No. 21A24

In the Supreme Court of the United States

WHOLE WOMAN'S HEALTH, ET AL.,
Applicants,

v.

JUDGE AUSTIN REEVE JACKSON, ET AL.,
Respondents.

RESPONDENTS' OPPOSITION TO EMERGENCY APPLICATION FOR WRIT OF INJUNCTION AND, IN THE ALTERNATIVE, TO VACATE STAYS OF DISTRICT COURT PROCEEDINGS

HEATHER GEBELIN HACKER
Counsel of Record
ANDREW B. STEPHENS
Hacker Stephens LLP
108 Wild Basin Road South, Suite 250
Austin, Texas 78746
Tel.: (512) 399-3022
heather@hackerstephens.com

Counsel for Respondent Clarkston

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

JUDD E. STONE II
Solicitor General
Counsel of Record

LANORA C. PETTIT
Principal Deputy Solicitor General

NATALIE D. THOMPSON
BETH KLUSMANN
Assistant Solicitors General

Office of the Texas Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Judd.Stone@oag.texas.gov

Counsel for Respondents Jackson, Carlton, Thomas, Young, Benz, and Paxton

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INTRODUCTION

There are many reasons that the Applicants are not entitled to the extraordinary relief they seek. The most obvious is that Applicants seek an injunction from this Court that would utterly fail to prevent any of the harm they claim will occur once Texas Senate Bill 8 becomes effective. This Court cannot expunge the law itself. Rather, it can enjoin only enforcement of the law. But the Governmental Defendants explicitly do not enforce the law, and the private-individual respondent testified that he will not do so.

Applicants' inability to obtain a preliminary injunction is the result of their own litigation decisions, not some injustice foisted upon them by the Fifth Circuit, which merely acknowledged a longstanding rule that the district court is divested of jurisdiction after appeal of an order denying sovereign immunity. Texas's Senate Bill 8 was signed into law on May 19. It takes effect on September 1. *See* Act of May 19, 2021, 87th Leg., R.S., SB 8 § 12, effective Sept. 1, 2021 ("SB 8"). Applicants waited until July 13 to file this lawsuit and until August 7 to seek a preliminary injunction. Supp.App.2; Dist. Ct. ECF No. 53. Applicants were (or should have been) well-aware the government officials they sued would invoke sovereign immunity. And Applicants' counsel could not have been ignorant of the firm boundaries Article III places around federal courts. Yet Applicants waited until August 11 to make any explanation as to how there is subject-matter jurisdiction in this case, even though Respondents had already raised the issue several times. Dist. Ct. ECF Nos. 56, 57, 62.

Those jurisdictional defects mean Applicants cannot obtain the injunction they seek. At bottom, Applicants' lawsuit asks the federal courts not to decide a concrete dispute between parties, but to sit as a "roving commission . . . on the validity of [Texas] law[]." *Broadrick v. Oklahoma*, 413 U.S. 601, 610-11 (1973). That is not the role of a federal court. Their audacious requests to this Court, given the numerous precedents standing in the way, should be denied.

STATEMENT OF THE CASE

I. SB 8 creates a private cause of action that enables Texans to sue those who perform, or aid and abet the performance of, abortions after a fetal heartbeat has been detected. SB 8 § 3 (creating Tex. Health & Safety Code § 171.208(a)). It is an affirmative defense that (1) the defendant in such an action "has standing to assert the third-party rights of a woman . . . seeking an abortion," and (2) awarding relief to the claimant would impose an undue burden. *Id.* § 171.209(b). Utilizing this cause of action, a lawsuit can be brought by "[a]ny person, *other than an officer or employee of a state or local governmental entity in this state*." *Id.* (emphasis added).

Section 6 of the bill declares that the private cause of action established in Section 3 is the only method of enforcing SB 8. Before SB 8, Chapter 171 of the Texas Health and Safety Code, which regulates abortions, provided that the Department of State Health Services "shall enforce this chapter." Tex. Health & Safety Code § 171.005. After SB 8 becomes effective, however, the provision will read: "The [Health and Human Services C]ommission 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 [HHSC]." SB 8 § 6 (amending Tex. Health & Safety Code § 171.005) (emphasis added).

Section 3 of the bill reiterates that private causes of action are the only method of enforcing SB 8: "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." SB 8 § 3 (creating Tex. Health & Safety Code § 171.207(a)) (emphasis added). It further expressly prohibits any form of public enforcement:

> 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.

Id.[1] In light of that clear text, the Office of the Texas Attorney General interprets state law to foreclose government enforcement of SB 8 section 3, whether direct or indirect. Supp.App.50-53.

II. Applicants are various abortion clinics and abortion doctors, Supp.App.9-12, as well as other organizations that allegedly advocate for abortions and two individuals who allegedly provide spiritual care and counseling about abortions, Supp.App.12-15.

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[1] Chapter 19 of the Penal Code sets out criminal homicide offenses and Chapter 22 sets out assaultive offenses.

Despite SB 8's plain text prohibiting government enforcement, Applicants filed suit seeking injunctive relief against a cadre of state executive officials: the Executive Directors of the Texas Medical Board ("TMB"), Texas Board of Nursing, and Texas Board of Pharmacy, as well as the Commissioner of HHSC, and the Attorney General (collectively, the "State Agency Defendants"). Supp.App.15-20.

Applicants also sued a Texas district judge and a court clerk. Respondent Judge Austin Reeve Jackson presides over Texas's 114th District Court. The 114th District Court is one of four district courts sitting in Smith County, Texas, population 235,753. Respondent Penny Clarkston is the clerk of Smith County's courts. Applicants' theory: Texas executive officials do not enforce SB 8 (notwithstanding their claims against those very officials), so it must be "enforced" by the clerks who accept filings and the judges who preside over private lawsuits. *See* Supp.App.24-25; Dist. Ct. ECF No. 62 at 3-5 (citing *Shelley v. Kraemer*, 334 U.S. 1, 14 (1948)). They have acknowledged that their suit names Judge Jackson in his "judicial capacity." Dist. Ct. ECF No. 19 at 4. And they have moved to certify defendant classes of all Texas judges with jurisdiction to hear private lawsuits brought under SB 8 and the district clerks of all 254 Texas counties. Dist. Ct. ECF No. 32; *see* Appl. at 4.

Applicants also sued Respondent Mark Lee Dickson, an individual who they allege has threatened to file private enforcement actions against them utilizing SB 8's cause of action. Respondent Dickson has testified that he does not intend to file any such action. *See* Dist. Ct. ECF No. 64-1.

ARGUMENT

To obtain the "extraordinary remedy" of an injunction pending appeal, Applicants must show that injunctive relief is (1) necessary or appropriate in aid of the Court's jurisdiction, and (2) the legal rights at issue are "indisputably clear." *Wis. Right to Life, Inc. v. Fed. Election Comm'n*, 542 U.S. 1305, 1306 (2004) (Rehnquist, C.J., in chambers); 28 U.S.C. § 1651(a). The Court's authority to issue such an injunction is to be used "sparingly and only in the most critical and exigent circumstances." *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regul. Comm'n*, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers) (quoting *Fishman v. Schaffer*, 429 U.S. 1325, 1326 (1976) (Marshall, J., in chambers)). Far from presenting "critical and exigent circumstances," *id.*, this case does not present an Article III case or controversy. Contrary to Applicants' hyperbolic assertions, they have not shown that they will be personally harmed by a bill that may never be enforced against them by anyone, much less by the Governmental Defendants. By contrast, the Governmental Defendants—and the State they have sworn to serve—will be irreparably harmed if any of the litany of alternative forms of requested relief are granted.

I. Applicants Have Not Shown an Indisputably Clear Right to Relief as to the Governmental Defendants.

At the outset, Applicants fail to show an "indisputably clear" right to relief because they fail to show federal jurisdiction over the present claim. They lack Article III standing, and sovereign immunity bars their claims against the

Governmental Defendants. No court—not even this one—can enjoin a defendant where it lacks jurisdiction. So even if Applicants were correct that SB 8 is facially unconstitutional, they would not be entitled to an injunction pending appeal.

A. Applicants lack Article III standing.

A plaintiff invoking federal jurisdiction must show that his alleged injury is caused by the defendant he has chosen to sue and redressable by an order against that defendant. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). And "for purposes of traceability, the relevant inquiry is whether the plaintiffs' injury can be traced to 'allegedly unlawful conduct' of the defendant, not to the provision of law that is challenged." *Collins*, 141 S. Ct. at 1779 (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)). As this Court recently explained, Applicants do not have standing to challenge legal provisions that the defendant cannot enforce. *See California v. Texas*, 141 S. Ct. 2104, 2114 (2021).

1. State Court Defendants

a. Applicants do not have standing to sue a state judge or court clerk because a private party might file a lawsuit in his court. As several courts of appeals have concluded, there is no case or controversy between a judge and a plaintiff challenging the constitutionality of a state law merely because the judge may apply that law. *See Cooper v. Rapp*, 702 F. App'x 328, 333 (6th Cir. 2017); *Bauer v. Texas*, 341 F.3d 352, 359 (5th Cir. 2003); *Mendez v. Heller*, 530 F.2d 457, 461 (2d Cir. 1976). The same principle applies to a state court's clerk

for the same reason, as he or she works at the direction of judges. *Ch. Clerk of Chickasaw County v. Wallace*, 646 F.2d 151, 160 (5th Cir. 1981). "The requirement of a justiciable controversy is not satisfied where a judge acts in his adjudicatory capacity." *Bauer*, 341 F.3d at 359. And whether a judge acts in that capacity turns on "the nature of the act itself, i.e., whether it is a function normally performed by a judge." *Stump v. Sparkman*, 435 U.S. 349, 362 (1978).

As the Fifth Circuit explained four decades ago, "clerks and judges do not have a sufficiently 'personal stake in the outcome of the controversy'" to allow for federal jurisdiction. *Wallace*, 646 F.2d at 160 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). Other courts agree: a judge's posture is "not in any sense the posture of an adversary to the contentions made on either side of the case." *Mendez*, 530 F.2d at 459. To the contrary, a judge acts as "a disinterested judicial adjudicator, bound to decide the issues before him according to the law." *Cooper*, 702 F. App'x at 333-34. For the same reasons, many courts have rejected attempts to name the judges who apply challenged statutes as defendants under section 1983. *See Allen v. DeBello*, 861 F.3d 433, 440 (3d Cir. 2017); *Grant v. Johnson*, 15 F.3d 146, 148 (9th Cir. 1994); *In re Justices of Sup. Ct. of P.R.*, 695 F.2d 17, 22 (1st Cir. 1982).

This conclusion follows from this Court's traditional three-part standing inquiry into whether the plaintiff has demonstrated an injury in fact, traceability, and redressability. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). In particular, the second element of Article III standing requires

that a plaintiff's injury be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." *Id.* It is not enough that the challenged *statute* causes the plaintiff's injury—the plaintiff must show the injury was caused by actions of the defendants. *See Collins*, 141 S. Ct. at 1779; *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1157 (10th Cir. 2005); *Hope Clinic v. Ryan*, 249 F.3d 603, 605 (7th Cir. 2001) (per curiam). When the alleged injury is the potential for a lawsuit, standing depends on (among other things) whether or where private lawsuits are filed, how they will be litigated, or whether any initial conclusions will be upheld on appeal. Each of these contingencies must be considered in assessing standing. *See Clapper*, 568 U.S. at 409.

b. As summarized by the district court, Applicants' theory is that judges and clerks can be sued because they will "exert their official power to open the actions in the docket and issue citations compelling those sued under SB 8 to respond to the lawsuit and exert the compulsive power of the state to force those sued under SB 8 to comply with the statute through an injunction and other penalties." App.51. That is a description of a judge's core judicial function: "issuing an injunction and other penalties," App.51, are "paradigmatic judicial acts." *Forrester v. White*, 484 U.S. 219, 227 (1988). And, if Applicants believe that Judge Jackson has exercised his judicial authority in a manner inconsistent with the constitution, they have an immediate route of judicial redress: appeal through the state system and—if necessary—a petition for certiorari before this Court. 28 U.S.C. § 1257; Sup. Ct. R. 10(b).

Applicants' contrary authority is inapposite because it addresses lawsuits brought against state judges where they are sued in an enforcement or administrative capacity—not in their judicial capacities. Chief among them is *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719 (1980), which addressed the Virginia Supreme Court's ability to create the rules governing the state bar and apply them by initiating disciplinary action against violators. This Court was very careful to distinguish between the capacities in which the Justices were being sued, and it allowed only those claims brought against them in their "enforcement capacity." *Id.* at 736. Similarly, this Court has held that a judge might be sued in an "administrative" capacity. *See Forrester v. White*, 484 U.S. 219, 227 (1988). In *Ex parte Virginia*, 100 U.S. (10 Otto) 339 (1880), for example, this Court found that a judge could be an appropriate defendant in a case challenging the process of summoning potential jurors because that administrative function could have been performed some other official. *See id.* Put in modern parlance, sending out jury summonses is not "a function normally performed by a judge." *Stump*, 435 U.S. at 362.

c. The district court erred by adopting *Shelley v. Kraemer* for the proposition that "Supreme Court precedent dictates that the Judicial Defendants are the proper defendants" because "the Judicial Defendants are the only members of the State immediately connected with the enforcement of SB 8." App.51. *Shelley* says nothing about standing, and it did not involve a state judge named as a defendant. *See* 334 U.S. at 15-16. It merely held that "judicial action" is "state action" for purposes of applying the Fourteenth

Amendment to racially restrictive covenants. *Id.* And since it was decided, this Court has "tightly confined *Shelley* to its most narrow application." G. Sidney Buchanan, *A Conceptual History of the State Action Doctrine: The Search for Governmental Responsibility (Part II of II)*, 34 Hous. L. Rev. 665, 709 (1997) (discussing *Evans v. Abney*, 396 U.S. 453, 445 (1970)). *Shelley* does not—and cannot—support a general proposition that a disgruntled potential litigant may sue any judge who has jurisdiction to adjudicate a hypothetical future case against him.

2. State Agency Defendants

Applicants also cannot establish standing to sue the State Agency Defendants because, by statute, these Respondents cannot enforce S.B.8 and do not cause any injury that might result from its private enforcement. Applicants concede (at 2, 7) the State Agency Defendants cannot "directly" enforce SB 8. But they contend (at 4) that the State Agency Defendants "have authority to enforce collateral penalties against Applicants for violating SB 8." *See also* App.23-25 (adopting Applicants' interpretation of Texas law). For example, Applicants cite a cause of action that may be utilized by the Texas Attorney General to pursue civil penalties against a licensed physician "[i]f it appears that [she] is in violation of or is threatening to violate this [Subtitle B of Title 3 of the Texas Occupations Code] or a rule or order adopted by the [Texas Medical Board]." Tex. Occ. Code § 165.101(a). They say this provision gives the attorney general "indirect" enforcement authority sufficient to show

traceability and redressability. That is an incorrect reading of Texas law. *See* Supp.App.50-53.

The Texas Legislature was unusually explicit in SB 8. "Notwithstanding . . . any other law," SB 8 "shall be enforced exclusively through the private civil actions described in Section 171.208." SB 8 § 3 (creating Tex. Health & Safety Code § 171.207(a)). Seeking civil penalties for a violation of SB 8 based on general authority, like that provided in the Occupations Code, would violate the specific text of SB 8. Like federal law, Texas law does not allow an agency to exercise authority not provided to it or to circumvent a clear legislative command leaving enforcement of a particular law to some other actor. *See, e.g.*, *Liberty Mut. Ins. Co v. Adcock*, 412 S.W.3d 492, 494 (Tex. 2013). General provisions authorizing other types of enforcement of other laws cannot be read to authorize public enforcement of SB 8. *See Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 901 (Tex. 2000) (explaining "the traditional statutory construction principle that the more specific statute controls over the more general"). So that is why Respondent Paxton's office takes the position the Office of the Attorney General "may not enforce it either directly or indirectly." Supp.App.53.

Applicants insinuate (at 7) that the structure of SB 8 is somehow unconstitutional because there is no statewide official against whom they can bring a pre-enforcement challenge. *See also* Dist. Ct. ECF No. 62 at 3-5; App.51. But this Court has squarely held that the absence of a party with standing to sue "is not a reason to find standing." *Valley Forge Christian Coll.*

v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 489 (1982). Nor does this leave Applicants open to repeated suits across the State with no hope of redress for a constitutional injury. *Contra* Appl. at 8, 20. As noted above (at 2), they can raise their constitutional challenge as a defense in an action brought under S.B.8 in state court and seek review here if necessary. State court may not be Applicants' preferred forum, but state courts are permitted to consider federal constitutional questions. *Stone v. Powell*, 428 U.S. 465, 494 n.35 (1976) ("State courts, like federal courts, have a constitutional obligation to safeguard personal liberties and to uphold federal law.") (citing *Martin v. Hunter's Lessee*, 1 Wheat. 304, 341-344 (1816)); *see also, e.g.*, *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 930 (1975) ("[S]tate courts are fully competent to adjudicate constitutional claims."). Indeed, there are several lawsuits challenging SB 8 already pending in Texas courts. *See, e.g., Tuegel v. Texas*, No. D-1-GN-21-004316 (261st Dist. Ct., Travis County, Tex. August 25, 2021); *The Bridge Collective v. Texas,* No. D-1-GN-21-004303 (126th Dist. Ct., Travis County, Tex. August 25, 2021); *Van Stean v. Texas,* No. D-1-GN-21-004179 (98th Dist. Ct., Travis County, Tex. August 23, 2021).The absence of a government official to sue in federal court at this time does not create standing. *Valley Forge*, 454 U.S. at 489.

B. Applicants cannot invoke *Ex parte Young* to overcome Respondents' sovereign immunity.

Even if Applicants had standing, they cannot sue the Governmental Defendants unless the claim fits within the *Ex parte Young* exception to

sovereign immunity. *See Kentucky v. Graham*, 473 U.S. 159, 166 (1985) ("[A]n official-capacity suit is, in all respects other than name, to be treated as a suit against the entity."). For a plaintiff to properly invoke *Ex parte Young*, 209 U.S. 123 (1908), the state official sued 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." *Id.* at 157. Applicants cannot show that necessary connection.

As this Court's precedent explains, "[t]here is a wide difference between a suit against [State officials] to prevent them, under the sanction of an unconstitutional statute, from committing by some positive act a wrong or trespass, and a suit against officers of a state merely to test the constitutionality of a state statute." *Fitts v. McGhee*, 172 U.S. 516, 529-30 (1899). The *Ex parte Young* exception authorizes lawsuits only against a state officer who is violating or intends to violate federal law; that is what "strips" the officer of his sovereign authority and allows him to be sued as a rogue individual rather than as a component of a sovereign entity. *See Ex parte Young*, 209 U.S. at 159-60; *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 104 (1984) ("[A]n official who acts unconstitutionally is 'stripped of his official or representative character'" (emphasis added) (quoting *Ex parte Young*, 209 U.S. at 60).

1. State Court Defendants

Applicants' claims against Ms. Clarkson and Judge Jackson demonstrate that they are attempting to do what *Ex parte Young* said they may not: "make

the state a party." 209 U.S. at 157. Applicants urge a federal court to enjoin every non-federal judge and court clerk in Texas—the entire Texas judiciary—to prevent the filing or consideration of private-enforcement suits under SB 8. Supp.App.7; Dist. Ct. ECF 32.

But Applicants' claims against Judge Jackson and Ms. Clarkston, even as individual state judicial officers, cannot fall within the *Ex parte Young* exception because neither has the necessary "connection with the *enforcement* of the [challenged] act." *Ex parte Young*, 209 U.S. at 157 (emphasis added). Under the federal constitution, it is axiomatic that "the province and duty of the judicial department [is] to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). Enforcement of the law is the province of the Executive Department. U.S. CONST. ART. II, § 3. The Texas Constitution functions the same way. *See* TEX. CONST. ART. II, § I; *see generally id.* art. IV. Indeed, *Ex parte Young* itself forecloses Applicants' theory:

> [T]he right to enjoin an individual, even though a state official, from commencing suits . . . does not include the power to restrain a court from acting in any case brought before it, either of a civil or criminal nature. . . . [A]n injunction against a state court would be a violation of the whole scheme of our government.

209 U.S. at 163.

Applicants' insistence to the contrary—that court clerks and judges "enforce" SB 8—fails for many of the same reasons that their standing arguments do not support jurisdiction. Applicants argue that, as a clerk, Ms. Clarkson is "connected to SB 8's private-enforcement mechanism" because

she "will docket SB 8 petitions for enforcement and issue summonses compelling those sued to appear on pain of default judgment." Appl. at 21. Applicants insist that Judge Jackson enforces SB 8 because he "will oversee enforcement actions and issue SB 8's mandatory penalties." These allegedly unconstitutional actions are wholly dependent on actions by a private party. Ms. Clarkston has no control over whether someone chooses to file an SB 8 enforcement petition in Smith County. And issuing citation comes only after a private party both chooses to file an enforcement action and "request[s]" that citation be issued. Tex. R. Civ. P. 99(a). And of course, Judge Jackson has no say over whether someone chooses to file suit in Smith County District Court, nor even over whether that case is assigned to him or one of the other three district judges in the county.

The mere act of docketing or hearing a case cannot strip Judge Jackson or Ms. Clarkston of their government authority because, even under Applicants' theory, not every SB 8 enforcement suit violates the Constitution. For instance, SB 8 and its private cause of action apply to late-term abortions already prohibited by Texas law—a prohibition Applicants cannot dispute is constitutional. *See* Tex. Health & Safety Code § 171.044. And it is the responsibility of the litigant—not the court clerk—to ensure that his court filings respect the constitutional rights of an opposing party. The clerk does nothing illegal by accepting a court filing that seeks to enforce a statute that may be unconstitutional in some applications, as Applicants allege here. Nor is Judge Jackson a federal lawbreaker merely by presiding over a lawsuit

between private litigants—even if the lawsuit is brought under an allegedly unconstitutional statute.

Applicants' lawsuit is all the more problematic because it attempts to force Judge Jackson and Ms. Clarkston to be the representatives of putative classes of every non-federal judge and court clerk in Texas—essentially asking federal courts to commandeer the entire Texas judiciary. But as this Court held in *Coeur d'Alene Tribe*, if a suit "implicates special sovereignty interests," the *Ex parte Young* exception does not apply. 521 U.S. at 281. By seeking relief against classes making up the entire Texas judiciary, Applicants seek relief that "is close to the functional equivalent" of suing the Texas judiciary. *Id.* at 282. "This is especially troubling when coupled with the far-reaching and invasive relief" Applicants seek. *Id.* Applicants cannot use the mechanism of a class action to bring a lawsuit otherwise barred by sovereign immunity.

2. State Agency Defendants

Plaintiffs' claims against the State Agency Defendants fail too because they do not enforce SB 8 within the meaning of *Ex parte Young*. *Ex parte Young* "rests on the premise—less delicately called a 'fiction'—that when a federal court commands a state official to do nothing more than refrain from violating federal law, he is not the State for sovereign-immunity purposes. The doctrine is limited to that precise situation . . . ." *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 255 (2011) (citation omitted). Because an *Ex parte Young* injunction "commands a state official to . . . refrain from violating federal law," *id.*, it cannot issue if the state official does not enforce

the law in question. 209 U.S. at 157. If the defendant does not enforce the challenged state law, then the plaintiff "is merely making him a party as a representative of the state, and thereby attempting to make the state a party," which sovereign immunity forbids. *Id.*

As explained above, the State Agency Defendants lack state law authority to enforce SB 8, whether directly or indirectly. *See* Supp.App.50-53. Even cases taking a broad view of the *Ex parte Young* exception recognize that it applies to "a state official who enforces [an unconstitutional state] law," not all state officials. *Va. Office for Prot. & Advocacy*, 563 U.S. at 255; *see also Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 437 (2004) ("state officials acting in violation of federal law"). Because the State Agency Defendants are not acting at all, the *Ex parte Young* fiction has no applicability. Put another way, a federal court cannot order parties to stop doing what they are already not doing.

Allowing Applicants to sue Defendants who do not enforce SB 8 would upend this Court's conception of judicial review. "The party who invokes the power [of judicial review] must be able to show, not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement . . . ." *Commonwealth of Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923). If relief is warranted, "the court enjoins, in effect, not the execution of the statute, but the acts of the official, the statute notwithstanding." *Id.*; *see also United States v. Sineneng-*

Smith, 140 S. Ct. 1575, 1585-86 (2020) (Thomas, J., concurring); *cf. Collins*, 141 S. Ct. at 1779.

In this case, however, Applicants' alleged injuries flow from the existence of the law and its potential use by unidentified private parties, not any enforcement by the State Agency Defendants. As a result, the Court cannot enjoin "the execution of the statute," much less "the acts of [any] official," because none of the defendants executes SB 8. *Mellon*, 262 U.S. at 488. In substance, Applicants ask this Court "to review and annul" SB 8 "on the ground that [it is] unconstitutional." *Id.* "To do so would be, not to decide a judicial controversy, but to assume a position of authority over the governmental acts of [a sovereign State], an authority which plainly [federal courts] do not possess." *Id.* at 488-89.

The Fifth Circuit has considered these issues in great detail over the years. *See, e.g.*, *City of Austin v. Paxton*, 943 F.3d 993, 997-1003 (5th Cir. 2019); *Okpalobi v. Foster*, 244 F.3d 405, 411-24 (5th Cir. 2001) (en banc) (plurality op.). So have other courts of appeals. *See, e.g.*, *Church v. Missouri*, 913 F.3d 736, 747-48 (8th Cir. 2019); *McBurney v. Cuccinelli*, 616 F.3d 393, 399-402 (4th Cir. 2010); *Children's Healthcare is a Legal Duty, Inc. v. Deters*, 92 F.3d 1412, 1414-18 (6th Cir. 1996). But Applicants would have this Court casually cast aside decades of well-reasoned circuit precedent without even briefing on the merits. The Court should decline that invitation.

C. 42 U.S.C. Section 1983 Bars Injunctive Relief Against Judge Jackson and Ms. Clarkston.

Even if the Court perceived an urgent need to reconsider the full scope of *Ex parte Young*, this would be a poor vehicle to do so because the Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, amended section 1983 to provide that "in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable." This case, brought against judicial officers in their judicial capacity runs afoul of this provision. Applicants insist to the contrary, that: (1) declaratory relief is unavailable because they were unable to get it on an emergency basis, and (2) the term "judicial officer" in section 1983 does not apply to Ms. Clarkston. Applicants are wrong on both counts.

1. Declaratory relief is available for Applicants' claim.

"[Applicants] cannot allege that declaratory relief is unavailable because [they] can, and indeed have, pursued a claim seeking a declaration." *ODonnell v. Harris County*, 251 F. Supp. 3d 1052, 1156 (S.D. Tex. 2017), *aff'd as modified*, 882 F.3d 528 (5th Cir. 2018) (quoting *MacPherson v. Town of Southampton*, 664 F. Supp. 2d 203, 211-12 (E.D.N.Y. 2009)); Supp.App.2, 8, 36, 38, 46-47. Applicants' claim for declaratory relief fails on its merits, but that does not mean it is "unavailable."

Applicants can cite no authority that they may obtain injunctive relief in direct defiance of section 1983 as a stopgap until they can obtain declaratory

relief via final judgment—because that is wrong. To satisfy section 1983, declaratory relief is "unavailable when as a matter of law no cause of action for declaratory relief is provided by statute." *ODonnell*, 251 F. Supp. 3d at 1156. Temporary unavailability is not enough. Indeed, "[a] merely temporal unavailability of declaratory relief in this case would defeat Congress's purpose in amending § 1983 to prohibit injunctive relief against judges except in extraordinary cases of recalcitrance against clearly defined court declarations." *Id.* at 1155 n.118 (citing S. Rep. No. 104-66 at 36-37 (1996) ("This section restores the doctrine of judicial immunity to the status it occupied prior to the Supreme Court's decision" in *Pulliam v. Allen*, 466 U.S. 522 (1984))).

2. The phrase "judicial officer" includes all judicial officers acting in an adjudicative capacity—not just judges.

a. Plaintiffs are also wrong to contend that section 1983's prohibition on injunctive relief against "judicial officers" excludes Ms. Clarkston because she is a clerk. As an initial matter, under Texas law, clerks are judicial officers: "[t]he district clerk must take and sign the oath prescribed for *officers* of this state." Tex. Gov't Code § 51.302 (emphasis added). Texas law provides that district clerks, like Ms. Clarkston, undertake "official acts" on behalf of the court. *Id.* at § 51.301(d) ("Each district clerk shall be provided with a seal for the district court. . . . The seal shall be impressed on all process issued by the court except subpoenas and shall be kept and *used by the clerk to authenticate official acts*." (emphasis added)).

b. But even if Ms. Clarkston were not a "judicial officer" in her own right, she still qualifies as one because she acts on behalf of judges, who are indisputably "judicial officers." Lower federal courts have long recognized that, in Texas, "[t]he clerks of court are also entitled to immunity the same as judges when performing their duties." *Zimmerman v. Spears*, 428 F. Supp. 759, 762 (W.D. Tex.), *aff'd*, 565 F.2d 310 (5th Cir. 1977); *see also Willis v. Shaw*, 186 F.R.D. 358, 361 (E.D. Tex. 1999). And they have long extended absolute judicial immunity to court clerks for "acts they are specifically required to do under court order or at a judge's discretion." *Kastner v. Lawrence*, 390 F. App'x 311, 315 (5th Cir. 2010) (quoting *Clay v. Allen*, 242 F.3d 679, 682 (5th Cir. 2001) (quoting *Tarter v. Hury*, 646 F.2d 1010, 1013 (5th Cir. 1981))). "Issuing process" is one such task. *Id.* Texas courts agree. *See, e.g.*, *Thompson v. Coleman*, No. 01-01-00114-CV, 2002 WL 1340314, at *5 (Tex. App.—Houston [1st Dist.] June 20, 2002, pet. denied); *Spencer v. City of Seagoville*, 700 S.W.2d 953, 958-59 (Tex. App.—Dallas 1985, no writ)).

Applicants cannot dispute that the acts they seek to prevent Ms. Clarkston from committing—docketing SB 8 enforcement cases and issuing citation—are acts she does at the direction of judges. District clerks act under authority of the Texas Rules of Civil Procedure, which are promulgated by the Texas Supreme Court. *See* Tex. Gov't Code § 22.004. The Texas Rules of Civil Procedure are what require a civil action to be commenced by a petition filed with the clerk, who "shall" document the filing. Tex. R. Civ. P. 22, 24. They also require that "[u]pon the filing of the petition, the clerk, when requested, shall

forthwith issue a citation and deliver the citation as directed by the requesting party." Tex. R. Civ. P. 99(a). The contents of the citation the clerk "shall" issue upon request are also prescribed by the Rules. Tex. R. Civ. P. 99(b), 99(c). "[I]n the absence of specific instructions from a "'judicial officer,' the clerk of court lacks authority to refuse or to strike a pleading presented for filing." *McClellon v. Lone Star Gas Co.*, 66 F.3d 98, 102 (5th Cir. 1995).

If district clerks are not acting directly under the Texas Rules of Civil Procedure, they are acting under the local rules of the District Court. These are promulgated by the judges of the District Court and the County Courts at Law and approved by the Texas Supreme Court. *See* Tex. R. Civ. P. 3(a); *see also, e.g., Local Smith Cty. R. of Civ. Trial*, https://www.smith-county.com/government/courts/local-rules-of-civil-trial.

As the Fifth Circuit concluded in holding judges *and* clerks were inappropriate defendants in an action challenging a law's constitutionality, "*[b]ecause of the judicial nature of their responsibility, the chancery clerks* and judges do not have a sufficiently 'personal stake in the outcome of the controversy . . .'" *Wallace*, 646 F.2d at 160 (emphasis added) (quoting *Baker*, 369 U.S. at 204). Thus, because the actions Applicants seek to enjoin Ms. Clarkston from taking are done at the direction of judges, including Judge Jackson, she may not be enjoined under section 1983.

c. Injunctive relief against Ms. Clarkston is particularly problematic because "a state official cannot be enjoined to act in any way that is beyond his authority to act in the first place." *Okpalobi*, 244 F.3d at 427. A court clerk is

not responsible for judging the merits of a lawsuit. *See* Tex. Const. art. V, § 9; Tex. Gov't Code § 51.303; Tex. R. Civ. P. 22-26. A court clerk like Ms. Clarkston does not have the authority to reject petitions, even when the filing is frivolous, harassing, improper, malicious, or based on an unconstitutional statute. Tex. R. Civ. P. 22-26 (using the mandatory term "shall"); *see also McClellon*, 66 F.3d at 102. Granting Applicants' requested relief against Ms. Clarkston would require her—a non-lawyer—to do something she otherwise never does: evaluate the legal basis for *every single case* filed in Smith County so that she can root out and reject any lawsuits filed under SB 8. Such relief would require her to exceed her responsibilities as an elected official under state law—essentially requiring her to violate state law by acting *ultra vires*. A federal court has no power to command that. *Okpalobi*, 244 F.3d at 427; *see also Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 691 n.11 (1949) ("[A] suit may fail, as one against the sovereign . . . if the relief requested cannot be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign.").

Moreover, Applicants' requested relief "would disrupt the normal course of proceedings in the state courts" and "would constitute a form of monitoring of the operation of state court functions that is antipathetic to established principles of comity." *O'Shea v. Littleton*, 414 U.S. 488, 501 (1974). Nor may a federal court instruct Ms. Clarkston that her official duties under State law *include* rooting out and rejecting SB 8 lawsuits. *Pennhurst State Sch.*, 465 U.S. at 106.

* * *

In sum, because none of the Governmental Defendants enforce SB 8 within the meaning of this Court's jurisprudence, Applicants lack standing to sue them, and their claims run afoul of sovereign immunity. Moreover, because alternative remedies are available, they cannot pursue injunctive relief against the State Court Defendants.

II. Applicants Have Not Shown Irreparable Harm.

Applicants assert that, without an injunction, they will face a litany of harms: they will be subject to endless lawsuits, they will be too afraid to perform abortions in the State, and abortions would be "decimated." Appl. 6. But (1) the requested injunctive relief will not prevent the harms they fear, (2) the claimed emergency is largely one of Applicants' own making, and (3) the injunction they seek is overbroad and so vague as to be impossible to implement in any meaningful manner. Moreover, Applicants can continue to litigate their challenge below, so injunctive relief is not necessary to aid the Court's jurisdiction. *See Hobby Lobby Stores, Inc. v. Sebelius*, 568 U.S. 1401, 1404 (2012) (Sotomayor, J., in chambers) (denying request for injunction when applicants could continue their legal challenge in the lower courts because "while the applicants allege they will face irreparable harm . . . they cannot show that an injunction is necessary or appropriate to aid our jurisdiction").

A. Enjoining Respondents will not remedy Applicants' alleged injury.

One thing is clear from their application: Applicants do not wish to be sued in Texas state courts, so they have asked this Court for a vague injunction to "enjoin enforcement of SB 8." Appl. at 38. But the Court does not enjoin laws—it enjoins parties. For the reasons discussed above, holding otherwise would be contrary to *Ex parte Young*'s prohibition on simply suing a state official as a representative of the State to test the constitutionality of its law. 209 U.S. at 157.

And enjoining the parties sued by Applicants will not remedy their claimed injury. Applicants seek to enjoin (1) certain state agencies from "collaterally" enforcing SB 8 at some unknown point in the future, (2) a single judge from hearing lawsuits brought in his court under SB 8, (3) a single court clerk from docketing lawsuits brought in her court under SB 8, and (4) a single private citizen from filing any lawsuit against them under SB 8, even though he already said he would not. [CITE] Even if this Court gave Applicants everything they asked for, Applicants could still face lawsuits in Texas state courts. And those private civil actions are the real basis for Applicants' alleged injury.

Applicants' application repeatedly notes that SB 8 precludes enforcement by government officials but is instead enforced through private lawsuits. Appl. at 2, 7. Applicants then assert that the threat of those private lawsuits and potentially defending them is what will cause their harm. Appl. at 8 (claiming

"the threat of unlimited lawsuits against them will prevent them" from performing abortions), 20 (complaining of the time and resources needed to litigate any private lawsuits). But the parties and claims that Applicants have brought to this Court do not permit the Court to enjoin all citizens in Texas from filing suit under SB 8. Thus, granting the only relief Applicants have sought will not prevent the private lawsuits that Applicants fear.

B. The alleged prejudice is of Applicants' own making.

Applicants' conduct is inconsistent with their present claims of impending doom. That the Texas Legislature was considering a major change to abortion regulation has been widely discussed since *at least* early 2021.[2] SB 8 was originally filed with the Texas State Legislature and Secretary of State on March 11. *Actions: SB8*, Texas Legislature Online (last visited Aug. 31, 2021), https://tinyurl.com/k3hhp83s. SB 8's. It was sent to the Governor or May 14 and signed on May 19. *Id.* The September 1 effective date is clear on its face. SB 8 § 12. But even before then, Applicants were aware of it—Applicants' counsel noted the bill on its website in March of 2021,[3] and the executive

[2] *E.g.*, Shannon Najmabadi, *Republican lawmakers push to make Texas' anti-abortion laws among the most restrictive in the nation*, Tex. Tribune (Feb. 1, 2021), https://tinyurl.com/bv8f5kr3.

[3] Center for Reproductive Rights, *Texas lawmakers push bill to make it easier to sue abortion providers and harder for new anti-abortion laws to be blocked by courts* (March 18, 2021), https://reproductiverights.org/texas-lawmakers-push-bill-to-make-it-easier-to-sue-abortion-providers-and-harder-for-new-anti-abortion-laws-to-be-blocked-by-courts/

director of one of the Applicant abortion-funding organizations provided testimony on the bill in March.[4]

Yet Applicants did not seek a preliminary injunction until the September 1 effective date was less than a month away. (Indeed, they did not even file their lawsuit until two months after the bill was signed into law. *See* Supp.App.1)

And it should not have come as a surprise when Respondents took an interlocutory appeal of the district court's denial of sovereign immunity. That is hardly an "unusual procedural posture," as Applicants claim (at 16). To the contrary, it has long been clear both that a sovereign immunity defense can be immediately appealed, *P.R. Aqueduct*, 506 U.S. at 144, and that "[t]he filing of a notice of appeal . . . 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). Indeed, interlocutory appeals from a denial of sovereign immunity are commonplace. *See, e.g.*, *Tennessee v. Lane*, 541 U.S. 509 (2004); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996); *P.R. Aqueduct*, 506 U.S. 139.

In light of these well-established principles, Applicants should have accounted for jurisdictional defenses—and the possibility of interlocutory appeal. "[S]elf-inflicted wounds are not irreparable injury. Only the injury

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[4] https://capitol.texas.gov/tlodocs/87R/witlistbill/html/SB00008S.htm (noting Rosann Mariappuram of Applicant Jane's Due Process provided written testimony)

inflicted by one's adversary counts for this purpose." *Second City Music, Inc. v. City of Chicago*, 333 F.3d 846, 850 (7th Cir. 2003); *see also, e.g. Texas v. Biden*, No. 21-10806, 2021 WL 3674780, at *14 (5th Cir. Aug. 19, 2021) (per curiam) (citing 11A Charles Alan Wright, et al., *Federal Practice and Procedure* § 2948.1 (2021)); *accord Biden v. Texas*, No. 21A21, 2021 WL 3732667 (U.S. Aug. 24, 2021).

C. Applicants' requested injunction is overbroad.

Applicants' request that the Court "issue an injunction preventing enforcement of SB 8" (Appl. at 3) is also overbroad. SB 8 contains numerous provisions that Applicants do not claim will cause them irreparable harm if allowed to go into effect. For example, Applicants have brought claims against SB 8 section 4, which creates a fee-shifting provision for challenges to abortion laws. Tex. Civ. Prac. & Rem. Code § 30.022 (effective Sept. 1, 2021). Applicants offer this Court no argument that they would suffer irreparable harm if this provision were to take effect on September 1.

Likewise for SB 8's requirement that a doctor check for a fetal heartbeat prior to performing an abortion. Tex. Health & Safety Code § 171.203(b) (effective Sept. 1, 2021). For the past ten years, Texas law has required physicians to perform a sonogram and make the heartbeat audible before inducing an abortion. *Id.* § 171.012(a)(4)(D); *see Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 579 (5th Cir. 2012) (rejecting constitutional challenge to informed consent law, including its sonogram requirement). That law has not been challenged here, and

Applicants have put on no evidence that checking for a heartbeat is an undue burden on a women's ability to obtain an abortion. And other portions of SB 8 merely require certain recordkeeping when an abortion is performed due to a "medical emergency." SB 8 §§ 7, 9. Again, Applicants do not explain why they need emergency relief from these recordkeeping requirements.[5] And SB 8 applies to abortions performed after 20 weeks' post-fertilization age and to partial-birth abortions, which are already prohibited by Texas laws Applicants do not challenge here. *See* Tex. Health & Safety Code §§ 171.044; 171.102.

Applicants' lack of clarity about the relief they need underscores the enormity of their request. Any "order granting an injunction" is required to "state its terms specifically" and "describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required." Fed. R. Civ. P. 65(d)(1). Yet Applicants never say what exactly each Respondent should be restrained from doing or required to do. For example, Judge Jackson and Ms. Clarkston undisputedly have state-law duties related to processing and adjudicating lawsuits, but Applicants do not say what they

[5] Applicants also make no mention of their equal-protection, First Amendment, and "preemption" claims or explain why those claims require emergency injunctive relief. Regardless, the Court has held that "[a]bortion is inherently different from other medical procedures" because it involves "the purposeful termination of potential life," *Harris v. McRae*, 448 U.S. 297, 325 (1980); SB 8 explicitly precludes application to protected First Amendment activity, Tex. Health & Safety Code § 171.208(g) (effective Sept. 1, 2021); and "preemption" is not a cause of action, *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324-25 (2015).

are supposed to do if someone files a private lawsuit under SB 8 in Smith County.

All Applicants say (at 38) is that the Court should "enjoin enforcement of SB 8." But, as detailed above, it is not that simple. Courts do not enjoin statutes, they enjoin parties. *See supra* at 8. And Applicants have no plausible theory why an injunction can or should issue against these defendants.

III. Respondents Will Be Irreparably Harmed if Subjected to an Injunction Pending Appeal.

If any party is facing irreparable injury in this application, it is Respondents, along with the State they serve and its people. "[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers); *see also Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Robert, C.J., in chambers). That is what Applicants ask this Court to do.

That harm is particularly acute where the requested injunction is directed at a state court. "[A]n injunction against a state court would be a violation of the whole scheme of our government." *Ex parte Young*, 209 U.S. at 163; *see also O'Shea v. Littleton*, 414 U.S. 488, 500 (1974) (rejecting a request for an "ongoing federal audit of state criminal proceedings" in suit against state judges). Such "monitoring of the operation of state court functions . . . is antipathetic to established principles of comity," *O'Shea*, 414 U.S. at 501, and

offends principles of federalism, *see Ballard v. Wilson*, 856 F.2d 1568, 1570 (5th Cir. 1988) (citing *O'Shea*, 414 U.S. 488); *see also Parker v. Turner*, 626 F.2d 1, 9 (6th Cir. 1980) (declining to issue injunction that would require monitoring state judges' conduct). Applicants ask this Court to enjoin Ms. Clarkston from performing her state law duties to file petitions, issue citations, and the like. As to Judge Jackson, Applicants seemingly want this Court to direct state judges how to decide SB 8 lawsuits filed in their courts. Such interference in the State judiciary would irreparably harm Texas and its courts.

Further, Judge Jackson and Ms. Clarkston's continued involvement as defendants in the case raises an ethical dilemma. Canon 3(B)(10) of the Texas Code of Judicial Ethics states:

> A judge shall abstain from public comment about a pending or impending proceeding which may come before the judge's court in a manner which suggests to a reasonable person the judge's probable decision on any particular case."[6]

Although this section exempts judges who are serving as litigants in their personal capacity,[7] it may apply to judges who are litigants in their official capacities. The Code also requires judges to ensure that court staff, including clerks, abide by this requirement as well. *See id.* ("A judge shall require similar

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[6] Available at https://www.txcourts.gov/media/1452409/texas-code-of-judicial-conduct.pdf.

[7] *See id.* ("This section does not apply to proceedings in which the judge or judicial candidate is a litigant in a personal capacity.").

abstention on the part of court personnel subject to the judge's direction and control.")

Judge Jackson and Ms. Clarkston have been placed in an untenable position by plaintiffs' lawsuit. Although no SB 8 private enforcement actions are presently pending or impending, they must be cognizant of their ethical obligations. If they refuse to defend the merits of the law because SB 8 litigation may be brought in their court (as Judge Jackson has thus far done), they risk liability for costs and attorneys' fees. But if they defend the claims against them on the merits, they must step out of their role of neutral arbiter of law. This is precisely why courts have long held that judges and clerks are not proper defendants under section 1983 as discussed above. Regardless, plaintiffs' requested relief and continued litigation against Judge Jackson and Ms. Clarkston in challenging the constitutionality of SB 8 threatens to do harm to the impartiality and neutrality of the Texas judiciary.

Because Applicants have not shown an undisputedly clear right to relief or likelihood of irreparable harm, they are not entitled to an injunction pending appeal. *Biden*, No. 21A21, 2021 WL 3732667. That conclusion is further underscored by the harm that Respondents will face if that relief is granted.

IV. The Court Should Reject Applicants' Requests for Alternative Forms of Relief.

The Court should also reject the ancillary forms of relief included in the application. The application process in this Court is designed to remedy

immediate, otherwise irreparable harm—not to require this Court to superintend the management of the district court's docket.

A. The Court should not vacate the district court stays.

As an alternative argument, Applicants ask the Court to vacate (1) the Fifth Circuit's administrative stay regarding their claims against Mr. Dickson, and (2) the district court's decision to vacate the preliminary injunction hearing in response to the divestiture of jurisdiction after Respondents filed their notice of appeal. Appl. at 27-36.

1. The Fifth Circuit did not abuse its discretion by issuing an administrative stay regarding the preliminary-injunction proceeding as to Dickson so it can consider Applicants' and Dickson's jurisdictional arguments. App.5. It ordered expedited briefing that was completed this morning. App.5.[8] There is no reason to think the Fifth Circuit panel will not act quickly, either granting Applicants' motion to dismiss Dickson's appeal and lifting the administrative stay or denying Applicants' motion to dismiss and ordering a stay of further district court proceedings pending appeal. Even so, Applicants have not shown irreparable harm from their inability to presently enjoin Dickson—a single individual who already stated he had no intention of suing

[8] Contrary to Applicants' repeated assertions (*e.g.*, at 3, 5, 14), the Fifth Circuit has not flatly refused to expedite the appeal. It refused to order Respondents to brief their sovereign immunity arguments on the merits in less than 24 hours and decide the case in 72 hours, which is what Applicants requested. Given the significance of the questions that Applicants insist this case presents, there is nothing unreasonable about that.

Applicants under SB 8. Other private parties would not be bound by such an injunction. *See Osborn v. Bank of U.S.*, 22 U.S. 738, 802 (1824) ("An injunction binds no person but the parties to the suit."). And, as explained *supra* __, preventing a single person from filing private enforcement actions against Applicants will not prevent the "ruinous" liability they allege will follow from other persons' lawsuits.

B. The Fifth Circuit did not err in denying Applicants' request to vacate the district court's decision to cancel the preliminary injunction hearing as to the Governmental Defendants. As an initial matter, Applicants have not appealed the district court's order, so there is no appellate jurisdiction to consider whether the district court erred. *See* Fed. R. App. P. 4; *Manrique v. United States*, 137 S. Ct. 1266, 1271 (2017) ("To secure appellate review of a judgment or order, a party must file a notice of appeal from that judgment or order."). If Applicants disagree with the district court's management of its docket, they can file a petition for mandamus in the Fifth Circuit, as two of the defendants did earlier in this case. But the only order currently on appeal is the denial of Respondents' motions to dismiss.

Regardless, the district court's decision to cancel the preliminary-injunction hearing was undoubtedly correct. The district court properly recognized that "[t]he filing of a notice of appeal . . . confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs*, 459 U.S. at 58. The "aspect[] of the case involved in the appeal" here is sovereign immunity, which calls into

question the very existence of the lawsuit in the first place and prohibits further proceedings until that question is resolved. *See Apostol v. Gallion*, 870 F.2d 1335, 1338 (7th Cir. 1989) ("It makes no sense for trial to go forward while the court of appeals cogitates on whether there should be one."). Canceling the preliminary-injunction hearing in these circumstances was the only correct action the district court could take. *See, e.g.*, *Price v. Dunn*, 139 S. Ct. 1533, 1537 (2019) (Thomas, J., concurring in the denial of certiorari) (explaining that the district court "manifestly lacked jurisdiction" to grant a preliminary injunction when a case had been appealed).

The "ultimate justification" for allowing interlocutory appeal from a denial of sovereign immunity "is the importance of ensuring that the States' dignitary interests can be fully vindicated." *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993). Permitting a State to be enjoined in preliminary-injunction proceedings while the question of its immunity is on appeal defeats the very purpose of permitting interlocutory appeal of immunity issues. *See* 16A Fed. Prac. & Proc., *supra*, at § 3949.1 ("[I]f further district court proceedings would violate the very right being asserted in the appeal taken under the collateral order doctrine—as is the case with claims of qualified immunity or double jeopardy—then the pendency of the appeal does oust the district court of authority to proceed."). Applicants' raise four arguments to the contrary. None has merit.

First, Applicants first say (at 29-30) that courts can issue orders to preserve the status quo even while a case is on appeal. But the Rule they rely

on, Federal Rule of Civil Procedure 62(d), permits district-court injunctive relief only when the order being appealed grants or denies an injunction. *See also Haw. Hous. Auth. v. Midkiff*, 463 U.S. 1323, 1324 (1983) (Rehnquist, J., in chambers) (citing Fed. R. Civ. P. 62). The district court here has not ruled on Applicants' request for injunctive relief, so it cannot grant that request once the case has been appealed.

Second, they argue (at 30-31) that the divestiture rule is judge-made, so it can be changed by the Court in order to promote efficiency. But that would create an exception that swallows the rule of *Puerto Rico Aqueduct*. It is undoubtedly faster not to stay trial-court proceedings pending appeal of sovereign-immunity issues, but the States' dignitary interests would be lost.

Third, Applicants complain (at 31) that the situation would be different if the district court had waited to rule on jurisdiction and the preliminary injunction at the same time. While potentially true, that is not what happened. If Applicants feared this outcome, they could have asked the district court to decide both issues together. In light of this Court's longstanding precedent regarding the jurisdictional significance of a notice of appeal, there is no reason to think the district court was haplessly caught unawares, as Applicants imply (at, *e.g.*, 15).

Fourth, the question of whether Applicants are entitled to the relief the Application seeks does not turn on whether the Court would review a hypothetical preliminary-injunction ruling (Appl. at 33), but whether the Court would review the Fifth Circuit's resolution of the motions to dismiss—

the only order currently on appeal. This Court has recently declined the opportunity to review the Fifth Circuit's *Ex parte Young* jurisprudence. *See City of Austin v. Paxton*, 141 S. Ct. 1047 (2021) (denying certiorari). And as demonstrated above, the jurisdictional problems with this case flow from long-established precedent. It is unlikely the Court would grant certiorari to review them.

The only way this Court could order the district court to proceed with the preliminary-injunction hearing would be to create an abortion-specific exception to the general rules regarding divestiture of jurisdiction and interlocutory appeals of sovereign immunity. The district court and Fifth Circuit have declined to do so. This Court should also deny Applicants' extraordinary request.

B. The Court should not vacate the denial of respondents' motions to dismiss solely so Applicants can seek injunctive relief.

In a last-ditch attempt to obtain some form of injunctive relief, Applicants ask this Court to vacate the district court's order *in their favor* denying Respondents' motions to dismiss—so the Fifth Circuit can declare the appeal moot, and the district court can proceed to a preliminary-injunction hearing. Appl. at 36-37. A Circuit Justice lacks the authority to vacate a lower court ruling. *See Blodgett v. Campbell*, 508 U.S. 1301, 1303-04 (1993) (O'Connor, J., in chambers) (stating that a Circuit Justice's authority is "limited to providing or vacating stays and other temporary relief"). Regardless, the Court should not engage in such fiction. And Applicants' theory that Respondents would

suffer no injury from returning to district court in order to be enjoined in a case in which the court lacks jurisdiction over them blinks reality.

CONCLUSION

The Court should deny the application for injunction pending appeal or, alternatively, to vacate the stays of district court proceedings.

HEATHER GEBELIN HACKER
Counsel of Record
ANDREW B. STEPHENS
Hacker Stephens LLP
108 Wild Basin Road South, Suite 250
Austin, Texas 78746
Tel.: (512) 399-3022
heather@hackerstephens.com

Counsel for Respondent Clarkston

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

JUDD E. STONE II
Solicitor General
Counsel of Record

LANORA C. PETTIT
Principal Deputy Solicitor General

NATALIE D. THOMPSON
BETH KLUSMANN
Assistant Solicitors General

Office of the Texas Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697
Judd.Stone@oag.texas.gov

Counsel for Respondents Jackson, Carlton, Thomas, Young, Benz, and Paxton

SUPPLEMENTAL APPENDIX

Supplemental Appendix
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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

WHOLE WOMAN'S HEALTH, on behalf of itself, its staff, physicians, nurses, and patients; ALAMO CITY SURGERY CENTER PLLC d/b/a ALAMO WOMEN'S REPRODUCTIVE SERVICES, on behalf of itself, its staff, physicians, nurses, and patients; BROOKSIDE WOMEN'S MEDICAL CENTER PA d/b/a BROOKSIDE WOMEN'S HEALTH CENTER AND AUSTIN WOMEN'S HEALTH CENTER, on behalf of itself, its staff, physicians, nurses, and patients; 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 WOMAN'S HEALTH ALLIANCE, on behalf of itself, its staff, physicians, nurses, and patients; ALLISON GILBERT, M.D., on behalf of herself and her patients; BHAVIK KUMAR, M.D., 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, 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; and MARVA SADLER,

Plaintiffs,

v.

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,

Civil Action No. 21-cv-616 _____

in her official capacity as Clerk for the District Court of Smith County, and on behalf of a class of all Texas court 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,

Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF — CLASS ACTION

INTRODUCTION

1. The Texas Legislature's well-documented hostility to the rights of pregnant people has gone to a new extreme. This lawsuit is brought under 42 U.S.C. § 1983 to challenge Texas Senate Bill 8, 87th Leg., Reg. Sess. (Tex. 2021) ("S.B. 8" or "the Act"), which flagrantly violates the constitutional rights of Texans seeking abortion and upends the rule of law in service of an anti-abortion agenda. If this attempt to strip Texans of their federal constitutional rights is not blocked, then any state could similarly subvert the federal constitutional rights of a group disfavored in that state. For this and many other reasons, S.B. 8 must be declared unconstitutional and enjoined.

2. S.B. 8 bans abortion at approximately six weeks in pregnancy, a point before many people even know they are pregnant and roughly four months before viability. A copy of S.B. 8, which is set to take effect on September 1, 2021, is attached as Exhibit 1.

3. In this respect, S.B. 8 is like other pre-viability abortion bans that states have adopted in defiance of *Roe v. Wade*, 410 U.S. 113 (1973), and nearly fifty years of unbroken

precedent. That precedent plainly holds that a state may not prohibit abortion before viability; until that time, it is for the patient—not the state—to decide whether to continue a pregnancy. Accordingly, when confronted with the merits of these abortion bans, courts have uniformly invalidated every state law banning abortion at a point before viability.

4. The Texas Legislature was well aware that S.B. 8 would stand no chance of taking effect if a court reviewed it in advance of the law's September 1 effective date. So the Legislature attempted to insulate its patently unconstitutional law from judicial review. S.B. 8 purports to bar government defendants—such as the attorney general, local prosecutors, and the health department—from directly enforcing the law's terms. Instead, the Act deputizes private citizens to enforce the law, allowing "any person" *other than government officials* to bring a civil lawsuit against anyone who provides an abortion in violation of the Act, "aids or abets" such an abortion, or intends to do these things. These civil suits are permitted regardless of whether the person suing has any connection to the abortion.

5. If a claimant in an S.B. 8 case prevails, they are entitled to (1) "injunctive relief sufficient to prevent" future violations; (2) without any showing of harm, an award of "statutory damages" of *at least* $10,000 per abortion, with no apparent maximum amount; and (3) their costs and attorney's fees. In effect, S.B. 8 places a bounty on people who provide or aid abortions, inviting random strangers to sue them.

6. The transparent purpose of S.B. 8's enforcement scheme was to make it so that abortion providers and people who assist abortions could not sue government officials for an injunction to block the law before it takes effect. As the legislative director for Texas Right to Life (the largest anti-abortion organization in the state) explained during the legislative proceedings, every six-week ban on abortion adopted by other states "has been enjoined or had at least some

negative court action," and "it's because of the [government] enforcement mechanism[]" provided for in those laws.[1] He later added that some people in the anti-abortion movement thought that the approach taken by other states "was not working in federal court, so let's try a different route."[2] In adopting S.B. 8, the Legislature believed that it could be the exception to the rule by setting vigilantes loose to enforce its unconstitutional abortion ban.

7. S.B. 8 also commandeers the state's courts to help enforce the ban. At every turn, S.B. 8 purports 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, so long as at least one vigilante there is willing to bring suit, and it prohibits transfer of the cases to any other venue without the parties' joint agreement. 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.

8. If not blocked, S.B. 8 will force abortion providers and others who are sued to spend massive amounts of time and money to defend themselves in lawsuits across the state in which the deck is heavily stacked against them. Even if abortion providers and others sued in S.B. 8 lawsuits ultimately prevail in them—as they should in every case if only they could mount a fair defense—the lawsuits against them will still have accomplished S.B. 8's goal of harassment. The suits may

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[1] Hr'g on S.B. 8 Before the S. Comm. on State Affairs, 87th Leg., Reg. Sess., video at 7:30–45 (Tex. 2021) (statement of John Seago, Leg. Dir. of Tex. Right to Life), *available at* https://tlcsenate.granicus.com/MediaPlayer.php?view_id=49&clip_id=15469.

[2] *Citizens, Not the State, Will Enforce New Abortion Law in Texas*, NYTimes.com (July 9, 2021), https://www.nytimes.com/2021/07/09/us/abortion-law-regulations-texas.html.

also bankrupt those who are sued in the process, since S.B. 8 states they cannot recover their attorney's fees and costs against the vigilante.

9. But because S.B. 8 does not, in fact, permit a fair defense, abortion providers and others targeted by the law must also weigh the risk of ruinous liability and injunctions if they provide services banned by S.B. 8, get sued, and lose in any one of Texas's state courts.

10. Other aspects of S.B. 8 are likewise targeted to chill the exercise of constitutional rights while systematically isolating abortion patients. Unlike typical aiding-and-abetting provisions, S.B. 8 targets those it describes as aiders or abettors even if they did not know or have any reason to know that the abortion they assisted would be deemed unlawful under S.B. 8. A person weighing whether their activity might prompt a costly S.B. 8 lawsuit for aiding and abetting must also consider the fact that the law invites enforcement by *anyone*, no matter how hostile and untrained in the law. As a result, someone who accompanies her sister to an abortion clinic and pays for the abortion, or a sexual assault counselor who calls an abortion clinic on behalf of a patient, could find themselves dragged into a court across the state. And although abortion patients cannot be sued under S.B. 8, the law provides any abusive partner, controlling parent, or disapproving neighbor with a ready tool to go after the patient's doctor for a court order to block that patient's abortion choice.

11. Separate from the six-week abortion ban and its enforcement mechanism, S.B. 8 also imposes a draconian one-way fee-shifting penalty that is designed to deter *any* challenges, including meritorious challenges, to state and local abortion restrictions in Texas, not just challenges to S.B. 8. Under this deterrence provision, civil-rights plaintiffs who challenge any Texas abortion restriction can be held liable for their opponents' attorney's fees and costs unless they sweep the table by prevailing on every single claim they bring. Parties that defend abortion

restrictions could recover fees, for example, if a court dismisses an abortion provider's claim as moot, or rejects one of two claims pleaded in the alternative, and they could do so even if the challenged abortion restriction was ultimately declared unconstitutional and enjoined. This new fee-shifting provision purports to apply to civil-rights challenges brought in both federal and state court and to any causes of action, including to Section 1983 claims that are already subject to a comprehensive—and diametrically opposed—fee-shifting regime.

12. To further take aim at civil-rights plaintiffs, even attorneys and law firms who represent challengers to abortion restrictions can be held jointly and severally liable for the opponent's attorney's fees and costs. If enforceable, S.B. 8 could therefore subject one-person firms or pro bono counsel to millions of dollars in liability just for making well-founded but ultimately unsuccessful claims on behalf of a client.

13. As with the six-week ban, S.B. 8 attempts to ensure that state-court proceedings to obtain attorney's fees under this new provision would be hopelessly stacked against abortion providers and others who attempt to vindicate constitutional rights. S.B. 8 provides that the person sued for attorney's fees would be barred from defending on the ground that an earlier court, including a federal district court in the underlying case, refused to award fees to the claimant, or held the fee penalty unconstitutional.

14. If permitted to take effect, S.B. 8 will create absolute chaos in Texas and irreparably harm Texans in need of abortion services. In particular, the burdens of this cruel law will fall most heavily on Black, Latinx, and indigenous patients who, because of systemic racism, already encounter substantial barriers to obtaining health care, and will face particular challenges and injuries if forced to attempt to seek care out of state or else carry an unwanted pregnancy to term. S.B. 8 will also cause irreparable harm to Plaintiffs, who are Texas abortion providers and

individuals and organizations who help patients obtain abortions. Accordingly, Plaintiffs bring this action to challenge S.B. 8 on behalf of themselves; their staff, including physicians, physician assistants, nurses, and pharmacists; and their patients.

15. Plaintiffs bring claims challenging the six-week ban and its enforcement scheme against a putative class of Texas state-court judges who will be called upon to enforce S.B. 8's terms; a putative class of Texas court clerks who will participate in the enforcement scheme by, at a minimum, accepting S.B. 8 enforcement actions for filing and issuing service of process; Mark Lee Dickson, a private individual deputized to bring S.B. 8 enforcement claims under color of state law, from whom Plaintiffs face a credible threat of enforcement; and state officials who, despite S.B. 8's enforcement restrictions, still have the power to apply S.B. 8 when enforcing other laws against Plaintiffs, including through disciplinary proceedings.

16. Plaintiffs also challenge S.B. 8's new fee-shifting penalty for challenges to abortion restrictions. Plaintiffs bring claims against the Attorney General and other state officials who have regularly defended and will continue to defend Texas's abortion restrictions in court and who would be permitted under S.B. 8 to recoup attorney's fees and costs.

17. At bottom, the question in this case is whether Texas may adopt a law that sets about 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).

18. The answer to that question must be no. Otherwise, states and localities across the country would have free rein to target federal rights they disfavor. Today it is abortion providers and those who assist them; tomorrow it might be gun buyers who face liability for every purchase. Churches could be hauled into far-flung courts to defend their religious practices because someone

somewhere disagrees with them. Same-sex couples could be sued by neighbors for obtaining a marriage license. And Black families could face lawsuits for enrolling their children in public schools. It is not hard to imagine how states and municipalities bent on defying federal law and the federal judiciary could override constitutional rights if S.B. 8 is permitted to take effect.

19. Plaintiffs urgently need this Court to put a stop to Texas's brazen defiance of the rule of law and the federal constitutional rights to which Texans are entitled.

JURISDICTION AND VENUE

20. The Court has jurisdiction over this action under 28 U.S.C. §§ 1331 and 1343. This is a civil and constitutional rights action arising under 42 U.S.C. § 1983 and the United States Constitution.

21. Plaintiffs' claims for declaratory and injunctive relief are authorized by 28 U.S.C. §§ 2201 and 2202, Rules 57 and 65 of the Federal Rules of Civil Procedure, and the general legal and equitable powers of the Court, including the Court's inherent authority to enforce the supremacy of federal law as against contrary state law.

22. Venue is appropriate in this district under 28 U.S.C § 1391(b) because one or more of the Defendants resides in this judicial district and because a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred in this judicial district.

23. This case is appropriately filed in the Austin Division because Defendants include the Executive Director of the Texas Medical Board, the Executive Director of the Texas Board of Nursing, the Executive Commissioner of the Texas Health and Human Services Commission, the Executive Director of the Texas Board of Pharmacy, and the Attorney General of Texas, all of whom maintain offices in this division. Assignment to the Austin Division is also proper because several Plaintiffs operate health centers in Austin that provide abortions banned by S.B. 8 and

serve abortion patients who reside in the Austin Division and whose rights are violated by the challenged law.

PLAINTIFFS

24. Plaintiff Whole Woman's Health operates licensed abortion facilities in Fort Worth, McAllen, and McKinney. Whole Woman's Health provides a range of reproductive health services, including medication and procedural abortions. The vast majority of abortions that it provides occur at a point in pregnancy when a "fetal heartbeat," as defined in S.B. 8, can be detected. Whole Woman's Health sues on behalf of itself and its physicians, nurses, other staff, and patients.

25. Plaintiff Alamo City Surgery Center PLLC d/b/a Alamo Women's Reproductive Services ("Alamo") operates a licensed ambulatory surgical center in San Antonio. Alamo provides a range of reproductive health services, including medication and procedural abortions. The vast majority of abortions that it provides occur at a point in pregnancy when a "fetal heartbeat," as defined in S.B. 8, can be detected. Alamo sues on behalf of itself and its physicians, nurses, pharmacists, other staff, and patients.

26. Plaintiff Brookside Women's Medical Center PA d/b/a Brookside Women's Health Center and Austin Women's Health Center ("Austin Women's") operates a licensed abortion facility in Austin. Austin Women's provides a range of reproductive health services, including medication and procedural abortions. The vast majority of abortions that it provides occur at a point in pregnancy when a "fetal heartbeat," as defined in S.B. 8, can be detected. Austin Women's sues on behalf of itself and its physicians, nurses, other staff, and patients.

27. Plaintiff Houston Women's Clinic provides medication and procedural abortions and contraceptive care at its licensed abortion facility in Houston. The vast majority of abortions that it provides occur at a point in pregnancy when a "fetal heartbeat," as defined in S.B. 8, can be

detected. Houston Women's Clinic sues on behalf of itself and its physician, nurses, other staff, and patients.

28. Plaintiff Houston Women's Reproductive Services ("HWRS") operates a licensed abortion facility in Houston. HWRS provides medication abortion services. The majority of abortions that it provides occur at a point in pregnancy when a "fetal heartbeat," as defined in S.B. 8, can be detected. HWRS sues on behalf of itself and its physicians, nurses, other staff, and patients.

29. Plaintiff Planned Parenthood of Greater Texas Surgical Health Services ("PPGT Surgical Health Services") is a Texas not-for-profit corporation headquartered in Dallas. It operates licensed ambulatory surgical centers in Austin, Dallas, and Fort Worth, and licensed abortion facilities in El Paso, Lubbock, and Waco.[3] PPGT Surgical Health Services provides a range of reproductive health services, including medication and procedural abortions. The vast majority of abortions that it provides occur at a point in pregnancy when a "fetal heartbeat," as defined in S.B. 8, can be detected. PPGT Surgical Health Services sues on behalf of itself and its physicians, nurses, pharmacists, other staff, and patients.

30. Plaintiff Planned Parenthood South Texas Surgical Center ("PPST Surgical Center"), is a not-for-profit corporation headquartered in San Antonio. It operates a licensed ambulatory surgical center and two licensed abortion facilities in San Antonio. PPST Surgical Center provides a range of reproductive health services, including medication and procedural

[3] The City of Lubbock recently passed an ordinance prohibiting all abortions in the municipality. That ban is subject to an ongoing legal challenge, and in the meantime, the Lubbock abortion facility is not currently providing abortion. *See 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* (N.D. Tex. June 29, 2021), ECF No. 51.

abortions. The vast majority of abortions that it provides occur at a point in pregnancy when a "fetal heartbeat," as defined in S.B. 8, can be detected. PPST Surgical Center sues on behalf of itself and its physicians, nurses, pharmacists, other staff, and patients.

31. Plaintiff Planned Parenthood Center for Choice ("PP Houston"), is a Texas not-for-profit corporation headquartered in Houston. It operates a licensed ambulatory surgical center in Houston and a licensed abortion facility in Stafford. PP Houston provides a range of reproductive health services, including medication and procedural abortions. The vast majority of abortions that it provides occur at a point in pregnancy when a "fetal heartbeat," as defined in S.B. 8, can be detected. PP Houston sues on behalf of itself and its physicians, nurses, pharmacists, other staff, and patients.

32. Plaintiff Southwestern Women's Surgery Center ("Southwestern") operates a licensed ambulatory surgical center in Dallas. Southwestern provides a range of reproductive health services, including medication and procedural abortions. The vast majority of abortions that it provides occur at a point in pregnancy when a "fetal heartbeat," as defined in S.B. 8, can be detected. Southwestern sues on behalf of itself and its physicians, nurses, pharmacists, other staff, and patients.

33. Plaintiff Whole Woman's Health Alliance is a Texas not-for-profit corporation. It operates a licensed abortion facility in Austin that provides both medication and procedural abortions. The vast majority of abortions that it provides occur at a point in pregnancy when a "fetal heartbeat," as defined in S.B. 8, can be detected. Whole Woman's Health Alliance sues on behalf of itself and its physicians, nurses, other staff, and patients.

34. Plaintiff Allison Gilbert, M.D., is a board-certified obstetrician-gynecologist who is licensed to practice medicine in Texas. She serves as a physician and Co-Medical Director at

Southwestern, where she provides medication and procedural abortions. The vast majority of abortions that Dr. Gilbert provides occur at a point in pregnancy when a "fetal heartbeat," as defined in S.B. 8, can be detected. She sues on behalf of herself and her patients.

35. Plaintiff Bhavik Kumar, M.D., is a board-certified family medicine physician who is licensed to practice medicine in Texas. He serves as a physician at PP Houston, where he provides medication and procedural abortions. The vast majority of abortions that Dr. Kumar provides occur at a point in pregnancy when a "fetal heartbeat," as defined in S.B. 8, can be detected. He sues on behalf of himself and his patients.

36. Plaintiffs Whole Woman's Health, Alamo, Austin Women's, Houston Women's Clinic, HWRS, PPGT Surgical Health Services, PPST Surgical Center, PP Houston, Southwestern, Whole Woman's Health Alliance, and Drs. Allison Gilbert and Bhavik Kumar are hereinafter referred to as the "Provider Plaintiffs" because each provides abortions in Texas that will be prohibited by S.B. 8 on September 1 absent this Court's relief.

37. Plaintiff The Afiya Center is a nonprofit organization incorporated in Texas and based in Dallas. Its mission is to serve Black women and girls by transforming their relationship with their sexual and reproductive health by addressing the consequences of reproductive oppression. The Afiya Center provides financial, practical, and emotional support for abortion patients and advocates for abortion access. Almost all its clients are at a point in pregnancy when a "fetal heartbeat," as defined in S.B. 8, can be detected. The Afiya Center sues on behalf of itself and its clients.

38. Plaintiff Frontera Fund is a nonprofit organization incorporated in Texas. Its mission is to make abortion accessible in the Rio Grande Valley by providing support for abortion patients regardless of their background and to shift the shame and stigma surrounding abortion

through grassroots organizing. Frontera Fund provides financial, practical, and logistical support for low-income abortion patients. Almost all its clients are at a point in pregnancy when a "fetal heartbeat," as defined in S.B. 8, can be detected. Frontera Fund sues on behalf of itself and its clients.

39. Plaintiff Fund Texas Choice is a nonprofit organization incorporated in Texas. Its mission is to help Texans equitably access abortion through safe, confidential, and comprehensive practical support. Fund Texas Choice provides practical and logistical support for abortion patients throughout the state. Almost all its clients are at a point in pregnancy when a "fetal heartbeat," as defined in S.B. 8, can be detected. Fund Texas Choice sues on behalf of itself and its clients.

40. Plaintiff Jane's Due Process is a nonprofit organization incorporated in Texas and based in Austin. Its mission is to help ensure that young people in Texas have full reproductive freedom and autonomy over their healthcare decisions. Jane's Due Process helps young people navigate parental-consent laws and confidentially access abortion care in Texas through practical support, financial assistance, and education. Almost all its clients are at a point in pregnancy when a "fetal heartbeat," as defined in S.B. 8, can be detected. Jane's Due Process sues on behalf of itself and its clients.

41. Plaintiff Lilith Fund for Reproductive Equity ("Lilith Fund") is a nonprofit organization incorporated in Texas. Its 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 provides financial, emotional, and case-management support primarily for abortion patients living in central and southeast Texas. Almost all its clients are at a point in pregnancy when a "fetal heartbeat," as defined in S.B. 8, can be detected. Lilith Fund sues on behalf of itself and its clients.

42. Plaintiff North Texas Equal Access Fund ("TEA Fund") is a nonprofit organization incorporated in Texas and based in Dallas. Its mission is to foster reproductive justice. TEA Fund provides financial, emotional, and logistical support for low-income abortion patients in northern Texas. Almost all its clients are at a point in pregnancy when a "fetal heartbeat," as defined in S.B. 8, can be detected. TEA Fund sues on behalf of itself and its clients.

43. Plaintiff Marva Sadler is the Senior Director of Clinical Services with Whole Woman's Health and Whole Woman's Health Alliance. Ms. Sadler oversees clinical operations for those entities' Texas clinics and is personally involved in many aspects of patient care.

44. Plaintiff Reverend Daniel Kanter is an ordained minister who serves as CEO and Senior Minister of First Unitarian Church in Dallas. He provides pastoral care and confidential counseling to pregnant people and their families as they make decisions about abortions. Reverend Kanter also leads the Chaplaincy Program at Southwestern, through which he provides individual counseling as well as spiritual guidance to clinic patients and their families during their appointments.

45. Plaintiff Reverend Erika Forbes is a licensed, ordained minister and trained spiritual counselor in Dallas. Through her private spiritual counseling practice, she provides religious guidance and spiritual support for pregnant people who are considering abortion.

46. The Afiya Center, Frontera Fund, Fund Texas Choice, Jane's Due Process, Lilith Fund, TEA Fund, Ms. Sadler, Rev. Kanter, and Rev. Forbes are hereinafter referred to as the "Advocate Plaintiffs" because they advocate for abortion patients through activities that may be alleged to aid and abet abortions prohibited by the Act and face a credible threat of enforcement on that ground.

47. Plaintiffs are frequently forced to bring Section 1983 suits to challenge abortion restrictions and similar laws and in some cases do not prevail on all claims. In addition to this case, they collectively have three Section 1983 cases pending in federal court that challenge abortion restrictions. *See Whole Woman's Health v. Paxton*, 978 F.3d 974 (5th Cir. 2020) (mem.) (en banc) (including Defendant Paxton); *Whole Woman's Health v. Smith*, 338 F. Supp. 3d 606 (W.D. Tex. 2018) (including the Commissioner of the Texas Health and Human Services Commission), *appeal filed*, No. 18-50730 (5th Cir. Sept. 7, 2018); *PPGTSHS 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* (N.D. Tex. June 29, 2021), ECF No. 51. Plaintiffs have frequently been forced to protect their interests in other litigation, including state-court litigation, as well. *See, e.g.*, *Planned Parenthood Ctr. for Choice v. Abbott*, 141 S. Ct. 1261 (2021) (mem.) (vacating decisions regarding Covid-related abortion ban after challenged executive order expired) (including the Attorney General and Texas licensing authorities as defendants).

DEFENDANTS

48. Defendant Hon. Austin Reeve Jackson is Judge of the 114th District Court, a court with jurisdiction over S.B. 8 claims. He is sued in his official capacity and as a representative of a putative class of all judges in the State of Texas with jurisdiction over the civil actions created by S.B. 8. He may be served with process at the Smith County Courthouse, 100 N. Broadway, Room 209, Tyler, TX 75702.

49. Defendant Penny 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. She is served in her official capacity and as a representative of a putative class of all court clerks in the State of Texas for courts with jurisdiction

over the civil actions created by the Act. She may be served with process at the Smith County Courthouse, 100 N. Broadway, Room 204, Tyler, TX 75702.

50. Defendant Mark Lee Dickson is a resident of Longview, Texas. He serves as the Director of Right to Life East Texas and has pushed for the adoption of state and local laws that impose liability on abortion providers and individuals who assist in the provision or obtainment of constitutionally protected abortion. Mr. Dickson has been deputized to seek enforcement of S.B. 8 against Plaintiffs for providing prohibited abortions, aiding and abetting such abortions, or intending to do these things. Plaintiffs face a credible threat that he will sue them under S.B. 8 if they perform or assist in the performance of abortions prohibited by the Act.[4] Mr. Dickson is properly sued under Section 1983 as acting under color of state law. He may be served with process at 233 E. George Richey Road, Longview, TX 75604-7622.

51. 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. Tex. Occ. Code § 152.051. TMB must initiate disciplinary action against licensees who violate any provision of Chapter 171 of the Texas Health and Safety Code. *Id.* § 165.001; *id.* § 164.055. Section 3 of S.B. 8, which includes the six-week ban and enforcement provisions, and

[4] *See, e.g.*, Mark Lee Dickson, Facebook (June 1, 2021, 7:45 AM), https://www.facebook.com/markleedickson/posts/10159259037629866 ("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."); Mark Lee Dickson, Facebook (Mar. 29, 2021, 11:15 PM), https://www.facebook.com/markleedickson/posts/10159115346774866 ("[B]ecause of [SB 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."); Mark Lee Dickson, Facebook (June 1, 2:07 PM), https://www.facebook.com/markleedickson/videos/10159259661094866 (posting a video of himself and another individual calling Planned Parenthood's Lubbock health center to test whether the center would schedule an abortion despite the City ban).

Section 7 of S.B. 8, will be codified in that chapter. TMB may impose discipline on a doctor who violates any state law "connected with the physician's practice of medicine" because such violation constitutes per se "unprofessional or dishonorable conduct." Tex. Occ. Code § 164.053(a)(1); *id.* § 164.052(a)(5); *see also* § 164.053(b) (making clear that "[p]roof of the commission of the act while in the practice of medicine . . . is sufficient" for discipline). TMB must also investigate and review the "medical competency" of licensees who have been named in three or more health-care-related lawsuits within a five-year period. 22 Tex. Admin. Code § 176.8. Mr. Carlton has been named by Plaintiffs as a defendant in previous litigation challenging abortion restrictions or regulations and will likely continue to be named in such suits given the nature of his duties. S.B. 8, therefore, authorizes him to seek attorney's fees and costs from Plaintiffs for any covered claim they bring in this litigation and in other suits, if judgment on any claim is entered in his favor or dismissed, regardless of reason. S.B. 8 § 4 (to be codified at Tex. Civ. Prac. & Rem. Code § 30.022) (hereinafter S.B. 8 § 4 citations are to the newly created sections of Tex. Civ. Prac. & Rem. Code only). Mr. Carlton is sued in his official capacity and may be served with process at 333 Guadalupe, Tower 3, Suite 610, Austin, TX 78701.

52. Defendant Katherine A. Thomas is the Executive Director of the Texas Board of Nursing ("TBN"). Ms. Thomas performs duties as required by the Nursing Practice Act and as designated by the board. Tex. Occ. Code § 301.101. TBN is authorized to take disciplinary, administrative, and civil action against licensed nurses who violate the Nursing Practice Act or its rules. *Id.* §§ 301.452(b)(1), 301.501, 301.553. Under TBN's rules, a nurse must "conform to . . . all federal, state, or local laws, rules or regulations affecting the nurse's current area of nursing practice." 22 Tex. Admin. Code § 217.11(1)(A). A nurse's "repeated[] fail[ure] . . . to perform" nursing duties "in conformity with th[is] standard[]" constitutes a per se "[u]nsafe [p]ractice" for

which discipline may be imposed. *Id.* § 217.12(1)(A). Ms. Thomas has been named by Plaintiffs as a defendant in previous litigation challenging abortion restrictions or regulations and will likely continue to be named in such suits given the nature of her duties. S.B. 8 thus authorizes her to seek attorney's fees and costs from Plaintiffs for any covered claim they bring in this litigation and in other suits, if judgment is entered on any claim in her favor or dismissed, regardless of reason. S.B. 8 § 30.022. Ms. Thomas is sued in her official capacity and may be served with process at 333 Guadalupe, Suite 3-460, Austin, TX 78701-3944.

53. Defendant Cecile Erwin Young is the Executive Commissioner of the Texas Health and Human Services Commission ("HHSC"). HHSC licenses and regulates abortion facilities and ambulatory surgical centers ("ASCs") operated by Plaintiffs. Tex. Health & Safety Code §§ 243.011, 245.012. HHSC is also charged with enforcing Chapter 171 of the Texas Health and Safety Code, *id.* § 171.005, including amendments made by § 7 of S.B. 8. Its regulations further provide that it may take disciplinary or civil action against any licensed facility that violates Chapter 171, where S.B. 8 § 3 and § 7 will be codified, or that fails to ensure physicians working in the facility comply with the Medical Practice Act. *See* 25 Tex. Admin. Code § 139.60(c), (*l*); Tex. Health & Safety Code §§ 243.014-.015, 245.015, 245.017; *see also* 25 Tex. Admin. Code § 135.4(*l*) (requiring abortion-providing ASCs to comply with rules for abortion facilities). HHSC may deny, suspend, or revoke a license and assess civil and administrative financial penalties against a licensed abortion facility or ASC for violating its rules. Tex. Health & Safety Code §§ 243.014-.015, 245.015, 245.017. Ms. Young's predecessor overseeing abortion facilities and ASCs has been named by Plaintiffs as a defendant in previous litigation challenging abortion restrictions or regulations, and Ms. Young will likely continue to be named in such suits given the nature of her duties. S.B. 8 authorizes her to seek attorney's fees and costs from Plaintiffs for any

covered claim they bring in this litigation and in other suits, if judgment is entered on any claim in her favor or dismissed, regardless of reason. S.B. 8 § 30.022. She is sued in her official capacity and may be served with process at 4900 N. Lamar Blvd., Austin, TX 78751.

54. Defendant Allison Vordenbaumen Benz is the Executive Director of the Texas Board of Pharmacy ("TBP"). As Executive Director, Ms. Benz performs duties as required by the Texas Pharmacy Act or designated by the board. Tex. Occ. Code § 553.003. TBP is authorized to take disciplinary, administrative, and civil action against licensed pharmacists and pharmacies who have violated the Texas Pharmacy Act or its rules, including for "unprofessional" conduct or "gross immorality." *Id.* §§ 565.001(a), 565.002. TBP defines "unprofessional conduct" to include "engaging in behavior or committing an act that fails to conform with the standards of the pharmacy profession, including, but not limited to, criminal activity." 22 Tex. Admin. Code § 281.7(a). "[G]ross immorality" includes broadly defined types of misconduct that are "willful" and "flagrant." *Id.* § 287.1(b). The Board of Pharmacy may assess a civil or administrative financial penalty for any violation of the Pharmacy Act or its rules. Tex. Occ. Code §§ 566.001-.002, 566.101. S.B. 8 authorizes Ms. Benz to seek attorney's fees and costs from Plaintiffs for any covered claim they bring in this litigation if judgment is entered in her favor or dismissed, regardless of reason. S.B. 8 § 30.022. She is sued in her official capacity and may be served with process at 333 Guadalupe, Suite 500, Austin, TX 78701-3944.

55. 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. Tex. Occ. Code § 165.101. Mr. Paxton has been named by Plaintiffs as a defendant in previous litigation challenging abortion restrictions or

regulations and will likely continue to be named in such suits given the nature of his duties. S.B. 8 authorizes him to seek attorney's fees and costs from Plaintiffs for any covered claim they bring in this litigation and in other suits, if judgment is entered on any claim in his favor or dismissed, regardless of reason. S.B. 8 § 30.022. He is sued in his official capacity and may be served with process at 300 West 15th Street, Austin, Texas 78701.[5]

56. Defendants Carlton, Thomas, Young, Benz, and Paxton are hereinafter referred to collectively as "the Government Official Defendants."

FACTUAL ALLEGATIONS

I. ABORTION IN THE UNITED STATES

57. Legal abortion is one of the safest medical procedures in the United States. A woman's risk of death associated with carrying a pregnancy to term is approximately 14 times higher than that associated with abortion, and every pregnancy-related complication is more common among women giving birth than among those having abortions.[6]

58. Abortion is also very common: approximately one in four women in the United States has an abortion by age forty-five.

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[5] Defendant Paxton is a proper defendant under Section 1983 and *Ex Parte Young*, 209 U.S. 123 (1908), based on his authority to enforce collateral statutes in response to S.B. 8 violations and to seek costs and fees under S.B. 8 Section 4. Plaintiffs further allege that they would have standing to sue Defendant Paxton and that he would be a proper defendant even in the absence of that collateral enforcement authority and Section 4's fee-shifting provision. Plaintiffs recognize that this standing theory is currently foreclosed by the Fifth Circuit's decision in *Okpalobi v. Foster*, 244 F.3d 405 (5th Cir. 2001) (en banc), but assert it here to preserve it for any appeal.

[6] References to "woman" or "women" are meant as shorthand for people who are or may become pregnant. However, people with other gender identities, including transgender men and gender-diverse individuals, may also become pregnant and seek abortion services. *Accord Reprod. Health Servs. v. Strange*, No. 17-13561, 2021 WL 2678574, at *1 n.2 (11th Cir. June 30, 2021) ("Although this opinion uses gendered terms, we recognize that not all persons who may become pregnant identify as female.")

59. Those seeking an abortion do so for a variety of deeply personal reasons, including familial, medical, and financial ones. Deciding whether to keep or end a pregnancy implicates a person's core religious beliefs, values, and family circumstances. Some people have abortions because it is not the right time to have a child or to add to their families—a majority of abortion patients already have at least one child. Some want to pursue their education; some lack the economic resources or level of partner support or stability needed to raise children; some will be unable to care adequately for their existing children or their ill or aging parents if they increase their family size. Others end a pregnancy to be able to leave an abusive partner. Some people seek abortions to preserve their life or health or because of a diagnosed fetal medical condition; some because they have become pregnant as a result of rape or incest; and others because they decide not to have children at all. Some families feel they do not have the societal or personal resources—financial, medical, educational, or emotional—to care for a child with physical or intellectual disabilities, or to do so and simultaneously provide for their existing children.

II. STATUTORY FRAMEWORK OF S.B. 8

A. S.B. 8, Section 3: The Six-Week Ban and Enforcement Actions

(i) ***The prohibition on performing abortions***

60. Section 3 of S.B. 8 requires physicians who perform abortions in Texas to first determine whether "a detectable fetal heartbeat" is present. S.B. 8 § 3 (to be codified at Tex. Health & Safety Code § 171.203(b)); *see id.* (to be codified at Tex. Health & Safety Code § 171.201(1)) (hereinafter S.B. 8 § 3 citations are to newly created sections of Tex. Health & Safety Code only). The Act prohibits the physician from providing an abortion after "detect[ing] a fetal heartbeat" or if the physician "failed to perform a test to detect a fetal heartbeat." *Id.* § 171.204(a). S.B. 8 contains no exception for pregnancies that result from rape or incest, or for fetal health conditions that are incompatible with sustained life after birth. The only exception is for a medical emergency.

Id. §§ 171.204(a), 171.205(a). Sections 7 and 9 of S.B. 8 impose additional reporting requirements on abortions performed because of a medical emergency. S.B. 8 § 7 (to be codified at Tex. Health & Safety Code § 171.008); S.B. 8 § 9 (to be codified at Tex. Health & Safety Code § 245.011(c)).

61. 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). In a typically developing pregnancy, ultrasound can generally detect cardiac activity beginning at approximately six weeks of pregnancy, as measured from the first day of a patient's last menstrual period ("LMP").

62. S.B. 8 thus prohibits virtually all abortions after approximately six weeks LMP—before many patients even know they are pregnant. Indeed, for patients with regular menstrual periods, six weeks of pregnancy is only two weeks after the patient's first missed period.

63. A full-term pregnancy is approximately 40 weeks LMP.

64. The cells that produce early cardiac activity described in S.B. 8 have not yet formed a "heart." The term "heartbeat" in S.B. 8 thus covers not just a "heartbeat" in the lay sense, but also early cardiac activity—more accurately, electrical impulses—present before full development of the cardiovascular system. Similarly, a developing pregnancy is properly referred to as an "embryo" until approximately ten weeks LMP, when it becomes a "fetus." So, despite S.B. 8's use of the phrase "*fetal* heartbeat," the Act forbids abortion even when cardiac activity is detected in an embryo. *See id.* §§ 171.201(1), 171.201(7), 171.204(a) (emphasis added). Because neither "fetal" nor "heartbeat" is accurate medical terminology at this stage of pregnancy, Plaintiffs refer to the prohibition against providing an abortion after the detection of a "fetal heartbeat" as a "six-week ban."

65. No embryo is viable at six weeks LMP, or at any other point when cardiac activity can first be detected by ultrasound. Instead, viability is generally understood as the point in pregnancy when a fetus, if born at that time, has a reasonable likelihood of sustained life after birth, with or without artificial support.

66. Viability generally does not occur until approximately 24 weeks LMP. By prohibiting abortion after approximately 6 weeks LMP, S.B. 8 bans abortion roughly *four months* before viability.

67. Although patients generally obtain an abortion as soon as they can, the overwhelming majority of abortions in Texas occur after six weeks of pregnancy. Many patients do not even realize they are pregnant before six weeks LMP—for instance, because they have irregular menstrual periods, or because they mistake the vaginal bleeding that is common in early pregnancy for a period.

68. Even those patients who do confirm a pregnancy before 6 weeks LMP and decide quickly that they want an abortion often encounter substantial barriers to obtaining one. They must navigate Texas's onerous legal scheme for abortion, which requires, *inter alia*, that all patients living within 100 miles of an abortion clinic travel to the clinic and obtain an ultrasound at least 24 hours before the abortion, Tex. Health & Safety Code §§ 171.011-.016, and that patients under eighteen obtain written parental authorization or a court order before obtaining care, Tex. Fam. Code §§ 33.001-.014.

69. Access to care in Texas has been decimated by years of unnecessary and burdensome restrictions. *See, e.g.*, *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2313 (2016) (unconstitutional abortion restriction "led to the closure of half of Texas' clinics, or thereabouts").

70. Financial and logistical difficulties also prevent many patients from obtaining an abortion before six weeks LMP. Nationwide, three out of four abortion patients are poor or have low incomes. Such patients are often delayed in accessing abortions as they struggle to raise funds to cover the cost of the abortion, childcare (for the majority of abortion patients who already have at least one child), transportation to and from the clinic, any needed hotel rooms for patients forced to travel long distances to the nearest provider, and lost wages for missed work.

71. With very narrow exceptions, Texas bars coverage of abortion through its Medicaid program, 1 Tex. Admin. Code § 354.1167, health plans offered in the state health-insurance exchange, Tex. Ins. Code § 1696.002, and private insurance plans, *id.* § 1218.001-.006, compounding the financial hurdles patients face in attempting to access abortion services.

72. Additionally, patients whose pregnancies are the result of sexual assault or who are experiencing intimate partner violence may be delayed because of ongoing physical or emotional trauma, or because of the need to keep their pregnancy and abortion decision private from an abusive partner.

(ii) ***Liability for providing prohibited abortions, aiding and abetting prohibited abortions, or intending to provide or aid and abet such abortions***

73. S.B. 8 creates liability for "perform[ing] or induc[ing] an abortion in violation of" the six-week ban. S.B. 8 § 171.208(a)(1).

74. S.B. 8 also creates liability for "knowingly engag[ing] in conduct that aids or abets the performance or inducement of" an abortion that violates the six-week ban. *Id.* § 171.208(a)(2). Although S.B. 8 does not define what constitutes aiding or abetting, it expressly provides that "paying for or reimbursing the costs of an abortion" is prohibited activity. *Id.* S.B. 8's aiding-and-abetting liability would apply "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.*

75. Even if someone does not actually perform a prohibited abortion or aid a prohibited abortion, the Act provides that they can still be sued if they merely intend to do so. *Id.* § 171.208(a)(3).

(iii) *Enforcement actions and penalties for non-compliance*

76. S.B. 8 expressly precludes the state or any political subdivision, as well as executive-branch officials and district and county attorneys, from directly enforcing the six-week ban. *Id.* § 171.207(a). Instead, S.B. 8 creates a private, civil enforcement action: "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 performs a prohibited abortion, aids or abets a prohibited abortion, or intends to engage in these activities. *Id.* § 171.208(a).

77. Besides government officials, the only people not permitted to initiate an S.B. 8 enforcement action are those "who impregnated the abortion patient through an act of rape, sexual assault, incest," or certain other crimes. *Id.* § 171.208(j). However, because the six-week ban itself contains no exception for pregnancies resulting from rape, sexual assault, or incest, anyone *other* than the perpetrator could still sue a clinic, physician, friend, or family member who assists a patient in terminating a pregnancy that resulted from the offense.

78. S.B. 8 does not permit suits against abortion patients. *Id.* § 171.206(b)(1). But it provides a ready tool for abusive and manipulative partners or family members to try to block a patient's abortion decision. Under S.B. 8, if such individuals know about a patient's plan to obtain an abortion, they could sue the patient's abortion provider, or anyone else who "intends" to assist with that abortion, to try to prevent the patient from accessing care. *Id.* § 171.208(a)(3).

79. S.B. 8 imposes draconian penalties. Where an S.B. 8 claimant prevails, "the court shall award": (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). S.B. 8 does not expressly require the claimant to allege or prove any injury to obtain an award.

(iv) *The rigged nature of the enforcement proceedings*

80. At every turn, S.B. 8's rules for the enforcement proceedings sharply diverge from those normally applicable to Texas litigants and make it impossible for those sued to fairly defend themselves. The proceedings conscript the state courts into enforcing this unconstitutional law while imposing maximum burdens on abortion providers and other people who are sued.

81. ***Statewide venue:*** S.B. 8 allows "any person"—including those with no connection to the abortion or the patient, and those who may be motivated by hostility to abortion rights or desire for financial gain—to file lawsuits in their home counties and then veto transfer to a more appropriate venue. As a result, abortion providers and alleged aiders and abettors could be forced to defend themselves in multiple, simultaneous enforcement proceedings in courts across the state. *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"). In contrast, venue in Texas is generally limited to 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).

82. ***One-way fee-shifting in favor of S.B. 8 claimants:*** S.B. 8 provides that in enforcement proceedings, anyone who brings an S.B. 8 claim and prevails is entitled to recover

costs and attorney's fees. S.B. 8 § 171.208(b)(3). Meanwhile, abortion providers and other people sued under S.B. 8 cannot be awarded costs or attorney's fees if they prevail, no matter how many times they are sued or the number of courts in which they must defend, and irrespective of the fact that *every* S.B. 8 claim is barred by binding federal law. *Id.* § 171.208(i).

83. ***Elimination of defenses:*** S.B. 8 purports to bar people who are sued from raising seven defenses under the Act, 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 people who are sued 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). The clear import of these provisions is to cast a pall on constitutionally protected activity, to force abortion providers and others who assist them to defend themselves over and over again, and to hamstring that defense.

84. ***Redefinition of federal abortion law:*** S.B. 8 also purports to override binding federal law when applied in state-court enforcement proceedings. Under an "unbroken line" of Supreme Court cases, "[s]tates 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." *Jackson Women's Health Org. v. Dobbs* ("*Jackson Women's I*"), 945 F.3d 265, 269 (5th Cir. 2019), *cert. granted*, No. 19-1392, 2021 WL 1951792 (U.S. May 17, 2021). The U.S. Supreme Court has articulated an undue-burden balancing standard that applies to assess the constitutionality of abortion regulations. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877–78 (1992). But as every court to consider a similar ban, including the Fifth Circuit, has concluded, a ban at six weeks can never survive constitutional review. *Jackson Women's Health Org. v. Dobbs* ("*Jackson*

Women's II"), 951 F.3d 246, 248 (5th Cir. 2020) (striking six-week ban because "cardiac activity can be detected well before the fetus is viable [and] [t]hat dooms the law"). Despite this federal framework and Fifth Circuit precedent, S.B. 8 would require state courts to weigh the undue burden anew in every case as part of an "affirmative defense" in enforcement actions, and even then would fundamentally "limit[]" that test. S.B. 8 § 171.209(c), (d). As one example, under S.B. 8's distorted version of the undue burden "defense," an abortion provider could not rely on the Act's practical effect on abortion access across the state, *id.* § 171.209(d)(2)), even though federal courts adjudicating undue-burden claims regularly do so, *see, e.g.*, *Whole Woman's Health*, 136 S. Ct. at 2312–13. Further, Section 5 of S.B. 8 attempts to create new rules of construction and severability, only as they apply to state abortion laws and regulations. S.B. 8 § 5 (to be codified at Tex. Gov. Code § 311.036).

85. Moreover, S.B. 8 directs state-court judges to ignore judgments and injunctions issued by federal courts, for example, by telling state courts to refuse to apply non-mutual collateral estoppel based on such judgments, and by mandating that they ignore whether a federal injunction expressly permitted activity by an abortion provider or other person sued in S.B. 8 proceedings. S.B. 8 § 171.208(e)(4), (5).

B. S.B. 8, Section 4: The Fee-Shifting Provision to Deter All Challenges to Texas Abortion Restrictions

86. Section 4 of S.B. 8 creates an unprecedented and draconian one-way fee-shifting provision designed to deter any legal challenges to Texas abortion restrictions and to penalize anyone who tries to bring such a challenge. This provision applies to any person—including a party's lawyers—who seeks injunctive or declaratory relief to prevent enforcement of S.B. 8. S.B. 8 § 30.022. And it goes beyond S.B. 8, reaching *any* challenge to a "law that regulates or

restricts abortion," or that excludes those who "perform or promote" abortion from participating in a public funding program. *Id.*

87. This fee provision purports to apply in state and federal court, and to any state or federal claim, including Section 1983 claims brought to vindicate federal constitutional rights.

88. Under this provision, civil-rights plaintiffs and their attorneys can be forced to pay defendants' attorney's fees unless they run the table in litigation, prevailing on every claim they brought. If a court dismisses a claim brought by the civil-rights plaintiff, regardless of the reason, or enters judgment in the other party's favor on that claim, the party defending the abortion restriction is deemed to have "prevail[ed]." S.B. 8 § 30.022(b). That is presumably true even if the court ultimately enjoins the challenged abortion restriction in full after, for example, rejecting one claim pleaded in the alternative or dismissing another rendered moot by circumstance.

89. According to Section 4 of S.B. 8, the party seeking fees need not even have asked for them in the underlying litigation. Rather, that party can file a new lawsuit against the abortion-rights advocate or their attorneys and law firms any time within three years of the claim resolution, thus choosing a different venue to litigate the fee claims before a judge who did not preside over the initial case. *Id.* § 30.022(c), (d)(1).

90. S.B. 8 then directs state courts resolving this new species of fee claims to start from scratch. According to S.B. 8, they cannot even consider whether the court in the underlying case already denied fees to the party defending the abortion restriction, or already considered the application of S.B. 8 Section 4 and held it "invalid, unconstitutional, or preempted by federal law." *Id.* § 30.022(d)(3). Nor does S.B. 8 explicitly limit fees to what is reasonable, unlike other fee-shifting statutes such as 42 U.S.C. § 1988.

III. IRREPARABLE HARM CAUSED BY S.B. 8

A. Impact on Abortion Patients

91. If S.B. 8 is permitted to take effect, many Texans will be forced to carry their pregnancies to term, to attempt to scrape together funds to obtain an abortion out of state, or possibly to attempt to self-manage their own abortions without access to accurate medical information. Currently, approximately 85-90% of people who obtain abortions in Texas are at least six weeks into pregnancy. Regardless of outcome, S.B. 8 will impose severe and irreparable harm on patients.[7]

92. Being forced to continue a pregnancy against one's will jeopardizes a person's physical, mental, and emotional health, as well as the stability and well-being of their family, including existing children.

93. Even for someone who is otherwise healthy and has an uncomplicated pregnancy, being forced to carry that pregnancy to term and give birth poses serious medical risks with both short- and long-term consequences for the patient's physical health and mental and emotional well-being. For someone with a medical condition caused or exacerbated by pregnancy, these risks are increased.

94. For people experiencing intimate partner violence, forced pregnancy also often exacerbates the risk of violence and further tethers the pregnant person to their abuser.

95. In addition, forced pregnancy will add to the anguish of patients and their families who receive fetal diagnoses that are incompatible with sustained life after birth—forcing patients

[7] *See* Kari White, et al., *Research Brief: Texas Senate Bill 8: Medical and Legal Implications*, Tex. Policy Evaluation Project (July 2021), *available at* http://sites.utexas.edu/txpep/files/2021/07/TxPEP-research-brief-SB8.pdf.

to carry doomed pregnancies for months and suffer the physical and emotional pains of labor and delivery, knowing all the while that their child will not survive.

96. S.B. 8 will be particularly devastating for Texans of color, particularly Black and Latinx populations, as well as for Texans with low incomes and those living in rural areas—communities that already face heightened barriers to medical care.

97. Low-income and Black and Latinx populations 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 communities will thus necessarily bear an outsized share of S.B. 8's burdens.

98. Black Texans will also disproportionately suffer the gravest consequences of forced pregnancy if S.B. 8 is allowed to take effect in light of the significantly higher rates of maternal mortality in their communities.

99. Those who attempt to travel out of state to access care will have to pay for and arrange transportation, childcare, and time off work. Because the majority of abortion patients are poor or have low incomes, these financial and other costs may be insurmountable or require them to forgo other basic needs for themselves and their existing families.

100. Even those able to amass funds and make arrangements to travel outside Texas for care will be delayed in obtaining an abortion. While abortion is very safe at all stages, the risks increase as pregnancy advances. Moreover, the cost of an abortion generally increases with gestational age.

101. Additionally, by targeting individuals who provide financial, practical, or emotional support for abortion access, S.B. 8 will decimate the support system on which Texans with low incomes rely to access abortion. Indeed, by imposing aiding-and-abetting liability

"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.* § 171.208(a)(2), it will chill support even for those few early abortions that remain permissible under S.B. 8.

B. Impact on Provider Plaintiffs and Their Physicians and Staff

102. S.B. 8 subjects the Provider Plaintiffs and their staff to a Hobson's choice. If they stop providing abortions and engaging in other activities that assist with abortion provision after six weeks of pregnancy as S.B. 8 requires, they will be forced to turn away patients in need of constitutionally protected care, and many will lose or lay off staff in light of the reduced services. Many will soon have to shutter their doors permanently because they cannot sustain operations if barred from providing the bulk of their current care. And as Texas's previous attempts at restricting abortion have demonstrated, abortion providers forced to close their doors may not ever reopen, even if a court later intervenes.

103. If these abortion providers instead offer abortion in violation of S.B. 8, they reach the same outcome with even longer-term consequences. They and their staff could be forced to defend dozens if not hundreds of simultaneous S.B. 8 lawsuits scattered across the state. And if that campaign of harassment does not alone bankrupt the abortion providers, they will quickly accrue catastrophic financial liability under S.B. 8's monetary penalty of at least $10,000 per abortion. Moreover, a steady stream of random strangers could seek injunctive relief preventing the abortion providers from performing prohibited abortions going forward—and do so in any of hundreds of state courts of their choosing.

104. There is no question that vigilante enforcement lawsuits under S.B. 8 will be filed if the Provider Plaintiffs continue performing abortions. Anti-abortion protestors in Texas frequently track clinic operations and staff, including by, for example, video recording staff as they

enter and exit health centers. Individuals opposed to abortion also regularly file false complaints with licensing agencies to trigger government investigations.

105. Moreover, months before S.B. 8 was even scheduled to take effect, two individuals trespassed onto Whole Woman's Health Alliance's private property to distribute a letter informing staff that they can be sued for providing or facilitating abortions after the detection of a "fetal heartbeat" and encouraging staff to report their colleagues to the letter's authors.

106. Similarly, Defendant Mark Lee Dickson has openly called for people to sue their local abortion providers under S.B. 8, has offered to connect interested claimants with attorneys, has threatened to sue PPGT Surgical Health Services under a functionally identical Lubbock ordinance, and has taken deceptive steps to test PPGT Surgical Health Services' compliance with that ordinance. *See supra* ¶ 50 n.4. Due to these threats and others, PPGT Surgical Health Services has already been forced to stop providing abortions in Lubbock, while it challenges the Lubbock ordinance in another federal lawsuit. With the Lubbock clinic not currently providing abortion, the next nearest abortion provider is three hundred miles away.

107. In addition to the costs of defending S.B. 8 lawsuits and the risk of mandatory statutory damages and injunctions, the Provider Plaintiffs and staff risk professional discipline and other liability for violations of the Act. While the Government Official Defendants lack authority to directly enforce S.B. 8, they retain the authority and duty to enforce *other* statutes and regulations against licensed abortion facilities, ambulatory surgical centers, pharmacies, physicians, physician assistants, nurses, and pharmacists that could be triggered by a violation of S.B. 8. *See supra* ¶¶ 51-55.

108. In addition to these harms, S.B. 8 Section 4's fee-shifting provision to penalize and deter challenges to *all* abortion laws, not just S.B. 8, will burden the Provider Plaintiffs' right to

petition the courts and to speak freely, exposing them to potentially ruinous liability for attorney's fees and costs because they attempt to vindicate their own and others' constitutional rights through public-interest litigation.

109. In sum, because of S.B. 8, the Provider Plaintiffs and their staff will suffer profound harm to their property, business, reputations, and a deprivation of their own constitutional rights.

C. Impact on Advocate Plaintiffs

110. If S.B. 8 forces the Provider Plaintiffs and their staff to stop providing abortion care after six weeks of pregnancy, most Texans will need to leave the state to obtain an abortion. This will require the Advocate Plaintiffs to redirect their limited resources to out-of-state travel, even though it inflicts heavy—sometimes insurmountable—burdens on their clients, who experience intersecting forms of oppression. In these ways, S.B. 8 will subvert the Advocate Plaintiffs' aim to help ensure that every person can exercise reproductive autonomy regardless of circumstance.

111. If the Advocate Plaintiffs continue to support those obtaining abortions in Texas, they are likely to face vigilante enforcement lawsuits for aiding and abetting abortions prohibited by S.B. 8 and risk mandatory statutory damages and injunctions. Defendant Dickson and other entities opposed to abortion access have already targeted some of the Advocate Plaintiffs for their efforts to ensure especially vulnerable Texans can terminate a pregnancy. Dickson, for example, drafted an ordinance adopted by seven towns in Texas branding Plaintiffs The Afiya Center, Lilith Fund, and TEA Fund as "criminal organizations," and has publicly referred to the "Lilith Fund and other abortion-aiding organizations" as "tak[ing] part in the murder of innocent unborn human beings."

112. Other Advocate Plaintiffs face the threat of vigilante enforcement lawsuits with unknown liability under S.B. 8 for simply engaging in First Amendment-protected speech and

other activity in support of abortion. Rev. Forbes and Rev. Kanter risk costly and burdensome civil lawsuits for providing spiritual and emotional counseling to patients and parishioners, as they are called by their own religious beliefs to provide. This risk extends to other clergy members, counselors, and advisors (such as sexual assault and genetic counselors), as S.B. 8 incentivizes lawsuits accusing individuals of aiding and abetting prohibited abortions.

113. Defending against S.B. 8 suits will drain the Advocate Plaintiffs' resources and prevent them from operating, regardless of whether the suits are ultimately dismissed.

CLASS ALLEGATIONS

114. This lawsuit is properly maintained as an action against two defendant classes under Federal Rule of Civil Procedure 23(b)(1)(A) or alternatively under Rule 23(b)(2).

A. Judicial Defendant Class

115. The first class consists of all non-federal judges in the State of Texas with jurisdiction over civil actions and the authority to enforce S.B. 8 ("Judicial Defendant Class").

116. Any separate actions commenced against individual judges for the purpose of challenging their enforcement of S.B. 8 may result in inconsistent decisions by the courts presiding over those actions.

117. Separate actions could put Plaintiffs in the untenable position of not knowing which of multiple, incompatible interpretations and rulings they must comply with to avoid violating the law and risking severe statutory damages.

118. There are potentially more than 1,000 non-federal judges in the State of Texas with jurisdiction over civil suits brought under S.B. 8 where the amount in controversy exceeds Two-Hundred Dollars ($200.00). Additionally, members of the proposed Judicial Defendant Class are located in each of Texas's 254 counties. Given the size of the class and this geographic dispersal,

it is impracticable to join all judges with power to enforce S.B. 8 in order to provide protection to all potential defendants in those actions.

119. Resolution of any one of the legal issues raised in this case will affect similarly each member of the proposed Judicial Defendant Class, by determining whether, and to what extent, they may enforce S.B. 8 under the U.S. Constitution and federal law. Moreover, the relief sought in this case does not turn on circumstances specific to particular members of the proposed defendant class. Accordingly, there are questions of law common to the class.

120. Defendant Judge Jackson is an adequate class representative because his court has jurisdiction over civil claims with an amount in controversy greater than $200.00. *See* Tex. Const. art. V, §§ 1, 8. S.B. 8 civil enforcement actions may be brought in the 114th District Court where Judge Jackson presides. Judge Jackson is directed to enforce compliance with the Act by implementing the remedies mandated by S.B. 8. In this action, Plaintiffs seek a declaratory judgment that S.B. 8 is invalid and cannot be enforced by any Defendant, including, *inter alia*, the Class Representative. Accordingly, the Class Representative is qualified as a member of the defined class.

121. The defenses which the Class Representative will raise will be typical of all members of the proposed Judicial Defendant Class. The claims against which the Class Representative must defend challenge the constitutionality of the Act and are asserted against all members of the proposed Judicial Defendant Class. Further, the Class Representative and the other class members hold a common position with respect to Plaintiffs, a position that is defined by statutory obligations and not by personal relationships. Therefore, any defenses the Class Representative asserts—and the legal theories on which they are based—will be available to the other class members.

122. The Class Representative's position is aligned with that of the other class members because all are charged with enforcing S.B. 8. For purposes of this suit, the Class Representative has no interests antagonistic to or in conflict with the interests of other members of the proposed class. Because the functions of all judges with respect to this statute are substantially the same, the Class Representative will be able to fairly and adequately represent the interests of all judges with authority to hear civil suits under S.B. 8.

B. Clerk Defendant Class

123. The second class consists of the clerks in all non-federal courts in the State of Texas with jurisdiction over civil actions and the authority to enforce S.B. 8 ("Clerk Defendant Class").

124. Any separate actions commenced against individual clerks for the purpose of challenging their role in enforcing S.B. 8 may result in inconsistent decisions by the courts presiding over those actions.

125. Separate actions could put Plaintiffs in the untenable position of not knowing which of multiple, incompatible interpretations and rulings they must comply with to avoid violating the law and risking severe statutory damages.

126. There are likely more than 500 clerks of the non-federal courts in the State of Texas with jurisdiction over civil suits brought under S.B. 8. Additionally, members of the proposed Clerk Defendant Class are located throughout the state. Given the size of the class and this geographic dispersal, it is impracticable to join all clerks for the courts with power to enforce S.B. 8 in order to provide protection to all potential defendants in those actions.

127. Resolution of any one of the legal issues raised in this case will affect similarly each member of the proposed Clerk Defendant Class, by determining whether, and to what extent, they may accept filing of and issue citations for service of process in S.B. 8 civil actions under the

U.S. Constitution and federal law. Moreover, the relief sought in this case does not turn on circumstances specific to particular members of the proposed Clerk Defendant Class. Accordingly, there are questions of law common to the class.

128. Defendant Penny Clarkston is an adequate class representative because she is the Clerk for the District Court of Smith County, which has jurisdiction over civil claims with an amount in controversy greater than $200.00. *See* Tex. Const. art. V, §§ 1, 8. S.B. 8 civil enforcement actions may be brought in the District Court of Smith County. Defendant Clarkson is directed to accept filing of and issue citations for service of process in S.B. 8 civil actions. In this action, Plaintiffs seek a declaratory judgment that S.B. 8 is invalid and that enforcement actions cannot be instituted by any Defendant, including, *inter alia*, the Class Representative, as well as injunctive relief precluding the members of the Clerk Defendant Class from participating in S.B. 8's enforcement. Accordingly, the Class Representative is qualified as a member of the defined class.

129. The defenses which the Class Representative will raise will be typical of all members of the proposed Clerk Defendant Class. The claims against which the Class Representative must defend challenge the constitutionality of the Act and are asserted against all members of the proposed Clerk Defendant Class. Further, the Class Representative and the other class members hold a common position with respect to Plaintiffs, a position that is defined by statutory obligations and not by personal relationships. Therefore, any defenses the Class Representative asserts—and the legal theories on which they are based—will be available to the other class members.

130. The Class Representative's position is aligned with that of the other class members because all are charged with playing a role in the enforcement of S.B. 8. For purposes of this suit,

the Class Representative has no interests antagonistic to or in conflict with the interests of other members of the proposed class. Because the functions of all clerks with respect to this statute are substantially the same, the Class Representative will be able to fairly and adequately represent the interests of all clerks for courts with authority to hear civil suits under S.B. 8.

CLAIMS FOR RELIEF

CLAIM I

(Fourteenth Amendment Substantive Due Process Right to Abortion—Section 3 of S.B. 8)

131. The allegations in paragraphs 1 through 130 above are incorporated as if fully set forth herein.

132. Under *Roe v. Wade*, 410 U.S. 113 (1973), and nearly fifty years of unbroken precedent, a patient has a constitutionally protected right to end a pregnancy before viability.

133. By prohibiting pre-viability abortion upon detection of a "fetal heartbeat" as defined in the Act, which may occur as early as six weeks LMP (or even sooner), Section 3 of the Act violates the substantive due process rights of Plaintiffs' patients to pre-viability abortion, as guaranteed by the Fourteenth Amendment to the U.S. Constitution.

CLAIM 2

(Fourteenth Amendment Equal Protection—Section 3 of S.B. 8)

134. The allegations in paragraphs 1 through 133 above are incorporated as if fully set forth herein.

135. The Equal Protection Clause commands that no State shall deny to any person within its jurisdiction the equal protection of the laws, which is essentially a direction that all persons similarly situated should be treated alike.

136. Section 3 of S.B. 8 singles out abortion providers and people who "aid or abet" the constitutionally protected right to abortion, or intend to do these things, and then treats this category of people differently from all other defendants in civil litigation in Texas.

137. S.B. 8 alters the procedural rules and limits the substantive defenses and arguments available in S.B. 8 enforcement proceedings to skew those proceedings and harm those sued under S.B. 8 in violation of the constitutional guarantee of equal protection. The statute's venue and fee-shifting provisions, its openness to claimants without any connection to an abortion, its evisceration of defenses and arguments, and its attempt to redefine federal law, all work together to disadvantage abortion providers and supporters. And they do so toward the goal of enforcing a patently unconstitutional abortion ban that is unenforceable under binding Supreme Court precedent.

138. The purpose for S.B. 8's enforcement provisions is animus and to burden the exercise of constitutional rights. Those are not legitimate government interests. Even if Defendants could assert a compelling government interest, S.B. 8's enforcement provisions are not narrowly tailored. Accordingly, S.B. 8's enforcement scheme cannot survive any level of review, and it violates Plaintiffs' equal protection rights.

CLAIM 3

(Fourteenth Amendment, Void for Vagueness—Section 3 of S.B. 8)

139. The allegations in paragraphs 1 through 138 above are incorporated as if fully set forth herein.

140. S.B. 8 imposes quasi-criminal penalties on persons who provide an abortion in violation of the six-week ban, engage in conduct that aids or abets an abortion that violates the six-week ban, or intends to do these things.

141. A law that imposes such penalties is void for vagueness, and thus inconsistent with the federal guarantee of due process, if it authorizes or encourages arbitrary and discriminatory enforcement, or fails to provide fair warning of its prohibitions so that ordinary people may conform their conduct accordingly.

142. S.B. 8 unlawfully empowers arbitrary and discriminatory enforcement by deputizing private individuals to enforce state law in violation of clearly established constitutional rights. Its terms incentivize purely ideological plaintiffs to force their opponents into court to defend themselves, and to do so without the legal and practical checks that might otherwise temper government prosecutors or enforcement agencies. S.B. 8 also empowers arbitrary and discriminatory enforcement because its penalties are standardless.

143. The Act also fails to adequately inform regulated parties and those charged with the law's enforcement of what conduct is prohibited and/or leads to penalties. S.B. 8 states that abortion providers and others assisting them may be held liable for violating the Act if a court decision permitting their conduct at the time it occurred is later overruled on appeal or by a subsequent court. S.B. 8 § 171.208(e)(3). Similarly, under S.B. 8, aiding-and-abetting liability may attach "regardless of whether [a] person knew or should have known that the abortion" they aided "would be performed or induced in violation" of the six-week ban. *Id.* § 171.208(a)(2).

144. In all of these circumstances, the only way for people to ensure they do not run afoul of S.B. 8 is by refusing to perform or assist with any abortions (or "intend" to do either). Due process does not permit such uncertainty, particularly where, as here, the challenged law threatens to inhibit the exercise of constitutionally protected rights.

145. S.B. 8 is, therefore, unconstitutionally vague and violates Plaintiffs' due process rights.

CLAIM 4

(First and Fourteenth Amendments, Freedom of Speech and the Right to Petition—Section 3 of S.B. 8)

146. The allegations in paragraphs 1 through 145 above are incorporated as if fully set forth herein.

147. Plaintiffs include physicians, health centers, nonprofit organizations, and individuals committed to ensuring that all Texas residents have access to safe abortion care regardless of their financial means or other sociodemographic characteristics. To serve this end, they collectively engage in public education, organizing, and/or lobbying activities, and help ensure minors who are unable to obtain written parental consent to terminate a pregnancy have free legal representation in judicial-bypass proceedings. They also provide direct financial, practical, and spiritual support to Texas residents seeking abortion.

148. S.B. 8's broad prohibition on activity that "aids or abets" a covered abortion, and on an intent to engage in such activity even without corresponding action, burdens Plaintiffs' speech and expressive conduct and ability to petition the courts, as described above. Because S.B. 8 does so without adequate justification, it cannot possibly survive the strict scrutiny that applies under the First Amendment.

149. Even if S.B. 8's prohibition were viewed as a regulation of conduct that only incidentally burdens speech, the prohibition would still be invalid because it serves no legitimate, much less important, governmental purpose and is otherwise not adequately justified to satisfy intermediate scrutiny.

CLAIM 5

(Federal Preemption—Section 3 of S.B. 8)

150. The allegations in paragraphs 1 through 149 above are incorporated as if fully set forth herein.

151. The U.S. Constitution is the supreme law of the land, and the Supreme Court is the final arbiter of its meaning. State statutes inconsistent with rights conferred by the U.S. Constitution or other federal law must give way. S.B. 8 defies this core tenet undergirding the rule of law.

152. S.B. 8 purports to require that for a person to argue that the six-week ban violates patients' constitutional right to abortion, the person must prove in each enforcement action that an award of relief in that action will impose an undue burden. This conflicts with the Supreme Court's constitutional precedents, which hold that states may not prohibit pre-viability abortions, and that balancing the burdens and state interests anew under the undue-burden test in a ban case is not permissible. This limitation also disregards and purports to redefine the actual undue-burden standard articulated by the U.S. Supreme Court, in conflict with the Supreme Court's constitutional precedents.

153. S.B. 8 further directs state-court judges to ignore judgments and injunctions issued by federal courts, *id*. § 171.208(e)(4), (5), contrary to decades of U.S. Supreme Court precedent. Under that case law, states cannot simply give federal-court judgments in federal-question cases "whatever effect they would give their own judgments," but instead "must accord them the effect" that federal law provides. *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 507 (2001) (emphasizing that the U.S. Supreme Court "has the last word on the claim-preclusive effect of *all* federal judgments"); *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (confirming that state legislators and

judicial officers may not "at will[] annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments").

154. Because S.B. 8's six-week ban and corresponding enforcement regime conflict with U.S. Supreme Court interpretations of the federal constitution that confer clear rights on Plaintiffs and their patients, they cannot validly be applied.

CLAIM 6

(Section 1988 Preemption—Section 4 of S.B. 8)

155. The allegations in paragraphs 1 through 154 above are incorporated as if fully set forth herein.

156. Section 4 of S.B. 8 would permit defendants in Section 1983 litigation to recover attorney's fees and costs if a court ultimately dismisses or rejects any claim against them in cases where someone challenges a state abortion regulation or restriction. The defendants could seek to recoup these costs from parties and their attorneys in an entirely new proceeding before a different judge within three years of the resolution of the substantive claim. No showing of frivolousness on the part of Plaintiffs would be required.

157. In contrast, 42 U.S.C. § 1988 sets out a comprehensive fee-shifting regime applicable to Section 1983 and certain other federal civil-rights claims, regardless of whether those claims are raised in state or federal court. Section 1988 provides civil-rights plaintiffs with a clear right to recover their fees for covered claims where they are "prevailing parties." It also provides such plaintiffs with a clear right *not* to be liable for the fees and costs of a prevailing defendant, unless a district court finds that the plaintiff's action was frivolous, unreasonable, or without foundation. Section 1988 further delineates civil-rights plaintiffs' rights by instructing that a request for attorney's fees must be made in the "action or proceeding to enforce" a federal civil

rights statute, including Section 1983, and that the fees, where assessed, are allowed only "as part of the costs." 42 U.S.C. § 1988(b).

158. Section 4 of S.B. 8 directly conflicts with Section 1988 and frustrates Congress's objective in adopting it. Because Section 4 of S.B. 8 is directly at odds with Section 1988, and violates the rights conferred on Plaintiffs by that federal statute, it is preempted and may not be applied to Plaintiffs in this or future Section 1983 litigation.

CLAIM 7

(First and Fourteenth Amendments, Freedom of Speech and the Right to Petition—Section 4 of S.B. 8)

159. The allegations in paragraphs 1 through 158 are incorporated as if fully set forth herein.

160. The legal services and litigation covered by Section 4 of S.B. 8 are a means for Plaintiffs and their attorneys to achieve lawful objectives through the court system, and they serve as a form of political expression.

161. Under Section 4, only litigants motivated to block the enforcement of laws that "regulate[] or restrict[] abortion" or laws that provide funding to entities who "perform or promote" abortion are punished for their advocacy in litigation. S.B. 8 § 30.022. In contrast, S.B. 8 does not impose a penalty on litigants whose goal is to uphold such laws, or to challenge laws that expand access to abortion or provide funding to abortion providers or advocates.

162. In both its purpose and effect, Section 4 is a viewpoint- and content-based restriction on Plaintiffs' abortion-related advocacy, including their petitioning activity. By threatening Plaintiffs and their attorneys with massive liability for fees and costs, Section 4 will necessarily chill the exercise of rights to free speech and to petition activity protected by the First Amendment.

163. Because SB 8 limits Plaintiffs' right to speak freely and to petition the courts for relief, without adequate justification, S.B. 8 violates the First Amendment and should be declared invalid and unenforceable.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs ask this Court:

A. To certify a class of Judicial Defendants as defined in paragraph 115 pursuant to Federal Rule of Civil Procedure 23(b)(1)(A) or alternatively under Rule 23(b)(2);

B. To certify a class of Clerk Defendants as defined in paragraph 123 pursuant to Federal Rule of Civil Procedure 23(b)(1)(A) or alternatively under Rule 23(b)(2);

C. To issue permanent, and if necessary, preliminary injunctive relief in advance of S.B. 8's September 1, 2021, effective date that:

(1) restrains the Clerk Defendants, their officers, agents, servants, employees, attorneys, and any persons in active concert or participation with them, from participating in the enforcement of S.B. 8 in any way, including by accepting for filing or taking any other action in the initiation of a lawsuit brought under S.B. 8;

(2) restrains 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;

(3) restrains the Government Official Defendants, their officers, agents, servants, employees, attorneys, and any persons in active concert or participation with them, from enforcing S.B. 8 in any way, including by applying S.B. 8 as a basis for enforcement of laws or regulations in their charge;

D. To enter a judgment against all Defendants declaring that S.B. 8 violates the First and Fourteenth Amendments to the U.S. Constitution and the Supremacy Clause and is preempted

by 42 U.S.C. §§ 1983 and 1988 and authoritative rulings of the U.S. Supreme Court regarding the right to abortion and the res judicata effect and binding nature of federal court judgments and injunctions;

E. To enter a judgment against all Defendants declaring that because Plaintiffs' advocacy, education, organizing, and lobbying activities, petitioning of the courts for relief, and support for abortion patients is protected by the First Amendment, they cannot be the basis for liability under S.B. 8;

F. To award Plaintiffs their costs and expenses, including attorney's fees, pursuant to 42 U.S.C. § 1988;

G. To retain jurisdiction after judgment for the purposes of resolving any future fee disputes between the parties and issuing further appropriate injunctive relief if the Court's declaratory judgment is violated; and

H. To grant such other and further relief as the Court deems just and proper.

Dated: July 13, 2021

Respectfully submitted,

/s/ Christen Mason Hebert

Christen Mason Hebert
(Texas Bar No. 24099898)
Johns & Hebert PLLC
2028 East Ben White Blvd
Suite 240-1000
Austin, TX 78741
(512) 399-3150
chebert@johnshebert.com

Attorney for all Plaintiffs

Marc Hearron (Texas Bar No. 24050739)*
Center for Reproductive Rights
1634 Eye St., NW, Suite 600
Washington, DC 20006
(202) 524-5539
mhearron@reprorights.org

Molly Duane*
Kirby Tyrrell*
Melanie Fontes*
Center for Reproductive Rights
199 Water Street, 22nd Floor
New York, NY 10038
(917) 637-3631
mduane@reprorights.org
ktyrrell@reprorights.org
mfontes@reprorights.org

Jamie A. Levitt*
J. Alexander Lawrence*
Morrison & Foerster LLP
250 W. 55th Street
New York, NY 10019
(212) 468-8000
jlevitt@mofo.com
alawrence@mofo.com

*Attorneys for Whole Woman's Health, Whole Woman's Health Alliance, Marva Sadler, Southwestern Women's Surgery Center, Allison Julie Murray**
Richard Muniz*
Planned Parenthood Federation of America
1110 Vermont Ave., NW Ste. 300
Washington, DC 20005
(202) 973-4997
julie.murray@ppfa.org
richard.muniz@ppfa.org

Attorneys for Planned Parenthood of Greater Texas Surgical Health Services, Planned Parenthood South Texas Surgical Center, Planned Parenthood Center for Choice, and Dr. Bhavik Kumar

Julia Kaye*
Brigitte Amiri*
Chelsea Tejada*
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2633
jkaye@aclu.org
bamiri@aclu.org
ctejada@aclu.org

Lorie Chaiten*
American Civil Liberties Union Foundation
1640 North Sedgwick Street
Chicago, IL 60614
(212) 549-2633
rfp_lc@aclu.org

Adriana Pinon (Texas Bar No. 24089768)
David Donatti (Texas Bar No. 24097612)
Andre Segura (Texas Bar No. 24107112)
ACLU Foundation of Texas, Inc.
5225 Katy Freeway, Suite 350
Houston, TX 77007
Tel. (713) 942-8146
Fax: (713) 942-8966

Gilbert, M.D., Brookside Women's Medical Center PA d/b/a Brookside Women's Health Center and Austin Women's Health Center, Alamo City Surgery Center PLLC d/b/a Alamo Women's Reproductive Services, Houston Women's Reproductive Services, Reverend Daniel Kanter, and Reverend Erika Forbes.

**Pro hac vice applications forthcoming*

apinon@aclutx.org
ddonatti@aclutx.org
asegura@aclutx.org

Attorneys for Houston Women's Clinic

Stephanie Toti
LAWYERING PROJECT
41 Schermerhorn Street #1056
Brooklyn, NY 11201
(646) 490-1083
stoti@lawyeringproject.org

Rupali Sharma*
LAWYERING PROJECT
197 Pine Street, Apt. 23
Portland, ME 04102
(908) 930-6445
rsharma@lawyeringproject.org

Attorneys for The Afiya Center, Frontera Fund, Fund Texas Choice, Jane's Due Process, Lilith Fund for Reproductive Equity, North Texas Equal Access Fund

No. 21A24

In the Supreme Court of the United States

WHOLE WOMAN'S HEALTH, ET AL.,
Applicants,

v.

JUDGE AUSTIN REEVE JACKSON, ET AL.,
Respondents.

DECLARATION OF LESLEY FRENCH HENNEKE

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

Office of the Texas Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697
Judd.Stone@oag.texas.gov

JUDD E. STONE II
Solicitor General
Counsel of Record

LANORA C. PETTIT
Principal Deputy Solicitor General

NATALIE D. THOMPSON
BETH KLUSMANN
Assistant Solicitors General

Counsel for Respondents Jackson, Carlton, Thomas, Young, Benz, and Paxton

DECLARATION OF LESLEY FRENCH HENNEKE

Pursuant to 28 U.S.C. § 1746, I testify that:

1. My name is Lesley French Henneke. I am over the age of 18 and fully competent in all respects to make this declaration. I make this declaration based on my own personal and professional knowledge.

2. I currently serve the Office of the Attorney General of Texas as Chief of Staff. I have served in this role since November 2020. Previously, I was General Counsel and Chief of the General Counsel Division of the Office of the Attorney General of Texas.

3. In my role as Chief of Staff for the Office of the Attorney General of Texas, I advise the Attorney General and assist in overseeing all of the Office of the Attorney General's operations. As part of my responsibility, I am familiar with the legal obligations of the Office of the Attorney General and with key legal positions that the Office of the Attorney General has taken regarding the scope of its authority.

4. In Senate Bill 8, the Texas Legislature provided for specific methods of enforcement of the law and expressly precluded other methods of enforcement. It is the position of the Office of the Attorney General that Section 3 of Senate Bill 8, which relates to the performance of abortions after a fetal heartbeat has been detected, is enforced exclusively through private causes of action and that it does not allow public officials, including the Attorney General, to enforce it through other statutory enforcement mechanisms.

5. Section 3 of the law creates a private cause of action that is expressly reserved for private persons. This section states that "[a]ny person, other than an officer or employee of a state or local governmental entity in this state, may bring a civil action."

6. In turn, Section 6 of Senate Bill 8 provides that the private cause of action established in Section 3 is the only method of enforcing the abortion regulations found in Section 3. Section 3 reiterates this point by explaining that it shall be "enforced exclusively through . . . private civil action."

7. Though the Attorney General may have a role in enforcing other aspects of the Health and Safety Code, Senate Bill 8 excludes the Office of the Attorney General or other state agencies from enforcing Section 3 of Senate Bill 8. Private persons may bring private causes of action to enforce Section 3, but public officers are expressly precluded from enforcing Section 3.

8. Eliminating all doubt, Senate Bill 8 was explicit in stating that "[n]otwithstanding . . . any other law," the statutes enacted in Section 3 "shall be enforced exclusively through the private civil actions described" therein. S.B. 8 § 3.

9. Therefore, public officers and agencies in the Texas, including the Attorney General and the Office of the Attorney General, lack authority to enforce the provisions of Section 3 of Senate Bill 8.

10. Because Senate Bill 8 expressly and specifically precludes enforcement of Section 3 by public officers, public officers may not enforce it either directly or indirectly. For example, and despite Plaintiffs' suggestion to the contrary, the Office of the Attorney General could not use its pre-existing authority under the Texas Occupations Code to seek civil penalties as a method of enforcing that which Senate Bill 8 leaves to the enforcement of private lawsuits.

11. The Office of the Attorney General understands that the Texas Legislature decided that Section 3 of Senate Bill 8 should be enforceable exclusively through private civil actions.

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

Executed on this 31st day of August 2021.

Lesley French Henneke