No. 21-463

In the Supreme Court of the United States

WHOLE WOMAN'S HEALTH, ET AL., PETITIONER

v.

AUSTIN REEVE JACKSON, JUDGE, DISTRICT COURT OF TEXAS, 114TH DISTRICT, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR RESPONDENT PENNY CLARKSTON

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INTRODUCTION

In their attempt to shoehorn a suit against a court clerk and state judge into the boundaries of Article III and the Eleventh Amendment, Petitioners argue that the possibility of being subject to a lawsuit that they believe violates the constitutional rights of their patients[1] *itself* violates the Constitution. But if the Court adopted this theory, and Petitioners' related theory that this injury enables them to sue judges and clerks, it is hard to see how it could be limited. A few hypotheticals illustrate the point.

Suppose a gun manufacturer fears litigation by individuals seeking to block the production of firearms by filing lawsuits. Before any lawsuit like that is filed, the gun manufacturer files suit against all court clerks and judges in their state, arguing that those judicial officials should be enjoined from entertaining any such lawsuits because they would violate the Second Amendment right of their customers to keep and bear arms. Do Article III and sovereign immunity permit this?

Further suppose that a religious denomination holding to traditional beliefs about marriage fears litigation against its parishioners who own wedding-service businesses and adhere to those denominational beliefs in providing creative services. Before any lawsuit like that

[1] Petitioners have no claim that the Texas Heartbeat Law violates their *own* constitutional rights. There is no constitutional right to *perform* abortions. *See Planned Parenthood of Greater Ohio v. Hodges*, 917 F.3d 908, 912 (6th Cir. 2019) ("Today's plaintiffs do not have a Fourteenth Amendment right to perform abortions. The Supreme Court has never identified a freestanding right to perform abortions. To the contrary, it has indicated that there is no such thing." (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992) (plurality op.) (emphasis added)).

is filed, the religious denomination files suit against all court clerks and judges in its state, arguing that those judicial officials should be enjoined from entertaining any such lawsuits because they would violate the First Amendment rights of their parishioners. Do Article III and sovereign immunity permit this?

Based on the precedent of this Court and multiple circuits, the answer to these questions should be no. Thus, it behooves Petitioners to explain why the answer to their identical request should be yes, unless they would also argue that the hypothetical suits and others like them should be permitted. They have not done so.

Perhaps Petitioners would say that this case is different because the State's law creates the cause of action for the lawsuits Petitioners fear. But even if we assume that fact in the above hypotheticals, it does not change the outcome. There is no logic that would support distinguishing between the above situations and a situation where the State has created the cause of action. If Petitioners would argue that the State-created cause of action makes it more likely that people will sue, assume that the gun manufacturer or religious denomination has credible information suggesting that a sizeable number of lawsuits are about to be filed. According to Petitioners' logic, shouldn't they still be able to preemptively sue court clerks and state judges to block those incoming lawsuits?

Unless Petitioners are prepared to admit that their unprecedented theory of standing and immunity would also open the floodgates to the above types of claims if the Court gives them what they want, they should receive the same answer that would likely be provided to

plaintiffs in non-abortion-related[2] cases: Raise these objections if you're sued in state court. Petitioners have never explained why that remedy is insufficient without improperly impugning the ability of Texas judges to assess the law's constitutionality. In the above situations, if a State created a private right of action that allegedly infringes a constitutional right, the gun owners and parishioners—or a significant number of them—would likely continue exercising their rights and assert them defensively if a lawsuit is filed, resting on the unconstitutionality of the law.[3] The difference here must be that Petitioners are not so sure that the law will ultimately be held unconstitutional. Otherwise, they would have no genuine fear of liability. Petitioners repeatedly raise their objections to the Heartbeat Law's procedural mechanisms to suggest this defensive litigation would be unfair to them, but they have never adequately explained why they cannot raise those same constitutional objections to a Texas court. After all, Texas courts, like federal courts, are not bound to blindly follow the law without testing its legality.

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[2] *See Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 814 (1986) (O'Connor, J., dissenting) (stating that it is "painfully clear that no legal rule or doctrine is safe from ad hoc nullification by this Court when an occasion for its application arises in a case involving state regulation of abortion.")

[3] The same is true of potential defendants in the types of cases listed in Petitioners' attempted parade of horribles, Pet. Br. 49–50. Are Petitioners really arguing that if a law created a private right of action to "enjoin the enrollment of an undocumented child in public school," Pet. Br. 49, that public schools would respond by refusing to enroll any undocumented child, which is the course of action chosen by Petitioners here? Or that such a law would not be found unconstitutional when a school district asserted that in defense?

If Petitioners are concerned about litigation costs, a typical calculation for any business (not just abortion clinics), they could limit their exposure by not performing as many abortions until the legal issues are resolved. Instead, Petitioners voluntarily stopped providing what they claim are vital services to their patients: all abortions after approximately six weeks of pregnancy, a line drawn by them, not the law.[4] They have done so because of their business interests, and so that they could manufacture their own injury for a pre-enforcement challenge. This choice does not create a constitutional crisis. Petitioners have options, and their preference to litigate pre-enforcement in federal court is insufficient to justify upending the settled precedent establishing that the Court lacks jurisdiction over Petitioners' suit.

[4] *See U.S. v. Texas* ROA.1528-30 ("[I]t is medically inaccurate and misleading to refer to the Heartbeat Law as a "6-week ban.")

ARGUMENT

I. The Court Lacks Jurisdiction Under Article III.

A. There is no justiciable case or controversy.

Petitioners incorrectly characterize Ms. Clarkston's case-or-controversy argument as mere "prudential considerations." Pet. Br. 43–44. But the Constitution limits the jurisdiction of federal courts to "Cases" and "Controversies." U.S. Const. art. III, § 2. And *"[o]ne component* of the case-or-controversy requirement is standing, which requires a plaintiff to demonstrate the now-familiar elements of injury in fact, causation, and redressability." *Lance v. Coffman*, 549 U.S. 437, 439 (2007) (emphasis added) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)). Standing (and its three elements) are a subset of the case-or-controversy requirement, not the other way around. Thus, if there is no case or controversy, this Court does not merely "decline" to exercise jurisdiction. Pet. Br. 43, 45. It *may not* exercise it according to Article III of the Constitution. *See California v. Texas*, 141 S. Ct. 2104, 2114–16 (2021).

1. The First, Second, Third, Fifth, Eighth, and Ninth Circuits all agree that constitutional challenges filed against state judicial officials lack this fundamental prerequisite for federal-court jurisdiction. *See Just. Network Inc. v. Craighead Cty.*, 931 F.3d 753, 763 (8th Cir. 2019); *Allen v. DeBello*, 861 F.3d 433, 442 (3d Cir. 2017); *Bauer v. Texas*, 341 F.3d 352, 359 (5th Cir. 2003); *Grant v. Johnson*, 15 F.3d 146, 148 (9th Cir. 1994); *In re Justices of The Supreme Court of Puerto Rico,* 695 F.2d 17, 21 (1st Cir. 1982) (Breyer, J.); *Chancery Clerk of Chickasaw Cty. v. Wallace*, 646 F.2d 151, 160 (5th Cir. 1981);

Mendez v. Heller, 530 F.2d 457 (2d Cir. 1976). Petitioners largely fail to address those cases though they have already been briefed several times. They do not even address the Fifth Circuit's decision in *this* case agreeing with that substantial case law. They offer one footnote claiming that the "extraordinary combination of the facts of this case" distinguish this case from "others" because there is somehow "adversariness" and no one else they can sue to preemptively enjoin enforcement suits. Pet. Br. 45 n.14.[5] That footnote contains Petitioners' only acknowledgement of this body of law and cites dicta from *In re Justices*, where the court noted that relief against judges might be appropriate where necessary to "ensure full relief to the parties," which was not the situation there. Pet. Br. 45 n.14 (quoting *In re Justices*, 695 F.2d at 23).

Setting aside that enjoining Ms. Clarkston or Judge Jackson here would not "ensure full relief to the parties" because there would still be 253 other Texas counties and hundreds more judges who could hear a Heartbeat enforcement suit, *In re Justices* helpfully illustrates why Petitioners' theory of this case does not work. Section 1983 does not provide an avenue for relief against judges "acting purely in their adjudicative capacity, any more than, say, a typical state's libel law imposes liability on a postal carrier or telephone company for simply

[5] Petitioners acknowledge that the Heartbeat Law "does not give [the Legislature] or executive-branch officials enforcement authority." Pet. Br. 31 (quoting Tex. Health & Safety Code § 171.207(a)). Just two pages later, Petitioners argue that the state-agency officials are "authorized to take indirect enforcement action against Petitioners" because of the Heartbeat Law. Pet Br. 33-34.

conveying a libelous message." *In re Justices*, 695 F.2d at 22. That is because it is the person who creates the libelous message that causes the injury, not the person who happens to deliver it, even if the harm could not have occurred without the delivery. The same is true here—if Petitioners are harmed by a Heartbeat enforcement suit, it is the person who files suit who causes that harm, not the clerk who dockets the filing.

2. Disputing that Ms. Clarkston, as a clerk, is a disinterested neutral like judges are, Petitioners incorrectly assert that she acts only "under state law" and *not* at the direction of judges. Pet. Br. 43–44. But the authorities they cite are the Texas Rules of Civil Procedure, which are promulgated by judges, as Ms. Clarkston previously explained. Clarkston Br. 6–7, 25; *see also* Tex. Const. art. V, § 31(b). Ms. Clarkston's role as district clerk is established by article V, section 9 of the Texas Constitution, and the Texas Government Code—not the Heartbeat Law—provides the duties of the District Clerk. *See* Tex. Gov't Code § 51.303 (maintaining the records of the District Court, recording the acts of the court, and entering judgments under the direction of the judge). But Ms. Clarkston's responsibilities to docket petitions and issue citation upon request—the actions Petitioners seek to enjoin her from doing—are established by the Texas Rules of Civil Procedure, which come from the Texas Supreme Court. *See* Tex. Gov't Code § 22.004. It is beyond dispute that clerks—including Ms. Clarkston—act at the direction of judges.

3. Petitioners further contend that there is "adversariness" here because Respondents filed cross-petitions urging that the Court reconsider *Roe v. Wade*, 410 U.S.

113 (1973), and *Casey*. Pet. Br. 44–45. To start, what Respondents did *after* the complaint was filed—when Petitioners were required to establish their case or controversy—is irrelevant to establishing jurisdiction.[6] *See Lujan*, 504 U.S. at 570 n.5 ("standing is to be determined as of the commencement of suit"); *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1547 (2016) (The plaintiff "must 'clearly … allege facts demonstrating' each element" of Article III standing). Regardless, Petitioners are still wrong. Thus far, Respondents have not had to offer a full defense of the Heartbeat Law on the merits; their arguments have been jurisdictional. If the Court allows this lawsuit to go forward, however, Ms. Clarkston will be forced to step out of her neutral role of receiving and docketing cases and will be required to defend the merits

[6] Examining the post-complaint facts undermines Petitioners' claims of impending "ruinous" and "unlimited" litigation, Pet. Br. 14, 29, as only three enforcement lawsuits have been filed under the Heartbeat Law, and that was only after one of the Petitioners announced in the Washington Post that he violated the law. *See* Alan Braid, *Why I violated Texas's extreme abortion ban*, Wash. Post (Sept. 18, 2021), https://wapo.st/3DUx4ki. Those suits have "stalled," Pet. Br. 37, because the *pro se* plaintiffs have not requested citation by issued by the clerk. *U.S. v. Texas* ROA.1594–95; *see also* Register of Actions, Case No. 21-2276-C, *Texas Heartbeat Project v. Braid* (Smith Cty. Dist. Ct., filed Sept. 22, 2021). The image of roaming Heartbeat "bounty hunters," *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2499 (2021) (Sotomayor, J., dissenting), fails to account for the standard of proof and how a potential plaintiff might meet it. A Heartbeat plaintiff cannot recover the civil penalty unless she *proves* her case, and evidence of what goes on inside the abortion clinic will be hard to come by unless there is an eyewitness. The Heartbeat Law does not affect the normal standard of proof in Texas courts, nor does it affect Texas standing doctrine.

of the Heartbeat Law, which raises a host of problems. *See* Clarkston Br. 27–28.

Ms. Clarkston's conditional cross-petition is consistent with that. It argues that the Court's departure from normal legal doctrines in abortion cases justifies revisiting the precedents causing the problem in the first place, especially since Petitioners are contending here that they are entitled to yet another "abortion exception" to jurisdictional limits. *See* Cond. Cross-Pet. of Penny Clarkston 9–10, No. 21-587 (U.S., filed Oct. 21, 2021). The point is that judges and clerks are supposed to be neutral in the administration of justice, and Petitioners' ill-conceived suit against Ms. Clarkston and Judge Jackson forces them into a role that has the potential to compromise that neutrality. The Court should not let this harm continue.

B. Petitioners failed to establish the elements of Article III standing.

1. Arguing that they suffered an injury-in-fact because they cannot continue to provide abortions against the backdrop of the Heartbeat Law's private-enforcement mechanism, Petitioners fail to connect this injury with any action of Ms. Clarkston. Pet. Br. 39–41. As discussed in the opening brief, given that Petitioners' allegations failed to rise above mere speculation that Ms. Clarkston (as opposed to any of the other 253 district clerks) would even docket a Heartbeat case, that injury does not suffice for purposes of establishing standing to sue Ms. Clarkston. *See Jackson*, 141 S. Ct. at 2495 (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) ("threatened injury must be *certainly impending*" (citation omitted)).

Again, Petitioners point (at 28) to post-filing factual developments to bolster their deficient complaint, but the "[t]he doctrine of standing generally assesses whether interest exists at the outset." *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 796 (2021). And a plaintiff cannot establish jurisdiction by pointing to a "byproduct of the litigation itself." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998), The Smith County suit undoubtedly is a "byproduct" of naming Ms. Clarkston and Judge Jackson as defendants, as the *pro se* filer of that case lives in the Houston area, nowhere near Smith County. *See* Orig. Pet., *Tex. Heartbeat Project v. Braid*, No. 21-2276-C (Smith Cty. Dist. Ct. filed Sept. 22, 2021). It cannot be used to establish standing now.

2. Further, as discussed above (at I.A.1) and in Ms. Clarkston's opening brief (at 28–35), Ms. Clarkston does not—and cannot—bring enforcement actions under the Heartbeat Law. So to the extent these actions are the source of Petitioners' claimed injury, Ms. Clarkston does not cause it. Petitioners are required to "'allege personal injury fairly traceable to the defendant's allegedly *unlawful conduct* and likely to be redressed by the requested relief.'" *California*, 141 S. Ct. at 2113 (emphasis added) (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006)). Assuming a Heartbeat enforcement suit violates the Constitution, *docketing* that case cannot be illegal. Private plaintiffs have a constitutional right to file cases. *See Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) ("The right of access to the courts is indeed but one aspect of the right of petition"); Tex. Const. art. I, § 13 ("All courts shall be open, and every person for an injury done him . . . shall

have remedy by due course of law.") It is possible for a *plaintiff* to violate the law by filing a lawsuit. *See Bill Johnson's Restaurants, Inc. v. N.L.R.B.*, 461 U.S. 731, 743 (1983) ("[B]aseless litigation is not immunized by the First Amendment right to petition"); Tex. Civ. Prac. & Rem. Code § 10.004 (imposing sanctions for filing a frivolous pleading). But clerks merely docket cases and have no responsibility for what a plaintiff chooses to file. Nor could they: If it is possible for docketing a case to be is an illegal act, it would subject clerks to (1) an obligation to evaluate the merits of each case submitted; and (2) to damages for docketing the wrong case. Neither can be true.

3. It also follows that because Ms. Clarkston cannot control whether someone brings a Heartbeat enforcement suit, relief against her fails to redress Petitioners' injury, as it will not stop lawsuits from being filed elsewhere. "Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement." *Steel Co.*, 523 U.S. at 107. Implicitly acknowledging this problem, Petitioners claim that relief against "the clerk class" would redress their injury. Pet. Br. 40. But there is no "clerk class," as no class was ever certified. *See generally* ROA.21–38. And if Petitioners lack standing to sue the class representative in the first place, there can be no class. *Cf. Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 216 (1974) ("To have standing to sue as a class representative it is essential that a plaintiff must be a part of that class, that is, he must possess the same interest and suffer the same injury shared by all

members of the class he represents.") Plaintiffs lack Article III standing to sue Ms. Clarkston.

II. Petitioners' Suit Against Ms. Clarkston is Barred by Sovereign Immunity.

Sovereign immunity also bars the claims against Ms. Clarkston. Because the exception to sovereign immunity in *Ex parte Young*, 209 U.S. 123 (1908), and 42 U.S.C. § 1983 were designed to allow suits against government officials for constitutional wrongs, Petitioners argue that means they get to bring *this* suit. The leaps of logic required to move from that premise to Petitioners' conclusion are dizzying. They forget that *Ex parte Young* was meant to be a "narrow" exception to the general rule *barring* claims against a state. *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993). This case does not fit into that narrow exception, so the Eleventh Amendment precludes jurisdiction.

1. Petitioners argue (at 27–30) that Ms. Clarkston has a sufficient "connection with the enforcement" of the Heartbeat Act for purposes of the *Young* exception, *Young*, 209 U.S. at 157, because she dockets petitions and issues citation upon request. But they cannot explain how a tangential connection *to someone else*'s enforcement of a law can constitute "enforcement" necessary for the *Young* exception to apply. Petitioners attempt to deflect *Young*'s express holding that federal courts may not "restrain a court from acting in any case brought before it," *id.* at 163, asserting that *Young* also allowed for an injunction against "commencing suits," *id.* But *Young* is clearly talking about a *government official* commencing the suits to be enjoined—not someone else:

> It is simply an illegal act upon the part of a state official *in attempting, by the use of the name of the state, to enforce* a legislative enactment which is void because unconstitutional. If the act *which the state attorney general seeks to enforce* be a violation of the Federal Constitution, the officer, in proceeding under such enactment, comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct.

Id. at 160 (emphasis added); *id.* at 160–61 (The "General Laws of Minnesota . . . impose[] the duty upon the attorney general *to cause* proceedings to be instituted"). Petitioners conflate "commencing suits" with docketing suits *someone else* filed (or "caused to be instituted") in order to implicate Ms. Clarkston, but that is unsupported by *Young*.

The other cases cited by Petitioners are also inapposite. *Finberg v. Sullivan*, 634 F.2d 50 (3d Cir. 1980) (en banc), and *Strickland v. Alexander*, 772 F.3d 876 (11th Cir. 2014), both involved court clerks involved in *enforcing* judgments already entered via challenged garnishment procedures. *Kitchen v. Herbert*, 755 F.3d 1193, 1201-02 (10th Cir. 2014), cites *Young* but does not appear to apply it, as its analysis is focused on standing. *Id.* at 1201. Regardless, *Kitchen* is factually inapposite because the clerks sued in that case were *county clerks*, not *court clerks*, so they were not acting in a judicial capacity. *Id.* at 1203; *cf. Young*, 209 U.S. at 163 (excluding judicial officials from its scope of relief because "an injunction

against a state court would be a violation of the whole scheme of our government.")[7]

2. Petitioners also fail to explain how *Young*'s legal fiction can apply where Ms. Clarkston has committed no unlawful act stripping her of governmental authority. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 104, 114 n.25 (1984). They contend that "[n]o one disputes that without the Texas clerks' involvement, the[] harms [of the Heartbeat Law] cannot be brought to bear." Pet. Br. 30. This is wrong for at least three reasons: (1) the "Texas clerks" are not defendants, only Ms. Clarkston is, (2) without Ms. Clarkston's involvement, Heartbeat lawsuits can be filed in the 253 other Texas counties, which would still bring plenty of harm "to bear" (according to Petitioners' theory of harm), and (3) the act of docketing a petition, even one which could violate the constitutional rights of the defendant, is not an illegal act. *See* Part I.B.2 *supra*. Accepting Petitioner's argument that Ms. Clarkston violates the law by docketing a case someone views as a violation of their rights would create an unworkable legal principle, as it would subject court clerks to potential liability if they fail to identify and root out potentially unconstitutional lawsuits. *See* Part I.B.2 *supra*.

If a court clerk dockets a petition suing an individual for protected speech activity, or for belonging to a certain religious organization, for example, that clerk does not violate the Constitution. Neither does Ms. Clarkston if she dockets a Heartbeat enforcement petition, especially given that not all applications of the Heartbeat

[7] *Finberg*, *Strickland*, and *Kitchen* are also discussed in the Brief in Opposition at 19–21.

Law are unconstitutional, even by Petitioner's definition. *See* Intervenors Br. 43, *United States v. Texas*, No. 21-588 (filed Oct. 27, 2021). Clerks have no responsibility to throw out illegal, frivolous, malicious, or legally improper claims—that authority belongs to a judge. And treating every petition equally despite their merits ensures that constitutional right of petition is preserved, and the judicial process, which Ms. Clarkston and other clerks are undoubtedly part of, is fair and impartial. Petitioners' requested relief would disrupt that, causing "excessive superintending of state judicial functions, which 'would constitute a form of monitoring of the operation of state court functions that is antipathetic to established principles of comity.'" *Bauer*, 341 F.3d at 358–59 (quoting *O'Shea v. Littleton*, 414 U.S. 488, 501 (1974)).

CONCLUSION

The Court should reverse the district court's order denying Ms. Clarkston's motion to dismiss and direct the district court to dismiss Petitioners' complaint for lack of jurisdiction.

Respectfully submitted.

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