



UTILIZING CITIZEN ENFORCEMENT PROVISIONS TO LEGALIZE VIGILANTISM

Carly Maylath*

TABLE OF CONTENTS

I. INTRODUCTION..... 646
II. HISTORY OF CITIZEN ENFORCEMENT..... 647
III. JUSTIFICATIONS FOR CITIZEN ENFORCEMENT..... 650
A. Deterrence 650
B. Cooperation 650
IV. FIRST-LOOK ISSUES REGARDING CITIZEN ENFORCEMENT CLAUSES..... 651
A. Standing 651
B. Notice Requirements..... 652
V. CONSTITUTIONALITY OF VALID CITIZEN ENFORCEMENT CLAUSES..... 652
A. Environmental Context 652
1. Clean Air Act 653
2. Endangered Species Act 654
B. Challenges to Environmental Citizen Suit Provisions 655
VI. UNCONSTITUTIONAL CITIZEN ENFORCEMENT CLAUSES 657
A. The Texas Heartbeat Act 657
B. The Harm 661
VII. WHERE IS THE LINE? 665
A. Privatizing Discrimination 666
B. Cash Reward..... 667
C. Notice Requirements..... 667
D. Standing 668
VIII. CONCLUSION 669

“[W]ho in hell are these vigilantes, anyway? What kind of guys are they?”

* J.D. Candidate, May 2023, Rutgers Law School–Camden.

*“Why, they’re the dirtiest guys in any town. They’re the same ones that burned the houses of old German people during the war. They’re the same ones that lynch Negroes. They like to be cruel. They like to hurt people, and they always give it a nice name, patriotism or protecting the constitution.”*¹

I. INTRODUCTION

The Fourteenth Amendment to the U.S. Constitution guarantees that:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person . . . the equal protection of the laws.²

But what happens when a state explicitly empowers its citizens to enforce laws that deprive one another of these essential rights?³

As a longstanding tradition in American history, citizens have played a role in law enforcement.⁴ However, whereas police officers are treated as agents of the state⁵ and are therefore subject to the requirements of the state-action doctrine, ordinary citizens are not held to the same

1 JOHN STEINBECK, *IN DUBIOUS BATTLE* 166 (Random House 1936).

2 U.S. CONST. amend. XIV, § 1.

3. This Note does not recognize nor respect the U.S. Supreme Court’s decision in *Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct. 2228 (2022), which overruled the settled precedent of *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), stripping Americans of their fundamental right to control their own reproductive decisions. As of August 2022, “16 states and the District of Columbia have laws that protect the right to abortion.” *Abortion Policy in the Absence of Roe*, GUTTMACHER INST., <https://www.guttmacher.org/state-policy/explore/abortion-policy-absence-ro> (last visited Jan. 25, 2023). The purpose of this Note, however, is not to argue for protection or validation of the right to abortion, but rather to show that the Texas Heartbeat Act contains a citizen enforcement clause that goes beyond the Constitution in allowing ordinary citizens to sue abortion providers. See Texas Heartbeat Act, S.B. 8, 87th Leg., Reg. Sess. ch. 62 § 3 (2021) (codified at TEX. HEALTH & SAFETY CODE ANN. §§ 171.201–.212 (West 2022)).

4. Gary T. Marx & Dane Archer, *Citizen Involvement in the Law Enforcement Process: The Case of Community Police Patrols*, 15 AM. BEHAV. SCIENTIST 52, 52–55 (1971).

5. See 18 U.S.C. § 242 (2018); see also *Deprivation of Rights Under Color of Law*, U.S. DEPT. JUST., <https://www.justice.gov/crt/deprivation-rights-under-color-law> (last visited Jan. 25, 2023) (making it a crime for a person acting under color of law to willfully deprive another of a right or privilege protected by the Constitution or other laws and defining “color of law” as acts done by federal, state, or local officials within their lawful authority).

standard.⁶ The Texas Heartbeat Act not only empowers citizens to take unprecedented action in enforcing the law, but also provides financial incentives for them to do so.⁷ In circumventing the state-action problem by putting enforcement in the hands of private citizens, the statute permits anti-abortion bounty hunting that goes beyond legality and crosses over into vigilantism.

This Note seeks to explain the history of citizen enforcement in American jurisprudence through the examples of environmental statutes such as The Clean Air Act and the Endangered Species Act, draw a line between what demarcates such clauses that satisfy due process from those that do not, and explore solutions, both new and old, that have attempted to bring citizen enforcement in line with the Constitution. The last few sections of this Note will discuss the Texas Heartbeat Act and how state legislatures are starting to use citizen enforcement clauses to harken back to a state of vigilantism.

II. HISTORY OF CITIZEN ENFORCEMENT

The involvement of ordinary citizens in American law enforcement is not a new phenomenon.⁸ In fact, one might say that “the history of the United States began with vigilantism” when American colonists “took part in what came to be known as the Boston Tea Party.”⁹

The modern police force can be traced back to large northern American cities in the early nineteenth century, which followed the English system of policing.¹⁰ Before that, early citizen enforcement took the form of vigilante groups concerned with “primarily horse thieves, counterfeiters, outlaws, and ‘bad men.’”¹¹ These groups emerged “in areas where settlement preceded effective law enforcement.”¹² However,

6. Julie K. Brown, *Less Is More: Decluttering the State Action Doctrine*, 73 MO. L. REV. 561, 561–62 (2008).

7. See TEX. HEALTH & SAFETY CODE ANN. § 171.208; Timothy S. Jost et al., *Supreme Court Agrees to Hear Challenges to Texas Abortion Law*, COMMONWEALTH FUND (Oct. 25, 2021), <https://www.commonwealthfund.org/blog/2021/litigation-texas-senate-bill-8>; Alan Feuer, *The Texas Abortion Law Creates a Kind of Bounty Hunter. Here's How It Works.*, N.Y. TIMES (Nov. 1, 2021), <https://www.nytimes.com/2021/09/10/us/politics/texas-abortion-law-facts.html>.

8. Marx & Archer, *supra* note 4, at 2.

9. *Vigilantism*, JRANK L. LIBR., <https://law.jrank.org/pages/11129/Vigilantism.html> (last visited Jan. 25, 2023).

10. Connie Hassett-Walker, *How You Start Is How You Finish? The Slave Patrol and Jim Crow Origins of Policing*, AM. BAR ASS'N (Jan. 11, 2021), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/civil-rights-reimagining-policing/how-you-start-is-how-you-finish/.

11. Marx & Archer, *supra* note 4, at 2.

12. *Id.*

southern states employed a different form of citizen policing, which focused on “apprehending escaped slaves[,] . . . returning them to their owners[,] . . . [and] unleashing terror to deter potential slave revolts.”¹³ These vigilante groups went beyond simply enforcing the law.¹⁴ By the end of the eighteenth century, every slave state in the United States had its own version of a vigilante slave patrol.¹⁵

*Qui tam*¹⁶ actions also carried over from England as a form of private enforcement of statutory laws, allowing “private plaintiffs to sue of the sovereign.”¹⁷ The First Congress authorized *qui tam* actions, including “a set of statutes granting bounties to informers whose information led to the recovery of funds by the government.”¹⁸ The prevalence of such statutes was a result of the inability of the early federal government to enforce widespread federal laws.¹⁹ Without a robust law enforcement system, “the First Congress had no choice but to rely heavily on familiar and common private prosecutors.”²⁰

As part of the Compromise of 1850, the Fugitive Slave Act and other fugitive slave laws were passed which emboldened slave catchers to cross state lines in order to find and return escaped slaves to their owners.²¹ After the abolition of slavery, southern groups—such as the Ku Klux Klan—continued to engage in vigilante warfare against freed Blacks and abolitionists in an effort to protect white dominance.²² Members of the Klan and other vigilante groups routinely “assaulted, tarred and feathered, and otherwise terrorized” abolitionists, attempting to dismantle the institution of slavery.²³

13. Hassett-Walker, *supra* note 10; see also Henry Louis Gates, Jr., *Did African-American Slaves Rebel?*, PBS (Apr. 22, 2013), <https://www.pbs.org/wnet/african-americans-many-rivers-to-cross/history/did-african-american-slaves-rebel/> (quoting Historian Herbert Aptheker who “found records of approximately two hundred and fifty revolts and conspiracies in the history of American Negro slavery”).

14. Marx & Archer, *supra* note 4, at 53 (“Rather than simple enforcement of the law, the second type frequently involved political struggles for power, racism, attempts to terrorize would-be criminals, and even the desire to spare the public the cost of the conventional judicial process.”).

15. Hassett-Walker, *supra* note 10.

16. *Qui tam* is a Latin shorthand phrase meaning “who pursues this action on our Lord the King’s behalf as well as his own.” *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 768 n.1 (2000) (citing 3 WILLIAM BLACKSTONE, COMMENTARIES *160).

17. Jeffrey G. Miller & Brooke S. Dorner, *The Constitutionality of Citizen Suit Provisions in Federal Environmental Statutes*, 27 J. ENV’T L. & LITIG. 401, 426–27 (2012).

18. *Id.* at 427.

19. *Id.* at 428.

20. *Id.*

21. See Fugitive Slave Act of 1850, ch. 60, §§ 5–6, 9 Stat. 462 (1850) (repealed 1864).

22. *Vigilantism*, *supra* note 9.

23. *Id.*

By the twentieth century, Black Americans began to gain political power and assemble against the systems of racial segregation and discrimination.²⁴ Following in the traditions of the early slave patrols, white Americans responded to the growing Black movement for equality “with the lynch mob, the Vigilance Committee, the Citizens’ Council and the Klan.”²⁵ In addition to racially motivated vigilante groups, private detectives and security guards have also held certain powers akin to police officers since the nineteenth century.²⁶

Following the passage of the Civil Rights Act of 1964, there was a push from liberals to “create a federal agency to enforce employment discrimination laws.”²⁷ To compromise with conservatives who saw this as “bureaucratic state-building,” the legislature came up with a system of private enforcement instead.²⁸ The 1970s and 80s saw a new form of citizen enforcement in the form of citizen-suit provisions, primarily contained in environmental laws.²⁹ A far cry from the early vigilante groups that persecuted people of color, this form of citizen enforcement allowed “private entities to bring judicial actions to enjoin, and in some instances to penalize, alleged violators of environmental regulatory requirements.”³⁰

Today’s version of vigilante justice and citizen enforcement can be separated into three broad categories: (1) citizen suit provisions that allow private citizens to bring suit against the government; (2) organized watch groups of private citizens; and (3) everyday people who attempt to use force to right what they consider legal wrongs.³¹ The focus of this Note will be to analyze how citizen suit provisions accomplish both regulatory and political goals, and what makes them constitutionally valid. Following that, this Note will discuss how citizen suit provisions

24. *Id.*

25. Michael Gould-Wartofsky, *America’s Ugly History of Vigilante Justice*, SALON.COM (Apr. 6, 2012, 12:00 PM), https://www.salon.com/2012/04/06/americas_ugly_history_of_vigilante_justice/.

26. Jonathan Obert, *Vigilantism, Again in the News, Is an American Tradition*, CONVERSATION (Aug. 27, 2020, 12:33 AM), <https://theconversation.com/vigilantism-again-in-the-news-is-an-american-tradition-141849>.

27. Carrie Levine, *Texas Abortion Law Reflects GOP Turn Towards Citizen Enforcement*, CTR. FOR PUB. INTEGRITY (Sept. 13, 2021), <https://publicintegrity.org/politics/texas-abortion-law-private-enforcement-lawsuits/>.

28. *Id.*

29. Barry Boyer & Errol Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws*, 34 BUFF. L. REV. 833, 835 (1985).

30. Mark Seidenfeld & Janna Satz Nugent, *The Friendship of the People: Citizen Participation in Environmental Enforcement*, 73 GEO. WASH. L. REV. 269, 269 (2005).

31. *Vigilantism*, *supra* note 9; Boyer & Meidinger, *supra* note 29, at 836–37.

are being used more broadly today to unconstitutionally enforce a system of morality.

Citizen suit provisions primarily provide private litigants a right of action to enforce regulatory laws.³² When enacting statutes, Congress will include a citizen suit provision “in part to combat [the] risk of underenforcement.”³³ Organized watch groups primarily operate to survey and protect a community and resemble the early “anti-horse-thief societies which amplified law enforcement through pursuit and capture.”³⁴ Vigilantism can be defined as “the private, violent enforcement of public moral or legal standards,” which tends to arise when either the government fails to act, or when the tide of moral norms changes faster than the government can address it.³⁵ In all three scenarios, private citizens attempt to enforce the law, protect their property or rights, or defend against threats.³⁶

III. JUSTIFICATIONS FOR CITIZEN ENFORCEMENT

A. *Deterrence*

Citizen enforcement is sometimes justified as a means to deter violative behavior.³⁷ Just as traditional law enforcement is meant to deter criminal activity, citizen enforcement of unwanted behaviors and actions is used similarly. The success of the citizen enforcement model is dependent on “the propensity of individuals to try, in good faith, to comply with regulatory requirements.”³⁸

B. *Cooperation*

Citizen enforcement has also been discussed as a means to accomplish greater cooperation within a regulatory scheme.³⁹ The benefits of using citizen enforcement to enhance cooperation include lower enforcement costs and more flexible regulation compliance.⁴⁰ However, this model assumes that those being regulated are in agreement as to what constitutes a violation of a permissible regulation.

32. Miller & Dorner, *supra* note 17, at 406.

33. Harold J. Krent & Ethan G. Shenkman, *Of Citizen Suits and Citizen Sunstein*, 91 MICH. L. REV. 1793, 1808 (1993).

34. Marx & Archer, *supra* note 4, at 53.

35. Obert, *supra* note 26.

36. *Id.*

37. Seidenfeld & Nugent, *supra* note 30, at 290.

38. *Id.*

39. *Id.* at 293.

40. *Id.* at 293–94.

In the environmental context, this is relatively simple: most people agree that protecting the environment is in the public's general interest. However, when political parties adopt such regulation to "give supporters broad power to sue over issues important to their base,"⁴¹ the use of citizen enforcement in the name of cooperation becomes an oxymoron. Moreover, as will be discussed later in more detail, even what was once thought to be the bipartisan notion of protecting the environment has become contentious as the divide between political parties becomes wider.

IV. FIRST-LOOK ISSUES REGARDING CITIZEN ENFORCEMENT CLAUSES

A. *Standing*

The Supreme Court has historically scrutinized citizen suits for their intuitively apparent lack of standing.⁴² In *Lujan v. Defenders of Wildlife*,⁴³ the Court "placed Constitutional and prudential limits on standing for environmental citizen suits."⁴⁴ It was not until eight years later, in *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*,⁴⁵ that the Court "reversed course, lowering the standing barriers faced by environmental citizen-suit plaintiffs."⁴⁶

While most states employ the federal *Lujan* requirements of establishing standing, the Texas Supreme Court has expressed *in dicta* that "statutory standing works [as] an exception to the typical rule requiring a particularized injury caused by the defendant."⁴⁷ Texas appellate courts have followed this dicta, allowing "any taxpayer' to enjoin a contract awarded illegally or allowing 'a citizen' to enjoin certain statutory violations."⁴⁸ Even so, the Texas Supreme Court found in 2020, that "[t]he Texas standing requirements parallel the federal test for Article III standing."⁴⁹

41. Levine, *supra* note 27.

42. Seidenfeld & Nugent, *supra* note 30, at 285.

43. 504 U.S. 555 (1992).

44. Jonathan H. Adler, *Stand or Deliver: Citizen Suits, Standing, and Environmental Protection*, 12 DUKE ENV'T L. & POL'Y F. 39, 39 (2001).

45. 528 U.S. 167 (2000).

46. Adler, *supra* note 44, at 40.

47. Howard Wasserman & Charles Rhodes, *The Procedural Puzzles of SB8, Part V: Standing in State-Court Litigation*, REASON: VOLOKH CONSPIRACY (Sept. 15, 2021, 11:08 AM), <https://reason.com/volokh/2021/09/15/the-procedural-puzzles-of-sb8-part-v-standing-in-state-court-litigation/>; see, e.g., Scott v. Bd. of Adjustment, 405 S.W.2d 55, 57 (Tex. 1966); Tex. Workers' Compen. Comm'n v. Garcia, 893 S.W.2d 504, 517–19 (Tex. 1995).

48. Wasserman & Rhodes, *supra* note 47.

49. *In re Abbott*, 601 S.W.3d. 802, 807 (Tex. 2020) (per curiam).

B. Notice Requirements

Notice requirements are contained in citizen suit provisions to “protect the government’s position as primary enforcer.”⁵⁰ These grace periods allow the government agency “to analyze the complaint and to decide whether to take over enforcement.”⁵¹ A citizen suit will be barred if the government can show that they are “diligently prosecuting” a civil action.⁵²

V. CONSTITUTIONALITY OF VALID CITIZEN ENFORCEMENT CLAUSES

A. Environmental Context

Proponents of citizen suit provisions point to how effective they have been in enforcing environmental regulations through statutes such as the Clean Air Act and the Endangered Species Act. Citizen participation in such regulation allows agencies such as the Environmental Protection Agency (“EPA”) to monitor and control the enforcement of environmental protections more effectively.⁵³

The EPA faces many challenges in ensuring regulatory compliance. To keep up with “the difficult task of detection, a lack of resources, and political constraints, the EPA has, to some extent, welcomed citizen suits to alleviate the tension created by demand for enforcement that outstrips the agency’s supply.”⁵⁴ Much like the First Congress’s reasoning behind enacting *qui tam* statutes, the reasoning behind citizen suits stems from a lack of personnel to carry out regulatory enforcement.

The private enforcement of federal regulatory practices dates back as far as the fourteenth century when the English Water Pollution Act of 1388 was enacted to allow citizens to sue as a means to address water pollution.⁵⁵ The modern version of such enforcement, however, is a relatively recent phenomenon, which rose in prominence primarily during the 1980s.⁵⁶ Although citizen-suit provisions were included in most environmental statutes that were written in the 1970s, they were largely overlooked for their first decade.⁵⁷ In the environmental context,

50. Seidenfeld & Nugent, *supra* note 30, at 284.

51. *Id.*

52. Clean Water Act, 33 U.S.C. § 1365(b)(1)(B).

53. Seidenfeld & Nugent, *supra* note 30, at 269.

54. *Id.* at 283 (footnotes omitted).

55. Joel Mintz, *Citizen Suits, Environmental Settlements, and the Constitution: Part II*, CTR. FOR PROGRESSIVE REFORM (Sept. 15, 2020), <http://progressivereform.org/cpr-blog/citizen-suits-environmental-settlements-constitution-part-ii/>.

56. Boyer & Meidinger, *supra* note 29, at 835.

57. *Id.*

citizen suits primarily act as a form “of judicial review of administrative action.”⁵⁸ When government agencies fail to enforce regulatory laws, citizens are free to usurp the role of “private attorneys general” and seek to compel remedial action.⁵⁹ Citizen suit provisions thereby allow private litigants to “bypass[] the administrative rule-making process and resulting judicial deference to agency interpretations.”⁶⁰

The Clean Air Act and the Endangered Species Act represent two environmental statutes that contain citizen suit provisions.⁶¹ Both have withstood constitutional challenges and are arguably constitutionally sound. The Clean Air Act was the first to incorporate the “modern civil suit provision” and since then, “almost all major environmental statutes have included citizen suit provisions that closely model those in the Clean Air Act.”⁶²

1. Clean Air Act

The Clean Air Act of 1970 was enacted shortly after the first Earth Day was recognized.⁶³ Professor Joseph Sax, of the University of Michigan Law School, previously initiated the citizen suit provision successfully “to incorporate a citizen’s right to litigate to protect environmental and public trust resources into the Michigan Environmental Protection Act of 1969.”⁶⁴ Section 304 of the Clean Air Act closely mirrors Sax’s provision, authorizing citizens to bring suit against the EPA for “failing to perform a mandatory duty . . . and against members of the regulated public for violating air pollution control requirements under the Act.”⁶⁵ In enacting the Clean Air Act, Congress explicitly intended for the role of citizen enforcement to supplement federal and state environmental enforcement.⁶⁶ The context for this decision is important. The legislative histories of both the Clean Air and Clean Water Acts show that there was “considerable skepticism, if not

58. *Id.* at 836.

59. *Id.* at 837.

60. 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, 63 (2014).

61. See Kevin T. Haroff, *Can Constitutional Standing Arguments Restrain Citizen-Suit Enforcement of Federal Environmental Laws?*, WASH. LEGAL FOUND. (Sept. 8, 2017), <https://www.wlf.org/2017/09/08/publishing/can-constitutional-standing-arguments-restrain-citizen-suit-enforcement-of-federal-environmental-laws/> (“Virtually every major federal environmental statute allows for some degree of private-party enforcement.”)

62. Seidenfeld & Nugent, *supra* note 30, at 283–84.

63. Boyer & Meidinger, *supra* note 29, at 844.

64. Coplan, *supra* note 60, at 65.

65. Miller & Dorner, *supra* note 17, at 406; Clean Air Act § 304, 42 U.S.C. § 7604.

66. Mintz, *supra* note 55.

despair, over the prospect of effective government enforcement.”⁶⁷ However, there was comparable wariness towards the broader forms of citizen enforcement that were also under consideration during that time.⁶⁸

Section 304 gives environmental plaintiffs an opportunity to file suit, but requires sixty days’ notice to the EPA, the state, and the alleged violator, so that either the EPA or the state can act before the suit is filed.⁶⁹ The government can interfere at this point, which effectively bars the citizen suit from proceeding.⁷⁰ Courts are required to defer to the agency’s comments as to whether their action or lack of action fails to comply with the statute.⁷¹ Successful plaintiffs may receive attorney’s fees, but a court has little power to do anything more than to order compliance.⁷²

Most environmental statutes that have been enacted since the Clean Air Act have included a citizen suit provision that closely mirrors section 304.⁷³ The Federal Water Pollution Control Act Amendments and the Clean Water Act both “incorporated and slightly modified the Clean Air Act version of the citizen suit.”⁷⁴

2. Endangered Species Act

The Endangered Species Act (“ESA”) was passed in 1973 as part of a broad range of environmental protections and policies proposed during the Nixon administration.⁷⁵ Section 11 subsection (g) of the ESA provides that “any person may commence a civil suit on his own behalf . . . to enjoin any person, including the United States . . . who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof.”⁷⁶ Citizens interested in filing a citizen suit under the ESA must provide sixty days of notice to the agency that is allegedly violating the statute.⁷⁷

67. Boyer & Meidinger, *supra* note 29, at 846.

68. *Id.*

69. Miller & Dorner, *supra* note 17, at 406; 42 U.S.C. § 7604(b).

70. Seidenfeld & Nugent, *supra* note 30, at 284; 42 U.S.C. § 7604(b)(1)(B).

71. Seidenfeld & Nugent, *supra* note 30, at 284.

72. *Id.* at 287.

73. *Id.* at 283–84.

74. Coplan, *supra* note 60, at 66.

75. Gabby Raymond, *Here’s Why the Endangered Species Act Was Created in the First Place*, TIME (July 23, 2018, 7:06 PM), <https://time.com/5345913/endangered-species-act-history/>.

76. Endangered Species Act § 11(g), 16 U.S.C. § 1540(g)(1)(A).

77. SARAH MATSUMOTO ET AL., CITIZENS’ GUIDE TO THE ENDANGERED SPECIES ACT 43 (2003), https://earthjustice.org/sites/default/files/library/reports/Citizens_Guide_ESA.pdf.

Environmental groups claim that the citizen-suit provision of the ESA has been instrumental in protecting threatened and endangered species.⁷⁸ Former U.S. Representative Norm Dicks went so far as to declare the ESA as “the strongest and most effective tool we have to repair the environmental harm that is causing a species to decline.”⁷⁹ However, the history of the ESA has not been without controversy. The citizen-suit provision was almost entirely negated in 2001 when “the budget for the Interior Department included a provision to forbid citizens from filing lawsuits to enforce mandatory listing and critical habitat deadlines in the ESA.”⁸⁰

The Trump administration also ushered in new proposals for legislation concerning the ESA.⁸¹ The ESA provides that in listing endangered species, determinations should be made based “solely on the basis of the best scientific and commercial data available.”⁸² Importantly, the ESA further provides that in designating critical habitat for endangered or threatened species, agencies may consider not only scientific data, but also “the economic impact, the impact on national security, and any other relevant impact.”⁸³ The legislative intent clearly indicates that economic impact was not to be considered in listing species, but only for designating critical habitat. However, in 2018, legislators proposed adding “economic considerations into the calculus on adding or keeping species on the ‘endangered’ or ‘threatened’ list, among other changes.”⁸⁴

B. Challenges to Environmental Citizen Suit Provisions

The Supreme Court has viewed citizen suits with “overwhelming hostility.”⁸⁵ Critics have questioned whether citizen suits unconstitutionally impinge on the power of the executive under Article II.⁸⁶ Former Supreme Court Justice Antonin Scalia took issue with citizen suits in relation to standing doctrine, using it “as a basis to deny standing for private plaintiffs who failed to suffer individual injuries

78. *Id.*; see also Raymond, *supra* note 75 (stating the legislation “saved the Bald Eagle, the Gray Wolf and the Peregrine Falcon, and is credited with saving 99% of the more than 1,600 species protected by the law.”)

79. Raymond, *supra* note 75.

80. MATSUMOTO ET AL., *supra* note 77, at 45.

81. Raymond, *supra* note 75.

82. 16 U.S.C. § 1533(b)(1)(A).

83. *Id.* § 1533(b)(2).

84. Raymond, *supra* note 75.

85. Miller & Dorner, *supra* note 17, at 404.

86. *Id.* at 407.

from those violations.”⁸⁷ To establish standing, a citizen plaintiff must prove that “the defendant’s violation is causally related to a concrete injury he suffers.”⁸⁸

The Clean Water Act’s citizen suit provision was limited in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, with the Supreme Court defining “any citizen” as “a person or persons having an interest which is or may be adversely affected.”⁸⁹ The Supreme Court continues to require that an alleged injury is “concrete and particularized” in order to establish standing for environmental citizen suits.⁹⁰ There is still an open question as to how lower federal judges at the trial court level will apply the test for standing that will give plaintiffs an opportunity to sue using a citizen suit provision.⁹¹

In addition to standing, critics and scholars also attack citizen suit provisions on the ground that they violate Article II of the U.S. Constitution, the Vesting and Appointments Clauses.⁹² Article II vests “[t]he executive Power . . . in a President of the United States of America.”⁹³ An amicus curiae brief filed in a Michigan Clean Air Act case argues that the executive power includes the power to enforce laws, and that citizen suit provisions unconstitutionally divest this power from the president to confer it to private citizens or citizen groups.⁹⁴

Another issue with citizen suits is the question of damages. Plaintiffs to citizen suits can “seek settlement agreements that provide compliance orders, [supplemental environmental projects (“SEPs”)], monetary penalties, and . . . attorneys’ fees.”⁹⁵ But citizen suit provisions that allow for greater damages awarded to plaintiffs call into question the purpose and the justification for citizen suits in the first place.

87. *Id.*; see also *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 564 (1992) (holding that “[s]uch ‘some day’ intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the ‘actual or imminent’ injury that our cases require”).

88. Seidenfeld & Nugent, *supra* note 30, at 285.

89. 528 U.S. 167, 174 (2000) (citing 13 U.S.C. § 1365(g)).

90. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 334 (2016).

91. Haroff, *supra* note 61.

92. William M. Droze & Viktoriia De Las Casas, *Amicus Briefing Suggests Citizen Suits Are Unconstitutional*, TROUTMAN PEPPER HAMILTON SANDERS LLP (Aug. 17, 2020), <https://www.environmentallawandpolicy.com/2020/08/amicus-briefing-suggests-citizen-suits-are-unconstitutional/#page=1>.

93. U.S. CONST. art. II, § 1.

94. Droze & De Las Casas, *supra* note 92; see also Brief of Richard Epstein and Jeremy Rabkin as Amici Curiae in Support of Plaintiff United States of America at 2–5, *United States v. DTE Energy Co.*, No. 10-cv-13101 (6th Cir. July 30, 2020), https://legacy-assets.eenews.net/open_files/assets/2020/08/07/document_gw_03.pdf.

95. Seidenfeld & Nugent, *supra* note 30, at 287.

VI. UNCONSTITUTIONAL CITIZEN ENFORCEMENT CLAUSES

A. *The Texas Heartbeat Act*

In May 2021, the Texas governor signed Senate Bill 8, also known as “The Heartbeat Act,” which bans abortions after six weeks of pregnancy, or “upon the detection of cardiac activity in embryos.”⁹⁶ On September 1, 2021, the Act took effect.⁹⁷ This law makes it increasingly more difficult for pregnant persons to obtain an abortion, for many do not know that they are even pregnant until well after the six-week mark.⁹⁸ For reference, the date of fetal viability—when a fetus is deemed capable of living outside the uterus—is usually between “twenty-two to twenty-four weeks after gestation.”⁹⁹ While there is nothing new or groundbreaking about southern states attempting to restrict access to abortion services,¹⁰⁰ the Texas Heartbeat Act goes beyond simply relying on public officials to enforce the law and instead elevates the role of private citizens to enforcement officers.¹⁰¹ Any private citizen can bring suit against someone who performs an abortion in the state after detection of cardiac activity, or, alternatively, against someone who “aids or abets’ anyone getting an abortion in Texas after that period or anyone who *intends* to aid or abet that process.”¹⁰² The phrase “aid or abet” is ill-defined, and lawyers are unsure of how far the statute will reach.¹⁰³ Clearly

96. Texas Heartbeat Act, S.B. 8, 87th Leg., Reg. Sess. ch. 62, § 3 (2021) (codified at TEX. HEALTH & SAFETY CODE ANN. §§ 171.201–.212 (West 2022)); Sarah McCammon, *What the Texas Abortion Ban Does—and What It Means for Other States*, NPR (Sept. 1, 2021, 8:48 AM), <https://www.npr.org/2021/09/01/1033202132/texas-abortion-ban-what-happens-next>; Peter Holley & Dan Solomon, *Your Questions About Texas’s New Abortion Law, Answered*, TEX. MONTHLY (Oct. 7, 2021), <https://www.texasmonthly.com/news-politics/texas-abortion-law-explained/>.

97. Richard D. Rosen, *Deterring Pre-Viability Abortions in Texas Through Private Lawsuits*, 54 TEX. TECH L. REV. 115, 120 (2021).

98. Holley & Solomon, *supra* note 96 (“Senate Bill 8[, otherwise known as the Texas Heartbeat Act.] implements some of the broadest restrictions on abortion in the nearly fifty years since the U.S. Supreme Court decided the landmark Texas case *Roe v. Wade*, which found a constitutional right to privacy that included the right to have an abortion.”).

99. Rosen, *supra* note 97, at 121.

100. See *State Facts About Abortion: Texas*, GUTTMACHER INST. (June 2022), <https://www.guttmacher.org/fact-sheet/state-facts-about-abortion-texas>. Other restrictions on abortion in Texas include mandatory state-directed counseling, twenty-four-hour waiting periods, parental consent for minors, and burdensome standards that abortion clinics must meet “related to their physical plant, equipment and staffing.” *Id.*

101. McCammon, *supra* note 96.

102. Holley & Solomon, *supra* note 96; see also Rosen, *supra* note 97, at 121 (alteration in original) (citation omitted) (“The Act creates a civil cause of action for [a]ny person[] other than an officer or employee of a state or local governmental entity.”).

103. Holley & Solomon, *supra* note 96.

encompassed by the law, are the doctors who provide the abortions, but what about someone who drives a patient to the clinic, or a family member who helps pay for the procedure? By financially incentivizing each lawsuit, the statute encourages widespread enforcement of the law by offering “a bounty of *at least* \$10,000 per violation proven, payable by the abortion provider or assister to the person who sued them.”¹⁰⁴ The law explicitly forbids state officers from enforcing it, which in effect sidesteps the state action problem and evades judicial review on that basis.¹⁰⁵ Plaintiffs who sue successfully are eligible to receive a minimum of \$10,000 in statutory damages, akin to “a sort of bounty.”¹⁰⁶ The Supreme Court declined to issue a stay of the law in early September 2021, claiming that the plaintiffs “have not carried their burden” on the “complex and novel antecedent procedural questions.”¹⁰⁷

Almost immediately after the Texas Heartbeat Act went into effect on September 1, lawsuits against abortion providers began to arise.¹⁰⁸ The first lawsuit was filed by Oscar Stilley—a former Arkansas lawyer who had been disbarred¹⁰⁹—against Dr. Alan Braid, a San Antonio doctor who “provided an abortion to a woman who, though still in her first trimester, was beyond the state’s new limit.”¹¹⁰ Stilley had no connection to either the doctor or the patient and told press that he was merely “curious to see how a suit such as his would play out in the courts.”¹¹¹ Braid had been practicing obstetrics and gynecology in San Antonio since before *Roe v. Wade* recognized abortion as a constitutional right in 1973.¹¹² For Braid, the new Texas statute limited the services he provided by eighty percent, setting back women’s health care to how it

104. Julia Kaye & Marc Hearron, *Even People Who Oppose Abortion Should Fear Texas’s New Ban*, WASH. POST (July 10, 2021, 8:56 AM), <https://www.washingtonpost.com/outlook/2021/07/19/texas-sb8-abortion-lawsuits/>.

105. Ian Millhiser, *Texas’s Anti-Abortion Law Is Back at SCOTUS. Here’s What’s Different This Time Around.*, VOX (Oct. 19, 2021, 8:30 AM), <https://www.vox.com/2021/10/19/22728389/supreme-court-doj-texas-sb8-abortion-jackson>; *Whole Woman’s Health v. Jackson*, 142 S. Ct. 522, 545–52 (2021) (Sotomayor, J., dissenting).

106. Holley & Solomon, *supra* note 96.

107. *See Whole Woman’s Health v. Jackson*, 141 S. Ct. 2494, 2495 (2021) (denying petitioner’s application for injunctive relief).

108. Holley & Solomon, *supra* note 96.

109. *Id.*

110. Alan Braid, *Opinion: Why I Violated Texas’s Extreme Abortion Ban*, WASH. POST (Sept. 18, 2021, 4:01 PM), <https://www.washingtonpost.com/opinions/2021/09/18/texas-abortion-provider-alan-braid/>.

111. Holley & Solomon, *supra* note 96.

112. Braid, *supra* note 110; *see also Roe v. Wade*, 410 U.S. 113, 153 (1973) (finding the right to privacy as protected in the Fourteenth Amendment to be “broad enough to encompass a woman’s decision whether or not to terminate her pregnancy”).

was pre-*Roe*, when he first began practicing in 1972.¹¹³ Stille's suit against Braid sought \$100,000, testing the limits of the broad statute.¹¹⁴

Authored by former Texas Solicitor General Jonathan Mitchell, the Texas Heartbeat Act was written to intentionally circumvent judicial review, as courts were at the time still bound by the viability standard established in *Roe* and *Casey*.¹¹⁵ In her dissent, Justice Sotomayor opposed declining the stay, writing that the structure of the law "was designed to make it more complicated for courts to enjoin the law's enforcement on a statewide basis."¹¹⁶ A Texas trial court temporarily halted the Texas Heartbeat Act,¹¹⁷ but the United States Court of Appeals for the Fifth Circuit formally blocked that decision on October 14, 2021.¹¹⁸ The Fifth Circuit then asked the Supreme Court of Texas to decide whether state officials have the authority to enforce the law, which the court answered in the negative, holding that state officials have no power to enforce the law and thus could not be sued.¹¹⁹

Criminalizing abortion and using tort law to restrict access to abortion providers has been part of the battle for reproductive rights for several years. For example, the Fifth Circuit decided *Okpalobi v. Foster* in 2001, after the Louisiana legislature enacted a tort law that allowed abortion recipients to bring suit against their abortion provider "simply

113. Braid, *supra* note 110.

114. Holley & Solomon, *supra* note 96.

115. Christine Vestal, *Citizen Enforcement of Texas Abortion Ban Could Spread to Other Laws*, PEW CHARITABLE TRUSTS (Sept. 23, 2021), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/09/23/citizen-enforcement-of-texas-abortion-ban-could-spread-to-other-laws>; *see also Roe*, 410 U.S. at 163 (explaining that the State's interest in fetal life begins at viability because it is not until then that the fetus "presumably has the capability of meaningful life outside the mother's womb"); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846, 877–79 (1992) (reaffirming *Roe*'s central holding but establishing a new standard to determine whether an undue burden is placed on a woman seeking an abortion).

116. *In re Whole Women's Health*, 142 S. Ct. 701, 702 (2022) (Sotomayor, J., dissenting) (disagreeing with Court's denial for writ of mandamus); *see also* Adam Liptak, *Supreme Court Lets Texas Abortion Law Stay in Effect, for Now*, N.Y. TIMES (Jan. 20, 2022), <https://www.nytimes.com/2022/01/20/us/politics/texas-abortion-law-supreme-court.html>.

117. *United States v. Texas*, 566 F. Supp. 3d 605, 691 (W.D. Tex. 2021), *cert. granted*, 142 S. Ct. 14 (2021), *vacated by* No. 21-50949, 2021 WL 4786458, at *1 (5th Cir. Oct. 14, 2021) (*per curiam*) and *cert. dismissed*, 142 S. Ct. 522 (2021).

118. *Texas*, 2021 WL 4786458 at *1; *see also* Millhisser, *supra* note 105.

119. *Whole Woman's Health v. Jackson*, 23 F.4th 380, 387–89 (5th Cir. 2022), *certifying questions to* 642 S.W.3d 569, 573–83 (Tex. 2022); *see also* Liptak, *supra* note 116; Kate Zernike & Adam Liptak, *Texas Supreme Court Shuts Down Final Challenge to Abortion Law*, N.Y. TIMES (Mar. 11, 2022), <https://www.nytimes.com/2022/03/11/us/texas-abortion-law.html>.

for having performed an abortion.”¹²⁰ This made abortion providers skeptical of providing abortion services out of fear that they would be held liable for having done their job.¹²¹ Abortion providers and doctors immediately challenged the Louisiana law in federal court, where they “prevailed in district court and that decision was affirmed by a two-member panel of the Fifth Circuit.”¹²² However, the Fifth Circuit then found, sitting en banc, that the doctors had failed to establish standing to sue any state officials, since state officials were not the ones enforcing the law.¹²³ By side-stepping state authorized enforcement, the Louisiana legislature recognized then, just as the Texas legislature recognizes now in the Texas Heartbeat Act, that to target arguably constitutionally protected rights, the most effective way to keep laws out of courts, is to put the power of enforcement in the hands of private citizens.

Texas has also been home to the “sanctuary city for the unborn,” after the city of Lubbock voted affirmatively on an ordinance to prohibit abortions within the city limits.¹²⁴ Shortly after a Planned Parenthood opened its doors in Lubbock, Texas, the movement to outlaw abortion saw a huge push from Christian conservatives.¹²⁵ Lubbock’s local ordinance not only outlaws abortion but also gives family members of an abortion patient the “power to sue anyone who helps a patient terminate” a pregnancy.¹²⁶

The Texas Heartbeat Act puts the law in the hands of citizens by empowering anti-abortion individuals and groups to enforce it.¹²⁷ But it also “takes the unprecedented step” of giving a cash reward to successful bounty hunters.¹²⁸ Groups such as Texas Right to Life have already

120. Okpalobi v. Foster, 244 F.3d 405, 409 (5th Cir. 2001) (en banc); Maya Manian, *Privatizing Bans on Abortion: Eviscerating Constitutional Rights Through Tort Remedies*, 80 TEMP. L. REV. 123, 125 (2007).

121. Manian, *supra* note 120, at 125.

122. *Id.*; see also Okpalobi v. Foster, 981 F. Supp. 977, 988 (E.D. La. 1998) (granting motion for preliminary injunction), *aff’d*, 190 F.3d 337 (5th Cir. 1999), *rev’d on reh’g en banc*, 244 F.3d 405 (5th Cir. 2001).

123. Okpalobi, 244 F.3d at 427–29; see also Manian, *supra* note 120 at 125.

124. Lubbock, Tex., Ordinance 2021-Initiative 1 (May 1, 2021); Shannon Najmabadi, *Lubbock Votes to Become the State’s Largest “Sanctuary City for the Unborn”*, TEX. TRIB. (May 1, 2021, 10:00 PM), <https://www.texastribune.org/2021/05/01/lubbock-abortion-vote-sanctuary-unborn/>.

125. See Najmabadi, *supra* note 124.

126. Claire Lampen, *What’s Next for the Extreme Texas Abortion Ban?*, VOX MEDIA, LLC (Jan. 21, 2022), <https://www.thecut.com/2022/01/texas-bans-abortion-at-6-weeks-sets-bounty-on-providers.html>; Lubbock, Tex., Ordinance 2021-Initiative 1 F(1).

127. McCammon, *supra* note 96; see also Texas Heartbeat Act, S.B. 8, 87th Leg., Reg. Sess. ch. 62, § 3 (Tex. 2021) (codified at TEX. HEALTH & SAFETY CODE ANN. §§ 171.201–.212 (West 2022)).

128. Lampen, *supra* note 126; see also TEX. HEALTH & SAFETY CODE ANN. § 171.208.

begun setting up websites where people can anonymously report anyone that they believe violated the law.¹²⁹ The law was created with the express design to be “difficult to block in court,” regardless of the status of abortion as a fundamental right.¹³⁰

On September 9, 2021, the Department of Justice filed a lawsuit against Texas for violating abortion patients’ rights to reproductive freedom and barring federal employees who provide abortions from doing their jobs.¹³¹ Nearly a month later, a temporary injunction was granted, and Texas quickly appealed to the Supreme Court.¹³² The Supreme Court upheld the law but granted providers standing to challenge it in federal court.¹³³ However, in January 2022, the Court once again ruled against abortion providers in favor of the state.¹³⁴

B. *The Harm*

Since the Texas Heartbeat Act took effect on September 1, 2021, the number of abortions performed in Texas has dropped dramatically.¹³⁵ A lack of abortion access can be life threatening.¹³⁶ One woman in North Texas who discovered that she was pregnant after the six-week period, found herself desperately “researching the clothes hanger.”¹³⁷ Patients seeking to obtain an abortion after six weeks must leave the state to get an abortion, which is not always economically feasible.¹³⁸ Already in Texas, about 900,000 people who are able to reproduce live more than 150 miles from their nearest abortion clinic and the new restrictions make it even harder to access a provider.¹³⁹ A forty-two year old woman told Dr. Alan Braid that in order to get an abortion in the nearest state—

129. McCammon, *supra* note 96.

130. Levine, *supra* note 27.

131. Complaint at 1–3, *United States v. Texas*, 566 F. Supp. 3d 605 (W.D. Tex. 2021) (No. 21-cv-796); *see also* Lampen, *supra* note 126.

132. *Texas*, 566 F. Supp. 3d 605, *cert. granted before judgment*, 142 S. Ct. 14 (2021) (mem.); *see also* Lampen, *supra* note 126.

133. Lampen, *supra* note 126.

134. *Id.*; *In re Whole Woman’s Health*, 142 S. Ct. 701 (2022) (denying petition for writ of mandamus).

135. Vestal, *supra* note 115.

136. Anusha Ravi, *Limiting Abortion Access Contributes to Poor Maternal Health Outcomes*, CTR. FOR AM. PROGRESS (June 13, 2018), <https://www.americanprogress.org/article/limiting-abortion-access-contributes-poor-maternal-health-outcomes/>.

137. Elizabeth Findell, *Texas Abortion Law Gives a Glimpse into a Post-Roe World*, WALL ST. J. (Nov. 3, 2021), https://www.wsj.com/articles/texas-abortion-law-gives-a-glimpse-of-a-post-roe-world-11635942617?mod=hp_lead_pos6.

138. *See* Braid, *supra* note 110.

139. *Abortion in Texas*, ACLU TEX. (Dec. 10, 2021), <https://www.aclutx.org/en/know-your-rights/abortion-texas>.

Oklahoma—she would have to secure childcare for her four kids, three of whom are under twelve years of age; make arrangements to take off work; and then drive over eighteen hours round trip.¹⁴⁰ Other anti-abortion state legislatures have quickly moved to propose similar citizen enforcement clauses to their own abortion restrictions.¹⁴¹ South Dakota Governor Kristi Noem unveiled an abortion ban proposal that mimics the Texas Heartbeat Act, almost exactly in its enforcement structure.¹⁴² Perhaps even more concerning, the states that were once equipped to deal with the outpouring of Texas abortion patients, such as Oklahoma, Arkansas, and Louisiana, are among those that had “laws already on the books to immediately outlaw most abortions” as soon as *Roe* and *Casey* were overturned.¹⁴³

But the right to have an abortion is not the only right that lawmakers are interested in putting in the hands of citizens. Legal scholars have correctly predicted that the language used to allow for citizen lawsuits against abortion providers will translate into other types of laws.¹⁴⁴ For example, a Tennessee law enacted in 2021 “allows students, parents or teachers to sue a public school and collect damages . . . if the school allows students to use the same bathroom, sleeping quarters or changing facility as people of the opposite sex.”¹⁴⁵ In Florida, a new statute amending a K-12 spending bill similarly allows citizens to sue schools that seek to accommodate transgender student athletes.¹⁴⁶ Moreover, in several jurisdictions across the country, bills are being drafted that would authorize parents to sue schools if critical race theory is taught or even mentioned.¹⁴⁷ U.S. Solicitor General Elizabeth Prelogar has argued that

140. Braid, *supra* note 110. At the time Dr. Braid wrote his op-ed for the *New York Times*, abortion was still legal in Oklahoma. *See id.* As of June 2022, Oklahoma enacted stringent abortion laws that mirror those of Texas. Eleanor Klibanoff, *With the End of Roe, Texans Will Have to Travel Long Distances for Legal Abortions*, TEX. TRIB. (June 24, 2022, 9:00 AM), <https://www.texastribune.org/2022/06/23/supreme-court-abortion-roe-dobbs-texas/>.

141. Vestal, *supra* note 115 (“At least 14 other states could propose similar legislation . . . Alabama, Arkansas, Georgia, Idaho, Iowa, Kentucky, Louisiana, Mississippi, Missouri, North Dakota, Ohio, Oklahoma, South Carolina and Tennessee.”).

142. *Noem Unveils Abortion Ban, Mimics Texas’ Private Enforcement*, ASSOCIATED PRESS (Jan. 21, 2022), <https://apnews.com/article/health-kristi-noem-texas-south-dakota-legislature-acc6e5c1d0f8d3cb16bbf74cfe2217bf>.

143. Findell, *supra* note 137. As of June 2022, the nearest abortion clinic to Texas is in New Mexico, a twelve-hour drive from Houston and a ten-hour drive from Dallas. *See* Klibanoff, *supra* note 140.

144. Vestal, *supra* note 115.

145. *Id.*

146. *Id.*

147. Jon Michaels & David Noll, *We Are Becoming a Nation of Vigilantes*, N.Y. TIMES (Sept. 4, 2021), <https://www.nytimes.com/2021/09/04/opinion/texas-abortion-law.html>.

“no constitutional right is safe” if the Texas law is allowed to stand by the Supreme Court.¹⁴⁸

Law professors Jon Michaels and David Noll, who have been tracking private enforcement laws, predict that there is reason to expect that political factions will push the limits of private enforcement to regulate activities such as “election monitoring and . . . immigration enforcement,” and perhaps even to bring “damages against people who engage in activities like handing out water to minority voters waiting in hourslong lines to vote.”¹⁴⁹ If that is the case, then what is to stop states on the other side of the equation from passing laws that permit citizens to sue and collect bounty on gun owners?¹⁵⁰ The possibilities for using citizen suits to threaten any right disliked by a state or locality are endless.¹⁵¹

Another potential harm resulting from an excess of citizen enforcement is the fact that one abortion provider can be sued multiple times for a single abortion.¹⁵² The statute encourages “frivolous lawsuits,” and there is very little to lose for plaintiffs who wish to take advantage of the law.¹⁵³ Even “doctors who have never performed an abortion are now limiting care discussions with their patients, afraid they could be misinterpreted or falsely accused of aiding in an abortion.”¹⁵⁴ Many abortion providers are “already underfunded,” and the threat of several lawsuits against them “could prove financially ruinous.”¹⁵⁵

Texas already had a “web of medically unnecessary abortion restrictions”¹⁵⁶ in place before the passage of the Texas Heartbeat Act, including a mandatory twenty-four-hour waiting period, a sonogram that is verbally explained to the patient, and parental consent for minors.¹⁵⁷ People of color face disproportionate harm from these burdens, and the Texas Heartbeat Act is no different.¹⁵⁸ Due to “racialized income disparities” and “inequitable access to medical care,” people of color are “more likely to need abortion care [and] are less likely to be able to afford

148. Transcript of Oral Argument at 46, *United States v. Texas*, 142 S. Ct. 522 (2021); John Wagner et al., *Biden Administration Asserts ‘No Constitutional Right Is Safe’ if Texas Law to Stand*, WASH. POST (Nov. 1, 2021), <https://www.washingtonpost.com/politics/2021/11/01/supreme-court-texas-abortion-live-updates/>.

149. Michaels & Noll, *supra* note 147.

150. Millhisser, *supra* note 105.

151. Kaye & Hearron, *supra* note 104.

152. *Id.*

153. Findell, *supra* note 137.

154. *Id.*

155. Lampen, *supra* note 126.

156. Kaye & Hearron, *supra* note 104.

157. *State Facts About Abortion: Texas*, *supra* note 100.

158. Kaye & Hearron, *supra* note 104.

out-of-state travel to obtain that care.”¹⁵⁹ Because of these insurmountable barriers, “countless Texans have been forced to carry pregnancies against their will.”¹⁶⁰ The Texas Heartbeat Act’s “tragic symbolism with fugitive slave laws reflects the lengths lawmakers will go and have gone to suppress the agency and liberty of vulnerable people.”¹⁶¹

Finally, abortion providers who seek to challenge the law itself as unconstitutional are only able to get into a federal court by violating the law and subsequently defending themselves.¹⁶² The national American Civil Liberties Union (“ACLU”), the ACLU of Texas, and other partners filed a federal lawsuit on July 13, 2021, on behalf of abortion providers to challenge the Texas Heartbeat Act before it went into effect.¹⁶³ This challenge appeared before the U.S. Supreme Court three times in three months until finally on December 10, 2021, the Court dismissed “the most significant part of the ACLU’s case . . . holding that the plaintiffs could not bring suit against the classes of state judges and clerks or the state attorney general.”¹⁶⁴ In only allowing the case to proceed against the Texas Medical Board and other licensing authorities, the Court denied widespread relief, essentially allowing “bounty-hunter lawsuits” to continue to be filed.¹⁶⁵ Instead of plaintiffs having to establish standing to bring suit against abortion providers, abortion providers are being forced to find a way to establish standing to challenge a law that threatens not only the rights of pregnant people across Texas but also their jobs and financial security.¹⁶⁶

159. *Id.*

160. *Whole Woman’s Health v. Jackson*, ACLU (Jan. 21, 2022), <https://www.aclu.org/cases/whole-womans-health-v-jackson>.

161. Michele Goodwin, *Pregnancy and the New Jane Crow*, 53 CONN. L. REV. 543, 545 (2021). Goodwin labels this era of “criminal law enforcement of women’s reproduction” as “the new *Jane Crow*,” symbolizing “the connection between the blatant disregard of civil liberties and constitutional protections of African Americans during the post-Reconstruction period and the current plight of women.” *Id.* at 562.

162. Todd Ruger, *Key Justices Skeptical of Texas Abortion Law Structure*, CQ ROLL CALL (Nov. 2, 2021, 4:18 PM), <https://rollcall.com/2021/11/01/key-justices-skeptical-of-texas-abortion-law-structure/>.

163. *Whole Woman’s Health v. Jackson*, *supra* note 160.

164. *Id.*

165. *Id.*

166. Scott Pilutik, *The Right Is Waging Its Culture War by Turning Its Base into Bounty-Hunters*, SLATE (Sept. 20, 2021, 12:03 PM), <https://slate.com/news-and-politics/2021/09/s-b-8-texas-republicans-conservative-culture-wars.html>; *cf.* Okpalobi v. Foster, 244 F.3d 405, 426–28 (5th Cir. 2001) (en banc) (holding abortion providers lacked standing to challenge a Louisiana statute making them liable to patients for damages occasioned by abortions because defendant state officials lacked a causal connection to and the ability to redress the providers’ injuries); *K.P. v. LeBlanc*, 729 F.3d 427, 437 (5th Cir. 2013) (holding abortion providers lacked standing under 42 U.S.C. § 1983 to challenge a Louisiana statute making

VII. WHERE IS THE LINE?

Empowering citizens to compel government agencies to take environmental protections seriously and empowering citizens to sue and collect punitive damages from doctors who provide medical abortions seem like two very different issues, but the legal strategy behind the two movements is eerily similar. The ESA has long been heralded “as a win for conservation at a time when the environment was seen by many as a non-partisan issue.”¹⁶⁷ Over time, however, environmental activism has become much more partisan than it was in the 1970s when Richard Nixon used it to propel his presidential campaign.¹⁶⁸ The growing gap between political parties and their views on the issues of climate change and abortion has created a divide that citizen enforcement cannot bridge.¹⁶⁹ To use the “power of private citizens to reform unconstitutional practices,”¹⁷⁰ there must be some consensus of what constitutes an unconstitutional practice. Deputizing citizens on a state-by-state basis will only widen the gap between political factions.

The Texas Heartbeat Act has expanded “the concept of a civil lawsuit” to keep “providers from using the constitutional right to an abortion under [*Roe v. Wade*] as a legal defense” even before *Roe* was overturned.¹⁷¹ Broadly speaking, the main difference between environmental citizen suit provisions and the Texas Heartbeat Act is that while environmental statutes privatize actions that seek to protect the country’s natural resources, the Act privatizes discriminatory lawsuits that seek to circumvent constitutional protections that were once

abortion providers strictly liable for damages because defendant state officials were not charged with enforcing the “strict liability” provision and could not redress any alleged injury).

167. Raymond, *supra* note 75.

168. *See id.*

169. *See* Brian Kennedy et al., *Americans Divided over Direction of Biden’s Climate Change Policies*, PEW RSCH. CTR. (July 14, 2022), <https://www.pewresearch.org/science/2022/07/14/americans-divided-over-direction-of-bidens-climate-change-policies/> (noting partisan gaps in several metrics relating to climate change); *Majority of Public Disapproves of Supreme Court’s Decision to Overturn Roe v. Wade*, PEW RSCH. CTR. (July 6, 2022), <https://www.pewresearch.org/politics/2022/07/06/majority-of-public-disapproves-of-supreme-courts-decision-to-overturn-roe-v-wade/#americans-views-of-abortion> (noting a forty percent gap between Democrats and Republicans on whether abortion should be legal).

170. Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384, 1387, 1409 n.106 (2000).

171. Erin Douglas & Carla Astudillo, *We Annotated Texas’ Near-Total Abortion Ban. Here’s What the Law Says About Enforcement*, TEX. TRIB. (Sept. 10, 2021, 4:00 PM), <https://www.texastribune.org/2021/09/10/texas-abortion-law-ban-enforcement/>.

afforded under federal law.¹⁷² Other key differences that separate the Texas statute from the constitutional citizen suit provisions found in environmental statutes include the cash reward, the notice requirements, and the standing requirements.

A. *Privatizing Discrimination*

Texas has a long history of empowering citizens to carry out discriminatory laws as a means to get around the state action doctrine.¹⁷³ In 1923, as part of the Jim Crow laws, Texas enacted a law that banned Black Americans from voting in Democratic party primary elections.¹⁷⁴ The Supreme Court opinion that followed, authored by Justice Oliver Wendell Holmes, found that although private actions are otherwise justiciable, the statute itself was “contrary to the Fourteenth and Fifteenth Amendments.”¹⁷⁵ The Texas legislature responded with a new statute “that specifically delegated to political parties the power to determine ‘qualifications of voters in primary elections.’”¹⁷⁶ Much like they have done with the Texas Heartbeat Act, the legislature then sought to “take the state out of the equation” to continue carrying out discriminatory laws.¹⁷⁷ The Supreme Court analyzed the subsequent version of the voting law in 1944 when they decided *Smith v. Allwright*.¹⁷⁸ There, the Supreme Court “looked behind the law and ferreted out the trickery,” as then-counsel Thurgood Marshall remarked later.¹⁷⁹ The Court struck down the statute, holding that “[c]onstitutional rights would be of little value if they could be thus indirectly denied.”¹⁸⁰ The Supreme Court recognized that the Texas legislature was merely invoking private actions to evade state action doctrine and continue a practice of racial discrimination.¹⁸¹

The Texas Heartbeat Act is “a similar attempt by the state to privatize enforcement of state policy.”¹⁸² The Supreme Court today

172. Stefanie Lindquist, *Jim Crow Tactics Reborn in Texas Abortion Law, Deputizing Citizens to Enforce Legally Suspect Provisions*, CONVERSATION (Sept. 13, 2021, 8:13 AM), <https://theconversation.com/jim-crow-tactics-reborn-in-texas-abortion-law-deputizing-citizens-to-enforce-legally-suspect-provisions-167621>.

173. *Id.*

174. 1923 Tex. Gen. Laws 74.

175. *Nixon v. Herndon*, 273 U.S. 536, 540 (1927).

176. Lindquist, *supra* note 172.

177. *Id.*

178. *Id.*; *Smith v. Allwright*, 321 U.S. 649, 658–59 (1944).

179. THURGOOD MARSHALL, THURGOOD MARSHALL: HIS SPEECHES, WRITINGS, ARGUMENTS, OPINIONS, AND REMINISCENCES 169 (Mark V. Tushnet, ed., 2001).

180. *Smith*, 321 U.S. at 664.

181. *Id.* at 663–64.

182. Lindquist, *supra* note 172.

should again recognize that although it was written in a way to avoid constitutional review, the statute is merely a resurrection of Jim Crow tactics that seek to discriminate against both people who can get pregnant and people of color, who will disproportionately suffer the impacts of such legislation.

B. Cash Reward

The cash reward of at least \$10,000 per lawsuit provides a novel addition to the citizen enforcement context demonstrated by the Texas Heartbeat Act. The Clean Air Act and other environmental statutes only authorize citizen suits that seek two types of relief: penalty or injunction against a violative company and an action-forcing suit against the EPA to compel a nondiscretionary duty.¹⁸³ Even if a penalty fee is sought, plaintiffs are only afforded attorneys' fees and costs; "all penalties and damage awards go to the federal fisc."¹⁸⁴ The idea behind environmental citizen suits is that concerned citizens are given an opportunity to redress a public wrong that affects the well-being of society and the planet. Private citizens are deputized "for the purpose of solving systemic social problems,"¹⁸⁵ and the reward is that the government agency who is violating an environmental statute is enjoined from such violative behavior.

The Texas Heartbeat Act, on the other hand, offers an explicit cash reward to successful plaintiffs, to be paid by the defendant.¹⁸⁶ This bounty demarcates a huge departure from constitutional citizen suit provisions and harkens back to forms of vigilantism that seek to threaten individuals who act on their fundamental rights with limitless fines and incentives.

C. Notice Requirements

Environmental citizen suits require notice "to give the government . . . time to evaluate potential violations and commence their own enforcement actions."¹⁸⁷ Private litigants may only proceed once it is clear that there is no government enforcement underway.¹⁸⁸ On the other hand, people can be held liable under the Texas Heartbeat Act "whether or not they knew, or even 'should have known,' that they were helping

183. Boyer & Meidinger, *supra* note 29, at 848.

184. Gilles, *supra* note 170, at 1424.

185. *Id.*

186. Holley & Solomon, *supra* note 96.

187. Haroff, *supra* note 61.

188. *Id.*

someone obtain a prohibited abortion.”¹⁸⁹ Without a notice requirement, doctors and abortion providers are forced to operate either in open defiance or cloaked in secrecy.

D. Standing

Proponents of a citizen suit provision must first overcome challenges to standing. The Texas Heartbeat Act allows plaintiffs who have no “direct connection to have standing to sue, something typically required by tort law.”¹⁹⁰ Those who bring suit against an abortion provider do not even need to live in Texas or have any connection at all to the accused.¹⁹¹ In defending the statute, Texas Solicitor General Judd Stone has argued that plaintiffs “can demonstrate injury because they could experience ‘extreme outrage’ that could cause ‘psychological harm.’”¹⁹² But this loose threat of psychological trauma is a far cry from the concrete and particularized injury requirements as established and embraced by both the federal courts and the Texas Supreme Court.

In the environmental context, there is an “intimate connection between individuals and their own communities [that] enables citizens to concentrate on localized environmental problems.”¹⁹³ But Texas legislators have almost entirely upended standing doctrine in enacting the Texas Heartbeat Act, with the notion that “the statute itself . . . implicitly presumes an injury.”¹⁹⁴

There has been sharp criticism of allowing statutory grants of standing, with some commentators “noting that the definition of a cognizable right or injury is now nothing more than whatever the current inhabitants of the Supreme Court believe that it is.”¹⁹⁵ Without giving “the women whose rights are most directly affected”¹⁹⁶ any right of action in court, the statute circumvents “[o]ur constitutional guarantees,” which

189. Maggie Astor, *Here's What the Texas Abortion Law Says*, N.Y. TIMES (Sept. 9, 2021), <https://www.nytimes.com/article/abortion-law-texas.html>.

190. Levine, *supra* note 27.

191. Lampen, *supra* note 126.

192. 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/>.

193. E. Roberts & J. Dobbins, *The Role of the Citizen in Environmental Enforcement*, ENV'T L. INST. (Aug. 8, 2016), <https://www.eli.org/sites/default/files/eli-pubs/57aa3700d853b-themetheroleofcitizensinenvironmental-full.pdf>.

194. Pilutik, *supra* note 166.

195. Gilles, *supra* note 170, at 1416.

196. Wagner et al., *supra* note 148.

U.S. Solicitor General Prelogar argues “cannot be that easily subject to manipulation.”¹⁹⁷

VIII. CONCLUSION

Although drafters of the Texas Heartbeat Act intended their legislation to evade judicial review by emulating the citizen suit provisions contained in environmental statutes, because of key differences, the law remains unconstitutional and encourages a form of vigilantism that resembles bounty hunting more than regulatory law enforcement. To enlist private citizens to carry out the law requires a consensus as to what constitutes a moral wrongdoing. But the United States is a country of moral relativism, in which “beliefs about right and wrong, good and bad, not only vary greatly across time and contexts, but . . . their correctness is dependent on or relative to individual or cultural perspectives and frameworks.”¹⁹⁸ To empower citizens to take action against one another in the name of moral certainty is to circumvent the legal system that protects us all from discriminatory laws as mandated by the Fourteenth Amendment. The Supreme Court should recognize that it has the ability to address the statute itself, as it is nothing more than a ghost of Jim Crow.

197. Abigail Abrams, *Supreme Court Justices Sound a Skeptical Note over Texas Abortion Law*, TIME (Nov. 1, 2021, 5:29 PM), <https://time.com/6112472/supreme-court-texas-abortion/>.

198. See MARIA BAGHRAMIAN & J. ADAM CARTER, *Relativism*, in STANFORD ENCYCLOPEDIA OF PHIL. (Edward N. Zalta ed., rev. ed. 2022), <https://plato.stanford.edu/entries/relativism/#MorRel>.