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

Wendy Davis, et al.,

Plaintiffs,

v.

Mistie Sharp, et al.,

Defendants.

Case No. 1:22-cv-00373-RP

MOTION TO DISMISS FIRST AMENDED COMPLAINT FOR LACK OF SUBJECT-MATTER JURISDICTION AND LACK OF VENUE

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The defendants respectfully move to dismiss the first amended complaint for lack of subject-matter jurisdiction and lack of venue. *See* Fed. R. Civ. P. 12(b)(1), (b)(3).

BACKGROUND

The law of Texas restricts abortion in numerous ways. The Texas Heartbeat Act, also known as Senate Bill 8 or SB 8, prohibits abortion after a fetal heartbeat is detectable and authorizes private civil-enforcement suits against anyone who performs or "aids or abets" a post-heartbeat abortion. *See* Senate Bill 8, 87th Leg. (attached as Exhibit 1). SB 8 prohibits enforcement by public officials and leaves enforcement entirely in the hands of private citizens, which has frustrated efforts to obtain pre-enforcement relief against the statute's enforcement. *See* Tex. Health & Safety Code § 171.207; *Whole Woman's Health v. Jackson*, 142 S. Ct. 522 (2021); *Whole Woman's Health v. Jackson*, 642 S.W.3d 569 (Tex. 2022). Anyone who violates SB 8 can be sued by "any person"[1] and ordered to pay at least $10,000 in statutory damages for each post-heartbeat abortion that they performed or facilitated, plus costs and attorneys' fees. Senate Bill 8 took effect on September 1, 2021, and it has remained in effect since that time.

The law of Texas also imposes felony criminal liability on anyone who "furnishes the means for procuring an abortion knowing the purpose intended"—regardless of whether the abortion occurs before or after a fetal heartbeat is detectable. *See* West's Texas Civil Statutes, article 4512.2 (1974) (attached as Exhibit 2).[2] Violations of article 4512.2 are punishable by two to five years imprisonment per abortion, and the

1. Except Texas government officials and individuals who impregnated the mother of the unborn child through rape or some other illegal act. *See* Tex. Health & Safety Code §§ 171.208(a); 171.208(j).
2. The full text of the statute says: "Whoever furnishes the means for procuring an abortion knowing the purpose intended is guilty as an accomplice." West's Texas Civil Statutes, article 4512.2 (1974).

statute of limitations is three years.[3] Texas has never repealed this statute, and the legislature re-affirmed the continuing vitality of article 4512.2 when it enacted Senate Bill 8 last year. *See* Senate Bill 8, 87th Leg., § 2 ("[T]he State of Texas never repealed, either expressly or by implication, the state statutes enacted before the ruling in *Roe v. Wade*, 410 U.S. 113 (1973), that prohibit and criminalize abortion unless the mother's life is in danger.") (attached as Exhibit 1).

The Supreme Court's decisions in *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), had prevented Texas officials from enforcing article 4512.2 (and other provisions of the state's criminal abortion statutes) against abortion providers until the Supreme Court overruled those decisions in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022). But there was never any constitutional obstacle to enforcing article 4512.2 against abortion funds and their donors, even while *Roe* and *Casey* were on the books. Abortion funds and their donors do not have standing to assert the third-party rights of women seeking abortions as a defense to criminal prosecution. *See Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004) ("A party 'generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.'" (citation omitted)).[4] And in all events, a woman seeking an abortion has no

3. The only exception is for abortions "procured or attempted by medical advice for the purpose of saving the life of the mother." West's Texas Civil Statutes, article 4512.6 (1974).

4. The Supreme Court has allowed abortion doctors and abortion providers to assert the third-party rights of abortion patients, but no court has ever held that an abortion fund (or a donor to such a fund) has the necessary "close relation" needed to establish third-party standing. *See, e.g.*, *Singleton v. Wulff*, 428 U.S. 106, 117 (1976) (plurality opinion) (allowing *physicians* to assert third-party rights of their patients seeking abortions on account of the "patent" "closeness of the relationship"); *June Medical Services LLC v. Russo*, 140 S. Ct. 2103, 2118 (2020) (plurality opinion) ("We have long permitted abortion *providers* to invoke the rights of their actual or potential patients in challenges to abortion-related regulations." (emphasis added)).

constitutional right to have other people pay for it, *see Harris v. McRae*, 448 U.S. 297, 325 (1980), so no abortion patient would suffer an "undue burden" if abortion funds and their donors are prosecuted for violating article 4512.2.[5] There is also no constitutional right to perform or pay for another person's abortion; that is why abortion providers who challenge abortion regulations must invoke the third-party rights of their patients rather than assert their own constitutional rights. *See, e.g.*, *Planned Parenthood of Greater Ohio v. Hodges*, 917 F.3d 908, 912 (6th Cir. 2019) (en banc) ("The Supreme Court has never identified a freestanding right to perform abortions. To the contrary, it has indicated that there is no such thing."). Nor would the abortionist's immunity from prosecution on account of *Roe* preclude the imposition of accomplice liability on abortion funds and others who have violated section 4512.2. *See* Tex. Penal Code § 7.03(2).

Yet abortion funds in Texas have flouted article 4512.2 with impunity, apparently unaware of its continued existence, or perhaps laboring under a belief that article 4512.2 was somehow "struck down" by the Supreme Court in *Roe v. Wade*, 410 U.S. 113 (1973).[6] But courts do not have the ability or the authority to formally revoke statutes when pronouncing them unconstitutional. *See Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2495 (2021) ("[F]ederal courts enjoy the power to enjoin individuals tasked with enforcing laws, not the laws themselves."); *Pidgeon v. Turner*, 538 S.W.3d 73, 88 n.21 (Tex. 2017) ("We note that neither the Supreme Court in *Obergefell* nor the Fifth Circuit in *De Leon* 'struck down' any Texas law. When a court

5. *See also Planned Parenthood of Kansas and Mid-Missouri v. Moser*, 747 F.3d 814, 826 (10th Cir. 2014) ("There is a qualitative difference between prohibiting an activity and refusing to subsidize it. The Supreme Court, for instance, has drawn that line in rejecting state laws prohibiting certain abortions but not laws refusing to provide funds for the practice.").

6. *See, e.g.*, Complaint, ECF No. 1, at ¶ 84 ("The Criminal Abortion Ban cannot be lawfully enforced because, in *Roe v. Wade*, 410 U.S. 113 (1973), the U.S. Supreme Court held that it was unconstitutional.").

declares a law unconstitutional, the law remains in place unless and until the body that enacted it repeals it"). More importantly, the severability provisions in Texas law preserve all constitutional applications of the state's pre-*Roe* abortion statutes, allowing them to be enforced in situations that do not violate the constitutional rights of abortion patients. *See* Tex. Gov't Code § 311.032(c); Tex. Gov't Code § 311.036(c); *Virginia v. Hicks*, 539 U.S. 113, 121 (2003) ("Severab[ility] is of course a matter of state law."); *Schneider Granite Co. v. Gast Realty & Investment Co.*, 245 U.S. 288, 290 (1917) ("[T]he severability of a statute of the state . . . is a question of state law."); *see also Connecticut v. Menillo*, 423 U.S. 9, 9–10 (1975) (allowing Connecticut to enforce its pre-*Roe* criminal abortion statutes against non-physician abortions). So article 4512.2 remained fully enforceable against abortion funds that pay for abortions performed in Texas, as well as their employees, volunteers, board members, and donors, even while *Roe* and *Casey* were in effect.

Each of the plaintiffs has violated article 4512.2, and in doing so they have exposed themselves to felony criminal prosecution. Plaintiff Wendy Davis admits that she has given money to the Lilith Fund for Reproductive Equity, and in doing so she has violated article 4512.2 by "furnishing the means for procuring an abortion knowing the purpose intended." *See* First Amended Complaint, ECF No. 62, at ¶ 10. Plaintiff Marva Sadler donated money to the Stigma Relief Fund, another organization that has paid for abortions in Texas in violation of article 4512.2, and she chairs its board of directors. *See id.* at ¶ 11. Plaintiff Sean Mehl has donated money to Texas abortion funds in violation of article 4512.2, and also serves on the Stigma Relief Fund's board of directors. *See id.* at ¶ 12. And plaintiff Stigma Relief Fund admits that it has provided financial support to patients who obtained elective abortions in Texas, which violates article 4512.2. *See id.* at ¶ 13.

At the same time, none of the plaintiffs appear to have violated Senate Bill 8—or, if they have, they have not alleged this in their complaint. The Stigma Relief Fund

claimed in the original complaint that it pays for abortions in Texas *only* when those abortions occur before six weeks LMP, so it has not violated SB 8 or exposed itself to private civil-enforcement lawsuits. *See* Original Complaint, ECF No. 1, at ¶ 17 ("[T]he Stigma Relief Fund has ceased providing financial assistance to Texas patients beyond six weeks LMP unless they travel out of state to obtain abortion[s]."). Sadler's and Mehl's involvement with the Stigma Relief Fund does not violate SB 8 either, absent an allegation that the Stigma Relief Fund has financed or assisted post-heart-beat abortions performed in Texas in violation of SB 8. *See* First Amended Complaint, ECF No. 62, at ¶¶ 12–13. Sadler and Mehl also claim that they donate money to "other Texas abortion funds," but that does not violate SB 8 unless those abortion funds have aided or abetted post-heartbeat abortions in Texas on or after September 1, 2021—and the complaint does not identify the unnamed funds that receive Sadler's and Mehl's donations or say whether any of those funds have paid for abortions in violation in SB 8. *See id.* at ¶¶ 12–13. Davis is the only plaintiff that admits an affiliation with an abortion fund that has violated SB 8. *See id.* at ¶ 10. But it is *still* not clear from the amended complaint whether Davis herself has violated SB 8 because the complaint does not say whether Davis's donations to the Lilith Fund were used to pay for post-heartbeat abortions after SB 8 took effect.

FACTS REGARDING THE DEFENDANTS

I. Mistie Sharp

Defendant Mistie Sharp intervened in *United States v. Texas*, No. 1:21-cv-00796-RP (W.D. Tex.), to protect her state-law right to sue abortion funds that violate Senate Bill 8. *See* Sharp Decl. ¶ 7 (attached as Exhibit 4). Ms. Sharp has no intention, and never had any intention, of suing Wendy Davis, Marva Sadler, Sean Mehl, or the Stigma Relief Fund under the private civil-enforcement lawsuits described in Senate Bill 8. *See id.* at ¶ 5. She is interested in suing only abortion *funds*—the actual entities rather than the individuals—that pay for abortions in violation of Senate Bill 8, and

the Stigma Relief Fund does not allege or claim that it has ever paid for an illegal post-heartbeat abortion in Texas or aided or abetted such an abortion. *See id.* at ¶¶ 6–7. Ms. Sharp has never threatened to sue any of the plaintiffs under SB 8, either publicly or privately, and she has categorically declared that will not sue any of the four plaintiffs in this case even if they violated SB 8 in the past or violate SB 8 in the future. *See id.* at ¶¶ 9–11; *id.* at ¶ 11 ("I also have no intention of suing Wendy Davis, Marva Sadler, Sean Mehl, or the Stigma Relief Fund in the future even if they engage in conduct that violates Senate Bill 8, and I will not sue them under SB 8's private civil-enforcement mechanism under any circumstance.").

II. Sadie Weldon and Ashley Maxwell

The plaintiffs claim that that defendants Sadie Weldon and Ashley Maxwell have "initiated proceedings to sue certain Texas abortion funds and their donors, employees, and volunteers under S.B. 8" and "publicly threatened all Texas abortion funds and their associates with civil lawsuits under S.B. 8." First Amended Complaint, ECF No. 62, at ¶ 4. Each of these claims is false.

Ms. Weldon has merely filed a Rule 202 petition that seeks to depose Neesha Davé, the deputy director of the Lilith Fund for Reproductive Equity, to ascertain the identity of those who aided or abetted illegal post-heartbeat abortions in Texas. *See* Weldon Decl. ¶ 5 (attached as Exhibit 5). Ms. Maxwell has filed a similar Rule 202 petition that seeks to depose Kamyon Conner, the executive director of the North Texas Equal Access Fund. *See* Maxwell Decl. ¶ 5 (attached as Exhibit 6). A Rule 202 petition is not a lawsuit or a "proceeding to sue"; it is merely a request for pre-suit discovery. *See, e.g.*, *Mayfield–George v. Texas Rehabilitation Commission*, 197 F.R.D. 280, 283–84 (N.D. Tex. 2000) (holding that a Rule 202 proceeding is not a "civil action" because "it asserts no claim or cause of action upon which relief may be granted" and that "[i]t is merely a petition for an order authorizing the taking of a

deposition"); *McCrary v. Kansas City S.R.R.*, 121 F. Supp. 2d 566, 569 (E.D. Tex. 2000) (holding that a Rule 202 proceeding is "not a civil action" because "it asserts no claim or cause of action upon which relief can be granted"). Neither Ms. Weldon nor Ms. Maxwell has ever threatened to sue anyone under SB 8. *See* Weldon Decl. ¶ 6; Maxwell Decl. ¶ 6.

Ms. Weldon and Ms. Maxwell have no intention, and never had any intention, of suing Wendy Davis, Marva Sadler, Sean Mehl, or the Stigma Relief Fund under SB 8. *See* Weldon Decl. ¶ 7; Maxwell Decl. ¶ 7. Neither Ms. Weldon nor Ms. Maxwell has ever threatened to sue any of the plaintiffs under SB 8, either publicly or privately, and each of them has categorically declared that they will not sue any of the four plaintiffs in this case even if they violated SB 8 in the past or violate SB 8 in the future. *See* Weldon Decl. ¶¶ 11–13; Maxwell Decl. ¶¶ 11–13; *id.* at ¶ 13 ("I also have no intention of suing Wendy Davis, Marva Sadler, Sean Mehl, or the Stigma Relief Fund in the future even if they engage in conduct that violates Senate Bill 8, and I will not sue them under SB 8's private civil-enforcement mechanism under any circumstance."); Weldon Decl. ¶ 13 (same).

ARGUMENT

I. The Claims Against Each Defendant Should Be Dismissed For Lack Of Subject-Matter Jurisdiction

There is no Article III case or controversy between the plaintiffs and any of the defendants.

A. Each Of The Claims Should Be Dismissed For Lack Of Article III Standing Because The Plaintiffs Failed To Allege Facts To Support Standing In Their Complaint

A plaintiff that sues in federal court must clearly allege facts demonstrating each element of Article III standing—injury in fact, traceability, and redressability. *See Spokeo, Inc. v. Robins,* 136 S. Ct. 1540, 1547 (2016) ("Where, as here, a case is at the pleading stage, the plaintiff must 'clearly . . . allege facts demonstrating' each element

[of Article III standing.]" (citation omitted)); *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 n.5 (2013) ("[P]laintiffs bear the burden of *pleading and proving concrete facts* showing that the defendant's actual action has caused the substantial risk of harm." (emphasis added)); *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) ("The litigant *must clearly and specifically set forth facts* sufficient to satisfy these Art. III standing requirements." (emphasis added)); *Warth v. Seldin*, 42 U.S. 490, 518 (1975) ("It is the responsibility of the complainant *clearly to allege facts demonstrating that* he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers." (emphasis added)). Litigants challenging abortion statutes are not an exception to this rule. Yet the amended complaint does not even acknowledge or discuss Article III standing, let alone allege facts that "clearly and specifically" show how each element of Article III standing is satisfied. *Whitmore*, 495 U.S. at 155. That alone requires dismissal of the complaint.

B. The Plaintiffs Lack Standing To Sue The Defendants Over Section 3 Because The Defendants Have Never Had Any Intention Of Suing Them

The plaintiffs also lack Article III standing to sue the defendants over section 3 of SB 8 because each of the defendants has declared unequivocally that they have no intention of suing the plaintiffs under SB 8, and they never had any such intentions. *See* Sharp Decl. ¶¶ 11–12; Weldon Decl. ¶¶ 13–14; Maxwell Decl. ¶¶ 13–14. And the defendants have foresworn any intention to sue the defendants *even if* they have violated SB 8 in the past or even if they violate the law in the future. *See* Sharp Decl. at ¶ 11 ("I also have no intention of suing Wendy Davis, Marva Sadler, Sean Mehl, or the Stigma Relief Fund in the future even if they engage in conduct that violates Senate Bill 8, and I will not sue them under SB 8's private civil-enforcement mechanism under any circumstance."); Weldon Decl. ¶ 13 (same); Maxwell Decl. ¶ 13 (same).

The defendants' declarations are indistinguishable from the declarations submitted by Mark Lee Dickson in *Whole Woman's Health v. Jackson*, 142 S. Ct. 522 (2021), which eliminates any possibility of Article III standing with respect to the claims involving article 4512.2 and section 3 of SB 8 8. *See id.* at 537 ("Mr. Dickson argues that the petitioners lack standing to sue him because he possesses no intention to file an S. B. 8 suit against them. Mr. Dickson has supplied sworn declarations so attesting. The petitioners do not contest this testimony or ask us to disregard it. Accordingly, on the record before us the petitioners cannot establish 'personal injury fairly traceable to [Mr. Dickson's] allegedly unlawful conduct.' No Member of the Court disagrees with this resolution of the claims against Mr. Dickson." (citations omitted)).

C. The Plaintiffs Lack Standing To Sue The Defendants Over Section 3 Of SB 8 Because They Have Not Alleged That They Have Violated The Texas Heartbeat Act In The Past Or Will Violate The Law In The Future

The first amended complaint contains no allegation that the plaintiffs have violated Senate Bill 8 in the past or will violate the statute in the future. *See* First Amended Complaint, ECF No. 62, at ¶¶ 1–5, 10–14. Yet the plaintiffs cannot establish standing to sue the defendants unless they have violated the statute in the past or intend to violate it in the future; otherwise there is no way for the defendants to sue them. And the plaintiffs must *specifically allege* a past violation or an intent to violate Senate Bill 8 in the future, because a complaint must allege all facts needed to establish the elements of Article III standing—injury in fact, causation, and redressability. *See Spokeo, Inc. v. Robins,* 136 S. Ct. 1540, 1547 (2016) ("Where, as here, a case is at the pleading stage, the plaintiff must 'clearly . . . allege facts demonstrating' each element [of Article III standing.]" (citation omitted)); *Warth v. Seldin*, 42 U.S. 490, 518 (1975) ("It is the responsibility of the complainant *clearly to allege facts demonstrating that* he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers." (emphasis added)). The plaintiffs cannot sue the defendants

if they are unwilling to allege that they violated or intend to violate Senate Bill 8, because the defendants cannot inflict Article III injury on the plaintiffs unless the plaintiffs violate the statute and expose themselves to private civil-enforcement lawsuits.[7]

The plaintiffs seem to think that they can sue the defendants by complaining about injuries that arise from the mere *existence* of section 3, rather than any action that would be undertaken by the defendants. The plaintiffs, for example, complain that section 3 imposes a "chilling effect" of their donors, employees, and volunteers. *See* First Amended Complaint, ECF No. 62, at ¶ 55 ("By threatening to chill abortion funds' relationships with their donors, employees, and volunteers, Section 3 of S.B. 8 violates the freedom of expressive association protected by the First Amendment."). But this "chilling effect" cannot support Article III standing unless it is "fairly traceable" to the conduct of the named defendants. *See California v. Texas*, 141 S. Ct. 2104, 2113 (2021) ("A plaintiff has standing only if he can 'allege personal injury *fairly traceable to the defendant's allegedly unlawful conduct* and likely to be redressed by the requested relief.'" (emphasis added) (citation omitted)); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) ("[T]he injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." (cleaned up) (citation and internal quotation marks omitted)). And the "chilling effect" or which the plaintiffs complain is not in any way "traceable" to the defendants, who have renounced any intention to sue the

7. And because the plaintiffs bear the burden of pleading and proving the elements of Article III standing, it is the plaintiffs who must allege (and eventually prove) that they will violate the statute in a manner that will expose them to lawsuits from Mr. Dickson. *See Carney v. Adams*, 141 S. Ct. 493, 499 (2020) ("[P]laintiff bears the burden of proving standing" (citing *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 561 (1992)); *Spokeo,* 136 S. Ct. at 1547 ("Where, as here, a case is at the pleading stage, the plaintiff must 'clearly . . . allege facts demonstrating' each element [of Article III standing.]" (citation omitted)).

plaintiffs under Senate Bill 8. *See* Sharp Decl. ¶¶ 11–12; Weldon Decl. ¶¶ 13–14; Maxwell Decl. ¶¶ 13–14. This "chilling effect" was imposed by the *legislature* that enacted Senate Bill 8. The plaintiffs cannot suffer injury at the hand of the defendants unless they have violated or intend to violate section 3 in a manner that exposes themselves to private civil-enforcement lawsuits—and they cannot sue the defendants unless they allege (and prove) that they have opened the door for the defendants to sue them.

D. The Plaintiffs Lack Standing To Sue The Defendants Over Section 3 Because The Court Cannot Redress Their Injuries, As Other Private Litigants Will Sue The Plaintiffs If The Defendants Are Enjoined From Doing So

There is a separate and independent obstacle to the plaintiffs' standing to sue the defendants over section 3. Even if the plaintiffs had alleged that they have violated or will violate Senate Bill 8 and that the defendants will sue them in response, the Court cannot "redress" that injury by enjoining the defendants from suing the plaintiffs under section 3. Senate Bill 8 allows anyone[8] to sue a person that aids or abets a post-heartbeat abortion, or that intends to engage in such conduct. *See* Tex. Health & Safety Code § 171.208(a). And if the defendants are enjoined from suing, there are countless others that will sue to recover the $10,000 for each illegal abortion that the plaintiffs perform or assist. An injunction that stops only the defendants from suing—while leaving the door open for every other person in the world to sue the plaintiffs for their violations of Senate Bill 8—does not redress any injury that the plaintiffs are suffering on account of the statute.

8. Other than Texas government officials and individuals who impregnated the mother of the fetus through rape or some other illegal act. *See* Tex. Health & Safety Code §§ 171.208(a); 171.208(j).

Senate Bill 8 allows only a single recovery of $10,000 for each post-heartbeat abortion that a defendant performs or assists,[9] so an injunction that prevents the defendants (and only the defendants) from suing does nothing to reduce the monetary exposure that the plaintiffs face under the statute. It also does nothing to reduce the deterrent effect of Senate Bill 8's private civil-enforcement regime. Someone will still sue the plaintiffs to collect the $10,000 per illegal abortion that the statute authorizes; taking the defendants out of the mix does nothing to eliminate (or even alleviate) the injuries described in the plaintiffs' complaint.

E. The Plaintiffs Lack Standing To Sue The Defendants Over Section 4 Because The Defendants Have No Intention Of Suing The Plaintiffs Under That Provision

The only remaining claims involve the fee-shifting provisions in section 4 of SB 8. But the plaintiffs lack standing to pursue these claims because they are not suffering "injury in fact" traceable to the defendants' allegedly unlawful conduct. None of the defendants can sue the plaintiffs under section 4 because they have not attained "prevailing party" status in any lawsuit that seeks to prevent the enforcement of an abortion statute. *See* Sharp Decl. ¶ 15; Weldon Decl. ¶ 17; Maxwell Decl. ¶ 17. And the plaintiffs do not allege that any of the defendants will acquire "prevailing party" status in this litigation, as any such prediction would amount to a confession that their claims should lose. Indeed, the complaint makes no allegations of *any* Article III injury traceable to the defendants, and is entirely bereft of factual allegations involving the defendants' role in "enforcing" this provision against the plaintiffs. That alone requires

9. *See* Tex. Health & Safety Code § 171.208(c) ("Notwithstanding Subsection (b), a court may not award relief under this section in response to a violation of Subsection (a)(1) or (2) if the defendant demonstrates that the defendant previously paid the full amount of statutory damages under Subsection (b)(2) in a previous action for that particular abortion performed or induced in violation of this subchapter, or for the particular conduct that aided or abetted an abortion performed or induced in violation of this subchapter.").

dismissal of the section 4 claims, because a complaint must "clearly . . . allege facts demonstrating" each element of Article III standing to survive a motion to dismiss. *Spokeo,* 136 S. Ct. at 1547 (citation and internal quotation marks omitted)).

The defendants currently have no intention of suing the plaintiffs under section 4 even if they prevail in this litigation, because they plan to seek recovery of attorneys' fees from this Court under 42 U.S.C. § 1988(b). *See* Sharp Decl. ¶ 13; Weldon Decl. ¶ 15; Maxwell Decl. ¶ 15. The defendants have not yet decided, however, whether they will sue the plaintiffs under section 4 if they are unsuccessful in recovering fees under 42 U.S.C. § 1988(b). *See* Sharp Decl. ¶ 14; Weldon Decl. ¶ 16; Maxwell Decl. ¶ 16.

The plaintiffs have no standing to sue the defendants under these circumstances. Any possibility that the defendants might someday sue them under section 4 is "conjectural" and "hypothetical"—and speculative injuries of that sort are insufficient to confer Article III standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (holding that an injury in fact must be "actual or imminent, not conjectural or hypothetical" (citation and internal quotation marks omitted)); *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) ("Allegations of possible future injury do not satisfy the requirements of Article III" because "[a] threatened injury must be 'certainly impending' to constitute injury in fact."); *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974) ("It must be alleged that the plaintiff has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged statute or official conduct. The injury or threat of injury must be both real and immediate, not conjectural or hypothetical." (citations and internal quotation marks omitted)); *Gee*, 941 F.3d at 164 ("Article III requires more than theoretical possibilities."). And the complaint has not even *alleged* the facts needed to establish Article III standing to sue the defendants over section 4, which is fatal to their claims. *See Spokeo,* 136 S. Ct. at 1547; *Whitmore*, 495 U.S. at 155.

F. The Plaintiffs Lack Article III Standing To Request Relief That Would Protect Non-Parties To This Lawsuit

The plaintiffs seek to prevent the defendants from suing or prosecuting *anyone* under Senate Bill 8 or article 4512.2—even if the person or entity is not a party to this case. But the plaintiffs have no standing to seek relief that prevents the defendants from suing or prosecuting non-parties to this litigation, absent allegations and evidence that the enforcement of Senate Bill 8 or article 4512.2 against those non-parties will inflict "injury" on the named plaintiffs. *See Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975) ("[N]either declaratory nor injunctive relief can directly interfere with enforcement of contested statutes or ordinances except with respect to the particular federal plaintiffs, and the State is free to prosecute others who may violate the statute."); *United States v. National Treasury Employees Union,* 513 U.S. 454, 477–78 (1995) (limiting relief to the parties before the Court and noting "we neither want nor need to provide relief to nonparties when a narrower remedy will fully protect the litigants"); *In re Abbott*, 954 F.3d 772, 786 n.19 (5th Cir. 2020), *vacated on other grounds by Planned Parenthood Center for Choice v. Abbott*, 141 S. Ct. 1261 (2021) ("[T]he district court purported to enjoin GA-09 as to *all* abortion providers in Texas. But Respondents are only a subset of Texas abortion providers and did not sue as class representatives. The district court lacked authority to enjoin enforcement of GA-09 as to anyone other than the named plaintiffs. The district court should be mindful of this limitation on federal jurisdiction at the preliminary injunction stage." (citation omitted)).[10]

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10. *See also McKenzie v. City of Chicago*, 118 F.3d 552, 555 (7th Cir. 1997) ("[T]he question at issue [is] whether a court may grant relief to non-parties. The right answer is no."); *Zepeda v. I.N.S.*, 753 F.2d 719, 727–28 (9th Cir. 1983) ("[An] injunction must be limited to apply only to the individual plaintiffs unless the district judge certifies a class of plaintiffs."); Richard H. Fallon, *Making Sense of Overbreadth*, 100 Yale L.J. 853, 854 (1991) ("[T]he binding effect of the federal judgment extends no further than the parties to the lawsuit. Against nonparties, the state remains free to lodge criminal prosecutions."); Vikram David Amar,

The plaintiffs have not asked this Court to certify them as class representatives; they have sued only as individual litigants. Yet the plaintiffs somehow think that the Court can treat this case as a de facto class action and allow them to seek relief that protects *every* individual or entity that might conceivably be sued under Senate Bill 8 or prosecuted under article 4512.2—regardless of whether those individuals or entities are plaintiffs to this lawsuit. But the judicial power extends only to resolving cases or controversies between parties, and the Court's relief may extend only to the named litigants, or to classes that have been certified consistent with the requirements of Rule 23. The only time that a court may issue relief that extends beyond the named litigants or a certified class is when such a remedy is needed to ensure that the prevailing parties obtain the relief to which they are entitled. *See Professional Association of College Educators v. El Paso County Community College District*, 730 F.2d 258, 273–74 (5th Cir. 1984). But that allowance is not applicable here. The only relief to which the plaintiffs might be entitled is a declaration or an injunction that shields *them* from lawsuits or prosecution, and that shields *them* from attorney-fee-collection lawsuits brought under section 4. The plaintiffs have not alleged that they will suffer Article III injury from lawsuits or prosecutions brought against nonparties to this litigation, and they have no standing to assert the rights or interests of non-parties in the absence of a certified class. *See Davis v. Romney,* 490 F.2d 1360, 1366 (3d Cir. 1974) ("Relief cannot be granted to a class before an order has been entered determining that class treatment is proper."). So the Court must, at the very least, dismiss

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How Much Protection Do Injunctions Against Enforcement of Allegedly Unconstitutional Statutes Provide?, 31 Ford. Urb. L.J. 657, 663 (2004) ("All injunctive relief, of course, including preliminary injunctions, binds only the defendants before the court, and applies only to protect the specific plaintiffs who have brought the suit.").

the plaintiffs' claims to the extent that they seek to prevent the enforcement of Senate Bill 8 or article 4512.2 against non-parties to this lawsuit.

II. The Plaintiffs' Claims Regarding Section 3 Of SB 8 Have Become Moot Now That Texas Has Outlawed And Criminalized All Elective Abortions Separate And Apart From SB 8

Since the plaintiffs filed their lawsuit, the State of Texas has outlawed and criminalized *all* elective abortions separate and apart from SB 8. *See* West's Texas Civil Statutes, articles 4512.1 – article 4512.6 (1974) (attached as Exhibit 2) (outlawing and criminalizing all abortions except those necessary to save the life of the mother); Tex. Health & Safety Code § 170A.002 (outlawing and criminalizing all abortions unless the patient "has a life-threatening physical condition aggravated by, caused by, or arising from a pregnancy that places the female at risk of death or poses a serious risk of substantial impairment of a major bodily function unless the abortion is performed or induced"); *see also Dobbs*, 142 S. Ct. 2228 (overruling *Roe v. Wade*, 410 U.S. 113 (1973), and allowing states to enforce criminal abortion bans). In addition, the Texas murder statute makes any abortion prohibited by these statutes an act of first-degree murder, as elective abortion no longer qualifies as a "lawful medical procedure" under the statutory exemptions to the murder statute. *See* Texas Penal Code § 19.06(2); *see also* Texas Penal Code § 19.02(b)(1) (defining murder as an act that "intentionally or knowingly causes the death of an individual"); Texas Penal Code § 1.07 ("'Individual' means a human being who is alive, including an unborn child at every stage of gestation from fertilization until birth.").

By criminalizing elective abortions, these provisions of Texas law also outlaw and criminalize conduct that aids or abets those abortions—including donations to abortion funds that assist elective abortions in Texas. *See* Tex. Penal Code §§ 7.01–7.03. These post-filing developments do not affect the plaintiffs' standing, which is assessed at the moment the plaintiffs filed their lawsuit. *See Carney v. Adams*, 141 S. Ct. 493,

499 (2020) ("[S]tanding is assessed 'at the time the action commences'" (quoting *Friends of the Earth, Inc.* v. *Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 191 (2000)). But they make it impossible for the plaintiffs to establish traceability or redressability when Texas has separately outlawed and criminalized the behavior that the plaintiffs wish to engage in. *See* 13A Charles Alan Wright et al., *Federal Practice and Procedure* § 3531.5 (3d ed. 2008 & Supp. 2021) ("One law alone does not cause the injury if the other law validly outlaws all the same activity."); *see also Kaspersky Lab, Inc. v. United States Dep't of Homeland Security*, 909 F.3d 446, 465 (D.C. Cir. 2018) (no Article III standing to challenge an agency directive when a separate (unchallenged) statute prohibits "all the same conduct as the directive—and then some."); *White v. United States*, 601 F.3d 545, 552 (6th Cir. 2010) (no standing to challenge the constitutionality of the federal Animal Welfare Act's prohibition on cockfighting when "the states' prohibitions on cockfighting would remain in place notwithstanding any action we might take in regard to the AWA."). This moots all of the plaintiffs' claims regarding section 3. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.22 (1997) ("Mootness has been described as the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." (citations and internal quotation marks omitted)).

The plaintiffs are not challenging the constitutionality of the state's pre-*Roe* abortion ban, its post-*Dobbs* trigger ban, or the murder statute. So there is nothing that this Court can do with respect to SB 8 that will enable the plaintiffs to resume paying for elective abortions in Texas, as that conduct is independently criminalized by at least three other statutes that will remain in effect even if the Court grants all the relief that the plaintiffs request. *See Kaspersky Lab*, 909 F.3d at 465.

In addition, all Texas abortion providers have ceased operations in response to these criminal statutory prohibitions. *See* Associated Press, *Texas clinics shut down*

abortion services after state high court ruling (July 3, 2022), https://to.pbs.org/3dM7ZQN (attached as Exhibit 7); Eleanor Klibanoff, *New Texas law increasing penalties for abortion providers goes into effect Aug. 25*, Texas Tribune (July 26, 2022), https://bit.ly/3AiXvQz ("The state's two dozen abortion clinics stopped providing abortions almost immediately after the court overturned *Roe v. Wade* in late June, fearing criminal prosecution under those pre-*Roe* statutes, which make it a crime punishable by up to five years in prison to provide or 'furnish the means' for an abortion.") (attached as Exhibit 8). So the plaintiffs will not be able to resume their activities even if this Court were to enjoin the enforcement of Senate Bill 8, because there are no longer any abortion providers in Texas willing to perform the post-heartbeat abortions that the plaintiffs wish to pay for.

Finally, the plaintiffs claim that they are seeking relief to "restore the ability of abortion funds and their associates to serve Texans seeking *legal* abortion[s]." First Amended Complaint, ECF No. 62, at ¶ 5 (emphasis added). But SB 8 does nothing to hinder the plaintiffs from assisting or paying for legal abortions—either in Texas or elsewhere. The plaintiffs appear to be unaware that abortion is no longer legal in Texas unless the mother's life is in danger, and that every abortion prohibited by SB 8 is independently criminalized by the state's pre-*Roe* abortion ban,[11] the post-*Dobbs* trigger ban,[12] and the murder statute.[13] SB 8 only prevents the plaintiffs from assisting criminal abortions, as every abortion prohibited by SB 8 is independently criminalized by at least three separate provisions of Texas law. If the plaintiffs wish to assist only legal abortions, as they insist in their amended complaint, then they are not being

11. *See* West's Texas Civil Statutes, articles 4512.1 – article 4512.6 (1974) (attached as Exhibit 2)
12. *See* Tex. Health & Safety Code § 170A.002.
13. *See* Texas Penal Code § 19.02(b)(1) ; Texas Penal Code § 1.07.

injured in the slightest by Senate Bill 8 or by any imaginable conduct of the named defendants.

III. The Case Should Be Dismissed For Improper Venue

Venue is improper because none of the defendants reside in the Western District of Texas. *See* Sharp Decl. ¶ 16; Weldon Decl. ¶ 18; Maxwell Decl. ¶ 18.[14] And none of the events giving rise to the plaintiffs' claims occurred in this district. *See* 28 U.S.C. § 1391(b)(2) (requiring "a substantial part of the events or omissions giving rise to the claim" to occur in the judicial district where suit is filed). The plaintiffs bear the burden of establishing venue, and they come nowhere close to doing so. *See Gutierrez v. Drill Cuttings Disposal Company, LLC*, 319 F. Supp. 3d 856, 861 (W.D. Tex. 2018) ("Once challenged, the burden of sustaining venue lies with the plaintiff.").

The plaintiffs are suing Ms. Sharp over a declaration that expresses interest in suing Texas abortion funds under SB 8, but Ms. Sharp executed that declaration in Henderson County, not in the Western District of Texas. *See* Sharp Decl. ¶ 17. The plaintiffs seize on the fact that Ms. Sharp's declaration was *filed* in a federal case in the Western District of Texas, but it was the *execution* of the declaration that gave rise to the plaintiffs' purported claims against Ms. Sharp—and the plaintiffs' claims against Ms. Sharp would be unaffected if Ms. Sharp had merely executed the declaration without ever filing it in *United States v. Texas*, No. 1:21-cv-00796-RP (W.D. Tex.).

The plaintiffs are suing Ms. Weldon and Ms. Maxwell in response to Rule 202 petitions that they filed in Jack and Denton counties, which are located in the North-

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14. The Court may consider the defendants' declarations when deciding a motion to dismiss under Rule 12(b)(3). *See Ambraco, Inc. v. Bossclip B.V.*, 570 F.3d 233, 238 (5th Cir. 2009) ("[U]nder both Rule 12(b)(1) and Rule 12(b)(3), the court is permitted to look at evidence in the record beyond simply those facts alleged in the complaint and its proper attachments." (citation and internal quotation marks omitted)).

ern and Eastern Districts of Texas. The plaintiffs observe that the Lilith Fund is located in the Western District of Texas,[15] but section 1391(b)(2) asks where the relevant "events" or "omissions" that gave rise to the claim occurred—not where the affected parties are located. The "events" that gave rise to the claims against Ms. Weldon and Ms. Maxwell were the filing of the Rule 202 petitions, and each of those "events" occurred outside the Western District of Texas.

The plaintiffs try to establish venue by relying on matters that have no relevance under section 1391(b)(2). The plaintiffs note that SB 8 "was enacted in this district,"[16] but the plaintiffs are not challenging the *enactment* of SB 8; they are suing the defendants over their roles in *enforcing* SB 8 and article 4512.2. The enactment of SB 8 did not "give rise" to the plaintiffs' claims against the defendants. It is the defendants' own conduct—and *only* the defendants' conduct—that can "give rise" to the claims that are being asserted. None of that conduct occurred in the Western District of Texas, and the plaintiffs do not argue to the contrary. The plaintiffs also allege that some of the Stigma Relief Fund's donors and beneficiaries reside in the Western District of Texas,[17] but section 1391(b)(2) is concerned with the location of "events" and "omissions" that give rise to the plaintiffs' claims—not with the location of individuals who may be affected by the defendants' conduct. The plaintiffs do not describe *any* "events" or "omissions" that: (1) occurred in the Western District of Texas; and (2) "gave rise to" the claims that the plaintiffs are asserting against the defendants.

CONCLUSION

The motion to dismiss for lack of subject-matter jurisdiction should be granted. In the alternative, the Court should dismiss for improper venue.

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15. *See* Complaint, ECF No. 1, at ¶ 12 ("Defendant Weldon has taken steps to enforce S.B. 8 against an abortion fund based in this district.").
16. *See* Complaint, ECF No. 1, at ¶ 12.
17. *See id.*

Respectfully submitted.

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