CAUSE NO. D-1-GN-23-000968

AMANDA ZURAWSKI, et al.,	§	IN THE DISTRICT COURT OF
Plaintiffs,	§	
	§	
	§	
v.	§	TRAVIS COUNTY, TEXAS
	§	
	§	
STATE OF TEXAS, et al.,	§	
Defendants.	§	353RD JUDICIAL DISTRICT

DEFENDANTS' PLEA TO THE JURISDICTION AND RESPONSE TO PLAINTIFFS' APPLICATION FOR TEMPORARY INJUNCTION

Defendants the State of Texas, Ken Paxton, in his official capacity as Attorney General of Texas, the Texas Medical Board ("TMB"), and Stephen Brint Carlton, in his official capacity as Executive Director of the Texas Medical Board file this PLEA TO THE JURISDICTION AND RESPONSE TO PLAINTIFFS' APPLICATION FOR TEMPORARY INJUNCTION.

BACKGROUND

Plaintiffs, generally, break down categorically into "pregnant people" (hereafter "Patients") who contend they would have had abortions, and "Abortionists" who contend they would have performed abortions, but for Texas' abortion laws. *See generally* PLS.' AM. PET.

Plaintiffs filed this suit on March 6, 2023, seeking declaratory relief to "clarify the scope" of Senate Bill 8 ("S.B. 8"), the pre-*Roe* statutes, and the Human Life Protection Act ("HLPA") and to enjoin Defendants from enforcing these statutes outside the scope of that declaratory judgment. PLS.' ORIG. PET. at 85–86; PLS.' AM. PET. at 112–13. Since then, Plaintiffs have gone on a media tour, *see e.g.* Eleanor Klibanoff, *Women denied abortions sue Texas to clarify exceptions to the*

laws, Tex. Trib. (Mar. 7, 2023), https://www.texastribune.org/2023/03/07/texas-abortion-lawsuit, recruited fellow activists to "tell their stories" to "be part of changing the law," PLS.' AM. PET. at ¶¶63, 137, 153, 169, 174, 186, 203, and raised more than $50,000 in donations, *id.* at ¶173; *see also* https://gofund.me/9cf7bce0.

But splashy news conferences and media tours do not transform Texas courts into the proper venue for individuals to "tell their stories," nor are they the place to "change the law" after failing to convince the Legislature to adopt their preferred legislation. *See* Senate Judiciary Hearing on Texas Abortion Pill Ruling, CSPAN (Apr. 26, 2023), https://www.c-span.org/video/?527656-1/senate-judiciary-hearing-texas-abortion-pill-ruling.

Plaintiffs' claims should be dismissed because they lack standing, the State enjoys sovereign immunity, the claims are not ripe, and the Court lacks the authority to issue advisory opinions on the scope of S.B. 8 and the HLPA. But even if the Court concludes otherwise, Plaintiffs are not entitled to the relief sought. Plaintiffs have not shown a probable right to recovery or success on the merits, and the injuries they allege do not show a threat of probable, imminent irreparable harm.

STANDARD OF REVIEW

Plea to the Jurisdiction

A plea to the jurisdiction challenges the court's authority to determine the subject matter of the controversy. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 553–54 (Tex. 2000). Subject matter jurisdiction is "never presumed and cannot be waived." *Tex. Ass'n of Bus. v. Tex. Air Ctr. Bd.*, 852 S.W.2d 440, 443–44 (Tex. 1993). "When a plea to the jurisdiction challenges the pleadings, [the court] determine[s] if the pleader has alleged facts that affirmatively demonstrate the court's jurisdiction to hear the cause." *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d

217, 226 (Tex. 2004). "If the pleadings affirmatively negate the existence of jurisdiction, then a plea to the jurisdiction may be granted without allowing the plaintiffs an opportunity to amend." *Id.* at 227.

Temporary Injunction

"[A] temporary injunction is an extraordinary remedy and does not issue as a matter of right." *Walling v. Metcalfe*, 863 S.W.2d 56, 57 (Tex. 1993). The purpose of a temporary injunction is to preserve the status quo pending trial on the merits. *Id.* Status quo is defined as "the last, actual, peaceable, noncontested status which preceded the pending controversy." *Transp. Co. v. Robertson Transps., Inc.*, 261 S.W.2d 549, 553–54 (1953) (internal quotations omitted). The applicant's burden is to establish a probable right of recovery following a trial on the merits and a probable injury in the interim, warranting preservation of the status quo pending the trial. *Universal Health Servs., Inc. v. Thompson*, 24 S.W.3d 570, 576 (Tex. App.—Austin 2000, no pet.). "To obtain a temporary injunction, the applicant must plead and prove three specific elements: (1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim." *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002). *see also In re Tex. Nat. Res. Conserv. Comm'n*, 85 S.W.3d 201, 204 (Tex. 2002) (noting a request for a temporary injunction "has more stringent proof requirements" than a request for a temporary restraining order).

Moreover, "the proof required to support a judgment issuing a writ of temporary injunction may not be made by affidavit." *Millwrights Local Union No. 2484 v. Rust Eng'g Co.*, 433 S.W.2d 683, 687 (Tex. 1968). Instead, a temporary injunction may issue only after the court conducts a hearing and only if the plaintiff offers evidence that "establishes a probable right of recovery" on

the merits. *Id.* Absent that showing, "no purpose is served" by the issuance of a temporary injunction because its purpose is likewise to maintain the status quo pending a trial on the merits. *In re Tex. Nat. Res. Conserv. Comm'n*, 85 S.W.3d at 204 (quotation omitted).

ARGUMENTS AND AUTHORITIES

I. Plaintiffs lack standing.

"Subject matter jurisdiction requires that the party bringing the suit have standing, that there be a live controversy between the parties, and that the case be justiciable." *State Bar of Tex. v. Gomez*, 891 S.W.2d 243, 245 (Tex. 1994). "A court has no jurisdiction over a claim made by a plaintiff who lacks standing to assert it." *Heckman v. Williamson Cnty.*, 369 S.W.3d 137, 150 (Tex. 2012). Standing "require[s] an actual, not merely hypothetical or generalized grievance." *Brown v. Todd*, 53 S.W.3d 297, 302 (Tex. 2001). The Texas Constitution's separation of powers "prohibit[s] courts from issuing advisory opinions because such is the function of the executive rather than judicial department." *Tex. Ass'n of Bus.*, 852 S.W.2d at 444. "The distinctive feature of an advisory opinion is that it decides an abstract question of law without binding the parties." *Id.*

To the extent not contradicted by state law, Texas courts "look to the more extensive jurisprudential experience of the federal courts on the subject [of standing] for any guidance it may yield." *Id.* To have standing, each plaintiff must meet three elements: (1) the plaintiff must have suffered an injury in fact—an invasion of a legally protected or cognizable interest that is both concrete and particularized and actual or imminent, not conjectural or hypothetical;(2) there must be a causal connection between the injury and the conduct complained of—that is, the injury must be fairly traceable to the challenged action of the defendant and not the independent action of a third party not before the court; and (3) it must be likely, and not merely speculative, that the injury

will be redressed by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992); *Brown*, 53 S.W.3d at 305 (referencing *Lujan*); *Heckman*, 369 S.W.3d at 155.

A. None of the Patient's alleged injuries are fairly traceable to Defendants.

The second element of standing requires that the plaintiff's alleged injury be "fairly traceable" to the defendant's conduct because "a court [can] act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court." *Meyers v. JDC/Firethorne, Ltd.*, 548 S.W.3d 477, 485 (Tex. 2018) (quoting *Heckman v. Williamson Cnty.*, 369 S.W.3d 137, 155 (Tex. 2012)).

The Patients' alleged injuries were the result of the independent actions of their medical providers who determined that they did not qualify for the medical exception in Texas' abortion laws or, in the case of Weller, determined that she did qualify for an exception and performed the requested abortion.

Amanda Zurawski alleges that she became septic when she was released from the care of her medical provider after being diagnosed with preterm premature rupture of membranes (PPROM). PLS.' AM. PET. at ¶¶7-30. She claims that she "nearly lost her own life and spent days in the ICU" "because of Texas's abortion bans." *Id.* at ¶24. But she alleges no facts that tie any of the Defendants to her medical providers' decision to release her from their care after her water had broken and after she was diagnosed with PPROM. *See generally id.* Her alleged injuries were, instead, the result of her medical providers' decision to wait to induce her labor until she was admitted to the emergency room with a septic infection. *See id.* at 7–8.

Lauren Miller similarly alleges that she would have had an abortion after she was hospitalized with dehydration and diagnosed with hyperemesis gravidarum ("a severe form of persistent nausea"). PLS.' AM. PET. at ¶¶31-52. She alleges she was pregnant with twins, one of whom appeared to have trisomy 18. *Id.* at ¶38. When she found out one of the twins had trisomy 18, she elected to travel to Colorado to abort that baby. *Id.* at ¶. Miller does not allege any facts—or cite any law—demonstrating that her inability to procure an abortion in Texas was traceable to any action by Defendants. *See generally id.* Plaintiff contends the source of her injuries was the confusion and frustration she felt after speaking to her medical providers, and her personal disagreement with her maternal-fetal medicine specialist's opinion that she did not meet the requirements for an medical exception to obtain an abortion in Texas. *Id*. at ¶¶39-42. Plaintiff has not and cannot link the independent intervening actions of these third parties to Defendants. *See generally id.* Moreover, she fails to allege that her baby's apparent diagnosis threatened her life; absent such an allegation, Miller had no legal right to abort her baby in Texas instead of Colorado. *See generally* Tex. Health & Safety Code Chs. 170-71; *see also* Tex. Civ. Stat. art. 4512.6 (when necessary to save the life of the mother, abortion is not criminal).

Similarly, Dr. Austin Dennard alleges that she was unable to procure an abortion in Texas for her baby who was diagnosed with anencephaly and she felt "silenced" and "marginalized." PLS.' AM. PET. at ¶¶53-65. She elected to abort her baby on the East Coast. *Id.* at ¶59-60. Dennard fails to allege that her personal feelings and inability to abort her baby in Texas were traceable to the actions of any of the Defendants. *See generally id.* And further, she fails to allege that her baby's diagnosis posed a threat to her life such that she could get an abortion under one of the exceptions in Texas's abortion statutes. *See generally id.*

Like Dennard, Lauren Hall's baby was also diagnosed with anencephaly. PLS.' AM. PET. at ¶¶66-80. Hall decided that she wanted to abort her baby to preempt her fear that she "would not get proper care for this pregnancy in Texas." *Id.* at ¶71. A threat to her life did not develop and she declined to join a support group for patients who give birth to babies with anencephaly. *Id*. at ¶74. She instead went to Seattle and aborted her baby. *Id.* at 16. Hall's failure to allege that there was any threat to her life such that she would qualify for one of the exceptions to Texas' prohibition on abortion is fatal to her claims. *See generally id.* Her fear that she "would not get proper care" is not traceable to any Defendants' actions. *See generally id.*

Like Zurwaski, Anna Zargarian alleges that she was diagnosed with PPROM after a visit to the emergency room at 19 and a half weeks pregnant. PLS.' AM. PET. at ¶¶81-96. After the diagnosis, Zargarian alleges that she "decided go home so [she] could begin researching abortion options" and, "fear[ful] for her life," flew to Colorado to abort her baby. *Id.* at ¶90-93. Zargarian alleges no facts to demonstrate that there was a threat to her life, failing to establish that she would have qualified for one of Texas's exceptions to the prohibition on abortion. She also fails to allege that her "stress and anxiety" from her choice to leave the hospital and take an elective trip to Colorado was traceable to any Defendant's actions; instead, the cause of her alleged injuries appears to be the intervening independent actions of her treatment providers who determined that she did not qualify for the medical exception to Texas' abortion laws. *See generally id.*

Ashley Brandt alleges that she was pregnant with twins when, at her twelve-week ultrasound, she was told that one twin "likely had acrania." PLS.' AM. PET. at ¶¶97-114. "[W]ithout guidance from her Texas physicians," and before confirming the diagnosis with a specialist, Brandt called an abortion provider in Colorado and made the decision to abort that twin.

Id. at ¶101. Brandt alleges no facts that demonstrate a threat to her life, thus failing to establish that she qualified for one of Texas's exceptions to the prohibition on abortion. *See generally id.* In fact, the only physical complications she alleges took place immediately *after* procuring an abortion in Colorado. *Id.* at ¶108-09. Furthermore, Brandt does not allege any facts to show that her "icky" feelings or her "fear and stress" after her out-of-state elective abortion are traceable to any action by any Defendant. *See generally id.*

Kylie Beaton alleges that, at her 20-week anatomy scan, her baby was diagnosed with alobar holoprosencephaly. PLS.' AM. PET. at ¶¶115-40. Beaton alleges that she sought to procure an abortion in other states, but many refused because the baby's "size was past the gestational cutoff," so she chose to continue the pregnancy. *Id.* at ¶120. Beaton's baby passed away five days after his birth. ¶133. Beaton does not allege that her life was threatened at any point; and even had she qualified for an abortion in Texas, her inability to procure an abortion is not traceable to any action by any Defendant. *See generally id.*

Jessica Bernardo alleges that her baby, already diagnosed with Down syndrome, had fetal anasarca and was showing signs of heart failure. PLS.' AM. PET. at ¶¶141-55. After conducting "her own research," Bernardo decided that continuing the pregnancy was "detrimental to [her] mental health" and "wanted to be able to grieve, start healing, and ultimately, try to get pregnant again." *Id.* at ¶149. Bernardo alleges that she ultimately traveled to Seattle to abort her baby. *Id.* at ¶151-52. Bernardo does not allege any facts that indicate her life was threatened, thus failing to show that she would have qualified for one of Texas's exceptions to the prohibition on abortion. *See generally id.* Furthermore, not only is her "terr[or] to get pregnant naturally again in Texas" not

traceable to any action by any Defendant, but her claim is also undermined by the fact that she alleges in the very next sentence that she is undergoing IVF to get pregnant again. *Id.* at ¶154.

Samantha Casiano alleges that her baby was diagnosed with anencephaly at her 20-week anatomy scan. PLS.' AM. PET. at ¶¶156-75. She alleges that she sought to receive an abortion out-of-state but chose to carry the pregnancy to term after learning of the costs. *Id.* at ¶160. Casiano's baby passed away four hours after birth. *Id*. at ¶169. Casiano, at no point, alleges that her life was threatened and, therefore, does not show that she qualified for an exception to Texas's prohibition on abortion. *See generally id.* Further, she does not allege that her injuries are fairly traceable to any Defendants' actions; instead, the cause of her alleged injuries appears to stem from a lack of resources and the intervening independent actions of her treatment providers who determined that she did not qualify for the medical exception to Texas' abortion laws. *See generally id.*

Taylor Edwards alleges that her baby was diagnosed with encephalocele at her 17-week anatomy scan. PLS.' AM. PET. at ¶¶176-88. She alleges that she was told "that no fetal surgery could correct the issue" and, thus, "decided she needed an abortion." *Id.* at ¶¶179-81. Edwards does not allege any facts that demonstrate that her life was threatened; however, she elected to travel to Colorado to abort her baby anyway. *Id.* at ¶185. Her "fears [of] being pregnant again" are not traceable to any action by any Defendant and, like Bernardo, her claims are undermined because she is allegedly seeking to get pregnant again through IVF. *Id.* at ¶187.

Kiersten Hogan alleges that, weeks after S.B.8 took effect, her "water broke . . . around 19 weeks pregnant" and that she was diagnosed with cervical insufficiency. PLS.' AM. PET. at ¶¶189-204. She alleges that her physically and emotionally abusive boyfriend tried to force her to have an abortion. *Id*. at ¶192.

She alleges that, at the hospital, she was given a battery of bad legal advice, including that "if she tried to leave the hospital, it would be used as evidence that she was trying to kill her baby" and that "criminal charges could be brought against her." *Id.* at ¶198*; but see* Tex. Health & Safety Code §§ 171.204(a), 171.206(b) (stating that "a *physician* may not knowingly perform or induce an abortion" and that nothing in S.B.8 is to be construed as authorizing civil or criminal charges against a woman on whom an abortion is performed in violation of S.B.8) (emphasis added). Hogan does not allege that, at any point, her life was threatened such that she would have qualified for an exception to the prohibition of abortion in S.B.8. *See generally* PL.'S AM. PET. She claims that "Texas law caused [her] to be detained against her will for four days and made to feel like a criminal . . . ." *Id.* at ¶199. She gave birth to a stillborn child. Id. at ¶200. However, Hogan does not allege any action or statement by any Defendant that is traceable to her alleged experience at the hospital. *See generally id.* And, just as with the other plaintiffs, the source of her alleged injuries, if any, was the result of the independent actions of her medical providers—not Defendants.

Lauren Van Vleet alleges that her baby was diagnosed with anencephaly at about 23 weeks gestation. PLS.' AM. PET. at ¶¶205-217. She alleges that she was told "she could either continue with the pregnancy or she could go to Colorado or New Mexico for an abortion." *Id.* at ¶209. Van Vleet chose to abort her baby and travelled to Maryland to do so. *Id.* at ¶¶212-13. Like the other plaintiffs, she fails to allege any threat to her life that would have qualified her for an exception to Texas's prohibition on abortion. *See generally id.* Further, she also does not allege any action by any Defendant that is traceable to her conflicting desire for children and feelings of being "scared to be pregnant in Texas again." *Id.* at 38.

Elizabeth Weller alleges that at "19 weeks pregnant [] her water broke" and "she was told that while her cervix was still closed, she had lost a lot of amniotic fluid." PLS.' AM. PET. at ¶¶218-36. She claims she was told that "if she did not terminate the pregnancy, she *could* get an infection that *could* cause her to lose her uterus or even her life." *Id.* at ¶224 (emphasis added). Weller alleges that hospital staff did not disclose the severity of her medical situation and "might even be lying to her." *Id.* at ¶223. Weller alleges that, three days later, she was ultimately diagnosed with chorioamnionitis and, after a medical review board determined that she met the medical exception to Texas' abortion laws, her doctor performed an abortion. *Id.* at ¶230. In other words, Weller suffered no injury because she qualified, and obtained, an abortion under the medical emergency exception to Texas' abortion laws. To the extent she contends that this determination should have occurred earlier, that decision was made by her medical providers—not Defendants. *See generally id.*

This Court should find that the Patients have not and cannot show that their alleged injuries are fairly traceable to the actions of the Defendants where the alleged injuries stem from their personal disagreement with Texas' abortion laws and the independent medical decisions of their treatment providers.

B. The Abortionists Lack Standing to Assert Claims on Behalf of their patients.

Standing is a "constitutional prerequisite to suit," *Heckman*, 369 S.W.3d at 150, and the burden is on the plaintiff to "demonstrate standing for each claim he seeks to press and for each form of relief that is sought," *Andrade v. NAACP of Austin*, 345 S.W.3d 1, 14 (Tex. 2011) (quoting *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008)). Because "[s]tanding is not dispensed in gross," "a plaintiff who has been subject to injurious conduct of one kind [does not] possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar,

to which he has not been subject." *Heckman*, 369 S.W.3d at 153 (quoting *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996)). Consequently, if a plaintiff lacks standing to assert any one of her claims, the court lacks jurisdiction over that claim and must dismiss it. *Id.* at 150.

Abortionists Karsan and Levison each purport to assert claims "on [their] own behalf and on behalf of [their] patients. PLS.' AM. PET. at ¶¶237-53. However, the Abortionist have not alleged that they are *personally* aggrieved, and they cannot rely on an injury to someone else to demonstrate standing. *DaimlerChrysler Corp. v. Inman*, 252 S.W.3d 299, 30 (Tex. 2008). Further, the federal third-party standing doctrine does not apply here, and even if it did, the Abortionists do not have a sufficiently close relationship with hypothetical future patients to constitute standing. Thus, the Abortionists lack standing to assert their claims.

i. Abortionists cannot rely on an injury to someone else to demonstrate standing.

The standing requirement in Texas "derives from the Texas Constitution's separation of powers among the departments of government, which denies the judiciary the 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.'" *Id.* (quoting Tex. Const. art. I, § 13). Thus, to demonstrate standing under Texas law, a plaintiff must be *personally* aggrieved, and his alleged injury must be concrete and particularized, actual or imminent, not hypothetical. *Id.* at 304–05. If a plaintiff lacks an actual or threatened injury, he is not "personally aggrieved," has no personal stake in the litigation, and lacks standing. *M.D. Anderson Cancer Ctr. v. Novak*, 52 S.W.3d 704, 707–08 (Tex. 2001).

Injuries to others—who are not plaintiffs—typically do not suffice to create standing. As the Supreme Court has stated, "the standing inquiry begins with determining whether the

plaintiff has personally been injured, that is, 'he must plead facts demonstrating that he, himself (rather than a third party or the public at large), suffered the injury.'" *Meyers v. JDC/Firethorne, Ltd.*, 548 S.W.3d 477, 485 (Tex. 2018) (quoting *Heckman*, 369 S.W.3d at 155); *accord Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004) (noting that to have standing in a typical lawsuit, a litigant must assert his own rights, not those of a third party). When challenging the constitutionality of a statute a plaintiff must (1) "suffer some actual or threatened restriction under that statute," and (2) "contend that the statute unconstitutionally restricts the plaintiff's rights, not somebody else's." *Tex. Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d 504, 518 (Tex. 1995); *see also Barshop v. Medina Cnty. Underground Water Conservation Dist.*, 925 S.W.2d 618, 626 (Tex. 1996) (stating "the plaintiff must contend that the statute unconstitutionally restricts the plaintiff's own rights").

The few instances in Texas law in which someone is permitted to sue for another's injuries are supported by statute or rule. Texas law gives parents the right to represent their children in court. Tex. Fam. Code § 151.001(a)(7). Certain personal injury actions survive in favor of heirs or an estate's legal representative. Tex. Civ. Prac. & Rem. Code § 71.021(b). The Legislature has also provided for derivative standing in some circumstances involving corporations. *See, e.g.*, Tex. Bus. Org. Code §§ 20.002(c)(1), 21.552, 153.402. And Texas law recognizes class actions, Tex. R. Civ. P. 42, although the named plaintiff must still be personally injured, *Heckman*, 369 S.W.3d at 151.

None of those situations exist here. Thus, under Texas law, the Abortionists cannot assert the rights of their patients. To the extent the Abortionists are attempting to assert that S.B.8 and the HLPA restrict their rights, they have no legal right to perform abortions. Tex. Health & Safety

Code Chs. 170-71. Furthermore, Defendants have not taken or threatened any enforcement action against either of them individually. Because they have not been personally injured by Defendants, Plaintiffs lack standing to bring those claims, and the claims must be dismissed.

ii. The federal third-party standing doctrine is inapplicable here.

The United States Supreme Court has created an exception to the general article III requirement in the U.S. Constitution that a litigant must assert his own injury: litigants may assert the rights of third parties when (1) the litigant has "a close relationship" with the third party; and (2) some "hindrance" affects the third party's ability to protect her own interests. *Kowalski*, 543 U.S. at 130 (citations omitted). But unlike its federal counterpart, the Texas Supreme Court has never recognized a general third-party standing doctrine that parties may (attempt to) apply to any given situation. And doing so here would be contrary to the Texas Supreme Court's repeated statements that standing requires an injury to the plaintiff—not to someone else. *Meyers*, 548 S.W.3d at 485.

Regardless, even if the Court were to apply the federal third-party standing doctrine here, The Abortionists would still lack standing to bring claims on behalf of their patients. They do not have a close relationship with their hypothetical future patients, and women in Texas are capable of bringing lawsuits themselves to challenge the abortion statutes.

Abortionists do not have the requisite "close relationship" with their hypothetical future patients. The United States Supreme Court's decision in *Kowalski* is on point. There, the Court held that attorneys lacked third-party standing to bring constitutional claims on behalf of criminal defendants who would be their future clients. 543 U.S. at 131. The Court contrasted an "*existing* attorney-client relationship," which could support third-party standing under federal law, with a

"*hypothetical* attorney-client relationship," which could not. *Id.* The Court ultimately concluded that the attorneys "d[id] not have a 'close relationship' with their alleged 'clients'; indeed, they ha[d] no relationship at all." *Id.*

There is no appreciable difference between the hypothetical attorney-client relationship that was insufficient in *Kowalski* and the hypothetical provider-patient relationship in this litigation. Here, the Abortionists are seeking injunctive relief by bringing suit on behalf of hypothetical future patients who would be affected by Texas's law. *Kowalski* rejects this nonexistent relationship as grounds to permit third-party standing.

The Abortionists have also not shown a "hindrance" to women bringing their own lawsuit challenging S.B.8 or the HLPA. As a factual matter, women can and do bring suits to challenge abortion regulations. *See, e.g., Leavitt v. Jane L.,* 518 U.S. 137 (1996) (per curiam); *Hodgson v. Minnesota*, 497 U.S. 417 (1990); *Matheson*, 450 U.S. 398; *Harris v. McRae*, 448 U.S. 297 (1980); *Bellotti v. Baird*, 428 U.S. 132 (1976); *Poelker v. Doe*, 432 U.S. 519 (1977) (per curiam); *Maher v. Roe*, 432 U.S. 464 (1977); *Roe v. Wade*, 410 U.S. 113 (1973). And any concerns about potential mootness due to the limited duration of a pregnancy are resolved by the "capable of repetition yet evading review" doctrine that the Texas Supreme Court has recognized. *Tex. A & M Univ.-Kingsville v. Yarbrough*, 347 S.W.3d 289, 290 (Tex. 2011). There is no hindrance to a woman in Texas bringing her own lawsuit to challenge the laws at issue here.

C. Plaintiffs cannot challenge the validity of state laws through an *ultra vires* suit.

Plaintiffs bring *ultra vires* claims against the Attorney General and Executive Director in their official capacities to challenge the constitutionality of Texas' abortion laws. PLS.' AM. PET. at ¶¶261, 448, 456, 464, 472.

However, *ultra vires* claims against state officials in their official capacities is an improper mechanism to challenge the constitutionality of a statute. *Patel v. Tex. Dep't of Licensing & Reg.*, 469 S.W.3d 69, 76–77 (Tex. 2015) ("[B]ecause the [plaintiffs] challenge the validity of the [] statutes and regulations . . . the *ultra vires* exception does not apply."). To challenge the constitutionality of a statute, the challenger must sue the relevant state entity—*not* an official capacity defendant and *not* through an *ultra vires claim*. *Id.*; *Tex. Dep't of Transp. v. Sefzik*, 355 S.W.3d 618, 621–22 & n.3 (Tex. 2011).

II. Sovereign immunity bars Plaintiffs' claims.

Sovereign immunity deprives a court of subject-matter jurisdiction in suits against the State. *Miranda*, 133 S.W.3d at 224. A suit against a state official lawfully exercising his governmental functions is considered a suit against the State. *Dir. of Dep't of Ag. & Env't v. Printing Indus. Ass'n of Tex.*, 600 S.W2d 264, 265–66, 270 (Tex. 1980). Public officials sued in their official capacities are protected by the same sovereign or governmental immunity as the governmental unit they represent. *See Tex. A&M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 843–44 (Tex. 2007) (holding that "an official sued in his official capacity would assert sovereign immunity[,]" and that "[w]hen a state official files a plea to the jurisdiction, the official is invoking sovereign immunity from suit held by the government itself").

For a plaintiff to overcome a defendant's assertion of sovereign immunity, "the plaintiff must affirmatively demonstrate the court's jurisdiction by alleging a valid waiver of immunity." *Dall. Area Rapid Transit v. Whitley*, 104 S.W.3d 540, 542 (Tex. 2003). Plaintiffs have not sufficiently pled facts to show an exception to sovereign immunity applies. Therefore, all of Plaintiffs' claims are barred by sovereign immunity.

A. Plaintiffs' *ultra vires* claims are barred by sovereign immunity.

"[*U*]*ltra vires* suits . . . cannot be brought against the state, which retains immunity, but must be brought against the state actors in their official capacity." *City of El Paso v. Heinrich*, 284 S.W3d 366, 373 (Tex. 2009). Governmental entities remain immune from suit and are not proper parties in an *ultra vires* action. *Id.* at 372–73. Thus, Plaintiffs' *ultra vires* claims against both the State of Texas and the Texas Medical Board are barred by sovereign immunity.

Admittedly, sovereign immunity does not bar an *ultra vires* suit seeking prospective injunctive relief against a state official in their official capacity for acting unlawfully. *Id.* However, "[t]o fall within this *ultra vires* exception, a suit . . . must allege, and ultimately prove, that the officer acted without legal authority or failed to perform a purely ministerial act." *Id.* at 372. If the plaintiff has not actually alleged such an action, the claims remain jurisdictionally barred. *E.g., Hall v. McRaven*, 508 S.W.3d 232, 240–41 (Tex. 2017).

The basis of an *ultra vires* claim is that a state official has exceeded the bounds of his or her authority; thus "*[u]ltra vires* claims depend on the scope of a state official's authority." *See id.* at 234, 238 (citing *Houston Belt & Terminal Ry. Co. v. City of Houston*, 487 S.W.3d 154, 158 (Tex. 2016)). Thus, to bring an *ultra vires* claim against the Defendants, Plaintiffs must point to a statute establishing that the Defendants' alleged actions were unlawful.

Further, "merely asserting legal conclusions or labeling a defendant's actions as '*ultra vires*,' 'illegal,' or 'unconstitutional' does not suffice to plead an *ultra vires* claim—what matters is whether the *facts* alleged constitute actions beyond the governmental actor's statutory authority, properly construed." *Tex. Dep't of Transp. v. Sunset Transp., Inc.*, 357 S.W.3d 691, 702 (Tex. App.—Austin 2011, no pet.) (emphasis in original); s*ee also Creedmoor-Maha Water Supply Corp. v.*

Tex. Comm'n on Env't Quality, 307 S.W.3d 505, 515–16 (Tex. App.—Austin 2010, no pet.) (noting that "if the claimant is attempting to restrain a state officer's conduct on the grounds that it is unconstitutional, it must allege facts that actually constitute a constitutional violation" to fall within the *ultra vires* exception); *Tabrizi v. City of Austin*, 551 S.W.3d 290, 305 (Tex. App.—El Paso 2018, no pet.) (holding that the trial court lacked subject matter jurisdiction because the pleaded facts did not allege a viable *ultra vires* claim).

Here, Plaintiffs did not sufficiently plead facts that either the Attorney General or the Executive Director acted outside the scope of their legal authority. In fact, Plaintiffs did not plead any facts showing that any Defendant acted against Plaintiffs at all. Thus, Plaintiffs' *ultra vires* claims against the Provisional Attorney General and the Executive Director are also barred by sovereign immunity.

B. The Attorney General did not act outside the scope of his legal authority.

The Attorney General cannot enforce S.B.8. *See Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 539 (2021); *Whole Woman's Health v. Jackson*, 642 S.W.3d 569 (Tex. 2022).[1] Neither have Plaintiffs alleged any facts indicating any attempt or imminent threat by the Attorney General to enforce those provisions against Plaintiffs. Thus, as it relates to Plaintiffs' perceived fear of enforcement of provisions under S.B.8, those claims are barred by sovereign immunity.

While Plaintiffs acknowledge that the Attorney General has the power to enforce civil penalties for violations of the HLPA, PLS.' AM. PET. at ¶255, Plaintiffs have not alleged facts that the Attorney General has pursued civil enforcement against *them*. Nor do Plaintiffs allege facts that would permit an inference that he is imminently about to pursue civil penalties against them.

[1] For the same reason, any injury alleged caused by S.B. 8 cannot be traced to any Defendant, leaving Plaintiffs' without standing to challenge S.B. 8.

Instead, Plaintiffs allege that the Attorney General "has threatened that he will 'strictly enforce'" the HLPA. *Id.* However, this statement does not imply any action by the Attorney General that would be outside his statutory scope of authority. Because Plaintiffs have not articulated any actions by the Attorney General that were outside the scope of his legal authority pursuant to HLPA, these claims are also barred by sovereign immunity.

C. The Executive Director did not act outside the scope of his legal authority.

An *ultra vires* claim cannot be brought against a high-level official merely as an apex representative of the organization. *Hall*, 508 S.W.3d at 241 (noting that "an *ultra vires* suit must lie against the 'allegedly responsible government actor in his official capacity,' not a nominal, apex representative who has nothing to do with allegedly *ultra vires* actions"). Again, to bring an *ultra vires* claim against the Executive Director, Plaintiffs must point to a statute establishing that his alleged actions were unlawful. *Id.* at 240–41.

Here, Plaintiffs only name the Executive Director as a party to this suit due to his "capacity serv[ing] as the chief executive and administrative officer" of the Texas Medical Board. PLS.' AM. PET. at ¶257. Plaintiffs do not allege any facts that indicate that the Executive Director acted outside the scope of his authority or acted at all in regard to Plaintiffs in his official capacity. Further, the Executive Director does not have the authority to enforce S.B. 8, *Whole Woman's Health*, 642 S.W.3d at 583, leaving the Court entirely without jurisdiction over Plaintiffs' claims regarding S.B. 8. Thus, Plaintiffs' *ultra vires* claims against the Executive Director are barred by sovereign immunity.

III. Plaintiffs' request for declaratory relief is barred by sovereign immunity.

The Uniform Declaratory Judgment Act ("UDJA") does not waive sovereign immunity.

See Acosta v. Univ. of Tex. at El Paso, No. 3:06-cv-408, 2007 WL 9701442, at *2 (W.D. Tex. 2007) ("A litigant cannot circumvent [sovereign immunity] by pleading a claim under the Declaratory Judgment Act."); *Beacon Nat'l Ins. Co. v. Montemayor*, 86 S.W.3d 260, 266 (Tex. App.—Austin 2002, no pet.) ("[T]he UDJA does not establish subject-matter jurisdiction."). However, the UDJA provides a narrow waiver of sovereign immunity for declaratory judgement actions that challenge the constitutionality of a statute, which only applies to "the relevant governmental entities," not state officials. *Tex. Dep't of Transp. v. Sefzik*, 355 S.W.3d 618, 621–22 & n.3 (Tex. 2011); *Tex. Educ. Agency v. Leeper*, 893 S.W.2d 432, 446 (Tex. 1994); *Gant v. Abbott*, 574 S.W.3d 625, 633–34 (Tex. App.—Austin 2019, no pet.). Thus, any declaratory judgment relief Plaintiffs seek against the Attorney General or the Executive Director is automatically barred by sovereign immunity.

To the extent that Plaintiffs seek declaratory relief from the State of Texas or TMB, their claims must meet the requirements laid out in the UDJA. Plaintiffs' claims do not. First, any declaratory relief only applies to "challenges to the validity of an ordinance or statute." *Town of Shady Shores v. Swanson*, 590 S.W.3d 544, 552 (Tex. 2019). To overcome sovereign immunity in such a suit, Plaintiffs must establish a viable constitutional claim. *See Abbott v. Mexican Am. Leg. Caucus, Tex. House of Reps.*, 647 S.W.3d 681, 699 (Tex. 2022); *Tex. Tech Univ. Health. Sci. Ctr. v. Enob*, 545 S.W.3d 607, 624 (Tex. App—El Paso 2016, no pet.) Additionally, "[t]he UDJA requires all with an interest who would be affected by a declaration be made parties to any declaratory judgment action." *Montemayor*, 86 S.W.3d at 268. Here, Plaintiffs have not asserted viable constitutional claims, nor made party to this suit all who would be affected. Thus, any request for declaratory relief against Defendants is barred by sovereign immunity.

A. Plaintiffs' Due Course of Law claims under the Texas Constitution are barred by sovereign immunity because Plaintiffs lack viable claims.

To overcome sovereign immunity, the plaintiff must establish a viable due course of law claim. *Tex. Tech Univ. Health.*, 545 S.W.3d at 624. "The Texas due course clause is nearly identical to the federal due process clause," and, though textually different, Texas courts analyze these clauses without substantive distinction. *Univ. of Tex. Med. Sch. v. Than*, 901 S.W.2d 926, 929 (Tex. 1995); Tex. Const. art. I, § 19. "A claimant prevails on a substantive due process claim by establishing it holds a constitutionally protected property right to which the Fourteenth Amendment's due process protection applies and by establishing that the challenged governmental action is not rationally related to furthering a legitimate state interest." *Edwards Aquifer Auth. v. Day*, 274 S.W.3d 742, 757 (Tex. App.—San Antonio 2008), *aff'd*, 369 S.W.3d 814 (Tex. 2012).[2] Furthermore, "the government may not infringe certain 'fundamental' liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Zaatari v. City of Austin*, 615 S.W.3d 172, 192 (Tex. App.—Austin 2019, pet. denied) (citing *Reno v. Flores*, 507 U.S. 292, 301–02 (1993)) Neither the Plaintiffs nor the Abortionists state a constitutionally protected liberty interest. Even if they did, the challenged statutes satisfy rational basis review. Thus, Plaintiffs do not state valid Due Course of Law claims and, as a result, all are barred by sovereign immunity.

i. Patients do not plead viable Due Course of Law claims.

Because Texas courts analyze the Texas due course clause like the federal due process

[2] Several Justices on the Texas Supreme Court have recently questioned the scope of the rights protected by the due-course clause. *Tex. Dep't of State Health Servs. v. Crown Distrib. LLC*, 647 S.W.3d 648, 664 (Tex. 2022) (Young. J., concurring). But as was the case in *Crown Distributing*, there is no formulation of the due-course clause that would support Plaintiffs' claims.

clause, "a law that does not affect fundamental rights or interests . . . is valid if it merely bears a rational relationship to a legitimate state interest." *Tex. Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d 504, 525 (Tex. 1995) (citing *Williamson v. Lee Optical Co.*, 348 U.S. 483, 491 (1995)). "The provision of abortion," Pls.' Am. Pet. at 107, "is not a fundamental constitutional right," let alone a Texas constitutional right. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2283 (2022). Because the Individual Plaintiffs do not allege facts that constitute a violation of their fundamental rights, rational basis review applies. *Garcia*, 893 S.W.2d at 525.

Under rational basis review, the statute must "merely bear[] a rational relationship to a legitimate state interest." *Id.* Indeed, the Texas Legislature has codified its findings as to the relationship between Texas' statutes prohibiting abortion and state interests: "Texas has compelling interests from the outset of a woman's pregnancy in protecting the health of the woman and the life of the unborn child . . . ." Tex. Health & Safety Code § 171.202(3). Because Texas' statutes prohibiting abortions are rationally related to this legitimate state interest, Patients' due course of law claims are not viable and are, thus, barred by sovereign immunity.

ii. Abortionists do not plead viable Due Course of Law claims.

The right to engage in a "chosen profession" has been generally recognized as a constitutionally protected liberty interest. *Tex. Dep't of State Health Servs. v. Crown Distrib., LLC*, 647 S.W.3d 648, 654 (Tex. 2022) (citing *Greene v. McElroy*, 360 U.S. 474, 492 (1959)). However, "[t]he due-course clause is not so broad as to protect *every* form and method in which one may choose to work or earn a living, and some work-related interests do not enjoy constitutional protection at all." *Id.* (emphasis in original). In order for a work-related interest to be constitutionally protected, the interest must be "vested" and, thus, not subject to "the

legislature's right to change the law and abolish the interest." *Id.* at 655 (internal quotations omitted). Abortionists allege a protected liberty interest in "the right to practice their profession by providing abortions . . . ." PLS.' AM. PET. at 110. However, this work-related interest is not vested because it is subject to the Texas legislature's right to abolish this interest. *See Dobbs*, 142 S. Ct. at 2239. Thus, Abortionists do not state a constitutionally protected liberty or property interest. Even if they did, the statutes still survive rational basis review for the same reasons Patients' claims do not overcome rational basis review. Either way, Abortionists' due course of law claims are, thus, barred by sovereign immunity because they did not state a viable due course of law claim.

B. Plaintiffs' Equal Rights claims under the Texas Constitution are barred by sovereign immunity.

"Texas cases echo federal standards when determining whether a statute violates equal protection." *Rose v. Doctors Hosp.*, 801 S.W.2d 841, 846 (Tex. 1990). However, in Texas, "sex-based classifications [are subject] to heightened strict-scrutiny review." *In re Mclean*, 725 S.W.2d 696, 698 (1987). Because Plaintiffs' claims are not sex-based claims, nor do they discriminate based on sex, rational-basis review applies. Further, because pregnancy is not a suspect class, any distinction based on pregnancy is subject only to rational-basis review, as well.

"Abortion is inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life." *Harris v. McRae*, 448 U.S. 297, 325 (1980). Additionally, "[w]hatever one thinks of abortion, it cannot be denied that there are common and respectable reasons for opposing it, other than hatred of, or condescension toward . . . women as a class . . . ." *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993). Indeed, the Texas Supreme Court has already held that, even though "abortions can only be

performed on women does not necessarily mean that governmental action restricting abortion . . . discriminates on the basis of gender." *Bell v. Low Income Women of Tex.*, 95 S.W.3d 253, 263 (Tex. 2002).

As in *Bell*, "[t]he classification here is not so much directed at women as a class as it is abortion as a medical treatment, which, because it involves a potential life, has no parallel as a treatment method." *Id.* at 258. And Plaintiffs have introduced no evidence that the Texas Legislature passed S.B. 8 or the HLPA as a pretext for discriminating against women, rather than protecting unborn life. Further, Plaintiffs have not identified any law that would support treating pregnant women as a suspect or even quasi-suspect class. Consequently, Texas's laws survive as long as they are rationally related to a legitimate state interest. And protecting unborn life is such an interest. *Dobbs v. Jackson Women's Health Org.*, 213 L. Ed. 2d 545, 142 S. Ct. 2228, 2284 (2022).

Plaintiffs fail to state a sex-based discrimination claim, instead alternating between allegations involving "pregnant women" and a separate, woke, category of "pregnant people" that seemingly includes both sexes. *See e.g.*, PLS.' AM. PET. at ¶1 ("Abortion bans harm the health of women and pregnant people."). Plaintiffs contend that they fall into the latter category of "pregnant people." *Id.* ("These pregnant people are not hypothetical. They are not unknown. They are real people with families, many with children already, and some of them are plaintiffs in this action."). Because Plaintiffs do not plead facts that assert a sex-based discrimination claim, rational basis applies and, for the reasons above, they fail to plead a viable Equal Rights claim. Thus, sovereign immunity bars these claims.

C. Plaintiffs request for declaratory relief under the UDJA is barred by sovereign immunity.

"The UDJA requires all with an interest who would be affected by a declaration be made

parties to any declaratory judgment action." *Montemayor*, 86 S.W.3d at 268. Plaintiffs specifically seek declaratory relief related to the enforcement of "Texas's abortion bans," PLS.' AM. PET. at 106, which includes S.B. 8, *id.* at 2. Senate Bill 8 expressly states that the statute "shall be enforced exclusively through the private civil actions" of private citizens. Tex. Health & Safety Code § 171. 207(a). Plaintiffs acknowledge as much. PLS.' AM. PET. at 45. Furthermore, Plaintiffs' challenge of "Texas's abortion bans" also includes the HLPA, *id.* at 2, which makes violation of the HLPA a criminal offense, Tex. Health & Safety Code § 170A.004. Thus, all criminal prosecutors are also parties "who would be affected by a declaration" in this action. *See Montemayor*, 86 S.W.3d at 268. Because all parties who would be affected by any declaration, namely every individual, private citizens of Texas and all criminal prosecutors, Plaintiffs' claims for declaratory judgment are barred by sovereign immunity.

IV. Plaintiffs' claims are not ripe.

"Under the ripeness doctrine, [the court] consider[s] whether, *at the time a lawsuit is filed*, the facts are sufficiently developed so that an injury has occurred or is likely to occur, rather than being contingent or remote." *Waco Indep. Sch. Dist. v. Gibson*, 22 S.W.3d 849, 851–52 (Tex. 2000) (emphasis in original, internal quotations omitted). "A case is not ripe when determining whether the plaintiff has a concrete injury depends on contingent or hypothetical facts, or upon events that have not yet come to pass." *Id.* at 852. Ripeness, like standing, is a component of subject matter jurisdiction. *Id.* at 850.

Here, Patients' "fears" of being pregnant in Texas, *see* PLS.' AM. PET.at 12, 17, 19, 26, 29, 34, 38, rest "upon events that have not yet come to pass,"—that is, a proper application of the HLPA by their doctors. *See Gibson*, 22 S.W.3d at 852. Furthermore, the Abortionists' "fear and

confusion . . . that prosecutors and politicians will target them personally and threaten the state funding of [their] hospitals," PLS.' AM. PET. at 42, 44, is also premised upon events that have not yet occurred. Plaintiffs' purported harm is entirely hypothetical; they point to no facts demonstrating that any Defendant has attempted or threatened to imminently enforce any provision of the HLPA against them. Thus, Plaintiffs' claims are not ripe for adjudication.

V. Plaintiffs are not entitled to a temporary injunction.

"To obtain a temporary injunction, the applicant must plead and prove three specific elements: (1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim." *Butnaru*, 84 S.W.3d at 204. As explained above, this Court lacks subject matter jurisdiction and should dismiss the action in its entirety. But even if the Court concludes otherwise, Plaintiffs are not entitled to the relief sought. Plaintiffs have not shown a probable right to recovery or success on the merits, and the injuries they allege do not show a threat of irreparable harm.

A. Plaintiffs have not demonstrated a probable right to the relief sought.

For the reasons set forth in the Plea to the Jurisdiction above, Plaintiffs cannot demonstrate a probable right to the relief sought and, accordingly, are not entitled to a temporary injunction. *Butnaru*, 84 S.W.3d at 204 (holding a plaintiff "must plead *and prove* . . . a cause of action against the defendant" to be entitled to a temporary injunction (emphasis added)). While "unlawful acts of public officials may be restrained when they would cause irreparable injury," a plaintiff must do more than name a cause of action and assert a constitutional violation. *See Tex. State Bd. of Exam'rs in Optometry v. Carp*, 343 S.W.2d 242, 245 (Tex. 1961). As explained in detail above, Plaintiffs have not demonstrated the Court's subject matter jurisdiction over, or the viability of, any claim—even

in the context of the pleadings, much less to the extent required for issuance of a temporary injunction. Plaintiffs have not alleged any action by any Defendant that they acted outside the scope of their authority—or acted or threatened to act at all—against Plaintiffs. Thus, Plaintiffs have not demonstrated a probable likelihood of success on the merits.

B. Plaintiffs cannot demonstrate a probable, imminent, and irreparable injury.

"An injury is irreparable if the injured party cannot be adequately compensated in damages or if the damages cannot be measured by any certain pecuniary standard." *Butnaru*, 84 S.W.3d at 204 (citing *Canteen Corp. v. Republic of Tex. Props., Inc.,* 773 S.W.2d 398, 401 (Tex. App.—Dallas 1989, no writ)). The plaintiff bears the burden to prove his damages are incalculable. *N. Cypress Med. Ctr. Operating Co. v. St. Laurent*, 296 S.W.3d 171, 177 (Tex. App.—Houston 2009, no pet.). Here, Plaintiffs only make conclusory allegations that there is "no adequate remedy at law" and that "money damages are insufficient" to redress any alleged injuries. PLS.' AM. PET. at ¶485. Thus, they have not met their burden that their damages are "incalculable." *N. Cypress Med. Ctr.*, 296 S.W.3d at 177.

Further, Plaintiffs must establish that they are "entitled to preservation of the status quo pending trial on the merits" and demonstrate "a probable injury in the interim." *Walling*, 863 S.W.2d at 57-58. "[T]he requirement of demonstrating an interim injury is not to be taken lightly." *Id.* at 57. Plaintiffs do not allege that Defendants have taken or threatened any enforcement action against them individually, and they do not demonstrate that any alleged injury is "probable" or "imminent" before trial. *Butnaru*, 84 S.W.3d at 204. Likewise, their claim that any alleged injury is imminent is belied by the fact that they did not request a temporary injunction until over two months after filing their original petition. Any alleged harm that Plaintiffs baselessly fear they may

imminently incur is not based on any action by Defendants and, thus, is not "probable" to occur before any trial on the merits. Therefore, Plaintiffs are not entitled to a temporary injunction.

CONCLUSION

For these reasons, Defendants respectfully request this Court to grant their Plea to the Jurisdiction and dismiss Plaintiffs' claims, including their Application for Temporary and Permanent Injunction, in their entirety.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that on June 2, 2023, a true and correct copy of the foregoing document was served via File and Serve Texas to all counsel of record.

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