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

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

STATE DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

The State Agency Defendants[1] and Judge Jackson[2] (collectively, "State Defendants") file this response in opposition to Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction. Because Plaintiffs have not demonstrated entitlement to relief, this Court should deny Plaintiffs' motion.

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

[2] The Honorable Austin Reeve Jackson, Judge of the 114th District Court of Texas. Plaintiffs have sued Judge Jackson in his official capacity. Judge Jackson notes that he does not join sections I.B and I.C of the argument in this response. Because Judge Jackson may be called upon to adjudicate constitutional challenges to provisions of S.B. 8 that might arise in specific cases that may be brought in his court in the future, it would be improper for him to opine in advance on the merits of any hypothetical constitutional challenges to S.B. 8. Accordingly, Judge Jackson does not join the portions of this response analyzing the substantive merits of Plaintiffs' claims.

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INTRODUCTION

Plaintiffs are asking a federal district court to preemptively issue an advisory opinion on the constitutionality of a new Texas statute, without any live case or controversy before the Court. *See* Act of May 19, 2021, 87th Leg., R.S., S.B. 8, effective Sept. 1, 2021 ("S.B. 8"). Further, Plaintiffs ask this Court to issue an advisory opinion on how a state judge ought to adjudicate hypothetical constitutional challenges to state laws that may or may not ever be brought in that state judge's court. This Court should decline Plaintiffs' baseless requests.

Plaintiffs have not shown any entitlement to extraordinary injunctive relief. Plaintiffs cannot show a likelihood of success on the merits of their claims for a variety of alternative reasons: (1) the Court lacks subject matter jurisdiction; (2) Plaintiffs have not provided sufficient evidence to support their claims; and (3) Plaintiffs' claims fail as a matter of law. Plaintiffs also fail to meet any of the other required elements for temporary or preliminary relief. This Court should deny Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction.

BACKGROUND

I. Senate Bill 8

In enacting S.B. 8, the Texas Legislature expressly found, "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.

S.B. 8 § 3 (to be codified at Tex. Health & Safety Code § 171.202). Based in part on those findings, S.B. 8 imposes several requirements on the performance of abortions.

A. Section 3

Section 3 of S.B. 8 concerns the performance of abortions after a heartbeat can be detected in the unborn child. Thus, as an initial matter, Section 3 requires a physician to determine, before performing or inducing an abortion, "whether the woman's unborn child has a detectable fetal heartbeat." S.B. 8 § 3 (to be codified at Tex. Health & Safety Code § 171.203(b)); *see also* S.B. 8 § 3 (to be codified at Tex. Health & Safety Code § 171.201(1)) (defining "fetal heartbeat" as "cardiac activity or the steady and repetitive rhythmic contraction of the fetal heart within the gestational sac"). "In making [that] determination . . . 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." S.B. 8 § 3 (to be codified at Tex. Health & Safety Code § 171.203(c)). The physician must then document in the 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." S.B. 8 § 3 (to be codified at Tex. Health & Safety Code § 171.203(d)).

Section 3 then states that "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." S.B. 8 § 3 (to be codified at Tex. Health & Safety Code § 171.204(a)). But this section does not apply if the physician believes a medical emergency exists

that prevents compliance. S.B. 8 § 3 (to be codified at Tex. Health & Safety Code § 171.205(a)).

Importantly, these requirements of sections 171.203 and 171.204 may not be enforced by any state or local government official. Further, they are expressly subject to an undue-burden affirmative defense.

Section 3 prohibits "th[e] state, a political subdivision, a district or county attorney, or an executive or administrative office or employee of th[e] state or a political subdivision" from taking or threatening to take any action to enforce Section 3. S.B. 8 § 3 (to be codified at Tex. Health & Safety Code § 171.207(a)); *see also* S.B. 8 § 3 (to be codified at Tex. Health & Safety Code § 171.208(h)). Instead the "exclusive[]" method for enforcing Section 3 is through "private civil actions." S.B. 8 § 3 (to be codified at Tex. Health & Safety Code § 171.207(a)). These actions may be brought by any person "other than an officer or employee of a state or local governmental entity" against any person who performs or induces an abortion in violation of Section 3; knowingly engages in conduct that aids or abets the performance of such an abortion; or intends to perform, aid, or abet such an abortion. S.B. 8 § 3 (to be codified at Tex. Health & Safety Code § 171.208(a)). The plaintiff in such an action may seek injunctive relief, statutory damages not less than $10,000, costs, and attorneys' fees. S.B. 8 § 3 (to be codified at Tex. Health & Safety Code § 171.208(b)).

Further, Section 3 recognizes, in any such private action, an affirmative defense that incorporates the Supreme Court's "undue burden" test: A person is not liable for violating S.B. 8 if the person "has standing to assert the third-party rights of a woman or group of women seeking an abortion" and "demonstrates that the relief sought by the claimant will impose an undue burden on that woman or that group of women seeking an abortion." *See* S.B. 8 § 3 (to be codified at Tex. Health & Safety Code § 171.209(b)). In other words, if a person can demonstrate that the Supreme Court's "undue burden" test is met for a specific woman or group of women seeking an

abortion, that person is not liable for violating Section 3's general requirements summarized above with respect to that specific woman or group of women. *See Casey v. Planned Parenthood of Se. Pa.*, 505 U.S. 833, 877 (1992) (plurality op.) ("A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.").

A defendant in a private action may also assert as an affirmative defense that they "reasonably believed, after conducting a reasonable investigation, that the physician performing or inducing the abortion had complied or would comply with this subchapter." S.B. 8 § 3 (to be codified at Tex. Health & Safety Code § 171.208(f)(1)). Similarly, a person is not liable for intending to perform a prohibited abortion or intending to aid and abet a prohibited abortion if the person "reasonably believed, after conducting a reasonable investigation, that the physician performing or inducing the abortion will comply with this subchapter." S.B. 8 § 3 (to be codified at Tex. Health & Safety Code § 171.208(f)(2)).

B. Section 4

The other portion of S.B. 8 that Plaintiffs directly challenge is Section 4, which creates a fee-shifting provision for actions that seek to prevent the State or any local government or official from enforcing any law that regulates or restricts abortion. S.B. 8 § 4 (to be codified at Tex. Civ. Prac. & Rem. Code § 30.022(a)). It makes plaintiffs and those that represent them in such actions jointly and severally liable to pay the costs and attorneys' fees of the prevailing party. *Id.* Section 4 further defines prevailing party as one who obtains dismissal of any claim or cause of action or obtains a judgment in that party's favor. S.B. 8 § 4 (to be codified at Tex. Civ. Prac. & Rem. Code § 30.022(b)).

C. Sections 6, 7, and 9

Plaintiffs suggest that Sections 6, 7, and 9 of S.B. 8 are necessarily unconstitutional if Section 3 is. Plfs.' Mot. for Summ. J. ("MSJ," ECF 19) at 25-26.[3] Section 6 reiterates that the Health and Human Services Commission may not enforce Section 3 of S.B. 8. S.B. 8 § 6 (to be codified at Tex. Health & Safety Code § 171.005). Sections 7 and 9 require a physician who performs an abortion due to medical emergency to document that in the woman's medical record as well as on the monthly report provided to the State. S.B. 8 §§ 7, 9 (to be codified at Tex. Health & Safety Code §§ 171.008, 245.011).

II. This Lawsuit

Plaintiffs are various abortion clinics and abortion doctors, Pls.' Compl. (ECF 1) ¶¶ 24-35 (collectively "Abortion Providers"), as well as other organizations that advocate for abortions and two individuals who allegedly provide spiritual care and counseling, *id.* ¶¶ 37-46 ("Abortion Advocates"). The Abortion Providers allege S.B. 8 harms them by prohibiting "the bulk of" the abortions they perform, *id.* ¶ 102, or, if they continue to perform such abortions, by exposing them to private lawsuits, *id.* ¶ 103. The Abortion Advocates allege they could likewise face private lawsuits and liability for aiding and abetting abortions prohibited by S.B. 8 and that they will have to redirect resources if abortion providers stop performing prohibited abortions. *Id.* ¶¶ 111-13.

Even though S.B. 8 expressly prohibits state actors from enforcing its provisions, Plaintiffs seek declaratory and injunctive relief against a cadre of state executive officers: the Executive Directors of the Texas Medical Board, Texas Board of Nursing,

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[3] Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction includes no legal argument on the merits of Plaintiffs' claims, but merely incorporates Plaintiffs' Motion for Summary Judgment. ECF 53 at 4. Thus, this response will refer to Plaintiffs' Motion for Summary Judgment (ECF 19) as appropriate.

and Texas Board of Pharmacy, as well as the Commissioner of the Texas Health and Human Services Commission ("HHSC") and the Attorney General. Plaintiffs recognize these official heads of various state agencies lack authority to enforce the provisions of S.B. 8. *See id.* ¶¶ 76, 107. Nevertheless, Plaintiffs allege they are proper defendants because Plaintiffs believe these agencies might seek to indirectly enforce S.B. 8 against Plaintiffs through their general authority to enforce various health-related laws and regulations. *See id.* ¶¶ 51-55, 107.

Plaintiffs have also sued a state district judge (Judge Jackson). Plaintiffs allege that Judge Jackson—and "potentially more than 1,000" other Texas judges, *id.* ¶ 118—will "enforce" S.B. 8 by "implementing the remedies mandated by S.B. 8," *id.* ¶ 120. On that basis, Plaintiffs seek to certify a defendant class of "all judges in the State of Texas with jurisdiction over the civil actions created by S.B. 8." *Id.* ¶ 48. Plaintiffs seek relief from this Court that would effectively instruct Judge Jackson (and the putative class of all non-federal judges in Texas) to dismiss lawsuits brought under S.B. 8 without actually adjudicating them.

In addition to these State Defendants, Plaintiffs have sued a state district clerk and a private citizen.

Plaintiffs filed a Motion for Summary Judgment (ECF 19) the same day they filed their complaint (ECF 1). Plaintiffs filed their Motion for a Temporary Restraining Order and Preliminary Injunction (ECF 53) on August 7. They seek relief by September 1, when S.B. 8 takes effect. The Court's revised scheduling order calls for Defendants to respond to the Motion for a Temporary Restraining Order and Preliminary Injunction by noon on August 16, with a hearing set for August 30. ECF 60. The State Defendants, thus, provide this response.[4]

[4] Given the time constraints for filing this response, State Defendants do not attach affirmative evidence at this time. State Defendants reserve the right to introduce evidence at the hearing scheduled by the Court on Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction. State Defendants further

ARGUMENT & AUTHORITIES

An award of preliminary injunctive relief is "an extraordinary remedy that should only issue if the movant shows: (1) a substantial likelihood of prevailing on the merits; (2) a substantial threat of irreparable injury if the injunction is not granted; (3) the threatened injury outweighs any harm that will result to the non-movant if the injunction is granted; and (4) the injunction will not disserve the public interest." *Ridgely v. Fed. Emergency Mgmt. Agency*, 512 F.3d 727, 734 (5th Cir. 2008). "[T]he enormity of the relief is difficult to overstate." *Trinity USA Operating, LLC v. Barker*, 844 F. Supp. 2d 781, 785 (S.D. Miss. 2011) (citing Wright, Miller & Kane, *Federal Practice and Procedure*: Civil 2d § 2948 (noting that courts describe such requests as "drastic" and "extraordinary," and the requesting party must make a "clear showing")). Plaintiffs have not met their burden of demonstrating an entitlement to this "extraordinary remedy."

I. Plaintiffs Have Not Shown a Substantial Likelihood of Prevailing on the Merits of Their Challenge to S.B. 8.

To succeed in their request for preliminary injunctive relief, Plaintiffs must show a substantial likelihood of prevailing on the merits of their claims. *Ridgely*, 512 F.3d at 734. They have not done so. For the reasons stated in the State Defendants' motions to dismiss and replies in support thereof (ECF 48, 49, 63, 66), as well as in this response, Plaintiffs have not shown that this Court has jurisdiction over their claims against the State Defendants. Further, even if the Court had jurisdiction, Plaintiffs have still not shown that they are substantially likely to succeed on the merits of their claims against the State Defendants because Plaintiffs' claims are not supported by sufficient evidence and, regardless, they fail as a matter of law. Although Plaintiffs assert their claims are purely legal, they submitted and relied on

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reserve the right to lodge specific objections to any evidence Plaintiffs may seek to introduce at that hearing, including but not limited to the 19 declarations attached to Plaintiffs' motion for summary judgment.

19 declarations to support their argument. Despite their attempt to pad the record with evidence from only one side, Plaintiffs still fail to demonstrate they are likely to succeed.

A. Plaintiffs' claims against the State Defendants are jurisdictionally barred.

If the Court lacks jurisdiction over Plaintiffs' claims, it cannot grant them preliminary injunctive relief. *See, e.g.*, *Speech First, Inc. v. Fenves*, 979 F.3d 319, 329 (5th Cir. 2020) ("A preliminary injunction, like final relief, cannot be requested by a plaintiff who lacks standing to sue."); *Moore v. La. Bd. of Elementary & Secondary Educ.*, 743 F.3d 959, 964 (5th Cir. 2014) (reversing grant of preliminary injunction when the state defendants were immune and *Ex parte Young* did not apply). The State Defendants have filed motions to dismiss demonstrating that Plaintiffs' claims against them are all barred by sovereign immunity, lack of standing, and lack of ripeness. *See* ECF 48, 49. The State Defendants hereby incorporate by reference those motions to dismiss, associated replies, and the authorities and arguments cited therein, which demonstrate this Court lacks subject matter jurisdiction to hear this case, adjudicate Plaintiffs' claims, or enter any relief against the State Defendants.

Plaintiffs' request for preliminary injunctive relief relies on the 19 declarations attached to their motion for summary judgment. As shown below, their evidence confirms only that this Court lacks jurisdiction over their claims. Consequently, the Court should dismiss this case for lack of jurisdiction without opining on any other issues raised by Plaintiffs. *See Okpalobi v. Foster*, 244 F.3d 405, 409 (5th Cir. 2001) (en banc) (noting that when a court lacks jurisdiction, it is "powerless to act except to say that [it] cannot act.").

1. Plaintiffs have no evidence that the State Agency Defendants are likely to enforce Section 3 against them.

Plaintiffs' claims against the State Agency Defendants regarding Section 3 (Compl. ¶¶ 131-54, Claims 1-5) depend on Plaintiffs' belief that the State Agency

Defendants plan to take administrative action against them for violating Section 3 of S.B. 8 despite the express prohibition on state enforcement in Section 3.[5] MSJ at 20-21. Plaintiffs acknowledge that Section 3 explicitly prohibits all state enforcement of its heartbeat provisions. MSJ at 20; *see* S.B. 8 § 3 (to be codified at Tex. Health & Safety Code § 171.207(a)). But they argue the State Agency Defendants may nevertheless enforce the requirements of Section 3 through their general regulatory authority to take administrative action against regulated entities and professionals who violate state laws. MSJ at 20-21; *see e.g.*, Tex. Occ. Code § 164.053(a)(1) (physicians who violate state law); 22 Tex. Admin. Code § 217.11(1)(A) (nurses are to conform with state law). As the State Agency Defendants explained in prior briefing, Plaintiffs' interpretation of state law on this point is dubious. ECF 48 at 6-7 & nn.3-4, ECF 63 at 2-5. But even if it were correct, Plaintiffs have offered no evidence that such administrative action by any of the State Agency Defendants is either likely or imminent.

At most, Plaintiffs' affidavits state that they "understand" they "may" be subjected to administrative actions. *See, e.g.*, MSJ Ex. A ¶ 35, Ex. B ¶ 34, Ex. C ¶ 12. But they do not explain how they obtained their "understand[ing]" of how the various regulatory Boards would choose to apply the applicable law. *See Cadena v. El Paso County*, 946 F.3d 717, 725 (5th Cir. 2020) ("[A]ffidavits setting forth ultimate or conclusory facts and conclusions of law are insufficient to either support or defeat a motion for summary judgment."). And Plaintiffs offer no evidence establishing that any State Agency Defendant has even discussed S.B. 8, let alone contemplated administrative enforcement or threatened such enforcement.

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[5] As Plaintiffs explained in their response to the State Agency Defendants' motion to dismiss, the Abortion Advocates do not bring any challenges against the State Agency Defendants regarding Section 3. ECF 56 at 1 n.1.

This lack of evidence is fatal to the Court's jurisdiction, as it prevents Plaintiffs from proving their arguments regarding immunity, standing, and ripeness. As explained in the motion to dismiss briefing, to overcome the State Agency Defendants' sovereign immunity under *Ex parte Young*, Plaintiffs must show the State Agency Defendants have both "the particular duty to enforce the statute in question and a demonstrated willingness to exercise that duty." *Morris v. Livingston*, 739 F.3d 740, 746 (5th Cir. 2014); *see also Okpalobi*, 244 F.3d at 421 (en banc) (plurality). The Fifth Circuit has held that a "demonstrated willingness" is lacking even when a public official issues a press release that violators would be "met with the full force of the law" or when a letter does not make a "specific threat or indicate that enforcement was forthcoming." *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 181 (5th Cir. 2020). If those circumstances are insufficient to overcome sovereign immunity under *Ex parte Young*, immunity cannot be overcome when there is complete silence from the state officials sued. That is particularly so where the state officials' authority to enforce the law is questionable.

As for standing, the Supreme Court has explained that "[a]llegations of possible future injury" are not enough to demonstrate standing. *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990). Rather, the "threatened injury must be certainly impending to constitute injury in fact." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (citing cases). Stated differently, there must be a "substantial risk" that the harm will occur. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014). Again, Plaintiffs provide no evidence of any risk that harm will occur, much less evidence of a "substantial risk" or "certainly impending" injury.

In the First Amendment context, Plaintiffs assert that they need not "expose [themselves] to liability before bringing suit" to challenge the constitutionality of this law. MSJ at 41 (citing *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128-29 (2007)). To be sure, there is Article III standing even if "the plaintiff ha[s] eliminated

[an] imminent threat of harm by simply not doing what he claimed the right to do"—here, perform abortions—if "the threat-eliminating behavior [i]s effectively coerced." *MedImmune*, 549 U.S. at 128-29. To show coercion, however, Plaintiffs must still show *threatened* enforcement by the State Agency Defendants. *See id.* at 129. Without coercion, Plaintiffs have done no more than try to "manufacture standing by choosing to [refrain from acting] based on hypothetical future harm that is not certainly impending," or imminent. *Clapper*, 568 U.S. at 133. Because Plaintiffs have not shown any threatened enforcement, they cannot claim the State Agency Defendants have coerced them to act. Thus, their alleged threat-eliminating behavior is nothing more than an attempt to manufacture standing, and they lack Article III standing to sue the State Agency Defendants for alleged future violations of Section 3.

Finally, as for ripeness, if a purported injury is "contingent [on] future events that may not occur as anticipated, or indeed may not occur at all," the claim is not ripe for adjudication. *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580-81 (1985) (quotation marks omitted); *see also Monk v. Huston*, 340 F.3d 279, 282 (5th Cir. 2003) ("A court should dismiss a case for lack of 'ripeness' when the case is abstract or hypothetical."). The ripeness doctrine "prevent[s] the courts, through premature adjudication, from entangling themselves in abstract disagreements." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967); *see also Shields v. Norton*, 289 F.3d 832, 835 (5th Cir. 2002) (explaining that a court lacks jurisdiction to decide disputes that are not ripe). As with immunity and standing, Plaintiffs have no evidence that the State Agency Defendants are planning to take administrative action against them for potential violations of Section 3. To obtain a preliminary injunction, Plaintiffs must do more than allege the hypothetical possibility of indirect enforcement. Consequently, Plaintiffs' claims regarding alleged future harms caused by the State Agency Defendants are not ripe.

As explained in the State Agency Defendants' motion to dismiss, if the Court does not dismiss Plaintiffs' Section 3 claim against the State Agency Defendants, the Court should at the very least abstain from deciding it under *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 500 (1941). Abstention is appropriate when resolution of "an unclear issue of state law," *Nationwide Mut. Ins. Co. v. Unauthorized Practice of Law Comm., of State Bar of Tex.*, 283 F.3d 650, 652 (5th Cir. 2002), would eliminate a federal issue or "significantly modify" the federal analysis, *Lake Carriers Ass'n v. MacMullan*, 406 U.S. 498, 512 (1972). "The second factor is flexible—it is satisfied if the constitutional questions will be substantially modified or otherwise present[ed] in a different posture." *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 397 n.13 (5th Cir. 2020) (internal quotation marks omitted).

Even if the State Agency Defendants wanted to indirectly enforce S.B. 8 through other administrative mechanisms—and Plaintiffs have submitted no evidence that they do—whether or not they *could* do so is an unsettled question of state law. If they (or Texas state courts) conclude that the State Agency Defendants cannot enforce S.B. 8 using their general regulatory oversight authority, then there is no federal constitutional claim against the State Agency Defendants. Accordingly, the Court should dismiss the Section 3 claim against the State Agency Defendants, but if not, it should abstain from deciding the issue until Texas does. But in no event should the Court grant Plaintiffs preliminary injunctive relief against the State Agency Defendants.

2. Plaintiffs have no evidence that the State Agency Defendants are likely to seek attorneys' fees from them under Section 4.

Plaintiffs' claims regarding Section 4 (Compl. ¶¶ 155-63, Claims 6-7) are likewise barred by sovereign immunity, lack of standing, and ripeness. Plaintiffs fear that, at some point in the future, the State Agency Defendants might ask a court to award them attorneys' fees under Section 4 related to pending or future litigation. MSJ at

21-22. But nowhere in the 19 declarations do they cite any evidence that the State Agency Defendants are planning to do so. All Plaintiffs do is list lawsuits that they have brought against state officials. *See, e.g.*, MSJ Ex. A ¶ 37, Ex. C ¶ 32, Ex. M ¶ 24, Ex. P ¶ 16.

Plaintiffs have not proven that the State Agency Defendants have either a duty to enforce Section 4 or a demonstrated willingness to do so, although Plaintiffs are required to prove both of those elements. *Morris*, 739 F.3d at 746. Indeed, the State Agency Defendants have no ability to "enforce" Section 4—it grants them only the ability to request attorneys' fees, which violates no federal law and does not constitute "enforcement" in any meaningful sense of that term. Plaintiffs have also not shown a future injury is certainly impending. *Clapper*, 568 U.S. at 409. The lack of such evidence means their lawsuit is based on contingent events that may never occur and is, therefore, unripe. *Thomas*, 473 U.S. at 580-81. Thus, for these numerous alternative reasons, the Court lacks jurisdiction over Plaintiffs' claims regarding Section 4. Accordingly, Plaintiffs cannot show a substantial likelihood that they will prevail on this claim.

3. Plaintiffs have no evidence to establish jurisdiction over Judge Jackson and all Texas judges.

As Judge Jackson demonstrated in the briefing on his motion to dismiss, Plaintiffs have no claim against him or any other judge in Texas because (1) Plaintiffs do not satisfy Article III's requirements and (2) their claims are barred by sovereign immunity. Indeed, binding precedent specifically holds there is no case or controversy between a plaintiff challenging a state law and the judges tasked with applying that law. *Bauer v. Texas*, 341 F.3d 352, 359 (5th Cir. 2003); *Chancery Clerk of Chickasaw County v. Wallace*, 646 F.2d 151, 160 (5th Cir. 1981). Further, Plaintiffs cannot invoke *Ex parte Young*, 209 U.S. 123 (1908), as an exception to sovereign immunity for their claims against Judge Jackson, because the *Ex parte Young* doctrine does not apply to

the quintessential judicial acts of which Plaintiffs complain here—adjudicating specific disputes in individual cases. Adjudicating is not "enforcing" for purposes of *Ex parte Young*.

Plaintiffs attempt to distract this Court from the legal standards required for subject matter jurisdiction by pointing to a press conference where Judge Jackson used the word "enforce." ECF 53 at 5. Such colloquial usage of a term is irrelevant to its legally operative meaning for the purpose of federal jurisdictional analysis. Judge Jackson's statements in a press conference do not constitute evidence that is relevant to, much less that establishes, the subject matter jurisdiction of this Court. The Court has an independent duty to determine its own subject matter jurisdiction, *see Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999), which necessarily entails analyzing jurisdiction under the legal definitions and standards used by binding precedential authority, not by personal comments from any individual. The directly binding authorities previously provided by Judge Jackson in his motion to dismiss briefing conclusively negate Plaintiffs' attempt to invoke jurisdiction, and Plaintiffs have provided no evidence to the contrary.

Plaintiffs' attempted appeal to 42 U.S.C. § 1983 fares no better, since parties may not obtain relief under § 1983 when they have failed to satisfy the jurisdictional requirements of *Ex parte Young*. *See Edelman v. Jordan*, 415 U.S. 651, 677 (1974). Further, Plaintiffs are plainly seeking relief against Judge Jackson in his judicial capacity, yet they have completely failed to show that declaratory relief is unavailable, which means they are not entitled to injunctive relief against Judge Jackson. *See* 42 U.S.C. § 1983; *ODonnell v. Harris Cty., Texas*, 251 F. Supp. 3d 1052, 1155-56 (S.D. Tex. 2017), *aff'd as modified*, 882 F.3d 528 (5th Cir. 2018).

B. Plaintiffs are not likely to succeed in their challenge to Section 3 of S.B. 8.

Plaintiffs focus their lawsuit on Section 3 of S.B. 8, which creates a private right of action that may be brought against those who perform or aid and abet the performance of a post-heartbeat abortion. Rather than defend such lawsuits—should Plaintiffs ever be sued—Plaintiffs seek to make an end run around Texas's courts and have this Court declare and enjoin Texas law. As explained above, the State Defendants do not enforce Section 3. Nevertheless, Plaintiffs' claims fail as a matter of law.

1. The heartbeat provision does not violate the substantive-due-process rights of Plaintiffs' patients.

Plaintiffs' first argument is that S.B. 8 is an unconstitutional ban on pre-viability abortion. MSJ at 22-24. From there, they assert that other portions of S.B. 8 necessarily fail. MSJ at 25-26. But S.B. 8 is not a ban on abortion, and Plaintiffs have not proven an undue burden on a large fraction of women, much less that any of the State Defendants would cause that burden. Moreover, the remainder of S.B. 8 is severable from Section 3. Even if the Court found the heartbeat provision unconstitutional—although it should not do so—it does not follow that other portions of S.B. 8 are unenforceable and subject to preliminary injunctive relief.

a. S.B. 8 does not ban abortion but creates a cause of action that incorporates the undue-burden test.

Plaintiffs' argument is built on the supposition that *Jackson Women's Health Organization v. Dobbs*, 951 F.3d 246 (5th Cir. 2020) (per curiam), entitles them to judgment as a matter of law. But it does not. *Casey*'s undue-burden standard is built into S.B. 8 as an affirmative defense to any private lawsuit. Section 3 of S.B. 8 does not, therefore, "ban" abortion. Rather, it creates a private cause of action that can be brought against those who perform or aid and abet abortions of unborn children who have a detectable heartbeat. S.B. 8 § 3 (to be codified at Tex. Health & Safety Code

§ 171.208(a)). But it also recognizes an undue-burden defense—where granting relief would impose an undue burden on pregnant women seeking such an abortion. S.B. 8 § 3 (to be codified at Tex. Health & Safety Code § 171.209(b)).

That makes this law different than the one at issue in *Dobbs*. There, Mississippi's law prohibited abortions after a heartbeat could be detected, regardless of any undue burden. 951 F.3d at 248. Under Texas's law, however, the abortion is permitted if preventing it would impose an undue burden—which is precisely the standard set by the Supreme Court for which abortions are protected. *See Casey*, 505 U.S. at 877 (plurality op.). In other words, Section 3 does not impose liability for any abortion protected by the Supreme Court's undue-burden test. Thus, Section 3 does not violate the substantive due process rights of Plaintiffs' patients.

Plaintiffs must prove that each challenged provision of S.B. 8 independently fails the undue-burden test. *See In re Gee*, 941 F.3d 153, 172 (5th Cir. 2019) (per curiam) (collecting cases and explaining "the Supreme Court has analyzed abortion provisions separately rather than cumulatively"); *cf. id.* at 161-62 ("[T]he district court must analyze Plaintiffs' standing to challenge each provision of law at issue."). Moreover, the Supreme Court has long held that "[i]n determining whether a law is facially invalid, [courts] must be careful not to go beyond that statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008). To obtain preliminary injunctive relief, Plaintiffs' evidence must be specific to each provision challenged and grounded in fact, not speculation. Under that standard, their evidence fails to demonstrate a likelihood they will prevail on the merits.

b. Plaintiffs have not produced evidence of an undue burden on a large fraction of women.

To obtain the facial relief they have requested, Plaintiffs must show, at a minimum, an undue burden on a large fraction of affected women.[6] *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309, 2320 (2016); *Casey*, 505 U.S. at 877, 895. They have not done so. Plaintiffs refer to section 171.204 as a "ban" because it states that a physician may not "knowingly perform or induce an abortion" once the unborn child has a detectable heartbeat. But as the Supreme Court recently held in *California v. Texas*, 141 S. Ct. 2104, 2114 (2021), a plaintiff lacks standing to challenge a statutory command unless that command can be enforced. Thus, Plaintiffs lack standing to challenge section 171.204 on its own. Its constitutionality can be analyzed only through its enforcement provisions.

Here, Plaintiffs have identified only two potential enforcement mechanisms relevant to the State Agency Defendants: (1) potential regulatory actions that "could" be brought by the State Agency Defendants, and (2) private lawsuits (that cannot be brought by any of the State Defendants). *See* Compl. ¶ 107. But Plaintiffs' evidence fails to show that either of these mechanisms would impose an undue burden.

i. As explained above, Plaintiffs have no evidence that the State Agency Defendants are considering, planning, or threatening to indirectly enforce Section 3's heartbeat provision. *See supra* section I.A.1. While that prohibits the Court from exercising jurisdiction over Plaintiffs' Section 3 claims against the State Agency Defendants, it also prohibits a finding that Plaintiffs are likely to prevail on the merits. If Plaintiffs have no evidence that they will be subject to any administrative action (much less administrative actions that would prohibit them from performing

[6] For the record, the State Agency Defendants preserve the argument that the United States Constitution does not contain a right to elective abortion and that *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), were wrongly decided.

abortions), then there is no evidence of undue burden on women, as abortion access will not be impacted.

ii. Plaintiffs' other undue-burden theory is entirely unconnected to the State Agency Defendants. Plaintiffs imply that private lawsuits will force them to stop performing abortions, leaving women in Texas without access to abortion after a fetal heartbeat is detected. But Plaintiffs offer speculation and innuendo, not evidence.

Plaintiffs' first option is to continue performing post-heartbeat abortions and, if they are sued, raise their undue-burden argument in that suit. Such a course of action would enable women in Texas to obtain abortions. But while Plaintiffs claim to fear such suits, they fail to prove that they will be subjected to them imminently or in such volume and for so prolonged a period that they would be forced to shut down. *See, e.g.*, MSJ Ex. 1 ¶ 35 (stating that "I fear" frivolous lawsuits); Ex. C ¶ 10 (explaining they typically receive one complaint per year); Ex. D ¶ 9 (stating, without elaboration, "I believe it is very likely" they will be sued); Ex. G ¶ 20 (describing two individuals distributing information about S.B. 8); Ex. H ¶ 11 (stating, without elaboration, "I believe it is very likely" they will be sued); Ex. I ¶ 6 (stating that they "could" be sued). They provide no evidence of how much it might cost to defend such suits, anticipated outcomes, and what the fiscal impact of such lawsuits might be. Nor do they address whether a ruling from the Texas Supreme Court could end all litigation. They allege these private lawsuits could cause "ruinous liability," Compl. ¶ 9, but they provide no financial analysis (or any financial information at all) that would enable the Court to determine whether and at what point that risk could materialize. Plaintiffs instead ask the Court to assume the worst-case scenario and rule accordingly.

Plaintiffs' other option is to stop performing post-heartbeat abortions when the law goes into effect. But Plaintiffs do not take a clear position on whether they will actually stop performing abortions to avoid liability. For example, the CEO of Plaintiff Whole Woman's Health states only that "[o]ur physicians and staff will have

to choose" between the potential lawsuits and turning away patients. MSJ Ex. G ¶ 22. The part-owner of another two clinics explains that he is "very concerned" about opening his clinics up to liability. MSJ Ex. H ¶ 12. The Co-Medical Director of Southwestern Women's Surgery Center states that "[i]t is unclear how long" Southwestern will be able to remain open if S.B. 8 takes effect. MSJ Ex. A ¶ 35. And the Medical Director for Primary and Trans Care at Planned Parenthood Gulf Coast made no statement about whether he would continue to perform abortions, only that he "worr[ied]" about the impact S.B. 8 would have on him. MSJ Ex. B ¶ 34.

Plaintiffs have not shown they are likely to succeed. Their own testimony fails to establish by a preponderance of the evidence that abortion clinics in Texas will either be forced to close due to lawsuits or will preemptively close due to potential lawsuits. Absent the closure of clinics, abortion access in Texas will not change and there will be no unconstitutional undue burden. Plaintiffs are not entitled to relief.

c. S.B. 8's provisions are severable.

Even if the heartbeat provision were unconstitutional, it is severable from the rest of S.B. 8. Thus, the Court should not, as Plaintiffs suggest, invalidate the remainder of Section 3, as well as Sections 6, 7, and 9. MSJ at 25-26. Plaintiffs have not shown that those provisions independently place an undue burden on abortion access.

Where the legislature "has expressly provided a severability clause," this Court must "presume "that [it] did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision." *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2209 (2020). Federal courts are to apply severability clauses in state laws. *Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996) (per curiam) ("Severability is of course a matter of state law."). As the Supreme Court has explained, courts should "enjoin only the unconstitutional applications of a statute while leaving other applications in force, or to sever its problematic portions while

leaving the remainder intact." *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 328-29 (2006) (citation omitted). S.B. 8 contains multiple severability provisions: Section 171.212 makes the provisions within Section 3 severable, and Section 10 of S.B. 8 makes all the provisions of S.B. 8 severable. Thus, a preliminary conclusion that the heartbeat-provision is unconstitutional should have no effect on the remainder of S.B. 8.

Nor have Plaintiffs shown that these other provisions would cause an undue burden. For example, Plaintiffs claim that new Texas Health and Safety Code section 171.203(b), which requires the physician to first determine whether the unborn child's heart is beating, is necessarily unconstitutional if the heartbeat provision is. MSJ at 25. It is not. For the past ten years, Texas law has required physicians to perform a sonogram and make the fetal heartbeat audible. Tex. Health & Safety Code § 171.012(a)(4)(D). That law has not been challenged here, and Plaintiffs have presented no evidence that checking for a heartbeat is an undue burden on a women's ability to obtain an abortion. Indeed, the Fifth Circuit has already noted that sonograms and detecting fetal heartbeats are routine measures in pregnancy medicine and considered "medically necessary" for the mother and unborn child. *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 579 (5th Cir. 2012). There are no legal or factual grounds to enjoin this provision of Section 3 as an undue burden.

Further, the private cause of action itself is not an undue burden in all circumstances (even if it were under some). Post-viability, States can prohibit abortion outright. *Casey*, 505 U.S. at 846. Thus, to the extent a Section 3 lawsuit is brought regarding a post-viability abortion, it is not an unconstitutional undue burden. Not only does this obviate Plaintiffs' facial challenge, but it also means that Section 3's private cause of action, including aiding and abetting liability, *see* MSJ at 25, must remain enforceable.

Plaintiffs' complaint about Section 6 is inexplicable. Section 6 merely states that the Health and Human Services Commission cannot enforce Section 3 of S.B. 8, and that it is enforced through private civil actions. Plaintiffs do not say how this prohibition on HHSC enforcement injures them, which results in a lack of standing. *See In re Gee*, 941 F.3d at 162 (explaining that Article III does not allow a federal court to entertain challenges to provisions of state law that do not injure the plaintiff). Regardless, Plaintiffs also fail to explain how this provision imposes any undue burden on their patients.

Plaintiffs state, without explanation, that the reporting requirements in Sections 7 and 9 are "inextricably linked" to the heartbeat provision. MSJ at 25-26. Section 7 requires a physician who performs an abortion due to a "medical emergency"—regardless of gestational age—to execute a written document certifying the need for the abortion. And Section 9 merely requires the inclusion of that information in the monthly report the facility sends to HHSC. The information and records have no tie to the heartbeat provision, and Plaintiffs have presented no evidence that requiring physicians to keep such medical records imposes an undue burden on women. *See also Casey*, 505 U.S. at 900-01 (upholding recordkeeping requirement).

In sum, Plaintiffs have not shown that Section 3 will create an unconstitutional undue burden or that, if it does, other provisions within S.B. 8 must also be declared unconstitutional. Plaintiffs are not likely to succeed on their substantive-due-process claim, and the Court should deny them preliminary injunctive relief.

2. Plaintiffs' "preemption claim" is not viable.

Plaintiffs assert that Section 3's enforcement provisions are preempted by federal law, as the Supremacy Clause makes federal law the "supreme Law of the Land." MSJ at 26-28 (quoting U.S. Const. art. VI, cl. 2); Compl. ¶¶ 150-54. They are not likely to succeed on this purported cause of action for the simple reason that it is not actually a cause of action. The Supremacy Clause is a rule of decision. *Armstrong v.*

Exceptional Child Ctr., Inc., 575 U.S. 320, 324 (2015); *cf. Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803) (the "very essence of judicial duty" is to "determine which of [two] conflicting rules governs"). It is not the source of any federal rights and does not create a private cause of action. *Armstrong*, 575 U.S. at 324; *Jefferson Cmty. Health Care Centers, Inc. v. Jefferson Par. Gov't*, 849 F.3d 615, 626 (5th Cir. 2017). Plaintiffs' cause of action for "preemption" is not legally cognizable.

Even so, Plaintiffs' claims make no sense. First, Plaintiffs wrongly assert that S.B. 8 directs judges to "ignore" federal court judgments. MSJ at 26. It does not. Section 171.212(e) simply states the obvious truth that an injunction is no more nor less than a prohibition on enforcement of the law. *See Collins v. Mnuchin*, 938 F.3d 553, 611 (5th Cir. 2019) (en banc) (Oldham, J., concurring), *aff'd in part, vacated in part, rev'd in part sub nom. Collins v. Yellen*, 141 S. Ct. 1761 (2021). "The Federal Judiciary does not have the power to excise, erase, alter, or otherwise strike down a statute." *Seila Law*, 140 S. Ct. at 2220 (Thomas, J., concurring). If the injunction is ever vacated, the law is again enforceable. *See, e.g.*, *Tex. Democratic Party*, 978 F.3d at 194 (vacating injunction of Texas voting law). And while Plaintiffs assert that States must follow Supreme Court precedent when deciding issues of res judicata, MSJ at 27 (citing *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 507 (2001)), they do not explain how that is different from what S.B. 8 requires.

Second, Plaintiffs claim that S.B. 8 prohibits them from proving their defense of undue burden by pointing to other defendants or potential defendants—in essence, limiting them to proof of undue burden in the specific circumstances of the lawsuit. MSJ at 27-28 (citing new Tex. Health & Safety Code § 171.208(d)(2)). They contrast this to facial challenges brought in other cases, in which the statewide impact on abortion was relevant. *See, e.g.*, *Whole Woman's Health*, 136 S. Ct. at 2313. There is no federal requirement that defending against an individual cause of action be

treated the same as a facial challenge. The Court should deny Plaintiffs preliminary injunctive relief on this claim.[7]

3. Plaintiffs have not shown an equal-protection violation.

Plaintiffs next argue that Section 3 violates the Equal Protection Clause because, they say, it treats abortion providers and supporters differently from unidentified others without sufficient reason. MSJ at 28-32. But Section 3 is not subject to strict scrutiny, and there is a rational basis for it. Plaintiffs' equal-protection claim fails.

At a fundamental level, Plaintiffs claim they are not being treated like others who are similarly situated, but they never identify who those other similarly situated people are. They disagree with various provisions within Section 3, such as venue and civil penalties, as well as the existence of the cause of action itself. But Texas law contains a variety of venue provisions, *see, e.g.*, Tex. Civ. Prac. & Rem. Code ch. 15; civil penalties, *see, e.g.*, Tex. Agric. Code § 72.046 (regarding fruit flies); Tex. Health & Safety Code § 436.027 (regarding the sale of molluscan shellfish and crabmeat); and causes of action, *see, e.g.*, Tex. Alco. Bev. Code § 28.081 (substitution of alcoholic beverage brands without consent); Tex. Bus. & Com. Code § 301.104 (telephone solicitation). The mere existence of a law that applies only to certain conduct or certain legal proceedings is not an equal-protection violation.

Plaintiffs err when they claim that their equal-protection claim concerns a fundamental right. MSJ at 31. Plaintiffs seek to perform and aid and abet the performance of abortions. Compl. ¶ 136. There is no fundamental right to perform (or aid in performing) abortions. *Planned Parenthood of Greater Ohio v. Hodges*, 917 F.3d 908, 912 (6th Cir. 2019). Even so, the Supreme Court has already held that abortion

[7] Notably, Plaintiffs make no effort to explain how their preemption claim relates to the State Agency Defendants. Their arguments solely concern the law governing the private cause of action authorized by S.B. 8—which the State Agency Defendants cannot bring. S.B. 8 § 3 (to be codified at Tex. Health & Safety Code § 171.207(a)).

can be treated differently: "Abortion is inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life." *Harris v. McRae*, 448 U.S. 297, 325 (1980).

Nor does Section 3 infringe any First Amendment rights. MSJ at 31. Instead, it explicitly prohibits the imposition of liability on any speech or conduct protected by the First Amendment. S.B. 8 § 3 (to be codified at Tex. Health & Safety Code § 171.208(g)). Thus, in this pre-enforcement facial challenge, Plaintiffs' assertions that they fear unknown individuals might wrongly sue them is insufficient to hold that Section 3 violates the First Amendment. *See infra* section I.B.5.

Section 3 is, therefore, subject to the rational-basis test. The Supreme Court has already recognized that the State has a legitimate interest in unborn life from the outset of the pregnancy. *Casey*, 505 U.S. at 846; *see also Gonzales v. Carhart*, 550 U.S. 124, 147 (2007) (stating that "a fetus is a living organism while within the womb, whether or not it is viable outside the womb"). Creating a cause of action that seeks to protect that life to the extent constitutionally permissible is certainly rationally related to furthering the State's interest in unborn life.[8]

Moreover, the Abortion Providers do not identify any First Amendment activity in which they wish to engage and for which any of the State Defendants would penalize them.[9] Section 3 does not violate the Equal Protection Clause, and Plaintiffs' motion for preliminary injunctive relief on that claim should be denied.

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[8] Not only does Section 3 incorporate the undue-burden test, but its private cause of action can also be brought based on abortions performed after viability. Plaintiffs offer no theory (much less evidence) as to how Section 3's application to an unlawful post-viability abortion would violate the Equal Protection Clause. *See supra* section I.B.1.c.

[9] The Abortion Advocates are not regulated by the State Agency Defendants and, therefore, face no risk of liability from them.

4. Section 3 is not void for vagueness.

Plaintiffs next seek preliminary injunctive relief on their claim that Section 3 violates the Fourteenth Amendment's guarantee of due process because it is unconstitutionally vague. MSJ at 32-35. They assert that Section 3 (1) fails to provide adequate notice that certain conduct is prohibited, and (2) invites arbitrary enforcement. MSJ at 32-35 (citing *United States v. Escalante*, 239 F.3d 678, 680 (5th Cir. 2001) and *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999) (plurality op.)). Neither theory permits a finding that Section 3 violates due process.

a. Plaintiffs have not shown that Section 3 fails to provide notice.

Plaintiffs assert that Section 3 fails to provide them notice that their conduct is prohibited in three ways. MSJ at 32-34. First, Plaintiffs assert that, because section 171.208(e)(3) prohibits defendants from relying on court decisions if they are subsequently overruled, someday the Supreme Court could overrule *Roe* and *Casey*, which could retroactively create liability. MSJ at 32-33. This is not a vagueness claim. A vagueness claim exists when a law's "prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Plaintiffs understand what this law permits and prohibits. Their complaint is really an unripe retroactivity claim. To reach it, the Court would have to assume that it is likely the Supreme Court will one day overrule *Roe* and *Casey* and that at some point after that, someone (but not any of the State Defendants) will bring a private lawsuit against Plaintiffs. If that happens, Plaintiffs can raise retroactivity as a defense if they believe it applies. The possibility that a law could be applied retroactively at some undetermined point in the future does not make it vague now.

Second, Plaintiffs claim that the phrase "aids and abets" has no uniform definition in Texas law. MSJ at 33. While they cite a law review article noting differences in how Texas courts have applied that language, *see* Nelson S. Ebaugh,

The Liability: Why You Should Understand the Five Tests of Civil Aiding and Abetting in Texas, 78 Tex. B.J. 362, 363 (2015), they fail to explain what conduct they are concerned about—what exactly they wish to do and how Section 3 fails to provide them with adequate notice. Pointing out slightly different lower-court interpretations does not make a law unconstitutional. And to the extent Plaintiffs' theory is that Texas law is unclear, the Court lacks jurisdiction to decide that question, *see Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984), and it should abstain from addressing it to avoid "needless friction with state policies," *Lake Carriers Ass'n*, 406 U.S. at 510; *see supra* pp. 12-13.

Third, and relatedly, Plaintiffs argue Section 3 is vague because it imposes liability for aiding and abetting even if the individual does not know at the time that the abortion they are aiding and abetting will be performed in violation of S.B. 8. MSJ at 33-34. Again, that is not a vagueness claim. Plaintiffs know exactly what the law means; they just disagree with it. And Section 3 contains a defense—as long as the person "reasonably believed, after conducting a reasonable investigation" that the physician would comply with Section 3, they are not liable. S.B. 8 § 3 (to be codified at Tex. Health & Safety Code § 171.208(f)). If Plaintiffs believe it is unconstitutional to impose liability in those circumstances, they can make that argument if such a lawsuit is filed. There are no grounds to enjoin the law now.

b. Section 3 does not invite arbitrary enforcement.

Plaintiffs also claim that Section 3 is void for vagueness because it invites arbitrary enforcement by allowing individual citizens to bring suit and allegedly providing insufficient standards to govern the amount of liability. MSJ 34-35.

They first assert that it is unlawful to permit any Texas citizen to bring suit for a violation of Section 3. MSJ at 34-35. But their argument is based on a case about Article III standing. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021). They cite

no precedent that allowing citizens to bring lawsuits is unconstitutionally vague. Indeed, as the Supreme Court has long recognized:

> The power of the state to impose fines and penalties for a violation of its statutory requirements is coeval with government; and the mode in which they shall be enforced, whether at the suit of a private party or at the suit of the public, and what disposition shall be made of the amounts collected, are merely matters of legislative discretion.

Missouri Pac. Ry. Co. v. Humes, 115 U.S. 512, 523 (1885).

Plaintiffs also claim that Section 3 fails to "provide standards to govern" the amount of liability. MSJ at 35. While the statute provides no maximum amount, the failure to cap a penalty or award is, again, not a vagueness problem. S.B. 8's statutory damages provision is of course subject to the limitations of the Due Process Clause, which "prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003). But whether any particular damages award runs up against that prohibition is a question to be decided in context—not as a facial challenge to the statute authorizing the penalty. Accepting Plaintiffs' theory would require the conclusion that every state statute allowing for exemplary damages awarded by a jury, *e.g.* Tex. Civ. Prac. & Rem. Code § 41.003, is facially unconstitutional because of the possibility a jury's award might be so high as to violate due process. *Cf. TXO Prod. Corp. v. All. Res. Corp.*, 509 U.S. 443, 453-54 (1993) (citing, *inter alia*, *St. Louis, I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 66 (1919), for the proposition that the Due Process Clause "imposes substantive limits beyond which penalties may not go"). And the Supreme Court rejected that theory years ago. *See Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 15 (1991). Rather, specific awards are discretely reviewed by the trial and appellate courts for reasonableness. *See id.* Plaintiffs offer no reason to think Texas courts would ignore due process rights when assessing statutory damages.

Plaintiffs' real argument appears to be that some citizens who might bring suit against them lack standing. *See* MSJ at 34-35 (arguing the statute is vague because the cause of action can be brought by "individuals to whom [abortion providers, etc.] have no connection, have never owed a duty, and have never caused any harm"). But that is an unripe question to be addressed in the Texas courts that will hear these lawsuits, should any be filed. Whether a plaintiff has standing to sue under Texas law is a question this Court lacks jurisdiction to address, *see Pennhurst*, 465 U.S. at 117, and from which it should abstain, *see Pullman*, 312 U.S. at 500; *supra* pp. 12-13. Plaintiffs, thus, have not shown a substantial likelihood of success on their vagueness claim.

5. Plaintiffs' First Amendment claim fails.

In their final argument regarding Section 3, Plaintiffs assert that imposing liability for "conduct that aids or abets" an abortion prohibited by S.B. 8 violates their First Amendment rights. MSJ at 35-42. Like Plaintiffs' other challenges to Section 3, this one also fails on the merits.[10]

a. Section 3—on its face—applies only to "*conduct* that aids or abets," S.B. 8 § 3 (to be codified at Tex. Health & Safety Code § 171.208(a)(2) (emphasis added)), and explicitly prohibits application to any speech or conduct protected by the First Amendment, S.B. 8 § 3 (to be codified at Tex. Health & Safety Code § 171.208(g)). Thus, as a facial matter, Section 3 cannot be used by anyone to hold Plaintiffs liable for protected First Amendment activity.

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[10] As explained above, Plaintiffs have no evidence that the State Agency Defendants plan to enforce, in any way, Section 3 against the Abortion Providers who exercise their First Amendment rights. *See supra* section I.A.1. Further, Plaintiffs have not shown it is even possible for the State Agency Defendants to take any action against the Abortion Advocates. *See supra* notes 5, 9. Again, this Court cannot grant relief for a claim where it has no jurisdiction. Regardless, there are no grounds to support the merits of Plaintiffs' First Amendment claim against any of the State Defendants.

Plaintiffs' grievances depend on the possibility of being wrongly sued under Section 3 for protected First Amendment conduct. For example, the two clergy Plaintiffs generally fear that their spiritual and pastoral counseling could subject them to lawsuits under Section 3. MSJ at 36-37, Ex. Q ¶ 24 ("I am concerned"), Ex. R ¶ 17 ("I fear"). But they identify no individual or group of individuals who have indicated an intent to sue them, and they have affirmatively disclaimed any argument that the State Agency Defendants could take administrative action against them. ECF 56 at 1 n.1. The mere possibility that someone might be wrongly sued for exercising First Amendment rights is not sufficient to enjoin the entire statute. *See CISPES (Comm. in Solidarity with People of El Salvador) v. F.B.I.*, 770 F.2d 468, 472-73 (5th Cir. 1985) (stating that "a statute need not fall *in toto* merely because it is capable of some unconstitutional applications" (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 614 (1973)). The Texas courts are quite capable of applying S.B. 8 to avoid infringement on First Amendment rights. *Cf. Brooks v. Northglen Ass'n*, 141 S.W.3d 158, 169 (Tex. 2004) (when interpreting statutes, "we are obligated to avoid constitutional problems if possible"). This Court cannot accept Plaintiffs' suggestion that Texas judges will not respect their First Amendment rights. *Cf. Withrow v. Larkin*, 421 U.S. 35, 47 (1975) (recognizing "a presumption of honesty and integrity in those serving as adjudicators").

b. The Abortion Advocates' argument that Section 3 infringes their advocacy activities (MSJ at 39-40) is also foreclosed by Section 3's explicit prohibition on liability for protected First Amendment conduct. Moreover, Section 3's liability provision is tied to aiding and abetting the performance of "an abortion"—not to engaging in "public education, organizing, and lobbying activities," as Plaintiffs fear. S.B. 8 § 3 (to be codified at Tex. Health & Safety Code § 171.208(a)(2)); MSJ at 40. If Plaintiffs' activities are protected by the First Amendment, then they cannot be held liable. And they have no evidence they will face an onslaught of lawsuits challenging

their protected activities. There are no grounds to enjoin Section 3 under the First Amendment.

Even so, this issue also counsels in favor of abstention. Even if it were plausible to read Section 3 to create liability for general advocacy in favor of abortion rights, as Plaintiffs read it, the Texas courts have not yet had an opportunity to consider whether that is the correct reading. (And given that Texas courts interpret statutes to avoid constitutional problems, *see Brooks*, 141 S.W.3d at 169, that reading is unlikely.) The federal court should not reach out to address a state law question of that magnitude before the Texas courts can address it.

c. Plaintiff Jane's Due Process claims that Section 3 violates its First Amendment right to petition the courts. MSJ at 38-39. But it provides no evidence that Jane's Due Process, in fact, petitions the courts. Litigants, not lawyers, have First Amendment rights to petition. *See Mezibov v. Allen*, 411 F.3d 712, 720–21 (6th Cir. 2005) ("[I]n the context of the courtroom proceedings, an attorney retains no personal First Amendment rights when representing his client in those proceedings."). Section 3 does not prohibit minors from petitioning courts for a judicial bypass, and Jane's Due Process's role is to connect minors with volunteer attorneys who assist with judicial bypass procedures. MSJ Ex. S ¶¶ 19-21. Jane's Due Process and its volunteer attorneys not only lack standing to sue on behalf of unknown future clients, *see Kowalski v. Tesmer*, 543 U.S. 125, 134 (2004), but also lack any First Amendment right to represent clients in court, *see Mezibov*, 411 F.3d at 720-21.

In sum, Plaintiffs have shown no violation of the First Amendment posed by Section 3 or by any actions on the part of the State Defendants. The mere possibility of a lawsuit is not enough to invoke the extraordinary remedy of a preliminary injunction. The Court should deny Plaintiffs' request for such extraordinary relief.

C. Plaintiffs are not likely to succeed on their claim that Section 4 of S.B. 8 is unconstitutional.

As Plaintiffs recognize, Section 4 is a standalone section, untethered to the heartbeat provision and private cause of action in Section 3. MSJ at 42. Section 4 permits defendants in challenges to abortion legislation to recover their attorneys' fees if they prevail. Plaintiffs are not likely to succeed on their claim that Section 4 is unconstitutional. As explained above, Plaintiffs have no evidence that any State Defendant intends to seek attorneys' fees from Plaintiffs under Section 4, thus the Court lacks jurisdiction over this claim against all State Defendants. *See supra* section I.A.2. But even if Plaintiffs had standing and could invoke *Ex parte Young*, requesting attorneys' fees does not violate federal law, so no injunction is permissible.

1. Section 4 does not violate the First Amendment.

Plaintiffs have not shown that Section 4's fee-shifting provision violates the First Amendment. The Seventh Circuit has held that "the proposition that the [F]irst [A]mendment, or any other part of the Constitution, prohibits or even has anything to say about fee-shifting statutes in litigation seems too farfetched to require extended analysis." *Premier Elec. Const. Co. v. Nat'l Elec. Contractors Ass'n, Inc.*, 814 F.2d 358, 373 (7th Cir. 1987) (footnote omitted). As the court explained, fee-shifting provisions are common and often biased towards one side in the litigation. *Id.* Under Plaintiffs' theory, pro-plaintiff provisions like section 1988 would be suspect because "they greatly increase the risks defendants bear in exercising their constitutional right to obtain the court's decision—they can lose but not win." *Id.* But that does not make fee-shifting provisions unconstitutional. *Id.*

For example, defendant intervenors in a section 1983 challenge to Illinois abortion regulations objected to having to pay attorneys' fees to the prevailing plaintiff under section 1988. *Charles v. Daley*, 846 F.3d 1057, 1074 (7th Cir. 1988). Citing *NAACP v. Button*, 371 U.S. 415 (1963), they argued that the award of fees

"represents a retaliatory sanction that impermissibly infringes upon their ability to engage in advocacy through litigation, a form of political expression protected by the First Amendment." *Charles*, 846 F.2d at 1074. The Seventh Circuit contrasted the laws at issue in *Button*—which placed rules on attorney conduct that limited an attorney's ability to recruit litigants—with the fee-shifting statute of section 1988, which does not interfere with an attorney's conduct. *Id.* The Court then explained that "[l]itigation is not purely speech, it is more; litigation is conduct which can and does impose considerable costs on the parties as well as upon the federal judiciary." *Id.* at 1075. The court, therefore, refused to hold section 1988 violated the First Amendment "simply because it forces those who choose voluntarily to interject themselves into such lawsuits to think twice before engaging in battle." *Id.*

Plaintiffs' position would spell the end of fee-shifting statutes generally, but especially those that, like section 1988, favor plaintiffs who bring certain kinds of claims. After all, defendants who are alleged to have violated civil rights have just as much right to seek vindication in court as the plaintiffs who bring the claims. *Premier Elec. Const. Co.*, 814 F.2d at 373. Moreover, given the background American Rule that each party pays its own fees and costs, *see Peter v. Nantkwest, Inc.*, 140 S. Ct. 365, 370 (2019), any time Congress singles out a cause of action for prevailing-plaintiff fees, courts would have to subject that statute to strict scrutiny. Plaintiffs identify no case holding a fee-shifting statute to that standard.

If, without violating the First Amendment, Congress can pass laws that award attorneys' fees to prevailing plaintiffs who bring certain claims, then the Texas Legislature can pass laws that award attorneys' fees to prevailing defendants who defend against certain claims. Plaintiffs want to engage in consequence-free litigation—if they win, they get fees; if they lose, they pay nothing. The First Amendment does not give them that right. Plaintiffs are not likely to succeed on their claim that Section 4 violates their First Amendment rights.

2. Plaintiffs' preemption claim is not viable.

For the reasons stated above, *see supra* section I.B.2, Plaintiffs' claim for "preemption" regarding Section 4 does not state a viable cause of action. *See Armstrong*, 575 U.S. at 324.

Regardless, at most, all Section 4 does is allow the State Agency Defendants to request attorneys' fees. Whether they would receive them is an entirely different question that cannot be answered here but would be litigated in the specific circumstances in whatever court the request was made, which, according to Plaintiffs' evidence, would likely be the federal district judges in the Western District of Texas. *See, e.g.*, MSJ Ex. A ¶ 37 Ex. C ¶ 32, Ex. M ¶ 24, Ex. O ¶ 16. But Plaintiffs have identified no constitutional violation or preemption problem merely in requesting fees that would permit a facial injunction. There is, therefore, no unlawful conduct to enjoin.

II. Plaintiffs Have Not Shown Irreparable Injury.

Plaintiffs' declarations describe their fears of what *could* happen, but they do not contain evidence of what is *likely* to happen. Consequently, they have not shown a substantial threat of irreparable injury. *Ridgely*, 512 F.3d at 734. As the Supreme Court has explained, "[i]ssuing a preliminary injunction based only on a *possibility* of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Nat. Res. Def. Council*, Inc., 555 U.S. 7, 22 (2008) (emphasis added).

As explained above, a state judge does not "enforce" a civil statute by simply adjudicating lawsuits brought pursuant to it. *See supra* section I.A.3. But even if mere adjudicating were enforcing, Plaintiffs still cannot show a likelihood of any irreparable injury by Judge Jackson (or any other Texas judge). To do so, they would have to show how a particular judge would rule on a hypothetical case under S.B. 8

that may (or may not) one day be brought in his court. This is not possible for Plaintiffs or anyone else to prove. Not even a judge can predict how he would rule in a hypothetical case yet to be filed or litigated before him. Because Plaintiffs cannot show that Judge Jackson or any other Texas judge would find them liable under S.B. 8 based on mere hypothetical suppositions, they cannot show any irreparable injury with respect to Judge Jackson or the proposed class of Texas judges.

Regarding the State Agency Defendants, Plaintiffs fear they might indirectly enforce the heartbeat provision of Section 3 against Plaintiffs through other administrative measures. MSJ at 20-21. Plaintiffs have not proven that (1) the State Agency Defendants intend to indirectly enforce Section 3, and (2) Plaintiffs would suffer irreparable harm if they sought to do so. There is no evidence of what any administrative enforcement would look like, how much it would cost, how many actions would be brought, or how it would impact Plaintiffs' ability to operate. Without any evidence of what an indirect administrative enforcement of Section 3 would entail, there is no evidence on which the Court could base a finding of irreparable injury.

Plaintiffs also fear that the State Agency Defendants might seek attorneys' fees from them under Section 4. Such fear does not show irreparable injury. Responding to a motion for attorneys' fees is not an irreparable injury, and Plaintiffs point to no precedent so holding. Plaintiffs have not shown that the State Agency Defendants will cause them any injury regarding Section 4, much less an irreparable one.

III. The Remaining Elements Do Not Favor Injunctive Relief.

Finally, Plaintiffs have not shown that the threatened injury outweighs any harm that will result to the State Defendants if the injunction is granted or that the injunction will not disserve the public interest. *Ridgely*, 512 F.3d at 734. Plaintiffs' theory is simply that, because they have alleged the potential violation of a constitutional right, these elements are necessarily met. But as has been repeatedly

explained above, Plaintiffs have not provided evidence that any constitutional right will be denied to them or their patients. The mere allegation is insufficient.

Moreover, as also explained above, questions of federalism counsel leaving this matter to the Texas state courts in which any claims would arise. Abstaining from deciding uncertain question of state law "will avoid both unnecessary adjudication of federal questions and needless friction with state policies." *Nationwide Mut. Ins. Co. v. Unauthorized Practice of Law Comm., of State Bar of Tex.*, 283 F.3d 650, 653 (5th Cir. 2002) (internal quotation marks omitted). And instructing state officials how to conform their conduct to state law "conflicts directly with the principles of federalism that underlie the Eleventh Amendment." *Pennhurst*, 465 U.S. at 106.

CONCLUSION

The Court should deny Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that on August 16, 2021, a true and correct copy of this document was electronically filed using the Court's CM/ECF system, which will send notification of such filing to the following counsel of record:

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