No. 21A220

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.,

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

RESPONDENTS DICKSON AND CLARKSTON'S OPPOSITION TO PETITIONERS' APPLICATION FOR ISSUANCE OF A COPY OF THE OPINION AND CERTIFIED COPY OF THE JUDGMENT FORTHWITH

Respondents Mark Lee Dickson and Penny Clarkston oppose the petitioners' application for the reasons set forth by the Solicitor General of Texas. Mr. Dickson and Ms. Clarkston especially oppose the petitioners' request to remand the case to the district court rather than the U.S. Court of Appeals for the Fifth Circuit. In addition to the reasons provided by the Solicitor General of Texas, the petitioners' request is hard to square with the text of 28 U.S.C. § 1254, which provides that "[c]ases in the courts of appeals may be reviewed by the Supreme Court" by writ of certiorari or certification. When this Court completes its "review" of a case "in" the court of appeals, it should remand the case to the court from which it came, and the petitioners make no effort to explain how section 1254 (or any other federal law) could authorize this Court to transfer such a case to a different court upon the completion of its review.

The petitioners also fail to cite any case in which this Court remanded directly to a district court after granting certiorari before judgment—and the petitioners'

letter of December 14, 2021, acknowledges that this Court remanded *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019), to the Second Circuit rather than the district court. Yet the petitioners claim that the Court should disregard this practice because the respondents will ask the Fifth Circuit to certify the appeal so that the Supreme Court of Texas can provide an authoritative construction of Tex. Health & Safety Code § 171.207. The petitioners claim that certification "would be contrary to this Court's opinion," but the Court made clear that it was offering only a tentative construction of Texas law,[1] and it recognized that "Texas courts and not this one are the final arbiters of the meaning of state statutory directions." *Whole Woman's Health v. Jackson*, No. 21-463, slip op. at 13 (opinion of Gorsuch, J.); *see also Murdock v. City of Memphis*, 87 U.S. 590 (1875); *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). In all events, the propriety of certification is for the Fifth Circuit to decide on remand, in a manner consistent with the rulings of this Court, and the petitioners must present their arguments against certification to that Court.

Respectfully submitted.

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1. *See Whole Woman's Health v. Jackson*, No. 21-463, slip op. at 13 (opinion of Gorsuch, J.) ("[I]t *appears* Texas law imposes on the licensing-official defendants a duty to enforce a law that 'regulate[s] or prohibit[s] abortion,' a duty expressly preserved by S. B. 8's saving clause." (emphasis added)).