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

DEFENDANTS PENNY CLARKSTON AND MARK LEE DICKSON'S RESPONSE TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

Rules

Other Authorities

The plaintiffs must "affirmatively demonstrate" that the proposed classes comply with each requirement of Rule 23, and they must present evidence sufficient to carry their burden of proof with respect to each of these requirements. *See Wal-Mart Stores, Inc.* v. *Dukes*, 564 U.S. 338, 350 (2011) ("A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc."); *Castano v. American Tobacco Co.*, 84 F.3d 734, 740 (5th Cir. 1996) ("The party seeking certification bears the burden of proof."); *Flecha v. Medicredit, Inc.*, 946 F.3d 762, 768 (5th Cir. 2020) ("[C]ourts must certify class actions based on proof, not presumptions."). The plaintiffs' motion for class certification falls far short of the affirmative demonstration that *Wal-Mart* requires.

I. The Eleventh Amendment Prohibits The Court From Certifying A Defendant Class Of All State-Court Judges Or All State-Court Clerks, Because This Would Allow The Plaintiffs To Sue The State Judiciary As An Institution

We have already explained that sovereign immunity bars the plaintiffs' claims against Judge Jackson and Ms. Clarkston because: (1) The *Ex parte Young* exception does not authorize lawsuits to prevent a state's judicial officers from adjudicating and deciding cases brought before them;[1] and (2) The *Ex parte Young* exception permits lawsuits only against individual federal lawbreakers, and neither Judge Jackson nor Ms. Clarkston is violating federal law or has any intention of doing so. *See* Mot. to Dismiss, ECF No. 50 at 11–14.

But the sovereign-immunity obstacles become even more grave when the plaintiffs are asserting claims against a putative *class* of state-court judges and court clerks. Now the defendants are seeking relief against the state judiciary as an *entity*, rather than against the individual officers who have violated (or intend to violate) federal

1. *See Ex parte Young*, 209 U.S. 123, 163 (1908) ("[A]n injunction against a state court would be a violation of the whole scheme of our government.").

law and have forfeited their sovereign status. *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 *Ex parte Young*, 209 U.S. 123, 160 (1908)). The state judiciary as an institution is categorically immune from suit as an arm of the state, and it cannot be sued under the *Ex parte Young* exception—even if some or all of its members are violating federal law. *See Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) ("The doctrine of *Ex parte Young* . . . has no application in suits against the States and their agencies, which are barred regardless of the relief sought"). A lawsuit against a "class" of state-court judges and court clerks is a lawsuit against the state judiciary as an entity, and it cannot proceed in federal court regardless of the relief sought. *See id.* at 144.

A court cannot use Rule 23 to abridge or modify the protections from suit that Article III and the Eleventh Amendment confer upon the state judiciary as an entity. *See* 28 U.S.C. § 2072(b) (providing that the rules of civil procedure "shall not abridge, enlarge or modify any substantive right."). Immunity from suit is indisputably a "substantive right," and the state judiciary must enjoy the same immunities that it would have in a world without Rule 23. A private litigant would never be allowed to seek declaratory or injunctive relief against the state judiciary as an entity; any such suit would be a paradigmatic violation of sovereign immunity. The class-action device cannot be used to "abridge" or "modify" this substantive immunity by allowing courts to certify classes that encompass an entire agency or institution of state government.

The Court must also ensure that it is not "abridging" or "modifying" the sovereign immunity of any of the absent class members. The class members as individuals enjoy immunity from suit unless they fall within the *Ex parte Young* exception—and they cannot be sued under *Ex parte Young* unless they are violating or are about to

violate federal law.[2] So the plaintiffs must demonstrate—and this Court must find—that *every* single absent class member is a lawbreaker or would-be lawbreaker who has been "stripped" of their sovereign immunity under *Ex parte Young*. Otherwise the proposed classes will violate the Rules Enabling Act by "abridging" or "modifying" an immunity of one or more absent class members.

II. Certifying The Classes And Forcing Judge Jackson and Ms. Clarkston To Defend The Constitutionality Of Senate Bill 8 In Their Capacity As Class Representatives Conflicts With The Judicial Code Of Conduct

Officers who are charged with enforcing state laws have a duty to defend the constitutionality of those laws when they are sued. But Judge Jackson and Ms. Clarkston are being sued for actions they would take in their adjudicatory capacity. *See* Clarkston MTD, ECF No. 51 at 5–9; Clarkston MTD Reply, ECF No. 67 at 6–11; They do not enforce Senate Bill 8. *See* Compl. Ex. 1, ECF No. 1-1 at 5; Clarkston MTD, ECF No. 51 at 6, 13–14, Clarkston MTD Reply, ECF No. 67 at 9–11, 15–16, 18–20. This precludes class certification because forcing Judge Jackson and Ms. Clarkston to defend the merits of Senate Bill 8 as class representatives conflicts with the Texas Code of Judicial Conduct.

The Texas Code of Judicial Conduct is issued by the Supreme Court of Texas and "is intended to establish basic standards for ethical conduct of judges."[3] The Code provides "guidance to judges and candidates for judicial office" and "a structure for

2. *See 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)).
3. Texas Judicial Branch, "Judicial Ethics & Bench Books," https://www.txcourts.gov/publications-training/judicial-ethics-bench-books/.

regulating conduct through the State Commission on Judicial Conduct." *Id.* Canon 3(B) is entitled "Adjudicative Responsibilities," and subsection 10 states:

> A judge shall abstain from public comment about a pending or impending proceeding which may come before the judge's court in a manner which suggests to a reasonable person the judge's probable decision on any particular case."[4]

And although this section exempts judges who are serving as litigants in their personal capacity,[5] it remains fully applicable to judges who are litigants in their official capacity. The Code also requires judges to ensure that court staff, including clerks, abide by this requirement as well. *See id.* ("A judge shall require similar abstention on the part of court personnel subject to the judge's direction and control.") Subsection 8 contains a similar requirement. *See id.* ("A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard under law. A judge shall not initiate . . . communications . . . concerning the merits of a pending or impending judicial proceeding. A judge shall require compliance with this subsection by court personnel subject to the judge's direction and control.")

Forcing Judge Jackson and Ms. Clarkston to serve as class representatives in a lawsuit challenging the constitutionality of Senate Bill 8 takes them out of their role as neutral arbiters of law and has places them in an untenable position. It forces them to either (1) defend the merits of a law that may be litigated in their court, or (2) refuse to do so and risk an adverse judgment, with liability for costs and attorneys' fees. They have already been forced to choose between these two unacceptable options because the Court refused, despite the defendants' repeated requests, to rule on the defendants' jurisdictional objections before proceeding to the merits. *See Lance v.*

4. Available at https://www.txcourts.gov/media/1452409/texas-code-of-judicial-conduct.pdf.
5. *See id.* ("This section does not apply to proceedings in which the judge or judicial candidate is a litigant in a personal capacity.").

Coffman, 549 U.S. 437, 439 (2007) ("Federal courts must determine that they have jurisdiction before proceeding to the merits."). As a result, Ms. Clarkston was forced to defend the merits of the law in response to the plaintiffs' motion for summary judgment and motion for preliminary injunction, and at the upcoming hearing on August 30, to avoid the risk of being enjoined if the Court disagrees with her jurisdictional objections.

Judge Jackson, by contrast, is *refusing to defend* the law on the merits because he may have to adjudicate lawsuits brought under Senate Bill 8:

> Judge Jackson notes that he does not join sections I.B and I.C of the argument in this response. Because Judge Jackson may be called upon to adjudicate constitutional challenges to provisions of S.B. 8 that might arise in specific cases that may be brought in his court in the future, it would be improper for him to opine in advance on the merits of any hypothetical constitutional challenges to S.B. 8. Accordingly, Judge Jackson does not join the portions of this response analyzing the substantive merits of Plaintiffs' claims.

State Defs.' Resp. in Opp to Pls.' MPI, ECF No. 75 at 1 n.2. How can Judge Jackson possibly be deemed an "adequate" class representative when his ethical duties as judge preclude him from defending the constitutionality of Senate Bill 8? And how can the plaintiffs assert that Judge Jackson "can be expected to vigorously defend this action" in light of the ethical constraints imposed by Canon 3(B) and his stated refusal to defend Senate Bill 8 on the merits?

Finally, neither Judge Jackson nor Ms. Clarkston should have been put in this situation to begin with. This Court was required by the rulings of the Supreme Court to resolve the defendants' jurisdictional objections before proceeding to the merits, *see Lance*, 549 U.S. at 439, and if it rejected Judge Jackson and Ms. Clarkston's Eleventh Amendment arguments they had a right to take an immediate interlocutory appeal and seek a stay of the district-court proceedings. *See Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993). This Court's

insistence on proceeding to the merits has already placed Judge Jackson and Ms. Clarkston in an untenable ethical position, and the Court should not aggravate these problems by certifying them as class representatives and obligating them to defend the merits of Senate Bill 8 on behalf of the entire Texas judiciary.

III. The Proposed Classes Fail Commonality And Typicality Because Each Class Member Will Handle Different Lawsuits And Will Handle Those Lawsuits Differently

The plaintiffs claim that the "legal questions presented by this case concern the constitutionality of the Act,"[6] but that is wrong. The legal questions in this case concern the constitutionality of the *defendants' actions*. Litigants do not challenge statutes; they challenge the conduct of the named defendants. *See California v. Texas*, 141 S. Ct. 2104, 2114–15 (2021); *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923) ("If a case for preventive relief be presented, the court enjoins, in effect, not the execution of the statute, but the acts of the official, the statute notwithstanding."); Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 Stan. L. Rev. 1209, 1221 (2010) ("Judicial review is not the review of statutes at large; judicial review is constitutional review of governmental action. Government actors violate the Constitution." (footnote omitted)). A court can rule only on whether a *defendant* is violating the Constitution.

To establish commonality, the plaintiffs must show that their proposed classes can generate common answers concerning whether the individual class members are violating the Constitution:

> "What matters to class certification . . . is not the raising of common 'questions'—even in droves—but rather, the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers."

6. Mot. for Class Certification, ECF No. 32 at 8.

Wal-Mart Stores, Inc. v. *Dukes*, 564 U.S. 338, 350 (2011) (quoting Richard Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009). The proposed classes cannot generate common answers regarding the constitutionality of the class members' behavior because: (1) Each class member will be handling different lawsuits; and (2) Each judge will handle those lawsuits differently.

A. Each Class Member Will Be Handling Different Lawsuits

The proposed classes cannot generate common answers regarding the constitutionality of the class members' actions because each class member will be handling different lawsuits. Senate Bill 8 authorizes lawsuits against anyone who performs or aids or abets a post-heartbeat abortion. Many of these lawsuits are indisputably constitutional under existing Supreme Court precedent. Here are a few examples:

> Lawsuits brought against those who perform (or assist) non-physician abortions;[7]
>
> Lawsuits brought against those who perform (or assist) post-viability abortions that are not necessary to save the life or health of the mother;[8]
>
> Lawsuits brought against those who use taxpayer money to pay for post-heartbeat abortions;[9]
>
> Lawsuits brought against those who covertly slip abortion drugs into a pregnant woman's food or drink.[10]

A clerk who accepts and files papers in lawsuits of this sort has not violated the Constitution, and a judge who presides over these lawsuits is not violating the Constitution either.

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7. *See Roe v. Wade*, 410 U.S. 113, 165 (1973); *Connecticut v. Menillo*, 423 U.S. 9, 9–10 (1975); *Mazurek v. Armstrong*, 520 U.S. 968, 973 (1997).
8. *See Roe*, 410 U.S. at 164–65.
9. *See Harris v. McRae*, 448 U.S. 297 (1980).
10. *See* Alexandra Hutzler, *Former Trump Aide Jason Miller Accused of Secretly Administering Abortion Pill*, Newsweek (Sept. 18, 2018), https://bit.ly/3stDRx2.

Other lawsuits filed under Senate Bill 8 may present closer questions, but that only highlights the problem with resolving these issues on a classwide basis. Every lawsuit filed under Senate Bill 8 will be different, and the constitutionality of each lawsuit will depend on the particular facts of that case. It is impossible to imagine the facts of every conceivable lawsuit that might be filed under Senate Bill 8. And it is equally impossible to resolve the constitutionality of a clerk's or judge's behavior without knowing the facts of the particular cases that will be brought before them.

B. Each Judge—And Therefore Clerk—Will Handle The Lawsuits Differently

The proposed classes also cannot generate common answers regarding the constitutionality of the class members' actions because each judge—and correspondingly, clerk—will handle those lawsuits differently.

A judge does not violate the Constitution merely by presiding over a lawsuit filed under an allegedly unconstitutional statute. Neither does a court clerk violate the Constitution merely by accepting for filing a case brought under an allegedly unconstitutional statute. And neither a judge nor a clerk violates the Constitution whenever a plaintiff sues a defendant in their court for engaging in constitutionally protected behavior. The judge does not violate the Constitution until he *rules* in a manner that violates someone's constitutional rights and tells the clerk to enter that judgment.

Yet there is no way knowing how each of the state-court judges will decide the cases that are brought before them under Senate Bill 8. This variability applies with equal force to the clerks, who act at the direction of the district judges. *See* Clarkston MTD Reply, ECF No. 67 at 11–13. It is possible to imagine that some state-court judges may cause an "undue burden" to be imposed on women seeking abortions if they misinterpret or misapply the affirmative defense provided in section 171.209. *See* Tex. Health & Safety Code § 171.209. It is also possible to imagine that some state-court judges will impose civil liability on conduct that is constitutionally protected.

But there is no way to know whether that will happen in a class-action lawsuit that has been filed before Senate Bill 8 takes effect, and a federal court is not permitted to assume that state judges will fail to protect federal constitutional rights in the cases brought before them. *See Middlesex County Ethics Commission v. Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982) ("Minimal respect for the state processes, of course, precludes any *presumption* that the state courts will not safeguard federal constitutional rights.").

C. Plaintiffs Have Not Met Their Burden Of Proving Typicality

Rule 23(a)(3) requires that the "claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). In determining typicality, courts consider whether the named defendant's claims and defenses "arise from the same event or course of conduct and share the same legal theories." *Stoeffels v. SBC Commc'ns, Inc.*, 238 F.R.D. 446, 453 (W.D. Tex. 2006) (internal quotations omitted). The plaintiffs claim that the typicality requirement is met because they are suing the district clerks based on "their obligations as clerks in such courts to accept cases for filing and to issue service of process permitting S.B. 8 enforcement actions to proceed" and "[e]ach member of the proposed classes has the same obligation under S.B. 8." See Doc. 32 at 14. That is a non sequitur. The typicality standard has nothing to do with similarlities between the job duties of the class representatives and the proposed class members; it depends on how similar their *claims and defenses* are. *See* 2 Newberg on Class Actions Sec. 5:10 (5th ed.) (the typicality "analysis focuses on whether the representative's claim is sufficiently similar to other class members' so as to justify certification."). The plaintiffs never offer any facts showing that the claims and defenses of Ms. Clarkston and the defendant class members are similar.

The proposed classes also flunk the "typicality" requirement for the same reasons they fail commonality: Each of the absent class members' defenses will depend on the facts of the particular cases that they will file or preside over. And those facts cannot be known in a lawsuit that has been filed before Senate Bill 8 has taken effect.

IV. Plaintiffs Have Failed To Demonstrate That There Is No Conflict Of Interest Between The Putative Class Members

The burden of proof is on the plaintiffs to show that the class members' interests are aligned. *See Berger v. Compaq Computer Corp.*, 257 F.3d 475, 481 (5th Cir. 2001) ("Adequacy is for the plaintiffs to demonstrate; it is not up to defendants to disprove the presumption of adequacy."). And the plaintiffs cannot make this showing when there are elected judges in Texas who publicly support legal abortion and are appalled at Senate Bill 8. Those class members will not want to defend the constitutionality of the statute, and they will not want to appeal a ruling from this Court that declares the statute unconstitutional or enjoins its enforcement. *See Hollingsworth v. Perry*, 570 U.S. 693, 702 (2013) (state officials who opposed California's ban on same-sex marriage refused to defend the constitutionality of the law and refused to appeal a district-court injunction that barred them from enforcing it); *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 625 (1997) ("The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent."). The proposed classes are plagued by the same problem that arose in *Hansberry v. Lee*, 311 U.S. 32 (1940), where some class members wanted to enforce a racially restrictive covenant while others opposed its enforcement:

> Those who sought to secure its benefits by enforcing it could not be said to be in the same class with or represent those whose interest was in resisting performance . . . . Because of the dual and potentially conflicting interests of those who are putative parties to the agreement in compelling or resisting its performance, it is impossible to say, solely because they are parties to it, that any two of them are of the same class. *Id.* at 44.

Id. at 44.

The plaintiffs have also failed to present any evidence that the judges and the clerks would want to defend Senate Bill 8 the same way that Judge Jackson or Ms. Clarkston would. Given the dilemma described in Part II, *supra*, it is especially unclear that the class members would agree with the litigation choices that Judge Jackson and Ms. Clarkston have made. Not even Judge Jackson and Ms. Clarkston agree on the same course of action. The Court cannot assume that each member of these classes wants to defend the constitutionality of Senate Bill 8, would choose not to, or would appeal an adverse judgment from this Court. It cannot find that Judge Jackson or Ms. Clarkston are adequate class representatives in the absence of this evidence.

V. The Plaintiffs Have Failed To Affirmatively Demonstrate The Adequacy Of The Proposed Class Representatives Or Their Counsel

Even apart from the conflict-of-interest problem,[11] the plaintiffs have failed to carry their burden on adequacy of representation. The plaintiffs bear the burden of proving the adequacy of their chosen class representative. *See Wal-Mart*, 564 U.S. at 350; *Berger*, 257 F.3d at 481 ("Adequacy is for the plaintiffs to demonstrate; it is not up to defendants to disprove"). That burden is especially stringent in defendant class actions, where the plaintiffs are choosing a representative for their adversaries, and where the plaintiffs have every incentive to "seek out weak adversaries to represent the class." 7A Charles Alan Wright et al., *Federal Practice and Procedure* § 1770 (3d ed. 2007); *see also Bell v. Brockett*, 922 F.3d 502, 511 (4th Cir. 2019) ("Rule 23's adequacy requirements . . . are especially important for a defendant class action where due process risks are magnified."); 7A Charles Alan Wright et al., *Federal Practice and*

11. *See supra* Part I.

Procedure § 1770 (3d ed. 2007) ("[I]f there is *any* evidence that the defendant representative is not able to or will not vigorously defend the action, then the class should not be certified." (emphasis added)).

If the class is certified here, Plaintiffs will have been allowed to select a class representative with one hand tied behind his back. As discussed above, Judge Jackson and Ms. Clarkston were forced into a dilemma by this lawsuit—choosing between risking liability and compromising ethical duties—that raises serious questions about adequacy that are unanswered by the plaintiffs. Judge Jackson is choosing not to defend the law on its merits. *See* State Defs.' Resp. in Opp to Pls.' MPI, ECF No. 75 at 1 n.2. In addition, on August 4, 2021, Judge Jackson held a press conference in which he publicly commented on this litigation and this Court. Plaintiffs have now used statements from that press conference to undercut the defendants' jurisdictional arguments. *See, e.g.*, Mot. for Prelim. Inj., ECF No. 53 at 5. Plaintiffs have failed to explain how Judge Jackson can qualify as an "adequate" class representative in light of these issues. Judge Jackson's comments at the press conference may also subject him to recusal motions in any lawsuit brought to enforce Senate Bill 8, as will his role as a defendant (and possible class representative) in this lawsuit. *See* Tex. R. Civ. P. 18b(b)(1) ("A judge must recuse in any proceeding in which . . . the judge's impartiality might reasonably be questioned"). If Judge Jackson may recuse himself, then the plaintiffs lack standing to sue him—yet the plaintiffs have failed to provide any evidence that Judge Jackson will continue to preside over Senate Bill 8 litigation.

The plaintiffs have also failed to affirmatively demonstrate the adequacy of Ms. Clarkston and the proposed class counsel. Their brief says only that "Plaintiffs have no reason to believe that Defendants Jackson and Clarkston will not vigorously defend the action as well, or that the Class Representatives' counsel will not be competent and sufficiently experienced to defend this action." Mot. for Class Certification, ECF

No. 32 at 9–10. A bald assertion of that sort is insufficient under *Wal-Mart*. *See Wal-Mart*, 564 U.S. at 350.

VI. Certifying Defendant Classes Of Every State-Court Judge And Court Clerk Would Violate Principles Of Comity, Federalism, And Abstention

Allowing the plaintiffs sue a defendant class of every non-federal judge in the state of Texas, along with a separate defendant class comprising every court clerk in Texas, would violate principles of comity, federalism, and abstention, and it would give this Court a supervisory power over entire state judiciary. This is incompatible with the abstention precedents of the Supreme Court and the Fifth Circuit.

In *O'Shea v. Littleton*, 414 U.S. 488 (1974), the Supreme Court extended *Younger* abstention to suits where there was no ongoing state litigation. *See Courthouse News Serv. v. Brown*, 908 F.3d 1063, 1071 (7th Cir. 2018). The plaintiffs in *O'Shea* sought an injunction under section 1983 that would "control[] or prevent[] the occurrence of specific events that might take place in the course of future . . . trials." 414 U.S. at 500. The Court recognized that "the need for a proper balance in the concurrent operation of federal and state courts counsels restraint against the issuance of injunctions against state officers engaged in the administration of the State's . . . laws." *Id*. at 499. And the principles of "equity, comity, and federalism" led the Court to "preclude equitable intervention." *Id*; *see also id*. at 500 ("This seems to us nothing less than an ongoing federal audit of state [court] proceedings which would indirectly accomplish the kind of interference that *Younger v. Harris* . . . and related cases sought to prevent.").

The Fifth Circuit has applied *O'Shea*'s abstention doctrine to foreclose injunctions against government officials such as public defenders, *Gardner v. Luckey*, 500 F.2d 712, 715 (5th Cir. 1974), and municipal court judges, *Ballard v. Wilson,* 856 F.2d 1568, 1570 (5th Cir. 1988) (noting that "a federal court ruling on the practices and

procedures of the municipal court system . . . would require supervisory enforcement of the ruling by the federal courts" and that "[t]his type of monitoring of state court procedures . . . offends principles of federalism and was condemned by the Supreme Court in *O'Shea*").

These same concerns are present here. The plaintiffs are seeking to certify classes that will allow this Court to monitor every state-court clerk to ensure that they do not accept for filing or take any action related to S.B. 8. That is "exactly the sort of intrusive and unworkable supervision of state judicial processes condemned in *O'Shea*." *Gardner*, 500 F.2d at 715 (5th Cir. 1974). *See also O'Shea*, 414 U.S. at 500 ("This seems . . . nothing less than an ongoing federal audit of state . . . proceedings which would indirectly accomplish the kind of interference that *Younger v. Harris* and related cases sought to prevent."); *id.* at 501–02 (worrying that "an injunction against acts which might occur in . . . future [court] proceedings would necessarily impose continuing obligations of compliance" and the question "of how compliance might be enforced if the beneficiaries of the injunction were to charge that it had been disobeyed" would impose "a major continuing intrusion of the equitable power of the federal courts into daily conduct of [state courts]"); *Miles v. Wesley*, 801 F.3d 1060, 1064 (9th Cir. 2015) (observing that *Younger–O'Shea* abstention is triggered where "the question of the defendants' compliance with any remedy imposed could be the subject of future court challenges" and holding that abstention was required there because "Plaintiffs seek precisely the sort of heavy federal interference in such sensitive state activities as administration of the judicial system that *Younger* and *O'Shea* sought to prevent").

For this court to daily monitor every single state court judge clerk in Texas, as well as "their officers, agents, servants, employees, attorneys, and any persons in active concert or participation with them, from participating in the enforcement of S.B. 8 in any way, including by accepting for filing or taking any other action in the initiation

of a lawsuit brought under S.B. 8," Plaintiffs' Compl., at 46, would eviscerate the principles of "equity, comity, and federalism" and violate the abstention doctrines of *Younger* and *O'Shea*. The Court should deny class certification for this reason.

VII. The Due Process Clause And The Rules Enabling Act Require The Absent Class Members To Be Given Notice And An Opportunity To Opt Out

The plaintiffs are proposing "mandatory" defendant classes that would bind every state-court judge and court clerk to this Court's judgment, without providing the absent class members with notice or an opportunity to opt out. This violates the Due Process Clause and the Rules Enabling Act. The Court should not certify either class without affording the class members notice and an opportunity to opt out.

The Supreme Court has never resolved whether defendant class members have a constitutional right to receive notice and an opportunity to opt out before being bound by a court judgment. *See, e.g.*, *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 811 n.3 (1985). But the idea that one can be bound as a defendant to a court judgment without ever receiving notice and an opportunity to be heard is antithetical to the most basic notions of due process. *See, e.g.*, *Hansberry v. Lee*, 311 U.S. 32, 40–41 (1940) ("It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process."); *Martin v. Wilks*, 490 U.S. 755, 762 (1989) ("A judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings."); *Richards v. Jefferson County*, 517 U.S. 793, 797 n.4 (1996) ("'The opportunity to be heard is an essential requisite of due process of law in judicial proceedings."). The Supreme Court requires absent plaintiffs to receive notice and an opportunity to opt out before they can be bound by a judgment concerning claims for money damages. *See Shutts,* 472 U.S. at 811–12. Absent defendants

are entitled to nothing less—regardless of whether they are being sued for damages or injunctive relief.

Indeed, the need for due-process protections for absent defendants is much greater than it is for absent plaintiffs, because absent defendants (unlike absent plaintiffs) are subjected to the coercive powers of the Court if they lose. A court defeat for an absent plaintiff means only that he has failed to obtain judicial relief, and he will be foreclosed from pursuing that relief in a future proceeding. A court defeat for an absent defendant, by contrast, will result in an affirmative deprivation of life, liberty, or property at the hands of government officials. *See* U.S. Const. amend. V ("No person shall be deprived of life, liberty, or property, without due process of law"); *see also Marchwinski v. Oliver Tyrone Corp.*, 81 F.R.D. 487, 489 (W.D. Pa. 1979) ("When one is an unnamed member of a plaintiff class one generally stands to gain from the litigation. The most one can lose in cases where res judicata operates is the right to later bring the same cause of action. However, when one is an unnamed member of a defendant class, one may be required to pay a judgment without having had the opportunity to personally defend the suit."). The notion that a court can bind an absent defendant to an injunction or declaratory decree without providing *any* notice—and without providing *any* opportunity to be heard—is anathema to the Due Process Clause, and no interest in administrative efficiency can trump this most basic tenet of constitutional due process.

Absent class defendants must also receive an opportunity to opt out because of the heightened due-process concerns inherent in defendant class actions. *See Ameritech Benefit Plan Committee v. Communication Workers of America*, 220 F.3d 814, 820 (7th Cir. 2000) ("Defendant classes, initiated by those opposed to the interests of the class, are more likely than plaintiff classes to include members whose interests diverge from those of the named representatives, which means they are more in need of the due process protections afforded by (b)(3)'s safeguards."); *Bell*, 922

F.3d at 511 ("[D]ue process risks are magnified . . . [i]n defendant class actions."); *Marchwinski*, 81 F.R.D. at 489 ("[T]he very notion of a defendant class raises immediate due process concerns."). In defendant class actions, the plaintiffs are defining the class for their opponents, and the plaintiffs are selecting the representative of the opposing class. That significantly increases the likelihood of intra-class conflicts. *See Ameritech*, 220 F.3d at 820 ("Defendant classes . . . are less likely to satisfy the requirements of Rule 23(a) [because] risks of diverging interests are particularly high"). And it increases the likelihood that the plaintiffs will propose a weak or unacceptable class representative. *See* 7A Charles Alan Wright et al., *Federal Practice and Procedure* § 1770 (3d ed. 2007) (noting the "the risk that plaintiff will seek out weak adversaries to represent the class."). Each of the absent state-court judges and clerks has the right to decide whether they want to be represented by Judge Jackson and Ms. Clarkston. The Court cannot impose this shotgun marriage without allowing the absent class members a say in the matter.

The Rules Enabling Act also prohibits the Court from denying the absent class members notice and an opportunity to be heard. *See* 28 U.S.C. § 2072(b). Rule 23 cannot be interpreted or enforced in any manner that "abridges" or "modifies" a substantive right that pre-exists the rules of civil procedure. And every state-court judge and court clerk in Texas has a substantive right (apart from Rule 23) to receive notice and an opportunity to be heard before a binding court judgment is imposed upon them. The "mandatory" class actions proposed by the plaintiffs would indisputably "abridge" or "modify" that substantive right, as it would allow the absent class members to subjected to declaratory decrees and injunctions backed by contempt sanctions without ever receiving notice or an opportunity to be heard. The Court cannot enforce Rule 23 in this manner.

The Court has the authority to require notice and opt-out under Rule 23(d)(1) for any certified class. *See In re Monumental Life Insurance Co.*, 365 F.3d 408, 417

(5th Cir. 2004) ("A district court is empowered by rule 23(d)(2) to provide notice and opt-out for any class action, so rule 23(b)(2) certification should not be denied on the mistaken assumption that a rule 23(b)(3) class is the only means by which to protect class members."). So if the Court decides to certify either of the proposed classes, it should order that notice and opt-out opportunities be provided to each of the absent class members before they can be bound by an order or judgment of this Court.

VIII. There Is No Risk Of "Inconsistent Or Varying Adjudications" Because The Federal Judiciary Transparently Lacks Subject-Matter Jurisdiction To Consider Lawsuits Brought Against Judges And Clerks Acting In An Adjudicatory Capacity

The plaintiffs seek certification under Rule 23(b)(1)(A), which allows a Court to certify a defendant class if "prosecuting separate actions . . . against individual class members would create a risk of . . . inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class." Fed. R. Civ. P. 23(b)(1)(A). There is no risk of "inconsistent or varying adjudications" if the state-court judges and court clerks were sued as individuals, because the federal judiciary transparently lacks subject-matter jurisdiction to consider such lawsuits. *See Bauer v. Texas*, 341 F.3d 352 (5th Cir. 2003); *Chancery Clerk of Chickasaw County v. Wallace*, 646 F.2d 151, 160 (5th Cir. 1981); *Ex parte Young*, 209 U.S. 123, 163 (1908); Dickson's Mot to Dismiss, ECF No. 51; Clarkston's Mot. to Dismiss, ECF No. 52.

The plaintiffs present no evidence that any federal district court will ignore these binding pronouncements, nor do they present reasons or evidence to believe that there is any "risk" that this might happen.

IX. The Plaintiffs Must Establish Article III Standing To Sue Each Of The Defendant Class Members

Neither the Supreme Court nor the Fifth Circuit has decided whether the plaintiffs must demonstrate Article III standing to sue each of the absent class members, and this remains an open question. *See TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208 n.4 (2021); *Flecha v. Medicredit, Inc.*, 946 F.3d 762, 768 (5th Cir. 2020). But the defendants believe that Article III should require the plaintiffs to demonstrate that a "case or controversy" exists between them and each of the absent class members, and they have made no attempt to do so. If this Court disagrees and believes that the plaintiffs need only demonstrate Article III standing to sue the proposed class representatives, then the defendants respectfully wish to preserve this issue for appeal.

CONCLUSION

The case should be dismissed immediately for lack of subject-matter jurisdiction, and the motion for class certification should be denied as moot.

Respectfully submitted.

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