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

WHOLE WOMAN'S HEALTH, et al.,	§	
Plaintiffs,	§	
v.	§	Civil Action No. 1:21-cv-00616-RP
AUSTIN REEVE JACKSON, et al.,	§	
Defendants.	§	

DEFENDANT PENNY CLARKSTON'S UNOPPOSED MOTION FOR LEAVE TO EXCEED PAGE LIMITS FOR REPLY IN SUPPORT OF MOTION TO DISMISS FOR LACK OF JURISDICTION

Defendant Clarkston files this Unopposed Motion for Leave to Exceed Page Limits for Reply in Support of Motion to Dismiss for Lack of Jurisdiction and would show the Court as follows:

1. On August 5, 2021, Defendant Clarkston filed her Motion to Dismiss for Lack of Jurisdiction. (ECF No. 51).

2. On August 11, 2021, Plaintiffs filed their Consolidated Opposition to Defendant Judge Jackson's and Defendant Clarkston's Motions to Dismiss. (ECF No. 59). The Consolidated Opposition is 36 pages long, raises numerous arguments regarding jurisdiction, and attempts to distinguish numerous cases cited by Defendant Clarkston in her Motion to Dismiss.

3. Defendant Clarkston requests that she be granted leave to exceed the 10-page limit in Local Rule CV-7(d) to fully respond to Plaintiffs' arguments. Defendant Clarkston's Reply in Support of her Motion to Dismiss is 19 pages. A copy of the reply is attached hereto.

4. Counsel for Plaintiffs have indicated that they do not oppose this motion.

WHEREFORE, Defendant Clarkston respectfully requests that the Court grant her Unopposed Motion for Leave to Exceed Page Limits for Reply in Support of Motion to Dismiss for Lack of Jurisdiction.

Respectfully submitted.

/s/ Heather Gebelin Hacker
HEATHER GEBELIN HACKER
Texas Bar No. 24103325
heather@hackerstephens.com
ANDREW B. STEPHENS
Texas Bar No. 24079396
andrew@hackerstephens.com
HACKER STEPHENS LLP
108 Wild Basin Rd. South, Suite 250
Austin, Texas 78746
Tel: (512) 399-3022

Attorneys for Defendant Penny Clarkston

CERTIFICATE OF SERVICE

I certify that on August 13, 2021, this document was served through the Court's CM/ECF Document Filing System or through electronic mail, upon all counsel of record.

/s/ Heather Gebelin Hacker
HEATHER GEBELIN HACKER

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

WHOLE WOMAN'S HEALTH, et al.,	§	
Plaintiffs,	§	
v.	§	Civil Action No. 1:21-cv-00616-RP
AUSTIN REEVE JACKSON, et al.,	§	
Defendants.	§	

[PROPOSED] ORDER GRANTING DEFENDANT PENNY CLARKSTON'S MOTION FOR LEAVE TO EXCEED PAGE LIMITS FOR REPLY IN SUPPORT OF MOTION TO DISMISS FOR LACK OF JURISDICTION

Having considered Defendant Clarkston's Unopposed Motion for Leave to Exceed Page Limits for Reply in Support of Motion to Dismiss for Lack of Jurisdiction, and good cause being shown therefor,

IT IS HEREBY ORDERED that Defendant Clarkston's Motion is GRANTED.

Dated:

_____
United States District Judge

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

WHOLE WOMAN'S HEALTH, et al., Plaintiffs, v. AUSTIN REEVE JACKSON, et al., Defendants.	§ § § § § § § § § § §	Civil Action No. 1:21-cv-00616-RP

DEFENDANT PENNY CLARKSTON'S REPLY IN SUPPORT OF MOTION TO DISMISS FOR LACK OF JURISDICTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

INTRODUCTION

Plaintiffs' arguments boil down to asserting that their disagreement with S.B. 8 is so strong it overrides Article III limits on this Court's jurisdiction. Even if that were a valid position, this Court has no authority to decide that. This Court is bound by controlling case law that holds there is no federal jurisdiction for multiple reasons in this situation. Plaintiffs' attempts to get around it fall flat and rest in large part on a completely fallacious assertion—that Ms. Clarkston (or Judge Jackson, for that matter) "enforce" S.B. 8. They do no such thing, as the law makes abundantly clear. Plaintiffs' frustration at having to wait to present their undue-burden arguments in state court in the event they are sued under S.B. 8, rather than preemptively in this Court, does not nullify the constitutional limits on this Court. This Court should dismiss Plaintiffs' claims against Ms. Clarkston in their entirety for lack of jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure.

ARGUMENT

I. The Fact That Pre-Enforcement Challenges Exist Does Not Entitle Plaintiffs to One Here.

As the Northern District of Texas just held in a similar case, "[i]t is simply not the case that because someone might suffer a burden on their constitutional rights, the person is granted an automatic entrance into federal court." *Planned Parenthood of Greater Tex. Surg. Health Servs. v. City of Lubbock, Tex.* (PPGTSHS), No. 5:21-CV-114-H, 2021 WL 2385110, at *16 (N.D. Tex. June 1, 2021). Plaintiffs argue (at 3-6) that because pre-enforcement constitutional challenges are possible, they are entitled to do it here, and they are entitled to commandeer the entire Texas judiciary (including court clerks like Ms. Clarkston) because there is no one else for them to

sue. Unsurprisingly, they cite no authority for this sweeping conclusion because none exists, as it would turn the concept of limited federal court jurisdiction on its head. No doubt, pre-enforcement constitutional challenges can be brought. But that fact does not provide a freestanding right to do so in every situation, nor a right to do so that overrides the Constitution's requirements for standing and justiciability. The courts "must not shrink from our duty to decide a controversy, but that duty includes faithful obedience to the limits of our mandate. It is beyond our mandate to issue prospective relief every time a state actor arguably infringes a constitutional right." *Soc'y of Separationists, Inc. v. Herman*, 959 F.2d 1283, 1286 (5th Cir. 1992) (en banc).

It is black-letter law that in order to "invoke" the judicial power and the jurisdiction of the federal courts, "a plaintiff must satisfy the ... 'irreducible constitutional minimum' for standing." *Cranor v. 5 Star Nutrition, LLC*, 998 F.3d 686, 689 (5th Cir. 2021) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). "Federal courts are courts of limited jurisdiction, and absent jurisdiction conferred by statute, lack the power to adjudicate claims. It is incumbent on all federal courts to dismiss an action whenever it appears that subject matter jurisdiction is lacking. This is the 'first principle of federal jurisdiction.'" *Texas v. Travis Cty., Tex.*, 910 F.3d 809, 811 (5th Cir. 2018) (*Travis Cty.*) (quoting *Stockman v. Fed. Election Comm'n*, 138 F.3d 144, 151 (5th Cir. 1998)). Plaintiffs' contention that their patients' constitutional rights will be violated by S.B. 8 does not permit them to bypass jurisdictional requirements. Article III "is not an unconditioned authority to determine the constitutionality of legislative or executive acts." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982). Rather, "'[u]nder our constitutional system[,] courts are not roving commissions assigned to

pass judgment on the validity of the Nation's laws.'" *In re Gee*, 941 F.3d 153, 161 (5th Cir. 2019) (citation omitted).

This Court recognized this concept before when Texas tried to preemptively sue municipalities in a declaratory-judgment action for violating state law. In *Texas v. Travis County*, this Court held that even though the defendants had standing to sue the State over the same law in another lawsuit, had enacted ordinances violating the challenged state law, and had publicly stated their intent to sue the State over the challenged law, the State could not bring a preemptive suit because it lacked an "imminent injury," as the law had not yet gone into effect and there was still "no evidence" the defendants intended to violate it. 272 F. Supp. 3d 973, 979–80 (W.D. Tex. 2017) (*Texas*). There was no standing because "[t]he State's alleged injury turns on the legal consequences of some act that may or may not occur—that is, Defendants' decision to violate the law." *Id.* at 980. The Fifth Circuit affirmed the dismissal for lack of subject-matter jurisdiction, holding that States are not prejudiced by a lack of a preemptive federal claim, even though the party being sued by the State could preemptively raise the same claim in their own lawsuit, because the State can enforce its laws through its "own courts." *Travis Cty.*, 910 F.3d at 812.

The same is true here. As Ms. Clarkston has already explained, *see* Clarkston Mot. to Dismiss 9–10, and will explain again below, *see* Part III.A *infra.*, the injury Plaintiffs allege is caused by Ms. Clarkston (or Judge Jackson) is not sufficiently imminent under binding precedent because there is no case currently pending in Smith County, nor has anyone even threatened to sue in Smith County. Even assuming that Ms. Clarkston would violate the Constitution by merely docketing a case brought under S.B. 8, whether Ms. Clarkston will actually be called upon to do

that "may or may not occur." *Texas*, 272 F. Supp. 3d at 980. Moreover, Plaintiffs have not even alleged that they will violate the law, which is the only way a case under S.B. 8 can be brought. *See* Compl. 1–49 (Dkt. 1).[1] Plaintiffs are not prejudiced by the lack of a federal preemptive challenge because they cannot meet standing requirements, as they are fully entitled to assert their constitutional defenses in state court actions brought under S.B. 8. *See Mendez v. Heller*, 530 F.2d 457, 460–61 (2d Cir. 1976) (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)).

What's more, S.B. 8 supplies Plaintiffs with an affirmative defense based on the Supreme Court's undue-burden standard, which applies in abortion cases anyway. Compl. Ex. 1 at 10. The Supreme Court has never held that the right to abortion is absolute—rather, it may be curtailed so long as the State does not impose an undue burden on the woman's right to previability abortion. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 874 (1992). Plaintiffs 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 under the defense baked into S.B. 8. In addition, Plaintiffs may assert an affirmative claim in state court that the law violates their constitutional rights if

[1] Plaintiffs state in their response that they "currently engage in and desire to continue to engage in activities that S.B. 8 will proscribe if it takes effect on September 1." Pls.' Cons. Opp. at 9 (Dkt. 62). They cite no allegation in the Complaint that says that. Regardless, in order for a case to even be brought under S.B. 8, Plaintiffs would actually have to violate it, and they have never said that they intend to do so.

they are sued, which is not out of the ordinary in constitutional litigation. There are many examples of constitutional challenges raised in a defensive posture. *PPGTSHS*, 2021 WL 2385110, at *16; *see also, 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).

Further, the Plaintiffs' belief that Texas state courts, which have an obligation to uphold the Constitution just like this Court does, are "rigged proceedings" is baseless. The objections Plaintiffs raise (at 7 and 28-29) to S.B. 8's provisions are all objections that may be considered by Texas judges. S.B. 8 does not render Texas judges incapable of determining its validity. Plaintiffs point to nothing that indicates that Texas judges cannot, or will not, consider whether S.B. 8 could legally eliminate issue and claim preclusion, for instance. The implication that Texas judges, as co-equal judicial officers and guardians of the Constitution, will not fairly consider these arguments is unfounded. This Court may not assume so without evidence to the contrary. *See Herman*, 959 F.2d at 1287 ("There is nothing to indicate, and we decline to presume, that [the state judge] will fail to take cognizance of applicable constitutional principles in future proceedings."); *cf. Goodwin v. Johnson*, 132 F.3d 162, 183 (5th Cir. 1997) ("the coequal responsibilities of state and federal judges in the administration of federal constitutional law are such that we think the district

judge may, in the ordinary case in which there has been no articulation, properly assume that the state trier of fact applied correct standards of federal law to the facts in the absence of evidence . . . that there is reason to suspect that an incorrect standard was in fact applied." (quoting *Townsend v. Sain*, 372 U.S. 293, 314–15 (1963)).

The bottom line is that there is no basis for Plaintiffs' attempt to force jurisdiction over their preemptive constitutional challenge where jurisdictional requirements are not met. And this Court, like all lower federal courts, is bound by controlling precedent holding that those requirements are not met in cases just like this one.

II. Plaintiffs' Claims Against Defendant Clarkston Fail to Satisfy Article III's Case-Or-Controversy Requirement According to Binding Fifth Circuit Precedent.

"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). The Fifth Circuit has squarely held that "the requirement of a justiciable controversy is not satisfied where a judge acts in his adjudicatory capacity." *Id.* Thus, "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.* The Fifth Circuit has also squarely held that "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 Cty. v. Wallace*, 646 F.2d 151, 160 (5th Cir. 1981) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

A. Plaintiffs cannot distinguish the Fifth Circuit's controlling precedent in *Bauer* and *Wallace*.

Plaintiffs have provided no basis for the Court to avoid the Fifth Circuit's binding precedent. They contend (at 23-27) that because there were other officials that could be sued in those cases, they do not apply here because there are no other officials, other than judges and clerks, that Plaintiffs may sue.[2] But this argument merely echoes the same incorrect argument refuted above. If, according to the Fifth Circuit, there is "no justiciable controversy" against state judges and clerks acting in their "adjudicative capacity," the fact that Plaintiffs may not sue other defendants does not suddenly create a "justiciable controversy." *Bauer*, 341 F.3d at 359.

Plaintiffs point to public statements made by Judge Jackson regarding his willingness to defend the law (at 22-23), claiming that they mean that he now has a stake in the outcome of the case per *Bauer*. But as an initial matter, Judge Jackson's statements have nothing to do with Ms. Clarkston, who has never said anything like that. Further, to the extent Judge Jackson's statements indicate that he thinks he has a "stake" in the outcome of this case, it is obvious why—he does *because the Plaintiffs sued him*. The same goes for Plaintiffs' assertion (at 22) about Ms. Clarkston's arguments regarding her state-law duties in response to the lawsuit.

[2] Notably, Plaintiffs *did* sue other officials here who they claim have enforcement authority. Compl. ¶¶ 51–55. Either plaintiffs are wrong about that and *Bauer* and *Wallace* apply even according to their (incorrect) arguments, or they are wrong about suing those other defendants.

Plaintiffs cannot stake their claim for justiciability on Defendants' positions taken in response to litigation against them—their case must be justiciable at the outset and cannot be made so retroactively by the litigation itself. *Cf. Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998) ("Obviously, however, a plaintiff cannot achieve standing to litigate a substantive issue by bringing suit for the cost of bringing suit.") Moreover, even if state officials have "a duty to support the constitutionality of challenged state statutes, and to defend actions in which the state is 'interested', [they] do[] so, not as an adverse party, but as a representative of the State's interest in asserting the validity of its statutes." *Mendez*, 530 F.2d at 460.

This is also precisely why judges shouldn't be sued in a challenge to a law that the judge may have to apply in their adjudicatory capacity. It forces the judge to step out of the role of neutral arbiter of the law and requires them to defend the merits of the law as a state official. 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 Plaintiffs' 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.

B. Judicial officers may not be sued under section 1983 where they act only in an adjudicatory capacity.

Ms. Clarkston is not contending, nor does the case law support, that judges and clerks may *never* be sued for constitutional violations. They just may not be sued in circumstances like this, where they are acting in their adjudicatory capacity. Plaintiffs contend (at 28-29) that Ms. Clarkston and Judge Jackson are acting as enforcers, but that is demonstrably incorrect. The Fifth Circuit explained the distinction between enforcement and adjudication in *Bauer*, where the plaintiff tried to make the same argument as Plaintiffs here:

> Bauer attempts to distinguish *Chickasaw* and other such cases, arguing this situation is different because Texas's guardianship statutes give [the judge] the ability to enforce, not merely adjudicate the law. Bauer relies on *Supreme Court of Virginia v. Consumers Union of U.S., Inc.*, 446 U.S. 719 (1980), in which it was held that the Chief Justice of the Virginia Supreme Court was a proper party under section 1983 because the Court acted in an enforcement, rather than an adjudicatory capacity, in initiating proceedings against attorneys for violating state regulations on legal advertising. Therefore, whether [the judge] is a proper party under section 1983 and whether there is a case or controversy depends on whether [the judge] likewise acted outside of his adjudicatory capacity. . . .
>
> *Supreme Court of Virginia* is distinguishable principally because, unlike the disciplinary proceeding against the attorney initiated by the Virginia Supreme Court, [the judge] did not initiate a temporary guardianship over Bauer. Instead, he issued an order creating a temporary guardianship after evidence was presented to him and he found sufficient cause. Although [the judge] did initiate the appointment of the guardian ad litem under [the challenged law], who petitioned after conducting an investigation for the creation of a temporary guardianship, the guardian ad litem was under no obligation to request a temporary guardianship.

341 F.3d at 360, 361. The same is true here. Neither Judge Jackson nor Ms. Clarkston "enforce" S.B. 8 because neither "initiate" S.B. 8 enforcement suits. *Id.* at 361. Docketing cases and issuing citation upon request, Tex. R. Civ. P. 99(a), does not "initiate" a S.B. 8 suit—a private plaintiff does that. Similarly, "issu[ing] an order" in an S.B. 8 case "after evidence [i]s presented" does not "initiate" the proceeding. *Bauer*, 341 F.3d at 361. 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, which is obviously what he meant by the statement quoted in Plaintiff's brief (at 28).

Plaintiffs cite *Caliste v. Cantrell*, 937 F.3d 525 (5th Cir. 2019), but it is not to the contrary. There, a magistrate judge was sued because he was "a member of the committee that allocates" court fees and served as both "generator and administrator of court fees," which created a conflict of interest. *Id.* at 526. Plaintiffs also cite *LeClerc v. Webb*, 419 F.3d 405 (5th Cir. 2005), but that case only supports *Bauer*'s reasoning. In *LeClerc*, the plaintiffs challenged Louisiana Supreme Court rules excluding nonimmigrant aliens from admission to the bar, which are "enforce[d]" by the Louisiana Supreme Court. *Id.* at 414. Citing *Supreme Court of Virginia*, the Court held that "*[w]hen acting in its enforcement capacity*, the Louisiana Supreme Court, and its members, are not immune from suits for declaratory or injunctive relief." *Id.* (emphasis added). The Court distinguished between acting in an enforcement capacity and in a "judicial capacity," noting that 42 U.S.C. § 1983 "precludes injunctive relief for suits against a judicial defendant acting" in that capacity. *Id.* & n. 19.

Plaintiffs cite no authority undermining *Bauer* or *Wallace*'s applicability here, nor any Supreme Court law to the contrary. The mere existence of cases involving

judges or clerks as defendants does not mean that Judge Jackson or Ms. Clarkston are proper defendants here, because as stated above, judges and clerks may be proper defendants in some circumstances. But these are not those circumstances. Under binding case law, Judge Jackson and Ms. Clarkston are acting in their adjudicatory capacity and the claims against them do not present a case or controversy under Article III. This Court is bound to follow that precedent and dismiss Plaintiffs' claims against Ms. Clarkston for lack of jurisdiction.

III. Plaintiffs Lack Standing to Sue Defendant Clarkston Under Binding Fifth Circuit Precedent.

Aside from the lack of adversity producing a justiciable case or controversy, *Bauer* also rejected a § 1983 suit against judicial officers for lack of standing. "Standing to sue is part of the common understanding of what it takes to make a justiciable case." *Steel Co.*, 523 U.S. 83, 102 (1998) (citing *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)).

A. Plaintiffs lack a non-speculative injury-in-fact inflicted by Ms. Clarkston.

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 v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (quoting *Whitmore*, 495 U.S. at 158).

That is the case here. There are no currently pending actions under S.B. 8 in Smith County, nor has Ms. Clarkston docketed any. Plaintiffs have offered nothing to suggest private enforcement is "certainly impending" there. *Glass v. Paxton*, 900 F.3d 233, 241 (5th Cir. 2018) (quoting *Whitmore*, 495 U.S. at 158). It is true that a

future injury can satisfy the injury-in-fact requirement in a pre-enforcement challenge, and Ms. Clarkston does not argue otherwise. But it is also clear that future injury cannot be speculative. Here, whether Plaintiffs will suffer an injury specifically from Judge Jackson and Ms. Clarkston is pure speculation because of the limited scope of their job duties.

Plaintiffs argue (at 9-11) that their injury in Smith County is sufficiently impending because Defendant Dickson's counsel has filed some other lawsuits there before, which is completely specious. But they mainly focus their arguments on what they perceive as the threat of litigation around the State. As a result, Plaintiffs are requesting that the Court certify a class of all Texas judges and clerks, but that's putting the cart before the horse. The standing issue must be resolved before a class is certified. *Rivera v. Wyeth–Ayerst Labs.*, 283 F.3d 315, 319 (5th Cir. 2002). Plaintiffs have sued defendants whose job duties are *only* in Smith County. Plaintiffs cannot create standing based on a request to certify a statewide class if they have no standing to sue the class representatives. "Standing cannot be acquired through the back door of a class action." *Allee v. Medrano*, 416 U.S. 802, 828–29 (1974) (Burger, C.J., concurring in part); *see also Brown v. Sibley*, 650 F.2d 760, 771 (5th Cir. 1981) ("Inclusion of class action allegations in a complaint does not relieve a plaintiff of himself meeting the requirements for constitutional standing, even if the persons described in the class definition would have standing themselves to sue. If the plaintiff has no standing individually, no case or controversy arises.")

If Plaintiffs cannot show that a lawsuit is certainly impending in Smith County specifically, the only place where their chosen putative class representatives have any ability to act and therefore inflict injury, they cannot succeed in showing

standing. Showing that they will potentially be injured by other members of the putative defendant class cannot rectify the lack of standing to sue the class representatives:

> [Plaintiffs] must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent. Unless these petitioners can thus demonstrate the requisite case or controversy between themselves personally and respondents, 'none may seek relief on behalf of himself or any other member of the class.'

Warth v. Seldin, 422 U.S. 490, 502 (1975) (*quoting O' Shea v. Littleton*, 414 U.S. 488, 494 (1974)).

And there is simply nothing to suggest that Plaintiffs will be sued in Smith County. None of the plaintiffs have any operations there. Compl. ¶¶ 24–46. They do not allege that they "currently engage in and desire to continue to engage in activities that S.B. 8 will proscribe," Pls.' Cons. Opp. at 9, in Smith County. Plaintiffs have pointed to no threats to sue that specifically involve Smith County. Pls.' Cons. Opp. at 10–11. Smith County is just one of 254 counties in Texas. If Plaintiffs have no evidence that there is greater than a one in 254 chance that someone will sue one of the Plaintiffs in Smith County, that injury is too speculative to confer standing.

That is why this case is like *Clapper* and unlike *Susan B. Anthony List v. Driehaus*, 573 U.S. 149 (2014) (*SBA List*), on which Plaintiffs rely. In *SBA List*, the plaintiff sued the Ohio Election Commission, who administered and enforced a state statute permitting individuals to file complaints with the Commission for making "false statements" concerning political candidates. The Commission would then investigate violations itself (subpoenaing documents and compelling production of

documents), referring to a prosecutor if it found merit. The threat of future enforcement in that case was credible for multiple reasons not present here. First, and "most obviously, there is a history of past enforcement [because] SBA was the subject of a complaint in a recent election cycle." *Id.* at 164. The threat is "even more substantial given that the Commission panel actually found probable cause to believe that SBA's speech violated the [challenged] statute" and "the threat is even more substantial" given that the Commission had found probable cause before, which future complainants could use to accuse SBA of a greater violation. *Id.* Further, there was evidence that the Commission handled numerous complaints per year involving the challenged law. *Id.* at 164–65.

Here, obviously, there is no history of past enforcement, nor evidence that numerous such cases have been brought. But there is also no evidence to suggest that Plaintiffs will be held liable for violating the statute because no court has applied the undue-burden defense in the context of S.B. 8. Further, SBA List sued the entity responsible for enforcing and administering the statute—the Commission did not act as a neutral court of law. And there was government action involved—as the Court pointed out, "*where threatened action by government is concerned*, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat." *Id.* at 158 (emphasis added) (quoting *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128–29 (2007)). S.B. 8 enforcement suits are brought by private individuals. There is no government action involved here other than Judge Jackson and Ms. Clarkston's adjudicatory responsibilities, which are different from the role played by the Commission.

Clapper is more similar to this case. There, the Court found that the alleged injury was too speculative to confer standing because the plaintiffs relied on a "chain of possibilities" that would result in their injury. *Clapper*, 568 U.S. at 410. Here too, it is speculative that a private third party not before the Court will decide to sue one of the Plaintiffs under S.B. 8, *and* will also decide to sue one of them in Smith County specifically, which is what it would take for Ms. Clarkston or Judge Jackson to injure Plaintiffs (assuming *arguendo* that their involvement in adjudicating an S.B. 8 case would even inflict a constitutional injury). Because S.B. 8 "at most *authorizes*—but does not *mandate* or *direct*" civil lawsuits, much less in Smith County specifically, Plaintiffs' fears regarding any lawsuits that would even tangentially involve Ms. Clarkston or Judge Jackson are "necessarily conjectural." *Id.* at 412.

Thus, just like the Fifth Circuit already held in *Bauer*, there is no "'substantial likelihood' and a 'real and immediate' threat that [plaintiff] will face injury" from Ms. Clarkston or Judge Jackson in the future.

B. Plaintiffs establish causation and redressability under Fifth Circuit precedent.

Plaintiffs also lack standing because they cannot establish the remaining elements according to Fifth Circuit case law.

1. Fifth Circuit precedent makes clear that where plaintiffs allege that their harm derives from private lawsuits, it is not *caused* by state actors. In *Okpalobi v. Foster*, 244 F.3d 405, 426 (5th Cir. 2001) (en banc), the Fifth Circuit held that plaintiffs lacked standing because no "act of the defendants has caused, will cause, or could possibly cause any injury to [plaintiffs]" because the defendants had not, and would not, initiate any of the private suits against abortion providers. 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.* The Fifth Circuit reached the same conclusion in *K.P v. LeBlanc*, 729 F.3d 427, 437 (5th Cir. 2013): "[I]t is the private plaintiff, bringing a private lawsuit . . . who causes the injury of which the plaintiffs complain." (emphasis omitted) (citing *Okpalobi*, 244 F.3d at 428).

Plaintiffs counter (at 12-17) with out-of-circuit cases. But those cases are not binding on this Court like *Okpalobi* and *LeBlanc*. Plaintiffs also rely on *K.P. v. LeBlanc*, 627 F.3d 115 (5th Cir. 2011) (*LeBlanc I*). But it does not support their argument because the defendants the plaintiffs sued in that case were members of a board that "administer[ed]" a state fund providing uniform compensation to patients injured by medical malpractice and which excluded coverage for abortions. *Id.* at 119. Acting as administrators, and not judges, the Board members were the "initial arbiters of compensable claims under the Fund," and they could "unilaterally preclude the Plaintiffs from claiming the benefits of limited liability and independent medical review," and "refuse to recognize the right to call on the Fund to pay a settlement or court judgment." *Id.* at 123. As *Bauer* makes clear, judges and court clerks act in an *adjudicatory*, not an administrative, capacity by hearing cases and fulfilling docketing responsibilities. 341 F.3d at 359. Adjudicatory actions do not make judges and court clerks adverse to Plaintiffs, nor give them a "personal stake" in the conflict such that a case or controversy is created, and therefore cannot cause injury sufficient to create standing. *Id.* As already explained above and in Ms. Clarkston's motion to dismiss (at 13-14), and as is clear on the face of the challenged law, *see* Compl. Ex. 1 at 5, neither Ms. Clarkston nor Judge Jackson enforce the law.

2. Plaintiffs also lack standing to sue Ms. Clarkston because their alleged injury is not redressable by any relief this Court could grant against her. As the Fifth Circuit held in *Okpalobi*, the plaintiffs' claimed injury cannot be redressed because Ms. Clarkston and Judge Jackson "cannot prevent purely private litigants from filing and prosecuting a cause of action under [the law]." 244 F.3d at 427. With respect to injunctive relief, Plaintiffs admitted that "only declaratory relief is available at this time against the defendant class of judges." Pls.' MSJ at 4 (Dkt. 19). Regardless, injunctive relief is unavailable against Ms. Clarkston because it is an "elemental fact that a state official cannot be enjoined to act in any way that is beyond his authority to act in the first place." *Okpalobi*, 244 F.3d at 427. Plaintiffs now argue (at 20) that all their requested injunction would do is require Ms. Clarkston to comply with federal law. But Plaintiffs have cited no federal law which states that court clerks must not docket cases that a plaintiff alleges are based on a law that violates their constitutional rights.

Nor can Plaintiffs obtain declaratory relief that redresses their injury. Even if this Court declares S.B. 8 unconstitutional, if such a suit is nevertheless brought in Smith County, Ms. Clarkston will still have to docket that case pursuant to her duties just like every other case. Plaintiffs' speculation that a declaration from this Court that S.B. 8 is unconstitutional may deter private plaintiffs is insufficient, as the Northern District of Texas just held: "[T]his potential relief is too speculative to show, as [plaintiffs] must, that the Court's order would likely redress their injury." *PPGTSHS*, 2021 WL 2385110, at *10. Even if a declaratory judgment might "deter the risk of future harm," "[r]elief that does not remedy the injury suffered cannot

bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement." *Steel Co.*, 523 U.S. at 107.

IV. Sovereign Immunity Bars Plaintiffs' Claims Against Defendant Clarkston.

Plaintiffs' § 1983 claims against Ms. Clarkston and Judge Jackson in their official capacity as state actors may only be brought if *Ex parte Young*'s exception to sovereign immunity applies. *Haverkamp v. Linthicum*, No. 20-40337, 2021 WL 3237233, at *4 (5th Cir. July 30, 2021). For a plaintiff to properly invoke *Ex parte 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." *Id.* at *4 (quoting *Ex parte Young*, 209 U.S. 123, 157 (1908)).

Plaintiffs quibble (at 34-36) with Defendants' invocation of the language of *Ex parte Young* itself, arguing that the quoted passage about judges not being subject to suit does not apply to clerks. But clerks act at the behest of judges and are part of the adjudicatory process, so there is no reason (and Plaintiffs cite none) why the language would not apply. Plaintiffs do not respond to Defendants' arguments that merely docketing complaints or presiding over a case that involves an allegedly unconstitutional law does not "strip" state officials of their sovereign immunity. *See* Pls.' Cons. Opp. at 34–36; Dickson MTD at 12–14, Jackson MTD at 8. But Plaintiffs' case against Ms. Clarkston and Judge Jackson again runs into a roadblock because they do not *enforce* S.B. 8. To be amenable to suit under the *Ex parte Young* exception, the state actor must both possess "the authority to enforce the challenged law" and have a "'sufficient connection [to] the enforcement' of the challenged act." *City of*

Austin v. Paxton, 943 F.3d 993 (5th Cir. 2019). Under Fifth Circuit precedent, the showing made by Plaintiffs as to the "connection" between Ms. Clarkston and Judge Jackson and any enforcement of the law is insufficient.

In *City of Austin*, the Fifth Circuit explained what kind of actions rise to the level of enforcement sufficient to implicate *Ex parte Young* according to its case law:

> In [*LeBlanc I*], *Air Evac* [*EMS, Inc. v. Tex. Dep't of Ins.*, 851 F.3d 507 (5th Cir. 2017)], and *NiGen* [*Biotech, LLC v. Paxton*, 804 F.3d 389 (5th Cir. 2015), the panels pointed to specific enforcement actions of the respective defendant state officials warranting the application of the *Young* exception: (i) prohibiting payment of claims under the abortion statute in [*LeBlanc I*]., (ii) rate-setting in *Air Evac*, and (iii) sending letters threatening formal enforcement of the DTPA in *NiGen*.

943 F.3d at 1001. *City of Austin* held that even though the Attorney General had brought actions before to enforce the supremacy of state law, and "the Attorney General *has* the authority to enforce" the challenged law, there was "no evidence that the Attorney General may 'similarly bring a proceeding to enforce'" the challenged law. *Id.* at 1002. Thus, the City's suit was "barred by Eleventh Amendment sovereign immunity." *Id.*

Ms. Clarkston and Judge Jackson, like other state officials, explicitly do not have the authority to enforce the law. Compl. Ex. 1 at 5. Notably, even "statutory authority . . . to issue, amend or rescind an Executive order [by the Governor] is not the power to enforce." *Mi Familia Vota v. Abbott*, 977 F.3d 461, 477 (5th Cir. 2020). As has been discussed extensively, by docketing petitions and issuing citations if requested, Ms. Clarkston does not enforce S.B. 8. The law's prohibition on certain abortions is enforced solely through lawsuits brought by private parties. Ms. Clarkston and Judge Jackson's adjudicatory role in possible S.B. 8 lawsuits is nothing

like the defendants' challenged actions discussed by *City of Austin*. Thus, Fifth Circuit precedent makes clear that Ms. Clarkston and Judge Jackson are entitled to sovereign immunity.

CONCLUSION

This Court should dismiss this case for lack of jurisdiction.

Respectfully submitted.

/s/ Heather Gebelin Hacker
HEATHER GEBELIN HACKER
Texas Bar No. 24103325
heather@hackerstephens.com
ANDREW B. STEPHENS
Texas Bar No. 24079396
andrew@hackerstephens.com
HACKER STEPHENS LLP
108 Wild Basin Rd. South, Suite 250
Austin, Texas 78746
Tel: (512) 399-3022

Attorneys for Defendant Penny Clarkston

CERTIFICATE OF SERVICE

I certify that on August 13, 2021, this document was served through the Court's CM/ECF Document Filing System or through electronic mail, upon all counsel of record.

/s/ Heather Gebelin Hacker
HEATHER GEBELIN HACKER