No. ____

In the Supreme Court of the United States

MARK LEE DICKSON, CROSS-PETITIONER

v.

WHOLE WOMAN'S HEALTH, ET AL.

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

CONDITIONAL CROSS-PETITION

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QUESTIONS PRESENTED

1. Should the Court overrule *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992)?

2. Should the Court overrule *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), which refused to enforce an explicit severability requirement in a state abortion statute?

PARTIES TO THE PROCEEDING

Cross-petitioner Mark Lee Dickson was the defendant-appellant in the court of appeals.

Respondents 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 were plaintiffs-appellees in the court of appeals.

A corporate disclosure statement is not required because Mr. Dickson is not a corporation. *See* Sup. Ct. R. 29.6.

STATEMENT OF RELATED CASES

Counsel is aware of no directly related proceedings arising from the same trial-court case as this case other than those proceedings appealed here.

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CONDITIONAL CROSS-PETITION

The petitioners' attacks on Senate Bill 8 depend on a controversial premise: that abortion is somehow a constitutional right. Mr. Dickson denies the premise of the petitioners' argument. He acknowledges that there are precedents of this Court that *claim* that women have a constitutional right to abort their unborn children before viability. *See, e.g.*, *Roe v. Wade*, 410 U.S. 113, 153 (1973). But Mr. Dickson denies that there is anything in the Constitution that can even remotely support this idea. *See Graves v. New York*, 306 U.S. 466, 491–92 (1939) (Frankfurter, J., concurring) ("[T]he ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it."); John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920, 947 (1973) ("Roe v. Wade . . . is *not* constitutional law

and gives almost no sense of an obligation to try to be." (emphasis in original)). If this Court grants certiorari to consider the petitioners' attacks on Senate Bill 8, it should grant certiorari on the antecedent question of whether abortion is a constitutional right to begin with. The most straightforward way to resolve this case is for this Court to abandon its indefensible claim that abortion is a constitutional right, which obviates any constitutional grievances that the petitioners (and the United States) might assert against Senate Bill 8 and its enforcement mechanisms.

The Court should also grant certiorari to reconsider *Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), which refused to enforce an explicit severability requirement in a state abortion statute. Senate Bill 8 includes severability requirements that are even more emphatic (and less capable of evasion) than the provisions that a majority of this Court refused to follow in *Hellerstedt*. Pet. App. 120a–122a, 124a–125a, 132a. These severability provisions foreclose a remedy that blocks the law's enforcement in its entirety—as there are *many* private civil-enforcement lawsuits authorized by Senate Bill 8 that are constitutional even under the precedents of this Court.[1] Yet the petitioners (and the United States) are demanding a remedy that would enjoin the respond-

1. Senate Bill 8, for example, authorizes private civil-enforcement lawsuits against post-heartbeat abortions performed by non-physicians—and such lawsuits are *per se* constitutional under the Court's precedents. *See Roe v. Wade*, 410 U.S. 113, 165 (1973); *Connecticut v. Menillo*, 423 U.S. 9, 9–10 (1975); *Mazurek v. Armstrong*, 520 U.S. 968, 973 (1997).

ents (and Texas) from enforcing *any* provision of Senate Bill 8 in *any* circumstance, even in situations in which the enforcement of Senate Bill 8 is indisputably constitutional—and despite the statute's severability provisions that compel reviewing courts to sever and preserve every constitutional provision (and every constitutional application) of the law. Pet. App. 120a–122a, 124a–125a, 132a; *see also* Tex. Health & Safety Code § 171.212(a) (Pet. App. 132a) ("Every provision, section, subsection, sentence, clause, phrase, or word in this chapter, and every application of the provisions in this chapter, are severable from each other."); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 506 & n.14 (1985) (enforcing an application-severability requirement in a state statute that contained an overbroad definition of prurience, holding that "facial invalidation of the statute was . . . improvident").

The district court in *United States v. Texas*, No. 1:21-CV-796-RP, 2021 WL 4593319, *47 (W.D. Tex. Oct. 6, 2021), held that the severability requirements in Senate Bill 8 should be ignored because *Hellerstedt* refused to enforce the severability requirements in Texas's admitting-privileges law—leaving us with a jurisprudence in which state-law severability provisions are enforced in all situations except abortion cases. *See Barr v. American Ass'n of Political Consultants, Inc.*, 140 S. Ct. 2335, 2349 (2020) (plurality opinion of Kavanaugh, J.) ("At least absent extraordinary circumstances, the Court should adhere to the text of the severability or nonseverability clause."); *Virginia v. Hicks*, 539 U.S. 113, 121 (2003) ("Severab[ility] is of course a matter of state law."). It is

intolerable to have a doctrine that allows explicit statutory severability requirements to be disregarded at whim, but only in cases involving abortion. *See Hellerstedt*, 136 S. Ct. at 2321 (Thomas, J., dissenting); *id.* at 2350–53 (Alito, J., dissenting). *Hellerstedt* was wrong from the day it was decided,[2] and remains (to our knowledge) the only time in the history of the United States in which this Court has refused to enforce an explicit severability requirement in a state law. It should be overruled as soon as possible, and this case presents an ideal vehicle for doing so.

OPINIONS BELOW

The opinion of the district court is reported at 2021 WL 3821062, and reprinted in the appendix to the petition at Pet. App. 1a–68a. There is no opinion of the court of appeals to review because the petitioners are seeking certiorari before judgment. The opinion of the Fifth Circuit motions panel, which explains its refusal to issue an injunction of Senate Bill 8 pending appeal, is reported at *Whole Woman's Health v. Jackson*, 13 F.4th 434 (5th Cir. 2021), and is reprinted in the appendix to the petition at 83a–105a.

JURISDICTION

The petitioners are seeking review under Supreme Court Rule 11, and they filed their certiorari-before-judgment petition on September 23, 2021. This condi-

2. *June Medical Services LLC v. Russo*, 140 S. Ct. 2103, 2133 (2020) (Roberts, C.J., concurring in the judgment) ("I . . . continue to believe that [*Hellerstedt*] was wrongly decided.").

tional cross-petition is timely under Supreme Court Rule 12.5.

Mr. Dickson denies that the federal district court had subject-matter jurisdiction to consider the merits of any of the petitioners' claims, because each of their claims is barred by Article III's case-or-controversy requirement. In addition, each of the petitioners' claims against respondents Jackson, Clarkston, Carlton, Thomas, Young, Benz, and Paxton is barred by sovereign immunity.

The Fifth Circuit's appellate jurisdiction is secure because the respondents appealed an order denying a sovereign-immunity defense, which is appealable under the collateral-order doctrine. *See Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993). This Court has jurisdiction under 28 U.S.C. § 1254 because the petitioners are asking this Court to review a case in the court of appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. III, § 2 provides, in relevant part:

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority . . . .

U.S. Const. amend. XI provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another

> State, or by Citizens or Subjects of any Foreign State.

The text of the Fourteenth Amendment is reprinted in the appendix to the petition at Pet. App. 106a. The text of 42 U.S.C. § 1983 is reprinted in the appendix to the petition at Pet. App. 107a. The Texas Heartbeat Act, also known as Senate Bill 8, is reprinted in the appendix to the petition at Pet. App. 108a–132a.

STATEMENT

On May 19, 2021, Governor Abbott signed the Texas Heartbeat Act, also known as Senate Bill 8, which prohibits abortion after a fetal heartbeat can be detected. Pet. App. 108a–132a. The Heartbeat Act does not impose criminal sanctions or administrative penalties on those who violate the statute, and it specifically prohibits state officials from enforcing the law. *See* Tex. Health & Safety Code § 171.207(a) (Pet. App. 113a). Instead, the Heartbeat Act authorizes private civil lawsuits to be brought against those who violate the statute, and it provides that these private citizen-enforcement suits shall be the sole means of enforcing the statutory prohibition on post-heartbeat abortions:

> Notwithstanding Section 171.005 or any other law, the requirements of this subchapter shall be enforced exclusively through the private civil actions described in Section 171.208. No enforcement of this subchapter, and no enforcement of Chapters 19 and 22, Penal Code, in response to violations of this subchapter, may be taken or threatened by this state, a political

> subdivision, a district or county attorney, or an executive or administrative officer or employee of this state or a political subdivision against any person, except as provided in Section 171.208.

Tex. Health & Safety Code § 171.207(a) (Pet. App. 113a). The Heartbeat Act took effect on September 1, 2021. Pet. App. 132a.

On July 13, 2021, the petitioners filed this lawsuit in an attempt to enjoin the enforcement the Heartbeat Act. The petitioners sued Judge Austin Reeve Jackson, a state district judge in Smith County, Texas, as a putative defendant class representative of every non-federal judge in the State of Texas. They also sued Penny Clarkston, who serves as clerk for the district court of Smith County, as a putative defendant class representative of every Texas court clerk. In addition to these judicial defendants, the petitioners sued Attorney General Paxton and several state agency officials, as well as Mark Lee Dickson, a pastor and anti-abortionist activist. Their complaint demands relief that would prohibit Judge Jackson—and every non-federal judge in the state of Texas—from considering or deciding any lawsuits that might be filed under the Heartbeat Act.[3] It also demands an injunction that would prohibit Ms. Clarkston (and every Texas court clerk) from accepting or filing any papers submitted in these lawsuits.[4] And it demands an in-

3. *See* Complaint, No. 1:21-cv-00616-RP (W.D. Tex.), ECF No. 1, at 46–47.

4. *See id.*

junction that would restrain Mr. Dickson from filing any private civil-enforcement lawsuits under the Heartbeat Act.[5] Later that day, the petitioners filed a motion for summary judgment, and they moved for class certification on July 16, 2021.

On August 4–5, 2021, each of the defendants moved to dismiss for lack of subject-matter jurisdiction. Each of the government defendants raised sovereign-immunity defenses and argued that the petitioners lacked Article III standing to sue them. But Mr. Dickson asserted only Article III standing objections to the claims brought against him, as Mr. Dickson is a private citizen and cannot assert a sovereign-immunity defense.

On August 25, 2021, the district court issued an order denying each of the defendants' motions to dismiss for lack of subject-matter jurisdiction. Pet. App. 1a–68a. Each of the defendants immediately appealed the district court's jurisdictional ruling. The next morning, the defendants informed the district court that their notice of appeal had automatically divested it of jurisdiction, and they asked the district court to cancel the preliminary-injunction hearing that the court had scheduled for August 30, 2021, and stay all further proceedings in the case. *See Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) ("The filing of a notice of appeal . . . divests the district court of its control over those aspects of the case involved in the appeal."); *Williams v. Brooks*, 996 F.2d 728, 730 (5th Cir. 1993) ("[T]he filing of a non-frivolous notice of interlocutory appeal following a

5. *See id.* at 46.

district court's denial of a defendant's immunity defense divests the district court of jurisdiction to proceed against that defendant."). The defendants also informed the district court that they would seek emergency relief from the Fifth Circuit if it did not cancel the preliminary-injunction hearing and vacate all deadlines by close of business on August 26, 2021. When the district court did not take these steps by the end of the day on August 26, 2021, the defendants filed an emergency motion with the Fifth Circuit, asking it to stay the district-court proceedings pending appeal, and asking for a temporary administrative stay pending consideration of that motion.

On August 27, 2021—after the defendants had filed their emergency motion with the court of appeals—the district court issued an order acknowledging that the notice of appeal had divested it of jurisdiction over the claims against the government defendants, and ordered the proceedings stayed with respect to those defendants only.[6] But the district court insisted that it retained jurisdiction over the claims against Mr. Dickson, even though Mr. Dickson had joined the appeal, because it held that Mr. Dickson has "no claim to sovereign immunity," and that the "the denial of his motion to dismiss is not appealable."[7] So the district court refused to vacate the preliminary-injunction hearing or stay proceedings with respect to the claims against Mr. Dickson. Later

6. *See* Order, No. 1:21-cv-00616-RP (W.D. Tex.), ECF No. 88, at 1–2.

7. *See id.* at 2.

that day, the Fifth Circuit issued an administrative stay of all district-court proceedings, including the preliminary-injunction hearing that had been scheduled to proceed against Mr. Dickson, pending its disposition of the defendants' motion for emergency relief.

In the meantime, the petitioners responded to the notice of appeal by launching a flurry of motions in an effort to quickly return to this case to the district court. First, the petitioners asked the district court to reclaim jurisdiction over the case by certifying the defendants' appeal as "frivolous."[8] The district court denied this request out of hand.[9] Then the petitioners asked the Fifth Circuit to adopt a hyper-expedited briefing schedule that would require the defendants to file their opening appellants' brief by Saturday, August 28 at noon central time, with the plaintiffs' answering brief due on Sunday, August 29, at 5:00 p.m. central time, and a ruling from this Court that would resolve the appeal "on the papers" by September 1, 2021. The court of appeals summarily denied this request. *See Whole Woman's Health v. Jackson*, 13 F.4th 434, 441 & n.7 (5th Cir. 2021). Then the petitioners asked the Fifth Circuit for an injunction that would prevent the defendants from enforcing Senate Bill 8 during the appeal. They also asked the Fifth Circuit to vacate the administrative stay that it had issued on August 27, 2021, as well as the stay of proceedings that the dis-

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8. *See* Pls.' Opp. to Motion to Stay, No. 1:21-cv-00616-RP (W.D. Tex.), ECF No. 86.

9. *See* Order, No. 1:21-cv-00616-RP (W.D. Tex.), ECF No. 88, at 1–2.

trict court had entered with respect to the government defendants. And in a last-ditch effort, the petitioners asked the Fifth Circuit to vacate the district court's order denying the defendants' Rule 12(b)(1) motions and dismiss the appeal as moot. The court of appeals denied all these requests. *See id.* at 441 & n.7.

The petitioners then sought emergency relief from this Court, asking it to enjoin the respondents from enforcing the Heartbeat Act and to vacate the stays of the district-court proceedings. This Court denied both requests on September 1, 2021, holding that the petitioners had failed to make a "strong showing" of likely success on the jurisdictional issues, while cautioning that it was not definitively resolving "any jurisdictional or substantive claim in the applicants' lawsuit." *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2495 (2021).

Finally, on September 10, 2021, the Fifth Circuit issued an opinion explaining why it had denied the petitioners' emergency request for an injunction pending appeal. *See Whole Woman's Health v. Jackson*, 13 F.4th 434 (5th Cir. 2021). The court of appeals held that the petitioners had failed to establish a "strong likelihood of success on the merits," which is needed to obtain an injunction pending appeal. *See id.* at 441 (citing *Florida Businessmen for Free Enterprise v. City of Hollywood*, 648 F.2d 956, 957 (5th Cir. 1981)). More specifically, the court of appeals held that the petitioners had no conceivable claims against Attorney General Paxton or any of the state-agency defendants (Carlton, Thomas, Young, and Benz) because each of these officials is statutorily barred from enforcing the Heartbeat Act. *See id.* at 443

("[T]he Texas Attorney General has no official connection whatsoever with the statute."); *id.* at 443 ("The agency officials sued here have no comparable 'enforcement' role under S.B. 8."); *see also* Tex. Health & Safety Code § 171.207(a) (Pet. App. 113a). The court of appeals also held that the claims against Judge Jackson and Ms. Clarkston were "absurd" and "specious" because *Ex parte Young*, 209 U.S. 123 (1908), "explicitly excludes judges from the scope of relief it authorizes," and because "it is well established that judges acting in their adjudicatory capacity are not proper Section 1983 defendants in a challenge to the constitutionality of state law." *Whole Woman's Health*, 13 F.4th at 443. The court of appeals also held that Mr. Dickson could pursue his Article III standing objections as part of the interlocutory appeal, and it granted Mr. Dickson's motion to stay the district-court proceedings pending appeal. *See id.* at 445–47. Finally, the Fifth Circuit expedited the appeal to the next available oral-argument panel. *See id.* at 448. The respondents have already submitted their opening appellate briefs, and oral argument is set for the week of December 6, 2021. The petitioners are now asking this Court to grant certiorari before judgment in the expedited Fifth Circuit proceedings.

REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION

I. IF THE COURT GRANTS THE PETITION, IT SHOULD ALSO GRANT CERTIORARI TO DECIDE WHETHER *ROE* AND *CASEY* SHOULD BE OVERRULED

The petition's attacks on Senate Bill 8 assume that abortion is a constitutional right—even though the Court is considering this term whether to modify or overrule *Roe v. Wade*, 410 U.S. 113 (1973). *See Dobbs v. Jackson Women's Health Organization*, No. 19-1392. And the petition argues that this Court *must* find a way to assert jurisdiction over the claims brought against the respondents, despite the Article III and Eleventh Amendment obstacles,[10] because otherwise Texas will be able to insulate an "unconstitutional" law from pre-enforcement judicial review. *See* Pet. at i; *see also Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2497 (2021) (Breyer, J., dissenting) (suggesting that "there may be other not-very-new procedural bottles that can also ade-

10. We will use the phrase "Eleventh Amendment" as shorthand to refer to the constitutional sovereign immunity recognized in *Hans v. Louisiana*, 134 U.S. 1, 15-16 (1890), and *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). The text of the Eleventh Amendment applies only to lawsuits "commenced or prosecuted against a [State] by Citizens of another State, or by Citizens or Subjects of any Foreign State," which is not the situation here. *See* U.S. Const. amend XI; *Allen v. Cooper*, 140 S. Ct. 994, 1000 (2020) ("The text of the Eleventh Amendment . . . applies only if the plaintiff is not a citizen of the defendant State."); John F. Manning, *The Eleventh Amendment and The Reading of Precise Constitutional Texts*, 113 Yale L.J. 1663 (2004).

quately hold what is, in essence, very old and very important legal wine: The ability to ask the Judiciary to protect an individual from the invasion of a constitutional right"). But if there is no constitutional right to abort an unborn child—or if there is no right to do so after a heartbeat is detected—then there is no cause for angst over the petitioners' inability to launch a pre-enforcement challenge to Senate Bill 8. And there is no reason for this Court to bend or revise jurisdictional rules to accommodate the petitioners' lawsuit.

If, on the other hand, the Court decides to double down on *Roe* by pronouncing Senate Bill 8 unconstitutional, then it will be difficult for the Court to avoid the appearance of lawlessness. The Article III and sovereign-immunity obstacles to the petitioners' lawsuit are insurmountable[11]—and the precedents and doctrines behind these jurisdictional barriers are far more venerable than *Roe v. Wade*. *See, e.g.*, *Raines v. Byrd*, 521 U.S. 811, 818 (1997) ("No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." (citation and internal quotation marks omitted)); *Ex parte Young*, 209 U.S. 123, 163 (1908) ("[T]he right to enjoin an individual, even though a state official, from commencing suits . . . does not include the power to restrain a court from acting in any case brought before it, either of a civil or criminal

11. *See Whole Woman's Health v. Jackson*, 13 F.4th 434, 443–44 (5th Cir. 2021) (describing the petitioners' efforts to sue state-court judges and court clerks as "absurd" and "specious").

nature"). And the United States' efforts to concoct an "equitable" cause of action that would allow it to sue Texas over Senate Bill 8 are squarely foreclosed by *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318–19 (1999), as well as the recent decisions from this Court that disfavor "implied" causes of action. *See Alexander v. Sandoval*, 532 U.S. 275, 287 (2001) (prohibiting federal courts from "[r]aising up causes of action where a statute has not created them"). If the Court finds a way to circumvent or disregard these jurisdictional and procedural obstacles, it will add fuel to the fire of those who have long accused this Court of ignoring established rules and doctrines to advance the cause of abortion rights. *See Hill v. Colorado*, 530 U.S. 703, 764–65 (2000) (Scalia, J., dissenting) (cataloging the "many aggressively proabortion novelties announced by the Court in recent years"); *McCullen v. Coakley*, 573 U.S. 464, 497 (2014) (Scalia, J., dissenting) ("There is an entirely separate, abridged edition of the First Amendment applicable to speech against abortion."); *Hellerstedt*, 136 S. Ct. at 2353 (Alito, J., dissenting); *June Medical Services LLC v. Russo*, 140 S. Ct. 2103, 2153–71 (2020) (Alito, J., dissenting).

The most straightforward way to resolve this case (if the Court decides to grant certiorari) is to hold that abortion is not a constitutional right and that *Roe* and *Casey* should be overruled. The Court is already considering this question in *Dobbs*, and the Court should (at the very least) grant the conditional cross-petition and put this option on the table.

II. IF THE COURT GRANTS THE PETITION, IT SHOULD ALSO GRANT CERTIORARI TO DECIDE WHETHER *HELLERSTEDT* SHOULD BE OVERRULED

The Court should also grant certiorari to reconsider and overrule *Hellerstedt*, which litigants and lower courts are using as a license to disregard statutory severability requirements in any case involving abortion. Senate Bill 8's severability provisions instruct reviewing courts to preserve *all* constitutional provisions and *all* constitutional applications of the statute. Section 10 of the Act says:

> Every provision in this Act and every application of the provision in this Act are severable from each other. If any provision or application of any provision in this Act to any person, group of persons, or circumstance is held by a court to be invalid, the invalidity does not affect the other provisions or applications of this Act.

Senate Bill 8, 87th Leg., § 10 (Pet. App. 132a). Section 5 also amends the Code Construction Act to establish a new rule of construction for every Texas statute that regulates abortion, requiring courts not only to sever the statute's provisions and applications but also to construe the statute, as a matter of state law, as applying *only* in situations that will not result in a violation of constitutional rights. *See* Senate Bill 8, 87th Leg., § 5 (codified at Tex. Gov't Code § 311.036(c)) (Pet. App. 124a–125a). And if that were not enough, section 3 of the Act adds an emphatic (and largely redundant) severability clause and saving-construction requirement that applies to each

provision of Chapter 171 of the Texas Health and Safety Code. *See* Senate Bill 8, 87th Leg., § 3 (codified at Tex. Health & Safety Code § 171.212) (Pet. App. 120a–122a); *see also* Tex. Gov't Code § 311.032(a) ("If any statute contains a provision for severability, that provision prevails in interpreting that statute.").

Yet the petitioners and the United States are asking the courts to disregard these explicit severability requirements. Both the petitioners and the United States are demanding relief that would block the enforcement of *any* provision in Senate Bill 8, including provisions of Senate Bill 8 that they do not even allege to be unconstitutional.[12] They are also seeking to enjoin the state judiciary from entertaining *any* civil-enforcement lawsuits filed under Senate Bill 8—even in situations in which the civil-enforcement lawsuit is undeniably constitutional and consistent with federal law. But the federal judiciary has no authority to enjoin Texas from enforcing the indisputably constitutional provisions and applications of SB 8. *See Alabama State Federation of Labor, Local Union No. 103 v. McAdory*, 325 U.S. 450, 465 (1945) ("When a statute is assailed as unconstitutional we are bound to assume the existence of any state of facts which would sustain the statute in whole or in part."); *Connecticut v. Menillo*, 423 U.S. 9, 9–10 (1975) (allowing Connecticut to

12. *See* Complaint, *Whole Woman's Health v. Jackson*, No. 1:21-cv-00616-RP (W.D. Tex.), ECF No. 1 at 46 (demanding relief that would prevent the defendants from "enforcing S.B. 8 in any way"); Proposed Order, *United States v. Texas*, No. 1:21-cv-00796-RP (W.D. Tex.), ECF No. 8-1 at 1–2 (requesting an injunction that would prevent Texas "from enforcing S.B.8").

enforce its pre-*Roe* criminal abortion statutes against non-physician abortions, and rejecting the Connecticut Supreme Court's argument that *Roe* had rendered those statutes "null and void, and thus incapable of constitutional application even to someone not medically qualified to perform an abortion"); *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 626 (2012) (Ginsburg, J., concurring in part and dissenting in part) ("When a constitutional infirmity mars a statute, the Court ordinarily removes the infirmity. It undertakes a salvage operation; it does not demolish the legislation."); *id.* at 646 ("For when a court confronts an unconstitutional statute, its endeavor must be to conserve, not destroy, the legislature's dominant objective."). That is especially true when SB 8 contains emphatic severability requirements that compel reviewing courts to sever and preserve every constitutional provision (and every constitutional application) of the law. *See* Senate Bill 8, 87th Leg., §§ 3, 5, 10; *see also* Tex. Health & Safety Code § 171.212(a) ("Every provision, section, subsection, sentence, clause, phrase, or word in this chapter, and every application of the provisions in this chapter, are severable from each other."); *Virginia v. Hicks*, 539 U.S. 113, 121 (2003) ("Severab[ility] is of course a matter of state law."); *Leavitt v. Jane L.*, 518 U.S. 137, 138 (1996) ("Severability is of course a matter of state law."); *Dorchy v. Kansas*, 264 U.S. 286, 290 (1924) ("[T]he state court['s] decision as to the severability of a provision is conclusive upon this Court.").[13]

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13. *See also Planned Parenthood of Greater Texas Surgical Health* (continued…)

Many of the civil-enforcement lawsuits authorized by Senate Bill 8 are undeniably constitutional under existing Supreme Court precedent. These include:

> Lawsuits brought against those who perform (or assist) non-physician abortions;[14]
>
> Lawsuits brought against those who perform (or assist) post-viability abortions that are not necessary to save the life or health of the mother;[15]
>
> Lawsuits brought against those who use taxpayer money to pay for post-heartbeat abortions;[16]
>
> Lawsuits brought against those who covertly slip abortion drugs into a pregnant woman's food or drink.[17]

Services v. Abbott, 748 F.3d 583, 589 (5th Cir. 2014) ("Federal courts are bound to apply state law severability provisions."); *City of Houston v. Bates,* 406 S.W.3d 539, 549 (Tex. 2013) ("When an ordinance contains an express severability clause, the severability clause prevails when interpreting the ordinance.").

14. *See Roe v. Wade*, 410 U.S. 113, 165 (1973); *Connecticut v. Menillo*, 423 U.S. 9, 9–10 (1975); *Mazurek v. Armstrong*, 520 U.S. 968, 973 (1997).
15. *See Roe*, 410 U.S. at 164–65;
16. *See Harris v. McRae*, 448 U.S. 297 (1980).
17. *See* Kristine Phillips, *A Doctor Laced His Ex-Girlfriend's Tea With Abortion Pills and Got Three Years in Prison*, Wash. Post (May 19, 2018), https://wapo.st/30NYQRp.

In addition, each of the intervenors in *United States v. Texas* has stated that they intend to bring civil-enforcement lawsuits *only* in response to violations of SB 8 that clearly fall outside the constitutional protections of *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 874 (1992). Erick Graham, for example, intends to sue only employers and insurance companies that provide or arrange for coverage of abortions that violate Senate Bill 8, as there is no constitutional right to pay for another person's abortion.[18] Mr. Graham also intends to sue the city of Austin if it uses taxpayer money to subsidize the provision of post-heartbeat abortions performed in Austin, as it was doing before the Heartbeat Act took effect.[19] Jeff Tuley intends to sue only individuals or entities that perform or assist abortions that are clearly unprotected under existing Supreme Court doctrine, which include: (a) non-physician abortions; (b) self-administered abortions; and (c) post-viability abortions that are not necessary to preserve the life or health on the mother.[20] And Mistie Sharp intends to sue only abortion funds who pay for post-heartbeat abortions performed in Texas.[21] All of these lawsuits authorized by Senate Bill 8 are constitu-

18. *See* Declaration of Erick Graham, *United States v. Texas*, No. 1:21-cv-00796-RP (W.D. Tex.), ECF No. 28-1 at ¶ 9.

19. *See id.* at ¶ 9; *see also Zimmerman v. City of Austin*, 620 S.W.3d 473, 482 (Tex. App. — El Paso 2021, pet. filed).

20. *See* Declaration of Jeff Tuley, *United States v. Texas*, No. 1:21-cv-00796-RP (W.D. Tex.), ECF No. 28-2 at ¶ 9.

21. *See* Declaration of Mistie Sharp, *United States v. Texas*, No. 1:21-cv-00796-RP (W.D. Tex.), ECF No. 28-3 at ¶ 9.

tional under *Roe* and *Casey*, and this Court has no authority to enjoin anyone from filing these types of cases. Nor can it prevent the Texas judiciary from considering civil-enforcement lawsuits of this sort.

Yet the petitioners and the United States somehow think that they can obtain an across-the-board injunction against the enforcement of Senate Bill 8 in *any* circumstance—even though Senate Bill 8 has many constitutional applications, and even though the statute contains emphatic severability requirements that compel reviewing courts to sever and preserve *every* constitutional application of the law. Pet. App. 120a–122a, 124a–125a, 132a.

Worse, the petitioners are challenging only the constitutionality of sections 3 and 4 of Senate Bill 8, and they have not argued that the remaining provisions of Senate Bill 8 violate the Constitution in any way.[22] The United States is similarly attacking *only* the provisions in section 3 of Senate Bill 8, which prohibit abortions after fetal heartbeat and establish a private civil-enforcement mechanism.[23] The United States does not even attempt to argue that any provision in sections 1 through 2 or sections 4 through 12 violates the Constitution or is preempted by federal law. Yet the petitioners and the United States are asking this Court to enjoin the

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22. *See* Complaint, *Whole Woman's Health v. Jackson*, No. 1:21-cv-00616-RP (W.D. Tex.), ECF No. 1 at ¶¶ 131–163 (listing seven "claims for relief," which purport to challenge only the constitutionality of sections 3 and 4).

23. *See* Complaint, *United States v. Texas*, No. 1:21-cv-00796-RP (W.D. Tex.), ECF No. 1.

enforcement of *any* provision in Senate Bill 8, including provisions that they are not even challenging as unconstitutional or preempted. That is patently unlawful when Senate Bill 8's severability clauses require this Court to sever and preserve every constitutional provision (and every constitutional application) of the statute. Pet. App. 120a–122a, 124a–125a, 132a; *see also Califano* v. *Yamasaki*, 442 U.S. 682, 702 (1979) ("[I]njunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs"). And it doubly unlawful because the petitioners and the United States lack Article III standing to seek relief that extends beyond the provisions or applications of SB 8 that are inflicting injury on them. *See Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996) ("[S]tanding is not dispensed in gross."); *Davis v. Federal Election Commission*, 554 U.S. 724, 733–34 (2008) (standing to challenge one statutory subsection does not confer standing to challenge a neighboring statutory subsection); *In re Gee*, 941 F.3d 153, 160 (5th Cir. 2019) ("[P]laintiffs must establish standing for each and every provision they challenge." (citing authorities)).

Yet *Hellerstedt* is allowing litigants and lower-court judges to defy severability requirements in abortion statutes—even though statutory severability provisions are supposed to be enforced in all other contexts. *See Barr v. American Ass'n of Political Consultants, Inc.*, 140 S. Ct. 2335, 2349 (2020) (plurality opinion of Kavanaugh, J.) ("At least absent extraordinary circumstances, the Court should adhere to the text of the severability or nonseverability clause."); *Virginia v. Hicks*,

539 U.S. 113, 121 (2003) ("Severab[ility] is of course a matter of state law."). The district court in *United States v. Texas*, No. 1:21-CV-796-RP, 2021 WL 4593319 (W.D. Tex. Oct. 6, 2021), for example, claimed that it could defy the severability requirements in Texas's abortion statutes because *Hellerstedt* had done so:

> The State argues that, should the Court find any provision of S.B. 8 to be unconstitutional, it should sever such provisions from the law and leave the remaining provisions intact. In support of this request, the State cites the severability provision of the law, which confirm that the Texas legislature "intended all provisions . . . to be severable," that it "would have enacted any and all provisions . . . regardless of whether any provisions are subsequently determined to be unconstitutional," and that "each provision is severable." (Resp., Dkt. 43, at 55). However, as the Supreme Court wrote in *Hellerstedt*, "our cases have never required us to proceed application by conceivable application when confronted with a facially unconstitutional statutory provision." 136 S. Ct. at 2319. Such an approach would be "quintessentially legislative work" outside the bounds of the court's ordinary review. *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329 (2006). The State attempts to distinguish the law and its severability provision from those at issue in *Hellerstedt*, but such a distinction cannot stand, because the severability

> provision of the *very same law* is at issue: Texas Health and Safety Code Chapter 171.

Id. at *47. In other words, *Hellerstedt* means that Texas can *never* enact an enforceable severability requirement in *any* part of Chapter 171—the chapter of the Health and Safety Code that deals with abortion regulations.

This is abject lawlessness. Litigants challenging abortion statutes do not get special dispensations from statutory severability requirements. And as long as *Hellerstedt* remains on the books, litigants and judges will continue defying severability provisions whenever they want to categorically enjoin the enforcement of an abortion regulation. The Court should overrule *Hellerstedt* and hold that Senate Bill 8's severability requirements must be obeyed and respected.

In *June Medical Services LLC v. Russo*, 140 S. Ct. 2103 (2020), Chief Justice Roberts reiterated his belief that *Hellerstedt* was "wrongly decided" but suggested that his hands were tied because the Court had not granted certiorari to reconsider or overrule that decision. *See id.* at 2133 (Roberts, C.J., concurring in the judgment) ("The question today however is not whether *Whole Woman's Health* was right or wrong"). The Court should grant the conditional cross-petition to ensure that *Hellerstedt*'s treatment of the severability issue can be reconsidered, and to prevent members of this Court from claiming that issues involving the correctness of *Hellerstedt* are not properly before the Court.

CONCLUSION

The conditional cross-petition should be granted if (and only if) the Court grants the petition in No. 21-463.

Respectfully submitted.

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