No. 21-463

In the Supreme Court of the United States

WHOLE WOMAN'S HEALTH ET AL., PETITIONERS

v.

AUSTIN REEVE JACKSON, ET AL.

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

RESPONDENTS CARLTON, THOMAS, TUCKER, AND YOUNG'S OPPOSITION TO PETITIONERS' APPLICATION FOR ISSUANCE OF A COPY OF THE OPINION AND CERTIFIED COPY OF THE JUDGMENT FORTHWITH

This Court granted certiorari before judgment to the United States Court of Appeals for the Fifth Circuit in late October. Three days ago, this Court issued its opinion and judgment affirming in part and reversing in part the denial of respondents' motions to dismiss. Petitioners now ask the Court to depart from its usual procedures in two respects: first, by issuing the opinion and judgment forthwith, and second, by remanding to the district court instead of the Fifth Circuit. Neither departure is proper, and each would prejudice respondents. The Court should deny petitioners' application.

BACKGROUND

Petitioners' lawsuit seeks to enjoin state officials from enforcing two aspects of SB 8: its prohibition on post-heartbeat abortions and its fee-shifting provision. Respondents Carlton, Thomas, Tucker,[1] and Young moved to dismiss based on sovereign immunity and

[1] Timothy L. Tucker has replaced Allison Vordenbaumen Benz as Executive Director of the Texas Board of Pharmacy; Mr. Tucker is automatically substituted for Ms. Benz pursuant to Rule 35.3.

petitioners' lack of Article III standing. They raised these issues in their opening brief in the Fifth Circuit.

After that brief was filed, this Court granted certiorari before judgment on a question that would resolve some, but not all, of these issues: "whether a State can insulate from federal-court review a law that prohibits the exercise of a constitutional right by delegating to the general public the authority to enforce that prohibition through civil actions." Pet. i. That grant did not include respondents' appeal over SB 8's attorney's fees provision.

Three days ago, this Court held that petitioners' claims fail against all respondents except the four executive licensing officials—Carlton, Thomas, Tucker, and Young. Slip Op. 4-14. As to those Texas officials, the Court held:

> On the briefing and argument before us, it appears that these particular defendants fall within the scope of *Ex parte Young*'s historic exception to state sovereign immunity. Each of these individuals is an executive licensing official who may or must take enforcement actions against the petitioners if they violate the terms of Texas's Health and Safety Code, including S. B. 8. *See, e.g.*, [Tex. Occ. Code § 164.055(a)]. Accordingly, we hold that sovereign immunity does not bar the petitioners' suit against these named defendants at the motion to dismiss stage.

Slip Op. 12. As this Court explained, that holding turned on its tentative resolution of a question of Texas Law, and "Texas courts and not [the Supreme Court] are the final arbiters of the meaning of state statutory directions." Slip Op. 13; *see also id.* at 6 n.3 (Thomas, J., concurring in part and dissenting in part).

ARGUMENT

In the ordinary course, this Court would remand to the Fifth Circuit—the court to which it granted a writ of certiorari. Petitioners give no reason why the usual procedure should not be followed in this case.

Indeed, it would be improper to send the case past the Fifth Circuit because doing so would prejudice respondents. This Court granted certiorari before judgment on only part of respondents' interlocutory appeal. Their appeal regarding petitioners' challenges to enforcement of SB 8's attorney's fees provision is unresolved and remains pending before the Fifth Circuit. Moreover, this Court concluded petitioners' claims could overcome respondents' sovereign immunity under *Ex parte Young*, Slip Op. 12; the Court does not appear to have addressed respondents' separate challenges to petitioners' Article III standing to sue the licensing-official defendants.

Moreover, respondents would be prejudiced by a remand directly to the district court because it would preclude them from seeking certification of the controlling state-law question—namely, whether the licensing-official respondents may "indirectly" enforce SB 8 as a matter of state law—to the Supreme Court of Texas. That Court accepts certified questions from appellate courts, *see* Tex. R. App. P. 58.1, not from district courts. And this Court made clear that its resolution of the state-law question was tentative. The Court concluded that "as best we can tell from the briefing before us, the licensing-official defendants are charged with enforcing "'other laws that regulate . . . abortion,'" so "it appears Texas law imposes on the licensing-official defendants a duty . . . expressly

preserved by S. B. 8's saving clause." Slip Op. 13. The Court also observed that the statutory text "suggests" the Texas Legislature did not intend to prohibit all collateral enforcement mechanisms. Slip Op. 13 n.4. The licensing-officials disagree with that reading of Texas law; they believe they have no such authority and do not intend to invoke it even if they do. But in any event, they intend to ask for certification of this dispositive question to the Supreme Court of Texas.

Petitioners provide no good reason why the Court should displace the ordinary, orderly resolution of this appeal by issuing the mandate sooner than the ordinary course. While respondents do not intend to seek rehearing in this Court, petitioners' request would prejudice their ability to pursue their appeal in the Fifth Circuit and to seek certification of the controlling state-law question. The Court should remand in the ordinary course to the Fifth Circuit.

CONCLUSION

The Court should deny the application and remand in the ordinary course to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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DECEMBER 2021