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

UNITED STATES OF AMERICA,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Case No. 1:21-cv-00796-RP
	§	
THE STATE OF TEXAS,	§	
	§	
Defendant.	§	

Exhibit F

David L. Carrasco SB8 Data

1. In the last three years, what is the number per year of pregnant students.
    a. 2021 - 3 students
    b. 2020 -1 student
    c. 2019 -22 students
    d. Source –> **Health Utilization Report**

2. What do we believe to be the cost of our services specific to pregnant students based on PRH 2.3 R7?
    a. Physician (M.D) -Averages 5 hours per month at regular OBS
    b. 5 hours @ ($150.00)/month = $750.00
    c. Family Planning Coordinator/Pregnancy 4 hours @ ($29)/month education presentation= $116.00
    d. Nursing 8 hour @ ($29.00)/month nursing visits/pregnancy = $232.00
    e. TEAP 2 hours @ ($24.00) / month referral = $48.00
    f. CMHC 2 hours @ ($75.00)/month referral = $150.00
    g. Laboratory (HIV $5.00, Chlamydia $21.65, Gonorrhea: $9.00, hcg $8.00, CBC $3.50) = $47.15
    h. Prenatal medications 100 tabs bottle HHS = $1.76 (3 months' supply per student)

    <u>Last full year at regular OBS (2019) used to determine a cost/pregnant student</u>
    i. **2021** – 3 students a@ $750.00 + $348.00 + $48 + $150 + $47.15 = $4,029.45/month
    j. **2020** – 1 student @ $750.00 + $348.00 + $48 + $150 + $47.15 = $1,343.15/month
    k. **2019** – 22 students @ $750.00 + $348.00 + $48 + $150 + $47.15 = $29,549.30/month (average enrollment up to 7 months)

3. Of the total number of pregnancies, how many students opt to terminate pregnancy?
    a. None

4. Of the students who have opted to terminate pregnancy, how many did we transport via center transportation?
    a. None

5. Please also consider what additional expenses may occur should you need to drive a student to the nearest out of state clinic?
    a. Nearest out of state clinic is in Las Cruces which is 57 miles one way for an hour and a round trip is 114 miles; Staff staying with student at clinic (4 – 5 hrs. for procedure = 7 hrs. Staff Salary $13.00 x 7 = $97.00; Gas $3.15 per gallon depending on the vehicle is $40.00.
    b. To transfer a student to the nearest out of state center – Albuquerque Job Corps Center:
        i. Airline ticket plus luggage is $200.00
    c. Emergency evacuation per Ambulance is $800.00
    d. Average cost of abortion in Las Cruces in NM is $800.00 with no complications; with complications is $2000.00.

From: Attipoe, Doe - ETA JC
To: Martino, Thony - ETA
Cc: June Rentas
Subject: FW: CARRASCO: Pregnancy Data
Date: Wednesday, September 8, 2021 12:10:10 PM
Attachments: image001.png
Carrasco Pregnancy Data.docx

Good morning:
This was sent last night at 9:14 p. m. I hope you received it.
Thanks.
Doe

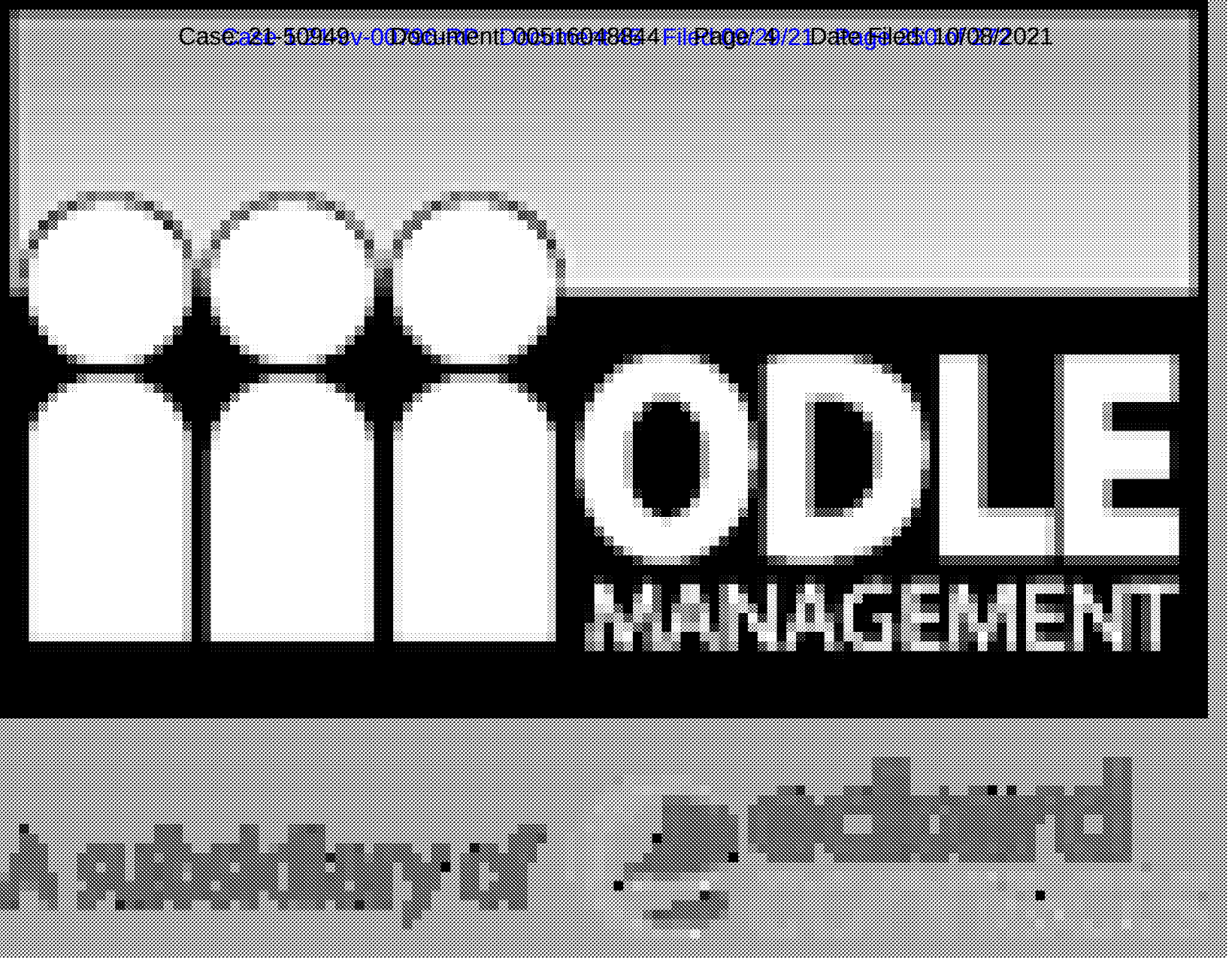
From: Doe Attipoe
Sent: Tuesday, September 7, 2021 9:14 PM
To: 'Martino.Thony@dol.gov' <Martino.Thony@dol.gov>
Cc: June Rentas <Rentas.June@jobcorps.org>; Cheryll Yowell <cheryll.yowell@serratocorp.com>; Lisa Odle <Odle.Lisa@odlemanagement.com>; Stephen Fuller <Fuller.Stephen@dol.gov>
Subject: CARRASCO: Pregnancy Data

Good evening Thony:
Attached is Carrasco's revised Pregnancy Data for your review. Let me know if you have any questions.
Thanks.

Doe Attipoe M. Ed.
Center Director

David L. Carrasco Job Corps Center
11155 Gateway West
El Paso, TX 79935

Office: 915-633-0999
Cell: 915-216-8697
Fax: 915-594-9173
attipoe.doe@jobcorps.org



Redacted

David L. Carrasco SB8 Data

1. In the last three years, what is the number per year of pregnant students.
    a. 2021 - 3 students
    b. 2020 -1 student
    c. 2019 -22 students
    d. Source –> **Health Utilization Report**

2. What do we believe to be the cost of our services specific to pregnant students based on PRH 2.3 R7?
    a. Physician (M.D) -Averages 5 hours per month at regular OBS
    b. 5 hours @ ($150.00)/month = $750.00
    c. Family Planning Coordinator/Pregnancy 4 hours @ ($29)/month education presentation= $116.00
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    g. Laboratory (HIV $5.00, Chlamydia $21.65, Gonorrhea: $9.00, hcg $8.00, CBC $3.50) = $47.15
    h. Prenatal medications 100 tabs bottle HHS = $1.76 (3 months' supply per student)

    <u>Last full year at regular OBS (2019) used to determine a cost/pregnant student</u>
    i. **2021** – 3 students a@ $750.00 + $348.00 + $48 + $150 + $47.15 = $4,029.45/month
    j. **2020** – 1 student @ $750.00 + $348.00 + $48 + $150 + $47.15 = $1,343.15/month
    k. **2019** – 22 students @ $750.00 + $348.00 + $48 + $150 + $47.15 = $29,549.30/month (average enrollment up to 7 months)

3. Of the total number of pregnancies, how many students opt to terminate pregnancy?
    a. None

4. Of the students who have opted to terminate pregnancy, how many did we transport via center transportation?
    a. None

5. Please also consider what additional expenses may occur should you need to drive a student to the nearest out of state clinic?
    a. Nearest out of state clinic is in Las Cruces which is 57 miles one way for an hour and a round trip is 114 miles; Staff staying with student at clinic (4 – 5 hrs. for procedure = 7 hrs. Staff Salary $13.00 x 7 = $97.00; Gas $3.15 per gallon depending on the vehicle is $40.00.
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	§	
THE STATE OF TEXAS,	§	
	§	
Defendant.	§	

Exhibit G

From: Denise Pinson
To: Martino, Thony - ETA
Cc: Fuller, Stephen - ETA; McCoy, Demoyn - ETA Ctr; Gutierrez, David - ETA JC
Subject: Fw: Center SB8 Info
Date: Wednesday, September 8, 2021 11:03:13 AM
Attachments: Laredo Info preq.docx

Mr. Martino:

Please see updated information for the Laredo JCC. Please contact me with any additional questions. Thank you.

Denise N. Pinson, PMP, CF APMP
Vice President, Education and Training

Strategix Management LLC
2101 L Street NW, Suite 400
Washington, DC 20037
direct | 202.924.3873
office | 202.467.8356
email | dpinson@strategixmanagement.com

www.strategixmanagement.com

cid:image004.png@01D46A73.3EFB31E0

From: David Gutierrez <Gutierrez.David@jobcorps.org>
Sent: Wednesday, September 8, 2021 7:40 AM
To: Denise Pinson <dpinson@strategixmanagement.com>
Cc: Monica Robledo <Robledo.Monica@jobcorps.org>; Laura Ramirez <Ramirez.Laura@jobcorps.org>
Subject:

David A. Gutierrez

Center Director
Laredo Job Corps Center

Phone 956-727-5147
Mobile 956-744-8651
Gutierrez.David@jobcorps.org

Laredo Info

1. In the last three years, what is the number per year of pregnant students.

   a. 2 for 2018

   b. 1 for 2019, Source – Health Utilization Report/MSWR CIS report

   c. 0 for 2020

2. What do we believe to be the cost of our services specific to pregnant students based on PRH 2.3 R7?

   a. 2018-2019 Doctors Hospital ER Visit 3,204, $7.13 mileage, $22.00 staff supervision

   b. 2019-2020 No expenses

   c. 2020-2021 No expenses

3. Of the total number of pregnancies, how many students opt to terminate pregnancy?

   a. 0

   b. 0

   c. 0

4. Of the students who have opted to terminate pregnancy, how many did we transport via center transportation?

   a. 0

   b. 0

   c. 0

5. Please also consider what additional expenses may occur should you need to drive a student to the nearest out of state clinic?

   Student and 1 chaperone via GSA vehicle nearest state clinic is in Sulphur LA, 7 hours away, 484 miles. The mileage and cost of an employee to chaperone (per diem $96 hotel, $55 meals a day, and mileage $522.72). This would be an overnight stay.

.

6. ADD: Transportation Expenses: Student and 1 chaperone via Greyhound Bus

   a. Alternate bus transportation $402 per person.

   b. Food $55 per person per day

   c. Hotel $96

Laredo Info

1. In the last three years, what is the number per year of pregnant students.

   a. 2 for 2018

   b. 1 for 2019, Source – Health Utilization Report/MSWR CIS report

   c. 0 for 2020

2. What do we believe to be the cost of our services specific to pregnant students based on PRH 2.3 R7?

   a. 2018-2019 Doctors Hospital ER Visit 3,204, $7.13 mileage, $22.00 staff supervision

   b. 2019-2020 No expenses

   c. 2020-2021 No expenses

3. Of the total number of pregnancies, how many students opt to terminate pregnancy?

   a. 0

   b. 0

   c. 0

4. Of the students who have opted to terminate pregnancy, how many did we transport via center transportation?

   a. 0

   b. 0

   c. 0

5. Please also consider what additional expenses may occur should you need to drive a student to the nearest out of state clinic?

   Student and 1 chaperone via GSA vehicle nearest state clinic is in Sulphur LA, 7 hours away, 484 miles. The mileage and cost of an employee to chaperone (per diem $96 hotel, $55 meals a day, and mileage $522.72). This would be an overnight stay.

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UNITED STATES OF AMERICA,	§	
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Plaintiff,	§	
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	§	
THE STATE OF TEXAS,	§	
	§	
Defendant.	§	

Exhibit H

From: Rodney Butler
To: Martino, Thony - ETA
Subject: RE: Transportation Cost
Date: Wednesday, September 8, 2021 10:41:33 AM
Attachments: image001.jpg
image002.png
image003.jpg
image004.png
image005.png

See AT Transportation cost below.

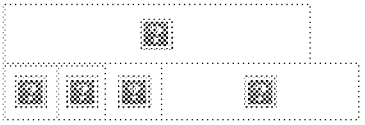
From: Rodney Butler
Sent: Wednesday, September 8, 2021 9:33 AM
To: 'Martino, Thony - ETA' <martino.thony@dol.gov>
Cc: Rodney Butler <rbutler@adamsaai.com>
Subject: Transportation Cost

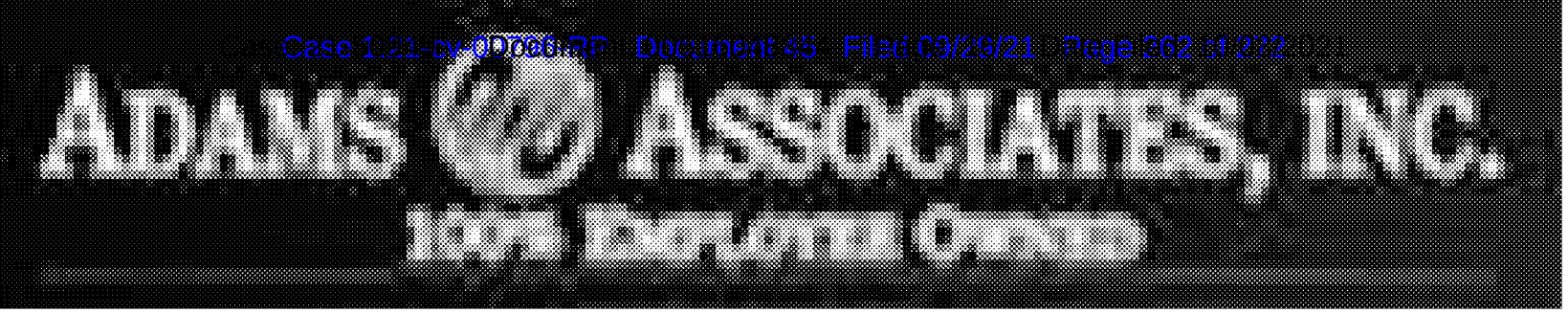
Here is the first part of the transportation costs. I will have the transfer information soon.

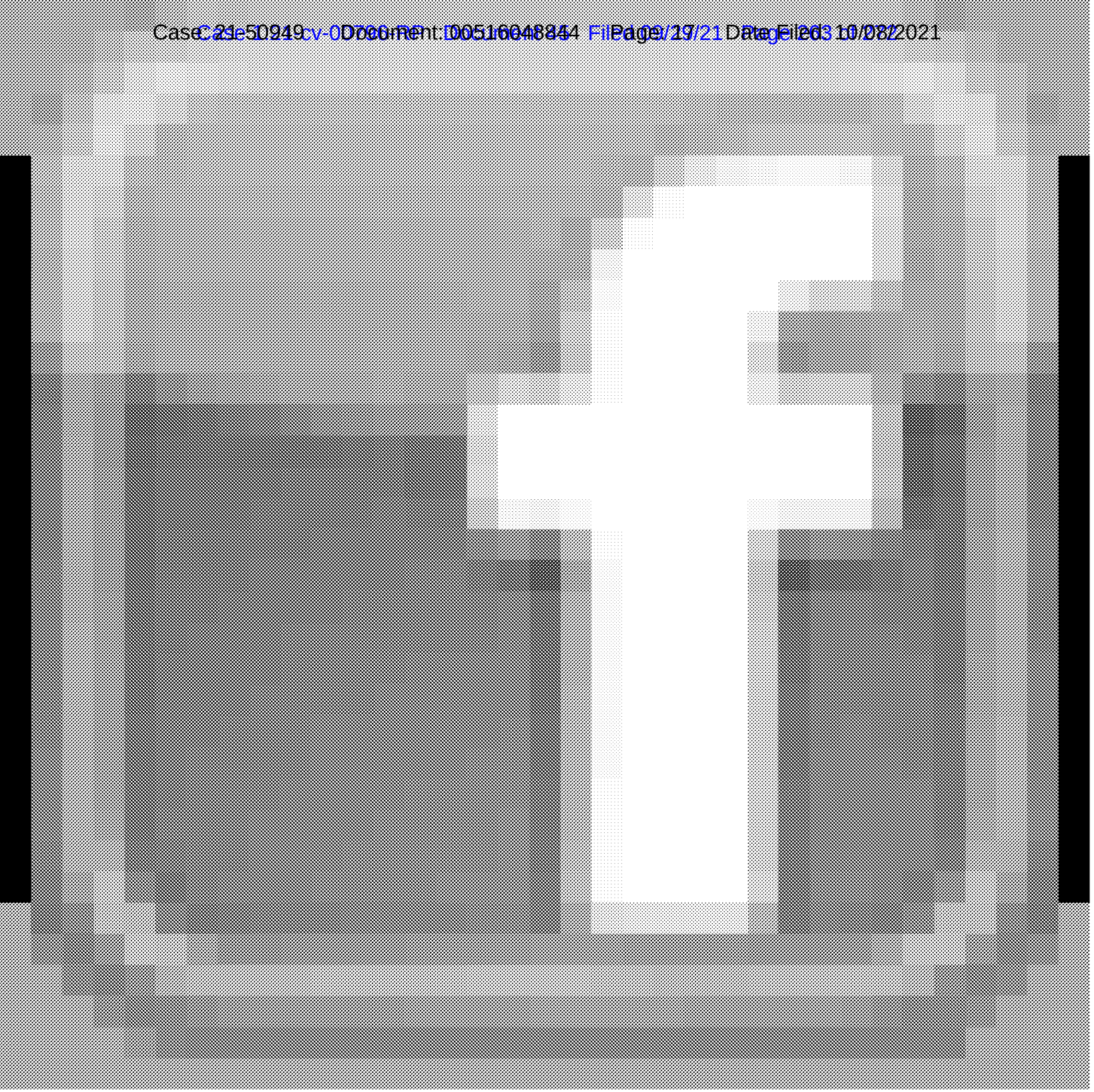
1. In the last three years, what is the number per year of pregnant students.
    a. 44
    b. 13
    c. 3
    d. Source – Health Utilization Report
2. What do we believe to be the cost of our services specific to pregnant students based on PRH 2.3 R7?
    a. Nurse Practitioner is the Pregnancy/Family Planning Coordinator.
    b. Average 12-14 hours per month at regular OBS,
    c. 14 hours/month x 12 months/year @ annual salary $110,442 (based on salary.com average wage) = $8,920.80
    d. Last full year at regular OBS (2019) used to determine a cost/pregnant student
    e. **2019** - $8,920.80/44 = 202.75/student
    f. **2020** – 13*202.75 = $2,635.75
    g. **2021** – 3*202.75 = $405.50
3. Of the total number of pregnancies, how many students opt to terminate pregnancy
    a. We do not have knowledge of this number
4. Of the students who have opted to terminate pregnancy, how many did we transport via center transportation?
    a. We do not have knowledge of this number
5. What additional expenses may occur should you need to drive a student to the nearest out of state clinic?
    a. The cost would be significant since we are not close to another state. If we were to drive to Santa Teresa, New Mexico it would be 1160 miles round trip with an overnight stay for the driver and student.
    b. Student Per Diem Room = $96
    c. Student Per Diem = $41.25*2 = $82.50
    d. Staff Per Diem Room = $96
    e. Staff Per Diem - $41.25*2 = $82.50
    f. Mileage – 1160*0.56 = $649.60
    g. Staff Salary – 2 days x 8 hours x $26.75 = $428
    h. Total – $1,434.60
6. What additional expenses may occur should you need to transfer a student to another center out of state?

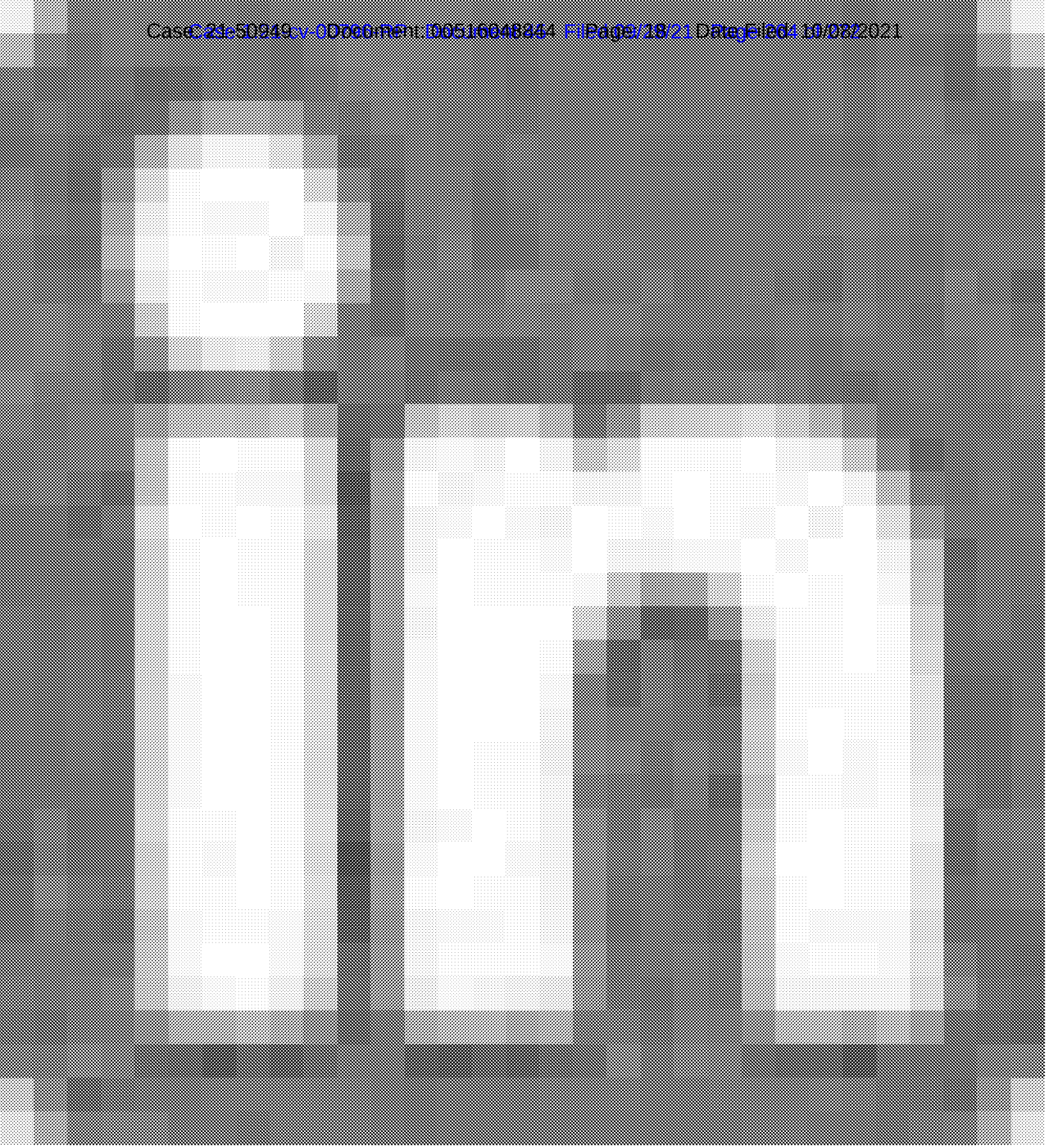
a. 9 AT Transfers the prior full PY.
b. Total Transportation cost - $2185.60
c. $242.85 per student (one way)
d. For this exercise, we would double that cost for the return back to the home center
e. Total cost per student - $485.70

Rodney H. Butler
Executive Director of Business Development, Capture and Regional Operations
10400 Little Patuxent Parkway, Suite 320
Columbia, MD 21044
C: 443.414.6581 O: 410.964.2888 F: 410.964.2961




ADAMS & ASSOCIATES, INC.





IN THE UNITED STATES DISTRICT COURT
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UNITED STATES OF AMERICA,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Case No. 1:21-cv-00796-RP
	§	
THE STATE OF TEXAS,	§	
	§	
Defendant.	§	

Exhibit I

From: Cheryll Yowell
To: Martino, Thony - ETA
Cc: Brown, Bobby - ETA JC
Subject: RE: GARY SB8 Info
Date: Wednesday, September 8, 2021 10:50:45 AM
Attachments: image001.png
North Texas SB8 Info.docx

Thony,

I also added that information into the document I sent you yesterday. It's attached if you need it.

Cheryll

From: Bobby Brown <Brown.Bobby@jobcorps.org>
Sent: Wednesday, September 8, 2021 9:23 AM
To: Thony Martino <martino.thony@dol.gov>
Cc: Cheryll Yowell <Cheryll.Yowell@serratocorp.com>
Subject: RE: GARY SB8 Info

Thony,

Transportation costs are below.

Bobby Brown
Center Director
North Texas Job Corps
1701 North Church Street
Mckinney, TX 75069
(972) 547-7850
Brown.Bobby@jobcorps.org

From: Thony Martino
Sent: Wednesday, September 8, 2021 8:12 AM
To: Cheryll Yowell <cheryll.yowell@serratocorp.com>; Bobby Brown <Brown.Bobby@jobcorps.org>; Butler, Robert D - OASAM DAL <Butler.Robert.D@dol.gov>; Lorraine Lane <Lane.Lorraine@jobcorps.org>; Doe Attipoe <Attipoe.Doe@jobcorps.org>; 'Denise Pinson' <dpinson@strategixmanagement.com>; David Gutierrez <Gutierrez.David@jobcorps.org>
Cc: Stephen Fuller <Fuller.Stephen@dol.gov>
Subject: RE: GARY SB8 Info

Expedited timeline:

I need all transportation costs back into me now please.

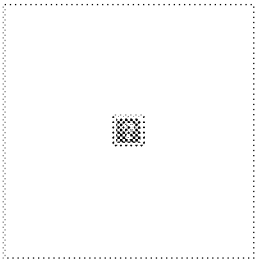
- Current Transportation Cost- Louisiana – Driving $485.00 (two drivers, gas, and per diem). Airfare $349.00.00 One way includes luggage fees
- Transportation Cost to Alternate Service Location - $956.00 Driving (two drivers gas, hotel and per diem) Airfare New Mexico $336.00 One way includes luggage fees
- Average Transfer Cost = $531.50 considering all four options

---

From: Martino, Thony - ETA
Sent: Tuesday, September 7, 2021 5:49 PM
To: Cheryll Yowell <Cheryll.Yowell@serratocorp.com>; Brown, Bobby - ETA JC <Brown.Bobby@jobcorps.org>; Butler, Robert D - OASAM DAL <Butler.Robert.D@dol.gov>; Lane, Lorraine - ETA JC <Lane.Lorraine@jobcorps.org>; Attipoe, Doe - ETA JC CTR (Attipoe.Doe@jobcorps.org) <Attipoe.Doe@jobcorps.org>; Denise Pinson <dpinson@strategixmanagement.com>; Gutierrez, David - ETA JC <Gutierrez.David@jobcorps.org>
Cc: Fuller, Stephen - ETA <Fuller.Stephen@dol.gov>
Subject: GARY SB8 Info

Here's the Gary's doc we went over today. Please complete the transportation expenses and if possible return by mid morning. If your data does not look like Gary's please change course to add.

Thony Martino
Acting Deputy National Director
Office of Job Corps
Employment and Training Administration
U.S. Department of Labor
202-329-2648



North Texas SB8 Info

Question 1

In the last 3 years how many pregnant students were served?

- Begin on 8/31/2021 and go back three years.

12 (information derived from CIS report, health utilization report, log in wellness)

Question 2

What is the cost of providing services to those pregnant students? -The center incurs zero costs when a student is pregnant because the student is automatically placed on medical insurance. The only time the center will incur a cost is when the student requires medications related to the pregnancy. Those medications are purchased through HHS and are stock meds. Students have no extra cost out of pocket. If the student does not have insurance for their first trimester appointments, they will be seen by the center physician until they are able to be seen for their OB appointments with insurance.

- Please consider how pregnant students are served on center:
    - How often are they seen in wellness? -They are seen once a month during the first trimester or as frequently as needed.
    - Do we transport to doctor visits? -Yes, we provide transportation to doctor visits. Transportation is provided by center transportation for every appointment up until delivery.
    - What about high-risk pregnancies? Is there extra monitoring, etc? -Yes, those students are encouraged to come to wellness when they have certain signs and symptoms of imminent premature labor. Students who show a need for further care will then be transported to OB emergency room for emergency care. If there is a very high risk, the center will call 911 and incur the cost of 911. As of today, the center has not had to call 911 for a student who is in labor.

Question 3

Of the number from question #1, how many opted to terminate the pregnancy?
Two students opted to terminate the pregnancy. The one student who opted to have an abortion, the center did not pay for the termination. The center does not incur costs of students who choose to have an abortion due to change notice 14-05 . The center did not transport the student to the abortion clinic.

- State the source of that information. How do we know? -The information is provided in change notice 14-05. Additional information can also be found in the PRH and the Family Planning TAG. All student information, whether they choose to deliver or have an abortion is also documented in the student health records.
- How many did the center transport? -The center transported 0 pregnant students.
- How many used the MSWR code for abortion in CIS? -The MSWR code for abortion was used for 1 student.

Question 4 – Transportation Expenses

Please also consider what additional expenses may occur should you need to drive a student to the nearest out of state clinic?

Current Transportation Cost- Louisiana

- Driving $485.00 (two drivers, gas, and per diem).
- Airfare $349.00.00 One way includes luggage fees

Transportation Cost to Alternate Service Location – New Mexico

- Driving (two drivers, gas, hotel and per diem) $956.00
- Airfare New Mexico $336.00 One way includes luggage fees
- Average Transfer Cost = $531.50 considering all four options

Exhibit 5: Motion To Intervene By Erick Graham, Jef Tuley, and Mistie Sharp

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

United States of America

Plaintiff,

v.

The State of Texas,

Defendant.

Case No. 1:21-cv-00796-RP

MOTION TO INTERVENE

Erick Graham, Jeff Tuley, and Mistie Sharp respectfully move to intervene as of right under Rule 24(a)(2). Each of these proposed intervenors also moves for permissive intervention under Rule 24(b)(1)(B). The United States is attempting to deprive Mr. Graham, Mr. Tuley, and Ms. Sharp (as well as countless others) of their state-law right to bring private civil-enforcement suits against individuals and entities that violate the Texas Heartbeat Act. And it is seeking to prevent them from bringing *any* civil-enforcement lawsuits under Senate Bill 8, even when they sue over conduct that is clearly unprotected by the Constitution. The categorical, across-the-board injunction that the United States is seeking defies the severability requirements in Senate Bill 8, which instruct this Court to sever and preserve every constitutional provision and every constitutional application of the statute. *See* Senate Bill 8, 87th Leg. §§ 3, 5, 10. Mr. Graham, Mr. Tuley, and Ms. Sharp seek intervention to preserve their state-law rights and to ensure that Senate Bill 8's severability requirements are observed and enforced. They also seek intervention to dispute the United States' contention that they (and other private individuals who might sue under Senate Bill 8) are part of "the State of Texas" and can be subject to injunctive relief directed at the State.

FACTS

Mr. Graham, Mr. Tuley, and Ms. Sharp[1] are Texas residents who are interested in bringing civil-enforcement lawsuits against individuals or entities that violate the Texas Heartbeat Act. *See* Declaration of Erick Graham ¶¶ 8–10 (attached as Exhibit 1); Declaration of Jeff Tuley ¶¶ 8–10 (attached as Exhibit 2); Declaration of Mistie Sharp ¶¶ 8–10 (attached as Exhibit 3). None of these proposed intervenors have any intention of suing over conduct that is arguably protected by the Supreme Court's interpretations of the Constitution. Instead, the proposed intervenors intend to sue only individuals and entities whose conduct is clearly unprotected by the Constitution, and who cannot plausibly assert an "undue burden" defense under section 171.209 of the Texas Health and Safety Code.

Mr. Graham, for example, intends to sue only employers and insurance companies that provide or arrange for coverage of abortions that violate Senate Bill 8. *See* Graham Decl. at ¶ 9. Mr. Graham also intends to sue the city of Austin if it uses taxpayer money to subsidize the provision of post-heartbeat abortions performed in Austin, as it was doing before the Heartbeat Act took effect. *See id.* at ¶ 9; *see also Zimmerman v. City of Austin*, 620 S.W.3d 473, 482 (Tex. App.—El Paso 2021, pet. filed). Mr. Graham has focused on these entities because the Supreme Court has made clear that there is no constitutional right to taxpayer subsidies or private insurance coverage of abortion, so there is no possible argument that any of Mr. Graham's intended lawsuits would violate the Constitution or anyone's constitutional rights. *See Harris v. McRae*, 448 U.S. 297, 325 (1980); Graham Decl. at ¶ 10. In addition, the entities that Mr. Graham intends to sue lack third-party standing to assert the constitutional rights of abortion patients under the tests for third-party standing established by the Supreme Court. *See, e.g.*, *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004).

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1. For simplicity and ease of exposition, we will refer to Mr. Graham, Mr. Tuley, and Ms. Sharp as "the movants" or "the proposed intervenors" throughout this brief.

Mr. Tuley intends to sue only individuals or entities that perform or assist abortions that are clearly unprotected under existing Supreme Court doctrine, which include: (a) non-physician abortions; (b) self-administered abortions; and (c) post-viability abortions that are not necessary to preserve the life or health on the mother. *See* Tuley Decl. at ¶ 9.[2] Mr. Tuley has decided to target these individuals and entities because the Supreme Court has made clear that there is no constitutional right to abortion in any of these scenarios, so there is no conceivable argument that any of those intended lawsuits would violate the Constitution or anyone's constitutional rights. *See id.* at ¶ 10; *Roe v. Wade*, 410 U.S. 113, 164–65 (1973); *Connecticut v. Menillo*, 423 U.S. 9, 9–10 (1975); *Mazurek v. Armstrong*, 520 U.S. 968, 971 (1997). These types of abortions were already prohibited before the Texas Heartbeat Act became effective, but the Heartbeat Act provides a private-enforcement mechanism that was previously unavailable. Preserving this enforcement mechanism is important to Mr. Tuley because several district attorneys in Texas refuse to enforce these laws.

Ms. Sharp intends to sue only abortion funds who pay for post-heartbeat abortions performed in Texas. *See* Sharp Decl. at ¶ 9. Ms. Sharp has decided to target these entities because there is no constitutional right to pay for another person's abortion, and there is no constitutional right to receive financial assistance from others when seeking an abortion. *See id.* at ¶ 10; *Harris v. McRae*, 448 U.S. 297, 325 (1980). In addition, the abortion funds that Ms. Sharp intends to sue lack third-party standing to assert the constitutional rights of abortion patients under the tests for third-party standing established by the Supreme Court. *See, e.g.*, *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004). Although the Supreme Court has allowed abortion *providers* to

2. Mr. Tuley has no intention of suing any pregnant woman who aborts or attempts to abort her unborn child. *See* Tuley Decl. at ¶ 7; Tex. Health & Safety Code § 171.206(b)(1) (forbidding such lawsuits).

assert the third-party rights of abortion patients in constitutional litigation,[3] it has never allowed abortion funds to assert the constitutional rights of abortion patients.

I. The Movants Are Entitled To Intervene As Of Right Under Rule 24(a)(2)

Rule 24(a)(2) requires a court to allow intervention to anyone who:

> claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Fed. R. Civ. P. 24(a)(2). And the Fifth Circuit has held that a court should allow intervention under Rule 24(a)(2) if: (1) the application is "timely"; (2) the proposed intervenors have "an interest relating to the property or transaction that is the subject of the action"; (3) the "disposition of the action" will "impair or impede [their] ability to protect [their] interest"; and (4) the interests of the proposed intervenors are "inadequately represented by the existing parties to the suit." *Sierra Club v. Espy*, 18 F.3d 1202, 1204–05 (5th Cir. 1994). Each of these requirements is satisfied.

A. The Motion To Intervene Is Timely

The motion to intervene is timely. *See NAACP v. New York*, 413 U.S. 345, 365 (1973) (the court must be satisfied as to timeliness based on the circumstances of each case). The Fifth Circuit uses four factors to determine timeliness:

> (1) The length of time during which the would-be intervenor actually knew or reasonably should have known of its interest in the case before it petitioned for leave to intervene;
>
> (2) the extent of the prejudice that the existing parties to the litigation may suffer as a result of the would-be intervenor's failure to apply for intervention as soon as it knew or reasonably should have known of its interest in the case;

3. *See, e.g.*, *Singleton v. Wulff*, 428 U.S. 106, 113–18 (1976) (plurality opinion); *June Medical Services LLC v. Russo*, 140 S. Ct. 2103, 2118–20 (2020) (plurality opinion); *id.* at 2139 (Roberts, C.J., concurring).

> (3) the extent of the prejudice that the would-be intervenor may suffer if intervention is denied; and
>
> (4) the existence of unusual circumstances militating either for or against a determination that the application is timely.

Espy, 18 F.3d at 1205. The timeliness "analysis is contextual"; thus, "courts should allow intervention 'where no one would be hurt and greater justice could be attained.'" *Id.* (quoting *McDonald v. E.J. Lavino Co.*, 430 F.2d 1065, 1074 (5th Cir. 1970)).

The United States did not file its lawsuit until September 9, 2021, and it did not move for a preliminary injunction until September 14, 2021. This motion was filed within days of the United States' announced intention to seek an injunction against private individuals. The motion for preliminary injunction is not scheduled to be heard until October 1, 2021, so no party will be prejudiced by the timing of this intervention. And the proposed intervenors will be prejudiced if intervention is denied, as they will not be able to participate in the hearing or present their own evidence and arguments to protect their rights. At such an early stage of the case, the motion to intervene is timely.

B. The Movants Have Interests Relating To The Subject Of The Action

Each of the movants has an obvious "interest" in this action: Their desire to preserve their state-law right to sue individuals and entities that perform or assist abortions in violation of the Texas Heartbeat Act. *See* Graham Decl. at ¶ 6; Tuley Decl. at ¶ 6; Sharp Decl. at ¶ 6; *see also New Orleans Public Service, Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452, 464 (5th Cir. 1984) (en banc) (requiring a "direct, substantial, legally protectable interest in the proceedings"); *id.* ("What is required is that the interest be one which the *substantive* law recognizes as belonging to or being owned by the applicant."). This right is conferred not only by state law, but also by the First Amendment right to petition the courts and the *Noerr–Pennington* doctrine. *See* U.S.

Const. amend I; *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972) (extending the *Noerr–Pennington* doctrine to efforts to sue in court). The United States is seeking to permanently deprive the movants of that right by asking this Court to enjoin every person in the world from suing to enforce Senate Bill 8 in any situation—even when they sue over conduct that is clearly unprotected by the Constitution—and by asking this Court to enjoin the Texas judiciary from "maintaining *any* civil proceeding pursuant to S.B. 8." Proposed Order, ECF No. 6-2 at 2 (emphasis added). And the United States is demanding this grossly overbroad remedy despite the severability requirements that appear throughout Senate Bill 8,[4] and despite the fact that the lawsuits that the movants intend to file are indisputably constitutional and will not result in a violation of anyone's constitutional rights.

The movants also have an "interest" in opposing the United States' contention that they are somehow part of the State of Texas. The State of Texas is the only named defendant in this lawsuit, yet the United States is insisting that the movants (and others) can be enjoined on the theory that the state of Texas comprises every private individual who might sue under Senate Bill 8. *See* Proposed Order, ECF No. 6-2 at 1–2 (asking this Court to enjoin "the State of Texas . . . including private individuals who initiate enforcement proceedings under S.B. 8"). The movants seek intervention to argue that they (and other private individuals who would file lawsuits under S.B. 8) are not part of the State of Texas and cannot be bound by an injunction entered against the State as an entity. *See Hansberry v. Lee*, 311 U.S. 32, 40 (1940) ("[O]ne is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process."); *Hollingsworth v. Perry*, 570 U.S. 693, 709–11 (2013) (holding that private individuals cannot be deemed agents of the state when purporting to appeal on the state's behalf,

4. *See* Senate Bill 8, 87th Leg. §§ 3, 5, 10.

even when the state's supreme court had "determined that they are 'authorized under California law to appear and assert the state's interest' in the validity of Proposition 8." (citation omitted)).

C. Disposition Of This Action Without The Movants' Involvement As Intervenor-Defendants Will Impair Their Ability To Protect Their Interests

The United States is asking this Court to enjoin the movants from filing any lawsuits under Senate Bill 8, even though the movants have never been made a party to this lawsuit by service of process. If the Court grants this requested relief, the movants could be subject to contempt proceedings if they exercise their right to petition the courts under state law and the First Amendment. Excluding the movants from this proceeding and resolving the case without their involvement would not only "impair" their "ability to protect their interests," it would also violate the Due Process Clause if the Court grants the relief sought by the United States. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 112 (1969) ("It was error to enter the injunction against Hazeltine . . . in a proceeding to which Hazeltine was [not] a party."); *Martin v. Wilks*, 490 U.S. 755, 762 (1989) ("A judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings.").

D. The Movants' Interests Are Inadequately Represented By The Parties

The only remaining question is whether the movants' interests are inadequately represented by the parties. The burden to show inadequate representation "is not a substantial one"; in fact, it is "minimal." *Brumfield v. Dodd*, 749 F.3d 339, 345 (5th Cir. 2014); *see also Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n.10 (1972) ("The requirement of the Rule [24(a)] is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal.").

There is certainly reason to believe that the Texas Attorney General's representation of the movants' interests "may be" inadequate. *Id.* The Texas Attorney General's office does not and cannot represent private entities such as the movants—precisely because these private individuals are *not* part of the State of Texas—and it has no particular reason or incentive to press arguments that would shield non-state actors such as the movants from injunctive relief if the entire "State of Texas" were to be enjoined. The Texas Attorney General's office represents the interests of state officers and state entities, not private individuals, and it is forbidden by law to represent private individuals in court. *See* https://www.texasattorneygeneral.gov/about-office/duties-responsibilities ("[T]he Attorney General is prohibited from offering legal advice or representing private individuals"). And it is not even clear that the Texas Attorney General would have standing to assert the rights of private individuals under the First Amendment or the *Noerr–Pennington* doctrine, given that these are third-party rights and there is a heavy presumption against third-party standing in federal court. *See, e.g.*, *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004) ("A party 'generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.'" (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)). So it is at least plausible to "doubt" that the Attorney General's office will effectively represent the movants' interest in excluding themselves from the definition of the "State of Texas"—and that is all that is needed to support intervention under Rule 24(a)(2). *See Trbovich*, 404 U.S. at 538 ("[W]e think it clear that in this case there is sufficient doubt about the adequacy of representation to warrant intervention."); *id.* at 538 n.10 ("The requirement of the Rule [24(a)] is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal."); *Rotstain v. Mendez*, 986 F.3d 931, 939 (5th Cir. 2021) ("A movant's burden to show that its interests are not

adequately protected is 'minimal' and 'satisfied if the applicant shows that representation of his interest "may be" inadequate.'" (quoting *Trbovich*, 404 U.S. at 538 n.10)).

The movants' severability contentions also "may be" inadequately represented absent intervention. The movants do expect that the Texas Attorney General's Office will point out the severability requirements that appear throughout Senate Bill 8, which require reviewing courts to sever and preserve all provisions and applications of the statute that can be enforced without violating the Constitution. But the movants (unlike the Attorney General's office) will be able to provide this Court with concrete evidence of intended lawsuits under Senate Bill 8 that fully comply with existing constitutional doctrines—and that must be preserved in any injunctive remedy that this Court might issue. The Attorney General's office cannot produce evidence of intended lawsuits that it might bring because the State is categorically forbidden to enforce Senate Bill 8. *See* Tex. Health & Safety Code § 171.207.

Intervention will also reduce the likelihood that the movants' severability contentions will be ignored. The United States is trying to induce this Court to overlook the severability requirements of Senate Bill 8 by refusing to acknowledge them in its brief, and by insisting that this Court enjoin the state of Texas from enforcing *any* provision of the statute, including provisions that the United States does not even allege to be unconstitutional. *See* Mot. for TRO or Prelim. Inj., ECF No. 6-1; Proposed Order, ECF No. 6-2. The United States is also asking the Court to enjoin the entire world from bringing *any* private civil-enforcement actions under Senate Bill 8, even when a litigant sues over conduct that is clearly unprotected by the Constitution. *See id.* Allowing the movants to intervene will crystallize the severability issues and make it impossible for the United States (and any court that might consider this case) to ignore the severability requirements in S.B. 8.

II. In The Alternative, The Court Should Grant Permissive Intervention Under Rule 24(b)(1)(B)

The movants also satisfy the requirements for permissive intervention. *See* Fed. R. Civ. P. 24(b)(1)(B) ("On timely motion, the court may permit anyone to intervene who . . . (B) has a claim or defense that share with the main action a common question of law or fact."). To obtain permissive intervention under Rule 24, a movant must demonstrate that: (1) the motion to intervene is timely; (2) its claim or defense has a question of law or fact in common with the existing action; and (3) intervention will not delay or prejudice adjudication of the existing parties' rights. *Id.*; *see United States v. LULAC*, 793 F.2d 636, 644 (5th Cir. 1986) ("Although the court erred in granting intervention as of right, it might have granted permissive intervention under Rule 24(b) because the intervenors raise common questions of law and fact.").

The movants have already established that their motion is timely. *See* Part I.A. *supra*. And intervention will not cause delay or prejudice, as the movants intend to file their brief opposing the preliminary-injunction motion by 9:00 A.M. on September 29, the same day on which the state of Texas's brief is due. Finally, the movants' defenses share common questions of law and fact with the main action. One of the movants' defenses is that the United States cannot deprive them of their right to sue under Senate Bill 8 because they intend to bring civil-enforcement actions only against individuals or entities who have no conceivable constitutional defense for their actions. This defense shares a common question of law with the main action: Are the severability requirements in Senate Bill 8 enforceable, or can they be ignored as the United States is proposing? The movants are also seeking to defend themselves on the ground that they cannot be considered part of "the State of Texas." This too involves a common question of law regarding the scope of permissible injunctive relief that can be entered against the state of Texas as an entity. The Court should therefore grant intervention under Rule 24(b)(1)(B) at minimum and allow the movants to contest the

patently overbroad remedy that the United States is seeking. *See Texas v. United States*, 805 F.3d 653, 656–57 (5th Cir. 2015) (holding that "Rule 24 is to be liberally construed" and that "[f]ederal courts should allow intervention where no one would be hurt and the greater justice could be attained." (citations and internal quotation marks omitted)).

CONCLUSION

The motion to intervene should be granted.

Respectfully submitted.

/s/ Jonathan F. Mitchell

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Counsel for Movants Erick Graham, Jeff Tuley, and Mistie Sharp

Dated: September 22, 2021

CERTIFICATE OF CONFERENCE

I certify that I have conferred with Lisa N. Newman, counsel for the plaintiff, and Will Thompson, counsel for the defendant. The State of Texas is unopposed to our intervention. Ms. Newman asked to review our motion before taking a position, so the United States has not taken a position on the motion at this time.

/s/ Jonathan F. Mitchell
JONATHAN F. MITCHELL
Counsel for Movants Erick Graham, Jeff Tuley, and Mistie Sharp

CERTIFICATE OF SERVICE

I certify that on September 22, 2021, I served this document through CM/ECF upon all counsel of record in this case.

/s/ Jonathan F. Mitchell
JONATHAN F. MITCHELL
Counsel for Movants Erick Graham, Jeff Tuley, and Mistie Sharp

Exhibit 6: Motion To Intervene By Oscar Stilley

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

UNITED STATES OF AMERICA PLAINTIFF

v. Case No. 1:21-cv-796

STATE OF TEXAS DEFENDANT

MOTION TO INTERVENE, BY OSCAR STILLEY

Comes now Oscar Stilley, (Stilley) as a putative intervenor, and for his motion to intervene on the side of the defendants in the instant action, and states:

1. Stilley is the plaintiff in an action entitled Oscar Stilley v. Alan Braid, MD, Bexar County 438th District Court 2021 CI 19940. For the convenience of the Court and parties, a link to Plaintiff's complaint is included here.

2. Stilley's authority to bring this suit is granted by the Texas Heartbeat Act, AKA Senate Bill 8 (SB8).

3. Stilley has thus far invested the sum of $295.29 for the filing fee and convenience fee, to file the aforementioned complaint.

4. Stilley also plans future litigation against various defendants not yet known, should all or part of SB8 be declared constitutional.

5. An adverse judgment against the Defendants in the captioned case would render Stilley's monetary investment worthless, with respect to the litigation prospects of the suit. An adverse judgment would also likely destroy or restrict future litigation prospects.

6. Stilley has reviewed Docket # 28, a motion to intervene by Erick Graham, Jeff Tuley, and Misty Sharp.

7. Said motion, which looks remarkably similar to legal briefs Stilley has read in times gone by, sets forth legal authorities which Stilley respectfully submits would entitle Stilley to intervention as a matter of right, pursuant to authorities cited by the aforesaid three individuals. Stilley sees no need to take the Court's time by repeating such citations and arguments.

8. Stilley wishes to intervene for the protection of his legal and property rights under SB8.

9. If intervention is granted, Stilley plans to present only those non-frivolous arguments in favor of SB8 that would tend to show that SB8, or part thereof, is constitutional and legally valid.

10. Stilley has made calls to Texas Right to Life on Monday, Tuesday, and Friday morning of this week, but has not yet received a return call.

11. Stilley intends to inquire of Texas Right to Life, as to all non-frivolous arguments known to that organization or its personnel, in support of SB8.

12. Stilley from a review of the aforementioned request for intervention, by the 3 putative plaintiffs under SB8, divines that said intervenors are focusing on trying to save only part of SB8.

13. Stilley also divines that said 3 putative intervenors are likely associated with Texas Right to Life, whether directly or indirectly.

14. Stilley hopes to get a copy of SB8, with strike-outs through language that the Texas Right to Life thinks the Court should strike, if severance of illegal provisions is deemed by the Court to be an appropriate remedy.

15. It also appears that said intervenors might hope that the Court will engage in a *de facto* redrafting the language of SB8, in order to save something out of the law.

16. If Stilley gets a chance to inquire, he hopes to discover from Texas Right to Life 1) precisely the changes of language (*de facto* or otherwise) espoused by Texas Right to Life, and 2)

legal authority known to them suggesting that courts, as a general rule, have the power to redraft a statute to save part of it.

17. Stilley also intends to request the support of an *amicus curiae* attorney, to ensure that Stilley's arguments, together with the assistance of *amicus* counsel, adequately present and vigorously argue all non-frivolous arguments in support of the validity of SB8, whether in whole or in part.

18. Stilley intends to present all non-frivolous arguments gained from such conversations, in defense of his property rights in his own current and prospective litigation under SB8.

19. In addition to service via CM/ECF, Stilley plans to fax this pleading to Texas Right to Life, at their posted fax number, so they understand the nature of Stilley's business, and the urgency thereof.

20. Stilley plans to comply with this Court's existing scheduling order, which requires that defense briefs be filed by 9:00 AM on September 29, 2021. Stilley does not anticipate that he will need any deviations from any scheduling order of this court, during the proceedings.

21. Stilley plans to rest upon the High Sabbath to Yahweh his Elohim, (Mighty Ones) known as "Last Great Day," which this year lasts from sundown September 28 to sundown September 29 of 2021.

22. Stilley says this so that Texas Right to Life specifically, and all parties generally, may understand that briefing materials should be provided to Stilley no later than 4:00 PM September 28, 2021, to ensure that Stilley can incorporate them into his brief, and submit them to the Clerk for filing, before sundown at Cedarville, Arkansas on that day. Sundown on that day and location will be at 7:05 PM Central Time.

23. Stilley being in federal custody, on home confinement, requests that court appearances, if necessary, by allowed via Zoom videoconferencing.

24. Stilley is willing to content himself with being heard on written briefs, should the Court find that such is in the interests of justice.

WHEREFORE, premises considered, Stilley respectfully requests that this Court order that Oscar Stilley be granted intervention as a matter of right, under such terms and conditions as the Court finds just; and for such other and further relief as may be appropriate whether or not specifically requested.

Respectfully submitted.

By: /s/ Oscar Stilley
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September 24, 2021

CERTIFICATE OF SERVICE

Oscar Stilley by his signature above certifies that he has caused this pleading to be served on all parties entitled to service, via CM/ECF, upon filing by the clerk. Also, a copy of this pleading is being faxed to Texas Right to Life at their published fax number, 713-952-2041.

Exhibit 7: September 28, 2021 Order Granting Motions To Intervene

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

UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF TEXAS., Defendant.	§ § § § § § § § §	1:21-CV-796-RP

ORDER

Before the Court are the Motion to Intervene by Erick Graham, Jeff Tuley, and Mistie Sharp (collectively the "Texas Residents"), (Dkt. 28), the Motion to Intervene by Oscar Stilley ("Stilley"), (Dkt. 31), and the United States' Response, (Dkt. 38). The Texas Residents seek to intervene both as of right, under Rule 24(a), and permissively, under Rule 24(b). (Dkt. 28, at 4, 10). Stilley seeks to intervene as of right "under such terms and conditions as the Court finds just[,]" as well as any other relief that the Court deems appropriate. Because Stilley is a pro se litigant, the Court will construe his Motion to include a request for permissive intervention.[1] The United States opposes intervention as of right under Rule 24(a), but takes no position on permissive intervention under Rule 24(b). (Dkt. 38, at 1). Both the Texas Residents and Stilley seek to participate in the preliminary injunction hearing scheduled for October 1, 2021, (Dkt. 12). (Dkt. 28, at 5; Dkt. 31, at 4).

On a timely motion, a court may permit anyone to intervene who has a claim or defense that shares with the main action a common question of law or fact. Fed. R. Civ. P. 24(b)(1)(B).

[1] *See Grant v. Cuellar*, 59 F.3d 524, 524 (5th Cir. 1995) (Courts "liberally construe briefs of pro se litigants and apply less stringent standards to parties proceeding pro se than to parties represented by counsel . . . ."); *United States v. Fisher*, 372 F. App'x 526, 528 (5th Cir. 2010) (citing *United States v. Early*, 27 F.3d 140, 141-42 (5th Cir. 1994)) ("[T]he nature of a motion must be determined according to its actual substance . . . ."); *Agueros v. Vargas*, No. SA-07-CV-904-XR, 2008 WL 4179452, at *2 (W.D. Tex. Sept. 5, 2008) (same).

Permissive intervention "is wholly discretionary . . . even though there is a common question of law or fact." *New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452, 470–71 (5th Cir. 1984).

In light of the motions for permissive intervention being unopposed, and pursuant to Rule 24(b), the Court will grant the Texas Residents and Stilley's requests for permissive intervention as defendants. The Court makes no statement as to the requests for intervention as of right. The Court will also allow the Texas Residents and Stilley to participate in the October 1, 2021 preliminary injunction hearing. The Court notes that their participation is premised on their representations that the State of Texas cannot adequately represent their interests, (Dkt. 28, at 7), and thus they will be permitted to raise only those facts and arguments not already put forth by the parties.

Accordingly, **IT IS ORDERED** that Erick Graham, Jeff Tuley, Mistie Sharp's motion to intervene, (Dkt. 28), and Oscar Stilley's motions to intervene, (Dkt. 31), are **GRANTED**. An order allotting time for the October 1, 2021 hearing will follow separately.

SIGNED on September 28, 2021.

ROBERT PITMAN
UNITED STATES DISTRICT JUDGE

Exhibit 8: United States' Reply Memorandum In Support Of Emergency Motion For A Temporary Restraining Order Or Preliminary Injunction

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

UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF TEXAS, Defendant.	Case No. 1:21-cv-796-RP

UNITED STATES' REPLY MEMORANDUM IN SUPPORT OF EMERGENCY MOTION FOR A TEMPORARY RESTRAINING ORDER OR PRELIMINARY INJUNCTION

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INTRODUCTION

It is every state's obligation to adhere to the United States Constitution, as authoritatively construed by the Supreme Court. The individual rights guaranteed by the Constitution cannot be nullified—their exercise deterred, and their promises rendered empty—if only a state government is sufficiently brazen to enact a statute designed to evade judicial review.

Texas's response to the United States' motion for preliminary injunction demonstrates why an injunction is necessary and in the public interest. On Texas's telling, a state is free to enact a law with both the purpose and effect of suppressing the exercise of federal constitutional rights. If the state imposes penalties that are sufficiently punitive to deter constitutionally protected conduct and also outsources enforcement to private parties, then there is nothing federal courts can do to prevent wholesale violations of constitutional rights. No individual plaintiff can invoke the Court's jurisdiction because of the Eleventh Amendment. And according to Texas, the United States cannot sue in its own courts to ensure the supremacy of federal law, because (Texas contends) the federal government is unaffected by the State's systematic suppression of federal constitutional rights and in any event has no authority to challenge it.

Texas makes virtually no effort to justify its intentional defiance of the Constitution on the merits. Nor could it: If Texas wanted in good faith to ask the Supreme Court to overrule *Roe* and *Casey*, none of the unusual features of S.B. 8 would have been necessary. It could simply have banned all abortions after the detection of a fetal heartbeat, acquiesced in an injunction in the lower courts, and asked the Supreme Court to reconsider its precedents. But that is not what Texas did, and the reason is plain. S.B. 8's novel enforcement scheme is calculated to accomplish what no state should be able to do in our federal system: deter, suppress, and render moot rights guaranteed by the Constitution of the United States. The State does not dispute that S.B. 8 has virtually eliminated pre-viability abortions after six weeks of pregnancy in the State. Moreover, the approach Texas has taken need not be confined to the abortion context. If this mechanism works here, it would serve as a blueprint for the suppression of nearly any other constitutional right recognized by the Supreme Court but resented by a state government.

Texas enacted S.B. 8. And the State—through its agencies, officers, and agents—is accountable for it. Texas may have succeeded in suppressing federal constitutional rights in a way that no individual person can easily challenge. But Texas enjoys no immunity from suit by the United States. For the reasons given in our motion and explained in greater detail below, this Court can and should enjoin enforcement of S.B. 8.

ARGUMENT

I. THIS CASE IS A PROPER VEHICLE BY WHICH TO RESOLVE THE CONSTITUTIONALITY OF S.B. 8.

A. The United States Has Authority To Bring This Suit and the Court Has Jurisdiction to Hear It.

As our opening brief explains, the United States brought this suit because S.B. 8 causes it two forms of concrete harm. First, S.B. 8 undermines the supremacy of the Federal Constitution by insulating a plainly unconstitutional law within an enforcement scheme designed to preclude judicial review. Second, S.B. 8 interferes with federal government operations in violation of the preemption and intergovernmental immunity doctrines. These concrete injuries—plainly caused by S.B. 8, and redressable by an injunction against its enforcement—support Article III jurisdiction. *See Vermont Agency of Natural Resources v. U.S. ex rel Stevens*, 529 U.S. 765, 771 (2000) (it is "beyond doubt" that the United States suffers an "injury to its sovereignty arising from violation of its laws"); *Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 159 (5th Cir. 2007) (holding, in a case in which the State had waived its Eleventh Amendment immunity, "[b]ecause the state itself [was] a party, causation and redressability [were] easily satisfied").[1]

[1] Texas additionally argues that the United States lacks *parens patriae* standing and that only States may pursue that theory of standing. Def.'s Mot. to Dismiss, Resp. to Pl.'s Mot. for a Prelim. Inj., & Mot. for Stay Pending Appeal, at 18-19, ECF No. 43 ("Dkt. 43"). That is wrong. *Cf. Massachusetts v. Mellon*, 262 U.S. 447, 485-86 (1923) ("[I]t is no part of [a state's] duty or power to enforce [citizens'] rights in respect of their relations with the federal government. In that field it is the United States, and not the state, which represents them as *parens patriae*, when such representation becomes appropriate; and to the former, and not to the latter, they must look for such protective measures as flow from that status."). In any case, the United States' authority for bringing this lawsuit is not principally founded in its role as *parens patriae* because it is suing to vindicate the government's own interests.

Texas appears not to question the government's authority to bring its preemption and intergovernmental immunity claims that are grounded in equity and the Supremacy Clause.[2] And for good reason: The federal government has well-established authority to sue states directly—not their officials—to challenge state laws that offend the doctrines of conflict preemption or intergovernmental immunity. *See, e.g.*, *Arizona v. United States*, 567 U.S. 387 (2012) (challenge to state law as preempted); *United States v. Washington*, 971 F.3d 856 (9th Cir. 2020), *as amended*, 994 F.3d 994 (9th Cir. 2020) (challenge to state law as violating doctrine of intergovernmental immunity). Texas instead focuses its fire on the United States' request for relief as to its first injury—the harm to the supremacy of federal law. Texas's arguments, however, are inconsistent with the well-established right to seek equitable relief where federal interests are implicated.

1. It Is Well Established That the United States Has the Authority to Sue In Equity to Protect the Public Interest.

Texas questions the government's authority to challenge S.B. 8 on the ground that it violates the Fourteenth Amendment in a manner designed to escape the supremacy of federal law. But the United States' authority to challenge S.B. 8 flows from established Supreme Court precedent.

In *In re Debs*, 158 U.S. 564 (1895), the Supreme Court recognized the government's authority to sue in equity to seek an injunction against the Pullman rail strike. The Court explained that "[e]very government, intrusted by the very terms of its being with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other, and it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter." *Id.* at 584. Although "it is not the province of the government to interfere in any mere matter of private controversy between individuals," the Court continued:

> [W]henever the wrongs complained of are such as affect the public at large, and are in respect of matters which by the constitution are intrusted to the care of the nation, and concerning which the nation owes the duty to all the citizens of securing to them

[2] The Intervenors' brief does not raise "any facts and arguments not raised by the parties," as required by the Court's order. *See* Dkt. 40 at 2. It simply repeats a subset of Texas's arguments. *Compare* Dkt. 43 at 45-49, *with* Dkt. 44 at 18-20.

> their common rights, then the mere fact that the government has no pecuniary interest in the controversy is not sufficient to exclude it from the courts, or prevent it from taking measures therein to fully discharge those constitutional duties.

Id. at 586.

Debs reflects the "general rule that the United States may sue to protect its interests," *Wyandotte Transp. Co. v. United States*, 389 U.S. 191, 201 (1967), and that right to sue is not limited to the protection of statutory (as opposed to constitutional) interests and does not depend on the existence of a statutory cause of action. The Supreme Court has routinely recognized the government's authority to seek equitable relief against threats to various federal interests without an express statutory cause of action. In addition to allowing federal challenges to state laws that conflict with federal law or hinder federal operations (as discussed above), the Court has allowed federal suits to protect the public from fraudulent patents, *United States v. Am. Bell Tel. Co.*, 128 U.S. 315 (1888); to protect tribes, *Heckman v. United States*, 224 U.S. 413 (1912); and to carry out the Nation's treaty obligations, *Sanitary Dist. of Chi. v. United States*, 266 U.S. 405, 426 (1925). *Debs* simply recognizes that the United States has an equally cognizable interest at stake in violations of federal law—including the rights protected by the Federal Constitution—that "affect the public at large, and are in respect of matters which by the constitution are intrusted to the care of the nation, and concerning which the nation owes the duty to all the citizens of securing to them their common rights." 158 U.S. at 586.

Texas does not meaningfully engage with the *Debs* line of precedent, and its argument as to why *Debs* is inapplicable disregards much of the language in that opinion. Texas focuses on *Debs*'s recognition that the United States could sue to protect its proprietary interest in the mails and its statutory authority over rail commerce. *See id.* at 583–84 (citing *United States v. San Jacinto Tin Co.*, 125 U.S. 273, 277 (1888), one of many cases recognizing an equitable cause of action for the United States to sue to protect proprietary interests). From this, Texas asserts that the ability of the United States is limited to bringing a suit only where it maintains a proprietary interest or where a statute affords the government particular powers. Dkt. 43 at 20-21, 28-29. But the *Debs* Court declined to "place [its] decision upon" the narrow proprietary-interest ground, 158 U.S. at 584, and its articulation of the broader holdings discussed above in no way depended on a statute. The Court's broad rationale was

not "dicta," as Texas suggests (Dkt. 43 at 20); it was the basis on which the Court ruled. Nor is it unique to *Debs*. As noted above, the Supreme Court has recognized the government's authority to seek equitable relief without express statutory authorization in other contexts. *See, e.g.*, *Am. Bell*, 128 U.S. at 367 (conceiving of "[t]he essence of the right of the United States" as one that would allow the United States to sue to vindicate "its obligation to protect the public," which in *American Bell* included protecting the public "from the monopoly of the patent which was procured by fraud").[3]

Texas also frames *Debs* as a case "about whether the federal government had standing, not whether it had a cause of action." Dkt. 43 at 28. But that understanding cannot be reconciled with the language of *Debs* itself, which speaks to the government's "*right to apply* to its own courts for any proper assistance in the exercise of" its powers and duties, 158 U.S. at 584 (emphasis added), rather than the courts' *power* to grant such assistance upon application. And it would be inconsistent with the Supreme Court's subsequent observation that the United States is "entitled to invoke the equity jurisdiction of its courts," "in order that it might properly discharge its duty, and that it might obtain adequate relief, suited to the nature of the case, in accordance with the principles of equity." *Heckman*, 224 U.S. at 439; *see also Sanitary Dist. of Chi.*, 266 U.S. at 426 ("The Attorney General by virtue of his office may bring this proceeding and no statute is necessary to authorize the suit.").

Texas recognizes that the United States' suit in *Debs* did, in fact, involve an equitable cause of action. *See* Dkt. 43 at 28-29. Contrary to Texas's understanding, though, the federal government's authority to bring suit in *Debs* did not turn on the existence of an "equitable cause of action to abate

[3] In our opening brief, we identified the Fifth Circuit's decision in *United States v. City of Jackson*, 318 F.2d 1 (5th Cir. 1963), as an example of an action properly brought by the United States, as sovereign, to challenge Fourteenth Amendment violations also affecting interstate commerce. Texas asserts that *Jackson*'s subsequent history casts doubt on its currency, citing concurring opinions accompanying the denial of rehearing *en banc* that acknowledged that a narrower, statutory cause of action was also available. *See United States v. City of Jackson*, 320 F.2d 870 (5th Cir. 1963) (per curiam). But that denial of rehearing *en banc* does not and cannot overrule the precedential value of *Jackson*. Even accepting Texas's position, the case remains instructive, as shown where a later panel of the Fifth Circuit relied on *Jackson* in similarly holding that the United States may sue to prevent harms to federal interests in interstate commerce. *See Fla. E. Coast Ry. v. United States*, 348 F.2d 682, 685 (5th Cir. 1965), *aff'd sub nom. Bhd. of Ry. & S.S. Clerks, Freight Handlers, Exp. & Station Emps. AFL-CIO v. Fla. E. Coast Ry.*, 384 U.S. 238 (1966).

a public nuisance." *Id.* at 28. Instead, as discussed above, *Debs* recognized the federal government's more general authority to sue "whenever the wrongs complained of are such as affect the public at large, and are in respect of matters which by the constitution are intrusted to the care of the nation, and concerning which the nation owes the duty to all the citizens of securing to them their common rights." 158 U.S. at 586.

2. The United States May Bring This Suit Because S.B. 8 Offends the Sovereign Interests of the Federal Government.

This is precisely the sort of suit that the United States can bring under the rationale of *Debs*. S.B. 8 offends the sovereign interests of the federal government in three ways.

First, as discussed above, S.B. 8's procedural provisions have the effect—and, indeed, the purpose, Dkt. 8 at 3—of frustrating federal judicial review of the constitutionality of S.B. 8's substantive provisions. Through Section 1983 and the Declaratory Judgment Act, Congress has provided individuals with the right to vindicate their constitutional rights, and to do so *before* those rights are infringed. Dkt. 8 at 14 (citing cases).

S.B. 8, however, is structured to limit, or entirely eliminate, the ability of pregnant persons to seek relief for the deprivation of their constitutional right to a pre-viability abortion. It does so by foreclosing enforcement by executive officials of the State, thereby removing the traditional class of defendants that a woman may sue for equitable relief for violating her constitutional rights, *see Ex parte Young*, 209 U.S. 123 (1908); precluding S.B. 8 claims against a pregnant woman herself, thereby limiting the ability of such an individual to assert her constitutional rights even defensively in an S.B. 8 lawsuit; and creating onerous financial and litigation burdens to discourage health care providers from violating the statute, thereby limiting the extent to which S.B. 8 ever faces meaningful judicial scrutiny at all. *See* Dkt. 8 at 2-6.

Indeed, it is the very presence of Texas's collusive scheme to prevent individuals from vindicating their constitutional rights that crucially distinguishes this case from those cited by Texas. Dkt. 43 at 21, 29-31 (citing *United States v. Solomon*, 563 F.2d 1121, 1127 (4th Cir. 1977); *United States v. City of Philadelphia*, 644 F.2d 187, 195 (3d Cir. 1980); *United States v. Mattson*, 600 F.2d 1295, 1299–300 (9th

Cir. 1979)). In none of those cases did a state deliberately legislate to prevent the rights-holders from seeking judicial review for the deprivation of their constitutional rights.

If states can insulate their unconstitutional enactments from federal judicial review through the mechanisms established by Congress, then States can effectively disregard the rights protected by the Federal Constitution, thus violating the Framers' dictate that "[t]his Constitution … shall be the supreme Law of the Land," U.S. Const. art. VI. The proposition that no state may enact statutes in violation of the Federal Constitution is fundamental to our federal system. *See, e.g.*, *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 136 (1810) ("Georgia cannot be viewed as a single, unconnected, sovereign power, on whose legislature no other restrictions are imposed than may be found in its own constitution."). And the United States has a weighty interest in preserving that basic character of the Union and in ensuring the supremacy of federal law.

Second, S.B. 8 has significant effects on interstate commerce, hindering the flow of commerce in a manner that (as in *Debs*) implicates federal concerns. As our opening brief explains, S.B. 8 burdens the interstate commercial activities of, for example, insurance companies that ordinarily reimburse plan holders for the provision of abortions, banks that process payments for abortions, and the manufacturers of drugs or devices used in the provision of abortions. And S.B. 8 has driven persons seeking abortions to providers outside Texas, overburdening out-of-state clinics and creating backlogs for care. The Fifth Circuit has already recognized that a State's regulation of abortion occurring within its borders may have a "substantial effect on interstate commerce," as it concluded in upholding the Freedom of Access to Clinic Entrances ("FACE") Act—which criminalizes various kinds of interference with abortion clinic access—as an appropriate exercise of Congress's authority under the Commerce Clause. *United States v. Bird*, 124 F.3d 667, 677–78 (5th Cir. 1997). The court explained that interference with clinic access could have a substantial effect "on the availability of abortion-related services in the national market" by causing "women to travel from the states where abortion services were interrupted to clinics, often out of state, that were able to provide unobstructed abortion services," thus potentially increasing "the cost of abortion services" and reducing "the availability of abortion services at the unobstructed clinics." *Id.* at 678, 681. Unrebutted evidence before this Court

demonstrates that S.B. 8 has the same sort of effect on interstate commerce. Texas persons are flooding abortion clinics in neighboring states such as Oklahoma and New Mexico, disrupting the ability of persons in those other states to obtain abortion care. Dkt. 8 at 10-11. Thus, Texas's assertion that *Debs* is inapplicable to this suit because it does not involve interstate commerce is belied by the evidentiary record.

Third, S.B. 8 interferes with federal programs and operations, as discussed below. *See infra* pp. 39-40. These federal interests likewise support the United States' request for equitable relief under *Debs*. For example, the Federal Bureau of Prisons ("BOP"), the U.S. Marshals Services ("USMS"), and the Office of Refugee Resettlement ("ORR") each have obligations under federal law to facilitate access to abortion for the individuals in their custody, but the agencies do not themselves administer abortion care. *See id.* So long as Texas maintains a legal regime that unconstitutionally eliminates most pre-viability abortion access, these agencies will be impeded in meeting their legal obligations. At a minimum, Texas's decision may require frequent transfers of persons in these agencies' custody out of the State whenever necessary to permit them access to abortion care that is unconstitutionally outlawed in Texas. *See id.*

3. Texas's Remaining Arguments Against An Equitable Cause of Action Under *Debs* Are Unpersuasive.

Debs and its progeny fit within the broader body of precedent that recognizes the authority of federal courts, in appropriate circumstances like those presented here, to entertain suits for equitable relief even in the absence of an express or implied cause of action. "[I]njunctive relief has long been recognized as the proper means for preventing entities from acting unconstitutionally." *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001). Thus, "a cause of action routinely exists for" claims "to enjoin official conduct that conflicts with the federal Constitution." *D.C. Ass'n of Chartered Pub. Sch. v. Dist. of Columbia*, 930 F.3d 487, 493 (D.C. Cir. 2019) (citation omitted); *see also Free Enter. Fund v. PCAOB*, 561 U.S. 477, 491 n.2 (2010). Similarly, in certain circumstances, federal courts permit suits to enjoin plain violations of unambiguous laws where no other cause of action will provide a "meaningful and adequate opportunity for judicial review." *Am. Airlines, Inc. v. Herman*, 176 F.3d 283, 293 (5th Cir.

1999). Federal courts also entertain suits by the United States to assert its interests as the supreme sovereign. *See supra* Section I.A.1.

The same principles of equity that support those suits support the United States' suit against Texas. Texas has interfered with the sovereign interests of the United States by deliberately acting to prevent Texans from exercising the rights secured to them by the Federal Constitution while obstructing their ability to seek meaningful judicial relief from that deprivation using the tools for doing so established by Congress. Texas is wrong to insist that no equitable cause of action is available to the United States in this case.

Texas's invocation of cases where courts declined to imply causes of action under the Constitution does not undermine the point. Dkt. 43 at 23 n.7. Most critically, the Supreme Court cases cited involved alleged implied rights of action at law *for damages*, not suits for equitable relief. *See David v. Passman*, 442 U.S. 228 (1979); *Hernandez v. Mesa*, 140 S. Ct. 735 (2020); *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017). The Supreme Court has explained that expanding the implied *Bivens* cause of action for damages is "disfavored." *Ziglar*, 137 S. Ct. at 1857. In contrast, an equitable suit under the Constitution is not lodged pursuant to a cause of action that is "'implied,'" but rather "exists in the body of equitable doctrine in the same way that a cause of action for breach of contract is not 'implied' from the contract but exists in the body of common law." *Green Valley Special Util. Dist. v. City of Schertz*, 969 F.3d 460, 493 n.2 (5th Cir. 2020) (Elrod, J., concurring). None of the *Bivens* cases that Texas cites call into question the well-established body of equitable doctrine under which federal courts permit plaintiffs, including the United States, to sue to enjoin plainly unconstitutional action. *Free Enter. Fund*, 561 U.S. at 491 n.2.

Texas further contends, Dkt. 43 at 30-33, that, by creating certain express statutory causes of action for the enforcement of constitutional and statutory rights, Congress impliedly precluded the type of equitable claim that the United States is bringing here. Again, however, the equitable cause of action that the United States is bringing is distinct from implied causes of action for damages, which the Supreme Court and other courts have most often hesitated to recognize.

And even if this suit were properly thought of as being based on an implied cause of action, it would be improper to read Congress's choice not to codify an express governmental cause of action for the enforcement of constitutional rights as an expression of congressional intent that the *Executive* is forbidden from bringing such suits. First, the Supreme Court has "frequently cautioned that [i]t is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law." *United States v. Wells*, 519 U.S. 482, 496 (1997) (quotation marks omitted). That is because, as a general matter, various "'equally tenable inferences' may be drawn from [congressional] inaction." *Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990). Second, Congress did not consider the creation of an express governmental cause of action at the same time as it created Section 1983's individual cause of action for the vindication of constitutional rights. Congress enacted Section 1983 in the Ku Klux Klan Act of 1871, 17 Stat. 13. *See Monroe v. Pape*, 365 U.S. 167, 171 (1961). Not until 1957 did Congress first consider creating an express cause of action for the Attorney General to seek equitable relief against violations of constitutional rights, and subsequent proposals to that effect came in 1959 and 1963. *See United States v. City of Philadelphia*, 644 F.2d 187, 195 (3d Cir. 1980). It is well established that "'[n]egative implications raised by disparate provisions are strongest' in those instances in which the relevant statutory provisions were 'considered simultaneously when the language raising the implication was inserted.'" *Gomez-Perez v. Potter*, 553 U.S. 474, 486 (2008). Congress's choice to enact Section 1983 in 1871—and not to enact a governmental cause of action nearly a century later—thus cannot be understood, as Texas suggests, to reflect a "detailed remedial scheme" (Dkt. 43 at 31) in which individual but not governmental actions are permitted.[4]

[4] Indeed, in *American Bell*, the Court rejected an argument that the presence of a statutory cause of action available to individuals in receipt of a fraudulently procured patent "superseded" the ability of the United States to sue. In so doing, the Court emphasized the limited utility of individual suits for fraud and the potential for mischief and the value to the public interest in allowing the government to sue. 128 U.S. at 372 ("[T]he patentee is not prevented by any such decision from suing a hundred other infringers, if so many there be, and putting each of them to an expensive defense, in which they all, or some of them, may be defeated and compelled to pay, because they are not in possession of the evidence on which the other infringer succeeded in establishing his defense. On the other hand, the suit of the government, if successful, declares the patent void, sets it aside as of no force, vacates it or recalls it, and puts an end to all suits which the patentee can bring against anybody.").

4. The United States Has Standing To Bring This Suit.

Texas additionally argues that the United States lacks standing to pursue its interest in the supremacy of federal law, resting that argument exclusively on *Muskrat v. United States*, 219 U.S. 346 (1911). But Texas's argument misunderstands both *Muskrat* and the nature of this lawsuit.

In *Muskrat*, the Supreme Court held that a statute that invited the federal courts to issue advisory opinions did not create a live controversy within the meaning of Article III. In 1906, Congress enacted a statute broadening the class of Native Americans entitled to participate in an allotment of lands and funds initially authorized by a 1902 statute. *Muskrat*, 219 U.S. at 348. After disputes over the constitutionality of the 1906 statute arose, Congress enacted a statute in 1907 that specifically named four individuals as authorized to bring two suits against the United States "to determine the validity" of the 1906 law. *Id.* at 350. As the Court recognized, the "object and purpose" of the cause of action was "wholly comprised in the determination of the constitutional validity of certain acts of Congress," and the attorneys for the private litigants—if successful—were "to be paid out of funds in the Treasury of the United States belonging to the beneficiaries." *Id.* at 360. The Supreme Court held that these manufactured suits did not present a justiciable "case" or "controversy" within the meaning of Article III. While the United States was "a defendant to this action," the Court explained, it had "no interest adverse to the claimants" because it was not itself a potential claimant to the property or funds in question. *Id.* at 361. Rather, the Court observed, "[t]he whole purpose of the law [was] to determine the constitutional validity of" the reapportionment statute "in a suit not arising between parties concerning a property right necessarily involved in the decision in question, but in a proceeding against the government in its sovereign capacity, and concerning which the only judgment required is to settle the doubtful character of the legislation." *Id.* at 361-62; *see Okpalobi v. Foster*, 244 F.3d 405, 426 (5th Cir. 2001) (*en banc*) (describing *Muskrat* as "holding that the United States as defendant had no interest adverse to the claimants") (citation omitted).

Unlike in *Muskrat*, there is plainly adversity between the United States and the State of Texas in this suit. As an initial matter, this action bears none of the hallmarks of a collusive suit that were at issue in *Muskrat*. The teaching of *Muskrat* is that "Congress must not be allowed to approach closely

a request for judicial advice, even as to completed legislation, by the simple device of conferring jurisdiction over a specific suit to be brought by individually named plaintiffs seeking to challenge a particular enactment." Wright & Miller, 13 Fed. Prac. & Proc. Juris. § 3529.1 (3d ed.). "[S]uch congressional tools might well be used to select ineffective adversaries of ambivalent loyalties," and *Muskrat* reflects the "Court's wish that constitutional adjudication be confined to cases arising more naturally between adversaries who have not selected each other." *Id.* Texas, of course, has not authorized the United States to sue here to determine the validity of S.B. 8; indeed, it has designed S.B. 8 in an effort to preclude any judicial review.

Moreover, unlike in *Muskrat*—where the United States had no concrete "interest" to defend, having merely allocated property rights among private parties—Texas has a concrete interest in this case. S.B. 8 is not a law that permits private parties to seek redress for *private harms* through the courts; it is a law that articulates an alleged *public harm*—namely, the provision of a constitutionally protected abortion after cardiac activity is detected in an embryo. In a bid to outflank federal judicial review, the State has deputized private individuals, rather than public officials, to bring suit by offering $10,000 bounties. But that maneuver does not obscure the fundamental point—that the statute incentivizes private plaintiffs to prosecute the *State's* interest, not their own.[5]

B. This Court Can Enter Injunctive Relief against the State of Texas, Which Will Redress the United States' Harms.

The United States seeks an injunction that would stay any state-court proceedings initiated under S.B. 8. Texas contends that this Court is powerless to order that relief, and that it cannot require the State to cease implementing and enforcing its unconstitutional statutory scheme. Dkt. 43 at 6-9. That proposition is remarkable. The State of Texas enacted S.B. 8; the statute is concededly intended to effectuate State policy about whether abortions should occur after cardiac activity is detectable, *id.*

[5] The Fifth Circuit's decision in *Okpalobi* is not to the contrary. In that case, private plaintiffs sued Louisiana's governor and attorney general to challenge the constitutionality of a state law creating a private tort remedy. 244 F.3d at 409. This suit, by contrast, is not brought by private plaintiffs and is not brought against individual state officials. As discussed, the United States has sovereign and proprietary interests not shared by private plaintiffs. And *Okpalobi* "does not control" the standing analysis in a case where the State itself is a proper defendant, as it is here. *Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 159 (5th Cir. 2007).

at 34-35; the statute is enforced by individuals cloaked in State authority; and the enforcement actions brought under S.B. 8 are prosecuted with the assistance of the State's judicial and administrative apparatus. And yet the State now contends that it has nothing to do with the ongoing injuries that S.B. 8 inflicts. That suggestion, if accepted, would fundamentally undermine the rule of law.

Doctrinally, Texas is wrong because the State is the appropriate defendant for this suit and can be subject to an injunction issued by this Court. S.B. 8 injures the United States, and that injury is fairly traceable to, and redressable by, Texas. *See supra* p. 10; *see also Allstate Ins. Co.*, 495 F.3d at 159; *Tel. & Data Sys., Inc. v. FCC*, 19 F.3d 42, 47 (D.C. Cir. 1994) ("injurious private conduct is fairly traceable to the administrative action contested in the suit if that action authorized the conduct or established its legality"). Indeed, Texas does not dispute that S.B. 8's enforcement requires *some* component of the State to act, and so an injunction against the State itself would suffice to redress the injury that S.B. 8 inflicts.

Texas argues, however, that the United States has not proposed sufficiently *specific* relief, and that any injunction must identify the particular State officials, employees, and agents who would be bound. *See* Dkt. 43 at 6. But Texas lacks authority for the specificity it demands. Unlike in the context of injunctions against the federal government under the Administrative Procedure Act, *see* 5 U.S.C. § 702, there is no need for this Court to cabin its injunction within the contours of a partial waiver of sovereign immunity. There is no bar to an injunction that runs against "the State" here. Indeed, the State surely knows who in its employ would be responsible for staying any proceedings brought under S.B. 8. If Texas believes that the costs of complying with an injunction directed against the State itself are too great, then it is free to propose a more tailored injunction to redress the injuries of the United States. Alternatively, the State is free at any time to end this litigation by rescinding S.B. 8. But when a party refuses to assist in tailoring an injunction, a broad injunction is warranted. *See FDIC v. Faulkner*, 991 F.2d 262, 267-68 (5th Cir. 1993).

Stepping back, Texas's contention that it is not properly subject to court-ordered relief is central to its efforts to evade the requirements of the Federal Constitution. Over fifty years ago, the

Supreme Court made clear in the school-desegregation context that constitutional rights cannot be nullified by hostile state actors:

> Whoever, by virtue of public position under a State government . . . denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning. Thus the prohibitions of the Fourteenth Amendment extend to all action of the State denying equal protection of the laws; whatever the agency of the State taking the action; or whatever the guise in which it is taken.

Cooper v. Aaron, 358 U.S. 1, 17 (1958) (internal citations omitted). The State of Texas has plainly acted here by enacting and maintaining S.B. 8 and by deputizing private parties to enforce it in state courts. The State should not be permitted to evade responsibility for its acts.

If Texas's arguments about the scope of relief are accepted, then all a state need do to nullify a constitutional right is to pair a sufficiently punitive statutory scheme with a provision delegating enforcement of that scheme to private individuals. Using that approach, a state could enact laws imposing ruinous financial penalties on any person who performs an interracial marriage, sells a firearm, performs a Catholic mass, or criticizes elected officials. Texas offers no principled basis for distinguishing such schemes from what the State has done here. Accordingly, unless every one of the rights protected by the Constitution is subject to nullification by the states, judicial relief must—at a minimum—be available in this suit by the United States against Texas.

That relief should entail an injunction against the State staying all proceedings brought under S.B. 8. An automatic stay of enforcement proceedings brought under S.B. 8 would upend the apparatus of deterrence at the center of Texas's unconstitutional design. No greater specificity is required. But even if it were, the State of Texas is acting through three groups of individuals who can properly be enjoined: private individuals who elect to file S.B. 8 enforcement proceedings; state court judges and clerks; and other administrative personnel involved in enforcing and executing state judgments. Relief against any one of these groups would redress the United States' injuries.

1. The Court should stay all state court proceedings brought under S.B. 8.

Texas disregards the most straightforward relief that the United States requested—an injunction staying all state court proceedings brought under S.B. 8. *See* Dkt. 8 at 29–30. Congress has expressly confirmed through the Anti-Injunction Act that a stay of state court proceedings can be an appropriate remedy, even in suits brought by private parties. *See* 28 U.S.C. § 2283 (setting forth the conditions pursuant to which a federal court may "grant an injunction to stay proceedings in a State court"). Given that the Anti-Injunction Act's restrictions do not apply to suits brought by the United States, *see In re Grand Jury Subpoena*, 866 F.3d 231, 233 (5th Cir. 2017), by definition such relief is likewise available here. *See, e.g.*, *United States v. Texas*, 356 F. Supp. 469, 473 (E.D. Tex. 1972) (enjoining "the District Court of Dallas County" from further proceedings in a case, and declaring "that the temporary restraining order issued by that court is void"); *United States v. Washington*, 459 F. Supp. 1020, 1034 (W.D. Wash. 1978) (enjoining "the Superior Court of the State of Washington, County of Thurston," from enforcing its temporary injunction and "from issuing any other order" interfering with the federal court's judgment).

Here, consistent with Congress's recognition that injunctions "to stay proceedings in a State court" are appropriate, this Court could provide that very same relief—*i.e.*, an order directed to the State, acting through its judiciary, staying proceedings in any civil suits seeking to enforce S.B. 8. This relief would operate against the State itself, and thus would avoid the need for this Court to consider Texas's arguments about directly enjoining individual judges or clerks. *See* section I.B.3, *infra*.

2. An injunction against the State of Texas may properly extend to private parties filing S.B. 8 enforcement suits.

Under S.B. 8, Texas has deputized private parties to perform the state function of pursuing enforcement actions. Because such individuals are in active concert and participation with the State, and also are properly considered state actors and agents of the State, this Court could expressly state that an injunction extends to them. *See* Dkt. 8 at 29-31; *see also* Fed. R. Civ. P. 65(d)(2)(B), (C).

Texas first contends that the Court cannot extend its injunction to private individuals seeking to enforce S.B. 8 because the Court has not yet provided those individuals with an opportunity to be

heard on that question. *See* Dkt. 43 at 7–8. But there is no requirement that a court, before enjoining an entity—and expecting its injunction to be complied with by each of those entity's agents and other affiliates—must first provide every individual conceivably subject to the injunction with notice and an opportunity to be heard regarding the scope of the injunction. If that were the rule, the Supreme Court could not have upheld an injunction against the State of Arizona governing the conduct of its state and local law enforcement officers, without first providing all of those individual law enforcement officers with notice and an opportunity to be heard regarding the injunction. *See Arizona*, 567 U.S. at 410.

Texas is conflating whether an injunction can be issued with whether an individual can be held in contempt for violating the injunction. *See Zenith Radio Corp. v. Hazeltine Rsch., Inc.*, 395 U.S. 100, 112 (1969) (holding that "a nonparty with notice *cannot be held in contempt* until shown to be in concert or participation" (emphasis added)); *see also Nat'l Spiritual Assembly of Baha'is of U.S. Under Hereditary Guardianship, Inc. v. Nat'l Spiritual Assembly of Baha'is of U.S., Inc.*, 628 F.3d 837, 853 (7th Cir. 2010). In any event, binding precedent confirms that notice requirements do not limit the appropriate scope of the injunction *ex ante*.[6] If anything, they counsel in favor of requiring Texas to advertise the unavailability of relief under S.B. 8.

[6] In *Waffenschmidt v. MacKay*, 763 F.2d 711 (5th Cir. 1985), the Fifth Circuit upheld contempt sanctions against individuals who had acted in concert with an enjoined party, despite the fact that they did not participate in the initial proceedings regarding the injunction. *Id.* at 718. Instead, those individuals "were made parties to the show cause order and were given an opportunity to prove that they did not aid or abet" the enjoined party in connection with subsequent contempt proceedings, which the Fifth Circuit held was consistent with the rule announced in *Zenith*. *Id.* Similarly, in *United States v. Hall*, 472 F.2d 261 (5th Cir. 1972), the Fifth Circuit upheld a contempt finding against a nonparty individual that took action contrary to a district court's school desegregation order, based solely on the fact that the individual "had notice of the court's order," even though he had no opportunity to participate in the initial proceeding leading to issuance of the order. *Id.* at 26368. But even if Texas were correct that notice concerns could affect the scope of the injunction, such a concern would still not foreclose relief against at least some individuals because the Court could enter an order extending to the four intervenors who have participated in this matter. The prospect of such partial relief, by itself, would allow this suit to proceed. *See Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982); *K.P. v. LeBlanc*, 627 F.3d 115, 123 (5th Cir. 2010).

Aside from its erroneous procedural objection, Texas offers little to support its claim that individuals filing enforcement actions under S.B. 8 are not properly subject to an injunction from this Court. Texas asserts that injunctions cannot bind non-parties. *See* Dkt. 43 at 7. As Texas acknowledges, however, that general rule does not apply to "agents" of an enjoined party or to non-parties "who are in active concert or participation with" the enjoined party. Fed. R. Civ. P. 65(d)(2)(B), (C); *see* Dkt. 43 at 7. Indeed, Texas later acknowledges that Rule 65(d)(2) was intended to prevent defendants from "nullify[ing] a decree by carrying out prohibited acts through aiders and abettors[.]" *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 14 (1945); *see* Dkt. 43 at 9. Consistent with that principle, courts have long extended injunctions to the actions of non-parties. *See Ex parte Lennon*, 166 U.S. 548, 554 (1897) ("The facts that petitioner was not a party to such suit, nor served with process of subpoena, nor had notice of the application made by the complainant for the mandatory injunction, nor was served by the officers of the court with such injunction, are immaterial so long as it was made to appear that he had notice of the issuing of an injunction by the court."); *Hall*, 472 F.2d at 265-67 (because a court has "inherent power . . . to protect its ability to render a binding judgment," injunctions may extend to "third parties . . . in a position to upset the court's adjudication").

Here, individuals filing lawsuits under S.B. 8 necessarily further Texas's scheme to undermine federal rights guaranteed by the Constitution. These individuals had no power to file such suits, nor any basis for suing the persons who would become defendants, before Texas enacted S.B. 8. This Court may therefore enjoin the private individuals whom Texas has deputized to implement the State's scheme. The United States recognizes that "courts are [not] free to issue permanent injunctions against all the world." *Hall*, 472 F.2d at 267. But that is not what is being requested here. Filing a lawsuit under S.B. 8 is itself an affirmative act by an individual,[7] and Texas has expressly chosen that as the means of enforcement of the statute. Any individual filing such a suit necessarily intends to

[7] *Cf. Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623 (1977) (state court lawsuits could themselves be antitcompetitive practices); *United States v. Lewis*, 411 F.3d 838 (7th Cir. 2005) (filing lawsuit could itself be a "course of conduct" of harassment); *In re Grand Jury Subpoena*, 267 F. Supp. 3d 741, 749 (N.D. Tex. 2016) (similar)), *aff'd*, 866 F.3d 231 (5th Cir. 2017).

penalize and prevent abortions occurring after six weeks, given that a successful suit automatically requires entry of a minimum damages award of $10,000 plus "injunctive relief sufficient to prevent the defendant from violating this subchapter" going forward. Tex. Health & Safety Code § 171.208(b); *cf.* Dkt. 48 at 5–6 (Intervenor Stilley sets forth plans to mirror suits against "insurance company, municipality, business corporation or *other juicy target with deep pockets*" and other "nice fat geese just waiting to be plucked"). Thus, any person who files a suit seeking to enforce S.B. 8 is in active concert and participation with Texas's goal of prohibiting almost all abortions after six weeks, which brings them within the scope of this Court's authority. As the Fifth Circuit observed in *Hall*, another case that "strongly excite[d] community passions," the scheme Texas has adopted here means that judicial relief is "particularly vulnerable to disruption by an undefinable class of persons who are neither parties nor acting at the instigation of parties." 472 F.2d at 266. In that sort of scenario, courts may "exercise broad and flexible remedial powers" to meet the "exigencies of the situation" and to "protect[] the court's judgment." *Id.*

Texas also contends that individuals filing suit under S.B. 8 cannot be acting in concert with the State based on *Texas v. Department of Labor*, 929 F.3d 205 (5th Cir. 2019). But the Fifth Circuit's decision in that case depended on the statutory scheme at issue (the Fair Labor Standards Act). *Id.* at 213. That statute created distinct roles for both the United States and private individuals, such that "litigation by a government agency would not preclude a private party from vindicating a wrong that arises from related facts but generate[d] a distinct, individual cause of action . . . for violation of distinct legal duties owed individual employees, rather than for violation of legal duties owed the public." *Id.* (internal quotation marks omitted). In contrast, S.B. 8 can only be understood as vindicating public interests. There is no separate government cause of action; individuals are authorized to pursue enforcement against *anyone*, regardless whether they have been personally affected or not; and success on the claim *requires* both statutory damages unconnected to personal injury *and* an injunction for the

benefit of the public, *i.e.*, "sufficient to prevent the defendant from violating this subchapter[.]" Tex. Health & Safety Code § 171.208(b)(1).[8]

Texas also disputes a separate basis on which individuals enforcing S.B. 8 could be subject to an injunction: They are state actors sufficient to render them "agents" of the State. *See* Dkt. 43 at 8, 10 n.1. The State of Texas enacted S.B. 8, vested private individuals with public enforcement authority under S.B. 8, and dictated the terms of that enforcement authority, and the State retains the legal right and ability to withdraw or otherwise modify S.B. 8 and the terms of its enforcement. Regardless of the distance that Texas now seeks to place between itself and its appointed cadre of citizen enforcers, that does not change the nature of its principal-agent relationship. *See* Restatement (Third) of Agency § 1.01 cmt. c (2006) ("[A] person may be an agent although the principal lacks the right to control the full range of the agent's activities, how the agent uses time, or the agent's exercise of professional judgment. A principal's failure to exercise the right of control does not eliminate it[.]").

Moreover, the primary state-action case on which Texas relies supports the availability of relief here: "[W]e have consistently held that a private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a 'state actor' for purposes of the Fourteenth Amendment." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 941 (1982) (cited in Dkt. 43 at 10 n.1); *see also Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 152 (1970) ("Private persons, jointly engaged with state officials in the prohibited action, are acting 'under color' of law for purposes of the statute. To act 'under color' of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents."); Dkt. 8 at 31 n.13. Whether viewed as state action, acting in concert with the State of Texas, or some combination of both, the bottom-line result is the same: Rule 65 plainly extends to those individuals who affirmatively choose

[8] If S.B. 8 were intended to create a cause of action for the benefit of private individuals alone, S.B. 8 would only permit injunctive relief sufficient to prevent the defendant from harming *the particular plaintiff*. *See generally City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983) (injunctive relief typically appropriate only when individual plaintiff is at recurring risk of harm). Instead, S.B. 8 *requires* injunctive relief sufficient to prevent the defendant from harming *anyone*—thereby confirming that suits brought under S.B. 8 are public enforcement actions, not purely private invocations of an individualized cause of action.

to cloak themselves in state authority by filing S.B. 8 enforcement actions, thereby seeking to redress public harms and participate in Texas's scheme to evade the Constitution.

Finally, to the extent there were any doubt about whether Rule 65 itself provides authority for this Court's injunction to reach private parties suing under S.B. 8, this Court could independently issue its injunction pursuant to the All Writs Act. "The power conferred by the Act extends, under appropriate circumstances, to persons who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice[.]" *United States v. New York Tel. Co.*, 434 U.S. 159, 174 (1977); *see also United States v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., AFL-CIO*, 907 F.2d 277, 281 (2d Cir. 1990) ("Injunctions may be issued against non-parties under the All Writs Act. . . . We believe that the All Writs Act requires no more than that the persons enjoined have the 'minimum contacts' that are constitutionally required under due process.").

Here, there can be no dispute that the group of persons subject to an injunction—*i.e.*, those who file suits in Texas courts pursuant to S.B. 8—have sufficient minimum contacts (regardless of where they reside) because they have affirmatively availed themselves of Texas's court system, and thus specific personal jurisdiction exists as to those proceedings. *See Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945) (party "conducting activities within a state" thereby "enjoys the benefits and protection of the laws of that state" and thus can be sued within that state based on those activities); *see also Waffenschmidt*, 763 F.2d at 718 (holding that individuals who "actively aid[ed] and abet[ed]" violations of an injunction "placed themselves within the personal jurisdiction of the district court"). Moreover, relief under the All Writs Act is appropriate because it would be "directed at conduct which, left unchecked, would have had the practical effect of diminishing the court's power to bring the litigation to a natural conclusion." *ITT Cmty. Dev. Corp. v. Barton*, 569 F.2d 1351, 1359 (5th Cir. 1978). Thus, the All Writs Act provides authority to act here, even if Rule 65 does not.

3. An injunction against the State of Texas may also extend to judges and clerks.

An injunction against the State of Texas would properly run to state judicial officials, including judges and clerks. Such an injunction would be appropriate here given the role that state courts play

in S.B. 8's enforcement scheme; it is the threat of *suits* under the statute that deters providers from offering abortion services that the Constitution protects, and so an injunction that requires state judges and clerks to stay, decline to docket, or otherwise decline to maintain any such suits is an appropriate means of redress. Texas offers two principal responses to this suggestion: that the United States lacks standing to sue individual state-court judges and clerks, and that this Court lacks the power to issue an injunction that would run to those judges and clerks. Both arguments lack merit.

Texas's first argument that Article III does not permit suits against state-court judges or clerks is a non-sequitur. No state-court judge or clerk is a defendant here; only Texas itself is. And the United States plainly has standing to sue the State for the reasons detailed above. *See supra* section I. That renders irrelevant the State's arguments about the Court's jurisdiction to issue an injunction that would run to the State's judiciary. And although Texas tries to create distance from its own judiciary by contending that "judicial officials are not within the scope of Rule 65(d)(2) and would not be covered by . . . any injunction issued against Texas," Dkt. 43 at 13, it fails to explain how "judicial officials" are anything other than "*officers*, agents, servants, [or] employees" of the State. *See* Fed. R. Civ. P. 65(d)(2) (emphasis added); *see also, e.g.*, Tex. Gov't Code § 411.201 ("'Active judicial officer' means . . . a judge or justice of the supreme court, the court of criminal appeals, a court of appeals, a district court, a criminal district court, a constitutional county court, a statutory county court, a justice court, or a municipal court[.]").

Perhaps recognizing that Texas judicial officials are indeed part of the State of Texas, the State tries to reframe the standing inquiry by suggesting there is no adversity between the United States and individual judges and clerks. *See* Dkt. 43 at 10–12, 14. But the State cites no authority for the proposition that the standing inquiry should focus on anything other than the adversity between the two parties to this case. Had Texas made S.B. 8 enforceable by the Texas Attorney General's Office, there would be no requirement that line lawyers be personally adverse to a party to be bound by an injunction against Texas. To that end, Texas's reliance on the case-or-controversy analysis in the recent motions-panel decision in *Whole Woman's Health* misses the mark because that decision—together with the relevant portions of the cases cited therein, *see, e.g.*, *Bauer v. Texas*, 341 F.3d 352, 359 (5th Cir. 2003),

and Texas's attempted reframing here—are all focused narrowly on the adversity between private parties and individual judges and clerks, who were the defendants in that action. *See Whole Woman's Health v. Jackson*, ___F.4th___, 2021 WL 4128951, at *5 (5th Cir. Sept. 10, 2021). Because the adversity between the United States and Texas is clear, standing is no barrier to an injunction that runs to a component part of the State.

Nor is there any other barrier to the issuance of an injunction that would run to state judges and clerks. Texas contends that *Muskrat* is such an obstacle, and that the case stands for the proposition that an injunction that is binding on Texas cannot be binding on state courts. *See* Dkt. 43 at 12-13. But the case suggests nothing of the sort. *See supra* pp. 11–12. The *Muskrat* Court's concern about advisory opinions has no bearing on the issue here—namely, whether an injunction that prohibits the maintenance of state-court actions brought under S.B. 8 could bind the judges and clerks responsible for overseeing and administratively facilitating such actions. And with respect to *that* question, *Pulliam v. Allen*, 466 U.S. 522 (1984), makes clear that federal courts can issues injunctions that bind state judicial officials. *Id.* at 541-42 ("[J]udicial immunity is not a bar to prospective injunctive relief against a judicial officer acting in her judicial capacity."); *see, e.g.*, *Mireles v. Waco*, 502 U.S. 9, 10 n.1 (1991) (explaining that a state "judge is not absolutely immune from . . . a suit for prospective injunctive relief"); *Doe v. Ceci*, 517 F.2d 1203, 1206 n.3 (7th Cir. 1975) ("Under all the circumstances, an injunction against Judge Ceci himself was justified."); *Bowen v. Doyle*, 880 F. Supp. 99, 138 (W.D.N.Y. 1995) (enjoining "Justices Doyle and Wolfgang and the courts of the State of New York" from "from proceeding in, and/or exercising any further jurisdiction over the parties and subject matter of," a case that was "pending in New York Supreme Court"); *see also Strickland v. Alexander*, 772 F.3d 876, 885–86 (11th Cir. 2014) (holding that a court clerk responsible for "docketing [a] garnishment affidavit, issuing the summons of garnishment, depositing the garnished property into the court registry, and holding the property" rendered the plaintiff's injury "'fairly traceable' to [the clerk's] actions").

If there were any doubt that this Court has the authority to issue an injunction that runs to state judges and clerks, the reasoning in *Pulliam* removes it. Texas acknowledges that *Pulliam* permits injunctions against state-court judges, *see* Dkt. 43 at 12, but the State claims the case has no relevance

here on the theory that *Pulliam*'s discussion of judicial immunity was limited to injunctions issued pursuant to § 1983, *see Pulliam*, 466 U.S. at 541-42. That characterization cannot be squared with the Court's reasoning. Indeed, the Court went to great lengths to detail "the *common law's* rejection of a rule of judicial immunity from prospective relief." *Id.* at 536 (emphasis added); *see also id.* at 529-36. And the Court concluded that its "own experience" and decisions from "[a]t least seven Circuits" supported a determination that there is no judicial-immunity bar to issuing prospective relief against state judges. *See id.* at 536-57. To be sure, the Court considered the effect that Congress's enactment of § 1983 had on the authority to enjoin state-court judges. But it explained that any restriction "on the availability of injunctive relief against a state judge" would have to come from either "the common law" or from "Congress'[s] own intent to limit the relief available under § 1983[.]" *Id.* at 539–40. Because the Court found that *neither* the common law nor Congress's enactment of § 1983 contained such a restriction, it held that prospective relief against state-court judges was available. *See id.* at 539-41.[9] At a minimum, the outcome in *Pulliam* is flatly inconsistent with Texas's argument that Article III always prohibits federal court relief against state judges acting in their Article III capacity.

The remaining authorities on which Texas relies do not alter the availability of injunctive relief. The State relies on dicta from the discussion of the Eleventh Amendment in *Ex parte Young*, but the suggestion that an injunction that runs to the state judiciary "would be a violation of the whole scheme of our government," Dkt. 43 at 10 (quoting *Ex parte Young*, 209 U.S. at 163), cannot be squared with the holding in *Pulliam* or the myriad cases in which courts have issued such an injunction. *See supra* 22–23. The State's discussion of writs of mandamus and prohibition runs into the same problem. *See* Dkt. 43 at 14-16. Indeed, the *Pulliam* Court extensively discussed the history of the issuance of "writs of prohibition and mandamus" by judges of the King's Bench, en route to holding that federal courts

[9] Contrary to Texas's suggestion, the current version of § 1983—which was adopted after *Pulliam*—does not "forb[id] injunctive relief against state judges[.]" *See* Dkt. 43 at 16. In fact, such relief expressly remains an option when "a declaratory decree [is] violated or declaratory relief [is] unavailable." 42 U.S.C. § 1983; *see also Caliste v. Cantrell*, 937 F.3d 525, 532 (5th Cir. 2019). And even if § 1983 contained a complete bar on injunctive relief against state-court judges, that bar would not apply here because, as Texas acknowledges, *see* Dkt. 43 at 16, the United States is not bringing suit under § 1983.

do have to authority enjoin state-court judges. *See Pulliam*, 466 U.S. at 533-36, 41-42. Texas suggests that the exercise of such authority here would call into question the neutrality of state judges who are bound to follow the Federal Constitution. *See* Dkt. 43 at 10-11. But that suggestion ignores the reality of the scheme Texas has enacted: It is the threat of suit that has chilled abortion providers throughout the State, *see* Dkt. 8 at 7, and so an injunction that prevents S.B. 8 suits from being maintained—irrespective of how the suits might eventually be resolved—is the appropriate remedy.

4. Texas Does Not Dispute that This Court Can Enjoin Personnel Involved in the Execution and Enforcement of State Judgments and Other Administrative Roles.

The last group of state employees against whom this Court's injunction could expressly extend would be administrative, law enforcement, and any other Texas government personnel who perform non-judicial tasks associated with processing and pursuing S.B. 8 enforcement actions, such as the enforcement of any state judgments obtained pursuant to S.B. 8. The United States addressed this relief in its opening motion, *see* Dkt. 8 at 32, and Texas failed to respond, *see* Dkt. 43 at 6-17. Thus, the Court may properly treat this issue as conceded.

In practical terms, this aspect of the injunction would extend to officials who have non-judicial roles in enforcing judgments obtained pursuant to S.B. 8. For example, Texas law directs that upon obtaining a judgment, an "execution" shall be issued, and the execution "shall be addressed to any sheriff or any constable within the State of Texas." Tex. R. Civ. P. 622; *see also* Tex. R. Civ. P. 629 ("The style of the execution shall be 'The State of Texas.' It shall be directed to any sheriff or any constable within the State of Texas."). These individuals are undoubtedly state employees, acting pursuant to state authority, and Texas provides no plausible reason why they cannot be enjoined with respect to judgments or "executions" obtained pursuant to the unconstitutional enforcement of S.B. 8. Similarly, Texas law provides that parties may seek to enforce judgments by placing liens on real property, which requires *county* clerks—not court clerks performing judicial functions—to "record in the county real property records each properly authenticated abstract of judgment that is presented for recording." Tex. Prop. Code Ann. § 52.004. There is no reason why these county clerks cannot be enjoined from recording any judgments that were obtained pursuant to S.B. 8.

Enjoining these state officials in the performance of their duties would redress the United States' injuries at least in part—*i.e.*, by making any judgments obtained pursuant to S.B. 8 effectively unenforceable. There likely are other state employees and officials involved in the administrative handling of S.B. 8 claims and judgments who could also be enjoined, and whom Texas is undoubtedly capable of identifying. At a minimum, however, these classes of state employees could expressly be enjoined, which would provide sufficient redress for this case to proceed under Article III.

II. THE UNITED STATES HAS SHOWN A LIKELIHOOD OF SUCCESS ON THE MERITS.

A. S.B. 8 Violates the Fourteenth Amendment and the Supremacy Clause.

Texas asserts that the United States has not clearly shown that S.B. 8 violates the Fourteenth Amendment. *See* Dkt. 43 at Sec. II.A. But it conspicuously fails to offer any constitutional defense of S.B. 8 on the law's own terms. Instead, the State contends that its six-week abortion ban is not a ban and that the ban somehow causes no undue burden on persons' constitutional rights. Neither argument has merit.

To begin, S.B. 8 is an abortion ban of the sort that is facially unconstitutional under governing Supreme Court precedent. *Contra* Dkt. 43 at 34-35. The statute's plain text—which Texas notably refrains from discussing—bans physicians from "knowingly perform[ing] or induc[ing] an abortion on a pregnant woman if the physician detected a fetal heartbeat for the unborn child." Tex. Health & Safety Code § 171.204(a). As this Court previously explained, that language creates a "ban [that] covers all abortions performed approximately six weeks [after the patient's last menstrual period]." *Whole Women's Health*, 1:21-cv-616, 2021 WL 3821062, at *2 n.4 (W.D. Tex. Aug. 25, 2021); *see also Jackson Women's Health Org. v. Dobbs*, 945 F.3d 265, 269 (5th Cir. 2019), *cert. granted,* No. 19-1392, 2021 WL 1951792 (U.S. May 17, 2021) ("*Jackson I*") (finding that "[t]he law at issue is a ban" where it barred physicians from "perform[ing] or induc[ing] an abortion" where the probable gestational age was greater than fifteen weeks). "Such a ban is unconstitutional under Supreme Court precedent without resort to the undue burden balancing test." *Jackson Women's Health Org. v. Dobbs*, 951 F.3d 246, 248 (5th Cir. 2020) (per curiam) ("*Jackson II*"); *accord Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 879

(1992) ("[A] State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.").

Texas next contends that the Supreme Court has applied the undue burden test in similar contexts, and thus should do so here. Dkt. 43 at 35 (citing *Gonzales v. Carhart*, 550 U.S. 124 (2007), and *June Med. Servs. LLC v. Russo*, 140 S. Ct. 2103 (2020)). But neither of these cases concerned an outright ban on a broad swath of previability abortions. It is settled that "laws that limit certain methods of abortion or impose certain requirements on those seeking abortions are distinct under *Casey* from those that prevent women from choosing to have abortions before viability." *Jackson I*, 945 F.3d at 274. *Gonzales*, which concerned a law prohibiting a specific method of abortion, "is distinguishable" from laws like S.B. 8 that "undisputedly prevent[] the abortions of some non-viable fetuses." *Id.* at 273 (explaining the Mississippi law "is a prohibition on pre-viability abortion"). *June Medical* concerned a Louisiana law requiring abortion providers to have certain hospital admitting privileges, and thus also concerned a *regulation* on the methods and requirements for obtaining abortions, rather than an outright ban of previability abortions. *See* 140 S. Ct. at 2112; *Jackson I*, 945 F.3d at 273-74. Both cases relied upon by Texas therefore only reinforce that no undue burden analysis is required—Texas's six-week abortion ban is unconstitutional on its face. *See Jackson I*, 945 F.3d at 269.

Regardless, Texas's insistence that its unconstitutional abortion ban not be termed a "ban" is academic because the law cannot survive even cursory review under the undue burden test. S.B. 8 bans most previability abortions and uses the threat of monetary penalties to chill providers from performing lawful abortion procedures. *See* Dkt. 8 at 15-16. The law therefore both in purpose and in effect "place[s] a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." *Casey*, 505 U.S. at 878. Texas's primary argument to the contrary is that S.B. 8 does not place an undue burden on persons seeking previability abortions because the law "incorporates the Supreme Court's test" in *Casey*. Dkt. 43 at 35. That argument contorts the Supreme Court's undue burden test and reveals Texas's strategy of abdicating its own sovereign responsibility for the burden it has placed on persons seeking abortions.

The undue burden test announced in *Casey* establishes the standard that *States* must comply with when enacting abortion regulations: "Under *Casey*, *the State* may not impose an undue burden on the woman's ability to obtain an abortion." *June Medical*, 140 S. Ct. at 2135 (Roberts, C.J., concurring) (emphasis added). Disclaiming its own obligation to comply with the Federal Constitution, Texas argues that S.B. 8 meets the undue burden test because it permits a limited set of third parties to argue, *after having been sued*, that the law "will impose an undue burden on that woman or that group of women seeking an abortion." Tex. Health & Safety Code § 171.209(b); Dkt. 43 at 35–38.

Here, the undue burden is front-loaded; the "obstacle in the path of a woman seeking an abortion," *Casey*, 505 U.S. at 878, is the threat of liability that has led providers to stop offering abortion services and therefore prevented persons from accessing an abortion in the first place. The statutory undue burden defense—that is to say, the fact that courts considering claims under S.B. 8 might find the statute to be unconstitutional—provides no avenue for relief to persons who cannot find a provider willing to assume the risks and costs placed upon providers by S.B. 8. S.B. 8 denies those persons—the rights-holders—any option to assert their rights in court. And even when the undue burden defense can be raised by others, Texas restricts the defense in a manner inconsistent with *Casey*. *See* Tex. Health & Safety Code § 171.209(b), (c), (d); *see also* Dkt. 8. at 15–16 (describing impermissibly narrow focus of S.B. 8's undue burden defense). In other words, Texas contends that S.B. 8 meets *Casey's* undue burden standard because defendants may assert something *called* an undue burden defense; but S.B. 8 does not, in theory or in practice, preserve constitutional rights.

Texas argues that S.B. 8 does not impose an undue burden because a single abortion provider within the State of Texas has described providing a single first trimester abortion beyond six weeks of pregnancy. *See* Dkt. 43 at 35-36 (citing Alan Braid, Opinion: Why I Violated Texas's Extreme Abortion Ban (Sept. 18, 2021), https://www.washingtonpost.com/opinions/2021/09/18/texas-abortion-provider-alan-braid/ ("Braid Op-Ed")). Far from showing that S.B. 8 has permitted persons in Texas to continue obtaining previability abortions, Mr. Braid's op-ed explains how the law has "virtually banned any abortion beyond about the sixth week of pregnancy" and "shut down about 80 percent of the abortion services [his clinics] provide." Braid Op-Ed.

Texas also disputes that it acted with any purpose to deprive persons of constitutional rights by enacting S.B. 8—a ground that is independently sufficient to render the law unconstitutional under *Casey*, 505 U.S. at 877; *see also* Dkt. 43 at 36-37. But evidence of Texas's unconstitutional intent abounds. *See* Dkt. 8 at 3. And the unconstitutional intent behind S.B. 8 is plain on the face of the statute. Not content to enact a six-week abortion ban nearly identical to one just recently enjoined by the Fifth Circuit in *Jackson I*, Texas paired its unconstitutional law with a novel private-enforcement scheme the self-evident purpose of which is to shield S.B. 8 from federal judicial review. There is no more powerful evidence of Texas's unconstitutional intent than its extensive effort to shirk its sovereign responsibility to defend the constitutionality of its own law in court.

Finally, S.B. 8's abortion ban is a particularly egregious constitutional violation because of the extraordinary procedural mechanisms intended to block persons from vindicating their Fourteenth Amendment rights and to evade the methods Congress established to ensure federal judicial review. *See* Dkt. 8 at 14. The concern here is not simply that the Act is "difficult to effectively enjoin," Dkt. 43 at 37, but that it was specifically designed in an attempt to circumvent the supremacy of federal law and defy the Constitution.

B. S.B. 8 Is Preempted as Applied to the Federal Government and its Contractors.

1. S.B. 8 Purports to Restrict the Operations of the Federal Government.

If Texas's position is that its law does not apply to the federal government, it should say so. But it does not. Instead, Texas states that, "Texas courts are unlikely to interpret the Act to apply to the federal government or those carrying out federal obligations." Dkt. 43 at 39. Of course, there is nothing unusual about a defendant in a Supremacy Clause lawsuit attempting to avoid liability by arguing that the challenged law might be interpreted narrowly. But courts routinely enjoin enforcement of state laws on preemption grounds even though the state may not ultimately enforce those laws in a manner that conflicts with federal law and operations.[10] Indeed, Texas recently tried, unsuccessfully, to make a similar argument in another Supremacy Clause challenge by the United States.

[10] *See, e.g.*, *United States v. City of Arcata*, 629 F.3d 986, 992 (9th Cir. 2010) (noting in preemption

The State argued there that it "may decide to enforce the [challenged Executive] Order in a way that does not disrupt the United States' [operations,]" but the court disagreed because the challenged law did not contain an express exemption that would support Texas's interpretation. *United States v. Texas*, No. 3:21-cv-173-KC, Dkt. 52, at 17 (W.D. Tex. Aug. 26, 2021) ("[I]t is reasonable to assume that the Order means what it says and may be enforced against federal contractors and NGO-partners[.]").[11]

Next, Texas cannot sidestep the Supremacy Clause by raising the *Pullman* abstention doctrine, which is unavailable "in a case in which the United States seeks relief against a state or its agency." *United States v. Composite State Bd. of Med. Examiners*, 656 F.2d 131, 136 (5th Cir. Unit B Sept. 1981); *United States v. Morros*, 268 F.3d 695, 709 (9th Cir. 2001); *United States v. Pa., Dep't of Env't Res.*, 923 F.2d 1071, 1079 (3d Cir. 1991).

Texas next argues that, if S.B. 8 "reaches the federal government, it does not interfere with federal activities." Dkt. 43 at 40. That is incorrect. As to BOP, Texas concedes that "federal regulations require a warden to arrange for an abortion" should an inmate choose one. *Id.* But Texas claims that there is no conflict between that regulation and S.B. 8 because BOP policy is for staff to abide by applicable federal and state laws. *Id.* But an unconstitutional law like S.B. 8 is not "applicable" state law, as federal agencies plainly are not bound by unconstitutional state laws. *See Gartrell Constr. Inc. v. Aubry*, 940 F.2d 437, 440 (9th Cir. 1991) (explaining that state laws "cannot be 'applicable' . . . where such laws are preempted by federal law"). Aside from S.B. 8's unconstitutionality, the reference to state law in BOP's policy document lacks the required "clear Congressional mandate" and "specific Congressional action" that unambiguously authorize state regulation of a federal activity. *See Hancock v. Train*, 426 U.S. 167, 178-79 (1976); *see also Geo Grp., Inc. v. Newsom*, 493 F. Supp. 3d 905, 939 (S.D.

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case that "the cities' promise of self-restraint does not affect our consideration of the ordinances' validity"); *Powell's Books, Inc. v. Kroger*, 622 F.3d 1202, 1215 (9th Cir. 2010) (permanently enjoining enforcement of state statutes under the First Amendment while explaining that "[w]e may not uphold the statutes merely because the state promises to treat them as properly limited").

[11] Even if S.B. 8 were deemed not to apply to the federal government directly, it would still unconstitutionally burden federal operations because it regulates the private clinics on which the federal government depends in order to provide access to abortion services to individuals in its custody and care.

Cal. 2020) (rejecting state's argument that state law was not preempted because federal law required compliance with "all applicable State and local laws and regulations"). Texas's arguments regarding the U.S. Marshals Service fail for the same reason. Dkt. 43 at 41 (arguing that USMS operations pertaining to abortion must be consistent with state law).

Texas suggests that ORR lacks any affirmative obligations concerning abortion services for individuals in its care. Dkt. 43 at 41. Consistent with its obligations to provide care for the unaccompanied children in its custody and to allow them to exercise their constitutional rights, ORR "shall ensure [unaccompanied noncitizen children] have access to medical appointments related to pregnancy in the same way they would with respect to other medical conditions." Def's Ex. C at DOJ-1004, Dkt. 45; Decl. of James S. De La Cruz ¶ 14, Dkt. 8-12. And Texas's arguments that ORR must comply with state laws fails for the reasons discussed above. Accordingly, the conflict between S.B. 8 and these federal laws violates the Supremacy Clause. *See Fed. Home Loan Bank Bd. v. Empie*, 778 F.2d 1447, 1454 (10th Cir. 1985) (affirming injunction sought by federal agency against a state "statute . . . expressly forbidding something that the federal regulations expressly permit" and noting that the "injunction here is justified so that private parties threatened by the federal scheme will not have a colorable claim to bring vexatious lawsuits in state court").

2. S.B. 8 Interferes With Federal Contracts.

S.B. 8 also interferes with contractual relationships between federal agencies and contractors. For example, S.B. 8 threatens liability against contractors who provide abortion-related transportation services as part of DOL's Job Corps program, thereby discouraging them from performing under their contracts. Dkt. 8 at 20. Texas again resorts to the same argument that the government and its contractors must follow prevailing state law, Dkt. 43 at 42, but that argument fails for the reasons already explained. Texas also seeks to create a *de minimis* exception to the Supremacy Clause that would allow states to interfere with federal operations in amounts the state considers minimal. *Id.*; *see also id.* at 54. Courts have rejected similar arguments. *See, e.g.*, *United States v. California*, 921 F.3d 865, 883 (9th Cir. 2019) ("We agree with the United States that Supreme Court case law compels the rejection of a *de minimis* exception to the doctrine of intergovernmental immunity.").

As for OPM, it negotiates with carriers to provide Federal Employees Health Benefits ("FEHB") plans that contain coverage for abortion under certain circumstances. Decl. of Laurie Bodenheimer ¶¶ 1-5, Dkt. 8-15. Unless S.B. 8 is enjoined, those "[c]arriers will be placed in the untenable position of either complying with their contract with OPM or violating S.B. 8, thereby raising the possibility that carriers will refuse to pay for or provide covered abortions as required under their FEHB contracts." *Id.* ¶ 8. This will "materially interfere with OPM's administrative authority to conduct the FEHB Program." *Id.* ¶ 9. The likely interference with OPM's contracts creates an impermissible obstacle to the accomplishment of federal objectives and improperly attempts to regulate the federal government in an area of "uniquely federal interests." *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988); *see also Student Loan Servicing All. v. District of Columbia*, 351 F. Supp. 3d 26, 62 (D.D.C. 2018) ("Courts have consistently held that any state law that impedes the Federal Government's ability to contract . . . [is] preempted.").

3. S.B. 8 Violates Medicaid Regulations.

Texas makes similarly misguided attempts to defend S.B. 8's conflict with Medicaid. As articulated in the declaration submitted on behalf of CMS, abortions in cases of rape or incest fall within mandatory service categories under Medicaid that must be covered for beneficiaries under the statute and applicable regulations. Dkt. 8 at 21-22. S.B. 8, however, bans pre-viability abortions after fetal cardiac activity is detected, ensuring that this service will not be "sufficient in amount, duration, and scope to reasonably achieve its purpose." *See* 42 C.F.R. § 440.230. S.B. 8's exception for undefined "medical emergencies" does not prevent the statute from foreclosing these entire categories of abortions that must be covered under Medicaid.

III. THE UNITED STATES WILL SUFFER IRREPARABLE HARM ABSENT AN INJUNCTION.

A. A Preliminary Injunction Would Prevent Further Irreparable Harm.

Neither Texas nor the Intervenors offer *any* response to the United States' argument that S.B. 8's ongoing violation of the Supremacy Clause causes irreparable harm to the sovereignty of the United

States. *See* Dkt. 8 at 33 (citing cases); Dkt. 43 at 45–49; Dkt. 44 at 18–20.[12] A claim "based on the Supremacy Clause . . . is one to enforce the proper constitutional structural relationship between the state and federal governments" that is disrupted when a state seeks to undermine federal law.[13] This injury to the United States is irreparable because "it cannot be undone through monetary remedies." *Deerfield Med. Ctr. v. Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. Unit B Nov. 1981). And there is a pressing need for immediate relief enjoining enforcement of S.B. 8 given that Texas's so-far successful defiance of the Constitution has already encouraged other states to pursue similar efforts to circumvent the Supremacy Clause.[14] *See Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 373 (2008) (noting that allowing a state to set a requirement that conflicts with federal law "would allow other States to do the same"). This alone is sufficient to establish irreparable harm, and Texas has no argument to the contrary.[15]

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[12] To be sure, Texas disputes whether constitutional violations generally are sufficient to establish irreparable injury. Dkt. 43 at 44. But Texas cites no authority involving the type of constitutional violation alleged here (a violation of the Supremacy Clause), which uniquely harms the United States' sovereignty so long as it is allowed to continue.

[13] *See Cal. Pharmacists Ass'n v. Maxwell-Jolly*, 563 F.3d 847, 851 (9th Cir. 2009) *vacated on other grounds by Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 565 U.S. 606 (2012); *United States v. Alabama*, 691 F.3d 1269, 1301 (11th Cir. 2012) ("The United States suffers injury when its valid laws in a domain of federal authority are undermined by impermissible state regulations."). For that reason, courts routinely find irreparable harm based on Supremacy Clause violations alone. *See Tex. Midstream Gas Servs., LLC v. City of Grand Prairie*, 608 F.3d 200, 206 (5th Cir. 2010) ("If a statute is expressly preempted, a finding with regard to likelihood of success fulfills the remaining [preliminary injunction] requirements."); *Trans World Airlines v. Mattox*, 897 F.2d 773, 783 (5th Cir. 1990) (ruling in a preemption case that a finding of likelihood of success on the merits "carries with it a determination that the other three requirements [for a preliminary injunction] have been satisfied"); *Greyhound Lines, Inc. v. City of New Orleans*, 29 F. Supp. 2d 339, 341 (E.D. La. 1998) (finding other requirements for preliminary injunction satisfied based on a showing of likelihood of success on the merits "[b]ecause this case involves preemption").

[14] Kurtis Lee & Jaweed Kaleem, "The New Texas Abortion Law Is Becoming A Model for Other States," Los Angeles Times (Sept. 18, 2021), https://www.latimes.com/world-nation/story/2021-09-18/texas-abortion-united-states-constitution.

[15] S.B. 8 also irreparably harms the United States by purporting to deny the federal government the ability to enforce particular federal laws and interfering with federal policies requiring agencies to provide access to abortion services. Federal employees and contractors are therefore confronted with the choice between complying with S.B. 8 or performing their federal duties and thereby risking lawsuits and civil penalties, a constitutional injury itself sufficient to establish irreparable harm. *See Composite State Bd. of Med. Exam'rs*, 656 F.2d at 138 (United States would suffer irreparable harm if federal

Faced with this roadblock, Texas takes a different tack, arguing that there can be no irreparable harm because *no* preliminary injunction issued by this Court could prevent the threat of liability to providers under S.B. 8. *See* Dkt. 43 at 45-49. In other words, Texas's argument is that S.B. 8 is so effective at chilling the exercise of constitutional rights that an injunction by an Article III court would be useless. But Texas mischaracterizes the injury that is subject to redress and falters on both the facts and the law.[16]

The assumption underlying this argument is that the United States can obtain redress only if every S.B. 8 lawsuit is permanently prohibited. But the United States is suffering an injury to its sovereignty right now. And that injury manifests itself tangibly through the patients who cannot receive services from an abortion provider in Texas. A preliminary injunction *would* remedy that injury to the United States because, as a matter of fact, apart from the sovereign injury, many providers would resume services upon issuance of a preliminary injunction. *See* Decl. of Amy Hagstrom Miller ¶¶ 4–5 ("WWH and WWHA's clinics in Texas will resume providing pre-viability abortion to patients whose pregnancies have cardiac activity up to the pre-existing legal limit for our clinics if and when a preliminary injunction is entered in this case."). That is because "neither [the clinics] nor our patients can wait the months or years for completion of all S.B. 8 litigation to resume services." *Id.* ¶ 5. And

court abstained from deciding its Supremacy Clause claim because "[d]uring this time the United States will be forced to alter its policies in the State of Georgia or risk having its employees who are assigned within Georgia be subject to disciplinary action by the State"); *Fed. Home Loan Bank Bd. v. Empie*, 778 F.2d 1447, 1454 (10th Cir. 1985); *City of El Cenizo v. Texas*, 264 F. Supp. 3d 744, 810 (W.D. Tex. 2017), *aff'd in part and vacated in part*, *City of El Cenizo v. Texas*, 890 F.3d 164, 173 (5th Cir. 2018); *Geo Grp.,* 493 F. Supp. 3d at 962 (United States faced "irreparable injury in the form of disrupted operations" where state law would require, *inter alia*, costly transportation of individuals in its custody).

[16] The Intervenors' suggestion that a preliminary injunction would not prevent providers from being sued in federal court by out-of-state individuals using diversity jurisdiction is meritless. Dkt. No. 44, at 19. The Intervenors' hypothetical lawsuit would only come to pass if, upon issuance of the preliminary injunction, a provider performed more than seven abortions, and an out-of-state couple seeking to adopt in Texas could show that they were unable to adopt because of those abortions, all in the time period between a preliminary decision and a decision on the merits. That type of pure speculation about one implausible lawsuit is insufficient to undermine a finding that the preliminary injunction would prevent irreparable harm. *See infra* n.17.

Texas is wrong to suggest that it can escape a preliminary injunction if judicial relief would not cure every possible injury inflicted by S.B. 8.[17]

The cases Texas cites to the contrary are inapposite. In *American Postal Workers Union, AFL-CIO v. United States Postal Services*, 766 F.2d 715 (2d Cir. 1985), the court held that a union employee seeking a preliminary injunction temporarily suspending his discharge for making allegedly false statements pending the outcome of the union's grievance and arbitration process failed to show irreparable harm, even assuming the discharge violated his First Amendment rights. The court reasoned in part that "the theoretical chilling of protected speech and union activities stems not from the interim discharge, but from the threat of permanent discharge." *Id.* at 722. Even with a preliminary injunction in place, then, the plaintiff would not have been able to exercise his constitutional rights. *See id.* The decisions in *Chiafalo v. Inslee*, 224 F. Supp. 3d 1140, 1147 (W.D. Wash. 2016), and *Ohio v. Yellen*, No. 1:21-cv-181, 2021 WL 1903908, at *14 (S.D. Ohio May 12, 2021), are even farther afield. In *Chiafalo*, the court held that "because the only potential harm to Plaintiffs is pecuniary, preliminary injunctive relief would have no impact on Plaintiffs' decision-making calculus." 224 F. Supp. 3d at 1148. In *Yellen* the court declined to issue a preliminary injunction against the federal government where the state's requested injunction was "directed solely at the Secretary's exercise of her recoupment powers," and "there [was] no reason to believe that the Secretary [would] exercise those powers any time soon." 2021 WL 1903908, at *14.

[17] *See, e.g.*, *Campaign for S. Equal. v. Miss. Dep't of Health and Human Services*, 175 F.Supp.3d 691, 710-11 (S.D. Miss. 2016) (rejecting state's argument that preliminary injunction against same-sex adoption ban would not remedy irreparable harm because "only an adoption decree will remedy [p]laintiffs' damages," reasoning that "[d]iscriminatory treatment at the hands of the government is an injury long recognized as judicially cognizable," and "while [p]aintiffs must undergo the adoption process to fully remedy their injuries, the current law imposes an unconstitutional impediment that has caused stigmatic and more practical injuries"); *Campaign for S. Equal. v. Bryant*, 64 F. Supp. 3d 906, 949 (S.D. Miss. 2014) (rejecting state's argument that preliminary injunction against same-sex marriage ban would not remedy irreparable harm because it "'would not alter' the public's negative perceptions of gay and lesbian couples," since "although the public may or may not change its views, the government can be enjoined from enforcing laws which perpetuate the idea that same-sex couples are second-class citizens"), *aff'd,* 791 F.3d 625 (5th Cir. 2015).

Nor does the fact that the preliminary injunction could be reversed on appeal (*see* Dkt. 43 at 46) change this calculus. Texas's argument on this front is once again based on a mischaracterization of the injury subject to redress—specifically, that the United States can obtain redress only if every S.B. 8 clinic lawsuit is permanently prohibited. But the United States is suffering an injury to its sovereignty right now, and a preliminary injunction would prevent the irreparable harm flowing from that injury.

B. There Is No Adequate Remedy at Law.

Texas also argues that there is no "irreparable" harm since those who are subject to lawsuits under S.B. 8—and those who intervene in those lawsuits—may challenge the constitutionality of S.B. 8 in those proceedings. Dkt. 43 at 50-54. Once again, Texas's argument does not even attempt to address the injury to the sovereignty of the United States, for which there is no adequate remedy at law. As explained above, S.B. 8's fundamental injury to the United States is an injury to United States' sovereignty, and that injury will continue so long as the law remains enforceable. *See supra* pp. 32-33. Requiring the United States to repeatedly defend its sovereign interests by intervening in numerous State court proceedings is plainly not an adequate alternative remedy because it would maintain enforcement of the offending law.

Rather than contend with the sovereign injury at issue, Texas claims that a preliminary injunction would not prevent irreparable harm because individuals sued under S.B. 8 could raise constitutional defenses in those lawsuits. But S.B. 8 forces parties to take steps to *avoid* lawsuits under S.B. 8—and thus prevents the proceedings through which providers and other parties could challenge S.B. 8's constitutionality from occurring. As explained in the United States' opening brief, S.B. 8 effectively deters providers from performing abortions that would violate its terms and thereby deprives persons of their constitutional right to a pre-viability abortion. *See* Dkt. 8 at 11–12 (citing and quoting from declarations). S.B. 8's deterrent effect directly injures the United States, because it impedes federal operations, including by purporting to prohibit federal personnel from enforcing federal law requiring them to facilitate certain abortions, risking breaches of federal contracts by health insurance carriers

and forcing agencies to absorb additional costs to transport pregnant persons seeking abortions outside of Texas. *See supra* pp. 28–31. These injuries do not stem from any actual enforcement proceeding in which any party—including the federal government—can challenge the constitutionality of S.B. 8.

Texas argues that S.B. 8 is no different than other state tort laws that may potentially interfere with constitutional rights. Texas contends that defendants in tort actions often challenge the constitutionality of the underlying tort laws as a defense; *e.g.*, defendants in libel actions challenge the libel laws as unconstitutional under the First Amendment. But in that hypothetical, only the First Amendment rights of the actual or potential defendant in a libel lawsuit are at stake, and that party would likely have an opportunity to raise a First Amendment defense. Here, as explained above, by deterring providers from performing constitutionally protected abortions, S.B. 8 burdens the constitutional rights of those who would *not* be defendants in an S.B. 8 suit (and who thus could not raise constitutional challenges to S.B. 8 in that suit). The rights-holders themselves—pregnant persons seeking an abortion—have no avenue for seeking relief. In any event, none of Texas's cited cases involves Supremacy Clause violations against the United States.

Texas also argues that, in *Yellen*, 2021 WL 1903908, the government took the position that an injunction against "threatened legal action" is improper if "the party will have an adequate opportunity to fully present his defenses and objections in the legal action he seeks to enjoin." Dkt. 43 at 50. But, as explained above, in that case the court determined that there was no reason to believe the government would take the threatened action during the pendency of the litigation, so the injury was hypothetical. Here, by contrast, S.B. 8 imposes injuries even *without* any lawsuits brought under S.B. 8, and it does not afford parties any recourse for those injuries.[18] Accordingly, S.B. 8 is imposing, and will

[18] The ability to raise a constitutional defense in a lawsuit brought under S.B. 8 would not be an adequate remedy even for parties who would be defendants in those actions. The Supreme Court has noted that a party "lacks the realistic option of violating [a] law . . . and raising its federal defenses" when this decision would "expose [it] to potentially huge liability" and in this circumstance, "there is no adequate remedy at law." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381 (1992). Here, of course, defendants in suits brought under S.B. 8 face steep monetary penalties for *each* abortion in which they are involved, and the prospect of paying attorneys' fees, under S.B. 8. *See* Dkt. 8 at 4. Further, it is unclear whether prospective defendants in S.B. 8 lawsuits may bring pre-enforcement

continue to impose, irreparable harms that will be remedied by a preliminary injunction, and thus the Court should enter the requested relief.

IV. THE PUBLIC INTEREST AND BALANCE OF EQUITIES FAVOR AN INJUNCTION.

Although Texas argues that it would be harmed by an injunction preventing the enforcement of its law, Dkt. 43 at 54, that principle has no application in situations where, as here, the State lacks a legitimate interest in the enforcement of a plainly unconstitutional law. Where a state's law is preempted by federal law, "the state[is] not injured by the injunction[.]" *Trans World Airlines v. Mattox*, 897 F.2d 773, 784 (5th Cir. 1990); *Alabama*, 691 F.3d at 1301 ("[W]e discern no harm from the state's nonenforcement of invalid legislation."). This is especially true where the clear purpose of the state law is to prohibit citizens from exercising their constitutional rights. Enjoining enforcement of S.B. 8 would not subject Texas to any hardship or penalty because the injunction would require only compliance with federal law under the Supremacy Clause. *See Mitchell v. Pidcock*, 299 F.2d 281, 287 (5th Cir. 1962) (noting that a permanent injunction requiring compliance with federal law does not constitute a hardship for it only "requires the defendants to do what the Act requires anyway—to comply with the law").

Moreover, it is always in the public's interest to prevent the violation of the Constitution and of individuals' constitutional rights. *Melendres v. Arpaio*, 695 F3d 990, 1002 (9th Cir. 2012). Likewise, the public interest is furthered by enjoining S.B. 8's interference with federal operations relating to providing access to abortion services. *See Alabama*, 691 F.3d at 1301 ("Frustration of federal statutes and prerogatives are not in the public interest."). Conversely, it is not in the public interest to allow a state to violate the requirements of federal law. *See Valle Del Sol Inc. v. Whiting*, 732 F.3d 1006, 1029 (9th Cir. 2013). "[I]t is clear that it would not be equitable or in the public's interest to allow the state

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lawsuits in Texas state courts and secure prompt relief. In fact, the Texas Multidistrict Litigation Panel recently stayed cases brought by multiple parties, including abortion providers, seeking precisely this type of relief in state court. *See* Transfer and Request for Stay, *In re Texas Heartbeat Act Litigation*, Texas Multidistrict Litigation Panel, No. 21-0782 (Sept. 13, 2021); Stay Order, *In re Texas Heartbeat Act Litigation*, Texas Multidistrict Litigation Panel, No. 21-0782 (Sept. 23, 2021).

to continue to violate the requirements of federal law[.]" *Cal. Pharmacists*, 563 F.3d at 852-53. "In such circumstances, the interest of preserving the Supremacy Clause is paramount." *Id.* at 853.

V. THE SCOPE OF THE REQUESTED INJUNCTION IS APPROPRIATE.

Texas disputes the scope of the United States' requested injunction, Dkt. 6-2, on several grounds. First, Texas contends that a stay of state proceedings under S.B. 8 "would not run against any person at all," and therefore "is categorically improper." Dkt. 43 at 55. But this argument recycles Texas's prior objections to the United States' requested remedy, and continues to overlook that federal court injunctions directed at a state itself are common, and that the availability of federal court stays of state proceedings is well-established, as Congress recognized in the Anti-Injunction Act. *See* Section I.B.1, *supra*. In any event, this argument would at most be a defect in form, not substance; to the extent Texas believes it is necessary, this Court can expressly confirm that the stay of proceedings operates *in personam* against state judges, clerks, and other court personnel. *See* Section I.B. 3, *supra*.

Next, Texas contends that it is simply not possible for the State to provide notice of any injunction to all civil claimants filing suits under S.B. 8. Dkt. 43 at 55. But Texas submits no evidence proving any such impossibility—it offers only the unsworn assertions of counsel and fails to explain why the clerk for each court could not provide such notice upon filing. And Texas should not be permitted to oppose this aspect of the injunction without proposing a reasonable alternative. At worst, this Court should enter the United States' requested injunction and provide Texas a set time period to propose reasonable alternatives to the notice requirements, supported with proof as to why such modifications are necessary.

Finally, Texas contends that "a blanket injunction of the Act" is inappropriate for two reasons. Dkt. 43 at 55. As an initial matter, the United States has not sought an injunction against S.B. 8 itself—it has requested judicial relief from this Court that would prevent S.B. 8 enforcement proceedings from being maintained. *See* Part I.B, *supra*. In any event, Texas's arguments are unpersuasive on their own terms.

Texas first invokes S.B. 8's severability provision, *see* Tex. Health & Safety Code § 171.212, but as discussed above, S.B. 8 is facially unconstitutional. *See* Section II.A, *supra*. And when a statute

is facially unconstitutional, both the Supreme Court and the Fifth Circuit have made clear that the presence of severability provisions is irrelevant: "The provisions are unconstitutional on their face: Including a severability provision in the law does not change that conclusion. . . . [O]ur cases have never required us to proceed application by conceivable application when confronted with a facially unconstitutional statutory provision." *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2318-19 (2016), as revised (June 27, 2016); *see also, e.g.*, *Jackson I*, 945 F.3d at 277 ("This law is facially unconstitutional because it directly conflicts with Casey. Accordingly, the district court did not abuse its discretion in declining to fashion relief narrowly[.]"). Because S.B. 8 is facially unconstitutional, this Court should disregard the severability clause, and enter an order staying all enforcement proceedings under S.B. 8.[19]

Texas also contends that "[t]he harm identified by the federal government concerns payment for abortions performed as a result of rape, incest, or life/health of the mother," and thus "any injunction should be limited to those specific circumstances[.]" Dkt. 43 at 56. But this argument is contrary to both the facts and the law. Legally, a court in equity should "accord full justice," *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946), and "administer complete relief between the parties[.]" *Kinney-Coastal Oil Co. v. Kieffer*, 277 U.S. 488, 507 (1928); *see also Brown v. Plata*, 563 U.S. 493, 538 (2011) ("Once invoked, the scope of a district court's equitable powers is broad, for breadth and flexibility are inherent in equitable remedies." (modifications omitted)). And factually, the United States' injuries are not limited only to abortions performed as a result of rape or incest, or for preserving the life or health of the mother. As discussed above, the United States brings this suit to vindicate its interest in ensuring that states cannot evade the supremacy of federal law, *see* Section I, *supra*, which itself justifies relief against all S.B. 8 enforcement proceedings.

[19] Even if Texas were correct about the severability clause—*i.e.*, that the Court cannot simply declare the statute facially unconstitutional but must instead proceed application-by-application—the Court would still be justified in entering a preliminary stay of S.B. 8 enforcement proceedings, in order to preserve the status quo while such constitutional adjudication unfolds. *Cf. United States v. United Mine Workers of Am.*, 330 U.S. 258, 293 (1947) ("[T]he District Court had the power to preserve existing conditions while it was determining its own authority to grant injunctive relief.").

But even setting aside that sovereign interest—and viewing the question of relief solely through the lens of harms to federal agencies—the harms to be redressed by an injunction are not limited to abortions involving rape, incest, or threats to the life or health of the mother. Several agencies facilitate abortions in other circumstances as well. *See* Dkt. 8 at 16–22. Moreover, and of particular significance in assessing the scope of relief, several federal agencies—such as BOP, USMS, and ORR—rely on abortion providers within the State of Texas to carry out their federal duties with respect to individuals within their care and custody. *See* Decl. of Alix McLearen Ph.D. ¶¶ 10, 17–19, Dkt. 8-10 (explaining that BOP's federal duties rely on abortion providers within the community, and S.B. 8 has significantly burdened BOP's ability to rely on such providers within Texas); Decl. of John Sheehan ¶¶ 9, 11, 14–16, Dkt. 8-11 (similar for USMS and its female detainees); De La Cruz Decl., ¶¶ 10–14, 20 (similar for ORR and unaccompanied children in its care). Thus, an injunction that fails to prevent lawsuits from being initiated against abortion providers would not provide complete relief to those agencies—the threat of liability for those providers would still lead to the dismantling of the abortion-provider network in the State, thereby preventing United States agencies from carrying out their functions. *See, e.g.*, Decl. of Amy Hagstrom Miller ¶ 42, Dkt. 8-4 ("If the law remains in effect for an extended period of time . . . we will have to shutter our doors and stop providing any healthcare to the communities we serve."). Texas cannot use an unconstitutional law to deprive the United States—and the persons in its care and custody—of access to the network of abortion providers who would otherwise operate in the State.

Ultimately, the question here is an equitable one—*i.e.*, how to provide complete relief that redresses the United States' injuries specifically caused by S.B. 8. The statute is patently unconstitutional, and neither federal agencies nor the public at large will be returned to the status quo unless the threat of liability for abortion providers is removed. Even if the Court considers only the federal agencies' injuries, therefore, it is still necessary to enjoin all S.B. 8 enforcement proceedings to remove the threat of liability for abortion providers.

VI. THE COURT SHOULD DENY TEXAS'S REQUESTED STAY.

The Court should deny Texas's request for a stay pending appeal of any injunctive relief this Court enters. "This Court has discretion to grant or deny a motion for stay pending appeal," *Silicon Hills Campus, LLC v. Tuebor REIT Sub, LLC*, No. 1:20-CV-1201-RP, 2021 WL 783554, at *2 (W.D. Tex. Mar. 1, 2021), and it considers four factors in exercising that discretion: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies," *Planned Parenthood of Greater Texas Surgical Health Servs. v. Abbott*, 734 F.3d 406, 410 (5th Cir. 2013) (quotation marks omitted). For the same reasons discussed above, consideration of these factors dictates that the Court should deny Texas's request.

CONCLUSION

For these reasons, the Court should preliminarily enjoin enforcement of S.B. 8.

Date: October 1, 2021

Respectfully submitted,

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Exhibit 9: Transcript of October 1 Hearing

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA	)	Docket No. A 21-CA-796 RP
	)	
vs.	)	Austin, Texas
	)	
STATE OF TEXAS	)	October 1, 2021

TRANSCRIPT OF VIDEOCONFERENCE MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION
BEFORE THE HONORABLE ROBERT L. PITMAN

APPEARANCES:

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09:04:18 THE CLERK: United States District for the
09:04:19 Western District of Texas is now in session. The
09:04:21 Honorable Robert Pitman, presiding.
09:04:25 Court calls A 21-CV-796, United States of America
09:04:30 vs. State of Texas and Others, for preliminary injunction
09:04:34 and temporary restraining order hearing.
09:04:37 THE COURT: Give me just one moment, please.
09:05:55 Good morning. And welcome. I'm going to ask the
09:05:58 clerk to call that case and if we could have announcements
09:06:00 for the record, please.
09:06:01 THE CLERK: A 21-CV-796, United States of America
09:06:05 vs. State of Texas and Others.
09:06:10 THE COURT: For the plaintiff.
09:06:12 MR. NETTER: Your Honor, Brian Netter for the
09:06:14 U.S. Department of Justice for the United States. I'm
09:06:17 joined by a variety of colleagues. I'll let them
09:06:20 introduce themselves.
09:06:22 MR. BAER: Good morning, your Honor.
09:06:23 Michael Baer from the Department of Justice on
09:06:25 behalf of the United States.
09:06:29 MS. EL-KHOURI: Good morning, your Honor.
09:06:29 Adele El-Khouri on behalf of the Department of
09:06:32 Justice on behalf of the United States.
09:06:35 MS. NEWMAN: Lisa Newman at the Department of
09:06:37 Justice on behalf of the United States.

09:06:42 THE COURT: And anyone else for the plaintiff?

09:06:45 MR. POWERS: Good morning, sir.

09:06:47 Jim Powers on behalf of the United States.

09:06:50 THE COURT: And good morning. Thank you.

09:06:52 And on behalf of the state of Texas?

09:06:58 MR. THOMPSON: Good morning, your Honor.

09:06:59 Will Thompson from the Texas Attorney General's Office. I represent Texas. I'm joined by my colleagues, Amy Hilton, Eric Hudson and Leif Olson.

09:07:08 THE COURT: Good morning.

09:07:09 And for the group of three Intervenors Graham Tuley and Sharp.

09:07:18 MR. STEPHENS: Your Honor, this is Andrew Stephens, and I'm joined by my law partner, Heather Hacker, and I believe Gene Hamilton is on, as well, on behalf of the Intervenor Defendants Graham, Tuley and Sharp.

09:07:31 THE COURT: Good morning.

09:07:33 MR. STEPHENS: Good morning.

09:07:34 THE COURT: Mr. Stilley, do we have you on the line?

09:07:37 MR. STILLEY: Yes, your Honor. I'm here as intervenor. Thank you, your Honor.

09:07:40 THE COURT: All right. Thank you all very much and welcome. Today, we are going to have a hearing on the

09:07:44 plaintiff's motion for a preliminary injunction. Before
09:07:46 we begin, let's sort of review our agenda for the day and
09:07:50 take up any housekeeping matters that any of you might
09:07:52 have.
09:07:53 Pursuant to my previous written orders in the
09:07:55 case, the hearing today will consist of first -- the first
09:08:02 thing we will do is making sure that each of you has in
09:08:05 the record everything that you want to have as a part of
09:08:10 the record before proceeding to your arguments. It's my
09:08:13 understanding from the United States that everything that
09:08:18 you wanted to put into the record has been accomplished by
09:08:23 -- before now by way of your pleadings.
09:08:26 Is that correct, Mr. Netter?
09:08:28 MR. NETTER: That is correct, your Honor.
09:08:31 THE COURT: I'm sorry. I didn't catch that.
09:08:32 MR. NETTER: That is correct, your Honor.
09:08:34 THE COURT: Okay. Very good.
09:08:37 And is -- can someone on behalf of the state --
09:08:41 Mr. Thompson, do you have any additional items that you
09:08:47 need to put into the record before we argue the case?
09:08:51 MR. THOMPSON: Two quick items on that, your
09:08:53 Honor. We have submitted some additional exhibits. There
09:08:58 are the deposition transcripts from the depositions that
09:09:01 we have taken that are the full context of the clips we
09:09:05 intend to play today. And so, we would move to admit

09:09:07 those, as well. I'm not aware of any objections about
09:09:10 that from the United States.
09:09:12 The second item is that we have filed a written
09:09:15 objections on the docket to aspects of the federal
09:09:21 government's evidence. And if your Honor would like to
09:09:23 hear argument on that this morning, my colleague, Ms.
09:09:25 Hilton, is prepared to do so.
09:09:26 THE COURT: First, Mr. Netter, do you have any
09:09:28 objection to the introduction of the exhibits that Mr.
09:09:32 Thompson was just referring to?
09:09:34 MR. NETTER: No objection, your Honor.
09:09:35 THE COURT: Okay. Then what we'll do -- as far
09:09:41 as the objections, I have seen your objections. I have
09:09:44 not had an opportunity to do anything other than review
09:09:47 them. If there's -- if you'd like to take a minute to
09:09:51 direct my attention to anything in particular that you
09:09:55 would like me to consider that is not evident by the
09:09:58 objections themselves, Ms. Hudson, I'd be happy to hear
09:10:02 from you for a minute on that if there's -- if you want to
09:10:04 focus me on any particular objection that you have that
09:10:07 the objection itself would not be sufficient to educate
09:10:13 me, I'm happy to hear from you on that.
09:10:15 MR. THOMPSON: I'll mention just one briefly,
09:10:17 your Honor, which is that our written objections were
09:10:19 filed yesterday. This morning, the federal government

09:10:22 filed two additional declarations with its reply brief.
09:10:25 We object to those, as well. We think it's improper to be
09:10:28 submitting new evidence at this late stage on our reply
09:10:31 brief, the morning of the hearing. Changing the story
09:10:35 from Ms. Miller, who's now submitted two declarations
09:10:38 likely are in contention with each other, and it is
09:10:41 improper for that to be admitted without us having an
09:10:44 opportunity to cross-examine her via deposition or
09:10:47 otherwise.
09:10:47 THE COURT: Okay. I'll take that under
09:10:49 advisement and consider that when I look at the evidence
09:10:52 in the case. Thank you.
09:10:54 All right. With that -- and then, let me go
09:10:59 ahead and make an inquiry of Mr. Stephens. Mr. Stephens,
09:11:01 I have allocated to your three clients 30 minutes, and
09:11:06 that's inclusive of any additional evidence that you would
09:11:11 like to introduce into the record.
09:11:13 Do you anticipate using up any of your time for
09:11:15 that purpose, or do you want to reserve that for argument?
09:11:19 MR. STEPHENS: Judge, as far as additional
09:11:21 evidence this morning, we filed an exhibit list as well as
09:11:26 copies of the exhibits that we would offer in opposition
09:11:29 to the plaintiff's or the United States' motion for
09:11:32 preliminary injunction. And so, we do -- you know, we
09:11:36 would intend to offer those. Whether through live

09:11:40 testimony or if unopposed by the United States, we would
09:11:43 just offer those into the record now.
09:11:47 We also would make a motion to strike three of
09:11:52 the declarations offered by the United States. I could
09:11:54 make that motion during our 30 minutes allotted time later
09:12:00 in the hearing, if you deem that appropriate.
09:12:04 THE COURT: That would be just fine. And if
09:12:07 you've made the written objections that I haven't had an
09:12:09 opportunity to review, you could also rely on those, as
09:12:11 well.
09:12:12 Mr. Netter, what's your position with regard to
09:12:15 -- have you had an opportunity to review the exhibits that
09:12:19 had been offered by Mr. Stephens?
09:12:22 MR. NETTER: We have not, your Honor. Looks like
09:12:23 the exhibit list was filed at 8:53 a.m., when we were
09:12:28 already logged into this hearing. So we've not yet had a
09:12:31 chance to review those exhibits. And I couldn't state
09:12:34 right now, whether or not we have any objections.
09:12:35 THE COURT: Okay. If you could then -- Mr.
09:12:39 Stephens, you can either use your time to go through those
09:12:43 or we can give you till the end of the day, Mr. Netter, to
09:12:49 lodge any objections and to those exhibits and -- but
09:12:54 again, Mr. Stephens, you're free to use your time however
09:12:57 you'd like. Those are -- I understand that Mr. Netter has
09:13:00 not had a meaningful opportunity to review those, but I

09:13:03 don't know whether they will be objectionable or not and
09:13:06 we'll see.
09:13:06 So -- and, Mr. Stilley, do you anticipate
09:13:09 introducing any additional evidence into the record today?
09:13:12 MR. STILLEY: No, your Honor.
09:13:13 THE COURT: Okay. Very good. Then it would be
09:13:16 my intention then to allow whomever wanted to put
09:13:19 additional evidence into the record during this hearing to
09:13:22 do so so that we have a complete record absent, I suppose,
09:13:28 the last-minute filed exhibits by the three intervenors
09:13:35 that will be taken up after this hearing potentially.
09:13:39 But if there's anything else that you'd like to
09:13:41 get into the record, I'd like to do that now, before we go
09:13:45 into the argument portion of this hearing.
09:13:48 So again, Mr. Thompson, is there anything that
09:13:51 you'd like to -- additionally that you'd like to put into
09:13:54 the record during the time that you've been allotted for
09:13:55 that purpose?
09:13:58 MR. THOMPSON: No, your Honor. The exhibits we
09:14:01 submitted through the Court's website are it.
09:14:02 THE COURT: Okay. Mr. Mitchell, would you like
09:14:05 to incorporate your comments about your proffered exhibits
09:14:07 during the time that's been allotted for argument?
09:14:17 MR. STEPHENS: Judge, you said Mr. Mitchell. Did
09:14:19 you mean --

09:14:20 THE COURT: I'm sorry. Mr. Stephens. I'm sorry.

09:14:23 MR. STEPHENS: We would. We can either go through those exhibits during our allotted time or we can -- you know, assuming there's not an objection later today from the United States, then, you know, we would have them in the record. So.

09:14:38 THE COURT: Okay. Why don't we just -- if you would incorporate those, then, into your argument, and then, we will make a note that we need to revisit the admissibility of those exhibits after the hearing.

09:14:52 All right. One small matter that I just wanted to clear up for our records, and that is that the government, earlier this morning, I believe, filed their reply that also requested leave to exceed page limits, and I think that was agreed to by everyone, except I don't think they were able to get a response from the three intervenors.

09:15:13 And so, Mr. Stephens, if you could let me know whether you oppose that, we can go ahead and clear that little detail on our records.

09:15:21 MR. STEPHENS: No. We're unopposed.

09:15:23 THE COURT: Okay. Thank you very much. I'll grant that motion.

09:15:28 Okay. With that, then, we will go into the portion of this hearing that has been reserved for

09:15:32 arguments on the motion. I have, previous to today, in
09:15:38 written orders allocated an hour to the federal government
09:15:43 for its presentation of its case. You can reserve up to a
09:15:49 half hour of that time for your rebuttal, but you do need
09:15:54 to use up at least half of your time in your initial
09:15:58 remarks.
09:15:59 That will be followed by an hour -- up to an hour
09:16:04 by the state to respond, followed by 30 minutes by the
09:16:09 group of three intervenors. And then, Mr. Stilley, we'll
09:16:12 give you the 10 minutes at the end to round out the
09:16:17 defendant's portion of this. And then, we will loop back
09:16:21 to the movants in the case for rebuttal.
09:16:24 With that, is there anything else that we need to
09:16:26 discuss before we launch into our argument portion of this
09:16:30 hearing? Okay. Not hearing any, then, Mr. Netter, will
09:16:36 you be taking the floor for the federal government?
09:16:38 MR. NETTER: I will, your Honor. Thank you.
09:16:41 And again, good morning and may it please the
09:16:43 Court. There is no doubt under binding constitutional
09:16:49 precedence that a state may not ban abortions at six
09:16:54 weeks. Texas knew this, but it wanted a six-week ban,
09:16:58 anyway. So the state resorted to an unprecedented scheme
09:17:02 of vigilante justice that was designed to scare abortion
09:17:06 providers and others who might help women exercise their
09:17:09 constitutional rights while skirting judicial review.

09:17:14 So far, it's working. Abortion providers across
09:17:18 the state have stopped treating patients at six weeks
09:17:21 gestational age, before some women even know that they're
09:17:25 pregnant. Women have been left desperate, forced under
09:17:29 sometimes harrowing circumstances to get out of Texas if
09:17:31 they even can. Texas has made clear that it does not want
09:17:36 to follow the Supreme Court's abortion precedence. But
09:17:40 Texas' recourse, its ploy to keep S.B. 8 out of court is
09:17:46 an open threat to the rule of law.
09:17:48 Although the right targeted today is one
09:17:52 protected by the Fourteenth Amendment, the precedent
09:17:56 established by this case will dictate whether the set of
09:17:58 rights guaranteed by our national compact are reliable or
09:18:02 it can be manipulated into oblivion through subversive
09:18:05 state action.
09:18:07 The United States brought this lawsuit because
09:18:10 S.B. 8 imperils the supremacy of the U.S. Constitution.
09:18:14 Texas does not seriously defend the constitutionality of a
09:18:17 six-week abortion ban nor could it; and it has no
09:18:21 good-faith justification for enforcing this law through a
09:18:24 system of bounties. Instead, the state and its
09:18:27 intervenors claim that procedural obstacles should permit
09:18:30 them to continue violating the Constitution.
09:18:34 In particular, the state and its intervenors
09:18:37 raise three legal issues that bear on the entitlement of

09:18:39 the United States to relief: Whether the United States is
09:18:41 a proper plaintiff in this action, whether the state of
09:18:46 Texas is a proper defendant, and the scope of relief
09:18:49 available at this juncture. This action, however, has a
09:18:53 well-founded basis and the United States has demonstrated
09:18:56 in its papers its entitlement to preliminary injunctive
09:18:59 relief.

09:19:00 Your Honor, the United States does not frequently
09:19:05 file suit to challenge state laws, and it does not do so
09:19:08 lightly here or elsewhere. But this suit is necessary
09:19:12 because S.B. 8 represents a, thus far, unprecedented
09:19:16 attack on the supremacy of the federal government and the
09:19:20 federal Constitution. A good starting point is to discuss
09:19:23 how disputes about the constitutionality of state laws are
09:19:25 usually resolved.

09:19:27 It has been long established and long understood
09:19:29 that the combination of Ex Parte: Young, Section 1983 and,
09:19:34 as necessary, the Declaratory Judgment Act permit
09:19:38 individuals who are set to be harmed under color of state
09:19:41 law to bring actions against those officials who are
09:19:44 responsible for enforcing an unconstitutional state law
09:19:46 and to get judicial relief, without suffering the
09:19:49 consequences of needing to take action beforehand.

09:19:53 S.B. 8, however, was designed in a way so as to
09:19:56 attempt to avoid actions under Ex Parte: Young and Section

09:20:01 1983. The state has already raised Eleventh Amendment
09:20:05 defenses to actions brought by abortion providers and
09:20:10 those who could be subject to the terms of S.B. 8, and
09:20:13 has, thus far, thwarted the sort of prejudicial review
09:20:16 that has been customary now for many decades.
09:20:20 It is because of the state's efforts to thwart
09:20:24 that judicial review, to write a statute that works around
09:20:27 the provisions of Section 1983, that makes this action by
09:20:31 the United States both necessary and appropriate. Let me
09:20:35 start first with what was perhaps a smaller point and that
09:20:39 any plaintiff appearing at a U.S. -- a federal district
09:20:43 court must first establish that it has standing under
09:20:45 Article III to appear in court, a sufficient injury in
09:20:50 fact that can be redressed by judicial action.
09:20:52 The state in this case has tried to cast out on
09:20:56 whether the United States does have standing, but there's
09:20:59 a pretty simple answer to that, and that's the Supreme
09:21:02 Court's decision in Vermont Agency of Natural Resources
09:21:05 vs. United States, Ex Rel. Stevens, and that's a case in
09:21:09 which the Court -- the Supreme Court held that when there
09:21:11 is a violation of the laws of the United States, that is
09:21:15 an injury to the sovereignty of the United States that
09:21:18 creates standing, that creates a justification for the
09:21:22 United States to invoke the authority of its courts.
09:21:25 That reasoning in the Stevens case is also, for

what it's worth, the reason why the United States can pursue criminal actions when there is a violation of a criminal law that exists in the statutory code of the United States. That's why the United States has standing to appear in court to prosecute such an action.

The response from the state of Texas is to rely on a Supreme Court case called Muskrat. And as we've explained in our rely brief, filed earlier this morning, the Muskrat case is -- simply doesn't bear on the questions that are at issue here. The issue in Muskrat was whether the United States and, in that case, a number of individuals from the Cherokee Tribe who had been appointed -- designated by Congress to challenge a lawsuit, whether they could collusively create a judicial action that could resolve the constitutional -- the constitutionality of a federal law in that case.

The Muskrat case is about collusion. As the proceedings, thus far, in this case should demonstrate, there is no collusion here. There is adequate adversity as between the United States, the state of Texas, and its intervenors. And the United States as the sovereign has injuries, discrete injuries that it is entitled to seek redress for before this court.

We've indicated in our papers what -- we can describe it as two categories of injuries. The first

09:22:55 category stems from a line of Supreme Court authority
09:23:01 called In Re: Debs and its progeny, and the second, which
09:23:04 we can discuss in a bit, relates to interference with
09:23:07 federal government operations under the doctrines of
09:23:11 preemption and intergovernmental immunity.
09:23:14 With respect to Debs, the Supreme Court has held
09:23:18 in Debs and elsewhere that it is the general rule that the
09:23:22 United States may sue to protect its interests, that is,
09:23:26 an equitable cause of action. There exists an equitable
09:23:29 cause of action for the United States as sovereign to
09:23:31 invoke the authority of its courts under certain
09:23:34 circumstances. Debs establishes three criteria that we
09:23:40 have identified in our opening brief that explain the
09:23:42 circumstances under which the United States can invoke
09:23:45 that equitable authority to pursue an equitable cause of
09:23:49 action.
09:23:49 First, a state law violates the Constitution.
09:23:54 Second, the state law as -- or the state action has a
09:23:57 widespread effect. And third, the state action is
09:24:01 designed to preclude the ability of those whose rights are
09:24:04 being violated from vindicating their rights. And just to
09:24:09 put some meat into where in the Debs case this is coming
09:24:12 from, the Supreme Court held in Debs that the government's
09:24:14 right to intervene in an otherwise private dispute arises,
09:24:18 quote, whenever the wrongs complained of are such as

09:24:22 affect the public at large, and are in respect of matters
09:24:25 which by the Constitution are intrusted to the care of the
09:24:28 nation, and concerning which the nation owes the duty to
09:24:30 all citizens of securing to them their common rights.
09:24:33 The court also held that because injunctions are
09:24:35 available only when other remedies cannot provide adequate
09:24:38 relief, where the choice is between the ordinary and the
09:24:42 extraordinary processes of law and the former are
09:24:45 sufficient, the rule will not permit the use of the
09:24:48 latter. Here, the wrongs resulting from S.B. 8 are
09:24:52 serious, they are wide-ranging, and other remedies have,
09:24:57 thus far, been thwarted.
09:24:59 Now, let's start with that last point. Texas
09:25:02 insists in its papers, and its intervenors agree, that its
09:25:06 courts can adequately protect abortion rights by
09:25:11 adjudicating the bounty lawsuits after the fact. They say
09:25:15 as a result, that our real complaint is a distrust of
09:25:17 state courts, but that's not right. And the problem here
09:25:23 is the mechanism by which Texas is denying state rights.
09:25:26 But if there were a legitimate way for those individuals,
09:25:31 or for women who need to seek an abortion, or for the
09:25:34 providers who need to stay open so that the women can
09:25:37 vindicate those constitutional rights, if there were a
09:25:39 mechanism in state court for those individuals to pursue
09:25:41 judicial relief, this would be a very different case, and

09:25:44 I suspect we would not be here already because courts
09:25:47 would have been able to rule on, what we believe to be the
09:25:50 obvious, unconstitutionality of S.B. 8's substantive
09:25:53 terms.
09:25:53 Instead, the judicial review that is available
09:25:58 under S.B. 8 consists of adjudicating these bounty
09:26:03 lawsuits after a provider or somebody aiding or abetting
09:26:08 an abortion after the six-week prohibition has taken steps
09:26:11 to subject him or herself to a penalty of $10,000, at
09:26:16 least $10,000, plus attorneys' fees, plus a future
09:26:20 injunction, plus a succession of lawsuits if the first one
09:26:23 should be unsuccessful.
09:26:26 This is a scheme which is designed to stack the
09:26:30 deck against those who are seeking to assist and to
09:26:33 facilitate the exercise of the constitutional rights of
09:26:36 women seeking a previability abortion. It's designed to
09:26:41 work through deterrence. The whole concept behind this
09:26:44 legislation is to make it so that nobody or virtually
09:26:48 nobody will be able to justify taking the chances, to
09:26:52 justify taking the risks of performing one of these
09:26:55 forbidden procedures and being locked up and in the
09:26:59 endless series of judicial conflicts that will be caused
09:27:02 by the vigilante actions.
09:27:05 So because it is part of the scheme to use this
09:27:10 judicial process to enforce Texas' unconstitutional end,

09:27:14 the existence of that review after the fact simply doesn't
09:27:18 cure the constitutional injury. And the facts on the
09:27:21 ground make that abundantly clear that there has, to date,
09:27:24 been one individual who has been willing to perform one
09:27:27 abortion. That abortion has already triggered several
09:27:33 lawsuits. One of them filed by the intervenor, Mr.
09:27:35 Stilley. But the shutdown of abortions after six weeks
09:27:43 within the state of Texas is proof enough already that the
09:27:45 state court review has achieved its design, and that
09:27:48 design was to create the system of deterrence to make it
09:27:51 impossible for individuals to vindicate their rights
09:27:54 through the court system.
09:27:55 It's because that system of state court review
09:27:59 isn't adequate that the extraordinary process of law, this
09:28:06 action by the United States is necessary because the
09:28:08 United States surely has an interest in defending and
09:28:09 upholding the supremacy of the federal Constitution. Were
09:28:14 it the case that the United States had no interest and
09:28:16 that there were no recourse, no ability for the United
09:28:19 States to assert the supremacy of federal law, then that
09:28:25 key provision of the Constitution would lose meaning, and
09:28:28 we would return to an era in which states felt that it was
09:28:31 appropriate to nullify provisions of the Constitution that
09:28:34 they felt were inconvenient or inconsistent with their
09:28:39 individual state-held views and conflict with what the

09:28:43 Supreme Court had held.

09:28:44 You know, I indicated at the outset that although
09:28:47 this case is about abortion, it's not hard to imagine
09:28:52 other laws that could be written in a way so as to create
09:28:54 the same result, to create unconstitutional ends through
09:28:59 deterrence. And that the hypotheticals are pretty easy to
09:29:02 come up with, but one that came to mind is, suppose a
09:29:06 state or suppose the United States wanted to prevent
09:29:08 people from criticizing the president of the United
09:29:13 States. And the federal government, Congress, therefore,
09:29:16 passed a statute that said that anybody who criticizes the
09:29:19 United States has to pay a $1 million penalty on his or
09:29:23 her taxes. And then, there's a refund procedure after the
09:29:28 fact for individuals who want to claim that they have
09:29:31 First Amendment rights that were being violated.

09:29:34 There are many precedents in First Amendment
09:29:36 contexts that talk about the chilling effects that
09:29:40 legislation or that state action can have. And surely
09:29:44 legislation that create a penalty, that put the money on
09:29:48 the line before any action could be taken, well, that
09:29:52 would reduce the amount of speech by individuals seeking
09:29:54 to criticize the president. So, too, here, Texas has
09:29:58 created a system where the risks, where the penalties
09:30:01 associated with taking constitutionally protected action
09:30:03 are designed to be so sufficient, so excessive that

09:30:08 individuals can't be willing or shouldn't be willing to
09:30:11 take those risks in order to take steps that are supposed
09:30:15 to be protected by the Constitution.
09:30:16 Now, the state in response to the tradition of
09:30:22 the United States having a cause of action, having the
09:30:24 ability to bring actions under the supremacy clause, the
09:30:27 state and its intervenors referred to the Supreme Court's
09:30:30 decision in Armstrong. It's Armstrong vs. Exceptional
09:30:34 Child Center. The Armstrong case was about whether the
09:30:39 Constitution implies a right of action for a private
09:30:42 plaintiff. That was a case about a Medicaid dispute, an
09:30:47 individual seeking to invoke federal law through the
09:30:51 supremacy clause as a private right of action.
09:30:54 There's no historical or logical reason, however,
09:30:58 to believe that the right of the United States to ensure
09:31:01 the supremacy of the U.S. Constitution is coextensive or
09:31:07 paralleled with the rights of individual citizens. The
09:31:10 United States has a special right as the sovereign to
09:31:13 enforce and to defend through the take care clause and
09:31:17 elsewhere, the supremacy of federal law and the compliance
09:31:20 of the states with the Constitution.
09:31:24 Now, I just mentioned the context of Armstrong,
09:31:29 this notion of implied causes of action, and that's
09:31:32 another important legal distinction that we think the
09:31:35 state and its intervenors are getting wrong. The state

09:31:39 and its intervenors have included some passages in their
09:31:42 filing suggesting that there's no or there shouldn't be an
09:31:46 implied right of action because in some circumstances,
09:31:48 implied rights of action are disfavored. But the right of
09:31:52 action that's been recognized by the United States is not
09:31:55 implied at all. It's an equitable cause of action. It's
09:31:58 an equitable cause of action with a long history that is
09:32:00 grounded in Supreme Court precedent.
09:32:03 And because equitable causes of action, implied
09:32:08 causes of action stem from different doctrinal
09:32:11 underpinnings, the limits that the state wants to offer as
09:32:13 to Bivens remedies or Cort vs. Ash, causes of actions that
09:32:19 are implied under law, they're simply inapplicable here.
09:32:23 The United States is here in court under an equitable
09:32:24 cause of action. An equitable cause of action is present
09:32:28 under the conditions of equity so long as Congress has not
09:32:31 abrogated such right.
09:32:33 And in this case, Congress has not abrogated the
09:32:36 right of the United States to file suit under these
09:32:39 circumstances. And because our right of action is
09:32:42 grounded in the Constitution and principles of equity,
09:32:46 Congress would need to have displaced the right of the
09:32:49 United States expressly.
09:32:53 Now, the state and it intervenors have suggested
09:32:56 that one ought to be able to imply that Congress would not

09:33:00 have wanted, the sovereign would not have wanted the
09:33:03 United States to assert a cause of action under these
09:33:05 circumstances, most notably, because Section 1983 exists.
09:33:12 But as the Supreme Court has emphasized in Mitchum vs.
09:33:17 Foster and Patsy vs. Board of Regents, the Fourteenth
09:33:20 Amendment was designed during the era of Reconstruction to
09:33:23 set up the federal government as a guarantor of the basic
09:33:26 federal rights of individuals against incursions by state
09:33:30 power.
09:33:30 Section 1983 was then adopted to supplement that
09:33:34 power to give individuals, aggrieved individuals a right
09:33:36 to challenge unconstitutional acts taken by individuals
09:33:40 under color of state law. Nothing about Section 1983,
09:33:44 certainly when it was passed, would permit the inference
09:33:47 that Congress was intending to divest the federal
09:33:50 government of authority that had just been granted years
09:33:53 prior in the Reconstruction era.
09:33:56 Section 1983 was about expanding the
09:34:00 enforceability of federal constitutional rights. To be
09:34:04 sure, there have been some statutory initiatives, there
09:34:06 have been draft legislation. Some of it introduced a full
09:34:09 hundred years after Section 1983 was adopted, suggesting
09:34:13 that there might be circumstances under which an explicit
09:34:16 cause of action could be provided by Congress. There is
09:34:19 generally a very weak inference that could be drawn about

09:34:22 Congress' intent when it fails to enact legislation,
09:34:27 particularly when the failure to enact legislation is so
09:34:29 separate in time from the adoption of Section 1983 in the
09:34:32 first place.
09:34:34 THE COURT: Mr. Netter, can I interject with a
09:34:36 question here pertaining to the last two points you've
09:34:39 made. If not congressional action, are there any limiting
09:34:42 principles to the equitable authority that you're relying
09:34:45 on to -- in these circumstances, you keep saying, you
09:34:50 know, the federal government does this rarely and it's
09:34:52 exceptional. But can you help me a little more with
09:34:55 whether or not there's a limit to when and under what
09:34:58 circumstances the federal government could exercise the
09:35:00 kind of authority that you're claiming in this case? It's
09:35:03 pretty expansive, right?
09:35:06 MR. NETTER: It depends on the nature of the
09:35:07 state action, your Honor, as to whether or not it's
09:35:09 expansive. And we've articulated the limits that we
09:35:11 believe are derived from the Supreme Court's holding In
09:35:14 Re: Debs, and those are that the state law has violated
09:35:17 the Constitution naturally and the state action has a
09:35:19 widespread effect, as this law clearly does. But perhaps
09:35:23 the most notable here is the state law is designed to
09:35:26 preclude the ability of those whose rights are being
09:35:28 violated from vindicating their rights.

09:35:29 And history will show that it is the exception, rather than the rule, that a state law that violates constitutional rights does so in a manner that leaves no individuals able to bring that action. That the reason that the United States had to file this action is not just that Texas-enacted legislation that was designed unconstitutionally to impose restrictions on abortion rights. Other states have done the same things. And women who have wanted to pursue abortions or clinics that provide abortions have succeeded in challenging those laws to the ordinary procedures.

09:36:04 What's unique and what's different about this law is that it specifically deprives those who are affected by the law of an ability to obtain the redress that is necessary in order to defend the Constitution. It's because of this system of deterrence that Texas is trying to effectively do an end run around the supremacy clause. And that limitation, the equitable principle that if other easier remedies are available that equity will not create a remedy, that is a limiting principle; and it's a limiting principle that doesn't come into effect here only because Texas has devised this scheme that the chief justice described as unprecedented.

09:36:41 So we do think that, you know, that's the limiting principle. If other states do similar things, if

09:36:48 other states try to create a system of deterrence designed
09:36:52 to evade judicial review, they're taking out any role --
09:36:57 supposedly taking out any role for the state's executive
09:37:00 branch so as to make the state's executive branch free
09:37:03 from suit under Section 1983 and Ex Parte: Young, you
09:37:07 know, those are the other circumstances in which the
09:37:09 United States might need to pursue an action such as this.
09:37:11 But one would hope that insofar as this is a
09:37:16 truly unique action, unique piece of legislation, that
09:37:21 actions of this nature would be unusual. And because --
09:37:28 again, because the cause of action of the United States is
09:37:31 grounded in equity, the critical point here is that
09:37:34 Congress hasn't superseded. I'm sure there are other
09:37:37 equitable interests, equitable standards that are always
09:37:40 going to dictate whether or not a court is going to grant
09:37:42 equitable relief, and those are standards that come into
09:37:45 play whenever a court is asked to enter an injunction.
09:37:48 But for present purposes, Congress has not stepped in to
09:37:51 supersede the equitable authority of the United States in
09:37:53 this context.
09:37:54 And to the extent the state and its intervenors
09:37:56 are suggesting that the Fourteenth Amendment is special in
09:38:00 this respect, that the United States has fewer powers to
09:38:03 enforce the Fourteenth Amendment than it does to enforce
09:38:06 other constitutional rights, that is again another

09:38:09 particularly troubling assertion in that the Fourteenth
09:38:13 Amendment was adopted no small part because the era
09:38:17 leading up to Reconstruction had proven that there were
09:38:20 circumstances that states were unwilling or unable to
09:38:23 assure the constitutional rights of their citizens, and
09:38:26 that the involvement of the United States was essential to
09:38:29 ensure that our founding document had force and effect
09:38:32 throughout the country.

09:38:33 There was surely no intent by those who drafted
09:38:36 and the states that ratified the Fourteenth Amendment to
09:38:39 create a second-class amendment that was conferring equal
09:38:43 protection under the laws. And we do not believe that the
09:38:45 Court would have any basis to find such a limitation
09:38:47 embedded within the Fourteenth Amendment.

09:38:51 I want to note briefly, also, that the state and
09:38:56 its intervenors have relied on cases that have under some
09:39:00 circumstances failed to recognize a cause of action for
09:39:04 the United States to enforce certain rights, including
09:39:05 Fourteenth Amendment rights in some circumstances. And I
09:39:08 think this again gets to your Honor's earlier question
09:39:10 about the limiting principles.

09:39:12 And the key case to mention here is the Third
09:39:15 Circuit's decision in United States vs. City of
09:39:17 Philadelphia. And I don't want to suggest that the United
09:39:21 States agrees with all aspects of that decision,

09:39:24 particularly the construction that that court gave to
09:39:26 Section 5 of the Fourteenth Amendment. But even accepting
09:39:29 this case on its terms, the court held in that case, or
09:39:32 noted in that case that there were other ways for the
09:39:36 injured individuals in the Philadelphia case to secure
09:39:40 recourse, that it was unnecessary for the United States to
09:39:42 be filing that action.
09:39:43 And that, again, puts the city of Philadelphia
09:39:46 case on the other side of the doctrinal law or the
09:39:49 doctrinal line that we -- I believe was established in
09:39:52 Debs as it is carried forth through the three-point rule
09:39:55 that we have suggested governs this case, as well.
09:40:00 Now, in addition to the injuries to the
09:40:04 sovereignty of the United States that stem from Texas'
09:40:07 efforts to violate the supremacy clause as a whole and to
09:40:11 imperil the supremacy of federal law through violation of
09:40:14 the Fourteenth Amendment, the United States also has
09:40:17 programmatic interests with which Texas is not permitted
09:40:19 to interfere. The Bureau of Prisons, the U.S. Marshal's
09:40:22 Service, the Office of Refugee Resettlement, all have
09:40:26 custody over women who are entitled to elect to have
09:40:29 abortions.
09:40:29 Texas claims primarily that the rights of inmates
09:40:32 and detainees to obtain abortions could be limited by
09:40:35 state law. But a federal agency cannot rely on an

09:40:39 unconstitutional state restriction to deprive individuals
09:40:42 of federally protected rights. So the interests of the
09:40:45 Bureau of Prisons, the U.S. Marshal's Service and the
09:40:48 Office of Refugee Resettlement all require the removal of
09:40:52 obstacles to abortion care in Texas.
09:40:55 S.B. 8 also interferes with federal contracts
09:40:58 governing the DOL's Job Corp program, and the Federal
09:41:01 Employees Health Benefits program, and also violates
09:41:04 Medicaid regulations. The state with respect to those
09:41:07 agencies offers a too-clever-by-half response that the
09:41:12 United States can't violate its obligations to provide and
09:41:14 to fund certain abortions if an external force, here, the
09:41:19 state of Texas, has made those abortions impossible. But
09:41:23 that argument merely proves our point that S.B. 8 stands
09:41:25 as an obstacle to the accomplishment of federal
09:41:28 objectives. And in the face of such a conflict, S.B. 8
09:41:31 must yield to the superior federal prerogatives.
09:41:35 The next point that I told the Court that we
09:41:38 would address is why the state of Texas is the proper
09:41:41 defendant. And just as the United States is an
09:41:45 appropriate defendant, the state of Texas is an
09:41:46 appropriate defendant, and that's in no small part because
09:41:51 many of the procedural obstacles that S.B. 8 was designed
09:41:54 to erect as to suits by private plaintiffs just simply
09:41:57 don't apply in an action brought by the United States.

09:42:00 Take, for example, the need to identify
09:42:03 particular state officials who can be sued under Ex Parte:
09:42:06 Young. As the Court is well aware, this was at issue in
09:42:08 the earlier provider lawsuit that remains ongoing. But Ex
09:42:14 Parte: Young does not apply in an action brought by the
09:42:16 United States. The state is not immune from suit under
09:42:19 the Eleventh Amendment, so the action is properly brought
09:42:22 by the United States against the state of Texas as a
09:42:25 political unit. And because the action is filed against
09:42:29 state of Texas as a political unit, the state can be held
09:42:32 to account through this lawsuit for all of its actions.
09:42:37 Here, with respect to S.B. 8, the unlawful state
09:42:39 action consists of the distortion of the judicial process
09:42:43 to deprive rights guaranteed by the federal Constitution.
09:42:46 And Texas is pursuing that unconstitutional end by
09:42:50 leveraging its state judiciary and by appointing vigilante
09:42:55 bounty hunters to act under color of state law.
09:42:58 Texas tries to argue in its opposition, and its
09:43:01 intervenors agree, that actions against particular state
09:43:04 actors might suffer from procedural difficulties. But we
09:43:07 would ask the Court to look at this question from the
09:43:11 opposite perspective. Because the state of Texas has no
09:43:13 immunity from suit, an injunction that runs against Texas
09:43:18 here is effective unless the state does absolutely nothing
09:43:21 to enforce or advance the unconstitutional objectives of

09:43:25 S.B. 8. And that's simply not the case.

09:43:27 So a proper injunction here runs against the
09:43:30 state. And if the state wants to impose a narrower
09:43:35 solution that reaches the same outcome, it is free to do
09:43:37 so. It is free to comply with an injunction that directs
09:43:39 the state to ensure that the rights of women within the
09:43:42 state of Texas to obtain abortions are not unduly limited,
09:43:46 in violation of the Constitution pursuant to S.B. 8.

09:43:49 Alternatively, we've identified four more
09:43:54 tailored injunctions that independently and jointly would
09:43:57 redress the United States' injuries. Again, a very
09:44:01 straightforward option is the Court could enter an
09:44:04 injunction staying all state court proceedings brought
09:44:07 under S.B. 8. There is, again, judicial precedent and
09:44:12 statutory guidance as to the existence -- the authority of
09:44:16 a federal court to issue an injunction as to state court
09:44:20 proceedings.

09:44:21 Notably, the Anti-Injunction Act, which limits
09:44:23 the authority of federal courts in some circumstances, it
09:44:26 does not apply to suits that are brought by the United
09:44:30 States. So it is possible, it is available for this court
09:44:33 to direct and order that the state to stay all state court
09:44:36 proceedings, and that would remove the system of
09:44:44 deterrence. It would remove the means by which the state
09:44:47 of Texas has chosen to pursue its unconstitutional end.

09:44:52 In addition, the Court's injunction could enjoin private
09:44:57 parties who are enforcing S.B. 8.
09:45:00 Now, the state and its intervenors have a couple
09:45:02 of responses to this. They say to begin that it would be
09:45:05 unfair somehow to the individuals who want to enforce S.B.
09:45:09 8 if they were subject to an injunction but not initially
09:45:13 parties to the proceeding. And I think in that respect,
09:45:17 the state and its intervenors are really flipping the
09:45:20 nature of how the inquiry should work. That there are
09:45:23 some cases that bear on whether contempt proceedings would
09:45:28 lie for individuals who don't have notice or, some
09:45:31 circumstances, may not be aware of their obligations under
09:45:33 an injunction. But that's not what we're asking here for.
09:45:36 We're asking for an injunction against the state of Texas
09:45:38 that runs for those individuals who are acting at the
09:45:41 behest of the state of Texas, Texas to enforce its state
09:45:46 objective.
09:45:47 The suggestion that each individual who might
09:45:51 have responsibilities under an injunction needs to be
09:45:54 named in the proceedings and haled into court is disproven
09:45:58 by the Supreme Court's recent decision in Arizona vs.
09:46:01 United States. The Arizona litigation was another case
09:46:03 brought by the United States with an equitable cause of
09:46:07 action under the supremacy clause to stop a state in that
09:46:09 case from taking actions to regulate immigration in

09:46:13 violation and inconsistent with federal authority. That
09:46:17 case was filed against the state of Arizona and its
09:46:20 governor. But the injunction that was entered, and
09:46:22 ultimately affirmed by the Supreme Court, surely was
09:46:26 binding as to each of those individuals, apart from the
09:46:29 governor, who would attempt to enforce Arizona's, in that
09:46:32 case, unconstitutional policy.
09:46:35 So the individuals who are in this case are third
09:46:42 parties who have been deputized by the state to bring
09:46:44 these lawsuits. They don't need to be named in the first
09:46:47 instance. It's also important to note that in this case,
09:46:50 the individuals who have been deputized by the state,
09:46:52 they're not truly private individuals, trying to vindicate
09:46:55 private rights in court. They are state actors. The
09:46:58 state of Texas has chosen to implement its policy by
09:47:02 appointing these individuals as state actors to advance
09:47:06 this unconstitutional cause that the state has enacted
09:47:10 into law.
09:47:10 Now, nobody would question obviously that
09:47:14 individuals could be sued if they were promised $10,000 to
09:47:17 be paid by the state. It's functionally equivalent here
09:47:20 because these individuals who have been deputized have no
09:47:23 personal injury. This is not a case in which an
09:47:27 individual is coming into court because something has
09:47:30 happened to him or her. The wrong here, the supposed

09:47:33 wrong here is Texas' belief that abortions after six weeks
09:47:38 are wrong. It is the state's interest that an individual
09:47:40 is entitled to come into court to vindicate. And proof
09:47:44 positive of that is the fact that only one person can get
09:47:47 the bounty for each abortion that is performed. It's not
09:47:50 that each individual had some distinct right that is being
09:47:53 vindicated. It's that each individual who may choose to
09:47:56 pursue a lawsuit has been designated by the court to --
09:48:01 excuse me, designated by the state to stand in for the
09:48:04 state to pursue the state's objective.
09:48:08 From the fact that these individuals are state
09:48:10 actors by virtue of the scheme that was developed by the
09:48:13 state, Rule 65 of the Federal Rules of Civil Procedure
09:48:18 also permits these individuals to be within the scope of
09:48:21 injunctive relief. Rule 65 provides that persons who are
09:48:26 in active concert or participation with the defendant can
09:48:30 be subject to injunctive relief, and that rule exists for
09:48:33 a good reason. That if it were possible for an individual
09:48:36 to convince a colleague, a friend, another individual to
09:48:40 aid or abet a violation of an injunction, then the court's
09:48:43 ability to impose injunctive relief would be meaningless.
09:48:47 And Rule 65 says that if another person is going
09:48:49 to act in active concert to violate the terms of an
09:48:51 injunction, that person's going to be subject to the
09:48:54 injunction. Here, the very nature of the S.B. 8

09:48:59 enforcement scheme is to post bounties for vigilantes to
09:49:02 prosecute. And those individuals who choose to file
09:49:05 actions, who choose to become state actors, or who choose
09:49:08 to pursue their $10,000 payment, are acting at the behest
09:49:12 of the state and are in active concert because they are
09:49:16 creating the deterrence scheme that is the design of
09:49:20 Texas' law.
09:49:21 Now, we separately believe that an injunction
09:49:24 would properly run as against state court judges and
09:49:28 judicial employees, for example, clerks within the state
09:49:32 of Texas. Now, to begin, the state of Texas suggests in
09:49:35 its opposition filing somehow that the state judiciary is
09:49:38 not part of the state. That's surely not true. The
09:49:41 Supreme Court held in Ex Parte: Virginia that a state acts
09:49:44 by its legis -- its executive or its judicial authorities.
09:49:47 So the notion that the judiciary can't be subject
09:49:51 to injunctive relief is just wrong. And the Supreme
09:49:53 Court's holding in Pulliam vs. Allen reenforces that fact.
09:49:58 Pulliam stands for the proposition that there is no rule
09:49:59 of judicial immunity at common law that prevents courts
09:50:03 from entering injunctions with prospective effect against
09:50:08 judges.
09:50:09 There are, indeed, a number of different
09:50:14 circumstances in which federal courts have entered
09:50:17 injunctions against state court proceedings. Some of the

09:50:20 precedence have suggested that that should be, again, the
09:50:24 exception, rather than the rule, that federal courts
09:50:26 should not in the first instance resort to imposing
09:50:29 injunctions that cover state judicial officials. But
09:50:32 this, again, is not the ordinary course. And under the
09:50:35 circumstances that are present here, state judicial
09:50:39 officials are part of the state, they are subject to an
09:50:41 injunction that is levelled against the state, and they
09:50:44 are not immune through the common law or through any other
09:50:48 mechanism.

09:50:48 Finally, there are other personnel within the
09:50:51 state who have nonjudicial roles who would and should be
09:50:55 subject to injunctive relief under the rubric of the
09:50:59 state. And those are, for example, the sheriffs and
09:51:01 constables who have the authority to impose executions,
09:51:06 the county clerks who would need to assist in the
09:51:09 execution of the ultimate awards that could potentially be
09:51:13 entered under S.B. 8. These are all state actors who are
09:51:17 performing state functions in order to advance the
09:51:22 unconstitutional cause, and an action brought by the
09:51:24 United States against the state of Texas as a whole would
09:51:26 properly constrain those individuals.

09:51:34 Now, I should note -- perhaps now is a good point
09:51:37 as we're about half an hour in -- to reemphasize again
09:51:42 that S.B. 8 unambiguously violates the Constitution. It's

09:51:48 beyond dispute at this point that under Roe vs. Wade and
09:51:51 Planned Parenthood vs. Casey, a state may not prohibit
09:51:54 abortions prior to fetal viability and may not regulate
09:51:58 abortion with the purpose or effect of placing a
09:52:01 substantial obstacle in the path of a woman seeking an
09:52:05 abortion for a non-viable fetus. Here, as we demonstrated
09:52:08 in the papers, we believe that this six-week prohibition
09:52:11 is an outright ban. It doesn't require the Court to
09:52:14 engage in the undue-burden analysis.

09:52:15 But even if the undue-burden analysis were
09:52:18 necessary, the undue burden here is creating the system of
09:52:22 deterrence that removes from women seeking an abortion the
09:52:26 ability to identify providers who can provide those
09:52:30 procedures. Now, the state's primary response here is
09:52:34 that the statute has offered this half-baked undue-burden
09:52:38 defense. But the defense doesn't save the law for at
09:52:41 least three reasons.

09:52:41 You know, the first of which is, of course, that
09:52:44 the statute is a prohibition, so you never even ask that
09:52:48 question. And second is that the burden, the undue burden
09:52:50 that is imposed by this law is the dismantling of the
09:52:52 provider network. So any judicial review that might be
09:52:56 available and proceedings that, for the most part, are
09:52:58 never going to be happen -- that are never going to happen
09:53:01 that are going to be coerced into existence -- or coerced

09:53:04 out of existence, excuse me, that can't be a satisfactory
09:53:07 response.
09:53:08 Finally, even if the defense were structurally
09:53:12 sufficient, it's too narrow. The state of Texas has
09:53:15 rewritten the undue-burden standard to only allow certain
09:53:18 individuals to raise certain defense and to require the
09:53:22 Supreme Court to weigh in in certain circumstances. It's
09:53:23 just not a genuine way to guarantee that no undue burden
09:53:27 is established that would prevent a woman trying to seek a
09:53:32 constitutionally protected abortion from discharging --
09:53:36 from exercising that constitutional right.
09:53:40 Now, a last point to note for now is that S.B. 8
09:53:47 contains a rather unusual severability provision. But a
09:53:51 severability provision is not truly unique in that a
09:53:56 severability provision with virtually identical provisions
09:54:01 was part of the statute that was struck down by the
09:54:03 Supreme Court in Whole Woman's Health vs. Hellerstedt. So
09:54:07 the state of Texas has asked the Court if it believes that
09:54:12 S.B. 8 is unconstitutional, which it surely is, to craft
09:54:16 what is effectively a new law, a new law that determines
09:54:19 those circumstances in which S.B. 8 is going to apply and
09:54:21 those circumstances in which it's not going to apply, and
09:54:24 to engage in what is essentially a legislative function.
09:54:28 The Court in the Hellerstedt case held that there
09:54:31 was no judicial obligation to follow that course. The

09:54:34 Court's cases, quote, have never required it to proceed
09:54:38 application by conceivable application when confronted
09:54:40 with a facially unconstitutional statutory provision.
09:54:44 Indeed, if a severability clause could impose such a
09:54:47 requirement on courts, legislatures would easily be able
09:54:50 to insulate unconstitutional statutes from most facial
09:54:54 review.

09:54:55 Here, S.B. 8 is unconstitutional on its face, and
09:55:00 there is no need, obligation, or justification for this
09:55:03 court to assume a fundamentally legislative role by
09:55:07 rewriting the statute as Texas has requested. Your Honor,
09:55:13 I've noted that this action is in many respects
09:55:17 exceptional, but there have been circumstances in the
09:55:21 history of this country where states have attempted to
09:55:25 nullify the federal Constitution and to nullify federal
09:55:28 laws.

09:55:29 One notable example came the Supreme Court's --
09:55:33 came the action that resulted in the Supreme Court's
09:55:37 decision in Cooper vs. Aaron, which is in history of the
09:55:40 Supreme Court, the only case in which all nine justices
09:55:43 have jointly signed the opinion for the Court. In Cooper,
09:55:50 this was during the era of desegregation after Brown vs.
09:55:55 The Board of Education, when the city of Little Rock
09:55:58 sought to delay its desegregation efforts because the
09:56:02 state had made it so difficult to comply with the

09:56:04 Constitution.

09:56:04 The Supreme Court held in short that the
09:56:07 constitutional rights of children not to be discriminated
09:56:10 against in school admission on grounds of race or color
09:56:13 declared by this court in the Brown case can neither be
09:56:16 nullified openly and directly by state legislators or
09:56:21 state executive or judicial officers, nor nullified
09:56:24 indirectly by them through evasive schemes for
09:56:27 segregation, whether attempted ingeniously or ingenuously.

09:56:32 There are, unfortunately, a fair number of
09:56:35 parallels between this case and Cooper. The state has
09:56:38 deployed a series of tricks to try to evade the
09:56:42 Constitution indirectly in a way that it has acknowledged
09:56:46 that the state cannot possibly dispute it could not
09:56:48 accomplish directly. The United States filed this action
09:56:51 because that effort to nullify and to undermine the
09:56:55 Constitution is a threat to the rule of law that this
09:56:58 court has the authority to redress.

09:57:01 So for the reasons that we have stated in our
09:57:03 papers, the United States has asked this court for
09:57:06 temporary and preliminary injunctive relief, and that
09:57:08 motion should be granted.

09:57:10 THE COURT: Thank you, Mr. Netter.

09:57:12 Mr. Thompson.

09:57:16 MR. THOMPSON: Thank you, your Honor. Will

09:57:17 Thompson for the state of Texas.

09:57:19 Well, I'm sorry to see that the federal
09:57:21 government's pattern of hyperbole and inflammatory
09:57:25 rhetoric is continuing. My friend on the other side
09:57:27 opened by accusing Texas of unprecedented scheme of
09:57:30 vigilante justice. It's completely untrue, your Honor.
09:57:33 There's nothing unprecedented about private individuals
09:57:36 enforcing state tort law rights in state court and state
09:57:39 tort law defendants being allowed to raise constitutional
09:57:43 defenses and, if necessary, appeal up through the state
09:57:45 court system to the U.S. Supreme Court.

09:57:47 Nor does vigilantism use state courts for its
09:57:54 methods. This law which the federal government is
09:57:57 challenging provides for more judicial process than any
09:58:01 other enforcement scheme could. Nothing happens to a
09:58:04 defendant in a heartbeat lawsuit until a state court has
09:58:10 heard the case. This is not some kind of vigilante
09:58:13 scheme, as opposing counsel suggests. It's a scheme that
09:58:16 uses the normal and lawful process of justice in Texas.

09:58:19 Before I get to the points that we've raised in
09:58:26 our brief, I'll also note that the federal government
09:58:28 seems to have shifted gears a bit here in its reply brief
09:58:32 and in its opening presentation. Rather than focus on the
09:58:37 possibility that the Heartbeat Act will create liability
09:58:41 through state court judgments, at times, the federal

09:58:43 government seems to have shifted to saying that it is the
09:58:46 presence of litigation at all that is the irreparable
09:58:50 harm.
09:58:51 Now, because they didn't raise that in their
09:58:53 opening motion, we have not briefed that issue. But I
09:58:56 will note, your Honor, that mere litigation expense, even
09:59:01 when it is substantial and unrecoverable, never
09:59:04 constitutes irreparable harm for purposes of preliminary
09:59:08 injunction. There are many cases on this point. I could
09:59:11 cite some of them later. But insofar as federal
09:59:13 government is now arguing that it is just the process of
09:59:16 having to go to state court and assert one's
09:59:19 constitutional rights is categorically improper, and it
09:59:23 cannot be the basis for a preliminary injunction.
09:59:25 I'll start, your Honor, with federal subject
09:59:30 matter jurisdiction. The United States' effort to
09:59:34 distinguish Muskrat is unpersuasive. If anything, Muskrat
09:59:39 had a much stronger basis for being an Article III case
09:59:43 for controversy than this case does. So a couple of key
09:59:45 features of the case.
09:59:47 The plaintiffs had undisputed Article III
09:59:51 injuries in fact in Muskrat. There are classic property
09:59:56 interests that had been diluted or harmed by the federal
09:59:58 government statute. And Congress had provided an express
10:00:00 cause of action allowing those individuals to sue. It

10:00:05 expressly created jurisdiction for claims and right of
10:00:09 appeal to the U.S. Supreme Court. Nonetheless, the
10:00:12 Supreme Court determined that the case was not
10:00:15 justiciable. Now, this was true even though the federal
10:00:21 government had some level of enforcement role through the
10:00:24 Secretary of Interior in that case. Despite that, the
10:00:27 Supreme Court said the United States, itself a defendant,
10:00:31 lacked sufficiently adverse interests in a case of the
10:00:36 constitutionality of a federal statute.
10:00:38 The same thing applies here. The state of Texas
10:00:41 when it is not enforcing a Heartbeat Act does not have a
10:00:44 sufficiently adverse interest to represent the would-be
10:00:50 class of defendants that the federal government seems to
10:00:54 want to sue. As the Court explained in Muskrat, a
10:00:56 judgment against the United States about the
10:00:59 unconstitutionality of a federal statute would not have
10:01:01 been binding in future litigation in federal court
10:01:05 involving private parties.
10:01:05 Now, I understand that my friend on the other
10:01:08 side thinks that that doesn't make a lot of sense, but it
10:01:11 is the Supreme Court's holding. And the Supreme Court's
10:01:13 holding means that private individuals who are suing
10:01:17 pursuant to a statute from a sovereign are not bound by a
10:01:21 judgment against that sovereign; and it also means that
10:01:24 that sovereign's courts would not have been bound in that

10:01:26 situation. After all, if a judgment against the United
10:01:30 States in Muskrat would have been binding on the federal
10:01:33 courts who adjudicate those private disputes, then there
10:01:36 actually would have been an Article III case for
10:01:38 controversy, but that is the opposite of the way the
10:01:40 Supreme Court ruled.
10:01:41 One last note on Muskrat. The federal government
10:01:49 now claims that Muskrat is really a case about collusion.
10:01:55 I think that's kind of a remarkable characterization.
10:01:57 What opposing counsel characterizes as collusion was
10:02:01 simply Congress creating an express cause of action and
10:02:05 creating a provision governing attorneys' fees, which is,
10:02:06 of course, the way normal litigation proceeds. Because
10:02:08 there's a legislatively created cause of action, and often
10:02:11 in these contexts, there's something about attorneys' fees
10:02:13 in the law.
10:02:14 Your Honor sees cases like that every day, I'm
10:02:16 sure. So that's not collusion. It doesn't make that case
10:02:20 particularly unusual. It means that Muskrat had a much
10:02:23 better claim to being in federal court than the federal
10:02:26 government does here.
10:02:31 Your Honor, I'll briefly touch on the scope of
10:02:34 injunctive relief here. The federal government suggests
10:02:37 that it can just get an injunction against the state of
10:02:42 Texas standing alone and that that will redress its

10:02:46 injuries. I don't understand how. And putting aside our
10:02:51 disputes about exactly what is appropriate or not for the
10:02:53 moment, I will ask that if your Honor is inclined to enter
10:02:57 an injunction, I think it should be very specific about
10:02:59 what is supposed to happen.
10:03:01 Obviously injunctions are very powerful tools.
10:03:04 They're enforced by contempt. It's important that
10:03:06 everyone know how to comply with them. That, you know, is
10:03:10 not only a due process principle, it's also codified in
10:03:13 Rule 65.
10:03:13 THE COURT: If I can get your -- get your views
10:03:17 on that because if not the state of Texas, then can you
10:03:20 identify for me -- and this is obviously assuming standing
10:03:24 and if they prevail up to that point and then, we're
10:03:29 talking about remedy. Can you identify an actual person
10:03:34 then? Because obviously in this circuit and in cases that
10:03:40 I've had with your office frequently, we're always
10:03:43 directed to look for people with responsibility for
10:03:48 enforcement.
10:03:49 And so, can you help me by identifying those
10:03:52 people who you believe would be proper objects of an
10:03:59 injunction if that relief were appropriate?
10:04:03 MR. THOMPSON: Your Honor, there is no public
10:04:04 official who enforces the Texas Heartbeat Act. The
10:04:08 legislature made its will clear on that point. It

10:04:11 expressly prohibited public officials at any level of
10:04:14 Texas or local government from enforcing it. And so, I
10:04:17 don't think there is someone I can identify for the Court
10:04:19 because I don't think any such person exists.
10:04:22 The people that the federal government has
10:04:26 suggested like, say, state judges or clerks, participate
10:04:31 only in an adjudicatory capacity. And that's an important
10:04:36 distinction because it is true that federal courts have
10:04:38 sometimes been allowed to enter injunctions against even
10:04:42 court officials when they have more administrative-type
10:04:46 roles. So you could imagine an employment dispute in
10:04:49 which the plaintiff had been fired from her job working at
10:04:53 a state court.
10:04:54 It is conceivable that one could get equitable
10:04:57 relief against some sort of court official in that court
10:05:01 official's capacity as an employer or administrator of the
10:05:03 employment process. But if an employee had a private
10:05:10 employer and had been fired and had an employment dispute
10:05:14 and then, brought that employment dispute to state court
10:05:16 where it would be adjudicated through the state court
10:05:19 system, and then, grew to dislike the way the state court
10:05:23 system was adjudicating it, would, of course, be improper
10:05:26 to seek equitable relief in federal court to control the
10:05:28 way that the state court adjudicates that dispute.
10:05:31 So the distinction here, your Honor, is when the

10:05:33 state court officials are acting in an adjudicatory
10:05:36 capacity, they cannot be enjoined even though they are
10:05:39 playing some role, of course, in the administration of
10:05:43 justice, including a particular law being challenged. And
10:05:45 I think that --
10:05:45 THE COURT: Is that to a county clerk, as well?
10:05:49 MR. THOMPSON: Yes, I believe that is true in the
10:05:50 county clerk. I believe the Fifth Circuit addressed this
10:05:55 point in the recent Jackson case from a couple of weeks
10:05:57 ago. I believe the Fifth Circuit even called the argument
10:05:59 absurd that state judges and clerks could be enjoined.
10:06:02 And while it is true, as the federal government stresses,
10:06:06 that that case involved a sovereign immunity argument
10:06:11 under Ex Parte: Young, it's worth noting that the Court
10:06:12 also flagged the Article III issues related to standing,
10:06:15 and in fact, the case it relied on primarily, Bauer, was a
10:06:18 standing case, not a sovereign immunity case.
10:06:21 So I think the Fifth Circuit --
10:06:22 THE COURT: No. I'm sorry. Go ahead.
10:06:25 MR. THOMPSON: We think the Fifth Circuit
10:06:26 precedence is pretty clear on this. There is no Article
10:06:30 III case or controversy against judicial officials,
10:06:33 whether judges, clerks or otherwise, when all they are
10:06:36 doing is adjudicating a state law matter.
10:06:39 THE COURT: What do you do with the federal

10:06:41 government's argument with regard to private parties and
10:06:43 the idea that they are acting more or less as proxies for
10:06:48 the state? In fact, I think that's what this whole
10:06:52 statute was designed to do is to find a proxy for the
10:06:56 state so that would insulate the state from the sort of
10:07:02 judicial oversight that ordinarily would exist.
10:07:07 What do you do with the argument that, really,
10:07:08 the whole idea of the statute was to put a private citizen
10:07:14 in the shoes of the state because -- unlike torts or other
10:07:21 thing that you've talked about, it's about personalized
10:07:23 injury to a particular plaintiff, rather than a plaintiff
10:07:27 -- a private plaintiff simply exercising what under other
10:07:32 circumstances would be something that the state would do
10:07:34 directly.
10:07:37 MR. THOMPSON: Your Honor, I think we would
10:07:38 respectfully disagree with that characterization. We
10:07:40 don't think that the private plaintiffs are put in the
10:07:43 shoes of the state, if you will. These kinds of laws are
10:07:47 not as unusual as opposing counsel suggests.
10:07:51 I don't think this made it into our briefing,
10:07:54 given we were obviously trying to cut it down to a
10:07:56 manageable size. But there's actually a cert petition to
10:08:01 the U.S. Supreme Court right now. I think the case is
10:08:03 called PokerStars, and it's a case dealing with a statute
10:08:06 in Kentucky, I believe, it authorizes the recovery of

10:08:09 gambling losses. And there are statutes like this around
10:08:13 the country. The way they work is, a state has prohibited
10:08:16 gambling, but it's hard to enforce, so they have private
10:08:19 individuals who can sue and say, you know, I lost money
10:08:23 gambling last month, I'm suing to recover it on the
10:08:25 grounds that this was an illegal transaction.
10:08:28 But the key feature is, in many of these states,
10:08:32 including Kentucky, if the individual who lost the money
10:08:36 doesn't bring suit for any reason, then other people can
10:08:39 start bringing suit, including people who have no
10:08:41 particular relationship to the gambler who lost the money.
10:08:46 I'll also note that I think Texas law is quite
10:08:49 different than federal law on the question of how standing
10:08:53 and private interests versus the public interests work.
10:08:56 So the Texas Supreme Court has upheld a scheme, for
10:09:00 example, in which private individuals were allowed to sue
10:09:05 to stop -- I believe the old term was body houses that
10:09:10 were in existence at that time. They could get
10:09:12 injunctions against their operation.
10:09:17 And the fact that the private individual did not
10:09:19 need to affirmatively prove a cognizable injury in fact,
10:09:23 like they would under, say, TransUnion in federal court,
10:09:26 didn't mean that the private individual, one, didn't have
10:09:29 standing under Texas law and, two, that he wasn't pursuing
10:09:33 his own interest. So even though the Heartbeat Act may

10:09:36 not require the same types of personalized injury showings
10:09:39 that would be required by federal law, I don't think that
10:09:42 means that the individuals aren't pursuing their own
10:09:44 interests as opposed to stepping into the shoes of the
10:09:48 state.
10:09:48 Not only because there are, of course, many
10:09:51 situations in which they do have a personalized interest.
10:09:55 For example, you could imagine a grandparent suing about
10:10:00 an unlawful abortion under the Heartbeat Act. I think we
10:10:04 would all agree that the grandparent has a sufficient
10:10:05 interest to satisfy even the Article III-type injury in
10:10:11 fact requirement. But it's just the fact that to ease the
10:10:15 litigation burdens, the legislature has provided that it
10:10:17 need not be proven in every case. Not that it doesn't
10:10:20 necessarily exist.
10:10:24 So I also think I should address the kind of Rule
10:10:29 65, Hazeltine point that my friend on the other side spoke
10:10:33 about and with respect -- I understand that the time has
10:10:36 been short. I think he may have misunderstood our
10:10:37 argument. The general rule, of course, is that nonparties
10:10:42 to a lawsuit cannot be enjoined. Of course, Rule 65(d)(2)
10:10:48 creates or recognizes a limited exception to that. It
10:10:51 talks about basically agents or those in active concert
10:10:55 with a party can be enjoined.
10:10:57 So that's just -- that was the common law -- or,

10:11:03 excuse me, the equitable rule from before Rule 65, I think
10:11:05 the Supreme Court's been clear that Rule 65 just kind of
10:11:09 codifies that. So this court can issue an injunction
10:11:14 that, you know, assuming the Court rejected all of our
10:11:16 other arguments, the Court could always enter an
10:11:19 injunction against the defendant and the groups of people
10:11:21 identified under Rule 65(d)(2). But what the Court can't
10:11:25 do is pre-decide which categories of individuals fit into
10:11:30 the 65(d)(2) count.

10:11:33 So this came up in the Zenith vs. Hazeltine case
10:11:37 where the Supreme Court said there's a parent in a
10:11:44 subsidiary corporation. They obviously were highly
10:11:46 related in the sense that one owned a controlling interest
10:11:49 in the other. One of the parties, I believe the
10:11:51 subsidiary was a defendant in a lawsuit. The federal
10:11:54 court issued an injunction that applied to both the party,
10:11:58 which was the subsidiary, and the nonparty parent
10:12:02 corporation on the theory that the parent subsidiary
10:12:05 relationship was sufficient to bring the parent within the
10:12:07 scope of Rule 65(d)(2).

10:12:09 The Supreme Court reversed that, and it wasn't
10:12:13 because the Supreme Court decided the parent subsidiary
10:12:16 relationship was insufficient. It said it was
10:12:19 categorically improper to decide that question before the
10:12:23 parent corporation had a chance to be heard on it. The

10:12:26 way -- the order this is supposed to go, your Honor, is if
10:12:29 there's an injunction, it issues against the defendant.
10:12:32 If someone then wants to argue that a nonparty has
10:12:36 violated the injunction because that nonparty's within the
10:12:38 scope of Rule 65(d)(2), then there are contempt
10:12:42 proceedings.
10:12:43 And, of course, the nonparty's then made a party
10:12:46 to the contempt proceedings and gets to defend against the
10:12:50 -- any potentially finding of contempt by arguing that he
10:12:53 is not within the scope of Rule 65(d)(2). So it's just
10:12:58 improper for the Court at this stage to, I think, even go
10:13:02 through the analysis of, you know, who would or wouldn't
10:13:05 be under 65(d)(2) in a hypothetical world where someone
10:13:10 violated or purportedly violated the Court's injunction.
10:13:14 Now, so that's one reason the Court shouldn't do
10:13:17 it. The other is, if we are going to have to fight kind
10:13:19 of in the hypothetical about whether other individuals
10:13:22 would be within the scope of Rule 65(d)(2), we think they
10:13:26 wouldn't. The Supreme Court has talked about 65(d)(2) as
10:13:32 codifying the common-law rule that the defendant cannot
10:13:37 nullify a judgment against the defendant by acting through
10:13:44 aiders and abetters. And so, the idea here is, the aiders
10:13:48 and abetters would be liable for contempt because they are
10:13:50 trying to help the defendant get around the injunction,
10:13:52 not because they are independently bound not to do the

10:13:56 thing that was enjoined. It's a crucial distinction, your
10:13:59 Honor.
10:13:59 Here, in none of the hypotheticals that the
10:14:04 federal government has offered would anyone be helping the
10:14:06 state of Texas to get around some kind of injunction
10:14:11 because the state of Texas never enforces this thing to
10:14:14 begin with.
10:14:17 Last, I'll note that the federal government
10:14:19 presents in at least a slightly different fashion than I
10:14:22 understood their argument the idea that an injunction
10:14:24 could stop the execution of state court judgments. So I
10:14:27 think that's problematic to be all the same reasons that
10:14:30 one can't enjoin other parts of the adjudicatory process.
10:14:34 But even if that could be overcome, your Honor, it faces a
10:14:38 perhaps more fundamental Article III problem that there
10:14:42 are no such judgments.
10:14:44 The United States is apparently asking the Court
10:14:46 to issue an injunction to stop the execution of a judgment
10:14:48 that does not exist. It's entirely speculative whether
10:14:52 such a judgment would exist, will exist at any point, who
10:14:56 it would run against, whether it would violate the federal
10:14:59 Constitution. You know, there's essentially no evidence
10:15:01 on any of that at this point. And so, even if the Court
10:15:05 rejected all of our other arguments and thought that it
10:15:07 was proper to enjoin the execution of a state court

10:15:11 judgment, I think there would at least have to be some
10:15:14 indication that a state court judgment is certainly
10:15:16 pending or imminent under Clapper vs. Amnesty
10:15:19 International.
10:15:22 Unless your Honor has further questions on that
10:15:26 point, I'm going to move on to Article III injury in fact.
10:15:32 We understood the federal government to be claiming parens
10:15:35 patriae standing in its opening motion. We argued against
10:15:39 it in the response, they seemed to have disclaimed that
10:15:41 theory in their reply. So I'm not going to spend much
10:15:43 time on it. I'll just note that the basic rule underlying
10:15:50 parens patriae cases is that the federal government or the
10:15:54 state, for that matter, cannot step into the shoes of a
10:15:57 private individual to assert that individual's interests.
10:16:00 The key is that they have to have an independent
10:16:08 basis for standing that does not depend on the interests
10:16:11 of the private individuals. The cite, your Honor, for the
10:16:14 disclaimer of the parens patriae theory is page 2,
10:16:21 footnote 1, I'm told.
10:16:24 There is no sovereign injury here either, your
10:16:28 Honor. The federal government says that this is analogous
10:16:31 to a violation of, say, a criminal provision in Title 18.
10:16:36 I don't think that's right in Alfred L. Snapp, which, I
10:16:40 think, is the Supreme Court's kind of leading case on
10:16:43 parens patriae standing and, also, sovereign injury, it

10:16:46 talks about how the sovereign injury is to the right to
10:16:50 create and enforce a legal code.
10:16:52 And so, of course, Congress can create a criminal
10:16:56 code or a civil code, codify that, have the Department of
10:17:00 Justice enforce it through criminal proceedings, or
10:17:01 otherwise, and there would be a sovereign injury in many
10:17:06 of those situations. Here, however, there is no code
10:17:10 created by the federal government. There is simply the
10:17:13 Fourteenth Amendment as part of the Constitution. It was
10:17:15 not created by the federal government. On the contrary,
10:17:17 the Constitution itself created the federal government,
10:17:20 not vice versa.
10:17:23 With regard to proprietary injuries, there is no
10:17:29 proprietary injury in the federal government here.
10:17:32 Certainly we explained in our opposition brief that I
10:17:36 think is very unlikely the Texas courts would ever
10:17:39 interpret the Heartbeat Act to allow for suits against the
10:17:44 federal government or its contractors acting pursuant to
10:17:46 federal functions. There is a presumption in Texas law
10:17:49 that Texas statutes don't apply to the federal government
10:17:53 or its contractors. I have not seen any argument or
10:17:57 evidence that this would work out differently in this case
10:18:00 than it does in every other case.
10:18:01 The federal government repeatedly cites cases
10:18:07 like United States vs. City of Arcata, a Ninth Circuit

10:18:10 opinion from 2010, but it's important to look at the
10:18:13 details of these cases and see why they're so different.
10:18:17 So in Arcata, the government was, quote, the sole target
10:18:19 of the challenged governmental action by the city of
10:18:22 Arcata in that case. And the ordinances that were
10:18:27 challenged prescribe some activity encouraged by federal
10:18:32 law, which may actually understate the matter because the
10:18:35 Ninth Circuit then goes on the cite federal statutes that
10:18:39 required intensive recruiting campaigns for military
10:18:44 enlistments, which was the exact target of the city of
10:18:49 Arcata's ordinance.
10:18:50 So I think it is fair to say that if the Texas
10:18:54 Heartbeat Act actually, you know, created liability for
10:18:58 the federal government, then of course there would be at
10:19:00 least a potential injury there that would be worth
10:19:03 litigating. But the Heartbeat Act doesn't do that both
10:19:07 because we don't think it applies to the federal
10:19:09 government, to begin with, under Texas state precedence,
10:19:12 which is, of course, binding on this court under Erie, but
10:19:16 also because the scope of the federal activities is far
10:19:19 different than what the United States presents in its
10:19:22 briefs.
10:19:22 Now, I'll address that more when we get to the
10:19:25 preemption and intergovernmental immunity arguments. But
10:19:29 suffice it to say, the federal government does not have a

10:19:32 program with a congressional purpose of encouraging
10:19:37 abortions. What it has is a series of programs in which
10:19:40 the federal government tries to get out of the way of
10:19:43 women who might want to get abortions.
10:19:47 The state of Texas is not preventing the federal
10:19:49 government from getting out of the way. It is welcome to
10:19:53 continue its policies of staying out of way for women who
10:19:56 want to get abortions and, of course, to continue its
10:19:58 general policies in all of these areas of making -- not
10:20:02 even making sure. Just the fact that the people in
10:20:07 federal custody generally have to comply with generally
10:20:10 applicable state laws on the availability of abortion.
10:20:14 We'll get to that a little bit further down the road, but
10:20:17 I wanted to preview it here.
10:20:19 With regard to our argument in Section 1(d), the
10:20:23 federal government lacks a cause of action here and I
10:20:26 think the -- that your Honor's question was right on. The
10:20:30 federal government's claiming extraordinarily broad power
10:20:34 here. And the limitations it offers in response to your
10:20:36 Honor's question are entirely ad hoc and not tied to any
10:20:41 statute, any constitutional provision, or the principles
10:20:44 of equity. It's simply tied to they think this is an
10:20:47 extreme case.
10:20:48 Now, I think it is common ground between opposing
10:20:53 counsel and myself that the Constitution does not create a

10:20:55 cause of action here. I don't understand them to be
10:20:57 asserting a cause of action created or expressly or
10:21:02 impliedly by the constitutional text; but to the extent
10:21:06 they were, that would be foreclosed by Armstrong and the
10:21:09 other cases saying that that's not what the Constitution
10:21:13 does.

10:21:13 Of course, we know that the Fourteenth Amendment
10:21:17 has a provision, Section 5, which talks about enforcement.
10:21:21 This wasn't something that the framers, you know, forgot
10:21:23 to think about. They expressly provided Congress with the
10:21:26 right to by appropriate legislation enforce the Fourteenth
10:21:32 Amendment, and Congress has, of course, taken them up on
10:21:34 that. Congress has created numerous statutes for the
10:21:37 enforcement of Fourteenth Amendment rights. It has done
10:21:39 so in both broad and specific contexts. It has done so in
10:21:44 incredibly detailed manner. The only problem for the
10:21:46 federal government is, it hasn't provided one for this
10:21:49 specific type of case.

10:21:50 The federal government also seems to agree that
10:21:53 there is no statutory cause of action here. That there is
10:21:56 no statute that could be read even to infer, to imply a
10:22:04 cause of action. And I think that's important and
10:22:07 distinguishes cases like Wyandotte that the federal
10:22:09 government cites in its opening brief and its reply. Now,
10:22:13 to the extent there were an implied cause of action

10:22:15 analysis under a statute that would need to occur, cases
10:22:18 like Wyandotte would, of course, be bad law under the more
10:22:23 modern precedent like Alexander vs. Sandoval. But I don't
10:22:25 think the Court needs to get into that because unless I
10:22:27 misunderstood opposing counsel, there is no claim to a
10:22:30 statutory cause of action.
10:22:30 The only category that leaves left is whether
10:22:35 there is some cause of action created by equity or common
10:22:38 law. Now, there are important things here. One, this
10:22:44 court is not in a position to create an equitable cause of
10:22:47 action. It has to be if the federal government is to have
10:22:50 an equitable cause of action, it must be one that has
10:22:52 existed since 1789 and before under cases like Grupo
10:22:59 Mexicano.
10:22:59 The second point is, even if there is an
10:23:01 equitable cause of action, or otherwise would be, it can
10:23:04 be and is displaced by the intense congressional activity
10:23:09 in this area to create separate and inconsistent remedies
10:23:13 for Fourteenth Amendment violations.
10:23:14 So I'll start with some of the cases that the
10:23:18 federal government relies on most heavily. In Re: Debs is
10:23:21 the 1895 decision that went up to the Supreme Court on a
10:23:26 habeas petition from Eugene Debs, who had been held in
10:23:29 contempt of the injunction in the underlying case. Now,
10:23:34 the part of the opinion that the federal government is

10:23:37 relying on is as an initial matter, isn't about whether
10:23:41 there's a cause of action. It's about the federal
10:23:43 government's injury in fact for standing purposes.
10:23:45 And I believe that that block quote that the
10:23:47 Supreme Court -- excuse me, that the federal government
10:23:49 likes to use, if you go to the very next sentence, I think
10:23:52 you'll see the word "standing" in it. That's what that
10:23:54 part of the opinion is about. It's not about the cause of
10:23:56 action. Now, the Court did discuss the cause of action
10:24:00 some in the opinion, but it's just in a different section,
10:24:03 and it talks about the federal government's right as a
10:24:06 sovereign to pursue a case in equity to abate a public
10:24:11 nuisance.
10:24:12 This is where the Supreme Court is talking about
10:24:15 obstructions on public highways being a public nuisance
10:24:21 that the federal government, like the King of England, is
10:24:24 able to seek to remove. And the ability to evade the
10:24:31 public nuisance in Debs was even more limited than just a
10:24:35 kind of general ability to evade a public nuisance because
10:24:37 the Supreme Court tied it into the federal government both
10:24:40 having an interstate commerce interest and then, claiming
10:24:43 that interest by claiming jurisdiction over the railroads
10:24:47 at issue in Debs. So there was a statute that Congress
10:24:50 had passed sort of regulating the railroads and claiming
10:24:53 jurisdiction over that aspect of interstate commerce.

10:24:55 The Supreme Court explained that by claiming that
10:24:58 jurisdiction over interstate commerce, the federal
10:25:02 government had a duty under the law to remove obstructions
10:25:06 to interstate commerce and that the proper method of
10:25:10 removing those obstructions was an equitable action to
10:25:13 evade a public nuisance. None of these factors are
10:25:16 present here, your Honor. There is no public nuisance
10:25:18 theory. Surely a private cause of action in state court
10:25:24 is not at all analogous to a public nuisance, and there is
10:25:28 no statute either. There is no statute the federal
10:25:31 government points to that has given it authority to kind
10:25:34 of claim jurisdiction over these abortions.
10:25:36 The only two statutes that I think the federal
10:25:39 government has cited that are remotely relevant, one is
10:25:41 the ban on partial-birth abortions, but of course, a
10:25:46 federal ban on certain abortions doesn't create a federal
10:25:48 duty for the executive branch to facilitate other
10:25:53 abortions. And the other statute is the FACE Act, the
10:25:56 Free Access to Clinic Entrances Act, I believe it is
10:25:59 called. And that statute supports us, your Honor, because
10:26:02 there, Congress expressly created a cause of action,
10:26:06 several causes of action, actually, related to statutory
10:26:09 abortion rights. So I believe it created a private cause
10:26:12 of action. It created a civil cause of action for the
10:26:17 attorney general. It created criminal liability that can

10:26:19 be enforced by the Department of Justice. It even created
10:26:23 a parens patriae cause of action for the state attorneys
10:26:25 general. But it did not at all create a cause of action
10:26:29 for the federal government related to a constitutional
10:26:31 right to abortion.
10:26:35 The next case the federal government relies on is
10:26:37 American Bell Telephone Company. The Feds say it allows
10:26:43 them to protect the public from fraudulent patents. But
10:26:45 that case just lets the federal government bring these
10:26:48 same equitable cause of action or fraud that any private
10:26:51 individual would be able to bring. This is true in a
10:26:53 number of the older cases that the federal government
10:26:55 cites.
10:26:56 The way these cases work is, there's some
10:26:58 interest the federal government has in, you know, not
10:27:01 being defrauded, not giving up something valuable like a
10:27:04 patent under a misimpression of the facts. And the
10:27:07 Supreme Court says more or less, it would be absurd if a
10:27:12 private individual were allowed to bring an equitable
10:27:15 cause of action for fraud with something like that and the
10:27:18 federal government, which has similar interests, were not
10:27:20 able to pursue that.
10:27:22 There's no reason to treat the federal government
10:27:24 worse when it comes to equitable causes of action than
10:27:26 similarly situated private individuals. But that holding

10:27:30 has no application here because the federal government is
10:27:31 not claiming that its cause of action could be brought by
10:27:34 a private individual and it, of course, certainly
10:27:40 couldn't.
10:27:40 In fact, in the American Bell Telephone Company
10:27:42 case, the Supreme Court goes through the English precedent
10:27:45 showing that there were equitable causes of action
10:27:49 analogous to what the federal government was trying to do
10:27:51 in that case. And that is just not at all a showing that
10:27:55 the United States has tried to make here.
10:27:57 The federal government next relies on Heckman vs.
10:28:02 United States. The problem with Heckman is that it's a
10:28:04 case about standing. It wasn't about whether the federal
10:28:06 government had a cause of action. And that's how the
10:28:08 Supreme Court itself described Heckman in Moe, which is
10:28:12 found at 425 U.S. 463, and the relevant description is at
10:28:19 475, footnote 13.
10:28:24 In any event, the logic of Heckman wouldn't apply
10:28:27 at all because what happened there is, the Supreme Court
10:28:30 describes the guardian relationship between the federal
10:28:32 government and the Indian tribes. So it's talking about
10:28:37 during the continuation of this guardianship, the right
10:28:39 and duty of the nation to enforce by all appropriate means
10:28:42 the restrictions designed for the security of the Indians
10:28:44 cannot be gainsaid. So the Indians had a cause of action,

10:28:49 they could have sued. And the federal government got to
10:28:52 step in the shoes of the Indians because of the
10:28:55 guardian/ward relationship that the Supreme Court believes
10:29:00 existed in that case. I assume and hope that the federal
10:29:03 government does not consider itself to have a
10:29:05 guardianship/ward relationship with pregnant women in
10:29:07 Texas. In addition, Heckman also actually involves a
10:29:12 statutory cause of action, which is discussed at page 442
10:29:16 of that case.
10:29:20 The federal governments also cites Sanitary
10:29:22 District of Chicago vs. United States, but again, there
10:29:25 was a statutory cause of action there that's at page 428
10:29:29 of the opinion. And then, finally, the federal government
10:29:32 has relied on Arizona vs. United States a couple of times.
10:29:36 The way to understand Arizona, your Honor, is
10:29:37 that it was decided before -- decided before Armstrong.
10:29:43 Before Armstrong, many litigants simply assumed that the
10:29:47 supremacy clause created an implied cause of action, and
10:29:50 that seems to be what Arizona assumed in that case. So
10:29:54 the parties didn't raise any question that I could find
10:29:57 about whether the United States had a cause of action.
10:30:00 It's not a jurisdictional issue, so the courts weren't
10:30:02 under any obligation to go looking for the issue. And
10:30:04 then, as far as I can tell, the courts never discussed it.
10:30:08 The Supreme Court has long held that questions

10:30:10 which merely lurk in the record, neither brought to the
10:30:13 attention of the court nor ruled upon, are not to be
10:30:17 considered as having been so decided as to constitute
10:30:19 precedents. Supreme Court said that in 2004 in Cooper
10:30:23 Industries, but it was quoted in Webster vs. Fall, about
10:30:26 100 years ago. It's a longstanding rule about how federal
10:30:29 precedents work.
10:30:30 Your Honor, even if the federal government were
10:30:33 right, even if there otherwise were some equitable cause
10:30:37 of action, which we, of course, don't concede, that cause
10:30:39 of action would be displaced by the congressional activity
10:30:43 in this space. Now, as I understand it, the federal
10:30:44 government concedes that congressional displacement is a
10:30:48 possibility. It's, you know, logically proper, legally
10:30:50 permissible. They just claim it has to be express, rather
10:30:53 than implied. That is directly contrary to the Supreme
10:30:56 Court's holding in Armstrong.
10:30:58 In Armstrong, remember it said holding one is
10:31:00 that there is no supremacy clause cause of action. But
10:31:04 then, holding two is, the Supreme Court says there is an
10:31:07 equitable cause of action, but it is displaced in this
10:31:12 case because of Congress' reticulated scheme for the
10:31:15 enforcement of these rights. So there was no statute in
10:31:19 Armstrong that said the equitable cause of action or ultra
10:31:25 vires activity as in Ex Parte: Young is hereby superseded.

10:31:28 There was no such statute. It was impliedly displaced and
10:31:32 that's what's happening here.
10:31:33 I think we should just pause briefly to consider
10:31:36 all of the causes of action and enforcement schemes that
10:31:39 Congress has created in this area and that none of them
10:31:41 apply here. So there's, of course, Section 1983, which
10:31:45 the federal government concedes they can't sue under, but
10:31:47 it allows private plaintiffs generally to vindicate
10:31:52 federal rights against many classes of governmental
10:31:56 defendants. So notably, not the state of Texas itself.
10:31:59 There are the express statutory causes of action
10:32:04 for the attorney general to enforce various constitutional
10:32:06 rights. The Twenty-Sixth Amendment, for example, Congress
10:32:08 passed the statute saying the United States should bring
10:32:12 through the attorney general lawsuits to enforce the
10:32:14 Twenty-Sixth Amendment. It has not done that in the
10:32:16 Fourteenth Amendment. There is the FACE Act, which
10:32:19 authorizes attorney general actions for statutory abortion
10:32:22 rights, but not constitutional ones.
10:32:26 And then, there are also statutes that allow the
10:32:32 federal government to intervene, rather than initiate
10:32:33 lawsuits. Congress has been very specific when it
10:32:37 authorizes these kinds of powers through the attorney
10:32:39 general. Sometimes they're allowed to initiate lawsuits.
10:32:44 Sometimes they're allowed to intervene in existing

10:32:46 lawsuits. And this third category is particularly
10:32:47 interesting. Sometimes the attorney general is allowed to
10:32:49 bring a cause of action precisely because it is hard for
10:32:52 private individuals to do so.
10:32:54 So this is where I think we get to the rub of the
10:32:58 federal government's argument about whether this is truly
10:33:01 an extraordinary case. Now, we obviously think it's not
10:33:04 that extraordinary, not that unusual for things to be
10:33:06 enforced this way, but even if it were, even if it were --
10:33:09 let's just assume arguendo that it is, you know -- that
10:33:14 this is so odd, well, the federal government has expressly
10:33:18 contemplated this.
10:33:19 Congress has passed at least two statutes where
10:33:22 if a private individual has an equal protection right that
10:33:26 is being violated, the attorney general can certify that
10:33:30 he does not think the private individual will be able to
10:33:34 effectively sue in federal court, and that itself is a
10:33:37 triggering event that authorizes the attorney general to
10:33:39 bring the lawsuit himself.
10:33:40 The only problem for the federal government is
10:33:43 that those statutes don't apply here. They're about
10:33:46 particular equal protection rights. They're not about a
10:33:49 due process right to abortion. So even the idea that, you
10:33:54 know, this is extraordinary because private individuals
10:33:57 aren't able to sue on their own, Congress has contemplated

10:33:59 this and encountered it before and created a remedy for
10:34:02 other cases, and it did not decide to create such a remedy
10:34:05 for this type of case.
10:34:07 And I think the kind of history of this
10:34:12 legislation is particularly interesting. The Third
10:34:14 Circuit went through it in some detail in the City of
10:34:18 Philadelphia case. Other cases have done the same that
10:34:21 we've cited in our brief. But the legislative history
10:34:26 that's relevant here is not just from 1957 and 1964, like
10:34:32 the federal government suggests. It also goes back to the
10:34:34 time of 1983 -- excuse me, the Section 1983 in 1871. So
10:34:40 here's what the Third Circuit said about that matter.
10:34:42 Between 1865 and 1871, Congress drafted the
10:34:47 Reconstruction amendments and then, enacted a
10:34:48 comprehensive statutory scheme for their enforcement. It
10:34:51 gave it extensive considerations to creation of remedies
10:34:54 to enforce the amendments. It provided several criminal
10:34:57 and civil action. It goes through what some of those are.
10:34:59 Extensive congressional consideration of the problem of
10:35:02 enforcement, the comprehensive legislative program that it
10:35:06 developed, simply foreclosed the possibility that it
10:35:08 implicitly created an additional remedy without ever
10:35:11 mentioning its existence in either the statutes or the
10:35:13 debates.
10:35:14 That's really what the federal government is

10:35:17 claiming here. That all of these congressional debates
10:35:21 about when they should authorize the attorney general to
10:35:24 bring suit, and whether it should be for an enforcement
10:35:27 action or for an intervention, or what conditions need to
10:35:30 be met, are all beside the point because in reality, the
10:35:34 federal government, according to its own argument, just
10:35:36 always has the right to bring these cases. That can't
10:35:39 possibly be right. It renders superfluous large sections
10:35:42 of the United States Code and would render pointless in
10:35:45 hours of congressional debate and work on important
10:35:49 legislation.
10:35:49 Now, the Third Circuit goes on to explain that
10:35:52 these same considerations apply in the kind of Civil
10:35:56 Rights era legislation that Congress passed. So the
10:36:00 statute I mentioned earlier, your Honor, about that allows
10:36:04 a federal government to sue upon a certification that it's
10:36:07 hard for private individuals to sue, that statute started
10:36:10 out as a bill that was proposed to be much broader than it
10:36:13 wound up being. Would have allowed, I believe,
10:36:17 enforcement of basically all Fourteenth Amendment rights,
10:36:19 perhaps all equal protection rights. It was certainly a
10:36:22 much larger class of rights. And through the
10:36:24 congressional debate, Congress decided that was far too
10:36:27 broad and would give dangerous powers to the attorney
10:36:30 general: and that's why it was narrowed and passed in a

much more limited form that we see in the United States Code today. And again, that discussion is in the City of Philadelphia case at page 195.

Now, to return to the federal government's uniqueness argument, it says that this case is unique because it is hard for private individuals to sue. But hurdles to private lawsuits in lower federal courts aren't unique and particularly uncommon. Basically all of state tort law works this way, including when important constitutional rights are at stake.

New York Times Company vs. Sullivan is, of course, very famous, your Honor, for its discussion of defamation law and the First Amendment defenses that must be allowed to state law defamation claims. It's important to remember how it got to the Supreme Court. There was no lawsuit against state court judges brought in lower federal courts. It was, of course, pursuant to a state court judgment that was appealed up through the state court system and then, wound up on the U.S. Supreme Court's docket through a normal writ of certiorari.

It's just not uncommon for that to be how it works, including even more recently, one could consider cases like Snyder vs. Phelps, another major First Amendment case in which a state tort raised alleged constitutional problems, and there was a First Amendment

10:37:47 defense. Now, that one happened to be in lower federal
10:37:50 courts but only because of diversity jurisdiction. It
10:37:52 still remained a lawsuit between private parties, private
10:37:55 plaintiff who was enforcing tort rights, and a private
10:37:59 defendant who asserted a constitutional defense, and it
10:38:01 wound up through the normal appellate system of
10:38:03 adjudicating that tort law question. There was no
10:38:07 pre-enforcement Ex Parte: Young-style action by the
10:38:11 federal government or otherwise.
10:38:13 Now, it sounds like the federal government might
10:38:15 think that these cases are distinguishable on the grounds
10:38:18 that the Texas Heartbeat Act is a legislative act as
10:38:23 opposed to a common-law rule. I think that's wrong for at
10:38:25 least a couple of reasons. One of them is that the law at
10:38:27 issue in New York Times vs. Sullivan was not just common
10:38:30 law, but it was actually supplemented by state statute,
10:38:33 according to the Supreme Court. So, you know, the
10:38:35 presence of a state statute doesn't seem to make any
10:38:37 difference.
10:38:37 But in addition, I think it's not right because
10:38:42 the federal Constitution, federal law more generally, have
10:38:45 nothing to say about the separation of powers within the
10:38:48 state governmental system. Whether a state exercises
10:38:53 law-making powers through kind of a common-law scheme or a
10:38:56 legislative scheme makes no difference to federal

10:39:00 constitutional rights.

10:39:03 Now, your Honor, I'll briefly touch on the merits
10:39:06 unless your Honor would like to discuss the cause of
10:39:08 action point more. I think on the Fourteenth Amendment --

10:39:12 THE COURT: I'll start you out on the merits
10:39:14 question then. So you go to great lengths in your
10:39:20 briefing to defend the statute in question. I guess my
10:39:25 obvious question to you is, if the state's so confident in
10:39:28 the constitutionality of the limitations on a woman's
10:39:32 access to abortion, then why did it go to such great
10:39:37 lengths to create this very unusual private cause of
10:39:41 action, rather than just simply doing it directly?

10:39:45 MR. THOMPSON: Well, your Honor, I'd say -- I'll
10:39:48 attempt to answer your question as a representative of the
10:39:50 state. I'll note, of course, that I can't speak to the
10:39:52 minds of legislators or anything like that. I don't have
10:39:54 that kind of information. But I will say that I don't
10:39:57 think that the state went to particularly unusual lengths
10:40:00 here. I think, as I mentioned earlier, the state has
10:40:03 previously enacted statutes that allow for this kind of
10:40:08 private enforcement of statutory right.

10:40:11 THE COURT: Well, then, let me ask you more
10:40:13 directly and simply. If the state had done this directly,
10:40:16 would you still defend the constitutionality of these
10:40:21 limitations on their merits?

10:40:23 MR. THOMPSON: I would, your Honor. I'm
10:40:25 obviously zealously advocating for my client and happy to
10:40:28 do that, however it works. The -- I think it's an
10:40:31 important hypothetical that your Honor asked, though,
10:40:33 which is, what if there had been, in addition to this
10:40:36 private cause of action, public enforcement? I don't
10:40:39 actually see how that would solve any of the problems that
10:40:41 the federal government claims exists.
10:40:43 So let's imagine that there were public
10:40:47 enforcement and let's imagine that an injunction had
10:40:50 issued to stop that public enforcement. That would put us
10:40:53 in the exact same position we're in right now where there
10:40:57 would still be private enforcement and there would be no
10:41:00 public enforcement. I think that's basically the holding
10:41:03 of Okpalobi, the Fifth Circuit's en banc opinion from
10:41:06 2001.
10:41:07 Even when a federal court can enjoin some level
10:41:11 of public enforcement, all that does is stop the public
10:41:15 enforcement. It doesn't stop the private enforcement.
10:41:17 And of course, state courts and state court litigants are
10:41:21 not bound by the precedential effect of lower federal
10:41:25 court rulings. So I don't think that any kind of public
10:41:29 enforcement scheme, even if it were enjoined, would have
10:41:32 stopped the possibility of state court lawsuits
10:41:36 proceeding. I don't understand the federal government to

10:41:39 be arguing otherwise, but perhaps I'll hear differently in
10:41:42 rebuttal.
10:41:44 With regard to the Fourteenth Amendment merits,
10:41:48 the federal government seems to primarily rest on this
10:41:51 idea that the Heartbeat Act constitutes a ban, rather than
10:41:57 a regulation, of abortion. I don't think that could be
10:41:58 right, your Honor, for the reasons we explained in our
10:42:00 brief, but the main one is, there's an undue-burden
10:42:03 defense. It doesn't really make any sense to call it a
10:42:06 ban if the statute itself contemplates that some of the
10:42:11 abortions can go forward.
10:42:13 All right. So the statute incorporates the Casey
10:42:16 test and says if it would violate the Casey test, then
10:42:21 we're not -- then the state is not stopping the abortion.
10:42:24 The abortion may proceed. There is no liability created
10:42:26 under the private cause of action. So it just can't be a
10:42:31 blanket ban. I'm not sure how that would work.
10:42:36 And I think that goes to this Texas
10:42:39 legislature's, you know, serious efforts to comply with
10:42:41 the Supreme Court precedent on this point. It included a
10:42:45 statutory defense that is expressly based on the
10:42:48 prevailing Supreme Court precedent. Now, to be sure, the
10:42:52 Texas legislature indicated some level of disagreement
10:42:55 with Casey. It said that the undue-burden defense would
10:42:58 not apply if and when Casey is overruled; but in the

10:43:02 meantime, it said that there is a defense under Casey so
10:43:06 long as Casey is not overruled.
10:43:08 It's hard to imagine kind of a more good-faith
10:43:11 basis or tailoring a rule to the Supreme Court's Casey
10:43:15 precedent than incorporating the Casey test of an undue
10:43:18 burden. Now, the federal government says that's not
10:43:21 sufficient because of limitations on third-party standing.
10:43:27 But again, your Honor, the Texas legislature incorporated
10:43:31 expressly the Supreme Court's test on third-party
10:43:33 standing.
10:43:34 So if your Honor looks at Section 171.209 that's
10:43:38 in the Texas Health and Safety Code -- it's one of the
10:43:40 provisions codified by the Heartbeat Act -- it talks about
10:43:44 how the third-party standing rule should work in state
10:43:48 court lawsuits under the Heartbeat Act, and it expressly
10:43:51 refers to two subsections. One saying if the Supreme
10:43:56 Court holds that third-party standing is required, then we
10:43:58 agree it's required. And then, the second subsection says
10:44:01 or a third-party standing is allowed if the third party
10:44:06 can meet the third-party standing test from existing
10:44:08 Supreme Court precedent. So I think the legislature, you
10:44:14 know, really has gone about as far as it can in
10:44:15 incorporating the existing Supreme Court precedence,
10:44:19 including expressly by statute.
10:44:22 With regard to the preemption and

10:44:23 intergovernmental immunity arguments, your Honor, I want
10:44:26 the hit those, as well. The Supreme Court has explained
10:44:31 in a case called Medtronic vs. Lohr that because the
10:44:36 states are independent sovereigns in our federal system,
10:44:39 we have long presumed that Congress does not cavalierly
10:44:43 preempt state law causes of action. It then goes on to
10:44:47 say, in all preemption cases, we start with the assumption
10:44:50 the historic police powers of the states were not to be
10:44:51 superseded by the federal act unless that was the clear
10:44:54 and manifest purpose of Congress.
10:44:56 Now, what's striking with these statements is, of
10:45:00 course, not only the very favorable to the state and very
10:45:05 unfavorable preemption standard it creates but, also, how
10:45:08 it focuses on the acts of Congress. Of course, that's
10:45:10 what the supremacy clause refers to. Supremacy clause,
10:45:13 which is the basis for federal preemption, refers to the
10:45:17 Constitution, treaties, and acts of Congress made pursuant
10:45:20 to the Constitution. It is not true that sort of, you
10:45:25 know, the actions of federal bureaucrats standing alone
10:45:27 get to preempt state law. It always has to be pursuant to
10:45:31 an act of Congress that allows for that outcome. The same
10:45:36 thing is true of intergovernmental immunity, your Honor.
10:45:40 It can't just be that a federal official prefers some
10:45:45 outcome. That's not enough to make them immune. You must
10:45:48 be acting pursuant to a valid federal statute.

10:45:51 Now, this is the point at which we think, your
10:45:54 Honor, it would make sense to play some of the deposition
10:45:56 videos from the federal declarants. And I'll just set
10:46:00 them up briefly to say they're from five federal agencies.
10:46:04 These are agencies that the federal government points to
10:46:07 as being involved in providing abortions in some way. And
10:46:13 I think what comes through from the things we've cited in
10:46:16 our brief, in addition to these videos, is that, by and
10:46:20 large, these witnesses do not have personal knowledge of
10:46:23 anything related to, you know, whether it is actually
10:46:26 going to be a problem in practice, whether there are
10:46:29 actually women in federal custody seeking abortions, or
10:46:31 anything like that, and that these federal programs are
10:46:35 not inconsistent with the Heartbeat Act.
10:46:36 I think I mentioned this idea earlier, your
10:46:38 Honor. The general idea behind these programs and these
10:46:41 policies is that the federal government stays out of the
10:46:44 way of women who -- in deciding whether they want to get
10:46:49 an abortion. The federal government doesn't have some
10:46:52 purpose of promoting abortions or trying to make more of
10:46:56 them happen. All it's trying to do is make sure it
10:46:58 doesn't violate Casey by staying out of the way of women
10:47:02 when they make a decision. And so, you know, if there are
10:47:04 underlying restrictions on the right to an abortion or
10:47:07 some other medical procedure, I don't think -- I've never

10:47:10 seen the federal government assert any kind of preemption
10:47:12 or intergovernmental immunity argument against things like
10:47:16 that. Obviously the federal government is particularly
10:47:18 perturbed by the Heartbeat Act, but the same logic would
10:47:21 apply to, I think, any regulation of abortion.
10:47:24 Texas does not allow third trimester abortions,
10:47:27 for example. I think that's true of many states. And all
10:47:30 of the federal government's arguments saying, oh, you
10:47:33 know, the federal program has to, you know, be able to
10:47:36 allow the woman in its custody to get an abortion. All of
10:47:39 those would apply equally, I believe, against a
10:47:42 restriction on third trimester abortions. And I have not
10:47:45 seen the federal government argue otherwise.
10:47:47 So with that introduction, I'm going to -- if I
10:47:50 can make the technology work correctly, your Honor, I will
10:47:52 play the videos.
10:47:52 THE COURT: I think you have about 10 minutes on
10:47:54 the clock.
10:47:56 MR. THOMPSON: Okay. Is that -- that's 10
10:47:58 minutes to argue and then, 20 minutes for the video?
10:48:00 THE COURT: Oh, that's right. If you want to
10:48:01 start your time now, we'll switch the clock over to your
10:48:04 presentation. How's that?
10:48:06 MR. THOMPSON: Thank you, your Honor.
10:48:07 THE COURT: Great. Unless you would like to --

10:48:09 about how long do you think this will?
10:48:11 MR. THOMPSON: I know that they're under 20
10:48:13 minutes, your Honor, 18 to be exact.
10:48:16 THE COURT: Okay. We'll do that and we'll take a
10:48:17 midmorning break.
10:48:19 MR. THOMPSON: Understood.
10:48:21 MR. NETTER: Your Honor, before the videos get
10:48:22 played, I just wanted to make sure the Court was aware
10:48:24 that the United States has a pending motion for protective
10:48:26 order pertaining to the sealing of the audiovisual aspects
10:48:29 here.
10:48:30 THE COURT: I understand that. It would be my
10:48:33 intention to put those under seal but not for purposes of
10:48:37 this hearing to -- in a sense, no one in this hearing is
10:48:42 going to record or broadcast this evidence then, would
10:48:47 that be sufficient for your purposes?
10:48:49 MR. NETTER: Understood, your Honor. Yes, that
10:48:54 would serve our current purposes.
10:48:54 I would note, also, that I think that the state
10:48:58 has edited out some of our objections in the deposition
10:49:01 videos, at least based on the line numbers. We're not
10:49:03 going to insist on a ruling on those objections in part
10:49:08 because the rules of evidence don't apply during these
10:49:10 preliminary injunction proceedings. But I just want to
10:49:12 make sure the Court was aware that we don't intend to

10:49:15 waive those objections down the road by not asserting them
10:49:17 today.
10:49:18 THE COURT: So noted. Thank you very much. You
10:49:22 may proceed.
10:49:23 MR. THOMPSON: I'll just note, your Honor,
10:49:24 they've agreed to admit the deposition transcripts. So I
10:49:27 don't think there's any problem with objections.
10:49:31 (Audio and video file played.)
10:52:09 THE COURT: Mr. Thompson, I don't know about
10:52:11 others, but I'm not able to hear anything from this
10:52:14 witness. I can't hear you either.
10:52:32 MR. THOMPSON: I apologize, your Honor. I
10:52:34 thought you could hear that. I will have a person smarter
10:52:37 than I am try to operate this technical scheme, if you
10:52:41 don't mind.
10:52:42 THE COURT: Not at all. Thank you.
10:52:55 MR. HUDSON: Good afternoon, your Honor.
10:53:53 (Audio and video file played.)
11:00:19 MR. NETTER: Your Honor, before the state moves
11:00:20 on to the next video, I just want to note another
11:00:22 objection from the United States. That video seemed to
11:00:23 cut out certain answers in the middle of the answer makes
11:00:27 it inconsistent with the rule of completeness. I assume
11:00:28 that the Court would refer to the transcript to actually
11:00:31 rely on the testimony. I did want to flag that some of

11:00:35 those answers were partial answers.

11:00:37 THE COURT: I'll note your objection. Thank you.

11:00:43 MR. HUDSON: Just briefly in response to that,

11:00:44 your Honor. To the extent there's argument about the rule

11:00:46 of completeness, we've already submitted the transcripts

11:00:48 and moved for their admission into the record. So that's

11:00:54 not really an issue here.

11:01:02 And so the Court's keeping score here, this is

11:01:04 going to be the video of Patrice Torres, who was a witness

11:01:10 from the Department of Labor concerning the Job Corp

11:01:14 program here in Texas. The Court will note that the Job

11:01:18 Corp program was one of the programs that the federal

11:01:22 government asserts has to provide transportation for

11:01:24 potential abortion services.

11:01:31 (Audio and video file played.)

11:07:19 MR. HUDSON: The next video, your Honor, is from

11:07:21 Laurie Bodenheimer. She is the office -- or, excuse me,

11:07:25 the OPM designee that provided a declaration in the case.

11:07:39 (Audio and video file played.)

11:09:48 MR. HUDSON: We have one last video, your Honor,

11:09:50 and this one's relatively short. Just so the Court's

11:09:52 aware, this is the video from Ms. Costello. She was the

11:09:58 CMS declarant, and her testimony is short because it goes

11:10:01 solely to the --or the video goes to the issue of her

11:10:05 being an improperly desig -- or an improperly designated

11:10:09 expert witness.

11:10:13 (Audio and video file played.)

11:11:39 MR. HUDSON: Unless your Honor has any questions, I'll turn the floor back over to my colleague.

11:11:43 THE COURT: Great. Thank you very much.

11:11:44 I think we'll take a 10-minute recess now, and we will then resume. And, Mr. Thompson, you can use the remainder of your 10 minutes, I believe, if you so choose at that time, and we'll proceed with the hearing. So we'll take a 10-minute recess.

11:12:00 MR. HUDSON: Thank you, your Honor.

11:17:51 (Recess.)

11:23:10 THE COURT: All right. We'll go back on the record now.

11:23:12 Mr. Thompson, I think the floor is yours for another 10 minutes if you choose to take it.

11:23:18 MR. THOMPSON: Thank you, your Honor.

11:23:19 One housekeeping matter before I get back into it is that on the motion to seal, we had intended to file a response on that on the deadline, which, I believe, is Monday. So if the Court -- I guess I hope the Court has not already ruled on that; if the Court has, we will submit our response. Of course, we don't intend to distribute the videos or anything in the interim. And once we get a ruling from the Court, we will either file

11:23:40 the videos under seal or not, depending on the Court's
11:23:43 ruling.
11:23:44 THE COURT: As long as you maintain custody of
11:23:46 them between now and then, until I issue a ruling, that'd
11:23:49 be great.
11:23:50 MR. THOMPSON: Thank you, your Honor. We
11:23:51 appreciate it.
11:23:53 So turning to the last items to discuss, kind of
11:23:59 back on the merits of the lawsuit, I think the key to any
11:24:04 preliminary injunction is, of course, a clear showing of
11:24:08 irreparable injury that can be avoided by the issuance of
11:24:11 the injunction. I think the federal government has not
11:24:13 made that clear showing here. And there are a couple of
11:24:17 different theories that I'll try to walk through very
11:24:20 briefly.
11:24:20 The first theory relates to abortion providers
11:24:24 that are allegedly chilled by the existence of the Texas
11:24:27 Heartbeat Act. Now, the trouble with that theory for the
11:24:30 federal government is, of course, no preliminary
11:24:33 injunction can undo the existence of a law. If it is the
11:24:39 prospect of future liability, as the federal government
11:24:42 claims, that creates the chilling effect, the prospect of
11:24:46 future liability on these particular facts will continue
11:24:49 to exist, regardless of whether a preliminary injunction
11:24:52 issues.

11:24:54 There is nothing special about a heartbeat
11:24:59 lawsuit that could be filed in the next couple of months
11:25:02 when the preliminary injunction might be in effect if -- a
11:25:04 heartbeat lawsuit filed after that time if an injunction
11:25:07 were expired by its terms, or were reversed or stayed, or
11:25:11 something like that, would have the exact same alleged
11:25:15 deterrent effect on providers of abortion services.
11:25:19 So I don't think there's any kind of strong
11:25:22 showing here that an injunction would make a real
11:25:27 difference to these providers. As kind of a background
11:25:31 principle, it's important to remember that under the Texas
11:25:34 Heartbeat Act, an injunction would not provide a defense
11:25:37 to liability if that injunction were ever no longer in
11:25:40 effect due to a stay, or a reversal, or just an
11:25:46 expiration. So to the extent it is the fear of potential
11:25:49 future liability that causes a chilling effect that the
11:25:53 federal government claims, that's not something that could
11:25:54 be solved by the injunction proposed by the federal
11:25:57 government on this evidence.
11:25:58 Now, it does appear that this morning, the
11:26:01 federal government decided to present some new evidence on
11:26:04 this point in a declaration from Ms. Miller. We, of
11:26:09 course, object to that declaration. We, you know, think
11:26:13 it is a counterintuitive and certainly a new assertion of
11:26:16 fact, and we absolutely would like to test that through

11:26:18 discovery or otherwise. If Ms. Miller had been produced
11:26:23 today, we perhaps could have cross-examined her on the
11:26:25 topic. The federal government has not gone that route.
11:26:29 So we're prejudiced by that new declaration and would ask
11:26:31 that the Court either not consider it or, at the very
11:26:34 least, allow us time to depose Ms. Miller and get into
11:26:39 that issue, potentially file a short sur-reply brief
11:26:43 before the Court rules otherwise on that kind of evidence.
11:26:50 The federal government, also this morning, seems
11:26:52 to be taking a tack that it is the mere existence of
11:26:57 adjudication in state court that creates irreparable harm.
11:27:02 They say that it is the threat of suit has chilled
11:27:05 abortion providers. And so, an injunction, according to
11:27:07 the federal government, prevents S.B. 8 suits from being
11:27:11 maintained is the appropriate remedy. That makes it sound
11:27:13 as though, your Honor, the federal government is
11:27:15 complaining about the cost of litigation as opposed to any
11:27:18 actual judgment that could or might be entered by a state
11:27:22 court. I mentioned there are a number of cases rejecting
11:27:26 that.
11:27:28 The Supreme Court did so in Renegotiation Board
11:27:30 vs. Bannercraft Clothing Company: that's 415 U.S. 1 at 24.
11:27:38 The Supreme Court had said, mere litigation expense, even
11:27:41 substantial and unrecoupable cost, does not constitute
11:27:45 irreparable injury. The Fifth Circuit in Bradley Lumber

11:27:50 said, these things are incident to every sort of trial and
11:27:53 are part of the social burden of living under government.
11:27:56 They are not the irreparable damage which equity will
11:27:59 interfere to prevent. A suit in equity would not wholly
11:28:03 obviate them. Then the Supreme Court later approved that
11:28:05 ruling in Petroleum Exploration, 304 U.S. 209.
11:28:11 Moving on from irreparable injury, your Honor,
11:28:14 I'm going to address the scope of relief in my remaining
11:28:18 few minutes. Obviously the state of Texas believes no
11:28:20 injunction should issue at all. But if the Court rejects
11:28:23 our arguments against injunctive relief, we think it is
11:28:26 absolutely crucial that the injunction answer two key
11:28:29 questions with specificity: Who is enjoined and what are
11:28:31 they enjoined from doing?
11:28:34 The precision is necessary, of course, to ensure
11:28:38 that everyone is able to fully comply with actually what
11:28:40 the Court intends to enjoin, if anything. But in addition
11:28:44 to that, exactly the scope of relief, of course, depends
11:28:47 on the Court's rulings on various procedural and merits
11:28:50 issues. So, for example, the preemption,
11:28:52 intergovernmental immunity claims are brought only as
11:28:55 applied, not facially. So -- and, of course, could not
11:28:58 support facial relief such as an injunction ordering that
11:29:01 no S.B. 8 suits proceed.
11:29:04 The federal government's intergovernmental

11:29:08 preemption claim seems to be limited to their employees
11:29:10 and contractors, at most. So that might support some
11:29:13 level of injunction if the Court rejected all of our
11:29:16 arguments just against those types of S.B. 8 lawsuits, not
11:29:20 S.B. 8 lawsuits against provide abortion providers. And,
11:29:23 of course, under Lewis vs. Casey, injunctions are limited
11:29:27 by the scope of the injury in fact that the plaintiff has
11:29:32 proven.

11:29:33 So as the video deposition clips, I believe,
11:29:36 demonstrate, we are talking about approximately zero women
11:29:39 in federal custody who are trying to obtain an abortion,
11:29:41 who cannot do so. To the extent the federal government
11:29:44 makes some further showing, the number were to increase
11:29:47 above zero, any injunction would, of course, be limited to
11:29:51 those women in those situations.

11:29:53 The federal government's Fourteenth Amendment
11:29:55 claim is broader, but it's not broad enough to support a
11:29:58 blanket injunction. Their only arguments on the merits of
11:30:02 the Fourteenth Amendment are really to previability
11:30:05 abortion. The private cause of action created by the
11:30:07 pre-Heartbeat Act is not limited to previability
11:30:09 abortions. It also applies to post-viability abortions.
11:30:13 So certainly it could continue to apply in those
11:30:16 situations.

11:30:16 And, of course, there are the other provisions of

11:30:18 the act the federal government has not challenged. There
11:30:20 are things related to attorneys' fees. There's the
11:30:23 substantive requirement of checking for a heartbeat. The
11:30:26 federal government has not raised any argument that those
11:30:28 provisions are unconstitutional.
11:30:30 And, your Honor, finally, the last part is just
11:30:33 with regard to a stay. If the Court rejects our
11:30:36 arguments, we'd respectfully request a stay pending
11:30:39 appeal. If the Court is not inclined to enter a stay
11:30:42 pending appeal, we'd request, at the least, an
11:30:44 administrative stay, seven days to allow us to seek a stay
11:30:47 from an appellate court. And to be clear, that is the
11:30:50 relief that the federal government has received, I think,
11:30:52 in our last two disputes with them in federal court that
11:30:55 have led to injunctions.
11:30:57 In Texas vs. Biden, the district court enjoined
11:31:01 enforcement of the migrant protection protocols, denied a
11:31:04 stay pending appeal, but it still gave the U.S. government
11:31:06 seven days to seek relief from appellate courts, which
11:31:09 they attempted. And then, in Texas vs. United States, a
11:31:13 recent -- another recent immigration case, the Southern
11:31:16 District did the same thing: Granted our injunction for
11:31:18 relief but still gave the court -- the federal government
11:31:21 seven days to seek relief from an appellate court. Texas
11:31:25 is asking, in the alternative, for the same seven-day stay

11:31:28 that the federal government has gotten in the recent past.
11:31:31 So with that, your Honor, I would conclude just
11:31:33 that there are serious procedural obstacles to
11:31:38 entertaining this suit. Federal government has not
11:31:40 identified a cause of action. And I think these
11:31:44 procedural objections are at least as serious as the ones
11:31:47 that prevented the Supreme Court from issuing an
11:31:50 injunction in the companion litigation.
11:31:52 With that, we ask that the Court deny the motion
11:31:55 and dismiss the case.
11:31:56 THE COURT: Thank you, Mr. Thompson.
11:31:58 Just one followup question and it's -- I think
11:32:00 you've probably sufficiently answered it but I want to --
11:32:04 I want you to answer it so that Mr. Netter can directly
11:32:07 respond to it, and that is, it seemed as though you're
11:32:11 saying that in the event the government is able to prove
11:32:15 their case and then, we get to the point of talking about
11:32:17 the appropriate remedy, that their first request, and that
11:32:21 is an injunction against the state of Texas from giving
11:32:24 effect to the statute, that you have for the reasons that
11:32:28 you've gone into today indicated that that would not be an
11:32:33 appropriate remedy.
11:32:34 But I suppose the question I would have for you
11:32:37 is, if I -- if the Court were to enjoin the state of Texas
11:32:41 from giving effect to this statute, what would you believe

11:32:50 that would obligate you to do, if anything?

11:32:56 MR. THOMPSON: Honestly, I'm not sure and I think
11:32:58 that's part of the problem. If it just says the state of
11:33:01 Texas standing alone and our position, I think correctly,
11:33:03 is that the state of Texas is not enforcing this, then I
11:33:06 would hope that we could get some kind of further clarity
11:33:09 from the Court about what exactly the Court intends.

11:33:12 I don't know if any -- I don't mean to suggest
11:33:14 that anyone would want to do anything that could lead to
11:33:17 contempt. Again, I'm not sure. It's hard to imagine what
11:33:21 it -- like should I call state court judges and tell them
11:33:25 to be on the lookout for these filings? I mean, you know,
11:33:27 we don't have a system for identifying them.

11:33:31 You know, your Honor may have experience with
11:33:33 PACER. I think PACER is sort of clunky, but it's far less
11:33:37 clunky than the Texas alternatives that are not even
11:33:40 statewide. So I don't know what we would do, to be
11:33:43 honest.

11:33:44 THE COURT: Thank you very much.

11:33:46 Mr. Stephens, you have your 30 minutes now you
11:33:49 may use as you will.

11:33:51 MR. STEPHENS: Good morning, your Honor.

11:33:52 Andrew Stephens on behalf of the Intervenor
11:33:55 Defendants Graham, Tuley and Sharp.

11:34:02 Your Honor, there's two legal issues that we

11:34:05 1 believe bar the injunctive relief that the United States
11:34:08 2 is seeking in this lawsuit and on this preliminary
11:34:10 3 injunction. We've discussed those in our briefing as has
11:34:14 4 the state in their briefing and in argument today. So I
11:34:21 5 would like to focus my time, the time that you've allotted
11:34:24 6 to the intervenor defendants on the underlying premise of
11:34:27 7 the United States' lawsuit, which in their view is what
11:34:31 8 justifies the extraordinary injunctive relief that they're
11:34:35 9 seeking the Court to enter today.
11:34:36 10 One of the first things that Mr. Netter said
11:34:40 11 today is that the heartbeat law, the Texas heartbeat law
11:34:46 12 S.B. 8, is a ban or a near total ban on abortion in Texas.
11:34:54 13 The United States makes that allegation not just in
11:34:57 14 argument this morning but in their pleadings and in their
11:35:02 15 declarations that they've submitted in support of their
11:35:06 16 motion for preliminary injunction.
11:35:09 17 Essentially what the United States contends and
11:35:12 18 repeats throughout its pleadings is that this law, the
11:35:15 19 Texas heartbeat law makes it virtually impossible for
11:35:18 20 women in Texas to access abortion. The problem with that
11:35:23 21 allegation and with the argument that Mr. Netter has made
11:35:27 22 today is that the plaintiff's own evidence and, in
11:35:34 23 particular, the declarations that the United States relies
11:35:36 24 on, prove that that claim is false. That that was the
11:35:43 25 purpose, your Honor, of our request to be given the

11:35:48 opportunity to cross-examine the abortion provider
11:35:50 declarants.
11:35:51 And we believe, and we continue to believe, that
11:35:56 if given that opportunity that those witnesses would have
11:35:59 to admit that the effect of this law, the impact of the
11:36:05 law on access to abortion in Texas is not what the
11:36:08 plaintiffs have alleged.
11:36:10 For example, one of the declarations offered by
11:36:14 the United States in this case is from the CEO of one of
11:36:20 the Planned Parenthood organizations in the state of
11:36:24 Texas. Her name is Melaney Linton. And in her
11:36:28 declaration, she makes a number of statements about how
11:36:33 this law affects women and affects that facility. When
11:36:40 looking closely at the allegations and the assertions,
11:36:44 factual statements that Melaney Linton has offered, it
11:36:47 becomes clear that this is not a virtual ban or near total
11:36:52 ban on abortions in Texas, and that since this law went in
11:36:58 effect on September 1st, based on what Ms. Linton has told
11:37:03 this court, and what she has now told Texas state courts
11:37:07 under oath in similar proceedings challenging this law,
11:37:12 the effect of the law is that facilities are performing
11:37:19 fewer abortions than they did on average before the law
11:37:22 went into effect, but they're still performing somewhere
11:37:26 between 40 and 60 percent of the abortions that they
11:37:31 performed, on average, before the Texas heartbeat law went

11:37:35 into effect on September 1st.

11:37:37 Now, we can't give the Court, and certainly the
11:37:40 plaintiffs have not given the court, those exact numbers.
11:37:44 Those numbers are in, you know, the possession or within
11:37:48 the knowledge of the declarants and within the knowledge
11:37:51 of the abortion providers in Texas. However, looking
11:37:57 closely at what they alleged, we can tell that the effect
11:38:00 is much less severe than they've told this court.

11:38:04 Now, the evidence they've offered and those
11:38:09 numbers that we believe, you know, undermine their claims
11:38:15 is further supported by a number of exhibits that we've
11:38:18 offered, we've proffered today to the Court in further
11:38:21 opposition to the preliminary injunction. In particular,
11:38:25 the United States CDC compiles very comprehensive data
11:38:31 regarding abortion practices in the United States. The
11:38:36 CDC has the most recent data pertains to abortion
11:38:40 practices in 2018. They look at nearly every state, I
11:38:46 believe, with the exception of California. They do a
11:38:49 state-by-state breakdown of abortion in each state.

11:38:53 According to the CDC, in 2018, nearly 40 percent
11:38:59 of abortions in Texas were performed at or before six
11:39:07 weeks. That's a very significant number, especially when
11:39:10 the United States comes to this court and alleges that the
11:39:15 abortion -- that the Texas heartbeat law would be a
11:39:18 virtual or complete ban, near complete ban on abortion in

11:39:23 Texas. Now, the CDC data, in fact, would be consistent
11:39:28 with what we found in looking closely at the plaintiff's
11:39:32 abortion provider declarant's testimony, which we found --
11:39:37 well, it looks that some -- that what their actual
11:39:41 practice is since this law went into effect is somewhere
11:39:44 between 40 and 63 percent of abortions are still being
11:39:47 performed. In 2018, in Texas, it was between 38 and 40
11:39:55 percent.
11:39:56 And so, we believe that, in fact, many abortions
11:40:01 still are being performed and that women in Texas, many
11:40:06 women in Texas seeking abortions are still able to access
11:40:09 care at these providers' facilities.
11:40:16 Looking to the burden that the United States
11:40:18 would have on this question, the United States has not
11:40:25 provided any evidence to the contrary because we don't --
11:40:33 we don't know why they haven't. We would expect that
11:40:36 based on the practice over the past three weeks, if the
11:40:40 Texas abortion provider declarants in this case had
11:40:45 experienced such a severe decline as alleged by the United
11:40:50 States, surely they would have offered such evidence to
11:40:54 the Court.
11:40:55 The law's been in effect for four weeks. The
11:41:01 limited data they've provided contradicts what the United
11:41:06 States alleges. If they had such evidence, we believe
11:41:10 that it should have been offered to the Court to prove

11:41:13 their claim as to the constitutionality or the effect of
11:41:18 the law.
11:41:20 Looking to the Fifth Circuit's opinion, and this
11:41:23 is significant because six weeks ago, the en banc Fifth
11:41:31 Circuit Court of Appeals ruled in Whole Woman's vs. Paxton
11:41:34 that the plaintiff has the burden to quantify the number
11:41:37 of women affected by an abortion law. So here, at least
11:41:43 under the most recent Fifth Circuit opinion that pertains
11:41:47 to a challenge as to the constitutionality of an abortion
11:41:52 law, the plaintiff in a facial challenge, as the United
11:41:56 States makes here, must show that -- or must quantify the
11:42:04 number of women who've experienced the alleged undue
11:42:07 burden or effect of the law. They haven't done that here
11:42:12 and nor could they, we believe, because the limited
11:42:16 evidence they've submitted suggests otherwise, or suggests
11:42:21 that the impact is much less severe than they've alleged.
11:42:25 This is true that the plaintiff has this burden.
11:42:33 Even if the plaintiffs are alleging that this law is a
11:42:36 previability ban, in Whole Woman's Health vs. Paxton, the
11:42:41 en banc Fifth Circuit stated that some unspecified number
11:42:44 of women does not constitute a large fraction for purposes
11:42:47 of facial invalidity.
11:42:51 Here, that's exactly what we have from the
11:42:53 government, an unspecified number of women. Vague
11:42:58 allegations about the effect of the law, but no real

11:43:01 evidence to prove the effect. And as I said, your Honor,
11:43:08 we believe that the United States has not presented that
11:43:11 evidence because the premise of their lawsuit regarding
11:43:17 the undue burden is simply not true. That was the purpose
11:43:22 of our request for cross-examination. That's what we
11:43:26 believe cross-examination of those witnesses would show.
11:43:31 A number of our -- of the exhibits and
11:43:33 declarations that we have submitted, we believe, support
11:43:37 that position. And if given the opportunity to seek
11:43:44 further discovery or to seek discovery or testimony from,
11:43:48 in particular, the three declarants, Dr. Gilbert, Amy
11:43:54 Hagstrom Miller and Melaney Linton, we believe the
11:43:55 evidence would show that this law does not impose an undue
11:44:03 burden on a large fraction of women in Texas.
11:44:06 I mentioned at the beginning of the hearing, your
11:44:09 Honor, that we also have some serious concerns about the
11:44:16 Court relying on those three declarations in this hearing;
11:44:23 those being the declaration of Dr. Allison Gilbert, Amy
11:44:27 Hagstrom Miller, who then filed a second declaration early
11:44:30 this morning, and Melaney Linton. We move to strike those
11:44:35 declarations as inadmissible hearsay, not subject to
11:44:38 exception under the Federal Rules of Evidence.
11:44:42 The Fifth Circuit precedent is that even on a
11:44:47 motion for preliminary injunction where the evidentiary
11:44:51 standards are relaxed, a party must be given a meaningful

11:44:56 opportunity to contest disputed facts at an evidentiary
11:45:00 hearing. As I've explained, there are significant
11:45:06 disputed facts in this case. We dispute that the Texas
11:45:11 heartbeat law is a near total ban on abortion in Texas.
11:45:15 We dispute that the Texas heartbeat law bans virtually all
11:45:21 abortions in Texas. And these are allegations and
11:45:24 assertions -- allegations made by the United States,
11:45:26 supported by statements from -- declaration statements
11:45:30 from Dr. Gilbert, Ms. Miller and Ms. Linton.
11:45:36 And our broader contention, our broader factual
11:45:41 dispute, then, is that the United States' factual
11:45:44 allegations, which rely on their witnesses' statements,
11:45:49 are disputed. Here, a meaningful opportunity to contest
11:45:55 the disputed facts that includes the right to
11:45:59 cross-examine those witnesses or at a min -- either at an
11:46:02 evidentiary hearing or through deposition. Because we,
11:46:08 the intervenor defendants, have not had that opportunity,
11:46:13 we move to strike the declarations from the record. To
11:46:18 the extent that the Court does not strike the
11:46:22 declarations, we believe that the Court may not rely on
11:46:24 their testimony as a basis for granting a preliminary
11:46:28 injunction.
11:46:31 Your Honor, the standard on a preliminary
11:46:43 injunction is that the government or that the plaintiff,
11:46:48 the United States here, must make a clear showing that

11:46:51 they're entitled to the relief, the extraordinary relief
11:46:53 that they're seeking. Similar to the depositions of the
11:46:58 admissions by the government witnesses in those
11:47:02 depositions, here, the United States has not made a clear
11:47:08 showing as to the effect of this law.
11:47:11 Under the Fifth Circuit precedent in the Paxton
11:47:14 case, we don't think they've met their burden, and we
11:47:19 certainly don't think that they've made that clear
11:47:22 showing. We think that the exhibits that we have offered
11:47:28 as well as declarations are -- demonstrate that the
11:47:32 government has not made that showing. And for those
11:47:35 reasons, we would join the state in urging the Court to
11:47:39 deny the preliminary injunction.
11:47:45 THE COURT: Thank you, Mr. Stephens.
11:47:47 And finally, Mr. Stilley, I think you've been
11:47:51 allotted 10 minutes for your argument.
11:47:55 MR. STILLEY: Yes, your Honor. Thank you.
11:47:56 If it pleases the Court, I'd like to just rely on
11:47:59 my written brief unless the Court has questions.
11:48:03 THE COURT: No. Thank you very much. And by the
11:48:06 way, for the record, I have reviewed all of the pleadings
11:48:08 in this case, including yours, Mr. Stilley. Thank you
11:48:11 very much.
11:48:12 MR. STILLEY: Thank you.
11:48:12 THE COURT: All right. Then I think we're back

11:48:14 to the federal government. Mr. Netter, we have 20 minutes
11:48:20 left on your clock.
11:48:23 MR. NETTER: Thank you very much, your Honor.
11:48:28 I'd note the time.
11:48:29 We've already been accused of being hyperbolic
11:48:34 today. And I must say that I did find it stunning that
11:48:39 the state contends that it has undertaken serious efforts
11:48:43 to comply with Supreme Court precedence in adopting S.B.
11:48:47 8, and it doesn't take a lot of reading between the lines
11:48:50 to see what the state's objectives were. Indeed, we've
11:48:55 cited in our papers some of the public statements made by
11:48:57 the legislator who drafted the legislation, the outside
11:49:02 attorney who came up with the idea, and it's all
11:49:06 consistent with what I think we all know to be true, which
11:49:09 is that Texas was looking for a way to object to the way
11:49:15 the Supreme Court has interpreted the Constitution and to
11:49:20 effectuate an unconstitutional policy, without needing to
11:49:25 answer to the courts.
11:49:26 And the proof here is in the state of play on the
11:49:30 ground. The Court can surely take judicial notice of the
11:49:34 many newspaper articles at this point that have covered
11:49:37 this situation, how difficult it is for women to obtain
11:49:41 abortions. And I can say, at the outset, that it wasn't
11:49:46 entirely clear, to me at least, what point intervenors'
11:49:50 counsel was trying to make. I think our papers are quite

clear that our challenge is to previability abortions after the six-week threshold that the state has set. There are still providers offering abortions prior to that six-week threshold.

But there are, as I said at the opening, a substantial number of women who either aren't aware at six weeks even that they're pregnant, can't get to a clinic quickly enough, or who decide after that point in time that they wish to terminate a pregnancy prior to viability. But the facts on the ground are quite clear and unambiguously the case that S.B. 8 has already had the effect of materially diminishing the opportunities of women within Texas to exercise a constitutional right.

Now, Mr. Thompson also indicated, and perhaps it's no surprise that this is the state's position, although it is quite extraordinary, that he believes that there is nobody, nobody within the state of Texas who can enforce this law, and the right question, and in response to that, I think is why. Why would the state of Texas have an interest in adopting a state policy, a public policy that the state itself has no authority to enforce?

Now, obviously we disagree that there's nobody in Texas who has the authority to enforce this. The state has just set up an enforcement mechanism that relies upon the judiciary, which is part of the state, and relies upon

11:51:34 these private actors, who have been offered bounties
11:51:37 instead, who are acting at the behest of the state and are
11:51:40 encompassed within the state for purposes of securing an
11:51:44 injunction or under Rule 65. But there's no answer to the
11:51:47 question of why Texas structured the law this way other
11:51:51 than because it was trying to avoid the sort of
11:51:56 constitutional litigation that any observer could have
11:52:00 told you would lead to a speedy injunction of a six-week
11:52:04 abortion ban.
11:52:05 So the state's pitch is that this is all just
11:52:10 ordinary. There's nothing unusual to look at here,
11:52:12 although I think we all know that that's not the case.
11:52:14 The state says that this is just a tort lawsuit. But to
11:52:21 take us back all to our first year of law school, a tort
11:52:27 is a civil wrong that causes a claimant to suffer loss or
11:52:30 harm. And what's the loss or harm for the claimant here?
11:52:33 We heard briefly from Mr. Stilley, one of the
11:52:37 individuals who's filed one of these lawsuits. What is
11:52:39 the individual harm caused to somebody like Mr. Stilley
11:52:42 that leaves them to experience a tort, to suffer a tort?
11:52:46 And the answer is clearly that there isn't any. That
11:52:49 individuals who file actions under S.B. 8 are not injured.
11:52:54 They're not suing to vindicate some personal injury to
11:52:57 themselves. They're suing to enforce the policy of the
11:52:59 state of Texas, and it's an unconstitutional policy, and

11:53:03 Texas cannot hide behind what it believes to be a clever
11:53:06 structuring of that law to deprive individuals within the
11:53:10 state of their constitutional rights.
11:53:12 Now, we were also accused of changing our theory
11:53:17 of how S.B. 8 works. And I do want to note for the record
11:53:21 that isn't true. And I would refer the Court to page 26
11:53:25 of our opening brief, which is perhaps the clearest place
11:53:27 where we indicated that the harm here is the obstruction
11:53:31 of access. The obstruction -- the fact that Texas
11:53:35 obstructs access to providers by women who want to seek
11:53:39 abortion, obstructs access to the federal court system.
11:53:43 The whole law is based on obstruction, and that was
11:53:46 explained in our opening brief and that's consistent with
11:53:48 the theory in our reply.
11:53:49 The injury here is the threat of enforcement, and
11:53:55 that threat is not speculative. It's happening now so
11:53:59 that the facts on the ground establish that Texas has been
11:54:02 effective in creating this obstructive machinery to
11:54:07 prevent women from exercising their rights. And the state
11:54:12 tried to focus in on individual components and say, oh,
11:54:18 well, you know, attorneys' fees, it's fine to make you pay
11:54:22 attorneys' fees. But if you look at each individual
11:54:24 component of S.B. 8, they are all a piece of a puzzle, and
11:54:26 the puzzle is designed unambiguously to create an array,
11:54:31 to create a system and a picture where women trying to

11:54:34 obtain an abortion prior to viability, after six weeks,
11:54:39 something that is clearly protected under the Supreme
11:54:41 Court's binding precedence, that they simply can't
11:54:43 accomplish that goal because of the state action that
11:54:46 erected those barriers.
11:54:48 It's notable in that respect that although the
11:54:51 state is trying to rely on the availability of judicial
11:54:54 review, the state doesn't have a theory for how a woman,
11:54:58 how a woman seeking an abortion has any remedy under S.B.
11:55:01 8 in state court or federal court, in part, because the
11:55:04 system was designed to ensure that there was no nobody who
11:55:07 such a woman could file a lawsuit against, and there was
11:55:12 nobody who could file a lawsuit against such a woman.
11:55:15 So the system, the apparatus that Texas has
11:55:19 itself chosen to implement its preferred policy, that is
11:55:23 what's causing the injury here, and that is something that
11:55:26 the Court can remedy through a preliminary injunction.
11:55:28 Now, before I get to these remedy points, I do want to
11:55:31 talk a bit about the nature of the cause of action again
11:55:35 here.
11:55:36 You know, we've indicated and we discussed this
11:55:40 earlier today that the cause of action that the United
11:55:43 States is asserting is grounded in equity. The Supreme
11:55:47 Court recognized that cause of action in Debs. The state
11:55:51 tried to limit Debs in some ways that we think are

11:55:54 inaccurate. That's explained in detail and in our reply
11:55:58 brief today.
11:56:00 I would note, for what it's worth, also, that the
11:56:02 Fifth Circuit has adopted an interpretation of Debs that
11:56:05 we think is consistent with our interpretation. This is
11:56:08 going to be in the Florida East Coast Railway case. See
11:56:13 if I can find the citation in here. That's 348 F. 2d,
11:56:18 682, 685. That's a case in which the Fifth Circuit held
11:56:21 that in an action by the United States claiming that it
11:56:25 has a right of action based upon the commerce clause to
11:56:27 enjoin conduct which obstructs interstate commerce under
11:56:31 the Debs case, the Fifth Circuit agreed, relying on United
11:56:35 States vs. City of Jackson, a case which Texas claims is
11:56:40 -- was not good law as soon as it was issued. To state
11:56:43 that the allegations of the complaint touching on the
11:56:45 threat of obstructing interstate commerce is sufficient to
11:56:47 bring the case within the ambit of the Court's decision in
11:56:51 In Re: Debs.
11:56:52 So the suggestion that equity can't be used to
11:56:58 get an injunction against the state for some historical or
11:57:01 statutory reasoning, it just doesn't hold on. It is
11:57:05 established that Section 1983 provides an equitable
11:57:12 remedy. That remedy, you know, can be available against
11:57:14 the state. And, indeed, the Supreme Court acknowledged
11:57:16 the Fourteenth Amendment was adopted and ratified for the

11:57:19 purpose of creating those additional checks, for creating
11:57:22 opportunities for the federal government to intervene to
11:57:27 prevent states from violating the constitutional rights of
11:57:31 their citizens.
11:57:32 Now, in trying to limit the scope of an equitable
11:57:37 cause of action, the state is trying to make its position
11:57:40 seem narrow, but it really isn't. The state's vision of
11:57:44 what an equitable cause of action looks like is, it's far
11:57:50 more extreme than Texas lets on because the preemption,
11:57:54 intergovernmental immunity cases, those are also based on
11:57:57 inequitable cause of action that is going to have the same
11:57:59 historical framework.
11:58:01 We noted in our brief, I think the number is 14
11:58:04 lawsuits filed by the United States over just the past
11:58:07 decade brought under a theory of preemption or
11:58:12 intergovernmental immunity, and those were actions brought
11:58:14 by administrations of different political parties. It's
11:58:18 been settled for many, many decades, centuries that such a
11:58:23 cause of action exists. The Supreme Court has decided
11:58:26 cases that premised on that theory.
11:58:30 It's an extraordinarily aggressive suggestion by
11:58:33 the state that the cause of action that resulted in
11:58:37 Arizona vs. The United States has somehow been abrogated
11:58:41 sub silentio by the Supreme Court's holding in Armstrong.
11:58:46 I explained earlier that our position is that Armstrong

11:58:50 and the reasoning of Armstrong is limited applied to
11:58:53 litigants. I didn't hear any response to that from the
11:58:55 state. I don't think there could be a response to that
11:58:58 because of the long history of causes of action that have
11:59:04 been available to the United States ever since the early
11:59:08 19th century at least.
11:59:11 Now, let me quickly talk through some of the
11:59:16 evidentiary points from the depositions that the state
11:59:19 played. The state played some testimony that was designed
11:59:22 to show that apparently at some subset of facilities in
11:59:28 Texas, there aren't currently any pregnant women. So let
11:59:32 me first say that it is irreparable injury for there to be
11:59:35 a violation of a supremacy clause, and we don't think we
11:59:38 need to go further than that.
11:59:39 But if we do, you know, to the extent our burden
11:59:41 is to establish an injury between now and when the case
11:59:45 will ultimately be decided, that evidence is available in
11:59:48 the record. With respect to the BOP witness, Ms.
11:59:52 MaClaren, the state did not play the portion of the
11:59:54 deposition at page 20 where Ms. McClaren testified that
11:59:58 there are pregnant women at FMC Carswell, which as we
12:00:01 noted in our briefs is the only secure medical facility
12:00:04 for women in the BOP system.
12:00:07 The witness for the U.S. Marshal Service was not
12:00:09 deposed. In his declaration, which is Exhibit 10 to our

12:00:13 motion, he indicated that there have been 403 reported
12:00:17 pregnancies among women in pretrial detention in Texas
12:00:21 just since 2017. Several abortions that the U.S. Marshal
12:00:26 Service needed to facilitate.
12:00:27 With respect to the Job Corp, paragraph 19, Ms.
12:00:31 Torres' declaration, which is Exhibit 12 to our motion,
12:00:34 says that the four centers in Texas have provided family
12:00:38 planning services to over 100 students over the past three
12:00:40 years, including transportation to access such services.
12:00:44 And I would note, finally, that the Court can
12:00:47 surely take judicial notice of the dispute that arose
12:00:49 during the past administration as to ORR, the Office of
12:00:52 Refugee Resettlement. This was a case that was known
12:00:55 during different points in time as Garza vs. Hargan, Garza
12:00:59 vs. Azar, and JD vs. Azar, which the dispute was whether a
12:01:04 series of women in ORR custody who wanted to obtain
12:01:08 abortions could be precluded from doing so by the federal
12:01:13 government. The settlement in that litigation created an
12:01:16 obligation on the United States, an obligation the United
12:01:20 States cannot live up to because of S.B. 8.
12:01:22 I think the ultimate upshot of the state's
12:01:26 evidentiary presentation is its belief that the state's
12:01:35 effort to show that we need to have evidence that there
12:01:39 are abortions that need to be performed tomorrow. We
12:01:43 have, instead, satisfied any evidentiary burden by

12:01:47 demonstrating the historical record here. There's no
12:01:50 reason to believe that demand for abortion among the
12:01:53 individuals who are within the custody of the United
12:01:56 States ought to or will change because of S.B. 8. So the
12:02:01 existence of the need and the historical record is
12:02:03 sufficient to establish the need for the United States to
12:02:06 resolve these issues by an ongoing basis.
12:02:10 Let me briefly also tackle the motion to strike
12:02:12 that the intervenors have made. We obviously disagree and
12:02:18 do not believe there's any cause to object in order to
12:02:22 strike the declarations. We cited in opposition to the
12:02:26 motion that they filed for reconsideration of the hearing
12:02:29 format, the Fifth Circuit case law explaining the
12:02:32 propriety of relying on declarations during a PI hearing.
12:02:37 And I mentioned earlier that the rules of evidence as to
12:02:39 hearsay and the like don't apply at this phase.
12:02:43 It's also important to note that the -- it's not
12:02:47 clear how these objections relate to the scope of the
12:02:49 intervenors' interests, although the intervenors came in
12:02:52 insisting that they had some unique interest, distinct
12:02:55 from the state of Texas. It's not clear in actually
12:02:59 seeing their papers and hearing their presentation that
12:03:01 they are trying to make any distinct interest. So our
12:03:04 position would be that they don't have standing just to
12:03:06 raise arguments that Texas decided and weren't

12:03:11 appropriately made consistent with the joint interests
12:03:13 that they are both trying to advance.
12:03:16 I would note, finally, that the dispute that we
12:03:18 learned about this morning, some 17 days after the
12:03:21 declarations were filed, it's just not material. It's not
12:03:24 material to the issues that the Court needs to resolve in
12:03:28 order to rule in favor of the United States. You know,
12:03:32 whether the percentage of abortions being prevented in the
12:03:37 state is 50 percent or 85 percent. Either way, this is a
12:03:41 prohibition on abortion after six weeks gestational age
12:03:45 that has caused dramatic and extreme effects for women in
12:03:50 the state of Texas and, more importantly, has injured
12:03:53 sovereignty of the United States by imperiling the
12:03:57 effectiveness of the supremacy clause, which is part of
12:04:01 the Constitution that the United States is obligated to
12:04:05 protect and defend.
12:04:07 Let me last respond to this point that the state
12:04:13 made that we can't get a preliminary injunction. And I'm
12:04:17 going to paraphrase this and put this in my own terms
12:04:20 here. Effectively because the law is so crafty and so
12:04:22 effective that it can't be deterred. Now, to state the
12:04:28 state of Texas argument there is to really underscore just
12:04:32 how aggressive and terrifying such an argument is that a
12:04:38 state can pass a law that effectively violates the
12:04:41 Constitution and deprives individuals of constitutional

12:04:43 rights without any recourse, I think that's their
12:04:45 position.
12:04:47 In any event, I would respond by noting that the
12:04:50 injury that is articulated by the United States is an
12:04:52 injury to the supremacy of the federal law, and that
12:04:55 injury is redressed, and can be redressed, by precluding,
12:04:59 by preventing the state of Texas, even on a preliminary
12:05:02 and temporary basis, from using its court system, from
12:05:06 using its state officials, and from using its agents to
12:05:10 enforce this law. The underlying right, the underlying
12:05:14 Fourteenth Amendment right is the right of women to obtain
12:05:18 an abortion after six weeks and prior to viability. We do
12:05:22 believe that the factual record supports the conclusion
12:05:25 that that right would be redressed on a preliminary basis
12:05:29 if an injunction were entered.
12:05:32 Now, the state objected to the declaration we
12:05:35 submitted with our reply brief. I would refer the Court
12:05:38 to paragraphs 42 and 47 of the Miller declaration that we
12:05:42 submitted with our opening brief, which make the same
12:05:44 basic point that the clinics are unwilling to be -- to
12:05:50 stay open without a preliminary injunction, but would open
12:05:52 with a preliminary injunction. Certainly I think the
12:05:55 Court can also take judicial notice of the fact that the
12:05:57 providers filed their own lawsuit or some number of
12:06:01 providers filed their own lawsuits seeking a preliminary

12:06:04 1 injunction so that they could reopen.
12:06:05 2 So the suggestion that the injury to the United
12:06:08 3 States would continue in the complete blockade that exists
12:06:11 4 right now is not supported by the law and is not supported
12:06:15 5 by the fact. So, your Honor, I don't believe that we have
12:06:19 6 heard anything from the state or its intervenors today to
12:06:23 7 undermine the critical point that's we've made in our
12:06:27 8 briefing.
12:06:27 9 This remains a truly extraordinary law designed
12:06:29 10 to outflank the federal government and to violate the
12:06:35 11 Constitution. The violation is ongoing, it requires
12:06:40 12 judicial intervention, and the United States is the
12:06:43 13 appropriate party to bring this suit and to obtain
12:06:46 14 judicial review. That relief can be obtained against the
12:06:49 15 state of Texas. The state passed this law, and the state
12:06:53 16 can take steps to ensure that the harms caused by the law,
12:06:58 17 the constitutional violations caused by the law do not
12:07:01 18 befall the citizens of Texas or the United States and its
12:07:05 19 interest in maintaining the supremacy of the U.S.
12:07:07 20 Constitution.
12:07:08 21 So we would reassert, your Honor, our request
12:07:11 22 that the preliminary injunction and/or the TRO be granted.
12:07:16 23 And we thank the Court again for its time.
12:07:19 24 THE COURT: Thank you. And thank you all for
12:07:23 25 your presentations today have been very helpful to me.

12:07:27 This case has been well and thoroughly briefed and now
12:07:30 argued. To the extent that there are any loose ends that
12:07:33 we -- from a -- really, from an evidentiary procedural
12:07:37 standpoint, we'll be back in touch with you.
12:07:40 But at this point, I will take this under
12:07:43 advisement. I will give careful consideration to the very
12:07:47 important issues that you have raised and argued. And we
12:07:50 will get to work on the appropriate order in this case.
12:07:53 And so, thank you all so much and have a great rest of the
12:07:55 day and weekend.
12:08:01 MR. NETTER: Thank you, your Honor.
12:08:02 MR. THOMPSON: Thank you, your Honor.
12:08:03 MS. NEWMAN: Thank you, your Honor.
(Proceedings concluded.)

* * * * * *

UNITED STATES DISTRICT COURT)
WESTERN DISTRICT OF TEXAS)

I, LILY I. REZNIK, Certified Realtime Reporter, Registered Merit Reporter, in my capacity as Official Court Reporter of the United States District Court, Western District of Texas, do certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

I certify that the transcript fees and format comply with those prescribed by the Court and Judicial Conference of the United States.

WITNESS MY OFFICIAL HAND this the 5th day of October, 2021.

/s/Lily I. Reznik
LILY I. REZNIK, CRR, RMR
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SOT Certification No. 4481
Expires: 1-31-23

Exhibit 10: October 6, 2021 Order Granting Emergency Motion for Temporary Restraining Order or Preliminary Injunction

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

UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF TEXAS, Defendant.	§ § § § § § § § §	1:21-CV-796-RP

ORDER

Before the Court are the United States' Emergency Motion for a Temporary Restraining Order or Preliminary Injunction (the "Motion"), (Dkt. 8), the State of Texas's (the "State" or "Texas") Motion to Dismiss, (Dkt. 54), the Amici States'[1] Unopposed Motion for Leave to File Brief as Amici Curiae, (Dkt. 9), the United States' Opposed Motion for Protective Order of Audiovisual Recordings, (Dkt. 36), the State's Objections to the United States' Declarations, (Dkt. 55), and Erick Graham, Jeff Tuley, and Mistie Sharp's (the "Texas Intervenors") motion to strike lodged at the hearing, (Hr'g Tr., Dkt. 65, at 96). On October 1, 2021, the Court held a hearing at which it heard evidence and considered arguments on the United States' request for a preliminary injunction and the State's motion to dismiss. (Dkt. 61; Hr'g Tr., Dkt. 65). Having considered the parties' arguments, the evidence presented, and the relevant law, the Court issues the following order.

I. INTRODUCTION

A person's right under the Constitution to choose to obtain an abortion prior to fetal viability is well established. Fully aware that depriving its citizens of this right by direct state action

[1] The Amici States are Massachusetts, California, Colorado, Connecticut, Delaware, the District of Columbia, Hawai'i, Illinois, Maine, Maryland, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, Wisconsin, and the Attorney General of North Carolina Joshua H. Stein. (Dkt. 9).

would be flagrantly unconstitutional, the State contrived an unprecedented and transparent statutory scheme to do just that. The State created a private cause of action by which individuals with no personal interest in, or connection to, a person seeking an abortion would be incentivized to use the state's judicial system, judges, and court officials to interfere with the right to an abortion. Rather than subjecting its law to judicial review under the Constitution, the State deliberately circumvented the traditional process. It drafted the law with the intent to preclude review by federal courts that have the obligation to safeguard the very rights the statute likely violates.

A person's right under the Constitution to choose to obtain an abortion prior to fetal viability is well established. With full knowledge that depriving its citizens of this right by direct state action would be flagrantly unconstitutional, the State contrived an unprecedented and transparent statutory scheme whereby it created a private cause of action in which private citizens with no personal interest in or connection to a person seeking an abortion would be able to interfere with that right using the state's judicial system, judges, and court officials. Rather than challenging the right to abortion via the appropriate process of judicial review, the State went so far as to draft the law in such a way as to attempt to preclude a review of the constitutionality of the statute by federal courts who have responsibility to safeguard the very rights the statute likely violates.

II. BACKGROUND

A. Factual Background

This case concerns State legislature's passage of Senate Bill 8 ("S.B. 8"), a sweeping anti-abortion law. *See* Senate Bill 8, 87th Leg., Reg. Sess. (Tex. 2021). S.B. 8 purports to ban all abortions performed on any pregnant person[2] where cardiac activity has been detected in the embryo, with no exceptions for pregnancies that result from rape, sexual abuse, incest, or fetal defect incompatible with life after birth. Tex. Health & Safety Code § 171.204(a). As explained further below, S.B. 8 can

[2] The Court recognizes that not all pregnant people identify as women.

be enforced through civil lawsuits by private citizens against anyone who performs, aids and abets or intends to participate in a prohibited abortion. *See id.* §§ 171.208, 171.210.

1. Abortion

The Court finds that the declarations of providers Gilbert, Dkt. 8-2, Hagstrom Miller, Dkt. 8-4, and Linton, Dkt. 8-5, credibly describe the details of embryonic development.[3] Fertilization of an egg usually happens at two weeks from the first day of a patient's last menstrual period ("LMP"). At three weeks LMP, the egg implants in the uterus and pregnancy begins. An ultrasound is first able to detect a pregnancy around four to five weeks LMP; the gestational sac is too small to detect before this time. (Gilbert Decl., Dkt. 8-2, at 8). An embryo then develops until nine weeks LMP. The embryo begins to form cells that in later stages of pregnancy will become the heart. An ultrasound during this phase will reveal a sac of fluid, sometimes with a dot inside that represents the embryo. At this early stage, certain cells produce cardiac activity, which appears on an ultrasound as "an electrical impulse that appears as a visual flicker within [the] dot." (*Id.* at 6). This electrical impulse can occur "very early in pregnancy," as soon as six weeks LMP or sometimes sooner; the embryo does not have a fully developed heart at this time. (*Id.*). At approximately ten weeks LMP, the embryo develops into a fetus. The fetus does not reach viability until approximately 24 weeks, although viability is an individual medical determination. (*Id.* at 6). "Viability is medically understood as the point when a fetus has a reasonable likelihood of sustained survival after birth, with or without artificial support[,]" and is "medically impossible at 6 weeks LMP . . . ." (*Id.* at 6–7).

[3] "In the field of medicine, physicians measure pregnancy from the first day of a patient's last menstrual period ("LMP"). . . . Pregnancy begins . . . at three weeks LMP, when the fertilized egg implants in the uterus and lasts until 40 weeks LMP. For the first nine weeks LMP, an embryo develops in the uterus. It is not until approximately 10 weeks LMP that clinicians recognize the embryo as a fetus." (Gilbert Decl., Dkt. 8-2, at 6).

The Court finds that abortion is a safe[4] and common medical procedure, based on the credible declarations of abortion providers founded on their education and experience. Most providers in Texas perform both medication and procedural abortions. A medication abortion consists of taking two medications, mifepristone and misoprostol, which initiate a process similar to a miscarriage. (*Id.* at 4). A procedural abortion requires a provider to conduct an abortion procedure in person on the patient. Approximately one quarter of women in the United States will have an abortion by the age of forty-five. (*Id.* at 8). In Texas alone, providers performed more than 50,000 abortions last year. (*Id.* at 8–9).[5] The declarants credibly describe a host of reasons why people might

[4] "Abortion is also one of the safest medical procedures. Fewer than 1% of pregnant people who obtain abortions experience a serious complication. And even fewer abortion patients—only approximately 0.3%—experience a complication that requires hospitalization. Abortion is far safer than pregnancy and childbirth. The risk of death from carrying a pregnancy to term is approximately 14 times greater than the risk of death associated with abortion. In addition, complications such as blood transfusions, infection, and injury to other organs are all more likely to occur with a full-term pregnancy than with an abortion." (Gilbert Decl., Dkt. 8-2, at 9).

[5] In addition, "others in the state self-manage their abortions (i.e., on their own without following a physician's advice) using a range of methods that can include herbs and vitamins, birth control pills, alcohol or drugs, and misoprostol obtained over the counter in Mexico." (Gilbert Decl, Dkt. 8-2, at 8–9).

obtain an abortion—commonly arising out of medical,[6] financial,[7] and family planning[8] concerns. In some cases, "patients choose to have an abortion because their pregnancies are the result of rape, incest, or other intimate partner violence." (*Id.* at 11).[9] Still others seek abortions after fetal anomalies are diagnosed, when such diagnoses may result in severe disabilities or death. Fetal

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[6] "For many, maternal health concerns make abortion desirable and even necessary. Pregnancy, including an uncomplicated pregnancy, significantly stresses the body, causes physiological and anatomical changes, and affects every organ system. It can worsen underlying health conditions, such as diabetes and hypertension. Some people develop additional health conditions simply because they are pregnant—conditions such as gestational diabetes, gestational hypertension (including preeclampsia), and hyperemesis gravidarum (severe nausea and vomiting). People whose pregnancies end in vaginal delivery may experience significant injury and trauma to the pelvic floor. Those who undergo a caesarean section (C-section) give birth through a major abdominal surgery that carries risks of infection, hemorrhage, and damage to internal organs." (*Id.* at 9–10). None of these conditions qualifies for the medical emergency exception in S.B. 8. *See* Tex. Health & Safety Code § 171.205(a).

[7] "Many Texans obtain abortions because they are unable to meet their basic needs. Pregnant patients who seek abortion care are often low-income and below the federal poverty line. 14.7% of working Texans live in poverty, and 34.5% are low income. This number is even higher for women of color; 19.1% of Black women and 20.5% of Latina women live in poverty in Texas. These patients are in dire financial circumstances and often struggle to pay for needs like housing, food, and medical care. As a result, these patients believe that obtaining an abortion is the best decision for themselves and for their families." (Gilbert Decl., Dkt. 8-2, at 10).

[8] "The majority of pregnant people who have abortions are already parents: sixty-one percent of pregnant patients who obtain abortions already have at least one child. They do not desire—and . . . may not be able to afford or properly care for—another child. . . . Other patients seek abortions because having another child is not right for them and their families at the present time. Sixty-six percent of abortion patients intend to have at least one child in the future. Some Texans become pregnant when they are young or still in school and want to wait to have children later in life. Some become pregnant with a partner with whom they do not wish to share a child. Others may be managing their own unrelated health issues, such as substance abuse disorders, and may determine that having a child would not be the best choice for them in their current condition." (*Id.* at 10–11).

[9] "For patients who have been abused, being pregnant often subjects them to increased surveillance and decreased control over their lives. Being pregnant also may make it more likely that their abusers will perpetrate more physical violence against them. Terminating the pregnancy may be critical for their physical health and psychological well-being." *Id.* at 11. A provider in Oklahoma credibly relates his experiences with survivors of rape seeking abortion in his clinics because the medical procedure is no longer available to them in Texas: "One of the most heart-wrenching cases I have seen recently was of a Texas minor who had been raped by a family member and traveled (accompanied by her guardian) all the way from Galveston, Texas—a 7- to 8-hour drive, one way—to get her abortion in Oklahoma because she was more than six weeks pregnant and could not get an abortion in Texas. And this patient is not the only sexual assault survivor from Texas that I have treated recently. I provided an abortion to another woman from Texas who had been raped and could not get an abortion in Texas because of S.B. 8. She was upset and furious that she could not get an abortion close to home and in her own state. She had to figure out how to take extra time off from work to make the trip to Oklahoma, as well as find childcare for her children. I know of at least one other patient from Texas on our schedule for this upcoming week who has indicated that their pregnancy was a result of sexual assault." (Yap Decl., Dkt. 8-9, at 9).

anomalies of this nature cannot be diagnosed until significantly later than six weeks LMP, and some cannot be diagnosed until 18 or 20 weeks LMP. (*See* Gilbert Decl., Dkt. 8-2, at 11). Many people do not realize they are pregnant at six weeks LMP because the markers of pregnancy vary greatly across the population.[10] As a result, they cannot seek abortion care until after embryonic cardiac activity is detectable.[11] Even so, the Court finds that "the vast majority of abortions in the United States and in Texas take place in the first 12 weeks of pregnancy"—but "most patients are at least 6 weeks LMP into their pregnancy when they make an abortion appointment." (Gilbert Decl., Dkt 8-2, at 8).

2. Abortion Regulation in Texas

Texas law contains a number of regulations for abortion procedures antecedent to the developments in S.B. 8 at issue here. Those regulations remain in force irrespective of the constitutionality of S.B. 8. State law requires physicians to perform an ultrasound before performing an abortion on a patient. An ultrasound typically cannot detect a pregnancy before four weeks LMP, when the gestational sac becomes visible. (*Id.* at 4). State law also requires a series of counseling

[10] "The commonly known markers of pregnancy—a missed menstrual period and pregnancy symptoms—are not the same for all pregnant people. First, not every pregnant person can rely on a missed menstrual period to determine whether they are pregnant. In people with an average menstrual cycle (e.g., a period every 28 days), fertilization begins at 2 weeks LMP, and they miss their period at 4 weeks LMP. Many people do not experience average menstrual cycles, though. Some people have regular menstrual cycles but only experience periods every 6 to 8 weeks, or even further apart. Others do not know when they will experience their next period because they have irregular cycles, which are caused by a variety of factors, including polyps, fibroids, endometriosis, polycystic ovary syndrome, eating disorders, and other anatomical and hormonal reasons. Some people may have irregular menstrual cycles because they are taking contraceptives or are breastfeeding. As a result, many people may not suspect they are pregnant until much later than 4 weeks LMP. Second, many people will not exhibit the commonly known symptoms of pregnancy. For instance, people may have negative results from over-the-counter pregnancy tests even when pregnant because these tests often cannot detect a pregnancy at 4 weeks LMP or earlier. Additionally, symptoms such as nausea or fatigue differ for each pregnant person, and some people never experience those symptoms. Further complicating early detection of pregnancy, it is common for pregnant people to experience light bleeding when the fertilized egg is implanted in the uterus and mistake that bleeding for a menstrual period." (Gilbert Decl., Dkt 8-2, at 7).

[11] "Even for someone with normal periods, 6 weeks LMP is only two weeks after a missed period, and many patients (including young people and those on birth control) do not have normal periods. And even after a patient learns that they are pregnant and decides they want to terminate the pregnancy, arranging an appointment for an abortion may take some time. Even assuming an appointment is available at a health center that is accessible to a patient, they need to come in for at least two visits (due to a different Texas law), and have to take time off work, arrange child care, and deal with other logistical issues that can result in some delay." (Linton Decl., Dkt. 8-5, at 6).

requirements to be completed, as well as imposing a 24-hour waiting period. Unless a person certifies that they live more than 100 miles from an abortion facility, they must make two trips to a clinic to complete these requirements because of the waiting period. *See* Tex. Health & Safety Code §§ 171.011–016. Appointments for counseling and for medication abortion must be done in person. *Id.*; *id.* § 171.063. Written parental consent or a court order are required for patients eighteen years old or younger. *Id.* §§ 33.001–014. The State also prohibits Medicaid coverage of abortion; most private insurers similarly refuse to cover the procedure. (*See* Hagstrom Miller Decl. I, Dkt. 8-4, at 4). Credible evidence establishes that these requirements create burdens for people seeking abortions. (*See* Gilbert Decl., Dkt. 8-2, at 12) ("Patients must coordinate transportation to the clinic, childcare for their family, lodging if they live far from a clinic, and time off from work (which may not be paid).")).

In addition, the Texas legislature passed H.B. 2 in 2013, imposing further restrictions on abortion facilities and providers. House Bill 2, 83rd Leg., 2nd Called Sess. (Tex. 2013). That law was enjoined and ultimately overturned by the Supreme Court. *See Whole Women's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). But during the period of its operation, it forced many clinics to close, almost all of which have not reopened.[12] The result is that, whereas before H.B. 2 there were 44 clinics, now only 20 clinics serve the entire state. (*See* Hagstrom Miller Decl. I, Dkt. 8-4, at 5).[13] Similar closures

[12] "Because WWH lacked sufficient physicians with admitting privileges in Beaumont and Austin, we had to shut those clinics down. Additionally, our clinic in McAllen was shut down for eleven months and was only reopened because of an injunction awarded by the United States District Court for the Western District of Texas. Ironically, one of our physicians in Austin was able to obtain admitting privileges in Fort Worth, and so he commuted by plane in order to keep our clinic in Fort Worth open. The cost of flights put further economic pressure on WWH." (Hagstrom Miller Decl. I, Dkt. 8-4, at 5).

[13] "In fact, the WWH clinic in Austin (now operated by Whole Woman's Health Alliance) is the only WWH clinic closed by H.B. 2 to have reopened since the Supreme Court struck it down. Less than two years after reopening, the Austin clinic was forced to close again because an anti-abortion pregnancy crisis center, Austin LifeCare, bought out the lease for our existing building. The Austin Clinic had to find a new location and relocate our operations, reopening again in February 2019. . . . Independent abortion providers will not be able to recover from clinic closures. Once abortion clinics close, they remain closed permanently." (*Id.* at 5).

arose from Governor Abbott's Executive Order shuttering clinics due to COVID-19.[14] For low-income patients, often from marginalized communities, and often facing language barriers, "significant logistical and financial burdens" on accessing abortion services existed even prior to the enactment of S.B. 8.[15]

3. Senate Bill 8

S.B. 8 imposes an almost outright ban on abortions performed after six weeks of pregnancy, as well as other anti-abortion measures meant to empower anti-abortion vigilantes and target those who support abortion care in Texas.

a. The Six-week Ban on Abortions

The cornerstone of S.B. 8 is its requirement that physicians performing abortions in Texas determine whether a "detectable fetal heartbeat" is present and bans any abortions performed if a "fetal heartbeat"[16] is detected or if the physician fails to perform a test for one. Tex. Health & Safety Code §§ 171.201(1), 171.203(b), 171.204(a). S.B. 8 empowers licensing authorities to discipline any licensed healthcare provider who perform abortions in violation of S.B. 8. Tex. Occ. Code §§ 164.053(a)(1)), 301.101, 553.003. S.B. 8 contains no exception for pregnancies that result from rape or incest, or for fetal health conditions that are incompatible with life after birth—though it does

[14] "Abortion providers had a similar experience last year when Governor Abbott issued a COVID-19 executive order that forced all of the abortion providers in the state to stop providing abortions for around three weeks. Even this short closure had a devastating and lasting impact on both the clinics and our patients. Had the closure lasted even a few weeks more, many clinics would have closed for good." (*Id.* at 6).

[15] "Most of WWH/WWHA's patients in Texas are Black, Latinx, or people of color from marginalized communities. Our patients overcome significant logistical and financial burdens to access abortion care at our clinics. The majority of our patients are poor or low-income and receive at least partial financial assistance for their abortions." (*Id.* at 4).

[16] Because an ultrasound can typically detect cardiac activity beginning at approximately six weeks of pregnancy, as measured from the first day of a patient's last menstrual period ("LMP"), and "fetal heartbeat" is a medically inaccurate term since what the law intends to refer to is "cardiac activity detected in an embryo" the Court will refer to S.B. 8's ban as a "six-week ban" to more accurately reflect that the ban covers all abortions performed approximately six week LMP, usually just two weeks after a missed menstrual period, when an embryo begins to exhibit electrical impulses. (Compl. Dkt. 1, at 22) ("[D]espite S.B. 8's use of the phrase 'fetal heartbeat,' the Act forbids abortion even when cardiac activity is detected in an embryo.").

contain a narrow exception for "a medical emergency . . . that prevents compliance." Tex. Health & Safety Code § 171.205(a).

S.B. 8 creates liability for anyone who performs an abortion in violation of the six-week ban and anyone who "knowingly" aids or abets the performance of an abortion performed at six weeks or later. *Id.* § 171.208(a)(1)–(2). Although S.B. 8 does not define what constitutes aiding or abetting under the statute, it specifies that paying for or reimbursing the costs of the abortion would fall under the ban, which would apply "regardless of whether the person knew or should have known that the abortion would be performed or induced in violation of [S.B. 8]." *Id.* In addition, a person need not even actually take steps to "aid and abet" a prohibited abortion to be held liable under S.B. 8; all that is required is that the person *intended* to "aid and abet" an abortion at six weeks or later. *Id.* § 171.208(a)(3).[17]

b. Enforcement of the Six-Week Ban

S.B. 8 precludes enforcement of the six-week ban by state or local authorities, instead empowering private citizens to bring civil actions against anyone who allegedly performs, or aids and abets in the performance of a banned abortion. *Id.* § 171.207(a). Despite having no exception to the six-week ban for pregnancies that result from rape or incest, S.B. 8 precludes those "who impregnated the abortion patient through rape, sexual assault, [or] incest" from bringing an S.B. 8 lawsuit. *Id.* § 171.208(j). S.B. 8 does not permit private citizens to bring civil suits against abortion patients. *Id.* § 171.206(b)(1).

Any private individual may bring suit under S.B. 8 in the county where "all or a substantial part of the events or omissions . . . occurred," in their county of residence (if they are a Texas resident) or the defendant's county of residence, or the county of a defendant entity's principal

[17] Amici raise the possibility that their citizens could be subject to suit by, among other activities, "perform[ing] research used to support abortion access in Texas" or "donat[ing] or provid[ing] in-kind support to abortion funds and other abortion advocacy groups in Texas . . ." (Br. of Amici, Dkt. 9-1, at 11).

office. *Id.* § 171.210(a). A private individual who brings suit can block transfer to a more appropriate venue if not consented to by all parties. *Id.* § 171.210(b).[18] Private individuals who prevail in S.B. lawsuits may be awarded (1) "injunctive relief sufficient to prevent" future violations or conduct that aids or abets violations; (2) "statutory damages . . . in an amount of not less than $10,000 for each abortion" that was provided or aided and abetted; and (3) "costs and attorney's fees." Tex. Health & Safety Code § 171.208(b). Significantly, a private individual may prevail in a civil suit brought under S.B. 8 without alleging any injury.

In contrast, those sued under S.B. 8 are prohibited from raising certain defenses enumerated under S.B. 8, including that they believed the law was unconstitutional; that they relied on a court decision, later overruled, that was in place at the time of the acts underlying the suit; or that the patient consented to the abortion. *Id.* § 171.208(e)(2)–(3). S.B. 8 also states that people who are sued may not rely on non-mutual issue or claim preclusion or rely on any other "state or federal court decision that is not binding on the court in which the action" was brought as a defense. *Id.* § 171.208(e)(4)–(5). If a suit is successful, the person sued will be bound by a mandatory injunction, violation of which will result in contempt orders. *Id.* § 171.208(b)(2). Furthermore, those sued under S.B. 8 who prevail in their case are barred from recovering their costs and attorney's fees if they prevail even if the person has been sued many times. *Id.* § 171.208(i). S.B. 8 also enlarges the statute of limitations, allowing private individuals to sue up to four years from the date the cause of action accrues. *Id.* § 171.208(d).

S.B. 8 changes the way state courts interpret binding precedent. "States may regulate abortion procedures prior to viability so long as they do not impose an undue burden" on a patient's

[18] Texas generally limits the venue where an action may be brought to one where the events giving rise to a claim took place or where the defendant resides, *see* Tex. Civ. Prac. & Rem. Code § 15.002(a), and a Texas state court may generally transfer venue "[f]or the convenience of the parties and witnesses and in the interest of justice," *id.* § 15.002(b).

right to abortion, but states "may not ban abortions." *Jackson Women's Health Org. v. Dobbs*, 945 F.3d 265, 269 (5th Cir. 2019), *cert. granted in part*, No. 19-1392, 2021 WL 1951792 (U.S. May 17, 2021). Under S.B. 8, a defendant may not establish an undue burden by "merely demonstrating that an award of relief will prevent women from obtaining support or assistance, financial or otherwise, from others in their effort to obtain an abortion[] or . . . arguing or attempting to demonstrate that an award of relief against other defendants or other potential defendants will impose an undue burden on women seeking an abortion." Tex. Health & Safety Code § 171.209(d). And S.B. 8 eliminates undue burden as a defense in the event the Supreme Court "overrules Roe v. Wade, 410 U.S. 113 (1973) or Planned Parenthood v. Casey, 505 U.S. 833 (1992), regardless of whether the [S.B. 8] conduct . . . occurred before the Supreme Court overruled either of those decisions." *Id.* § 171.209(e).

B. Procedural Background

The procedural background and timing of this case is connected to the fate of another case in this Court challenging the constitutionality of S.B. 8: *Whole Woman's Health v. Jackson*, USDC No. 1:21-cv-616 (W.D. Tex. 2021). The *Jackson* case had an intense ramp-up starting when Plaintiffs[19] filed a suit on July 13, 2021. (1:21-cv-616, Dkt. 1). Plaintiffs are a large group of abortion care providers and advocates who sued Texas Attorney General Ken Paxton, a state court judge, a state court clerk, a private individual who previously expressed his intent to bring S.B. 8 lawsuits, and various State officials. (*Id.*). Defendants filed motions to dismiss, (1:21-cv-616, Dkts. 48, 49, 50, 51),

[19] Plaintiffs in that action include 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 of Greater Texas Surgical Health Services, Planned Parenthood South Texas Surgical Center, Planned Parenthood Center for Choice, Southwestern Women's Surgery Center, Whole Woman'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 for Reproductive Equity, North Texas Equal Access Fund, Marva Sadler, Reverend Daniel Kanter, and Reverend Erika Forbes. (1:21-cv-616, Dkt. 1, at 9–14).

and then Plaintiffs filed a motion for preliminary injunction, (1:21-cv-616, Dkt. 53). Three days after the motions to dismiss were filed, two of the Defendants—the state court clerk and the private individual—filed a petition for writ of mandamus, arguing that this Court erred by purportedly "refusing to resolve [their] jurisdictional objections before proceeding to the merits." *In re Clarkston*, No. 21-50708 (5th Cir. Aug. 7, 2021). After dozens of filings, the Fifth Circuit denied the petition of mandamus on August 13, 2021. *Id.*

During the pendency of the petition for writ of mandamus, the Court set the preliminary injunction motion to be heard on August 30, 2021. (1:21-cv-616, Dkt. 61). On August 25, 2021, the Court denied the pending motions to dismiss. (1:21-cv-616, Dkt. 82). Defendants filed an interlocutory appeal to the Fifth Circuit. (1:21-cv-616, Dkt. 83). Finding that Defendants who are state officials asserted sovereign immunity, this Court stayed its proceedings as to those Defendants but could not, and did not, stay its proceedings as to the private individual. (1:21-cv-616, Dkt. 88). On that same day, the Fifth Circuit entered a "temporary administrative stay" of this Court's proceedings and denied Plaintiffs' request to expedite the interlocutory appeal. (1:21-cv-616, Dkt. 92). Two days later, on August 29, 2021, the Fifth Circuit denied Plaintiffs' requests for an injunction pending appeal and to vacate its administrative stay, among other denials. (1:21-cv-616, Dkt. 93).

With S.B. 8 about to go into effect, Plaintiffs filed an application for injunctive relief or, in the alternative, to vacate the Fifth Circuit's stays of this Court's proceedings with the Supreme Court. *Whole Woman's Health v. Jackson*, No. 21A24, 2021 WL 3910722, at *1 (U.S. Sept. 1, 2021). At midnight, S.B. 8 became law, and that night the Supreme Court issued its opinion denying Plaintiffs' request for an injunction or stay. *Id.* While acknowledging that Plaintiffs had "raised serious questions regarding the constitutionality of the Texas law at issue[,]" the Supreme Court expressed concern about the "complex and novel antecedent procedural questions." *Id.*

In dissent, Chief Justice Roberts noted that "[t]he statutory scheme before the Court is not only unusual, but unprecedented," because "[t]he legislature has imposed a prohibition on abortions after roughly six weeks, and then essentially delegated enforcement of that prohibition to the populace at large," with the "desired consequence appear[ing] to be to insulate the State from responsibility for implementing and enforcing the regulatory regime." *Id.* (Roberts, C.J., dissenting). The Chief Justice stated that he "would grant preliminary relief to preserve the status quo ante—before the law went into effect—so that the courts may consider whether a state can avoid responsibility for its laws in such a manner." *Id.* at *2. Justices Breyer, Sotomayor, and Kagan each wrote a dissenting opinion, noting the need to preserve judicial review in the face of S.B. 8's unusual enforcement regime. *See id.* at *3–5.

On September 10, 2021, the Fifth Circuit denied Plaintiffs' motion to dismiss the private individual's appeal, granted the private individual's motion to stay, and expedited the appeal "to the next available oral argument panel." (1:21-cv-616, Dkt. 95). The Fifth Circuit's order confirmed its stay of this Court's proceedings, and the *Jackson* case has come to a halt pending the resolution of Defendants' interlocutory appeal.

The United States filed the instant action for declaratory and injunctive relief on September 9, 2021. (Compl., Dkt. 1). The United States accuses the State of banning nearly all abortions after six weeks, and months before a pregnancy is viable, "in open defiance of the Constitution." (*Id.* at 1). "Because S.B. 8 clearly violates the Constitution," the United States alleges that the State "adopted an unprecedented scheme 'to insulate the State from responsibility.'" (*Id.* (quoting *Jackson*, 2021 WL 3910722, at *1 (Roberts, C.J., dissenting))). The United States seeks a declaratory judgment that S.B. 8 is "invalid under the Supremacy Clause and the Fourteenth Amendment, is preempted by federal law, and violates the doctrine of intergovernmental immunity." (*Id.* at 3). The United States also seeks an "order preliminarily and permanently enjoining the State of Texas, including its

officers, employees, and agents, including private parties who would bring suit under the law, from implementing or enforcing S.B. 8." (*Id.*).

S.B. 8 was designed to stymie judicial review. (*Id.*) (citing Emma Green, *What Texas Abortion Foes Want Next*, THE ATLANTIC (Sept. 2, 2021), https://www.theatlantic.com/politics/archive/2021/09/texas-abortion-ban-supreme-court/619953/; Jacob Gershman, *Behind Texas Abortion Law, an Attorney's Unusual Enforcement Idea*, THE WALL ST. J. (Sept. 4, 2021), https://www.wsj.com/articles/behind-texas-abortion-law-an-attorneys-unusual-enforcement-idea-11630762683 (quoting Texas State Senator Bryan Hughes: "We were going to find a way to pass a heartbeat bill that was going to be upheld."); Jenna Greene, *Column: Crafty Lawyering on Texas Abortion Bill Withstood SCOTUS Challenge*, REUTERS (Sept. 5, 2021), https://reuters.com/legal/government/crafty-lawyering-texas-abortion-bill-withstood-scotus-challenge-greene-2021-09-05/(quoting Sen. Hughes as saying S.B. 8 is a "very elegant use of the judicial system")).

In its complaint, the United States describes the effects of S.B. 8 on Texans and the injuries to the United States. According to the complaint, after being deprived of their constitutional right to an abortion, pregnant people are crossing state lines to seek abortion care since S.B. 8 took effect. (Compl., Dkt. 1, at 12–13). The complaint also asserts that S.B. 8 irreparably injures the United States by depriving people of their constitutional rights while preventing them from vindicating those rights in federal court and unconstitutionally restricting the operation of the federal government and conflicting with federal law. (*Id.* at 14–24). The United States brings claims under the Fourteenth Amendment, preemption, and intergovernmental immunity. (*Id.* at 24–26).

On September 15, 2021, the United States filed an emergency motion requesting a temporary restraining order or preliminary injunction to enjoin the enforcement and effect of S.B. 8. (Mot. Prelim. Inj., Dkt. 8). The United States, through declarations, detailed the "devastating effects" S.B. 8 already was having in Texas and nearby states, including the vast majority of people seeking

abortions being turned away, some people forced to seek care in other states, scheduling backlogs in other states because Texans are claiming 50-75% of appointments, and losing health care professionals who fear liability. (*Id.* at 17–22). Arguing that S.B. 8 violates the Constitution and the principles of preemption and intergovernmental immunity, the United States makes its case that it is likely to succeed on the merits. (*Id.* at 23–32). The United States also contends that it has standing to bring this suit against the State and that its requested relief will redress its injuries. (*Id.* at 32–43). Finally, the United States argues it faces irreparable harm and the balance of the equities tip in favor of an injunction. (*Id.* at 43–44). The Court set a hearing for October 1, 2021. (Dkt. 12).

On the same day the United States filed its preliminary injunction motion, the Amici States filed their Unopposed Motion for Leave to File Brief as Amici Curiae. (Dkt. 9). The Amici States express their interests in protecting their residents' ability to seek abortion care and avoid suit and their more general interest in "ensuring each State abides by its constitutional obligation not to prohibit access to otherwise lawful and safe abortion care." (Dkt. 9-1, at 9). The Amici argue that S.B. 8 represents an "unprecedented attack on our constitutional order and rule of law," (*id.* at 12), and urge this Court to immediately enjoin the State from enforcing S.B. 8, (*id.* at 26–27).

Several would-be intervenors filed motions, starting with the Texas Intervenors. (Mot. Intervene, Dkt. 28, at 1). The Texas Intervenors, who also later filed an opposition to the preliminary injunction motion, (Dkt. 44), seek to "preserve their state-law rights and to ensure that Senate Bill 8's severability requirements are observed and enforced." (Mot. Intervene, Dkt. 28, at 1). The Texas Intervenors claim they intend to sue people and entities, pursuant to S.B. 8, "whose conduct is clearly unprotected by the Constitution[] and who cannot plausibly assert an 'undue burden' defense under [S.B. 8]." (*Id.* at 2). The Court granted the Texas Intervenors' motion to intervene. (Dkt. 40). The next motion to intervene was filed by Oscar Stilley ("Stilley"), an Arkansas resident "in federal custody[] on home confinement" who already has sued an abortion provider

under S.B. 8 in Bexar County. (Stilley Mot., Dkt. 31, at 1, 4). The Court granted Stilley's motion to intervene. (Dkt. 40). Finally, just a few days ago, Felipe Gomez, who also brought an S.B. 8 suit in Bexar County, filed a motion to intervene. (Dkt. 62). Since the response window to that motion is still open, it is not ripe or before the Court at this time.

On September 30, 2021, the State filed its response to the preliminary injunction, (Resp., Dkt. 43), and its motion to dismiss, (Dkt. 54).[20] In its motion to dismiss, the State argues that there is no justiciable controversy between the United States and Texas; the United States cannot obtain relief against state courts or private individuals; the United States is not injured; and the United States lacks a cause of action. (Dkt. 54). In its opposition to the preliminary injunction motion, the State contends that S.B. 8 is lawful because the United States has not shown a clear violation of the Fourteenth Amendment and the United States has not clearly shown S.B. 8 is preempted or violates intergovernmental immunity. (Resp., Dkt. 43, at 49–59). The State also asserts that the United States has not clearly shown irreparable harm or that the balance of the equities and public interest favor an injunction. (*Id.* at 59–69). Rounding out its arguments, the State disputes the requested injunction as unlawfully broad. (*Id.* at 69–71). Finally, the State requests that, should this Court grant the preliminary injunction motion, this Court stay the injunction to allow the State to seek a stay from "the appropriate appellate courts." (*Id.* at 71–72).

III. LEGAL STANDARDS

Federal Rule of Civil Procedure 12(b)(1) allows a party to assert lack of subject-matter jurisdiction as a defense to suit. Fed. R. Civ. P. 12(b)(1). Federal district courts are courts of limited

[20] In its response, the State improperly included two motions—the motion to dismiss, which it separately filed later, (Dkt. 54), and a request for a stay in the event an injunction is granted—with its response brief. (Dkt. 43; *see* Deficiency Notice, Dkt. 47). While normally a filing error of this kind is not of note, this Court refers to it only because the State did not refile its request for a stay as a separate motion. Assuming a miscommunication or a misunderstanding, the Court still considers the State's request for a stay to be before this Court even though it resides with the State's response brief.

subject matter jurisdiction and may only exercise such jurisdiction as is expressly conferred by the Constitution and federal statutes. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). A federal court properly dismisses a case for lack of subject matter jurisdiction when it lacks the statutory or constitutional power to adjudicate the case. *Home Builders Ass'n of Miss., Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998). "The burden of proof for a Rule 12(b)(1) motion to dismiss is on the party asserting jurisdiction." *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001), *cert. denied*, 536 U.S. 960 (2002). "Accordingly, the plaintiff constantly bears the burden of proof that jurisdiction does in fact exist." *Id.* In ruling on a Rule 12(b)(1) motion, the court may consider any one of the following: (1) the complaint alone; (2) the complaint plus undisputed facts evidenced in the record; or (3) the complaint, undisputed facts, and the court's resolution of disputed facts. *Lane v. Halliburton*, 529 F.3d 548, 557 (5th Cir. 2008).

Pursuant to Rule 12(b)(6), a court may also dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). In deciding a 12(b)(6) motion, a "court accepts 'all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff.'" *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007) (quoting *Martin K. Eby Constr. Co. v. Dallas Area Rapid Transit*, 369 F.3d 464, 467 (5th Cir. 2004)). "To survive a Rule 12(b)(6) motion to dismiss, a complaint 'does not need detailed factual allegations,' but must provide the plaintiff's grounds for entitlement to relief—including factual allegations that when assumed to be true 'raise a right to relief above the speculative level.'" *Cuvillier v. Taylor*, 503 F.3d 397, 401 (5th Cir. 2007) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). That is, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 540, 678 (2009) (quoting *Twombly*, 550 U.S. at 570).

A claim has facial plausibility "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "The

tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* A court ruling on a 12(b)(6) motion may rely on the complaint, its proper attachments, "documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Dorsey v. Portfolio Equities, Inc.,* 540 F.3d 333, 338 (5th Cir. 2008) (citations and internal quotation marks omitted). A court may also consider documents that a defendant attaches to a motion to dismiss "if they are referred to in the plaintiff's complaint and are central to her claim." *Causey v. Sewell Cadillac-Chevrolet, Inc.*, 394 F.3d 285, 288 (5th Cir. 2004). But because the court reviews only the well-pleaded facts in the complaint, it may not consider new factual allegations made outside the complaint. *Dorsey,* 540 F.3d at 338. "[A] motion to dismiss under 12(b)(6) 'is viewed with disfavor and is rarely granted.'" *Turner v. Pleasant*, 663 F.3d 770, 775 (5th Cir. 2011) (quoting *Harrington v. State Farm Fire & Cas. Co.*, 563 F.3d 141, 147 (5th Cir. 2009)).

A preliminary injunction is an extraordinary remedy, and the decision to grant such relief is to be treated as the exception rather than the rule. *Valley v. Rapides Parish Sch. Bd.*, 118 F.3d 1047, 1050 (5th Cir. 1997). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The party seeking injunctive relief carries the burden of persuasion on all four requirements. *PCI Transp. Inc. v. W. R.R. Co.*, 418 F.3d 535, 545 (5th Cir. 2005). When the United States is a party, the third and fourth requirements merge. *Nken v. Holder*, 556 U.S. 418, 435 (2009). A movant cannot be granted a preliminary injunction unless it can establish that it will suffer irreparable harm without an injunction. *Amazon.com, Inc. v. Barnesandnoble.com, Inc.*, 239 F.3d 1343, 1350 (Fed. Cir. 2001).

IV. DISCUSSION

Due to the length, the Court offers a high-level roadmap of its legal analysis. The Court first considers two requests—a motion to seal and a set of evidentiary objections—before reaching the jurisdictional and procedural questions presented by the State's motion to dismiss. Satisfied that the Court has subject matter jurisdiction and that the United States has stated a valid claim against the State, the Court then addresses the United States' preliminary injunction motion.

A. Motion to Seal and Evidentiary Objections

1. United States' Motion to Seal

Before the hearing, on September 27, 2021, the United States filed its Opposed Motion for a Protective Order of Audiovisual Recordings. (Mot. Seal, Dkt. 36). Pursuant to Federal Rule of Civil Procedure 26(c)(1), the United States requests this Court to seal the audiovisual recordings of depositions (the "Depositions") of Patrice Rachel Torres, Laurie Bodenheimer, Alix McLearen, James S. De La Cruz, and Anne Marie Costello (the "Deponents"), civil servants who were deposed by the State. (*Id.* at 1). The United States argues the Deponents have a "legitimate privacy interest in limiting permanent and public dissemination of video recordings of them being deposed." (*Id.*). The United States relies on two United States District Court for the District of Columbia decisions that sealed audiovisual recordings of civil servants. (*Id.* at 2) (citing Order at 2–3, ECF No. 96, *Judicial Watch, Inc. v. U.S. Dep't of State*, (D.D.C. Apr. 25, 2019); *Judicial Watch v. Dep't of State*, No. 13-cv-1363-EGS (D.D.C. May 26, 2016)). The State opposes this request. (Resp. Mot. Seal, Dkt. 64).

Generally, the public has a right to inspect judicial records. *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978). This right "promotes the trustworthiness of the judicial process, curbs judicial abuses, and provides the public with a better understanding of the judicial process, including its fairness[, and] serves as a check on the integrity of the system." *Bradley on behalf of AJW v. Ackal*,

No. 18-31052, 2020 WL 1329658, at *4 (5th Cir. Mar. 23, 2020) (citing *United States v. Sealed Search Warrants*, 868 F.3d 385, 395 (5th Cir. 2017)).

This right is not absolute and the "common law merely establishes a presumption of public access to judicial records." *Id.* (citing *SEC v. Van Waeyenberghe*, 990 F.2d 845, 848 (5th Cir. 1993)). The Fifth Circuit has neither assigned a particular weight to this presumption nor interpreted the presumption in favor of access as creating a burden of proof. *Id.* at *4. But in light of the public's right to access judicial records, courts are required to "use caution in exercising [their] discretion to place records under seal." *United States v. Holy Land Found. for Relief & Dev.*, 624 F.3d 685, 689–90 (5th Cir. 2010) (citing *Fed. Sav. & Loan Ins. Corp. v. Blain*, 808 F.2d 395, 399 (5th Cir. 1987)). "In exercising its discretion to seal judicial records, the court must balance the public's common law right of access against the interests favoring nondisclosure." *Bradley*, 2020 WL 1329658, at *4 (citing *Van Waeyenberghe*, 990 F.2d at 848). "The presumption however gauged in favor of public access to judicial records is one of the interests to be weighed on the public's side of the scales." *Id.* (internal quotations omitted).

"Not every document, however, is a judicial record subject to the common law right of access." *Id.* at *5. "[S]ealing may be appropriate where orders incorporate confidential business information." *N. Cypress Med. Ctr. Operating Co. v. Cigna Healthcare*, 781 F.3d 182, 204 (5th Cir. 2015). In some cases, such as those involving "trade secrets, the identity of informants, and the privacy of children," *Jessup v. Luther*, 277 F.3d 926, 928 (7th Cir. 2002), or those in which information could be used for "scandalous or libelous purposes," *Hagestad v. Tragesser*, 49 F.3d 1430, 1434 (9th Cir. 1995), the interest in secrecy is compelling. But when the party seeking leave to file under seal "does not identify any particular confidential information in the orders that may cause it harm, and much of the information therein is available elsewhere," sealing is generally unwarranted. *N. Cypress*, 781 F.3d at 204; *see also Powers v. Duff & Phelps, LLC*, No. 1:13-CV-768, 2015 WL 1758079, at *7–8 (W.D. Tex.

Apr. 17, 2015) ("[T]he parties' decision to designate documents as confidential does not mandate that the Court seal the record. The standard for sealing court documents is more stringent than [the] standard for protecting discovery materials under a protective order."). "[I]n order for a document to be sealed, the movant must not only point to specific confidential information contained in the document, but must also show the specific harm that would be suffered if the public were granted access to this document." *Omega Hosp., LLC v. Cmty. Ins. Co.*, No. CV 14-2264, 2015 WL 13534251, at *4 (E.D. La. Aug. 12, 2015) (citing *N. Cypress*, 781 F.3d at 204).

The United States has not presented any compelling reasons for sealing the Depositions other than that civil servants have a privacy interest. (Mot. Seal, Dkt. 36, at 2). While civil servants may very well have such a privacy interest, the United States has not explained how it outweighs the presumption of public access to the court documents. *See Nixon*, 435 U.S. at 597; *Bradley*, 2020 WL 1329658, at *4 (citing *United States v. Sealed Search Warrants*, 868 F.3d at 395). Additionally, the United States does not seek to seal the transcripts of the Depositions. (Mot. Seal, Dkt. 36, at 2). The fact that the United States does not object to the content of the Depositions being public also favors access to the Depositions. *See N. Cypress*, 781 F.3d at 204. The Court will deny the United States' motion to seal.

2. The State's and the Texas Intervenors' Objections to the United States' Declarations

On September 30, 2021, the State filed its objections to the declarations attached to the United States' Motion. (Dkt. 55). The next day, during the hearing on the Motion, the State additionally objected to the two declarations attached to the United States' reply, (Dkt. 59). (Hr'g Tr., Dkt. 65, at 6–7). The State objected to those two declarations as improper because (1) they are new evidence submitted with a reply brief and (2) the State did not have the opportunity to cross examine one of the declarants. (*Id.* at 7). At the hearing on the preliminary injunction motion, the Texas Intervenors moved to strike three declarations proffered by the United States: Dr. Allison

Gilbert, Amy Hagstrom Miller, and Melaney Linton. (Hr'g Tr., Dkt. 65, at 96). The Texas Intervenors moved to strike them as inadmissible hearsay. (*Id.*). The Texas Intervenors also objected that they lacked a meaningful opportunity to contest the content of the declarations. (*Id.* at 96–97). The Court took the evidentiary objections under advisement. (*Id.* at 7).

The Court will now deny the State's and the Texas Intervenors' evidentiary objections. For preliminary injunctions, courts may less strictly follow the rules of admissibility and even may rely on inadmissible evidence. *See, e.g.*, *Sierra Club, Lone Star Chapter v. F.D.I.C.*, 992 F.2d 545, 551 (5th Cir. 1993) ("Furthermore, at the preliminary injunction stage, the procedures in the district court are less formal, and the district court may rely on otherwise inadmissible evidence, including hearsay evidence."); *Null v. Wainwright*, 508 F.2d 340, 344 (5th Cir. 1975) ("Strict evidentiary rules of admissibility are generally relaxed in bench trials, as appellate courts assume that trial judges rely upon properly admitted and relevant evidence."). The Court will examine the evidence presented and make determinations, whether explicit or implicit, about whether to rely on that evidence as it makes its findings of fact and conclusions of law.

To the extent the State or the Texas Intervenors believe they lacked a meaningful opportunity to contest evidence, the Court notes that a full evidentiary hearing was held on October 1, 2021, at which the State, for example, presented deposition testimony from when the State cross-examined declarants for the United States and had a meaningful opportunity to present and refute evidence. (*See* Minute Entry, Dkt. 61). The Court reminds the Texas Intervenors that they did not file their motion to intervene, (Dkt. 28), until two weeks after this case was filed; the Court expedited its consideration of that motion; and the Court allotted them 30 minutes at the hearing (as compared to the one hour given to each party) to present evidence or argument. (*See* Order Denying Mot. Reconsideration, Dkt. 53, at 1–2). Taking into account the compressed schedule, the Court

provided the Texas Intervenors, like the parties, a meaningful opportunity to present and refute the evidence.

B. Motion to Dismiss

"The statutory scheme [in S.B. 8] is not only unusual, but unprecedented." *Jackson*, 2021 WL 3910722, at *1 (Roberts, C.J., concurring). The intent of this scheme, according to its drafters, was to stymie judicial review and ensure that no private party would be able to bring a pre-enforcement suit to challenge the constitutionality of the law. *See supra* Section II(B). Thus far, this tact has been effective—the Supreme Court denied a private, pre-enforcement preliminary injunction against S.B. 8, and the law has been in effect for over a month. *See id.* at *3 (Sotomayor, J., dissenting). The United States seeks to establish that its distinct, sovereign interests in upholding the supremacy of the Constitution, safeguarding constitutional rights, ensuring the availability of judicial review, and protecting the work of federal agencies all warrant its opportunity to sue in this Court. Based on the following analysis, the Court holds that the United States indeed has standing to file its lawsuit with this Court

1. Standing

The first question this Court must answer is whether the United States has the authority to sue Texas to enjoin S.B. 8 in federal court. Article III of the Constitution confines the federal judicial power to the resolution of "Cases" and "Controversies." *Raines v. Byrd*, 521 U.S. 811, 819 (1997). For there to be a case or controversy, the plaintiff must have a "personal stake" in the case. *Id.* A personal stake exists when three requirements are met: The plaintiff must show (i) that the injury it suffers is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (stating the three elements of Article III standing). The standing requirements are heightened somewhat in a motion for a preliminary injunction, where

the plaintiff must make a "clear showing" that she has standing to maintain the preliminary injunction. *Barber v. Bryant*, 860 F.3d 345, 352 (5th Cir. 2017). However, "[t]he injury alleged . . . need not be substantial; it need not measure more than an identifiable trifle." *OCA-Greater Hous. v. Texas*, 867 F.3d 604, 612 (5th Cir. 2017) (quotations omitted).

The United States asserts that S.B. 8 injures the federal government in two ways. (Mot. Prelim. Inj., Dkt. 8, at 12). First, it claims S.B. 8 unconstitutionally impairs the United States' responsibilities under federal law to provide abortion-related services in certain circumstances. (Compl., Dkt. 1, at 2). Specifically, it argues S.B. 8 will expose the United States and its third-party contractors to liability and increased costs for providing abortion-related services to persons in the care and custody of federal agencies.[21] Second, the United States asserts that it is "injured by Texas's attempt to circumvent its obligations under the federal Constitution" and "thwarting mechanisms of judicial review provided by federal law." *Id.* It contends it possesses the authority to sue when a state violates the federal government's interest in upholding the Constitution and injures the federal government's sovereignty. (Mot. Prelim. Inj., Dkt. 8, at 22).

a. Injury-in-Fact

The first requirement of Article III standing doctrine is that the plaintiff's injury be concrete, particularized, and actual or imminent. *Lujan*, 504 U.S. at 560–61. An injury is "concrete" if it is "real, and not abstract." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204 (2021) (citing *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016)). Certain harms readily qualify as concrete injuries under Article III, including traditional tangible harms such as physical or monetary injury. *Id.* However, a harm need not be tangible to be concrete; various intangible harms can meet this requirement, including violations of constitutional rights, such as freedom of speech or the free exercise of religion. *Spokeo*,

[21] The United States offers as examples of federal agencies impacted by S.B. 8 the Department of Labor, the Office of Refugee Resettlement, the Bureau of Prisons, the Centers for Medicare and Medicaid Services, the Office of Personnel Management, and the Department of Defense. (Compl., Dkt. 1, at 15–24).

136 S. Ct. at 1549; *TransUnion*, 141 S. Ct. at 2204. A harm is particularized if the plaintiff has personally suffered the harm. *Lujan*, 504 U.S. at 560 n.1. Finally, a harm is actual or imminent if the harm has happened or is sufficiently threatening, not merely if it may occur at some future time. *Id.* at 564.

i. Injury-in-Fact to Federal Agencies and Programs

Insofar as S.B. 8 impedes the federal government's ability to provide abortion-related services mandated by regulations, statutes, and case law, the United States has met its burden to demonstrate a concrete, particularized, and actual injury. *See id.* at 561 ("The party invoking federal jurisdiction bears the burden of establishing these elements."). This Court finds that S.B. 8 concretely injures the United States by prohibiting federal personnel and contractors from carrying out their obligations to provide abortion-related services and subjecting federal employees and contractors to civil liability for aiding and abetting the performance of an abortion. (Mot. Prelim. Inj., Dkt. 8, at 17).

By imposing damages liability of $10,000 or more on any person performing, inducing, aiding, or abetting an abortion, S.B. 8 exposes the federal government, its employees, and its contractors to monetary injury. *See TransUnion*, 141 S. Ct. at 2204 (stating that certain harms readily qualify as concrete injuries, such as monetary injury). Under S.B. 8, these employees and contractors must choose between facing this civil liability and damages or violating federal regulations, statutes, or case law. For example, the Federal Bureau of Prisons ("BOP") regulations provide that a BOP prison's Clinical Director "*shall* arrange for an abortion to take place" when a pregnant inmate requests an elective abortion. 28 C.F.R. § 551.23(c) (emphasis added). BOP further bears all costs of providing an abortion "in the case of rape or incest." (*See* McLearen Decl., Dkt. 8-10, at 3–4). S.B. 8, however, may result in civil liability even when the pregnancy was caused by rape, sexual assault, or incest. Tex. Health & Safety Code § 171.208(j) (providing only that civil actions "may not be

brought by a person" who impregnated, through rape, sexual assault, or incest, the individual seeking an abortion).

Several other agencies of the federal government are similarly impacted by S.B. 8. The United States Marshals Service ("USMS") offers individuals in its custody the opportunity to seek elective abortions. (Sheehan Decl., Dkt. 8-11, at 2). The Department of Defense ("DoD") has a statutory obligation to provide abortion services in cases where the pregnant person's life would be endangered by carrying the fetus to term, or in instances of rape or incest. 10 U.S.C. §§ 1074; 1093(a). The Department of Health and Human Services' Office of Refugee Resettlement ("ORR") may not interfere with access to a pre-viability abortion for unaccompanied minors in the agency's custody. *J.D. v. Azar*, 925 F.3d 1291, 1338 (D.C. Cir. 2019). Indeed, the ORR must provide access to abortion services when requested and permitted by law. (De La Cruz Decl., Dkt. 8-12, at 5). The Department of Labor's ("DOL") Job Corps program employs private contractors that are contractually obligated to inform Job Corps participants about their options to terminate a pregnancy. (Matz Decl., Dkt. 8-14, at 2–3, 5–6; Torres Decl., Dkt. 8-13, at 3–4). The Office of Personnel Management ("OPM"), which manages the health benefits of federal employees, annuitants, and other statutorily eligible individuals, has contracts with providers that offer abortion procedures in certain circumstances. (Bodenheimer Decl., Dkt. 8-15, at 2). Finally, the Medicaid program in Texas, which is a cooperative state-federal program administered by Centers for Medicare & Medicaid Services ("CMS"), may be required to cover abortions that are deemed medically necessary. 42 U.S.C. § 1396d(a)(1)–(2); (Costello Decl., Dkt. 8-16, at 4).

Crediting the declarations of the administrators of the BOP, USMS, DoD, ORR, DOL, OPM, and CMS—and taking into account the regulations, statutes, and cases governing the abortion-related services provided by these agencies—this Court finds that the federal government indeed provides services that would subject federal employees and contractors to civil liability under

S.B. 8. As S.B. 8 forces these agencies to choose between facing civil damages or providing the mandated services, this Court further finds that the United States suffers a concrete injury to its ability to effectuate these services and programs. The injury is particularized as the impacted agencies are agencies of the federal government. Finally, the harm is actual—S.B. 8 took effect at midnight on September 1, 2021. *See Jackson*, 2021 WL 3910722, at *3 (Sotomayor, J., dissenting). Several of the United States' agency administrator declarants stated that upon S.B. 8 taking effect, they would be required to begin transporting those in their custody or care in Texas to out-of-state locations to receive abortion services, which would increase the cost of providing those services and possibly subject the agencies to civil liability for providing this transport. (*See* McLearen Decl., Dkt. 8-10, at 5–6; Sheehan Decl., Dkt. 8-11, at 4–5; De La Cruz Decl., Dkt. 8-12, at 7; Torres Decl., Dkt. 8-13, at 5–6; Matz Decl., Dkt. 8-14, 5–6). Overall, this Court finds that S.B. 8 subjects the United States to an injury-in-fact insofar as the United States provides abortion-related services to persons in the care or custody of federal agencies.

ii. *Parens Patriae* Standing

The next question is whether the United States suffers an injury-in-fact such that it has standing to challenge a potential violation of Constitutional rights that not only impacts federal agencies, but the public at large. The United States argues that it possesses a "sovereign interest" in ensuring that States are not able to enact laws in plain violation of the Constitution. There is no doubt that harms to the exercise of Constitutional rights is a concrete harm for Article III purposes. *See generally Pleasant Grove City, Utah v. Summum*, 555 U.S. 460 (2009) (permitting a suit based on a violation of free speech rights); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (permitting a suit based on a violation of the Free Exercise Clause). It is further without question that any harm posed to the United States by the enactment of S.B. 8 is actual; as stated above, the law went into effect at midnight on September 1, 2021. The primary question, then, is

whether the United States indeed has an interest in ensuring States may not enact laws that likely violate the Constitution such that the injury is particularized.

States have long had the authority to sue private defendants to vindicate citizens' rights, and, in doing so, to vindicate the interests of the state as a sovereign. *See, e.g.*, *State of Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237–38 (1907) (holding that Georgia could sue a private company over the release of noxious fumes because Georgia had an interest "independent of and behind the titles of its citizens" in preventing pollution that endangered the state's ecosystem). This authority of states to sue private defendants in *parens patriae* also extends to protecting federal rights.[22] *See, e.g.*, *Georgia v. Pennsylvania Railroad Co.*, 324 U.S. 439, 451 (1945) (authorizing Georgia to sue a private company for violations of federal antitrust laws because "Georgia, as a representative of the public, is complaining of a wrong which, if proven, limits the opportunities of her people, shackles her industries, retards her development, and relegates her to an inferior economic position among her sister states . . . Georgia's interest is not remote—it is immediate").

The State asserts that *parens patriae* standing is limited to state governments. (Resp., Dkt. 43, at 18). However, this assertion is demonstrably incorrect. In *Massachusetts v. Mellon*, the Supreme Court indicated in dicta that the United States may also sue to vindicate federal rights. Indeed, as the Supreme Court noted, states may not sue the federal government to enforce their citizens' federal rights because "[i]n that field, it is the United States, and not the State, which represents [its citizens] as *parens patriae* when such representation becomes appropriate, and to the former, and not to the latter, they must look for such protective measures as flow from that status." *Commonwealth of Mass. v. Mellon*, 262 U.S. 447, 485–86 (1923). The Supreme Court lent further credence to this concept when

[22] *Parens patriae*—literally "parent of the country"—refers traditionally to the role of state as sovereign and guardian of persons under legal disability. *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 600 (1982) (citing Black's Law Dictionary 1003 (5th ed. 1979)).

it relied on the dicta in *Mellon* to deny Florida leave to file a suit in *parens patriae* against the United States for instituting an allegedly unconstitutional tax. *Florida v. Mellon*, 273 U.S. 12, 18 (1927); *see also South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966) (citing *Mellon* in support of the proposition that a "State does not have standing as the parent of its citizens to invoke these constitutional provisions against the federal government, the ultimate parens patriae of every American citizen"). The Fifth Circuit recently reinforced the concept that states may not sue the federal government in *parens patriae* to enforce Constitutional rights because the federal government is the ultimate *parens patriae* when it comes to enforcement of the Constitution. *Brackeen v. Haaland*, 994 F.3d 249, 292 n.13 (2021) (rehearing en banc) (quoting *Katzenbach*, 383 U.S. at 324).

The United States has standing to file suit in *parens patriae* for probable violations of its citizens' Constitutional rights. As stated in *Pennsylvania Railroad*, States can sue in *parens patriae* to vindicate their citizens' federal rights against private parties. But the dicta in *Mellon* (and the subsequent case law relying on this dicta) clarifies that states' standing to sue in *parens patriae* for violations of federal and Constitutional rights does not extend to suits against the federal government because, in that arena, the federal government's interest in protecting its citizens' rights overrides the state interest. *Id.* This preclusion of state standing necessarily implies the existence of federal standing. But this Court need not solely rely on this inference. The principle is stated outright: while states may sue in *parens patriae* in support of federal and constitutional rights in certain instances, the United States is the "ultimate parens patriae." *Id.* When it comes to violations of the federal and constitutional rights of U.S. citizens, the United States has standing to represent "[its citizens] as *parens patriae*," and it is to the United States they "look for such protective measures as flow from that status." *Mellon*, 262 U.S. at 485–86.

Having established that the United States has the authority to file this suit in *parens patriae*, it is necessary to identify the character of the federal government's particular interest. The Supreme

Court has stated that to maintain an action in *parens patriae*, a state "must articulate an interest apart from the interests of particular private parties, i.e., the State must be more than a nominal party." *Snapp*, 458 U.S. at 607. One way to establish this interest is by expressing a "quasi-sovereign interest," which is a "judicial construct that does not lend itself to a simple or exact definition," but generally refers to "a set of interests that the State has in the well-being of its populace." *Id.* at 601–02, 607 (noting, for example, that a state has a quasi-sovereign interest "in the health and well-being . . . of its residents" and "in not being discriminatorily denied its rightful status within the federal system").

A sovereign interest also may support a *parens patriae* suit. *Pennsylvania v. New Jersey*, 426 U.S. 660, 666 (1976) (denying Pennsylvania leave to file a suit in *parens patriae* because "[n]o sovereign or quasi-sovereign interests" of the state were implicated); *Com. Of Pa. v. Porter*, 659 F.2d 306, 315 (3d Cir. 1981) (noting that a suit by Pennsylvania in *parens patriae* was advancing the state's "significant sovereign interest" in preventing violations of its citizens' constitutional rights); *South Carolina v. North Carolina*, 558 U.S. 256, 266 (2010) (stating that "when a State is a party to a suit involving a matter of sovereign interest, it is *parens patriae* and it must be deemed to represent all [of] its citizens") (internal quotations omitted).

The United States sets out in its reply brief that it does not "principally" rely on *parens patriae* as a basis for standing because "it is suing to vindicate the government's own interest." (Reply, Dkt. 56-1, at 2 n.1). Possessing a sovereign or quasi-sovereign interest is, in fact, a requirement to sue in *parens patriae*. The United States, although it does not explicitly rely on *parens patriae* to support its standing argument, argues that it possesses both quasi-sovereign and sovereign interests in this suit. (*See* Compl., Dkt. 1, at 5). Regarding quasi-sovereign interests, the United States asserts that its interest in ensuring its citizens can invoke the power of the federal courts to vindicate their rights is a quasi-sovereign interest "in the health and well-being" of its citizens and "in not being . . . denied

its rightful status within the federal system." (*Id.* (citing *Snapp*, 458 U.S. at 601–02)). The State, in response, argues that S.B. 8 is "not hazardous to women's health." (Resp., Dkt. 43, at 19). However, this Court need not address the merits of these arguments. Instead, it finds that the United States possesses an indisputably sovereign interest sufficient to support its standing in this lawsuit.

The United States argues that it has a "profound sovereign interest" in vindicating its citizens constitutional rights and ensuring those rights "remain redeemable in federal court." (Compl., Dkt. 1, 4–5). It asserts that it has a weighty interest in protecting the supremacy of the Constitution by opposing laws that shield violations of U.S. citizens' constitutional rights from federal judicial review. (Reply, Dkt. 56-1, at 7). In response, the State contends that a sovereign interest in ensuring states do not violate the Constitution cannot support Article III standing. The State supports that argument by suggesting that sovereign injuries are limited to those described in *Snapp*, which include interests in "the exercise of sovereign power over individuals" and "the power to create and enforce a legal code." (Resp., Dkt. 43, at 20) (citing *Snapp*, 458 U.S. at 601). However, sovereign interests are not limited to those discussed in *Snapp*. The Supreme Court has found, for example, that a state has a sovereign interest in ensuring it receives "an equitable share of an interstate river's water." *South Carolina*, 558 U.S. at 274; *see also New Jersey v. New York*, 345 U.S. 369, 374–75 (1953). As another example, it is also a sovereign interest for a state to protect its economy from deceptive mortgage practices. *See Nevada v. Bank of America Corp.*, 672 F.3d 661, 671 (2012). The interests that were sufficient in these examples pale in comparison to the interest the United States asserts here—none of those interests involved the potential for large-scale violations of constitutional rights and frustration of core constitutional principles.

The State also asserts that the United States' interest in the case is nominal and insufficient to establish *parens patriae* standing. (Resp., Dkt. 43, at 18). However, the claim that the United States' interest in this case is merely nominal is unfounded. Federal courts have held that states suing in

parens patriae hold "significant sovereign interests of [their] own in" preventing violations of their citizens' constitutional rights. *Porter*, 659 F.2d at 315. Indeed, an interest in upholding the legitimacy of the constitution and vindicating the constitutional rights of United States citizens is arguably even more significant when the party seeking to do so is the federal government. *See Sanitary Dist. of Chicago v. United States*, 266 U.S. 405, 426 (1925) (noting that the United States' sovereign interest in enforcing constitutional provisions "seem to be stronger than those that have established a similar standing for a state").[23] Further, the concept of *parens patriae*—the government as the parent of the country—fits cleanly within the fundamental principles underlying the very sovereignty of the United States. "The government of the Union, then . . . is, emphatically, and truly, a government of the people . . . [i]ts powers are granted by them, and are to be exercised directly on them, *and for their benefit*." *U.S. Term Limits, Inc. v. Ray Thornton*, 514 U.S. 779, 839 (1995) (Kennedy, J., concurring) (quoting *M'Culloch v. Maryland*, 4 Wheat. 316 404–05 (1819)) (emphasis added). The United States is a government chartered by the people, and its sovereignty is conditioned on its ability to safeguard the rights of its citizens. Thus, when, as here, a state appears to deprive individuals of their constitutional rights by adopting a scheme designed to evade federal judicial review, the United States possesses sovereign interest in preventing such a harm. This interest is sufficient to establish a particularized injury.

iii. *In Re Debs* Standing

While this Court finds the doctrine of *parens patriae* sufficient to establish the United States' injury for standing purposes, this Court finds, in the alternative, that the concepts underpinning *In*

[23] The United States cites—and the State does not directly dispute the applicability of—*Vt. Agency of Nat. Ress. v. United States ex rel. Stevens*. 529 U.S. 765 (2000); (*see also* Reply, Dkt. 56-1, at 2; Hr'g Tr., Dkt. 65, at 14). While *Vermont* was a qui tam relator case in which an individual was suing on behalf of the federal government over violations of federal law, the case is instructive here, as it states "[i]t is beyond doubt that the complaint asserts an injury" to the sovereignty of the United States "arising from violations of its laws." *Vt. Agency of Nat. Ress.*, 529 U.S. at 771.

Re Debs and its progeny likewise establish a particularized injury to sovereign interests of the United States. *Debs* arose out of the Pullman rail strike of 1894. The Supreme Court held that the United States had the authority to sue private parties for injunctive relief as the strike was obstructing interstate commerce. *In Re Debs*, 158 U.S. 564, 584 (1895). In support of the United States' interest in the case, the Supreme Court stated, "[t]he obligations which [the United States] is under to promote the interest of all, and to prevent the wrongdoing of one resulting in injury to the general welfare, is often sufficient to give it a standing in court." *Id.* at 584.[24] This suggests the type of interest sufficient to give the United States standing can be interpreted broadly to encompass harms to the public interest and general welfare.

Lower courts have had differing interpretations of the interests that can establish standing under *Debs*. Some have given *Debs* an expansive reading, suggesting it offers the United States standing to sue whenever an alleged harm affects the public at large. *See, e.g.*, *United States v. Brand Jewelers, Inc.*, 318 F. Supp. 1293, 1296 (S.D.N.Y. 1970); *Porter*, 659 F.2d at 316–17 n.15. Others have cited *Debs* in support of standing based on more specific interests, such as national security and proprietary interests. *See, e.g.*, *United States v. Marchetti*, 466 F.2d 1309, 1313 (4th Cir. 1972); *United States v. Allen*, 179 F. 13, 17 (8th Cir. 1910). Perhaps the most common reading of *Debs* is that it offers the United States standing when there are obstructions to interstate commerce. *See, e.g.*, *United States v. City of Montgomery*, 201 F. Supp. 590, 594 (M.D. Ala. 1962) (finding the United States had

[24] This Court notes that *Debs* was decided before the Supreme Court thought of standing and cause of action as analytically distinct concepts; indeed, it was not until the Supreme Court decided *Fairchild v. Hughes* in 1922 that the Supreme Court began directly addressing the "right to sue" as such. *Fairchild v. Hughes*, 258 U.S. 126, 129 (1922) (finding that the plaintiff's "alleged interest in the question submitted is not such as to afford a basis for this proceeding"). This Court finds that relevance of *Debs* to this case is primarily in its discussion of non-statutory, equitable causes of action. (Reply, Dkt. 56-1, at 5). Therefore, the bulk of this Court's analysis of *Debs* occurs in its discussion of the United States' cause of action in Section IV(B)(2), *infra*. However, while *Debs* did not directly address standing, subsequent opinions have relied on *Debs* to determine the government's interest in the proceedings for standing purposes. As such, this Court's use of *Debs* to address standing will rely heavily on courts' interpretations of *Debs* in subsequent cases.

standing based on large-scale obstructions to interstate commerce); *United States v. Solomon*, 563 F.2d 1121, 1129 (4th Cir. 1977) (declining to rely on *Debs* to establish standing because the case did not involve a "factor of interstate commerce").

The State asserts that *Debs* and its progeny do not support the United States' standing argument, stating that the case stands for the limited proposition that the United States may sue to protect its proprietary interest in the mails and its statutory authority over interstate rail commerce, and that these narrowly defined interests are not present here. (Resp., Dkt. 43, at 20) (citing *Debs*, 148 U.S. at 583–84). However, the language of *Debs* itself does not support such a limited view of the United States' interests in the case. The Supreme Court explicitly stated that it declined to "place [its] decision upon" the proprietary interest ground alone. *Debs*, 158 U.S. at 584. The Court further stated that the national government has an interest in "brush[ing] away *all* obstructions to the freedom of interstate commerce or the transportation of the mails," not merely those obstructions over which the United States has statutory authority. *Id.* Several of the subsequent cases that have relied on *Debs* to establish the government's standing have not read *Debs* to require that the government's interest be based on a statute. *See, e.g.*, *Brand Jewelers*, 318 F. Supp. at 1297; *Marchetti*, 466 F.2d at 1313; *United States v. City of Jackson, Miss.*, 318 F.2d 1, 15 (5th Cir. 1963) (noting that a "proprietary interest provides a non-statutory basis for standing of private persons and would provide a basis for the United States to sue . . .").[25]

Neither the Supreme Court nor the Fifth Circuit have expressly limited *Debs*'s implications for standing, at times offering both more expansive and confined readings of the scope of the interests supported by *Debs*. *See, e.g.*, *Hopkins Fed. Sav. & Loan Ass'n v. Cleary*, 296 U.S. 315, 339

[25] While the State is correct in noting that *Jackson*'s subsequent history left open the question of whether the United States has standing to sue under *Debs* absent congressional authorization, the subsequent history does not overrule the Fifth Circuit's statements in *Jackson* regarding the government's standing to sue without a statutory basis.

(1935) (citing *Debs* in support of government standing when the interest at issue involves a matter "of grave public concern"); *Wyandotte Transp. Co. v. United States*, 389 U.S. 191, 201 (1967) (stating the "United States may sue to protect its interests," which include "ensuring . . . routes of commerce over which it has assumed control, remain free of obstruction") *Sanitary Dist. of Chicago v. United States*, 266 U.S. at 426 (noting *Debs* offered the government standing to remove obstructions to interstate commerce); *Fla. E. Coast Ry. Co. v. United States*, 348 F.2d 682, 685 (5th Cir. 1965) (same); *City of Jackson*, 318 F.2d at 14 (same). Furthermore, in cases where the Supreme Court or the Fifth Circuit relied on a more limited reading of *Debs*, they did not do so to the exclusion of a broader reading.

In the absence of additional guidance from the Supreme Court and the Fifth Circuit as to the scope of *Debs*'s standing analysis, this Court finds that *Debs* supports standing where the government's interest is preventing harms to "the general welfare" and the "public at large."[26] The United States has demonstrated that its interest in this case does relate to such harms. The same sovereign interests that supported the United States' standing argument in *parens patriae* are applicable here. The United States' interest in vindicating its citizens constitutional rights and ensuring those rights "remain redeemable in federal court" fits within the broad interest *Debs* articulated in preventing harms that affect the public broadly. (*See* Compl., Dkt. 1, 4–5).

However, this Court notes that were *Debs*'s progeny to be read narrowly to support standing only in cases involving interstate commerce, the United States has likewise demonstrated an interest sufficient to establish standing. In *Debs,* the Supreme Court found the United States had standing to sue regarding protests that interfered with interstate commerce. *Debs*, 158 U.S. at 582. This Court finds that S.B. 8 interferes with interstate commerce. Congress acknowledged that abortion

[26] While the *interests* that form the basis for standing under *Debs* may be broad, the *types* of suits the United States may institute based on these interests are subject to limiting principles. *See infra*, Section IV(B)(2).

implicates interstate commerce when it enacted a ban on "partial-birth abortions." *See* 18 U.S.C. § 1531(a). And the particular features of S.B. 8 burden interstate commerce even beyond the impacts of traditional legislation. By extending liability to persons anywhere in the country, S.B. 8's structure all but ensures that it will implicate commerce across state lines—whether through insurance companies reimbursing Texas abortions, banks processing payments, medical device suppliers outfitting providers, or persons transporting patients to their appointments. (Compl., Dkt. 1, at 13). In addition to imposing liability on those coming into Texas, the law has also already had the effect of pushing individuals seeking abortions into other states. (*See* Br. of Amici, Dkt. 9-1, at 25–26). This stream of individuals across state lines burdens clinics in nearby states and impedes pregnant individuals in surrounding states from accessing abortions due to backlogs. (*See* Tong Decl., Dkt. 8-6; Cowart Decl., Dkt. 8-7; Rupani Decl., Dkt. 8-8; Yap Decl., Dkt. 8-9). These harms to interstate commerce are independently sufficient to support the United States' right to sue in this case.

b. Causation

The second requirement of Article III standing is that the plaintiff's injury was likely caused by the defendant. *Lujan*, 504 U.S. at 560–61. The causal connection must be such that the injury is "fairly traceable" to the challenged action of the defendant. *Id.* The United States has established that the passage of S.B. 8 caused immediate injury to interests of the United States. Its interests include ensuring that federal agencies can follow statutes, regulations, and judicial decisions instructing them to provide abortion-related services without the agencies being subject to liability. S.B. 8 going into effect also harmed the United States' sovereign interest in upholding the supremacy of the Constitution and ensuring that citizens may access their constitutional rights. S.B. 8 taking effect immediately chilled pregnant individuals from accessing their constitutional right to an abortion and discouraged abortion providers from providing services, even before a single private lawsuit was ever filed to enforce the law. (Hagstrom Miller Decl. I, Dkt 8-4, at 2 – 3; Gilbert Decl.,

Dkt. 8-2, at 12–14; Linton Decl., Dkt. 8-5, at 7–9; *see also supra* Section II(A). The state's contrary suggestion, that this chilling of access to abortion rights is a "counterintuitive theory," minimizes legitimate and serious constitutional injury. (*See* Resp., Dkt. 43, at 46).

The State argues that the Supreme Court's decision in *Muskrat* precludes the United States from identifying the State as the source of its injuries. According to the State, *Muskrat* prohibits federal courts from hearing "a proceeding against the government in its sovereign capacity" when "the only judgment required is to settle the doubtful character of the legislation in question." (Resp., Dkt. 43, at 1) (quoting *Muskrat v. United States*, 219 U.S. 346, 361–62 (1911)). The State asserts that *Muskrat* stands for the principle that federal courts may not hear cases to determine the constitutionality of a statute that the sovereign itself is not enforcing, because any injury based on such a statute is not traceable to future action of the state. (*Id.* at 4–5).

But the State's characterization of *Muskrat*'s holding is taken out of context and, in any event, *Muskrat* does not apply here. In *Muskrat*, the Supreme Court assessed whether Congress could artificially create standing for an action between parties that were not truly adverse to one another to test the constitutionality of a law. *Muskrat*, 219 U.S. at 350. In 1906, Congress passed a law that "undertook to increase the number of [Native Americans] entitled to share in the final distribution of lands and funds" authorized by an earlier statute. *Id.* at 248. Disputes arose over the constitutionality of the 1906 law, and so, in 1907, Congress passed another Act purporting to offer standing to four individuals to sue the United States—which was to distribute the lands and funds under the 1906 law—to test the law's constitutionality. *Id.* at 348–50. However, the United States did not have interests adverse to those of the plaintiffs; it did not seek to dispute the constitutionality of the law or the plaintiffs' right to receive the land and funds. *Id.* at 361. Congress, in manufacturing this cause of action, was setting the stage for the Court to issue an advisory opinion on the constitutionality of the 1906 law, and advisory opinions have been "disapproved by this Court from

the beginning." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 101 (1998) (citing *Muskrat*, 219 U.S. at 362). Therefore, the central theme of *Muskrat* is that Congress may not artificially manufacture standing for a plaintiff to sue a non-adverse party, because to do so would, in essence, require a federal court to issue an advisory opinion. *Muskrat*, 219 U.S. at 357. The case does not, as the State suggests, act as a general bar from establishing standing in federal courts when a sovereign defendant claims it cannot be held responsible for implementing and enforcing its own laws. The State merely asserting that it is absolved of any enforcement liability does not mean that it did not cause a constitutional injury.

Furthermore, taking *Muskrat* in context, the holding does not apply here. Congress has not purported to legislatively manufacture standing for the United States to test the constitutionality of S.B. 8. Nor is the United States seeking an advisory opinion from this Court on the law's constitutionality. The United States' suit against the State is an Article III "case or controversy." Interests of the United States—such as its interest in protecting federal agencies and programs from liability, and its sovereign interest in upholding the Constitution—have already been directly harmed by the State's implementation of S.B. 8, and the United States seeks to enjoin the state and state actors from continuing to engage in actions that harm those interests. *Muskrat* does not prevent the United States from establishing standing in this lawsuit.

c. Redressability

The issue of redressability in this case is interwoven with the cause-of-action analysis, the central question being whether a suit in equity is an appropriate and available remedy for the United States.

2. Cause of Action

S.B. 8 was deliberately crafted to avoid redress through the courts. (*See generally* Newman Decl., Dkt. 8-3). Yet it is this very unavailability of redress that makes an injunction the proper

remedy—indeed, the only remedy for this clear constitutional violation. No cause of action created by Congress is necessary to sustain the United States' action; rather, traditional principles of equity allow the United States to seek an injunction to protect its sovereign rights, and the fundamental rights of its citizens under the circumstances present here. This case strikes at the core function of the equitable cause of action, as, "[w]hether acting through its judiciary or through its Legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it." *Brinkerhoff-Faris Tr. & Sav. Co. v. Hill*, 281 U.S. 673, 682 (1930). The American legal system cannot abide a situation where constitutional rights are only as good as the states allow—"[t]o impose on [the United States] the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments, which might disappoint its most important designs . . . ." *M'Culloch v. Maryland*, 4 Wheat. 316, 424 (1819).

a. The Foundations of the Equitable Remedy

Equitable remedies have a long been established as tools available to courts, predating the Constitution itself. *See Irvine v. Marshall*, 61 U.S. 558, 565 (1857) ("[C]ases in equity are to be understood [as] suits in which relief is sought according to the principles and practice of the equity jurisdiction, as established in English jurisprudence"). The federal judicial power extends to "all cases, in law and equity, arising under [the] Constitution[,]" U.S. CONST. art. III, § 2, through which grant of authority "adopt[s] equitable remedies in all cases . . . where such remedies are appropriate." *Paine Lumber Co. v. Neal*, 244 U.S. 459, at 475 (1917). As Justice Scalia has explained, suits in equity to "enjoin unconstitutional actions by state and federal officers" are a judge-made remedy deeply rooted in American jurisprudence, reflecting "a long history of judicial review . . . , tracing back to

England." *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015) (quoting Jaffe & Henderson, *Judicial Review and the Rule of Law: Historical Origins*, 72 L.Q. REV. 345 (1956)).

The State is mistaken in searching for a blueprint of the cause of action here. For the United States' cause of action is a creature of equity, a centuries-old vehicle which eschews categorical definition. That remedy is available where no adequate remedy exists at law; any attempt to codify such situations would be futile, and likely require powers of clairvoyance which no legislator possesses. Relying on *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308 (1999), the State argues for limiting equitable actions to the exact claims available at common law. (Resp., Dkt. 43, at 14). That reliance, however, is misplaced. *Grupo Mexicano* at most stands for the proposition that federal courts have jurisdiction over suits in equity, in which the broad equitable remedies that predate the Constitution remain available. The formal source of that jurisdiction is codified in the Judiciary Act of 1789, as discussed in *Grupo Mexicano*. However, the principle itself is broader and is not defined by that Act. Indeed, by the time he returned to the question in *Armstrong*, Justice Scalia—the author of *Grupo Mexicano*—had dispensed with any need to locate this power in the Judiciary Act. Nowhere in the latter case did he cite to the Judiciary Act. Rather, he wrote of general equitable powers "tracing back to England," translating to the "judge-made remedy" in the federal courts. *Armstrong*, 575 U.S. at 327. It is the essential nature of equity that it is not subject to strict limitations, unless and until Congress acts directly to restrict it.

Equity exists independent of any remedies conferred under state law, as, "[t]he Federal courts . . . are not limited to the remedies existing in the courts of the respective states, but are to grant relief in equity according to the principles and practice of the equity jurisdiction as established in England." *Paine Lumber*, 244 U.S. at 476; *see Robinson v. Campbell*, 16 U.S. 212, 222–23 (1818) ("[T]he remedies in the courts of the United States, are to be, at common law or in equity, not according to the practice of state courts, but according to the principles of common law and

equity, as distinguished and defined in that country from which we derive our knowledge of those principles."). Indeed, "[t]he right to equitable relief does not depend upon the nature or source of the substantive right whose violation is threatened, but upon the consequences that will flow from its violation." *Paine Lumber*, 244 U.S. at 476; *see Holland v. Challen*, 110 U. S. 15, 25, (1884) ("If the controversy be one in which a court of equity only can afford the relief prayed for, its jurisdiction is unaffected by the character of the questions involved.").

Far from a novel vehicle, "injunctive relief has long been recognized as the proper means for preventing entities from acting unconstitutionally." *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001). And the action in equity is "unlike the Bivens remedy, which [courts] have never considered a proper vehicle for altering" unconstitutional regulations.[27] *Id.* That an equitable action is available to challenge a violation of the United States' sovereignty does not rest on judicial or congressional recognition of a right of action under the specific constitutional right at issue. *See Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.,* 561 U.S. 477, 491 n.2 (2010) ("The Government asserts that petitioners have not pointed to any case in which this Court has recognized [a] . . . right of action directly under . . . the Appointments Clause or separation-of-powers principles. . . . If the Government's point is that [such a] claim should be treated differently than every other constitutional claim, it offers no reason and cites no authority . . . ."") (quotations omitted); *see Bell v. Hood*, 327 U.S. 678, 684 (1946) ("[I]t is established practice for [the Supreme] Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution.").

b. Unavailability of Remedies at Law

Equitable remedies are appropriate where "in the particular case the threatening effects of a continuing violation . . . are such as only equitable process can prevent." *Paine Lumber*, 244 U.S. at

[27] The State attempts to analogize to *Bivens v. Six Unknown Federal Narcotics Agents,* 403 U.S. 388 (1971), and its progeny in its objections to this suit. (Resp., Dkt. 43, at 23 n.7). But this case is not an action for damages, so the limitations on *Bivens* actions and other damages actions have no bearing here.

476. That is, an injunction is appropriate where required by the "ends of justice": where "the remedy in equity could alone furnish relief." *Watson v. Sutherland*, 72 U.S. 74, 79 (1866). A state may not, within its authority, legislate in a manner that deprives its citizens of the avenues of redress required under the constitution. *See, e.g.*, *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, Dep't of Bus. Regul. of Fla.*, 496 U.S. 18, 31 (1990) ("If a State places a taxpayer under duress promptly to pay a tax . . . and relegates him to a postpayment refund action in which he can challenge the tax's legality, the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation."); *Reich v. Collins*, 513 U.S. 106, 111 (1994) ("[W]hat a State may not do . . . is to reconfigure its scheme, unfairly, in midcourse—to "bait and switch," . . . . Georgia held out what plainly appeared to be a 'clear and certain' postdeprivation remedy . . . and then declared, only after Reich and others had paid the disputed taxes, that no such remedy exists."); *cf. Webster v. Doe*, 486 U.S. 592, 603 (1988) ("[Section] 102(c) may [not] be read to exclude review of constitutional claims. . . . [W]here Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear. . . . '[S]erious constitutional question[s]' . . . would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim.") (internal citations omitted). The federal courts cannot abide state foreclosure of judicial review of constitutional claims.

When no other remedy is available, by statutory right or otherwise provided by law, traditional principles of equity remain to ensure that fundamental rights are protected. Indeed, "'[e]quity suffers not a right to be without a remedy.'" *CIGNA Corp. v. Amara*, 563 U.S. 421, 440 (2011) (quoting R. Francis, Maxims of Equity 29 (1st Am. ed. 1823)). Where the State has acted deliberately to remove all possible remedies at law, equity remains available to vindicate federal rights. *See Paine Lumber Co.*, 244 U.S. at 474 (noting that an equitable remedy is available where Defendants acted with "malice . . . in the intentional doing of an unlawful act, to the direct damage

of another, without just cause or excuse"). Equitable relief is not appropriate in all—or even most—circumstances; but where it is called for, there is no doubt as to its propriety:

> The Constitution of the United States does not declare in terms that infringements of the rights thereby secured may be prevented by injunction. Ordinarily they may not be. It is only where a threatened infringement will produce injury and damage for which the law can afford no remedy—such, for instance, as irreparable and continuing damage, . . . —that resort may be had to equity; and when this does appear, the right to an injunction arises because that is the only appropriate relief.

Paine Lumber Co., 244 U.S. at 476–77. Put simply, "[t]he absence of a plain and adequate remedy at law affords the only test of equity jurisdiction . . . ." *Watson*, 72 U.S. at 79.

Here, S.B. 8 is deliberately structured so that no adequate remedy at law exists by which to test its constitutionality. By purporting to preclude direct enforcement by state officials, the statutory scheme is intended to be insulated from review in federal court.[28] The State itself concedes that the law's terms proscribe review by the federal courts, limiting review to state court alone. (Resp., Dkt. 43, at 27).[29] And even in state court, the opportunities for review are severely constrained. By limiting the defenses that a defendant may raise in state court, the law's authors effectively cut off any hope that a defendant will prevail. *See supra* at II(A)(3)(b). The State makes much of potential defendants' ability to challenge the constitutionality of the statute in state court. (Resp., Dkt. 43, at 27, 36, 45, 50). However, the law itself prohibits defendants from raising the defense that they believed the law to be unconstitutional. Tex. Health & Safety Code § 171.208(e)(2). And by preventing defendants from recovering any attorney's fees in the event that they prevail, the law winnows down the class of individuals financially able to sustain the litigation—even if they are sure

[28] The State's invocation of *United States v. Madison County Board of Education*, 326 F.2d 237 (5th Cir. 1964), misses the point. The issue in that case was not the general authority of the federal government to bring an equitable action, but the propriety of it doing so when the challenged statute provided a remedy—review in the federal courts of appeals. *Id.* at 242. Here, federal judicial review is not merely "inadequate," *id.*, it is unavailable.

[29] The State also offers the possibility that a suit could make its way to federal court if filed against a federal officer, who then elected to remove the suit. This possibility is open to only a small subset of potential defendants, and as such cannot suffice to render review available.

to prevail. Moreover, the scheme provides no mechanism for suit by pregnant persons seeking abortions, the individuals most affected by the law. Given these circumstances, the Court finds that redress at law is likely unavailable in federal court and is likely unavailable through the state courts as well. Thus, this is a paradigmatic case in which equitable remedies are necessary vindicate a fundamental constitutional right.

c. The United States as a Plaintiff in Equity

The United States is well within its authority to bring this suit, as "the Constitution contemplates suits among the members of the federal system" including those "commenced and prosecuted against a State in the name of the United States[.]" *Alden v. Maine*, 527 U.S. 706, 755–56 (1999). Such a power is inherent in the very "constitutional duty" of the Executive to "take Care that the Laws be faithfully executed." *Id.* (quoting U.S. CONST. art. II, § 3). The United States may, as may any private plaintiff with standing, resort to equity to protect its interests. As the Fifth Circuit wrote in *City of Jackson*:

> [T]here is no reason to restrict the Nation's non-statutory rights of action within the same limits established for private persons. The Constitution cannot mean to give individuals standing to attack state action inconsistent with their constitutional rights but to deny to the United States standing when States jeopardize the constitutional rights of the Nation. Or that the United States may sue to enforce a statute but not sue to preserve the fundamental law on which that statute is based. Or that the United States may sue to protect a proprietary right but may not sue to protect much more important governmental rights, the existence and protection of which are necessary for the preservation of our Government under the Constitution.

318 F.2d at 15–16. The State notes that in a subsequent denial of rehearing en banc, two judges limited their concurrences so that they did "not reach the question whether the United States would have standing to sue under the Commerce Clause [or the Fourteenth Amendment of the Constitution] absent all of these enactments of the Congress." ." (*See* Resp., Dkt. 43, at 30) (citing *United States v. City of Jackson, Miss.,* 320 F.2d 870, 872–73 (5th Cir. 1963) (Bootle, J., specially concurring); *accord. id.* at 873 (Ainsworth, J., specially concurring)). However, as the United States

correctly notes, that subsequent history does not alter the precedential value of the decision and its reasoning, even if the judges ultimately relied on different ground in that instance. (Reply, Dkt. 59, at 16). And, as the United States further notes, the Fifth Circuit subsequently relied on *City of Jackson* as support for the constitutional bases for suits by the United States in the public interest. (*Id.*) (citing *Fla. E. Coast Ry.*, 348 F.2d at 685).

Where appropriate, as here, federal courts have not hesitated to grant injunctions sought by the United States to vindicate otherwise unprotected constitutional rights, even when no cause of action is provided by statute. This relief is premised on the basic principle, articulated in *Debs*, that "[e]very government, intrusted by the very terms of its being with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other . . . ." 158 U.S. at 584. The Court has recognized the authority of the United States to sue in equity when its own proprietary interests are at stake. *See, e.g.*, *United States v. San Jacinto Tin Co.*, 125 U.S. 273 (1888); *Wyandotte Transp. Co.*, 389 U.S. at 201 ("Our decisions have established . . . the general rule that the United States may sue to protect its interests."). And courts have held that interference with interstate commerce can constitute a national interest of sufficient weight as to sustain appeals to equity by the United States. *See supra* Section IV(B)(1)(a)(iii). Indeed, "[n]o delicate touch is required in weighing unlawful state action against national policy. This is doubly true in a constitutional area, interstate commerce, in which the Federal Government has unquestioned paramount interest. . . . Under [the Commerce Clause] there is authority for the United States to sue without specific congressional authorization." *City of Jackson*, 318 F.2d at 13–14. In *Debs*, the Court enjoined protests that interfered with interstate commerce, explaining that "[t]he strong arm of the national government may be put forth to brush

away all obstructions to the freedom of interstate commerce . . .” 158 U.S. at 582;[30] *see Sanitary District of Chicago*, 266 U.S. at 425–26 (“The United States is asserting its sovereign power to regulate commerce [and uphold its treaty obligations] . . . . [I]n matters where the national importance is imminent and direct even where Congress has been silent the States may not act . . . .”).

Courts have long embraced the principle that United States can sue in equity to right a “grievous wrong upon the general public . . . .” *United States v. Am. Bell Tel. Co.*, 128 U.S. 315, 357 (1888); *see also Robbins v. United States*, 284 F. 39, 46, (8th Cir. 1922) (“[N]ational policy is involved of protecting the public in traveling within the park, and in such a case, injunction is the proper remedy.”). This right inheres in such extreme cases where “the wrongs complained of are such as affect the public at large, and are in respect of matters which by the constitution are intrusted to the care of the nation, and concerning which the nation owes the duty to all the citizens of securing to them their common rights . . . .” *Debs*, 158 U.S. at 586. For example, in *Debs*, the Court recognized the authority of the United States to enjoin the Pullman strikes when they constituted a fundamental threat to interstate commerce, an area of chief federal concern. *Id.* at 564. The United States may properly turn to the courts for an injunction “[w]hen a State, not by some sporadic act against a particular individual but by a law or pattern of conduct, takes action motivated by a policy which collides with national policy as embodied in the Constitution,” and when “the action of a State violative of the Fourteenth Amendment conflicts with the Commerce Clause and casts more than a shadow on the Supremacy Clause . . . .” *City of Jackson*, 318 F.2d at 14.

The State questions the strength of *Debs* as authority for this suit, but its objections are misplaced. It cites *Solomon*, 563 F.2d at 1127, for the proposition that *Debs* requires a statutory

[30] To the extent that the State claims *Debs* should be limited as authority to cases involving interstate commerce, (Resp., Dkt. 43, at 20–21), the Court there made clear that it did not intend its reasoning to be so limited, cautioning, “[w]e do not care to place our decision upon this ground alone.” *Debs*, 158 U.S. at 584.

interest in order to provide a cause of action. (Resp., Dkt. 43, at 21).[31] The State misreads both *Debs* and *Solomon* in so arguing. In *Solomon*, the controversy involved "no factor of interstate commerce[,]" nor injury to "the public at large," nor a "situation that constitutes a national emergency." *Solomon*, 563 F.2d at 1129. By contrast, here the offending law implicates interstate commerce. *See supra* Section IV(B)(1)(a)(iii). Its harms affect the public at large, as it affects any person with reproductive capacity, who engages in sexual contact with a person with reproductive capacity, or who can conceivably be sued under S.B. 8. *See supra* at II(A)(3)(a). Further, it has, in just over one month, had a "truly catastrophic" effect. (Gilbert Decl., Dkt. 8-2, at 13). Likewise, the State's claim that *Debs* is limited to claims to abate a public nuisance is incorrect. (Resp., Dkt. 43, at 28). By its own terms, *Debs* speaks of a broader federal authority: "The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights intrusted by the constitution to its care." *Debs*, 158 U.S. at 582. When a public nuisance interferes with "the full and free exercise" of federal power, then an equitable action provides a remedy. But a public nuisance is far from the only way in which "the security of all rights intrusted by the constitution" may be imperiled. *Debs*, 158 U.S. at 582.[32]

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[31] The State also cites the concurrence of Judge Tamm in *Clark v. Valeo*, 559 F.2d 642, 654 (D.C. Cir. 1977), for the same point. (*See* Resp., Dkt. 43, at 21). This case is entirely inapposite, as it dealt with interbranch conflict over the interpretation of election regulations and was dismissed as unripe. The considerations relevant to executive interference in election administration raise a host of concerns related to separation of powers and justiciability that are not present here.

[32] This case is also unlike the post *Armstrong*, 575 U.S. 320, cases, where courts have declined to read in statutory causes of action where none are provided by the legislature. *See Safe Streets All. v. Hickenlooper*, 859 F.3d 865, 903 (10th Cir. 2017) ("[T]o determine whether a private plaintiff may enforce the [Controlled Substances Act], we must first determine whether that plaintiff has substantive rights in the CSA that he or she is seeking to vindicate."). Here, the constitutional right to abortion under the Fourteenth Amendment is firmly established, and is rooted in the Constitution rather than a legislative grant. *See infra* Section IV(C). Unlike the statutory grants at issue in the *Armstrong* line, abortion is a substantive, enforceable right sufficient to sustain an action for equitable relief for its protection. Similarly, the holding of *Armstrong* itself, that there is no independent cause of action under the Supremacy Clause, has no bearing here, where the United States does not purport to bring suit under that clause. Rather, it moves under the equitable cause of action available to parties with standing who can show an ongoing violation of federal law—which Justice Scalia recognized in *Armstrong*, 575 U.S. at

These objections aside, the Court need not go so far as to endorse the broadest reading of *Debs* to find a substantial likelihood of success here. First, the United States can be expected to use its discretion in deciding to commence the significant, and potentially politically damaging, undertaking of a suit in equity in federal court. *See Alden*, 527 U.S. at 751 ("When the Federal Government asserts authority over a State's most fundamental political processes, it strikes at the heart of the political accountability so essential to our liberty and republican form of government."). Moreover, the confluence of circumstances here is unlikely to be repeated with such frequency as to overwhelm the courts. The United States offers three limiting principles to determine when the United States may bring a suit in equity to vindicate the rights of citizens: (1) a state law violates the constitution, (2) that state action has a widespread effect, and (3) the state law is designed to preclude review by the very people whose rights are violated. (*See* Hr'g Tr., Dkt. 65, at 24). The Court expresses no opinion as to whether there may be other considerations apparent in future cases that will call for further limiting the availability of equitable relief. However, under the circumstances present here, it is substantially likely that the equitable cause of action has firm support, and the United States may seek an injunction against the State.

The final factor identified by the United States will likely carry the most weight, as states can be expected not to deliberately deprive their citizens of redress through the courts. It is the rare case in which direct actions by the state lead directly and indisputably to a deprivation of fundamental federal rights.[33] But in the unlikely event that the state behaves so egregiously that it actively infringes constitutional protections, then the United States may properly sue to enjoin the offensive

[33] The State cites *City of Philadelphia*, where the Third Circuit declined to allow the Attorney General to enjoin purportedly unconstitutional policies of the city's police department based in part on its fear of sanctioning unconstrained executive interference with local policing. 644 F.2d at 201. The court there worried that to allow federal enforcement under the circumstances there would endorse "standards . . . so vague as to lack real content." *Id.* By contrast, here there is a clear metric by which to assess the propriety of the United States' suit: the presence of deliberate state action in violation of the supremacy of the federal government and Constitution.

action. The Fifth Circuit has affirmed this principle, granting equitable relief to the United States "[w]hen a State, not by some sporadic act against a particular individual but by a law or pattern of conduct, takes action motivated by a policy which collides with national policy as embodied in the Constitution." *City of Jackson*, 318 F.2d at 14; *cf. Ex parte Hull*, 312 U.S. 546, 549 (1941) (invalidating a prison regulation requiring court documents to pass through an internal review process before being filed because "the state and its officers may not abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus"); *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725 (1961) ("By its inaction, . . . the State, has not only made itself a party to the [challenged action], but has elected to place its power, property and prestige behind the admitted discrimination. [It] has so far insinuated itself into a position of interdependence . . . that it must be recognized as a joint participant . . . ."); *Brinkerhoff-Faris Tr.*, 281 U.S. at 678–79 (where state law administrative remedy was futile, but state court refused to hear case due to failure to exhaust administrative remedies, equitable relief in federal court was appropriate; and "[i]f the result above stated were attained by an exercise of the state's legislative power, the transgression of the due process clause of the Fourteenth Amendment would be obvious").

Above all, it is the intentional design of the law by state actors for the chief purpose of avoiding judicial review that sets it apart—and makes it particularly likely to be appropriate for this Court to enjoin. Indeed, there have been many examples of unconstitutional state laws attempting to restrict abortion—not to mention laws in other areas—in which private parties have successfully challenged through the ordinary operation of judicial review. *See, e.g.*, *June Med. Servs., LLC v. Russo*, 140 S. Ct. 2103 (2020); *Hellerstedt*, 136 S. Ct. at 2320; *Stemberg v. Carhart*, 530 U.S. 914 (2000); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 883 (1992); *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989); *Thornburgh v. American Coll. of Obstetricians and Gynecologists*, 476 U.S. 747 (1986); *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416 (1983); *Colautti v. Franklin,* 439 U.S. 379 (1979); *Planned Parenthood*

v. Danforth, 428 U.S. 52 (1976). The United States has not brought suit over any of these laws, nor should it have had to. But when the machinations of the state effectively cut off private access to the federal courts, and the other factors identified by the United States are present, the situation may warrant resort to an equitable action by the United States.

There can be no doubt that S.B. 8 was a deliberate attempt by lawmakers, notably its author, State Senator Bryan Hughes, to "find another way" around resistance to enforcement of laws criminalizing abortion. (Newman Decl., Dkt. 8-3, at 5) (citing Jenna Greene, *Column: Crafty Lawyering on Texas Abortion Bill Withstood SCOTUS Challenge*, REUTERS (Sept. 5, 2021), https://reuters.com /legal/government/crafty-lawyering-texas-abortion-bill-withstood-scotus-challenge-greene-2021-09-05/).[34] Hughes has openly described his motivation to avoid judicial review that would invalidate S.B. 8, stating, "[w]e were going to find a way to pass a heartbeat bill that was going to be upheld." (*Id.* at 9) (citing Jacob Gershman, *Behind Texas Abortion Law, an Attorney's Unusual Enforcement Idea*, THE WALL ST. J. (Sept. 4, 2021), https://www.wsj.com/articles/ behind-texas-abortion-law-an-attorneys-unusualenforcement-idea-11630762683). Jonathan Mitchell, who conceived of the bill, pledged to lawmakers that S.B. 8 would "have a fighting chance, and will have a better chance than a regular heartbeat law" to avoid, not by its content but by it structure, being invalidated as unconstitutional. (*Id.* at 17) (citing Michael S. Schmidt, *Behind the Texas Abortion Law, a Persevering Conservative Lawyer*, N.Y. TIMES (Sept. 12, 2021), https://www.nytimes.com/2021/09/12/us/

[34] Hughes described the law as "a very elegant use of the judicial system"; others called it "creative lawyering" on the part of Jonathan Mitchell—the law's architect. (Newman Decl., Dkt. 8-3, at 5). Hughes and Mitchell spearheaded a conference call between Hughes, Mitchell, and other legislators at which Mitchell convinced the group to back the law. (*Id.* at 17). Beginning with local ordinances designed to ban abortion while insulating municipalities from footing the bill for litigation, Mitchell set out to "counter the judiciary's constitutional pronouncements" protecting the right to abortion (*Id.* at 14–15). Mitchell was "galvanized" to formulate the "more radical concepts" underlying the law by what he considers "political branches [that] have been too willing to cede control of constitutional interpretation to the federal judiciary." (*Id.* at 13–14). Mitchell sought to show "that the states need not adopt a posture of learned helplessness in response to questionable or unconstitutional rulings." (*Id.* at 15).

politics/texas-abortion-lawyerjonathan-mitchell.html). State actors worked deliberately to craft a statutory scheme that would avoid review by the courts, and thereby circumvent any pronouncement of its unconstitutionality. The words of the *Debs* Court are perhaps even more fitting in this case: "[i]f ever there was a special exigency, one which demanded that the courts should do all that courts can do, it was disclosed by this bill . . . ." 158 U.S. at 592. Without endorsing the breadth of the principle in *Debs*, equity allows the United States to sue when other remedies are deliberately withheld by the State.

d. The Lack of Statutory Basis

Finally, equitable remedies need not be rooted in an act of Congress. Defendants make much of the lack of a statutory cause of action under which the United States may sue. However, "[t]he principles of equity exist independently of, and anterior to, all congressional legislation." *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 339 (1906). As Justice Miller explained, "[t]he powers of the executive officers of England are . . . vested in the executive officers of the United States" not automatically but as "defined by law, *constitutional or statutory*," such "that to *one or both* of these sources we must resort . . . ." *San Jacinto Tin Co.*, 125 U.S. at 307–08 (quoting the case of *The Floyd Acceptances*, 7 Wall. 676 (1868)) (emphasis added). And the absence of statutory language enshrining these equitable principles in law cannot alone diminish their force. The Supreme Court has "frequently cautioned that [i]t is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law." *United States v. Wells*, 519 U.S. 482, 496 (1997); *see Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (discussing how congressional "inaction lacks 'persuasive significance' because 'several equally tenable inferences' may be drawn . . . .") (quoting *United States v. Wise*, 370 U.S. 405, 411 (1962)); *see Helvering v. Hallock*, 309 U.S. 106, 119–20 (1940) ("To explain the cause of non-action by Congress when Congress itself sheds no light is to venture

into speculative unrealities."). Thus, the absence of a statutory cause of action should not be equated with a decision by Congress to withhold a cause of action.

The State makes much of legislative history from the 1950s and 1960s regarding a statutory cause of action for the Attorney General to bring equitable actions to enforce Fourteenth Amendment rights. (Resp., Dkt. 43, at 46). In *United States v. City of Philadelphia*, the Third Circuit looked to debates regarding three provisions that Congress considered and ultimately did not pass. 644 F.2d 187, at 193–97 (3d Cir. 1980). It took that history to evince a legislative intent "to deny the government the right of action here." *Id.* at 197. But that history has little bearing on the action here. *City of Philadelphia* and the legislative debates it cites must be understood in their respective contexts. The legislative debates in the 1950s and 1960s were concerned exclusively with enforcement of the Civil Rights Acts of 1957, H.R. 6127, 85th Cong. (1957), the Civil Rights Act of 1960, H.R. 8601, 86th Cong. (1960), and the Civil Rights Act of 1964, H.R. 7152, 88th Cong. (1964). Those statutes were addressed at countering racial discrimination specifically, just as the *City of Philadelphia* litigation itself concerned racially discriminatory policing practices subject to the civil rights statutes. *City of Philadelphia*, 644 F.2d at 190. The legislative debates at issue occurred between 1957 and 1964, placing them a decade before the Supreme Court first recognized the right to abortion in *Roe v. Wade*, 410 U.S. 113 (1973). Congress could not have considered and declined to provide a cause of action relating to the right to abortion before the right itself had ever been recognized. The implication that these legislators intended to express any opinion at all regarding a right that did not yet exist, in discussions relating specifically to the Civil Rights Acts, borders on the absurd.

The legislators there could not have contemplated the possibility, much less intended, that their discussions regarding civil rights enforcement would have the effect of ousting other constitutional rights. In considering enforcement of the Civil Rights Acts, Congress took pains to ensure that adequate procedural mechanisms were available. *See, e.g.*, *City of Philadelphia*, 644 F.2d at

194 ("[Congress] provided several criminal and civil actions. In s 9 of the Civil Rights Act of 1866, . . . it even authorized the President to call out the military 'to prevent the violation and enforce the due execution of this Act.'"); *id.* at 197 ("The Judiciary Committee deleted the proposed Title III and reported H.R. 7152 with a substitute designed to authorize the Attorney General under certain circumstances to sue to enjoin racial segregation in public facilities owned or operated by a state or local government."). But by providing for enforcement in this single area, it in no way precluded any mechanisms for constitutional enforcement in other areas. This legislative history cannot stand for the proposition that there is no cause of action when the state has acted, as it has here, to actively, aggressively, and deliberately deprive its citizens of a constitutional right.

While the reasoning of *City of Philadelphia* may be faulty in its breadth—and to the extent that it purports to speak to all litigation under the Fourteenth Amendment, *see id.* at 196—the result is correct. There, unlike here, no freestanding right to relief in equity existed because a remedy was available at law. Here, no such remedy is available because of the state's decision to foreclose any avenue of relief. There, ordinary enforcement mechanisms whereby citizens could vindicate their federal rights had not been curtailed by the state. Instead, "Congress ha[d] enacted a comprehensive remedial scheme while deliberately refusing to create the right of action asserted here." *City of Philadelphia*, 644 F.2d at 199–200. A private right of action remained under the Civil Rights Acts. *Id.* at 206. Indeed, the Court provided a laundry list of available mechanisms by which the injuries arising out of unlawful policing practices could be remedied: (1) private suits against "state officials for damages or injunctive relief under 42 U.S.C. §§ 1981, 1982, 1983, and 1985;" (2) class actions on the same bases; (3) private actions against the city under *Owen v. City of Indep.*, 445 U.S. 622 (1980), and *Monell v. Dep't of Soc. Servs. of the City of N.Y.*, 436 U.S. 658 (1978); (4) private injunctive actions which had "been maintained successfully against 'widespread' violations committed by local law enforcement officials;" and (5) criminal prosecutions by the United States for constitutional

violations under 18 U.S.C.A. §§ 241 and 242. *City of Philadelphia*, 644 F.2d at 192–93. There can be no claim that no remedies at law existed for the injuries there, even if the efficacy of those remedies is less than clear. The same cannot be said here. And, in particular, it is the deliberate action by the State to foreclose all private remedies that separates this case from *City of Philadelphia*. Thus, the legislative history discussed in *City of Philadelphia* cannot be taken as evidence of legislative intent to foreclose the equitable cause of action here.

Neither does the private right of action under § 1983 foreclose this suit.[35] There is no evidence that § 1983 was meant to displace suits brought by the United States. That mechanism is designed to empower private plaintiffs in their suits against state officers; it is not a tool for the United States as plaintiff. *See Hernandez v. Mesa*, 140 S. Ct. 735, 747 (2020) ("[T]he limited scope of § 1983 weighs against recognition of the *Bivens* claim" as both provide analogous remedies to private parties). Section 1983 in no way divests the United States of its existing cause of action in equity, nor scales back that equitable authority. The equitable cause of action predates the private cause of action and would have continued to exist whether § 1983 had been enacted. Moreover, it would have been antithetical to the purposes of § 1983 to, by the same legislative act, restrict the United States' ability to protect against the constitutional ills targeted by the private right of action. And if these principles were ever in doubt, the State provides no evidence whatsoever for its affirmative defense that Congress intended to supersede preexisting equitable remedies through its enactment of § 1983. *See, e.g.*, *United States v. Haggerty*, 997 F.3d 292, 299 (5th Cir. 2021) ("[A]n affirmative defense .

[35] The United States correctly notes, (*see* Reply, Dkt. 59, at 10), that the legislative debates at issue in *City of Philadelphia* took place were nearly a century after Congress created the § 1983 individual cause of action for constitutional violations as part of the Ku Klux Klan Act of 1871. *See Monroe v. Pape*, 365 U.S. 167, 171 (1961). This substantial gap in time counsels against reading § 1983 together with the debates at issue in *Philadelphia* as support for an implicit denial of a cause of action for the United States. *See Gomez-Perez v. Potter*, 553 U.S. 474, 486 (2008) ("Negative implications raised by disparate provisions are strongest' in those instances in which the relevant statutory provisions were 'considered simultaneously when the language raising the implication was inserted.") (quotations omitted).

. . must first be raised by a defendant—i.e., the defendant bears the burden of pleading and production . . . .").

Further, under the State's construction, the United States would have *less* of a claim to enforce the Fourteenth Amendment than other parts of the constitution. (*See* Hr'g Tr., Dkt. 65, at 26). This cannot be the case. The suggestion is particularly troubling given the context in which the Fourteenth Amendment was passed and ratified. The history of Reconstruction is populated with instances of states failing to protect the constitutional rights of their citizens. *See*, *e.g.*, *McDonald v. City of Chi., Ill.*, 561 U.S. 742, 857 (2010) (Thomas, J., concurring) (chronicling the history of lynching of Black people following the Civil War); *Briscoe v. LaHue*, 460 U.S. 325, 337 (1983) ("[Ku Klux] Klan outrages—arson, robbery, whippings, shootings, murders, and other forms of violence and intimidation. . . . went unpunished . . . because Klan members and sympathizers controlled or influenced the administration of state criminal justice."); *Strauder v. State of W. Va.*, 100 U.S. 303, 310 (1879) ("[T]he statute of West Virginia, discriminating in the selection of jurors, as it does, against negroes because of their color, amounts to a denial of the equal protection of the laws to a colored man when he is put upon trial for an alleged offence against the State . . . ."). This abdication of duty led to the ratification of the Fourteenth Amendment, an attempt to use federal power and affirmative federal enforcement to protect those abandoned, if not targeted, by the states. Indeed, the Department of Justice itself was created in this same period to serve these same ends.[36] Thus, the power to sue to vindicate the constitutional rights of citizens against states that would infringe them strikes at the core of the mandate of the Department of Justice, and the essence of the Fourteenth Amendment.

[36] *See* Bryan Greene, *Created 150 Years Ago, the Justice Department's First Mission Was to Protect Black Rights*, SMITHSONIAN MAG. (July 1, 2020), https://www.smithsonianmag.com/history/created-150-years-ago-justice-departments-first-mission-was-protect-black-rights-180975232/.

As to abortion regulations specifically, the State cites the cause of action provided to the Attorney General in the Freedom of Access to Clinic Entrances Act of 1993, H.R. 796, 103rd Cong. (1993) (codified at 18 U.S.C. § 248(c)(2)(A)), as evidence that Congress has contemplated all of the potential rights of action it could create related to abortion and has "refused to create a broader cause of action for the Attorney General." (Resp., Dkt. 43, at 16). Yet this is only one narrow provision addressed to a single issue within the much broader field of abortion rights. To suggest that Congress has given its final word on the subject of abortion through this single statute would read far more into that enactment than could have plausibly been intended. Abortion is a robust right, implicating numerous areas of potential regulation. Yet there is remarkably little legislation on the subject. Indeed, it is the lack of comprehensive federal regulation of abortion that makes the State's invocation of statutory causes of action regarding desegregation—a densely regulated area—particularly inapt. (Resp., Dkt. 43, at 48) (citing 42 U.S.C. §§ 2000b(a), 2000c-6(a)). The absence of a legislatively created cause of action should not be taken to be more than it is: a lack of Congressional action one way or the other, with no effect on the preexisting equitable cause of action. Because Congress has not acted, nothing about this action in equity supersedes any act of Congress. Rather, it is the State that attempts by this law to supersede the Supremacy Clause and the Fourteenth Amendment.

The Court finds the United States is substantially likely to establish a cause of action in equity against the State.

3. Scope of Relief

The State's deliberate attempts to evade federal judicial review extend to the form and scope of relief that may be afforded by this Court. The United States seeks a preliminary and permanent injunction against the State prohibiting the enforcement of S.B. 8. (Compl., Dkt. 1, at 26). Specifically, the United States seeks to enjoin three categories of obligors: (1) the State, (2) state

actors, and (3) private individuals. (*Id.*). Based on the analysis below, the Court concludes it has the authority to enjoin the State, its officials, and private individuals.

a. Application to the State of Texas

Prior to the ratification of the U.S. Constitution, and over the centuries since its ratification, politicians, scholars, and judges have debated the extent to which federal courts may hear and grant relief in a lawsuit against a state. The Constitution and our system of government and laws were structured to protect state sovereignty for many important reasons, including the desire to uphold federalism and preclude the national government from "act[ing] upon and through the States." The Federalist No. 15 at 109 (Alexander Hamilton). The Eleventh Amendment states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subject of any Foreign State." U.S. CONST. amend. XI. Although the Eleventh Amendment somewhat minimally protects states from suit, "the Constitution's structure, its history, and the authoritative interpretations by [the Supreme] Court make clear, the States' immunity from suit is a fundamental aspect of [state] sovereignty." *Alden*, 527 U.S. at 755. State sovereignty is not unbounded. States are "residuary sovereigns," and "States and their officers are bound by obligations imposed by the Constitution . . . that comport with the constitutional design." *Id.* at 748, 755.

Within that framework, the threshold question in this Court's sovereign immunity analysis—whether the State is shielded from an equitable suit brought by the United States—presents virtually no complications. The Supreme Court has explained in no uncertain terms that "[i]n ratifying the Constitution, the States consented to suits brought by other States or by the Federal Government." *Alden*, 527 U.S. at 755; *see also United States v. Mississippi*, 380 U.S. 128 (1965) ("The reading of the Constitution urged by Mississippi [that a state cannot be sued by the United States] is not supported by precedent, is not required by any language of the Constitution, and would without justification in

reason diminish the power of courts to protect the people of this country against deprivation and destruction by States of their federally guaranteed rights."). For the same reasons, the State is not shielded by the principle of sovereign immunity from this equitable lawsuit by the United States, and, quite reasonably, the State does not contend otherwise.[37]

Even in the absence of a dispute, this Court briefly examines the rationale for why a state yields its sovereignty to the federal government as it guides the Court's analysis. In *Alden*, the Supreme Court discussed the history and contours of state sovereign immunity at length. 527 U.S. at 712–30, 41–48. While recognizing Maine's sovereign powers derive from the structure of our Constitution, the Supreme Court clarified that the "constitutional privilege of a State to assert its sovereign immunity in its own courts does not confer upon the State a concomitant right to disregard the Constitution or valid federal law." *Id.* at 754–55. The Court continued: "We are unwilling to assume the States will refuse to honor the Constitution . . . . The good faith of the States thus provides an important assurance that '[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land.'" *Id.* at 755 (quoting U.S. CONST. art. VI). Here, the State—by fashioning S.B.8 to insulate it from federal judicial review and then enacting it as law despite its apparent deprivation of a recognized constitutional right—appears to be intentionally doing the very thing the Supreme Court was unwilling to fathom.

Satisfied that the United States has standing to seek injunctive relief to vindicate the rights of its citizens, uphold the primacy of the Constitution, and safeguard our republic's system of law against the State's aggressively defiant acts, this Court holds that it has the authority to enjoin the State of Texas. The State offers virtually no rebuttal, other than to argue that it must understand

[37] The Court notes that S.B. 8 claims the State "has sovereign immunity . . . in any equitable action that challenges the validity of [S.B. 8] on constitutional grounds or otherwise." Tex. Health & Safety Code § 171.211(b).

"who is supposed to do what" in the face of an injunction.[38] (Mot. Dismiss, Dkt. 50-2, 15–16). The Court generally agrees. To that end, the Court asked the State during the preliminary injunction hearing: "[I]f the Court were to enjoin the state of Texas from giving effect to this statute, what would you believe that would obligate you to do, if anything?" (Hr'g Tr., Dkt. 65, at 89–90). The State responded:

> Honestly, I'm not sure and I think that's part of the problem. If it just says the state of Texas standing alone and our position, I think correctly, is that the state of Texas is not enforcing this, then I would hope that we could get some kind of further clarity from the Court about what exactly the Court intends. I don't know if any -- I don't mean to suggest that anyone would want to do anything that could lead to contempt. Again, I'm not sure. It's hard to imagine what it -- like should I call state court judges and tell them to be on the lookout for these filings?

(*Id.* at 90). The State effectively conceded that its employees, like state judges, have a role to play if the Court were to issue an injunction against the State.

Indeed, the State has its prints all over the statute. The operation and enforcement of S.B. 8 requires the State and its employees to act, whether those acts are the maintenance of a lawsuit or carrying out a court order regarding the enforceability of S.B. 8. The State enacted S.B. 8 when Governor Abbott signed it into law; the law represents the State's pre-viability abortion policy; the State chose to partially delegate its enforcement authority to private individuals; and the State's judiciary accepts and hears S.B. 8 lawsuits. *See, e.g.*, (Resp., Dkt. 43, at 49–50) (explaining how the State, through S.B. 8, chose to regulate abortion care: "Texas has not banned all pre-viability abortions," and "Texas has enacted a private cause of action"). And the State continues to defend S.B. 8, disclaiming responsibility by pointing the finger at the private individuals who the State deputized as enforcers. The State's disavowal of S.B. 8 is unconvincing. Employing a private cause

[38] The State's role demonstrates the United States' injuries are fairly traceable and redressable by the State as explained *supra* Section IV(B)(2), (3).

of action neither relieves the State of its obligations to enforce and maintain its own law nor exempts the State from this federal court's authority to impose an injunction.

The Supreme Court recognized that states cannot avoid the preservation of constitutional rights through a scheme of deflection in *Cooper v. Aaron*, 358 U.S. 1 (1958). In *Cooper*, the Little Rock schools sought to delay mandated desegregation largely because of the unrest caused by Arkansas's governor whose troops blocked Black students from entering a white high school in 1957. *Id.* at 17. "Had Central High School been under the direct management of the State itself, it could hardly be suggested that those immediately in charge of the school should be heard to assert their own good faith as a legal excuse for delay in implementing the constitutional rights of these respondents, when vindication of those rights was rendered difficult or impossible by the actions of other state officials. The situation here is in no different posture because the members of the School Board and the Superintendent of Schools are local officials; from the point of view of the Fourteenth Amendment, they stand in this litigation as the agents of the State." *Id.* at 15–16. Quoting from *Ex parte Virginia*, 100 U.S. 339, 347 (1879), the Supreme Court explained that "'[a] State acts by its legislative, its executive, or its judicial authorities . . . . Whoever, by virtue of public position under a State government, . . . denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning.'" *Cooper*, 358 U.S. at 16–17. The Supreme Court concluded: "Thus the prohibitions of the Fourteenth Amendment extend to all action of the State denying equal protection of the laws; whatever the agency of the State taking the action, or whatever the guise in which it is taken." *Id.* at 17.

Likewise, the State's scheme to disguise its enforcement role and disclaim accountability collapses upon cursory inspection. The State enacted S.B. 8 and created a private enforcement scheme that clothes private individuals with the State's enforcement power. *See id.* at 17. That

delegation alone would have been sufficient to show state action. The practical operation of an S.B. 8 lawsuit in Texas courts deepens the State's enforcement role. As set out above, the State plays a role at every step of an S.B. 8's lifecycle in Texas courts. A private cause of action enforcement scheme is meaningless without state action. Yet, the State endeavors to use it as a sword (to effectuate its regulation of abortion) and a shield (to insulate those regulations from federal review). The State cannot pin the enforcement of S.B. 8 solely on the backs of private individuals and avoid federal judicial review or injunctive relief. An injunction properly runs against the State.

The United States also asks this Court to stay all state court proceedings brought under S.B. 8. (Reply, Dkt. 56-1, at 26). The Anti-Injunction Act provides that federal courts generally are prohibited from enjoining state court proceedings. 28 U.S.C. § 2283. That restriction does not apply when the United States seeks the injunction. *In re Grand Jury Subpoena*, 866 F.3d 231, 233 (5th Cir. 2017). Federal courts, in suits brought by the United States, have enjoined state court proceedings. *See, e.g.*, *United States v. Texas*, 356 F. Supp. 469, 473 (E.D. Tex. 1972), *aff'd*, 495 F.2d 1250 (5th Cir. 1974) ("Accordingly, it is . . . [o]rdered that the District Court of Dallas County, 162nd Judicial District of the State of Texas, is permanently enjoined from further proceedings in the case."). Given that the State does not argue otherwise, this Court finds that it also can enjoin the state judiciary without running afoul of the Anti-Injunction Act.[39]

b. Application to State Officers

In addition to sovereign immunity not shielding the State from this suit, the doctrine of sovereign immunity also offers no protection to state actors when the United States sues a state in an equitable action like this. Typically, a person, rather than the United States, sues a state official for

[39] The State contends that an injunction against it would not bind its courts from hearing S.B. 8 lawsuits with a strained analogy to *Muskrat*, 219 U.S. at 362. (Resp., Dkt. 43, at 12–13). While the *Muskrat* Court expressed a concern about advisory opinions, *Muskrat* has no bearing on whether an injunction prohibiting the State from maintaining S.B. 8 lawsuits also binds the judges and court clerks who oversee and administer S.B. 8 lawsuits.

a violation of a constitutional right, and the Court starts from the premise that the state has sovereign immunity and looks to whether the *Ex parte Young* exception to sovereign immunity applies. In *Ex parte Young*, the Supreme Court held that lawsuits may proceed in federal court when a plaintiff requests prospective relief against state officials in their official capacities for ongoing federal violations. 209 U.S. 123, 159–60 (1908). The exception "rests on the fiction . . . that because a sovereign state cannot commit an unconstitutional act, a state official enforcing an unconstitutional act is not acting for the sovereign state and therefore is not protected by the Eleventh Amendment." *Okpalobi v. Foster*, 244 F.3d 405, 411 (5th Cir. 2001). Because state officials lack sovereign immunity protection in a suit brought by the United States, this Court need not address whether their conduct falls within the *Ex parte Young* exception.[40] Even so, the Supreme Court's reasoning for creating the *Ex parte Young* exception informs this Court's determination. The exception "is based in part on the premise that sovereign immunity bars relief against States and their officers in both state and federal courts, and that certain suits for declaratory or injunctive relief against state officers must therefore be permitted if the Constitution is to remain the supreme law of

[40] In *Jackson*, Chief Justice Roberts noted in his dissent that the procedural posture of that case before the Supreme Court required the Supreme Court to address "particularly difficult" questions like "whether the exception to sovereign immunity recognized in *Ex parte Young* . . . should extend to state court judges in circumstances such as these" in the "course of two days." 2021 WL 3910722, at *2 (Roberts, C.J., dissenting). In addition to having a brief but longer period of time than two days for consideration, this Court not required to conduct an *Ex parte Young* analysis by virtue of the United States bringing this equitable lawsuit and eliminating the State's claim to sovereign immunity. This also is not a case brought by individuals against a state like the abortion providers who sued the Louisiana governor and attorney general in *Okpalobi*. 244 F.3d at 409. There, the Fifth Circuit, sitting en banc, was confronted with whether the *Ex parte Young* exception protected Louisiana from suit by individuals when no enforcement connection existed between the abortion statute and the two state officials. *Id.* at 416–17. Similarly, this Court is not constrained by the concerns expressed by the Fifth Circuit in *Jackson*, when it found no enforcement connection between the judges and court clerks and S.B. 8 under the rubric of an *Ex parte Young* analysis. *Whole Woman's Health v. Jackson*, No. 21-50792, 2021 WL 4128951, at *4 (5th Cir. Sept. 10, 2021) ("Plaintiffs fail to show any enforcement connection between any of the State Defendants and S.B. 8, and therefore cannot satisfy either understanding of *Ex parte Young*.").

the land." *Alden*, 527 U.S. at 747. It is rooted in the "supreme authority of the United States." *Young*, 209 U.S. at 167.

Lacking the protections of sovereign immunity, an injunction against the State also would run as to people who act as an arm of the state, such as state judicial officials like judges and court clerks. Given that it is the threat of S.B. 8 lawsuits that deters providers from offering abortion care services, *see supra* Section IV(B)(1)(a)(i), an injunction must halt existing S.B. lawsuits and prevent new suits from being maintained by the state judiciary. Even though private individuals file S.B. 8 lawsuits, the state judiciary plays a role in the lawsuits through several official actions including docketing, maintaining, hearing, and rendering relief in an S.B. 8 lawsuit.[41] The State cannot claim that its state court judges and court clerks are not "officers, agents, servants, [or] employees" of the State. Fed. R. Civ. P. 65(d)(2); *see, e.g.*, Tex. Gov't Code § 411.201 ("'Active judicial officer' means . . . a person serving as a judge or justice of the supreme court, the court of criminal appeals, a court of appeals, a district court, a criminal district court, a constitutional county court, a statutory county court, a justice court, or a municipal court[.]"). When they act in their official capacities, state district court judges and court clerks generally act as an arm of the state as a state official. *See Clark v. Tarrant Cty., Tex.*, 798 F.2d 736, 744 (5th Cir. 1986) (stating that Texas "district judges . . . are undeniably elected state officials."); *Holloway v. Walker*, 765 F.2d 517 (5th Cir. 1985) (recognizing that Texas state judges are state elected officials), *cert. denied*, 474 U.S. 1037 (1985); *see also Davis v. Tarrant Cty., Tex.*, 565 F.3d 214, 228 (5th Cir. 2009) ("[In cases brought by individuals,] Texas judges are entitled

[41] Even taking into account the Fifth Circuit's pronouncement that because S.B. 8 states that it "'shall be enforced exclusively through the private civil actions[,]'" *Jackson*, 2021 WL 4128951, at *4 (quoting Tex. Health & Safety Code § 171.207(a)), "exclusive means exclusive," *id.*, and therefore state judges and clerks have no connection to the enforcement of S.B. 8 actions, this Court is not bound by the Fifth Circuit's *Ex parte Young* analysis in *Jackson* regarding sovereign immunity since the state actors in this case have no claim to sovereign immunity.

to Eleventh Amendment immunity for claims asserted against them in their official capacities as state actors.").

The Fifth Circuit's opinion in *Jackson*, 2021 WL 4128951, reinforces what S.B. 8 already makes clear: Texas courts are a necessary component to the operation of S.B. 8. In *Jackson*, the Fifth Circuit considered whether to stay this Court's proceedings in a related case challenging the constitutionality of S.B. 8. *Id.* at *1. In deciding to stay the proceedings in the district court, the Fifth Circuit recognized the sovereign immunity claim of state officials, including a state district judge and court clerk, *id.* at *3, and did not shy away from the notion that state judicial officials act as an arm of the state, referring to state district "court clerks who act under the direction of judges acting in their judicial capacity." *Id.* at *5. In this case, the United States seeks to enjoin the State "including all of its officers, employees, and agents." (Compl., Dkt. 1, at 26). Just like *Jackson*, this lawsuit challenges the constitutionality of the same law and revolves around the same operative facts. One significant, material difference between this case and *Jackson* is that the United States is the plaintiff here. In both cases, the courts have determined that state officials like judges and clerk act as an arm of the State, but the legal conclusions drawn from that determination differ: there, being a state actor potentially protects judges and clerks from suits brought by individuals whereas, here, being a state actor provides no protection to judges and clerks from a suit brought by the United States. In other words, "Texas's scheme to insulate its law from judicial review by deputizing private parties to carry out unconstitutional restrictions on the State's behalf" unravels in the face of a lawsuit by the United States. *Jackson*, 2021 WL 3910722, at *5 (Kagan, J., dissenting). In *Jackson*, clinging to sovereign immunity was a (thus far) successful strategy; in this case, it is the judges and clerks' very role as state officials that leaves them vulnerable to an injunction.

The State's main argument seems to be that, even if state judges and court clerks act as an arm of the state, S.B. 8's language divorces the State from enforcement of the law—"the State does

not enforce [S.B. 8]," (Resp., Dkt. 43, at 17)—and relies on individuals to bring private causes of action. The law states:

> [T]he requirements of this subchapter shall be enforced exclusively through the private civil actions described in Section 171.208. No enforcement of this subchapter, and no enforcement of Chapters 19 and 22, Penal Code, in response to violations of this subchapter, may be taken or threatened by this state, a political subdivision, a district or county attorney, or an executive or administrative officer or employee of this state or a political subdivision against any person.

Tex. Health & Safety Code § 171.207. S.B. 8's enforcement provision states that only private individuals can bring an S.B. 8 suit. It is a fallacy to allow the State to disclaim an enforcement role. *See Shelley v. Kraemer*, 334 U.S. 1 (1948); (*see supra* Section IV(B)(3)(a); *see infra* Section IV(B)(3)(c)). A lawsuit's very existence requires state action; it cannot be filed, maintained, heard, or resolved without state action. Indeed, S.B. 8 expressly states that an individual who files an S.B. 8 lawsuit relies on state action: a person "may bring a civil action," may "prevail in [the] action," "the court shall award[] injunctive relief[,] statutory damages[,] and . . . costs and attorney's fees." Tex. Health & Safety Code § 171.208(a), (b). S.B. 8 further dictates when courts cannot award damages. *Id.* § 171.208(c). S.B. 8 mandates when courts cannot award attorney's fees and costs. *Id.* § 171.208(i). S.B. 8 instructs when courts may not award relief. *Id.* § 171.209(f). S.B. 8 even explicitly grants "official immunity" to "each [state] officer and employee" who is sued in a challenge to S.B. 8. *Id.* § 171.211(b). Any argument that the State, through its judicial system and judges, is not involved in the enforcement of S.B. 8 lawsuits is contradicted by the plain language of the statute and by the reality of how state courts operate as an arm of the state to enforce the law, especially when the State has intentionally crafted a statute to employ private citizens as its proxy. Put simply, the State's participation in enforcing S.B. 8 lawsuits amounts to actionable state action. *See Shelley*, 334 U.S. at 18 ("[I]t has never been suggested that state court action is immunized from the operation of [the Fourteenth Amendment] simply because the act is that of the judicial branch of the state government.").

Finally, federal courts have the authority to specifically enjoin state judicial officials should this Court enjoin natural persons in addition to the State. The Supreme Court has instructed that "judicial immunity is not a bar to prospective injunctive relief against a judicial officer acting in her judicial capacity." *Pulliam v. Allen*, 466 U.S. 522, 541–42 (1984); *see Mireles v. Waco*, 502 U.S. 9, 10 n.1 (1991) (stating that while a judge is generally immune from a suit for money damages, a "judge is not absolutely immune from criminal liability . . . or from a suit for prospective injunctive relief"). In *Pulliam*, the Supreme Court considered judicial immunity in Section 1983 actions but, in its reasoning, it relied, in part, on the "common law's rejection of a rule of judicial immunity from prospective relief." 466 U.S. at 536. Because its reasoning sounded partly in the common law, the *Pulliam*'s Court reasoning and its conclusion that prospective relief is available against state court judges undermines the State's argument that Article III prohibits federal court relief against state judges acting in their Article III capacity.

c. Application to Private Individuals

The United States also asks this Court to enjoin those "private parties who bring suit under S.B. 8." (Compl., Dkt 1, at 26). The private individuals, like the state officials, are themselves acting as an arm of the state. The State entrusted part of its enforcement authority to private individuals by deputizing them to bring S.B. 8 lawsuits. *Jackson*, 2021 WL 3910722, at *3 (Sotomayor, J., dissenting) ("[T]he Texas Legislature has deputized the State's citizens as bounty hunters, offering them cash prizes for civilly prosecuting their neighbors' medical procedures."). In *Jackson*, the Fifth Circuit's analysis of its appellate jurisdiction over a private individual who might sue under S.B. 8 hinged on the fact that the "connection between judges, clerks, and [the private individual are] impossible to miss." *Jackson*, 2021 WL 4128951, at *7. So much so that the Fifth Circuit determined that the private individual's "jurisdictional issues [under S.B. 8] are 'inextricably intertwined' with the same issues in the State Defendants' appeal . . . ." *Id.* (quoting *Swint v. Chambers Cty. Comm'n*, 514 U.S. 35,

51 (1995)). S.B. 8 vests private individuals with the authority to enforce the statute, "a traditionally exclusive state power." (Mot. Prelim. Inj., Dkt. 8, at 40). The Chief Justice of the Supreme Court has himself described the statutory scheme as "unprecedented" and noted that it "delegated enforcement . . . to the populace at large. . . . to insulate the State from responsibility for implementing and enforcing the regulatory regime." *Jackson*, 2021 WL 3910722, at *1 (Roberts, C.J., dissenting).

As such, private individuals enforcing S.B. 8 are properly regarded as state actors. "Individuals suing under S.B. 8 are not suing 'for violation of distinct legal duties owed' to them as individuals, but instead are suing 'for violation of legal duties owed the public.'" (Mot. Prelim. Inj., Dkt. 8, at 40) (quoting *Texas v. Dep't of Labor*, 929 F.3d 205, 213 (5th Cir. 2019)). Courts have characterized private parties as state actors where a state allows or is involved with conduct that would be unconstitutional should the state itself engage in that conduct.[42] *See also Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 621–22 (1991) ("Our precedents establish that, in determining whether a particular action or course of conduct is governmental in character, it is relevant to examine the following: the extent to which the actor relies on governmental assistance and benefits; whether the actor is performing a traditional governmental function; and whether the injury caused is aggravated in a unique way by the incidents of governmental authority.") (internal citations omitted). Apt is *Shelley*, a 1948 case brought by the Kraemers, a white couple, against the Shelleys, a Black couple, to stop the Shelleys from moving into the house they had just purchased in a St. Louis neighborhood.[43]

[42] *See, e.g.*, *Reitman v. Mulkey*, 387 U.S. 369, 380–81 (1967) (finding state action where law "authorize[d] . . . racial discrimination in the housing market"); *Smith v. Allwright*, 321 U.S. 649, 663–64 (1944) (holding that a state's establishment of primary system made party that set up an all-white primary "an agency of the state"); *Nixon v. Condon*, 286 U.S. 73 (1932) (state's conferral of authority to party committee to determine who may vote in primary created state action); *Skinner v. Ry. Lab. Execs. Ass'n*, 489 U.S. 602, 615–16 (1989) (finding state action where the government removed "all legal barriers" to private conduct at issue and "made plain . . . its strong preference" that private parties engaged in the conduct).

[43] Before the Supreme Court were a bundle of cases, the first of which that came to the Supreme Court on certiorari was the dispute arising from the Shelleys' purchase of their home. *Shelley*, 334 U.S. at 4.

334 U.S. at 4–6. The Kraemers sought to enforce the terms of a restrictive covenant that specifically excluded Blacks from occupying the property. *Id.* Before the Supreme Court, the Shelleys, who were unaware of the restrictive covenant when they purchased their home, argued that they had been denied equal protection of the laws. *Id.* at 8. Confident that racial restrictive covenants violate the Fourteenth Amendment when they involve "action by state legislature or city councils," the Court considered whether "agreements among private individuals" to discriminate removed the state action necessary to invoke the Fourteenth Amendment. *Id.* at 12–13. Noting that a restrictive covenant standing alone would not violate the Constitution, the Supreme Court concluded that "here there was more. These are cases in which the purposes of the agreements were secured only by judicial enforcement by state courts of the restrictive terms of the agreements." *Id.* at 13–14. The Supreme Court imputed the unconstitutional acts of the private individuals to the state because the state "grant[ed] judicial enforcement" of the unconstitutional act. *Id.* at 20. Likewise here, the State has granted judicial enforcement of private causes of action brought under S.B. 8. and has done more. In addition to allowing its judiciary to enforce a likely unconstitutional S.B. 8, the State designed S.B. 8's private cause of action enforcement mechanism and authorized private individuals to bring suit on its behalf, and the private individuals who bring an S.B. 8 suit "make extensive use" of the state judicial system. *Edmonson*, 500 U.S. at 622 ("Although private use of state-sanctioned private remedies or procedures does not rise, by itself, to the level of state action, our cases have found state action when private parties make extensive use of state procedures with 'the overt, significant assistance of state officials.'") (internal citations omitted). The fact that the enforcement of S.B. 8 begins with a private individual does not immunize the State. *See Shelley*, 334 U.S. at 20 ("Nor is the Amendment ineffective simply because the particular pattern of discrimination, which the State has enforced, was defined initially by the terms of a private agreement.").

While this Court is convinced that private individuals who bring an S.B. 8 lawsuit act as an arm of the State in this case, this Court also examines whether it has the authority to enjoin them separately for being in active concert with the State. Under Federal Rule of Civil Procedure 65, an injunction may bind the parties, the parties' "officers, agents, servants, employees, and attorneys," and "other persons who are in active concert or participation" with the parties or the parties' officers. Fed. R. Civ. P. 65(d)(2)(A)-(C). To avoid the likely insurmountable challenge of providing actual notice to all people who can bring an S.B. 8 suit—if such notice would be necessary—the Court must be satisfied that the private individuals who sue under S.B. 8 act in active concert with the State in order to issue an injunction as to them as nonparties. Most courts look to whether the nonparty is in privity with the parties or the nonparty's "interest [was] represented adequately by a party in the original suit." *Texas*, 929 F.3d at 211. Deputizing private individuals to sue abortion providers creates the necessary privity and obviates the need for individualized notice.

The private individuals who bring S.B. 8 lawsuits are in active concert with the State to enforce S.B. 8. As the State acknowledged, Rule 65(d)(2) was intended to prevent defendants from "'nullify[ing] a decree by carrying out prohibited acts through aiders and abettors[.]'" (Resp., Dkt. 43, at 24) (quoting *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 14 (1945)). Private individuals who file S.B. 8 lawsuits help effectuate the State's blueprint to potentially deprive Texans of their constitutional rights. Before S.B. 8, these individuals would have had neither a cause of action to obtain relief in a suit against abortion care providers nor standing to bring such a suit. The State chose to deputize them; the State chose to remove any requirement that they suffer an injury to bring suit (an injury is almost always required to bring suit); and the State chose to incentivize them by automatically awarding them damages of at least $10,000 if their suit is successful. Tex. Health & Safety Code § 171.208(a), (b).

This Court's conclusion that private individuals are either state actors or in active concert with the State is bolstered by the positions of the intervenors in this case. In their Motion to Intervene, which this Court granted, (Dkt. 40), the Texas Intervenors stated that they intend to sue people and entities that violate S.B. 8 for conduct that is "clearly unprotected by the Constitution." (Mot. Intervene, Dkt. 28, at 2). The Texas Intervenors carefully tried to argue they are not state actors, but their declared intent to enforce S.B. 8 speaks the loudest. For example, Jeff Tuley ("Tuley") intends to bring S.B. suits for (1) non-physician abortions, (2) self-administered abortions, and (3) post-viability abortions. (*Id.* at 3; Tuley Decl., Dkt. 28-1, at 7). To explain why he sought intervention in this case, Tuley stated: "Preserving this enforcement mechanism is important to Mr. Tuley because several district attorneys in Texas refuse to enforce these laws." (Mot. Intervene, Dkt. 28, at 3). Tuley admitted that he seeks to stand in place of district attorneys in abortion cases where the district attorney *does have* the enforcement right to bring a lawsuit, like for a post-viability abortion that is already prohibited by the State and enforced by the State. The Texas Intervenors want to use the procedural mechanisms of S.B. 8 to enforce abortion restrictions that are not substantively prohibited by S.B. 8. But those abortion restrictions are already enforced by the State. Adding private causes of action to the mix either duplicates or supplants the enforcement work being done by the State. Whether duplicating the efforts of the State or supplanting the State, the Texas Intervenors are acting in active concert with the State or acting as an arm of the State.

More broadly, the Intervenors as a group believe that the State granted them a roving commission to enforce the State's abortion laws. The fact that the Texas Intervenors understand that their interests would be impacted if this Court enjoins enforcement of S.B. 8 drives home the point that the Texas Intervenors recognize that they are carrying out state policy and enforcement and that an injunction of S.B. 8 would interfere with their rights to enforce state laws. The other intervenor, Oscar Stilley ("Stilley"), an Arkansas resident who filed an S.B. 8 lawsuit against an

abortion provider, spells it out: "The State of Texas in enacting [S.B. 8] has delegated power that it does have to people it does not know." (Stilley Resp., Dkt. 48, at 2, 8). He continues: "We are told that doctors don't have standing to raise the constitutional rights of their patients – but Oscar Stilley somehow has standing to sue people he'd probably like if he knew them, for things he doesn't disagree with, which caused him no damage or injury whatsoever." (*Id.*). Stilley has sued an abortion provider and wants to continue suing abortion providers and health insurance companies solely to make money. (*Id.* at 5–7). His strategy is to sue and then offer a cheap settlement of "perhaps as low as $100 per abortion"—versus $10,000 or more in statutory damages. (*Id.* at 6). His is a volume business. Setting aside the absurdity and perversity of a law that incentivizes people who do not disagree with abortion care to sue abortion providers to make a quick buck, Stilley explicitly states his perception that the State delegated part of its enforcement power, i.e., bringing suits, to him. (*Id.* at 2).

The State's concern that private individuals should not be enjoined because they have not been heard by the Court conflates persons who are enjoined through an injunction with persons who may be in contempt for violating an injunction. The State relies on *Zenith Radio Corp. v. Hazeltine Rsch., Inc.*, in which the party subsidiary company and its nonparty parent company were enjoined. 395 U.S. 100, 109 (1969). The Supreme Court vacated the judgment against the nonparty parent company. *Id.* at 110. The State wrongly assumes that a federal court cannot enjoin a person or entity without first providing every possible obligor with notice and an opportunity to be heard. In fact, the Supreme Court, in *Arizona v. United States*, upheld an injunction against Arizona that governed the conduct of its state and local law enforcement officers who had not first been given notice or an opportunity to be heard regarding the injunction. 567 U.S. 387, 410 (2012). What the *Zenith* Court held was that "a nonparty with notice cannot be held in contempt until shown to be in concert or participation." 395 U.S. at 112. Since the question of contempt is not before this Court, the Court

takes no position on whether it can hold in contempt a person who has not received notice of or been heard on an injunction.

C. Motion for Preliminary Injunction

1. Likelihood of Success on the Merits

The Court's findings of fact, together with its analysis of the parties' submissions, lead it to conclude that the United States is substantially likely to succeed on the merits of its claims. It is substantially likely that S.B. 8 violates the Fourteenth Amendment, whether as an unconstitutional pre-viability abortion ban, or as an unconstitutional undue burden on pre-viability abortion. It is also substantially likely that S.B. 8 unconstitutionally interferes with principles of preemption and intergovernmental immunity.

a. Whether S.B. 8 Violates the Fourteenth Amendment

The United States argues that S.B. 8 purports to deny Fourteenth Amendment substantive due process rights to pre-viability abortions, in contravention of binding precedent. S.B. 8 prohibits any "abortion on a pregnant woman if the physician detected a fetal heartbeat . . . or failed to perform a test to detect a fetal heartbeat." Tex. Health & Safety Code § 171.204(a). It allows for an exception only in the case of a documented "medical emergency[.]" *Id.* § 171.205. When the Supreme Court heard a preliminary challenge to S.B. 8 in *Jackson*, the comments on the law's substance ranged from "serious questions regarding [its] constitutionality," 2021 WL 3910722, at *1, to concerns that it "threatens to invade a constitutional right," *id.* at *3 (Breyer, J., dissenting), to incredulity at the "flagrantly unconstitutional law engineered to prohibit women from exercising their constitutional rights and evade judicial scrutiny . . . ." *id.* (Sotomayor, J., dissenting). Even at that preliminary stage, before the constitutional issues were even before the court, the "clear, and indeed undisputed, conflict with *Roe* and *Casey*" was plain to see. *Id.* at *5 (Kagan, J., dissenting). As Justice Sotomayor wrote in dissent, "[t]he Act is clearly unconstitutional under existing precedents.

The [state] respondents do not even try to argue otherwise. Nor could they: No federal appellate court has upheld such a comprehensive prohibition on abortions before viability under current law." *Id.* at *4 (Sotomayor, J., dissenting).

i. Unconstitutionality of Pre-Viability Abortion Bans

Indisputable, binding precedent holds that pre-viability bans on abortions are unconstitutional. Indeed, the Supreme Court has long held that "a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability." *Casey*, 505 U.S. at 879; *see also Roe*, 410 U.S. at 163 ("[F]or the period of pregnancy prior to [viability], the attending physician, in consultation with [her] patient, is free to determine, without regulation by the State, that, in [her] medical judgment, the patient's pregnancy should be terminated."). In recent years, the Fifth Circuit has repeatedly confirmed that outright bans on pre-viability abortions are "unconstitutional under Supreme Court precedent without resort to the undue burden balancing test." *Jackson Women's Health Org. v. Dobbs*, 951 F.3d 246, 248 (5th Cir. 2020); *see also Jackson*, 945 F.3d at 274 ("Until viability, it is for the woman, not the state, to weigh any risks to maternal health and to consider personal values and beliefs in deciding whether to have an abortion."). Seen in light of the nearly half-century of precedent in this line, "the Act is a breathtaking act of defiance—of the Constitution, of this Court's precedents, and of the rights of women seeking abortions throughout Texas." *Jackson*, 2021 WL 3910722, at *4 (Sotomayor, J., dissenting).

The State contends that S.B. 8 does not constitute an outright "ban" on pre-viability abortions; rather it attempts to characterize the law as a regulation that poses "mere obstacles" to pre-viability abortion access. (Resp., Dkt. 43, at 49). But there can be no question that S.B. 8 operates as a ban on pre-viability abortions in contravention of *Roe v. Wade*, and "equates to a near-categorical ban on abortions beginning six weeks after a woman's last menstrual period, before many women realize they are pregnant, and months before fetal viability." *Jackson*, 2021 WL 3910722, at *3

(Sotomayor, J., dissenting). The State analogizes to *Gonzales v. Carhart*, in which the Court upheld a law prohibiting the intact dilation and evacuation method of abortion. 550 U.S. 124, 135 (2007). But the law in question there was limited exclusively to a single method; it had no effect whatsoever on abortions, at any stage of pregnancy, performed using any other method. Indeed, "the Act allow[ed], among other means, a commonly used and generally accepted method, so it [did] not construct a substantial obstacle to the abortion right." *Id.* at 165. As such, it could not accurately be considered an abortion ban. In contrast, S.B. 8 effectively forecloses all abortions, by any method, that occur after approximately six weeks of pregnancy. In this way, S.B. 8 reaches far more widely than did the law at issue in *Gonzales*—so far, in fact, that it can properly be considered a ban subject to the constitutional requirements of *Roe v. Wade*.

June Medical, 140 S. Ct. at 2112–13, is similarly illustrative. The State suggests that the impact of the law at issue there was so extensive as to render it effectively a ban, and, whether or not a ban, to render it comparable to S.B. 8. But again, the two laws should not be equated. Though the Court in no way intends to minimize the consequences had the law at issue in *June Medical* been upheld, its reach was still far more limited than that of S.B. 8—a law that prohibits all abortions, by any method, by any doctor, that occur after cardiac activity is detected. The former is a regulation that poses an undue burden on obtaining abortion services; the latter is a categorical ban. Indeed, faced with patients showing embryonic cardiac activity earlier than six weeks LMP, who "are incredibly frustrated because they feel like they did everything 'right' under the law by trying to get to the abortion clinic as soon as possible," Planned Parenthood physicians "explain to patients that S.B. 8 is effectively a near total ban on abortion." (Linton Decl., Dkt. 8-5, at 11).

The credible declarations from providers make clear the extent to which S.B. 8 has cut off abortion access.[44] The recent statistics at the two Planned Parenthood Center for Choice, Inc. ("PPCFC"), facilities in Houston and Stafford are illustrative. Ordinarily, the clinics provided an average of 25 abortions per day. In the week preceding S.B. 8 going into effect, that number ballooned to 205 daily, with 184 for Texas residents. (Linton Decl., Dkt. 8-5, at 10). Between September 1 and September 10, PPCFC performed 123 ultrasounds at the first appointments required under state law to take place at least 24 hours before an abortion. The clinics had 63 patients scheduled for abortions in the next ten days but could only perform 52 because "some patients had embryonic activity by the time they returned." (*Id.*).[45] Thus, the clinics went from performing approximately 25 abortions per day to approximately 5 per day, all at less than six weeks LMP. [46] For the approximately 20 women per day who, but for S.B. 8, would have received abortion care at PPCFC, the Court can only speculate as to the hardships they had to endure. Since

[44] "Before S.B. 8 took effect, Southwestern [Women's Surgery Center ("Southwestern")] provided medication abortion up to 10 weeks from the first day of a patient's last menstrual period ("LMP") and procedural abortions through 21 weeks and 6 days LMP. Since September 1, 2021, Southwestern has provided only procedural abortions up until detection of a "fetal heartbeat" as defined under S.B. 8 and described below. In a typical year, prior to S.B. 8 taking effect, the clinic performed approximately 9,000 medication and procedural abortions, and I personally performed between 2,000 and 3,000 abortions at Southwestern over the last year." (Gilbert Decl., 8-2, at 4-5). In addition, "[i]n 2020, the four [Whole Women's Health ("WWH")]/[Whole Women's Health Alliance ("WWHA")] clinics in Texas provided approximately 9,200 abortions. Of these patients, less than 10% were at gestations less than 6 weeks LMP." (Hagstrom Miller Decl. I, Dkt 8-4, at 3–4). The various Planned Parenthood centers and affiliates in Texas (comprising 11 of the 24 licensed facilities in the state) provided, as a low estimate, 14,184 abortions last year. Between 90% and 93.4% of these abortions were provided at 6 weeks LMP or later. (*See* Linton Decl., Dkt. 8-5, at 4–6).

[45] "Unfortunately, we have had to inform some patients at their second visit that they were barred under S.B. 8 from having an abortion. At their first visit, there was no embryonic cardiac activity on the ultrasound, but when they came back the next day after the state-mandated waiting period, there was embryonic cardiac activity and we were not able to provide the abortion. This means patients can lose their ability to access abortion in Texas literally overnight. As a result, our physicians have to caution patients that even though cardiac activity is not shown at the ultrasound appointment, it could occur on the day of the abortion, which causes patients significant stress. Another patient was found to be about five weeks pregnant without embryonic cardiac activity, so she could have qualified for an abortion, but at the same visit, she also learned she had COVID-19. By the time she would finish the mandatory quarantine, she would be too far along in her pregnancy to get an abortion in Texas." (Linton Decl., Dkt. 8-5, at 9).

[46] "The vast majority of abortion patients at Southwestern before S.B. 8 took effect were 6 or more weeks LMP. In 2020, Southwestern performed only 936 abortions for patients up to 5 weeks, 6 days LMP—only 10% of the 8,623 abortions the clinic provided in total that year." (Gilbert Decl., Dkt. 8-2, at 5).

September 1, 2021, these providers ceased performing abortions after detection of embryonic cardiac activity.[47] One provider, who oversees four Texas clinics, stated that between September 1 and September 14, "[w]e have already turned away more than 100 patients . . . , and every day the law is in effect, we are forced to turn away the majority . . . ." (Hagstrom Miller Decl. I, Dkt 8-4, at 4). Indeed, "S.B. 8 bans approximately 90% of the abortions . . . previously performed" at those four clinics." (*Id.* at 7). This credible evidence establishes that "S.B. 8 has had an immediate and devastating effect on abortion care in Texas." (*Id.*).

Although "[m]ost patients obtain an abortion as soon as they are able[,]" many do not know they are pregnant at the point when embryonic cardiac activity becomes detectable. (Gilbert Decl., Dkt. 8-2, at 8). Most people are at least six weeks LMP into pregnancy when they make their first abortion appointment, and so are permanently precluded from obtaining an abortion in Texas. (*Id.*). Clinics have stopped providing both procedural and medication abortions, as "in the rare instance where the medication fails to complete the abortions, the clinic would be unable to provide the medically appropriate procedure to complete the abortion." (Gilbert Decl., Dkt. 8-2, at 4–5).[48]

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[47] (*See* Gilbert Decl., Dkt. 8-2, at 4) ("Since September 1, 2021, Southwestern has provided only procedural abortions up until detection of a 'fetal heartbeat' as defined under S.B. 8."); (Hagstrom Miller Decl. I, Dkt. 8-4, at 4) ("Since S.B. 8 took effect on September 1, 2021, all four WWH/WWHA clinics in Texas have stopped offering both medication and procedural abortions for patients whose pregnancies have cardiac activity, meaning that our clinics are only providing abortions to patients with gestational ages under approximately 6 weeks LMP."); (*Id.* at 7) (I have had personal conversations with the majority of independent abortion clinics in Texas regarding S.B. 8 and can affirm that the independent abortion providers in Texas are all complying with S.B. 8. All of these clinics continue, for now, to provide abortions only for pregnant people without any embryonic or fetal cardiac activity, meaning that we are forced to turn away the majority of patients seeking abortion in Texas."); (Linton Decl., Dkt. 8-5, at 7) ("The risk of civil liability, damages, and certain cost of litigation if a provider offers abortion in violation of S.B. 8 (as well as the possibility of a court order stopping the provider from providing abortions) means that none of the Planned Parenthood providers—and, to my knowledge, no other abortion provider in Texas—has offered services after embryonic cardiac activity is detected since September 1. . . . Because of the real possibility that [Planned Parenthood South Texas] Surgical Center and its physicians and staff will be sued for providing any abortions, and be forced to defend against these meritless lawsuits, it has suspended all abortion services as of September 1.").

[48] Another provider addresses the same concerns: "We have seen at least two patients who obtained

According to one provider's credible description, "[m]edication abortion is thus not an option we feel we can provide patients in light of S.B. 8's restrictions, even though it is medically preferred for many patients." (Gilbert Decl., Dkt. 8-2, at 4–5). The provider describes how, because of S.B. 8, she "had two patients . . . who are minors, who had never had a pelvic exam before, and who both preferred a medication abortion that I was unable to provide." (*Id.* at 15). As that provider credibly summarized, "[a]s a practical matter, S.B. 8 is a near total ban on abortion. It prohibits abortion care at the earliest moments that a pregnancy may be detected and often before a patient has any reason to suspect that they may be pregnant." (*Id.* at 8).

ii. Undue Burden

Even if S.B. 8 is more properly characterized as a regulation, it is nonetheless unconstitutional because it places an "undue burden" on individuals seeking an abortion. *Casey*, 505 U.S. at 874. More specifically, "an undue burden is a shorthand for the conclusion that a state regulation has the purpose[49] or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Casey*, 505 U.S. at 877. Since the Court set out this standard, it has invalidated state laws that impose far lower burdens on access to abortion care than does S.B. 8. In *Hellerstedt*, it held unconstitutional a Texas law (H.B. 2) requiring that doctors who perform abortions have active admitting privileges at a hospital no more than 30 miles from the abortion facility, and that such facilities meet the state-law standards "ambulatory surgical centers." 136 S. Ct. at 2299. These requirements led approximately half of the abortion clinics in Texas to

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medication abortions before September 1 and returned at their follow-up visits after September 1 with ongoing pregnancies—meaning they were in the very small fraction of patients for whom the medication abortion was unsuccessful. In the past, we would have provided these patients with procedures to complete their abortions, as that is the medical standard of care, but because of S.B. 8 we were forced to turn these patients away. One of these patients was only 18 years old. Our physician was so upset that a staff member had to help the doctor break the news to the patient." (Hagstrom Miller Decl., Dkt. 8-4, at 10).

[49] *See supra* Section IV(B)(2)(c).

close, meaning that women forced into the few remaining clinics faced longer wait times, crowding, and longer distances to travel to providers. *Id.* at 2313. Based on the "substantial obstacle" the regulations "[e]ach place . . . in the path of women seeking a previability abortion, each constitutes an undue burden on abortion access . . . , and each violates the Federal Constitution." *Id.* And in *June Medical*, the Court invalidated an almost identical Louisiana law, again explaining that "the burdens [the law] imposes far outweigh any . . . . benefit, and thus the Act imposes an unconstitutional undue burden." 140 S. Ct. at 2121.

While the laws at issue in those cases surely created severe impediments to abortion access, they pale in comparison to the obstacles at issue here. For, as one provider credibly described:

> Even under the best circumstances, if a Texan determines they are pregnant as soon as they miss their period, they would have roughly two weeks to decide whether to have an abortion, comply with state-mandated procedures for obtaining an abortion, resolve all financial and logistical challenges associated with abortion care in Texas, and obtain an abortion. As a result of S.B. 8, the many pregnant people who do not learn that they are pregnant until after 6 weeks LMP may never access abortion in Texas.

(Gilbert Decl., Dkt. 8-2, at 8). Moreover, under S.B. 8, a doctor must be willing to pay no less than $10,000 for every abortion she performs. *See* Tex. Health & Safety Code § 171.208(i). Nor does the deterrent stop there: so too must every nurse, security guard, insurer, or rideshare driver. This law is not a question of a one-time, excessive, and unnecessary resource investment needed to comply with a law. It is an ongoing, wide-ranging, and debilitating burden on anyone associated with providing abortions, sufficient to effectively cut off access to the medical procedure entirely. (*See* Hagstrom Miller Decl. I, Dkt. 8-4, at 7; Gilbert Decl., Dkt. 8-2, at 16–17). If any provider does take the extraordinary step of proceeding with an abortion in the face of the law, she will be saddled with litigation extending potentially for years, and in which she is precluded from even raising the unconstitutionality of the law as a defense and must also contend with repercussions from

professional licensing boards.[50] And even if the provider ultimately prevails, the law prohibits her from ever recovering attorney's fees from her opponent. *See* Tex. Health & Safety Code § 171.208(i). Given the unlikelihood of any provider having the financial wherewithal to overcome under these financial obstacles, the effect of S.B. 8 is to force all abortion providers in Texas to cease performing constitutionally protected medical procedures.

These provisions operate—and were intended to operate—as an effective deterrent to provision of pre-viability abortion services in Texas, precluding the vast majority of individuals from accessing this constitutional right. One provider lamented that, "[n]ow that abortion is almost entirely inaccessible in Texas, patients have few options and each of their stories is more heartbreaking than the last."[51] Indeed, it is the dismantling of the provider network that constitutes the undue burden on access to abortion.[52] The same provider noted credibly that "S.B. 8 is like no other abortion restriction or abortion ban we have dealt with before," and its "immediate impact . . .

[50] The Court finds credible the provider's description that "our physicians, particularly the ones that travel from out of state, are concerned that if lawsuits are filed against them, they will be required to report these lawsuits to their professional licensure boards and hospitals in every state where they are licensed, and that they will ultimately lose their professional privileges and credentials. For most of our physicians, the risk was too great to even come to work." (Hagstrom Miller Decl. I, Dkt. 8-4, at 11).

[51] Declarant and abortion provider Amy Hagstrom Miller describes some of these "heartbreaking" cases: "The first patient we saw at our Fort Worth clinic on September 1 was ineligible under S.B. 8. She had a 3-month-old daughter and had just started a new job. She had just left an unsupportive partner and moved in with her parents and feared that if she told them about her pregnancy, they would kick her out. Similarly, we saw a patient on September 1 at our Austin clinic who was so stunned to learn she was 10 weeks LMP and ineligible for abortion in Texas that she was in too much shock to process our suggestions for where to turn for care. We saw another patient last week with consistent periods who had no signs of pregnancy other than a positive pregnancy test. The patient thought she was likely 4-5 weeks LMP but was shocked to learn that her ultrasound showed that she was beyond 13 weeks. The patient already has a young infant at home, less than a year old. We have not heard from any of these patients since they left our clinics." (*Id.*).

[52] (*See* Gilbert Decl., Dkt. 8-2, at 13) ("Southwestern has weathered short-term abortion bans in Texas before and barely survived. Last year, when Southwestern was shut down for approximately three weeks due to the COVID-19 executive order shutdown, the impact was severe. Repeatedly having to stop and restart services, as various court orders allowed us to reopen only to be shut down again hours later, created absolute chaos for our patients and staff. The COVID-19 shutdown took an immense emotional toll on our staff and drove our clinic to the financial brink. . . . [I]t took us months to work through the patient backlog. Even then, we were unable to see every patient who needed our services.").

on our patients, staff, and physicians has been truly catastrophic." (Gilbert Decl., Dkt. 8-2, at 13). Indeed, as a Planned Parenthood Provider credibly described the state of affairs:

> both practically and emotionally, abortion providers and their staff are now barely hanging on due to S.B. 8. Our staff are doing all they can to help patients navigate this awful law, including working long hours to get patients in as quickly as possible for their appointments. They are doing their best to provide as many ultrasounds on a daily basis as they can in order to catch those few patients where cardiac activity will not be detected, but there are only so many working hours in a day and our staff are still dedicated to providing high-quality care. This experience has also been traumatic for our physicians and staff as they must tell patient after patient that they cannot care for them, despite that, medically, they should be able to and, indeed, went through significant medical training to provide the very medical care that their patients are asking them to provide and are entitled to receive. They are essentially being forced to inflict trauma on their patients.

(Linton Decl., Dkt. 8-5, at 14–15). The law appears to be having the desired chilling effect: the provider describes a staff "plagued by fear and instability" who "remain seriously concerned that even providing abortions in compliance with S.B. 8 will draw lawsuits from anti-abortion vigilantes or others seeking financial gain under S.B. 8's bounty hunting scheme." *Id.*[53] As one provider aptly observed, the days since the ban went into effect "have been nothing short of agonizing for our staff. No one should be forced to risk overwhelming costs of litigation and crushing penalties to

[53] Gilbert continues, "I am one of only two physicians, out of the eight physicians that typically provide care at our clinic, who is currently providing abortions at Southwestern. While our other physicians are willing to provide S.B. 8-compliant abortions, we feel constrained to limit the potential liability of our physicians to lawsuits brought under S.B. 8 by having fewer physicians providing abortions. Bringing in additional providers also adds to the clinic's costs at a time when Southwestern confronts an unknown period of higher security costs and significantly reduced patient volume." *Id.* Further, "[b]ecause S.B. 8 allows almost anyone to sue me, Southwestern, and the staff who work with me, I continue to worry that just by coming to work, I risk exposure to multiple lawsuits . . . ." (*Id.* at 17–18).

provide safe and common health care. No one should be subject to state-directed harassment for caring for patients in need." (Linton Decl., Dkt. 8-5, at 12).[54]

Providers understand that "[e]ven if there is no basis for the suits [they] know will be filed, . . . [their] physicians, nurses, and staff will be forced to travel to the claimant's home county, hire a lawyer, and spend months, if not years, defending themselves." (Hagstrom Miller Decl. I, Dkt. 8-4, at 7).[55] Indeed, "The costs of defending against what could be a flood of lawsuits in every county in Texas would be impossible for abortion providers to absorb, even if they were to win each case." (Linton Decl., Dkt. 8-5, at 8). The threats are not limited to litigation itself—"almost immediately

[54] "Abortion providers deal with relentless harassment from abortion opponents, including as they come into work each day, which has increased since S.B. 8 took effect. For example, Texas Right to Life ('TRTL') launched a 'whistleblower' website to recruit S.B. 8 claimants, as well as 'informants' to support S.B. 8 enforcement suits by providing information about abortion providers' and support networks' perceived violations. Though the website, which could previously be found at www.prolifewhistleblower.com, is currently down, TRTL has expressed its intention to quickly restore it. The website stated that '[a]ny abortion performed in violation of the Texas Heartbeat Act is a criminal offense, and any individual or entity that aids or abets an abortion on a child with a detectable heartbeat in Texas is violating the law as well.' It further provided that '[TRTL] will ensure that these lawbreakers are held accountable for their actions' and invited visitors to '[j]oin the Team of Pro-Lifers working to enforce' S.B. 8 and '[s]end an anonymous tip or information about potential violations' of the Act. Recruits who clicked on the button inviting them to become a 'team member' by submitting contact information were asked: 'How are you interested in enforcing the Texas Heartbeat Act?' with response options of 'Litigating,' 'Plaintiff,' 'Data Collection,' and 'Other' and they were also asked to provide the 'best time for a TRTL team member to call you to talk about enforcing' S.B. 8. Individuals who selected the option to send an anonymous tip were asked to provide 'as much detail as possible' on 'how [they thought] the law ha[d] been violated," as well as "how [they] obtain[ed] this evidence' and the 'Clinic or Doctor this evidence relate[d] to.' Our staff have also had to endure protestors trespassing; conducting drone surveillance; blocking roads, driveways, and entrances; yelling at staff and patients; using illegal sound amplification; video recording staff, staff vehicles, and license plates, as well as surreptitiously recording inside the health center; trying to follow staff home; and more. On the first day S.B. 8 went into effect, we had to call the police because a protestor was blocking the driveway with his vehicle. He came back the next day, and even had a porta-potty delivered. The next day, someone trespassed on the property and vandalized a few of our signs. We are also aware that someone created a forum on Reddit where numerous individuals posted discussions on how they could be bounty hunters under S.B. 8 and turn doctors into the police, which has since been taken down." (Linton Decl., Dkt. 8-5, at 13–14).

[55] One provider notes credibly, "[w]hile we generally have low staff turnover, ever since S.B. 8 started receiving public attention, staff began to express serious fears that their jobs would no longer exist . . . . [W]e have lost around one staff member every week, including two of our clinic directors. . . . Our physicians in particular, many of whom are licensed in multiple states and travel to Texas to provide patient care, are extremely concerned about their potential personal and professional liability under S.B. 8. Our physicians and nurses worry that lawsuits under S.B. 8 might trigger investigations and other repercussions, including loss of licensure, that will follow these professionals for the rest of their careers, even if they choose to practice outside Texas." (Hagstrom Miller Decl., Dkt. 8-4, at 10–11).

after" S.B. 8 was signed into law, vigilantes began harassing providers based on their newfound enforcement authority.[56] The deterrent effect of the law has translated directly to a "devastating" impact as clinics must "turn away patients in droves . . . ." (Gilbert Decl., Dkt. 8-2, at 14–15). Providers are "only able to help a fraction of the patients [they] ordinarily would see and treat, as most patients . . . are beyond the gestational limit imposed by S.B. 8." Indeed, one provider stated that "[i]f the law is not struck down soon, [her] clinic in Dallas will inevitably close." *Id.* at 14.[57]

[56] "In late May, an individual snuck into the Austin Clinic by following a patient through the front door to evade our security. Once inside, the individual distributed a letter about S.B. 8 to our Austin Clinic staff and those present in the reception area. . . . The individual was asked to leave, but once outside, the individual was joined by another person and both individuals continued to distribute the letter to staff outside, still on the clinic's private property. The letter gives a phone number and email address for individuals to use to report violations of S.B. 8 and states: 'please call or send us a text at any time.' The threats have continued despite our public statements that we would be and now are in compliance with S.B. 8. On the day before S.B. 8 took effect, our Fort Worth clinic opened at 7:30 am and was working until 11:56 pm to serve as many patients as possible before the law took effect at midnight. Our physician and staff were in tears, terrified that they would not be able to see every patient who was still sitting in the waiting room before the deadline. All the while, our clinic was under surveillance from anti-abortion activists stationed outside. Protesters flooded the areas around our clinic, shining flashlights into the cars of patients as they entered and exited the parking lots. After nightfall, the protesters brought in giant lights and shined them at the clinic, illuminating the parking lot and the building in order to track our every move. The protesters called the fire and police departments multiple times throughout that day in an attempt to stop our work or slow down the last abortions we would be able to provide after six weeks LMP. Since September 1, the threats have only gotten worse. Several days before S.B. 8 took effect, my staff brought to my attention a website run by Texas Right to Life called prolifewhistleblower.com. . . . The website requests information from individuals interested in enforcing S.B. 8, including those interested in "litigating" or becoming a "plaintiff." . . . My staff also identified a subreddit called 'TexasBountyHunters' where individuals have posted plans to enforce S.B. 8. In addition, WWH and WWHA have seen an uptick in protester activity at our clinics, and threatening calls, emails, and social media posts. For example, one message we received read: 'It's a shame we can no long murder innocent babies in their mother's womb. If your women are so about 'Their body, their choice' then let's make the law say this: As long as a woman is willing to die along with her unborn child we'll allow her to get rid of it. You see? It's not about her body at all, it's about the body of the unborn child which is a human at conception. Thank God for the sane people that still exist in this world. You should be in prison for life.'" (Hagstrom Miller Decl. I, Dkt. 8-4, at 10–11).

[57] Another provider expressed that "[i]f we are not able to resume providing abortion services soon, I am worried about our ability to retain staff. Even before S.B. 8 took effect, the Act was already taking a negative toll on our ability to recruit new staff. PPCFC has already had two prospective staff members decline job offers specifically because of fear of S.B. 8." (Linton Decl., Dkt. 8-5, at 14).

With all the turmoil and uncertainty caused by S.B. 8, "[p]atients are panicked, both for themselves and their loved ones." (Gilbert Decl., Dkt. 8-2, at 15).[58] Even those who attempt to comply with the law may be harmed. For example, one provider describes seeing a patient "who has been taking the same contraception consistently for a decade and nonetheless found herself pregnant. She was only 5.4 weeks LMP but had detectible cardiac activity, so I had to turn her away." *Id.* The 24-hour waiting period required under state law "is also compounding the burden of S.B. 8" as patients "become ineligible for abortion care between their first and second appointments." *Id.* at 16.[59] One provider describes patients "devastated to learn that after two appointments, . . . their only option for abortion care is to leave Texas, which not all can do."[60] Moreover, "because under S.B. 8 patients only have a very limited window of time after discovering they are pregnant to decide that they want an abortion, S.B. 8 is forcing some patients to make a decision about their abortion before they are truly ready to do so." (Gilbert Decl., Dkt. 8-2, at 17).[61] One provider credibly describes "particular[] concern[s] about the unaccompanied migrant teenagers

[58] Gilbert continues, "I saw a patient for counseling who was eligible for an abortion under S.B. 8 but nonetheless broke down in tears because she was so scared that her sister, who was planning to drive her to the clinic the next day for her procedure, would be sued under S.B. 8 for aiding and abetting. Other patients are making appointments before they have received a positive pregnancy test, seeking unnecessary blood tests and procedures, for fear that if they are pregnant, they will be unable to access care." (*Id.*)

[59] The Court finds credible Gilbert's statement that one in fifteen patients becomes ineligible for abortion under S.B. 8 between their first and second appointments. *Id.* Further, according to a provider, Planned Parenthood "call centers also inform patients that if there is embryonic cardiac activity, they will have to seek abortion out of state, and so if they think the pregnancy is greater than six weeks LMP, they may come in for an ultrasound to help them determine the gestational age of their pregnancy, but we will not be able to perform their abortion. Explaining the new law to people and the fact that it means we cannot provide them an abortion, and then helping them navigate a way to get out of state and get to another provider, means that calls with patients are taking twice as long as they used to. As a result, our hold times have increased significantly, which in turn makes it harder for us to reach and schedule those people who may still be eligible for an abortion but have a short window to get in for an appointment before they are banned." (Linton Decl., Dkt. 8-5, at 9).

[60] "One patient, for example, showed cardiac activity when she arrived for her abortion and upon learning she was ineligible for an abortion, she broke down in tears." (*Id.*)

[61] A provider notes that one of her clinics "already had a woman who came to one of our health centers reporting that because she had no money or resources, she said she had turned to the internet where she found some 'abortion tea.' She took it, and it didn't work. The ultrasound showed embryonic cardiac activity, and so we had to tell her that her only option was to try and travel out of state." (Linton Decl., Dkt. 8-5, at 12).

who often present at our . . . clinic, as the logistical barriers to these patients' care mean that they are unable to reach us for treatment prior to 9 weeks LMP," at least in part because "the judicial bypass process [for minors] usually takes at least 2 weeks. The majority of these patients do not become pregnant through consensual sex and tend to be much younger than other minor patients we treat." (Hagstrom Miller Decl., Dkt. 8-4, at 8-9).

Even though the ban has been in effect for just over a month, necessarily limiting the data available, this harm is still far from speculative. One provider stated that S.B. 8 "shut down about 80 percent of the abortion services we provide." (Newman Decl., Dkt. 59-1, at 4–6) (citing Alan Braid, *Opinion: Why I Violated Texas's Extreme Abortion Ban*, Wash. Post (Sept. 18, 2021), https://www.washingtonpost.com/opinions/2021/09/18/texas-abortion-provider-alan-braid/). Others place the figure higher: between 85% and 95% of all abortions previously provided in Texas are now prohibited by law. (*See* Hagstrom Miller Decl. I, Dkt. 8-4, at 3-4; Gilbert Decl., Dkt. 8-2, at 5; Linton Decl., Dkt. 8-5, at 6). This burden is far more extreme than that created by H.B. 2 in *Hellerstedt*, which caused half of abortion facilities to close, doubled the number of women living more than 50 miles from a clinic, and increased the number of women living more than 150 miles from a clinic by more than 350%. *Hellerstedt*, 136 S. Ct. at 2296.[62] The law thus has both the "purpose" *and* the

[62] As a whole, the situation is even more dire for minors: "[n]ow that the school year has begun, minors who cannot confide in their families about their pregnancies or desire for an abortion are unable to explain a protracted absence from school. Thus, S.B. 8 condemns minors to carry to term or take matters into their own hands." (Rupani Decl, Dkt. 8-8, at 8). Indeed, "[t]he near impossibility of obtaining an abortion within the time permitted by the Act is all the more clear for our minor patients. Minor patients without a history of pregnancy may be less likely to recognize early symptoms of pregnancy than older patients who have been pregnant before. In addition, some of these patients cannot obtain written parental authorization for an

"effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Casey*, 505 U.S. at 877. If this situation does not constitute an undue burden, it is hard to imagine what would.

The State makes a half-hearted attempt to establish that pregnant persons are still able to access abortions since S.B. 8 went into effect on September 1. But its assertions only illustrate how effective the ban has been. The State cites *only one* case of an abortion being performed in post-S.B. 8 Texas. (Resp., Dkt. 43, at 50) ("Even as everyone is adjusting to the new law, women have been able to obtain post-heartbeat abortions. Dr. Alan Braid, for example, reports that at least one of his patients received an abortion 'beyond the new legal limit[.]'")). With this claim, the State appears to argue that abortion services remain available because providers are willing to act in violation of S.B. 8—in other words, the law is constitutional because people will violate it. The absurdity of this reasoning speaks for itself. Moreover, the abortion in question was a unique case, as it was seemingly performed to invite publicity of the unconstitutional law. (Newman Decl., Dkt. 59-1, at 4–6) (citing Alan Braid, *Opinion: Why I Violated Texas's Extreme Abortion Ban*, Wash. Post (Sept. 18, 2021), https://www. washingtonpost.com/opinions/2021/09/18/texas-abortion-provider-alan-braid/); (Hagstrom Miller Decl. II, Dkt. 59-2 at 2 ("To my knowledge only one abortion in violation of S.B. 8 has occurred since September 1.")). Even if this was not the only prohibited abortion to take place,

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abortion as required by state law and must obtain a court order permitting them to receive care. Tex. Fam. Code §§ 33.001–33.014. A court may take up to five business days to rule on a patient's petition to bypass the state's parental-consent law for abortions, *id.* § 33.003, not including any time that may be necessary for a minor patient to appeal an unfavorable decision. That process cannot realistically happen before a patient's pregnancy reaches 6 weeks LMP." (Linton Decl., Dkt. 8-5, at 7). According to Linton, "the law is having a particularly burdensome effect on minors who need a judicial bypass. We have already seen minors who do not show embryonic cardiac activity at their initial ultrasound appointment, but will inevitably show cardiac activity by the time that they come back for the abortion because it will take them days to get a judicial bypass. These patients are so desperate, and we are worried that they will do something unsafe because the only alternative for them to get an abortion is to go out of state, which is incredibly difficult for a minor to do on their own. It is also our experience that some minors seeking a judicial bypass do so because they cannot tell their parents about their pregnancy and abortion decision for fear of violence. We worry S.B. 8 will force them into a dangerous situation." (Linton Decl., Dkt. 8-5, at 11).

the absence of other examples in a state which ordinarily would have seen thousands of abortions in a month's time makes clear the immediate chilling effect of the law.[63]

iii. Out-of-State Recourse

The State further asserts that Texas residents can still travel to other states to access abortion care, which nullifies the likely unconstitutionality of the ban. (Resp., Dkt. 43, at 51). It argues that the fact that people are travelling across state lines to obtain abortions, which may ultimately force other states to expand their capacity, proves that abortion is still accessible and will remain so. (*See* Tong Decl., Dkt. 8-6, at 3–5). But forcing people to make expensive and otherwise unnecessary journeys to secure abortions cannot render this law constitutional.[64] And even if they try to accommodate the influx, other states may not be able to expand their capacity to keep pace.[65] The

[63] To be clear, the claim of constitutional infirmity does not arise out of the existence of a state tort law on its own, as the State suggests with its puzzling analogy to *New York Times v. Sullivan*, 376 U.S. 254 (1964) and *Snyder v. Phelps*, 562 U.S. 443 (2011). (*See* Resp., Dkt. 43, at 69; Hr'g Tr., Dkt. 65, at 70). It is the chilling effect of the state law that creates the grave constitutional concern here, in contrast to the comparatively innocuous defamation and other tort laws at issue in the cases the State cites. Here, review of the tort law is unavailable through the ordinary process available in those cases because the abortion services that would result in civil actions have been coerced out of existence.

[64] (*See* Hagstrom Miller Decl. I, Dkt 8-4, at 8) ("Based on our prior experiences with clinic shutdown laws, we know that the majority of our patients will not be able to travel out of state to obtain an abortion due to their work, school, family, or childcare responsibilities and the high costs. In addition, many of our patients have cited fears about travel during the COVID-19 pandemic or an inability to travel due to COVID-19 as one of the many reasons they cannot travel out of state for care."); (Gilbert Decl., Dkt. 8-2, at 16) ("I talked to a colleague in Alabama who saw a patient last week from Dallas who drove ten hours to get to her, only to be forced to wait several days for her procedure due to Alabama's 48-hour waiting period.").

[65] A provider in Oklahoma and Kansas explained that her staff were "working hard to expand our capacity and increase the number of patients we can serve at both clinics. . . . [by] working toward adding more clinic days at both locations. Hiring and scheduling physicians and other support staff is no simple feat, though. In both Kansas and Oklahoma, it is difficult to find in-state physicians who are willing to provide abortion care because of the documented stigma, harassment, and violence abortion providers face. As a result, we must recruit doctors from other states who will travel to our clinics. These physicians work with us on a part-time basis and maintain medical practices and personal lives in their home states. It is challenging to find out-of-state abortion providers willing to travel to our clinics, and even when we do find them, they must become licensed in Kansas or Oklahoma before they can provide there. Our clinics also have a critical need for additional support staff. In particular, we need more nurses . . . . Hiring this medical staff during a pandemic is challenging to do. Trust Women Oklahoma City has already asked its physicians to increase their clinic days to provide abortions three days each week. Some doctors are able to make this arrangement, but others cannot. If S.B. 8 is not blocked, we will work toward providing abortions four days per week (up from two days), but such a move is entirely dependent on our ability to hire and schedule new physicians and staff. But

State's examples only serve to illuminate just how unduly burdensome this ban is in practice. Indeed, "[w]hile some patients have been able to pull together the resources to travel out of state for medical care, many others cannot do so and are being forced to carry their pregnancy to term against their will or to seek ways to end their pregnancies on their own." (Linton Decl., Dkt. 8-5, at 5). And this says nothing of the burden on patients and providers in other states. The Court finds, as one provider credibly described, "[a]bsorbing thousands of Texas residents will have a domino effect on access and wait times, and will interfere with our ability to provide timely reproductive and sexual health care to the communities we currently serve. Thus, patients living in [other states] must delay preventative care or go without . . . ." (Cowart Decl., Dkt. 8-7, at 8).

Many patients are unable to travel to other states for any number of reasons, from immigration status to dangerous family situations to financial constraints.[66] Indeed, "[t]raveling out of state for abortion care presents significant, if not insurmountable, logistical and financial challenges" such that "even the lucky ones able to travel are both delayed in obtaining care and need to travel hundreds more miles to reach an abortion provider." (Hagstrom Miller Decl., Dkt. 8-4, at 9).[67] And delay is more than a minor inconvenience: patients must "continue to cope with the physical symptoms of pregnancy, which for many include debilitating nausea and vomiting[;]" face the risk that "others will discover the pregnancy, including abusive partners or family members[;]"

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even if the two Trust Women clinics do expand their capacity, I fear that we still will not be able to serve Texans and other out-of-state patients affected by S.B. 8." (Tong Decl., Dkt. 8-6, at 8–9).

[66] (*See* Hagstrom Miller Decl. I, Dkt. 8-4, at 4) ("A majority of patients at the McAllen Clinic are Spanish speakers, and many face immigration-related restrictions on traveling outside of the Rio Grande Valley. For example, while many of the patients are in this country legally, their visas prohibit them from traveling outside of the Rio Grande Valley, so they cannot travel to New Mexico or even to San Antonio for any reason, including to access abortion services."); (Gilbert Decl., Dkt. 8-2, at 14–15) ("[T]here have been multiple undocumented patients who were ineligible for an abortion under S.B. 8, but who stated that traveling out of state was not an option for fear of being stopped by border patrol and deported. Another patient said she could not travel out of state because she could not tell her unsupportive family that she was having an abortion and 'disappear for a few days' without an explanation.").

[67] "For example, we saw one patient in McAllen who had already made a backup appointment in Oklahoma, an 11-hour drive away. I have also spoken to colleagues in Michigan, Florida, New York, New Mexico, and Georgia who have all seen patients from Texas in the last week." (Hagstrom Miller Decl. I, Dkt. 8-4, at 9).

deal with increasing costs and medical risks of both pregnancy and abortion with increasing gestational age; and "cope with the fear of not being able to obtain abortion care in time (based on other states' gestational age limits, as most of the states surrounding Texas ban abortion after 22 weeks LMP)—and of the life-altering consequences of having to go through childbirth against their will." (Hagstrom Miller Decl., Dkt. 8-4, at 9). The increased travel burdens have forced more Texans to turn to practical support organizations for financial and other support.[68] The director of one non-

[68] One out of state provider credibly described some of the practical obstacles: "We have also seen patients who are homeless and face tremendous difficulties navigating how to travel a long distance to get an abortion. One Texas patient, for example, told us that by the time they realized they were pregnant, they could not have an abortion under S.B. 8 but they did not have any funds to travel out of state. The patient told us they felt defeated, but knew that having an abortion was the best choice for them for a number of reasons. Fortunately, we were able to get them an appointment at our health center in Colorado and provide assistance for them to get there. Sadly, this level of personal and individualized support will simply not be possible for everyone who contacts us (and there are so many more who will never contact us). Carless individuals trying to find transportation to our health centers from Texas are also experiencing numerous obstacles to travel. For example, we recently provided care to a Texas patient who was 7 weeks pregnant, but who did not have her own credit card to rent a car (which many rental companies require) in order to travel to New Mexico for an appointment. Although the patient is employed full-time, saving the funds to rent the car and pay for gas (in addition to the cost of the abortion) was difficult for her. The patient told us she was ultimately able to secure a rental car by using a friend's credit card, and drove alone out and back to her appointment in the same day—over 1000 miles round trip—because she didn't have paid time off work and couldn't afford to miss the hours." (Cowart Decl., Dkt. 8-7, at 5).

profit has witnessed the challenges her clients must face,[69] all while contending with potential liability under S.B. 8, and dwindling funds available to support patients in need.[70]

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[69] "The number of callers seeking assistance . . . has shot up from approximately ten per week to ten to fifteen per day. All but one has been unable to obtain an abortion in Texas because no abortion provider is offering abortion care in the state after approximately six weeks of pregnancy, and virtually all our clients are past six weeks. As a result, our callers are frantically trying to secure the resources needed to attend abortion appointments out of state. By driving virtually all Texas residents out of state for abortion care and saddling abortion facilities closer to various areas of Texas with long wait times, S.B. 8 has forced our callers to secure appointments in farther and farther locations, including Tulsa and Oklahoma City, Oklahoma; Wichita, Kansas; Santa Fe and Albuquerque, New Mexico; Denver, Colorado; and Seattle, Washington. Traveling to any of these locations from Texas has been much more expensive, logistically demanding, and nerve-wracking for our clients than traveling within the state, particularly during the COVID-19 pandemic. . . . The out-of-state travel precipitated by S.B. 8 has also required lodging spanning multiple days, added food costs, extended time away from work depriving clients of critical wages and jeopardizing their jobs, extended time away from children requiring alternate care arrangements, extended time away from home making it difficult to conceal a pregnancy or abortion from an abuser, and extended time away from school compromising minors' confidentiality before their parents.

One of our clients obtained an ultrasound . . . only to learn there was cardiac activity and she would be unable to obtain an abortion in Texas. To do so, she traveled almost 200 miles roundtrip within the state. Since then, she has struggled to secure enough time off of work to leave Texas. The client's appointment is not for another three weeks, in Oklahoma City, Oklahoma, which will require her to make close to a 1,000-mile round-trip for abortion care. . . . Another client has an appointment today in Albuquerque, New Mexico and called us in a panic yesterday because, despite fighting tooth and nail, she had been unable to come up with the funds for a hotel or any ground transportation. Fortunately, we were able to work with another practical support organization to make sure she could obtain her abortion. . . . Another consequence of S.B. 8 is that most of our current clients must end their pregnancies without the support of loved ones, who can rarely make lengthy trips without substantial financial and practical support either. . . . [O]ur clients now have to choose between obtaining earlier appointments in even more distant locations or delaying their abortion care even longer to get an appointment closer (but not close) to home. Most of our clients attempt to travel farther because they are committed to ending their pregnancies as soon as possible. . . . One Texan faced with this dilemma, piled her children into her car and drove over 15 hours overnight to obtain a medication abortion in Kansas rather than struggle to patch together the money needed for air-fare and childcare or remain in limbo. Another Texan traveled 12 hours round-trip to Oklahoma during the day to get her procedure because she did not want her partner to know and was scared he would find out if she was not home overnight." (Rupani Decl., Dkt. 8-8, at 2).

[70] "S.B.8 has constrained [the organization's] ability to increase its budget to match the surge in callers and greater scope of their needs. In the seven business days thus far in September, we have already spent $10,000. We estimate that we will expend at least $25,000 before October, or a minimum of $10,000 more than usual. Yet, at least fifteen potential donors have expressed fear that funding . . . . could be understood as aiding or abetting under the statute. Accordingly, we have been unable to increase the number of callers we help since S.B. 8 took effect." When [the organization] lacks the resources to help a caller leave the state for abortion care, we refer them to other practical support organizations throughout the country. Because these organizations are serving the same influx of Texans, however, they too are often at capacity. Several callers have been unable to obtain assistance from any of us and thus unable to leave Texas for an abortion. Notably, almost all of them have at least one child at home and have expressed that they cannot afford to care for their existing children if they are forced to have another. In my experience, these callers will carry to term against their will if S.B. 8 remains in effect." (*Id.* at 7–8)

Texas residents forced to leave the state must also contend with the abortion restrictions and backlogs in other states. The Court finds credible the evidence showing that the inundation of Texas patients overburdens abortion services in other states, many of which are already stretched to the breaking.[71] For example, one provider in Oklahoma described the debilitating pressure on that state's limited abortion care resources. Before S.B. 8 went into force, her clinic provided abortions to approximately ten Texas patients per week, totaling about one quarter of their patients. (Tong Decl., Dkt. 8-6, at 4). Since September 1, however, there has been a "dramatic increase in patient volume": "the clinic's call volume has more than doubled from approximately 15 patient appointment calls per day to 30 to 40. About two-thirds of our patient appointment calls now come from Texas patients seeking abortions that are unavailable throughout their home state." (*Id.*). The clinic is scheduling at capacity but can accommodate no more than 40 patients per day and 80 per week. Less than two weeks after the law went into effect, the clinic "has been forced to delay patients' abortions because of the volume of appointments needed." (*Id.*).[72] A provider at two Planned Parenthood facilities in Oklahoma credibly expressed similar sentiments:

> I have treated numerous individuals who reside in Texas and who have been forced to travel to Oklahoma to terminate their pregnancies. The surge of Texans that we have provided abortions to in our Oklahoma health centers since September 1 is unprecedented, and the demand only continues to grow. . . . [T]his is causing our schedules to become very

[71] In neighboring Oklahoma, only one clinic in the state provides abortions after approximately 18 weeks LMP. (Tong Decl., Dkt. 8-6, at 3). As Tong describes, "[d]ue to Oklahoma's burdensome anti-abortion restrictions, there are only four abortion clinics in the state, all of which are located in Oklahoma City and Tulsa. Pregnant people in rural areas of Oklahoma, including the panhandle and southwestern corner of the state, must travel hundreds of miles to reach the nearest abortion provider. Very few doctors who live in Oklahoma are willing to provide abortion care. The regulatory requirements are extremely burdensome, and physicians who do provide abortions are subject to discrimination in the medical and local communities, harassment, and threatened and actual violence. . . . Trust Women Oklahoma City is therefore staffed entirely by Oklahoma-licensed physicians based in other states who travel to Oklahoma City to provide abortion care. . . . As a result, Trust Women Oklahoma City is able to offer abortion appointments only two days each week." (*Id.* at 2–3).

[72] "Before September 1, if a patient called on Monday for an appointment, the clinic would generally be able to schedule the patient for an abortion on a Thursday or Friday of the same week (with the mandatory 72-hour delay required by Oklahoma law). Now, the clinic is scheduling patients for appointments three weeks in advance—a significant delay for a time-sensitive medical procedure, and a delay that was extremely rare before September 1." (*Id.*).

> backlogged and I fear that we will not be able to continue to serve our existing patient population in Oklahoma in a timely manner given the overflow of patients coming from Texas. I believe this will force many patients to have abortions later in pregnancy, pressure patients from communities in Oklahoma to scramble to seek care in other states farther away, influence some patients to attempt to terminate their pregnancies outside the medical system altogether in unsafe ways, or result in people carrying unwanted pregnancies to term.

(Yap Decl., Dkt. 8-9, at 3).[73] The provider also notes credibly that, among the obstacles to obtaining an abortion in Oklahoma, the state has a 72-hour waiting period, making the travel prohibitively burdensome or expensive for some. (Yap Decl., Dkt. 8-9, at 5).[74] The impact on the Oklahoma clinics is stunning:

> Since S.B. 8 took effect twelve days ago, I was the sole provider at our Tulsa and Oklahoma City health centers . . . and treated 69 patients who reside in Texas. In the days leading up to S.B. 8's effective date, I also treated many patients from Texas who had heard about the law in the news and were already scared . . . . [I]n the first six months of 2021 we treated a total of 175 Texas residents. . . . [W]e saw 40% of the total number of patients from Texas that we would normally see in six months in just twelve days. And since S.B. 8 took effect, we have seen an overall staggering 646% increase of Texan patients per day compared to the first six months of the year. Currently, people who are traveling from Texas to get an abortion in Oklahoma are taking up at least 50% (and on some days nearly 75%) of the appointments we have available at our Oklahoma health centers. . . . Indeed, there are over 240 Texans that have made appointments to . . . this week and next week.[75]

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[73] The declarant is "the only abortion provider at our Tulsa health center" and must "occasionally travel to Oklahoma City to provide abortions when not other provider can." The Oklahoma City Planned Parenthood facility relies on "out-of-state doctors who each travel to Oklahoma to provide care a few days per month." (*Id.* at 4). The facilities have provided more than 1,300 abortions in 2021. (Tong Decl., Dkt. 8-6, at 3).

[74] "We have had at least two patients from Texas make appointments to have a medication abortion but after they had traveled to our Tulsa health center, we determined that they were ineligible for a medication abortion and had to be rescheduled for another day to get a procedural abortion. This meant they had to travel back to Texas, and then make another round trip from Texas to Oklahoma—traveling hundreds of miles to get an abortion. We had to reschedule one of these patients for one week later because—due to her work schedule—the only day she could make the long trip to Oklahoma was the following Saturday. This is a concern we have heard from other Texas patients, too. Our schedule was already booked but we made an exception because otherwise this patient would have had to wait two weeks, forcing her to have a more expensive procedure, which she said she could not afford." (Tong Decl., Dkt. 8-6, at 7).

[75] The provider continues his credible description, "on Saturday, September 10, I provided abortions at our Tulsa health center and of the 28 patients that received abortions, 17 were from Texas. The day before when I provided abortions in Oklahoma City, of the 30 patients who received abortions, 23 of those patients were from Texas. We expect this trend to only worsen over the coming weeks. . . . Specifically, for the week of September 13, there are 101 people scheduled to have abortions at our Tulsa health center, of which 52 are from Texas. And at our Oklahoma City health center, there are 219 people scheduled to have abortions, of which 137 are people who live in Texas." (Yap Decl., Dkt. 8-9, at 6). Further, "[b]ecause our schedules in Oklahoma are quickly filling up, we have also begun telling people that they can travel to our health centers in Kansas, or even Arkansas, to get an appointment sooner." (*Id.* at 9).

This provider echoes the concern that "[p]regnant people from Texas are scared and are frantically trying to get appointments. They are doing everything they can to get to a state that will allow them to terminate their pregnancies." (*Id.* at 5).[76]

Similarly, in Kansas, a clinic that previously provided 20-40 abortions per week, and few to Texas residents, has seen a crushing increase in patients.[77] Since S.B. 8 took effect, "the clinic's total call volume has doubled, and approximately half of our calls now come from Texas patients seeking abortions that they are no longer able to obtain in their home state. That clinic, Trust Women Wichita is scheduling as many abortion procedures as it can—approximately 30 patients per clinic day, or 60 patients per week." (*Id.* at 5). About half of its patients now are from Texas, traveling from as far as San Antonio and Houston—some travel 600 miles each way simply to obtain the pills

[76] The provider continues, "What I have seen unfold since S.B. 8 took effect has been absolutely devastating. The patients that are able to make it to Oklahoma to get their abortion are having to make substantial sacrifices and overcome numerous obstacles, including struggling to come up with the funds to make the trip to Oklahoma. They are also scared that someone may find out that they had an abortion when they go back home to Texas and are unsure of what could happen to them under S.B. 8. Those patients who are seeking abortions in the context of intimate partner violence or other family violence are risking more than they already do in order to travel out of state to end their unwanted pregnancies. People are also worried about having to travel long distances in the middle of a pandemic and what that could mean for the health and safety of themselves and their families. And I too fear that this increased travel puts myself, our staff, and our patients at greater risk of contracting COVID-19.

I also know that we are seeing only a fraction of the people in Texas who are seeking to have an abortion, with some finding care in other states and others who simply cannot travel out of state or are afraid to do so. I fear that many people, especially those with the fewest resources, will not be able to obtain safe abortion care at all and will either seek to terminate their pregnancies themselves outside the medical system, or be forced to carry unwanted pregnancies to term. Abortion is one of the safest medical procedures, but by forcing patients to travel long distances and likely delay their procedures, Texas is endangering its citizens. Not only is there no medical basis for this ban, but it is already inflicting serious hardship and trauma on patients who are making very personal decisions that are right for them and their families." (*Id.* at 10).

[77] "Trust Women Wichita provides abortion care to approximately 1500 patients per year. . . . There are only four abortion clinics in Kansas, serving the state's nearly three million residents, and all four clinics are in the Wichita or Kansas City metropolitan areas. Trust Women Wichita currently schedules patients for abortions two days each week. Our schedule is limited by the availability of our physicians, nearly all of whom fly into Wichita from out of state to perform abortions and have other practices in their home states, and the capacity of our nurses and our staff. . . . [I]n 2019, Kansas abortion providers cumulatively provided abortions for only 25 patients from Texas. . . . In 2020, that number soared to 289 because many abortions were unavailable in Texas and Oklahoma for approximately one month." (Tong Decl., Dkt. 8-6, at 5).

for a medication abortion. (*Id.* at 5–6).[78] This influx has resulted in scheduling delays for "most or all" patients seeking abortion services at the clinic, increasing the risks and anxieties associated with the process. (Tong Decl., Dkt. 8-6, at 6) ("Delays can result in adverse mental health consequences for pregnant people who are forced to carry their pregnancies longer than they desired or intended."). And with the overlapping state regulation regimes, a delayed abortion can mean the difference between a medication abortion—only available up to 11 weeks LMP in Kansas—or a procedural abortion, if a patient is able to obtain an abortion at all. (*Id.* at 6–7).[79] The provider was "extremely concerned about [the Oklahoma and Kansas clinics'] ability to provide abortion care to all pregnant people who contact us." (*Id.*).[80]

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[78] An Oklahoma provider relates the same phenomenon: "While historically (before S.B. 8 took effect) the patients we treated from Texas tended to live near the border, we are now seeing patients in Oklahoma who are traveling from all across Texas. I treated one patient, for example, who got in her car at midnight in Texas so that she could drive through the night and make it to Oklahoma in the morning for her abortion appointment, and then she had to turn around the same day to travel back to Texas. Another patient traveled six hours (one way) to get to Oklahoma and said she drove alone because she was worried about asking someone to accompany her in case they could get in trouble under S.B. 8. Just since S.B. 8 took effect, I have treated patients who have traveled from as far as Austin, Houston, Round Rock and San Antonio, which means patients are traveling anywhere from 5 to 8 hours (one way) to get to our health centers in Tulsa or Oklahoma City. . . . I can think of at least one patient who got a last minute ticket to come by plane, and returned back to Texas the same day.

I also treated a patient from Texas who found someone to give her a ride to Tulsa, Oklahoma for her appointment, but the trip took longer than expected and they arrived too late for her to get an abortion that day. We managed to accommodate her on the Oklahoma City schedule for the next day, but she had to scramble to find a hotel in Oklahoma for the night and get assistance to be able to pay for the hotel. Unfortunately, her ride could not spend the night in Oklahoma so she had to also find help to get to Oklahoma City from Tulsa, and then we had to help her with a bus ticket to get back to Texas. There was only one bus that she could take, so we had to get her in and out of the abortion clinic with enough time to make it to the bus station. . . . And while we are going to extraordinary measures to accommodate patients due to S.B. 8, this is not a sustainable way to operate our health centers." (Yap Decl., Dkt. 8-9, at 5–7).

[79] "Additionally, although abortions at any gestational age are very safe, delays will push patients towards more complicated procedural abortions in their second trimester. Later-stage procedural abortions carry increased medical risks, may involve multiple visits to the clinic over two days, and involve significantly more financial cost to patients—creating even more hardship for the economically and medically vulnerable populations we serve. Most alarmingly, delays in abortion care might prevent some pregnant people from obtaining an abortion altogether. Although we are working to mitigate that possibility, the need to accommodate so many additional patients will mean that Trust Women may become unable to see some patients before they reach the legal gestational limit for abortion in Kansas." (Tong Decl., Dkt. 8-6, at 7).

[80] Further, the clinics "have direct experience with abortion bans in neighboring states and know that the influx of patients in Kansas and Oklahoma will require capacity we do not have. For example, during the

Clinics in Colorado, New Mexico, and Nevada have also seen an increase in Texas patients since S.B. 8 went into force. Ordinarily, Planned Parenthood facilities in these states provide an average of 8.8 abortions for Texas residents per week. (Cowart Decl., Dkt. 8-7, at 3). "Yet, in a one-week period (9/3/21–9/9/21), [the facilities] provided abortion services to 20 Texas patients—which is 53% of [the] typical monthly patient volume [in] less than a third of the month" and "at least 64 Texas residents who have scheduled appointments . . . in the coming weeks . . . ." (*Id.*).[81] To be clear, of these states, only New Mexico shares a border with Texas. Patients are thus undertaking significant travels, in the midst of a pandemic, to access abortion care.[82] In these states too, the constant stream of Texas patients has created backlogs that in some places prevent residents from accessing abortion services in their own communities. As the Planned Parenthood provider explains credibly, a "significant percentage of the appointments available in our relatively small New Mexico health centers are going to Texas residents. . . . [O]n August 31, the day prior to the law taking effect, all of our online abortion appointments for [the] Albuquerque health center were made by

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COVID-19 emergency in 2020, when both Texas and Oklahoma had executive orders preventing pregnant people in those states from accessing abortions, Trust Women Wichita provided abortions to 200 Texans. Both of those abortion bans were short-lived but taught us that we do not have the capacity to accommodate large numbers of out-of-state patients in addition to the patients living in the communities we typically serve." (*Id.* at 8).

[81] According to the credible provider, "this number may be an underestimation as we don't require patients to provide their address or location when making an appointment." (Cowart Decl., Dkt. 8-7, at 4).

[82] Patients from Texas travel incredibly long distances to reach our health centers in New Mexico and Colorado; one patient even traveled all the way to one of our Southern Nevada health centers. For example, we have had Texas patients travel from Fort Worth to Boulder, CO (approximately 790 miles one way); San Antonio to Park Hill, CO (approximately 930 miles one way); and Houston to Fort Collins, CO and Aurora, CO (approximately 1000 miles one way). Even those Texas patients who have come from cities that are closer to the New Mexico border (such as El Paso and Amarillo) are having to make 4-hour drives (one way) to reach our Albuquerque, NM health center. When faced with longer wait times at their "nearest" location within our states, some patients have had to travel longer distances to access the care they need. On average, the Texas patients we have seen since S.B. 8 went into effect have traveled approximately 650 miles (one way) to access abortion out of state." (*Id.* at 4). Moreover, "for patients who are experiencing intimate partner violence, seeking an out-of-state abortion poses numerous challenges. For example, one patient told us that she is discreetly attempting to leave Texas without her husband finding out because he is abusive and she does not want to carry this pregnancy to term. She has told our staff that she is desperate, and is going to extraordinary lengths to scrape together the funds (including selling personal items) to be able to make the additional expenses of an out-of-state trip, but is very worried that her husband will find out given all the logistical planning that she is doing." (*Id.*).

Texas residents." (*Id.* at 5). Further, "[f]rom September 1 to September 11, Texas patients made up close to one-third (29%) of the total abortion patients we saw at our New Mexico health centers." (*Id.*). When New Mexico clinics were similarly overwhelmed by Texas patients following Governor Abbot's shutdown of clinics early in the pandemic, providers were forced to refer New Mexico patients to Colorado clinics, "negatively impacting their ability to seek care closer to their homes in New Mexico."[83] According to credible calculations by a provider, "[i]f we averaged the number of patients seen over the 5-week COVID-19 ban in Texas and assumed the current ban would follow a similar pattern, [we] would expect to see 2,080 patients from Texas per year, up from 458 . . . . This would be 4.5 times as many patients as [we] usually see[] from Texas." (*Id.* at 7). But these smaller clinics simply cannot cope with such an increase in demand;[84] "[e]ven before the pandemic, this would have strained operations and impacted patients from across our region. But . . . the pandemic has put significant strain on our operations and we are not operating today at the same capacity . . . ." (*Id.* at 7). Among other complications, the pandemic has created staffing shortages that further burden abortion care resources.[85] "Thus, despite sound operations, exhausting effort, and deep

[83] "During the approximately five weeks when Texas deemed abortion services non-essential (3/22/20–4/25/20), [Planned Parenthood facilities in the three states] saw 198 patients from Texas where we would have expected only 44 patients based on prior monthly averages. This was a 350% increase over expected patient volume from Texas and is a relevant case study for what we can anticipate since the State's ban on abortions after 6 weeks went into effect. During the time that the COVID-19 executive order was in place, we were referring patients from New Mexico to our Colorado health centers in Durango and Cortez . . . . At its peak during the COVID-19 ban, PPRM saw double the Texas patients in one week (64) than would typically be observed in an entire month. Naturally, the numbers from this five-week period only captured Texas patients who had the means, funding, and could take time away from school, work and other responsibilities to facilitate travel outside of Texas for abortion care and undercounts the true demand for services. For a host of reasons, many people will be unable to make the long out-of-state trips to bordering states at all." (Cowart Decl., Dkt. 8-7, at 6–7).

[84] "[A]ccording to the most recent publicly available data, in 2019, there were 55,966 abortions performed in Texas on Texas residents, whereas in 2019, the total number of abortions performed in New Mexico was 2,735. In 2020, there were 10,368 total abortions performed in Colorado." (*Id.* at 7).

[85] "Currently, we are at 75% staff capacity with significant shortages of licensed providers and support staff. Indeed, right now due to staffing shortages, two New Mexico sites are sharing providers as we work to increase staffing. Dealing with an influx of patients traveling long distances from another state also adds to the stress and concerns our staff have about their own health and safety in avoiding contracting COVID-19." (*Id.* at 8).

dedication to all patients regardless of their zip code, there is simply no way we can increase capacity by that sort of magnitude to absorb tens of thousands Texas patients seeking their important, legal health care." (*Id.* at 8). These circumstances "will inevitably lead to scheduling delays[,]" as the facilities were already scheduling two weeks in advance by mid-September. (*Id.* at 6). Moreover, the clinics in New Mexico and Nevada do not provide abortions after 18 weeks LMP, meaning wait times are even longer for those at later gestational stages.[86] According to the Amici, similar effects are expected to be felt in California and Illinois as well, underscoring the vast geographic reach of S.B. 8's implications. (Br. of Amici, Dkt. 9-1, at 10).

All this is to say that the State does not exist in a vacuum. Indeed, if Texas's neighbors, much less every other state, were to pass laws similar to S.B. 8—which if S.B. 8 is constitutional—they are free to do—there would be no other states to which pregnant people could travel to obtain an abortion. (*See* Newman Decl., Dkt 59-1, at 2) (citing Kurtis Lee & Jaweed Kaleem, *The New Texas Abortion Law Is Becoming a Model for Other States*, L.A. TIMES (Sept. 18, 2021), https://www.latimes.com/world-nation/story/2021-09-18/texas-abortionunited-states-constitution) ("From the Deep South to the Upper Midwest, legislators in many conservative states have started to explore how similar laws could be put in place in the months ahead."). Underscoring the national scope of the harm, Kansas clinics are now struggling to cope with an influx of patients from Louisiana who, prior to the passage of S.B. 8 would have traveled to Texas for abortions, but now must find another,

[86] The provider continues credibly, "[u]nderstandably, people are devastated that they cannot access health care closer to home and that they are having to wait longer and face tremendous barriers than if Texas had not forced abortion providers to shut down. One Texas patient had planned her pregnancy but recently learned that the fetus had an anomaly incompatible with life. She was told by her doctor in Texas that there is no exception under S.B. 8 for her circumstances, and that her only options were either to carry to term with the fetus dying after birth, or to leave the state to receive the needed care to terminate the pregnancy. Understandably, she was stricken with grief in dealing with this added burden. Our patient does not want to incur the trauma of being forced to carry the pregnancy to term, and is hoping to move past this loss to continuing planning her family. Faced with this heartbreaking "option," she decided to make the long trip to Colorado to seek care out of state." (*Id.* at 6).

more hospitable state among the ever-dwindling number. (Tong Decl., Dkt. 8-6, at 6). And laws recently enacted in Oklahoma will, if they take effect, further burden the region's abortion care resources.[87] Even now, an Oklahoma provider "had one woman from Texas who made an appointment . . . but by the time she was scheduled, completed the consult appointment, and made it in for the abortion appointment, . . . learned she was past the gestational age limit by which we could provide an abortion at our clinic[,]" meaning the provider "regrettably had to refer that Texas patient to a health center hours away in Colorado." (Yap Decl., Dkt. 8-9, at 7). Indeed, states across the country have enacted record numbers of abortion restrictions in recent years, including laws that purport to ban all or most abortion services. (*See* Br. of Amicus, Dkt. 9-1, at 26). Given this trend, there are increasingly few places for Texas residents to turn. State lines only provide a refuge so long as different laws exist across them. But the constitutionality of a Texas law surely cannot turn on the policy choices of its fellow states.

iv. Other Provisions of S.B. 8

The "undue burden" affirmative defense also fails to save the law, in the event that the law is understood as a regulation rather than a ban, and assuming that the deterrent effect of the law has not succeeded to the extent that a provider can still be found to perform the procedure. The *Casey* court was clear in defining an "undue burden," explaining, "Because we set forth a standard of general application to which we intend to adhere, it is important to clarify what is meant by an undue burden. . . . To the extent that the opinions of the Court or of individual Justices use the undue burden standard in a manner that is inconsistent with this analysis, we set out . . . the controlling standard." 505 U.S. at 876–77. The affirmative defense written into S.B. 8 "bears no

[87] "Oklahoma has passed five anti-abortion laws, all of which will take effect on November 1, 2021, unless blocked by court order. At least two of those laws would decimate abortion access in the state: (1) H.B. 1102, which is essentially a total ban on abortion that declares provision of abortion to be unprofessional conduct by physicians that carries a penalty of, at a minimum, suspension of medical licensure for one year, and (2) H.B. 2441, which bans abortion at approximately six weeks LMP." (Tong Decl., Dkt. 8-6, at 9).

resemblance" to the *Casey* standard, (Mot. Prelim. Inj., Dkt. 8, at 15), and so cannot bring an otherwise unconstitutional law into compliance with that precedent. Further, it is implausible that this obscure and somewhat unclear provision in the law will be sufficient to convince providers to continue to provide abortions in the face of all of the obstacles discussed above. And unless it has this effect, the affirmative defense—despite its name—does nothing to lessen the undue burden imposed by S.B. 8.

Having found that Section 3's post-embryonic cardiac activity ban is likely unconstitutional, the remaining provisions of S.B. 8 must also be found facially invalid, as this Court declines to comb through S.B. 8 "in piecemeal fashion" after determining that "the statutory provisions at issue [are] facially unconstitutional." *Hellerstedt*, 136 S. Ct. at 2318–19, *as revised* (June 27, 2016). Sections, 6 ,7 and 9 of S.B. 8 are unconstitutional in that they serve no purpose aside from implementing and punishing non-compliance with the six-week ban. For example, the Court need not assess separately S.B. 8's mandate that physicians test for cardiac activity in an embryo before performing an abortion because this requirement has no cognizable state interest aside from "the prohibition on abortion after detection of cardiac activity." *See Planned Parenthood S. Atl.*, 2021 WL 672406, at *1; *SisterSong Women of Color Reprod. Just. Collective v. Kemp*, 472 F. Supp. 3d 1297, 1324 (N.D. Ga. 2020) (remaining provisions of Georgia abortion law invalid where "mutually dependent" on section found unconstitutional). Similarly, the remaining sections of Section 3 that purport to create scheme to enforce the six-week ban have no meaning in the absence of any prohibition of abortions under S.B. 8. *See* S.B. 8 § 171.208(a)(2) (limiting liability to those who aid or abet an abortion "performed or induced in violation of" S.B. 8). As such, Sections 3, 6, 7, and 9 of S.B. 8 are facially invalid in their entirety, and accordingly their enforcement must be enjoined. The same must be true for the entirety of S.B. 8, for "[t]he provisions are unconstitutional on their face: Including a severability provision in the law does not change that conclusion. *Hellerstedt*, 136 S. Ct. at 2319.

The State argues that, should the Court find any provision of S.B. 8 to be unconstitutional, it should sever such provisions from the law and leave the remaining provisions intact. In support of this request, the State cites the severability provision of the law, which confirm that the Texas legislature "intended all provisions . . . to be severable," that it "would have enacted any and all provisions . . . regardless of whether any provisions are subsequently determined to be unconstitutional," and that "each provision is severable." (Resp., Dkt. 43, at 55). However, as the Supreme Court wrote in *Hellerstedt*, "our cases have never required us to proceed application by conceivable application when confronted with a facially unconstitutional statutory provision." 136 S. Ct. at 2319. Such an approach would be "quintessentially legislative work" outside the bounds of the court's ordinary review. *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329 (2006). The State attempts to distinguish the law and its severability provision from those at issue in *Hellerstedt*, but such a distinction cannot stand, because the severability provision of the *very same law* is at issue: Texas Health and Safety Code Chapter 171. In that case and here, the State has attempted to insulate its amendments to that law with substantially the same severability provisions. *Compare Hellerstedt*, 136 S. Ct. at 2318–19 ("The severability clause says that 'every provision, section, subsection, sentence, clause, phrase, or word in this Act, and every application of the provision in this Act, are severable from each other.'. . . It further provides that if 'any application of any provision in this Act to any person, group of persons, or circumstances is found by a court to be invalid, the remaining applications of that provision to all other persons and circumstances shall be severed and may not be affected.'") (*citing* H.B. 2, § 10(b), *with* Resp., Dkt. 43, at 70 ("In section 171.212 . . . , the Texas Legislature explicitly stated that (1) it intended all provisions of chapter 171, in which the heartbeat provisions are located, to be severable, and (2) it would have enacted any and all provisions of chapter 171 regardless of whether any provisions are subsequently determined to be

unconstitutional.")). Here, as there, the Court "reject[s] Texas' invitation to pave the way for legislature to immunize their statutes from facial review." *Hellerstedt*, 136 S. Ct. at 2319.

b. Whether S.B. 8 Violates Preemption and Intergovernmental Immunity Principles

The United States also separately asserts as-applied challenges based on S.B. 8's interference with federal officers and programs that provide or facilitate abortions for those under the programs' ambits. (Compl., Dkt. 1, at 15–24; Mot. Prelim. Inj., Dkt. 8, at 16–22). As the Court has already established the United States' likelihood of success in establishing the unconstitutionality of S.B. 8 broadly, it need not dwell extensively on as-applied challenges to S.B. 8's impact on federal programs. However, it will briefly address this point as it finds the United States has a high likelihood of success in demonstrating that S.B. 8 violates constitutional principles of preemption and intergovernmental immunity. Under the doctrine of preemption, "state laws are preempted when they conflict with federal law." *Arizona*, 567 U.S. at 399 (2012). State laws are also preempted when they "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Aldridge v. Miss. Dep't of Corrections*, 990 F.3d 868, 875 (5th Cir. 2021) (quotations omitted). This doctrine includes cases where "compliance with both federal and state regulations is a physical impossibility." *Arizona*, 567 U.S. at 399 (quotations omitted). In order for a state law to be preempted, it must be in "sharp conflict" with the federal law. *Williams*, 987 F.3d at 198.[88]

Regarding intergovernmental immunity, states cannot "control the operations of the constitutional laws enacted by Congress" nor directly impede the Executive Branch's "execution of those laws." *Trump v. Vance*, 140 S. Ct. 24124, 2425 (2020). States may not subject federal officers to liability by states for carrying out their federal duties. *In re Neagle*, 135 U.S. 1, 62 (1890) (noting that

[88] The preemption doctrine applies to federal regulations as well as statutes. *See, e.g.*, *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 138, 141 (1963).

the Supremacy Clause protects the right of the United States and its officers to enforce federal law without state interference). Further, a state law violates intergovernmental immunity if it "interferes with a federal contractor's ability to discharge" its contractual obligations to the federal government. *Student Loan Servicing*, 351 F.Supp.3d at 73–74.

In response to the United States' arguments that S.B. 8 is preempted by federal law and violates principles of intergovernmental immunity, the State's primary argument is that "Texas courts are unlikely to interpret the Act to apply the federal government . . ." (Resp., Dkt. 43, at 39).[89] However, this argument is ineffective for two reasons: First, S.B. 8 does not explicitly disclaim its applicability to the federal government. And second, without an explicit disclaimer, the doctrines of preemption and intergovernmental immunity are violated, regardless of whether anyone actually sues the United States to enforce S.B. 8. The United States has sufficiently established that S.B. 8 conflicts with the laws and regulations governing the abortion-related services of its agencies, as it would subject them to liability for carrying out their mandates to provide or facilitate pre-viability abortions. (*See, e.g.*, McLearen Decl., Dkt. 8-10, at 4–5; Sheehan Decl., Dkt. 8-11, at 6; Matz Decl.,

[89] The State argues this Court should not decide the applicability of S.B. 8 to the federal government because of the *Pullman* abstention doctrine. (Resp., Dkt. 43, at 40). The *Pullman* abstention doctrine is appropriate only when "(1) there is a substantial uncertainty as to the meaning of the state law and (2) there exists a reasonable probability that the state court's clarification of state law might obviate the need for a federal constitutional ruling." *See Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 236 (1984). The doctrine "is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it." *Southwest Airlines Co. v. Texas Inter. Airlines, Inc.*, 546 F.2d 84, 92 (1977) (citing *Allegheny Cty. V. Frank Mashuda Co.*, 360 U.S. 185, 188–89 (1959)). "[A]bstention is inappropriate when the United States seeks to assert in federal court a superior federal interest." *United States v. Composite State Bd. Of Medical Examiners, State of Ga.*, 656 F.2d 131, 135 (1981). As discussed *supra* in Section IV(B)(1)(a)(ii), the United States has a significant federal interest in ensuring its agencies are able to follow the laws and regulations governing their provision of abortion-related services. This interest is superior to that of the State's in supporting the validity of S.B. 8, as S.B. 8 likely violates the Supremacy Clause, preemption, and principles of intergovernmental immunity. As such, this Court does not find that this case fits within *Pullman*'s "extraordinary and narrow exception" to this Court's jurisdiction.

Dkt. 8-14, at 5; Bodenheimer Decl., Dkt. 8-15, at 3).[90] For example, S.B. 8 permits liability for providing abortion services in cases of rape, incest, and assault, *see* Tex. Health & Safety Code § 171.208(j), while federal regulations require BOP to assume all costs for an individual who requests an abortion if the pregnancy resulted from rape or incest. (McLearen Decl., Dkt. 8-10, at 6, 25); 28 C.F.R. § 551.23. This type of direct conflict between S.B.8 and federal law easily constitutes a case where "compliance with both federal and state regulations is a physical impossibility." *Arizona*, 567 U.S. at 399 (quotations omitted).

The State additionally goes through each of the federal programs cited by the United States as being impacted by S.B. 8 and, in doing so, makes three main arguments. First, the State asserts that BOP, USMS, ORR, OPM, DOL, and Medicaid are only required to perform abortion-related services when they are able to do so in line with the applicable state law regarding abortions, and as such, should be able to accommodate S.B. 8. (Resp., Dkt. 43, at 40–42). But, of course, the requirement that abortion provision be consistent with state law assumes the constitutionality of the state law. Requiring federal programs providing mandated abortion services to suffer liability based on a state law that is likely unconstitutional "subject[s] federal officers to liability . . . for carrying out their federal duties" and is thus most likely violation of intergovernmental immunity. *See In Re Neagle*, 135 U.S. at 62.

[90] The Texas Intervenors argue that any federal obligations to arrange for post-heartbeat abortions can be "fulfilled by having those abortions performed in other states." (Int. Resp., Dkt. 44, at 16). The State itself made this argument during the October 1, 2021 hearing on the preliminary injunction. (Hr'g Tr., Dkt. 65, at 86). But that is precisely the issue—in order for these agencies to comply with their responsibilities under federal statutes, regulations, and case law, they must expend considerable resources. (McLearen Decl., Dkt. 8-10, at 5–6; Sheehan Decl., Dkt. 8-11, at 4–5; De La Cruz Decl., Dkt. 8-12, at 7; Torres Decl., Dkt. 8-13, at 5–6; Matz Decl., Dkt. 8-14, 5–6). The agency directors have stated they are unsure of how to comply with their federal law obligations and S.B. 8 simultaneously, and whether providing services that purport to violate S.B. 8 will subject them to liability. (*See, e.g.*, McLearen Decl., Dkt. 8-10, at 4). This is sufficient to demonstrate that S.B. 8 is, at the very least, "an obstacle to the accomplishment and execution of" these agencies' obligations under the law. *See Aldridge*, 990 F.3d at 875.

The second argument the State makes is that DoD and ORR are not themselves responsible for coordinating abortion services but must instead simply "step out of the way" when individuals in their care or custody request such services. (Resp., Dkt. 43, at 41–42; *see also* Hr'g Tr., Dkt. 65, at 57). However, the evidence before this Court does not support this conclusion. ORR regulations state that the agency "must provide access to abortion services when requested and permitted by law." (Def. Hr'g Exh., Dkt. 67-11, at 44–46; De La Cruz Decl., Dkt. 8-12, at 5). Further, the DoD has the authority to use federal funds to provide abortions to individuals in its care when "the life of the mother would be endangered" or where the pregnancy resulted from "rape or incest." S.B. 8 explicitly. 10 U.S.C. § 1093(a). But S.B. 8 allows suits based on "rape, sexual assault, [or] incest," and the law provides only a very narrow exception for abortions during a "medical emergency," which may not be interpreted by providers working with DoD to encompass an abortion any time the mother's life might be endangered. *See* Tex. Health & Safety Code § 171.205(a).[91] As such, the regulations and statutes governing the ORR and DoD are in conflict with S.B. 8 and likely violate the preemption doctrine.

Finally, regarding DOL, the State makes the curious argument that there is no violation of intergovernmental immunity since only one or two participants in Texas's Job Corps centers requested abortion services between 2019-21. (Resp., Dkt. 43, at 41, 43–44). It appears the State believes there is some sort of volume requirement when it comes to the number of people that must be affected by a law to find a violation of intergovernmental immunity. This requirement, of course, does not exist. *See Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301, 2323 (2004) ("There are no *de minimis* violations of the Constitution—no constitutional harms so slight that the courts are obliged to ignore them."). S.B. 8 has already changed the way DOL provides healthcare for their

[91] This same conclusion applies to Medicaid, which *must*, when medically necessary, provide abortion-related services for pregnancies resulting from rape or incest, or to save the life of the pregnant person. (Costello Decl., Dkt. 8-16, at 4).

participants by increasing costs and limiting opportunities for these individuals to access abortions, should they request one. (*See* Torres Decl., Dkt. 8-13, at 5–6; Matz Decl., Dkt. 8-14, 5–6).[92] The law plainly conflicts with the agency's obligations to facilitate services for any present or future Job Corps participants seeking an abortion beyond the timeline allowed by S.B. 8. As such, there is a high likelihood S.B. 8 violates intergovernmental immunity.

Given the propriety of the United States as plaintiff, the State as defendant, the nature of the equitable action, and the apparent constitutional violations, the Court finds that the United States is substantially likely to succeed on the merits of its claims.

2. Irreparable Harm

The party seeking a preliminary injunction must prove that irreparable harm is likely, not merely possible. *Winter*, 555 U.S. at 22. Irreparable harm "consists of harm that could not be sufficiently compensated by money damages or avoided by a later decision on the merits." *Canon, Inc. v. GCC Int'l Ltd.*, 263 F. App'x 57, 62 (Fed. Cir. 2008). The State urges that a preliminary injunction would not prevent irreparable harm, as "[t]he *threat* of liability would remain given the significant possibility that a preliminary injunction would be stayed, reversed, or not turned into a permanent injunction . . . ." (Resp., Dkt. 43, at 60). What the State fails to understand, or chooses not to acknowledge, are the stakes of this injunction in the lives of its citizens. The cases it cites address monetary penalties, funding regulations, and arbitration procedures. *See*, *e.g.*, *American Postal Workers Union, AFL-CIO v. U.S. Postal Service*, 766 F.2d 715 (2d Cir. 1985); *Buckingham Corp. v. Karp*, 762 F.2d 257, 262 (2d Cir. 1985); *Ohio v. Yellen*, No. 1:21-cv-181, 2021 WL 1903908, at *14 (S.D. Ohio May 12, 2021); *Chiafalo v. Inslee* 224 F. Supp. 3d 1140, 1147 (W.D. Wash. 2016); *Oxford Capital*

[92] Job Corps administrator Rachel Torres testified during a deposition that the North Texas Job Corps center does not pay costs related to abortion services for its participants. (Def. Hr'g Exh. 12, Dkt. 67-12, at 36–38). This is in line with her sworn declaration, which explained how three of the four Job Corps sites in Texas do in fact pay for abortion-related costs. (Torres Decl., Dkt. 8-13, at 5).

Ill., L.L.C. v. Sterling Payroll Fin., L.L.C., No. 1:01-cv-1173, 2002 WL 411553, at *5 (N.D. Ill. Mar. 15, 2002). At the most basic level, these cases do not present the same fundamental and immediate threats to the lives and wellbeing of citizens as seen here. Attempts to analogize to those cases are of course valid to understand the legal principles, but this exercise cannot be allowed to overshadow the reality that real people are being denied the constitutionally protected right to make decisions about their pregnancies. The State attempts to distance the law from its consequences, but let us be clear: S.B. 8 prevents individuals from exercising their right to obtain abortions in Texas, and an injunction will restore that right. The Court finds credible the appraisal of the current state of affairs by one provider:

> Every day that S.B. 8 is in effect, our patients are in jeopardy. Draconian laws like S.B. 8 do not stop people from needing abortions, and they don't stop abortions from happening—by eliminating safe and legal options, they only force abortion care underground with potentially devastating consequences. This cruel and dangerous law is causing irreparable harm to our patients and the communities we serve.

(Linton Decl., Dkt. 8-5, at 15).

The State attempts to argue that a preliminary injunction will provide no redress to the harms caused by S.B. 8, claiming that the deterrent effect of S.B. 8 will remain even if the law is preliminarily enjoined. (Resp., Dkt. 43, at 61). This claim rests on the section of S.B. 8 providing that "reliance on any court decision that has been overruled on appeal or by a subsequent court" is "not a defense." Tex. Health & Safety Code § 171.208(e)(3). The State claims it is unlikely providers will be willing to resume abortion procedures upon an injunction, given that the retroactivity provision in S.B. 8—of questionable legality itself—extends future liability to abortions facilitated during the operation of any preliminary injunction. There is no reason to assume providers will be so deterred. Indeed, the President and Chief Executive Officer of Whole Women's Health and Whole Women's Health Alliance (which collectively operate four clinics in Texas) has represented that the clinics under her authority will resume providing those abortions prohibited under S.B. 8 "if and when a

preliminary injunction is entered in this case[,]" and has received personal confirmation that other clinics will do the same. (*See* Hagstrom Miller Decl. II, Dkt. 59-2, at 2).[93] But even if the desired chilling effect of this provision does materialize, such speculation is no reason for the Court to tie its own hands.

Despite the State's attempts to obscure the question, the irreparable harm inquiry is in reality quite clear: people seeking abortions face irreparable harm when they are unable to access abortions; these individuals are entitled to access to abortions under the U.S. Constitution; S.B. 8 prevents access to abortion; a preliminary injunction will allow—at least for some subset of affected individuals—abortions to proceed that otherwise would not have.[94] The harm from S.B. 8 has already materialized, as "[t]he civil penalties and burdens of litigation threatened by this ban are severe and . . . . have already prevented abortion providers from carrying out [their] medical and ethical duties." (Gilbert Decl., Dkt. 8-2, at 15). It is clear that, absent an injunction, "[t]he majority of pregnant Texans who want an abortion will be forced to carry those pregnancies to term and face the risks—medical and financial—attendant with childbirth." (Hagstrom Miller Decl. I, Dkt. 8-4, at 8). Moreover, the Court finds credible the existential threat to abortion clinics, and thus to the

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[93] Hagstrom Miller further attests, "this week our physicians have been using their discretion to provide patients whose pregnancies are found to have cardiac activity with all state mandated information to comply with Texas's 24-hour mandatory delay, so that if and when a preliminary injunction is entered, we will be ready to call those patients to come in for abortions. . . . I have had personal conversations with the majority of independent abortion clinics in Texas regarding S.B. 8. I can affirm that like WWH/WWHA, many providers will resume pre-viability abortion services to patients with cardiac activity up to the legal limit in Texas (17.6 weeks LMP or 21.6 weeks LMP, depending on the type of clinic) if and when a preliminary injunction is entered in this case. While we continue to have concerns about liability under S.B. 8 if the injunction is later reversed, neither we nor our patients can wait the months or even years for completion of all S.B. 8 litigation to resume services. If this Court issues an injunction, we intend to follow the Court's order and resume services.") (*Id.* at 2-3).

[94] (*See* Rupani Decl., Dkt. 8-8, at 8) ("Despite our staff working 12- to 14-hour days, however, [a practical aid organization] cannot meet the level and scope of need we are seeing since S.B. 8 took effect. Indeed, no network of organizations can serve the untold number of Texans seeking abortions whose only option now is to leave the state, but who cannot afford to or are practically unable to do so. Currently, the relatively fortunate clients are those who are able to leave Texas, subject nonetheless to delayed abortion care, lengthy travel, and significant time away from work and home. In these ways, S.B. 8 has triggered an unprecedented crisis that will persist until the statute is invalidated.").

constitutional right to abortion, as articulated by the President and Chief Executive Officer of Whole Women's Health and Whole Women's Health Alliance:

> If the law remains in effect for an extended period of time, and we are only able to serve a fraction of our patients with a fraction of our staff, we will have to shutter our doors and stop providing any healthcare to the communities we serve. I believe that, without court-ordered relief in the next couple of weeks, S.B. 8 will shutter most if not all of the remaining abortion clinics in Texas. . . . We simply cannot stay open if we are only providing a fraction of patient services.

(Hagstrom Miller Decl. I, Dkt. 8-4, at 11). Therefore, an injunction is appropriate and warranted to prevent irreparable harm to the United States' interest in protecting the constitutional rights of its citizens.

3. Balance of Equities and Public Interest

When the United States is a party to a preliminary injunction motion, the final two factors of the inquiry—balance of the equities and public interest—merge. *Nken*, 556 U.S. at 435. Here it is abundantly clear that the harm to the plaintiff and the public interest "are one and the same, because the government's interest *is* the public interest . . . ." P*ursuing Am.'s Greatness v. Fed. Election Comm'n*, 831 F.3d 500, 511 (D.C. Cir. 2016). The State argues that, to the extent S.B. 8 causes any harm to individual citizens, it is not within the United States' purview to rectify those harms, and that the harm to the United States itself is merely "*de minimis*" financial costs. (Resp., Dkt. 43, at 54). However, the United States' interest in vindicating the constitutional rights of its citizens is a sovereign interest, as "our National Government is republican in form and . . . national citizenship has privileges and immunities protected from state abridgement by the force of the Constitution itself." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 842 (1995) (Kennedy, J., concurring). The United States is charged with protecting those "privileges and immunities." *See Brackeen*, 994 F.3d at 292 n.13 (stating that the federal government, and not the state, is the ultimate protector of the constitutional rights of its citizens). Defending the constitutional rights of citizens is

always in the public interest. *G&V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994) (citing *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 383 (1979)).

Included within the United States' interest in upholding the legitimacy of the Constitution is the federal government's interest in defending against schemes that offer state governments an opportunity to do an end run around the Constitution. *See infra* Section V (discussing how the model of S.B. 8 could be replicated to impede upon other types of constitutional rights). The United States has demonstrated that it is in its interest—and therefore the public's interest—to prove that the Constitution is not only as strong as one state's thinly veiled attempt to restrict constitutional rights and preclude judicial review. "[T]here is the highest public interest in" preserving "constitutional guarantees, including those that bear the most directly on private rights. *United States v. Raines*, 362 U.S. 17, 27 (1960). Conversely, the State can have no interest in enforcing a law that is likely unconstitutional on its face, nor can it have any valid interest in shielding an arguably unconstitutional law from judicial review. *See Velazquez*, 531 U.S. at 546 (noting that a statute written with the intent to limit judicial review "threatens severe impairment of the judicial function").

V. THE PRELIMINARY INJUNCTION AND ITS EFFECT

Based on the foregoing, this Court holds that a remedy in equity is warranted and will enter a preliminary injunction that comports with the well-established principles of equity. The State insists that this Court should examine the individual provisions of S.B. 8 and sever only portions of it. (Resp., Dkt. 43, at 70–71); Tex. Health & Safety Code § 171.212. While S.B. 8's severability clause "express[es] the enacting legislature's preference for a narrow judicial remedy," its severability clause does not require this Court to perform legislative work.[95] *Hellerstedt*, 136 S. Ct. at 2319. Like the *Hellerstedt* Court, this Court will not attempt the legislative exercise of picking and choosing what

[95] While S.B. 8 states that "[n]o court may decline to enforce the severability requirements . . . on the ground that severance would rewrite the statute or involve the court in legislative or lawmaking activity," this Court follows the Supreme Court's instructions.

portions of S.B. 8 could remain in effect, if any, to avoid the substantial risk of causing the "inconsistent application of only a fraction of interconnected regulations" in Chapter 171 of the Texas Health and Safety Code. *Id.* at 2320.

Despite the Texas Attorney General's lack of clarity about what the State would do in the face of a preliminary injunction, this Court trusts that the State will identify the correct state officers, officials, judges, clerks, and employees to comply with this Order. The Court relies on the Texas Attorney General's representation that the State "would [not] want to do anything that could lead to contempt." (Hr'g Tr., Dkt. 65, at 90).

IT IS ORDERED that the State of Texas, including its officers, officials, agents, employees, and any other persons or entities acting on its behalf, are preliminarily enjoined from enforcing Texas Health and Safety Code §§ 171.201–.212, including accepting or docketing, maintaining, hearing, resolving, awarding damages in, enforcing judgments in, enforcing any administrative penalties in, and administering any lawsuit brought pursuant to the Texas Health and Safety Code §§ 171.201–.212. For clarity, this Court preliminarily enjoins state court judges and state court clerks who have the power to enforce or administer Texas Health and Safety Code §§ 171.201–.212.

As set out above, this Court has the authority to enjoin the private individuals who act on behalf of the State or act in active concert with the State, including the Intervenors, and that injunction would be commensurate in scope with S.B. 8's grant of enforcement power. However, the Court need not craft an injunction that runs to the future actions of private individuals per se, but, given the scope of the injunctions discussed here and supported by law, those private individuals' actions are proscribed to the extent their attempts to bring a civil action under Texas Health and Safety Code § 171.208 would necessitate state action that is now prohibited.

IT IS ORDERED that the State of Texas must publish this preliminary injunction on all of its public-facing court websites with a visible, easy-to-understand instruction to the public that S.B. 8 lawsuits will not be accepted by Texas courts. **IT IS FURTHER ORDERED** that the State of Texas shall inform all state court judges and state court clerks of this preliminary injunction and distribute this preliminary injunction to all state court judges and state court clerks. The Court recognizes that it may not be in the best position to dictate the particulars. Accordingly, the State may propose different means of disseminating this information—that still achieve the goals of informing the state judiciary and plainly informing the public of this preliminary injunction and its effect—for this Court's review and approval.

In reaching the conclusion that a preliminary injunction is necessary here, the Court has attempted to carefully and thoughtfully weigh the important interests of the parties in this case and be mindful of the larger principles at play. In particular, the Court acknowledges the State's concern that this decision could increase the number of suits brought by the United States against states. The Court is satisfied that this is an exceptional case and likely will remain an exceptional case for several reasons. First, historically, the United States does not file many suits against states. In the last decade, the United States sued a state fourteen times under a theory of preemption or intergovernmental immunity. (Hr'g Tr., Dkt. 65, at 105). And, "those were actions brought by administrations of different political parties." (*Id.*). Second, the United States acts when state law violates the Constitution and has a widespread effect. (*See id.* at 24). Third, and this what makes this case exceptional, the United States seeks to enjoin the State in this case not only because the United States believes S.B. 8 violates the constitutional rights of Texas citizens and is causing widespread, significant injuries, but also because the United States alleges that the State "designed [S.B. 8] to preclude the ability of those whose rights are being violated from vindicating their rights." (Hr'g Tr., Dkt. 65, at 24).

The United States, in response to this Court's questioning about limiting principles, explained:

> [T]he reason that the United States had to file this action is not just that Texas enacted legislation that was designed unconstitutionally to impose restrictions on abortion rights. Other states have done the same things. And women who have wanted to pursue abortions or clinics that provide abortions have succeeded in challenging those laws [through] the ordinary procedures.
>
> What's unique and what's different about this law is that it specifically deprives those who are affected by the law of an ability to obtain the redress that is necessary in order to defend the Constitution. It's because of this system of deterrence that Texas is trying to effectively do an end run around the supremacy clause. And that limitation, the equitable principle that if other easier remedies are available that equity will not create a remedy, that is a limiting principle; and it's a limiting principle that doesn't come into effect here only because Texas has devised this scheme that the chief justice described as unprecedented.

(Hr'g Tr., Dkt. 65, at 25). The Court further observes that this case is exceptional because it is the rare intersection where the United States has standing *and* a cause of action to vindicate its citizens' rights. To the extent that this Court's holding leads to more lawsuits like this one, this Court would rely on the Congress and higher courts to narrow the scope of the cause of action.

Moreover, had this Court not acted on its sound authority to provide relief to the United States, any number of states could enact legislation that deprives citizens of their constitutional rights, with no legal remedy to challenge that deprivation, without the concern that a federal court would enter an injunction. As has been reported, "legal scholars fear that the law in Texas will lead to a rush of similar efforts in other states, prompting local legislators to pursue new measures on gun rights, immigration[,] and other divisive political issues, all in an effort to sidestep the federal government. From the Deep South to the Upper Midwest, legislators in many conservative states have started to explore how similar laws could be put in place in the months ahead." (The New Texas Abortion Law Is Becoming a Model for Other States, L.A. Times, Supp. Dec. Newman, Dkt. 56-2, at 10–11). Equally plausible is that states at the other end of the political spectrum could use a similar tactic to ban or impermissibly limit another constitutional right, like a right grounded in the

Second Amendment, to further a political agenda. This Court's preliminary injunction, should it stand, discourages states from doing so: if legislators know they cannot accomplish political agendas that curtail or eliminate constitutional rights and intentionally remove the legal remedy to challenge it, then other states are less likely to engage in copycat legislation. Thus, rather than increase the number of suits by the United States, this Court's preliminary injunction maintains the status quo of very few such suits and preserves this cause of action for exceptional cases like this one.

Finally, the State has requested, in the event the Court preliminarily enjoins enforcement of S.B. 8, that the Court stay any injunction until the State has the opportunity to seek appellate review. The State has forfeited the right to any such accommodation by pursuing an unprecedented and aggressive scheme to deprive its citizens of a significant and well-established constitutional right. From the moment S.B. 8 went into effect, women have been unlawfully prevented from exercising control over their lives in ways that are protected by the Constitution. That other courts may find a way to avoid this conclusion is theirs to decide; this Court will not sanction one more day of this offensive deprivation of such an important right.

VI. CONCLUSION

Based on the Court's findings of fact and conclusions of law:

IT IS ORDERED that the United States' Emergency Motion for Temporary Restraining Order or Preliminary Injunction, (Dkt. 8), is **GRANTED** as set out above in Section V.

IT IS FURTHER ORDERED that the States of Texas's Motion to Dismiss, (Dkt. 54), is **DENIED**.

IT IS FURTHER ORDERED that Amici States' Unopposed Motion for Leave to File Brief as Amici Curiae, (Dkt. 9), is **GRANTED**.

IT IS FURTHER ORDERED that the United States' Opposed Motion for a Protective Order of Audiovisual Recordings, (Dkt. 36), is **DENIED**.

IT IS FURTHER ORDERED that the State of Texas's Objections to the United States' Declarations, (Dkt. 55), are **DENIED**.

IT IS FINALLY ORDERED that the Texas Intervenors' motion to strike, lodged at the preliminary injunction hearing, (Hr'g Tr., Dkt. 65, at 96), is **DENIED**.

SIGNED on October 6, 2021.

ROBERT PITMAN
UNITED STATES DISTRICT JUDGE