STEPHEN A. HIGGINSON, *Circuit Judge*, dissenting:

I respectfully disagree with the majority's decision to hear oral argument on this remand from the United States Supreme Court. I do not read the Supreme Court's judgment, especially in a case of this magnitude and acceleration, to countenance such delay. I would immediately remand the case to the district court, denying without oral argument the defendants' motion to certify and alternative motion to set a briefing schedule. However, having been unpersuasive, upon an appropriate motion, I would preliminarily enjoin the defendant licensing officials from enforcing S. B. 8 against the plaintiffs, in accordance with the Supreme Court's near unanimous holding that "sovereign immunity does not bar the [plaintiffs'] suit against these named defendants at the motion to dismiss stage." *Whole Woman's Health v. Jackson*, No. 21-463, 2021 WL 5855551, at *8 (U.S. Dec. 10, 2021).

I.

I would deny the defendants' motion to certify. I am confident that the Court did not intend an unintelligible *perhaps* when it concluded that the plaintiffs' suit may proceed against four "executive licensing official[s] who 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." *Jackson*, 2021 WL 5855551, at *8 (citing TEX. OCC. CODE § 164.055(a)).

The Court examined this point with care. The argument that the defendants tell us warrants the further delays of certification and, whether the question is accepted or declined, re-litigation before us—that Texas law does *not*, in fact, allow these licensing officials to take enforcement actions against the plaintiffs if they violate S. B. 8—was sufficiently briefed and argued in the Supreme Court to be the basis of Justice Thomas's dissenting opinion. *Compare id.* at *13-14 (Thomas, J., concurring in part and dissenting in part) (citing TEX. HEALTH & SAFETY CODE §§ 171.207(a),

171.208(a)), *with* Defendants-Appellants' Motion to Certify at 7 (proposed certification question).

The Court majority could not have been more explicit, declaring that it "approves today" the plaintiffs' challenges in federal court. *Jackson*, 2021 WL 5855551, at *11. In its exact holding, the Court stated, "we hold that sovereign immunity does not bar the petitioners' suit against these named defendants at the motion to dismiss stage." *Id.* at *8. Later, in a summation, the Court emphatically reconfirmed that "eight Justices hold this case may proceed past the motion to dismiss stage against Mr. Carlton, Ms. Thomas, Ms. Benz, and Ms. Young, defendants with specific disciplinary authority over medical licensees, including the [plaintiffs]." *Id.* at 11.

I do not find any ambiguity in the majority's judgment. The defendants already lost this point in the Supreme Court. They should not get a second bite.

Moreover, even if the Supreme Court's opinion were somehow a raveled mass that the defendants could undo by pulling on a single thread, this court should not pull that thread. The Supreme Court drafts its judgments with precise decretal language. Although the defendants had informed the Court of its intent to move for certification,[1] the Court did not instruct us to certify this purportedly outcome-determinative question, as it has done in previous cases. *Cf. McKesson v. Doe*, 141 S. Ct. 48, 51 (2020) (per curiam) ("[T]he Fifth Circuit should not have ventured into so uncertain an area of tort law—one laden with value judgments and fraught with implications for First Amendment rights—without first seeking guidance on potentially controlling Louisiana law from the Louisiana Supreme Court.").

[1] *See* Respondents Carlton, Thomas, Tucker, and Young's Opposition to Petitioners' Application for Issuance of a Copy of the Opinion and Certified Copy of the Judgment Forthwith, *Whole Woman's Health v. Jackson*, No. 21-463 (U.S. Dec. 13, 2021).

Likewise, the Court declined to certify this question itself, as it has also previously done. *See Fiore v. White*, 528 U.S. 23 (1999); *Elkins v. Moreno*, 435 U.S. 647 (1978); *Aldrich v. Aldrich*, 375 U.S. 249 (1963); *Dresner v. City of Tallahassee*, 375 U.S. 136 (1963); *see also* TEX. R. APP. P. 58.1 ("The Supreme Court of Texas may answer questions of law certified to it by *any federal appellate court*.") (emphasis added).

Indeed, when this issue was before the Supreme Court, no Justice indicated that the Court should certify the question itself or instruct us to certify the question, even though "[n]ormally this Court ought not to consider the Constitutionality of a state statute in the absence of a controlling interpretation of its meaning and effect by the state courts." *Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 75 (1997) (quoting *Poe v. Ullman*, 367 U.S. 497, 526 (1961) (Harlan, J., dissenting)).[2] After all, as the Court's own actions demonstrate, nothing about this case is "normal." Rather, it "has received extraordinary solicitude at every turn." *Jackson*, 2021 WL 5855551, at *11 n.6. The Court expedited the case at each opportunity, took the extraordinary step of granting certiorari before judgment, and then heard three total hours of oral argument about whether Texas has improperly shielded from federal court review a law that openly defies a right expounded by the Supreme Court and provides a model for states to effectively nullify any constitutional right, whether expounded or enumerated. Finally, the Court granted the plaintiffs'

[2] Indeed, in his dissenting opinion, Justice Thomas urged his interpretation of Texas law directly on Texas courts rather than arguing for certification. *See Jackson*, 2021 WL 5855551, at *14 n.3 (Thomas, J., dissenting) ("Because the principal opinion's errors rest on misinterpretations of Texas law, the Texas courts of course remain free to correct its mistakes.").

application to issue the judgment forthwith, rather than waiting the typical 25 days to issue its judgment.[3]

For these reasons, I would deny the defendants' motion to certify.

II.

I would also deny the defendants' alternative motion to set a briefing schedule to address the remaining issues. That motion is premised on there being remaining issues in this appeal for us to resolve. However, no such issues exist. Because the Supreme Court "granted certiorari before judgment," it "effectively [stood] in the shoes of the Court of Appeals." *Jackson*, 2021 WL 5855551, at *5. Accordingly, the Court "review[ed] the defendants' appeals challenging the District Court's order denying their motions to dismiss," ultimately holding that the "order of the District Court is affirmed in part and reversed in part." *Id.* at *5, *11. Because the Supreme Court stepped into our 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.[4]

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[3] *See* Order, *Whole Woman's Health v. Jackson*, No. 21-463, 2021 WL 5931622, at *1 (U.S. Dec. 16, 2021); *see also* Application for Issuance of a Copy of the Opinion and Certified Copy of the Judgment Forthwith, *Whole Woman's Health v. Jackson*, No. 21-463 (U.S. Dec. 13, 2021); SUP. CT. R. 45.2, 45.3.

[4] Though the defendants claim that their jurisdictional objections to the fee-shifting provision in section 4 of S. B. 8 were excluded from the Supreme Court's grant of certiorari, the parties argued this point in the Supreme Court. *See* Petitioner's Br. 2–3, *Whole Woman's Health v. Jackson*, No. 21-463 (U.S. Oct. 27, 2021) (arguing that "the state executive officials named as defendants cause distinct injuries to [the plaintiffs] . . . through their ability to sue [the plaintiffs] for the collection of fees and costs under S.B. 8's draconian fee-shifting provision"); Reply Br. for Respondents Jackson et al. 7-8, *Whole Woman's Health v. Jackson*, No. 21-463 (U.S. Oct. 29, 2021) (arguing that the fact that "executive officials could seek attorney's fees as 'prevailing parties' under section 4 of SB

III.

Given our oath to "protect and defend" the Constitution, I would not add yet another stack to this matryoshka doll's despairing design. The Supreme Court's opinion and remand does not allow us to place new impediments in the path of federal court review of this mutinous law—above all not obstacles that the Court has already held do not exist. It is indignity enough that states feel emboldened to nullify constitutional rights expounded by the Court.

Contrary to the Supreme Court's accelerated relief, what this court does today adds impermissible delay to the vindication of the constitutional rights of Texas women in federal court. I would deny the defendants' motions and remand this case to the district court as soon as possible, so that what remains of the plaintiffs' lawsuit can proceed. As Chief Justice Roberts wrote, with no demurrer from other members of the Court: "Given the ongoing chilling effect of the state law, the District Court should resolve this litigation and enter appropriate relief without delay." *Id.* at *15 (Roberts, C.J., concurring in the judgment in part and dissenting in part).[5]

8" did not create an Article III injury and that plaintiffs could not pursue their section 4 claim under Ex parte Young").

[5] Given that my colleagues, whom I respect, have decided to hear oral argument, I would take two steps to protect the Supreme Court's opinion and remand to us. First, as noted at the outset, upon an appropriate motion, I would preliminarily enjoin the defendant licensing officials from enforcing S. B. 8 against the plaintiffs, in accordance with the Supreme Court's near unanimous holding that "sovereign immunity does not bar the [plaintiffs'] suit against these named defendants at the motion to dismiss stage." *Jackson*, 2021 WL 5855551, at *8. Second, I would invite the United States Attorney General to participate as amicus curiae for the duration of this case. *Cf. Bush v. Orleans Par. Sch. Bd.*, 191 F. Supp. 871, 878-79 (E.D. La.), *aff'd sub nom. Denny v. Bush*, 367 U.S. 908 (1961), *Legislature of Louisiana v. United States*, 367 U.S. 908 (1961), and *Tugwell v. Bush*, 367 U.S. 907 (1961) ("We conclude that the participation of the United States at this stage of the proceeding is entirely appropriate.").

IV.

Underscoring why we should not further delay this case on points that the defendants raised and lost in the Supreme Court, it is worth remembering how Justice Holmes described the Court: "We are very quiet there, but it is the quiet of a storm centre."[6] I do not think that any Justice would disagree with Justice Sotomayor's description of the present storm, even if they forcefully disagree about when and how that storm will abate:

> In open defiance of this Court's precedents, Texas enacted Senate Bill 8 (S. B. 8), which bans abortion starting approximately six weeks after a woman's last menstrual period, well before the point of fetal viability. Since S. B. 8 went into effect on September 1, 2021, the law has threatened abortion care providers with the prospect of essentially unlimited suits for damages, brought anywhere in Texas by private bounty hunters, for taking any action to assist women in exercising their constitutional right to choose. The chilling effect has been near total, depriving pregnant women in Texas of virtually all opportunity to seek abortion care within their home State after their sixth week of pregnancy. Some women have vindicated their rights by traveling out of State. For the many women who are unable to do so, their only alternatives are to carry unwanted pregnancies to term or attempt self-induced abortions outside of the medical system.

Jackson, 2021 WL 5855551, at *17 (Sotomayor, J., concurring in the judgment in part and dissenting in part).

The Court has properly ignored the public controversy surrounding this case. But I do not read any member of the Court to be intimating

[6] Oliver Wendell Holmes, *Law in the Court*, *in* The Essential Holmes: Selections from the Letters, Speeches, Judicial Opinions, and Other Writings of Oliver Wendell Holmes, Jr. 145, 145 (Richard A. Posner ed. 2012).

trepidation, much less retreat, from Chief Justice Marshall's charge: "[A] law repugnant to the Constitution is void." *Marbury v. Madison*, 5 U.S. 137, 180 (1803). Accordingly, if we were to certify this question to the Texas Supreme Court and that court were to answer these licensing officials do not have the power to enforce S. B. 8, I anticipate that the Supreme Court would revisit its conclusion that the plaintiffs' suit could not proceed against the other defendants. After all, time and time again, the Court has rejected the claim that private enforcement mechanisms can shield constitutional violations from judicial review. This case is analogous to *Terry v. Adams*, in which the Court rebuffed one Texas county's attempt to use a clever "device" to "circumvent[]" the Fifteenth Amendment, holding instead that the amendment's "command that the right of citizens to vote shall neither be denied nor abridged on account of race" applies to "any election in which public issues are decided or public officials selected," even if that election is held by "a self-governing voluntary club" that "is not regulated by the state at all." 345 U.S. 461, 463, 464, 468, 469 (1953).[7] Professor Charles Black said it best in his paean to *Terry*: "[The state action doctrine] now exists principally as a hope . . . that 'somewhere, somehow, to some extent,' community organization of . . . discrimination can be so featly managed as to force the Court admiringly to confess that this time it cannot tell where the

[7] *See also Bush v. Orleans Par. Sch. Bd.*, 188 F. Supp. 916, 927 (E.D. La. 1960), *aff'd*, 365 U.S. 569 (1961) (enjoining a law enacted in explicit defiance of *Brown v. Board of Education* on the ground that the law's "unconstitutional premise strikes with nullity all that it would support"); *id.* at 922 (explaining that the court was enjoining a state legislative committee from enforcing the law, even though injunctions normally only run against "officers of the executive branch," because "[h]aving found a statute unconstitutional, it is elementary that a court has power to enjoin all those charged with its execution" (citing *Marbury*, 5 U.S. at 170 ("It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done that the propriety or impropriety of issuing a mandamus, is to be determined."))).

pea is hidden."[8] Writing as but one judge on an inferior federal court, albeit the court entrusted to enforce an earlier, actively resented Supreme Court decree, I am confident that, in this case as in *Terry*, the Supreme Court will not allow the Constitution to be circumvented and itself to be enfeebled.

[8] Charles L. Black Jr., *Foreword: State Action, Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 95 (1967) (quoting *Terry*, 345 U.S. at 473).