CENTER *for*
REPRODUCTIVE
RIGHTS

July 21, 2020

Lyle W. Cayce, Clerk of Court
United States Court of Appeals for the Fifth Circuit
F. Edward Herbert Building
600 S. Maestri Place
New Orleans, LA 70130-3408

**Re: *Whole Woman's Health, et al. v. Paxton, et al.,* No. 17-51060**

Dear Mr. Cayce:

On July 6, 2020, this Court directed the parties to submit a supplemental letter brief addressing the legal effect, if any, upon this case of *June Medical Services, L.L.C. v. Russo*, Nos. 18-1323, 18-1460, 2020 WL 3492640 (U.S. June 29, 2020) ("*June Medical*"). Plaintiffs-Appellees respectfully submit this letter brief in response.

This appeal concerns a challenge to a provision of Texas Senate Bill 8 of 2017, which prohibits the performance of dilation and evacuation ("D&E") procedures unless physicians first complete and confirm fetal demise (the "D&E Ban"). For the reasons that follow, the Supreme Court's decision in *June Medical* does not change the applicable legal analysis in this case and only underscores that the D&E Ban is unconstitutional. Specifically, both the plurality and concurring opinions in *June Medical* confirm that: (1) the principle of *stare decisis* requires this Court to follow binding Supreme Court precedent regarding abortion; (2) the undue burden standard, established in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) and applied in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), is the applicable standard for the constitutionality of abortion restrictions. The district court here properly applied this standard in holding that the D&E Ban is an unconstitutional undue burden.

## I. The Supreme Court's Decision in *June Medical.*

In *June Medical*, the Supreme Court held that a Louisiana law requiring doctors who provide abortion care to maintain hospital admitting privileges imposes an undue burden on abortion access. 2020 WL 3492640, at *4. Justice Breyer announced the judgment of the Supreme Court and delivered an opinion in which Justices Ginsburg, Sotomayor, and Kagan joined. *Id.* at *3-21. Chief Justice Roberts filed a separate opinion concurring in the judgment. *Id.* at *21-29. The remaining four Justices dissented, each filing a separate opinion. *Id.* at *29-63.

All Justices in the majority agreed that *stare decisis* requires adherence to the Supreme Court's prior decisions in *Casey* and *Whole Woman's Health*. Likewise, all emphasized that the undue burden standard is highly fact-dependent and appellate courts are obligated to defer to a district court's factual findings unless clearly erroneous. *Id.* at *11 (plurality) ("Where 'the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently.'" (citation omitted)); *id.* at *28 (Roberts, C.J., concurring) ("Clear error review follows from a candid appraisal of the comparative advantages of trial courts and appellate courts. 'While we review transcripts for a living, they listen to witnesses for a living.'" (citation omitted)).[1]

[1] The State has never challenged Plaintiffs-Appellees' third-party standing to bring this case, either in this Court or the district court, so like the State in *June Medical*, all such arguments are waived. *See* 2020 WL 3492640, at *8-9. In any event, the plurality and the concurrence in *June Medical* reaffirmed, in both reasoning and conclusion, that plaintiffs have third-party standing where, as here, enforcing the challenged law against them would violate the third party's rights. *Id.* at *10 ("[T]he State's strategic waiver and a long line of well-established precedents foreclose its belated challenge to the plaintiffs' standing."); *id.* at *9 (plurality opinion) ("We have long permitted abortion providers to invoke the rights of their actual or potential patients in challenges to abortion-related regulations.") (collecting cases); *id.* at *26 n.4 (Roberts, C.J., concurring) ("For the reasons the plurality explains, I agree that the abortion providers in this case have standing to assert the constitutional rights of their patients." (citation omitted)). Here, the challenged law subjects abortion providers to criminal penalties for violating the D&E Ban, so abortion providers clearly have third-party standing. In a separate case currently pending before this Court, the State conceded that the plurality and the concurrence in *June Medical* reaffirmed that abortion providers may exercise third-party standing to challenge regulations that restrict "access to abortion," as the D&E Ban plainly does. *Whole Woman's Health v. Phillips*, No. 18-50730, Doc. 00515485754, at *2-3 (5th Cir. July 10, 2020).

## II. This Court Is Bound by Supreme Court Precedent.

*June Medical*, like *Whole Woman's Health* before it, reaffirms that an abortion restriction imposes a constitutionally invalid "undue burden" if it has "the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion." *See June Med.*, 2020 WL 3492640, at *3 (plurality) (quoting *Casey*); *Whole Woman's Health*, 136 S. Ct. at 2300 (quoting *Casey*). In both cases, the Supreme Court struck down abortion restrictions as undue burdens, correcting a misapplication of the *Casey* standard in the lower courts. *June Med.*, 2020 WL 3492640, at *21 (plurality) ("The Court of Appeals' judgment is erroneous."); *Whole Woman's Health*, 136 S. Ct. at 2309 ("The Court of Appeals' articulation of the relevant standard is incorrect."). The Supreme Court's most recent instruction to lower courts to follow established precedent is especially important in this case, where the Supreme Court has already ruled that a ban on D&E is an unconstitutional undue burden under *Casey*. *See Stenberg v. Carhart*, 530 U.S. 914 (2000); *Gonzales v. Carhart*, 550 U.S. 124 (2007).

### *A. Controlling Supreme Court Precedent Governs the Outcome of this Case.*

Since *Casey* was decided nearly thirty years ago, the Supreme Court has consistently applied its undue burden test to laws restricting abortion. Both the plurality and the concurrence in *June Medical* took pains to emphasize the importance of precedent. In striking down a Louisiana law "identical" to the Texas law struck down in *Whole Woman's Health*, the plurality in *June Medical* stated that "[t]his case is similar to, nearly identical with, *Whole Woman's Health*. And the law must consequently reach a similar conclusion." 2020 WL 3492640, at *21. Chief Justice Roberts's concurrence made the point even more strongly:

> The legal doctrine of *stare decisis* requires us . . . to treat like cases alike. The result in this case is controlled by our decision four years ago invalidating a nearly identical Texas law. The Louisiana law burdens women seeking previability abortions to the same extent as the Texas law, according to factual findings that are

> not clearly erroneous. For that reason, I concur in the judgment of the Court that the Louisiana law is unconstitutional.

2020 WL 3492640, at *29 (Roberts, C.J., concurring). Chief Justice Roberts went on to emphasize the importance of *stare decisis*, even where judges disagree with prior precedent: "This principle is grounded in a basic humility that recognizes today's legal issues are often not so different from the questions of yesterday and that we are not the first ones to try to answer them." *Id.* at *22.

As discussed in Plaintiffs-Appellees' merits brief, the district court in this case properly applied binding Supreme Court precedent, as the Supreme Court has consistently struck down laws that ban the most common method of abortion in the second trimester, including laws that ban D&E procedures. *See* Appellees' Br. at 28-33; ROA.1594-97. In *Stenberg*, applying the *Casey* undue burden test, the Supreme Court struck down a law purporting to ban the intact D&E procedure, so-called "partial-birth abortion," because the law was so broadly written that it banned not only the rarely used *intact* D&E procedure, but also the most commonly used *standard* D&E procedure—the same procedure banned by the Texas law at issue here. *See* 530 U.S. at 945-46. Critically, like the district court here, the Supreme Court facially invalided the law as part of a pre-enforcement, facial challenge to the statute. *Carhart v. Stenberg*, 11 F. Supp. 2d 1099, 1101 (D. Neb. 1998), *aff'd*, 192 F.3d 1142 (8th Cir. 1999), *aff'd*, 530 U.S. 914 (2000). Similarly, in *Gonzales*, the Supreme Court, again applying the *Casey* undue burden standard, held that a federal ban on intact D&E was constitutional precisely because the "prototypical" (meaning standard) D&E procedures remained available. 550 U.S. at 165. "*Gonzales* left undisturbed the holding from *Stenberg* that a prohibition on D&E amounts to an undue burden on a woman's right to terminate her pregnancy." *Northland Family Planning Clinic, Inc. v. Cox*, 487 F.3d 323, 336-37 (6th Cir. 2007).

*June Medical*'s admonition to respect precedent demonstrates that the district court was

correct in relying on *Stenberg* and *Gonzales*—along with the unbroken line of precedent from *Casey* to *June Medical* repeatedly affirming the undue burden standard—to invalidate the D&E Ban. As the district court held, the Supreme Court has previously addressed—on "two occasions"—laws that specifically "banned the previability standard D&E procedure," and "[i]n each instance, the Court determined that to the extent a law directly reached or might be interpreted in such a way to reach the previability standard D&E procedure performed before fetal demise, the law imposed an undue burden on a woman seeking" pre-viability abortion care. ROA.1594-95. Finding no distinction between the facts here and those in *Stenberg* or *Gonzales*, the district court properly held that "*Stenberg* and *Gonzales* lead inescapably to the conclusion" that the D&E Ban is an undue burden. ROA.1612.

In the months that have elapsed since oral argument in this case, additional courts have reached this same conclusion. As discussed in Plaintiffs-Appellees' 28(j) letter dated September 10, 2018, the Eleventh Circuit affirmed a permanent injunction blocking an Alabama law nearly identical to the Texas law challenged here. *W. Ala. Women's Ctr. v. Williamson*, 900 F.3d 1310 (11th Cir. 2018). The Supreme Court has since denied certiorari. *Harris v. W. Ala. Women's Ctr.*, 139 S. Ct. 2606 (2019).[2] Last month, the Sixth Circuit similarly affirmed an injunction blocking a nearly identical law in Kentucky. *EMW Women's Surgical Ctr., P.S.C. v. Friedlander*, 960 F.3d 785 (6th Cir. 2020). As the Sixth Circuit stated, "[t]he Supreme Court has repeatedly affirmed that laws that amount to a prohibition of the most common second-trimester abortion method impose [an undue] burden." *Id.* at 797. Thus, the Kentucky D&E Ban, like Texas's, "poses a substantial obstacle to abortion access prior to viability and is an undue burden." *Id.*

[2] Justice Thomas wrote an opinion *concurring* in the denial of certiorari in which, while expressing his disapproval of the undue burden standard from *Casey*, he agreed that the law fails that standard.

### *B.* Whole Woman's Health *Remains Binding Precedent.*

As the district court concluded, even if *Stenberg* and *Gonzales* alone are not determinative of the outcome here, the D&E Ban still fails the undue burden standard as articulated in *Whole Woman's Health*. Because there was no majority opinion in *June Medical*—and certainly no majority to overrule either *Whole Woman's Health* or *Casey*—this Court is bound to continue following the Supreme Court's decision in *Whole Woman's Health*.

Typically, "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" *Marks v. United States*, 430 U.S. 188, 193 (1997) (citation omitted). This principle, however, "is only workable where there is some 'common denominator upon which all of the justices of the majority can agree.'" *United States v. Duron-Caldera*, 737 F.3d 988, 994 n.4 (5th Cir. 2013) (quoting *United States v. Eckford*, 910 F.2d 216, 219 n.8 (5th Cir. 1990)). Where none of the opinions concurring in the judgment on a specific issue "can be viewed as a logical subset of the other[s]," the case "does not provide a controlling rule" that is binding in future cases.[3] *Id.* Thus, in *Duron-Caldera*, this Court held that the Supreme Court's decision in *Williams v. Illinois*, 567 U.S. 50 (2012), failed to produce a binding rule because there was no common denominator between a four-Justice plurality and a separate opinion concurring in the judgment. *Duron-Caldera*, 773 F.3d at 994 & n.4 ("Neither of these opinions can be viewed as a logical subset of the other. Rather, Justice Thomas [concurring in the judgment] expressly disavows what he views as 'the plurality's

[3] This is because binding precedent can only be created by a majority of the Supreme Court. *See CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 81 (1987) ("As the plurality . . . did not represent the views of a majority of the Court, we are not bound by its reasoning." (footnote omitted)); *see also In re Pilgrim's Pride Corp.*, 690 F.3d 650, 663 (5th Cir. 2012) ("[W]e exercise restraint when determining whether a Supreme Court decision has produced an intervening change in the law," and such a change "must be more than merely illuminating with respect to the case before the court and must unequivocally overrule prior precedent." (citation and internal quotation marks omitted)).

flawed analysis,' including the plurality's 'new primary purpose test.'" (citation omitted)).

So too in *June Medical*. Both the plurality and the concurrence agreed abortion restrictions violate the undue burden standard where they impose an unconstitutional level of burden on individuals seeking abortion care. *See June Med.*, 2020 WL 3492640, at *10-11 (plurality); *id.* at *26 (Roberts, C.J., concurring) ("I agree with the plurality that the determination in *Whole Woman's Health* that Texas's law imposed a substantial obstacle requires the same determination about Louisiana's law."). But they disagreed on how to determine whether the burdens imposed by a law are unconstitutional. The plurality held that a determination of undue burden necessarily *requires* weighing the law's benefits relative to its burdens. *Id.* at *20 (plurality). It therefore assessed the Louisiana law's burdens relative to its benefits, concluding that the burdens were undue. *Id.* The concurrence, meanwhile, proposed that laws violate the undue burden test only where (1) they are not reasonably related to a legitimate governmental interest, *or* (2) they impose an unconstitutional level of burden on individuals seeking abortion care. *Id.* at *21-23 (Roberts, C.J., concurring). The concurrence contended that the second prong of its test *bars* weighing of a law's benefits, confining consideration of benefits to the first prong. *See id.* at *24-25 (Roberts, C.J., concurring). Therefore, the concurrence assessed the magnitude of the Louisiana law's burdens independently of its benefits, concluding that they were substantial. *See id.* at *26 (Roberts, C.J., concurring). Because the two opinions lack a common denominator with respect to this specific issue, there is no rule of decision on that point as to which at least five Justices agree, and neither opinion is controlling on this issue.[4] *See Duron-Caldera*, 737 F.3d at 994 n.4.

[4] It is of no moment that the four dissenting Justices rejected the rule applied by the plurality. Only opinions concurring in the judgment may supply a binding rule of decision. *See Marks*, 430 U.S. at 193 (explaining that the holding of the Court "may be viewed as that position taken by those Members *who concurred in the judgments* on the narrowest grounds" (emphasis added) (citation omitted)); *Duron-Caldera*, 737 F.3d at 994 n.4 (explaining that, to divine a binding rule, there must be a "common denominator upon which all of the justices *in the majority* can agree" (emphasis added)).

Accordingly, this Court must continue to follow *Whole Woman's Health*, the Supreme Court's most recent majority opinion concerning application of the undue burden standard and a decision that both the plurality and the concurrence recognize as binding precedent. 136 S. Ct. at 2300; *June Med.*, 2020 WL 3492640, at *4 (plurality); *id.* at *21 (Roberts, C.J., concurring) ("The question today . . . is not whether *Whole Woman's Health* was right or wrong, but whether to adhere to it in deciding the present case."). There, the Supreme Court held that "[t]he rule announced in *Casey* . . . requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer," 136 S. Ct. at 2309, such that a law is unconstitutional if it fails to confer benefits "sufficient to justify the burdens" it imposes on abortion access, *id.* at 2300.[5] Indeed, under exactly the reasoning above, a district court in Maryland recently held that this articulation of the undue burden test from *Whole Woman's Health* remains controlling after *June Medical*: "To the extent that there is a 'common denominator,' it is that the five Justices agreed that a 'substantial obstacle' based solely on consideration of burdens is *sufficient* to satisfy the undue burden standard, not that it is *necessary*." *Am. Coll. of Obstetrics & Gynecologists v. U.S. Food & Drug Admin.*, No. 8:20-cv-01320-TDC, 2020 WL 3960625, at *16-*17 (D. Md. July 13, 2020) ("Accordingly, *June Medical Services* is appropriately considered to have been decided

[5] The concurrence's contention that *Whole Woman's Health* does not require weighing a law's burdens against its benefits, *June Med.*, 2020 WL 3492640, at *26, is contrary to the language and reasoning of the decision, as several of the dissenting Justices point out, *see id.* at *39 (Alito, J., dissenting) ("[T]he plurality adheres to the balancing test adopted in *Whole Woman's Health*"); *id.* at *62 (Gorsuch, J., dissenting) ("At no point [in *Whole Woman's Health*] did the Court hold that the burdens imposed by the Texas law alone—divorced from any consideration of the law's benefits—could suffice to establish a substantial obstacle."); *id.* at *63 (Kavanaugh, J., dissenting) ("The plaintiffs ask us to apply the cost-benefit standard of *Whole Woman's Health v. Hellerstedt.*"). In any event, this part of the concurring opinion is not controlling because it represents the view of a single Justice, not a majority of the Supreme Court. *See, e.g.*, *Ramos v. Louisiana*, 140 S. Ct. 1390, 1402 (2020) (plurality) (rejecting the notion that "a single Justice writing only for himself has the authority to bind this Court to propositions it has already rejected"); *King v. Palmer*, 950 F.2d 771, 781-82 (D.C. Cir. 1991) ("When, however, one opinion supporting the judgment does not fit entirely within a broader circle drawn by the others, *Marks* is problematic. If applied in situations where the various opinions supporting the judgment are mutually exclusive, *Marks* will turn a single opinion that lacks majority support into national law. When eight of nine Justices do not subscribe to a given approach to a legal question, it surely cannot be proper to endow that approach with controlling force, no matter how persuasive it may be.").

without the need to apply or reaffirm the balancing test of *Whole Woman's Health*, not that *Whole Woman's Health* and its balancing test have been overruled. Where *Whole Woman's Health* remains the most recent majority opinion delineating the full parameters of the undue burden test, the Court finds that its balancing test remains binding on this Court.").

## III. The D&E Ban Is an Unconstitutional Undue Burden Under Any Test.

The D&E Ban fails the governing test set forth in *Whole Woman's Health* and the *June Medical* plurality opinion because it imposes burdens on abortion access that are not justified by proportional benefits. Appellees' Br. at 34-48. But even if Chief Justice Roberts's concurring opinion controlled, which it does not for the reasons discussed above, the D&E Ban nonetheless fails because it is not reasonably related to a legitimate government interest and because it poses substantial obstacles to abortion access. *Id.* at 40-48. Indeed, the district court made clear that the D&E Ban fails under any test: "whether the court weighs the asserted state interests against the effects of the provisions or examines only the effects of the provisions, Plaintiffs have carried their burden of demonstrating that the Act creates an undue burden." ROA.1611. *June Medical* therefore only strengthens the conclusion that the district court must be affirmed.

### *A. The D&E Ban Poses Obstacles to Abortion That Are Substantial Under Any Test.*

The district court's detailed findings of fact support the conclusion that the D&E Ban poses obstacles to abortion access in Texas that are substantial, regardless of whether those burdens are viewed independently of or relative to the law's benefits. *See, e.g.*, ROA.1590-91 n.5, 1594. These findings are based on ample evidence, including expert and lay testimony from nineteen witnesses—whose credibility the district court directly assessed—after a trial on the merits. *June Medical* makes clear that an appellate court's attempt to disturb those findings would constitute reversible error. *See* 2020 WL 3492640, at *11 (plurality); *id.* at *28 (Roberts, C.J., concurring).

The district court found that "the State's reliance on adding an additional step to an otherwise safe and commonly used procedure in and of itself" established "an undue burden." ROA.1602-03. The district court nonetheless went on to find that, particularly in the absence of *any* legislative findings as to the state's proposed methods of pre-evacuation fetal demise, *each* method posed a "substantial obstacle" to patients' access to abortion. ROA.1605, 1607, 1609. These findings are well supported by the record, which demonstrates that each of the proposed methods of fetal demise is painful and unreliable, involves additional medical risks, and is completely medically unnecessary. Digoxin injection—which involves inserting a four-inch surgical needle through the patient's abdomen or vagina at least 24 hours before the abortion—fails for 5-10% of patients. ROA.1603-05. Patients receiving digoxin would need to make an additional trip to the clinic the day before their procedures, in addition to their first trip to the clinic for counseling, which is especially burdensome for low-income patients. ROA.1605, 1610-11. Potassium chloride injection involves a similar procedure, though it must be injected into the fetal heart or risk death to the patient, and it is exclusively performed by highly trained specialists in a hospital setting. ROA.1605-07. Umbilical cord transection, which is largely experimental and unstudied, involves a risky and difficult attempt to locate and cut the umbilical cord before evacuating the uterus which, even if successful, doubles the patient's procedure time. ROA.1607-09.[6] The Eleventh and Sixth Circuits have already affirmed similar district court findings that a D&E Ban poses substantial obstacles on abortion access. *See EMW Women's Surgical Ctr.*, 960 F.3d at 807-08 (The law "imposes substantial burdens . . . [b]ecause none of the fetal-demise

[6] The State's claim that suction can be used to cause fetal demise well into the second trimester is unsupported by the record. *See* Appellees' Br. at 43-44. The district court made well-supported findings (based on the record as a whole) that physicians begin routinely using D&E, in place of suction, at 15 weeks and for some patients even earlier. *See* ROA.1601, 1920-21, 2017, 2176-77, 2388, 2800. The State's claim that because some Plaintiffs use digoxin for some patients starting at 18 or 20 weeks gestation, it can be used for all patients at all gestations is also unsupported by the record. *See* Appellees' Br. at 10-12. The district court found that digoxin is unreliable at any gestation and is "arguably experimental" before 18 weeks gestation. *See* ROA.1603-04.

procedures proposed by the [State] provides a feasible workaround to [the law's] restrictions"); *W. Ala. Women's Ctr.*, 900 F.3d at 1327 ("All of those findings about the fetal demise methods . . . support the conclusion that the Act would 'place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.'" (citation omitted)).

*June Medical* makes clear that these burdens constitute a substantial obstacle to abortion access. Contrary to the State's arguments, *see* Appellants' Br. at 40; Appellants' Reply Br. at 2-6, both the plurality and concurrence in *June Medical* emphasize that burdens to access need not amount to burdens that prevent patients from accessing abortion altogether (like clinic closures) to be substantial and thus an undue burden. *See* 2020 WL 3492640, at *18 (plurality) (explaining that even patients "not altogether prevented from obtaining an abortion would face other burdens" including "longer waiting times," "increased crowding," "delays," and "increased driving distances"); *id.* at *27 (Roberts, C.J., concurring) (detailing the many burdens of the Louisiana law, including "longer waiting times for appointments, increased crowding and increased associated health risk," "difficulty affording or arranging for transportation and childcare on the days of their clinic visits," and "increased travel distance"); *see also Am. Coll. of Obstetrics & Gynecologists*, 2020 WL 3960625, at *17 (*June Medical* emphasizes that "a restriction can impose an undue burden even if it does not entirely prevent women from obtaining an abortion of any kind."). Indeed, the concurring opinion explains that the Supreme Court has found burdens on other protected rights to be "substantial" in a wide variety of circumstances that fall far short of outright prevention. *Id.* at *24 (collecting cases); *see Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 694-695 (2014) (finding substantial burden on religious exercise where, in challengers' view, covering contraception in employee health plan forced the corporation to facilitate its use); *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 748 (2011) (finding

substantial burden on free speech where state public campaign financing law imposed indirect cap on use of personal funds by limiting matching public funds).

Notably, the plurality and concurrence point to burdens that "increase the risk that a woman will experience complications from the procedure," 2020 WL 3492640, at *18-19 (plurality), and that lead to "increased . . . health risks," *id.* at *27 (Roberts, C.J., concurring), as one of the substantial burdens that made the Louisiana law unconstitutional. *June Medical* thus underscores that the substantial burdens posed by the D&E Ban—banning the standard of care for abortions after approximately 15 weeks, increasing the medical risks to patients including by mandating unnecessary and invasive procedures, and increasing delays in access to care from extra trips to the clinic—constitute an undue burden. *See* Appellees' Br. at 3-17, 40-48 (detailing increased medical risks to patients from compliance with the D&E Ban).[7]

### *B. Under* Whole Woman's Health*, the Burdens Outweigh Any Potential Benefits.*

Under *Whole Woman's Health*, these burdens must be balanced against the Act's asserted benefits. For the reasons explained in Plaintiffs-Appellees' merits brief, none of Texas's stated rationales for banning D&E procedures is persuasive. *See* Appellees' Br. at 35-40. As the district court correctly concluded, "[t]he State's argument" that "its interests are sufficiently strong" is "premised on it being feasible for all Texas abortion providers to utilize one of the three fetal-demise methods." ROA.1609. The record clearly shows that none are feasible. ROA.1599-1608.

Critically, the State also failed to demonstrate that any of its fetal-demise methods are

[7] Importantly, *June Medical* affirms that the burdens found by the district court here are sufficient for facial invalidation of the Act; the plurality explained that the large fraction test for facial relief requires courts to consider only "those women for whom the provision is an actual rather than an irrelevant restriction," not "every woman" who is subject to the law, *id.* at *21 (plurality) (quoting *Casey*, 505 U.S. at 895), rejecting the view of the large fraction test that the State advances in this case. The concurrence does not disturb this holding. *See id.* at *29 (Roberts, C.J., concurring); *see also Am. Coll. of Obstetrics & Gynecologists*, 2020 WL 3960625, at *17 (holding that *June Medical* reaffirms that "[t]he relevant denominator of this 'large fraction' is not all women of reproductive age, all pregnant women, or even the class of women seeking an abortion, but those women for whom the provision 'is an actual rather than an irrelevant restriction'" (quoting *Whole Woman's Health*, 136 S. Ct. at 2320)).

themselves respectful or further the State's interests as compared to standard D&E. Quite the contrary. The State's own expert admitted that potassium chloride injection constitutes a "horrific procedure." ROA.2873. Similarly, uncontested record evidence demonstrates that while standard D&E achieves both fetal demise and evacuation of the uterus in a simple, ten-minute, outpatient procedure, ROA.1597-98, 1601, digoxin injection, if it works at all, can take up to 24 hours to cause fetal demise, ROA.1937, 1941, 1946, 2029-30, 2101, 2150, 2658-59, while umbilical cord transection, if even possible, can double the length of the abortion procedure. ROA.1607, 1962. It is telling that the State's assertion that "most people" would see the standard D&E as "more brutal" than "injecting a fetus with a lethal substance" is unsupported by any cites to the record. Appellants' Reply Br. at 15. The State's only other proposal is counterproductive to its purported goal. The State encourages physicians to "dismember" the living fetus with suction instead of surgical instruments, despite the fact that the state's own witnesses testified that "the end result of both procedures is the same" and both are "brutal" and "inhumane." ROA.2398-99; *see* Appellees' Br. at 44-45. Ultimately, as the district court found, each of the State's alternatives serves only to reduce the safety of abortion and increase the health risks to the patient.

The district court correctly concluded that the state's interests are "not sufficient to justify such a substantial obstacle to the constitutionally protected right of a woman to terminate a pregnancy before fetal viability." ROA.1611. As with the district court's findings as to the D&E Ban's burdens, these findings are entitled to deference. *See June Med.*, 2020 WL 3492640, at *11 (plurality); *id.* at *28 (Roberts, C.J., concurring).

### *C. Even Under the Test the* June Medical *Concurrence Would Apply, the D&E Ban Imposes an Unconstitutional Undue Burden.*

Even if Chief Justice Roberts's concurring opinion controls, the D&E Ban nonetheless fails. As discussed above, the D&E Ban imposes substantial obstacles to abortion access. But the

D&E Ban also fails the concurrence's test because it is not "'reasonably related' to a legitimate state interest." 2020 WL 3492640, at *23 (Roberts, C.J., concurring) (quoting *Casey*, 505 U.S. at 878). The concurrence describes the question of whether an abortion restriction is reasonably related to a legitimate government interest as a "threshold requirement," meaning that courts must first answer this question before considering a law's burdens. *Id.* at *25. If a law is not reasonably related to a legitimate state interest, it is unconstitutional regardless of the nature and extent of those burdens. The plurality, meanwhile, describes the assessment of whether the law is "a permissible means of serving its legitimate ends" as baked into the balancing test described in *Whole Woman's Health. See id.* at *10 (plurality). Either way, the result is the same.

In articulating its "threshold requirement," the concurrence emphasizes that the undue burden standard is not merely rational basis scrutiny but a form of heightened or intermediate scrutiny. *See* 2020 WL 3492640, at *25 ("To be sure, . . . *Casey* discussed benefits in considering the threshold requirement that the State have a 'legitimate purpose' and that the law be 'reasonably related to that goal.'" (citations omitted)); *id.* at *25 n.2 (explaining that *Casey* adopted the undue burden standard to give states slightly more latitude to regulate abortion, as strict scrutiny under *Roe v. Wade* had proved too restrictive). The concurrence thus rebuts the State's argument that under *Casey*, a court asks *only* if an abortion restriction is a substantial obstacle and defers to the legislature on all other matters. *See* Appellants' Reply Br. at 2-4. Indeed, it is a longstanding principle of abortion jurisprudence that the State has the burden of demonstrating—with evidence, not speculation—that the fit between a law's means and its ends is reasonably well tailored. *See Whole Woman's Health,* 136 S. Ct. at 2309 ("[The Court of Appeals] is wrong to equate the judicial review applicable to regulation of a constitutionally protected personal liberty with the less strict review applicable where, for example, economic legislation is at issue."); *City of Akron v. Akron*

*Ctr. for Reprod. Health*, 462 U.S. 416, 431 (1983) (explaining that "[i]f a State . . . undertakes to regulate the performance of abortions . . . the health standards adopted must be 'legitimately related to the objective the State seeks to accomplish'" and noting this was "the decisive factor" in prior cases); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 78-79 (1976) (restriction on use of saline amniocentesis held unconstitutional because it did not advance state interest in protecting maternal health); *Doe v. Bolton*, 410 U.S. 179, 195 (1973) (invalidating requirement that abortions be performed in an accredited hospital when state failed to show that "only hospitals meet its acknowledged interest in insuring the quality of the operation and the full protection of the patient"). Nothing in *June Medical*'s opinions disturbs this long-standing principle.

Here, the State has failed to demonstrate that the D&E Ban is reasonably related to a legitimate state interest. Although the district court assumed without deciding the legitimacy of the State's stated interests in "advance[ing] respect for the dignity of the life of the unborn and protect[ing] the integrity of the medical profession," ROA.1599, its factual findings support the conclusion that the D&E Ban is not reasonably related to those interests or any others. If anything, its findings show that the State's methods of fetal-demise methods are *less* "humane," Appellants' Reply Br. at 1, than standard D&E. *See supra* at 13. This ground alone provides a sufficient basis for upholding the district court's judgment.

Yet regardless of whether the D&E Ban passes the concurrence's "threshold test," it is still unconstitutional because it poses substantial obstacles to abortion access. *See supra* at 10-12. For these reasons, as the district court correctly found, "whether the court weighs" the burdens against the benefits or not, "Plaintiffs have carried their burden of demonstrating that the Act creates an undue burden." ROA.1611.

Sincerely,

*/s/ Molly Duane*

Molly Duane
Center for Reproductive Rights
199 Water Street, Fl. 22
New York, NY 10038
(917) 637-3631
mduane@reprorights.org

Melissa Cohen
Planned Parenthood Federation of America, Inc.
123 William Street
New York, NY 10038
(212) 541-7800
melissa.cohen@ppfa.org

J. Alexander Lawrence
Morrison & Foerster, L.L.P.
250 W. 55th St., Fl. 24
New York, NY 10019
(212) 336-8638
alwarence@mofo.com

*Counsel for Plaintiffs-Appellees*

cc: All Counsel of Record