No. 21-50792

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

WHOLE WOMAN'S HEALTH, et al.

Plaintiffs - Appellees,

v.

JUDGE AUSTIN REEVE JACKSON, et al.

Defendants - Appellants.

On Appeal from the United States District Court for the
Western District of Texas, Austin Division
No. 1:21-cv-00616-RP

PLAINTIFFS-APPELLEES' COMBINED MOTION TO DISMISS DEFENDANT-APPELLANT MARK LEE DICKSON'S APPEAL AND OPPOSITION TO EMERGENCY MOTION TO STAY

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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.

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/s/ Marc Hearron

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INTRODUCTION

Earlier today, the district court stayed proceedings and vacated the hearing on the pending preliminary-injunction motion as to the Government Defendants.[1] Suppl. App. 136– 37. Thus, their stay request in this Court is moot, and they "no longer require immediate relief." Hacker & Thompson Ltr. to Court at 2 (Aug. 27, 2021). However, the district court denied Defendant-Appellant Dickson's stay request because Dickson "made no claim to sovereign immunity" and raised only Article III standing objections in his motion to dismiss, and therefore "the denial of his motion to dismiss is not appealable." Suppl. App. 137.

Dickson maintains that this Court should nevertheless grant him the "extraordinary remedy" of a stay pending appeal. *Belcher v. Birmingham Tr. Nat'l Bank*, 395 F.2d 685, 685 (5th Cir. 1968), notwithstanding that this Court lacks jurisdiction over his interlocutory appeal in the first place. Even if this Court had jurisdiction over his appeal, Dickson failed to show *any* of the factors justifying this exceptional relief. *See Nken v. Holder*, 556 U.S. 418, 425–26, 434 (2009). Indeed, Defendants' stay motion did not even argue that Dickson would suffer any harm absent a stay, which is dispositive. This Court should thus dismiss Dickson's appeal and deny his stay motion as moot.

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[1] Defendants-Appellants Jackson, Clarkston, Carlton, Thomas, Young, Benz, and Paxton.

BACKGROUND

I. Senate Bill 8

The Supreme Court has reiterated for nearly fifty years that "[b]efore viability, the State's interests are not strong enough to support a prohibition of abortion." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992). In direct defiance of this prohibition, Senate Bill 8, 87th Leg., Reg. Sess. (Tex. 2021) ("S.B. 8" or the "Act"), bans abortion in Texas at the point when embryonic cardiac activity can be detected, which is approximately six weeks of pregnancy—before many patients know they are pregnant, and roughly four months before viability. *See* S.B. 8 § 3 (adding Tex. Health & Safety Code § 171.204);[2] Suppl. App. 006–09, 023–24, 035, 043; *see also Casey*, 505 U.S. at 870; *Jackson Women's Health Org. v. Dobbs*, 951 F.3d 246, 248 (5th Cir. 2020) (per curiam) (striking similar ban because "cardiac activity can be detected well before the fetus is viable" and that alone "dooms the law").[3]

In an attempt to insulate this patently unconstitutional law from judicial review, the Texas Legislature barred the traditional governmental defendants—such

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

[3] S.B. 8 contains no exception for pregnancies from rape or incest, nor for a fetal health condition incompatible with sustained life after birth. There is only a narrow exception for a "medical emergency." S.B. 8 § 171.205(a).

as the attorney general, local prosecutors, and the health department—from directly enforcing S.B. 8's terms. S.B. 8 § 171.207(a); App. 390. Instead, the Act deputizes private citizens to initiate enforcement proceedings in state court, allowing "any person" *other* than government officials to bring a civil lawsuit against anyone who provides an abortion in violation of the Act, "aids or abets" such an abortion, or intends to do these things. *Id.* § 171.208(a); App. 379–80, 412. These civil suits are permitted regardless of whether the person suing alleges any injury, or any connection to the abortion at all. App. 380. A successful S.B. 8 claimant is entitled to at least $10,000 in monetary penalties, paid by the person sued, and injunctions preventing the person sued from continuing to provide abortions or to assist Texans in obtaining abortions. *Id.* § 171.208(b); App. 412.

S.B. 8 also changes the normal courthouse rules applicable to other civil litigants in Texas to make it impossible for those sued to fairly defend themselves and to make these proceedings as burdensome and costly as possible, even for those who prevail. For instance, S.B. 8 allows "any person"—including those with no connection to the patient—to file lawsuits in their home counties and then veto transfer to a more appropriate venue. App. 379–80. As a result, abortion providers and alleged aiders and abettors could be forced to defend themselves in multiple,

simultaneous enforcement proceedings in courts across the state.[4] *See* App. 379– 80. S.B. 8 also provides that anyone who brings an S.B. 8 enforcement claim and prevails is entitled to recover costs and attorney's fees, while abortion providers and others sued under S.B. 8 cannot be awarded costs or fees if they prevail. *Id.* § 171.208(b)(3), (i); App. 380–81. And S.B. 8 purports to bar people who are sued from raising multiple standard defenses, including that they relied on a court decision, later overruled, that was in place at the time of the acts underlying the suit; it also states that S.B. 8 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)(2)–(5); App. 380. The clear import is to cast a pall on constitutionally protected activity; to force abortion providers and patient-supporters to repeatedly defend themselves in costly enforcement actions; and to hamstring their defenses.[5]

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[4] *Compare* S.B. 8 § 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"), *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").

[5] In addition, S.B. 8 creates an unprecedented one-way fee-shifting provision designed to deter any legal challenges to *any* Texas abortion restriction (not only S.B. 8 itself), including Section 1983 claims brought in federal court to vindicate federal constitutional rights, by holding the challenger responsible for the other

II. Plaintiffs' Challenge Against Defendant Dickson

On July 13, 2021, Plaintiffs—who include abortion clinics, doctors, health-center staff, clergy, and funds and practical support networks that assist abortion patients in accessing care—filed this case challenging the Act's constitutionality. App. 010–16. Plaintiffs sued two putative defendant classes of courthouse clerks and state-court judges, the government officials that the Texas Legislature made responsible for directly compelling compliance with S.B. 8. App. 385–86, 396–97. And Plaintiffs sued the executive-branch officials who compel compliance through the threat of license revocation and other discipline under collateral statutes that are triggered by violations of S.B. 8 App. 382–83, 391–92. In addition, Plaintiffs sued Mark Lee Dickson, a private individual who is deputized under S.B. 8 to initiate enforcement claims under color of state law. By his own admission, Defendant Dickson is a "prospective plaintiff[]" in private enforcement lawsuits under S.B. 8. *See* App. 123.

As the Director of Right to Life East Texas, Dickson has pushed for the adoption of state and local laws that impose liability on abortion providers and individuals who assist in the provision or obtainment of constitutionally protected abortion. App. 017. His efforts were successful in the City of Lubbock, Texas, which

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side's fees unless they run the table in litigation, prevailing on every claim they brought. S.B. 8 § 30.022(c), (d)(1).

enacted an ordinance earlier this year prohibiting abortions within the city. Suppl. App. 055– 56. Plaintiff Planned Parenthood of Greater Texas Surgical Health Services ("PPGTSHS") operates a licensed abortion facility in Lubbock. App. 011; Suppl. App. Cite 051–52, 056. After the ordinance became effective, Mr. Dickson posted on Facebook that "[i]f abortions do end up being performed this week or next week or any week thereafter, I will be suing Planned Parenthood for the murder of unborn children under the provisions allowed in the Lubbock Ordinance Outlawing Abortion." Suppl. App. 084. He also posted a video of himself and another individual calling PPGTSHS's Lubbock health center and using misleading tactics to test whether the center would schedule an abortion despite the ordinance's ban. Mark Lee Dickson, Facebook (June 1, 2021, 2:07 PM), https://www.facebook.com/markleedickson/videos/10159259661094866. Such threats forced PPGTSHS to stop providing abortions in Lubbock while it challenges the Lubbock ordinance in another federal lawsuit. Suppl. App. 056; *PPGTSHS v. City of Lubbock*, No. 5:21-CV-114-H, 2021 WL 2385110 (N.D. Tex. June 1, 2021) (dismissing case for lack of jurisdiction), *mot. for reconsideration filed* (N.D. Tex. June 29, 2021), ECF No. 51; *see also* App. 145–46 (stating that the "mere threat of civil lawsuits" caused PPGTSHS to cease providing abortions in Lubbock).

Defendant Dickson has been a proponent of S.B. 8 and has trumpeted it as "mak[ing] everyone in Texas an attorney general" to "go[] after" abortion providers

for purposes of intimidation. Suppl. App. 097; *see also* Suppl. App. 074, 090–91. Dickson has also made clear his intent to conspire with other individuals to bring enforcement actions under S.B. 8 against Plaintiffs. Suppl. App. 106 ("[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."); Suppl. App. 103 (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 [Plaintiff Whole Woman's Health] who are in violation of this law"); *see also* App. 146–47 (declaring personal knowledge of "many" "individuals who intend to sue the abortion-provider plaintiffs and the abortion-fund plaintiffs if they defy [S.B.] 8").

Additionally, Dickson has drafted local ordinances branding the Plaintiffs as "criminal organizations" and seeking to bar them from operating in towns that adopt the ordinances. Suppl. App. 074, 84, 090–91; *see also* Suppl. App. 113 (announcing that "[a]ll organizations that perform abortions and assist others in obtaining abortions (including [multiple Plaintiffs here]) are now declared to be criminal organizations in Waskom, Texas"); *Dickson v. Afiya Ctr.*, No. 05-20-00988-CV, 2021 WL 3412177, at *13 (Tex. Ct. App. 5th Dist. Aug. 4, 2021) (describing Dickson's targeting of certain Plaintiffs as "criminal organizations whose conduct amounts to murder" and permitting defamation claims against Dickson to proceed).

Dickson has also demonstrated a willingness to target individual staff members and even patients who enter health centers that provide abortion, including by posting pictures of their license plates online. *See* Suppl. App. 117, 120. He has taken other steps to purportedly monitor abortion providers' compliance with abortion restrictions. *See* Suppl. App. 125 (post regarding compliance by Plaintiff Houston Women's Clinic with an executive order prohibiting abortion early in the COVID pandemic), 130 (post regarding same executive order and stating "what we need to be doing is documenting, compiling, and reporting evidence [that Dickson viewed as indicating clinics' non-compliance] . . . . We have several people high up working on this, but what we really need is very detailed and accurate information. If you would like to help me with this process, feel free to reach out.").

Dickson has endorsed the use of unconstitutional abortion restrictions to impose irreparable harm on abortion providers, forcing them to shut down before they can vindicate their patients' constitutional rights. Dickson has lauded, for example, that two 2013 abortion restrictions later ruled unconstitutional forced roughly half of the abortion providers in Texas to close, and many never reopened. *See* Suppl. App. 134 ("We went from over 40 baby murdering facilities in the State of Texas to less than 20 . . . in just a few years. Even with the win for abortion advocates with Whole Woman's Health v. Hellerstedt, how many . . . facilities have opened back up? Not very many at all.").

As a defendant in this case, Dickson has not disclaimed future suit against any of the Plaintiffs if they violate S.B. 8. To the contrary, he states that he has "no intention of suing any of the plaintiffs under the private civil-enforcement lawsuits described in [S.B.] 8, *because [he] expect[s] each of the plaintiffs to comply* with the Texas Heartbeat Act when it takes effect on September 1, 2021" in light of the "threat of civil lawsuits." App. 145 (emphasis added). Should Plaintiffs violate S.B. 8, he expressly leaves open his authority "to bring a civil enforcement lawsuit under [S.B.] 8." App. 147–48. Indeed, Dickson argued that he "is the real party in interest" with respect to Plaintiffs' claims against Judge Jackson and Ms. Clarkston because those "claims are attempting to strip Mr. Dickson . . . of [his] state-law right to sue abortion providers and their enablers." App. 123.

On August 25, 2021, the district court denied all Defendants' motions to dismiss. App. 376–426. Although the district court rendered one decision, it analyzed Dickson's motion separately. App. 419–25. The district court found Plaintiffs have standing to sue Dickson, because they "sufficiently alleged 'a significant possibility of future harm' in the form of an enforcement action by Dickson," based on Dickson's own "statements regarding his intent to participate in [S.B. 8's] private enforcement." App. 423 (quoting *City of Austin v.* Paxton, 943 F.3d 993, 1002 (5th Cir. 2019)). The court also found that relief against Dickson

would redress Plaintiffs' injuries because an injunction would alleviate "a discrete injury" in the form of private enforcement actions brought by Dickson. App. 423.[6] Plaintiffs moved for a temporary restraining order and preliminary injunction against all defendants, including Dickson. App. 377. At Dickson's insistence, the Court set an evidentiary hearing on the preliminary-injunction motion for Monday, August 30. App. 377. After Defendants appealed the denial of their motions to dismiss, they moved to vacate the preliminary-injunction hearing and stay all further proceedings pending appeal. App. 433-65. The district court subsequently granted the request as to the Government Defendants, but denied the request as to Dickson. Suppl. App. 136–37.

ARGUMENT

This Court has "an independent obligation to assure [itself] of jurisdiction." *United States v. Eli Lilly & Co., Inc.*, 4 F.4th 255, 261 (5th Cir. 2021). "[S]tanding must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance." *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2195–96 (2020) (quoting *Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013)).

[6] The court also found Plaintiffs have standing to challenge the fee-shifting provision in Section 4. App. 423– 25; *see supra* n.5.

A stay pending appeal is an extraordinary remedy, *Belcher v. Birmingham Tr. Nat'l Bank*, 395 F.2d 685, 685 (5th Cir. 1968), and should be granted only "in exceptional cases," *Greene v. Fair*, 314 F.2d 200, 202 (5th Cir. 1963). To prevail on his motion, Defendant Dickson must demonstrate: (1) "a strong showing" that he is likely to succeed on the merits of his appeal; (2) that he is likely to suffer irreparable injury absent a stay; (3) that Plaintiffs, their staff, and their patients will not be substantially harmed by a stay; and (4) that granting the stay will serve the public interest. *Nken*, 556 U.S. at 425–26, 434 (citations omitted).

I. This Court Lacks Jurisdiction to Consider Dickson's Appeal, Including His Motion to Stay

Far from granting Defendant Dickson's motion to stay, this Court should dismiss his appeal for lack of jurisdiction. Defendant Dickson is a private citizen who has appealed from an interlocutory order denying his motion to dismiss for lack of Article III standing. He has never asserted that he is entitled to sovereign immunity (nor could he). Accordingly, the district court's denial of his motion to dismiss is precisely the kind of garden-variety interlocutory order that "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). Because this Court's jurisdiction is limited to final orders and only a narrow category of interlocutory orders made appealable by statute, it lacks appellate jurisdiction to review the district court's

denial of Dickson's motion to dismiss. 28 U.S.C. § 1291; *Newball v. Offshore Logistics Int'l*, 803 F.2d 821, 824 (5th Cir. 1986).

Dickson makes several alternative arguments, but none can overcome the jurisdictional bar on this Court's review before final judgment. First, Dickson claims that because he joined the notice of appeal along with the Government Defendants, this Court has jurisdiction over his claims, too. But the Supreme Court has held that "there is no 'pendent party' appellate jurisdiction," and thus parties lacking sovereign immunity cannot have their unrelated issues reviewed in an interlocutory sovereign-immunity appeal filed by government officials. *Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 51 (1995). This Court's jurisdiction extends only to "those aspects of the case involved in the appeal," *Weingarten Realty Invs. v. Miller*, 661 F.3d 904, 908 (5th Cir. 2011) (quoting *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982)), and here, the only appealable aspects of the case under review are the sovereign-immunity claims of the Government Defendants.

In the same vein, Dickson suggests that if this Court were to review the subject-matter jurisdiction of the district court over the Government Defendants, it should also review subject-matter jurisdiction as it relates to him. But Dickson's Article III standing arguments—the sole basis of his motion to dismiss—are wholly distinct from the sovereign-immunity issues before this Court. Pendent appellate jurisdiction lies "only where [the non-immediately appealable rulings] are essential

to the resolution of properly appealed collateral orders." *Escobar v. Montee*, 895 F.3d 387, 392 (5th Cir. 2018) (alterations omitted) (dismissing cross-appeal where the "district court considered and decided [cross-appellee's claims] separately" from the appealable immunity claims).

Second, Dickson contends he is injured "because the relief that the plaintiffs are seeking against the government defendants will strip Mr. Dickson of his state-law rights under Senate Bill 8's private civil-enforcement mechanism." App. 123. But Dickson lacks standing to appeal because he cannot show any personal injury from the denial of sovereign immunity to the Government Defendants. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (holding that a "particularized injury . . . must affect the plaintiff in a personal and individual way" (internal quotation marks omitted)); *Sierra Club v. Babbitt*, 995 F.2d 571, 575 (5th Cir. 1993) ("Where standing to appeal is at issue, appellants must demonstrate some injury *from the judgment below*."). Sovereign immunity is an immunity that belongs to the sovereign, not to Dickson. In addition, Dickson's alleged injury instead amounts to nothing more than a "generalized grievance" about the ultimate availability of a state-law right authorizing any person to sue Plaintiffs, not just Dickson. *See Hollingsworth*, 570 U.S. at 706 (holding that a "'generalized grievance,' no matter how sincere, is insufficient to confer standing" to appeal).

For all of these reasons, this Court should not only deny the stay, but dismiss Dickson's interlocutory appeal for lack of jurisdiction.

II. Even If This Court Had Jurisdiction Over the Appeal, Defendant Dickson Is Not Entitled to A Stay

This Court need not—and in fact, cannot—reach Dickson's motion for a stay of the district-court proceedings because it lacks jurisdiction to do so. However, if the Court were to consider that motion, it would nevertheless be compelled to deny it. Dickson cannot show a likelihood of success on his appeal for all of the reasons described in Part I, among others. And "likelihood of success on the merits need not [even] be considered . . . if the applicant fails to show irreparable injury from the denial of the stay." *Ruckelshaus v. Monsanto Co.,* 463 U.S. 1315, 1317 (1983) (Blackmun, J., in chambers). Dickson's motion fails in precisely this way, and otherwise does not meet the high bar necessary to justify a stay.

A. Dickson will not suffer harm from denial of his motion to stay.

Notably absent from Dickson's stay motion is any mention of any harm to Dickson if the stay motion is denied as to him. Stay Mot. 10-11 (alleging harm to "the Government Defendants"); *id.* at 11 (alleging harm to the "state defendants"); *id.* at 12-13 (arguing impact on "Judge Jackson and Ms. Clarkston's continued involvement as defendants"). This silence is fatal to Dickson's stay motion. *See Nken*, 556 U.S. at 439 (Kennedy, J., concurring) (Supreme Court's decisions make clear that a stay applicant "must meet a heavy burden of showing not only that the

judgment of the lower court was erroneous on the merits, but also that the applicant will suffer irreparable injury if the judgment is not stayed pending his appeal"); *Whalen v. Roe*, 423 U.S. 1313, 1317–18 (1975) (Marshall, J., in chambers) (conclusion that "applicant would suffer no irreparable injury if a stay is denied . . . necessarily decides the application"); *Williams v. Zbaraz*, 442 U.S. 1309, 1312 (1979) (Stevens, J., in chambers).

Defendants' argument that permitting the district court to proceed to evaluate Plaintiffs' preliminary-injunction motion as to Defendant Dickson would harm the governmental Defendants, against whom such proceedings are currently stayed, is of no moment. Dickson cites no authority that an applicant's stay can be granted based on purported harm to others, when the applicant *himself* is not injured by the stay. Under Dickson's theory, a stay applicant could be entitled to a stay based solely on the public interest, even in the absence of any harm whatsoever to him.

In any event, Plaintiffs' TRO/PI Motion is fully briefed, including oppositions filed by the governmental Defendants. *See* D. Ct. ECF Nos. 74–75. Moreover, it is plainly wrong that allowing Dickson to defend himself in any further proceedings will prejudice the Government Defendants in any way. Dickson argues that the court "may make factual findings that negatively impact the Government Defendants' defense of the same law in their absence, *which they will have no opportunity to respond to*." Stay Mot. 11. If the Government Defendants do not prevail in their

jurisdictional appeal and are remanded for further proceedings on the merits, they will still have an opportunity to defend S.B. 8 on their own behalf—and in any event, no Defendant can raise any defense that could possibly justify a six-week ban on abortion under binding precedent.

B. Plaintiffs Will Be Substantially Harmed By a Stay

There is extensive evidence that Defendant Dickson seeks to brandish S.B. 8 against Plaintiffs to stop abortions in Texas after six weeks and shutter as many abortion clinics in the state as possible. App. 008, 017, 034, 035; *see also supra*, Background. Defendant Dickson admitted that he is a "prospective plaintiff[]" in private enforcement lawsuits under S.B. 8 and argued that he is the "real party in interest" in this action brought by Plaintiffs. App. 123. He has already argued in this Court against any relief that would "strip" him "of [his] state-law right to sue abortion providers and their enablers." App. 123. He has been actively recruiting S.B. 8 enforcement actions, and thus unsurprisingly testified that he is in communication with people planning to sue Plaintiffs under S.B. 8. Suppl. App. 106 ("[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."); App. 146 ("I have personal knowledge that there are many other individuals who intend to sue the . . . plaintiffs if they defy [S.B.] 8.") Defendant Dickson has also directly threatened to sue Plaintiff Planned Parenthood of Greater Texas Surgical Health Services under a similar ordinance if he believes they are violating

that city's abortion ban. Suppl. App. 055–56, 064. And his testimony in this case likewise made clear that whether he intends to sue Plaintiffs is wholly contingent on whether the Providers actually "comply with the Texas Heartbeat Act when it takes effect on September 1, 2021"—or, more accurately, whether Defendant Dickson perceives Plaintiffs to be in compliance. App. 004–05.

There is thus no doubt that 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," App. 047, would mitigate harm to Plaintiffs—and therefore that blocking the district court from evaluating Plaintiffs' fully briefed TRO/PI Motion as against Defendant Dickson would cause Plaintiffs harm. Indeed, S.B. 8's private enforcement scheme is designed not only to intimidate abortion providers into compliance with an unconstitutional ban, but ultimately to shut down abortion clinics in Texas by subjecting those sued under S.B. 8 to ruinous costs even if they prevail. *See e.g.*, S.B. 8 § 171.208(i) (prohibiting individuals sued under S.B. 8 from recouping their attorney's fees and costs from enforcement actions, even if they ultimately prevail). And Defendant Dickson has championed such a strategy with regard to other unconstitutional abortion restrictions allowed to take effect even temporarily. *See* Suppl. App. 085–92; *see supra*, Background.

As the district court found in denying Dickson's Motion to Dismiss, preventing Dickson from enforcing S.B. 8 would alleviate a discrete harm on Plaintiffs. App. 423. By contrast, granting the stay would prevent the district court from exercising its authority to restrain Defendant Dickson and those acting in

concert with him from bringing abusive lawsuits that threaten to shut down Plaintiffs' clinics and permanently diminish abortion access in the state.

Finally, there is an urgent need for declaratory relief against Defendant Dickson to discourage other private enforcers from invoking the offending law. As the district court found, "any injunction by this Court would serve as a 'strong deterrent' to other individuals contemplating bringing enforcement actions under S.B. 8." App. 423; *see also Steffel v. Thompson*, 415 U.S. 452, 470 (1974) (a declaration of a state law's unconstitutionality may have a "deterrent effect"). That includes by signaling that "defendants in S.B. 8 proceedings in state court [can] bring counterclaims under Section 1983" and recover their attorney's fees after prevailing on those claims, App. 423; *State, Cty. of Bexar v. Southoaks Dev. Co.*, 920 S.W.2d 330, 337 (Tex. Ct. App. 1995), and recover their attorney's fees after prevailing on those claims, 42 U.S.C. § 1988(b); *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983); *Pruett v. Harris Cty. Bail Bond Bd.*, 356 S.W.3d 103, 108 (Tex. Ct. App. 2011) (reversing state district court denial of fees under Section 1988).

C. The Public Interest Weighs Strongly Against a Stay

Finally, the public interest weighs in favor of denying the stay, and Defendants make no argument to the contrary. Indeed, a stay would strip the district court of its ability to adjudicate Plaintiffs' request for a preliminary injunction or temporary restraining order against Dickson, which, if granted, would prevent Dickson from suing Plaintiffs to enforce a blatantly unconstitutional law. It threatens to stop Plaintiffs' claims against Dickson in their tracks, despite this Court's obvious lack

of jurisdiction and the absence of any harm to Dickson. As this Court has recognized, the public interest is served when constitutional deprivations are prevented. *Jackson Women's Health Org*., 760 F.3d 448, 458 n.9 (5th Cir. 2014) (cleaned up); *see also Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 280 (5th Cir. 1996), *cert. denied sub nom. Moore v. Ingebretsen*, 519 U.S. 965 (1996). This Court has already held that a six-week ban on abortion is "doom[ed]" under binding Supreme Court precedent because it violates a person's federal constitutional right to abortion. *Jackson Women's Health Org. v. Dobbs*, 951 F.3d at 248. Every other federal court evaluating a previability abortion ban has agreed and blocked such laws. The public interest demands that this Court not be the first to turn its back on such harms and to embolden those behind S.B. 8's adoption who have so cynically attempted to avoid judicial review of their blatantly unconstitutional action.

CONCLUSION

For these reasons, the Court should dismiss Dickson's appeal and deny his stay motion as moot.

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Respectfully submitted,

/s/ Marc Hearron

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CERTIFICATE OF SERVICE

I hereby certify that on August 27, 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. I certify that counsel for the Defendants-Petitioners are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/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 4692 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).

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