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OPINION, U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT (AUGUST 19, 2024)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CHRISTINE REULE; HARRIET NICHOLSON; REBECCA ALEXANDER FOSTER; JIMMY LEE MENIFEE; TONY LAMAR VANN; HONORABLE MADELEINE CONNOR,

Plaintiffs-Appellants,

v.

HONORABLE REEVE JACKSON; PENNY CLARKSTON; MEGAN LAVOIE,

Defendants-Appellees.

No. 23-40478

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 6:22-CV-367

Before: SMITH, ENGELHARDT, and RAMIREZ, Circuit Judges.

IRMA CARRILLO RAMIREZ, *Circuit Judge*:

Appellants are a group of individuals who have been declared vexatious litigants under a Texas statute. Their challenge to the constitutionality of that statute,

which they asserted in a lawsuit against a state court judge, a state court clerk, and a state official responsible for publishing the online list of individuals declared vexatious litigants, was dismissed for lack of jurisdiction. We AFFIRM.

I

A

Chapter 11 of the Texas Civil Practice & Remedies Code ("Chapter 11") sets out a process by which Texas courts can restrict vexatious *pro se* litigants' access to state courts upon a motion by the opposing party. TEX. CIV. PRAC. & REM. CODE § 11.051. Section 11.054 sets out the criteria for declaring a plaintiff a vexatious litigant. *Id.* § 11.054. 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"). *Id.* § 11.101(a). "A person who disobeys [this prefiling order] is subject to contempt of court." *Id.* § 11.101(b). A prefiling order is appealable, and that appeal may be taken without permission from an LAJ. *Id.* §§ 11.101(c), 11.103(d). Section 11.102 sets out the process by which a vexatious litigant may obtain permission from the LAJ to file a new suit, including the standard the LAJ must apply. *Id.* § 11.102.

State court clerks must reject any filing submitted by a vexatious litigant unless that litigant has first obtained permission from an LAJ. *Id.* § 11.103(a). If a clerk mistakenly dockets a filing from a vexatious litigant, any party may file a notice pointing out the mistake; the clerk must then notify the court, and

"[o]n receiving notice from the clerk, the court shall immediately stay the litigation and shall dismiss the litigation" unless the litigant obtains retroactive permission from the LAJ. *Id.* § 11.1035. Finally, clerks must notify the Office of Court Administration of the Texas Judicial System ("OCA") when a court enters a prefiling order. *Id.* § 11.104(a). OCA is required to maintain a list of litigants who are subject to a prefiling order and post that list on its website. *Id.* § 11.104(b). And OCA is prohibited from removing an individual's name from the list without a court order. *Id.* § 11.104(c).

B

Appellants are a group of individuals who have been declared vexatious litigants and are subject to a prefiling order. As such, they must seek permission from the local LAJ to file lawsuits *pro se*.

Lead Appellant Christine Reule, a resident of Smith County, was declared a vexatious litigant and has been subject to a prefiling order since 2019. Appellants allege that Reule needs to file a new lawsuit *pro se* because her neighbor—who purportedly knew that Reule was on the vexatious litigants list and therefore could not sue him—shot and killed her dog. They claim Chapter 11 has "severely and permanently impaired" Reule's right to petition and access courts. Their complaint contains similar allegations pertaining to each of the Appellants. Other than Reule, however, none of the Appellants alleges that he or she has an immediate need to file a lawsuit that is inhibited by operation of Chapter 11.

Appellants filed this suit challenging the constitutionality of Chapter 11—specifically, sections

11.001(2), 11.052, 11.053, 11.054, 11.055, 11.056, 11.101, 11.102, 11.103, and 11.104—both on its face and as applied to them. They averred that Chapter 11 permanently deprives them of their First Amendment right to petition, and therefore operates as an unlawful prior restraint; it is overbroad, vague, and arbitrary and capricious and cannot satisfy any level of judicial scrutiny; it flouts due process and equal protection; it operates independently of applicable rules of evidence; it abridges a plaintiff's right to appeal a decision; and it runs counter to federal judicial principles regarding vexatious litigants. They sought a declaration that Chapter 11 is unconstitutional; certification of two defendant classes consisting of all Texas state court clerks and all LAJs; an injunction prohibiting one of the Appellees and all members of the two defendant classes from enforcing Chapter 11; nominal damages; and costs and attorney's fees.

Appellants sue Judge Austin Reeve Jackson,[1] Penny Clarkston, and Megan LaVoie. Appellants sue Judge Jackson, the LAJ for Smith County,[2] in his official capacity and as representative of a putative class of defendants defined as all "Texas LAJs or others with similar duties." Appellants clarify that Judge Jackson "is not sued in his *judicial* capacity,"

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[1] Appellants originally named as a defendant Judge Jack Skeen, Jr. Judge Jackson has since replaced Judge Skeen as the LAJ for Smith County. For clarity, we refer to them collectively as "Judge Jackson."

[2] Each county has one Laj. Tex. Gov't Code § 74.091(a). In a county with only one statutory county court, the judge of that court serves as the LAJ, *id.* § 74.091(c); in a county with multiple statutory county courts, the judges of those courts elect the LAJ from their ranks to serve for a two-year term, *id.* § 74.091(b).

but instead "in his official and administrative capacities in the performance of the ministerial task of deciding whether to permit a 'vexatious litigant's' *pro se* filing." They allege that Judge Jackson "enforces Chapter 11 by granting or denying permission for a 'vexatious litigant' to file a *pro se* suit or appeal."

Appellants sue Clarkston, the District Clerk for Smith County, in her official capacity and as representative of a putative class of defendants defined as all court clerks in Texas. They allege that Clarkston enforces Chapter 11 because "she accepts civil cases for filing and issues citations for service of process" and "[h]er role in enforcing and executing Chapter 11 is set forth in the statute." Appellants maintain that "[i]f Defendant Clarkston did not perform this duty, the statute would be of no effect."

Finally, Appellants sue LaVoie, the Administrative Director for OCA, in her official capacity. They claim that she "enforces and executes Chapter 11 by creating, updating, and disseminating the list of 'vexatious litigants.'" According to Appellants, "if [LaVoie] did not create and update the list, and make the list available to the public on OCA's website, including to clerks, judges, and potential defendants, Chapter 11 would be of no effect."

Appellees moved to dismiss the complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). They argued, in relevant part, that the suit should be dismissed because no justiciable case or controversy existed and Appellants lacked standing. Following a hearing, the district court dismissed under Rule 12(b)(1). Although it "assume[d] that [Appellants] alleged an injury[,]" and Appellees "d[id] not dispute that [Appellants] have identified a cognizable injury

for Article III purposes[,]" the court concluded that Appellants did not have standing to bring this suit because they did not satisfy the two remaining elements of Article III standing. Additionally, the court held that it lacked subject matter jurisdiction over the claims against Judge Jackson because they did not give rise to a case or controversy within the meaning of Article III. Accordingly, the court dismissed all claims without prejudice and denied as moot Appellants' motion for class certification.

Appellants moved to alter the judgment. The court denied that motion. This appeal followed.

II

We review a district court's grant of a 12(b)(1) motion to dismiss *de novo*, "applying the same standard used by the district court." *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001) (citing *Hebert v. United States*, 53 F.3d 720, 722 (5th Cir. 1995)). Appellants bear the burden of proving, by a preponderance of the evidence, that the court has subject matter jurisdiction. *Ballew v. Cont'l Airlines, Inc.*, 668 F.3d 777, 781 (5th Cir. 2012). The issue of subject matter jurisdiction cannot be waived, and federal courts "are duty-bound to examine the basis of subject matter jurisdiction" at all stages in the proceedings and dismiss if jurisdiction is lacking. *See Colvin v. LeBlanc*, 2 F.4th 494, 498 (5th Cir. 2021); *Carver v. Atwood*, 18 F.4th 494, 497 (5th Cir. 2021).

III

Appellants challenge the district court's conclusion that there is no case or controversy between them and Judge Jackson.

Article III of the Constitution "limits the jurisdiction of federal courts to 'Cases' and 'Controversies[.]'" *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 559 (1992). In *Whole Woman's Health v. Jackson*, the Supreme Court noted that state court judges "exist to resolve controversies about a law's meaning or its conformance to the Federal and State constitutions, not to wage battle as contestants in the parties' litigation." 595 U.S. 30, 40 (2021). Accordingly, because judges are not sufficiently adverse to parties like Appellants, "'no case or controversy' exists 'between a judge who adjudicates claims under a statute and a litigant who attacks the constitutionality of the statute.'" *Id.* (quoting *Pulliam v. Allen*, 466 U.S. 522, 538 n.18 (1984)).

We have identified an important principle that clarifies this rule: "[t]he requirement of a justiciable controversy is not satisfied where a judge acts in his *adjudicatory* capacity." *Bauer v. Texas*, 341 F.3d 352, 359 (5th Cir. 2003) (emphasis added) (citing *Mendez v. Heller*, 530 F.2d 457, 458 (2d Cir. 1976)). In contrast, if a judge acts as the enforcer or administrator of a challenged statute, a case or controversy may exist. *See Lindke v. Tomlinson*, 31 F.4th 487, 493 (6th Cir. 2022) ("If [the state judge] acted as an enforcer or administrator of the statute, he may be a proper defendant[.]"); *see also Bauer*, 341 F.3d at 359–60 (distinguishing a Supreme Court case holding that a § 1983 action against a state judge was proper because the judge "acted in an enforcement, rather than an adjudicatory capacity").

Accordingly, to determine whether a case or controversy exists, courts look to the role the judge plays in the relevant statutory scheme. *See Machetta v. Moren*, 726 F. App'x 219, 220 (5th Cir. 2018) (per curiam)

(citing *Bauer*, 341 F.3d at 359). If the role is strictly adjudicatory, then no case or controversy exists. *Id.* Relevant considerations include whether the judge initiated the proceedings that the plaintiff is challenging or was "a cause of the statute being enacted" and whether the challenged statutory scheme compels or allows for traditional judicial safeguards such as notice and a hearing. *See id.*; *Bauer*, 341 F.3d at 360, 361. Judges are not proper parties to a suit challenging a state law if, in resolving disputes under the challenged statute, they "act as they would in any other case" in that "they sit as adjudicators, finding facts and determining law in a neutral and impartial judicial fashion." *In re Justices of Sup. Ct. of P.R.*, 695 F.2d 17, 21 (1st Cir. 1982).

Here, Judge Jackson was acting in his adjudicatory capacity, rather than as enforcer or administrator of Chapter 11. The only duty that Judge Jackson and other LAJs are compelled to discharge under Chapter 11 is to evaluate vexatious litigants' requests for permission to file a new lawsuit. *See* TEX. CIV. PRAC. & REM. CODE § 11.102. The statute instructs them to rule on the motions by "mak[ing] a determination on the request with or without a hearing[,]" and if a hearing is necessary, "the judge may require that the vexatious litigant . . . provide notice of the hearing to all defendants named in the proposed litigation." *Id.* § 11.102(c). The statute sets out criteria for determining whether permission should be granted, too. *Id.* § 11.102(d). And although the LAJ's decision cannot be directly appealed, "the litigant may apply for a writ of mandamus" to obtain review of the LAJ's ruling. *Id.* § 11.102(f). In these respects, the functions compelled

by Chapter 11 are "function[s] normally performed by a judge." *Stump v. Sparkman*, 435 U.S. 349, 362 (1978).

Appellants emphasize, however, that they intended to sue Judge Jackson in his administrative capacity, challenging only "the performance of the ministerial task of deciding whether to permit a 'vexatious litigant's' *pro se* filing." But there is nothing ministerial or administrative about that duty: it is precisely the type of adjudicatory function judges perform every day, and Appellants cannot escape the rule articulated in *Whole Woman's Health* by labeling an adjudicatory process as an administrative one.

There is no Article III case or controversy between Appellants and Judge Jackson.[3] We therefore affirm the dismissal of the claims against him.

IV

Appellants argue that the district court erred in ruling that they lacked standing to sue Appellees.

As noted, federal courts have the authority to resolve only live cases or controversies under Article III of the Constitution. *Lujan*, 504 U.S. at 559. One of the "landmarks" identifying those cases and controversies which are susceptible to judicial determination is standing. *Id.* at 560. "[T]he irreducible constitutional minimum of standing contains three elements." *Id.* They are:

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[3] Appellants contend that this principle does not apply where a plaintiff seeks prospective, rather than retrospective, relief. This argument appears to be based on a conflation of the lack of an Article III case or controversy on the one hand and the availability of judicial immunity, which we do not address, on the other.

> (1) that the plaintiff [has] suffered an "injury in fact"—an invasion of a judicially cognizable interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) that there be a causal connection between the injury and the conduct complained of—the injury must be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court; and (3) that it be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Bennett v. Spear, 520 U.S. 154, 167 (1997) (citing *Lujan*, 504 U.S. at 560–61).

The party invoking federal jurisdiction bears the burden of proving that standing exists. *Lujan*, 504 U.S. at 561 (citing *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990)). "[S]tanding is not dispensed in gross." *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008) (quoting *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996)). Instead, "a plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." *Town of Chester v. Laroe Ests., Inc.*, 581 U.S. 433, 439 (2017).

Here, the district court assumed, for purposes of resolving the motion to dismiss, that Appellants had satisfied the first element of standing, factual injury. It found that Appellants had not satisfied the second and third elements: traceability and redressability. Because we affirm the district court's conclusion as to traceability and redressability, we do not address whether Appellants have demonstrated factual injury.

A

To satisfy the traceability element of standing, a plaintiff must establish that there is "a causal connection between the injury and the conduct complained of—the injury must be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court[.]" *Bennett*, 520 U.S. at 167. Standing exists where the purported injury is connected to allegedly unlawful government conduct. *See Duarte ex rel. Duarte v. City of Lewisville*, 759 F.3d 514, 520 (5th Cir. 2014) (citing *Allen v. Wright*, 468 U.S. 737, 752 (1984)). The defendant's conduct does not need to be "the very last step in the chain of causation." *Bennett*, 520 U.S. at 169. And proximate cause need not be shown. *Inclusive Cmtys. Project, Inc. v. Dep't of Treas.*, 946 F.3d 649, 655 (5th Cir. 2019).

"[W]here a causal relation between injury and challenged action depends upon the decision of an independent third party . . . , 'standing is not precluded, but it is ordinarily substantially more difficult to establish[.]'" *California v. Texas*, 593 U.S. 659, 675 (2021) (internal citations omitted). Indeed, it is well established that standing cannot exist where the injury "depends on the unfettered choices made by independent actors not before the court and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict[.]" *Lujan*, 504 U.S. at 562 (quoting *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615 (1989) (opinion of Kennedy, J.)). Nevertheless, the causation element can be satisfied where "the defendant's actions produce a 'determinative or coercive effect upon the action of

someone else,' resulting in injury." *Inclusive Cmtys.*, 946 F.3d at 655 (quoting *Bennett*, 520 U.S. at 169).

Here, Appellants do not satisfy this causation element for several reasons. First, if Appellees all ceased discharging their duties under Chapter 11, nothing about Appellants' situation would change. Even if all LAJs across the state refused to evaluate and adjudicate vexatious litigants' requests for permission to file new suits, all clerks of court across the state simply ignored their duties under Chapter 11 and docketed those suits, and LaVoie on behalf of OCA took down the webpage publishing the list of vexatious litigants, Appellants would still not get the unfettered access to state courts they seek. Under Chapter 11, they could still face contempt if they filed a new suit, and their suits could still be dismissed. Accordingly, Appellants' injury is not fairly traceable to Appellees' conduct.[4] Chapter 11 does have an "immediate coercive effect" on Appellants, but Appellants confuse that effect "with any coercive effect that might be applied by the *defendants*[.]" *Okpalobi v. Foster*, 244 F.3d 405,

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[4] This conclusion could also be framed as an issue of redressability, which is discussed below. "The second and third standing requirements—causation and redressability—are often 'flip sides of the same coin.' . . . If a defendant's action causes an injury, enjoining the action or awarding damages for the action will typically redress that injury." *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 380–81 (2024) (quoting *Sprint Commc'ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 288 (2008)); *see also* 33 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 8342 (2d ed. 2024) ("The causation and redressability prongs of constitutional standing often boil down to the same thing—*i.e.*, where a certain action is causing a claimed injury, vacating that action will provide redress for that injury.").

426 (5th Cir. 2001) (en banc) (emphasis in original). That confusion is fatal to their causation arguments.

Additionally, the individuals who arguably are responsible for causing Appellants' complained-of injury are the judges who entered the prefiling orders against Appellants. The state court judges who declared Appellants vexatious did so based on the discretion afforded them under Chapter 11. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE § 11.054 ("A court *may* find a plaintiff a vexatious litigant if the defendant shows" that the plaintiff satisfies the two criteria set out in the statute. (emphasis added)). To the extent Appellants were injured, therefore, they were injured by the "unfettered choices made by independent actors not before the court" based on those actors' "broad and legitimate discretion[.]" *Lujan*, 504 U.S. at 562.

Appellants apparently contend that these deficiencies are rectified by the fact that they seek a declaratory judgment that Chapter 11 is unconstitutional. They suggest that, because prevailing in this litigation will lead to such a declaration, no one will be able to enforce Chapter 11, and therefore any injury caused by its operation will be remedied. But the type of remedy sought cannot relieve Appellants of their obligation to establish that they have standing to seek any remedy at all. *See Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671, 674 (1950) (holding that while the Declaratory Judgment Act "enlarged the range of remedies available in the federal courts" it did not alter the Article III jurisdiction of those courts). Appellants' injuries are not fairly traceable to Appellees' conduct.

B

Appellants also failed to satisfy the third element of standing: redressability. "To satisfy redressability, a plaintiff must show that 'it is *likely*, as opposed to merely *speculative*, that the injury will be redressed by a favorable decision.'" *Inclusive Cmtys.*, 946 F.3d at 655 (emphasis in original) (quoting *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000)). The specific form of relief sought must at least lessen the injury of which plaintiff complains, but it need not completely resolve it. *Id.* (citing *Sanchez v. R.G.L.*, 761 F.3d 495, 506 (5th Cir. 2014)); *see also Denning v. Bond Pharmacy, Inc.*, 50 F.4th 445, 452 (5th Cir. 2022) (citing *Uzuegbunam v. Preczewski*, 592 U.S. 279, 282 (2021)) (holding plaintiff lacked standing to sue because her complained-of injury was not redressable by the award of compensatory and punitive damages she sought).

Appellants' position regarding redressability is unavailing. The redress they seek—injunctions against Appellees' enforcement of Chapter 11—would not remedy their purported injury because they would still have limited access to state courts. In fact, if LAJs like Judge Jackson were enjoined from discharging their duties under Chapter 11, Appellants would have no hope of ever getting into court again, because every action they filed would be dismissed for failure to obtain the permission their prefiling orders require. And because Appellees' conduct did not cause Appellants' injury, altering or prohibiting that conduct will do nothing to redress it. Accordingly, Appellants do not have standing to bring their claims against Appellees because the relief they seek against Appellees will not redress Appellants' injuries.

C

Finally, citing the Ninth Circuit's decision in *Wolfe v. Strankman*, 392 F.3d 358 (9th Cir. 2004), Appellants contend that "[a]ffirming lack of standing would create a conflict between this Court and the Ninth Circuit[,]" which held that a similarly situated plaintiff had standing to sue similarly situated defendants. *Wolfe* did not analyze the issue of standing. The court only discussed standing as part of its *Rooker-Feldman* analysis, because the plaintiff's myriad references to his previous state lawsuits were not made in an attempt to appeal or otherwise challenge those lawsuits, but instead to establish that he had sued in the past and was therefore likely to do so again in the future. *See id.* at 363–64. No express holding in *Wolfe* runs counter to a conclusion that Appellants lack standing to sue these Appellees. More importantly, *Wolfe* has been overturned. *See Munoz v. Super. Ct. of LA Cnty.*, 91 F.4th 977, 980–81 (9th Cir. 2024) ("To the extent *Wolfe* 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.").

In conclusion, Appellants have not established standing to bring their claims against Appellees.

* * *

We AFFIRM the district court's judgment. All outstanding motions are DENIED AS MOOT.

JUDGMENT, U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT (AUGUST 19, 2024)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CHRISTINE REULE; HARRIET NICHOLSON; REBECCA ALEXANDER FOSTER; JIMMY LEE MENIFEE; TONY LAMAR VANN; HONORABLE MADELEINE CONNOR,

Plaintiffs-Appellants,

v.

HONORABLE REEVE JACKSON; PENNY CLARKSTON; MEGAN LAVOIE,

Defendants-Appellees.

No. 23-40478

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 6:22-CV-367

Before: SMITH, ENGELHARDT, and RAMIREZ, Circuit Judges.

JUDGMENT

This cause was considered on the record on appeal and was argued by counsel.

IT IS ORDERED and ADJUDGED that the judgment of the District Court is AFFIRMED.

IT IS FURTHER ORDERED that Appellants pay to Appellees the costs on appeal to be taxed by the Clerk of this Court.

The judgment or mandate of this court shall issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. *See* Fed. R. App. P. 41(b). The court may shorten or extend the time by order. *See* 5th Cir. R. 41 I.O.P.

ORDER DENYING MOTION TO ALTER OR AMEND THE JUDGMENT, U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS TYLER DIVISION (JULY 18, 2023)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

CHRISTINE REULE, ET AL.,

Plaintiffs,

v.

AUSTIN REEVE JACKSON, ET AL.,

Defendants.

Case No. 6:22-cv-367-JDK

Before: Jeremy D. KERNODLE, U.S. District Judge.

ORDER DENYING MOTION TO ALTER OR AMEND THE JUDGMENT

Plaintiffs in this case challenged the constitutionality of Chapter 11 of the Texas Civil Practice and Remedies Code, which governs "vexatious litigations." On May 30, 2023, the Court issued a Memorandum Opinion and Order granting Defendants' motions to dismiss (Docket Nos. 14, 15) after concluding that Plaintiffs lacked standing. Docket No. 46. The Court

entered final judgment dismissing Plaintiffs' claims without prejudice. Docket No. 47.

Citing Federal Rule of Civil Procedure 59(e), Plaintiffs now move to alter or amend the judgment. Docket No. 49.

I.

Rule 59(e) provides for a "motion to alter or amend a judgment." In discussing the rule's purpose, the Supreme Court stated:

> Rule 59(e) was added to the Federal Rules of Civil Procedure in 1946. Its draftsmen had a clear and narrow aim. According to the accompanying Advisory Committee Report, the Rule was adopted to "mak[e] clear that the district court possesses the power" to rectify its own mistakes in the period immediately following entry of judgment. . . . Consistent with this original understanding, the federal courts have invoked Rule 59(e) only to support reconsiderations of matters properly encompassed in a decision on the merits.

White v. N.H. Dep't of Emp't Sec., 455 U.S. 445, 450–51 (1982) (citations omitted). Furthermore, "Rule 59(e) permits a court to alter or amend a judgment, but it may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment." *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 485 n.5 (2008) (citation omitted).

The Fifth Circuit has observed that a Rule 59(e) motion "serve[s] the narrow purpose of allowing a

party to correct manifest errors of law or fact or to present newly discovered evidence." *Waltman v. Int'l Paper Co.*, 875 F.2d 468, 473 (5th Cir. 1989) (citation and internal quotations omitted). A Rule 59(e) motion "is not the proper vehicle for rehashing evidence, legal theories, or arguments that could have been offered or raised before the entry of judgment." *Templet v. HydroChem, Inc.*, 367 F.3d 473, 479 (5th Cir.).

Moreover, "[r]econsideration of a judgment after its entry is an extraordinary remedy that should be used sparingly." *Id.* at 479 (citations omitted). The decision to alter or amend a judgment is committed to the sound discretion of the district judge and will not be overturned absent an abuse of discretion. *S. Contractors Grp., Inc. v. Dynalectric Co.*, 2 F.3d 606, 611 & n.18 (5th Cir. 1993).

II.

Plaintiffs argue the Court's Memorandum Opinion and Order includes three manifest errors of law. Plaintiffs' arguments are meritless.

First, Plaintiffs contend they sued the judicial defendant, Judge Austin Reeve Jackson, in his "official and administrative capacity," and the Court erred in "fail[ing] to recognize" the distinction between "ministerial and judicial acts." Docket No. 49 at 4–5 (quoting Docket No. 1 ¶ 19). Plaintiffs, however, fail to explain how this distinction has any bearing on the Court's Order, which held that Plaintiffs had no "case or controversy" against Judge Jackson. Docket No. 46 at 12–13; *see also Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 532 (2021) ("'[N]o case or controversy' exists 'between a judge who adjudicates claims under a statute and a litigant who attacks the constitutionality of the

statute.'"). Under the case-or-controversy analysis, courts look to the judicial defendant's actions under the challenged statute to determine whether he acts in an "adjudicatory capacity," irrespective of the capacity in which plaintiffs have sued him. *Bauer v. Texas*, 341 F.3d 352, 357, 361 (5th Cir. 2003) (finding a judge acted in an "adjudicatory capacity" for purposes of the case-or-controversy requirement although plaintiff sued him "in his judicial capacity"); *Brandon E. ex rel. Listenbee v. Reynolds*, 201 F.3d 194, 195 (3d Cir. 2000) (same where plaintiff sued judicial defendants in their "official capacity"). Because the Court found that Judge Jackson's actions are "adjudicatory" under Chapter 11, Plaintiffs lack standing to sue him. Thus, Plaintiffs' first argument to reconsider fails. *E.g.*, *Bauer*, 341 F.3d at 361.

Second, Plaintiffs argue they have standing to sue Penny Clarkston, the District Clerk for Smith County, and the Court erred in concluding otherwise. Specifically, Plaintiffs contend that a "declaratory judgment that sets forth that Chapter 11 is unconstitutional on its face"—which they request in their complaint, Docket No. 1 ¶ 171—will redress their alleged injury, because it will halt enforcement of Chapter 11 by clerks like Clarkston. Docket No. 49 at 6.

But a declaratory judgment is not a workaround that permits Plaintiffs to bypass Article III's requirements—they must still show that a judgment against Clarkston would redress their claimed injury. *California v. Texas*, 141 S. Ct. 2104, 2115 (2021) ("[J]ust like suits for every other type of remedy, declaratory-judgment actions must satisfy Article III's case-or-controversy requirement."); *Okpalobi v. Foster*, 244 F.3d 405, 431 (5th Cir. 2001) (en banc) (Higginbotham, J., concurring)

("Lack of standing disposes of this case regardless of the relief sought—injunctive or declaratory."). And, as the Court explained, a judgment against Clarkston would *not* redress their injury because even if Clarkston momentarily permitted them to file new lawsuits, Plaintiffs would be "subject to contempt of court" and their suits would be immediately dismissed. Docket No. 46 at 10–12; *see also California v. Texas*, 141 S. Ct. at 2115 (finding plaintiff lacked standing to seek a declaratory judgment that the challenged provision was unconstitutional); *K.P. v. LeBlanc*, 729 F.3d 427, 437 (5th Cir. 2013) (same where plaintiffs sought injunction and judgment declaring state law unconstitutional because "enjoining the [defendants] from 'enforcing' the cause of action" would not redress injury); *Planned Parenthood of Greater Tex. Surgical Health Servs. v. City of Lubbock*, 542 F. Supp. 3d 465, 480 (N.D. Tex. 2021) (same where "an order from the Court enjoining the city or declaring the law invalid would, for redressability purposes, be 'utterly meaningless.'"). Accordingly, Plaintiffs' second argument is meritless.

Third, Plaintiffs complain about the Court's citation to Magistrate Judge Hightower's report and recommendation in prior litigation involveing Plaintiffs' counsel, Mary Louise Serafine. Docket No. 7–16. It is not a "manifest error of law" to acknowledge related litigation, which here included a 34-page written opinion in a nearly identical case rejecting Plaintiffs' claims. Contrary to Plaintiffs' suggestion, moreover, the Court did not rely on facts in the report and recommendation in issuing the Order here.

III.

Accordingly, Plaintiffs have failed to identify any "manifest error of law" in support of their motion. The Court DENIES the motion to alter or amend the judgment (Docket No. 49).

Signed this 18th day of July, 2023

/s/ Jeremy D. Kernodle
U.S. District Judge

MEMORANDUM OPINION AND ORDER GRANTING MOTIONS TO DISMISS, U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS TYLER DIVISION (MAY 30, 2023)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

CHRISTINE REULE, ET AL.,

Plaintiffs,

v.

AUSTIN REEVE JACKSON, ET AL.,

Defendants.

Case No. 6:22-cv-367-JDK

Before: Jeremy D. KERNODLE, U.S. District Judge.

MEMORANDUM OPINION AND ORDER GRANTING MOTIONS TO DISMISS

Plaintiffs in this case challenge the constitutionality of Chapter 11 of the Texas Civil Practice and Remedies Code, which governs "vexatious litigants." Defendants are state judicial and executive officials authorized to act under Chapter 11.

Defendants move to dismiss the action under Federal Rule of Civil Procedure 12. They argue Plaintiffs

lack standing, Defendants are entitled to sovereign and judicial immunity, and abstention doctrines warrant dismissal. Docket Nos. 14, 15. Defendants also argue Plaintiffs fail to state a claim because there is no "right to file frivolous litigation," and other courts have already rejected Plaintiffs' constitutional arguments. Docket No. 14 at 23–31 (citing *Bill Johnson's Rests., Inc. v. N.L.R.B.*, 461 U.S. 731, 743 (1983)). The Court heard oral argument on the motions on May 10, 2023.

As explained below, the Court holds that Plaintiffs do not have standing to sue these Defendants. In particular, Plaintiffs have not identified an injury fairly traceable to, or likely to be redressed by a favorable ruling against, the non-judicial Defendants. And Plaintiffs lack a case or controversy against the remaining judicial Defendant.

Accordingly, the Court lacks subject matter jurisdiction and grants Defendants' motions to dismiss.

I.

Chapter 11 of the Texas Civil Practice and Remedies Code was enacted in 1997 to restrict frivolous and vexatious litigation. Act of June 17, 1997, 75th Leg., R.S., ch. 86, 1997 Tex. Gen. Laws 2634 (codified at TEX. CIV. PRAC. & REM. CODE §§ 11.001, *et seq.*). Plaintiffs are individuals found to be "vexatious litigants" under Chapter 11. They argue that the statute violates the U.S. Constitution.

A.

Chapter 11 provides criteria for determining if a plaintiff is a "vexatious litigant" and empowers state

courts to prohibit such litigants from filing new lawsuits pro se without permission.

A court may find a plaintiff vexatious if, after notice and a hearing, the defendant shows "there is not a reasonable probability that the plaintiff will prevail in the litigation against the defendant" and any one of the following requirements:

(1) the plaintiff, in the seven-year period immediately preceding the date the defendant makes the motion under Section 11.051, has commenced, prosecuted, or maintained at least five litigations as a pro se litigant other than in a small claims court that have been:

(A) finally determined adversely to the plaintiff;

(B) permitted to remain pending at least two years without having been brought to trial or hearing; or

(C) determined by a trial or appellate court to be frivolous or groundless under state or federal laws or rules of procedure;

(2) after a litigation has been finally determined against the plaintiff, the plaintiff repeatedly relitigates or attempts to relitigate, pro se, either:

(A) the validity of the determination against the same defendant as to whom the litigation was finally determined; or

(B) the cause of action, claim, controversy, or any of the issues of fact or law determined or concluded by the final determination against

the same defendant as to whom the litigation was finally determined; or

(3) the plaintiff has previously been declared to be a vexatious litigant by a state or federal court in an action or proceeding based on the same or substantially similar facts, transition, or occurrence.

TEX. CIV. PRAC. & REM. § 11.054.

If a court finds a plaintiff vexatious, the court may "enter an order prohibiting [the plaintiff] from filing, pro se, a new litigation . . . without permission of the appropriate local administrative judge." *Id.* § 11.101(a). The plaintiff may appeal this "prefiling order . . . designating the person a vexatious litigant." *Id.* § 11.101(c). A plaintiff who violates the order is subject to contempt of court. *Id.* § 11.101(b).

The local administrative judge may permit a vexatious litigant to file a new lawsuit pro se "only if it appears to the judge that the litigation: (1) has merit; and (2) has not been filed for the purposes of harassment or delay." *Id.* § 11.102(d).[1] If the judge denies permission, the litigant "may apply for a writ of mandamus with the court of appeals." *Id.* § 11.102(f). The judge "may make a determination on the request with or without a hearing." *Id.* § 11.102(c).

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[1] Local administrative judges are a statutory creation. TEX. GOV'T CODE §§ 74.091–.092. One district judge from each county serves as the local administrative judge. *Id.* § 74.091(a). In counties with two or more district courts, the judges of those courts elect a district judge to serve as the local administrative judge. *Id.* § 74.091(b). In counties with one district court, the judge of that court serves as the local administrative judge. *Id.* § 74.091(c).

Chapter 11 also mandates that a "clerk of court may not file a litigation, original proceeding, appeal, or other claim presented, pro se, by a vexatious litigant subject to a prefiling order" unless the litigant has obtained the permission from the local administrative judge. *Id.* § 11.103(a).

And finally, Chapter 11 requires the Texas Office of Court Administration to "post on the agency's Internet website a list of vexatious litigants subject to prefiling orders under Section 11.101." *Id.* § 11.104(b). The office may not remove the name of a vexatious litigant from the website unless it "receives a written order from the court that entered the prefiling order or from an appellate court." *Id.* § 11.104(c).

B.

Plaintiffs are six individuals whom Texas courts have declared vexatious litigants under Chapter 11. Docket No. 1 ¶¶ 12–17. Plaintiffs sue under 42 U.S.C. § 1983, claiming Chapter 11 violates the First and Fourteenth Amendments both facially and as applied to them. *Id.* at 1. In particular, Plaintiffs contend Chapter 11 is an unlawful prior restraint, denies them due process, violates "equal protection," and is "arbitrary and capricious." *Id.* ¶¶ 122–70.

Defendants are Judge Austin Reeve Jackson, the administrative judge of Smith County, Texas; Penny Clarkston, the District Clerk for Smith County; and Megan LaVoie, the Administrative Director of the Office of Court Administration. *Id.* ¶¶ 18–26. Plaintiffs claim these defendants enforce Chapter 11. *See id.* ¶¶ 18–29. Pursuant to Rule 23, Plaintiffs seek to certify two classes of defendants, one comprised of all Texas local administrative judges, and the other

comprised of all district clerks in Texas. Docket No. 30 at 1.

Plaintiffs seek a declaratory judgment stating that Chapter 11 is unconstitutional, and they ask the Court to enjoin LaVoie and the defendant classes "from enforcing Chapter 11 against Plaintiffs and those similarly situated." Docket No. 1 ¶ 175.

C.

Plaintiffs are represented by Mary Louise Serafine, a vexatious litigant who previously challenged the constitutionality of Chapter 11. On January 8, 2021, a Texas state court found Serafine to be a vexatious litigant based on her multiple lawsuits against former neighbors and the judges presiding over those cases. *Order Dated January 8, 2021*, *Serafine v. Crump*, No. D-1-GN-19-002601 (345th Dist. Ct., Travis Cnty., Tex.); *see also Serafine v. LaVoie*, 2022 WL 229364, at *1–3 (W.D. Tex. Jan. 26, 2022) (detailing Serafine's litigation history). The court entered a prefiling order under Chapter 11 preventing her from filing new pro se litigation.

Serafine challenged the constitutionality of Chapter 11 in the U.S. District Court for the Western District of Texas in a case nearly identical to the one here. *Serafine v. LaVoie*, 2022 WL 229364, at *1–3. In that case, Serafine sued the Travis County local administrative judge and district clerk, LaVoie, Chief Justice Nathan Hecht, Governor Greg Abbott, and Attorney General Ken Paxton. *Id.* at *3. After Serafine voluntarily dismissed Governor Abbott and General Paxton, Magistrate Judge Susan Hightower issued a report recommending dismissal of all remaining defendants. *Id.* at *17.

Twelve days later—and before the District Judge adopted the recommendation—Serafine voluntarily dismissed the case. *Plaintiff's Notice of Dismissal of All Parties*, *Serafine v. LaVoie*, No. 1:20-cv-1249 (W.D. Tex. Feb. 7, 2022), ECF No. 119. At a hearing before this Court, Serafine explained "we did not want Judge Pitman to adopt that recommendation because we thought it was wrong." Hearing Tr. 5/10/2023 at 33:17–19. She further explained, "So we thought [Judge Hightower's] opinion was biased and also erroneous and that she completely misdescribed the law of abstention in the Fifth Circuit," *id.* at 34:6–8, and later stated that the recommendation "was wholly wrong," *id.* at 35:18–19.

II.

"The first jurisdictional question is whether the plaintiffs have standing" to challenge Chapter 11. *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 178 (5th Cir. 2020); *see also DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 340–41 (2006) ("If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so."). Article III of the U.S. Constitution limits federal courts to deciding only "cases" or "contro versies," which ensures that the judiciary "respects the proper—and properly limited—role of the courts in a democratic society." *DaimlerChrysler*, 547 U.S. at 341 (cleaned up); *see also Raines v. Byrd*, 521 U.S. 811, 829 (1997) ("Our regime contemplates a more restricted role for Article III courts . . . 'not some amorphous general supervision of the operations of government.'" (quoting *United States v. Richardson*, 418 U.S. 166, 192 (1974))).

"[A]n essential and unchanging part of the case-or-controversy requirement of Article III" is that the plaintiff has standing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). The standing requirement is not subject to waiver and requires strict compliance. *E.g.*, *Lewis v. Casey*, 518 U.S. 343, 349 n.1 (1996). Article III standing requires a plaintiff to show: (1) he "has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical"; (2) "the injury is fairly traceable to the challenged action of the defendant"; and (3) "it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *El Paso Cnty. v. Trump*, 982 F.3d 332, 336 (5th Cir. 2020) (quoting *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000)). "The party invoking federal jurisdiction bears the burden of establishing these elements." *Lujan*, 504 U.S. at 561.

Here, Plaintiffs do not have standing. As an initial matter, the Court assumes that Plaintiffs alleged an injury—the inability to file meritorious "litigation and to access the courts . . . without the [local administrative judge's] permission." Hearing Tr. 5/10/2023 at 17:23–18:1; Docket No. 1 ¶ 119 (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Although Plaintiffs do not identify any meritorious litigation blocked by an administrative judge—and in fact, one Plaintiff received permission to file a name-change petition, Hearing Tr. 5/10/2023 at 18:2–4—Defendants do not dispute that Plaintiffs have identified a cognizable injury for Article III purposes.

The problem for Plaintiffs, however, is that they have not satisfied Article III's remaining requirements for standing. *Williams v. Parker*, 843 F.3d 617, 621

(5th Cir. 2016) ("If the party invoking federal jurisdiction fails to establish any one of injury in fact, causation, or redressability, then federal courts cannot hear the suit.").

The Court addresses this problem with each Defendant in turn.

A.

First, Megan LaVoie, the Administrative Director of Court Administration. LaVoie's sole duty under Chapter 11 is to compile the list of vexatious litigants subject to a prefiling order for publication on her agency's website. *See* CIV. PRAC. & REM. § 11.104(b). LaVoie does not declare a litigant vexatious, issue prefiling orders, or decide whether vexatious litigants may file new lawsuits. *See id.* Nor may LaVoie remove a litigant from the vexatious-litigant list without a court order. *Id.* § 11.104(c).

Given LaVoie's limited role under Chapter 11, Plaintiffs cannot show that their claimed injury is "fairly traceable" to LaVoie or is likely to be "redressed by a favorable decision" against her. *El Paso Cnty.*, 982 F.3d at 336. "Standing requires a 'causal connection between the injury and the conduct complained of.'" *Cameron Cnty. Hous. Auth. v. City of Port Isabel*, 997 F.3d 619, 623 (5th Cir. 2021) (quoting *Lujan*, 504 U.S. at 560). And, here, Plaintiffs' claimed injury is the inability to file a new pro se lawsuit without the permission of a local administrative judge—which has nothing to do with LaVoie's publishing a list of vexatious litigants. *See id.* (holding causation "is lacking where 'the challenged action of the defendant [is] . . . the result of the independent action of some third party not before the court."); *Serafine v. LaVoie*,

2022 WL 229364, at *10 (dismissing LaVoie for lack of causation). Rather, the restriction on filing new lawsuits results from prefiling orders issued by various judges. *See* § 11.101(a).

Plaintiffs claim that if LaVoie "did not create and update the list, . . . Chapter 11 would be of no effect." Docket No. 1 ¶ 25. Not so. Even without LaVoie's list, Plaintiffs would be subject to prefiling orders prohibiting them from filing new lawsuits pro se without permission. *See* § 11.101(a). An order against LaVoie in this case would therefore not give Plaintiffs the relief they want. *See, e.g.*, *El Paso Cnty.*, 982 F.3d at 343 (plaintiff lacks standing where an order granting the requested relief "would not rescind," and "accordingly would not redress," the alleged harm); *Stewart v. Wells*, 2020 WL 3146866, at *3 (N.D. Tex. May 26) (holding that plaintiff challenging the constitutionality of the Texas Family Code's "best interest of child" standard lacked standing to sue state officials where "[n]one of the defendants have the authority to change the statute or affect the way in which the courts apply it"), *report and recommendation adopted*, 2020 WL 3129645 (N.D. Tex. June 12, 2020).

Accordingly, Plaintiffs do not have standing to sue LaVoie. *See, e.g.*, *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 400 (5th Cir. 2020) (dismissing Governor Abbott for lack of causation where he had no power to determine who qualified for mail-in voting); *Serafine v. LaVoie*, 2022 WL 229364, at *10.

B.

A similar analysis applies to Penny Clarkston, the District Clerk for Smith County. Chapter 11 prohibits Clarkston—and all district clerks in Texas—

from filing new pro se litigation by vexatious litigants subject to a prefiling order "unless the litigant obtains an order from the appropriate local administrative judge." § 11.103(a). Like LaVoie, the clerks do not declare litigants vexatious, issue prefiling orders, or decide whether vexatious litigants may file new lawsuits. *See id*.

Thus, as with LaVoie, Plaintiffs cannot show that their claimed injury is "fairly traceable" to Clarkston's conduct or is likely to be "redressed by a favorable decision" against her. *El Paso Cnty.*, 982 F.3d at 336; *Serafine v. LaVoie*, 2022 WL 229364, at *13 (dismissing Travis County district clerk for lack of causation and redressability). Plaintiffs argue that an injunction against Clarkston and the putative class of clerks would stop the rejection of their filings, fulfilling the redressability requirement. Docket No. 21 at 9–10. But Plaintiffs would still be subject to prefiling orders prohibiting them from filing new pro se lawsuits without permission. § 11.101(a); *see also, e.g.*, *Reule v. Chism*, No. 18-1817-C, at *2 (241st Dist. Ct., Smith County, Tex. May 21, 2019) (imposing "prohibition" on named Plaintiff Christine Reule from "filing additional litigation"). Plaintiffs concede they do not "seek[] to appeal and overturn the vexatiousness orders against them." *See* Docket No. 21 at 14. Accordingly, an injunction against Clarkston would not "serve . . . to eliminate any effects of" the conduct giving rise to their injury. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 105–06 (1998); *see also El Paso Cnty.*, 982 F.3d at 343; *Coastal Habitat All. v. Patterson*, 601 F. Supp. 2d 868, 881 (W.D. Tex. 2008), *as amended* (May 22, 2009) ("[Plaintiff] does not ask the Court to command the State Defendants to conduct consistency

review. The [plaintiff's] requested relief therefore does not lead to a reasonable inference that the injury of deprivation of consistency review will be removed. . . . "); *Cherry v. F.C.C.*, 641 F.3d 494, 498 (D.C. Cir. 2011) ("[T]he relief that this court might give [plaintiff] would not remedy the injuries alleged, because this court has no authority over Zwirn's foreclosure action or the New York court's appointment of a receiver."); *Cnty. of Del. v. Dep't of Transp.*, 554 F.3d 143, 150 (D.C. Cir. 2009) (finding no redressability where "air-space redesigns" responsible for plaintiff's harm would remain in place even if the court vacated defendant's action).

To be sure, an injunction against Clarkston would allow Plaintiffs' new suits to be docketed—for a moment. But until Plaintiffs received the administrative judge's permission, they would be "subject to contempt of court" and their suits would be immediately dismissed. § 11.101(b); § 11.1035(a)–(b) (directing courts to "immediately stay" and "dismiss" any litigation filed by vexatious litigants in violation of a prefiling order). Indeed, Texas courts routinely dismiss cases filed by vexatious litigants who, often by clerk error, momentarily succeed in filing a new lawsuit. *Nunu v. Risk*, 612 S.W.3d 645, 652 (Tex. App.—Houston [14th Dist.] 2020, pet. denied).[2]

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[2] *See also, e.g.*, *Ratcliff v. Jenkins & Young PC*, 2022 WL 17168389, at *1 (Tex. App.—Amarillo Nov. 22, 2022, no pet.); *Reeves v. Cent. Hous. Nissan*, 617 S.W.3d 676, 678 (Tex. App.—Houston [14th Dist.] 2021, no pet.); *Leonard v. Paxton*, 2020 WL 1814614, at *2 (Tex. App.—Austin Apr. 10, 2020, no pet.); *Moody v. Success Holding, LLC*, 2018 WL 650274, at *2 (Tex. App.—Houston [1st Dist.] Feb. 1, 2018, no pet.); *Barnes v. Donihoo*, 2017 WL 6062296, at *2 (Tex. App.—Texarkana Dec. 8, 2017, no pet.); *Serrano v.*

Plaintiffs therefore lack standing to sue Clarkston.

C.

This leaves Local Administrative Judge Austin Reeve Jackson. The problem with suing Judge Jackson, however, is that "'no case or controversy' exists 'between a judge who adjudicates claims under a statute and a litigant who attacks the constitutionality of the statute.'" *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 532 (2021) (quoting *Pulliam v. Allen*, 466 U.S. 522, 538 n.18 (1984)); *see also Bauer v. Texas*, 341 F.3d 352, 359 (5th Cir. 2003). Thus, a judge acting in an "adjudicative capacity . . . is not a proper party in a section 1983 action challenging the constitutionality of a state statute." *Bauer*, 341 F.3d at 359; *see also Whole Woman's Health*, 142 S. Ct. at 532–33. This is so because "judges do not have a sufficiently personal stake in the outcome of the controversy as to assure that concrete adverseness.'" *Bauer*, 341 F.3d at 359 (cleaned up).

And here, Judge Jackson is acting in an adjudicatory capacity when he considers whether to permit a new lawsuit from a vexatious litigant. Under Chapter 11, Judge Jackson "may grant permission" "only if it appears to the judge that the litigation (1) has merit; and (2) has not been filed for the purposes of harassment or delay." § 11.102(d). Evaluating the merit and purpose of a lawsuit under these circumstances is a quintessential adjudicatory function. *Bauer*, 341 F.3d at 360 (holding that judge acted in adjudicatory capacity when determining probable cause to grant

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Lone Star Title Co., 2016 WL 155888, at *1 (Tex. App.—El Paso Jan. 13, 2016, no pet.).

guardian ad litem applications); *Brandon E. ex rel. Listenbee v. Reynolds*, 201 F.3d 194, 199 (3d Cir. 2000) (same where judge considered both "sufficient facts" and "good reason" to grant requests for commitment to substance-abuse treatment); *Lindke v. Tomlinson*, 31 F.4th 487, 493 (6th Cir. 2022) (same where judge determined "reasonable cause" to grant request for domestic protective order). A local administrative judge proceeding under Chapter 11, moreover, may make this determination "with or without a hearing" and "may condition permission on the furnishing of security for the benefit of the defendant." § 11.102(c), (d). If the judge denies the request, the vexatious litigant may apply for a writ of mandamus. § 11.102(f).

Courts have held that judges conducting similar proceedings are acting in an adjudicatory capacity. *Bauer*, 341 F.3d at 360–61; *In re Justs. of Sup. Ct. of P.R.*, 695 F.2d 17, 21 (1st Cir. 1982) (Breyer, J.) (holding that judges acted in adjudicatory capacity when presiding over disbarment proceedings after an attorney's failure to pay bar-membership dues); *Campaign for S. Equal. v. Miss. Dep't of Hum. Servs.*, 175 F. Supp. 3d 691, 699 (S.D. Miss. 2016) (same for judges reviewing adoption petitions); *Cerigny v. Cappadora*, 2018 WL 11446157, at *1 (E.D. La. Aug. 3, 2018) (same for eviction proceedings); *Ortiz v. Foxx*, 596 F. Supp. 3d 1100, 1109 (N.D. Ill. 2022) (same for name-change petitions). Indeed, the procedural safeguards and limitations provided by Chapter 11 highlight the adjudicatory nature of the proceeding. *Bauer*, 341 F.3d at 360–61 ("[J]udicial determinations pursuant to [the guardian ad litem statute] are . . . clearly within a judge's adjudicatory capacity, as this statute requires notice and a hearing, among other

safeguards and limitations."); *cf. In re Justs. of Sup. Ct. of P.R.*, 695 F.2d at 23 (suggesting that judges act within their adjudicatory capacity when they act pursuant to state statutes as opposed to court rules).

Accordingly, no "case or controversy" exists between "adverse litigants," and Judge Jackson must be dismissed. *Whole Woman's Health*, 142 S. Ct. at 532.

* * *

Plaintiffs repeatedly cite *Wolfe v. Strankman*, 392 F.3d 358 (9th Cir. 2004), which permitted a plaintiff challenging California's vexatious litigant statute to sue defendants acting similarly to Defendants here. But the court in *Wolfe* failed to address the causation, redressability, or case-and-controversy problems that hamstring Plaintiffs' suit. The Court finds the opinion unpersuasive.

Accordingly, the Court GRANTS Defendants' motions to dismiss. Docket Nos. 14, 15. Because the Plaintiffs do not have standing, the Court need not address Defendants' alternative arguments for dismissal. *Smiley v. Oxford Cap., LLC*, 100 F. App'x 970, 974 (5th Cir. 2004).

Further, the Court DENIES as moot Plaintiffs' motion for class certification. Docket No. 30; *see Rivera v. Wyeth-Ayerst Labs.*, 283 F.3d 315, 321–22 (5th Cir. 2002) ("Because this suit does not present a justiciable case or controversy under Article III, we do not reach the class certification question and intimate no view on its merits."); *Flecha v. Medicredit, Inc.*, 946 F.3d 762, 769 (5th Cir. 2020) ("[I]f the class representative[s] lacks standing, then there is no Article III suit to begin with—class certification or otherwise.).

So ORDERED and SIGNED this 30th day of May, 2023.

/s/ Jeremy D. Kernodle
U.S. District Judge

ORDER DENYING PETITION FOR REHEARING, U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT (SEPTEMBER 23, 2024)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CHRISTINE REULE; HARRIET NICHOLSON; REBECCA ALEXANDER FOSTER; JIMMY LEE MENIFEE; TONY LAMAR VANN; HONORABLE MADELEINE CONNOR,

Plaintiffs-Appellants,

v.

HONORABLE REEVE JACKSON; PENNY CLARKSTON; MEGAN LAVOIE,

Defendants-Appellees.

No. 23-40478

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 6:22-CV-367

Before: SMITH, ENGELHARDT, and RAMIREZ, Circuit Judges.

ON PETITION FOR REHEARING EN BANC

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5th Cir. R. 35 I.O.P.), the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (Fed. R. App. P. 35 and 5th Cir. R. 35), the petition for rehearing en banc is DENIED.

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; the Fourteenth Amendment of the U.S. Constitution; and Chapter 11 of the Texas Civil Practice & Remedies Code.

* * *

Article III, section 2 of the U.S. Constitution states:

> 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.

* * *

The Fourteenth Amendment in relevant part provides:

> 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.

* * *

Section 1983 of Title 42, as amended in 1996, provides in relevant part:

§ 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. []

42 U.S.C. § 1983

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Chapter 11 of the Texas Civil Practice & Remedies Code

CIVIL PRACTICE AND REMEDIES CODE

TITLE 2. TRIAL, JUDGMENT, AND APPEAL

SUBTITLE A. GENERAL PROVISIONS

CHAPTER 11. VEXATIOUS LITIGANTS

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 11.001. DEFINITIONS. In this chapter:

(1) "Defendant" means a person or governmental entity against whom a plaintiff commences or maintains or seeks to commence or maintain a litigation.

(2) "Litigation" means a civil action commenced, maintained, or pending in any state or federal court.

(3) Repealed by Acts 2013, 83rd Leg., R.S., Ch. 1224, Sec. 10, eff. September 1, 2013.

(4) "Moving defendant" means a defendant who moves for an order under Section 11.051 determining that a plaintiff is a vexatious litigant and requesting security.

(5) "Plaintiff" means an individual who commences or maintains a litigation pro se.

Sec. 11.002. APPLICABILITY. (a) This chapter does not apply to an attorney licensed to practice law in this state unless the attorney proceeds pro se.

(b) This chapter does not apply to a municipal court.

SUBCHAPTER B. VEXATIOUS LITIGANTS

Sec. 11.051. MOTION FOR ORDER DETERMINING PLAINTIFF A VEXATIOUS LITIGANT AND REQUESTING SECURITY.

In a litigation in this state, the defendant may, on or before the 90th day after the date the defendant files the original answer or makes a special appearance, move the court for an order:

(1) determining that the plaintiff is a vexatious litigant; and

(2) requiring the plaintiff to furnish security.

Sec. 11.052. STAY OF PROCEEDINGS ON FILING OF MOTION.

(a) On the filing of a motion under Section 11.051, the litigation is stayed and the moving defendant is not required to plead:

(1) if the motion is denied, before the 10th day after the date it is denied; or

(2) if the motion is granted, before the 10th day after the date the moving defendant receives written notice that the plaintiff has furnished the required security.

(b) On the filing of a motion under Section 11.051 on or after the date the trial starts, the litigation is stayed for a period the court determines.

Sec. 11.053. HEARING.

(a) On receipt of a motion under Section 11.051, the court shall, after notice to all parties,

conduct a hearing to determine whether to grant the motion.

(b) The court may consider any evidence material to the ground of the motion, including:

(1) written or oral evidence; and

(2) evidence presented by witnesses or by affidavit.

Sec. 11.054. CRITERIA FOR FINDING PLAINTIFF A VEXATIOUS LITIGANT.

A court may find a plaintiff a vexatious litigant if the defendant shows that there is not a reasonable probability that the plaintiff will prevail in the litigation against the defendant and that:

(1) the plaintiff, in the seven-year period immediately preceding the date the defendant makes the motion under Section 11.051, has commenced, prosecuted, or maintained at least five litigations as a pro se litigant other than in a small claims court that have been:

(A) finally determined adversely to the plaintiff;

(B) permitted to remain pending at least two years without having been brought to trial or hearing; or

(C) determined by a trial or appellate court to be frivolous or groundless under state or federal laws or rules of procedure;

(2) after a litigation has been finally determined against the plaintiff, the plaintiff repeatedly

relitigates or attempts to relitigate, pro se, either:

(A) the validity of the determination against the same defendant as to whom the litigation was finally determined; or

(B) the cause of action, claim, controversy, or any of the issues of fact or law determined or concluded by the final determination against the same defendant as to whom the litigation was finally determined; or

(3) the plaintiff has previously been declared to be a vexatious litigant by a state or federal court in an action or proceeding based on the same or substantially similar facts, transition, or occurrence.

Sec. 11.055. SECURITY.

(a) A court shall order the plaintiff to furnish security for the benefit of the moving defendant if the court, after hearing the evidence on the motion, determines that the plaintiff is a vexatious litigant.

(b) The court in its discretion shall determine the date by which the security must be furnished.

(c) The court shall provide that the security is an undertaking by the plaintiff to assure payment to the moving defendant of the moving defendant's reasonable expenses incurred in or in connection with a litigation commenced, caused to be commenced, maintained, or caused to be maintained by the plaintiff, including costs and attorney's fees.

Sec. 11.056. DISMISSAL FOR FAILURE TO FURNISH SECURITY.

The court shall dismiss a litigation as to a moving defendant if a plaintiff ordered to furnish security does not furnish the security within the time set by the order.

Sec. 11.057. DISMISSAL ON THE MERITS.

If the litigation is dismissed on its merits, the moving defendant has recourse to the security furnished by the plaintiff in an amount determined by the court.

SUBCHAPTER C. PROHIBITING FILING OF NEW LITIGATION

Sec. 11.101. PREFILING ORDER; CONTEMPT.

(a)A court may, on its own motion or the motion of any party, enter an order prohibiting a person from filing, pro se, a new litigation in a court to which the order applies under this section without permission of the appropriate local administrative judge described by Section 11.102(a) to file the litigation if the court finds, after notice and hearing as provided by Subchapter B, that the person is a vexatious litigant.

(b) A person who disobeys an order under Subsection (a) is subject to contempt of court.

(c) A litigant may appeal from a prefiling order entered under Subsection (a) designating the person a vexatious litigant.

(d) A prefiling order entered under Subsection (a) by a justice or constitutional county court applies only to the court that entered the order.

(e) A prefiling order entered under Subsection (a) by a district or statutory county court applies to each court in this state.

Sec. 11.102. PERMISSION BY LOCAL ADMINISTRATIVE JUDGE.

(a) A vexatious litigant subject to a prefiling order under Section 11.101 is prohibited from filing, pro se, new litigation in a court to which the order applies without seeking the permission of:

(1) the local administrative judge of the type of court in which the vexatious litigant intends to file, except as provided by Subdivision (2); or

(2) the local administrative district judge of the county in which the vexatious litigant intends to file if the litigant intends to file in a justice or constitutional county court.

(b) A vexatious litigant subject to a prefiling order under Section 11.101 who files a request seeking permission to file a litigation shall provide a copy of the request to all defendants named in the proposed litigation.

(c) The appropriate local administrative judge described by Subsection (a) may make a determination on the request with or without a hearing. If the judge determines that a hearing is necessary, the judge may require that the vexatious litigant filing a request under Subsection (b) provide notice of the hearing to all defendants named in the proposed litigation.

(d) The appropriate local administrative judge described by Subsection (a) may grant permission to a

vexatious litigant subject to a prefiling order under Section 11.101 to file a litigation only if it appears to the judge that the litigation:

(1) has merit; and

(2) has not been filed for the purposes of harassment or delay.

(e) The appropriate local administrative judge described by Subsection (a) may condition permission on the furnishing of security for the benefit of the defendant as provided in Subchapter B.

(f) A decision of the appropriate local administrative judge described by Subsection (a) denying a litigant permission to file a litigation under Subsection (d), or conditioning permission to file a litigation on the furnishing of security under Subsection (e), is not grounds for appeal, except that the litigant may apply for a writ of mandamus with the court of appeals not later than the 30th day after the date of the decision. The denial of a writ of mandamus by the court of appeals is not grounds for appeal to the supreme court or court of criminal appeals.

Sec. 11.103. DUTIES OF CLERK.

(a) Except as provided by Subsection (d), a clerk of a court may not file a litigation, original proceeding, appeal, or other claim presented, pro se, by a vexatious litigant subject to a prefiling order under Section 11.101 unless the litigant obtains an order from the appropriate local administrative judge described by Section 11.102(a) permitting the filing.

(b) Repealed by Acts 2013, 83rd Leg., R.S., Ch. 1224, Sec. 10, eff. September 1, 2013.

(c) If the appropriate local administrative judge described by Section 11.102(a) issues an order permitting the filing of the litigation, the litigation remains stayed and the defendant need not plead until the 10th day after the date the defendant is served with a copy of the order.

(d) A clerk of a court of appeals may file an appeal from a prefiling order entered under Section 11.101 designating a person a vexatious litigant or a timely filed writ of mandamus under Section 11.102.

Sec. 11.1035. MISTAKEN FILING.

(a) If the clerk mistakenly files litigation presented, pro se, by a vexatious litigant subject to a prefiling order under Section 11.101 without an order from the appropriate local administrative judge described by Section 11.102(a), any party may file with the clerk and serve on the plaintiff and the other parties to the litigation a notice stating that the plaintiff is a vexatious litigant required to obtain permission under Section 11.102 to file litigation.

(b) Not later than the next business day after the date the clerk receives notice that a vexatious litigant subject to a prefiling order under Section 11.101 has filed, pro se, litigation without obtaining an order from the appropriate local administrative judge described by Section 11.102(a), the clerk shall notify the court that the litigation was mistakenly filed. On receiving notice from the clerk, the court shall immediately stay the litigation and shall dismiss the litigation unless the plaintiff, not later than the 10th day after the date the notice is filed, obtains an order from the appropriate local administrative judge described by Section 11.102(a) permitting the filing of the litigation.

(c) An order dismissing litigation that was mistakenly filed by a clerk may not be appealed.

Sec. 11.104. NOTICE TO OFFICE OF COURT ADMINISTRATION; DISSEMINATION OF LIST.

(a) A clerk of a court shall provide the Office of Court Administration of the Texas Judicial System a copy of any prefiling order issued under Section 11.101 not later than the 30th day after the date the prefiling order is signed.

(b) The Office of Court Administration of the Texas Judicial System shall post on the agency's Internet website a list of vexatious litigants subject to prefiling orders under Section 11.101. On request of a person designated a vexatious litigant, the list shall indicate whether the person designated a vexatious litigant has filed an appeal of that designation.

(c) The Office of Court Administration of the Texas Judicial System may not remove the name of a vexatious litigant subject to a prefiling order under Section 11.101 from the agency's Internet website unless the office receives a written order from the court that entered the prefiling order or from an appellate court. An order of removal affects only a prefiling order entered under Section 11.101 by the same court. A court of appeals decision reversing a prefiling order entered under Section 11.101 affects only the validity of an order entered by the reversed court.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF (SEPTEMBER 19, 2022)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION
Jury

CHRISTINE REULE, HARRIET NICHOLSON, REBECCA FOSTER, JIMMY LEE MENIFEE, TONY LAMAR VANN, AND THE HONORABLE MADELEINE CONNOR,

Plaintiffs,

v.

THE HONORABLE JACK SKEEN, JR., IN HIS OFFICIAL CAPACITY AS LOCAL ADMINISTRATIVE JUDGE OF SMITH COUNTY, TEXAS, AND ON BEHALF OF THE CLASS OF ALL LOCAL ADMINISTRATIVE JUDGES IN TEXAS SIMILARLY SITUATED; PENNY CLARKSTON, IN HER OFFICIAL CAPACITY AS DISTRICT CLERK OF SMITH COUNTY, TEXAS, AND ON BEHALF OF THE CLASS OF ALL CLERKS OF COURT IN TEXAS SIMILARLY SITUATED; AND MEGAN LAVOIE, ADMINISTRATIVE DIRECTOR OF THE OFFICE OF COURT ADMINISTRATION OF TEXAS,

Defendants.

Civil Action No. 22-367

Demand for Jury Trial filed separately

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

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COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs Christine Reule, Harriet Nicholson, Rebecca Foster, Jimmy Lee Menifee, Tony Lamar Vann, and the Honorable Madeleine Connor, seeking to vindicate their civil rights, allege that Chapter 11 (Chapter 11) of the Texas Civil Practice & Remedies Code (CPRC)—a law titled "Vexatious Litigants"—violates the Constitution, offending the First and Fourteenth Amendments. Plaintiffs sue under the Civil Rights Act of 1871, codified at 42 U.S.C. § 1983. Plaintiffs ask the Court to declare Chapter 11 unconstitutional, on its face and as applied, in particular CPRC §§ 11.001(2), 11.052, 11.053, 11.054, 11.055,

11.056, 11.101, 11.102, 11.103, and 11.104. Plaintiffs also seek preliminary and permanent injunctions against enforcement. Chapter 11 is attached as Exhibit 1.

INTRODUCTION

1. If the Texas legislature had tried to create a procedure for blocking hundreds of citizens' access to the courts—and to streamline it by doing away with due process and the laws of evidence—it could not have done better than the Texas "Vexatious Litigants" law.

2. For citizens designated "vexatious," the law slams shut the courthouse doors *across the entire state, for the rest of the litigant's life.*[1] The purpose is to identify citizens who file vexatious suits and stop them from filing prospectively, *i.e.*, before they file such suits.

3. Astonishingly, however, the law massively over-designates, permanently depriving the rights of citizens who *have never been found to file a single "vexatious" or "frivolous" suit*. Once designated "vexatious," the citizen must ask "permission" to file a suit, but the law rigs the procedure in favor of denying it.

4. Given how dire the punishment is, one expects Chapter 11's procedures to be consistent with constitutional rights. Instead, the law is unconstitutionally overbroad, is riddled with vague terms, and facilitates arbitrary, capricious, and undisciplined application of the law to the facts.

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[1] There is only a minor exception for orders by constitutional county courts.

5. And the accused citizen is hampered in defending himself, right at the start of the proceeding, before he is even found "vexatious."

6. Chapter 11 also suspends the rules of evidence and thwarts due process.

7. In contrast to virtually all other Texas statutes, Chapter 11 specifically limits appeal.

8. Chapter 11 has desecrated the constitutional rights of some 360 Texas citizens thus far.

JURISDICTION AND VENUE

9. This Court has jurisdiction under 28 U.S.C. §§ 1331 and 1343(a).

10. The relevant events concerning the first-named plaintiff, Christine Reule, took place in the 241st District Court of Smith County, Texas. On information and belief, Defendants Skeen and Clarkston, and all members of defendant classes, reside in Texas. Named Defendants maintain offices in Smith County.

11. Venue is proper in the Tyler Division of the Eastern District of Texas under 28 U.S.C. § 1391(b)(1) and 28 U.S.C. § 124(c)(1).

PARTIES

12. Plaintiff Christine Reule resides in Smith County, Texas. On May 21, 2019, in Case No. 18-1871-C in the 241st Civil District Court of Smith County, Reule was declared a "vexatious litigant" under Chapter 11. The declaration remains in effect and, every day, it continues to violate Reule's rights.

13. Plaintiff Harriet Nicholson resides in Tarrant County, Texas. On January 5, 2022, in Cause No. DC-

21-12504 in the 162nd Judicial District Court of Dallas County, she was declared a "vexatious litigant" under Chapter 11. The declaration remains in effect and, every day, it continues to violate Nicholson's rights.

14. Plaintiff Rebecca (Alexander) Foster resides in Gregg County, Texas. On May 24, 2011, in Case No. 2006-1531-DR in the 307th Judicial District Court of Gregg County, she was declared a "vexatious litigant" under Chapter 11. The declaration remains in effect and, every day, it continues to violate Foster's rights.

15. Plaintiff Jimmy Lee Menifee resides in Dallas County, Texas. On April 12, 2021, in Cause No. CC-20-04820-C in County Court No. 3 of Dallas County, he was declared a "vexatious litigant" under Chapter 11. The declaration remains in effect and, every day, it continues to violate Menifee's rights.

16. Plaintiff Tony Lamar Vann resides in Dallas County, Texas. On September 17, 2021, in Cause No. DC-21-08738, in the 162nd Judicial District Court of Dallas County, he was declared a "vexatious litigant" under Chapter 11. The declaration remains in effect and, every day, it continues to violate Vann's rights.

17. Plaintiff the Honorable Madeleine Connor resides in Travis County, Texas. On March 8, 2019 (before she took the bench), in Cause No. D-1-GN-18-005130 in the 201st Civil District Court, of Travis County, Connor was declared a "vexatious litigant" under Chapter 11. The declaration remains in effect and, every day, it continues to violate Connor's rights.

18. Defendant the Honorable Jack Skeen, Jr. is the Local Administrative Judge (LAJ) of Smith County, Texas. As Chapter 11 sets out, Judge Skeen enforces Chapter 11 by granting or denying permission for a

"vexatious litigant" to file a *pro se* suit or appeal. Clerks of court at the trial and appellate levels will reject such a litigant's attempted filings, unless the LAJ grants permission. If Judge Skeen and other LAJs did not perform this role, Chapter 11's punishment could not be carried out.

19. Judge Skeen is not sued in his *judicial* capacity, that is, in connection with any particular decision to grant or deny permission. Instead, he is sued in his official and administrative capacities in the performance of the ministerial task of deciding whether to permit a "vexatious litigant's" *pro se* filing. He is also sued as a representative of a putative class of Texas LAJs or others with similar duties.

20. Judge Skeen may be served at the Smith County Courthouse, 100 N. Broadway, Room 220, Tyler, TX 75702 (241st District Court), Telephone 903-590-1643.

21. Defendant Penny Clarkston is the District Clerk for Smith County, Texas. In that role she accepts civil cases for filing and issues citations for service of process. Her role in enforcing and executing Chapter 11 is set forth in the statute.

22. Ms. Clarkston uses information from the Office of Court Administration to learn who has been designated a "vexatious litigant." When a "vexatious litigant" submits a *pro se* document for filing, she rejects it, unless permitted by the LAJ. If Defendant Clarkston did not perform this duty, the statute would be of no effect. Ms. Clarkston is sued in her official capacity and as a representative of a putative class of all court clerks in Texas.

23. Clerk Clarkston may be served at the Smith County Courthouse, 100 N. Broadway, Room 204, Tyler, TX 75702. Telephone 903-590-1675.

24. Defendant Megan LaVoie is the Administrative Director of the Office of Court Administration (OCA) for Texas. Her position was created by statute. Ms. LaVoie was appointed by the Texas Supreme Court and serves under the direction and supervision of the Chief Justice and the Court. Ms. LaVoie is sued in her official capacity.

25. Ms. LaVoie enforces and executes Chapter 11 by creating, updating, and disseminating the list of "vexatious litigants." CPRC § 11.104. If Ms. LaVoie did not create and update the list, and make the list available to the public on OCA's website, including to clerks, judges, and potential defendants, Chapter 11 would be of no effect.

26. Defendant LaVoie may be served at the Office of Court Administration, Texas Capitol, 205 W. 14th Street, Austin, TX 78701. Telephone 512-463-1625.

DEFENDANTS ENFORCE CHAPTER 11

27. The first step in blocking "vexatious litigants" from the courts is for the clerk to send the designating order to the Office of Court Administration (OCA). CPRC § 11.104.

28. The OCA adds the name to its "vexatious litigants" list published on its website.[2]

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[2] https://www.txcourts.gov/judicial-data/vexatious-litigants/ Accessed 9-15-2022.

29. All clerks of court across the state must reject new, *pro se* "claims" by persons on the list, unless the litigant has obtained permission from the LAJ. CPRC §§ 11.102, 11.103.

DEFENDANT CLASS ALLEGATIONS

30. Each county in Texas has at least one clerk of court. Each has the same duties under Chapter 11, which specifies how they must enforce Chapter 11. CPRC §§ 11.103, 11.1035, and 11.104. When a "vexatious litigant" submits a *pro se* paper for filing, the clerk must reject it, unless the Local Administrative Judge has given permission for it.

31. Each county also has at least one LAJ. Each has the same enforcement duties, with Chapter 11 specifying that they must stand ready to decide requests for permission to file by "vexatious litigants." CPRC §§ 11.101 and 11.102.

32. Plaintiffs ask the Court to certify two defendant classes under Federal Rule of Civil Procedure 23(b)(1)(A), or under Rule 23(b)(2).

a. One proposed class consists of all non-federal clerks of court in Texas, to be represented by Defendant Clarkston.

b. The other proposed class consists of all LAJ's in Texas state courts, to be represented by Defendant Judge Skeen.

33. In both classes, the members are so numerous—several hundred clerks and at least 254 LAJ's—that joinder of them is impracticable.

34. There are questions of law and fact common to each class. Members of each class carry out their

respective Chapter 11 duties. Not certifying the classes would risk inconsistent judgments if each class member had to be sued separately.

35. Each representative will marshal defenses typical of his class and will fairly and adequately protect the interests of it.

CHAPTER 11 IS UNCONSTITUTIONAL AS WRITTEN AND AS APPLIED

A. Chapter 11 permanently revokes a first amendment right.

36. The so-called "vexatious litigant" is stripped of his *pro se* right to petition, *in every Texas court for any reason*, *against any defendant, permanently*.[3] CPRC § 11.101(c).

37. Appeal is restricted, and no other mechanism exists to un-do the designation. *See infra.*

38. That the litigant might get "permission" to file a suit does not correct the deprivation. Certainly if one had to get permission before speaking, no one would consider it consistent with the first amendment. In any event, the standard that the litigant must meet to obtain permission is higher than in a normal filing. *See infra.*

B. Chapter 11 is arbitrary, overbroad, and vague.

39. Although Chapter 11's purpose is to stop the filing of vexatious suits, Chapter 11 *does not require*

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[3] There is only a minor exception for orders by constitutional county courts.

the court to find that the litigant has ever filed even a single vexatious suit.

40. Instead, Chapter 11 requires only that the judge meet two criteria:

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

b. 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.[4]

CPRC §§ 11.054(1)(A). The vague words in bold allow arbitrary application of Chapter 11.

41. And neither prong identifies a vexatious litigant.[5] Both are unconstitutionally vague as well as contrary to federal doctrine where, to designate a litigant vexatious, the court must "make substantive findings of frivolousness or harassment."[6] Without

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[4] Chapter 11 permits alternative methods of meeting Prong Two, but anecdotal evidence suggests the definition above is the most frequently used. In any event most of the alternatives also do not all require finding that plaintiff made vexatious filings. CPRC § 11.054.

[5] 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).

[6] *Ringgold-Lockhart v. County of Los Angeles*, 761 F.3d 1057, 1062 (9th Cir. 2014); *Farguson v. MBank Houston, N.A.*, 808 F.2d 358, 359 (5th Cir. 1986) (prefiling order was justified where plaintiff

the necessity of making that finding, Chapter 11 is unconstitutionally overbroad because it sweeps into its ambit litigants who have never been found to file a vexatious lawsuit.

C. Chapter 11 thwarts due process.

42. The Chapter 11 proceeding begins with defendant or the judge filing a motion that accuses plaintiff of being "vexatious." CPRC § 11.051. Instantly, on mere filing of the motion, the case is "stayed"; plaintiff is barred from filing anything. CPRC § 11.052.

43. He cannot move to compel witnesses to the hearing, seek discovery or anti-SLAPP protection if it were warranted, or take other steps that would be in his interest. This is so when plaintiff is merely accused, not yet found guilty of being a "vexatious litigant."

44. Yet defendant reaps benefits merely by filing the motion:

a. He is relieved of having to plead to the suit; CPRC §§ 11.052, 11.053.

b. If his motion is granted, plaintiff must furnish security to cover defendant's expected attorney's fees and costs; CPRC §§ 11.051, 11.055.

c. If plaintiff fails to furnish security, defendant wins dismissal. CPRC § 11.056.

d. Defendant can also move for a *prefiling order* to prevent plaintiff from filing other lawsuits (without permission), anywhere in the state. CPRC § 11.101.

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filed same "frivolous and irrational" complaint repeatedly against the same defendant).

45. At the same time, the dollar amount of plaintiff's security is unlimited—in one case, $422,000.00.[7] There is no consideration of plaintiff's ability to pay and no interlocutory appeal of the amount of security.

D. Chapter 11 suspends the rules of evidence.

46. Chapter 11 provides only that the judge "may consider any evidence material . . . to the motion." But there is no requirement to take offers of evidence, hear objections, and rule on admission. CPRC § 11.053.

47. Witnesses may testify "by affidavit," thereby preventing a cross-examination. *Id*.

48. In a Chapter 11 proceeding, the judge often examines no documents, admits or rejects no evidence, places no documents in the court file, and files no findings of fact or conclusions of law. With the standard of review being only abuse of discretion, successful appeal is nearly impossible.

E. Chapter 11 hobbles appeal.

49. Except by permission, many appeals of "vexatious litigant" orders are not even filed.[8]

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[7] Order of Dec. 13, 2018 in Cause No. DC-18-05278, 191st Judicial District Court of Dallas County, Texas.

[8] Clerks of court "may not file a litigation, original proceeding, appeal, or other claim presented, *pro se*, by a vexatious litigant . . . unless the litigant obtains [permission] from the appropriate [LAJ]." CPRC § 11.103(a). *McCann v. Mondragon*, No. 13-21-00186-CV (Tex. App.—Corpus Christi-Edinburgh Sept. 16, 2021) (appeal dismissed if filed . . . "without permission of a local administrative judge"); *McCray v. Glass*, No. 03-22-00162-CV (Tex. App.—Austin May 20, 2022) (same).

1. Denial of permission is itself non-appealable.

50. The LAJ may take any length of time to decide permission, with or without a hearing, and without giving reasons. Defendant may weigh in on the question. CPRC § 11.102.

51. The LAJ must refuse permission unless plaintiff's proposed filing affirmatively "has merit." CPRC § 11.102. This is a higher standard than is required in the ordinary case.

52. And a denial by the LAJ "is not grounds for appeal, except that the litigant may apply for a writ of mandamus with the court of appeals. . . . " CPRC § 11.102(f).

2. The option of mandamus is a ruse.

53. While mandamus is technically available, it too is "new litigation." Thus, it requires the LAJ's permission—that is, permission from the same judge who just denied the filing.

54. Few judges will see merit in allowing a plaintiff to urge that the LAJ abused discretion.

55. Even if plaintiff does reach the court of appeals, denial of mandamus there "is not grounds for appeal to the supreme court. . . . " CPRC § 11.102.(f).

F. Chapter 11 rejects the narrow tailoring and appeal mandated by federal doctrine.

56. Federal doctrine requires prefiling injunctions to be narrowly tailored.[9] Such orders usually bar plaintiff from re-litigating against the same defendants for the same relief.

57. By contrast, a Texas prefiling order is vastly overbroad. If "entered . . . by a district or statutory county court [the order] applies to each court in this state." CPRC § 11.101(e).

58. Federal doctrine permits a genuine appeal of the prefiling order and the possibility of removing it entirely, which is itself appealable.[10] Chapter 11 has neither provision.

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[9] *Farguson v. MBank Houston, N.A.*, 808 F.2d 358, 360 (5th Cir. 1986) (citing *Martin-Trigona,* affirming narrow injunction that bars only same claims against same defendants).

See In re Martin-Trigona, 737 F.2d 1254 (2nd Cir. 1984) (Winter, J.) (limiting district court's injunction, although plaintiff had filed some 250 suits and papers across the nation).

See also De Long v. Hennessey, 912 F.2d 1144 (9th Cir. 1990) (setting detailed requirements for constitutionality of a pre-filing injunction); *Ringgold-Lockhart v. County of Los Angeles*, 761 F.3d 1057 (9th Cir. 2014) (same).

See also Thomas v. Culpepper, No. 4:18-CV-814 (E.D. Tex. Sept. 20, 2019) (Mazzant, J.) (without permission, pre-filing injunction bars only *pro se* suits on a particular overly-litigated home repair dispute).

[10] The designated litigant "may file a Rule 60(b)(5) motion to modify or dissolve the pre-filing injunction . . . [and that ruling] will be appealable." *Baum v. Blue Moon Ventures, LLC*, 513 F.3d 181, 193 (5th Cir. 2008).

CHAPTER 11 IS UNCONSTITUTIONAL AS APPLIED TO PLAINTIFFS

Plaintiff Christine Reule

59. Reule filed a suit *pro se* in Texas district court in Smith County, concerning enforcement of deed restrictions, failure to disclose, and fraud.

60. In that case, on May 21,2019, Reule was (1) declared a "vexatious litigant"; (2) warned that her suit would be dismissed if she did not pay security of $7,500, which was beyond her means; and (3) barred from filing "new litigation in this state," without first obtaining permission from the LAJ.

61. The last of these is Chapter 11's prefiling order. CPRC § 11.101(a). Chapter 11 does not prohibit expanding the prefiling order beyond merely *pro se* "litigations." But in Reule's case, the prefiling order apparently applies even when she has counsel.

62. Reule was harmed by all the unconstitutional provisions of Chapter 11, including the automatic stay and Prong Two's use of the plural, "litigations." CPRC § 11.054(1).

63. For example, the Prong Two criterion applied to Reule was five "litigations" "finally determined adversely." CPRC § 11.054(1)(A). These phrases being vague, Chapter 11 permitted counting the following as meeting Prong Two:

a. a mandamus petition that was denied, but not because of frivolousness;

b. an appeal dismissed because it became moot;

c. affirmance of a sanction against Reule, but not for frivolousness; the sanction was

allegedly only for "wasting time." However, the appellate Chief Justice—who would have vacated the sanction— dissented vociferously;

d. a case dismissed without prejudice;

e. a dismissal resulting from settlement.

64. None of these indicates frivolousness or vexatiousness.

65. Reule was also harmed by the automatic stay, which barred her from (1) getting a default judgment against a non-answering defendant; and (2) seeking contempt for a defendant's violation of the TRO Reule had already won. CPRC § 11.052.

66. Reule now needs to file a new lawsuit. In October 2020 Reule's neighbor removed one of Reule's puppies from Reule's yard. A video shows that the neighbor repeatedly shot at the puppy as it hyperventilated and ran here and there in terror. Following this cruelty, the neighbor finally shot and killed the puppy. Later the neighbor showed Reule the video and taunted her, saying that, as a vexatious litigant, Reule could not sue him.

67. Reule's rights to petition and to access the courts *pro se*, or even under counsel, are severely and permanently impaired. Without the relief requested here, if Reule needed to bring a lawsuit, original proceeding, appeal, or other claim, she would be barred from doing so—even if she somehow shouldered the expense of retaining counsel—unless she obtained the LAJ's permission.

68. No government entity was a party to Reule's case.

Plaintiff Harriet Nicholson

69. Nicholson was harmed by all the unconstitutional provisions of Chapter 11, especially by the statute's disregard of the rules of evidence. Her case is a microcosm of how Chapter 11 eliminates the need for evidence.

70. Defendant's motion to declare Ms. Nicholson vexatious, in substance, consisted of

a. a list of 13 papers allegedly filed *pro se* by Ms. Nicholson;[11] and

b. a request, *only in a footnote*, that the court "take judicial notice of all dockets and pleadings listed throughout this Motion. . . ."[12]

71. Yet, incredibly, the moving defendant presented no "dockets and pleadings" for the court's examination—in either the motion or at the hearing. Instead, defendant asked the court "to take judicial notice" of a raft of court documents that were alleged to exist, but that the court could not see, much less analyze under the statute.

72. Next, defendant asked the judge to conclude that the same invisible "dockets and pleadings" met both of the Prong Two tests in Subsections 11.054(1) and (2).

73. At the hearing to designate Nicholson a "vexatious litigant," defense counsel offered no

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[11] *Defense motion* filed Nov. 29, 2021, Dallas County Cause No. DC-21-12504 at 6-8.

[12] *Id.* at note 1.

documents and presented no testimony. Nothing showed that any case was "finally determined," much less adversely to Nicholson, or constituted a "litigation" and "relitigation" under the statute. Instead, defense counsel acted as her own unsworn witness, telling the court:

a. "These cases have all been denied or ruled adversely to Plaintiff."[13]

b. "So the above-referenced examples that I gave you, the 13 . . . established Plaintiff's repeated attempts to relitigate final determinations against her."[14]

74. Chapter 11 permitted these conclusory statements to act as "evidence," which would never be permitted in an ordinary case.

75. As is usual, the trial court's order declaring Nicholson a "vexatious litigant" also warned her that her case would be dismissed if she did not deposit security—here, $1500.

76. Although Nicholson deposited the security to allow the case to go forward, defendants filed motions for summary judgment. These were granted and final judgment entered.

77. Since then, Nicholson's rights to petition and to access the courts *pro se* have been severely and permanently impaired. Without the relief requested here, if Ms. Nicholson needed to bring a lawsuit, orig-

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[13] Hearing, Jan. 4, 2022, Cause No. 21-12504, transcript at 10. Video of the hearing is posted on judge's Youtube page: https://www.youtube.com/watch?v-98v_z-OVEvQ&t-865s accessed 7/10/2022.

[14] *Id.* at 10-11.

inal proceeding, appeal, or other claim, she would be barred from doing so, unless she somehow shouldered the expense of retaining counsel or got permission from the LAJ.

78. No government entity was a party to Nicholson's case.

Plaintiff Rebecca (Alexander) Foster

79. Foster was harmed by all the unconstitutional provisions of Chapter 11. She was declared a vexatious litigant in a child custody matter—which remains the only case she ever brought in any court.

80. Chapter 11 is supposed to prevent litigants who file multiple, frivolous suits from filing more of them. Declaring Foster vexatious in the only suit she ever filed is a lesson in how Chapter 11 is pliable enough to ensnare virtually any litigant.

81. Foster was harmed by the vague terms "litigation," "finally determined adversely," "relitigates," and "attempts to relitigate." CPRC § 11.054(2).

82. Most Texas courts would interpret

a. "litigation" to mean *a lawsuit*;

b. "finally determined" to mean *after exhaustion of appeals*; and

c. "relitigates" to mean filing the same claim against the same defendant.

83. But these terms are vague and malleable in Chapter 11 because

a. "litigation" can also mean *a motion;*

b. "finally determined" can mean a trial court order not-yet-appealed; and

c. "relitigates" can mean a challenge such as a motion to reconsider.

84. Thus, to meet Prong Two[15] of the vexatiousness determination, Chapter 11 permitted the order declaring Foster vexatious to find that,[16] Rebecca Alexander[17] " . . . has attempted to relitigate issues which have been concluded . . . by this Court."

85. The case in which Foster was declared vexatious involved Foster's custody and visitation rights as the mother of a child not yet in elementary school.

86. For more than a decade Foster has been deprived of a normal mother-daughter relationship, just as the child was deprived of the same. At a minimum, as the child grew up, changes in custody and visitation might have been appropriate matters for a court to consider. But these were closed off by the use of Chapter 11 to designate her a "vexatious litigant."

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[15] One of the tests for meeting Prong Two is Section 11.054(2), which reads, generally:

> after *a litigation* has been *finally determined against the plaintiff,* [he] repeatedly *relitigates or attempts to relitigate*. . . . [the same issues against the same defendant].

CPRC § 11.054(2) (emphases added).

[16] *See* Order filed in Cause No. 2006-1531-DR on May 24, 2011, in 307th Judicial District Court of Gregg County, Texas.

[17] At the time of the litigation, Rebecca's last name was Alexander. Today it is Foster.

87. Chapter 11 has no provision for un-doing the designation, regardless of how much time passes. Foster's child is now in her mid-teens. Without the relief requested here, if Foster needed to bring a lawsuit, original proceeding, appeal, or other proceeding, she would be barred from doing so, unless she somehow shouldered the expense of retaining counsel or got the LAJ's permission.

88. No government entity was a party to Foster's case.

Plaintiff Jimmy Lee Menifee

89. Esteemed jurist Richard Posner resigned from the Seventh Circuit bench on one-day's notice because, he said, "I was not getting along with the other judges because I was . . . very concerned about how the court treats *pro se* litigants."[18] He criticized judges who did not appear neutral to *pro se* litigants (*e.g.*, when they cut and paste the other side's brief into an opinion) and complained that the "maze of rules" was nearly impossible for pro se's to navigate.[19]

90. Plaintiff Menifee epitomizes what Posner was talking about. Menifee attempted to appeal his "vexatious litigant" designation by filing one-and-a-half hand-written pages.

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[18] Patricia Manson, "Posner says friction on 7th Circuit bench led to his retirement," *Chicago Law Bulletin*, Sept. 6, 2017.

[19] Kevin Bliss, Former Seventh Circuit Judge Posner Founds Short-Lived Project to Help Pro Se Litigants, *Prison Legal News*, Jan. 9, 2020. *See* https://www.prisonlegalnews.org/news/ 2020 /jan/9/former-seventh-circuit-judge-posner-founds-short-lived-project-help-pro-se-litigants/ Accessed 9/12/2022.

91. The court of appeals warned Menifee that he had failed to meet nearly all of the briefing rules. So Menifee re-briefed in four-and-a-half hand-written pages. The brief stated the titles of each required section of a brief. After each title, Menifee stated in a sentence or two his opinion of why the court should find in his favor.

92. The appellate court held that Menifee waived review by failing to meet briefing rules.

93. Without the relief requested here, if Menifee needed to bring a lawsuit, original proceeding, appeal, or other proceeding, he would be barred from doing so, unless he somehow shouldered the expense of retaining counsel or got the LAJ's permission.

94. No government entity was a party to Menifee's case.

Plaintiff Tony Lamar Vann

95. Plaintiff Vann was harmed by each of Chapter 11's unconstitutional provisions, including that the court declaring him vexatious did not need to report specific findings.

96. Instead, as with nearly all such orders, the order declaring Vann "vexatious" does no more than re-state Chapter 11's criteria, almost *verbatim* and, before each one, inserts the words "The Court finds that. . . . "

97. Thus, almost word-for-word quoting Section 11.054(1)(A), the order states:[20]

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[20] Order, Sept. 17, 2021, No. DC-21-08738, 162nd District Court of Dallas County, TX.

> The Court finds that Plaintiff has . . . in the seven (7) year period immediately preceding the filing of Defendants' Motion, commenced, prosecuted, or maintained, in propria persona, at least five litigations other than in small claims court that have been finally determined adversely to Plaintiff.

98. Without the relief requested here, if Vann needed to bring a lawsuit, original proceeding, appeal, or other proceeding, he would be barred from doing so, unless he somehow shouldered the expense, as an indigent, of retaining counsel or got the LAJ's permission.

Plaintiff Judge Madeleine Connor

99. The Hon. Madeleine Connor has been the duly-elected presiding judge of the 353rd Civil District Court of Travis County since January 1, 2021. Prior to taking the bench, she had an exemplary career as an attorney.[21]

100. Connor was harmed by each of Chapter 11's unconstitutional provisions, especially by the vague term *litigation* and its use in two phrases: First,*"not a reasonable probability that the plaintiff will prevail in the litigation against the defendant."* CPRC § 11.054. Second, *"a new litigation"* in the statute's prohibition

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[21] After law school Connor clerked at Texas' 14th Court of Appeals, and then for two years at the Court of Criminal Appeals. Thereafter she was an Assistant Attorney General for eight years in the General Litigation Division of the AG's office. Later she was in private practice and then served as Assistant General Counsel, then as General Counsel, to the Texas Veterans Commission. She held that post until taking the bench.

in the prefiling order. CPRC § 11.101(a). Connor was also harmed by the automatic stay. CPRC § 11.052.

101. During 2018, while she was counsel to the Veterans Commission, Connor discovered on the internet a purported "review" of her work by anonymous reviewers. They falsely claimed to have been her clients. Their review was false, negative, and damaging.

102. Connor thought she knew who the culprits were but, in an abundance of caution, she refrained from filing suit and instead filed a petition under Texas Rule of Civil Procedure 202. Under this rule, Connor could be permitted only to take depositions before filing suit, to investigate whether she had a claim. Rule 202 is not a type of lawsuit; it is discovery.[22]

103. Chapter 11 allows a defendant to seek a vexatiousness order only "*[i]n a litigation in this state.*" CPRC § 11.051 (emphasis added). But the word *litigation* is vague. Thus the statute allowed the intended deponents to appear at the Rule 202 hearing and immediately move to declare Connor a vexatious litigant. This suggests that any court proceeding could give rise to a "vexatious litigant" motion.

104. Various events showed that the intended deponents had indeed authored the defamatory review against Connor. She therefore filed suit directly against them and, with her Rule 202 petition becoming moot, properly dismissed it with prejudice.

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[22] A Rule 202 proceeding "is not a separate, independent lawsuit. . . . " *Lee v. Gst Transp. System*, 334 S.W.3d 16, 19 (Tex. App.—Dallas 2008). It "asserts no substantive claim or cause of action upon which relief can be granted." *Combs v. Tex. Civil Rights Project*, 410 S.W.3d 529, 534 (Tex. App.—Austin 2013).

105. Prong One of the test for identifying a "vexatious litigant" is finding that "there is not a reasonable probability that the plaintiff will prevail in the *litigation* against the defendant." CPRC § 11.054. With *litigation* vaguely including even a Rule 202 proceeding, the statute mandated that Connor, obviously, could not "prevail in the litigation against the defendant"—because she had dismissed the petition herself, for mootness. Therefore, she met Prong One of the test to be declared a vexatious litigant.

106. Connor's filing of the Rule 202 petition is arguably as far away from frivolous or vexatious conduct as one could get.

107. But for the vague, expansiveness of the word *litigation*, Connor's conduct could not have met Prong One, and she could not have been declared vexatious.

108. Connor was also harmed by the automatic stay. CPRC § 11.052. In the Rule 202 proceeding, she drafted and filed an anti-SLAPP motion that would have provided protection against defendants' motion. But then, because of the automatic stay, she had to withdraw from setting it for hearing. That nullified it, and she lost the protection.[23]

109. Connor was ultimately declared a "vexatious litigant."

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[23] Under Texas law, a motion filed, but not set for hearing is a nullity until it is set. *Metzger v. Sebek*, 892 S.W.2d 20, 49 (Tex. App.—Houston [1 Dist.] 1994) ("Until the defendants filed their notices of a hearing on the motions for sanctions, [the party] was entitled to treat those motions as potential nullities") (citations omitted).

110. Under the prefiling order, Chapter 11 barred her from filing "a new litigation" *pro se* unless she had permission from the LAJ. CPRC § 11.101(a).

111. Judge Connor recently filed documents for a name change. A name change is not a lawsuit and has no defendants. Nevertheless, with "new litigation" being vague, the clerk insisted on rejecting the filing.

112. Chapter 11 severely and permanently impaired Judge Connor's rights to petition and to access the courts. Without the relief requested here, if Judge Connor needed to bring a lawsuit, original proceeding, appeal, or even something as non-litigious as a name change, *pro se*, she would be barred from doing so, unless she shouldered the expense of retaining counsel or was granted permission by the LAJ.

113. No government entity was a party to Connor's case.

All Plaintiffs suffer continuous, ongoing, irreparable harm, without remedy at law.

114. Plaintiffs repeatedly suffer continuous, ongoing harm.

115. Every day, in 254 Texas counties, clerks and local administrative judges stand ready to enforce Chapter 11 against 360 "vexatious litigants" plus those newly designated.

116. In 2017, about 17 Texas citizens were declared "vexatious litigants," thereby impinging their first amendment rights. In 2018, about 25 Texas citizens were so declared, plus another 25 the following year. In 2020, perhaps under the effect of the pandemic, 19 Texas citizens were declared "vexatious litigants" and

another 19 so declared in 2021. So far in 2022, eight Texas citizens have been declared "vexatious."

117. In the roughly nineteen years between the statute's passage in 1997 through the end of 2016, at least 250 Texas citizens had been declared vexatious. Then, in the five-and-a-half years since January, 2017 up to the present, more than another 100 have been added to the list of those whose attempted filings would be rejected.

118. This shows that, across all members of defendant classes of clerks of court and LAJs, defendants continuously violate the first and fourteenth amendment rights of Texans.

119. The United States Supreme Court has held that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (citation omitted).

120. Plaintiffs here have been deprived of their first amendment rights of petition for months or years. Without the relief requested here, Plaintiffs will continue to suffer irreparable harm for the rest of their lives.

121. Except for the one "appeal" (which requires permission), there is no procedure by which a "vexatious litigant" can undo the designation, regardless of how much time passes.

CLAIMS FOR RELIEF

122. All Plaintiffs allege that Chapter 11 is unconstitutional on its face and as applied to each of them, as described in the following counts.

Count I. Prior Restraint

123. The foregoing is incorporated herein by reference as though stated in full.

124. Prior restraints on first amendment rights are disfavored, unless an activity poses a clear and present danger or a serious and imminent threat to a protected, competing interest. If the restraint is allowed, the government must demonstrate that the restraint is narrowly tailored and provides the least restrictive means to achieve the government's goal. *In re Goode*, 821 F.3d 553, 559 (5th Cir. 2016) (cleaned up).

125. Chapter 11 imposes a broad prior restraint on the right to petition, for life, without providing protection against a clear and present danger or imminent threat.

126. Chapter 11 is not narrowly tailored and is not the least restrictive means to achieve the goal of reducing vexatious litigation. Instead of restricting the "vexatious litigant's" lawsuits on certain claims, or against certain defendants, or for certain time periods, Chapter 11 prohibits all "litigations" against anyone, on any claim, for any purpose, for the remainder of the litigant's life. This is as broad a prior restrain as there could be.

127. Without intervention from this Court, Plaintiffs are suffering and will continue to suffer irreparable injury for which there is no adequate remedy at law.

Count II. Overbreadth

128. The foregoing is incorporated herein by reference as though stated in full.

129. Chapter 11 is unconstitutional on its face because it is overbroad; it substantially infringes the rights of persons far beyond any plainly legitimate sweep it might have.

130. The only potential exception to striking down an overbroad law is where a law incorporates a limiting construction, or so narrows the impairment of the right that it removes the overbroad nature of the statute. Chapter 11 fails to do this.

131. Instead of stopping only those who burden the courts, Chapter 11, by its own language, sweeps into its ambit litigants who have never filed a single vexatious lawsuit or paper.

132. The punishment meted out by Chapter 11 is also overbroad. It impairs all suits in Texas by "vexatious litigants" instead of impairing only those that plaintiff has shown he is willing to bring frivolously or vexatiously.

133. Without intervention by the Court, Plaintiffs are suffering and will continue to suffer irreparable injury, for which there is no adequate remedy at law.

Count III. Denial of Due Process

134. The foregoing is incorporated herein by reference as though stated in full.

135. Chapter 11 denies due process at the initial stage—when determining whether the plaintiff is a "vexatious litigant"—and again after the designation, when the litigant must obtain permission to file a suit.

136. On the mere filing of defendant's motion, plaintiff is faced with a presumption of guilt, not a presumption of innocence. Merely filing defendant's motion

imposes a stay that blocks plaintiff from filing papers he may need for his own defense, such as a motion to change venue, especially for local prejudice, or to disqualify counsel or the judge, or for protection under the anti-SLAPP statute. This impairment of plaintiff's defense takes place on defendant's mere accusation, before plaintiff has been found "vexatious."

137. And when a "vexatious litigant" attempts to get permission to file a suit, he has no right to a hearing and no right to appeal the outcome. Chapter 11 does allow that mandamus might be sought if permission is denied, but mandamus is a very high standard. In any event the petition for writ would itself require permission from the LAJ who rejected the suit in the first place, and so permission to seek the writ is unlikely to be granted.

138. Chapter 11 does not require a court to state in writing the reasons for declaring a plaintiff a "vexatious litigant." The vast majority of orders declaring litigants "vexatious" do not contain written findings. The undersigned are aware of only one. At most, they recite conclusions that parrot the language of the statute. As a result, even if the "vexatious litigant" retained counsel and took appeal, the absence of written findings would require appellant to defeat every possible ground supporting the order. This burden is heavier than defeating only actual, written grounds for the order.

139. Without intervention from the Court, Plaintiffs are suffering and will continue to suffer irreparable injury for which there is no adequate remedy at law.

Count IV. Void for Vagueness

140. The foregoing is incorporated herein by reference as though stated in full.

141. Chapter 11's words and phrases are vague and therefore fail to give the notice required by due process.

142. That Chapter 11 ensnares innocent people is exacerbated by its use of "litigation" and "litigations" as *countable* nouns. In American English, *litigation* is usually general and *uncountable*, like *beauty* or *knowledge*. But Chapter 11 uses the word as a *countable* noun, thereby causing confusion about whether the word refers to subparts of a suit.

143. These terms, "litigation" and "litigations," are unconstitutionally vague. They might refer to lawsuits where, for example, plaintiff won no relief on the merits, or they could refer to losing a single claim while winning another. *Litigations* could refer to proceedings unrelated to merits—such as discretionary appeals, mandamus petitions, Rule 202 proceedings, etc. This makes it impossible for anyone to know what is and is not counted for Prong Two.[24]

144. Also vague is the phrase "finally determined adversely." CPRC § 11.054(1)(A). It might refer to losing on the merits, or to dismissals for non-merits reasons—*e.g.*, suits that became moot, were settled, or were outside jurisdiction. There are many reasons why

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[24] Chapter 11's definition of "litigation" is "a civil action . . . in any state or federal court," CPRC § 11.001(2), which makes the term no less vague.

a plaintiff might be unsuccessful under some theories, without being frivolous or vexatious on the merits.

145. It is unclear whether the phrase "finally determined adversely" refers to a suit in plaintiff's past that he actually lost on the merits, or whether it includes suits that could not have reflected vexatiousness, such as missing disputable statutes of limitation, dismissals without prejudice, voluntary dismissals by plaintiff, or dismissals for want of prosecution or for lack of jurisdiction.

146. Without intervention from this Court, Plaintiffs are suffering and will continue to suffer irreparable injury for which there is no adequate remedy at law.

Count V. Failure to Pass Any Level of Scrutiny

147. The foregoing is incorporated herein by reference as though stated in full.

148. The right to petition embodied in the First Amendment is a fundamental right. Chapter 11 impairs that right, and must be analyzed under strict scrutiny.

149. Under strict scrutiny, the government has the burden to prove that the law is narrowly tailored to further a compelling state interest.

150. The government cannot meet either of these burdens. The statute is not narrowly tailored because it does not prescribe that lesser sanctions should be tried first—such as payment of attorney's fees, early dismissal, use of the Texas anti-SLAPP law if appropriate, use of the Rule 91a procedure for dismissal and fee-shifting, plus stays of discovery, the civil malicious

prosecution tort, and the "no-evidence" summary judgment motion.

151. Texas has *twenty statutes* that provide for early dismissal and that punish filing frivolous or groundless papers, without eliminating litigants' first amendment rights. For example, the *Inmate Litigation Act* already allows courts to rule on many frivolous suits even before they are served.

152. Chapter 11 also does not address a truly compelling state interest. Vexatious suits cause inconvenience and expense, but they do not cause irreparable harm.

153. Chapter 11 even fails to meet rational basis review, because many factors leading to the branding of a "vexatious litigant" are unrelated to whether a legal action is vexatious.

154. Because it fails to pass any level of scrutiny, Chapter 11 is unconstitutional on its face.

155. Chapter 11 is also unconstitutional as applied to Plaintiffs, for the same reasons.

156. Without intervention from this Court, Plaintiffs are suffering and will continue to suffer irreparable injury for which there is no adequate remedy at law.

Count VI. Arbitrary and Capricious

157. The foregoing is incorporated herein by reference as though stated in full.

158. Chapter 11 allows and encourages Texas court to designate a citizen "vexatious" without the court itself making a finding of frivolousness, harassment, or vexatiousness. Federal courts, by comparison, where they do issue prefiling orders, must "make sub-

stantive findings of frivolousness or harassment." *Ringgold-Lockhart v. County of Los Angeles*, 761 F.3d 1057, 1062 (9th Cir. 2014).

a. By contrast, a Texas court can adopt the vexatiousness finding of another "state or federal court" in which "the plaintiff has previously been declared a vexatious litigant" under the same or substantially similar facts. CPRC § 11.054(3). *See also* § 11.054(1)(C). 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).

b. Other subsections of Chapter 11 are also arbitrary and capricious because plaintiff can be designated vexatious if only *five* of plaintiff's *pro se* cases were lost, or not set for hearing or trial for two years. CPRC § 11.054 (1)(A) and (B). But Texas courts themselves hold that losing a case is no indication of vexatiousness. *Callaway v. Martin*, No. 02-16-00181-CV (Tex. App.—Fort Worth (May 25, 2017) (summary judgment against a party on every cause of action does not "necessarily mean that his claims were groundless").

c. Likewise it is no indication of vexatiousness that a court dismisses a case without prejudice or for want of prosecution.

d. Without intervention from the Court, Plaintiffs are suffering and will continue to suffer irreparable injury for which there is no adequate remedy at law.

Count VII. Impairment of Liberty and Property Interests

159. The foregoing is incorporated herein by reference as though stated in full.

160. The Supreme Court has determined that the due process clause protects a person's reputation as a liberty interest.

161. Chapter 11 requires or allows a person to be branded a "vexatious litigant," which harms his reputation. Where one's reputation is especially important to one's livelihood, such as in a profession demanding a good reputation, the branding impinges his property interest.

162. As applied to Plaintiffs, Chapter 11 has harmed their reputations by branding them "vexatious litigants." This affects their livelihoods.

163. Without intervention from the Court, Plaintiffs are suffering and will continue to suffer irreparable injury for which there is no adequate remedy at law.

Count VIII. Equal Protection

164. The foregoing is incorporated herein by reference as though stated in full.

165. The Fourteenth Amendment bars the government from treating similarly-situated persons differently. For example, in getting permission from the local administrative judge for a future filing, the

person designated "vexatious" must show that the filing "has merit." This is a standard higher than what is necessary for filing a suit in the ordinary case. And an ordinary citizen would be able to bring a novel case, to change the law. But the "vexatious litigant" loses the right to bring such a case.

166. As another example, under Texas law, all citizens have the right to appeal a judgment issued against themselves; all citizens are entitled to move to change venue, especially by reason of local prejudice; all citizens are entitled to protect their first amendment rights of speech, petition, and association by moving to dismiss strategic actions under the Texas anti-SLAPP statute.

167. But citizens who are merely *accused* under Chapter 11—who have done no more than bring a suit, a motion, or a Rule 202 proceeding—are arbitrarily shorn of their right to defend themselves by using these same protections that are used by everyone else.

168. As a violation of equal protection, Chapter 11 is unconstitutional on its face.

169. Chapter 11 is also unconstitutional as applied to Plaintiffs.

170. Without intervention from this Court, Plaintiffs are suffering and will continue to suffer irreparable injury for which there is no adequate remedy at law.

PRAYER

Plaintiffs pray that the Court will:

171. Issue a declaratory judgment that sets forth, as a matter of law, that Chapter 11 of the Texas Civil

Practice & Remedies Code, in its entirety, is unconstitutional on its face.

172. If Chapter 11 is not unconstitutional in its entirety, issue the same declaratory judgment individually for each section of Chapter 11 that is unconstitutional on its face.

173. Issue a declaratory judgment that Chapter 11—in its entirety, or as to particular sections —is unconstitutional as applied to each Plaintiff.

174. Certify two defendant classes of all Texas court clerks and local administrative judges.

175. Consistent with the declaratory judgment or judgments, enter a preliminary injunction as to each plaintiff and a permanent injunction that enjoins Defendant LaVoie, all clerks of court in Texas, and all local administrative judges in Texas from enforcing Chapter 11 against Plaintiffs and all those similarly situated;

176. Grant Plaintiffs their costs and attorneys' fees, including under 42 U.S.C. § 1988.

177. Award to Plaintiffs a nominal, symbolic award of $1.00, in recognition of their inconvenience and trouble.

178. Grant such other and further relief as the Court determines is just and proper.

Respectfully submitted,

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