No. 21A24

In the Supreme Court of the United States

WHOLE WOMAN'S HEALTH; ALAMO CITY SURGERY CENTER, P.L.L.C. D/B/A ALAMO WOMEN'S REPRODUCTIVE SERVICES; BROOKSIDE WOMEN'S MEDICAL CENTER, P.A. D/B/A BROOKSIDE WOMEN'S HEALTH CENTER AND AUSTIN WOMEN'S HEALTH CENTER; HOUSTON WOMEN'S CLINIC; HOUSTON WOMEN'S REPRODUCTIVE SERVICES; PLANNED PARENTHOOD CENTER FOR CHOICE; PLANNED PARENTHOOD OF GREATER TEXAS SURGICAL HEALTH SERVICES; PLANNED PARENTHOOD SOUTH TEXAS SURGICAL CENTER; SOUTHWESTERN WOMEN'S SURGERY CENTER; WHOLE WOMEN'S HEALTH ALLIANCE; ALLISON GILBERT, M.D.; BHAVIK KUMAR, M.D.; THE AFIYA CENTER; FRONTERA FUND; FUND TEXAS CHOICE; JANE'S DUE PROCESS; LILITH FUND, INCORPORATED; NORTH TEXAS EQUAL ACCESS FUND; REVEREND ERIKA FORBES; REVEREND DANIEL KANTER; MARVA SADLER,

Applicants,

v.

JUDGE AUSTIN REEVE JACKSON; PENNY CLARKSTON; MARK LEE DICKSON; STEPHEN BRINT CARLTON; KATHERINE A. THOMAS; CECILE ERWIN YOUNG; ALLISON VORDENBAUMEN BENZ; KEN PAXTON,

Respondents.

MEMORANDUM IN OPPOSITION TO EMERGENCY APPLICATION FOR WRIT OF INJUNCTION AND, IN THE ALTERNATIVE, TO VACATE STAYS OF DISTRICT COURT PROCEEDINGS

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There is no conceivable basis for subject-matter jurisdiction over any of the claims in this lawsuit. Litigants cannot challenge the constitutionality of a statute by suing the entire state judiciary and demanding an injunction that prevents every judge in the state from presiding over any case that might be filed under an allegedly unconstitutional law. *See Ex parte Young*, 209 U.S. 123, 163 (1908) ("[T]he right to enjoin an individual, even though a state official, from commencing suits . . . does not include the power to restrain a court from acting in any case brought before it, either of a civil or criminal nature. . . . [A]n injunction against a state court would be a violation of the whole scheme of our government."); *see also Bauer v. Texas*, 341 F.3d 352 (5th Cir. 2003). Nor can a litigant sue a defendant class of state-court clerks to prevent them from accepting documents that might be filed in lawsuits brought under a purportedly unconstitutional statute. *See Chancery Clerk of Chickasaw County v. Wallace*, 646 F.2d 151, 160 (5th Cir. 1981). The very suggestion that a litigant might challenge the constitutionality of a statute this way is preposterous, and the plaintiffs'[1] claims are unequivocally foreclosed by Article III's case-or-controversy requirement and the Eleventh Amendment[2]—as well as the binding precedent of this Court and the Fifth Circuit.

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1. For simplicity and ease of exposition, we will refer to the "applicants" as the "plaintiffs" throughout this brief.
2. We will use the phrase "Eleventh Amendment" as shorthand to refer to the constitutional sovereign immunity recognized in *Hans v. Louisiana*, 134 U.S. 1, 15–16 (1890), and *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). The text of the Eleventh Amendment applies only to lawsuits "commenced or prosecuted against a [State] by Citizens of another

Yet the plaintiffs want this Court to overlook all of these insurmountable jurisdictional barriers and award them an injunction that will do nothing to prevent Senate Bill 8 from taking effect on September 1, 2021, and that will prevent only the eight defendants in this case from "enforcing" the statute after it goes into effect tomorrow. There is no certified class of state-court judges that can be enjoined, and there is no certified class of court clerks either, because the district court did not rule on class certification before the defendants appealed its jurisdictional ruling. The plaintiffs never address this problem, and they pretend as though their requested injunction can somehow extend beyond the named defendants to every other judge and court clerk in Texas—even though none of those individuals have ever been parties to this case. *See Republican National Committee v. Democratic National Committee*, 140 S. Ct. 1205, 1207 (2020) (rebuking a district court for "in essence enjoin[ing] nonparties to this lawsuit."). But an injunction against the state judiciary as an institution would violate the Eleventh Amendment. And an injunction against every individual state judge would be an equally flagrant violation of the Due Process Clause, as none of these individuals (apart from Judge Jackson) is a party to this lawsuit and there is no certified class to rep-

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State, or by Citizens or Subjects of any Foreign State," which is not the situation here. *See* U.S. Const. amend XI; *Allen v. Cooper*, 140 S. Ct. 994, 1000 (2020) ("The text of the Eleventh Amendment . . . applies only if the plaintiff is not a citizen of the defendant State."); John F. Manning, *The Eleventh Amendment and The Reading of Precise Constitutional Texts*, 113 Yale L.J. 1663 (2004).

resent them. *See Richards v. Jefferson County*, 517 U.S. 793, 798 (1996) ("'[O]ne is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.'" (quoting *Hansberry v. Lee,* 311 U.S. 32, 40 (1940)). The only constitutional injunction that this Court could issue would be limited to the defendants in this case—but that does nothing to prevent the "irreparable harm" that the plaintiffs describe in their brief. An injunction that prevents Judge Austin Reeve Jackson from presiding over lawsuits filed under Senate Bill 8—while leaving every other judge in Texas free to do so—does not help the plaintiffs because they will remain subject to private civil-enforcement lawsuits if they violate Senate Bill 8 after it takes effect. The same goes for an injunction that prevents Penny Clarkston from accepting or filing documents in Senate Bill 8 lawsuits, while leaving the clerks in Texas's remaining counties unaffected. The plaintiffs cannot show that an injunction against the named defendants will prevent the irreparable harms that they allege, and an injunction that extends beyond the defendants would be patently unconstitutional.

These are the two most serious problems with the plaintiffs' request for emergency relief—and there are many more. But the Court should deny the application out of hand because the federal judiciary transparently lacks subject-matter jurisdiction over this entire case, and this Court has no ability to provide an effective injunction to the plaintiffs without violating the Constitution.

Statement Of Facts

On May 19, 2021, Governor Abbott signed the Texas Heartbeat Act, which prohibits abortion after a fetal heartbeat can be detected. The Texas Heartbeat Act does not impose criminal sanctions or administrative penalties on those who violate the statute, and it specifically prohibits state officials from enforcing the law. *See* Tex. Health & Safety Code § 171.207. Instead, the Heartbeat Act authorizes private civil lawsuits to be brought against those who violate the law, and it provides that these private citizen-enforcement suits shall be the sole means of enforcing the statutory prohibition on post-heartbeat abortions:

> Notwithstanding Section 171.005 or any other law, the requirements of this subchapter shall be enforced exclusively through the private civil actions described in Section 171.208. No enforcement of this subchapter, and no enforcement of Chapters 19 and 22, Penal Code, in response to violations of this subchapter, may be taken or threatened by this state, a political subdivision, a district or county attorney, or an executive or administrative officer or employee of this state or a political subdivision against any person, except as provided in Section 171.208.

See Tex. Health & Safety Code § 171.207(a).

The Texas Heartbeat Act takes effect on September 1, 2021. On July 13, 2021—nearly two months after Governor Abbott signed the bill into a law, and only seven weeks before the Act takes effect—the plaintiffs filed this lawsuit. The plaintiffs sued Judge Austin Reeve Jackson, a state district judge in Smith County, Texas, as a putative defendant class representative of every non-federal judge in the State of Texas. They also sued Penny Clarkston,

who serves as clerk for the district court of Smith County, as a putative defendant class representative of every Texas court clerk. In addition to these defendants, the plaintiffs also sued Attorney General Ken Paxton and several state agency officials, as well as Mark Lee Dickson, a pro-life activist. Their complaint demands relief that would prohibit Judge Jackson—and every non-federal judge in the state of Texas—from considering or deciding any lawsuits that might be filed under the Texas Heartbeat Act. It also demands an injunction that would prohibit Ms. Clarkston (and every Texas court clerk) from accepting or filing any papers submitted in those lawsuits. Later that day, the plaintiffs filed a motion for summary judgment, and they moved for class certification on July 16, 2021.

The defendants filed their motions to dismiss for lack of subject-matter jurisdiction on August 5, 2021.[3] Each of the government defendants[4] raised sovereign-immunity defenses and argued that the plaintiffs lacked Article III standing to sue them. Mr. Dickson asserted only Article III standing objections to the claims brought against him. The district court denied the defendants' Rule 12(b)(1) motions on August 25, 2021, rejecting each of their sovereign-immunity and Article III standing objections. *See* Order, ECF No. 88.

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3. *See* State Agency Defs.' Mot. to Dismiss (ECF No. 48); Judge Jackson's Mot. to Dismiss (ECF No. 49); Mark Lee Dickson's Mot. to Dismiss (ECF No. 50); Penny Clarkston's Mot. to Dismiss (ECF No. 51).
4. The "government defendants" include each of the defendants in this case except Mark Lee Dickson.

The district court ruled on these jurisdictional matters before the preliminary-injunction hearing that had been scheduled for August 30, 2021. In doing so, the district court followed the precedent of this Court, which requires federal district courts to rule on jurisdictional issues at the outset of a case before considering the merits. *See Lance v. Coffman*, 549 U.S. 437, 439 (2007) ("Federal courts must determine that they have jurisdiction before proceeding to the merits."); *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94–95 (1998) ("The requirement that jurisdiction be established as a threshold matter 'spring[s] from the nature and limits of the judicial power of the United States' and is 'inflexible and without exception.'" (quoting *Mansfield, C. & L.M.R. Co. v. Swan,* 111 U.S. 379, 382 (1884)). But the district court's jurisdictional ruling allowed the defendants to take an immediate interlocutory appeal, because denials of sovereign-immunity defenses are appealable under the collateral-order doctrine. *See Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993). The defendants promptly appealed the district court's order, and their notice of appeal automatically divested the district court of jurisdiction. *See Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) ("The filing of a notice of appeal . . . divests the district court of its control over those aspects of the case involved in the appeal."); *Williams v. Brooks*, 996 F.2d 728, 730 (5th Cir. 1993) ("[T]he filing of a non-frivolous notice of interlocutory appeal following a district court's denial of a defendant's immunity defense divests the district court of jurisdiction to proceed against that defendant.").

On August 26, 2021, the defendants informed the district court that their notice of appeal had automatically divested it of jurisdiction over the case, and they asked the district court to cancel the preliminary-injunction hearing that had been scheduled for August 30, 2021, and stay all further proceedings in the case. *See* Mot. to Stay, ECF No. 84. The defendants also informed the district court that they would seek emergency relief from the Fifth Circuit if it did not cancel the preliminary-injunction hearing and vacate all deadlines by close of business on August 26, 2021. *See* Notice to the Court, ECF No. 85. When the district court failed to take these steps by the end of the day on August 26, 2021, the defendants filed an emergency motion with the Fifth Circuit, asking it to stay the district-court proceedings pending appeal, and asking for a temporary administrative stay pending consideration of that motion.

On August 27, 2021—after the defendants had filed their emergency motion with the Fifth Circuit—the district court issued an order acknowledging that the notice of appeal had divested it of jurisdiction over the claims against the government defendants, and ordered the proceedings stayed with respect to those defendants only. *See* Order, ECF No. 88 at 1–2. But the district court insisted that it retained jurisdiction over the claims against Mr. Dickson, even though Mr. Dickson had joined the appeal, because it held that Mr. Dickson has "no claim to sovereign immunity," and that the "the denial of his motion to dismiss is not appealable." *See id.* at 2. So the district court refused to va-

cate the preliminary-injunction hearing or stay proceedings with respect to the claims against Mr. Dickson. *See id.*

On August 27, 2021, the Fifth Circuit issued an administrative stay of the district-court proceedings, including the preliminary-injunction hearing that was scheduled to proceed against Mark Lee Dickson. It also ordered Mr. Dickson to file a combined response to the plaintiffs' motion to dismiss Mr. Dickson's appeal, and reply brief in support of the defendants' motion to stay the district-court proceedings. That brief was filed earlier today, and the Fifth Circuit has yet to rule on whether to stay the district-court proceedings with respect to Mr. Dickson. In the meantime, the administrative stay that the court issued on August 27, 2021, remains in place.

Since the defendants filed their notice of appeal on August 25, 2021, the plaintiffs have filed a series of increasingly desperate motions in an effort to return this case to the district court—despite the fact that the government defendants are entitled to appellate review of their sovereign-immunity arguments before they can be subjected to additional district-court proceedings.[5] First, the plaintiffs asked the district court to reclaim jurisdiction over

5. *See Metcalf & Eddy*, 506 U.S. at 147 ("States and state entities that claim to be 'arms of the State' may take advantage of the collateral order doctrine to appeal a district court order denying a claim of Eleventh Amendment immunity."); *McCarthy ex rel. Travis v. Hawkins*, 381 F.3d 407, 411–12 (5th Cir. 2004) ("Under the collateral order doctrine, this court has jurisdiction over an interlocutory appeal from a denial of a motion to dismiss asserting Eleventh Amendment immunity. *See P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.,* 506 U.S. 139, 144–45 (1993).").

the case by certifying the defendants' appeal as "frivolous." *See* Pls.' Opp. to Motion to Stay, ECF No. 86. The district court denied this request out of hand. *See* Order, ECF No. 88, at 1. Then the plaintiffs asked the Fifth Circuit to adopt a hyper-expedited briefing schedule that would require the defendants to file their opening appellants' brief by Saturday, August 28 at noon central time, approximately 24 hours after the plaintiffs filed their motion requesting this schedule, with the plaintiffs' answering brief due on Sunday, August 29, at 5:00 P.M. central time, and a ruling from the Fifth Circuit that would resolve the appeal "on the papers" by September 1, 2021. The Fifth Circuit summarily denied this request.

Then the plaintiffs asked the Fifth Circuit for an injunction that would prevent the defendants from enforcing Senate Bill 8 during the appeal. It also asked the Fifth Circuit to vacate the administrative stay that it had issued on August 27, 2021, as well as the stay of proceedings that the district court had entered with respect to the government defendants. And in a last-ditch effort, the plaintiffs asked the Fifth Circuit to vacate the district court's order denying the defendants' Rule 12(b)(1) motions and dismiss the appeal as moot. The Fifth Circuit denied all of these requests, and the plaintiffs are now seeking similar relief from this Court.

SUMMARY OF ARGUMENT

This case begins and ends with jurisdiction. There is no federal subject-matter jurisdiction over any of the plaintiffs' claims—and there never has been. And the plaintiffs cannot cover up these jurisdictional deficiencies by

attacking the constitutionality of Senate Bill 8. If a federal court lacks subject-matter jurisdiction to consider a constitutional challenge to a statute, then it does not matter whether the disputed statute is unconstitutional—and it does not matter how unconstitutional the statute may seem to a litigant or a judge. *See California v. Texas*, 141 S. Ct. 2104, 2113 (2021).

The plaintiffs think they can present a "clear case for relief" by focusing on the merits of their constitutional grievances, at the expense of their obligation to show how the federal judiciary can assert subject-matter jurisdiction over their claims. But the plaintiffs offer only the most cursory discussion of the jurisdictional obstacles that they confront. *See* Emergency App. at 20–22. And the jurisdictional arguments that the plaintiffs make are demonstrably untenable. The plaintiffs' argument for Article III standing would allow anyone who might someday be sued or prosecuted under a statute to sue any state-court judge (or court clerk) who might be involved in that hypothetical future court proceeding. *See* Emergency App. at 21–22. This would allow judges and clerks to be sued whenever a litigant wants to challenge the constitutionality of a statute that authorizes civil lawsuits or criminal prosecution—an absurd result that contradicts every tenet of Article III standing. And the plaintiffs' description of the *Ex parte Young* exception to sovereign immunity is inaccurate. It is not enough to allege an "an ongoing violation of federal law" and seek prospective relief; the violation of federal law must either be committed or about to be committed *by the defendant* who has been sued. *See Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 104

(1984) ("[A]n official *who acts unconstitutionally* is 'stripped of his official or representative character'" (emphasis added) (quoting *Young*, 209 U.S. at 60 (1908)). The plaintiffs have not sued a federal lawbreaker or would-be lawbreaker, so they cannot use *Ex parte Young* to surmount the government defendants' sovereign-immunity defenses.

ARGUMENT

I. The Federal Judiciary Has No Subject-Matter Jurisdiction To Consider Any Of The Plaintiffs' Claims

The plaintiffs cannot obtain any relief from this Court unless their claims against the defendants: (1) satisfy Article III's requirements for a case or controversy; and (2) comport with the Eleventh Amendment. The plaintiffs come nowhere close to establishing either of these jurisdictional prerequisites.

A. The Plaintiffs' Claims Against The State Agency Defendants Are Unequivocally Barred By Article III And The Eleventh Amendment

Senate Bill 8 specifically prohibits state or local government officials from enforcing the prohibition on post-heartbeat abortions, and it states that the private civil-enforcement actions shall be the "exclusive" means of enforcing this requirement:

> Notwithstanding Section 171.005 or any other law, the requirements of this subchapter shall be enforced exclusively through the private civil actions described in Section 171.208. No enforcement of this subchapter, and no enforcement of Chapters 19 and 22, Penal Code, in response to violations of this subchap-

> ter, may be taken or threatened by this state, a political subdivision, a district or county attorney, or an executive or administrative officer or employee of this state or a political subdivision against any person, except as provided in Section 171.208.

Tex. Health & Safety Code § 171.207(a). Despite this clear, unambiguous, and absolute statutory prohibition on public enforcement, the plaintiffs sued four state agency officials and claimed that they could "indirectly" enforce the heartbeat prohibition by using violations of Senate Bill 8 as an excuse to sanction the plaintiffs under some other statutory provision.

This argument defies the first sentence of section 171.207(a), which says that "the requirements of this subchapter shall be enforced *exclusively* through the private civil actions described in Section 171.208." Tex. Health & Safety Code § 171.207(a) (emphasis added). The word "exclusively" means that *no other* type of enforcement—whether "direct" or "indirect"—may be taken by anyone against any person who violates the heartbeat provisions. The plaintiffs have no answer to this language. And neither did the district court, which entirely ignored the first sentence of section 171.207(a) in holding that the plaintiffs could sue the state agency defendants under Article III and the Eleventh Amendment. *See* Order, ECF No. 82 at 15–16.

The plaintiffs cannot challenge the constitutionality of a statute by suing someone who is statutorily barred from enforcing it. *See Poe v. Ullman*, 367 U.S. 497 (1961); *California v. Texas*, 141 S. Ct. 2104, 2113 (2021) ("A plaintiff has standing only if he can 'allege personal injury fairly traceable to the *defendant's allegedly unlawful conduct*'" (emphasis added)). And the agency de-

fendants have sovereign immunity from the plaintiffs' lawsuit because section 171.207(a) prevents them from having any "connection with the enforcement of the act," as required for the *Ex parte Young* exception to apply. *See Ex parte Young*, 209 U.S. 123, 157 (1908). This Court has never in its history enjoined a government official from enforcing a statute that he is statutorily prohibited from enforcing. Yet the plaintiffs are asking the Court to do exactly that without even trying to explain how it can enjoin the state agency defendants in the teeth of section 171.207(a).

B. The Plaintiffs Lack Article III Standing To Sue Judge Jackson And Ms. Clarkston

A litigant cannot sue a state-court judge to prevent him from considering cases that might be filed under an allegedly unconstitutional statute. There is no Article III case or controversy between a person who fears that a future litigant might sue him and a judge who might someday preside over that hypothetical future lawsuit. And a judge does not inflict Article III "injury" on a future litigant by sitting in his office and waiting to see if someone will file a lawsuit against that individual. There is also no adversity when an individual challenges the constitutionality of a statute by suing a judge who might adjudicate future lawsuits under that statute.[6] A judge serves as an impartial arbiter of the law—and he is ethically precluded from defending the constitu-

6. *See Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227, 240–41 (1937) ("The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests.").

tionality of a statute as a private litigant when he will be called upon to resolve those same constitutional challenges in the cases that litigants bring before him.[7] As the Fifth Circuit explained in *Bauer v. Texas*, 341 F.3d 352 (5th Cir. 2003):

> The requirement of a justiciable controversy is not satisfied where a judge acts in his adjudicatory capacity. Similarly, a section 1983 due process claim is not actionable against a state judge acting purely in his adjudicative capacity because he is not a proper party in a section 1983 action challenging the constitutionality of a state statute.

Id. at 359. The Fifth Circuit has similarly recognized that there is no Article III case or controversy when lawsuits are filed against court clerks engaged in judicial responsibilities:

> Because of the judicial nature of their responsibility, the chancery clerks and judges do not have a sufficiently "personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues on which the court so largely depends for illumination of difficult constitutional questions."

Chancery Clerk of Chickasaw County v. Wallace, 646 F.2d 151, 160 (5th Cir. 1981) (citation omitted). The holdings of *Bauer* and *Wallace* are binding on the district court and the Fifth Circuit, and they compel those courts to dis-

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7. *See* Canon 3(B)(10), Texas Code of Judicial Ethics ("A judge shall abstain from public comment about a pending or impending proceeding which may come before the judge's court in a manner which suggests to a reasonable person the judge's probable decision on any particular case."), available at https://www.txcourts.gov/media/1452409/texas-code-of-judicial-conduct.pdf

miss the claims brought against Judge Jackson and Ms. Clarkston. But the plaintiffs do not even present an argument in this Court that *Bauer* or *Wallace* was wrongly decided, and they do not explain how a person can have Article III standing to sue a judge who is not even presiding over a case that he is involved in.

The plaintiffs also lack standing to sue Judge Jackson and Ms. Clarkston because any "injury" will result from the independent actions of third parties not before the Court, and a litigant cannot establish Article III standing when the alleged injury rests entirely on the conduct of independent third-party actors. *See Lujan*, 504 U.S. at 560 ("[T]he injury has to be fairly . . . traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." (cleaned up) (citation and internal quotation marks omitted)); *Clapper v. Amnesty International USA*, 568 U.S. 398, 414 (2013) ("We decline to abandon our usual reluctance to endorse standing theories that rest on speculation about the decisions of independent actors."). The *only* people who might sue the plaintiffs in Smith County are "third parties not before the court," as Mr. Dickson is legally incapable of suing the plaintiffs in Smith County because he resides in Gregg County.[8] So the plaintiffs' theory of standing rests on speculation that some independent actor—who is not before the court—will not only choose to sue

8. *See* Declaration of Mark Lee Dickson, ECF No. 50-1, at ¶ 13 ("I am a resident of Gregg County, not Smith County, and I have no intention of changing my residence to Smith County at any time in the future.").

the defendants, but will choose to sue the defendants *in Smith County*. That injury is not "fairly traceable" to Judge Jackson or Ms. Clarkston, because it cannot exist unless an independent third-party actor chooses to sue the plaintiffs in Smith County.

C. The Claims Against Judge Jackson And Ms. Clarkston Are Barred By Sovereign Immunity

The plaintiffs' claims against Judge Jackson and Ms. Clarkson must be dismissed for a separate and independent reason: The Eleventh Amendment forbids courts to assert jurisdiction over claims brought against non-consenting state officers sued in their official capacity, unless the claim fits within the *Ex parte Young* exception to sovereign immunity. *See Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 269–70 (1997); *Kentucky v. Graham*, 473 U.S. 159, 166 (1985) ("[A]n official-capacity suit is, in all respects other than name, to be treated as a suit against the entity.").[9] But the *Ex parte Young* exception does not authorize lawsuits to prevent a state's *judicial* officers from adjudicating and deciding cases brought before them. We know that because *Ex parte Young* says so:

> [T]he right to enjoin an individual, even though a state official, from commencing suits . . . does not include the power to restrain a court from acting in any case brought before it, either of a civil or criminal nature. . . . [A]n injunction against a state

9. A state district judge in Texas is a state officer and shares in the sovereign immunity of the state. *See Clark v. Tarrant County*, 798 F.2d 736, 744 (5th Cir. 1986) (holding that district judges in Texas "are undeniably elected state officials" for purposes of the Eleventh Amendment).

> court would be a violation of the whole scheme of our government. . . . The difference between the power to enjoin an individual from doing certain things, and the power to enjoin courts from proceeding in their own way to exercise jurisdiction, is plain, and no power to do the latter exists because of a power to do the former.

Ex parte Young, 209 U.S. 123, 163 (1908).

And even apart from *Ex parte Young*'s categorical prohibition on lawsuits to enjoin state courts from adjudicating cases, the plaintiffs face yet another insurmountable Eleventh Amendment obstacle. The *Ex parte Young* exception authorizes lawsuits only against a state officer who is violating or intends to violate federal law; that is what "strips" the officer of his sovereign authority and allows him to be sued as a rogue individual rather than as a component of a sovereign entity. *See Ex parte Young*, 209 U.S. 123, 159–60 (1908); *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 104 (1984) ("[A]n official *who acts unconstitutionally* is 'stripped of his official or representative character'" (emphasis added) (quoting *Young*, 209 U.S. at 60 (1908)). That means the *Ex parte Young* exception can be used only to sue a federal lawbreaker or would-be lawbreaker; a state officer who is not violating federal law (and has no plans to do so) retains his sovereign immunity and cannot be subjected to suit.[10]

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10. The plaintiffs' recitation of the *Ex parte Young* formulation is inaccurate. It is not enough to allege an "an ongoing violation of federal law"; the violation of federal law must either be committed or about to be committed *by the defendant* who has been sued. *See Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 104 (1984) ("[A]n official *who acts*

It is preposterous to claim that Judge Jackson is violating the Constitution—and has forfeited his sovereign immunity—by sitting in his chambers waiting to see if someone files a lawsuit under Senate Bill 8 that winds up getting assigned to him. The plaintiffs have not even alleged (let alone produced evidence) that any resident of Smith County plans to sue any of the plaintiffs when Senate Bill 8 takes effect on September 1, so it is nothing but rank speculation to assert that Judge Jackson is about to violate federal law. And even if the plaintiffs could prove that someone is about to file a Senate Bill 8 enforcement action in Judge Jackson's Court, a state judge does not violate the Constitution merely by presiding over a lawsuit between private litigants—even if the lawsuit is brought under an allegedly unconstitutional statute. A judge that adjudicates a case does not become a federal lawbreaker unless and until he enters an actual ruling that violates someone's federally protected rights. Then—and only then—can a state judge be stripped of his sovereign character and regarded as a rogue individual actor.

It is even more untenable to claim that Ms. Clarkston would be breaking federal law by accepting petitions or documents for filing. A court clerk is not responsible for judging the merits of a lawsuit, and must file documents submitted by litigants even when the filing is frivolous, malicious, or based on an unconstitutional statute. It is the responsibility of the litigant—not the court clerk—to ensure that his court filings respect the constitutional rights of an

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unconstitutionally is 'stripped of his official or representative character'" (emphasis added) (quoting *Young*, 209 U.S. at 60).

opposing party. And it is the responsibility of the judge (not the clerk) to evaluate the merits of a legal filing and dispose of it in accordance with law. The clerk does nothing wrong—and certainly nothing illegal—by accepting a court filing that seeks to enforce an unconstitutional statute, no matter how unconstitutional the underlying statute may be.

There is no authority supporting the idea that a state judge forfeits his sovereign immunity whenever a private litigant *might* file a lawsuit in his courtroom that seeks to enforce an allegedly an unconstitutional statute. On the contrary, existing law makes abundantly clear that state-court judges are *not* permissible defendants in this situation. *See Bauer*, 341 F.3d at 357; *Wallace*, 646 F.2d at 160; *Allen v. DeBello*, 861 F.3d 433, 440 (3d Cir. 2017) ("[A] judge who acts as a neutral and impartial arbiter of a statute is not a proper defendant to a Section 1983 suit challenging the constitutionality of the statute."); *In re Justices of Supreme Court of Puerto Rico*, 695 F.2d 17, 22 (1st Cir. 1982) (Breyer, J.) ("[J]udges are not proper party defendants in § 1983 actions challenging the constitutionality of state statutes. In short, § 1983 does not provide relief against judges acting purely in their adjudicative capacity, any more than, say, a typical state's libel law imposes liability on a postal carrier or telephone company for simply conveying a libelous message."). There is also nothing in existing law to support the idea that a state-court clerk is "stripped" of her sovereign immunity or violates 42 U.S.C. § 1983 by accepting filings from private litigants who seek to enforce an unconstitutional statute. *See Wallace*, 646 F.2d at 160; *Mendez v. Heller*, 530 F.2d 457 (2d Cir.

1976) (state court judges and clerks could not be sued as defendants in a lawsuit challenging New York's durational residence requirement for divorce). And the plaintiffs' brief does not present any argument for extending *Ex parte Young* to these situations. *See Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 114 n.25 (1984) ("The authority-stripping theory of *Young* is a fiction that has been narrowly construed.").

D. The Plaintiffs Lack Standing To Sue Mr. Dickson Because Mr. Dickson Has No Intention Of Suing Them

The plaintiffs have no standing to sue Mr. Dickson because Mr. Dickson has no intention of suing them under Senate Bill 8's private civil-enforcement mechanism. *See* Declaration of Mark Lee Dickson, ECF No. 50-1 ¶¶ 4–7. The plaintiffs allege that they face a "credible threat" that Mr. Dickson might sue them when Senate Bill 8 takes effect. *See* Complaint, ECF No. 1, at ¶¶ 17, 50. But Mr. Dickson has no intention of suing anyone under section 3 because he is expecting the plaintiffs to comply with the statute rather than expose themselves to private civil-enforcement lawsuits. *See* Declaration of Mark Lee Dickson, ECF No. 50-1 ¶¶ 5, 7. Mr. Dickson has never threatened to sue the plaintiffs if they violate Senate Bill 8,[11] and he has no intention of suing the plaintiffs even if they unexpectedly violate the statute. *See* Supplemental Declaration of Mark Lee Dickson, ECF No. 64-1 at ¶¶ 6,

11. *See* Declaration of Mark Lee Dickson, ECF No. 50-1 at ¶ 6 ("I have never threatened to sue any of the plaintiffs under the private civil-enforcement lawsuits described in Senate Bill 8, either publicly or privately").

11–15. In the unlikely event that plaintiffs refuse to comply with Senate Bill 8 after it takes effect, Mr. Dickson will consider suing "only the individuals and entities that cannot plausibly assert an 'undue burden' defense under section 171.209," and he will not consider suing the plaintiff abortion providers or the plaintiff abortion funds under section 171.208 until a court opines that he can do so without encountering an obstacle from section 171.209's "undue burden" defense. *See id.* at ¶¶ 11–13. Mr. Dickson also knows that there are other individuals who will sue the abortion-fund and abortion-provider plaintiffs if they defy the statute, and he has renounced any interest in "piling on" with a redundant lawsuit. *See id.* at ¶ 15. So the plaintiffs have no evidence of a "credible threat" that Mr. Dickson will sue them—even if one assumes that the plaintiffs will disobey the statute and expose themselves to lawsuits.

The plaintiffs have no evidence that Mr. Dickson will sue them if they violate Senate Bill 8, and they have no evidence that Mr. Dickson has threatened to bring such lawsuits. Mr. Dickson's efforts to enact local ordinances that subject abortion providers and their enablers to private civil-enforcement lawsuits is not evidence that Mr. Dickson intends to become a plaintiff in a Senate Bill 8 enforcement action. *See* Pls.' Br., ECF No. 57, at 3. And Mr. Dickson's public support for Senate Bill 8 and his efforts to encourage others to bring civil-enforcement lawsuits is constitutionally protected speech. It does not in any way indicate that Mr. Dickson himself intends to sue the plaintiffs. *See id.* at 4. In all events, Mr. Dickson's unrebutted declarations prevent the courts from drawing any such implications from his conduct.

E. The Provisions Of Senate Bill 8 Are Severable, And The Plaintiffs Have Failed To Allege Any Injury From The Provisions In Senate Bill 8 Apart From Sections 3 And 4

There are also jurisdictional barriers to the remedy that the plaintiffs are requesting. The plaintiffs want this Court to enjoin "the enforcement of Senate Bill 8." Emergency App. at 38. But the provisions of Senate Bill 8 are severable — and each discrete application of these provisions is severable as well. Section 10 of the Act says:

> Every provision in this Act and every application of the provision in this Act are severable from each other. If any provision or application of any provision in this Act to any person, group of persons, or circumstance is held by a court to be invalid, the invalidity does not affect the other provisions or applications of this Act.

Senate Bill 8, 87th Leg., § 10. Section 5 also amends the Code Construction Act to establish a new rule of construction for every Texas statute that regulates abortion, requiring courts not only to sever the statute's provisions and applications but also to construe the statute, as a matter of state law, as applying *only* in situations that will not result in a violation of constitutional rights. *See* Senate Bill 8, 87th Leg., § 5 (to be codified at Tex. Gov't Code § 311.036(c)). And if that were not enough, section 3 of the Act adds an emphatic (and largely redundant) severability clause and saving-construction requirement that applies to each provision of Chapter 171 of the Texas Health and Safety Code. *See* Senate Bill 8, 87th Leg., § 3 (to be codified at Tex. Health & Safety Code § 171.212); *see also* Tex. Gov't Code § 311.032(a) ("If

any statute contains a provision for severability, that provision prevails in interpreting that statute.").

Despite all of this, the plaintiffs refuse to acknowledge the severability requirements in Senate Bill 8 and the Code Construction Act. And they insist that the Court enjoin the enforcement of the *entire statute*—and they insist that this Court treat the statute as non-severable despite the three separate and independent severability requirements in Senate Bill 8. But the statute *is* severable, and that means that the plaintiffs must establish Article III standing to sue over *each* provision of Senate Bill 8 that they seek to declare unconstitutional. *See In re Gee*, 941 F.3d 153, 160 (5th Cir. 2019) ("It is now beyond cavil that plaintiffs must establish standing for each and every provision they challenge." (citing authorities)); *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996) ("[S]tanding is not dispensed in gross."); *Davis v. Federal Election Commission*, 554 U.S. 724, 733–34 (2008) (standing to challenge one statutory subsection does not confer standing to challenge a neighboring statutory subsection). And the plaintiffs' request for relief must be limited to the discrete provisions of Senate Bill 8 that the plaintiffs have standing to challenge.

The plaintiffs cannot pretend that the statute is nonseverable and act as though they have standing to enjoin the enforcement of the entire statute—especially when there are provisions in Senate Bill 8 that do not injure them in the slightest. *See, e.g.*, Senate Bill 8, 87th Leg., § 6 (prohibiting the Texas Health and Human Services Commission from enforcing the prohibition on

post-heartbeat abortions); *id.* at § 8 (technical amendments to provisions in the Texas Health and Safety Code).

F. The Plaintiffs Have No Standing To Seek An Injunction That Protects Non-Parties To This Lawsuit

The plaintiffs want this Court to enjoin defendants from enforcing Senate Bill 8 against *anyone*—including persons or entities that are even not parties to this case. But the plaintiffs have no standing to seek relief that prevents the defendants from enforcing Senate Bill 8 against non-parties to this litigation, absent allegations and evidence that the enforcement of Senate Bill 8 against those non-parties will inflict "injury in fact" on the named plaintiffs. *See Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975) ("[N]either declaratory nor injunctive relief can directly interfere with enforcement of contested statutes or ordinances except with respect to the particular federal plaintiffs, and the State is free to prosecute others who may violate the statute."); *United States v. National Treasury Employees Union,* 513 U.S. 454, 477–78 (1995) (limiting relief to the parties before the Court and noting "we neither want nor need to provide relief to nonparties when a narrower remedy will fully protect the litigants").[12]

12. *See also McKenzie v. City of Chicago*, 118 F.3d 552, 555 (7th Cir. 1997) ("[T]he question at issue [is] whether a court may grant relief to nonparties. The right answer is no."); *Zepeda v. I.N.S.*, 753 F.2d 719, 727–28 (9th Cir. 1983) ("[An] injunction must be limited to apply only to the individual plaintiffs unless the district judge certifies a class of plaintiffs."); Richard H. Fallon, *Making Sense of Overbreadth*, 100 Yale L.J. 853, 854 (1991) ("[T]he binding effect of the federal judgment extends no further than the parties to the lawsuit. Against nonparties, the state

The plaintiffs have not asked this Court to certify them as class representatives; they have sued only as individual litigants. Yet the plaintiffs somehow think that the Court can treat this case as a de facto class action and allow them to seek relief that protects *every* individual or entity that might conceivably be sued under Senate Bill 8—regardless of whether those individuals or entities are plaintiffs to this lawsuit. But the judicial power extends only to resolving cases or controversies between parties, and the Court's relief may extend only to the named litigants, or to classes that have been certified consistent with the requirements of Rule 23. The only time that a court may issue relief that extends beyond the named litigants or a certified class is when such a remedy is needed to ensure that the prevailing parties obtain the relief to which they are entitled. *See Professional Association of College Educators v. El Paso County Community College District*, 730 F.2d 258, 273–74 (5th Cir. 1984). But that allowance is not applicable here. The only relief to which the plaintiffs might be entitled is a declaration or an injunction that shields *them* from private civil-enforcement lawsuits brought under section 3, and that shields *them* from attorney-fee-collection lawsuits brought under section 4. The plaintiffs have not alleged that they will suffer Article

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remains free to lodge criminal prosecutions."); Vikram David Amar, *How Much Protection Do Injunctions Against Enforcement of Allegedly Unconstitutional Statutes Provide?*, 31 Ford. Urb. L.J. 657, 663 (2004) ("All injunctive relief, of course, including preliminary injunctions, binds only the defendants before the court, and applies only to protect the specific plaintiffs who have brought the suit.").

III injury from lawsuits or other enforcement actions brought against nonparties to this litigation, and they have no standing to assert the rights or interests of non-parties in the absence of a certified class. *See Davis v. Romney,* 490 F.2d 1360, 1366 (3d Cir. 1974) ("Relief cannot be granted to a class before an order has been entered determining that class treatment is proper.").

* * *

The plaintiffs bear the burden of proving subject-matter jurisdiction, and they have not attempted to carry that burden in this Court. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 n.3 (2006) ("[B]ecause '[w]e presume that federal courts lack jurisdiction unless the contrary appears affirmatively from the record,' the party asserting federal jurisdiction when it is challenged has the burden of establishing it"). This Court is constitutionally obligated to ensure that the federal judiciary has subject-matter jurisdiction over each of the plaintiffs' claims before granting relief, even when (perhaps especially when) a litigant tries to downplay or ignore jurisdictional obstacles. *See Hamer v. Neighborhood Housing Services of Chicago*, 138 S. Ct. 13, 17 (2017) ("[C]ourts are obliged to notice jurisdictional issues and raise them on their own initiative."). The jurisdictional barriers to the plaintiffs' claims are insurmountable, and the plaintiffs cannot make them go away by acting as though the district court's jurisdictional ruling has res judicata effect. And the plaintiffs cannot plausibly ask this Court for relief *in an emergency motion* when they are unwilling to explain how this Court could grant relief in the face of these daunting jurisdictional impediments.

II. The Injunction Requested By The Plaintiffs Will Be Either Useless Or Unconstitutional

The plaintiffs are asking this court for an "injunction," but they never explain what this injunction should say or how far it should extend. In several places they say that this Court should enjoin the "enforcement of S.B. 8." Emergency App. at 3, 38. But injunctions are directed at *litigants*, not statutes. *See Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923) ("If a case for preventive relief be presented, the court enjoins, in effect, not the execution of the statute, but the acts of the official, the statute notwithstanding."); *Okpalobi v. Foster*, 244 F.3d 405, 426 n.34 (5th Cir. 2001) (en banc) ("An injunction enjoins a defendant, not a statute."). And the plaintiffs never tell us *who* should be enjoined from enforcing Senate Bill 8.[13]

This is a major problem for the plaintiffs because there are only eight named defendants in this lawsuit. Five of these defendants (Carlton, Thomas, Young, Benz, and Paxton) have no conceivable involvement with Senate Bill 8. *See* Tex. Health & Safety Code § 171.207(a). The remaining defendants include one judge (Jackson), one court clerk (Clarkston), and one private citizen (Dickson). An injunction that prevents these defendants from enforcing Senate Bill 8 is useless to the plaintiffs, because the plaintiffs will remain subject to private civil-enforcement actions in every state court other

13. Elsewhere in their brief the plaintiffs say that "Injunctive Relief Is Proper as to All Respondents," which could be read to imply that the requested injunction extends only to the named defendants. But the plaintiffs' brief is not clear on this point.

than Jackson's, in every county other than Smith, and from every private citizen other than Dickson. And the plaintiffs cannot possibly show how an injunction of this sort will prevent the "irreparable injuries" of which they complain. *See* Emergency App. at 20 ("[B]eing forced to defend potentially numerous lawsuits, filed anywhere in the state, itself constitutes irreparable harm"). An applicant must show that irreparable injury will occur *in the absence of injunctive relief*; it cannot rely on irreparable injuries that will occur regardless of whether the injunction issues. *See, e.g.*, *Winter v. Natural Resources Defense Council*, 555 U.S. 7, 20 (2008).

The plaintiffs were hoping to obtain a classwide preliminary injunction against every judge and court clerk in the state of Texas. But the defendants appealed the district court's jurisdictional ruling before the district court could certify those classes, so there is no certified class of state-court judges (or court clerks) that can be enjoined. The plaintiffs' brief seems to envision an injunction from this Court that would prevent *anyone* from enforcing Senate Bill 8,[14] but the plaintiffs never explain how this Court could issue an injunction of that scope. *See Republican National Committee v. Democratic National Committee*, 140 S. Ct. 1205, 1207 (2020) (rebuking a district court for "in essence enjoin[ing] nonparties to this lawsuit.").

And an injunction from this Court that purports to enjoin *every* judge and court clerk in Texas would be a patent violation of the Constitution. An in-

14. *See* Emergency App. at 3, 38 (asking this Court to enjoin the "enforcement of S.B. 8").

junction directed at the state judiciary as an institution would violate the Eleventh Amendment. And an injunction directed at every individual state judge and clerk would violate the Due Process Clause, as none of them (other than Jackson and Clarkston) have been made parties to this lawsuit, and none of them are represented by a certified class. *See Richards v. Jefferson County*, 517 U.S. 793, 798 (1996) ("'[O]ne is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.'" (quoting *Hansberry v. Lee,* 311 U.S. 32, 40 (1940)). So the Court cannot issue an injunction without violating the Constitution or violating the standards for issuing an injunction, because an injunction that extends beyond the named defendants will violate the Constitution, while an injunction limited to the named defendants will leave the plaintiffs subject to the same "irreparable injuries" that led them to seek injunctive relief in the first place.

III. The Proposed Injunction Violates Senate Bill 8's Severability Requirements

The plaintiffs are also seeking an injunction that would prevent the defendants (or others) from enforcing Senate Bill 8 in *any* situation—even in situations where the enforcement of Senate Bill 8 is indisputably constitutional. *See* Emergency App. at 3, 38 (asking this Court to enjoin the "enforcement of S.B. 8"). But a court has no authority to enjoin the constitutional provisions and applications of Senate Bill 8. *See Alabama State Federation of Labor, Local Union No. 103 v. McAdory*, 325 U.S. 450, 465 (1945)

("When a statute is assailed as unconstitutional we are bound to assume the existence of any state of facts which would sustain the statute in whole or in part."). Section 6 of the Act, for example, prohibits the Texas Health and Human Services Commission from enforcing the prohibition on post-heartbeat abortions, while section 8 of the Act makes technical amendments to provisions in the Texas Health and Safety Code. How can those provisions possibly be unconstitutional? And how can the plaintiffs ask a court to "enjoin" the enforcement of these undeniably constitutional (and undeniably severable) provisions?

The plaintiffs also neglect to mention that Senate Bill 8 *prohibits* courts from imposing civil liability if the defendant: (1) has third-party standing to assert the constitutional rights of abortion patients; and (2) shows that an award of damages will impose an "undue burden" on women seeking abortions. *See* Tex. Health & Safety Code § 171.209 ("Civil Liability: Undue Burden Defense Limitations."). The plaintiffs never even mention the undue-burden defense codified in the statute, and they falsely tell the court that the statute "requires" courts to award damages and injunctive relief whenever a "violation" of the heartbeat ban occurs. *See* Emergency Stay at 7. But the statute codifies the undue-burden test that this Court has adopted for pre-viability abortion regulations as an affirmative defense,[15] and it allows anyone

15. *See Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 874 (1992) (plurality opinion) ("Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of

who performs or assists a post-heartbeat abortion to escape liability if they have third-party standing and can show that an undue-burden will occur. So the civil-liability regime under this statute is consistent with this Court's pronouncements on when states can punish those who violate abortion laws.

More importantly, many of the civil-enforcement lawsuits authorized by Senate Bill 8 are indisputably constitutional under existing precedent:

> Lawsuits brought against those who perform (or assist) non-physician abortions;[16]
>
> Lawsuits brought against those who perform (or assist) post-viability abortions that are not necessary to save the life or health of the mother;[17]
>
> Lawsuits brought against those who use taxpayer money to pay for post-heartbeat abortions;[18]
>
> Lawsuits brought against those who covertly slip abortion drugs into a pregnant woman's food or drink.[19]

All of these lawsuits authorized by Senate Bill 8 are constitutional, and this Court has no authority to enjoin the defendants from filing or presiding over lawsuits in any of those situations.

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the State reach into the heart of the liberty protected by the Due Process Clause.").

16. *See Roe v. Wade*, 410 U.S. 113, 165 (1973); *Connecticut v. Menillo*, 423 U.S. 9, 9–10 (1975); *Mazurek v. Armstrong*, 520 U.S. 968, 973 (1997).
17. *See Roe*, 410 U.S. at 164–65;
18. *See Harris v. McRae*, 448 U.S. 297 (1980).
19. *See* Alexandra Hutzler, *Former Trump Aide Jason Miller Accused of Secretly Administering Abortion Pill*, Newsweek (Sept. 18, 2018), https://bit.ly/3stDRx2.

There are other lawsuits authorized by Senate Bill 8 that are at least arguably constitutional, and the plaintiffs present no argument for how these civil-enforcement lawsuits would impose an "undue burden" or violate anyone's constitutional rights. Senate Bill 8, for example, authorizes lawsuits against employers or insurers who pay for post-heartbeat abortions. *See* Tex. Health & Safety Code § 171.208(a)(2). Yet there is no constitutional right to pay for another person's abortion, and there is no conceivable "undue burden" that would be imposed if the beneficiary can afford the procedure without insurance coverage. The Court cannot enjoin the defendants from filing or presiding other lawsuits brought in these situations either.

The plaintiffs somehow think that they can obtain an across-the-board injunction against the enforcement of this statute—even though Senate Bill 8 has many constitutional applications, and even though the statute contains emphatic severability requirements that compel reviewing courts to sever and preserve every constitutional application of the law. *See* Senate Bill 8, 87th Leg., §§ 3, 5, 10. Yet the plaintiffs have decided that they will ignore these severability requirements, as well as the fact that many of the civil-enforcement lawsuits authorized by Senate Bill 8 are constitutional even under the plaintiffs' interpretation of the Constitution,[20] apparently in the hope that their ostrich-like pose will induce the courts to ignore these problems as

20. Not even the plaintiffs would contend that it is unconstitutional to authorize private civil-enforcement lawsuits against individuals who covertly slip abortion drugs into an unsuspecting woman's food or drink.

well and give the plaintiffs the unlawful remedy that they are seeking. But ignoring the severability requirements is not an option,[21] and a court is not permitted to categorically enjoin the enforcement of a statute that has indisputably constitutional provisions and applications. *See McAdory*, 325 U.S. at 465; *Menillo*, 423 U.S. at 9–10.

IV. There Is No Lawful Basis For Vacating The Stays

The plaintiffs want this Court to vacate the stays of the district-court proceedings so that the plaintiffs can return to the district court and pursue a classwide preliminary injunction. *See* Emergency App. at 27–36. There are many problems with this request.

The district court's jurisdiction over the case was automatically divested when the defendants filed their notice of appeal. *See Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) ("The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal."). That divestiture of jurisdiction occurs re-

21. *See Leavitt v. Jane L.*, 518 U.S. 137, 138 (1996) (per curiam) (rebuking the Tenth Circuit for refusing to treat as dispositive the statute's "explicit stat[ement]" of legislative intent regarding severability in a state-law abortion statute); *Planned Parenthood of Greater Texas Surgical Health Services v. Abbott*, 748 F.3d 583, 589 (5th Cir. 2014) ("Federal courts are bound to apply state law severability provisions."); *City of Houston v. Bates,* 406 S.W.3d 539, 549 (Tex. 2013) ("When an ordinance contains an express severability clause, the severability clause prevails when interpreting the ordinance.").

gardless of whether the district court acknowledges it by entering an order staying the proceedings. It is not the *stay* that divested the district court of jurisdiction over the case, but the *notice of appeal*. And an order from this Court that vacates the district court's stay cannot restore jurisdiction to the district court unless this Court overrules *Griggs* or finds some way to cancel the notice of appeal that the defendants filed on August 25, 2021.

It is preposterous for the plaintiffs to claim that the Fifth Circuit "misapplied the governing legal standards"[22] by refusing to vacate the stays. This Court's binding pronouncement in *Griggs compelled* the district court to relinquish jurisdiction over the claims against the government defendants, and the Fifth Circuit would have defied this Court if it had vacated that stay and allowed the district court to reclaim jurisdiction after the defendants had filed their notice of appeal. More importantly, the district court has no subject-matter jurisdiction over the claims in this case, and a decision to vacate the stays would violate Article III and the Eleventh Amendment by returning the case to a district court that clearly erred in rejecting the defendants' jurisdictional objections—and that would prolong and aggravate the unconstitutional impositions that the defendants have already been subjected to. Finally, the government defendants have the right to obtain appellate review of the district court's order denying their immunity defenses *before* they are subjected to further proceedings in the district court. *See Metcalf & Eddy,*

22. Emergency App. at 29.

Inc., 506 U.S. at 147. A court cannot override this prerogative simply because a plaintiff wants to pursue a preliminary injunction from the district judge.

The plaintiffs also criticize the Fifth Circuit's decision to stay the district-court proceedings with respect to Mark Lee Dickson,[23] but the Fifth Circuit entered only an administrative stay on that issue—and it has not yet ruled on whether it will ultimately stay the district-court proceedings against Mr. Dickson. But Mr. Dickson is entitled to a stay of the district-court proceedings as he pursues his appeal. Mr. Dickson is joining the government defendants in seeking to reverse the district court's sovereign-immunity holding, and he may do so without needing to independently establish Article III standing to appeal. *See Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2379 n.6 (2020) (holding that a litigant may join an appeal and seek the same relief sought by other appellants, as long as at least one appellant has standing to appeal the district court's judgment or order). Since Mr. Dickson is a proper party to the appeal of the sovereign-immunity rulings, he may simultaneously pursue any *other* jurisdictional objections on that appeal—in addition to the jurisdictional objections that arise from the district court's sovereign-immunity analysis. *See Hospitality House, Inc. v. Gilbert*, 298 F.3d 424, 429 (5th Cir. 2002) ("[W]here, as in the instant case, we have interlocutory appellate jurisdiction to review a district court's denial of Eleventh Amendment immunity, we may first determine whether

23. See Emergency App. at 32–33.

there is federal subject matter jurisdiction over the underlying case."). And because the district court has been divested of jurisdiction over all "aspects of the case involved in the appeal,"[24] it cannot assert jurisdiction over any claims against Mr. Dickson until this appeal concludes.

The plaintiffs think that Mr. Dickson needs to satisfy the four-factor test from *Nken v. Holder*, 556 U.S. 418, 427 (2009), but that test is irrelevant because the district court has lost jurisdiction over the claims against Mr. Dickson. *See Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) ("The filing of a notice of appeal . . . divests the district court of its control over those aspects of the case involved in the appeal."). When a notice of appeal divests the district court of jurisdiction, an appellate court must stay the proceedings without considering irreparable harm or the public interest, and it has no latitude for exercising the "discretion" that normally applies when deciding whether to issue a stay. *See Nken*, 556 U.S. at 427. There is only one question for the Fifth Circuit to resolve: Do Mr. Dickson's jurisdictional objections to the claims brought against him qualify as "aspects of the case involved in the appeal"? *Griggs*, 459 U.S. at 58. If the answer to that question is "yes," (and it is), then the district court has been divested of jurisdiction and the proceedings against Mr. Dickson must be stayed without considering any other factors.

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24. *See Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982).

V. There Is No Lawful Basis To Vacate The District Court's Jurisdictional Ruling

Finally, the plaintiffs ask this Court to "vacate" the district-court order that led to the defendants' interlocutory appeal. There is no authority that allows this Court to do such a thing. District-court orders are reviewed by the courts of appeals, with the exception of three-judge district-court panels that have automatic appeals to this Court. The plaintiffs cite 21 U.S.C. § 2106, but that allows an appellate court to modify or vacate court orders that have been "*lawfully brought before it* for review." 21 U.S.C. § 2106 (emphasis added). The plaintiffs appear to think that their presentation of the district-court order to this Court, along with their request to "vacate" that order, is enough to make that order "lawfully brought before" this Court. If that were true, then any appellate court could modify or vacate any order that any litigant brings to the Court's attention—it would allow the Ninth Circuit to vacate a district-court ruling from the Eastern District of Pennsylvania if a litigant asked the Ninth Circuit to do so. An order is not "lawfully brought before" an appellate court unless that court has jurisdiction to review it, and the plaintiffs cite no authority and provide no explanation for how this Court has jurisdiction to vacate or modify a district-court order that is currently on appeal to a circuit court.

The plaintiffs are effectively asking this Court to cancel the defendants' interlocutory appeal by vacating the district-court ruling that led to that appeal—simply because the plaintiffs want to keep matters in front of the dis-

trict court for a little bit longer so that it can issue the classwide preliminary injunction that they want. This request is beyond audacious when the district court so obviously lacks subject-matter jurisdiction over the plaintiffs' claims—and when the precedent of this Court *requires* federal district courts to resolve jurisdiction *before* proceeding to the merits of a case. *See Lance v. Coffman*, 549 U.S. 437, 439 (2007) ("Federal courts must determine that they have jurisdiction before proceeding to the merits."). And the plaintiffs' claim that the defendants "would suffer no prejudice" from this maneuver is risible. The defendants would not only be subjected to continued proceedings in the district court, they would also be subjected to the risk of a classwide injunction that will place the entire state judiciary under the oversight of a single federal district judge—a judge that never had jurisdiction over this case to begin with and who should have promptly dismissed the plaintiffs' claims after filing.

CONCLUSION

The motion for emergency relief should be denied.

Respectfully submitted.

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