world effect.”).

112. CHEMERINSKY, *supra* note 47, at 49.

113. *Hewitt*, 482 U.S. at 761.

114. The only possible defendants in a declaratory judgment action are public officials because it is unknown which private citizens, if any, will bring a private lawsuit under the private cause of action. *See supra* Part III.B.

115. *See Hessick, supra* note 111, at 80–81.

116. *Hewitt*, 482 U.S. at 761 (emphasis in original omitted); *see also* CHEMERINSKY, *supra* note 47, at 49–51.

nor enforcing the statute,¹¹⁷ there is no real effect on the defendant public officials' behavior; they would not need to change their conduct in any way. Thus, a declaration of the statute's unconstitutionality is a nonjusticiable advisory opinion.

But even if the declaratory judgment here is not an advisory opinion, a declaratory judgment would still not redress the plaintiff's injury in a pre-enforcement action challenging the constitutionality of a statute creating a private cause of action. Courts and scholars have advanced several incorrect rationales for why a declaratory judgment—i.e., the court simply declaring the statute to be unconstitutional—redresses the plaintiff's injury. The first rationale is that the declaration would comfort the pre-enforcement plaintiff by allowing him to believe that he can engage in the conduct because if he is later sued under the private cause of action, the statute that created it will definitely be found unconstitutional (and thus the private cause of action is invalid).¹¹⁸ The second rationale is that the declaration would deter other potential litigants (i.e., women who had an abortion) from bringing a lawsuit under the statute.¹¹⁹

The first rationale is simply incorrect, and the declaratory judgment remains an advisory opinion that does not redress any injury. State courts and lower federal courts are “separate and coequal.”¹²⁰ As such, state courts are not bound by a federal court's declaratory judgment if a subsequent lawsuit involves parties different from the declaratory judgment action (i.e., the pre-enforcement action).¹²¹ Thus, if an abortion provider obtains a declaratory judgment that the state law is unconstitutional and is later sued by a woman who previously had an abortion, the state

117. The fact that the public officials do not enforce the statute can be illustrated in a simple manner: if the court prohibited the public official from “enforcing” the statute (like a prosecutor enforces a criminal statute), the statute still remains in effect, and private citizens can still sue under the private cause of action.

118. *Okpalobi v. Foster*, 244 F.3d 405, 436 (5th Cir. 2001) (en banc) (Benavides, J., dissenting); see *Borgmann*, *supra* note 2, at 781–82.

119. See, e.g., *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1159 (10th Cir. 2005); *Borgmann*, *supra* note 2, at 780.

120. John H. Martin, *The Binding Effect of Federal Declaratory Judgments on State Courts*, 51 TEX. L. REV. 743, 753 (1973).

121. *Id.* (“Because the state courts enjoy concurrent, coequal jurisdiction with the federal courts over questions of the constitutionality of state statutes, the state courts should not be broadly bound by federal declarations short of a federal court injunction against state court action.” (citation omitted)); Rosman, *supra* note 107, at 733–34; see David L. Shapiro, *State Courts and Federal Declaratory Judgments*, 74 NW. U.L. REV. 759, 771 (1979).

court¹²² hearing that lawsuit is not required to afford the declaratory judgment any weight. Thus, the declaratory judgment would not provide the pre-enforcement plaintiff any real relief. As Michael Rosman candidly points out:

As a matter of common sense, if substantial liability has a significant chilling effect on the behavior of some actors, the fact that those actors have one additional non-binding authority to cite in a lawsuit against them, or that one of many potential litigants could not sue them, would not seem to provide much of a thaw.¹²³

As such, the declaratory judgment would not redress the injury.¹²⁴

The problem with the second rationale—that the declaration would deter other potential litigants from bringing a lawsuit under the statute—is that it is merely speculative, and thus fails the requirement that it “be ‘likely,’ as opposed to merely ‘speculative,’ that the injury will be ‘redressed’” by the court ruling for the plaintiff.¹²⁵ Moreover, a private citizen is not likely to be deterred from bringing her own lawsuit under the private cause of action because she is not limited by the declaratory judgment of the pre-enforcement action of which she was not a party.¹²⁶ This is because the pre-enforcement action’s declaratory judgment has no res judicata effect¹²⁷ on parties not a part of the lawsuit.¹²⁸ It is

122. In most, if not all cases, a state court would hear the lawsuit brought under the private cause of action. This is because it would be a state law claim (arising under the state statute), so there would be no federal question jurisdiction under 28 U.S.C. § 1331. Even if the abortion provider raised the statute’s unconstitutionality as a defense, there would still be no federal question in the plaintiff’s complaint. Moreover, there would likely be no diversity jurisdiction under 28 U.S.C. § 1332 because the woman likely obtained an abortion from a provider within the state in which she lived, so there likely would be no diversity of citizenship. But even if a federal court were to hear the lawsuit under diversity jurisdiction, there is still no res judicata effect on a declaratory judgment when it is sought to be used against a party who was not subject to the declaratory judgment action.

123. Rosman, *supra* note 107, at 734–35.

124. While it is true that 28 U.S.C. § 2202 allows a court to use a declaratory judgment as the basis for an injunction, see Bray, *supra* note 63, at 1111, the plaintiff must still have standing to go back to court and obtain an injunction. Thus, the pre-enforcement plaintiff must have standing for an injunction against the same defendant against whom the declaratory judgment was awarded. See 28 U.S.C. § 2202 (2012) (limiting the “further relief”—i.e., the injunction—to be awarded against the party whose rights were affected by the initial declaratory judgment). As Parts III.B.2–3 discuss, an injunction against the defendant public official—the party of the initial declaratory judgment action—does not redress the plaintiff’s injury, and thus there is no standing for the declaratory judgment to be converted into an injunction.

125. Lujan v. Defs. of Wildlife, 504 U.S. 555, 561 (1992) (citations omitted).

126. See Rosman, *supra* note 107, at 733.

127. Res judicata precludes the litigation of issues that were litigated in a previous ac-

the res judicata effect that impacts the defendant's behavior towards the plaintiff.¹²⁹ Because there is no res judicata effect on private citizens who are not parties to the pre-enforcement action, there is no deterrence to private citizens bringing their own lawsuit, as these private citizens were not parties in the pre-enforcement action. Thus, a declaration of the statute's unconstitutionality would not redress the pre-enforcement plaintiff's injury of ceasing to engage in certain conduct due to fear of a lawsuit.¹³⁰

For these reasons, a declaratory judgment against public officials that the statute creating a private cause of action is unconstitutional is a nonjusticiable advisory opinion and/or fails to satisfy the redressability requirement.

2. Injunction Against a State Executive Officer Fails Standing's Redressability Requirement

In many pre-enforcement actions challenging a state law, the named defendant is the state attorney general because the attorney general is the chief enforcement officer of the statute.¹³¹ Typically, the statute's threatened enforcement causes the injury. For example, the threat of criminal prosecution for violating a statute causes the pre-enforcement plaintiff to cease engaging in that conduct. If that conduct is constitutionally protected, then enjoining the attorney general from prosecuting the pre-enforcement plaintiff would allow the pre-enforcement plaintiff to continue engaging in the conduct without risk of prosecution, thus redressing the injury.

tion among the same parties. *See* *Allen v. McCurry*, 449 U.S. 90, 94 (1980).

128. *See, e.g., Allen*, 449 U.S. at 94.

129. *See* *Rosman*, *supra* note 107, at 729–30; *cf. Martin*, *supra* note 120, at 746 (arguing that the reason declaratory judgments are not always advisory opinions is because they are binding on the parties to the lawsuit).

130. Several more equally speculative, and thus unconvincing, reasons why a declaratory judgment would satisfy the redressability requirement have been asserted, including that in response to a declaration that the statute is unconstitutional, the state legislature “might repeal or amend the statute. . . [or] the attorney general might issue an opinion advising that private lawsuits brought under the act would fail due to the statute’s unconstitutionality.” *Borgmann*, *supra* note 2, at 781–82. These reasons are wholly speculative and thus do not satisfy the standing requirement. *See Lujan*, 504 U.S. at 561.

131. *See, e.g., Ex parte Young*, 209 U.S. 123, 149 (1908); *Mobil Oil Corp. v. Att’y Gen. of Va.*, 940 F.2d 73, 75 (4th Cir. 1991); *see also Borgmann*, *supra* note 2, at 778.

While typically, especially in the criminal setting, such circumstances allow for a pre-enforcement action when the statute creates a private cause of action for civil liability, an injunction against an executive officer cannot redress the injury.¹³² While the causation element is satisfied via the attorney general's willingness to enforce and defend the statute or the governor signing the bill into law,¹³³ an injunction against either of these executive officers would not redress the injury. Thus, the redressability requirement is not met.

Under state statutes creating a private cause of action, the state governor, attorney general, and other public figures have no enforcement role.¹³⁴ Unlike a criminal statute, for example, that authorizes the attorney general to prosecute individuals, privately enforced statutes give the "enforcement" power to private citizens and, more specifically, the group that can utilize the private cause of action (in the abortion context, the women who suffered an injury resulting from the abortion). In other words, the statute remains in full force even if the court orders the state governor, attorney general, and other public figures to not enforce the statute.

As such, an injunction enjoining these defendants would not remedy the plaintiff's injury of being de facto compelled to cease engaging in arguably constitutionally protected conduct due to the risk of liability.¹³⁵ The requested injunction could order one of two things: (1) enjoin the public defendants from bringing a lawsuit as private citizens under the private cause of action (for example, as a person who suffered emotional distress from their own previous abortion); and/or (2) enjoin the public defendants from enforcing the statute. The first injunction would not remedy the plaintiff's injury because even if the governor, attorney general, and other public officials are enjoined from filing lawsuits as private citizens, that leaves hundreds of thousands of other po-

132. It is important to note that an injunction enjoins a person from enforcing a statute. It does not enjoin the statute itself. *Okpalobi v. Foster*, 190 F.3d 337, 361 (5th Cir. 1999) (Jolly, J., dissenting) ("A court . . . does not enjoin a statute. A statute itself cannot operate to effect any result; an injunction enjoins defendants who are attempting to enforce or apply the statute."). Furthermore, an injunction can only enjoin parties to the lawsuit and certain unrelated individuals specifically affiliated with those parties; it cannot enjoin unrelated, nonaffiliated nonparties. *See* FED. R. CIV. P. 65(d)(2).

133. *See* Borgmann, *supra* note 2, at 777–79.

134. *E.g.*, *supra* note 65 and accompanying text.

135. *See, e.g.*, *Okpalobi v. Foster*, 244 F.3d 405, 426–27 (5th Cir. 2001) (en banc).

tential plaintiffs that could still potentially bring suit (in the abortion context, any woman who has had an abortion or who could, in the future, have an abortion).¹³⁶ Thus, the pre-enforcement plaintiff will still feel compelled to cease to engage in the de facto prohibited conduct. The second type of injunction would not redress the injury because the statute is entirely privately enforced, as the statute would remain in full force even if the court ordered the state governor, attorney general, and other public figures to not enforce the statute.

Indeed, there is little merit to arguing that an injunction will satisfy the redressability requirement in this context.¹³⁷ In the two key cases relating to this issue, *Okpalobi v. Foster*¹³⁸ and *Nova Health Systems v. Gandy*,¹³⁹ where the majority held that the pre-enforcement plaintiffs lacked standing, the dissenting judges conceded that an injunction would not remedy the plaintiffs' injuries.¹⁴⁰

3. Injunction Against the State Legislature Fails Standing's Redressability Requirement

Similar problems with redressability arise if the pre-enforcement plaintiff sues the state legislature.¹⁴¹ While the legislature arguably caused the pre-enforcement plaintiff's injury by enacting the statute,¹⁴² obtaining an injunction against the legislature would not redress the pre-enforcement plaintiff's injury.

An injunction cannot order the legislature to repeal a statute.¹⁴³ As such, the only remedial effect an injunction against a legislator would have would be to prevent the legislator from

136. See, e.g., *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1159 (10th Cir. 2005).

137. In addition to the redressability requirement not being met, there may be sovereign immunity issues precluding the lawsuit as well. See, e.g., *Okpalobi*, 244 F.3d at 423–24 (en banc) (plurality).

138. *Id.* at 429.

139. 416 F.3d at 1160.

140. See *id.* at 1162–68 (Briscoe, J., dissenting); *Okpalobi*, 244 F.3d at 433 (Benavides, J., dissenting).

141. Moreover, a lawsuit against the legislature may not even be possible due to legislative immunity. See Rosman, *supra* note 107, at 754. But see Manian, *supra* note 6, at 178–97 (while conceding that the Eleventh Amendment bars a lawsuit against the legislature as a whole, arguing that legislative immunity does not bar a lawsuit against individual legislators).

142. Borgmann, *supra* note 2, at 777–78.

143. See Manian, *supra* note 6, at 178–79.

bringing a lawsuit as a private citizen under the private cause of action created by the statute. As was the case if a pre-enforcement action was brought against the state attorney general or governor, such an injunction would not remedy the plaintiff's injury, as there would still be hundreds of thousands of other potential plaintiffs that could still potentially bring suit.¹⁴⁴

IV. THE SOLUTION: SUING STATE JUDGES FOR AN INJUNCTION

The implicit underlying issue discussed throughout this comment is determining who the correct defendant would be in a pre-enforcement action challenging the constitutionality of a statute that creates a private cause of action. As discussed in Part III, bringing a pre-enforcement action against state executive officials or state legislators would not satisfy the redressability requirement, and, thus, the lawsuit would not be justiciable. Furthermore, one could not bring a pre-enforcement action against private individuals who could potentially bring suit under the private cause of action because it is unknown which of the thousands, if not millions, of potential parties will actually bring suit in the years to come. Thus, the question remains: Who to sue? The answer to that question is to seek an injunction against state court judges in the state in which the statute was passed. There are several issues that may arise in suing state judges in this context—including standing and justiciability, cause of action, and which judge(s) to sue—and each is addressed. This section concludes by explaining why this proposed solution is the most appropriate and prudent method of filing a pre-enforcement action challenging statutes that create a private cause of action.

A. *Standing Is Satisfied*

As has been discussed, to have standing, there must be an injury in fact that was caused by the defendant and will be redressed by the requested remedy.¹⁴⁵ In the context of the abortion statutes discussed in Part I,¹⁴⁶ the abortion providers have standing to

144. See, e.g., *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1159 (10th Cir. 2005).

145. See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992).

146. As a reminder, these statutes create a private cause of action that allow women who had an abortion to later sue the abortion provider for physical injury or emotional distress, suffered by the mother or unborn baby, as a result of the abortion. *E.g.*, *supra* notes 13–18 and accompanying text.

bring a pre-enforcement action against state judges to enjoin the application of the statute that creates the private cause of action. Regarding the first standing requirement, the abortion providers suffer the injury of having to cease engaging in purported constitutionally protected conduct or their chosen profession.¹⁴⁷ The risk of liability and significant damages potentially imposed against them de facto compel abortion providers to cease providing abortions.¹⁴⁸ Thus, the pre-enforcement plaintiff abortion provider intends to engage in conduct affected with a “constitutional interest,” that is “arguably proscribed” by the statute,¹⁴⁹ and the risk of injury is substantially credible.¹⁵⁰ As such, the injury-in-fact requirement is satisfied.¹⁵¹

The second standing requirement, causation, is also satisfied when state judges are the defendants. If the pre-enforcement plaintiff’s injury is having to forgo constitutionally protected conduct due to the risk of liability, that injury is caused by the judges’ willingness to hear lawsuits brought under the private cause of action created by the statute. Statutes creating a private cause of action are meaningless and harmless if a court will not hear the lawsuit. But when a court is willing to hear a lawsuit, the risk of liability resulting from the private cause of action compels the potential defendants to cease to engage in the conduct that could create liability. As such, the state judges’ willingness to hear the lawsuits under the statute causes the injury.¹⁵²

The third standing requirement, redressability, is also satisfied when the pre-enforcement action is brought against state judges, rather than the state legislature or executive officials. Unlike an injunction against state legislative or executive officials,¹⁵³ an in-

147. *E.g.*, *Okpalobi v. Foster*, 981 F. Supp. 977, 980 (E.D. La. 1998) (pre-enforcement plaintiff abortion providers alleging that Act 825 violates the Fourteenth Amendment because it prevents them from practicing their chosen profession).

148. As well, there could be third-party standing where the abortion providers also bring suit on behalf of their potential patients on the ground that the statute compels abortion providers to cease providing abortions, which consequently causes women to experience an “undue burden” to obtain an abortion. *E.g.*, *id.* at 979–80.

149. *Susan B. Anthony List v. Driehaus*, 573 U.S. ___, ___, 134 S. Ct. 2334, 2343–45 (2014) (citations omitted).

150. *See id.* at 2345; *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 409 (2013).

151. *See supra* Part III.A for a more in-depth discussion of the injury in fact requirement.

152. This analysis focuses on state judges’ effect on the plaintiff’s injury because it is very likely that the private suit will be brought in state court. *See supra* note 122.

153. *See supra* Parts III.B.2–3.

junction against state judges enjoining the application of the contested statute would redress the pre-enforcement plaintiff's injury. If a state judge is enjoined from recognizing or applying the statute—which consequently means the judge is enjoined from recognizing or applying the private cause of action that the statute creates—then there is no longer a risk of liability if parties engage in conduct that could have created liability under the private cause of action (such as abortion providers providing abortions). Unlike a federal court's declaratory judgment, which does not bind state courts due to their co-equal status,¹⁵⁴ a federal court injunction will bind state judges.¹⁵⁵

However, there is a viable argument that suing state judges for pre-enforcement relief does not satisfy standing because no “case or controversy” exists when state judges are the defendants.¹⁵⁶ The standing doctrine—injury in fact, causation, and redressability—was created to effectuate Article III's “cases” or “controversies” requirement.¹⁵⁷ More specifically, the standing doctrine is meant to determine “whether the ‘conflicting contentions of the parties . . . present a real, substantial controversy between parties having adverse legal interests.’”¹⁵⁸ When judges are defendants, the argument that there are no “adverse legal interests” is that:

Judges sit as arbiters without a personal or institutional stake on either side of the constitutional controversy. They are sworn to uphold the Constitution of the United States. They will consider and decide a claim . . . without any interest beyond the merits of the case. Almost invariably, they have played no role in the statute's enactment, they have not initiated its enforcement, and they do not even have an institutional interest in following their prior decisions (if any) concerning its constitutionality if an authoritative contrary legal determination has subsequently been made¹⁵⁹

154. Martin, *supra* note 120, at 753.

155. *Id.*; see also FED. R. CIV. P. 65(d)(2) (stating that an injunction binds the parties to the lawsuit).

156. See, e.g., *In re Justices of the Supreme Court of Puerto Rico*, 695 F.2d 17, 21 (1st Cir. 1982) (“We also agree that, at least ordinarily, no ‘case or controversy’ exists between a judge who adjudicates claims under a statute and a litigant who attacks the constitutionality of the statute.”).

157. See *supra* notes 48–52 and accompanying text.

158. *Babbitt v. UFW Nat'l Union*, 442 U.S. 289, 298 (1979) (quoting *Ry. Mail Ass'n v. Const.*, 326 U.S. 88, 93 (1945)).

159. *In re Justices of the Supreme Court of Puerto Rico*, 695 F.2d at 21.

The response to this concern is twofold. First, as was just discussed, the three standing requirements are still satisfied. Second, if a pre-enforcement action is brought against the judges, the state attorney general or a similar public official will inevitably intervene in the lawsuit. The statute was enacted because it had the support of the legislative and executive branches of the state government—it could not have been enacted without both branches' approval (absent an override of the governor's veto). As such, the state government desires to keep the statute in effect¹⁶⁰ and would be opposed to any challenges to void it, which is the purpose of the pre-enforcement action. Thus, in the abortion context, if abortion providers file a pre-enforcement action seeking to enjoin state judges from applying the private cause of action, the state government, in some form, will intervene in the case to defend the statute's constitutionality so that it remains in effect. In this way, there will be sufficient "adverse legal interests"¹⁶¹ to provide "concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."¹⁶² Thus, the three standing requirements are satisfied and there will ultimately be adverse legal interests involved in the lawsuit. As such, the pre-enforcement action should be found justiciable in federal court.¹⁶³

B. *Section 1983 Provides the Cause of Action Against State Judges*

In addition to having standing, the pre-enforcement plaintiff must have a cause of action to bring against the state judges. The cause of action is provided by 42 U.S.C. § 1983, which allows parties to sue judges, who in their official "judicial capacity,"¹⁶⁴ violate the plaintiff's constitutional or statutory rights.¹⁶⁵ However,

160. The pre-enforcement action would be brought immediately following the statute's enactment, so there is no viable risk, absent rare circumstances, that a new administration with opposing views will take over prior to the lawsuit.

161. *Babbitt*, 442 U.S. at 298.

162. *United States v. Windsor*, 570 U.S. ___, ___, 133 S. Ct. 2675, 2687 (2013) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). As Professor Borgmann articulated, "the states' eagerness to defend the statute's merits . . . creates the odor of a 'case or controversy.'" Borgmann, *supra* note 2, at 774 (citations omitted).

163. Federal courts would have jurisdiction to hear this pre-enforcement action under 28 U.S.C. § 1331 because the pre-enforcement plaintiff would be alleging that the state violated the United States Constitution.

164. 42 U.S.C. § 1983 (2012).

165. *See, e.g., Lake v. Speziale*, 580 F. Supp. 1318, 1320–21, 1342 (D. Conn. 1984)

under § 1983, to obtain an injunction against a judge for the judge's conduct taken in his or her judicial capacity, a declaratory judgment must have first been violated or declaratory relief must be unavailable.¹⁶⁶ As discussed in Part III.B.1, declaratory relief is unavailable because it would be an advisory opinion, and a pre-enforcement plaintiff does not have standing to obtain a declaratory judgment. Therefore, § 1983 provides a proper cause of action to obtain an injunction against a judge concerning the application of a statute creating a private cause of action.

To bring a § 1983 claim, the judge must cause the plaintiff "to be subjected . . . to the deprivation of any rights [or] privileges . . . secured by the Constitution and laws."¹⁶⁷ In *Shelley v. Kraemer*, the United States Supreme Court held that if a court enforces a contract that violates the Constitution, the court engages in unconstitutional conduct.¹⁶⁸ In that same vein of reasoning, if a court upholds an unconstitutional statute, it engages in unconstitutional conduct. The judge's willingness to hear a lawsuit brought under the private cause of action created by the statute effectuates the purportedly unconstitutional statute, and thus causes the judge to be complicit—even if unintentionally complicit—in restricting constitutionally protected conduct. Thus, the judge's willingness causes the pre-enforcement plaintiff to continue not engaging in conduct purportedly "secured by the Constitution."¹⁶⁹ This should be sufficient for a federal court to at least hear a § 1983 claim to determine whether a preliminary injunction is warranted until the merits of the case can be heard.¹⁷⁰

Finally, unlike the sovereign immunity issues that potentially arise when suing the state legislature or executive branch,¹⁷¹ su-

(seeking relief individually and for the putative class alleging that the refusal of the Judges of the Superior Court of the State of Connecticut to advise indigent individuals of their rights to counsel was a violation of the Sixth and Fourteenth Amendments).

166. 42 U.S.C. § 1983.

167. *Id.*

168. 334 U.S. 1, 20 (1948).

169. 42 U.S.C. § 1983.

170. *Cf. O'Shea v. Littleton*, 414 U.S. 488, 500 (1974) (suggesting that because the plaintiff-respondents did not sue the state judges to challenge the law's constitutionality, an injunction against the state judges was not as appropriate compared to if the plaintiff-respondents sought to challenge the law's constitutionality). In the pre-enforcement actions discussed in this comment, the pre-enforcement plaintiff would be suing to challenge the statute's constitutionality.

171. *See supra* notes 135–40 and accompanying text.

ing individual judges for injunctive relief is not barred by judicial immunity.¹⁷²

C. *Determining Which Judge(s) to Sue*

In determining which judge(s) to bring the pre-enforcement action against, there are two approaches to making this decision. The first and better option is to sue the chief judge in the district, or the chief justice of the state supreme court, along with all the lower trial judges.¹⁷³ The chief judge within the district or the chief justice of the state supreme court has the authority to instruct the other appropriate judges, so by enjoining the chief judge or justice, the plaintiff can enjoin the other relevant judges.

The second approach would be to sue the state judges in the district where the pre-enforcement plaintiff resides and works. In this manner, the pre-enforcement plaintiff can enjoin the judges where there would be proper venue if the pre-enforcement plaintiff were sued under the private cause of action.¹⁷⁴ However, this would only preclude the application of the statute if only one defendant was sued under the private cause of action and the defendant resided in, worked in, or engaged in the conduct giving rise to the cause of action in the same district.¹⁷⁵ If there was a proper venue outside of the district where the state judges were enjoined, the statute creating the private cause of action could still be applied.

D. *Final Justifications for This Comment's Proposed Solution*

The solution this comment proposes—suing state judges in a pre-enforcement action for injunctive relief—is admittedly an imperfect solution. As Part IV.A discusses, when a judge is the de-

172. 42 U.S.C. § 1983 (creating a cause of action against judges).

173. *E.g.*, *Lake v. Speziale*, 580 F. Supp. 1318, 1320 (D. Conn. 1984) (suing all the state superior court judges, with the chief justice of the state supreme court as the first named defendant).

174. A pre-enforcement plaintiff would only have to preclude the application of the private cause of action where there would be proper venue for the private suit against him because a lawsuit can only be brought if there is proper venue.

175. This is because in many states, there is proper venue in any district where any defendant resides, is employed, or where the cause of action arose (which, in the abortion context, would be the location where the abortion was performed). *See, e.g.*, VA. CODE ANN. §§ 8.01-262 (Cum. Supp. 2017), 8.01-263 (Repl. Vol. 2015).

fendant, there may not be a live “case or controversy” sufficient to make the case justiciable. One may disagree that § 1983 provides a proper cause of action, as Part IV.B argues. There are concerns of federalism and comity.¹⁷⁶ Yet the alternative is to deny pre-enforcement challenges, which, in effect, is to allow unconstitutional statutes to potentially remain in effect, restricting constitutionally protected conduct.

Thus, while imperfect, this comment’s proposed solution is the best possible solution to a very real and significant issue. Because individual constitutional rights threatened by a private cause of action are protected by pre-enforcement challenges, pre-enforcement challenges must be kept available. Potentially relaxing justiciability doctrines—namely Article III’s live case or controversy requirement—is preferable to rigidly adhering to justiciability doctrines and making pre-enforcement challenges unavailable. Indeed, the United States Supreme Court has previously relaxed Article III’s justiciability doctrine in order to protect individuals’ constitutional rights.¹⁷⁷

Furthermore, this comment’s proposed solution adheres *most closely* to current justiciability doctrines. To bend justiciability doctrines to allow a pre-enforcement action against state executive officials or the state legislature would require courts to either allow the rendering of advisory opinions by federal courts,¹⁷⁸ or completely eliminate standing’s redressability requirement.¹⁷⁹ Allowing advisory opinions and completely eliminating or ignoring the redressability requirement would involve significant alterations to established judicial and constitutional principles,¹⁸⁰ much

176. See, e.g., *Freedom Commc’ns, Inc. v. Mancias*, 129 F.3d 609 (5th Cir. 1997) (per curiam) (unpublished table decision); *Pompey v. Broward Cty.*, 95 F.3d 1543, 1548–49 n.6 (11th Cir. 1996); *Hoover v. Wagner*, 47 F.3d 845, 850 (7th Cir. 1995).

177. E.g., *Flast v. Cohen*, 392 U.S. 83, 85, 105–06 (1968) (abandoning the previous doctrine that a taxpayer always lacks standing to challenge a statute’s constitutionality, and holding that a taxpayer can have such standing to ensure his tax money is being used constitutionally).

178. See *supra* Part III.B.1 (arguing that awarding a declaratory judgment in a pre-enforcement action challenging the constitutionality of a statute that creates a private cause of action would be a nonjusticiable advisory opinion).

179. See *supra* Part III.B.2–3 (arguing that awarding an injunction, against state officials, in a pre-enforcement action challenging the constitutionality of a statute that creates a private cause of action does not satisfy the redressability requirement).

180. To allow advisory opinions or to eliminate one-third of the standing doctrine would significantly undermine the entire federal justiciability doctrine. CHEMERINSKY, *supra* note 47, at 54 (“[T]he prohibition of advisory opinions is at the core of Article III [of the

more so than allowing the state government's intervention into the lawsuit to satisfy the actual case or controversies—and “adverse legal interests”—requirements in a pre-enforcement action against state judges.¹⁸¹ Thus, while admittedly imperfect, this comment's proposed solution permits pre-enforcement lawsuits to ensure that constitutional rights are protected, while most closely adhering to current justiciability doctrines.

CONCLUSION

State legislatures should not be able to restrict constitutional rights by creating a private cause of action. But, under the standing doctrine and the prohibition of advisory opinions, legislatures have that ability if a pre-enforcement action can only be brought against the state legislative or executive branches. While the standing doctrine effectuates Article III of the United States Constitution, it effectively—albeit indirectly—permits the restriction of constitutional rights. Thus, it is essential that pre-enforcement plaintiffs have the ability to challenge statutes in a pre-enforcement action, because without a pre-enforcement action, there may never be any challenge to the statute, and an allegedly unconstitutional statute could forever remain in effect.

The solution is to file pre-enforcement actions against state judges to obtain an injunction enjoining state judges from applying the purportedly unconstitutional statute. This is admittedly an imperfect solution. However, under current justiciability doctrines, that is the price that must be paid to ensure that constitutional rights are protected, as there is no other possible pre-enforcement defendant. Moreover, when considering what is at stake, and when considering the ultimate outcome, suing state judges is not so outlandish. Normally, after a successful challenge to a statute's constitutionality, an injunction enjoins the government's enforcement of the statute; when this happens, state

United States Constitution] . . . [and] the other justiciability doctrines exist largely to ensure that federal courts will not issue advisory opinions. That is, it is because standing . . . implement[s] the policies and requirements contained in the advisory opinion doctrine that it is usually unnecessary for the Court to separately address the ban on advisory opinions.”); *see also id.* at 47 (explaining that the prohibition on advisory opinions maintains separation of powers, conserves judicial resources, and ensures that the courts hear real and non-hypothetical disputes).

181. *See supra* notes 154–61 and accompanying text.

courts can no longer hear cases that arise under that statute because the government can no longer enforce it. The solution proposed in this comment—an injunction directly enjoining state judges from applying the statute in a lawsuit—has the exact same effect. If the former is acceptable, the latter should be as well, especially when constitutional rights are at stake.

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