No. ______

In the Supreme Court of the United States

PENNY CLARKSTON, CROSS-PETITIONER

v.

WHOLE WOMAN'S HEALTH, ET AL.

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

CONDITIONAL CROSS-PETITION

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QUESTION PRESENTED

Whether the Court should overrule *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

PARTIES TO THE PROCEEDING

Respondent and cross-petitioner Penny Clarkston is a defendant-appellant in the court of appeals.

Respondents Judge Austin Reeve Jackson, Mark Lee Dickson, Stephen Brint Carlton, Katherine A. Thomas, Cecile Erwin Young, Allison Vordenbaumen Benz, and Ken Paxton are defendants-appellants in the court of appeals.

Petitioners 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 are plaintiffs-appellees in the court of appeals.

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

STATEMENT OF RELATED CASES

- *Whole Woman's Health, et al. v. Judge Austin Reeve Jackson, et al.*, No. 1:21-cv-00616-RP, U.S. District Court for the Western District of Texas. Order denying defendants' motions to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) entered August 25, 2021.
- *In re Clarkston*, No. 21-50708, U.S. Court of Appeals for the Fifth Circuit. Order denying petition for writ of mandamus entered August 13, 2021.
- *Whole Woman's Health et al. v. Judge Austin Reeve Jackson*, *et al.*, No. 21-50792, U.S. Court of Appeals for the Fifth Circuit. Appeal docketed August 25, 2021, Appellants' opening briefs filed October 13, 2021, oral argument scheduled for the week of December 6, 2021.
- *Whole Woman's Health et al. v. Judge Austin Reeve Jackson*, *et al.*, No. 21A24, United States Supreme Court, Emergency Application to Justice Alito for Writ of Injunction and, in the Alternative, to Vacate Stays of District Court Proceedings, application denied September 1, 2021.
- *Whole Woman's Health, et al. v. Austin Reeve Jackson, et al.*, No. 21-463, United States Supreme Court. Petition for writ of certiorari before judgment filed September 23, 2021; response requested by October 21, 2021.

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OPINIONS BELOW

The opinion of the district court is reported at 2021 WL 3821062 and reprinted in the appendix to the petition in 21-463 at Pet. App. 1a–68a. There is no opinion of the court of appeals to review because Petitioners are seeking certiorari before judgment. The opinion of the Fifth Circuit motions panel, which explains its decision not to issue an injunction of the Heartbeat Law pending appeal, is reported at *Whole Woman's Health v. Jackson*, 13 F.4th 434 (5th Cir. 2021) (*Jackson*), and is reprinted in the appendix to the petition in 21-463 at 83a–105a.

JURISDICTION

Petitioners are seeking review under Supreme Court Rule 11, and they filed their certiorari-before-judgment petition on September 23, 2021. This conditional cross-petition is timely under Supreme Court Rule 12.5.

The district court lacked subject-matter jurisdiction because Petitioners' claims are barred by Article III's case-or-controversy requirement. Petitioners' claims against respondents Jackson, Clarkston, Carlton, Thomas, Young, Benz, and Paxton are additionally barred by sovereign immunity.

The Fifth Circuit has appellate jurisdiction because the respondents appealed an order denying a sovereign-immunity defense, which is appealable under the collateral-order doctrine. *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993). This Court has jurisdiction under 28 U.S.C. § 1254 because 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 Law, 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 Law, also known as Senate Bill 8, which prohibits abortion after a fetal heartbeat can be detected. Pet. App. 108a–132a. The Heartbeat Law 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 Law 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 Law took effect on September 1, 2021. Pet. App. 132a.

Petitioners filed this lawsuit on July 13, 2021.[1] They sued Penny Clarkston, who serves as clerk for the district court of Smith County, as a putative defendant class representative of every non-federal Texas court clerk.[2] They also 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.[3] In addition to these judicial defendants, Petitioners sued Attorney General Paxton and several state agency officials, as well as Mark Lee Dickson, a private individual.[4] Petitioners' complaint requests 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 Law.[5] It also requests an injunction that would prohibit Ms. Clarkston—and every non-federal Texas court clerk—from docketing petitions submitted in these lawsuits.[6] It also requests an injunction that would restrain Mr. Dickson from filing any private civil-enforcement

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[1] *See* Complaint, *Whole Woman's Health v. Jackson*, No. 1:21-cv-00616-RP (W.D. Tex. Jul. 13, 2021), ECF No. 1.

[2] *Id.* at 15–16.

[3] *Id.* at 15.

[4] *Id.* at 16–20.

[5] *Id.* at 46–47.

[6] *See id.*

lawsuits under the Heartbeat Law.[7] Later that day, Petitioners filed a motion for summary judgment, and they moved for class certification on July 16, 2021.[8]

On August 4–5, 2021, all the defendants moved to dismiss for lack of subject-matter jurisdiction on the basis of sovereign immunity and Article III standing. Pet. App. 90a. 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. The defendants immediately appealed the district court's jurisdictional ruling. Pet. App. 90a. The next morning, the defendants informed the district court that their notice of appeal had automatically divested it of jurisdiction. 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.[9] *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 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

[7] *See id*. at 46.

[8] Pls.' Mot. for Summ. J., *Jackson*, No. 1:21-cv-00616-RP (W.D. Tex. Jul. 13, 2021), ECF No. 19; Mot. for Class Cert., *Jackson*, No. 1:21-cv-00616 (W.D. Tex. Jul. 16, 2021), ECF No. 32.

[9] Mot. to Stay Case, *Jackson*, No. 1:21-cv-00616-RP (W.D. Tex. Aug. 26, 2021), ECF No. 84.

business on August 26, 2021.[10] When that time passed, the defendants filed an emergency motion with the Fifth Circuit, requesting that it stay the district-court proceedings pending appeal. Pet. App. 90a. Defendants also asked for a temporary administrative stay pending consideration of that motion. Pet App. 90a.

On August 27, 2021, 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.[11] The district court stated that it retained jurisdiction over the claims against Mr. Dickson because he has "no claim to sovereign immunity," and "the denial of his motion to dismiss is not appealable."[12] Later that day, the Fifth Circuit issued an administrative stay of all district-court proceedings, including proceedings against Mr. Dickson, pending its disposition of the defendants' motion for emergency relief. Pet. App. 90a.

Petitioners responded by filing several motions. First, they asked the district court to reclaim jurisdiction over the case by certifying the defendants' appeal as "frivolous."[13] The district court denied this request.[14] Then Petitioners asked the Fifth Circuit to adopt an extreme schedule that would have required a ruling by

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[10] Notice, *Jackson*, No. 1:21-cv-00616-RP (W.D. Tex. Aug. 26, 2021), ECF No. 85.

[11] *See* Order, *Jackson*, No. 1:21-cv-00616-RP (W.D. Tex. Aug. 27, 2021), ECF No. 88, at 1–2.

[12] *See id.* at 2.

[13] *See* Pls.' Opp. to Motion to Stay, *Jackson*, No. 1:21-cv-00616-RP (W.D. Tex. Aug. 26, 2021), ECF No. 86.

[14] *See* Order, *Jackson*, No. 1:21-cv-00616-RP (W.D. Tex. Aug. 27, 2021), ECF No. 88, at 1–2.

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). Petitioners also asked the Fifth Circuit for an injunction that would prevent the defendants from enforcing Senate Bill 8 during the appeal. They further 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 district court had entered with respect to the government defendants. Finally, 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.

Petitioners then sought emergency relief from this Court, asking it to enjoin the respondents from enforcing the Heartbeat Law and to vacate the stays of the district-court proceedings. *Whole Woman's Health v. Jackson*, No. 21A24 (U.S. Aug. 30, 2021). This Court denied both requests on September 1, 2021, holding that Petitioners 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).

On September 10, 2021, the Fifth Circuit issued an opinion explaining its decision to deny Petitioners' emergency request for an injunction pending appeal. *See Jackson*, 13 F.4th 434. The court of appeals held that 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 Petitioners had no conceivable claims against Attorney General Paxton or any of the state-agency defendants because each of these officials is statutorily barred from enforcing the Heartbeat Law. *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 "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." *Jackson*, 13 F.4th at 443. Further, it held that "the court clerks act under the direction of judges acting in their judicial capacity. Their duty within the court is to accept and file papers in lawsuits, not to classify "acceptable" pleadings. Accordingly, the clerks are improper defendants against whom injunctive relief would be meaningless." *Id.* at 444. 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 briefs, and oral argument is set for the week of December 6, 2021. Petitioners now ask this Court to grant certiorari before judgment in the expedited Fifth Circuit proceedings.

REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION

If the Court decides to grant the petition and depart from normal rules of appellate procedure because Petitioners say the Texas Heartbeat Law violates *Roe* and *Casey*, the Court should also consider whether *Roe* and *Casey* should be overruled.

Were the Court inclined to grant the petition here, it would unfortunately not be the first time this Court has departed from the typical rules in an abortion case, as multiple Justices of this Court have observed. Justice Scalia wrote that "no legal rule or doctrine is safe from ad hoc nullification by this Court when an occasion for its application arises in a case" about abortion. *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 785 (1994) (Scalia, J. concurring in the judgment in part and dissenting in part). Examples of the "abortion exception" to the usual rules are many. *See, e.g.*, *Stenberg v. Carhart*, 530 U.S. 914, 954 (2000) (Scalia, J., dissenting) (canons of statutory interpretation); *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2330 (2016) (Alito, J., dissenting) (rules of civil procedure); *Hill v. Colorado*, 530 U.S. 703, 742–65 (2000) (Scalia, J., dissenting) (First Amendment); *June Med. Servs. LLC v. Russo,* 140 S. Ct. 2103, 2142 (2020) (Thomas, J. dissenting) (Article III standing). The petition in this case urges yet another occasion for the "abortion exception," and this time, Petitioners urge the Court to set aside not just one, but multiple longstanding legal doctrines to make room for their challenge to the Texas Heartbeat Law.

This Court should reject that bold request. But the "abortion exception" is merely a symptom of a systemic

disease inflicted on this Court's jurisprudence by *Roe* and *Casey*. Thus, if it entertains the petition, the Court should also consider whether to eliminate the root cause of this jurisprudential rule-bending: *Roe* and *Casey*. Aside from being exceptionally poorly reasoned and not grounded in the text, history, or tradition of the Constitution, *Roe* and *Casey* have had both adverse jurisprudential effects and grave "real-world consequences," warranting reversal. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1415 (2020) (Kavanaugh, J., concurring in part).

I. *Roe* and *Casey* Should Be Overruled Because They Have Damaged This Court's Jurisprudence.

Almost 50 years of this Court perpetuating *Roe* and *Casey* as unassailable precedent has inflicted harm on this Court's jurisprudence. And it has done so in multiple ways aside from the "abortion exception."

A. The fluidity of the undue-burden standard, the arbitrariness of viability as a line of legal demarcation, and the Court's constantly shifting rationales and standards, have undermined the Court's reasoning and precedent. Indeed, as Justice Thomas noted in his dissent in *June Medical,* "the fact that no five Justices can agree on the proper interpretation of our [abortion] precedents today evinces that our abortion jurisprudence remains in a state of utter entropy." 140 S. Ct. at 2152 (Thomas, J., dissenting).

1. These feeble guideposts have also left state legislatures with little guidance as to what types of restrictions will be deemed valid. Until the Texas Heartbeat Law, lawmakers were left with the sole option of passing a restriction or regulation and immediately litigating its constitutionality all the way to the Supreme

Court to learn whether it passes constitutional muster. As Judge Easterbrook has complained,

> The "undue burden" approach announced in *Planned Parenthood of Southeastern Pennsylvania v. Casey* does not call on a court of appeals to interpret a text. Nor does it produce a result through interpretation of the Supreme Court's opinions. How much burden is "undue" is a matter of judgment, which depends on what the burden would be (something the injunction prevents us from knowing) and whether that burden is excessive . . . Only the Justices, the proprietors of the undue-burden standard, can apply it to a new category of statute . . .

Planned Parenthood of Ind. & Ky., Inc. v. Box, 949 F.3d 997, 999 (7th Cir. 2019) (Easterbrook, J., concurring in the denial of rehearing en banc). This is now standard practice for every State that seeks to even modestly limit abortion. And because of *Casey*'s meaningless undue-burden standard, lower courts have even struck down laws similar to those this Court has already upheld. *See Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. State Dep't of Health*, 896 F.3d 809 (7th Cir. 2018), *cert. granted, judgment vacated sub nom. Box v. Planned Parenthood of Ind. & Ky., Inc*., 141 S. Ct. 184 (2020) (ultrasound and 18-hour waiting period); *Planned Parenthood of Ind. & Ky., Inc. v. Adams*, 937 F.3d 973 (7th Cir. 2019), *cert. granted, judgment vacated sub nom. Box v. Planned Parenthood of Ind. & Ky., Inc*., 141 S. Ct. 187 (2020) (parental consent); *Bristol Reg'l Women's Ctr., P.C. v. Slatery*, 994 F.3d 774 (6th Cir. 2021) (48-hour waiting period); *Falls Church Med. Ctr., LLC v. Oliver*,

412 F. Supp. 3d. 668 (E.D. Va. 2019) (ambulatory surgical center requirement for second-trimester abortions).

2. Even if these state abortion laws are eventually permitted by courts to go into effect, they are first delayed with years of hard fought and expensive litigation. As the Fifth Circuit recently noted when the en banc court upheld Texas's ban on live-dismemberment abortions, "SB8 was signed into law four years ago—four years in which federal courts have halted Texas's duly enacted and modest legislation from taking effect." *Whole Woman's Health v. Paxton*, 10 F.4th 430, 455 (5th Cir. 2021) (plurality op.). Judge Ho separately emphasized this point in concurrence:

> Texas does not ban abortion until 22 weeks. So Texas law is not only valid under the Constitution and Supreme Court precedent—it's also more permissive than the overwhelming majority of laws around the world.
>
> Yet federal courts have blocked it for four years. This in spite of the fact that, when it comes to medical disputes surrounding abortion, Supreme Court precedent requires judges to defer to—not overturn—the will of the voters and the judgment of the legislators they elected to office. "The right to vote means nothing if we abandon our constitutional commitments and allow the real work of lawmaking to be exercised by [federal judges], rather than by elected officials accountable to the American voter." *Texas v. Rettig*, 993 F.3d 408, 410–11 (5th Cir. 2021) (Ho, J., dissenting from denial of rehearing en banc). After four years, the court today finally allows the law to take effect.

Id. at 470 (Ho, J., concurring). Given this state of affairs, it is no wonder that Texas lawmakers sought to craft an abortion law that had a chance of not being immediately enjoined by unelected federal judges and precluded from being enforced for years. When the Texas Heartbeat Law went into effect, it marked the first time in recent history (to our knowledge) that a challenged Texas abortion law was permitted to go into effect on its effective date.

B. Another problem with the perpetual litigation regime resulting from *Casey*'s vague undue-burden standard is that it permits enforcement of abortion laws to be enjoined for years based on nothing but the plaintiffs' predictions of doom and no actual evidence proving that projected impact of the law is correct. As Judge Easterbrook noted,

> Talk is cheap, which makes it easy for the plaintiffs in a pre-enforcement suit to predict the worst and demand that an injunction issue before the disaster comes to pass. If the judge issues the injunction, the prediction cannot be tested—unless by chance a similar rule in some other state is not enjoined, and then the judiciary can learn by that experience. *See, e.g., A Woman's Choice—East Side Women's Clinic v. Newman*, 305 F.3d 684 (7th Cir. 2002). Unless a baleful outcome is either highly likely or ruinous even if less likely, a federal court should allow a state law (on the subject of abortion or anything else) to go into force; otherwise the prediction cannot be evaluated properly. And principles of federalism should allow the states that much leeway. Talk of the states

> as laboratories is hollow if federal courts enjoin experiments before the results are in.

Box, 949 F.3d at 998 (Easterbrook, J., concurring in the denial of rehearing en banc).

1. When these laws have finally gone into effect, we have seen that the abortion plaintiffs' hyperbolic predictions are wrong. A few examples: In the challenges to the federal Partial-Birth Abortion Ban Act, abortion doctors claimed that the law would prohibit them from doing "all" dilation & evacuation procedures, which are the most common method of performing second-trimester abortions. *See Gonzales v. Carhart*, 550 U.S. 124, 147 (2007). Yet second-trimester abortion has continued unabated since *Gonzales* upheld the Act. In the litigation over Texas's decision to exclude Planned Parenthood from its Medicaid program because of unethical conduct captured on undercover video, Planned Parenthood insisted that it needed a preliminary injunction against the exclusion because losing its Medicaid funds could cause their Texas clinics to cut services and close clinics.[15] That preliminary injunction was in place for years while the case worked its way through the courts before finally being overturned by the en banc Fifth Circuit. *See Planned Parenthood of Greater Tex. Surg. Health Servs. v. Kauffman*, 981 F.3d 347 (5th Cir. 2020) (en banc). But not only

[15] *See* Mot. for Prelim. Inj. 21, *Planned Parenthood of Greater Tex. Surg. Health Servs. v. Smith*, No. 1:15-cv-01058-SS (W.D. Tex. Dec. 30, 2016), ECF No. 55-2.

has Planned Parenthood stayed open in Texas since being removed from the Medicaid program, it has opened new clinics.[16]

2. This case is no exception. The first time Petitioners came to this Court seeking relief, they insisted that if the Heartbeat Law went into effect, the law would result in prohibiting abortion "for at least 85% of Texas abortion patients (those who are six weeks pregnant or greater)." Emergency App. for Writ of Inj. at 2, *Whole Woman's Health v. Jackson*, No. 21A24 (U.S. Aug. 30, 2021). But that dire prediction does not appear to be true. According to the CDC, in 2018, nearly 40% of all Texas abortions, and *over* 40% nationwide, were performed at or below six weeks of pregnancy.[17] In some states, that number is even higher. For example, in Florida—a state with no Heartbeat Law—CDC data shows that 72% of abortions in that state were performed at or below six weeks of pregnancy.[18] That means that a significant number—perhaps even as high as three-quarters—of the number of abortions that were being performed previously may still be performed in compliance with the Heartbeat Law.

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[16] *Compare* Planned Parenthood Texas Health Center Locations, https://www.plannedparenthood.org/health-center?location=TX&service=&channel=any (last accessed Oct. 20, 2021) (showing 41 locations) *with Kauffman*, 981 F.3d at 351 (noting that Planned Parenthood operated 30 Texas health centers).

[17] Katherine Kortsmit, et al., *Centers for Disease Control: Abortion Surveillance—United States, 2018* at Table 9, https://www.cdc.gov/mmwr/volumes/69/ss/pdfs/ss6907a1-H.pdf; *see also* Intervenors' Exhibits in Opposition to Preliminary Injunction Motion, *United States v. Texas*, No. 1:21-cv-00796-RP (W.D. Tex. Oct. 1, 2021), ECF No. 58-1 at 30.

[18] *Id.*

Because this case was appealed on jurisdictional grounds before the law went into effect, there is no evidentiary record to speak of, other than Petitioners' untested hearsay declarations filed in the district court, relied on here by Petitioners. *See* Pet. at 17-22. The district court did not permit Intervenors in *United States v. Texas* (21A85) to present testimony or cross-examination at the preliminary-injunction hearing, but they nevertheless obtained some evidence that calls into question the accuracy of Petitioners' predictions.[19]

According to the latest data provided by Petitioners, it appears that from September 12, 2021 through September 16, 2021, Planned Parenthood clinics in Houston and Stafford, Texas performed between 50 and 63% of the average number of abortions they performed before the Heartbeat Law.[20] That valuable information about the actual impact of the law would have been unavailable had the law been prevented from going into effect. And it is indeed relevant here because Petitioners rely on what they claim are extraordinary circumstances to urge

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[19] *See* Intervenors' Mot. to Stay Inj. at 17-18, *United States v. Texas*, No. 21-50949 (5th Cir. Oct. 7, 2021).

[20] *See* Decl. of Monique Chireau Wubbenhorst, M.D., M.P.H., at ¶ 25, *Texas*, No. 1:21-cv-00796-RP (W.D. Tex. Oct. 1, 2021), ECF No. 58-1 at 141. Based on statistics given by Melaney Linton, CEO of Planned Parenthood Center for Choice (PPCFC), PPCFC performed between 14.3 and 17.9 abortions per day before the Heartbeat Law (the daily average for 400-500 abortions per month). Ms. Linton attested that PPCFC performed 52 abortions between September 1 and September 11 and 97 abortions between September 1 and September 16, which means that PPCFC performed 45 abortions between September 12 and September 16. That averages to approximately 9 abortions per day, which is between 50-63% of the abortions that were performed on average before the Heartbeat Law.

the Court to grant extraordinary relief. *See* Pet. at 17-22. Yet because of *Casey*'s unworkable standard, which has resulted in repeated preemptive injunctions for even the modest abortion regulations, courts are often deprived of this information despite being asked to decide these significant issues. *See June Med. Servs. v. Gee*, 139 S. Ct. 663 (2019) (mem. op.) (Kavanaugh, J., dissenting) (noting that he would deny the stay of the law to determine whether the "factual prediction" about the impact of the law "proves to be inaccurate."); *Box*, 949 F.3d at 998 (Easterbrook, J., concurring in the denial of rehearing en banc) (lamenting "pre-enforcement relief that forever prevents the judiciary from knowing what a law *really* does."). That problem calls for reconsidering *Roe* and *Casey*.

* * *

On a broader scale, *Roe* and *Casey*'s utter lack of workability is an inexorable consequence of the Court's self-proclaimed, but constitutionally unwarranted, role as the nation's "*ex officio* medical board with powers to approve or disapprove medical and operative practices and standards throughout the United States." *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 456 (1983) (O'Connor, J., dissenting). The Court lacks the constitutional authority and institutional competence for such a role and should relinquish it now.

II. *Roe* and *Casey* Should Be Overruled Because They Have Had Damaging "Real-World" Effects.

The "real-world effects on the citizenry" of *Roe* and *Casey* have also been devastating, warranting their reversal. *Ramos*, 140 S. Ct. at 1415 (Kavanaugh, J., concurring in part).

A. *Roe* and *Casey* have nullified the laws of every State seeking to offer meaningful protections to human beings *in utero* from the lethal violence of abortion, and as a result, the loss of life has been staggering. Since 1973, the number of abortions in the United States has exceeded *62 million*.[21] The Court's abortion jurisprudence has placed this country far out of the world's mainstream, with the United States one of only a handful of countries in the world that allows elective abortions after twenty weeks' gestation.[22] Even as Americans gaze with wonder at detailed ultrasound images of their unborn babies and throw gender reveal parties, the U.S. abortion regime simultaneously renders other unborn babies subject to slaughter and dehumanization as mere "cells" or "tissue". As one abortionist pondered while observing a premature newborn, "I thought to myself how bizarre it was that I could have legally dismembered this fetus-now-newborn if it were inside its mother's uterus – but that the same kind of violence against it now would be illegal, and unspeakable."[23] This cognitive dissonance about the humanity and value of the unborn child stems from the continued legality of the horrific procedure enshrined in law by *Roe* and *Casey*.

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[21] Nat'l Right to Life, *Abortion Statistics: United States Data and Trends*, https://www.nrlc.org/uploads/factsheets/FS01AbortionintheUS.pdf, (relying on adjusted data from the Guttmacher Institute, former research arm of Planned Parenthood).

[22] *See, e.g.*, Michelle Ye Hee Lee, *Is the United States One of Seven Countries that "Allows Elective Abortions After Twenty Weeks of Pregnancy?"*, Wash. Post, Oct. 9, 2017 (fact check rating this statement as "true").

[23] L. Harris, *Second Trimester Abortion Provision: Breaking the Silence and Changing the Discourse*, Repro. Health Matters, Vol. 16 no. supp. 31, 74–81, 76 (2008), https://www.tandfonline.com/doi/pdf/10.1016/S0968-8080%2808%2931396-2?needAccess=true.

B. America's abortion jurisprudence has likewise gravely damaged our electoral politics, making it a bitter and polarized zero-sum contest for control of this Court because of abortion. Supreme Court confirmation hearings have devolved into a toxic bloodsport. This does not appear to be the case in other nations around the world that have been allowed to govern themselves on the question of abortion through democratic deliberation and compromise rather than having the matter usurped by their Court of last resort.

C. *Roe* and *Casey* have also artificially solidified an outdated viability standard, preventing States from following new science as it crafts its regulations. As lower courts have recognized, "'because the Court's rulings have rendered basic abortion policy beyond the power of our legislative bodies, the arms of representative government may not meaningfully debate' medical and scientific advances." *MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 774 (8th Cir. 2015) (quoting *McCorvey v. Hill*, 385 F.3d 846, 852 (5th Cir. 2004) (Jones, J., concurring)). And the Court's foray into medical regulation may not merely be stagnating the legal standard despite advancing science—it may be *impeding* science. Researchers fear that acknowledging science on fetal pain, for example, may lead to restriction on abortion.[24] The American College of Obstetricians and Gynecologists (ACOG)'s clinging to decade-old research on fetal pain illustrates

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[24] *See* S. Derbyshire & J. Bockmann, *Reconsidering fetal pain*, J. Med. Ethics Vol. 46, no. 1, 3–6, 3 (2020), https://jme.bmj.com/content/46/1/3 ("Fetal pain has long been a contentious issue, in large part because fetal pain is often cited as a reason to restrict access to termination of pregnancy or abortion."); *see also* Harris, *supra,* at 77 (abortion providers are "silen[t]" about the violence of abortion because "frank talk like this is threatening to abortion rights.")

this point.[25] It also illustrates how ACOG's views[26] are based less on science and more on the politics of protecting *Roe* and *Casey*. It is unconscionable to think that the "medical" community shapes "the science" to fit its political goals. But this is the division the Court's abortion jurisprudence inflames.

* * *

Abortion is one of the most controversial issues in the United States and is likely so *because of* this Court's intervention. The Court's attempt to answer the question for all time and remove the issue from public debate, *see Casey*, 505 U.S. at 867, has had the opposite effect, and least half of the American public is still as intensely opposed to abortion as it was in 1973.[27] If the Court is concerned about efforts by states to craft abortion legislation that may actually take effect, it should eliminate the root of the problem: its unworkable abortion precedent. Overruling *Roe* and *Casey* would allow the Court to relinquish its role as nationwide abortion regulator and return the job to States and elected officials where it belongs.

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[25] *See* Am. Coll. of Obstet. & Gyns., *Facts are Important: Fetal Pain*, https://www.acog.org/advocacy/facts-are-important/fetal-pain (undated but referencing the Trump Administration).

[26] Most practicing obstetrician-gynecologists do not share this view, as over 85% do not perform abortions. D. Stulberg, et al., *Abortion provision among practicing obstetrician-gynecologists*, Obstet. Gyn., Vol. 118 no. 3, 609–14 (Sept. 2011), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3170127/.

[27] *See, e.g., Americans' Opinions on Abortion: Knights of Columbus/Marist Poll Nat'l Survey* 7 (Jan. 2021), https://www.kofc.org/en/resources/news-room/polls/kofc-national-survey-with-tables012021.pdf.

CONCLUSION

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

Respectfully submitted.

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