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

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

DEFENDANT JUDGE JACKSON'S REPLY IN SUPPORT OF RULE 12(b)(1) MOTION TO DISMISS

The Honorable Austin Reeve Jackson, Judge of the 114th District Court of Texas ("Judge Jackson"), files this reply in support of his motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1). Because nothing in Plaintiffs' response brief (ECF 62) establishes the subject matter jurisdiction of this Court, the Court should dismiss Plaintiffs' claims against Judge Jackson.

1. The absence of federal jurisdiction over other state officials does not magically create federal jurisdiction over state judges.

Plaintiffs apparently believe that federal jurisdiction must always exist against *some* state official for any alleged challenge to a state law. *See* ECF 62 at 11–14. Plaintiffs further appear to believe that state judges are proper defendants by default where no other state official meets the requirements of jurisdiction. ECF 62 at 31–35. Under Plaintiffs' view, a federal court always has jurisdiction to hear a constitutional challenge; it is simply a matter of finding the state official with the

best connection to the law, with state judges being the fallback option when no other category of state official suffices. That is a warped view of federal jurisdiction.

Binding precedent forecloses Plaintiffs' expansive theory. The Fifth Circuit has rejected the notion that under *Ex parte Young*, there must always be some state official capable of being sued. *See, e.g.*, *Haverkamp v. Linthicum*, __ F.4th __, No. 20-40337, 2021 WL 3237233, at *6 (5th Cir. July 30, 2021) (per curiam) (rejecting a plaintiff's suggestion that it was "inequitable for Texas to assert that these Defendants are entitled to sovereign immunity when the State has not identified any other person or entity that would have responsibility for enforcing [the policy at issue]"). Its recent decisions rejecting plaintiffs' *Ex parte Young* theories do not turn on, much less mention, whether some other state official might be a proper defendant. *See generally, e.g.*, *Mi Familia Vota v. Abbott*, 977 F.3d 461 (5th Cir. 2020); *City of Austin v. Paxton*, 943 F.3d 993 (5th Cir. 2019); *Okpalobi v. Foster*, 244 F.3d 405 (2001) (en banc) (plurality). To answer the question whether the requirements of jurisdiction are satisfied against a specific state official, it is not enough to simply assert that because no other state official satisfies the requirements, a court should pretend that the closest candidate may be deemed to have satisfied them. A state official either "enforces" the law in the sense contemplated by *Ex parte Young* or he does not. Similarly, the Supreme Court has recognized that the absence of a party with standing to sue "is not a reason to find standing." *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 489 (1982).

Simply put, a plaintiff does not establish federal jurisdiction to sue a state official by merely raising a constitutional challenge to a state law. It does not offend the Constitution for there to be no federal jurisdiction over any state official for a particular litigant's proposed challenge to a state law. It *does* offend the Constitution to pretend there is jurisdiction where there is not. Plaintiffs cannot escape their burden to show jurisdiction by simply showing how difficult that burden is to meet. That is not how federal jurisdiction works.

2. Plaintiffs cannot overcome sovereign immunity.

Plaintiffs contend Judge Jackson and every other Texas judge "enforces" S.B. 8 within the meaning of *Ex parte Young* because Texas judges adjudicate lawsuits. Relying on *Shelly v. Kraemer*, 334 U.S. 1 (1948), Plaintiffs argue (ECF 62 at 11, 37) that judges "enforce" S.B. 8 by entering judgments that "enforce adherence to S.B. 8." *Shelley v. Kraemer*, of course, says nothing about sovereign immunity. *See* 334 U.S. at 15–16 (holding that "judicial action" is "state action" for purposes of applying the Fourteenth Amendment to racially restrictive covenants). If *Shelley v. Kraemer* stood for the proposition that judges are appropriate *Ex parte Young* defendants, there would be no point in assessing whether any other state official enforces a challenged law. Plaintiffs' theory would make this an ordinary case—a challenger could always sue judges—not, as they claim, an "unusual case." ECF 62 at 32.

The judicial actions Plaintiffs contend would constitute "enforcement" of a civil statute like S.B. 8 are actions related to the entry of judgment. *See* ECF 62 at 12 (alleging that judges will "exert the compulsive power of the state to force those

sued under S.B. 8 to comply with the statute through an injunction and other penalties"). The entry of judgment occurs at the *end* of litigation—only *after* a judge has heard all relevant evidence, carefully analyzed all legal issues (including constitutional challenges), and thoughtfully applied the law to the facts, thus adjudicating the specific dispute before him. Those case-specific adjudicatory actions do not constitute "enforcement" of S.B. 8 in the sense required under *Ex parte Young*.[1] They are paradigmatic judicial acts. *See Forrester v. White*, 484 U.S. 219, 227 (1988).

In any event, Plaintiffs do not argue that S.B. 8 is unconstitutional as applied to abortions performed (or attempted) after the point of viability. They offer no rationale for how Judge Jackson would violate the constitution merely by adjudicating a private lawsuit based on, for example, a third-trimester abortion. Nor do they allege they intend to perform abortions that would not satisfy the Supreme Court's undue burden test, which is built into S.B. 8.[2] Accordingly, their "exceptional

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[1] Plaintiffs attempt to distract this Court from the legal standards required for subject matter jurisdiction by pointing to a press release where Judge Jackson used the word "enforce." Such colloquial usage of a term is patently distinct from the legally operative meaning of a term in the context of federal constitutional jurisdictional requirements. This Court has an independent duty to determine its own subject matter jurisdiction, *see Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999), which necessarily entails analyzing jurisdiction under the legal definitions and standards used by binding precedential authority.

[2] Plaintiffs insist that S.B. 8 imposes a categorical "ban" on all abortions performed after approximately 6 weeks LMP. This conclusion is wrong as a matter of simple statutory construction. On its face, S.B. 8 expressly provides for no liability when the Supreme Court's undue burden test is satisfied. *See* S.B. 8 § 3 (to be codified at Tex. Health & Safety Code § 171.209(b)).

case" theory would fail even if Plaintiffs were correct that S.B. 8 is unconstitutional as to pre-viability abortions.

Plaintiffs' cited authorities (ECF 62 at 13) are inapposite. Precedent holding that section 1983 extends to suits against judicial officers does not eliminate Plaintiffs' burden to invoke the fiction of *Ex parte Young*. *See* ECF 62 at 13 (citing *Mitchum v. Foster*, 407 U.S. 225 (1972); *Mireles v. Waco*, 502 U.S. 9 (1991); *Pulliam v. Allen*, 466 U.S. 522 (1984); *Sup. Ct. of Virginia v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 736 (1980)). Whether *Ex parte Young* allows a suit is a different question from whether a state judge falls within the reach of section 1983. If Plaintiffs wish to sue a state official, they must show he enforces the challenged law within the meaning of *Ex parte Young*. Otherwise, sovereign immunity bars the claim, and section 1983 does not abrogate sovereign immunity. *See Edelman v. Jordan*, 415 U.S. 651, 677 (1974).

Adjudicating cases brought by private litigants is an action a judge takes in his judicial capacity. *See Forrester*, 484 U.S. at 227 (describing "resolving disputes between parties who have invoked the jurisdiction of a court" as "the paradigmatic judicial acts" that undisputedly are taken in a judge's judicial capacity). Judge Jackson does not "enforce" civil statutes like S.B. 8 by adjudicating specific disputes that may be brought in his court. A district judge does not magically transform from an adjudicator into an "enforcer" of a civil statute where the judge simply adjudicates disputes and applies the law to the facts before him.

3. Even if sovereign immunity were not a barrier, this Court lacks Article III jurisdiction over Plaintiffs' lawsuit against Judge Jackson.

Plaintiffs acknowledge, as they must, the rule that litigants may not sue judges who simply interpret and apply the law. *See, e.g.*, *Bauer v. Texas*, 341 F.3d 352, 359 (5th Cir. 2003); *Chancery Clerk of Chickasaw County v. Wallace*, 646 F.2d 151, 160 (5th Cir. 1981); *see also* ECF 62 at 32 (claiming that the cases cited by Judge Jackson are "ordinary" but that this case is "unusual" and thus merits different treatment). Nevertheless, Plaintiffs contend this Court should ignore that rule and hold this is an exceptional case. Plaintiffs' only basis for such a bold request is their claim that S.B. 8 could not possibly be constitutional under any circumstances (i.e., that it is facially unconstitutional), which means that any action brought under S.B. 8 would automatically constitute a deprivation of constitutional rights, such that a district judge has no discretion to adjudicate any disputes brought pursuant to S.B. 8. But every plaintiff in a facial challenge contends the law he is challenging is unconstitutional—that theory does not distinguish this suit from any other. And even if Plaintiffs are correct, their dispute is not with Judge Jackson. *See Bauer*, 341 F.3d at 359. There is no case or controversy, so this Court lacks jurisdiction.[3]

[3] Despite Plaintiffs' discussion in their response, *see* ECF 62 at 29, whether the holdings of *Bauer* and *Chancery Clerk of Chickasaw County* are viewed as part of the traditional three-part standing test (injury in fact, traceability, and redressability) or as a separate requirement inherent in Article III is beside the point. Plaintiffs have failed to articulate any convincing argument for why this Court is not bound by those holdings to dismiss Judge Jackson from this case for lack of jurisdiction. Further, Plaintiffs cannot overcome the presumption that Judge Jackson will follow his oath of office and faithfully interpret and apply the law to cases that come before him. *Cf. Withrow v. Larkin*, 421 U.S. 35, 47 (1975) (recognizing "a presumption of honesty and integrity in those serving as adjudicators").

To be sure, sometimes state judges can be sued in a capacity other than their judicial capacity. In *Supreme Court of Virginia*, the plaintiffs challenged rules governing the Virginia state bar. *See* 446 U.S. at 734. Because the court had "authority of its own to initiate proceedings against attorneys" for violating those rules, the court and its members could be sued in their "enforcement capacities." *Id.* at 735–36; *see id.* at 721–24. Similarly, a judge might be sued in an "administrative" capacity. *See Forrester*, 484 U.S. at 227. In *Ex parte Virginia*, 100 U.S. (10 Otto) 339 (1880), for example, a judge was an appropriate defendant in a case challenging the process of summoning potential jurors because that function could have been performed by some other official—it simply happened to be performed by a judge. *See id.* Plaintiffs rely on cases allowing suits against judges in a capacity other than their judicial capacity. ECF 62 at 34 n.8, 35 n.9, 42–43. For instance, issuing marriage licenses is not part of the "paradigmatic judicial acts" of "resolving disputes between parties who have invoked the jurisdiction of a court." *See Forrester*, 484 U.S. at 227.

Plaintiffs' cited cases are inapplicable here because Plaintiffs have not sued Judge Jackson in any capacity other than his judicial capacity. *See* ECF 49 at 5. Indeed, they identify inherently judicial acts—issuing "an injunction and other penalties"—as the source of their alleged injuries. ECF 62 at 12. Yet they contend that they *must* be allowed to sue Judge Jackson because they cannot sue "executive officials" to enjoin enforcement. ECF 62 at 34–35. That argument fails. The absence

of a different defendant Plaintiffs could sue "is not a reason to find standing" to sue Judge Jackson. *Valley Forge*, 454 U.S. at 489.

Finally, Plaintiffs argue that deciding private lawsuits brought under S.B. 8 is not a judicial act because, as Plaintiffs put it, S.B. 8's procedures are not a "genuine adjudication." ECF 62 at 36–37. That is because, they say, its procedures are "rigged." ECF 62 at 14. Hyperbole aside, whether a judge acts in his judicial capacity turns on "the nature of the act itself, i.e., whether it is a function normally performed by a judge." *Stump v. Sparkman*, 435 U.S. 349, 362 (1978). Awarding "financial penalties," issuing "injunctive relief," and awarding costs, ECF 62 at 36, are all functions normally performed by a judge. Similarly, deciding whether issue preclusion applies or determining the merits of a constitutional defense, ECF 62 at 36–37, are paradigmatic judicial acts. And Supreme Court precedent forecloses Plaintiffs' suggestion (at 30–31, 37) that subjective motivations affect whether acts are judicial in nature. *See Mireles v. Waco*, 502 U.S. 9, 11 (1991).

To the extent Plaintiffs argue that the mere filing of lawsuits under S.B. 8 is a constitutionally cognizable injury, they also cannot show traceability. Judges have no control over what lawsuits are filed in their courts or assigned to their dockets. Plaintiffs have no standing to sue Judge Jackson on the theory that the mere existence of litigation constitutes unconstitutional "enforcement," as such a theory plainly fails to satisfy the requirements of traceability and redressability. That theory of standing relies on "the independent action of some third party not before the court." *Lujan*, 504 U.S. at 560.

CONCLUSION & PRAYER

Plaintiffs cannot escape the fact that they are asking this Court to issue an advisory opinion instructing a state judge how to adjudicate hypothetical constitutional challenges to a state law that may or may not ever be brought in his court. Plaintiffs have failed to carry their burden to establish this Court's jurisdiction over Judge Jackson. Binding precedent directly forecloses Plaintiffs' claims for relief against a state court judge tasked with adjudicating case-specific disputes. Because Plaintiffs have failed to satisfy the requirements of Article III or to overcome the bar of sovereign immunity, this Court lacks jurisdiction to grant any relief against Judge Jackson (or any of the other putative class members of all state judges in Texas). Accordingly, this Court should dismiss Plaintiffs' claims against Judge Jackson without subjecting him to any further burdens of litigation.

For all the foregoing reasons, as well as the reasons set forth in Judge Jackson's motion to dismiss, Judge Jackson respectfully requests this Court to dismiss all Plaintiffs' claims against him for lack of jurisdiction.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that on August 13, 2021, a true and correct copy of this document was electronically filed using the Court's CM/ECF system, which will send notification of such filing to the following counsel of record:

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