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

ALLISON VAN STEAN, et al	*	IN THE DISTRICT COURT
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	*	
VS.	*	98th JUDICIAL DISTRICT
	*	
	*	
TEXAS RIGHT TO LIFE, et al	*	TRAVIS COUNTY, TEXAS

ORDER DECLARING CERTAIN CIVIL PROCEDURES UNCONSTITUTIONAL and ISSUING DECLARATORY JUDGMENT[1]

[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.

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.
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> 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

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[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
>
> (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