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

WENDY DAVIS; MARVA SADLER; SEAN MEHL; and STIGMA RELIEF FUND,	)	CIVIL ACTION
Plaintiffs,	)	CASE NO. 1:22-CV-00373-RP
v.	)	
MISTIE SHARP; SADIE WELDON; and ASHLEY MAXWELL,	)	
Defendants.	)	

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS FIRST AMENDED COMPLAINT FOR LACK OF SUBJECT-MATTER JURISDICTION AND LACK OF VENUE

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INTRODUCTION

Plaintiffs seek to associate with like-minded organizations and individuals to: (1) convey messages of support and affirmation for people seeking abortion care, including by helping Texans obtain abortions in states where abortion is legal and (2) advocate for abortion rights in courts and policy arenas. Defendants' credible threats of civil lawsuits under Texas Senate Bill 8, 87th Leg., Reg. Sess. (Tex. 2021) ("S.B. 8") against Texas abortion funds and their donors, employees, and volunteers have chilled these constitutionally protected activities. Plaintiffs seek a declaration that S.B. 8 is unconstitutional, preempted by federal law, and therefore unenforceable. This Court should deny Defendants' motion to dismiss in its entirety because it fails to identify a valid basis for dismissing Plaintiffs' claims.[1]

STATEMENT OF FACTS

I. Plaintiffs

Abortion funds are charitable organizations that provide informational, financial, and/or practical assistance to abortion patients. First Am. Compl. (ECF No. 62) ¶ 1. Plaintiff Stigma Relief Fund is an abortion fund that serves people, including Texas residents, seeking abortion

[1] Rather than engage with Plaintiffs' well-founded allegations concerning S.B. 8, Defendants accuse Plaintiffs of violating article 4512.2 (the "Pre-*Roe* Ban")—which is no longer at issue in the case—based on several legal distortions. These legal distortions include: 1) the groundless claim that the Pre-*Roe* Ban was enforceable against abortions funds and their donors even when *Roe v. Wade*, 410 U.S. 113 (1973), was controlling precedent, *see* Defs.' Mot. to Dismiss First Am. Compl. for Lack of Subject-Matter Jurisdiction & Lack of Venue ("Defs.' MTD") at 3–4; 2) the misconception that Tex. Health & Safety Code § 170A.002 (the "Trigger Ban") did not repeal the Pre-*Roe* Ban by implication, *contra Whole Woman's Health v. Paxton*, 2022-38397 (Harris Cnty. Dist. Ct. June 27, 2022), *petition for mandamus filed,* No. 22-0527 (Tex. June 29, 2022); and 3) the misapprehension that the Pre-*Roe* Ban prohibits the activities of abortion funds or their donors even if it has not been repealed, *see, e.g.*, *Moore v. State*, 37 Tex. Crim. 552, 561–62 (1897) (indicating that the ban's prohibition against "furnish[ing] the means for procuring an abortion" refers to providing instruments or medicines that cause an abortion). In any event, the Pre-*Roe* Ban is no longer at issue in this case, and Defendants' discussion of it is a red herring that is not relevant to the disposition of their motion to dismiss.

care in states where abortion remains legal. *Id.* Stigma Relief Fund provides its services in part to send a message to people seeking an abortion that they are not alone, their community supports them, and they are entitled to end a pregnancy with dignity. *Id.* ¶ 13. Stigma Relief Fund's clients include people who reside in the Western District of Texas. *Id.* ¶ 8. Stigma Relief Fund also engages in advocacy to promote abortion access. *See id*. ¶ 13. Through this advocacy, it seeks to convey to policymakers and the general public that everyone deserves safe abortion care regardless of their circumstances. *Id.*

Plaintiffs Marva Sadler and Sean Mehl serve on the Board of Directors of the Stigma Relief Fund. *Id.* ¶¶ 11–12. Both have donated money to Stigma Relief Fund and other Texas abortion funds, including funds with clients who reside in the Western District of Texas. *Id.* ¶ 8. They would like to continue making such donations in the future. *Id.* Through their association with Stigma Relief Fund and other Texas abortion funds, Plaintiffs Sadler and Mehl seek to communicate to abortion patients that they are not alone, their community supports them, and they are entitled to end their pregnancy with dignity. *Id.* ¶¶ 11 –12. Additionally, Plaintiffs Sadler and Mehl work through Stigma Relief Fund to advocate for abortion rights and equitable abortion access to policymakers and the general public. *Id.*

Plaintiff Wendy Davis regularly donates money to the Lilith Fund for Reproductive Equity ("Lilith Fund"), which is based in the Western District of Texas, and she works in coalition with that abortion fund and others to support abortion patients and advocate for abortion rights. *Id.* ¶ 10. One goal of her activism is to send a message to Texans seeking abortion care that they are not alone, are not doing anything wrong, and deserve access to safe abortion care regardless of their background or financial circumstances. *Id.*

II. S.B. 8's Framework

S.B. 8's operative provisions are set forth in Sections 3 and 4, which include an abortion ban, private civil enforcement mechanism, and one-way fee-shifting scheme. *See* S.B. 8 §§ 3-4. These sections are described below. S.B. 8 took effect on September 1, 2021. *See* S.B. 8 § 12.

A. S.B. 8 Bans Abortion Beginning at Approximately Six Weeks LMP.

S.B. 8 requires physicians to perform an ultrasound before providing an abortion, and it prohibits the abortion if "cardiac activity" is detected. S.B. 8 § 3 (codified at Tex. Health & Safety Code §§ 171.201(1), 171.203(b), 171.204(a)).[2] S.B. 8 defines "physician" as "an individual licensed to practice medicine in [Texas]." *Id.* § 171.201(4). "Cardiac activity" is generally detectible beginning at approximately six weeks of pregnancy, as measured from the first day of a patient's last menstrual period ("LMP"). First Am. Compl. ¶ 27. The only exception to this prohibition is for a "medical emergency" that entails "a life-threatening physical condition." Tex. Health & Safety Code §§ 171.002(3), 171.205(a). S.B. 8 thus prohibits virtually all abortions after approximately six weeks LMP. First Am. Compl. ¶ 28.

B. S.B. 8's Enforcement Provisions Subject Anyone Who Provides, Aids, or Abets a Prohibited Abortion to Unlimited Civil Liability Without Adequate Procedural Safeguards.

S.B. 8 expressly precludes government officers from enforcing the six-week ban. Tex. Health & Safety Code § 171.207(a); *see Whole Woman's Health v. Jackson*, 642 S.W.3d 569, 582 (Tex. Mar. 11, 2022). Instead, the statute creates a private, civil enforcement mechanism that authorizes "[a]ny person, other than an officer or employee of a state or local governmental entity in this state" to "bring a civil action against any person" who violates S.B. 8. Tex. Health & Safety Code § 171.208(a). Three classes of people are subject to such actions: (1) any person who

[2] Hereinafter, citations to codified provisions of S.B. 8 will be to the relevant code only.

"performs or induces an abortion in violation of" the six-week ban; (2) any person who "knowingly engages in conduct that aids or abets the performance or inducement of" an abortion that violates the six-week ban; and (3) any person who "intends to" perform, induce, aid, or abet a prohibited abortion, regardless of whether they actually commit those acts. *Id.* § 171.208(a)(1)-(3). Although S.B. 8 does not define aiding or abetting, it states that the term includes "paying for or reimbursing the costs of an abortion." *Id.* § 171.208(a)(2).

Where an S.B. 8 claimant prevails, "the court shall award": (1) "injunctive relief sufficient to prevent the defendant from violating [the six-week abortion ban] or engaging in acts that aid or abet violations of [the six-week abortion ban]"; (2) "statutory damages in an amount of not less than $10,000 for each abortion" that the defendant provided, aided, or abetted; and (3) the claimant's "costs and attorney's fees." *Id.* § 171.208(b). S.B. 8 does not require the claimant to allege or prove any injury to obtain an award. First Am. Compl. ¶ 35.

The rules governing S.B. 8 enforcement proceedings diverge sharply from the rules that normally apply to Texas litigants in ways that make it extremely difficult for those sued to fairly defend themselves. *Id.*¶ 36. For example, S.B. 8 authorizes statewide venue for enforcement actions, which means that those subject to S.B. 8 lawsuits can be forced to defend themselves in multiple, simultaneous enforcement proceedings in courts across the State. Tex. Health & Safety Code § 171.210(a)-(b).

Moreover, S.B. 8 authorizes one-way fee-shifting in favor of claimants, providing that any claimant who prevails is entitled to recover their costs and attorney's fees. *Id.* § 171.208(b)(3). Meanwhile, those sued under S.B. 8 cannot be awarded costs or attorney's fees even if they prevail. *Id.* § 171.208(i).

Additionally, S.B. 8 eliminates or limits key defenses available to litigants in other actions that are necessary to ensure fundamental fairness. *Id.* § 171.208(e); *see also id.* § 171.208(f-1); First Am. Compl. ¶¶ 39–40. These defenses include that a valid court order authorized the defendants' conduct and that the defendants relied on a court decision, later overruled, that was in place at the time of the acts underlying the suit. Tex. Health & Safety Code §§ 171.208(e),171.209(d)(1).

C. S.B. 8 Makes Litigants and Attorneys Who Challenge Abortion Restrictions Broadly Liable for Their Adversaries' Costs and Attorney's Fees.

Section 4 of S.B. 8 creates an unprecedented one-way fee-shifting scheme designed to deter legal challenges to all Texas abortion restrictions and penalize anyone who tries to bring such a challenge. Tex. Civ. Prac. & Rem. Code § 30.022; *see* First Am. Compl. ¶¶ 41–45. This scheme is distinct from the fee-shifting provision in Section 3 of the statute that applies only to S.B. 8 enforcement actions. *See* Tex. Health & Safety Code § 171.208(b)(3). The Section 4 fee-shifting scheme applies to any person —including a party's lawyer—who seeks declaratory or injunctive relief to prevent enforcement of laws "that regulate[] or restrict[] abortion," or laws that exclude those who "perform or promote" abortion from participating in public funding programs. Tex. Civ. Prac. & Rem. Code § 30.022(a). It lacks an exception for Section 1983 claims to vindicate federal constitutional rights, which are already subject to a comprehensive fee-shifting regime under 42 U.S.C. § 1988. *See id.* § 30.022; First Am. Compl. ¶ 42. The fee-shifting scheme makes civil rights plaintiffs and their attorneys liable for their adversaries' attorney's fees unless they prevail on *all* of their claims. Tex. Civ. Prac. & Rem. Code. § 30.022(b). Nor does it limit recovery to fees that are reasonable or necessary. *See id.* § 30.022. Notably, S.B.8 claimants can file their fee application in a new venue before a judge who did not preside over the underlying case. *Id.* § 30.022(c), (d)(1)-(2).

D. Defendants Have Made Credible Threats to Enforce S.B. 8 Against Texas Abortion Funds and Their Associates.

Defendant Mistie Sharp intervened in a challenge to S.B. 8 filed in this district "to defend and preserve [her] state-law right to sue abortion funds that pay for post-heartbeat abortions in violation of Senate Bill 8." First Am. Compl. ¶ 46 (citations omitted). In support of the motion to intervene, which was granted, she declared under penalty of perjury that she "intend[s] to sue . . . abortion funds who pay for other people's abortions in violation of S.B. 8." *Id.* (citation omitted).

Defendants Sadie Weldon and Ashley Maxwell commenced legal proceedings against at least two Texas abortion funds and their associates, and publicly threatened all Texas abortion funds and their associates, with civil lawsuits under S.B. 8. *Id.* ¶¶ 47–48. In February 2022, they respectively filed in state court verified petitions to take depositions and investigate a lawsuit ("Rule 202 Petitions") against Lilith Fund and North Texas Equal Access Fund ("TEA Fund"). *Id.* These petitions assert that Defendants' "goal is to . . . ascertain the identity of all individuals and organizations who are subject to liability under [Texas Health & Safety Code] section 171.208." First Am. Compl. ¶ 47; *id.* Ex. 2 at 3; *id.* Ex. 3 at 3. On February 14, 2022, Defendants Weldon and Maxwell, through their lawyers, issued a press release stating that they filed the Rule 202 Petitions "to determine which individuals are subject to civil liability . . . for paying [for] illegal abortions, which will include employees, volunteers, and donors" of the respondent abortion funds. First Am. Compl. ¶ 48 (citations omitted). On February 21, 2022, Defendants Weldon and Maxwell issued an additional press release through their lawyers stating that the respondent abortion funds "exposed their employees, volunteers, and donors to civil lawsuits." *Id*. (internal citations omitted). That same day, in response to a tweet by one of the abortion funds announcing its goal to "raise $20k for Texans who need abortions," Defendants' lawyers tweeted a warning to potential "donors" that they "could get sued under S.B. 8." *Id.*; *id.* Ex. 4.

Defendants' credible threats of civil lawsuits under S.B. 8 against abortion funds and their donors, employees, and volunteers have bred uncertainty about whether donors can contribute money to Texas abortion funds without being subject to ruinous civil liability. *See id.* ¶ 49. Consequently, Plaintiffs Sadler and Mehl have ceased donating money to Texas abortion funds pending judicial clarification. *Id.* The Stigma Relief Fund is reasonably concerned that Defendants' threats will chill prospective and existing donors, employees, and volunteers from associating with the fund. *See id.* ¶ 13. Further, the aggressive, public nature of Defendants' statements and actions threatens to have a chilling effect on other abortion funds and their supporters, making it even harder for Plaintiffs to associate with like-minded people to achieve common goals, including communicating messages of support and affirmation to abortion patients and advocating for access to safe, legal, and affordable abortion care for all. *See id.*¶ 10.

ARGUMENT

I. Plaintiffs Have Standing to Maintain Their Claims Against Section 3.

A. Plaintiffs Satisfy the Injury-in-Fact Requirement for Standing.

Contrary to Defendants' contentions, the allegations in the First Amended Complaint are more than sufficient to establish that Plaintiffs have standing to maintain their claims against Section 3. "To have [Article III] standing, a plaintiff must (1) have suffered an injury in fact, (2) that is fairly traceable to the challenged action of the defendant, and (3) that will likely be redressed by a favorable decision." *Speech First, Inc. v. Fenves*, 979 F.3d 319, 330 (5th Cir. 2020) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)). "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice." *Lujan*, 504 U.S. at 561 (citation omitted).

"A plaintiff has suffered an injury in fact if he (1) has an 'intention to engage in a course of conduct arguably affected with a constitutional interest,' (2) his intended future conduct is 'arguably . . . proscribed by [the policy in question],' and (3) 'the threat of future enforcement of the [challenged policies] is substantial.'" *Speech First, Inc.*, 979 F.3d at 330 (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 161–64 (2014)).

Plaintiffs plainly satisfy this test. First, they have alleged that they seek to associate with Texas abortion funds and their donors, employees, and volunteers to: (1) convey messages of support and affirmation for people seeking abortion care, including by helping Texans obtain abortions in states where abortion is legal and (2) advocate for abortion access in courts and policy arenas. First Am. Compl. ¶¶ 10–13. It is well-settled that such expressive association implicates vital First Amendment interests. *See, e.g.*, *Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2382 (2021); *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647–48 (2000); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984); *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 460 (1958).

Second, Plaintiffs have sufficiently alleged that their intended future association is burdened by S.B. 8, which imposes unlimited civil liability on anyone who provides financial assistance—or merely intends to provide financial assistance—to someone obtaining abortion care that S.B. 8 deems unlawful. *See* Tex. Health & Safety Code § 171.208(a)(2)-(3). Defendants Weldon and Maxwell have already conceded this point. In public statements through their attorneys, they warned potential abortion fund donors that they "could get sued under S.B. 8." First Am. Compl. ¶ 48; *id.* Ex. 4. Both S.B. 8 and Defendants' threats to enforce it have had a chilling effect on Texas abortion funds and their associates, including Plaintiffs. *Id.* ¶¶ 10–13, 49. For example, Plaintiffs Sadler and Mehl have ceased donating money to Texas abortion funds. *Id.* ¶¶ 11–12, 49. The Fifth Circuit "has repeatedly held, in the pre-enforcement context, that '[c]hilling

a plaintiff's speech is a constitutional harm adequate to satisfy the injury-in-fact requirement.'" *Speech First, Inc.*, 979 F.3d at 330–31 (citation omitted).

Third, Plaintiffs have sufficiently alleged that the threat of future enforcement of S.B. 8 is substantial. Defendant Sharp declared under penalty of perjury, in this very Court, that she "intend[s] to sue . . . abortion funds who pay for other people's abortions in violation of Senate Bill 8." First Am. Compl. ¶ 46 (citation omitted). Similarly, Defendants Weldon and Maxwell respectively filed Rule 202 Petitions in state court for the purpose of gathering information to support S.B. 8 lawsuits against Texas abortion funds and their associates. *Id.* ¶¶ 47–48. In subsequent press releases and tweets, these Defendants repeatedly threatened Texas abortion funds and their donors, employees, and volunteers with civil lawsuits pursuant to S.B. 8. *Id.* ¶ 48. Under the circumstances, Plaintiffs "have alleged an actual and well-founded fear that the law will be enforced against them." *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988). "Further, the alleged danger of th[e] statute [at issue] is, in large measure, one of self-censorship; a harm that can be realized even without an actual prosecution." *Id.*

Accordingly, Plaintiffs satisfy the injury-in-fact requirement for standing. *See Speech First, Inc.*, 979 F.3d at 330.

Defendants' attempts to defeat Plaintiffs' standing with self-serving declarations that they do not intend to sue Plaintiffs under S.B. 8 are unavailing. *See* Defs.' MTD at 8–9. Defendants Sharp, Weldon, and Maxwell have made written, public statements declaring their broad intention to sue Texas abortion funds and their associates under S.B. 8 and taken concrete steps toward doing so. In Ms. Sharp's case, she intervened in a case pending in this Court to "preserve [her] state-law right to sue abortion funds." First Am. Compl. ¶ 46 (citation omitted). In Ms. Weldon's and Ms. Maxwell's cases, they filed Rule 202 Petitions in state court seeking to "ascertain the identity of

all individuals and organizations who are subject to liability under [Texas Health & Safety Code] section 171.208." *Id.* ¶ 47; *id.* Ex. 2 at 3; *id.* Ex. 3 at 3. Defendants willfully ignore that these statements distinguish this case from *Whole Woman's Health v. Jackson* because the record there lacked evidence that Defendant Mark Lee Dickson made specific, published threats to sue abortion providers, abortion funds, or their associates, or that he took concrete steps towards doing so. 142 S. Ct. 522, 537 (2021); *see* Defs.' MTD at 9. Critically, Defendants' public threats to enforce S.B. 8 against abortion funds and their donors, volunteers, and employees will continue to have a chilling effect on the willingness of like-minded people to associate with Plaintiffs—for example, the willingness of prospective donors to contribute money to the Stigma Relief Fund—regardless of whether Defendants actually intend to follow through on them. First Am. Compl. ¶ 49.

Defendants' post-hoc disavowal of their intent to enforce S.B. 8 against Plaintiffs amounts to a voluntary cessation of challenged conduct. *Cf. Already, LLC v. Nike, Inc.*, 568 U.S. 85, 92 (2013) (holding that the issuance of a covenant not to enforce a trademark against a competitor's products—in response to litigation—constituted voluntary cessation of the challenged conduct). Such voluntary cessation does not deprive the Court of Article III jurisdiction unless "it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000). It is Defendants' burden to show that they satisfy this standard, *see Already*, *LLC*, 568 U.S. at 92, and they have not met it.

B. Plaintiffs Satisfy the Causation and Redressability Requirements for Standing.

Plaintiffs satisfy the causation and redressability requirements of standing, *see Speech First, Inc.*, 979 F.3d at 330, because "[p]otential enforcement of [S.B. 8] caused the [Plaintiffs'] self-censorship, and the injury could be redressed by" a declaration that S.B. 8 is unconstitutional

and/or preempted by federal law and therefore unenforceable. *Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 661 (5th Cir. 2006); *accord Speech First*, *Inc.*, 979 F.3d at 338.

Defendants' claim that Plaintiffs cannot meet the causation requirement "unless they have violated the statute in the past or intend to violate it in the future," and thus "opened the door for the defendants to sue them," is disingenuous at best. Defs.' MTD at 9, 11. Defendants concede, as they must, that they would be causing Plaintiffs' injuries if they were chilling Plaintiffs' constitutionally protected conduct. *Id.* at 10; *see Driehaus*, 573 U.S. at 163 ("Nothing in [the Supreme] Court's decisions requires a plaintiff who wishes to challenge the constitutionality of a law to confess that he will in fact violate that law.") (citing *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 301 (1979), which found standing even though plaintiffs disavowed any intent to "propagate untruths" prohibited by the statute); *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128–129 (2007) ("[W]e do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat—for example, the constitutionality of a law threatened to be enforced. The plaintiff's own action (or inaction) in failing to violate the law eliminates the imminent threat of prosecution, but nonetheless does not eliminate Article III jurisdiction.").

The remainder of Defendants' claim that Plaintiffs have not satisfied the causation requirement for standing collapses into the faulty contention that they can defeat the Court's jurisdiction by disavowing their prior threats of enforcement. *See* Defs.' MTD at 10–11. But, as explained above, self-serving declarations submitted in response to litigation cannot deprive the Court of jurisdiction in the absence of any evidence that the credible threats will not recur. *See supra* at10; *Friends of the Earth*, 528 U.S. at 190.

Defendants also wrongly assert that this Court cannot redress Plaintiffs' injuries because "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." Defs.' MTD at 11; *see id.* ("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."). This, however, misconstrues the relief that Plaintiffs are seeking: "a declaratory judgment that S.B. 8 is unenforceable because it is unconstitutional and/or preempted by federal law." This would not only ameliorate the chilling effect of Defendants' specific threats; it would neutralize the risk of successful enforcement by nonparties. First Am. Compl. at 17.

Importantly, a plaintiff "need not show that a favorable decision will relieve his *every* injury.'" *Massachusetts v. EPA*, 549 U.S. 497, 525 (2007) (quoting *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982)). Rather, the redressability requirement is satisfied when the plaintiff shows that "a favorable decision will relieve a discrete injury to himself." *Id.* (quoting *Larson*, 456 at 243 n.15); *see K.P. v. LeBlanc*, 627 F.3d 115, 123 (5th Cir. 2010) (holding that abortion providers had Article III standing to sue a state compensation-fund board over the constitutionality of a statute subjecting them to civil liability even though "the [b]oard [was] far from the sole participant in the application of the challenged statute"). And as the Supreme Court has explained:

> Even where a declaration of [a state law's] unconstitutionality is [rendered by a lower federal court], the declaration may still be able to cut down the deterrent effect of an unconstitutional state statute. The persuasive force of the [lower court's] opinion and judgment may lead . . . courts[] and legislators to reconsider their respective responsibilities toward the statute. Enforcement policies or judicial construction may be changed, or the legislature may repeal the statute and start anew.

Steffel v. Thompson, 415 U.S. 452, 470 (1974).

Consistent with these principles, the Supreme Court has repeatedly held that a declaratory judgment resolving a live dispute would provide meaningful relief, including by impacting persons who were not before the court. *See, e.g.*, *Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992) (determining that "an authoritative interpretation of the census statute and constitutional provision by the District Court" would redress an injury involving reapportionment because it would pressure other government actors "not [] directly bound" by the judgment).

Here, a declaration that S.B. 8 is unenforceable because it is unconstitutional and/or preempted by federal law would strongly deter anyone seeking to sue Plaintiffs under S.B. 8 and thus relieve the chilling effect from Defendants' actions on Texas abortion funds and their donors, employees, and volunteers. *See* First Am. Compl. ¶ 48 (noting that the lawyers for Defendants Weldon and Maxwell "tweeted a warning to potential 'donors' that they 'could get sued under S.B. 8'") (quoting *id.* Ex. 4).

II. Plaintiffs Have Standing to Maintain Their Claims Against Section 4.

Defendants contend without merit that Plaintiffs lack standing to bring a pre-enforcement challenge to the fee-shifting scheme set forth in Section 4 of S.B. 8. Defs.' MTD at 12–13. The Fifth Circuit has made clear that "[i]t is not hard to sustain standing for a pre-enforcement challenge in the highly sensitive area of public regulations governing bedrock political speech." *Speech First, Inc.*, 979 F.3d at 331. It is well-settled that public-interest litigation constitutes such speech. *See Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 548 (2001); *In re Primus*, 436 U.S. 412, 431–32 (1978); *NAACP v. Button*, 371 U.S. 415, 429–30 (1963) ("In the context of NAACP objectives, litigation is . . . a form of political expression. . . . [U]nder the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances.").

Plaintiffs' efforts to challenge the constitutionality of laws, such as S.B. 8, that restrict access to abortion fall squarely within the zone of protection. The fee-shifting provision harms Plaintiffs by burdening their protected speech with financial disincentives that threaten to limit what arguments they make and how long they continue to litigate. *See* Tex. Civ. Prac. & Rem. Code § 30.022; *see* First Am. Compl. ¶¶ 41–45. That harm is caused by Defendants' ability to invoke the fee-shifting provision if successful in this lawsuit, and it would be redressed by a declaration by this Court that the provision is unconstitutional. Plaintiffs therefore have standing to challenge it. *See Speech First, Inc.*, 979 F.3d at 330.

III. Plaintiffs Have Standing to Seek Facial Relief from S.B. 8.

Defendants incorrectly assert that Plaintiffs lack standing to seek facial relief "absent allegations and evidence that the enforcement of Senate Bill 8 . . . against . . . non-parties will inflict 'injury' on the named plaintiffs." Defs.' MTD at 14. In fact, it is well-settled that federal courts are authorized to grant facial relief whenever the circumstances of a case warrant it. *See*, *e.g.*, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 336 (2010) ("[A] statute which chills speech can and must be invalidated where its facial invalidity has been demonstrated."). Each case that Defendants cite in support of their faulty assertion is inapposite, dealing with limitations on federal courts' authority to issue injunctive relief, which is not at issue in this case. *See* Defs.' MTD at 14. In fact, one of these cases expressly recognizes that some "case[s] require[ ] . . . a facial challenge in order to vindicate a party's right not to be bound by an unconstitutional statute." *U.S. v. Natl. Treasure Emps. Union*, 513 U.S. 454, 477–78 (1995); *see* Defs.' MTD at 14.

Likewise, facial relief is warranted here because Plaintiffs have alleged, and will demonstrate, that S.B. 8 is not enforceable against anyone because it is unconstitutional and/or preempted by federal law. *See Elfbrandt v. Russell*, 384 U.S. 11, 13, 18–19 (1966) (holding, in an

action brought by a single schoolteacher, that a statute requiring a loyalty oath by state employees facially violated the freedom of association guaranteed by the First Amendment) ("Such a law cannot stand."); Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1324 (2000) ("[I]n applying [doctrinal] tests to resolve particular claims, courts often engage in reasoning indicating that a statute is invalid in whole or in part, and not merely as applied.").

IV. There Continues to Be a Live Case or Controversy Concerning Section 3 of S.B. 8.

Defendants mistakenly argue that the enforcement of criminal bans on abortion in Texas have mooted Plaintiffs' claims against Section 3. *See* Defs.' MTD at 16–17. "[E]ven when the primary relief sought is no longer available, being able to imagine an alternative form of relief is all that's required to keep a case alive." *Dierlam v. Trump*, 977 F.3d 471, 476–77 (5th Cir. 2020) (citation omitted). "As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307–08, (2012). "[A] court analyzing mootness in the early stages of litigation need only ask whether the plaintiff's requested relief is 'so implausible that it may be disregarded on the question of jurisdiction.'" *Dierlam*, 977 F.3d at 477 (quoting *Chafin v. Chafin*, 568 U.S. 165, 177 (2013)).

There clearly continues to be a live case or controversy here. Plaintiffs' injuries include a chilling effect on their ability to associate with Texas abortion funds and their donors, employees, and volunteers to: 1) express messages of support and affirmation for people seeking abortion care by facilitating that care in states where abortion remains legal and 2) advocate for abortion rights in courts and policy arenas. First Am. Compl. ¶¶ 10–13, 41–45. These injuries are caused by Defendants' credible threats to enforce S.B. 8 against Texas abortion funds and their associates. *Id.* Accordingly, a declaratory judgment that S.B. 8 is unenforceable because it is unconstitutional

and/or preempted by federal law would relieve those injuries, and for instance allow Plaintiffs Mehl and Sadler to resume donating to Stigma Relief Fund and other Texas abortion funds, even if the criminal bans on abortion in Texas remain in effect. *Id.* ¶¶ 11–13; *see Knox*, 567 U.S. at 307–08. For these reasons, Plaintiffs claims against Section 3 are not moot.

V. Venue is Proper in This District Under 28 U.S.C. § 1391(b)(2).

Defendant's contention that venue is improper because "*only* the defendants' conduct . . . can 'give rise'" to Plaintiffs' claims is patently meritless. Defs.' MTD at 20. Under 28 U.S.C. § 1391(b)(2), venue is appropriate in a "district in which a substantial part of the events or omissions giving rise to the claim[s] occurred." *See Trois v. Apple Tree Auction Ctr., Inc.*, 882 F.3d 485, 492–94 (5th Cir. 2018) (italics in original). In assessing whether this standard is satisfied, "the Court may . . . consider the location of the effects of the alleged conduct, which can include a consideration of a plaintiff's activities." *Umphress v. Hall*, 479 F.Supp.3d 344, 352 (N.D. Tex. Aug. 14, 2020). Further, the Fifth Circuit has held that venue is proper when conduct occurring outside the district where the case is brought is nonetheless directed at people in the district. In *Trois*, for example, a Texas citizen sued Ohio citizens in a Texas district court for fraudulent misrepresentations made during a conference call from Ohio to Texas. 882 F.3d at 488. The Fifth Circuit held that the Texas district court was the proper venue for the challenge because "the misrepresentations directed at Texas [were] a substantial part of the events giving rise to" plaintiffs' claim. *Id*. at 494. Notably, "[c]ourts have recognized that venue may be properly laid in more than one district, and that 28 U.S.C. § 1391(b)(2) does not require that the chosen venue be the *best* venue . . . the selected district must simply have a substantial connection to the claim."

Zurich Am. Ins. Co. v. Tejas Concrete & Materials Inc., 982 F. Supp. 2d 714, 722 (W.D. Tex. 2013) (quotation and citation omitted).

Venue is appropriate in this district because Defendant Sharp intervened in a lawsuit filed in this district based on her declared intention to sue Texas abortion funds under S.B. 8[3]; Defendant Weldon has made threats, and taken steps, to enforce S.B. 8 against an abortion fund based in this district; and Defendants' actions are having a chilling effect on abortion funds that are based in and/or serve people residing in this district.[4] First Am. Compl. ¶ 8; *see Trois*, 882 F.3d at 494; *Umphress*, 479 F.Supp.3d at 352.

CONCLUSION

For the reasons set forth above, this Court should deny Defendants' motion to dismiss.

[3] Defendants' assertion that Plaintiffs' claims "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" is at odds with 28 U.S.C. § 1391(b)(2), which asks where the events that *actually* gave rise to Plaintiffs' claims occurred, and not where the events that *could have* given rise to Plaintiffs' claims occurred.

[4] Defendants argue that Plaintiffs cannot establish venue based on the fact that S.B. 8 was enacted in this district, but Plaintiffs have not tried to do so. *See* Defs.' MTD at 20; First Am. Compl. ¶ 8.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 22, 2022, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification to all counsel of record.

/s/ Rupali Sharma
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