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# "A Solemn Mockery": Why Texas's Senate Bill 8 Cannot Be Legitimized Through Comparisons to *Qui Tam* and Environmental Protection Statutes

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# "A Solemn Mockery": Why Texas's Senate Bill 8 Cannot Be Legitimized Through Comparisons to *Qui Tam* and Environmental Protection Statutes

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*On September 1, 2021, the Texas Legislature enacted the Texas Heartbeat Act, an anti-abortion statute popularly known as Senate Bill 8 ("S.B. 8"). Although many states passed anti-abortion legislation in 2021, S.B. 8 received national attention due to the law's unusual enforcement mechanism: S.B. 8 empowers private citizens, not state actors, to sue individuals who perform or aid in the performance of an abortion after a fetal heartbeat is detected.*

*Unsurprisingly, the authors of S.B. 8 received extreme backlash from the public, and many academics and legal scholars viewed the law's private enforcement mechanism as an effort to evade judicial review under then-recognized precedent* Roe v. Wade*. In an effort to defend S.B. 8's strategic statutory structure, the law's authors compared S.B. 8's private enforcement provision to similar provisions found in* qui tam *and environmental protection statutes. This Note discusses the rationales behind private citizen enforcement provisions in* qui tam *and environmental protection statutes and*

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*analyzes why these rationales are not applicable in the abortion context.*

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## INTRODUCTION

*If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery[.]*

—Chief Justice John Marshall[1]

[1] United States v. Peters, 9 U.S. 115, 136 (1809).

In 1973, the United States Supreme Court recognized that "the Fourteenth Amendment's concept of personal liberty and restrictions upon state action . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[2] In 1992, the Court recognized that a woman's right to choose extends up to the point of fetal viability.[3] Though the Court of years' past clearly asserted that a woman's right to choose was embedded in her Fourteenth Amendment rights, on June 24, 2022, the Court reversed course in *Dobbs v. Jackson Women's Health Organization*.[4] Noting the impact of "the critical moral question posed by abortion,"[5] the

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[2] Roe v. Wade, 410 U.S. 113, 153 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2279 (2022). *But see id.* at 154 (noting this right is not absolute).

[3] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 870 (1992), *overruled by Dobbs*, 142 S. Ct. at 2279 ("We conclude the line should be drawn at viability, so that before that time a woman has a right to choose to terminate her pregnancy."). Nevertheless, the Court never suggested that states were "prohibited from taking steps to ensure that this choice is thoughtful and informed." *See id.* at 872 (noting a state may enforce rules and regulations which inform women seeking abortions of "philosophic and social arguments of great weight" supporting her bringing her fetus to full term and of "procedures and institutions to allow adoptions of unwanted children"). Instead, pre-*Dobbs* abortion decisions merely declared that states could not restrict abortions in a manner that unduly burdened a woman's right to choose. *See id.* at 874 ("Only where state regulation imposes an undue burden on a woman's ability to make th[e decision whether to terminate her pregnancy] does the power of the State reach into the heart of the liberty protected by the Due Process Clause.").

[4] *Dobbs*, 142 S. Ct. at 2279. *Dobbs* concerned the constitutionality of a Mississippi statute, enacted in 2018, that prohibits abortion after fifteen weeks. *Id.* at 2242; MISS. CODE ANN. § 41–41–191 (West 2018). Jackson Women's Health Organization, an abortion clinic, filed suit against Mississippi officials in 2021, claiming that the law violated women's then-recognized right to choose. *Dobbs*, 142 S. Ct. at 2244. The Court granted certiorari to determine whether "'all previability prohibitions on elective abortions are unconstitutional[.]'" *Id.* (citation omitted). In its opinion, the Court recognized that the question presented left it only two options: to "reaffirm or overrule *Roe* and *Casey*." *Id.* ("'[N]o half-measures are available . . . ." (quoting Brief for Respondents at 50, *Dobbs*, 142 S. Ct. at 2242)).

[5] *Id.* at 2258. The Court reasoned that the abortion issue could be sharply distinguished from prior Fourteenth Amendment jurisprudence because "[a]bortion destroys what those decisions call 'potential life' and what the law at issue in [*Dobbs*] regard[ed] as the life of an 'unborn human being.'" *Id.* at 2243 (first citing *Roe*, 410 U.S. at 159; then citing *Casey*, 505 U.S. at 852).

Court concluded that, contrary to its prior jurisprudence, the Fourteenth Amendment does not, in fact, support a woman's right to choose.[6]

However, even before the Court's landmark *Dobbs* decision, many Americans were willing, and even eager, to infringe upon the then-recognized constitutional right to an abortion.[7] The anti-abortion movement reached a fever pitch in 2021, almost fifty years since the Court first recognized a woman's right to choose in *Roe v. Wade*.[8] That year, a record number of restrictive anti-abortion statutes were enacted across the United States:[9]

> [A]s of early June 2021, 561 abortion restrictions have been introduced this year in all but three states. And as of early August, states had enacted [ninety-seven] of those introduced abortion-restrictive statutes into law, bringing the total number of state abortion restrictions enacted since *Roe v. Wade* to 1,327. . . . Of the [ninety-seven] new measures, more than [eighty] were signed into law in states that have

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[6] *See id.* at 2258 ("[T]he . . . decisions cited by *Roe* and *Casey* . . . are . . . inapposite. They do not support the right to obtain an abortion, and . . . our conclusion that the Constitution does not confer such a right does not undermine them in any way."). The Court arrived at this conclusion by determining that the right to an abortion was neither "'deeply rooted in [our] history and tradition'" nor "essential to our Nation's 'scheme of ordered liberty.'" *Id.* at 2246 (citations omitted). Under this analysis, the Court reasoned that a "right to autonomy" was too broad to be recognized by the Constitution, claiming that such "a high level of generalit[y] could license fundamental rights to illicit drug use, prostitution, and the like." *Id.* at 2258.

[7] *See, e.g.*, Elyssa Spitzer & Nora Ellmann, *State Abortion Legislation in 2021*, CTR. FOR AM. PROGRESS (Sept. 21, 2021), https://www.americanprogress.org/article/state-abortion-legislation-2021 ("[R]estrictive state [anti-abortion] laws . . . are part of the anti-abortion movement's efforts to legislate and litigate abortion access out of existence . . . [in] the United States."); *In re* Whole Woman's Health, 142 S. Ct. 701, 702 (2022) (Sotomayor, J., dissenting) ("Today, for the fourth time, this Court declines to protect pregnant Texans from egregious violations of their constitutional rights.").

[8] *See generally* Spitzer & Ellmann, *supra* note 7.

[9] *See id.* ("In 2021, the United States has already seen the highest number of abortion restrictions enacted in a single year, according to the Guttmacher Institute.").

> onerous abortion restrictions, making abortion even harder to access.[10]

Twelve of the anti-abortion laws enacted in 2021 were abortion bans that included provisions which authorized near-total bans[11] and trigger bans[12] upon the Court's overturning of *Roe v. Wade*. While many supporters of restrictive abortion bans claimed the bans are intended to protect women's health and the life of the fetus,[13] the underlying goal of these laws was clear: extinguishing women's then-recognized Fourteenth Amendment right to choose whether to terminate her own pregnancy.[14]

While the vast majority of anti-abortion laws utilize typical methods of abortion restriction,[15] one law stands out from the rest for its novel enforcement mechanism: Texas's Senate Bill 8 ("S.B.

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[10] *Id.*

[11] *Id.* For example, in 2021, Oklahoma enacted a statute that "permit[ted] abortion only where it [was] 'necessary to prevent the death of the mother or to prevent substantial or irreversible physical impairment of the mother that substantially increases the risk of death.'" *Id.* (quoting Enr. H.B. 1102, 2022 Leg., Reg. Sess. (Okla. 2021)). However, once *Roe* was overturned, Oklahoma began re-enforcing its anti-abortion criminal statute from 1910. *See* Dana Branham, *Can You Face Charges After an Abortion? What the AG's Memo on Oklahoma Abortion Laws Means*, THE OKLAHOMAN, https://www.oklahoman.com/story/news/2022/09/01/oklahoma-abortion-law-explained-birth-control-ivf-exceptions-criminal-charges/65468604007/ (Sept. 1, 2022, 4:56 PM).

[12] Trigger bans were created to "ban abortion if *Roe* is overturned or gutted . . . ." Spitzer & Ellmann, *supra* note 7. Six months after the *Dobbs* decision, trigger bans had already gone into effect in thirteen states: Alabama, Arkansas, Idaho, Kentucky, Louisiana, Mississippi, Missouri, Oklahoma, South Dakota, Tennessee, Texas, West Virginia, and Wisconsin. *Tracking the States Where Abortion is Now Banned*, N.Y. TIMES, https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html (Dec. 23, 2022, 9:30 AM).

[13] *See infra* note 221 (stating Texas's claimed interests in a woman's pregnancy).

[14] *See generally* Spitzer & Ellmann, *supra* note 7 ("Th[e] onslaught of restrictive state [abortion] laws . . . [is] part of the anti-abortion movement's efforts to legislate and litigate abortion access out of existence.").

[15] *See, e.g.*, *id.* (noting abortion laws passed in 2021 utilize "established tactics."). See *id.* for a description of the most common types of statutory abortion restrictions.

8").[16] The first anti-abortion law of its kind,[17] S.B. 8 acts as a near-total abortion ban by declaring all abortions performed after detection of a "fetal heartbeat" illegal, including in cases of rape or incest.[18] At the time of its enactment in September 2021, S.B. 8 was the strictest anti-abortion law not just in Texas but in the United States.[19] Now, in a post-*Dobbs* world, S.B. 8 is only one of three anti-abortion laws in Texas.[20] However, the way the law is written, not the extreme restriction the law imposes, is arguably what makes S.B. 8 the most egregious piece of anti-abortion legislation to date.[21]

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[16] Texas Heartbeat Act ("S.B. 8"), TEX. HEALTH & SAFETY CODE ANN. §§ 171.201–171.212 (2021).

[17] While many states, such as Oklahoma, enacted anti-abortion laws like S.B. 8 in 2022, Texas was the first to enact such a law. *See, e.g.*, *Oklahoma Governor Signs the Nation's Strictest Abortion Ban*, NPR (May 26, 2022, 5:58 AM), https://www.npr.org/2022/05/26/1101428347/oklahoma-governor-signs-the-nations-strictest-abortion-ban.

[18] S.B. 8. defines "fetal heartbeat" as "cardiac activity or the steady and repetitive rhythmic contraction of the fetal heart . . . ." § 171.201(1). This activity can occur "at approximately six weeks after a last menstrual period . . . ." Brief of Leading Medical Organizations as Amici Curiae in Support of Petitioners at 12, Whole Woman's Health v. Jackson, 142 S. Ct. 522 (2021) [hereinafter Brief of Leading Medical Organizations]. *See* discussion *infra* Section I.A. for an in depth discussion of S.B. 8's provisions.

[19] *See, e.g.*, Alison Durkee, *Texas Now Has the Most Restrictive Abortion Law in the U.S.—Here's What Could Happen Next*, FORBES (Sept. 1, 2021, 10:47 AM), https://www.forbes.com/sites/alisondurkee/2021/09/01/texas-now-has-the-most-restrictive-abortion-law-in-the-us-heres-what-could-happen-next/?sh=78a26a525f0c ("A Texas law prohibiting abortions after a fetal heartbeat is detected . . . [is] the most restrictive abortion law to take effect in the U.S. post-Roe v. Wade . . . .").

[20] *See, e.g,*, Eleanor Klibanoff, *Texans Who Perform Abortions Now Face Up to Life in Prison, $100,000 Fine*, TEX. TRIB. (Aug. 25, 2022, 5:00 AM), https://www.texastribune.org/2022/08/25/texas-trigger-law-abortion/. For example, Texas's criminal trigger law went into effect on August 25, 2022, and "criminalized performing an abortion from the moment of fertilization" except in cases where the mother faces life-threatening complications from the pregnancy. *Id.* Individuals who violate this law can face up to life in prison. *Id.* The law also gives the Texas Attorney General the right to seek $100,000 in civil penalties. *Id.*

[21] *See, e.g.*, Brief of Local Governments as Amici Curiae in Support of Petitioners at 1, *Whole Woman's Health*, 142 S. Ct. at 522 (describing S.B. 8 as "flagrantly unconstitutional disregard") [hereinafter Brief of Local Governments]; *c.f. Whole Woman's Health*, 142 S. Ct. at 543 (Roberts, C.J., concurring in the judgment in part and dissenting in part) ("Texas has employed an array of stratagems designed to shield its unconstitutional law from judicial review.").

Instead of relying on government officials to enforce the law's provisions, S.B. 8 empowers private citizens to sue "[a]ny person, other than an officer or employee of a [Texas] state or local governmental entity" who "performs or induces an abortion" after six weeks of pregnancy, "knowingly engages in conduct that aids or abets the performance or inducement of an abortion" after six weeks of pregnancy, or "intends to engage in" that conduct.[22] A successful claimant under S.B. 8 is entitled to injunctive relief and attorney's fees and costs; however, the law's most scandalous damages provision awards "statutory damages in an amount of not less than $10,000 for each abortion that the defendant performed or induced" and "for each abortion . . . that the defendant aided or abetted" after six weeks.[23] S.B. 8's private enforcement mechanism is extremely unconventional,[24] as the lack of state action effectively protected S.B. 8 from judicial review even though its purpose was to deprive women of their then-recognized Fourteenth Amendment right to an abortion.[25]

Unsurprisingly, S.B. 8's unusual private enforcement provision has sparked extreme outrage from abortion advocates,[26] gun rights groups,[27] and legal scholars[28] alike. To downplay their true intention behind S.B. 8's private enforcement provision, the law's sponsors,

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[22] § 171.208(a)(1)–(3); *see* discussion *infra* Section I.A (discussing S.B. 8 and its provisions).

[23] § 171.208(b)(1)–(3); *see* discussion *infra* Section I.A. (discussing S.B. 8 and its provisions).

[24] *See, e.g.*, Brief of Legal Scholars as Amici Curiae in Support of Petitioners at 2, *Whole Woman's Health*, 142 S. Ct. at 522 ("S.B. 8's private enforcement scheme is a far cry from 'entirely commonplace,' as its defenders contend." (citation omitted)) [hereinafter Brief of Legal Scholars].

[25] *See* Brief of Local Governments, *supra* note 21, at 5 ("The legislative purpose in crafting SB 8 to prohibit public enforcement—but empower allow would-be private litigants—is . . . to make the law effectively self-executing while circumventing judicial review."); *see also* discussion *infra* Section I.B.1 (discussing Jonathan Mitchell's *The Writ of Erasure Fallacy*).

[26] *See* Petition for Writ of Certiorari, *Whole Woman's Health*, 142 S. Ct. at 522 (constitutional challenge to S.B. 8 brought by abortion providers).

[27] *See generally* Brief of Firearms Policy Coalition as Amicus Curiae in Support of Petitioners, *Whole Woman's Health*, 142 S. Ct. at 522. *But see* Miller v. Bonta, No. 22cv1446-BEN (JLB), 2022 WL 17363887 (S.D. Cal. Dec. 19, 2022) (suggesting statutory schemes that infringe on gun rights are more heavily scrutinized than schemes infringing on abortion rights).

[28] *See generally* Brief of Legal Scholars, *supra* note 24, at 2.

authors, and supporters compared the law to *qui tam* statutes and environmental protection laws,[29] both of which allow private citizens to sue individuals who violate the statute in question.[30] This Note compares the rationales underlying the private enforcement provisions of S.B. 8, *qui tam* statutes, and environmental protection statutes to determine whether comparisons between the three are legitimate.

Part I outlines the provisions of S.B. 8. and the law's impact on abortion access in Texas pre-*Dobbs*. It discusses the man behind the private enforcement provision, Jonathan Mitchell, and his motivations for purposefully crafting legislation to circumvent judicial review. The section also briefly discusses the Waskom, Texas, municipal abortion ordinance which acted as a test run for the effects of private enforcement provisions in the abortion context.

Part II discusses *qui tam* statues and environmental protection laws. The section focuses on the two rationales which justify the existence of private enforcement provisions in both areas of law: (1) a cognizable public harm occurs when an individual violates a *qui tam* statute or an environmental protection law; and (2) a private enforcement provision backed by monetary incentive is necessary to ensure adequate enforcement of a *qui tam* statute or an environmental protection law.

Part III analyzes whether the two rationales that underlie private enforcement of *qui tam* statutes and environmental protection laws apply to S.B. 8. This Note concludes S.B. 8's private enforcement provision cannot be reasonably compared to those in *qui tam* statutes and environmental protection laws to legitimize the predatory provision's existence. It argues that no cognizable public harm occurs when any one woman receives an abortion after six weeks of pregnancy but before the fetus is viable; rather, the statute itself perpetuates a public harm by acting as precedent for intentional state infringement of a constitutional right. It also argues that because other

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[29] *See infra* notes 108–09 and accompanying text.

[30] *See, e.g.*, False Claims Act (FCA), 31 U.S.C. § 3730(b)(1) (authorizing civil actions by private persons against individuals who defraud the federal government); Clean Water Act (CWA) § 505(a), 33 U.S.C. § 1365 (authorizing civil actions by private persons against those who violate the Clean Water Act). *See infra* Part II for a complete discussion on *qui tam* and environmental protection statutes that contain private enforcement provisions.

avenues are available to ensure enforcement of an anti-abortion law, the $10,000 minimum statutory damages award established in S.B. 8 is a bad faith provision which only serves to promote vigilantism for a subjective moral wrong.

## I. BACKGROUND

### A. *Senate Bill 8*

On September 1, 2021, S.B. 8[31] took effect. Also known as the Texas Heartbeat Act, S.B. 8 requires doctors to check for fetal cardiac activity before they perform an abortion.[32] If a doctor performs an abortion even after cardiac activity is detected, the abortion is illegal under S.B. 8.[33] The law does not provide exceptions in cases of "rape, incest, or a fetal health incompatible with sustained life."[34] Most fetal heartbeat activity is detected around the six-week mark of pregnancy; because most women are not aware of their pregnancy

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[31] Texas Heartbeat Act ("S.B. 8"), TEX. HEALTH & SAFETY CODE ANN. §§ 171.201–171.212 (2021).

[32] § 171.203(b) (requiring a physician to determine no cardiac activity exists before performing an abortion); *see* § 171.201(1) (defining "fetal heartbeat"); *see also* Bryan Hughes, Opinion, *The Texas Abortion Law Is Unconventional Because It Had to Be*, WALL ST. J.: OPINION (Sept. 12, 2021, 4:24 PM), https://www.wsj.com/amp/articles/texas-abortion-law-unconventional-lawsuit-pro-life-roe-v-wade-heartbeat-six-weeks-11631471508.

[33] § 171.204(a). It is also a crime for a doctor to fail to check for cardiac activity altogether. *Id.*

[34] Petitioners' Brief at 6, Whole Woman's Health v. Jackson, 142 S. Ct. 522 (2021). While the statute does provide an exception for "medical emergenc[ies,]" many doctors and attorneys have determined the statutory language outlining this exception to be too vague and have advised pregnant women at risk of serious health issues due to their pregnancy to receive abortions across state lines. § 171.205(a) ("Sections 171.202 and 171.204 do not apply if a physician believes a medical emergency exists that prevents compliance with this subchapter."); *see, e.g.*, Elizabeth Cohen & Danielle Herman, *Why a Woman's Doctor Warned Her Not to Get Pregnant in Texas*, CNN, https://www.cnn.com/2022/09/09/health/abortion-restrictions-texas/index.html (last updated Sept. 20, 2022, 8:12 PM) (discussing one woman's struggle to obtain an abortion in Texas even though her life was at risk during the pregnancy).

after just six weeks,[35] critics of the statute characterized S.B. 8 as a cleverly disguised near-total ban on abortion at a time when women still had a constitutional right to the procedure.[36] While S.B. 8's heartbeat provisions were controversial in the court of public opinion, [37] it was the statute's crafty civil enforcement provision that caused the most controversy with the United States Supreme Court.[38]

S.B. 8 marked the first time legislators implemented a statutory framework specifically designed to circumvent judicial review.[39] Given that public officials could not enforce S.B. 8 without violating a woman's then-constitutionally recognized right to choose,[40] the

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[35] *See* Brief of Leading Medical Organizations, *supra* note 18, at 12 ("The average menstrual cycle is four weeks long, which means that at six weeks gestation, . . . many women are not aware that they are pregnant . . . .").

[36] *C.f.* Durkee, *supra* note 19 (stating S.B. 8's enactment blocked approximately 85% of abortion in Texas and recognizing enforcement lawsuits "could potentially bankrupt abortion providers" in Texas).

[37] *See, e.g.*, Bess Levin, *The Lawyer Defending Texas's Abortion Ban is Exactly as Evil as You'd Expect*, VANITY FAIR (Oct. 29, 2021), https://www.vanityfair.com/news/2021/10/jonathan-mitchell-texas-abortion-ban (criticizing Jonathan Mitchell, creator of S.B. 8's private enforcement framework, calling him "comically evil").

[38] *Compare* On Application for Injunctive Relief, *Whole Woman's Health*, 142 S. Ct. at 522 (Alito, J., in chambers) (denying emergency application for injunctive relief against enforcement of S.B. 8) *with id.* (Sotomayor, J., dissenting) ("The Court's order is stunning. Presented with a flagrantly unconstitutional law . . . a majority of Justices have opted to bury their heads in the sand.").

[39] *See infra* notes 87–93 and accompanying text (discussing Jonathan Mitchell's *The Writ of Erasure Fallacy*); *see also* Petitioners' Brief, *supra* note 34, at 7 ("[S.B. 8] is designed to insulate the law from meaningful judicial review while deterring the exercise of constitutional rights.").

[40] The "State Action Doctrine" generally "prohibits constitutional review of the actions of private individuals or organizations." Wilson R. Huhn, *The State Action Doctrine and the Principle of Democratic Choice,* 34 HOFSTRA L. REV. 1379, 1386 (2006); *c.f.* Shelley v. Kraemer, 334 U.S. 1, 13 (1948) (noting the Fourteenth Amendment does not apply to "merely private conduct, however discriminatory or wrongful"). However, an individual may seek injunctive relief against a government official in his or her individual capacity for attempting to enforce a law that allegedly violates the Constitution. *See Ex parte* Young, 209 U.S. 123, 155–56 (1908) ("[I]ndividuals, who, as officers of the State . . . threaten and are about to commence proceedings . . . to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined . . . ."). Thus, "the idea behind SB 8 is that if no state officials are enforcing the law, then there's no one to sue for violating your rights." Cathy Zhang, *Beyond Abortion:*

Texas state legislature decided to delegate enforcement power to the private citizen.[41]

> Any person, *other than an officer or employee of a state or local governmental entity in this state,* may bring a civil action against any person who:
>
> (1) performs or induces an abortion in violation of this subchapter;
>
> (2) knowingly engages in conduct that aids or abets the performance or inducement of an abortion . . . if the abortion is performed or induced in violation of this subchapter, regardless of whether the person knew or should have known that the abortion would be performed or induced in violation of this subchapter; or
>
> (3) intends to engage in the conduct described by Subdivision (1) or (2).[42]

A private citizen who instigates a civil action under S.B. 8 does not need to prove he or she suffered an injury from the abortion in violation of the statute;[43] rather, their right to sue stems from the statute itself.[44] Because S.B. 8 "'allows regular citizens to participate in [enforcing] state interest[s],'"[45] those wishing to challenge

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*The Far-Reaching Implications of SB 8's Enforcement Mechanism*, PETRIE-FLOM CTR.: BILL OF HEALTH (Sept. 28, 2021), https://blog.petrieflom.law.harvard.edu/2021/09/28/tx-sb8-abortion-enforcement-mechanism/.

[41] *See* Texas Heartbeat Act ("S.B. 8"), TEX. HEALTH & SAFETY CODE ANN. § 171.208(a) (2021); *c.f.* Zhang, *supra* note 40 (noting private citizens are subject to fewer judicial restraints than government officials).

[42] § 171.208(a)(1)–(3) (emphasis added). A private citizen suit is the only method of enforcement for the statute. Brief in Opposition to Petition for a Writ of Certiorari Before Judgment at 4, *Whole Woman's Health*, 142 S. Ct. at 522.

[43] Petitioners' Brief, *supra* note 34, at 7. Additionally, a person who sues under S.B. 8 need not be connected to the defendant or person who had the unlawful abortion, nor does he or she need to be a resident of Texas or of the United States to successfully bring suit under the law. *Id.*

[44] *See* § 171.208(a).

[45] Petitioners' Brief, *supra* note 34, at 7 (citation omitted).

the constitutionality of the law originally faced challenges naming the correct defendants in pre-enforcement challenges to the law.[46]

S.B. 8 provides for three separate judicial remedies if an enforcement action brought by a citizen plaintiff is successful.[47] Two of these remedies are commonplace in civil law; for example, a court can award injunctive relief "sufficient to prevent the defendant from violating [S.B. 8] or engaging in acts that aid or abet violations of [S.B. 8]," and it may also award costs and attorney's fees to the citizen plaintiff.[48] The other remedy available, however, is more similar to a bounty than a judicial remedy.[49] A citizen who brings a successful suit under S.B. 8 is guaranteed a minimum of $10,000 in "statutory damages" for each unlawful abortion at issue in the suit.[50] The defendant must fund this damage award, and there is no maximum damage amount under the statute.[51]

S.B. 8's strategic statutory framework has worked as intended. Both before and after *Dobbs*, the law has constructively acted as a total, no-exceptions[52] ban on abortion in the state of Texas due to

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[46] *See* Reese Oxner, *Key U.S. Supreme Court Justices Express Concern About Texas Abortion Law's Enforcement*, TEX. TRIB. (Nov. 1, 2021, 6:00 PM), https://www.texastribune.org/2021/11/01/texas-abortion-law-supreme-court/ ("[O]pponents seeking to block [S.B. 8] have struggled to narrow their focus and name the right defendants."). The Supreme Court addressed these challenges in *Whole Woman's Health*, 142 S. Ct. at 522. The Court held state-court judges, state-court clerks, and Texas Attorney General Paxton could not be sued in a pre-enforcement action challenging the constitutionality of S.B. 8 in federal court. *Id.* at 534. However, "executive licensing official[s] who may or must take enforcement actions against [potential defendants] if they violate the terms of S.B. 8," were deemed properly named defendants for any pre-enforcement challenges to S.B. 8's constitutionality. *Id.* at 535.

[47] *See* § 171.208(b).

[48] *Id.* § 171.208(b)(1), (3).

[49] *See, e.g.*, Mary Tuma, *The Supreme Court Lets SB 8 Stand, but Allows Abortion Providers Their Day in Court*, TEX. OBSERVER (Dec. 10, 2021, 12:56 PM), https://www.texasobserver.org/the-supreme-court-lets-sb-8-stand-but-allows-abortion-providers-their-day-in-court/ (noting S.B. contains a provision which incentivizes litigation due to the law's bounty-hunter style guaranteed reward).

[50] § 171.208(b)(2).

[51] Petitioners' Brief, *supra* note 34, at 7.

[52] *C.f.* Cohen & Herman, *supra* note 34 (discussing how abortion providers in Texas are refusing to perform abortions even in situations where the fetus's and woman's health are at risk).

the "numerous enforcement actions, ruinous liability, and limitless attorney's fees and costs" associated with performing an abortion that violates the statute.[53] While the Court recognized the clear chilling effect S.B. 8 had on a woman's then-constitutional right to an abortion in *Whole Woman's Health v. Jackson*,[54] it refused to enjoin the enforcement of the law and remanded the case to the Fifth Circuit Court of Appeals, leading to prolonged litigation within the state of Texas.[55]

On January 17, 2022, the Fifth Circuit Court of Appeals remanded *Whole Woman's Health* and certified a novel question of law to the Supreme Court of Texas:[56] "Whether Texas law authorizes [state executive officials], directly or indirectly, to take disciplinary or adverse action of any sort against individuals or entities that violate the Texas Heartbeat Act . . . ." [57] In a divisive move, the Court again declined to intervene and remove the case to the appropriate federal district court.[58] These decisions were the subject of great controversy at the time, as "one judge on the [Fifth Circuit] panel raised the notion [at oral argument] that because th[e] Court [was] considering a challenge to *Roe v. Wade* . . . the [Texas Supreme Court] panel could [have] 'just s[at] on this until the end of June' rather than fulfill its obligation to apply existing precedent."[59] While expressing her disagreement with the Court's decision to not remove the case, Justice Sotomayor suggested the panelist's comments about sitting on the case until the Court decided the fate of

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[53] Petitioners' Brief, *supra* note 34, at 14 (noting these potential outcomes have "coerced compliance" with S.B. 8); *c.f. id.* ("Before S.B. 8, most abortions at Petitioners' health centers occurred at or after six weeks' pregnancy.").

[54] *See* Whole Woman's Health v. Jackson, 142 S. Ct. 522, 538 (2021) ("[T]he 'chilling effect' associated with a potentially unconstitutional law being '"on the books"' is insufficient to 'justify federal intervention' in a pre-enforcement suit." (quoting Younger v. Harris, 401 U.S. 37, 42, 50–51 (1971))).

[55] *See id*. at 539; *see also* On Application for Injunctive Relief, *supra* note 38 (denying emergency application for injunction against enforcement of S.B. 8).

[56] Whole Woman's Health v. Jackson, 23 F.4th 380, 384 (5th Cir. 2022) (certifying questions of Texas state law aw to the Supreme Court of Texas).

[57] Whole Woman's Health v. Jackson, 642 S.W.3d 569, 574 (Tex. 2022).

[58] *In re* Whole Woman's Health, 142 S. Ct. 701, 701 (2022). *See id.* at 702 (Breyer, J., dissenting) ("[T]he Court of Appeals ignored our judgment. It kept the case and certified questions about the licensing-official defendants to the Texas Supreme Court.").

[59] *Id.* at 702–03 (Sotomayor, J., dissenting).

abortion rights in *Dobbs* indicated an ideological motivation for the Fifth Circuit's remanding the case to the Texas Supreme Court.[60]

While the Texas Supreme Court did not sit on *Whole Woman's Health* for long, its answer to the Fifth Circuit's certified question had the same effect as if it ignored the case altogether. On March 11, 2022, the Texas Supreme Court upheld S.B. 8's private citizen enforcement provision:

> Senate Bill 8 provides that its requirements may be enforced by a private civil action, that no state official may bring or participate as a party in any such action, that such an action is the exclusive means to enforce the requirements, and that these restrictions apply notwithstanding any other law. Based on these provisions, we conclude that Texas law does not grant the state-agency executives named as defendants in this case any authority to enforce the Act's requirements, either directly or indirectly. We answer the Fifth Circuit's certified question No.[61]

As a result of the Texas Supreme Court's decision, the Fifth Circuit instructed all lower courts to dismiss any actions challenging S.B. 8's private citizen enforcement provisions.[62] Thus, Texas succeeded in its efforts to enact an anti-abortion law that could circumvent judicial review under *Roe* after years of careful drafting and several months of litigation. Then, less than one week after the Fifth Circuit's order, Politico leaked a draft of the *Dobbs* majority opinion, foreshadowing the Court's decision to overturn *Roe* in June 2022.[63]

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[60] *Id.* at 705 (Sotomayor, J., dissenting) ("[T]his case is about abortion . . . one need only note the judge below's musings about sitting on the case until this Court decides the pending challenge to *Roe*.").

[61] *Whole Woman's Health*, 642 S.W.3d at 583.

[62] *See* Whole Woman's Health v. Jackson, 31 F.4th 1004, 1006 (5th Cir. 2022) ("[T]his court remands the case with instructions to dismiss all challenges to the private enforcement provisions of the statute . . . .").

[63] Josh Gerstein and Alexander Ward, *Supreme Court Has Voted to Overturn Abortion Rights, Draft Opinion Shows*, POLITICO (May 2, 2022, 8:32 PM), https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473 (leak of the *Dobbs* initial draft majority opinion).

### B. *The History and Development of Senate Bill 8*

In the years preceding the *Dobbs* opinion, Texas State Senator Bryan Hughes, an author and sponsor of S.B. 8, knew that a restrictive anti-abortion law would not be easy to enforce.[64] He knew Court precedent was not on his side at the time, and he knew "prosecutors from across the country," including those in Texas, "[had] announced their refusal to enforce laws regulating abortion," even before those laws were duly enacted by the state legislature.[65] Therefore, Senator Hughes sought the help[66] of former Texas solicitor general Jonathan Mitchell,[67] a man with a proven interest in the impact, or lack thereof, of judicial review on statutory enforcement.[68] Thanks to his experience helping Texas municipalities enact novel anti-abortion ordinances with private enforcement mechanisms,[69] Mitchell ensured S.B. 8 included language that would stifle judicial review of the law.[70]

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[64] *See* Jacob Gershman, *Behind Texas Abortion Law, an Attorney's Unusual Enforcement Idea*, WALL ST. J. (Sept. 4, 2021, 9:38 AM), https://www.wsj.com/articles/behind-texas-abortion-law-an-attorneys-unusual-enforcement-idea-11630762683 ("[T]he senator said he also wanted to avoid the fate of those other [anti- abortion heartbeat] bills . . . .").

[65] Hughes, *supra* note 32.

[66] *See* Michael S. Schmidt, *Behind the Texas Abortion Law, a Persevering Conservative Lawyer*, N.Y. TIMES (Sept. 12, 2021), https://www.nytimes.com/2021/09/12/us/politics/texas-abortion-lawyer-jonathan-mitchell.html (describing how Mitchell advised Hughes on how to structure an abortion bill that would survive judicial review).

[67] *See, e.g.*, Gershman, *supra* note 64. Mr. Mitchell served as Texas's solicitor general under former Texas governor Rick Perry, entering the position in 2010 and leaving once Perry's term ended. *Id.*

[68] *See infra* notes 87–93 and accompanying text (describing Mitchell's *The Writ-of-Erasure Fallacy*); *see generally* discussion *infra* Section I.B.2.

[69] *See* discussion *infra* Section I.B.2. (discussing the Waskom, Texas abortion ordinance).

[70] *C.f.* Schmidt, *supra* note 66 ("Mr. Mitchell wrote into the heartbeat bill the same provision that he had written about in the journal article and that served as the core of ordinances in dozens of cities across Texas.").

### 1. THE ARCHITECT: JONATHAN MITCHELL AND THE WRIT-OF-ERASURE FALLACY

Jonathan Mitchell was born to a religious Christian family in Pennsylvania.[71] A graduate of the University of Chicago Law School, Mitchell has held various positions in the legal field: he clerked for the former Justice Antonin Scalia, taught at a variety of law schools, and even served as Texas's solicitor general for a short period.[72] Mitchell has a clear penchant for the intersection of law, government, and politics. For example, he served as lead counsel in anti-union litigation and argued against the City of Houston's benefits to married same-sex couples.[73] After he served as a volunteer attorney on the Trump transition team in 2016, Mitchell was nominated by the former president to serve as the head of the Administrative Conference of the United States;[74] however, questions arose about "whether [Mitchell] had taken money from donors to pursue cases that would help the far right," and he was removed from consideration.[75]

Mitchell found a career niche representing conservative interests in the courts,[76] but his reputation as a fierce anti-abortion advocate

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[71] *Id.*

[72] *See* Jessica Gresko & Paul J. Weber, *Origin Story of the Texas Law That Could Upend Roe v. Wade*, AP NEWS (Sept. 4, 2021), https://apnews.com/article/texas-us-supreme-court-laws-185e383ba4aa6cfc558231dcabd4104a. Mitchell has taught at Stanford Law School and the University of Texas at Austin School of Law. *Id*. He has also taught at the Antonin Scalia School of Law at George Mason University. Gershman, *supra* note 64.

[73] *See* Noam Scheiber, *Trump Nominee Is Mastermind of Anti-Union Legal Campaign*, N.Y. TIMES (July 18, 2018), https://www.nytimes.com/2018/07/18/business/economy/union-fees-lawyer.html.

[74] *See id.* ("[T]he Administrative Conference of the United State[s] [is] a small federal agency that advises the government on improving its inner workings.").

[75] *See* Schmidt, *supra* note 66.

[76] *See supra* notes 73–75 and accompanying text.

is what propelled him to legal prominence.[77] He has worked for various anti-abortion organizations[78] and has helped write various anti-abortion laws and municipal ordinances.[79] Mitchell's first foray into abortion legislation as a state official occurred when he helped author Texas House Bill 2 ("H.B. 2") during his tenure as Texas's solicitor general.[80] Enacted into Texas state law in 2013,[81] H.B. 2 contained provisions that made it harder for doctors to provide abortions in Texas and for abortion clinics to operate legally in Texas.[82] In 2016, the Supreme Court found the provisions unconstitutional in *Whole Woman's Health v. Hellerstedt*[83] because the requirements unduly burdened abortion access.[84]

The Court's opinion in *Hellerstedt* frustrated Mitchell,[85] who believed "'the political branches [were] too willing to cede control of

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[77] *See* Mimi Swartz, *Meet the Legal Strategist Behind the Texas Abortion Ban*, TEX. MONTHLY (Sept. 5, 2021), https://www.texasmonthly.com/news-politics/meet-the-legal-strategist-behind-the-texas-abortion-ban/ (noting Mitchell's reputation as a successful, "near-invisible standard bearer" for Texas's pro-life movement); *see also* Schmidt, *supra* note 66 ("Mr. Mitchell . . . is only now emerging as a pivotal player in . . . the right to abortion.").

[78] *See* Swartz, *supra* note 77 (""He has served as a contract attorney for the Texas Alliance for Life Trust Fund and for Texas Values.'").

[79] *See* discussion *infra* Section I.B.2 (discussing the Waskom, Texas abortion ordinance). Mitchell also worked on the Texas Sonogram Law as Texas's solicitor general; the law "requires vaginal sonograms for women seeking abortions." Swartz, *supra* note 77.

[80] *See* Schmidt, *supra* note 66 ("Mr. Mitchell had quietly worked on [H.B. 2] . . . as the Texas state government's top appeals court lawyer . . . .").

[81] *See* Adam Liptak, *Supreme Court Strikes Down Texas Abortion Restrictions*, N.Y. TIMES (June 27, 2016), https://www.nytimes.com/2016/06/28/us/supreme-court-texas-abortion.html.

[82] *See generally* Whole Woman's Health v. Hellerstedt, 579 U.S. 582, 590–92 (2016). The law contained an admitting-privilege requirement, which required a physician performing an abortion to have admitting privileges at a hospital no more than thirty miles from where the abortion occurs, and a surgical center requirement, which required abortion clinics meet standards set for ambulatory surgical centers under Texas law. *See id.*

[83] *Id.*

[84] *See id.* at 624. In response to Texas's claim that a severability clause in H.B. 2 shielded the requirements from facial review, the Court declared it would not accept "Texas' invitation to pave the way for legislatures to immunize their statutes from facial review." *Id.* at 625.

[85] *See* Schmidt, *supra* note 66 ("For Mr. Mitchell . . . the decision [in *Whole Woman's Health*] was a stinging rebuke, and he vowed that if he ever had the

constitutional interpretation to the federal judiciary . . . .'"[86] Mitchell expanded upon this belief in an article published by the Virginia Law Review in 2018 titled *The Writ-of-Erasure Fallacy*.[87] The article is premised upon the argument that judicial pronouncements of unconstitutionality are temporary; therefore, any statute a court enjoins on constitutional grounds may be enforced against past or future violators "if the injunction happens to be dissolved on appeal or after trial."[88]

In the article, Mitchell explores ways state legislatures can defeat the "writ-of-erasure fallacy" and ensure public compliance with a statute even after a court deems it unconstitutional.[89] Mitchell notes, however, state legislatures could also avoid less than favorable judicial outcomes if they strategically draft their statutes to avoid an injunction in the first place.[90] For example, he suggested legislatures could include provisions that prevent a statute of limitations for civil and criminal penalties or exclude the availability for certain defenses.[91] Mitchell's most creative suggestion, however, was to include in the law itself a provision that allowed for private enforcement:

> The legislature can also induce compliance with its statutes by providing for private enforcement through civil lawsuits and qui tam relator actions. These mechanisms are especially powerful because they enable private litigants to enforce a statute even after a federal district court has enjoined the executive from enforcing it. . . . The statute continues to

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chance to help develop another anti-abortion law, he would ensure it survived at the Supreme Court.").

[86] *Id.* (quoting Mitchell's statement to the New York Times regarding his efforts to enact anti-abortion legislation).

[87] *See generally* Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933 (2018).

[88] *See id.* at 937–38. Mitchell defines the "writ-of-erasure" fallacy as "[t]he assumption that a judicial pronouncement of unconstitutionality has canceled or blotted out a duly enacted statute . . . ." *Id.* at 937.

[89] *See id.* at 986–1000.

[90] *See id.* at 1000 ("[T]he legislature can obviate many . . . barriers to subsequent enforcement in the statutes that it enacts.").

[91] *See id.*

> exist (it has not been "struck down") and private litigants remain free to bring their own enforcement actions in state or federal court. . . . Unless and until the Supreme Court of the United States declares a statute unconstitutional, the States remain free to authorize and entertain private enforcement actions in their own courts—even after a federal district or circuit court has disapproved the statute and enjoined the State's executive from enforcing it.[92]

If the public at large was tasked with enforcement of a statute, Mitchell reasoned, "regulated parties could not identify who would sue them in advance of enforcement," essentially protecting the statute from judicial review.[93] This theory of strategic private enforcement would later become the framework for S.B. 8.[94] Prior to the enactment of S.B. 8, municipalities in Texas adopted anti-abortion ordinances that adhered to Mitchell's private citizen enforcement suggestion found in *The Writ-of-Erasure Fallacy*.[95]

### 2. THE TEST RUN: PRIVATE ENFORCEMENT OF ANTI-ABORTION MUNICIPAL ORDINANCES IN TEXAS

In 2019, the anti-abortion group The Right to Life of East Texas became concerned that abortion clinics from Louisiana, Alabama, and Mississippi would move across into Texas after those states

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[92] *Id.* at 1001–02. Mitchell uses the Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531, as an example of a statute which imposed a private right of action that could not be enjoined by federal district courts. *See id.* at 1001 n.270.

[93] *See* Petitioners' Brief, *supra* note 34, at 6.

[94] *See* discussion *supra* Section I.A. (discussing the framework of Senate Bill 8); *see also* Gresko & Weber, *supra* note 72 (noting Senate Bill 8 mirrors the anti-abortion ordinances in Texas towns which employ Mitchell's private enforcement theory).

[95] *See generally* Gresko & Weber, *supra* note 72 (describing the origins of Senate Bill 8). By the time S.B. came into effect in September 2021, thirty-four municipalities in the state of Texas had already adopted ordinances outlawing abortion through Mitchell's private-enforcement scheme. *See Sanctuary Cities for the Unborn,* SANCTUARY CITIES FOR THE UNBORN, https://sanctuarycitiesfortheunborn.org/incorporated-cities (last visited Jan. 5, 2023) (listing municipalities in Texas which outlaw abortion through private enforcement).

passed stricter abortion laws.[96] Mark Lee Dickson, the group's director, approached the city council of Waskom, Texas, a small town just across the border from Shreveport, Louisiana, and warned them an abortion clinic might be on its way to Waskom.[97] Determined to prevent an abortion clinic from opening in the city, but concerned about the judicial repercussions of an ordinance which outright banned abortion,[98] Dickson sought advice from Bryan Hughes, the Texas state senator who represented Waskom and the surrounding area.[99] Understanding Dickson and the city of Waskom's predicament, Hughes put Dickson in contact with Jonathan Mitchell.[100]

With the help of Mitchell and Dickson,[101] Waskom passed Ordinance No. 336 on June 11, 2019.[102] The ordinance states any organization which "'perform[s] abortions and assist[s] others in obtaining abortions'" is a criminal organization; if any such organization operates in Waskom, the organization is committing a criminal act under the ordinance.[103] Most importantly, the ordinance contains a provision modeled after *The Writ-of-Erasure Fallacy*'s private enforcement theory; the ordinance "shields Waskom from lawsuits by saying city officials can't enforce the abortion ban. Instead, citizens can sue anyone who performs an abortion in the city or assists someone in obtaining one."[104] After the Waskom ordinance's successful enactment, Mitchell and Dickson lobbied other Texas municipalities to adopt similar ordinances; overall, more than thirty cities in Texas

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[96] *See* Robin Y. Richardson, *Waskom Becomes First 'Sanctuary City for the Unborn'*, MARSHALL NEWS MESSENGER (June 13, 2019), https://www.marshallnewsmessenger.com/news/local/waskom-becomes-first-sanctuary-city-for-the-unborn/article_6f3a821a-8d64-11e9-af16-d3b45e7a7667.html.

[97] *Id.*

[98] *See* Schmidt, *supra* note 66.

[99] *Id.* Hughes later authored Senate Bill 8. *See* Hughes, *supra* note 32.

[100] *See* Schmidt, *supra* note 66 (stating Hughes believed Mitchell was "the perfect lawyer" to help Dickson and Waskom's city council draft an impenetrable anti-abortion ordinance).

[101] *See id*.

[102] Waskom, Tex., Ordinance 336 (June 11, 2019). *See* Complaint at 6, Texas Equal Access Fund v. City of Waskom, No. 2:20-cv-00055-JRG, 2020 WL 916815, at *1 (E.D. Tex. Feb. 25, 2020).

[103] Complaint, *supra* note 102, at 7. "[P]rocuring or performing an abortion, aiding or abetting an abortion, and causing an abortion," were also unlawful under the Waskom ordinance. *Id.*

[104] Gresko & Weber, *supra* note 72.

adopted anti-abortion ordinances that allowed for private citizens to enforce the ordinances prior to S.B. 8's enactment.[105]

## II. THE HISTORY OF PRIVATE CITIZEN ENFORCEMENT

S.B. 8's statutory delegation of power to private citizens, while novel in the abortion context, is not an *entirely* original concept.[106] Two other areas of law rely upon the citizenry to adequately enforce statutory law: *qui tam* statutes and environmental protection statutes.[107] Proponents of S.B. 8 have pointed to the existence of *qui tam* statutes in defense of S.B. 8's private enforcement scheme,[108] while others have compared S.B. 8's vigilante-like enforcement mechanism to environmental citizen suits.[109]

### A. Qui Tam *Statutes*

The most traditional form of private citizen involvement in statutory enforcement is the *qui tam* statute.[110] Latin for "'who brings

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[105] Schmidt, *supra* note 66; *see Sanctuary Cities for the Unborn*, *supra* note 95. The adoption of such stringent anti-abortion ordinances was "largely symbolic, since no abortion provider tried to move to Waskom." *See* Schmidt, *supra* note 66.

[106] Brief of Legal Scholars, *supra* note 24, at 4 ("Federal and state laws supply myriad examples of statutes enforced by private parties.").

[107] *See* discussion *infra* Sections II.A–B; *see also* Diego A. Zambrano & Sharon Driscoll, *Maneuvering Around the Court: Stanford's Civil Procedure Expert Diego Zambrano on the Texas Abortion Law*, STAN. L. SCH.: BLOGS (Sept. 8, 2021), https://law.stanford.edu/2021/09/08/maneuvering-around-the-court-stanfords-civil-procedure-expert-diego-zambrano-on-the-texas-abortion-law/.

[108] *See, e.g.*, Hughes, *supra* note 32 ("In contexts other than abortion, citizens often sue to enforce laws that are otherwise difficult for the government to enforce through traditional channels.").

[109] *See, e.g.*, Erin Douglas, *Texas Abortion Law a "Radical Expansion" of Who Can Sue Whom, and an About-Face for Republicans on Civil Lawsuits*, TEX. TRIB. (Sept. 3, 2021, 5:00 AM), https://www.texastribune.org/2021/09/03/texas-republican-abortion-civil-lawsuits/ ("The closest legal precedent for the law's 'vigilante' enforcement . . . is found in environmental law.").

[110] *See* Evan Caminker, *The Constitutionality of* Qui Tam *Actions*, 99 YALE L.J. 341, 341 (1989) ("[T]he *qui tam* enforcement framework is familiar to our legal tradition."). The *qui tam* framework originated in fourteenth century England. J. R. Beck, *The False Claims Act and the English Eradication of Qui Tam Legislation*, 78 N.C. L. REV. 539, 567 (2000). Due to "limited public enforcement

the action as well for the king as for himself,'"[111] *qui tam* statutes grant private citizens the power to sue on behalf of both themselves *and* the United States government after an individual violates a statute prohibiting certain conduct.[112] These private plaintiffs, known as "relators,"[113] receive monetary recovery for initiating suit; however, in a traditional *qui tam* action, the relator splits any recovery with the United States government.[114]

A *qui tam* action differs from the average civil suit as a *qui tam* relator does not suffer any personal injury from the defendant's violation of the statute.[115] Rather, the basic premise of a *qui tam* action is that the defendant's violation of the statute effectuates a harm to the United States government and, as a result, to the general public;[116] this public harm vests the relator with standing[117] to bring suit

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resources and the difficulty of implementing national policies over numerous, geographically separated, local jurisdictions," English Parliament enacted *qui tam* statutes "to police compliance with regulatory requirements." *Id. See id.* at 567–73 for a discussion on fourteenth and fifteenth century English *qui tam* statutes.

[111] Caminker, *supra* note 110, at 341 n.1 ("The phrase '*qui tam*' is shorthand for '*qui tam pro domino rege quam pro se imposo sequitur*' . . . ." (quoting Bass Anglers Sportsman's Soc'y of Am. v. U.S. Plywood-Champion Papers, Inc., 324 F.Supp. 302, 305 (S.D. Tex. 1971))).

[112] *See id.* at 341.

[113] *Id.* at 341 n.1. The term "relator" derives from the nature of the action: the plaintiff brings the action at the *relation* of another. *See* Raoul Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?*, 78 YALE L.J. 816, 826 (1969) (describing the origin of "relator" actions).

[114] Caminker, *supra* note 110, at 341.

[115] *See id.* at 345 ("The *qui tam* litigant is not personally injured by the defendant's challenged conduct; her interest in the litigation arises rather from the statutory bounty offered for successful prosecution."); *see also* Joel M. Androphy & Mark A. Correro, *Whistleblower and Federal Qui Tam Litigation – Suing the Corporation for Fraud*, 45 S. TEX. L. REV. 23, 81 (2003) ("In a qui tam case . . . the government is the party injured . . . . The relator's interest in the suit is the percentage he will recover, and it is contingent on the case succeeding.").

[116] *See* Caminker, *supra* note 110, at 347 ("[*Q*]*ui tam* litigants represent interests belonging solely to the public at large . . . .").

[117] *See* Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 774 (2000) ("[T]he United States' injury in fact suffices to confer standing on Respondent Stevens.") (holding *qui tam* relators have standing under Article III of the United States Constitution even though they do not suffer personal injury); *see also* Androphy & Correro, *supra* note 115 ("Even though a qui tam plaintiff's rights have not suffered an invasion, the right he seeks to vindicate is enough to satisfy Article III.").

under the statute's *qui tam* provision to protect the "legal interests granted by Congress to the public at large."[118] In this way, *qui tam* relators are comparable to whistleblowers; they "blow the whistle" on wrongdoers who inflict injury on the United States government and, therefore, the people of the United States. [119]

The government's awarding successful *qui tam* relators a monetary recovery is strategic. The monetary recovery acts as an economic incentive and "encourage[s] citizens to report wrongdoing against the government that would otherwise go unnoticed."[120] The government's sharing of monetary recovery with *qui tam* relators has also been characterized as a reward for the relators' whistleblowing activities.[121] Today, the most frequently used *qui tam* statute[122] is the False Claims Act.[123]

### 1. THE FEDERAL FALSE CLAIMS ACT

Originally enacted in 1863, the False Claims Act aimed to stop fraud against the Union Army by defense contractors during the Civil War;[124] Congress sought to deter such fraud by providing mon-

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[118] *See* Caminker, *supra* note 110, at 345.

[119] *See id.* at 345 n.21 ("Thus understood, *qui tam* authorization can be characterized as a 'whistleblowing' enforcement strategy, whereby erstwhile bystanders to transactions are given incentives to detect and report (and here prosecute) suspected misconduct.").

[120] Androphy & Correro, *supra* note 115, at 26–27.

[121] *See id.* at 27 ("'Congress wanted to reward private individuals who take significant personal risks to bring wrongdoing to light, to break conspiracies of silence among employees of malfeasors, and to encourage whistleblowing and disclosure of fraud.'" (quoting United States v. Bank of Farmington, 166 F.3d 853, 858 (7th Cir. 1999))) .

[122] *See* Caminker, *supra* note 110, at 342–43 (explaining Congress "revitalized" the previously dormant *qui tam* framework through the enactment of the False Claims Act); *see also* Androphy & Correro, *supra* note 115, at 28 ("The FCA has become a strong deterrent for those who defraud the federal government. The 1986 amendments have resulted in a dramatic increase in the number of qui tam actions filed . . . .").

[123] False Claims Act (FCA), 31 U.S.C. §§ 3729–33. *See* § 3730(b)(1) for explicit authorization of civil actions by private persons.

[124] *See* Caminker, *supra* note 110, at 349. Because the Act was enacted during the Civil War and the Lincoln presidency, the Act is colloquially referred to as "Lincoln's Law." *See* Androphy & Correro, *supra* note 115, at 26.

etary incentives to private individuals who reported defense contractor fraud against the government.[125] The modern False Claims Act, however, is more expansive and "imposes civil liability upon persons presenting false claims for payment to or otherwise defrauding the Federal treasury."[126] Staying true to its *qui tam* framework, the Act essentially "grant[s] all citizens a statutory right to be secure from the various injurious effects of government fraud . . . ."[127] Today, the False Claims Act is commonly used to punish fraudulent activity in the healthcare sector, and *qui tam* actions under the Act save the government "millions of dollars every year in fraudulent [healthcare] claims."[128]

Two rationales justify the Act's *qui tam* framework which utilizes private citizens to enforce statutorily granted public rights. First, an individual's defrauding the Federal Treasury creates cognizable harm not only to the United States government, but also to the general public at large:

> Because "the United States holds its general funds [in the Federal treasury] . . . as surrogate for the population at large," each member of the public is injured by the loss of financial resources that were generated by the public (primarily through taxes) and intended to be spent on the public's behalf. Financial concerns aside, false claims practices may generate other diffuse injuries, including threats to national security.[129]

This harm vests False Claims Act relators with standing to bring a *qui tam* action under the statute in federal court.[130]

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[125] Androphy & Correro, *supra* note 115, at 26.

[126] Caminker, *supra* note 110, at 343; *see also* Androphy & Correro, *supra* note 115, at 34 ("The FCA covers a broad range of misconduct potentially harmful to the federal treasury."). *See* § 3729(a)(1) for a complete breakdown of acts which make an individual liable under the False Claims Act.

[127] Caminker, *supra* note 110, at 353.

[128] *See* Androphy & Correro, *supra* note 115, at 38. Prior to the COVID-19 pandemic, healthcare fraud was "second only to bioterrorism" in priority for the Department of Health and Human Services. *Id.*

[129] Caminker, *supra* note 110, at 349 (quoting Flast v. Cohen, 392 U.S. 83, 119 (1968) (Harlan, J., dissenting)).

[130] *See supra* notes 116–18 and accompanying text.

Second, a False Claims Act relator's potential for monetary recovery upon the action's success[131] serves as an enforcement mechanism for underutilized federal legislation as well as an incentive for individuals to report fraudulent activity against the government. Smaller-scale fraudulent activity against the government may pass unnoticed by executive officials who are more focused on large-scale fraud operations; thus, the relator's chance of monetary recovery supplements federal statutory enforcement by incentivizing individuals to report smaller-scale fraud which overwhelmed executive enforcement agencies would otherwise not detect or pursue further.[132]

Moreover, the average citizen is unlikely to report fraud against the government at all without the chance of monetary recovery.[133] The average citizen does not experience obvious, immediate personal injury from another individual's defrauding the government; therefore, an economic incentive puts potential relators on notice to watch out for false claims.[134] Additionally, most individuals who have knowledge of such fraudulent activity are also close to the perpetrator and are therefore unlikely to breach the perpetrator's trust without monetary enticement.[135]

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[131] *See* §§ 3730(d)(1)–(2) (stating the guidelines for *qui tam* relator awards). If the government chooses to intervene in the action, the relator generally receives "at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action." § 3730(d)(1). If the government does not intervene, however, the relator shall receive "not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds." § 3730(d)(2). Additionally, in the case of government non-intervention, the relator recovers reasonable expenses and reasonable attorney's fees and costs. *Id.*

[132] *See, e.g.*, Caminker, *supra* note 110, at 350–51 ("[P]ublic officials often cannot commit the time and resources necessary for the successful prosecution of fraud even when they have already somehow managed to detect it."); *see also id.* at 350 ("[Congress was] concerned that Federal officials, acting alone, [could not] adequately protect the United States' interest in remedying and deterring fraud . . . .").

[133] *See id.* at 350.

[134] *Id.*

[135] *See id.* (noting participants are often the only ones to know of fraudulent misconduct). *See* §§ 3730(d)(3)–(4) for recovery guidelines for relators who "pla[n] and initiat[e]" the fraudulent activity at issue in their case.

Overall, the ends of the False Claims Act have seemed to justify its *qui tam* means. In 2020 alone, there were 672 new *qui tam* actions brought under the False Claims Act compared to 250 non *qui tam* actions.[136] In fact, there have been 13,657 *qui tam* actions brought under the False Claims Act since the United States Department of Justice began tracking False Claims Act statistics after the Act's 1986 amendments.[137] Most importantly, relators received over $309 million out of the $1.6 billion in settlements and judgments of *qui tam* actions under the False Claims Act in 2020.[138] Thus, it is understandable why "[t]he [False Claims Act] has become a strong deterrent for those who defraud the federal government."[139]

### 2. STATE FALSE CLAIMS ACTS

Today, twenty-nine states have implemented their own state statutory False Claims Acts.[140] Twenty-two of those states' False Claims Acts have been certified by the Office of the Inspector General as "at least as effective in rewarding and facilitating qui tam actions" as the federal False Claims Act.[141] While most states have False Claims Acts that cover fraud broadly, some states, including Texas, have narrow statutes which concern only Medicaid fraud.[142]

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[136] U.S. DEP'T. OF JUST., CIV. DIV., FRAUD STATISTICS – OVERVIEW (2020), https://www.justice.gov/opa/press-release/file/1354316/download.

[137] *Id. See generally* Androphy & Correro, *supra* note 115, at 27 (discussing the importance of the Act's 1986 amendments).

[138] U.S. DEP'T. OF JUST., *supra* note 136.

[139] Androphy & Correro, *supra* note 115, at 28. The thousands of *qui tam* actions brought since 1986 and the multimillion dollar recovery by relators in 2020 alone indicate that "[t]he price of defrauding the government is rising, the likelihood of being caught is increasing, and the consequences are more severe." *Id.*

[140] *See State False Claims Act Reviews*, OFF. OF INSPECTOR GEN., https://oig.hhs.gov/fraud/state-false-claims-act-reviews/ (last visited Mar. 26, 2023). As of March 2023, the following states have their own False Claims Acts: California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Louisiana, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Rhode Island, Tennessee, Texas, Vermont, Virginia, Washington, and Wisconsin. *Id.*

[141] *See id.* As of March 2023, seven states' False Claims Acts have not been approved by the Office of Inspector General: Florida, Louisiana, Michigan, New Hampshire, New Jersey, New Mexico, and Wisconsin. *Id.*

[142] *See* Androphy & Correro, *supra* note 115, at 85.

Fraud against a state's Medicaid program not only threatens the financial health of the state and the Medicaid program itself but also negatively affects the quality of health care provided to the state's citizens and, therefore, the health of the state's citizens overall.[143]

Texas's version of the False Claims Act, known as the Texas Medicaid Fraud Prevention Act ("TMFPA"),[144] was originally enacted in 1995.[145] The purpose of the statute was to combat fraud against the state's Medicaid program and to prevent the infliction of harm to the state of Texas as well as "[t]he Texas Medicaid program, Medicaid beneficiaries, all the state's taxpayers, and the relators who come forward to expose fraud."[146]

The original version of the TMFPA did not contain a *qui tam* provision; however, in 1997, the TMFPA was amended to include a *qui tam* provision like the provision in the federal False Claims Act.[147] Thus, under the TMFPA, private parties known as relators may bring suit against those who commit Medicaid fraud not only on their own behalf, but on behalf of the Texas state government.[148] Additionally, just like its federal counterpart, the TMFPA allows a relator to receive a portion of the settlement or judgment amount in a successful suit.[149]

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[143] *See generally* U.S. DEP'T. OF HEALTH AND HUM. SEVS. & U.S. DEP'T. OF JUST., HEALTH CARE FRAUD AND ABUSE CONTROL PROGRAM ANNUAL REPORT FOR FISCAL YEAR 2020 11 (2021) (listing the goals of the Health Care Fraud Prevention and Enforcement Action Team).

[144] Texas Medicaid Fraud Prevention Act (TMFPA), TEX. HUM. RES. CODE ANN. §§ 36.001–36.132.

[145] John E. Clark, *Sharp, New Teeth for the State and Cash Rewards for Relators Exposing Wrongdoers*, 65 TEX. B.J. 120, 122 (2002).

[146] *Id.* at 122, 125.

[147] *Id.* at 122. *See* §§ 36.101–36.117 for sections which deal with actions by private parties.

[148] § 36.101.

[149] If Texas intervenes in the relator's action, the relator is eligible to receive "at least 15 percent but not more than 15 percent of the proceeds of the action, depending on the extent to which the person substantially contributed to the prosecution of the action." § 36.110(a). However, if Texas chooses not to intervene in the relator's action, the relator is eligible to receive "at least 25 percent but not more than 30 percent of the proceeds of the action." § 36.110(a-1). If the defendant is found liable in the action, the relator is entitled to reasonable costs and attorney's fees, regardless of whether Texas chose to intervene in the action. § 36.110(c).

The same two rationales which support the False Claims Act's *qui tam* framework serve as the justification for Texas's inclusion of a *qui tam* provision in the TMFPA. First, just like the False Claims Act seeks to prevent and further rectify harm done by those who defraud the federal government, the TMFPA recognizes and seeks to rectify and further prevent the public harm done by those who defraud the Texas Medicaid program.[150] The law's narrow focus on Medicaid fraud indicates the Texas legislature clearly recognizes the harm such activity causes to their citizenry.[151] Second, like the False Claims Act, the TMFPA uses monetary incentives to "[discourage] fraud by enhancing the government's enforcement weapons with [monetary] remedies . . . and [give] private parties a financial incentive to assist in the effort."[152]

The decision to include a *qui tam* provision in the TMFPA suggests the Texas legislature recognizes private citizen enforcement of statutes as a trustworthy and worthwhile method to reach the state's statutory objectives. The TMFPA's framework has proved successful for the state of Texas, and the statute's objectives continue to be successfully met; as of March 2023, the Texas Office of the Attorney General "has recovered over $1.4 [b]illion dollars on behalf of the Texas Medicaid system."[153]

### B. *Environmental Protection Statutes*

Private citizens are also heavily involved in the enforcement of federal environmental law.[154] Environmental protection statutes, such as the Clean Water Act ("CWA")[155] and the Clean Air Act

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[150] *See* Clark, *supra* note 145, at 122 (noting health care fraud affects the entire United States public by wasting billions of taxpayer dollars annually).

[151] *See id.* at 124–25 ("By enacting a strong Medicaid fraud statute and vigorously employing its statutory remedies, including adopting meritorious *qui tam* cases filed by relators, the state of Texas has given notice that it will not tolerate fraud against the Medicaid program . . . .").

[152] *Id.* at 122–23.

[153] *Civil Medicaid Fraud Division*, ATT'Y GEN. OF TEX., https://www2.texasattorneygeneral.gov/cmf/civil-medicaid-fraud (last visited Mar. 26, 2023).

[154] *See* Caminker, *supra* note 110, at 343 n.6 ("Congress' authorization of [private enforcement] suits is most pervasive in the field of environmental protection.").

[155] Clean Water Act (CWA), 33 U.S.C. §§ 1251–1389.

("CAA"),[156] seek to protect and regulate the environmental quality enjoyed by those who live and visit the United States. Adequate enforcement of environmental protection laws directly benefits the public at large: "[E]nvironmental quality . . . has direct implications for the health and welfare of U.S. residents, with the result that the benefits of environmental regulation–in terms of monetary benefits and quality of life–have repeatedly been shown to outweigh its costs . . . ."[157] Environmental protection laws, therefore, create statutorily recognized rights to a quality environment; just because these rights are abstract rather than individualized in nature does not mean they do not warrant protection by the courts.[158]

Many federal environmental laws include "citizen suit" provisions which allow a private citizen to sue a violator of an environmental protection statute.[159] The same rationales which justify *qui tam* actions also justify this brand of private citizen statutory enforcement.[160] First, a defendant in an environmental citizen suit harms the public at large when the defendant violates an environmental protection statute.[161] While the citizen-plaintiff's harm must

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[156] Clean Air Act (CAA), 42 U.S.C. §§ 7401–7671.

[157] Robin Kundis Craig, *Should There Be a Constitutional Right to a Clean/Healthy Environment?*, 34 ENV'T. L. REP. 11013, 11013 (2004) (stating the benefits of environmental protection laws).

[158] *See* Sean P. Ociepka, Note, *Protecting the Public Benefit: Crafting Precedent for Citizen Enforcement of Conservation Easements*, 58 ME. L. REV. 225, 246 (2006) ("'[T]he fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process.'" (quoting Sierra Club v. Morton, 405 U.S. 727, 734 (1972))).

[159] *See, e.g.*, § 505(a), 33 U.S.C. § 1365; § 304, 42 U.S.C. § 7604; Safe Drinking Water Act (SDWA) § 1449(a)(2), 42 U.S.C. § 300j-8; Endangered Species Act (ESA) § 11(g)(1)(A), 16 U.S.C. § 1540(g)(1); Marine Protection, Research, and Sanctuaries (Ocean Dumping) Act § 105(g), 33 U.S.C. § 1415(g); Resource Conservation and Recovery Act (RCRA) § 7002, 42 U.S.C. § 6972; Toxic Substances Control Act (TSCA) § 20(a)(2), 15 U.S.C. 2619; Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) § 310(a)(2), 42 U.S.C. § 9659; Emergency Planning and Community Right-to-Know Act (EPCRA) § 326(a)(1), 42 U.S.C. § 11046.

[160] *See* Caminker, *supra* note 110, at 344 ("From Congress' perspective, *qui tam* statutes and . . . [environmental] citizens' suit provisions serve the same purpose . . . .").

[161] *See supra* note 157 and accompanying text.

be personal to them in nature,[162] the Court recognizes harms to "[a]esthetic and environmental well-being"[163] and "'recreational interests'"[164] as valid injuries which vest a citizen-plaintiff with standing to bring a citizen suit under an applicable environmental protection law.[165] Thus, environmental citizen suits can be seen as opportunities for citizens negatively impacted by environmental harm to vindicate their own interest, and also the public's interest, in environmental quality.[166]

Second, environmental citizen suits provide executive agencies tasked with implementing these laws additional enforcement avenues.[167] In the context of environmental enforcement, citizens are viewed as on-the-ground informants who are likely to observe violations of environmental law that might be overlooked by busy bureaucratic agencies.[168] Citizens have a uniquely personal incentive

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[162] *See* Sierra Club v. Morton, 405 U.S. 727, 739–40 (1972) ("A mere 'interest in a problem,' . . . is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved' . . . .").

[163] *See, e.g.*, *id.* at 734 (stating that aesthetic and environmental well-being are protectable rights even though these rights are public in nature).

[164] *See, e.g.*, Ass'n of Data Processing Serv. Org. v. Camp, 397 U.S. 150, 153–54 (1970) ("[T]he interest sought to be protected by the complainant . . . may reflect 'aesthetic, conservational, and recreational' . . . values." (quoting Scenic Hudson Pres. Conf. v. Fed. Power Comm'n, 354 F.2d 608, 618 (2d Cir. 1965))).

[165] *See Sierra Club*, 405 U.S. at 738 (recognizing individuals who suffer non-economic injuries may have standing to bring suit under the correct circumstances).

[166] *See, e.g.*, E. ROBERTS & J. DOBBINS, ENV'T. L. INST., THE ROLE OF THE CITIZEN IN ENVIRONMENTAL ENFORCEMENT 7 (1992) ("In most other areas where citizen suits are permitted, a personal economic interest . . . must coincide with the claimed public rights. . . . [E]nvironmental protection statutes, however . . . truly provide citizens with the authority to represent the interests of the public. Environmental citizen suits, in their strongest form, might even be characterized as permitting citizens to sue on behalf of the environment itself.").

[167] *Id.* at 1 ("Citizen participation in environmental enforcement . . . broadens access to enforcement resources."); *see also* Ociepka, *supra* note 158, at 247 ("It has been the policy of Congress, since the 1970s, to allow citizens to enforce important environmental laws when other enforcement mechanisms do not effectively address the problem.").

[168] ROBERTS & DOBBINS, *supra* note 166, at 2 ("The sheer size of the citizenry . . . enables individual citizens to monitor compliance throughout the nation and identify violations an understaffed investigative agency might miss.").

to report environmental harm that is absent in any other context because "citizens work, play, and travel in the environment."[169] Therefore, citizens are likely to report local environmental harms that interfere with not only their health and wellbeing, but also that of their families and their communities.[170]

Unlike *qui tam* provisions, however, successful citizen-plaintiffs are not directly rewarded from the civil penalties enforced against violators of environmental protection suits.[171] Still, statutory implementations of civil penalties against violators incentivize citizens to become involved in the enforcement of environmental protection laws.[172] At the most basic level, civil penalties are symbolic and provide citizen-plaintiffs with meaningful relief.[173] Civil penalties also act as a deterrence mechanism—they ensure the violator is punished and put any potential violators on notice of the consequences of their behavior.[174]

Moreover, citizens have used the threat of civil penalties to enter into consent decrees whereby violators "instead pa[y] a sum of money to a third party environmental organization or to an otherwise environmentally beneficial project."[175] In fact, the CAA has statuto-

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[169] *See id.* at 1 ("[C]itizen participation in environmental enforcement taps the direct, immediate connection between individuals and their environment. . . .").

[170] *See id.* at 1–2 ("In the context of environmental enforcement, citizens [aim to] maximiz[e] compliance of the good of all.").

[171] *See, e.g.*, Clean Air Act (CAA), 42 U.S.C. § 304(g)(1). *But see* Endangered Species Act (ESA) § 11(d) (allowing "any person who furnishes information which leads to . . . [a] civil penalty assessment" to receive a reward "from sums received as penalties . . . ."). In all environmental citizen suits, citizen plaintiffs may be awarded costs of the litigation and attorney's fees at the court's discretion. *See supra* note 149 (listing the environmental protection laws which include citizen suits).

[172] *See* ROBERTS & DOBBINS, *supra* note 166, at 12 ("[C]ivil penalty provisions [are a] significant incentive to bring citizen suits.").

[173] Courtney M. Price, *Private Enforcement of the Clean Water Act*, 1 NAT. RES. & ENV'T 31, 33 (1986) (discussing how civil penalties incentivize citizens to sue under the Clean Water Act).

[174] *See* ROBERTS & DOBBINS, *supra* note 166, at 12 ("The ability to request civil penalties . . . offers citizen plaintiffs a simple means of punishing and deterring future violators.").

[175] *Id.*; *see also* Price, *supra* note 173 ("[T]he possibility of penalties has been used as leverage by citizens in negotiating settlements which call for payments to be applied toward environmentally beneficial projects or organizations.").

rily adopted this strategy and bestows a court hearing an environmental citizen suit with the discretion to order civil penalties "be used in beneficial mitigation projects which are consistent with [the CAA] and enhance the public health or the environment."[176] The characterization of a civil penalty as a beneficial donation works as a symbolic incentive for potential citizen-plaintiffs bringing suit.[177]

Today, citizen suit provisions are widely used in environmental litigation.[178] Since 2016, 617 citizen suits have been filed under the CWA, CAA, Safe Drinking Water Act ("SDWA"), Resource Conservation and Recovery Act ("RCRA"), and Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA").[179] These suits have led to multi-million dollar settlements, large donations to environmental groups, and more oversight on individuals and corporations who harm the environment.[180] The success and prevalence of citizen suits in environmental litigation suggests private involvement in statutory enforcement can positively impact communities when citizens are motivated to help their communities.

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[176] *See* Clean Air Act (CAA), 42 U.S.C. § 304(g)(2). However, a payment under this provision may not exceed $100,000. *Id.*

[177] *Compare id. with* § 3730(d)(1)–(2) (stating potential rewards for *qui tam* plaintiffs upon successful suit).

[178] *See generally* Karl S. Coplan, *Citizen Litigants Citizen Regulators: Four Cases Where Citizen Suits Drove Development of Clean Water Law*, 25 COLO. NAT. RES., ENERGY & ENV'T. L. REV. 61, 85–107 (2014) (discussing environmental citizen suits where citizens sought to rectify negative effects of recreational shooting ranges, Concentrated Animal Feed Operation (CAFO) manure spreads, pesticide applications into or over water, and interbasin water transfers).

[179] Dylan Bruce, *Analysis: A Closer Look at Environmental Citizen Suits*, BL (Mar. 29, 2021, 4:00 AM), https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-a-closer-look-at-environmental-justice-citizen-suits.

[180] *See, e.g.* Porter Wells & Ellen M. Gilmer, *Formosa Settles Plastic Pellet Water Suit for $50 Million*, BL (Oct. 15, 2019, 12:09 PM), https://www.bloomberglaw.com/bloomberglawnews/environment-and-energy/XBJNQ8O000000?bna_news_filter=environment-and-energy#jcite (discussing a fifty million dollar settlement arising out of a Clean Water Act citizen suit).

## III. COMPARING S.B. 8 TO *QUI TAM* ACTIONS AND ENVIRONMENTAL PROTECTION LAWS

Comparisons of S.B. 8's private right of action to *qui tam* actions and environmental citizen suits have been promulgated in the media since the law's enactment in September 2021.[181] However, S.B. 8's extreme private enforcement regime cannot be legitimized or defended through comparisons to *qui tam* actions or environmental citizen suits: the rationales which underlie those statutes simply do not exist in the abortion context, nor do they apply to S.B. 8.

First, S.B. 8 does not work to mitigate or disrupt a legitimate public harm like *qui tam* actions and environmental citizen suits.[182] Rather, S.B. 8's provisions infringed upon a constitutional right that was recognized by the Supreme Court at the time the law was enacted in September 2021, thereby *creating* a public harm instead.[183] Second, abortion restrictions do not require outside enforcement to ensure the laws are adequately enforced, unlike *qui tam* statutes and environmental protection laws.[184] Third, S.B. 8's guaranteed statutory damage award is not comparable to either *qui tam* relator awards or the civil penalties available in environmental citizen suits; the damages award in S.B. 8 encourage vigilantism based on moral imperative,[185] while relator awards and civil penalties incentivize private citizens to work toward a public good.[186]

### *A. S.B. 8 Does Not Address a Legitimate Public Harm*

Both *qui tam* actions and environmental citizen suits are premised on the idea that a defendant in either action committed an act that harmed the public at large.[187] When a defendant in a False Claims Act suit defrauds the Department of the Treasury, the public is harmed through "the loss of financial resources that were generated by the public (primarily through taxes) and intended to be spent

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[181] *See, e.g.*, *supra* notes 108–09 and accompanying text (discussing comparisons between S.B. 8, *qui tam* statutes, and environmental protection statutes).

[182] *See* discussion *supra* Sections II.A–B.

[183] *See* discussion *infra* Section III.A.

[184] *See* discussion *infra* Section III.B.

[185] *See* discussion *infra* Section III.C.

[186] *See* discussion *supra* Sections II.A–B.

[187] *See* discussion *supra* Sections II.A–B.

on the public's behalf."[188] Similarly, an individual who defrauds the Texas Medicaid program indirectly harms the health and wellbeing of the Texan public.[189] Moreover, environmental citizen suits allow citizens to vindicate their statutorily granted rights to a clean environment,[190] as violations of environmental protection laws both directly and indirectly affect public health and wellbeing.[191] Conversely, the private enforcement of an anti-abortion statute like S.B. 8 does not vindicate any public interest or avenge any public harm.[192]

No comparable harm occurs to the public at large when any one woman has a legal abortion after six weeks of pregnancy.[193] Supporters of S.B. 8 have claimed "private citizens[ ] . . . can demonstrate injury because they could experience 'extreme outrage' that could cause 'psychological harm,'"[194] or that "they are harmed by living in a community where abortion is legal."[195] However, any generalized, abstract harm a supporter of S.B. 8 claims abortion inflicts upon the public is not "th[e] kind of 'harm' . . . state or federal law recognizes."[196] In fact, S.B. 8 likely causes more public harm

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188 Caminker, *supra* note 110, at 349.

189 *See* discussion *supra* Section II.A.2 (discussing the Texas Medicaid Fraud Prevention Act).

190 *See* Zambrano & Driscoll, *supra* note 107.

191 *See* discussion *supra* Section II.B. (discussing environmental citizen suits).

192 *See* Zambrano & Driscoll, *supra* note 107 ("[R]andom members of the public are neither directly nor indirectly harmed by someone else procuring an abortion.").

193 *See id.*; *c.f.* John M. Swomley, *Abortion and Public Policy*, 13 ST. LOUIS U. PUB. L. REV. 409, 409 (1993) ("The alternative to private decision making and medical judgment is compulsory pregnancy if the government adopts laws prohibiting or restricting abortion prior to the third trimester . . . ."). This statement is not meant to discount psychological or even physical harms women may face in the aftermath of a voluntary, consensual abortion; however, even when considered in the aggregate, these harms are individualized and simply do not constitute a "public harm" as understood in the context of traditional private enforcement schemes.

194 Oxner, *supra* note 46.

195 Zambrano & Driscoll, *supra* note 107.

196 *Id.* Even if such harms *were* recognized by state or federal law, "[t]hat a particular illegal act injures the public does not mean that prosecuting the wrongdoer necessarily serves the *overall* public interest, which is composed of many competing objectives." Caminker, *supra* note 110, at 359.

than the abortions it seeks to restrict. For example, the law will burden public health systems and place local governments at risk of litigation:

> As traditional guarantors of public health and safety, [local governments] administer public health systems that depend on access to requisite care, including abortion care. When abortion is effectively banned and pregnant people cannot locally access the care they need in certain states, [local governments] bear a host of heightened health and economic costs. Abortion bans exacerbate health disparities . . . [and] also overburden health systems. . . .
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> . . . Beyond those directly targeted by SB 8, the terms of the statute's aiding and abetting liability provisions are so vague and their scope so broad that a wide range of individuals and entities, including local governments . . . will be exposed to litigation for routine and innocuous activities. This exposure is further exacerbated by SB 8's removal of procedural protections against frivolous litigation.[197]

These negative impacts on local governments will not just affect pregnant women who seek abortions; these impacts will affect the public at large, including individuals who do not even live in the state of Texas.[198]

Additionally, S.B. 8 harms a major portion of the population: pregnant women. Almost half of pregnancies in the United States are unplanned, and "approximately one quarter of American women have an abortion before the age of 45."[199] A near-total ban on abor-

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[197] Brief of Local Governments, *supra* note 21, at 2–4.

[198] *See id.* at 24 ("S.B. 8's ban of abortion creates a domino effect: as providers outside of Texas bear the costs of caring for Texans who need abortion care, their own resources become more strained and less able to provide constitutionally protected care to others (including residents within their own communities).").

[199] Brief of Leading Medical Organizations, *supra* note 18, at 14 n.5, 15.

tion denies this portion of the population adequate physical and psychological healthcare.[200] For example, women without adequate access to abortion care "face significantly greater risk to maternal health and mortality,"[201] and doctors in the state of Texas have declined to provide abortions under S.B. 8's medical necessity exception unless the woman is """dying on the table."""[202] As a result, women with preexisting health conditions in Texas have been forced to decide between risking their lives to give birth in Texas or spending thousands of dollars to get an abortion out-of-state.[203] A near-total ban on abortion also greatly increases the risk that women desperate to terminate their pregnancy will take matters into their own hands and attempt "self-induced abortions through harmful or unsafe methods."[204] Thus, S.B. 8 presents a clear and unnecessary danger to the health and well-being of the women the law claims to protect.[205]

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[200] *Id.* at 16 ("S.B. 8 dangerously limits the ability of women to obtain health care.").

[201] *Id.* at 17. A woman is fourteen times more likely to die from childbirth than from a legal abortion. *See id.* (quoting Elizabeth G. Raymond & David A. Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 OBSTETRICS & GYNECOLOGY 215, 216 (2012)).

[202] *See* Cohen & Herman, *supra* note 34. While Texas Right to Life has claimed that a pregnant woman's being at risk of death is included in the "'circumstances that an abortion could be performed,'" legal experts have disagreed, stating that S.B. 8 is "not at all clear and [is] 'designed to be purposely vague and broad.'" *Id.*

[203] *Id.* In one case, a Texas woman was informed that her child would likely die either before or a few minutes after birth due to severe heart, lung, kidney, and brain problems. *Id.* Additionally, due to her two blood clotting disorders, she was at a high risk of developing and subsequently dying from blood clots or even preeclampsia. *Id.* Still, doctors in Texas refused to perform an abortion out of fear of S.B. 8's civil enforcement provisions. *Id.* The woman traveled 10 hours to New Mexico to obtain an abortion, paying $3,500 out-of-pocket after her insurance company declined to cover the procedure. *Id.*

[204] Brief of Leading Medical Organizations, *supra* note 18, at 16. Self-induced abortion tactics include "herbal or homeopathic remedies, intentional trauma to the abdomen, abusing alcohol or illicit drugs, or misusing dangerous hormonal pills." *Id.* at 16–17.

[205] *See id.* at 16 (stating S.B. 8 "increases the likelihood of avoidable, negative consequences" to women's health); Texas Heartbeat Act ("S.B. 8"), TEX. HEALTH & SAFETY CODE ANN. § 171.202(3) (2021) ("Texas has compelling interests from the outset of a woman's pregnancy in protecting the health of the woman . . . .").

Moreover, at the time the law was enacted, S.B. 8 directly contradicted Court precedent which afforded women the constitutional right to an abortion before viability of the fetus.[206] Because S.B. 8 functions as a constructive ban on abortion,[207] women in the state of Texas were deprived of a constitutional right[208] from September 1, 2021, until June 24, 2022, the day the *Dobbs* decision nullified the constitutional right to abortion. Outright and purposeful denial of *any* constitutional right through statutory construction is a greater danger to the public at large than allowing women to receive abortions after embryonic cardiac activity is detected. If state legislatures are given permission to view constitutional rights recognized by the Court as "fantas[ies] spun by . . . ludicrous logic,"[209] then "the role of the Supreme Court in our constitutional system is at stake,"[210] and "'the constitution itself becomes a solemn mockery.'"[211]

### B. *Abortion Laws Do Not Require an Outside Enforcement Mechanism*

*Qui tam* relator awards and civil penalties available in environmental citizen suits serve as incentives for the general public to come forward and report wrongdoing which harms the general public.[212] Monetary incentives like those found in the False Claims Act and environmental protection statutes can be characterized as last resort enforcement mechanisms.[213] These relator awards and civil

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206 *See generally* Roe v. Wade, 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2279 (2022); Planned Parenthood v. Casey, 505 U.S. 833 (1992), *overruled by Dobbs*, 142 S. Ct. at 2279.

207 *See* discussion *supra* Section III.C (discussing the pre-enforcement effect of S.B. 8's minimum statutory damages award of $10,000 on the availability of abortions in Texas).

208 *See* Whole Woman's Health v. Jackson, 142 S. Ct. 522, 545 (2021) (Sotomayor, J., concurring in part and dissenting in part) ("The chilling effect has been near total, depriving pregnant women in Texas of virtually all opportunity to seek abortion care within their home state after their sixth week of pregnancy.").

209 *See* Hughes, *supra* note 32 (describing *Roe v. Wade*).

210 *Whole Woman's Health*, 142 S. Ct. at 543–45 (Roberts, C.J., concurring in part and dissenting in part).

211 *Id.* (quoting United States v. Peters, 5 Cranch 115, 136 (1809)).

212 *See* discussion *supra* Sections II.A–B.

213 *See* discussion *supra* Sections II.A–B.

penalties ensure statutes "that are otherwise difficult for the government to enforce through traditional channels"[214] are adequately enforced, thereby ensuring the goals of those respective statutes are reached.[215] However, this rationale does not apply in the context of abortion and S.B. 8's $10,000 statutory damages provision for three reasons:

First, unlike an individual's defrauding the government or violating an environmental protection statute, a woman receiving an abortion does not create public harm; therefore, an outside enforcement mechanism is not necessary to protect the public good.[216] Additionally, while environmental protection laws utilize private enforcement mechanisms so citizens can rectify smaller, individualized harms they personally experience,[217] an individual does not have to have a personal interest in an abortion prohibited under S.B. 8 in order to bring an action under the law.[218]

Second, *qui tam* statutes and environmental protection laws are notoriously difficult to enforce due to a lack of agency resources.[219] However, S.B. 8 does not require private enforcement because of a lack of agency resources; the law requires private enforcement because, at the time the law was enacted, state executive officials could not enforce the law without infringing upon a judicially recognized constitutional right.[220] Thus, any claim that private enforcement of

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[214] *See* Hughes, *supra* note 32 (comparing S.B. 8's private enforcement mechanism to *qui tam* statutes).

[215] *See* discussion *supra* Sections II.A–B.

[216] *See* discussion *supra* Section III.A.

[217] *See* discussion *supra* Section II.B (discussing environmental protection laws); *see generally* Sierra Club v. Morton, 405 U.S. 727 (1972) (holding citizen-plaintiffs must suffer an individualized harm in order to have standing).

[218] *See* Texas Heartbeat Act ("S.B. 8"), TEX. HEALTH & SAFETY CODE ANN. § 171.208(a) (2021) (stating "any person" may bring a civil action against "any person" who violates the statute).

[219] *See* discussion *supra* Sections II.A–B.

[220] *See* Brief of Local Governments, *supra* note 21, at 5 ("The legislative purpose in crafting SB 8 to prohibit public enforcement—but empower allow would-be private litigants—is . . . to make the law effectively self-executing while circumventing judicial review."); Whole Woman's Health v. Jackson, 142 S. Ct. 522, 543 (2021) (Roberts, C.J., concurring in part and dissenting in part) ("Texas has employed an array of stratagems designed to shield its unconstitutional law from judicial review."); *see also* Hughes, *supra* note 32 (discussing how S.B. 8 was intended to contravene *Roe v. Wade*).

S.B. 8 is necessary for adequate enforcement of the law cannot withstand scrutiny.

Third, other means besides restricting access to abortion can be employed to reach S.B. 8's stated goal of "protect[ing] the health of the woman and the life of the unborn child."[221] In fact, Texas already has programs to reach this goal, and, according to S.B. 8's sponsor, Bryan Hughes, these programs have been quite successful.[222] Therefore, such a large, guaranteed sum of money is not as necessary to enforce the law in the context of abortion as it is in the context of false claims and environmental harm.

### C. *S.B. 8's Statutory Damages Provision Was Enacted in Bad Faith*

While the monetary incentives present in *qui tam* statutes and environmental protection laws are necessary to vindicate the public interest,[223] S.B. 8's statutorily guaranteed minimum damages award of $10,000 was solely intended to ensure abortion providers were too afraid to operate in the state of Texas pre-*Dobbs*.[224] In fact, rather than encouraging local communities to come together for the public good, S.B. 8's statutory damages provision promotes vigilantism and distrust in Texan communities.[225]

Given that a monetary incentive is not necessary for the state of Texas to protect women's health[226] or, after *Dobbs*, to limit the number of abortions which occur in the state,[227] the statutory damage award is more accurately characterized as a bounty. However, in the state of Texas, it is more difficult to legally bounty hunt for actual

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[221] § 171.202(3) ("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 . . . .").

[222] *See* Hughes, *supra* note 32 (noting Texas's Alternatives to Abortion program has received over $100 million in funding and assists both pregnant women and adoptive parents economically and psychologically).

[223] *See* discussion *supra* Sections II.A–B.

[224] *See supra* note 53 and accompanying text (noting the potential for tremendous legal and financial liability upon violation of S.B. 8 has "coerced" abortion providers to comply with the law).

[225] *Id.*

[226] *See* discussion *supra* Section III.B.

[227] *See supra* notes 5–6 and accompanying text (discussing the *Dobbs* opinion).

criminals than it is to "bounty hunt" for individuals who perform abortions or aid and abet a woman receiving an abortion.[228] This legal disparity shows S.B. 8 is not inspired by Texas's interest in women's health, but is rather motivated by Texas lawmakers' moral disdain toward abortion providers, those who aid and abet an abortion (even unknowingly), and, at the root of it all, women who seek and receive abortions.[229] The inclusion of a bounty in S.B. 8 suggests the state of Texas is eager to make an example of those who violate S.B. 8 and wishes to encourage vigilante identification and prosecution of such individuals.

Moreover, unlike environmental citizen suits, which require citizen plaintiffs to establish they experienced individualized harm,[230] S.B. 8 is not narrowly tailored to avenge harms experienced by parties involved with or connected to the abortion at issue in an enforcement action.[231] Instead, S.B. 8 allows *any* person to instigate a civil action against *anyone* who violates the statute, regardless of actual injury.[232] This strategic statutory language again points to Texas's goal of encouraging vigilante actions. Limiting the pool of potential plaintiffs to those who were involved with or connected to the abortion at issue would have significantly decreased the amount of enforcement actions under S.B. 8 and, therefore, limit the statute's intended effect.

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[228] *Compare* TEX. OCC. CODE § 1702.3863(a)(1)–(3) (criminalizing bounty hunting if the individual is not a peace officer, licensed private investigator, or commissioned security officer employed by a licensed guard company) *with* Texas Heartbeat Act ("S.B. 8"), TEX. HEALTH & SAFETY CODE ANN. §§ 171.208(a)(1)–(3), (b)(2) (2021) (stating any person who successfully brings a suit against an individual in violation of S.B. 8 will receive a minimum of $10,000 in statutory damages).

[229] *C.f.* Swomley, *supra* note 193, at 423 ("[T]he anti-abortion movement will not deal with unwanted pregnancies . . . . They simply want to pass laws against abortion."). While it is logical to conclude a legislature that passes a constructive ban on abortion without exceptions for rape or incest would pass moral judgment against women who seek and receive abortions, it is important to note S.B. 8 does not authorize suits against these women. *See* S.B. 8 § 171.208(a)(1)–(3).

[230] *See generally* Sierra Club v. Morton, 405 U.S. 727 (1972)).

[231] *See* § 171.208(a)(1)–(3).

[232] *Id.*

Most importantly, the statutory bounty ensured S.B. 8 acted as a constructive ban on abortion before *Dobbs* overturned *Roe*, no matter whether the law was ever enforced.[233] For most abortion providers and clinics, the threat of having to pay a minimum of $10,000 per "illegal" abortion performed was enough to stop providing abortions altogether.[234] Similarly, the threat of costly and time consuming litigation was not worth the risk.[235] By attaching such an expensive penalty to a law that was sure to be litigated over for months, or even years, on end, Texas found a way to totally ban abortion while *Roe* was still good law.[236]

## CONCLUSION

Through its enacting of S.B. 8, the state of Texas outwardly declared it did not respect the Supreme Court, its rulings, or those American citizens whose rights the Court's Justices take an oath to protect.[237] Supporters of S.B. 8 should not have been able to legitimize such an egregious attempt to infringe upon a then-recognized constitutional right through comparisons to *qui tam* and environmental protection statutes. The private enforcement provisions in these two areas of law allow citizens to become involved in their

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[233] *See, e.g.*, Whole Woman's Health v. Jackson, 142 S. Ct. 522, 544 (2021) (Roberts, C.J., concurring in the judgment in part and dissenting in part) ("[B]y design, the mere threat of even unsuccessful suits brought under S.B. 8 chills constitutionally protected conduct, given the peculiar rules that the State has imposed.").

[234] Oxner, *supra* note 46 ("All Texas abortion providers have had to shutter the bulk of the procedures they previously offered, with some ceasing to offer any abortions, even ones allowed under SB 8."). Around eighty-five percent of abortions that previously occurred in Texas would now be illegal under S.B. 8. Douglas, *supra* note 109.

[235] *See* Douglas, *supra* note 109 ("[D]efending from many lawsuits–even if they are dismissed–could still be financially damaging to a clinic or doctor.").

[236] *See, e.g.*, Brief of Local Governments, *supra* note 21, at 1 ("As a result of [S.B. 8's construction], abortion is almost entirely banned in Texas in direct contravention of *Roe* . . . .").

[237] *See Whole Woman's Health*, 142 S. Ct. at 545 (Roberts, C.J., concurring in part and dissenting in part) ("The clear purpose and actual effect of S.B. 8 has been to nullify this Court's rulings.").

government's enforcement process and help better the lives of themselves and those around them.[238] A comparison between such helpful pieces of legislation and a law that was specifically designed to extinguish a then-recognized constitutional right is distasteful at best, and, at worst, an outright lie to the American public.

Americans of all political, moral, and religious beliefs should be frightened by S.B. 8's private enforcement scheme, statutory damages provision, and the motivations behind its enactment. The success of such a brazen attempt to avoid judicial review is a sobering look into how state legislatures can infringe upon constitutional rights they find disagreeable. For example, in July 2022, California Governor Gavin Newsom signed Senate Bill 1327 ("S.B. 1327"),[239] a law that "create[s] a private right of action for any person against any person" who manufacturers or distributes firearms banned in the state of California.[240] While S.B. 1327's private enforcement provisions went into effect on January 1, 2023, the Southern District of California enjoined a different provision of the law on December 19, 2022.[241] The basis for the injunction was a fee-shifting provision specific to S.B. 1327 and that provision's effect on court access.[242] Even though the S.B. 8-inspired private enforcement mechanism was not directly at issue in the opinion, the Southern District of California distinguished S.B. 1327 from the Texas law by suggesting statutory schemes designed to infringe upon enumerated constitutional rights, like S.B. 1327, should be scrutinized to a greater degree than statutory schemes designed to infringe upon implied constitutional rights.[243] This suggestion is extremely concerning: an im-

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238 *See* discussion *supra* Part II.

239 *See* CAL. CODE CIV. P. § 1021.11 (2023) ("S.B. 1327").

240 *Id. See generally* Alex Riggins, *Federal Judge to Block Part of California Gun Law Modeled After Texas Abortion Ban*, SAN DIEGO UNION-TRIB. (Dec. 16, 2022, 5:02 PM), https://www.sandiegouniontribune.com/news/courts/story/2022-12-16/injunction-california-gun-law-fee-shifting.

241 Miller v. Bonta, No. 22cv1446-BEN (JLB), 2022 WL 17811114 (S.D. Cal. Dec. 19, 2022).

242 *See id.* at *2 (stating that California's S.B. 127 "goes even further" than S.B. 8).

243 *See id.* at *1 (reasoning both S.B. 1327 and S.B. 8 should be "constitutionally scrutinized," but only S.B. 1327 affects "a clearly enumerated constitutional right set forth" in the Constitution).

plied constitutional right is still a constitutional right, and the infringement of *any* constitutional right, whether enumerated or implied, is too dangerous to overlook.[244]

The disparate fates of S.B. 1327 and S.B. 8 demonstrate that, until Congress or the Supreme Court step in to prohibit these predatory statutory schemes, the success of S.B. 8-inspired statutes will vary by state, by the type of constitutional right at issue, and even by judge.[245] For example, critics of the Fifth Circuit, a major actor in the success of S.B. 8, have long claimed that the court's controversial decisions, including its abortion rulings, are driven by ideology rather than law:

> To anyone closely tracking the Fifth's evolution over the past few years, [the court's] behavior [regarding S.B. 8] wasn't surprising. The Fifth, based as it is in the Deep South, has long been a conservative court . . . . Several of the judges spearheading the abortion fight were appointed to the Fifth by Donald Trump . . . [a]nd they all have roots in Texas Republican politics . . . .
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> . . . . [T]hese Trump appointees on the Fifth . . . spent years in the trenches of Texas politics, allied closely with the most powerful elected officials in the state . . . . They fought partisan conflicts at the behest of their bosse[s,] [including] against abortion . . . .

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[244] *See* Whole Woman's Health v. Jackson, 142 S. Ct. 522, 545 (2021) (Roberts, C.J., concurring in part and dissenting in part) ("The nature of the federal right infringed does not matter . . . .").

[245] *C.f.* Riggins, *supra* note 240 ("[Judge] Benitez, a George W. Bush appointee, has often sided with gun rights groups in lawsuits challenging California's strict gun laws, earning him the moniker "St. Benitez" among firearms enthusiasts."); Brianne Gorod, *One U.S. Circuit Court Is Breaking Every Rule in the Book to Push Its Radical Agenda*, SLATE (Jan. 27, 2022, 11:46 AM), https://slate.com/news-and-politics/2022/01/fifth-circuit-ignores-supreme-court-breyer.html ("It's one thing for conservative judges to reach conservative outcomes. It's something else entirely for them to ignore the Supreme Court and standard court procedures in order to reach those outcomes.").

> [A] close examination of their work on the bench, and conversations with those who know them, suggests that their time in politics has strongly shaped both their decisions in the courtroom and their outspoken behavior outside it, a pattern that worries even longtime conservatives.[246]

Americans look to the judiciary for an unbiased, reasoned interpretation of the law. To honor this expectation, judges "have traditionally avoided taking public positions . . . [and] have generally eschewed involvement in political campaigns and associations."[247] However, the Southern District of California's suggestion that enumerated rights should be afforded higher protection than implied rights and the controversies surrounding the Fifth Circuit's purported political bias will only weaken constitutional protections. To protect the health of our democracy, judges must be willing to put aside their own politics when analyzing S.B. 8-inspired statutes in the future.

The *Dobbs* opinion sent shockwaves across the United States. The public quickly redirected its outrage toward the Texas legislature to the Supreme Court, allowing the creators and proponents of S.B. 8 to fade into the background relatively unscathed. As the controversy surrounding S.B. 8 becomes a memory of the past and ideological division grows in the United States,[248] history will likely repeat itself. The next time around, the American judicial system has a democratic responsibility to make one thing clear: any state law crafted to extinguish an established constitutional right is a stain on American democracy that no legitimization attempts can remove.

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[246] Michael Hall, *The Rogue Court that Paved the Way for Roe's Demise*, TEX. MONTHLY (Sept. 2022), https://www.texasmonthly.com/news-politics/fifth-circuit-court-appeals-roe-wade-scotus-supreme-abortion-rights/ (discussing the Fifth Circuit's growing reputation as a biased court).

[247] *Id.*

[248] *C.f., e.g.,* Carrie Blazina, *Americans at the Ends of the Ideological Spectrum are the Most Active in National Politics*, PEW RSRCH. CTR. (Jan. 5th, 2022), https://www.pewresearch.org/fact-tank/2022/01/05/americans-at-the-ends-of-the-ideological-spectrum-are-the-most-active-in-national-politics/ (noting the far right and the far left are the most politically engaged demographics "by several measures").