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

PETITION FOR REHEARING EN BANC

Ken Paxton
Attorney General of Texas

Jeffrey C. Mateer
First Assistant Attorney General

Ryan L. Bangert
Deputy First Assistant Attorney General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

Kyle D. Hawkins
Solicitor General
Kyle.Hawkins@oag.texas.gov

Beth Klusmann
Assistant Solicitor General

Counsel for Defendant-Appellant Ken Paxton

Christopher D. Hilton
christopher.hilton@oag.texas.gov

Counsel for Defendants-Appellants Sharen Wilson and Barry Johnson

Certificate of Interested Persons

Whole Woman's Health, on behalf of itself, its staff, physicians and patients, et al.,

Plaintiffs-Appellees,

v.

Ken Paxton, Attorney General of Texas, in his official capacity, et al.,

Defendants-Appellants.

Under the fourth sentence of Fifth Circuit Rule 28.2.1, movants, as governmental parties, need not furnish a certificate of interested persons.

/s/ Kyle D. Hawkins
Kyle D. Hawkins
Solicitor General
Kyle.Hawkins@oag.texas.gov

Counsel for Defendant-Appellant Ken Paxton

/s/ Christopher D. Hilton
Christopher D. Hilton
Christopher.Hilton@oag.texas.gov

Counsel for Defendants-Appellants Sharen Wilson and Barry Johnson

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Introduction and Rule 35(b) Statement

In November 2017, the district court below enjoined the enforcement of an important Texas abortion regulation. Texas filed a notice of appeal the same day. This appeal has been pending ever since. Though the Panel assigned to this case heard oral argument almost two years ago, it has not yet issued its decision, and it has denied Texas's motion to stay the injunction below pending resolution of this appeal. Whether a State may enforce a duly enacted law is a question of exceptional importance, *see* Fed. R. App. P. 35(b)(1)(B), and the Panel's published order denying a stay conflicts with *June Medical Services v. Russo*, 140 S. Ct. 2103 (2020), *see* Fed. R. App. P. 35(b)(1)(A). Furthermore, the Panel's order creates an acknowledged circuit split with the Eighth Circuit's decision in *Hopkins v. Jegley*, No. 17-2879, 2020 WL 4557687, at *1-2 (8th Cir. Aug. 7, 2020) (per curiam). Therefore, pursuant to Rules 8 and 35(a), Texas now asks the en banc Court to stay the district court's injunction and allow Texas to enforce its law immediately.

The law at issue, Senate Bill 8, bans live-dismemberment abortions, a gruesome procedure by which a living, pain-capable fetus on the cusp of viability is ripped limb from limb inside her mother's womb. The Texas Legislature chose to ban this "brutal and inhumane procedure" lest it "further coarsen society to the humanity of not only newborns, but all vulnerable and innocent human life." *Gonzales v. Carhart*, 550 U.S. 124, 157 (2007). SB8 regulates only the moment of fetal termination; it merely requires abortion providers to kill unborn children in a more humane way before dismembering them.

Plaintiffs—abortion providers—sued. The district court enjoined SB8's enforcement, relying on *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), to conclude, via a balancing test, that SB8's benefits are insufficiently weighty to justify its burdens. ROA.1594, 1611. Texas immediately appealed, and the Panel heard oral argument in November 2018. Four months later, in March 2019, the Panel *sua sponte* placed this appeal in abeyance pending the Supreme Court's decision in *June Medical*.

Now *June Medical* has been decided in a 4-1-4 vote. The Eighth Circuit has squarely held that the Chief Justice's concurring opinion controls and rejects the type of balancing test the district court relied on below. *See Hopkins*, 2020 WL 4557687, at *1-2. Consistent with that view, Texas asked the Panel to stay the injunction. On August 22, the Panel declined, issuing a published opinion contradicting—and creating a circuit split with—the Eighth Circuit. Ex. A. It held that "the district court correctly applied" the same "balancing test" the Eighth Circuit rejected. Ex. A at 4. Judge Willett dissented, noting that "[t]he three-year-old injunction issued by the district court in this case rests upon a now-invalid legal standard." Ex. A at 8.

Texas now asks the en banc Court to stay the district court's injunction immediately. As Judge Willett explained, a stay is plainly warranted. First, Texas is very likely to prevail in this appeal, because *June Medical* confirms that the district court's injunction is unlawful. Second, the injunction below irreparably harms Texas, by preventing it from enforcing its law and requiring it to tolerate the "brutal and inhumane procedure," *Gonzales*, 550 U.S. at 157, of live-dismemberment abortion. Third, the

equities strongly favor Texas, as plaintiffs face no harm of their own, and the public interest supports the immediate enforcement of Texas law.

Issue Meriting En Banc Consideration

Whether Texas is entitled to a stay of the injunction below.

Statement of Facts

On May 26, 2017, the Texas Legislature passed SB8. Act of May 26, 2017, 85th Leg., R.S., ch. 441, § 6, 2017 Tex. Gen. Laws 1164, 1165-67 (eff. Sept. 1, 2017). Except in cases of medical emergency, SB8 prohibits "dismemberment abortion," that is, intentionally causing the death of a fetus by dismembering it with forceps or a similar instrument. Tex. Health & Safety Code §§ 171.151-.153.[1]

Plaintiffs sued, claiming SB8 is unconstitutional. ROA.43-89. Following a trial, on November 22, 2017, the district court declared SB8 unconstitutional and entered a permanent injunction and final judgment. ROA.1613, 1615-17. Texas filed its notice of appeal that same day. ROA.1618-21.

The Panel heard oral argument on November 5, 2018, and *sua sponte* placed this case in abeyance on March 13, 2019, pending *June Medical*. The Supreme Court decided *June Medical* on June 29, 2020; Chief Justice Roberts authored the controlling opinion for a divided Court. *See Hopkins*, 2020 WL 4557687, at *1-2. As Judge Willett explained, the controlling opinion "upended the previous cost-benefit balancing test for reviewing the constitutionality of abortion restrictions" and confirms that

[1] The parties' briefs present the full factual background relevant to this appeal. *See* Appellants' Br. 3-11.

"[t]he three-year-old injunction issued by the district court in this case rests upon a now-invalid legal standard." Ex. A at 8.

Because *June Medical* confirms that the injunction below is unlawful, on July 21, Texas asked the Panel to stay the district court's injunction. On August 22, the Panel published an order denying Texas's stay motion over Judge Willett's dissent. Ex. A.

ARGUMENT

Courts consider four factors in assessing whether to stay a district court order pending appeal. *Nken v. Holder*, 556 U.S. 418, 426 (2009); *Veasey v. Abbott*, 870 F.3d 387, 391 (5th Cir. 2017) (per curiam). The two "most critical" factors, *Nken*, 556 U.S. at 434, are "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits," and "(2) whether the applicant will be irreparably injured absent a stay." *Id*. at 426. Less "critical" are "whether issuance of the stay will substantially injure the other parties interested in the proceeding," and "where the public interest lies." *Id*. at 426, 434. Each factor favors a stay here.

I. Texas Is Likely to Prevail.

Judge Willett put it best: "The three-year-old injunction issued by the district court in this case rests upon a now-invalid legal standard." Ex. A at 8. Indeed, that injunction applied two legal principles inconsistent with *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), and squarely rejected by *June Medical*. First, per Judge Willett, the district court relied on "the previous cost-benefit balancing test for reviewing the constitutionality of abortion restrictions" that "*June Medical* upended." Ex. A at 8. Second, the district court misunderstood the

"substantial burden" test that governs abortion regulations. To the district court, any non-negligible burden is automatically substantial, because a "substantial burden" is nothing more than a burden "of substance." ROA.1594. *June Medical* says otherwise: The proper test is whether the regulation imposes a substantial *obstacle* to abortion access—not merely some burden "of substance." 140 S. Ct. at 2135-38.[2]

Because "a court by definition abuses its discretion when it applies an incorrect legal standard," *Cruson v. Jackson Nat'l Life Ins. Co.*, 954 F.3d 240, 249 (5th Cir. 2020) (cleaned up), the district court's judgment cannot survive appellate review. Moreover, SB8 is constitutional: It does not unduly burden the right to abortion.

A. The district court's legal analysis conflicts with *Casey* and *June Medical*.

Since 1992, to demonstrate that an abortion regulation is invalid, plaintiffs have been required to show that "its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." *Casey*, 505 U.S. at 878.[3] *June Medical* applied that standard and rejected the district court's "balancing test." 140 S. Ct. at 2138.

1. Chief Justice Roberts's controlling *June Medical* opinion demonstrates how the undue-burden standard is correctly applied. The key *Casey* inquiry, he explained, is whether the law imposes a substantial obstacle. *Id*. Drawing on *Casey*, the Chief

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[2] Except where noted otherwise, all *June Medical* citations reference Chief Justice Roberts's controlling opinion.

[3] All *Casey* citations reference the plurality opinion.

Justice demonstrated that is it not enough to show merely that a law imposes some "burden" on abortion access, or that a regulation makes abortion more difficult or expensive. *Id*. Rather, "the *only* question for a court is whether a law has the 'effect of placing a substantial obstacle in the path of a woman seeking an abortion of a non-viable fetus.'" *Id*. (emphasis added) (quoting *Casey*, 505 U.S. at 877).

June Medical further confirms that *Hellerstedt* neither altered *Casey*'s undue-burden standard nor replaced it with a freestanding benefits-and-burdens balancing test. *Id.* at 2138-39; *see* Appellants' Br. 39-42, Reply Br. 2-7. Justice Kavanaugh noted explicitly that "five Members of the Court reject the *Whole Woman's Health* cost-benefit standard." 140 S. Ct. at 2182 (Kavanaugh, J., dissenting); *see also* Ex. A at 8 (Willett, J., dissenting).

2. Judge Willett and the Eighth Circuit correctly concluded that Chief Justice Roberts authored the controlling opinion in *June Medical*. *See Hopkins*, 2020 WL 4557687, at *1-2. The Supreme Court has long held that the "narrowest" opinion in the majority controls. *Marks v. United States*, 430 U.S. 188, 193-94 (1977). The Chief Justice's opinion is the "narrowest" because it harmonizes *Casey* and *Hellerstedt* to reaffirm the three-decades-old substantial-obstacle test.

The Panel majority, by contrast, reads the *June Medical* plurality to *broaden* both *Casey* and *Hellerstedt* and create "a grand balancing test" that "would require [judges] to act as legislators" in ways *Casey* never contemplated. *June Med.*, 140 S. Ct. at 2135-36 (cleaned up); Ex. A at 4. The Chief Justice rejected that dramatic expansion of the judicial role for a narrower approach. He instead endorsed the *Casey*

standard described above. 140 S. Ct. at 2135-36. So did the plurality. *Id.* at 2120, 2133. So the Chief Justice's concurrence is the narrowest opinion that states the "common denominator upon which all of the justices in the majority can agree." *United States v. Duron-Caldera*, 737 F.3d 988, 994 n.4 (5th Cir. 2013).

The Supreme Court's own docket erases any doubt that *June Medical* rejected the benefits-burdens balancing test applied below. Shortly after deciding *June Medical*, the Court ordered the Seventh Circuit to reconsider two decisions that had themselves relied on a balancing test. *See* Order List, 591 U.S. __ (July 2, 2020) (GVRing No. 18-1019, *Box v. Planned Parenthood*, and No. 19-816, *Box v. Planned Parenthood*, "for further consideration in light of" *June Medical*). Those orders are clear evidence that the Court believes it rejected a balancing test. *See, e.g.*, Amy Howe, *Justices Grant New Cases, Send Indiana Abortion Cases Back for a New Look*, SCOTUSBlog, (July 2, 2020, 12:48 PM), https://www.scotusblog.com/2020/07/justices-grant-new-cases-send-indiana-abortion-cases-back-for-a-new-look/.

3. *June Medical* thus confirms that the district court committed two foundational legal errors that require reversal.

First, the district court applied the following test: "Whether an obstacle is substantial—and a burden is therefore undue—must be judged in relation to the benefits that the law provides." ROA.1594. But that test is untethered to *Casey*'s framework, which "requir[es] a substantial obstacle before striking down an abortion regulation." *June Med.*, 140 S. Ct. 2139. Indeed, "[n]othing about *Casey* suggested that a weighing of costs and benefits of an abortion regulation was a job for the courts." *Id.*

at 2136. Rather, *Casey* "focuses on the existence of a substantial obstacle, the sort of inquiry familiar to judges across a variety of contexts." *Id.* And the *June Medical* controlling opinion explicitly rejected any "balancing test," *id.*—as did four other Justices. *See id.* at 2182 (Kavanaugh, J. dissenting); Ex. A at 8 (Willett, J., dissenting).

Second, the district court redefined and reduced "substantial obstacle" to a mere burden "no more and no less than 'of substance.'" ROA.1594. But that renders *any* burden on abortion access "substantial," and therefore, "by definition," an undue burden. ROA.1594, 1611. That is why the Supreme Court has rejected the district court's understanding of "substantial obstacle." As *Casey* recognized, "not every law which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right." 505 U.S. at 873. Rather, a "substantial obstacle" is something that "prevent[s] a significant number of women from obtaining an abortion," *id.* at 893—a far higher standard than what the district court applied.

B. SB8 is constitutional.

The judgment below should be stayed—and ultimately reversed—because SB8 easily passes the *Casey*/*June Medical* test: It advances important state interests and imposes no substantial obstacle to abortion access. It is therefore constitutional.

1. SB8 is reasonably related to a legitimate purpose.

The first component of the *Casey*/*June Medical* test is satisfied easily. The district court properly "conclude[d] [that] the Act advances a valid state interest." ROA.1613. And the Supreme Court has recognized the State's valid interest in val-

uing human life. *See Gonzales*, 550 U.S. at 158. SB8 advances that interest by prohibiting a particularly brutal abortion procedure that kills pain-capable children by literally tearing them limb from limb. SB8 further advances the State's interest in making sure the choice to have an abortion is well-informed, since plaintiffs keep their patients in the dark about what happens to their baby during a D&E abortion. *Id*. at 159-60; *see* Appellees' Br. 36-37; ROA.4300-02, 4317-19, 4328-32.

2. SB8 creates no substantial obstacle to abortion access.

Because SB8 advances a legitimate purpose, "the *only* question" that remains "is whether [SB8] has the 'effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.'" *June Med.*, 140 S. Ct. at 2138 (emphasis added) (quoting *Casey*, 505 U.S. at 877). For at least two reasons, the answer is unequivocally "no." First, the Supreme Court's reasoning in *Gonzales* confirms that SB8 does not pose a substantial obstacle to abortion access. Second, the record below—including plaintiffs' own admissions—confirms that SB8 poses no substantial obstacle to any abortion.

a. *Gonzales* requires this Court to conclude that SB8 poses nothing like an undue burden as described in *Casey* and *June Medical*. Indeed, the same reasoning the Supreme Court used in *Gonzales* to uphold the federal Partial-Birth Abortion Ban Act requires this Court to uphold SB8.

The statute in *Gonzales* "prohibit[ed] a doctor from intentionally performing" a particularly "gruesome and inhumane procedure" called "intact D&E." *Gonzales*,

550 U.S. at 124, 150. The *Gonzales* plaintiffs challenged that ban as "an undue burden . . . because its restrictions on second-trimester abortions are too broad." *Id.* at 150. But the Supreme Court disagreed, holding that the Act did not impose a substantial obstacle because the record demonstrated the availability of "safe alternatives" to intact D&E. *Id.* at 166-67.

In reaching that conclusion, the Supreme Court rejected many of the same arguments plaintiffs make here. For example, the Court disregarded medical evidence showing that partial-birth abortion was sometimes safer for the mother, concluding that such "uncertainty" cannot create a substantial obstacle "given the availability of other abortion procedures that are considered to be safe alternatives." *Id.* One such "safe alternative," according to the Court, is "an injection that kills the fetus." *Id.* at 164. The Court specifically identified "digoxin or potassium chloride" as among these "safe alternatives." *Id.* at 136. The upshot is clear: So long as a State allows "safe alternatives" to the banned procedure, courts must respect the "traditional rule that state and federal legislatures [have] wide discretion to pass legislation in areas where there is medical and scientific uncertainty." *June Med.*, 140 S. Ct. at 2136 (cleaned up.)

Gonzales thus requires this Court to uphold SB8. SB8 prohibits live-dismemberment abortions but permits "safe alternatives," 550 U.S. at 166-67, that cause the unborn child to die before it is dismembered. These permitted alternative methods of ensuring fetal demise include digoxin, potassium chloride, suction, and umbilical-cord transection. Each is "reasonable," *id.* at 166, as abortion providers admit they

already use all these methods, *see* Appellants' Br. 30-31, 33-35, 38. Of the nearly 300 reported abortion complications in Texas in the last five years, none involved digoxin injections or any other method of fetal demise. ROA.2530, 2532, 2534-35; *see also* ROA.5241-5534 (under seal).

b. The record below confirms that the alternatives to live-dismemberment abortion are safe, reasonable, and available:

Fetal demise is safe and already performed routinely. Plaintiffs admit that they and other abortion providers routinely cause fetal demise before the surgical removal of the fetus. *See, e.g.*, ROA.2047, 4312, 4314, 4421. Causing fetal demise is less risky than the abortion itself, which plaintiffs claim is "extremely safe." Appellees' Br. 4. And as one of plaintiffs' doctors admitted, and as abortion textbooks explain, suction—which is already used in second-trimester abortion procedures—can be used to cause fetal demise in abortions under 17 weeks' gestation, and suction does not implicate SB8. ROA.2198, 2202, 2221, 2227, 2576-77, 2584, 2586, 2588-90, 4877-79; Tex. Health & Safety Code § 171.151.

Inducing fetal demise via digoxin is safe and effective. Plaintiffs and other abortion providers routinely use digoxin, ROA.2047, 2605-07, 4312, 4314, 4421 4494; Appellants' Br. 30 n.4—but not to comply with SB8. Instead, they use digoxin to guarantee the unborn child's death and thereby preclude the legal liability that comes with the accidental delivery of a live baby. *See* ROA.1934, 1992, 4307, 4327, 4438-43, 4783; Appellants' Br. 30. Plaintiffs tell their patients that digoxin injections are safe.

ROA.2169, 2247, 2248, 2249, 2774, 4307, 4327, 4438-43. And plaintiffs' doctors admitted digoxin carries an extremely low failure rate. See ROA.2150, 2244. Even if a first dose fails, Planned Parenthood agrees a second injection may be safely administered. *See* ROA.4307, 4428, 4438.

Other alternatives to live-dismemberment abortion are also safe, available, and effective. The district court ignored evidence that potassium chloride achieves the same result as effectively as digoxin and can be administered the same way. ROA.2407-08, 2413-14, 2419-20, 2422-23; *accord* ROA.1977 (plaintiffs' expert agreeing). And Planned Parenthood agrees that umbilical-cord transection is an available alternative to digoxin. ROA.2624, 2626. Planned Parenthood also agrees that umbilical-cord transection is an option their physicians can use to comply with the Partial-Birth Abortion Ban Act. ROA.4414, 4460, 4546, 4564, 4586, 4616, 4625, 4678. And there may be more alternatives still. *See* ROA.2413-14 (injecting air or amniotic fluid); Appellants' Br. 30 n.4 (National Abortion Federation endorsing injection of lidocaine).

SB8's requirements will not delay the abortion procedure. Plaintiffs' own expert co-authored a textbook that acknowledges that digoxin works within hours. ROA.2619-20, 2627. Planned Parenthood admits that digoxin can be administered anytime from 24 hours to 30 minutes before the abortion procedure, and intrafetal digoxin causes demise in one to two hours. ROA.4433, 4582-83, 4653. Even when a second digoxin injection is necessary, it remains "likely," according to Planned Parenthood, that the patient can have "the abortion completed on the scheduled

day." ROA.4438. And there is no dispute that potassium chloride causes demise within minutes. ROA.2419-20, 2608-09; Appellees' Br. 12-15.

C. The district court impermissibly entered facial relief even though plaintiffs failed to show SB8 is unconstitutional in a large fraction of cases.

To win facial relief, plaintiffs must demonstrate that SB8 "would be unconstitutional in a large fraction of relevant cases." *Gonzales*, 550 U.S. at 167-68. They did not do so—yet the district court entered facial relief anyway. That clear error further merits a stay. The discussion above shows that that SB8's ban on live-dismemberment abortions will impact only a tiny fraction of abortions performed in Texas. SB8 cannot possibly affect the nearly 95% of abortions in Texas performed without dismemberment. ROA.4256, 4259. And SB8 only impacts a scant few of the already small number of abortions currently performed with live dismemberment. Suction—which SB8 does not implicate—is already used in second-trimester abortions between 15 and 17 weeks' gestation. ROA.2198, 2202, 2221, 2227, 2576-77, 2584, 2586, 2588-90, 4877-79; Tex. Health & Safety Code § 171.151. These abortions make up nearly half of all abortions performed after 15 weeks. ROA.4256, 4259. That means facial relief is unavailable. *Gonzales*, 550 U.S. at 167-68; *cf. June Med.*, 140 S. Ct. at 2133-34 (Louisiana law "would result in a drastic reduction in the number and geographic distribution of abortion providers" (cleaned up)).

II. A Stay Will Not Harm Plaintiffs.

A stay will not injure plaintiffs' current or hypothetical patients. As explained above, the vast majority of abortions are not impacted by SB8. Many women receiving second-trimester abortions in Texas already undergo a procedure that complies with SB8. Plaintiffs failed to show that SB8 will prevent any woman from receiving an abortion. And since plaintiffs assert no injuries of their own, there is no need to look at whether abortion providers will suffer any harm.

III. The State Will Suffer Ongoing Irreparable Harm If the Injunction Is Not Stayed, and the Public Interest Favors a Stay.

When a State is enjoined from enforcing the law, "the State necessarily suffers the irreparable harm of denying the public interest in the enforcement of its laws." *Veasey*, 870 F.3d at 391. Furthermore, a stay is in the public interest. When the State seeks a stay pending appeal, "its interest and harm merge with that of the public." *Id.* (citing *Nken*, 556 U.S. at 435).

Those considerations support a stay here. Each day that the district court's injunction has operated, the State has been harmed, both because it cannot enforce its law, and because it must tolerate a "brutal and inhumane procedure" that "will further coarsen society to the humanity of not only newborns, but all vulnerable and innocent human life." *Gonzales*, 550 U.S. at 157.

IV. En Banc Review Is Available and Warranted.

Finally, there are no procedural or prudential bars to the relief this motion seeks.

1. Rules 8 and 35(a) permit en banc review of the Panel's order. *See* Internal Operating Procedures at 36. And that order, which creates a circuit split, is eminently

well suited to en banc review. *See, e.g.*, *Def. Distributed v. U.S. Dep't of State*, 865 F.3d 211, 213 (5th Cir. 2017) (Elrod, J., dissenting) (circuit split merits rehearing en banc); *United States v. Escalante-Reyes*, 689 F.3d 415, 418 (5th Cir. 2012) (en banc) (Haynes, J.) (similar); *United States v. Garcia-Espinoza*, 325 F. App'x 380, 382 (5th Cir. 2009) (per curiam) (Owen, J., concurring) (similar).

2. Although the Panel majority faulted Texas for declining to seek a stay in district court, Rule 8 permits Texas to move directly in this Court when it would be "impracticable" to move in district court. The D.C. Circuit has held that it is "impracticable" to move first in district court when an appellate court has already "heard argument" and "the appeal has progressed so near resolution." *United States v. Microsoft Corp.*, No. 97-5343, 1998 WL 236582, at *1 (D.C. Cir. May 12, 1998) (granting stay). So too here: It would be "impracticable" and inefficient to ask the district court—which has not thought about this case since 2017—to assess Texas's likelihood of success in this appeal when the Panel has already received full briefing, already heard oral argument, already ordered and received supplemental briefing, and already determined that "the district court correctly applied" the Panel's view of the governing legal standard. *See id.*; Ex. A at 4.

3. This motion is timely. Texas sought a stay promptly after *June Medical* was decided. Although Texas declined to seek a stay in 2017 on the good-faith assumption this Court would decide this appeal swiftly, two things have changed since then. First, the Supreme Court issued new dispositive authority rendering the injunction

below unlawful. Second, this appeal is approaching its fourth year without resolution. In light of those developments, a stay is now appropriate.

Conclusion

The en banc Court should stay the injunction below.

Respectfully submitted.

Ken Paxton
Attorney General of Texas

Jeffrey C. Mateer
First Assistant Attorney General

Ryan L. Bangert
Deputy First Assistant Attorney General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

/s/ Kyle D. Hawkins
Kyle D. Hawkins
Solicitor General
Kyle.Hawkins@oag.texas.gov

Beth Klusmann
Assistant Solicitor General

Counsel for Defendant-Appellant Ken Paxton

/s/ Christopher D. Hilton
Christopher D. Hilton
Christopher.Hilton@oag.texas.gov

Counsel for Defendants-Appellants Sharen Wilson and Barry Johnson

Certificate of Service

On August 25, 2020, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

/s/ Kyle D. Hawkins
Kyle D. Hawkins

Certificate of Compliance

Rule 35 governs this motion and limits it to 3,900 words. *See* Internal Operating Procedures at 36. "The [Federal Rules] covering rehearings en banc do apply to interlocutory orders of this Court issued pursuant to [Rule] 8." This motion complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 35 because it contains 3896 words, excluding the parts exempted; and (2) the typeface and type style requirements of Rules 35 and 27 because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the program used for the word count).

/s/ Kyle D. Hawkins
Kyle D. Hawkins

Exhibit A

AMENDED

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
August 21, 2020
Lyle W. Cayce
Clerk

No. 17-51060

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,

versus

Ken Paxton, Attorney General of Texas, *in his official capacity*; John Creuzot, District Attorney for Dallas County, *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.

No. 17-51060

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:17-CV-690

Before STEWART, DENNIS, and WILLETT, *Circuit Judges*.

IT IS ORDERED that Appellants' joint opposed motion for stay pending appeal is DENIED.

James L. Dennis, *Circuit Judge*.

Nearly 1,000 days ago, a federal district court declared that Texas Senate Bill 8 placed an undue burden on a woman's right to access a pre-viability abortion and enjoined its enforcement. Texas appealed that same day. Now, almost three years later, the State seeks to stay the judgment below. Because the State's motion is procedurally improper, it must be denied.

I.

As an initial matter, we address our dissenting colleague's view that the motion should be granted, and this case remanded, because the governing legal standards have supposedly changed in light of the Supreme Court's decision in *June Medical Servs. LLC v. Russo*, 140 S. Ct. 2103 (2020). Respectfully, this is not so. *June Medical Servs. LLC v. Russo*, 140 S. Ct. 2103 (2020), has not disturbed the undue-burden test, and *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), remains binding law in this Circuit.

June Medical was a 4-1-4 decision. "Ordinarily, '[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 the position taken by those Members who concurred in the judgment[] on the narrowest grounds.'" *United States v. Duron-Caldera*, 737 F.3d 988, 994 n.4 (5th Cir. 2013) (first alteration in original) (quoting *Marks v. United States*, 430 U.S. 188, 193 (1977)). But as we have repeatedly explained, this "principle . . . is only workable where there is some 'common denominator upon which all of the justices of the majority can agree.'" *Id.* (quoting *United States v. Eckford*, 910 F.2d 216, 219 n. 8 (5th Cir. 1990)). When a concurrence does not share a "common denominator" with, or cannot "be viewed as a logical subset of," a plurality's opinion, it "does not provide a controlling rule" that establishes or overrules precedent. *Id.*

In *June Medical*, the only common denominator between the plurality and the concurrence is their shared conclusion that the challenged Louisiana law constituted an undue burden. *Compare* 140 S. Ct. at 2132 (plurality opinion), *with id.* at 2141-42 (Roberts, C.J., concurring in the judgment). What they obviously disagreed on is the proper test for conducting the undue-burden analysis: the plurality applied *Hellerstedt*'s balancing of the law's burdens against its benefits, while the concurrence analyzed only the burdens. *Compare* 140 S. Ct. at 2132, *with id.* at 2141-42. Indeed, the Chief Justice expressly disavowed the plurality's test. *See id.* at 2136; *cf. Duron-Caldera*, 737 F.3d at 994 n.4 (holding that, in the Supreme Court's decision in "*Williams*[*v. Illinois*, 132 S. Ct. 2221 (2012)], there is no such common denominator between the plurality opinion and Justice Thomas's concurring opinion. Neither of these opinions can be viewed as a logical subset of the other. Rather, Justice Thomas *expressly disavows* what he views as 'the plurality's flawed analysis,' including the plurality's 'new primary purpose test.'" (quoting *Williams,* 132 S. Ct. at 2255, 2262 (Thomas, J., concurring) (emphasis added))).

Thus, under our Circuit's reading of the *Marks* principle, that the challenged Louisiana law posed an undue burden on women seeking an abortion is the full extent of *June Medical*'s ratio decidendi. The decision does not furnish a new controlling rule as to how to perform the undue-burden test. Therefore, *Hellerstedt*'s formulation of the test continues to govern this case, and because the district court correctly applied *Hellerstedt*'s balancing test, remand is not warranted.

Curiously, the dissent does not cite our relevant precedents or our court's common-denominator/logical-subset rule. Instead, it cites Justice Kavanaugh's statement, in dissent in *June Medical*, that five Justices disapproved of the *Hellerstedt*'s balancing test for determining undue burden. *See* Dissenting Op. at 2 (quoting *June Med. Servs. LLC*, 140 S. Ct. at 2182

(Kavanaugh, J., dissenting)). With all due respect, this observation is of no moment in determining the Court's holding. *See* 430 U.S. at 193 (explaining that when no opinion receives a majority of votes the Court's holding is "viewed as that position taken by those Members who *concurred in the* judgment[] on the narrowest grounds (emphasis added)). And any intimation that the views of dissenting Justices can be cobbled together with those of a concurring Justice to create a binding holding must be rejected. That is not the law in this or virtually any court following common-law principles of judgments.

II.

The State's stay motion is also patently procedurally defective. To understand why, it bears emphasizing that the State's appeal has been pending before this court for nearly 1,000 days. Never during this time period has the State moved in the district court for a stay. Instead, it asks this court to hear in the first instance its profoundly belated motion. But Federal Rule of Appellate Procedure 8(2) mandates that the party moving for a stay in a court of appeals must have either first tried and failed to obtain a stay in the district court or, alternately, "show that moving first in the district court would be impracticable." FED. R. APP. P. 8(a)(2)(A). As noted, Texas bypassed the first route.

As for the second, Texas's explanations for the purported impracticability of moving in the district do not pass muster. The State cites *Ruiz v. Estelle*, 650 F.2d 555, 567 (5th Cir. 1981), in which we explained that stay motions must first be presented to the district court "unless it clearly appears that further arguments in support of the stay would be pointless in the district court." But the problem here is that the State does not even attempt to explain why it would be "pointless" to move first in the district court. Perhaps that is because, under our precedents, it would not be. *Cf.*

Bayless v. Martine, 430 F.2d 873, 879 (5th Cir. 1970) ("It does not follow from the refusal to grant a preliminary injunction pending a trial in the court below that the district court would refuse injunctive relief pending an appeal."). The State appears to apply a presumption of bad faith on the part of the district court when the appropriate presumption is of course just the opposite. *See Evans v. Michigan*, 568 U.S. 313, 325-266 (2013) ("We presume here, as in other contexts, that courts exercise their duties in good faith.").

Notably, after waiting years to file this motion, the only recent development the State identifies is the Supreme Court's decision in *June Medical*. But that the State may now presume its litigation position to be more favorable due to an intervening Supreme Court decision clearly does not bear on its ability to move in the district. Preference and impracticability are not synonyms.

The State's failure to show the impracticability of moving first in the district court is sufficient grounds to deny its motion. *See, e.g.*, *SEC v. Dunlap*, 253 F.3d 768, 774 (4th Cir. 2001) (explaining that movant's failure to move first in the district court for a stay or explain why doing so was impracticable "constitutes an omission we cannot properly ignore" and thus denying the motion (citing *Hirschfield v. Bd. of Elections*, 984 F.2d 35, 38 (2d Cir. 1993) (denying motion to stay judgment because there was 'no explanation why the instant motion for a stay pending appeal was made in the first instance to [the appellate court]"))); *Baker v. Adams Cnty./Ohio Valley Sch. Bd.*, 310 F.3d 927, 930-31 (6th Cir. 2002) (seeking a stay pending appeal first in the district court is "[t]he cardinal principle of stay applications" and denying the stay motion where "[t]he defendant did not so move below and has not made any showing that such a motion would be impracticable" (first alteration in original) (quoting 16A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3954 (3d ed. 1999))).

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III.

For these reasons, the State's motion for a stay is denied.

CARL E. STEWART, *Circuit Judge*, concurs.

Don R. Willett, *Circuit Judge*, dissenting:

I would grant the State of Texas's motion to stay the injunction.

The Supreme Court recently divided 4-1-4 in *June Medical Services LLC v. Russo*, 140 S. Ct. 2103 (2020). The opinions are splintered, but the takeaway seems clear: The three-year-old injunction issued by the district court in this case rests upon a now-invalid legal standard. *See Hopkins v. Jegley*, No. 17-2879, 2020 WL 4557687, at *1-2 (8th Cir. Aug. 7, 2020) (explaining that *June Medical* upended the previous cost-benefit balancing test for reviewing the constitutionality of abortion restrictions); *June Med. Servs.*, 140 S. Ct. at 2182 (Kavanaugh, J., dissenting) ("Today, five Members of the Court reject the *Whole Woman's Health* cost-benefit standard.").

I would grant the motion to stay. Additionally, I would remand the underlying merits appeal to the district court for reconsideration under the now-governing legal standard. *See Box v. Planned Parenthood of Ind. & Ky., Inc.*, No. 19-816, 2020 WL 3578672, at *1 (U.S. July 2, 2020) and *Box v. Planned Parenthood of Ind. & Ky., Inc.,* No. 18-1019, 2020 WL 3578669 (U.S. July 2, 2020) (remanding "for further consideration in light of *June Medical*").

Because the majority does otherwise, I respectfully dissent.