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Re: ***Van Stean* v. *Texas*,**
No. D-1-GN-21-004179 (98th Dist. Ct.)
***Faulkner* v. *Texas*,**
No. D-1-GN-21-004189 (250th Dist. Ct.)
***The Bridge Collective* v. *Texas*,**
No. D-1-GN-21-004303 (126th Dist. Ct.)
***Tuegel* v. *Texas*,**
No. D-1-GN-21-004316 (261st Dist. Ct.)
***Moayedi* v. *Texas*,**
No. D-1-GN-21-004489 (98th Dist. Ct.)
***N. Tex. Equal Access Fund* v. *Texas*,**
No. D-1-GN-21-004503 (455th Dist. Ct.)
***Lilith Fund for Reproductive Equity* v. *Texas*,**
No. D-1-GN-21-004504 (53d Dist. Ct.)
***Clinic Access Support Network* v. *Texas*,**
No. D-1-GN-21-004544 (201st Dist. Ct.)
***Fund Texas Choice* v. *Texas*,**
No. D-1-GN-21-004606 (98th Dist. Ct.)
***The Afiya Ctr.* v. *Texas*,**
No. D-1-GN-21-004605 (455th Dist. Ct.)
***The West Fund* v. *Texas*,**
No. D-1-GN-21-004648 (261st Dist. Ct.)
***Frontera Fund* v. *Texas*,**
No. D-1-GN-21-004846 (53d Dist. Ct.)
***Doe* v. *Texas*,**
No. D-1-GN-21-004193 (53d Dist. Ct.)

Letter Brief of Professor Stephen I. Vladeck as *Amicus Curiae* in Support of the Plaintiffs

May It Please the Court:

The following letter brief is submitted *in propria persona* as an amicus curiae in support of the plaintiffs in each of the above-captioned cases.[1] As I explain in the brief that follows, SB8's various procedural devices have both

1. Rule 11 of the Texas Rules of Appellate Procedure expressly recognizes that Texas appellate courts should receive and consider *amicus curiae* briefs unless there is good cause to refuse them in a particular case. Tex. R. App. P. 11. While TRAP is not applicable in district court, courts have inherent discretion to accept and consider amicus briefs—and have regularly accepted such briefs without leave. *See, e.g.*, *Live Oak Resort, Inc.* v. *Tex. Alcoholic Beverage Comm'n*, 920 S.W.2d 795, 798 n.5 (Tex. App.—Houston [1st Dist.] 1996, no writ).

the intent and the effect of depriving abortion providers and pregnant Texans of an effective legal remedy for challenging its substantive constitutionality under both the Texas and U.S. Constitutions.[2] It does so by frustrating the efficacy of existing causes of action and defenses to enforcement proceedings, and all without good reason. SB8 therefore violates Article I, Section 13 of the Texas Constitution, which guarantees that "[a]ll courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law." TEX. CONST. art. I, § 13.[3]

I. UNLIKE THE U.S. CONSTITUTION, THE TEXAS CONSTITUTION EXPRESSLY PROTECTS A GENERAL RIGHT OF ACCESS TO COURTS

Unlike the U.S. Constitution, the Texas Constitution expressly protects a right of access to the courts for *all* parties. *Cf. Lewis* v. *Casey*, 518 U.S. 343, 350–51 (1996) (noting the recognition of an *implied* federal constitutional right of access to the courts for prisoners). The so-called "Open Courts" provision of the Texas Constitution guarantees that "[a]ll courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law." TEX. CONST. art. I, § 13. Tellingly, as the Texas Supreme Court has explained, the constitutional right of access to courts has always been understood as *distinct* from a right to due process *in* the courts. Instead, "[s]eparate due process and open courts guarantees were included in the seventh and eleventh declarations of rights in the first constitution of Texas as a sovereign republic. These separate rights have been preserved in every constitution since." *Nelson* v. *Krusen*, 678 S.W.2d 918, 921 (Tex. 1984) (citing TEX. CONST. (1836); and 1 GEORGE D. BRADEN, THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 47 (1977)).

To that end, the Open Courts provision creates "a substantial right, independent of other constitutional provisions." *Id*. It requires that "meaningful legal remedies" be provided to citizens—such that statutes enacted by the legislature *cannot* impede the right to assert common-law causes of action unless they repeal or otherwise modify the underlying substantive right. *See Tex. Ass'n of Bus*. v. *Tex. Air Control Bd.*, 852 S.W.2d 440, 448 (Tex. 1993). Put another way, under the Open Courts provision, the legislature may not *indirectly* scale back existing rights by adopting

2. My interest in this issue (and these cases) stems from both my longstanding academic work on the constitutional right of access to the courts and my teaching and writing more generally on Federal Courts—a body of doctrines that, though focused on litigation in courts created by the U.S. Congress, also bears in significant ways on state-court litigation, especially where federal constitutional rights are concerned. My full biography, including an up-to-date curriculum vitae, is available at https://law.utexas.edu/faculty/stephen-i-vladeck.

3. This *amicus* brief is addressed exclusively to Article I, § 13—and takes no position on the other state constitutional objections raised by the Plaintiffs.

procedures that frustrate their enforcement through existing common-law causes of action; it must scale them back *directly* (insofar as it can).

To prove an Open Courts violation, the plaintiff must show that: (1) she has a "well-recognized common law cause of action" (as opposed to a cause of action created by the legislature) that the allegedly unconstitutional legislation either eliminates or frustrates; and (2) the legislature's elimination or frustration of the existing cause of action is "unreasonable or arbitrary when balanced against the purpose and basis of the statute." *Moreno* v. *Sterling Drug, Inc.*, 787 S.W.2d 348, 355 (Tex. 1990). The Open Courts provision therefore guarantees that plaintiffs will not be denied access to the courts in an "unreasonable or arbitrary" manner. *Stockton* v. *Offenbach*, 336 S.W.3d 610, 618 (Tex. 2011) (internal quotation marks omitted). Thus, to claim a violation of the Open Courts provision, a plaintiff must at the very least raise a fact issue on whether he or she had "a reasonable opportunity to be heard." *Id*.

II. PLAINTIFFS HAVE WELL-RECOGNIZED CAUSES OF ACTION THAT THE LEGISLATURE HAS RENDERED INEFFECTIVE THROUGH SB8

Importantly, the Open Courts provision does not *itself* provide a cause of action for plaintiffs seeking a remedy. It does not confer an affirmative right to sue; rather, it is a constraint on the legislature's power to take away or otherwise impair *existing* causes of action. *See Moreno*, 787 S.W.2d at 355. Thus, for instance, the legislature *can* impose caps on damages awards in civil suits authorized by the legislature that *lacked* common-law analogues without offending Article I, § 13. *See, e.g.*, *Horizon/CMS Healthcare Corp.* v. *Auld*, 34 S.W.3d 887, 903 (Tex. 2000). But the negative implication is just as significant: the legislature cannot arbitrarily eliminate existing remedies for substantive rights that *were* available at common law, at least without eliminating the rights themselves.

Here, there is no question that the plaintiffs had—and, indeed, still have—causes of action and defensive mechanisms for challenging the substantive constitutionality of SB8 that have traditionally been available in Texas courts. Although Texas does not recognize an implied or common law cause of action for *damages* to enforce constitutional rights, "suits for equitable remedies for violation of constitutional rights are not prohibited." *City of Beaumont* v. *Bouillion*, 896 S.W.2d 143, 149 (Tex. 1995) (citing *Hemphill* v. *Watson*, 60 Tex. 679, 681 (1884)). Thus, *non-statutory* "'suits for injunctive relief' may be maintained against governmental entities to remedy violations of the Texas Constitution." *City of Elsa* v. *M.A.L.*, 226 S.W.3d 390, 392 (Tex. 2007).

Numerous recent Court of Appeals decisions have reiterated this understanding. *See, e.g.*, *Brown* v. *Daniels*, No. 05-20-00579-CV, 2021 WL 1997060, at *9 (Tex. App.—Dallas May 19, 2021, no pet.) (mem. op.) ("The Texas Constitution's Bill of Rights does not provide a private right of action

for damages for violations of constitutional rights, but suits for equitable or injunctive relief may in some instances be brought to remedy violations of the Texas Constitution."); *City of Houston* v. *Downstream Env't, L.L.C.*, 444 S.W.3d 24, 38 (Tex. App.—Houston [1st Dist.] 2014, pet. denied) ("The Texas Constitution authorizes suits for equitable or injunctive relief for violations of the Texas Bill of Rights."). While *Bouillion* involved free speech claims, its reasoning has been extended to due process objections as well. *See, e.g.*, *Univ. of Tex. Sys.* v. *Courtney*, 946 S.W.2d 464, 469 (Tex. App.—Fort Worth 1997, writ denied).[4]

The upshot of this analysis is that, but for the legislative restrictions imposed by SB8, plaintiffs would have had freestanding, judge-made causes of action through which they could have effectively challenged the constitutionality of SB8's substantive restrictions on the performance of pre-viability abortions. Thus, plaintiffs' claims satisfy the first prong of the *Moreno* analysis.

III. SB8 EFFECTIVELY RESTRICTS ACCESS TO COURTS FOR RESOLUTION OF COLORABLE FEDERAL CONSTITUTIONAL CLAIMS

Plaintiffs' claims also satisfy the second prong of the *Moreno* analysis, for SB8 deprives them of an *effective* remedy for judicial resolution of their constitutional claims—and does so without good reason. Indeed, it cannot be disputed that analysis of Article I, Section 13 looks to *effective* access to the courts—a functional, rather than formal, approach. The Texas Supreme Court has held that the legislature cannot "*effectively* abrogat[e]" a common law cause of action "absent a showing that the legislative basis for the statute outweighs the denial of the constitutionally-guaranteed right of redress." *Sax* v. *Votteler*, 648 S.W.2d 661, 665–66 (Tex. 1983).

To that end, courts will consider both the purpose of the statute and the severity of the restriction in evaluating whether it violates the state Constitution. *Id*. at 666. In *Sax*, the Texas Supreme Court held that a health insurance statute's restrictive statute of limitations violated the Open Courts clause because a minor under the law was "effectively barred from any remedy if his parents fail to timely file suit." *Id*. at 667. Even though the statute had a legitimate purpose, and even though it was theoretically possible for a minor to satisfy the statutory period, the statute unreasonably restricted their right to a remedy without providing a reasonable alternative—and thus was unconstitutional. *Id*.

Likewise, the Texas Supreme Court has also invalidated a damages cap on medical malpractice claims under the Open Courts provision because,

4. Of course, both the U.S. Constitution and the Texas Constitution would also be traditionally available defenses to enforcement proceedings at law. *Cf. Bond* v. *United States*, 564 U.S. 211, 224–25 (2011) (noting the extent to which defendants in enforcement proceedings are generally allowed to raise any constitutional objection that, if successful, would bear upon their case).

without providing an adequate substitute, the legislature denied catastrophically damaged plaintiffs the ability to recover the full amount of their damages. *Lucas* v. *United States*, 757 S.W.2d 687, 690–91 (Tex. 1988). What's more, the *Lucas* court specifically *rejected* the defendant's argument that the plaintiff's cause of action (and, therefore, the right of access) had not totally been abolished; the provision *still* violated the Open Courts clause because of its practical effect, not its paper form. *Id*. at 691–92.

Here, SB8 presents the same effective denial of a remedy. Although the very existence of these lawsuits underscores the continuing *formal* availability of relief for the plaintiffs, the bill, in both its design and its effect, leaves plaintiffs functionally unable to vindicate their rights and the rights of their patients. Indeed, as plaintiffs have already demonstrated, that was the whole point.

First, SB8 effectively pretermitted *pre-enforcement* review of its substantive restrictions on abortion. *See, e.g.*, *Whole Woman's Health* v. *Jackson*, 141 S. Ct. 2494 (2021) (mem.) (refusing to prevent SB8 from going into effect because of the "complex and novel antecedent procedural questions" it raises). Second, although SB8 does not *foreclose* post-enforcement review, it *does* heavily mitigate the efficacy of such review. As in the *Jackson* case, it remains unclear whether these plaintiffs will ever be able to obtain an injunction of sufficient breadth to remove the specter of future SB8 enforcement proceedings *ad infinitum*.

And *in* those enforcement proceedings (in which plaintiffs here could be defendants), SB8 not only constricts the defenses available to them, but it also (1) bars defendants from recovering costs and fees from plaintiffs *regardless* of the outcome; and (2) does nothing to prevent an endless run of successive plaintiffs from bringing frivolous suits against SB8 defendants—again, for which the defendants will not be allowed to recover costs and fees. Because, the way the law is designed, there can be no judgment the effect of which would bar *all* future SB8 suits, SB8 defendants can win every single one of these cases—on procedural grounds or on the merits—and still lose insofar as they have to foot the (ever-growing) bill. The legislature's goal, as plaintiffs have demonstrated, was to produce a procedural reality that forces abortion providers to close their doors to virtually all patients beyond the sixth week of pregnancy *even if* SB8's substantive restriction on abortions violates the Due Process Clause of the Fourteenth Amendment. If the Open Courts provision means anything, it means that the legislature cannot arbitrarily render futile any and all litigation to enforce settled state and federal constitutional rights. And yet, that is exactly what happened here.

As the Texas Supreme Court recently reiterated, The Open Courts provision is a bulwark against statutes that make existing remedies to which plaintiffs are entitled "contingent upon an impossible condition." *Stockton* v. *Offenbach*, 336 S.W.3d 610, 617–18 (Tex. 2011). But that's exactly what SB8 does. The "impossible condition" it imposes is the *inability* of SB8 defendants

to ever *effectively* vindicate their federal constitutional defense—because nothing would stop them from having to vindicate that defense in literally endless distinct civil suits, all while bearing their own costs and fees regardless of how patently meritless or even frivolous the SB8 plaintiff's claims would be. Because it is literally impossible for the plaintiffs here to sue every hypothetical future SB8 plaintiff—or to defend against every hypothetical future SB8 enforcement action—SB8 violates Article I, Section 13 of the Texas Constitution.

IV. THE U.S. SUPREME COURT HAS LIKEWISE REQUIRED A FUNCTIONALLY EFFECTIVE REMEDY TO VINDICATE FEDERAL RIGHTS TO JUDICIAL REVIEW

Finally, although it is less directly relevant to the analysis of the Texas Constitution, it is worth emphasizing that, in interpreting the U.S. Constitution, the U.S. Supreme Court has likewise focused on *functional* access to courts—and whether litigants have an *effective* means of enforcing their constitutional rights, and not just a remedy that exists on paper. *See generally* Stephen I. Vladeck, Boumediene*'s Quiet Theory: Access to Courts and the Separation of Powers*, 84 NOTRE DAME L. REV. 2107, 2125–38 (2009) (summarizing the U.S. Supreme Court's jurisprudence).

Consider, in this regard, the U.S. Supreme Court's sequential rulings in *McKesson Corp.* v. *Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990), and *Reich* v. *Collins*, 513 U.S. 106 (1994). In *McKesson*, the Court held that, where states require taxpayers to challenge the validity of taxes only *after* paying them, the federal Constitution requires that the state afford "*meaningful* backward-looking relief to rectify any unconstitutional deprivation." 496 U.S. at 31 (emphasis added). To ensure that the remedy would be "meaningful," the *McKesson* Court insisted that it be "clear and certain." *Id*. at 39 (quoting *Atchison, Topeka, & Santa Fe Ry. Co.* v. *O'Connor*, 223 U.S. 280, 285 (1912)). Four years later, after Georgia attempted a "bait-and-switch" to trap unwitting taxpayers between pre-deprivation and post-deprivation review, the Court reiterated what it had said in *McKesson*—insisting that the relevant consideration was the availability of an *effective* remedy, not just a theoretically available one. *See Reich*, 513 U.S. at 112–13. This requirement, the Court explained, came from the Due Process Clause of the Fourteenth Amendment (which, of course, also applies to Texas state courts).

Support for the proposition that constitutional protections for access to courts must be functionally *effective* can also be found in the U.S. Supreme Court's interpretation of the Suspension Clause, U.S. CONST. art. I, § 9, cl. 2, in *Boumediene* v. *Bush*, 553 U.S. 723 (2008). There, the Court held that an alternative review scheme created by the federal Executive Branch to review the detention of non-citizens detained at Guantánamo as "enemy combatants" was *not* an "adequate" substitute for the judicial review via habeas corpus to which those detainees were otherwise entitled—such that a

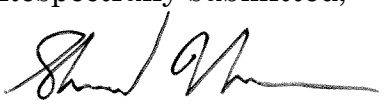
statute stripping federal courts of jurisdiction over the detainees' cases was unconstitutional. *See id.* at 785–92.

If anything, the plaintiffs here are on even firmer footing. Unlike the petitioners in *Boumediene*, they have clearly established *substantive* rights under the Texas and U.S. Constitutions. Prior to SB8, no one disputes that they would have had numerous available causes of action by which they could challenge any effort by the legislature to frustrate enforcement of those rights—whether in state or federal court. And *because* of SB8, they have been effectively unable to *vindicate* those rights—or to conclusively resolve the constitutionality of SB8's substantive restrictions on abortions in a way that, if they prevail, would allow them to exercise those rights to whatever extent they choose. Ultimately, there would be little point in *having* an Open Courts provision in a state constitution if the legislature could so easily render it a dead letter.

* * *

For the reasons identified above, and those identified by the plaintiffs, I respectfully submit that SB8 violates Article I, Section 13 of the Texas Constitution—insofar as it, without good reason, effectively frustrates plaintiffs' ability to vindicate their substantive rights under state and federal law through existing causes of action.

Respectfully submitted,



Stephen I. Vladeck[5]

5. Including this footnote, this relevant parts of this letter brief contain 2492 words.