No. 21-_____

In The
Supreme Court of the United States

IN RE WHOLE WOMAN'S HEALTH, ET AL., PETITIONERS

ON PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF MANDAMUS

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QUESTION PRESENTED

When this case was before the Court on a writ of certiorari before judgment, this Court "effectively [stood] in the shoes of the Court of Appeals" and "review[ed] the defendants' appeals challenging the District Court's order denying their motions to dismiss." *Whole Woman's Health v. Jackson*, No. 21-463, slip op. 4 (Dec. 10, 2021). This Court held that Petitioners' lawsuit challenging a Texas statute "is permissible against some of the named defendants but not others." *Id.* at 1. Accordingly, the Court's judgment affirmed in part and reversed in part the district court's order and remanded to the Fifth Circuit for proceedings consistent with the opinion. Rather than remanding the case to the district court, a divided panel of the court of appeals has scheduled oral argument for January 7, 2022, to consider whether to certify to the Texas Supreme Court the question whether the remaining defendants have enforcement authority and, alternatively, to set a briefing schedule on purportedly remaining justiciability issues.

The question presented is whether a writ of mandamus should issue directing the court of appeals to remand the case to the district court without delay.

PARTIES TO THE PROCEEDING

Petitioners in this Court (plaintiffs-appellees in the court of appeals) are Whole Woman's Health; Alamo City Surgery Center, P.L.L.C. d/b/a Alamo Women's Reproductive Services; Brookside Women's Medical Center, P.A. d/b/a Brookside Women's Health Center and Austin Women's Health Center; Houston Women's Clinic; Houston Women's Reproductive Services; Planned Parenthood Center for Choice; Planned Parenthood of Greater Texas Surgical Health Services; Planned Parenthood South Texas Surgical Center; Southwestern Women's Surgery Center; Whole Woman's Health Alliance; Allison Gilbert, M.D.; Bhavik Kumar, M.D.; The Afiya Center; Frontera Fund; Fund Texas Choice; Jane's Due Process; Lilith Fund for Reproductive Equity; North Texas Equal Access Fund; Reverend Erika Forbes; Reverend Daniel Kanter; and Marva Sadler.

Respondent in this Court is the United States Court of Appeals for the Fifth Circuit. Respondents also include Judge Austin Reeve Jackson, in his official capacity as Judge of the 114th District Court; Penny Clarkston, in her official capacity as Clerk for the District Court of Smith County; Mark Lee Dickson; Stephen Brint Carlton, in his official capacity as Executive Director of the Texas Medical Board; Katherine A. Thomas, in her official capacity as Executive Director of the Texas Board of Nursing; Cecile Erwin Young, in her official capacity as Executive Commissioner of the Texas Health and Human Services Commission; Timothy L. Tucker, in his official capacity as Executive Director of the Texas Board of Pharmacy; and Ken Paxton, in his official capacity as Attorney General of Texas.

CORPORATE DISCLOSURE STATEMENT

Whole Woman's Health is the doing business name of a consortium of limited liability companies held by a holding company, the Booyah Group, which includes Whole Woman's Health of McAllen, LLC and Whole Woman's Health of Fort Worth, LLC d/b/a Whole Woman's Health of Fort Worth and Whole Woman's Health of North Texas. Whole Woman's Health has no parent corporation, and no publicly held corporation holds 10% or more of its shares.

Planned Parenthood of Greater Texas Surgical Health Services is a subsidiary of Planned Parenthood of Greater Texas. No publicly held corporation holds 10% or more of shares in either organization.

Planned Parenthood South Texas Surgical Center discloses that Planned Parenthood South Texas is its sole member. No publicly held corporation holds 10% or more of shares of either organization.

Alamo City Surgery Center, P.L.L.C. d/b/a Alamo Women's Reproductive Services; Brookside Women's Medical Center, P.A. d/b/a Brookside Women's Health Center and Austin Women's Health Center; Houston Women's Clinic; Houston Women's Reproductive Services; Planned Parenthood Center for Choice; Southwestern Women's Surgery Center; Whole Woman's Health Alliance; The Afiya Center; Frontera Fund; Fund Texas Choice; Jane's Due Process; Lilith Fund for Reproductive Equity; and North Texas Equal Access Fund have no parent corporations, and no publicly held corporation holds 10% or more of their shares.

STATEMENT OF RELATED PROCEEDINGS

The following proceedings are directly related to the case in this Court within the meaning of Rule 14.1(b)(iii): U.S. District Court for the Western District of Texas, No. 1:21-cv-616, *Whole Woman's Health v. Jackson*, (Aug. 20, 2021); U.S. Court of Appeals for the Fifth Circuit, No. 21-50708, *In re Clarkston, Dickson* (Aug. 13, 2021); Supreme Court of the United States, No. 21A24, *Whole Woman's Health v. Jackson*, (Sept. 1, 2021); Supreme Court of the United States, No. 21-463, *Whole Woman's Health v. Jackson*, (Dec. 10, 2021); Supreme Court of the United States, No. 21A220, (Dec. 16, 2021); U.S. Court of Appeals for the Fifth Circuit, No. 21-50792, *Whole Woman's Health v. Jackson* (Dec. 30, 2021).

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PETITION FOR A WRIT OF MANDAMUS

Petitioners respectfully petition for a writ of mandamus to the United States Court of Appeals for the Fifth Circuit, requesting that the Fifth Circuit be directed to remand this case to the district court.

OPINIONS BELOW

The district court's August 25, 2021, opinion in *Whole Woman's Health v. Jackson* is reported at 2021 WL 3821062. This Court's decision on certiorari before judgment is reported at 142 S. Ct. 522. The Fifth Circuit's December 27, 2021, order setting oral argument on defendants' Motion to Certify to the Supreme Court of Texas or, Alternatively, to Set a Briefing Schedule, as well as Judge Higginson's dissenting opinion, are unpublished and appear in the Appendix to this Petition ("Pet. App.") at 4a–14a. The Fifth Circuit's December 30, 2021, order denying plaintiffs' Motion for Reconsideration and to Remand the Case to the District Court is unpublished and appears in the Pet. App. at 80a.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1651.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The All Writs Act, 28 U.S.C. § 1651(a), provides: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

STATEMENT OF THE CASE

There is no clearer rule in all appellate jurisprudence than the rule that a lower court must comply with the mandate of a superior court and that the issues decided by the superior court are not subject to relitigation below.

Here, when this Court granted certiorari before judgment, it "[stood] in the shoes of the Court of Appeals." *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 531 (2021). In that capacity it decided defendants' appeals of the district court's denial of their motions to dismiss. It concluded that plaintiffs' claims against multiple defendants could not proceed because of sovereign immunity and justiciability issues. As to the licensing official defendants, however, it reached the opposite conclusion, with eight Justices agreeing that the case against those defendants may proceed and affirming the district court's denial of their motion to dismiss.

With a clear majority of this Court having held that the case may proceed past the motion-to-dismiss stage, the Fifth Circuit has no issues left to resolve on the appeal before it and no authority to retain jurisdiction. Its only remaining task is to remand the case to the district court for further proceedings consistent with this Court's opinion.

Because it has refused to do so, Petitioners respectfully request that this Court issue a writ of mandamus directing such remand.

A. Texas Senate Bill 8

Texas Senate Bill 8, 87th Leg., Reg. Sess. (Tex. 2021) ("S.B. 8" or the "Act"), which took effect on

September 1, provides that "a physician may not knowingly perform or induce an abortion * * * if the physician detect[s] a fetal heartbeat," a term that S.B. 8 defines to include embryonic cardiac activity. Tex. Health & Safety Code § 171.204(a); *see also id.* § 171.201(1), (3), (7). Such activity is typically detectable by approximately six weeks in pregnancy, Pet. App. 23a n.3, before many patients even realize they are pregnant, D.Ct. Dkt. 19-1 at 5–6.

To insulate the law from meaningful judicial review and deter the exercise of constitutional rights, S.B. 8 delegates direct enforcement of the prohibition to any member of the public. It authorizes "[a]ny person" other than a government official to bring a civil enforcement action against anyone alleged to have (1) provided a prohibited abortion, (2) engaged in activity that "aids or abets" such an abortion, or (3) intended to provide, aid, or abet a prohibited abortion. Tex. Health & Safety Code § 171.208(a). Where a violation is established, the court "shall" enjoin further violations and award the S.B. 8 claimant a minimum bounty (there is no statutory maximum) of $10,000 per abortion, payable by the person sued. *Id.* § 171.208(b)(1)–(2). S.B. 8 also seeks to frustrate state-court vindication of federal rights by creating a web of claimant-favoring rules applicable to S.B. 8 claims alone, and by authorizing the shifting of attorney's fees against unsuccessful challengers to abortion restrictions. *See* Tex. Civ. Prac. & Rem. Code § 30.022; Pet'rs' Br. at 9–10, *Whole Woman's Health v. Jackson*, No. 21-463 (U.S. Oct. 27, 2021).

B. Petitioners' Lawsuit

Petitioners—plaintiffs below, who are Texas abortion providers and individuals and organizations that support abortion patients—brought this pre-enforcement challenge to S.B. 8. Plaintiffs named two putative defendant classes of officials integral to S.B. 8's private enforcement: one composed of clerks and the other of judges in Texas courts authorized to hear S.B. 8 claims. Penny Clarkston, a court clerk, and Judge Austin Reeve Jackson were named as the class representatives. Pet. App. 32a.

Plaintiffs also named as a defendant Mark Lee Dickson, a private party who plaintiffs contended presented a credible threat of enforcement against plaintiffs who violate the Act, and Texas Attorney General Ken Paxton, the state attorney general who serves as Texas's chief law-enforcement officer. Pet. App. 32a–33a.

Finally, Plaintiffs sued Executive Director of the Texas Medical Board, Stephen Carlton; Executive Director of the Texas Board of Nursing, Katherine Thomas; Executive Director of the Texas Board of Pharmacy, Allison Benz;[1] and Executive Commissioner of the Texas Health and Human Services Commission, Cecile Young. Pet. App. 32a–33a. Plaintiffs sued these state licensing officials on the grounds that they can enforce S.B. 8's prohibitions indirectly by exercising regulatory authorities triggered by violations of S.B. 8, as well as S.B. 8's fee-shifting provision, as parties regularly involved in plaintiffs' challenges to abortion regulations in Texas.

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[1] Timothy L. Tucker has replaced Allison Benz as Executive Director of the Texas Board of Pharmacy.

Pet. App. 38a; *see also* Pet'rs' Br. at 2–3, 11–12, 36, *Whole Woman's Health*, No. 21-463 (U.S. Oct. 27, 2021) (raising the state licensing officials' authority to enforce section 4 of S.B. 8, the fee-shifting provision); Reply Br. for Resp'ts Jackson, et al., at 7–8, *Whole Woman's Health*, No. 21-463 (U.S. Oct. 29, 2021) (addressing section 4's fee-shifting provision).

C. Proceedings in the District Court

Plaintiffs moved for summary judgment; they later moved for a preliminary injunction when it became clear that final judgment would not be available by September 1. All defendants moved to dismiss for lack of jurisdiction and—with respect to the government defendants—on sovereign-immunity grounds. Pet. App. 38a, 53a–54a, 77a.

The district court denied the motions to dismiss, concluding that plaintiffs have standing and that the claims against clerks, judges, and other government officials were subject to suit in federal court under *Ex parte Young*, 209 U.S. 123 (1908). Pet. App. 37a–85a. As relevant here, the district court held that the licensing-official defendants had authority to "enforce violations of other state laws," such as the Medical Practice Act, when those laws are triggered by an S.B. 8 violation, and to seek attorney's fees under S.B. 8's fee-shifting provision. Pet. App. 39a–41a.[2]

[2] The district court also held that Defendant Dickson could seek attorney's fees under S.B. 8's fee-shifting provision. Pet. App. 83a–84a.

D. Proceedings in the Court of Appeals and This Court

Defendants filed a notice of appeal from the interlocutory "Order issued August 25, 2021 (ECF No. 82), which denies Defendants' motions to dismiss for lack of jurisdiction under Fed. R. Civ. P. 12(b)(1)." D.Ct. Dkt. 83 at 1. The district court then stayed further proceedings as to the government officials based on their sovereign-immunity defenses. D.Ct. Dkt. 88. The court of appeals later stayed the district-court proceedings as to Dickson, too. Order at 3 (5th Cir. Sept. 10, 2021), Doc. No. 00516009284.

This Court granted certiorari before judgment on October 22, 2021. In so doing, the Court necessarily determined "that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." S. Ct. R. 11; *see Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 350 (1985). The Court then heard the case on an expedited basis, setting oral argument for only ten days later, and issuing its opinion 39 days after oral argument.

In their briefing, the licensing-official defendants could have asked this Court to certify to the Texas Supreme Court the question whether they have any authority to enforce S.B. 8. *See* Tex. R. App. P. 58.1 (providing for certification from any "federal appellate court"). They did not do so.

The defendants also recognized that the issues before the Court included whether plaintiffs' claims concerning S.B. 8's fee-shifting provision can proceed. The state licensing officials argued that the fact that

"executive officials could seek attorney's fees as 'prevailing parties' under section 4 of SB 8" did not create an Article III injury, and also that plaintiffs could not pursue their section 4 claim under *Ex parte Young*. Reply Br. for Resp'ts Jackson, et al., 7–8, *Whole Woman's Health v. Jackson*, No. 21-463 (U.S. Oct. 29, 2021). Similarly, Dickson's brief included six pages of argument under the heading: "The Plaintiffs Lack Standing To Sue Mr. Dickson Over Section 4 Because Mr. Dickson Has No Intention Of Suing The Plaintiffs Under That Provision." Br. for Resp't Dickson 44–49, *Whole Woman's Health v. Jackson*, No. 21-463 (U.S. Oct. 27, 2021).

In its December 10 opinion, the Court explained that because it "granted certiorari before judgment, [it] effectively stand[s] in the shoes of the Court of Appeals." *Whole Woman's Health v. Jackson*, 142 S. Ct. at 531. This Court thus "review[ed] the defendants' appeals challenging the District Court's order denying their motions to dismiss." *Id.* The Court concluded that plaintiffs' claims against the state-court judge and clerk, as well as the Texas attorney general, could not proceed because of sovereign immunity and justiciability issues. *Id.* at 531–36. As to Dickson, the Court held, based on "the briefing before us" and "on the record before us," that plaintiffs lacked standing to sue him. *Id.* at 537.

As to the licensing officials, however, this Court held that plaintiffs' claims for relief "survive" the motion to dismiss. *Id.* at 535–36. The Court reviewed Texas law and concluded that the licensing officials "may or must take enforcement actions against the [plaintiffs] if they violate the terms of Texas's Health and Safety Code, including S.B. 8." *Id.* at 535.

"Accordingly," the Court held "that sovereign immunity does not bar the [plaintiffs'] suit against these named defendants at the motion to dismiss stage." *Id.* 535–36. The Court also concluded that plaintiffs' claims against the licensing official defendants satisfy Article III. *Id.* at 536–37.

Summarizing its holdings, the Court explained: (1) the Court unanimously agrees "Judge Jackson should be dismissed from this suit"; (2) "[a] majority reaches the same conclusion with respect to the [plaintiffs'] parallel theory for relief against state-court clerks"; (3) with respect to Attorney General Paxton, "a majority concludes that he must be dismissed"; and (4) "[e]very Member of the Court accepts that the only named private-individual defendant, Mr. Dickson, should be dismissed." *Id.* at 539. As to the licensing officials, however, "eight Justices hold this case may proceed past the motion to dismiss stage against Mr. Carlton, Ms. Thomas, Ms. Benz, and Ms. Young." *Id.*

The Court thus "affirmed in part and reversed in part" the district court's order, and "remanded [the case] for further proceedings consistent with [its] opinion." *Id.*

Petitioners filed an application for issuance of a certified copy of the judgment forthwith and requested that the case be remanded directly to the district court. Defendants urged the Court to wait the usual 25 days before issuing its judgment, even though no defendant planned to file any petition for rehearing. Defendants also argued that the Court should follow its usual procedure of remanding to the court of appeals and suggested that departing from that

ordinary practice would preclude defendants from asking the Fifth Circuit to certify to the Texas Supreme Court the question whether the licensing officials have state authority to enforce S.B. 8. Justice Gorsuch granted the request to issue the judgment forthwith, consistent with the Court's expedition of the case.

The Court issued a certified copy of its judgment on December 16, 2021. The judgment states that "it is ordered and adjudged by this Court that the judgment of the District Court is affirmed in part and reversed in part, and the case is remanded to the United States Court of Appeals for the Fifth Circuit for further proceedings consistent with the opinion of this Court."

E. Proceedings on Remand

The same day, defendants filed in the Fifth Circuit an opposed "Motion to Certify to the Supreme Court of Texas or, Alternatively, To Set a Briefing Schedule." Pet. App. 3a. All defendants joined this motion, including those who this Court had already ordered must be dismissed from this suit (i.e., defendants Jackson, Clarkston, Paxton, and Dickson).

Defendants asked the Fifth Circuit to certify to the Supreme Court of Texas the question of "[w]hether, notwithstanding statutory provisions making private lawsuits the only enforcement mechanism for SB 8 and prohibiting government officials from bringing such lawsuits, Texas licensing officials retain indirect enforcement authority to bring disciplinary proceedings for violations of SB 8 * * * before remanding this case to the district court." Mot. 1 (5th Cir. Dec. 16, 2021), Doc. 00516135054. Defendants alternatively asked the court of appeals to

"set a briefing schedule to resolve the remaining issues in this appeal." *Id.* According to defendants, the supposedly remaining issues include "whether the plaintiffs have Article III standing to sue the executive licensing officials," *id.* at 4, as well as "the defendants' jurisdictional objections to the claims involving SB 8's fee shifting provision," *id.* at 7–8.

In response to the motion, plaintiffs explained that this Court had stepped into the Fifth Circuit's shoes and had already fully decided the appeal pending in the Fifth Circuit. They sought remand of the case to the district court without delay.

On December 27, 2021, a divided panel of the court of appeals issued an order stating that it had "decided that oral argument is appropriate before ruling on the State's Motion to Certify or Alternate Motion to Set a Briefing Schedule, and the Response thereto." Pet. App. 4a. It stated that "[w]ithout limiting the parties' discretion, the court is particularly interested in questions concerning justiciability as to the defendants remaining in this suit, and the necessity and appropriateness of certification to the Texas Supreme Court." *Id.* Although the court of appeals scheduled oral argument for January 7, 2022, it provided no indication of when it would decide the motion. *Id.*

Judge Higginson dissented, stating that he did "not read the Supreme Court's judgment, especially in a case of this magnitude and acceleration, to countenance such delay." Pet. App. 6a. He "would have immediately remand[ed] the case to the district court, denying without oral argument the defendants' motion." *Id.*

He explained that the motion to certify should be denied because the "Court majority could not have been more explicit" that claims against the licensing officials should proceed past the motion-to-dismiss stage. Pet. App. 7a. As he noted, the state-law question as to the licensing officials' enforcement authority "was sufficiently briefed and argued in the Supreme Court to be the basis of Justice Thomas's dissenting opinion." *Id.* As Judge Higginson explained, there is not "any ambiguity in the majority's judgment. The defendants already lost this point in the Supreme Court." *Id.* He also observed that "when this issue was before the Supreme Court, no Justice indicated that the Court should certify the question itself or instruct [the Fifth Circuit] to certify the question." Pet. App. 8a.

Judge Higginson also would have denied immediately the defendants' "alternative motion to set a briefing schedule to address the remaining issues" because "no such issues exist." Pet. App. 9a–10a. In his view, "[b]ecause the Supreme Court stepped into [the Fifth Circuit's] shoes and issued a full judgment affirming in part and reversing in part the district court's order, which had addressed all of the plaintiffs' claims, there are no issues remaining in this appeal for us to resolve." Pet. App. 10a.

On December 29, 2021, plaintiffs moved for reconsideration and to remand the case to the District Court. On December 30, 2021, the court of appeals denied that motion. Pet. App. 15a–17a. Judge Higginson again dissented from that order. Pet. App. 17a n.1.

REASONS FOR GRANTING THE PETITION

The Court may "issue all writs necessary or appropriate in the aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a).

A writ of mandamus is warranted where "(1) no other adequate means exist to attain the relief [the party] desires, (2) the party's right to issuance of the writ is clear and indisputable, and (3) the writ is appropriate under the circumstances." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (quoting *Cheney v. United States Dist. Ct.*, 542 U.S. 367, 380–81 (2004)) (internal quotation marks and alterations omitted).

Mandamus is reserved for "exceptional circumstances amounting to a judicial 'usurpation of power.'" *Cheney*, 542 U.S. at 380 (citation omitted). Where a lower court "mistakes or misconstrues the decree of this Court" and fails to "give full effect to the mandate, its action may be controlled * * * by a writ of mandamus to execute the mandate of this Court." *Gen. Atomic Co. v. Felter*, 436 U.S. 493, 497 (1978) (per curiam) (quoting *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895)); *see also United States v. Fossatt*, 62 U.S. 445, 446 (1858) ("[W]hen a case is sent to the court below by a mandate from this court, * * * if the court does not proceed to execute the mandate, or disobeys and mistakes its meaning, the party aggrieved may, by motion for a mandamus, at any time, bring the errors or omissions of the inferior court before this court for correction.").

Exceptional circumstances are present here, where a divided panel of the Fifth Circuit has refused to relinquish jurisdiction over this case to the district

court despite this Court having fully resolved the appeal pending in the Fifth Circuit.

I. PETITIONERS' RIGHT TO ISSUANCE OF A WRIT IS CLEAR

Petitioners are entitled to a writ directing the Fifth Circuit to relinquish jurisdiction over this case and remand it to the district court for further proceedings consistent with this Court's opinion, because the appeals before the Fifth Circuit have been fully resolved by this Court.

What this Court "is asked to do by way of granting certiorari before judgment is to render the kind of judgment on the merits of the appeal that the court of appeals could have rendered." Stephen M. Shapiro et al., Supreme Court Practice § 2.2 at 80 (10th ed. 2013). The Court did so here. By "grant[ing] certiorari before judgment, [it] effectively [stood] in the shoes of the Court of Appeals." *Whole Woman's Health*, 142 S. Ct. at 531. And after full briefing and oral argument, "eight Justices [held] this case *may proceed past the motion to dismiss stage* against" the licensing-official defendants. *Id.* (emphasis added). The Court repeated this conclusion three separate times, *see id.* at 535–36, 537, 539, rejecting the position of the sole Justice who dissented from this holding, *id.* at 539 (Thomas, J., concurring in part and dissenting in part). *See also id.* at 543 ("I would instruct the District Court to dismiss this case against all respondents[.]").

With a clear majority of this Court having held that the case may proceed past the motion-to-dismiss stage as to the state-licensing defendants, "there are no issues remaining" before the Fifth Circuit "for [it]

to resolve," as the appeal was of the district court's denial of defendants' motion to dismiss. Pet. App. 10a (Higginson, J., dissenting). Instead, all that is left for the court of appeals to do is enter its own order remanding the case to the district court. *See Whole Woman's Health*, 142 S. Ct. at 539 ("affirm[ing] in part and revers[ing] in part" the "order of the District Court" and remanding the case to the Fifth Circuit "for further proceedings consistent with [its] opinion").

However, in contravention of this Court's mandate, the court of appeals denied petitioners' motion to remand and is continuing to exercise jurisdiction over the fully decided appeal, precluding the case from proceeding past the motion-to-dismiss stage as this Court directed. The court of appeals has ordered oral argument and indicated that it intends to consider, at minimum, "questions concerning justiciability as to the defendants remaining in this suit, and the necessity and appropriateness of certification to the Texas Supreme Court." Pet. App. 4a.

Yet no such "questions concerning justiciability" remain. This Court already concluded that Article III is satisfied here. Responding to Justice Thomas's contention that plaintiffs lack standing to sue the licensing officials, the Court explained that plaintiffs have shown an injury caused by those defendants. *Whole Woman's Health*, 142 S. Ct. at 536–37. The Court recognized that plaintiffs "have plausibly alleged that S.B. 8 has already had a direct effect on their day-to-day operations," and that there is a credible threat of enforcement by the licensing officials, *id.* at 537, which is sufficient to establish

Article III standing, *see Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014); *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979).

Moreover, even if the Fifth Circuit limited its consideration to defendants' motion for certification to the Supreme Court of Texas and excluded "justiciability" questions, it has still violated this Court's mandate. There is no way to reconcile certification with this Court's decision, since the Court already *affirmed* the part of the district court's order denying the licensing officials' motions to dismiss. *Whole Woman's Health*, 142 S. Ct. at 538–39 (resolving in full defendants' appeals and ordering that plaintiffs' case may proceed against state licensing officials).

Defendants had the opportunity to present their certification request to this Court during merits briefing and argument, but they did not do so. And even without such a request, this Court could have sua sponte sought to certify any questions of state law to the Texas Supreme Court, had it believed that certification was necessary. *See* Tex. R. App. P. 58.1 (providing for certification from any "federal appellate court"). Yet "the Court declined to certify this question itself, as it has * * * previously done." Pet. App. 8a (Higginson, J., dissenting) (citing *Fiore v. White*, 528 U.S. 23 (1999); *Elkins v. Moreno*, 435 U.S. 647 (1978); *Aldrich v. Aldrich*, 375 U.S. 249 (1963); *Dresner v. City of Tallahassee*, 375 U.S. 136 (1963)).

Defendants are not entitled to a second bite at the apple now that this Court has fully resolved their appeal, and the Fifth Circuit lacks authority to do

anything else beyond remanding the case to the district court.

Therefore, Petitioners meet the high threshold for a writ of mandamus ordering the Fifth Circuit to confine its actions to the limits prescribed by this Court's mandate.

II. A WRIT OF MANDAMUS IS WARRANTED GIVEN THE URGENT CIRCUMSTANCES OF THIS CASE

Because the Court of Appeals is acting in conspicuous violation of this Court's mandate, a writ of mandamus from this Court is the appropriate vehicle to rectify the error. *See, e.g.*, *Ex parte Republic of Peru*, 318 U.S. 578, 583 (1943); *Fossatt*, 62 U.S. at 446.

This Court's intervention is particularly necessary because of the extraordinary, urgent circumstances of this case. As the Chief Justice stated, "[g]iven the ongoing chilling effect of the state law, the District Court should resolve this litigation and enter appropriate relief without delay." *Whole Woman's Health*, 142 S. Ct. at 544 (Roberts, C.J., concurring in the judgment in part and dissenting in part).

For more than four months, thousands of Texans have been unable to exercise their federal constitutional right to terminate their pregnancy. Those with the means to do so are being forced to travel out of State—in many cases, hundreds of miles or more—to obtain constitutionally protected medical care, while many others are being forced to take on the profound medical risks and pains of continuing pregnancy and childbirth against their will. And the rush of Texans fleeing to seek care is causing weeks-

long appointment backlogs in other States, harming residents of multiple States and invariably delaying first-trimester abortion patients across the country until later in pregnancy. Pet. for Cert. Before J. 18–21, *Whole Woman's Health*, No. 21-463, (U.S. Sept. 23, 2021); *see also Whole Woman's Health*, 142 S. Ct. at 545 (Sotomayor, J., concurring in the judgment in part and dissenting in part).

Given the magnitude of the constitutional questions presented, this case "has received extraordinary solicitude," and for good reason. *Whole Woman's Health*, 142 S. Ct. at 538 n.6. On August 30, petitioners filed an emergency application for injunctive relief, and the Court resolved that application in approximately two days. On October 18, the Court granted petitioners' motion to expedite consideration of the petition for a writ of certiorari before judgment and directed respondents to file a response three days later. On October 22, the Court granted the petition and set oral argument for only ten days later. And the Court issued its opinion 39 days after oral argument. Most recently, the Court granted the plaintiffs' application to issue the judgment forthwith, rather than waiting the typical twenty-five days to issue its judgment.

Allowing the court of appeals to flout this Court's mandate and derail indefinitely the timely resolution of the merits of this case by the district court would render this extraordinary solicitude effectively meaningless and compound the ongoing harm to pregnant Texans under S.B. 8.

III. NO OTHER ADEQUATE MEANS TO OBTAIN RELIEF EXIST

No other adequate means exist to obtain Petitioners' requested relief. "[T]he Court has indicated that mandamus is the only proper remedy available to a party who has prevailed in the Supreme Court where the lower court, in the words of *United States v. Fossatt*, 62 U.S. (21 How.) 445, 446 (1858), 'does not proceed to execute the mandate, or disobeys and mistakes its meaning.'" Stephen M. Shapiro, et al., Supreme Court Practice 665 (10th ed. 2013). And here, petitioners have already moved for reconsideration of the court of appeals' order setting oral argument and for the case to be immediately remanded to the district court. A divided panel of the Fifth Circuit denied that request on December 30, 2021. Pet. App. 15a–17a.

Absent intervention by the Court, the Fifth Circuit is poised to entertain questions already decided by the Court in direct violation of this Court's mandate, and delay further resolution of this case in the district court by at least weeks, and potentially months or more. Therefore, Petitioners have no recourse in any other court. *In re Sanford Fork & Tool Co.*, 160 U.S. at 255; *Will v. United States*, 389 U.S. 90, 95–96 (1967); Stephen M. Shapiro et al., Supreme Court Practice 665 (10th ed. 2013) ("One function of the writ of mandamus is to force a lower court to comply with the mandate of an appellate court. When the mandate or judgment in question is that of the Supreme Court, application for the writ must, of course, be made to that Court.").

CONCLUSION

For the foregoing reasons, the Court should issue a writ of mandamus directing the court of appeals to remand this case to the district court.

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