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

RESPONSE TO TO APPELLEES' COMBINED MOTION TO DISMISS DEFENDANT-APPELLANT MARK LEE DICKSON'S APPEAL AND REPLY BRIEF IN SUPPORT OF EMERGENCY STAY MOTION

JONATHAN F. MITCHELL
Mitchell Law PLLC
111 Congress Avenue, Suite 400
Austin, Texas 78701
(512) 686-3940 (phone)
(512) 686-3941 (fax)
jonathan@mitchell.law

Counsel for Defendant-Appellant Mark Lee Dickson

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The motion to dismiss Mr. Dickson's appeal should be denied out of hand. The Supreme Court has specifically held that a litigant may join an appeal and seek relief sought by the other appellants, as long as at least one of the appellants has standing to appeal the district court's order. *See Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2379 n.6 (2020). It is undisputed that the government defendants have standing to appeal the district court's sovereign-immunity ruling, and it is equally undisputed Mr. Dickson is asking this Court to reverse the district court's sovereign-immunity rulings with respect to the government defendants. Mr. Dickson may therefore join this appeal and seek a reversal of the district court's sovereign-immunity analysis—regardless of whether he could independently establish Article III standing to appeal. *See id.* Whether Mr. Dickson may also pursue his Article III standing objections to the claims brought against him goes to the scope of the permissible issues that Mr. Dickson may pursue on this appeal, but dismissing Mr. Dickson from the appeal is not an option.

And because Mr. Dickson's status as an appellant is secure, the law of this Court is clear that Mr. Dickson may pursue *any* objections to the district court's subject-matter jurisdiction alongside his objections to the district court's sovereign-immunity rulings. *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."). That means that Mr.

Dickson's jurisdictional objections to the claims brought against him are "aspects of the case involved in the appeal"—and the district court is divested of jurisdiction those claims until this appeal is resolved. *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."). The district court erred by insisting that it retained jurisdiction over the claims brought against Mr. Dickson, and this Court should stay the district-court proceedings in their entirety until the conclusion of this appeal.

STATEMENT OF THE CASE

On May 19, 2021, Governor Abbott signed the Texas Heartbeat Act, which prohibits abortion after a fetal heartbeat can be detected. App.052–076.[1] The Texas Heartbeat Act does not impose criminal sanctions or administrative penalties on those who violate the statute, and it specifically prohibits state officials from enforcing the law. *See* Tex. Health & Safety Code § 171.207 (App.056). Instead, the Heartbeat Act authorizes private civil lawsuits to be brought against those who violate the law, and it provides that these private citizen-enforcement suits shall be the sole means of enforcing the statutory prohibition on post-heartbeat abortions:

1. Unless otherwise indicated, the "App." citations throughout this brief refer to the appendix that the appellants submitted in support of their motion to stay, and not to either of the appendices that the appellees have submitted.

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

See Tex. Health & Safety Code § 171.207(a) (App.056).

The Texas Heartbeat Act takes effect on September 1, 2021. App.075. On July 13, 2021—nearly two months after Governor Abbott signed the bill into a law, and only seven weeks before the Act takes effect—the plaintiff abortion providers filed this lawsuit. App.002. The plaintiffs sued Judge Austin Reeve Jackson, a state district judge in Smith County, Texas, as a putative defendant class representative of every non-federal judge in the State of Texas. App.036–038. They also sued Penny Clarkston, who serves as clerk for the district court of Smith County, as a putative defendant class representative of every Texas court clerk. App.038–040. In addition to these defendants, the plaintiffs also sued Attorney General Ken Paxton and several state agency officials, as well as Mark Lee Dickson, a pro-life activist. Their complaint demands relief that would prohibit Judge Jackson—and every non-federal judge in the state of Texas—from considering or deciding any lawsuits that might be filed under the Texas Heartbeat Act. App.047–048. It also demands an injunction that would prohibit Ms. Clarkston (and every Texas court clerk) from accepting or filing any papers submitted in these lawsuits. *Id.* Later that

day, the plaintiffs filed a motion for summary judgment, and they moved for class certification on July 16, 2021.

On August 5, 2021, each of the defendants moved to dismiss for lack of subject-matter jurisdiction.[2] Each of the government defendants raised sovereign-immunity defenses and argued that the plaintiffs lacked Article III standing to sue them. Mr. Dickson likewise argued that the claims against the government defendants were barred by sovereign immunity and by Article III's case-or-controversy requirement.[3] But Mr. Dickson asserted only Article III standing objections to the claims brought against him.[4]

On August 25, 2021, the district court issued an order denying each of the defendants' motions to dismiss for lack of subject-matter jurisdiction. App.376–426. Later that day, each of the defendants appealed the district court's jurisdictional ruling. App.428. The next morning, the defendants informed the district court that their notice of appeal had automatically divested it of jurisdiction over the case, and they asked the district court to cancel the preliminary-injunction hearing that had been scheduled for August 30, 2021, and stay all further proceedings in the case. App.433–435. The defendants also informed the district court that they would seek emergency relief

2. *See* State Agency Defs.' Mot. to Dismiss (ECF No. 48) (App.77–101); Judge Jackson's Mot. to Dismiss (ECF No. 49) (App.102–115); Mark Lee Dickson's Mot. to Dismiss (ECF No. 50) (App.116–150); Penny Clarkston's Mot. to Dismiss (ECF No. 51) (App.151–175).
3. *See* Mark Lee Dickson's Mot. to Dismiss (ECF No. 50) (App.116–150).
4. *See* Mark Lee Dickson's Mot. to Dismiss (ECF No. 50) at 1–10 (App.123–133).

from this Court that if it did not cancel the preliminary-injunction hearing and vacate all deadlines by close of business on August 26, 2021. App.440. When the district court failed to take these steps by the end of the day on August 26, 2021, the defendants filed an emergency motion with this Court, asking it to stay the district-court proceedings pending appeal, and asking for a temporary administrative stay pending consideration of that motion.

On August 27, 2021—after the defendants had filed their emergency motion with this Court—the district court issued an order acknowledging that the notice of appeal had divested it of jurisdiction over the claims against the government defendants,[5] and ordered the proceedings stayed with respect to those defendants only. *See* Order, ECF No. 88 at 1–2. But the district court insisted that it retained jurisdiction over the claims against Mr. Dickson, even though Mr. Dickson had joined the appeal, because it held that Mr. Dickson has "no claim to sovereign immunity," and that the "the denial of his motion to dismiss is not appealable." *See id.* at 2. So the district court refused to vacate the preliminary-injunction hearing or stay proceedings with respect to the claims against Mr. Dickson. *See id.* Later that day, the district court issued an "amended briefing schedule" and ordered Mr. Dickson to respond to the defendants' 50-page motion for summary judgment, which was supported by 19 sworn declarations, by Friday, September 3, 2021—only four

5. The "government defendants" include each of the defendants in this case except Mark Lee Dickson.

days after the preliminary-injunction hearing that the district court had scheduled for August 30, 2021. *See* Scheduling Order, ECF No. 89.[6]

On August 27, 2021, this Court issued an administrative stay of the district-court proceedings, including the preliminary-injunction hearing that was scheduled to proceed against Mark Lee Dickson. It also ordered Mr. Dickson to file a combined response to the plaintiffs' motion to dismiss Mr. Dickson's appeal, and reply brief in support of the defendants' motion to stay the district-court proceedings.

SUMMARY OF ARGUMENT

Mr. Dickson's appeal is properly before this Court because he is seeking to reverse the district court's sovereign-immunity holding, and it is undisputed that the other appellants have standing to appeal that aspect of the district court's ruling. Nothing more is needed to allow Mr. Dickson's appeal to proceed. *See Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2379 n.6 (2020). The only issue for this Court to resolve is whether Mr. Dickson may also pursue his Article III standing objections to the claims brought against him on this appeal. But that has nothing to do with whether Mr. Dickson's appeal should be dismissed; it pertains only to the

6. The district court never explained why it decided to order Mr. Dickson to respond to the plaintiffs' motion for summary judgment by September 3, 2021, as no litigant had made that request, and there was no need to expedite the summary-judgment briefing schedule when the district court was planning to hold a preliminary-injunction hearing on August 30, 2021.

scope of the issues that Mr. Dickson may raise on this appeal, and the extent to which the district court's jurisdiction has been divested by the notice of appeal. Mr. Dickson's appeal may proceed regardless of how this Court decides that question.

The precedent of this Court also allows Mr. Dickson to pursue *any* jurisdictional objections on this appeal—in addition to the jurisdictional objections that arise from the district court's sovereign-immunity analysis. *See Hospitality House, Inc. v. Gilbert*, 298 F.3d 424, 429 (5th Cir. 2002) ("[W]here, as in the instant case, we have interlocutory appellate jurisdiction to review a district court's denial of Eleventh Amendment immunity, we may first determine whether there is federal subject matter jurisdiction over the underlying case."). And because the district court has been divested of jurisdiction over all "aspects of the case involved in the appeal,"[7] it cannot assert jurisdiction over any claims against Mr. Dickson until this appeal concludes.

Finally, there is no basis for applying the four-factor test from *Nken v. Holder*, 556 U.S. 418, 427 (2009), because the district court has lost jurisdiction over the claims against Mr. Dickson. *See Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) ("The filing of a notice of appeal . . . divests the district court of its control over those aspects of the case involved in the appeal."). When a notice of appeal divests the district court of jurisdiction, an appellate court must stay the proceedings without considering irrep-

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

arable harm or the public interest, and it has no latitude for exercising the "discretion" that normally applies when deciding whether to issue a stay. *See Nken*, 556 U.S. at 427. There is only one question for this Court to resolve: Do Mr. Dickson's jurisdictional objections to the claims brought against him qualify as "aspects of the case involved in the appeal"? *Griggs*, 459 U.S. at 58. If the answer to that question is "yes," (and it is), then the district court has been divested of jurisdiction and the proceedings against Mr. Dickson must be stayed without considering any other factors.

I. The Court Should Deny The Motion To Dismiss Mr. Dickson's Appeal

The plaintiffs have moved to "dismiss" Mr. Dickson's appeal, but the denial of this motion requires nothing more than a citation of *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020), which holds that a litigant may join an appeal and seek the same relief sought by other appellants, so long as at least one appellant has standing to appeal the district court's judgment or order:

> The Third Circuit also determined *sua sponte* that the Little Sisters lacked appellate standing to intervene because a District Court in Colorado had permanently enjoined the contraceptive mandate as applied to plans in which the Little Sisters participate. This was error. Under our precedents, at least one party must demonstrate Article III standing for each claim for relief. An intervenor of right must independently demonstrate Article III standing if it pursues relief that is broader than or different from the party invoking a court's jurisdiction. See *Town of Chester* v. *Laroe Estates*, *Inc.*, 581 U.S. ––––, –––– (2017). Here, the Federal Government clearly had standing to invoke the Third Circuit's appellate jurisdiction, and both the Federal Govern-

> ment and the Little Sisters asked the court to dissolve the injunction against the religious exemption. The Third Circuit accordingly erred by inquiring into the Little Sisters' independent Article III standing.

Id. at 2379 n.6. Mr. Dickson is asking this Court to reverse the district court's sovereign-immunity holdings, which is the same relief that the government defendants are seeking. And it is undisputed that the government defendants have standing to appeal the district court's jurisdictional ruling and present those sovereign-immunity arguments to this Court. So there is no basis for "dismissing" Mr. Dickson from the appeal, as he may participate in the appeal at least to the extent that he seeks a reversal of the district court's sovereign-immunity analysis.

The plaintiffs never mention or acknowledge this holding from *Little Sisters*, but it squelches any possibility of dismissing Mr. Dickson from this appeal. The plaintiffs note that Mr. Dickson has never asserted a sovereign-immunity defense, but does not preclude him from joining this appeal and seeking reversal of the district court's sovereign-immunity holding. *See Little Sisters*, 140 S. Ct. at 2379 n.6. The plaintiffs also note that *Swint v. Chambers County Commissioners*, 514 U.S. 35, 51 (1995), limits the ability of appellate courts to consider *unrelated* issues when deciding an interlocutory appeal,[8]

8. *Swint*, 514 U.S. at 51 ("The Eleventh Circuit's authority immediately to review the District Court's denial of the individual police officer defendants' summary judgment motions did not include authority to review at once the unrelated question of the county commission's liability. The District Court's preliminary ruling regarding the county did not

but that in no way limits Mr. Dickson's ability to *participate* in this appeal to the extent that he seeks to vindicate the government defendants' sovereign-immunity arguments. *See Little Sisters*, 140 S. Ct. at 2379 n.6. Mr. Dickson will remain a party to this appeal—regardless of whether he is allowed to raise arguments beyond his sovereign-immunity objections.

Finally, even if Mr. Dickson were required to independently demonstrate Article III standing to appeal the district court's sovereign-immunity rulings (and he isn't),[9] Mr. Dickson would easily satisfy those requirements. The relief that the plaintiffs are seeking against Judge Jackson (and the putative class of state-court judges), as well as Ms. Clarkston (and the putative class of court clerks) threatens to strip Mr. Dickson of his state-law right to bring civil-enforcement actions under Senate Bill 8. This threat inflicts injury in fact; it is fairly traceable to the district court's jurisdictional ruling denying the defendants' sovereign-immunity objections; and an order from this Court compelling the dismissal of Judge Jackson and Ms. Clarkston will redress that injury. *See Hollingsworth v. Perry*, 570 U.S. 693 (2013). So Mr. Dickson can independently appeal the district court's sovereign-immunity rulings and ask this Court to dismiss Judge Jackson and Ms. Clarkston from the litigation—

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qualify as a 'collateral order,' and there is no 'pendent party' appellate jurisdiction of the kind the Eleventh Circuit purported to exercise.").

9. *See Little Sisters*, 140 S. Ct. at 2379 n.6.

and he could have done that even if the government defendants had never been parties to this appeal.[10]

* * *

The plaintiffs' request to dismiss Mr. Dickson from this appeal is meritless. Mr. Dickson may litigate the sovereign-immunity objections alongside the other appellants who indisputably have standing to appeal. *See Little Sisters*, 140 S. Ct. at 2379 n.6. And Mr. Dickson would have had standing to appeal the district court's refusal to dismiss Judge Jackson and Ms. Clarkston in his own right, even if the government defendants were not parties to this appeal. *See Hollingsworth*, 570 U.S. 693. There is no possible basis on which this Court can dismiss Mr. Dickson from this appeal.

10. The plaintiffs' attempt to pass off Mr. Dickson's injury as a "generalized grievance" is groundless. *See* Appellees' Br. at 17. The alleged injury is widely shared, to be sure, but that does not make it a "generalized grievance," and the Supreme Court has specifically held that widely shared "concrete" injuries will confer Article III standing. *See Carney v. Adams*, 141 S. Ct. 493, 499 (2020); *see also Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 n.7 (2016) ("The fact that an injury may be suffered by a large number of people does not of itself make that injury a nonjusticiable generalized grievance. The victims' injuries from a mass tort, for example, are widely shared, to be sure, but each individual suffers a particularized harm."). Mr. Dickson is asserting more than a generalized interest in ensuring compliance with the law; he is seeking to preserve a state-law cause of action that the Texas legislature has conferred upon him.

II. The Notice Of Appeal Divested The District Court Of Jurisdiction Over The Claims Asserted Against Mr. Dickson

The only remaining question is whether the notice of appeal divested the district court of jurisdiction over the claims brought against Mr. Dickson. If the answer to this question is yes, then the district-court proceedings must be stayed and there are no further factors for this Court to consider. The district court acknowledged that the notice of appeal ousted its jurisdiction over the claims against the government defendants. *See* Order, ECF No. 88 at 1–2; *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."). But the district court insisted that it retained jurisdiction over the claims brought against Mr. Dickson, because it held that Mr. Dickson has "no claim to sovereign immunity," and that the "the denial of his motion to dismiss is not appealable." *See id.* at 2.

The district court's conclusion that it retained jurisdiction over the claims against Mr. Dickson is wrong. A notice of appeal divests the district court of jurisdiction over all "aspects of the case involved in the appeal." *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*, 459 U.S. at 58). And Mr. Dickson's jurisdictional objections will be "involved in the appeal," because the law of this Court allows it to consider other objections to subject-matter jurisdiction when resolving an interlocutory appeal of a sovereign-immunity defense. *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."). A simple syllogism will illustrate:

> **Major Premise**: A notice of appeal divests the district court of jurisdiction over "all aspects of the case involved in the appeal." *Griggs*, 459 U.S. at 58; *Weingarten*, 661 F.3d at 908.
>
> **Minor Premise**: Mr. Dickson's Article III standing objections qualify as "aspects of the case involved in the appeal" because this Court may consider other objections to a district court's subject-matter jurisdiction when resolving an interlocutory appeal of a sovereign-immunity defense. *See Hospitality House*, 298 F.3d at 429.
>
> **Conclusion**: The notice of appeal therefore divested the district court of jurisdiction over the claims brought against Mr. Dickson.

All of this was clearly explained to the district court,[11] and the district court did not deny the major premise or the minor premise of this argument.

11. Reply Br., ECF No. 87 at 1–2 (App.459–460).

Instead, the district court falsely stated that the defendants "acknowledge in their reply [that] their appeal has only divested this Court of jurisdiction as to the State Defendants. (Reply, Dkt. 87, at 1)." Order, ECF No. 88 at 2 (App.460). That is an astounding misrepresentation of the defendants' argument. The very page of the defendants' brief that the district court cited says:

> The notice of appeal *has also divested this Court of jurisdiction over the claims asserted against defendant Dickson*.

Reply Br., ECF No. 87 at 1 (App.459) (emphasis added). It's hard to know how to respond when a federal district judge not only falsely attributes a concession to party, but goes so far as to cite the party's own brief and claim that it says the exact opposite of what the brief actually says.

The plaintiffs, for their part, acknowledge the holdings of *Griggs* and *Weingarten*, which establish that a notice of appeal divests the district court of jurisdiction over all "aspects of the case involved in the appeal." Appellees' Br.[12] at 16 (quoting *Weingarten*, 661 F.3d at 908).[13] Yet they insist that

12. The appellees' brief does not have page numbers—an understandable oversight given the emergency nature of the filing and the compressed time schedule. We will therefore use page numbers from the file stamp that appears in the header of the appellees' brief.

13. The district court, by contrast, never mentioned *Griggs* or *Weingarten*, and refused to acknowledge that the defendants' notice of appeal had divested it of jurisdiction over all "aspects of the case involved in the appeal." *Griggs*, 459 U.S. at 58. *See* Order, ECF No. 88 at 1–2 (App.459–460).

"the only appealable aspects of the case under review are the sovereign-immunity claims of the Government Defendants." Appellees' Br. at 16.

The problem with this argument is that *Hospitality House* specifically holds that appellants may raise additional objections to a district court's subject-matter jurisdiction when appealing a district court's denial of a sovereign-immunity defense. *See Hospitality House*, 298 F.3d at 429 ("[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."). The plaintiffs do not cite or acknowledge *Hospitality House*—even though it was cited repeatedly in the defendants' district-court briefing[14]—and they make no effort to explain how Mr. Dickson could be foreclosed from presenting his Article III standing objections in this appeal given the holding of that case.

* * *

Mr. Dickson's Article III standing objections are "aspects of the case involved in the appeal," because *Hospitality House* explicitly allows him to raise those jurisdictional objections alongside his arguments for sovereign immunity. The notice of appeal therefore divested the district court of jurisdiction over the claims brought against Mr. Dickson, as well as those brought against the government defendants.

14. Defs.' Motion to Stay, ECF No. 84 (App.434); Reply Br., ECF No. 87 at 1–2 (App. 460).

III. The Four-Factor Test From Nken v. Holder Is Irrelevant When A Notice Of Appeal Has Divested The District Court Of Jurisdiction

The defendants are seeking a stay of proceedings because their notice of appeal has deprived the district court of jurisdiction over the case. *See Griggs*, 459 U.S. at 58; *Weingarten*, 661 F.3d at 908; *Williams v. Brooks*, 996 F.2d 728, 730 (5th Cir. 1993). In these situations, it is improper to apply the four-part test from *Nken v. Holder*, 556 U.S. 418 (2009), or exercise "judicial discretion" in determining whether a stay should issue. *Id.* at 427. If a district court lacks jurisdiction, then it cannot proceed with a case, regardless of any considerations surrounding "irreparable harm" or the "public interest." If this Court determines that Mr. Dickson's Article III standing arguments are "aspects of the case involved in the appeal," then it has no choice but to conclude that the district court has been divested of jurisdiction over the claims brought against Mr. Dickson, as the absence of jurisdiction cannot be balanced or weighed against other factors. That is why Mr. Dickson did not discuss "irreparable harm" or the "public interest" in his opening brief. *See* Appellees' Br. at 18. These factors are irrelevant when the argument for a stay is based on a divestiture of jurisdiction.

In all events, the plaintiffs' analysis of these (irrelevant) stay factors is wrong. Mr. Dickson will suffer irreparable harm absent a stay of proceedings because he will remain subject to district-court litigation in a case where there is transparently no subject-matter jurisdiction over the claims brought against him. Mr. Dickson has renounced any intention of suing the plaintiffs

under Senate Bill 8. *See* Declaration of Mark Lee Dickson, ECF No. 50-1 at ¶¶ 5–13 (App. 145–148); Supplemental Declaration of Mark Lee Dickson, ECF No. 54-1 at ¶ 6 (App.315) ("I have never threatened to sue anyone under the private civil-enforcement mechanism provided in section 3 of Senate Bill 8, and I have no intention of suing any of the plaintiffs under that provision when the law takes effect on September 1, 2021."); *id.* at ¶¶ 6–17 (App. 315–319).[15] The district court brushed aside these express renunciations and allowed the plaintiffs to sue Dickson anyway. *See* Order Denying Motions to Dismiss, ECF No. 82, at 46–50 (App.421–425). The governmental defendants will also suffer irreparable harm if the district court rules on the constitutionality of Senate Bill 8 while their appeal proceeds, as this would deny them an opportunity to defend the constitutionality of Senate Bill 8 before the district court.

And the plaintiffs will not be harmed by a stay of proceedings because an injunction against Mr. Dickson would do nothing to protect the plaintiffs

15. The plaintiffs falsely state that Mr. Dickson's refusal to sue the plaintiffs is "wholly contingent on whether the Providers 'actually comply with the Texas Heartbeat Act when it takes effect.'" Appellees' Br. at 18. *But see* Supplemental Declaration of Mark Lee Dickson ¶ 13 ("I would not consider suing the abortion-provider plaintiffs under section 171.208 if they choose to violate Senate Bill 8, unless and until a court decision makes clear that I can do so without encountering an 'undue burden' defense under section 171.209."); *id.* at ¶ 14 ("I have no intention of suing plaintiffs Forbes or Kanter, either now or in the future, regardless of whether they comply with Senate Bill 8 and regardless of any future court decision.").

from private civil-enforcement lawsuits under Senate Bill 8. Mr. Dickson has already stated under oath that he has no intention of suing the plaintiffs when Senate Bill 8 takes effect.[16] In addition, Mr. Dickson was not sued as a defendant class representative, so nearly everyone else in the world will remain able to sue the plaintiffs under Senate Bill 8 even if Mr. Dickson were to be enjoined. Finally, Mr. Dickson cannot even be sued under 42 U.S.C. § 1983 because he is a private citizen, and a private citizen does not act "under color of" state law unless he coordinates or conspires with public officials in denying someone their constitutional rights. *See Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 152 (1970); *Earnest v. Lowentritt*, 690 F.2d 1198, 1200 (5th Cir. 1982); *Howard Gault Co. v. Texas Rural Legal Aid, Inc.*, 848 F.2d 544, 555 (5th Cir. 1988); *McCartney v. First City Bank*, 970 F.2d 45, 47 (5th Cir. 1992) ("If a state merely allows private litigants to use its courts, there is no state action within the meaning of § 1983 unless 'there is corruption of judicial power by the private litigant.'"). So the plaintiffs would not be able to obtain relief against Mr. Dickson even if the claims against him were allowed to proceed.

The public interest also counsels in favor of a stay because federal courts have limited subject-matter jurisdiction and enforcing these constitutional limits will always be in the public interest. The district court has no jurisdiction over the claims against Mr. Dickson because he has disclaimed any intention of suing the plaintiffs under Senate Bill 8, and the district court's de-

16. *See* note 15 and accompanying text.

cision to allow those claims to proceed in the teeth of Mr. Dickson's unrebutted declarations violates Article III. But in the end, none of these factors should be considered because the district court has been divested of jurisdiction, and that divestiture of jurisdiction is conclusive on whether a stay of proceedings should issue.

CONCLUSION

The motion to dismiss Mr. Dickson's appeal should be denied. The Court should stay the district-court proceedings until the conclusion of this appeal.

Respectfully submitted.

/s/ Jonathan F. Mitchell
JONATHAN F. MITCHELL
Mitchell Law PLLC
111 Congress Avenue, Suite 400
Austin, Texas 78701
(512) 686-3940 (phone)
(512) 686-3941 (fax)
jonathan@mitchell.law

Counsel for Defendant-Appellant
Mark Lee Dickson

Dated: August 31, 2021

CERTIFICATE OF SERVICE

I certify that on August 31, 2021, this document was electronically filed with the clerk of the court for the U.S. Court of Appeals for the Fifth Circuit and served through CM/ECF upon all counsel of record in this case.

/s/ Jonathan F. Mitchell
JONATHAN F. MITCHELL
Counsel for Defendant-Appellant
Mark Lee Dickson

CERTIFICATE OF COMPLIANCE

with type-volume limitation, typeface requirements,
and type-style requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 27(d)(2) because it contains 4,910 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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/s/ Jonathan F. Mitchell
JONATHAN F. MITCHELL
Counsel for Defendant-Appellant
Mark Lee Dickson

Dated: August 31, 2021

CERTIFICATE OF ELECTRONIC COMPLIANCE

Counsel also certifies that on August 31, 2021, this brief was transmitted to Mr. Lyle W. Cayce, Clerk of the United States Court of Appeals for the Fifth Circuit, through the court's CM/ECF document filing system, https://ecf.ca5.uscourts.gov/

Counsel further certifies that: (1) required privacy redactions have been made, 5th Cir. R. 25.2.13; (2) the electronic submission is an exact copy of the paper document, 5th Cir. R. 25.2.1; and (3) the document has been scanned with the most recent version of VirusTotal and is free of viruses.

/s/ Jonathan F. Mitchell
JONATHAN F. MITCHELL
Counsel for Defendant-Appellant
Mark Lee Dickson