No. 21-50792

In the United States Court of Appeals for the Fifth Circuit

Whole Woman's Health, on behalf of itself, its staff, physicians, nurses, and patients; Alamo City Surgery Center, P.L.L.C., on behalf of itself, its staff, physicians, nurses, and patients, doing business as Alamo Women's Reproductive Services; Brookside Women's Medical Center, P.A., on behalf of itself, its staff, physicians, nurses, and patients, doing business as Brookside Women's Health Center and Austin Women's Health Center; Houston Women's Clinic, on behalf of itself, its staff, physicians, nurses, and patients; Houston Women's Reproductive Services, on behalf of itself, its staff, physicians, nurses, and patients; Planned Parenthood Center for Choice, on behalf of itself, its staff, physicians, nurses, and patients; Planned Parenthood of Greater Texas Surgical Health Services, on behalf of itself, its staff, physicians, nurses, and patients; Planned Parenthood South Texas Surgical Center, on behalf of itself, its staff, physicians, nurses, and patients; Southwestern Women's Surgery Center, on behalf of itself, its staff, physicians, nurses, and patients; Whole Women's Health Alliance, on behalf of itself, its staff, physicians, nurses, and patients; Medical Doctor Allison Gilbert, on behalf of herself and her patients; Medical Doctor Bhavik Kumar, on behalf of himself and his patients; The Afiya Center, on behalf of itself and its staff; Frontera Fund, on behalf of itself and its staff; Fund Texas Choice, on behalf of itself and its staff; Jane's Due Process, on behalf of itself and its staff; Lilith Fund, Incorporated, on behalf of itself and its staff; North Texas Equal Access Fund, on behalf of itself and its staff; Reverend Erika Forbes; Reverend Daniel Kanter; Marva Sadler,

Plaintiffs-Appellees,

v.

Judge Austin Reeve Jackson; Penny Clarkston; Mark Lee Dickson; Stephen Brint Carlton; Katherine A. Thomas; Cecile Erwin Young; Allison Vordenbaumen Benz; Ken Paxton,

Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Texas, Austin Division
Case No. 1:21-cv-00616-RP

DEFENDANTS-APPELLANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION TO EXPEDITE APPEAL

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Plaintiffs have asked the Court for an extraordinary schedule—26 hours for Appellants' opening briefs, 29 hours for Appellees' briefs, and no reply briefs—all so the Court can reach a decision on the merits of this appeal before September 1. Plaintiffs have not justified this exceptional request. Rather, the present "emergency" is one of Plaintiffs' own making, given that they waited two months before filing their jurisdictionally flawed lawsuit. Having shown such lack of urgency when initiating this suit, they cannot now require Defendants and the Court to meet their unusually truncated scheduling demands. The Court should deny the motion to expedite.

Background

Senate Bill 8 (SB 8) creates a private cause of action that enables Texans to sue those who perform, or aid and abet the performance of, abortions after a fetal heartbeat has been detected. Tex. Health & Safety Code § 171.208(a). It also builds into the cause of action an affirmative defense of undue burden. *Id.* § 171.209. SB 8 makes these private civil actions the exclusive method of enforcing SB 8's provisions and explicitly prohibits any government official in Texas from enforcing SB 8. *Id.* § 171.207(a). Nevertheless, Plaintiffs brought seven claims against five state officials (the State Agency Defendants), a state judge (Judge Jackson), a court clerk (Ms. Clarkston) (collectively, "State Defendants"), and a private citizen (Mr. Dickson). Plfs.' Compl. (ECF No. 1).

As is their right, Defendants all filed motions to dismiss raising a variety of jurisdictional defenses, including sovereign immunity. (ECF Nos. 48, 49, 50, 51). Two days ago, the district court denied those motions (ECF No. 82), and

Defendants filed a notice of interlocutory appeal (ECF No. 83). That appeal automatically divested the district court of jurisdiction over Plaintiffs' claims against Defendants. *BancPass, Inc. v. Highway Toll Admin., LLC*, 863 F.3d 391, 398 (5th Cir. 2017) (quoting *United States v. Dunbar*, 611 F.2d 985, 987 (5th Cir. 1980)). As a result, the district court has cancelled the preliminary injunction hearing that had been set for August 30 for all Defendants except for Mr. Dickson, the private citizen sued by Plaintiffs. (ECF No. 88).

But because Plaintiffs seek relief prior to September 1, they have filed the instant motion asking the Court to require Defendants to file their appellants' briefs in 26 hours (from the filing of the motion) and waive their reply briefs. The Court should deny Plaintiffs' extraordinary request.

ARGUMENT

I. Plaintiffs' Delay in Bringing This Suit Should Not Prejudice Defendants' Sovereign Immunity.

Governor Abbott signed SB 8 on May 19, 2021. As is apparent from the face of the bill, it takes effect on September 1, 2021. SB 8, § 12. Despite Plaintiffs' current fears that SB 8 will cause them "profound and irreparable harm," (Mot. at 1), they waited until July 13—nearly two months after Governor Abbott signed the bill and approximately seven weeks before it takes effect—to file this suit. (ECF No. 1).

And when Plaintiffs did act, it was to file a suit obviously lacking jurisdiction. Although SB 8 expressly precludes state officials from enforcing SB 8, Tex. Health & Safety Code § 171.207(a), Plaintiffs sued five state officials, a district-court judge, a district-court clerk, and a private citizen, bringing seven causes of action. (ECF No.

1). They have also sought to certify a class of all non-federal judges and a class of all court clerks in Texas. (ECF No. 32).

Plaintiffs cannot claim to have been surprised by Defendants' jurisdictional arguments, as the jurisdictional flaws in this case are open and obvious. Plaintiffs cannot show that the State Agency Defendants have a "particular duty" to enforce SB 8 or a "demonstrated willingness" to do so, meaning their suit is barred by sovereign immunity. *City of Austin v. Paxton*, 943 F.3d 993, 1000-01 (5th Cir. 2019). And binding precedent from this Court precludes suits of this type against state judges and court clerks. *See Bauer v. Texas*, 341 F.3d 352, 359 (5th Cir. 2003); *Chancery Clerk of Chickasaw County v. Wallace*, 646 F.2d 151, 160 (5th Cir. 1981). It is the plaintiffs' burden to establish subject-matter jurisdiction. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) ("The party invoking federal jurisdiction bears the burden of establishing" it). And as Plaintiffs should know, "[f]ederal courts must determine that they have jurisdiction before proceeding to the merits." *Lance v. Coffman,* 549 U.S. 437, 439 (2007); *see, e.g.*, *In re Gee*, 941 F.3d 153, 159 (5th Cir. 2019) (per curiam).

Plaintiffs went to great lengths to try to establish that the State Agency Defendants "enforce" SB 8 within the meaning of *Ex parte Young*—despite SB 8's plain text disallowing any state enforcement. (*E.g.* ECF 1 at 7, 33.) Indeed, Plaintiffs highlighted a jurisdictional defect in their Complaint regarding Attorney General Paxton. (ECF No. 1 p. 20 n.5). They were well aware that sovereign immunity would be a significant hurdle standing in the way of their suit.

Further, Plaintiffs waited until August 7, 2021, before they even filed a request for preliminary relief. (ECF No. 53). And despite the fact that Plaintiffs knew (or should have known) about the significant jurisdictional hurdles to their suit, and even though Defendants raised them several times, Plaintiffs waited until August 11, 2021, before responding to those arguments. (ECF Nos. 56, 57, 62). In briefs filed before that, Plaintiffs would only refer the court to their "forthcoming" August 11 briefing. *See, e.g.*, ECF No. 53 at 4.

Having frequently litigated against the State, Plaintiffs should have been aware that Defendants would vigorously defend themselves and that Defendants would seek appellate review if their sovereign-immunity arguments were denied. Yet they still waited to file their suit until all proceedings would necessarily have to be conducted on an emergency basis. "[S]elf-inflicted wounds are not irreparable injury. Only the injury inflicted by one's adversary counts for this purpose." *Second City Music, Inc. v. City of Chicago*, 333 F.3d 846, 850 (7th Cir. 2003); *see also Stuller, Inc. v. Steak N Shake Enterprises, Inc.*, 695 F.3d 676, 679 (7th Cir. 2012).

The extraordinary briefing schedule Plaintiffs' request would self-evidently prejudice Defendants-Appellants. It would also inhibit the Court's consideration of the weighty issues raised in this case, which touch on federalism and the scope of federal courts' jurisdiction. This case should not be decided based on truncated briefing.

II. Plaintiffs have not shown immediate, irreparable harm.

Plaintiffs have also failed to link their claimed harm to Defendants. Regarding the State Agency Defendants, Plaintiffs' position is that, at some unknown point in

the future, those Defendants might try to "indirectly enforce" SB 8 against the Plaintiff abortion providers through other administrative avenues. (ECF No. 19 at 20-21). Plaintiffs also assert that all Defendants, again at some unknown point in the future, might seek attorneys' fees from them under SB 8's fee-shifting provision if they are successful in an abortion-related suit. (ECF No. 19 at 21-22). As mentioned above, Plaintiffs include no allegations that Defendants are planning or even contemplating such actions. Indeed, the State Agency Defendants have explained repeatedly that they are "prohibited by law from enforcing S.B. 8." (ECF No. 63 at 2 (quoting ECF 48 at 2)). Neither of those prospects is an emergency that requires Appellants to forego a reasonable briefing schedule in order that the Court may reach a resolution before next Wednesday.

Plaintiffs' claims against Judge Jackson and Ms. Clarkston are dependent on third parties choosing to file lawsuits under SB 8 in Smith County, where Ms. Clarkston is clerk and Judge Jackson is one of four district judges. Again, there are no allegations that individuals are prepared to file suit in Smith County on September 1, if ever. (ECF No. 1). And Plaintiffs have failed to show that Defendant Dickson will file any suit anywhere, much less file so many suits that they will be forced to shut down.

Plaintiffs' main concern is that other people who are not parties to this lawsuit might sue them in state court. But this Court must conclude that state-court judges are equipped to properly handle those suits. After all, "[s]tate 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 n.35 (1976); *see also McKesson v. Doe*,

141 S. Ct. 48, 51 (2020) (recognizing the presumption that state and federal courts alike are competent to decide both federal and state law); *cf. Withrow v. Larkin*, 421 U.S. 35, 47 (1975) (recognizing "a presumption of honesty and integrity in those serving as adjudicators"). And even if this Court were to conclude that portions of SB 8 are unconstitutional, that ruling would not be binding on state-court judges. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 58 n.11, 66 n.21 (1997); *Penrod Drilling Corp. v. Williams*, 868 S.W.3d 294, 296 (Tex. 1993) (per curiam) (stating that Texas courts are obligated to follow the Supreme Court, but not the Fifth Circuit); *In re Devon Energy Corp.*, 332 S.W.3d 543, 548 (Tex. App.—Houston [1st Dist.] 2009, no pet.) ("[D]ecisions of the federal courts of appeals do not bind Texas courts[.]").

Conclusion

The Court should deny Plaintiffs' motion to expedite.

Respectfully submitted.

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Certificate of Service

On August 27, 2021, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

/s/ Natalie D. Thompson
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Certificate of Compliance

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A)) because it contains 1,521 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

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