"*Jurisdiction and the Supreme Court's Orders Docket*"

U.S. Senate Committee on the Judiciary

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Dear Chairman Durbin, Ranking Member Grassley, and Members of the Subcommittee,

Thank you for the invitation to appear today to testify regarding Supreme Court jurisdiction and resolution of matters on the Court's orders docket. I teach and write in the areas of constitutional law and interpretation, administrative law, federal courts, and the separation of powers. Previously I served as a Deputy Assistant Attorney General in the Office of Legal Counsel and as an Associate Deputy Attorney General within the U.S. Department of Justice.

My testimony will address the procedural and jurisdictional challenges related to the Supreme Court's recent consideration of an emergency motion regarding the Texas heartbeat legislation and trends related to Supreme Court resolution of applications for orders on its non-merits docket. Due to the Committee's expressed interest in discussion of the Court's role in review of the Texas Heartbeat Act, my testimony will focus on the Court's decision not to grant an affirmative injunction pending appeal, thus preserving the pre-litigation status quo under state law.

The Supreme Court's September 1, 2021, decision not to issue an emergency order enjoining application of the Texas Heartbeat Act was consistent with longstanding federal jurisdictional doctrines related to threshold questions of standing, state sovereign immunity, and the scope of relief available in the challenge brought before the Court. In light of these numerous complex and thorny issues, and the lack of a present concrete dispute involving the defendants in the litigation, it would have been extraordinary for the Court to grant an order on the merits of the challenged state legislation.[1] The Court's decision not to intervene maintained the pre-litigation status quo and the stays of district court litigation pending appeal issued by both of the lower courts to rule in the case.[2]

Some court observers and scholars have expressed concern with the recent pace of the Supreme Court's issuance of orders, outside the typical merits briefing process, that stay or vacate lower court orders granting relief from challenged laws or policies. But, critically, such

[1] *See, e.g.*, *California v. Texas*, 593 U.S. ___, ____ (2021) (Breyer, J.) (slip op., at 8); *Ex parte Young*, 209 U.S. 123, 163 (1908).

[2] The district court stay applied only to the state defendants and not to the private citizen defendant. *See* Order, *Whole Woman's Health v. Jackson*, slip op. at 2 (W.D. Tex. Aug. 27, 2021); Order, *Whole Woman's Health v. Jackson*, slip op. at 2 (5th Cir. Aug. 27, 2021) (per curiam) ("Fifth Circuit Order"). The Fifth Circuit subsequently issued a temporary administrative stay of the district court proceedings. See Fifth Circuit Order at 2.

an order was *not* issued here—indeed, it was the abortion providers who asked the Supreme Court to grant extraordinary relief. The Court declined to do so. Unlike in past cases where the federal government sought relief from lower court orders invalidating its policies, there were serious jurisdictional questions here whether abortion providers could obtain effective injunctive relief from the Texas law's private civil remedy merely by suing one private party, one state court clerk, and one state court judge who allegedly might bring and adjudicate future suits under the Texas law (in addition to the several state defendants who lack any role in enforcing the Texas statute). More generally, the arguably increased rate of Supreme Court orders on the emergency docket is due in large part to actions taken outside the control of the Court but impacting its docket, such as the increase in federal district court nationwide injunctions and state executive actions during the pandemic health emergency to address the crisis outside the ordinary legislative policymaking process.[3]

On May 19, 2021, the Texas state legislature and governor enacted the Texas Heartbeat Act. Close to two months later, on July 13, petitioners filed a complaint challenging the constitutionality of the measure under the Fourteenth Amendment. More than three weeks after that, petitioners filed a motion on August 7 for an emergency injunction to halt operation of the law. This motion thus came within several weeks of the effective date of the legislation on September 1. The heartbeat legislation restricts abortion once a fetal heartbeat is discovered, subject to an exception for the life of the mother, but prohibits state government officials from enforcing its provisions. Instead the state statute authorizes private citizens to bring civil actions against individuals such as practitioners and health insurers who either violate the post-heartbeat prohibition or take action facilitating prohibited abortions. Civil liability attaches for violations of the bill by individuals who perform or induce abortion or "aid or abet[]" those actions. Women seeking abortions are not subject to potential penalties or prosecution under the bill.

At the time of the filing of the litigation, the Texas bill had not yet become operational. Plaintiffs (and subsequent petitioners in the Supreme Court) brought their complaint against one state court judge, a county judicial clerk, a private activist, and various state executive officials such as the Texas Attorney General. None of these defendant state officials have authority under the terms of the state legislation to bring an action to enforce it. And the private defendant indicated by affidavit that he had no intention of bringing civil action to enforce the state law. As for the judicial officers, the county clerk's sole role is to docket any action brought for adjudication without regard to the underlying merits, and the state court judge's sole role is to neutrally adjudicate any such action.

Within the three-branch federal constitutional structure, Article III of the Constitution authorizes creation of a federal judiciary to resolve cases and controversies against particular parties.[4] The drafters and ratifiers of the Constitution rejected proposals for creation of a

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[3] *See, e.g.*, *Dep't of Homeland Security v. New York*, 589 U.S. __ (2020); *Tandon v. Newsom*, 593 U.S. __ (2021).

[4] U.S. CONST. art. III, section 2, clause 1 ("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 . . . . [and] to Controversies . . . .").

general council of revision to review constitutional and legal questions in the abstract.[5] Consequently the Court has repeatedly reaffirmed, over the course of hundreds of years, its lack of jurisdiction to issue advisory opinions generally reviewing legislation or providing legal guidance outside the context of resolution of concrete disputes involving specific parties.[6]

In *Whole Woman's Health v. Jackson*, petitioners requested relief against state officials with no responsibilities or authority under the Texas heartbeat law to bring the private actions forming the core enforcement mechanism of the statute. Therefore, it is unclear how any judicial decision issuing an order or injunction against those officials in this litigation would have interrupted the general operation of the Texas law or addressed the harm alleged by petitioners. That is especially so given that no decision had yet been issued to certify a defendant class, such that any order issued by the Supreme Court would not have applied to the overwhelming majority of state court judges and clerks and potential private plaintiffs. In addition, there was no official concrete action applying the law for a court to address or halt.[7] The one private defendant indicated no intention to take action under the Texas law, meaning there was no ripe controversy for federal courts to resolve regarding this defendant under longstanding principles of federal jurisdiction.[8] This litigation would have been a poor vehicle for any in-depth evaluation of the merits of petitioners' constitutional claims.

The Constitution provides for limited federal jurisdiction because of the structural principles that form its foundation such as the three-branch separation of powers at the federal level and the federal-state structure providing for a limited federal government overlaying continued vibrant state government.[9] In the U.S. representative republic structure,[10] federal and state legislatures bear general responsibility for policymaking to help ensure that laws regulating citizens will represent the interests of the electorate. The federal judiciary has the relatively more modest role of stepping in when laws are applied in a way that creates a concrete dispute impacting a particular party who then initiates a case or controversy challenging the law. The normal way this process operates in circumstances where a state-law private civil remedy allegedly violates federal constitutional rights is for a defendant in state court to seek appellate relief from the adverse judgment in the U.S. Supreme Court.[11] What is outside the normal course is for a state-law defendant to evade that

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[5] *Cf.* Max Farrand, ed., *The Records of the Federal Convention of 1787*, vol. 1, at 20-21 (describing an early proposal to grant a national legislature veto authority over state legislation and to establish a council with veto authority over national laws).

[6] *See, e.g.*, *California v. Texas*, slip op. at 8*; Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Muskrat v. United States*, 219 U.S. 346 (1911).

[7] *Cf., e.g.*, *Murphy v. National Collegiate Athletic Assn.*, 584 U.S. __, ____ (2018) (Thomas, J., concurring) (observing that remedies typically "operate with respect to specific parties" and not on "legal rules in the abstract"), cited in *California v. Texas*, slip op. at 8.

[8] *See, e.g.*, *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 579-81 (1985).

[9] *See, e.g.*, U.S. CONST. amend. X; *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991).

[10] *Cf.* U.S. CONST. art. IV, section 4.

[11] *See* 28 U.S.C. § 1257; *see, e.g.*, *New York Times v. Sullivan*, 376 U.S. 254 (1964) (resolving a First Amendment challenge related to defamation rules created by Alabama courts).

tried-and-true path for judicial review by instead filing a pre-enforcement suit in federal court against state executive officials with no enforcement role, state judicial officers charged with neutrally processing and adjudicating any claims and defenses, and a private party who had disavowed any intent to bring a state-court suit. Unsurprisingly, therefore, the complaint and filings in *Whole Woman's Health v. Jackson* alleged no concrete application of the Texas heartbeat law by any of the parties named as defendants.[12] Nor could the filings have made such a claim against the state government defendants in the case, as those defendants lack an enforcement role under the terms of the state law providing for enforcement through private causes of action.[13]

In addition to the federal jurisdictional limitation of resolution of concrete cases and controversies, the federal-state constitutional structure rests on the longstanding principle of state sovereign immunity. State sovereign immunity, like immunity for elected officials at the federal level, is a longstanding principle foundational to, and inherent in, the federal constitutional structure.[14]

The Supreme Court has repeatedly recognized and reaffirmed the scope of state sovereign immunity subject to certain limited exceptions. For example, in *Ex parte Young*, the Supreme Court acknowledged that state sovereign immunity encompasses both suits against a state as a party and suits against state officials taking official action such that the state is essentially the party subject to challenge.[15] Because none of the state officers named in *Ex parte Young* "held any special relation to the particular statute alleged to be unconstitutional," the Court dismissed the suit for lack of jurisdiction.[16] The Court noted that none of the state officer parties had been expressly directed to enforce the law and, thus, an action against them could not serve as a vehicle to bring a general challenge to the constitutionality of the relevant state law.[17] The Court emphasized that "[a]s no state officer who was made a party bore any close official connection with the [challenged] act, . . . the making of such officer a party defendant was a simple effort to test the constitutionality of [the] act" and "there is *no principle* upon which [that] could be done."[18]

If the rule were to the contrary and a suit could be brought against state officials simply "because they were law officers of the state, a case could be made for the purpose of testing the constitutionality of the statute."[19] That would be a "very convenient way" to "obtain[] a speedy judicial determination of questions of constitutional law," the Court noted.[20] But,

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[12] *See generally* Emergency Application for Writ of Injunction and in the Alternative, to Vacate Stays, *Whole Woman's Health v. Jackson*, No. 21A24 (Sup. Ct. 2021).

[13] *Cf. Whole Woman's Health v. Jackson*, slip op. at 2 (Sup. Ct. Sept. 1, 2021) ("Supreme Court Op.") (noting that "[]he State has represented that neither it nor its executive employees possess the authority to enforce the Texas law either directly or indirectly").

[14] *Cf.* U.S. CONST. art. I, section 6, clause 1 (Speech or Debate Clause).

[15] *See, e.g.*, *Ex parte Young*, 209 U.S. 123, 150 (1908).

[16] *See id.* at 157, 168.

[17] *See id.* at 156-57.

[18] *Id.* at 156 (emphasis added).

[19] *Id.* at 157.

[20] *Id.*

according to the Court, "it is a mode which cannot be applied to the states of the Union consistently with the fundamental principle that they cannot, without their assent, be brought into any court at the suit of private persons."[21]

Consistent with those passages from the more-than-100-year-long precedent of *Ex parte Young*, the Court has repeatedly reaffirmed the structural constitutional principles underlying state sovereign immunity and the limits of federal judicial review of certain official state action.[22] State sovereign immunity "inheres in the system of federalism" and applies to immunity even from claims arising under federal law.[23] The "sovereign immunity of the States" is "a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today" unless expressly or structurally altered by Constitution.[24]

In light of those background principles of the contours of Article III jurisdiction and the longstanding provenance of sovereign immunity, the Supreme Court noted "complex and novel antecedent procedural questions" in *Whole Woman's Health v. Jackson*, making issuance of the requested preliminary relief inappropriate at that time and ineffectual.[25] The Court acknowledged that applicants had "raised serious questions regarding the constitutionality of the Texas law at issue."[26] But the Court indicated that its review of questions on the merits of the state law would not be appropriate in the current posture, in part because the Court found it "unclear whether the named defendants in [the] lawsuit can or will seek to enforce the Texas law against the applicants in a manner that might permit [Court] intervention."[27] This determination was consistent with the Court's lack of power to generally review in an advisory fashion or enjoin "laws themselves"—in contrast to the Court's "power to enjoin individuals tasked with enforcing laws."[28]

In addition to the specific questions related to Supreme Court jurisdiction in *Whole Woman's Health v. Jackson*, the Committee has indicated interest in testimony today related to the Court's general consideration of matters on its orders list. The orders docket of the Court includes matters such as routine denials of petitions for certiorari as well as matters brought before the Court in an emergency posture.[29] Maintenance of an orders docket is typical for a judicial body and is a longstanding practice of the Court.

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[21] *Id.*

[22] *See, e.g.*, *Alden v. Maine*, 527 U.S. 706, 730-35 (1999).

[23] *Id.* at 731-32.

[24] *See id.* at 713. *See also Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 69 (1996) (noting that sovereign immunity is rooted in "fundamental jurisprudence in all civilized nations" (internal quotation omitted)). *See also* Federalist No. 81 (Hamilton) ("It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent" consistent with "the general practice of mankind").

[25] Supreme Court Op. at 1.

[26] *Id.*

[27] *Id.*

[28] *Id.*; *see also* Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933 (2018).

[29] *See generally* Hashim M. Mooppan, Testimony to the Presidential Commission on the Supreme Court of the United States (September 2021), *available at* https://www.whitehouse.gov/wp-content/uploads/2021/09/Hashim-Mooppan.pdf (addressing litigation concerning stays and injunctions of executions). And Supreme Court practitioner Tom Goldstein who co-founded SCOTUSblog recently observed

Recently the Supreme Court's orders docket in particular has received more attention in part because of legal scholarship analyzing the docket and applying to it a pithy moniker.[30] But as noted this past winter during expert testimony on the Supreme Court's orders list before the U.S. House Subcommittee on the Courts, Intellectual Property, and the Internet, the Court makes public every brief and order on the docket.[31] And the most common category of Supreme Court order issued in summary fashion is Supreme Court denials of certiorari, a function of the Supreme Court's generally discretionary jurisdiction.[32] Some scholars have expressed concern that the Court is using the orders docket with increased frequency to reverse lower court stays and permit challenged government policies to become effective.[33] But requests for the Court to step into such questions often arise from the decisions of lower federal courts to unilaterally issue decisions with broad, immediate effect, causing litigants to seek Supreme Court relief to permit the enacted laws or regulations to remain operational during more in-depth judicial review of their legality.[34] And again, it warrants emphasis that the Court's action in *Whole Woman's Health v. Jackson* was procedurally different from these cases, because it was the abortion providers who were asking the Court to grant relief denied by lower courts and thereby disturb the pre-litigation status quo. The Court declined to do so.

Commensurate with the increased attention to the Court's orders docket, lower federal courts have increasingly relied on the issuance of national injunctions to immediately halt the application of laws and regulations put in place by elected and appointed policy officials.[35] Federal courts scholars and more than one Justice on the Court have questioned whether federal courts legitimately have "Article III jurisdiction to grant nationwide defendant-oriented injunctions."[36] As the Committee considers issues related to the Supreme Court's issuance of orders on the emergency docket, trends related to the issuance of far-ranging relief in the lower courts also warrant consideration.

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that the Court's orders docket is growing as lower courts issue an increasing number of decisions directly inconsistent with binding precedent and current law. Remarks, Thomas C. Goldstein, *Supreme Court Preview: What is in Store for October Term 2021?* (Sept. 2021), recording available at https://www.youtube.com/watch?v=VDgMJr32UjQ&t=17.

[30] William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J. of Law & Liberty 1 (2015).

[31] Testimony of Professor Michael T. Morley, *The Supreme Court's Shadow Docket*, U.S. House subcommittee hearing on Feb. 18, 2021, at p. 1, available at https://docs.house.gov/meetings/JU/JU03/20210218/111204/HHRG-117-JU03-Wstate-MorleyM-20210218-U1.pdf.

[32] *See id.* at 2.

[33] *See generally, e.g.*, Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123 (2019).

[34] *See, e.g.*, *id.* at 134; Morley, *supra* note 31, at 4.

[35] *See generally* Samuel Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417 (2017); Michael T. Morley, *Disaggregating Nationwide Injunctions*, 71 Ala. L. Rev. 1 (2019).

[36] *See* Morley, *supra* note 31, at 5; *see also Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring); *Trump v. Hawaii*, 138 S. Ct. 2392, 2429 (2018) (Thomas, J., concurring).