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

DEFENDANT MARK LEE DICKSON'S MOTION RESPONSE TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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A preliminary injunction is an "extraordinary remedy," and it may not be granted unless the movant has "clearly carried the burden of persuasion on all four requirements." *Texas Medical Providers Performing Abortion Services v. Lakey*, 667 F.3d 570, 574 (5th Cir. 2012). That means the plaintiffs must make: (1) a clear showing that they will likely succeed on the merits; (2) a clear showing that they will suffer irreparable harm absent a preliminary injunction; (3) a clear showing that their injury outweighs any harm that will result if a preliminary injunction is granted; and (4) a clear showing that a preliminary injunction will not disserve the public interest. *See Roho, Inc. v. Marquis*, 902 F.2d 356, 358 (5th Cir. 1990).

The plaintiffs refuse to acknowledge the "clear showing" requirement, and they do not even assert that they have "clearly carried" their burden of persuasion on any of the four prongs of the preliminary-injunction test. But the law of the Fifth Circuit requires a "clear showing" from the plaintiffs on *each* of these four requirements. *See Voting for America, Inc. v. Steen*, 732 F.3d 382, 386 (5th Cir. 2013) ("This court has repeatedly cautioned 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.'" (citation and some internal quotation marks omitted)). The plaintiffs come nowhere close to making a "clear showing" on any component of the preliminary-injunction test.

I. The Plaintiffs Have Failed To Make A "Clear Showing" Of Likely Success On Merits

The plaintiffs must make a "clear showing" that they will prevail on the merits of their claims. That requires them to make: (1) a "clear showing" that they have Article III standing and will overcome the defendants' sovereign-immunity defenses;[1] and (2)

1. *See Barber v. Bryant*, 860 F.3d 345, 352 (5th Cir. 2017) ("Because a preliminary injunction 'may only be awarded upon a clear showing that the plaintiff is entitled to such relief,' the plaintiffs must make a 'clear showing' that they have standing to maintain the preliminary injunction." (citation omitted)).

a "clear showing" that they will obtain a permanent injunction against the defendants at the end of these proceedings. The plaintiffs fall woefully short on both fronts.

A. The Plaintiffs Have Failed To Make A "Clear Showing" That This Court Has Subject-Matter Jurisdiction Over Any Of Their Claims

The motion for preliminary injunction does not even present an argument for how this Court has subject-matter jurisdiction. Instead, it tells the Court that the plaintiffs will get around to addressing subject-matter jurisdiction when they file their responses to the defendants' Rule 12(b)(1) motions, and it purports to "incorporate" those future briefs "by reference." Pls.' Mot. for Prelim. Inj., ECF No. 53 at 4. That is impermissible. The rules of this Court limit a motion for preliminary injunction to 20 pages,[2] and the plaintiffs may not circumvent these page limits by announcing that they are "incorporating" 75 pages of future briefing into their preliminary-injunction motion.[3] It is equally impermissible to file a motion that plays "hide the ball" by announcing that arguments will be disclosed in a future brief, which shortens the defendants' time to respond to the arguments that have been concealed. The plaintiffs have forfeited any argument for subject-matter jurisdiction, and their motion should be denied on that basis alone.

If the Court decides to allow the plaintiffs to flout the page limits with this "incorporation by reference" maneuver, it cannot possibly conclude that the plaintiffs have made a "clear showing" of subject-matter jurisdiction. To obtain a preliminary injunction, the plaintiffs must explain how they have "clearly carried" their burden of establishing jurisdiction, and the briefing submitted in response to the Rule 12(b)(1) motions does not even attempt to explain how that heightened standard has been met. Mr. Dickson's unrebutted declarations show that he has no intention of suing

2. *See* Local Rule 7(c)(2).
3. The plaintiffs have not asked this Court for leave to exceed the 20-page limit, and they have conferred with the defendants or obtained our consent to do so.

the plaintiffs under section 3 or section 4 of the Act,[4] which defeats any possibility of Article III standing, and his declarations likewise refute any possible claim that an injunction against Mr. Dickson will "redress" any injury that the plaintiffs allege.[5] The plaintiffs have also failed to plead facts in their complaint that establish Article III standing to sue Mr. Dickson, as required by the rulings of the Supreme Court. *See, e.g.*, *Warth v. Seldin*, 42 U.S. 490, 518 (1975) ("It is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers.").

The plaintiffs have no standing to sue the state agency defendants because Senate Bill 8 unequivocally prohibits them from enforcing section 3 in any manner. *See* Tex. Health and Safety Code § 171.207(a) ("Notwithstanding Section 171.005 *or any other law*, the requirements of this subchapter shall be enforced *exclusively* through the private civil actions described in Section 171.208." (emphasis added)). The plaintiffs' claim that the state agency defendants can use other statutes to punish them for violations of Senate Bill 8 is directly foreclosed by this statutory language, and even if it weren't the plaintiffs have failed to allege (let alone show) that the state agency defendants have any intention of doing this. The Eleventh Amendment bars the section 3 claims against the state agency defendants for the same reason. *See Ex parte Young*, 209 U.S. 123, 157 (1908) ("[S]uch officer must have some connection with the enforcement of the act."). The plaintiffs also lack standing to sue the state agency defendants over section 4, as the state agency defendants have yet to attain "prevailing party" status in an abortion suit and are legally incapable of suing the plaintiffs for attorneys' fees at this time.

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4. *See* Declaration of Mark Lee Dickson, ECF No. 50-1 at ¶¶ 5–7, 9–11; Supplemental Declaration of Mark Lee Dickson, ECF No. 64-1 at ¶¶ 6–17.
5. *See* Declaration of Mark Lee Dickson, ECF No. 50-1 at ¶ 8; Supplemental Declaration of Mark Lee Dickson, ECF No. 64-1 at ¶ 15.

Then there are the claims against Judge Jackson and Ms. Clarkston, which are directly foreclosed by the Fifth Circuit's binding pronouncements in *Chancery Clerk of Chickasaw County v. Wallace*, 646 F.2d 151 (5th Cir. 1981), and *Bauer v. Texas*, 341 F.3d 352 (5th Cir. 2003). *See id.* at 359 ("The requirement of a justiciable controversy is not satisfied where a judge acts in his adjudicatory capacity."). The plaintiffs spend 38 pages attempting to persuade this Court to disregard the holdings of those cases. They assert that the holdings of *Bauer* or *Wallace* apply only when "there is someone else to sue with authority to directly enforce" the allegedly unconstitutional law,[6] but that is nonsense. There is nothing in *Bauer* or *Wallace* that even remotely suggests that their holdings are limited in this regard, and (more importantly) the Article III standing inquiry does not in any way depend on whether someone else is capable of sued. *See Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 489 (1982) ("[T]he assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing."). All that matters under Article III is whether the named defendant is injuring the plaintiff. The answer to that question has nothing to do with whether some other potential defendant can also be sued under Article III.

The sovereign-immunity obstacles to the claims against Judge Jackson and Ms. Clarkston are equally insurmountable. A state officer cannot be sued under *Ex parte Young* unless he is violating or about to violate federal law; that is what "strips" the officer of his sovereign authority and allows him to be sued as a rogue individual rather than as a component of a sovereign entity. *See Ex parte Young*, 209 U.S. 123, 159–60 (1908). The plaintiffs do not even attempt to argue that a judge violates the Constitution by presiding over a lawsuit brought under an allegedly unconstitutional statute, or that a clerk violates the Constitution by filing documents submitted by

6. *See* Pls.' Consolidated Opp., ECF No. 62 at 26.

litigants under a purportedly unconstitutional law. An *Ex parte Young* lawsuit may be brought only against a federal lawbreaker or would-be lawbreaker, yet the plaintiffs have failed to allege or show how Judge Jackson or Ms. Clarkston will be violating *any* federal law.

Finally, the plaintiffs do not bother to explain how they have standing to challenge any provision of Senate Bill 8 apart from sections 3 and 4. *See In re Gee*, 941 F.3d 153, 160 (5th Cir. 2019) ("[P]laintiffs must establish standing for each and every provision they challenge." (citing authorities)). Nor do they explain how they have standing to seek a "universal" injunction that prevents the enforcement of Senate Bill 8 against non-parties to this litigation. *See Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975); *In re Abbott*, 954 F.3d 772, 786 n.19 (5th Cir. 2020), *vacated on other grounds by Planned Parenthood Center for Choice v. Abbott*, 141 S. Ct. 1261 (2021). The plaintiffs have forfeited any such arguments for standing, so any preliminary injunction issued by this Court must be limited to the named plaintiffs and the discrete provisions of Senate Bill 8 that the plaintiffs have established standing to challenge.

It is inconceivable how the plaintiffs can establish subject-matter jurisdiction over any of the claims in this case—and they have certainly not made a "clear showing" of subject-matter jurisdiction, which is needed to obtain a preliminary injunction. *See Barber v. Bryant*, 860 F.3d 345, 352 (5th Cir. 2017). Indeed, the plaintiffs do not even assert that their jurisdictional arguments satisfy the "clear showing" standard, which is reason enough to deny their motion.

B. The Plaintiffs Have Failed To Make A "Clear Showing" That They Are Entitled To An Injunction That Prevents The Defendants From Enforcing Senate Bill 8 In Any Situation

The plaintiffs are demanding a preliminary injunction that blocks the defendants from enforcing Senate Bill 8 in *any* situation—even in situations where the enforcement of Senate Bill 8 is undeniably constitutional. But this Court has no authority to

enjoin the constitutional applications of Senate Bill 8. *See Alabama State Federation of Labor, Local Union No. 103 v. McAdory*, 325 U.S. 450, 465 (1945) ("When a statute is assailed as unconstitutional we are bound to assume the existence of any state of facts which would sustain the statute in whole or in part."); *Planned Parenthood of Greater Texas Surgical Health Services v. Abbott*, 748 F.3d 583, 589 (5th Cir. 2014) ("Even when considering facial invalidation of a state statute, the court must preserve the valid scope of the provision to the greatest extent possible."). Here are just a few of the many the civil-enforcement lawsuits authorized by Senate Bill 8 that are indisputably constitutional under existing Supreme Court precedent:

> 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]

All of these lawsuits authorized by Senate Bill 8 are constitutional, and this Court has no authority to enjoin the defendants from filing or presiding over lawsuits in any of those situations.

There are other lawsuits authorized by Senate Bill 8 that are at least arguably constitutional, and the plaintiffs present no argument for how these civil-enforcement lawsuits would impose an "undue burden" or violate anyone's constitutional rights.

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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.

Senate Bill 8, for example, authorizes lawsuits against employers or insurers who pay for post-heartbeat abortions. *See* Tex. Health & Safety Code § 171.208(a)(2). Yet there is no constitutional right to pay for another person's abortion, and there is no conceivable "undue burden" that would be imposed if the beneficiary can afford the procedure without insurance coverage. The Court cannot enjoin the defendants from filing or presiding other lawsuits brought in these situations either.

The plaintiffs somehow think that they can obtain an across-the-board injunction against the enforcement of this statute—even though Senate Bill 8 has many constitutional applications, and even though the statute contains emphatic severability requirements that compel reviewing courts to sever and preserve *every* constitutional application of the law. *See* Senate Bill 8, 87th Leg., §§ 3, 5, 10. Yet the plaintiffs have decided that they will simply ignore these severability requirements, as well as the fact that many of the civil-enforcement lawsuits authorized by Senate Bill 8 are constitutional even under the plaintiffs' interpretation of the Constitution,[11] apparently in the hope that their ostrich-like pose will induce this Court to ignore these problems as well and give the plaintiffs the patently unlawful remedy that they are seeking. But ignoring the severability requirements is not an option,[12] and a court is not permitted to categorically enjoin the enforcement of a statute that has indisputably constitutional applications. *See McAdory*, 325 U.S. at 465; *Menillo*, 423 U.S. at 9–10; *Voting*

11. Not even the plaintiffs would contend that it is unconstitutional to authorize private civil-enforcement lawsuits against individuals who covertly slip abortion drugs into an unsuspecting woman's food or drink.
12. *See Leavitt v. Jane L.*, 518 U.S. 137, 138 (1996) (per curiam) (rebuking the Tenth Circuit for refusing to treat as dispositive the statute's "explicit stat[ement]" of legislative intent regarding severability in a state-law abortion statute); *Planned Parenthood of Greater Texas Surgical Health Services v. Abbott*, 748 F.3d 583, 589 (5th Cir. 2014) ("Federal courts are bound to apply state law severability provisions."); *City of Houston v. Bates*, 406 S.W.3d 539, 549 (Tex. 2013) ("When an ordinance contains an express severability clause, the severability clause prevails when interpreting the ordinance.").

for America, Inc. v. Steen, 732 F.3d 382, 398 (5th Cir. 2013). The plaintiffs must request an injunction that is limited to the allegedly unconstitutional provisions and applications of Senate Bill 8; the Court cannot award an across-the-board preliminary injunction against the enforcement of Senate Bill 8.

There are many other problems with the plaintiffs' arguments on the merits; we will address each of them briefly.

1. The Plaintiffs Cannot Obtain A Preliminary Injunction Unless They Show That The Named Defendants Are Violating Their Constitutional Rights Or Imposing An "Undue Burden" On Abortion Patients

The plaintiffs spend much of their brief complaining that the *statute* enacted by the Texas legislature will impose an "undue burden" on women seeking abortions. But that does nothing to help the plaintiffs obtain a preliminary injunction, because the statute will take effect on September 1 regardless of whether this Court enjoins the defendants from enforcing it. *See Okpalobi v. Foster*, 244 F.3d 405, 426 n.34 (5th Cir. 2001) (en banc) ("An injunction enjoins a defendant, not a statute."). To obtain a preliminary injunction, the plaintiffs must show that the *named defendants* are violating the Constitution or imposing an "undue burden"—or that the defendants will impose an "undue burden" if they are not promptly enjoined by this Court. *See* 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)).

None of the defendants are imposing an "undue burden" on abortion patients, and none of them are threatening to do so. Mr. Dickson has already said in unrebutted declarations that he has no plans to bring civil-enforcement lawsuits under Senate Bill 8, and the state agency defendants are statutorily prohibited from enforcing the heartbeat ban in any way. The plaintiffs have not alleged or shown that anyone is planning

to file a civil-enforcement lawsuit in Smith County, so Judge Jackson and Ms. Clarkston are incapable of imposing an "undue burden" on abortion patients even if they wanted to. The plaintiffs complain that they will be deterred from performing abortions when Senate Bill 8 takes effect on September 1, but those grievances are with the statute and the legislature that it, not with anything that the defendants are doing. None of the defendants are imposing an "undue burden" on any abortion patient—and there is no evidence that any of these defendants will violate the Constitution or impose an "undue burden" when the law takes effect on September 1. The defendants cannot be enjoined or held liable under these circumstances.

2. The Plaintiffs Have Failed To Make A "Clear Showing" That Mr. Dickson Is Acting "Under Color Of" State Law

Mr. Dickson is not subject to suit under 42 U.S.C. § 1983 because he is a private citizen and is not acting (and does not intend to act) "under color of" state law. The law of the Fifth Circuit is clear that a private litigant does not act "under color of" state law by filing a lawsuit authorized by a state statute.[13] The plaintiffs' motion for summary judgment, which the plaintiffs purport to "incorporate" in their motion for preliminary injunction, does not present an argument for how Mr. Dickson can be sued under 42 U.S.C. § 1983 as a private citizen. It provides only a bald assertion that

13. *See 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.'" (quoting *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) ("The growers cannot be held liable in a § 1983 suit simply because they filed suit under Texas statutes and obtained a temporary restraining order."); *Hollis v. Itawamba County Loans*, 657 F.2d 746, 749 (5th Cir. 1981) ("[N]o state action is involved when the state merely opens its tribunals to private litigants."); *Gras v. Stevens*, 415 F. Supp. 1148, 1152 (S.D.N.Y. 1976) (Friendly, J.) ("[W]e know of no authority that one private person, by asking a state court to make an award against another which is claimed to be unconstitutional, is violating 42 U.S.C. § 1983.").

"Mr. Dickson is properly sued under Section 1983 as acting under color of state law." Mot. for Summ. J., ECF No. 19, at 20. Worse, the plaintiffs have produced no allegations (let alone evidence) that Mr. Dickson is conspiring or coordinating his efforts with government officials, which is needed for a private party to held liable under 42 U.S.C. § 1983,[14] and Mr. Dickson has specifically denied doing so in his in his unrebutted declaration. *See* Declaration of Mark Lee Dickson, ECF No. 50-1 at ¶ 12. Worse still, Mr. Dickson denies that he is intending to sue anyone when Senate Bill 8 takes effect on September 1,[15] which defeats even the possibility that he can be sued for acting "under color of' state law. The plaintiffs must make a "clear showing" that Mr. Dickson can be sued under 42 U.S.C. § 1983, and they have fallen far short of that.

3. The Plaintiffs Abortion Funds Have No Third-Party Standing To Assert The Rights Of Abortion Patients

The plaintiff abortion funds have no third-party standing to assert the rights of women seeking abortions. *See Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004) ("A party generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." (citation and internal quotation marks omitted)). Although the Supreme Court has allowed physicians to assert the constitution rights of women seeking to abort their unborn children,[16] it has never extended third-party standing to abortion funds or other entities that seek to pay for another person's abortion.

The burden is on the plaintiffs to show how the abortion funds have third-party standing to assert the rights of women seeking abortions. *See Carney v. Adams*, 141

14. *See Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 152 (1970).
15. *See* Declaration of Mark Lee Dickson, ECF No. 50-1 at ¶¶ 5–7, 9–11; Supplemental Declaration of Mark Lee Dickson, ECF No. 64-1 at ¶¶ 6–17.
16. *Singleton v. Wulff*, 428 U.S. 106, 113–18 (1976) (plurality opinion); *June Medical Services LLC v. Russo*, 140 S. Ct. 2103 (2020).

S. Ct. 493, 499 (2020) ("[P]laintiff bears the burden of proving standing"). The plaintiffs have not even presented an assertion—let alone an argument—that the abortion funds have third-party standing, and there is no constitutional right to pay for another person's abortion. So the abortion funds have forfeited any argument for third-party standing, and they must be excluded from any preliminary injunctive relief issued by this Court.

4. The Plaintiffs Have Failed To Show How Authorizing Lawsuits Against Abortion Funds Will Impose An "Undue Burden" On Women Seeking Abortions

The plaintiffs have also failed to explain how lawsuits against abortion funds (as opposed to abortion providers) will impose "undue burdens" on abortion patients. The Supreme Court has held that there is no constitutional right to have another person pay for your abortion. *See Harris v. McRae*, 448 U.S. 297 (1980). So the plaintiffs must explain how it would violate the Constitution to prohibit abortion funds from "aiding or abetting" post-heartbeat abortions, while exposing them to civil-enforcement lawsuits if they violate this statutory prohibition. Senate Bill 8 is severable—not only in regard to its discrete provisions, but with respect to every application of those provisions to every person, group of persons, or circumstances. *See* Senate Bill 8, 87th Leg., §§ 3, 5, 10. The plaintiffs do not get to pretend that the statute is nonseverable and refuse to explain how lawsuits against the abortion funds (as opposed to the abortion providers) violate the Constitution.

The plaintiffs abortion funds have not even attempted to show how the enforcement of Senate Bill 8 against them will violate the constitutional rights of abortion patients—even if one were to assume that abortion funds have third-party standing to assert these constitutional rights. They have failed to make a "clear showing" that the enforcement of Senate Bill 8 against them will violate the Constitution, and they must be excluded from the scope of any preliminary injunctive relief.

5. The Plaintiffs Cannot Use 42 U.S.C. § 1983 Or The Declaratory Judgment Act To Assert The Constitutional Rights Of Third Parties

The plaintiffs (other than Forbes and Kanter) are not asserting their own constitutional rights in this litigation; they are asserting the third-party rights of women seeking abortions. Yet they claim to be suing under 42 U.S.C. § 1983 and the Declaratory Judgment Act. They cannot, however, invoke either of these statutes to assert third-party rights, because the causes of action established by these statutes allow plaintiffs to assert only their *own* rights, and not the rights of third parties. This is not an issue of Article III standing, or "prudential" third-party standing. It is a matter of whether the plaintiffs have identified a cause of action that authorizes them to sue. Even when litigants can establish Article III standing, they must *also* point to a law that gives them the right to sue. *See Davis v. Passman*, 442 U.S. 228, 239 n.18 (1979); David P. Currie, *Misunderstanding Standing*, 1981 Sup. Ct. Rev. 41, 42 ("No one can sue . . . unless authorized by law to do so").

The text of 42 U.S.C. § 1983 permits lawsuits only by the party who has suffered a violation of his *own* federally protected rights:

> Every person who, under color of [state law], subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, *shall be liable to the party injured* in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983 (emphasis added). Section 1983 permits lawsuits only by "*the* party injured," not "*a* party injured," which refers back to the statute's earlier description of the "citizen" or "person" who has suffered the deprivation of his rights. In the words of Professor Currie, section 1983

> plainly authorizes suit by anyone alleging that he has been deprived of rights under the Constitution or federal law, *and by no one else*. It thus incorporates, *but without exceptions*, the Court's "prudential" principle that the plaintiff may not assert the rights of third parties.

David P. Currie, *Misunderstanding Standing*, 1981 Sup. Ct. Rev. 41, 45 (emphasis added). Only the rights-holder may sue under section 1983; the statute does not accommodate lawsuits brought by plaintiffs who seek to vindicate the constitutional rights of third parties.

This principle has long been recognized by the Supreme Court and the Fifth Circuit lower federal courts. In *Rizzo v. Goode*, 423 U.S. 362 (1976), for example, this Court emphasized that liability under section 1983 can attach only to conduct that violates the *plaintiff's* federally protected rights. *Id.* at 370–71 ("The plain words of [section 1983] impose liability whether in the form of payment of redressive damages or being placed under an injunction *only for* conduct which 'subjects, or causes to be subjected' *the complainant* to a deprivation of a right secured by the Constitution and laws." (emphasis added)). The Fifth Circuit has likewise recognized that section 1983 makes no allowance for lawsuits that seek to vindicate a third party's constitutional rights. *See Shaw v. Garrison*, 545 F.2d 980, 983 n.4 (5th Cir. 1977) *rev'd on other grounds sub nom. Robertson v. Wegmann*, 436 U.S. 584 (1978) (allowing a section 1983 lawsuit to proceed only after concluding that it was "not an attempt to sue under the civil rights statutes for deprivation of another's constitutional rights" and noting that "[s]uch suits are impermissible."); *Coon v. Ledbetter*, 780 F.2d 1158, 1160 (5th Cir. 1986) (holding that plaintiffs who invoke section 1983 are "required to prove some violation of their *personal* rights." (emphasis added)); *see also id.* (citing with approval rulings from other federal courts that prohibit third-party litigation under section 1983).[17]

17. *See also Bates v. Sponberg*, 547 F.2d 325, 331 (6th Cir. 1976) ("42 U.S.C. § 1983 offers relief only to those persons whose federal statutory or federal constitutional rights have been violated."); *Garrett v. Clarke*, 147 F.3d 745, 746 (8th Cir. 1998) ("Garrett may not base his Section 1983 action on a violation of the rights of third parties."); *Archuleta v. McShan*, 897 F.2d 495, 497 (10th Cir. 1990) (it is a "well-settled principle that a section 1983 claim must be based upon the violation of plaintiff's personal rights, and not the rights of someone else").

The plaintiffs' reliance on the Declaratory Judgment Act fares no better. The text of the statute provides:

> In a case of actual controversy within its jurisdiction, . . . any court of the United States . . . may declare the rights and other legal relations *of any interested party seeking such declaration*.

28 U.S.C. § 2201 (emphasis added). Like section 1983, the Declaratory Judgment Act establishes a cause of action that allows litigants to seek a declaration of their *own* rights and legal relations. By authorizing courts to declare the rights "of *any interested party seeking such declaration*," the Declaratory Judgment Act necessarily excludes actions brought to declare the rights of non-parties—or anyone other than the party "seeking such declaration" under the Act. *See* Currie, *supra* at 45 ("The court is empowered to declare only the 'rights' of the 'party seeking such declaration,' and he must be 'interested'; these terms seem both to forbid litigation of third-party rights absolutely and to impose an additional and unfamiliar 'interest' requirement that goes beyond the constitutional minimum.").

The plaintiffs try to get around this problem by appealing to the "general legal and equitable powers of the Court, including the Court's inherent authority to enforce the supremacy of federal law as against contrary state law." Complaint, ECF No. 1 at ¶ 21. But the Supreme Court has rejected the idea that the Constitution creates an implied cause of action for litigants to sue to enforce the supremacy of federal law. *See Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320, 326–27 (2015). And although the Supreme Court has recognized that *Ex parte Young* creates an implied cause of action to sue state officers, that cause of action may be used *only* against state officers "who are violating, or planning to violate, federal law." *Id.* at 326 ("[W]e have long held that federal courts may in some circumstances grant injunctive relief against state officers who are violating, or planning to violate, federal law."). None of the

defendants in this case are planning to violate federal law, so they cannot be sued under the *Ex parte Young* cause of action.

So the plaintiffs have no cause of action to support their claims—and they have not made a "clear showing" that 42 U.S.C. § 1983, the Declaratory Judgment Act, or the *Ex parte Young* cause of action can authorize the claims that they asserting.

6. The Plaintiffs' Motion for Preliminary Injunction Fails To Present Any Argument For Likely Success On The Merits, And Its Attempt To Incorporate A 50-Page Summary Judgment Brief Violates Local Rule 7(c)(2)

Finally, the plaintiffs' motion for preliminary injunction fails to present an argument for how the plaintiffs are likely to succeed on the merits. Instead, it purports to "incorporate by reference" a 50-page motion for summary judgment that was filed on July 13, 2021. *See* Pls.' Mot. for Prelim. Inj., ECF No. 53 at 4. This is yet another attempt to circumvent the 20-page limit without seeking leave of court or the consent of opposing counsel. It cannot be tolerated, and the Court should not consider any arguments in the motion for summary judgment until the plaintiffs file a motion for preliminary injunction that complies with the rules of this Court.

II. The Plaintiffs Have Failed To Make A Clear Showing That They Will Suffer Irreparable Harm

The plaintiffs will certainly suffer irreparable harm when Senate Bill 8 takes effect on September 1. But that is not the showing required to obtain a preliminary injunction. The plaintiffs must show that they will suffer irreparable harm *absent a preliminary injunction from this Court*. *See Roho*, 902 F.2d at 358 (movant must demonstrate, "by a clear showing: . . . (2) a substantial threat of irreparable harm *if the injunction is not granted*" (emphasis added)). And the plaintiffs have not made any assertion or showing that a preliminary injunction will prevent the irreparable harms that they fear from Senate Bill 8.

The plaintiffs claim that they will suffer "irreparable harm" because the threats of civil-enforcement lawsuits will deter them from performing or assisting abortions. But those threats will still exist even if the Court grants the classwide preliminary injunction that the plaintiffs are requesting. A preliminary injunction will not block the statute from taking effect; it will merely enjoin the defendants from enforcing it. *See Okpalobi*, 244 F.3d at 426 n.34 ("An injunction enjoins a defendant, not a statute."). The statute will take effect on September 1 regardless of what this Court does, and the *in terrorem* effects of the statute will remain even if the Court gives the plaintiffs everything that they ask for.

First. A preliminary injunction from this Court will *not* prevent the defendants from being sued in federal district court under the diversity jurisdiction. Senate Bill 8 allows "any person" to sue, regardless of whether they live in Texas, and any citizen of a diverse state can sue the plaintiffs in federal court if they can establish Article III standing. Any out-of-state couple that is waiting to adopt from a Texas-based adoption agency can assert "injury in fact" from the negative effects that abortion has on adoption markets,[18] and they will clear the $75,000 amount-in-controversy requirement if a plaintiff performs (or assists) as few as eight post-heartbeat abortions. A preliminary injunction from this Court will have no binding effect on those proceedings. *See Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011) ("A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case."); Tex. Health & Safety Code § 171.208(e)(5) (non-mutual issue or claim preclusion no defense).

18. See Richard A. Posner, *The Regulation of the Market in Adoptions*, 67 B.U. L. Rev. 59, 63 (1987) ("The supply of babies for adoption has been dramatically affected by the increase in abortions since the Supreme Court's decision in *Roe v. Wade*.").

Second. A preliminary injunction from this Court will *not* protect the plaintiffs from being sued over the post-September 1 abortions that they perform if the injunction is ever vacated on appeal. *See* Tex. Health & Safety Code § 171.208(e)(3)–(4). So the plaintiffs cannot regard a preliminary injunction from this Court as a shield from eventual civil liability, especially when the statute of limitations is four years. *See* Tex. Health & Safety Code § 171.208(d).

Third. A preliminary injunction from this Court will not protect the plaintiffs from criminal prosecution if the Supreme Court overrules *Roe v. Wade*. Section 2 of the statute says that Texas has "never repealed, either expressly or by implication, the state statutes enacted before the ruling in *Roe v. Wade*, 410 U.S. 113 (1973), that prohibit and criminalize abortion unless the mother's life is in danger." Senate Bill 8, 87th Leg., § 2. So these criminal prohibitions remain on the books—with a three-year statute of limitations—and any ruling from the Supreme Court that overrules *Roe* will have retroactive effect. *See Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97 (1993); *Ranolls v. Dewling*, 223 F. Supp. 3d 613, 622 (E.D. Tex. 2016) (holding that *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), must apply retroactively on the authority of *Harper*). And although many of the plaintiffs reside in counties where the district attorney is unlikely to prosecute them, there is nothing to prevent the Texas legislature from giving the state attorney general authority to prosecute abortion crimes when the local DA is unwilling to do so. The plaintiffs will be committing state-law crimes if they continue to perform or assist abortions after September 1, and they will be exposing themselves to criminal penalties that can be imposed if the Supreme Court overrules *Roe* at any time within the next three years.

So the plaintiffs will be exposing themselves to legal jeopardy (both civil and criminal) if they continue performing or assisting abortions after September 1, and they will suffer irreparable harm regardless of whether the Court enters a preliminary injunction. And it is especially untenable for the plaintiffs to claim that a preliminary

injunction against Mark Lee Dickson will prevent "irreparable harm" when it is undisputed that there are other individuals who are eager and ready to sue the plaintiffs. *See* Declaration of Mark Lee Dickson, ECF No. 50-1 at ¶ 8.

III. The Plaintiffs Have Failed To Make A "Clear Showing" That The Balance Of Equities Weighs In Their Favor

The plaintiffs have failed to show that a preliminary injunction will do anything to remove the deterrent effects of Senate Bill 8, *see supra* Section II, so they have not made a "clear showing" that the balance of equities weighs in favor of a preliminary injunction.

IV. The Plaintiffs Have Failed To Make A "Clear Showing" That The Public Interest Favors A Preliminary Injunction That Prevents The Defendants From Enforcing Senate Bill 8 In Any Situation

It is undisputed that at least some applications of Senate Bill 8 are constitutional.[19] Yet the plaintiffs demand a total, across-the-board injunction that would prevent the defendants from enforcing Senate Bill 8 in any situation. An injunction that prevents the enforcement of a statute's constitutional applications is by definition contrary to the public interest. *See Berman v. Parker*, 348 U.S. 26, 32 (1954) ("Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia . . . or the States legislating concerning local affairs.").

* * *

Finally, we wish to reiterate (once again) the Court has no subject-matter jurisdiction over this case, and that the Court should not be considering the plaintiffs'

19. *See* notes 7–10 and accompanying text.

motion for preliminary injunction in the absence of a ruling on the defendants' jurisdictional objections. *See Lance v. Coffman*, 549 U.S. 437, 439 (2007) ("Federal courts must determine that they have jurisdiction before proceeding to the merits."). There is no conceivable basis for subject-matter jurisdiction over any of the claims asserted in this case, and the motion for preliminary injunction should not even be considered.

CONCLUSION

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

Respectfully submitted.

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