

In The
Supreme Court of the United States

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

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

**MOTION TO EXPEDITE CONSIDERATION OF THE
PETITION FOR A WRIT OF MANDAMUS AND TO
EXPEDITE CONSIDERATION OF THIS MOTION**

Pursuant to Supreme Court Rule 21, petitioners move for expedited consideration of their petition for a writ of mandamus to the United States Court of Appeals for the Fifth Circuit.

When this case was before this Court on a writ of certiorari before judgment, this Court “effectively [stood] in the shoes of the Court of Appeals” and “review[ed] the defendants’ appeals challenging the District Court’s order denying their motions to dismiss.” *Whole Woman’s Health v. Jackson*, 142 S. Ct. 522, 531 (2021). This Court held that this lawsuit challenging a Texas statute “is permissible against some of the named defendants but not others.” *Id.* at 530. In relevant part, it determined that the case may proceed against the licensing-official defendants and affirmed the district court’s denial of their motion to dismiss. *Id.* at 535–37, 539. Accordingly, the Court’s

judgment affirmed in part and reversed in part the district court's order and remanded to the Fifth Circuit for proceedings consistent with the opinion. *Id.* at 539.

Rather than remanding the case to the district court, the court of appeals has scheduled oral argument for January 7, 2022, to consider whether to certify to the Texas Supreme Court the question whether the remaining defendants have enforcement authority and, alternatively, to set a briefing schedule on purportedly remaining justiciability issues. The petition respectfully requests that a writ of mandamus issue directing the court of appeals to remand the case to the district court because the appeal before the Fifth Circuit has already been fully decided by this Court, and no basis exists for the Fifth Circuit to retain jurisdiction.

Given the extraordinary, urgent circumstances of this case, petitioners respectfully request that the Court direct respondents to file an opposition to the petition by Wednesday, January 5, 2022. Petitioners also move for this Court to order respondents to file any opposition to this motion by Tuesday, January 4, 2022.

BACKGROUND

A. Proceedings Below

Petitioners—plaintiffs below, who are Texas abortion providers and individuals and organizations that support abortion patients—brought this pre-enforcement challenge to Texas Senate Bill 8, 87th Leg., Reg. Sess. (Tex. 2021) (“S.B. 8” or the “Act”). Plaintiffs named two putative defendant classes of officials integral to S.B. 8’s private enforcement: one composed of clerks and the other of judges in Texas courts authorized to hear S.B. 8 claims. Pet. App. 32a. Plaintiffs also named as

a defendant a private party who plaintiffs contended presented a credible threat of enforcement against plaintiffs who violate the Act, and Texas's attorney general. Pet. App. 32a–33a. Finally, Plaintiffs sued four state licensing officials on the grounds that they can enforce S.B. 8's prohibitions indirectly by exercising regulatory authority triggered by violations of S.B. 8, and, as parties regularly involved in plaintiffs' challenges to abortion regulations in Texas, can also enforce S.B. 8's fee-shifting provision. Pet. App. 38a.

The district court denied the defendants' motions to dismiss, concluding that plaintiffs have standing and that the claims against clerks, judges, and other government officials were subject to suit in federal court under *Ex parte Young*, 209 U.S. 123 (1908). Pet. App. 37a–85a.

Defendants filed a notice of appeal from the interlocutory “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).” D.Ct. Dkt. 83 at 1. The district court then stayed further proceedings as to the government officials based on their sovereign-immunity defenses. D.Ct. Dkt. 88. The court of appeals later stayed the district-court proceedings as to the private individual, too. Order at 3 (5th Cir. Sept. 10, 2021), Doc. No. 00516009284.

B. Proceedings in This Court

This Court granted certiorari before judgment on October 22, 2021. In so doing, the Court necessarily determined “that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require

immediate determination in this Court.” S. Ct. R. 11; see *Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305, 350 (1985). The Court then heard the case on an expedited basis, setting oral argument for only ten days later, and issuing its opinion 39 days after oral argument.

In its December 10 opinion, the Court explained that because it “granted certiorari before judgment, [it] effectively stand[s] in the shoes of the Court of Appeals.” *Whole Woman’s Health v. Jackson*, 142 S. Ct. at 531. This Court thus “review[ed] the defendants’ appeals challenging the District Court’s order denying their motions to dismiss.” *Id.* The Court concluded that plaintiffs’ claims against the state-court judge and clerk, as well as the Texas attorney general, could not proceed because of sovereign immunity and justiciability issues. *Id.* at 531–36. As to Dickson, the Court held, based on “the briefing before us” and “on the record before us,” that plaintiffs lacked standing to sue him. *Id.* at 537.

As to the licensing officials, however, this Court held that plaintiffs’ claims for relief “survive” the motion to dismiss. *Id.* at 535–36. The Court reviewed Texas law and concluded that the licensing officials “may or must take enforcement actions against the [plaintiffs] if they violate the terms of Texas’s Health and Safety Code, including S.B. 8.” *Id.* at 535. “Accordingly,” the Court held “that sovereign immunity does not bar the [plaintiffs’] suit against these named defendants at the motion to dismiss stage.” *Id.* 535–36. The Court also concluded that plaintiffs’ claims against the licensing official defendants satisfy Article III. *Id.* at 536–37.

Summarizing its holdings, the Court explained: (1) the Court unanimously agrees “Judge Jackson should be dismissed from this suit”; (2) “[a] majority reaches the same conclusion with respect to the [plaintiffs’] parallel theory for relief against state-court clerks”; (3) with respect to Attorney General Paxton, “a majority concludes that he must be dismissed”; and (4) “[e]very Member of the Court accepts that the only named private-individual defendant, Mr. Dickson, should be dismissed.” *Id.* at 539. As to the licensing officials, however, “eight Justices hold this case may proceed past the motion to dismiss stage against Mr. Carlton, Ms. Thomas, Ms. Benz, and Ms. Young.” *Id.*

The Court thus “affirmed in part and reversed in part” the district court’s order, and “remanded [the case] for further proceedings consistent with [its] opinion.” *Id.*

Petitioners filed an application for issuance of a certified copy of the judgment forthwith and requested that the case be remanded directly to the district court. Defendants urged the Court to wait the usual 25 days before issuing its judgment, even though no defendant planned to file any petition for rehearing. Defendants also argued that the Court should follow its usual procedure of remanding to the court of appeals and suggested that departing from that ordinary practice would preclude defendants from asking the Fifth Circuit to certify to the Texas Supreme Court the question whether the licensing officials have state authority to enforce S.B. 8. Justice Gorsuch granted the request to issue the judgment forthwith, consistent with the Court’s expedition of the case.

The Court issued a certified copy of its judgment on December 16, 2021. The judgment states that “it is ordered and adjudged by this Court that the judgment of the District Court is affirmed in part and reversed in part, and the case is remanded to the United States Court of Appeals for the Fifth Circuit for further proceedings consistent with the opinion of this Court.” *Id.* at 3.

C. Proceedings on Remand

The same day, defendants filed in the Fifth Circuit an opposed “Motion to Certify to the Supreme Court of Texas or, Alternatively, To Set a Briefing Schedule.” Pet. App. 3a. All defendants joined this motion, including those who this Court had already ordered must be dismissed from this suit (i.e., defendants Jackson, Clarkston, Paxton, and Dickson).

Defendants asked the Fifth Circuit to certify to the Supreme Court of Texas the question of “[w]hether, notwithstanding statutory provisions making private lawsuits the only enforcement mechanism for SB 8 and prohibiting government officials from bringing such lawsuits, Texas licensing officials retain indirect enforcement authority to bring disciplinary proceedings for violations of SB 8 * * * before remanding this case to the district court.” Mot. 1 (5th Cir. Dec. 16, 2021), Doc. 00516135054. Defendants alternatively asked the court of appeals to “set a briefing schedule to resolve the remaining issues in this appeal.” *Id.* According to defendants, the supposedly remaining issues include “whether the plaintiffs have Article III standing to sue the executive licensing officials,” *id.* at 4, as well as “the defendants’

jurisdictional objections to the claims involving SB 8's fee shifting provision," *id.* at 7–8.

In response to the motion, plaintiffs explained that this Court had stepped into the Fifth Circuit's shoes and had already fully decided the appeal pending in the Fifth Circuit. They sought remand of the case to the district court without delay.

On December 27, 2021, a divided panel of the court of appeals issued an order stating that it had “decided that oral argument is appropriate before ruling on the State’s Motion to Certify or Alternate Motion to Set a Briefing Schedule, and the Response thereto.” Pet. App. 4a. It stated that “[w]ithout limiting the parties’ discretion, the court is particularly interested in questions concerning justiciability as to the defendants remaining in this suit, and the necessity and appropriateness of certification to the Texas Supreme Court.” *Id.* Although the court of appeals scheduled oral argument for January 7, 2022, it provided no indication of when it would decide the motion. *Id.*

Judge Higginson dissented, stating that he did “not read the Supreme Court’s judgment, especially in a case of this magnitude and acceleration, to countenance such delay.” Pet. App. 6a. He “would have immediately remand[ed] the case to the district court, denying without oral argument the defendants’ motion.” *Id.*

He explained that the motion to certify should be denied because the “Court majority could not have been more explicit” that claims against the licensing officials should proceed past the motion-to-dismiss stage. Pet. App. 7a. As he noted, the state-law question as to the licensing officials’ enforcement authority “was sufficiently

briefed and argued in the Supreme Court to be the basis of Justice Thomas's dissenting opinion." *Id.* As Judge Higginson explained, there is not "any ambiguity in the majority's judgment. The defendants already lost this point in the Supreme Court." *Id.* He also observed that "when this issue was before the Supreme Court, no Justice indicated that the Court should certify the question itself or instruct [the Fifth Circuit] to certify the question." Pet. App. 8a.

Judge Higginson also would have denied immediately the defendants' "alternative motion to set a briefing schedule to address the remaining issues" because "no such issues exist." Pet. App. 9a–10a. In his view, "[b]ecause the Supreme Court stepped into [the Fifth Circuit's] shoes and issued a full judgment affirming in part and reversing in part the district court's order, which had addressed all of the plaintiffs' claims, there are no issues remaining in this appeal for us to resolve." Pet. App. 10a.

On December 29, 2021, plaintiffs moved for reconsideration and to remand the case to the District Court. On December 30, 2021, the court of appeals denied that motion. Pet. App. 15a–17a. Judge Higginson again dissented from that order. Pet. App. 17a n.1.

ARGUMENT

For the same reasons that petitioners have filed a petition for a writ of mandamus, they request expedited consideration of that petition. As the Chief Justice stated, "[g]iven the ongoing chilling effect of the state law, the District Court should resolve this litigation and enter appropriate relief without delay." *Whole Woman's*

Health, 142 S. Ct. at 544 (Roberts, C.J., concurring in the judgment in part and dissenting in part).

With a clear majority of this Court having held that the case may proceed past the motion-to-dismiss stage against the licensing officials, the court of appeals has no issues left to resolve on the appeal before it and no authority to retain jurisdiction. Its only remaining task is to remand the case to the district court for further proceedings consistent with this Court's opinion. However, in contravention of this Court's mandate, the court of appeals denied petitioners' motion to remand and is continuing to exercise jurisdiction over the fully decided appeal, precluding the case from proceeding past the motion-to-dismiss stage as this Court directed. The court of appeals has ordered oral argument and indicated that it intends to consider, at minimum, "questions concerning justiciability as to the defendants remaining in this suit, and the necessity and appropriateness of certification to the Texas Supreme Court." Pet. App. 4a.

Absent intervention by the Court, the Fifth Circuit is poised to entertain questions already decided by the Court in direct violation of this Court's mandate and delay further resolution of this case in the district court by at least weeks, and potentially months or more.

For more than four months, thousands of Texans have been unable to exercise their federal constitutional right to terminate their pregnancy. Those with the means to do so are being forced to travel out of State—in many cases, hundreds of miles or more—to obtain constitutionally protected medical care, while many others are being

forced to take on the profound medical risks and pains of continuing pregnancy and childbirth against their will. And the rush of Texans fleeing to seek care is causing weeks-long appointment backlogs in other States, harming residents of multiple States and invariably delaying first-trimester abortion patients across the country until later in pregnancy. Pet. for Cert. Before J. 18–21, *Whole Woman’s Health*, No. 21-463, (U.S. Sept. 23, 2021); *see also Whole Woman’s Health*, 142 S. Ct. at 545 (Sotomayor, J., concurring in the judgment in part and dissenting in part).

Given the magnitude of the constitutional questions presented, this case “has received extraordinary solicitude,” and for good reason. *Whole Woman’s Health*, 142 S. Ct. at 538 n.6. On August 30, petitioners filed an emergency application for injunctive relief, and the Court resolved that application in approximately two days. On October 18, the Court granted petitioners’ motion to expedite consideration of the petition for a writ of certiorari before judgment and directed respondents to file a response three days later. On October 22, the Court granted the petition and set oral argument for only ten days later. And the Court issued its opinion 39 days after oral argument. Most recently, the Court granted the plaintiffs’ application to issue the judgment forthwith, rather than waiting the typical twenty-five days to issue its judgment.

Allowing the court of appeals to flout this Court’s mandate and derail indefinitely the timely resolution of the merits of this case by the district court would render this extraordinary solicitude effectively meaningless and compound the ongoing harm to pregnant Texans under S.B. 8.

For these reasons, petitioners move the Court to order that any response to this petition be filed by Wednesday, January 5, 2022. That deadline is reasonable given the urgency of the situation and because defendants have already briefed multiple times why they believe the court of appeals can certify questions to the Texas Supreme Court and decide purportedly remaining issues despite this Court's clear mandate.¹ And to facilitate expedition, petitioners also request that this Court direct any response to this motion be filed by Tuesday, January 4.

¹ They did so (1) in response to petitioners' motion for issuance of the judgment forthwith in this Court, (2) in their motion in the Fifth Circuit, and (3) in their reply in support of their motion.

January 3, 2022

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