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.	Case No. 1:21-cv-00616-RP

REPLY BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO STAY PROCEEDINGS AND VACATE PRELIMINARY-INJUNCTION HEARING

The notice of appeal has automatically divested this Court of jurisdiction over the claims asserted against defendants Jackson, Clarkston, Benz, Carlton, Thomas, Young, and Paxton, as each of them has asserted an immunity defense. *See 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 notice of appeal has also divested this Court of jurisdiction over the claims asserted against defendant Dickson. A notice of appeal divests the district court of jurisdiction over all "aspects of the case involved in the appeal,"[1] and Mr. Dickson is a

1. *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982); *see also id.* ("The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal."); *Weingarten Realty Investors v. Miller*, 661 F.3d 904, 908 (5th Cir. 2011) ("[A]ppeals transfer jurisdiction from the district court to the appellate court concerning 'those aspects of the case involved in the appeal'" (quoting *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982)).

party to the appeal and will assert his jurisdictional objections on appeal—as the law of the Fifth Circuit expressly allows him to do. *See Hospitality House, Inc. v. Gilbert*, 298 F.3d 424, 429 (5th Cir. 2002) ("[W]here, as in the instant case, we have interlocutory appellate jurisdiction to review a district court's denial of Eleventh Amendment immunity, we may first determine whether there is federal subject matter jurisdiction over the underlying case."); *Weingarten Realty Investors v. Miller*, 661 F.3d 904, 908 (5th Cir. 2011). And Mr. Dickson indisputably has standing to appeal this Court's denial of sovereign immunity because the relief that the plaintiffs are seeking against the government defendants will strip Mr. Dickson of his state-law rights under Senate Bill 8's private civil-enforcement mechanism. *See, e.g.*, *Hollingsworth v. Perry*, 570 U.S. 693, 704 (2013).

The only way that this Court can reclaim jurisdiction is to certify that the defendants' appeal is "frivolous." *United States v. Dunbar*, 611 F.2d 985, 987 (5th Cir. 1980); *Williams v. Brooks*, 996 F.2d 728, 729–30 (5th Cir. 1993). For an appeal to be frivolous, the defendants must show that this Court's disposition of the sovereign-immunity issues "is so plainly correct that nothing can be said on the other side." *BancPass, Inc. v. Highway Toll Admin., LLC*, 863 F.3d 391, 399 (5th Cir. 2017).

The plaintiffs' claim that this standard has been met is preposterous—indeed, frivolous in itself. The Court's opinion spent no fewer than seven and a half pages discussing the defendants' sovereign-immunity objections,[2] and it took each of the defendants' arguments seriously without ever suggesting that the defendants had engaged in "frivolous" argumentation, and without ever subjecting the defendants' arguments to back-of-the-hand treatment. More importantly, the Court's conclusion that the defendants lack sovereign immunity is wrong—and it is likely to be reversed by the court of appeals. The state agency defendants are immune because state law

2. *See* Order, ECF No. 82 at 15–20, 33–35.

expressly prohibits them from enforcing Senate Bill 8 in any manner. *See* Tex. Health & Safety Code § 171.207(a) ("*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." (emphasis added)). The Court's opinion never quotes or acknowledges this statutory language, which directly contradicts the Court's claim the Senate Bill 8 establishes a "dual private and public enforcement scheme." Order, ECF No. 82 at 4. The Court also appeared to recognize later in its opinion that Senate Bill 8 does indeed prohibit the state agency defendants from enforcing Senate Bill 8—because it repeatedly states that the state agency defendants *cannot be sued*, in direct contradiction of its holding that the state agency defendants *can* be sued. *See id.* at 29 ("[H]ere S.B. 8 forecloses Plaintiffs' ability to name anyone in the State's legislature or executive branch in this challenge."); *id.* at 30 ("[I]f this Court were to dismiss the Judicial Defendants for lack of a case or controversy, Plaintiffs would have no avenue to challenge the constitutionality of S.B. 8 outside of an enforcement action brought against them under S.B. 8"); *id.* at 31 ("[T]here are no other state officials [besides the judicial defendants] against whom Plaintiffs might seek relief in federal court"). It is hard to fathom how this Court could declare our appeal "frivolous" when its own opinion contradicts itself in this manner.

The Court's opinion also failed to acknowledge that the *Ex parte Young* exception to sovereign immunity can be used only when the named defendant is violating or threatening to violate federal law; that is what "strips" the officer of his sovereign authority and allows him to be sued as a rogue individual rather than as a component of a sovereign entity. *See Ex parte Young*, 209 U.S. 123, 159–60 (1908); *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 104 (1984) ("[A]n official *who acts unconstitutionally* is 'stripped of his official or representative character'" (emphasis added) (quoting *Young*, 209 U.S. at 60 (1908)); *Frazier v. King*, 873 F.2d 820, 827 (5th Cir. 1989) ("Under *Young, when a state officer acts unconstitutionally*, he is acting

outside his authority and is 'stripped of his official or representative character.'" (emphasis added) (citations omitted)); *American Civil Liberties Union of Mississippi, Inc. v. Finch*, 638 F.2d 1336, 1340 (5th Cir. 1981) ("[A]n official *who acts unlawfully* may not claim the immunity of his sovereign" (emphasis added)). The Court's opinion does not attempt to explain how Judge Jackson would violate federal law by presiding over a lawsuit brought under an allegedly unconstitutional statute. Nor does it explain how a court clerk can violate federal law by accepting petitions or documents for filing. The Court's failure to explain how Judge Jackson or Ms. Clarkston would become federal lawbreakers by participating in lawsuits brought under Senate Bill 8 is more than enough to show that the defendants' appeal from this ruling is not frivolous.

CONCLUSION

The Court should cancel the preliminary-injunction hearing and deny the plaintiffs' request to certify the defendants' appeal as frivolous.

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Respectfully submitted.

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