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

WHOLE WOMAN'S HEALTH, et al.,	§	
	§	
Plaintiffs,	§	
v.	§	Cause No. 1:21-cv-00616-RP
	§	
AUSTIN REEVE JACKSON, et al.,	§	
	§	
Defendants.	§	

STATE AGENCY DEFENDANTS' REPLY IN SUPPORT OF RULE 12(b)(1) MOTION TO DISMISS

The State Agency Defendants[1] file this reply in support of their motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1). This Court lacks jurisdiction to entertain Plaintiffs' claims.

I. Sovereign Immunity Bars Plaintiffs' Claims.

Plaintiffs want a federal court to opine on the constitutionality of S.B. 8, so they went in search of someone to sue. But they chose state officials who cannot enforce S.B. 8 as a matter of explicit statutory text. S.B. 8 § 3 (to be codified at Tex. Health & Safety Code § 171.207(a)). Plaintiffs' theory of indirect enforcement is unsupported by statutory text, Plaintiffs' allegations, and the evidence on which they rely. Their claims are barred by sovereign immunity.

[1] Defendants Stephen Brint Carlton, Executive Director of the Texas Medical Board; Katherine A. Thomas, Executive Director of the Texas Board of Nursing; Cecile Erwin Young, Executive Commissioner of the Texas Health and Human Services Commission; Allison Vordenbaumen Benz, Executive Director of the Texas Board of Pharmacy; and Ken Paxton, Attorney General of Texas. Plaintiffs have sued the State Agency Defendants in their official capacities.

A. Plaintiffs have not demonstrated that the State Agency Defendants intend to enforce Section 3.

To overcome sovereign immunity, Plaintiffs must first demonstrate that the State Agency Defendants have a "particular duty" to enforce Section 3's heartbeat provision and a "demonstrated willingness" to do so. *City of Austin v. Paxton*, 943 F.3d 993, 1000-01 (5th Cir. 2019). But, as the State Agency Defendants have explained, they are "prohibited by law from enforcing S.B. 8." ECF 48 at 2.[2] The law provides:

> ***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[.]

S.B. 8 § 3 (to be codified at Tex. Health & Safety Code § 171.207(a)) (emphasis added).

The Abortion Providers say the State Agency Defendants nevertheless "could," ECF 1 ¶ 17, "indirectly enforce" S.B. 8, ECF 56 at 6.[3] As a matter of Texas law, that is dubious. After all, S.B. 8 says there can be "no enforcement" by the State or any of its officers and employees. S.B. 8 § 3 (to be codified at Tex. Health & Safety Code § 171.207(a)). And, contrary to Plaintiffs' characterization (at 14–15), S.B. 8 says there is "no enforcement of this subchapter," not solely "no enforcement . . . of Chapters 19 and 22, Penal Code, in response to violations of this subchapter." One would think that "no enforcement" means "no enforcement." Plaintiffs' "indirect

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[2] It is puzzling that Plaintiffs claim the State Agency Defendants "effectively concede . . . they do have authority under other Texas laws to enforce S.B. 8's terms." ECF 56 at 12 (citing ECF 48 at 8 n.5). To be clear, the State Agency Defendants make no such concession. A footnote citing examples of the general oversight provisions cited in Plaintiffs' complaint does not concede that those provisions extend to S.B. 8 despite S.B. 8's prohibition on enforcement.

[3] Plaintiffs' response clarifies that only the Abortion Providers—not the Abortion Advocates—challenge Section 3. ECF 56 at 6 n.1.

enforcement" theory is hardly the more probable reading. It is certainly not "unequivocal." ECF 56 at 16.

Plaintiffs do not explain why the well-established rule that the specific controls over the general would be "beside the point." ECF 56 at 15. They cite authorities for the proposition that statutes should be construed "so as to give meaning to each provision" and avoid "conflict." ECF 56 at 15. But those maxims are fully consistent with the specific-controls-the-general canon, which applies when there *is* conflict, as Plaintiffs allege there is here.

City of Austin does not help the Abortion Providers. Indeed, *City of Austin* teaches that the mere existence of enforcement power—without demonstrated willingness to exercise it—is not enough to invoke *Ex parte Young*. *See* 943 F.3d at 1001. In *City of Austin*, it was undisputed "that the Attorney General has the authority to enforce [the challenged law]." *Id.* at 998. Yet the court concluded that "the mere fact that the Attorney General has the authority to enforce [the challenged law] cannot be said to 'constrain' the City from enforcing the Ordinance," which meant the City had not shown a "sufficient connection" to enforcement. *Id.* at 1001.

City of Austin also forecloses Plaintiffs' argument that they "need not show a 'demonstrated willingness' on the part of a government official to enforce [the] challenged law." ECF 56 at 16. They contend that *Okpalobi*'s "non-binding plurality opinion" says it is enough that the defendant official "*at least have the ability to act*." ECF 56 at 17 (citing *Okpalobi*, 244 F.3d at 421 (plurality)). To be sure, the plurality used those words. But *City of Austin*—which *is* binding—forecloses Plaintiffs' theory. As explained above, *City of Austin* rejected the plaintiff's attempt to invoke *Ex parte Young* even though there was no dispute the Attorney General "at least had the ability to act." *See* 943 F.3d at 998 (explaining "[t]he State concedes in its brief that the Attorney General has the authority to enforce [the challenged law]"). Under *City*

of Austin, *Okpalobi* cannot be read to reduce *Ex parte Young*'s "some connection" requirement to the bare ability to act.

Fifth Circuit precedent confirms that an official must do *something* to become a proper *Ex parte Young* defendant. In *NiGen Biotech, L.L.C. v. Paxton*, 804 F.3d 389 (5th Cir. 2015), the Attorney General sent "numerous 'threatening letters'" alleging the plaintiff had violated the Texas Deceptive Trade Practices Act. *City of Austin*, 943 F.3d at 1001 (quoting *NiGen*, 804 F.3d at 392-95). In *K.P. v. LeBlanc*, 627 F.3d 115 (5th Cir. 2010), the defendant officials had "denied the plaintiffs coverage for an abortion-related malpractice claim, relying on the challenged statute." *City of Austin*, 943 F.3d at 1000. In *Air Evac EMS, Inc. v. Texas Department of Insurance, Division of Workers' Compensation*, 851 F.3d 507 (5th Cir. 2017), the plaintiffs challenged a workers' compensation rate structure as preempted by federal law, and the defendant officials set the rates and arbitrated disputes about worker's compensation reimbursement. *Id.* at 519. That gave them a sufficient connection to "enforcing" the rate structure. *See id.* And more recently, the Fifth Circuit concluded the Texas Secretary of State was a proper defendant in a Twenty-Sixth Amendment challenge to Texas's restriction on no-excuse absentee voting to those over age 65 because the Secretary promulgated application forms for absentee ballots that included criteria based on age. *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 180 (5th Cir. 2020). There is no such connection here.

Plaintiffs fault the State Agency Defendants for not having "provide[d] specific, binding assurances that they lack authority to enforce S.B. 8 indirectly against Plaintiffs." ECF 56 at 15. The Fifth Circuit recently rejected a similar attempt to shift the burden of disproving *Ex parte Young* to the defendants: "The burden of proof . . . is on the party asserting jurisdiction[.]" *Haverkamp v. Linthicum*, __ F.4th __, No. 20-40337, 2021 WL 3237233, at *6 (5th Cir. July 30, 2021) (per curiam) (citation omitted). Plaintiffs point to no authority saying a defending official

must disclaim intent to enforce. Indeed, *City of Austin* illustrates the fault in that theory. There, despite the Attorney General's undisputed authority to enforce the statute—and without demanding that he disclaim intent to use it—the Fifth Circuit held the plaintiffs had not carried their burden to show even "some scintilla of enforcement." 943 F.3d at 1002.

Plaintiffs' enforcement theory is entirely speculative and is unsupported by any specific allegations of what the State Agency Defendants intend to do. This does not meet the standard of *Ex parte Young*, and the State Defendants remain immune from Plaintiffs' challenge to Section 3.

B. The State Agency Defendants do not "enforce" S.B. 8 section 4.

Plaintiffs next contend they can challenge Section 4 of S.B. 8 under *Ex parte Young* because the State Agency Defendants may seek attorneys' fees under its auspices. Section 4 is a fee-shifting provision. The mere existence of a fee-shifting statute is not an "ongoing violation of federal law." Plaintiffs theorize that this one is an ongoing violation of federal law because its existence "will *immediately* chill Plaintiffs' First Amendment rights to free speech and to petition, and thus deter Plaintiffs from bringing claims that challenge Texas abortion restrictions." ECF 56 at 19. Such a claim is difficult to believe in light of this lawsuit. But as the Seventh Circuit puts it, "the proposition that the [F]irst [A]mendment, or any other part of the Constitution, prohibits or even has anything to say about fee-shifting statutes in litigation seems too farfetched to require extended analysis." *Premier Elec. Constr. Co. v. Nat'l Elec. Contractors Ass'n, Inc.*, 814 F.2d 358, 373 (7th Cir. 1987) (footnote omitted).

Even if Plaintiffs are correct that the First Amendment has something to say about fee shifting, however, the State Agency Defendants do not "enforce" the fee-shifting provision merely by requesting fees (and there's no allegation they've even

done that). There are no allegations that the State Agency Defendants have a "duty" to enforce Section 4 or a demonstrated willingness to do so. Their sovereign immunity remains intact, and the Section 4 claims should be dismissed.

II. Plaintiffs Have Not Met Article III's Requirements.

For related reasons, Plaintiffs do not have Article III standing to sue the State Agency Defendants.

A. Plaintiffs do not have standing under Article III.

For standing to bring their challenge to Section 3 of S.B. 8, the Abortion Providers offer the possibility that the State Agency Defendants "could" "indirectly" enforce S.B. 8 against them. *See* ECF 1 ¶ 107; ECF 56 at 6. As discussed above, that is doubtful as a matter of Texas law—and it is a question neither the State Agency Defendants nor Texas courts have had an opportunity to consider. But even if the State Agency Defendants have such authority, bare authority is not enough. Plaintiffs must also show that some "indirect enforcement" is imminent. They cannot.

The Supreme Court has explained that "[a]llegations of possible future injury" are not enough to demonstrate standing. *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990). Rather, the "threatened injury must be certainly impending to constitute injury in fact." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (citing cases). Stated differently, there must be a "substantial risk" that the harm will occur. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014). Plaintiffs offer nothing but speculation that the State Agency Defendants will interpret state law in such a way as to permit "indirect enforcement" of S.B. 8.

In the First Amendment context, Plaintiffs assert that they need not "expose [themselves] to liability before bringing suit" to challenge the constitutionality of this law. ECF 19 at 53 (citing *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128-29

(2007)). But they still must show *threatened* enforcement by the State Agency Defendants. *MedImmune*, 549 U.S. at 128-29. The "theoretical possibilit[y]" of disciplinary action is not an actual or imminent injury-in-fact. *In re Gee*, 941 F.3d 153, 164 (5th Cir. 2019) (per curiam). Plaintiffs' citation to *Babbitt v. United Farm Workers National Union*, 442 U.S. 289 (1979) is not to the contrary. ECF 56 at 21. The law at issue in *Babbitt* proscribed speech on its face. 442 U.S. at 302. S.B. 8 does not. Rather, it explicitly protects First Amendment rights. S.B. 8 § 3 (to be codified at Tex. Health & Safety Code § 171.208(g)). Thus, Plaintiffs must establish that the State Agency Defendants intend to (wrongly) apply S.B. 8 in a way that infringes Plaintiffs' First Amendment rights. But Plaintiffs provide no allegations this will occur, leaving them without a "substantial risk" of or "certainly impending" injury.

Plaintiffs' allegations depend on a series of contingent events: they must perform a post-heartbeat abortion; their undue-burden defense must fail; the State Agency Defendants must decide that they can indirectly enforce violations of S.B. 8; they must conclude Plaintiffs have violated S.B. 8; they must impose administrative sanctions; and (for the undue-burden claim) they must do so in a way that prevents Plaintiffs from performing abortions, denying access to a large fraction of women in Texas. Plaintiffs' allegations do not establish this chain of speculative events and do not suffice to demonstrate any imminent injury. Therefore, Plaintiffs lack standing to sue the State Agency Defendants for alleged future violations of Section 3.

Plaintiffs have also failed to allege a certainly impending injury from Section 4's fee-shifting provision. Plaintiffs do not identify any fee requests that the State Agency Defendants have made, any threats to make such requests, or any lawsuits that Plaintiffs are "chilled" from bringing. *See Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (stating that where "the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief'" (alteration in original) (quoting

Fed. R. Civ. P. 8(a)(2)). Nor do they cite any case in which a fee-shifting provision has given rise to a First Amendment injury. *See Premier Elec. Constr. Co.*, 814 F.2d at 373 (holding a fee-shifting provision did not violate the First Amendment). Without allegations that the State Agency Defendants are likely to seek attorneys' fees from Plaintiffs, and in such a way as to chill their First Amendment rights, Plaintiffs lack standing.

B. Plaintiffs' claims are not ripe.

For similar reasons, Plaintiffs' claims are not ripe. If a purported injury is "contingent [on] future events that may not occur as anticipated, or indeed may not occur at all," the claim is not ripe for adjudication. *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580-81 (1985) (quotation marks omitted); *see also Monk v. Huston*, 340 F.3d 279, 282 (5th Cir. 2003) ("A court should dismiss a case for lack of 'ripeness' when the case is abstract or hypothetical."). The ripeness doctrine "prevent[s] the courts, through premature adjudication, from entangling themselves in abstract disagreements." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967); *see also Shields v. Norton*, 289 F.3d 832, 835 (5th Cir. 2002) (explaining that a court lacks jurisdiction to decide disputes that are not ripe). Again, Plaintiffs' speculation about what *might* happen in the future does not make their claims ripe in the present.

C. Plaintiffs' other arguments fail.

1. The Abortion Advocates admit they do not seek relief from the State Agency Defendants with respect to Section 3 and the heartbeat provision. ECF 56 at 6 n.1. Thus, their only claim concerns Section 4, which does not appear to be brought on behalf of their clients. Even so, they cannot assert the third-party rights of their clients under *Kowalski v. Tesmer*, 543 U.S. 125, 130, 134 (2004). They do not argue to the contrary.

2. The Abortion Advocates fail to rebut the argument that they have not pleaded a diversion of resources caused by Section 4's fee-shifting provision. ECF 48 at 15-17. At most, they assert it is possible that an actual award of attorneys' fees under Section 4 would result in diverting resources at some time in the future. ECF 56 at 7. But they have alleged no present diversion of resources done because of imminent future injury. *Zimmerman v. City of Austin*, 881 F.3d 378, 390 (5th Cir. 2018) ("The change in plans must still be in response to a reasonably certain injury imposed by the challenged law.").

3. The Abortion Providers do not have third-party standing to assert the rights of their employees. To the extent their staff do not have licenses regulated by the State Agency Defendants, there is no Article III standing, as the State Agency Defendants can only act against regulated individuals.

Next, the Fifth Circuit case cited by Plaintiffs refers only to "practical" difficulties that make the assertion of third-party rights permissible. *Hang On, Inc. v. City of Arlington*, 65 F.3d 1248, 1252 (5th Cir. 1995). But several years later, the Supreme Court in *Kowalski* made clear that there must be a "hindrance." 543 U.S. at 130. The Supreme Court did agree that they have been more forgiving in the First Amendment realm, *id.*, but Plaintiffs have not identified any First Amendment activity in which their (regulated) employees wish to engage that would be prohibited by S.B. 8. *See* S.B. 8 § 3 (to be codified at Tex. Health & Safety Code § 171.208(g)) (precluding liability for speech or conduct protected by the First Amendment).

Further, Plaintiffs' interests are not aligned with their regulated employees, which precludes third-party standing. *Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 15 & n.7 (2004). Plaintiffs' regulated employees would certainly wish to argue the heartbeat provision cannot be enforced against them under S.B. 8. S.B. 8 § 3 (to be codified at Tex. Health & Safety Code § 171.207(a)). Yet, Plaintiffs' entire

theory of standing against the State Agency Defendants is premised on their request that this Court find those Defendants *must* take action against Plaintiffs' employees for any violation of S.B. 8. ECF 56 at 7-10. Plaintiffs' employees may not wish to have a federal court hold that the State Agency Defendants must administratively sanction them. Plaintiffs' attempt to establish third-party standing fails.

CONCLUSION & PRAYER

For all the foregoing reasons, as well as the reasons set forth in the State Agency Defendants' motion to dismiss, the State Agency Defendants respectfully request this Court to dismiss all claims against them for lack of jurisdiction.

Respectfully submitted.

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

GRANT DORFMAN
Deputy First Assistant Attorney General

SHAWN E. COWLES
Deputy Attorney General for Civil Litigation

THOMAS A. ALBRIGHT
Chief - General Litigation Division

/s/ Benjamin S. Walton
BENJAMIN S. WALTON
Texas Bar No. 24075241
Benjamin.Walton@oag.texas.gov
CHRISTOPHER D. HILTON
Texas Bar No. 24087727
Christopher.Hilton@oag.texas.gov
HALIE DANIELS
Texas Bar No. 24100169
Halie.Daniels@oag.texas.gov
Assistant Attorneys General
General Litigation Division

BETH KLUSMANN
Texas Bar No. 24036918
Beth.Klusmann@oag.texas.gov
NATALIE D. THOMPSON
Texas Bar No. 24088529
Natalie.Thompson@oag.texas.gov
Assistant Solicitors General

Office of the Attorney General
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 463-2120 – Phone
(512) 320-0667 – Fax

Counsel for State Defendants

CERTIFICATE OF SERVICE

I hereby certify that on August 13, 2021, a true and correct copy of this document was electronically filed using the Court's CM/ECF system, which will send notification of such filing to the following counsel of record:

Christen Mason Hebert Johns & Hebert PLLC 2028 East Ben White Blvd Suite 240-1000 Austin, TX 78741 (512) 399-3150 chebert@johnshebert.com *Attorney for all Plaintiffs*	Julie Murray Richard Muniz Planned Parenthood Federation of America 1110 Vermont Ave., NW Ste 300 Washington, DC 20005 (202) 973-4997 Julie.murray@ppfa.org Richard.muniz@ppfa.org *Attorneys for Planned Parenthood of Greater Texas Surgical Health Services, Planned Parenthood South Texas Surgical Center, Planned Parenthood Center for Choice, and Dr. Bhavik Kumar*
Stephanie Toti LAWYERING PROJECT 41 Schermerhorn Street #1056 Brooklyn, NY 11201 (646) 490-1083 stoti@lawyeringproject.org *Attorneys for The Afiya Center, Frontera Fund, Fund Texas Choice, Jane's Due Process, Lilith Fund for Reproductive Equity, North Texas Equal Access Fund*	Rupali Sharma LAWYERING PROJECT 197 Pine Street, Apt. 23 Portland, ME 04102 (908) 930-6445 rsharma@lawyeringproject.org *Attorneys for The Afiya Center, Frontera Fund, Fund Texas Choice, Jane's Due Process, Lilith Fund for Reproductive Equity, North Texas Equal Access Fund*

Molly Duane Kirby Tyrrell Melanie Fontes Center for Reproductive Rights 199 Water Street, 22nd Floor New York, NY 10038 (917) 637-3631 mduane@reprorights.org ktyrrell@reprorights.org mfontes@reprorights.org Jamie A. Levitt J. Alexander Lawrence Morrison & Foerster LLP 250 W. 55th Street New York, NY 10019 (212) 468-8000 jlevitt@mofo.com alawrence@mofo.com *Attorneys for Whole Woman's Health, Whole Woman's Health Alliance, Marva Sadler, Southwestern Women's Surgery Center, Allison Gilbert, MD., 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.*	Julia Kaye Brigitte Amiri Chelsea Tejada American Civil Liberties Union Foundation 125 Broad Street, 18th Floor New York, NY I 0004 (212) 549-2633 jkaye@aclu.org bamiri@aclu.org ctejada@aclu.org Lorie Chaiten American Civil Liberties Union Foundation 1640 North Sedgwick Street Chicago, IL 60614 (212) 549-2633 rfp_lc@aclu.org Adriana Pinon David Donatti Andre Segura ACLU Foundation of Texas, Inc. 5225 Katy Freeway, Suite 350 Houston, TX 77007 Tel. (713) 942-8146 Fax: (713) 942-8966 apinon @aclutx.org ddonatti@aclutx.org asegura@aclutx.org *Attorneys for Houston Women's Clinic*

Hacker Stephens LLP Heather G. Hacker Andrew B. Stephens 108 Wild Basin Rd. South Suite 250 Austin, TX 78746 (512) 399-3022 heather@hackerstephens.com andrew@hackerstephens.com *Attorneys for Penny Clarkston*	Mitchell Law PLLC Jonathan F. Mitchell 111 Congress, Suite 400 Austin, TX 78701 (512) 686-3940 jonathan@mitchell.law *Attorney for Mark Lee Dickson*
M. Shane McGuire THE MCGUIRE FIRM, PC 102 N College, Suite 301 Tyler, Texas 75702 (903) 630-7154 – Phone (903) 630-7173 – Fax *Additional attorney for Judge Austin Reeve Jackson*	

/s/ Benjamin S. Walton
BENJAMIN S. WALTON
Assistant Attorney General