No. 21A_____

IN THE

Supreme Court of the United States

WHOLE WOMAN'S HEALTH; ALAMO CITY SURGERY CENTER, P.L.L.C. D/B/A ALAMO WOMEN'S REPRODUCTIVE SERVICES; BROOKSIDE WOMEN'S MEDICAL CENTER, P.A. D/B/A BROOKSIDE WOMEN'S HEALTH CENTER AND AUSTIN WOMEN'S HEALTH CENTER; HOUSTON WOMEN'S CLINIC; HOUSTON WOMEN'S REPRODUCTIVE SERVICES; PLANNED PARENTHOOD CENTER FOR CHOICE; PLANNED PARENTHOOD OF GREATER TEXAS SURGICAL HEALTH SERVICES; PLANNED PARENTHOOD SOUTH TEXAS SURGICAL CENTER; SOUTHWESTERN WOMEN'S SURGERY CENTER; WHOLE WOMEN'S HEALTH ALLIANCE; ALLISON GILBERT, M.D.; BHAVIK KUMAR, M.D.; THE AFIYA CENTER; FRONTERA FUND; FUND TEXAS CHOICE; JANE'S DUE PROCESS; LILITH FUND, INCORPORATED; NORTH TEXAS EQUAL ACCESS FUND; REVEREND ERIKA FORBES; REVEREND DANIEL KANTER; MARVA SADLER,

Applicants,

v.

JUDGE AUSTIN REEVE JACKSON; PENNY CLARKSTON; MARK LEE DICKSON; STEPHEN BRINT CARLTON; KATHERINE A. THOMAS; CECILE ERWIN YOUNG; ALLISON VORDENBAUMEN BENZ; KEN PAXTON,

Respondents.

EMERGENCY APPLICATION TO JUSTICE ALITO FOR WRIT OF INJUNCTION AND, IN THE ALTERNATIVE, TO VACATE STAYS OF DISTRICT COURT PROCEEDINGS

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TO THE HONORABLE SAMUEL A. ALITO, JR., ASSOCIATE JUSTICE OF THE SUPREME COURT AND CIRCUIT JUSTICE FOR THE FIFTH CIRCUIT:

Nearly fifty years ago, this Court held that Texas could not ban abortion prior to viability. *Roe v. Wade*, 410 U.S. 113 (1973). Yet, absent intervention from this Court, in less than two days, on Wednesday, September 1, Texas will do precisely that. This new Texas law will ban abortion starting at six weeks of pregnancy, which is indisputably prior to viability and before many people even know they are pregnant. Senate Bill 8, 87th Leg., Reg. Sess. (Tex. 2021) ("S.B. 8" or the "Act"). As such, it unquestionably contravenes this Court's precedent, including *Roe*, which the State of Texas concedes is binding. Indeed, as an amicus in *Dobbs v. Jackson Women's Health Organization*, No. 19-1392 (pet. for cert. granted May 17, 2021), Texas asked this Court to *overrule* its precedent in order to uphold the fifteen-week abortion ban at issue in that case. *See, e.g.*, Br. for the States of Texas, et al. as Amici Curiae in Supp. of Pet'rs, *Dobbs v. Jackson Women's Health Org.*, No. 19-1392, 2021 WL 3374343 (U.S. July 29, 2021).

Despite this Court's precedent, and the clear harm that will occur in less than two days, the U.S. Court of Appeals for the Fifth Circuit entered an indefinite administrative stay of all district-court proceedings in Applicants' challenge to S.B. 8; vacated the preliminary-injunction hearing that had been scheduled for August 30; denied Applicants' motion to expedite Respondents' interlocutory appeal; and denied an injunction pending appeal. Absent relief from this Court, the court of appeals' orders will prevent the district court from ruling on Applicants' request for emergency injunctive relief in a meaningful timeframe, allowing Texas to ban abortion beginning

at six weeks of pregnancy before this Court considers the question presented in *Jackson Women's Health Organization*.

If permitted to take effect, S.B. 8 would immediately and catastrophically reduce abortion access in Texas, barring care for at least 85% of Texas abortion patients (those who are six weeks pregnant or greater) and likely forcing many abortion clinics ultimately to close. Patients who can scrape together resources will be forced to attempt to leave the state to obtain an abortion, and many will be delayed until later in pregnancy. The remaining Texans who need an abortion will be forced to remain pregnant against their will or to attempt to end their pregnancies without medical supervision.

This obvious and immediate harm is precisely S.B. 8's intent. In an attempt to insulate this patently unconstitutional law from federal judicial review prior to enforcement, the Texas Legislature barred government officials—such as local prosecutors and the health department—from directly enforcing S.B. 8's terms. Instead, the Act deputizes private citizens to enforce the law, allowing "[a]ny person" who is not a government official to bring a civil lawsuit against anyone who provides an abortion in violation of the Act, "aids or abets" such an abortion, or merely intends to do so. S.B. 8 § 3 (adding Tex. Health & Safety Code § 171.208). These civil suits are permitted regardless of whether the person suing has any connection to the abortion, and a successful S.B. 8 claimant is entitled to at least $10,000 in "statutory damages" per abortion, plus mandated injunctions preventing the person sued from providing or assisting future abortions, and costs and attorney's fees. *Ibid.*

At bottom, the question in this case is whether—by outsourcing to private individuals the authority to enforce an unconstitutional prohibition—Texas can adopt a law that allows it to "do precisely that which the [Constitution] forbids." *Terry v. Adams*, 345 U.S. 461, 469–70 (1953) (striking down a Texas law attempting to insulate white-only political primaries from federal court review). The answer to that question must be no. This Court should grant relief to block Texas's flagrant defiance of this Court's clearly established constitutional precedent. In so doing, it should make clear that the Fifth Circuit's extraordinary decision to administratively stay all proceedings in the district court just days before that court was set to rule on Applicants' fully briefed preliminary injunction motion was an abuse of discretion, as was its decision to deny an injunction pending appeal and Applicants' request to expedite that appeal. Accordingly, Applicants ask that the Court issue an injunction preventing enforcement of S.B. 8 pending appeal and disposition of a petition for certiorari to this Court.

In the alternative, Applicants urge the Court to provide other relief to ensure that the district court may rule on their pending motions for a temporary restraining order/preliminary injunction and class certification before an irreparable deprivation of constitutional rights occurs. Specifically, Applicants request that the Court (1) vacate the Fifth Circuit's administrative stay of the district-court proceedings as to Respondent Mark Lee Dickson, who is not a government official, has never claimed sovereign immunity, and has no right to an immediate interlocutory appeal from an order denying sovereign immunity, and (2) vacate the district court's stay of its own

proceedings as to the remaining Respondents, who are all government officials with specific authority to enforce compliance with S.B. 8, because the district court incorrectly concluded that the notice of appeal necessarily divested it of jurisdiction to issue an order maintaining the status quo and preventing irreparable harm. In lieu of this course, the Court could vacate the district-court order denying the motions to dismiss and remand this case to the Fifth Circuit with instructions to dismiss the appeal from that order as moot. Finally, if the Court needs additional time to consider this Application, it should enter appropriate interim relief.

While the relief requested will maintain the status quo ante and protect the constitutional rights of countless Texans, Respondents will suffer no harm from an injunction pending appeal or vacatur of the stays. One of the Respondents is a private individual sued by Applicants based on his threats to enforce S.B. 8 against them. He has no colorable claim to sovereign immunity or other ground for interlocutory appeal. The remaining Respondents are a county clerk and a state judge sued in their official capacities and on behalf of putative defendant classes of similarly situated clerks and judges, who are integral to S.B. 8's private enforcement scheme, as well as state agency officials who have authority to enforce collateral penalties against Applicants for violating S.B. 8. The district court properly rejected their assertions of sovereign immunity. In any event, given that Applicants' motions for class certification and preliminary injunction require no further briefing from Respondents in the district court, delaying their opportunity to seek appellate review by mere days while the district court considers those motions would impose no burden on them.

DECISIONS BELOW

The Fifth Circuit's order denying Applicants' emergency motion for an injunction pending appeal and emergency motion to vacate the stays of the district court's proceedings, App.1–2, is unreported. The Fifth Circuit's order granting an administrative stay of the district court proceedings and denying Applicants' emergency motion to expedite the appeal, App.4–5, is unreported. The district court's order granting in part and denying in part the motion to stay, App.6–7, is unreported. The district court's order denying the motions to dismiss, App.8–58, is available at 2021 WL 3821062.

JURISDICTION

The district court denied Respondents' motions to dismiss on August 25, 2021. Respondents filed a notice of appeal the same day. *See P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993). Respondents' appeal is pending in the Fifth Circuit. This Court's jurisdiction is invoked under 28 U.S.C. §§ 1651, 1254.

STATEMENT

A. Senate Bill 8

S.B. 8 provides that "a physician may not knowingly perform or induce an abortion . . . if the physician detect[s] a fetal heartbeat," a term that the Act defines to include even embryonic cardiac activity that appears at approximately six weeks in pregnancy. S.B. 8 § 3 (adding Tex. Health & Safety Code § 171.204(a)–(b));[1]

[1] Hereinafter, citations to S.B. 8 § 3 are to the newly added provisions of the Texas Health & Safety Code.

App.10. The Act also makes it unlawful for any person to "aid[] or abet[]" an abortion prohibited by the law, including by helping to pay for a prohibited abortion, or even merely to intend to provide or assist with a prohibited abortion. S.B. 8 § 171.208(a)(2), (b)(1); App.10. Six weeks is so early in pregnancy that many patients do not yet realize they are pregnant, App.91, 157, and it is indisputably prior to viability, App.90–91, a point in pregnancy at which the State may not prohibit a patient from deciding whether to end her pregnancy, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 879 (1992); *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2120 (2020) (plurality opinion); *id.* at 2135 (Roberts, C.J., concurring). If permitted to take effect, S.B. 8 would immediately and irreparably decimate abortion access in Texas, barring care for at least 85% of Texas abortion patients (those who are six weeks pregnant or greater) and likely forcing many abortion clinics to ultimately close. App.89, 105, 115–16, 124–24, 131, 148, 155, 158, 172, 178. Patients who can scrape together resources will be forced out of state to obtain abortion care, by one estimate increasing the average one-way drive to a health center by 20 times, from 12 miles to 248—almost 500 miles round trip.[2]

In this respect, S.B. 8 is like other unconstitutional laws that states have enacted in recent years to ban abortion before viability. Every single federal appellate

[2] Elizabeth Nash et al., *Impact of Texas' Abortion Ban: A 20-Fold Increase in Driving Distance to Get an Abortion*, Guttmacher Inst. (Aug. 4, 2021), https://www.guttmacher.org/article/2021/08/impact-texas-abortion-ban-20-fold-increase-driving-distance-get-abortion.

court to consider a law prohibiting abortion before viability, with or without exceptions, has struck it down as a violation of the Fourteenth Amendment.[3]

But S.B. 8 differs from those bans in that it bars executive-branch officials—such as local prosecutors or the health department—from enforcing it directly. S.B. 8 §§ 171.207(a), 171.208(a). Instead, S.B. 8 may be enforced only by state courts via civil-enforcement actions that "[a]ny person" can bring against anyone alleged to have violated the ban by performing or assisting with a prohibited abortion, or by intending to do so. *Id.* § 171.208(a). When a "violation" of the ban occurs, S.B. 8 requires state courts to issue an injunction to prevent further prohibited abortions from being performed, aided, or abetted. *Id.* § 171.208(b)(1). In addition, courts are required to award the person who initiated the enforcement action a minimum (there is no statutory maximum) of $10,000 per abortion, payable by the person who violated the Act. *Id.* § 171.208(b)(2).

At every turn, S.B. 8 attempts to replace normal civil-litigation rules and clearly established federal constitutional rules with distorted versions designed to maximize the abusive and harassing nature of the lawsuits and to make them impossible to fairly defend against. For example, S.B. 8 provides that persons sued under the Act could be forced into any of Texas's 254 counties to defend themselves,

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[3] *See, e.g.*, *MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 773 (8th Cir. 2015); *McCormack v. Herzog*, 788 F.3d 1017, 1029 (9th Cir. 2015); *Edwards v. Beck*, 786 F.3d 1113, 1117 (8th Cir. 2015) (per curiam); *Isaacson v. Horne*, 716 F.3d 1213, 1217 (9th Cir. 2013); *Women's Med. Pro. Corp. v. Voinovich*, 130 F.3d 187, 201 (6th Cir. 1997); *Jane L. v. Bangerter*, 102 F.3d 1112, 1114, 1117–18 (10th Cir. 1996); *Sojourner T v. Edwards*, 974 F.2d 27, 29, 31 (5th Cir. 1992); *Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 962 F.2d 1366, 1368–69, 1373 & n.8 (9th Cir. 1992).

and it prohibits transfer of the cases to any other venue without the parties' joint agreement. *Id.* § 171.210(b). S.B. 8 also states that a person sued under the Act may not point to the fact that the claimant already lost an S.B. 8 lawsuit against someone else on equally applicable grounds or that a court order permitted an abortion provider's conduct at the time when it occurred, if that court order was later overruled. *Id.* § 171.208(e)(3)–(5). And S.B. 8 imposes a draconian fee-shifting provision providing that, if an abortion provider or other person challenges S.B. 8 seeking declaratory or injunctive relief against its enforcement, that person and all of their lawyers can be held jointly and severally liable for the opposing party's attorney's fees and costs if any of these claims are dismissed for any reason. S.B. 8 § 4 (adding Tex. Civ. Prac. & Rem. Code § 30.022(a)–(b)).

As former Texas judges and legal scholars have observed, S.B. 8 "weaponizes the judicial system by exempting the newly created cause of action from the normal guardrails that protect Texans from abusive lawsuits and provide all litigants a fair and efficient process in our state courts."[4] As a result, even if abortion providers and others sued in S.B. 8 lawsuits ultimately prevailed in them—as they should in every case if only they could mount a fair defense—the threat of unlimited lawsuits against them will prevent them from continuing to provide constitutionally protected health care.

[4] Letter from Texas attorneys to Dade Phelan, Speaker of the Tex. House of Representatives (Apr. 28, 2021), *available at* https://npr.brightspotcdn.com/d5/51/a2eac3664529a017ade7826f3a69/attorney-letter-in-opposition-to-hb-1515-sb-8-april-28-2021-1.pdf.

B. The District Court Proceedings

On July 13, 2021, Applicants, who are plaintiffs in the district court, filed this case to challenge the Act's constitutionality. They named as defendants those officials whom the Texas Legislature made responsible for compelling compliance with S.B. 8: a state judge (Judge Austin Reeve Jackson) and a court clerk (Penny Clarkston), each on behalf of a putative defendant class of judges and clerks, respectively, who will be conscripted into enforcing S.B. 8 through actions in the courts where they serve. App.17. Applicants further named as a defendant Mark Lee Dickson, a private party whom Plaintiffs reasonably expect to file suit against those who violate the Act. App.18. Additionally, Applicants sued certain State licensing officials and the Attorney General of Texas (the "State Agency Respondents") because, although these officials cannot directly enforce the Act's ban on providing, aiding, or abetting abortions, they are authorized and required to bring administrative and civil-enforcement actions under other laws that are triggered by violations of S.B. 8. App.17–18; S.B. 8 § 171.207(a); *see also, e.g.*, Tex. Occ. Code § 164.055(a) (requiring the Texas Medical Board to "take an appropriate disciplinary action against a physician who violates . . . Chapter 171, Health and Safety Code").

Applicants filed a motion for summary judgment on all claims the same day they filed their lawsuit, roughly seven weeks before the Act's effective date. They supported their motion with 19 declarations, App.86–238, including declarations from every abortion provider plaintiff, App. 86–188. The providers testified that it would be impossible for them to continue to perform abortions after six weeks if S.B. 8 takes effect, in light of the extraordinary financial penalties and injunctions that S.B.

8 requires state-court judges to impose for any violation; the risk to their professional licenses; and the severe costs and burdens of defending themselves in S.B. 8 enforcement actions across the state of Texas even if they might ultimately prevail. App.94–95, 112, 115–16, 124, 131–32, 149, 158, 166, 172–73, 179, 185.

Applicants effected service quickly and, three days after filing suit and moving for summary judgment, they moved to certify the defendant classes of clerks and judges under Federal Rule of Civil Procedure 23(b)(1)(A). The district court subsequently entered a scheduling order that would have ensured full briefing by August 13.

All Respondents filed a motion to stay the district court proceedings beyond resolution of the motions to dismiss, which the district court judge denied. App.8–9. Respondents then filed their Rule 12(b)(1) motions to dismiss. The State Agency Respondents and state judge argued that they were entitled to sovereign immunity. App.22, 40. The county clerk claimed sovereign immunity solely by "adopting the arguments of her co-Defendants without further elaboration." App.40.

All government official Respondents, along with Respondent Dickson, also argued that Applicants lacked Article III standing to bring their claims, although their rationales diverged. In particular, Dickson contended that Applicants lacked standing as to him because he had not credibly threatened to bring an S.B. 8 enforcement action against them, and Dickson submitted declarations in which he attempted to distance himself from previous threats against Applicants, while acknowledging that he has personal knowledge of "countless" individuals prepared to

sue Plaintiffs for any perceived violation as soon as S.B. 8 takes effect. App.53–54, 242–43. The government officials argued in the aggregate that Plaintiffs lacked standing because they failed to plead an actual case or controversy, an imminent injury-in-fact, traceability, or redressability and that prudential standing requirements were not met. App.27.

C. The Fifth Circuit's Mandamus Order

On August 7, before Applicants even had an opportunity to respond to the motions to dismiss, Respondents Clarkston (the court clerk) and Dickson (the private individual) filed a petition for a writ of mandamus asking the court of appeals to "direct the district court to immediately dismiss the claims brought against Judge Jackson and Ms. Clarkston," on the ground that these officials were entitled to sovereign immunity. *In re: Penny Clarkston*, No. 21-50708, Pet. for Writ of Mandamus (5th Cir. Doc. No. 515969448) ("Mandamus Pet.") at 24. Notably, Judge Jackson and the other State Agency Respondents did not join the petition. Respondents Clarkston and Dickson also sought a stay of the district-court proceedings as to *all* Respondents, and argued that, if Applicants "need relief before September 1[,] they should move for a preliminary injunction rather than forcing the case to final judgment within seven weeks." *Id.* at 5. Given the delay caused by Respondents' writ of mandamus request, Plaintiffs immediately filed a motion for a temporary restraining order and preliminary injunction against all Respondents, D. Ct. ECF No. 53, mirroring their previously filed motion for summary judgment.

The district court judge subsequently submitted a letter to the Fifth Circuit panel in the mandamus action. He assured the court of appeals that he would rule on

Respondents' jurisdictional defenses before resolving the merits of the case. App.239–40. In light of Applicants' filing of a preliminary injunction request, the judge also told the Fifth Circuit that, absent further guidance from the court of appeals, he would enter a new briefing schedule. That briefing schedule called first for completion of briefing on the motions to dismiss, concurrent with briefing on the preliminary-injunction request, and it provided for completion of class-certification briefing by late August. He indicated he would hold a hearing on the preliminary-injunction motion on August 30. The district court judge then entered a briefing schedule consistent with what he had laid out in his letter to the Fifth Circuit.

On August 13, 2021, the court of appeals denied the mandamus petition, stating:

> We conclude that the essence of what petitioners request is that this court alter the schedule established by the district court for briefing. We interpret the district court's statement to be that an order on the motion to dismiss will be issued no later than any order as to summary judgment. We do not find in petitioners' arguments a basis to grant the extraordinary relief of a writ of mandamus simply to direct the timing of briefing.

App.59.

D. Further Proceedings

On remand, Respondent Clarkston subpoenaed eleven of the Applicants and their staff members to testify at the preliminary-injunction hearing, D. Ct. ECF No. 72, which in turn led the district court to convert the proceeding to an evidentiary hearing. Applicants made clear that they believed the case could be resolved without an evidentiary hearing.

On August 25, 2021, the district court denied Respondents' motions to dismiss in a consolidated order. App.8. In a detailed opinion, the district court rejected Respondents' arguments concerning sovereign immunity, standing, and other Article III issues. App.21–57. At that time, briefing on Applicants' motion for a preliminary injunction was complete, and Respondents had responded to Applicants' motion for defendant class certification. D. Ct. ECF No. 72, at 4–6.

Respondents appealed the denial of the motion to dismiss the same day it was decided, and simultaneously filed a motion in the district court asking it to stay the proceedings and vacate the preliminary-injunction hearing. Before the district court ruled on that motion, all Respondents also filed on August 27 an emergency motion in the Fifth Circuit to stay district-court proceedings pending appeal. 5th Cir. Doc. No. 515997262. Shortly thereafter, the district court granted a stay of the proceedings as to Respondents Jackson and Clarkston and the State Agency Respondents, based on their argument that the interlocutory appeal on sovereign immunity divested the court of jurisdiction, but it denied a stay as to Respondent Dickson and ordered the preliminary injunction hearing to proceed as scheduled with respect to the claims against the latter. App.6–7.

Later in the day, Plaintiffs filed an opposition to the Fifth Circuit motion to stay, combined with a motion to dismiss Respondent Dickson's appeal. 5th Cir. Doc. No. 515998618. Plaintiffs also filed an emergency motion to expedite the appeal. 5th Cir. Doc. No. 515997650.

That evening, the court of appeals entered a temporary administrative stay of all district court proceedings, including the preliminary-injunction hearing. App.5. Although Respondent Dickson had asked the court by letter to permit him to respond by 12 p.m. on Sunday, the Fifth Circuit denied Applicants' motion to expedite the appeal and directed Respondent Dickson to file a combined response to Applicants' motion to dismiss his appeal and reply to Applicants' opposition to his emergency stay motion by 9 a.m. on August 31, the day after the preliminary injunction hearing was scheduled to take place and the day before S.B. 8 takes effect. App.5.

On August 29, 2021, Applicants filed emergency motions with the Fifth Circuit asking that the court of appeals (1) issue an injunction pending appeal; (2) vacate its administrative stay of the district-court proceedings as to Respondent Dickson; (3) vacate the district court's own stay of its proceedings as to the government official Respondents; and (4) in the alternative to vacatur of the stays, vacate the underlying district court order denying the motions to dismiss. Later that day, the Fifth Circuit denied all of Applicants' motions without explanation. App.2.

ARGUMENT

I. ISSUANCE OF AN INJUNCTION IS NECESSARY TO MAINTAIN CLEARLY ESTABLISHED LEGAL RIGHTS AND TO PREVENT IRREPARABLE HARM

The Circuit Justices of this Court have authority to issue injunctions under the All Writs Act, 28 U.S.C. § 1651(a), when applicants' claims "are likely to prevail," the denial of injunctive relief "would lead to irreparable injury," and "granting relief would not harm the public interest." *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 65–66 (2020) (per curiam) (granting emergency injunctive relief to prevent

likely constitutional violations from state law); *see also Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regul. Comm'n.*, 479 U.S. 1312, 1312 (1986) (Scalia, J., in chambers) (injunctive relief under All Writs Act appropriate where the legal rights at issue are "indisputably clear," the circumstances are "critical and exigent," and injunctive relief is "necessary or appropriate in aid of the Court's jurisdiction" (citations and alterations omitted)).

An application for an injunction may be granted without serving "as an expression of the Court's views on the merits," *Little Sisters of the Poor Home for the Aged v. Sebelius*, 571 U.S. 1171, 1171 (2014) (mem.), to prevent enforcement of a potentially unconstitutional statute. The Court has thus granted emergency injunctions pending appeal when there is a "fair prospect" of reversal and a likelihood of "irreparable harm . . . from the denial of equitable relief." *Lucas v. Townsend*, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers); *see also, e.g.*, *Wheaton Coll. v. Burwell*, 134 S. Ct. 2806, 2807 (2014) (granting injunction enjoining enforcement of challenged provisions of the Affordable Care Act "pending final disposition of appellate review"); *Roman Cath. Diocese*, 141 S. Ct. at 66 (granting injunction enjoining enforcement of executive order limiting attendance at religious services).

Applicants satisfy the standard for an emergency injunction. First, this appeal presents an indisputably clear case for relief. The court of appeals has blocked the district court from taking prompt action to enjoin enforcement of a law that violates nearly fifty years of this Court's precedent, and it has refused to expedite consideration of the pending appeal—leaving the rights of Texas women to obtain a

legal abortion in jeopardy for months or more. In so doing, the court of appeals will be the first in the nation to allow a pre-viability abortion ban to take effect—and it will do so while the question whether all pre-viability prohibitions on elective abortions are unconstitutional is currently pending before this Court in *Dobbs v. Jackson Women's Health Organization*, No. 19-1392. This Court's intervention is needed to protect this Court's ability to meaningfully decide that question.

Second, Applicants' request is both extraordinarily time-sensitive and solely within this Court's power to redress. In just two days, on Wednesday, September 1, pregnant Texans will be prohibited from exercising fundamental rights consistently protected by this Court. Yet, due to an unusual procedural posture below and the Fifth Circuit's refusal either to safeguard Texans' constitutional rights itself or to permit the district court to rule on Applicants' fully briefed preliminary-injunction motion, this Court's injunctive powers under the All Writs Act are the last resort.

Third, the balance of equities weighs heavily in favor of maintaining the status quo by enjoining S.B. 8, because irreparable harm will flow from the deprivation of fundamental freedoms protected by the Constitution. In contrast, Respondents will face no harm from maintaining the status quo while their appeal proceeds. Granting an injunction would simply mean that abortion will be legal in Texas as it has been since *Roe v. Wade* was decided nearly fifty years ago, subject to all of Texas's pre-existing abortion regulations other than S.B. 8's outright six-week ban. This Court's longstanding precedent and the public interest cannot be served by allowing enforcement of a constitutionally foreclosed statute.

Fourth and finally, injunctive relief is appropriate in aid of the Court's jurisdiction. Given the short duration of pregnancy and the typical length of appellate proceedings, the Court will lose the opportunity to provide meaningful relief to Texas residents seeking abortion care on September 1 if it does not enter an injunction now.

A. This Court's Precedent Indisputably Precludes Enforcement of S.B. 8

There is no dispute that S.B. 8 is facially unconstitutional under this Court's precedent. S.B. 8 bans abortion in Texas if there is detectable cardiac activity, S.B. 8 § 171.204; *see id.* § 171.201(1), which occurs early in pregnancy and months prior to viability, *see supra* pp. 5–7. An unbroken line of this Court's precedents through the last Term establishes that "[b]efore viability, the State's interests are not strong enough to support a prohibition of abortion." *Casey*, 505 U.S. at 846; *see also June Med. Servs., L.L.C.*, 140 S. Ct. at 2154 (Alito, J., dissenting) ("Unless *Casey* is reexamined . . . the test it adopted should remain the governing standard."); *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2343 (2016), *as revised* (June 27, 2016) (Alito, J., dissenting) ("Under our cases, petitioners must show that the [statutory] requirements impose an 'undue burden' on women seeking abortions."). Here, the bill's proponents do not even deny that it runs afoul of this Court's precedent. To the contrary, Texas has acknowledged that pre-viability bans cannot survive this Court's established precedents. Brief for the States of Texas, et al. as Amici Curiae in Support of Petitioners, at 31–33, Dobbs v. Jackson Women's Health Org., No. 19-1392, 2021 WL 3374343, at *31–33 (U.S. July 29, 2021) (arguing that

the Supreme Court should overturn its precedent in order to uphold pre-viability abortion bans).

This Court has recently granted injunctions where it has determined there would otherwise be constitutional harm. Last Term, the Court granted an emergency injunction to prevent constitutional injury from the restrictions on religious gatherings imposed by New York's COVID-19 executive orders. *Roman Cath. Diocese*, 141 S. Ct. at 65–67. In that case, this Court granted an "emergency application" for "immediate relief" to prevent a state order curtailing in-person religious gatherings from going into effect. *Id.* at 65–66. Recognizing that "[s]temming the spread of COVID–19 is unquestionably a compelling interest," *id.* at 67, the Court nonetheless enjoined the executive order, finding it "a drastic measure" that risked interference with constitutional rights, *id.* at 68. This Court granted similar injunctions with respect to challenged provisions of the Affordable Care Act. *See Wheaton Coll.*, 134 S. Ct. at 2807 (granting application enjoining enforcement of challenged provisions of the Affordable Care Act to certain non-profits with religious affiliation pending appellate review on the merits); *Little Sisters of the Poor Home for the Aged*, 571 U.S. at 1171 (same).

The Court also has granted injunctions to prevent violation of federal law. In *Lucas*, Justice Kennedy considered whether to enjoin a Georgia Board of Education election that was about to proceed without preclearance from the Attorney General pursuant to Section 5 of the Voting Rights Act. 486 U.S. at 1302. A panel of the court of appeals had "declined to issue the injunction prayed for by the applicants,"

notwithstanding the lack of preclearance, and the applicants moved this Court for emergency relief. *Id.* at 1304. Observing that the case presented "substantial[] . . . federal questions" and that the lower court's decision to allow the election to go forward was "problematic under our precedents," Justice Kennedy "concluded that four Members of the Court would likely vote to note probable jurisdiction" and issued an injunction. *Id.* at 1304–05.

Similarly, in *Hollingsworth v. Perry*, 558 U.S. 183 (2010), this Court acted on a request to enjoin live streaming of proceedings over California's Proposition 8 banning same-sex marriages. The district court had amended a rule prohibiting video-streaming of the trial to allow for live broadcast without providing an appropriate public notice and comment period as required by federal law, *id.* at 192–93, but the Ninth Circuit failed to redress the potential violation due to procedural and technical hurdles, *see id.* at 188–89. Noting the significance of the issue and the potential violation of federal law, this Court intervened and granted a stay of the district court's order. *Id.* at 199.

Despite this Court's precedent squarely foreclosing a six-week abortion ban, Respondents argued below that the only way abortion providers and those who provide practical and financial assistance to abortion patients can challenge this flagrantly unconstitutional law is by violating it, subjecting themselves to what one Respondent acknowledged were "ruinous" penalties that no "rational" abortion provider would risk, App.242; and then, once they are haled into court to defend themselves in enforcement proceedings, raise federal constitutional claims as

affirmative defenses, *see, e.g.*, App.27, 37, 53–54; D. Ct. ECF No. 49 at 9. But as this Court has explained, an "enforcement action is not a prerequisite to challenging the law." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014); *see also MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007) (that plaintiffs have not yet "violate[d] the law . . . does not eliminate Article III jurisdiction"); *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) ("It is not necessary that the plaintiff first expose himself to actual arrest or prosecution to be entitled to challenge the statute that he claims deters the exercise of his constitutional rights." (cleaned up)); *Doe v. Bolton*, 410 U.S. 179, 188 (1973) ("The physician-appellants . . . should not be required to await and undergo a criminal prosecution as the sole means of seeking relief."). Moreover, being forced to defend potentially numerous lawsuits, filed anywhere in the state, itself constitutes irreparable harm; indeed, even if Applicants ultimately prevail in those lawsuits, they will never recover the time and resources required to defend them, and the threat of those lawsuits will chill Plaintiffs' constitutionally protected conduct immediately if S.B. 8 takes effect. *See Perez v. Ledesma*, 401 U.S. 82, 85 (1971); *id.* at 117–18 (Brennan, J., concurring in part and dissenting in part); *Dombrowski v. Pfister*, 380 U.S. 479 (1965).

Furthermore, notwithstanding the government-official Respondents' assertions of sovereign immunity, this challenge falls squarely within the *Ex parte Young*, 209 U.S. 123 (1908), doctrine, which involves a "straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*,

535 U.S. 635, 645 (2002) (citation omitted). Here, Applicants allege that enforcing S.B. 8 would be an ongoing violation of federal law, and they seek solely prospective equitable relief blocking such enforcement. App.38, 51. Applicants have also named as defendants the Attorney General of Texas, who is the State's chief law-enforcement officer, as well as the government officials most immediately connected to S.B. 8's private-enforcement mechanism: (1) a putative defendant class of clerks, who will docket S.B. 8 petitions for enforcement and issue summonses compelling those sued to appear on pain of default judgment, and (2) a putative defendant class of judges, who will oversee enforcement actions and issue S.B. 8's mandatory penalties. Additionally, Applicants named state agency heads who retain authority to enforce other state laws against Applicants premised on violations of S.B. 8. Applicants have also named Respondent Dickson, a private individual who has threatened enforcement actions under S.B. 8 and as to whom no conceivable sovereign immunity defense applies.

Further, as the district court aptly concluded, App.27–33, 42–51, 53–57, Applicants readily satisfy the requirements for standing. First, Applicants have an imminent injury because, as in *Susan B. Anthony List*, the challenged statute allows "[a]ny person" to "file a complaint" "alleging a violation" of the statute, meaning that "there is a real risk of complaints from, for example, political opponents." 573 U.S. at 152, 164; *see* S.B. 8 § 171.208(a). Second, the Respondents will each contribute to Applicants' harm by (1) initiating S.B. 8's direct enforcement actions (private Respondent Dickson), (2) opening the enforcement actions in the dockets and issuing

the summonses that compel people sued under S.B. 8 to respond (clerks), (3) issuing the penalties mandated by S.B. 8 (judges), or (4) indirectly enforcing S.B. 8 through other laws governing the state licenses or professional practice of Applicants and their staff (agency heads). App.17–18, 23–24, 27–30, 44–47, 53–61. And third, equitable relief would redress Plaintiffs' harm by blocking S.B. 8's enforcement.

Accordingly, the district court correctly held that neither Article III jurisdiction nor sovereign immunity bars declaratory and injunctive relief to prevent enforcement of a law that is in clear violation of this Court's precedent.

B. Exigent Circumstances Warrant Immediate and Extraordinary Relief

Notwithstanding the clear conflict between S.B. 8 and Supreme Court precedent, and the lack of merit to any of Respondents' immunity or standing arguments, the proceedings below have left Applicants no avenue other than to seek the Circuit Justice's urgent intervention. In short, recent events in the district court and the Fifth Circuit have ground Applicants' efforts to obtain relief to a halt, and without an emergency injunction it is likely that a six-week ban clearly foreclosed by precedent will take effect on Wednesday, September 1 to the irreparable harm of the recognized constitutional rights of Texans.

Applicants brought this case nearly seven weeks ago, seeking a declaration "that S.B. 8 is unconstitutional and invalid" and that the Respondents may not burden the constitutional rights of Applicants and their patients. D. Ct. ECF No. 19, at 49. As discussed, Applicants also moved for a preliminary injunction to maintain the status quo among the parties prior to the entry of final judgment. D. Ct. ECF No. 53. The parties completed briefing on the preliminary injunction, and the district

court set a hearing on the motion for August 30—two days before the law was set to take effect. But after the district court denied Respondents' motions to dismiss, Defendants immediately appealed to the Fifth Circuit. On Respondents' motion, the district court entered a stay pending appeal as to the proceedings against Judge Jackson, Ms. Clarkston, and the State Agency Respondents but denied the stay as to Dickson. App.6–7. The Fifth Circuit then entered a blanket administrative stay—of indefinite duration—for all district-court proceedings, including the preliminary-injunction hearing, and denied Applicants' motion to expedite the appeal. App.4–5. Subsequently, the Fifth Circuit denied without explanation Applicants' motion to vacate the stays and issue an injunction pending appeal. App.1–2. Accordingly, Applicants have been functionally deprived of an opportunity to obtain an injunction of S.B. 8 prior to its effective date.

The substantive result is unacceptable: absent an injunction, Applicants and thousands of other Texans will be stripped of their fundamental constitutional rights on Wednesday without ever receiving a decision on their fully briefed request for a preliminary injunction. Unlike emergency motions before this Court seeking "judicial intervention that has been withheld by lower courts," *Ohio Citizens for Responsible Energy, Inc.*, 479 U.S. at 1312, Applicants here have not even had their full day in court and yet will be irreparably deprived of their recognized constitutional rights without this Court's intervention.

C. Absent an Emergency Injunction, Applicants Will Face Irreparable Harm

Without an injunction, a ban on abortion months before viability will take effect across Texas on September 1 in flagrant violation of longstanding precedent. *See Casey*, 505 U.S. at 879 ("[A] State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability."). "The loss of [constitutional] freedoms . . . unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (threatened violation of First Amendment rights); 11A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane Federal Practice & Procedure § 2948.1 (3d ed. 2013) ("When an alleged deprivation of a constitutional right is involved, . . . most courts hold that no further showing of irreparable injury is necessary."). This Court has recognized as much when considering emergency injunctive relief. *Roman Cath. Diocese*, 141 S. Ct. at 67 (violations of constitutional protections for "even minimal periods of time" will cause irreparable harm (citing *Elrod*, 427 U.S. at 373)). Here, the Fifth Circuit has left Applicants and Texans in limbo. There is no telling when the Fifth Circuit will decide Applicants' motion to dismiss Respondent Dickson's improper interlocutory appeal, much less resolve the other Respondents' collateral-order appeal on sovereign immunity. But beginning in less than two days, Texans will be without most access to time-sensitive abortion care for months or longer as the appellate process runs its course. Moreover, Respondents have not identified any cognizable harm to the public interest that would occur if the status quo of lawful pre-viability abortion in Texas were preserved pending judicial resolution of Applicants' challenge. Given the constitutional questions at play, the

equities weigh strongly in favor of granting an injunction to maintain the status quo in this case. *See Lucas*, 486 U.S. at 1304.

D. Injunctive Relief Is Proper as to All Respondents

Finally, to the degree that this Court might look to 42 U.S.C. § 1983 in considering whether to use its authority under the All Writs Act to enter an injunction pending appeal, Section 1983 expressly permits injunctive relief "in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity" where "a declaratory decree was violated or declaratory relief was unavailable." 42 U.S.C. § 1983. This limitation does not preclude injunctive relief against either Respondent Clarkston (the county clerk) or Jackson (the state-court judge).

First, Clarkston is not a "judicial officer" subject to this limitation. Although Section 1983 does not define "judicial officer," the term is common in the U.S. Code, and its use in those statutes consistently refers to judges and other jurists—not all court employees, such as clerks. *See, e.g.*, 18 U.S.C. § 3156(a)(1); 18 U.S.C. § 3172(1); 28 U.S.C. §§ 480, 482; 5 U.S.C. App. 4 § 103(c); 5 U.S.C. App. 4 § 109(8), (10). Federal Rules use "judicial officer" in the same way. *See, e.g.*, Fed. R. Crim. P. 1(b)(4)(10); 18 U.S.C. § 3041; Fed. R. Bankr. P. 9001(3), (4). Congress knew how to make the amendment to Section 1983 applicable to individuals who were not judges: it could have used "court employee" or "judicial employee" as it had done before. But Congress chose not to do so. This Court likewise has not treated "judicial officer" as synonymous with clerks or other courthouse staff. *See Osterneck v. Ernst & Whinney*, 489 U.S.

169, 179 (1989) (a late-filed notice of appeal can be deemed timely if the party "has received specific assurance by a judicial officer").

Moreover, Congress added Section 1983's limitation on injunctive relief against "judicial officers" for the narrow purpose of modifying this Court's decision in *Pulliam v. Allen*. S. Rep. No. 104-366, at 36–37 (1996). In *Pulliam*, this Court used "judicial officer" and "judge" interchangeably. *See, e.g.*, 466 U.S. 522, 537 (1984). Accordingly, the Senate Report explained that the amendment to Section 1983 limiting the availability of injunctive relief would modify *Pulliam*'s effect as to "judges." S. Rep. No. 104-366, at 37.

Second, injunctive relief—even if confined to the scope of what is available under Section 1983—is warranted here as to Respondent Jackson as well, because declaratory relief has become "unavailable." 42 U.S.C. § 1983. "Unavailable" means the "status or condition of not being available." *See* Black's Law Dictionary 1768 (10th ed. 2014); *Schindler Elevator Corp. v. United States ex rel. Kirk*, 563 U.S. 401, 407 (2011) (providing that courts look to the ordinary meaning of a term left undefined by statute). In turn, "the ordinary meaning of the word 'available' is 'capable of use for the accomplishment of a purpose,' and that which 'is accessible or may be obtained." *Ross v. Blake*, 578 U.S. 1174, 1858 (2016) (quoting Webster's Third New International Dictionary 150 (1993)). Here, where all proceedings in the district court, including those against Respondent Jackson, have been stayed indefinitely while Respondents' appeal of the motion to dismiss proceeds, it is plain that

declaratory relief against Respondent Jackson is not capable of "be[ing] obtained." *Ross*, 578 U.S. at 1858.

E. An Injunction Is Appropriate in Aid of the Court's Jurisdiction

Under the circumstances of this case, entry of an injunction is appropriate in aid of the Court's jurisdiction. *See* 28 U.S.C. § 1651(a). Absent an immediate injunction, the Court would be powerless to safeguard the constitutional rights of Texas residents impacted by S.B. 8 when it takes effect less than two days from now. By the time this Court had the opportunity to review the court of appeals' judgment, individuals seeking abortion care on September 1 would no longer be eligible for such care. *See Roe*, 410 U.S. at 125 ("[W]hen, as here, pregnancy is a significant fact in the litigation, the normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete."). Although the case would not technically be moot, the Court's ability to provide meaningful relief to those seeking abortions in the interim would be lost. *See generally Nken v. Holder*, 556 U.S. 418, 421 (2009) ("It takes time to decide a case on appeal. . . . [A]nd if a court takes the time it needs, the court's decision may in some cases come too late for the party seeking review.").

II. IN THE ALTERNATIVE, VACATUR OF THE LOWER COURTS' STAYS IS WARRANTED SO THAT THE DISTRICT COURT CAN RULE ON A MOTION FOR PRELIMINARY RELIEF ADEQUATE TO MAINTAIN THE STATUS QUO

In the alternative, this Court should vacate the stays below and remand for the district court to consider the pending motions for a temporary restraining order, preliminary injunction, and class certification, none of which require any further briefing by Respondents. D. Ct. ECF No. 60.

The full Court or Circuit Justice has jurisdiction to vacate a stay by a court of appeals, including one characterized as an "administrative stay." *Off. of Pers. Mgmt. v. Am. Fed'n of Gov't Emps.*, 473 U.S. 1301, 1306 (1985) (Burger, C.J., in chambers). That authority exists "regardless of the finality of the judgment below." *W. Airlines, Inc. v. Int'l Brotherhood of Teamsters*, 480 U.S. 1301, 1305 (1987) (O'Connor, J., in chambers). The full Court or Circuit Justice also has jurisdiction to vacate a stay entered by a district court. *See Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2320 (2021) (per curiam) (directly vacating a district court's stay of judgment pending appeal).

This Court may vacate a stay of the court of appeals if the lower court "clearly and demonstrably erred in its application of accepted standards." *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 134 S. Ct. 506, 506 (2013) (Scalia, J., concurring) (quotation marks and citation omitted); *see also Coleman v. Paccar Inc.*, 424 U.S. 1301, 1304 (1976) (Rehnquist, J., in chambers) (holding that Court may vacate a stay where "the rights of the parties . . . may be seriously and irreparably injured by the stay"; "the court of appeals is demonstrably wrong in its application of accepted standards in deciding to issue the stay"; and the case "could and very likely would be reviewed here upon final disposition in the court of appeals").

A. The Stays Will Seriously and Irreparably Harm the Rights of Applicants and Pregnant Texans

As discussed *supra*, the stays will cause immediate and irreparable harm to Applicants and patients by precluding the district court from issuing effective relief

to block enforcement of Texas's unconstitutional abortion ban. In just two days, approximately 85–90% of Texans who seek abortions, *see* App.89, 105, 115–16, 124, 131, 148, 155, 172, 178, and every Texan who seeks an abortion after six weeks' pregnancy, will be stripped of a constitutional right long recognized by this Court. This itself is irreparable harm. *See supra* Part I.C.

Further, the serious and irreparable deprivation of constitutional rights will continue indefinitely unless this Court lifts the stays, because the district court's proceedings are stayed until the Fifth Circuit: (1) at a minimum, decides whether to dismiss Respondent Dickson's appeal and deny him a stay; and (2) resolves the government officials' appeal, which it refused to expedite and which could last for months or longer).

B. In Refusing to Lift the Stays, the Fifth Circuit Erred in Its Application of Accepted Standards

1. The Fifth Circuit's refusal to lift the stays of proceedings against the government official Respondents misapplied the governing legal standards.

Although the filing of a notice of appeal generally "divests the district court of its control over those aspects of the case involved in the appeal," *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982) (per curiam), "it is well-settled that a court retains the power to grant injunctive relief to a party to preserve the status quo during the pendency of an appeal, even to this Court," *Haw. Hous. Auth. v. Midkiff*, 463 U.S. 1323, 1324 (1983) (Rehnquist, J., in chambers) (citing *Newton v. Consol. Gas Co.*, 258 U.S. 165, 177 (1932); *Merrimack River Sav. Bank v. Clay Ctr.*, 219 U.S. 527, 531–35 (1911); Fed. R. Civ. P. 62). Here, the status quo is that S.B. 8 has not taken

effect; Texans are permitted to exercise their constitutionally protected right to abortion as required by this Court's precedents. The Fifth Circuit should have lifted the stays to allow the district court to issue an order maintaining that status quo during the pendency of the appeal.

That is all the more true here where the stays will have the effect of upending the status quo, contravening the very purpose of a stay: to "preserv[e] rights during the pendency of an appeal . . . [and] ensur[e] that appellate courts can responsibly fulfill their role in the judicial process." *Nken*, 556 U.S. at 427 (citation omitted). Far from "suspend[ing] judicial alteration of the status quo," *Ohio Citizens for Responsible Energy, Inc.*, 479 U.S. at 1312, the Fifth Circuit's stay deprives the district court of its inherent authority to prevent the irreparable injuries that will certainly befall Texans starting this Wednesday.

Moreover, the Fifth Circuit erred in its rigid application of the divestiture doctrine. As this Court has explained, "[o]nly Congress may determine a lower federal court's subject-matter jurisdiction." *Hamer v. Neighborhood Hous. Servs. of Chi.*, 138 S. Ct. 13, 17 (2017) (citations omitted); *see* U.S. Const. art. III, § 1. The divestiture doctrine "is a judge made rule originally devised in the context of civil appeals to avoid confusion or waste of time resulting from having the same issues before two courts at the same time." *United States v. Claiborne*, 727 F.2d 842, 850 (9th Cir. 1984). "[B]ecause the judge-made divestiture rule isn't based on a statute, it's not a hard-and-fast jurisdictional rule." *United States v. Rodriguez-Rosado*, 909 F.3d 472, 477 (1st Cir. 2018) (citing *Kontrick v. Ryan*, 540 U.S. 443, 452–53 (2004); *Claiborne*, 727

F.2d at 850); *accord United States v. Rodgers*, 101 F.3d 247, 251 (2d Cir. 1996); *United States v. Leppo*, 634 F.2d 101, 104 (3d Cir. 1980). The rule's guiding principle has always been efficiency; it was never intended to be used as an end-run to allow a clearly unconstitutional law to take effect indefinitely and cause severe and irreparable harm in the process. *See* 16A Charles Alan Wright, Arthur R. Miller, & Catherine T. Struve, Federal Practice & Procedure § 3949.1 (5th ed.) (providing that the rule is a "judge-made doctrine designed to implement a commonsensical division of labor between the district court and the court of appeals" and should be implemented "to guard against the risk that a litigant might manipulate the doctrine for purposes of delay").

The district court could have granted a preliminary injunction after ruling on Respondents' jurisdictional arguments in the same order. Indeed, the Fifth Circuit recognized in its order denying mandamus in this case that the district court need only rule on the motions to dismiss before resolving a motion for summary judgment. App.59; *see United States v. United Mine Workers of Am.*, 330 U.S. 258, 290 (1947) (holding that district court "unquestionably had the power to issue a restraining order for the purpose of preserving existing conditions pending a decision upon its own jurisdiction"). It would be a perverse application of the divestiture rule if Respondents could defeat any meaningful relief from a preliminary injunction by appealing a ruling that completely rejected all their jurisdictional arguments.

In any event, regardless of what the court of appeals should have done, this Court plainly has the authority to allow the district court to regain control over the case, consider the pending temporary-restraining-order/preliminary-injunction and

class-certification motions, and enter any appropriate orders to preserve the status quo. Doing so would preserve all parties' ability to raise their jurisdictional arguments on appeal, as whichever side does not prevail in the preliminary-injunction proceedings could appeal from that decision. By contrast, preventing the district court from acting on the fully briefed motions would defer a ruling on an issue of *preliminary* relief for potentially months or longer until after the Fifth Circuit decides the pending appeal.

2. The Fifth Circuit demonstrably erred in staying proceedings against the private individual Respondent, Mark Lee Dickson. Dickson did not, and could not, demonstrate the traditional standard for a stay. *Nken*, 556 U.S. at 425–26 (citation omitted). In particular, Dickson did not identify any harm to himself absent a stay of the district court proceedings.

Dickson also failed to show he was likely to succeed on his appeal, for which the court of appeals plainly lacks jurisdiction. Dickson is a private citizen who appealed from an interlocutory order denying his motion to dismiss for lack of Article III standing. He has never asserted that he is entitled to sovereign immunity. *Cf. P.R. Aqueduct & Sewer Auth.*, 506 U.S. at 139 (holding that denial of motion to dismiss based on Eleventh Amendment immunity is immediately appealable under collateral-order doctrine). Accordingly, the district court's denial of his motion to dismiss is precisely the kind of garden-variety interlocutory order that is not "immediately appealable under [28 U.S.C.] § 1292(a)(1)." *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 84 (1981).

Nor can Dickson rely on "'pendent party' appellate jurisdiction," which this Court has foreclosed. *Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 51 (1995). And pendent appellate jurisdiction is unavailable to him because his Article III standing arguments—the sole basis of his motion to dismiss—are wholly distinct from the sovereign-immunity issues on review. *See ibid.* (rejecting pendent appellate jurisdiction where non-appealable order was not "inextricably intertwined" with immediately appealable order and where "review of the former decision was [not] necessary to ensure meaningful review of the latter"). In any event, Dickson lacks standing to appeal because he cannot show any personal injury from the denial of sovereign immunity to the government-official Respondents. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (holding that a "particularized [injury] . . . must affect the plaintiff in a personal and individual way" (internal quotation marks and citation omitted)); *Hollingsworth*, 570 U.S. at 715 (holding that petitioners had failed to "demonstrate standing to appeal the judgment" below).

Accordingly, the Fifth Circuit stay of the district-court proceedings as to Respondent Dickson, and its refusal to lift the district court's own stay as to the government-official Respondents, were clearly erroneous.

C. The Court Would Likely Grant Review of Judgment in This Case

Vacatur of the stays that have halted district-court proceedings is also appropriate because this Court could, and very likely would, review a decision from a direct appeal of the district court's grant or denial of the preliminary injunction or from the appeal currently pending in the Fifth Circuit.

This case will present the question whether a state may ban abortion at six weeks of pregnancy, roughly four months before viability. That question is not open to dispute under this Court's existing precedent. Because the statute at issue is in such clear contravention of this Court's decisions, this Court would and should intervene if the lower courts allow its enforcement. And further demonstrating the worthiness of this Court's review is the fact that this Court has already granted review on the question whether all pre-viability prohibitions on elective abortions are unconstitutional in *Dobbs v. Jackson Women's Health Organization*, No. 19-1392, 2021 WL 1951792 (U.S. May 17, 2021).

This case will also present the question whether a state can evade federal court review of a state law that is in clear contravention of this Court's precedents by creating a scheme of private enforcement in the state's courts. Under this Court's decisions, federal courts have clear authority to prospectively enjoin violations of federal rights that occur in a state's judicial system. *See Mitchum v. Foster*, 407 U.S. 225, 242 (1972) (The Court "long ago recognized that federal injunctive relief against a state court proceeding can in some circumstances be essential to prevent great, immediate, and irreparable loss of a person's constitutional rights."); *see also Mireles v. Waco*, 502 U.S. 9, 10 n.1 (1991) (per curiam); *Pulliam*, 466 U.S. at 536–43. The Fifth Circuit, however, is improperly constraining district courts' authority to remedy clear ongoing violations of federal rights under Section 1983 and *Ex parte Young*. For instance, the Fifth Circuit has held that state officials cannot be sued in their official capacity under Section 1983 for injunctive relief, notwithstanding this Court's clear

statement that "a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983." *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 n.10 (1989); *see Freedom from Rel. Found. v. Mack*, 4 F.4th 306, 312–13 (5th Cir. 2021); *Green Valley Special Util. Dist. v. City of Schertz, Tex.*, 969 F.3d 460, 475 (5th Cir. 2020) (en banc). And the Fifth Circuit's *Ex parte Young* jurisprudence incorrectly requires federal court litigants to demonstrate that the state attorney general satisfies a heightened standard of connection to the challenged state statute as a condition of suing him as the state's chief law enforcement officer for prospective relief from unconstitutional applications of state law. *See Morris v. Livingston*, 739 F.3d 740, 746 (5th Cir. 2014) (quoting *Okpalobi v. Foster*, 244 F.3d 405, 416 (5th Cir. 2001) (en banc) (plurality opinion)). This heightened standard is inconsistent with *Ex parte Young*, itself, *see* 209 U.S. at 160–61, as well as subsequent decisions by this Court, *see Verizon Md., Inc.*, 535 U.S. at 645, and the Fifth Circuit's approach undermines the purpose of *Ex parte Young*'s legal fiction: to "permit the federal courts to vindicate federal rights." *Va. Off. for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 254–55 (2011) (citations omitted); *accord Green v. Mansour*, 474 U.S. 64, 68 (1985) ("Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law.").

In addition, this Court is likely to grant certiorari review of the Fifth Circuit's appellate decision or a decision on appeal from a preliminary injunction order because such decisions will present questions of national importance. *See* Sup. Ct. R. 10(c); *see, e.g.*, *June Med. Servs. L.L.C. v. Gee*, 140 S. Ct. 35 (2019) (mem.); *N.Y. State Rifle*

& Pistol Ass'n v. N.Y.C., 139 S. Ct. 939 (2019) (mem.). The drastic consequences of S.B. 8 for public health, women's health, and the constitutional right to a pre-viability abortion plainly present issues of national importance warranting this Court's review. Likewise, Texas's open defiance of this Court's precedent—and its transparent attempt to evade federal review—call out for this Court to protect its authority. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

III. IN THE ALTERNATIVE, VACATUR OF THE DISTRICT COURT'S ORDER DENYING THE MOTIONS TO DISMISS IS PROPER TO PERMIT THAT COURT TO RULE ON APPLICANTS' REQUEST FOR INJUNCTIVE RELIEF AND CLASS CERTIFICATION IN THE FIRST INSTANCE

As a final alternative, should the Court find that it is appropriate for the district court to rule on any injunctive relief in the first instance, but that the judge-made divestiture-of-jurisdiction removes that authority here, this Court should vacate the district court's order denying Respondents' motions to dismiss and remand to the Fifth Circuit with instructions to dismiss the appeal as moot.

In so doing, this Court could automatically return jurisdiction to the district court, which could then decide Respondents' motions to dismiss simultaneously with Applicants' pending requests for preliminary injunctive relief and class certification. Should the district court determine that the requirements for a preliminary injunction are satisfied, it would then be able to grant such relief against the appropriate defendants or classes of defendants, preventing devastating and irreparable harm to Applicants and to Texans seeking abortion. On the other hand, Respondents would suffer no prejudice: they have already completed all briefing on Applicants' preliminary-injunction and class-certification motions, and, should the

district court issue a new order provisionally or ultimately denying the motions to dismiss while also issuing preliminary injunctive relief and/or class certification, Respondents' ability to seek appellate review of their sovereign immunity defenses would be delayed only by a matter of days.

Consequently, if the Court does not either grant relief directly, *see supra* Part I, or lift the stays and permit the district court to rule on Applicants' motions for class certification and a temporary restraining order or preliminary injunction, *see supra* Part II, it should restore the district court's authority to prevent a flagrantly unconstitutional law from taking effect in less than two days by: vacating the district court's order denying Respondents' motions to dismiss; dismissing the appeal as moot; remanding the case to the district court for further proceedings; and issuing the mandate forthwith. *See* 28 U.S.C. § 2106 ("[A]ny . . . court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and . . . require such further proceedings to be had as may be just under the circumstances."); *GuideOne Specialty Mut. Ins. Co. v. Missionary Church of Disciples of Jesus Christ*, 687 F.3d 676, 682 n.3 (5th Cir. 2012) ("Once jurisdiction attaches, Courts of Appeals have broad authority to dispose of district court judgments as they see fit.").

CONCLUSION

This Court has continually recognized the importance of enjoining enforcement of drastic state restrictions on access to pre-viability abortion, pending later review. *See Whole Woman's Health*, 136 S. Ct. at 2303; *June Med. Servs. L.L.C.*, 139 S. Ct.

at 663. For the foregoing reasons, the Court should do the same here and enjoin enforcement of S.B. 8 or, at a minimum, vacate the stays entered by the Fifth Circuit and the district court so that the district court may again exercise its control over this case and consider the propriety of Applicants' pending motions for class certification and a temporary restraining order or preliminary injunction.

Respectfully submitted.

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August 30, 2021

RULE 20.3(a) STATEMENT

Relief is sought against Austin Reeve Jackson, in his official capacity as Judge of the 114th District Court, and on behalf of a class of all Texas judges similarly situated; Penny Clarkston, in her official capacity as Clerk for the District Court of Smith County, Texas, and on behalf of a class of all Texas clerks similarly situated; Mark Lee Dickson; Stephen Brint Carlton, in his official capacity as Executive Director of the Texas Medical Board; Katherine A. Thomas, in her official capacity as Executive Director of the Texas Board of Nursing; Cecile Erwin Young, in her official capacity as Executive Commissioner of the Texas Health and Human Services Commission; Allison Vordenbaumen Benz, in her official capacity as Executive Director of the Texas Board of Pharmacy; and Ken Paxton, in his official capacity as Attorney General of Texas.

CORPORATE DISCLOSURE STATEMENT

Plaintiff Whole Woman's Health is the doing business name of a consortium of limited liability companies held by a holding company, the Booyah Group, which includes Whole Woman's Health of McAllen, LLC and Whole Woman's Health of Fort Worth, LLC d/b/a Whole Woman's Health of Fort Worth and Whole Woman's Health of North Texas. Whole Woman's Health has no parent corporation, and no publicly held corporation holds 10% or more of its shares.

Plaintiff Whole Woman's Health Alliance is a Texas non-profit corporation. It has no parent corporation, and no publicly held corporation holds 10% or more of its shares.

Plaintiff Planned Parenthood Center for Choice has no parent corporation, and no publicly held corporation holds 10% or more of its shares.

Plaintiff Planned Parenthood of Greater Texas Surgical Health Services discloses that its parent corporation is Planned Parenthood of Greater Texas, and no publicly held corporation holds 10% or more of Planned Parenthood of Greater Texas Surgical Health Services' or Planned Parenthood of Greater Texas's shares.

Plaintiff Planned Parenthood South Texas Surgical Center discloses that Planned Parenthood South Texas is its sole member , and further discloses that no publicly held corporation holds 10% or more of either Planned Parenthood South Texas Surgical Center's or Planned Parenthood South Texas's shares.

Plaintiff Southwestern Women's Surgery Center, has no parent corporation, and no publicly held corporation holds 10% or more of its shares.

Plaintiff Alamo City Surgery Center PLLC d/b/a Alamo Women's Reproductive Services, has no parent corporation, and no publicly held corporation holds 10% or more of its shares.

Plaintiff Houston Women's Reproductive Services, has no parent corporation, and no publicly held corporation holds 10% or more of its shares.

Plaintiff Brookside Women's Medical Center PA d/b/a Brookside Women's Health Center and Austin Women's Health Center has no parent corporation, and no publicly held corporation holds 10% or more of its shares.

Plaintiff Houston Women's Clinic has no parent corporation, and no publicly held corporation holds 10% or more of its shares.

Plaintiff The Afiya Center is a Texas non-profit corporation. It has no parent corporation, and no publicly held corporation holds 10% or more of its shares.

Plaintiff Frontera Fund is a Texas non-profit corporation. It has no parent corporation, and no publicly held corporation holds 10% or more of its shares.

Plaintiff Fund Texas Choice is a Texas non-profit corporation. It has no parent corporation, and no publicly held corporation holds 10% or more of its shares.

Plaintiff Jane's Due Process is a Texas non-profit corporation. It has no parent corporation, and no publicly held corporation holds 10% or more of its shares.

Plaintiff Lilith Fund for Reproductive Equity is a Texas non-profit corporation. It has no parent corporation, and no publicly held corporation holds 10% or more of its shares.

Plaintiff North Texas Equal Access Fund is a Texas non-profit corporation. It has no parent corporation, and no publicly held corporation holds 10% or more of its shares.

s/ Marc Hearron
MARC HEARRON
Counsel of Record

APPENDIX
TABLE OF CONTENTS

United States Court of Appeals for the Fifth Circuit

No. 21-50792

WHOLE WOMAN'S HEALTH, *on behalf of itself, its staff, physicians, nurses, and patients*; ALAMO CITY SURGERY CENTER, P.L.L.C., *on behalf of itself, its staff, physicians, nurses, and patients, doing business as Alamo Women's Reproductive Services*; BROOKSIDE WOMEN'S MEDICAL CENTER, P.A., *on behalf of itself, its staff, physicians, nurses, and patients, doing business as Brookside Women's Health Center and Austin Women's Health Center*; HOUSTON WOMEN'S CLINIC, *on behalf of itself, its staff, physicians, nurses, and patients*; HOUSTON WOMEN'S REPRODUCTIVE SERVICES, *on behalf of itself, its staff, physicians, nurses, and patients*; PLANNED PARENTHOOD CENTER FOR CHOICE, *on behalf of itself, its staff, physicians, nurses, and patients*; PLANNED PARENTHOOD OF GREATER TEXAS SURGICAL HEALTH SERVICES, *on behalf of itself, its staff, physicians, nurses, and patients*; PLANNED PARENTHOOD SOUTH TEXAS SURGICAL CENTER, *on behalf of itself, its staff, physicians, nurses, and patients*; SOUTHWESTERN WOMEN'S SURGERY CENTER, *on behalf of itself, its staff, physicians, nurses, and patients*; WHOLE WOMEN'S HEALTH ALLIANCE, *on behalf of itself, its staff, physicians, nurses, and patients*; MEDICAL DOCTOR ALLISON GILBERT, *on behalf of herself and her patients*; MEDICAL DOCTOR BHAVIK KUMAR, *on behalf of himself and his patients*; THE AFIYA CENTER, *on behalf of itself and its staff*; FRONTERA FUND, *on behalf of itself and its staff*; FUND TEXAS CHOICE, *on behalf of itself and its staff*; JANE'S DUE PROCESS, *on behalf of itself and its staff*; LILITH FUND, INCORPORATED, *on behalf of itself and its staff*; NORTH TEXAS EQUAL ACCESS FUND, *on behalf of itself and its staff*; REVEREND ERIKA FORBES; REVEREND DANIEL KANTER; MARVA SADLER,

Plaintiffs—Appellees,

versus

JUDGE AUSTIN REEVE JACKSON; PENNY CLARKSTON; MARK LEE DICKSON; STEPHEN BRINT CARLTON; KATHERINE A. THOMAS; CECILE ERWIN YOUNG; ALLISON VORDENBAUMEN BENZ; KEN PAXTON,

Defendants—Appellants.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:21-cv-616

Before JONES, DUNCAN, and ENGELHARDT, *Circuit Judges*.

PER CURIAM:

IT IS ORDERED that Appellees' emergency motion for an injunction pending appeal is DENIED.

IT IS FURTHER ORDERED that Appellees' emergency motion to vacate this court's administrative stay of the district court proceedings and to vacate the district court's stay of proceedings as to the government official defendants is DENIED.

IT IS FURTHER ORDERED that Appellees' emergency motion to vacate the district court order denying Appellants' motion to dismiss, to dismiss this appeal as moot, and to issue the mandate forthwith is DENIED.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

August 29, 2021

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 21-50792 Whole Woman's Health v. Jackson
USDC No. 1:21-CV-616

Enclosed is an order entered in this case.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Peter A. Conners, Deputy Clerk
504-310-7685

Ms. Jeannette Clack
Ms. Heather Gebelin Hacker
Mr. Marc A. Hearron
Mr. Joseph Alexander Lawrence
Mr. Jonathan F. Mitchell
Mr. Richard Muniz
Ms. Julie A. Murray
Mr. Andre Segura
Mr. Andrew Bowman Stephens
Mr. Judd Edward Stone II
Mrs. Natalie Deyo Thompson
Ms. Stephanie Toti
Mr. Benjamin Walton

United States Court of Appeals for the Fifth Circuit

No. 21-50792

WHOLE WOMAN'S HEALTH, *on behalf of itself, its staff, physicians, nurses, and patients*; ALAMO CITY SURGERY CENTER, P.L.L.C., *on behalf of itself, its staff, physicians, nurses, and patients, doing business as Alamo Women's Reproductive Services*; BROOKSIDE WOMEN'S MEDICAL CENTER, P.A., *on behalf of itself, its staff, physicians, nurses, and patients, doing business as Brookside Women's Health Center and Austin Women's Health Center*; HOUSTON WOMEN'S CLINIC, *on behalf of itself, its staff, physicians, nurses, and patients*; HOUSTON WOMEN'S REPRODUCTIVE SERVICES, *on behalf of itself, its staff, physicians, nurses, and patients*; PLANNED PARENTHOOD CENTER FOR CHOICE, *on behalf of itself, its staff, physicians, nurses, and patients*; PLANNED PARENTHOOD OF GREATER TEXAS SURGICAL HEALTH SERVICES, *on behalf of itself, its staff, physicians, nurses, and patients*; PLANNED PARENTHOOD SOUTH TEXAS SURGICAL CENTER, *on behalf of itself, its staff, physicians, nurses, and patients*; SOUTHWESTERN WOMEN'S SURGERY CENTER, *on behalf of itself, its staff, physicians, nurses, and patients*; WHOLE WOMEN'S HEALTH ALLIANCE, *on behalf of itself, its staff, physicians, nurses, and patients*; MEDICAL DOCTOR ALLISON GILBERT, *on behalf of herself and her patients*; MEDICAL DOCTOR BHAVIK KUMAR, *on behalf of himself and his patients*; THE AFIYA CENTER, *on behalf of itself and its staff*; FRONTERA FUND, *on behalf of itself and its staff*; FUND TEXAS CHOICE, *on behalf of itself and its staff*; JANE'S DUE PROCESS, *on behalf of itself and its staff*; LILITH FUND, INCORPORATED, *on behalf of itself and its staff*; NORTH TEXAS EQUAL ACCESS FUND, *on behalf of itself and its staff*; REVEREND ERIKA FORBES; REVEREND DANIEL KANTER; MARVA SADLER,

Plaintiffs—Appellees,

versus

JUDGE AUSTIN REEVE JACKSON; PENNY CLARKSTON; MARK LEE DICKSON; STEPHEN BRINT CARLTON; KATHERINE A. THOMAS; CECILE ERWIN YOUNG; ALLISON VORDENBAUMEN BENZ; KEN PAXTON,

Defendants—Appellants.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:21-cv-616

Before JONES, DUNCAN, and ENGELHARDT, *Circuit Judges*.

PER CURIAM:

IT IS ORDERED that a temporary administrative stay of the district court proceedings, including the upcoming preliminary injunction hearing, is GRANTED until further order of this court. Appellant Mark Lee Dickson is ORDERED to file a combined response and reply of no more than 7,500 words to Appellees' Combined Motion to Dismiss Defendant-Appellant Mark Lee Dickson's Appeal and Opposition to Emergency Stay Motion, by 9 a.m. central time on Tuesday, August 31, 2021.

IT IS FURTHER ORDERED that Appellees' joint opposed motion to expedite the appeal is DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

WHOLE WOMEN'S HEALTH, et al.,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	1:21-CV-616-RP
	§	
JUDGE AUSTIN REEVE JACKSON, et. al.,	§	
	§	
Defendants.	§	

ORDER

Before the Court is Defendants' opposed motion to stay case and vacate the preliminary injunction hearing. (Dkt. 84). Plaintiffs filed a response, (Dkt. 86), and Defendants' filed a reply, (Dkt. 87). Having reviewed the parties' briefs and the relevant law, the court will grant in part and deny in part Defendants' motion.

Defendants ask the Court to stay this case and vacate the upcoming preliminary injunction hearing because they have appealed this Court's order denying their motions to dismiss, (Order, Dkt. 82; Not. Appeal, Dkt. 83). Defendants argue that this Court lacks jurisdiction over this case because they have appealed the Court's denial of their claims of sovereign immunity under the collateral order doctrine. (Dkt. 84, at 1). Under the collateral order doctrine, Defendants may appeal a denial of a motion to dismiss asserting sovereign immunity. (*Id.*) (citing *McCarthy ex rel. Travis v. Hawkins*, 381 F.3d 407, 411–12 (5th Cir. 2004)). In their response, Plaintiffs ask the Court to retain jurisdiction by certifying Defendants' appeal as "frivolous or dilatory." (Dkt. 86, at 2) (citing *BancPass, Inc. v. Highway Toll Admin., L.L.C.*, 863 F.3d 391, 399 (5th Cir. 2017)). The Court is unwilling to make an "express finding of frivolousness" as to Defendants' appeal and rejects Plaintiffs' invitation to do so at this time. *BancPass, Inc.*, 863 F.3d at 400.

Nonetheless, the Court finds that only Defendants Allison Vordenbaumen Benz, Stephen Brint Carlton, Ken Paxton, Katherine A. Thomas, Cecile Erwin Young, Austin Reeve

Jackson, Penny Clarkston ("the State Defendants") have asserted that they are immune from suit under the doctrine of sovereign immunty. (*See* Mots. Dismiss, Dkts. 48, 49, 50, 51). The Court will thus grant Defendants' motion as to the State Defendants.

Defendant Mark Lee Dickson ("Dickson"), however, has not asserted that he is entitled to sovereign immunity, and as a private actor, he could not make such a claim. As Defendants acknowledge in their reply, their appeal has only divested this Court of jurisidiction as to the State Defendants. (Reply, Dkt. 87, at 1). Defendants attempt to couch Dickson's standing to appeal this Court's order by citing to cases dealing with appeals of final orders or interlocutory appeals by state actors claiming sovereign immuntiy. (Dkt. 87, at 2) (citing *Hollingsworth v. Perry*, 570 U.S. 693, 704 (2013); *Hospitality House, Inc. v. Gilbert*, 298 F.3d 424, 429 (5th Cir. 2002) (court reviewed subject matter jurisdiction in state health official's collateral order doctrine appeal of denial of motion to dismiss)). None of these cases are relevant here. Given that Dickson has made no claim to sovereign immunity, the denial of his motion to dismiss is not appealable. *Newball v. Offshore Logistics Int'l*, 803 F.2d 821, 824 (5th Cir. 1986). Moreover, Dickson does not provide the Court with a legitimate independent basis for staying the proceedings as to him. Finding that Dickson has not shown good cause as to why the proceedings against him should not go forward, the Court denies Defendants' motion as to Dickson.

Accordingly, **IT IS ORDERED** that Defendants' opposed motion to stay case and vacate the preliminary injunction hearing, (Dkt. 84), is **GRANTED IN PART** and **DENIED IN PART**. Defendants' motion is granted as to the State Defendants and denied as to Dickson.

SIGNED on August 27, 2021.

ROBERT PITMAN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

WHOLE WOMEN'S HEALTH, et al., Plaintiffs, v. JUDGE AUSTIN REEVE JACKSON, et. al., Defendants.	§ § § § § § § § §	1:21-CV-616-RP

ORDER

Before this Court are Defendants Allison Vordenbaumen Benz, Stephen Brint Carlton, Ken Paxton, Katherine A. Thomas, Cecile Erwin Young, Austin Reeve Jackson, Penny Clarkston, and Mark Lee Dickson's (together, "Defendants") motions to dismiss, (Dkts. 48, 49, 50, 51), Plaintiffs' responses, (Dkts. 56, 57, 62), and Defendants' replies. (Dkts. 64, 66, 67). related briefing. Having considered the parties' briefing, the record, and the relevant law, the Court will deny the motions.

I. BACKGROUND

A. Procedural Background

Plaintiffs[1] filed the instant action on July 13, 2021, requesting declaratory and injunctive relief to prevent Senate Bill 8 ("S.B. 8"), an abortion restriction bill signed into law by Governor Greg Abbott ("Abbott") (collectively ("Texas" or the "State"), from taking effect on September 1,

[1] Plaintiffs in this action include Whole Woman's Health, Alamo City Surgery Center PLLC d/b/a Alamo Women's Reproductive Services ("Alamo"), Brookside Women's Medical Center PA d/b/a Brookside Women's Health Center and Austin Women's Health Center ("Austin Women's"), Houston Women's Clinic, Houston Women's Reproductive Services ("HWRS"), Planned Parenthood of Greater Texas Surgical Health Services ("PPGT Surgical Health Services"), Planned Parenthood South Texas Surgical Center ("PPST Surgical Center"), Planned Parenthood Center for Choice ("PP Houston"), Southwestern Women's Surgery Center ("Southwestern"), Whole Woman's Health Alliance, Allison Gilbert, M.D., Bhavik Kumar, M.D., (together, "the Provider Plaintiffs"), The Afiya Center, Frontera Fund, Fund Texas Choice, Jane's Due Process, Lilith Fund for Reproductive Equity ("Lilith Fund"), North Texas Equal Access Fund ("NTEA Fund"), Marva Sadler, Reverend Daniel Kanter, and Reverend Erika Forbes ("the Advocate Plaintiffs," and together with the "the Provider Plaintiffs," "Plaintiffs"). (Dkt. 1, at 9–14).

2021. (Compl., Dkt. 1, at 2); S. B. 8, 87th Leg., Reg. Sess. (Tex. 2021). That same day, Plaintiffs filed a motion for summary judgment on all their claims. (Mot. Summ. J., Dkt. 19). On July 16, 2021, Plaintiffs filed a motion to certify two defendant classes of non-federal judges and clerks in Texas with jurisdiction to enforce S.B. 8. (Mot. Certify Class, Dkt. 32). Defendants then moved to stay consideration of Plaintiffs' pending motion for summary judgment and motion to certify class until the Court's resolution of jurisdictional challenges Defendants planned to bring in motions to dismiss, (Dkt. 39), which the Court denied in setting a briefing schedule for the pending motions after holding a conference with the parties. (Dkts. 40, 47).

After being served, Defendants filed the instant motions to dismiss Plaintiffs' claims under the terms of the scheduling order issued by the Court. (Dkts. 48, 49, 50, 51). On August 7, 2021, Defendants Clarkston and Dickson filed a petition for writ of mandamus and emergency motion to stay with the Fifth Circuit, arguing that they should not have to respond to the merits of Plaintiffs' claims until the jurisdictional motions to dismiss were resolved by this Court. *See In re Clarkston*, No. 21-50708 (5th Cir. filed Aug. 7, 2021). After entering a temporary administrative stay of this action, the Fifth Circuit denied Defendants Clarkston and Dickson's petition for mandamus on August 13, 2021. *See id.* In the interim, Plaintiffs filed a motion for a preliminary injunction, which is set for a hearing on August 30, 2021. (Mot. Prelim. Inj., Dkt. 53; Order, Dkt. 61). The Court then issued an amended briefing schedule to clarify that jurisdictional challenges to Plaintiffs' suit would be reached before the merits of the claims. (Order, Dkt. 60).

B. Senate Bill 8

S.B. 8 purports to ban all abortions performed on any pregnant person[2] where cardiac activity has been detected in the embryo, with no exceptions for pregnancies that result from rape,

[2] The Court notes that people other than those who identify as "women" may also become pregnant and seek abortion services. *See Accord Reprod. Health Servs. v. Strange*, 2021 WL 2678574, at *1 n.2 (11th Cir. June 30,

sexual abuse, incest, or a fetal defect incompatible with life after birth. S.B. 8 § 3 (to be codified at Tex. Health & Safety Code §171.204(a)). As explained below, S.B. 8 is enforced through a dual private and public enforcement scheme, whereby private citizens are empowered to bring civil lawsuits in state courts against anyone who performs, aids and abets, or intends to participate in a prohibited abortion, *see id.* §§ 171.208, 210, and the State may take punitive action against the Provider Plaintiffs through existing laws and regulations triggered by a violation of S.B. 8—such as professionally disciplining a physician who performs an abortion banned under S. B. 8. *See, e.g.,* Tex. Occ. Code §§ 164.053(a)(1)), 165.101; 243.011–.015, 245.012–.017; 301.10, 553.003, 565.001(a), 565.002.

1. The Six-Week Ban on Abortions

The cornerstone of S.B. 8 is its requirement that physicians performing abortions in Texas determine whether a "detectable fetal heartbeat"[3] is present before performing an abortion. S.B. 8 § 3 (to be codified at Tex. Health & Safety Code §§ 171.203(b), 171.204(a)). S.B. 8 further bans any abortions performed once a "fetal heartbeat" has been detected or if the physician fails to perform a test for cardiac activity within an embryo ("the six-week ban"[4]). *Id.* The six-week ban contains no exception for pregnancies that result from rape or incest, or for fetal health conditions that are incompatible with life after birth—though it does contain an exception for "a medical

2021) ("Although this opinion uses gendered terms, we recognize that not all persons who may become pregnant identify as female.").

[3] S.B. 8 defines "fetal heartbeat" as "cardiac activity or the steady and repetitive rhythmic contraction of the fetal heart within the gestational sac." S.B. 8 § 171.201(1). Because an ultrasound can typically detect cardiac activity beginning at approximately six weeks of pregnancy, as measured from the first day of a patient's last menstrual period ("LMP"), the Court notes that "fetal heartbeat" is a medically inaccurate term since what the law intends to refer to is "cardiac activity detected in an embryo."

[4] The Court will refer to S.B. 8's ban as a "six-week ban" to reflect that the ban covers all abortions performed approximately six weeks LMP, usually just two weeks after a missed menstrual period, when an embryo begins to exhibit electrical impulses but is not accurately defined as a "fetus" and does not have a "heartbeat." (Dkt. 1, at 22) ("[D]espite S.B. 8's use of the phrase 'fetal heartbeat,' the Act forbids abortion even when cardiac activity is detected in an embryo.").

emergency…that prevents compliance." S.B. 8 § 3 (to be codified at Tex. Health & Safety Code §171.205(a)).

S.B. 8 holds liable anyone who performs an abortion in violation of the six-week ban, and anyone who "knowingly" aids or abets the performance of an abortion performed six weeks after LMP. *Id.* § 171.208(a)(1)–(2). Although S.B. 8 does not define what constitutes aiding or abetting under the statute, it specifies that paying for or reimbursing the costs of the abortion falls under the six-week ban, which applies "regardless of whether the person knew or should have known that the abortion would be performed or induced in violation of" S.B. 8. *Id.* In addition, a person need not even actually take steps to "aid and abet" a prohibited abortion to be held liable under the law if that person intended to help another person obtain an abortion six weeks from the patient's LMP. *Id.* § 171.208(a)(3).

2. Enforcement of the Six-Week Ban

S.B. 8 is enforced against those who provide abortions or help patients obtain abortions through a dual private and public enforcement scheme. S.B. 8's centerpiece is its private enforcement scheme, which empowers private citizens to bring civil actions against anyone who allegedly performs, or aids and abets in the performance of, a banned abortion. *Id.* § 171.207(a).[5] Under S.B. 8's public enforcement mechanism, state agencies and authorities are tasked with enforcing state licensing and professional codes for healthcare provides, whose provisions are triggered by violations of S.B. 8. Tex. Occ. Code §§ 164.053(a)(1)), 301.101, 553.003.

Under S.B. 8's private enforcement scheme, any private citizen who is a "natural person residing in" Texas may bring suit under S.B. 8 in their county of residence and block transfer to a

[5] Despite having no exception to the six-week ban for pregnancies that result from rape or incest, S.B. 8 precludes those "who impregnated the abortion patient through rape, sexual assault, or incest, or other crimes" from bringing a civil suit under this section. *Id.* § 171.208(a). S.B. does not permit private citizens to bring civil suits again abortion patients. *Id.* § 171.206(b)(1).

more appropriate venue if not consented to by all parties. *See id.* § 171.210(a)(4) (permitting suit in the claimant's county of residence if "the claimant is a natural person residing in" Texas); *id.* § 171.210(b) (providing that S.B. 8 "action may not be transferred to a different venue without the written consent of all parties.").[6] Private citizens who prevail in civil suits brought under S.B. 8 may be awarded (1) "injunctive relief sufficient to prevent" future violations or conduct that aids or abets violations; (2) "statutory damages" to the claimant "in an amount of not less than $10,000 for each abortion" that was provided or aided and abetted; and (3) the claimant's "costs and attorney's fees." *Id.* § 171.208(b). A private citizen may prevail in a civil suit brought under S.B. 8 without alleging any injury caused by the defendants, in contravention of the traditional rules of standing. (Dkt. 1, at 26).

While empowering private enforcers, S.B. 8 limits the defenses available to defendants and subjects them to a fee-shifting regime skewed in favor of claimants. For example, defendants in S.B. 8 enforcement actions are prohibited from raising certain defenses enumerated under S.B. 8, including that they believed the law was unconstitutional; that they relied on a court decision, later overruled, that was in place at the time of the acts underlying the suit; or that the patient consented to the abortion. *Id.* § 171.208(e)(2), (3). S.B. 8 also states that defendants may not rely on non-mutual issue or claim preclusion or rely as a defense on any other "state or federal court decision that is not binding on the court in which the action" was brought. *Id.* § 171.208(e)(4), (5).

Although under binding Fifth Circuit precedent "[s]tates may regulate abortion procedures prior to viability so long as they do not impose an undue burden," Section 5 of S.B. 8 requires state judges to weigh the undue burden anew in every case as part of an "affirmative defense" in line with S.B. 8's new strictures regarding construction and severability of claims. S.B. 8 § 5 (to be codified at

[6] S.B. 8 bucks the usual rules in Texas that govern where a lawsuit can be filed and when a case can be transferred to a different county. Texas generally limits the venue where an action may be brought to one where the events giving rise to a claim took place or where the defendant resides, *see* Tex. Civ. Prac. & Rem. Code § 15.002(a), and a Texas state court may generally transfer venue "[f]or the convenience of the parties and witnesses and in the interest of justice," *id.* § 15.002(b).

Tex. Gov. Code § 311.036); S.B. 8 §§ 171.209(c), (d)(2)); *Jackson Women's Health Org. v. Dobbs*, 945 F.3d 265, 269 (5th Cir. 2019), *cert. granted*, No. 19-1392, 2021 WL 1951792 (U.S. May 17, 2021) ("States may regulate abortion procedures prior to viability so long as they do not impose an undue burden" on a patient's right to abortion, but states "may not ban abortions.").

S.B. 8 further creates a novel fee-shifting regime slanted in favor of S.B. 8 claimants and proponents, not only in S.B. 8 enforcement actions but in any challenges to the law, including in the instant case. S.B. 8 § 30.022. Under Section 4 of S.B. 8 ("Section 4"), not only may S.B. 8 claimants recover their attorney's fees in enforcement actions, but plaintiffs and attorneys who participate in lawsuits challenging abortion restrictions in Texas may be liable for attorney's fees unless they prevail on all of their initial claims, regardless of the ultimate outcome of the litigation. *Id.* Indeed, Section 4 applies to any challenge, in state or federal court, to the enforcement of S.B. 8 or any "law that regulates or restricts abortion," or that excludes those who "perform or promote" abortion from participating in a public funding program. S.B. 8. S.B. 8 § 30.022.

Defendants in such a challenge need not request attorney's fees in the original lawsuit but may file a new lawsuit in a venue of their choosing to collect attorney's fees within three years of a resolution of the underlying case. *Id.* § 30.022(c), (d)(1). When resolving new lawsuits over attorney's fees, judges are precluded from taking into account whether the court in the underlying case already denied fees to the party defending the abortion restriction, or already considered the application of Section 4 and held it "invalid, unconstitutional, or preempted by federal law." *Id.* § 30.022(d)(3). Furthermore, those sued under S.B. 8 who prevail in their case are barred from recovering their costs and attorney's fees even if they prevail "no matter how many times they are sued or the number of courts in which they must defend." (Dkt. 1, at 27) (citing Tex. Health & Safety Code § 171.208(i)).

Under S.B. 8's public enforcement mechanism, state agencies are empowered to bring administrative and civil enforcement actions against medical professionals who participate in abortions that violate the six-week ban based on their state-issued licenses. S.B. 8. Tex. Occ. Code §§ 164.053(a)(1)), 165.101; 243.011–.015, 245.012–.017; 301.10, 553.003, 565.001(a), 565.002. Because subchapter H of S.B. 8, which includes the six-week ban, will be added to Chapter 171 of the Texas Health and Safety Code, violations of the six-week ban trigger enforcement of other provisions of Chapter 171, as well as regulations state agencies have jurisdiction to enforce based on a violation of S.B. 8.

Under the Texas Medical Practice Act, for example, the Texas Medical Board ("TMB") must initiate investigations and disciplinary action against, as well as refuse to issue or renew licenses to, licensed physicians who violate a provision of Chapter 171. *See, e.g.,* Tex. Occ. Code § 164.055(a) (TMB "shall take an appropriate disciplinary action against a physician who violates . . . Chapter 171, Health and Safety Code."); *see id.* (TMB "shall . . . refuse to issue a license or renewal license to a person who violates that . . . chapter."); Tex. Occ. Code § 164.052(a)(5), § 164.001(b)(2)–(3) (TMB, "on determining that a person committed an act described by Sections 164.051 through 164.054, shall enter an order" of discipline, which may include suspension, limitation, or revocation of a physician's license."); Tex. Admin. Code § 176.2(a)(3), 176.8(b) ("TMB must investigate and "shall . . . review the medical competency" of licensees who have been named in three or more [healthcare-related] lawsuits within a five-year period."). The Texas Board of Nursing ("TBN"), Texas Board of Pharmacy ("TBP"), and Health and Human Services Commission ("HHSC") have similar authority to take disciplinary actions against those who violate S.B. 8. Tex. Occ. Code §§ 301.453(a) (TBN "shall enter an order imposing" discipline for violations of the Nursing Practice Act), 301.452(b)(1), 565.001(a), 565.002 (empowering TBP to take disciplinary, administrative or civil action against violators of the Texas Pharmacy Act); Tex. Health & Safety Code §§ 243.011–.015, 245.012–.017

(empowering HHSC to take disciplinary or civil action against licensed abortion facilities and ambulatory surgical centers ("ASC") based on violations of the Medical Practice Act. 25 Tex. Admin. Code §§ 135.4(l) (requiring abortion-providing ASCs to comply with rules for abortion facilities), § 139.60(c), (l); § 217.11(1)(A), 213.33(b) (imposing disciplinary measures for nurses who fail to " conform to . . . all federal, state, or local laws, rules or regulations affecting the nurse's current area of nursing practice.").

C. The Parties

1. Plaintiffs

Plaintiffs are comprised of those who provide abortion services, the Provider Plaintiffs, and those who support patients in need of an abortion, the Advocate Plaintiffs.

The Provider Plaintiffs[7] include reproductive healthcare providers across the state of Texas, who bring this suit on behalf of themselves, their physicians, nurses, pharmacists, other staff, and patients. (Dkt. 1, at 9–12). All of the Provider Plaintiffs allege that the "vast majority" of the abortions performed in their facilities occur after the six-week ban imposed by S.B. 8. (*See id.*). As such, the Provider Plaintiffs all perform abortions that will be proscribed by S.B. 8 when it takes effect September 1, 2021. (*Id.* at 12). The Provider Plaintiffs allege that if S.B. 8 takes effect, they and their staff will "suffer profound harm to their property, business, reputations, and a deprivation of their own constitutional rights." (*Id.* at 34).

[7] The Provider Plaintiffs in this action include Whole Woman's Health, Alamo City Surgery Center PLLC d/b/a Alamo Women's Reproductive Services ("Alamo"), Brookside Women's Medical Center PA d/b/a Brookside Women's Health Center and Austin Women's Health Center ("Austin Women's"), Houston Women's Clinic, Houston Women's Reproductive Services ("HWRS"), Planned Parenthood of Greater Texas Surgical Health Services ("PPGT Surgical Health Services"), Planned Parenthood South Texas Surgical Center ("PPST Surgical Center"), Planned Parenthood Center for Choice ("PP Houston"), Southwestern Women's Surgery Center ("Southwestern"), Whole Woman's Health Alliance, Allison Gilbert, M.D., and Bhavik Kumar, M.D. (together, "the Provider Plaintiffs"). (Dkt. 1, at 9–12).

Since many abortions provided by the Provider Plaintiffs occur after six weeks of a patient's LMP, they allege they could not "sustain operations if barred from providing the bulk of their current care." (*Id.* at 32). If the Provider Plaintiffs continued to offer abortions that they believe are constitutionally protected, but are prohibited by S.B. 8, they and their staff will risk private enforcement suits and professional discipline. (*Id.* at 32–33). Provider Plaintiffs further allege that S.B. 8 Section 4's fee-shifting provision impacts their "right to petition the courts and to speak freely" because they may be exposed to "potentially ruinous liability for attorney's fees and costs" as they bring lawsuits to vindicate their constitutional rights. (*Id.* at 33–34).

The Advocate Plaintiffs[8] provide support to those in need of abortions and advocate for reproductive rights within Texas and fear that "because they advocate for abortion patients through activities that may be alleged to aid and abet abortions prohibited by [S.B. 8], [they] face a credible threat of enforcement." (Dkt. 1, at 12–14). The Advocate Plaintiffs allege that if S.B. 8 takes effect September 1, they will be forced to redirect resources to support Texans who need to leave the state to obtain an abortion after 6 weeks LMP. (*Id.* at 34). If the Advocate Plaintiffs continue to support those seeking abortions banned by S.B. 8, they will likely face "enforcement lawsuits for aiding and abetting abortions prohibited by S.B. 8" or "engaging in First Amendment-protected speech and other activity in support of abortion." (*Id.* at 34–35). Specifically, Reverends Forbes and Kanter worry that their efforts to provide spiritual and emotional counseling to "patients and parishioners" will expose them to "costly and burdensome civil lawsuits," and that this risk extends to "other clergy members, counselors, and advisors (such as sexual assault and genetic counselors), as S.B. 8

[8] The Advocate Plaintiffs include The Afiya Center, Frontera Fund, Fund Texas Choice, Jane's Due Process, Lilith Fund for Reproductive Equity ("Lilith Fund"), North Texas Equal Access Fund ("TEA Fund"), Marva Sadler, Reverend Daniel Kanter ("Kanter"), and Reverend Erika Forbes ("Forbes"). (together, "the Advocate Plaintiffs."). (Dkt. 1, at 12–14).

incentivizes lawsuits accusing individuals of aiding and abetting prohibited abortions" through generous award of fees to successful claimants. (*Id.*).

2. Defendants

Defendant the Honorable Austin Reeve Jackson ("Jackson") is the judge for the 114th District Court in Smith County, Texas, a court with jurisdiction over S.B. 8 claims. (Dkt. 1, at 15). Defendant Penny Clarkston ("Clarkston") is the Clerk for the District Court of Smith County and in that role is charged with accepting civil cases for filing and issuing citations for service of process upon the filing of a civil lawsuit. (*Id.*). Both Jackson and Clarkston are sued in their official capacities and as representatives of two putative classes consisting of all state judges and clerks in Texas with the authority to initiate S.B. 8 enforcement actions and exert their coercive power over Plaintiffs to participate in and be sanctioned by S.B. 8 actions. (*Id.* at 15–16; *see also* Mot. Certify Class, Dkt. 32). Defendant Jackson recently participated in a press conference regarding the instant suit, in which he referred to himself as one of "the judges who enforce [S.B. 8] in east Texas." (Aug. 4 Press Conf. Tr., Dkt. 53-1, at 4).

Defendant Stephen Brint Carlton is the Executive Director of the Texas Medical Board ("TMB") and in that capacity serves as the chief executive and administrative officer of TMB. (Dkt. 1, at 16–17) (citing Tex. Occ. Code § 152.051). Defendant Katherine A. Thomas is the Executive Director of the Texas Board of Nursing ("TBN") and in that role performs duties as required by the Nursing Practice Act, and as designated by the TBN. (*Id.* at 17–18) (citing Tex. Occ. Code § 301.101). Defendant Allison Vordenbaumen Benz is the Executive Director of the Texas Board of Pharmacy ("TBP") and in that capacity performs duties under the Texas Pharmacy Act, or designated by the TBP. (*Id.* at 19) (citing Tex. Occ. Code § 553.003). Defendant Cecile Erwin Young is the Executive Commissioner of the Texas Health and Human Services Commission ("HHSC"),

which licenses and regulates abortion facilities and ambulatory surgical centers ("ASCs") operated by Provider Plaintiffs. (*Id.* at 18) (citing Tex. Health & Safety Code §§ 243.011, 245.012).

Defendant Ken Paxton is the Attorney General of Texas. He is empowered to institute an action for a civil penalty against physicians and physician assistants licensed in Texas who are in violation of or threatening to violate any provision of the Medical Practice Act, including provisions triggered by a violation of S.B. 8. (*Id.* at 19–20) (citing Tex. Occ. Code § 165.101).[9]

Defendant Mark Lee Dickson is a resident of Longview, Texas, who serves as the Director of Right to Life East Texas. (Dkt. 1, at 16). Dickson has advocated for the adoption of state and local laws prohibiting abortions and has expressed his intent to bring civil enforcement actions as a private citizen under S.B. 8. (*Id.* at n.4, 33).

II. LEGAL STANDARDS

A. 12(b)(1)

Federal Rule of Civil Procedure 12(b)(1) allows a party to assert lack of subject-matter jurisdiction as a defense to suit. Fed. R. Civ. P. 12(b)(1). Federal district courts are courts of limited jurisdiction and may only exercise such jurisdiction as is expressly conferred by the Constitution and federal statutes. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). A federal court properly dismisses a case for lack of subject matter jurisdiction when it lacks the statutory or constitutional power to adjudicate the case. *Home Builders Ass'n of Miss., Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998). "The burden of proof for a Rule 12(b)(1) motion to dismiss is on

[9] The "State Agency Defendants" refers to those members of the Texas government authorized to enforce S.B. 8 through existing state laws, regulations, licensing and professional codes, including Stephen Brint Carlton, Executive Director of the Texas Medical Board, Katherine A. Thomas, Executive Director of the Texas Board of Nursing, Allison Vordenbaumen Benz, Executive Director of the Texas Board of Pharmacy, Cecile Erwin Young, Executive Commissioner of the Texas Health and Human Services Commission, and Ken Paxton, Attorney General of Texas.

the party asserting jurisdiction." *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001), *cert. denied*, 536 U.S. 960 (2002). "Accordingly, the plaintiff constantly bears the burden of proof that jurisdiction does in fact exist." *Id.* In ruling on a Rule 12(b)(1) motion, the court may consider any one of the following: (1) the complaint alone; (2) the complaint plus undisputed facts evidenced in the record; or (3) the complaint, undisputed facts, and the court's resolution of disputed facts. *Lane v. Halliburton*, 529 F.3d 548, 557 (5th Cir. 2008).

B. Standing

Under Article III of the Constitution, federal court jurisdiction is limited to cases and controversies. U.S. Const. art. III, 2, cl. 1; *Raines v. Byrd*, 521 U.S. 811, 818 (1997). A key element of the case-or-controversy requirement is that a plaintiff must establish standing to sue. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

To establish Article III standing, a plaintiff must demonstrate that she has "(1) suffered an injury-in-fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Id.* at 560–61. "For a threatened future injury to satisfy the imminence requirement, there must be at least a 'substantial risk' that the injury will occur." *Stringer v. Whitley*, 942 F.3d 715, 721 (5th Cir. 2019) (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014)). A plaintiff suffers injury-in-fact for purposes of "bring[ing] a preenforcement suit when he has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." *Susan B. Anthony List*, 573 U.S. at 160. A credible threat of enforcement exists when it is not "imaginary or wholly speculative." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 302 (1979).

The purpose of these requirements is to ensure that plaintiffs have "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the

presentation of issues upon which the court so largely depends for illumination." *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007) (quoting *Baker v. Carr*, 369 U.S. 186 (1962) (internal quotation marks removed)). "[I]n the context of injunctive relief, one plaintiff's successful demonstration of standing 'is sufficient to satisfy Article III's case-or-controversy requirement.'" *Tex. Democratic Party v. Abbott*, No. 20-50407, 2020 WL 5422917, at *4 (5th Cir. Sept. 10, 2020) (quoting *Texas v. United States*, 945 F.3d 355, 377–78 (5th Cir. 2019). Further, "[t]he injury alleged as an Article III injury-in-fact need not be substantial; it need not measure more than an identifiable trifle." *OCA-Greater Hous. v. Texas*, 867 F.3d 604, 612 (5th Cir. 2017) (quotations omitted). This is because the injury-in-fact requirement under Article III is qualitative, not quantitative, in nature." *Id.*

C. Sovereign Immunity

The Eleventh Amendment typically deprives federal courts of jurisdiction over "suits against a state, a state agency, or a state official in his official capacity unless that state has waived its sovereign immunity or Congress has clearly abrogated it." *Moore v. La. Bd. of Elementary & Secondary Educ.*, 743 F.3d 959, 963 (5th Cir. 2014). However, under the *Ex parte Young* exception to sovereign immunity, lawsuits may proceed in federal court when a plaintiff requests prospective relief against state officials in their official capacities for ongoing federal violations. 209 U.S. 123, 159–60 (1908). Thus, "[t]here are three basic elements of an *Ex parte Young* lawsuit. The suit must: (1) be brought against state officers who are acting in their official capacities; (2) seek prospective relief to redress ongoing conduct; and (3) allege a violation of federal, not state, law." *Williams ex rel. J.E. v. Reeves*, 954 F.3d 729, 736 (5th Cir. 2020).

The Supreme Court has instructed lower courts evaluating whether state officials are subject to suit under the exception to sovereign immunity to conduct a "straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 253 (2011). If so,

the Court must then examine whether "the state official, 'by virtue of his office,' must have 'some connection with the enforcement of the [challenged] act, or else [the suit] is merely making him a party as a representative of the state, and thereby attempting to make the state a party.'" *City of Austin v. Paxton*, 943 F.3d 993, 997 (5th Cir. 2019), *cert. denied sub nom. City of Austin, Texas v. Paxton*, 141 S. Ct. 1047 (2021) (quoting *Young*, 209 U.S. at 157). The Fifth Circuit has not established "a clear test for when a state official is sufficiently connected to the enforcement of a state law so as to be a proper defendant under *Ex parte Young*.". *Texas Democratic Party v. Hughs*, No. 20-50683, 2021 WL 1826760 (5th Cir. May 7, 2021); *City of Austin*, 943 F.3d at 997 ("What constitutes a sufficient connection to enforcement is not clear from our jurisprudence.") (cleaned up).

While "[t]he precise scope of the 'some connection' requirement is still unsettled," the Fifth Circuit has stated that "it is not enough that the official have a '*general* duty to see that the laws of the state are implemented.'" *Texas Democratic Party*, 961 F.3d at 400–01 (quoting *Morris v. Livingston*, 739 F.3d 740, 746 (5th Cir. 2014)). And "[i]f the official sued is not statutorily tasked with enforcing the challenged law, then the requisite connection is absent and '[the] *Young* analysis ends.'" *City of Austin*, 943 F.3d at 998). Where, as here, "no state official or agency is named in the statute in question, [the court] consider[s] whether the state official actually has the authority to enforce the challenged law." *Id.*

III. DEFENDANTS' MOTIONS TO DISMISS

All Defendants filed motions to dismiss Plaintiffs' claims against them on jurisdictional bases. (*See* SAD Mot. Dismiss, Dkt. 48; Jackson Mot. Dismiss, Dkt. 49; Dickson Mot. Dismiss, Dkt. 50; Clarkston Mot. Dismiss, Dkt. 51). The Court will address the motions to dismiss below.

A. SAD Motion to Dismiss

Provider Plaintiffs seek relief against the State Agency Defendants ("SAD") based on their authority to enforce other statutes and regulations against licensed abortion facilities, ambulatory

surgical centers, pharmacies, physicians, physician assistants, nurses, and pharmacists that are triggered by a violation of S.B. 8, and their ability to directly enforce Section 4's fee-shifting regime in this or other challenges to S.B. 8's constitutionality. (Compl., Dkt. 1, at 33–34). The SAD moved to dismiss Provider Plaintiffs' claims against them as barred by sovereign immunity and for lack of standing. (*See* SAD Mot. Dismiss, Dkt. 48). Plaintiffs filed a response, (Dkt. 56), and the SAD filed a reply, (Dkt. 63).

1. Sovereign Immunity

The SAD argue that Plaintiffs' claims are barred by sovereign immunity and do not fall within the *Ex Parte Young* exception. (Mot. Dismiss, Dkt. 48, at 6). Specifically, the SAD argue that S.B. 8 explicitly precludes enforcement actions to be brought by "an executive or administrative officer or employee of this state" and that any threat that the SAD will seek fees under Section 4 or institute disciplinary actions through the health-related laws and regulations triggered by violations of S.B. 8 are too speculative to establish a "particular duty to enforce the statute in question." (Dkt. 48, at 6) (citing *Morris v. Livingston*, 739 F.3d 740, 746 (5th Cir. 2014)).

Plaintiffs respond that the SAD are in fact tasked with in enforcement of S.B. 8 and have the requisite connection the law's enforcement against the Provider Plaintiffs because the SAD may seek legal fees under Section 4 and can force them to "comply with the Act by bringing an enforcement action to constrain the Provider Plaintiffs and their physicians, nurses, and pharmacists from violating S.B. 8's restrictions on providing and assisting with abortion." (Pls.' Resp., Dkt. 56, at 14) (citing *K.P. v. LeBlanc ("K.P. I")*, 627 F.3d 115, 124 (5th Cir. 2010)). The Court agrees and finds Plaintiffs' action against the SAD is not barred by sovereign immunity because the SAD's enforcement capacity under S.B. 8 place them within the *Ex Parte Young* exception.

First, the Court finds that S.B. 8's prohibition on direct enforcement of S.B. 8 by state officials does not preclude the SAD's ability to enforce violations of other state laws triggered by a

violation of S.B. 8, such as the Medical Practice Act, Nursing Practice Act, and Pharmacy Act. *See, e.g.,* Tex. Occ. Code §§ 301.453(a); 301.452(b)(1), 565.001(a), 565.002; Tex. Health & Safety Code §§ 243.011–.015, 245.012–.017; Tex. Admin. Code § § 135.4(l), 139.60(c), (l); § 217.11(1)(A), 213.33(b)). The parties quibble about the meaning of S.B. 8's admonition that "[n]o 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." S.B. 8 § 3 (to be codified at Tex. Health & Safety Code § 171.207(a)). While the SAD are correct that they are precluded from enforcing S.B. 8 Section 3 through the private enforcement mechanism created under the law, nowhere does S.B. 8 indicate that it refers to the provisions of the Medical Practice Act, Nursing Practice Act, and Pharmacy Act or the State's ability to enforce such provisions under Chapter 171. The Court thus finds that there is no conflict between S.B. 8's prohibition on the SAD's private enforcement of S.B. 8 and the SAD's enforcement authority under existing Texas laws that may be triggered by a violation of S.B. 8. *See City of Austin v. Paxton*, 943 F.3d 993, 1001 (5th Cir. 2019), *cert. denied sub nom. City of Austin, Texas v. Paxton*, 141 S. Ct. 1047 (2021) ("direct enforcement of the challenged law. . .not required: actions that constrain[] the plaintiffs [are] sufficient to apply the *Young* exception"); *K.P. v. LeBlanc* ("*K.P. I*"), 627 F.3d 115, 124 (5th Cir. 2010) ("'Enforcement' typically involves compulsion or constraint.")

Second, the Court finds that the SAD have the requisite connection to enforcement and demonstrated willingness the enforce Section 4 and the state laws triggered by S.B. 8 violations so as to bring their conduct within the *Ex Parte Young* exception to sovereign immunity. While the SAD are correct that some of the disciplinary and civil actions triggered violations of Section 3 of S.B. 8 are within the discretion of the SAD to bring, others are mandatory. *Compare* Tex. Occ. Code § 165.001; *see also id.* § 165.101 (attorney general may institute an action for civil penalties against a

licensed physician for certain violations); *id.* § 301.501 (Board of Nursing "may impose an administrative penalty"); *id.* § 566.001(1) (same as to Board of Pharmacy); Tex. Health & Safety Code § 245.017 (HHSC "may assess an administrative penalty") *with* Tex. Occ. Code § 164.052(a)(5), § 164.001(b)(2)–(3) (TMB "shall enter an order" disciplining any physician who violate certain provisions of the Texas Medical Act).

Plaintiffs argue that as in *Air Evac EMS, Inc. v. Tex., Dep't of Ins., Div. of Workers' Comp.*, where the Fifth Circuit held that *Ex Parte Young* applied to state officials who, though not empowered to directly enforce challenged statute, "obviously constrain[ed]" the plaintiff under the law through administrative proceedings, here the SAD are similarly authorized and mandated to enforce violations of existing Texas laws stemming from a violation of S.B. 8. 51 F.3d 507, 519 (5th Cir. 2017). Similarly, in *K.P. v. LeBlanc* ("*K.P. I*"), the Fifth Circuit found that state agency defendants who reviewed abortion-related claims for medical malpractice coverage fell within the *Ex Parte Young* because their responsibilities under the statute demonstrated that they were "delegated some enforcement authority." 627 F.3d 115, 124 (5th Cir. 2010); *see also Air Evac*, 851 F.3d 518–19 (noting that board members in *K.P.* "had a specific means through which to apply the abortion statute"). The Court agrees and finds that the SAD have "specific means" to directly enforce Section 4 and to enforce Section 3 through disciplinary and civil actions against Provider Plaintiffs. Thus, the SAD's authority to enforce S.B. 8 falls within the *Ex Parte Young* exception to sovereign immunity. *City of Austin*, 943 F.3d at 1000–02 ("Panels in this circuit have defined 'enforcement' as 'typically involv[ing] compulsion or constraint.'"); *Air Evac*, 851 F.3d 518–19.

The parties dispute whether Provider Plaintiffs must demonstrate that the SAD have a "demonstrated willingness" to enforce S.B. 8 in order to bring them within the *Ex Parte Young* exception. (Dkt. 48, at 8; Dkt. 56, at 16). Although it is unclear whether binding Fifth Circuit precedent requires Provider Plaintiffs to show a demonstrated willingness by the SAD to enforce

Sections 3 and 4, the Fifth Circuit has nonetheless cited with approval, though has not fully endorsed, such a requirement. *See City of Austin* 943 F.3d 993, 1000 ("[W]e find that we need not define the outer bounds of this circuit's Ex parte Young analysis today—i.e., whether Attorney General Paxton must have 'the particular duty to enforce the statute in question and a demonstrated willingness to exercise that duty' to be subject to the exception."); *but see Morris v. Livingston*, 739 F.3d 740, 746 (5th Cir. 2014) (The required "connection" is not "merely the general duty to see that the laws of the state are implemented," but "the particular duty to enforce the statute in question and a demonstrated willingness to exercise that duty.") (quoting *Okpalobi v. Foster*, 244 F.3d 405, 416 (5th Cir. 2001)).

The Court finds that the Provider Plaintiffs have sufficiently alleged a demonstrated willingness on the part of the SAD to enforce abortion restrictions through administrative actions and that such actions are likely imminent here. First, the SAD's "longstanding defense of their enforcement authority under other abortion restrictions" demonstrates their willingness to enforce the S.B. 8 to the extent they are empowered to do so. (Dkt. 56, at 18) (citing *In re Abbott*, 956 F.3d 696 (5th Cir. 2020), *vacated as moot by Planned Parenthood Ctr. for Choice v. Abbott*, 141 S. Ct. 1261 (2021) (mem.) (COVID abortion ban); *Whole Woman's Health v. Paxton*, 978 F.3d 896 (5th Cir. 2020), *reh'rg en banc granted, vacated by* 978 F.3d 974 (5th Cir. 2020) (mem.)). Indeed, in *In re Abbott*, the Fifth Circuit noted that the State had "threatened that [the anti-abortion statute] would be enforced" by "health and law enforcement officials"—demonstrating the State's existing intent to enforce abortion restrictions through health officials such as the defendants named here. 956 F.3d at 709. The SAD also have demonstrated their willingness to pursue professional discipline of medical professionals who violate state laws, such as the Texas Medical Practice Act. *See, e.g., Emory v. Texas State Bd. of Med. Examiners*, 748 F.2d 1023, 1025 (5th Cir. 1984) (violation of federal law by plaintiff triggered TMB to "h[o]ld a hearing in [plaintiff's] absence and cancel[] his [medical] license"); *Andrews v.*

Ballard, 498 F. Supp. 1038, 1041 (S.D. Tex. 1980). Here, the State's prior demonstrated willingness to enforce anti-abortion laws through health officials and actual use of disciplinary proceedings against medical professionals who violate laws that trigger such discipline is sufficient to establish that the SAD have a demonstrated willingness to enforce S.B. 8 through health officials.

The parties do not dispute that the SAD have the authority to enforce Section 4 but rather dispute whether the SAD have demonstrated a willingness to enforce the provision. *See* S.B. 8 § 4 (adding § 30.022, making Plaintiffs liable for fees to any "public official in this state" who defends a Texas abortion restriction.). The Court rejects the SAD's argument that they have not demonstrated their willingness to enforce Section 4 because they have not yet requested attorney's fees, as it would be impossible for them to have already requested fees in this case or any other one related to S.B. 8 since the law has not yet taken effect. Furthermore, Plaintiffs may bring a pre-enforcement challenge to the SAD's enforcement of the provision where they face a credible threat of enforcement. (Reply, Dkt. 63, at 5–6); *see Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 164 (2014).

Indeed, the Provider Plaintiffs have demonstrated that the SAD have the power to exert "compulsion or constraint" over them in initiating disciplinary or civil proceedings against the Provider Plaintiffs for violations of Texas law triggered by failure to comply with S.B. 8, and as explained above, the SAD have previously defended their authority to enforce abortion restrictions. Because the SAD have demonstrated their willingness to enforce abortion restrictions and may enforce the slew of disciplinary, administrative and civil actions triggered by a violation of S.B. 8's six-week ban, the Provider Plaintiffs have sufficiently alleged that the SAD have more than "some scintilla of 'enforcement'" authority to enforce Sections 3 and 4 of S.B. 8 so as to satisfy *Ex Parte Young*. *City of Austin*, 943 F.3d at 1000–02 ("Panels in this circuit have defined 'enforcement' as 'typically involv[ing] compulsion or constraint.'").

For all these reasons, the Court finds that the SAD's enforcement authority under S.B. 8 places them within the *Ex parte Young* exception to sovereign immunity as to the Provider Plaintiffs' claims against them.

2. Standing

The SAD also move to dismiss the Provider Plaintiffs' claims against them for lack of standing. (Dkt. 48, at 9). First, the SAD argue that the Provider Plaintiffs have failed to plead an imminent or ripe injury because their fear of enforcement actions by SAD are "conjectural" at this time since the law has not taken effect. (*Id.* at 11–12). In the absence of a cognizable injury, the SAD's argument goes, Plaintiffs' claims fail for lack of standing, or alternatively, for lack of ripeness. (*Id.* at 11–15). The SAD further argue that the Provider Plaintiffs lack third-party standing to bring claims on behalf of their employees. (*Id.*). The Court will address each of the SAD's standing arguments in turn.

a. Cognizable injury and Ripeness

The SAD argue that Plaintiffs have not alleged a plausible threat of enforcement of S.B. 8 by the SAD under the statute's public enforcement mechanism or under Section 4. (*Id.* at 12). They rely on essentially the same arguments to suggest that this suit is not ripe since S.B. 8 has not taken effect and, as such, the Provider Plaintiffs have not faced any enforcement actions. (Dkt. 48, at 12–13; Reply, Dkt. 63, at 8).

The SAD first contend that the Provider Plaintiffs' claimed injuries under Section 3 rely on a "chain of contingencies" because any such a disciplinary proceeding by the SAD would first require a violation of S.B. 8 that is reported the applicable state agency, and would then have to decide to investigate the violation and to impose liability on the offender. (Dkt. 48, at 12) (citing *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410 (2013)). The SAD further argue that the Provider Plaintiffs' claim is not ripe for the same reason—their purported injury is "contingent on multiple future

events." (*Id.* at 13). The Provider Plaintiffs respond that they have demonstrated an imminent and ripe injury stemming from the potential administrative actions the SAD may initiate against the Provider Plaintiffs. (Dkt. 56, at 20). Because the Provider Plaintiffs provide abortions that will be banned once S.B. 8 takes effect, they will either have to violate S.B. 8 and await disciplinary actions against them by the SAD or cease to provide what they believe to be constitutionally-protected healthcare, causing harm to their patients. (*Id.* at 21). Furthermore, the Provider Plaintiffs assert that they need not wait until S.B. 8 takes effect, violate S.B. 8 by continuing to serve their patients, and then face enforcement actions by the SAD in order to demonstrate an impending injury—especially given that the SAD have not disavowed their ability or intent to enforce S.B. 8 through its public enforcement mechanism. (*Id.* at 21) (citing *MedImmune, Inc. v. Genentech, Inc.,* 549 U.S. 118, 128–29 (2007); *Roark & Hardee LP v. City of Austin*, 522 F.3d 533, 542 (5th Cir. 2008)).

The Provider Plaintiffs further respond that their alleged injuries "are not so contingent" as the SAD suggest because they are required to report healthcare-related lawsuits to licensing authorities and private citizens may file complaints with the relevant disciplinary agencies and have done so in the past. (Dkt. 56, at 22) (Linton Decl., Dkt. 19-6, at 5) ("We thus expect complaints and lawsuits filed against us and the staff if we provide abortions, including permitted abortions, after September 1."); (Ferringno Decl., Dkt. 19-3, at 3–4) ("Plaintiffs…are regularly harassed by anti-abortion vigilantes, who file false complaints with licensing authorities to trigger government investigations."); (Ferrigno Decl., Dkt. 19-3, at 3) ("These protesters have also filed false complaints against our physicians, attempting to provoke an investigation by the Texas Medical Board. We typically have one complaint filed against a physician at each clinic every year."); (Rosenthal Decl., Dkt. 19-9, at 4) ("I understand that my staff and I would risk ruinous licensure consequences, because a violation of SB 8 could also trigger disciplinary action by the Texas Medical and Nursing Board, and that the clinic could likewise potentially lose its license."). Because the Provider Plaintiffs

face a credible threat of enforcement whether they violate S.B. 8 or not beginning September 1, they have alleged a cognizable injury for standing purposes and their Section 3 claims are ripe for resolution.

The Provider Plaintiffs further argue that they have demonstrated standing as to Section 4's fee-shifting provision because they face a credible threat of a future action for fees under S.B. 8, which will immediately chill their First Amendment right to petition the courts to vindicate their constitutional rights. (Dkt. 56, at 19) (citing Gilbert Decl., Dkt. 19-1, at 11) (Section 4 "will chill our ability to bring cases or present claims to vindicate the rights of ourselves and our patients, due to fears that if we are not 100% successful, there will be serious financial consequences."). Plaintiffs correctly point out that while their injury cannot be a byproduct of the current litigation, here the Provider Plaintiffs challenge the constitutionality of the fee-shifting provision itself and the harm it is likely to cause them, even in the instant action. (Dkt. 56, at 19–20) (citing *Diamond v. Charles*, 476 U.S. 54, 70 (1986); *see also Funeral Consumers All., Inc. v. Serv. Corp. Int'l*, 695 F.3d 330, 341 (5th Cir. 2012).

Members of the Provider Plaintiffs submitted declarations averring that the possibility of fee awards in S.B. 8 cases will have a chilling effect on their ability to engage in constitutionality-protected activity, which is sufficient to establish an impending injury-in-fact for the purposes of standing. (Dkt. 56, at 20); (Lambrecht Decl., Dkt. 19-5, at 12) ("I am also concerned about the impact that S.B. 8. will have on the arguments we bring in litigation [due to] the possibility of huge legal bills . . . every time we bring a claim that is well-founded and in good faith."); (Sadler Decl., Dkt. 19-11) ("S.B. 8's fee-shifting provision could make us liable for costs and attorney's fees in these cases, impairing our ability to use litigation to vindicate our rights and those of our patients."); *Funeral Consumers*, 695 F.3d at 341 ("The interest at issue (mandatory attorneys' fees and costs) is related to this injury-in-fact because the plain language and undisputed purpose of the mandatory

attorneys' fees and costs provision (to discourage potential defendants from violating antitrust laws) helps prevent the violation of the legally protected right.").

Although the SAD emphasize that the Provider Plaintiffs have not identified any fee requests or threats of such a request by the SAD, yet since S.B. 8 does not take effect until September 1, it would be impossible for the Provider Plaintiffs to allege as much. (Dkt. 63, at 7). The SAD also argue that the existence of the present lawsuit indicates that the Provider Plaintiffs' ability to bring lawsuits challenging abortion restrictions will not be chilled by S.B. 8. (*Id.*). That is not a logically sound argument. The Provider Plaintiffs specifically brought this lawsuit prior to S.B. 8 taking effect to prevent such a constitutional violation. (*See* Compl., Dkt. 1, at 46). Furthermore, the Provider Plaintiffs may establish standing in a pre-enforcement suit challenging the constitutionality of a state law by alleging a threat of future enforcement. *See Susan B. Anthony List*, 573 U.S. at 164 (credible threat of future enforcement sufficient to establish standing in pre-enforcement action); *Holder v. Humanitarian L. Project*, 561 U.S. 1, 15–16 (2010) (finding standing in a pre-enforcement action). As noted above, the Provider Plaintiffs have demonstrated a credible threat of an impending injury once S.B. 8 takes effect on September 1, and as such have demonstrated that they have standing to challenge Section 4. (*See, e.g.*, Gilbert Decl., Dkt. 19-1, at 11).

b. Third-party Standing

The SAD next argue that the Provider Plaintiffs have failed to demonstrate either organizational or third-party standing to bring their claims on behalf of their employees and staff. (Dkt. 48, at 15). As noted above, however, "in the context of injunctive relief, one plaintiff's successful demonstration of standing 'is sufficient to satisfy Article III's case-or-controversy requirement.'" *Tex. Democratic Party*, 2020 WL 5422917, at *4 (5th Cir. Sept. 10, 2020); *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583, 589 (5th Cir. 2014). Here, at

least one of the physician-parties has standing to seek relief against each of the SAD based on their performance of abortions S.B. 8 purports to ban. (*See* Gilbert Decl., Dkt. 19-1, at 1, 10) ("I am also a Staff Physician. . . [b]ecause S.B. 8 allows almost anyone to sue me, Southwestern, and the staff who work with me, I fear that I will be subject to multiple frivolous lawsuits that will take time and emotional energy—and prevent me from providing the care my pregnant patients need."); (Kumar Decl., Dkt. 19-2, at 1, 34) ("I am also a staff physician at Planned Parenthood Center for Choice ("PPCFC"), where I provide abortions."). As such, this Court need not consider the standing of other plaintiffs asserting the same claim for the purposes of issuing injunctive and declaratory relief. *Horne v. Flores*, 557 U.S. 433, 446 (2009); *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264, n.9 (1977) ("[W]e have at least one individual plaintiff who has demonstrated standing…because of the presence of this plaintiff, we need not consider whether the other individual and corporate plaintiffs have standing to maintain the suit.").

To the extent the Provider Plaintiffs are required to establish third-party standing for the purposes of obtaining injunctive and declaratory relief on behalf of their employees, they have made such a showing because the Provider Plaintiffs have demonstrated that they have a "close relationship" with their employees and there is a "hindrance" in their employees' ability to protect their own rights. *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004).

First, the Provider Plaintiffs argue that under Fifth Circuit precedent, they may bring claims on behalf of their employees because their interests are "fully aligned" in that they "all seek to avoid S.B. 8's devastating penalties, including adverse licensing actions, which will force them to turn away patients and, in many cases, close clinic doors permanently." (Dkt. 56, at 24). While the SAD claim that the Provider Plaintiffs' interests are not sufficiently aligned with their regulated employees because the employees "may not wish to have a federal court hold that the [SAD] must administratively sanction them," the Provider Plaintiffs attached to their response several

declarations specifically detailing how their employees' interests are aligned with their own. (Dkt. 63, at 10); (Dkt. 56, at 24) (Lambrecht Decl., Dkt. 19-5, at 8–9) ("Many staff members entered health care because serving patients was their calling. . . . S.B. 8 will prevent PPGTSHS and our dedicated team of medical professionals from fulfilling our mission."); (Miller Decl., Dkt. 19-7, at 6) ("Our physicians and staff will have to choose between subjecting themselves to these lawsuits or turning away the majority of our patients, putting us in an impossible situation.").[10] As such, the Court finds that the Provider Plaintiffs' interests are sufficiently aligned with those of their employees so as to confer third-party standing. *Campbell v. Louisiana*, 523 U.S. 392, 397–98 (1998).

The SAD argue that the Provider Plaintiffs have not demonstrated that their employees face a "hindrance" to their ability to protect their own interests because they have not alleged a First Amendment injury on behalf of their employees. (Dkt. 63, at 9) (quoting *Kowalski*, 543 U.S. 130). The Provider Plaintiffs have provided evidence of the "multiple barriers" that impede their employees from joining this litigation, as they face violence and harassment due to the nature of their work, and as such, do not want their names publicly identified in a lawsuit, which may cause them to be "targeted in costly and abusive S.B. 8 enforcement lawsuits." (Dkt. 56, at 24–25) (citing Lambrecht Decl., Dkt. 19-5, at 8) ("Our staff deal with never-ending harassment from opponents of abortion. They pass through lines of protestors, yelling at them (and at patients), just to do their jobs."); (Linton Decl., Dkt. 19-6, at 6–7) ("Even staff who have no direct role in abortion services

[10] *See also* Sadler Decl., Dkt. 19-11, at 6) ("The uncertainty created by S.B. 8 has already had a significant impact on our clinics. Our staff are worried that the clinics will be forced to close and they will be out of a job."); Kumar Decl., Dkt. 19-2, at 12 ("I also worry about the impact that S.B. 8 will have on me as a physician and on my colleagues, including PPCFC's nurses and other staff, without whom I could not provide abortion services to our patients. As in other areas of medicine, these professionals provide several essential aspects of the health care services we provide. We already face harassment because of our jobs."); (Braid Decl., Dkt. 19-8, at 4) ("I am concerned not only about liability for myself and the other physicians, but also Alamo and HWRS and the staff at these clinics."); (Rosenfeld Decl., Dkt. 19-9, at 3–4) ("[I]f we continue to perform abortions prohibited by SB 8, the clinic and I, as well as all of the nurses, medical assistants, receptionists, and other staff that assist with providing, scheduling, billing, and/or counseling for abortion care.").

are worried about being named in harassing lawsuits."); (*see id.*) ("Our staff already deal with relentless harassment from abortion opponents, including [opponents] trying to follow staff home. . . . As a result of these threats, and the increasing volume of threats and harassment to abortion providers more broadly—and the increasing severity of threats (including homicide)—we have had to expend more resources ensuring our health centers and staff and patients remain safe."); (Baraza Decl., Dkt. 19-10, at 5–6) ("Our staff are fearful that they will be sued and forced into a Texas court far away from home to defend themselves, and they are frightened that defending these cases will financially ruin them and their families. . . Staff endure endless harassment from opponents of abortion. . . These protestors often video record staff and patients as they enter and exit the health centers, and we worry they are writing down staff license plates and/or other identifying information.").[11] The significant risks of harassment and S.B. 8 enforcement against the Provider Plaintiffs' employees supports a finding they are hindered in their ability to bring claim on their own behalf. *See Campbell*, 523 U.S. at 397–98 (third-party standing existed where "common interest in eliminating discrimination" and party named in lawsuit had "an incentive to serve as an effective advocate" for those not before the court).

The Court thus finds that the Provider Plaintiffs have sufficiently demonstrated that they have a "close" relationship with their employees for the purposes of this lawsuit, and their employees are hindered from bringing these claims themselves due to the rampant harassment and violence they face from anti-abortion opponents as abortion providers.

[11] *See also Planned Parenthood Se., Inc. v. Strange*, 33 F. Supp. 3d 1330, 1333 (M.D. Ala. 2014) (noting the "history of severe violence against abortion providers in Alabama and the surrounding region."); *Planned Parenthood of Wis., Inc. v. Van Hollen*, 94 F. Supp. 3d 949, 982–83 (W.D. Wis. 2015), *aff'd sub nom. Planned Parenthood of Wis., Inc. v. Schimel*, 806 F.3d 908 (7th Cir. 2015) ("One of the most striking aspects of the trial was [abortion provider] plaintiffs' testimony about their personal experiences with harassment and threats" from opponents of abortion.).

B. Judicial Defendants' Motions to Dismiss

Defendants Jackson and Clarkston (together, the "Judicial Defendants") also move to dismiss Plaintiffs' claims against them[12] for lack of subject matter jurisdiction. (Jackson Mot. Dismiss, Dkt. 49; Clarkston Mot. Dismiss, Dkt. 51). Plaintiffs filed a consolidated response to the Judicial Defendants' motions to dismiss, (Dkt. 62), and the Judicial Defendants filed replies, (Dkts. 66, 67).

The Court will analyze the Judicial Defendants' motions to dismiss together as they are both members of the state judicial system, and their arguments in support of the motions to dismiss largely overlap. (*See* Jackson Mot. Dismiss, Dkt. 49; Clarkston Mot Dismiss, Dkt. 51). The Judicial Defendants first argue that Plaintiffs' claims against them are not cognizable under Article III because there is no case or controversy since the Judicial Defendants play an adjudicatory role in S.B. 8's enforcement. (Dkt. 49, at 5; Dkt. 51, at 10) (arguing that there is no case or controversy between Plaintiffs and Jackson because he will only act in his "adjudicatory capacity if he presides over a lawsuit brought under S.B. 8."). Second, the Judicial Defendants argue that Plaintiffs lack standing to bring their claims. (Dkt. 49, at 5; Dkt. 51, at 13). Finally, the Judicial Defendants argue that Plaintiffs' claims against them are barred by sovereign immunity. (Dkt. 49, at 6; Dkt. 51, at 22). To the extent Defendant Dickson has offered arguments in support of the Judicial Defendants' motions to dismiss in his own motion that were not raised in the Judicial Defendants' motions, (Dkt. 50, at 16–22), the Court will address them here.

1. Case or controversy

The Judicial Defendants argue that Plaintiffs' claims against them fail to satisfy Article III's case or controversy requirement because "[n]either Judge Jackson nor Ms. Clarkston have a personal

[12] Jackson notes that "all the arguments raised in this Motion to Dismiss would apply with equal force to all the other state judges across Texas." (Dkt. 49, at 1).

stake in the outcome of S.B. 8 enforcement suits, neither of them were involved in the statute's enactment, and they are barred by state law from initiating S.B. 8's enforcement in their official capacity." (Dkt. 51, at 11; Dkt. 49, at 4). "The case or controversy requirement of Article III of the Constitution requires a plaintiff to show that he and the defendants have adverse legal interests." *Bauer v. Texas*, 341 F.3d 352, 359 (5th Cir. 2003).

The Judicial Defendants argue that their legal interests are not adverse to those of Plaintiffs' because their role in S.B. 8 enforcement actions is purely related to the adjudication of claims brought under the law. (Dkt. 49, at 4); (Dkt. 51, at 11) (citing *Bauer*, 341 F.3d at 361) ("Section 1983 will not provide any avenue for relief against judges 'acting purely in their adjudicative capacity, any more than, say, a typical state's libel law imposes liability on a postal carrier or telephone company for simply conveying a libelous message.'"); (Dickson Mot. Dismiss, Dkt. 50, at 16–17).[13] The Judicial Defendants further cite to *Chancery Clerk of Chickasaw County v. Wallace* for the proposition that because state judges and clerks have no personal stake in the outcome of S.B. 8 enforcement actions, they lack the requisite adversity to Plaintiffs, who as here, challenge the constitutionality of a state statute. (Dkt. 51, at 11–12); 646 F.2d 151 (5th Cir. 1981). Plaintiffs respond that because Judicial Defendants cannot open or resolve S.B. 8 enforcement actions without violating Plaintiffs' constitutional rights, the Judicial Defendants have demonstrated their personal stake in S.B. 8. (Dkt. 62, at 30–38). And because there are no other governmental authorities tasked with enforcement of S.B. 8, Plaintiffs have demonstrated that their interests are sufficiently adverse to those of the Judicial Defendants so as to present a "case or controversy" under Article III. (*Id.*).

[13] Clarkton likens herself to a "postal carrier," arguing that her docketing and issuing of a citation in any S.B. 8 case brought in her district renders her even "less adverse" to Plaintiffs than Jackson. (Dkt. 51, at 11). However, unlike a postal carrier, who merely transmits a message, here Clarkston will exert coercive power over defendants in S.B. 8 actions by issuing citations against them. Tex. R. Civ. P. 99(a).

Initially, the Court notes that Plaintiffs have likely demonstrated that their claims against the Judicial Defendants satisfy Article III's case or controversy requirement because while Judicial Defendants have indicated that they believe they must accept and adjudicate private enforcement actions brought under S.B. 8, Plaintiffs on the other hand claim that any such action would violate their constitutional rights. (Dkt. 62, at 30; Clarkston Mot. Dismiss, Dkt. 51; Jackson Mot. Dismiss, Dkt. 49). *See Aetna Life Ins. Co. of Hartford v. Haworth*, 300 U.S. 227, 242 (1937).[14]

Moreover, in contrast to the cases cited by the Judicial Defendants, where the Fifth Circuit found judges to be improper defendants in Section 1983 challenges to state statutes where other government defendants were more properly named, here there are no other government enforcers against whom Plaintiffs may bring a federal suit regarding S.B. 8's constitutionality. While in *Wallace* and *Bauer* the Fifth Circuit found that state judges were not the proper defendants because other state officials were more appropriately named as defendants due to their enforcement activities, here S.B. 8 forecloses Plaintiffs' ability to name anyone in the State's legislature or executive branch in this challenge.[15] *Bauer*, 341 F.3d at 359 ("Our decision today does not foreclose Bauer or others from directly challenging the constitutionality of Texas's guardianship statutes, as it does not reach the question of whether these statutes are constitutional."); *Wallace*, 646 F.2d 151 (allowing plaintiffs to "substitute the proper public officials as defendants" where class of state judges and clerks did not

[14] While Jackson insists that this Court must assume that he will "simply interpret and apply the law" in adjudicating cases under S.B. 8, this assertion is belied by Jackson's own statements at an August 4, 2021 press conference indicating that he is not a neutral arbiter because he is "one hundred percent committed to seeing . . . the voice and vote of pro-life Texans defended" regardless of "what some leftist judge down in Austin may do." (Aug. 4 Press Conf. Tr., Dkt. 53-1, at 4).

[15] State Senator Bryan Hughes, a legislative sponsor of S.B. 8 has admitted that the legislature deliberately crafted S.B. 8 to not "require any action by the district attorney, by the state, or any government actor." (Aug. 4 Press Conf. Tr, Dkt. 53-1, at 5). Similarly, Defendant Dickson has noted that S.B. 8 is "very clever" because, like the recent Lubbock, Texas ordinance banning abortions, "[t]here's no way for a court to hear the validity of this law until someone actually brings a civil lawsuit" since "the government can't enforce this law." (Dickson May 5, 2021 Facebook Post, Dkt. 57-1, at 3).

have "the requisite personal stake in defending the state's interests" in Section 1983 suit challenging state civil commitment procedures).

Furthermore, courts have acknowledged that state judges may be proper defendants in constitutional challenges to state statutes where, as here, it is not possible to enjoin any "other parties with the authority to seek relief under the statute." *In re Justices of the Supreme Court of Puerto Rico*, 695 F.2d 17 (1st Cir. 1982). Here, the naming of the Judicial Defendants is "necessary" for Plaintiffs to seek "full relief" for the alleged violations of their constitutional rights that will occur if the Judicial Defendants use their authority to force Plaintiffs to participate in S.B. 8 enforcement actions. *Id.* at 23; *see also Mitchum*, 407 U.S. at 242 ("[F]ederal injunctive relief against a state court proceeding can in some circumstances be essential to prevent great, immediate, and irreparable loss of a person's constitutional rights.").

Recognizing that their arguments would essentially prohibit Plaintiffs from naming any state official in a federal lawsuit challenging the constitutionality of a state statute structured like S.B. 8, the Judicial Defendants suggest that Plaintiffs should instead wait to be sued in state court, and then raise the defenses available to them under S.B. 8 in such an enforcement action. (Dkt. 51, at 12). This argument sidesteps the fact that if this Court were to dismiss the Judicial Defendants for lack of a case or controversy, Plaintiffs would have no avenue to challenge the constitutionality of S.B. 8 outside of an enforcement action brought against them under S.B. 8—an action Plaintiffs allege would violate their constitutional rights in the first place. (Dkt. 62, at 38). Even within an enforcement action, Plaintiffs' ability to raise the defense that the law is unconstitutional is severely limited under S.B. 8's private enforcement mechanism. Tex. Health & Safety Code §§ 171.208(e)(2), (3), 171.209(b).[16]

[16] "Notwithstanding any other law, the following are not a defense to [a S.B. 8 enforcement action]. . . a defendant's belief that the requirements of this subchapter are unconstitutional or were unconstitutional. . . a defendant's reliance on any court decision that has been overruled on appeal or by a subsequent court, even if

Although the Judicial Defendants are correct that state courts can consider constitutional issues, the Court finds troubling the Judicial Defendants' suggestion that Plaintiffs should only be allowed to challenge S.B. 8 through the "defenses available to them under the [same] statute" when Plaintiffs' claim is that S.B. 8 cannot be enforced against them at all without violating the Constitution. (Dkt. 51, at 12). Because there are no other state officials against whom Plaintiffs might seek relief in federal court for S.B. 8's alleged constitutional violations and state judicial defendants may be properly named in federal suits seeking equitable relief to vindicate federal constitutional rights, the Court finds that the Judicial Defendants are sufficiently adverse to Plaintiffs in S.B. 8 actions to bring this action within Article III's case or controvert requirement.[17]

Furthermore, the Court finds that the Judicial Defendants play an enforcement role in S.B. 8 and thus are not immune from suit under *Bauer*, which only applies where judges act "purely in their adjudicative capacity." 341 F.3d at 361. Here, in contrast, the Judicial Defendants are "not immune from suits for declaratory or injunctive relief" because S.B. 8 empowers the Judicial Defendants to

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that court decision had not been overruled when the defendant engaged in conduct that violates this subchapter." Tex. Health & Safety Code §§ 171.208(e)(2), (3).

[17] *See, e.g.*, *WXYZ, Inc. v. Hand*, 658 F.2d 420, 427 (6th Cir. 1981) (affirming issuance of permanent injunction against Michigan state court judge who was required by statute to issue a suppression order in a criminal proceeding that barred media from publishing the defendant's identity); *Caliste v. Cantrell*, Civ. No. 17-6197, 2017 WL 6344152, at *3 (E.D. La. Dec. 12, 2017) (awarding declaratory relief and later entering a consent decree against a magistrate judge of Orleans Parish who under Louisiana state law received a set percentage of any bond amount collected from a for-profit surety for the court's discretionary use and who had an active role in setting bail and managing generated funds), *aff'd*, 937 F.3d 525 (5th Cir. 2019); *Strawser v. Strange*, 100 F. Supp. 3d 1276 (S.D. Ala. 2015) (awarding declaratory and injunctive relief against a defendant class of Alabama probate judges who were directed by Alabama law to refuse to issue marriage licenses to same-sex couples or recognize their out-of-state marriages); *Tesmer v. Granholm*, 114 F. Supp. 2d 603, 616–18, 622 (E.D. Mich. 2000) (awarding declaratory relief initially, and injunctive relief subsequently, against a defendant class of state court judges who were directed by a state statute to deny appellate counsel to indigent criminal defendants who plead guilty), *aff'd in part and rev'd in part on other grounds*, 333 F.3d 683 (6th Cir. 2003) (en banc), *rev'd on other grounds sub nom Kowalski v. Tesmer*, 543 U.S. 125 (2004); *Kendall v. True*, 391 F. Supp. 413, 420 (W.D. Ky. 1975) (awarding declaratory and injunctive relief against a class of county circuit court judges who oversaw civil commitment proceedings pursuant to procedures set forth by Kentucky law); *Blick v. Dudley*, 356 F. Supp. 945, 953–54 (S.D.N.Y. 1973) (awarding injunctive relief against Administrative Judge and Chief Clerk of New York criminal court requiring expungement of all records of plaintiffs' unconstitutional arrests because only the clerks could expunge the records).

take on an enforcement role in the law's application. *LeClerc v. Webb*, 419 F.3d 405, 414 (5th Cir. 2005). Not only are the Judicial Defendants the only state officials tasked with directly enforcing S.B. 8 against Plaintiffs, but Jackson has even publicly stating that he is one of "the judges who enforce [S.B. 8] in east Texas." (Aug. 4 Press Conf. Tr, Dkt. 53-1, at 4). Jackson's statement regarding the enforcement power state courts wield under S.B. 8, coupled with the provisions of S.B. 8 that so obviously skew in favor of claimants, bring this case outside the scope of cases where the Fifth Circuit has found that state judicial officers acted purely in their adjudicatory roles.

For example, while the *Bauer* court found that judges played a purely adjudicatory role in the statute at issue in part because of the "safeguards" built into the statute before a guardianship could be imposed, here S.B. 8 contains no such "safeguards" for defendants in S.B. 8 enforcement actions. 341 F.3d 361. In fact, S.B 8 does just the opposite by purporting to dictate how state courts hear S.B. 8 enforcement actions, including by eliminating non-mutual issue preclusion and claim preclusion, modifying federal constitutional defenses, and prohibiting state courts' ability to rely on non-binding precedent or even assess whether a claimant has been injured[18] by a violation of S.B. 8. *See* S.B. 8 § 5 (to be codified at Tex. Gov. Code § 311.036); Tex. Health & Safety Code §§ 171.209(c), (d)(2)). Because Jackson has declared his enforcement authority under S.B. 8 and the Judicial Defendants play a role in S.B. 8 cases that is more than purely adjudicatory, S.B. 8 renders the Judicial Defendants judicial enforcers of S.B. 8 rather than neutral adjudicators. *Id.*; *see, e.g.,* S.B. 8 § 171.211.

Here, Plaintiffs have alleged that the Judicial Defendants' interests are sufficiently adverse to their own so as to satisfy the case of controversy requirement under Article III.

[18] The Court finds it somewhat ironic that Judicial Defendants argue that Plaintiffs cannot show injury-in-fact to support standing to challenge S.B. 8, a law that purports to remove such a requirement from private enforcement proceedings brought under the law.

2. Sovereign Immunity

The Judicial Defendants next argue that Plaintiffs' claims against them are barred by sovereign immunity. (Dkt. 49, at 6–8; Dkt. 50, at 17; Dkt. 51, at 22).[19] Jackson contends that while *Ex Parte Young* allows for equitable causes of action to be brought against state officials who act unconstitutionally, "this authority does not include the power to enjoin state courts." (Dkt. 49, at 7) (citing *Ex Parte Young*, 209 U.S. at 163.). Even if injunctive relief were available against state courts, Jackson argues that the lack of sufficient statutory enforcement authority under S.B. 8 excludes him from the *Ex Parte Young* exception. (*Id.* at 8) (citing *City of Austin v. Paxton*, 943 F.3d 993, 1000 (5th Cir. 2019)). Dickson further contends that the Judicial Defendants cannot be sued under *Ex Parte Young* because they have no intent to violate federal law by merely "waiting to see if someone files a lawsuit under Senate Bill 8." (Dkt. 50, at 18). Instead, Dickson argues that Jackson could only be sued under *Ex Parte Young* once he hears an enforcement action under S.B. 8 and "enters an actual ruling that violates someone's federally protected rights." (Dkt. 50, at 19).

Plaintiffs respond that the Judicial Defendants are not entitled to sovereign immunity because they are sued in their official capacities to prevent future actions to enforce an allegedly unconstitutional law. (Dkt. 62, at 28) (citing *Green Valley Special Util. Dist. v. City of Schertz*, 969 F.3d 460, 472–73 & n.22 (5th Cir. 2020); *Warnock v. Pecos Cnty.*, 88 F.3d 341, 343 (5th Cir. 1996) (claims against Texas judges seeking prospective relief against violations of federal law are not barred by sovereign immunity). Indeed, as noted above, forcing Plaintiffs to wait until a state enforcement action is brought against them to raise their constitutional concerns would leave Plaintiffs without the ability to vindicate their constitutional rights in federal court before any constitutional violation

[19] Clarkston argues that she is also entitled to sovereign immunity by adopting the arguments of her co-Defendants without further elaboration. (Dkt. 51, at 22) ("Ms. Clarkston is entitled to sovereign immunity for the same reasons as Judge Jackson, and Judge Jackson's and Defendant Mark Lee Dickson's arguments as to sovereign immunity are incorporated herein.").

occurs. *Supreme Ct. of Virginia v. Consumers Union of U.S.*, Inc., 446 U.S. 719, 737 (1980) (reasoning that state court and chief justice were proper defendants in Section 1983 challenge to state's disciplinary rules because otherwise "putative plaintiffs would have to await the institution of state-court proceedings against them in order to assert their federal constitutional claims.").

Plaintiffs further point out that under more recent precedent than that cited by Judicial Defendants, the Fifth Circuit has found that the availability of relief under *Ex Parte Young*, which "allows plaintiff[s] to sue a state official, in his official capacity, in seeking to enjoin enforcement of a state law that conflicts with federal law," may apply to Section 1983 challenges against state judicial actors who play a role in enforcing state statutes, even through ministerial duties. (Dkt. 62, at 42–43) (citing *Air Evac EMS*, 851 F.3d at 515; *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 281 (1997); *Green Valley*, 969 F.3d at 473 n.22; *Finberg*, 634 F.2d at 54 ("[C]ourts often have allowed suits to enjoin the performance of ministerial duties in connection with allegedly unconstitutional laws."); *Supreme Ct. of Virginia v. Consumers Union of U. S., Inc.*, 446 U.S. 719, 735.

For example, in *Supreme Ct. of Virginia*, a Virginia court and its chief justice were found to not be immune from claims brought under Section 1983 because of the court's "own inherent and statutory enforcement powers" with regard to state bar disciplinary rules. 446 U.S. 719, 735. In fact, Section 1983 was designed to allow individuals to challenge unconstitutional actions by members of state government, whether they be part of the "executive, legislative, or judicial" branches of that state government. *Mitchum*, 407 U.S. at 242 (emphasis added) (quoting *Ex parte Virginia*, 100 U.S. at 346). In 1996, Congress even amended Section 1983 to make clear that an action brought seeking declaratory relief may be "brought against a judicial officer for an act or omission taken in such officer's judicial capacity," and injunctive relief may be brought against a judicial officer who violates a declaratory decree or against whom declaratory relief is not available. 42 U.S.C. § 1983; *see also Pulliam v. Allen*, 466 U.S. 522, 540 (1984) (noting that Congress enacted Section 1983 in part because

"state courts were being used to harass and injure individuals, either because the state courts were powerless to stop deprivations or were in league with those who were bent upon abrogation of federally protected rights.").

Here, as noted above, the Judicial Defendants' enforcement role in S.B. 8's private enforcement mechanism brings them within the carveouts courts have created to allow Section 1983 challenges to laws to proceed against state court officials under the *Ex Parte Young* exception to sovereign immunity. Plaintiffs' claims are thus not barred by sovereign immunity.

3. Standing

The Judicial Defendants next challenge Plaintiffs' standing to bring their claims, arguing that Plaintiffs have failed to meet the standing requirements of injury-in-fact, traceability, and redressability. While the Judicial Defendants argue that Plaintiffs have failed to meet any of these standing requirements, (Dkt. 49, at 5–6; Dkt. 51, at 13), Plaintiffs contend that they have met all standing criteria as to their claims against the Judicial Defendants. (Dkt. 62, at 16).

a. Injury-in-fact

The Judicial Defendants first argue that Plaintiffs cannot show an impending injury-in-fact because there is no immediate threat of enforcement actions. (Dkt. 51, at 14). The Judicial Defendants emphasize that there "are no currently pending actions under S.B. 8," and of course, there could not be since the law does not take effect until September 1. (Dkt. 51, at 14–15). Dickson once again argues that since Plaintiffs have not specifically alleged that they plan to violate S.B. 8 or identified who would bring an enforcement action against them for such a violation apart from Dickson, their threatened injury constitutes "rank speculation." (Dkt. 50, at 20–21). However, as explained above, there need not be a pending enforcement action against Plaintiffs to confer Plaintiffs standing over claims alleging imminent constitutional harm once S.B. 8 takes effect. *See* Section A(2)(a); *See, e.g.*, *Babbitt*, 442 U.S. 289, 298; *Susan B. Anthony List*, 573 U.S. at 158.

Furthermore, contrary to Defendant Dickson's contention that Plaintiffs must specifically allege that they intend to violate S.B. 8, such as admission is not in fact required to demonstrate an injury-in-fact for standing purposes. *SBA List*, 573 U.S. at 163; *MedImmune*, 549 U.S. at 129.

Even if required to allege an intent to violate S.B. 8, Plaintiffs have stated that they provide abortions that would violate the six-week ban and "desire to continue to" provide the medical care and other forms of support banned by S.B. 8. (Compl., Dkt. 1, at 9–12, 32). As such, Plaintiffs argue, the threat of lawsuits stemming from enforcement actions brought by private citizens in Judicial Defendants' courts is an injury-in-fact sufficient to confer Article III standing. (Dkt. 62, at 17); *K.P. v. LeBlanc* ("*K.P. I*"), 627 F.3d 115, 123 (5th Cir. 2010) (injury established where "probability of future suits" meant it was "sufficiently likely that the physicians will face liability for abortion-related procedures."). Indeed, the threat of enforcement actions is not "imaginary or wholly speculative" given that S.B. 8 specifically targets Plaintiffs by making their primary activities subject to enforcement actions before Judicial Defendants. (Dkt. 62, at 17); *SBA List*, 573 U.S. at 160 (quoting *Babbitt*, 442 U.S. at 302). In addition, Plaintiffs contend that having to defend themselves in S.B. 8 enforcement actions is an injury in and of itself. (Dkt. 62, at 6–8, 18).

In response to Dickson's suggestion that Plaintiffs alleged injuries are speculative because they have not identified who will bring enforcement actions, Plaintiffs identify the Texas Right to Life's statement that it is actively "encouraging individuals to sue abortion providers and abortion funds." (Dkt. 62, at 18) (citing Seago Decl., Dkt. 50-2, at 1). Furthermore, Plaintiffs note that last year Dickson's own counsel filed eight lawsuits[20] in just one day against some of the Plaintiffs in this

[20] *Blackwell v. The Lilith Fund for Reprod. Equity*, No. 2020-147 (Tex. Dist. Ct. Rusk Cnty., filed July 16, 2020); *Byrn v. The Lilith Fund for Reprod. Equity*, No. 12184-D (Tex. Dist. Ct. Taylor Cnty., filed July 16, 2020); *Enge v. The Lilith Fund for Reprod. Equity*, No. 20-1581-C (Tex. Dist. Ct. Smith Cnty., filed July 16, 2020); *Gentry v. The Lilith Fund for Reprod. Equity*, No. CV2045746 (Tex. Dist. Ct. Eastland Cnty., filed July 17, 2020); *Maxwell v. The Lilith Fund for Reprod. Equity*, No. C 2020135 (Tex. Dist. Ct. Hood Cnty., filed July 16, 2020); *Moore v. The Lilith Fund for Reprod. Equity*, No. 2020-216 (Tex. Dist. Ct. Panola Cnty., filed July 16, 2020); *Morris v. The Lilith*

lawsuit in counties across Texas, including Smith County where the Judicial Defendants are located—suggesting that it is far from speculative to assume that those intending to file S.B. 8 actions will do so in as many Texas counties as possible. (Dkt. 62, at 18–19).

The fact that S.B. 8 empowers "any person" to initiate enforcement actions bolsters the credibility of Plaintiffs' alleged harm as those who are politically opposed to Plaintiffs are empowered to sue them for substantial monetary gain. (Dkt. 62, at 19) (citing *Susan B. Anthony List*, 573 U.S. at 156). Indeed, S.B. 8 incentivizes anti-abortion advocates to bring as many lawsuits against Plaintiffs as possible by awarding private enforcers of the law $10,000 per banned abortion. Tex. Health & Safety Code § 171.208(b). Furthermore, Defendants themselves have confirmed the immediacy of the threat of S.B. 8 enforcement actions in state courts. (Seago Decl., Dkt. 50-2, at 1) ("I have personal knowledge that there are several individuals who intend to sue the abortion-provider plaintiffs and the abortion-fund plaintiffs if they defy Senate Bill 8."); Dickson Decl., Dkt. 50-1, at 2–3) ("I have personal knowledge that there are many other individuals who intend to sue the abortion-provider plaintiffs and the abortion-fund plaintiffs if they defy Senate Bill 8. . ."). Given that Plaintiffs have demonstrated that the threat of enforcement actions under S.B. 8 is credible and imminent, the Court finds that they have sufficiently demonstrated an injury-in-fact for the purposes of establishing standing to bring their claims against the Judicial Defendants.

b. Causation

The Judicial Defendants next argue that Plaintiffs lack standing because they cannot show that their alleged injuries are traceable to Judicial Defendants since S.B. 8 specifically empowers private citizens, rather than any member of the State, to enforce its provisions. (Dkt. 51, at 16–18). Clarkston cites to *Okpalobi v. Foster*, 244 F.3d 405, 426–27 (5th Cir. 2001) (en banc), and *K.P. v.*

Fund for Reprod. Equity, No. 200726270 (Tex. Dist. Ct. Hockley Cnty., filed July 16, 2020); *Stephens v. The Lilith Fund for Reprod. Equity*, No. 12678 (Tex. Dist. Ct. Franklin Cnty., filed July 16, 2020).

LeBlanc ("K. P. II"), 729 F.3d 427, 437 (5th Cir. 2013), for the proposition that any injury to Plaintiffs caused by S.B. 8 enforcement actions is not fairly traceable to the Judicial Defendants because S.B. 8 statutorily tasks private citizens, rather than state officials, to enforce the six-week ban and fee-shifting provisions. (Dkt. 51, at 17–22; Dkt. 50, at 21–22). Jackson argues that Plaintiffs' injuries are likewise not traceable to him since he has no authority to prevent a private plaintiff from bringing a cause of action under S.B. 8. (Dkt. 49, at 6). Dickson echoes the Judicial Defendants' arguments regarding causation, arguing that since he is "legally incapable" of bringing an enforcement action in Smith County since he is not a resident there, Plaintiffs' alleged injuries are only "fairly traceable" to independent actors not before the Court. (Dkt. 50, at 21–22).

Plaintiffs respond that their impending injuries are in fact traceable to the Judicial Defendants because although only private parties may initiate the civil enforcement actions, the Judicial Defendants actions will exert coercive authority over Plaintiffs by "forcing them into unconstitutional enforcement actions" that "will drain Plaintiffs' resources and potentially force them to close their doors, regardless of whether the enforcement actions are ultimately successful." (Dkt. 62, at 22–23; Compl., Dkt. 1, at 32, 35); *see also Strickland v. Alexander*, 772 F.3d 876, 885–86 (11th Cir. 2014) (injury imposed on plaintiff through garnishment proceeding fairly traceable to court clerk who performed "ministerial" duties in "docketing the garnishment affidavit [and] issuing the summons of garnishment"); *De Leon v. Perry*, 975 F. Supp. 2d 632, 646 (W.D. Tex. 2014).

Plaintiffs further point out that absent relief from this Court, the Judicial Defendants will take coercive actions to enforce S.B. 8 against them when private civil suits are filed in their courts. (Dkt. 62, at 22–23). For example, Defendant Clarkston has stated that she will docket cases and issue citations filed under S.B. 8 as is required by her under state law. (Dkt. 62, at 22) (citing Tex. R. Civ. P. 99(a) ("Upon the filing of the petition, the clerk . . . shall forthwith issue a citation[.]"). Similarly, the proposed defendant class of judges are charged with imposing sanctions under S.B. 8

that include injunctive relief and monetary penalties, which Plaintiffs similarly argue are coercive enforcement actions by the State that will at least in part cause Plaintiffs' alleged injuries. (Dkt. 62, at 23) (citing S.B. 8 § 171.208(b) (judges in enforcement proceedings "shall award" "injunctive relief sufficient to prevent" future violations, as well as monetary penalties of "not less than $10,000 for each abortion" performed in violation of S.B. 8 and "costs and attorney's fees.").

Plaintiffs also contend that the involvement of private parties in the enforcement of S.B. 8 does not negate the role the Judicial Defendants will play in causing Plaintiffs' forecasted injuries because the Judicial Defendants' "state-law duty to act on enforcement petitions submitted to them makes them part of the injurious causal chain." (Dkt. 62, at 23) (citing *K.P. I*, 627 F.3d at 122–23; *Okpalobi*, 244 F.3d at 426). Indeed, while only private individuals can file enforcement actions under S.B. 8, it is only the Judicial Defendants who will exercise their coercive power on behalf of the State to force Plaintiffs to participate in lawsuits they believe to be unconstitutional. (Dkt. 62, at 24) (citing *Strickland*, 772 F.3d at 886). The Judicial Defendants need not be the sole cause of Plaintiffs' alleged injuries nor do they need to be involved in every step of the causal chain to properly establish causation. Instead, Judicial Defendants need only be "among those who would contribute to Plaintiffs' harm," and here the alleged harms to Plaintiffs could not occur absent the clerks' involvement. *K.P. I.*, 627 F.3d at 123; *Durham v. Martin*, 905 F.3d 432, 434 (6th Cir. 2018) ("Even if the administrators were only implementing the consequences of others' actions—that is, [plaintiff]'s expulsion by the legislature—[plaintiff] still has standing to sue the administrators for their actions in carrying out those consequences."); *Strickland*, 772 F.3d 886. Here, the Judicial Defendants are integral in executing S.B. 8 enforcement measures by coercing Plaintiffs to participate in such suits and issuing relief against those who violate S.B. 8. (Dkt. 62, at 24). Indeed, the Judicial Defendants may be one of many individuals who may cause harm to Plaintiffs through S.B. 8, but that does negate their role in causing the injuries Plaintiffs have alleged. *Mitchum v. Foster*, 407 U.S. 225, 242

(1972) (federal actions against state judges are particularly appropriate where risk of "great, immediate, and irreparable loss of a person's constitutional rights.").

Because Plaintiffs have alleged that Judicial Defendants will contribute to their injuries by exercising coercive power over them in S.B. 8's private enforcement suits, Plaintiffs have sufficiently alleged that their injuries are traceable to Judicial Defendants so as to support a finding of standing.

c. Redressability

The Judicial Defendants further argue that any declaratory relief issued by this Court would not redress the harm to Plaintiffs because they do not have the power to reject or refuse to adjudicate lawsuits. (Dkt. 51, at 21). Clarkston suggests that any order from this Court requiring her to decline to docket cases brought under S.B. 8 would require her to "exceed her responsibilities as an elected official under state law" to "evaluate the legal basis for *every single case* filed in Smith County." (Dkt. 51, at 20). Because Clarkston is charged under state law with filing any lawsuit initiated in Smith County, she argues that any order from this Court declaring S.B. 8 unenforceable in state courts would force her to violate state law and threaten the principles of federalism. (Dkt. 51, at 20–21).

Plaintiffs respond that their injuries are in fact redressable by an order from this Court enjoining the Judicial Defendants from initiating or adjudicating private enforcement actions under S.B. 8. (Dkt. 62, at 26). For example, Plaintiffs argue that an order enjoining the proposed class of clerks from docketing or issuing citations for any petitions for enforcement brought under S.B. 8 would help redress Plaintiffs' injuries by preventing them from being forced to participate in a state court proceeding initiated under an allegedly unconstitutional law. (Dkt. 62, at 26).[21] In addition,

[21] *See, e.g., Air Evac EMS*, 851 F.3d at 514 (injunction against the state defendants involved in causing the plaintiffs' injuries "would remove a 'discrete injury' caused by state defendants' enforcement"); Strickland, 772 F.3d at 886 (injury could be redressed if the court were to "declare the Georgia garnishment process unconstitutional or enjoin any future similar actions that lacked adequate due process protections"); Durham, 905 F.3d at 434 ("[W]ere the district court to order the administrators to pay him those benefits, as requested

Plaintiffs argue that an order declaring S.B. 8 unconstitutional would deter private parties from bringing enforcement actions under the law in the first place and would presumably preclude Judicial Defendants from adjudicating lawsuits under a law declared unconstitutional. (Dkt. 62, at 27). Indeed, in *Roe v. Wade*, the Supreme Court issued only declaratory relief under the assumption that "Texas prosecutorial authorities will give full credence to this decision that the present criminal abortion statutes of that State are unconstitutional." 410 U.S. 113, 166 (1973). The Court assumes any declaratory relief issued in this case would have the same impact on Judicial Defendants here.

Clarkston asserts that this Court cannot redress Plaintiffs' alleged harm because any injunction would force her to violate her state law duty to docket cases filed in her county. (Dkt. 51, at 19–20). Yet Clarkston's state law duty to docket petitions and issue citations cannot trump her duty to act according to the Constitution, and in any event, an order from this Court would require her to "do nothing more than uphold federal law." *Air Evac EMS*, 851 F.3d at 516. To the extent her duty to act in accordance with the U.S. Constitution conflicts with her duties to docket petitions and issue citations under state law, her state law duties must yield to federal law. *Aldridge v. Mississippi Dep't of Corr.*, 990 F.3d 868, 874 (5th Cir. 2021) ("[A]ny state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.") (internal citations removed). Contrary to Clarkston's position that upholding the Constitution would present a federalism issue, state officials are never absolved from violating the Constitution merely because their state-mandated duties require them to act in an unconstitutional manner. *Nashville Cmty. Bail Fund v. Gentry*, 446 F. Supp. 3d 282, 301 (M.D. Tenn. 2020). The Court further rejects Clarkston's argument that she is incapable as a non-lawyer of identifying petitions brought under S.B. 8—even if she were incapable of reading a petition to identify whether it was brought under S.B. 8, she may

by the complaint, that remedy would redress Durham's claimed injury."); *Kitchen v. Herbert*, 755 F.3d 1193, 1201–02 (10th Cir. 2014) (injuries caused by the clerk "would be cured by an injunction prohibiting the enforcement of Amendment 3").

obtain guidance from the state attorney general with regard to how to implement any injunction from this Court. *See Campaign for S. Equal. v. Bryant*, 197 F. Supp. 3d 905, 909 (S.D. Miss. 2016).

Clarkston relies on *Okpalobi* to support her argument that Plaintiffs do not have standing to sue public officials in challenges to laws that create private rights of actions against abortion providers. 244 F.3d at 426–27. In *Okpalobi*, the Fifth Circuit found that there was no "case or controversy" between the plaintiff abortion providers and the Louisiana government and attorney general in a suit challenging the constitutionality of a statute creating tort liability against physicians who provide abortions because the governor and attorney general played no role in the private tort lawsuits. 244 F.3d at 409, 429. Clarkston also relies on *K.P. II*, where the Fifth Circuit held that the same abortion providers could not challenge the same law by suing members of the oversight board that reviewed patient tort claims to determine whether they would be covered by a medical-malpractice fund because the board was not charged with enforcing the tort actions. 729 F.3d at 437. Here, in contrast, the Judicial Defendants are involved in the S.B. 8 private enforcement actions in a way that none of the defendants in *Okapalobi* and *K.P. II* were so as to support causation for the purposes of standing, and the absence of other appropriate state official defendants means the Judicial Defendants are the only state officials against whom relief from this Court might redress Plaintiffs' alleged injuries.

In addition, Plaintiffs point out that in *K.P. I*, the Fifth Circuit found that abortion providers had standing to sue members of an oversight board in a challenge against the same tort liability provisions because under the statute the board could deny plaintiffs state-sponsored medical malpractice coverage. 627 F.3d 115 (5th Cir. 2010). The Fifth Circuit found that causation was satisfied because the board members, although unable to bring tort claims under the Louisiana law, had the "authority to disburse or withhold the benefits associated with Fund membership." *Id.* Here, Judicial Defendants "wield influence at multiple points in the" enforcement of S.B. 8, and

declaratory relief defining their constitutional obligations with respect to Plaintiffs would serve to redress Plaintiffs' alleged harm. *Air Evac*, 851 F.3d at 515–6. Accordingly, Plaintiffs have established the requisite causal connection between their alleged harm and the Judicial Defendants because the Judicial Defendants have coercive power over Plaintiffs in S.B. 8 enforcement actions.

Furthermore, the Court once again notes that the Fifth Circuit has never stated that there is no proper defendant in challenges to anti-abortion laws that create private rights of action, but rather that the defendants named in previous lawsuits were not properly named due to their lack of enforcement power. See *K.P. I*, 627 F.3d at 124; *Wallace*, 646 F.2d 160. The Court thus does not read these cases to say that Plaintiffs cannot name any state official whatsoever in their suit, as suggested by the Judicial Defendants here. Such a finding would countenance any stratagem to relegate enforcement of state laws to judges so as to avoid federal court review of unconstitutional state statutes. As such, absent guidance from the Fifth Circuit or the State regarding who would be the proper government defendant in a lawsuit challenging the constitutionality of a state statute primarily enforced through a private actors, the Court must find that the Judicial Defendants are the proper defendants here. To find otherwise would be to tell Plaintiffs that there is no state official against whom they may bring a challenge in federal court to vindicate their constitutional rights.

d. Prudential Standing

Clarkston further argues that even if Plaintiffs have demonstrated the three elements of standing, Plaintiffs' request for declaratory relief against the Judicial Defendants would be improper for "prudential standing considerations" because any such relief would "impermissibly monitor the operation of state court functions." (Dkt. 51, at 15–16) (citing *Bauer*, 341 F.3d at 358). However, rather than serve to "monitor" the operation of state courts, any order from this Court would serve to clarify the Judicial Defendants' constitutional duties with regard to S.B. 8 and avoid violating Plaintiffs' constitutional rights through their adjudication of enforcement actions under S.B. 8.

Plaintiffs rightly argue that all state statutes must be enforced through some form of State coercion, whether through "its legislative, its executive, or its judicial authorities." (Dkt. 62, at 11) (citing *Shelley v. Kraemer*, 334 U.S. 1, 14 (quoting *Ex parte Virginia*, 100 U.S. 339, 347 (1880)). Because the State has crafted S.B. 8 in such a way as to purposefully avoid enforcement by the legislative or executive branches of the government, the only State authority able to enforce the law are members of the proposed classes of Judicial Defendants who "exert their official power to open the actions in the docket and issue citations compelling those sued under S.B. 8 to respond to the lawsuit" or "exert the compulsive power of the state to force those sued under S.B. 8 to comply with the statute through an injunction and other penalties." (Dkt. 62, at 12) (citing S.B. 8 § 171.208(a)–(b)). As such, Plaintiffs argue that the proposed classes of Judicial Defendants are "the lone government officials responsible for directly coercing compliance with S.B. 8" and thus are the proper State defendants in this action. (Dkt. 62, at 12).

The Court agrees that absent further instruction from the State or the Fifth Circuit regarding who would be the proper the defendant in this pre-enforcement suit for equitable relief, the Court finds that Supreme Court precedent dictates that the Judicial Defendants are the proper defendants. *Shelley v. Kraemer*, 334 U.S. 1. Indeed, the Judicial Defendants are the only members of the State immediately connected with the enforcement of S.B. 8 and an order from this Court precluding them from instituting or adjudicating private enforcement actions under S.B. 8 would serve the redress Plaintiffs' alleged harm. Indeed, the correct answer cannot be that "there is *no one* [from the State] who can be sued to block enforcement" of S.B. 8 merely because the law was drafted to avoid federal review of its constitutionality. (Dkt. 62, at 14).

C. Dickson Motion to Dismiss

Dickson similarly moves to dismiss Plaintiffs' claims against him because S.B. 8's severability provision requires Plaintiffs to establish standing as to every provision of S.B. 8 and that, in any

event, Plaintiffs have failed to meet show an injury-in-fact traceable to him under S.B. 8's private enforcement mechanism. (*See* Dickson Mot. Dismiss, Dkt. 50). Plaintiffs filed a response, (Dkt. 57), and Dickson filed a reply. (Dkt. 64).

1. Severability

Dickson argues that because S.B. 8 contains severability provisions, Plaintiffs must allege an injury with regard to each provision of the law to establish standing over their claims against him. (Dkt. 50, at 7–10) (citing Senate Bill 8, 87th Leg., §§ 3, 5, 10)). Because certain provisions of S.B. 8 are not enforced by private citizens, Dickson's argument goes, Plaintiffs lack standing to challenge those provisions as against him. (Dkt. 50, at 9). According to Dickson, Plaintiffs only have standing in connection with Sections 3 and 4 of S.B. 8, which empower private citizens to bring lawsuits and recover attorney's fees against those who participate in abortions the law purports to ban. (*Id.*) ("Only sections 3 and 4 of the statute can be "enforced" by private citizens such as Mr. Dickson in civil litigation—and those are the *only* provisions in Senate Bill 8 that the plaintiffs can conceivably challenge in a lawsuit against Mr. Dickson.").

Yet as Plaintiffs point out, the issue of "severability is a question of remedy, [to be] considered only after a legal violation has been established on the merits." (Dkt. 57, at 24) (citing *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328–29 (2006)). Despite his insistence that Plaintiffs cannot have standing with regard to each provision they challenge "unless it applies the statute's severability requirements," Dickson cites to authority stating that severability and standing are not to be analyzed together. (Dkt. 50, at 8) (citing *In re Gee*, 941 F.3d 153, 160 (5th Cir. 2019). Indeed, in *Gee*, the Court assessed standing and severability separately, stating that "[s]everability obviously governs the remedy after the finding of a constitutional violation; it plays no part in finding a constitutional violation." *Gee*, 941 F.3d at 173; *see also Ayotte v. Planned Parenthood of N. New England*, 546 U.S. at 328–29.

To the extent Dickson argues that Plaintiffs must demonstrate standing for "each and every provision they challenge," Plaintiffs have met this burden by showing they have standing as to Sections 3 and 4, the only sections Plaintiffs challenge as against Dickson. (Compl., Dkt. 1, at 46); *Gee*, 941 F.3d at 160. The Court rejects Dickson's argument that Plaintiffs must establish standing as to provisions of S.B. 8 that they do not challenge as against Dickson to sustain their claims against him. Because the Court properly addresses severability after a constitutional violation has been found, the Court need not assess S.B. 8's severability provisions at this time. *Gee*, 941 F.3d at 173. Moreover, the Court notes that severability provisions do not necessarily preclude a finding that, if Section 3's six-week ban on abortions is found to be unconstitutional, other provisions of the law found to be "mutually dependent" on the provisions challenged here also would be unconstitutional. *See SisterSong Women of Color Reprod. Just. Collective v. Kemp*, 472 F. Supp. 3d 1297, 1324 (N.D. Ga. 2020) (remaining provisions of Georgia abortion law with severability provision invalid where "mutually dependent" on section found unconstitutional).

2. Standing

Dickson next claims that Plaintiffs have no standing to bring their claims against him because they have not demonstrated an impending injury-in-fact traceable to Dickson that could be redressed by an injunction against him. (Dkt. 50, at 10–16).

Dickson first argues that he has "no intention" of suing Plaintiffs under Section 3 of S.B. 8 because "he is expecting each of the plaintiffs to comply with the statute rather than expose themselves to private civil-enforcement lawsuits." (Dkt. 50, at 10). Dickson emphasizes that Plaintiffs have not indicated whether they intend to violate S.B. 8 when it takes effect, apparently under the impression that Plaintiffs must "specifically allege" their intent to violate S.B. 8 in order to establish standing. (Dkt. 50, at 11–12). As such, Dickson argues that there is no impending injury

traceable to him or adversity between the parties as required to support standing or meet the "case or controversy" requirement under Article III. (Dkt. 50, at 11).

Plaintiffs respond that they need not specifically allege that they plan to violate S.B. 8 to establish standing and, in any event, have demonstrated a credible threat of enforcement by Dickson. (Dkt. 57, at 13–14). Plaintiffs are correct that they need not allege they intent to violate a challenged statute to confer standing. Indeed, the Supreme Court has repeatedly stated that plaintiffs need not plead that they plan to violate a law to have standing to challenge its constitutionality. *SBA List*, 573 U.S. at 163 ("Nothing in [the Supreme] Court's decisions requires a plaintiff who wishes to challenge the constitutionality of a law to confess that he will in fact violate that law."); *Holder v. Humanitarian L. Project*, 561 U.S. 1, 15–16 (2010) (finding standing in a pre-enforcement action based on plaintiffs' allegation that "they would provide similar support [to groups designated as terrorist organizations] again if the statute's allegedly unconstitutional bar were lifted"); *Vantage Trailers, Inc. v. Beall Corp.*, 567 F.3d 745, 748 (5th Cir. 2009). Dickson has cited no contrary authority, and the Court thus rejects his argument that Plaintiffs have failed to properly allege an injury-in-fact against him by not admitting that they will violate S.B. 8 after September 1.

Additionally, Dickson has demonstrated his intent to enforce S.B. 8 if Plaintiffs violate the law. (Dickson Decl., Dkt. 50-1, at 1) (admitting that he "expect[s] that the mere threat of civil lawsuits under section 171.208 will be enough to induce compliance" with S.B. 8 by Plaintiffs"); (Dickson Mar. 29, 2021 Facebook Post, Dkt. 57-2, at 7) ("[B]ecause of [S.B. 8] you will be able to bring many lawsuits later this year against any abortionists who are in violation of this bill. Let me know if you are looking for an attorney to represent you if you choose to do so. Will be glad to recommend some."); *id.* at 4 (stating with respect to the then-pending S.B. 8 that "because of this bill you will be able to bring many lawsuits later this year against any at WWH [i.e., Plaintiff Whole Woman's Health] who are in violation of this law"); (Dickson May 5, 2021 Facebook Post, Dkt. 57-

1, at 4) ("The Heartbeat Bill is being said to make everyone in Texas an attorney general going after abortionists."). Based on Dickson's statements regarding his intent to participate in the private enforcement of Section 3 should Plaintiffs continue to provide the banned abortions after September 1, the Court finds that Plaintiffs have sufficiently alleged "a significant possibility of future harm" in the form of an enforcement action by Dickson under Section 3 to support their standing against him. *City of Austin v. Paxton*, 943 F.3d 993, 1002 (5th Cir. 2019).

Dickson also argues that any alleged injury to Plaintiffs caused by S.B. 8's Section 3 cannot be redressed by this Court because even if Dickson is enjoined from bringing an enforcement action, there are "countless others" who would bring enforcement actions under S.B. 8. (Dkt. 50, at 13–14). As Plaintiffs point out, however, because an order preventing "these [private] penalties and lawsuits" by Dickson would alleviate "a discrete injury" to Plaintiffs, Plaintiffs have sufficiently demonstrated standing as to Dickson. (Dkt. 57, at 17) (citing *Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 159 (5th Cir. 2007); *see also Massachusetts v. EPA*, 549 U.S. 497, 525 (2007) ("[P]laintiff need not show that a favorable decision will relieve his every injury.'"). Indeed, Plaintiffs have alleged that an injunction preventing Dickson from bringing enforcement actions under S.B. 8 would redress their injuries, at least in part, by preventing Dickson from "suing and imposing significant litigation costs on Plaintiffs." (Dkt. 57, at 16). Moreover, any injunction by this Court would serve as a "strong deterrent" to other individuals contemplating bringing enforcement actions under S.B. 8 and allow defendants in S.B. 8 proceedings in state court to bring counterclaims under Section 1983. (Dkt. 57, at 18). Preventing Dickson and discouraging others from filing S.B. 8 enforcement actions would also prevent the discrete harm of forcing Plaintiffs to shut down completely to comply with S.B. 8. (*Id.* at 16–17).

Dickson similarly argues that Plaintiffs alleged injury under Section 4 is too "conjectural" to confer standing because he has not been deemed a "prevailing party" in any relevant lawsuit and

Plaintiffs do not allege that he will be a prevailing party in this lawsuit. (Dkt. 50, at 14–15). Dickson further contends that if he does prevail in this litigation, he intends to recover his attorney's fees under 42 U.S.C. § 1988(b), rather than under Section 4, and as such "currently" has no intention of enforcing Section 4. (Dkt. 50, at 14–15) ("Dickson has not yet decided, however, whether he will sue the plaintiffs under section 4 if he is unsuccessful in recovering fees under 42 U.S.C. § 1988(b)."). Plaintiffs respond that Dickson has not disputed that Section 4 empowers him to seek attorney's fees and costs if he is successful on any claim in this case or that he will seek attorney's fees in the event Plaintiffs are not successful in every claim. (Dkt. 57, at 18–19). Plaintiffs argue that Dickson would have to move for attorney's fees under Section 4 because "Dickson has no colorable basis for fees under Section 1988" because Plaintiffs' claim against him are well-founded. (Dkt. 57, at 19). The Court agrees.

Fees are available to defendants under 42 U.S.C § 1988 only if the court finds the action is "frivolous, unreasonable, or without foundation." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978). The Court finds that Dickson has not met the "difficult standard" of showing that Plaintiffs' claims are groundless or without foundation. *Mitchell v. City of Moore, Oklahoma*, 218 F.3d 1190, 1203 (10th Cir. 2000) ("This is a difficult standard to meet, to the point that rarely will a case be sufficiently frivolous to justify imposing attorney fees on the plaintiff."). Having withstood the motions to dismiss phase against all Defendants, and in the absence of any showing on Dickson's part tending to show that Plaintiffs' claims rely on "an indisputably meritless legal theory," the Court finds that Dickson will not be able to rely on Section 1988 to recover fees in this action. *See Doe v. Silsbee Indep. Sch. Dist.*, 440 F. App'x 421, 425 (5th Cir. 2011) ("[T]he dismissal of a plaintiff's claims before they reach the jury is insufficient by itself to support a finding of frivolity.").

In any event, Dickson has demonstrated his intent to recover attorney's fees in this action, and in the absence of relief available to him under Section 1988, he will necessarily need to rely on

Section 4 in making such a request. (Dickson Decl., Dkt. 50-1, at 3) ("If I am unsuccessful in recovering fees under 42 U.S.C. § 1988(b) at the conclusion of this litigation, then I will consider at that time whether to sue the plaintiffs under section 30.022 of the Texas Civil Practice and Remedies Code, in consultation with my attorneys."). Moreover, as described above, Plaintiffs need not wait, as Dickson suggests, for him to be considered a "prevailing party" in this litigation and fail to recover fees under Section 1988 to seek a pre-enforcement remedy in this Court for Dickson's future exercise of Section 4 in this case or others. *See Susan B. Anthony List*, 573 U.S. at 160.

Next, Dickson argues that Plaintiffs lack standing to seek an injunction to prevent enforcement of S.B. 8 against parties not named in this lawsuit and in the absence of a plaintiff class, which would presumably represent every person who might be sued under S.B. 8 in the future. (Dkt. 50, at 22–24). Dickson asks the Court to dismiss Plaintiffs' claim to the extent they seek relief on behalf of those not before this Court. (Dkt. 50, at 24). The Court finds that Plaintiffs have clearly sought relief on behalf of themselves and do not purport to bring their claims on behalf of others not before this Court. (Compl., Dkt.1, at 39–47). The Court thus rejects Dickson's argument that this Court must dismiss Plaintiffs' claims on this basis. Lastly, Dickson argues that this Court has "no power to formally revoke legislation or delay its effective start date" but rather may only enjoin named defendants from enforcing the statute. (Dkt. 50, at 24–26). The Court again finds this argument perplexing given that Plaintiffs have specifically sought an injunction preventing the named defendants in this lawsuit from enforcing S.B. 8. (*See, e.g.*, Dkt. 1, at 46) (requesting that the Court issue "permanent, and if necessary, preliminary injunctive relief . . . restrain[ing] Defendant Mark Lee Dickson, his agents, servants, employees, attorneys, and any persons in active concert or participation with him, from enforcing S.B. 8 in any way."). The Court finds this argument unavailing. Accordingly, the Court finds that Dickson's motion to dismiss must be denied.

IV. CONCLUSION

For the reasons given above, **IT IS ORDERED** that Defendants' motions to dismiss, (Dkts. 48, 49, 50, 51), are **DENIED**.

SIGNED on August 25, 2021.

ROBERT PITMAN
UNITED STATES DISTRICT JUDGE

United States Court of Appeals for the Fifth Circuit

No. 21-50708

United States Court of Appeals
Fifth Circuit
FILED
August 13, 2021
Lyle W. Cayce
Clerk

IN RE: PENNY CLARKSTON; MARK LEE DICKSON,

Petitioners.

Petition for a Writ of Mandamus
to the United States District Court
for the Western District of Texas
USDC No. 1:21-CV-616

Before SOUTHWICK, GRAVES, and COSTA, *Circuit Judges*.

PER CURIAM:

Petitioners seek a writ of mandamus primarily for the purpose of having the district court rule on a motion to dismiss prior to that court's requiring the petitioners to respond to a motion for summary judgment. We do not further detail the petition. After entering an administrative stay, which will end with this order, we received a response from the plaintiffs in the case, a reply from petitioners, and a statement from the district court.

We conclude that the essence of what petitioners request is that this court alter the schedule established by the district court for briefing. We interpret the district court's statement to be that an order on the motion to dismiss will be issued no later than any order as to summary judgment. We do not find in petitioners' arguments a basis to grant the extraordinary relief of a writ of mandamus simply to direct the timing of briefing.

IT IS ORDERED that the administrative stay earlier entered by this court is WITHDRAWN.

IT IS ORDERED that the petition for writ of mandamus is DENIED.

IT IS FURTHER ORDERED that the petitioners' opposed emergency motion to stay the district court proceedings is DENIED.

AN ACT

relating to abortion, including abortions after detection of an unborn child's heartbeat; authorizing a private civil right of action.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. This Act shall be known as the Texas Heartbeat Act.

SECTION 2. The legislature finds that the State of Texas never repealed, either expressly or by implication, the state statutes enacted before the ruling in *Roe v. Wade*, 410 U.S. 113 (1973), that prohibit and criminalize abortion unless the mother's life is in danger.

SECTION 3. Chapter 171, Health and Safety Code, is amended by adding Subchapter H to read as follows:

SUBCHAPTER H. DETECTION OF FETAL HEARTBEAT

Sec. 171.201. DEFINITIONS. In this subchapter:

(1) "Fetal heartbeat" means cardiac activity or the steady and repetitive rhythmic contraction of the fetal heart within the gestational sac.

(2) "Gestational age" means the amount of time that has elapsed from the first day of a woman's last menstrual period.

(3) "Gestational sac" means the structure comprising the extraembryonic membranes that envelop the unborn child and that is typically visible by ultrasound after the fourth week of

pregnancy.

(4) "Physician" means an individual licensed to practice medicine in this state, including a medical doctor and a doctor of osteopathic medicine.

(5) "Pregnancy" means the human female reproductive condition that:

(A) begins with fertilization;

(B) occurs when the woman is carrying the developing human offspring; and

(C) is calculated from the first day of the woman's last menstrual period.

(6) "Standard medical practice" means the degree of skill, care, and diligence that an obstetrician of ordinary judgment, learning, and skill would employ in like circumstances.

(7) "Unborn child" means a human fetus or embryo in any stage of gestation from fertilization until birth.

Sec. 171.202. LEGISLATIVE FINDINGS. The legislature finds, according to contemporary medical research, that:

(1) fetal heartbeat has become a key medical predictor that an unborn child will reach live birth;

(2) cardiac activity begins at a biologically identifiable moment in time, normally when the fetal heart is formed in the gestational sac;

(3) Texas has compelling interests from the outset of a woman's pregnancy in protecting the health of the woman and the life of the unborn child; and

(4) to make an informed choice about whether to

continue her pregnancy, the pregnant woman has a compelling interest in knowing the likelihood of her unborn child surviving to full-term birth based on the presence of cardiac activity.

Sec. 171.203. DETERMINATION OF PRESENCE OF FETAL HEARTBEAT REQUIRED; RECORD. (a) For the purposes of determining the presence of a fetal heartbeat under this section, "standard medical practice" includes employing the appropriate means of detecting the heartbeat based on the estimated gestational age of the unborn child and the condition of the woman and her pregnancy.

(b) Except as provided by Section 171.205, 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.

(c) In making a determination under Subsection (b), the physician must use a test that is:

(1) consistent with the physician's good faith and reasonable understanding of standard medical practice; and

(2) appropriate for the estimated gestational age of the unborn child and the condition of the pregnant woman and her pregnancy.

(d) A physician making a determination under Subsection (b) shall record in the pregnant woman's medical record:

(1) the estimated gestational age of the unborn child;

(2) the method used to estimate the gestational age; and

(3) the test used for detecting a fetal heartbeat,

including the date, time, and results of the test.

Sec. 171.204. PROHIBITED ABORTION OF UNBORN CHILD WITH DETECTABLE FETAL HEARTBEAT; EFFECT. (a) Except as provided by Section 171.205, a physician may not knowingly perform or induce an abortion on a pregnant woman if the physician detected a fetal heartbeat for the unborn child as required by Section 171.203 or failed to perform a test to detect a fetal heartbeat.

(b) 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.

(c) This section does not affect:

(1) the provisions of this chapter that restrict or regulate an abortion by a particular method or during a particular stage of pregnancy; or

(2) any other provision of state law that regulates or prohibits abortion.

Sec. 171.205. EXCEPTION FOR MEDICAL EMERGENCY; RECORDS. (a) Sections 171.203 and 171.204 do not apply if a physician believes a medical emergency exists that prevents compliance with this subchapter.

(b) A physician who performs or induces an abortion under circumstances described by Subsection (a) shall make written notations in the pregnant woman's medical record of:

(1) the physician's belief that a medical emergency necessitated the abortion; and

(2) the medical condition of the pregnant woman that prevented compliance with this subchapter.

(c) A physician performing or inducing an abortion under this section shall maintain in the physician's practice records a copy of the notations made under Subsection (b).

Sec. 171.206. CONSTRUCTION OF SUBCHAPTER. (a) This subchapter does not create or recognize a right to abortion before a fetal heartbeat is detected.

(b) This subchapter may not be construed to:

(1) authorize the initiation of a cause of action against or the prosecution of a woman on whom an abortion is performed or induced or attempted to be performed or induced in violation of this subchapter;

(2) wholly or partly repeal, either expressly or by implication, any other statute that regulates or prohibits abortion, including Chapter 6-1/2, Title 71, Revised Statutes; or

(3) restrict a political subdivision from regulating or prohibiting abortion in a manner that is at least as stringent as the laws of this state.

Sec. 171.207. LIMITATIONS ON PUBLIC ENFORCEMENT. (a) 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.

(b) Subsection (a) may not be construed to:

(1) legalize the conduct prohibited by this subchapter or by Chapter 6-1/2, Title 71, Revised Statutes;

(2) limit in any way or affect the availability of a remedy established by Section 171.208; or

(3) limit the enforceability of any other laws that regulate or prohibit abortion.

Sec. 171.208. CIVIL LIABILITY FOR VIOLATION OR AIDING OR ABETTING VIOLATION. (a) 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).

(b) If a claimant prevails in an action brought under this section, the court shall award:

(1) injunctive relief sufficient to prevent the defendant from violating this subchapter or engaging in acts that aid or abet violations of this subchapter;

(2) statutory damages in an amount of not less than $10,000 for each abortion that the defendant performed or induced in violation of this subchapter, and for each abortion performed or induced in violation of this subchapter that the defendant aided or abetted; and

(3) costs and attorney's fees.

(c) Notwithstanding Subsection (b), a court may not award relief under this section in response to a violation of Subsection (a)(1) or (2) if the defendant demonstrates that the defendant previously paid the full amount of statutory damages under Subsection (b)(2) in a previous action for that particular abortion performed or induced in violation of this subchapter, or for the particular conduct that aided or abetted an abortion performed or induced in violation of this subchapter.

(d) Notwithstanding Chapter 16, Civil Practice and Remedies Code, or any other law, a person may bring an action under this section not later than the fourth anniversary of the date the cause of action accrues.

(e) Notwithstanding any other law, the following are not a defense to an action brought under this section:

(1) ignorance or mistake of law;

(2) a defendant's belief that the requirements of this subchapter are unconstitutional or were unconstitutional;

(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;

(4) a defendant's reliance on any state or federal court decision that is not binding on the court in which the action has been brought;

(5) non-mutual issue preclusion or non-mutual claim preclusion;

(6) the consent of the unborn child's mother to the abortion; 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 by Section 171.209.

(f) It is an affirmative defense if:

(1) a person sued under Subsection (a)(2) reasonably believed, after conducting a reasonable investigation, that the physician performing or inducing the abortion had complied or would comply with this subchapter; or

(2) a person sued under Subsection (a)(3) reasonably believed, after conducting a reasonable investigation, that the physician performing or inducing the abortion will comply with this subchapter.

(f-1) The defendant has the burden of proving an affirmative defense under Subsection (f)(1) or (2) by a preponderance of the evidence.

(g) This section may not be construed to impose liability on any speech or conduct protected by the First Amendment of the United States Constitution, as made applicable to the states through the United States Supreme Court's interpretation of the Fourteenth

Amendment of the United States Constitution, or by Section 8, Article I, Texas Constitution.

(h) Notwithstanding any other law, this state, a state official, or a district or county attorney may not intervene in an action brought under this section. This subsection does not prohibit a person described by this subsection from filing an amicus curiae brief in the action.

(i) Notwithstanding any other law, a court may not award costs or attorney's fees under the Texas Rules of Civil Procedure or any other rule adopted by the supreme court under Section 22.004, Government Code, to a defendant in an action brought under this section.

(j) Notwithstanding any other law, a civil action under this section may not be brought by a person who impregnated the abortion patient through an act of rape, sexual assault, incest, or any other act prohibited by Sections 22.011, 22.021, or 25.02, Penal Code.

Sec. 171.209. CIVIL LIABILITY: UNDUE BURDEN DEFENSE LIMITATIONS. (a) A defendant against whom an action is brought under Section 171.208 does not have standing to assert the rights of women seeking an abortion as a defense to liability under that section unless:

(1) the United States Supreme Court holds that the courts of this state must confer standing on that defendant to assert the third-party rights of women seeking an abortion in state court as a matter of federal constitutional law; or

(2) the defendant has standing to assert the rights of women seeking an abortion under the tests for third-party standing

established by the United States Supreme Court.

(b) A defendant in an action brought under Section 171.208 may assert an affirmative defense to liability under this section if:

(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.

(d) A defendant may not establish an undue burden under this section by:

(1) merely demonstrating that an award of relief will prevent women from obtaining support or assistance, financial or otherwise, from others in their effort to obtain an abortion; or

(2) arguing or attempting to demonstrate that an award of relief against other defendants or other potential defendants will impose an undue burden on women seeking an abortion.

(e) The affirmative defense under Subsection (b) is not available if the United States Supreme Court overrules *Roe v. Wade*,

410 U.S. 113 (1973) or *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), regardless of whether the conduct on which the cause of action is based under Section 171.208 occurred before the Supreme Court overruled either of those decisions.

(f) Nothing in this section shall in any way limit or preclude a defendant from asserting the defendant's personal constitutional rights as a defense to liability under Section 171.208, and a court may not award relief under Section 171.208 if the conduct for which the defendant has been sued was an exercise of state or federal constitutional rights that personally belong to the defendant.

Sec. 171.210. CIVIL LIABILITY: VENUE. (a) Notwithstanding any other law, including Section 15.002, Civil Practice and Remedies Code, a civil action brought under Section 171.208 shall be brought in:

(1) the county in which all or a substantial part of the events or omissions giving rise to the claim occurred;

(2) the county of residence for any one of the natural person defendants at the time the cause of action accrued;

(3) the county of the principal office in this state of any one of the defendants that is not a natural person; or

(4) the county of residence for the claimant if the claimant is a natural person residing in this state.

(b) If a civil action is brought under Section 171.208 in any one of the venues described by Subsection (a), the action may not be transferred to a different venue without the written consent of all parties.

Sec. 171.211. SOVEREIGN, GOVERNMENTAL, AND OFFICIAL IMMUNITY PRESERVED. (a) This section prevails over any conflicting law, including:

(1) the Uniform Declaratory Judgments Act; and

(2) Chapter 37, Civil Practice and Remedies Code.

(b) 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.

Sec. 171.212. SEVERABILITY. (a) Mindful of *Leavitt v. Jane L.*, 518 U.S. 137 (1996), in which in the context of determining the severability of a state statute regulating abortion the United States Supreme Court held that an explicit statement of legislative intent is controlling, it is the intent of the legislature that every provision, section, subsection, sentence, clause, phrase, or word in this chapter, and every application of the provisions in this chapter, are severable from each other.

(b) If any application of any provision in this chapter to any person, group of persons, or circumstances is found by a court to be invalid or unconstitutional, the remaining applications of that provision to all other persons and circumstances shall be

severed and may not be affected. All constitutionally valid applications of this chapter shall be severed from any applications that a court finds to be invalid, leaving the valid applications in force, because it is the legislature's intent and priority that the valid applications be allowed to stand alone. Even if a reviewing court finds a provision of this chapter to impose an undue burden in a large or substantial fraction of relevant cases, the applications that do not present an undue burden shall be severed from the remaining applications and shall remain in force, and shall be treated as if the legislature had enacted a statute limited to the persons, group of persons, or circumstances for which the statute's application does not present an undue burden.

(b-1) If any court declares or finds a provision of this chapter facially unconstitutional, when discrete applications of that provision can be enforced against a person, group of persons, or circumstances without violating the United States Constitution and Texas Constitution, those applications shall be severed from all remaining applications of the provision, and the provision shall be interpreted as if the legislature had enacted a provision limited to the persons, group of persons, or circumstances for which the provision's application will not violate the United States Constitution and Texas Constitution.

(c) The legislature further declares that it would have enacted this chapter, and each provision, section, subsection, sentence, clause, phrase, or word, and all constitutional applications of this chapter, irrespective of the fact that any provision, section, subsection, sentence, clause, phrase, or word,

or applications of this chapter, were to be declared unconstitutional or to represent an undue burden.

(d) If any provision of this chapter is found by any court to be unconstitutionally vague, then the applications of that provision that do not present constitutional vagueness problems shall be severed and remain in force.

(e) No court may decline to enforce the severability requirements of Subsections (a), (b), (b-1), (c), and (d) on the ground that severance would rewrite the statute or involve the court in legislative or lawmaking activity. A court that declines to enforce or enjoins a state official from enforcing a statutory provision does not rewrite a statute, as the statute continues to contain the same words as before the court's decision. A judicial injunction or declaration of unconstitutionality:

(1) is nothing more than an edict prohibiting enforcement that may subsequently be vacated by a later court if that court has a different understanding of the requirements of the Texas Constitution or United States Constitution;

(2) is not a formal amendment of the language in a statute; and

(3) no more rewrites a statute than a decision by the executive not to enforce a duly enacted statute in a limited and defined set of circumstances.

SECTION 4. Chapter 30, Civil Practice and Remedies Code, is amended by adding Section 30.022 to read as follows:

Sec. 30.022. AWARD OF ATTORNEY'S FEES IN ACTIONS CHALLENGING ABORTION LAWS. (a) Notwithstanding any other law, any

person, including an entity, attorney, or law firm, who seeks declaratory or injunctive relief to prevent this state, a political subdivision, any governmental entity or public official in this state, or any person in this state from enforcing any statute, ordinance, rule, regulation, or any other type of law that regulates or restricts abortion or that limits taxpayer funding for individuals or entities that perform or promote abortions, in any state or federal court, or that represents any litigant seeking such relief in any state or federal court, is jointly and severally liable to pay the costs and attorney's fees of the prevailing party.

(b) For purposes of this section, a party is considered a prevailing party if a state or federal court:

(1) dismisses any claim or cause of action brought against the party that seeks the declaratory or injunctive relief described by Subsection (a), regardless of the reason for the dismissal; or

(2) enters judgment in the party's favor on any such claim or cause of action.

(c) Regardless of whether a prevailing party sought to recover costs or attorney's fees in the underlying action, a prevailing party under this section may bring a civil action to recover costs and attorney's fees against a person, including an entity, attorney, or law firm, that sought declaratory or injunctive relief described by Subsection (a) not later than the third anniversary of the date on which, as applicable:

(1) the dismissal or judgment described by Subsection (b) becomes final on the conclusion of appellate review; or

(2) the time for seeking appellate review expires.

(d) It is not a defense to an action brought under Subsection (c) that:

(1) a prevailing party under this section failed to seek recovery of costs or attorney's fees in the underlying action;

(2) the court in the underlying action declined to recognize or enforce the requirements of this section; or

(3) the court in the underlying action held that any provisions of this section are invalid, unconstitutional, or preempted by federal law, notwithstanding the doctrines of issue or claim preclusion.

SECTION 5. Subchapter C, Chapter 311, Government Code, is amended by adding Section 311.036 to read as follows:

Sec. 311.036. CONSTRUCTION OF ABORTION STATUTES. (a) A statute that regulates or prohibits abortion may not be construed to repeal any other statute that regulates or prohibits abortion, either wholly or partly, unless the repealing statute explicitly states that it is repealing the other statute.

(b) A statute may not be construed to restrict a political subdivision from regulating or prohibiting abortion in a manner that is at least as stringent as the laws of this state unless the statute explicitly states that political subdivisions are prohibited from regulating or prohibiting abortion in the manner described by the statute.

(c) Every statute that regulates or prohibits abortion is severable in each of its applications to every person and circumstance. If any statute that regulates or prohibits abortion

is found by any court to be unconstitutional, either on its face or as applied, then all applications of that statute that do not violate the United States Constitution and Texas Constitution shall be severed from the unconstitutional applications and shall remain enforceable, notwithstanding any other law, and the statute shall be interpreted as if containing language limiting the statute's application to the persons, group of persons, or circumstances for which the statute's application will not violate the United States Constitution and Texas Constitution.

SECTION 6. Section 171.005, Health and Safety Code, is amended to read as follows:

Sec. 171.005. COMMISSION [~~DEPARTMENT~~] TO ENFORCE; EXCEPTION. The commission [~~department~~] shall enforce this chapter except for Subchapter H, which shall be enforced exclusively through the private civil enforcement actions described by Section 171.208 and may not be enforced by the commission.

SECTION 7. Subchapter A, Chapter 171, Health and Safety Code, is amended by adding Section 171.008 to read as follows:

Sec. 171.008. REQUIRED DOCUMENTATION. (a) If an abortion is performed or induced on a pregnant woman because of a medical emergency, the physician who performs or induces the abortion shall execute a written document that certifies the abortion is necessary due to a medical emergency and specifies the woman's medical condition requiring the abortion.

(b) A physician shall:

(1) place the document described by Subsection (a) in the pregnant woman's medical record; and

(2) maintain a copy of the document described by Subsection (a) in the physician's practice records.

(c) A physician who performs or induces an abortion on a pregnant woman shall:

(1) if the abortion is performed or induced to preserve the health of the pregnant woman, execute a written document that:

(A) specifies the medical condition the abortion is asserted to address; and

(B) provides the medical rationale for the physician's conclusion that the abortion is necessary to address the medical condition; or

(2) for an abortion other than an abortion described by Subdivision (1), specify in a written document that maternal health is not a purpose of the abortion.

(d) The physician shall maintain a copy of a document described by Subsection (c) in the physician's practice records.

SECTION 8. Section 171.012(a), Health and Safety Code, is amended to read as follows:

(a) Consent to an abortion is voluntary and informed only if:

(1) the physician who is to perform or induce the abortion informs the pregnant woman on whom the abortion is to be performed or induced of:

(A) the physician's name;

(B) the particular medical risks associated with the particular abortion procedure to be employed, including, when

medically accurate:

(i) the risks of infection and hemorrhage;

(ii) the potential danger to a subsequent pregnancy and of infertility; and

(iii) the possibility of increased risk of breast cancer following an induced abortion and the natural protective effect of a completed pregnancy in avoiding breast cancer;

(C) the probable gestational age of the unborn child at the time the abortion is to be performed or induced; and

(D) the medical risks associated with carrying the child to term;

(2) the physician who is to perform or induce the abortion or the physician's agent informs the pregnant woman that:

(A) medical assistance benefits may be available for prenatal care, childbirth, and neonatal care;

(B) the father is liable for assistance in the support of the child without regard to whether the father has offered to pay for the abortion; and

(C) public and private agencies provide pregnancy prevention counseling and medical referrals for obtaining pregnancy prevention medications or devices, including emergency contraception for victims of rape or incest;

(3) the physician who is to perform or induce the abortion or the physician's agent:

(A) provides the pregnant woman with the printed materials described by Section 171.014; and

(B) informs the pregnant woman that those materials:

(i) have been provided by the commission [~~Department of State Health Services~~];

(ii) are accessible on an Internet website sponsored by the commission [~~department~~];

(iii) describe the unborn child and list agencies that offer alternatives to abortion; and

(iv) include a list of agencies that offer sonogram services at no cost to the pregnant woman;

(4) before any sedative or anesthesia is administered to the pregnant woman and at least 24 hours before the abortion or at least two hours before the abortion if the pregnant woman waives this requirement by certifying that she currently lives 100 miles or more from the nearest abortion provider that is a facility licensed under Chapter 245 or a facility that performs more than 50 abortions in any 12-month period:

(A) the physician who is to perform or induce the abortion or an agent of the physician who is also a sonographer certified by a national registry of medical sonographers performs a sonogram on the pregnant woman on whom the abortion is to be performed or induced;

(B) the physician who is to perform or induce the abortion displays the sonogram images in a quality consistent with current medical practice in a manner that the pregnant woman may view them;

(C) the physician who is to perform or induce the

abortion provides, in a manner understandable to a layperson, a verbal explanation of the results of the sonogram images, including a medical description of the dimensions of the embryo or fetus, the presence of cardiac activity, and the presence of external members and internal organs; and

(D) the physician who is to perform or induce the abortion or an agent of the physician who is also a sonographer certified by a national registry of medical sonographers makes audible the heart auscultation for the pregnant woman to hear, if present, in a quality consistent with current medical practice and provides, in a manner understandable to a layperson, a simultaneous verbal explanation of the heart auscultation;

(5) before receiving a sonogram under Subdivision (4)(A) and before the abortion is performed or induced and before any sedative or anesthesia is administered, the pregnant woman completes and certifies with her signature an election form that states as follows:

"ABORTION AND SONOGRAM ELECTION

(1) THE INFORMATION AND PRINTED MATERIALS DESCRIBED BY SECTIONS 171.012(a)(1)-(3), TEXAS HEALTH AND SAFETY CODE, HAVE BEEN PROVIDED AND EXPLAINED TO ME.

(2) I UNDERSTAND THE NATURE AND CONSEQUENCES OF AN ABORTION.

(3) TEXAS LAW REQUIRES THAT I RECEIVE A SONOGRAM PRIOR TO RECEIVING AN ABORTION.

(4) I UNDERSTAND THAT I HAVE THE OPTION TO VIEW THE SONOGRAM IMAGES.

(5) I UNDERSTAND THAT I HAVE THE OPTION TO HEAR THE HEARTBEAT.

(6) I UNDERSTAND THAT I AM REQUIRED BY LAW TO HEAR AN EXPLANATION OF THE SONOGRAM IMAGES UNLESS I CERTIFY IN WRITING TO ONE OF THE FOLLOWING:

___ I AM PREGNANT AS A RESULT OF A SEXUAL ASSAULT, INCEST, OR OTHER VIOLATION OF THE TEXAS PENAL CODE THAT HAS BEEN REPORTED TO LAW ENFORCEMENT AUTHORITIES OR THAT HAS NOT BEEN REPORTED BECAUSE I REASONABLY BELIEVE THAT DOING SO WOULD PUT ME AT RISK OF RETALIATION RESULTING IN SERIOUS BODILY INJURY.

___ I AM A MINOR AND OBTAINING AN ABORTION IN ACCORDANCE WITH JUDICIAL BYPASS PROCEDURES UNDER CHAPTER 33, TEXAS FAMILY CODE.

___ MY UNBORN CHILD [~~FETUS~~] HAS AN IRREVERSIBLE MEDICAL CONDITION OR ABNORMALITY, AS IDENTIFIED BY RELIABLE DIAGNOSTIC PROCEDURES AND DOCUMENTED IN MY MEDICAL FILE.

(7) I AM MAKING THIS ELECTION OF MY OWN FREE WILL AND WITHOUT COERCION.

(8) FOR A WOMAN WHO LIVES 100 MILES OR MORE FROM THE NEAREST ABORTION PROVIDER THAT IS A FACILITY LICENSED UNDER CHAPTER 245, TEXAS HEALTH AND SAFETY CODE, OR A FACILITY THAT PERFORMS MORE THAN 50 ABORTIONS IN ANY 12-MONTH PERIOD ONLY:

I CERTIFY THAT, BECAUSE I CURRENTLY LIVE 100 MILES OR MORE FROM THE NEAREST ABORTION PROVIDER THAT IS A FACILITY LICENSED UNDER CHAPTER 245 OR A FACILITY THAT PERFORMS MORE THAN 50 ABORTIONS IN ANY 12-MONTH PERIOD, I WAIVE THE REQUIREMENT TO WAIT 24 HOURS AFTER THE SONOGRAM IS PERFORMED BEFORE RECEIVING THE ABORTION

PROCEDURE. MY PLACE OF RESIDENCE IS:_____.

_____ _____

SIGNATURE DATE";

(6) before the abortion is performed or induced, the physician who is to perform or induce the abortion receives a copy of the signed, written certification required by Subdivision (5); and

(7) the pregnant woman is provided the name of each person who provides or explains the information required under this subsection.

SECTION 9. Section 245.011(c), Health and Safety Code, is amended to read as follows:

(c) The report must include:

(1) whether the abortion facility at which the abortion is performed is licensed under this chapter;

(2) the patient's year of birth, race, marital status, and state and county of residence;

(3) the type of abortion procedure;

(4) the date the abortion was performed;

(5) whether the patient survived the abortion, and if the patient did not survive, the cause of death;

(6) the probable post-fertilization age of the unborn child based on the best medical judgment of the attending physician at the time of the procedure;

(7) the date, if known, of the patient's last menstrual cycle;

(8) the number of previous live births of the patient;

[~~and~~]

(9) the number of previous induced abortions of the patient;

(10) whether the abortion was performed or induced because of a medical emergency and any medical condition of the pregnant woman that required the abortion; and

(11) the information required under Sections 171.008(a) and (c).

SECTION 10. Every provision in this Act and every application of the provision in this Act are severable from each other. If any provision or application of any provision in this Act to any person, group of persons, or circumstance is held by a court to be invalid, the invalidity does not affect the other provisions or applications of this Act.

SECTION 11. The change in law made by this Act applies only to an abortion performed or induced on or after the effective date of this Act.

SECTION 12. This Act takes effect September 1, 2021.

President of the Senate

Speaker of the House

I hereby certify that S.B. No. 8 passed the Senate on March 30, 2021, by the following vote: Yeas 19, Nays 12; and that the Senate concurred in House amendments on May 13, 2021, by the following vote: Yeas 18, Nays 12.

Secretary of the Senate

I hereby certify that S.B. No. 8 passed the House, with amendments, on May 6, 2021, by the following vote: Yeas 83, Nays 64, one present not voting.

Chief Clerk of the House

Approved:

Date

Governor

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

WHOLE WOMAN'S HEALTH, et al.,	)	
	)	
Plaintiffs,	)	
	)	CIVIL ACTION
v.	)	
	)	CASE NO. _____
AUSTIN REEVE JACKSON, et al.,	)	
	)	
Defendants.	)	

DECLARATION OF ALLISON GILBERT, M.D., IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

ALLISON GILBERT, M.D., declares under penalty of perjury that the following statements are true and correct:

1. I am the Co-Medical Director of Plaintiff Southwestern Women's Surgery Center ("Southwestern"), a licensed ambulatory surgical center in Dallas. I am also a Staff Physician at Southwestern.

2. I submit this declaration in support of Plaintiffs' Motion for Summary Judgment to prevent enforcement of Texas Senate Bill 8 ("S.B. 8"). The facts I state here and the opinions I offer are based on my education, training, and practical experience as an OB/GYN and an abortion provider; my expertise as a doctor and abortion provider; my personal knowledge; my review of Southwestern's business records and information obtained through the course of my duties at Southwestern; and my research and familiarity with relevant medical literature recognized as reliable in the medical profession.

My Background

3. I am licensed to practice medicine in Texas, Alabama, and Massachusetts, and am board-certified in Obstetrics and Gynecology. I am a member of the American College of Obstetricians and Gynecologists ("ACOG"), the Society of Family Planning, the Texas Medical Association, and the Dallas County Medical Association. I provide the full spectrum of reproductive health care to women and pregnant people, including obstetric care for low-, medium-, and high-risk pregnancies, and am trained to provide abortion care up to 24 weeks as dated from the first day of the patient's last menstrual period ("LMP").

4. I graduated from the University of Oklahoma College of Medicine with an M.D. in 2014. I completed my internship in obstetrics and gynecology in 2015 and my residency in obstetrics and gynecology in 2018, both at the University of Alabama at Birmingham. After residency, I completed a two-year fellowship in family planning at Brigham and Women's Hospital in Boston, Massachusetts. I also graduated from the Harvard T.H. Chan School of Public Health with a Master in Public Health degree in 2019. My *curriculum vitae*, which sets forth my experience and credentials, is attached as Exhibit 1.

5. I began working at Southwestern in August of 2020, as a Staff Physician and as Co-Medical Director. I moved to Texas because I wanted to increase abortion access for underserved populations in the South.

6. As Co-Medical Director of Southwestern, I oversee Southwestern's policies and procedures, guided by evidence-based medicine, to ensure that we are following current and best practices. I also review patients' charts to make sure that Southwestern is following those procedures, and I review any patient complications in the rare circumstances in which they arise.

7. In my role as Co-Medical Director, I work closely with the OB/GYN program directors at several medical residency programs throughout the state to provide training in abortion care to OB/GYN and family medicine residents during their clinical rotations at Southwestern. I occasionally teach residents from other in-state residency programs as well as medical students and fellows from out-of-state programs. Southwestern has a robust training program for residents, and I have personally worked with approximately twenty residents over the last year.

8. In addition to my management responsibilities, I am also a full-time Staff Physician at Southwestern. As a Staff Physician, I provide a wide range of gynecological care to our patients, including but not limited to, abortion care, contraception, pregnancy testing, STI testing, and diagnosis of ectopic pregnancies. I spend approximately three days a week providing clinical care at Southwestern and an additional day doing administrative work at the clinic.

Southwestern Women's Surgery Center

9. Southwestern operates a licensed ambulatory surgical center in Dallas, Texas. The clinic provides medication abortion and procedural abortion care, as well as miscarriage management and contraceptive services.

10. The clinic typically performs approximately 9,000 abortions on an annual basis. I personally perform between 2,000 and 3,000 abortions at Southwestern each year.

11. Southwestern provides both medication and procedural abortions. In a medication abortion, the patient takes two medications, mifepristone and misoprostol, that together cause a pregnancy termination in a process similar to a miscarriage.

12. Procedural abortion is performed using gentle suction, sometimes along with instruments, to empty the patient's uterus. After approximately 18 weeks LMP, a procedural

abortion may involve two separate appointments—along with an additional state-mandated counseling and ultrasound appointment[1]—to prepare the cervix for the abortion and then perform the procedure.

13. Southwestern provides medication abortion up to 10 weeks LMP and procedural abortions through 21 weeks and 6 days LMP.

14. The vast majority of abortion patients at Southwestern are 6 or more weeks LMP. In 2020, Southwestern performed only 936 abortions for patients up to 5 weeks, 6 days LMP—only 10% of the 8,623 abortions the clinic provided in total.

S.B. 8 Bans Abortion Before Viability.

15. I have reviewed the provisions of S.B. 8, which bans abortion once a "fetal heartbeat" has been detected and establishes civil penalties for physicians who provide and others who aid or abet the provision of that care.[2] S.B. 8 defines "fetal heartbeat" as "cardiac activity or the steady and repetitive rhythmic contraction of the fetal heart within the gestational sac."[3]

16. My understanding is that exceptions to S.B. 8 are very narrow. A physician could provide an abortion after a "fetal heartbeat" is detectable only if there is a medical emergency, which Texas law defines as "a life-threatening physical condition aggravated by, caused by, or arising from a pregnancy that, as certified by a physician, places the woman in danger of death or a serious risk of substantial impairment of a major bodily function unless an abortion is performed."[4]

[1] Tex. Health & Safety Code §§ 171.011-171.016.
[2] Tex. Health & Safety Code §§ 171.204, 171.208.
[3] Tex. Health & Safety Code § 171.201(a).
[4] Tex. Health & Safety Code §§ 171.204(a), 171.205(a), 171.002(3).

17. S.B. 8's use of terminology is confusing and, in many cases, medically inaccurate. In the field of medicine, physicians measure pregnancy from the first day of a patient's last menstrual period ("LMP"). Fertilization of the egg typically occurs at two weeks LMP. Pregnancy begins one week later, at three weeks LMP, when the fertilized egg implants in the uterus and lasts until 40 weeks LMP. For the first nine weeks LMP, an embryo develops in the uterus. It is not until approximately 10 weeks LMP that clinicians recognize the embryo as a fetus.

18. In a typically developing embryo, cells that form the basis for development of the heart later in gestation produce cardiac activity that can be detected with ultrasound. Detection of this cardiac activity happens very early in pregnancy at approximately 6 weeks, 0 days LMP, and sometimes sooner.[5] At this point in pregnancy, an ultrasound may reveal a fluid-filled sac—or gestational sac—within the uterus. An ultrasound at this early gestation may also show a dot within the gestational sac, which represents the developing embryo, and an electrical impulse that appears as a visual flicker within that dot. No fully developed heart is present at this time.

19. As a result, S.B. 8 defines "fetal heartbeat" to include not just "heartbeat" in the medical sense, but also early electrical impulses present before the full development of the cardiovascular system.

20. Viability is medically impossible at 6 weeks LMP, the time at which early cardiac activity is generally detectable and at which S.B. 8 bans abortion. Viability is generally understood as the point when a fetus has a reasonable likelihood of sustained survival after birth,

[5] I personally have observed cardiac activity as early as 5 and a half weeks LMP.

with or without artificial support. This is an individual medical determination that occurs much later in pregnancy—at approximately 24 weeks LMP—if at all.[6]

21. Many patients do not know they are pregnant at 6 weeks LMP and thus seek abortion care only after cardiac activity is detectable. That is because the commonly known markers of pregnancy—a missed menstrual period and pregnancy symptoms—are not the same for all pregnant people.

22. First, not every pregnant person can rely on a missed menstrual period to determine whether they are pregnant. In people with an average menstrual cycle (e.g., a period every 28 days), fertilization begins at 2 weeks LMP, and they miss their period at 4 weeks LMP. Many people do not experience average menstrual cycles, though. Some people have regular menstrual cycles but only experience periods every 6 to 8 weeks, or even further apart. Others do not know when they will experience their next period because they have irregular cycles, which are caused by a variety of factors, including polyps, fibroids, endometriosis, polycystic ovary syndrome, eating disorders, and other anatomical and hormonal reasons. Some people may have irregular menstrual cycles because they are taking contraceptives or are breastfeeding. As a result, many people may not suspect they are pregnant until much later than 4 weeks LMP.

23. Second, many people will not exhibit the commonly known symptoms of pregnancy. For instance, people may have negative results from over-the-counter pregnancy tests even when pregnant because these tests often cannot detect a pregnancy at 4 weeks LMP or earlier. Additionally, symptoms such as nausea or fatigue differ for each pregnant person, and some people never experience those symptoms. Further complicating early detection of

[6] Some fetuses are never viable, such as those in ectopic pregnancies and those with certain fetal diagnoses.

pregnancy, it is common for pregnant people to experience light bleeding when the fertilized egg is implanted in the uterus and mistake that bleeding for a menstrual period.

24. In Texas, physicians are required to perform an ultrasound on a patient before performing an abortion. Ultrasounds typically cannot detect a pregnancy before 4 weeks LMP.

25. As a practical matter, S.B. 8 is a near total ban on abortion. It prohibits abortion care at the earliest moments that a pregnancy may be detected and often before a patient has any reason to suspect that they may be pregnant.

26. Even under the best circumstances, if a Texan determines they are pregnant as soon as they miss their period, they would have roughly two weeks to decide whether to have an abortion, comply with state-mandated procedures for obtaining an abortion, resolve all financial and logistical challenges associated with abortion care in Texas, and obtain an abortion.

27. If S.B. 8 goes into effect, the many pregnant people who do not learn that they are pregnant until after 6 weeks LMP may never access abortion in Texas.

S.B. 8 Will Be Devastating for Pregnant People in Texas.

28. Abortion is a common procedure. Approximately one in four women in this country will have an abortion by the age of forty-five.[7] Providers in Texas performed over 50,000 abortions last year,[8] and others in the state self-manage their abortions.[9]

[7] Rachel K. Jones & Jenna Jerman, *Population Group Abortion Rates and Lifetime Incidence of Abortion: United States, 2008-2014*, 107 Am. J. Pub. Health 1904, 1907 (2017).
[8] Tex. Health & Human Servs. Comm'n, ITOP Statistics, https://www.hhs.texas.gov/about-hhs/records-statistics/data-statistics/itop-statistics.
[9] *See* Liza Fuentes et al., *Texas Women's Decisions and Experiences Regarding Self-Managed Abortion*, 20 BMC Women's Health 6 (2020).

29. Abortion is also one of the safest medical procedures.[10] Fewer than 1% of pregnant people who obtain abortions experience a serious complication.[11] And even fewer abortion patients—only approximately 0.3%—experience a complication that requires hospitalization.[12]

30. Abortion is far safer than pregnancy and childbirth.[13] The risk of death from carrying a pregnancy to term is approximately 14 times greater than the risk of death associated with abortion.[14] In addition, complications such as blood transfusions, infection, and injury to other organs are all more likely to occur with a full-term pregnancy than with an abortion.

31. Pregnant patients have a multitude of reasons for seeking abortion care. For many, maternal health concerns make abortion desirable and even necessary. Pregnancy, including an uncomplicated pregnancy, significantly stresses the body, causes physiological and anatomical changes, and affects every organ system. It can worsen underlying health conditions, such as diabetes and hypertension. Some people develop additional health conditions simply because they are pregnant—conditions such as gestational diabetes, gestational hypertension (including preeclampsia), and hyperemesis gravidarum (severe nausea and vomiting). People whose pregnancies end in vaginal delivery may experience significant injury and trauma to the pelvic floor. Those who undergo a caesarean section (C-section) give birth through a major abdominal surgery that carries risks of infection, hemorrhage, and damage to internal organs.

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[10] *See, e.g.*, Comm. on Reprod. Health Servs., Nat'l Acads. of Scis., Eng'g, & Med., *The Safety and Quality of Abortion Care in the United States* 10, 59, 79 (2018).
[11] Ushma Upadhyay, et al., *Incidence of Emergency Department Visits and Complications After Abortion*, 125 Obstetrics & Gynecology 175, 175 (2015).
[12] *Id.*
[13] E.G. Raymond & D.A. Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 Obstetrics & Gynecology 215, 215-19 (2012).
[14] *See id.* at 215.

32. Others seek abortion because they do not wish or do not have the resources to add an additional child to their family. Some patients choose to have an abortion because their pregnancies are the result of rape, incest, or other intimate partner violence. Still other Texans obtain an abortion because they receive a fetal anomaly diagnosis, which can be severe or even lethal. These diagnoses are made later in pregnancy—well after 6 weeks LMP.

33. If S.B. 8 goes into effect, many pregnant Texans who seek abortions will have to travel out of state to receive healthcare they want and need, adding tremendous cost to a procedure that is common, safe, and medically appropriate.

S.B. 8 Will Be Devastating for Abortion Providers in Texas.

34. S.B. 8 is intended to take away my ability as a highly trained OB/GYN to provide the care to patients which I have been licensed by the State of Texas to provide. I moved to Texas because I am morally compelled to provide abortion care to patients in need. Not being able to do the job that I spent years being trained to do is personally devastating. I am deeply concerned about what S.B. 8 will mean for my chosen profession, for the certifications I worked so hard to obtain, and for my future as both a doctor and a Texan.

35. The civil penalties threatened by this ban are severe and will sooner or later prevent all abortion providers from carrying out our medical and ethical duties. Because S.B. 8 allows almost anyone to sue me, Southwestern, and the staff who work with me, I fear that I will be subject to multiple frivolous lawsuits that will take time and emotional energy—and prevent me from providing the care my pregnant patients need. These lawsuits also carry heavy financial consequences even if they are ultimately unsuccessful. I also understand that the Texas Medical Board may be able to bring disciplinary action against me for violations of S.B. 8 and the Texas Nursing Board may be able to take similar actions about Southwestern's nurses. And most

importantly, court orders in successful suits under S.B. 8 would prevent me from providing abortion care in Texas after 6 weeks LMP. It is not clear how long I will be able to provide abortions for my patients or how long Southwestern will be able to keep its doors open if this ban goes into effect.

S.B. 8's Fee-Shifting Provision Will Also Harm Southwestern.

36. I also understand that another provision of S.B. 8 makes parties and their attorneys liable to pay defendants' costs and attorney's fees in cases challenging Texas laws that restrict or regulate abortion if they do not succeed on every claim they bring in the case.

37. To continue providing patients with safe and medically appropriate abortion care, Southwestern has repeatedly had to challenge laws that restrict or regulate abortion care in Texas. *See e.g.*, *In re Abbot*, 954 F.3d 772 (5th Cir. 2020), *cert. granted, judgment vacated as moot by Planned Parenthood Ctr. for Choice v. Abbott*, 141 S. Ct. 1261 (2021) (mem.) (COVID abortion ban); *Whole Woman's Health v. Paxton*, 978 F.3d 896 (5th Cir. 2020), *reh'rg en banc granted, vacated by* 978 F.3d 974 (5th Cir. 2020) (ban on common method of abortion); and *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583 (5th Cir. 2014), *reh'rg en banc denied*, 769 F.3d 330 (5th Cir. 2014) (decision on admitting-privileges, medication-abortion regulations).

38. If Southwestern is responsible for defendants' costs and attorney's fees, this will chill our ability to bring cases or present claims to vindicate the rights of ourselves and our patients, due to fears that if we are not 100% successful, there will be serious financial consequences.

Dated: 7/12/2021

Dr. Allison Gilbert

Exhibit 1

ALLISON LYNNE GILBERT, MD, MPH

8616 Greenville Ave, Ste 101
Dallas, TX 75243
agilbert@southwesternwomens.com
(214) 742-9310 (p)
(214) 969-946 (f)

EDUCATION

July 2018-May 2019	Master of Public Health Harvard T.H. Chan School of Public Health Boston, MA
Aug 2010-May 2014	Doctor of Medicine University of Oklahoma College of Medicine Oklahoma City, OK
Aug 2006-May 2010	Bachelor of Arts in Biology Colorado College Colorado Springs, CO

POST-DOCTORAL TRAINING

July 2018-June 2020	Family Planning Fellowship Division of Family Planning, Department of Obstetrics, Gynecology and Reproductive Biology Brigham and Women's Hospital Boston, MA
June 2014-June 2018	Obstetrics and Gynecology Residency Department of Obstetrics and Gynecology University of Alabama at Birmingham Birmingham, AL

CLINICAL WORK EXPERIENCE

August 2020-Present	Co-Medical Director & Staff Physician Southwestern Women's Surgical Center Dallas, TX
July 2018-June 2020	Clinical Fellow Department of Obstetrics, Gynecology and Reproductive Biology Brigham and Women's Hospital Boston, MA
July 2018-June 2020	Physician (part-time) Wellesley Women's Care Newton Wellesley Hospital Newton, MA

BOARD CERTIFICATION AND LICENSURE

2020	Advanced Cardiac Life Support (ACLS)/Basic Life Support (BLS)
2020	Texas Medical License, Active
2020	American Board of Obstetrics and Gynecology Certifying Examination, passed
2018	Massachusetts Medical License, Active
2018	American Board of Obstetrics and Gynecology Qualifying Examination, passed
2015	Alabama Medical License, Active

HONORS AND AWARDS

2020	Outstanding Medical Student Teaching Department of Obstetrics, Gynecology and Reproductive Biology Brigham and Women's Hospital Harvard Medical School Boston, MA
2018	Chairman's Award of Excellence Department of Obstetrics and Gynecology University of Alabama at Birmingham Birmingham, AL
2018	Best Teaching Chief Resident Department of Obstetrics and Gynecology University of Alabama at Birmingham Birmingham, AL
2018	Alpha Omega Alpha Honor Society University of Alabama at Birmingham Birmingham, AL
2017, 2018	The Society for Academic Specialists in General Obstetrics and Gynecology Resident Award for Academic Excellence Department of Obstetrics and Gynecology University of Alabama at Birmingham Birmingham, AL
2015, 2018	Resident Research Award Department of Obstetrics and Gynecology University of Alabama at Birmingham Birmingham, AL
2015, 2016	Resident Teaching Award Department of Obstetrics and Gynecology University of Alabama at Birmingham Birmingham, AL

RESEARCH INTERESTS

2018-Present	Medication abortion management in the setting of pregnancy of unknown location

PUBLICATIONS

Goldberg A, Hofer R, Cottrill A, Fulcher I, Fortin J, Dethier D**, Gilbert A,** Janiak E, Roncari D. Mifepristone and misoprostol abortion for undesired pregnancy of unknown location. NAF's 2021 Virtual Annual Meeting Oral Abstracts. Contraception. 2021; 103 (5): 373-375.

Gilbert A, Barbieri R. When providing contraceptive counseling to women with migraine headaches, how do you identify migraine with aura? OBG Manag. 2019 October; 31 (10): 10-12.

Gilbert A, Goepfert A, Mazzoni S. Bixby Postpartum LARC Program. UAB Department of OBGYN Evidence-Based Guidelines: Protocols and Policies. 8 May 2017.

Becker D, Thomas E, **Gilbert A**, Boone J, Straughn JM, Huh W, Bevis K, Leath C, Alvarez R. Improved outcomes with dose-dense paclitaxel-based neoadjuvant chemotherapy in advanced epithelial ovarian carcinoma. Gynecologic Oncology. 2016 Jul; 142 (1): 25-29.

Van Arsdale A, Arend R, Mitchell C, **Gilbert A**, Leath C, Huang G. Evaluation of circulating neutrophils as a biomarker for outcomes in uterine carcinosarcoma. J Clin Oncol 34, 2016 (suppl; abstr e17121).

POSTERS

Gilbert A, Clay V, Wang M, Arbuckle J, Boozer M, Harper L. "You can't get pregnant:" Contraceptive counseling by non-gynecologic specialties. Poster presented at: Society for Maternal Fetal Medicine Annual Clinical Meeting; Las Vegas, NV; Feb 2019.

Becker D, Thomas E, **Gilbert A**, Boone J, Straughn JM, Huh W, Bevis K, Leath C, Alvarez R. Improved outcomes with dose-dense paclitaxel-based neoadjuvant chemotherapy in advanced epithelial ovarian carcinoma. Poster presented at: Society of Gynecologic Oncology Annual Clinical Meeting; San Diego, CA; March 2016.

Bryant C, **Gilbert A**, Arnold K, Nightengale L. Improving awareness and knowledge of advocacy and impacting outcomes in the local medical community. Poster presented at: Doctors for America Leadership Conference; Washington, D.C.; March 2014.

TEACHING AND PRESENTATIONS

2021	Family planning Jeopardy! Resident lecture given at: University of Oklahoma, Dept. Ob/Gyn, Oklahoma City, OK
2021	Providing abortions in a hostile state. Family Planning Division lecture given at: Brigham and Women's Hospital, Boston, MA
2021	Abortion complications and management. Resident lecture given at: University of Oklahoma, Dept. Ob/Gyn, Oklahoma City, OK
2020	Medical management of early pregnancy loss. Grand Rounds given at: Newton Wellesley Hospital, Dept. Ob/Gyn, Newton, MA
2020	Contraception for those with medical co-morbidities. Resident lecture given at: Tufts Medical Center, Boston, MA
2020	Pregnancy options counseling and difficult patient cases. Medical student lecture given at: Harvard Medical School, Boston, MA
2020	Abnormal uterine bleeding. Medical student lecture given at: Harvard Medical School, Boston, MA
2020	Anticoagulation and abortion. Family Planning Division lecture given at: Brigham and Women's Hospital, Boston, MA
2019	Pregnancy options counseling and difficult patient cases. Resident lecture given at: University of Oklahoma, Oklahoma City, OK
2019	Introduction to OR Culture and Skills, Transitions to the PCE (PWY150). Medical student simulation given at: Harvard Medical School, Boston, MA
2019	Combination oral contraceptives: Troubleshooting "The Pill." Gynecology Division lecture (1500 Lecture) given at: Brigham and Women's Hospital, Boston, MA
2019	Gynecologic office practice. Resident simulation given at: Brigham and Women's Hospital, Boston, MA
2019	Vasectomy and updates in male contraception. Family Planning Division lecture given at: Brigham and Women's Hospital, Boston, MA
2019	Contraception in women with cardiovascular disease. Cardiology Division lecture given at: Brigham and Women's Hospital, Boston, MA
2019	Combination oral contraceptives. Resident lecture given at: Tufts Medical Center, Boston, MA
2019	Contraceptive technology. Undergraduate lecture given at: Massachusetts Institute of Technology, Cambridge, MA
2019	Following declining human chorionic gonadotropin values in pregnancies of unknown location: When is it safe to stop? Regional journal club given at: Planned Parenthood League of Massachusetts, Boston, MA
2019	Natural family planning methods. Family Planning division lecture given at: Brigham and Women's Hospital, Boston, MA
2019	LARCs, papaya and post-abortion hemorrhage workshop. Resident simulation given at: Brigham and Women's Hospital, Boston, MA
2017	Combination oral contraceptives. Resident lecture given at: University of Alabama at Birmingham, Birmingham, AL
2017	Anticoagulation and abortion. Family Planning Division lecture given at: University of North Carolina Chapel Hill, Chapel Hill, NC
2016	Secondary amenorrhea. REI Division lecture given at: University of Alabama at Birmingham, Birmingham, AL
2016	Postoperative PCA management. Resident lecture given at: University of Alabama at Birmingham, Birmingham, AL

LEADERSHIP

2017-2018	Administrative Chief of Education Department of Obstetrics and Gynecology University of Alabama at Birmingham Birmingham, AL
2016-2018	Young Professionals Council Planned Parenthood Southeast Birmingham, AL
2016-2018	Resident Coordinator for Immediate Postpartum LARC Program Department of Obstetrics and Gynecology University of Alabama at Birmingham Birmingham, AL
2016-2017	Resident Selection Committee Chair Department of Obstetrics and Gynecology University of Alabama at Birmingham Birmingham, AL
2015-2016	Philanthropy Committee Co-Chair Department of Obstetrics and Gynecology University of Alabama at Birmingham Birmingham, AL
	American College of Obstetrics and Gynecology
2016-2017	District VII Junior Fellow Secretary and Treasurer
2015-2016	District VII Junior Fellow Advocacy Chair
2015-2016	Alabama Section Junior Fellow Chair
2014-2015	Alabama Section Junior Fellow Vice Chair

PROFESSIONAL MEMBERSHIPS

2021-Present	Dallas County Medical Association
2021-Present	Texas Medical Association
2018-Present	Society of Family Planning
2012-Present	American College of Obstetricians and Gynecologists

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

WHOLE WOMAN'S HEALTH, et al., *Plaintiffs*, v. AUSTIN REEVE JACKSON, et al., *Defendants*.	Civil Action No. _____

DECLARATION OF BHAVIK KUMAR, M.D., M.P.H., IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

I, Bhavik Kumar, declare as follows:

1. I am a board-certified family medicine physician, licensed to practice in the State of Texas. I obtained my medical degree from Texas Tech University in 2010, completed my residency in family and social medicine in 2013, obtained my master's degree in public health in 2015, and completed a fellowship in family planning in 2015.

2. I am the Medical Director for Primary and Trans Care at Planned Parenthood Gulf Coast ("PPGC"). I am also a staff physician at Planned Parenthood Center for Choice ("PPCFC"), where I provide abortions.

3. Before coming to PPGC and PPCFC, I was the Texas medical director of Whole Woman's Health, another provider of abortion in Texas.

4. I currently provide abortion services through 21 weeks and 6 days of pregnancy as measured from the first day of the patient's last menstural period ("LMP") at PPCFC's Houston ambulatory surgical center. In addition, I train other physicians in the provision of abortion services.

5. I submit this declaration in support of Plaintiffs' Motion for Summary Judgment. I understand that Texas Senate Bill 8 ("S.B. 8" or the "Act") would ban the provision of abortion in Texas after embryonic cardiac activity can be detected, which occurs at approximately 6 weeks LMP.[1]

6. The information in this declaration is based on my education, training, practical experience, information, and personal knowledge I have obtained as a physician and an abortion provider; my attendance at professional conferences; review of relevant medical literature; and conversations with other medical professionals. If called and sworn as a witness, I could and would testify competently thereto.

Abortion in Texas

7. Legal abortion is one of the safest procedures in contemporary medical practice.[2] Abortion is also very common: approximately one in four women in this country will have an abortion by age 45.[3]

8. Medication abortion involves the use of mifepristone and misoprostol, two medications taken to safely and effectively end an early pregnancy in a process similar to a miscarriage. Procedural abortion involves the use of suction and/or the insertion of instruments through the vagina and cervix to empty the contents of a patient's uterus. Although sometimes known as "surgical abortion," abortion by procedure does not involve surgery in the traditional

[1] S.B. 8's only exception is for a "medical emergency," which is defined in Texas law as "a life-threatening physical condition aggravated by, caused by, or arising from a pregnancy that, as certified by a physician, places the woman in danger of death or a serious risk of substantial impairment of a major bodily function unless an abortion is performed." Tex. Health & Safety Code § 171.002(3).

[2] Nat'l Acads. of Scis., Eng'g, & Med. ("Nat'l Acads."), *The Safety & Quality of Abortion Care in the United States* 77–78, 162–63 & tbl. 5-1 (2018).

[3] Rachel K. Jones & Jenna Jerman, *Population Group Abortion Rates and Lifetime Incidence of Abortion: United States, 2008–2014*, 107 Am. J. Pub. Health 1904, 1907 (2017).

sense: it does not require an incision into the patient's skin or a sterile field. PPCFC offers medication abortions and procedural abortions.

9. As I noted above, cardiac activity generally can be detected starting at approximately 6 weeks LMP with ultrasound, but it may be detected as early as 5 weeks. Because of the ultrasound technology, it is generally not possible to locate a pregnancy in the uterus using ultrasound until sometime between 4 and 5 weeks LMP; before that time, the gestational sac is simply too small for the ultrasound to detect.

10. In my roles, I know how important abortion access is to our patients. Patients' lives are complicated, and their decisions to have an abortion often involve multiple considerations. The majority of PPCFC's patients (and abortion patients nationwide[4]) already have one or more children. Our patients with children understand the obligations of parenting and decide to have an abortion based on what is best for them and their existing families, which may already struggle to make ends meet. Other patients decide that they are not ready to become parents because they are too young or want to finish school before starting a family. Some patients have health complications during pregnancy that lead them to conclude that abortion is the right choice for them. In some cases, patients are struggling with substance abuse and decide not to become parents or have additional children during that time in their lives. Others have an abusive partner or a partner with whom they do not wish to have children for other reasons. In all of these cases, our patients seeking abortion have decided that abortion is the best option for themselves and their families.

[4] *See id.* at 1906 (in 2014, 59.3% of all abortions in the United States were performed for patients who already had at least one child).

11. Regardless of the reasons that bring a patient to us, PPCFC is committed to providing high-quality, compassionate abortion services that honor each patient's dignity and autonomy. PPCFC trusts its patients to make the best decisions for themselves and their families, taking into account the full complexity of their lives, something that only they can fully grasp.

12. Most patients obtain an abortion as soon as they are able, and the vast majority of abortions in the United States and in Texas take place in the first trimester of pregnancy. According to data from the Texas Health and Human Services Commission from 2020, approximately 84% of all abortions performed in Texas for Texas residents occurred at 10 weeks LMP (8 weeks post-fertilization) or less, and approximately 95% occurred before 15 weeks LMP (13 weeks post-fertilization).[5] However, most patients are at least 6 weeks LMP into their pregnancy by the time they make an abortion appointment.

13. Even after patients learn that they are pregnant and decide they want an abortion, arranging an appointment for an abortion may take some time. For patients living in poverty or without insurance, travel-related and financial barriers also help explain why the vast majority of our patients do not—and realistically could not—obtain abortions before 6 weeks LMP, even assuming they learn they are pregnant before that time. Texas has the twelfth highest rate of poverty among women: nearly 15% of women in Texas live in poverty, exceeding the national average of 12%,[6] and that rate rises to more than 19% among Black women and 20% among Latina

[5] Tex. Health & Hum. Servs. Comm'n, *2020 ITOP Statistics* (March 15, 2021), *available at* https://www.hhs.texas.gov/about-hhs/records-statistics/data-statistics/itop-statistics.

[6] Nat'l Women's L. Ctr., *Poverty Rates by State, 2018* (2019), *available at* https://nwlc.org/wp-content/uploads/2019/10/Poverty-Rates-State-by-State-2018.pdf.

women in Texas.[7] Approximately 37% of female-headed households in Texas live in poverty, and Texas has the twelfth highest rate of children living in poverty, at more than 21%.[8]

14. Some patients are delayed because they may need time to consider their options and/or consult their partner, family, friends, clergy, and others in deciding to have an abortion.

15. The lack of comprehensive insurance coverage also poses a barrier to patients' ability to confirm they are pregnant and obtain abortion coverage when they need it. Notably, Texas is one of just 12 states that have not expanded Medicaid under the Affordable Care Act,[9] and the rate of uninsured Texas women of reproductive age (24.7%) is far worse than the national average (11.9%).[10] Unsurprisingly, more than 23% of women in Texas reported not receiving health care in the prior 12 months due to cost.[11] Even those patients who *do* have health insurance rarely have access to abortion coverage. With very narrow exceptions, Texas bars coverage of abortion in its Medicaid program, 1 Tex. Admin. Code § 354.1167, and it prohibits coverage of abortion in private insurance plans offered on the state's Affordable Care Act exchange, Tex. Ins. Code § 1696.002,[12] an important source of health insurance for individuals who do not have access to employer-sponsored health coverage, and in other private insurance plans, *id.* §§ 1218.001 et seq. In any event, I understand that S.B. 8 prohibits "reimbursing the costs of an abortion through insurance." S.B. 8, § 3 (adding Tex. Health & Safety Code § 171.208(a)(2)).

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[7] *Id.*

[8] *Id.*

[9] Kaiser Fam. Found., *Status of State Medicaid Expansion Decisions: Interactive Map*, https://www.kff.org/medicaid/issue-brief/status-of-state-medicaid-expansion-decisions-interactive-map/ (updated July 9, 2021).

[10] Nat'l Women's L. Ctr., *Texas*, https://nwlc.org/state/texas/ (last accessed July 7, 2021).

[11] *Id.*

[12] Guttmacher Inst., *Regulating Insurance Coverage of Abortion*, https://www.guttmacher.org/state-policy/explore/regulating-insurance-coverage-abortion (updated July 1, 2021).

16. Texas's lack of investment in health care is reflected in access indicators. In 2020 Texas ranked 50th in the United States for women's access to clinical care and 49th for the quality of women's clinical care, 46th for cervical cancer screening, and 40th for well-woman visits.[13]

17. Patients living in poverty and without insurance must often make difficult tradeoffs of other basic needs to pay for their abortions, even with assistance from PPCFC to those patients in need. Many patients must seek financial assistance from extended family and friends to pay for care, as well, which is a process that takes time. Many patients must navigate other logistics, such as inflexible or unpredictable job hours and child care needs that may delay the time when they are able to obtain an abortion.

18. In addition to the medical and practical impediments I have just described to patients' obtaining an abortion before 6 weeks of pregnancy, Texas has also enacted numerous medically unnecessary statutory and regulatory requirements that must be met before a patient may obtain an abortion. Texas generally requires patients to make two visits to a health center to obtain an ultrasound and certain state-mandated information designed to discourage them from having an abortion at least 24 hours in advance of an abortion. Tex. Health & Safety Code § 171.012. Practically speaking, the effect of this 24-hour delay law lasts far longer than one day, which may push even patients who have discovered they are pregnant, decided to have an abortion, and scheduled an appointment prior to 6 weeks LMP past that point by the time they actually arrive at the health center for their abortion appointment.

[13] Am.'s Health Rankings, *Texas: 2020 Health of Women and Children*, at 4 (2020), https://www.americashealthrankings.org/api/v1/render/pdf/%2Fcharts%2Fstate-page-extended%2Freport%2F2020-health-of-women-and-children%2Fstate%2FTX/as/AHR-2020-health-of-women-and-children-TX-full.pdf?params=mode%3Dfull.

19. The near impossibility of obtaining an abortion within the time permitted by the Act is all the more clear for our minor patients. Minor patients without a history of pregnancy may be less likely to recognize early symptoms of pregnancy than older patients who have been pregnant before. In addition, some of these patients cannot obtain written parental authorization for an abortion as required by state law and must obtain a court order permitting them to receive care. Tex. Fam. Code §§ 33.001–33.014. A court may take up to five business days to rule on a patient's petition to bypass the state's parental-consent law for abortions, *id.* § 33.003, not including any time that may be necessary for a minor patient to appeal an unfavorable decision. That process cannot realistically happen before a patient's pregnancy reaches 6 weeks LMP.

20. Texas law also prohibits the use of telemedicine for the provision of medication abortion, Tex. Health & Safety Code § 171.063, closing off a safe and effective option that would enable some patients to obtain an abortion earlier in pregnancy.

21. Patients whose pregnancies are the result of sexual assault or who are experiencing interpersonal violence may need additional time to access abortion services due to ongoing physical or emotional trauma. For these patients, too, obtaining an abortion before 6 weeks LMP is exceedingly difficult, if not impossible.

22. For all these reasons, the vast majority of PPCFC's abortion patients in Texas do not and could not obtain an abortion until after 6 weeks LMP.

The Impact of S.B. 8's Abortion Ban

23. I understand that S.B. 8 would require me to attempt to detect cardiac activity in a pregnancy before performing an abortion, and it would ban the abortion if cardiac activity is detected. S.B. 8 bans previability abortion because no embryo is viable at 6 weeks LMP, or at any other point when cardiac activity can first be detected by ultrasound.

24. By banning previability abortion, S.B. 8 seriously harms my patients by depriving them of access to safe and legal abortions. If Texas abortion providers are forced to stop providing abortions after approximately 6 weeks LMP, some patients will not be able to access abortion at all because travel to another state is simply not possible for them. Even those patients who are able to travel may have to go hundreds of miles to find an abortion provider. The need to travel such long distances can significantly delay patients in accessing care, as they need to raise additional funds for travel and arrange for child care and time off work. Delay also increases the costs associated with the procedure itself, as it becomes more expensive later in pregnancy. Patients can find themselves in a vicious cycle of delaying while gathering the necessary funds, but then finding the procedure has gotten more expensive and needing to further delay. Some patients may be so delayed that they are pushed too far into pregnancy and are no longer able to have an abortion.

25. Delays in accessing abortion, or being unable to access abortion at all, also pose risks to patients' health. While abortion is a very safe procedure throughout pregnancy, the risks of abortion increase with gestational age.[14] If an individual is forced to carry a pregnancy to term against their will, it can pose a risk to their physical health, as childbirth poses far more risks than abortion,[15] as well as their mental and emotional health and the stability and wellbeing of their family, including existing children. Some patients who are unable to access legal abortion may turn to methods that may potentially be unsafe.

26. These burdens will particularly harm patients who are poor or have low incomes, rural patients living in counties without adequate prenatal care and obstetrical providers, and Black patients. Texas has higher rates of people living on low incomes than the United States as a

[14] Nat'l Acads., *supra* note 2, at 77–78, 162–63 & tbl. 5-1.
[15] *Id.* at 75 tbl. 2-4.

whole.[16] And nationwide, three out of four abortion patients are poor or live on low incomes (up to 200% of the federal poverty level).[17] A majority of Texans who had an abortion in 2019 identified as Black or Latina/Hispanic[18]—communities that already face inequities in access to medical care. Black and Latinx populations with low incomes seek abortions at a higher rate than wealthier and white populations (both in Texas and nationally) due to inadequate access to contraceptive care, income inequity, and other facets of structural racism. These patients are the hardest hit by the expenses and logistical difficulties of travel, including being forced to miss work and/or child-care obligations. These patients already struggle to reach us for the care they need, and they face even more severe barriers to accessing care elsewhere.

27. Although patients who obtain abortions demonstrate a strong level of certainty with respect to the decision, some patients take longer to make a decision than others. Even if there were some way in theory for patients to have an abortion in compliance with the Act and in light of all the other legal and logistical barriers, the Act would force patients to race to a health center for an abortion, even if they did not yet feel confident in their decision.

28. The Act will also add to the anguish of patients and their families who receive fetal diagnoses later in pregnancy. There is no prenatal testing for fetal anomalies available at 6 weeks

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[16] In 2019, 32.6% of Texans were living under 200% of the federal poverty level, compared to 28.9% nationwide. That same year, 13.6% of Texans were living in poverty (compared to 10.5% nationwide). Kaiser Fam. Found., *Distribution of the Total Population by Federal Poverty Level (Above and Below 200% FPL)*, https://www.kff.org/other/state-indicator/population-up-to-200-fpl/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D (last accessed July 12, 2021); U.S. Census Bur., *QuickFacts: Texas* (2019), https://www.census.gov/quickfacts/fact/table/TX/RHI125219; U.S. Census Bur., *QuickFacts: United States*, https://www.census.gov/quickfacts/fact/table/US/PST045219 (2019).

[17] Jones & Jerman, *supra* note 3, at 1906.

[18] Tex. Health & Hum. Servs., *2019 Induced Terminations of Pregnancy for Texas Residents* 2 (Dec. 23, 2020), https://www.hhs.texas.gov/sites/default/files/documents/about-hhs/records-statistics/research-statistics/itop/2019/2019-itop-narrative-texas-residents.pdf.

LMP or earlier. Indeed, some anomalies cannot be identified until closer to 18 to 20 weeks LMP. Often these pregnancies are very much wanted throughout the first trimester of pregnancy and into the second. S.B. 8 would deny patients in these circumstances the ability to access an abortion in Texas.

29. Given the narrow definition of "medical emergency," *see* Tex. Health & Safety Code § 171.002(3), patients with medical conditions that do not fall within that definition under S.B. 8 will be forced to travel out of state or wait and see if their health deteriorates to the point that the pregnancy places them "in danger of death or a serious risk of substantial impairment of a major bodily function" in order to obtain an abortion in Texas. *Id.*

30. S.B. 8 will also have a devastating impact on survivors of sexual assault, rape, or incest. While S.B. 8 prevents the perpetrators of these crimes from suing, it does not authorize an abortion, forcing the patients to carry the pregnancy to term or arrange the complex logistics of traveling out of state for their care.

31. These fears are not theoretical. After the Texas governor temporarily banned abortion during the COVID-19 pandemic, *see* Executive Order No. GA-09, PPCFC and other providers sued. After we obtained a temporary restraining order from this Court, we began offering services again to patients, but that victory was short lived. The Fifth Circuit stayed the order, which meant that patients we had already counseled, and who had already obtained an ultrasound and waited for 24 hours, had to be suddenly turned away. PPCFC's ambulatory surgical center was forced to cancel appointments for abortion services for 170 people. By the time the executive order expired, some of those patients were beyond the gestational age limit to have an abortion in Texas. Others could not use referrals to out-of-state providers because they knew they could not make such a lengthy trip.

32. Turning patients away was traumatic for me and other PPCFC staff. Serving patients, particularly those from marginalized communities who have historically been denied access to quality health care, is my passion. I and other staff choose to work at PPCFC because we support Planned Parenthood's mission to ensure all individuals have the right and ability to manage their health by providing them with comprehensive reproductive health services and advocating for them.

33. For these reasons, I believe S.B. 8 will deprive PPCFC's patients of access to critical health care and will threaten their health, safety, and lives.

34. I also worry about the impact that S.B. 8 will have on me as a physician and on my colleagues, including PPCFC's nurses and other staff, without whom I could not provide abortion services to our patients. As in other areas of medicine, these professionals provide several essential aspects of the health care services we provide. We already face harassment because of our jobs. Texas has now set vigilantes loose to come after us in court, all for providing critical health care to patients who seek and expressly consent to it. I also understand that in addition to this state-sponsored harassment, S.B. 8 would still subject me to the possibility of an investigation and disciplinary proceedings by the Texas Medical Board over S.B. 8 lawsuits against me. It is simply inconceivable that Texas would treat any other medical professionals this way, and S.B. 8's impact is an insult to me and my committed colleagues as we work tirelessly to serve Texans in need of health care.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 12th, 2021, in Houston, Texas.

Bhavik Kumar, M.D., M.P.H.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

WHOLE WOMAN'S HEALTH, et al.,	)	
	)	
Plaintiffs,	)	
	)	CIVIL ACTION
v.	)	
	)	CASE NO. _____
AUSTIN REEVE JACKSON, et al.,	)	
	)	
Defendants.	)	

DECLARATION OF ANDREA FERRIGNO IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

ANDREA FERRIGNO hereby declares under penalty of perjury that the following statements are true and correct:

1. I am the Corporate Vice-President with Whole Woman's Health ("WWH"), a plaintiff in this case.

2. WWH currently operates three licensed abortion facilities in Texas, in Fort Worth (the "Fort Worth Clinic"), McAllen (the "McAllen Clinic") and McKinney (the "North Texas Clinic"). WWH also operates abortion clinics in Baltimore, Maryland; Bloomington, Minnesota; and Alexandria, Virginia.

3. My responsibilities as Corporate Vice-President include ensuring that each clinic complies with all statutes and regulations concerning the provision of the health services they offer, including abortion care, as well as recruiting physicians. I also lead Growth and Acquisitions for WWH, which involves incorporating new models of care into our clinics and expanding to new areas of care.

4. I have worked at WWH in a variety of roles since 2004, when I first joined as a Patient Advocate. As a result, I am well-versed in abortion clinic operations and patient care.

5. I provide the following testimony based on personal knowledge and review of WWH's business records.

Provision of Abortion Care at the WWH Clinics in Texas

6. Both the Fort Worth and McAllen clinics offer procedural abortions up to 17.6 weeks gestation, as measured from the first day of a patient's last menstrual period ("LMP"). All three clinics also offer medication abortions up to 10 weeks LMP.

Impact of Senate Bill 8 on WWH Physicians and Staff

7. My understanding of Senate Bill 8 (S.B. 8) is that it prohibits a physician from providing an abortion if they have detected fetal or embryonic cardiac activity or if they have failed to test for cardiac activity. Cardiac activity is typically detectable in an embryo around 6 weeks LMP.

8. It is my understanding that after September 1, 2021, if any person believes that a physician at the clinics has violated S.B. 8, they can bring a civil action against them.

9. Furthermore, because the penalties also apply to anyone who aids or abets the performance of an abortion, it seems possible that the clinics or members of the clinics' staffs could also be sued.

10. We have a number of protesters who regularly gather outside the clinics. On slower days, we have 5-25 protesters, but we have had over 100 protesters when they have marches or rallies in front of the clinics. These protesters have also filed false complaints against our physicians, attempting to provoke an investigation by the Texas Medical Board. We typically have one complaint filed against a physician at each clinic every year. Though these complaints have

always been found to be without merit and dismissed, they are still disruptive to our clinics' operations and a means of threatening our physicians.

11. Because lawsuits under S.B. 8 can be filed by any person, including the protesters and other individuals with no relationship to the patients, it is very likely that lawsuits will be filed against our clinics, physicians, and/or staff members. They will have to hire lawyers, travel to the counties where the lawsuits are filed, and spend months, or even years, defending themselves against the lawsuits.

12. If our clinics, physicians and/or staff members are found to have violated S.B. 8, they will be banned from providing abortions or assisting in the performance of an abortion in violation of S.B. 8 and will have to pay a minimum of $10,000 per prohibited procedure, as well as costs and attorney's fees. I also understand that they may be subject to disciplinary action by the Texas Medical and Nursing Boards.

13. These lawsuits would be enormously burdensome for the individual physicians and staff members, financially, logistically, and emotionally, but they would also be disastrous for the clinics. We cannot continue to operate if our physicians and staff are being sued around the state and are barred from doing their jobs.

14. Further, there is no practical way for us to comply with S.B. 8 and continue providing abortion care for most of our patients. Currently, only around 10% of our patients obtain an abortion before six weeks LMP. This is because medically, there is very little time between when a pregnancy can be detected and when cardiac activity is detectible by ultrasound. In that small window, few patients are able to make the necessary two trips to the clinic, first for a mandatory ultrasound and counseling, and second for their abortion (which must be at least 24 hours later for patients who live fewer than 100 miles from the closest abortion provider). In addition, many

of our patients do not even know they are pregnant before six weeks. Thus, S.B. 8 is effectively a prohibition on the vast majority of abortions we currently provide.

15. Ultimately, this law puts our clinics in an impossible situation. We can either turn away a majority of our patients seeking care, which will eventually cause us to go out of business, or we can continue providing abortions in violation of S.B. 8, knowing that our physicians and staff will be sued and potentially barred from providing care after 6 weeks LMP anyway, again making it difficult for us to keep our doors open. Either way, S.B. 8 is designed to put us out of business entirely.

16. WWH has been subjected to clinic shut-down laws in Texas before. In 2013, Texas passed House Bill 2, a law that required all abortion facilities to be licensed ambulatory surgical facilities and all abortion providers to have local hospital admitting privileges. Because WWH lacked sufficient physicians with admitting privileges in Beaumont and Austin, we had to shut those clinics down. Additionally, our clinic in McAllen was shut down for eleven months and was only reopened because of an injunction awarded by the United States District Court for the Western District of Texas. Ironically, one of our physicians in Austin was able to obtain admitting privileges in Fort Worth, and so he commuted by plane in order to keep our clinic in Fort Worth open. The cost of flights put further economic pressure on WWH.

17. While HB 2 was ultimately struck down in 2016 as unconstitutional by the Supreme Court, WWH was severely strained by the litigation. And things have only gotten worse since 2013, as WWH has been forced to litigate three additional severe abortion restrictions since 2016.

18. Because the regulatory environment in Texas is so hostile, the clinics shuttered by HB 2 have largely not reopened. In fact, the WWH clinic in Austin (now operated by Whole Woman's

Health Alliance) is the only WWH clinic closed by HB 2 to have reopened since the Supreme Court struck it down.

Impact on WWH Patients

19. A majority of patients at our Fort Worth Clinic are people of color and Spanish speakers. They hail from all over Texas.

20. A majority of patients at our McAllen Clinic are Spanish speakers and many face immigration-related restrictions on traveling outside of the Rio Grande Valley.[1]

21. The patients at the clinics seek abortion care for a variety of reasons. Many have low incomes, are uninsured, and are the parents of dependent children. Having access to abortion care in their community is incredibly important for our patients.

22. Our patients regularly rely on friends, family members, and social support networks to aid them in obtaining an abortion. Under S.B. 8, any friend, family member, or other person who helps the patient could open themselves up to the threat of lawsuits. Some patients will have to choose between being forced to remain pregnant or subjecting their loved ones to the risk of a lawsuit with serious financial consequences.

23. If the clinics are not able to continue providing abortions after six weeks LMP, it will be devastating for the patients we serve. It will be impossible for most of these patients to obtain an abortion before six weeks LMP.

24. Our patients already have to overcome many obstacles and navigate complicated logistics simply to get to us. Traveling to our clinics twice to have their abortion, as required by Texas's 24-hour delay law, is expensive and difficult for these patients. They have to arrange for

[1] The North Texas Clinic opened so recently that we have not yet identified patient trends.

transportation back and forth from our clinics twice, secure childcare if they already have another child, and take time off work. If they lack paid sick leave, they also lose wages. For patients who have to travel longer distances to obtain care, some need to pay for lodging for a multiple-day stay, which then requires additional, costly logistical arrangements, including being away from home and work for longer and needing more childcare. We offer funding and transportation assistance to these patients, but the need is still significant. All of these costs and logistical challenges often force patients to delay obtaining care by weeks after they have already decided to have an abortion. It will be nearly impossible for them to overcome these challenges in the limited time between when they discover they are pregnant and six weeks LMP. And again, many patients do not even discover they are pregnant until after six weeks LMP.

25. The challenges are heightened for younger patients. Texas requires patients under the age of eighteen to obtain written parental authorization for an abortion or get a court order. We see minor patients at our clinics and this restriction often delays them in obtaining care.

26. We see patients at our clinics who are victims of rape or incest. These patients are sometimes delayed getting care due to ongoing physical or emotional trauma, making it difficult for them to obtain an abortion before six weeks LMP.

27. If they cannot obtain an abortion in Texas, some of our patients may be able to access care out of state. They will be further delayed and forced to live with an unwanted pregnancy for an indefinite amount of time—which, in addition to the profound stress and anxiety of being in such limbo, also subjects patients to the physical and mental health symptoms and risks of continuing pregnancy, and for some, the increased possibility that an abusive partner or family member will learn of the pregnancy.

28. However, most of our patients will not be able to travel out of state. It is simply too logistically challenging and expensive. It is also very risky for those who are undocumented. I have heard from many patients that there is an immigration checkpoint in Falfurrias, Texas, about 75 miles north of McAllen, that makes it very difficult for those in the southern part of Texas to travel north for care if they are undocumented or on a restricted visa.

29. These patients will be forced to carry pregnancies to term against their will or seek ways to end their pregnancies without medical supervision, which may be unsafe. Forcing our patients to continue pregnancies against their will poses risk to their physical, mental, and emotional health, and even their lives, as well as to the stability and wellbeing of their families, including their existing children.

30. In these ways, S.B. 8 will cause WWH patients to suffer in significant and lasting ways.

S.B. 8's Fee Shifting Provision

31. I further understand that S.B. 8 makes parties and their attorneys liable to pay the costs and attorney's fees in cases challenging Texas laws that restrict abortion.

32. WWH has frequently litigated cases challenging Texas's abortion restrictions, including *Whole Woman's Health v. Hellerstedt*, the case in which the Supreme Court struck down as unconstitutional the two provisions of HB 2 that threatened to close our clinics. The cases we have been involved with include: *In re Abbot*, 954 F.3d 772 (5th Cir. 2020), *cert. granted, judgment vacated as moot by Planned Parenthood Ctr. for Choice v. Abbott*, 141 S. Ct. 1261 (2021) (mem.) (COVID abortion ban); *Whole Woman's Health v. Paxton*, 978 F.3d 896 (5th Cir. 2020), *reh'rg en banc granted, vacated, and argued*, 978 F.3d 974 (5th Cir. 2020) (ban on common method of abortion); *Whole Woman's Health v. Smith*, 338 F. Supp. 3d 606 (W.D. Tex. 2018), *appeal docketed and argued*, No. 18-50730 (5th Cir.) (requirement for interment or

cremation of embryonic and fetal tissue); *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) (decision on admitting-privileges and ASC requirements); and *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583 (5th Cir. 2014), *reh'rg en banc denied*, 769 F.3d 330 (5th Cir. 2014) (decision on admitting-privileges, medication-abortion regulations)

33. Litigation is critical not only to keeping our doors open, but to fulfilling our mission to serve patients seeking abortion in Texas. I am concerned that the fee-shifting provision of S.B. 8 is intended to intimidate us and discourage us from using litigation to vindicate the constitutional rights of our patients and keep the doors of our clinics open.

Dated: 7/9/2021

Andrea Ferrigno
Corporate Vice-President
Whole Woman's Health

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

WHOLE WOMAN'S HEALTH, et al.,	)	
	)	
Plaintiffs,	)	
	)	CIVIL ACTION
v.	)	
	)	CASE NO. _____
AUSTIN REEVE JACKSON, et al.,	)	
	)	
Defendants.	)	

DECLARATION OF JESSICA KLIER IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

JESSICA KLIER, declares under penalty of perjury that the following statements are true and correct:

1. I am the Administrator at Austin Women's Health Center and Brookside Women's Medical Center, a position that I have held for 16 years. Along with the Medical Director, I provide overall leadership for the clinic. My responsibilities include carrying out the clinic's organizational goals, developing and implementing clinic policies and procedures with operational oversight of financial and budgetary activities, and ensuring compliance with all regulatory agencies governing health care delivery.

2. Austin Women's Health Center is a licensed abortion facility and Brookside Women's Medical Center is a gynecological and primary care practice. Together, these two facilities (collectively "Austin Women's") have provided high-quality reproductive services to Texas women for over 40 years. Austin Women's provides medication abortion up to 70 days of gestation and procedural abortions (sometimes referred to as "surgical abortions") up to 17 weeks, 6 days as dated from the first day of the patient's last menstrual period ("LMP"). Austin Women's also provides contraception, miscarriage management, and gynecologic surgical

procedures, including colposcopies, biopsies, and loop electrosurgical excision procedures ("LEEPs"), in which a layer of cervical tissue is removed to diagnose and treat cancer or precancerous cells.

3. I submit this declaration in support of Plaintiffs' Motion for Summary Judgment.

4. The facts I state here are based on my experience, my review of Austin Women's business records, information obtained in the course of my duties at Austin Women's, and personal knowledge that I have acquired through my service at Austin Women's.

5. My understanding of Senate Bill 8 ("S.B. 8") is that it prevents a physician from performing an abortion if they can detect embryonic or fetal cardiac activity or if they have failed to check for cardiac activity. I understand that any person may sue a physician who violates this law and if they are successful, the physician is blocked from violating the law again, and must pay a minimum of $10,000, as well as costs and attorney's fees.

6. I further understand that anyone who "aids or abets" in the performance of a prohibited abortion, including clinics, can also be sued and would face the same penalties as the physicians.

7. Embryonic or fetal cardiac activity can generally be detected as early as six weeks LMP. Therefore, S.B. 8 bans abortion in Texas after approximately six weeks LMP.

8. If we continue providing abortions after six weeks LMP, the threat of lawsuits will cause uncertainty and anxiety for Austin Women's, its physicians, and staff. Our patients will be burdened in their decision-making because their friends, family, and support networks could be sued for allegedly "aiding and abetting" them in obtaining their abortions.

9. I believe it is very likely that Austin Women's, our physicians and/or staff members will be sued by the anti-abortion individuals who are constantly threatening abortion access in this state and who are opposed to our provision of abortion care.

10. S.B. 8 is designed to prohibit the majority of abortion care we provide and put our future at risk. Staff or physicians who are sued will be forced to defend themselves against lawsuits that will be emotionally, logistically, and financially burdensome. I understand that they may also face disciplinary action by the Texas Medical and Nursing Boards. We will not be able to continue operating if our staff and physicians are prohibited from performing their jobs. Staff have already come to me, concerned about their jobs, about our long-term sustainability, and fearful for the repercussions S.B. 8 will have for them personally.

11. It will also be devastating for the patients we serve if we cannot continue offering abortions after six weeks LMP.

12. For multiple reasons, ten percent or less of our patients obtain an abortion before six weeks LMP. It is extremely difficult to arrange the necessary logistics and finances and comply with the many burdensome Texas laws that the state has placed on abortion, all before the patient reaches six weeks LMP.

13. If these patients are prevented from getting abortion care in Texas, many will be unable to access abortion at all. Those who are able to travel out of state will suffer increased risks to their health by the delay in ending their pregnancies. Many will also face increased costs related to abortion, as their abortion access is pushed to later gestational points when abortion is more expensive and may require a two-day procedure, instead of one.

14. I am all too familiar with laws like S.B. 8 that are intended to close clinics. While later ruled unconstitutional, House Bill 2 of 2013 succeeded in closing down more than half of

the abortion clinics in Texas, including our sister clinic in Killeen. Our clinic in Killeen has never reopened.

15. I am worried for myself, my staff, the doctors I work with, and the patients we serve. We have been providing high-quality medical care to patients in Texas for 40 years, under constant threat from those who oppose the work we do. Yet I have never been more concerned for our future than I am today.

16. I also understand that S.B. 8 requires those who challenge abortion restrictions or regulations in Texas to pay defendants' costs and attorney's fees for any claims they do not succeed on.

17. Austin Women's has been involved in a number of lawsuits challenging Texas abortion laws, including: *In re Abbot*, 954 F.3d 772 (5th Cir. 2020), *cert. granted, judgment vacated as moot by Planned Parenthood Ctr. for Choice v. Abbott*, 141 S. Ct. 1261 (2021) (mem.) (COVID abortion ban); *Whole Woman's Health v. Smith*, 338 F. Supp. 3d 606 (W.D. Tex. 2018), *appeal docketed and argued*, No. 18-50730 (5th Cir.) (requirement for interment or cremation of embryonic and fetal tissue); *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) (decision on admitting-privileges and ASC requirements); and *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583 (5th Cir. 2014), *reh'rg en banc denied*, 769 F.3d 330 (5th Cir. 2014) (decision on admitting-privileges, medication-abortion regulations).

18. Austin Women's has stayed open because of litigation we have brought against unconstitutional laws. If we are required to pay for defendants' costs and attorney's fees when we do not succeed on every claim we bring, even if we obtain our desired relief, this will make it

more difficult for us to bring cases and certain claims that are necessary to protect our patients' constitutional rights.

Jessica Klier

Jessica Klier

Date: 7-10-2021

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

WHOLE WOMAN'S HEALTH, et al., *Plaintiffs*, v. AUSTIN REEVE JACKSON, et al., *Defendants*.	Civil Action No. _____

DECLARATION OF KEN LAMBRECHT IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

I, Ken Lambrecht, declare as follows:

1. I am over the age of 18. I make this declaration based on personal knowledge of the matters stated herein and on information known or reasonably available to my organization. If called to do so, I am competent to testify as to the matters contained herein.

2. I am President and CEO of Planned Parenthood of Greater Texas ("PPGT"). PPGT is a Texas not-for-profit corporation headquartered in Dallas, and is the parent corporation to two separate entities that provide reproductive health care services throughout central, east, north, and west Texas. One of those entities, Planned Parenthood of Greater Texas Family Planning and Preventative Health Services, provides a range of family planning and other health services at 18 health centers throughout our service areas. Those services include physical exams; contraception and contraceptive counseling; clinical breast exams; HIV testing; pre-exposure prophylaxis ("PrEP") and post-exposure prophylaxis ("PEP") HIV prevention; screening and prevention for cervical cancer; testing for certain sexually transmitted infections; pregnancy testing and counseling; gender-affirming hormone therapy; and certain procedures such as biopsies and colposcopies. The other entity, Planned Parenthood of Greater Texas Surgical Health Services

("PPGTSHS") provides abortion, miscarriage management, and contraception at ambulatory surgical centers licensed by the Texas Health and Human Services Commission ("HHSC") in Austin, Dallas, and Fort Worth and HHSC-licensed abortion facilities in Waco, El Paso, and Lubbock, Texas.[1]

3. I am responsible for the management of these organizations and therefore am familiar with our operations and finances, including the services we provide and the communities we serve.

4. I submit this declaration in support of Plaintiffs' Motion for Summary Judgment. I understand that Texas Senate Bill 8 ("S.B. 8" or the "Act") would ban the provision of abortion in Texas after embryonic cardiac activity can be detected, which occurs at approximately 6 weeks of pregnancy, as measured from the first day of a patient's last menstrual period ("LMP").[2] Therefore, without relief from the Court, we will be legally prohibited from providing abortions after approximately 6 weeks of pregnancy at our health centers throughout Texas on September 1, 2021, the Act's effective date.

5. By banning abortion at a point in pregnancy before many patients even realize they are pregnant, the Act will make it virtually impossible to access abortion in Texas. I anticipate that patients who can scrape together the resources will be forced to travel out of state for medical care, and many others who cannot do so will be forced to carry a pregnancy to term against their will or

[1] Abortion services are temporarily unavailable in El Paso due to the COVID-19 pandemic, and are currently unavailable in Lubbock due to a City ordinance banning abortion that is subject to an ongoing legal challenge. *Planned Parenthood of Greater Tex. Surgical Health Servs. v. City of Lubbock*, No. 5:21-CV-114-H, 2021 WL 2385110 (N.D. Tex. June 1, 2021) (dismissing case for lack of jurisdiction), *mot. for reconsideration filed* (June 29, 2021), ECF No. 52.

[2] S.B. 8's only exception is for a "medical emergency," which is defined in Texas law as "a life-threatening physical condition aggravated by, caused by, or arising from a pregnancy that, as certified by a physician, places the woman in danger of death or a serious risk of substantial impairment of a major bodily function unless an abortion is performed." Tex. Health & Safety Code § 171.002(3).

seek ways to end their pregnancies without medical supervision, some of which may be unsafe. I am gravely concerned about the effect that the Act will have on Texans' emotional, physical, and financial wellbeing and the wellbeing of their families.

PPGTSHS and Its Services

6. As noted above, PPGTSHS provides abortion, miscarriage management, and contraception to patients. It provides both medication abortion and procedural abortion.

7. PPGTSHS's Austin health center is licensed as an ambulatory surgical center and offers medication abortion through 10 weeks LMP and procedural abortion through 21 weeks 6 days LMP; our Dallas health center is licensed as an ambulatory surgical center and offers medication abortion through 10 weeks LMP and procedural abortion through 18 weeks 6 days LMP; our Fort Worth health center is licensed as an ambulatory surgical center and offers medication abortion through 10 weeks LMP and procedural abortion through 13 weeks 6 days LMP; and our Waco health center is licensed as an abortion facility and offers medication abortion through 10 weeks LMP and procedural abortion through 15 weeks 6 days LMP. Each of these centers also operates a pharmacy licensed by the Texas Pharmacy Board that is utilized in the provision of abortion and related services, including through the dispensing of mifepristone, misoprostol, and other drugs used in abortion and post-abortion contraceptives. *See* 25 Tex. Admin. Code § 135.12(a) (requiring ASCs to be licensed as required by the Texas Pharmacy Board); *id.* § 139.60(g) (requiring abortion facilities that provide pharmacy services to be obtain a pharmacy license).

8. PPGTSHS's staff who are involved in the provision of abortions include physicians and physician assistants licensed by the Texas Medical Board, nurses licensed by the Texas Nursing Board, and pharmacists licensed by the Texas Pharmacy Board.

9. Although most patients obtain an abortion as soon as they are able, most are at least 6 weeks LMP into their pregnancy by the time they contact us seeking an abortion. In 2019, PPGTSHS performed 6,984 abortions, and approximately 93.4% were performed at 6 weeks LMP or later.

10. Patients likely reach us at or after 6 weeks LMP because they do not learn they are pregnant before that time, and even after a patient learns that she is pregnant and decides she wants to terminate the pregnancy, arranging an appointment for an abortion may take some time. Even assuming an appointment is available at a health center that is accessible to a patient, they need to come in for at least two visits, and have to take time off work, arrange child care, and deal with other logistical issues that can result in some delay. For patients living in poverty or without insurance, which is most, travel-related and financial barriers also help explain why the vast majority of our patients do not—and realistically could not—obtain abortions before 6 weeks LMP.

Effects of S.B. 8's Abortion Ban

11. My understanding of S.B. 8 is that it bans abortions in Texas by exposing PPGTSHS and its doctors, nurses, and other staff members to substantial liability for providing or assisting with abortion services and by mandating that courts enjoin future violations of the law. Specifically, I understand that S.B. 8 allows "any person" to bring a lawsuit against anyone who performs an abortion after approximately 6 weeks LMP, aids or abets the performance of a prohibited abortion, or intends to perform (or aid or abet) a prohibited abortion. S.B. 8, § 3 (adding Tex. Health & Safety Code § 171.208(a)). I further understand that, where an S.B. 8 plaintiff is successful, Texas state courts must impose substantial monetary penalties of at least $10,000 per abortion, as well as injunctions forcing abortion providers to stop providing constitutionally

protected health care. *Id.* (adding Tex. Health & Safety Code § 171.208(b)). I also understand that anyone who is sued and loses is responsible to pay the claimant's attorney's fees, *id.* (adding Tex. Health & Safety Code § 171.208(b)), but they cannot recover their own attorney's fees if they prevail, *id.* (adding Tex. Health & Safety Code § 171.208(i)).

12. S.B. 8 will force us to shut down abortion services after detection of embryonic cardiac activity, i.e., at approximately 6 weeks of pregnancy. It threatens liability for anyone who assists in the provision of abortion prohibited by the Act. That applies not only to PPGTSHS and each health center's physicians, but also to all of the health center's staff who have critical roles in the provision of this care and without whom we cannot provide abortion.

13. PPGTSHS, our physicians, and our staff cannot afford the monetary damages that would be owed, and therefore we simply cannot take the risk of facing civil liability and damages. Additionally, because S.B. 8 requires courts to issue injunctions against any person found to have violated S.B. 8, we could be ordered to stop providing abortions for an extended period of time while we challenge S.B. 8 defensively, even if we were willing to go forward with performing abortions banned by S.B. 8. I also understand our licensed staff may face professional consequences for violating S.B. 8, which could jeopardize our facility and pharmacy licenses.

14. Our staff and I believe that, given the strong anti-abortion sentiments held by some Texans and others outside of Texas, lawsuits would inevitably and imminently be brought against us under S.B. 8. Indeed, after our Lubbock health center opened, Lubbock voters approved a blatantly unconstitutional ordinance banning abortions in the city, which—like S.B. 8—could be directly enforced only through private lawsuits. As the June 1, 2021, effective date approached, we learned of several threats to sue us if we continued to provide abortions in Lubbock. Ex. B to Br. in Supp. of Pls.' Mot. for Reconsideration, *Planned Parenthood of Greater Tex. Surgical*

Health Servs. v. City of Lubbock, No. 5:21-CV-114-H (N.D. Tex. June 29, 2021), ECF No. 052-2 (social media post showing one such threat from Mark Lee Dickson) (attached as Ex. 1). In addition, a lawyer representing the ordinance's proponent in a hearing in our case challenging the ordinance told the judge presiding over the case that litigants and attorneys were prepared to sue us on June 1 if we continued to provide abortions. Tr. of Hr'g on Jurisdictional Issue at 44:8–45:11, *Planned Parenthood of Greater Tex. Surgical Health Servs. v. City of Lubbock*, No. 5:21-CV-114-H (N.D. Tex. May 28, 2021) (attached as Ex. 2). And on the day that the Ordinance took effect, two individuals (including one who had previously directly threatened to sue us) posted online a video of themselves calling our call center and pretending to need an abortion to determine whether we would provide one despite the City ban. Mark Lee Dickson, Facebook (June 1, 2:07 PM), https://www.facebook.com/markleedickson/videos/10159259661094866. We fully expect that these same individuals, along with many others, will target PPGT again to determine its compliance with S.B. 8 if the law is permitted to take effect, and would bring suits against us if we performed abortions barred by the statute.

15. As a result of the Lubbock ordinance taking effect, we have been forced to stop providing abortions at that health center while we litigate over the ordinance's constitutionality. In the meantime, patients in the Lubbock area who would have had access to a local abortion provider now have to travel roughly 300 miles each way to obtain the care they need, if they can afford to travel at all.

16. Even if we were to ultimately prevail in suits filed against us under S.B. 8, the cost to defend ourselves against an unlimited number of lawsuits, potentially in every county in Texas simultaneously, would be impossible for us to absorb.

17. I am also very concerned about the nature of these proceedings, which seem designed to make it hard, if not impossible, to bring defenses, including ones based on clear federal constitutional protection for abortion. S.B. 8 also makes it impossible for us to predict the costs and full scope of risks that the law threatens, and it opens us up to repeated frivolous lawsuits brought in bad faith.

18. Health care providers, like other organizations, need certainty in their operations. I cannot think of a single other instance in which a health care provider—or any other organization or individual—is subjected to this kind of unfair targeting. S.B. 8 clearly aims to bankrupt and harass us and our staff, and to eliminate abortion access in Texas that is protected by federal law. There is simply no other conceivable purpose for it.

19. Shutting down abortion services will seriously harm both PPGTSHS and our patients. The prospect of S.B. 8 taking effect has already harmed our staff. Staff are understandably frightened that they will be sued and forced into a Texas court far away from home to defend themselves, and they are deeply worried about the impact that these suits will have on themselves and their families.

20. Our staff deal with never-ending harassment from opponents of abortion. They pass through lines of protestors, yelling at them (and at patients), just to do their jobs.

21. Despite all this, they come to work because they believe in Planned Parenthood's mission. The provision of abortion services is essential to PPGTSHS's mission: providing comprehensive reproductive health care services, which are vital for public health, especially for medically underserved populations. Many staff members entered health care because serving patients was their calling. They have dedicated their lives and careers to providing high-quality

health care and advocating for their patients. S.B. 8 will prevent PPGTSHS and our dedicated team of medical professionals from fulfilling our mission.

22. Even staff who have no direct role in abortion services are worried about being named in harassing lawsuits. In fact, before the Lubbock abortion ban took effect, health center staff began expressing concerns about working, because they were worried about being named in a lawsuit and having their professional licenses and livelihoods put at risk.

23. Most fundamentally, S.B. 8 seriously harms our patients by depriving them of access to safe and legal abortions. If we are forced to stop providing abortions after approximately 6 weeks LMP, many patients will be forced to travel out of state to obtain care, which may involve hundreds of miles of travel (to Shreveport, Baton Rouge, New Orleans, Oklahoma City, or Albuquerque). This sort of travel will delay patients in accessing care (and pushing some into a later, more expensive abortion that carries greater risks) and will prevent others from accessing abortion altogether, because the travel is simply impossible for them.

24. Our patient population is comprised of a significant percentage of people with low incomes: of the patients who obtained abortions at our health centers in 2019, approximately 42% had incomes at or below the federal poverty line, and 68% had incomes at or below 200% of the federal poverty line. These patients are the hardest hit by the expenses and logistical difficulties of travel, including from being forced to miss work and/or child-care obligations. We know that these patients would face severe barriers to accessing care elsewhere.

25. Indeed, after the Texas governor banned abortion by executive order during the early days of the pandemic, we scrambled to help patients get care out of state, going as far as Colorado and Missouri. Executive Order No. GA-09; *In re Abbott*, 954 F.3d 772 (5th Cir. 2020), *cert. granted, judgment vacated as moot by Planned Parenthood Ctr. for Choice v. Abbott*, 141 S.

Ct. 1261 (2021) (mem.). We now know that while some were able to get care elsewhere, many were not.

26. I believe S.B. 8 will deprive PPGTSHS's patients of access to critical health care and will threaten their health, safety, and lives.

The Impact of S.B. 8's Fee-Shifting Provisions

27. I understand that S.B. 8 also makes parties and their attorneys liable to pay defendants' costs and attorney's fees in cases challenging Texas laws that restrict or regulate abortion, or that provide public funding to entities that perform abortion or promote abortion access. My understanding is that this fee provision purports to apply even if the case is brought in federal court and/or to assert a federal right; that it attempts to apply to challenges to covered local as well as state laws; and that it would extend to counterclaims that we make in defending against lawsuits filed against us under S.B. 8 by private individuals.

28. PPGT and its PPGTSHS (and their predecessor organizations) are regularly forced to bring court challenges to restrictions on abortion or laws targeting abortion providers in Texas. *See City of Lubbock*, 2021 WL 2385110 (Section 1983 and state-law claims) (local ban on abortion); *In re Planned Parenthood of Greater Tex. Fam. Planning & Preventative Health Servs., Inc.*, No. D-1-GN-21-000528 (Travis Cty. Dist. Ct., *writ denied* March 10, 2021) (petition for a state writ of mandamus) (Medicaid defunding decision); *Whole Woman's Health v. Paxton*, 978 F.3d 896 (5th Cir. 2020), *reh'rg en banc granted, vacated by* 978 F.3d 974 (5th Cir. 2020) (Section 1983 claims) (ban on common method of abortion); *In re Abbott*, 954 F.3d 772 (Section 1983) (COVID abortion ban); *Planned Parenthood of Greater Tex. Fam. Planning & Preventative Health Servs. v. Kauffman*, 981 F.3d 347 (5th Cir. 2020) (en banc) (Section 1983 claims) (Medicaid termination decision); *Tex. Dep't of State Health Servs. v. Balquinta*, 429 S.W.3d 726 (Tex. Ct.

App. 2014) (state-law claims) (Medicaid Women's Health Program exclusion decision), *appeal filed & case dismissed as moot* (Tex. March 13, 2015) (No. 14-0270); *Tex. Health & Hum. Servs. Comm'n v. Planned Parenthood of Greater Tex. Fam. Planning & Preventative Health Servs., Inc.*, No. 03–12–00745–CV, 2014 WL 1432566 (Tex. Ct. App. Apr. 9, 2014) (state-law claims) (dismissing Texas Women's Health Program exclusion challenge as moot); *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583 (5th Cir. 2014), *reh'rg en banc denied*, 769 F.3d 330 (5th Cir. 2014) (Section 1983) (decision on admitting-privileges, medication-abortion regulations); *Planned Parenthood of Hidalgo Cty. Tex., Inc. v. Suehs*, 692 F.3d 343 (5th Cir. 2012) (Section 1983 and other federal and state-law claims) (Women's Health Program defund).

29. These litigation efforts are critical to fulfilling our mission to protect and expand access to comprehensive reproductive and sexual health care, including abortion, in Texas.

30. S.B. 8's fee-shifting provision will make it extremely difficult for us to continue to protect our patients' constitutional rights via the important tool of litigation, as nearly every case will bring with it the risk that we and our attorneys could be responsible for crushing attorney's fees and costs. We routinely rely on pro bono or reduced-rate legal counsel to help us defend our rights and those of our patients. There is no doubt in my mind that S.B. 8 will make it more difficult for us to obtain legal counsel when we need it, particularly local counsel, and that this outcome is exactly what the Texas Legislature intended. The impact of the fee provision will be particularly harsh for us when we are forced to sue in the United States District Court of the Northern District

of Texas, which requires that local counsel reside or have their primary office within 50 miles of the courthouse, a substantial restriction in itself on the availability of counsel.

31. I am also concerned about the impact that S.B. 8 will have on the arguments we bring in litigation. It will force us and our attorneys to weigh the possibility of huge legal bills (and fights over legal bills years after a case is over) every time we bring a claim that is well-founded and in good faith. We will be forced to risk those penalties to defend our rights and those of our patients, while government officials and other individuals trying to restrict abortion or ban it outright—in clear disregard for the U.S. Constitution—would face no similar consequence under S.B. 8.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 12, 2021, in Austin, Texas.

Ken Lambrecht

Ken Lambrecht

EXHIBIT 1

Exhibit B

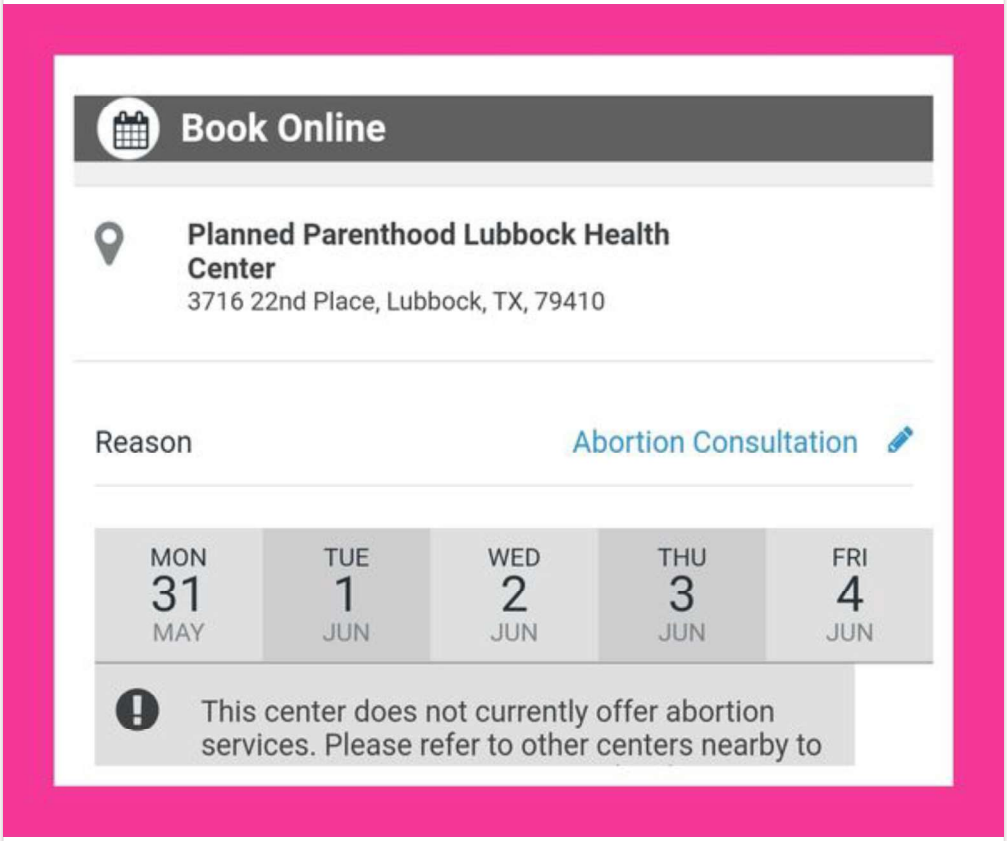
Mark Lee Dickson is in Lubbock, Texas.
June 1 7:45 AM

It is June 1st. The Lubbock Ordinance Outlawing Abortion is in effect. According to Planned Parenthood's website "This center does not currently offer abortion services."

Let's hope it stays that way.

If abortions do end up being performed this week or next week or any week thereafter, I will be suing Planned Parenthood for the murder of unborn children under the provisions allowed in the Lubbock Ordinance Outlawing Abortion.

#therighttolife #thefightforlife #fromconceptiontillnaturaldeath #unbornlivesmatter #loveoneanother #sanctuarycitiesfortheunborn



103 20 Comments 21 Shares

Like Comment Share

EXHIBIT 2

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

PLANNED PARENTHOOD OF GREATER TEXAS SURGICAL HEALTH SERVICES, on behalf of itself, its staff, physicians and patients, et al., PLAINTIFFS,	)	CAUSE NO. 5:21-CV-114-H
VS.	)	
CITY OF LUBBOCK, TEXAS, DEFENDANT.	)	

HEARING ON JURISDICTIONAL ISSUE
BEFORE THE HONORABLE JAMES WESLEY HENDRIX,
UNITED STATES DISTRICT JUDGE

FRIDAY, MAY 28, 2021
LUBBOCK, TEXAS

FEDERAL OFFICIAL COURT REPORTER: MECHELLE DANIEL, 1205 TEXAS AVENUE, LUBBOCK, TEXAS 79401, (806) 744-7667.

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY; TRANSCRIPT PRODUCED BY COMPUTER-AIDED TRANSCRIPTION.

on the books. Texas has not repealed its sodomy statute in response to *Lawrence*.

THE COURT: Yeah, fair point. Those statutes remain, even if unenforceable.

What about the deterrence piece of the argument?

MR. MITCHELL: The deterrence with respect to the plaintiffs is also exceedingly--well, it's entirely speculative, but also, in this case, 100 percent false. The litigants and the attorneys who are prepared to sue on June 1st are well aware that this Court has no power to formally nullify or invalidate the ordinance, even though that may be how the media will report it.

And I will agree with Mr. Lehn on this much. There are people out there who are in the grips of what I'll call the writ-of-erasure fallacy. There are some people who mistakenly believe that when a federal court declares an ordinance unconstitutional, that the ordinance has somehow been formally revoked in a way that nobody can enforce it, even if they're not a party to the case. That's certainly how most journalists think, because that's how they report on decisions from federal court district courts, incorrectly. And--

THE COURT: And the Fifth Circuit-- I'm familiar with the author of that article. The Fifth Circuit has said as much, correct, in the--

MR. MITCHELL: That is correct. So certainly, yes,

the Fifth Circuit understands that. But for Mr. Lehn to suggest that the litigants who are prepared to sue Planned Parenthood are going to fall for that idea, I can tell the Court for sure they won't. And neither will the attorneys who are prepared to litigate this issue on June 1st. I'm probably the last person in the world who's going to be duped into thinking that a ruling from a federal district court that declares an ordinance to be unconstitutional is somehow erasing the ordinance or formally revoking it in a way that will bind nonparties to the lawsuit and prevent them from suing when the ordinance actually takes effect on June 1st.

THE COURT: What of their argument that this is--it is their burden, but it's an initial burden to establish standing. And for redressability, they've argued they don't have to show complete or perfect redressability; they just have to show--I'm not sure exactly how they would put it, but some redressability--

MR. MITCHELL: Yes.

THE COURT: --citing *Massachusetts vs. EPA* and a second case that Massachusetts was cited itself. What's your response to that piece?

MR. MITCHELL: The language from the Supreme Court is that they have to show that it is likely, as opposed to merely speculative, that the requested relief will redress the injury. That's the actual language from the Supreme Court's

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

WHOLE WOMAN'S HEALTH, et al., *Plaintiffs*, v. AUSTIN REEVE JACKSON, et al., *Defendants*.	Civil Action No. _____

DECLARATION OF MELANEY A. LINTON IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

I, Melaney A. Linton, declare as follows:

1. I am over the age of 18. I make this declaration based on personal knowledge of the matters stated herein and on information known or reasonably available to my organization. If called to do so, I am competent to testify as to the matters contained herein.

2. I am President and CEO of Planned Parenthood Gulf Coast, Inc. ("PPGC"). PPGC is a Texas not-for-profit corporation headquartered in Houston. We operate six health centers in the Houston Metropolitan area that provide a range of family planning services and other preventative care, including physical exams, contraception and contraceptive counseling, screening for breast cancer, screening and treatment for cervical cancer, screening and treatment for sexually transmitted infections, pregnancy testing and counseling, and certain procedures, including biopsies and colposcopies. In addition to those centers, PPGC has a facilities and services agreement with a separate organization, Planned Parenthood Center for Choice, Inc. ("PPCFC"), which provides abortion services at two health centers, and of which I am also the President and CEO. PPCFC is also a Texas not-for-profit corporation that is headquartered in Houston. It operates a licensed ambulatory surgical center ("ASC") in Houston and a licensed

abortion facility in Stafford. PPCFC and its predecessor organizations have provided abortion in Houston and southeast Texas since 1973.

3. I am responsible for the management of these organizations and therefore am familiar with our operations and finances, including the services we provide and the communities we serve.

4. I submit this declaration in support of Plaintiffs' Motion for Summary Judgment. I understand that Texas Senate Bill 8 ("S.B. 8" or the "Act") would ban the provision of abortion in Texas after embryonic cardiac activity can be detected, which occurs at approximately 6 weeks of pregnancy, as measured from the first day of a patient's last menstrual period ("LMP"). Without relief from the Court, we will be legally prohibited from providing abortions after approximately 6 weeks of pregnancy at our health centers on September 1, 2021, the Act's effective date.

5. The Act will make it virtually impossible to access abortion in Texas by banning abortion at a point in pregnancy before many patients even realize they are pregnant. Patients who can pull together the resources will be forced to travel out of state for medical care, and many others who cannot do so will be forced to carry a pregnancy to term against their will or seek ways to end their pregnancies on their own.

PPCFC and Its Services

6. As noted above, PPCFC provides abortion, as well as miscarriage management and contraception to patients. PPCFC's Houston ASC offers medication abortion through 10 weeks LMP and procedural abortion through 21 weeks 6 days LMP; the Stafford abortion facility offers medication abortion through 10 weeks LMP.

7. PPCFC's staff who are involved in the provision of abortions include physicians and physician assistants licensed by the Texas Medical Board, nurses licensed by the Texas Nursing Board, and pharmacists licensed by the Texas Pharmacy Board.

8. While most patients obtain an abortion as soon as they are able, most patients are at least 6 weeks LMP into their pregnancy by the time they come in for an abortion. In 2019, approximately 92% of abortions that PPCFC provided were at 6 weeks LMP or later. This means only 8% of 2019 PPCFC patients would have likely qualified for an abortion under the Act, although for some, there may have been embryonic cardiac activity at the time of the abortion.

9. The vast majority of patients who do not reach us until after 6 weeks likely do not for a variety of reasons, including that they may not have learned they are pregnant until after 6 weeks. Given that fact, and the travel-related and financial barriers that many of our patients face, we are certain that the vast majority could not obtain abortions before 6 weeks LMP.

Effects of S.B. 8's Abortion Ban

10. I understand that S.B. 8 exposes PPCFC and its doctors, nurses, and other staff members to substantial liability for providing or assisting abortion prohibited by the law and requires courts to enjoin violations.

11. As a result, S.B. 8 will force us to shut down abortion services after embryonic cardiac activity is detected—at approximately 6 weeks of pregnancy. PPCFC and its physicians and staff simply cannot risk the civil liability, damages, and certain cost of litigation that S.B. 8 will impose.

12. We understand that even if we risked liability, a court could order us to stop providing abortions, even while we are defending against these lawsuits.

13. Given the strong anti-abortion sentiments held by some Texans and others outside of Texas, I am certain lawsuits under S.B. 8 will be filed against us if we provide abortions in violation of S.B. 8. Indeed, opponents of abortion rights have subjected us to harassment and false complaints even when we have complied fully with our legal obligations. We nearly always have protestors outside our health centers, monitoring who enters and exits the building. They have made complaints to government officials based on completely unfounded allegations. By way of example, a few years ago, a protestor called local law enforcement falsely alleging that we had performed an abortion after the state's legal gestational age limit, which currently is 21 weeks and 6 days LMP (but will be around 6 weeks LMP after S.B. 8 takes effect). Authorities then opened a criminal homicide investigation, which included grand jury proceedings. Although the investigation was ultimately completed with no findings of any wrongdoing (because, of course, we did not do what the protestor alleged we did), we nevertheless had to divert time and resources to comply with the baseless investigation.

14. As another example, after a secretly recorded video alleging that we participated in unlawful tissue donation practices appeared online, we were investigated by multiple federal, state, and local government officials. No government entity has found us guilty of any crime and the allegations have been widely discredited; in fact, a Houston grand jury cleared us, and instead, indicted the filmmakers (though those charges were dismissed on procedural grounds). Nevertheless, the resulting investigations were very distressing for staff and costly to the organization. We thus expect complaints and lawsuits filed against us and the staff if we provide abortions, including permitted abortions, after September 1.

15. The costs of defending against what could be a flood of lawsuits in every county in Texas would be impossible for us to absorb, even if we were to win each case.

16. If we are forced to shut down abortion services, PPCFC and our patients will be seriously harmed. Indeed, even the prospect of S.B. 8 taking effect has already had an effect on staff, who are understandably very concerned about the impact of S.B. 8 on them and their livelihoods. No one should be forced to risk overwhelming costs of litigation and crushing penalties to provide safe and common health care. No one should be subject to state-directed harassment for caring for patients in need.

17. Our staff already deal with relentless harassment from abortion opponents, including as they come into work each day. We have had to endure protestors trespassing; conducting drone surveillance; blocking roads, driveways, and entrances; yelling at staff and patients; using illegal sound amplification; video recording staff, staff vehicles, and license plates, as well as surreptitiously recording inside the health center; trying to follow staff home; and more. And after the discredited video about our tissue donation practices was released, multiple staff received death threats. As a result of these threats, and the increasing volume of threats and harassment to abortion providers more broadly—and the increasing severity of threats (including homicide)[1]—we have had to expend more resources ensuring our health centers and staff and patients remain safe.

18. Despite the harassment, our dedicated staff return to work because they are committed to Planned Parenthood's mission of providing comprehensive reproductive health care services. They have devoted their lives and careers to serving and advocating for their patients. S.B. 8 will prevent PPCFC and our staff from fulfilling our mission.

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[1] *See* Nat'l Abortion Fed., *2019 Violence and Disruption Statistics* (July 30, 2020), *available at* https://5aa1b2xfmfh2e2mk03kk8rsx-wpengine.netdna-ssl.com/wp-content/uploads/NAF-2019-Violence-and-Disruption-Stats-Final.pdf; Julie Turkewitz & Jack Healy, *3 Are Dead in Colorado Springs Shootout at Planned Parenthood Center*, N.Y. Times (Nov. 27, 2015), https://www.nytimes.com/2015/11/28/us/colorado-planned-parenthood-shooting.html.

19. Even staff who have no direct role in abortion services are worried about being named in harassing lawsuits.

20. S.B. 8 is already taking a negative toll on our ability to recruit new staff. PPCFC has already had two prospective staff members decline job offers specifically because of fear of S.B. 8.

21. In addition to its devastating impact on PPCFC, S.B. 8 will seriously harm our patients. The Act will deprive them of access to safe and legal abortion, forcing those who can to travel hundreds of miles out of state, which will delay their care and increase costs. Many others will be prevented from accessing abortion altogether, because the travel and costs are simply too great.

22. These effects will fall most heavily on patients who already face barriers to accessing health care, including our patients with low incomes.

23. We know that these patients will face very high barriers to accessing care elsewhere. In fact, after the Texas governor banned abortion by executive order during the early days of the pandemic, we know some of our patients were not able to get an abortion and were forced to carry their pregnancies to term and give birth. Some were able to go out of state to get care, as far away as Colorado and Georgia. Executive Order No. GA-09; *In re Abbott*, 954 F.3d 772 (5th Cir. 2020), *cert. granted, judgment vacated as moot by Planned Parenthood Ctr. for Choice v. Abbott*, 141 S. Ct. 1261 (2021) (mem.).

24. Scrambling to get our patients care still haunts me and our staff. We had to cancel and reschedule and cancel appointments again due to the various court orders, and telling patients that they could not obtain an abortion was very difficult for the staff. And while our staff worked tirelessly to try to help patients access care elsewhere, they were crushed when so many of our

patients reported that, even with financial and logistical support, there was simply no way they would be able to travel out of the state. We had several staff who heard from patients that if they could not be seen by us, they would self-induce using pills from flea markets or household chemicals, like bleach. Hearing this was extremely distressing for the staff.

25. I believe S.B. 8 will deprive PPCFC's patients of access to critical health care and will threaten their health, safety, and lives.

The Impact of S.B. 8's Fee-Shifting Provisions

26. I understand that S.B. 8 also makes parties and their attorneys liable to pay defendants' costs and attorney's fees in cases challenging Texas laws that restrict or regulate abortion, or that provide public funding to entities that perform abortion or promote abortion access.

27. PPCFC is regularly forced to bring court challenges to restrictions on abortion or laws targeting abortion providers in Texas. Litigation is critical to fulfilling our mission to protect and expand access to comprehensive reproductive and sexual health care, including abortion, in Texas.

28. S.B. 8's fee-shifting provision will make it extremely difficult for us to continue to protect our patients' constitutional rights because nearly every case carries the significant risk that we and our attorneys could be held liable for attorney's fees and costs, which in turn will make it more difficult for us to retain legal counsel when we need it.

29. I am also concerned that S.B. 8 will force us and our attorneys to weigh the possibility of huge legal bills against the claims we might bring. We will be forced to risk those penalties to defend our rights and those of our patients, even though government officials and other

individuals trying to restrict abortion—or ban it outright—would face no similar consequence under S.B. 8.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 12th, 2021, in Houston, Texas.

Melaney A. Linton

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

WHOLE WOMAN'S HEALTH, et al.,	)	
	)	
Plaintiffs,	)	
	)	CIVIL ACTION
v.	)	
	)	CASE NO. _____
AUSTIN REEVE JACKSON, et al.,	)	
	)	
Defendants.	)	

DECLARATION OF AMY HAGSTROM MILLER IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

AMY HAGSTROM MILLER hereby declares under penalty of perjury that the following statements are true and correct:

1. I am the President and Chief Executive Officer ("CEO") of Whole Woman's Health Alliance ("WWHA"), a plaintiff in this case.

2. WWHA is a nonprofit organization incorporated under Texas law. Its mission is to provide abortion care in underserved communities and shift the stigma around abortion in our culture.

3. WWHA currently operates an abortion clinic in Austin, Texas (the "Austin clinic"), as well as abortion clinics in Indiana and Virginia. The Austin clinic opened in 2017 and is a licensed abortion facility.

4. As President and CEO of WWHA, I oversee all aspects of the organization's work.

5. I have been working in the abortion care field since 1989. Prior to my work at WWHA, I founded a consortium of limited liability companies involved in the provision of abortion care throughout the United States. These companies do business under the name

"Whole Woman's Health" ("WWH"). I continue to serve as President and CEO of WWH, which opened its first abortion clinic in 2003.

6. I am thoroughly familiar with all aspects of abortion clinic operations and patient care.

7. I provide the following testimony based on my personal knowledge and review of WWHA's business records.

Provision of Abortion Care at the Austin Clinic

8. The Austin clinic provides procedural abortions up to 17.6 weeks of pregnancy as measured from the first day of a patient's last menstrual period ("LMP"). Under Texas law, licensed abortion facilities are not permitted to provide procedural abortions beyond this gestational age. *See* Tex. Health & Safety Code § 171.004.

9. The Austin clinic provides medication abortions up to 70 days LMP. Under Texas law, medication abortions are prohibited after this gestational age. *See* Tex. Health & Safety Code § 171.063(a)(2).

10. In a typical week, the Austin clinic provides abortions to approximately 60 patients. Only around 10% of patients who seek care at the Austin clinic are under six weeks LMP.

11. Texas law requires abortion patients who reside within 100 miles of a licensed abortion clinic to make two separate visits to the clinic to obtain care, at least 24 hours apart. *See* Tex. Health & Safety Code § 171.012(a)(4), (b). During the first visit, we must provide the patient with certain state-mandated information and perform an ultrasound examination. *See id.* During the second visit, we provide abortion care. Most of our patients reside within 100 miles of the Austin clinic.

12. The Austin Clinic originally opened as a WWH clinic in 2003. It was shuttered by House Bill 2 of 2013 and was only able to reopen as a WWHA clinic in 2017 due to years of hard-

fought litigation, culminating in a victory at the U.S. Supreme Court in *Whole Woman's Health v. Hellerstedt*. Less than two years after reopening, we were forced to close again because an anti-abortion pregnancy crisis center, Austin LifeCare, bought out the lease for our existing building. The Austin Clinic had to find a new location and relocate our operations, reopening again in February 2019.

Senate Bill 8

13. I understand that Texas Senate Bill 8 ('S.B. 8") requires physicians to determine if a "fetal heartbeat" is present before performing an abortion. *See* Tex. Health & Safety Code § 171.203(b). If the physician detects a "fetal heartbeat" or fails to test for it, they are prohibited from performing the abortion. *See* Tex. Health & Safety Code § 171.204(a).

14. Fetal or embryonic cardiac activity can be detected as early as six weeks LMP. By banning abortions at or after six weeks LMP, S.B. 8 bans approximately 90% of the abortions we perform at the Austin clinic.

15. I further understand that a private right of civil action can be brought by any person against a) someone who performs an abortion in violation of S.B. 8; b) someone who aids or abets the performance of an abortion in violation of S.B. 8; or c) someone who intends to engage in a) or b). *See* Tex. Health & Safety Code § 171.208(a). If the person suing is a Texas resident, they can file the case in a court in their home county. *See* Tex. Health & Safety Code § 171.210(a)(4).

16. I understand that if that individual wins their lawsuit under S.B. 8, they will be granted "injunctive relief sufficient to prevent the defendant" from violating S.B. 8; a monetary award of at least $10,000 per abortion; and costs and attorney's fees. *See* Tex. Health & Safety Code § 171.208(b).

Impact of S.B. 8

17. It is very difficult for patients to obtain an abortion before six weeks LMP. Patients are already four weeks LMP when they miss their period, which is generally the first indication that the patient might be pregnant. Many patients do not confirm pregnancy until many weeks later, particularly if they have irregular periods. Under Texas law, our patients must come to the clinic for a mandatory ultrasound, wait 24 hours if they live less than 100 miles from the nearest abortion provider, and then come back to have an abortion from the same physician. *See* Tex. Health & Safety Code § 171.012(a)(4). Our patients have to rearrange their work or school schedules, arrange for childcare, and raise the money necessary to have an abortion, as insurance generally does not cover abortion in Texas. It is extremely challenging for our patients to do all of this in a matter of days or weeks.

18. I further understand that under S.B. 8, any person can sue both our physicians for performing an abortion, as well as any person who "aids or abets" in the performance of an abortion, which could potentially include the Austin Clinic and our staff.

19. I have no doubt that WWHA, our physicians, and possibly our staff will be targeted by individuals opposed to abortion who will file lawsuits under S.B. 8, including the protesters who frequently picket the Austin Clinic. Indeed, the threat of lawsuits has already begun.

20. In late May, an individual sneaked into the Austin Clinic by following a patient through the front door to evade our security. Once inside, the individual distributed a letter about S.B. 8 to our Austin Clinic staff and those present in the reception area. This letter is attached as Exhibit 1 to my declaration. The individual was asked to leave, but once outside, the individual was joined by another person and both individuals continued to distribute the letter to staff outside, still on the clinic's private property. This letter informs staff that they can be sued for providing or

facilitating abortions after the detection of a "fetal heartbeat" and encourages them to report their colleagues to the letter's authors—"K+W Partnership." The letter gives a phone number and email address for individuals to use to report violations of S.B. 8 and states: "please call or send us a text at any time." If anti-abortion individuals would go to this length to encourage lawsuits several months before S.B. 8 is scheduled to take effect, I have no doubt that they will bring suits against us in September.

21. Even if there is no basis for these suits, our physicians and staff will be forced to travel to the claimant's home county, hire a lawyer, and spend months, if not years, defending themselves. If the claimant is successful, our physicians and staff will be banned from providing abortions prohibited by S.B. 8 and subject to very serious financial penalties. I also understand that they may be subject to disciplinary action by the Texas Medical and Nursing Boards.

22. This will be extremely burdensome to our physicians and staff—emotionally, logistically, and financially—and it will also have very serious impacts on the Austin Clinic. Our physicians and staff will have to choose between subjecting themselves to these lawsuits or turning away the majority of our patients, putting us in an impossible situation.

23. S.B. 8 is designed to shut us down and stop us from providing needed care to Texans. Indeed, afraid for job security given the impending effective date of S.B. 8, some staff at the Austin Clinic have started looking for other work, and some have already quit. If S.B. 8 is not blocked from taking effect, the Austin Clinic will inevitably close.

24. Our patients will suffer if they cannot obtain abortion care in Texas after six weeks LMP. S.B. 8 will also exacerbate the shame, stigma, and confusion surrounding abortion access in Texas, as patients are already regularly calling us to ask if abortion is still legal in the state.

25. Many of the patients who seek care at the Austin clinic have low incomes, and many are parents of dependent children. The majority are uninsured.

26. Our patients seek abortion care for a variety of reasons. Many do not have the resources to add an additional child to their family. Some are students who want to complete their education before having children. Some do not want to be tied financially or emotionally to the putative father, or fear abuse if their pregnancy is discovered.

27. Many of our patients will not be able to travel out of state to obtain an abortion due to their work, school, family, or childcare responsibilities and the high costs.

28. Some of our patients may be able to travel out of state but they will be delayed in obtaining care.

29. Being forced to delay a wanted abortion is nerve-wracking. Patients who are delayed from accessing abortion must continue to cope with the physical symptoms of pregnancy, which for many include debilitating nausea and vomiting. The longer a patient remains pregnant, the more likely it is that others will discover the pregnancy, including abusive partners or family members. The cost of abortion care (as well as the medical risks of pregnancy and abortion) increase significantly with gestational age.

30. Patients who are delayed from accessing abortion must also cope with the fear of not being able to obtain abortion care in time—and of the life-altering consequences of having to carry an unwanted pregnancy to term and go through childbirth against their will.

31. Inevitably, if S.B. 8 is not blocked, many Texans will be forced to carry pregnancies to term against their will.

S.B. 8's Fee Shifting Provision

32. I further understand that S.B. 8 makes parties and their attorneys liable to pay the costs and attorney's fees in cases challenging Texas laws that restrict abortion.

33. WWHA has been involved in several cases challenging abortion restrictions in Texas, including: *Whole Woman's Health Alliance v. Paxton*, No. 1:18-CV-00500 (W.D. Tex.) (various laws regulating abortion); and *In re Abbot*, 954 F.3d 772 (5th Cir. 2020), *cert. granted, judgment vacated as moot by Planned Parenthood Ctr. for Choice v. Abbott*, 141 S. Ct. 1261 (2021) (mem.) (COVID abortion ban).

34. Litigation is critical to our mission to provision abortion access to patients in Texas and reduce the shame and stigma associated with abortion. I am concerned that the fee-shifting provision of S.B. 8 is intended to intimidate us and discourage us from using litigation to vindicate the constitutional rights of our patients and keep the doors of our clinic open.

Dated:

July 9, 2021

AMY HAGSTROM MILLER

Exhibit 1

K+W Partnership

(512) 366-2893 kwpartnership@protonmail.com

May 22, 2021

To all employees both medical and clerical:

The 'Heartbeat bill' has been signed into Texas law and will become effective September 1st 2021. Those who provide or facilitate abortions after a fetal heartbeat has been detected will be in violation of the law and are subject to private lawsuits. Fetal heartbeat can be detected as early as 3 weeks gestation and almost always by 6 ½ weeks. Please be aware that if you are involved in such an abortion one of your employees has the right to report you.

If you are aware of any babies in danger of being aborted at or around 6 weeks gestation, please call or send us a text at any time.

Thank you,

K+W Partnership
512-366-2893
kwpartnership@protonmail.com

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

WHOLE WOMAN'S HEALTH, et al.,	)	
	)	
Plaintiffs,	)	
	)	CIVIL ACTION
v.	)	
	)	CASE NO. _____
AUSTIN REEVE JACKSON, et al.,	)	
	)	
Defendants.	)	

DECLARATION OF ALAN BRAID, M.D., IN SUPPORT OF PLAINTIFFS' MOTION SUMMARY JUDGMENT

ALAN BRAID, M.D., declares under penalty of perjury that the following statements are true and correct:

1. I am a board-certified obstetrician/gynecologist licensed to practice in Texas. I am the part owner of Alamo City Surgery Center PLLC d/b/a Alamo Women's Reproductive Services ("Alamo") in San Antonio and Houston Women's Reproductive Services ("HWRS") in Houston. I also provide abortion services at Alamo.

2. I graduated from the University of Texas Health Science Center at San Antonio with an M.D. in 1972. I completed my internship in obstetrics and gynecology in 1973 at Bexar County Hospital District and my residency in obstetrics and gynecology in 1976. I have extensive experience and training in those fields and have provided reproductive health care, including abortions and obstetrical care, in San Antonio as a private practitioner since 1978.

3. I submit this declaration in support of Plaintiffs' Motion for Summary Judgment.

4. The facts I state here are based on my experience, my review of Alamo's and HWRS's business records, information obtained in the course of my duties at Alamo and HWRS,

and personal knowledge that I have acquired through my work at and management of Alamo and HWRS.

Alamo Women's Reproductive Services and Houston Women's Reproductive Services

5. Alamo operates a licensed ambulatory surgical center in San Antonio, Texas, open since June of 2015. Alamo provides medication abortion through 10 weeks of pregnancy as measured from the first day of the patient's last menstrual period ("LMP"). Alamo provides procedural abortion services through 21.6 weeks LMP. In rare instances in which a procedure comes under permitted exceptions in Texas's gestational limit, Alamo provides abortion services through 23.6 weeks LMP.

6. HWRS operates a licensed abortion facility in Houston, Texas. HWRS started seeing patients in May of 2019. HWRS provides medication abortion services through 10 weeks of pregnancy LMP.

Senate Bill 8

7. I understand that Senate Bill 8 ("S.B. 8") prohibits me or any other physician in Texas from providing an abortion if there is a "fetal heartbeat" detected or we do not test for a "fetal heartbeat." The term "fetal heartbeat" is not medically accurate. In a typically developing embryo, cells that eventually form the basis for development of the heart later in pregnancy produce cardiac activity that is generally detectible via ultrasound beginning at approximately six weeks LMP, though I have seen cardiac activity several days before 6 weeks LMP. Therefore, S.B. 8 bans abortion in Texas after approximately six weeks LMP.

8. An embryo is not viable at 6 weeks LMP. Viability is generally understood in medical science as the point in gestation when a fetus has a reasonable likelihood of survival

outside of the pregnant woman. The medical consensus in the United States is that viability is not possible until approximately 24 weeks LMP.

9. I understand that if any of the physicians at Alamo or HWRS continues to provide abortions after 6 weeks LMP, any person may sue us and if they are successful in their suit, the court must order us to cease providing abortions after six weeks LMP, and to pay a minimum of $10,000 per prohibited abortion plus their costs and attorney's fees.

10. I understand that the same penalties can be leveled against a person who "aids or abets" in the performance of an abortion. Due to this provision, I am concerned not only about liability for myself and the other physicians, but also Alamo and HWRS and the staff at these clinics. I also understand that the Texas Medical Board and Texas Nursing Board may be able to take disciplinary action against us for violations of S.B. 8.

11. Because there are not many abortion clinics in San Antonio and Houston, and we are well known in the state, I believe it is very likely that the clinics, myself, or other members of my team at Alamo or HWRS will be sued.

12. I am very concerned about opening the clinics, myself, and other staff members up to legal liability, but I also know that it will be devastating for patients if they cannot obtain abortions in Texas after 6 weeks LMP.

Burdens on Patients

13. Some patients do not realize they are pregnant until after six weeks LMP. This includes patients who have irregular menstrual cycles, have certain medical conditions, have been using contraceptives, are breastfeeding, or experience bleeding during early pregnancy, a common occurrence that is frequently and easily mistaken for a period. Other patients may not develop or recognize symptoms of early pregnancy.

14. Even for the patients who do realize they are pregnant before six weeks LMP, they would have a very small window to obtain an abortion. For a patient with regular monthly periods, fertilization typically occurs at two weeks LMP (two weeks after the first day of their last menstrual period). Thus, even a woman with a highly regular, four-week menstrual cycle would already be four weeks LMP when she misses her next period, generally the first clear indication of a possible pregnancy.

15. If patients are prohibited from obtaining an abortion after 6 weeks LMP, this gives them one to two weeks at most to decide they want an abortion, arrange all of the necessary logistics, gather the money, and schedule the two appointments at least 24 hours apart, as required by Texas law.

16. The majority of our patients will not be able to obtain an abortion before six weeks LMP. The patients who can afford to do so will attempt to travel out of state. Those traveling out of state will need to pay additional travel and lodging costs and will likely face increased costs for the procedure. At later gestational points, abortion is more expensive and may require a two-day surgical procedure, instead of one. These patients would also experience increased risks to their health by the delay in access to abortion care.

17. For many patients, pregnancy creates serious symptoms and health risks. Even for people without comorbidities, common symptoms of pregnancy can include debilitating nausea, migraines, and dizziness. For people with comorbidities like asthma, hypertension, or diabetes, pregnancy exacerbates the symptoms and risk of an emergency. There is also a significant percentage of people who suffer perinatal depression or anxiety.

18. Many of our patients will not be able to travel out of state. A significant percentage of the patients we see at Alamo and HWRS struggle to afford an abortion and receive

some form of financial assistance. These patients may try to travel to Mexico for care or attempt to order pills through the mail to self-manage their abortions. We regularly see patients who have attempted abortions themselves and failed, and the number of patients in this situation will only increase if S.B. 8 takes effect.

19. The reality is that many of our patients will be forced to carry their pregnancies to term, having been denied their constitutional right to make decisions about their own bodies.

S.B. 8's Fee Shifting Provision

20. I understand that under S.B. 8, if parties challenge Texas laws that regulate or restrict abortion and do not succeed on every claim they bring, the parties and their attorneys are responsible for the defendants' costs and attorney's fees.

21. Alamo, HWRS, or me personally have been a litigant in many cases challenging Texas laws regulating or restricting abortion, including: *In re Abbot*, 954 F.3d 772 (5th Cir. 2020), *cert. granted, judgment vacated as moot by Planned Parenthood Ctr. for Choice v. Abbott*, 141 S. Ct. 1261 (2021) (mem.) (COVID abortion ban); *Whole Woman's Health v. Paxton*, 978 F.3d 896 (5th Cir. 2020), *reh'rg en banc granted, vacated, and argued*, 978 F.3d 974 (5th Cir. 2020) (ban on common method of abortion); *Whole Woman's Health v. Smith*, 338 F. Supp. 3d 606 (W.D. Tex. 2018), *appeal docketed and argued*, No. 18-50730 (5th Cir.) (requirement for interment or cremation of embryonic and fetal tissue); *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583 (5th Cir. 2014), *reh'rg en banc denied*, 769 F.3d 330 (5th Cir. 2014) (decision on admitting-privileges, medication-abortion regulations); and *Texas Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570 (5th Cir. 2012) (mandatory ultrasound law).

22. Litigation is essential to keeping the doors of Alamo and HWRS open. If we are responsible for defendants' costs and attorney's fees, this will hinder our ability to bring cases and certain claims that are necessary to protect our rights and the rights of our patients.

Dated: July 11, 2021

DR. ALAN BRAID

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

WHOLE WOMAN'S HEALTH, et al.,	)	
	)	
Plaintiffs,	)	
	)	CIVIL ACTION
v.	)	
	)	CASE NO. _____
AUSTIN REEVE JACKSON, et al.,	)	
	)	
Defendants.	)	

DECLARATION OF BERNARD ROSENFELD, M.D., Ph.D., IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

I, Bernard Rosenfeld, M.D., Ph.D., declare as follows:

1. I am over the age of 18. I make this declaration based on personal knowledge of the matters stated herein and on information known or reasonably available to my organization. If called to do so, I am competent to testify as to the matters contained herein.

2. I am the owner and sole physician at Houston Women's Clinic ("HWC"), which provides medication abortion and aspiration abortion (sometimes referred to as "procedural" or "surgical" abortion), as well as contraceptive care. I have been providing abortion and contraceptive services at HWC since 1980. I received my medical degree at Tufts University; did my residency at Johns Hopkins University, the University of Southern California, and Wayne State University; and received a Ph.D. in Psychology at the University of Texas at Austin. I am on staff at Texas Women's and St. Luke's Hospitals in the Texas Medical Center, as well as at First Street Hospital. I also have a routine OB-GYN

practice with a surgical specialty in microsurgical tubal ligation reversals. I previously served as an assistant professor at Baylor College of Medicine.

3. I submit this declaration in support of Plaintiffs' Motion for Summary Judgment seeking a declaratory judgment and to enjoin Texas Senate Bill 8 ("SB 8" or the "Act"). For more than four decades, HWC has persisted in providing high-quality, compassionate abortion care to Texans despite relentless attacks by our state legislature and anti-abortion activists. But if SB 8 is allowed to take effect, we will no longer be able to serve the vast majority of patients who come to us seeking abortion care and will soon be forced to permanently close our doors. I implore the Court to block this catastrophic law from taking effect.

Impact of SB 8's Six-Week Ban

4. Cardiac activity is first detectable in an embryo at approximately six weeks of pregnancy, as measured from the first day of a patient's last menstrual period ("LMP"). Thus, SB 8 bans abortion at or before six weeks LMP, a mere two weeks after a patient's first missed period (assuming regular menstrual cycles) and four months before viability (approximately 24 weeks LMP).

5. The vast majority of abortions that we perform at HWC are past SB 8's six-week cut-off. Many patients do not even realize they are pregnant before that point, and those patients who do generally still need time to make the decision whether to keep or end the pregnancy and then access care consistent with Texas's preexisting regulatory scheme.

6. It will be impossible for HWC to sustain our practice under SB 8's enforcement scheme. On the one hand, if we continue to perform abortions prohibited by SB 8, the clinic and I, as well as all of the nurses, medical assistants, receptionists, and other staff that assist

with providing, scheduling, billing, and/or counseling for abortion care, could *each* be sued under SB 8 and potentially held liable for *at least* $10,000 in statutory damages per violation, quickly accruing enormous financial liability. On top of that, I understand that my staff and I would risk ruinous licensure consequences, because a violation of SB 8 could also trigger disciplinary action by the Texas Medical and Nursing Board, and that the clinic could likewise potentially lose its license. And, after a single ruling against us, we would be enjoined from performing any further abortions in violation of SB 8. Even if, hypothetically, we were guaranteed to win every one of the lawsuits sure to be brought against us—by anyone, anywhere, who opposes our mission and wants to win themselves tens or hundreds of thousands of dollars to boot—we would still face endless costs and burdens, because we would be forced to defend ourselves in venues across Texas with no opportunity to recover costs or attorney's fees.

7. On the other hand, if we stop providing abortions after six weeks as SB 8 requires, we will soon have to lay off our staff and shutter our clinic permanently. SB 8 bans the majority of care we provide at HWC—the same care, in the same location, that we have been providing to Texans for decades—without which we simply cannot afford to keep our doors open.

8. In either scenario, we will be forced to turn away patients in need, to devastating effect.

Impact of SB 8's Fee-Shifting Provision

9. I also understand that SB 8 makes parties and their attorneys liable to pay defendants' costs and attorney's fees in cases challenging Texas laws that restrict or regulate abortion if we lose on any one legal claim, even if the litigation was successful.

10. In order to fulfill our mission and provide our patients with the constitutionally protected abortion care they seek, HWC has repeatedly been forced to bring judicial challenges to restrictions targeting abortion providers in Texas.

11. SB 8's fee-shifting provision will undermine our ability to vindicate our patients' constitutional rights, potentially preventing us from bringing well-founded cases and/or claims for fear that we and our attorneys might have to absorb massive fees and costs if we are anything less than 100% successful.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 12, 2021, in Houston, Texas.

B. Rosenfeld MD

Bernard Rosenfeld, M.D., Ph.D.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

WHOLE WOMAN'S HEALTH, et al., *Plaintiffs*, v. AUSTIN REEVE JACKSON, et al., *Defendants*.	Civil Action No. _____

DECLARATION OF POLIN C. BARRAZA IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

I, Polin C. Barraza, declare as follows:

1. I am over the age of 18. I make this declaration based on personal knowledge of the matters stated herein and on information known or reasonably available to my organization. If called to do so, I am competent to testify as to the matters contained herein.

2. I am President and Board Chair of Plaintiff Planned Parenthood South Texas Surgical Center ("PPST Surgical Center"), a not-for-profit corporation headquartered in San Antonio. PPST Surgical Center operates an ambulatory surgical center ("ASC") licensed by the Texas Health and Human Services Commission ("HHSC") and two HHSC-licensed abortion facilities—all of which are located in San Antonio.

3. I am responsible for management of PPST Surgical Center (as well as the operations of its parent organization, Planned Parenthood South Texas ("PPST")) where I am the Senior Vice President and Chief Operations Officer, and therefore am familiar with our operations and finances, including the services we provide and the communities we serve. PPST operates health centers that provide a range of family planning and other preventative health services, including physical exams, contraception and contraceptive counseling, screening for breast cancer,

screening and treatment for cervical cancer, screening for sexually transmitted infections, pregnancy testing and counseling, and certain procedures including biopsies and colposcopies. PPST Surgical Center currently provides abortions, miscarriage management, and contraception at each of its three HHSC-licensed facilities, to the degree permitted by state law. Each of these centers also operates a pharmacy licensed by the Texas Pharmacy Board that is used in the provision of abortion and related services, including through the dispensing of mifepristone, misoprostol, and other drugs used in abortion, as well as post-abortion contraceptives.

4. I submit this declaration in support of Plaintiffs' Motion for Summary Judgment. I understand that Texas Senate Bill 8 ("S.B. 8" or the "Act") would ban the provision of abortion in Texas after embryonic cardiac activity can be detected, which occurs at approximately 6 weeks of pregnancy, as measured from the first day of a patient's last menstrual period ("LMP"). Therefore, without relief from the Court, we will be legally prohibited from providing abortions after approximately 6 weeks of pregnancy at our health centers in San Antonio on September 1, 2021, the Act's effective date.

5. Many patients do not even realize they are pregnant at 6 weeks. By banning abortion at that gestational age, the Act will make it virtually impossible to access abortion in Texas. Although some of our patients may be able to pull together the resources to go out of state, I fear many others will not be able to do so and instead will be forced to carry the pregnancy to term or attempt to end the pregnancy without medical supervision, which may be unsafe. For these reasons, I am very worried about S.B. 8's effect on Texans' emotional, physical, and financial wellbeing and the wellbeing of their families.

PPST Surgical Center and Its Services

6. PPST Surgical Center offers medication abortion through 10 weeks LMP and procedural abortion through 15 weeks 6 days LMP.

7. PPST Surgical Center's staff who are involved in the provision of abortions include physicians and physician assistants licensed by the Texas Medical Board, nurses licensed by the Texas Nursing Board, and pharmacists licensed by the Texas Pharmacy Board.

8. While most patients obtain an abortion as soon as they are able, the vast majority of patients are at least 6 weeks LMP into their pregnancy by the time they contact us seeking an abortion. In 2019, approximately 90% of abortions PPST Surgical Center provided were done at 6 weeks LMP or later.

9. There are many reasons why patients do not reach us until at or after 6 weeks LMP, including because many do not know they are pregnant before that time. Additionally, travel-related and financial barriers are significant reasons why the vast majority of our patients do not—and realistically could not—obtain abortions before 6 weeks LMP.

Effects of S.B. 8's Abortion Ban

10. I understand that S.B. 8 bans abortions in Texas by making PPST Surgical Center and its doctors, nurses, and other staff members who assist with abortion services liable for significant monetary penalties and court injunctions preventing us from continuing to provide any abortion in violation of the Act. I also understand that anyone who is sued and loses is responsible to pay the claimant's attorney's fees but that the person sued cannot recover their own attorney's fees if they prevail.

11. Although S.B. 8 still permits abortion before approximately 6 weeks of pregnancy, because of the real possibility PPST Surgical Center and its physicians and staff will be sued for

providing *any* abortions, and be forced to defend against these meritless lawsuits, we will likely suspend all abortion services if S.B. 8 is allowed to take effect.

12. Even if we were to provide some abortions, we could not provide abortions after embryonic cardiac activity is detected if S.B. 8 takes effect. Because the Act would subject providers and anyone who assists in a prohibited abortion to liability, PPST Surgical Center, our physicians, and the staff who have essential roles in the provision of abortion—such as nurses, ultrasound technicians, and lab technicians—could be sued.

13. PPST Surgical Center, our physicians, and our staff cannot afford the monetary damages that would be owed and cannot risk civil liability and damages. We understand that even if we were willing to provide abortions at or after 6 weeks of pregnancy, which S.B. 8 prevents us from doing, we could be ordered to stop by a court while we are defending against the lawsuit.

14. The mere cost to defend against these lawsuits, which could be limitless, and potentially filed in every county in Texas, would be impossible for us to absorb, even putting aside monetary penalties the Act authorizes.

15. Even staff who have no direct role in abortion services are worried about being named in harassing lawsuits.

16. Forcing us to cease abortion services will seriously harm both PPST Surgical Center and our patients. The prospect of S.B. 8 taking effect has already taken a heavy toll on staff. Our staff are fearful that they will be sued and forced into a Texas court far away from home to defend themselves, and they are frightened that defending these cases will financially ruin them and their families.

17. Staff endure endless harassment from opponents of abortion, including passing through protestors as they come to work who berate them (and patients). These protestors often

video record staff and patients as they enter and exit the health centers, and we worry they are writing down staff license plates and/or other identifying information.

18. Despite the harassment and threats, our staff are dedicated to our mission of providing comprehensive reproductive health care services, including abortion, and have dedicated their lives and careers to providing this health care to patients and advocating for them. S.B. 8 will prevent PPST Surgical Center and our dedicated team of medical professionals from fulfilling this mission.

19. If S.B. 8 is allowed to take effect, it is likely we will have to reduce the hours of physicians and staff.

20. Unquestionably, S.B. 8 seriously harms our patients by depriving them of access to safe and legal abortions. If we are forced to stop providing abortions, patients who are able will be forced to travel out of state to obtain care. Travel will delay patients in obtaining care, which may push them into a later, more expensive abortion that carries greater risks. S.B. 8 will also prevent some patients from accessing abortion altogether, because the travel is simply too burdensome for them.

21. These burdens will fall most heavily on patients who already face barriers to accessing health care, including patients with low incomes, patients of color, and patients who live the farthest from health centers. A significant percentage of our patients are people with low incomes: of the patients who obtained abortions at our health centers in 2019, approximately 50% had incomes at or below the federal poverty line.

22. Just last year, after the Texas governor banned abortion by executive order during the early days of the pandemic, we referred patients to out-of-state providers. Executive Order No. GA-09; *In re Abbott*, 954 F.3d 772 (5th Cir. 2020), *cert. granted, judgment vacated as moot by*

Planned Parenthood Ctr. for Choice v. Abbott, 141 S. Ct. 1261 (2021) (mem.). What we learned is that while some patients were able to get care out of state, many were not.

23. I believe S.B. 8 will deprive PPST Surgical Center's patients of access to critical health care and will threaten their health, safety, and lives.

The Impact of S.B. 8's Fee-Shifting Provisions

24. PPST Surgical Center regularly challenges Texas abortion restrictions. S.B. 8's fee-shifting provision will make it extremely difficult for us to continue to protect our patients' constitutional rights, because it will make it more difficult for us to obtain legal counsel.

25. S.B. 8 may also impact the arguments we raise, because it will force us and our attorneys to weigh the possibility of huge legal bills every time we bring a claim.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 12, 2021, in San Antonio, Texas.

Polin C. Barraza

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

WHOLE WOMAN'S HEALTH, et al.,	)	
	)	
Plaintiffs,	)	
	)	CIVIL ACTION
v.	)	
	)	CASE NO. _____
AUSTIN REEVE JACKSON, et al.,	)	
	)	
Defendants.	)	

DECLARATION OF MARVA SADLER IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

MARVA SADLER hereby declares under penalty of perjury that the following statements are true and correct:

1. I am the Senior Director of Clinical Services with Whole Woman's Health ("WWH") and Whole Woman's Health Alliance ("WWHA"). WWH currently owns and operates three abortion clinics in Texas: in Fort Worth (the "Fort Worth Clinic"), McAllen (the "McAllen clinic") and McKinney (the "North Texas Clinic"). WWHA owns and operates an abortion clinic in Austin, Texas (the "Austin Clinic"). WWH and WWHA are both plaintiffs in this case. I am also a plaintiff in my individual capacity.

2. I have been working in abortion clinics for over fifteen years and I have been working with WWH since 2008. As a result, I am well-versed in abortion clinic operations and patient care.

3. I provide the following testimony based on personal knowledge and review of WWH's and WWHA's business records.

Background and Role

4. I was born in Detroit but raised in Texas since the age of 3. Early in my career, I served various roles in the medical field, working as a medical assistant, patient technician, and paramedic. In 2005, I took a job as a patient advocate at an abortion clinic in Waco, Texas. I enjoyed this work so much that I worked my way up and eventually became the manager of that clinic.

5. I was introduced to Amy Hagstrom Miller and WWH in 2008. I was impressed by the way they centered the patient experience in every aspect of their work, and I accepted a job as the clinic manager of the WWH clinic in Beaumont, Texas. The Beaumont Clinic has since closed due to a separate restrictive abortion law, House Bill 2 from 2013.

6. Over the next 10 years with WWH, I held a variety of positions: I served as clinic manager of the Fort Worth Clinic, clinic manager of the San Antonio Clinic, and then the Director of Clinical Services South, supervising the clinic managers of the San Antonio, Fort Worth, and McAllen Clinics. The San Antonio Clinic has since closed.

7. In 2018, I was promoted to my current role as Senior Director of Clinical Services. In this role, I am responsible for overseeing all of the clinical operations of all four Texas clinics, which involves a variety of responsibilities. I manage human resources for our clinical staff, including hiring, training, and physician scheduling. I oversee clinic compliance with state and federal law. I supervise the development of new medical services and programs. I also work with our associate director of clinical services and our medical director to create and update our clinic policies and procedures. Finally, I coordinate with members of the executive team who are responsible for other aspects of the organization, including finances, equipment, security

concerns, and vendor services. Generally, if an issue arises at one of our clinics, from a patient concern to a security issue, the issue is elevated to me.

8. For example, when an anti-abortion individual infiltrated our Austin Clinic and distributed handouts to staff inviting them to report violations of S.B. 8, I was notified and assisted with the incident reporting and other repercussions.

9. I am often involved in addressing issues and incidents related to protesters, who are regularly stationed outside each of our Texas clinics.

Impact of Texas Senate Bill 8

10. I understand that Texas Senate Bill 8 ('S.B. 8") prohibits a physician from providing an abortion if they have detected fetal or embryonic cardiac activity or if they have failed to test for cardiac activity.

11. Since embryonic or fetal cardiac activity can be detected as early as six weeks gestation, as measured from the first day of a patient's last menstrual period ("LMP"), S.B. 8 bans almost all abortion in Texas.

12. Only approximately 10% of the patients at all four WWH/WWHA clinics obtain an abortion before six weeks LMP.

13. If we are not able to help these patients in Texas, we will do our best to connect them with services in another state. However, not everyone can travel out of state. Almost all of the states neighboring Texas are also hostile to abortion rights, so many patients will probably have to fly across the country to receive care. Patients have childcare, work, and school responsibilities. It is expensive to travel, particularly by plane, to have an abortion, and many of our patients have low incomes or are poor. If the patient wants to keep their abortion private for

any number of reasons, including their personal safety, it is much harder to do so if they are traveling out of state.

14. It makes me incredibly sad to think about what abortion access would look like in Texas if care is unavailable after six weeks LMP. We know from experience that some patients will be forced to remain pregnant. I was working for WWH in 2013 when House Bill 2 took effect, closing several of our clinics, and this had a devastating impact on our patients. Last year, when Governor Abbott issued an Executive Order that temporarily shut down abortion access in Texas for approximately three weeks, we had to send panicked patients home from our clinics, and I know some of them were never able to get the care they needed.

15. I understand that another aspect of S.B. 8 is that it is not directly enforced by state officials but by private citizens. These private citizens can sue physicians performing abortions after six weeks LMP, as well as anyone who "aids or abets" the performance of an abortion after six weeks. If the private citizen wins their lawsuit, the physician or "aider or abettor" can be banned from providing or helping to provide abortions after six weeks LMP and ordered to pay $10,000 or more per abortion, as well as costs and attorney's fees. I understand that even if someone has not violated S.B. 8, they could still be sued and would have to travel to a state court somewhere in Texas, hire a lawyer, and defend themselves.

16. Based on the work I do at WWH and WWHA, I am very concerned that I will personally be targeted by lawsuits under S.B. 8. In my current role, I am involved in virtually every aspect of abortion services, either directly or indirectly. In addition to the management I provide for our clinics, I am personally involved in patient care. I generally spend at least one day a month on site at the clinics, filling in for staff members or providing an extra set of hands for intake, payment and funding, pathology, patient counseling, and assistance during procedures.

17. I also understand that S.B. 8 includes a fee-shifting provision that makes parties and their attorneys liable to pay the costs and attorney's fees in cases challenging Texas laws that restrict abortion.

18. I am concerned that because WWH and WWHA frequently file cases to challenge unconstitutional abortion laws, S.B. 8's fee-shifting provision could make us liable for costs and attorney's fees in these cases, impairing our ability to use litigation to vindicate our rights and those of our patients.

19. The uncertainty created by S.B. 8 has already had a significant impact on our clinics. Our staff are worried that the clinics will be forced to close and they will be out of a job. While we generally have low staff turnover, ever since S.B. 8 started receiving public attention, staff began to express serious fears that their jobs would no longer exist come September 1. In fact, over the last several months, we have lost around one staff member every week, including one of our clinic directors. We have been interviewing replacements for these positions, but every applicant brings up S.B. 8 during their interview, asking questions I just can't answer. Our physicians are concerned if they will still be able to travel to Texas to perform abortions in September.

20. Because of our staffing challenges, I have had to spend much more time—1-2 days per week—on-site at the clinics filling in for missing staff. This has been going on for months, and the problem is only getting worse.

21. I do not want to be sued just for coming to work to do my job. I do this work because I believe it is the right thing to do. I have spoken with my family and they understand what might happen and they support me.

22. More than anything, S.B. 8 fills me with sadness. I am sad for our patients, who already overcome so much, on a daily basis, just to make their way into our clinics. I feel terrible for our

staff, who are already giving everything they can to our patients, but are now worried for their own livelihood and their families. We have been through this type of challenge before, with the clinic closures caused by House Bill 2, but at least then we knew roughly what to expect. This time, I feel helpless and uncertain.

23. Because S.B. 8 is already disrupting our work, I am deeply concerned about what will happen in September. I want to continue helping Texas patients access the care they need in a non-judgmental supportive environment, as I have done for the past thirteen years. I don't know if Texas will let me.

Dated: July 8, 2021

Marva N. Sadler

MARVA SADLER

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

WHOLE WOMAN'S HEALTH, et al., Plaintiffs, v. AUSTIN REEVE JACKSON, et al., Defendants.	Civil Action No. _____

DECLARATION OF ZAENA ZAMORA IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

I, Zaena Zamora, hereby declare as follows:

1. I am the Executive Director of Frontera Fund ("Frontera"), a nonprofit corporation incorporated in Texas that arranges and funds transportation and lodging and provides financial assistance for abortion care for people who want to end a pregnancy, but who cannot afford the cost of abortion care, the ancillary costs that may be necessary to access that care, or both.

2. Our mission is to make abortion accessible in the Rio Grande Valley by providing financial and practical support regardless of immigration status, gender identity, ability, sexual orientation, race, class, age, or religious affiliation and to build grassroots organizing power at intersecting issues across our region to shift the culture of shame and stigma.

3. As Executive Director of Frontera, I personally carry out, with assistance from Frontera's Board of Directors, all of Frontera's operations, including the fundraising, financial, communications, administrative, and programmatic work.

4. Prior to my service as the Executive Director, I served on the Board of Frontera for about two years. During that time, I managed Frontera's finances, provided fundraising support,

and interacted directly with community members seeking Frontera's assistance, helping them obtain both funding for their abortion care, and the practical support necessary to access that care.

5. I provide the following testimony based on personal knowledge acquired through my service at Frontera Fund and review of the organization's business records.

Frontera's Services

6. Frontera engages in various forms of advocacy to promote abortion access, including providing direct funding for abortion care. When someone contacts Frontera seeking assistance, we engage them in an intake process through which we obtain information about the caller's circumstances and pledge financial support for their abortion care. We then contact the abortion clinic directly and provide a voucher for the amount pledged, which goes toward the caller's medical costs. After the caller's appointment, the clinic bills us directly for the pledged voucher amount.

7. Each week, we pledge funding for callers until we exhaust our weekly budget. We typically have to turn away a few callers each week. We provide financial support to roughly seventy to eighty callers each quarter. We average about $200-300 per pledge, although the specific amount for each individual caller may vary based on factors such as the gestational age of their pregnancy and the clinic where they seek care.

8. Certain times of the year are busier than others. For example, following natural disasters or other hardship, such as the February 2021 power crisis caused by the polar vortex. Such events cause people to work reduced hours (and receive reduced pay), incur costs to replace contaminated food or water, or incur additional recovery expenses, leading to increased financial hardship.

9. Some callers additionally need support securing and financing costs associated with travel. For these callers, we book and directly pay vendors for long-distance ground or air travel; public and rideshare services for local transportation near both the caller's home and destination; and lodging. We also provide reimbursement for gasoline to callers with access to private vehicles.

10. In addition to providing financial and practical support for callers seeking abortion care, Frontera engages in policy advocacy regarding abortion; provides callers with information regarding abortion access and current restrictions on abortion care; and refers callers to other abortion support service organizations, as needed.

Frontera's Clients

11. Frontera serves callers who either live in south Texas—the area south of the latitude connecting Laredo, TX to Corpus Christi, TX—or who are traveling to Whole Woman's Health of McAllen ("WWH") for their abortion care.[1] We do not pledge funding or provide practical support to callers not meeting these criteria. However, Frontera may provide "solidarity funding" for callers not meeting these criteria under certain exceptions: if we receive a request from another abortion fund seeking aid for one of its callers, or if the caller is undocumented. Most of our callers, roughly 84%, reside in the Rio Grande Valley, an area that includes Starr, Hidalgo, Willacy, and Cameron Counties.

12. The majority of our callers are under the age of thirty-five. Some of our callers are minors. Some are undocumented. About one in twenty lack English proficiency. Most of our callers currently have children. The overwhelming majority are beyond six weeks gestational age, measured by the last menstrual period ("LMP"). All of them lack the necessary funds to access abortion care; South Texas is one of the poorest areas in the country.

[1] Frontera is not affiliated with WWH in any way.

13. Some of our callers are facing particularly difficult circumstances. Some are experiencing homelessness. Some are students, have recently experienced a job loss, or are facing other financial struggles. Some are experiencing domestic violence or other unsafe situations. Others have experienced sexual assault. We have seen an increase in all of these circumstances since the beginning of the COVID-19 pandemic. We try to provide these callers with additional financial support, resources, and necessary referrals.

Impact of SB 8 on Frontera and Its Clients

14. I understand that Texas Senate Bill 8 ("SB 8"), which is scheduled to take effect on September 1, 2021, would ban the provision of abortions at approximately six weeks of pregnancy, prohibit aiding or abetting such abortions, and prohibit intending to aid or abet such abortions. I also understand SB 8 to enable private parties to sue individuals and entities who engage in such activities for a minimum of $10,000 per abortion performed in violation of the ban. With the impending threat of SB 8, I am reluctant to onboard volunteers who could now be subject to legal liability.

15. If SB 8 prevents Texas abortion providers from offering abortion care after six weeks' gestational age, nearly all our callers would need to travel out of state. As stated above, out-of-state travel is generally more expensive than in-state travel because it involves long-distance air or ground fare, lodging, and local travel expenses in costlier destinations than Texas. Currently, we can afford to provide this support to the callers who need it only because relatively few of them require it. If all our callers required assistance traveling out of state, we would be able to serve only a tiny fraction of them in any meaningful way.

16. Additionally, out-of-state travel would burden our callers in other ways. Traveling longer distances means that they would have to take more time off work. For at least some callers,

this would be impossible. Some cannot take time off work without jeopardizing their employment, others have limited time off, and others may not be able to afford the lost wages during time off. Callers with children would have to arrange and pay for childcare for significantly longer. This is prohibitively expensive for some. Callers would also face a more significant challenge to keep their pregnancy and abortion care confidential, a particularly devastating result of SB 8 for those experiencing domestic violence or other abusive situations.

17. Many of our callers would be forced to carry their pregnancy to term or take matters into their own hands. Those who can travel out of state would still have to overcome substantial obstacles to accessing abortion services, such as the heightened expense; additional time away from home and work; and added stress and anxiety from having to navigate an entirely different environment. These obstacles can be immensely burdensome even when they are not prohibitive.

18. On the other hand, if some people continue to access abortion in Texas with Frontera's help after SB 8 takes effect, I expect individuals or organizations opposed to abortion access to sue Frontera for providing practical and financial support for Texans seeking abortion care after six weeks. Although I believe that SB 8 is unconstitutional and therefore invalid, lawsuits filed pursuant to SB 8 against Frontera would hobble our ability to serve our clients because we lack the resources to defend against the suits. I understand that lawyers typically charge hundreds of dollars per hour for their services, and to date, Frontera has not been able to secure commitments from attorneys to represent us on a pro bono basis if we are sued under SB8. It is my understanding that attorneys who represent us in an SB 8 lawsuit cannot recover their costs or fees from the plaintiffs or the state even if successful, but they could be held liable for the plaintiffs' costs and attorney's fees.

19. Frontera provides an important service in the Rio Grande Valley, an under-resourced community facing many challenges already. We give people access to the life that they want to live. By giving people the resources to make the decisions that are best for them, we commit radical acts of care and community love. When I tell a caller that Frontera will help them, I always hear relief from the caller that they can move on with their lives or make decisions for themselves without worrying about not having the money. The cost of abortion care and related expenses is a lot of money, especially for people of reproductive age in this community. It is not a drop in the bucket. Frontera's assistance means our callers do not have to forego food, rent, diapers, other medical care, or other expenses.

20. In preventing us from helping vulnerable South Texans obtain abortion care in their state, and forcing us to shift our support to out-of-state travel, which is either impracticable or extremely burdensome for our clients, SB 8 would frustrate our mission.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Dated: July 6, 2021

Zaena Zamora

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

WHOLE WOMAN'S HEALTH, et al., Plaintiffs, v. AUSTIN REEVE JACKSON, et al., Defendants.	Civil Action No. _____

DECLARATION OF MARSHA JONES IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

I, Marsha Jones, declare as follows:

1. I am the Co-Founder and Executive Director of The Afiya Center.

2. I am responsible for overseeing all of The Afiya Center's programs and operations; raising money for the organization and managing its finances; and serving as a liaison between The Afiya Center's staff and Board of Directors.

3. I provide the following testimony based on personal knowledge acquired through my service at The Afiya Center, including consultation with staff and Board members and review of the organization's business records.

The Afiya Center's Advocacy to Promote Abortion Access

4. Based in Dallas, Texas, The Afiya Center is a nonprofit organization incorporated under Texas law.

5. Its mission is to serve Black women and girls by transforming their relationship with their sexual and reproductive health through addressing the consequences of reproductive oppression.

6. The Afiya Center currently has 16 paid staff members and 5 volunteers.

7. The Afiya Center's work includes advocacy to promote abortion access. The Afiya Center has long recognized that, for Black women, there is a perceived double standard: we are stigmatized when we have children and are further shamed and stigmatized when we seek abortions. Our advocacy efforts include programs to ensure that every Texas woman is truly supported — no matter her choice. The Afiya Center is a proud participant in the Trust, Respect, Access Coalition—a multi-year campaign to promote policies that restore trust in Texans to make their own reproductive health care decisions, respect the dignity of Texans and the judgment of health care professionals, and ensure access to abortion and the support all Texas families need to thrive. This unprecedented, coordinated campaign aims to shift the policy climate around abortion access in Texas, to educate the public about the harm caused by decades of anti-abortion laws, and to hold lawmakers accountable for political attacks on reproductive health care.

8. The Afiya Center's advocacy to promote abortion access includes operation of the Supporting Your Sistahs (SYS) Fund. The SYS Fund was conceptualized in 2017 and officially launched in 2019. Its purpose is to meet the unique needs of Black women and girls requiring practical and financial support to access abortion care. I oversee The Afiya Center staff members and volunteers who operate the SYS Fund. In addition, I sometimes provide supportive services directly to SYS Fund recipients. For example, I have accompanied recipients to their abortion appointments.

9. The SYS Fund provides direct financial assistance to pregnant women and girls who want to have an abortion but cannot afford the cost of care. We pledge a minimum of $250 to every prospective abortion patient and pay that money directly to the abortion provider after the abortion is completed.

10. In addition, the SYS Fund provides practical support to prospective abortion patients in the form of assistance with transportation, lodging, meals, childcare, over-the-counter medications, and supplies such as menstrual pads, as well as emotional support.

11. People seeking assistance from the SYS Fund may contact The Afiya Center by phone or email twenty-four hours per day, seven days per week. We aim to have a staff member or volunteer respond within twenty-four hours. That staff member or volunteer will gather information about the person's circumstances and assess their needs with respect to financial and practical support. They will also provide the person with information about abortion services and the resources available to assist them.

12. We stay in touch with each recipient of financial assistance or practical support for thirteen months after her abortion. We check in with recipients the day before, the day of, and the day after their abortions to assess their emotional and practical support needs. Subsequently, we check in with recipients once per week for the first month after their abortion, then once per month for the next three months, and then on a quarterly basis. The purpose of these check-ins is to assess a recipient's ongoing emotional and practical support needs. For example, we have provided individuals with financial assistance for rent and utilities during this thirteen-month period.

13. The Afiya Center's abortion access work, including operation of the SYS Fund, is intended to send a clear message to the public, to policymakers, and to Black women: All people have a human right to bodily autonomy; all people have a human right to make their own medical decisions and access the healthcare that they choose; and all people should be treated with dignity and respect when obtaining abortion care.

Characteristics of People Who Receive Assistance from the SYS Fund

14. Since its launch in 2019, approximately 218 pregnant women have received financial or practical assistance from the SYS Fund.

15. All of them have been at least six weeks pregnant at the time of their abortion.

16. Most recipients have been from the Dallas-Fort Worth metroplex, but a few have been from other parts of Texas, such as Houston.

17. All recipients have been Black women. A majority of recipients are under twenty-five years old, have meager financial resources, and are already parents. Many have multiple children to care for; have unsupportive or abusive partners or family members; and lack stable housing. A substantial number of recipients are HIV positive.

18. Many SYS Fund recipients are low-wage workers with little or no control over their work hours, no paid sick leave, and no job security.

19. SYS Fund recipients typically are uninsured, do not have regular contact with the healthcare system, and have low health literacy. Like all Black women, they are at significantly higher risk of experiencing pregnancy-related complications and maternal mortality than the general population.

SB 8's Impact on The Afiya Center and SYS Fund Recipients

20. I understand that Texas Senate Bill 8 ("SB 8"), which is scheduled to take effect on September 1, 2021, would ban the provision of abortions at approximately six weeks of pregnancy, prohibit aiding or abetting such abortions, and prohibit intending to aid or abet such abortions. I also understand that SB 8 would enable private parties to sue individuals and entities who engage in such activities for a minimum of $10,000 per abortion performed in violation of the ban.

21. The Afiya Center believes that SB 8 is unconstitutional and therefore invalid. Nevertheless, if it takes effect, it will cause irreparable harm to The Afiya Center and SYS Fund recipients.

22. As a nonprofit organization, The Afiya Center depends on charitable donations to fund its work. SB 8 is already having a chilling effect on The Afiya Center's donors, who are

concerned both that they might face lawsuits alleging that they have aided and abetted prohibited abortions under SB 8 by supporting The Afiya Center's abortion access work, and that their contributions might ultimately go to pay judgments and legal bills related to SB 8 rather than to their intended purpose.

23. The Afiya Center's total annual revenue is modest. Having to pay a $10,000 judgment for every abortion we facilitate would easily bankrupt us. Even if we successfully assert constitutional or other defenses in response to lawsuits filed against us under SB 8, the legal bills we would incur in the process would likely bankrupt us. I understand that lawyers typically charge hundreds of dollars per hour for their services. To date, The Afiya Center has not been able to secure commitments from licensed, Texas attorneys to represent us on a pro bono basis if we are sued under SB 8, nor have we been able to raise money to pay for legal services.

24. The Afiya Center is a plaintiff in a federal lawsuit in the Western District of Texas, captioned *Whole Woman's Health Alliance v. Paxton*, No. 1:18-cv-500-LY, which challenges the constitutionality of certain abortion restrictions. In that case, as in this one, our attorneys are representing us on a pro bono basis because they have the opportunity to recover their fees from the state under 42 U.S.C. § 1988 if The Afiya Center is a prevailing party. It is my understanding that attorneys who represent us in an SB 8 lawsuit could not recover their costs or fees from the plaintiffs or the state even if successful, and SB 8 indicates that they could be held liable for the plaintiffs' costs and attorney's fees in a variety of circumstances.

25. If SB 8 takes effect, I believe the likelihood is high that individuals or organizations opposed to abortion access will sue us for aiding and abetting prohibited abortions. As an organization run by Black women for the benefit of Black women, we often have a target on our back. Moreover, we have a history of being targeted for our efforts to ensure abortion access for

marginalized Black women. Last year, seven towns in Texas enacted local ordinances declaring themselves "sanctuary cities for the unborn" and labeling The Afiya Center, along with other nonprofit organizations that facilitate abortion access, as "criminal organizations" barred from operating in the towns.

26. If SB 8 ultimately causes Texas abortion providers to cease offering abortions after six weeks of pregnancy, none of our SYS Fund recipients would be able to obtain lawful abortions in Texas. Yet, most of them would lack the capacity to travel out of state for abortion care given their limited resources, lack of job flexibility, and family obligations. I expect that many of these marginalized women will be forced to carry an unwanted pregnancy to term and then struggle to support a larger family.

27. Overall, I expect that low-income, Black women will disproportionately suffer the denial of bodily integrity and basic human dignity that SB 8 seeks to inflict on Texas residents. I pray that the Court will take action to prevent this outrageous injustice from manifesting.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Dated: July 9, 2021

Marsha Jones

Marsha Jones

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

WHOLE WOMAN'S HEALTH, et al., Plaintiffs, v. AUSTIN REEVE JACKSON, *et al.*, *Defendants.*	Civil Action No. _____

DECLARATION OF ANNA RUPANI IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

I, Anna Rupani, declare as follows:

1. I am Co-Executive Director of Fund Texas Choice ("FTC"), a nonprofit corporation incorporated in Texas that arranges and pays for transportation, lodging, and childcare for people seeking abortion care in Texas.

2. Our mission is to help Texans equitably access abortion through safe, confidential, and comprehensive practical support. FTC was founded in response to HB 2, a Texas statute that shuttered over half of the state's abortion clinics, imposing long wait-times on abortion patients and forcing them to travel long distances for care.

3. As Co-Executive Director, my primary responsibility is overseeing the implementation of strategies to fulfill the organization's mission. This includes serving as a liaison between our staff and Board of Directors, monitoring and building our budget, supervising staff in the administration of our programmatic work, and developing client-centered policies.

4. I bring to this position considerable experience as an attorney and licensed social worker who has provided direct services to survivors of intimate partner violence ("IPV") and human trafficking and unaccompanied minors seeking healthcare, including abortion care. This

experience inspired me to dedicate much of my time and energy to getting the many resources needed to obtain an abortion in Texas to the most vulnerable residents of the state.

5. I provide the following testimony based on personal knowledge acquired through my service at FTC, including consultation with staff and Board members, and review of the organization's business records.

FTC Services

6. FTC currently employs three full-time staff members and one part-time staff member, and we serve people throughout Texas. A program coordinator fields texts and calls from Texans seeking abortion care who cannot afford to travel to an abortion provider. They then work with individuals who have abortion appointments to help plan and support their trip. This includes booking and directly paying vendors for bus tickets, ride shares, and lodging—and air fare for those forced out of Texas for abortion care. FTC also books and directly pays for the transportation and lodging of companions for minor clients or clients who have a fetal anomaly.

7. We reimburse clients for gasoline and food costs incurred during their journey. Most abortion providers do not allow patients to bring their children to their appointments, particularly during the COVID-19 pandemic. So, when clients are unable to find affordable childcare, we reimburse them for the services they can secure. FTC connects callers unable to pay for the abortion itself to nonprofit organizations that provide cash subsidies to defray the cost of abortion services. These organizations are generally known as "abortion funds." Occasionally, we help callers identify the closest abortion provider that is appropriate for them and try to secure an abortion appointment for them despite long wait times.

8. We accept intakes until we have exhausted our budget. On average, we spend over $15,000 a month on practical support for clients. Our policy is to follow up with them twice after

their abortion appointment —first a few days after the appointment when they have returned home, and then again weeks afterwards.

9. In addition to providing practical support to access abortion care, FTC helps interested clients tell the stories of how they obtained abortion care, including by connecting them to the media. We regard this as a way to combat abortion stigma, which furthers our mission.

FTC Clients

10. In 2020, 404 individuals reached out to FTC for help accessing an abortion, and we provided practical support to 330 clients. Almost all of our callers have pregnancies past six weeks gestational age for a variety of reasons. Many are unaware they are pregnant before that point. Others exceed six weeks trying to cobble together resources to travel to an abortion provider, making a second, State-mandated trip to the abortion provider, or petitioning for a judicial bypass of Texas's parental consent requirement for adolescents.

11. These factors also push clients past 22 weeks of pregnancy, the gestational age cut-off for terminating a pregnancy in Texas, subject only to narrow circumstances. As a result, about 35% of our clients obtain their abortion out of state, as far away as Colorado, Illinois, Louisiana, New Mexico, Oklahoma, Oregon, Virginia, and Washington, D.C.. Virtually every expense associated with long-distance travel of any kind, whether it be childcare, transportation, or lodging, is magnified when our clients leave the state due to the greater length of the journey and higher cost of living in some states. Having to navigate a new environment exacerbates the stress and anxiety that some clients experience in connection with their pregnancy.

12. Almost all of our clients have little to no capacity to absorb an unforeseen medical expense—not to mention the costs of traveling to one of the abortion providers left in Texas. This includes lost wages from time off from work, for which we are unable to reimburse clients. Thus,

many of our clients must stitch together resources from multiple organizations to ultimately obtain an abortion in Texas.

13. In following up with clients after their scheduled abortion appointments, we find that, each year, some fall short of the resources needed to reach the abortion provider—despite wanting an abortion. Because the cost of an abortion increases with the gestational age of the pregnancy, the time it takes to gather resources delays some clients to a point at which they can no longer afford their abortion, triggering another cycle of having to gather resources and further delaying their care. Some of our clients are IPV survivors who are prevented from accessing abortion when their abusers learn of their intentions, despite their best efforts to conceal their pregnancies from their abusers. Others have no option but to travel out of state for abortion care, but are unable to do so because they cannot spend the necessary time away from work, school, or home. This includes IPV survivors who cannot leave home for an extended period without arousing the suspicions of their abuser.

Impact of SB 8 on FTC and its Clients

14. I understand that Texas Senate Bill 8 ("SB 8"), which is scheduled to take effect on September 1, 2021, would ban the provision of abortions at approximately six weeks of pregnancy, prohibit aiding or abetting such abortions, and prohibit intending to aid or abet such abortions. I also understand SB 8 to enable private parties to sue individuals and entities who engage in such activities for a minimum of $10,000 per abortion performed in violation of the ban.

15. If SB 8 prevents Texas abortion providers from offering abortion care after six weeks gestational age, nearly all our clients would need to travel out of state. Out-of-state travel is generally more expensive than in-state travel because it typically takes more time and sometimes involves costlier destinations than Texas. Thus, out-of-state travel is generally harder for FTC to

fund. We already spend over $4,500 in flights and bus travel each month for approximately 33% of clients leaving the state. Consequently, SB 8 would require us to both dramatically expand our budget and to redirect organizational resources to out-of-state travel. Even then, there is no question that we would be able to provide support to far fewer Texans in need of it than we do now, and SB 8 would in fact cause the number of Texans who need assistance to grow dramatically. Separately, the information we routinely gather through our intake process indicates that at least some of our clients would be unable to leave Texas for abortion care because of the time away involved and the difficulty of maintaining confidentiality in an abusive situation. Both groups of clients would be forced to carry to term or take matters into their own hands. Those who can travel out of state would still have to overcome substantial obstacles to accessing abortion services, such as the heightened expense; additional time away from home and work; and added stress and anxiety from having to navigate an entirely different environment. These obstacles can be immensely burdensome even when they are not prohibitive.

16. These are the very outcomes that FTC managed when Texas sharply curtailed abortion at the start of the COVID-19 pandemic last year. Patients throughout Texas were delayed in accessing abortion and had to travel much longer distances to reach a provider legally authorized to provide abortion services. As a result, even after increasing our weekly budget from $1500 to $2500, we had to suspend our intake process twice because the demand for practical support services far exceeded our resources.

17. I believe that SB 8 is unconstitutional and therefore invalid. Nevertheless, if SB 8 takes effect, I expect individuals or organizations opposed to abortion access to sue FTC for providing practical and financial support for Texans seeking abortion care after six weeks. FTC has already been targeted for its efforts to ensure abortion access for all Texans regardless of

circumstance. Last year, a former Austin City Council member sued the City of Austin for indirectly allocating funds to FTC to carry out its mission.

18. Lawsuits filed pursuant to SB 8 against FTC would hobble our ability to serve our clients because we lack the resources to defend against the suits. This is true even if we were to divert our limited staff time and organizational funds to doing so. I understand that lawyers typically charge hundreds of dollars per hour for their services, and to date, FTC has not been able to secure commitments from attorneys to represent us on a pro bono basis if we are sued under SB8. It is my understanding that attorneys who represent us in an SB 8 lawsuit cannot recover their costs or fees from the plaintiffs or the state even if successful, but SB 8 states they could be held liable for the plaintiffs' costs and attorney's fees in some circumstances.

19. FTC is currently serving as a plaintiff in a federal lawsuit in the Western District of Texas to challenge the constitutionality of certain restrictive abortion laws. That case is captioned *Whole Woman's Health Alliance v. Paxton*, No. 1:18-cv-500-LY. In that case, as in this one, our attorneys are representing us on a pro bono basis because they have the opportunity to recover their fees from the state under 42 U.S.C. § 1988 if FTC is a prevailing party.

20. In preventing us from helping vulnerable Texans obtain abortion care in their state, and forcing us to shift our support to out-of-state travel, which is either impracticable or extremely burdensome for our clients, SB 8 would frustrate our mission.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Dated: July 9, 2021

Anna Rupani

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

WHOLE WOMAN'S HEALTH, et al., Plaintiffs, v. AUSTIN REEVE JACKSON, et al., Defendants.	Civil Action No. _____

DECLARATION OF KAMYON CONNER IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

I, Kamyon Conner, declare as follows:

1. I am the Executive Director of the North Texas Equal Access Fund ("TEA Fund"), a nonprofit corporation incorporated under Texas law and based in Dallas, that provides financial and emotional support for low-income abortion patients in northern Texas. Our mission is to foster reproductive justice, which includes removing barriers to abortion access through community education.

2. My primary responsibilities as Executive Director are working with our Board of Directors to help ensure the implementation of our mission; managing our budget, including fundraising; and overseeing our programmatic work, including supervising staff and volunteers.

3. I have provided services at TEA Fund for nearly fifteen years, first as a volunteer fielding calls to our Helpline, and then as a Board Member and Intake Coordinator. In the latter roles, I helped shape the mission and strategies of the organization based on our clients' experiences.

4. I provide the following testimony based on personal knowledge acquired through my service at TEA Fund, including consultation with staff and Board members, and review of the organization's business records.

TEA Fund's Services

5. TEA Fund has seven staff members and over 125 volunteers. We primarily serve people living in northern Texas. In 2020, our Helpline received over 10,500 calls from Texans seeking help paying for an abortion. Most of our callers are referred by abortion providers in the state. The calls came from 110 counties in Texas, many of them rural. Seventy percent of the callers were Black, indigenous, or people of color. Indeed, the majority of Texas abortion patients identify as Black or Latina—communities that already face inequities in access to medical care. At least 50% of our callers had a child. Almost all were more than six weeks pregnant.

6. A caller can qualify for assistance based on their financial circumstances, the amount of financial aid they have been able to obtain from other sources, and the cost of their abortion care. When a caller qualifies, TEA Fund sends a financial voucher to the abortion provider with whom the caller's appointment is scheduled and pays the provider after the abortion is completed. The average amount for a voucher is $330 and varies based on gestational age.

7. In 2020, TEA Fund provided over $400,218 to assist 1,218 Texans in obtaining abortions. Unfortunately, budgetary constraints prevent us from providing funding for every caller who needs it and from covering the full cost of the abortion for the callers we can help. In 2020, we were unable to provide any financial assistance at all to three-quarters of the people who requested it.

8. To help address clients' other needs, such as transportation, lodging, and meals, we coordinate with organizations offering practical support for obtaining an abortion. TEA Fund has

a social worker who follows up with clients soon after their scheduled abortion appointment. Each year, we learn that some clients never made it to their abortion provider because they were unable to meet travel expenses even with our contribution towards the cost of the abortion itself.

9. Last year, TEA Fund introduced a textline that provides information about where to get an abortion, how to get help paying for care, and how to connect to practical support networks. TEA Fund also has a virtual Client Companion Program, through which our volunteers provide emotional support to abortion patients during their medication abortion at home or their in-clinic abortion procedure. TEA Fund's Caller Engagement Program organizes people throughout Texas to advocate for meaningful abortion access.

10. TEA Fund provides these services to people seeking abortion care in Texas to express and effectuate its deeply held belief that abortion is a fundamental part of healthcare and that restrictions on abortion access discriminate against people with low incomes, young people, people in rural areas, and people of color.

Impact of SB 8 on TEA Fund and its Clients

11. I understand that Texas Senate Bill 8 ("SB 8"), which is scheduled to take effect on September 1, 2021, would ban the provision of abortions at approximately six weeks of pregnancy, prohibit aiding or abetting such abortions, and prohibit intending to aid or abet such abortions. I also understand SB 8 to enable private parties to sue individuals and entities who engage in such activities for a minimum of $10,000 per abortion performed in violation of the ban.

12. If SB 8 prevents Texas abortion providers from offering abortion care after six weeks gestational age, almost all our clients would need to leave the state for care. This would mean traveling even greater distances than they already do; increased transportation costs, including air fare; increased lodging and childcare costs; more lost wages; a greater risk of losing

their jobs; and greater difficulty maintaining the confidentiality of their abortion or pregnancy. In my experience, these challenges would be overly burdensome for nearly all our clients and insurmountable for some. If SB 8 takes effect, TEA Fund intends to shift its resources to the costs of out-of-state abortion care and to add a practical support budget for each client. Even this is unlikely to ensure abortion access for our most vulnerable clients, however.

13. When Texas sharply curtailed abortion access at the start of the COVID-19 pandemic last year, our clients faced long wait times for an appointment and often traveled long distances out of state to reach a provider legally authorized to perform abortions. The resulting financial burdens, including more expensive procedures due to the later gestational age of the pregnancies, made it even more difficult for them than usual to meet the costs associated with out-of-state travel. So, we coordinated with abortion funds in New Mexico to provide food and other resources to Texans traveling to a provider there. Despite our best efforts, several Texans were unable to leave the state and carried to term.

14. TEA Fund believes that SB 8 is unconstitutional and thus invalid. If it takes effect, however, I expect individuals or organizations opposed to abortion access to sue us for providing assistance, including financial support, to Texans seeking abortion care after six weeks of pregnancy. We have already been targeted for our efforts to ensure abortion access for all Texans regardless of circumstance. Last year, seven towns in Texas enacted ordinances drafted by the Director of Right to Life of East Texas declaring themselves "sanctuary cities for the unborn"; branding us, along with other abortion funds, as "criminal organizations"; and attempting to bar us from operating in the towns. After we challenged the ordinances in federal court as violations of our First Amendment rights to free expression and association, the towns revised the ordinances to make it clear that we could continue our work in support of equitable abortion access throughout

Texas. In response to a defamation suit we brought with other abortion funds against the Director of Right to Life of East Texas, he stated: "Abortion is the murder of innocent unborn human beings. The Lilith Fund and other abortion-aiding organizations all take part in the murder of innocent unborn human beings."[1] Since we brought the defamation suit, there have been twelve countersuits filed against us and other abortion funds by individuals opposed to abortion access. We were also targeted for our services and message when a former Austin City Council member sued the City of Austin in 2020 for indirectly allocating funds to TEA Fund to carry out its mission.

15. Lawsuits filed pursuant to SB 8 against FTC would undermine our ability to serve our clients because we lack the resources to defend against the suits. This is true even if we were to divert our limited staff time and organizational funds to doing so. I understand that lawyers typically charge hundreds of dollars per hour for their services. We had to raise money to retain lawyers to represent us in the defamation lawsuits discussed above. To date, TEA Fund has neither been able to secure commitments from attorneys to represent us on a pro bono basis if we are sued under SB 8, nor have we been able to raise additional funds to pay for legal services. It is my understanding that attorneys who represent us in an SB 8 lawsuit cannot recover their costs or fees from the plaintiffs or the state even if successful, but SB 8 states they could be held liable for the plaintiffs' costs and attorney's fees in some circumstances.

16. TEA Fund is also a plaintiff in a federal lawsuit in the Western District of Texas to challenge the constitutionality of certain abortion restrictions. That case is captioned *Whole Woman's Health Alliance v. Paxton*, No. 1:18-cv-500-LY. In that case, as in this one, our attorneys

[1] Robin Y. Richardson, Defamation lawsuit filed against Right to Life East Texas Director, Tyler Morning Telegraph (July 16, 2020), https://tylerpaper.com/news/local/defamation-lawsuit-filed-against-right-to-life-east-texas-director/article_eb2431f7-070a-53bf-89a2-5bc98d57acac.html.

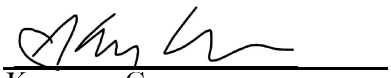
are representing us on a pro bono basis because they have the opportunity to recover their fees from the state under 42 U.S.C. § 1988 if TEA Fund is a prevailing party.

17. As Executive Director of TEA Fund, I am also concerned that the likelihood of being sued by individuals or organizations opposed to abortion access will chill our volunteers or staff from continuing on in their roles at the organization.

18. By preventing us from helping vulnerable Texans obtain abortion care in their state and forcing us to shift to out-of-state financial support that will be largely inadequate for our clients, SB 8 would frustrate our mission.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Dated: July 12, 2021



Kamyon Conner

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

WHOLE WOMAN'S HEALTH, *et al.*,

Plaintiffs,

v.

AUSTIN REEVE JACKSON, *et al.*,

Defendants.

Civil Action No. _____

DECLARATION OF AMANDA BEATRIZ WILLIAMS IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

I, Amanda Williams, declare as follows:

1. Since 2016, I have served as the Executive Director of Lilith Fund for Reproductive Equity, Inc. ("Lilith Fund"), a nonprofit corporation incorporated in Texas. Lilith Fund's mission is to provide financial assistance and emotional support for people needing abortions in Texas, foster a positive culture around abortion, and fight for reproductive justice across the state. Lilith Fund offsets the costs of the abortion care itself rather than the expenses involved in traveling to an abortion provider in Texas.

2. My primary responsibilities as Executive Director are working with our Board of Directors to ensure the execution of our mission, maintaining the financial health of the organization, and supervising staff and volunteers.

3. I served on Lilith Fund's Board of Directors from 2012 to 2015, fielded requests to its hotline as a volunteer from 2011 to 2012, and I have more than a decade of experience in the reproductive rights, health, and justice field in Texas.

4. I provide the following testimony based on personal knowledge acquired through my service at Lilith Fund, including consultation with staff and Board members, and review of the organization's business records.

Lilith Fund's Services

5. Lilith Fund has nine staff members and more than thirty volunteers, and we primarily serve people living in central and southeast Texas. The hotline program director fields requests from Texans who are unable to afford the cost of their abortion. They are typically referred to us by an abortion provider in the state. Lilith Fund prioritizes callers at later gestational ages because they risk exceeding Texas's 22-week gestational age cut-off for a legal abortion and because the cost of an abortion increases as pregnancy progresses.

6. When we can help a caller with the cost of their abortion care, we send a financial voucher to the abortion provider with whom the caller has scheduled an appointment. Lilith Fund pays the abortion provider after the abortion is completed. Last year, our hotline program director fielded requests from 4,557 callers requesting help paying for an abortion. We were only able to fund 27% of the callers at an average amount of $348.

7. The average gestational age at which Lilith Fund's clients obtain an abortion is thirteen weeks, and almost all are past eight weeks. Seventy-two percent of our clients are people of color and fifty-nine percent are parents. At least half do not work for pay and forty-three percent lack health insurance, requiring them to pay out-of-pocket for any healthcare. Even those who have health insurance generally do not have coverage for abortion services. In addition to Texans with pregnancies at later gestational ages, Lilith Fund prioritizes callers living with multiple hardships, including homelessness, incarceration, intimate partner violence, and physical or mental health issues. In 2018, we hired a social worker to provide case-management

services connecting clients to resources, including food banks, programs offering job assistance, help paying utility bills, and free diapers.

8. To help address clients' immediate needs, such as transportation, lodging, and meals, we coordinate with organizations offering practical support for obtaining an abortion. Lilith Fund has a practice of following up with clients soon after their scheduled abortion appointment. Each year, we learn that some clients never made it to their abortion provider because they were unable to meet travel expenses even with our contribution towards the cost of the abortion itself.

9. Lilith Fund connects clients to story-telling opportunities aimed at combatting the stigma surrounding abortion care, and we promote campaigns that educate Texans about their rights and conduct trainings about abortion access within the state.

10. Lilith Fund provides these services to people seeking abortion care in Texas to express and effectuate its deeply-held belief that all people should have access to a full range of reproductive healthcare.

Impact of SB 8 on Lilith Fund and its Clients

11. I understand that Texas Senate Bill 8 ("SB 8"), which is scheduled to take effect on September 1, 2021, would ban the provision of abortions at approximately six weeks of pregnancy, prohibit aiding or abetting such abortions, and prohibit intending to aid or abet such abortions. I also understand SB 8 to enable private parties to sue individuals and entities who engage in such activities for a minimum of $10,000 per abortion performed in violation of the ban.

12. If SB 8 prevents Texas abortion providers from offering abortion care after six weeks gestational age, virtually all our clients would need to leave the state for care. This would

mean traveling even greater distances than they already do; increased transportation costs, including air fare; increased lodging and childcare costs; significant delays to care as they try to gather these resources; more expensive care due to the delays; more lost wages; a greater risk of losing their jobs; and greater difficulty maintaining the confidentiality of the abortion or pregnancy. In my experience, these challenges would be onerous for nearly all our clients and insurmountable for some.

13. When Texas sharply curtailed abortion access at the start of the COVID-19 pandemic last year, our clients faced steep waiting times for an appointment and traveled an average of 606 miles to reach a provider legally authorized to perform abortions. One client was pushed to 19 weeks of pregnancy and forced to travel nearly 1,600 miles round-trip out of state after a Texas clinic within three miles of her home was no longer able to care for her. Because of the delays to their abortion care, the average cost of our clients' care shot up to $2,400. Most clients had no choice but to stay at a hotel for three to four days. We managed to increase our voucher amount to $355 but were unable to provide any funds for countless callers. At least seven of our clients were forced to carry to term.

14. Lilith Fund believes that SB 8 is unconstitutional and thus invalid. If it takes effect, however, I expect individuals or organizations opposed to abortion access to sue us for providing assistance, including financial support, to Texans seeking abortion care. We have already been targeted for our efforts to ensure abortion access for all Texans regardless of circumstance. Last year, seven towns in Texas enacted ordinances drafted by the Director of Right to Life of East Texas declaring themselves "sanctuary cities for the unborn"; branding us, along with other abortion funds, as "criminal organizations"; and seeking to bar us from operating in the towns. After we challenged the ordinances in federal court as violations of our

First Amendment rights to free expression and association, the towns revised the ordinances to make it clear that we could continue our work in support of equitable abortion access throughout Texas. In response to a defamation suit we brought with other abortion funds against the Director of Right to Life of East Texas, he stated: "Abortion is the murder of innocent unborn human beings. The Lilith Fund and other abortion-aiding organizations all take part in the murder of innocent unborn human beings."[1] There have been twelve countersuits filed against us and other abortion funds by individuals opposed to abortion access since we brought the defamation suit.

15. Lilith Fund's total operating budget is less than $1.5 million. Having to pay a minimum $10,000 judgment for every abortion we facilitate would easily bankrupt us. Even if we successfully assert constitutional defenses in response to lawsuits filed against us under SB 8, the legal bills we would incur in the process would likely bankrupt us. I understand that lawyers typically charge hundreds of dollars per hour for their services. We had to raise money to retain lawyers to represent us in the defamation lawsuits discussed above. To date, Lilith Fund has neither been able to secure commitments from attorneys to represent us on a pro bono basis if we are sued under SB 8, nor have we been able to raise additional funds to pay for legal services. It is my understanding that attorneys who represent us in an SB 8 lawsuit cannot recover their costs or fees from the plaintiffs or the state even if successful, but SB 8 states they could be held liable for the plaintiffs' costs and attorney's fees in some circumstances.

16. Lilith Fund is also a plaintiff in a federal lawsuit in the Western District of Texas to challenge the constitutionality of certain abortion restrictions. That case is captioned *Whole Woman's Health Alliance v. Paxton*, No. 1:18-cv-500-LY. In that case, as in this one, our

[1] Robin Y. Richardson, Defamation lawsuit filed against Right to Life East Texas Director, Tyler Morning Telegraph (July 16, 2020), https://tylerpaper.com/news/local/defamation-lawsuit-filed-against-right-to-life-east-texas-director/article_eb2431f7-070a-53bf-89a2-5bc98d57acac.html.

attorneys are representing us on a pro bono basis because they have the opportunity to recover their fees from the state under 42 U.S.C. § 1988 if Lilith Fund is a prevailing party.

17. By preventing us from helping vulnerable Texans obtain abortion care in their state and forcing us to shift our financial support to out-of-state abortion services, which is either impracticable or onerous for our clients, SB 8 would frustrate our mission.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Dated: July 12, 2021

Amanda Beatriz Williams

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

WHOLE WOMAN'S HEALTH, et al.,	)	
	)	
Plaintiffs,	)	
	)	CIVIL ACTION
v.	)	
	)	CASE NO. _____
AUSTIN REEVE JACKSON, et al.,	)	
	)	
Defendants.	)	

DECLARATION OF REVEREND DANIEL KANTER IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

REVEREND DANIEL KANTER, declares under penalty of perjury that the following statements are true and correct:

1. I am the CEO and Senior Minister of the First Unitarian Church of Dallas ("First Church").

2. First Church is a progressive cathedral of Unitarian Universalism. My congregation consists of 1,100 people in the Dallas-Fort Worth region across a 50-mile radius. The Church reaches 3,000 people in total through broadcasting to 37 states and 7 countries.

3. I submit this declaration in support of Plaintiffs' Motion for Summary Judgment to prevent enforcement of Texas Senate Bill 8 ("S.B. 8"). The facts I state here and the opinions I offer are based on my training and experience as a licensed and ordained member of the clergy who has worked in Texas for the past 20 years.

My Background and Beliefs

4. I received my Doctorate in Ministry from the Perkins School of Theology at Southern Methodist University in 2007. I also received my Master's Degree in Divinity from the

Starr King School for the Ministry in Berkeley, California and my B.A. in Psychology and Asian Area Studies from the University of Vermont.

5. I was ordained at King's Chapel in Boston, Massachusetts in 1998, where I served as an Assistant Minister for three years.

6. I moved to Texas 20 years ago to be a sabbatical minister at First Church. I have been promoted over the years to Assistant Minister, Associate Minister, and now Senior Minister. I have served this Church as CEO and Senior Minister since January 2009.

7. As CEO and Senior Minister, I am responsible for all operations of the Church and its ministry. In my role as CEO, I design the strategic direction for the Church and its programs, manage our full-time employees, and serve as steward of our community. In my role as Senior Minister, I regularly preach to the congregation; provide pastoral care, such as the administration of rites of passage and officiation of burials and weddings; and oversee the educational programs of the Church.

8. My personal religious beliefs stem from the core principles of Unitarian Universalism. The core belief in Unitarian Universalism is the inherent dignity and worth of all living human beings. We believe that God is a loving God that loves us all, and our job is to live up to that ideal by making the world as loving, compassionate, and just as we can.[1]

9. Because of these core tenets, I believe that pregnant people need to make decisions about their reproductive health—including decisions to have an abortion—for themselves. I believe that respect for the pregnant person's dignity requires that we respect their choice. This is particularly important given that people seeking abortions often face challenging circumstances, including rape, abuse, and judgment from their loved ones.

[1] *The Seven Principles*, Unitarian Universalist Association, https://www.uua.org/beliefs/what-we-believe/principles.

10. I believe that just like any other person called to the ministry of the care of people, I am an agent of God on this Earth. My religious mission is to serve my parishioners and others I encounter with justice and compassion. I find fulfillment whenever I am supporting the dignity and worth of all people.

11. I also believe that every person who wants a confidential conversation with a member of the clergy before making decisions about their reproductive choices is entitled to that conversation. My dedication to providing pastoral care includes providing emotional and spiritual support to individuals and their families contemplating abortion. During my years as a Minister, I have provided confidential counseling to parishioners seeking guidance about unintended pregnancy, past abortions, and other reproductive decision-making.

History of First Church

12. First Church was founded in 1899 and has a long history of involvement in progressive causes—work that continues to this day. For instance, First Church advocated for school desegregation 20 years before any court-ordered school desegregation. The Church has spoken out for LGBT causes for 45 years and has worked on AIDS-related issues for years. Further, the Church itself has a history of providing comprehensive sex education for youth.

13. First Church also has a long history advocating for reproductive rights. As early as 1969, the Women's Alliance at the Church began to work on abortion rights. After speaking with Virginia Whitehill, then a volunteer at Planned Parenthood, the Women's Alliance formed a broad coalition to repeal Texas's existing abortion ban. This coalition identified Norma McCorvey, the plaintiff who would be known as Jane Roe, and participated in an amicus brief submitted in the *Roe v. Wade* case.[2] First Church continues that coalition to this day, celebrating

[2] *Our History*, First Unitarian Church of Dallas, https://www.dallasuu.org/history/.

its history and continuing to move forward its advocacy. For example, First Church recently held a fiftieth anniversary event for *Roe v. Wade*, and has hosted numerous community events, inviting speakers like Cecile Richards to present to our congregation.

14. When I first came to First Church, its history was particularly salient to me in both my ministry and my involvement with the progressive religious community in Dallas. I have long preached about society's responsibility to preserve reproductive rights and justice, but these issues took on new meaning when I joined First Church. Over the years, I have become increasingly dedicated to the cause and expanded my own advocacy regarding my beliefs. I joined the Board for Planned Parenthood of North Texas and, later, the Board for Planned Parenthood of Greater Texas, on which I still serve. From 2017 to 2019, I was the Chair of the Clergy Advocacy Board for Planned Parenthood Federation of America.

15. For many years, I have also worked with the Texas Freedom Network, a non-partisan grassroots organization of more than 150,000 religious and community leaders who support civil rights and progressive causes like reproductive rights and justice. First Church is the first church that Texas Freedom Network designated as a reproductive justice congregation.

16. First Church's work in the community has not come without risks. Five years ago, for example, First Church was a target for harassment by anti-choice protesters called the Abolitionists, who launched a protest outside our Church during Sunday services. Carrying large signs and wearing body cameras, the group yelled at parishioners and their children, haranguing them for attending a church that "kills babies." The protesters' attempt to scare away my parishioners was, thankfully, unsuccessful. In fact, the Church gained new members because of that incident.

Southwestern's Chaplaincy Program

17. Pursuant to my beliefs, in 2017, I founded a Chaplaincy Program at Southwestern Women's Surgery Center ("Southwestern"), an abortion provider in Dallas. Through my work with First Church and my community in Dallas, I recognized the shame and stigma that accompanies reproductive decision-making and the lack of support that many Texans have during these important and tender moments in their lives. My goal in creating the Chaplaincy Program was to create a support network to be present with patients and their families making decisions about abortion to fill this spiritual gap. This work is an important part of my commitment to the human journey and to ensuring that all individuals have spiritual support in the moments in their life when they need compassion.

18. The Chaplaincy Program involves me, and other clergy members from various religious faiths, including Jews, Methodists, Presbyterians, and Disciples of Christ, providing individual counseling and emotional/spiritual support to patients and/or their families during their appointments at Southwestern. At the program's peak, we had 8-10 members of the clergy volunteering at Southwestern during shifts throughout the week.

19. I have personally counseled hundreds of patients through the Chaplaincy Program. I have counseled a wide range of patients over the years, including: anti-choice individuals seeking an abortion to save their lives; families struggling with fetal diagnoses; patients abused by their own families; anxious boyfriends and husbands waiting for their partners; and the full range of individuals who are attempting to create agency in their own lives. Our conversations have covered a wide range of topics. I have assured patients that God is not condemning them for their choices. I have answered religious questions and sat in prayer or meditation with patients and their families. My counseling has helped uncover abuse and other

important issues that enable Southwestern's staff to provide the highest level of care to their patients.

20. Over the last several years, the Chaplaincy Program has served hundreds of patients and has been extremely well-received by both patients and clinic staff. Patients have been extremely thankful and have reported how important and meaningful the counseling we provide was to their experience at the clinic.

21. While the in-person Chaplaincy Program has been temporarily suspended during the COVID-19 pandemic, I have continued to be on-call for remote consultations with patients, and we intend to re-start in-person counseling when it is safe to do so.

The Impact of S.B. 8

22. I understand that S.B. 8 prohibits providing an abortion after the detection of "fetal heartbeat" and is therefore a six-week ban on abortions. The bill also makes it a violation to aid or abet an abortion after the detection of a "fetal heartbeat."

23. I am personally opposed to S.B. 8 because it effectively outlaws the majority of abortions in Texas. My understanding is that at six weeks, many pregnant people do not know that they are pregnant. Thus, in practicality, S.B. 8 makes it impossible for the majority of Texans to discern and decide whether to carry or terminate a pregnancy. Patients will not be able to access a safe medical procedure and necessary healthcare.

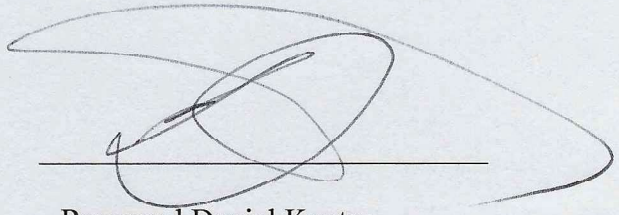
24. Moreover, I am concerned that the religious counseling I provide to both my parishioners and to Southwestern's patients through the Chaplaincy Program could subject me to lawsuits by individuals who say that I am "aiding and abetting" abortion. S.B. 8 appears to restrain what I—as a member of the clergy—can say to another human being and prevent me from providing the spiritual and emotional counseling that I am called by my religious beliefs to

provide. I am deeply concerned that S.B. 8 violates my ability to be in a conversation with a patient and that patient's family on a pastoral issue—an ability which I thought was protected in this country as sacrosanct. If I cannot provide pastoral care consistent with my religious beliefs, I am not able to exercise my right to practice as a Minister.

25. Based on my experiences as a member of the clergy in Dallas for 20 years, I believe that S.B. 8 will have wide-ranging and harmful consequences, both for people like me and for the Texans who need abortion care. At a minimum, S.B. 8 will result in many unwanted pregnancies and many Texans denied the ability to make basic decisions about their reproductive lives. The bill will have very public consequences as well, forcing people further into poverty and derailing people's agency in their own lives. There will inevitably be a lot of emotional and spiritual trauma, as well as unnecessary pain and suffering, on the part of people forced to bring a pregnancy to term, whether that pregnancy is viable or not.

26. I refuse to let S.B. 8 or any other law interfere with my ability to practice my ministry. Although I am concerned with the financial consequences—which seem entirely punitive and arbitrary—I must be able to fully present myself in the ministry to which I have been called by God.

Dated: 7/10/21



Reverend Daniel Kanter

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

WHOLE WOMAN'S HEALTH, et al.,	)	
	)	
Plaintiffs,	)	
	)	CIVIL ACTION
v.	)	
	)	CASE NO. _____
AUSTIN REEVE JACKSON, et al.,	)	
	)	
Defendants.	)	

DECLARATION OF REVEREND ERIKA FORBES IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

REVEREND ERIKA FORBES, declares under penalty of perjury that the following statements are true and correct:

1. I am a licensed, ordained minister and licensed spiritual counselor, located in Dallas, Texas.

2. I received my license and ordination as an Interfaith Minister from One Spirit Interfaith Seminary in New York City in 2006. I also received a Master's Degree in World Religions from the same institution as well as a B.A. in Education from California State University, Hayward (n/k/a California State University, East Bay).

3. After obtaining my license and ordination, I moved to San Antonio and founded The Awakening Spiritual Community, a faith-based 501(c)(3) organization. I served as full-time Spiritual Director and Pastor for six years, creating a non-denominational spiritual community bound together by love rather than religion. We held Sunday services and amplified our messages through digital media. Through this community, I have worked with people of every

religious background and provided pastoral care for various life cycle events, including pregnancy and other reproductive choices.

4. Since leaving The Awakening Spiritual Community, I have continued to work as a minister and have given sermons before many congregations throughout Texas.

5. I also maintain a separate, private spiritual counseling practice. My clients are primarily pregnant people from all religious traditions, including no tradition. They come to me for prayer and support as they make pregnancy decisions or after their abortions. I have counseled over 200 pregnant people, more than half of whom are Texans.

6. I am also the State Faith and Outreach Manager for the Texas Freedom Network, a non-partisan grassroots organization of more than 150,000 religious and community leaders who support civil rights and progressive causes like reproductive rights and justice.

7. I submit this declaration in support of Plaintiffs' Motion for Summary Judgment to prevent enforcement of Texas Senate Bill 8 ("S.B. 8"). The facts I state here and the opinions I offer are based on my training and experience as a licensed and ordained member of the clergy and spiritual counselor who has worked in Texas for the last eight years.

My Personal Beliefs

8. I have been an outspoken advocate for reproductive rights and justice for many years.

9. I believe that there is a greater divine presence—whether you call it God or a spirit or something else—that gives us the divine right to make the best choice for ourselves at any given time and that we alone are equipped with the right answers for the decisions we will make in our lives. This divine right includes the right to bodily autonomy, the right to thrive,

and, specifically, the right to obtain an abortion. I believe that in both scripture- and earth-bound traditions, God does not condemn the personal choice to end a pregnancy.

10. I believe that I have been called to help pregnant people, particularly people in Texas, realize their divine rights. Here in Texas, God has been taken hostage by those opposed to abortion. As a result, pregnant people have internalized shame and stigma around their abortion choices. I believe that it is my duty and responsibility to help people feel supported and trusted by a licensed and ordained member of the clergy while making choices about their bodies, particularly because this is a message they rarely hear from clergy. I believe that pregnant people in Texas need access to clergy that are supportive of their bodily autonomy.

11. My work as a spiritual counselor is particularly important because of who I am. I am a Black female minister, a mother, and a person who has had two abortions. It is rare to find a female member of the clergy like me. But this is exactly why pregnant people contemplating abortion seek my counsel.

12. Pregnant people who come to me for counseling need a variety of spiritual and emotional services to aid in their pregnancy decision. Many come to me to ask for permission from God for their abortion, for absolution of the guilt they feel, or for reassurance that they can make the choice that they already know is right for them. Clients who come to me after their abortions often seek relief from the shame and guilt they feel as a result of the stigma around abortion. For both types of clients, I use the clients' own religious tradition and texts to provide needed spiritual support.

13. Over the years, I have also become a vocal public advocate for abortion access in Texas. As a result, I have suffered from persistent digital harassment by those who oppose abortion.

The Effects of S.B. 8

14. I understand that S.B. 8 is an abortion ban that will prohibit all pregnant people in the state of Texas from accessing abortion care once they are approximately six weeks pregnant. I also understand that anyone who assists with an abortion later than six weeks can be sued in a civil case. Particularly given the hostility against me and others supportive of abortion in Texas, I fear that people who file suits under S.B. 8 will broadly target myriad forms of assistance, including the counseling that I provide.

15. It is impossible to overstate the impact that this bill will have if it were to go into effect. I know because I serve the people of Texas as a minister, a counselor, and a spiritual advisor. I am deeply concerned about the prospects pregnant people will face. As a person who had two abortions after six weeks myself, I know that the inability to get a legal and safe abortion will decimate pregnant people's livelihoods and future opportunities. S.B. 8 will take a tremendous toll on their financial, psychological, emotional, and spiritual existence.

16. Moreover, this bill is devastating because it will affect both the Texans who seek abortions after they are six weeks pregnant and every person in their support network, who will understandably fear being sued for any assistance they provide.

17. I fear that S.B. 8 will prevent me from fulfilling my calling and purpose as a member of the clergy. If this bill goes into effect, I fear I will not be able to continue my counseling work and will be forced by a court to stop supporting pregnant people making decisions about abortion. S.B. 8 will not change my beliefs, but it could prevent me from expressing them and practicing my own religious and spiritual beliefs.

18. I am driven to my work in counseling pregnant people by an inner, divine calling that there is some purpose bigger than myself. As a person of faith and as a woman who has

benefited from the right to abortion, I feel a divine mandate and destiny to sacrifice as much for those I serve now as the advocates who came before me. It is my turn to serve.

Dated: 7/12/2021

Reverend Erika Forbes

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

WHOLE WOMAN'S HEALTH, et al., Plaintiffs, v. AUSTIN REEVE JACKSON, et al., et al., Defendants.	Civil Action No. _____

DECLARATION OF ROSANN MARIAPPURAM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

I, Rosann Mariappuram, declare as follows:

1. I am the Executive Director of Jane's Due Process, Inc., a nonprofit corporation incorporated in Texas and based in Austin, that helps young people navigate parental consent laws and confidentially access abortion and contraception care in Texas. This includes providing funds to Texas abortion providers on behalf of abortion patients in the state to subsidize the cost of their care.

2. Our mission is to help ensure that young people in Texas have full reproductive freedom and autonomy over their healthcare decisions.

3. As Executive Director, my primary responsibilities are overseeing the daily operations of the organization, including its programmatic work; helping ensure the financial health of the organization, including fundraising; managing staff; and serving as a liaison to our Board of Directors.

4. I bring to this position experience as an attorney and advocate for abortion, miscarriage and contraceptive care access. I previously served on the Boards of Directors for the Lilith Fund for Reproductive Equity and NARAL Pro-Choice Texas.

5. I provide the following testimony based on personal knowledge acquired through my service at Jane's Due Process, including consultation with staff and Board members and review of the organization's business records.

Jane's Due Process Services

6. Jane's Due Process currently employs five full-time staff members and nearly 100 volunteers, and we serve young people throughout Texas. Under state law, an abortion provider must obtain the written consent of a parent or guardian before providing abortion care to a minor. Without parental consent, a minor's only recourse is to petition a court for a bypass of the requirement. Jane's Due Process operates a hotline through which young people can request assistance with the judicial bypass process. Specifically, we connect young people to a network of volunteer attorneys who we have recruited and trained to provide free legal representation to minors in judicial bypass proceedings.

7. Jane's Due provides case management services, which includes providing emotional support and making referrals to housing, education, childcare, and other social services.

8. Jane's Due Process completes about thirty hotline intakes for judicial bypass assistance per month. Roughly half of these clients complete the bypass process.

9. In addition to facilitating abortion access for young people who are unable to obtain parental consent, Jane's Due Process provides funds to abortion providers in Texas on behalf of young patients in the state to subsidize the cost of their care. Occasionally, we also refer young people to abortion providers in Texas, secure the abortion appointments for them, and train abortion providers on how to navigate Texas laws and regulations governing minors' abortion access.

10. Lastly, Jane's Due Process educates young people in Texas about contraceptive and abortion access, including the judicial bypass process, through educational events and social media.

11. Jane's Due Process provides these services to young people seeking abortion care in Texas to express and effectuate its deeply held belief in young people's equal rights to bodily autonomy and dignity.

Jane's Due Process Clients

12. Almost all our clients obtain an ultrasound dating their pregnancy before their bypass hearing because the legal requirements to be granted a bypass require them to be well informed about their decision, thus judges expect young people to have obtained counseling about the benefits, risks, and alternatives of an abortion before the bypass hearing. I cannot think of a single client who was less than six weeks pregnant when their pregnancy was dated.

13. Most young people involve a parent or guardian in their abortion decision if it is safe for them to do so. Jane's Due Process serves those who cannot. Our clients have parents or guardians who are deceased, incarcerated, or abusive; who are inclined to kick them out upon learning of their pregnancy or plans for an abortion; or who would try to coerce them to carry to term, for example.

14. Many of our clients experience multiple, intersecting forms of oppression. The vast majority are people of color: 50% identify as Latino/Hispanic and 24% identify as Black. Indeed, the majority of Texas abortion patients identify as Black or Latina—communities that already face inequities in access to medical care. Additionally, many of our clients live under the poverty line. Thus, they are unable to absorb an unforeseen medical expense—not to mention the costs of

traveling to one of the few abortion providers left in Texas, including transportation, lodging, and childcare.

15. Our clients also face unique barriers to abortion access as young people. The process of seeking a judicial bypass delays their abortion care by approximately ten days, which raises the costs of the abortion. Further, it is extremely difficult for young people to explain an extended absence from school or home caused by the judicial bypass hearing and abortion appointment. Such absences threaten the confidentiality surrounding their pregnancy and plans for an abortion. Confidentiality is especially important for our clients because of the unsupportive, and sometimes abusive environments they live in.

Impact of SB 8 on Jane's Due Process and Its Clients

16. I understand that Texas Senate Bill 8 ("SB 8"), which is scheduled to take effect on September 1, 2021, would ban the provision of abortions at approximately six weeks of pregnancy, prohibit aiding or abetting such abortions, and prohibit intending to aid or abet such abortions. I also understand SB 8 to enable private parties to sue individuals and entities who engage in such activities for a minimum of $10,000 per abortion performed in violation of the ban.

17. If SB 8 prevents Texas abortion providers from offering abortion care after six weeks' gestational age, our clients will no longer be able to obtain an abortion in Texas. As a result, while they will no longer need to petition for a judicial bypass in Texas, our clients will have no choice but to travel out of state for abortion care. Because they are unable to be absent from school or home for an extended period without compromising their confidentiality and safety, our clients will largely be unable to obtain an abortion outside of Texas—or at all. Thus, efforts by Jane's Due Process to divert its resources to out-of-state travel and to educate young people about out-of-state providers will be inadequate.

18. This is precisely what happened when Texas sharply curtailed abortion access at the start of the COVID-19 pandemic last year. Patients throughout Texas were delayed in accessing abortion and had to travel much longer distances to reach a provider legally authorized to perform abortions. Consequently, only a third of the young people who sought our help were able to obtain abortion care, all outside of Texas. Many young people we worked with reported that leaving the state was simply not an option for them.

19. SB 8 is unconstitutional and therefore invalid. But if it takes effect, I expect individuals or organizations opposed to abortion access to sue Jane's Due process for facilitating minors' abortion care after six weeks of pregnancy. We have already been targeted for our efforts to ensure that young people who are unable or to obtain parental consent can nevertheless terminate a pregnancy. Individuals who identify as "pro-life" have sent disparaging emails and letters to our staff, attempted to disrupt our tabling activities, and threatened our volunteer attorneys. And last year, a former Austin City Council member sued the City of Austin for allocating funds to the Austin Public Health department to provide abortion support services. After a competitive bid process, Jane's Due Process was awarded a contract to provide these services and to carry out its mission. The City of Austin has been sued three additional times over this funding and contract, and each time Jane's Due Process has been served with third-party subpoenas regarding the lawsuits.

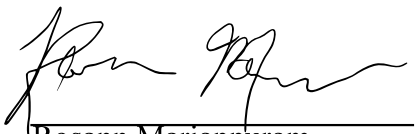
20. Lawsuits filed pursuant to SB 8 against Jane's Due Process would impair our ability to serve our clients because we lack the resources to defend against the suits. This is true even if we were to divert our limited staff time and organizational funds to doing so. Although we work with local attorneys regarding judicial bypass proceedings, we have been unable to secure commitments from any attorneys to represent us on a pro bono basis if we are sued under SB 8.

Moreover, the unlimited liability associated with lawsuits filed under SB 8 threatens to deplete our resources.

21. By preventing us from helping young people exercise their fundamental right to abortion access and forcing us to shift our resources to out-of-state travel they generally cannot pursue, SB 8 would frustrate the mission of Jane's Due Process.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Dated: July 12, 2021



Rosann Mariappuram

ROBERT PITMAN
U.S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
501 West 5th Street, Suite 5300
Austin, Texas 78701

TELEPHONE
(512) 391-8824

August 9, 2021

Lyle W. Cayce, Clerk
United States Court of Appeals for the Fifth Circuit
600 S. Maestri Place
New Orleans, LA 70130-3408

Re: *In re Penny Clarkston,* No. 21-50708

Dear Mr. Cayce,

The District Court responds to the invitation by the Court of Appeals to respond to Defendants Penny Clarkston and Mark Lee Dickson's Petition for Mandamus pursuant to Federal Rule of Appellate Procedure 21(b)(4).

First, the District Court confirms that, despite having ordered briefing to occur simultaneously on Defendants' motions to dismiss and Plaintiffs' motion for summary judgment in light of the time constraints inherent in this case, the District Court does intend to address jurisdictional issues before resolving the merits of the case. Indeed, nothing in its original scheduling order should have been taken to indicate otherwise. The District Court invited Defendants to raise in their responses any obstacles to resolving the merits of the case on the timeline instituted by the court.

Second, in light of Plaintiffs' recently filed motion for preliminary injunction, the District Court intends to revise the current briefing schedule to provide for simultaneous briefing of *Defendants' motions to dismiss* and *Plaintiffs' motion for a preliminary injunction*. It is this Court's impression that it is not uncommon for district courts in this circuit to routinely order briefing on motions to dismiss simultaneously with motions for emergency injunctive relief. *See, e.g.*, *TrueBeginnings, LLC v. Spark Network Servs., Inc.*, 2008 WL 11350256, at *1 (N.D. Tex. Mar. 6, 2008) ("[B]ecause both motions to dismiss and plaintiff's motion for preliminary injunction implicate the 'Terms of Use' agreement on the TrueBeginnings website, the court determines that all three motions should be briefed together."). Any motions for summary judgment will then be decided in the appropriate sequence.

Accordingly, absent alternate guidance from the Court of Appeals, it is the District Court's intention to enter the following revised briefing schedule:

1. All responses to Defendants' motions to dismiss shall be filed on or before **August 11, 2021 at 5 p.m.** Any replies shall be filed on or before **August 13, 2021**.

2. Defendants shall respond to Plaintiffs' motion for preliminary injunction, (Dkt. 53), on or before **August 16, 2021 at noon**. Any replies shall be filed on or before **August 19, 2021**.
3. Defendants shall respond to Plaintiffs' motion to certify class, (Dkt. 32), on or before **August 25, 2021 at noon**. Any replies shall be filed on or before **August 27, 2021**.
4. Defendants shall respond to Plaintiffs' motion for summary judgment on or before **September 10, 2021**. Any replies shall be filed on or before **September 17, 2021**.
5. The Court will hold a hearing on Plaintiffs' motion for preliminary injunction on **August 30, 2021**.

Because Defendants Clarkston and Dickson need not respond to Plaintiffs' motion for summary judgment before their motions to dismiss are resolved under the District Court's planned revised scheduling order, the District Court respectfully requests that this Court dismiss the pending petition for mandamus as moot. The District Court is endeavoring to sequence the many important requests for relief being sought by all the parties, bearing in mind the compressed schedule, and ensuring the case proceeds in accordance with the law and notions of fairness.

Sincerely,

ROBERT PITMAN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Whole Woman's Health, et al., Plaintiffs, v. **Austin Reeve Jackson**, et al., Defendants.	Case No. 1:21-cv-00616-RP

DECLARATION OF MARK LEE DICKSON

I, Mark Lee Dickson, being duly sworn, states as follows:

1. My name is Mark Lee Dickson. I am over 21 years old and fully competent to make this declaration.

2. I have personal knowledge of each of the facts stated in this declaration, and everything stated in this declaration is true and correct.

3. I am a defendant in this lawsuit.

4. The plaintiffs have sued me because they claim that they face a "credible threat" that I will sue them after the Texas Heartbeat Act takes effect on September 1, 2021. *See* Complaint, ECF No. 1 at ¶¶ 17, 50.

5. I have no intention of suing any of the plaintiffs under the private civil-enforcement lawsuits described in Senate Bill 8, because I expect each of the plaintiffs to comply with the Texas Heartbeat Act when it takes effect on September 1, 2021. I expect that the mere threat of civil lawsuits under section 171.208 will be enough to induce compliance. We saw that happen in Lubbock last June, when Planned Parenthood ceased performing abortions in response to a local abortion ban that au-

thorized private civil-enforcement suits against anyone who performed an illegal abortion or "aided or abetted" such an act. Planned Parenthood complied immediately when the Lubbock ordinance took effect on June 1, 2021, rather than expose itself and its employees and volunteers to ruinous civil liability and potential criminal prosecution under sections 1.07(a)(26) and 19.02(b) of the Texas Penal Code. I expect the plaintiffs in this case to do the same when the Texas Heartbeat Act takes effect on September 1, 2021.

6. I have never threatened to sue any of the plaintiffs under the private civil-enforcement lawsuits described in Senate Bill 8, either publicly or privately, and I have never told anyone that I intend to sue any of the plaintiffs under the private civil-enforcement lawsuits described in Senate Bill 8. Nor have I ever formed an intention to sue any of the plaintiffs under the private civil-enforcement lawsuits described in Senate Bill 8.

7. I have reviewed the plaintiffs' complaint (ECF No. 1) and the motion for summary judgment (ECF No. 19) that they have filed in this case. Neither document makes any claim that the plaintiffs intend to defy Senate Bill 8 and expose themselves to private civil-enforcement lawsuits when the statute takes effect on September 1, 2021. Instead, the plaintiffs complain about the "Hobson's choice" that Senate Bill 8 subjects them to, without ever stating *which* choice they intend to make when the statute takes effect. So I continue to believe that the plaintiffs will comply with Senate Bill 8 and obviate the need for private civil-enforcement lawsuits. Indeed, no rational abortion provider or abortion fund (in my view) would subject itself to the risk of civil liability under Senate Bill 8, especially when the Supreme Court could overrule *Roe v. Wade* next term in *Dobbs v. Jackson Women's Health Organization*, No. 19-1392.

8. I have personal knowledge that there are many other individuals who intend to sue the abortion-provider plaintiffs and the abortion-fund plaintiffs if they defy

Senate Bill 8, and those individuals will sue even if this Court enjoins me from filing a private civil-enforcement lawsuit.

9. The plaintiffs also seek to enjoin me from filing a lawsuit to recover attorneys' fees under section 30.022 of the Texas Civil Practice and Remedies Code. I currently have no intention of suing the plaintiffs under section 30.022 because I expect to recover fees from the plaintiffs under 42 U.S.C. § 1988(b) at the conclusion of this litigation. Section 1988(b) allows prevailing defendants to recover fees if the claims brought against them are "unreasonable" and "without foundation." *Christiansburg Garment Co. v. EEOC,* 434 U.S. 412, 418 (1978). The law of the Fifth Circuit is clear that a private citizen does not act "under color of state law" merely by filing a lawsuit authorized by a state statute. *See McCartney v. First City Bank*, 970 F.2d 45, 47 (5th Cir. 1992); *Howard Gault Co. v. Texas Rural Legal Aid, Inc.*, 848 F.2d 544, 555 (5th Cir. 1988); *Hollis v. Itawamba County Loans*, 657 F.2d 746, 749 (5th Cir. 1981). So I will seek and expect to recover attorneys' fees from the plaintiffs under 42 U.S.C. § 1988(b) at the conclusion of this litigation, which will obviate the need for me to seek recovery of fees under section 30.022 of the Texas Civil Practice and Remedies Code.

10. If I am unsuccessful in recovering fees under 42 U.S.C. § 1988(b) at the conclusion of this litigation, then I will consider at that time whether to sue the plaintiffs under section 30.022 of the Texas Civil Practice and Remedies Code, in consultation with my attorneys.

11. I am not a party to any other lawsuit that seeks to prevent the enforcement of any Texas abortion law, and I have not been a party to any such lawsuit in the past. If I become a party to any such lawsuit during the pendency of this litigation, I will notify the Court.

12. I have not conspired or consulted with any judge or any government official with regard to any possible lawsuit that I might bring under Senate Bill 8, and I have

no intention of doing so. If I ever decide to bring a civil-enforcement lawsuit under Senate Bill 8, it will be entirely of my own accord, and it will be brought in consultation with no one except my attorneys, who are private citizens and not government officials. Under no circumstance will I coordinate my efforts with any judge or any government official, and I will not allow my attorneys to do so.

13. I am a resident of Gregg County, not Smith County, and I have no intention of changing my residence to Smith County at any time in the future. So if I ever were to sue someone under section 3 or section 4 of Senate Bill 8, I would not file that lawsuit in the 114th District Court or in any district court in Smith County.

This concludes my sworn statement. I swear under penalty of perjury that the facts stated in this declaration are true and correct.

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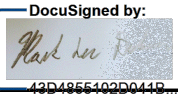
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MARK LEE DICKSON

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Whole Woman's Health, et al.,

Plaintiffs,

v.

Austin Reeve Jackson, et al.,

Defendants.

Case No. 1:21-cv-00616-RP

DECLARATION OF JOHN SEAGO

I, John Seago, being duly sworn, states as follows:

1. My name is John Seago. I am over 21 years old and fully competent to make this declaration.

2. I have personal knowledge of each of the facts stated in this declaration, and everything stated in this declaration is true and correct.

3. I serve as Legislative Director for Texas Right to Life.

4. Texas Right to Life strongly supported the enactment of Senate Bill 8.

5. Texas Right to Life is publicizing the availability of private civil-enforcement lawsuits under Senate Bill 8 through social media and other forms of advertising, and we are encouraging individuals to sue abortion providers and abortion funds if they defy the law when it takes effect on September 1, 2021.

6. I have personal knowledge that there are several individuals who intend to sue the abortion-provider plaintiffs and the abortion-fund plaintiffs if they defy Senate Bill 8, and those individuals will sue the plaintiffs for violating Senate Bill 8 even if this Court enjoins Mark Lee Dickson from filing private civil-enforcement lawsuits under the statute.

This concludes my sworn statement. I declare under penalty of perjury that the facts stated in this declaration are true and correct.

DocuSigned by:
John Seago
E1818FCE223C4AF...

JOHN SEAGO

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

WHOLE WOMAN'S HEALTH, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	CIVIL ACTION
v.	)	
	)	CASE NO. 21-cv-00616-RP
AUSTIN REEVE JACKSON, *et al.*,	)	
	)	
Defendants.	)	

DECLARATION OF J. ALEXANDER LAWRENCE

J. ALEXANDER LAWRENCE, declares under penalty of perjury that the following statements are true and correct:

1. I am a Partner in the law firm Morrison & Foerster LLP ("Morrison & Foerster").

2. On August 4, 2021, Judge Austin Jackson held a press conference at Living Alternatives, The AXIA Center (Pregnancy Resource Center) in Tyler, Texas.

3. The video of the press conference is available at https://www.ketk.com/news/local-news/judge-austin-jackson-east-texas-pro-life-activist-sued-in-effort-to-block-texas-abortion-heartbeat-bill/ (last visited August 7, 2021).

4. Attached hereto as Exhibit A is a true and correct copy of a transcription of the video of the press conference.

Dated: August 7, 2021

/s/ J. Alexander Lawrence
J. Alexander Lawrence

Exhibit A

JUDGE AUSTIN JACKSON, EAST TEXAS PRO-LIFE ACTIVISTS SUED IN EFFORT TO BLOCK TEXAS ABORTION HEART (AUGUST 4, 2021)

Judge Austin Jackson

Thank you so much for allowing us to be here today and to the rest of the folks here from Living Alternatives, I want you to know how much this means to me personally that you allowed us to not only come in here, but were willing to show the courage to stand with us on an issue like this.

As a judge, I like to think that every day I get to do a little justice and there's no doubt, looking at what you do here that every day you get to love a little mercy. And I think it's very exciting that today we get to come together and walk humbly together with our God. And so thank you so much for that opportunity.

For those of you who don't know, my name is Austin Reeve Jackson, and I'm the judge of the 114th District Court here in Smith County. And we're here today because I have been recently named as the number one target in Texas of Planned Parenthood and other pro-abortion activists. On the most basic level, we're here because these groups have filed a frivolous lawsuit against me down in Travis County in front of a liberal Obama-appointed federal judge for no reason other than that I am someone committed to the rule of law and biblical values. We're here because out-of-county, out-of-state, out-of-touch groups like Planned Parenthood and the ACLU have decided that if they can't silence the legislators down in Austin, maybe they can silence the judges who enforce the law in east Texas. You see, the left is so used to the idea of having an activist judge that they believe any judge can be bought, bullied, or beaten into submission or resignation.

Make no mistake; this lawsuit is a direct attack by far-left groups on the rule of law and the right of pro-life communities to elect people who share their values. This is cancel culture at its finest. But man, am I lucky to be from Smith County. The outpouring of support over this attack on me, on my job, on all of us who share these values has been met by an overwhelming show of support from people like Senator Hughes and the folks here at Living Alternatives. But more than that, I am incredibly thankful for the wonderful, wonderful support from average east Texans, who are not only proud to have a conservative judge who is willing to answer the fight that these groups started, but who are thrilled to be standing by me as we take on this challenge. With their support, I am one hundred percent committed to seeing this frivolous lawsuit dismissed, the attempts to run Christians out of elected office defeated, and the voice and the vote of pro-life Texans defended.

You see, when Planned Parenthood came for me, they didn't realize they were coming for a whole community of Texans who are unshakeable in our belief that there are certain and immutable rights with which we are all endowed not by our government, but by our God. Not by virtue of being out of the womb, but by virtue of having his spirit within us from the moment of conception. And chief among these rights is the unalienable right to life. And with the support of my community, I am here to today that I will not be scared by the vicious attacks and implicit threats of radical organizations. I will not allow the voice and the vote of any Texan to be silenced by the left, but I will stand for what is right. On this front of the culture war, I will yield no further. And regardless of what some organization like Planned

Parenthood threatens me with. No matter what some leftist judge down in Austin may do to me. As for me and my house, we will continue to serve the Lord. And I am thrilled to have by my side in this fight my friend and my lawyer Shane McGuire, who has taken up this cause and who is representing me at no cost to the Smith county taxpayer because he believes in me, but more importantly, because he believes this fight is a fight worth having.

Shane McGuire

Thanks, Reeve. Good morning. My name is Shane McGuire. I just wanted to say a couple of words about the lawsuit itself, he merit or lack thereof of the lawsuit, and why it is I think that Reeve has been sued in this case.

First, I've read this complaint in full. I've read all the motions filed by these special interest groups. And I have to say this lawsuit is frivolous on its face. It is black letter law that you cannot sue a sitting judge and just demand some advisory opinion, asking a court to ban people from filing lawsuits in his court. This—it is open season on judges in Texas if this lawsuit is allowed to go forward.

Now I want to say a word about why it is I think Judge Jackson has been sued in this case. There's a thousand judges in Texas. They could have sued anybody. Reeve came into my office last week and said, "Shane, why do you think it is they picked me?" I said, "Reeve, I've known you a long time. I know exactly why they picked you. They picked you because they know that you're a man who would rather read his bible than read Rules for Radicals by Saul Alinsky. They picked you because they know you're a man of character and integrity and a man of God. And they picked you because they knew you would engage in the fight."

So listen, we're going to file a motion to dismiss this lawsuit today or tomorrow. It's already been drafted. I was editing it as late as 11 o' clock last night. That's going to get on file. I'm sure ultimately the case against Judge Jackson is going to be dismissed if the rules of law are followed. But I would ask you all to pray for him and to pray for his—we've got a great legal team. Pray for all of us as we go forward in this case. And Senator Hughes, thank you for your leadership on the life issue. We appreciate everything that you've done. Thank you all.

Senator Bryan Hughes

It is so good to be here with you. The work you've done for all these years, quietly serving, helping those little babies come in life, alongside those moms, helping those moms in difficult times. Thank you. Our crisis pregnancy centers, the best kept secret of the pro-life movement in all the debate about the right to life. This work done by this place and places like it around Texas and around the country. This is where the real work is being done. Where moms are being helped. They're being encouraged. Where hearts are being changed, and little lives are being saved. So what a blessing to be here. Not my first time here, and is it great to be back here today.

I'm Bryan Hughes, and I'm blessed to represent northeast Texas in the Texas senate, and yes, I'm so honored to be the author of Senate Bill 8, the—we called it the heartbeat bill. It's now the heartbeat law, signed by Governor Abbott. Governor Abbott signed that bill and gave me the pen he used to sign, and I will cherish that forever. That bill says—that law says that little baby growing inside her mother's womb—when there's a heartbeat detected. Every one of us here has a heartbeat. I can tell from looking at you. That heartbeat, that universal sign of

life—they tell us to follow the science. We are following the science. When there is a heartbeat, there is a human life worthy of protection, and that's what the heartbeat law does in Texas.

Now, it takes a different approach. You may have seen this many places in Texas. They are not blessed with wonderful district attorneys like we have in Jacob Putman. We have a strong constitutional concerted district attorney. Many DAs around the state and around the country publicly told us last year, "If you pass a heartbeat bill, we will not enforce it." These are district attorneys sworn to enforce the law who said, "We will not enforce a heartbeat bill." And so that's why Senate Bill 8 doesn't need their help. Senate Bill 8 doesn't require any action by the district attorney, by the state, or any government actor. It's driven by private individuals who want to stand up for the right to life.

And so any Texan who is aware of an illegal abortion can bring an action against the doctor committing the illegal abortion. Let me be clear. The mother is not affected by the heartbeat law. This is about doctors performing illegal abortions. And any Texan has the right to bring that suit, to right that wrong, to protect that innocent human life. Now the radical abortion industry is upset about this law, and that's why they've taken the extreme step of suing Judge Jackson and every judge in the state of Texas.

I can't underscore enough what you've heard. This lawsuit is radical. It clearly violates the law. And we're confident the judge will do the right thing. The court system will work as it should. And at the end of the day—at the end of the day, we look forward to this lawsuit being successful on the right side. This law moving forward, and little babies—that little baby growing inside her mother's womb—inside her mother's womb ought to be the safest place on earth. That little unborn baby—the most innocent, the most helpless, and the most deserving of protection a human will ever be. We're so thankful the heartbeat law has been signed by Governor Abbott, and we look forward to its taking effect and being upheld by the courts. Thank you for being here today. God bless you.

Unidentified

Alright, thank you all so much for being here. This concludes the press release. If anyone wants to stay and offer any interviews for Reeve, then you're welcome to. He'll be available. Thank you so much.

Mark Lee Dickson
May 5 ·

Texas Right to Life was live.
May 5 ·

The Texas House passed the Texas Heartbeat Act, Senate Bill 8, which bans abortions in Texas after the preborn child's heartbeat is detectable, as early as 6 weeks!

This bill is very close to being law since SB 8 was already passed by the Texas Senate! Because the Texas Heartbeat Bill was amended by the House, SB 8 will go back to the Senate for final approval, and then to the governor's desk for signing.

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Twitter - https://twitter.com/txrighttolife
Website - https://www.texasrighttolife.com

26 9 Comments 4 Shares

Like Comment Share

Rick Small
God curses Heartbeat bills.
Woe to those who decree iniquitous decrees, and the writers who keep writing oppression, to turn aside the needy from justice and to rob the poor of my people of their right, that widows may be their spoil, and that they may... See More

Like · Reply · 7w

Jonathan Darnel
I could maybe see this as a path forward if the state would just uphold the law. But if they just cave when someone sues the state what's the point?

Like · **Reply** · 7w

Mark Lee Dickson
Jonathan Darnel The Texas Heartbeat Act is similar to the Sanctuary Cities Ordinance.

Check out this quote from the Texan. The same principle applies.

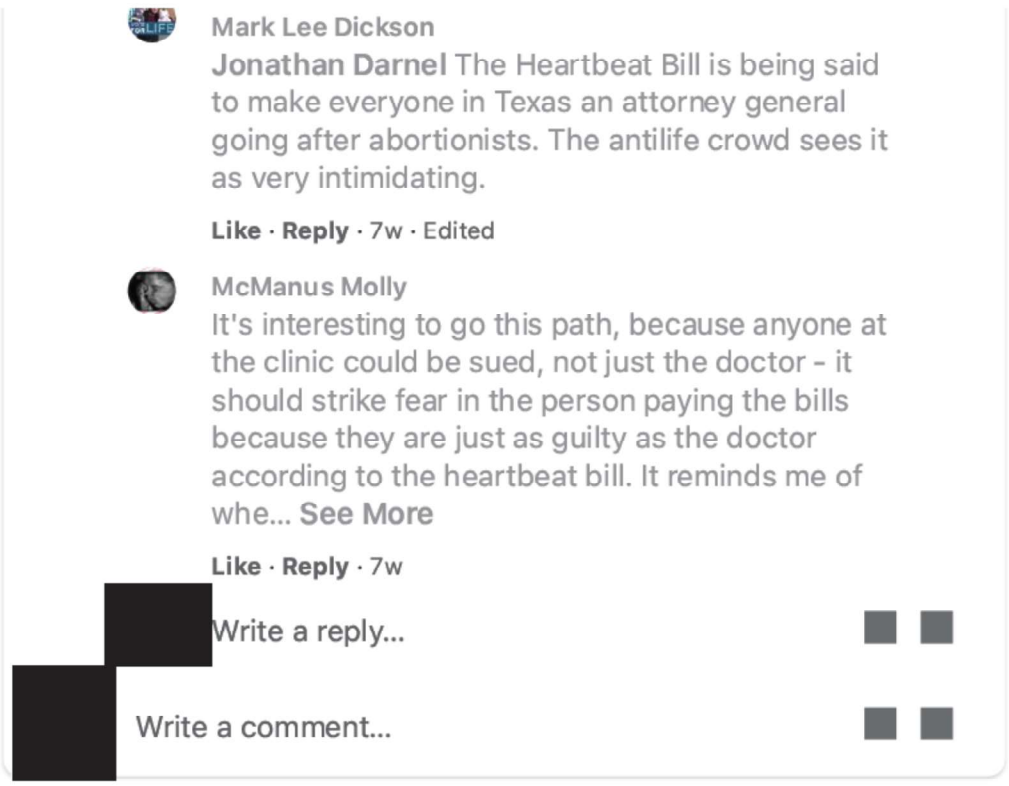
"According to Josh Blackman, a Houston law professor with a favorable opinion of the ordinance, said the crafting of its text has complicated pro-choice retaliation that would otherwise be cut-and-dry.

"It's actually a very clever ordinance, the way they've devised it. Usually, the way laws work is the government enforces it. So let's say the city or county puts a restriction on abortion.... With the usual law, when the government enforces it, Planned Parenthood can bring what's called a pre-enforcement challenge. It says, 'Well, this law hasn't been enforced yet, but they will enforce it, and when they do enforce it, we'll have our rights violated. So we can sue now,'" Blackman said.

"This ordinance is different. It specifically says government, the Lubbock government, cannot enforce this law. Cannot. The only people who can enforce this law are private citizens... Why is this fact important? It's almost impossible to do a pre-enforcement challenge when the government's not enforcing it. In other words, they can sue the government — which they probably will try to — and the court will say, 'Well, that's nice, but the government can't enforce this law, so what are you suing them for?' There's no way for a court to hear the validity of this law until someone actually brings a civil lawsuit.""

Like · **Reply** · 7w

Jonathan Darnel
Mark Lee Dickson I will have to research and think about this more. However, I must admit it seems on the surface to lack teeth. Why can't we find any city in the nation willing to simply stop people (physically) from killing their children?


Mark Lee Dickson
Jonathan Darnel The Heartbeat Bill is being said to make everyone in Texas an attorney general going after abortionists. The antilife crowd sees it as very intimidating.
Like · Reply · 7w · Edited
McManus Molly
It's interesting to go this path, because anyone at the clinic could be sued, not just the doctor - it should strike fear in the person paying the bills because they are just as guilty as the doctor according to the heartbeat bill. It reminds me of whe... See More
Like · Reply · 7w
Write a reply...
Write a comment...

Mark Lee Dickson is with **Bryan Hughes**.
29 March ·

Today our Texas State Senators made us proud by voting 19-12 to pass SB 8 - the Texas Heartbeat Act! Special thanks to Senator Bryan Hughes for championing this very important bill!

#therighttolife #thefightforlife #fromconceptiontillnaturaldeath #unbornlivesmatter #loveoneanother

260 163 comments 66 shares

Like Comment Share

Donna McWilliams
Good Job Senators!!!
Like · Reply · 19 w 1

Ted Raymond
Please tell me how it will be enforced.
Like · Reply · 19 w 1

Mark Lee Dickson
Ted Raymond Immediate private enforcement by citizens throughout Texas.
Like · Reply · 19 w 2

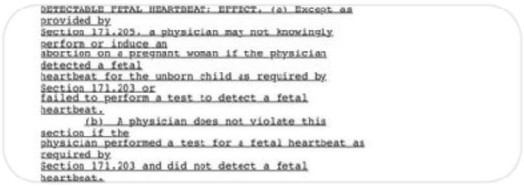
Ted Raymond
Mark Lee Dickson so we're going to have private citizens in the kill room?

Mark Lee Dickson
Ted Raymond You should read the bill. That is what we criticize people in D.C for not doing but we ourselves are just as lazy at times. The bill is very clear about how it is enforced. And then listen to the video posted with them debating out the bill.

Like · Reply · 19 w

2

Ted Raymond
Mark Lee Dickson I guess my question is this: what is going to stop the abortionist or his staff from Lying if they find a heartbeat but the love of money causes them to lie? Or concealing the fact that they found a heartbeat? Who is going to oversee t... See more


DETECTABLE FETAL HEARTBEAT; EFFECT. (a) Except as provided by Section 171.205, a physician may not knowingly perform or induce an abortion on a pregnant woman if the physician detected a fetal heartbeat for the unborn child as required by Section 171.203 or failed to perform a test to detect a fetal heartbeat.
(b) 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.

Like · Reply · 19 w · Edited

2

Mark Lee Dickson
Ted Raymond Did you even read the whole bill? You gotta read the bill!

Like · Reply · 19 w

1

Ted Raymond
Mark Lee Dickson I have. And I see all the things that will be against the law. But I don't see an enforcement officer on site during testing for the heartbeat! Abortionists are by and large...liars!

Like · Reply · 19 w

2

Mark Lee Dickson
Ted Raymond You did not listen to the Senate floor debate did you? The fact that you are making the arguments you are making reveal that you do not understand how the bill works.

Like · Reply · 19 w

Ted Raymond
Mark Lee Dickson I listened to as much of it as I could stomach.

Like · Reply · 19 w

Mark Lee Dickson
Ted Raymond Well if you didn't listen to all of it and are speaking without knowledge then what more can be said?

Donna McWilliams
Ted Raymond to say that legal action is not enough so we should do nothing is foolish. Right to Life Politicians and people like Mark are out their fighting the giant in front of them. It makes a difference. My question is what are you doing for this c... See more

Like · Reply · 19 w

Write a reply...

Cass Lynette Bowker
Amen!!

Like · Reply · 19 w

Jill Alexander Lindsey
This is great!!!

Like · Reply · 19 w

Chalon Goodley
Awesomeness!!! 💕

Like · Reply · 19 w

Pamela Murphy Payne
👍👍👍👍👍👍👍

Like · Reply · 19 w

Julia Davis
Wonderful news!

Like · Reply · 19 w

Ruthie Davis Letterman
Thank you Lord!

Like · Reply · 19 w

Marcia Coleman

Like · Reply · 19 w

Debbie Warbington Rogers
Thank you both !

1

Like · Reply · 19 w

Gay Weitinger Herrin

Martha Roberts
Praise Our Lord! Thank you all so much.
Like · Reply · 19 w 1

Cherri Head
This is awesome! 1
Like · Reply · 19 w

Sandra Boyd King
Fabulous.👏👏 1
Like · Reply · 19 w

Jim Nelson
Amen 1
Like · Reply · 19 w

James McKinney
Thank You Mark 1
Like · Reply · 19 w

Melanie Davis Wright
👏👏👏 nice work men! Thankful for all your hard work! 1
Like · Reply · 19 w

Mary Beth Scallon
Yes! Thank you, Texas!! 1
Like · Reply · 19 w
Mary Beth Scallon replied · 1 reply

Jon Speed
Disgusting. You should be ashamed of yourself for denying the humanity of babies at conception. 6
Like · Reply · 19 w
Hide 14 replies

Mark Lee Dickson
Jon Speed he bill clearly states, "The State of Texas has never repealed its pre–Roe v. Wade statutes that outlaw and criminalize abortion unless the mother's life is in danger." In making this statement this bill fully recognizes the humanity of unborn children. I encourage you to listen to the arguments from democrat Senator Johnson which were brought against the bill today Jon. It is a great bill that Senator Hughes defended well. Pending passage by the House, because of this bill you will be able to bring many lawsuits later this year against any at WWH who are in violation of this law

Betty Taylor
If the bill recognizes the humanity of unborn children , does it protect all unborn children ? Does it defy Roe ?

Something about not showing partiality and unjust weights and measures the Lord abhors .

Like · Reply · 19 w

Jon Speed
Mark you are digging pretty deep to support a bill like this. It depends on the fairy tale of Roe being overturned. It's unjust because it denies equal justice for life in the womb. It is also an unenforceable heartbeat bill. It's an ethical nightm... See more

1

Like · Reply · 19 w

Mark Lee Dickson
Betty Taylor No bill, in and of itself, protects all unborn children. Not even the Abolition Bill, unfortunately. But I am not saying you should not support the Abolition Bill. We have to do what we can! I do not think the Lord hates the Abolition Bill... See more

Like · Reply · 19 w · Edited

Mark Lee Dickson
Jon Speed The enforcement of the bill which can take place right now is not dependent on Roe v. Wade being overturned, but is immediate. Did you even read the bill?

Like · Reply · 19 w

Jon Speed
Mark Lee Dickson explain limitation (a) (1).

Like · Reply · 19 w

Mark Lee Dickson
Jon Speed Which section are you referring to?

Like · Reply · 19 w

Jon Speed
Mark Lee Dickson look under "limitations".

Like · Reply · 19 w

Mark Lee Dickson
Jon Speed Are you referencing Sec. 171.207. Limitations On Public Enforcement?

Like · Reply · 19 w

Mark Lee Dickson
The statement "(1) legalize the conduct prohibited by this subchapter or by Chapter 6-1/2, Title 71, Revised Statutes;" means that just because there is no public enforcement right now of the public enforcement penalties that does not mean the actions ... See more

Like · Reply · 19 w · Edited

Jon Speed
Mark Lee Dickson lawsuits are not equal justice or equal protection for the unborn. Shame on you.

Like · Reply · 19 w

Mark Lee Dickson
Jon Speed Some might say "shame on you" for closing your business for a day to not pay sales tax . . . only to reopen it and pay sales tax to the same abortion loving government. That is not something I shame you for. I say you did what you could, desp... See more

Like · Reply · 19 w

Amy Hedtke
The biggest problem is that these same legecritters who refuse -- REFUSE!!-- to even FILE abolition will sail to re-election on your praise. Abolition gets successfully set back another 20 years with stuff like this. Gotta wait till these freaks die of... See more

Like · Reply · 19 w

Elea Wood
Jon Speed Go back to liver ny

Like · Reply · 18 w

Write a reply...

Norm Breitenberg
PTL

Like · Reply · 19 w

Connie Cassell Ainsworth
Whoooohooooo!!!!

Like · Reply · 19 w

Betty Taylor
Why is that celebratory ?

2

Like · Reply · 19 w

Hide 13 replies

Mark Lee Dickson
Betty Taylor The bill clearly states, "The State of Texas has never repealed its pre–Roe v. Wade statutes that outlaw and criminalize abortion unless the mother's life is in danger." In making this statement this bill fully recognizes the humanity of unborn children. It is a great bill. Pending passage by the House, because of this bill you will be able to bring many lawsuits later this year against any abortionists who are in violation of this bill. Let me know if you are looking for an attorney to represent you if you choose to do so. Will be glad to recommend some.

Like · Reply · 19 w 1

Betty Taylor
So it is just to kill let them kill some babies ? And what abortionist is going to be honest and perform an honest sonogram ?

Like · Reply · 19 w 1

Mark Lee Dickson
Betty Taylor You haven't read the bill. Read the bill. If you read the bill and understood the bill then you would know the answer to that!

Like · Reply · 19 w

Jon Speed
Mark Lee Dickson I've read the bill and if you have then you already know that this is EXACTLY what this bill does. Stop lying Mark. Read the first line.

Like · Reply · 19 w 1

Mark Lee Dickson
Jon Speed You may have read the bill but you clearly do not understand the bill or it's ramifications. I am guessing you will not be filing any lawsuits against the abortionist later this year if they are performing abortions in violation of this law? If this passes the power will be in your hands to do so!

Like · Reply · 19 w · Edited

Jon Speed
Mark Lee Dickson guessing? No I won't be filing imaginary lawsuits based on a law the SCOTUS will shoot down as it has shot down every other heartbeat ban on the books. I too like fantasy but Tolkien is a better writer than Hughes.

Mark Lee Dickson
Jon Speed The Supreme Court does not have the ability to kill laws Speed. And this is unlike other heartbeat bills. Had you heard or read the commentary on the bill and understood it then you would know that.

Like · Reply · 19 w 1

Jon Speed
Mark Lee Dickson so show me one heartbeat Bill that's been upheld by the court.

Like · Reply · 19 w 1

Mark Lee Dickson
Jon Speed This is unlike any heartbeat bill out there Speed. This was explained several times. Even in liberal rags.

Like · Reply · 19 w

Jon Speed
Mark Lee Dickson since the issue with the SCOTUS has been not placing an undue burden on the abortive woman this thing has a snowball's chance.

Like · Reply · 19 w 1

Mark Lee Dickson
Jon Speed I do not see how this places an undue burden on the woman getting the abortion anymore than people suing abortionists who rear-ended them at a stop light would create an undue burden for women getting an abortion.

Like · Reply · 19 w · Edited

Jon Speed
Mark Lee Dickson be honest man. You know how the court rules on these regulations.

Like · Reply · 19 w 3

Mark Lee Dickson
Jon Speed You making that statement reveals that you do not really understand the bill. That is why the bill was written the way it was.

Like · Reply · 19 w

Write a reply...

Leah Powers
Praising God for a step forward

Like · Reply · 19 w 1

Mark Foster
Thank You Senator Bryan Hughes for standing up for the Unborn !!! ❤️🙌
Like · Reply · 19 w 1

Bobbie LaGrone Harrison
Thank you Sir you have made me proud I voted for you.
Like · Reply · 19 w 1

Ruth Alison
Love this!! 1
Like · Reply · 19 w

Rene Davison
This does not provide equal protection for all preborn children... even if it doesn't get overturned. It is unenforceable (and yes, I have read the bill and heard testimony and debate). It doesn't account for the babies murdered at home via abortion pills ordered online. How does this bill stop that? The moms are not held accountable for murdering their children. You keep saying that we can go after the abortionists. They are not the only guilty parties. Everyone involved should be held accountable. Only a bill of true abolition (HB3326) will do that. Stop praising prolife politicians and their iniquitous decrees!
Like · Reply · 19 w 6
Mark Lee Dickson replied · 11 replies

Jacob Ross Miller
This bill is a wicked bill.

Exodus 23:2 (ESV): You shall not fall in with the many to do evil, nor shall you bear witness in a lawsuit, siding with the many, so as to pervert justice... See more
Like · Reply · 19 w 4
Mark Lee Dickson replied · 14 replies

Amy Hedtke
The biggest problem is that these same legecritters who refuse -- REFUSE!!-- to even FILE abolition will sail to re-election on your praise. Abolition gets successfully set back another 20 years with stuff like this. Gotta wait till these freaks die of... See more
Like · Reply · 19 w 6
Mark Lee Dickson replied · 16 replies

T. Russell Hunter

Elea Wood replied · 27 replies

Ryan Bailey Cavel
Mark Lee Dickson I asked you previously if you have a list of the cities that have become sanctuary cities for the unborn and the population of each city and you gave me what I perceive to be the typical politicians answer. Then, I see your comment on ... See more

Like · Reply · 19 w 1

Bethany Stevenson Owens replied · 2 replies

Stacy McMahan
I love this picture! Two great pro-life fighters. 1

Like · Reply · 19 w

Matthew Stringer
Thanks for your work, Mark! 1

Like · Reply · 19 w

Jim Boatman
Awesome!!! 1

Like · Reply · 19 w

Frank Dobrovolny
Wow. Some of the comments remind me of this famous quote by Teddy Roosevelt.

"It is not the critic who counts; not the man who points out how the strong man stumbles, or where the doer of deeds could have done them better. The credit belongs to the ma... See more

Like · Reply · 19 w 7

Mark Lee Dickson replied · 2 replies

Brenda Osborn Owens
Praise the Lord, and thank you Texas Senators!! 1

Like · Reply · 19 w

Gloria Toti
Beautiful work... 1

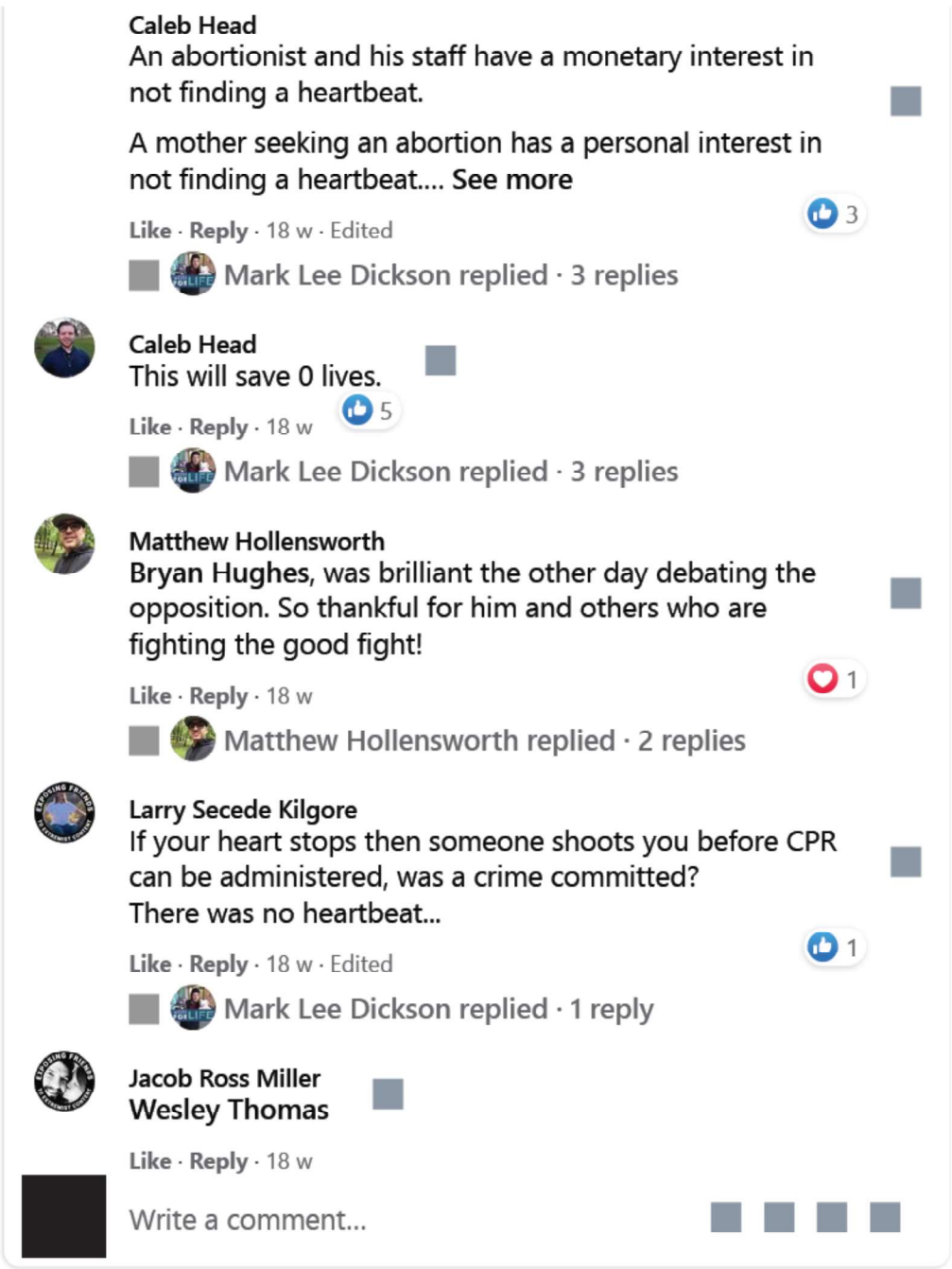
Like · Reply · 19 w

Jackie McFadden
So wonderful!!!! 1

Like · Reply · 18 w

Jorge A Valverde
Wonderful 🙏💖🙏

Like · Reply · 18 w


Caleb Head
An abortionist and his staff have a monetary interest in not finding a heartbeat.
A mother seeking an abortion has a personal interest in not finding a heartbeat.... See more
Like · Reply · 18 w · Edited
3
Mark Lee Dickson replied · 3 replies
Caleb Head
This will save 0 lives.
Like · Reply · 18 w
5
Mark Lee Dickson replied · 3 replies
Matthew Hollensworth
Bryan Hughes, was brilliant the other day debating the opposition. So thankful for him and others who are fighting the good fight!
Like · Reply · 18 w
1
Matthew Hollensworth replied · 2 replies
Larry Secede Kilgore
If your heart stops then someone shoots you before CPR can be administered, was a crime committed?
There was no heartbeat...
Like · Reply · 18 w · Edited
1
Mark Lee Dickson replied · 1 reply
Jacob Ross Miller
Wesley Thomas
Like · Reply · 18 w
Write a comment...

Mark Lee Dickson is with Rusty Thomas and Jonathan Landrum in Waskom, Texas.
June 11, 2019 ·

Congratulations Waskom, Texas for becoming the first city in Texas to become a "Sanctuary City for the Unborn" by resolution and the first city in the Nation to become a "Sanctuary City for the Unborn" by ordinance. Although I did have my disagreements with the final version, the fact remains that abortion is now OUTLAWED in Waskom, Texas!

To quote the ordinance "the Supreme Court erred n Roe v. Wade when it said that pregnant women have a constitutional right to abort their pre-born children."

"constitutional scholars have excoriated Roe v. Wade, 410 U.S. 113 (1973), for its lack of reasoning and its decision to concoct a constitutional right to abortion that has no textual foundation in the Constitution or any source of law, see John Hart Ely, The Wages of Crying Wolf: A Comment on Roe v. Wade, 82 Yale L.J. 920, 947 (1973) ("Roe v. Wade . . . is not constitutional law and gives almost no sense of an obligation to try to be."); Richard A. Epstein, Substantive Due Process By Any Other Name: The Abortion Cases, 1973 Sup. Ct. Rev. 159, 182 ("It is simple fiat and power that gives [Roe v. Wade] its legal effect."); Mark Tushnet, Red, White, and Blue: A Critical Analysis of Constitutional Law 54 (1988) ("We might think of Justice Blackmun's opinion in Roe as an innovation akin to Joyce's or Mailer's. It is the totally unreasoned judicial opinion;"

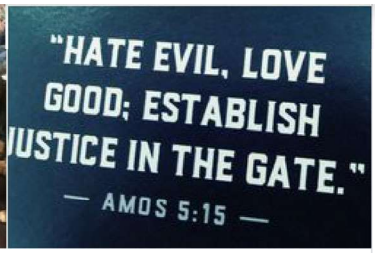
"Roe v. Wade, 410 U.S. 113 (1973), is a lawless and illegitimate act of judicial usurpation, which violates the Tenth Amendment by trampling the reserved powers of the States, and denies the people of each State a Republican Form of Government by imposing abortion policy through judicial decree."

"The Supreme Court's rulings and opinions in Roe v. Wade, 410 U.S. 113 (1973), Planned Parenthood v. Casey, 505 U.S. 833 (1992), Stenberg v. Carhart, 530 U.S. 914 (2000), Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016), and any other rulings or opinions from the Supreme Court that purport to establish or enforce a "constitutional right" to murder a pre-born child, are declared to be unconstitutional usurpations of judicial power, which violate both the Tenth Amendment the Republican Form of Government Clause, and are null and void in the City of Waskom."

All organizations that perform abortions and assist others in obtaining abortions (including Planned Parenthood and any of its affiliates, Jane's Due Process, The Afiya Center, The Lilith Fund for Reproductive Equality, NARAL Pro-Choice Texas, National Latina Institute for Reproductive Health, Whole Woman's Heath and Woman's Heath Alliance, Texas Equal Access Fund, and others like them) are now declared to be criminal organizations in Waskom, Texas.

This is history in the making and a great victory for life!

#therighttolife #thefightforlife #fromconceptiontillnaturaldeath #unbornlivesmatter #loveoneanother #EndAbortionNow #ResolutionOnTheRightToLife #OrdinanceOnTheRightToLife #SanctuaryCityForTheUnborn #WaskomTexas #GatewayOfTexas

699 191 Comments 531 Shares

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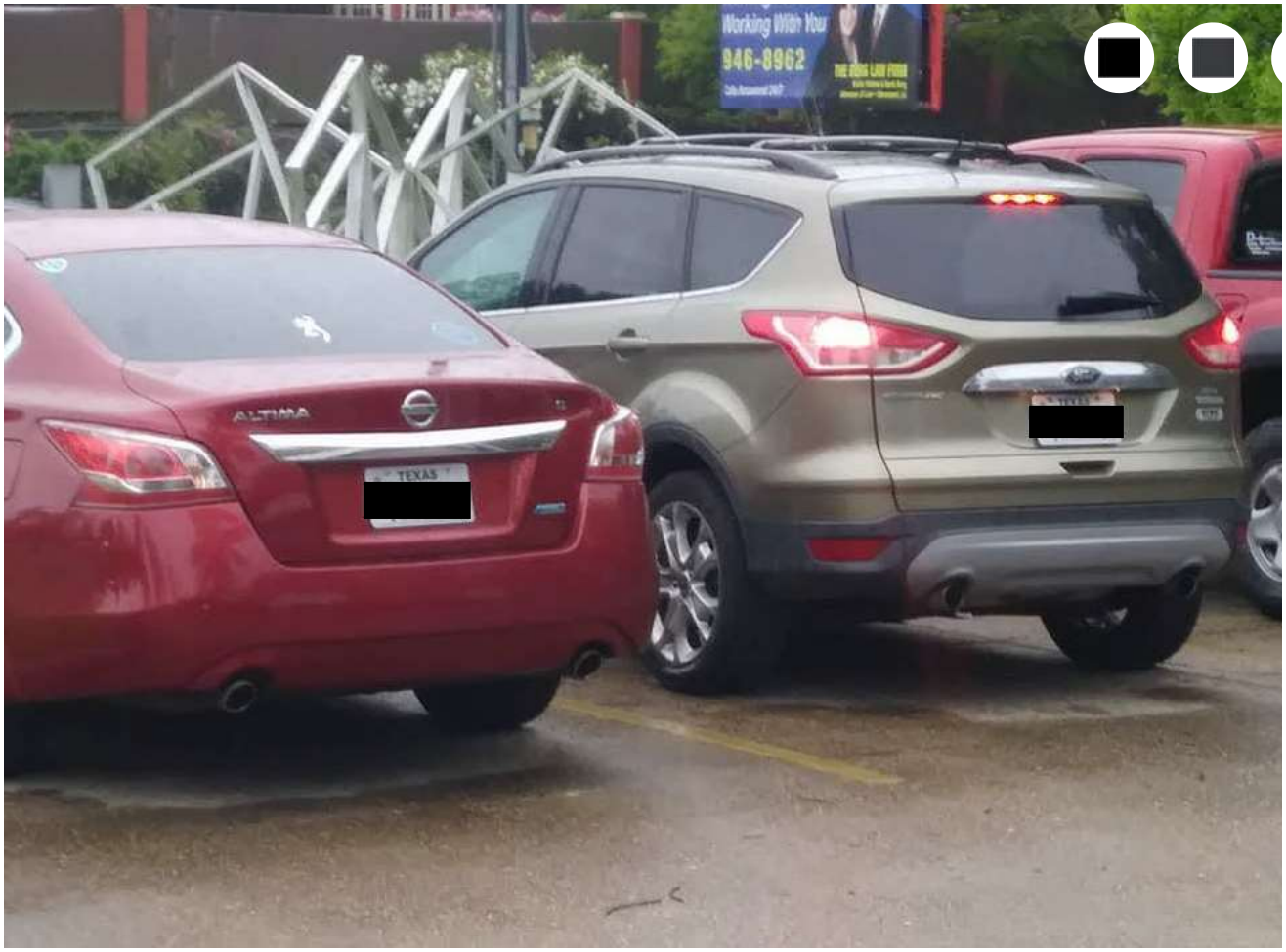


Mark Lee Dickson
April 6, 2019 ·

— at Hope Medical Group for Women.

5 66 Comments

Like Comment Share

View 8 more comments

TeriLynne Lopez
Omg! What a lot of sidetracked comments.
The Bible is God's Word, even though some are trying to rewrite it.

See more of Mark Lee Dickson on Facebook

Log In or Create New Account

Mark Lee Dickson is at Hope Medical Group for Women.

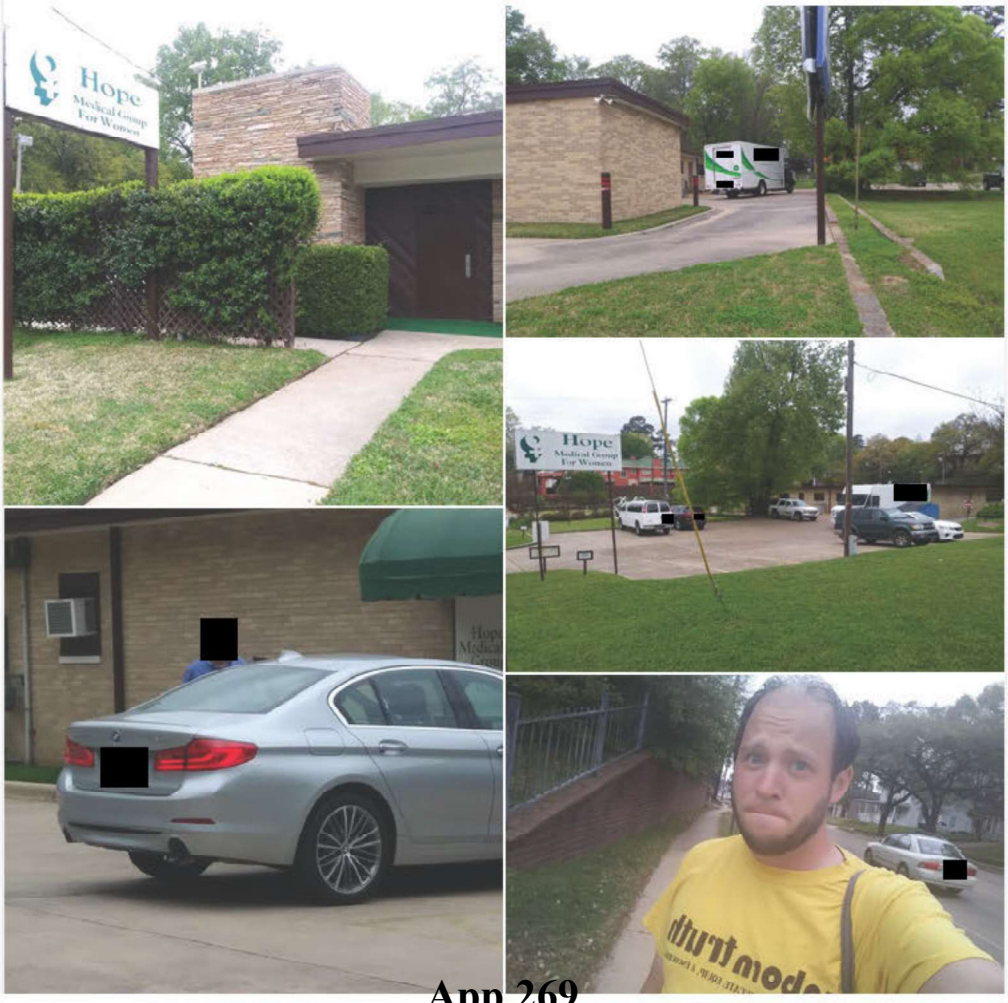
March 29, 2019 ·

I was not feeling all that great, but since I was already in Shreveport, I made a short trip to Hope Medical Group For Women. Two of the counselors who counsel people about the decision to murder their child were in today: Dr. Name (the one standing by the [redacted] and Name (the one who is a member of [redacted] and drives the [redacted].

It is worth noting that even though Dr. Name works at a kill center for baby human beings, Dr. Name has been a staunch advocate against kill shelters for animals.

Rise up Church. There are babies that Hope Medical is planning to execute TOMORROW. But unlike the animal shelters, Hope Medical is not making an open call for anyone to adopt these precious children in order to save them from death.

#riseupchurch #therighttolife #thefightforlife #fromconceptiontillnaturaldeath #unbornlivesmatter #loveoneanother #EndAbortionNow



Like Comment Share

Mary Clark Broughton Shipp
These people are really demonic and sick
Like · Reply · 2y

Esther Blanco
Feel better soon, Mark
Like · Reply · 2y

Ashley Hembree
I prayed for you to get better...
Like · Reply · 2y

Colleen Marie Kerr-Mathews
That does not make since to me about not wanting Kill shelters for Animals; which I do not like either; but then killing babies is ok; that is crazy to me!
Like · Reply · 2y

Colleen Marie Kerr-Mathews
Lord Reach out to these doctors and unveil yourself to them; and let them become Advocates; against Abortion and Thank you Lord and AMEN!!!'
Like · Reply · 2y

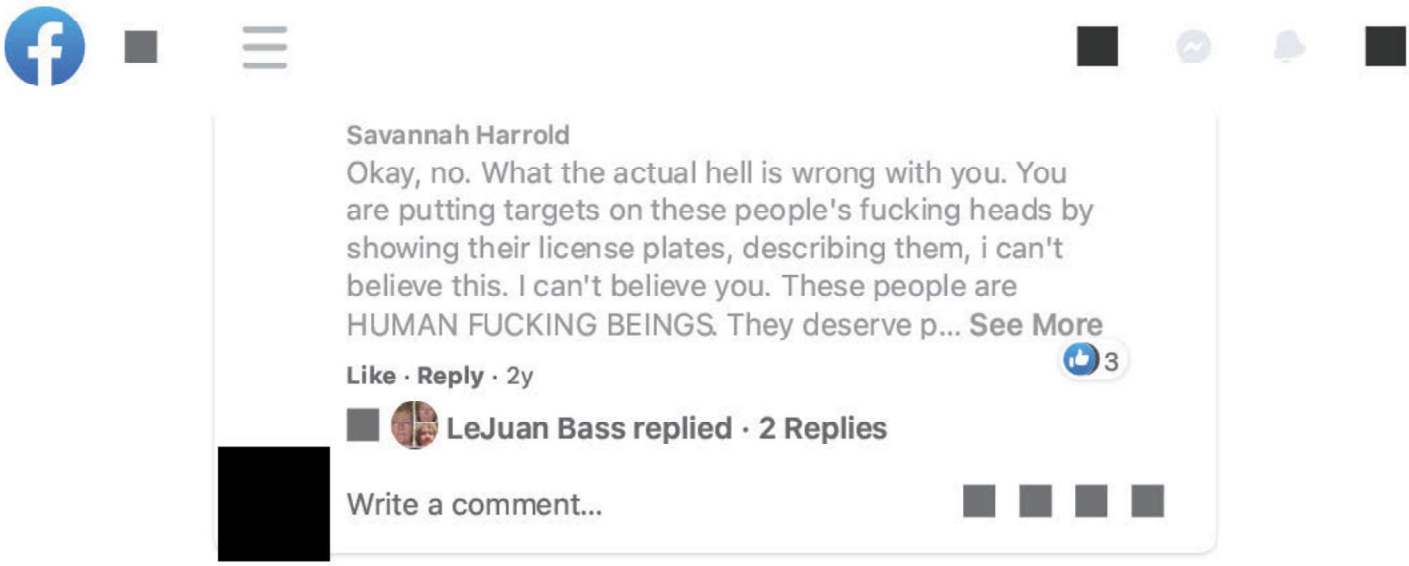
Debikay Johnson replied · 1 Reply

Phyllis Hood Buckman
Mark, I'm so sorry you are so very ill. Thank you for posting this.
Like · Reply · 2y

Hope Medical Group for Women
We are happy to connect families willing to adopt with inidividuals interested in adoption. We are also happy to connect those interested in supporting struggling families financially with individuals who want to carry to term and parent. Families in o... See More
Like · Reply · 2y

Mary Kellow Haddox replied · 1 Reply

Justin Jodo Creed
Your an absolute fucking idiot
Like · Reply · 2y


Facebook
Savannah Harrold
Okay, no. What the actual hell is wrong with you. You are putting targets on these people's fucking heads by showing their license plates, describing them, i can't believe this. I can't believe you. These people are HUMAN FUCKING BEINGS. They deserve p... See More
3
Like · Reply · 2y
LeJuan Bass replied · 2 Replies
Write a comment...

Mark Lee Dickson
April 6, 2020 ·

Houston Women's Clinic is complying with Governor Abbott's Executive Order.

"In compliance with the state of Texas mandate, Houston Women's Clinic is not currently providing abortions."

#therighttolife #thefightforlife #fromconceptiontillnaturaldeath #unbornlivesmatter #loveoneanother #covid19 #stopthespread #flattenthecurve

HOUSTONWOMENSCLINIC.COM
COVID-19 Update
Please check here for updates on abortion and consutation appointment...

58 80 Comments 2 Shares

Share

Mark Lee Dickson
March 23, 2020 ·

And, just like that, the whole State of Texas has temporarily become a Sanctuary State for the Unborn in regards to surgical abortions. This order will, without a doubt, save the lives of many.

"No one is exempt from the governor's executive order on medically unnecessary surgeries and procedures, including abortion providers," Paxton said in a statement shared with CBS News on Monday afternoon. "Those who violate the governor's order will be met with the full force of the law."

#therighttolife #thefightforlife #fromconceptiontillnaturaldeath #unbornlivesmatter #loveoneanother #stopthespread #covid19 #sanctuarycitiesfortheunborn

CBSNEWS.COM
Texas becomes latest state to halt abortion services amid coronavirus outbreak

212 55 Comments 613 Shares

Like Comment Share

George McFarlane
Praise God
Like · Reply · 1y 1

Susan Wells
Like · Reply · 1y 1

Jerry Nicks

Alison Phillips
Mark, thanks for the update!

Like · Reply · 1y

Write a reply...

TeriLynne Lopez
Praise God!!! ♡♡♡♡
Life y'all, it's all about living.

Like · Reply · 1y

Karen Eudy
Southwest Women's Surgery Center abortion clinic in Dallas Texas was very busy today doing abortion procedures. Local police officers did nothing to stop them.

Like · Reply · 1y

1

Mark Lee Dickson

Karen Eudy On the date of this post, the order was passed. In the post I was clear that this was surgical abortions. Surgical abortions have not been happening at any clinic in Texas since this order. Some have been performing medical abortions because they do not believe that the order addresses that. Many have decided not to risk even doing that.

There has been much misinformation out there and even some false reporting that some clinics have been doing abortions on days where we know they are for sure not.

A clinic could be in compliance one day and breaking the order the next.

A lawsuit has been filed by PP and others requesting a TRO and we will see what happens there.

Under emergency orders many things in our state is different than normal, but what we need to be doing is documenting, compiling, and reporting evidence to the proper authorities. We have several people high up working on this, but what we really need is very detailed and accurate information. If you would like to help with this process, feel free to reach out to me. Judges and police are not always getting things right, unfortunately.

We would love to have your help.

Like · **Reply** · 1y

Karen Eudy

Mark Lee Dickson Yes Mark, my post was not a criticism of your post, just reporting on what I saw today. I have alot of video, an associate called and they said they were doing pill abortions. The police were called on me by the clinic. I asked the police to let me file a complaint, to stop them and investigate, they did nothing. I can send you info., let me know what you need and how.

Like · **Reply** · 1y · Edited

1

Mark Lee Dickson

Karen Eudy If you can call me tomorrow I can give you an overview of what we need. Just message me tomorrow for my number!

1

Mark Lee Dickson is with **Chance Nichols** at **Chili's Grill & Bar.**

November 27, 2019 · Abilene, TX ·

The ACLU has sent a letter to the Mayor and City Council of Big Spring, Texas. Apparently the ACLU does not like the idea of Big Spring, Texas outlawing abortion and becoming a Sanctuary City for the Unborn.

Friends, always remember to consider your sources. This is the group that has defended Nazis and the Ku Klux Klan - two groups that I would never want to openly associate myself with. I would assume that the ACLU's letter is meant to intimidate the City Council of Big Spring from hating evil, loving what is good, and establishing justice within the city gates.

Who would try to stop a city from preventing organizations from murdering unborn children in their city?

The ACLU, that's who.

For months I have said that the ACLU gave us our greatest "endorsement" for these ordinances. When the city of Waskom passed the ordinance Drucilla Tigner, Reproductive Rights Strategist with the ACLU, said the ordinance, "makes it impossible for an abortion clinic to exist in Waskom, ever." Like Waskom, the City of Big Spring does not want an abortion clinic to exist in Big Spring, ever. No matter how many letters the ACLU and their friends (which I view as part of a modern-day Axis of Evil) send to the Big Spring city council, it does not change the reality that Big Spring and their friends (which I view as part of a modern-day Allied forces) do not want any organization to come into this city and murder innocent unborn children. It seems very clear to me that the ACLU wants this holocaust of abortion to continue, while groups like Right to Life of East Texas, Texas Right to Life, and the majority of Texans want this holocaust of abortion to end once and for all.

So what, besides this letter, is the ACLU doing to try to stop cities from outlawing abortion?

They have released a webinar, made a toolkit, and launched a section of their website to address how to stop local abortion bans. Despite doing all of this, what they have not done is file a lawsuit. It is worthy to mention, and should be recognized by all, that there has not been one lawsuit filed against the seven cities which have passed a Sanctuary Cities for the Unborn ordinance. Seven cities have passed this ordinance, with the first city to pass this ordinance in June - yet not a single lawsuit filed.

That is because these ordinances have been carefully drafted by expert legal counsel to keep cities out of a lawsuit and protect their citizens and their unborn children by prohibiting baby murdering

The ACLU is wrong when it says that this ordinance is unconstitutional, just like they are wrong when they say that abortion is a constitutional right. This ordinance does not violate the United States Constitution, the Texas Constitution, or the laws of the State of Texas. Big Spring's ordinance does the most that it can in the areas where the federal and state legislatures have not spoken while still respecting the boundaries that have been given to us under the current Supreme Court precedent. There are currently no federal or state laws on the books that prohibit cities from prohibiting abortion within their jurisdiction. Actually, in the most recent legislative session, Texas passed SB 22 which included an amendment explicitly clarifying that cities and counties are not prohibited from prohibiting abortion within their jurisdiction.

Nothing is unconstitutional about this ordinance. Even the listing of abortion providers as examples of criminal organizations is not unconstitutional. We can legally do that. This is an ordinance that says murdering unborn children is outlawed, so it makes sense to name examples of organizations that are involved in murdering unborn children. That is what we are talking about here: The murder of unborn children.

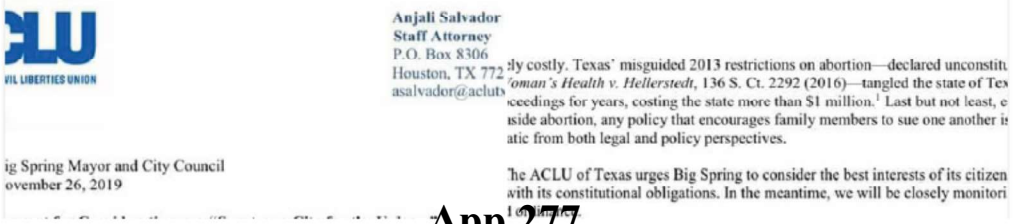
Also, when you point out how the abortion restrictions in 2013 cost the State of Texas over a million dollars, you should also point out how many baby murdering facilities closed because of those restrictions. We went from over 40 baby murdering facilities in the State of Texas to less than 20 baby murdering facilities in the State of Texas in just a few years. Even with the win for abortion advocates with Whole Woman's Health v. Hellerstedt, how many baby murdering facilities have opened back up? Not very many at all. So thank you for reminding us all that when we stand against the murder of innocent children, we really do save a lot of lives.

Stand strong leaders of Big Spring. You are going to be on the right side of history. You know, that side of history that the Nazis and the Ku Klux Klan were not on.

Big Spring residents, if you are for seeing your city pass an ordinance outlawing abortion within the city limits be sure to sign the online petition here:

https://sanctuarycitiesfortheunborn.com/online-petition

#therighttolife #thefightforlife #fromconceptiontillnaturaldeath #unbornlivesmatter #loveoneanother #BigSpringTexas #PotentialSanctuaryCityForTheUnborn



CLU
VIL LIBERTIES UNION

Anjali Salvador
Staff Attorney
P.O. Box 8306
Houston, TX 772
asalvador@aclut

ly costly. Texas' misguided 2013 restrictions on abortion—declared unconstit
oman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016)—tangled the state of Tex
ceedings for years, costing the state more than $1 million.[1] Last but not least, e
side abortion, any policy that encourages family members to sue one another is
atic from both legal and policy perspectives.

he ACLU of Texas urges Big Spring to consider the best interests of its citizen
with its constitutional obligations. In the meantime, we will be closely monitori

ig Spring Mayor and City Council
ovember 26, 2019

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Whole Woman's Health, et al., Plaintiffs, v. **Austin Reeve Jackson**, et al., Defendants.	Case No. 1:21-cv-00616-RP

SUPPLEMENTAL DECLARATION OF MARK LEE DICKSON

I, Mark Lee Dickson, declare as follows:

1. My name is Mark Lee Dickson. I am over 21 years old and fully competent to make this declaration.

2. I have personal knowledge of each of the facts stated in this declaration, and everything stated in this declaration is true and correct.

3. I am a defendant in this lawsuit.

4. I have reviewed the plaintiffs' brief in opposition to my motion to dismiss for lack of subject-matter jurisdiction (ECF No. 57).

5. The plaintiffs continue to claim that they face a "credible threat" that I will sue them after the Texas Heartbeat Act takes effect on September 1, 2021. *See* Pls.' Opp. to Def. Mark Lee Dickson's Mot. to Dismiss for Lack of SMJ, ECF No. 57 at 7.

6. The plaintiffs' claim is false. I have never threatened to sue anyone under the private civil-enforcement mechanism provided in section 3 of Senate Bill 8, and I have no intention of suing any of the plaintiffs under that provision when the law takes effect on September 1, 2021.

7. I continue to expect the plaintiffs to comply with Senate Bill 8 when it takes effect, and if the plaintiffs comply it will be impossible for anyone to sue the plaintiffs for non-compliance. That is one of many reasons why I have no intention of suing the plaintiffs under Senate Bill 8—and why I have made no plans and no threats to do so.

8. My expectations that the plaintiffs will comply with Senate Bill 8 when it takes effect have only been strengthened by the plaintiffs' submissions in this litigation. Nothing in the plaintiffs' brief opposing dismissal—and nothing in any document that the plaintiffs have filed in this lawsuit—has done anything to alter my expectation that the plaintiffs will comply with Senate Bill 8 when it takes effect. The plaintiffs' brief does not deny my prediction that they will comply with Senate Bill 8 rather than expose themselves to private-civil enforcement lawsuits. And none of the declarations attached to the motion for summary judgment asserts that any of the plaintiffs intends to defy Senate Bill 8 after it takes effect.

9. A story published in the Houston Chronicle on August 12, 2021, has further reinforced my belief that the plaintiffs intend to comply with Senate Bill 8 when it takes effect. See Jeremy Blackman, *Texas abortion clinics brace for near shutdown as new law is enacted: "We have to comply"*, Houston Chronicle (Aug. 12, 2021), https://bit.ly/3yKtmaL (last visited on August 13, 2021). The article reports that:

> The Texas Equal Action Fund "will likely 'pause' its ride share program that helps women reach abortion appointments."
>
> Bhavik Kumar, an abortionist and plaintiff in this lawsuit, is quoted as saying: "[I]t is the law, and if it passes, we have to comply."
>
> The article reports that "[s]ome clinics in the state are preparing not only to abide by the new guidelines, but to go beyond them, shuttering their abortion offerings entirely."

> The article reports that "providers and the people who help women access abortions in Texas say they can't afford the risk of potentially endless litigation"
>
> Amy Hagstrom Miller is quoted as saying: "I have one physician who's for sure willing to provide abortions and comply with S.B. 8, . . . [b]ut the rest of my 16 physicians are still trying to figure out where their risks stop and start, and if they're willing to provide."
>
> The article reports that abortion provider Lauren Thaxton and others "said they were unaware of anyone who is planning to openly defy the law on Sept. 1, though that strategy has also been discussed."
>
> The article reports that "Planned Parenthood Gulf Coast . . . will continue offering abortions for women before the fetal heartbeat has been detected, as allowed under the law."

Nothing in the Houston Chronicle article indicates that *any* abortion provider or abortion fund in Texas intends to defy the statute and expose itself to private civil-enforcement suits when Senate Bill 8 takes effect on September 1.

10. An authentic copy of the Houston Chronicle story of August 12, 2021, is attached as Exhibit 2 to the reply brief.

11. In the unlikely and unexpected event that any of the plaintiffs decides to violate the Texas Heartbeat Act after it takes effect on September 1, I would consider suing only the individuals and entities that cannot plausibly assert an "undue burden" defense under section 171.209, and that cannot plausibly assert that the enforcement of the Texas Heartbeat Act against them would violate their constitutional rights or the supposed constitutional rights of abortion patients.

12. I would not consider suing the abortion-fund plaintiffs under section 171.208 if they aid or abet post-heartbeat abortions after Senate Bill 8 takes effect, unless and until a court holds that: (a) abortion funds lack third-party standing to assert the constitutional rights or the supposed constitutional rights of abortion patients; or (b) no "undue burden" will be imposed by a lawsuit that limits the ability of abortion funds to pay for another person's abortion. To my knowledge, no court

has issued a holding on either of these questions, and I have no intention of suing the plaintiff abortion funds until it becomes clear that I can do so without encountering an "undue burden" defense under section 171.209.

13. I would not consider suing the abortion-provider plaintiffs under section 171.208 if they choose to violate Senate Bill 8, unless and until a court decision makes clear that I can do so without encountering an "undue burden" defense under section 171.209.

14. I have no intention of suing plaintiffs Forbes or Kanter, either now or in the future, regardless of whether they comply with Senate Bill 8 and regardless of any future court decision.

15. Finally, even if one of the plaintiffs decides to violate Senate Bill 8, and even if a future court decision makes clear that I can sue the abortion-fund plaintiffs or the abortion-provider plaintiffs without encountering an "undue burden" defense under section 171.209, I know that there will be countless other individuals who will sue the plaintiffs if they violate the statute, and I have no interest in piling on with a me-too lawsuit. The statute allows only one plaintiff to recover the $10,000 per illegal abortion performed. My time is better spent on other matters than pursuing redundant litigation against the plaintiff abortion providers and the plaintiff abortion funds.

16. I have given no thought or consideration to whether I will sue the plaintiffs or their attorneys under section 4 if I attain "prevailing party" status in this litigation and fail to recover attorneys' fees under 42 U.S.C. § 1988(b). The plaintiffs say that my "present intent not to seek fees under S.B. 8 is contingent on the availability of fees under Section 1988,"[1] but that is false. I have no intention of pursuing fees under section 4 at this time—even if I fail to recover fees under section 1988(b)—because I have not considered the matter and I have not discussed it with my attorneys, and I

1. Pls.' Br., ECF No. 57 at 13.

have not formed any intention one way or the other. And I have not made any threat to seek costs and fees under section 4.

17. I continue to believe that I will successfully recover fees from the plaintiffs at the conclusion of this litigation under 42 U.S.C. § 1988(b), even after reading the section of their brief that insists that I am subject to suit under 42 U.S.C. § 1983. *See* Pls.' Br., ECF No. 57 at 13–17.

This concludes my sworn statement. I swear under penalty of perjury that the facts stated in this declaration are true and correct.

DocuSigned by:
43D4833102D041B...

MARK LEE DICKSON

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

PLANNED PARENTHOOD OF GREATER TEXAS SURGICAL HEALTH SERVICES, on behalf of itself, its staff, physicians and patients, et al., PLAINTIFFS,	)	CAUSE NO. 5:21-CV-114-H
VS.	)	
CITY OF LUBBOCK, TEXAS, DEFENDANT.	)	

HEARING ON JURISDICTIONAL ISSUE
BEFORE THE HONORABLE JAMES WESLEY HENDRIX,
UNITED STATES DISTRICT JUDGE

FRIDAY, MAY 28, 2021
LUBBOCK, TEXAS

FEDERAL OFFICIAL COURT REPORTER: MECHELLE DANIEL, 1205 TEXAS AVENUE, LUBBOCK, TEXAS 79401, (806) 744-7667.

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY; TRANSCRIPT PRODUCED BY COMPUTER-AIDED TRANSCRIPTION.

defendants and the amici should have their opportunity to present countervailing evidence to the extent needed. What will happen on June 1st if this Court were to issue a ruling declaring the statute unconstitutional? Would everyone in the City of Lubbock mistakenly believe that they no longer can sue Planned Parenthood, even though they clearly can, and even though the Fifth Circuit has said in *Okpalobi* that they clearly can?

Here's another problem with Mr. Lehn's argument, beyond the empirical problems. The argument simply proves too much. If his argument were to be accepted by this Court, then *Okpalobi* has to come out the other way, because the plaintiffs in *Okpalobi* could just have easily said that an opinion from the Fifth Circuit or from the Louisiana District Court would have deterred individuals from invoking their rights under the private right of action created by statute. And the Fifth Circuit had none of that in *Okpalobi*.

THE COURT: And as also present in *LeBlanc* as well.

MR. MITCHELL: I'm sorry?

THE COURT: That point would be equally valid in *LeBlanc*.

MR. MITCHELL: Yes, K.P. against LeBlanc, that's true. Right? Because if this argument were to be accepted, *Okpalobi* has to come out the other way, and so does K.P. against LeBlanc.

There's one other area of disagreement I'd like to mention to the Court. Mr. Lehn said in his argument that if this Court were to dismiss for lack of standing, the statute can't be challenged. That's not right. The statute can still be challenged. First, the statute can be challenged defensively, but it can also be challenged offensively.

If Planned Parenthood were to be sued after June 1st for violating the ordinance, they can immediately go to federal court under 42 U.S.C. Section 1983 and sue the state court judge in his official capacity under *Ex Parte Young*. And there is an exception to the Anti-Injunction Act for Section 1983 claims.

I'm not saying that Planned Parenthood would actually prevail in that lawsuit, because there's a very good argument that the ordinance is perfectly constitutional because there is an undue burden defense. The ordinance specifically says that if you're sued and you can show that imposing liability on you would impose an undue burden on abortion patients, you can't be held liable, if you have third-party standing to assert those rights. But that would be a question for the federal court to resolve later, if there is a lawsuit filed in state court and if Planned Parenthood chooses to respond by bringing a Section 1983 action.

So this is not a situation where they are being completely shut out from the possibility of preenforcement

challenge. They just can't bring the preenforcement challenge now, because they have sued only the City of Lubbock, and the people they need to be suing are the state court judges and the private litigants who will enforce the private right of action. They have sued the wrong defendant. The lawsuit is premature. It's not that the lawsuit can never be brought; it's just that the lawsuit can't be brought now.

The final point of disagreement I have with Mr. Lehn is that he suggested this is extraordinary, that a litigant would be unable to come into federal court preenforcement, before they have been sued, and challenge the constitutionality of a statute.

It's not at all extraordinary. The best analogy right now are the wedding vendors throughout the United States who are unable to participate in same-sex marriages on account of their religious faith. They are facing the threat of private lawsuits in any state or local jurisdiction that has an anti-discrimination law that covers not only sexual orientation, but also sex, in the wake of the Supreme Court's decision in *Bostock*.

There is nothing those wedding vendors can do, to come into federal court preenforcement, to stop the private lawsuits. They are in the same predicament that Planned Parenthood finds itself in before this Court today.

THE COURT: And that--I mean, that was my question

I, Mechelle Daniel, Federal Official Court Reporter in and for the United States District Court for the Northern District of Texas, do hereby certify pursuant to Section 753, Title 28, United States Code, that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

/s/ Mechelle Daniel **DATE** JUNE 1, 2021

MECHELLE DANIEL, CSR #3549
FEDERAL OFFICIAL COURT REPORTER

Cause No. DC-20-08104

The Afiya Center, Plaintiff, v. **Mark Lee Dickson; Right to Life East Texas,** Defendants	IN THE DISTRICT COURT DALLAS COUNTY, TEXAS 116th JUDICIAL DISTRICT

AFFIDAVIT OF MARK LEE DICKSON

I, Mark Lee Dickson, being duly sworn, states as follows:

1. My name is Mark Lee Dickson. I am over 21 years old and fully competent to make this affidavit. I submit this affidavit in support of the defendants' motion to dismiss under the Texas Citizens Participation Act and Rule 91a of the Texas Rules of Civil Procedure.

2. I have personal knowledge of the matters contained in this affidavit, and all of the facts stated in this affidavit are true and correct.

3. I am a defendant in *The Afiya Center v. Dickson, et al.*, No. DC-20-08104. I also serve as Director of Right to Life East Texas, the other defendant in this case. I am responsible for any allegedly "defamatory" statement published by Right to Life East Texas, and for any alleged "conspiracy" to commit defamation that Right to Life East Texas may have engaged in.

4. The Afiya Center alleges that Right to Life East Texas and I committed defamation by drafting and advocating for an ordinance that outlaws abortion within city limits, and that specifically prohibits the Afiya Center—and other organizations that

aid and abet abortions—from "operating" inside those cities. A copy of this ordinance, which was adopted by the city of Waskom, is attached as Exhibit A to the original petition filed in this case.

5. The ordinance provides a non-exhaustive list of abortion-assistance groups that have been banned from the city and declares them to be "criminal organizations." *See* Waskom Ordinance No. 336, § B.3. The Afiya Center is mentioned in the ordinance as one of the "criminal organizations" that is outlawed from operating within the city.

6. The ordinance also declares abortion to be "an act of murder with malice aforethought," except when medically necessary to preserve the life or health of the mother. *See* Waskom Ordinance No. 336, § C(3)(a).

7. The Afiya Center also alleges that Right to Life East Texas and I defamed it by publishing certain statements on social media.

8. I did not act with actual malice in publishing these any of these statements because I believed that each of those statements was truthful at the time I published them, and I continue to believe that those statements are true today. I have never once doubted the truthfulness of any of the statements for which I am being sued. I also did not act with negligence or "reckless disregard" toward the truth, because I carefully researched the law and consulted with legal counsel and other legal experts before publishing the ordinance and the other statements at issue in this lawsuit.

9. In the following sections, I will discuss each of the allegedly defamatory utterances and explain how neither I nor Right to Life East Texas acted with actual malice or negligence.

THE SANCTUARY CITIES ORDINANCE

10. At the time that I first published the sanctuary cities ordinance, I believed that it was truthful to describe abortion as a "crime" and to describe abortion-assis-

tance organizations such as the Afiya Center as "criminal organizations." I also believed that it was truthful to declare abortion to be an act of "murder" in a city that has enacted an ordinance that outlaws abortion. I continue to hold those beliefs today. I did not act with negligence or "reckless disregard" toward the truth in forming these beliefs or in publishing the ordinance.

11. I have long known and understood that the state of Texas has never repealed its pre–*Roe v. Wade* statutes that criminalize abortion unless the mother's life is in danger. I first learned this fact by watching a video presentation in 2017 by Bradley Pierce, a licensed attorney in Texas who has given many lectures on the subject. I was aware of the continued existence of Texas's criminal abortion statutes long before I drafted and published the ordinance that Waskom adopted.

12. Although I am not a lawyer, I carefully researched the Texas abortion statutes to confirm that Mr. Pierce's statements were accurate before I drafted and published the Waskom ordinance. I learned that the Texas legislature enacted a statute shortly after *Roe v. Wade* that recodified and transferred the state's criminal abortion prohibitions to articles 4512.1 through 4512.6 of the Revised Civil Statutes. I also read the criminal abortion prohibitions that are codified in the Revised Civil Statutes to ensure that they still exist.

13. I also learned from Mr. Pierce's video presentation that the Texas Penal Code defines the crime of first-degree murder to include the intentional or knowing killing of an unborn child. *See* Tex. Penal Code § 19.02(b)(1); *see also* Tex. Penal Code § 1.07 ("'Individual' means a human being who is alive, including an unborn child at every stage of gestation from fertilization until birth."). I was aware that the murder statute exempts "lawful medical procedures" and the dispensation or administration of drugs "in accordance with law." *See* Tex. Penal Code § 19.06(2), (4). But these exceptions will not protect abortion if abortion is not considered a "lawful" medical procedure in the place where it is performed. I realized upon reading and studying

this statute that a local ordinance outlawing abortion would render abortion an act of "murder" under the Texas Penal Code if any abortion were to be performed in that jurisdiction.

14. I also researched case law and legal scholarship to ensure that it is truthful and accurate to describe abortion as a "criminal" act in Texas, and to describe organizations that perform or assist abortions in Texas as "criminal organizations." I learned that the Supreme Court of Texas had held in *Pidgeon v. Turner*, 538 S.W.3d 73 (Tex. 2017), that judicial pronouncements of unconstitutionality do not "strike down" or formally revoke the offending statutes, and I read the following passage that appears in that state supreme court opinion:

> [N]either the Supreme Court in *Obergefell* nor the Fifth Circuit in *De Leon* 'struck down' any Texas law. When a court declares a law unconstitutional, the law remains in place unless and until the body that enacted it repeals it . . . . [T]he Texas and Houston DOMAs remain in place as they were before *Obergefell* and *De Leon*, which is why Pidgeon is able to bring this claim.

Id. at 88 n.21.

15. Because the Supreme Court of Texas held in *Pidgeon* that the Texas marriage laws remain on the books and continue to exist as law, despite the Supreme Court's pronouncement in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), I believed and continue to believe that it is truthful and accurate to describe abortion as a "criminal" offense on account of the fact that the Texas pre-*Roe* statutes have never been repealed. I also believed and (continue to believe) that it is truthful and accurate to describe the Afiya Center as a "criminal organization" on account of its admitted violations of article 4512.2 of the Revised Civil Statutes.

16. I also read a law-review article entitled *The Writ-of-Erasure Fallacy*, 104 Va. L. Rev. 933 (2018). Although this article does not specifically address the continued existence of the Texas abortion statutes, it carefully explains that the Supreme Court

lacks any power to formally revoke or "strike down" statutes that it declares unconstitutional, and that those statutes continue to exist as laws until they are repealed by the legislature that enacted them. I found the analysis in this article persuasive and it further confirmed my belief that abortion remains a "criminal" offense under Texas law, despite the Supreme Court's ruling in *Roe v. Wade*.

17. I understand that the Supreme Court's decision in *Roe v. Wade* means that the federal judiciary is unlikely to sustain criminal convictions obtained under the Texas abortion statutes for as long as the Supreme Court adheres to the notion that abortion is a constitutional right. I also understand that *Roe* makes it unlikely that any prosecutor in Texas will attempt to bring criminal charges against abortion providers for their violations of state law because the courts are unlikely to uphold those convictions until *Roe* is overruled. But none of that changes the fact that the law of Texas continues to define abortion as a criminal offense. I believed (and continue to believe) that it is truthful to call abortion a "crime" under state law even if abortion providers are not currently being prosecuted for their criminal acts. And I believed (and continue to believe) that a person or organization that breaks a criminal statute is a "criminal"—regardless of whether they are ultimately prosecuted and punished for their unlawful conduct.

18. I am also aware that the Supreme Court has opined that abortion is a constitutional right in *Roe v. Wade* and subsequent cases. But I believe these decisions are lawless, unconstitutional, and illegitimate, because there is no language in the Constitution that even remotely suggests that abortion is a constitutional right. The Supreme Court justices invented a right to abortion in *Roe v. Wade* and falsely claim that this right can be found in the Constitution. Because I do not believe that *Roe* correctly interpreted the Constitution (indeed, I do not believe that *Roe* "interpreted" the Constitution at all), I do not believe that abortion is a constitutional right. I am not required to agree with the Supreme Court's interpretations of the Constitution, and

I will continue to respect the state's criminal abortion prohibitions as the law of Texas even if the current Supreme Court is unwilling to enforce those statutes in the cases and controversies that fall within its jurisdiction.

19. More importantly, my research led me to believe that the Supreme Court has no power to veto, repeal, or formally revoke a statute that it believes to be unconstitutional. Although it is common for people to say that the Supreme Court "strikes down" statutes when pronouncing them unconstitutional, this phrase is a misnomer. The Supreme Court's constitutional powers extend only to resolving cases and controversies within its jurisdiction. It has no power to alter, amend, or in any way change the law of Texas, even if it is currently unwilling to enforce those statutes in cases or controversies. So I believe that it is truthful to describe the Afiya Center as a "criminal organization" because it is violating extant criminal prohibitions on abortion that continue to exist as Texas law, and I have based this belief on careful research and consultation with legal counsel.

20. Finally, I believed (and I continue to believe) that it is truthful and legally accurate for the ordinance that I drafted to declare abortion to be an act of "murder" because: (1) Abortion can no longer be considered a "lawful" medical procedure in a jurisdiction that has outlawed abortion by city ordinance; and (2) Abortion is not a "lawful" medical procedure anywhere in Texas because Texas has never repealed its pre-*Roe* statutes that criminalize abortion.

21. In describing abortion as an act of "murder" in the ordinance, I did not believe that any reasonable person could interpret the ordinance as an accusation or insinuation that the Afiya Center is complicit in the murder of human beings *after* they have been born, and I did not intend to communicate or in any way imply that the Afiya Center murders or assists in the murder of human beings after birth. The Afiya Center is not even mentioned in the provision of the ordinance that declares abortion to be an act of "murder."

22. In addition to my reliance on the writings and teachings of Mr. Pierce, and my own independent legal research on these issues, I also consulted with legal counsel in drafting this ordinance in a further effort to ensure its truthfulness and accuracy. I will not waive the attorney–client privilege by disclosing the content of those communications, but I mention this to refute any insinuation that I acted negligently or with "reckless disregard" of the truth in drafting and publishing the ordinance.

THE FACEBOOK POSTING OF JULY 2, 2019

23. The Afiya Center alleges that Right to Life East Texas and I defamed it in the following statement that was posted on Facebook on July 2, 2019:

> "Abortion is Freedom" in the same way that a wife killing her husband would be freedom—Abortion is Murder. The Lilith Fund and NARAL Pro-Choice Texas are advocates for abortion, and since abortion is the murder of innocent life, this makes these organizations advocates for the murder of those innocent lives. This is why the Lilith Fund and NARAL Pro-Choice Texas are listed as criminal organizations in Waskom, Texas. They exist to help pregnant Mothers murder their babies.

24. I believe that abortion is murder regardless of where it is performed because I believe that life begins at conception. I also believe that abortions performed in Texas are murder under 19.02(b)(1) of the Texas Penal Code, because Texas has never repealed its pre-*Roe* statutes that criminalize abortion and abortion therefore cannot qualify as a "lawful" medical procedure or a "lawful" use of drugs under sections 19.06(2) and (4) of the Texas Penal Code. I held those beliefs at the time I published that statement and I continue to hold those beliefs today.

25. I did not act with negligence or reckless disregard of the truth in forming those beliefs, for the reasons provided in paragraphs 11–22, *supra*.

26. When I described abortion as "murder" and accused the Lilith Fund of "help[ing] pregnant Mothers murder their babies," I did not believe that any reasonable person could interpret these statements as an accusation or insinuation that the

Lilith Fund (or the Afiya Center) is complicit in the murder of human beings after they have been born, and I did not intend to communicate that the Lilith Fund (or the Afiya Center) murders or assists in the murder of human beings after birth. The context of the statement was intended to make clear that the acts of "murder" described in the passage refer exclusively to "abortion," *i.e.*, the killing of unborn human beings, and not the murder of human beings who have already been born. I believed at the time I made this statement, and I continue to believe today, that this statement would be understood to mean only that the Lilith Fund assists in the intentional killing of unborn human beings.

THE FACEBOOK POSTING OF A SIMILAR STATEMENT BY RIGHT TO LIFE EAST TEXAS

27. The Afiya Center also alleges that Right to Life East Texas and I defamed it in the following statement that was posted on Facebook, which resembles the statement from my Facebook posting of July 2, 2019:

> As I have said before, abortion is freedom in the same way that a wife killing her husband is freedom. Abortion is murder. The thought that you can end the life of another innocent human being and not expect to struggle afterwards is a lie. In closing, despite what these groups may think, what happened in Waskom was not a publicity stunt. The Lilith Fund was in error when they said on a July 2nd Facebook post, "Abortion is still legal in Waskom, every city in Texas, and in all 50 states." We said what we meant and we meant what we said. Abortion is illegal in Waskom, Texas. In the coming weeks more cities in Texas will be taking the same steps that the City of Waskom took to outlaw abortion in their cities and become sanctuary cities for the unborn. If NARAL Pro-Choice Texas and the Lilith Fund want to spend more money on billboards in those cities we welcome them to do so. After all, the more money they spend on billboards the less money they can spend on funding the murder of innocent unborn children.

28. I believe that abortion is murder regardless of where it is performed because I believe that life begins at conception. I also believe that abortions performed in Texas are murder under 19.02(b)(1) of the Texas Penal Code, because Texas has never

repealed its pre-*Roe* statutes that criminalize abortion and abortion therefore cannot qualify as a "lawful" medical procedure or a "lawful" use of drugs under sections 19.06(2) and (4) of the Texas Penal Code. I held those beliefs at the time this statement was published and I continue to hold those beliefs today.

29. I did not act with negligence or reckless disregard of the truth in forming those beliefs, for the reasons provided in paragraphs 11–22, *supra*.

30. When I described abortion as "murder" and accused the Lilith Fund of assisting in the "murder of innocent unborn children," I did not believe that any reasonable person could interpret these statements as an accusation or insinuation that the Lilith Fund (or the Afiya Center) is complicit in the murder of human beings after they have been born, and I did not intend to communicate that the Lilith Fund (or the Afiya Center) murders or assists in the murder of human beings after birth. The context of the statement was intended to make clear that the acts of "murder" described in the passage refer exclusively to "abortion," *i.e.*, the killing of "innocent *unborn* children," and not the murder of human beings who have already been born. I believed at the time I made this statement, and I continue to believe today, that this statement would be understood to mean only that the Lilith Fund assists in the intentional killing of unborn human beings.

31. I also believed it was truthful to say that "[t]he Lilith Fund was in error when they said on a July 2nd Facebook post, 'Abortion is still legal in Waskom, every city in Texas, and in all 50 states.' We said what we meant and we meant what we said. Abortion is illegal in Waskom, Texas." I believed that abortion was made illegal in Waskom by the ordinance because the ordinance specifically outlaws the procedure, and no court has ruled that the abortion ban in the Waskom ordinance is unconstitutional or enjoined the city from enforcing it. I did not act with negligence or with reckless disregard of the truth in forming or expressing those views, because the text

of the Waskom ordinance makes clear that abortion is outlawed and there has been no court decision that pronounces the ordinance unconstitutional.

THE FACEBOOK POSTING OF NOVEMBER 26, 2019

32. The Afiya Center alleges that Right to Life East Texas and I defamed it in the following statement that was posted on Facebook on November 26, 2019:

> Nothing is unconstitutional about this ordinance. Even the listing of abortion providers as examples of criminal organizations is not unconstitutional. We can legally do that. This is an ordinance that says murdering unborn children is outlawed, so it makes sense to name examples of organizations that are involved in murdering unborn children. That is what we are talking about here: The murder of unborn children. Also, when you point out how the abortion restrictions in 2013 cost the State of Texas over a million dollars, you should also point out how many baby murdering facilities closed because of those restrictions. We went from over 40 baby murdering facilities in the State of Texas to less than 20 baby murdering facilities in the State of Texas in just a few years. Even with the win for abortion advocates with Whole Woman's Health v. Hellerstedt, how many baby murdering facilities have opened back up? Not very many at all. So thank you for reminding us all that when we stand against the murder of innocent children, we really do save a lot of lives.

33. I believed all of these statements to be true at the time I published them, and I continue to believe these statements are true today. I believe the ordinance is constitutional because there is nothing in the Constitution that even remotely suggests that abortion is a constitutional right. *See* paragraph 18, *supra*. I believed and continue to believe that it is constitutional (and truthful) to list the Afiya Center and other organizations that violate the unrepealed Texas abortion statutes as "criminal organizations," because Texas law continues to define abortion as a criminal offense, as well as acts that aid and abet abortions. *See* paragraphs 11–22, *supra*.

34. I did not act with negligence or with reckless disregard of the truth in forming or expressing those views, because I carefully researched the law and consulted with legal counsel before publishing this statement. *See* paragraphs 11–22, *supra*.

THE STATEMENT OF JUNE 11, 2019

35. The Afiya Center alleges that Right to Life East Texas and I defamed it in the following statement on June 11, 2019, shortly after Waskom adopted the sanctuary-cities ordinance:

> Congratulations Waskom, Texas for becoming the first city in Texas to become a "Sanctuary City for the Unborn" by resolution and the first city in the Nation to become a "Sanctuary City for the Unborn" by ordinance. Although I did have my disagreements with the final version, the fact remains that abortion is now OUTLAWED in Waskom, Texas! . . . . All organizations that perform abortions and assist others in obtaining abortions (including Planned Parenthood and any of its affiliates, Jane's Due Process, The Afiya Center, The Lilith Fund for Reproductive Equality, NARAL Pro-Choice Texas, National Latina Institute for Reproductive Health, Whole Woman's Heath and Woman's Health Alliance, Texas Equal Access Fund, and others like them) are now declared to be criminal organizations in Waskom, Texas. This is history in the making and a great victory for life!

36. I believed all of these statements to be true at the time I published them, and I continue to believe these statements are true today. I believed it was truthful to say that abortion has been "outlawed" in Waskom because the ordinance specifically outlaws abortion by its terms, and no court has declared the ordinance or the abortion ban unconstitutional. I believed and continue to believe that it is truthful to describe the Afiya Center and other organizations that violate the unrepealed Texas abortion statutes as "criminal organizations," because Texas law continues to define abortion as a criminal offense, as well as acts that aid and abet abortions. *See* paragraphs 11–22, *supra*.

37. I did not act with negligence or with reckless disregard of the truth in forming or expressing those views, because I carefully researched the law and consulted with legal counsel before publishing this statement. *See* paragraphs 11–22, *supra*.

THE STATEMENT TO CNN

38. The Afiya Center alleges that Right to Life East Texas and I defamed it when I made the following statement to CNN:

> The idea is this: in a city that has outlawed abortion, in those cities if an abortion happens, then later on when *Roe v. Wade* is overturned, those penalties can come crashing down on their heads.

39. I believed this statement to be true at the time I made, and I continue to believe that this statement is true today. I believed it was truthful to say that the penalties in the ordinance can be imposed after *Roe v. Wade* is overruled because the ordinance specifically provides for this. The ordinance outlaws abortion within city limits and establishes penalties of $2,000 for each violation. *See* Waskom Ordinance No. 336, § C(1) ("It shall be unlawful for any person to procure or perform an abortion of any type and at any stage of pregnancy in the City of Waskom, Texas."); *id.* at § D(2)–(3). Yet the ordinance also prohibits the city and its officials from collecting the fines until the Supreme Court overrules *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). *See* Waskom Ordinance No. 336, § D(1)–(3).

40. I did not act with negligence or with reckless disregard of the truth in forming or expressing those views, because I carefully researched the law and consulted with legal counsel before publishing this statement. *See* paragraphs 11–22, *supra*.

This concludes my sworn statement. I swear under penalty of perjury that the facts stated in this affidavit are true and correct.

MARK LEE DICKSON

Subscribed and sworn to me
this 18th day of August, 2020

NOTARY

PHYLLIS MELTON
NOTARY PUBLIC
STATE OF TEXAS
ID # 13210927-0
My Comm. Expires 07-30-2023

Cause Nos. DC-20-08104, DC-20-08113

The Afiya Center, Plaintiff, v. **Mark Lee Dickson**; **Right to Life East Texas**, Defendants	IN THE DISTRICT COURT
Texas Equal Access Fund, Plaintiff, v. **Mark Lee Dickson**; **Right to Life East Texas**, Defendants	DALLAS COUNTY, TEXAS 116th JUDICIAL DISTRICT

SUPPLEMENTAL AFFIDAVIT OF MARK LEE DICKSON

I, Mark Lee Dickson, being duly sworn, states as follows:

1. My name is Mark Lee Dickson. I am over 21 years old and fully competent to make this affidavit. I submit this affidavit in support of the defendants' reply brief in support of their motion to dismiss under the Texas Citizens Participation Act and Rule 91a of the Texas Rules of Civil Procedure.

2. I have personal knowledge of the matters contained in this affidavit, and all of the facts stated in this affidavit are true and correct.

3. I am a defendant in *The Afiya Center for Reproductive Equity v. Dickson, et al.*, No. DC-20-08104, and in *Texas Equal Access Fund v. Dickson, et al.*, No. DC-20-08113. I also serve as Director of Right to Life East Texas, the other defendant in this case.

4. I have reviewed the plaintiffs' briefs in opposition to the motion to dismiss. The plaintiffs' briefs make numerous false statements about the ordinances and my state of mind, and I submit this affidavit to refute those claims under oath.

5. On page 27, each of the plaintiffs' briefs claims that I "designed the ordinances to be unenforceable until *Roe* and *Casey* are overruled (if ever)." That is a false description of the ordinances, and it is a false description of how I designed the ordinances.

6. The ordinances outlaw abortion immediately upon enactment, and they establish a *private* enforcement mechanism that takes effect immediately upon enactment. Section E of the original Waskom ordinance, which appears as an exhibit to the plaintiffs' briefs, contains the private-enforcement provisions, which authorize private-enforcement lawsuits to be brought by any citizen against those who perform or assist abortions within city limits. The private-enforcement mechanism is in full force and effect under the amended Waskom ordinance.

7. The ordinances provide that *public* enforcement by city officials will be delayed until *Roe* and *Casey* are overruled. But that does not make the ordinances "unenforceable" or "of no effect," as the plaintiffs falsely asserts in their briefs. The ordinances remain enforceable through private citizen suits brought against abortion providers and abortion-assistance organizations that operate within city limits.

8. In addition, the provisions of the ordinance that delay *public* enforcement do not change that fact that abortion remains illegal under city law by virtue of the ordinance. Conduct can remain illegal and outlawed despite the fact that public authorities are not currently imposing penalties on lawbreakers.

9. I drafted the ordinance to temporarily prohibit public enforcement for one reason only: To prevent abortion providers and abortion-assistance organizations from acquiring standing to sue the city or city officials over the sanctuary-cities ordinance. A statute or ordinance that is not currently being enforced by the city or its officials cannot be the subject of a pre-enforcement challenge in federal court. *See Poe v. Ullman*, 367 U.S. 497 (1961). An abortion ban that is enforceable solely by private citizen suits, by contrast, cannot be subject to pre-enforcement lawsuits brought by abortion providers in federal court. *See Okpalobi v. Foster*, 244 F.3d 405 (5th Cir. 2001) (en banc).

10. The plaintiffs' claim that my decision to temporarily prohibit public enforcement in the sanctuary-cities ordinance is somehow evidence that I "understood . . . that laws criminalizing abortion were (and remain) currently unconstitutional and of no effect" is absolutely false. I believe that laws outlawing abortion are entirely constitutional, as I explained in my previous affidavit, because there is no language in the Constitution that even remotely suggests that abortion is a constitutional right. I do not believe that *Roe* correctly interpreted the Constitution (indeed, I do not believe that *Roe* "interpreted" the Constitution at all), so I do not believe that abortion is a constitutional right. I continue to respect the state's criminal abortion prohibitions as the law of Texas, despite the federal judiciary's current unwillingness to enforce those statutes in the cases and controversies that fall within its jurisdiction, and I honestly and truthfully believe that entities that violate those un-repealed abortion statutes are "criminal organizations."

11. The plaintiffs also claim that Right to Life East Texas and I have "admitted that the purpose of the ordinances was not to actually make abortion illegal, but instead to confuse the public about the current state of the law." Pls.' Br. at 27. The only evidence that they cite to support this claim is paragraphs 21 through 30 of their original petition. I have reviewed those paragraphs (as well as the rest of their petition)

and I see nothing where either Right to Life East Texas and I or "admitted that the purpose of the ordinances was *not* to actually make abortion illegal" or anything where we "admitted that the purpose of the ordinances . . . was to confuse the public about the current state of the law." To remove any doubt on this score, I am stating emphatically—and under oath—that my purpose in drafting and advocating for the ordinances was to make abortion illegal under city law, and that is exactly what the ordinances accomplish. Abortion *is* illegal under city law by virtue of the ordinances, and the ordinances were drafted in a manner that prevents litigants from obtaining Article III standing to challenge the ordinances in federal court.

12. I did not draft these ordinances with the purpose of "confusing the public about the current state of the law," as the plaintiffs claim in their brief. Pls.' Br. at 27. The current state of the law is that abortion is illegal in each of the cities that has enacted the sanctuary-cities ordinance, and no court has ruled that the ordinances are unconstitutional.

13. I have never "admitted"—in any setting or context—that the purpose of the sanctuary-cities ordinances was "to confuse the public about the current state of the law." And I have never "admitted" that the purpose of the ordinances "was not to actually make abortion illegal." The statements in the plaintiffs' briefs that claim that I made these admissions are false.

14. The plaintiffs' brief also contends that my Facebook posting of November 26, 2019, states that "the desired effect of the confusion generated by the ordinances is for organizations providing abortions or abortion support services to shut down." I did not make any such statement in the Facebook posting of November 26, 2019. That statement merely expressed satisfaction over the fact that a statewide admitting-privileges law caused abortion clinics to close before the Supreme Court's ruling in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2307 (2016). It did not claim

or in any way suggest that the "desired effect" of the sanctuary-cities ordinances was to "shut down" abortion providers or abortion-assistance organizations.

15. My Facebook posts that describe Lilith as a baby-stealing demon are entirely consistent with my belief that it is truthful to describe the Lilith Fund (and other abortion-assistance organizations) as "criminal organizations" because they are violating the state's un-repealed abortion statutes.

16. The plaintiffs claim that I accused them of "criminal" conduct "with no investigation whatsoever into [their] actual activities." Pls.' Br. at 28. That is absolutely false. I investigated the activities of The Afiya Center and the Texas Equal Access Fund before uttering the statements for which they have sued me, and I know that they help pay for abortions. Indeed, The Afiya Center and the Texas Equal Access Fund admit that they help pay for abortions. *See* Affidavit of Marsha Jones ¶ 4 (attached as Exhibit 9 to the Afiya Center's brief); TEA Fund's Br. at 15. This violates article 4512.2 of the Revised Civil Statutes, which imposes criminal liability on anyone who "furnishes the means for procuring an abortion knowing the purpose intended." West's Texas Civil Statutes, article 4512.1 (1974) ("Whoever furnishes the means for procuring an abortion knowing the purpose intended is guilty as an accomplice."). It also violates section 7.02 of the Texas Penal Code, which imposes criminal liability on anyone who aids or abets an act that the law of Texas defines as criminal.

17. The plaintiffs claim that I would have discovered that they have never been subjected to "a governmental investigation or prosecution" if I had conducted additional research. See Pls.' Br. at 28. I already know that the plaintiffs have never been subjected to "a governmental investigation or prosecution," and I have never made any statement that the plaintiffs have been investigated or prosecuted for their violations of Texas's pre-*Roe* abortion statutes. My claim that the plaintiffs are committing "criminal" acts by paying for abortions in violation of article 4512.2 of the Revised

Civil Statutes does not turn on whether they currently being prosecuted or punished for those acts.

18. The plaintiffs' brief claims that *In re Lester*, 602 S.W.3d 469 (Tex. 2020), and *Ex parte E.H.*, 602 S.W.3d 486, 502-03 (Tex. 2020), "overruled" the language in *Pidgeon v. Turner*, 538 S.W.3d (Tex. 2017), that I relied upon in forming my belief that it is truthful to describe organizations that violate the state's pre-*Roe* abortion statutes as "criminal." But *Lester* and *E.H.* had not been decided at the time I made the statements for which the defendants have sued me. *Pidgeon* was undoubtedly good law at the time I made those statements, and I was entitled to rely on that opinion.

19. Page 2 of the plaintiffs' brief says:

> Dickson and his counsel themselves acknowledge that the entire point of the disinformation campaign is to convince the citizens of Texas . . . that anyone who obtains an abortion is committing a crime that can be prosecuted at a later date. . . .

I have never said or acknowledged, in any setting or context, that women who obtain abortions in Texas are committing crimes, or that women who obtain abortions in Texas can be prosecuted at a later date. The plaintiffs' assertion to the contrary is false and defamatory. The Texas pre-*Roe* abortion statutes do not impose criminal liability on women who obtain abortions. *See* West's Texas Civil Statutes, articles 4512.1 – 4512.6 (1974). The Texas murder statute, which defines the intentional killing of an unborn child as first-degree murder, specifically exempts "conduct committed by the mother of the unborn child" from the statutory definition of murder. *See* Tex. Penal Code § 19.06. And women who obtain abortions are not subject to punishment or civil liability under any of the sanctuary cities ordinances that I have drafted.

This concludes my sworn statement. I swear under penalty of perjury that the facts stated in this affidavit are true and correct.

MARK LEE DICKSON

Subscribed and sworn to me
this 22 day of OCTOBER, 2020

NOTARY

PATRICK RICHARD VON DOHLEN
Notary ID #126284600
My Commission Expires
January 17, 2024

Help enforce the Texas Heartbeat Act

JOIN THE TEAM SEND AN ANONYMOUS TIP

GETTING INVOLVED

During the Regular Session of the 87th Legislature, Texas lawmakers passed Senate Bill 8, the Texas Heartbeat Act.

SB 8 requires an abortionist to use standard medical practice to detect the preborn child's heartbeat before an elective abortion. If the heartbeat is detected, then the abortion is prohibited. A heartbeat is generally detectable around six weeks of gestation.

If the abortionist is acting in bad faith or does not properly document the method and results of the heartbeat detection the law is violated. Individuals who aid or abet an illegal abortion can also be sued under SB 8.

SB 8 is unique since enforcement is in the hands of private citizens. The Texas Heartbeat Act calls upon citizens to hold abortionists accountable to following the law. Any Texan can bring a lawsuit against an abortionist or someone aiding and abetting an abortion after six weeks. If these individuals are proved to be violating the law, they have to pay a fine of at least $10,000.

Join the team of Pro-Lifers working to enforce the Texas Heartbeat Act.

Click Here

Send an anonymous tip or information about potential violations of the Texas Heartbeat Act.

Click Here

Help enforce the Texas Heartbeat Act

JOIN THE TEAM SEND AN ANONYMOUS TIP

If you want to help enforce the Texas Heartbeat Act anonymously, or have a tip on how you think the law has been violated, fill out the form below. We will not follow up with or contact you.

How do you think the law has been violated?

Please include as much detail as possible.

If you have any attachments of evidence for how you think the law is being violated, please attach them below

Drag and Drop (or) **Choose Files**

Pictures, files, etc.

How did you obtain this evidence?

Clinic or Doctor this evidence relates to

City

State

Zip

County

Are you currently elected to public office?

- [ ] Yes
- [ ] No

Submit

Help enforce the Texas Heartbeat Act

JOIN THE TEAM SEND AN ANONYMOUS TIP

Fill out this questionnaire to help us plug you into the best way you can enforce the law and hold the abortion industry accountable:

Name *

E.g. John Doe

Street Address *

E.g. 42 Wallaby Way

Apartment, suite, etc

City

E.g. Sydney

State/Province

E.g. New South Wales

ZIP / Postal Code

E.g. 2000

Country

Select country

Phone *

E.g. +1 300 400 5000

Email Address *

E.g. john@doe.com

Occupation

Employer

Are you currently or have you ever been elected to public office? *

- [ ] Yes
- [ ] No

How are you involved in the Pro-Life movement? *

- [ ] Sidewalk counselor
- [ ] Pray outside abortion facilities
- [ ] Volunteer at pregnancy center
- [ ] Other

Are you involved in a local Pro-Life organization?

- [ ] Yes
- [ ] No

How are you interested in enforcing the Texas Heartbeat Act? *

- [ ] Litigating
- [ ] Plaintiff
- [ ] Data collection
- [ ] Other

Is there an abortion provider currently in your city? *

- [ ] Yes
- [ ] No

Best time for TRTL team member to call you to talk about enforcing the Texas Heartbeat Act? *

Hours

0

Minutes

0

AM

If applicable: Do you have information about potential violations of the Texas Heartbeat Act?

Please include as much detail as possible.

Submit

Texas abortion clinics brace for near shutdown as new law is enacted: 'We have to comply'

Jeremy Blackman, Austin Bureau
Aug. 12, 2021 Updated: Aug. 14, 2021 3:54 p.m.

The National Abortion Federation has told doctors in Texas it will stop referring patients and sending money to clinics that offer abortions after about six weeks of pregnancy.

In North Texas, the Texas Equal Action Fund will likely “pause” its ride-share program that helps women reach abortion appointments.

Dr. Bhavik Kumar, an abortion provider for Planned Parenthood, has cleared his schedule to fit in as many patients as he can before the end of the month.

And online, the group Texas Right to Life has launched a website for whistleblowers who want to potentially help sue Kumar and doctors just like him, beginning Sept. 1.

With only days left until the country’s first six-week abortion ban rolls out in Texas, abortion clinics and their supporters are bracing for a virtual shutdown of legal access to the procedure, at least for several weeks. Some clinics in the state are preparing not only to abide by the new guidelines but to go beyond them, shuttering their abortion offerings entirely.

“This law is senseless. It’s not in the best interest of the people of Texas,” Kumar said. “But it is the law, and if it passes, we have to comply.”

What unfolds over the coming weeks could have broad ripple effects. Even a brief pause in access in Texas, the second most populous state, could affect thousands of pregnant women and encourage similar laws across much of the South and Midwest, where abortion care is already limited.

"This is a new approach, and it's going to open up new opportunities," said John Seago, legislative director for Texas Right to Life, which opposes abortion access. "It's a different battlefield than what we typically have with pro-life laws, and that's why we're optimistic."

Abortion providers are trying to delay the rollout in federal court but are not counting on a win given the law's largely untested enforcement tool. Unlike similar bans in other states, which have all been blocked by judges, Senate Bill 8 allows ordinary citizens to sue doctors and others who defy the ban.

That makes it tough to challenge preemptively, because providers don't know whom to sue.

Hundreds of Texas lawyers have come out against the law, warning it contradicts provisions in the state constitution and would open the door to absurd outcomes beyond abortion if allowed to stand. Even proponents of the law expect many of the suits to be dismissed.

But providers and the people who help women access abortions in Texas say they can't afford the risk of potentially endless litigation, even if hardly any of it is deemed credible. Under the law, defendants are unable to recoup legal expenses.

That's why some are considering shutting down their abortion operations altogether, at least until it is clear whether the law will withstand scrutiny in the courts.

"I have one physician who's for sure willing to provide abortions and comply with SB 8," said Amy Hagstrom Miller, the chief executive of Whole Woman's Health. "But the rest of my 16 physicians are still trying to figure out where their risks stop and start, and if they're willing to provide."

Defying new law not a popular option

Most of the physicians at Whole Woman's four clinics in Texas also work at universities and in other states, flying in regularly to provide abortions. Hagstrom Miller said she does not plan to shut down any of the sites, regardless of the law, and will continue at least providing nonabortion pregnancy care, as well as counseling and referrals to clinics in states where abortion access is more protected.

Dr. Lauren Thaxton, a Whole Woman's provider and a researcher at the Texas Policy Evaluation Project who is still weighing her options, said she assumes she will be sued even if she tries to provide abortion care strictly within the parameters of the law.

"Whether or not a case is found to be reasonable, or a true violation of SB 8, there are concerns about how that could affect someone's other sources of employment," she said. "How that could affect their medical licensing. How that could affect the patients that they see and their potential loss of privacy."

Thaxton and others said they were unaware of anyone who is planning to openly defy the law on Sept. 1, though that strategy has been discussed.

Planned Parenthood Gulf Coast, where Kumar works, will continue offering abortions for women before the fetal heartbeat has been detected, as allowed under the law. But most women don't know they're pregnant at that point, typically about six weeks into the gestation period.

Spokeswomen at the nonprofit's two other independent Texas affiliates, one based in San Antonio and the other in Dallas, declined to describe their plans.

Kumar said "the vast majority" of Planned Parenthood patients will need to leave the state for abortion care if the law proceeds, and that he is personally preparing to pitch in at out-of-state clinics that accept Texas patients, to help with their influxes.

Providers performed about 54,000 abortions last year and 56,000 in 2019, according to state data.

The chaos now forming may be the exact scenario that lawmakers were envisioning when they passed Senate Bill 8 this spring. Republicans, who control all branches of the Texas government, have tried for years to choke the industry out of existence, imposing restriction after restriction, many of them later overturned in federal court.

Past disruptions, including last year when Gov. Greg Abbott prohibited most abortions at the beginning of the COVID-19 pandemic, have especially impacted low-income women and women of color, many of whom lack private insurance or the resources or time to travel out of state, according to groups that support abortion access.

‘They think they can go to jail’

This upheaval could drag on longer, and it’s not clear that providers would be able to outright block the law even if they prove that it infringed on their federally protected right to abortion. Josh Blackman, a constitutional law professor at South Texas College of Law Houston, said the decisions in each suit will apply only to that case.

“This is a law designed to prevent Planned Parenthood from going on offense,” he said. “It keeps them on defense.”

In response, abortion providers and their support networks in Texas are scrambling to expand the out-of-state pipelines they pieced together last year and that many have feared will be needed if the conservative-led U.S. Supreme Court rolls back federal abortion protections. This fall, the justices are set to hear their first major abortion case in years.

At abortion clinics, employees are being retrained on what information they will be able to legally give patients on Sept. 1. Those who choose to comply with the law will have to update their websites and promotional materials.

Earlier this month, the National Abortion Federation, a coalition of abortion providers, notified clinics in Texas that it would be pulling support from clinics that defy the ban but would fund up to the full cost of patients seeking abortions within the new guidelines. Chief executive Katherine Hancock Ragsdale said in an interview that the organization is creating a special “concierge team” to assist women in Texas.

Small abortion funds that operate solely in Texas are also rethinking their approach and have been inundated with questions internally.

“No one knows what’s happening. Even our volunteers, they think they can go to jail when that’s not what this is,” said Kamyon Conner, who heads the Texas Equal Access Fund.

Despite the rhetoric, abortion opponents and others are not convinced that providers will comply with the law. Many of their supporters have been working for months to recruit women and employees at abortion clinics who would be willing to help sue. Successful claimants can win at least $10,000 in damages.

"There's a lot of people who are interested in this fight from different angles," said Seago, of Texas Right to Life. "And you're going to see a lot of these people getting involved, now that they have the tools to do it."

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CERTIFICATE OF SERVICE

I, Marc Hearron, a member of the bar of this Court, certify that on this 30th day of August, 2021, I caused all parties requiring service in this matter to be served with a copy of the foregoing by email and overnight delivery to the individuals listed below:

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