No. 21-463

In the Supreme Court of the United States

WHOLE WOMAN'S HEALTH, ET AL., PETITIONER

v.

AUSTIN REEVE JACKSON, JUDGE, DISTRICT COURT OF TEXAS, 114TH DISTRICT, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT PENNY CLARKSTON

HEATHER GEBELIN HACKER
Counsel of Record

ANDREW B. STEPHENS
HACKER STEPHENS LLP
108 Wild Basin Rd. South,
Suite 250
Austin, Texas 78746
heather@hackerstephens.com
(512) 399-3022

QUESTIONS PRESENTED

The Texas Heartbeat Law, or Senate Bill 8, creates a cause of action for private persons—but expressly not government officials—against those who perform or aid and abet the performance of an abortion after the unborn child's heartbeat can be detected. Petitioners challenge the constitutionality of the law and seek declaratory and injunctive relief against a putative class of all non-federal judges and court clerks in Texas, in addition to a private individual and numerous Texas executive officials. The questions presented are:

1. Whether a State can insulate from federal-court review a law that prohibits the exercise of a constitutional right by delegating to the general public the authority to enforce that prohibition through civil actions.

2. Whether Article III and the Eleventh Amendment permit litigants to challenge the constitutionality of a statute enforced solely through a private right of action by suing state judges and court clerks for injunctive and declaratory relief.

PARTIES TO THE PROCEEDING

Respondent and cross-petitioner Penny Clarkston is a defendant-appellant in the court of appeals.

Respondents Judge Austin Reeve Jackson, Mark Lee Dickson, Stephen Brint Carlton, Katherine A. Thomas, Cecile Erwin Young, Allison Vordenbaumen Benz, and Ken Paxton are defendants-appellants in the court of appeals.

Petitioners 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 Woman'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 for Reproductive Equity; North Texas Equal Access Fund; Reverend Erika Forbes; Reverend Daniel Kanter; and Marva Sadler are plaintiffs-appellees in the court of appeals.

A corporate disclosure statement is not required because Ms. Clarkston is not a corporation. *See* Sup. Ct. R. 29.6.

STATEMENT OF RELATED CASES

- *Whole Woman's Health, et al. v. Judge Austin Reeve Jackson, et al.*, No. 1:21-cv-00616-RP, U.S. District Court for the Western District of Texas. Order denying defendants' motions to dismiss pursuant to

Federal Rule of Civil Procedure 12(b)(1) entered August 25, 2021.

- *In re Clarkston*, No. 21-50708, U.S. Court of Appeals for the Fifth Circuit. Order denying petition for writ of mandamus entered August 13, 2021.
- *Whole Woman's Health, et al. v. Judge Austin Reeve Jackson, et al.*, No. 21-50792, U.S. Court of Appeals for the Fifth Circuit. Oral argument scheduled for the week of December 6, 2021 cancelled on October 22, 2021 in light of this proceeding.
- *Whole Woman's Health, et al. v. Judge Austin Reeve Jackson, et al.*, No. 21A24, United States Supreme Court. Emergency Application to Justice Alito for Writ of Injunction and, in the Alternative, to Vacate Stays of District Court Proceedings. Application denied September 1, 2021.
- *Mark Lee Dickson v. Whole Woman's Health, et al.*, No. 21-582, United States Supreme Court. Conditional cross-petition docketed October 21, 2021.
- *Stephen Brint Carlton, et al., v. Whole Woman's Health, et al.*, No. 21-583, United States Supreme Court. Conditional cross-petition docketed October 21, 2021.
- *Penny Clarkston v. Whole Woman's Health, et al.*, No. 21-587, United States Supreme Court. Conditional cross-petition docketed October 21, 2021.
- *United States v. Texas*, No. 21-588, United States Supreme Court. Certiorari before judgment granted October 22, 2021. Oral argument scheduled for November 1, 2021.

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INTRODUCTION

The Texas Heartbeat Law is not "insulate[d] from federal-court review," as the petition's question presented assumes, since this Court may review a decision of the Texas Supreme Court related to the Heartbeat Law's constitutionality. 28 U.S.C. § 1257; Sup. Ct. R. 10(b); *see Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 341–44 (1816). What Petitioners really ask is whether they are guaranteed a pre-enforcement constitutional challenge in federal court against parties who do not enforce the law, even if courts must ignore the Constitution itself to consider that challenge. The answer must be no.

Petitioners' belief that the Heartbeat Law is unconstitutional does not justify an expansion of federal-court jurisdiction beyond Article III boundaries to permit their pre-enforcement challenge, nor does it justify a violation of the Eleventh Amendment. As Chief Justice John Marshall said, "'[i]f the judicial power extended to every *question* under the constitution' or 'to every *question* under the laws and treaties of the United States,' then '[t]he division of power [among the branches of Government] could exist no longer, and the other departments would be swallowed up by the judiciary.'" *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 803 (2021) (Roberts, C.J., dissenting) (quoting 4 Papers of John Marshall 95 (C. Cullen ed. 1984)). Federal courts may not issue constitutional edicts outside the bounds of their judicial authority—that itself would be unconstitutional. Yet to obtain the result Petitioners desire, this Court would have to exceed multiple constitutional boundaries essential to our structure of government.

Petitioners challenged the constitutionality of the Texas Heartbeat Law by suing a state court judge and

Respondent Penny Clarkston, the clerk of the District Court of Smith County, Texas, as putative class representatives for all non-federal judges and court clerks in Texas. While Petitioners' attempt to sue Texas by suing its judicial officers "would be a very convenient way for obtaining a speedy judicial determination of questions of constitutional law which may be raised by individuals, [] it is a mode which cannot be applied to the states of the Union consistently with the fundamental principle that they cannot, without their assent, be brought into any court at the suit of private persons." *Fitts v. McGhee*, 172 U.S. 516, 529–30 (1899). Ms. Clarkston does not enforce the Heartbeat Law within the meaning of *Ex parte Young*'s exception to sovereign immunity, so Petitioners' claims against her are barred.

Even if the Eleventh Amendment were not a wholly sufficient reason to dismiss Petitioners' claims against Ms. Clarkston, Article III clearly is. It is "well established" in multiple circuits that judges acting in their adjudicatory capacities are not proper defendants in a 42 U.S.C. § 1983 challenge to the constitutionality of a state law because there is no justiciable case or controversy. *See Whole Woman's Health v. Jackson*, 13 F.4th 434, 443 (5th Cir. 2021) (*Jackson II*). The same is true of court clerks. *Id.* at 444. And "'[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.'" *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1547 (2016) (quoting *Raines v. Byrd*, 521 U.S. 811, 818 (1997)). That is because, "under our constitutional system[,] courts are not

roving commissions assigned to pass judgment on the validity of the Nation's laws." *Broadrick v. Oklahoma*, 413 U.S. 601, 610–11 (1973).

The Court must respect its constitutional limitations and instead direct Petitioners to the avenues of relief they have available: (1) adjudication in a state-court enforcement proceeding, (2) petitioning Congress to use its Fourteenth Amendment enforcement power to preempt state law, U.S. Const. amend. XIV, § 5, or (3) advocating that the Texas Legislature change the law.

The Court should reverse the district court's decision denying Ms. Clarkston's motion to dismiss and order that the case be dismissed for lack of subject-matter jurisdiction.

OPINIONS BELOW

The opinion of the district court is reported at 2021 WL 3821062 and reprinted in the appendix to the petition in 21-463 at Pet. App. 1a–68a. There is no opinion of the court of appeals to review because the Court granted certiorari before judgment. The opinion of the Fifth Circuit motions panel, which explains its decision not to issue an injunction of the Heartbeat Law pending appeal, is reported at *Whole Woman's Health v. Jackson*, 13 F.4th 434 (5th Cir. 2021), and is reprinted in the appendix to the petition in 21-463 at 83a–105a.

JURISDICTION

The district court lacked subject-matter jurisdiction because Petitioners' claims are barred by Article III's case-or-controversy requirement. Petitioners' claims against respondents Clarkston, Jackson, Carlton, Thomas, Young, Benz, and Paxton are additionally barred by sovereign immunity.

The Fifth Circuit had appellate jurisdiction because the respondents appealed an order denying a sovereign-immunity defense, which is appealable under the collateral-order doctrine. *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993).

This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. III, § 2 provides, in relevant part:

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority . . . .

U.S. Const. amend. XI provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The text of the Fourteenth Amendment is reprinted in the appendix to the petition at Pet. App. 106a. The text of 42 U.S.C. § 1983 is reprinted in the appendix to the petition at Pet. App. 107a. The Texas Heartbeat Law, also known as Senate Bill 8, is reprinted in the appendix to the petition at Pet. App. 108a–132a.

STATEMENT

I. Factual Background

A. The Texas judicial system

1. The judicial power of the State of Texas arises from Article 5, Section 1 of the Texas Constitution. The Texas Constitution establishes the Supreme Court as the highest state appellate court for civil matters and the Court of Criminal Appeals as the highest state appellate court in criminal matters. Tex. Const. art. V, §§ 3–5. It also establishes courts of appeals that exercise intermediate appellate jurisdiction in civil and criminal cases. *Id.* § 6. District courts are the state's trial courts of general jurisdiction. *Id.* § 8. There are 478 district courts in Texas.[1] The Texas judiciary also includes County Courts at Law, Constitutional County Courts, justice courts, and municipal courts, which are courts of limited jurisdiction.[2]

2. The position of District Clerk is established by article V, section 9 of the Texas Constitution. The District Clerk is elected by qualified voters of each county. Tex. Const. art. V, § 9. The District Clerk is a county employee, as are all other staff of the District Courts, except for the District Judge.[3] The Texas Government Code

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[1] *See* Tex. Office of Ct. Admin., *Annual Statistical Report for the Texas Judiciary* iii, https://www.txcourts.gov/media/1451853/fy-20-annual-statistical-report_final_mar10_2021.pdf.

[2] *See id.*

[3] *See, e.g.*, Funding of the Texas Judicial Branch, https://www.txcourts.gov/media/1437891/about-texas-courts-2016.pdf ("Counties pay the operating costs of district courts, as well as the base salary of judges, full salaries of other staff, and operating costs for constitutional county courts, county courts at law, and justice courts.")

provides the duties of the District Clerk, which include maintaining the records of the District Court, recording the acts of the court, and entering judgments under the direction of the judge. Tex. Gov't Code § 51.303. The District Clerk also acts under authority of the Texas Rules of Civil Procedure, which are promulgated by the Texas Supreme Court. *See* Tex. Gov't Code § 22.004. The District Clerk may also act under the local rules of the District Court, which are promulgated by the judges of the District Court and the County Courts at Law and approved by the Texas Supreme Court. *See* Tex. R. Civ. P. 3(a); *see also, e.g.*, Local Smith Cty. R. of Civ. Trial.

The Texas Rules of Civil Procedure require litigants to commence a civil action by filing a petition with the clerk, who "shall" document the filing. Tex. R. Civ. P. 22, 24. Each clerk shall keep a file docket and a court docket for each case. Tex. R. Civ. P. 25, 26. "Upon the filing of the petition, the clerk, when requested, shall forthwith issue a citation and deliver the citation as directed by the requesting party . . . The clerk must retain a copy of the citation in the court's file." Tex. R. Civ. P. 99(a). The contents of the citation the Clerk issues upon request are prescribed by the Rules. Tex. R. Civ. P. 99(b), 99(c). The citation is like a summons in federal court and is issued so that the party commencing the action can serve the defendant with the lawsuit. *Compare* Tex. R. Civ. P. 99, 106 *with* Fed. R. Civ. P. 4.

B. Ms. Clarkston's role as district clerk of Smith County, Texas.

Smith County, population 232,751, is located in northeast Texas and encompasses the Tyler metropolitan area. Respondent Penny Clarkston is the elected District

Clerk of Smith County. There are four district courts in Smith County, including the 114th District Court, where Respondent Austin Reeve Jackson presides. Ms. Clarkston was elected to her position in 2018. She has worked as a legal administrator since 1985, when she became a certified legal assistant. She has worked for judges and attorneys throughout her career.

The District Clerk's office is the office of record for all proceedings heard in Smith County District Courts as well as some civil and family matters heard in County Courts at Law.[4] Records of felony cases are also kept in the District Clerk's office.[5] And the District Clerk is the Administrator of the Smith County Jury System.[6]

C. The Texas Heartbeat Act

1. On May 19, 2021, Governor Abbott signed the Texas Heartbeat Law, also known as Senate Bill 8, which prohibits abortion after a fetal heartbeat can be detected. Pet. App. 108a–132a. The Heartbeat Law 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(a) (Pet. App. 113a). Instead, the Heartbeat Law authorizes private civil lawsuits to be brought against those who violate the statute, and it provides that these private citizen-enforcement suits shall be the sole means of enforcing the statutory prohibition on post-heartbeat abortions:

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[4] *See* Smith County, Texas, *District Clerk*, https://www.smithcounty.com/government/elected-officials/district-clerk.

[5] *Id.*

[6] *Id.*

> 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.

Tex. Health & Safety Code § 171.207(a) (Pet. App. 113a). The Heartbeat Law took effect on September 1, 2021. Pet. App. 132a.

2. After the Heartbeat Law took effect, abortion providers in Texas announced that they were complying with the law. *See* Pet. at 3. Though Petitioners previously expressed fear of "abusive" and "unlimited" lawsuits, Emergency App. for Writ of Inj. at 8, *Whole Woman's Health v. Jackson*, No. 21A24 (U.S. Aug. 30, 2021), only three purported lawsuits to date have been brought to enforce the Heartbeat Law, and none of them have been served. *U.S. v. Texas* ROA.1594–95; *see also* Register of Actions, Case No. 21-2276-C, *Texas Heartbeat Project v. Braid* (filed Sept. 22, 2021).[7] Those lawsuits were only filed after a San Antonio abortion doctor published an

[7] *Available at* https://judicial.smith-county.com/PublicAccess/CaseDetail.aspx?CaseID=1771462.

op-ed in the *Washington Post* on September 18, 2021, asserting that he had performed a post-heartbeat abortion in an effort to draw an enforcement suit.[8]

By contrast, fourteen lawsuits have been filed against Texas Right to Life, including by some of the Petitioners here, requesting that the state courts enjoin Texas Right to Life from filing enforcement suits and declare the Heartbeat Law unconstitutional. *U.S. v. Texas* ROA.1594. Those cases have summary-judgment hearings currently set for November 10, 2021 in Travis County, Texas District Court. Texas Right to Life and its employees have also suffered significant harassment and threats of violence by pro-abortion individuals since the law went into effect. *U.S. v. Texas* ROA.1595–96.

3. The first time Petitioners came to this Court seeking relief, they insisted that the Heartbeat Law would result in prohibiting abortion "for at least 85% of Texas abortion patients (those who are six weeks pregnant or greater)." Emergency App. for Writ of Inj. at 2, *Whole Woman's Health v. Jackson*, No. 21A24 (U.S. Aug. 30, 2021). There has been a decrease in the number of abortions provided in Texas since September 1. But based on the limited evidence available, which was given by some of the Petitioners, it appears that the decrease has not been as dramatic as predicted.

Because this case was appealed on jurisdictional grounds before the law went into effect, there is no evidentiary record other than Petitioners' untested hearsay declarations filed in the district court, relied on here by Petitioners. *See* Pet. at 17-22. The district court did not

[8] *See* Alan Braid, *Why I violated Texas's extreme abortion ban*, Wash. Post (Sept. 18, 2021), https://wapo.st/3DUx4ki.

permit Intervenors in *United States v. Texas* (21-588) to present testimony or cross-examination at the preliminary-injunction hearing, but they nevertheless obtained some evidence regarding the accuracy of Petitioners' predictions.[9]

First, according to a highly qualified medical expert, the Heartbeat Law is not a six-week ban, as Petitioners have characterized it. *U.S. v. Texas* ROA.1528-30. When the unborn child's heartbeat can be detected depends on several factors which may or may not permit detection by six weeks of pregnancy. *U.S. v. Texas* ROA.1528-29.[10] But even if the Heartbeat Law could be construed as a 6-week ban, according to the CDC, nearly 40% of all Texas abortions in 2018, or 21,299 abortions, were performed at or below six weeks of pregnancy. *U.S. v. Texas* ROA.1532–33. Over 40% nationwide were performed at or below six weeks of pregnancy. *U.S. v. Texas* ROA.1563. In some states, that number is even higher. For example, in Florida—a state with no Heartbeat Law—CDC data shows that 72% of abortions in that state were performed at or below six weeks of pregnancy. *U.S. v. Texas* ROA.1532–33, 1563. So it is possible that a significant number—perhaps even as high as three-quarters—of the number of abortions that were being performed previously might still be performed in compliance with the Heartbeat Law. *See U.S. v. Texas* ROA.1533.

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[9] *See* Intervenors' Mot. to Stay Inj. at 17-18, *United States v. Texas*, No. 21-50949 (5th Cir. Oct. 7, 2021).

[10] Medical literature and widely accepted practice shows that the use of the term "heartbeat" in this context is appropriate. *U.S. v. Texas* ROA.1529-30.

According to the latest data provided by Petitioners, it appears that from September 12, 2021 through September 16, 2021, Planned Parenthood clinics in Houston and Stafford, Texas performed between 50 and 63% of the average number of abortions they performed before the Heartbeat Law. *U.S. v. Texas* ROA.1531-32.[11] Those numbers appear to be trending up, and reports indicate that women are increasing reliance on contraceptives in response to the law, which is clinically preferable to relying on abortion for birth control. *U.S. v. Texas* ROA.1531, 1533-34.

II. Procedural History

A. Petitioners' lawsuit

Petitioners filed this lawsuit on July 13, 2021. ROA.21. They sued Ms. Clarkston as a putative defendant class representative of every non-federal Texas court clerk. ROA.53–54. They also 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 Texas. ROA.53. In addition to these judicial officials, Petitioners sued the Texas Attorney General and several state-agency officials, as well as

[11] Based on statistics given by Melaney Linton, CEO of Planned Parenthood Center for Choice (PPCFC), PPCFC performed between 14.3 and 17.9 abortions per day before the Heartbeat Law (the daily average for 400-500 abortions per month). Ms. Linton attested that PPCFC performed 52 abortions between September 1 and September 11 and 97 abortions between September 1 and September 16, which means that PPCFC performed 45 abortions between September 12 and September 16. That averages to approximately 9 abortions per day, which is between 50-63% of the abortions that were performed on average before the Heartbeat Law.

Mark Lee Dickson, a private individual. ROA.54–58. Petitioners' complaint requests relief that would prohibit Judge Jackson—and every non-federal judge in Texas—from considering or deciding any lawsuits that might be filed under the Heartbeat Law, and that would prohibit Ms. Clarkston—and every non-federal Texas court clerk—from docketing petitions submitted in such lawsuits. ROA.84–85. It also requests an injunction that would restrain Mr. Dickson from filing any private civil-enforcement lawsuits under the Heartbeat Law. ROA.84. Later that day, Petitioners filed a motion for summary judgment, and they moved for class certification on July 16, 2021. ROA.24, 28.

B. Lower court proceedings

On August 4-5, 2021, all the defendants moved to dismiss for lack of subject-matter jurisdiction on the basis of sovereign immunity and Article III standing. Pet. App. 90a. On August 25, 2021, the district court issued an order denying each of the defendants' motions to dismiss for lack of subject-matter jurisdiction. Pet. App. 1a–68a. The defendants immediately appealed the district court's jurisdictional ruling. Pet. App. 90a.

The next morning, the defendants informed the district court that their notice of appeal had automatically divested it of jurisdiction. They asked the district court to cancel the preliminary-injunction hearing that the court had scheduled for August 30, 2021 and stay all further proceedings in the case. ROA.1540–42. *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."). 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. ROA.1547. When that time passed, the defendants filed an emergency motion with the Fifth Circuit, requesting that it stay the district-court proceedings pending appeal. Pet. App. 90a. Defendants also asked for a temporary administrative stay pending consideration of that motion. Pet App. 90a.

On August 27, 2021, 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. ROA.1571–72. The district court stated that it retained jurisdiction over the claims against Mr. Dickson because he has "no claim to sovereign immunity," and "the denial of his motion to dismiss is not appealable." ROA.1572. Later that day, the Fifth Circuit issued an administrative stay of all district-court proceedings, including proceedings against Mr. Dickson, pending its disposition of the defendants' motion for emergency relief. Pet. App. 90a.

Petitioners responded by filing several motions. First, they asked the district court to reclaim jurisdiction over the case by certifying the defendants' appeal as "frivolous." ROA.1551–60. The district court denied this request. ROA.1571. Then Petitioners asked the Fifth

Circuit to adopt an extreme schedule that would have required a ruling by September 1, 2021. The court of appeals summarily denied this request. *See Whole Woman's Health v. Jackson*, 13 F.4th 434, 441 & n.7 (5th Cir. 2021) (*Jackson II*). Petitioners also asked the Fifth Circuit for an injunction that would prevent the defendants from enforcing Senate Bill 8 during the appeal. They further 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. Finally, Petitioners 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 court of appeals denied these requests. *See id.* at 441 & n.7.

C. Emergency proceedings in this Court

After the court of appeals denied Petitioners' requests for an injunction pending appeal and to vacate the district court stay, Petitioners sought emergency relief from this Court, asking for the same relief. *Whole Woman's Health v. Jackson*, No. 21A24 (U.S. Aug. 30, 2021). This Court denied both requests on September 1, 2021, holding that Petitioners failed to make a "strong showing" of likely success on the jurisdictional issues, while cautioning that it was not definitively resolving "any jurisdictional or substantive claim in the applicants' lawsuit." *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2495 (2021) (*Jackson I*).

In denying the application, the Court noted that there are "complex and novel antecedent procedural questions" at issue in this case. *Id.* As examples, the Court

pointed to two standing-related issues. First, the Court noted that "federal courts enjoy the power to enjoin individuals tasked with enforcing laws, not the laws themselves." *Id.* (citing *California v. Texas*, 141 S. Ct. 2104, 2115–16 (2021)). Second, the Court also noted that "it is unclear whether the named defendants in this lawsuit can or will seek to enforce the Texas law against the applicants in a manner that might permit our intervention." *Id.* (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) ("threatened injury must be *certainly impending*" (citation omitted))).

The Court also referenced *Ex parte Young*, 209 U.S. 123, 163 (1908), pointing out two further weaknesses in Petitioners' case which precluded the grant of their requested relief. *Jackson I*, 141 S. Ct. at 2495. First, "[t]he State has represented that neither it nor its executive employees possess the authority to enforce the Texas law either directly or indirectly." *Id.* Second, it also explained that it was not "clear whether, under existing precedent, this Court can issue an injunction against state judges asked to decide a lawsuit under Texas's law." *Id.*

D. The court of appeals' stay decision

On September 10, 2021, the Fifth Circuit issued an opinion explaining its decision to deny Petitioners' emergency request for an injunction pending appeal. *See Jackson II*, 13 F.4th 434. The court of appeals held that Petitioners failed to establish a "strong likelihood of success on the merits," which is needed to obtain an injunction pending appeal. *See id.* at 441 (citing *Fla. Businessmen for Free Enterprise v. City of Hollywood*, 648 F.2d 956, 957 (5th Cir. 1981)).

More specifically, the court of appeals held that Petitioners' claims against Attorney General Paxton or any of the state-agency defendants are barred by the Eleventh Amendment because each of these officials is statutorily prohibited from enforcing the Heartbeat Law. *See id.* at 443 ("[T]he Texas Attorney General has no official connection whatsoever with the statute."); *id.* at 443 ("The agency officials sued here have no comparable 'enforcement' role under S.B. 8."); *see also* Tex. Health & Safety Code § 171.207(a).

The court of appeals also held that the claims against Judge Jackson and Ms. Clarkston were "specious" because *Ex parte Young* "explicitly excludes judges from the scope of relief it authorizes," and because "it is well established that judges acting in their adjudicatory capacity are not proper Section 1983 defendants in a challenge to the constitutionality of state law." *Jackson II*, 13 F.4th at 443. Further, it held that "the court clerks act under the direction of judges acting in their judicial capacity. Their duty within the court is to accept and file papers in lawsuits, not to classify 'acceptable' pleadings. Accordingly, the clerks are improper defendants against whom injunctive relief would be meaningless." *Id.* at 444.

The court of appeals also held that Mr. Dickson could pursue his Article III standing objections as part of the interlocutory appeal, and it granted his motion to stay the district-court proceedings pending appeal. *See id.* at 445–47.

Finally, the Fifth Circuit expedited the appeal to the next available oral-argument panel. *See id.* at 448. The respondents had already submitted their opening briefs

on October 13, 2021 and oral argument was scheduled for the week of December 6, 2021.

E. Current proceedings in this Court

Petitioners filed a petition for certiorari before judgment on September 23, 2021. On October 18, 2021, the Court requested a response to be filed by October 21, 2021. Each of the respondents also filed cross-petitions on October 21, 2021. This Court granted the petition on October 22, 2021 and set the case for argument on November 1, 2021.

SUMMARY OF ARGUMENT

"Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (citations omitted). The district court violated this bedrock principle by exceeding its jurisdiction under Article III and by denying Ms. Clarkston's sovereign-immunity defense.[12]

I. Petitioners lack standing to sue Ms. Clarkston because there is no justiciable case or controversy. *See* Part I.A *infra*. Judges and clerks are not sufficiently adverse to plaintiffs challenging the constitutionality of a state law, and it is well established in multiple circuits that judges and clerks are not proper defendants in this context.

The district court's ruling attempted to skirt these precedents by asserting that Ms. Clarkston (and Judge Jackson) do not act as judicial officials in docketing or hearing cases brought under the Heartbeat Law but rather as "judicial enforcers" because there is no one else for Petitioners to sue preemptively. The district court's simultaneous (incorrect) recognition of Petitioners'

[12] While the interlocutory appeal underlying this case relates to the district court's denial of sovereign immunity, this Court "must first address whether this action . . . is the sort of 'Article III' 'case or controversy' to which federal courts are limited." *Calderon v. Ashmus*, 523 U.S. 740, 745 (1998). "While the Eleventh Amendment is jurisdictional in the sense that it is a limitation on the federal court's judicial power, and therefore can be raised at any stage of the proceedings . . . it is not coextensive with the limitations on judicial power in Article III." *Id.* at 745 n.2.

claims against other state defendants contradicts that conclusion. Regardless, that is plainly not the law. *See* Part I.B *infra.* If it were, plaintiffs could regularly sue state judges and clerks to challenge state laws that may be enforced by others in state-court proceedings, which is problematic because it removes these judicial officials from a position of neutrality toward the law and forces them to defend its merits. The procedural provisions of the Heartbeat Law also do not transform Ms. Clarkston and Judge Jackson into "judicial enforcers," as the district court argued, because Texas judges are not barred from considering Petitioners' objections to those provisions during state-court proceedings. Further, the fact that Petitioners lack an avenue for a federal pre-enforcement challenge does not authorize federal courts to expand their own jurisdiction beyond Article III's boundaries.

Even if the lack of case or controversy did not outright preclude Petitioners' claims against Ms. Clarkston, Petitioners fail to meet other Article III standing requirements. *See* Parts I.C, I.D *infra.* Petitioners failed to plead an imminent, non-speculative injury-in-fact. But even if they had, their claims against Ms. Clarkston fail to satisfy the causation and redressability requirements because Ms. Clarkston cannot prosecute any enforcement actions, so Petitioners' possible injury from potential enforcement actions is not traceable to her, and any relief a court could grant against her could not stop anyone from filing Heartbeat enforcement suits in the 253 other Texas counties.

II. Aside from the lack of Article III standing, Petitioners' claims are also barred by sovereign immunity.

Because Ms. Clarkston has no enforcement authority under the Heartbeat Law, the *Ex parte Young* exception to sovereign immunity, which allows suits for prospective relief against state officials, does not apply, as multiple circuits have found. *See* Part II.A *infra*. Ms. Clarkston also retains her governmental authority—and the suit against her in her official capacity remains a barred suit against a sovereign state—because the actions Petitioners seek to prevent her from taking are not inherently unlawful acts which would strip her immunity and form the basis of an official capacity suit under *Ex parte Young*. *See* Part II.B *infra*.

ARGUMENT

I. Petitioners Lack Article III Standing to Assert Their Claims Against Defendant Clarkston.

The Constitution limits the jurisdiction of federal courts to "Cases" and "Controversies." U.S. Const. art. III, § 2. And "[o]ne component of the case-or-controversy requirement is standing, which requires a plaintiff to demonstrate the now-familiar elements of injury in fact, causation, and redressability." *Lance v. Coffman*, 549 U.S. 437, 439 (2007) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–561 (1992)). Petitioners lack standing because no case or controversy exists between them and any of the defendants. They also fail to meet the other standing requirements.

A. Judges and clerks are not proper parties in actions challenging the constitutionality of a state statute because there is no justiciable case or controversy.

Article III ensures that federal courts exercise their authority only "'as a necessity in the determination of real, earnest and vital controversy between individuals.'" *Uzuegbunam*, 141 S. Ct. at 804 (Roberts, C.J., dissenting) (*quoting Chicago & Grand Trunk R. Co. v. Wellman*, 143 U.S. 339, 345 (1892)). "The case or controversy requirement of Article III of the Constitution requires a plaintiff to show that he and the defendants have adverse legal interests." *Bauer v. Texas*, 341 F.3d 352, 359 (5th Cir. 2003).

1. In its decision not to grant an injunction pending appeal, the Fifth Circuit held that judicial officers are not proper defendants in a case challenging the constitutionality of a state law because there is a lack of adversity, and thus, no case or controversy. "The [Petitioners] are not 'adverse' to the state judges. When acting in their adjudicatory capacity, judges are disinterested neutrals who lack a personal interest in the outcome of the controversy." *Jackson II*, 13 F.4th at 443. Multiple circuits agree that judicial officials are not proper defendants in this context. *See Just. Network Inc. v. Craighead Cty.*, 931 F.3d 753, 763 (8th Cir. 2019) (holding "judicial immunity typically bars claims for prospective injunctive relief against judicial officials acting in their judicial capacity"); *Allen v. DeBello*, 861 F.3d 433, 442 (3d Cir. 2017) (holding state judges are not proper parties to a § 1983 suit challenging the constitutionality of state cus-

tody dispute procedures because the judges could not initiate the actions themselves, had no administrative function under the statute, and did not promulgate the procedures); *Grant v. Johnson*, 15 F.3d 146, 148 (9th Cir. 1994) (holding that "judges adjudicating cases pursuant to state statutes may not be sued under § 1983 in a suit challenging the state law"); *In re Justices of The Supreme Court of Puerto Rico,* 695 F.2d 17, 21 (1st Cir. 1982) (Breyer, J.) (holding that Section 1983 will not provide any avenue for 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."); *cf. Mendez v. Heller*, 530 F.2d 457 (2d Cir. 1976) (finding state court judges and clerks joined as defendants in a suit challenging New York's durational residency requirement for divorce lack the requisite interest in defending the allegedly unconstitutional statutes).

As the Fifth Circuit explained, there are multiple reasons that judicial officials acting in their judicial capacity are not proper defendants in a constitutional challenge:

> First, 'judges sit as arbiters without a personal or institutional stake on either side of the constitutional controversy.' Second, 'almost invariably, they have played no role in the statute's enactment.' Third, 'they have not initiated its enforcement.' Finally, 'they do not even have an institutional interest in following their prior decisions (if any) concerning its constitutionality if an authoritative contrary legal determination has subsequently been made.'

Id. (quoting *In re Justices,* 695 F.2d at 21).

The same is true here. Neither Judge Jackson nor Ms. Clarkston have a personal stake in the outcome of Heartbeat enforcement suits, neither of them were involved in the statute's enactment, and as state officials, they are barred by state law from enforcing the Heartbeat Law. Tex. Health & Safety Code § 171.207(a). Thus, "[s]ection 1983 will not provide any avenue for 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.'" *Bauer*, 341 F.3d at 361 (quoting *In re Justices*, 695 F.2d at 22.).

2. As a clerk merely docketing petitions and issuing citations as required under state law and the Texas Rules of Civil Procedure, Ms. Clarkston is even more like the "postal carrier" than a judge is. Multiple circuits have also held that court clerks specifically, like judges, lack adversity to plaintiffs challenging the constitutionality of a state law, and claims against them fail to satisfy Article III's case-or-controversy requirement.

In *Chancery Clerk of Chickasaw County v. Wallace*, 646 F.2d 151, 160 (5th Cir. 1981), the Fifth Circuit held that a plaintiff challenging the state's commitment procedures for the mentally ill could not bring a class action against judges and chancery clerks as defendants because there was no adversity between the plaintiffs and the putative defendant class. The Court noted that "[b]ecause 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.'" *Id.* at 160 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)); *see also Mendez*, 530 F.2d 457 (state court judges and clerks joined as defendants in a suit challenging New York's durational residency requirement for divorce found to lack the requisite interest in defending the allegedly unconstitutional statutes)).

Court clerks are not adverse to Petitioners for the same reason that judges are not, since clerks act at the direction of judges. Texas district clerks act under authority of the Texas Rules of Civil Procedure, which are promulgated by judges. *See* Tex. Gov't Code § 22.004. Without instructions from a judge, "the clerk of court lacks authority to refuse or to strike a pleading presented for filing." *McClellon v. Lone Star Gas Co.*, 66 F.3d 98, 102 (5th Cir. 1995). Texas "[c]ourt clerks, acting in the course of their duties, are accorded judicial immunity because *they function as an arm of the court*." *Thompson v. Coleman*, No. 01-01-00114-CV, 2002 WL 1340314, at *5 (Tex. App.—Houston [1st Dist.] June 20, 2002, pet. denied) (emphasis added) (citing *City of Houston v. Swindall*, 960 S.W.2d 413, 417 (Tex. App.—Houston [1st Dist.] 1998, no pet.))

Moreover, clerks are like judges in that they are instrumental to the administration of justice and the operation of the courts. "[T]he judicial process has been, and continues to be, defined by the skills and personalities of federal court clerks, [and] the customs and practices of those clerks have contributed to the vitality of judicial

independence in our federal system."[13] Early federal court clerks had "responsibilities . . . quite similar to those of state court clerks at the time and to those of clerks in the colonial courts that existed prior to the American Revolution. The structures and practices of those clerks' offices, in turn, were modeled on those that had developed over centuries in English courts."[14] The "chief functions" of court clerks, dating from the Middle Ages, are "to enter records of cases on the plea rolls, and secondly, to issue judicial writs of process in the course of actions at law."[15] Conducting those tasks neutrally, without preference or favor, is critical to the court's overall task of administering justice and upholding the law. If one cannot file their lawsuit or summon the defendant to court, one cannot obtain justice. And unless someone keeps record of judicial proceedings, they are of little value.

The Fifth Circuit agreed in this case that "clerks are improper defendants" because "court clerks act under the direction of judges acting in their judicial capacity," and because a clerk's "duty within the court is to accept and file papers in lawsuits, not to classify 'acceptable pleadings.'" *Jackson II*, 13 F.4th at 444 (citing *Bauer*,

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[13] I. Scott Messinger, *Order in the Courts: A History of the Federal Court Clerk's Office* 3, Federal Judicial Center 2002, https://www.rid.uscourts.gov/sites/rid/files/historical/documents/OrdCourt.pdf.

[14] *Id.* at 4.

[15] R.W. Bentham & J.M. Bennett, *The Office of Prothonotary: Its Historical Development in England and in New South Wales*, 3 Sydney L. Rev. 47, 49 (1959), *available at* http://classic.austlii.edu.au/au/journals/SydLawRw/1959/5.pdf.

341 F.3d at 359). Thus, "the clerks are improper defendants against whom injunctive relief would be meaningless." *Id.* (citing *Wallace*, 646 F.2d at 160).

3. The lack of adversity between the judicial defendants and Petitioners is also apparent when one considers the effect of suing them in a lawsuit challenging the constitutionality of a state law. If the judge is forced to say, in his official capacity, what he thinks about the merits of the law in the context of this litigation, it requires him to render what amounts to an advisory opinion. Absent this litigation, Judge Jackson and every other judge in Texas must merely observe their constitutional duties in applying the law and evaluating its validity. In other words, under their normal role, judges don't *defend* the law's validity, they *test* it.

In the case of clerks like Ms. Clarkston, she is being forced to depart from her statutory duties to treat every case filed in her court equally regardless of the merits, both in defending against this litigation and if the Plaintiffs were to obtain the relief they seek. Evenhandedness and equal justice under the law are bedrocks of our judicial system, but Petitioners' ill-founded suit against judicial officers acting in their adjudicatory capacity necessarily pulls them away from their duties as neutral arbiters and forces them to take on roles contradictory to that duty.

Judge Jackson and Ms. Clarkston's continued involvement as defendants in the case also raises an ethical dilemma. Canon 3(B)(10) of the Texas Code of Judicial Ethics states:

> 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."[16]

The Code also requires judges to ensure that court staff, including clerks, abide by this requirement as well. *See id.* ("A judge shall require similar abstention on the part of court personnel subject to the judge's direction and control.")

Judge Jackson and Ms. Clarkston will be placed in an untenable position by Petitioners' lawsuit if it is permitted to continue. If they refuse to defend the merits of the law, they risk liability for costs and attorneys' fees. But if they defend the claims against them on the merits, they must step out of the role of neutral arbiter of law. This is precisely why courts have long held that judges and clerks are not proper defendants under section 1983—because of their neutral role, they lack a personal stake in the outcome and are not sufficiently adverse to the plaintiff to provide a case or controversy under Article III. Petitioners should not be permitted to challenge the constitutionality of a state law by suing defendants who are hampered in raising a full and vigorous defense and who lack an adverse interest.

B. Ms. Clarkston does not "enforce" the Heartbeat Law.

Disregarding the plain language of the Heartbeat Law prohibiting enforcement by state or local officials,

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[16] *Available at* https://www.txcourts.gov/media/1452409/texas-code-of-judicial-conduct.pdf.

the district court held that Ms. Clarkston and Judge Jackson "play an enforcement role in S.B. 8." ROA.1515. The district court concluded that "S.B. 8 empowers the Judicial Defendants to take on an enforcement role in the law's application," and "the Judicial Defendants [are] the only state officials tasked with directly enforcing S.B. 8 against Plaintiffs." ROA.1516. But the Fifth Circuit rejected that, pointing to the statute's express language forbidding enforcement by state officials and stating that the law is enforced "exclusively" through private civil actions:

> This language could not be plainer. Exclusive means exclusive . . . . Confirming that none of the State Defendants has an 'enforcement connection' with S.B. 8 is not difficult in light of the statute's express language and our case law. . . . No enforcement power means no enforcement power.

Jackson II, 13 F.4th at 442–43.

Setting aside the plain language of the statute, the district court contended that two factors distinguish this case from *Bauer* and the other cases holding that judges and clerks are not proper defendants in this context: Judge Jackson's public statements about "enforc[ing]" the Heartbeat Law, and provisions of the Heartbeat Law that "skew in favor of claimants." ROA.1516. According to the district court, those two factors render Judge Jackson and Ms. Clarkston's actions not "purely adjudicatory" and makes them "judicial enforcers rather than neutral adjudicators." ROA.1516. The district court further found it "troubling" that Respondents argued that

Petitioners could assert their constitutional claims defensively, ROA.1515, and found that Judge Jackson and Ms. Clarkston were "sufficiently adverse" to Petitioners because "there are no other governmental authorities tasked with enforcement of S.B. 8," ROA.1512.[17] This reasoning is entirely mistaken.

First, Judge Jackson, like this Court, *applies* the law—he does not "enforce" it other than by administering justice in the way the law and Constitution require. That is obviously what he meant by the statement quoted in the district court opinion. ROA.1516. Further, the district court did not explain how Judge Jackson's oversimplified statement implicates Ms. Clarkston. There is no evidence that Ms. Clarkston has ever made such a statement.

Second, Petitioners' objections to the procedural provisions of the Heartbeat Law do not transform Judge Jackson or Ms. Clarkston into "enforcers." The Heartbeat Law does not render Texas judges incapable of determining its validity. Indeed, "[i]t is absurd to contend, as Plaintiffs do, that the way to challenge an unfavorable state law is to sue state court judges, who are bound to follow not only state law but the U.S. Constitution and federal law." *Jackson II*, 13 F.4th at 444. It was improper and unfounded for the district court to imply that Texas judges—co-equal judicial officers and guardians of the Constitution—will not fairly consider Petitioners' argu-

[17] This is an odd argument given that Petitioners sued other government officials in this case who they claim have enforcement authority, and the district court agreed (incorrectly) that Petitioners have standing to sue those officials. ROA.54–58, 1498–1507.

ments as to the legality of the Heartbeat Law's procedural provisions. This Court has been "unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States. State courts, like federal courts, have a constitutional obligation to safeguard personal liberties and to uphold federal law." *Stone v. Powell*, 428 U.S. 465, 494 (1976) (citing *Martin*, 14 U.S. (1 Wheat.) at 341–44).

Third, Petitioners are not prejudiced by the lack of a federal pre-enforcement challenge because they cannot meet standing requirements, as they are fully entitled to assert their constitutional defenses in state court actions brought under the Heartbeat Law. *See Mendez*, 530 F.2d at 460–61 (rejecting plaintiff's argument that the lower court's dismissal for lack of justiciability against any state defendant, including judge and clerk, "improperly forces her to initiate state proceedings to vindicate her federal claim, and prevents her from seeking federal relief except in the Supreme Court" because "we perceive no injustice therein." (citations omitted)). No doubt, pre-enforcement constitutional challenges can be brought in some circumstances. But that fact alone does not provide a right to do so in every situation, nor a right to override the Constitution's requirements for standing and justiciability. Further, the Heartbeat Law supplies Petitioners with an affirmative defense based on the Supreme Court's undue-burden standard, which applies in abortion cases anyway. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 874 (1992). Petitioners may thus argue in state court, if they are sued, that the law imposes

an undue burden—just as they do here—and avoid liability. In addition, if they are sued, Petitioners may assert an affirmative claim in state court that the law violates their constitutional rights.

Finally, the cases holding judicial officials are not proper defendants did not turn on whether there were other defendants the plaintiffs could sue aside from the judges or clerks. The district court (and Petitioners, Pet. at 28-31) cited to other cases in which judges or clerks were named as defendants to support this point, but Ms. Clarkston has not argued that judges and clerks could *never* be proper defendants. Rather, when a judge or clerk is acting in her *adjudicatory capacity*, she is not a proper defendant under section 1983. *Bauer*, 341 F.3d at 359–60; *Nollet v. Justices of Trial Ct. of Com. of Mass.*, 248 F.3d 1127 (1st Cir. 2000); *In re Justices*, 695 F.2d at 22; *Mendez*, 530 F.2d at 458; *accord Wallace*, 646 F.2d at 160.

Petitioners expressly seek to prevent "all non-federal judges in the State of Texas" from granting "remedies mandated by S.B. 8." ROA.73, 74. In what other capacity could a judge grant legal "remedies" in cases brought before her? *See Mireles v. Waco*, 502 U.S. 9, 12 (1991) ("Whether an act by a judge is a 'judicial' one relate[s] to the nature of the act itself, i.e., whether it is a function normally performed by a judge, and to the expectations of the parties, i.e., whether they dealt with the judge in his judicial capacity.") Further, Petitioners' logic would even allow the Justices and clerks of *this* Court to be named as defendants and enjoined if it adjudicates a case involving a challenged law. That result must be rejected: "Plaintiffs' position is antithetical to federalism, violates

the Eleventh Amendment and *Ex parte Young*, and ignores state separation of powers." *Jackson II*, 13 F.4th at 444.

The district court's expansion of its own jurisdiction—to accommodate Petitioners' otherwise impermissible pre-enforcement challenge—was error.

C. Petitioners further failed to satisfy Article III because they lacked an imminent, non-speculative injury-in-fact.

The Supreme Court has "repeatedly reiterated that 'threatened injury must be certainly *impending* to constitute injury in fact,' and that '[a]llegations of *possible* future injury' are not sufficient." *Clapper*, 568 U.S. at 409 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)). *Bauer* also held that dismissal of a section 1983 claim against state judges that challenged the constitutionality of a state statute was proper because the plaintiff failed to show immediate injury and prudential standing considerations counseled against relief, even if standing requirements were minimally met. Because there were no currently pending actions under the challenged statute before the defendant judge, the Fifth Circuit held that there was no

> "substantial likelihood" and a "real and immediate" threat that [plaintiff] will face injury from [the defendant judge] in the future. This court has often held that plaintiffs lack standing to seek prospective relief against judges where the likelihood of future encounters is speculative. *Adams v. McIlhany*, 764 F.2d 294, 299 (5th Cir.

> 1985); *Society of Separationists, Inc. v. Herman*, 959 F.2d 1283 (5th Cir. 1992). Furthermore, there is the danger that excessive superintending of state judicial functions "would constitute a form of monitoring of the operation of state court functions that is antipathetic to established principles of comity." *O'Shea v. Littleton*, 414 U.S. 488, 501 (1974). Because there is no ongoing injury to [plaintiff] and any threat of future injury is neither imminent or likely, there is not a live case or controversy for this court to resolve and a declaratory judgment would therefore be inappropriate.

Bauer, 341 F.3d at 358–59.

The same is true here. There were no pending actions under the Heartbeat Law in Smith County at the time the complaint was filed, nor had Ms. Clarkston docketed any.[18] Petitioners claimed to be injured by the threat of potential litigation, but Petitioners did not plead that private enforcement was imminent enough that Ms. Clarkston would have to docket such a petition in Smith

[18] Counsel is aware that since this lawsuit was filed and the Heartbeat Law went into effect, there appear to be a grand total of three purported enforcement suits filed, and only after the owner of a Plaintiff clinic claimed he violated the Heartbeat Law in a *Washington Post* op-ed, apparently to trigger enforcement suits. One is in Smith County, and it was docketed by Ms. Clarkston's staff. No citation appears to have been issued, however, even though the suit was filed three weeks ago. *See* Register of Actions, Case No. 21-2276-C, *Texas Heartbeat Project v. Braid* (filed Sept. 22, 2021), https://judicial.smith-county.com/PublicAccess/CaseDetail.aspx?CaseID=1771462. Regardless, "standing is to be determined as of the commencement of suit." *Lujan*, 504 U.S. at 570 n.5.

County anytime soon. That is fatal. The plaintiff "must 'clearly … allege facts demonstrating' each element" of Article III standing. *Spokeo*, 136 S. Ct. at 1547 (citation omitted). "'Hypothetical'" injuries are insufficient to establish Article III jurisdiction. *Whitmore*, 495 U.S. at 155 (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 101–02 (1983). And Petitioners, who do not even have an abortion clinic or operation in Smith County, *see* ROA.47–52, offered nothing to suggest private enforcement was "certainly impending" there. *Whitmore*, 495 U.S. at 158 (citation omitted). Because the Heartbeat Law "at most *authorizes*—but does not *mandate* or *direct*" civil lawsuits, much less in Smith County specifically, Petitioners' fears regarding any lawsuits that would even tangentially involve Ms. Clarkston are "necessarily conjectural." *Clapper*, 568 U.S. at 412. And as this Court just reaffirmed, the fact that Petitioners ask for declaratory relief does not give them a pass to standing requirements. "Instead, just like suits for every other type of remedy, declaratory-judgment actions must satisfy Article III's case-or-controversy requirement." *California*, 141 S. Ct. at 2115 (citation omitted). Thus, "'[t]he declaratory judgment device does not . . . permit litigants to invoke the power of this Court to obtain constitutional rulings in advance of necessity.'" *Id.* (quoting *Poe v. Ullman*, 367 U.S. 497, 506 (1961)).

D. Petitioners also lack standing to sue Ms. Clarkston because of a lack of causation and redressability.

If the holdings of multiple circuits that suits against judicial officials in their judicial capacity present no Ar-

ticle III case or controversy were somehow not applicable, and even assuming Petitioners have an injury-in-fact, they still lack standing to sue because they cannot establish causation and redressability. In a very similar context to this case, the Fifth, Seventh, and Tenth Circuits have all held that plaintiffs lack standing to preemptively challenge laws creating private rights to sue abortion providers. *See K.P. v. LeBlanc*, 729 F.3d 427, 437 (5th Cir. 2013); *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1157–58 (10th Cir. 2005); *Hope Clinic v. Ryan*, 249 F.3d 603, 605–06 (7th Cir. 2001) (en banc); *Okpalobi v. Foster*, 244 F.3d 405, 426–27 (5th Cir. 2001) (en banc).

In *Okpalobi*, abortion doctors and clinics preemptively sued government officials—Louisiana's Governor and Attorney General—to block a law that provided for unlimited tort liability for abortion doctors injuring women and their unborn children. 244 F.3d at 409. Those plaintiffs, like these plaintiffs, argued that the law would force them to cease providing abortions that potentially exposed them to civil damages claims under the law, and that the law created an undue burden on women's right to abortion. *Id.* at 410. A majority of the *en banc* Fifth Circuit held that the plaintiffs lacked standing and remanded the case for dismissal. *Id.* at 429.

The *Okpalobi* plaintiffs lacked standing because no "act of the defendants has caused, will cause, or could possibly cause any injury to [plaintiffs]" because neither the Governor nor Attorney General had (or would) "file and prosecute" any of the private suits against the plaintiffs. *Id.* at 426, 427. Even assuming an injury-in-fact, the court concluded that plaintiffs could not satisfy the other elements of Article III standing. *Id.* at 428. It was not the

government "who inflicts the claimed injury—it is the private plaintiff, bringing a private lawsuit . . . who *causes* the injury of which the plaintiffs complain." *Id.* And the claimed injury could not be redressed because the government defendants "cannot prevent purely private litigants from filing and prosecuting a cause of action under [the law]." *Id.* at 427.

Relying on *Okpalobi*, the Fifth Circuit reached the same result in *LeBlanc*, where abortion providers challenged the constitutionality of the private-enforcement provision of a Louisiana law in a lawsuit against board members of a medical-malpractice patient fund that excluded participation with respect to abortion-related procedures. *LeBlanc*, 729 F.3d at 437. The court held that the providers lacked standing to challenge the private cause of action against the board members because they had no authority to enforce or bring suit under that provision. *Id.*

In *Hope Clinic*, the Seventh Circuit held that the plaintiffs lacked standing to challenge a law providing for civil liability in the event a partial-birth abortion is performed on a minor without parental consent. 249 F.3d at 605. The court held that "plaintiffs lack standing to contest the statutes authorizing private rights of action, not only because the defendants cannot cause the plaintiffs injury by enforcing the private-action statutes, but also because any potential dispute plaintiffs may have with future private plaintiffs could not be redressed by an injunction running only against public [officials]." *Id.* at 605. The Court continued: "An injunction prohibiting these defendants from enforcing the private-suit rules would be pointless; an injunction prohibiting the world

from filing private suits would be a flagrant violation of both Article III and the due process clause." *Id.* Just as here, "insofar as [Petitioners] seek protection from suits that may be filed by [private individuals] . . . [Petitioners] must rely on the value of [abortion precedent] . . . rather than on an injunction against state officers." *Id.* at 606.

The Tenth Circuit came to the same conclusion. In *Nova Health*, an abortion provider preemptively challenged an Oklahoma law creating civil liability for medical expenses incurred because of an abortion performed on a minor without parental consent. *Nova Health*, 416 F.3d at 1156–60. First, the Court held that the plaintiff "failed to show the required causal connection between its injury and these defendants" because there was "no evidence that the defendants have done or threatened to do anything that presents a substantial likelihood of causing [the plaintiff] harm." *Id.* at 1157. There was no connection between the abortion provider's claimed injury—loss of business—and anything the defendants would do. *Id.* Second, the Court held that the plaintiff had not demonstrated redressability because "the record cannot support a conclusion enjoining *only these defendants* from filing suit to recover damages under [the law] would redress that injury." *Id.* at 1158–59.

Applying these principles, Petitioners have no standing to sue Ms. Clarkston. As Ms. Clarkston is prohibited from enforcing the Heartbeat Law, *see* Tex. Health & Safety Code § 171.207(a), she cannot cause Petitioners' injury because she cannot "file and prosecute" any enforcement action. *Okpalobi*, 244 F.3d at 427. She has no control over whether someone chooses to file a Heartbeat Law enforcement petition. And issuing citation

comes only after a private party chooses to both file an enforcement action *and* "request[]" that citation be issued. Tex. R. Civ. P. 99(a). Of course, Judge Jackson has no say over whether someone chooses to file suit in Smith County District Court, nor even over whether that case is assigned to him or one of the other district judges in the county. Again, these officials do not "inflict[] the claimed injury—it is the private plaintiff, bringing a private lawsuit . . . who *causes* the injury of which the plaintiffs complain." *Okpalobi*, 244 F.3d at 427. Docketing a petition or considering a case, even if meritless, is not itself an unconstitutional action.

Petitioners also lack standing to sue Ms. Clarkston because their alleged injury is not redressable. An injunction against Ms. Clarkston cannot prohibit private parties from initiating Heartbeat Law enforcement actions in any of the 253 other counties in Texas where Ms. Clarkston has no responsibility for docketing petitions. Thus, "[fo]r all practical purposes," such an injunction "is utterly meaningless." *Id.* at 426; *accord Nova Health*, 416 F.3d at 1159 ("a judgment in Nova's favor would do nothing to prevent lawsuits against Nova" by private individuals).

Moreover, section 1983 itself prohibits injunction actions against judicial officers acting in their judicial capacity, *see Jackson II*, 13 F.4th at 443–44; 42 U.S.C. § 1983 ("in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable"). And as established above, Ms. Clarkston

acts in such a capacity when she performs the acts Petitioners contend subject her to liability (docketing petitions and issuing citation upon request).

Declaratory relief does not work either. Ms. Clarkston has "no authority to prevent a private plaintiff from invoking the statute in a civil suit." *Okpalobi*, 244 F.3d at 427. Nor does Ms. Clarkston have any authority to "order what cases the judiciary of [Texas] may hear or not hear." *Id.* A declaratory judgment against Ms. Clarkston also cannot prevent private litigants from suing under the Heartbeat Law.

Thus, "[t]he question of standing in this case is easily framed. We should ask whether enjoining defendants from enforcing the statute complained of will bar its application to these plaintiffs. The answer is no." *Id.* at 430 (Higginbotham, J., concurring). Ms. Clarkston has no "responsibility for enforcing [the Heartbeat Law]," and "whether that is so ought to be the beginning and the end of this [case]." *Id.*

II. Petitioners' Suit Against Defendant Clarkston Does Not Fit Within the *Ex parte Young* Exception to Sovereign Immunity.

Even if there were a justiciable case or controversy, the claims against Ms. Clarkston are barred by sovereign immunity. The Eleventh Amendment bars a suit against state officials when "the state is the real, substantial party in interest." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 (1984). "[A]n official-capacity suit is, in all respects other than name, to be treated as a suit against the entity." *Kentucky v. Graham*, 473 U.S. 159, 166 (1985). Here, it is clear that Peti-

tioners are attempting to make the state a party. Petitioners urged the district court to enjoin every non-federal judge and court clerk in Texas—the entire Texas judiciary—to prevent the filing or consideration of private-enforcement suits under the Texas Heartbeat Law.

Under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), however, there is a long and well-recognized exception to this rule for suits against state officers seeking prospective equitable relief to end continuing violations of federal law. Thus, this lawsuit must be dismissed unless it falls within the *Young* exception.[19] For a plaintiff to properly invoke *Young*, the state official sued must have "some connection with the enforcement of the [challenged] act, or else [the suit] is merely making him a party as a representative of the state, and thereby attempting to make the state a party." *Young*, 209 U.S. at 157.

A. The Eleventh Amendment does not permit suits against state officials to challenge laws creating private causes of action.

1. As this Court noted over a century ago, "[t]here is a wide difference between a suit against [state officials]

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[19] Even if Ms. Clarkston "enforced" the Heartbeat Law, if a suit "implicates special sovereignty interests," the *Ex parte Young* exception does not apply. *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 281 (1997). By seeking relief against classes making up the entire Texas judiciary, Petitioners seek relief that "is close to the functional equivalent" of suing the Texas judiciary. *Id.* at 282. "This is especially troubling when coupled with the far-reaching and invasive relief" Petitioners seek. *Id.* Petitioners cannot use the mechanism of a class action to make an end-run around sovereign immunity.

. . . to prevent them, under the sanction of an unconstitutional statute, from committing by some positive act a wrong or trespass, and a suit against officers of a state merely to test the constitutionality of a state statute." *Fitts*, 172 U.S. at 529–30. If a state official cannot commit the "wrong or trespass" at issue, the *Young* exception to sovereign immunity does not apply. The threat of private civil enforcement lawsuits does not suffice to show a connection between those lawsuits, which Petitioners claim violate their constitutional rights, and Ms. Clarkston, who cannot bring such lawsuits. The Fifth and Eleventh Circuits agree.

In this case, the Fifth Circuit referred to the "plain" language of the Heartbeat Law itself in finding that none of the State Defendants—including Ms. Clarkston—have an enforcement connection with the Heartbeat Law sufficient to apply the *Young* exception. *Jackson II*, 13 F.4th at 442. Thus, "[c]onfirming that none of the State Defendants has an 'enforcement connection' with S.B. 8 is not difficult in light of the statute's express language [prohibiting government enforcement] and our case law." *Id.* As the court noted, *Young* explicitly excludes judicial officials from the scope of relief it authorizes:

> [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.

Id. (quoting *Young*, 209 U.S. at 163).

The Eleventh Circuit came to the same conclusion in a case involving a challenge to a private right of action against abortion providers, holding that the "Eleventh Amendment bars [plaintiffs'] challenge to the *private* civil enforcement provision of the partial-birth abortion statute." *Summit Med. Assocs., P.C. v. Pryor*, 180 F.3d 1326, 1341 (11th Cir. 1999). The *Young* doctrine "cannot operate as an exception to . . . sovereign immunity where no defendant has any connection to the enforcement of the challenged law at issue." *Id.* Because the civil actions could not be brought by the government officials, they had no "relationship to the enforcement of this provision." *Id.* at 1342.

2. The district court sidestepped the statute's plain language prohibiting enforcement by state officials. It claimed that simply because Petitioners bring claims for prospective relief, their claims are permitted under *Ex parte Young* because Petitioners would otherwise be left without means to obtain pre-enforcement relief. ROA.1517. This argument is flawed in at least two ways.

First, it leaves out half of the analysis. It is true that suits against state officials for prospective relief are the *Young* exception to sovereign immunity. *Papasan v. Allain*, 478 U.S. 265, 277–78 (1986). But for the *Young* exception to even *apply*, the state actor must have "some connection with the enforcement of the [challenged] act." 209 U.S. at 157.

Second, Petitioners' lack of a pre-enforcement challenge does not justify expanding federal jurisdiction beyond the bounds of Article III. Asserting rights in defense, rather than pre-enforcement, is common in constitutional litigation. *See, e.g.*, *Our Lady of Guadalupe Sch.*

v. Morrissey-Berru, 140 S. Ct. 2049 (2020) (indicating that religious schools may raise a First Amendment claim defensively after being sued for employment discrimination); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp. Opportunity Comm'n*, 565 U.S. 171 (2012) (same); *Masterpiece Cakeshop, Ltd., v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018) (showing that a cake baker could raise Free Exercise and Free Speech claims defensively after being sued for violation of the Colorado Anti-Discrimination Act).[20]

B. The act of docketing or hearing a case brought under S.B. 8 is not an illegal act "stripping" Ms. Clarkston of her governmental authority.

"The *Young* doctrine recognizes that if a state official violates federal law, he is stripped of his official or representative character and may be personally liable for his conduct; the State cannot cloak the officer in its sovereign immunity." *Coeur d'Alene Tribe*, 521 U.S. at 288 (O'Connor, J., concurring); *see also Pennhurst*, 465 U.S. at 104 ("[A]n official who acts unconstitutionally is 'stripped of his official or representative character'" (quoting *Young*, 209 U.S. at 60)).

An illegal act committed by the state official is essential to apply *Young* because that act is what creates the distinction between the state and its officers, permitting suit without violating the Eleventh Amendment. *See Pennhurst*, 465 U.S. at 114 n.25. Petitioners contend that the *Young* exception applies because Ms. Clarkston "coerce[s] those sued to appear and defend themselves" by

[20] *See also* Br. of Amicus Curiae Becket Fund for Religious Liberty, *United States v. Texas*, No. 21-588 (filed Oct. 26, 2021).

docketing cases and issuing citation upon request if Heartbeat Law suits are filed in Smith County District Court. Pet. 28. But docketing enforcement suits filed by others, and issuing citation upon the request of others, does not mean that Ms. Clarkston is "enforcing" the Heartbeat Law. The private suits themselves are what seek to "enforce" the law, not the citation to appear. *See Enforcement*, *Black's Law Dictionary* (11th ed. 2019) ("the act or process of compelling compliance with a law, mandate, command, decree, or agreement."). Even if the Heartbeat Law's prohibition on post-heartbeat abortions were unconstitutional, Ms. Clarkston is no more "enforcing" that prohibition by docketing a case than a court clerk who dockets a petition suing an individual for protected speech activity, or for belonging to a certain religious organization. Indeed, a person could bring such a suit even without a private enforcement mechanism—it would simply be dismissed as frivolous by a judge. Ms. Clarkston would not violate the Constitution by merely docketing those petitions like she does all others.

Simply put, Ms. Clarkston does nothing illegal by accepting a court filing that seeks to enforce a statute, even if that statute is unconstitutional. And without an illegal act "stripping" her of her governmental authority or participation in the enforcement of an unconstitutional law, the *Young* exception does not apply and Petitioners' suit is barred by sovereign immunity.

CONCLUSION

The Court should reverse the district court's order denying Ms. Clarkston's motion to dismiss and direct the district court to dismiss Petitioners' complaint for lack of jurisdiction.

Respectfully submitted.

HEATHER GEBELIN HACKER
Counsel of Record
for Respondent Penny Clarkston

ANDREW B. STEPHENS
HACKER STEPHENS LLP
108 Wild Basin Rd. South,
Suite 250
Austin, Texas 78746
heather@hackerstephens.com
(512) 399-3022

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