No. 21A220 (21-463)

IN THE

# Supreme Court of the United States

WHOLE WOMAN'S HEALTH, ET AL., Petitioners,

*v.*

AUSTIN REEVE JACKSON,
IN HIS OFFICIAL CAPACITY AS JUDGE OF THE 114TH DISTRICT COURT, ET AL.

## REPLY IN SUPPORT OF APPLICATION FOR ISSUANCE OF A COPY OF THE OPINION AND CERTIFIED COPY OF THE JUDGMENT FORTHWITH


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## RULE 29.6 STATEMENT

The Rule 29.6 disclosure statement in the application remains accurate.

## ARGUMENT

Consistent with this Court's expedited treatment of this case, this Court should issue the certified copy of its opinion and judgment forthwith and remand this case to the district court.

Respondents have no valid reason to oppose expedition. The 25-day delay provided in Rule 45 before transmission of the opinion and judgment allows time for aggrieved parties to seek rehearing. But Respondents Carlton, Thomas, Tucker, and Young "do not intend to seek rehearing in this Court." Opp'n 4. And none of the remaining respondents has any basis to seek rehearing, as they are not aggrieved by this Court's decision. Accordingly, there is no basis to delay transmission of the opinion and certified copy of the judgment. Rather, there are compelling reasons to transmit the opinion and judgment immediately: because the state law at issue clearly violates this Court's precedent and is chilling the exercise of a constitutional right recognized by this Court, the district court should be permitted to enter appropriate relief without delay. *See* slip op. 2 (Roberts, C.J., concurring in the judgment in part and dissenting in part).

Further, respondents are incorrect in suggesting that the ordinary course is for this Court to remand to the Fifth Circuit. As this Court explained, because it granted certiorari before judgment, it "stand[s] in the shoes of the Court of Appeals." Slip op. 4; *see* Eugene Gressman, et al., Supreme Court Practice § 2.4 at 84 (9th ed. 2007) ("[W]hat the Supreme 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."). This Court commonly remands to the district court when it grants certiorari before judgment. *See, e.g.*, *Department of Commerce v. New York*, 139 S. Ct. 2551, 2576 (2019); *United States v. Booker*, 543 U.S. 220, 267–68 (2005); *Gratz v. Bollinger*, 539 U.S. 244, 276 (2003). And here, the majority opinion and other opinions indicate that the Court is remanding to the district court. *See* slip op. 18 ("The order of the District Court is affirmed in part and reversed in part, and the case is remanded for further proceedings consistent with this opinion."); slip op. 1 (Thomas, J., concurring in part and dissenting in part) ("I would reverse in full the District Court's denial of respondents' motions to dismiss and remand with instructions to dismiss the case for lack of subject-matter jurisdiction."); *id.* at 8 ("I would instruct the District Court to dismiss this case against all respondents * * * ."); slip op. 2 (Roberts, C.J., concurring in the judgment in part and dissenting in part) ("[T]he District Court should resolve this litigation and enter appropriate relief without delay.").

Indeed, there is nothing left for the Fifth Circuit to do. The only order that respondents appealed to the Fifth Circuit was "the 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)." Notice of Appeal, D. Ct. Dkt. No. 83 at 1. This Court has already "review[ed] the defendants' appeals challenging the District Court's order denying their motions to dismiss," slip op. 4, and it "affirmed in part and reversed in part" the district court's order, *id.* at 18. In so ruling, the Court resolved the justiciability issues as to each defendant, slip op. 4–14, including Article III standing

issues, *see* slip. op. 5–6; *see also* slip. op. 14 (concluding that petitioners have plausibly alleged an injury caused by the licensing-official defendants), as to all of petitioners' claims, including the attorney's fees provision.

Respondents suggest that they have a right to ask the Fifth Circuit to certify to the Supreme Court of Texas the state-law question that this Court analyzed and decided. Opp'n 3–4. But this Court already held that respondents' justiciability arguments do "not bar the petitioners' suit against these named defendants at the motion to dismiss stage," slip op. 12, and that holding is binding on the Fifth Circuit. Respondents could have made their request for certification to this Court, but they did not do so. *See* Tex. R. App. P. 58.1 (providing for certification from any "federal appellate court").

At bottom, respondents' opposition is a transparent attempt to forestall relief. They seek to needlessly delay proceedings by 25 days even though no petition for rehearing will be filed, then send the case to the Fifth Circuit to ask that court to send the case to the Texas Supreme Court, all to indefinitely prevent petitioners from obtaining *any* effective relief from the district court in the face of a law that is clearly contrary to this Court's decisions. Their arguments should be rejected.

## CONCLUSION

The application under Rule 45.3 for the immediate transmission of the Court's opinion and a certified copy of the judgment to the Clerk of the United States District Court for the Western District of Texas should be granted.

Respectfully submitted.

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