**No. 17-51060**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

WHOLE WOMAN'S HEALTH, On Behalf of Itself, Its Staff, Physicians and Patients; PLANNED PARENTHOOD CENTER FOR CHOICE, On Behalf of Itself, Its Staff, Physicians, and Patients; PLANNED PARENTHOOD OF GREATER TEXAS SURGICAL HEALTH SERVICES, On Behalf of Itself, Its Staff, Physicians, and Patients; PLANNED PARENTHOOD SOUTH TEXAS SURGICAL CENTER, On Behalf of Itself, Its Staff, Physicians, and Patients; ALAMO CITY SURGERY CENTER, P.L.L.C., On Behalf of Itself, Its Staff, Physicians, and Patients, doing business as Alamo Women's Reproductive Services; SOUTHWESTERN WOMEN'S SURGERY CENTER, On Behalf of Itself, Its Staff, Physicians, and Patients; CURTIS BOYD, M.D., On His Own Behalf and On Behalf of His Patients; JANE DOE, M.D., M.A.S., On Her Own Behalf and On Behalf of Her Patients; BHAVIK KUMAR, M.D., M.P.H., On His Own Behalf and On Behalf of His Patients; ALAN BRAID, , M.D., On His Own Behalf and On Behalf of His Patients; ROBIN WALLACE, M.D., M.A.S., On Her Own Behalf and On Behalf of Her Patients

Plaintiffs-Appellees,

v.

KEN PAXTON, Attorney General of Texas, In His Official Capacity; SHAREN WILSON, Criminal District Attorney for Tarrant County, In Her Official Capacity; BARRY JOHNSON, Criminal District Attorney for McLennan County, In His Official Capacity

Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Texas, Austin Division
No. 1:17-cv-00690

**OPPOSITION TO MOTION TO STAY INJUNCTION PENDING APPEAL**

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The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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## INTRODUCTION

Two and a half years after the District Court entered its well-reasoned permanent injunction blocking the enforcement of provisions of Texas Senate Bill 8 of 2017, and one and a half years after oral argument in this case, the State now seeks a stay of the injunction pending appeal in this Court without first seeking relief in the District Court. This inexcusably untimely and procedurally improper request for a remedy available only in "extraordinary" circumstances should be rejected. The State's delay in seeking a stay undermines any claim of urgency or irreparable harm, and the State makes no effort to argue that new or different harm to the State exists now. Rather, it is Texans seeking abortion, now in the middle of a pandemic, who will be irreparably harmed by a stay.

Moreover, a stay is improper as the State is unlikely to prevail on the merits of its appeal. The State's attempt to prohibit dilation and evacuation ("D&E") procedures unless physicians first confirm fetal demise (the "D&E Ban"), runs contrary to binding Supreme Court precedent and imposes burdens on Texans' access to abortion that are substantial by any measure. The State's contention that the Supreme Court's decision in *June Medical Services, L.L.C. v. Russo*, 140 S. Ct. 2103 (2020) ("*June Medical*"), should result in a stay of the District Court's judgment is baseless. As Plaintiffs explained in their supplemental briefing, the Supreme Court's recent decision in *June Medical* does not change the applicable

legal analysis in this case and only underscores that the District Court properly ruled the D&E Ban unconstitutional.

There is no basis for a stay at this late stage of the appeal process, and the injunction should remain in place while this Court adjudicates the pending appeal in the normal course.

## BACKGROUND

Plaintiffs respectfully refer the Court to the statement of facts in their merits brief, Appellees' Br. at 3-20, and provide the following additional procedural history:

On November 22, 2017, after a full trial on the merits, the District Court issued a memorandum opinion incorporating detailed findings of fact and conclusions of law and entered final judgment permanently enjoining the State from enforcing the D&E Ban. ROA.1588-1617. In its opinion, the District Court carefully weighed the evidence presented at trial and the credibility of 19 witnesses to find that the D&E Ban would impose severe burdens on abortion, ROA.1602-09, and went on to hold that the D&E Ban posed an undue burden both because the Supreme Court had already found bans on D&E were unconstitutional, ROA.1594-95, 1612, and because the D&E Ban failed the undue burden test, ROA.1611.

The State filed its notice of appeal the same day the District Court entered judgment, but did not then seek a stay of the injunction pending appeal in either the

District Court or this Court. ROA.1618-26. The State also did not seek a stay of the injunction, or otherwise object, when this Court held the case in abeyance pending the outcome of *June Medical* in the Supreme Court. The State still has never filed a motion with the District Court for a stay pending appeal, as required by the Federal Rules. Fed. R. App. P. 8(a) ("A party must ordinarily move first in the district court."). Instead, more than two and a half years after entry of judgment and more than one and a half years after oral argument, the State now seeks to bypass the District Court entirely and asks this Court, after an egregious delay, for a stay.

## ARGUMENT

Stay pending appeal is an extraordinary remedy, *Belcher v. Birmingham Tr. Nat'l Bank*, 395 F.2d 685, 685 (5th Cir. 1968), and should be granted only "in exceptional cases," *Greene v. Fair,* 314 F.2d 200, 202 (5th Cir. 1963).

To prevail on its motion, the State must demonstrate: (1) "a strong showing" that it is likely to succeed on merits of its appeal; (2) that it is likely to suffer irreparable injury absent a stay; (3) that Plaintiffs and their patients will not be substantially harmed by a stay; and (4) that granting the stay will serve the public interest. *Nken v. Holder*, 556 U.S. 418, 425-26, 434 (2009) (citations omitted). At this late stage in the appeal process, the State does not approach meeting that heavy burden.

## I. The State Faces No Irreparable Injury in the Absence of a Stay and Erred in Failing to Seek Relief First in the District Court.

The State does not even attempt to argue that it suddenly faces new or different irreparable injury that would justify a stay two and a half years after entry of the permanent injunction, instead simply repeating the argument it has made throughout this case that the State is irreparably harmed whenever it is prevented from enforcing a law. *See* State's Mot. at 20; Resp. to Mot. for TRO at 19 (ECF No. 41). But *June Medical* only adds to the mountain of precedent demonstrating that the D&E Ban is unconstitutional, *see infra* at 9-16, and, as Plaintiffs have argued, the "state suffers little or no harm when it is prevented from enforcing an unconstitutional law. . . ." *Austin Div. Dep't of Texas v. Texas Lottery Comm'n*, No. A-10-CA-465-SS, 2010 WL 11597747, at *2 (W.D. Tex. Dec. 14, 2010). There can also be no harm to the State where a stay would disrupt, not maintain, the status quo. *Barber v. Bryant*, 833 F.3d 510, 512 (5th Cir. 2016) (denying motion to stay because doing so "maintains the status quo in Mississippi as it existed before the Legislature's passage and attempted enactment of [the law at issue]").

Moreover, the State's egregious delay in seeking a stay soundly refutes its claim of irreparable harm. *See Dillard v. Sec. Pac. Corp.*, No. 95-20503, 1996 WL 254971, at *4 (5th Cir. Apr. 18, 1996) (per curiam) ("[B]ecause he waited nearly six years to request injunctive relief, [this] strongly impl[ies] that delay was not causing irreparable harm."); *Boire v. Pilot Freight Carriers, Inc.*, 515 F.2d 1185, 1193 (5th

Cir. 1975) (affirming district court's denial of temporary injunctive relief where movant delayed three months in making its request).[1]

The State has also failed to follow appropriate procedure as it had no basis to bypass the District Court in seeking a stay. Under Federal Rule of Appellate Procedure 8(a)(1)(A), "[a] party must ordinarily move first in the district court for . . . a stay of the judgment or order of a district court pending appeal." The State suggests that seeking relief in the District Court would be impracticable "because this Court has already exercised its appellate jurisdiction," State's Mot. at 4 n.2, but cites no authority for this proposition, as there is none. Rule 8 provides an explicit exception to the rule of jurisdictional divestment for requests to stay or modify injunctive relief. As this Court has previously held, "[t]he district court maintains jurisdiction as to matters not involved in the appeal" including "ordering stays or

[1] *See also Odonnell v. Harris Cty.*, 328 F. Supp. 3d 643, 662 (S.D. Tex. 2018) ("The defendants have operated under the original Preliminary Injunction Order for more than a year without suffering irreparable harm."); *Joseph Paul Corp. v. Trademark Custom Homes, Inc.*, No. 3:16-CV-1651-L, 2016 WL 4944370, at *16 (N.D. Tex. Sept. 16, 2016) (holding that a delay of approximately six months "strongly undercut[ ]" plaintiff's claim of irreparable harm); *Gonannies, Inc. v. Goupair.Com, Inc.*, 464 F. Supp. 2d 603, 609 (N.D. Tex. 2006) (holding that plaintiffs' "delay [of over six months] in seeking a preliminary injunction rebuts any presumption of irreparable harm"); *Resolution Tr. Corp. v. Miramon*, No. CIV.A. 92-2672, 1993 WL 302662, at *1 (E.D. La. Aug. 4, 1993) (holding that "defendants cannot reasonably complain that they will suffer irreparable injury if a stay does not issue since they delayed over six months before filing a motion to stay these proceedings"); *Tough Traveler, Ltd. v. Outbound Prods.*, 60 F.3d 964, 968 (2d Cir. 1995) ("[F]ailure to act sooner undercuts the sense of urgency that ordinarily accompanies a motion for preliminary relief and suggests that there is, in fact, no irreparable injury."); *Hirschfeld v. Bd. of Elections*, 984 F.2d 35, 39 (2d Cir. 1993) ("The Board of Elections' inexcusable delay in filing the motions here at issue severely undermines the Board's argument that absent a stay irreparable harm would result.").

modifying injunctive relief." *See Farmhand, Inc. v. Anel Eng'g Indus., Inc.*, 693 F.2d 1140, 1145-46 (5th Cir. 1982) (citing Rule 8 and noting that the district court's divestment of jurisdiction in appeal "is not absolute").[2]

## II. A Stay Will Irreparably Harm Plaintiffs and Their Patients and Is Not in the Public Interest.

The balance of equities and public interest also weigh overwhelmingly toward denying the stay, even if the State *could* identify any harm to it. Issuance of a stay would impose severe burdens on *every* patient seeking abortion after approximately 15 weeks in Texas, including forcing patients to submit to unnecessary medical procedures, additional medical risks, and delays in access to care. *See infra* at 13. Deprivation of these patients' constitutional rights constitutes a profound and irreparable harm. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also, e.g.*, *De Leon v. Perry*, 975 F. Supp. 2d 632, 665 (W.D. Tex. 2014) ("[I]t is in the public interest to override legislation that, as found here, infringes on an individual's federal

[2] Indeed, *Planned Parenthood of Greater Texas Surgical Health Services v. Abbott*, 734 F.3d 406, 410-11 & n.12 (5th Cir. 2013), cited by the State, makes clear that the State should have first sought relief in the District Court. Although the State there did not first seek a stay from the district court, "as it would ordinarily be required to do," doing so was excused as impracticable because plaintiffs did not "contend that the State should have sought relief in the district court," and the challenged law "was to have taken effect . . . the day after the district court issued its opinion and final judgment." *Id.* at 410-11. Here conversely, the State presents no explanation for its failure to seek a stay in the District Court following the entry of the injunction in 2017 or at any time since then. *Cf. Hirschfeld*, 984 F.2d at 38 ("No showing of impracticability of bringing such a motion in the district court was offered . . . [and Appellant] has clearly made no effort to follow proper appellate procedure in their motion for a stay.").

constitutional rights."), *aff'd sub nom. De Leon v. Abbott*, 791 F.3d 619 (5th Cir. 2015).

Moreover, a disruption to the status quo *now*—in the middle of the ongoing COVID-19 pandemic—would significantly exacerbate the harms the D&E Ban would inflict on patients seeking abortion in Texas. The impact of the pandemic in Texas and around the country has been severe. The disastrous effect of a stay in this case, during this time of emergency in Texas when more patients have been forced to seek abortion in the second trimester,[3] cannot be overstated. As the District Court found, the D&E Ban will, even under ordinary circumstances, result in "delay and extra cost" because it will force patients "to make an additional trip the clinic" and "endure a medically unnecessary and invasive procedure that increases the duration of what otherwise is a one-day standard D&E procedure." ROA.1604, 1610. The pandemic in Texas is already causing these same burdens—as patients are delayed in accessing care, experiencing increased health risks, and often forced to travel long distances for care—which would only be compounded by the D&E Ban. *See*

[3] *See* Kari White, et al., *Research Brief: The Potential Impacts of Texas' Executive Order on Patients' Access to Abortion Care*, Tex. Policy Evaluation Project, at 2 (Mar. 2019), http://sites.utexas.edu/txpep/files/2020/03/TxPEP-Research-Brief-Executive-Order-3-31-20.pdf (projecting increase in second trimester abortions during pandemic); Jonathan Bearack, et al., *Covid-19 Abortion Bans Would Greatly Increase Driving Distances for Those Seeking Care, Policy Analysis*, Guttmacher Inst. (Apr. 2020), https://www.guttmacher.org/article/2020/04/covid-19-abortion-bans-would-greatly-increase-driving-distances-those-seeking-care (explaining that burdens in access to abortion are "exacerbated by unprecedented financial constraints, school closures and limited child-care options" caused by the pandemic).

Opposition to Second Petition for Writ of Mandamus at 7-8, *In re Abbott*, 956 F.3d 696 (5th Cir. 2020) (No. 20-50296) (Doc. No. 00515381741, April 14, 2020).

Further, as the District Court found, the harms from the D&E Ban "would be particularly burdensome for low-income women, many of whom must wait to seek a second-trimester abortion, because of the time required to obtain the funding to cover the costs of the abortion." ROA.1611. Data shows that COVID-19 hits people struggling to make ends meet and communities of color the hardest,[4] the same populations that disproportionately seek abortion in the second trimester[5] and that will be disproportionately affected by the D&E Ban.

## III. The State Is Not Likely to Prevail in Its Appeal.

### A. Standard on Appeal.

A district court's legal conclusions are reviewed *de novo*, and its findings of fact for clear error. *Guzman v. Hacienda Records & Recording Studio, Inc.*, 808 F.3d 1031, 1036 (5th Cir. 2015). Clear error review "plainly does not entitle a

[4] *See COVIDView: A Weekly Surveillance Summary of U.S. Covid-19 Activity, Key Updates for Week 26, ending June 27, 2020*, Ctrs. for Disease Control & Prevention, at 2 (June 27, 2020), https://www.cdc.gov/coronavirus/2019-ncov/covid-data/pdf/covidview-07-03-2020.pdf (finding that Black Americans have a mortality rate from COVID-19 nearly five times that of white Americans).

[5] *See* Rachel K. Jones, et al., *Who has Second-Trimester Abortions in the United States?*, 85(6) Contraception 544 (Dec. 2012) (finding patients most likely to have second trimester abortions included Black women and women with less education); Vinita Goyal, et al., *Factors Associated with Abortion at 12 or More Weeks Gestation After Implementation of a Restrictive Texas Law*, Contraception (June 24, 2020) (showing increase in second trimester abortions following enforcement of restrictive abortion law in Texas and that patients seeking second trimester abortions were disproportionately Black and low-income).

reviewing Court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573 (1985). Following a bench trial, "even 'greater deference to the trial Court's findings [is required] when they are based upon determinations of credibility.'" *Guzman*, 808 F.3d at 1036 (citations omitted). *June Medical* makes clear that an appellate court's attempt to disturb plausible findings of fact constitutes reversible error. *See June Med.*, 140 S. Ct. at 2120-21 (plurality); *id.* at 2141 (Roberts, C.J., concurring).

### B. The District Court Correctly Found that the D&E Ban Imposes an Undue Burden.

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*. Mot. at 6-7. In so doing, the State misstates or ignores binding Supreme Court precedent, cherry picks record evidence that runs counter to the weight of evidence submitted at trial, and asks this Court to reverse the District Court's careful factual findings.

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

As Plaintiffs explained in their merits brief and letter briefs, the District Court properly applied binding Supreme Court precedent striking down laws that ban the safest and most common method of abortion in the second trimester, including laws

that ban D&E. *See Stenberg v. Carhart*, 530 U.S. 914 (2000); *Gonzales v. Carhart*, 550 U.S. 124 (2007); *see also June Med.*, 140 S. Ct. at 2134 (Roberts, C.J., concurring) ("The legal doctrine of *stare decisis* requires us . . . to treat like cases alike."). 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*, Mot. at 9-12, the State again ignores the fact that the *Gonzales* Court treated as dispositive 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 methods of fetal demise the State relies on here were known at the time *Stenberg* and *Gonzales* were decided, and their existence did not change the Court's conclusion that D&E Bans are unconstitutional. Appellees' Br. at 30.

Even if precedent did not dictate the outcome here, the District Court correctly analyzed the D&E Ban under *Whole Woman's Health*, which remains binding precedent. Appellees' Ltr. Br. at 6-9; *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). The State asks this Court to adopt the test proposed in Chief Justice Roberts's concurring opinion in *June Medical*, Mot. at 1 n.1, 5-7, but the State's

cursory analysis of *June Medical* under *Marks v. United States*, 430 U.S. 188, 193 (1977), is wrong. Because the plurality and concurrence lack a common denominator with respect to how to determine whether the burdens imposed by a law are unconstitutional, 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. *See United States v. Duron-Caldera*, 737 F.3d 988, 994 & n.4 (5th Cir. 2013) ("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 flawed analysis,' including the plurality's 'new primary purpose test.'" (citation omitted)). The State cites Justice Kavanaugh's statement in *dissent* that "five Members of the Court reject the *Whole Woman's Health* cost benefit standard," Mot. at 7, ignoring that those five votes include the four dissenters, when *Marks* states that only "those Members who *concurred* in the judgments on the narrowest grounds" can create a precedential holding.[6] 430 U.S. at 193 (emphasis added).

Accordingly, the *Whole Woman's Health* balancing test remains binding. Appellees' Ltr. Br. at 6-9. Under that test, the District Court correctly found that the

[6] That the Supreme Court took the routine procedural step of granting certiorari, vacating, and remanding ("GVR") two Seventh Circuit decisions invalidating abortion restrictions after deciding *June Medical*, *see* Appellants' Rebuttal Ltr. Br. at 3, is of no moment. GVRs do not reflect any view of the Court as to the merits or any effect of an intervening opinion pursuant to well-established precedent. *See, e.g.*, *Diaz v. Stephens*, 731 F.3d 370, 378 (5th Cir. 2013) ("[A] GVR makes no determinative impact on an underlying case . . . ."); *Kenemore v. Roy*, 690 F.3d 639, 641 (5th Cir. 2012) ("When the Supreme Court utilizes its GVR power, . . . it is not making a decision that has any determinative impact on future lower-court proceedings.").

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; Appellees' Br. at 34-40; Appellees' Ltr. Br. at 12-13.

But even if the State were correct that the test articulated by the *June Medical* concurrence controls, the D&E Ban fails because (1) it is not reasonably related to a legitimate government interest, and (2) it poses substantial obstacles to abortion access. *See* Appellees' Ltr. Br. at 13-15. None of the State's arguments to the contrary withstand scrutiny.

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

First, the State erroneously argues that a substantial obstacle to abortion access exists only where a significant number of women are prevented entirely from obtaining an abortion. Mot. at 6-9. On the contrary, as both the *June Medical* plurality and concurring opinions 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; *June Med.,* 140 S. Ct. at 2129-2130 (plurality) (explaining that 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 2140 (Roberts, C.J., concurring) (detailing the 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"). The District Court made detailed factual findings that the D&E Ban imposes additional medical risks with no corresponding benefit, requires additional trips to the clinic, and delays access to abortion, which undoubtedly amount to a substantial obstacle.

Second, the State's arguments that the D&E Ban does not impose a substantial obstacle would necessitate overturning numerous factual findings the District Court made after conducting a full trial on the merits, including as to the safety and feasibility of the State's proposed methods of fetal demise. *See* Mot. at 13-14. But this is precisely what *June Medical* admonished. The *June Medical* plurality and concurrence emphasized that appellate courts must to defer to a district court's factual findings unless clearly erroneous, and thus err when they engage in a *de novo* review of the record. *See* Appellee's Ltr. Br. at 2. This Court may not disregard the District Court's fact-finding, particularly given that every other court around the country to adjudicate challenges to nearly identical D&E bans has found the State's proposed fetal demise methods not to be safe or feasible alternatives.[7]

[7] *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 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).

Third, the State's criticism of the District Court's articulation of "'substantial' to mean no more and no less than 'of substance'" is misplaced. Mot. at 8. 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 regardless of its benefits. *See* ROA.1611 ("[W]hether 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.").

Finally, as in its merits brief, the State repeatedly mischaracterizes the record evidence regarding the burdens of the D&E Ban. *See* Appellees' Br. at 3-18, 40-48 (describing burdens). For example, nowhere does the record show that the State's alternatives are "less risky than the abortion itself," Mot. at 11, as they are necessarily additive to, not a replacement for, the D&E procedure. Similarly, the State continues to make the misleading claim that there are "zero" reports of complications from fetal demise in the past five years. Mot. at 12. 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, as well as complications not required to be reported. ROA.580-88, 817-39, 1230-34, 2165-67, 2796-97, 2810-11.

### 3. The D&E Ban is Not Reasonably Related to a Legitimate Government Interest.

Far from "agree[ing] that SB8 advances a legitimate purpose," Mot. at 9, 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' test because it is not reasonably related to a legitimate government interest. The State bears the burden to show, with evidence, that a law actually furthers a legitimate interest, Appellees' Ltr. Br. at 13-15, which it failed to do. On the contrary, the record shows that the D&E Ban does not advance the State's asserted interest in preventing a brutal procedure, as the State's proposed alternatives are, if anything, less humane. *See* Appellees' Ltr. Br. at 15. Nor is there any evidence in the record (and thus the State cites none) to support the proposition that the D&E Ban ensures patients' abortion decisions are well-informed. Indeed,

all other courts adjudicating challenges to nearly identical laws in other states have found that these laws do not sufficiently advance the states' asserted interests.[8]

### C. The District Court Appropriately Entered Facial Relief.

As to relief, the State again applies the wrong legal test and disregards the District Court's factual findings. *June Medical* affirms 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" in a state who seeks an abortion, 140 S. Ct. at 2132 (plurality) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 895 (1992)), rejecting the view the State advances in this case. The concurrence's reliance on *Casey* only bolsters this holding. *Id.* at 2137-38 (Roberts, C.J., concurring) (citing to section of *Casey* where Court struck down the spousal consent requirement); *see Casey*, 505 U.S. at 894 (holding, in striking down spousal consent requirement, that "[t]he proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant"). Here, the relevant group is patients seeking abortion after approximately 15 weeks, the gestational age at which physicians begin

[8] *See, e.g.*, *Bernard*, 392 F. Supp. 3d at 959 (holding that Indiana had not "shown a rational relation between" its interest in fetal dignity and its ban on D&E, especially given the law's choice to ban the use of instruments for disarticulation while not banning the use of suction to achieve the same result, and holding that "to the extent such rational relations exist," the state did not show that a D&E ban "appreciably and in fact advance[d]" any legitimate interests); *EMW Women's Surgical Ctr.*, 960 F.3d at 807 (finding that the law had "limited benefit" and the state's interest in medical ethics was likely undermined by requiring "physicians to subject their patients to additional harmful, experimental, and invasive medical procedures, in contravention of their ethical duties").

performing D&Es. The State's continuing focus on the fact that most abortions in Texas are not D&E procedures, *see* Mot. at 15, is of no moment, as the law is irrelevant for patients undergoing non-D&E abortions.

The District Court found that, for patients undergoing D&E procedures, none of the State's proposed demise procedures are feasible alternatives, as all are unreliable and impose unnecessary and additional health risks. Appellees' Ltr. Br. at 7-17. Accordingly, it is far from "hypothetical" that a large fraction of patients will be burdened by the D&E Ban. Yet the State again asks this Court to reject the District Court's well-supported fact-finding. For example, the State asserts that all abortion procedures up to 17 weeks gestation can be performed using suction and not D&E, Mot. at 15, despite the fact that the weight of evidence at trial led the District Court to conclude otherwise.[9] The State also insists, contrary to the District Court's factual findings, that: patients seeking D&Es from providers who use digoxin at limited gestational ages, or who have used digoxin in the past, are not burdened by the D&E Ban; patients with health conditions that prevent them from

[9] As the record evidence shows, at 15 weeks and sometimes sooner, most physicians use forceps during surgical abortion, bringing the procedure within the ambit of the D&E Ban. ROA.1601, 1920-21, 2017, 2176-77, 2388, 2800. While it may be possible in some circumstances to use only suction beyond 15 weeks, it will be impossible to do so for many patients. ROA.1601, 1920, 1978, 2224-25 2689, 2807, and several physicians testified at trial that they would stop performing abortions at 15 weeks should the D&E Ban go into effect. ROA.2221-23, 2758. Even the one physician who testified that she could use suction up to 16 weeks, and would attempt to go through 16.6 weeks if the law took effect, stated that she could not always count on being able to rely on suction alone. ROA.2204-05, 2221-23.

receiving an intrauterine injection can simply undergo an umbilical cord transection procedure; and that the fetal demise procedures the State proposes do not routinely fail. Appellants' Ltr. Br. at 13-14. On each issue, the District Court found otherwise, putting it squarely in line with the numerous other courts to address similar D&E Bans and enter facial relief. *See, e.g.*, *EMW Women's Surgical Ctr.*, 960 F.3d at 811 (holding that Kentucky's D&E ban "imposes an undue burden on not just a large fraction, but all of the individuals it restricts, and so facial relief is appropriate"); *Bernard*, 392 F. Supp. 3d at 963 (holding that Indiana's D&E ban "imposes a substantial obstacle" on the abortion right for "a large fraction . . . perhaps most or even all" of the individuals for whom the ban was relevant); *Hopkins*, 267 F. Supp. 3d at 1067 (concluding that Arkansas's D&E ban was relevant for "women who select standard D&E during the early weeks of the second trimester" and the ban "creates an undue burden for a large fraction of these women" and in fact "would unduly burden 100% of these women"); *see also id.* at 1050 (noting that "the large fraction standard is in some ways more conceptual than mathematical" (internal quotation marks omitted)).

The State's further suggestion that as-applied relief is more 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.*

## CONCLUSION

For these reasons, the Court should reject the State's request for a stay pending appeal.

Respectfully submitted this 31st day of July, 2020.

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## CERTIFICATE OF SERVICE

I hereby certify that on July 31, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system. I certify that counsel for the Defendants-Appellants are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

*/s/ Molly Duane*
Molly Duane

## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I hereby certify that the foregoing complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 5133 words, excluding the items exempted by Fed. R. App. P. 32(f).

Dated: July 31, 2020.

*/s/ Molly Duane*
Molly Duane