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July 27, 2020

Lyle W. Cayce, Clerk
United States Court of Appeals for the Fifth Circuit
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:

Plaintiffs-Appellees respectfully reply to the State's letter brief addressing the impact of *June Medical Services, L.L.C. v. Russo*, Nos. 18-1323, 18-1460, 2020 WL 3492640 (U.S. June 29, 2020) ("*June Medical*") on the instant case.

I. Supreme Court Precedent Governs the Outcome of this Case.

The district court properly applied binding Supreme Court precedent regarding laws that ban dilation and evacuation ("D&E") procedures. *See Stenberg v. Carhart*, 530 U.S. 914 (2000); *Gonzales v. Carhart*, 550 U.S. 124 (2007); *see also June Medical*, 2020 WL 3492640, at *29 (Roberts, C.J., concurring). The State makes the curious claim that *June Medical*, a case *striking down* an abortion restriction as required by *stare decisis*, somehow "leaves no doubt" that the law here should be *upheld*. Appellants' Ltr. Br. at 3. Yet the State makes no mention of the controlling authority of *Stenberg*, which already struck down a ban on D&E like the one at issue here. And while the State seeks to rely on *Gonzales*, Appellants' Ltr. Br. at 6-8, it once again ignores that the *Gonzales* Court both relied on the continuing availability of D&E procedures in upholding a ban on the rarely

used dilation and extraction procedure, and "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); *see* Appellees' Ltr. Br. at 4; Appellees' Br. at 30. The fact that the State's proposed methods of fetal demise were well known when *Stenberg* and *Gonzales* were decided, and their existence did not change the Court's conclusion that D&E Bans are unconstitutional, only strengthens Plaintiffs' argument. Appellees' Br. at 30.

Even if *Stenberg* and *Gonzales* alone did not dictate the outcome, the district court correctly applied *Whole Woman's Health*. Appellees' Ltr. Br. at 6-9. As Plaintiffs made clear in their letter brief, the State's cursory analysis of *June Medical* under *Marks v. United States*, 430 U.S. 188 (1977) is wrong.[1] But the D&E Ban fails under any standard, Appellees' Ltr. Br. at 13-15, and none of the State's claims otherwise are persuasive.

A. The D&E Ban Imposes a Substantial Obstacle to Abortion Access.

First, the State erroneously argues that a substantial obstacle exists only where a significant number of patients are prevented entirely from accessing abortion. Appellants' Ltr. Br. at 2-5. This has never been the law, nor is it the law following *June Medical*. To the contrary, as both the *June Medical* plurality and concurring opinions

[1] In addition to ignoring the lack of common denominator between how the plurality and concurrence assess the constitutionality of abortion restrictions, the State cites repeatedly to Justice Kavanaugh's statement in *dissent* that "five Members of the Court reject the *Whole Woman's Health* cost benefit standard," Appellants' Ltr. Br. at 3-4, ignoring that those five votes include the four dissenters when *Marks* itself states that only "those Members who *concurred* in the judgment on the narrowest grounds" can create a precedential holding, 430 US. at 193 (emphasis added); *see* Appellees' Ltr. Br. at 6-9.

make clear, burdens do not need to amount to complete barriers to access to constitute a substantial obstacle. *See* Appellees' Ltr. Br. at 11-12; 2020 WL 3492640, at *18 (plurality); *id.* at *27 (Roberts, C.J., concurring). The State's position that the burdens imposed by the D&E Ban are not substantial mischaracterizes the record. *See* Appellees' Br. at 3-18, 40-48.[2]

Second, the State asks this Court to overturn numerous factual findings the district court made after conducting a full trial on the merits. *See* Appellants' Ltr. Br. at 8-10. But this is precisely what *June Medical* admonished. *See* Appellee's Ltr. Br. at 2 (citing plurality and concurrence). This Court may not disregard the district court's careful fact-finding, particularly given that every other court around the country to adjudicate challenges to nearly identical D&E bans have similarly found that the State's proposed fetal demise methods are not safe and feasible alternatives.[3]

Third, the State's criticism of the district court's articulation of "substantial

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[2] For example, the State continues to make the misleading claim that there are "zero" reports of complications from fetal demise in the past five years. Appellants' Ltr. Br. at 8-9. Not only does the record show that potassium chloride and umbilical cord transection are not used in Texas (and thus could not lead to reported complications), *see, e.g.*, ROA.1606-07, 2027, 2031, 2115, 2220, 2222, 2439, but as the State knows, because it won a motion to compel the medical charts and corresponding complication forms which Plaintiffs accordingly produced, digoxin has caused numerous reportable complications over the last five years, as well as complications not required to be reported to the state. ROA.580-88, 817-39, 1230-34, 2165-67, 2796-97, 2810-11.

[3] *See EMW Women's Surgical Ctr., P.S.C. v. Friedlander*, 960 F.3d 785, 798 (6th Cir. 2020); *W. Ala. Women's Ctr. v. Williamson*, 900 F.3d 1310, 1324-25, 1327 (11th Cir. 2018), *cert. denied*, 139 S. Ct. 2606 (2019); *Bernard v. Individual Members of the Ind. Med. Licensing Bd.*, 392 F. Supp. 3d 935, 962 (S.D. Ind. 2019); *Planned Parenthood of Sw. Ohio Region v. Yost*, 375 F. Supp. 3d 848, 867 (S.D. Ohio 2019); *Hopkins v. Jegley*, 267 F. Supp. 3d 1024, 1065 (E.D. Ark. 2017), *appeal docketed*, No. 17-2879 (8th Cir. Aug. 28, 2017); *Hodes & Nauser v. Schmidt*, 440 P.3d 461, 498 (Kan. 2019); *Nova Health Sys. v. Pruitt*, No. CV-2015-1838, slip op. at 6 (Okla. Cty. Dist. Ct. Oct. 28, 2015).

obstacle" to mean "'no more and no less than 'of substance'" is misplaced. Appellants' Ltr. Br. at 4. The district court made this statement in the context of describing how a Court assesses whether, under *Whole Woman's Health*'s balancing test, the burdens outweigh the benefits, and thus result in a substantial obstacle. ROA.1594. But the district court went on to explicitly find that the burdens imposed by the D&E Ban constitute a substantial obstacle independent of its benefits. *See also* ROA.1611.

B. The D&E Ban Is Not Reasonably Related to a Legitimate Government Interest.

Far from "agree[ing] that SB8 advances a legitimate purpose," Appellants' Ltr. Br. at 5, the district court assumed, without deciding, that the State's interests were legitimate because the D&E Ban imposes a substantial obstacle regardless, ROA.1611. Yet the district court's findings support the conclusion that the D&E Ban also fails the first prong of Chief Justice Roberts's test because it is not reasonably related to a legitimate government interest. The State bears the evidentiary burden to show that a law actually furthers a legitimate government interest, which it failed to do. Appellees' Ltr. Br. at 13-15. Indeed, other courts adjudicating challenges to nearly identical laws have found that these laws do not sufficiently advance the states' asserted interests.[4]

II. The District Court Appropriately Entered Facial Relief.

As to the appropriate relief, the State again applies the wrong legal test and disregards the district court's factual findings. *June Medical* affirms that the large fraction

[4] *See, e.g.*, *Bernard*, 392 F. Supp. 3d at 959; *EMW Women's Surgical Ctr.*, 960 F.3d at 807.

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" in a state who seeks an abortion, 2020 WL 3492640, 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's reliance on *Casey* only bolsters this holding. *Id.* at *25 (Roberts, C.J., concurring). Here, the relevant group is patients seeking abortion after approximately 15 weeks, the gestational age at which physicians begin D&Es. The State's focus on the fact that most abortions are not D&E procedures, *see* Appellants' Ltr. Br. at 11, is of no moment, as the law is irrelevant for patients undergoing non-D&E abortions.

The district court here found that, for these patients undergoing D&E procedures, none of the State's proposed demise procedures are feasible, as all are unreliable and impose additional health risks. Appellees' Ltr. Br. at 7-17. Thus, it is far from "hypothetical" that a large fraction of patients will be burdened by the D&E Ban. Yet the State once against asks this Court to reject the district court's findings, which are in line with other courts to address D&E Bans and enter facial relief. *See EMW Women's Surgical Ctr.*, 960 F.3d at 811(holding D&E Ban burdens "all of the individuals it restricts"); *Bernard*, 392 F. Supp. 3d at 963; *Hopkins*, 267 F. Supp. 3d at 1067.[5]

[5] The State's further suggestion that as-applied relief could ever be appropriate ignores that every patient undergoing a D&E abortion in Texas must undergo an additional medical procedure that poses risks to her health. Moreover, as-applied challenges are entirely impractical, as the record shows that a physician cannot know whether a demise procedure will be successful until after it has begun, *see* Appellees' Ltr. Br. at 11-12, 16, and once an abortion procedure has started, any delay in completing it exposes patients to serious medical risks. *Id.*

Respectfully submitted,

/s/ Molly Duane

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