



(Clerk's Document 46), Plaintiff-Intervenor's Opposed Motion to Take Limited Depositions, Pursuant to Local Rule CV-12, on Issue of Defendant Sharon Keller's Assertion of Immunity filed April 15, 2008 (Clerk's Document 39), and Defendant Keller's Response to Plaintiff-Intervenor's Opposed Motion to Local Rule CV-12, on Issue of Defendant Sharon Keller's Assertion of Immunity filed April 21, 2008 (Clerk's Document 42). By her March 25, 2008 advisory, Defendant Judge Sharon Keller informed the Court she planned to file an updated motion to dismiss and requested that the Court not rule on her December 13, 2007 motion to dismiss. Judge Keller filed her updated motion to dismiss on March 26, 2008. The Court will dismiss the originally filed motion. Having considered Judge Keller's currently pending motion to dismiss, the responses, the reply, the supplement, the applicable law, and the entire case file, the Court will grant Judge Keller's motion to dismiss because Judge Keller is entitled to judicial immunity, and Marsha Richard and Doreen Anderson (collectively, "Plaintiffs") have not alleged a case or controversy sufficient to merit equitable relief. The Court will dismiss Plaintiffs' claims against Judge Keller and Marsha Richard's claims against the John Does.<sup>1</sup>

### I. Background<sup>2</sup>

On the morning of September 25, 2007, the United States Supreme Court granted writ of

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<sup>1</sup> Marsha Richard asserts "Defendant John Does are those state actors who by action or inaction along with Defendant Keller caused the Appeal not to be filed." The Does' interests are generally aligned with Judge Keller's interests and for ease of discussion they are subsumed in the Court's references to Judge Keller. When necessary, the Court refers to the Does. Anderson sues only Judge Keller.

<sup>2</sup> In considering the motions to dismiss, the Court accepts as true all facts alleged in Plaintiff's Second Amended Original Complaint and Plaintiff-Intervenor Doreen Anderson's First Amended Complaint in Intervention, the live complaints. See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 n.1 (2002).

certiorari in *Baze v. Rees*, 128 S.Ct. 372 (2008), to determine whether the method of lethal injection administered in Kentucky is constitutionally prohibited as cruel-and-unusual punishment. See U.S. Const. amend. VIII. Texas follows the same lethal-injection protocol as Kentucky. Marsha Richard and Anderson's decedent Michael Richard was scheduled to be executed by lethal injection the evening of September 25, 2007.<sup>3</sup> That day, Michael Richard's attorneys, located in Houston, Texas, prepared a last-minute appeal and request for stay of execution for Michael Richard, which they planned to file that day in the Texas Court of Criminal Appeals in Austin, Texas.<sup>4</sup> Judge Keller is the presiding judge of that court. The court of criminal appeals is the highest state court in Texas having jurisdiction over criminal cases and would have had to rule on Michael Richard's appeal before the United States Supreme Court could consider any appeal by Richard. Every other scheduled execution in the United States was stayed on September 25, 2007, following the Supreme Court's granting of the *certiorari* petition *Baze*.<sup>5</sup> The State of Texas, however, executed Michael Richard the night of September 25, 2007.

Although this Court, for the purpose of considering Judge Keller's pending motions, takes as true Plaintiffs' pleaded allegations, separating factual allegations from conclusions is difficult. Marsha Richard asserts that Judge Keller "knowingly violated an alleged long standing unwritten

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<sup>3</sup> Marsha Richard was the wife of Michael Richard. Doreen Anderson is Michael Richard's daughter.

<sup>4</sup> Michael Richard's attorneys intended to file both an appeal and a request for stay of execution. For ease of discussion, the court refers to both pleadings simply as the "appeal."

<sup>5</sup> The Supreme Court rendered its decision on the merits in *Baze* on April 16, 2008, holding that Kentucky's three-drug lethal-injection protocol did not constitute cruel and unusual punishment that violated the Eighth Amendment of the Constitution. See *Baze v. Rees*, 128 S.Ct. 1520, 1534 (2008). Executions thereupon resumed.

policy that the assigned case judge—the Honorable Cheryl Johnson . . . receive all communications about a death penalty appeal and an alleged policy to accept death penalty appeals after 5:00 pm on execution days.” Anderson states, “[a]t least three Court of Criminal Appeals judges were working in the courthouse at the time, including the judge specifically assigned to the Richards [sic] case, Cheryl Johnson . . . .” The other judges, according to Anderson, were Texas Court of Criminal Appeals Judges Paul Womack<sup>6</sup> and Cathy Cochran, who “allege they never heard about Richard’s attempt to appeal until after his execution.”

Anderson goes on to say that the

unwritten policies allegedly include that the judge assigned to handle the appeal, . . . Judge Johnson . . . , be notified of any communication from the condemned’s lawyers. The unwritten policies which Defendant Keller allegedly knew about, and that she was consciously indifferent to, allegedly state that the [court-of-criminal-appeals] judge assigned to a particular death penalty case should also stay on duty on the day of an execution until the execution occurs. Allegedly a policy existed that “all communications regarding the scheduled execution shall first be referred to the assigned judge.”

This Court presumes that because Michael Richard’s attorneys were in Houston and the court of criminal appeals is in Austin, telephonic communications between the two took place the day of the execution. Plaintiffs’ pleadings are vague, however, as to exactly who communicated and how any communications were conducted. Marsha Richards alleges, “[p]rior to 5:00 pm Michael’s attorneys made it clear to Defendant Keller, the clerk of the [court of criminal appeals], and possibly

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<sup>6</sup> Anderson quotes media accounts that Judge Womack stated, “[a]ll I can tell you is that night I stayed at the court until 7 o’clock in case some late filing came in. I was under the impression we might get something . . . ,” and Judge Cochran stated, “[t]here were plenty of judges here, and there were plenty of other personnel here. A number of judges stayed very late that evening, waiting for a filing from the defense attorney . . . . I would definitely accept anything at any time from someone who was about to be executed.”

others that the appeal paperwork was forthcoming but that, due to circumstances beyond their control, the paperwork would be filed a few minutes past 5:00 pm.”

Anderson asserts, “[Michael] Richard’s lawyers had requested the court clerk to stay open for an extra twenty minutes so they could file their petition for stay of execution. The attorneys had experienced severe computer problems in preparing the pleading, transmitting it from Houston to Austin, and downloading it, and so informed the clerk.” She further states that “[b]ecause from calls earlier in the day from Richard’s counsel, [court-of-criminal-appeals general-counsel Edward] Marty was aware of the pending appeal and the request for stay and that it would be coming in to the court later in the day, in the afternoon.”

Accepting these allegations as true, Judge Keller, general-counsel Marty, and the court clerk were all advised that Michael Richard’s attorneys would be filing appellate paperwork, including a motion for stay of execution, for Richard on September 25, 2007, shortly after 5:00 p.m.<sup>7</sup> Plaintiffs’ complaints provide no further information regarding such conversations.

Lacking from the pleadings is any allegation that Judge Keller advised any attorney for Michael Richard that the court of criminal appeals would refuse a post-five-o’clock filing. Marsha Richard’s factual allegation is that “[o]n September 25, 2007, Defendant Keller allegedly ordered the clerk of the [court of criminal appeals] located in Austin, Texas not to accept any paperwork concerning Michael after 5:00 pm.”

Anderson’s factual allegations provide somewhat more: (1) “unbeknownst to [Judges Johnson, Womack, and Cochran] . . . , Judge Keller refused to allow the emergency 11th-hour appeal

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<sup>7</sup> On September 25, 2007, the Texas Court of Criminal Appeals did not accept filings electronically. The court now accepts electronic filing in capital cases.

and request for stay to be filed after 5:00pm [sic][[]]; (2) “Judge Keller refused the request [to file after 5:00 p.m.], and [Michael] Richard was put to death[[]]; (3) “Defendant Keller’s administrative decision to close the clerk’s office was arbitrary and capricious and contrary to the long-standing practice of the Court.”

Distilled and stated most favorably to non-movants Marsha Richard and Anderson, the pleaded facts of this case are as follows. Judge Keller ordered the clerk of the court of criminal appeals to close the clerk’s office at 5:00 p.m. on September 25, 2007. Her action prevented Michael Richard’s attorneys from filing an appeal of Richard’s death sentence and request for a stay of execution. As a direct consequence of her action, Richard was executed. Judge Keller did not advise any other judge of the court of criminal appeals of her action. In taking the action, Judge Keller violated internal court-of-criminal-appeals operating procedures.

Marsha Richard brings her action under Texas’s wrongful-death and survival statutes against Judge Keller, seeking to vindicate Michael Richard’s constitutional rights pursuant to Section 1983 of the Civil Rights Act of 1871 (Section 1983). 42 U.S.C. § 1983. *See* Tex. Civ. Prac. & Rem. Code Ann. §§ 71.002, .021 (West 2008). Marsha Richard sued Judge Keller in her individual and official capacities, alleging Judge Keller’s actions violated Michael Richard’s rights under the Fourth, Fifth, Eighth, and Fourteenth Amendments to the United States Constitution as well as guarantees of the Texas Constitution. *See* U.S. Const. amends. IV, V, VIII, and XIV. Marsha Richard further alleges a Section 1983 conspiracy between Judge Keller and the Does, and also alleges state-law claims for intentional infliction of emotional distress and assault and battery. *See Spear v. Town of W. Hartford*, 954 F.2d 63, 68 (2d Cir. 1992). Marsha Richard seeks actual and punitive damages, declaratory and injunctive relief, and attorney’s fees.

Doreen Anderson intervened, invoking Texas's wrongful-death and survival statutes to bring constitutional claims against Judge Keller. *See* Tex. Civ. Prac. & Rem. Code Ann. §§ 71.002, .021. Specifically, Anderson claims Judge Keller violated Michael Richard's Eighth Amendment right not to be subjected to cruel-and-unusual punishment, his Fourteenth Amendment right not to be deprived of life without due process, and the open-courts provision of the Texas Constitution. *See* U.S. Const. amends. VIII, XIV; Tex. Const. art. I, § 13. Anderson seeks punitive damages and a declaratory judgment.

Judge Keller filed a motion to dismiss Marsha Richard's Second Amended Original Complaint and Anderson's First Amended Complaint in Intervention. Judge Keller argues she is entitled to judicial immunity. In the alternative, Judge Keller argues she is entitled to sovereign and Eleventh Amendment immunity. *See* U.S. Const. amend. XI. Judge Keller further argues Plaintiffs fail to allege facts that state Due Process, Equal Protection, Eighth Amendment, or Fourth Amendment constitutional violations, and fail to allege facts that state a conspiracy claim under the Civil Rights Act. Judge Keller also argues that in the event this Court finds Plaintiffs have pleaded constitutional violations or a conspiracy, Judge Keller is entitled to qualified immunity because her actions were objectively reasonable and no clearly established law precluded her actions. Judge Keller further argues Plaintiffs have not shown violations of state law. Because the Court concludes Judge Keller is entitled to judicial immunity, the Court need not, and does not, address Judge Keller's other arguments.

## II. Analysis

### A. 12(b)(6) Standard of Review<sup>8</sup>

The Court construes a plaintiff's complaint liberally in the plaintiff's favor, and all facts pleaded are taken as true. See *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993). A complaint is sufficient if it gives the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. See *Conley v. Gibson*, 355 U.S. 41, 47 (1957). Dismissal for failure to state a claim is inappropriate unless the plaintiff's factual allegations fail to show a right to relief that is plausible and above mere speculation. See *Bell Atl. Corp. v. Twombly*, 127 S.Ct. 1955, 1964-65 (2007). "[O]nce a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Id.* at 1969. Although courts grant motions to dismiss infrequently, "conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss." *Fernandez-Montes v. Allied Pilots Ass'n*, 987 F.2d 278, 285 (5th Cir. 1993).

### B. Judicial Immunity

Judges are generally absolutely immune from suit for damages, including suits brought under Section 1983. *Pierson v. Ray*, 386 U.S. 547, 554-55 (1967); *Mays v. Sudderth*, 97 F.3d 107, 111 (5th Cir. 1996). Absolute judicial immunity protects a judge's ability to proclaim the law "without apprehension of personal consequences to [her]self." *Stump v. Sparkman*, 435 U.S. 435, 349 (1977)

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<sup>8</sup> Judge Keller moves to dismiss Plaintiffs' complaints under both Federal Rule of Civil Procedure 12(b)(6) and 12(b)(1). A motion under 12(b)(1) attacks the Court's subject-matter jurisdiction over a case; sovereign and Eleventh Amendment immunities are often analyzed under a 12(b)(1) standard. See 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1350, at 79 (2004). Judicial immunity, on the other hand, as a "built-in defense," is more appropriately analyzed under a 12(b)(6) standard. *Id.* § 1357, at 713, 722.

(quoting *Bradley v. Fisher*, 13 Wall. 335, 347 (1872)); see also *Ballard v. Wall*, 413 F.3d 510, 515 (5th Cir. 2005). A judge's duties make her particularly vulnerable to lawsuits from vexed litigants, as she must exercise discretion to make potentially controversial decisions. See *Forrester v. White*, 484 U.S. 219, 226-27 (1987). "Only a hero could exercise an unfettered judgment while facing, day after day and case after case, the prospect of personal ruin implicit in permitting every losing party to sue [her] for damages . . . a sound policy must deal with the prospect that some who occupy the bench may not be of that ilk." *Sparks v. Duval County Ranch Co., Inc.*, 604 F.2d 976, 979-80 (5th Cir. 1979) (*en banc*). Judicial immunity is immunity from suit, not just damages, and therefore applies despite allegations of malice or corruption. *Mireles v. Waco*, 502 U.S. 9, 11 (1991) (*per curiam*). Even grave procedural errors do not overcome judicial immunity. *Stump*, 435 U.S. at 359; *Brandley v. Keeshan*, 64 F.3d 196, 200 (5th Cir. 1995).

Judicial immunity does not apply if the judge acted outside her judicial capacity or if the judge acted in the absence of jurisdiction. *Id.* at 11-12. In determining whether a judge's act was judicial in nature, courts use a functional approach, which emphasizes the policy behind judicial immunity. Judicial immunity exists to protect the public and protect the integrity of the judicial system generally, not to protect the specific judge in question. See *Forrester*, 484 U.S. at 224, 227; *Pierson*, 386 U.S. at 554. Therefore, an act is not judicial simply because a judge performed it, and the Court must distinguish between judicial and administrative, legislative, or executive acts. *Forrester*, 484 U.S. at 227-29.

In determining whether a complained-of act occurred in a judge's judicial capacity, a district court must consider four factors:

- (1) whether the precise act complained of is a normal judicial

function; (2) whether the act[] occurred in the courtroom or appropriate adjunct spaces such as the judge's chambers; (3) whether the controversy centered around a case pending before the court; and (4) whether the acts arose out directly out of a visit to the judge in [her] official capacity.

*Ballard v. Wall*, 413 F.3d 510, 515 (5th Cir. 2005), quoting *Malina v. Gonzales*, 994 F.2d 1121, 1124 (5th Cir. 1993); see also *McAlester v. Brown*, 469 F.2d 1280, 1282 (5th Cir. 1972). Significantly, “[t]hese factors are *broadly construed in favor of immunity*.” *Ballard*, 413 F.3d at 510 (emphasis added), citing *Malina*, 994 F.2d at 1124. Immunity may be afforded in the absence of one or more of these factors. *Malina*, 994 F.2d at 1124, citing *Adams v. McIlhaney*, 764 F.2d 294, 297 (5th Cir. 1985).<sup>9</sup>

For purposes of absolute immunity, a judge has jurisdiction if the court has some subject-matter jurisdiction. *Adams*, 764 F.2d at 298. Actions taken in excess of jurisdiction do not deprive a court of jurisdiction, only actions taken in the “absence” of jurisdiction do. *Stump*, 435 U.S. at 357 n.7.

### ***C. Application***

Before applying the judicial-capacity factors, this Court must determine what Judge Keller did or did not do. Plaintiffs' factual allegations provide little guidance. They are silent as to specific statements attributed to any of Michael Richard's appellate attorneys concerning specific contact with any identified person at the court of criminal appeals. The Court thus presumes that any contact was by telephone and was between an attorney for Michael Richard and Judge Keller, general-counsel Marty, or the court clerk or an employee in the court clerk's office. The Court further

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<sup>9</sup> These factors have been referred to both as the “*McAlester* factors,” see *Malina v. Gonzales*, 994 F.2d 1121, 1124 (5th Cir. 1993); *Adams v. McIlhaney*, 764 F.2d 294, 297 (5th Cir. 1985), and the “*Malina* factors,” see *Ballard v. Wall*, 413 F.3d 510, 517 (5th Cir. 2005).

presumes that if the contact was not with Judge Keller personally, she either authorized or specifically directed the response to any inquiry by an attorney for Michael Richard. The Court also presumes that Judge Keller did not advise any other judge of the Texas Court of Criminal Appeals of such contact. Indulging in these presumptions, Plaintiffs' allegations, if taken as true, are that Judge Keller ordered the clerk's office not to extend its hours of operation past 5:00 p.m. on September 25, 2007, in spite of her knowledge that Michael Richard's attorneys desired to file an appeal of Richard's death sentence that day before his scheduled execution.

What is lacking from Plaintiffs' allegations is any allegation that there was an actual attempt on September 25 to *file* anything with the court of criminal appeals. In Texas, a document is deemed filed with the court of criminal appeals by delivering the document to either to the clerk of the court or a judge of the court. Tex. R. App. P. 9.2(a). A physical location is not specified. Plaintiffs posit neither that Michael Richard's attorneys attempted to deliver an appeal or stay to the clerk or a judge, or that any attorney attempted to contact a judge of the court to accept delivery.

Anderson argues "Judge Keller obstructed and refused to follow the court's own procedures . . . [h]er conduct is not entitled to judicial immunity because such egregious action and obstruction is not within a judge's normal function." Marsha Richard asserts that Judge Keller's actions were not judicial and that Judge Keller's actions were administrative, ministerial, or *ultra vires*. In light of these allegations, the Court will consider the judicial-capacity factors in turn.

The first judicial-capacity factor inquires as to whether the precise act complained of was a normal judicial function. *See Ballard*, 413 F.3d at 515. Accepting a tendered document for filing is a normal judicial function. *See Tex. R. App. P. 9.2(a)*. The converse must likewise be true—refusing to accept a document is a judicial function. At worst, Judge Keller caused a document

to not be accepted for filing, a clearly judicial function.

The second factor is also met. Judge Keller's actions, if any, occurred within the confines of the court of criminal appeals. There is no allegation they did not. Judge Keller, from the court in Austin, either spoke with an attorney for Michael Richard or, while at the court, instructed the court's general counsel or clerk to act or refrain from acting in the manner alleged by Plaintiffs. In any event, any action of Judge Keller alleged by Plaintiffs occurred on the premises of the court of criminal appeals, clearly an adjunct space to the court's courtroom. *See Ballard*, 413 F.3d at 515.

Regarding the third factor, the Court inquires whether the controversy centered around a case pending before the court. The Court here presumes that there was no pending matter before the court of criminal appeals pertaining to Michael Richard at the time of the activities giving rise to this controversy. Indeed, it appears that the controversy centers around *whether* there would be an appeal before the court of criminal appeals by Richard. The parties agree that the documents Richard's attorneys indicated they wished to file involved matters which the court of criminal appeals could legally determine. In fact, all agree that the court of criminal appeals would of necessity have to consider Richard's allegations before he could further appeal to the Supreme Court of the United States. This Court holds that "pending before the court" may be construed to include all procedural matters necessary to bring an action before that court. *See id.* In Richard's case, the trial court had ruled; he could not proceed to the Supreme Court in the absence of court-of-criminal-appeals action. To fail to construe the third judicial-capacity factor in this manner would create a gap in the orderly proceeding from one court to the next. Such failure would also undermine broadly construing the factors to favor judicial immunity. *Id.* This Court holds that the third judicial-capacity factor has been met. *See id.*

Finally, this court must determine if the act alleged against Judge Keller arose “directly out of a visit to . . . [her] in [her] official capacity.” *Id.* No physical visit to Judge Keller occurred. It is unclear whether there was a telephonic visit to her, as the contact with the court of criminal appeals might have occurred with someone other than her. Again, construing the judicial-capacity factors broadly and likewise construing Plaintiffs’ allegations broadly, there was contact with the court of criminal appeals by an attorney for Michael Richard that was either directly with Judge Keller or set in motion a series of events leading to action by Judge Keller. This Court holds that, for purposes of determining whether a judge acted in her official capacity, the visit need not be face to face. *Cf. Adams*, 764 F.2d at 298 (party’s letter to judge could be construed as “visit”; relevant factor was that correspondence was directed to judge in judge’s official capacity). Here, Richard’s attorneys initiated contact with the court of criminal appeals with regard to a filing they intended to make.

This Court construes the judicial-capacity factors in accordance with their underlying policy and holds that all indicate that the actions complained of in this case were judicial acts for the purpose of immunity analysis.

Judge Keller also had sufficient jurisdiction, as that term is used in judicial-immunity analyses, for her immunity to attach. The court of criminal appeals had subject-matter jurisdiction to accept Michael Richard’s proposed filing. Tex. Const. art. I, § 5(b) (“[t]he appeals of all cases in which the death penalty has been assessed shall be to the court of criminal appeals”). The court also had jurisdiction to deny the filing. Again, construing the pleaded facts most advantageously to Plaintiffs, this Court cannot hold that Judge Keller’s conduct was in complete absence of all jurisdiction. *See Mireles*, 502 U.S. at 12; *Ballard*, 413 F.3d at 517; *Adams*, 764 F.2d at 298.

Because Judge Keller acted in her judicial capacity at all times relevant to the controversy before this Court, and because she did not act in the absence of all jurisdiction, Judge Keller is entitled to complete judicial immunity from suit for damages.

Judicial immunity applies equally to the Does named by Marsha Richard in her Second Amended Complaint. *See Trackwell*, 472 F.3d at 1247 (stating clerk shares judge's judicial immunity when clerk assists judge in discharge of judicial functions); *Wiggins v. New Mexico State Supreme Court Clerk*, 664 F.2d 812, 815 (10th Cir. 1981) (dismissing action against state judges and their clerks based on judicial immunity).<sup>10</sup>

#### ***D. Equitable Relief***

Marsha Richard requests that the Court render a declaratory judgment specifying her rights under the United States and Texas Constitutions. She also requests an injunction that would (1) prevent Defendants from interfering with appeal rights of the condemned; (2) enjoin Judge Keller, the Texas Court of Criminal Appeals, and the State of Texas from preventing filing of death-penalty appeals; and (3) require that all death-penalty appeal communications be directed to the judge assigned to such appeal. Anderson requests a declaratory judgment concerning each of Judge Keller's violations of law and specifying Michael Richard's rights.

Judicial immunity does not protect a judge from injunctive relief. *Pulliam v. Allen*, 466 U.S. 522, 541-42 (1983). However, Section 1983 only allows for injunctive relief if a "declaratory decree

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<sup>10</sup> Plaintiffs seek limited discovery "in support of [their] claim against Defendant Keller's assertion of immunity." Specifically, Plaintiffs seek the depositions of Judges Keller, Johnson, and Womack, court-clerk Alex Acosta, and general-counsel Marty. This Court has accepted as true, for purposes of today's rulings, all pleaded factual allegations of Plaintiffs and has held that Judge Keller is entitled to complete judicial immunity. All that could be accomplished by such discovery is to confirm what the Court has taken to be true. The Court will therefore deny the request.

was violated or declaratory relief [is] unavailable.” 42 U.S.C. § 1983; *Bauer v. Texas*, 341 F.3d 352, 357 (5th Cir. 2003). Marsha Richard has not alleged a declaratory decree was violated.

Regarding the availability of declaratory relief, Plaintiffs are only entitled to declaratory relief if they allege facts showing they are at substantial risk of suffering injury inflicted by Defendants in the future. 28 U.S.C. § 2201(a) (2006) (requiring “actual controversy” between parties); *City of Los Angeles v. Lyons*, 461 U.S. 95, 111-12 (1983); *Bauer*, 341 F.3d at 358. Such injury must be actual and concrete, not hypothetical or speculative, and Plaintiffs “must allege facts from which the continuation of the dispute may be reasonably inferred.” *Bauer*, 341 F.3d at 358. “For a declaratory judgment to issue, there must be a dispute which ‘calls, not for an advisory opinion on a hypothetical basis, but for an adjudication of present right upon established facts.’” *Ashcroft v. Mattis*, 431 U.S. 171, 172 (1976) (*per curiam*) (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 242 (1937)); *Bauer*, 341 F.3d at 358. For obvious reasons, Plaintiffs have not alleged, pursuant to their survival claims, that Michael Richard is at risk of suffering injury by Defendants in the future.<sup>11</sup> Plaintiffs have not alleged, pursuant to their wrongful-death claims, that they are at risk of suffering injury by Defendants in the future.<sup>12</sup> Plaintiff have therefore failed to allege a case or controversy sufficient to demonstrate Article III standing. *See* U.S. Const. art. III, sec. 2; *Lyons*, 461 U.S. at 111-12.

For the same reason, Plaintiffs’ argument that Defendants’ actions are capable of repetition

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<sup>11</sup> A survival action is a personal-injury lawsuit brought on behalf of the heirs, legal representatives, and estate of an injured person despite that person’s death. Tex. Civ. Prac. & Rem. Code Ann. § 71.021. A survival action derives from the claim the decedent would have had if he had survived.

<sup>12</sup> A wrongful-death action allows a surviving spouse, children, and parents of a decedent to bring a lawsuit for actual damages arising from an injury that causes an individual’s death. Tex. Civ. Prac. & Rem. Code Ann. §§ 71.002; .004. As such, it seeks compensation for the spouse’s, children’s, or parents’ injuries.

yet evading review fails. “Capable of repetition yet evading review” is an established exception to the mootness doctrine; it applies when there is a likelihood that the challenged action is too short in duration to be fully litigated before its cessation or expiration, and it is reasonable to expect a plaintiff will be subject to the same action again. *Davis v. Federal Election Com’n*, 128 S.Ct. 2759, 2769 (2008). Marsha Richard points out that “stopping an appeal on execution night will result in the death of the aggrieved and possible barring [of] the case from review,” which goes to the first capable-of-repetition-yet-evading-review requirement. Plaintiffs have failed to allege, however, that they will personally be subjected to this injury again. Plaintiffs’ requests for declaratory relief must be dismissed. Section 1983 does not prevent injunctive relief against judicial officers when declaratory relief is unavailable. 42 U.S.C. § 1983. The Court holds declaratory relief is unavailable. However, the Court’s holding that Marsha Richard fails to allege a case or controversy sufficient to obtain declaratory relief applies equally to her request for injunctive relief, and it must also be dismissed.

### III. Conclusion

**IT IS THEREFORE ORDERED** that Defendant Judge Keller’s Motion to Dismiss Under Federal Rule of Civil Procedure 12(b)(6) for Failure to State a Claim and 12(b)(1) for Lack of Jurisdiction (Clerk’s Document 37) is **GRANTED**, Plaintiff Marsha Richard’s claims against Judge Keller and the John Does are **DISMISSED**, and Plaintiff-Intervenor Doreen Anderson’s claims against Judge Keller are **DISMISSED**.

**IT IS FURTHER ORDERED** that Defendant Judge Keller’s Motion to Dismiss Under Federal Rule of Civil Procedure 12(b)(6) for Failure to State a Claim and 12(b)(1) for Lack of Jurisdiction (Clerk’s Document 8) **IS DISMISSED**.

**IT IS FURTHER ORDERED** that Plaintiff-Intervenor's Opposed Motion to Take Limited Depositions, Pursuant to Local Rule CV-12, on Issue of Defendant Sharon Judge Keller's Assertion of Immunity (Clerk's Document 39) is **DENIED**.

SIGNED this 29<sup>th</sup> day of September, 2008.

  
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LEE YEAKEL  
UNITED STATES DISTRICT JUDGE