DETERRING PRE-VIABILITY ABORTIONS IN TEXAS THROUGH PRIVATE LAWSUITS

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INTRODUCTION

Several Texas municipalities have enacted "Sanctuary City for the Unborn" ordinances, and the Texas legislature passed the Heartbeat Act[1] that proscribe pre-viability abortions, but without government enforcement of the prohibitions. Instead, the laws depend upon private citizens to sue abortion providers and others for injunctive relief, statutory damages, and tort-based compensatory and punitive damages for performing or aiding and abetting abortions in violation of the laws.[2] Although the ordinances and statute are clearly unconstitutional, the laws expose abortion providers to both legal and

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1. Tex. Heartbeat Act, 87th Leg., R.S., ch. 62, § 3, secs. 171.201–.212, 2021 Tex. Gen. Laws 1, 1–14 (current version at TEX. HEALTH & SAFETY CODE ANN. §§ 171.201–.212). The statute took effect on September 1, 2021. *Id.* § 12.

2. *See generally* Sabrina Tavernise, *Citizens, Not the State, Will Enforce New Abortion Law in Texas*, N.Y. TIMES (July 9, 2021), https://www.nytimes.com/2021/07/09/us/abortion-law-regulations-texas.html. *See* Maya Manian, *Privatizing Bans on Abortion: Eviscerating Constitutional Rights Through Tort Remedies*, 80 TEMP. L. REV. 123, 129 (2007) ("By enacting self-enforcing tort statutes, state legislators are attempting to prevent judicial review of laws that operate as a prohibition on constitutionally protected conduct.").

financial risks that might deter them from offering abortions.[3] And while abortion providers should ultimately be successful in defending these private actions, they will have to do so in state courts and, in the case of the Texas statute, in possibly remote locations. Importantly, based upon the en banc decision of the United States Court of Appeals for the Fifth Circuit in *Okpalobi v. Foster*,[4] and its subsequent panel decision in *K.P. v. LeBlanc*,[5] providers do not have standing in the federal courts to lodge preemptive facial challenges to the laws. Indeed, on June 1, 2021, the United States District Court for the Northern District of Texas dismissed a challenge to the Lubbock Sanctuary City for the Unborn Ordinance in part because of lack of standing.[6]

This Article examines both the Texas statute and the various local sanctuary city ordinances, focusing on the ordinance passed by popular initiative in Lubbock[7]—the only municipality to date having such an ordinance in which Planned Parenthood offers abortions. Part I describes the local sanctuary city ordinances. Part II examines Texas's recently passed Heartbeat Act. Part III addresses the nearly absolute constitutional protection for pre-viability abortions, which—except for legitimate measures to ensure informed consent and foster the health of women—are supposed to be free from government regulation. Part IV discusses the ordinances and statute's private enforcement mechanisms and how they will prove problematic for those who perform or assist constitutionally protected pre-viability abortions. Part IV also considers the laws in light of the Supreme Court's decision to review the constitutionality of Mississippi's prohibition against pre-viability abortions in *Jackson Women's Health Organization v. Dobbs*.[8]

PART I: "SANCTUARY CITY FOR THE UNBORN" ORDINANCES

Spurred by Right to Life activists, in June 2019, the city of Waskom in far-east Texas became the first to adopt an ordinance declaring the town to

3. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 879 (1992)*; see also* Gonzales v. Carhart, 550 U.S. 124, 146 (2007); Jackson Women's Health Org. v. Dobbs, 945 F.3d 265, 273 (5th Cir. 2019), *cert. granted in part*, 141 S. Ct. 2619 (2021).

4. Okpalobi v. Foster, 244 F.3d 405, 426–28 (5th Cir. 2001) (en banc).

5. K.P. v. LeBlanc, 729 F.3d 427, 437 (5th Cir. 2013).

6. Planned Parenthood of Greater Tex. Surgical Health Servs. v. City of Lubbock, No. 21-CV-114, 2021 WL 2385110, at *1, 10 (N.D. Tex. June 1, 2021). On July 13, 2021, abortion providers filed suit in the U.S. District Court for the Western District of Texas against, *inter alia*, Texas district judges, Texas district court clerks, and others, seeking to enjoin and declare unconstitutional the Texas Heartbeat Act. Complaint for Declaratory & Injunctive Relief—Class Action at 1–2, Whole Woman's Health v. Jackson, No. 21-cv-00616 (W.D. Tex., July 13, 2021) [hereinafter Complaint, Whole Woman's Health v. Jackson]; *see infra* text accompanying notes 78–89 (discussing complaint).

7. Lubbock, Tex., Ordinance Outlawing Abortion Within the City of Lubbock, Declaring Lubbock a Sanctuary City for the Unborn (May 11, 2021) [hereinafter Lubbock Ordinance Outlawing Abortion].

8. *Dobbs*, 945 F.3d at 268–69. The Court granted certiorari on the following question: "Whether all pre-viability prohibitions on elective abortions are unconstitutional." *See* Petition for Writ of Certiorari at (i), Dobbs v. Jackson Women's Health Org., No. 19-1392 (June 15, 2020).

be a sanctuary city for the unborn.[9] Thereafter, similar sanctuary city ordinances spread first in small east Texas towns and later to larger towns and cities throughout Texas.[10] In May 2021, Lubbock became the largest Texas city to adopt the ordinances and the first city in which a Planned Parenthood Center operated.[11]

The Lubbock City Council received the proposed ordinance in September 2020[12] and unanimously rejected the ordinance on November 17, 2020.[13] Thereafter, enough Lubbock citizens signed for a referendum on the ordinance[14] and, on May 1, 2021, nearly two-thirds of voters approved the initiative.[15] On May 11, 2021, the Lubbock City Council approved the

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9. Robyn Y. Richardson, *Waskom Becomes First 'Sanctuary City for the Unborn'*, MARSHALL NEWS MESSENGER (July 17, 2020), https://www.marshallnewsmessenger.com/news/local/waskom-becomes-first-sanctuary-city-for-the-unborn/article_6f3a821a-8d64-11e9-af16-d3b45e7a7667.html; *Sanctuary Cities*, SANCTUARY CITIES FOR THE UNBORN, https://sanctuarycitiesfortheunborn.com/ (last visited Oct. 5, 2021).

10. *See* Emily Wax-Thibodeaux, *Anti-Abortion Law Spreads in East Texas as "Sanctuary City for the Unborn" Movement Expands*, TEX. TRIB. (Oct. 1, 2019), https://www.texastribune.org/2019/10/01/antiabortion-law-spreads-east-texas/; Edgar Walters, *Three Texas Towns Vote in Favor of "Sanctuary Cities for the Unborn," Hoping to Ban Abortion*, TEX. TRIB. (Jan. 15, 2020), https://www.texastribune.org/2020/01/15/three-more-texans-towns-try-ban-abortion/; Harmeet Kaur, *Small Towns in Texas Are Declaring Themselves 'Sanctuary Cities for the Unborn,'* CNN (Jan. 25, 2020, 9:53 AM), https://www.cnn.com/2020/01/25/us/sanctuary-cities-for-unborn-anti-abortion-texas-trnd/index.html; *see also* SANCTUARY CITIES FOR THE UNBORN, *supra* note 9 (listing twenty-nine Texas towns and cities, as well as two towns in Nebraska and one in Ohio that have adopted an ordinance, and thirty-eight Texas towns and cities and one Florida city (Naples) that might adopt an ordinance).

11. Shannon Najmabadi, *Lubbock Voters Will Decide Saturday if the City Will Become a "Sanctuary City for the Unborn"*, MIDLAND REP. TELEGRAM (Apr. 28, 2021), https://www.mrt.com/news/article/Lubbock-voters-will-decide-Saturday-if-the-West-16136850.php. The recently enacted Texas Heartbeat Act explicitly does not "restrict political subdivision from regulating or prohibiting abortion in a manner that is *at least as stringent* as the laws of this state." Tex. Heartbeat Act, 87th Leg., R.S., ch. 62, § 3, sec. 171.206, 2021 Tex. Gen. Laws 1, 5 (current version at TEX. HEALTH & SAFETY CODE ANN. § 171.206(b)(3)) (emphasis added).

12. Camelia Juarez, *'Sanctuary for the Unborn' Ordinance Proposed to City Council*, KCBD (Sept. 9, 2020, 6:42 PM), https://www.kcbd.com/2020/09/09/sanctuary-unborn-ordinance-proposed-city-council/.

13. *City Council Rejects Proposed Ordinance Making Lubbock a 'Sanctuary City for the Unborn,'* KAMC (Nov. 18, 2020, 12:03 AM), https://www.everythinglubbock.com/news/local-news/city-council-rejects-proposed-ordinance-declaring-lubbock-a-sanctuary-city-for-the-unborn/.

14. Michael Marks & Caroline Covington, *Lubbock Moves Ahead with Referendum On Sanctuary City For The Unborn*, KUT (Dec. 16, 2020, 5:09 PM), https://www.kut.org/health/2020-12-16/lubbock-moves-ahead-with-referendum-on-sanctuary-city-for-the-unborn; Matt Dotray, *Lubbock Will Soon Be at the Center of the Abortion Debate — Here's What to Expect*, LUBBOCK AVALANCHE-J. (Mar. 15, 2021), https://www.lubbockonline.com/story/news/2021/03/13/lubbock-soon-center-abortion-debate-heres-what-expect/6949196002/.

15. Matt Dotray, *Lubbock Voters Say Yes to Sanctuary City for the Unborn Ordinance to Limit Abortion*, LUBBOCK AVALANCHE-J. (May 1, 2021), https://www.lubbockonline.com/story/news/2021/05/01/lubbock-voters-approve-anti-abortion-ordinance-municipal-election/4908890001/; Shannon Najmabadi, *Lubbock Votes to Become the State's Largest "Sanctuary City for the Unborn,"* THE EAGLE, (May 1, 2021), https://theeagle.com/news/state-and-regional/lubbock-votes-to-become-the-state-s-largest-sanctuary-city-for-the-unborn/article_d40c6a47-af9a-5d0b-b5af-948628c81161.html.

election results.[16]

Typical of similar ordinances enacted by smaller towns and cities, the Lubbock ordinance has two parts. First, the ordinance declares Lubbock a Sanctuary City for the Unborn and states that "[a]bortion at all times and at all stages of pregnancy is . . . an act of murder."[17] The ordinance deems unlawful the procurement or performance of "an abortion of any type and at any stage of pregnancy in the City of Lubbock."[18] It also states that it is unlawful to knowingly aid or abet an abortion in the city, including the following acts:

> (a) Knowingly providing transportation to or from an abortion provider;
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> (b) Giving instructions over the telephone, the internet, or any other medium of communication regarding self-administered abortion;
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> (c) Providing money with the knowledge that it will be used to pay for an abortion or the costs associated with procuring an abortion;
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> (d) Coercing a pregnant mother to have an abortion against her will.[19]

The ordinance affords an affirmative defense to the proscribed acts if "the abortion [is] in response to a life-threatening physical condition aggravated by, caused by, or arising from a pregnancy that, as certified by a physician, places the woman in danger of death or a serious risk of substantial impairment of a major bodily function unless an abortion is performed."[20] "[A] person, corporation, or entity who [violates the ordinance is] subject to the maximum penalty permitted under Texas law for the violation of a municipal ordinance governing public health, and each violation . . . constitute[s] a separate offense."[21]

The ordinance's second part deals with its enforcement. The ordinance expressly forbids enforcement by state or local public officials unless:[22]

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16. Matt Dotray, *Council Approves Election Results, Lubbock to Become Sanctuary City for the Unborn*, LUBBOCK AVALANCHE-J. (May 11, 2021), https://www.lubbockonline.com/story/news/2021/05/11/council-approves-election-results-lubbock-become-sanctuary-city-unborn/5047202001/.

17. Lubbock Ordinance Outlawing Abortion, *supra* note 7, § C. The ordinance includes a findings section that asserts that the State of Texas never repealed its laws criminalizing abortion unless the mother's life is in danger. *Id.* § A.(1), (3). It states that the Supreme Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973), merely limited "the ability of State officials to impose penalties on those who violate the Texas abortion statutes, but . . . do[es] not veto or erase the statutes themselves, which continue to exist as the law of Texas until they are repealed by the legislature that enacted them." *Id.* § A.(5).

18. *Id.* § D.(1).

19. *Id.* § D.(2).

20. *Id.* § D.(3).

21. *Id.* § E.(1).

22. *Id.* § E.(2).

(1) The Supreme Court overrules *Roe v. Wade*[23] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*;[24] or (2) a state or federal court declares that the imposition of the ordinance's penalty does not constitute an "undue burden" on women seeking an abortion;[25] or (3) a state or federal court declares or otherwise rules that the person, corporation, or entity performing the abortion does not have "third-party standing to assert the rights of women seeking abortions in court."[26]

The ordinance relies upon private enforcement. First, the ordinance creates tort cause of action for the "unborn child's mother, father, grandparents, siblings and half-siblings."[27] The person or entity that committed an unlawful act (*i.e.*, an abortion) is liable to "each surviving relative of the aborted unborn child for: (a) [c]ompensatory damages, including damages for emotional distress; (b) [p]unitive damages; and (c) [c]osts and attorneys' fees."[28] The ordinance provides that "[t]here is no statute of limitations for this private right of action" and that mistake of law or "[t]he consent of the unborn child's mother to the abortion [is] not a defense to liability, even if the unborn child's mother sues under this provision."[29]

Second, the ordinance permits any private citizen of Texas, other than a government official,[30] to seek to enjoin a defendant from committing or planning to commit an unlawful act (i.e., an abortion).[31] In addition to costs and attorneys' fees,[32] the ordinance also requires the award of statutory damages of not less than $2,000 for each violation, but "not more than the maximum penalty permitted under Texas law for the violation of a municipal ordinance governing public health."[33] The ordinance does not permit citizen suits against the "mother of the unborn child that has been or will be aborted."[34] Like the tort remedy, "[t]here is no statute of limitations for this private right of action[,]" and mistake of law or "[t]he consent of the unborn child's mother to the abortion [is] not a defense to liability, even if the unborn

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23. *See generally* Roe v. Wade, 410 U.S. 113 (1973).

24. S*ee* Lubbock Ordinance Outlawing Abortion, *supra* note 7, § E.(2)(a)*; see generally* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

25. Lubbock Ordinance Outlawing Abortion, *supra* note 7, § E.(2)(b) (describing conditional limitations of enforcement).

26. *Id.* § E(2)(c). The mother of the unborn child is not subject to penalty. *Id.* § E.(3).

27. *Id.* § F(1).

28. *Id.* Other than a qualified parental notification requirement for minors, the Court held in *Casey* that the designated plaintiffs would not ordinarily have standing to challenge a woman's decision to have an abortion. *Casey*, 505 U.S. at 893-95. Even a husband's consent is not required. *Id.* at 895*; see also* R.I. Med. Soc'y v. Whitehouse, 66 F. Supp. 2d 288, 315–16 (D.R.I. 1999) (holding unconstitutional a statute that gave the father and the maternal grandparents a civil remedy for partial-birth abortions).

29. Lubbock Ordinance Outlawing Abortion, *supra* note 7, § F.(1).

30. *Id.* § F.(3).

31. *Id.* § F.(2)(a).

32. *Id.* § F.(2)(c).

33. *Id.* § F.(2)(b).

34. *Id.* § F.(2).

child's mother sues under this provision."[35]

The ordinance permits defendants to assert *Roe v. Wade*,[36] or *Planned Parenthood v. Casey*,[37] "or any other abortion-related pronouncement of the Supreme Court as a defense to liability if that individual or entity has third-party standing to assert the rights of women seeking abortions in court, and if the imposition of liability in that particular lawsuit would impose an 'undue burden' on women seeking abortions."[38]

On May 17, 2021, Planned Parenthood sued the City of Lubbock seeking to enjoin the ordinance and to declare it unconstitutional.[39] On June 1, 2021, the effective date of the ordinance, Planned Parenthood in Lubbock stopped providing abortions except for medical emergencies.[40] On the same day, the U.S. District Court for the Northern District of Texas dismissed the plaintiff's lawsuit for lack of jurisdiction.[41]

PART II: TEXAS HEARTBEAT ACT

The Texas Senate passed the Heartbeat Act on March 29, 2021;[42] the house followed on May 5, 2021;[43] and the governor signed the Act into law on May 19, 2021.[44] The Act took effect on September 1, 2021.[45]

The Texas Heartbeat Act is like the sanctuary city for the unborn ordinances on steroids. The Act is more liberal than the sanctuary city ordinances in the sense that it does not forbid abortions from conception, but it prohibits them when a physician detects a fetal heartbeat, typically in the

35. *Id.* § F.(1).

36. *See generally* Roe v. Wade, 410 U.S. 113 (1973).

37. *See generally* Planned Parenthood of Se. Pa. v. Casey 505 U.S. 833 (1992).

38. Lubbock Ordinance Outlawing Abortion, *supra* note 7, § F.(4).

39. Planned Parenthood of Greater Tex. Surgical Health Servs. v. City of Lubbock, No. 21-CV-114, 2021 WL 2385110, at *1 (N.D. Tex. June 1, 2021).

40. *Planned Parenthood Stops Abortions in Lubbock, Except When Legally Permissible*, KCBD (June 1, 2021, 2:44 PM), https://www.kcbd.com/2021/06/01/planned-parenthood-stops-abortions-in-lubbock-except-when-legally-permissible/.

41. *Planned Parenthood of Greater Tex.*, 2021 WL 2385110, at *24. *See infra* text accompanying notes 138–151 (discussing the decision).

42. Madlin Mekelburg, *Texas Senate Approves Legislation Banning Most Abortions, Testing* Roe v. Wade, AUSTIN AM.-STATESMAN (Mar. 30, 2021, 3:56 PM), https://www.statesman.com/story/news/politics/state/2021/03/30/texas-senate-anti-abortion-ban-heartbeat-outlaw-prohibit/7053955002/; Alex Briseño, *Senate Passes Several Bills Restricting Access to Abortions*, DALL. MORNING NEWS (Mar. 29, 2021, 7:03 PM), https://www.dallasnews.com/news/politics/2021/03/30/heartbeat-legislation-several-abortion-bills-receive-senates-preliminary-approval/.

43. Mary Tuma, *House Passes Near Total Abortion Ban*, AUSTIN CHRON. (May 5, 2021, 6:52 PM) https://www.austinchronicle.com/daily/news/2021-05-05/texas-house-passes-near-total-abortion-ban/.

44. Shannon Najmabadi, *Gov. Greg Abbott Signs into Law One of Nation's Strictest Abortion Measures, Banning Procedure as Early as Six Weeks into a Pregnancy*, TEX. TRIB. (May 20, 2021, 11:00 AM), https://www.texastribune.org/2021/05/18/texas-heartbeat-bill-abortions-law/.

45. Tex. Heartbeat Act, 87th Leg., R.S., ch. 62, § 12, secs. 171.201–.212, 2021 Tex. Gen. Laws 1, 24 (current version at TEX. HEALTH & SAFETY CODE ANN. §§ 171.201–.212).

fifth or sixth week of pregnancy.[46] Nevertheless, the date a fetal heartbeat is detectable is far earlier than the date of fetal viability, which is usually twenty-two to twenty-four weeks after gestation.[47] Fetal viability in this context means the fetus or unborn child has "reached such a stage of development as to be capable of living, under normal conditions, outside the uterus."[48] Consequently, as noted above and discussed in Part III below, the Act is facially unconstitutional.[49]

The Act prohibits physicians from knowingly performing or inducing an abortion "if the physician detect[s] a fetal heartbeat for the unborn child[.]"[50] The Act excepts abortion "if [the] physician believes a medical emergency exists that prevents compliance with [the Act]."[51] The Act's requirements may only be enforced through private civil actions.[52]

The Act creates a civil cause of action for "[a]ny person[] other than an officer or employee of a state or local governmental entity."[53] Such persons may bring a civil action against any person who:

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46. *Id.* § 3 (current version at TEX. HEALTH & SAFETY CODE ANN. § 171.204). Gestational age is generally measured from the date of the last normal menstrual period; fetal age is calculated from the date of conception, which occurs about two weeks later. *Pregnancy Lingo*: *What Does Gestation Mean?*, HEALTHLINE PARENTHOOD, https://www.healthline.com/health/pregnancy/what-is-gestation (last visited Oct. 5, 2021)*; see also* Ahsan H. Khandoker et al., *Estimating Fetal Age by Fetal Maternal Heart Rate Coupling Parameters*, 2020 ANN. CONF. IEEE ENG'G MED. BIOLOGY SOC'Y 604, 604, https://ieeexplore.ieee.org/stamp/stamp.jsp?arnumber=9176049&casa_token=9GVLUk5g86QAAAAA:U29mCg4_3bfOMceengsM7bGID_1V3i2gJ2O5kGWYcmmb8i_BEdzEN5gXZVegXfOfeSJPpEew&tag=1.

47. *When Is It Safe to Deliver Your Baby?*, HEALTH UNIV. OF UTAH, https://healthcare.utah.edu/womenshealth/pregnancy-birth/preterm-birth/when-is-it-safe-to-deliver.php (last visited Oct. 5, 2021); Amos Grunebaum, *What Is a Viable Pregnancy and a Nonviable Pregnancy?*, BABYMED (Jan. 15, 2021) https://www.babymed.com/what-is-a-viable-nonviable-periviability-viability-pregnancy#.

48. G.H. Breborowicz, *Limits of Fetal Viability and Its Enhancement*, EARLY PREG. 49–50, https://pubmed.ncbi.nlm.nih.gov/11753511/; David F. Forte, *Life, Heartbeat, Birth*: *A Medical Basis for Reform*, 74 OHIO ST. L.J. 121, 135–37 (2013).

49. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 879 (1992)*; see also* Gonzales v. Carhart, 550 U.S. 124, 146 (2007); Jackson Women's Health Org. v. Dobbs, 945 F.3d 265, 273 (5th Cir. 2019), *cert. granted in part*, 141 S. Ct. 2619 (2021).

50. Tex. Heartbeat Act, 87th Leg., R.S., ch. 62, § 3, sec. 171.204(a), 2021 Tex. Gen. Laws 1, 4 (current version at TEX. HEALTH & SAFETY CODE ANN. § 171.204(a)). "'Fetal heartbeat' means cardiac activity or the steady and repetitive rhythmic contraction of the fetal heart within the gestational sac." *Id.* (current version at TEX. HEALTH & SAFETY CODE ANN. § 171.201(1)). The Act requires physicians to determine the presence of a fetal heartbeat as "'standard medical practice.'" *Id.* (current version at TEX. HEALTH & SAFETY CODE ANN. § 171.203). "'Standard medical practice' means the degree of skill, care, and diligence that an obstetrician of ordinary judgment, learning, and skill would employ in like circumstances." *Id.* (current version at TEX. HEALTH & SAFETY CODE ANN. § 171.201(6)).

51. Tex. Heartbeat Act, 87th Leg., R.S., ch. 62, § 3, sec. 171.201, 2021 Tex. Gen. Laws 1, 1–14 (current version at TEX. HEALTH & SAFETY CODE ANN. § 171.205(a)).

52. *Id.* (current version at TEX. HEALTH & SAFETY CODE ANN. § 171.207(a)).

53. *Id.* (current version at TEX. HEALTH & SAFETY CODE ANN. § 171.208(a)). The Act forbids civil actions by "persons who impregnated the abortion patient through the act of rape, sexual assault, incest, or any other [prohibited] act." *Id.* (current version at TEX. HEALTH & SAFETY CODE ANN. § 171.208(j)).

> (1) [P]erforms or induces an abortion in violation of [the Act];
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> (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 [the Act], regardless of whether the person knew or should have known that the abortion would be performed or induced in violation of [the Act]; or
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> (3) intends to engage in the conduct described by Subdivision (1) or (2).[54]

If the claimant prevails in the civil action, the court must award:

> (1) [I]njunctive relief sufficient to prevent the defendant from violating [the Act] or engaging in acts that aid or abet violations of [the Act];
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> (2) statutory damages in an amount of not less than $10,000 for each abortion that the defendant performed or induced in violation of [the Act], and for each abortion performed or induced in violation of [the Act] that the defendant aided or abetted; and
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> (3) costs and attorney's fees.[55]

Persons must bring civil actions "not later than the fourth anniversary of the date the cause of action accrues."[56] Importantly, the Act disallows defenses based upon a "defendant's reliance on any court decision that has been overruled on appeal or by a subsequent court, *even if that court decision had not been overruled when the defendant engaged in [prohibited] conduct*."[57] And a defendant may neither rely upon the consent of the "unborn child's mother to the abortion[,]"[58] nor upon "any state or federal court decision that

54. *Id.* (current version at TEX. HEALTH & SAFETY CODE ANN. § 171.208(j)).

55. *Id*. (current version at TEX. HEALTH & SAFETY CODE ANN. § 171.208(b)). A defendant may not recover costs and attorney's fees. *Id*. (current version at TEX. HEALTH & SAFETY CODE ANN. § 171.208(i)).

56. *Id*. (current version at TEX. HEALTH & SAFETY CODE ANN. § 171.208(d)).

57. *Id*. (current version at TEX. HEALTH & SAFETY CODE ANN. § 171.208(e)(3)) (emphasis added). Although the provision is in the nature of an *ex post facto* law, the Supreme Court has interpreted the *Ex Post Facto* Clauses of the Constitution, U.S. CONST. art. I, § 9, cl. 3 (Congress), § 10, cl. 1 (states), to apply only to criminal statutes. Calder v. Bull, 3 U.S. 386, 390 (1798); Collins v. Youngblood, 497 U.S. 37, 41–42 (1990); Bevis v. City of New Orleans, 686 F.3d 277, 280 (5th Cir. 2012). The Texas Constitution also proscribes *ex post facto* laws. TEX. CONST. art. I, § 16. Texas courts also generally distinguish between criminal and civil legislation. Rodriguez v. State, 93 S.W.3d 60, 66–68 (Tex. Crim. App. 2002) (considering whether the legislature intended the law to be punitive).

58. Tex. Heartbeat Act § 3 (current version at TEX. HEALTH & SAFETY CODE ANN. § 171.208(e)(6)).

is not binding on the court in which the action has been brought."[59] The Act does include a form of civil "double jeopardy" that bars relief if a defendant demonstrates they previously paid the full amount of statutory damages in a previous action for that particular abortion or for the particular conduct that aided or abetted the abortion.[60]

The Act denies a defendant in a civil action standing to assert as a defense the right of women seeking abortion, unless:

> (1) [T]he Supreme Court of the United States holds that the courts of this state must confer standing on that defendant to assert the third-party rights of women seeking an abortion in state court as a matter of federal constitutional law; or
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> (2) the defendant has standing to assert the rights of women seeking an abortion under the tests for third-party standing established by the [Supreme Court of the United States].[61]

Assuming the existence of third-party standing, a defendant may assert, as an affirmative defense to liability, that the relief sought will impose an undue burden on that woman or group of women seeking an abortion.[62] A court may not find an undue burden, however,

> unless the defendant introduces evidence proving that: (1) An award of relief will prevent a woman or a group of women from obtaining an abortion; or (2) an award of relief will place a substantial obstacle in the path of a woman or a group of women who are seeking an abortion."[63]

And a defendant may not establish an undue burden by:

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

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59. *Id.* (current version at TEX. HEALTH & SAFETY CODE ANN. § 171.208(e)(4)).

60. *Id.* (current version at TEX. HEALTH & SAFETY CODE ANN. § 171.208(c)). The Double Jeopardy Clauses of the Constitution, U.S. CONST. art. I, § 9, cl. 3 (Congress), § 10, cl. 1 (states), generally apply only to criminal punishments. Hudson v. United States, 522 U.S. 93, 98–99 (1997); Breed v. Jones, 421 U.S. 519, 528 (1975); Bickham Lincoln-Mercury, Inc. v. United States, 168 F.3d 790, 795 (5th Cir. 1999). *See also* TEX. CONST. art. 1, § 14; State v. Akin, 484 S.W.3d 257, 266–67 (Tex. App.—Corpus Christi – Edinburg 2016).

61. Tex. Heartbeat Act § 3 (current version at TEX. HEALTH & SAFETY CODE ANN. § 171.209(a)).

62. *Id.* (current version at TEX. HEALTH & SAFETY CODE ANN. § 171.209(b)).

63. *Id.* (current version at TEX. HEALTH & SAFETY CODE ANN. § 171.209(c)).

> (2) arguing or attempting to demonstrate that an award of relief against other defendants or other potential defendants will impose an undue burden on women seeking an abortion.[64]

Importantly, if the Supreme Court overrules *Roe v. Wade*[65] or *Planned Parenthood v. Casey*,[66] the defendant may not assert the undue-burden defense "regardless of whether the conduct on which the cause of action is based . . . occurred before the Supreme Court overruled either of those decisions."[67]

The Act's venue provision is quite broad, permitting a civil action to be brought in:

> (1) [T]he county in which all or a substantial part of the events or omissions giving rise to the claim occurred;
>
> (2) the county of residence for any one of the natural person defendants at the time the cause of action occurred;
>
> (3) the county of the principal office in this state of any one of the defendants that is not a natural person; or
>
> (4) the county of residence for the claimant if the claimant is a natural person residing in this state.[68]

Provided the civil action is brought in any one of the venues, the Act does not permit transfer to a different venue "without the written consent of all parties."[69]

While the Act permits plaintiffs to recover costs and attorney's fees,[70] it does not permit defendants in a private action to recover their costs and attorney's fees.[71] Moreover, the Act contains what has been described as a "one-way fee-shifting penalty[,]" under which "civil-rights plaintiffs who challenge [the Act] can be held liable for their opponents' attorney's fees and costs *unless* they sweep the table by prevailing on every single claim they

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64. *Id.* (current version at TEX. HEALTH & SAFETY CODE ANN. § 171.209(d)).

65. *See generally* Roe v. Wade, 410 U.S. 113 (1973).

66. *See generally* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

67. Tex. Heartbeat Act § 3 (current version at TEX. HEALTH & SAFETY CODE ANN. § 171.209(e)) (emphasis added). *See infra* Part IV.D (discussing the question of third-party standing).

68. Tex. Heartbeat Act § 3 (current version at TEX. HEALTH & SAFETY CODE ANN. § 171.210(a)).

69. *Id.* (current version at TEX. HEALTH & SAFETY CODE ANN. § 171.210(b)).

70. *Id.* (current version at TEX. HEALTH & SAFETY CODE ANN. § 171.208(b)(3)). A defendant may not recover costs and attorney's fees. *Id.* (current version at TEX. HEALTH & SAFETY CODE ANN. § 171.208(i))

71. *Id.* (current version at TEX. HEALTH & SAFETY CODE ANN. § 171.208(i)).

bring."[72] In other words,

> [n]otwithstanding any other law, any person, including an entity, attorney, or law firm, who seeks declaratory or injunctive relief to prevent this state, a political subdivision, any governmental entity or public official in this state, or any person in this state from enforcing any statute, ordinance, rule, regulation, or any other type of law that regulates or restricts abortion or that limits taxpayer funding for individuals or entities that perform or promote abortions, in any state or federal court, or that represents any litigant seeking such relief in any state or federal court, is jointly and severally liable to pay the costs and attorney's fees of the prevailing party.[73]

The statute considers a defendant to be a prevailing party if a federal or state court: "(1) [D]ismisses any claim or cause of action brought against the party that seeks the declaratory or injunctive relief . . . regardless of the reason for the dismissal; or (2) enters judgment in the party's favor on any such claim or cause of action."[74] Thus, plaintiffs challenging the Act—including the attorneys and law firms who represent them—can be held jointly and severally liable for attorney's fees even if they successfully challenge the Act on some grounds (*e.g.*, due process), but the court dismisses claims pleaded in the alternative (*e.g.*, equal protection).[75] Moreover, the Act permits the award of costs and fees even if:

> (1) [A] prevailing party . . . failed to seek [the] recovery of costs [and fees] in the underlying action; [or] (2) the court in the underlying action declined to recognize or enforce the [costs and attorney's fees statute]; or (3) the court in the underlying action held that any provisions of [the] section are invalid, unconstitutional, or preempted by federal law, notwithstanding the doctrines of issue or claim preclusion.[76]

Finally, the Act expressly preserves state sovereign immunity as applied to both legal and equitable claims.[77]

On July 13, 2021, several abortion rights advocates and providers filed a federal lawsuit challenging the Texas Heartbeat Act under 42 U.S.C.

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72. Complaint, Whole Woman's Health v. Jackson, *supra* note 6, ¶ 11; Tex. Heartbeat Act § 4 (current version at TEX. CIV. PRAC. & REM. CODE ANN. § 30.022) (emphasis added).

73. Tex. Heartbeat Act § 4 (current version at TEX. CIV. PRAC. & REM. CODE ANN. § 30.022(a)).

74. *Id.* (current version at TEX. CIV. PRAC. & REM. CODE ANN. § 30.022(b)).

75. Complaint, Whole Woman's Health v. Jackson, *supra* note 6, ¶¶ 11–12. "Prevailing parties" may bring an action for costs and attorney's fees even if they did not seek such relief in the original lawsuit. The Act imposes a three-year statute of limitations. *Id.* § 4 (current version at TEX. CIV. PRAC. & REM. CODE ANN. § 30.022(c)).

76. Tex. Heartbeat Act § 4 (current version at TEX. CIV. PRAC. & REM. CODE ANN. § 30.022(d)).

77. *Id.* § 3 (current version at TEX. HEALTH & SAFETY CODE ANN. § 171.211).

§ 1983.[78] The plaintiffs claim, among other things, that the Texas Heartbeat Act would "force abortion providers and others who are sued to spend massive amounts of time and money to defend themselves in lawsuits across the state in which the deck is heavily stacked against them."[79] Moreover, even if the plaintiffs prevail in these lawsuits, the Act will "have accomplished [its] goal of harassment."[80]

The complaint names as defendants Texas district judge Austin Reeve as a representative of a putative class of all Texas judges with jurisdiction over civil actions under the Act,[81] and Smith County district court clerk Penny Clarkson, as a representative of a putative class of all Texas court clerks in courts having jurisdiction over civil actions under the Act.[82] Additionally, the plaintiffs name as defendants Texas officials responsible for licensing and regulation of abortion facilities, doctors, nurses, and pharmacists, as well as the Texas Attorney General (Government Official Defendants), who can bring disciplinary, administrative, and civil proceedings against plaintiffs who violate the Act.[83] The plaintiffs also sue the Director of Right to Life of East Texas who has advocated for the adoption of laws imposing civil liability on abortion providers, who the complaint alleges "[poses] a credible threat" that he will sue the plaintiffs under the Act.[84]

The plaintiffs assert that the Texas Heartbeat Act "violates the First and Fourteenth Amendments to the U.S. Constitution and the Supremacy Clause and is preempted by 42 U.S.C. §§ 1983 and 1988 and [the] authoritative rulings of the U.S. Supreme Court regarding the right to abortion."[85] With

78. Complaint, Whole Woman's Health v. Jackson, *supra* note 6, ¶ 1; *see* Amanda Robert, *Abortion Providers Sue Judicial Officials Over Citizen-Enforced Texas Abortion Law*, A.B.A J. (July 15, 2021, 9:30 AM), https://www.abajournal.com/news/article/abortion-providers-sue-judicial-officials-over-citizen-enforced-texas-abortion-law; Heidi Perez-Moreno, *Twenty Abortion Providers Sue Texas Officials Over Law That Bans Abortions as Early as Six Weeks*, TEX. TRIB. (July 13, 2021), https://www.texastribune.org/2021/07/13/texas-heartbeat-bill-lawsuit/.

79. Complaint, Whole Woman's Health v. Jackson, *supra* note 6, ¶ 8.

80. *Id.*

81. *Id.* ¶ 48.

82. *Id.* ¶ 49.

83. *Id.* ¶¶ 51–55.

84. *Id.* ¶ 50.

85. *Id.* ¶¶ 131–63; *id.* at Request for Relief, ¶ D. Specifically, the complaint alleges that the Texas Heartbeat Act (1) violates the substantive due process right to an abortion, *Id.* ¶¶ 131–33; (2) violates equal protection, ¶¶ 134–38, by "sing[ling] out abortion providers and people who 'aid or abet' the constitutionally protected right to abortion, or intend to do these things, and then treat[ing] this category of people differently from all other defendants in civil litigation in Texas[]" *Id.* ¶ 136; (3) is void for vagueness, ¶¶ 139–45; (4) violates the First and Fourteenth Amendments' freedom of speech and right to petition by prohibiting activity that "aids or abets" abortion by speech or expressive conduct and the ability to petition the courts, and by punishing, through the "one-way fee-shifting provision[s]," ¶ 86; litigants and counsel for challenging the Act, ¶¶ 146–49, 159–63; and (5) is preempted by federal law, specifically by denying the constitutional right to abortion, by directing state court judges to ignore federal court judgments and injunctions, and by conflicting with 42 U.S.C. § 1988 respecting the award of attorney's fees in civil rights litigation, ¶¶ 150–58.

respect to the judges, the plaintiffs seek a declaratory judgment that the Texas Heartbeat Act is invalid and cannot be enforced by Texas judges.[86] The plaintiffs seek to enjoin the court clerks from "participating in the enforcement of [the Act] in any way, including by accepting for filing or taking any other action in the initiation of a lawsuit brought under [the Act]."[87] They also seek to enjoin the Government Official Defendants from "enforcing [the Act] in any way, including by applying [the Act] as a basis for [the] enforcement of laws or regulations in their charge."[88] Finally, the plaintiffs seek to restrain the Director of Right to Life East Texas from enforcing the Act in any way.[89]

PART III: PRE-VIABILITY ABORTIONS ARE CONSTITUTIONALLY PROTECTED

The Supreme Court in *Planned Parenthood of Southeast of Pennsylvania v. Casey* recognized:

> [T]he right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure.[90]

In declaring unconstitutional a Mississippi law prohibiting abortion after fifteen weeks of gestation, the Court of Appeals for the Fifth Circuit, in *Jackson Women's Health Organization v. Dobbs*, held:

> Prohibitions on pre-viability abortions . . . are unconstitutional regardless of the State's interests because a "State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability." "[V]iability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic

86. *Id.* ¶ 120.
87. *Id.* ¶ C.(1).
88. *Id.* ¶ C.(3).
89. *Id.* ¶ C.(2).
90. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992). *See also* Gonzales v. Carhart, 550 U.S. 124, 146 (2007); Stenberg v. Carhart, 530 U.S. 914, 921 (1997). The Supreme Court acknowledges that a "'State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient.'" Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2309 (2016) (quoting Roe v. Wade, 410 U.S. 110, 150 (1973)). *See also Casey*, 505 U.S. at 846. The Court has refused to sustain, however, unnecessary state health regulations that "'have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion.'" *Hellerstedt*, 136 S. Ct. at 2309 (quoting *Casey*, 505 U.S. at 878). *See also* June Med. Servs., L.L.C. v. Russo, 140 S. Ct. 2103 (2020). Neither the Texas statute nor the Lubbock ordinance involve efforts to regulate abortion procedures to ensure the safety of patients; instead, they flatly prohibit pre-viability abortions.

> abortions." Thus, if the Act is a ban, the State's interests cannot outweigh the woman's right to choose an abortion and the undue-burden balancing test has no place in this case.[91]

The Texas Heartbeat Act prohibits abortions after a doctor detects a heartbeat from the fetus or unborn child,[92] typically in the fifth or sixth week of pregnancy.[93] As discussed above, however, the date a fetal heartbeat is detectable is far earlier than the date of fetal viability, which is usually twenty-two to twenty-four weeks after gestation.[94] The Lubbock ordinance deems abortions "*at all times and at all stages of pregnancy* is . . . an act of murder."[95] It proscribes "an abortion of any type and *at any stage of pregnancy* in the City of Lubbock[.]"[96] Consequently, the Texas statute and the Lubbock ordinance are unconstitutional bans on pre-viability abortions.

PART IV: THE PROBLEMATIC PRIVATE ENFORCEMENT MECHANISMS

Both Texas's Heartbeat Act and Lubbock's Sanctuary City for the Unborn Ordinance are enforced solely through private citizen lawsuits and not public officials. For abortion providers, such as Planned Parenthood, the private enforcement mechanism creates procedural hurdles to a successful facial challenge to the laws. Plaintiffs will likely be unable to demonstrate constitutional standing with respect to either law—specifically, that the state and city caused them injury and that the injury can be redressed by a federal court. Attempts to circumvent these barriers by suing state court judges and court clerks will similarly fail because of the absence of adversity between abortion providers and state court clerks and judges. And abortion providers will only be able to establish standing against the Texas government officials charged with regulating abortion providers if they can demonstrate the likelihood that the officials will in fact pursue disciplinary or civil actions against them. This demonstration may be difficult given the Texas Heartbeat Act's express prohibition against enforcement by state officials.

With respect to the Texas Heartbeat Act, state sovereign immunity may also bar federal court jurisdiction over such a challenge. Consequently, abortion providers must wait until after a private lawsuit is filed against them

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91. Jackson Women's Health Org. v. Dobbs, 945 F.3d 265, 273 (5th Cir. 2019), *cert. granted in part*, 141 S. Ct. 2619 (2021) (citations omitted) (quoting another source).

92. Tex. Heartbeat Act, 87th Leg., R.S., ch. 62, § 3, sec. 171.204, 2021 Tex. Gen. Laws 1, 4 (current version at TEX. HEALTH & SAFETY CODE ANN. § 171.204).

93. *See supra* text accompanying note 46. In *Whole Woman's Health v. Jackson*, the plaintiffs assert that many women do not even know they are pregnant after six weeks. Complaint, Whole Woman's Health v. Jackson, *supra* note 6, ¶ 62 at 22. "Indeed, for [women] with regular menstrual periods, six weeks of pregnancy is only two weeks after the patient's first missed period." *Id.*

94. *See supra* text accompanying note 47 (describing that the date a fetal heartbeat is detectable earlier that the date of fetal viability).

95. Lubbock Ordinance Outlawing Abortion, *supra* note 7, § C (emphasis added).

96. *Id.* § D(1) (emphasis added).

before asserting constitutional challenges to the laws. And because such claims are based solely on state law, the abortion providers will be unable to remove the cases to federal court; instead, they will have to present their constitutional defenses to the private lawsuits in Texas state courts, which are largely comprised of popularly elected judges. Finally, with respect to their constitutional defenses, abortion providers must establish the necessary third-party standing to represent the interests of women seeking abortions to assert their constitutional claims.

A. Constitutional Standing

1. Preemptive Facial Challenges to the Act and Ordinance

Under Article III of the Constitution, the federal courts have jurisdiction over a claim between a plaintiff and a defendant only if it presents a "[c]ase[] . . . or . . . [c]ontrovers[y]."[97] "The Supreme Court has derived from these two words a substantial body of doctrine prescribing the circumstances in which federal courts may or may not exercise their subject-matter jurisdiction."[98] "Justiciability" is the term of art employed to give expression to the dual limitation imposed upon the federal courts by the case-and-controversy doctrine.[99] An important component of justiciability is that a plaintiff has standing to bring a matter before a federal court for adjudication.[100]

The doctrine of standing ensures that a litigant is the proper party to bring a matter before a federal court for adjudication by asking if that specific litigant has a sufficient stake in the matter to invoke the federal judicial process.[101] "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues."[102] Standing focuses primarily on the party seeking to get the complaint before a federal court and only secondarily on the issues raised.[103] The standing doctrine includes both constitutional and prudential limitations.[104] The focus in this section is the constitutional standing

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97. U.S. CONST. art. III, § 2.

98. LAURENCE C. TRIBE, AMERICAN CONSTITUTIONAL LAW 67, 68 (2d ed. 1988).

99. *See* Flast v. Cohen, 392 U.S. 83, 94–95 (1968).

100. *See id.* at 98–99; Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 180 (2000)*; see also* Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—and Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 635 (2013).

101. *Flast*, 392 U.S. at 99; Simon v. E. Ky. Welfare Rts. Org. 426 U.S. 26, 37–38 (1976); Duke Power Co. v. Carolina Env't Study Grp., 438 U.S. 59, 72 (1979); Lujan v. Defs. of Wildlife, 504 U.S. 555, 580–81 (1992) (Kennedy, J., concurring); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 58 (5th ed. 2015).

102. Warth v. Seldin, 422 U.S. 490, 498 (1975).

103. Whitmore v. Arkansas, 495 U.S. 149, 155 (1990).

104. Horne v. Flores, 557 U.S. 433, 445 (2009); *Warth*, 422 U.S. at 498; Lewis v. Governor of Ala., 944 F.3d 1287, 1296 (5th Cir. 2019).

requirements.

To establish constitutional standing, plaintiffs must satisfy three elements.[105] Plaintiffs must *first* demonstrate that they have suffered an injury that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical (*i.e.*, the injury-in-fact requirement).[106] "To satisfy this injury-in-fact test, [p]laintiffs . . . must allege more than an injury to *someone's* concrete, cognizable interest; they must 'be [themselves] among the injured.'"[107] The plaintiff's injury must be unique and particularized, not simply harm suffered by the public at large, and a plaintiff's heightened interest in an issue does not confer standing.[108] Moreover, an asserted right to have the government act in accordance with law does not confer standing.[109]

The Texas Act and Lubbock ordinance subject abortion providers to injunctions and to tort and statutory damages, which may deter—and in the case of the Lubbock ordinance has deterred—the delivery of pre-viability abortions.[110] Thus, except for the claims against the Texas government officials charged with regulating abortions and abortion providers, providers will likely be able to establish they have, or are about to suffer, an injury in fact.[111] Beyond suffering a concrete injury, however, plaintiffs must prove *second*, that the injury is traceable to the acts or omissions of the defendant

105. *Lujan*, 504 U.S. at 560*; see also* Lance v. Coffman, 549 U.S. 437, 439 (2007) (per curiam); *Friends of the Earth*, 528 U.S. at 180–81 (discussing the elements of standing). These elements are the "'irreducible constitutional minimum' of Article III standing." Uzuegbunam v. Preczewski, 141 S. Ct. 792, 797 (2021) (quoting Spokeo, Inc. v. Robins, 978 U.S. 330, 338 (2016)); Moore v. Bryant, 853 F.3d 245, 248 (5th Cir. 2017) (quoting *Lujan*, 504 U.S. at 560).

106. *Lujan*, 504 U.S. at 560; Clapper v. Amnesty Int'l USA, 568 U.S. 398, 409 (2013).

107. McMahon v. Fenves, 946 F.3d 266, 270 (5th Cir. 2020), *cert. denied*, 141 S. Ct. 363 (2020).

108. Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, 454 U.S. 464, 486 (1982) ("[S]tanding is not measured by the intensity of the litigant's interest or the fervor of his advocacy"). *See* Felix Frankfurter & Adrian S. Fisher, *The Business of the Supreme Court at the October Terms, 1935 and 1936*, 51 HARV. L. REV. 577, 623 (1938) ("The [Supreme] Court is not the forum for a chivalrous or disinterested [claim] . . . . Its business is with self-regarding, immediate, secular claims.").

109. Allen v. Wright, 468 U.S. 737, 754 (1984), *abrogated on other grounds by* Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118 (2014); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 223 (1974).

110. Lubbock Ordinance Outlawing Abortion, *supra* note 7, § F*; see also* Tex. Heartbeat Act, 87th Leg., R.S., ch. 62, § 3, sec. 171.208(b), 2021 Tex. Gen. Laws 1, 6 (current version at TEX. HEALTH & SAFETY CODE ANN. § 171.208(b)).

111. Planned Parenthood of Greater Tex. Surgical Health Servs. v. City of Lubbock, No. 21-CV-114, 2021 WL 2385110, at *8 (N.D. Tex. June 1, 2021) (assuming injury from Lubbock ordinance). "[S]tanding is not defeated because it is not certain that the plaintiff will be injured by the defendant. Rather, it is enough that there be some likelihood that the challenged law would be used to injure the plaintiff's interests." Manian, *supra* note 2, at 139 (citing, *inter alia*, Pennell v. City of San Jose, 485 U.S. 1, 7–8 (1988) (remaining citations omitted)). *See* Nova Heath Sys. v. Gandy, 416 F.3d 1149, 1155 (10th Cir. 2005) (finding deterrent effect of lawsuit for performing an abortion on minors without parental consent sufficient).

(*i.e.*, the causation requirement)[112] and *third*, that the plaintiffs' stake in the controversy is sufficient to ensure that the injuries claimed will be effectively redressed by a favorable court decision (*i.e.*, the redressability requirement).[113] Abortion providers will be unable to establish these standing requirements in lawsuits against the State of Texas, or its officers, or the City of Lubbock or its officers.

The controlling case in the Fifth Circuit, which includes Texas, is the en banc decision of the court in *Okpalobi v. Foster*,[114] which involved a Louisiana abortion law with a private enforcement mechanism similar to the Texas Heartbeat Act and Lubbock Sanctuary City for the Unborn Ordinance. Known commonly as Act 825,[115] the statute provides to women who underwent an abortion "a private tort remedy against the doctors who perform the abortion. It exposes those doctors to unlimited tort liability for any damage caused by the abortion procedure to both mother and '*unborn child*.'"[116] The Act permits damages to be reduced, "but not eliminated altogether (and perhaps not at all with respect to any damages asserted on behalf of the fetus), if the pregnant woman signs a consent form prior to the abortion procedure."[117] The plaintiff, Dr. Okpalobi, joined "by five

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112. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992); *Allen*, 468 U.S. at 752 (explaining that the issue is whether the line of causation between the putatively illegal conduct and plaintiff's injury is too attenuated).

113. Simon v. E. Ky. Welfare Rts. Org., 426 U.S. 26, 38 (1976); Linda R.S. v. Richard D., 410 U.S. 614, 619 (1973).

114. Okpalobi v. Foster, 244 F.3d 405, 405 (5th Cir. 2001) (en banc).

115. LA. REV. STAT. ANN., § 2800.12 (1999). The Act read:

> (A) Any person who performs an abortion is liable to the mother of the unborn child for any damage occasioned or precipitated by the abortion, which action survives for a period of three years from the date of discovery of the damage with a preemptive period of ten years from the date of the abortion.
>
> (B) For purposes of this Section:
>
> (1) "Abortion" means the deliberate termination of an intrauterine human pregnancy after fertilization of a female ovum, by any person, including the pregnant woman herself, with an intention other than to produce a live birth or to remove a dead unborn child.
>
> (2) "Damage" includes all special and general damage which are recoverable in an intentional tort, negligence, survival, or wrongful death action for injuries suffered or damages occasioned by the unborn child or mother.
>
> (3) "Unborn child" means the unborn offspring of human beings from the moment of conception through pregnancy and until termination of the pregnancy.
>
> (C)
>
> (1) The signing of [the] consent form by the mother prior to the abortion does not negate this cause of action, but rather reduces the recovery of damages to the extent that the content of the consent form informed the mother of the risk of the type of injuries or loss [from] which she is seeking to recover.
>
> (2) The law[] governing medical malpractice or limitations of liability thereof provided in Title 40 of the Louisiana Revised Statutes of 1950 are not applicable to this Section.

Id.

116. *Okpalobi*, 244 F.3d at 409 (emphasis added).

117. *Id.*

health[]care clinics and other physicians, individuals, and businesses who perform abortions in the [s]tate," sued the Louisiana Governor and attorney general seeking to enjoin the operation and effect of Act 825.[118]

The plaintiffs' lawsuit was a "facial attack on the constitutionality" of Act 825.[119] The plaintiffs argued that Act 825 "constitutes an 'undue burden' on a woman's right to obtain an abortion," and "the Act will force physicians in Louisiana to cease providing abortion services to women because of the potential exposure to civil damage claims authorized by the Act."[120] "[T]he plaintiffs assert[ed] that, if they are forced to discontinue providing their services, the State may have achieved in practical terms what it could not constitutionally do otherwise—eliminate abortions in Louisiana."[121] Finding the Act interfered with a woman's right to choose an abortion,[122] the district court granted the plaintiffs' motion for a preliminary injunction that enjoined the "operation and effect of Act 825."[123] A panel of the Court of Appeals for the Fifth Circuit affirmed.[124]

Rehearing the case, the en banc court reversed, rejecting the panel's reasoning that the plaintiffs did not need "to plead or prove that a defendant state official has enforced or threatened to enforce a statute in order to meet the case or controversy requirement when [the] statute is immediately and coercively self-enforcing."[125] The majority of judges found that the plaintiffs lacked Article III standing because the plaintiffs failed to meet both the causation and redressability requirements.[126] The en banc court noted:

> [T]he panel confuse[d] the *statute's* immediate coercive effect on the plaintiffs with any coercive effect that might be applied by the *defendants*. . . . Once the coercive impact of the statute (coercive in that it exposes plaintiffs to unlimited tort liability by individual plaintiffs) is understood to be distinct from the coercive power of state officials (for example, if the State could institute criminal or civil proceedings under the Act), the panel's finding of causation here is without a basis.[127]

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118. *Id.*

119. *Id.*

120. *Id.* at 410.

121. *Id.*

122. Okpalobi v. Foster, 981 F. Supp. 977, 987 (E.D. La. 1999), *aff'd*, 190 F.3d 337 (5th Cir. 1999), *rev'd en banc*, 244 F.3d 405 (5th Cir. 2001).

123. *Id.* at 988.

124. Okpalobi v. Foster, 190 F.3d 337, 361 (5th Cir. 1999), *rev'd en banc*, 244 F.3d 405 (5th Cir. 2001).

125. *Okpalobi*, 244 F.3d at 426 (quoting panel decision, *Okpalobi*, 190 F.3d at 349). The majority of the panel opined: "The Plaintiffs' assertion that they will be forced to discontinue offering legal abortions to patients because of the untenable risks of unlimited civil liability under an unconstitutional Act, sets forth a justiciable case or controversy between the plaintiffs and the Governor and Attorney General of Louisiana." *Id.*

126 *Id.* at 429.

127. *Id.* at 426.

The court reasoned that there must be "'a causal connection between the *injury and* the *conduct* complained of' . . . that is, here, a connection between the unwarranted monetary judgment (the injury) and the prosecution of a lawsuit under Act 825 by a private civil litigant (the conduct)."[128] In this case, "[t]he plaintiffs have never suggested that any act of the defendants has caused . . . or could possibly cause any injury to them."[129] The court pointed to the "long-standing rule that a plaintiff may not sue a state official who is without any power to enforce the complained-of statute."[130]

The court also found that the plaintiff's failed to meet the redressability requirement because:

> The governor and attorney general have no power to redress the asserted injuries. In fact, under Act 825, no state official has any duty or ability to do *anything*. The defendants have no authority to prevent a private plaintiff from invoking the statute in a civil suit. Nor do the defendants have any authority under the laws of Louisiana to order what cases the judiciary of Louisiana may hear or not hear.[131]

In other words, "it is not the Governor or the Attorney General who inflicts the claimed injury—it is the private plaintiff, bringing a private lawsuit under Act 825, who *causes* the injury of which the plaintiffs complain."[132] Consequently, any injunction issued by the district court against the named defendants would be "utterly meaningless."[133]

Twelve years after *Okpalobi*, in *K.P. v. LeBlanc*, the Fifth Circuit again considered a facial challenge to Act 825's private enforcement provision.[134] In this case, the abortion providers sued members of a Patients' Compensation Fund Oversight Board who, based upon another section of Act 825, denied the plaintiffs' participation in a statutorily created malpractice insurance fund.[135] The court held that the plaintiffs lacked standing to challenge the private enforcement provision of the statute because the board members are not charged under state law with enforcing this provision—

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128. *Id.* (quoting Lujan v. Defs. Of Wildlife, 504 U.S. 555, 560–61 (1992))*; see also* Michael E. Rosman, *Challenges to State Anti-Preference Laws and the Role of Federal Courts*, 18 WM. & MARY BILL OF RTS. J. 709, 724 (2010) (courts "have distinguished a 'causal connection' between the state law and plaintiffs' injuries from one between specific state officials and plaintiffs' injuries.").

129. *Okpalobi*, 244 F.3d at 426.

130. *Id; see also* Rosman, *supra* note 128, at 725–26.

131. *Okpalobi*, 244 F.3d at 427.

132. *Id.* at 428.

133. *Id.* at 426. After their defeat in the Fifth Circuit, the plaintiffs filed suit for declaratory relief in Louisiana state court, but they were equally unsuccessful under the case-or-controversy requirement in the Louisiana Constitution. Manian, *supra* note 2, at 144 (citing, in part, Women's Health Clinic v. State, 825 So. 2d 1208 (La. Ct. App. 2002)).

134. K.P. v. LeBlanc, 729 F.3d 427, 433 (5th Cir. 2013).

135. *Id.* at 432–33. Act 825 specifically excludes elective abortions from coverage under the Medical Malpractice Act. *Id.* at 432 (citing LA. REV. STAT. ANN. § 9:2800.12(C)(2)).

"only a private plaintiff may bring suit."[136] Thus, "enjoining the Board Parties from 'enforcing' the cause of action would not address their role in administering the Fund. It follows that declaratory and injunctive relief directed to the Board Parties will not address the [plaintiffs'] injury."[137]

On June 1, 2021, in *Planned Parenthood of Greater Texas Surgical Health Services v. City of Lubbock*,[138] the District Court for the Northern District of Texas dismissed for lack of standing a lawsuit challenging the Lubbock Sanctuary City for the Unborn Ordinance, which like Act 825, permits only private enforcement.[139] Relying on the Fifth Circuit's decision in *Okpalobi*, the district court found that the plaintiff failed to satisfy the redressability requirement of standing.[140] The court noted that the plaintiffs admitted that the court could not force the revocation of the Lubbock ordinance, nor would a court order "regarding the ordinance's constitutionality or validity . . . bind the state courts that would hear the private[]enforcement suits."[141] And the court rejected as "too speculative" the plaintiffs' argument that a "declaration of invalidity from the Court may deter lawsuits and may help convince state courts of [the] plaintiffs' arguments."[142]

The court thus found, and the plaintiffs conceded, that "like the defendants in *Okpalobi*, the city [is powerless] to prevent private plaintiffs from invoking [civil suits]."[143] The court held that the "[p]laintiff[s]' concession is justified because multiple considerations demonstrate this reality."[144] First, the court noted that "a declaratory judgment declares only the rights of the parties in the case."[145] "Second, an injunction [would] not bind unrelated nonparties."[146] Third, as noted above, while the court can rule the ordinance is unconstitutional, "it can only 'hold laws unenforceable; [it cannot] . . . erase them.'"[147] Fourth, plaintiffs concede that a court "order in th[e] case will not prevent private suits."[148] And fifth, Texas "'state courts are

136. *Id.* at 437.

137. *Id.* The court found that the plaintiffs did have standing to challenge the exclusion of elective abortions from the malpractice fund. *Id.* Nevertheless, the court denied relief on the merits of an equal protection challenge to the provision, finding that the exclusion of abortions was "not tainted by irrational animus." *Id.* at 441–42*; see generally* Christine Donovan, Note, *Denying Abortion Providers Access to a Patient Compensation Fund is not Unconstitutional*—K.P. v. LeBlanc, 40 AM. J.L. & MED. 167 (2014).

138. *See generally* Planned Parenthood of Greater Tex. Surgical Health Servs. v. City of Lubbock, No. 21-CV-114, 2021 WL 2385110, at *1 (N.D. Tex. June 1, 2021).

139. *See supra* notes 22–38 and text accompanying (outlining the City of Lubbock's ordinance and enforcement mechanism).

140. *Planned Parenthood of Greater Tex.*, 2021 WL 2385110, at *8.

141. *Id.* at *10.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* (citing 28 U.S.C. § 2201).

146. *Id.* at *11 (citing Harris Cnty. v. CarMax Auto Superstores Inc., 177 F.3d 306, 314 (5th Cir. 1999)).

147. *Id.* (quoting Pool v. City of Houston, 978 F.3d 307, 309 (5th Cir. 2020))*; see also* Rosman, *supra* note 128, at 728 ("Federal courts cannot erase state statutes (nor, for that matter, federal statutes).").

148. *Planned Parenthood of Greater Tex.*, 2021 WL 2385110, at *11.

not bound by Fifth Circuit [or federal district-court] precedent when making a determination of federal law.'"[149] In other words, "Texas state-court judges have no obligation to follow a federal district-court or circuit-court decision."[150] Consequently, a favorable district court judgment could not redress the plaintiffs' underlying injury—a lawsuit brought by a private party.[151]

The Fifth Circuit is not alone in refusing to find constitutional standing to challenge self-enforcing tort legislation.[152] And until the *Okpalobi* case is overruled or abrogated, it precludes facial challenges to the Texas Heartbeat Act and the Lubbock Sanctuary City for the Unborn Ordinance. This means that abortion providers must find a means of facially challenging the laws in state court[153] or await a private lawsuit in tort and use *Roe v. Wade* and

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149. *Id.* (quoting Magouirk v. Phillips, 144 F.3d 348, 361 (5th Cir. 1998)*; see also* Arizonans for Off. Eng. v. Arizona, 520 U.S. 43, 66 n.21 (1997); Brackeen v. Haaland, 994 F.3d 249, 447–48 (5th Cir. 2021) (en banc) (Costa, J., concurring in part).

150. *Planned Parenthood of Greater Tex.*, 2021 WL 2385110, at *12 (citing Penrod Drilling Corp. v. Williams, 868 S.W.2d 294, 296 (Tex. 1993)). *See* Rosman, *supra* note 128, at 727 ((first citing Allen v. Wright, 468 U.S. 737, 753 n.19 (1984); and then quoting CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS § 13 (4th ed. 1983)):

> [W]hen privately enforceable tort laws are challenged, the cases have found a lack of redressability [and a lack of causation]. The remedy against the state officials, be it an injunction or a declaratory judgment, simply will not do the plaintiffs much good. It certainly will not prevent them from being sued in state court for violations of the underlying statutes. Thus, to the extent that the plaintiffs are injured by the chilling effect of the statutes, and the possibility of state court lawsuits for substantial liability against them, an injunction or declaratory judgment against, say, the attorney general of the state, will not prevent that harm.

See also David L. Shapiro, *State Courts and Federal Declaratory Judgments*, 74 NW. U. L. REV. 759, 774 (1979) ("The concept that state and lower federal courts are coordinate courts on issues of federal law is one that . . . is deeply rooted in the federal system.").

151. *Planned Parenthood of Greater Tex.*, 2021 WL 2385110, at *16. Alternatively, the court abstained from considering the constitutionality of the Lubbock ordinance under the *Pullman* Doctrine, *id.* at *16 (citing R.R. Comm'n of Tex. v. Pullman, 312 U.S. 496 (1941)), which directs the federal courts to avoid ruling on an unclear question of state law when resolution of the state-law issue would render the federal constitutional issue moot. *Id.* at *18. *See* Nationwide Mut. Ins. Co. v. Unauthorized Prac. of L. Comm., 283 F.3d 650, 652–53 (5th Cir. 2002) (quoting Hawaii Hsg. Auth. v. Midkiff, 467 U.S. 229, 236 (1984)):

> [U]nder the *Pullman* doctrine a federal court should abstain from exercising its jurisdiction "when difficult and unsettled questions of state law must be resolved before a substantial federal constitutional question can be decided. By abstaining in such cases, federal courts will avoid both unnecessary adjudication of federal questions and needless friction with state policies . . . ."

The district court dismissed the plaintiffs' complaint without prejudice to allow state courts to address the plaintiffs' claim that the city lacked authority to create civil liability between private litigants. *Planned Parenthood of Greater Tex.*, 2021 WL 2385110, at *24. The plaintiffs have since asked the court to reconsider its decision. Samantha Jarpe, *Planned Parenthood Asks Judge to Reconsider Dismissal of Case Against the City of Lubbock*, EVERYTHINGLUBBOCK (June 30, 2021, 6:15 PM), https://www.everythinglubbock.com/news/local-news/planned-parenthood-asks-judge-to-reconsider-dismissal-of-case-against-city-of-lubbock/.

152. Manian, *supra* note 2, at 145–51 (first citing, inter alia, Nova Health Sys. v. Gandy, 416 F.3d 1149, 1149 (10th Cir. 2005); then citing Hope Clinic v. Ryan, 249 F.3d 603, 605 (7th Cir. 2001); and then citing Summit Med. Assoc., P.C. v. Pryor, 180 F.3d 1326 (11th Cir. 1999)).

153. *See id.* at 152.

Planned Parenthood of Southeast Pennsylvania as defenses.

2. Lawsuits Against State Court Judges and Clerks

In *Whole Woman's Health v. Jackson*, Texas abortion providers and others have sued Texas District Judge Austin Reeve Jackson as a representative of a putative class of all Texas judges with jurisdiction over the civil actions created by the Texas Heartbeat Act.[154] They have also named as a defendant Smith County District Clerk Penny Clarkson as a representative of a putative class of all Texas clerks of court with jurisdiction over the Act's civil actions.[155] The plaintiffs seek certification of the classes under Federal Rule of Civil Procedure 23(b)(1)(A), or alternatively, under Rule 23(b)(2).[156] Lodging their complaint under 42 U.S.C. § 1983, the plaintiffs assert that the Texas Heartbeat Act directs judges to enforce its remedies[157] and court clerks to accept filing of and issue citations for service of process of actions under the Act.[158] They seek to enjoin the court clerks (but not the judges[159]) "from participating in the enforcement of [the Act] in any way, including by accepting . . . or taking any other action in the initiation of a lawsuit brought under [the Act]."[160]

The plaintiffs' characterization of the duties of judges and court clerks is inaccurate; neither judges nor court clerks enforce the Act's civil remedies. Texas judges with jurisdiction over the civil remedies act in a solely adjudicatory capacity and court clerks perform purely nondiscretionary

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154. Complaint, Whole Woman's Health v. Jackson, *supra* note 6, ¶ 48.

155. *Id.* ¶¶ 15, 49.

156. *Id.* ¶¶ 114–39.

157. *Id.* ¶ 120. *See also id.* ¶ 80 (discussing the Act's enforcement "proceedings conscript the state courts into enforcing this unconstitutional law while imposing maximum burdens on abortion providers and other people who are sued.").

158. *Id.* ¶ 128.

159. A 1996 amendment to 42 U.S.C. § 1983 expressly proscribes injunctive relief against judges for acts or omissions taken in their official capacities, "unless a declaratory decree was violated or declaratory relief was unavailable." 42 U.S.C. § 1983. The amendment overruled the Supreme Court's decision in Pulliam v. Allen, 466 U.S. 522, 541–43 (1984). Federal Courts Improvements Act of 1996, Pub. L. No. 104-317, § 309(c), 110 Stat. 3853. *See* S. Rep. No. 104-366, at 36–37, *as reprinted in* 1996 U.S.C.C.A.N. 4202, 4217*; see also* Brandon E. *ex rel.* Listenbee v. Reynolds, 201 F.3d 194, 197–98 (3d Cir. 2000). In other words, while judges may not be directly enjoined under § 1983, they are subject to injunctive relief if they violate a prospective declaratory decree or if a declaratory decree is unavailable. *See* Scheffler v. Trachy, 821 F. App'x 648, 653 (8th Cir. 2020); Justice Network, Inc. v. Craighead Cnty, 931 F.3d 753, 763 (8th Cir. 2019) ("Currently, most courts hold that the amendment to § 1983 does not bar declaratory relief against judges."). The plaintiffs' complaint is seemingly consistent with these rules; however, the question is whether lawsuits for declaratory relief against judges acting in their adjudicatory capacity are appropriate under § 1983. *See* McNeil v. Cmty. Prob. Servs., L.L.C, 945 F.3d 991, 996–97 (6th Cir. 2019); Allen v. Debello, 861 F.3d 433,439–42 (3d Cir. 2017); *see generally* California v. Texas, 141 S. Ct. 2104, 2115 (2021) ("[J]ust like suits for every other type of remedy, declaratory-judgment actions must satisfy Article III's case-or-controversy requirement.").

160. Complaint, Whole Woman's Health v. Jackson, *supra* note 6, ¶ C.(1).

ministerial duties.[161] The Supreme Court has yet to rule definitively on the issue; however,

> there is widespread agreement among the federal courts that a plaintiff may not bring a Section 1983 claim against a state court judge attacking the constitutionality of a statute that the judge construed and applied while adjudicating a dispute. The courts have unanimously rejected these claims on the ground that the interests of a judge who has construed a statute in her capacity as a neutral adjudicator are not adverse to the interests of a plaintiff who challenges the constitutionality of the statute.[162]

While all courts agree with this proposition, they differ as to the proposition's basis.

> Some courts have concluded that the lack of adversity makes the judge an improper party to a claim challenging the constitutionality of a state statute, and those courts have dismissed those claims on the merits under Federal Rule of Civil Procedure Rule 12(b)(6). Other courts have concluded that the lack of adversity means that the claims against judges present no case or controversy under Article III, and those courts have dismissed the claims for lack of subject matter jurisdiction.[163]

In re Justices of the Supreme Court of Puerto Rico[164] is a leading decision in those cases holding that "a judge who acts as a neutral and impartial arbiter of a statute is not a proper defendant to a Section 1983 suit challenging the constitutionality of the statute."[165] That case involved a § 1983 lawsuit against the justices of the Puerto Rico Supreme Court (among others) brought by attorneys who unsuccessfully challenged in the

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161. *See* Chancery Clerk of Chickasaw Cnty v. Wallace, 646 F.2d 151, 159–60 (5th Cir. 1981)*; see also* Manian, *supra* note 2, at 170 n. 243 ("[C]ourt clerks or other judicial personnel are not 'enforcers' of state tort law . . . .").

162. Lindke v. Lane, No. 19-CV-11905, 2021 WL 807727, at *5 (E.D. Mich. Mar. 3, 2021). A companion case with a similar holding is *Lindke v. Tomlinson*. Lindke v. Tomlinson, No. 20-CV-12857, 2021 WL 2434120 (E.D. Mich. June 15, 2021), *appeal filed*, No. 21-2612 (6th Cir. June 16, 2021)*; see also* Manian, *supra* note 2, at 170 n.243: "There are no courts that have allowed a challenge to a state statute to proceed against a state court judge on the ground that the judge, simply by adjudicating a case pursuant to that law at some future point, will 'enforce' the law and thereby 'cause' injury." *But see* Stephen N. Scaife, Comment, *The Imperfect but Necessary Lawsuit*: *Why Suing State Court Judges Is Necessary to Ensure that Statutes Creating a Private Cause of Action Are Constitutional*, 52 U.. RICH. L. REV. 495 (2018) (arguing in favor of injunctive relief against state court judges when a statute creates an unconstitutional private cause of action). On the other hand, state court judges who are acting in administrative capacity are subject to lawsuits under § 1983. Allen v. DeBello, 861 F.3d 433, 440 (3d Cir. 2017) (citing Georgevich v. Strauss, 772 F.3d 1078, 1087 (3d Cir. 1985) ("[S]tate court judges who were administrators of the parole power under state statute were proper parties to a Section 1983 suit challenging the constitutionality of those statutes.")).

163. *Lindke*, 2021 WL 807727, at *5.

164. *See generally In re* Justices of the Supreme Court of Puerto Rico, 695 F.2d 17 (1st Cir. 1982) (Breyer, J.).

165. *Allen*, 861 F.3d at 440 (citing *In re Justices*, 695 F.2d at 17).

Commonwealth courts mandatory membership in the Puerto Rico Bar Association.[166] The Court of Appeals for the First Circuit rejected the claim against the justices.[167] In a decision written by then-Judge Stephen Breyer, the court recognized the absence of an Article III "case or controversy",[168] however, the court ultimately predicated its decision on the plaintiffs' failure to state a claim for which relief can be granted. More precisely, the court held that § "1983 does not provide relief against judges acting purely in their adjudicative capacity, any more than, say, a typical state's libel law imposes liability on a postal carrier or a telephone company for simply conveying a libelous message."[169] The court reasoned:

> [T]he type of harm that would be caused by remitting the Justices to the ordinary appellate process here is not that suffered by an ordinary litigant who is forced to wait until the conclusion of a lawsuit to cure legal errors on appeal. To require the Justices unnecessarily to assume the role of advocates or partisans on these issues would tend to undermine their role as judges. To encourage or even force them to participate as defendants in a federal suit attacking Commonwealth laws would be to require them to abandon their neutrality and defend as constitutional the very laws that the plaintiffs insist are unconstitutional—laws as to which their judicial responsibilities place them in a neutral posture. Indeed, a public perception of partiality might well remain even were the Justices to take no active part in the litigation. The result risks harm to the court's stance of institutional neutrality—a harm that appeal would come too late to repair. While at times such harms may have to be tolerated in order to afford proper relief to a party, we believe that they warrant the exercise of our mandamus power here, when no relief question is at issue and when the plaintiffs, for reasons of a jurisdictional sort, have failed to make out a case against the Justices.[170]

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166. *In re Justices*, 695 F.2d at 18–19.

167. *Id.* at 27.

168. *Id.* at 21:

> We also agree that, at least ordinarily, no "case or controversy" exists between a judge who adjudicates claims under a statute and a litigant who attacks the constitutionality of the statute. Judges sit as arbiters without a personal or institutional stake on either side of the constitutional controversy. They are sworn to uphold the Constitution of the United States. They will consider and decide a claim that a state or Commonwealth statute violates the federal Constitution without any interest beyond the merits of the case. Almost invariably, they have played no role in the statute's enactment, they have not initiated its enforcement, and they do not even have an institutional interest in following their prior decisions (if any) concerning its constitutionality if an authoritative contrary legal determination has subsequently been made (for example, by the United States Supreme Court).

169. *Id.* at 22.

170. *Id.* at 25. In addition:

> To allow litigants to sue state court judges on the ground that they will enforce a state law violative of the United States Constitution suggests that the state court judges have prejudged the constitutional question. Since their obligation to apply the United States Constitution is no less than that of federal court judges, the likelihood of them enforcing the statute against the federal court plaintiff is at best unclear, and likely inadequate.

The Courts of Appeals for the Third, Eighth, and Ninth Circuits "have likewise held that a plaintiff may not bring a Section 1983 action challenging a state statute against a state court judge who construed the statute while acting in adjudicatory capacity."[171]

Other federal courts, including the Court of Appeals for the Fifth Circuit,[172] "have treated the lack of adversity between a judge who has acted in an adjudicatory capacity and a litigant challenging a state statute as an Article III subject matter jurisdiction issue."[173] In *Bauer v. Texas*, the Court of Appeals for the Fifth Circuit ruled:

> The case or controversy requirement of Article III of the Constitution requires a plaintiff to show that he and the defendants have adverse legal interests. . . . The requirement of a justiciable controversy is not satisfied where a judge acts in his adjudicatory capacity. . . . Similarly, a section 1983 due process claim is not actionable against a state judge acting purely in his adjudicative capacity because he is not a proper party in a section 1983 action challenging the constitutionality of a state statute. . . .[174]

The court also held that, because of the nature of their responsibilities, court clerks, like judges, also do not have a "sufficiently 'personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues on which the court so largely depends for illumination of difficult constitutional questions.'"[175]

Similarly, the Court of Appeals for the Second Circuit, in *Mendez v. Heller*,[176] held that a plaintiff's challenge to a durational residency requirement for a divorce action against a judge did not "present the 'honest and actual antagonistic assertion of rights,' . . . 'indispensable to adjudication

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Rosman, *supra* note 128, at 750 (footnote omitted); *see* U.S. CONST. art. VI, cl. 2; Public Serv. Comm'n v. Wycoff Co., 344 U.S. 237, 247–48 (1952).

171. Lindke v. Lane, No. 19-CV-11905, 2021 WL 807727, at *7–8 (E.D. Mich. Mar. 3, 2021) (citing Allen v. DeBello, 861 F.3d 433 (3d Cir. 2017)); R.W.T. v. Dalton, 712 F.2d 1225, 1233 (8th Cir. 1983), *abrogated by* Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827 (1990); Grant v. Johnson, 15 F.3d 146, 148 (9th Cir. 1994)*; see also* Fam. C.L. Union v. Dep't of Child. & Fams., Div. of Child Prot. & Permanency, 837 F. App'x 864, 867–68 (3d Cir. 2020); Brandon E. *ex rel.* Listenbee v. Reynolds, 201 F.3d 194, 199–200 (3d Cir. 2000); Desrosiers v. Androscoggin Cnty., 611 F. Supp. 897, 898 (D. Me. 1985).

172. Bauer v. Texas, 341 F.3d 353, 359 (5th Cir. 2003).

173. *Lindke*, 2021 WL 807727, at *8.

174. *Bauer*, 341 F.3d at 359 (citations omitted)*; see also* Machetta v. Moren, 726 F. App'x 219, 220 (5th Cir. 2018) (citation omitted) ("A judge acting purely in her 'adjudicative capacity' is not a proper party to a lawsuit challenging a state law because the judge, unlike the legislature or state attorney general, has no personal interest in defending the law . . . . In other words, the judge is not a cause of the statute being enacted or enforced.").

175. *Bauer*, 341 F.3d at 359 (quoting Chancery Clerk of Chickasaw Cnty. v. Wallace, 646 F.2d 151, 160 (5th Cir. 1981)).

176. *See* Mendez v. Heller, 530 F.2d 457 (2d Cir. 1976).

of constitutional questions.'"[177] And in an unpublished decision, the Court of Appeals for the Sixth Circuit in *Cooper v. Rapp*[178] held that a lawsuit for declaratory relief against a state court judge in his adjudicatory capacity attacking, *inter alia*, the state's cognovit-judgment statute was barred by Article III's case-or-controversy requirement.[179] The court found that, in such circumstances, the judge was neither an adversary of the plaintiffs nor an enforcer or administrator of the challenged statute.[180] Instead, he "acted as a disinterested judicial adjudicator, bound to decide the issues before him according to the law."[181]

Importantly, absent an Article III case or controversy, the plaintiffs cannot secure the declaratory relief they seek against state judges and court clerks.[182] Consequently, the plaintiffs in *Whole Woman's Health v. Jackson* are unlikely to prevail on their claims against Texas state judges and court clerks.

3. Lawsuits Against Government Official Defendants

The plaintiffs in *Whole Woman's Health v. Jackson* seek to enjoin certain government officials with oversight over abortion providers and medical professionals from taking administrative, disciplinary, or civil action against persons who perform or assist with abortion procedures in violation of the Texas Heartbeat Act.[183] Specifically, the plaintiffs name as Government Official Defendants: the Executive Director of the Texas Medical Board,[184] the Executive Director of the Texas Board of Nursing,[185] the Executive Commissioner of the Texas Health and Human Services Commission,[186] the Executive Director of the Texas Board of Pharmacy,[187] and the Attorney General of Texas.[188] Assertedly, each may take

177. *Id.* at 460 (first quoting Chicago & Grand Trunk Ry. Co. v. Wellman, 143 U.S. 339, 345 (1892); and then quoting United States v. Johnson, 319 U.S. 302, 305 (1943) (per curiam)). The court found that the clerk, at the plaintiff's insistence, would be required to submit the claim to the judge for adjudication. *Id.*

178. *See* Cooper v. Rapp, 702 F. App'x 328 (6th Cir. 2017).

179. *Id.* at 333.

180. *Id.*

181. *Id. See also* Oliver v. Scorsone, No. 20-5381, 2020 WL 5959638, at *1–2 (6th Cir. Sept. 8, 2020); McNeil v. Cmty. Prob. Serv., 945 F.3d 991, 996–97 (6th Cir. 2019) (dicta); Columbia MHC E., L.L.C. v. Stewart, 815 F. App'x 887, 891 (6th Cir. 2020) (dicta); Whitaker v. Kirby, No. 18cv540, 2018 WL 5622040, at *2–3 (S.D. Ohio Oct. 30, 2018).

182. California v. Texas, 141 S. Ct. 2104, 2115 (2021) (citing MedImmune, Inc. v. Genetech, Inc., 549 U.S. 118, 126–27 (2007)) ("[J]ust like suits for every other type of remedy, declaratory-judgment actions must satisfy Article III's case-or-controversy requirement.").

183. Complaint, Whole Woman's Health v. Jackson, *supra* note 6, at Request for Relief, ¶ C.(3).

184. *Id.* ¶ 51.

185. *Id.* ¶ 52.

186. *Id.* ¶ 53.

187. *Id.* ¶ 54.

188. *Id.* ¶ 55.

administrative, disciplinary, or civil actions against those abortion providers and medical professionals who violate the Texas Heartbeat Act.

If any of the named government officials actually threatened or initiated an administrative, disciplinary, or civil action against the plaintiffs for performing a statutorily forbidden pre-viability abortion, the plaintiffs could challenge, in federal court, the Act's clearly unconstitutional provisions. In such a case, the plaintiffs would suffer a concrete and particularized injury—the threatened suspension or loss of their professional licenses for performing a constitutionally protected procedure.[189] The issue, however, is whether the threat of such actions is actual or imminent and not merely conjectural or hypothetical—the first element of constitutional standing.[190]

> Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is *certainly* impending. Thus, we have repeatedly reiterated that threatened injury must be *certainly impending* to constitute injury in fact, and that allegations of *possible* future injury are not sufficient.[191]

That the Government Official defendants may theoretically have the general authority to take adverse administrative, disciplinary, or civil action against the plaintiffs is insufficient for Article III standing.[192]

Because the Act's effective date is September 1, 2021,[193] after this Article was written, no threats of adverse action have yet been made against the plaintiffs. More importantly, however, the Texas Heartbeat Act expressly forbids such official enforcement actions; the Act's Detection of Fetal Heartbeat provisions may only be enforced through private civil actions:

> LIMITATIONS ON PUBLIC ENFORCEMENT. Notwithstanding Section 171.005 *or any other law*, the requirements of this subchapter shall be enforced *exclusively* through the private civil actions described in Section

189. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

190. *Id.*; *see* Clapper v. Amnesty Int'l USA, 568 U.S. 398, 409 (2013); Carney v. Adams, 141 S. Ct. 493, 498 (2020); text accompanying *supra* notes 97–109, 112–13 (discussing the elements of constitutional standing).

191. *Clapper*, 568 U.S. at 409 (citations and internal quotations omitted)*; see also* Glass v. Paxton, 900 F.3d 233, 241 (5th Cir. 2018) (holding that fears which are "objectively understandable and reasonable" are insufficient for standing); *compare* Shrimpers & Fishermen of RGV v. Tex. Comm'n Env't Quality, 968 F.3d 419, 424 (5th Cir. 2020) ("The 'actual or imminent' requirement is satisfied only by evidence of a 'certainly impending' harm or a 'substantial risk' of harm.") (citations and internal quotations omitted), *with* Susan B. Anthony List v. Driehaus, 573 U.S. 149, 163–66 (2014) (demonstrating that threatened administrative proceedings justified pre-enforcement review of statute based upon past enforcement of the statute).

192. *See In re* Gee, 941 F.3d 153, 163–65 (5th Cir. 2019) (challenging to abortion regulations that could theoretically injure abortion providers insufficient for standing).

193. Tex. Heartbeat Act, 87th Leg., R.S., ch. 62, § 10, sec. 171.201, 2021 Tex. Gen. Laws 1, 1–14 (current version at TEX. HEALTH & SAFETY CODE ANN. § 171.201).

> 171.208. No enforcement of this subchapter, and no enforcement of Chapters 19 and 22, Penal Code, in response to violations of this subchapter, may be taken or threatened by this state, a political subdivision, a district or county attorney, *or an executive or administrative officer or employee of this state* or a political subdivision against any person, except as provided in Section 171.208.[194]

Moreover, the Act explicitly forbids the "state, a state official, or a district or county attorney" from intervening in a civil action brought under the section.[195] Finally, the Act gives the Texas Health and Human Services Commission the power to enforce the state's abortion regulations, *except* for the Detection of Fetal Heartbeat provisions, which the plaintiffs challenge:

> COMMISSION TO ENFORCE; EXCEPTION. The commission shall enforce this chapter *except* for Subchapter H [Detection of Fetal Heartbeat provisions], *which shall be enforced exclusively through private civil enforcement actions described by Section 171.208 and may not be enforced by the commission*.[196]

Consequently, unless the Government Official defendants violate the Act to exercise their general authority to enforce the Act, the threat of such action is merely conjectural, theoretical, or hypothetical and insufficient for Article III standing.[197]

B. The Texas Heartbeat Act and State Sovereign Immunity

The Eleventh Amendment to the Constitution divests the federal courts of the power to entertain suits "commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[198] Although, by its terms, the Eleventh Amendment reaches only lawsuits against a state by citizens of another state or a foreign nation, the Supreme Court has held that state sovereign immunity, irrespective of the Eleventh Amendment, extends to lawsuits brought by the citizens of the

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194. *Id.* § 3 (current version at TEX. HEALTH & SAFETY CODE ANN. § 171.207(a)) (emphasis added).

195. *Id.* (current version at TEX. HEALTH & SAFETY CODE ANN. § 171.208(h)). The Act does not prohibit these individuals "from filing an amicus curiae brief in the" civil actions. *Id.* (current version at TEX. HEALTH & SAFETY CODE ANN. § 171.208(h)).

196. *Id.* § 6 (current version at TEX. HEALTH & SAFETY CODE ANN. § 171.005) (emphasis added); *see also* TEX. HEALTH & SAFETY CODE ANN. § 11.001(1) (defining "Commission" as the "Health and Human Services Commission"). Section 171.208(a) permits "[a]ny person, other than an officer or employee of a state or local governmental entity" in Texas to bring a civil action under the Act. Id.; *see also supra* text accompanying notes 53–60 (describing § 171.208).

197. Clapper v. Amnesty Int'l USA, 568 U.S. 398, 409 (2013) ("'[T]hreatened injury must be *certainly impending* to constitute injury in fact,' and . . . '[a]llegations of *possible* future injury' are not sufficient.") (quoting Whitmore v. Arkansas, 495 U.S. 149, 158 (1990)).

198. U.S. CONST. amend. XI.

state.[199] The Supreme Court has made it clear that the immunity of states from private lawsuits derives not from the Eleventh Amendment, but from the constitutional structure itself.[200] In other words, state sovereign immunity flows from the states' status as sovereign entities, under the Constitution, and is not demarcated by the text of the Amendment alone, but by the fundamental postulates in the constitutional design.[201] Upon the ratification of the Constitution, the states "did not consent to become mere appendages of the Federal Government[;] [r]ather, they entered the Union 'with their sovereignty intact.'"[202] And an integral component of state sovereignty is immunity from private suits.[203] Moreover, "[t]he Eleventh Amendment does not exist solely in order to 'preven[t] federal-court judgments that must be paid out of a State's treasury,' . . . it also serves to avoid 'the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.'"[204] State sovereignty does not, however, shield municipalities from private lawsuits[205] such as lawsuits challenging Lubbock's Sanctuary City Ordinance.

While state "sovereign immunity also prohibits suits against state officials or agencies that are effectively suits against a state,"[206] the Supreme Court carved an exception to this rule in *Ex parte Young*:[207] "a suit challenging the constitutionality of a state official's action is not one against the State."[208] The exception is based upon a legal fiction that because a state cannot authorize the state officer's unconstitutional action, the state officer is "'stripped of his official or representative character and [is subject] in his person to the consequences of his individual conduct.'"[209] Moreover, the

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199. Hans v. Louisiana, 134 U.S. 1, 15 (1890)*; see also* Seminole Tribe of Fla. v. Florida. 517 U.S. 44, 54 (1996). The Eleventh Amendment's purpose was to overturn the Supreme Court decision in *Chisholm v. Georgia*, in which the Court permitted an out-of-state creditor of the state of Georgia to bring his lawsuit against the state in federal court. *See* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793); Alden v. Maine, 527 U.S. 706, 720–27 (1999) (discussing genesis and purpose of the Eleventh Amendment).

200. *Hans*, 134 U.S. at 15.

201. *Id.* at 13.

202. Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 751 (2002) (quoting Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 779 (1991)).

203. *Id; see also* Franchise Tax Bd. of Cal. v. Hyatt, 139 S. Ct. 1485, 1493 (2019); Sossamon v. Texas, 563 U.S. 277, 283–84 (2011).

204. *Seminole Tribe*, 517 U.S. at 58 (first quoting Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 48 (1994); and then quoting P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 146 (1993)).

205. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977); Cutrer v. Tarrant Cnty. Loc. Workforce Dev. Bd., 943 F.3d 265, 269 (5th Cir. 2019) (citing Lincoln Cnty. v. Luning, 133 U.S. 529, 530 (1890)).

206. City of Austin v. Paxton, 943 F.3d 993, 997 (5th Cir. 2019), *cert. denied*, 141 S. Ct. 1047 (2021); *see, e.g.*, Edleman v. Jordan, 415 U.S. 651, 663–69 (1974).

207. *See generally Ex parte* Young, 209 U.S. 123 (1908).

208. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 102 (1984)*; see also Paxton*, 943 F.3d at 997.

209. *Pennhurst*, 465 U.S. at 102 (quoting *Young*, 209 U.S. at 160).

Supreme Court has extended the exception to violations of federal law.[210] When a federal court finds that a state official has violated the Constitution or a federal law, it may award injunctive or declaratory relief governing the official's future conduct, but not retroactive relief that would be paid from the state treasury.[211]

Young involved the state of Minnesota's attempt to reduce both passenger and freight railroad rates.[212] The legislation established fixed maximum rates and imposed severe sanctions, including criminal penalties for railroad employees, for noncompliance with the rates.[213] Railroad company shareholders brought derivative actions in federal circuit court against (among others) the railroads and the state attorney general, Edward T. Young, seeking to enjoin the railroads from complying with the act and preventing Young from enforcing the act.[214] They alleged that the legislatively imposed rate structure was "unjust, unreasonable, and confiscatory" in violation of the Constitution.[215] "The suit that gave its name to the circuit court litigation was brought by Carl F. Perkins against the Northern Pacific."[216]

Young moved to dismiss the complaint, arguing that the lawsuit was in effect against the state and barred by the Eleventh Amendment.[217] The circuit court overruled Young's motion and entered a temporary injunction with respect to the new commodity rates, restraining the railroad company from complying with the rates and enjoining Young from enforcing them.[218] Federal statutes at the time permitted appellate review only of final judgments, and "[e]xtensive fact-finding, probably before a special master, would be required before a final decision could be reached."[219] Rather than endure the long delay before he could bring the sovereign immunity issue before the Supreme Court, Young "put himself in contempt of the circuit

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210. *Edleman*, 415 U.S. at 666–67.

211. *See* Verizon Md. v. Pub. Serv. Comm'n of Md., 535 U.S. 635, 645–46 (2002); *Pennhurst*, 465 U.S. at 102–03*; see also* Spec's Fam. Partners v. Nettles, 972 F.3d 671, 681–82 (5th Cir. 2020) (holding that *Ex parte Young* applies only to ongoing violations of federal law, not past actions or retroactive relief such as damages).

212. John Harrison, Ex Parte Young, 60 STAN. L. REV. 989, 991 (2008).

213. *Ex parte Young*, 209 U.S. at 127–28. The act provided that:

> "[A]ny railroad company, or any officer, agent, or representative thereof, who shall violate any provision of this act, shall be guilty of a felony, and, upon conviction thereof, shall be punished by a fine not exceeding five thousand ($5,000) dollars, or by imprisonment . . . for a period not exceeding five (5) years, or both such fine and imprisonment."

Id. at 128.

214. *See generally id.*.

215. *Id*. at 130–32.

216. Harrison, *supra* note 212, at 992 (citing Perkins v. N. Pac. Ry. Co., 155 F. 445 (C.C.D. Minn. 1907)).

217. *Young*, 209 U.S. at 132.

218. *Id*. The circuit court refused to grant a preliminary injunction with respect to passenger rates because they had gone into effect and had been accepted by the railroads. *Id.* The commodity rates had not yet gone into effect. *Id.* at 133.

219. Harrison, *supra* note 212, at 993.

court's order" by filing a state court mandamus action against the railroad.[220] The state court issued the writ commanding compliance with the act.[221] The federal circuit court held Young in contempt, "directing . . . the United States marshal take Young into custody until he purged himself of the contempt by withdrawing the mandamus action, and fining him $100. Young was required to report to the marshal once a day."[222] Because Young "was in federal custody . . . [he] was able to petition to the Supreme Court for . . . [a] writ of habeas corpus," by which the Court could review the decision of the lower court.[223]

The Supreme Court held that state officials who violate the U.S. Constitution cannot be acting on behalf of the state and their actions are not shielded by sovereign immunity:

> [W]here an official claims to be acting under the authority of the state[, and] [t]he act to be enforced is alleged to be unconstitutional; and if it be so, the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of, and one which does not affect, the state in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting, by the use of the name of the state, to enforce a legislative enactment which is void because unconstitutional. If the act which the state attorney general seeks to enforce be a violation of the Federal Constitution, the officer, in proceeding under such enactment, comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The state has no power to impart to him any immunity from responsibility to the supreme authority of the United States.[224]

The Court, noting its earlier decision in *Fitts v. McGhee*,[225] also held:

> In making an officer of the state a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional, it is plain that such officer must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the state, and thereby attempting to make the state a party.[226]

In other words,

> individuals who, as officers of the state, *are clothed with some duty* in

220. *Id.*; *see also Young*, 209 U.S. at 133–34.
221. *See Young*, 209 U.S. at 133–34.
222. Harrison, *supra* note 212, at 993; *see Young*, 209 U.S. at 126.
223. Harrison, *supra* note 212, at 993; *see Young*, 209 U.S. at 126.
224. *Young*, 209 U.S. at 159–60.
225. *See generally* Fitts v. McGhee, 172 U.S. 516 (1899).
226. *Young*, 209 U.S. at 157.

> regard to the enforcement of the laws of the state, and *who threaten and are about to commence proceedings, either of a civil or criminal nature*, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action.[227]

The duty to enforce need not be expressly declared in the act, and "the fact that the state officer, by virtue of his office, has some connection with the enforcement of the act, is the important and material fact, and whether it arises out of the general law, or is specially created by the act itself, is not material so long as it exists."[228] In this case, by his commencement of proceedings to compel the railroad to obey the act, Young clearly "regarded it as a duty" to enforce the act.[229]

By contrast, in *Fitts v. McGhee* the Alabama Legislature fixed the tolls to be charged for crossing the Florence Bridge across the Tennessee River.[230] The statute imposed a $20 penalty for each.[231] Importantly, the penalties for charging higher tolls "were to be collected by the persons paying them."[232] "No officer of the state had any official connection with the recovery of such penalties."[233] The owner of the bridge sued Alabama's Governor and attorney general to enjoin enforcement of the statute.[234]

The Supreme Court of the United States deemed the lawsuit against the governor and attorney general to be, in effect, a lawsuit against the state of Alabama that was barred by the Eleventh Amendment.[235] The Court found that neither the governor nor the attorney general had been "charged by law with any special duty in connection with" enforcing the toll statute.[236] Consequently, neither official could be sued to test the constitutionality of the statute; instead, there must be a "special relation[ship]" between the state officials and the particular statute alleged to be unconstitutional.[237] Otherwise, if

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227. *Id.* at 155–56 (emphasis added).

228. *Id*. at 157.

229. *Id.* at 160. The Court also relied upon the duties of the state attorney general imposed by the common law and Minnesota statutes to enforce state law. *Id.* at 161–62. The Court concluded:

> It would seem to be clear that the attorney general, under his power existing at common law, and by virtue of these various statutes, had a general duty imposed upon him, which includes the right and the power to enforce the statutes of the state, including, of course, the act in question, if it were constitutional. His power by virtue of his office sufficiently connected him with the duty of enforcement to make him a proper party to a suit of the nature of the one now before the United States circuit court.

Id. at 161.

230. *Fitts*, 172 U.S. at 516.

231. *See id*.

232. *Young*, 209 U.S. at 156.

233. *Id.*

234. *Fitts*, 172 U.S. at 517–18.

235. *Id.* at 528–29.

236. *Id.* at 529.

237. *Id.* at 530.

> a case could be made for the purpose of testing the constitutionality of the statute, by an injunction suit brought against them, then the constitutionality of every act passed by the legislature could be tested by a suit against the governor and the attorney general, based upon the theory that the former, as the executive of the state, was, in a general sense, charged with the execution of all its laws, and the latter, as attorney general, might represent the state in litigation involving the enforcement of its statutes.[238]

The Court recognized that this

> would be a very convenient way for obtaining a speedy judicial determination of questions of constitutional law which may be raised by individuals, *but it is a mode which cannot be applied to the states of the Union consistently with the fundamental principle that they cannot, without their assent, be brought into any court at the suit of private persons*.[239]

Ex Parte Young's requirement that a state official "have 'some connection' to the enforcement of the statute being challenged[] is generally well accepted."[240] A plurality of the Fifth Circuit applied this requirement in its en banc decision in *Okpalobi v. Foster*.[241] Recall that the law at issue in *Okpalobi* provided to women who underwent an abortion "a private tort remedy against the doctors who perform the abortion. It expose[d] those doctors to . . . tort liability for any damage caused by the abortion procedure to both mother and '*unborn child*.'"[242] The plaintiff, Dr. Okpalobi, joined "by five health care clinics and other physicians, individuals, and businesses who perform abortions in" the state, sued the Louisiana Governor and attorney general seeking to enjoin the operation and effect of Act 825.[243] The plaintiffs' lawsuit was a "facial attack on the constitutionality" of Act 825.[244] According to the plurality, the issue in *Okpalobi* was

> whether the *Young* fiction requires that the defendant state official have some enforcement powers with respect to the particular statute at issue, or whether the official need have no such enforcement powers and only need be charged with the general authority and responsibility to see that all of the laws of the state be faithfully executed.[245]

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238. *Id.*
239. *Id.* (emphasis added).
240. Rosman, *supra* note 128, at 737 (citing *Ex parte* Young, 209 U.S. 123, 156–57 (1908)).
241. Okpalobi v. Foster, 244 F.3d 405, 416 (5th Cir. 2001) (en banc); *see* Jennifer L. Achilles, Comment, *Using Tort Law to Circumvent* Roe v. Wade *and Other Pesky Due Process Decisions*: *An Examination of Louisiana's Act 825*, 78 TUL. L. REV. 853, 865 (2004).
242. *Okpalobi*, 244 F.3d at 409 (emphasis added).
243. *Id.*
244. *Id.*
245. *Id.* at 416.

The plurality ruled that not only must the sued state officials have the general duty to see that state laws are implemented, they must also have

> the particular duty to enforce the statute in question and a demonstrated willingness to exercise that duty. For a duty found in the general laws to constitute a sufficient connection, it must "include[] the right *and the power* to enforce the statutes of the state, including, of course, the act in question . . . ."[246]

Thus, "any probe into the existence of a *Young* exception should gauge (1) the ability of the official to enforce the statute at issue under his statutory or constitutional powers, and (2) the demonstrated willingness of the official to enforce the statute."[247]

Because "the Eleventh Amendment analysis in *Okpalobi* . . . received support only from a plurality of [the] en banc court," subsequent Fifth Circuit decisions have not found it to be binding precedent.[248] Nevertheless, following *Young*, the court requires that the state official sued have "some connection" with enforcing the state law that conflicts with federal law, and that the official threatens to exercise that authority.[249] In this regard,

> the similarity between the constitutional standing elements and the "some connection" requirement of the *Ex parte Young* exception to Eleventh Amendment immunity is strong. Most obviously, a state official who cannot enforce a statute in any meaningful sense both cannot cause any injury to plaintiff (and thus plaintiff's injury is not traceable to his or her conduct as required under Article III) and lacks the "connection" requirement of *Ex parte Young*.[250]

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246. *Id.* at 416–17 (quoting *Ex parte* Young, 209 U.S. 123, 161 (1908)). Additionally,

> *Young* solidified the doctrine that state officers could be sued in federal court despite the Eleventh Amendment, while simultaneously emphasizing the requirements that the officers have "some connection with the enforcement of the act" in question or be "specially charged with the duty to enforce the statute" and be threatening to exercise that duty.

Id. at 414–15 (quoting *Young*, 209 U.S. at 157).

247. *Id.* at 417.

248. Air Evac EMS, Inc. v. Tex., Dep't of Ins., Div. of Workers' Comp., 851 F.3d 507, 518 (5th Cir. 2017) (citing K.P. v. LeBlanc, 627 F.3d 115, 124 (5th Cir. 2010)).

249. *See, e.g.*, Tex. Democratic Party v. Hughs, 997 F.3d 288, 291 (5th Cir. 2021); Mi Familia Vota v. Abbott, 977 F.3d 461, 467 (5th Cir. 2020); City of Austin v. Paxton, 943 F.3d 993, 1000 (5th Cir. 2019), *cert. denied*, 141 S. Ct. 1047 (2021).

250. Rosman, *supra* note 128, at 738. *See also* Manian, *supra* note 2, at 171 (citation omitted):

> *Ex parte Young*'s connection requirement mimics the causation element of Article III standing. Both look for the state official who will enforce the challenged state law, although for different reasons. Standing looks to enforcement through the element of causation to protect separation of powers by ensuring a concrete controversy between the plaintiff and defendant. *Ex parte Young* looks at enforcement through the requirement of 'some connection' out of concern for federalism principles (*i.e.*, encroachment on state prerogatives); arguably, if any state official can be named in a suit, the 'fictional' line that *Ex parte Young* draws dissolves entirely.

Challengers to the Texas Heartbeat Act are unlikely to overcome the state's sovereign immunity.[251] The Eleventh Amendment bars suits by private citizens against a state in federal court.[252] Unless *Young* applies, the Eleventh Amendment also prohibits lawsuits by private citizens against state officials in their official capacities.[253] With respect to the Texas Heartbeat Act, *Young* is unquestionably inapposite. Because only private citizens, not state officials, can bring actions for a violation of the statute,[254] there are no state officials who have "some connection" with enforcing the law. Indeed, the statute expressly forbids the "state, a political subdivision, a district or county attorney, or an executive or administrative officer or employee of th[e] state or a political subdivision" from enforcing or threatening to enforce the statute against a person who violates the law.[255] The Act also prohibits "th[e] state, a state official, or a district or county attorney" from intervening in an action brought by a private citizen.[256]

C. Litigating the Texas Heartbeat Act in the State Courts

Because abortion providers cannot preemptively challenge the Texas Heartbeat Act or the Lubbock Sanctuary City for the Unborn Ordinance in the federal courts, they must await private lawsuits against them before asserting their constitutional challenges to the laws as defenses to the private claims.[257] Both the Texas statute and the Lubbock ordinance anticipate such

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But cf. Daniel D. Williams, *The Right to Sue for the Right to Choose*: *Does the Eleventh Amendment Prevent Suits Challenging Statutes Permitting Tort Damages Against Physicians Who Perform Law Term Abortions?*, 1 GEO. J. GENDER & L. 911, 939 (2000) (arguing that the *Young*'s "some connection" requirement should be considered only in terms of Article III standing).

251. A state may waive its sovereign immunity and consent to suit, Clark v. Barnard, 108 U.S. 436, 447–48 (1883), but such "consent to suit must be 'unequivocally expressed' in the text of the relevant statute. . . . Waiver may not be implied." Sossamon v. Texas, 563 U.S. 277, 284 (2011) (citations omitted). "[A] waiver of sovereign immunity 'will be strictly construed, in terms of its scope, in favor of the sovereign.'" *Id.* at 285 (quoting Lane v. Pena, 518 U.S. 187, 192 (1996)). Texas does not waive its sovereign immunity under the Heartbeat Act; in fact, the statute explicitly preserves the state's sovereign immunity. Tex. Heartbeat Act, 87th Leg., R.S., ch. 62, § 3, sec. 171.211, 2021 Tex. Gen. Laws 1, 12 (current version at TEX. HEALTH & SAFETY CODE ANN. § 171.211).

252. Alden v. Maine, 527 U.S. 706, 715 (1999); Hutto v. Finney, 437 U.S. 678, 700 (1978).

253. LeBlanc, 627 F.3d at 124 (citing Nelson v. Univ. of Tex. at Dall., 535 F.3d 318, 320 (2008))*; see also* Edleman v. Jordan, 415 U.S. 651, 663–69 (1974); *Paxton*, 943 F.3d at 997.

254. Tex. Heartbeat Act, 87th Leg., R.S., ch. 62, § 3, sec. 171.211, 2021 Tex. Gen. Laws 1–14 (current version at TEX. HEALTH & SAFETY CODE ANN. § 171.207(a)).

255. *Id.* (current version at TEX. HEALTH & SAFETY CODE ANN. § 171.207(a)).

256. *Id.* (current version at TEX. HEALTH & SAFETY CODE ANN. § 171.208(h)). The statute does not prohibit amicus curiae briefs in the action. *Id.* (current version at TEX. HEALTH & SAFETY CODE ANN. § 171.208(h)).

257. Professor Maya Manian aptly points out that under these tort schemes "no one need ever file a civil suit in state court in order to restrict the provision of abortion services. Like a Sword of Damocles, the threat of a catastrophic lawsuit alone will chill abortion providers." Manian, *supra* note 2, at 126.

defenses.[258] While the abortion providers' defenses to such lawsuits unquestionably raise federal questions under the Constitution, the defenses cannot serve as a basis for removal of the lawsuits to a federal district court. Instead, they must litigate their defenses in the state courts.

The federal question jurisdiction statute, 28 U.S.C. § 1331, states: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."[259] Section 1331 is based on Article III of the Constitution, which provides: "The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their [a]uthority."[260] While Supreme Court precedent suggests that Article III may encompass all cases in which a federal question is "an ingredient of the original cause,"[261] the Constitution describes only cases that Congress *may* permit federal district courts to hear.[262] Article III jurisdiction is not self-executing,[263] and Congress has the discretion to confer on the inferior federal courts only part of what the Constitution allows.[264] Thus, "[a]lthough the language of § 1331 parallels that of the 'Arising Under' Clause of Art[icle] III, [the Supreme] Court never has held that statutory 'arising under' jurisdiction is identical to Art[icle] III 'arising under' jurisdiction."[265]

As a general rule, to invoke jurisdiction under § 1331, federal law must be part of the plaintiff's "well-pleaded" complaint.[266] That is, the federal

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258. Tex. Heartbeat Act, 87th Leg., R.S., ch. 62, § 3, sec. 171.201, 2021 Tex. Gen. Laws 1, 1–14 (current version at TEX. HEALTH & SAFETY CODE ANN. § 171.209(b)); Lubbock Ordinance Outlawing Abortion, *supra* note 7, at § F.(4).

259. Attempts to remove lawsuits by non-Texas residents against Texas abortion providers based upon diversity jurisdiction, 28 U.S.C. § 1332(a), are unlikely to succeed because of the "forum-defendant rule" of 28 U.S.C. § 1441(b)(2): "A civil action otherwise removable solely on the basis of the jurisdiction under section 1332(a) of this title may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." 28 U.S.C. § 1441(b)(2). The rule is not jurisdictional, however, and may be waived. *In re* 1994 Exxon Chem. Fire, 558 F.3d 378, 393 (5th Cir. 2009)*; see also* Holbein v. TAW Enter., Inc. 983 F.3d 1049, 1053 (8th Cir. 2020) (en banc) (holding that a violation of the forum-defendant rule is a non-jurisdictional defect in removal that is waived if not raised in a motion to remand made within thirty days after the filing of the notice of removal).

260. U.S. CONST. art. III, § 2.

261. Osborn v. Bank of the U.S., 22 U.S. (9 Wheat.) 738, 823 (1824).

262. Merrell Dow Pharm., Inc. v. Thompson, 478 U.S. 804, 807–08 (1986).

263. Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 377 (1994) ("Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution *and statute* . . . .") (emphasis added); Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 541 (1986) ("Federal courts are not courts of general jurisdiction; they have only the power that is authorized by Article III of the Constitution *and the statutes enacted by Congress pursuant thereto*.") (emphasis added).

264. Kontrick v. Ryan, 540 U.S. 443, 452 (2004*; see also* Paul M. Bator, *Congressional Power Over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030, 1030–31 (1982); *see generally* F. Andrew Hessick III, *The Common Law of Federal Question Jurisdiction*, 60 ALA. L. REV. 895, 901 (2009).

265. Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 494 (1983)*; see also Merrell Dow*, 478 U.S. at 807–08.

266. Gunn v. Minton, 568 U.S. 251, 258 (2013)*; see also Merrell Dow*, 478 U.S. at 808; Franchise Tax Bd. v. Constr. Laborers Vacation Tr. Fund, 463 U.S. 1, 9–10 (1983).

courts look only to the plaintiff's complaint—not to the defendant's asserted defenses against the plaintiff—to determine whether there is federal question jurisdiction.[267] Well-pleaded refers to that part of the complaint supporting the plaintiff's claim; the courts will ignore any extraneous material that the plaintiff may have inserted into his or her complaint—material that does not relate directly to the claim.[268] For example, if the plaintiff anticipates that the

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The Supreme Court has recognized a "less frequently encountered, variety of federal 'arising under' jurisdiction," Grable & Sons Metal Prods. v. Darue Eng'g & Mfg., 545 U.S. 308, 312 (2005), where "the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." *Franchise Tax Bd.*, 463 U.S. at 28. For example, in *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921), a shareholder sued the defendant corporation claiming that it could not lawfully buy certain federal bonds "because their issuance was unconstitutional. Although Missouri law provided the cause of action, the Court recognized federal-question jurisdiction because the principal issue in the case was the federal constitutionality of the bond issue." *Grable*, 545 U.S. at 312. And in *Grable*, the Internal Revenue Service seized the plaintiff's property, selling it to satisfy the plaintiff's federal tax delinquency. *Id.* at 310. Five years later, the plaintiff filed a state law quiet title action against the party that had purchased the property, alleging that the IRS had failed to comply with certain federally imposed notice requirements, so the seizure and sale were invalid. *Id.* at 311.

> In holding that the case arose under federal law, [the Court in *Grable*] primarily focused not on the interests of the litigants themselves, but rather on the broader significance of the notice question for the Federal Government. [The Court] emphasized the Government's "strong interest" in being able to recover delinquent taxes through seizure and sale of property, which in turn "require[d] clear terms of notice to allow buyers . . . to satisfy themselves that the Service has touched the bases necessary for good title." . . . The Government's "direct interest in the availability of a federal forum to vindicate its own administrative action" made the question "an important issue of federal law that sensibly belong[ed] in a federal court."

Gunn, 568 U.S. at 258 (quoting *Grable*, 545 U.S. at 315). The Court in *Grable* "condensed the inquiry" for this branch of "arising under" jurisdiction to the following:

> Does the "state-law claim necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities?" . . . That is, federal jurisdiction over a state law claim will lie if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress. Where all four of these requirements are met, . . . jurisdiction is proper because there is a "serious federal interest in claiming the advantages thought to be inherent in a federal forum," which can be vindicated without disrupting Congress's intended division of labor between state and federal courts.

Id. at 258 (quoting *Grable*, 545 U.S. at 313–14)*; see also* Budget Prepay, Inc. v. AT&T Corp., 605 F.3d 273, 280–81 (5th Cir. 2010); Singh v. Duane Morris L.L.P., 538 F.3d 334, 338–40 (5th Cir. 2008). The causes of action created by the Texas Heartbeat Act and the Lubbock Sanctuary City for the Unborn Ordinance do not turn on a substantial question of federal law (although they do involve federally based defenses). The only questions are whether an abortion provider furnished an abortion prohibited by the Act or the ordinance and whether the plaintiff falls within the class of persons permitted to bring a lawsuit.

267. Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 152 (1908).

268. *Franchise Tax Bd.*, 463 U.S. at 10–11 (internal quotations and citations omitted):

> [A] federal court does not have original jurisdiction over a case in which the complaint presents a state-law cause of action, but also asserts that federal law deprives the defendant of a defense he may raise, . . . or that a federal defense the defendant may raise is not sufficient to defeat the claim . . . . Although such allegations show that very likely, in the course of the litigation, a question under the Constitution would arise, they do not show that the suit, that is, the plaintiff's original cause of action, arises under the Constitution. . . . For better or worse, under the present statutory scheme as it has existed since 1887, a defendant may not remove a case to federal court unless the *plaintiff*'s complaint establishes that the case 'arises under'

defendant will raise a particular defense and attempts to rebut it in advance, the allegations will be ignored in determining jurisdiction.[269] Only if the plaintiff's *claim* or *cause of action* (not the plaintiff's discussion of matters beyond the claim) arises under federal law will the case fall under § 1331.[270]

Lawsuits filed under the Texas Heartbeat Act and the Lubbock Sanctuary City for the Unborn Ordinance are purely state causes of action—they are defined by state and local law. While abortion providers have a strong and substantial federal defense to lawsuits filed under the laws, the federal defenses are not a basis for removal of the lawsuits to a federal district court.[271] Consequently, Texas state courts—not federal district courts—will hear lawsuits under the Texas statute and Lubbock ordinance.

"State courts are bound equally with the federal courts by the Federal Constitution and laws."[272] Unlike federal judges who receive life tenure,[273] unless appointed to fill temporary vacancies,[274] Texas judges are generally elected in partisan elections.[275] *A fortiori*, state judges are subject to removal by voters based upon their decisions. While most Texas judges will appropriately apply federal defenses to lawsuits arising under the Texas Heartbeat Act and the Lubbock Sanctuary City for the Unborn Ordinance, one cannot dismiss the possibility that some will decide cases with an eye towards future elections.[276] For example, Lubbock judges will recognize that

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> federal law. [A] right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action.

269. *Mottley*, 211 U.S. at 152; Tennessee v. Union & Planters' Bank, 152 U.S. 454, 460 (1894); Quinn v. Guerrero, 863 F.3d 353, 359 (5th Cir. 2017); Enable Miss. River Transmission, L.L.C. v. Nadel & Gussman, L.L.C., 844 F.3d 495, 498–500 (5th Cir. 2016); New Orleans & Gulf Coast Ry. Co. v. Barrois, 533 F.3d 321, 329 (5th Cir. 2008).

270. Am. Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 260 (1916) ("A suit arises under the law that creates the cause of action.").

271. Under the general removal statute, 28 U.S.C. § 1441(a), a defendant may remove a case only if the plaintiff could have filed the case in federal court. 24 U.S.C. § 1441(a). In other words, the case must be one over which the federal courts would have had original jurisdiction had the case been filed there initially. Am. Fire & Cas. Co. v. Finn, 341 U.S. 6, 17–18 (1951); *Quinn*, 863 F.3d at 359; Avitts v. Amoco Prod. Co., 53 F.3d 690, 693 (5th Cir. 1995). Removal is predicated upon the plaintiff's well-pleaded complaint in the state court—not anticipated defenses. *Merrell Dow*, 478 U.S. at 808; Pub. Serv. Comm'n v. Wycoff Co., 344 U.S. 237, 243 (1952); *see generally Mottley*, 211 U.S. at 149, 152.

272. *Wycoff*, 344 U.S. at 247–48; U.S. CONST. art. VI, cl. 2 (emphasis added):

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; *and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.*").

See also Testa v. Katt, 330 U.S. 386, 391 (1947).

273. U.S. CONST. art III, § 1.

274. TEX. CONST. art. V, § 28.

275. TEX. ELEC. CODE ANN. §§ 172.001–.002; TEX. COMM'N ON JUD. SELECTION, FINAL REPORT at v, 17–18, 32 (2020), [hereinafter TEXAS COMM'N, https://www.txcourts.gov/media/1450219/201230_tcjs-final-report_compressed.pdf; *see* TEX. CONST. art. V, § 7 (election of district judges). Municipal judges may be elected or, in some cases, appointed by the mayor. TEX. GOV'T CODE ANN. § 29.004.

276. For example, the Texas Commission on Judicial Selection notes that a disadvantage of partisan elections is that it creates "[v]oters' perception . . . that judicial function is mainly political rather than

nearly two-thirds of voters approved the Sanctuary City initiative.[277]

The Texas Heartbeat Act is even more problematic for abortion providers. The Act allows venue in (among others) the county of residence for the claimant if the claimant is a natural person residing in this state.[278] The Act does not permit transfer to a different venue "without the written consent of all parties."[279] Thus, the Act enables abortion opponents to "forum shop" by finding willing plaintiffs who are residents of counties in which judges are perceived to be more sympathetic to their claims.[280] Just as notably, by selecting a forum as far from the residence of the abortion provider, the plaintiffs add to the provider's costs making the defense of the litigation more onerous. Thus, for example, a plaintiff who resides in Sierra Blanca, Texas, the county seat of Hudspeth County in far west Texas, may bring an action in that county against an abortion provider that only serves women in Houston (Harris County), over 600 miles away.[281] And absent the plaintiff's consent to transfer the case to Harris County, the case will be tried in Hudspeth County.[282]

D. The Question of Third-Party Standing

As discussed in Part IV.A, Article III of the U.S. Constitution requires that litigants give standing to bring a matter before a federal court for adjudication.[283] To establish constitutional standing, a plaintiff must satisfy three elements: (1) an "injury in fact" (2) fairly traceable to the acts or omissions of the defendant (3) that can be effectively redressed by a favorable court decision.[284] Apart from the constitutionally mandated standing requirement, the Supreme Court has recognized several so-called "prudential" standing limits, which are "essentially matters of judicial self-governance": they enable courts to avoid abstract questions of wide public significance more competently addressed by other governmental

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based on the rule of law." TEXAS COMM'N, *supra* note 275, at 32. Likewise, the advantage of a nonpartisan elections is that they "help[] public perceive judicial officers as different from effective policymakers." *Id.* at 31.

277. *See supra* text accompanying note 15 (explaining that 21,400 out of 34,260 votes were in favor of the ordinance).

278. Tex. Heartbeat Act, 87th Leg., R.S., ch. 62, § 3, sec. 171.210(a)(4), 2021 Tex. Gen. Laws 1, 11 (current version at TEX. HEALTH & SAFETY CODE ANN. § 171.210(a)(4)).

279. *Id.* (current version at TEX. HEALTH & SAFETY CODE ANN. § 171.210(b)).

280. Conversely, opponents of the Act may find willing plaintiffs in more favorable forums to sue abortion providers for performing unlawful pre-viability abortions hoping for decisions overturning the Act.

281. *Distance from Sierra Blanca, TX to Houston, TX*, DISTANCE BETWEEN CITIES, https://www.distance-cities.com/distance-sierra-blanca-tx-to-houston-tx (last visited Oct. 5, 2021).

282. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 171.210(a)–(b).

283. *See* Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 180 (2000); *see also* Fallon, *supra* note 100, at 635.

284. *See, e.g.*, Lance v. Coffman, 549 U.S. 437, 439 (2007) (per curiam); *Friends of the Earth*, 528 U.S. at 180–81; Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992).

institutions where judicial intervention is unnecessary to protect individual rights.[285] Unlike constitutional standing requirements, Congress or the courts may modify or abrogate prudential limits.[286]

The most important prudential limitation is the prohibition against third-party standing (or *jus tertii*); that is, the courts will generally not permit a party to assert the constitutional rights of third parties.[287] The Supreme Court has recognized an exception to the third-party standing limitation where (a) the party asserting the right to sue has a "close" personal relationship with persons who possess standing; and (b) a "hindrance" exists to the possessor's ability to protect his/her own interests.[288] Under this exception, the federal courts have permitted physicians and abortion providers to assert a woman's right to an abortion.[289]

Of course, federal courts will not hear lawsuits under the Texas Heartbeat Act and the Lubbock Sanctuary City for the Unborn Ordinance. While state courts are not subject to Article III's case or controversy limits,[290] the Texas courts have found a standing requirement derived "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.'"[291] "Texas's standing test parallels the federal test for Article III standing: 'A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.'"[292] Texas courts also recognize limits on third-party standing, generally holding that when challenging the constitutionality of a statute, a party must show "that in its operation the

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285. Warth v. Seldin, 422 U.S. 490, 498–501 (1975)*; see also* June Med. Servs., L.L.C. v. Russo, 140 S. Ct. 2103, 2117 (2020); Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 126 (2014); Gladstone Realtors v. Vill. of Bellwood, 441 U.S. 91, 99–100 (1979).

286. Bennett v. Spear, 520 U.S. 154, 162 (1997)*; see also* Dep't of Com. v. U.S. House of Representatives, 525 U.S. 316, 328–29 (1999).

287. *See* Hollingsworth v. Perry, 570 U.S. 693, 708 (2013); Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 12 (2004), *abrogated by* Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S.118 (2014); Kowalski v. Tesmer, 543 U.S. 125, 129 (2004); Sec'y of State v. Joseph H. Munson, Co., 467 U.S. 947, 955 (1984); Tyler v. Judges of Ct. of Registration, 179 U.S. 405, 407–09 (1900).

288. *See* Singleton v. Wulff, 428 U.S. 106, 117–18 (1976).

289. *Id.* at 118.

290. ASARCO Inc. v. Kadish, 490 U.S. 605, 617 (1989):

> We have recognized often that the constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law, as when they are called upon to interpret the Constitution or, in this case, a federal statute.

291. Meyers v. JDC/Firethorne, Ltd., 548 S.W.3d 477, 484 (Tex. 2018) (citing TEX. CONST. art. I, § 13)*; see also* Tex. Ass'n of Busn. v. Tex. Air Control Bd., 852 S.W.2d 440, 444 (Tex. 1993).

292. *Meyers*, 548 S.W.3d at 485 (first quoting Heckman v. Williamson Cnty., 369 S.W.3d 137, 154 (2012); and then quoting Allen v. Wright, 468 U.S. 737, 751 (1984))*; see also* Data Foundry, Inc. v. City of Austin, 620 S.W.3d 692, 696 (Tex. 2021); Pike v. Tex. EMC Mgmt., L.L.C., 610 S.W.3d 763, 773–74 (Tex. 2020); *see generally* William V. Dorsaneo, III, *The Enigma of Standing Doctrine in Texas Courts*, 28 REV. LITIG. 35 (2008).

statute is unconstitutional as to him in his situation; that it may be unconstitutional as to others is not sufficient."[293] To have third-party standing, a party must still have suffered an injury in fact.[294]

The Texas legislature may grant private standing.[295] "'When standing has been statutorily conferred, the statute itself serves as the proper framework for a standing analysis.'"[296] Texas's Heartbeat Act defines the scope of an abortion provider's standing to assert the rights of women seeking an abortion as a defense to liability. The statute states that an abortion provider does not have standing to assert a woman's right to an abortion unless

> (1) the United States Supreme Court holds that the courts of this state must confer standing on that defendant to assert the third-party rights of women seeking an abortion in state court as a matter of federal constitutional law; *or* (2) the defendant has standing to assert the rights of women seeking an abortion under the tests for third-party standing established by the United States Supreme Court.[297]

If one of these prerequisites to third-party standing is met,[298] a defendant may assert the rights of women to an abortion if "the defendant demonstrates that the relief sought by the claimant will impose an undue burden on that woman or that group of women seeking an abortion."[299] A court may not, however

> find an undue burden . . . unless the defendant introduces evidence proving that: (1) an award of relief will prevent a woman or a group of women from obtaining an abortion; or (2) an award of relief will place a substantial obstacle in the path of a woman or a group of women who are seeking an abortion."[300]

And:

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293. Parent v. State, 621 S.W.2d 796, 797 (Tex. Crim. App. 1981)*; see also* Santikos v. State, 836 S.W.2d 631, 633 (Tex. Crim. App. 1992); Shaffer v. State, 184 S.W.3d 353, 364 (Tex. App.—Fort Worth 2006, pet. ref'd); *Ex parte* Luna, 24 S.W.3d 606, 607 (Tex. App.—Fort Worth 2000, no pet.); Kircus v. London, 660 S.W.2d 869, 872 (Tex. App.—Austin 1983, no writ); First State Bank v. Lewis, 560 S.W.2d 191, 192 (Tex. App.—Waco 1977, writ ref'd n.r.e.).

294. McGuire v. Abbott, No. 02-17-00189-CV, 2017 WL 5895186, at *2 (Tex. App.—Fort Worth Nov. 30, 2017, pet. denied) (citing Powers v. Ohio, 499 U.S. 400, 410–11 (1991)).

295. Brown v. De La Cruz, 156 S.W.3d 560, 566 (Tex. 2004); Bickham v. Dall. Cnty, 612 S.W.3d 663, 670 (Tex. App.—Dallas 2020, pet. filed).

296. *Bickham*, 612 S.W.3d at 670 (quoting Everett v. TK-Taito, L.L.C. 178 S.W.3d 844, 851 (Tex. App.—Fort Worth 2005, no pet.)).

297. Tex. Heartbeat Act, 87th Leg., R.S., ch. 62, § 3, sec. 171.209(a), 2021 Tex. Gen. Laws 1, 9 (current version at TEX. HEALTH & SAFETY CODE ANN. § 171.209(a)) (emphasis added).

298. *Id.* (current version at TEX. HEALTH & SAFETY CODE ANN. § 171.209(b)(1)).

299. *Id.* (current version at TEX. HEALTH & SAFETY CODE ANN. § 171.209(b)(2)).

300. *Id.* (current version at TEX. HEALTH & SAFETY CODE ANN. § 171.209(c)).

> A defendant may *not* establish an undue burden . . . by: (1) merely demonstrating that an award of relief will prevent women from obtaining support or assistance, financial or otherwise, from others in their effort to obtain an abortion; or (2) arguing or attempting to demonstrate that an award of relief against other defendants or other potential defendants will impose an undue burden on women seeking an abortion.[301]

The Lubbock Sanctuary City for the Unborn Ordinance simply permits a defendant sued under the ordinance to

> assert the Supreme Court's rulings in *Roe v. Wade*, 410 U.S. 113 (1973), or *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), or any other abortion-related pronouncement of the Supreme Court as a defense to liability if that individual or entity has third-party standing to assert the rights of women seeking abortions in court, and if the imposition of liability in that particular lawsuit would impose an "undue burden" on women seeking abortions.[302]

Abortion providers will be able to demonstrate constitutional standing in the Texas courts. They will suffer a concrete and particularized injury if they are enjoined from providing their services or are ordered to pay statutory, compensatory, and punitive damages for performing abortions.[303] The question is whether they have third-party standing to assert the rights of women who seek abortions. In *Singleton v. Wulff*,[304] physicians challenged a Missouri law excluding non-medically indicated abortions from Medicaid coverage. The Court determined that physicians are "uniquely qualified to litigate the constitutionality of the State's interference with, or discrimination against, that decision[,]" because "the constitutionally protected abortion decision is one in which the physician is intimately involved."[305] The Court found substantial obstacles to a woman's ability to assert her own constitutional rights:

> For one thing, she may be chilled from such assertion by a desire to protect the very privacy of her decision from the publicity of a court suit. A second obstacle is the imminent mootness, at least in the technical sense, of any individual woman's claim. Only a few months, at the most, after the maturing of the decision to undergo an abortion . . . . It is true that these obstacles are not insurmountable. Suit may be brought under a pseudonym,

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301. *Id.* (current version at TEX. HEALTH & SAFETY CODE ANN. § 171.209(d)) (emphasis added). Nothing in the Act limits or precludes defendants from asserting their own constitutional rights. *See id*. (current version at TEX. HEALTH & SAFETY CODE ANN. § 171.209(f)).

302. Lubbock Ordinance Outlawing Abortion, *supra* note 7, § F.(4).

303. *See* Singleton v. Wulff, 428 U.S. 106, 112–13 (1976) (arguing that doctors providing abortions have constitutional standing to challenge exclusion of "nonmedically indicated abortions" from Medicaid because they will be out of pocket by the amounts of the payments).

304. *Id.* at 110.

305. *Id.* at 117.

> as so frequently has been done. A woman who is no longer pregnant may nonetheless retain the right to litigate the point because it is 'capable of repetition yet evading review.' . . . And it may be that a class could be assembled, whose fluid membership always included some women with live claims. *But if the assertion of the right is to be "representative" to such an extent anyway, there seems little loss in terms of effective advocacy from allowing its assertion by a physician*.[306]

The Court concluded "that it generally is appropriate to allow a physician to assert the rights of women patients as against governmental interference with the abortion decision."[307] Thereafter, the Court has "long permitted abortion providers to invoke the rights of their actual or potential patients in challenges to abortion-related regulations."[308] It has also "generally permitted plaintiffs to assert third-party rights in cases where 'the enforcement of the challenged restriction *against the litigant*, would result indirectly in violation of third parties' rights.'"[309] Consequently, abortion providers meet the initial requirement for third-party under both the Texas Heartbeat Act: they "assert the rights of women seeking an abortion under the tests for third-party standing established by the United States Supreme Court."[310] Moreover, the abortion providers satisfy the test established by the

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306. *Id.* at 117–18 (citation omitted) (emphasis added).

307. *Id.* at 118.

308. *See, e.g.*, June Med. Servs., L.L.C. v. Russo, 140 S. Ct. 2103, 2118 (2020) (plurality opinion) (dicta) (listing cases in which the Court has allowed abortion providers to assert their patients and potential patients' constitutional right to abortion)*; see also* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2322 (2016) ("[T]he Court has been especially forgiving of third-party standing criteria for one particular category of cases: those involving the purported substantive due process right of a woman to abort her unborn child."). *See generally* Hannah Tuschman, *Challenging TRAP Laws*: *A Defense for Standing for Abortion Providers*, 34 BERKELEY J. GENDER L. & JUST. 235, 261–65 (2019). *But cf.* Kowalski v. Tesmer, 543 U.S. 125, 134 (2004) (criminal defense attorneys lack third-party standing on behalf of hypothetical future clients to challenge constitutionality of state statute denying appellate counsel to criminal defendants who plead guilty or *nolo contendere*).

309. *June Med. Servs*., 140 S. Ct. at 2118–19 (internal quotations and citations omitted) (emphasis in the original). *June Med. Servs.* involved a challenge to a Louisiana statute requiring physicians who perform abortions to have active admitting privileges at a hospital within 30 miles of where the abortions were performed or induced. *Id.* at 2113. The state did not challenge the affected physicians' claim of third-party standing until it filed its cross-petition for certiorari. *Id.* at 2117. The Court held that because the third-party standing rule is prudential and not constitutionally based, the state waived the issue. *Id.* Three of the four dissenting justices would have ruled physicians (at least in this case) do not have standing to assert a woman's right to an abortion. *Id.* at 2142–49 (Thomas, J., dissenting); *id.* at 2165–70 (Alito, J., dissenting); *id.* at 2173–75 (Gosuch, J., dissenting). *See generally* Elika Nassirnia, Note, *Third-Party Standing and Abortion Providers*: *The Hidden Dangers of* June Medical Services, 16 NW. J.L. & SOC. POL'Y 214 (2021); Brandon L. Winchel, *The Double Standard for Third-Party Standing*: June Medical *and The Continuation of Disparate Standing Doctrine*, 96 NOTRE DAME L. REV. 421 (2020).

310. Tex. Heartbeat Act, 87th Leg., R.S., ch. 62, § 3, sec. 171.209(a)(2), 2021 Tex. Gen. Laws 1, 9 (current version at TEX. HEALTH & SAFETY CODE ANN. § 171.209(a)(2)). Because the third-party standing limitation is prudential and not constitutionally based, *June Med. Servs*., 140 S. Ct. at 2117, the Supreme Court has never held "that the courts of . . . state must confer standing on that defendant to assert the third-party rights of women seeking an abortion in state court as a matter of federal constitutional law." Tex. Heartbeat Act, 87th Leg., R.S., ch. 62, § 3, sec. 171.209(a)(1), 2021 Tex. Gen. Laws 1, 9 (current

Lubbock Sanctuary City for the Unborn Ordinance.

To establish third-party standing, the Texas statute requires abortion providers to prove:

> (1) an award of relief [against them and not other providers] will prevent a woman or a group of women from obtaining an abortion; or (2) an award of relief will place a substantial obstacle in the path of a woman or a group of women who are seeking an abortion.[311]

If abortion clinics comply with the statute, all women in Texas will be denied their constitutional right to most pre-viable abortions—those performed anywhere between the fifth or sixth week of pregnancy and the twenty-second to the twenty-fourth week of pregnancy.[312] In Lubbock, absent a qualifying medical emergency, no woman may receive a pre-viable abortion.[313] Thus, abortion providers' obedience to the Texas statute and the Lubbock ordinance alone places a substantial obstacle to a woman's right to a constitutionally protected abortion.

Some, if not all, abortion providers might comply with the Fetal Heartbeat Act given the time, cost, and expense of defending private lawsuits—sometimes in courts hundreds of miles away—and the prospect of potentially devastating damages for noncompliance.[314] Moreover, the Texas statute subjects not only those persons who actually perform abortions to civil

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version at TEX. HEALTH & SAFETY CODE ANN. § 171.209(a)(1)). Moreover, constitutionally required standing is based upon Article III's "case or controversy" requirement, *June Med. Servs.*, 140 S. Ct. at 2117, which is also inapplicable to the states. ASARCO Inc. v. Kadish, 490 U.S. 605, 617 (1989).

311. Tex. Heartbeat Act, 87th Leg., R.S., ch. 62, § 3, sec. 171.209(a)(2), 2021 Tex. Gen. Laws 1, 9 (current version at TEX. HEALTH & SAFETY CODE ANN. §§ 171.209(c), (d)).

312. *See supra* text accompanying notes 46–47, 92–94 (explaining gestational age and viability).

313. Lubbock Ordinance Outlawing Abortion, *supra* note 7, §§ C., D.

314. "A self-enforcing tort statute means a tort law that imposes such a high degree of a severe penalty directed at constitutionally protected conduct that it freezes that conduct in the same way as would a criminal ban." Manian, *supra* note 2, at 152*; see also* Complaint, Whole Woman's Health v. Jackson, *supra* note 6, ¶ 8:

> If not blocked, the [Texas Heartbeat Act] will force abortion providers and others who are sued to spend massive amounts of time and money to defend themselves in lawsuits across the state in which the deck is heavily stacked against them. Even if abortion providers and others sued in [these] lawsuits ultimately prevail in them—as they should in every case if only they could mount a fair defense—the lawsuits against them will have still accomplished [the Act's] goal of harassment. The suits may also bankrupt those who are sued in the process, since [the Act] states that they cannot recover their attorney's fees and costs against the vigilante.

Indeed, in Lubbock, Planned Parenthood stopped performing abortions except as permitting by the city's ordinance. KCBD Staff, *Planned Parenthood Stops Abortions in Lubbock, Except When Legally Permissible*, KFDA (June 1, 2021, 2:44 PM), https://www.newschannel10.com/2021/06/01/planned-parenthood-stops-abortions-in-lubbock-except-when-legally-permissible/. The Lubbock ordinance only permits abortions "in response to a life-threatening physical condition aggravated by, caused by, or arising from a pregnancy that, as certified by a physician, places the woman in danger of death or a serious risk of substantial impairment of a major bodily function unless an abortion is performed." Lubbock Ordinance Outlawing Abortion, *supra* note 7, § D.(3).

liability, but also those individuals who aid or abet the performance of an abortion, including those "paying for or reimbursing the costs of an abortion through insurance or otherwise."[315] These individuals face civil liability "regardless of whether [they] knew or should have known that the abortion would be performed or induced in violation of [the law]."[316] Thus, multiple individuals and other entities are subject to suit and potentially face statutory damages of not less than $10,000.

> Among those who could face civil liability are physicians who provide abortion care, but also nurses, clinic staff, and any others who helped the patient access abortion care. This means that family members, clergy, domestic violence and rape crisis counselors, or referring physicians could be subject to tens of thousands of dollars in liability to total strangers. Even more egregiously, these bills add as potential defendants any person who merely formed an intent to help a patient, which could include donors and supporters of abortion funds and clinics, and could make individuals liable before they took any action at all.[317]

Similarly, the Lubbock ordinance imposes liability not only on physicians who perform abortions, but also on, *inter alia*, those who knowingly provide transportation to or from an abortion provider; give instructions over the telephone, the internet, or any other medium of communication regarding self-administered abortion; or provide money with the knowledge that it will be used to pay for an abortion or the costs associated with procuring an abortion.[318] Thus, even if physicians are willing to risk the consequences of offering abortions in violation of the statute, those who work for the physicians or who are in anyway connected with the provision of such services may be reluctant to do so.[319]

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315. Tex. Heartbeat Act, 87th Leg., R.S., ch. 62, § 3, sec. 171.208(a)(2), 2021 Tex. Gen. Laws 1, 6 (current version at TEX. HEALTH & SAFETY CODE ANN. § 171.208(a)(2)).

316. *Id.* (current version at TEX. HEALTH & SAFETY CODE ANN. § 171.208(a)(2)).

317. Open Letter from 370 Attorneys to Texas House of Representatives Speaker Dade Phelan in Opposition to HB 1515 and SB 8 (Apr. 28, 2021), [hereinafter Open Letter to Speaker Phelan], https://documentcloud.adobe.com/link/review?uri=urn:aaid:scds:US:38eff803-3fd3-498b-a6b4-658305bf6beb#pageNum=1; *see also* Complaint, Whole Woman's Health v. Jackson, *supra* note 6, ¶¶ 10, 12 (discussing the potential liability for those who aid or abet abortions under Texas Senate Bill 8).

318. Lubbock Ordinance Outlawing Abortion, *supra* note 7, § D.(2).

319. As Judge Benavides observed in his dissent in *Okpalobi v. Foster*, these kinds of laws

> by [their] mere existence, coerce[] the plaintiffs to abandon the exercise of their legal rights lest they risk incurring substantial civil liability. With respect to the Act's coercive effect, this case presents what this Court has recognized as the classic situation for declaratory relief: "where the plaintiff is put to the Hobson's choice of giving up an intended course of conduct which he believes he is entitled to undertake or facing possible severe civil or criminal consequences if he does undertake it." *Okpalobi v. Foster*, 244 F.3d 405, 435 (5th Cir. 2001) (en banc) (Benavides, J., dissenting) (quoting Tex. Emps.' Ins. Assoc. v. Jackson, 862 F.2d 491, 507 n.22 (5th Cir. 1988) (en banc))*; see also* Complaint, Whole Woman's Health v. Jackson, *supra* note 6, ¶¶ 102–03:

Further, the impact of the Texas statute, at least through the end of the Supreme Court's October 2021 Term, could be disastrous for physicians who perform pre-viability abortions in violation of the statute and those who "aid or abet" their services. The Texas law prohibits abortion providers from asserting the rights of women to an abortion "if the[] Supreme Court overrules *Roe v. Wade*, 410 U.S. 113 (1973) or *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), *regardless of whether the conduct on which the [statutory] cause of action is based . . . occurred before the Supreme Court overruled either of those decisions*."[320] The Supreme Court granted review in *Jackson Women's Health Organization v. Dobbs*,[321] which could spell the demise of both *Roe* and *Casey*. The case involves a challenge to the constitutionality of Mississippi's prohibition against abortions after fifteen weeks of pregnancy, well before viability, and the Court will consider the following issue: "Whether all pre-viability prohibitions on elective abortions are unconstitutional."[322] If *Roe* and *Casey* are overruled, Texas abortion

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> 102. [The Texas Heartbeat Act] subjects the Provider Plaintiffs and their staff to a Hobson's choice. If they stop providing abortions and engaging in other activities that assist with abortion provision after six weeks of pregnancy as [the Act] requires, they will be forced to turn away patients in need of constitutionally protected care, and many will lose or lay off staff in light of the reduced services. Many will soon have to shutter their doors permanently because they cannot sustain operations if barred from providing the bulk of their current care. And as Texas's previous attempts at restricting abortion have demonstrated, abortion providers forced to close their doors may not ever reopen, even if a court later intervenes.
>
> 103. If these abortion providers instead offer abortion in violation of [the Act], they reach the same outcome with even longer-term consequences. They and their staff could be forced to defend dozens if not hundreds of simultaneous . . . lawsuits scattered across the state. And if that campaign of harassment does not alone bankrupt the abortion providers, they will quickly accrue catastrophic financial liability under [The Act]'s monetary penalty of at least $10,000 per abortion. Moreover, a steady stream of random strangers could seek injunctive relief preventing the abortion providers from performing prohibited abortions going forward—and do so in any of hundreds of state courts of their choosing.

320. Tex. Heartbeat Act, 87th Leg., R.S., ch. 62, § 3, sec. 171.208(e)(3), 2021 Tex. Gen. Laws 1, 7 (current version at TEX. HEALTH & SAFETY CODE ANN. § 171.208(e)(3)) (emphasis added).

321. *See generally* Jackson Women's Health Org. v. Dobbs, 945 F.3d 265 (5th Cir. 2019), *cert. granted in part*, 141 S. Ct. 2619 (2021).

322. Dobbs v. Jackson Women's Health Org., 209 L.Ed.2d 748 (U.S. May 17, 2021) (No. 19-1392) (granting certiorari as to Question 1 presented by the Petition for a Writ of Certiorari); Petition for Writ of Certiorari at i, Dobbs v. Jackson Women's Health Org., No. 19-1392 (June 15, 2020), https://www.supremecourt.gov/DocketPDF/19/19-1392/145658/20200615170733513_FINAL%20Petition.pdf. A number of commentators view the Court's decision to review *Dobbs* as an existential threat to *Roe v. Wade* and *Planned Parenthood v. Casey*. *See, e.g.*, Roe *at Risk*: *U.S. Supreme Court to Review Mississippi's Abortion Ban, A Direct Challenge to* Roe v. Wade, CTR. FOR REPROD. RTS. (May 17, 2021), https://reproductiverights.org/roe-at-risk-u-s-supreme-court-to-review-mississippis-abortion-ban-a-direct-challenge-to-roe-v-wade/; Jonathan Turley, *The Big One? The Supreme Court Accepts Case That Could Deliver a Lethal Blow to* Roe, JONATHAN TURLEY (May 20, 2021), https://jonathanturley.org/2021/05/20/the-big-one-the-supreme-court-accepts-case-that-could-deliver-a-lethal-blow-to-roe/; Amy Davidson Sorkin, *The Unique Dangers of the Supreme Court's Decision to Hear a Mississippi Abortion Case*, NEW YORKER (May 30, 2021), https://www.newyorker.com/magazine/2021/06/07/the-unique-dangers-of-the-supreme-courts-decision-to-hear-a-mississippi-abortion-case; Mark Joseph Stern, *The Supreme Court Is Taking Direct Aim at* Roe v. Wade, SLATE (May 17, 2021), https://slate.com/news-and-

providers and persons who aid or abet their services will be unable to assert third-party standing in the state courts even for abortions constitutionally protected when they were performed. Prompted by the expectation of statutory damages of at least $10,000,[323] one might expect a rush to courthouses throughout the state to sue those who provided abortions or aided and abetted them in the event *Roe* and *Casey* are overruled. Indeed, a defendant in *Whole Woman's Health v. Jackson*—Mark Lee Dickson, the Director of Right to Life East Texas—has already indicated his intent to file such lawsuits.[324]

Thus, as long as *Roe* and *Casey* remain "good law," the Texas statute unconstitutionally deprives women in Texas of access to most pre-viability abortions in the state. The Supreme Court has held, albeit in a different context, that such obstacles impose undue burdens on a woman's right to an abortion.[325]

In *Whole Woman's Health v. Hellerstedt*,[326] the Court struck down a Texas statute requiring physicians performing abortions to have active admitting privileges at a hospital no farther than 30 miles from where the abortion takes place and mandating that abortion facilities meet the minimum standards for ambulatory surgical centers.[327] The Court found that neither of these regulations "confer[red] medical benefits sufficient to justify the burdens upon access that each imposes. Each places a substantial obstacle in the path of women seeking a pre[-]viability abortion, each constitutes an undue burden on abortion access[.]"[328] Specifically, the admitting privileges mandate resulted in the closure of half the abortion clinics in the state,[329] and the ambulatory surgical center requirement further reduced the number of abortion facilities in Texas to seven or eight confined to Houston, Dallas, Austin, and San Antonio, making it difficult to meet the abortion demand for

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politics/2021/05/supreme-court-barrett-dobbs-roe.html; Mary Ziegler, *The Supreme Court Just Took a Case That Could Kill* Roe v. Wade*—Or Let It Die Slowly*, WASH. POST (May 18, 2021), https://www.washingtonpost.com/politics/2021/05/18/supreme-court-just-took-case-that-could-kill-roe-v-wade-or-let-it-die-slowly/.

323. Tex. Heartbeat Act, 87th Leg., R.S., ch. 62, § 3, sec. 171.208(b)(2), 2021 Tex. Gen. Laws 1, 7 (current version at TEX. HEALTH & SAFETY CODE ANN. § 171.208(b)(2)); *see* Nate Henson, *Yes, Private Citizens Are Tasked with Enforcing the New Texas Abortion Law and Could Be Awarded $10,000*, ABC10 (July 20, 2021, 1:18 PM), https://www.abc10.com/article/news/verify/government-verify/texas-abortion-law-10000-dollar-award/536-9c0bef34-1fdd-494e-aaec-0b9dd66c5e87. The Lubbock ordinance requires the award of statutory damages of not less than $2,000 for each violation, but "not more than the maximum penalty permitted under Texas law for the violation of a municipal ordinance governing public health." Lubbock Ordinance Outlawing Abortion, *supra* note 7, § F.(2).(b). *See generally* Ed Kilgore, *Texas New Abortion Law Enlists Activists to Harass Providers in Court*, N.Y. MAG. INTELLIGENCER (July 9, 2021), https://nymag.com/intelligencer/2021/07/texas-abortion-law-enlists-activists-to-harass-providers.html.

324. Complaint, Whole Woman's Health v. Jackson, *supra* note 6, ¶ 50 n.4.

325. *See generally* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2300 (2016); June Med. Servs., L.L.C. v. Russo, 140 S. Ct. 2103, 2132 (2020) (plurality opinion).

326. *Hellerstedt*, 136 S. Ct. at 2300.

327. *Id.*

328. *Id.*

329. *Id.* at 2312.

all women in the state.[330] At the very least, the requirement "force[d] women to travel long distances to get abortions in crammed-to-capacity superfacilities. Patients seeking these services are less likely to get the kind of individualized attention, serious conversation, and emotional support that doctors at less taxed facilities may have offered."[331] Thus, the admitting privileges and ambulatory surgical center requirements provided "few, if any, health benefits for women, pose[d] a substantial obstacle to women seeking abortions, and constitute[d] an 'undue burden' on their constitutional right to do so."[332]

The Texas Heartbeat Act does not employ the façade of a measure to protect women's health; instead, it flatly prohibits most constitutionally protected pre-viability abortions. "The [Act also] specifically prohibits the defense that a party relied on a court decision that was valid at the time of their actions but that was later overruled—meaning even if a person was following the law, they could still be liable if the law changed later."[333] In *Whole Woman's Health*, the Supreme Court ruled that elimination of all but seven or eight of Texas' abortion facilities constituted a substantial obstacle to a women's right to an abortion.[334] By comparison, the Texas Heartbeat Act may induce the closure of *all* abortion clinics in Texas, forcing women to travel hundreds of miles to other states to secure their constitutional right to choose.[335] Thus, the Act meets the prerequisites for third-party standing by potentially preventing women from obtaining pre-viability abortions in the state.[336]

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330. *Id.* at 2316–17.

331. *Id.* at 2318*; see also id.* at 2313:

> [T]he closure of abortion clinics] meant fewer doctors, longer waiting times, and increased crowding. Record evidence also supports the finding that after the admitting-privileges provision went into effect, the 'number of women of reproductive age living in a county . . . more than 150 miles from a provider increased from approximately 86,000 to 400,000 . . . and the number of women living in a county more than 200 miles from a provider from approximately 10,000 to 290,000.' . . . We recognize that increased driving distances do not always constitute an 'undue burden'. . . . But here, those increases are but one additional burden, which, when taken together with others that the closings brought about, and when viewed in light of the virtual absence of any health benefit, lead us to conclude that the record adequately supports the District Court's 'undue burden' conclusion.

332. *Id; see also June Med. Servs.*, 140 S. Ct. at 2103 (dealing with a Louisiana law similar to the Texas statute at issue in *Whole Woman's Health*).

333. Open Letter to Speaker Phelan, *supra* note 317, at 2.

334. *See generally Hellerstedt*, 136 S. Ct. at 2292.

335. Complaint, Whole Woman's Health v. Jackson, *supra* note 6, ¶¶ 91, 99. The impact will be greatest on poor, rural, and disadvantaged women. *Whole Woman's Health*, 136 S. Ct. at 2302*; see also* Complaint, Whole Woman's Health v. Jackson, *supra* note 6, ¶¶ 97–98, 101 (explaining how minority and low-income populations are affected by the Act).

336. Tex. Heartbeat Act, 87th Leg., R.S., ch. 62, § 3, sec. 171.209(c), 2021 Tex. Gen. Laws 1, 9 (current version TEX. HEALTH & SAFETY CODE ANN. §§ 171.209(c), (d)). The Act also permits courts to enjoin violations of the Act. *Id.* (current version at TEX. HEALTH & SAFETY CODE ANN. § 171.208(b)(1)). *A fortiori*, the award of such injunctive relief prevents women from seeking an abortion. *Id.* (current version at TEX. HEALTH & SAFETY CODE ANN. § 171.209(c)(2)).

CONCLUSION

Both the Lubbock Sanctuary City for the Unborn Ordinance and the Texas Heartbeat Act prohibit abortion procedures that are currently constitutionally protected. Both laws impose strict liability on those who perform abortions as well as those who "aid or abet" them regardless of whether a woman gives informed consent to the abortion and whether the procedure is conducted with reasonable care. The injury is the abortion itself.[337]

To avoid preemptive facial challenges to the laws—which are unquestionably unconstitutional—Texas and Lubbock remove the enforcement of the laws from government officials, depending instead upon private citizens to enforce the laws through suits for injunctive relief, statutory damages, and tort-based compensatory and punitive damages.[338] By doing so, Texas and Lubbock cleverly avert federal court challenges to the laws by depriving abortion providers and those who directly or indirectly assist them of constitutional standing, and Texas sovereign immunity bars such challenges against the state.[339] Consequently, those who provide abortion services must await a lawsuit in the Texas courts before having the opportunity to lodge constitutional challenges to the laws. And with respect to the Texas statute, abortion providers must be prepared to defend against lawsuits in any Texas county where a plaintiff resides, regardless of distance or the relationship between the forum county and where the procedure was conducted.

For women seeking pre-viability abortions, the worst result would be compliance with the laws resulting in a cessation of all abortion procedures in Texas, at least unless and until the Supreme Court sustains its *Roe* and *Casey* decisions in *Dobbs v. Jackson Women's Health Organization*.[340] For those abortion providers who are willing to continue to offer abortions and defend lawsuits under the Texas and Lubbock laws, it becomes incumbent upon state court judges to apply Supreme Court decisions striking state

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337. *See* Manian, *supra* note 2, at 131.

338. *Id.* at 127*; see also id.* at 152:

> Through the mechanism of self-enforcing tort remedies, state legislators can ban constitutionally protected conduct by making it prohibitively expensive. Self-enforcing tort statutes manipulate the line between 'public,' *i.e.*, criminal or regulatory laws, and ostensibly 'private' tort laws. A self-enforcing tort law is essentially a publicly enforced law appearing in the guise of a privately enforced tort law. Although styled as privately enforced tort legislation, in operation a self-enforcing tort statute is direct government regulation of the targeted conduct, similar to a criminal or regulatory fine . . . [L]egislators use self-enforcing tort laws to arrogate the enforcement power of the executive to itself–to assume the role of enforcer and thereby also evade the judicial branch.

339. These laws use private rights of action "to make an end-run" around the preservation in the federal courts of constitutionally protected abortion procedures. *Id.* at 127.

340. *See generally* Dobbs v. Jackson Women's Health Org., 141 S. Ct. 2619 (2021) (granting certiorari as to Question 1 presented by the Petition for a Writ of Certiorari).

legislation prohibiting or imposing substantial obstacles to pre-viability abortions, regardless of voter sentiment and the potential fallout during the next election.