No. 21-___

In the Supreme Court of the United States

STEPHEN BRINT CARLTON, ET AL., CROSS-PETITIONERS

v.

WHOLE WOMAN'S HEALTH, ET AL.

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

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

JUDD E. STONE II
Solicitor General
Counsel of Record

BETH KLUSMANN
NATALIE D. THOMPSON
Assistant Solicitors General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Judd.Stone@oag.texas.gov
(512) 936-1700

QUESTIONS 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

Cross-Petitioners are Stephen Brint Carlton, in his official capacity as Executive Director of the Texas Medical Board; Katherine A. Thomas, in her official capacity as Executive Director of the Texas Board of Nursing; Cecile Erwin Young, in her official capacity as Executive Commissioner of the Texas Health and Human Services Commission; Allison Vordenbaumen Benz, in her official capacity as Executive Director of the Texas Board of Pharmacy; and Ken Paxton, in his official capacity as Attorney General of Texas.

Cross-Respondents are Whole Woman's Health; Alamo City Surgery Center, P.L.L.C.; 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 Women's Health Alliance; Medical Doctor Allison Gilbert; Medical Doctor Bhavik Kumar; The Afiya Center; Frontera Fund; Fund Texas Choice; Jane's Due Process; Lilith Fund, Incorporated; North Texas Equal Access Fund; Reverend Erika Forbes; Reverend Daniel Kanter; Marva Sadler.

Respondents in the underlying petition include Judge Austin Reeve Jackson, in his official capacity as Judge of the 114th District Court; Penny Clarkston, in her official capacity as Clerk for the District Court of Smith County; and Mark Lee Dickson. Clarkston and Dickson intend to also file conditional cross-petitions.

RELATED PROCEEDINGS

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.

Whole Woman's Health et al. v. Judge Austin Reeve Jackson, 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.

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, 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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The opinion of the district court is reported at 2021 WL 3821062 and reprinted in the appendix to the petition in *Whole Woman's Health v. Jackson*, No. 21-463, at Pet. App. 1a-68a. The opinion of the Fifth Circuit, which explains its decision not to issue an injunction of SB 8 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 *Whole Woman's Health v. Jackson*, No. 21-463, at 83a-105a.

JURISDICTION

Petitioners are seeking review under Supreme Court Rule 11, and they filed their petition for a writ of certiorari before judgment 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 lacked Article III standing and their claims against the State Respondents are barred by sovereign immunity. But the Fifth Circuit has appellate jurisdiction under the collateral-order doctrine, because the State Respondents appealed an order denying a sovereign-immunity defense. *See 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 prior to judgment 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.

U.S. Const. amend. XIV, § 1 provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Senate Bill 8, is reprinted in the appendix to the petition in *Whole Woman's Health v. Jackson*, No. 21-463, at Pet. App. 108a-32a.

INTRODUCTION

Petitioners' lawsuit—which seeks to enjoin a host of state officials from enforcing Texas Senate Bill 8 (SB 8) even though the bill itself already forbids them to enforce it—is beset with fatal jurisdictional flaws. Petitioners lack standing. And they cannot overcome Respondents' sovereign immunity. Petitioners will have the opportunity to address these issues in the Fifth Circuit in their appellate brief, due less than four weeks from today, and at oral argument scheduled for the first week of December. Nevertheless, for the second time in four weeks, Petitioners have sought relief from this Court before the expedited appeal in the Fifth Circuit runs its course. For the reasons discussed in Respondents' concurrently filed Brief in Opposition, the Court should deny Petitioners' hastily filed petition for certiorari before judgment. *See generally* Brief in Opposition to Petition for a Writ of Certiorari Before Judgment ("BIO"), *Whole Woman's Health v. Jackson*, No. 21-463.

But if the Court chooses to grant their petition, it should also consider whether to overrule *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). Petitioners themselves have conceded that the merits of their lawsuit—whether SB 8 violates the putative constitutional right to abortion—are of "exceptional" importance. Pet. 17. More fundamentally, *Roe* and *Casey* were wrong from the day they were decided: the purported right to abortion announced in those cases does not have a foothold in constitutional text or in this Nation's history and traditions. And the distortion wrought by *Roe* and *Casey* on numerous, generally-applicable legal doctrines—from standing at the beginning of the case to res judicata at its conclusion—illustrates the

degree to which abortion-specific exceptions have warped other areas of law. If the Court grants the Petition, this case presents an ideal vehicle for returning the question of abortion to where it belongs—the States—and restabilizing numerous legal doctrines that have been unsettled by *Roe* and the cases that have followed.

STATEMENT

Respondents incorporate by reference the statement of facts in their concurrently filed Brief in Opposition. BIO 2-8. Respondents provide this abbreviated Statement to underscore aspects of the record that are relevant to the cross-petition.

1. SB 8 creates a private cause of action that can be brought against those who perform, or aid and abet the performance of, abortions after a fetal heartbeat has been detected. Tex. Health & Safety Code § 171.208(a). Any person or entity sued under SB 8 may assert an affirmative defense that (1) the defendant in such an action "has standing to assert the third-party rights of a woman . . . seeking an abortion," and (2) awarding relief to the claimant would impose an undue burden on that woman. *Id.* § 171.209(b); *see Casey*, 505 U.S. at 877 (plurality op.).

Utilizing SB 8's cause of action, a lawsuit can be brought by "[a]ny person, *other than an officer or employee of a state or local governmental entity in this state*." Tex. Health & Safety Code § 171.208(a) (emphasis added). This private cause of action is the only method of enforcing SB 8. *See id.* §§ 171.005 (enforcement is "exclusively" through private cause of action), 171.207(a) ("No enforcement . . . in response to violations of this subchapter may be taken or threatened by this state . . . or an executive or administrative officer or employee of this state."). In the light of that clear text, the Office of the Texas Attorney General interprets state law to foreclose

government enforcement of SB 8, whether direct or indirect. *See* Resp'ts Suppl. App'x at 50-53, *Whole Woman's Health v. Jackson*, No. 21A24 (U.S. Aug. 31, 2021).

2. Petitioners are abortion providers and advocates for abortion who filed suit to enjoin SB 8 on, among other grounds, the theory that it violates the right to elective abortion announced in *Roe* and preserved in *Casey*. Pet. App. 12a-14a.

Petitioners sued a Texas district judge and court clerk as putative class representatives to enjoin Texas courts from adjudicating lawsuits filed under SB 8's private cause of action. Pet. App. 15a. Petitioners also sought injunctive relief against a number of state executive officials, including the Attorney General of Texas. Pet. App. 15a-16a.[1] These executive officials are barred by Texas law from using SB 8's private cause of action, which is its "exclusive" enforcement mechanism. Tex. Health & Safety Code §§ 171.005, 171.207(a), 171.208(a). Finally, Petitioners sued Mark Lee Dickson, a private person who they allege has threatened to file lawsuits against them utilizing SB 8's cause of action. Pet. App. 16a.

In the district court, Respondents moved to dismiss under Federal Rule of Civil Procedure 12(b)(1) on the grounds that Petitioners' lawsuit was barred by Respondents' sovereign immunity and that Petitioners also lacked Article III standing. Pet. App. 21a-60a. The

[1] Respondent Stephen Brint Carlton is Executive Director of the Texas Medical Board; Respondent Katherine A. Thomas is Executive Director of the Texas Board of Nursing; Respondent Cecile Erwin Young is Executive Commissioner of HHSC; Respondent Allison Vordenbaumen Benz is Executive Director of the Texas Board of Pharmacy; and Respondent Ken Paxton is the Attorney General of Texas.

district court denied Respondents' motions to dismiss. Pet. App. 21a-60a.

Respondents immediately took this interlocutory appeal, which "divest[ed] the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 57 (1982) (per curiam). The district court therefore stayed all proceedings as to the governmental Respondents, Pet. App. 72a-76a, and the Fifth Circuit stayed the proceedings as to Mr. Dickson, Pet. App. 77a-79a. The Fifth Circuit denied Petitioners' request for an injunction pending appeal, later explaining that Petitioners had not shown they were likely to overcome the governmental Respondents' sovereign immunity. *Jackson*, 13 F.4th at 442-45. It did not reach Respondents' other jurisdictional challenges to Petitioners' claims. *Id.* at 444 n.14.

Petitioners then asked this Court for an injunction to prevent SB 8 from taking effect on September 1. *See* Emergency Application to Justice Alito for Writ of Injunction and in the Alternative, to Vacate Stays of District Court Proceedings, Whole Woman's Health v. Jackson, No. 21A24 (U.S. Aug. 30, 2021). The Court denied their application. Petitioners were not entitled to an injunction, as the Court explained:

> [Plaintiffs' application] presents complex and novel antecedent procedural questions on which they have not carried their burden. For example, federal courts enjoy the power to enjoin individuals tasked with enforcing laws, not the laws themselves. And it is unclear whether the named defendants in this lawsuit can or will seek to enforce the Texas law against the applicants in a manner that might permit our intervention. The State has represented that neither it nor its

> executive employees possess the authority to enforce the Texas law either directly or indirectly. Nor is it clear whether, under existing precedent, this Court can issue an injunction against state judges asked to decide a lawsuit under Texas's law. Finally, the sole private-citizen respondent before us has filed an affidavit stating that he has no present intention to enforce the law.

Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2495 (2021) (internal citations omitted). Dissenting justices, too, recognized the jurisdictional hurdles Petitioners must clear. *See id.* at 2496 (Roberts, C.J., dissenting) ("Defendants argue that existing doctrines preclude judicial intervention, and they may be correct." (citing *California v. Texas*, 141 S. Ct. 2104, 2115-16 (2021)); *id.* at 2497 (Breyer, J., dissenting) ("It should prove possible to apply procedures adequate to that task here, perhaps by permitting lawsuits against a subset of delegatees . . .").

On September 22, the Fifth Circuit set an expedited briefing schedule (to take place during October and November) and assigned the case to the next available oral argument panel (during the week of December 6). Nevertheless, on September 23, Petitioners filed an unusual petition for writ of certiorari before judgment, seeking to short-circuit the Fifth Circuit's expediated consideration of the appeal. Their chief justification for seeking certiorari before judgment: "there is no argument under existing precedent" that SB 8 "is constitutional, and that is true regardless of how it is enforced." Pet. 22.

If that justifies granting certiorari before judgment, then the Court should take up the underlying "existing precedent": *Roe* and *Casey*.

REASONS FOR GRANTING THE CROSS-PETITION

I. If the Court Grants Review, It Should Also Consider Whether *Roe* and *Casey* Should Be Overruled.

Petitioners' lawsuit is plagued by many insurmountable jurisdictional flaws that the Fifth Circuit should consider in the first instance. BIO 8-27. But if the Court chooses to prematurely grant review notwithstanding these jurisdictional maladies, it should also grant review to answer another question: whether *Roe* and *Casey* should be overruled.

Justices of this Court have explained why *Roe* and *Casey* were lawless on the days they were decided. *See, e.g.*, *June Med. Servs., LLC v. Russo*, 140 S. Ct. 2103, 2149-53 (2020) (Thomas, J., dissenting); *Casey*, 505 U.S. at 979-1002 (Scalia, J., concurring in the judgment in part and dissenting in part); *Doe v. Bolton*, 410 U.S. 179, 221-23 (1973) (White, J., dissenting); *Roe*, 410 U.S. at 172-78 (Rehnquist, J., dissenting). *Roe* and *Casey*'s failings are straightforward: The Constitution does not include a right to abortion, and there is no history or tradition of protecting such a right.

A. The Constitution does not include a right to elective abortion.

1. Abortion is a "right" in search of a constitutional home. It is found nowhere in the text of the Constitution, and the majority in *Roe* did not claim otherwise. Instead, the *Roe* Court determined that abortion fell within the right to privacy, which it admitted was not "explicitly mention[ed]" in the Constitution. 410 U.S. at 152-53. Thus, the Court drew from multiple amendments (the First, Fourth, Fifth, Ninth, and Fourteenth), as well as the "penumbras" of the Bill of Rights, as potential

sources. *Id.* at 152. The Court appeared to narrow it down to two possibilities—the Ninth Amendment (as the district court concluded) and the Fourteenth Amendment (as the Court "fe[lt]" it was)—but held it was a protected right regardless of where in the Constitution it was located. *Id.* at 153.

Simply reading the relevant amendments reveals that none of them explicitly includes anything resembling the right to abortion. And the "penumbras," of course, contain nothing explicit at all. Nevertheless, the *Roe* Court concluded, based on little more than its own *ipse dixit*, that the right to privacy encompassed a constitutional right to abortion. *Id.*

2. Reconsidering the constitutional source for the right to abortion nearly twenty years later, the Court in *Casey* determined it was a liberty interest protected by the Due Process Clause of the Fourteenth Amendment. 505 U.S. at 846. The Court explained that the liberties protected by the substantive component of the Due Process Clause are not limited to those identified in the Bill of Rights or even those that were protected at the time the Fourteenth Amendment was ratified. *Id.* at 847. Instead, to the Court in *Casey*, whether an act is a constitutionally protected liberty interest is subject only to this Court's "reasoned judgment." *Id.* at 849; *see also id.* at 850 (stating that there is "[n]o formula" other than "judgment and restraint" (quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting))).

Attempting to ground its "reasoned judgment" in prior precedent, the Court analogized abortion to marriage, contraception, school choice, and freedom from forced medical procedures. *Id.* at 849 (citing, *inter alia*, *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977); *Loving v. Virginia*, 388 U.S. 1 (1967); *Pierce v. Soc'y of*

Sisters, 268 U.S. 510 (1925); *Rochin v. California*, 342 U.S. 165 (1952)). But none of those rights involve ending the life of an unborn child. *See Gonzales v. Carhart*, 550 U.S. 124, 147 (2007) (noting that "by common understanding and scientific terminology, a fetus is a living organism while within the womb, whether or not it is viable outside the womb"). And as the Court later recognized, "[a]bortion is inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life." *Harris v. McRae*, 448 U.S. 297, 325 (1980).

The Court supplemented its review of precedent with vague statements about the "heart of liberty," "defin[ing] one's own concept of existence," "the mystery of human life," and a woman's "conception of her spiritual imperatives and her place in society." *Casey*, 505 U.S. at 852-53. None of these elevated sentiments are found in the text of the Constitution and instead demonstrate that the right to abortion exists only because the Court decided it should.

3. Dissatisfied with the due-process analysis, other Justices began to look to the Equal Protection Clause. Justice Blackmun suggested that denying a woman the right to abort her unborn child "appears to rest upon a conception of women's role that has triggered the protection of the Equal Protection Clause." *Id.* at 928 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part). Another four Justices have argued that the right to abortion is not, in fact, about the right to privacy, but rather the right of a woman to "enjoy equal citizenship stature." *Gonzales*, 550 U.S. at 172 (Ginsburg, J., dissenting) (citing Reva Siegel, *Reasoning from the Body: A Historical*

Perspective on Abortion Regulation and Questions of Equal Protection, 44 Stan. L. Rev. 261 (1992)).

Half a century on—and leaving no clause unexamined—the Court has been unable to locate the right to abortion in the Constitution. Because it is not there.

B. There is no right to elective abortion in the Nation's history and tradition.

As noted above, *Casey* determined that the right to abortion was part of substantive due process. 505 U.S. at 846. But the Court did not even attempt to apply the proper test for substantive-due-process rights: (1) the right must be "objectively[] 'deeply rooted in this Nation's history and tradition'" and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if [it was] sacrificed"; and (2) there must be a "'careful description' of the asserted fundamental liberty interest." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). Elective abortion is not deeply rooted in the history and tradition of our Nation.

1. Beginning with the second element first, the "careful description" of the right at issue is a right to elective abortion. *Casey* identified no such right—relying instead on *other* rights (marriage, contraception, bodily integrity), 505 U.S. at 849, and high-minded, philosophical statements about the human condition and childbearing, *id.* at 852-53. At no point did the Court in *Casey* look for the specific right to elective abortion within America's history and tradition. Had it done so, it would have come up empty, as did the Court in *Roe*.

2. Addressing the right to abortion in the first instance, the majority in *Roe* reviewed the history of abortion. 410 U.S. at 130-47. But rather than establish a pre-existing right to abortion protected by the States, *Roe*'s

historical discussion demonstrated that most States criminalized elective abortion.

As detailed in *Roe*, until the early to mid-1800s, many States followed English common law regarding abortion, which criminalized abortion after the quickening, when the unborn child's movements could be felt (at about 16-18 weeks' pregnancy). *Id.* at 132-36, 138. But in 1828, New York enacted legislation that became a "model" for other States. *Id.* at 138. Under that law, all abortion was criminalized unless necessary to preserve the life of the mother, although post-quickening abortion was penalized more severely. *Id.* In 1857, the American Medical Association's Committee on Criminal Abortion urged an end to abortion generally, explaining that support for abortion was based on a "wide-spread popular ignorance . . . that the foetus is not alive till after the period of quickening." *Id.* at 141.

Overtaken by advances in medical knowledge, the quickening distinction was abandoned by the late 1800s, and by the late 1950s, a "large majority of the jurisdictions banned abortion, however and whenever performed, unless done to save or preserve the life of the mother." *Id.* at 139. The *Roe* Court spoke of a recent "trend toward liberalization" of abortion statutes by one-third of States based on the ALI Model Penal Code, but that model law still criminalized all abortions absent a substantial risk to the mother's health, a grave defect in the child, or a pregnancy resulting from rape or incest. *Id.* at 140; *see also Doe*, 410 U.S. at 205. The only significant movement towards elective abortion noted in *Roe* was in the three years prior, when the American Medical Association, the American Public Health Association, and the American Bar Association announced their support for elective abortion. *Roe*, 410 U.S. at 143-46.

Thus, the history of abortion since the Founding is not one of a "deeply rooted" right, "implicit in the concept of ordered liberty." *Glucksberg*, 521 U.S. at 720. As then-Justice Rehnquist put it,

> The fact that a majority of the States reflecting, after all the majority sentiment in those States, have had restrictions on abortions for at least a century is a strong indication . . . that the asserted right to an abortion is not "so rooted in the traditions and conscience of our people as to be ranked as fundamental."

Roe, 410 U.S. at 174 (Rehnquist, J., dissenting). Elective abortion is not deeply rooted in this Nation's history and tradition. It is not protected by substantive due process.

* * *

The case against abortion as a constitutional right is not difficult to make. It is simply not present in the Constitution or protected throughout the Nation's history. Those who seek to justify the continued preservation of the right have the greater hurdle—and one that must ultimately prove insurmountable.

Stare decisis cannot save clearly erroneous constitutional decisions as these, which have proven wholly unworkable. *See Janus v. State, Cnty. & Mun. Emps.*, 138 S. Ct. 2448, 2478 (2018). The Constitution, not the judge-made rule of *stare decisis*, is the "supreme Law of the Land," U.S. Const. art. VI, cl. 2. If *Roe* and *Casey* are wrong (and they are), the Court is obligated to overturn them, especially where, as here, "fidelity" to those precedents "does more to damage" the rule-of-law ideals than to advance them. *Citizens United v. F.E.C.*, 558 U.S. 310, 378 (2010) (Roberts, C.J., concurring). This Court must adhere to the Constitution, not to itself.

II. The Continuing Validity of *Roe* and *Casey* Presents a Question of Exceptional Importance.

Since the Court's creation of the constitutional right to abortion, it has been "used like a bulldozer to flatten legal rules that stand in the way." *June Med.*, 140 S. Ct. at 2153 (Alito, J., dissenting). Indeed, "no legal rule or doctrine is safe from ad hoc nullification by this Court when an occasion for its application arises in a case involving state regulation of abortion." *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 814 (1986) (O'Connor, J., dissenting).

Petitioners seek to carry that ignominious practice forward in this case, asking the Court to add both Article III and sovereign immunity to the list of jurisprudential doctrines that this Court has concluded must give way to the putative right to elective abortion. If the Petition is granted, this case provides an ideal vehicle for ending this Court's errant policy of abortion-exceptionalism.

A. The Court's precedents contain numerous examples of differential treatment of judicial doctrines in cases in which abortion is at issue. For example, in a typical facial challenge, the challenger bears the "heavy burden" of establishing that "no set of circumstances exists under which the [law] would be valid. *United States v. Salerno*, 481 U.S. 739, 745 (1987). But in a challenge to a statute impacting abortion, the plaintiff need only show that the law is unconstitutional in a "large fraction" of cases in which the law is "relevant." *Casey*, 505 U.S. at 895 (plurality op.); *see also June Med.*, 140 S. Ct. at 2176 (Gorsuch, J., dissenting) (*Casey*'s large-fraction test "winds up asking only whether the law burdens a very large fraction of the people that it burdens" and is

"unlike anything we apply to facial challenges anywhere else.").

The Court has also altered the rules of severability and res judicata in cases challenging abortion regulations. *See Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2321 (2016) (Thomas, J., dissenting) (stating that the majority's decision "creates an abortion exception to ordinary rules of res judicata . . . and disregards basic principles of the severability doctrine"); *see also June Med.*, 140 S. Ct. at 2153 (Alito, J., dissenting) ("In [*Hellerstedt*], res judicata and our standard approach to severability were laid low."). And it has watered down its third-party standing doctrine, permitting abortion providers to assert the rights of hypothetical future patients without proving that such women would face a hindrance to bringing their own claims. *Compare Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004) (requiring a "close relationship" and a "hindrance" before permitting third-party standing), *with June Med.*, 141 S. Ct. at 2118-19 (plurality op.), *and Singleton v. Wolff*, 428 U.S. 106, 113-18 (1976) (plurality op.) (permitting abortion providers to raise claims on behalf of their patients).

Even unrelated constitutional doctrines have not escaped unscathed, as the Court has upheld laws aimed it restricting the speech of those who protest or counsel outside of abortion clinics. *Hill v. Colorado*, 530 U.S. 703, 730 (2000); *see also id.* at 765 (Kennedy, J., dissenting) (noting that the majority's holding "contradict[ed] more than a half century of well-established First Amendment principles"); *cf. Bruni v. City of Pittsburgh*, 141 S. Ct. 578, 578 (2021) (Thomas, J., respecting the denial of certiorari) (noting the "glaring tension" between *Hill* and *Reed* [*v. Town of Gilbert*, 576 U.S. 155 (2015)] with respect to whether a law is subject to strict scrutiny when

it "targets a 'specific subject matter . . . even if it does not discriminate among viewpoints within that subject matter.'").

B. Petitioners seek to add to the list of abortion-only rules by inviting the Court to craft new exceptions to state sovereign immunity and Article III. To enjoin a state officer without violating sovereign immunity, that officer "must have some connection with the enforcement of the act, or else it is merely making . . . the state a party." *Ex parte Young*, 209 U.S. 123, 157 (1908). Yet despite SB 8's explicit prohibition on enforcement by state officials, *see* Tex. Health & Safety Code § 171.207(a), Petitioners ask this Court to conclude that sovereign immunity is no bar to suing and enjoining them. Similarly, to establish standing under Article III, a plaintiff's injury must be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Yet Petitioners' claimed injuries stem, not from the state officials sued, but from the actions of private individuals who are not before the Court. Were the Court to agree with Petitioners' arguments concerning sovereign immunity and standing, it would represent yet another abortion-specific exception to otherwise applicable constitutional doctrines.

There is no reason to accept Petitioners' invitation. The creation of numerous abortion-specific rules will only hurt the Court's integrity in the long run. "Abortion doctrine has become known for inconsistency and incoherence. Those on both sides of the abortion conflict have bemoaned what they call abortion law exceptionalism—doctrinal twists or interpretations that seem applicable only in abortion cases." Mary Ziegler, *The*

Jurisprudence of Uncertainty: Knowledge, Science, and Abortion, 2018 Wis. L. Rev. 317, 357 (2018) (footnotes omitted). As a result, the Court's case law "is now so riddled with special exceptions for special rights that [its] decisions deliver neither predictability nor the promise of a judiciary bound by the rule of law." *Whole Woman's Health*, 136 S. Ct. at 2321 (Thomas, J., dissenting). These judicial aberrations call into question whether the underlying "right" is worth the effort of continual manipulation of legal doctrines in order to sustain it.

CONCLUSION

Should the Court grant the petition for a writ of certiorari before judgment, the Court should grant the conditional cross-petition.

Respectfully submitted.

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

JUDD E. STONE II
Solicitor General
Counsel of Record

BETH KLUSMANN
NATALIE D. THOMPSON
Assistant Solicitors General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Judd.Stone@oag.texas.gov
(512) 936-1700

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