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

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

DEFENDANT PENNY CLARKSTON'S OPPOSITION
TO PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER
AND PRELIMINARY INJUNCTION

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INTRODUCTION

Plaintiffs' proposed class-wide injunction seeks to commandeer the entire Texas judiciary, asking this Court to tell every non-federal judge and clerk in Texas, from justices of the peace all the way up to the justices of the Supreme Court of Texas, that they may not even permit S.B. 8 actions to be filed in Texas courts. Plaintiffs' complaints about the law may be heard in any state court where any S.B. 8 enforcement action is brought, and those courts are bound to follow the Constitution just like this Court. Plaintiffs' objection to the forum in which they may do that does not justify the unprecedented trampling of bedrock constitutional principles that their lawsuit invites.

Aside from the grave concerns regarding comity and federalism that such an unprecedented injunction would create, Plaintiffs cannot make a "clear showing" that they are entitled to temporary injunctive relief against Ms. Clarkston for many reasons. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). First, Plaintiffs cannot make a clear showing of success on the merits because the Court plainly lacks jurisdiction under directly applicable binding precedent. Second, injunctive relief against Ms. Clarkston is unavailable under § 1983. Third, Plaintiffs cannot make a clear showing of success on the merits because they have not shown that Ms. Clarkston inflicts any constitutional injury by docketing cases, among other reasons. Fourth, Plaintiffs have failed to show that they will suffer irreparable harm absent an injunction. And fifth, an injunction is not in the public interest because it would exceed the Court's constitutional authority. Plaintiffs' motion should be denied.

STATEMENT OF FACTS

A. The Powers and Duties of the District Clerk

The position of the Clerk of each county's District Court is established by article V, section IX of the Texas Constitution. The District Clerk is elected by qualified voters of each county. Tex. Const. art. V, § 9. The District Clerk is a county employee, as are all other staff of the District Courts, except for the District Judge.[1] The Texas Government Code provides the duties of the District Clerk, which include maintaining the records of the District Court, recording the acts of the court, and entering judgments under the direction of the judge. Tex. Gov't Code § 51.303. The District Clerk also acts under authority of the Texas Rules of Civil Procedure, which are promulgated by the Texas Supreme Court. *See* Tex. Gov't Code § 22.004. The District Clerk may also act under the local rules of the District Court, which are promulgated by the judges of the District Court and the County Courts at Law and approved by the Texas Supreme Court. *See* Tex. R. Civ. P. 3(a); *see also, e.g.,* Local Smith Cty. R. of Civ. Trial.[2] Aside from District Courts, which are state trial courts of general jurisdiction, the Texas judiciary also includes County Courts at Law, Constitutional County Courts, justice courts, and municipal courts, which are courts of limited jurisdiction.[3]

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[1] *See, e.g.*, Funding of the Texas Judicial Branch, https://www.txcourts.gov/media/1437891/about-texas-courts-2016.pdf ("Counties pay the operating costs of district courts, as well as the base salary of judges, full salaries of other staff, and operating costs for constitutional county courts, county courts at law, and justice courts.")

[2] Available at https://www.smith-county.com/government/courts/local-rules-of-civil-trial.

[3] *See* Court Structure of Texas, Feb. 2021, https://www.txcourts.gov/media/1452084/court-structure-chart-february-2021.pdf.

The Texas Rules of Civil Procedure require a civil action to be commenced by a petition filed with the clerk, who "shall" document the filing. Tex. R. Civ. P. 22, 24. Each clerk "shall" keep a file docket and a court docket for each case. Tex. R. Civ. P. 25, 26. "Upon the filing of the petition, the clerk, when requested, shall forthwith issue a citation and deliver the citation as directed by the requesting party . . . The clerk must retain a copy of the citation in the court's file." Tex. R. Civ. P. 99(a). The contents of the citation the Clerk "shall" issue upon request are prescribed by the Rules. Tex. R. Civ. P. 99(b), 99(c). The citation is similar to a summons in federal court and is issued so that the party commencing the action can serve the defendant with the lawsuit. *Compare* Tex. R. Civ. P. 99, 106 *with* Fed. R. Civ. P. 4. "The party requesting citation shall be responsible for obtaining service of the citation and a copy of the petition." Tex. R. Civ. P. 99(a).

B. Senate Bill 8

On May 19, 2021, Governor Abbott signed Senate Bill 8 (S.B. 8),[4] which prohibits abortion after the fetus has a detectable heartbeat and creates a private right of action in Texas courts for enforcement. *See* Compl. Ex. 1 at 4, 6–7 (Dkt. 1-1). The law also provides an affirmative defense which allows defendants to avoid liability if it would impose an undue burden on a woman or group of women seeking a prohibited abortion. Compl. Ex. 1 at 10. The law contains no provisions pertaining directly to district clerks. In fact, the law expressly states that public officials may not enforce the law in their official capacity:

[4] *See* Tex. Senate Journal 1612 (Weds. May 19, 2021), https://journals.senate.texas.gov/sjrnl/87r/pdf/87RSJ05-19-F.PDF#page=23.

> 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 . . .

Compl. Ex. 1 at 5. The law specifies that the enforcement of the law's prohibition on abortions performed after a detectable fetal heartbeat is "exclusively" through the private right of action. Compl. Ex. 1 at 5.

C. Plaintiffs' suit and allegations against Defendant Clarkston

On July 13, 2021, Plaintiffs filed the instant lawsuit challenging S.B. 8. Compl. 48 (Dkt. 1). Plaintiffs sued Defendant Penny Clarkston "in her official capacity as Clerk for the District Court of Smith County," Texas, and "and on behalf of a class of all Texas court clerks similarly situated." Compl. 2. Plaintiffs' allegations concerning Ms. Clarkston are limited. Plaintiffs allege that

> Defendant Penny Clarkston is the Clerk for the District Court of Smith County, and in that role is charged with accepting civil cases for filing and issuing citations for service of process upon the filing of a civil lawsuit. She is served [sic] in her official capacity and as a representative of a putative class of all court clerks in the State of Texas for courts with jurisdiction over the civil actions created by the Act.

Compl. ¶ 49. Plaintiffs allege that Ms. Clarkston is an adequate class representative for a class including "all clerks for courts with authority to hear civil suits under S.B. 8." Compl. ¶¶ 128–30. Plaintiffs request that the Court enjoin Ms. Clarkston 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." Compl. 46. Plaintiffs do not allege that any private enforcement actions under S.B. 8 will, or are likely to be, brought in the District Court of Smith County. *See generally*

Compl. 1–47. The only individual the complaint identifies as potentially likely to bring a private enforcement action, Defendant Mark Lee Dickson, is a resident of Longview, Texas, which is not in Smith County. Compl. ¶ 50.

The same day Plaintiffs filed suit, they also filed a motion for summary judgment, along with 19 supporting declarations. Pls.' MSJ (Dkt. 19–19-19). Three days later, on July 16, 2021, Plaintiffs filed a motion to certify a defendant class of all non-federal Texas judges, represented by Smith County District Judge Austin Reeve Jackson, and a defendant class of all non-federal court clerks, represented by Ms. Clarkston. Pls.' Mot. Class Cert. (Dkt. 32). Plaintiffs filed a motion for temporary restraining order and preliminary injunction on August 7, 2021. Pls.' Mot TRO (Dkt. 53). That was shortly before the Fifth Circuit granted a temporary stay for Defendant Clarkston and Dickson's obligation to respond to the motion for summary judgment to ensure that the Court would "rule on properly filed motions to dismiss based on an absence of jurisdiction before ruling on any merits issues in the case." Order Granting Temp. Admin. Stay, *In re Clarkston*, No. 21-50708 (5th Cir. Aug. 7, 2021).

ARGUMENT

To obtain a preliminary injunction, Plaintiffs must show:

> (1) a substantial likelihood that he will prevail on the merits, (2) a substantial threat that he will suffer irreparable injury if the injunction is not granted, (3) that his threatened injury outweighs the threatened harm to the party whom he seeks to enjoin, and (4) that granting the preliminary injunction will not disserve the public interest.

Def. Distributed v. U.S. Dep't of State, 838 F.3d 451, 457 (5th Cir. 2016). The Fifth Circuit has "cautioned repeatedly that a preliminary injunction is an extraordinary remedy which should not be granted unless the party seeking it has 'clearly carried

the burden of persuasion' on all four requirements." *Id.* (quoting *PCI Transp., Inc. v. Fort Worth & W. R. Co.*, 418 F.3d 535, 545 (5th Cir. 2005)). Plaintiffs are unable to make this "clear" showing here.

I. Plaintiffs Cannot Make a "Clear Showing" That They Are Likely to Succeed on the Merits Because the Court Lacks Jurisdiction over the Claims Against Defendant Clarkston.

Plaintiffs fail to affirmatively explain how this Court has jurisdiction in either their motion for temporary restraining order or their incorporated motion for summary judgment. But "'the burden of establishing [jurisdiction] rests upon the party asserting jurisdiction.'" *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (quoting *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 182–83 (1936)). Counsel has an ethical duty to alert the Court to authority that calls into question its jurisdiction and must do so without delay. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 66 n.23 (1997) ("It is the duty of counsel to bring to the federal tribunal's attention, '*without delay*,' facts that may raise a question of mootness" or subject-matter jurisdiction (citation omitted)); *Bd. of License Comm'rs of Tiverton v. Pastore*, 469 U.S. 238, 240 (1985) (per curiam) ("When a development . . . could have the effect of depriving the Court of jurisdiction due to the absence of a continuing case or controversy, that development should be called to the attention of the Court *without delay*."). But despite knowing that Defendants had already raised significant jurisdictional objections[5]—including by pointing to binding precedent precluding jurisdiction over Judge Jackson and Ms. Clarkston—they failed to affirmatively

[5] Jurisdiction is not an affirmative defense. "Subject-matter jurisdiction can never be waived or forfeited." *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012). Plaintiffs were obligated to address jurisdiction regardless of whether Defendants objected on that basis. *Kokkonen*, 511 U.S. at 377.

demonstrate why the Court has jurisdiction in their motion for preliminary injunction. *See* Jackson MTD (Dkt. 49); Dickson MTD (Dkt. 50), Clarkston MTD (Dkt. 51). Instead, Plaintiffs point the Court to its *future* defensive briefing, to be filed several days later. Pls.' Mot. TRO 4. Plaintiffs' failure to carry *their* burden in *their* motion should be reason enough to deny it. Regardless, it is obvious why Plaintiffs were purposely dragging their feet—the Court clearly lacks jurisdiction for multiple reasons according to binding precedent.

Defendant Clarkston incorporates the arguments in her motion-to-dismiss brief and reply in support here. *See* Clarkston MTD; Clarkston MTD Reply (Dkt. 67). Those briefs conclusively demonstrate that the Court should dismiss Ms. Clarkston for lack of jurisdiction. It is impossible for Plaintiffs to make a "clear showing" of jurisdiction when there are at least two binding cases directly on point that show that the Court lacks jurisdiction over the claims against Ms. Clarkson and Judge Jackson. *Winter*, 555 U.S. at 22; *see Bauer v. Texas*, 341 F.3d 352, 359 (5th Cir. 2003); *Chancery Clerk of Chickasaw Cty., Miss. v. Wallace*, 646 F.2d 151, 160 (5th Cir. 1981).

II. Plaintiffs Cannot Make a Clear Showing of Likelihood of Success on the Merits Because Injunctive Relief Against Defendant Clarkston Is Unavailable as a Matter of Law.

A. 42 U.S.C. § 1983 bars injunctive relief against judicial officers where declaratory relief is available.

Plaintiffs have already admitted that 42 U.S.C. § 1983 bars injunctive relief against the putative defendant class of judges. Pls.' MSJ 4. They now backtrack, making the frivolous argument that they seek only relief against the judges in their "official," not "judicial," capacity because they seek to enjoin the "enforcement" of S.B. 8. Pls.' Mot. TRO 5. But judges (and court clerks) do not "enforce" S.B. 8. Compl. Ex.

1 at 5; Clarkston MTD at 6, 13–14, Clarkston MTD Reply 9–11, 15–16, 18–20. And Plaintiffs expressly seek to prevent "all non-federal judges in the State of Texas" from granting "remedies mandated by S.B. 8." Compl. ¶¶ 115, 120. In what capacity would a judge grant legal "remedies" in cases brought before them besides their judicial capacity? "'Whether an act by a judge is a 'judicial' one relate[s] to the nature of the act itself, i.e., whether it is a function normally performed by a judge, and to the expectations of the parties, i.e., whether they dealt with the judge in his judicial capacity.'" *Davis v. Tarrant Cnty.*, 565 F.3d 214, 222 (5th Cir. 2009) (quoting *Mireles v. Waco*, 502 U.S. 9, 12 (1991)). Further, Plaintiffs' logic would allow the judges and clerks of this Court to be named as defendants and enjoined every time someone challenges the constitutionality of a federal law that the Court adjudicates. That absurd result must be rejected.

The Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, amended § 1983 to prevent that exact problem with respect to state judges. It now provides that "in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable." Plaintiffs have not pleaded that "a declaratory decree was violated or declaratory relief was unavailable," so § 1983 bars their claim for injunctive relief. *McCarrell v. Davis*, No. A-17-CV-668-LY-ML, 2017 WL 11221248, at *3 (W.D. Tex. July 31, 2017), *report and recommendation adopted*, No. 1:17-CV-668-LY, 2017 WL 11221249 (W.D. Tex. Aug. 25, 2017); *Aubrey v. D Mag. Partners, L.P.*, No. 3:19-CV-0056-B, 2019 WL 2549458, at *4 (N.D. Tex. June 20, 2019) ("Because Plaintiffs do not allege, and the record does not show, that a declaratory decree was violated or that declaratory relief was

unavailable, the claim for injunctive relief against Judge Moyé must be dismissed."); *De Luna v. Hidalgo Cty., Texas*, No. CV M-10-268, 2011 WL 13282104, at *2 (S.D. Tex. June 24, 2011) ("Plaintiffs cannot seek injunctive relief against the Judicial Defendants, whether sued individually or in their official capacities, for acts or omissions taken in their judicial capacities because they have not alleged or shown that the statutory exceptions apply, i.e., that a declaratory decree has been violated or declaratory relief is otherwise unavailable."); *LaBranche v. Becnel*, No. CV 13-5158, 2013 WL 12091147, at *2 (E.D. La. July 30, 2013), *report and recommendation adopted*, No. CV 13-5158, 2013 WL 12091156 (E.D. La. Aug. 16, 2013); *Green v. Mayfield*, No. CIV.A. 3:08-CV-2287L, 2009 WL 230161, at *2 n.1 (N.D. Tex. Jan. 29, 2009) ("Plaintiff alleges no facts suggesting that a prior declaratory decree has been violated or that declaratory relief is unavailable.")

Here, of course, "Plaintiffs cannot allege that declaratory relief is unavailable because Plaintiffs can, and indeed have, pursued a claim seeking a declaration." *ODonnell v. Harris Cty., Texas*, 251 F. Supp. 3d 1052, 1156 (S.D. Tex. 2017), *aff'd as modified*, 882 F.3d 528 (5th Cir. 2018) (quoting *MacPherson v. Town of Southampton*, 664 F. Supp. 2d 203, 211–12 (E.D.N.Y. 2009)); Compl. at 2, 46–47, ¶¶ 21, 120, 128. Plaintiffs' claim for declaratory relief fails on its merits, but that also does not mean it is "unavailable." "Availability" of declaratory relief does not mean "entitlement." *See LaBranche*, 2013 WL 12091147, at *2 (rejecting injunctive relief because declaratory relief was available and rejecting declaratory relief on legal grounds); *Dockeray v. Francis*, No. 3:03-CV-2862-K, 2004 WL 2187118, at *4 (N.D. Tex. Sept. 28, 2004), *report and recommendation adopted*, No. 3:03-CV-2862-K, 2004 WL 2607808 (N.D. Tex. Nov. 16, 2004) (same).

Neither may Plaintiffs obtain injunctive relief in direct defiance of section 1983 as a stopgap until they can obtain declaratory relief from this Court via summary judgment. Plaintiffs cite no authority for this novel proposition because it is wrong. The unavailability of declaratory relief is not merely a temporal unavailability—it is "unavailable when as a matter of law no cause of action for declaratory relief is provided by statute." *ODonnell*, 251 F. Supp. 3d at 1156. As Judge Rosenthal has explained, "[a] merely temporal unavailability of declaratory relief in this case would defeat Congress's purpose in amending § 1983 to prohibit injunctive relief against judges except in extraordinary cases of recalcitrance against clearly defined court declarations." *Id.* at 1155 n.118 (citing S. Rep. No. 104–66 at 36–37 (1996) ("[t]his section restores the doctrine of judicial immunity to the status is occupied prior to the Supreme Court's decision" in *Pulliam v. Allen*, 466 U.S. 522 (1984))).

B. 42 U.S.C. § 1983's prohibition on injunctions against judicial officers applies to Defendant Clarkston.

Plaintiffs contend that § 1983's prohibition on injunctive relief against "judicial officers" does not apply to Ms. Clarkston because she is a clerk. Pls.' Mot. TRO 6. But Ms. Clarkston is an employee of the judicial branch of the State of Texas, holds an elected "office" of the Smith County District Court, and works for the judges of the Smith County District Court. *See* Tex. Const. art. V, § 9; *Shadwick v. City of Tampa*, 407 U.S. 345, 351 (1972) ("The municipal court clerk is assigned not to the police or prosecutor but to the municipal court judge for whom he does much of his work. In this sense, he may well be termed a 'judicial officer.'") Texas law provides that "[t]he district clerk must take and sign the oath prescribed for *officers* of this state." Tex. Gov't Code § 51.302 (emphasis added). Texas law provides that district clerks, like

Ms. Clarkston, undertake "official acts" on behalf of the court. *Id.* at § 51.301(d) ("Each district clerk shall be provided with a seal for the district court. . . . The seal shall be impressed on all process issued by the court except subpoenas and shall be kept and *used by the clerk to authenticate official acts*." (emphasis added)). The district clerk also has the power under state law to "appoint deputy clerks," who are other "officers" of the court. *Id.* at § 51.309(a). "Each appointment must be in writing under the hand and seal of the district court and must be recorded in the office of the county clerk. A deputy clerk must take the oath prescribed for *officers* of this state." *Id.* (emphasis added).

But even if Ms. Clarkston were not a "judicial officer" in her own right, she still qualifies as one because she acts on behalf of judges, who are indisputably "judicial officers." "The clerks of court are also entitled to immunity the same as judges when performing their duties." *Zimmerman v. Spears*, 428 F. Supp. 759, 762 (W.D. Tex.), *aff'd*, 565 F.2d 310 (5th Cir. 1977). "Not only judges, but clerks and their staff also enjoy a certain degree of immunity." *Willis v. Shaw*, 186 F.R.D. 358, 361 (E.D. Tex. 1999). The Fifth Circuit extends absolute judicial immunity to court clerks for "acts they are specifically required to do under court order or at a judge's discretion." *Kastner v. Lawrence*, 390 F. App'x 311, 315 (5th Cir. 2010) (quoting *Clay v. Allen*, 242 F.3d 679, 682 (5th Cir. 2001) (quoting *Tarter v. Hury*, 646 F.2d 1010, 1013 (5th Cir. 1981))). "Issuing process" is one such task. *Id.*

Texas law agrees that a Texas judge's immunity extends to others performing duties at the judge's direction. "Judges enjoy absolute judicial immunity for judicial acts." *Thompson v. Coleman*, No. 01-01-00114-CV, 2002 WL 1340314, at *5 (Tex. App.—Houston [1st Dist.] June 20, 2002, pet. denied) (citing *City of Houston v.*

Swindall, 960 S.W.2d 413, 417 (Tex. App.—Houston [1st Dist.] 1998, no pet.)). "When judges delegate their authority, the judge's judicial immunity may follow the delegation." *Id.* (citing *Swindall*, 960 S.W.2d at 417). "Court clerks, acting in the course of their duties, are accorded judicial immunity because *they function as an arm of the court*." *Id.* (emphasis added) (citing *Swindall*, 960 S.W.2d at 417; *Spencer v. City of Seagoville*, 700 S.W.2d 953, 958–59 (Tex. App.—Dallas 1985, no writ)).

Plaintiffs cannot dispute that the acts they seek to prevent Ms. Clarkston from committing—docketing S.B. 8 enforcement cases and issuing citation—are acts she does at the direction of judges. District clerks act under authority of the Texas Rules of Civil Procedure, which are promulgated by the Texas Supreme Court. *See* Tex. Gov't Code § 22.004. District clerks may also act under the local rules of the District Court, which are promulgated by the judges of the District Court and the County Courts at Law and approved by the Texas Supreme Court. *See* Tex. R. Civ. P. 3(a); *see also, e.g.*, Local Smith Cty. R. of Civ. Trial.[6] The Texas Rules of Civil Procedure are what require a civil action to be commenced by a petition filed with the clerk, who "shall" document the filing. Tex. R. Civ. P. 22, 24. They also require that "[u]pon the filing of the petition, the clerk, when requested, shall forthwith issue a citation and deliver the citation as directed by the requesting party." Tex. R. Civ. P. 99(a). The contents of the citation the clerk "shall" issue upon request are also prescribed by the Rules. Tex. R. Civ. P. 99(b), 99(c). "[I]n the absence of specific instructions from a "'judicial officer,' the clerk of court lacks authority to refuse or to strike a pleading presented for filing." *McClellon v. Lone Star Gas Co.*, 66 F.3d 98, 102 (5th Cir. 1995).

[6] *Available at* https://www.smith-county.com/government/courts/local-rules-of-civil-trial.

As the Fifth Circuit concluded in holding judges *and* clerks were inappropriate defendants in an action challenging a law's constitutionality, "*[b]ecause of the judicial nature of their responsibility, the chancery clerks* and judges do not have a sufficiently 'personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues on which the court so largely depends for illumination of difficult constitutional questions.'" *Wallace*, 646 F.2d at, 160 (emphasis added) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). Thus, because the actions Plaintiffs seek to enjoin Ms. Clarkston from taking are done at the direction of judges, including Judge Jackson, she may not be enjoined under § 1983.

C. Defendant Clarkston cannot be enjoined to act in a way that exceeds her authority under state law.

Injunctive relief against Ms. Clarkston is unavailable for yet another reason: it is an "elemental fact that a state official cannot be enjoined to act in any way that is beyond his authority to act in the first place." *Okpalobi v. Foster*, 244 F.3d 405, 427 (5th Cir. 2001) (en banc). A court clerk is not responsible for judging the merits of a lawsuit, *see* Tex. Const. art. V, § 9; Tex. Gov't Code § 51.303; Tex. R. Civ. P. 22–26, and a clerk "shall" file documents submitted by litigants, Tex. R. Civ. P. 22–26. A court clerk like Ms. Clarkston does not have the authority to reject petitions, even when the filing is frivolous, harassing, improper, malicious, or based on an unconstitutional statute. Unless a judge directs her, "the clerk of court lacks authority to refuse or to strike a pleading presented for filing." *McClellon*, 66 F.3d at 102. Granting Plaintiffs' requested relief against Ms. Clarkston would require her—a non-lawyer—to do something she otherwise never does: evaluate the legal basis for

every single case filed in Smith County so that she can root out and reject any lawsuits filed under S.B. 8. Aside from gumming up the procedural workings of the Smith County District Court, such relief would require her to exceed her responsibilities as an elected official under state law—essentially requiring her to violate state law by acting *ultra vires*.[7] A federal court has no power to command that. *Okpalobi*, 244 F.3d at 427.

Moreover, Plaintiffs' requested relief "would disrupt the normal course of proceedings in the state courts" and "would constitute a form of monitoring of the operation of state court functions that is antipathetic to established principles of comity." *O' Shea v. Littleton*, 414 U.S. 488, 501 (1974). Nor may a federal court instruct Ms. Clarkston that her official duties under State law *include* rooting out and rejecting S.B. 8 lawsuits. *Planned Parenthood Gulf Coast, Inc. v. Phillips*, No. 18-30699, 2021 WL 2980702, at *6 (5th Cir. July 15, 2021) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984)). Plaintiffs now argue that all their requested injunction would do is require Ms. Clarkston to comply with federal law. Pls.' Cons. MTD Opp. 20. But Plaintiffs have cited no federal law which states that court clerks must not docket cases that a plaintiff alleges are based on a law that violates their constitutional rights. Again, if that logic were applied in other situations it becomes untenable, as it would permit anyone who brings a

[7] Further, if this Court were to grant the class-wide relief Plaintiffs demand against every non-federal court clerk in Texas, this Court would be imposing an extra-legal duty on hundreds of non-lawyers, requiring them to review *every single case filed in Texas* to root out S.B. 8 cases. The burden that such an order would impose on the state judiciary is staggering, and such relief is really nothing less than completely commandeering the state judiciary. It is difficult to think of a situation where the comity doctrine would be implicated in a stronger way.

constitutional challenge to a state law creating a cause of action to enjoin clerks from docketing such cases. That is not how the court system works.

III. Even If Injunctive Relief Against Defendant Clarkston Were Available and the Court Had Jurisdiction, Plaintiffs Cannot Make a "Clear Showing" That They Are Likely to Succeed on the Merits.

A. Plaintiffs failed to make a "clear showing" of success on the merits of their Due Process claim.

1. Plaintiffs also failed to make a "clear showing" of success on the merits because they failed to explain how *Ms. Clarkston* has imposed an undue burden on any woman's right to abortion simply because she might docket a case brought under S.B. 8, which is the limit of her involvement in anything to do with S.B. 8. *Winter*, 555 U.S. at 22. Nor do they cite any legal authority in support. Ms. Clarkston has extensively refuted the idea that she "enforces" the law in any way. Compl. Ex. 1 at 5; Clarkston MTD at 6, 13–14, Clarkston MTD Reply 9–11, 15–16, 18–20. Plaintiffs' objections appear to be focused on the law itself and how the *law* causes an undue burden, but "[a]n injunction enjoins a *defendant*, not a statute." *Okpalobi*, 244 F.3d at 426 n.34 (emphasis added). Plaintiffs have provided no legal basis for enjoining Ms. Clarkston. And to the extent Plaintiffs' arguments rely on a cumulative effect of lawsuits elsewhere in the State, Ms. Clarkston is not even arguably involved with anything that happens outside of Smith County.

2. Further, Plaintiffs assert that they are entitled to injunctive relief because "[i]f allowed to take effect, S.B. 8 will prohibit nearly all abortions in the State of Texas." Pls.' MSJ 14. That assertion is false for multiple reasons, as will be shown by evidence and testimony to be presented at the preliminary injunction hearing on

August 30, 2021. Plaintiffs have relied on declarations submitted in support of their motion for summary judgment as the factual basis for their motion for injunctive relief, but these declarations are unreliable hearsay. Defendants intend to cross-examine the declarants at the hearing and present reliable evidence refuting key assertions made in these declarations. For example, Defendants contest Plaintiffs' statements on S.B. 8's impact, which is relevant both to whether they have met their burden under the "likelihood of success on the merits" prong as well as the "irreparable harm" prong. These factual problems illustrate that Plaintiffs have not "clearly carried the burden of persuasion." *Def. Distributed*, 838 F.3d at 457.

B. Plaintiffs failed to make a "clear showing" that they are likely to succeed on their Equal Protection Clause claim.

Plaintiffs do not allege or argue that Ms. Clarkston "singles out" or "discriminates" against them by docketing an S.B. 8 case. In fact, she treats every petition filed in Smith County District Court the same. Tex. R. Civ. P. 99(a). Their arguments center around the potential remedies for a successful S.B. 8 claim, *see* Pls.' MSJ 29–32, which Ms. Clarkston has nothing to do with.

Further, Plaintiffs do not dispute that the direct effect of S.B. 8 would be on the clinics and abortion funds, not patients. S.B. 8 explicitly does not carry any penalties for abortion patients. *See* Compl. Ex. 1 at 5 ("This subchapter may not be construed to . . . authorize the initiation of a cause of action against or prosecution of a woman on whom an abortion is performed.") But there is no constitutional right to perform or pay for abortions. *Planned Parenthood of Greater Ohio v. Hodges*, 917 F.3d 908, 912 (6th Cir. 2019) ("The Supreme Court has never identified a freestanding right to perform abortions. To the contrary, it has indicated that there is no such

thing.") "In cases that do not implicate suspect classes or fundamental rights, '[t]he appropriate standard of review is whether the difference in treatment between [classes] rationally furthers a legitimate state interest.'" *Harris v. Hahn*, 827 F.3d 359, 365 (5th Cir.2016) (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992)). Under rational basis review, differential treatment "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *FCC v. Beach Commc'n*, 508 U.S. 307, 313 (1993). Plaintiffs therefore must rely on a "class-of-one" theory of equal protection. But the "class-of-one" theory does not apply to "forms of state action. . . which by their nature involve discretionary decisionmaking based on a vast array of subjective, individualized assessments." *See Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 603 (2008). In these situations, "treating like individuals differently is an accepted consequence of the discretion granted" to government officials. *Id.* Crafting legislation is obviously one of the most discretionary activities of state government. Thus, Plaintiffs' equal-protection claim fails.

C. Plaintiffs failed to make a "clear showing" that they are likely to succeed on their fee-shifting claim as to Ms. Clarkston.

Plaintiffs also challenge the fee-shifting provisions of S.B. 8, but this claim as to Ms. Clarkston is unripe. Pls.' MSJ 42–48. "A court should dismiss a case for lack of 'ripeness' when the case is abstract or hypothetical." *Choice Inc. of Texas v. Greenstein*, 691 F.3d 710, 715 (5th Cir. 2012) (citation omitted). "The key considerations are 'the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.'" *Id.* "[A] case is not ripe if further factual development is required." *Id.* But "'even where an issue presents purely legal

questions, the plaintiff must show some hardship in order to establish ripeness.'" *Id.* (quoting *Cent. & S.W. Servs., Inc. v. EPA*, 220 F.3d 683, 690 (5th Cir.2000)).

This is the first and only abortion-related case Ms. Clarkston has ever been involved in, so this is the only case she could seek fees in under S.B. 8. Compl. Ex. 1 at 15. But Ms. Clarkston would be ineligible to seek fees under the statute unless she prevails on some part of the litigation. Compl. Ex. 1 at 15. This litigation has just begun and may continue for years before Ms. Clarkston would even be eligible to seek fees. And according to Plaintiffs, Ms. Clarkston would not prevail. Plaintiffs have not argued nor pleaded that Ms. Clarkston will realistically be eligible to seek fees under this provision at any point in the near future, so preliminary injunctive relief preventing her from doing so is unwarranted. Further, in the cases cited by Plaintiffs pertaining to preemption of fee-shifting provisions, *see* Pls.' MSJ at 48, the fee-shifting provisions were addressed on appeal *after* the courts ruled for the defendants on the merits of the case and defendants sought recovery of their fees under the applicable statutes. *See Hubbard v. SoBreck, LLC*, 554 F.3d 742, 744 (9th Cir. 2009); *State v. Golden's Concrete Co.*, 962 P.2d 919, 925 (Colo. 1998) (en banc). As in those cases, Plaintiffs can challenge the fee-shifting provisions of S.B. 8 *if* Ms. Clarkston prevails in this lawsuit and seek recovery of her fees. Plaintiffs cannot make a "clear showing" entitling them to a preliminary injunction preventing Ms. Clarkston to seek fees she may only be hypothetically entitled to at some point in the distant future.

D. Plaintiffs failed to make a "clear showing" that they are likely to succeed on their vagueness claim.

The extent of Plaintiffs' vagueness argument is a few case citations and the bald statement, "S.B.'s enforcement provisions fail both vagueness prongs." Pls.' MSJ

32. That falls far short of a "clear showing" of success on the merits. *Winter*, 555 U.S. at 22.

E. Plaintiffs fail to allege or argue how Ms. Clarkston plays any role in any of their other claims.

Plaintiffs' claims articulated at pages 34–35 center around the "amount of liability." Ms. Clarkston has no control over whether Plaintiffs will be held liable and for what amount; thus, it is unclear how she could violate their constitutional rights through anything to do with the imposition of liability. There is no basis for enjoining Ms. Clarkston under these claims.

Similarly, Plaintiffs' First Amendment claims center around their claim that S.B. 8 "chills" their speech. Pls.' MSJ 35–40. Plaintiffs' dispute would be with a government official who enforces the law, but Ms. Clarkston does not. Compl. Ex. 1 at 5; Clarkston MTD at 6, 13–14, Clarkston MTD Reply 9–11, 15–16, 18–20. Plaintiffs have not articulated any basis for enjoining Ms. Clarkston under this claim for relief.

F. Even if the Court were to find that Plaintiffs are likely to succeed in their challenge to one part of S.B. 8, the Court cannot enjoin or declare unconstitutional the entire law.

Plaintiffs seek to enjoin all the Defendants from "enforcing Senate Bill 8 in any way." Compl. 46; Pls.' MSJ 50; *see also* Pls.' Mot. TRO 8. But the law contains an extensive severability clause. Compl. Ex. 1 at 12–14, 16–17. The Court may not enjoin anyone from enforcing parts of the law it does not find violate the Constitution. Generally, "[w]e prefer, for example, to enjoin only the unconstitutional applications of a statute while leaving other applications in force, or to sever its problematic portions while leaving the remainder intact." *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328–29 (2006) (citation omitted). "Severability is a state law

issue that binds federal courts." *Voting for Am., Inc. v. Steen*, 732 F.3d 382, 398 (5th Cir. 2013). Moreover, even if there were no severability clause, because "the scope of injunctive relief is dictated by the extent of the violation established, [t]he district court must narrowly tailor an injunction to remedy the specific action which gives rise to the order." *John Doe #1 v. Veneman*, 380 F.3d 807, 818 (5th Cir. 2004) (cleaned up).

IV. Plaintiffs Have Not Made a "Clear Showing" of Irreparable Harm Warranting Injunctive Relief.

"To satisfy the irreparable harm element of a preliminary injunction, [Plaintiffs] must demonstrate that if the Court denied the grant of a preliminary injunction, irreparable harm would result." *BioTE Med., LLC v. Jacobsen*, 406 F. Supp. 3d 575, 580 (E.D. Tex. 2019). "In general, a harm is irreparable where there is no adequate remedy at law, such as monetary damages." *Janvey v. Alguire*, 647 F.3d 585, 595 (5th Cir. 2011).

A. The Court should deny injunctive relief because of Plaintiffs' delay in seeking it.

At the outset, Plaintiffs' claims of impending irreparable harm are undermined by their delay in seeking relief. Courts may deny injunctive relief pursuant to the equitable doctrine of laches. *See Armco, Inc., v. Armco Burglar Alarm Co., Inc.*, 693 F.2d 1155, 1161 n.14 (5th Cir. 1982). ""[D]elay in seeking a remedy is an important factor bearing on the need for a preliminary injunction." *Wireless Agents, L.L.C. v. T–Mobile USA, Inc.*, No. 3:05–CV–0094–D, 2006 WL 1540587, *4 (N.D. Tex. June 6, 2006) (quoting *High Tech Med. Instrumentation Inc. v. New Image Indus.*, 49 F.3d 1551, 1557 (Fed. Cir. 1995)). "Evidence of an undue delay in bringing suit may be

sufficient to rebut the presumption of irreparable harm." *Id.* at *3. And "[u]ndue delay in seeking a preliminary injunction tends to negate the contention that the feared harm will truly be irreparable." *Lupi v. Diven*, No. 1:20-CV-207-RP, 2020 WL 1667375, at *7 (W.D. Tex. Apr. 3, 2020).

Governor Abbott signed S.B. 8 on May 19, 2021, yet Plaintiffs waited until July 13, 2021 to file this lawsuit, and until August 7 to seek injunctive relief, even though the law goes into effect September 1. Plaintiffs have offered only this justification for their delay: "Given the nature of S.B. 8 and its broad scope, the case involves 21 plaintiffs and 6 separate sets of attorneys, all of whom have endeavored to act as quickly as possible to ascertain S.B. 8's impact, protect their unique interests, and coordinate with the other parties." Pls.' Opp. to Clarkston Mot. for Extension 1–2 (Dkt. 44). That excuse does not hold water given that Plaintiffs had *eighteen attorneys* to put together this case challenging a law that was filed in the Legislature in March and passed both houses by wide margins. The truth is that Plaintiffs presumably sought a tactical advantage by sitting on their claims until mere weeks before S.B. 8's effective date in order to rush the proceedings, avoid jurisdictional scrutiny, and avoid discovery—and prejudice Defendants. Plaintiffs' delay resulted in an extremely truncated litigation schedule that would have been unnecessary had Plaintiffs filed suit shortly after the law was passed.

And significantly, this is not the first time Plaintiffs have done this. For instance, a previous S.B. 8, Texas's ban on live dismemberment abortion, was passed on May 26, 2017 and signed into law on June 6, 2017.[8] But many of the same plaintiffs

[8] *See* https://capitol.texas.gov/BillLookup/History.aspx?LegSess=85R&Bill=SB8.

waited until July 20, 2017 before filing their lawsuit, weeks before the effective date of September 1, 2017. In 2013, some of the same plaintiffs waited until 30 days before effective date of H.B. 2, Texas's law requiring admitting privileges for abortion providers and clinics to meet ambulatory-surgical center requirements, to sue. *See* Tr. of Oct. 1, 2013 Scheduling Conf., *Planned Parenthood of Greater Tex. Surg. Health Servs. v. Abbott*, No. 13-cv-00862-LY (W.D. Tex. 2013), at 13:22–14:3.

A party should not be permitted to continue engaging in this inequitable conduct and still obtain equitable relief, especially the extraordinary relief of a preliminary injunction.

B. Plaintiffs cannot show a "substantial threat" of irreparable injury from Defendant Clarkston.

In *Bauer,* because there were no currently pending actions under the challenged statute before the defendant judge, the Fifth Circuit held that there was no "'substantial likelihood' and a 'real and immediate' threat that [plaintiff] will face injury from [the defendant judge] in the future." 341 F.3d at 359. There are no private enforcement actions under S.B. 8 pending in Smith County District Court, nor have Plaintiffs provided any evidence that there will be any enforcement actions in Smith County in the near future. *See* Clarkston MTD 9–10, Clarkston MTD Reply 11–15. Further, any possibility that claims could be filed in *other* courts does not mean that Ms. Clarkston or Judge Jackson could do anything to injure Plaintiffs. *See* Clarkston MTD Reply 12–13.

Nor can Plaintiffs show that they or their patients will suffer irreparable harm if this Court does not enjoin Ms. Clarkston. As explained above, *see* Part III.A *supra*,

Plaintiffs cannot prove their claim that S.B. 8 will "prohibit nearly all abortions in the State of Texas."

Plaintiffs' many complaints about the legality of S.B. 8 (*see* Pls.' MSJ at 22–50) can all be raised in state court if Plaintiffs are sued in an S.B. 8 enforcement action or if any defendant seeks fees in the future as a prevailing party under S.B. 8. Insofar as Plaintiffs argue that their, or their patients', constitutional rights are violated by merely having to respond to a lawsuit filed in state court, they cite no law or evidence supporting that idea. To the extent they argue that litigating S.B. 8 cases or S.B. 8's monetary penalties will negatively their business's finances, that is only monetary harm. And "[i]t is thus well-established that an injury is irreparable only "if it cannot be undone through monetary remedies." *Dennis Melancon, Inc. v. City of New Orleans*, 703 F.3d 262, 279 (5th Cir. 2012) (quoting *Interox Am. v. PPG Indus., Inc.*, 736 F.2d 194, 202 (5th Cir. 1984)). "Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of [an injunction], are not enough." *Id.* (citation omitted). Further, any such harm is also speculative because it is not yet clear whether they will ever be held liable in an S.B. 8 enforcement action, assuming Texas courts would reach the merits of any case filed despite Plaintiffs' many objections to suit, and given that there is no liability if the law imposes an undue burden on its patients' right to abortion, *see Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 874 (1992), Compl. Ex. 1 at 5.

V. A Preliminary Injunction Is Not in the Public Interest.

Issuing a preliminary injunction against Ms. Clarkston or Judge Jackson, despite the law clearly forbidding it, *see* Part I *supra*, despite the binding case law on point showing there is no jurisdiction over the claims against them, *see* Clarkston

MTD 5–17, MTD Reply 6–18, and despite the binding case law showing they are obviously entitled to sovereign immunity, *see* Clarkston MTD 17, Clarkston MTD Reply 18–20, would blatantly exceed the Court's constitutional authority. Upholding constitutional limits on federal court jurisdiction is unquestionably of bedrock importance to our system of government, and therefore, to the public.

CONCLUSION

This Court should deny Plaintiffs' motion for injunctive relief and dismiss this case for lack of jurisdiction.

Respectfully submitted.

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

Attorneys for Defendant Penny Clarkston

CERTIFICATE OF SERVICE

I certify that on August 16, 2021, this document was served through the Court's CM/ECF Document Filing System or through electronic mail, upon all counsel of record.

/s/ Heather Gebelin Hacker
HEATHER GEBELIN HACKER