22-2100-431

CAUSE NO. _____

NORTH TEXAS EQUAL ACCESS FUND, on behalf of itself and its staff, volunteers, and its donors	§	**In the District Court of**
	§	
	§	**Denton County, Texas**
Plaintiff,	§	
	§	
v.	§	**____Judicial District**
	§	
ASHLEY MAXWELL	§	
	§	
Defendant.	§	
	§	
	§	
	§	

PLAINTIFF'S ORIGINAL PETITION, REQUEST FOR DECLARATORY JUDGMENT, AND APPLICATION FOR TEMPORARY INJUNCTION AND ANTI-SUIT INJUNCTION

In May 2021, the Texas Legislature passed a sweeping new abortion prohibition, known as Senate Bill 8 or the "Texas Heartbeat Act" ("SB8"). Abortions are already highly regulated and constrained under Texas law. SB8 goes further by making providers liable in tort to any person who may bring a lawsuit if an abortion is performed after a fetal "heartbeat"[1] is detectable and also subjects anyone who helps—or even intends to help—a pregnant Texan obtain an abortion to the same liability.[2] Plaintiff North Texas Equal Access Fund ("TEA Fund") is a non-profit

[1] SB8 defines "fetal heartbeat" as "cardiac activity or the steady and repetitive rhythmic contraction of the fetal heart within the gestational sac." TEX. HEALTH & SAFETY CODE § 171.201(1). In a typically developing pregnancy, ultrasound can generally detect cardiac activity beginning at approximately six weeks of pregnancy. But cells that produce early cardiac activity have not yet formed a "heart." The term "heartbeat" in SB8 thus covers not just a "heartbeat" in the lay sense, but also early cardiac activity—more accurately, electrical impulses—present before full development of the cardiovascular system. Thus, neither "fetal" nor "heartbeat" is accurate medical terminology at this early stage of pregnancy. Plaintiff therefore refers to "cardiac activity" throughout its Petition.

[2] This case does not challenge SB8's abortion restrictions themselves—although the courts have consistently held that a ban on abortions pre-viability is wholly unconstitutional. This case is about

organization that focuses on reproductive health and provides funds to assist pregnant Texans with the costs of abortion services. TEA Fund is a "helper" and subject to liability under SB8.

Helpers such as TEA Fund cannot be prosecuted criminally under SB8 because the State of Texas cannot enforce SB8. But the helper is subjected to liability in tort for at least $10,000 and an award of attorneys' fees, along with a mandatory injunction to prevent future violations of SB8. The law therefore improperly gives SB8 claimants a windfall when they have suffered no injury whatsoever, based on the dubious legal premise that helping a person seeking to exercise a constitutional right can be policed by private citizens, and that helpers can be punished by their neighbors for doing nothing more than offering a ride, information, or funding.

This case is brought to vindicate the fundamental and constitutional rights of TEA Fund, its staff, board, volunteers, donors, and clients. "[W]here there is a legal right, there is also a legal remedy . . ." *Marbury v. Madison*, 5 U.S. 137, 163, 2 L. Ed. 60 (1803). And where the rights at issue are constitutional, no amount of legislative trickery, obfuscation, or wordplay that can subvert them:

> . . . all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void. This theory is essentially attached to a written constitution, and is consequently to be considered, by this court, as one of the fundamental principles of our society.

Id. at 177. When a legislative act and a constitutional requirement conflict, "it is emphatically the province and duty of the judicial department to say what the law is." *Id.*

Constitutional rights are not technical things, subject to nullification by clever drafting. SB8 is an overreach, and has citizens do the bidding that government actors cannot. But in

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the myriad other constitutional rights the "private enforcement" scheme of SB8 vitiates for any person subject to SB8, organizations that focus on reproductive health and abortion assistance.

attempting to subvert one constitutional right, SB8 violates several others. Indeed, the Multi-District Litigation Pretrial Court handling SB8 cases such as this one has already determined that SB8 private civil enforcement mechanism is unconstitutional on several different bases.

Despite her awareness of the MDL Pretrial Court's ruling and the invalidity of the underlying SB8 claim, Defendant Ashley Maxwell ("Maxwell") filed a Rule 202 Petition, seeking discovery related to a claim under SB8 from the Executive Director of TEA Fund, Kamyon Conner, indicating that Defendant Maxwell wished to explore documents and testimony that would enable her to bring a SB8 claim in the future. The request is a transparent attempt to intimidate and harass TEA Fund and anyone who may associate with it, for fear that they may be subject to reprisal from Defendant Maxwell for conducting all kinds of activity that she may construe as violative of SB8. Notably, this request comes even after Defendant Maxwell's counsel specifically requested creation of the MDL Pretrial Court to make determinations on SB8's constitutionality, which it has done. Dissatisfied with the Court's order, Defendant Maxwell, represented by the same counsel as defendants in the MDL on SB8, now seeks to impose the unconstitutional strictures of a void law on TEA Fund, and presumably others, despite Judge David Peeples' order in those cases.

TEA Fund files this (1) Original Petition and Request for Declaratory Judgment and (2) Application for Temporary Injunction, and Anti-Suit Injunction against Ashley Maxwell and respectfully shows the Court as follows:

I. PARTIES

1. Plaintiff TEA Fund is a nonprofit organization incorporated in Texas and may be reached at the office of the undersigned.

2. Plaintiff's request for declaratory judgment finding is on behalf of Plaintiff TEA

Fund, individually, and on behalf of its staff, volunteers, and donors. As discussed in detail below, Plaintiff suffered a direct injury because: (a) it is being required to divert organizational resources to counteract Defendant's unlawful actions and the threats of civil liability created by SB8's invalid provisions and Defendant's threats; and (b) the organization's mission is also being frustrated. TEA Fund also has representational standing based on injuries to its staff, volunteers, and donors because at least one of its staff, at least one of its volunteers, and at least one of its donors, has standing the interests at stake are germane to TEA Fund's purpose, and neither the claims nor the relief requested requires participation of the organization' s individual members.

3. Defendant Ashley Maxwell is an individual residing in Hood County, Texas. She may be served through her counsel, Jonathan Mitchell, at 111 Congress Avenue, Suite 400, Austin, TX 78701.

II. JURISDICTION AND VENUE

4. This Court has jurisdiction over this matter, pursuant to The Texas Uniform Declaratory Judgments Act ("UDJA"), Texas Civil Practice and Remedies Code § 37.001, *et seq*., sections 24.007 and 24.008 of the Texas Government Code, and TEX. CONST. ART. 5, § 8.

5. Venue is proper in Denton County under § 15.002 of the Texas Civil Practice and Remedies Code because that is where the conduct underlying this Declaratory Judgment action—the 202 Petition—was filed.

6. Defendant Maxwell is a proper party to Plaintiff's claims under the UDJA because (1) she clearly contends that SB8 is valid (if she did not, she would not be pursuing a petition under Rule 202 for pre-suit deposition to investigate alleged violations of SB8), while TEA Fund understands that SB8 is not valid, thereby creating a "justiciable controversy between the parties" which would be solved by the declaration sought, and (2) Maxwell must be made a party since she

has or claims an "interest that would be affected by the declaration" sought by TEA Fund (which is that SB8 is invalid, as the MDL Pretrial Court has already determined). TEX. CIV. PRAC. & REM. Code § 37.006(a).

7. Pursuant to Texas Rule of Civil Procedure 47(c)(5), TEA Fund seeks non-monetary relief only.[3]

III. FACTS

A. Senate Bill 8

8. On May 19, 2021, Governor Abbott signed Senate Bill 8, 87th Leg., Reg. Sess., also known as the "Texas Heartbeat Act," attached as Exhibit A.[4]

9. SB8 bans abortion at approximately six weeks in pregnancy—not by criminalizing it, which would be a clear violation of the United States Constitution and nearly a half-century of binding authority from the United States Supreme Court—but by deputizing private citizens to enforce the law. SB8 allows "any person" other than governmental officials to bring a civil lawsuit against anyone who provides an abortion in violation of the Act, "aids or abets" such an abortion, or even *intends* to do these things. These civil suits are permitted regardless of whether the person suing has any connection to the abortion or the person who sought it.

10. "Aiding and abetting" is not defined by SB8 and could reach any conduct or speech found to relate to an abortion. Further, the statute applies to an individual who even intends to speak or engage in any action that might be construed as assistance in obtaining an abortion. The

[3] As specifically pleaded in this Petition, Plaintiff does intend to seek an award of costs and reasonable and necessary attorneys' fees, as authorized under Chapter 37 of the Texas Civil Practice and Remedies Code, but does not believe such an award constitutes monetary relief under Rule 47.

[4] The majority of SB8's provisions at issue in this lawsuit are codified in Chapter 171 of the Texas Health and Safety Code. The remaining challenged provisions are codified in Chapter 30 of the Texas Civil Practice and Remedies Code. This Petition refers to SB8's specific provisions by codified locations.

statute makes clear that a person or entity that provides funds used to obtain an abortion is liable for "aiding and abetting" under SB8 and that person or entity does not even have to know the funds will be used that way in order to be liable.

11. If a claimant in an SB8 case prevails, they are entitled to (1) mandatory "injunctive relief sufficient to prevent" future violations; and (2) without any showing of harm, an award of "statutory damages" of *at least* $10,000 per violation, with no apparent maximum amount; and (3) costs and attorneys' fees. SB8 therefore places a bounty on people who provide, aid, fund, speak about, or even think about abortions, inviting random strangers to sue them throughout the state.

12. SB8 thus creates potentially millions of prospective "qui tam" plaintiffs armed to bring these financially devasting civil suits. But unlike actual qui tam plaintiffs, the work and recovery of an SB8 claimant does not inure to the state; instead, it simply provides the claimants a financial windfall with no risk to themselves. SB8 claimants are never responsible for attorneys' fees, and they get to keep all the money they recover and can bring lawsuit after lawsuit against anyone they believe are assisting with any abortions contemplated or performed after cardiac activity is detected. Additionally, there is no injury to the state that can be conferred onto the SB8 claimant.

13. SB8 further purports to eliminate virtually any common law defense otherwise available to a defendant, except an affirmative defense that the defendant has already been required to pay damages on the exact same claim, related to the exact same abortion. Further, if the defendant dares to affirmatively claim that SB8 is unconstitutional, both the defendant and her counsel will be jointly and severally liable for a plaintiff's attorneys' fees, regardless of whether the claim under SB8 has any merit whatsoever. *See* TEX. CIV. PRAC. & REM. CODE ANN. §

30.022(a). This fee shifting provision purports to benefit the "prevailing party," but the only party that can be liable for fees under this provision of SB8 is the party seeking injunctive or declaratory relief *against* SB8 (or any other abortion-regulating law). *Id*. Therefore, even if the party seeking a declaration that the law is unconstitutional prevails, its only reward is that it becomes obligated to pay its *own* fees rather than the opposing party's fees. *Id*. A party opposing such a declaration can prevail if even a single one of the grounds for declaratory or injunctive relief is denied. And in that case, the party partially successful in challenging the constitutionality of the statue may nonetheless be on the hook for all of the other side's fees, and that liability is shared jointly and severally with the party's attorney. *Id*. at § 30.022(b). Thus, SB8 seeks to prevent a defendant from obtaining her counsel of choice by chilling zealous representation with a threat of joint and several liability for attorneys' fees.

14. The transparent purpose of SB8's private-enforcement scheme was to prevent pre-enforcement challenges to the law, as the Texas Solicitor General recently acknowledged to the Supreme Court of Texas.[5] By removing any enforcement authority from state government officials, SB8 was purposefully and improperly designed to insulate it from pre-enforcement judicial review, usurping both the executive function supplanting the judiciary's function by depriving citizens of avenues for challenging an unconstitutional law based solely on the content of the claims they would bring.

15. SB8 became effective on September 1, 2021.

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[5] *See* Transcript of Oral Argument, Matter 22-0033 *Whole Women's Health v. Jackson*, 20:6-18 (Solicitor General Stone: "Well, the legislature clearly – first of all, as a matter of description about why the legislature did what it did, the point on restraining state actors from being able to take enforcement actions was specifically to preclude federal pre-enforcement challenges. That was the reason, both of those—" Justice Lehrmann: "So you concede that." Solicitor General Stone: "Of, of course. We said as much before the United States Supreme Court. That's been the position of the state the entire time."). A certified transcript of this oral argument is appended to this Petition as Exhibit N.

B. Defendant

16. Defendant Maxwell seeks to depose TEA Fund's Executive Director to "investigate the possibilities for future civil actions brought under section 171.203" of SB8. Exhibit B at ¶ 5.

17. Defendant Maxwell intends to use SB8 to silence and prevent TEA Fund, its staff, board, volunteers, donors, and clients from exercising their rights under both the U.S. and Texas Constitutions (as described in more detail below). Defendant Maxwell also intends to use the information she discovers to sue TEA Fund, TEA Fund's staff, TEA Fund's volunteers, and TEA Fund's donors. *See* Exhibits B-F.

18. Specifically, Defendant Maxwell stated in her Rule 202 Petition that TEA Fund "is expected to have information relevant to the potential claims that Ms. Maxwell is investigating, and it is expected to have interests adverse to Ms. Maxwell in any anticipated suit." Exhibit B at ¶ 7. "Ms. Maxwell's goal is to use the depositions sought by this petition to ascertain the identity of *all individuals and organization who are subject to liability* under section 171.208." *Id*. at ¶ 9 (emphasis added).

19. Defendant Maxwell's stated goal clearly indicates the direct and imminent harm faced by individuals and organizations that performed or facilitated abortions, including any of TEA Fund's employees, volunteers, and donors. *See* Exhibits B-D[6].

20. Defendant Maxwell is undertaking efforts with America First Legal Foundation ("AFL") and the Thomas More Society ("TMS") (or has been recruited by them for the purposes

[6] Exhibit C, The Texas Tribune, *Anti-abortion Lawyers target those funding the procedure for potential lawsuits under new Texas law*, from the website located at https://www.texastribune.org/2022/02/23/texas-abortion-sb8-lawsuits/ (last visited on Mar. 6, 2022); Exhibit D, America First Legal, *AFL Files Petitions Against Two Abortion Funds in Texas Who Violated The Texas Heartbeat Act*, from the website located at https://www.aflegal.org/news/afl-files-petitions-against-two-abortion-funds-in-texas-who-violated-the-texas-heartbeat-act (last visited on Mar. 6, 2022).

of this litigation), organizations that have publicly stated that Maxwell's Rule 202 Petition will serve to determine "what claims may be brought" including "civil lawsuits and *potential criminal prosecution*." *See* Exhibits C-F[7].

21. TMS is a non-profit organization that claims its mission is "to protect[] traditional family values and parental rights [that] are threatened by secular society." Its "fight [] to restore respect in law for life, marriage, and religious liberty" are driven by its conservative Catholic religious beliefs.

22. TMS issued several public statements explicitly stating that the intent of Defendant Maxwell's Rule 202 Petition is to target individuals and entities providing financial support to those seeking or who have received abortions. *See* Exhibits E-F. Specifically, "[t]hese depositions will uncover the individuals subject to *civil liability and criminal prosecution* for aiding or abetting these illegal abortions, which will include each fund's employee, volunteers, and donors whose gifts are targeted or used for these illegal purposes." Exhibit E. (emphasis added).

23. Even though SB8 has been found to be blatantly unconstitutional by the presiding judge of the MDL court, Tom Brejcha, TMS's president, assumes the statutory mantle. He publicly stated that by providing assistance to an individual to obtain an abortion during the federal injunction preventing the enforcement of SB8, TEA Fund has "exposed their employees,

[7] Exhibit E, The Thomas More Society, *Abortion Funds to Face Pre-Suit Discovery Over Violations of the Texas Heartbeat Act*, from the website located at https://thomasmoresociety.org/abortion-funds-to-face-pre-suit-discovery-over-violations-of-the-texas-heartbeat-act/ (last visited on Mar. 6, 2022); Exhibit F, Social media posts from the Twitter account for the Thomas More Society at https://twitter.com/ThomasMoreSoc/status/1496641113305886725, social media post from the Thomas More Society at https://www.facebook.com/plugins/post.php?href=https%3A%2F%2Fwww.facebook.com%2Fthomasmoresoc%2Fposts%2F1016086321961281 4&show_text=true&width=500; and social media post from the Thomas More Society at https://twitter.com/lilithfund/status/1495832172548210701.

volunteers[,] and donors *to civil lawsuits and potential criminal prosecution*." Exhibit C (emphasis added).

24. TMS further publicly stated that "it is illegal to donate to []abortion funds that pay for abortions performed in []Texas." Exhibit F. Brejcha erroneously claimed that these alleged "illegal donations" to TEA Fund "were used not for First Amendment advocacy" but instead were used "to end the lives of innocent unborn human beings with beating heart [.]" *See* Exhibit G[8].

25. Brejcha further stated, "[t] hose who are funding or assisting in bringing about these abortions will be revealed in discovery," and "[a]nyone who has aided or abetted an illegal abortion in Texas is *subject to the full force of the law and impositions of these civil and criminal sanctions*." Exhibits C, G (emphasis added).

26. TMS "tweeted" warnings at similar organizations and their followers, indicating their intent to target them for civil suits under SB8:

27. TMS reiterated and amplified the direct threat on its own social media platforms, stating:

[8] The Ohio Star, *Abortion Funding Groups Admitting to Violating Texas Heartbeat Act to Face Depositions*, from the website located at https://theohiostar.com/2022/02/23/abortion-funding-groups-admitting-to-violating-texas-heartbeat-act-to-face-depositions/?fbclid=IwAR09RXL6Ou-NCkkARsEFITGEQslYlVygZMdtr4LgPuyg3aLcNFG7G2iLFDQ (last visited on Mar. 10, 2022).

28. AFL similarly issued a statement that it seeks to "take depositions of [TEA Fund's Executive Director] to determine which individuals are subject to civil liability and criminal prosecution for paying these illegal abortion, which will include employees, volunteers, and donors of the Lilith Fund and the [North] Texas Equal Access Fund." Exhibit D. AFL's president, Stephen Miller, stated that AFL is "seeking court-ordered discovery against organizations who have admitted their role in aiding and abetting abortions in violation of [SB8]." *Id.*

29. AFL also publicly stated that it was "honored to have been part of the legal team defending the Texas Heartbeat Act!" Exhibit K[9].

30. As demonstrated by the Rule 202 Petition itself, as well as by Defendant's counsel's statements regarding the purpose of the Rule 202 Petition, Maxwell's threat of a lawsuit to enforce SB 8 is imminent.

C. Plaintiff

31. TEA Fund's mission is to foster reproductive justice, provide financial and emotional support for those needing abortions in Texas, and offset the costs of abortion care.

32. TEA Fund openly communicates with the public regarding abortion, voicing support for abortion rights and seeking the support of other who share the same values.

[9] AFL's Twitter account at https://twitter.com/America1stLegal/status/1498428025477685249 (last visited March 10, 2022).

33. According to the terms of SB8, TEA Fund aids and abets abortions. TEA Fund has engaged in conduct that helped to facilitate the performance or inducement of an abortion prior to the enactment of SB8 that would have violated its terms. Because the organization understands that SB8 is void under both federal and Texas law, as the MDL's Presiding Judge found, it cannot in good faith discontinue its supportive actions for its clients.

34. SB8 chills TEA Fund's ability to engage in constitutionally-protected speech in support of reproductive healthcare rights, and to provide financial, emotional, and logistical support for its clients for abortion access. Insofar as the TEA Fund may be accused of "aiding or abetting" abortion services in Texas, by making the speech and associations subject to potential strict liability, TEA Fund is directly and adversely affected by SB8's unconstitutional threat of ruinous liability by enforcers such as Maxwell.

35. Defendant Maxwell's Rule 202 Petition is even more chilling than the direct threats that have given rise to previous SB8 litigation. Defendant's Rule 202 Petition demonstrates that Defendant intends to sue TEA Fund (and others), and is seeking information about exactly how broad that suit should be. Defendant necessarily presumes that SB8 is a valid exercise of government authority, while TEA Fund believes that SB8 is unconstitutional and void. A court's intervention is necessary to resolve that disagreement. And Defendant's present, imminent threat of enforcement of the unconstitutional law against TEA Fund is a separate, independent demonstration of the concrete injury TEA Fund will suffer unless it is provided declaratory relief against Defendant and Defendant is enjoined from any attempts to sue TEA Fund (and to obtain discovery from it, or from Ms. Conner, its Executive Director, by these means).

36. Although SB8 purports to except any conduct that would be protected by the First Amendment to the Constitution, its terms negate that protection because providing funds that could

be used for abortion services is specifically defined to constitute "aiding and abetting." TEX. HEALTH & SAFETY CODE § 171.208(2). Money is speech, according to the United States Supreme Court, and the freedom to associate and donate to political and social causes is an inviolate tenet of First Amendment jurisprudence. *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 130 S. Ct. 876, 884, 175 L. Ed. 2d 753 (2010) ("All speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech. The First Amendment protects the resulting speech, even if it was enabled by economic transactions with persons or entities who disagree with the speaker's ideas.").

37. SB8 and Defendant Maxwell target TEA Fund and intend specifically to silence the organization and others like it on the basis of the content of its speech in favor or reproductive rights and justice. Such content-specific attacks by the legislature are patently unconstitutional. TEA Fund's rights were immediately violated upon SB8's taking effect on September 1, 2021, and the threat of unmitigated potential civil liability to it is imminent because citizen bounty hunters, such as Defendant Maxwell, already have TEA Fund in their cross-hairs with their "pre-suit" investigations and publicized efforts to organize lawsuits under SB8. *See* Exhibit B-C, E-F.

IV. NOTICE OF RELATED CASES

38. TEA Fund's petition relates to the *In re Texas Heartbeat Act Litigation* MDL cases, *Van Stean v. Texas Right to Life, et al*., Cause No. D-1-GN-21-004179 ("MDL"), before the Honorable David Peeples, where the plaintiffs similarly sought and obtained declaratory relief that key provisions of SB8, including the civil enforcement provision, are unconstitutional. Plaintiffs in that matter also sought and obtained injunctive relief restraining the MDL defendants from filing suit under SB8. TEA Fund is a plaintiff in one of the cases pending in the MDL. The Defendants are Texas Right to Life and its legislative director, John Seago. The MDL defendants were

represented by the same counsel now signing Rule 202 Petitions for Defendant Maxwell. A copy of the present injunction binding Texas Right to Life, John Seago, and those acting in concert with them (including their attorneys) is attached to this Petition as Exhibit L.

39. In the MDL, individuals, abortion providers, and abortion funds filed suit in state court against Texas Right to Life and its legislative director, John Seago, to prevent them from initiating lawsuits against them under section 171.208 of SB8. The presiding judge denied the MDL defendants' motion to dismiss under the Texas Citizens Participation Act and granted the MDL plaintiffs' motion for summary judgment. A copy of the order denying MDL defendants' TCPA Motion to Dismiss and granting MDL plaintiffs' motion for summary judgment is attached to this Petition as Exhibit M. The MDL defendants appealed the decision, and that appeal is currently pending in the Third Court of Appeals. *See Texas Right to Life v. Van Stean*, No. 03-21-00650-CV.

40. This petition also relates to the Rule 202 petition filed in Denton County, Texas by Defendant Maxwell against Kamyon Conner, which has also been transferred to the MDL Pretrial Court.

V. CLAIMS

CLAIM 1: DECLARATORY JUDGMENT

41. TEA Fund incorporates the preceding paragraphs.

42. TEA Fund petitions the Court pursuant to the UDJA, Chapter 37 of the Texas Civil Practice and Remedies Code.

43. Section 37.002 of the UDJA is remedial and its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations; and it is to be liberally construed and administered.

44. Under Section 37.003 of the UDJA, a court of proper jurisdiction has the power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed. The declaration may be either affirmative or negative in form and effect and the declaration has the force and effect of a final judgment or decree.

45. Section 37.004 of the UDJA provides that a person whose rights, status, or other legal relations are affected by statute may have determined any question of construction or validity arising under the statute and obtain a declaration of rights, status, or other legal relations thereunder.

46. Section 37.011 of the UDJA provides for "[f]urther relief based on a declaratory judgment or decree may be granted whenever necessary or proper." TEA Fund seeks such further relief as may be required to effectuate the declaratory relief it obtains in this action.

A. Plaintiff's Rights to Free Speech

47. The Texas and U.S. Constitutions guarantee their citizens the right to free speech, assembly, association, and petition.

48. Section 171.208 of SB8 purports to impose civil liability on anyone who (1) engages in conduct that helps to facilitate the performance or inducement of an abortion in violation of SB8, or (2) merely intends to engage in such conduct.

49. The breadth of SB8 makes the following actions possible violations of Texas law: providing information about how to obtain an abortion, paying in part for an abortion, driving a patient to an abortion provider, advocating for a person seeking an abortion, providing childcare to a person seeking an abortion, and/or merely "intending" to do any of the above. This is not an all-inclusive list of actions that may violate the terms of SB8; the conduct merely has to be construed as "aid" or assistance.

50. Such imposition of civil liability on the content of TEA Fund's speech infringes on its free speech rights to discuss publicly and truthfully matters of public concern without previous restraint or fear of subsequent punishment.

51. Moreover, because TEA Fund's use of funds are considered political speech, banning the use of such funds based on their intended purpose also violates the organization's free speech rights.

52. SB8's provisions are facially unconstitutional with regard to the free speech guarantees of both the Texas and U.S. Constitutions, contain content-based restrictions subject to strict scrutiny, and are retaliatory under both the U.S. and Texas Constitutions.

53. Given the breadth of civil liability imposed by the law, SB8 chilled speech prior to its effective date and has continued to do so after it became effective on September 1, 2021.

B. Plaintiff's Open Courts Rights

54. The Texas Constitution includes an "Open Courts" provision in Article 1, Section 13 that guarantees all litigants the right to redress their grievances and the right to their day in court:

> All court shall be open, and every person for an injury done him, in his lands, goods, person, or reputation, shall have remedy by due course of law.

55. Under this provision, citizens must have access to courts unimpeded by unreasonable financial barriers and the legislature may not abrogate the right to assert a well-established common law cause of action.

56. The following provisions of SB8 (a) restrict TEA Fund's right (and the rights of other citizens) to access the courts of this state:

a. Section 171.208(b)'s provision for mandatory relief of no less than $10,000 for a prevailing claimant;

b. Section 171.208(b)'s provision for mandatory injunctive relief for a prevailing claimant;

c. Section 171.208(e)'s elimination of applicable defenses for potential Defendant;

d. Section 171.208(i)'s prohibition of an award of fees to a prevailing defendant;

e. Section 171.211(b)'s maintenance of immunity for all state and political subdivisions or their employees in any action, claim, or counterclaim or any type of legal or equitable action that challenges the validity of SB8;[10] and

f. Section 30.022's imposition of joint and several liability for attorneys' fees on litigants and attorneys/firm that take on challenges to abortion laws, including retroactively.

57. The above provisions individually and collectively purport to eliminate TEA Fund's ability to seek a declaratory judgment regarding the constitutionality of SB8 (at least against the state), eliminate defenses to any claims asserted against it under SB8, and impose all financial risks and burdens of seeking any kind of legal redress onto one set of litigants—namely those seeking to challenge the provisions of SB8.

58. The above provisions also require judges to issue a mandatory injunction sufficient to prevent future actionable conduct by the defendant if a plaintiff prevails in any part on a SB8

[10] Section 171.211(b) is also unconstitutional under the Equal Protection clauses of both the U.S. and Texas Constitutions because it is a content-based exception to the Legislature's prior waiver of sovereign immunity in the UDJA. Section 171.211(b) cannot survive the any level of Equal Protection review, particularly the strict scrutiny analysis required when a legislature attempts to enact a statute that applies only to a subset of citizens based on the content of their speech, which is a fundamental right. *Mauldin v. Tex. State Bd. of Plumbing Exam'rs*, 94 S.W.3d 867, 871, 873 (Tex. App.—Austin 2002, no pet.) ("If the statute implicates a fundamental right or a suspect class, then we apply strict scrutiny, under which the statute will be upheld only if it is narrowly tailored to further a compelling government interest."); *see also City of Cleburne v. Cleburne Living Ctr*., 473 U.S. 432, 439 (1985).

cause of action. A mandatory injunction removes all discretion from the trial judge to determine the appropriate relief and subjects a defendant to a civil injunction which is likely to operate as a restraint on the defendant's work and speech. The mandatory injunction provision means that a defendant will be prevented from further opportunity to challenge claims made against her; otherwise, she would subject herself to civil contempt penalties.

59. The above provisions create an automatic conflict between a defendant and her attorney. Any attorney who agrees to present a constitutional defense or mount a proactive challenge to the constitutionality of SB8 subjects herself and her firm to joint and several liability for the attorneys' fees incurred by the opposing party in the case. The above provisions force an attorney to choose between the best interests of her client and undertake potential liability under SB8 or refuse to represent the client at all. The above provisions thus further prevent a litigant from redressing wrongs done to her rights by significantly burdening her ability to obtain counsel.

60. The above provisions violate the open courts provisions of the Texas Constitution by encouraging wholly frivolous claims for the purpose of harassment and/or fishing expeditions. The defendants bear all of the risk of paying their adversaries' attorneys' fees, and there is only reward and no disincentive for SB8 plaintiffs to bring a claim any time they even suspect non-compliance. This is at best a waste of the judiciary's resources that the Texas Constitution does not permit; at worst, it is a travesty, and there is no meaningful remedy for a defendant, who is impeded by unreasonable financial barriers imposed by SB8 itself.[11]

C. Plaintiff's Due Process Rights

61. Under the Texas Constitution, "[n]o citizen of this State shall be deprived of life,

[11] To the extent these provisions apply solely to a subset of litigants defined by the content of the claims or defenses they would assert, all of these provisions also separately violate the Equal Protection clauses of the U.S. and Texas Constitutions.

liberty, property, privileges, or immunities, or in any manner disfranchised, except by the due course of the law of the land." TEX. CONST. ART. I, § 19.

62. Similarly, the federal Due Process Clause provides, "[n]o state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . ." UNITED STATES CONST. AMEND. XIV, § 1.

63. SB8 infringes upon TEA Fund's constitutionally secured rights such as freedom of speech, freedom to assemble, freedom of association, equal protection, due process/due course of law, and the right to openly access the courts.

64. SB8's purpose is not rationally related to a legitimate governmental interest.

65. Further, SB8's actual, real world effect is not rationally related to a governmental interest or is so burdensome as to be oppressive to the above delineated rights.

66. SB8 violates TEA Fund's due process rights under both the Texas and U.S. Constitutions.

D. SB8 Violates the Texas Prohibition of Retroactive Statutes

67. Article 1, Section 16 of the Texas Constitution provides:

> No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made.

68. The following provisions of SB8 impair prior and settled rights, which violate the Texas Constitution's prohibition of retroactive statutes:

a. Section 171.208(e)'s elimination of defenses to liability; and

b. Section 30.022's imposition of joint and several liability on attorneys or law firms that represent or defend clients in matters that seek injunctive or declaratory relief regarding abortion regulations and statutes.

69. These provisions are not reasonably tailored to the alleged purposes of SB8.

70. The retroactive reach of SB8 further and impermissibly burdens TEA Fund by depriving it of the constitutional right to be apprised of laws that it may be held liable for and by impairing its ability to redress its rights in its defense.

E. SB8's Standing Provision is Unconstitutional

71. SB8 purports to deputize private citizens to enforce the law, allowing "any person" other than government officials to bring a civil lawsuit against anyone who provides an abortion in violation of the Act, "aid or abets" such an abortion, or intends to do these things.

72. SB8 purports to confer standing to a broad group and does not require damages or injury for such private citizens to bring the claim—the private citizen need not show damages or injury.

73. Such broad standing violates the Texas Constitution because the SB8 claimants are not personally injured and need not demonstrate that they suffered an injury.

74. Qui tam actions are sometimes used in order to deputize private individuals to act for and on behalf of the government. Here, the state could not enforce the abortion restrictions as drafted in SB8, and it cannot assign authority it does not have to a private individual. Likewise, the state has no injury to confer on a qui tam plaintiff.

75. The Texas Legislature cannot create by statute a no-injury standing that is below the constitutional level of standing required by the Texas and U.S. Constitutions.

76. The no-injury standing purportedly conferred by SB8 inflicts imminent harm upon the Lilith Fund because all of its constitutional rights detailed above are and will be imminently violated.

F. SB8 Violates the Separation of Powers Doctrine

77. By deputizing private citizens to enforce Texas's new ban on abortion at five to six weeks gestation, the Texas Legislature has entirely usurped the function of the Executive Branch in enforcing the laws of the state.

78. By permitting bounty-seeking claimants to keep all recoveries obtained by bringing these "strict liability" lawsuits, the Texas Legislature further deprived the State and the Executive Branch of monies obtained solely because of a civil prohibition made by the State itself, thereby violating the separation of powers doctrine.

79. By purportedly insulating SB8 against pre-enforcement judicial review, the Texas Legislature has usurped the role of the Judicial Branch in interpreting the law and determining what the law is and means.

80. By protecting SB8 claimants from any fees awarded against them and mandating liability for any defendant who dares to defend himself, the Texas Legislature and Governor Abbott further usurped the role of the Judicial Branch by depriving the Texas judiciary of its role in affording fairness and due process required by the Texas Constitution.

81. Various provisions of SB8, as detailed herein, violate the venerable concept of "separation of powers" upon which our very form of democracy (and the Texas Constitution) rests.

G. SB8 Is Void for Vagueness

82. SB8 is void for vagueness and unenforceable.

83. SB8 is a quasi-criminal statute that imposes civil penalties.

84. SB8 is too vague for the average citizen to determine what persons are regulated, what conduct is prohibited, and what civil penalties may be imposed.

85. SB8 is also void for vagueness because it imposes on TEA Fund's rights to freedom

of speech and assembly.

86. Because SB8 violates TEA Fund's due process rights, it cannot be enforced.

87. SB8 burdens TEA Fund by depriving it of the constitutional right to be apprised of laws that it may be held liable for and by impairing its ability to redress and assert its rights in its defense.

H. Requested Declaratory Relief

88. TEA Fund therefore respectfully requests that the Court enter the following declarations:

a. That SB8 violates TEA Fund's right to free speech (including the rights to assemble, associate, and petition) under the U.S. and Texas Constitutions;

b. That SB8 violates TEA Fund's rights to open courts under the Texas Constitution;

c. That SB8 violates TEA Fund's due process rights under the U.S. and Texas Constitutions;

d. That SB8 violates the prohibition against retroactive liability under the Texas Constitution;

e. That SB8's overbroad standing provisions, which inflict imminent harm, violate the Texas Constitution;

f. That SB8 improperly disregards the separation of powers required by the Texas Constitution;

g. That SB8 is void for vagueness;

h. That the following provisions within SB8 are unconstitutional and void:

i. Section 171.207(a);

ii. Section 171.208(a);

iii. Section 171.208(b);

iv. Section 171.208(e);

v. Section 171.208(f);

vi. Section 171.208(g);

vii. Section 171.208(h);

viii. Section 171.208(i);

ix. Section 171.208(j);

x. Section 171.209;

xi. Section 171.211;

xii. Section 171.212;

xiii. Section 30.022; and

i. That any claims asserted by Defendant Maxwell under any provision of SB8 declared to be invalid are invalid and frivolous as a matter of law and have no basis in law.

VI. APPLICATION FOR TEMPORARY INJUNCTION AND ANTI-SUIT INJUNCTION

89. TEA Fund incorporates the preceding paragraphs.

90. Pursuant to Texas common law and Texas Civil Practice and Remedies Code Section 65.011(1) and (5), TEA Fund is entitled to injunctive relief against Maxwell, and all persons in active concert and participation with her, because Defendant Maxwell's threatened actions of bringing lawsuit after lawsuit against TEA Fund for constitutionally-protected conduct would cause irreparable injury.

91. TEA Fund will suffer immediate and irreparable harm if Defendant Maxwell is not enjoined from organizing and planning to bring lawsuits against it and others like her who speak

about and provide funds to organizations that help people access abortions and other reproductive health services. As set forth above, Defendant Maxwell has stated she will take action, and has already taken prefatory steps to that action by filing a Rule 202 action. If her threatened actions are allowed to proceed, TEA Fund will be harmed in a manner from which it will be unable to recover.

92. TEA Fund is likely to prevail on the merits of this case and receive the requested declaratory judgment, as well as equitable relief, attorneys' fees, and costs of court.

93. TEA Fund also has no adequate remedy at law to redress Defendant Maxwell's threatened actions. Specifically, money damages are insufficient to undo the threatened injury to TEA Fund. Several of TEA Fund's constitutional rights are at stake and would be irreparably harmed by the continuing threat of multiple lawsuits.

94. Threatened injury to TEA Fund outweighs any possible damages to Defendant Maxwell. Indeed, Defendant Maxwell is not harmed by TEA Fund's conduct in any sense, nor by its alleged non-compliance with SB8. Therefore, Defendant Maxwell would lose absolutely nothing by the issuance of an injunction.

95. Accordingly, TEA Fund also requests that this Court issue a temporary injunction preventing lawsuits against it by Defendant Maxwell in other venues under SB8 until such time as this case reaches its conclusion.

VII. RELIEF SOUGHT AND DISCOVERY LEVEL

96. Pursuant to Texas Rule of Civil Procedure 190, TEA Fund requests that discovery in this case be conducted under Level 3. The remedies TEA Fund seeks are within the jurisdictional limits of this Court. TEA Fund seeks non-monetary and all other relief to which it may show itself entitled.

VIII. ATTORNEYS' FEES

97. TEA Fund specifically requests the recovery of reasonable attorneys' fees in advancing this action under TEX. CIV. PRAC. & REM. CODE § 37.009.

IX. PRAYER FOR RELIEF

For the reasons set forth above, TEA Fund requests the following:

(a) Judgment against Defendant Maxwell for declaratory relief as set forth above;

(b) That Defendant Maxwell be cited to appear and show cause that upon hearing, a temporary injunction issue enjoining her, and any of her agents and any person or entity acting in concert with her from instituting lawsuits pursuant to SB8 against TEA Fund until or unless this case comes to a conclusion;

(c) An anti-suit injunction against the Rule 202 proceeding;

(d) Costs of court;

(e) Any and all costs and reasonable attorneys' fees incurred in any and all related appeals and collateral actions (if any); and

(f) Such other relief to which this Court deems TEA Fund justly entitled.

DATED: March 15, 2022.

Respectfully submitted,

By: */s/ Jennifer R. Ecklund*

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EXHIBIT A

SB 8 Enacted Text

AN ACT

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

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

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

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

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

SUBCHAPTER H. DETECTION OF FETAL HEARTBEAT

Sec. 171.201. DEFINITIONS. In this subchapter:

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

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

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

pregnancy.

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

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

(A) begins with fertilization;

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

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

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

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

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

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

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

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

(4) to make an informed choice about whether to

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

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

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

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

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

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

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

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

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

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

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

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

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

(c) This section does not affect:

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

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

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

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

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

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

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

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

(b) This subchapter may not be construed to:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(3) costs and attorney's fees.

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

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

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

(1) ignorance or mistake of law;

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

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

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

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

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

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

(f) It is an affirmative defense if:

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

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

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

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

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

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

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

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

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

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

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

established by the United States Supreme Court.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(1) the Uniform Declaratory Judgments Act; and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) the time for seeking appellate review expires.

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) A physician shall:

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

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

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

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

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

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

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

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

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

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

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

(A) the physician's name;

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

medically accurate:

(i) the risks of infection and hemorrhage;

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

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

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

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

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

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

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

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

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

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

(B) informs the pregnant woman that those materials:

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

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

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

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

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

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

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

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

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

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

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

"ABORTION AND SONOGRAM ELECTION

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

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

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

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

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

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

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

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

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

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

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

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

PROCEDURE. MY PLACE OF RESIDENCE IS:_____.

_____ _____

SIGNATURE DATE";

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

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

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

(c) The report must include:

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

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

(3) the type of abortion procedure;

(4) the date the abortion was performed;

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

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

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

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

[~~and~~]

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

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

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

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

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

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

President of the Senate

Speaker of the House

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

Secretary of the Senate

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

Chief Clerk of the House

Approved:

Date

Governor

EXHIBIT B
Feb. 2, 2022
Rule 202 Petition of
Ashley Maxwell

Cause No. 22-1046-431

In re Ashley Maxwell, Petitioner	IN THE DISTRICT COURT DENTON COUNTY, TEXAS ____ JUDICIAL DISTRICT

VERIFIED PETITION TO TAKE DEPOSITION TO INVESTIGATE A LAWSUIT

Petitioner Ashley Maxwell respectfully asks the Court for permission to take a deposition by oral examination of Kamyon Conner of the North Texas Equal Access Fund. Ms. Maxwell seeks this testimony to investigate potential claims brought by Ms. Maxwell or others under section 171.208 of the Texas Health and Safety Code.

PERSONS TO BE DEPOSED AND JURISDICTION

1. Petitioner Ashley Maxwell is a citizen of Texas and resident of Hood County.

2. Ms. Maxwell seeks to depose Kamyon Conner. Upon information and belief, Ms. Conner is a resident of Denton County and may be served at [redacted]. Ms. Conner's telephone number is [redacted].

3. In accordance with Rule 202.2(b)(2) of the Texas Rules of Civil Procedure, this petition is filed in Denton County, the county in which Ms. Conner resides.

4. This petition is verified by Ms. Maxwell, as required by Rule 202.2(a) of the Texas Rules of Civil Procedure.

NATURE OF THE ACTION

5. This petition is filed to investigate the possibilities for future civil actions brought under section 171.208 of the Texas Health and Safety Code, against individuals and organizations that performed or aided or abetted abortions in violation of the Texas Heartbeat Act, also known as Senate Bill 8 or SB 8. In her capacity as executive director of the North Texas Equal Access Fund ("TEA Fund"), Kamyon Conner has stated in a sworn declaration that her organization knowingly and intentionally

aided or abetted at least one post-heartbeat abortion in violation of the Texas Heartbeat Act. ***See*** Declaration of Kamyon Conner ¶ 7 (attached as Exhibit 1).

6. Ms. Conner submitted this sworn declaration in a lawsuit that her organization brought against Texas Right to Life and its legislative director, John Seago. This lawsuit was originally filed as ***North Texas Equal Access Fund v. State of Texas, et al.***, No. D-1-GN-21-004503 (Travis County), and was transferred by the multidistrict litigation panel to 98th Judicial District Court of Travis County. Those pre-trial proceedings were conducted under the caption of ***Van Stean v. State of Texas, et al.***, No. D-1-GN-21-004179, and the cases are currently on appeal to the Third Court of Appeals in Austin. ***See Texas Right to Life, et al. v. Van Stean, et al.***, No. 03-21-00650-CV.

7. North Texas Equal Access Fund ("TEA Fund") is expected to have information relevant to the potential claims that Ms. Maxwell is investigating, and it is expected to have interests adverse to Ms. Maxwell in any anticipated suit. The TEA Fund's mailing address is 501 Winnewood Village Shopping Center #386, Dallas, Texas 75224-1838; its registered office is at 8035 East R.L. Thornton Freeway, Suite 128, Dallas, Texas 75228; and its phone number is (844) 832-3863.

8. Kamyon Conner is expected to have information relevant to the potential claims that Ms. Maxwell is investigating, and she is expected to have interests adverse to Ms. Maxwell in any anticipated suit. On information and belief, Ms. Conner's address is [redacted], and her phone number is [redacted].

9. Additional parties are expected to have information relevant to the potential claims that Ms. Maxwell is investigating, as well as interests adverse to Ms. Maxwell's in any anticipated suit, but the identities of those parties are currently unknown. Ms. Conner's sworn declaration states that the TEA Fund aided or abetted the provision of at least one post-heartbeat abortion performed in Texas. But Ms. Conner's declaration does not say who provided those post-heartbeat abortions, nor does it identify

the individuals who aided or abetted these illegal abortions. Ms. Maxwell's goal is to use the deposition sought by this petition to ascertain the identity of all individuals and organizations who are subject to liability under section 171.208.

NOTICE OF RELATED CASES

10. There are no ongoing cases between Ms. Maxwell and Kamyon Conner. There are also no ongoing cases between Ms. Maxwell and TEA Fund.

11. There are several ongoing cases that seek to restrain state officials and private individuals from enforcing certain provisions in SB 8. One of those cases is ***Whole Woman's Health v. Jackson***, in which the plaintiffs are attempting to enjoin state licensing authorities from taking adverse action against abortion providers and medical professionals that violate the Texas Heartbeat Act. That case is currently pending in the U.S. Court of Appeals for the Fifth Circuit, after a remand from the Supreme Court of the United States. ***See Whole Woman's Health v. Jackson***, No. 21-50792 (5th Cir.); ***see also Whole Woman's Health v. Jackson***, 142 S. Ct. 522 (2021). On January 17, 2022, the Fifth Circuit certified a state-law question to the Supreme Court of Texas. ***See Whole Woman's Health v. Jackson***, --- F.4th ----, 2022 WL 142193 (5th Cir.). Those certification proceedings remain pending in the state supreme court.

12. A coalition of abortion providers and abortion funds has also filed suit in state court to restrain Texas Right to Life and its legislative director, John Seago, from initiating lawsuits against them under section 171.208 of the Texas Health and Safety Code. The district judge in those cases denied the defendants' motion to dismiss under the Texas Citizens Participation Act, and the defendants have taken an interlocutory appeal from that ruling. That appeal is currently pending in the Third Court of Appeals. ***See Texas Right to Life v. Van Stean***, No. 03-21-00650-CV.

BACKGROUND

13. The Texas Heartbeat Act, also known as SB 8, outlaws abortion after a fetal heartbeat is detectable. ***See*** Tex. Health & Safety Code § 171.204.

14. SB 8 prohibits state officials from enforcing the law. ***See*** Tex. Health & Safety Code § 171.207. Instead of public enforcement by state officials, SB 8 establishes a private right of action that authorizes individuals to sue those who violate the statute. ***See*** Tex. Health & Safety Code § 171.208. These private civil-enforcement suits may be brought against anyone who "performs or induces" a post-heartbeat abortion, ***see id.*** at § 171.208(a)(1), as well as anyone who "knowingly engages in conduct that aids or abets the performance or inducement of an abortion, including paying for or reimbursing the costs of an abortion through insurance or otherwise, if the abortion is performed or induced in violation of [SB 8]," ***id.*** at § 171.208(a)(2). Lawsuits may also be brought against anyone who "intends" to perform or aid or abet a post-heartbeat abortion in Texas.

15. A plaintiff who successfully sues an individual or organization under section 171.208 is entitled to injunctive relief and $10,000 in statutory damages for each unlawful abortion that the defendant performed or facilitated, plus costs and attorneys' fees. ***See*** Tex. Health & Safety Code § 171.208(b).

16. The Texas Heartbeat Act took effect on September 1, 2021, and it has remained in effect as the law of Texas since that time.

17. The person that Ms. Maxwell seeks to depose is the leader of an organization that helps women in Texas abort their unborn children. Kamyon Conner is executive director of the North Texas Equal Access Fund ("TEA Fund"). She is "responsible for executing TEA Fund's mission, protecting the organization's financial health, and supervising staff and volunteers." Conner Decl. ¶ 3 (attached as Exhibit 1).

18. The TEA Fund aids or abets abortion in Texas through a variety of means. As Ms. Conner explained in a sworn statement, the TEA Fund "provides financial,

emotional, and logistical support for low-income abortion patients in north Texas." Conner Decl. ¶ 4 (attached as Exhibit 1).

19. Most of the abortions that the TEA Fund aids or abets occur after a fetal heartbeat is detectable. Conner Decl. ¶ 4 (attached as Exhibit 1).

20. Since the Texas Heartbeat Act took effect on September 1, 2021, the TEA Fund has aided or abetted at least one post-heartbeat abortion in violation of the law. In her sworn declaration, Ms. Conner stated:

> TEA Fund has engaged in conduct with the intent to assist pregnant Texans obtain abortions after the detection of cardiac activity. Specifically, following the entry of an injunction by the Honorable Robert Pitman on October 6, 2021, and while that injunction was still in place, TEA Fund paid for at least one abortion after confirming the gestational age of the fetus was beyond the time when cardiac activity is usually detected. In doing so, it was TEA Fund's intention to pay for the abortion even if cardiac activity was detected.

Conner Decl. ¶ 7 (attached as Exhibit 1).

21. Ms. Conner's sworn declaration also states that the TEA Fund "partner[s] with" several abortion providers in northern Texas. This includes "clinics that have publicly confirmed that post-cardiac activity abortions were performed" in violation of the Texas Heartbeat Act. Conner Decl. ¶ 8 (attached as Exhibit 1).

REQUEST FOR DEPOSITION

22. Ms. Maxwell seeks a court order authorizing her to depose Ms. Conner because she seeks to investigate potential claims that she or others might bring under section 171.208 of the Texas Health and Safety Code, against any person or organization that performed or aided or abetted illegal post-heartbeat abortions of the type described in Ms. Conner's declaration. ***See*** Tex. R. Civ. P. 202(d)(2).

23. Ms. Maxwell additionally seeks to depose Ms. Conner because she anticipates the institution of a suit in which Ms. Conner or the TEA Fund may be a party. ***See*** Tex. R. Civ. P. 202(d)(1).

24. There is good reason for this court to find that deposing Ms. Conner at this time is the best way to avoid a delay or failure of justice in an anticipated suit. ***See*** Tex. R. Civ. P. 202.4(a). In addition, the likely benefit of allowing Ms. Maxwell to depose Ms. Conner to investigate a potential claim outweighs the burden or expense of the procedure. ***See*** Tex. R. Civ. P. 202.4(b).

25. Ms. Maxwell is considering whether to sue individuals and organizations that performed or facilitated the illegal abortions described in Ms. Conner's declaration. The sworn statement of Ms. Conner makes it clear that the TEA Fund has violated the Texas Heartbeat Act in a manner that could expose its employees, volunteers, and donors to liability under section 171.208 of the Texas Health and Safety Code.

26. Yet Ms. Maxwell is unwilling to file suit as this time because she is still investigating the range of potential defendants, as well as any possible defenses or substantive arguments that they might raise in the litigation. Ms. Maxwell expects to be able to better evaluate the prospects for legal success after deposing Ms. Conner and discovering the extent of involvement of each individual that aided or abetted post-heartbeat abortions in violation of SB 8.

27. Ms. Maxwell also wishes to preserve evidence of how the TEA Fund aided or abetted abortions in violation of SB 8, as well as evidence surrounding the involvement of each individual who aided or abetted these illegal abortions. Ms. Maxwell seeks to depose Ms. Conner on topics including the following: the TEA Fund's exact role in supporting, funding, and facilitating abortions provided in violation of the Texas Heartbeat Act; the identity of each individual or entity that the TEA Fund collaborated with in providing these illegal abortions; the number of illegal abortions provided; whether the TEA Fund has in any way distinguished its funding streams for advocacy and its funding streams for conduct that aids or abets illegal abortions performed in Texas; and the sources of financial support for the TEA Fund. Ms. Maxwell

also seeks discovery of documents[1] that reveal the sources of funding for the TEA Fund's operations and address the issues that will be covered in the deposition.

28. Deposing Kamyon Conner allows Ms. Maxwell to preserve evidence of great importance to the anticipated litigation. Ms. Conner's sworn declaration already attests to her knowledge of violations of the law. What Ms. Maxwell does not know is how many violations occurred and what other parties were involved in providing these illegal abortions. The value of this information to any subsequent litigation, and to the important policies embodied in the Heartbeat Act, is high. It is, indeed, essential to be able to implement the law.

29. Delay in obtaining this evidence increases the chances that information about the abortions provided will be forgotten and that documentation will become more difficult to obtain. Given the widespread press coverage of the Texas Heartbeat Act, including attention to the risks taken by abortion providers who choose to violate the

1. The scope of a pre-suit deposition under Rule 202 is the same as a regular deposition of non-parties in litigation. ***See*** Tex. R. Civ. P. 202.5. This specifically allows document-production requests. ***See*** Tex. R. Civ. P. 199.2(b)(5) (providing for requests for production along with a deposition notice); Tex. R. Civ. P. 205.1(c) (providing for noticing document production requests to nonparties); ***In re City of Tatum***, 567 S.W.3d 800, 808 (Tex. App. 2018) ("The "language of these rules when read together permits a petition seeking a pre-suit deposition under Rule 202 to also request the production of documents.'" quoting ***In re Anand***, No. 01-12-01106-CV, 2013 WL 1316436, at *3 (Tex. App. Apr. 2, 2013)). ***See also City of Dallas v. City of Corsicana***, No. 10-14-00090-CV, 2015 WL 4985935, at *6 (Tex. App. Aug. 20, 2015) ("Under rule 202, documents can be requested in connection with a deposition."). While some courts have refused to permit document discovery under Rule 202, ***see, e.g.***, ***In re Pickrell***, No. 10-17-00091-CV, 2017 WL 1452851, at *6 (Tex. App. Apr. 19, 2017), they have not analyzed the text of Rule 202.5 or its relationship to Rule 199. ***See In re City of Tatum***, 567 S.W.3d 800, 808 n. 7 (Tex. App. 2018) (criticizing courts denying document production under Rule 202).

Act's provisions,[2] there is considerable incentive for violators to hide or obscure any record of their involvement in unlawful activities.

30. Without the documentation, there would be a risk of miscarriage or delay of justice, as the law of Texas would be difficult or impossible to enforce. The policy of the state will be thwarted if it is not possible to identify the parties complicit in providing illegal abortions.

31. It would also enhance judicial efficiency to allow the eventual lawsuit to consider the entire chain of events (from funding to actual performance of the abortion) involved in the particular violations of SB 8 that Ms. Conner described in her sworn statement. Waiting for discovery in the course of litigation not only runs increased risks of forgetfulness or record-keeping deficiencies. It also has costs to the administration of justice in that the courts would have to adjudicate the matters either in separate proceedings, or through complaints successively amended to add additional defendants. Allowing deposition under Rule 202 would avoid this delay of justice.

32. The burden on Ms. Conner is modest. To be sure, she must appear for a deposition and must produce documents. But the inconvenience will only grow greater with any delay, as memories fade and documents accumulate. The value of the information sought outweighs the burden, as required by Rule 202.

33. Ms. Maxwell seeks to depose Ms. Conner by oral deposition. ***See*** Tex. R. Civ. P. 199. A notice of deposition identifying the topics for examination is attached to this Petition as Exhibit 2. This procedure will impose a minimal burden on Ms. Conner while permitting Ms. Maxwell to preserve for future litigation information about the illegal abortions that Ms. Conner has acknowledged.

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2. ***See, e.g.***, Abigail Abrams, ***Inside The Small Group of Doctors Who Risked Everything to Provide Abortions in Texas***, Time (Oct. 14, 2021), available at https:/ / bit.ly/ 3qxa5qx.

34. Ms. Maxwell further requests that the court order Ms. Conner to produce at or before the deposition any and all non-privileged documents relating to: TEA Fund's role in supporting, funding, and facilitating abortions provided in violation of the Texas Heartbeat Act; the identity of all individuals or entities that the TEA Fund collaborated with in providing these illegal abortions; the number of post-heartbeat abortions provided in Texas since September 1, 2021; and the sources of financial support for the TEA Fund's abortion-assistance activities.

REQUEST FOR HEARING

35. After the service of this petition and a notice of hearing, Ms. Maxwell respectfully requests that the court conduct a hearing, in accordance with Rule 202.3(a) of the Texas Rules of Civil Procedure, to determine whether to issue an order allowing the deposition.

REQUEST FOR RELIEF

36. For these reasons, Ms. Maxwell respectfully requests that the court set a date for a hearing on this petition, and thereafter issue an order:

a. finding that the benefits of a deposition and accompanying production of documents outweighs the burden;

b. finding that a deposition and accompanying production of documents will avoid delay or failure of justice;

c. authorizing Ms. Maxwell to take an oral deposition of Ms. Conner;

d. requiring Ms. Conner to produce the documents identified by this petition, at a time and place to be agreed by the parties; and

e. awarding all other relief that the Court may deem just, proper, or equitable.

Respectfully submitted.

/s/ Jonathan F. Mitchell

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* ***pro hac vice*** applications forthcoming

Dated: February 2, 2022

Counsel for Petitioner

Cause No. _____

In re Ashley Maxwell, Petitioner	IN THE DISTRICT COURT DENTON COUNTY, TEXAS ___ JUDICIAL DISTRICT

VERIFICATION

STATE OF TEXAS

COUNTY OF _____

Before me, the undersigned notary public, on this day personally appeared Ashley Maxwell and after being duly sworn, stated under oath that she has read the above verified petition to take deposition to investigate potential legal claims and its exhibits; that every statement of fact contained in it is within her personal knowledge and is true and correct; and that every exhibit is an authentic copy of what it purports to be.

KELLY WILKINSON
Notary ID #126738976
My Commission Expires
January 13, 2025

ASHLEY MAXWELL

Subscribed and sworn to me
this 2 day of February, ~~2020~~ 2022

NOTARY

Exhibit 1

(Declaration of Kamyon Conner)

DECLARATION OF KAYMON CONNER

STATE OF TEXAS §

DALLAS COUNTY §

1. My name is Kaymon Conner. I am a resident of Denton County, Texas, over 21 years of age, competent, and capable of testifying to the facts stated in this Declaration.

2. I declare that the statements within this Declaration are within my personal knowledge, and are true and correct.

3. I am the Executive Director of North Texas Equal Access Fund ("TEA Fund"). As Executive Director, I am responsible for executing TEA Fund's mission, protecting the organization's financial health, and supervising staff and volunteers.

4. TEA Fund's mission is to foster reproductive justice. It provides financial, emotional, and logistical support for low-income abortion patients in north Texas. Almost all of its clients are at a point in pregnancy when cardiac activity can be detected.

5. SB8 specifically states that providing funds to assist a pregnant person in obtaining an abortion violates SB8 *even if* the funder had no knowledge that the abortion at issue would ultimately violate SB8. Consequently, SB8, when it became effective, immediately rendered all of our services—even for people who have been pregnant fewer than six weeks—potentially subject to expensive litigation and punitive fines.

6. According to the terms of SB8, TEA Fund aids and abets abortions in the State of Texas by providing funding at all. It is my understanding that TEA Fund would also likely be liable for assisting pregnant people in locating legal abortion services by providing information, and by engaging in protected speech by advocating for safe, legal abortion services.

7. Since September 1, 2021, TEA Fund has engaged in conduct with the intent to assist pregnant Texans obtain abortions after the detection of cardiac activity. Specifically, following the entry of an injunction by the Honorable Robert Pitman on October 6, 2021, and while that injunction was still in place, TEA Fund paid for at least one abortion after confirming the gestational age of the fetus was beyond the time when cardiac activity is usually detected. In doing so, it was TEA Fund's intention to pay for the abortion even if cardiac activity was detected.

8. TEA Fund partners with several abortion provider clinics in Texas, including the clinics that have publicly confirmed that post-cardiac activity abortions were performed following the injunction issued by Judge Pitman.

9. I declare under penalty of perjury under the laws of the State of Texas that the foregoing is true and correct and that this Declaration was executed on this 3rd day of November, 2021.

_____
Kamyon Conner

Exhibit 2

(Notice of Deposition)

Cause No. _____

In re Ashley Maxwell, Petitioner	IN THE DISTRICT COURT DENTON COUNTY, TEXAS ____ JUDICIAL DISTRICT

NOTICE OF DEPOSITION OF KAMYON CONNER AND SUBPOENA DUCES TECUM

To: Kamyon Conner, [redacted]

Please take notice that the attorneys for petitioner Ashley Maxwell will take the oral deposition of Kamyon Conner at 9:00 a.m. on March 4, 2022, in connection with this matter and on the topics designated in Exhibit A, which is attached to this notice. The deposition will be taken before a certified court reporter at the law offices of Mitchell Law PLLC, 111 Congress Avenue, Suite 400, Austin, Texas, 78701. The deposition will continue day-to-day, before a court reporter, until completed. The deposition may be videotaped.

Please take further notice that at the time and place of the deposition the deponent shall produce, at the commencement of the deposition, certain documents and tangible things described in the subpoena, which is attached as Exhibit 3 to the petition and incorporated by reference.

Respectfully submitted.

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info@thomasmoresociety.org

* ***pro hac vice*** applications forthcoming

Dated: February 2, 2022

Counsel for Petitioner

EXHIBIT A

I. Definitions

For the purposes of this deposition notice, the following definitions apply:

- The terms "**TEA Fund**," "**you**" and "**your**" refer to the North Texas Equal Access Fund, including any agent or person authorized to act for or on its behalf, including its officers, employees, staff, and unpaid volunteers.

- The terms "**communication**" and "**communicate**" refer to any method used to transmit or exchange information, concepts, or ideas (whether verbal or nonverbal) including oral, written, typed, or electronic transmittal of any type of information or data, by the use of words, silence, numbers, symbols, images, or depictions, from one person or entity to another person or entity.

- The term "**document**" refers to the act of noting, recording, or preserving any type of information, data, or communication, without regard to the method used to note, record, or preserve such information, data, or communication. The term includes any e-mail or text message.

- The term "**entity**" means any legal entity inquired about (other than a natural person) including a partnership, professional association, joint venture, corporation, governmental agency, or other form of legal entity.

- The terms "**identify**" and "**identity**," when used in connection with a natural person, require disclosure of that person's full name, present or last known address, and present or last known telephone number. When used in connection with a legal entity, the terms require disclosure of its legal name, its address, and telephone number.

- The terms "**implement**" and "**implementation**" refer to any method, process, or action used to put a decision or plan into effect or achieve a goal or obligation.

- The term "**information**" refers to and includes documents, records, communications, facts, ideas, data, observations, opinions, photographs, slides, video recordings, audio recordings, and tangible and intangible items and evidence of any kind or sort.

- The terms "**person**" and "**persons**" mean any legal entity inquired about, whether a natural person, partnership, sole proprietorship, professional association, joint venture, corporation, governmental agency, or other form of legal entity.

- The term "**record**" means letters, words, sounds, or numbers, or the equivalent of letters, words, sounds, or numbers, that have been written, recorded, documented, or received by Defendant by:

  (A) handwriting;
  (B) typewriting;
  (C) printing;
  (D) photostat;
  (E) photograph;
  (F) magnetic impulse;
  (G) mechanical or electronic recording;
  (H) digitized optical image; or
  (I) another form of data compilation.

- The term "**record**" also includes any communication, including an e-mail or text-message communication.

- The term "**reproduction**" means an accurate and complete counterpart of an original document or record produced by:

  (A) production from the same impression or the same matrix as the original;
  (B) photograph, including an enlargement or miniature;
  (C) mechanical or electronic re-recording;
  (D) chemical reproduction;
  (E) digitized optical image; or
  (F) another technique that accurately reproduces the original.

- The term "**third party**" means any person, persons, or entity other than the defendants or the attorneys of record for the defendants.

- The terms "**and**" and "**or**," when used in these definitions and in the discovery requests, include the conjunction "and/ or."

II. Deposition Topics

1. TEA Fund's involvement with or support for any abortions performed after September 1, 2021, in which a fetal heartbeat was detectable (or likely to be detectable if properly tested).

2. TEA Fund's role in supporting, funding, or facilitating abortions provided in violation of the Texas Heartbeat Act.

3. TEA Fund's role in supporting, funding, or facilitating abortions provided in violation of any other law enacted by the Texas legislature.

4. The identity of any individuals or entities that the TEA Fund consulted or collaborated with in supporting, funding, or facilitating abortions provided in violation of the Texas Heartbeat Act or any other law enacted by the Texas legislature.

5. The manner in which the TEA Fund has distinguished its funding streams for advocacy and its funding streams for conduct that aids or abets abortion.

6: The sources of financial support for the TEA Fund's conduct that aids or abets abortion.

7. The identity of the officers, employees, volunteers, board members, and donors of the TEA Fund.

Exhibit 3

(Subpoena for Deposition and Production of Documents)

Cause No. _____

In re Ashley Maxwell, Petitioner	IN THE DISTRICT COURT DENTON COUNTY, TEXAS ____ JUDICIAL DISTRICT

SUBPOENA FOR DEPOSITION AND PRODUCTION OF DOCUMENTS

This subpoena is issued in the name of the State of Texas:

To any sheriff or constable of the State of Texas, or any other person authorized to serve and execute subpoenas as provided by Texas Rule of Civil Procedure 176, Greetings:

You are hereby commanded to summon:

[redacted]

to appear at the offices of:

Mitchell Law PLLC
111 Congress Avenue, Suite 400
Austin, Texas 78701

on March 4, 2022, at 9:00 a.m., to attend and give testimony at a deposition in this case, to produce and permit inspection and copying of documents or tangible things to be used as evidence in this case, and to remain in attendance from day to day until lawfully discharged. All documents or tangible items listed in Exhibit A must be produced.

Pursuant to Rule 176.8(a) of the Texas Rules of Civil Procedure:

Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena is issued or a district court in the county in which the subpoena is served, and may be punished by fine or confinement, or both.

This subpoena is issued by Jonathan F. Mitchell, counsel of record for the petitioner in the above-styled and numbered cause.

RETURN OF SERVICE

Came to hand this _____ day of _____, 2022, and executed this the _____ day of _____, 2022, a true and correct copy hereof in the following manner: By delivering to the within named witness _____, via

_____ USPS Priority Mail
_____ USPS Certified Mail/ Return Receipt Requested
_____ Personal Service/ Hand-Served
_____ Fax/ Electronic Mail

Returned this _____ day of _____, 2022.

By: _____
Authorized Person who is not a party to the suit and is not less than 18 years of age.

****

ACCEPTANCE OF SERVICE OF SUBPOENA BY WITNESS PER RULE 176 OF THE TEXAS RULES OF CIVIL PROCEDURE

I, the undersigned witness named in the Subpoena acknowledge receipt of a copy thereof, and hereby accept service of the attached subpoena.

Rule 176.8(a) Contempt. Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena is issued or a district court in the county in which the subpoena is served, and may be punished by fine or confinement, or both.

_____ _____
SIGNATURE OF WITNESS DATE

EXHIBIT A

Documents to Be Produced by Kamyon Conner

I. Definitions and Instructions For Requests For Production

1. Each request shall operate and be responded to independently and, unless otherwise indicated, no request limits the scope of any other request.

2. Unless otherwise indicated, the relevant time period for these requests is from January 1, 2019, to the present.

3. Unless otherwise defined, the terms used should be read and construed in accordance with the English language and the ordinary meanings and definitions attached. You should, therefore: (i) construe the words "and" as well as "or" in the disjunctive or conjunctive, as necessary to make the request more inclusive; (ii) construe the term "including" to mean "including, but not limited to"; and (iii) construe the words "all" and "each" to mean all and each.

The following definitions apply to each of these requests:

- The terms "**TEA Fund**," "**you**" and "**your**" refer to the North Texas Equal Access Fund, including any agent or person authorized to act for or on its behalf, including its officers, employees, staff, and unpaid volunteers.

- The terms "**communication**" and "**communicate**" refer to any method used to transmit or exchange information, concepts, or ideas (whether verbal or nonverbal) including oral, written, typed, or electronic transmittal of any type of information or data, by the use of words, silence, numbers, symbols, images, or depictions, from one person or entity to another person or entity.

- The term "**document**" refers to the act of noting, recording, or preserving any type of information, data, or communication, without regard to the method used to note, record, or preserve such information, data, or communication. The term includes any e-mail or text message.

- The term "**entity**" means any legal entity inquired about (other than a natural person) including a partnership, professional association, joint

venture, corporation, governmental agency, or other form of legal entity.

- The terms "**identify**" and "**identity**," when used in connection with a natural person, require disclosure of that person's full name, present or last known address, and present or last known telephone number. When used in connection with a legal entity, the terms require disclosure of its legal name, its address, and telephone number.

- The terms "**implement**" and "**implementation**" refer to any method, process, or action used to put a decision or plan into effect or achieve a goal or obligation.

- The term "**information**" refers to and includes documents, records, communications, facts, ideas, data, observations, opinions, photographs, slides, video recordings, audio recordings, and tangible and intangible items and evidence of any kind or sort.

- The terms "**person**" and "**persons**" mean any legal entity inquired about, whether a natural person, partnership, sole proprietorship, professional association, joint venture, corporation, governmental agency, or other form of legal entity.

- The term "**record**" means letters, words, sounds, or numbers, or the equivalent of letters, words, sounds, or numbers, that have been written, recorded, documented, or received by Defendant by:

  (A) handwriting;
  (B) typewriting;
  (C) printing;
  (D) photostat;
  (E) photograph;
  (F) magnetic impulse;
  (G) mechanical or electronic recording;
  (H) digitized optical image; or
  (I) another form of data compilation.

- The term "**record**" also includes any communication, including an e-mail or text-message communication.

- The term "**reproduction**" means an accurate and complete counterpart of an original document or record produced by:

(A) production from the same impression or the same matrix as the original;
(B) photograph, including an enlargement or miniature;
(C) mechanical or electronic re-recording;
(D) chemical reproduction;
(E) digitized optical image; or
(F) another technique that accurately reproduces the original.

- The term "**third party**" means any person, persons, or entity other than the defendants or the attorneys of record for the defendants.

- The terms "**and**" and "**or**," when used in these definitions and in the discovery requests, include the conjunction "and/or."

II. Documents Or Tangible Things Requested

Request No. 1: Any and all non-privileged documents describing abortions provided with the TEA Fund's support after September 1, 2021, in which a fetal heartbeat was detectable (or likely to be detectable if properly tested).

Request No. 2: Any and all non-privileged documents addressing the TEA Fund's role in supporting, funding, or facilitating abortions provided in violation of the Texas Heartbeat Act.

Request No. 3: Any and all non-privileged documents identifying any individual or entities that the TEA Fund consulted or collaborated with in supporting, funding, or facilitating abortions provided in violation of the Texas Heartbeat Act.

Request No. 4: Any and all non-privileged documents describing whether the TEA Fund has in any way distinguished its funding streams for advocacy and its funding streams for conduct that aids or abets abortion.

Request No. 5: Any and all non-privileged documents describing or identifying the sources of financial support for the TEA Fund's conduct that aids or abets abortion.

Request No. 6: Any and all non-privileged documents describing or identifying any officer, employee, volunteer, board member, or donor of the TEA Fund.

EXHIBIT B—TRCP 176.6

You are advised that under Texas Rule of Civil Procedure 176.6, a person served with a subpoena has certain rights and obligations, specifically, that rule states:

(a) Compliance required. Except as provided in this subdivision, a person served with a subpoena must comply with the command stated in the subpoena unless discharged by the court or by the party summoning such witness. A person commanded to appear and give testimony must remain at the place of deposition, hearing, or trial from day to day until discharged by the court or by the party summoning the witness.

(b) Organizations. If a subpoena commanding testimony is directed to a corporation, partnership, association, governmental agency, or other organization, and the matters on which examination is requested are described with reasonable particularity, the organization must designate one or more persons to testify on its behalf as to matters known or reasonably available to the organization.

(c) Production of documents or tangible things. A person commanded to produce documents or tangible things need not appear in person at the time and place of production unless the person is also commanded to attend and give testimony, either in the same subpoena or a separate one. A person must produce documents as they are kept in the usual course of business or must organize and label them to correspond with the categories in the demand. A person may withhold material or information claimed to be privileged but must comply with Rule 193.3. A nonparty's production of a document authenticates the document for use against the nonparty to the same extent as a party's production of a document is authenticated for use against the party under Rule 193.7.

(d) Objections. A person commanded to produce and permit inspection and copying of designated documents and things may serve on the party requesting issuance of the subpoena—before the time specified for compliance—written objections to producing any or all of the designated materials. A person need not comply with the part of a subpoena to which objection is made as provided in this paragraph unless ordered to do so by the court. The party requesting the subpoena may move for such an order at any time after an objection is made.

(e) Protective orders. A person commanded to appear at a deposition, hearing, or trial, or to produce and permit inspection and copying of designated documents and things may move for a protective order under Rule 192.6(b)—before the time specified for compliance—either in the court in which the action is pending or in a district court in the county where the subpoena was served. The person must serve the motion on all parties in accordance with Rule 21a. A person need not comply with the part of a subpoena from which protection is sought under this paragraph unless ordered to do so by the court. The party requesting the subpoena may seek such an order at any time after the motion for protection is filed.

Exhibit 4

(Declaration of Jonathan F. Mitchell)

Cause No. _____

In re Ashley Maxwell, Petitioner	IN THE DISTRICT COURT DENTON COUNTY, TEXAS ____ JUDICIAL DISTRICT

DECLARATION OF JONATHAN F. MITCHELL

I, Jonathan F. Mitchell, being duly sworn, states as follows:

1. My name is Jonathan F. Mitchell. I am over 18 years old and fully competent to make this declaration.

2. I have personal knowledge of the facts stated in this declaration, and all of these facts are true and correct.

3. I represent petitioner Ashley Maxwell in this litigation.

4. I also represent Texas Right to Life and John Seago in the lawsuit that the North Texas Equal Access Fund has filed against them. That lawsuit was originally filed as ***North Texas Equal Access Fund v. State of Texas, et al.***, No. D-1-GN-21-004503 (Travis County), and it is currently on appeal to the Third Court of Appeals in Austin. ***See Texas Right to Life, et al. v. Van Stean, et al.***, No. 03-21-00650-CV.

5. The document attached as Exhibit 1 to this petition is an authentic copy of a sworn declaration that Kamyon Conner submitted in that litigation.

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

Jonathan F. Mitchell

Dated: January 28, 2022 JONATHAN F. MITCHELL

EXHIBIT C
Feb. 23, 2022
Texas Tribune Article

Anti-abortion lawyers target those funding the procedure for potential lawsuits under new Texas law

> **Attorneys who helped design Texas' novel abortion ban have asked a judge to allow them to depose the leaders of two abortion funds, seeking information about anyone who may have "aided or abetted" in a prohibited procedure.**

BY ELEANOR KLIBANOFF FEB. 23, 2022 2 PM CENTRAL

A patient waits to see a doctor prior to her abortion at Trust Women clinic in Oklahoma City on Dec. 6, 2021. REUTERS/Evelyn Hockstein

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For nearly six months, as Texas' novel abortion law has wended its way through the courts, abortion providers and opponents have been locked in a stalemate.

The law, known as Senate Bill 8, empowers private citizens to sue anyone who "aids or abets" an abortion after about six weeks of pregnancy. With one exception as soon as the law went into effect, abortion providers in Texas have stopped performing these prohibited procedures —so opponents haven't tried to bring one of these enforcement suits.

But that could be changing. A group of anti-abortion lawyers have taken steps to potentially bring lawsuits under SB 8, claiming in state court petitions that the leaders of two abortion funds have information about illegal abortions they helped patients procure.

This is a significant escalation on the part of abortion opponents, who have so far seemed satisfied with the chilling effect that even just the threat of lawsuits has had on abortion providers and their affiliates.

The petitions were filed by two women, Ashley Maxwell of Hood County and Sadie Weldon of Jack County. They are represented by Jonathan Mitchell, the architect of SB 8 and a former solicitor general for Texas; state Sen. Bryan Hughes (R-Mineola), the law's chief legislative advocate; and lawyers from the right-wing Thomas More Society and America First Legal Foundation.

Maxwell and Weldon are asking a judge to allow them to depose the executive director of the Texas Equal Access Fund and the deputy director of the Lilith Fund before any lawsuits are filed.

If granted, the depositions will allow the petitioners to discover "the extent of involvement of each individual that aided or abetted post-heartbeat abortions in violation of SB 8" so they can "better evaluate the prospects for legal success."

While abortion providers have reported significant declines in patient loads since the law went into effect, abortion funds have seen a surge in demand from clients trying to access abortions before the deadline or leave the state to seek the procedure.

"What [these petitions] mean to do is chill pregnant people from seeking out the help of abortion funds," said Elizabeth Sepper, a law professor at the University of Texas at Austin. "If someone thinks that their identity and circumstances are going to be revealed to the world at large by a lawsuit … they're going to hesitate before they pick up the phone and call for help."

"Aided and abetted"

The petitions seek to depose Kamyon Conner, executive director of the Texas Equal Access Fund, and Neesha Davé, deputy director of the Lilith Fund for Reproductive Equity, two nonprofit abortion funds that provide financial assistance to patients seeking abortions.

Conner and Davé both admitted, in sworn affidavits in state court, that their organizations helped fund abortions "after the period in which cardiac activity is usually detectable." That would put them in violation of SB 8, also known as the Texas Heartbeat Act, and open them up to potential lawsuits.

The organizations helped fund these abortions during a brief period last fall in which a federal district judge had enjoined the law from being enforced. A higher court quickly overturned that ruling; SB 8 specifically notes that an injunction that is later overturned is not a protection from future lawsuits.

That aspect of the law hasn't been tested in court, and experts say it's unclear whether it would hold up.

"In part, this attempt to get a deposition is also an attempt to figure out if claims can be brought based on the abortions performed in those few days where SB 8 was not in effect," said Sepper.

The depositions are also seeking to identify who, in the language of the law, "aided and abetted" in these abortions —and the petitions indicate they're taking a very wide view of that term. According to the filing, they're seeking information on the funds' role in facilitating abortions, the identity of individuals that they collaborated with and access to documents on the funds' sources of financial support.

In a statement, Thomas More Society President Tom Brejcha said the two named abortions funds have "exposed their employees, volunteers and donors to civil lawsuits and potential criminal prosecution."

"Those who are funding or assisting in bringing about these abortions will be revealed in discovery," Brejcha said. "Anyone who has aided or abetted an illegal abortion in Texas is subject to the full force of the law and imposition of these civil and criminal sanctions."

In response to a fundraising callout by the Lilith Fund, the Thomas More Society tweeted a warning, "@lilithfund donors could get sued under SB 8," and linked to the press release about the petitions.

Is this a standalone case?

Lawyers for the abortion funds and lawyers for the petitioners disagree on how — and where —these deposition requests should proceed. The conflict centers on

the ongoing “multidistrict litigation,” where 14 challenges to the law in state court were combined into one courtroom in Austin.

These cases specifically targeted the anti-abortion group Texas Right to Life and its legislative director, John Seago, and were heard by retired state magistrate judge David Peeples. It was as part of this multidistrict litigation that Conner and Davé filed these sworn affidavits, admitting to potential violations of SB8.

In December, Peeples ruled that SB8 was unconstitutional, though he didn’t enjoin it from being enforced. Texas Right to Life has appealed that decision, and all other actions in the case are halted while that appeal proceeds.

The central question is whether these petitions seeking to depose Conner and Davé are related to that case and should be added to the multidistrict litigation. If they are, they too would be stayed from moving forward by the ongoing appeal, and the depositions wouldn’t happen anytime soon.

Jennifer Ecklund and Elizabeth Myers, who are representing the abortion funds, consider these new petitions to be “tag-along” cases —the actual legal term — and have moved them into the multidistrict litigation.

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Mitchell, representing both Texas Right to Life and the women who filed the petitions, has filed a motion arguing that these petitions are not related to the ongoing litigation and should be sent back to Jack and Denton counties, where the cases are filed.

Seago, with Texas Right to Life, said that he was not consulted by Mitchell or anyone else before these petitions were filed and has no part in this effort. Mitchell declined to comment; Hughes did not respond to requests for comment.

The next step would be for Peeples to hold a hearing and decide whether or not the cases are related. Lawyers for the abortion funds argue that the stay in the multidistrict case blocks Peeples from even taking that step, a stance that will likely be challenged by the lawyers for the petitioners.

Disclosure: University of Texas at Austin has been a financial supporter of The Texas Tribune, a nonprofit, nonpartisan news organization that is funded in part by donations from members, foundations and corporate sponsors. Financial supporters play no role in the Tribune's journalism. Find a complete list of them here.

newsroom, we rely on members to help keep our stories free and our events open to the public. Do you value our journalism? Show us with your support.

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EXHIBIT D
Feb. 14, 2022
America First Legal
Press Release

AFL FILES PETITIONS AGAINST TWO ABORTION FUNDS IN TEXAS WHO VIOLATED THE TEXAS HEARTBEAT ACT

MONDAY, FEBRUARY 14, 2022

WASHINGTON, DC—America First Legal has filed petitions against two abortion funds in Texas that have admitted to paying for abortions in violation of the Texas Heartbeat Act.

Last week, AFL served papers on Neesha Davé, the Deputy Director of the Lilith Fund for Reproductive Equity, and Kamyon Conner, the Executive Director of the Texas Equal Access Fund, after each of them admitted in court that their organizations had paid for an abortion of an unborn child that had a detectable heartbeat.

The Texas Heartbeat Act imposes civil liability on any person who aids or abets an abortion performed after fetal heartbeat, and anyone found to have assisted a post-heartbeat abortion must pay at least $10,000 in statutory damages plus costs and attorneys' fees. It is also a criminal offense in Texas to "furnish the means for procuring an abortion knowing the purpose intended" unless the mother's life is in danger, and anyone convicted of paying for another's abortion faces two to five years imprisonment for each abortion that they funded.

America First Legal is seeking to take depositions of Davé and Conner to determine which individuals are subject to civil liability and criminal prosecution for paying these illegal abortions, which will include employees, volunteers, and donors of the Lilith Fund and the Texas Equal Access Fund.

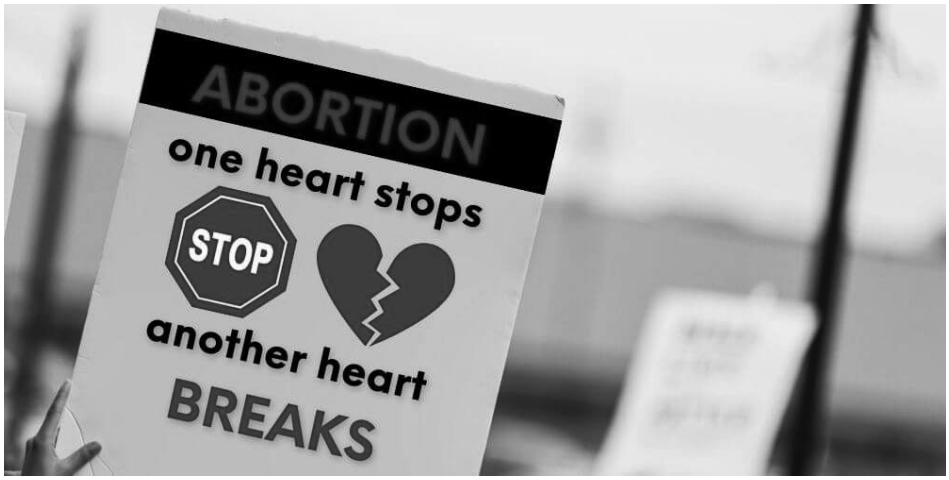
America First Legal President Stephen Miller released the following statement:

> "*America First legal is proud to be part of the legal team that successfully defended the Texas Heartbeat Act, including before the Supreme Court of the United States. As a civil rights organization, we strongly advocate for the inalienable right to life—including the right of all children to reach their full God-given potential. For this reason, we are seeking court-ordered discovery against organizations who have admitted their role in aiding and abetting abortions in violation of the Act. We will maintain the rule of law and protect the right to life,*" Stephen Miller said.

Read the petitions here and here.

To schedule an engagement with America First Legal, please email **info@athospr.com**.

EXHIBIT E
Feb. 21, 2022
TMS Press Release
Re: Pre-suit Discovery



Abortion Funds to Face Pre-Suit Discovery over Violations of the Texas Heartbeat Act

Staff Writer February 21, 2022 9:00 pm

Attorneys from the Thomas More Society have filed pre-suit petitions for discovery against two abortion funds that have admitted to violating the Texas Heartbeat Act. Directors of the Lilith Fund for Reproductive Equity and the Texas Equal Access Fund have admitted in court that their organizations paid for at least one abortion of an unborn child in Texas that had a detectable heartbeat. Earlier this month Thomas More Society attorneys submitted petitions to take depositions from Neesha Davé, the Deputy Director of the Lilith Fund for Reproductive Equity, and Kamyon Conner, the Executive Director of the Texas Equal Access Fund. These depositions will uncover the individuals subject to civil liability and criminal prosecution for aiding or abetting these illegal abortions, which will include each fund's employees, volunteers, and donors whose gifts are targeted or used for these illegal purposes.

The Texas Heartbeat Act imposes civil liability on any person who aids or abets an abortion performed after fetal heartbeat is detected, and anyone found to have assisted a post-heartbeat abortion must pay at least $10,000 in statutory damages plus costs and attorneys' fees. It is also a criminal offense in Texas to "furnish the means for procuring an abortion knowing the purpose intended" unless the mother's life is in danger, and anyone convicted of

paying for another's abortion faces two to five years imprisonment for each abortion that they funded or otherwise helped to take place.

"It is illegal to pay for an abortion performed in Texas or to contribute to abortion funds to aid or abet these abortions," explained Tom Brejcha, President and Chief Counsel of the Thomas More Society. "The Lilith Fund and the Texas Equal Access Fund have admitted to paying for abortions in violation of the Texas Heartbeat Act, and in doing so they have exposed their employees, volunteers, and donors to civil lawsuits and potential criminal prosecution. Those donations were used not for First Amendment advocacy but to end the lives of innocent unborn human beings with beating hearts.Those who are funding or assisting in bringing about these abortions will be revealed in discovery. Anyone who has aided or abetted an illegal abortion in Texas is subject to the full force of the law and imposition of these civil and criminal sanctions."

Read the Verified Petition to Take Deposition to Investigate a Lawsuit filed in the District Court, Jack County, Texas, 271st Judicial District, requesting to depose Neesha Davé of the Lilith Fund for Reproductive Equity, here.

Read the Verified Petition to Take Deposition to Investigate a Lawsuit filed in the District Court, Denton County, 431st Texas, Judicial District, requesting to depose Kamyon Conner of the North Texas Equal Access Fund here.


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EXHIBIT F
TMS Collection of Tweets

Lilith Fund @lilithfund · Feb 21
Help us raise $20k for Texans who need abortions this AmplifyATX!

It's been 174 days of an extreme abortion ban but that's why we are now frequently covering the entire procedure cost for our clients and serving nearly every client who calls.

20 32

weet

ThomasMoreSoc
ThomasMoreSoc

Replying to @lilithfund

@lilithfund donors could get sued under SB 8: thomasmoresociety.org/abortion-funds…

6:45 PM · Feb 21, 2022 · witter Web App

1 Retweet 2 Quote weets 1 Like

weet your reply

Lilith Fund @lilithfund · Feb 22
Replying to ThomasMoreSoc
Yeah we think you're wrong. Worry about yourself and we'll keep funding abortions and supporting Texans

1 20

nellastu @nellastu1 · Feb 24
Replying to ThomasMoreSoc
Directors of the Thomas More Society are directly funding the abortions of their sex-slave mistresses in violation of SB-8.

3

Relevant people

ThomasMoreSoc
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Restoring respect in marriage, and religio 1997. We are a natio law firm that provid services.

Lilith Fund
@lilithfund
Financial assistance support, and buildin spaces for people w in Texas—unapolo compassion &conv

What's happening

War in Ukraine · LIVE
Tensions continue as Ukrai and Russia fail to reach agreement in 'high level' ta

CODAFilm
Now Streaming on Apple TV+
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Entertainment · Trending
JussieSmollett
4,421 weets

Sports · Trending
Kershaw
2,479 weets

COVID-19 · LIVE
COVID-19: News and updat Texas

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Dan Davis Bindlestaff · Feb 24
Replying to ThomasMoreSoc and @lilithfund
Stick to making stew.
Oh, sorry. That's Dinty Moore. Easy mistake.
1

Show more replies

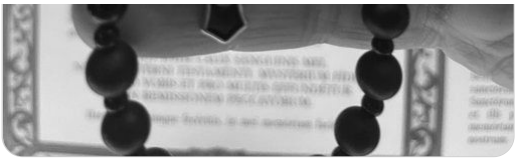
More weets

Sister Mary Joseph @sscjusa · 20h
"The world is your ship and not your home."
St. Therese of Lisieux

23 333 2,486

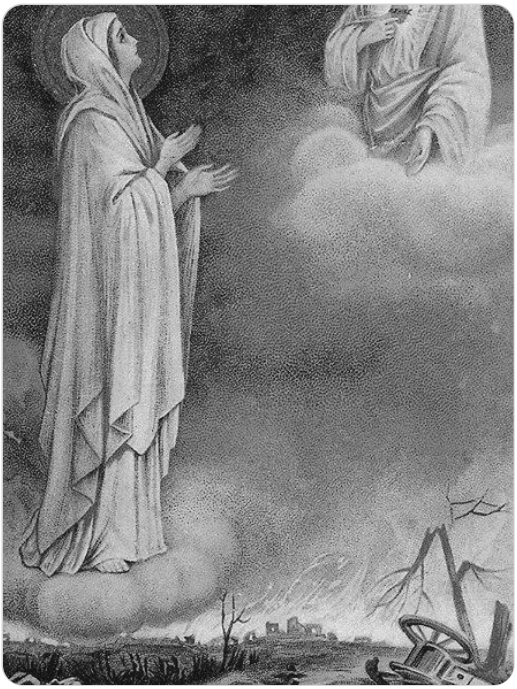
LifeNews.com LifeNewsHQ · 23h
Christians don't support killing babies in abortions.
30 418 1,614

Fr. Jeff Fasching JefferyFasching · 11h
Satan will never succeed in destroying the prayer of the Holy Rosary..It is the prayer of she who holds all power over him…



45 270 1,556

Behold Thy Mother @beholdthymother · 23h
Our Lady of Peace, intercede for us



17 258 1,497

@ThomasMoreSoc @ThomasMoreSoc · 2h

It is illegal to donate to #abortion funds that pay for abortions performed in #Texas. Violators are subject to civil #lawsuits and criminal #prosecution.

texastribune.org

Anti-abortion lawyers target those funding the procedure for potentia...

Attorneys who helped design Texas' novel abortion ban have asked a judge to allow them to depose the leaders of two abortion funds, ...

1 5

@ThomasMoreSoc @ThomasMoreSoc · 10h

"Those who are funding or assisting in bringing about these abortions will be revealed in discovery. Anyone who has aided or abetted an illegal abortion in Texas is subject to the full force of the law and imposition of these civil and criminal sanctions." @lilithfund

2 6

Thomas More Society
6h ·

Tom Brejcha, president and chief counsel of the Thomas More Society explained that, in keeping with the #Texas law, the two pro-abortion funding organizations “have admitted to paying for #abortions in violation of the Texas Heartbeat Act, and in doing so they have exposed their employees, volunteers, and donors to civil #lawsuits and potential criminal prosecution. Those donations were used not for #First#Amendment advocacy but to end the lives of innocent #unborn human beings with beating hearts,” Brejcha, continued. “Those who are funding or assisting in bringing about these abortions will be revealed in discovery. Anyone who has aided or abetted an illegal abortion in Texas is subject to the full force of the law and imposition of these civil and criminal sanctions.”
https://theohiostar.com/.../abortion-funding-groups.../

THEOHIOSTAR.COM

Abortion Funding Groups Admitting to Violating Texas Heartbeat Act to Face Depositions - The Ohio Star

19 2 Comments 2 Shares

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All comments

Write a comment...

Press Enter to post.

Mike Roder
"I've noticed that everyone who is for abortion has already been born." - Ronald Reagan. "It is a very great poverty to decide that a child must die that you might live as you wish." - Mother Teresa of Calcutta

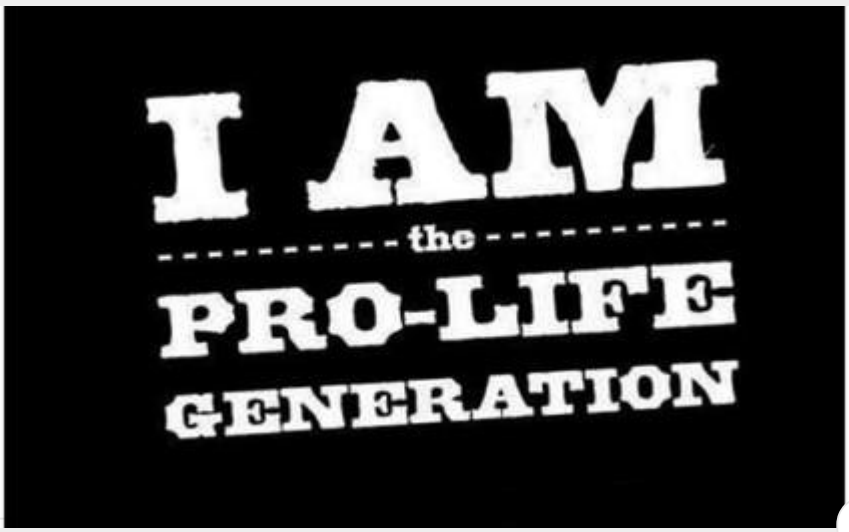
Like Reply 5h 1

Francesca Si Sp
In Charlotte, NC
.....**https://www.facebook.com/ATTWNOutreach/photos/a.316516275096741/4821916764556647/?__cft__[0]=AZWiv6DgUJ-lLYOiQor4K2dN3M8BAGv7Avay2wAdmag3njzVNs3P7b8Gog-opWCMXDf88NYGWp-kKZi_Fsi-qVW5B5ggvXsN7GtKs35YJyzXuVLbw6pe766xJWe75p49O-bmCAu0T3PPcgxgfYS0nIcKyFBk8i0k1bGUcbHz3b5rFZA6MphWdFr3DQtn3FT0l45_KqoBNUu9UOlWfJ6UkwiK&__tn__=-UK-R**

Like Reply 4h

Thomas More Society
1d ·

Students for Life of America Today is the deadline for a #lasvegas school to respond to our #demandletter regarding their #discrimination of our #prolife client who was denied #FirstAmendment right to promote the pro-life message of his club: https://afn.net/.../will-school-make-changes-or-welcome.../



AFN.NET
Will school make changes or welcome lawsuit?
Today is the deadline for a Las Vegas-area high school to respond t...

EXHIBIT G
Feb. 23, 2022
The Ohio Star
Article re: Rule 202 Petitions

The Ohio Star
LEADING THE WAY IN NEWS AND EDUCATION

Abortion Funding Groups Admitting to Violating Texas Heartbeat Act to Face Depositions

February 23, 2022 Susan Berry, PhD

Two litigation firms have filed petitions against organizations that have admitted to paying for abortions in Texas after detection of a fetal heartbeat, a violation of the Texas Heartbeat Act.

Attorneys from both America First Legal and the Thomas More Society filed petitions for discovery against the Lilith Fund for Reproductive Equity and the Texas Equal Access Fund, both of which have admitted in court that their organizations paid for at least one abortion of an unborn baby in Texas who had a detectable heartbeat.

The litigation firms submitted petitions to take depositions from Neesha Davé, deputy director of the Lilith Fund for Reproductive Equity, and Kamyon Conner, executive director of the Texas Equal Access Fund.

Texas Equal Access Fund
@TEAFund

Be loud and proud with some pro-abortion merch from our Threadless shop! All proceeds help us fund abortions. teafund.threadless.com

8:18 AM · Feb 16, 2022

15 Reply Share

Explore what's happening on Twitter

The depositions will serve to determine which individuals are subject to civil liability and criminal prosecution for assisting with illegal abortions.

The Texas law contains a unique enforcement mechanism that allows any private citizen to le a civil lawsuit against an abortion provider or any other individual who "aids or abets" a "criminal abortion." Any individual found to have assisted an abortion after a fetal heartbeat is detected can be penalized at least $10,000 in statutory damages plus costs and attorneys' fees.

Lilith Fund
@lilithfund

Black women invented the #ReproductiveJustice framework.

#BlackHistoryMonth

1:05 PM · Feb 1, 2022

87 Reply Share

Explore what's happening on Twitter

Additionally, it is unlawful in Texas to provide the means for obtaining an abortion, "knowing the purpose intended," unless the mother's life is in danger. Individuals convicted of funding abortions face 2 to 5 years in prison for each abortion they either paid for or helped to bring about in other ways.

"America First legal is proud to be part of the legal team that successfully defended the Texas Heartbeat Act, including before the Supreme Court of the United States," said Stephen

Miller, the rm's president, in a statement.

Miller added:

> *"As a civil rights organization, we strongly advocate for the inalienable right to life—including the right of all children to reach their full God-given potential. For this reason, we are seeking court-ordered discovery against organizations who have admitted their role in aiding and abetting abortions in violation of the Act. We will maintain the rule of law and protect the right to life.*

Texas Equal Access Fund
@TEAFund

Need help getting an abortion? We provide free, non-judgmental, confidential, and affirming support for all abortion seekers. Text us at 1-844-TEA-FUND (1-844-832-3863).

9:15 AM · Feb 14, 2022

28 Reply Share

Read 2 replies

Tom Brejcha, president and chief counsel of the Thomas More Society, explained that, in keeping with the Texas law, the two pro-abortion funding organizations "have admitted to paying for abortions in violation of the Texas Heartbeat Act, and in doing so they have exposed their employees, volunteers, and donors to civil lawsuits and potential criminal prosecution."

"Those donations were used not for First Amendment advocacy but to end the lives of innocent unborn human beings with beating hearts," Brejcha, continued. "Those who are funding or assisting in bringing about these abortions will be revealed in discovery. Anyone

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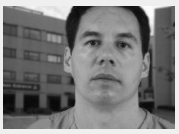
Ohio Supreme Court Gives Redistricting Commission Deadline to Show Cause



Trial of Proli c Accused Ohio Serial Killer Begins with Opening Arguments

Ohio University Employees Are Donating to Democrats 10-to-1 over Republicans

The Ohio Star Podcast for Feb. 21, 2022

Eight Individuals Arrested in Ohio Anti-Human Traf cking Operation

who has aided or abetted an illegal abortion in Texas is subject to the full force of the law and imposition of these civil and criminal sanctions."

– – –

Susan Berry, PhD, is national education editor at The Star News Network. Email tips to sberryphd@protonmail.com.

Faith, National, News, The West abortion, abortion funds, America First Legal, civil enforcement, pro-abortion group, Texas, Texas Heartbeat Act

« Ohio Supreme Court Gives Redistricting Commission Deadline to Show Cause

Ohio Senate Candidate J.D. Vance Slams Proponents of Intervention in Ukraine »

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Ohio Supreme Court Gives Redistricting Commission Deadline to Show Cause

COMMENTS

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Story Calendar

FEBRUARY 2022

S	M	T	W	T	F	S
		1	2	3	4	5
6	7	8	9	10	11	12
13	14	15	16	17	18	19
20	21	22	23	24	25	26
27	28					

« Jan

ADD COMMENT

EXHIBIT H
Mar. 3, 2022
AFL Facebook Post
re: press release

America First Legal
March 2 at 1:31 PM ·

PRO-LIFE UPDATE: America First Legal has filed petitions against two abortion funds in Texas that have admitted to paying for abortions in violation of the Texas Heartbeat Act. ⚠️

AFLEGAL.ORG

America First Legal — AFL Files Petitions Against Two Abortion Funds In Texas Who Violated The Texas...

11

Like Comment Share

EXHIBIT I
AFL Tweet
Mar. 2, 2022
re: Press Release

America First Legal
@America1stLegal

PRO-LIFE UPDATE: America First Legal has filed petitions against two abortion funds in Texas that have admitted to paying for abortions in violation of the Texas Heartbeat Act. #SB8

aflegal.org
AFL Files Petitions Against Two Abortion Funds In Texas Who Violated The Tex...
WASHINGTON, DC—America First Legal has filed petitions against two abortion funds in Texas that have admitted to paying for abortions in violation of the ...

1:08 PM · Mar 2, 2022 · Twitter Web App

EXHIBIT J
Feb. 24, 2022
AFL Facebook Post
re: Texas Tribune Article

America First Legal
February 24 at 3:31 PM ·

READ: America First Legal is in the news → "Anti-abortion lawyers target those funding the procedure for potential lawsuits under new Texas law..." ⬇️

TEXASTRIBUNE.ORG

Anti-abortion lawyers target those funding the procedure for potential lawsuits under new Texas law

19 2 Shares

Like Comment Share

EXHIBIT K
Feb. 28, 2022
AFL Tweets re: SB8

America First Legal @America1stLegal · Feb 28

BREAKING → America First Legal is proud of @TXAG's efforts and is honored to have been part of the legal team defending the Texas Heartbeat Act! ⬇️

> **Texas Attorney General** @TXAG · Feb 28
>
> I want to thank everyone that was involved in making #SB8 happen. Abortions fell by 60 percent in #Texas the first month after its effect.
>
> I will continue to fight tirelessly for the rights of the unborn.

2 4 16

America First Legal @America1stLegal · Feb 28

America First Legal is proud of @TXAG's efforts and is honored to have been part of the legal team defending the Texas Heartbeat Act! #SB8

3 3 12

America First Legal Retweeted

Texas Attorney General @TXAG · Feb 28

I want to thank everyone that was involved in making #SB8 happen. Abortions fell by 60 percent in #Texas the first month after its effect.

I will continue to fight tirelessly for the rights of the unborn.

122 106 341

EXHIBIT L
Oct. 28, 2021
Temporary Injunction

CAUSE NO. D-1-GN-21-004179

BEFORE THE TEXAS HEARTBEAT LITIGATION MDL PRETRIAL JUDGE

ALLISON VAN STEAN, et al.	§	In the District Court of
	§	
Plaintiff,	§	
	§	Travis County, Texas
v.	§	
	§	
TEXAS RIGHT TO LIFE, et. al,	§	98th Judicial District
	§	
Defendants.	§	

This Agreed Temporary Injunction relates to the causes transferred from:

CAUSE NO. D-1-GN-21-004179, in the 98th Judicial District of Travis County, Texas;
CAUSE NO. D-1-GN-21-004189, in the 250th Judicial District of Travis County, Texas;
CAUSE NO. D-1-GN-21-004303, in the 126th Judicial District of Travis County, Texas;
CAUSE NO. D-1-GN-21-004316, in the 261st Judicial District of Travis County, Texas;
CAUSE NO. D-1-GN-21-004489, in the 98th Judicial District of Travis County, Texas;
CAUSE NO. D-1-GN-21-004503, in the 455th Judicial District of Travis County, Texas;
CAUSE NO. D-1-GN-21-004504, in the 53rd Judicial District of Travis County, Texas;
CAUSE NO. D-1-GN-21-004544, in the 201st Judicial District of Travis County, Texas;
CAUSE NO. D-1-GN-21-004606, in the 98th Judicial District of Travis County, Texas;
CAUSE NO. D-1-GN-21-004605, in the 455th Judicial District of Travis County, Texas;
CAUSE NO. D-1-GN-21-004648, in the 261st Judicial District of Travis County, Texas; and
CAUSE NO. D-1-GN-21-004846, in the 53rd Judicial District of Travis County, Texas.

AGREED ORDER ON APPLICATION FOR TEMPORARY INJUNCTION

Plaintiffs Allison Van Stean, Michelle Tuegel, Monica Faulkner, Ghazaleh Moayedi, North Texas Equal Access Fund, The West Fund, The Afiya Center, The Lilith Fund, Frontera Fund, Clinic Access Support Network, and The Bridge Collective have each filed an application for a temporary injunction prohibiting Defendants Texas Right to Life, John Seago, and the Jane/John Does (collectively, "Defendants"), and all persons in active concert and participation with Defendants, from instituting private enforcement lawsuits against Plaintiffs under Senate Bill 8 ("SB8") until final judgment is entered in this lawsuit.

In the interest of resolving the Plaintiffs' applications, the Defendants agree to stipulate to the entry of this Order provided that Defendants do not admit to the truth of Plaintiffs' allegations or to liability, and Defendants do not waive any defenses or objections to this suit.

The Court, having considered the Plaintiffs' Verified Petitions and applications for a temporary injunction, and the affidavits of Plaintiffs filed in support of their applications for a temporary restraining order and attached hereto as Exhibit A, **finds that this Agreed Order should be GRANTED**. The Court specifically finds as follows:

1. The Court finds that Plaintiffs will be imminently and irreparably harmed absent a temporary injunction. Plaintiffs reasonably fear that Defendants and those acting in concert with them will file claims against them under SB8.

2. The Court finds that Defendants have not shown that they will suffer any harm if a temporary injunction is granted.

3. The Court finds that an underlying cause of action for declaratory judgment exists in this case as to the constitutionality of SB8 and Plaintiffs have shown that they have a probable right to relief on their claims that SB8 violates the Texas Constitution.

4. The Court finds that Plaintiffs have no other adequate remedy at law.

5. The parties agree that the de minimus amount of $100 total, deposited with the Travis County District Clerk, and the amounts already deposited for the temporary restraining orders already granted in favor of each Plaintiff constitutes sufficient security as bond for any foreseeable harm or compensable damages that could result from the granting of this temporary injunction until further order of this Court or final judgment on the merits.

It is therefore **ORDERED** that Defendants Texas Right to Life, John Seago and their officers, agents, servants, employees, and attorneys, and all persons in active concert and participation with Defendants, including all persons listed in the sealed Exhibit B attached to this

Order, are enjoined from instituting private enforcement lawsuits against Plaintiffs or their staff under SB8, for the pendency of this lawsuit. This temporary injunction shall become effective immediately.

It is **FURTHER ORDERED** that Defendants shall provide notice of this temporary injunction to their officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them, including the individuals listed in Exhibit B to this Order.

It is **FURTHER ORDERED** that Exhibit B to this Order is temporarily sealed pending the disposition of the Rule 76a motion previously filed by Defendants and set for hearing on November 3, 2021 at 9:00 a.m.

It is **FURTHER ORDERED** that trial on the merits of this case is set for April 4, 2022 at 9:00 a.m. in Travis County, Texas.

It is **FURTHER ORDERED** that the clerk of this Court shall forthwith issue this Order and Writ of Temporary Injunction. Once effective, this Order and Injunction shall remain in full force and effect until final judgment in this matter.

SO ORDERED.

Dated: October 28, 2021 at 12:42 P.M.

David Peeples

Hon. David Peeples

AGREED AS TO FORM AND SUBSTANCE:

/s/ Jennifer R. Ecklund
Jennifer R. Ecklund
Texas Bar No. 24045626
Elizabeth G. Myers
Texas Bar No. 24047767
Mackenzie S. Wallace
Texas Bar No. 24079535
John Atkins
Texas Bar No. 24097326

Thompson Coburn, LLP
2100 Ross Avenue, Suite 3200
Dallas, Texas 75201
Telephone: (972) 629-7100
jecklund@thompsoncoburn.com

ATTORNEYS FOR PLAINTIFFS

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jonathan@mitchell.law

Heather Gebelin Hacker
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Texas Bar No. 240779396
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Austin, Texas 78746
Telephone: (512) 399-3022
heather@hackerstephens.com

ATTORNEYS FOR DEFENDANTS

EXHIBIT A

CAUSE NO. D-1-GN-21-004189

MONICA FAULKNER	§	**In the District Court of**
	§	
Plaintiff,	§	
	§	**Travis County, Texas**
v.	§	
	§	
STATE OF TEXAS, et al.	§	**Judicial District 250th**
	§	
	§	
Defendants.	§	

DECLARATION OF MONICA FAULKNER

1. My name is Monica Faulkner. I am a resident of Williamson County, Texas, over 21 years of age, competent, and capable of testifying to the facts stated in this Declaration.

2. I declare that the statements within this Declaration are within my personal knowledge, and a true and correct.

3. I am a Licensed Master Social Worker in the State of Texas, and a Research Associate Professor of the Texas Institute for Child and Family Wellbeing at the Steve Hicks School of Social Work at the University of Texas. I have published articles relating to domestic violence, trauma, child maltreatment, immigration and trafficking in peer-reviewed journals, and I regularly conduct research on issues related to childhood trauma, immigration, and adolescents. I have worked with survivors of domestic and sexual violence and child maltreatment since 1997.

4. As a social worker, I use my training, consistent with my professional responsibilities, to restore or enhance social, psychosocial, or bio-psychosocial functioning to those I counsel. In doing so, I apply specialized knowledge and advanced practice skills I have developed through my training and during my years of practice. I am obligated to follow the professional code of ethics that applies to licensed social workers.

5. The preamble to the National Association of Social Workers Code of Ethics states:

> The primary mission of the social work profession is to enhance human well-being and help meet the basic human needs of all people, with particular attention to the needs and empowerment of people who are vulnerable, oppressed, and living in poverty. A historic and defining feature of social work is the profession's dual focus on individual well-being in a social context and the well-being of society. Fundamental to social work is attention to the environmental forces that create, contribute to, and address problems in living.
>
> Social workers promote social justice and social change with and on behalf of clients.
> …
> The mission of the social work profession is rooted in a set of core values. These core values, embraced by social workers throughout the profession's history, are the foundation of social work's unique purpose and perspective:
>
> - service
> - social justice
> - dignity and worth of the person
> - importance of human relationships
> - integrity
> - competence.

6. I cannot both comply with this code, as I understand it, and also comply with Senate Bill 8. In assisting a pregnant client to meet basic human needs; in aiming to improve that client's individual well-being; and in working to foster an environment that reduces problems in living; there are times when I must advise client regarding, or help my client to seek reproductive healthcare, sometimes including an abortion after the roughly six weeks it takes for electrical cardiac activity to be detectable *in utero*. As a professional, I view this code as requiring me to provide information regarding the availability of abortion services inside and outside of the state of Texas, and the availability of resources to defray the costs of abortion and travel, when asked by a client.

7. As I understand SB8, it puts a target on my back and a bounty on my head if I dare to take on a client who may be in need of any information about abortion or other reproductive healthcare, by imposing strict liability for the act of providing counsel in accordance with the law and my professional ethics. The law authorizes hundreds of thousands of civilian bounty hunters to sue me for money damages without demonstrating any interest or injury, and subjects me and other social worker to a mandatory injunction that would prohibit us from complying with our professional obligations.

8. According to the terms of SB8, I aid and abet abortions in the State of Texas. I have engaged in conduct that helped to facilitate the performance or inducement of an abortion in the past that would have violated SB8's terms, and because of my professional obligations, and my view that SB8 is unconstitutional, I believe that conduct remains protected.

9. SB8 also chills my ability to engage in constitutionally-protected speech by educating people about the professional responsibilities of social workers *vis-à-vis* reproductive healthcare (including abortion). Although SB8 purports to except any conduct which would be protected by the First Amendment to the Constitution, such statements do not change the explicit text of its "aiding and abetting" liability provisions, which are extremely broad.

10. SB8 targets me and attempts to silence me and others like me on the basis of the content of my speech and decision to donate funds to organizations in the abortion space.

11. My rights will be immediately violated upon SB8's effective date of September 1, 2021, and the threat of unmitigated potential civil liability to me is imminent because citizen bounty hunters are already publicly organizing to file lawsuits under SB8.

12. I will suffer immediate irreparable harm if Defendants Texas Right to Life, John Sego, and John Does 1-10 (collectively, the "Injunctive Defendants") are not enjoined from

organizing and planning to bring lawsuits against me and others like me who provide assistance to people who, as a result of their status as victims of sexual violence, are particularly likely to be in need of reproductive healthcare, including abortion services.

13. I am aware that the costs associated with attorney's fees for both sides in a potential action under SB8 could easily reach the hundreds of thousands of dollars, particularly if I were to make a serious, constitutional defense of my actions. Therefore, the damage likely to result from even one claim made against me could be financially ruinous.

14. The Injunctive Defendants have stated they will take action, and if the threatened actions of the Injunctive Defendants are allowed to proceed, I will be harmed in a manner in which I will be unable to recover.

15. My constitutional rights are at stake and would be irreparably harmed by the continuing threat of multiple lawsuits; thus, I have no adequate remedy at law for the Injunctive Defendants' threatened actions.

16. I declare under penalty of perjury under the laws of the State of Texas that the foregoing is true and correct and that this Declaration was executed on this 31st day of August, 2021.

Monica Faulkner

CAUSE NO. D-1-GN-21-004648

THE WEST FUND	§	In the District Court of
	§	
Plaintiff,	§	
	§	Travis County, Texas
v.	§	
	§	
STATE OF TEXAS, et al.	§	261ST Judicial District
	§	
	§	
Defendants.	§	

DECLARATION OF RACHEL CHEEK

1. My name is Rachel Cheek. I am a resident of El Paso, Texas, over 21 years of age, competent, and capable of testifying to the facts stated in this Declaration.

2. I declare that the statements within this Declaration are within my personal knowledge, and a true and correct.

3. I am the President of the West Fund. West Fund is a non-profit, grass-roots organization based in El Paso, Texas. It was founded in November of 2013 after a variety of restrictions on abortion clinics were imposed by the Texas Legislature. Its mission was, and is, to provide direct and/or supportive funding to assist pregnant people seeking abortion services in El Paso, Texas; Ciudad Juarez, Chihuahua, Mexico; and throughout southern and eastern New Mexico. It operates a Spanish and English hotline through which it provides information to callers and does client intake

4. Almost all of West Fund's clients for its funding work are at a point in pregnancy when a "fetal heartbeat," as defined in SB8, can be detected.

5. West Fund also collaborates with other Texas reproductive justice organizations to advance advocacy for abortion access and engages in other political activities, with reproductive

justice as its central focus. It also provides comprehensive sexual education programs to high schoolers. West Fund has previously funded and will continue to provide funding to support reproductive healthcare, sexual assault survivors, abortions, and people who seek abortions.

6. West Fund also openly communicates with the public regarding abortion, voicing its support for abortion rights, advocating for reproductive freedom and reproductive justice, and seeking the support of others who share the same values.

7. According to the terms of SB8, West Fund aids and abets abortions in the State of Texas.

8. SB8 interferes with West Fund's ability to provide assistance to people seeking an abortion.

9. SB8 also seeks to prohibit West Fund from asserting that the provisions of SB8 are themselves unconstitutional restrictions on its rights.

10. West Fund may also be targeted by supposed "qui tam" plaintiffs like Texas Right to Life, John Sego, and John Does 1-10 (collectively, the "Injunctive Defendants") for its work, wherein its ability to defend itself and its staff and volunteers both factually and legally is impaired by the provisions of SB8 relating to burden-shifting, fee awards, joint and several liability of counsel, and elimination of defenses.

11. West Fund's rights (along with its staff's and volunteer's right) to freely speak, associate, petition, work, and access the courts of this state are substantially burdened by SB8.

12. SB8 targets West Fund and attempts to silence West Fund, its staff and volunteers, and others like them on the basis of the content of their speech and a specific and content-based aspect of the work they do__assisting pregnant people in need of abortion.

13. West Fund's (and its staff's and volunteers') rights were immediately violated upon SB8's effective date of September 1, 2021, and the threat of unmitigated potential civil liability to West Fund's is imminent because citizen bounty hunters like the Injunctive Defendants are publicly organizing to file lawsuits under SB8.

14. West Fund will suffer immediate irreparable harm if the Injunctive Defendants are not enjoined from organizing and planning to bring lawsuits against West Fund, its staff and volunteers, and others like them who provide support to organizations that help women access abortions and other reproductive health services.

15. The Injunctive Defendants have stated they will take action, and if the threatened actions of the Injunctive Defendants are allowed to proceed, West Fund will be harmed in a manner in which it will be unable to recover.

16. An award of damages for any one claim under SB8 alone would be financially ruinous for West Fund, its staff, or its volunteers. Further, I understand that the attorney's fees likely to be assessed against West Fund and/or any individual staff member or volunteer may exceed $100,000, which would be financially devastating to the organization and/or any one of its staff members or volunteers,

17. West Fund's (and its staff's and volunteer's) constitutional rights are at stake and would be irreparably harmed by the continuing threat of multiple lawsuits; West Fund therefore has no adequate remedy at law for the Injunctive Defendants' threatened actions.

18. I declare under penalty of perjury under the laws of the State of Texas that the foregoing is true and correct and that this Declaration was executed on this 8th day of September, 2021.

_____

Rachel Cheek

CAUSE NO. D-1-GN-21-004544

CLINIC ACCESS SUPPORT NETWORK,	§	In the District Court of
	§	
Plaintiff,	§	Travis County, Texas
	§	
v.	§	
	§	201st Judicial District
STATE OF TEXAS, et al.	§	
	§	
Defendants.	§	

DECLARATION OF TERRI CHEN

1. My name is Terri Chen. I am a resident of Harris County, Texas, over 21 years of age, competent, and capable of testifying to the facts stated in this Declaration.

2. I declare that the statements within this Declaration are within my personal knowledge, and are true and correct.

3. I am a member of the Board of Directors for Clinic Access Support Network ("CASN") and also serve as its Treasurer.

4. CASN is an organization comprised solely of helpers targeted by SB8. Its mission includes providing information, transportation, and accommodations for people seeking abortions in the greater Houston and Southeast Texas region.

5. The majority of CASN's activities involve providing transportation, accommodations, and direct payments to people trying to access abortion services in the Houston area. It also uses a network of trained volunteers to drive people to and from their abortion appointments.

6. CASN mobilizes volunteers and resources to ensure that all people seeking abortions in the Houston area have equal access to abortion care.

7. CASN also supports the bodily autonomy of all people and its members believe everyone deserves access to reproductive healthcare. The support offered by CASN is unconditional and judgment-free.

8. CASN has previously provided, and will continue to provide, people with assistance when they are in need of an abortion.

9. According to the terms of SB8, CASN aids and abets abortions in the State of Texas.

10. SB8 interferes with CASN's ability to provide assistance to people seeking an abortion.

11. SB8 also seeks to prohibit CASN from asserting that the provisions of SB8 are themselves unconstitutional restrictions on its rights.

12. CASN may also be targeted by supposed "qui tam" plaintiffs like Texas Right to Life, John Sego, and John Does 1-10 (collectively, the "Injunctive Defendants") for its volunteer work, wherein its ability to defend itself and its volunteers both factually and legally is impaired by the provisions of SB8 relating to burden-shifting, fee awards, joint and several liability of counsel, and elimination of defenses.

13. CASN's rights (along with its volunteer members' right) to freely speak, associate, petition, work, and access the courts of this state are substantially burdened by SB8.

14. SB8 targets CASN and attempts to silence CASN, its member volunteers, and others like them on the basis of the content of their speech and a specific and content-based aspect of the volunteer work they do—assisting pregnant people in need of abortion.

15. CASN (and its member-volunteers') rights were immediately violated on September 1, 2021, when SB8 became effective, and the threat of unmitigated potential civil

liability to CASN is imminent because citizen bounty hunters like the Injunctive Defendants are already publicly organizing to file lawsuits under SB8.

16. CASN will suffer immediate irreparable harm if the Injunctive Defendants are not enjoined from organizing and planning to bring lawsuits against CASN, its member-volunteers, and others like them who provide support to organizations that help women access abortions and other reproductive health services.

17. The Injunctive Defendants have stated they will take action, and if the threatened actions of the Injunctive Defendants are allowed to proceed, CASN will be harmed in a manner in which it will be unable to recover.

18. An award of damages for any one claim under SB8 alone would be financially ruinous for CASN and/or its staff and volunteers. Further, I understand that the attorney's fees likely to be assessed against CASN and/or any individual volunteer may exceed $100,000, which would be financially devastating to the organization and/or any one of its volunteer members.

19. CASN's (and its staff and volunteers') constitutional rights are at stake and would be irreparably harmed by the continuing threat of multiple lawsuits; CASN therefore has no adequate remedy at law for the Injunctive Defendants' threatened actions.

20. I declare under penalty of perjury under the laws of the State of Texas that the foregoing is true and correct and that this Declaration was executed on this 1st day September, 2021.

Terri Chen

CAUSE NO. D-1-GN-21-004179

ALLISON VAN STEAN	§	In the District Court of
	§	
Plaintiff,	§	
	§	Travis County, Texas
v.	§	
	§	
STATE OF TEXAS, et al.	§	Judicial District 98th
	§	
	§	
Defendants.	§	

DECLARATION OF ALLISON VAN STEAN

1. My name is Allison Van Stean. I am a resident of Collin County, Texas, over 21 years of age, competent, and capable of testifying to the facts stated in this Declaration.

2. I declare that the statements within this Declaration are within my personal knowledge, and a true and correct.

3. I am a practicing attorney in the State of Texas.

4. I previously donated and will continue to donate to political candidates and philanthropic organizations that work to combat sexual assault, and support and fund access to reproductive healthcare, abortions, and women who seek abortions.

5. I have experienced various health issues of my own which cause me to be particularly concerned about the right to obtain reproductive healthcare.

6. I am active in political causes that advocate for the rights of victims of sexual assault.

7. I openly communicate with the public regarding abortion, voicing my support for abortion rights, and seeking the support of other who share the same values.

8. According to the terms of SB8, I aid and abet abortions in the State of Texas. I have engaged in conduct that helped to facilitate the performance or inducement of an abortion in the past that would have violated SB8's terms, and because I believe that SB8 is void under both federal and Texas law, I cannot in good faith discontinue my supportive actions and philanthropic giving.

9. SB8 chills my ability to engage in constitutionally-protected speech by donating to organizations that work to ensure women's rights to reproductive healthcare and provide services for victims of sexual assault insofar as those organizations may be accused of "aiding or abetting" or providing abortions services in Texas.

10. Although SB8 purports to except any conduct which would be protected by the First Amendment to the Constitution, its terms also specifically provide that providing funds that could be used for abortion services constitutes "aiding and abetting."

11. SB8 targets me and attempts to silence me and others like me on the basis of the content of my speech and decision to donate funds to organizations in the abortion space.

12. My rights will be immediately violated upon SB8's effective date of September 1, 2021, and the threat of unmitigated potential civil liability to me is imminent because citizen bounty hunters are already publicly organizing to file lawsuits under SB8.

13. I will suffer immediate irreparable harm if Defendants Texas Right to Life, John Sego, and John Does 1-10 (collectively, the "Injunctive Defendants") are not enjoined from organizing and planning to bring lawsuits against me and others like me who speak about and provide funds to organizations that help women access abortions and other reproductive health services.

14. I have given money to numerous organizations that fund women's reproductive health in the past, any one of which may subject me to a claim under SB8 if a potential plaintiff interpreted the donation to be assisting abortion services.

15. As an attorney, I am aware that the costs associated with attorney's fees for both sides in a potential action under SB8 could easily reach the hundreds of thousands of dollars, particularly if I were to make a serious, constitutional defense of my actions. Therefore, the damage likely to result from even one claim made against me could be financially ruinous.

16. The Injunctive Defendants have stated they will take action, and if the threatened actions of the Injunctive Defendants are allowed to proceed, I will be harmed in a manner in which I will be unable to recover.

17. My constitutional rights are at stake and would be irreparably harmed by the continuing threat of multiple lawsuits; thus, I have no adequate remedy at law for the Injunctive Defendants' threatened actions.

18. I declare under penalty of perjury under the laws of the State of Texas that the foregoing is true and correct and that this Declaration was executed on this 29th day of August, 2021.

Allie Van Stean

Allison Van Stean

DECLARATION OF AMANDA BEATRIZ WILLIAMS

STATE OF TEXAS §

TRAVIS COUNTY §

1. My name is Amanda Beatriz Williams. I am a resident of Travis County, Texas, over 21 years of age, competent, and capable of testifying to the facts stated in this Declaration.

2. I declare that the statements within this Declaration are within my personal knowledge, and are true and correct.

3. I am the Executive Director for Lilith Fund for Reproductive Equity ("Lilith Fund"). As Executive Director, I do what is necessary to execute Lilith Fund's mission, protect the organization's financial health, and supervise staff and volunteers.

4. Lilith Fund provides financial assistance and emotional support for people needing abortions in Texas, and seeks to foster a positive culture around abortion. Lilith Fund also fights for reproductive justice throughout Texas. Lilith Fund offsets the costs of abortion care itself, rather than paying for or providing assistance to people traveling to an abortion provider in Texas.

5. Lilith Fund has nine staff members and more than thirty regular volunteers, and serves people in central and southeast Texas.

6. SB8 specifically provides that providing funds to assist a pregnant person in obtaining an abortion violates SB8 *even if* the funder had no knowledge that the abortion at issue would ultimately violate SB8. Consequently, SB8, when it becomes effective, will immediately render all of our services—even for people who have been pregnant fewer than six weeks—potentially subject to expensive litigation and punitive fines.

7. Because Lilith Fund provides funds based on financial need, many of Lilith Fund's clients are unemployed, underemployed, indigent, or otherwise unable to fund abortion care for themselves. Without Lilith Fund's services, or the services of similar organizations, these people would be functionally denied abortion services.

8. According to the terms of SB8, Lilith Fund aids and abets abortions in the State of Texas by providing funding at all. Lilith Fund would also likely be liable for assisting pregnant people in locating legal abortion services by providing information, and by engaging in protected speech by advocating for safe, legal abortion services.

9. SB8 interferes with Lilith Fund's ability to provide assistance to people seeking an abortion.

10. SB8 also seeks to prohibit Lilith Fund from asserting that the provisions of SB8 are themselves unconstitutional restrictions on its rights, by purporting to penalize them—and any lawyers who would assist them—from even bringing constitutional or equitable challenges to the legislation.

11. Lilith Fund may also be targeted by quasi "qui tam" plaintiffs like Texas Right to Life, John Sego, and John Does 1-10 (collectively, the "Injunctive Defendants") for its volunteer work, wherein its ability to defend itself, its staff, and its volunteers both factually and legally is impaired by the provisions of SB8 relating to burden-shifting, fee awards, joint and several liability of counsel, and elimination of defenses.

12. Lilith Fund's rights (along with its staff's, board's, and volunteers' rights) to freely speak, associate, petition, work, and access the courts of this state are substantially burdened by SB8.

13. SB8 targets Lilith Fund and attempts to silence Lilith Fund, its staff and board, and others like them on the basis of the content of their speech and a specific and content-based aspect of the volunteer work they do—assisting pregnant people in need of abortion, and providing financial support for them.

14. Lilith Fund's (and its staff's, board's, and volunteer's) rights will be immediately violated upon SB8's effective date of September 1, 2021, and the threat of unmitigated potential civil liability to Lilith Fund is imminent because the Injunctive Defendants and others are already publicly organizing to file lawsuits under SB8.

15. Lilith Fund will suffer immediate irreparable harm if the Injunctive Defendants are not enjoined from bringing, and organizing and planning to bring lawsuits against Lilith Fund, its staff, its board, its volunteers, and others like them who fund and provide support to organizations that help individuals access abortions and other reproductive health services.

16. The Injunctive Defendants have taken steps to indicate they will take action, and if the threatened actions of the Injunctive Defendants are allowed to proceed, Lilith Fund will be harmed in a manner in which it will be unable to recover.

17. An award of damages for any one claim under SB8 alone would be financially ruinous for Lilith Fund and its staff and volunteers. Further, I understand that the attorney's fees likely to be assessed against Lilith Fund and/or any individual staff member or volunteer may exceed $100,000, which would be financially devastating to the organization and/or any one of its staff members, board members, or volunteers.

18. Lilith Fund's constitutional rights, my constitutional rights, and the rights of our staff members, board members, volunteers, and clients are all at stake and would be irreparably

harmed by the continuing threat of multiple lawsuits; Lilith Fund therefore has no adequate remedy at law for the Injunctive Defendants' threatened actions.

19. I declare under penalty of perjury under the laws of the State of Texas that the foregoing is true and correct and that this Declaration was executed on this 31st day of August, 2021.

Amanda Beatriz Williams

DECLARATION OF ANNA RUPANI

STATE OF TEXAS §

TRAVIS COUNTY §

1. My name is Anna Rupani. I am a resident of Dallas County, Texas, over 21 years of age, competent, and capable of testifying to the facts stated in this Declaration.

2. I declare that the statements within this Declaration are within my personal knowledge, and a true and correct.

3. I am the Co-Executive Director of Fund Texas Choice ("FTC").

4. FTC's mission is to help Texans equitably access abortion through safe, confidential, and comprehensive practical support. FTC was founded in response to HB2, a Texas statute that shuttered over half of the state's abortion clinics, imposing long wait times on patients and forcing them to travel long distances for care.

5. FTC fields texts and calls from Texans seeking abortion care who cannot afford to travel to an abortion provider. They then work with individuals who have abortion appointments to help plan and support their trip. This includes booking and directly paying vendors for bus tickets, ride shares, providing food assistance, and lodging—and airfare for those forced out of Texas for care. FTC also books and directly pays for the transportation and lodging of companions for minor clients or clients who have a fetal anomaly.

6. When clients are unable to find affordable childcare, FTC may offer a childcare stipend or help book travel for children to accompany their parent(s). FTC connects callers unable to pay for the abortion itself to nonprofit organizations that provide cash subsidies to defray the cost of abortion services. Occasionally, FTC helps callers identify the closest abortion provider

that is appropriate for them and try to secure an abortion appointment for them despite long wait times.

7. In addition to providing practical support to access abortion care, FTC helps interested clients tell the stories of how they obtained abortion care, including by connecting them to the media. FTC regards this as a way to combat abortion stigma, which furthers its mission.

8. According to the terms of SB8, FTC aids and abets abortions in the State of Texas.

9. SB8 interferes with FTC's ability to provide assistance to people seeking an abortion.

10. SB8 also seeks to prohibit FTC from asserting that the provisions of SB8 are themselves unconstitutional restrictions on its rights.

11. FTC may also be targeted by supposed "qui tam" plaintiffs like Texas Right to Life, John Sego, and John Does 1-10 (collectively, the "Injunctive Defendants") for its volunteer work, wherein its ability to defend itself, its staff, and its volunteers both factually and legally is impaired by the provisions of SB8 relating to burden-shifting, fee awards, joint and several liability of counsel, and elimination of defenses.

12. FTC's rights (along with its staff's and volunteer members' rights) to freely speak, associate, petition, work, and access the courts of this state are substantially burdened by SB8.

13. SB8 targets FTC and attempts to silence FTC, its staff and members, and others like them on the basis of the content of their speech and a specific and content-based aspect of the volunteer work they do—assisting pregnant people in need of abortion.

14. FTC's (and its staff's) rights will be immediately violated upon SB8's effective date of September 1, 2021, and the threat of unmitigated potential civil liability to FTC is imminent

because the Injunctive Defendants and others are already publicly organizing to file lawsuits under SB8.

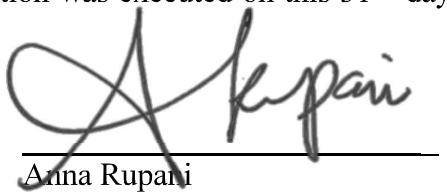
15. FTC will suffer immediate irreparable harm if the Injunctive Defendants are not enjoined from bringing, and organizing and planning to bring lawsuits against FTC, its staff, and others like them who fund and provide support to organizations that help women access abortions and other reproductive health services.

16. The Injunctive Defendants have taken steps to indicate they will take action, and if the threatened actions of the Injunctive Defendants are allowed to proceed, FTC will be harmed in a manner in which it will be unable to recover.

17. An award of damages for any one claim under SB8 alone would be financially ruinous for FTC, its staff, and/or its volunteers. Further, I understand that the attorney's fees likely to be assessed against FTC and/or any individual volunteer may exceed $100,000, which would be financially devastating to the organization and/or any one of its volunteer members,

18. FTC's (and its staff's) constitutional rights are at stake and would be irreparably harmed by the continuing threat of multiple lawsuits; FTC therefore has no adequate remedy at law for the Injunctive Defendants' threatened actions.

19. I declare under penalty of perjury under the laws of the State of Texas that the foregoing is true and correct and that this Declaration was executed on this 31st day of August, 2021.



Anna Rupani

CAUSE NO. _____

DR. GHAZALEH MOAYEDI	§	**In the District Court of**
	§	
Plaintiff,	§	
	§	**Travis County, Texas**
v.	§	
	§	
STATE OF TEXAS, et al.	§	**Judicial District ___**
	§	
	§	
Defendants.	§	

DECLARATION OF DR. GHAZALEH MOAYEDI

1. My name is Dr. Ghazaleh Moayedi. I am a resident of Dallas County, Texas, over 21 years of age, competent, and capable of testifying to the facts stated in this Declaration.

2. I declare that the statements within this Declaration are within my personal knowledge, and are true and correct.

3. I am a practicing physician in the State of Texas.

4. I am a Board Certified Obstetrician and Gynecologist who trained in Texas and who provides abortion care in Texas. I hold a Master of Public Health degree and I am a Fellow of the American College of Obstetricians and Gynecologists.

5. According to the terms of SB8, I perform and "aid" and "abet" abortions in the State of Texas. As a doctor who provides abortion care, I actually perform abortions. As a physician who provides medical advice to my community, I also advise patients about their medical options with respect to abortion care on a regular basis.

6. SB8 functionally prohibits abortions after about six weeks, by (1) requiring a test to detect cardiac activity before any abortion, and (2) prohibiting an abortion after cardiac activity is detected. Such cardiac activity—which is medically not any kind of heartbeat, since the heart

has yet to form at that time—is present at around six weeks, long before many women are even aware that they are pregnant, and certainly before most people would have had any reasonable amount of time to consider their medical options after discovering that they are pregnant. Consequently, SB8 would subject me to liability for providing medical care and abortion services in the vast majority of cases. This not only violates the rights of my patients, the people I serve, but it also directly injures me by subjecting me to strict tort liability for assisting people in exercising their constitutionally protected rights and in providing appropriate care to my patients.

7. SB8 also chills my ability to engage in constitutionally-protected speech and discharge my professional medical responsibilities by educating people regarding their medical choices as those relate to abortion. Providing information regarding the availability of safe and effective, medically indicated abortion services subjects me to liability under SB8 for "aiding and abetting" the performance of abortions. I am also worried about the potential "aiding" or "abetting" liability that those who assist me in my practice may be subjected to.

8. My rights will be immediately violated upon SB8's effective date of September 1, 2021, and the threat of unmitigated potential civil liability to me is imminent because organizations and individuals like Texas Right to Life are already publicly organizing to file lawsuits under SB8. Providers of abortion services, like myself, are at particular risk.

9. I will suffer immediate irreparable harm if Defendants Texas Right to Life, John Sego, and John Does 1-10 (collectively, the "Injunctive Defendants") are not enjoined from bringing, and organizing and planning to bring lawsuits against me and others like me who provide abortion services or provide medical advice relevant to the medical safety, availability, and advisability of abortion services.

10. I am aware that the costs associated with attorney's fees alone for both sides in a potential action under SB8 could easily reach the hundreds of thousands of dollars, particularly if I were to make a serious, constitutional defense of my actions. Therefore, the damage likely to result from even one claim made against me could be financially ruinous, especially since the law purports to prevent any opportunity for me to recover attorney fees under SB8.

11. Even by filing this lawsuit, SB8 subjects me to risk, by purporting to shift all fees in the event any declaratory or injunctive relief is sought against SB8, if *any* of the relief requested is not ultimately granted. This injures my right to have my rights, and those of my patients, vindicated in court, and my only way to obtain relief is to get a court declaration that this provision of SB8 is unconstitutional and void.

12. The Injunctive Defendants have taken steps to indicate they will take action, and if the threatened actions of the Injunctive Defendants are allowed to proceed, I will be harmed in a manner from which I will be unable to recover.

13. My constitutional rights and my professional occupation are at stake and would be irreparably harmed by the continuing threat of multiple lawsuits; thus, I have no adequate remedy at law for the Injunctive Defendants' threatened actions.

14. I declare under penalty of perjury under the laws of the State of Texas that the foregoing is true and correct and that this Declaration was executed on this 31st day of August, 2021.

Ghazaleh Moayedi, DO, MPH, FACOG

DECLARATION OF KAMYON CONNER

STATE OF TEXAS §

TRAVIS COUNTY §

1. My name is Kamyon Conner. I am a resident of Denton County, Texas, over 21 years of age, competent, and capable of testifying to the facts stated in this Declaration.

2. I declare that the statements within this Declaration are within my personal knowledge, and a true and correct.

3. I am the Executive Director of North Texas Equal Access Fund ("TEA Fund").

4. TEA Fund's mission is to foster reproductive justice. It provides financial, emotional, and logistical support for low-income abortion patients in north Texas. Almost all of its clients are at a point in pregnancy when cardiac activity can be detected.

5. TEA Fund previously funded and will continue to provide funding to support reproductive healthcare, sexual assault survivors, abortions, and people who seek abortions.

6. TEA Fund openly communicates with the public regarding abortion, voicing its support for abortion rights, advocating for reproductive freedom and reproductive justice, and seeking the support of others who share the same values.

7. According to the terms of SB8, TEA Fund aids and abets abortions in the State of Texas.

8. SB8 interferes with TEA Fund's ability to provide assistance to people seeking an abortion.

9. SB8 also seeks to prohibit TEA Fund from asserting that the provisions of SB8 are themselves unconstitutional restrictions on its rights.

10. TEA Fund may also be targeted by supposed "qui tam" plaintiffs like Texas Right to Life, John Sego, and John Does 1-10 (collectively, the "Injunctive Defendants") for its volunteer work, wherein its ability to defend itself, its staff, and its volunteers both factually and legally is impaired by the provisions of SB8 relating to burden-shifting, fee awards, joint and several liability of counsel, and elimination of defenses.

11. TEA Fund's rights (along with its staff's and volunteer members' rights) to freely speak, associate, petition, work, and access the courts of this state are substantially burdened by SB8.

12. SB8 targets TEA Fund and attempts to silence TEA Fund, its staff and members, and others like them on the basis of the content of their speech and a specific and content-based aspect of the volunteer work they do—assisting pregnant people in need of abortion.

13. TEA Fund's (and its staff's) rights will be immediately violated upon SB8's effective date of September 1, 2021, and the threat of unmitigated potential civil liability to TEA Fund is imminent because the Injunctive Defendants and others are already publicly organizing to file lawsuits under SB8.

14. TEA Fund will suffer immediate irreparable harm if the Injunctive Defendants are not enjoined from bringing, and organizing and planning to bring lawsuits against TEA Fund, its staff, and others like them who fund and provide support to organizations that help women access abortions and other reproductive health services.

15. The Injunctive Defendants have taken steps to indicate they will take action, and if the threatened actions of the Injunctive Defendants are allowed to proceed, TEA Fund will be harmed in a manner in which it will be unable to recover.

16. An award of damages for any one claim under SB8 alone would be financially ruinous for TEA Fund, its staff, and/or its volunteers. Further, I understand that the attorney's fees likely to be assessed against TEA Fund and/or any individual volunteer may exceed $100,000, which would be financially devastating to the organization and/or any one of its volunteer members,

17. TEA Fund's (and its staff's) constitutional rights are at stake and would be irreparably harmed by the continuing threat of multiple lawsuits; TEA Fund therefore has no adequate remedy at law for the Injunctive Defendants' threatened actions.

18. I declare under penalty of perjury under the laws of the State of Texas that the foregoing is true and correct and that this Declaration was executed on this 31st day of August, 2021.

Kamyon Conner

CAUSE NO. D-1-GN-21-004303

THE BRIDGE COLLECTIVE	§	In the District Court of
	§	
Plaintiff,	§	
	§	Travis County, Texas
v.	§	
	§	
STATE OF TEXAS, et al.	§	Judicial District 126th
	§	
	§	
Defendants.	§	

DECLARATION OF KRISTINA ARIKE

1. My name is Kristina Arike. I am a resident of Travis County, Texas, over 21 years of age, competent, and capable of testifying to the facts stated in this Declaration.

2. I declare that the statements within this Declaration are within my personal knowledge, and a true and correct.

3. I am a member of The Bridge Collective and also serve as its Treasurer.

4. The Bridge Collective is an all-volunteer, consensus-based, non-hierarchical practical support network, which seeks to provide practical, responsive support for abortion services and reproductive resources for Central Texans.

5. The Bridge Collective aids and assists people with rides, emotional support, supplies, information, and counsel related to abortion decisions and procedures. Historically, The Bridge Collective has coordinated, facilitated, and provided more than 100 rides per year for people seeking abortions.

6. The Bridge Collective generates no revenue, charges no fees for its services, and exists purely out of the generosity and commitment of its volunteers to be of services to people in need.

7. The Bridge Collective has previously provided, and will continue to provide, people with assistance when they are in need of an abortion.

8. According to the terms of SB8, The Bridge Collective aids and abets abortions in the State of Texas.

9. SB8 interferes with The Bridge Collective's ability to provide assistance to people seeking an abortion.

10. SB8 also seeks to prohibit The Bridge Collective from asserting that the provisions of SB8 are themselves unconstitutional restrictions on its rights.

11. The Bridge Collective may also be targeted by supposed "qui tam" plaintiffs like Texas Right to Life, John Sego, and John Does 1-10 (collectively, the "Injunctive Defendants") for its volunteer work, wherein its ability to defend itself and its volunteers both factually and legally is impaired by the provisions of SB8 relating to burden-shifting, fee awards, joint and several liability of counsel, and elimination of defenses.

12. The Bridge Collective's rights (along with its volunteer members' right) to freely speak, associate, petition, work, and access the courts of this state are substantially burdened by SB8.

13. SB8 targets The Bridge Collective and attempts to silence The Bridge Collective, its member volunteers, and others like them on the basis of the content of their speech and a specific and content-based aspect of the volunteer work they do—assisting pregnant people in need of abortion.

14. The Bridge Collective's (and its member-volunteers') rights will be immediately violated upon SB8's effective date of September 1, 2021, and the threat of unmitigated potential

civil liability to The Bridge Collective is imminent because citizen bounty hunters like the Injunctive Defendants are already publicly organizing to file lawsuits under SB8.

15. The Bridge Collective will suffer immediate irreparable harm if the Injunctive Defendants are not enjoined from organizing and planning to bring lawsuits against The Bridge Collective, its member-volunteers, and others like them who provide support to organizations that help women access abortions and other reproductive health services.

16. The Injunctive Defendants have stated they will take action, and if the threatened actions of the Injunctive Defendants are allowed to proceed, The Bridge Collective will be harmed in a manner in which it will be unable to recover.

17. An award of damages for any one claim under SB8 alone would be financially ruinous for The Bridge Collective—an all-volunteer organization—and/or its volunteers. Further, I understand that the attorney's fees likely to be assessed against The Bridge Collective and/or any individual volunteer may exceed $100,000, which would be financially devastating to the organization and/or any one of its volunteer members,

18. The Bridge Collective's (and its member-volunteers') constitutional rights are at stake and would be irreparably harmed by the continuing threat of multiple lawsuits; The Bridge Collective therefore has no adequate remedy at law for the Injunctive Defendants' threatened actions.

19. I declare under penalty of perjury under the laws of the State of Texas that the foregoing is true and correct and that this Declaration was executed on this 29th day of August, 2021.

_____

Kristina Arike

DECLARATION OF MARSHA JONES

STATE OF TEXAS §

DALLAS COUNTY §

1. My name is Marsha Jones. I am a resident of Dallas County, Texas, over 21 years of age, competent, and capable of testifying to the facts stated in this Declaration.

2. I declare that the statements within this Declaration are within my personal knowledge, and a true and correct.

3. I am the Co-Founder and Executive Director of The Afiya Center ("Afiya").

4. Afiya's mission is to serve Black women and girls by transforming their relationships with their sexual and reproductive health by addressing the consequences of reproductive oppression.

5. Afiya provides financial, practical and emotional support for abortion patients through its SYS Fund and also advocates for abortion access. People seeking assistance from the SYS Fund may contact Afiya by phone or email twenty-four hours per day, seven days per week. Afiya aims to have a staff member or volunteer respond within twenty-four hours. That staff member or volunteer will gather information about the person's circumstances and assess their needs with respect to financial and practical support. They will also provide the person with information about abortion services and the resources available to assist them.

6. Afiya also stays in touch with each recipient of financial assistance or practical support for thirteen months after her abortion. Its staff and/or volunteers check in with recipients the day before, the day of, and the day after their abortions to assess their emotional and practical support needs. Subsequently, Afiya checks in with recipients once per week for the first month

after their abortion, then once per month for the next three months, and then on a quarterly basis. The purpose of these check-ins is to assess a recipient's ongoing emotional and practical support needs. For example, Afiya has provided individuals with financial assistance for rent and utilities during this thirteen-month period.

7. Since its launch in 2019, approximately 218 pregnant women have received financial or practical assistance from the SYS Fund. All of those recipients have been at least six weeks pregnant at the time of the abortion.

8. Afiya previously funded and will continue to provide funding to support reproductive healthcare, sexual assault survivors, abortions, and people who seek abortions.

9. According to the terms of SB8, Afiya aids and abets abortions in the State of Texas.

10. SB8 interferes with Afiya's ability to provide assistance to people seeking an abortion.

11. SB8 also seeks to prohibit Afiya from asserting that the provisions of SB8 are themselves unconstitutional restrictions on its rights.

12. Afiya may also be targeted by supposed "qui tam" plaintiffs like Texas Right to Life, John Sego, and John Does 1-10 (collectively, the "Injunctive Defendants") for its volunteer work, wherein its ability to defend itself, its staff, and its volunteers both factually and legally is impaired by the provisions of SB8 relating to burden-shifting, fee awards, joint and several liability of counsel, and elimination of defenses.

13. Afiya's rights (along with its staff's and volunteer members' rights) to freely speak, associate, petition, work, and access the courts of this state are substantially burdened by SB8.

14. SB8 targets Afiya and attempts to silence Afiya, its staff and members, and others like them on the basis of the content of their speech and a specific and content-based aspect of the volunteer work they do—assisting pregnant people in need of abortion.

15. Afiya's (and its staff's) rights will be immediately violated upon SB8's effective date of September 1, 2021, and the threat of unmitigated potential civil liability to Afiya is imminent because the Injunctive Defendants and others are already publicly organizing to file lawsuits under SB8.

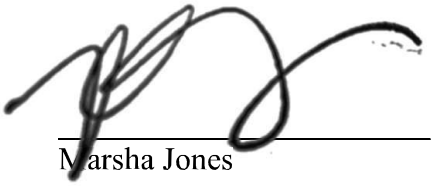
16. Afiya will suffer immediate irreparable harm if the Injunctive Defendants are not enjoined from bringin, and organizing and planning to bring lawsuits against Afiya, its staff, and others like them who fund and provide support to organizations that help women access abortions and other reproductive health services.

17. The Injunctive Defendants have taken steps to indicate they will take action, and if the threatened actions of the Injunctive Defendants are allowed to proceed, Afiya will be harmed in a manner in which it will be unable to recover.

18. An award of damages for any one claim under SB8 alone would be financially ruinous for Afiya, its staff, and/or its volunteers. Further, I understand that the attorney's fees likely to be assessed against Afiya and/or any individual volunteer are impossible to predict, but may exceed $100,000, which would be financially devastating to the organization and/or any one of its volunteer members,

19. Afiya's (and its staff's) constitutional rights are at stake and would be irreparably harmed by the continuing threat of multiple lawsuits; Afiya therefore has no adequate remedy at law for the Injunctive Defendants' threatened actions.

20. I declare under penalty of perjury under the laws of the State of Texas that the foregoing is true and correct and that this Declaration was executed on this 31st day of August, 2021.



Marsha Jones

CAUSE NO. D-1-GN-21-004316

MICHELLE TUEGEL	§	**In the District Court of**
	§	
Plaintiff,	§	
	§	**Travis County, Texas**
v.	§	
	§	
STATE OF TEXAS, et al.	§	**Judicial District 261st**
	§	
	§	
Defendants.	§	

DECLARATION OF MICHELLE TUEGEL

1. My name is Michelle Tuegel. I am a resident of Dallas County, Texas, over 21 years of age, competent, and capable of testifying to the facts stated in this Declaration.

2. I declare that the statements within this Declaration are within my personal knowledge, and a true and correct.

3. I am a practicing attorney in the State of Texas.

4. I am a trial lawyer who focuses my practice on representing victims of sexual assault and abuse and am a victim's right advocate.

5. As a regular part of my roles as attorney and advisor, I provide guidance and legal advice to victims of sexual assault, domestic violence, and sexual abuse.

6. In provision of such privileged legal advice, I communicate with my clients regarding abortion.

7. I have previously provided, and will continue to provide, my clients with advice regarding and related to abortion services. I counsel, comfort, provide information, and assist my clients in providing information regarding where to obtain abortions. I also donate to organizations that fund and support abortions and women who seek abortions.

8. According to the terms of SB8, I aid and abet abortions in the State of Texas. I have engaged in conduct that helped to facilitate the performance or inducement of an abortion in the past that would have violated SB8's terms, and because I believe that SB8 is void under both federal and Texas law, I cannot in good faith discontinue my supportive actions and philanthropic giving.

9. SB8 chills my ability to engage in constitutionally-protected speech by donating to organizations that work to ensure women's rights to reproductive healthcare and provide services for victims of sexual assault insofar as those organizations may be accused of "aiding or abetting" or providing abortions services in Texas.

10. Although SB8 purports to except any conduct which would be protected by the First Amendment to the Constitution, its terms also specifically provide that providing funds that could be used for abortion services constitutes "aiding and abetting."

11. SB8 targets me and attempts to silence me and others like me on the basis of the content of my speech and decision to donate funds to organizations in the abortion space.

12. My rights will be immediately violated upon SB8's effective date of September 1, 2021, and the threat of unmitigated potential civil liability to me is imminent because citizen bounty hunters are already publicly organizing to file lawsuits under SB8.

13. I will suffer immediate irreparable harm if Defendants Texas Right to Life, John Sego, and John Does 1-10 (collectively, the "Injunctive Defendants") are not enjoined from organizing and planning to bring lawsuits against me and others like me who speak about and provide funds to organizations that help women access abortions and other reproductive health services.

14. In the past twelve months, I have counseled and/or been retained by several clients or potential clients who needed information about abortion options. While the needs of sexual assault victims obviously vary from client to client, it is common for clients to require or request counseling around pregnancy termination options related to their assaults.

15. Based on my experience as an attorney, I expect that the attorney's fees associated with a case brought under SB8 to be significant, potentially in the tens or hundreds of thousands of dollars, particularly if a vigorous constitutional defense is mounted. Thus, an award of fees against me is likely to be financially ruinous.

16. Additionally, a finding against me under SB8 for exercising my constitutional rights is likely to result in additional costs for or the inability to obtain professional liability insurance, which could have a devastating impact on my ability to practice law.

17. The Injunctive Defendants have stated they will take action, and if the threatened actions of the Injunctive Defendants are allowed to proceed, I will be harmed in a manner in which I will be unable to recover.

18. My constitutional rights are at stake and would be irreparably harmed by the continuing threat of multiple lawsuits; thus, I have no adequate remedy at law for the Injunctive Defendants' threatened actions.

19. I declare under penalty of perjury under the laws of the State of Texas that the foregoing is true and correct and that this Declaration was executed on this 29th day of August, 2021.

Michelle S. Tuegel

Michelle Tuegel

DECLARATION OF ZAENA ZAMORA

STATE OF TEXAS §

TRAVIS COUNTY §

1. My name is Zaena Zamora. I am a resident of Hidalgo County, Texas, over 21 years of age, competent, and capable of testifying to the facts stated in this Declaration.

2. I declare that the statements within this Declaration are within my personal knowledge, and are true and correct.

3. Frontera Fund is a Texas nonprofit that provides financial assistance for transportation, lodging, and abortion care for people who want to end a pregnancy but who cannot afford it. Our mission is to make abortion accessible in the Rio Grande Valley by providing financial and practical support regardless of immigration status, gender identity, ability, sexual orientation, race, class, age, or religious affiliation and to build grassroots organizing power at intersecting issues across our region to shift the culture of shame and stigma as it relates to reproductive health care.

4. As Executive Director of Frontera Fund, I personally carry out, with assistance from Frontera Fund's Board of Directors, all of Frontera Fund's operations, including the fundraising, financial, communications, administrative, and programmatic work. I served on the board of Frontera Fund for two years before becoming Executive Director, helping to manage Frontera Fund's finances, providing fundraising support, and interacting directly with community members seeking Frontera's assistance, helping them obtain both funding for their abortion care, and the practical support necessary to access that care.

5. Frontera Fund screens clients through an intake process, during which we obtain information about the client's needs and determine whether we can assist them by providing funding to support their abortion care. When the client qualifies, we contact the abortion clinic directly, and provide a voucher to defray abortion costs for the client. We pledge an average of $200-$300.

6. SB8 would prohibit nearly every abortion Frontera Fund assists with, since cardiac activity is usually detectable at six weeks (as I understand it) and nearly all of the abortions we have provided funds for are after that point. SB8 specifically provides that providing funds to assist a woman in obtaining an abortion violates SB8 even if the funder had no knowledge that the abortion at issue would ultimately violate SB8. Consequently, SB8, when it becomes effective, will immediately render all of our services—even for people who have been pregnant fewer than six weeks—potentially subject to expensive litigation and punitive fines.

7. Because Frontera Fund provides funds based on financial need, many of Frontera Fund's clients are unemployed, underemployed, indigent, or otherwise unable to fund abortion care for themselves. Without Frontera Fund's services, or the services of similar organizations, these people would be functionally denied abortion services.

8. According to the terms of SB8, Frontera Fund aids and abets abortions in the State of Texas by providing funding at all. Frontera Fund would also likely be liable for assisting women in locating legal abortion services by providing information, and by engaging in protected speech by advocating for safe, legal abortion services.

9. SB8 interferes with Frontera Fund's ability to provide assistance to people seeking an abortion.

10. SB8 also seeks to prohibit Frontera Fund from asserting that the provisions of SB8 are themselves unconstitutional restrictions on its rights, by purporting to penalize them—and any lawyers who would assist them—from even bringing constitutional or equitable challenges to the legislation.

11. Frontera Fund may also be targeted by quasi "qui tam" plaintiffs like Texas Right to Life, John Sego, and John Does 1-10 (collectively, the "Injunctive Defendants") for its volunteer work, wherein its ability to defend itself, its staff, and its volunteers both factually and legally is impaired by the provisions of SB8 relating to burden-shifting, fee awards, joint and several liability of counsel, and elimination of defenses.

12. Frontera Fund's rights (along with its staff's and volunteer members' rights) to freely speak, associate, petition, work, and access the courts of this state are substantially burdened by SB8.

13. SB8 targets Frontera Fund and attempts to silence Frontera Fund, its staff and members, and others like them on the basis of the content of their speech and a specific and content-based aspect of the volunteer work they do—assisting pregnant people in need of abortion, and providing financial support for them.

14. Frontera Fund's (and its staff's and volunteer's) rights will be immediately violated upon SB8's effective date of September 1, 2021, and the threat of unmitigated potential civil liability to Frontera Fund is imminent because citizen bounty hunters like the Injunctive Defendants are already publicly organizing to file lawsuits under SB8.

15. Frontera Fund will suffer immediate irreparable harm if the Injunctive Defendants are not enjoined from organizing and planning to bring lawsuits against Frontera Fund, its staff,

its volunteers, and others like them who fund and provide support to organizations that help women access abortions and other reproductive health services.

16. The Injunctive Defendants have taken steps indicating they will take action, and if the threatened actions of the Injunctive Defendants are allowed to proceed, Frontera Fund will be harmed in a manner in which it will be unable to recover.

17. An award of damages for any one claim under SB8 alone would be financially ruinous for Frontera Fund and its staff and volunteers. Further, I understand that the attorney's fees likely to be assessed against Frontera Fund and/or any individual staff member or volunteer may ultimately exceed $100,000, which would be financially devastating to the organization and/or any one of its staff members or volunteer members.

18. Frontera Fund's constitutional rights, my constitutional rights, and the rights of our staff members, volunteers, and clients are all at stake and would be irreparably harmed by the continuing threat of multiple lawsuits; Frontera Fund therefore has no adequate remedy at law for the Injunctive Defendants' threatened actions.

19. I declare under penalty of perjury under the laws of the State of Texas that the foregoing is true and correct and that this Declaration was executed on this 31st day of August, 2021.

Zaena Zamora

Zaena Zamora

EXHIBIT B

FILED UNDER SEAL PURSUANT TO OCTOBER 28, 2021 AGREED ORDER (one (1) page)

EXHIBIT B

Elizabeth Graham
Jim Graham
Rich DeOtte
Brent Clingerman
Kimberlyn Schwartz
Jackson Milton
Rebecca Parma
John Barton
Steve Sherman
Veronica Arnold Smither

EXHIBIT M
Dec. 9, 2021
Order Granting MSJ

CAUSE No. D-1-GN-21-004179

ALLISON VAN STEAN, et al	*	IN THE DISTRICT COURT
	*	
	*	
VS.	*	98th JUDICIAL DISTRICT
	*	
	*	
TEXAS RIGHT TO LIFE, et al	*	TRAVIS COUNTY, TEXAS

ORDER DECLARING CERTAIN CIVIL PROCEDURES UNCONSTITUTIONAL and ISSUING DECLARATORY JUDGMENT[1]

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[1] This Order Denies Defendants' Plea to the Jurisdiction, denies Defendants' Motion to Dismiss Under the Texas Citizens Participation Act, grants Partial Summary Judgment to Plaintiffs, and Issues a Declaratory Judgment holding parts of SB 8 unconstitutional.

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INTRODUCTION.

This case is about the Texas Heartbeat Act, Senate Bill 8. SB 8 combines new *abortion regulations* with completely new *civil procedures* to enforce them.

But this case is not about abortion; it is about civil procedure. It is about whether SB 8's civil procedures are constitutional. This Order declares that some of SB 8's civil procedures are unconstitutional, and that others will remain pending and will be given more study than the court has been able to provide at this time.[2]

[2] The parties are under an *agreed temporary injunction*, signed by this court on October 28. All

SB 8's provisions fall into two broad categories:

(1) *Abortion restrictions.* SB 8 imposes limits on when abortions may be performed or induced, and it states that deviation from those limits can subject the violator to civil liability. Most of SB 8's *substantive abortion provisions* are in sections 171.101 and 171.203–205. These sections define fetal heartbeat and require physicians (a) to test for fetal heartbeat before performing or inducing an abortion and (b) to keep records of the testing and results. (c) If no test is performed, the physician must record the reasons in detail. (d) A physician may not perform an abortion if a fetal heartbeat is detected *or* no test was done. (e) There is a provision for abortions in emergencies, provided that specified records are kept. (f) There are provisions for an "undue burden" affirmative defense.

These abortion rules could have been made criminal and enforced by official prosecutors. Instead SB 8 made them enforceable by "any person" using a set of stand-alone procedures for SB 8 cases only.

(2) *Civil enforcement procedures.* SB 8 enacts new and unprecedented procedures that change existing rules of civil procedure, apply them to SB 8 cases alone, and make an SB 8 lawsuit difficult to defend. These procedures threaten personal financial risks for everyone in an industry that has been declared legal and protected by the Constitution in a 49-year-old line of decisions from the United States Supreme Court. The procedures are summarized more fully on pages 5-8 below.

In September of this year, fourteen lawsuits were filed seeking declaratory and injunctive relief concerning SB 8. One case was filed by various Planned Parenthood organizations; the other thirteen were filed by organizations and individuals who are involved in different aspects of providing abortions in Texas. On October 14 the Texas Panel on Multi-District Litigation appointed the undersigned judge to serve as pretrial judge for the fourteen cases. After several pretrial Zoom discussions with counsel, on November 10

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parties approved the injunction as to form and substance, though Defendants expressly preserved and did not waive their right to present their arguments to the courts. The agreed temporary injunction says: "In the interest of resolving the Plaintiffs' applications, Defendants agree to stipulate to the entry of this Order provided that Defendants do not admit to the truth of Plaintiffs' allegations or to liability, and Defendants do not waive any defenses or objection to this suit."

the court held an in-person hearing. At that hearing the court heard argument on three matters: (1) Defendants' Plea to the Jurisdiction; (2) Defendants' Motion to Dismiss Under the Texas Citizens Participation Act; and (3) Plaintiffs' Motions for Summary Judgment, which attack SB 8's civil procedures as unconstitutional under Texas law and seek declaratory and injunctive relief.

Plaintiffs' motions for summary judgment challenge only the constitutionality of SB 8's *civil procedures*. The motions do not ask this court to make rulings on the *federal* constitutional law concerning *abortion* restrictions.[3] Some of the Plaintiffs do assert that SB 8's abortion restrictions violate the *Texas Constitution*, and the court has denied that claim below (see pages 25 – 28); but whether SB 8's abortion rules violate the United States Supreme Court's 49-year body of abortion law is not before this court. The federal abortion issues have been left to the federal courts, and therefore this court will consider *only* SB 8's new and unique set of *civil procedures*.

Because SB 8's civil procedures are completely new, there is not a single factual precedent for this court to consult—from Texas or from the rest of the United States, from the founding until now. In response to a direct question from this court, the attorneys responded that they are not aware of any comparable set of procedures in American law, ever, whether enacted for civil cases generally or for one special kind of lawsuit alone, as is true in this case. As a result, the court's task has been to study analogous constitutional decisions, from factually different situations, and to reason from them in assessing how these procedures will operate and whether they are constitutional.

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[3] The Motion for Summary Judgment of thirteen groups of Plaintiffs expressly disclaims any federal challenge to SB 8's abortion rules *in this case*. They say (at page 2, note 2): "This case does not challenge the constitutionality of SB 8's abortion restrictions themselves—although the U. S. Supreme Court has expressly held that a ban on abortions pre-viability is unconstitutional. Instead, this case challenges the constitutionality of SB 8's private enforcement provisions, which vitiate other constitutional rights held by persons subject to SB 8's provisions." Similarly, the Planned Parenthood Plaintiffs do not challenge SB 8's abortion rules *on federal grounds in these cases or this motion*, either in their pleadings or in their motions for summary judgment.

I. Summary of SB 8's Civil Procedures

SB 8's three most important provisions are:

(1) the grant of standing for "any person" to become a claimant;

(2) the mandate that courts award a fixed minimum of $10,000 per defendant; and

(3) the option for claimants to sue in their home county, which cannot be changed to a different county without the claimant's express agreement.

A. "Any person" may sue and become a "claimant"

Traditional civil procedure generally grants people standing to sue if they have been "aggrieved" or "adversely affected" by something or someone. The Texas Supreme Court summarized well the *traditional rules of standing* in 1966, as quoted in footnote four.[4]

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[4] The court said this in *Scott v. Board of Adjustment*, 405 S.W.2d 55 (Tex. 1966):

> In most cases of this general nature, it has usually been required that the plaintiff be a 'person aggrieved' or a person whose interests are adversely affected, or a person having a special interest in the matter. *This has been held to be true in the absence of statute*. . . . Many statutes give the right to review or to institute suit to 'persons aggrieved,' 'persons adversely affected,' 'any party in interest,' or any persons 'whose rights are substantially affected.' . . . Where the statute requires that the person be interested, affected, or aggrieved, or (*in the absence of a statute*) where the common law rule requiring the showing of particular injury or damage is controlling, the plaintiff must allege and show how he has been injured or damaged other than as a member of the general public in order to enjoin the actions of a governmental body. Such suits are essentially private in character and are for the protection of private rights.
>
> In other instances, however, the courts have recognized the rights of individuals to challenge governmental action without showing any particular damage. . . . *Within constitutional bounds*, the Legislature may grant a right to a citizen or to a taxpayer to bring an action against a public body or a right of review on behalf of the public without proof of particular or pecuniary damage peculiar to the person bringing the suit. Thus, in *Spence v. Fenchler*, 107 Tex. 443, 180 S.W. 597 (1915), the statute authorized 'any citizen' to bring an action to enjoin the operation of a bawdyhouse. The statute went further, specifically providing that 'such citizen shall not be required to show that he is personally injured by the acts complained of.' This Court concluded that the plaintiff did not have to show particular interest or damage.

Id. at 56 (emphasis added, citations omitted).

SB 8 grants to "any person" standing to sue "any person" who violates SB 8 by *performing* a prohibited abortion, and to sue "any person" who *helps* perform such an abortion. This means standing for 21+ million Texans, and probably for every adult in the United States.

B. A successful claimant receives a fixed, mandatory $10,000 (or more); the court "shall" issue an injunction

Traditional civil procedure specifies that a judge or jury will assess the evidence of harm to the plaintiff and then decide whether to award damages or other relief, and if so, how much. The judge or jury exercises *discretion* when determining an amount.

SB 8 *mandates* a judgment for *at least $10,000* against each defendant who has performed or induced an abortion or helped someone perform or induce one. The claimant need not introduce *any* evidence of injury or harm; in fact, the claimant can be a stranger from far away who wants only to recover the statutory sum of at least $10,000, plus costs and attorney fees. Neither judge nor jury is given any discretion to award *less* than $10,000, but they can award *more*. SB 8 does not give even a word of guidance about whether and how much more to award.[5]

This does not mean the SB 8 plaintiff receives $10,000 per abortion. It means $10,000 *per person, per abortion*. A judgment against defendants Dr. *A*, Nurse *B*, Contributor *C*, and

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[5] **Sec. 171.208. CIVIL LIABILITY FOR VIOLATION OR AIDING OR ABETTING VIOLATION.**

(a) *Any person,* other than an officer or employee of a state or local governmental entity in this state, may bring a civil action against *any person* who:

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

(2) knowingly engages in conduct that *aids or abets* the performance or inducement of an abortion, including paying for or reimbursing the costs of an abortion through insurance or otherwise . . . . [or]

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

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

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

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

(3) *costs and attorney's fees*. . . .

TEX. HEALTH & SAFETY CODE ANN. § 171.208 (emphasis added).

Driver *D* would not be simply a joint and several judgment for $10,000, collectable against any of the four defendants for a total recovery of $10,000. Instead the claimant would have a judgment against each defendant for $10,000 individually, for a total of $40,000---plus more if the court awards more, in addition to costs and attorney fees.

C. Venue in claimant's home county.

Legislatures have traditionally possessed great authority to enact and control venue rules. Statutes usually say venue is proper where the individual defendant *resides* or the entity defendant has its principal place of *business,* or where the *acts or conduct* alleged in the lawsuit took place. SB 8 modifies the usual rules and *adds* that any *Texas claimant* may choose to sue in the *county where he lives.*

Venue may or may not matter much in small states, but in Texas venue is especially important because it is so much more inconvenient and expensive (in terms of money and lost time) to litigate a case in a distant forum.

But venue is not just about distance and inconvenience—to choose venue is also to choose the *judge* (or judges) and the *jury pool.* All this can often influence the outcome, sometimes decisively. Venue is more than the "home team" advantage, with a familiar stadium and a partisan crowd that can make deafening noise on cue. Trial lawyers know that venue is more than location because *to choose venue* from several alternatives is also to *choose the referees*—the judge and the jury pool. Venue is so important in Texas that until 1983 our law allowed an interlocutory appeal if a request for change of venue was denied.

In an SB 8 case venue will always be proper in the claimant's home county, and the trial court is forbidden to transfer venue unless all parties expressly agree to the transfer.[6] It is hard to imagine why a claimant would ever agree to a change in venue from his home

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[6] **Sec. 171.210. CIVIL LIABILITY: VENUE.**

(a) [A] civil action . . . shall be brought in:

(1) the county in which all or a substantial part of the events . . . occurred;

(2) [for individual defendants] the county of residence . . . .

(3) [if the defendant is a company] the county of [its] principal office in this state; or

(4) the county of [the claimant's] residence . . . if the claimant is a natural person residing in this state.

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

Id. § 171.210.

county to somewhere else.[7]

II. How SB 8's Civil Procedures Will Probably Work in Practice

Claimants and home counties—If you build it, will they come? SB 8 empowers some 21+ million Texas adults[8] to file enforcement cases. One would expect that claimants would usually choose to file in their home counties. When it is possible to choose venue (and the court system) where you live, a claimant would usually choose to file the case in one of his home county's courts rather than somewhere more distant and unfamiliar. More important though, is the reality that people motivated by ideology will study and will know *where* they prefer that cases be filed, and then they will be able to use social media to locate willing claimants to file suit in those counties.

Some claimants will likely be interested in the money award. But many may well be ideological claimants, interested in the enforcing the law against abortion providers and their helpers, including the mandatory injunction. Some claimants may be acting alone, filing cases from home at their computer. They will probably be people who have enough money to pay filing fees and enough leisure time to do this. Other claimants will be working in tandem with activists who have found claimants who live in "good venue" counties.

Counties that prove to be a receptive forum for SB 8 lawsuits will probably attract more

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[7] The legislature might have been concerned, with good reason, that some elected prosecutors in some counties would not enforce SB 8. There is evidence in the declarations that some district attorneys have vowed not to enforce any abortion law in their districts. Prosecutors do have discretion in choosing which cases to prosecute. Prosecutors also have an ethical duty to see that justice is done, not just to seek a conviction. (See footnote 77 below) It is not clear to this court what alternatives are available when laws passed by a legislature won't be enforced by the elected prosecutors in some areas, that is, whether the legislature could have established a statewide prosecutor for these cases or given this duty to the Attorney General.

In any event, the choice made in SB 8 was to establish state-wide civil enforcers, tempted by the easy financial reward and also by the luxury of filing suit in one's home county against persons who live in the other 253 Texas counties, who will have to defend the case far from home.

[8] According to the 2020 census 21,866,700 adults (18 and over) live in Texas.

filings than other counties. Even though counsel for Defendants said offhandedly, in papers filed with this court, that "any person" means *anyone in the world,*[9] it seems very unlikely that even English-speaking foreigners would file SB 8 cases. Like non-Texans in this country, they would not be able to file suit in a home county because they don't live here and therefore don't have one; they could file only where the defendant lives or where the abortion took place. Those venues will seldom be as favorable to these lawsuits as some other counties in Texas.

Claimants and activists will learn quickly which venues and courts are friendly to SB 8 suits and which are not. Some courts will not prioritize these cases. A claimant might learn that his case keeps getting reset or placed last on the docket. *SB 8 filings will gravitate to the more favorable venues.*

Choice of courts. SB 8 does not specify which courts have jurisdiction to hear these cases, so the general rules of jurisdiction would apply. Each of Texas' 484 District Courts, many of its 256 Statutory County Courts, and all of its 840 Justices of the Peace would have *jurisdiction* to hear these cases.[10] Every claimant would have a pool of courts to choose

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[9] *See Defendants' Motion to Dismiss under the Texas Citizens Participation Act* (at page 7): "An injunction that prevents Texas Right to Life and Mr. Seago from suing Ms. Van Stean does nothing to liberate abortion providers in Texas, who remain subject to private civil enforcement suits from *anyone else in the world* if they violate the statute." (emphasis added); *Defendants' Response to Plaintiffs' Motions for Summary Judgment* (at page 15): "An injunction that stops only Texas Right to Life and Mr. Seago from suing—while leaving the door open for *everyone else in the world* to sue the plaintiffs for their violations of SB 8—does not redress any injury that the plaintiffs are suffering on account of the statute." (emphasis added).

SB 8's language supports the conclusion that suit may be brought by *any person in the United States* and maybe beyond. SB 8 makes venue proper in the county of the claimant's residence "if the claimant is a natural person *residing in this state.*" (emphasis added). This clearly means that natural persons who do *not* reside in Texas may bring suit, but only in one of the other three counties mentioned. *See* footnote 6 above for text of SB 8's venue provisions.

[10] All 484 *District Courts* in Texas would have *jurisdiction,* although many of the district courts specialize in criminal, family, or juvenile cases and might not handle civil cases. The 256 *statutory county courts* generally have jurisdiction in civil cases up to $250,000. *See* TEX. GOV'T CODE § 27.031. Special statutes sometimes limit their jurisdiction in particular counties or specify unique jurisdiction (e.g., combinations of family law, misdemeanors, civil, and probate). The 840 *Justices*

from within their home county.

Discovery. Claimants will need to know something about the abortion to know which persons to sue. It is more likely that ideological activists will have that information than the lone wolf. But Texas law allows persons to "petition the court" for an order allowing a deposition "before suit or to investigate claims."[11] These Rule 202 suits might well be used to compel documents from a potential defendant and to compel him to appear for sworn testimony in a deposition. Once a claimant locates one person who participated as a doctor or an aider, discovery will usually lead to more potential defendants.

Default judgments. An SB 8 lawsuit could not be safely ignored by any defendant, who would suffer a default judgment that would become final and be collectible by the procedures mentioned below. A defendant who has notice of the suit and ignores it will have a difficult time convincing a court to set aside the default judgment, all in the claimant's home county, where the motion for new trial or suit to set aside the judgment must be filed.

Texas collection tools. Claimants who file and win an SB 8 case will have access to several procedures for obtaining money or assets from judgment debtors who don't pay voluntarily.

Texas law gives a judgment creditor several tools for enforcing the judgment. (1) *Judgment lien.* The creditor can file an abstract of the judgment in the real property records where the debtor owns real property. This creates a lien that will cloud title so when the debtor/property owner eventually tries to sell the property, no one will buy it until the lien is paid and title cleared. In these days some buyers might just agree to pay off the lien, to prevent the holder from foreclosing when it is no longer the debtor's homestead and may lawfully be sold at auction. (2) *Turnover.* The creditor can seek a *turnover* order (usually appointing a receiver with court-approved power to investigate, question the defendant, locate nonexempt assets,[12] and sell them). *See* TEX. CIV. PRAC. & REM. CODE §

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of the Peace generally may hear civil cases up to $20,000. *See id.* 25.0003.

[11] Rule 202, titled "Depositions Before Suit or to Investigate Claims," provides: "A person may petition the court for an order authorizing the taking of a deposition on oral examination or written questions . . . (b) to investigate a potential claim or suit." TEX. R. CIV. PRO. 202.

[12] Our state has longstanding and effective protections for a debtor's wages and homestead in addition to protections for some retirement, disability, and other benefits.

31.002. The turnover statute is too long to quote in this Order, but it has become the tool of choice for creditors who want to collect a judgment from a debtor who does not want to pay. (3) *Garnishment.* The judgment holder can *garnish* the defendant's bank accounts. A writ of garnishment requires the bank to freeze the debtor's money and ultimately pay it to the creditor, after a court hearing to make sure all is in order. *See* TEX. R. CIV. PRO. 657-679. (4) *Execution.* The creditor can have a sheriff or constable levy *execution* by seizing assets. *See* TEX. R. CIV. PRO. 621-656.

The court does not suggest that these tools *always* work (they do not) or that they are *easy* to employ (they are not). But there are lawyers who specialize in using these procedures and defending against their use, and in the hands of the right lawyer the tools could be used to extract money from most of the potential defendants in an SB 8 enforcement suit. Judgment liens are relatively simple to file and inexpensive; for the patient creditor they can produce payment when the debtor eventually wants to sell his house, or dies and his estate is in probate and the property is no longer exempt as homestead. These procedures can inflict pain on the debtor and can increase one's stress level.

On the subject of collecting the judgment, a money judgment against someone with a job or with assets is a thing of value. Lawyers could take collection cases for a percentage of the recovery. They could at least file the judgment for record and let it sit and earn interest at the statutory rate.[13]

Injunctions. SB 8 mandates that when a defendant is found liable the court "shall" issue an injunction.[14] Courts could enforce SB 8 injunctions by holding the defendant in contempt of court. If the defendant does not come in person for a contempt hearing, the court must issue a capias and have him arrested and brought to court. It is possible that the law enforcement officers in defendant's county might not be eager to arrest the local person. Claimant's home court might have to simply keep the capias/warrant active and then if the defendant is stopped for a traffic violation anywhere, that warrant will show

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[13] On most judgments the statutory interest rate accrues at the Federal Reserve's prime rate, but at 5% if the prime rate is below 5 and at 15% if the prime rate is above 15. *See* TEX. FIN. CODE ANN. § 304.003 (a).

[14] Section 171.208 (b) provides: "If a claimant prevails in an action brought under this section, the court shall award: (1) injunctive relief sufficient to prevent the defendant from violating this subchapter or engaging in acts that aid or abet violations of this subchapter." TEX. HEALTH & SAFETY CODE ANN. § 171.208 (b).

up on the officer's computer and the defendant could well be arrested and held.

III. Could SB 8's Procedures be used in Other Situations?

SB 8 raises an obvious concern: if its civil procedures are constitutional for abortions, they will be constitutional for other targets. Other states (or future Texas Legislatures) might copy and paste them onto other substantive provisions to drive undesired activities out of business. In our polarized country, other states with different electorates and different priorities might decide to use these procedures to put other people out of business or to stamp out behavior they dislike intensely, including other areas of life covered by constitutional law. The undesired activities targeted in other states, of course, might be different from abortion providers in Texas.

How might these civil procedures work against gun owners? *State A* could copy the procedures and replace the abortion provisions with language that forbids *openly carrying* guns, or with language requiring *trigger locks* on all guns. There could be exceptions for carrying a gun to and from one's house and truck in a gun case, and provisions making it lawful to possess and openly carry a gun outside the city limits on your own property or when lawfully hunting or at a shooting range. The *State A* claimant (an activist physically distant from the gun-owning defendant) could simply file suit and obtain the judgment, record it in the real property records from his home computer, and wait until the owner tries to sell the property.

State B might use the procedures to enforce discrimination laws against bakery owners who will not, as a matter of conscience, decorate a cake with a message that is offensive to them or that violates their religious beliefs.[15] To be effective, this statute would need to cover the bakery *and its "aiders and abetters"* (aka employees, suppliers, financial backers), who might quickly decide it is best to stop helping the bakery discriminate and thereby avoid these lawsuits. Such a statute would not need to empower "any person" in the state to be a claimant; the person who arranged the test case(s) and whose message was not placed on the cake, would be a claimant with easy standing and a psychological injury. The courts might eventually uphold the baker's right not to be compelled to speak a message he disagrees with, but he and others like him and his employees might be

[15] *See, e.g., Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018).

bankrupted in the meantime.

The procedures could be used not only to put people out of business, but to attack a disputed area of constitutional law that a legislature passionately disagrees with, like the First Amendment. Statutes could adapt these procedures to single out climate change deniers, or those who utter "hate speech," or American History teachers who teach X or don't teach X. We are a diverse and creative people, and it seems naïve to hope these procedures will be cabined voluntarily once they are upheld.

In sum, if SB 8's civil procedures are constitutional, a new and creative series of statutes could appear year after year, to be enforced by eager ideological claimants, who could bring suit in their home counties, where the judges would do their constitutional duty and enforce the law. Pandora's Box has already been opened a bit, and time will tell.

IV. Jurisdictional and Procedural Challenges

A threshold question in this case is whether Plaintiffs are entitled to make a pre-enforcement challenge to SB 8's procedures, or whether they must wait until cases are brought and then the persons sued would have to defend themselves case by case and appeal adverse decisions until the constitutionality of SB 8's procedures is decided.

Defendants challenge the standing of all Plaintiffs. If no plaintiff has standing, the court has no jurisdiction and must dismiss the suit. The challenge to Plaintiffs' standing is the heart of Defendants' Plea to the Jurisdiction, their Motion to Dismiss under the Texas Citizens Participation Act, and their response to Plaintiffs' Motions for Summary Judgment.

The Texas Supreme Court has stated the rules for evaluating a *plea to the jurisdiction*:

> When assessing a plea to the jurisdiction, our analysis begins with the live pleadings. We may also consider evidence of jurisdiction—and we must consider such evidence when necessary to resolve the jurisdictional issue. *We construe the plaintiff's pleadings liberally, taking all factual assertions as true,* and look to the plaintiff's intent.[16]

A *TCPA motion to dismiss* is assessed in much the same way:

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[16] *Heckman v. Williamson County*, 369 S.W.3d 137, 150 (Tex. 2012) (emphasis added).

> In determining whether a legal action is subject to or should be dismissed under this chapter, the court shall consider the pleadings, evidence a court could consider under Rule 166a, Texas Rules of Civil Procedure, and supporting and opposing affidavits stating the facts on which the liability or defense is based.[17]

In keeping with these rules, the court will assess the pleadings and declarations.[18]

A. Defendants' Plea to the Jurisdiction

1. Standing

Defendants challenge plaintiffs' standing to bring these lawsuits. Their Plea to the Jurisdiction says no plaintiff has *standing* because everyone is complying with SB 8 and therefore there is no one to "aid" or "abet":

> None of the plaintiffs can establish standing because every Texas abortion provider is complying with SB 8 . . . . [and] it is impossible for the plaintiffs to "aid or abet" post-heartbeat abortions in Texas, as no such abortions are being performed. . . . The defendants will not sue any of the plaintiffs because they are not violating SB 8—and they *cannot* violate, aid or abet abortions in violation of SB 8 even if they wanted to. . . . So there is nothing for the Court to enjoin: The plaintiffs are complying with the law, and the defendants are incapable of suing the plaintiffs because they are fully complying with SB 8.[19]

There are multiple Plaintiffs in these consolidated cases. The rules of standing for *multiple plaintiffs* were recently summarized in *Patel v. Texas Department of Licensing & Regulation*, 469 S.W.3d 69, 77-78 (Tex. 2015):

> Generally, courts must analyze the standing of each individual plaintiff to bring each individual claim he or she alleges. *Heckman v. Williamson Cnty.*, 369 S.W.3d 137, 152 (Tex. 2012). However, "where there are multiple plaintiffs in a case, who seek injunctive or declaratory relief (or both), who sue individually, and who all seek the same relief[,] . . . the court need not analyze the standing of more than one plaintiff—so long as that plaintiff has standing to pursue as much or more

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[17] TEX. CIV. PRAC. & REM. CODE § 27.006(a).

[18] Affidavits and unsworn declarations are given essentially the same weight. *See id.* § 132.001.

[19] *Defendants' Plea to the Jurisdiction*, at 2.

relief than any of the other plaintiffs." *Id.* at 152 n.64. The reasoning is fairly simple: if one plaintiff prevails on the merits, the same prospective relief will issue regardless of the standing of the other plaintiffs. *Id.*

Patel and *Heckman* cited with approval *Andrade v. NAACP of Austin*, 345 S.W.3d 1, 6 (Tex. 2011), a voting case that put the principles in a nutshell: "Because the [plaintiff] voters seek only declaratory and injunctive relief, and because each voter seeks the same relief, only one plaintiff with standing is required."

In reliance on these authorities, this court will examine the standing of only a few representative plaintiffs, who clearly have standing to bring these cases and to seek declaratory and injunctive relief based on their constitutional arguments.

According to the pleadings, several plaintiffs in these fourteen cases have standing to challenge SB 8 in its entirety. This conclusion is based on their pleadings, taken as true under *Heckman*, and it is not changed by the abundant admissible evidence in the record.[20]

Plaintiff Dr. Ghazaleh Moayedi is a board certified obstetrician gynecologist who provides abortion care in Texas. She is a Fellow of the American College of Obstetricians and Gynecologists. If she continues to provide abortions after a fetal heartbeat is detectable, she would be subject to liability for at least $10,000 plus attorney fees and costs and a mandatory injunction forbidding her to do such abortions again. She would be liable for performing or inducing abortions.

Plaintiff Clinic Access Support Network is an organization whose volunteers provide transportation, information, money for meals, accommodations, and childcare or dependent care assistance, to people seeking abortion services. CASN is managed by a board and has one full-time employee. It brings suit for itself, because entities can be liable, and for its members and board, who might be held liable under SB 8's "aid and abet" provision.

Three different Planned Parenthood organizations are Plaintiffs who do business in Austin, Dallas, El Paso, Fort Worth, Houston, Lubbock, San Antonio, and Waco. They

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[20] Defendants have made approximately 250 boilerplate objections to Plaintiffs declarations, which the court has read. *Those objections are overruled.* The objections to the declarations of the three plaintiffs discussed in this Order and the court's rulings on them have been expressly stated in footnotes 33, 35, and 36. The one-word hearsay objections to the Muniz and Adkins declarations are also overruled.

each have standing to bring these suits for declaratory and injunctive relief. Their petitions say their staff members provide information, transportation, meal funding, physical accommodations, childcare, dependent care, and compassionate care to people seeking abortion advice and services. For these aiding and abetting activities, they might face liability with no upper limits.

Dr. Bhavik Kumar is a board-certified family medicine doctor in Houston; he provides medication and procedural abortions. Before SB 8 the vast majority of the abortions provided by him occurred at a time when fetal cardiac activity could be detected.

Several Plaintiffs provide funding and/or refer patients to funding sources. They fear—reasonably—that they could be sued and held liable for $10,000 or more, plus attorney fees and costs.

All of these activities have been curtailed by the real possibility of SB 8 lawsuits against abortion providers and those who aid them.

2. Ripeness

The Defendants' Plea to the Jurisdiction also states that Plaintiffs' claims are not *ripe* for two reasons: (1) "because it is impossible to 'aid or abet' post-heartbeat abortions that Texas abortion providers are refusing to perform," and therefore Defendants cannot sue anybody. In addition, (2) it is "indeterminate and unknowable whether the Defendants, as opposed to some other person unrelated to the Defendants, would sue one of the Plaintiffs if they chose to violate [SB 8]."[21]

The court respectfully rejects these arguments. SB 8 empowers "any person" to seek $10,000 per defendant. Plaintiffs' petitions allege that the law is chilling abortion activity, and has had that effect since it took effect on September 1.

Defendants' filings in this case unwittingly admit the reality of the threat and the chill—Defendants' TCPA motion to dismiss and their response to the summary judgment motions both point out that Plaintiffs gain nothing by enjoining Defendants because they are still subject to lawsuits from *anyone and everyone else in the world* if they violate the act.[22] They also point out that there are no prohibited abortions taking place right now for

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[21] *Id.* at 4.

[22] *See* footnote 9 on page 9.

anyone to aid or abet.

Plaintiffs' pleadings and declarations also state that their activities have been chilled by the prospect of having to defend SB 8 lawsuits and the danger of having $10,000 judgments and mandatory injunctions rendered against them.

The court holds that Plaintiffs have *standing* and their claims are *ripe*.

3. State action and pre-enforcement relief

Defendants' argue that the "state action" doctrine bars these suits. The court respectfully rejects this contention.

Plaintiffs would be able to challenge SB 8's constitutionality if and when they are sued for $10,000 in a lawsuit. A claimant in a regular *enforcement* case for $10,000 could simply not successfully make the following argument to the trial court:

> Your Honor, because I am a private person suing this abortion defendant, he cannot argue that SB 8 is unconstitutional because *I am not a state actor*. Yes, I am enforcing a state law and seeking $10,000 from him, and also my costs and attorney fees, but this doctor/nurse/driver/contributor can't even argue that any part of SB 8 is unconstitutional because there is *no state action*.

The state-action argument could not be successfully urged in an enforcement case in one of the 254 counties in Texas, when persons are being sued for $10,000 or more. The argument is also without merit in this *pre-enforcement* case.

Plaintiffs simply want to make their constitutional arguments in this *pre-enforcement* case instead of waiting until SB 8 is enforced by civil lawsuits. The law allows them to do that. In essence, Defendants challenge Plaintiffs' right to challenge SB 8 before case-by-case enforcement; they want the court to make these Plaintiffs wait until SB 8 claimants sue them in distant courts for the mandatory money awards. This court holds that these pre-enforcement suits are permissible.

The Texas Supreme Court in *In re Abbott*, 601 S.W.3d 802 (Tex. 2020), recently discussed principles of standing in pre-enforcement situations. *Abbott* was a suit by sixteen trial judges against the Governor and Attorney General seeking an injunction to prevent enforcement of an executive order concerning pretrial bail. Factually *Abbott* is dissimilar to this case—as is all existing American case law—but the pre-enforcement relief principles that it summarized are pertinent here:

> To establish standing based on a perceived threat of injury that has not yet come to pass, the "threatened injury must be certainly impending to constitute injury in fact"; mere "allegations of possible future injury" are not sufficient. *Whitmore v. Arkansas*, 485 U.S. 149, 158 (1990) (citations omitted). A plaintiff does not need to be arrested and prosecuted before suing to challenge the constitutionality of a criminal law. He must, however, allege "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." *Babbitt v. Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979).[23]

Here there is not a threat of *criminal prosecution*, but there is a real and serious threat of civil enforcement with ruinous $10,000-plus judgments issued by courts distant from the defendants' county of residence.[24]

Unlike the situation in *Abbott*, the SB 8 threat is much more real and serious than "unsubstantiated speculation"; and the plaintiffs here, unlike the judge-plaintiffs in *Abbott*, do not enjoy "long-established principles of judicial immunity that provide adequate protection." The Plaintiffs' complaints are certainly not "generalized complaints" about government.[25] A review of this court's summary of the procedures and how they will work in practice (above at pages 5-12) makes this plain.

As will be seen below on pages 29-46, the court holds SB 8's civil procedures unconstitutional on three grounds, standing, punishment without due process, and delegation: (1) SB 8 unconstitutionally grants standing for uninjured persons to take a fixed, automatic sum of money from a person who has not harmed them in any way; (2) SB 8 unconstitutionally punishes without due process of law; and (3) SB 8 unconstitutionally delegates enforcement authority to private persons.

Concerning *standing*, the state action concept does not apply because if a plaintiff does not have standing to bring the claim, the court has no jurisdiction to entertain the suit at all and must dismiss it for lack of jurisdiction. That is, in an SB 8 enforcement suit, the

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[23] *See* 601 S.W.3d at 812.

[24] It is certainly *possible* that a plaintiff might bring an SB 8 suit against a resident defendant in Austin or Dallas or Houston, where a defendant lives. But in this court's experience, plaintiffs almost always bring cases in the better venue when one is available, as it is in SB 8 cases.

[25] *Id.* at 812-13.

defendant would be able to file a Plea to the Jurisdiction challenging the claimant's standing and the court's jurisdiction to entertain the suit. That defendant could argue that SB 8's grant of standing to 21 million uninjured persons is unconstitutional. The court holds they are permitted to make that assertion *now* in this *pre-enforcement* suit.

Concerning *punishment,* courts must give litigants due process of law, period. A civil lawsuit for punitive damages is usually a case between two (or more) private litigants—ordinarily *none* of the parties are *state actors*. Yet courts must still give each litigant a trial that conforms to principles of due process of law. The concept of "no state action" simply does not apply when a litigant is asking the court in a civil case to provide a trial that complies with due process. A litigant is entitled to due process even if the state does nothing but provide the *law* and the *court*. In most civil cases, neither the plaintiff nor the defendant is a state actor, but both are entitled to due process. Due process is something a court must provide before life, liberty, or property can be taken.

Concerning *delegation* of enforcement authority to private persons, it is *the state* that has delegated power to the private person. The act of delegating itself is state action. Another way of stating this is that the claimant is a state actor, or a *de facto agent of the state*. But when the constitutional assertion is improper delegation, there is no state action problem.

Defendants' request that the court dismiss this case because there is no state action is respectfully **denied.**

As part of their state-action argument, Defendants also say the Plaintiffs cannot employ third-party standing to assert the rights of pregnant mothers.[26] But Plaintiffs assert their own personal rights to engage in the provision of abortions. They do not need to assert third-party standing in this case because *they are not challenging SB 8's abortion restrictions in this case*. Plaintiffs' argument is not that the mother's rights are being violated; their argument is that *SB 8' civil procedures violate the Texas Constitution.*

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[26] *Defendants' Motion to Dismiss Under the TCPA* at 11.

B. Defendants' Motion to Dismiss Under the TCPA

Defendants' *Motion to Dismiss under the TCPA* is analyzed in three steps:[27] (1) Does the TCPA apply to the case? (The court answers *no, it does not*). (2) Have the Plaintiffs established a prima facie case? (The court answers *yes, they have*). (3) Have Defendants proven a valid defense? (The court answers *no, they have not*). The Motion to Dismiss under the TCPA is respectfully **denied** for the following reasons.

Defendants' motion to dismiss relies largely on the argument that these cases are not justiciable—that is, Plaintiffs have not shown *standing* and their claims are not *ripe*. This assertion is without merit for the reasons stated above in the discussion of the Plea to the Jurisdiction.

The Texas Supreme Court recently said: "The TCPA's purpose is to identify and summarily dispose of lawsuits designed only to chill First Amendment rights, not to dismiss meritorious lawsuits."[28] This statement is a fair distillation of the TCPA's statement of purpose.[29] These lawsuits do not seek to chill Defendants' First Amendment

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[27] *See Youngkin v. Hines*, 546 S.W.3d 675, 679-80 (Tex. 2018) (discussing the TCPA's three-step analysis). As it pertains to this case, the TCPA states in § 27.005:

> (b) Except as provided by Subsection (c) . . . a court shall dismiss a legal action . . . if the [defendant] demonstrates that the legal action is based on or is in response to: (1) the [defendant's] exercise of: (A) the right of free speech; (B) the right to petition; or (C) the right of association; . . .
>
> (c) The court may not dismiss a legal action under this section if the [plaintiff] establishes by clear and specific evidence a prima facie case for each essential element of the claim in question.
>
> (d) Notwithstanding the provisions of Subsection (c), the court shall dismiss a legal action [if the defendant] establishes an affirmative defense or other grounds on which the [defendant] is entitled to judgment as a matter of law.

TEX. REV. CIV. STAT. ANN. § 27.005.

[28] *In re Lipsky*, 460 S.W.3d 579, 589 (Tex. 2015).

[29] Section 27.002 of the act states: "The purpose of this chapter is to encourage and safeguard the constitutional rights of persons to *petition, speak freely, associate freely, and otherwise participate in government* to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury." TEX. CIV. PRAC. & REM. CODE ANN.

rights or their right to "participate in government."

(1) The TCPA applies if a plaintiff's lawsuit "is based on or is in response to" Defendants' exercise of first amendment rights. Plaintiffs' pleadings do state that Defendants advocated and lobbied for SB 8 in the legislature and they have made public statements supporting it. *But Plaintiffs have not sued Defendants for making those statements; instead their pleadings complain essentially that Defendants have been encouraging persons to file SB 8 lawsuits or to provide information to that end.* It is clear that these cases are not "based on" and do not "respond to" Defendants' exercise of their First Amendment rights—Plaintiffs have not sued them for that.

If this court is correct that some of SB 8's core civil procedures are unconstitutional, as the court explains on pages 29-46 below, there is no First Amendment right to encourage persons in Texas and across the United States to file suits to take money from other persons *by using an unconstitutional civil procedure.*

The court holds that Defendants have not satisfied the TCPA's first step, and the motion is respectfully **denied** for that reason.

(2) A TCPA motion to dismiss should be denied if the court finds that Plaintiffs have made out a prima facie case. The supreme court recently discussed and explained step two's evidentiary burden:

> [The TCPA] does not impose an elevated evidentiary standard or categorically reject circumstantial evidence. In short, it does not impose a higher burden of proof than that required of the plaintiff at trial. [The act does not require] direct evidence of each essential element of the underlying claim to avoid dismissal.[30]

Declaratory judgment. The court finds and holds that Plaintiffs have made out a prima facie case that they are entitled to a declaratory judgment. Indeed, they have proven as a matter of law their right to a declaratory judgment for the reasons stated below on pages 29-46 of this Order.[31]

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§ 27.002. (emphasis added).

[30] *In re Lipsky*, 460 S.W.3d at 591.

[31] The Texas Uniform Declaratory Judgments Act, TEX. CIV. PRAC. & REM. CODE § 37.006(a), requires that "all persons who have or claim any interest that would be affected by the declaration must be made parties." Defendants certainly qualify as such persons. The Texas Attorney General

Permanent injunction. The court makes two holdings on the request for a permanent injunction: (1) the court holds that Plaintiffs have shown a prima facie case for a permanent injunction, and therefore Defendants' *TCPA motion to dismiss* should be **denied**, but (2) Plaintiffs' request for issuance of a *permanent injunction* by summary judgment has not been established as a matter of law and is therefore **denied**.

There are contested fact issues on the injunction claim that should be decided by a conventional trial, not by summary judgment. The record shows that several plaintiffs are experiencing irreparable harm from SB 8's provisions and from Defendants' efforts to see that the law is enforced by private citizens if anyone violates SB 8. Plaintiffs' declarations, taken as true, show that defendant Texas Right to Life's website has asked for tips about violators, solicited funds, and promised to "sue the abortionists ourselves."[32]

Plaintiffs' evidence is contradicted by Defendants' summary judgment evidence, which includes sworn denials by Defendants that they ever intended to do anything to stir up SB 8 lawsuits or encourage people to file them. At trial both sides will have an opportunity to cross-examine witnesses and explore the facts. The court will then decide whether to grant or deny a permanent injunction.

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was notified of this suit in September and has chosen not to attend hearings, file briefs, or defend SB 8. More recently, in response to an email from the court, the Attorney General's office replied on November 9 that the office did not intend to appear at the November 10 hearing.

[32] Defendant Seago's declaration in federal court (August 5) is part of this record: ¶ 6: "Texas Right to Life is publicizing the availability of private civil-enforcement lawsuits under Senate Bill 8 through social media and other forms of advertising, and we are encouraging individuals to sue abortion providers and abortion funds if they defy the law when it takes effect on September 1, 2021." Seago's declaration in this case (November 7): ¶ 6: Neither Texas Right to Life nor I will sue any person or entity that is *complying with SB 8*. We would consider suing *only* individuals or entities that are *violating the law* by performing or inducing a post-heartbeat abortion, or by aiding or abetting an illegal abortion of that sort, and only if we have credible information to support such a lawsuit (emphasis added)." The Texas Right to Life website said concerning SB 8 (September 2, 2021): "Use the links below to report anyone who is violating the Texas Heartbeat Act . . . . If you want to help enforce the Texas Heartbeat Act anonymously, or have a tip on how you think the law has been violated, fill out the form below. We will not follow up with or contact you." Muniz declaration, Exhibits 3 & 5.

In sum, on this record Plaintiffs have shown a prima facie case for a permanent injunction but have not proven all of their case as a matter of law, as is their summary judgment burden.

Concerning the request for a permanent injunction, Plaintiffs' affidavits contain competent evidence that Plaintiffs' claims are justiciable and individual Plaintiffs and Planned Parenthood organizations have standing to assert them. The summary judgment evidence shows particularized injury-in-fact, traceable to Defendants' conduct, that would be redressed adequately by an injunction. That evidence is countered by Defendants' evidence, which creates fact issues for trial.

As stated above (pages 14-15) if even one plaintiff has standing to seek the declaratory and/or injunctive relief sought by other plaintiffs in these cases, the one plaintiff with standing is sufficient for the whole case. The court has selected the declarations of three representative Defendants.

The affidavit of Dr. Bhavik Kumar establishes standing and ripeness as a provider. He is a board-certified family doctor who performs abortions. He clearly qualifies as an expert witness.[33]

Ken Lambrecht's affidavit establishes standing and ripeness as President and CEO of one of the Planned Parenthood organizations on behalf of the organizations and their

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[33] Kumar's declaration says: ¶5. "I understand that SB 8 bans the provision of abortion in Texas after embryonic cardiac activity can be detected, which occurs at approximately 6 weeks LMP [last menstrual period]." The objection ("no personal knowledge, legal opinion, conclusory, foundation") is overruled. ¶12: "Viability is medically impossible at 6 weeks LMP. Viability is generally understood as the point when a fetus has a reasonable likelihood of sustained survival after birth, with or without artificial support, which occurs much later in pregnancy at approximately 24 weeks LMP, though some pregnancies are never viable." The objection to this paragraph ("foundation") is overruled. ¶44: "Since SB 8 has taken effect, I have seen only a small fraction of the patients I would see on a typical day—and of those, many have embryonic cardiac activity so I am unable to provide the patients care. For instance, on the first day I provided abortions after SB 8 became effective, I saw only 6 patients when I usually see approximately 20 to 30 in a day. Half of the patients I saw had embryonic cardiac activity and thus were ineligible for an abortion in Texas." The objection ("foundation") is overruled.

employees.[34] Their subsidiaries have eleven locations in central, east, north and west Texas, and in Austin, Dallas, El Paso, Fort Worth, and Waco.[35]

Lambrecht and Michelle Tuegel[36] establish standing and ripeness as Plaintiffs who "aid

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[34] The court held in *Texas Workers' Comp. Comm'n v. Garcia,* 893 S.W.2d 504, 518 (Tex. 1995), that an association may sue on behalf of its members when "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Texas Ass'n of Business v. Texas Air Control Bd.,* 852 S.W.2d 440, 447 (Tex. 1993) (citing *Hunt v. Washington State Apple Advertising Comm'n,* 432 U.S. 333, 343 (1977))."

This court holds that an *organization* has the same standing to sue on behalf of its *employees*.

[35] Lambrecht says the organizations provide miscarriage management and contraception advice, and before September 1 when SB 8 took effect "offered medication abortion up to 10 weeks LMP and procedural abortion through 21 weeks 6 days LMP" in Austin; "offered medication abortion up to 10 weeks LMP and procedural abortion through 18 weeks 6 days LMP" in Dallas; he gave similar testimony (with slightly different numbers) for Fort Worth and Waco. Members of his staff receive intake calls, schedule patients, counsel patients on their options, and refer them to other providers when appropriate. The court holds that these activities would subject these people to lawsuits alleging "aid or abet" liability. ¶12: Lambrecht's organizations, "our physicians, and our staff cannot afford the certain cost of abusive litigation, plus any monetary penalties and attorneys' fees and costs that SB 8 would impose if we were to violate the Act by providing abortions after the six-week ban." The objection ("speculation, no personal knowledge, foundation") is overruled. ¶15: Lambrecht expressed his concern about "SB 8's fee-shifting provisions" which might "force us to pay opponents' legal costs and fees" in enforcement suits, and also might "expose our attorneys to joint liability for the other side's fees and costs." The objection ("legal opinion, conclusory, speculation") is overruled. ¶17: "Staff are understandably frightened that they will be sued and forced into a Texas court far away from home to defend themselves, and they are deeply worried about the impact that these suits will have on themselves and their families." The objection ("no personal knowledge, foundation, relevance") is overruled.

[36] Michelle Tuegel is a licensed practicing Texas attorney who "focuses her practice on representing victims of sexual assault and abuse." She has provided and will continue to provide her clients and potential clients with advice about abortion services. ¶8: "According to the terms of SB 8, I aid and abet abortions in the State of Texas. I have engaged in conduct that helped to facilitate the performance or inducement of an abortion in the past that would have violated SB 8's terms, and because I believe that SB 8 is void under both federal and Texas law, I cannot in

and abet" by providing funding, driving and transportation, counseling, and assistance to women trying to locate abortion facilities. This would expose Lambrecht (and his employees) and Tuegel to suits alleging liability as "aiders" in the abortion process.

The testimony of *any* of these persons should *alone* establish standing. The record contains more than adequate evidence of standing and ripeness and the impact on Plaintiffs. The court has read the declarations and the Defendants' 250 boilerplate objections are overruled.

In view of how SB 8's procedures will probably work and harm Plaintiffs, coupled with Defendants' statements in their declarations above, the court holds that Plaintiffs have presented a prima facie case of irreparable harm.

The court holds that Plaintiffs have shown "injury in fact," traced to Defendants' conduct. To show redressability Plaintiffs do not have to show that a declaratory judgment or injunction would remedy their situation *entirely*. It would be impossible to sue and enjoin every adult in Texas or in the United States. Plaintiffs are entitled to bring this pre-enforcement challenge to SB 8's constitutionality.

The summary judgment evidence proves Plaintiffs are entitled to a declaratory judgment as discussed below, and are entitled to proceed to trial on their request for a permanent injunction. They have not proved as a matter of law that they are entitled to *summary judgment* granting a permanent injunction. That issue is reserved for trial.

For all these reasons, Defendants' *Plea to the Jurisdiction* and their *Motion to Dismiss Under the TCPA* are respectfully **denied**.

V. Challenges Based on Right to Privacy under the Texas Constitution

In 1996 the Texas Supreme Court observed that *federal decisions* have recognized two

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good faith discontinue my supportive actions and philanthropic giving." The objection ("legal opinion, speculation, foundation, conclusory") is overruled. Tuegel is a Texas attorney who is qualified to give her opinion about SB 8's constitutionality as part of her reason for continuing her activities as a matter of principle. But in deciding *the legal question of SB 8's constitutionality* in this case, the court disregards her legal opinions about constitutionality.

distinct aspects of the privacy right:

> The United States Supreme Court has recognized that at least two different kinds of privacy interests are protected by the United States Constitution. . . . The first type of privacy protects an individual's interest in avoiding the *disclosure* of personal information. . . . This interest is the '*right to be let alone*' . . . . The second constitutionally protected privacy interest is the right to make certain kinds of important *decisions* and to engage in certain kinds of *conduct*. . . . The first privacy interest focuses on governmental action that is *intrusive or invasive*; the second concerns *decisions or conduct* by individuals."[37]

In 2002 the court spoke again about these two aspects of the privacy right: "We have recognized that the Texas Constitution protects personal privacy from [i] *unreasonable governmental intrusions* and [ii] *unwarranted interference with personal autonomy*."[38]

Plaintiffs argue that SB 8 violates their right to privacy in two ways:

> (1) "SB 8 denies Plaintiffs' patients their right under the Texas Constitution to end a pregnancy before viability" [i.e. the personal autonomy aspect], and
>
> (2) "SB 8 violates patients' right to disclosural privacy by permitting any person to place patient records and decision-making at issue in public litigation" [i.e. the disclosure of personal information/intrusion aspect].

A. Right to end a pregnancy before viability

Plaintiffs assert that the *Texas* right of privacy "is at least as broad" as the *federal* right, that it encompasses the right to end a pregnancy before viability, and that SB 8's "fetal heart activity" provision violates this right.

The court respectfully rejects this contention. Though the Texas Supreme Court has cited and discussed federal abortion decisions, it has never adopted those decisions as the constitutional law of this state. The court in *Bell* made this clear when it discussed and accepted the United States Supreme Court's distinction between a government's decision to *prohibit abortion* and a decision to *encourage childbirth* by not subsidizing abortion:

> [The United States Supreme Court has] recognized a fundamental difference

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[37] *City of Sherman v. Henry*, 928 S.W.2d 464, 467-68 (Tex. 1996) (emphasis added, citations omitted).

[38] *Bell v. Low Income Women of Texas*, 95 S.W.3d 253, 264 (Tex. 2002) (emphasis added).

> between governmental action prohibiting abortion, and the government's decision to encourage childbirth as a policy matter. . . . [There is a] 'basic difference between direct state interference with a protected activity {abortion] and state encouragement of an alternative activity' [childbirth].
>
> While *we have never decided whether the Texas Constitution creates privacy rights coextensive with those recognized under the United States Constitution*, we find this distinction persuasive.[39]

The Texas decisions have considered whether the Texas right of privacy: (1) requires subsidized abortion funding whenever the law also subsidizes childbirth,[40] (2) prevents a police chief from denying promotion to an officer because he had a sexual affair with a fellow officer's wife,[41] and (3) protects a public employee from having to submit to a polygraph examination.[42] But Texas constitutional law does not create a state right to end a pregnancy before viability.

The court respectfully declines to declare that the Texas right to privacy encompasses the right to end a pregnancy before viability. Plaintiffs have not argued or briefed the federal right to privacy, and therefore this court will not address that issue.

2. Right to keep patient medical records and decision-making out of public litigation

SB 8 requires doctors to keep specified medical records when they perform an abortion. The Planned Parenthood Plaintiffs argue essentially that disclosure of the patient's records in an SB 8 lawsuit would violate the intrusion/personal information aspect of the privacy right. Defendants point out that SB 8 says nothing about discovery of medical records and does not override evidence privileges—SB 8 simply requires that records be

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[39] *Id.* at 265 (emphasis added, internal citations omitted).

[40] *Id* (the court answered *no*).

[41] Answering *no*, the court in *City of Sherman* held that "the Texas Constitution does not provide a right of privacy for a police officer who was denied a promotion because he had a sexual affair with the wife of another police officer. This conclusion does not mean, however, that the government is free to engage in intrusive methods to determine the sexual practices of individuals." 928 S.W.2d at 474.

[42] *Texas State Employees Union v. Texas Dep't of Mental Health & Mental Retardation*, 746 S.W.2d 203 (Tex. 1987) (the court answered *yes*).

kept.

The Texas Supreme Court has spoken on this question. In *R.K. v. Ramirez*, 887 S.W.2d 836 (Tex. 1994), the court interpreted TEX. R. EVID. 509, which states the Physician-Patient Privilege and makes the following exception for civil cases:

> **(e) Exceptions in a civil case.** The privilege does not apply: . . .
>
> > **(4) Party relies on patient's condition.** If any party relies on the patient's physical, mental or emotional condition as a part of the party's claim or defense and the communication or record is relevant to that condition.

The court said further: "We reject R.K.'s argument that discovery of his medical and mental health records violates his constitutional right of privacy. The patient-litigant exceptions in Rules 509 and 510, as we have interpreted them, are not unconstitutional."[43]

These decisions are sensitive to the patient's interest in keeping medical information private unless that interest is outweighed by a litigant's need to see the records. TEX. R. EVID. 509 states: "The physician may claim the privilege on the patient's behalf." And rule 509 also says the "patient's representative" may claim the privilege. Presumably the patient could sign a form in the doctor's office saying anyone accused of "aiding or abetting" within the meaning of SB 8 is authorized to claim the privilege on her behalf.[44]

The court concludes that Plaintiffs' facial attack on SB 8's record-keeping mandate is without merit. It is respectfully **denied**. If and when an SB 8 case is brought and a *physician* and/or a *patient representative* asserts the privilege, that issue will be for the trial court to decide.

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[43] 887 S.W.2d at 843. The supreme court in *In re Collins*, 286 S.W.3d 911 (Tex. 2009), also discussed when and whether medical records are subject to discovery and may be admitted at trial.

[44] The mother cannot be a party to an SB 8 enforcement case because SB 8 prohibits lawsuits against her. *See* § 171.206 (b) (1).

VI. Constitutional Challenges to SB 8's Civil Procedures

A. Standing for "any person" to seek and obtain automatic and non-discretionary $10,000 is unconstitutional

Plaintiffs' motions for summary judgment argue that "SB 8's standing provision is unconstitutional" and it "violates the Texas Constitution by conferring on uninjured persons a right to sue [Plaintiffs in this case] in Texas courts."

Section 171.208 provides *procedures* for civil lawsuits by claimants to allege and prove violations of SB 8's substantive provisions, summarized above. SB 8 authorizes "any person" (but not a state or local government official or employee) to sue "any person" who *performs or induces* an abortion in violation of SB 8's terms and against any person who *aids or abets* a violator.

If the claimant prevails by proving a violation, section 171.208 mandates that the court "shall award . . . not less than $10,000," plus costs and attorney fees, against each physician and each person who aided the physician. The statute expressly includes insurers or businesses that pay for medical care that includes abortions done in violation of SB 8.[45]

1. The requirement of harm

Plaintiffs argue that SB 8's grant of standing to "any person" exceeds the boundaries set by the Texas Constitution and case law, which require some kind of harm for standing. The case law establishes that standing in Texas generally requires some kind of harm or injury.

The Texas Supreme Court has said often and recently that the standing doctrine rests on two provisions of our constitution: *separation of powers* and *open courts*.[46] The court said in

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[45] Section 171.208: (a) Any person . . . may bring a civil action against *any person* who: . . . (2) knowingly engages in *conduct that aids or abets* the performance or inducement of an abortion, including *paying for or reimbursing the costs* of an abortion through *insurance or otherwise*, if the abortion is performed or induced in violation of this subchapter, regardless of whether the person knew or should have known that the abortion would be performed or induced in violation of this subchapter; . . . *See* TEX. HEALTH & SAFETY CODE § 171.208 (emphasis added).

[46] The Texas Bill of Rights provides: "Sec. 13. EXCESSIVE BAIL OR FINES; CRUEL OR UNUSUAL PUNISHMENT; OPEN COURTS; REMEDY BY DUE COURSE OF LAW. Excessive bail shall not be

In re Abbott, 601 S.W.3d 802 (Tex. 2020):

> The Texas standing doctrine derives from the Texas Constitution's provision for *separation of powers* among the branches of government, which denies the judiciary authority to decide issues in the abstract, and from the *open courts* provision, which provides court access only to a "person for an injury done him."[47]

Similar statements were made recently in *Finance Comm'n of Texas v. Norwood*, 418 S.W.3d 566, 580 (Tex. 2013); *Daimler-Chrysler Corp. v. Inman*, 252 S.W.3d 299, 304 & n.17 (Tex. 2008); and *South Texas Water Authority v. Lomas*, 223 S.W.3d 304, 307 (Tex. 2007).

Lomas phrased the harm requirement in these words:

> And our constitution's open-courts provision contemplates access to the courts for only those litigants who have suffered an actual injury, as opposed to one that is general or hypothetical. Thus, as a general rule, to have standing an individual must demonstrate a particularized interest in a conflict distinct from that sustained by the public at large.[48]

Texas standing law generally mirrors federal law. It is true, as Defendants point out, that federal standing law rests in part on Article III's limitation of federal court standing to "cases and controversies," language not found in the Texas Constitution. It is also true that Texas standing law rests in part on our open-courts provision, language not found in the U. S. Constitution.

Harm can be intangible. The United States Supreme Court said this year:

> To have Article III standing to sue in federal court, plaintiffs must demonstrate, among other things, that they suffered a concrete harm. *No concrete harm, no standing*. Central to assessing concreteness is whether the asserted harm has a *"close relationship" to a harm traditionally recognized as providing a basis for a lawsuit in American courts*—such as physical harm, monetary harm, or various intangible

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required, nor excessive fines imposed, nor cruel or unusual punishment inflicted. *All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.*" TEX. CONST. Art. I, § 13 (emphasis added).

[47] 601 S.W.3d at 807 (emphasis added, citations omitted).

[48] 223 S.W.3d at 307.

> harms including (as relevant here) reputational harm. *Spokeo, Inc.* v. *Robins*, 578 U. S. 330, 340–341 (2016). . . .
>
> Various intangible harms can also be concrete. Chief among them are injuries with a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts. Those include, for example, reputational harms, disclosure of private information, and intrusion upon seclusion. . . .[49]

2. Statutory standing

Defendants argue that SB 8's grant of standing to "any person" is constitutional, and that "a plaintiff is not required to demonstrate injury if standing has been conferred by statute." They cite Texas cases that say *unless standing is granted by statute*, the general rule of standing is that a plaintiff must have an interest in the conflict that differs from the interest of the general public.[50]

Defendants also cite *Spence v. Fenchler*, 180 S.W. 597 (Tex. 1915), which involved a statute granting "any citizen" standing to seek an *injunction* against a bawdyhouse, without having to show that he was "*personally injured* by the acts complained of."[51] The supreme court approved enforcement of that statute by a citizen who did not show that he was "personally harmed," although his pleadings did allege the bawdyhouse was near his

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[49] *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2200, 2204 (2021) (emphasis added, citations omitted).

[50] *E.g., Sneed v. Webre*, 465 S.W.3d 169, 180 (Tex. 2015) ("Generally, *unless standing is conferred by statute*, a plaintiff must demonstrate that he or she possesses an interest in a conflict distinct from that of the general public, such that the defendant's actions have caused the plaintiff some particular injury.") (emphasis added, citation omitted); *Hunt v. Bass*, 664 S.W.2d 323, 324 (Tex. 1984) ("Standing consists of some interest peculiar to the person individually and not as a member of the general public. The general rule of standing is applied in all cases *absent a statutory exception to the contrary.*") (emphasis added, citations and internal quotation marks omitted).

[51] The statute authorized the attorney general and local prosecutors to bring suit and said "any citizen of this state" may also bring such a case, and "such citizen shall not be required to show that he is *personally injured* by the acts complained of." 180 S.W. at 603 (emphasis added).

property and he alleged concrete and specific harm to his *business* and the *property's rental value and market value.* [52]

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[52] The trial court had denied Spence's request for an injunction without hearing evidence, based on the pleadings alone. The supreme court summarized and quoted plaintiffs' petition at length, which stated in vivid detail how the bawdyhouse had damaged the usefulness and value of Spence's property *nearby* (and the property of other plaintiffs similarly situated). Spence's sworn petition had alleged:

> That each of the plaintiffs owns and is in possession of certain described real estate in the city of El Paso, Tex.; that the defendant Fenchler owns and . . . sublets or rents said building at 214 Broadway to his codefendant, Bess Montell, who is now in possession thereof and interested therein as tenant or lessee; 'that the said Bess Montell . . . [runs] a bawdy and disorderly house on said property . . . defendants have often been notified that their said property is being used, rented, and kept for such illegal purposes . . . that prostitutes are permitted to resort and reside in and on the said premises for the purpose of plying their vocation, and that the said lewd women and women of bad reputation for chastity are employed and permitted to display and conduct themselves in a lewd, lascivious, and indecent manner on the said premises . . . .
>
> 'That the keeping and maintaining of said bawdy and disorderly house, or houses, upon said premises . . . is a nuisance, and *seriously damages and depreciates the rental value and market value* of plaintiffs' property hereinbefore described, which said property is *situated in close proximity and near* to the said property so owned by said defendants . . . that said nuisances make the dwelling houses . . . of these plaintiffs, and others similarly situated, *unfitted for the occupancy of respectable people* . . . and the said immoral and illegal places drive out and turn away the respectable citizens from that vicinity . . . and greatly reduce and decrease, and will continue to so greatly reduce and decrease, the *rental value and market value* thereof, unless the said nuisance is abated' [and are] irreparably damaging the property of these plaintiffs, as well as the property of other citizens and taxpayers . . . [that all of this] 'renders the property of these plaintiffs, as well as the property of other citizens and taxpayers, unfit for occupation by respectable families as tenants, and prevent these plaintiffs, and others similarly situated, from improving their property and building thereon because of the impossibility of securing good tenants; that said bawdy and disorderly house, or houses . . . prevent these plaintiffs, and others similarly situated, from maintaining and running business houses, stores, and rooming houses for decent and first-class trade and patronage, and *hamper them in securing decent and respectable girls, men, and women to enter their employ and work for them* . . . and prevent the

The statutory grant of standing in *Spence* empowered citizens to seek an *injunction pursuant to the usual court procedures of the time, as in all civil suits.*[53] SB 8 grants standing to "any person," using an unfairly tilted set of procedures, with venue always available at home for Texas claimants, against defendants from anywhere in the state, who are liable for a significant sum.[54] The court in *Spence* was not allowing an El Paso citizen to sue an East Texas person in El Paso to shut down an East Texas brothel. In fact. Spence had pleaded in detail that his property was *nearby* to Fecnhler's and that the bawdyhouse *damaged his property's value* as shown in footnote 52 above.

When the Texas Supreme Court discussed *Spence* in 1966, it said there are "constitutional bounds" around a legislature's grant of standing:

> [T]he courts have recognized the rights of individuals to challenge governmental action without showing any particular damage. . . . *Within constitutional bounds,* the Legislature may grant a right to a citizen or to a taxpayer to bring an action against a public body or a right of review on behalf of the public without proof of particular or pecuniary damage peculiar to the person bringing the suit. Thus, in *Spence v. Fenchler*, 107 Tex. 443, 180 S.W. 597 (1915), the statute authorized 'any citizen' to bring an action to enjoin the operation of a bawdyhouse. The statute went further, specifically providing that 'such citizen shall not be required to show that he is personally injured by the acts complained of.' This Court concluded that the plaintiff did not have to show particular interest or damage.[55]

None of the cases that mention statutory standing involved a statute that granted standing to "any person." And none authorized the claimant to win a significant, mandatory amount of money without showing any connection to, or harm from, the

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> wives and daughters of the citizens of El Paso from visiting their stores and business houses owned by plaintiffs, and other citizens of El Paso, Tex., similarly situated to the great and irreparable injury and damage of these plaintiffs and others similarly situated.'

180 S.W. at 599-600 (emphasis added).

[53] The statute said that "the procedure in all cases brought hereunder shall be the same as in other suits for injunction, as near as may be." *Id.*

[54] At the risk of mixing metaphors, one might say SB 8 tilts the playing field, or stacks the deck, or puts a thumb on the scales.

[55] *Scott v. Board of Adjustment*, 405 S.W.2d 55, 56 (Tex. 1966) (emphasis added).

defendant or his conduct.

Many of the statutory cases grant standing to challenge the action of a *government agency*. None give persons standing to seek a money judgment against a fellow citizen, and then to use the machinery of the courts and collection procedures of our rules and statutes. Volunteer drivers, nurses, receptionists, social workers, and others will often not have liquid funds to pay a judgment. But Texas law gives the holder of a judgment a range of tools for collecting judgments from them. These collection tools can be used to make life miserable for the judgment debtor when the creditor has the time, the desire, and the know-how, as discussed on pages 10-12 above.

It is one thing to authorize taxpayers or citizens to file suits against government officials to make them obey a law, and to compensate these private attorneys general for their time and trouble and their attorney fees with money from the state treasury, as statutes sometimes do. It is quite another thing to incentivize citizens or persons to file suits against other private citizens to extract money from them, with no pretense of compensating the claimant for anything.

3. Constitutional limits on standing

Plaintiffs point out that recent cases say the legislature cannot grant standing beyond constitutional limits. The court in *Norwood* said:

> The [Administrative Procedure Act] does not purport to set a higher standard than that set by the general doctrine of standing, and *it cannot be lower, since courts' constitutional jurisdiction cannot be enlarged by statute. In re Allcat Claims Serv. L.P.*, 356 S.W.3 455, 462 (Tex. 2011) ("If the grant of jurisdiction or the relief authorized in the statute exceeds the limits of [the Constitution], then we simply exercise as much jurisdiction over the case as the Constitution allows . . . .").[56]

The United States Supreme Court has recently discussed the issue of constitutional limits on standing. As the Court said in *Ramirez*:

> Congress may "elevate to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law." . . . But even though "Congress may 'elevate' harms that 'exist' in the real world before Congress recognized them to actionable legal status, *it may not simply enact an injury into*

[56] 418 S.W.3d at 582 n. 83 (emphasis added).

> *existence, using its lawmaking power to transform something that is not remotely harmful into something that is.*" . . .
>
> [I]f the law of Article III did not require plaintiffs to demonstrate a "concrete harm," *Congress could authorize virtually any citizen to bring a statutory damages suit against virtually any defendant who violated virtually any federal law.*[57]

Three dissenters disagreed with the majority about the *adequacy of the proof of harm* in *Ramirez*. But they took pains to make clear, as did the majority, that *there are limits on Congress's constitutional power to grant standing to plaintiffs who have suffered no harm whatsoever*:

> [I]n *Spokeo*, this Court held that "Article III requires a concrete injury even in the context of a statutory violation." . . . Article III requires for concreteness only a "real harm" (that is, a harm that "actually exist[s]") or a "risk of real harm." . . . Overriding an authorization [by Congress] to sue is appropriate *when but only when* Congress could not reasonably have thought that a suit will contribute to *compensating or preventing the harm at issue*.[58]

The Supreme Court in *Ramirez* stressed that its standing rules rest on Article III's "case or controversy" requirement. Though Texas has no such constitutional requirement, the Texas Constitution does have the open-courts provision, which opens the Texas courts for those who seek redress for injury, requiring proof of injury perhaps stronger than is found in Article III.

4. Four principles

From all these authorities, four overriding principles emerge:

> (1) standing ordinarily requires that a plaintiff show some kind of harm different from harm to the public generally,
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> (2) the legislature can change the usual rules with a statute,
>
> (3) statutory standing rules must stay within constitutional boundaries, and
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> (4) Texas standing law rests in part on Texas Supreme Court decisions inter-

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[57] *TransUnion LLC v. Ramirez*, 141 S. Ct. at 2204-2208.

[58] *Id.* at 2226 (Kagan, J., joined by Breyer and Sotomayor, JJ, dissenting) (emphasis added, citations omitted).

preting the Constitution's open courts provision.

Applying these principles, this court holds that SB 8's grant of standing for persons who have not been harmed to sue persons who have not harmed them, mandating a large award without proof of harm, is unconstitutional.

B. SB 8's mandated $10,000 provision is punishment without due process

Plaintiffs argue that SB 8's "mandatory statutory minimum $10,000 is excessive and arbitrary" because "there is no articulable individual injury," citing *State Farm Mutual Automobile Insurance Company v. Campbell*, 538 U.S. 408 (2003). The court sustains this contention. SB 8 is not compensatory, and it is not a form of statutory liquidated damages known to American law. The statute authorizes punishment by civil lawsuit, and deprivation of property, without due process of law as guaranteed by the Fourteenth Amendment.

1. SB 8 does not compensate

The Court in *State Farm v. Campbell* summarized the traditional American understandings about damages for *compensation* and damages for *punishment*:

> [I]n our judicial system compensatory and punitive damages . . . serve different purposes. . . . Compensatory damages "are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct." . . .
>
> While States possess discretion over the imposition of punitive damages, it is well established that there are procedural and substantive constitutional limitations on these awards. . . . The due process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor. . . .
>
> "Despite the broad discretion that States possess with respect to the imposition of *criminal penalties* and *punitive damages*, the Due Process Clause . . . imposes substantive limits on that discretion." . . . To the extent an award is grossly excessive, it furthers no legitimate purpose and constitutes an *arbitrary deprivation of property*. . . .[59]

The Court then held that there must be a *proportionate relationship* between the *harm* to the

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[59] 538 U.S. at 416-17 (emphasis added, citations omitted).

plaintiff and the *amount* of punitive damages:

> [C]ourts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered.[60]

For twenty-five years Texas law of punitive (or exemplary) damages has been consistent with federal due process as declared by the United States Supreme Court. Our statute codifies due process principles: Exemplary damages may be awarded only when the claimant proves with *clear and convincing evidence* that his *harm* resulted from *fraud, malice, or gross negligence*.[61] The standard jury instruction says: "'Exemplary damages' means any damages awarded as a penalty or by way of punishment but not for compensatory purposes."[62] SB 8 makes no attempt to comply with these due process principles.

The person who files an SB 8 lawsuit will not have to prove injury to be awarded a sum of money; he will have to prove only that the defendant violated SB 8. And he can increase the monetary award by adding defendants. Needless to say, the number of defendants a claimant can name has nothing to do with whether or how much he has been harmed. (See the example on page 6 above.)

SB 8's award of at least $10,000 from one stranger to another is not compensatory. Yet it cannot lawfully be punitive without observing at least some of the constitutional rights and procedures for criminal cases. SB 8 does not come close to satisfying constitutional due process. Instead it lessens the procedural rights enjoyed by other civil litigants, such as a court and jury with *discretion* to assess damages, and *fair notice* of what the court and jury may consider when deciding whether to award more than the statutory minimum.

In addition to the money award, which can only be seen as punitive and not compensatory, SB 8 has other provisions that have the effect of *punishing* a defendant rather than *compensating* a plaintiff. For example:

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[60] *Id.* at 426.

[61] *See* TEX. CIV. PRAC. & REM. CODE § 41.003(a): "[Unless they are authorized by another specific statute], exemplary damages may be awarded only if the claimant proves by clear and convincing evidence that the harm with respect to which the claimant seeks recovery of exemplary damage results from: (1) fraud; (2) malice; or (3) gross negligence."

[62] *See State Bar of Texas,* Texas Pattern Jury Charges §§ 28.7 & 29.7 (2018).

(a) Lawyers and law firms who advise their clients to bring a pre-enforcement challenge to SB 8's provisions are potentially liable for the claimant's attorney fees.[63] But a defendant wrongfully sued and totally innocent can never recover his attorney fees from an SB 8 claimant.[64]

(b) The longstanding rules of claim preclusion (res judicata) do not apply in SB 8 cases—a judgment against an abortion defendant does not bar additional lawsuits against him on the same facts and same event *unless he has paid the judgment in full.* This means that second and third claimants litigating the same event have every reason to pursue their lawsuits in other counties because if they are the first to collect, their judgment will be first in time and will bar the others. The incentive is to hurry and sue and collect, using the collection tools discussed above on pages 10-12.[65] And

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[63] SB 8 includes this provision in **§ 30.002 (a):** "Notwithstanding any other law, any person, including an *entity, attorney, or law firm,* who seeks declaratory or injunctive relief to prevent . . . any person in this state from enforcing [SB 8 or any other abortion law] in any state or federal court, or that *represents any litigant seeking such relief* . . . is jointly and severally liable to pay the costs and attorney's fees of the prevailing party." TEX. CIV. PRAC. & REM. CODE ANN. § 30.002 (a) (emphasis added).

[64] **§ 171.208**: . . . "(i) Notwithstanding any other law, a court *may not award* costs or attorney's fees under the Texas Rules of Civil Procedure or any other rule adopted by the supreme court under Section 22.004, Government Code, *to a defendant* in an action brought under this section." TEX. HEALTH & SAFETY CODE ANN. § 171.208 (i) (emphasis added).

[65] SB 8 gives a defendant a defense to successive or multiple suits for the same abortion *only if* he has already paid the first judgment completely. **Section 171.208 (c)** says a defendant has this defense "if the defendant demonstrates that the defendant previously *paid the full amount* of statutory damages under Subsection (b)(2) in a previous action for that particular abortion . . . . (emphasis added). In other words, o*rdinary principles of claim preclusion do not apply to an SB 8 case,* as Section **171.208 (e)** makes clear: "Notwithstanding any other law, the following are not a defense to an action brought under this section: . . . (5) non-mutual issue preclusion or non-mutual claim preclusion; . . ." TEX. HEALTH & SAFETY CODE. ANN. § 171.208 (c) & (e). Claimant *A*, having secured a judgment, would be barred from bringing case after case on the same cause of action, but *claimant A's judgment* would not bar claimants *B, C,* and *D* from continuing to litigate their cases to judgment and, hopefully, to collection.

even after he has paid, the defendant might still have the other judgments against him on the books in multiple counties. This "multiple lawsuits" feature of SB 8 is a total change from the usual and longstanding claim preclusion rules, and a departure from other rules that bring order when more than one suit is filed concerning the same subject matter.[66]

Curious to determine the correct reading of the statute, the court asked counsel the following question by email on November 26:

> After a judgment for $10,000 in Case 1 for abortion number 1 on a certain day, *can there be successive judgments* (i.e. case 2, case 3, case 4, etc.) brought by different claimants against the same abortion provider or aider *for that same abortion number 1* until the defendant actually pays in full the first judgment? Or does the *first judgment itself* bar assertion of a second case about Abortion 1?
>
> Section 171.208 (c) appears to *allow successive cases* if the first one has not been paid in full. In other words the judgment itself does not bar the later cases on the same event because the claimant in those cases is not bound by res judicata aka claim preclusion because it is not mutual. *If there is a different claimant in cases 2, 3, and 4, etc. wouldn't 171.208 (e) (5) allow those later suits on the same event* when it says there is no defense on the basis of "non-mutual issue preclusion or non-mutual claim preclusion"? (emphasis added).

Both sides answered *yes* to the court's question.

[66] In other kinds of civil litigation, the litigants have no incentive to keep filing new lawsuits against a defendant for the same conduct because the courts will *consolidate* the cases (if they are in the same county) and will *abate* the second-filed case (if they are in different counties). *See In re J. B. Hunt Transport, Inc.*, 492 S.W.3d 287 (Tex. 2016); *Wyatt v Shaw Plumbing Co.*, 760 S.W.2d 645 (Tex. 1988). The *J. B. Hunt* case stated the usual rules:

> "The general common law rule in Texas is that the court in which suit is first filed acquires dominant jurisdiction to the exclusion of other coordinate courts." As a result, when two suits are inherently interrelated, "a plea in abatement in the second action *must* be granted." This first-filed rule flows from "principles of comity, convenience, and the necessity for an orderly procedure in the trial of contested issues." The default rule thus tilts the playing field in favor of according dominant jurisdiction to the court in which suit is first filed.

In sum, SB 8 is punitive and not compensatory.

2. The $10,000 is not defensible as a civil penalty or a form of statutory liquidated damages

Federal and state statutes sometimes grant a fixed statutory amount to the Government or to an injured or aggrieved person rather than requiring proof of actual damages. Some of these statutes grant the injured party a statutory amount *or* actual damages, whichever is higher. *These statutes always involve culpable conduct and harm to either the government or the authorized plaintiff.* SB 8's statutory $10,000 cannot be considered as rough liquidated damages for anything.

One Texas example is the fraudulent lien statute, which makes the filer of a fraudulent lien on property liable for "the greater of $10,000 or [the property owner's] actual damages" plus costs, attorney fees, and exemplary damages.[67] Another example is Texas Property Code § 5.077, which provides rules to govern executory contracts for the sale of residential property (that is, sales where the deed will not be delivered to the buyer until full payment is made, aka "contracts for deed"). Section 5.077 requires sellers to send buyers an annual accounting statement of payments. A seller who does not do this is liable for daily statutory liquidated damages: $100 a day for one violation and $250 a day if the seller has also violated the statute in a second transaction in that year.

The supreme court discussed an earlier version of § 5.077 in *Flores v. Millennium Interests, Ltd.*, 185 S.W.3d 427 (Tex. 2005.) *Flores* cited several Texas statutes that impose civil penalties and/or liquidated damages, but all involved *culpable conduct by the defendant toward the plaintiff,* such as illegal wiretapping, freight overcharges, and violating the

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492 S.W.3d at 294 (emphasis by the court, citations omitted). When multiple cases involving the same or similar issues are filed, the Multi-district Litigation process may be available, and the suits might be placed into one pretrial court, as happened in these pre-enforcement cases.

[67] TEX. CIV. PRAC. & REM. CODE §§ 12.001: "A person who [files a fraudulent lien] is liable to each injured person for:

(1) the greater of:

(A) $10,000; or

(B) the actual damages caused by the violation;

(2) court costs;

(3) reasonable attorney 's fees; and

(4) exemplary damages in an amount determined by the court."

minimum wage laws.[68] The court then said this about *statutory damages without actual harm:*

> We have found statutory damage schemes far less draconian than this one [§ 5.077] to be penal in nature. *See Johnson v. Rolls*, 97 Tex. 453, 79 S.W. 513, 514 (1904) (statutory liquidated damages awarded *without reference to any actual loss or injury* have "much the character of exemplary or punitive damages"); *The Houston & Tex. Central Ry. Co. v. H.W. Harry & Bros.*, 63 Tex. 256, 260 (1885) (to the extent that an award of statutory damage *exceeds the amount necessary to compensate* plaintiff's injury, "the excess is but exemplary damage").[69]

It is interesting to compare the differences between SB 8 and the Texas Medicaid Fraud Prevention Act discussed in *In re Xerox*, 555 S.W.3d 518 (Tex. 2018). There the supreme court reviewed a statute that empowered the *state* to sue and recover *civil penalties within a range* of $5500 to $15,000, and allowed the *trier of fact* to decide the amount depending upon the defendant's *culpability* and whether there was *injury* to an elderly or disabled person, or a youth under 18 years of age, all with *venue* available in either Travis County or a county where all or part of the *conduct* occurred.[70]

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[68] 185 S.W.3d at 432 & n. 7.

[69] *Id.* at 433 (emphasis added).

[70] Sec. 36.052. CIVIL REMEDIES. (a) . . . a person who commits an unlawful act [of Medicaid fraud] is liable to the *state* for: . . . (3) a civil penalty of:

(A) not less than $5,500 . . . and not more than $15,000 . . . for each unlawful act . . . that results in injury to an elderly person . . . a person with a disability . . . or a person younger than 18 years of age; or

(B) not less than $5,500 . . . and not more than $11,000 . . . for each unlawful act . . . that does not result in injury to [an elderly, disabled, or young] person . . .

(b) In *determining the amount of the civil penalty* . . . the *trier of fact* shall consider:

(1) whether the person has previously violated the provisions of this chapter

(2) the seriousness of the unlawful act committed by the person . . .

(3) whether the health and safety of the public or an individual was threatened by the unlawful act;

(4) whether the person acted in bad faith . . . and

(5) the amount necessary to deter future unlawful acts. . . .

In the *Xerox* case the court summarized the core principles of liquidated damages in the context of a suit for civil penalties. "Liquidated damages constitute a penalty unless (1) the harm caused by the breach is incapable or difficult of estimation and (2) the amount of liquidated damages is a reasonable forecast of just compensation." The court then discussed the civil penalty statute quoted in footnote 70 and said: "At first blush, this sounds like damages, but in operation, it is a *penalty* because it is fixed without regard to any *loss* to the Medicaid program and without a direct *benefit* to the liable party. *A remedy unrelated to actual loss is a penalty*." (emphasis added).

The United States Supreme Court's civil penalty cases examine the penalty to determine whether they are *comparable to liquidated damages* and *proportionate* or *remedial* to redress harm or expense to the Government, and whether they are *so disproportionate as to be punitive.* The statutory civil penalty cases involve conduct such as smuggling,[71] filing false

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(d) An action under this section shall be brought in Travis County or in a *county* in which any part of the *unlawful act occurred.*

(e) The *attorney general* may: . . . bring an action for civil remedies . . . [with or without] a suit for injunctive relief . . . .

See TEX. HUM. RES. CODE § 36.052 (emphasis added).

[71] *See One Lot Emerald Cut Sones and One Ring v. United States,* 409 U.S. 232 (1972) ("[The statute] prevents forbidden merchandise from circulating in the United States, and, by its monetary penalty, it provides a *reasonable form of liquidated damages* for violation of the inspection provisions and serves to *reimburse the Government for investigation and enforcement expenses.* In other contexts we have recognized that such purposes characterize *remedial* rather than *punitive* sanctions. [citations omitted] Moreover, it cannot be said that the measure of recovery fixed by Congress in [the statute] is so unreasonable or excessive that it transforms what was clearly intended as a *civil remedy* into a *criminal penalty*." (emphasis added).

Medicare claims,[72] and polluting navigable waters.[73]

This court has not found any instance—and none has been cited—in which any American legislature has authorized a private person to sue another private person for a fixed automatic sum of money without any showing of harm to the claimant or culpable conduct by the defendant toward the claimant, as does SB 8.

The court sustains Plaintiffs' contention that SB 8 violates due process of law because it is punitive and not compensatory.

C. SB 8 is an unconstitutional delegation of enforcement power to private persons

SB 8 is an unguided and unsupervised delegation of enforcement power to private persons. Delegation to an *agency* or to *public officials* is of course a different matter and is common in the well-developed field of administrative law, with many precedents concerning delegation of *rulemaking, adjudication, and enforcement* to agencies. But *agencies* are staffed at the top by appointed officials, and the statute that creates them must provide sufficient guidance to guide them, narrow their discretion, and provide for review. Agency decisions are subject to judicial review by traditional courts with their full powers. *None*

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[72] *See United States v. Halper*, 490 U.S. 435 (1989), where the Court discussed the statute's fixed civil penalty as "remedial" and liquidated damages for the Government's expenses in enforcing the law. The Court expressed concern about "the possibility that in a particular case a civil penalty authorized by the Act may be *so extreme and so divorced from the Government's damages and expenses as to constitute punishment*. . . . [T]he question we face today [is] whether a civil sanction, in application, may be *so divorced from any remedial goal that it constitutes "punishment"* for the purpose of double jeopardy analysis. . . . [A] *civil sanction that* cannot fairly be said solely to serve a remedial purpose, but rather *can only be explained as also serving either retributive or deterrent purposes, is punishment*, as we have come to understand the term."

A concurrence summarized the unanimous Court's holding: "Our rule permits the imposition in the ordinary case of at least *a fixed penalty roughly proportionate to the damage caused or a reasonably liquidated amount*, plus double damages." *Id.* at 452-53 (Kennedy, J., concurring) (emphasis added).

[73] *See United States v. Ward*, 448 U.S. 242, 248-49 (1980) ("[W]here Congress has indicated an intention to establish a *civil penalty*, we have inquired further whether the statutory scheme was *so punitive either in purpose or effect* as to negate that intention.") (emphasis added).

of this can be said about SB 8's delegation to private persons.

SB 8 grants to 21 million Texans the power to bring cases without any guidance, supervision, or screening. There is no guidance in the statute and no guidance from any public official. There is nothing to prevent a billionaire from Texas or another state, motivated by ideology, from setting up an enforcement system by locating a few willing Texans who live in favorable counties of venue to file suits in their home counties and enforce SB 8 across Texas.

Because SB 8 is unique and unprecedented, there is no case law factually the same from Texas or elsewhere about outsourcing law enforcement to private parties who act with no supervision or guidance from a statute or from any state official. There is no Texas law governing delegation of enforcement to private parties who may sue in the county where they live and seek mandatory money awards and injunctions. Defendants argue that the courts provide guidance, supervision, and review, but that seems hollow when SB 8 has tied the courts' hands and deprived them of real discretion concerning the money to be taken from the defendant or equitable discretion in deciding whether to issue an injunction.

The Texas Supreme Court has stated eight factors for courts to assess and apply when a statute has delegated authority to *private persons*:

1. Are the private delegate's actions subject to meaningful review by a state agency or other branch of state government?
2. Are the persons affected by the private delegate's actions *adequately represented* in the decisionmaking process?
3. Is the private delegate's power limited to making rules, or does the delegate also apply the law to particular individuals?
4. Does the private delegate have a pecuniary or other personal interest that may conflict with his or her public function?
5. Is the private delegate empowered to define criminal acts or impose criminal sanctions?
6. Is the delegation narrow in duration, extent, and subject matter?
7. Does the private delegate possess special qualifications or training for the task delegated to it?

8. Has the Legislature provided sufficient standards to guide the private delegate in its work?[74]

Other cases have applied these eight factors in assessing delegations for adherence to the constitution.[75] The supreme court has suggested that the eight factors may apply to delegations of enforcement power and not just to legislative power.[76]

SB 8 makes no pretense of satisfying these factors and clearly falls short, on some factors more than others. There is no supervision or meaningful review by government (#1), no one is represented in the claimant's decision-making process (#2), the claimant obviously applies and enforces the law (#3), the claimant has a clear monetary incentive (although ideological claimants would not necessarily be subject to this problem) (#4), the claimant would not be enforcing criminal law, but as stated on pages 36-43 his lawsuit would be imposing punishment on the defendant (#5), the subject matter is narrow (abortion) but state-wide in its reach and potentially broad in its extension to those who "aid or abet" (#6), there is no assurance whatsoever that any claimant would "possess special qualification or training for the task delegated" (#7), and the Legislature has provided no guidance or standards at all for claimants (#8).

This court would also note that SB 8 does not choose specified private persons to exercise SB 8 power; it lets 21 million private persons *self-select* and *volunteer* for the SB 8 job. They have no ethical training or guidelines, in contrast to professional ethics for lawyers and especially for criminal prosecutors.[77]

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[74] *See Texas Boll Weevil Eradication Foundation., Inc. v. Lewellen,* 952 S.W.2d 454, 472 (Tex. 1993).

[75] *See, e.g., FM Props. Operating Co. v. City of Austin,* 22 S.W.3d 868 (Tex. 2000), and authorities cited.

[76] *See Texas Workers' Comp. Comm'n v. Patient Advocates of Texas,*136 S.W.3d 643 (Tex. 2004) (discussing the eight factors in context of delegation of executive authority but deciding case on other grounds).

[77] The Texas Code of Criminal Procedure commands, for example, that prosecutors seek not only to convict but that justice be done. Prosecutors are also told not to hide exculpatory evidence or witnesses. *See* Art. 2.01. DUTIES OF DISTRICT ATTORNEYS. . . . "It shall be the primary duty of all prosecuting attorneys, including any special prosecutors, not to convict, but to see that justice is done. They shall not suppress facts or secrete witnesses capable of establishing the innocence of

The court holds that SB 8's delegation of enforcement power to private claimants[78] is unconstitutional.

VII. Summary of Rulings

1. Defendants' Plea to the Jurisdiction is **denied**.
2. Defendants' Motion to Dismiss Under the Texas Citizens Participation Act is **denied**.
3. Plaintiffs' challenge to SB 8 based on the Texas right to privacy is **denied**.

   A. Their contention that under Texas law there is a right to end a pregnancy before viability is **denied**.

   B. Their contention that there is a right under Texas law to keep patient medical records and decision-making out of pubic litigation is **denied**.
4. Plaintiffs' Motions for Summary Judgment are **granted in part** and **denied in part.**

   A. **Standing for uninjured persons.** The court **sustains** Plaintiffs' contention that SB 8's grant of standing for "any person" to seek $10,000 and a mandatory injunction without showing harm violates the Texas Constitution's "open courts" provision. Plaintiffs' request that the court declare Tex. Health & Safety Code Ann. § 171.208 unconstitutional on this ground is **granted**.

   B. **Punishment without due process.** The court **sustains** Plaintiffs' contention that SB 8 denies due process of law as guaranteed by the Fourteenth Amendment because it is punitive and not compensatory. Plaintiffs' request that the court declare Tex. Health & Safety Code Ann. § 171.208 unconstitutional on this ground is **granted**.

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the accused." Art. 45.201. MUNICIPAL PROSECUTIONS. . . . "(d) It is the primary duty of a municipal prosecutor not to convict, but to see that justice is done." Prosecutors are also subject to a degree of periodic review and control by the voters or by the persons who appointed them; they are not self-appointed.
Tex. Code Crim. Proc. arts. 2.01 & 45.201.

[78] SB 8 is not comparable to qui tam lawsuits, in which a private party can notify the federal government of unlawful conduct and, with the government's permission, participate in a lawsuit to recover damages from that misconduct.

C. **Delegation of enforcement power to private persons.** The court **sustains** Plaintiffs' contention that SB 8's grant of enforcement power to "any person" is an unlawful delegation of enforcement power to a private person that violates the Texas Constitution. Plaintiffs' request that the court declare TEX. HEALTH & SAFETY CODE ANN. § 171.208 unconstitutional on this ground is **granted**.

D. **Permanent injunction.** Plaintiffs' request for summary judgment granting a permanent injunction to prevent Defendants from encouraging the filing SB 8 lawsuits is **denied**. That issue will be tried on the merits and is not disposed of by this summary judgment.

E. **Other contentions.** The remaining arguments in this case about SB 8's constitutionality are **neither granted nor denied** and remain pending.

VIII. DECLARATORY JUDGMENT

This court declares that TEXAS HEALTH & SAFETY CODE § 171.208 (a) & (b) is unconstitutional, and should not be enforced or applied in Texas courts, for the following three separate and independent reasons:

A. **Standing for uninjured persons.** SB 8's grant of standing to "any person" to be awarded "no less than $10,000" and a mandatory injunction without showing harm to himself, taken from a person who has not harmed him, violates the Texas Constitution's "open courts" provision and is unconstitutional.

B. **Punishment without due process.** SB 8's mandate that trial courts "shall" award "no less than $10,000" to an unharmed claimant from a defendant who did him no harm is punishment and not compensation that will deprive persons of property without due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution.

C. **Delegation of executive power to private persons.** SB 8's grant of enforcement power to "any person" is an unlawful delegation of power to private persons that violates the Texas Constitution's separation of powers provision and is unconstitutional.

IX. ISSUES REMAINING

1. The court will sign an order of severance and will ensure that the issues addressed in this Order are promptly appealable to the appellate courts.

2. The court will contact the attorneys in the coming week and, after discussion, will schedule a hearing to consider the remaining issues.

SIGNED: December 9, 2021

David Peeples

DAVID PEEPLES, JUDGE PRESIDING
Sitting by Assignment

EXHIBIT N
Transcript of Oral Argument

Whole Woman's Health v. Jackson

22-0033

Certified Question from U.S. Court of Appeals

for the Fifth Circuit

(No. 21-50792)

Transcription of Video

Video Runtime: 0:58:55

(Beginning of Audio Recording.)

THE CLERK: All rise. Oh yea, oh yea, oh yea, the Honorable, the Supreme Court of Texas. All persons having business before the Honorable, the Supreme Court of Texas, are admonished to draw near and give their attention for the Court is now sitting. God save the State of Texas and this Honorable Court.

CHIEF JUSTICE HECHT: Please be seated. I would ordinary apologize, especially when we have counsel from D.C., for delaying argument for icy weather conditions that would go wholly unnoticed there, but Mr. Aaron (phonetic) is no stranger to Texas, and he should understand.

We have two cases set for argument this morning. First is 22-0033, Jackson versus Whole Woman's Health, a certified question from the United States Court of Appeals for the 5th Circuit.

And then 20-0687, Berry against Berry, from Nueces County and the 13th Court of Appeals District. Justice Huddle and Justice Young are not participating in the decision of

that case.

We have allotted 20 minutes per side in each of the cases, and we'll take a brief recess between them. The arguments this morning are being live streamed and should be available on the Court's archives later. We're ready to 22-0033.

THE CLERK: May it please the Court, Mr. Stone will present argument for the Appellant. Appellant has reserved five minutes for rebuttal.

MR. STONE: Thank you, Mr. Chief Justice. And may it please the Court, Senate Bill 8 prohibits the abortion of a child with a beating heart. But the legislature has directed that no enforcement of that prohibition may be taken or threatened by the State.

If a State official revoked a doctor's license as a consequence of violating SB 8, any ordinary individual would describe that as enforcement. Plaintiff's indirect enforcement theory cannot supplant the legislature's clear no-enforcement directive.

JUSTICE LEHRMANN: Excuse me. May I

ask you -- if, in fact, the legislature intended no enforcement, then, what purpose does the statute's reference to the penal code provision serve?

MR. STONE: Of course, Your Honor. It's superfluous as against several other components within the Section 207(a). To begin with, Section 207(a) states that it is the -- that 208 Civil Suit mechanism is the exclusive means of enforcement.

AVA DUVERNAY: But don't we have a rule against, you know, construing something so that it's just superfluous?

MR. STONE: Of course, Your Honor. The problem is taking that clause of Chapter 19 and 22 as somehow bringing back in indirect theories of enforcement makes a variety of parts of 207(a) superfluous, in fact, much more language.

Just to walk through it a bit, the original point I was making was that exclusive in this context should the exclusive means of enforcement, Section 208 that is, can only be taken to mean only. When it calls something exclusive, we mean that against all the world.

The non obstante clause that begins with states specifically contemplating this kind of a conflict, notwithstanding Section 171055 or any other law that that mechanism will be exclusive.

And then situating the two clauses regarding Chapters 19 and 22 of the penal code in the full sense in which they appear, specifically, and no enforcement -- rather, no enforcement of this subchapter and no enforcement of Chapters 19 and 22 penal code in response to violations of the subchapter may be taken or threatened by the State or other State entities.

So to believe --

JUSTICE LEHRMANN: So your answer is that they're just repeating themselves, basically?

MR. STONE: Yes, Your Honor, because otherwise we have to believe that the legislature inside of a sentence saying there will be no other enforcement of this subchapter when they included a statement about no enforcement about a particular penal code provision secretly meant to import all

kinds of indirect enforcement. That's just an impossible English reading of that provision.

JUSTICE BUSBY: What do you make of the difference between enforcement of this subchapter and enforcement in response to violations of this subchapter? Those seem to be different wording, so should we treat them differently?

MR. STONE: I agree that that's an interesting -- sort of an interesting lexical difference, Justice Busby. The problem is enforcement can only occur under Section 208 in violation of the subchapter.

If you turn to 208, Section A, for example, at A-2, we have -- or A-1, rather, it says any person -- you can bring a civil action -- say anyone who performs or induces an abortion in violation of this subchapter -- so to the extent that we're talking about what triggers enforcement or Section 208, that imports back in that in response to a violation of that subchapter and I think makes those two parallel again, confirming that essentially it's superfluous language.

JUSTICE BUSBY: If the legislature had

been concerned that without that penal code clause that somehow the -- that would work together with the substantive provisions of Subchapter 8, prohibiting certain conduct and create, that that would, therefore, become a crime and so did that particular clause does do some work because you would -- by reading the penal code together with other provisions of subchapter H without this clause, you would be enforcing Chapters 19 or 22, but using some of the other sections of Subchapter H and that's why this is there?

MR. STONE: I think that's plausible. I think that's the sort of ordinary intuition one would get from reading that clause is to keep overzealous prosecutors from attempting to use SB 8 substantive Heartbeat prohibition as a predicate act for some other crime. I think 207(a), nonetheless, would have foreclosed any of that attempt, any of those attempts without that clause specifically by saying notwithstanding any other State law, this will be exclusive.

And I think to the extent that one relies on, at 204, substantive primary rule of

conduct in order to complete some other tort or to make out the elements of a crime, under those circumstances, that is the enforcement of 204.

So I think 207(a) as a result bars that, even if it were to be in a (inaudible) tort action, for example, someone wanted to bring a tort of intentional infliction of emotional distress predicated on the violation of 204's Heartbeat provision, I think 207(a) once again kicks into say, I'm sorry, you can't enforce that substantive rule of primary conduct unless you use 208 as your mechanism.

And then, 208, again, is sort of the most belt-and-suspenders-filled statute I've ever read, specifically says it can be any person other than a State or local governmental entity or officer.

JUSTICE HUDDLE: General Stone, what do you make of the very last phrase in that sentence that seems to make a carve-out that reads except as provided in Section 171? How do you read that? What do you make of that?

MR. STONE: So I understand that to be reiterating the statement that it shall be

earlier on in Section A as exclusively through the private civil actions designed in 171.208. If the legislature had stopped there, it would have effected the same result.

Instead, it continued and said, by the way, for purposes of emphasis, there shall be no enforcement anywhere ever, except as provided in 171.208. 171.208 confirms the restrictions in 207(a) by specifically stating any person other than an officer or employee of the State or local government may bring an SB 8 civil action.

So that's how I read those two working together, again, acknowledging that there's quite a bit of superfluity here, but to the extent the Court's concerned about that and understandably, ordinarily is, take a glance at Section 212, the severability provision behind SB 8, where in no less than Subsections A, B, B-1, C, and D, the legislature repeats, sometimes in the very same language, that it intends for every application, word, clause, section, conceivable world to be severed from every other.

This is because the legislature

specifically wanted to prevent sort of tendentious theories of Federal court pre-enforcement review from putting functionally an abortion law into pre-clearance for the next four years as has occurred with a number of laws later found perfectly constitutional.

JUSTICE LEHRMANN: Let me ask you, so in line with your argument that the whole thing is superfluous, and so we just have to accept that, is the Plaintiff's reading superfluous?

MR. STONE: Yes, Your Honor. As I understand the Plaintiff's reading, they're attempting to say the specific mention of Chapters 19 and 22 imply that those vehicles for indirect enforcement are not permissible, but all the others are, right? For example, general medical licensing statutes, general pharmaceutical license statutes, those are still available for someone to enforce a violation of SB 8.

The problem with that is, again, it makes almost every other word of Section 171 and 207(a) superfluous, virtually all of them. The exclusivity requirement, the non obstante

clause, the language for acceptance provided in Section 208, almost the remainder of the paragraph --

JUSTICE BOYD: Unless we read the word directly in all of that, which is what the Appellees would say here is -- would say that -- that no state can directly enforce the provisions and requirements of this act.

MR. STONE: That's right --

JUSTICE BOYD: If we did that, then nothing would be superfluous.

MR. STONE: Well, that's right, Your Honor. If you inserted additional language into the statute to codify sort of this purposed theory that the Plaintiffs are suggesting, of course, if you would rewrite the statute, you could make some sense of every clause of it.

The problem is the point of this entire exercise and superfluity canon and all the other canons is to figure out what an ordinary English speaker would take from reading this statute and sort of giving it its fair meaning. And there's no way of reading Section 207(a) to give it its fair meaning

that doesn't require at least some superfluity.

I think an ordinary speaker, having been confronted with three or four separate unequivocal textual commands of no enforcement, would not read that to include stealth enforcement through collateral mechanisms hidden somewhere else, especially when the legislature has specifically noted that it wants the exclusivity notwithstanding any other law.

CHIEF JUSTICE HECHT: Eight Justices on the Supreme Court didn't think that.

MR. STONE: They didn't, Your Honor, they didn't. And of course, at least five of them particularly noted that they were making essentially a guess, an Erie guess, and that this Court was the final arbitrator of that. It's understandable, perhaps, that they didn't.

That was not the focus of the briefing originally before the U.S. Supreme Court. The focus of the briefing and argument regarding whether or not they can obtain injunctions against the court system itself, either

against the state as an entity or the state courts altogether or state judges or state clerks or some combination of them.

The idea that these executive entities would be -- would sort of -- would offer another appropriate target for relief was sort of an afterthought. And it's part of the reason why Justice Gorsuch was pointing out, saying, it appears that Texas law may allow this, and the Texas courts are free to disagree on -- free to disagree with their interpretation.

JUSTICE LEHRMANN: We certainly -- we understand that, but you certainly must understand, also, that while it may be a secondary source, so to speak, for us, it's certainly not something we're just going to thumb our nose at.

MR. STONE: Of course not, Your Honor, of course not, and that's part of the reason why, of course, both sides have developed their statutory arguments much greater degree here to give you reasons as to why on closer reflection that, in fact, this is the appropriate -- this is the appropriate

construction.

I'm might also point out that this Court has made at least, for example, take your language in re Facebook much stronger commitments to textualism as the sole, legitimate means of ascertaining the legislature's intent. There are several members of the United States Supreme Court who are not so committed, and that Court is sometimes fairly described as a fair-weather textualist bench.

This one is not. So it's a meaningful difference, and upon further review of specifically these provisions, I think this Court can safety conclude, particularly on 207(a), that the U.S. Supreme Court simply was incorrect.

JUSTICE YOUNG: You think Justice Gorsuch is a fair-weather textualist?

MR. STONE: I was speaking of the body, Justice. I don't think that Justice Gorsuch is as fair-weather textualist. I think he's merely wrong.

JUSTICE LEHRMANN: Eight of them.

MR. STONE: Yes, oh, yes. Please,

though, for the sake of my future, don't ask me to say what I think about everything.

JUSTICE HUDDLE: Would it be a plausible reading of 207(a) to say that the second sentence that begins, "No enforcement of this subchapter by the various state actors except as provided by 208," refers to 208(b), which describes how the Court in one these civil actions is going to enter injunction relief and a damages award? Is that a plausible reading?

MR. STONE: I don't think so because it speaks about as provided in Section 208. And Section 208(a) specifically describes bringing civil actions in response to violations of the subchapter. That strikes me as explicitly the enforcement mechanism.

So I think that would -- I think the Court would have to sort of append B at the end of 208. Just on my first impression, it seems as though when the legislature referred to that whole section, it meant the entire section and not just part B, though parts A and B do both reflect what we described in our brief as secondary -- secondary rules rather

than primary ones. I think both secondary rules are what's being referred to in Section 207.

JUSTICE YOUNG: Do you agree that the medical board must undertake the investigations of physician if the physician -- well, first, do you agree that the physician has to report to the medical board any healthcare-related lawsuit he's filed?

MR. STONE: Generally speaking, on the assumption that there's a health and safety code requirement of that, certainly.

JUSTICE YOUNG: Would there have to be one in this instance? Would they have to report it?

MR. STONE: Yes.

JUSTICE YOUNG: Setting aside whether the medical board could enforce it directly or indirectly, would a Texas physician who is sued under SB 8 have to report that lawsuit to the medical board?

MR. STONE:. I think that would determine whether or not that report could be accurately described as enforcement. I think

that's a very close question because it sounds to me from what you're describing that might be incidental to enforcement, and that might be an appropriate place for the medical board to promulgate a rule clarifying we don't enforce SB 8 in any way whatsoever. Therefore, we interpret SB 8 doesn't -- sort of dispenses with the requirements, specifically reports related to them.

I think that's a close question, and I think that's the best I can tell you off the top of my head.

JUSTICE YOUNG: Is your position based on that, if we were to say the medical board has no role whatsoever directly or indirectly in enforcing SB 8 that there would be no obligation for the doctor to report the filing of a lawsuit or the -- the finding of liability potentially of such a lawsuit?

MR. STONE: Again, I'd have to read the statutory scheme to see whether or not those reports are sort of so bound up in enforcement for the statement that they have no enforcement would -- would fairly capture the filing of those reports. But my first

instinct to your question is, yes, that that would discharge a requirement to filing sort of enforcement-related paperwork to an entity that otherwise has a general ability to enforce.

I think that's a -- I think that's a very close question on sort of the margins of what enforcement might be. What's not a close question is whether or not they'd have the ability to revoke a license in response to, for example, a noncompliant abortion by virtue of SB 8. Any attempt to revoke a license, to suspend a license, to impose a fine, anything along those lines would clearly be prescribed by 207(a).

JUSTICE LEHRMANN: So if -- go ahead.

If the Plaintiffs were to -- if this case were to proceed and the Plaintiffs were to obtain an injunction against the health department officials, would that have any effect on the enforcement of SB 8 by private civil actions?

MR. STONE: No, Your Honor. I mean, by definition, an injunction can't bind a nonparty. So an injunction against several

state defendants couldn't possibly prevent private individuals from attempting to enforce SB 8's subsection 204 requirements through the civil mechanisms provided in SB 8 in 208.

There are cases percolating up regarding some of the procedures where those cases -- one in the Third Court of Appeals right now, those involve private parties. That's -- the decisions in those cases might well determine how and whether individuals can bring them. But an injunction against the governmental defendants simply can't prevent outside private individuals from bringing SB 8 lawsuits nonetheless.

That's why they initially sought an injunction against courts and court systems so that they wouldn't have those cases docketed, and the Supreme Court obviously rejected that.

CHIEF JUSTICE HECHT: Any other questions?

JUSTICE LEHRMANN: So we have -- excuse me, I'm sorry. A statute here that is clearly prohibiting ends of pregnancy within a certain period of time. But within that same legislative scheme, the language indicates

that they're also preventing discipline of someone who violates that.

Now, as loathe as we are to say that -- that anything is absurd, how does that make sense?

MR. STONE: Well, the legislature clearly -- first of all, as a matter of description about why the legislature did what it did, the point on restraining state actors from being able to take enforcement actions was specifically to preclude federal pre-enforcement challenges. That was the reason, both of those --

JUSTICE LEHRMANN: So you concede that.

MR. STONE: Oh, of course. We said that as much before the United States Supreme Court. That's been the position of the state the entire time. The State of Texas' legislature is not required to be naive about the federal court consequences of the rules that they embody in laws.

Of course, there isn't actually a federal constitutional right to a federal pre-enforcement challenge. So there's no problem with that in priori.

The only way, I think, of making sense of it is sort of through that lens, and of course, there's circumstances where a legislature might say we prohibit this but we would prefer private enforcement rather than public enforcement. This sort of thing happens in the antitrust laws all the time, far more antitrust practices are challenged by antitrust plaintiffs than by the Federal Trade Commission or DOJ.

Sometimes the EPA citizen suit provisions, that is, generally speaking, one of the more robust ways that environmental laws are enforced.

So I don't think it's a particularly unusual circumstance where a legislature will come out and say we want this subjective rule of decision, but we would rather have private individuals sort of sort it out in their individual suits.

JUSTICE LEHRMANN: But isn't the distinction there that those private individuals have what we consider traditional standing?

MR. STONE: Oh, well, those would be

required in any case, of course, Your Honor, and undoubtedly, that will be one of the issues that comes to this Court when a proper case dealing with the merits of an SB 8 claim is here.

In fact, there's standing issue in the -- in the consolidated, multi-district litigation inside the -- in the Third Court of Appeals right now, standing is one of the issues of the (inaudible) there.

And the legislature has to -- when it creates causes of action, it's still subject to the constitutional standing requirements.

JUSTICE BOYD: Assuming you're right and there's no pre-enforcement -- assuming the objective is accomplished and there is no pre-enforcement opportunity, there would still be the opportunity by a physician or anyone else that gets sued in a civil action to raise the unconstitutionality of SB 8's requirements as a defense to that civil action?

MR. STONE: That's right.

JUSTICE BOYD: You agree with that.

MR. STONE: That's right, Your Honor. It's only federal pre-enforcement review.

State pre-enforcement review may still exist. Obviously, this is designed to channel pre-enforcement review and other questions into state courts, where the state courts and this Court are equally competent to determine both the manner of state law and federal law as to any applicable, for example, undue burden defenses, which this Court undoubtedly will be called to do when an appropriate case comes to it.

CHIEF JUSTICE HECHT: Any other questions? Thank you, General. We'll hear from the Appellees.

THE CLERK: May it please the Court, Mr. Hearron will present argument for the Appellee.

MR. HEARRON: Good morning. May it please the Court. Unless SB 8 abrogates the Agency Defendant's authority, it is undisputed that they can indirectly enforce SB 8 by taking disciplinary or civil enforcement actions under other laws using violations of SB 8 --

JUSTICE LEHRMANN: The language, excuse me, that says notwithstanding any other law is

pretty definitive. How do you get around that?

MR. HEARRON: Your Honor, I agree that the notwithstanding clause means that that -- what follows that clause takes precedence over any other law. But the question is what follows the notwithstanding clause.

And I think that's -- the fact that it says notwithstanding any other law doesn't answer what the meaning of what follows is. What follows says that the requirements of Subchapter H are enforced exclusively through the private causes of action but that, as for other laws, enforcement of other laws in response to violations of Subchapter H that those -- the only enforcement that is precluded are two chapters of the penal code.

JUSTICE BUSBY: It doesn't quite say that, right? It says other laws that regulate or prohibit abortion. Not any other laws.

MR. HEARRON: Well, Your Honor, that -- you're pointing right now to the saving clause, which is in 207(b). The language that I was pointing to earlier is in 207(a), which is --

JUSTICE BUSBY: Shouldn't we construe those together?

MR. HEARRON: Yes. I think that 207(a), 171.207(a), is the limitation on enforcement, and 207(b) is a rule of construction that -- that provides guidance about how broadly to read the limitation in 207(a).

JUSTICE BUSBY: So for example, would it make sense for the legislature to put in any other laws that regulate or prohibit abortion given that they've just given some examples of what those laws are in Chapter 19 and 22 of the penal code in Section A?

And if that's right, shouldn't it -- shouldn't we look to Chapters 19 and 22 of the penal code to determine what laws the legislature had in mind, laws like that that regulate or prohibit abortion directly?

MR. HEARRON: I -- I think that's a plausible reading. I think, however, looking at the text of the saving clause, 207(b), laws that regulate or prohibit abortion, it's clear that the Medical Practice Act, that the nursing regulation are laws that regulate

abortion. Medical Practice Act specifically calls out and makes it a violation of the Medical Practice Act.

JUSTICE BOYD: But if that's true, then aren't Chapters 19 and 22 of the penal code also other laws that regulate or prohibit abortion?

MR. HEARRON: I think those probably are laws that regulate or prohibit abortion if one were to construe the penal code as also applying to abortion.

I think this would be a -- a case where it would be appropriate to look at the general versus specific canon, which is there in 207(a), the legislature is specifically saying that there can be no enforcement of those two chapters of the penal code, and then there's a general reading that the legislature put forward in 207(b).

JUSTICE BOYD: So you would read it -- you would read the savings clause, 207(b)(3), to mean that these exclusivity provisions do not preclude indirect enforcement. In other words, enforcing abortion restriction laws using some other vehicle that's not specific

as to abortion, but the exception to that would be Chapters 19 and 22 of the penal code because they're specifically mentioned in 207(a)? Is that -- do I understand that right?

MR. HEARRON: I -- I think so. And if I can articulate how I -- I would read the provisions together. I think 207(a) is the limitation. And -- on public enforcement. And in 207(a), the legislature was specific that when it wanted -- when the legislature wanted to preclude enforcement of other laws in response to violations of SB 8, it would -- it do so expressly, and it did so only as to the two chapters of the penal code.

And then looking to 207(b), the saving clause, that is a rule of construction that tells you broadly how to interpret -- how broadly or narrowly to interpret anything that's not specific.

And so I think it's -- it -- the saving clause confirms our reading of 207(a). So I would read those two provisions -- now, if you disagree with our reading of the -- of the saving clause, that doesn't necessarily mean

that you would disagree with our reading of 207(a). I think our reading of 207(a) sort of stands alone, and the savings clause tells you how to -- you know, how broadly or how narrowly. So it would inform your reading.

But if you --

JUSTICE BOYD: So I have a couple questions about your reading of 207(a). One is do you agree that we essentially have to write the word directly into those -- that provision and also the 208 provision in order to get where you are?

MR. HEARRON: I don't think you would be writing the word directly in, but I think you would be reading enforcement of Subchapter H to be referring to -- to be referring to direct enforcement.

JUSTICE BOYD: Only direct enforcement through a 208 civil action.

MR. HEARRON: Correct.

JUSTICE BOYD: Okay.

MR. HEARRON: That's right. And that -- and the direct enforcement of Subchapter H itself can only be through the civil action --

JUSTICE BOYD: Through a civil action.

MR. HEARRON: But as to the Medical Practice Act, as to the Nursing Act, as to other laws --

JUSTICE BOYD: So what do we make of in 207(a), instead of saying notwithstanding any other law, this subchapter shall be enforced, Subchapter H, it says notwithstanding any other law the requirements of this subchapter shall be enforced exclusively, which sounds to me like -- I mean, I think we all have to agree that the requirements or least the two primary ones are the testing and no heartbeat requirements, right?

And that sounds to me like that's a lot more specific than just saying this subchapter shall be enforced exclusively through a 208 civil action.

MR. HEARRON: Well, there would be additional requirements. So -- so first, I have a couple of responses to that. First, I think that is a reasonable reading, a plausible reading. But if you were to read it that way, then the rest of 207(a), the whole second sentence, would serve no worth

whatsoever. It would be completely superfluous. The first sentence would do all of the work that would be necessary if you were to read it that way.

The second response is there are other requirements that are imposed by -- by other statutes like the Medical Practice Act that are not simply the detection of cardiac activity, including one of them is -- as was mentioned earlier, the reporting of lawsuits that were filed.

And the Solicitor General has -- has now taken a position that, well, it's unclear whether if a doctor doesn't report the lawsuits that are filed, the State might still be able to take enforcement action. And that's, again, unclear.

But again, that is part of what is feeding into the Plaintiff's reasonable apprehension --

JUSTICE YOUNG: Well, suppose that we were to eliminate all such ambiguity -- I mean, your briefing described the background, Plaintiffs were concerned the officials are authorized. Plaintiff's concerned the SB 8

permits such (inaudible) enforcement. Plaintiff's concerned about agency enforcement.

If we adopt the Solicitor General's reading, it seems like we would allay all of your concerns, and you're working really hard to make us do the opposite.

MR. HEARRON: Your Honor, if you were to do that, that would, at a minimum, provide our client some certainty about --

JUSTICE YOUNG: So you sued all of the agency heads in order to make sure that they could not enforce it. And at the Supreme Court, I get it, it was an Erie guess. If this Court now were to say we're going to eliminate all doubt, they cannot directly, indirectly, you know, any day of the week, any day of the year, is that a win for you?

MR. HEARRON: It would, at a minimum, provide our client some certainty. It would, however, end our -- essentially end our challenge to -- the remaining part of our challenge to Section 3 of SB 8 that's currently existing in our federal ranks.

JUSTICE BOYD: Federal pre-enforcement

challenge.

MR. HEARRON: Exactly.

JUSTICE BOYD: You've got the State and then you've got the post-enforcement.

MR. HEARRON: The challenge in this case, it would essentially end the challenge to Section 3 of that case.

JUSTICE BUSBY: But you're getting all the relief that you requested.

MR. HEARRON: It would be --

JUSTICE BUSBY: As far as the remedy is concerned.

MR. HEARRON: You're absolutely correct that it would -- in a sense, our clients would have certainty about what the state officials can or cannot do.

JUSTICE BUSBY: So there's no -- there's no dispute between the parties as to the proper remedy in this case. It's just how you get there?

MR. HEARRON: No, I don't think that's quite right because the question, then, would be if -- if this Court were to rule that the State does have -- these officials do have enforcement authority, then we would certainly

say that those officials now should be enjoined, and we should be entitled to a declaratory judgment that the law's unconstitutional. And we would seek that relief. And I'm sure the State would oppose that relief as well. So I don't think there's necessarily an agreement on the -- on the outcome, but I do --

JUSTICE BOYD: The irony is what that means is that if you were to win here, you would have to take one more step, which is to prove the unconstitutionality of SB 8 in order to get what you want. Whereas if you lose here, you get what you want without having to prove another step.

MR. HEARRON: Well, SB 8 is blatantly unconstitutional under nearly 50 years of United States Supreme Court precedent. You're correct that there is a -- there would be additional litigation that we would have to carry on.

And if you were to rule that our client -- that the State officials lack enforcement authority. That would, at a minimum, give our client some certainty.

However, you know, we -- we do believe that the best reading of the statute is the way that the eight Supreme Court justices read it.

JUSTICE BOYD: You have a footnote that refers to that last clause of 207(a) where it says that no enforcement may be taken or threatened by the State or any official or employee except as provided by Subsection 208. And Justice Huddle was asking your friend on the other side about this.

And your footnote says it's really unclear what to make of that. We don't know. Have you thought through that any further to give us -- or is that -- so one theory is, well, it means if you're a person acting other than -- so in other words, Greg Abbott individually can file the suit, not acting as an official. And that would fit under 208.

Another theory is that the ability that 208(h) mentions that allows the State to file an amicus brief, it might be referring to that. Well, look, except as otherwise provided by 208, which lets you at least file an amicus brief, which isn't really

enforcement, but -- I mean, I don't know what to make of it either. Have you fleshed that out any further than your brief?

MR. HEARRON: Well, your first option, I'm not sure actually under the text of 208(a) that a state official in any capacity --

JUSTICE BOYD: Even individual capacity.

MR. HEARRON: I'm not sure that any official could -- could bring such -- the best reading that I can come up with is the reference to the amicus brief.

JUSTICE BOYD: Yeah. But you would agree that filing of an amicus brief would not be enforcement under Ex Parte Young -- that would qualify under Ex Parte Young?

MR. HEARRON: I would agree with that, Your Honor, yes. But that's an issue with -- with both sides' interpretation.

JUSTICE BOYD: It is, yeah.

MR. HEARRON: That that end of 207(a) appears to be a redundance, surplusage. But I do believe, Your Honor, that the Plaintiff's interpretation does give effect to every other part of 207(a) and does -- does give more

effect to each of the clauses and phrases. The Defendant's interpretations give -- ascribes no meaning whatsoever to the reference to other laws in response to violations of -- of SB 8 or such as the penal code.

JUSTICE BOYD: It gives meaning to no enforcement in response to -- it doesn't give meaning to the -- to the penal code clause.

MR. HEARRON: That's right. That reference to and other --

JUSTICE BOYD: And so the argument is, well, this is like what we've -- we've got a number of cases, and I think they cite the Scalia-Garner book that say, well, its emphasis -- to basically say that this is actually kind of legit, it seems to me, is to say look, nobody can enforce this.

No -- no state employee or official or district attorney or -- can enforce these requirements other than through the 208 Civil Action. And that even means if somebody commits homicide or assault under 19 or 22, you can't prosecute them. They're scot-free on the criminal side on this, and that -- that

does seem to be worth emphasizing to me. That you can't even prosecute if you think there was a homicide or an assault here. Can't do it. I mean, isn't there some legitimacy, at least, to the idea that the legislature might want to emphasize the act even at the risk of redundancy?

MR. HEARRON: So I -- I -- that's the certainly the view that Justice Thomas took in dissent on this. And -- and I think it's a -- it is a plausible interpretation. I -- we -- we have been trying to follow this Court's instructions about statutory interpretation, and ascribing meaning to every --

JUSTICE YOUNG: When -- when it comes to the penal code --

MR. HEARRON: -- part of the statute --

JUSTICE YOUNG: -- if there is something brought under it, it doesn't come to this Court. All right? You have to walk out the doors, and across the hall and go to that court. And so if the legislature is trying to funnel everything about SB 8 through a civil action, isn't there something along the lines that Justice Boyd was -- was going? Isn't

there some utility in making very clear that the Penal Code path that would lead to a different high court is foreclosed to try to at least concentrate everything here?

MR. HEARRON: Again, I -- that is a plausible reading. I -- I -- it does, however, still mean that that reading of 207(a) of that language doesn't actually -- it is -- it is pure emphasis. It is pure surplusage, which I think that it needs --

JUSTICE YOUNG: Is 212 that way, too? Every section, subsection, sentence, clause, word: And -- and it's the same statute that -- is -- is there anything in that that is -- can we avoid surplusage there?

MR. HEARRON: I -- I -- I'm not sure that -- I mean, we're not talking about excising or -- or severing any parts of the -- the statute. What we're talking about is -- is interpreting the statute based on the text, and trying to ascribe meaning to every part of the text.

JUSTICE YOUNG: So the 212 uses all of those things for emphasis. That's what you just mentioned in there.

MR. HEARRON: Well, I mean, a word is different from a clause, which is different from a phrase. I mean, those -- those --

JUSTICE YOUNG: Words are in clauses and phrases.

MR. HEARRON: They're in clauses, but those --

JUSTICE YOUNG: And subsections are in sections.

MR. HEARRON: Those -- those terms do have different meanings. And so that the legislature, you know -- and -- and that's a standard clause. That is a severability clause is a standard clause that -- that is inserted into --

JUSTICE YOUNG: But that's not the severability clause kind of on steroids; isn't it?

MR. HEARRON: I -- I have seen other severability clauses very similar, so it's -- it's not -- I -- I don't think it was unusual to have such a clause, and I -- and I do think that each of those words does actually carry some meaning that is different. And just as our reading of 207(a) ascribes meaning to the

references to the Penal Code and other -- other laws in response to violations of SB 8, whereas the Defendant's interpretation ascribes no meaning whatsoever to them.

JUSTICE BOYD: Should we consider the bill's legislative history in the form of legislative reports: The House report, the Senate report, or the comments made by the bill's authors regarding their intent here?

MR. HEARRON: No, neither side is relying on legislative history. We -- we are both pointing to the statutory text and to canons of -- of statutory interpretation --

JUSTICE BOYD: Plaintiffs agree we should not rely on that.

MR. HEARRON: I think you shouldn't, and I -- I think there isn't any of the type of legislative history that would ascribe meaning to the legislature as whole. Individual statements made by individual legislators can't be imputed to the legislature as a whole.

JUSTICE BOYD: Um-hum.

MR. HEARRON: So I -- I would -- we are focusing on the -- the statutory text, and --

and the canons of instruction -- interpretation.

JUSTICE BUSBY: I'm still trying to figure out if the Penal Code clause really is surplusage, because it seems like, if -- if you didn't have the and no enforcement of Chapters 19 and 22 Penal Code in response to violations of this subchapter, it could be argued that their application, enforcement, and response to violations of this subchapter would be the enforcement of any other law that regulates or prohibits abortion. That's -- that's not construed to be limited in Subsection B; couldn't it?

MR. HEARRON: I -- I think you're articulating our -- our reading.

JUSTICE BUSBY: Well, actually, what I'm -- what I'm suggesting is that there's no -- that there's no surplusage in the State's reading because the -- in response to violations of this subchapter, the reason for -- the reason for the -- the language there about regulating or prohibiting -- the other laws that regulate or prohibit abortion, they're generally enforceable, but -- but the

only type that -- that they're talking about are laws that regulate or prohibit abortion directly, which is what Subchapters 19 and 22 are.

MR. HEARRON: But if -- but if you take that view, then that alters -- than that would mean that the saving clause also allows enforcement of, at a minimum, the Medical Practice Act, which itself makes it a violation of the Medical Practice Act to violate -- it's -- it's its own separate violation, to violate Chapter 171. And --

JUSTICE BUSBY: But that's a statute of general applicability. It doesn't mention abortion specifically, right?

MR. HEARRON: But I think the Penal Code is -- is the same way. That -- that -- that the general applicability to murder and to assault are -- are laws of general applicability --

JUSTICE BUSBY: I think it mentions unborn children specifically in the Penal Code, doesn't it?

MR. HEARRON: You may be -- you may be right. I've --

JUSTICE BUSBY: I'm pretty sure about that.

MR. HEARRON: Okay. But -- but it's still the -- the same -- I think the same does apply to the Medical Practice Act because the Medical Practice Act has a -- a provision titled Prohibition on Certain -- I can't remember the exact language, but it specifically refers to abortion, and it makes it a violation of the Medical Practice Act to violate Chapter 171 of the -- of the Health and Safety Code. So I still -- I don't think that the --

JUSTICE BUSBY: But then you have to rely on the provision of general applicability saying we're going to -- we're going to discipline you for violations of -- of the Health and Safety Code, right? Which doesn't refer specifically to abortion.

MR. HEARRON: I'm not sure I understood your question. It -- it would still -- the -- the Medical Practice Act -- I think my point is just the Medical Practice Act does specifically refer to abortion; does specifically say it is a requirement to

follow --

JUSTICE BUSBY: Right. But not in the disciplinary provision, specifically.

MR. HEARRON: Yes. I believe it is in the disciplinary provisions.

JUSTICE BOYD: 164.055 says they -- they have to enforce Chapter 171; is that what you're referring to?

MR. HEARRON: Yeah. 160 -- that's correct. Occupations Code 164.055(a) says the Medical Board shall take an appropriate disciplinary action against a physician who violates Chapter 171.

But then there's -- there are additional requirements in 165 -- excuse me. 164.052(a)(5) says that a physician commits a prohibited practice, if the physician commits unprofessional or dishonorable conduct, which is defined in the next section 053(a)(1) as including committing an act that violates a state law if the act is connected with the physician's practice of medicine.

So it is -- it's its own violation of the Medical Practice Act, not simply enforcement of the underlying SB 8 itself. Or

Chapter 1 -- 171 of the Health and Safety Act.

CHIEF JUSTICE HECHT: Any other questions?

JUSTICE LEHRMANN: So, I have one, too.

CHIEF JUSTICE HECHT: Yes, Justice Lehrmann.

JUSTICE LEHRMANN: So do you agree with your friend on the other side's assessment that if we do rule contrary to the United States Supreme Court's assessment of our law, that that's basically because we're just more of a textualist court?

MR. HEARRON: No, Your Honor. I -- I don't -- I don't think that the -- the US Supreme Court didn't point to anything other than the text of the statute when it was interpreting the statute. It pointed to the saving clause and 207 -- 207(b)(3). And it also pointed to the text of 207(a). That is all that the US Supreme Court pointed to. But -- but this Court is the -- has the last say on the meaning --

JUSTICE LEHRMANN: Sure.

MR. HEARRON: -- of those provisions.

JUSTICE LEHRMANN: Sure.

MR. HEARRON: But I don't -- I think they would just be different reading of the text itself.

CHIEF JUSTICE HECHT: Any other questions? Thank you, Mr. Hearron. General, you have five minutes.

MR. STONE: Thank you. If I could pick up with what Justice Lehrmann just had mentioned. Of course, part of the reason why I believe the US Supreme Court got it wrong was simply we're dealing with extremely accelerated timelines. The gravity of the case was in different locations, specifically the effect of this case on courts and judges, and the ex parte on doctrine there.

And yes, certainly not walking back from the belief that this Court has a certain exclusive focus on text -- on textualism as an interpretive method for understanding these questions, and the US Supreme Court does not. But again, that's sort of one of several reasons why the US Supreme Court, in my opinion was incorrect in their interpretation here.

Without disparaging that Court, this

Court is free to, and should, come to a different conclusion.

JUSTICE BOYD: Then you agree then -- you agree, then, that we should not look at legislative history in the form of any kind of statements made by the authors of this bill or other legislators?

MR. STONE: Of course, the way -- the way this Court rejected that much in Facebook and a variety of other important cases this Court has seen.

Now, to turn specifically to a question, I believe my friend on the other side misspoke a bit when answering you, Justice Busby, about the conclusions that would happen to him in the answering of question -- this question in the affirmative or the negative.

If this Court answers the question in the negative, well, currently the state of play before the district court -- they're obligated to identify and then prove that some number of State Defendants have both the ability to enforce under Texas law and have demonstrated as a matter of fact a willingness

to enforce some provision that they're challenging.

At the moment, the question certified over is whether or not that first link, the ability to enforce, as part of Ex Parte Young, has been, exists, or can be shown. If this Court answers no, because no other individual, no state individual may enforce subchapter H, then they have to be dismissed, and they won't be able to continue in a pre-enforcement challenge.

No doubt some of what's going on here is a preference for their preferred forum, the Western District of Texas. No doubt some of what's going on here involves the desire to seek fees against the State of Texas. But as the United States Supreme Court held and stated its opinion clearly, not every Plaintiff gets to have their choice of forum, or get to have -- gets to have the choice of forum at a pre-enforcement venue. There's not any Constitutional troubles with that. That's just a consequence of having Federal Courts of limited jurisdiction.

So there is a -- there is a -- this is,

in fact, a dispositive question of state law, as is required by the Constitution and the certification procedure.

JUSTICE BUSBY: I'm not suggesting its mood, I'm just -- I'm just remarking that the -- the end -- the endpoint that you're both seeking seems to be the same.

MR. STONE: Of course --

JUSTICE BUSBY: It's just that the state officials are not enforcing this in any way directly or indirectly.

MR. STONE: Of course, no doubt they would like an injunction against the state officials saying we can't enforce it. We believe we can't enforce it.

The difference, of course, is they want such an injunction so they can have a craft it to apply to all kinds of people not party to the injunction, to be able to have a sort of ongoing monitoring efforts and fees associated with it and all that. You simply can't enjoin individuals that you can't get jurisdiction over, and sovereign immunity is the sort of background principle as to why another state -- none of the State Defendants are amenable to

this kind of suit without a Federal Law exception. To turn --

JUSTICE BLAND: Looking at -- at 207, limitations on Public Enforcement with the -- with the interpretation that you advocate, why not prohibition on public enforcement?

MR. STONE: I agree, Your Honor, that would have been a better word, considering that specifically prohibiting any kind of public enforcement. Of course, the limitation all the way down to zero is quite a -- or rather, is a limitation, just a very severe one.

We still describe it as a Statute of Limitation when it's nonetheless expired bars the bringing of a claim whatsoever. But I agree. Prohibition on public enforcement would have been a more appropriate word there.

As a general rule, sort of the title of a chapter can get -- can be one interpretative clue as to what's going. But again, the -- the extreme and repeated insistence in 207(a) that there will be no enforcement by public entities -- a sort of bootstrap by 208, I think leave only the inclusion that the

limitation they imposed on public enforcement was to limit it to zero.

To speak back, there's one final point. Justice Young's comments with my friend on the other -- on the opposite side regarding the -- regarding the savings -- or rather the savings clause -- the severability clause.

The severability clause is one good example of this act -- SB 8 -- simply has is shot through with superfluidity. One other good example aside from the savings clause? Take the heartbeat restriction itself. In 204(a), it obligates doctors to seek a heartbeat, and if they perceive one, there can be no abortion of that child.

In 204(b), they say the contra positive, where they say if you do not detect a heartbeat, there is no liability. Well, of course, you can frame every form of liability as a sort of bi-part inception that way, where A says the thing you're not permitted to do, and B says if you didn't do that thing, you're not liable. Sort of classic superfluidity that serves no other purpose than emphasis.

This occurs multiple times for reasons

only known to the drafters of this act. But remember, the goal here is to just to figure out the ordinary English meaning of this statute. And reading 207(a), there's simply no ordinary English interpretation that entertains any possibility of public enforcement.

CHIEF JUSTICE HECHT: Any other questions? Thank you, gentlemen. The case is submitted, and the Court will take a brief recess.

THE CLERK: All rise.

(End of Audio Recording.)

CERTIFICATE

I, Wendy Sawyer, do hereby certify that I was authorized to and transcribed the foregoing recorded proceedings and that the transcript is a true record, to the best of my ability.

DATED this 24th day of February, 2022.

WENDY SAWYER, CDLT

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