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

FUND TEXAS CHOICE, et al., **Plaintiffs,** **v.** **JOSÉ GARZA, in his official capacity as District Attorney of Travis County, Texas, et al.,** **Defendants.**	**Civil Case No. 1:22-cv-859-RP**

PLAINTIFFS' MOTION FOR PROTECTIVE ORDER FROM DEFENDANT SHANNON D. THOMASON'S DISCOVERY REQUESTS

Plaintiffs Fund Texas Choice, The North Texas Equal Access Fund, The Lilith Fund for Reproductive Equity, Frontera Fund, The Afiya Center, West Fund, Jane's Due Process, Clinic Access Support Network, Buckle Bunnies Fund, and Dr. Ghazaleh Moayedi, DO, MPH, FACOG ("Plaintiffs") move for a protective order under Federal Rule of Civil Procedure 26(c) from Defendant Shannon D. Thomason's Interrogatories, Requests for Production, and Requests for Admission (collectively, "Discovery Requests"), and in support thereof state as follows:

I. INTRODUCTION AND FACTUAL BACKGROUND

On September 12, 2023, Defendant Thomason served each Plaintiff with extensive Discovery Requests. (Exhibits A-1 - A-10). The Discovery Requests are overly broad, harassing, and irrelevant to the legal issues raised in this case. They seek among other things, private and constitutionally protected information about pregnant Texans the Plaintiffs have assisted, Plaintiffs' donor lists, the names of doctors who have provided care to Texans outside of the state, and all communications between Plaintiffs and their attorneys. (*See* Exhibits A-1 - A-10 at Rog. Nos. 1, 2, 5, 7; RPFs Nos. 1-4, 8). The Discovery Requests are plainly meant to further chill

Plaintiffs' constitutional rights and the rights of every person that seeks to associate with them, which is the very crux of Plaintiffs' claims seeking declaratory and injunctive relief from the SB8 Defendants' enforcement of an unconstitutional state law.

II. LEGAL STANDARDS

A. Protective Order Standard

Federal Rule of Civil Procedure 26(c) permits a court to, "for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26(c)(1). Good cause requires the movant to "show the necessity of its issuance, which contemplates a particular and specific demonstration of fact as distinguished from stereotyped and conclusory statements." *In re Terra Int'l, Inc.*, 134 F.3d 302, 306 (5th Cir. 1998) (citation omitted).

B. First Amendment Privilege

"A party who objects to a discovery request as an infringement of the party's First Amendment rights is in essence asserting a First Amendment privilege." *La Union Del Pueblo Entero v. Abbott*, No. SA-21-CV-00844-XR, 2022 WL 17574079, at *6 (W.D. Tex. Dec. 9, 2022). That privilege protects against a forced "[d]isclosure[ ] of political affiliations and activities" that would have a deterrent effect on the exercise of free speech or freedom of association rights. *Id*. The First Amendment privilege protects a party from compelled disclosure that would chill the associational rights at issue. *Nat'l Ass'n for Advancement of Colored People v. State of Ala. ex rel. Patterson*, 357 U.S. 449, 462-63 (1958).

A party asserting the privilege must make a prima facie showing of an objectively reasonable probability of a chilling effect on their First Amendment rights if the discovery is permitted. *Wal-Mart Stores, Inc. v. Texas Alcoholic Beverage Comm'n*, No. A-15-CV-134-RP,

2016 WL 5922315, at *6 (W.D. Tex. Oct. 11, 2016) (citation omitted). Once that showing is made, the evidentiary burden shifts to the requesting party to establish that its interest in the information sought is sufficient to justify the deterrent effect on the free exercise of the constitutionally protected right of association. *La Union Del Pueblo Entero*, 2022 WL 17574079, at *6.

III. ARGUMENT AND AUTHORITIES

Every Discovery Request Defendant Thomason made is objectionable and improper. As explained in more detail below, the requests impermissibly: (1) violate the First Amendment Rights of Plaintiffs (and others); (2) seek information protected by the attorney-client privilege; (3) call for legal conclusions; and (4) seek information that is irrelevant and unnecessary to the claims in this case. Plaintiffs respectfully request that the Court issue a protective order under Rule 26(c) relieving them of any obligation to provide any response.

A. The Discovery Requests improperly seek information protected by the First Amendment.

1. The Discovery Requests aim directly at the Plaintiffs' rights to free association and free speech.

Defendant Thomason seeks, among other things, private and constitutionally protected information about pregnant Texans the Plaintiffs have assisted, Plaintiffs' donors, staff, and volunteers, and the names of doctors who have provided care to Texans outside of the state. Indeed, the very first discovery request made by Defendant Thomason in Interrogatory No. 1 asks each Plaintiff to identify every abortion they have "assisted or facilitated" in any way since September 1, 2021, and demands, among other things, the following information: the date on which the abortion occurred; the name and contact information for the medical provider; the method of abortion; the gestational age of the embryo or fetus; the city and state of residence for the pregnant person; the location where any medication abortion pills were ingested; the identity

of every person associated with [Plaintiff] involved in assisting or facilitating the abortion; every county in Texas where the pregnant person traveled; the identity of anyone else who assisted or facilitated the abortion; and the identity of anyone who helped the pregnant person "procure" the abortion.[1] The very next request, Interrogatory No. 2, asks each Plaintiff to identify "every person involved with the activities or mission of [Plaintiff] including its employees, officers, board members, volunteers, donors, and financial supporters."

In addition to being an improper and threatening fishing expedition, these requests plainly seek information protected from disclosure by the First Amendment and other privileges. *See NAACP*, 357 U.S. at 466 (absent a controlling justification a trial court could not compel a political organization to turn over its member lists in civil discovery); *see also Sierra Club v. Energy Future Holdings Corp*., No. 5:10CV156, 2013 WL 12244352, at *3 (E.D. Tex. Dec. 30, 2013) (denying the defendants' motion to compel disclosure of the names and contact information of the plaintiff's members).

Similarly, the people with whom the Plaintiffs associate to carry out their philanthropic mission are also protected by the First Amendment. *See NAACP*, 357 U.S. at 460-61. And information about a particular person's medical treatment – to the extent the Plaintiffs even have such information – is specifically protected by HIPAA. *Acara v. Banks*, 470 F.3d 569, 571 (5th Cir. 2006) ("HIPAA generally provides for confidentiality of medical records.") (citation omitted); *see also Huber v. Tex. Woman's Univ*., No. CV H-06-00303, 2006 WL 8446878, at *1 (S.D. Tex. June 16, 2006) ("A right to privacy, though not expressly stated in Rule 26(c)'s reasons for issuing a protective order, is 'implicit in the broad purpose and language of the rule.'").

This Court has already found that speaking about and fundraising for Texans who seek

[1] Mr. Thomason's Requests for Production seek documents related to any abortions identified in response to Interrogatory No. 1. (RFP Nos. 1, 3).

abortions in other states are "plainly afforded constitutional interests [protected] by the First Amendment." Order, [Dkt. 120 at *19], *citing Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.,* 487 U.S. 781, 789 (1988); *Citizens United v. Fed. Election Comm'n,* 558 U.S 310, 365 (2010). The discovery sought by Thomason in this court (and by many of the SB8 Defendants in state courts across Texas) undeniably demand information related to Plaintiffs' First Amendment rights.

2. Plaintiffs' rights are chilled by the discovery sought.

Because the information sought is plainly affected by First Amendment interests, Plaintiffs' only remaining burden is to demonstrate that there is an objective probability of the discovery chilling their First Amendment rights. *Wal-Mart Stores, Inc.*, 2016 WL 5922315, at *6 (citation omitted). Here, the evidence of chilling is already in the Court's record, in many different forms, including:

- Declarations provided in support of Plaintiffs' Request for Preliminary Injunction [Dkt. 4, Exhibits C-K];
- Testimony provided by various Plaintiffs' representatives at the Hearing on Preliminary Injunction on September 27, 2022. [*See, e.g.,* Hr'g Tr., Dkt. 86-1, at 14, 17-18, 55, 79-90, 94-95]; and
- Exhibits contained in Plaintiffs' Supplemental Appendix in Support of Motion for Preliminary Injunction [Dkt. 57-58].

Additionally, this Court found in its February 24, 2023, Order that "Plaintiffs presented evidence that their speech and conduct has been chilled by the Defendants threatening to enforce Texas's abortion laws against those who facilitate out-of-state abortions." [Dkt. 120 at *9]. This evidence included the litigation hold letter sent to Plaintiffs by Defendant Thomason, and a letter that was copied verbatim in portions from the Thomason litigation hold letter and sent to Sidley Austin by the "Texas Freedom Caucus." [Dkt. 129-1, 129-2, 129-3, 129-4; *see also* Dkt. 42-1, Dkt. 58-2.]. Further, the record also contains the Rule 202 Petitions filed in various Texas state

courts that request much of the same information, and which were provided in support of Plaintiffs' claims that their First Amendment association and speech rights are being chilled. [Dkt. 58-1; Dkt. 129-25, 129-26, 129-27, 129-28, 129-29, 129-30, 129-31, 129-32, 129-33].

Defendant Thomason and his counsel plainly seek a "hit list" to be used in other civil litigation, and potentially to provide to those tasked with enforcing the criminal laws in Texas. These improper discovery requests themselves lay bare the harm being inflicted on Plaintiffs and the necessity for the Court to resolve the legal issues in this case. While SB8's civil enforcement mechanism may be unique to the law, Defendant Thomason's improper and harassing Discovery Requests themselves prove the point. A state statute purporting to confer standing without injury can and will be used by private citizens deputized to impose quasi-criminal penalties on those with whom they disagree. Or at least terrify supporters of reproductive justice organizations out of associating with them. Either result is unconstitutional.

3. None of the Discovery Requests are necessary and thus the First Amendment harm is the paramount concern.

None of the information requested by Defendant Thomason and his counsel is necessary to confirm (again) the jurisdiction of this Court or to resolve the legal issues raised by the declaratory judgments and injunctive relief sought. The discovery is a blatant attempt to chill the First Amendment rights of Plaintiffs and their supporters, and to utilize discovery in this action to obtain the SB8 Defendants' desired ends in other venues. Plaintiffs should not have to respond and sacrifice constitutional protections to threatening and harassing discovery.

B. The Discovery Requests seek to invade the attorney-client privilege.

Defendant Thomason also improperly seeks to invade and dissolve the attorney-client privilege. Several of his requests ask directly for communications between Plaintiffs and their attorneys. Interrogatory No. 7, for example, demands that each Plaintiff identify "every attorney

that advised or counseled [Plaintiff] to commit or engage" in a series of alleged activities. Similarly, Request for Production 8 seeks all communications between Plaintiff and any of its attorneys that related to Interrogatory No. 7. And multiple Requests for Production include language in which Defendant Thomason purports to define the "crime fraud exception" to require Plaintiffs to produce communications with their attorneys related to a series of situations that Defendant Thomason believes violate Texas law. (RFP Nos. 1-4).[2]

As the party seeking to invoke the crime-fraud exception, Mr. Thomason must establish a prima facie case that the attorney-client relationship was intended to further criminal or fraudulent activity. *In re Grand Jury Subpoena*, 419 F.3d 329, 336 (5th Cir. 2005); *see also City of San Antonio v. Hotels.com*, No. SA-06-CA-381-OG, 2009 WL 10670130, at *3 (W.D. Tex. Aug. 5, 2009). Mr. Thomason has made no showing whatsoever that Plaintiffs consulted attorneys to perpetuate a crime or fraud. Nor can he. Plaintiffs sought clarity from this Court about whether their desired conduct is legal, while simultaneously altering their behavior and operations because of the threats made by the SB8 Defendants (and others).[3]

C. The Discovery Requests improperly call for legal conclusions.

Defendant Thomason seeks information regarding communications or actions taken that "violates the Texas Heartbeat Act" and other criminal abortion laws in Texas. (Rog Nos. 3-4, 7-8; RFP Nos. 1-6, 8; RFA Nos. 1-4). Further, Defendant Thomason's Discovery Requests require Plaintiffs to determine whether certain actions are "killing" and "murder" under Texas law. (*See*

[2] The DA Defendants have all chosen to remain silent on whether the information sought by Defendant Thomason can form the basis for criminal prosecutions of Plaintiffs. After receiving the Discovery Requests, Plaintiffs forwarded a copy to each of the DA Defendants and inquired whether the DA Defendants believed the information sought could form the basis for a criminal prosecution of any Plaintiff. Plaintiffs also inquired whether each DA would agree to not prosecute any Plaintiff on the basis of any information revealed in the course of responding to the requests. All of them refused to provide an answer. Exhibits A-11 – A-16.

[3] Dkt. 6, 57, 58; *see also* Hr'g. Tr. from September 27, 2022.

Discovery Requests at p. 7). But the answers to those questions are the ultimate legal issues before this Court. The Discovery Requests are therefore improper. *See Warnecke v. Scott*, 79 Fed. App'x. 5, 6 (5th Cir. 2003).[4]

Plaintiffs believe that the state laws they have challenged in this case, including SB8, are unconstitutional and/or void and therefore cannot impose any penalty on them. [Dkt. 129 at 2, 9-10, 54, 67, 70-71, 75-76, 80-81; Dkt. 209 at 9-10, 15-16, 19-40]. If this Court determines that Plaintiffs are correct as a matter of law, then they have not violated any law because an unconstitutional law is not a law. *Ex parte Siebold*, 100 U.S. 371, 376–77 (1879) ("An unconstitutional law is void, and is as no law. An offence created by it is not a crime."); *Alexander v. Cockrell*, 294 F.3d 626, 630 (5th Cir. 2002) ("An unconstitutional statute is void *ab initio*, having no effect, as though it had never been passed."). Defendant Thomason and the other SB8 Defendants have all made it clear that they believe SB8 is a valid law that can be enforced. This disagreement between the parties underlies every single claim asserted by Plaintiffs against the SB8 Defendants. It is this Court's role to declare what the law is, not the parties.

D. <u>The Discovery Requests are irrelevant to the claims and defenses in this matter, which raise purely legal questions.</u>

Plaintiffs' claims against the SB8 Defendants pose pure legal questions regarding the constitutionality of SB8. There is no material fact issue in dispute because the SB8 Defendants have already made clear their intentions to enforce SB8 against Plaintiffs. [Dkt. 209 at 60-140, 142-151, 160, 166, 171-73, 175-89]. And in the case of Defendant Thomason, he specifically

[4] *See also Alvarado v. State Farm Lloyds*, No. 7:14-CV-166, 2015 WL 12941979, at *4 (S.D. Tex. Jan. 29, 2015) ("In effect, Plaintiff's requests either seek admission of legal conclusions or central facts in dispute, rather than undisputed issues of fact or peripheral matters in an effort to expedite proceedings, . . . attempting to use these requests as a discovery device, a tactic clearly prohibited by the Federal Rules and admonished in this circuit."); *Kassell v. Crafton*, No. A-12-CA-669 LY, 2013 WL 12076484, at *2 (W.D. Tex. Apr. 5, 2013) (denying motion to compel response to interrogatory finding that the question requests a legal conclusion).

invoked SB8 as a basis for his litigation hold letters that he sent to every single Plaintiff. [Dkt. 129-2, 129-3, 129-4; Dkt. 209 at 92 -110]. There is simply no doubt that Defendant Thomason believes SB8 is a valid law. There is also no doubt that Plaintiffs believe it is unconstitutional and therefore void.

Nor is there any serious doubt that Plaintiffs have standing to bring the constitutional challenges against SB8. Every single one of them has sworn under oath that (1) they facilitated an abortion without regard to SB8 during this Court's injunction of SB8; (2) they want to engage in behavior that arguably violates the terms of SB8; and/or (3) they have refrained from undertaking certain activities because they fear the enforcement of SB8. [Dkt. 4-3 - 4-11; Dkt. 86-1 at 11-16, 42-44, 47, 54-58, 60-63, 71, 84-87, 114-18, 120-21, 126-30, 153-54, 164-65, 168-69, 189-94, 197, 199-208, 210-12; Dkt. 177-1]. Nothing more is needed.

This Court has already found injury-in-fact, which is thus far undisputed. [*See* Dkt. 120]. The SB8 Defendants' protests that the injury is traceable to SB8, and not the enforcers, is bizarre—without willing enforcers, SB8 is toothless. Just as the executive branch of government ordinarily enforces the law, here the private-yet-state-deputized citizens who have indicated a willingness and a threat to enforce this unconstitutional law are the proper defendants because the threat flows through them. [Dkt. 129-2 - 129-4; Dkt. 209 at 92 -110; Dkt. 209 at 60-140, 142-151, 160, 166, 171-73, 175-89]. Defendant Thomason is part of that regime, and is now seeking information about every single person Plaintiffs have assisted or associated with since September 1, 2021, when SB8 went into effect. He is seeking information about pregnant Texans who have fled the state to seek reproductive care where it is legal to do so. He is seeking core attorney-client communications. He is seeking information about donors and doctors who are not before this Court.

None of the information sought would change the evidence already put forward by Plaintiffs regarding the injuries they have already suffered, the injuries they are continuing to suffer, that those injuries are traceable (at least in part) to the SB8 Defendants, and that those injuries would be redressed (at least in part) by the relief Plaintiffs seek.[5] Nor does the information sought have any bearing on the legal issues before the Court. The identity of pregnant Texans who have obtained care, the ways in which they traveled to obtain it, who helped them afford the care the needed, who donates to the Plaintiffs, who volunteers with the Plaintiffs, and which out-of-state medical providers help Texans get the care they need have nothing to do with whether SB8 can withstand constitutional scrutiny. That information will not, and cannot, make SB8 more or less constitutionally valid. Defendant Thomason's requests are irrelevant and harassing, and the Court should not countenance them. *Martin v. Crestline Hotels & Resorts, LLC*, No. A-19-CV-00470-LY, 2020 WL 3145694, at *4 (W.D. Tex. June 12, 2020) (quashing subpoena for confidential, private, medical information, information protected by attorney client privilege, and irrelevant information and granting order of protection).[6]

IV. CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court grant Plaintiffs' Motion for Protection and order that Plaintiffs do not have to respond to any of the discovery propounded by Defendant Thomason.

[5] The discovery Defendant Thomason seeks relates to information that would further confirm Plaintiffs' standing, not refute it. For example, if Plaintiffs specifically identified additional abortions that occurred after September 1, 2021 (and they are not admitting that such abortions occurred or waiving related privileges), it would simply confirm the prior testimony already before the court that at least one such abortion occurred.

[6] *See also Fret v. Melton Truck Lines, Inc*., No. SA-15-CV-00710-OLG, 2018 WL 6220128, at *1 (W.D. Tex. Apr. 4, 2018) (granting defendant's motion for protective order from plaintiff's overbroad and harassing discovery requests).

Dated: September 26, 2023

Respectfully submitted,

By: */s/ Jennifer R. Ecklund*

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CERTIFICATE OF CONFERENCE

Pursuant to Local Rule CV-7(G), undersigned counsel conferred with counsel for Defendant Shannon D. Thomason, and counsel indicated that Defendant is opposed to the requested relief.

/s/ Jennifer R. Ecklund
Jennifer R. Ecklund

CERTIFICATE OF SERVICE

I hereby certify that on September 26, 2023, a copy of the foregoing was filed electronically with the Clerk of Court using the CM/ECF system.

/s/ Jennifer R. Ecklund
Jennifer R. Ecklund

IN THE UNITED STATES DISTRICT COURT
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AUSTIN DIVISION

FUND TEXAS CHOICE, et al., **Plaintiffs,** **v.** **JOSÉ GARZA, in his official capacity as District Attorney of Travis County, Texas, et al.,** **Defendants.**	**Civil Case No. 1:22-cv-00859-RP**

[PROPOSED] ORDER GRANTING MOTION FOR PROTECTIVE ORDER FROM DEFENDANT SHANNON D. THOMASON'S DISCOVERY REQUESTS

Before the Court is Plaintiffs' Motion for Protective Order From Defendant Shannon D. Thomason's Discovery Requests ("Motion"). Having considered the pleadings, applicable law, and any arguments of counsel, the Court determines that the Motion should be **GRANTED**.

The Motion is hereby **GRANTED**. Accordingly, Plaintiffs do not have to respond to any of Defendant Thomason's discovery requests served on Plaintiffs via email on September 12, 2023. It is further ordered that Plaintiffs are protected from further discovery requests seeking private and constitutionally protected information about pregnant Texans the Plaintiffs have assisted, Plaintiffs' donor lists, volunteer lists, and/or membership lists, the names of doctors who have provided care to Texans outside of the state, and all communications between Plaintiffs and their attorneys.

SO ORDERED this _____ day of _____, 2023.

_____
HON. ROBERT L. PITMAN

PROPOSED ORDER