

April 28, 2021

Texas House of Representatives
ATTN: Speaker Dade Phelan
P.O. Box 2910
Austin, Texas 78768-2910

RE: Open letter in opposition to HB 1515 and SB 8 from the Texas legal community

Speaker Phelan and Members of the Texas House:

As licensed attorneys in the state of Texas, including former judges, attorneys who are board certified in Civil Trial law, Civil Appellate Law, and Health Law, and other members of the State Bar of Texas, we are deeply concerned by the provisions in Senate Bill 8 (SB 8) and House Bill 1515 (HB 1515) that create an unprecedented cause of action for the enforcement of healthcare regulations. This bill would not only create a new unconstitutional restriction on abortion, but also extend this extraordinary cause of action to all twenty-eight requirements placed on abortion providers in Chapter 171 of the Health and Safety Code. SB 8 and HB 1515 contravene the Texas Constitution and undermine long standing rules and tenets of our civil legal system. Because we believe that all Texans deserve a fair, efficient, and predictable court system, we ask that you oppose these bills.

We are specifically concerned that HB 1515 and SB 8 grant “any person” the right to sue, including even those who do not reside in Texas and those with no connection to a patient, against a broad range of defendants. Among those who could face civil liability are physicians who provide abortion care, but also nurses, clinic staff, and any others who helped the patient access abortion care. This means that family members, clergy, domestic violence and rape crisis counselors, or referring physicians could be subject to tens of thousands of dollars in liability to total strangers. Even more egregiously, these bills add as potential defendants any person who merely formed an intent to help a patient, which could include donors and supporters of abortion funds and clinics, and could make individuals liable before they took any action at all.

This exceptionally broad cause of action and the almost unlimited array of potential defendants is inconsistent with the Texas Constitution’s minimum requirements to maintain a civil legal action in Texas. The Texas Constitution allows access to our courts only to a “person for an injury done him.” Tex. Const. Art. I, §13. As Justice Willett explained, “In Texas, the standing doctrine requires a concrete injury to the plaintiff” and “[t]he plaintiff must be personally injured—he must plead facts demonstrating that he, himself (rather than a third party or the public at large), suffered the injury.” *Heckman v. Williamson County*, 369 S.W.3d 137, 154-155 (Tex. 2012).

The Texas Legislature cannot bestow standing on someone who has not personally suffered an injury without violating the separation of powers doctrine. The Texas Supreme Court has elaborated on this bedrock rule repeatedly. As Chief Justice Hecht explained succinctly, “courts’ constitutional jurisdiction cannot be enlarged by statute.” *Finance Commission of Texas v. Norwood*, 418 S.W.3d 566, 583 n. 83 (Tex. 2013). Chief Justice Hecht has also noted: “For the Legislature to attempt to authorize a court to act without subject matter jurisdiction would violate the constitutional separation of powers.” *In re Lazy W Dist. No. 1*, 493 S.W.3d 538, 544 (Tex. 2016). By attempting to grant standing to individuals who have not personally suffered an injury, SB 8 and HB 1515 subvert this core constitutional and democratic principle.

In addition to the constitutional issues outlined above, this legislation further weaponizes the judicial system by exempting the newly created cause of action from the normal guardrails that protect Texans from abusive lawsuits and provide all litigants a fair and efficient process in our state courts.

The proposed legislation would allow a plaintiff to file the lawsuit in their own home county and then block transfer to a more appropriate venue. This contradicts the general venue provisions in the civil practice and remedies code. Furthermore, the bills prevent unjustly sued defendants from recovering attorney fees for frivolous and harassing lawsuits under the Texas Rules of Civil Procedure allowing plaintiffs to harass defendants without any repercussion.

Perhaps most troubling is that these proposals would impose liability on people whose actions were legal at the time they took them. The bill specifically prohibits the defense that a party relied on a court decision that was valid at the time of their actions but that was later overruled—meaning even if a person was following the law, they could still be liable if the law changed later. This type of ex post facto liability violates the very bedrock of our legal system which requires notice and due process before imposing liability.

Regardless of our personal beliefs about abortion, as licensed attorneys sworn to uphold the constitutions of Texas and the United States, we implore you to not use the judicial branch in the political battle over abortion with legislation that subverts the foundations of our judicial system. All Texans deserve a fair and predictable court system whose impartiality is above question. Anything less ruptures basic notions of fairness and liberty in a democratic society. Because we care about these fundamental values—and we believe you do too—we urge you to vote against HB 1515 and SB 8.

Sincerely,

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