

No. _____

In the
Supreme Court of the United States

CHRISTINE REULE, ET AL.,

Petitioners,

v.

HONORABLE REEVE JACKSON, ET AL.,

Respondents.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This is a case that, as in the Court's *Whole Woman's Health* proceeding, the state's actors, affirmed by the Fifth Circuit, claim that Petitioners cannot bring a constitutional challenge to an egregiously unconstitutional state statute because there is no one to sue. With no one to sue, Petitioners are said to lack Article III standing, and the statute is beyond review by a court, whether state or federal.

Petitioners assert they have standing. There are conflicting decisions in four circuits.

The Question Presented Is:

Whether Petitioners have Article III standing to sue for prospective declaratory and injunctive relief, having sued the Texas clerks of court, local administrative judges (LAJ's)—who Petitioners assert are acting in ministerial, not adjudicatory capacity—and the Director of the state's Office of Court Administration.

PARTIES TO THE PROCEEDINGS

Petitioners and Plaintiff-Appellants below

- Christine Reule
- Harriet Nicholson
- Rebecca Alexander Foster
- Jimmy Lee Menifee
- Tony Lamar Vann
- Honorable Madeleine Connor

Respondents and Defendant-Appellees below

- Honorable Reeve Jackson, exclusively in his role as the Local Administrative Judge of Smith County, Texas
- Penny Clarkston, the District Clerk of Smith County, Texas
- Megan LaVoie, the Director of the Texas Office of Court Administration

CORPORATE DISCLOSURE STATEMENT

No party is a corporate entity.

LIST OF PROCEEDINGS

U.S. Court of Appeals, Fifth Circuit

No. 23-40478

Christine Reule et al., *Plaintiff-Appellants v.*

Hon. Reeve Jackson et al., *Defendant-Appellees*

Final Opinion: August 19, 2024

Rehearing Denial: September 23, 2024

U.S. District Court, E.D. Texas (Tyler)

No. 6:22-cv-367

Christine Reule et al., *Plaintiffs v.*

Hon. Reeve Jackson et al., *Defendants*

Memorandum Opinion: May 30, 2023

Order Denying Motion to Alter Judgment:

July 18, 2023

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PETITION FOR A WRIT OF CERTIORARI

If left in the published literature, the Fifth Circuit’s reasoning and barriers to standing are a road map for eliminating federal review of other constitutional rights —in addition to violating the first and fourteenth amendment rights at issue here.

A state need only place enforcement of an unconstitutional statute in the hands of state agents related in some way to the judicial branch. With no one to sue and without standing, the statute and agents are protected from judicial review.

This Court recently opined that limitations on standing implement “the Framers’ concept of the proper—and properly limited—role of the courts in a democratic society.” *FDA v. Alliance for Hippocratic Medicine*, 144 S. Ct. 1540, 1555 (2024) (quoting J. Roberts, *Article III Limits on Statutory Standing*, 42 DUKE L. J. 1219, 1220 (1993) (cleaned up)). This means that federal courts allow some issues “to percolate and potentially be resolved by the political branches in the democratic process.” *Id.* (citing *Raines v. Byrd*, 521 U.S. 811, 829-830, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997)).

But at the same time the Court has opined that “a legislature cannot create new categories of unprotected speech simply by weighing the value of a particular category against its social costs and then punishing it if it fails the test.” *Brown v. Entertainment Merchants Ass’n*, 564 US 786, 131 S.Ct. 2729, 2731 (2011) (citations omitted) (finding that California law

restricting violent video games violated freedom of speech) (Scalia, J.).

Indeed the Fifth Circuit has acknowledged that the very purpose of the Bill of Rights was to remove fundamental rights “from the rough and tumble of the political process” *O’Hair v. White*, 675 F.2d 680, 689 (5th Cir. 1982) (en banc) (cleaned up).

Petitioners urge that percolating in the political branches and weighing interests “democratically” is precisely what the Bill of Rights was intended to prevent.

Not only lawyers but ordinary Americans want to know whether the doctrine of Article III standing contains the seed of eroding the Bill of Rights. Petitioners ask the Court to grant the writ, reverse the decisions below, and clarify how Article III standing impacts the first amendment.



OPINIONS BELOW

The Fifth Circuit’s published opinion and judgment are *Reule v. Jackson*, No. 23-40478 (5th Cir. Aug. 19, 2024), reported at *Reule v. Jackson*, 114 F.4th 360 (5th Cir. 2024), and shown at App. 1. Unofficial citations are 2024 U.S. App. LEXIS 20912 **; and 2024 WL 3858127.

The Fifth Circuit’s order denying rehearing and rehearing en banc is reproduced at App. 40.

The District Court’s *Memorandum Opinion and Order Granting Motions to Dismiss* is Document 46 in

Reule v. Jackson, No. 6:22-cv- 367-JDK, 2023 WL 3724770 (E.D. Tex. May 30, 2023), shown at App. 24.

The District Court’s *Order Denying Motion to Alter or Amend the Judgment* is Document 51 in *Reule v. Jackson*, No. 6:22-cv-367-JDK, 2023 WL 5346056 (E.D. Tex. July 18, 2023), shown at App. 18.

The Texas statute at issue is Chapter 11, Texas Civil Practice & Remedies Code, shown at App. 44.

Petitioners’ Complaint is Document 1 in *Reule v. Jackson*, No. 6:22-cv-367-JDK, shown at App. 53.



JURISDICTION

The court of appeals issued the opinion and judgment sought to be reviewed here on August 19, 2024. App. 1. Petitioners’ timely-filed petition for rehearing was denied on September 23, 2024. App. 40. The court of appeals issued its mandate on October 1, 2024. On November 24, 2024 Justice Alito extended Petitioners’ deadline to file a petition for certiorari to January 21, 2025.

The Court’s jurisdiction is invoked under 28 U.S.C. § 1254(1).



CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are Section 1983 of Title 42 of the U.S. Code; the U.S. Constitution's Article III, Section 2, Clause 1; the Fourteenth Amendment of the U.S. Constitution; and Chapter 11 of the Texas Civil Practice & Remedies Code.

* * *

Section 1983 of Title 42 of the U.S. Code, as amended in 1996, provides in relevant part:

42 U.S.C. § 1983 Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, 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, except 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.

**U.S. Constitution, Article III, Section 2, Clause 1
Judicial Branch. Justiciability.
Cases or Controversies**

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;— to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;— between a State and Citizens of another State,— between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

* * *

U.S. Constitution, amend. XIV, sec. 1, in relevant part:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Chapter 11 of the Texas Civil Practice & Remedies Code (“Vexatious Litigants”) is reproduced at App 53.



STATEMENT OF THE CASE

A. Procedural History

Each of the six Petitioners was designated a “vexatious litigant” in the past; each has suffered dire consequences since then when he or she was victimized by a tortfeasor but could not sue for relief. Each challenges the facial and as-applied constitutionality of the Texas Vexatious Litigant statute and seeks declaratory and injunctive relief.¹ App. 53, Complaint.

As stated at oral argument at the Fifth Circuit, Petitioners do not urge that every limitation on vexatious litigants’ future filings would be unconstitutional. But the Texas statute is unconstitutional because, first, it violates due process. It effectively blocks plaintiffs from defending against the “vexatious” designation because it imposes an automatic stay as soon as defendant files the motion to designate plaintiff vexatious; thus plaintiff is barred from filing any motions to defend against the designation.

Also there are effectively no appeals from the designation or from denials of permission to file later papers—contrary to misstatements in the appellate opinion otherwise. There are poor written records of proceedings under the statute and no records at all in the case of requests for and denials of permissions.

¹ The statute was passed in 1997 and is codified at Chapter 11, Texas Civil Practice & Remedies Code.

Petitioners also allege that the statute is void for vagueness, overbroad, not narrowly tailored, and imposes a prior restraint on speech.

Petitioners filed their complaint in the Tyler Division of the Eastern District of Texas under 28 U.S.C. §§ 1331 and 1343(a), because the first-named petitioner, Christine Reule, lives in Smith County, Texas where she was designated a “vexatious litigant” during a lawsuit there.

The remaining five petitioners live and were designated “vexatious litigants” in their respective home counties in Texas.

Who was sued. Petitioners sued the three state agents who carry out the rejection of their future lawsuits or papers. That is, they do not seek to vacate the orders to designate them vexatious. They seek only prospective relief to restore their rights to petition and to access the courts in the future.

Thus defendant-respondents are: (1) all Texas clerks of court, designated as a class of defendants represented by Respondent Clerk Clarkston; (2) all Texas local administrative judges, designated as a class of defendants represented by Respondent Judge Jackson;² and (3) Respondent Megan LaVoie, whose office publishes and circulates the list of those designated

² When this case was first filed, the local administrative judge (LAJ) of Smith County was the Honorable Jack Skeen, Jr., later replaced in that role by the Honorable Austin Reeve Jackson. The fact that Judge Jackson and Clerk Penny Clarkston are respondents here—and also were respondents in this Court’s decision in *Whole Woman’s Health v. Jackson*, 595 U.S. 30 (2021)—is pure happenstance and without significance.

“vexatious litigants” so that the clerks know whose filings to reject.

Petitioners maintain that, even if LAJ’s cannot be sued, the remaining defendant-respondents—clerks of court and the Director of the Office of Court Administration—are sufficient to establish standing. A Ninth Circuit case has recognized standing in a comparable case. *See infra.*

The district court dismissed Petitioners’ complaint without prejudice, reasoning that Petitioners lacked Article III standing to sue.³ The Fifth Circuit held oral argument on July 8, 2024. It later affirmed the district court’s decision and reported almost *verbatim* its facts, assumptions, and reasoning. Both courts claimed reliance on *Whole Woman’s Health v. Jackson*, 595 U.S. 30 (2021) and *Bauer v. Texas*, 341 F.3d 352 (5th Cir. 2003).

Notably, Petitioners did not bring suit against any trial judge who initially designated a plaintiff “vexatious,” believing they are performing an adjudicatory duty.

B. Factual Background

Critically, the Texas statute, App. 46, *does not require* that the trial judge designating the plaintiff a “vexatious litigant” actually determine that plaintiff has ever filed a lawsuit or paper that is vexatious or frivolous. Instead, the trial judge need find only that

³ The district court’s opinion reported about Petitioners’ counsel being designated a “vexatious litigant” herself. No such material was in the court’s record or raised by any party. The opinion is inaccurate and fails to report that the designation was on appeal; it was reversed by the Supreme Court of Texas.

a plaintiff, in a case before the trial judge, (1) is prosecuting a suit that does not have a “reasonable probability” of success (that is, meets a higher standard than is normally permitted under notice pleading); and that plaintiff (2) has previously prosecuted five “litigations” *pro se* in which he did not prevail—for any reason, whether want of jurisdiction, plaintiff’s own dismissal, failure to prosecute quickly enough, or actual loss on the merits. Alternatively, there are less frequently used substitutes for this second criterion—although they too do not require the trial judge to determine for himself whether a plaintiff has ever filed a vexatious or frivolous suit. *See* App. 46, Vexatious Litigants statute, § 11.054.

At the time this petition is filed, about 425 people in Texas have been designated “vexatious litigants.”⁴ They are barred *permanently* from filing “litigations”—except under representation by counsel—in every state court in Texas, against anyone, for any reason, unless they obtain permission from the “local administrative judge” of the county.⁵ Under the statute, permission is granted only if the local administrative judge finds that the attempted litigation affirmatively has “merit.” This too is a higher standard than that required under Texas’s fair-notice pleading standard, which is comparable to federal notice pleading. Without permission, the vexatious litigant’s filing is rejected by state-court

⁴ The list of such litigants is published by the Texas Office of Court Administration, whose Director is defendant-respondent Megan LaVoie, at <https://tinyurl.com/ycybrpju>

⁵ *See* App. 49-51, Civil Practice & Remedies Code §§ 11.102(d) (requiring pre-filing court order that grants permission) and 11.103 (requiring clerks to reject attempted filings except by order of the LAJ).

clerks in every Texas jurisdiction at every level and never filed. No written records are kept of requests for permission or their outcomes.

Petitioners maintain that, under Texas's fair notice standard, it is virtually impossible for the LAJ to determine if a suit has "merit." Indeed the Ninth Circuit has opined that under notice pleading, it is not possible to tell whether a claim has "merit."

[C]ourts cannot properly say whether a suit is "meritorious" from pleadings alone. A lawsuit need not be meritorious to proceed past the motion-to-dismiss stage[.]

[]

And even as to the propriety of a Rule 12(b)(6) dismissal, whether a case merits dismissal for failure to state a claim is often determinable only after briefing and argument; it is often not a decision accurately to be made at a pre-filing stage.

Ringgold-Lockhart v. County of Los Angeles, 761 F.3d 1057, 1066 (9th Cir. 2014) (citing *Bell A. Corp. v. Twombly*, 550 U.S. 544, 556, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (internal quotation marks omitted)).

The enforcement scheme. Petitioners' Complaint sets out Chapter 11's enforcement method. App. 53, Complaint, ¶¶ 27-29. The first step—after the trial judge, during a regular proceeding, declares plaintiff a "vexatious litigant"—is for the trial judge or the district clerk to send the order to that effect and the order imposing the prefilings bar to the Office of Court Administration (OCA). App. 52, Tex. Civ. Prac. & Rem. Code § 11.104. The OCA then adds the name to the

list of “vexatious litigants” published on its website and distributes the list to all clerks of court.

The purpose of this is to warn potential defendants as well as to notify clerks of court. All Texas clerks of court—for the lower courts, appellate courts, and Supreme Court—must reject for filing any new *pro se* claims by persons on the list, unless the person has obtained permission from the local administrative judge. App. 49-50, Tex. Civ. Prac. & Rem. Code §§ 11.102, 11.103.

To see how this works, consider first-named petitioner, Ms. Reule. Her neighbor removed one of her puppies from Reule’s yard. A video shows that the neighbor repeatedly shot at the puppy as it hyper-ventilated and ran here and there in terror. The neighbor then shot and killed the puppy, showed Reule a video of it, and taunted Reule, saying that, as a vexatious litigant, Reule could not sue him. App. 53, Complaint. App. 67-68.

The local administrative judge of the county did not grant Ms. Reule’s request for permission to sue, nor later did the new LAJ who replaced him. Each time Reule filed for a writ of mandamus—as the statute appears to allow when permission is denied. But the state court of appeals held it lacked jurisdiction because Reule could not get permission to file the petition for writ from either of the local administrative judges—the same ones who had denied permission to sue in the first place. App. 66, Complaint, ¶¶ 53-55 (explaining mandamus as a ruse). Thus there was no proceeding in which Reule could seek relief or even prevention of similar acts in the future.



REASONS FOR GRANTING THE PETITION

1. The Distinction Between a Judge's *Ministerial* and *Adjudicatory* Duties Determines Standing, but at Least Four Circuits Are in Conflict Over It⁶

The Third, Eighth, and Ninth Circuits have set forth reasoning about when a judge may or may not become a defendant. Those decisions are in conflict with the Fifth Circuit's reasoning here. As noted, Petitioners sued the Texas LAJ's because they represent part of the enforcement scheme. Petitioners maintain, however, that even if the LAJ was not a defendant-respondents (which Petitioners maintain he is), the remaining defendant-respondents—the clerks of court and the Director of the state's Office of Court Administration—are sufficient defendant-respondents to provide "some connection" to enforcement that enables Article III standing.

a. Third Circuit.

The Third Circuit has determined that, because "[c]ourts have inherent power to keep their proceedings fair and orderly," their doing so is not in the nature of a neutral adjudication. *Bank of Hope v. Miye Chon*, 938 F.3d 389, 392, 394 (3d Cir. 2019). Thus, when a judge crafts a gag order, it is ministerial or administrative in character, not adjudicatory, because

⁶ As a general matter, the duties of a local administrative judge are entirely ministerial and administrative, such as supervising the distribution of caseloads, recommending security, etc. Tex. Gov't Code § 74.092, "Duties of Local Administrative Judge."

it is “non-merits” *Id.* That is, it does not bear on the merits of each side’s position in the litigation; it does not bear on who wins. As a result, such a judge can be sued for declaratory relief under Section 1983 for such rulings. *Argen v. Attorney Gen. N.J.*, No. 21-2571 (3rd Cir. Aug 16, 2022) (non-precedential but citing *Allen v. DeBello*, 861 F.3d 433, 440 (3d Cir. 2017)).

The key is that gag orders are unrelated to adjudicating the merits issues between the parties.

In the same way, an LAJ who grants or denies permission to file a claim is not adjudicating who wins. Indeed, the LAJ will almost always not even know defendant’s side of the story and certainly will not have papers from defendant at the time of resolving permission. The LAJ’s contribution to enforcing the Vexatious Litigants statute is not *adjudication* of the claim. Instead the LAJ does no more than contribute to keeping the “vexatious litigant” out of the courts.

This same reasoning to distinguish ministerial from adjudicatory functions is employed by Illinois state courts. One case has distinguished between ministerial and adjudicatory judicial actions in order to determine whether an interlocutory appeal was available. *Johnson v. Gen. Bd. of Pension & Health Benefits of the United Methodist Church*, 2014 IL App (1st) 132910-U, No. 1-13-2910 (Ill. App. Oct 14, 2014).

In *Johnson*, the Illinois appellate court explained that when an order impinges upon or restrains a party’s rights external to the litigation, it is adjudicatory and immediately appealable as of right. *Johnson*, No. 1-13-2910 at ¶ 15. “In contrast, a ministerial or administrative order does not affect the relationship of the parties in their everyday activity apart from the litig-

gation. . . .” *Id.* at ¶ 16. Thus, such ministerial orders are not eligible for interlocutory appeal.

By contrast, the Fifth Circuit’s Opinion does no more than repeat the district court’s informal observation that “there is nothing ministerial or administrative about [the LAJ’s] duty [in deciding permissions]: it is precisely the type of adjudicatory function judges perform every day. . . .” App. 9, Opinion at 8. This boils down to a circular observation that deciding permission is not ministerial because it is adjudicatory.

More importantly, judges do not perform such tasks as deciding permissions ever, much less “every day.” There is never a time when—before service on a defendant or before a defendant’s appearance in the case—a judge nixes even initiation of a suit by refusing permission to file it. We are not aware of a state or federal rule of procedure that allows a judge to refuse even to allow a suit to be filed. Instead, our courts universally begin proceedings after a claimant files a claim against the other on the public record and serves it on defendant.

The same is true of clerks. Never do clerks deny the mere filing of a claim on the court’s public record. Petitioners here—far contrary to the Petitioners in *Whole Woman’s Health*—are suing clerks to compel them to do what they are supposed to be doing: filing claims on the public record. Petitioners in *Whole Woman’s Health*, by contrast, sought to prevent clerks from performing that task in suits under Senate Bill 8.

In sum, local administrative judges decide permissions under this statute in a way they never do in their adjudicatory role. Even when both sides appear before a trial judge after a claim is filed, *the judge is not*

permitted to dismiss the claim outright—unless, of course, a claimant lacks a legible claim, does not present it to the court, fails to pay a filing fee, or an equally-mechanical act that clerks, rather than judges, usually decide.

Instead, a sitting judge must allow the claimant to be heard; the judge should garner evidence from both sides. And the judge must rule on some type of motion by one of the parties in order to have jurisdiction to rule. The sitting judge must also, as an initial matter, assure himself that he has subject matter jurisdiction and personal jurisdiction over the parties.

In short, permissions to file a suit do not alter the relationship of the parties; indeed the parties are not both present yet. Thus the LAJ's task in deciding permissions is ministerial, as a gag order is.

There are other differences between the LAJ's deciding permissions and the adjudicatory tasks that sitting trial judges actually do perform every day:

- i. Before the LAJ, there is no requirement of written records, of either the request or the outcome.
- ii. Requests for permission from litigants designated vexatious are not made in the courtroom; the LAJ is not presiding, enrobed, or with the parties before him or her.
- iii. Petitioners are aware of requests for permission being made and denied only by telephone and email to and from the LAJ's staff.
- iv. There is no court reporter or recorder present.

Fifth Circuit's Opinion errs regarding traceability. Petitioners urge that the Opinion of the Fifth Circuit errs in concluding that the LAJ is *adjudicating* a claim, instead of performing the ministerial duty of allowing a suit to be filed. In addition, the Opinion errs in concluding that Petitioners fail the test for causation and redressability because even if respondent state agents “all ceased discharging their duties under [the statute] nothing about [Petitioners’] situation would change.”

Even if . . . all clerks of court across the state simply ignored their duties . . . and docketed those suits, and LaVoie on behalf of OCA took down the webpage publishing the list of vexatious litigants, [Petitioners] would still not get the unfettered access to state courts they seek.”

App. 12, Opinion at 10.

The reason Petitioners’ situation would not change, according to the Opinion, is that under the statute, “they could still face contempt if they filed a new suit, and their suits could still be dismissed.” *Id.*

In other words, the Opinion reasons, under Petitioner’s requested injunction and declaration that the statute is unconstitutional, Texas courts would still enforce the Vexatious Litigants statute anyway, holding such litigants in contempt, presumably forcing them into jail time and perhaps paying fines.

This is a bizarre conclusion. First, it assumes that Petitioners’ requested declaratory relief (that the statute is unconstitutional) would be ignored by Texas judges, and they would continue to enforce the provision on contempt.

Petitioners urge that this would never occur. Nor would most Texas lawyers file such motions. Second, Petitioners would have to win only an appropriate provision in the declaration or injunction to quell contempt proceedings.

Finally, according to the Opinion, even if Respondents “all ceased discharging their duties,” *id.*, the provision on contempt would somehow still be alive and enforceable. If this were true, every draconian, unconstitutional statute that a state legislature could devise could easily be impenetrable to review by putting a contempt-for-violation provision in the statute, thereby quelling causation and redressability and defeating Article III standing.

Petitioners urge that this has never happened and should not now be presumed to happen.

b. Eighth Circuit

The Eighth Circuit has decided a case in which a clerk of court is a proper defendant in a first amendment lawsuit. *Courthouse News Serv. v. Gilmer*, 48 F.4th 908 (8th Cir. 2022) (Stras, J.). There, the *Gilmer* panel decided that *Whole Woman’s Health* did *not* issue an absolute rule that clerks and judges could never be sued. Instead, the panel noted that the rule of *Whole Woman’s Health* contained important “qualifiers.” *Gilmer* quoted *Whole Woman’s Health*:

Far from laying out an absolute rule, the Court [in *Whole Woman’s Health*] said that it “does not *normally* permit federal courts to issue injunctions against state-court judges or clerks” because “[u]sually, those individuals do not enforce state laws as executive offi-

cials might; instead, they work to resolve disputes between parties.”

Gilmer quoting *Whole Woman’s Health* and adding emphases, 48 F.4th at 912.

Fifth Circuit’s Opinion diverges. Petitioners recognize that the Eighth Circuit is talking about sovereign immunity, while the Fifth Circuit is talking about standing. Nevertheless, these courts take opposite approaches on whether *Whole Woman’s Health* articulated a “rule” that lower courts must follow. Contrary to the Eighth Circuit’s Opinion, the Fifth Circuit’s Opinion views *Whole Woman’s Health* as providing a “rule” to be followed by the lower courts and advancing that, in making LAJ’s defendants, Petitioners violated “the rule articulated in *Whole Woman’s Health*.” App. 9, Opinion at 8.

c. Ninth Circuit

The Ninth Circuit issued an opinion in *Wolfe v. Strankman*, 392 F.3d 358 (9th Cir. 2004) in which, contrary to the Opinion here, the former vexatious litigant and plaintiff Mr. Strankman had standing to pursue a challenge to the constitutionality of the California vexatious litigants statute. *Strankman* allowed suit to progress against two defendants—the Chief Justice of the California Supreme Court and an employee of the California Judicial Council—who enforced the statute in their administrative, not judicial, capacities. These defendants had roles similar to Defendant-Respondent LaVoie in the instant case.

More recently, in *Munoz v. Superior Court of Los Angeles County*, 91 F.4th 977 (9th Cir. 2024), the Ninth Circuit dismissed suits against judges acting in their

judicial capacity on grounds of sovereign and judicial immunity. In addition, the court in *Munoz* distinguished *Strankman*:

In [*Wolfe v. Strankman*], we allowed some claims against judicial defendants to go forward when sued in their administrative, as opposed to judicial, capacity.

Munoz, 91 F.4th at 981, n. 1 (emphasis added).

But the Fifth Circuit's Opinion here complains that Petitioners' reference to *Strankman* is no longer viable because it has been "overturned" by *Munoz*. App. 15, Opinion at 13. Petitioners respectfully disagree. Even the Fifth Circuit's Opinion recognizes that *Munoz* said only that

[t]o the extent [*Strankman*] can be read to hold that the *Ex parte Young* exception allows injunctions against judges acting in their judicial capacity, that conclusion is "clearly irreconcilable" with [Whole Woman's Health] and thus overruled.

Munoz, 91 F.4th at 981.

But as plainly stated, *Munoz* "overruled" *Strankman* only to the extent that *Strankman* allowed suit "against judges acting in their judicial capacity." This is exactly what *Strankman* did not allow. It allowed claims against defendants only in their *administrative* capacity. *Strankman* dismissed any judges who were acting in adjudicatory capacity. Thus, the statement in *Munoz* in no sense "overruled" *Strankman*.

After *Munoz* was issued, a different panel of the Ninth Circuit decided whether *Whole Woman's Health* would prevent a suit against Native American tribal

judges. If *Whole Woman’s Health* was strictly interpreted, tribal judges should not be subject to suit. But the panel in *Lexington Ins. Co. v. Mueller*, Nos. 23-55144, 23-55193 (9th Cir. Dec 06, 2024) determined that *Whole Woman’s Health* did not apply to tribal judges; thus the Lexington party had standing to sue the defendants for injunctive relief in federal court. This was so although the panel acknowledged “tension” between *Whole Woman’s Health* and the Ninth Circuit’s precedents.

Finally, Petitioners wish to note that the Ninth Circuit’s opinion in *Wolfe v. Strankman* has been cited by district courts 80 times—since *Munoz* was issued. It is true that five such courts erroneously referred to *Strankman* as “overruled”. But the remaining 75 courts citing *Strankman* do so without noting that *Strankman* was overruled or impaired in any way. In sum, we conclude that the Ninth Circuit’s *Strankman* decision is in conflict with the Opinion here and that *Strankman* has not been overruled.

2. This Statute Should Not Escape Federal Review, Because Texas Courts Likely Will Not Further Review Its Constitutionality.

This Court in *Whole Woman’s Health v. Jackson* suggested that a method to obtain constitutional review, if the Supreme Court did not provide it, is that “petitioners . . . would be able to raise the Constitution as a defense in any S. B. 8 enforcement action brought by others against them.” *Whole Woman’s Health*, 595 U.S. at 43.

The Court has opined that “many federal constitutional rights are as a practical matter asserted typically

as defenses to state-law claims” *Whole Woman’s Health* at 595 U.S. at 49-50, 142 S.Ct. at 538.

But that solution cannot come to life in the case of the Vexatious Litigants statute because, first, there are no enforcement actions that can be expected. The vexatious litigants have already been designated as such, and if the enforcement scheme works—the OCA publishes their names and the clerks reject their filings—there is nothing more to enforce.

More importantly, Texas appellate courts, and one federal district court have pronounced the Vexatious Litigants statute as constitutional. Courts of Appeals now routinely reject briefing that raises constitutional questions.

The Court of Appeals at Austin has collected the many cases across the state that “have repeatedly and consistently rejected constitutional challenges to [the Vexatious Litigants statute].” *Connor v. Hooks*, No. 03-19-00198-CV (Tex. App.—Austin Mar. 5, 2021). We show in the margin only a few of the raft of cases that pronounced the statute constitutional—as of 2021.⁷

⁷ *Bierwirth v. Rio Rancho Props., LLC*, No. 03-17-00733-CV, 2018 WL 4610447, at *4 (Tex. App.—Austin Sept. 25, 2018, no pet.) (mem. op.); *Guardianship of L.S.*, No. 14-15-00494-CV, 2017 WL 1416190, at *5 (Tex. App.—Houston [14th Dist.] Apr. 18, 2017, pet. denied) (mem. op.); *Cooper v. McNulty*, No. 05-15-00801-CV, 2016 WL 6093999, at *4 (Tex. App.—Dallas Oct. 19, 2016, no pet.) (mem. op.); *Thomas v. Adams*, No. 11-12-00312-CV, 2014 WL 5463528, at *2 (Tex. App.—Eastland Oct. 9, 2014, pet. denied) (mem. op.); *In re Potts*, 399 S.W.3d 685, 688–90 (Tex. App.—Houston [14th Dist.] 2013, orig. proceeding); *Johnson v. Cornelius*, No. 07-11-00091-CV, 2011 WL 4485465, at *5 (Tex. App.—Amarillo Sept. 28, 2011, no pet.) (mem. op.); *In re Potts*, 357 S.W.3d 766, 769 (Tex. App.—Houston [14th Dist.] 2011, orig. proceeding); *Johnson v. Sloan*, 320 S.W.3d 388, 389–90 (Tex.

There are more cases reaching the same result since then, and we find no case that has left the door open for a constitutional challenge. Indeed the Austin Court of Appeals has noted that “[e]ven if we were inclined to revisit the issue, ‘[w]e may not overrule a prior panel opinion of this court absent an intervening change in the law by the Legislature or a higher court or by decision of this court sitting en banc.’” *Connor v. Hooks* at n. 11. (citations omitted).

Despite the certainty with which Texas courts have uniformly pronounced the statute “constitutional,” no Texas court has actually analyzed the text or applied any constitutional tests. The statute has never been compared to other punishments or been analyzed as vague, overbroad or without narrow tailoring, for example. Virtually all courts have repeated only the statement that the statute is “constitutional” when compared to its purpose of eliminating vexatious litigants from the courts. This is not sufficient constitutional analysis, but Texas courts seem disinclined to pursue the question further.

App.—El Paso 2010, pet. denied); *Clifton v. Walters*, 308 S.W.3d 94, 101–02 (Tex. App.—Fort Worth 2010, pet. denied); *Dolenz v. Boundy*, No. 05-08-01052-CV, 2009 WL 4283106, at *3–4 (Tex. App.—Dallas Dec. 2, 2009, no pet.) (mem. op.); *In re Johnson*, No. 07-09-00035-CV, 2009 WL 2632800, at *1 (Tex. App.—Amarillo Aug. 27, 2009, orig. proceeding) (mem. op.); *In re Johnson*, No. 07-07-00245-CV, 2008 WL 2681314, at *2 (Tex. App.—Amarillo July 9, 2008, orig. proceeding) (mem. op.); *Leonard v. Hearst Corp.*, No. 01-04-01023-CV, 2005 WL 3118700, at *8 (Tex. App.—Houston [1st Dist.] Nov. 23, 2005, pet. denied) (mem. op.).

3. This Statute Should Not Escape Review Because It Is Patently Unconstitutional, and Hundreds of People in Texas Have Been Unfairly Shorn of Their Rights to Petition and to Access the Courts

The statute is unconstitutional in numerous ways. *See* App. 67, Complaint. The three most important are that (1) the punishment is not narrowly tailored; (2) the statute encourages arbitrary and capricious decision making because the statute is vague and the standards unclear; and (3) the person designated vexatious has no recourse. We note that the Fifth Circuit’s Opinion mis-reports that appeal and mandamus are available without permission. But Texas courts have interpreted those sections as *not* permitting appeal if the LAJ does not give permission. We believe that people designated “vexatious” are severely chilled in asking for permission. We are aware of only a handful of requests being made, only one of which was granted.

a. Lack of Narrow Tailoring

As an initial matter, the statute strips the “vexatious litigant” of his *pro se* right to petition too broadly—that is, except through counsel or by permission, he is barred *in every Texas court for any reason, against any defendant, permanently*. App. 48, Civ. Prac. & Rem. Code § 11.101(c). And the Texas statute has no mechanism to un-do the designation, regardless of the passage of time. By contrast, the California statute concerning vexatious litigants—which otherwise is nearly identical to the Texas statute—allows the litigant to apply once a year to have the designation removed. Cal. Code Civ. Proc. § 391.8.

The Texas statute also imposes the pre-filing bar as widely as possible, that is, covering all state courts.⁸ It is useful to compare the over-broad punishment imposed by the Texas statute with pre-filing injunctions imposed on vexatious litigants by federal courts. Federal courts, when they impose pre-filing injunctions, use narrow tailoring. *Ferguson v. MBank Houston, N.A.*, 808 F.2d 358, 360 (5th Cir. 1986) (affirming narrow injunction that bars only the same claims against the same defendants); *In re Martin-Trigona*, 737 F.2d 1254 (2nd Cir. 1984) (Winter, J.) (placing further limits on district court's injunction, although plaintiff had filed some 250 suits and papers across the nation); *Thomas v. Culpepper*, No. 4:18-CV-814 (E.D. Tex. Sept. 20, 2019) (Mazzant, J.) (pre-filing injunction bars only *pro se* suits on a particular overly-litigated home repair dispute). *See also De Long v. Hennessey*, 912 F.2d 1144, 1148 (9th Cir. 1990) (“If we are to permit pre-filing restrictive orders, these orders must be narrowly tailored to closely fit the specific vice encountered”).

Indeed the statute so patently states that the vexatious litigant is barred from *all* state courts that, when some trial judges try to limit their pre-filing order, the appellate courts nix those orders and rule that, because the statute's bar is so broad, trial judges actually are not permitted to attempt to enter a narrower order. *See, e.g., Emerson v. Holly Lake Ranch Ass'n*, No. 12-23-00316-CV, 2-3 (Tex. App.—Tyler Jan. 3, 2024); *Madugula v. FM 969 Commercial Dev.*, 03-24-00565-CV (Tex. App.—Austin Oct. 2, 2024).

⁸ There is only a minor exception for orders by constitutional county courts.

b. Arbitrariness

The Texas Vexatious Litigants statute is also arbitrary because it *does not require the court making the designation to find* that the litigant has ever filed even a single vexatious or frivolous suit. App. 5, Tex. Civ. Prac. & Rem. Code § 11.054. Instead, Chapter 11 requires only that the judge meet two criteria:

Prong One: that “there is not a reasonable probability that the plaintiff will prevail” in the litigation at hand; and

Prong Two: that the plaintiff, in the previous seven years, carried out at least five pro se “litigations” that were “finally determined adversely” to him. App. 5, Civ. Prac. & Rem. Code § 11.054(1)(A).

The statute is arbitrary because losing a case is not a sign of vexatious or frivolous conduct. A suit can be “unsuccessful but reasonably based.” *BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 532 (2002). Even losing all “causes of action does not necessarily mean that [plaintiff’s] claims were groundless.” *Callaway v. Martin*, No. 02-16-00181-CV (Tex. App.—Fort Worth, May 25, 2017) (collecting cases).

The statute does permit alternative methods of meeting Prong Two, but review of a random sampling of the orders issued since the statute was passed indicates that counting cases ending “adversely” to plaintiff, as sub-section 11.054(1)(A) permits, appears most frequently.

In any event the alternative methods of meeting Prong Two also do not require that the trial judge making the designation find for herself that plaintiff actually made vexatious or frivolous filings. *Id.* at

§ 11.054. At most the trial judge might take notice that a different court identified the plaintiff as “vexatious.” App. 46-47, Civ. Prac. & Rem. Code §§ 11.054(1)(C) 11.054(3). But adopting the findings of other courts is contrary to evidentiary standards because “courts generally cannot take notice of findings of fact from other proceedings for the truth asserted therein because these are disputable and usually are disputed.” *Taylor v. Charter Medical Corp.*, 162 F.3d 827, 830 (5th Cir. 1998).

Thus, the statute encourages the vexatious designation based upon an unreliable measure (counting five cases lost) or at most relying on disputed findings from other courts, who likely employ different criteria.

Again the Texas statute is unlike federal designations of vexatiousness because, when federal courts do issue pre-filing orders, they must “make substantive findings of frivolousness or harassment.” *Ringgold-Lockhart v. County of Los Angeles*, 761 F.3d 1057, 1062 (9th Cir. 2014). *See also De Long v. Hennessey*, 912 F.2d 1144 (9th Cir. 1990) (setting detailed requirements for constitutionality of a pre-filing injunction).

c. Lack of Recourse for Wrong Decisions— Constitutional Violations That Are Mis- Reported by the Fifth Circuit’s Opinion

As in other states, Texas permits at least one freely-taken appeal after a negative legal outcome, and some outcomes may be corrected on mandamus. But the Texas Vexatious Litigant statute is apparently unique because it permits neither of these forms of relief without the amorphous permission from the LAJ. Far from providing protection when the vexatious designation is wrongly imposed, the statute provides

no route of relief on this life-long impairment of the right to petition and denial of due process.

The Fifth Circuit's opinion erroneously reports that there is recourse:

Once a litigant has been declared vexatious, the court may enter a prefiling order precluding that litigant from filing future suits *pro se* without first obtaining permission from a local administrative judge ("LAJ"). [] A prefilng order is appealable, and that appeal may be taken without permission from an LAJ.

App. 2 (citing §§ 11.101(c), 11.103(d)) (emphasis added).

But neither the sub-sections cited nor any others say unequivocally that a litigant designated vexatious may file an appeal of a pre-filing order *without first obtaining LAJ permission*. There is only language that the litigant may file; it doesn't say she may do so without permission.

Texas courts are uniform in holding that, to appeal, one must have permission. And the requirement is jurisdictional.⁹ *Yazdchi v. Wells Fargo*, No. 01-21-00268-CV (Tex. App.—Houston (1st Dist.) Dec. 13, 2022) (“[c]ourt intends to dismiss [vexatious litigant's] appeal for lack of jurisdiction unless appellant provides this Court with proof of permission to appeal from the local administrative judge”) (citing App. 50-51,

⁹ We find only one exception where the Tyler Court of Appeals has stated in a footnote that [t]here is an exception [from the requirement of permission] for appeals from the prefilling order. But the statement is *dictum*, not holding. *In Re: Christine Reule*, No. 12-22-00271-CV at * n. 2 (Tex. App.—Tyler Nov. 30, 2022) (mem. op.)

Tex. Civ. Prac. & Rem. Code § 11.103); *Madugula v. FM 969 Commercial Dev.*, No. 03-24-00565-CV (Tex. App.—Austin Oct. 2, 2024) (“vexatious litigant must . . . obtain[] permission from the appropriate local administrative judge to file an appeal); *Reeves v. Cent. Hous. Nissan*, 617 S.W.3d 676, 678 (Tex. App.—Houston (14th Dist.) 2021) (court will “dismiss this appeal . . . unless . . . Reeves obtain[s] an order from the local administrative judge. . . .”); *Shockome v. Reyes*, No. 07-22-00212-CV (Tex. App.—Amarillo Aug. 31, 2023) (same); *Yasin v. Harris Cnty. Civil Courts at Large Court 1*, No. 01-23-00822-CV (Tex. App.—Houston (1st Dist.) Jan 30, 2024).

Equally, the Fifth Circuit reports, erroneously, that if the LAJ rejects permission to file a future suit, and although it cannot be directly appealed, “the litigant may apply for a writ of mandamus’ to obtain review of the LAJ’s ruling.” App. 8 (Opinion at 7). The Opinion then references section 11.102(f) of the statute.

Unfortunately the statute says nothing about freely seeking mandamus without counsel or permission. It merely says that the litigant make seek mandamus; it doesn’t say how. Texas courts have interpreted the statute’s language contrary to the Fifth Circuit’s Opinion, Texas courts hold that “[a]bsent an order granting [a litigant designated vexatious] permission to file [an] original proceeding, we lack jurisdiction.” and dismiss on those grounds. *In Re: Christine Reule, Relator*, No. 12-22-00271-CV (Tex. App.—Tyler Nov. 30, 2022) (mem. op.) (citing *In re Johnson*, No. 14-22-00332-CV, 2022 WL 3093195, at *1 (Tex. App.—Houston [14th Dist.] Aug. 4, 2022) (same).



CONCLUSION

Petitioners respectfully ask that the petition for a writ of certiorari be granted.

Respectfully submitted,

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