No. 21-50792

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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

Plaintiffs - Appellees,

v.

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

Defendants - Appellants.

On Appeal from the U.S. District Court, Western District of Texas (Austin)
No. 1:21-cv-00616-RP

PLAINTIFFS-APPELLEES' EMERGENCY MOTION FOR AN INJUNCTION PENDING APPEAL

Marc Hearron
CENTER FOR REPRODUCTIVE RIGHTS
1634 Eye St., NW, Suite 600
Washington, DC 20006
(202) 524-5539
mhearron@reprorights.org

Molly Duane
CENTER FOR REPRODUCTIVE RIGHTS
199 Water Street, 22nd Floor

Julie Murray
Richard Muniz
PLANNED PARENTHOOD FEDERATION OF AMERICA
1110 Vermont Ave., NW Ste. 300
Washington, DC 20005

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

New York, NY 10038

Jamie A. Levitt
J. Alexander Lawrence
MORRISON & FOERSTER LLP
250 W. 55th Street
New York, NY 10019

Attorneys for Whole Woman's Health, Whole Woman's Health Alliance, Marva Sadler, Southwestern Women's Surgery Center, Allison Gilbert, M.D., Brookside Women's Medical Center PA d/b/a Brookside Women's Health Center and Austin Women's Health Center, Alamo City Surgery Center PLLC d/b/a Alamo Women's Reproductive Services, Houston Women's Reproductive Services, Reverend Daniel Kanter, and Reverend Erika Forbes

Rupali Sharma
LAWYERING PROJECT
113 Bonnybriar Rd.
Portland, ME 04106

Stephanie Toti
LAWYERING PROJECT
41 Schermerhorn Street, No. 1056
Brooklyn, NY 11201

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

Julia Kaye
Brigitte Amiri
Chelsea Tejada
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004

Lorie Chaiten
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
1640 North Sedgwick Street
Chicago, IL 60614

Adriana Pinon
David Donatti
Andre Segura
ACLU FOUNDATION OF TEXAS, INC.
5225 Katy Freeway, Suite 350
Houston, TX 77007

Attorneys for Houston Women's Clinic

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Plaintiffs-Appellees	**Counsel**
Whole Woman's Health Alamo City Surgery Center PLLC d/b/a Alamo Women's Reproductive Services Brookside Women's Medical Center PA d/b/a Brookside Women's Health Center and Austin Women's Health Center Houston Women's Clinic Houston Women's Reproductive Services Planned Parenthood Center for Choice Planned Parenthood of Greater Texas Surgical Health Services Planned Parenthood South Texas Surgical Center Southwestern Women's Surgery Center Whole Woman's Health Alliance The Afiya Center Frontera Fund Fund Texas Choice Jane's Due Process	Center for Reproductive Rights ● Marc Hearron ● Molly Duane ● Kirby Tyrrell ● Melanie Fontes ● Nicolas Kabat Morrison & Foerster LLP ● Jamie A. Levitt ● J. Alexander Lawrence Planned Parenthood Federation of America ● Julie Murray ● Richard Muniz Johns & Hebert PLLC ● Christen Mason Hebert American Civil Liberties Union Foundation ● Julia Kaye ● Brigitte Amiri ● Chelsea Tejada

Lilith Fund North Texas Equal Access Fund Allison Gilbert, M.D. Bhavik Kumar, M.D. Rev. Erika Forbes Rev. Daniel Kanter Marva Sadler	● Lorie Chaiten ACLU Foundation of Texas, Inc. ● Adriana Pinon ● David Donatti ● Andre Segura Lawyering Project ● Rupali Sharma ● Stephanie Toti
Defendants-Appellants	**Counsel**
Penny Clarkston, Clerk for the District Court of Smith County Mark Lee Dickson Austin Reeve Jackson, Judge of the 114th District Court Stephen Brint Carlton, Executive Director of the Texas Medical Board Katherine A. Thomas, Executive Director of the Texas Nursing Board Cecile Erwin Young, Executive Commissioner of the Texas Health and Human Services Commission Allison Vordenbaumen Benz, Executive Director of the Texas Board of Pharmacy Ken Paxton, Attorney General of Texas	Hacker Stephens LLP ● Andrew B. Stephens ● Heather Gebelin Hacker Mitchell Law PLLC ● Jonathan F. Mitchell Office of the Texas Attorney General ● Judd E. Stone ● Beth Klusman ● Natalie D. Thompson ● Benjamin S. Walton ● Christopher D. Hilson ● Halie Daniels The McGuire Firm, PC ● M. Shane McGuire

/s/ Marc Hearron
Marc Hearron

INTRODUCTION AND NATURE OF EMERGENCY

In less than four days, Texas Senate Bill 8, 87th Leg., Reg. Sess. (Tex. 2021) ("S.B. 8" or the "Act") will ban abortion starting at six weeks of pregnancy, immediately imposing catastrophic harm to Texans seeking abortions and to Plaintiffs-Appellees. As this Court has held—and as nearly five decades of Supreme Court precedent make clear—a six-week ban on abortion is "doom[ed]" because it violates patients' substantive-due-process right to abortion. *Jackson Women's Health Org. v. Dobbs*, 951 F.3d 246, 248 (5th Cir. 2020) (per curiam).

Although Plaintiffs' preliminary-injunction motion is fully briefed, the Court has now stayed all district-court proceedings, preventing that court from entering the emergency relief that Plaintiffs desperately need, and to which they are plainly entitled under longstanding precedent. In light of the overwhelming harm that will occur without this Court's intervention, Plaintiffs respectfully request that the Court issue an injunction against all Defendants pending appeal under Federal Rule of Appellate Procedure 8. Given the urgency, Plaintiffs seek a ruling by 10:00 pm, Sunday, August 29, 2021.

BACKGROUND

A. Senate Bill 8

S.B. 8 bans abortion in Texas upon detection of embryonic cardiac activity, which occurs at approximately six weeks of pregnancy, roughly four months before

the viability line established by the Supreme Court. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 870 (1992); *Jackson Women's Health Org.*, 951 F.3d at 248 (holding Mississippi's six-week abortion ban unconstitutional). In that respect, S.B. 8 is like other unconstitutional laws that states have enacted to ban abortions at gestational ages before viability—all of which have been blocked by federal courts when challenged. *See id.*; *Planned Parenthood S. Atl. v. Wilson*, No. 3:21-00508-MGL, 2021 WL 672406, at *2 (D.S.C. Feb. 29, 2021) (collecting cases), *appeal filed*, No. 21-1369 (4th Cir. Apr. 5, 2021).

But S.B. 8 differs from those other bans in that it bars executive-branch officials—such as local prosecutors or the health department—from enforcing it directly. S.B. 8, § 3 (adding Tex. Health & Safety Code §§ 171.207(a), 171.208(a)).[1] Instead, S.B. 8 may be directly enforced only by state courts via civil enforcement actions that "any person" can initiate against anyone alleged to have (1) provided an abortion that violates the ban, (2) engaged in conduct that "aids or abets" an abortion that violates the ban, or (3) intended to do any of those things. *Id.* § 171.208(a). When a "violation" of the ban occurs, S.B. 8 requires state courts to issue an injunction to prevent further prohibited abortions from being performed, aided, or abetted. *Id.* § 171.208(b)(1). In addition, courts are required to award the person who

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

initiated the enforcement action a minimum (there is no statutory maximum) of $10,000 per abortion, payable by the person who violated the Act. *Id.* § 171.208(b)(2).

Further, as former judges and legal scholars in Texas have observed, S.B. 8 "weaponizes the judicial system by exempting the newly created cause of action from the normal guardrails that protect Texans from abusive lawsuits and provide all litigants a fair and efficient process in our state courts."[2] S.B. 8 imposes a patently discriminatory enforcement scheme, thus inviting harassing, costly lawsuits as a penalty for providing or facilitating access to safe abortion in Texas.[3]

Separately, S.B. 8 also creates an unprecedented one-way fee-shifting provision designed to deter legal challenges to any Texas abortion restriction (not just S.B. 8), including Section 1983 claims brought in federal court to vindicate federal constitutional rights. This provision holds the challenger and their attorneys

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

[3] *Compare, e.g.*, Tex. Health & Safety Code § 171.210(a)(4) (permitting S.B. 8 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"), *with* Tex. Civ. Prac. & Rem. Code § 15.002(a) (generally limiting venue to where the events giving rise to a claim took place or where the defendant resides); *id.* § 15.002(b) (generally permitting Texas state courts to transfer venue "[f]or the convenience of the parties and witnesses and in the interest of justice").

jointly liable for the other side's fees unless they run the table in litigation, prevailing on every claim they brought. S.B. 8 § 4 (adding Tex. Civ. Prac. & Rem. Code § 30.022). And it allows the party seeking fees to do so in a new action, before a new judge, filed up to three years after resolution of the claims. *Id.*

B. Procedural History

On July 13, 2021, Plaintiffs—who include abortion clinics, doctors, health-center staff, clergy, and funds and practical support networks that assist abortion patients—filed this case challenging the Act's constitutionality. App. 002–03. They allege that S.B. 8's ban on abortion and its enforcement scheme violate the First Amendment and the due process and equal protection guarantees of the Fourteenth Amendment.

Plaintiffs sued the government officials responsible for compelling compliance with S.B. 8: two putative classes of Texas clerks and judges in courts with authority over S.B. 8 enforcement proceedings, and certain State licensing officials and the Attorney General of Texas (the "State Agency Defendants" or "SAD") who, although not able to directly enforce the Act's ban, are authorized and required to bring administrative and civil enforcement actions under other laws for violations of S.B. 8. App. 016–21. Plaintiffs also sued a private party, Mark Lee Dickson, whom Plaintiffs reasonably expect to file suit against purported violators based on his history of threats and other targeting of Plaintiffs. App. 047–049.

Plaintiffs moved for summary judgment, class certification, and a preliminary injunction. App. 003. All Defendants filed motions to dismiss for lack of jurisdiction. App. 003.

The district court set a preliminary-injunction hearing for August 30, 2021. After Defendant Clarkston served subpoenas on numerous Plaintiffs and their staff, the district court permitted the parties to present testimony and argument in a one-day hearing. App. 060–61.

On August 25, the court denied Defendants' motions to dismiss. App. 002–052. The district court carefully considered, and ultimately rejected, Defendants' arguments concerning sovereign immunity and Article III jurisdiction. App. 016–21. At that time, the preliminary-injunction motion was already fully briefed, and Defendants had been able to submit declarations and evidence, as one Defendant did.

Later that day, Defendants filed a Notice of Appeal and moved in the district court to stay proceedings and vacate the preliminary-injunction hearing, arguing that the appeal had divested the court of jurisdiction. Then in this Court, Defendants filed an Opposed Emergency Motion to Stay Proceedings Pending Appeal (5th Cir. Doc. No. 515997262). While that motion was pending, the district court stayed its proceedings as to the Government Defendants, denied a stay as to Defendant Dickson, and ordered the preliminary-injunction hearing to proceed with respect to

the claims against him. App. 057–58. That same day, Plaintiffs moved to dismiss Dickson's appeal (5th Cir. Doc. No. 515998618) and to expedite the appeal (5th Cir. Doc. No. 515997650).

On August 27, this Court entered a temporary administrative stay of the district court proceedings, including the preliminary-injunction hearing. Order (5th Cir. Doc. No. 515998773). The Court denied Plaintiffs' motion to expedite and directed Dickson to respond to Plaintiffs' motion to dismiss by 9 a.m. on Tuesday, the day after the preliminary-injunction hearing had been scheduled to take place and the day before S.B. 8 takes effect. *Id.*

ARGUMENT

Rule 8 "explicitly gives the court of appeals the power to grant . . . an injunction pending an appeal." *Laurenzo By Laurenzo v. Miss. High Sch. Activities Ass'n, Inc.*, 708 F.2d 1038, 1042 n.9 (5th Cir. Unit B 1983) (per curiam). Such relief is available in the first instance in the court of appeals where it is impracticable to move first in the district court. Fed. R. App. P. 8(a)(2)(A)(i). Here, seeking relief first in the district court is impossible due to the stay issued by this Court.

An injunction pending appeal is warranted. In evaluating the motion, this Court considers: "(1) the likelihood that the moving party will ultimately prevail on the merits of the appeal; (2) the extent to which the moving party would be irreparably harmed by denial of the [injunction]; (3) the potential harm to opposing

parties if the [injunction] is issued; and (4) the public interest. *Fla. Businessmen for Free Enter. v. City of Hollywood*, 648 F.2d 956, 957 (5th Cir. 1981). Plaintiffs readily satisfy that standard.

A. Plaintiffs Are Likely to Succeed on the Merits.

The only question properly on appeal is sovereign immunity. Whether the *Ex Parte Young*, 209 U.S. 123 (1908), exception applies is a "straightforward inquiry." *Green Valley Special Util. Dist. v. City of Schertz*, 969 F.3d 460, 471 (5th Cir. 2020) (en banc). A claim satisfies *Ex parte Young* where it "requests relief prospectively requiring [state officials] to refrain from taking future actions to enforce" an allegedly unlawful state law. *Id.* at 472. Because all of the Government Defendants are state officials sued in their official capacity over future violations of the Federal Constitution, and Plaintiffs seek prospective injunctive and declaratory relief, *Ex Parte Young* is satisfied "[o]n its face." *Id.*; *see* App. 109–14.

The remaining question is whether each defendant, "by virtue of his office," has "some connection with the enforcement of the [challenged] act." *City of Austin v. Paxton*, 943 F.3d 993, 997 (5th Cir. 2019), *cert. denied*, 141 S. Ct. 1047 (2021) (quoting *Young*, 209 U.S. at 157). As the district court explained, "[w]here, 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," App. 015 (quoting *City of Austin*, 943 F.3d at 998), beyond just a "'*general* duty to

see that the laws of the state are implemented,'" *id.* (quoting *Tex. Dem. Party v. Abbott*, 961 F.3d 389, 400–01 (5th Cir. 2020), *cert. denied*, 141 S. Ct. 1124 (2021)). The district court properly found that the Government Defendants each satisfy that test. *See infra*.

The court also correctly found that Plaintiffs had established Article III standing as to each Defendant. Because a motion to dismiss based on standing "does not constitute an immediately appealable order," *Thomas ex rel. D.M.T. v. Sch. Bd. St. Martin Par.*, 756 F.3d 380, 383 (5th Cir. 2014), this Court has no jurisdiction to review Dickson's appeal, and indeed Plaintiffs have moved to dismiss his appeal. And the Court has jurisdiction to review the Government Defendants' standing objections only to the extent they are "essential to the resolution of [the] properly appealed collateral orders." *Escobar v. Montee*, 895 F.3d 387, 392 (5th Cir. 2018) (alterations omitted). Nevertheless, Plaintiffs detail below why the order was correct.

1. The District Court Correctly Rejected Dickson's Standing Arguments.

Dickson's argument that Plaintiffs lack standing because they have not specifically alleged they will violate S.B. 8's unconstitutional ban in the absence of judicial relief is baseless because "the Supreme Court has repeatedly stated that plaintiffs need not plead that they plan to violate [the] law to have standing to challenge its constitutionality." App. 048; *see Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 163 (2014). And the district court rightly found that Dickson's

statements and testimony "demonstrated his intent to enforce S.B. 8 if Plaintiffs violate [S.B. 8]," and to seek fees against Plaintiffs under S.B. 8's fee-shifting scheme. App. 048–50; *see also* Mot. Dismiss Dickson Appeal 9–14.

2. The District Court Correctly Rejected the State Agency Defendants' Sovereign Immunity and Standing Arguments.

The district court correctly found that State Agency Defendants, by virtue of their offices, have "a sufficient connection to the enforcement of the challenged law." *City of Austin*, 943 F.3d at 998 (cleaned up). This requirement is not stringent: "[a] scintilla of enforcement by the relevant state official with respect to the challenged law will do." *Tex. Dem. Party*, 978 F.3d at 179 (cleaned up). "'Enforcement' typically involves compulsion or constraint." *K.P. v. LeBlanc*, 627 F.3d 115, 124 (5th Cir. 2010). "[D]irect enforcement of the challenged law [is] not required: actions that constrain[] the plaintiffs [are] sufficient to apply the *Young* exception." *City of Austin*, 943 F.3d at 1001.

While S.B. 8 precludes State Agency Defendants from enforcing the six-week ban directly "through the private enforcement mechanism created under the law," App. 017, the district court detailed how State Agency Defendants retain authority "to enforce violations of *other* state laws triggered by a violation of S.B. 8," App. 016–17 (emphasis added). S.B. 8 explicitly prohibits enforcement of two statutes within the penal code based on a violation of S.B. 8, but "nowhere does S.B. 8 indicate that" State Agency Defendants are prohibited from enforcing "the

provisions of the Medical Practice Act, Nursing Practice Act, and Pharmacy Act" in response to an S.B. 8 violation. App. 017. Moreover, some of State Agency Defendants' disciplinary obligations "are mandatory." App. 017. The Court further found that, to the extent this Court also requires a "demonstrated willingness to enforce," State Agency Defendants have shown it through their longstanding "enforce[ment] [of] anti-abortion laws through health officials and actual use of disciplinary proceedings against medical professionals who violate laws," like S.B. 8, "that trigger such discipline." App. 019–20. The district court further noted that the State Agency Defendants did not dispute their authority to seek fees under S.B. 8, and could hardly be expected to have sought fees already yet when S.B. 8 has not yet taken effect. App. 023–24.

The court rejected State Agency Defendants' standing arguments for similar reasons. The court found that Plaintiffs had alleged an injury-in-fact because they "will either have to violate S.B. 8 and await disciplinary actions against them by the SAD or cease to provide" abortions. App. 022. And the Court explained that there was a credible threat of enforcement where Plaintiffs "are required to report healthcare-related lawsuits to licensing authorities and private citizens may file complaints [against Plaintiffs] with the relevant disciplinary agencies and have done so in the past." App. 022–23.

3. The District Court Correctly Rejected Clarkston's Sovereign Immunity and Standing Arguments.

Clarkston is a county clerk whose purported claim to sovereign immunity is so dubious that she elected not to articulate it on her own behalf in the district court. *See* App. 034 ("Clarkston argues that she is also entitled to sovereign immunity by adopting the arguments of her co-Defendants without further elaboration."). The district court properly found that Texas court clerks, including Clarkston, will play an essential role in compelling compliance with S.B. 8. Clarkston conceded that S.B. 8 enforcement petitions will be "filed with the clerk" who will open the action and keep the docket. App. 073 (citing Tex. R. Civ. P. 22, 24–26). The clerk then "'shall forthwith issue a citation'" which is "similar to a summons in federal court." App. 073–74 (quoting Tex. R. Civ. P. 99(a)). Citations "direct the defendant to file a written answer to the plaintiff's petition" for enforcement of S.B. 8 and notify them that failure to respond may result in a default judgment. Tex. R. Civ. P. 99(b). Clerks' authority to issue citations ordering responses to S.B. 8 enforcement petitions under threat of default judgment—responses that Plaintiffs allege present a constitutional violation in and of themselves, *see* App. 031—is indisputably compulsive authority connected to S.B. 8's direct enforcement.

It makes no difference that clerks' duties arise from other state laws rather than from S.B. 8 directly. Whether the duty "'arises out of the general law, or is specially created by the act itself, is not material so long as it exists.'" *K.P.*, 627 F.3d

at 124 (quoting *Ex parte Young*, 209 U.S. at 157); *see also Okpalobi v. Foster*, 244 F.3d 405, 419 (5th Cir. 2001) (en banc) (lead plurality opinion) (enforcement power "can be found implicitly elsewhere in the laws of the state, apart from the challenged statute"). As the district court explained, "[c]ourts often have allowed suits to enjoin the performance of ministerial duties in connection with allegedly unconstitutional laws." App. 035 (quoting *Finberg v. Sullivan*, 634 F.2d 50, 54 (3d Cir. 1980) (en banc)).

4. The District Court Correctly Rejected Judge Jackson's Sovereign Immunity and Standing Arguments.

The court rightly identified that state-court judges are "immediately connected with the enforcement of S.B. 8," and "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 [mandatory] penalties." App. 045. In "more recent precedent than that cited by Judicial Defendants, the Fifth Circuit has found that the availability of relief under *Ex Parte Youn*g . . . may apply to Section 1983 challenges against state judicial actors who play a role in enforcing state statutes." App. 035 (citing *Air Evac EMS v. Tex., Dep't of Ins., Div. of Workers' Compensation*, 851 F.3d 507, 515 (5th Cir. 2017); *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; *Sup. Ct. of Va. v. Consumers Union of U. S., Inc*., 446 U.S. 719, 735 (1980)). Just so here.

The court underscored that, unlike the cases on which Defendants relied, here there are no other government authorities tasked with direct enforcement of S.B. 8. App. 029–30. Thus, this matter fits within the exception envisioned by the case law, where suing judges is "necessary" in order for Plaintiffs to seek "full relief for the alleged violations of their constitutional rights." App. 031 (citing *In re Justices of Sup. Ct. of P. R.*, 695 F.2d 17, 23 (1st Cir. 1982); *Mitchum v. Foster*, 407 U.S. 225, 242 (1972)).

The court also found that Plaintiffs had satisfied Article III's case or controversy requirement against the judges because their interests are adverse. App. 028–33. Indeed, Plaintiffs allege that the clerk and judge defendants "*cannot* open or resolve S.B. 8 enforcement actions"—actions they believe they are bound by state law to take—"without violating Plaintiffs' constitutional rights." App. 029–30 (emphasis added). The court explained that judges will not be playing a "purely adjudicatory role" here, and indeed, that Defendant Jackson publicly stated that he is one of "the judges who enforce [S.B. 8] in east Texas." App. 033.

The court correctly rejected Jackson's argument that Plaintiffs have not alleged injury-in-fact, based on Supreme Court precedent that "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." App. 036 (citing *Babbitt*, 442 U.S. 289, 298; *Susan B. Anthony List*, 573 U.S. at 158); *see also*

Okpalobi, 244 F.3d at 426-27 (exposure to "unlimited tort liability" is injury-in-fact). The court found the threat of enforcement particularly credible given Dickson's testimony that he has personal knowledge of "countless" individuals ready to sue Plaintiffs. App. 037–38. And the court noted that "last year Dickson's own counsel filed eight lawsuits in just one day against some of the Plaintiffs in this lawsuit in counties across Texas, including Smith County where the [clerk and judge 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." App. 037–38.

The court found Plaintiffs' impending injuries traceable to the judge Defendants, because private parties plainly cannot impose S.B. 8's mandatory penalties or compel compliance via injunctions absent Defendants. App. 039–40. Defendants need only be "among those who would contribute to Plaintiffs' harm." *K.P.*, 627 F.3d at 123. The court likewise did not err in finding that relief against Jackson would redress Plaintiffs' injury by "deter[ring] private parties from bringing enforcement actions under the law in the first place, and judges from issuing penalties under a law declared unconstitutional. App. 042; *see also Roe v. Wade*, 410 U.S. 113, 166 (1973); *Steffel v. Thompson*, 415 U.S. 452, 470 (1974).

5. *Plaintiffs' Suit Against the Attorney General Should Satisfy* Ex Parte Young *Notwithstanding the Plurality Decision in* Okpalobi

As explained *supra*, the Attorney General is a proper defendant based on his particular authority to enforce a professional discipline statute in response to a violation of S.B. 8's six-week ban and to seek attorney's fees under S.B. 8's fee-shifting scheme. The plurality opinion in *Okpalobi* stated that *Ex parte Young* requires more than "merely the general duty to see that the laws of the state are implemented that substantiates the required 'connection,' but the particular duty to enforce the statute in question and a demonstrated willingness to exercise that duty." 244 F.3d 405, 416 (5th Cir. 2001) (en banc). The district court's findings with regard to State Agency Defendants (including Attorney General Paxton) are entirely consistent with that standard.

However, as Plaintiffs alleged in their Complaint, App 114 n.5, Attorney General Paxton would also be a proper defendant as the state official ultimately responsible for law enforcement in Texas. The *Ex parte Young* standard suggested by the *Okpalobi* plurality is inconsistent with Supreme Court precedent, *see Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002), with the law applied in other circuits, *see, e.g.*, *In re Dairy Mart Convenience Stores, Inc.*, 411 F.3d 367, 372 (2d Cir. 2005); *Const. Party of Pa. v. Cortes*, 824 F.3d 386, 396–97 (3d Cir. 2016); *Aff'd Allied Artists Picture Corp. v. Rhodes*, 679 F.2d 656, 665 n.5 (6th Cir. 1982); *Ent. Software Ass'n v. Blagojevich*, 469 F.3d 641, 645 (7th Cir.

2006), and with the purpose of *Ex parte Young*'s legal fiction: to avoid precisely the outcome Defendants advance here, that Plaintiffs "await proceedings against [them] . . . , grounded upon a disobedience of the act, and then, if necessary, obtain a review in [the Supreme Court] by writ of error." 209 U.S. at 123, 165.

6. Plaintiffs Are Likely to Succeed on Their Claims

This Court has already held that a nearly identical ban on abortions after detectable cardiac activity violates the Fourteenth Amendment Right to substantive due process and is facially invalid. *Jackson Women's*, 951 F.3d at 248. Because S.B. 8's six-week ban is facially unconstitutional, the enforcement provisions (including aiding-and-abetting liability) are invalid because there is no prohibition to be enforced. And without a six-week ban, there is no reason for physicians to document and report medical emergencies as exceptions to the stricken prohibition as required by sections 7 and 9 of S.B. 8.

Moreover, S.B. 8's fee-shifting provision in Section 4 conflicts with and is preempted by 42 U.S.C. § 1988, and when "state and federal law directly conflict, state law must give way." *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 617-18 (2011) (cleaned up). Congress carefully determined how attorney's fees are to be allocated in federal civil-rights actions, and S.B. 8's attempt to override that determination fails.

B. Plaintiffs, Their Staff, and Their Patients Will Suffer Irreparable Harm Absent Relief.

Without an injunction, in just four days, approximately 85–90% of Texans who seek abortions, *see, e.g.*, App. 175, 273, and every Texan who seeks an abortion after six weeks' pregnancy, will be stripped of a longstanding, fundamental constitutional right held by Americans in all other States.

It is beyond question that this deprivation of clearly established constitutional rights constitutes irreparable harm. *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. Unit B 1981). Denying Texans time-sensitive medical care that approximately one in four women will choose in their lifetime, and instead forcing them to bear the pains, anxieties, and serious health risks of pregnancy against their wishes, is harm that can never be repaired. The harms associated with unwanted pregnancy are "[s]pecific and direct," and can include physical "harm medically diagnosable even in early pregnancy," "psychological harm," and a "distressful life and future." *Roe,* 410 U.S. at 153 ; *see also Casey*, 505 U.S. at 852 (pregnant person "who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear"); App. 179; 260 (risk of mortality for pregnancy and childbirth is 14 times greater than that of abortion). All of these consequences are irreparable. *See e.g., Planned Parenthood of Kan. & Mid-Mo. v. Andersen*, 882 F.3d 1205, 1236 (10th Cir. 2018)

("disruption or denial of . . . patients' health care cannot be undone after a trial on the merits").[4]

Unless this Court acts, Plaintiffs, their staff, and thousands of Texans will suffer severe and irreparable harm starting on Wednesday.

C. Maintaining the Status Quo Pending Appeal Will Not Harm Defendants.

Defendants identify *no harm* from maintaining the status quo. In their oppositions to Plaintiffs' district-court TRO/PI Motion, no Defendant could identify *any* harm if S.B. 8 is preliminarily enjoined. Dickson even conceded that no harm will result from a stay to the extent S.B. 8 is unconstitutional, D. Ct. ECF 70 at 18, which it plainly is.

D. The Public Interest Strongly Favors Preventing Irreparable Constitutional Harm.

Preventing constitutional deprivations serves the public interest. *Jackson Women's Health Org*., 760 F.3d at 458 n.9 (cleaned up); *see Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 280 (5th Cir. 1996). The public interest demands that this Court not be the first to allow a six-week abortion ban to take effect.

[4] It is of no moment that some Texans harmed by S.B. 8 may ultimately be able to obtain abortion care out of state. Texas "cannot lean on its sovereign neighbors to provide protection of its citizens' federal constitutional rights. *Jackson Women's Health Org.*, 760 F.3d at 457 (citing *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 350 (1938)). Regardless, because most abortion patients have low incomes and face severe logistical hurdles, out-of-state travel will be impossible for many. *See, e.g.*, App. 194, 196–197.

E. Injunctive Relief Is Available Against All Defendants.

Finally, to the degree that Section 1983 could be read to limit this Court's authority under Rule 8 to enter an injunction pending appeal, it is not a bar to the relief sought here because it expressly permits injunctive relief "in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity" where "a declaratory decree was violated or declaratory relief was unavailable." 42 U.S.C. § 1983. This limitation does not preclude injunctive relief against either Clarkston or Jackson.

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

Courts have likewise recognized the distinction between judicial officers and clerks on which Plaintiffs rely here. *Osterneck v. Ernst & Whinney*, 489 U.S. 169,

179 (1989); *United States v. Heller*, 957 F.2d 26, 29 (1st Cir. 1992); *Rezzonico v. H & R Block, Inc.*, 182 F.3d 144, 152 (2d Cir. 1999); *Sonicraft, Inc. v. NLRB*, 814 F.2d 385, 387 (7th Cir. 1987); *United States v. Unger*, 700 F.2d 445, 453 (8th Cir. 1983).

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

Second, injunctive relief is available even as to Defendant Jackson, because declaratory relief has become "unavailable," 42 U.S.C. § 1983, largely due to Defendants' delay tactics, *see* Reply Br. in Supp. of Mot. to Expedite Appeal (5th Cir. Doc. 00515998658), at 2; *see Fam. Trust Found. of Ky., Inc. v. Wolnitzek*, 345 F. Supp. 2d 672, 689–90 (E.D. Ky. 2004), *stay denied sub nom. Fam. Trust Found. of Ky., Inc. v. Ky. Jud. Conduct Comm'n*, 388 F.2d 224 (6th Cir. 2004) (finding that declaratory relief had become "unavailable" under nearly identical circumstances). This Court's order staying all district court proceedings only underscores that the exception is satisfied here.

Because Section 1983 does not define "unavailable," the Court should look to that term's ordinary meaning. *See Schindler Elevator Corp. v. United States ex rel.*

Kirk, 563 U.S. 401, 407 (2011). "Unavailable" means the "status or condition of not being available." *See* Black's Law Dictionary 1768 (10th ed. 2014). In turn, "the ordinary meaning of the word 'available' is 'capable of use for the accomplishment of a purpose,' and that which 'is accessible or may be obtained.'' *Ross v. Blake*, 578 U.S. 1174, 1858 (2016) (quoting Webster's Third New International Dictionary 150 (1993)). That the unavailability of declaratory relief may be only temporary makes no difference. For example, the President can fill certain vacancies while the Senate is "unavailable" due to recess, though Congress will be available again. *See NLRB v. Noel Canning*, 573 U.S. 513, 530, 552 (2014).

G. The Injunction Should Issue Without Bond or Security.

Defendants have not disputed that a bond or security is unnecessary because damages are not at issue here.

CONCLUSION AND PRAYER FOR RELIEF

Plaintiffs respectfully request that the Court enjoin Defendants from enforcing S.B. 8 pending appeal.

Dated: August 29, 2021

Respectfully submitted,

/s/ Marc Hearron

Marc Hearron
CENTER FOR REPRODUCTIVE RIGHTS
1634 Eye St., NW, Suite 600
Washington, DC 20006
(202) 524-5539
mhearron@reprorights.org

Molly Duane
CENTER FOR REPRODUCTIVE RIGHTS
199 Water Street, 22nd Floor
New York, NY 10038

Jamie A. Levitt
J. Alexander Lawrence
MORRISON & FOERSTER LLP
250 W. 55th Street
New York, NY 10019

Attorneys for Whole Woman's Health, Whole Woman's Health Alliance, Marva Sadler, Southwestern Women's Surgery Center, Allison Gilbert, M.D., Brookside Women's Medical Center PA d/b/a Brookside Women's Health Center and Austin Women's Health Center, Alamo City Surgery Center PLLC d/b/a Alamo Women's Reproductive Services, Houston Women's Reproductive Services, Reverend Daniel Kanter, and Reverend Erika Forbes

Rupali Sharma
LAWYERING PROJECT
113 Bonnybriar Rd.
Portland, ME 04106

Stephanie Toti
LAWYERING PROJECT
41 Schermerhorn Street, No. 1056

Julie Murray
Richard Muniz
PLANNED PARENTHOOD
FEDERATION OF AMERICA
1110 Vermont Ave., NW Ste. 300
Washington, DC 20005

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

Julia Kaye
Brigitte Amiri
Chelsea Tejada
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004

Lorie Chaiten
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
1640 North Sedgwick Street
Chicago, IL 60614

Adriana Pinon
David Donatti
Andre Segura
ACLU FOUNDATION OF TEXAS, INC.
5225 Katy Freeway, Suite 350
Houston, TX 77007

Attorneys for Houston Women's Clinic

Brooklyn, NY 11201

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

CERTIFICATE OF CONFERENCE

On August 29, 2021, Marc Hearron, counsel for Plaintiffs, contacted counsel for all Defendants by e-mail about this motion, who state that they oppose.

/s/ Marc Hearron
Marc Hearron

CERTIFICATE OF COMPLIANCE WITH RULE 27.3

I certify the following in compliance with Fifth Circuit Rule 27.3:

- Before filing this motion, counsel for Plaintiffs-Appellees contacted the clerk's office and opposing counsel to advise them of their intent to file this motion.
- The facts stated herein supporting emergency consideration of this motion are true and complete.
- The Court's review of this motion is requested as soon as possible and no later than Sunday, August 29, 2021 at 10:00 pm.
- True and correct copies of relevant orders and other documents are attached in the Appendix to this motion, filed separately.
- This motion is being served at the same time it is being filed.

/s/ Marc Hearron
Marc Hearron

CERTIFICATE OF SERVICE

I hereby certify that on August 29, 2021, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system. Service will be accomplished by the CM/ECF system and by email to counsel for Defendants-Appellees.

/s/ Marc Hearron
Marc Hearron

CERTIFICATE OF COMPLIANCE

This emergency motion complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 21(d) because it contains 5026 words, excluding the parts exempted by Rule 32(f); and (2) the typeface and type style requirements of Rule 32(a)(5) and Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Times New Roman) using Microsoft Word (the program used for the word count).

/s/ Marc Hearron
Marc Hearron