EXHIBIT 1:
S.B. 8 (Tex. 2021) (Ex. 1 to Complaint)

Exhibit 1

S.B. No. 8

AN ACT

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

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

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

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 The legislature finds that the State of Texas never repealed, either expressly or by implication, the state statutes enacted before the ruling in *Roe v. Wade*, 410 U.S. 113 (1973), that prohibit and criminalize abortion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

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

SUBCHAPTER H. DETECTION OF FETAL HEARTBEAT

Sec. 171.201. DEFINITIONS. In this subchapter:

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

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

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

pregnancy.

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

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

(A) begins with fertilization;

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

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

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

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

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

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

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

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

(4) to make an informed choice about whether to

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

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

(b) Except as provided by Section 171.205, a physician may not knowingly perform or induce an abortion on a pregnant woman unless the physician has determined, in accordance with this section, whether the woman's unborn child has a detectable fetal heartbeat.

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

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

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

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

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

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

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

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

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

(b) A physician does not violate this section if the physician performed a test for a fetal heartbeat as required by Section 171.203 and did not detect a fetal heartbeat.

(c) This section does not affect:

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

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

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

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

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

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

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

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

(b) This subchapter may not be construed to:

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

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

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

Sec. 171.207. LIMITATIONS ON PUBLIC ENFORCEMENT. (a) Notwithstanding Section 171.005 or any other law, the requirements of this subchapter shall be enforced exclusively through the private civil actions described in Section 171.208. No enforcement of this subchapter, and no enforcement of Chapters 19 and 22, Penal Code, in response to violations of this subchapter, may be taken or threatened by this state, a political subdivision, a district or county attorney, or an executive or administrative officer or employee of this state or a political subdivision against any person, except as provided in Section 171.208.

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

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

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

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

Sec. 171.208. CIVIL LIABILITY FOR VIOLATION OR AIDING OR ABETTING VIOLATION. (a) Any person, other than an officer or employee of a state or local governmental entity in this state, may bring a civil action against any person who:

(1) performs or induces an abortion in violation of this subchapter;

(2) knowingly engages in conduct that aids or abets the performance or inducement of an abortion, including paying for or reimbursing the costs of an abortion through insurance or otherwise, if the abortion is performed or induced in violation of this subchapter, regardless of whether the person knew or should have known that the abortion would be performed or induced in violation of this subchapter; or

(3) intends to engage in the conduct described by Subdivision (1) or (2).

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

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

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

(3) costs and attorney's fees.

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

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

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

(1) ignorance or mistake of law;

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

(3) a defendant's reliance on any court decision that has been overruled on appeal or by a subsequent court, even if that court decision had not been overruled when the defendant engaged in conduct that violates this subchapter;

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

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

(6) the consent of the unborn child's mother to the abortion; or

(7) any claim that the enforcement of this subchapter or the imposition of civil liability against the defendant will violate the constitutional rights of third parties, except as provided by Section 171.209.

(f) It is an affirmative defense if:

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

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

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

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

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

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

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

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

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

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

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

established by the United States Supreme Court.

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

(1) the defendant has standing to assert the third-party rights of a woman or group of women seeking an abortion in accordance with Subsection (a); and

(2) the defendant demonstrates that the relief sought by the claimant will impose an undue burden on that woman or that group of women seeking an abortion.

(c) A court may not find an undue burden under Subsection (b) unless the defendant introduces evidence proving that:

(1) an award of relief will prevent a woman or a group of women from obtaining an abortion; or

(2) an award of relief will place a substantial obstacle in the path of a woman or a group of women who are seeking an abortion.

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

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

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

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

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

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

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

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

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

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

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

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

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

(1) the Uniform Declaratory Judgments Act; and

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

(b) This state has sovereign immunity, a political subdivision has governmental immunity, and each officer and employee of this state or a political subdivision has official immunity in any action, claim, or counterclaim or any type of legal or equitable action that challenges the validity of any provision or application of this chapter, on constitutional grounds or otherwise.

(c) A provision of state law may not be construed to waive or abrogate an immunity described by Subsection (b) unless it expressly waives immunity under this section.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) the time for seeking appellate review expires.

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) A physician shall:

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

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

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

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

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

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

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

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

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

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

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

(A) the physician's name;

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

medically accurate:

(i) the risks of infection and hemorrhage;

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

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

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

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

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

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

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

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

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

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

(B) informs the pregnant woman that those materials:

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

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

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

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

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

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

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

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

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

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

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

"ABORTION AND SONOGRAM ELECTION

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

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

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

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

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

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

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

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

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

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

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

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

PROCEDURE. MY PLACE OF RESIDENCE IS:_____.

_____ _____

SIGNATURE DATE";

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

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

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

(c) The report must include:

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

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

(3) the type of abortion procedure;

(4) the date the abortion was performed;

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

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

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

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

[~~and~~]

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

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

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

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

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

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

S.B. No. 8

President of the Senate

Speaker of the House

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

Secretary of the Senate

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

Chief Clerk of the House

Approved:

Date

Governor

EXHIBIT 2:
District Court Order (denying defendants' motions to dismiss)

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

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

ORDER

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

I. BACKGROUND

A. Procedural Background

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

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

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

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

B. Senate Bill 8

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

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

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

1. The Six-Week Ban on Abortions

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

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

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

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

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

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

2. Enforcement of the Six-Week Ban

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

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

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

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

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

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

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

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

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

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

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

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

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

C. The Parties

1. Plaintiffs

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

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

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

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

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

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

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

2. Defendants

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

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

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

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

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

II. LEGAL STANDARDS

A. 12(b)(1)

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

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

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

B. Standing

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

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

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

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

C. Sovereign Immunity

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

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

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

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

III. DEFENDANTS' MOTIONS TO DISMISS

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

A. SAD Motion to Dismiss

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

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

1. Sovereign Immunity

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

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

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

violation of S.B. 8, such as the Medical Practice Act, Nursing Practice Act, and Pharmacy Act. *See, e.g.,* Tex. Occ. Code §§ 301.453(a); 301.452(b)(1), 565.001(a), 565.002; Tex. Health & Safety Code §§ 243.011–.015, 245.012–.017; Tex. Admin. Code § § 135.4(l), 139.60(c), (l); § 217.11(1)(A), 213.33(b)). The parties quibble about the meaning of S.B. 8's admonition that "[n]o enforcement of this subchapter, and no enforcement of Chapters 19 and 22, Penal Code, in response to violations of this subchapter, may be taken or threatened by this state, a political subdivision, a district or county attorney, or an executive or administrative officer or employee of this state or a political subdivision against any person." S.B. 8 § 3 (to be codified at Tex. Health & Safety Code § 171.207(a)). While the SAD are correct that they are precluded from enforcing S.B. 8 Section 3 through the private enforcement mechanism created under the law, nowhere does S.B. 8 indicate that it refers to the provisions of the Medical Practice Act, Nursing Practice Act, and Pharmacy Act or the State's ability to enforce such provisions under Chapter 171. The Court thus finds that there is no conflict between S.B. 8's prohibition on the SAD's private enforcement of S.B. 8 and the SAD's enforcement authority under existing Texas laws that may be triggered by a violation of S.B. 8. *See City of Austin v. Paxton*, 943 F.3d 993, 1001 (5th Cir. 2019), *cert. denied sub nom. City of Austin, Texas v. Paxton*, 141 S. Ct. 1047 (2021) ("direct enforcement of the challenged law. . .not required: actions that constrain[] the plaintiffs [are] sufficient to apply the *Young* exception"); *K.P. v. LeBlanc* ("*K.P. I*"), 627 F.3d 115, 124 (5th Cir. 2010) ("'Enforcement' typically involves compulsion or constraint.")

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

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

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

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

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

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

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

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

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

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

2. Standing

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

a. Cognizable injury and Ripeness

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

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

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

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

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

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

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

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

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

b. Third-party Standing

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

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

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

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

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

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

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

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

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

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

B. Judicial Defendants' Motions to Dismiss

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

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

1. Case or controversy

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Sovereign Immunity

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

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

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

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

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

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

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

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

3. Standing

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

a. Injury-in-fact

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

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

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

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

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

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

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

b. Causation

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

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

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

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

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

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

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

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

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

c. Redressability

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

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

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

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

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

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

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

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

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

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

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

d. Prudential Standing

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

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

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

C. Dickson Motion to Dismiss

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

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

1. Severability

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

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

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

2. Standing

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. CONCLUSION

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

SIGNED on August 25, 2021.

ROBERT PITMAN
UNITED STATES DISTRICT JUDGE

EXHIBIT 3:
Declaration of Mark Lee Dickson (in support of his motion to dismiss)

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

Whole Woman's Health, et al.,

Plaintiffs,

v.

Austin Reeve Jackson, et al.,

Defendants.

Case No. 1:21-cv-00616-RP

DECLARATION OF MARK LEE DICKSON

I, Mark Lee Dickson, being duly sworn, states as follows:

1. My name is Mark Lee Dickson. I am over 21 years old and fully competent to make this declaration.

2. I have personal knowledge of each of the facts stated in this declaration, and everything stated in this declaration is true and correct.

3. I am a defendant in this lawsuit.

4. The plaintiffs have sued me because they claim that they face a "credible threat" that I will sue them after the Texas Heartbeat Act takes effect on September 1, 2021. *See* Complaint, ECF No. 1 at ¶¶ 17, 50.

5. I have no intention of suing any of the plaintiffs under the private civil-enforcement lawsuits described in Senate Bill 8, because I expect each of the plaintiffs to comply with the Texas Heartbeat Act when it takes effect on September 1, 2021. I expect that the mere threat of civil lawsuits under section 171.208 will be enough to induce compliance. We saw that happen in Lubbock last June, when Planned Parenthood ceased performing abortions in response to a local abortion ban that au-

thorized private civil-enforcement suits against anyone who performed an illegal abortion or "aided or abetted" such an act. Planned Parenthood complied immediately when the Lubbock ordinance took effect on June 1, 2021, rather than expose itself and its employees and volunteers to ruinous civil liability and potential criminal prosecution under sections 1.07(a)(26) and 19.02(b) of the Texas Penal Code. I expect the plaintiffs in this case to do the same when the Texas Heartbeat Act takes effect on September 1, 2021.

6. I have never threatened to sue any of the plaintiffs under the private civil-enforcement lawsuits described in Senate Bill 8, either publicly or privately, and I have never told anyone that I intend to sue any of the plaintiffs under the private civil-enforcement lawsuits described in Senate Bill 8. Nor have I ever formed an intention to sue any of the plaintiffs under the private civil-enforcement lawsuits described in Senate Bill 8.

7. I have reviewed the plaintiffs' complaint (ECF No. 1) and the motion for summary judgment (ECF No. 19) that they have filed in this case. Neither document makes any claim that the plaintiffs intend to defy Senate Bill 8 and expose themselves to private civil-enforcement lawsuits when the statute takes effect on September 1, 2021. Instead, the plaintiffs complain about the "Hobson's choice" that Senate Bill 8 subjects them to, without ever stating *which* choice they intend to make when the statute takes effect. So I continue to believe that the plaintiffs will comply with Senate Bill 8 and obviate the need for private civil-enforcement lawsuits. Indeed, no rational abortion provider or abortion fund (in my view) would subject itself to the risk of civil liability under Senate Bill 8, especially when the Supreme Court could overrule *Roe v. Wade* next term in *Dobbs v. Jackson Women's Health Organization*, No. 19-1392.

8. I have personal knowledge that there are many other individuals who intend to sue the abortion-provider plaintiffs and the abortion-fund plaintiffs if they defy

Senate Bill 8, and those individuals will sue even if this Court enjoins me from filing a private civil-enforcement lawsuit.

9. The plaintiffs also seek to enjoin me from filing a lawsuit to recover attorneys' fees under section 30.022 of the Texas Civil Practice and Remedies Code. I currently have no intention of suing the plaintiffs under section 30.022 because I expect to recover fees from the plaintiffs under 42 U.S.C. § 1988(b) at the conclusion of this litigation. Section 1988(b) allows prevailing defendants to recover fees if the claims brought against them are "unreasonable" and "without foundation." *Christiansburg Garment Co. v. EEOC,* 434 U.S. 412, 418 (1978). The law of the Fifth Circuit is clear that a private citizen does not act "under color of state law" merely by filing a lawsuit authorized by a state statute. *See McCartney v. First City Bank*, 970 F.2d 45, 47 (5th Cir. 1992); *Howard Gault Co. v. Texas Rural Legal Aid, Inc.*, 848 F.2d 544, 555 (5th Cir. 1988); *Hollis v. Itawamba County Loans*, 657 F.2d 746, 749 (5th Cir. 1981). So I will seek and expect to recover attorneys' fees from the plaintiffs under 42 U.S.C. § 1988(b) at the conclusion of this litigation, which will obviate the need for me to seek recovery of fees under section 30.022 of the Texas Civil Practice and Remedies Code.

10. If I am unsuccessful in recovering fees under 42 U.S.C. § 1988(b) at the conclusion of this litigation, then I will consider at that time whether to sue the plaintiffs under section 30.022 of the Texas Civil Practice and Remedies Code, in consultation with my attorneys.

11. I am not a party to any other lawsuit that seeks to prevent the enforcement of any Texas abortion law, and I have not been a party to any such lawsuit in the past. If I become a party to any such lawsuit during the pendency of this litigation, I will notify the Court.

12. I have not conspired or consulted with any judge or any government official with regard to any possible lawsuit that I might bring under Senate Bill 8, and I have

no intention of doing so. If I ever decide to bring a civil-enforcement lawsuit under Senate Bill 8, it will be entirely of my own accord, and it will be brought in consultation with no one except my attorneys, who are private citizens and not government officials. Under no circumstance will I coordinate my efforts with any judge or any government official, and I will not allow my attorneys to do so.

13. I am a resident of Gregg County, not Smith County, and I have no intention of changing my residence to Smith County at any time in the future. So if I ever were to sue someone under section 3 or section 4 of Senate Bill 8, I would not file that lawsuit in the 114th District Court or in any district court in Smith County.

This concludes my sworn statement. I swear under penalty of perjury that the facts stated in this declaration are true and correct.

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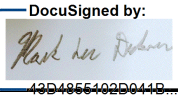
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MARK LEE DICKSON

EXHIBIT 4:
Declaration of John Seago (in support of Mark Lee Dickson's motion to dismiss)

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

Whole Woman's Health, et al.,

Plaintiffs,

v.

Austin Reeve Jackson, et al.,

Defendants.

Case No. 1:21-cv-00616-RP

DECLARATION OF JOHN SEAGO

I, John Seago, being duly sworn, states as follows:

1. My name is John Seago. I am over 21 years old and fully competent to make this declaration.

2. I have personal knowledge of each of the facts stated in this declaration, and everything stated in this declaration is true and correct.

3. I serve as Legislative Director for Texas Right to Life.

4. Texas Right to Life strongly supported the enactment of Senate Bill 8.

5. Texas Right to Life is publicizing the availability of private civil-enforcement lawsuits under Senate Bill 8 through social media and other forms of advertising, and we are encouraging individuals to sue abortion providers and abortion funds if they defy the law when it takes effect on September 1, 2021.

6. I have personal knowledge that there are several individuals who intend to sue the abortion-provider plaintiffs and the abortion-fund plaintiffs if they defy Senate Bill 8, and those individuals will sue the plaintiffs for violating Senate Bill 8 even if this Court enjoins Mark Lee Dickson from filing private civil-enforcement lawsuits under the statute.

This concludes my sworn statement. I declare under penalty of perjury that the facts stated in this declaration are true and correct.

DocuSigned by:
John Seago
E1818FCE223C4AF...

JOHN SEAGO

EXHIBIT 5:
Declaration of Allison Gilbert, M.D., in Support of Plaintiffs' Motion for Summary Judgment

Exhibit A

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

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

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

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

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

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

My Background

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

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

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

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

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

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

Southwestern Women's Surgery Center

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

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

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

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

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

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

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

S.B. 8 Bans Abortion Before Viability.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Dated: 7/12/2021

Dr. Allison Gilbert

Exhibit 1

ALLISON LYNNE GILBERT, MD, MPH

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agilbert@southwesternwomens.com
(214) 742-9310 (p)
(214) 969-946 (f)

EDUCATION

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

POST-DOCTORAL TRAINING

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

CLINICAL WORK EXPERIENCE

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

BOARD CERTIFICATION AND LICENSURE

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

HONORS AND AWARDS

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

RESEARCH INTERESTS

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

PUBLICATIONS

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

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

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

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

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

POSTERS

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

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

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

TEACHING AND PRESENTATIONS

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

LEADERSHIP

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

PROFESSIONAL MEMBERSHIPS

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

EXHIBIT 6:
Declaration of Bhavik Kumar, M.D., in Support of Plaintiffs' Motion for Summary Judgment

Exhibit B

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

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

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

I, Bhavik Kumar, declare as follows:

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

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

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

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

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

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

Abortion in Texas

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[7] *Id.*

[8] *Id.*

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

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

[11] *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

EXHIBIT 7:
Declaration of Jessica Klier in Support of Plaintiffs' Motion for Summary Judgment

Exhibit D

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Jessica Klier

Jessica Klier

Date: 7-10-2021

EXHIBIT 8:
Declaration of Alan Braid, M.D. in Support of Plaintiffs' Motion for Summary Judgment

Exhibit H

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

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

DECLARATION OF ALAN BRAID, M.D., IN SUPPORT OF PLAINTIFFS' MOTION SUMMARY JUDGMENT

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

1. I am a board-certified obstetrician/gynecologist licensed to practice in Texas. I am the part owner of Alamo City Surgery Center PLLC d/b/a Alamo Women's Reproductive Services ("Alamo") in San Antonio and Houston Women's Reproductive Services ("HWRS") in Houston. I also provide abortion services at Alamo.

2. I graduated from the University of Texas Health Science Center at San Antonio with an M.D. in 1972. I completed my internship in obstetrics and gynecology in 1973 at Bexar County Hospital District and my residency in obstetrics and gynecology in 1976. I have extensive experience and training in those fields and have provided reproductive health care, including abortions and obstetrical care, in San Antonio as a private practitioner since 1978.

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

4. The facts I state here are based on my experience, my review of Alamo's and HWRS's business records, information obtained in the course of my duties at Alamo and HWRS,

and personal knowledge that I have acquired through my work at and management of Alamo and HWRS.

Alamo Women's Reproductive Services and Houston Women's Reproductive Services

5. Alamo operates a licensed ambulatory surgical center in San Antonio, Texas, open since June of 2015. Alamo provides medication abortion through 10 weeks of pregnancy as measured from the first day of the patient's last menstrual period ("LMP"). Alamo provides procedural abortion services through 21.6 weeks LMP. In rare instances in which a procedure comes under permitted exceptions in Texas's gestational limit, Alamo provides abortion services through 23.6 weeks LMP.

6. HWRS operates a licensed abortion facility in Houston, Texas. HWRS started seeing patients in May of 2019. HWRS provides medication abortion services through 10 weeks of pregnancy LMP.

Senate Bill 8

7. I understand that Senate Bill 8 ("S.B. 8") prohibits me or any other physician in Texas from providing an abortion if there is a "fetal heartbeat" detected or we do not test for a "fetal heartbeat." The term "fetal heartbeat" is not medically accurate. In a typically developing embryo, cells that eventually form the basis for development of the heart later in pregnancy produce cardiac activity that is generally detectible via ultrasound beginning at approximately six weeks LMP, though I have seen cardiac activity several days before 6 weeks LMP. Therefore, S.B. 8 bans abortion in Texas after approximately six weeks LMP.

8. An embryo is not viable at 6 weeks LMP. Viability is generally understood in medical science as the point in gestation when a fetus has a reasonable likelihood of survival

outside of the pregnant woman. The medical consensus in the United States is that viability is not possible until approximately 24 weeks LMP.

9. I understand that if any of the physicians at Alamo or HWRS continues to provide abortions after 6 weeks LMP, any person may sue us and if they are successful in their suit, the court must order us to cease providing abortions after six weeks LMP, and to pay a minimum of $10,000 per prohibited abortion plus their costs and attorney's fees.

10. I understand that the same penalties can be leveled against a person who "aids or abets" in the performance of an abortion. Due to this provision, I am concerned not only about liability for myself and the other physicians, but also Alamo and HWRS and the staff at these clinics. I also understand that the Texas Medical Board and Texas Nursing Board may be able to take disciplinary action against us for violations of S.B. 8.

11. Because there are not many abortion clinics in San Antonio and Houston, and we are well known in the state, I believe it is very likely that the clinics, myself, or other members of my team at Alamo or HWRS will be sued.

12. I am very concerned about opening the clinics, myself, and other staff members up to legal liability, but I also know that it will be devastating for patients if they cannot obtain abortions in Texas after 6 weeks LMP.

Burdens on Patients

13. Some patients do not realize they are pregnant until after six weeks LMP. This includes patients who have irregular menstrual cycles, have certain medical conditions, have been using contraceptives, are breastfeeding, or experience bleeding during early pregnancy, a common occurrence that is frequently and easily mistaken for a period. Other patients may not develop or recognize symptoms of early pregnancy.

14. Even for the patients who do realize they are pregnant before six weeks LMP, they would have a very small window to obtain an abortion. For a patient with regular monthly periods, fertilization typically occurs at two weeks LMP (two weeks after the first day of their last menstrual period). Thus, even a woman with a highly regular, four-week menstrual cycle would already be four weeks LMP when she misses her next period, generally the first clear indication of a possible pregnancy.

15. If patients are prohibited from obtaining an abortion after 6 weeks LMP, this gives them one to two weeks at most to decide they want an abortion, arrange all of the necessary logistics, gather the money, and schedule the two appointments at least 24 hours apart, as required by Texas law.

16. The majority of our patients will not be able to obtain an abortion before six weeks LMP. The patients who can afford to do so will attempt to travel out of state. Those traveling out of state will need to pay additional travel and lodging costs and will likely face increased costs for the procedure. At later gestational points, abortion is more expensive and may require a two-day surgical procedure, instead of one. These patients would also experience increased risks to their health by the delay in access to abortion care.

17. For many patients, pregnancy creates serious symptoms and health risks. Even for people without comorbidities, common symptoms of pregnancy can include debilitating nausea, migraines, and dizziness. For people with comorbidities like asthma, hypertension, or diabetes, pregnancy exacerbates the symptoms and risk of an emergency. There is also a significant percentage of people who suffer perinatal depression or anxiety.

18. Many of our patients will not be able to travel out of state. A significant percentage of the patients we see at Alamo and HWRS struggle to afford an abortion and receive

some form of financial assistance. These patients may try to travel to Mexico for care or attempt to order pills through the mail to self-manage their abortions. We regularly see patients who have attempted abortions themselves and failed, and the number of patients in this situation will only increase if S.B. 8 takes effect.

19. The reality is that many of our patients will be forced to carry their pregnancies to term, having been denied their constitutional right to make decisions about their own bodies.

S.B. 8's Fee Shifting Provision

20. I understand that under S.B. 8, if parties challenge Texas laws that regulate or restrict abortion and do not succeed on every claim they bring, the parties and their attorneys are responsible for the defendants' costs and attorney's fees.

21. Alamo, HWRS, or me personally have been a litigant in many cases challenging Texas laws regulating or restricting abortion, including: *In re Abbot*, 954 F.3d 772 (5th Cir. 2020), *cert. granted, judgment vacated as moot by Planned Parenthood Ctr. for Choice v. Abbott*, 141 S. Ct. 1261 (2021) (mem.) (COVID abortion ban); *Whole Woman's Health v. Paxton*, 978 F.3d 896 (5th Cir. 2020), *reh'rg en banc granted, vacated, and argued*, 978 F.3d 974 (5th Cir. 2020) (ban on common method of abortion); *Whole Woman's Health v. Smith*, 338 F. Supp. 3d 606 (W.D. Tex. 2018), *appeal docketed and argued*, No. 18-50730 (5th Cir.) (requirement for interment or cremation of embryonic and fetal tissue); *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583 (5th Cir. 2014), *reh'rg en banc denied*, 769 F.3d 330 (5th Cir. 2014) (decision on admitting-privileges, medication-abortion regulations); and *Texas Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570 (5th Cir. 2012) (mandatory ultrasound law).

22. Litigation is essential to keeping the doors of Alamo and HWRS open. If we are responsible for defendants' costs and attorney's fees, this will hinder our ability to bring cases and certain claims that are necessary to protect our rights and the rights of our patients.

Dated: July 11, 2021

DR. ALAN BRAID

EXHIBIT 9:
Declaration of Polin C. Barraza in Support of Plaintiffs' Motion for Summary Judgment

Exhibit J

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

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

DECLARATION OF POLIN C. BARRAZA IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

I, Polin C. Barraza, declare as follows:

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

2. I am President and Board Chair of Plaintiff Planned Parenthood South Texas Surgical Center ("PPST Surgical Center"), a not-for-profit corporation headquartered in San Antonio. PPST Surgical Center operates an ambulatory surgical center ("ASC") licensed by the Texas Health and Human Services Commission ("HHSC") and two HHSC-licensed abortion facilities—all of which are located in San Antonio.

3. I am responsible for management of PPST Surgical Center (as well as the operations of its parent organization, Planned Parenthood South Texas ("PPST")) where I am the Senior Vice President and Chief Operations Officer, and therefore am familiar with our operations and finances, including the services we provide and the communities we serve. PPST operates health centers that provide a range of family planning and other preventative health services, including physical exams, contraception and contraceptive counseling, screening for breast cancer,

screening and treatment for cervical cancer, screening for sexually transmitted infections, pregnancy testing and counseling, and certain procedures including biopsies and colposcopies. PPST Surgical Center currently provides abortions, miscarriage management, and contraception at each of its three HHSC-licensed facilities, to the degree permitted by state law. Each of these centers also operates a pharmacy licensed by the Texas Pharmacy Board that is used in the provision of abortion and related services, including through the dispensing of mifepristone, misoprostol, and other drugs used in abortion, as well as post-abortion contraceptives.

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

5. Many patients do not even realize they are pregnant at 6 weeks. By banning abortion at that gestational age, the Act will make it virtually impossible to access abortion in Texas. Although some of our patients may be able to pull together the resources to go out of state, I fear many others will not be able to do so and instead will be forced to carry the pregnancy to term or attempt to end the pregnancy without medical supervision, which may be unsafe. For these reasons, I am very worried about S.B. 8's effect on Texans' emotional, physical, and financial wellbeing and the wellbeing of their families.

PPST Surgical Center and Its Services

6. PPST Surgical Center offers medication abortion through 10 weeks LMP and procedural abortion through 15 weeks 6 days LMP.

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

8. While most patients obtain an abortion as soon as they are able, the vast majority of patients are at least 6 weeks LMP into their pregnancy by the time they contact us seeking an abortion. In 2019, approximately 90% of abortions PPST Surgical Center provided were done at 6 weeks LMP or later.

9. There are many reasons why patients do not reach us until at or after 6 weeks LMP, including because many do not know they are pregnant before that time. Additionally, travel-related and financial barriers are significant reasons why the vast majority of our patients do not—and realistically could not—obtain abortions before 6 weeks LMP.

Effects of S.B. 8's Abortion Ban

10. I understand that S.B. 8 bans abortions in Texas by making PPST Surgical Center and its doctors, nurses, and other staff members who assist with abortion services liable for significant monetary penalties and court injunctions preventing us from continuing to provide any abortion in violation of the Act. I also understand that anyone who is sued and loses is responsible to pay the claimant's attorney's fees but that the person sued cannot recover their own attorney's fees if they prevail.

11. Although S.B. 8 still permits abortion before approximately 6 weeks of pregnancy, because of the real possibility PPST Surgical Center and its physicians and staff will be sued for

providing *any* abortions, and be forced to defend against these meritless lawsuits, we will likely suspend all abortion services if S.B. 8 is allowed to take effect.

12. Even if we were to provide some abortions, we could not provide abortions after embryonic cardiac activity is detected if S.B. 8 takes effect. Because the Act would subject providers and anyone who assists in a prohibited abortion to liability, PPST Surgical Center, our physicians, and the staff who have essential roles in the provision of abortion—such as nurses, ultrasound technicians, and lab technicians—could be sued.

13. PPST Surgical Center, our physicians, and our staff cannot afford the monetary damages that would be owed and cannot risk civil liability and damages. We understand that even if we were willing to provide abortions at or after 6 weeks of pregnancy, which S.B. 8 prevents us from doing, we could be ordered to stop by a court while we are defending against the lawsuit.

14. The mere cost to defend against these lawsuits, which could be limitless, and potentially filed in every county in Texas, would be impossible for us to absorb, even putting aside monetary penalties the Act authorizes.

15. Even staff who have no direct role in abortion services are worried about being named in harassing lawsuits.

16. Forcing us to cease abortion services will seriously harm both PPST Surgical Center and our patients. The prospect of S.B. 8 taking effect has already taken a heavy toll on staff. Our staff are fearful that they will be sued and forced into a Texas court far away from home to defend themselves, and they are frightened that defending these cases will financially ruin them and their families.

17. Staff endure endless harassment from opponents of abortion, including passing through protestors as they come to work who berate them (and patients). These protestors often

video record staff and patients as they enter and exit the health centers, and we worry they are writing down staff license plates and/or other identifying information.

18. Despite the harassment and threats, our staff are dedicated to our mission of providing comprehensive reproductive health care services, including abortion, and have dedicated their lives and careers to providing this health care to patients and advocating for them. S.B. 8 will prevent PPST Surgical Center and our dedicated team of medical professionals from fulfilling this mission.

19. If S.B. 8 is allowed to take effect, it is likely we will have to reduce the hours of physicians and staff.

20. Unquestionably, S.B. 8 seriously harms our patients by depriving them of access to safe and legal abortions. If we are forced to stop providing abortions, patients who are able will be forced to travel out of state to obtain care. Travel will delay patients in obtaining care, which may push them into a later, more expensive abortion that carries greater risks. S.B. 8 will also prevent some patients from accessing abortion altogether, because the travel is simply too burdensome for them.

21. These burdens will fall most heavily on patients who already face barriers to accessing health care, including patients with low incomes, patients of color, and patients who live the farthest from health centers. A significant percentage of our patients are people with low incomes: of the patients who obtained abortions at our health centers in 2019, approximately 50% had incomes at or below the federal poverty line.

22. Just last year, after the Texas governor banned abortion by executive order during the early days of the pandemic, we referred patients to out-of-state providers. Executive Order No. GA-09; *In re Abbott*, 954 F.3d 772 (5th Cir. 2020), *cert. granted, judgment vacated as moot by*

Planned Parenthood Ctr. for Choice v. Abbott, 141 S. Ct. 1261 (2021) (mem.). What we learned is that while some patients were able to get care out of state, many were not.

23. I believe S.B. 8 will deprive PPST Surgical Center's patients of access to critical health care and will threaten their health, safety, and lives.

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

24. PPST Surgical Center regularly challenges Texas abortion restrictions. S.B. 8's fee-shifting provision will make it extremely difficult for us to continue to protect our patients' constitutional rights, because it will make it more difficult for us to obtain legal counsel.

25. S.B. 8 may also impact the arguments we raise, because it will force us and our attorneys to weigh the possibility of huge legal bills every time we bring a claim.

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

Executed on July 12, 2021, in San Antonio, Texas.

Polin C. Barraza

EXHIBIT 10:
Declaration of J. Alexander Lawrence

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

WHOLE WOMAN'S HEALTH, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	CIVIL ACTION
v.	)	
	)	CASE NO. 21-cv-00616-RP
AUSTIN REEVE JACKSON, *et al.*,	)	
	)	
Defendants.	)	

DECLARATION OF J. ALEXANDER LAWRENCE

J. ALEXANDER LAWRENCE, declares under penalty of perjury that the following statements are true and correct:

1. I am a Partner in the law firm Morrison & Foerster LLP ("Morrison & Foerster").

2. On August 4, 2021, Judge Austin Jackson held a press conference at Living Alternatives, The AXIA Center (Pregnancy Resource Center) in Tyler, Texas.

3. The video of the press conference is available at https://www.ketk.com/news/local-news/judge-austin-jackson-east-texas-pro-life-activist-sued-in-effort-to-block-texas-abortion-heartbeat-bill/ (last visited August 7, 2021).

4. Attached hereto as Exhibit A is a true and correct copy of a transcription of the video of the press conference.

Dated: August 7, 2021

/s/ J. Alexander Lawrence
J. Alexander Lawrence

Exhibit A

JUDGE AUSTIN JACKSON, EAST TEXAS PRO-LIFE ACTIVISTS SUED IN EFFORT TO BLOCK TEXAS ABORTION HEART (AUGUST 4, 2021)

Judge Austin Jackson

Thank you so much for allowing us to be here today and to the rest of the folks here from Living Alternatives, I want you to know how much this means to me personally that you allowed us to not only come in here, but were willing to show the courage to stand with us on an issue like this.

As a judge, I like to think that every day I get to do a little justice and there's no doubt, looking at what you do here that every day you get to love a little mercy. And I think it's very exciting that today we get to come together and walk humbly together with our God. And so thank you so much for that opportunity.

For those of you who don't know, my name is Austin Reeve Jackson, and I'm the judge of the 114th District Court here in Smith County. And we're here today because I have been recently named as the number one target in Texas of Planned Parenthood and other pro-abortion activists. On the most basic level, we're here because these groups have filed a frivolous lawsuit against me down in Travis County in front of a liberal Obama-appointed federal judge for no reason other than that I am someone committed to the rule of law and biblical values. We're here because out-of-county, out-of-state, out-of-touch groups like Planned Parenthood and the ACLU have decided that if they can't silence the legislators down in Austin, maybe they can silence the judges who enforce the law in east Texas. You see, the left is so used to the idea of having an activist judge that they believe any judge can be bought, bullied, or beaten into submission or resignation.

Make no mistake; this lawsuit is a direct attack by far-left groups on the rule of law and the right of pro-life communities to elect people who share their values. This is cancel culture at its finest. But man, am I lucky to be from Smith County. The outpouring of support over this attack on me, on my job, on all of us who share these values has been met by an overwhelming show of support from people like Senator Hughes and the folks here at Living Alternatives. But more than that, I am incredibly thankful for the wonderful, wonderful support from average east Texans, who are not only proud to have a conservative judge who is willing to answer the fight that these groups started, but who are thrilled to be standing by me as we take on this challenge. With their support, I am one hundred percent committed to seeing this frivolous lawsuit dismissed, the attempts to run Christians out of elected office defeated, and the voice and the vote of pro-life Texans defended.

You see, when Planned Parenthood came for me, they didn't realize they were coming for a whole community of Texans who are unshakeable in our belief that there are certain and immutable rights with which we are all endowed not by our government, but by our God. Not by virtue of being out of the womb, but by virtue of having his spirit within us from the moment of conception. And chief among these rights is the unalienable right to life. And with the support of my community, I am here to today that I will not be scared by the vicious attacks and implicit threats of radical organizations. I will not allow the voice and the vote of any Texan to be silenced by the left, but I will stand for what is right. On this front of the culture war, I will yield no further. And regardless of what some organization like Planned

Parenthood threatens me with. No matter what some leftist judge down in Austin may do to me. As for me and my house, we will continue to serve the Lord. And I am thrilled to have by my side in this fight my friend and my lawyer Shane McGuire, who has taken up this cause and who is representing me at no cost to the Smith county taxpayer because he believes in me, but more importantly, because he believes this fight is a fight worth having.

Shane McGuire

Thanks, Reeve. Good morning. My name is Shane McGuire. I just wanted to say a couple of words about the lawsuit itself, he merit or lack thereof of the lawsuit, and why it is I think that Reeve has been sued in this case.

First, I've read this complaint in full. I've read all the motions filed by these special interest groups. And I have to say this lawsuit is frivolous on its face. It is black letter law that you cannot sue a sitting judge and just demand some advisory opinion, asking a court to ban people from filing lawsuits in his court. This—it is open season on judges in Texas if this lawsuit is allowed to go forward.

Now I want to say a word about why it is I think Judge Jackson has been sued in this case. There's a thousand judges in Texas. They could have sued anybody. Reeve came into my office last week and said, "Shane, why do you think it is they picked me?" I said, "Reeve, I've known you a long time. I know exactly why they picked you. They picked you because they know that you're a man who would rather read his bible than read Rules for Radicals by Saul Alinsky. They picked you because they know you're a man of character and integrity and a man of God. And they picked you because they knew you would engage in the fight."

So listen, we're going to file a motion to dismiss this lawsuit today or tomorrow. It's already been drafted. I was editing it as late as 11 o' clock last night. That's going to get on file. I'm sure ultimately the case against Judge Jackson is going to be dismissed if the rules of law are followed. But I would ask you all to pray for him and to pray for his—we've got a great legal team. Pray for all of us as we go forward in this case. And Senator Hughes, thank you for your leadership on the life issue. We appreciate everything that you've done. Thank you all.

Senator Bryan Hughes

It is so good to be here with you. The work you've done for all these years, quietly serving, helping those little babies come in life, alongside those moms, helping those moms in difficult times. Thank you. Our crisis pregnancy centers, the best kept secret of the pro-life movement in all the debate about the right to life. This work done by this place and places like it around Texas and around the country. This is where the real work is being done. Where moms are being helped. They're being encouraged. Where hearts are being changed, and little lives are being saved. So what a blessing to be here. Not my first time here, and is it great to be back here today.

I'm Bryan Hughes, and I'm blessed to represent northeast Texas in the Texas senate, and yes, I'm so honored to be the author of Senate Bill 8, the—we called it the heartbeat bill. It's now the heartbeat law, signed by Governor Abbott. Governor Abbott signed that bill and gave me the pen he used to sign, and I will cherish that forever. That bill says—that law says that little baby growing inside her mother's womb—when there's a heartbeat detected. Every one of us here has a heartbeat. I can tell from looking at you. That heartbeat, that universal sign of

life—they tell us to follow the science. We are following the science. When there is a heartbeat, there is a human life worthy of protection, and that's what the heartbeat law does in Texas.

Now, it takes a different approach. You may have seen this many places in Texas. They are not blessed with wonderful district attorneys like we have in Jacob Putman. We have a strong constitutional concerted district attorney. Many DAs around the state and around the country publicly told us last year, "If you pass a heartbeat bill, we will not enforce it." These are district attorneys sworn to enforce the law who said, "We will not enforce a heartbeat bill." And so that's why Senate Bill 8 doesn't need their help. Senate Bill 8 doesn't require any action by the district attorney, by the state, or any government actor. It's driven by private individuals who want to stand up for the right to life.

And so any Texan who is aware of an illegal abortion can bring an action against the doctor committing the illegal abortion. Let me be clear. The mother is not affected by the heartbeat law. This is about doctors performing illegal abortions. And any Texan has the right to bring that suit, to right that wrong, to protect that innocent human life. Now the radical abortion industry is upset about this law, and that's why they've taken the extreme step of suing Judge Jackson and every judge in the state of Texas.

I can't underscore enough what you've heard. This lawsuit is radical. It clearly violates the law. And we're confident the judge will do the right thing. The court system will work as it should. And at the end of the day—at the end of the day, we look forward to this lawsuit being successful on the right side. This law moving forward, and little babies—that little baby growing inside her mother's womb—inside her mother's womb ought to be the safest place on earth. That little unborn baby—the most innocent, the most helpless, and the most deserving of protection a human will ever be. We're so thankful the heartbeat law has been signed by Governor Abbott, and we look forward to its taking effect and being upheld by the courts. Thank you for being here today. God bless you.

Unidentified

Alright, thank you all so much for being here. This concludes the press release. If anyone wants to stay and offer any interviews for Reeve, then you're welcome to. He'll be available. Thank you so much.

EXHIBIT 11:

Ex. 8 to Plaintiffs' Opposition to Mark Lee Dickson's Motion to Dismiss

EXHIBIT 8

Mark Lee Dickson is with **Chance Nichols** at **Chili's Grill & Bar.**

November 27, 2019 · Abilene, TX ·

The ACLU has sent a letter to the Mayor and City Council of Big Spring, Texas. Apparently the ACLU does not like the idea of Big Spring, Texas outlawing abortion and becoming a Sanctuary City for the Unborn.

Friends, always remember to consider your sources. This is the group that has defended Nazis and the Ku Klux Klan - two groups that I would never want to openly associate myself with. I would assume that the ACLU's letter is meant to intimidate the City Council of Big Spring from hating evil, loving what is good, and establishing justice within the city gates.

Who would try to stop a city from preventing organizations from murdering unborn children in their city?

The ACLU, that's who.

For months I have said that the ACLU gave us our greatest "endorsement" for these ordinances. When the city of Waskom passed the ordinance Drucilla Tigner, Reproductive Rights Strategist with the ACLU, said the ordinance, "makes it impossible for an abortion clinic to exist in Waskom, ever." Like Waskom, the City of Big Spring does not want an abortion clinic to exist in Big Spring, ever. No matter how many letters the ACLU and their friends (which I view as part of a modern-day Axis of Evil) send to the Big Spring city council, it does not change the reality that Big Spring and their friends (which I view as part of a modern-day Allied forces) do not want any organization to come into this city and murder innocent unborn children. It seems very clear to me that the ACLU wants this holocaust of abortion to continue, while groups like Right to Life of East Texas, Texas Right to Life, and the majority of Texans want this holocaust of abortion to end once and for all.

So what, besides this letter, is the ACLU doing to try to stop cities from outlawing abortion?

They have released a webinar, made a toolkit, and launched a section of their website to address how to stop local abortion bans. Despite doing all of this, what they have not done is file a lawsuit. It is worthy to mention, and should be recognized by all, that there has not been one lawsuit filed against the seven cities which have passed a Sanctuary Cities for the Unborn ordinance. Seven cities have passed this ordinance, with the first city to pass this ordinance in June - yet not a single lawsuit filed.

That is because these ordinances have been carefully drafted by expert legal counsel to keep cities out of a lawsuit and protect their citizens and their unborn children by prohibiting baby murdering

The ACLU is wrong when it says that this ordinance is unconstitutional, just like they are wrong when they say that abortion is a constitutional right. This ordinance does not violate the United States Constitution, the Texas Constitution, or the laws of the State of Texas. Big Spring's ordinance does the most that it can in the areas where the federal and state legislatures have not spoken while still respecting the boundaries that have been given to us under the current Supreme Court precedent. There are currently no federal or state laws on the books that prohibit cities from prohibiting abortion within their jurisdiction. Actually, in the most recent legislative session, Texas passed SB 22 which included an amendment explicitly clarifying that cities and counties are not prohibited from prohibiting abortion within their jurisdiction.

Nothing is unconstitutional about this ordinance. Even the listing of abortion providers as examples of criminal organizations is not unconstitutional. We can legally do that. This is an ordinance that says murdering unborn children is outlawed, so it makes sense to name examples of organizations that are involved in murdering unborn children. That is what we are talking about here: The murder of unborn children.

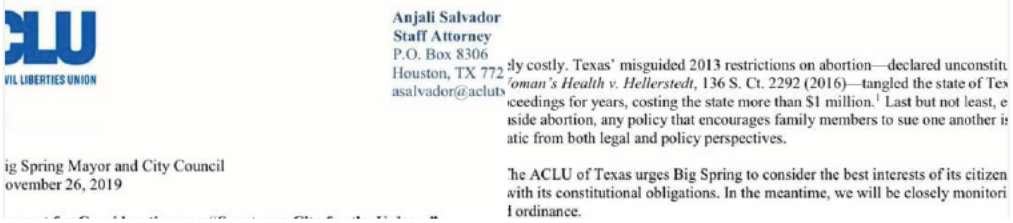
Also, when you point out how the abortion restrictions in 2013 cost the State of Texas over a million dollars, you should also point out how many baby murdering facilities closed because of those restrictions. We went from over 40 baby murdering facilities in the State of Texas to less than 20 baby murdering facilities in the State of Texas in just a few years. Even with the win for abortion advocates with Whole Woman's Health v. Hellerstedt, how many baby murdering facilities have opened back up? Not very many at all. So thank you for reminding us all that when we stand against the murder of innocent children, we really do save a lot of lives.

Stand strong leaders of Big Spring. You are going to be on the right side of history. You know, that side of history that the Nazis and the Ku Klux Klan were not on.

Big Spring residents, if you are for seeing your city pass an ordinance outlawing abortion within the city limits be sure to sign the online petition here:

https://sanctuarycitiesfortheunborn.com/online-petition

#therighttolife #thefightforlife #fromconceptiontillnaturaldeath #unbornlivesmatter #loveoneanother #BigSpringTexas #PotentialSanctuaryCityForTheUnborn



CLU
VIL LIBERTIES UNION

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ly costly. Texas' misguided 2013 restrictions on abortion—declared unconstitu
oman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016)—tangled the state of Tex
ceedings for years, costing the state more than $1 million.[1] Last but not least, e
side abortion, any policy that encourages family members to sue one another is
atic from both legal and policy perspectives.

he ACLU of Texas urges Big Spring to consider the best interests of its citizen
with its constitutional obligations. In the meantime, we will be closely monitori
l ordinance.

ig Spring Mayor and City Council
ovember 26, 2019