July 10, 2020

Lyle W. Cayce, Clerk of Court
U.S. Court of Appeals for the Fifth Circuit
600 S. Maestri Pl., Ste. 115
New Orleans, LA 70130

Re: *Whole Woman's Health, et al. v. Charles Smith*, No. 18-50730

Dear Mr. Cayce:

Plaintiffs-Appellees respectfully submit this letter in response to the Court's June 29, 2020, directive to address the impact on this matter, if any, of the Supreme Court's recent decision in *June Medical Services, L.L.C. v. Russo*, Nos. 18-1323, 18-1460, 2020 WL 3492640 (U.S. June 29, 2020). This appeal concerns a challenge to Texas laws (the "Challenged Laws") prohibiting medical disposition of certain embryonic and fetal tissue—identified by statute as "embryonic and fetal tissue remains" ("EFTR")—and instead requiring that such tissue be disposed of by interment or scattering of ashes, means typically associated with the disposition of human bodies after the death of a person. *June Medical* confirms that this Court should affirm the district court's judgment invalidating the Challenged Laws on constitutional grounds.

In *June Medical*, the Supreme Court held, for the second time in four years, that this Court erred in upholding an abortion restriction that violated the undue burden standard. *Id.* at *4. Justice Breyer announced the judgment of the 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 *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), and *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). Likewise, all emphasized that the undue burden standard is highly fact-dependent and underscored the obligation of appellate courts to defer to a

district court's factual findings unless they are clearly erroneous. *June Med.*, 2020 WL 3492640, 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]

I. The Challenged Laws Are Not Reasonably Related to a Legitimate State Interest.

June Medical confirms that an abortion restriction violates the undue burden standard if 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); *see also id.* at *10 (plurality) (adopting the standards set forth in *Casey* and *Whole Woman's Health*). The concurrence describes this as a "threshold requirement," meaning that courts must first determine whether an abortion restriction is reasonably related to a legitimate state interest before considering its burdens. *Id.* at *25. If a law regulating abortion is not reasonably related to a legitimate state interest, it is unconstitutional regardless of the nature and extent of those burdens. *See id.*

In *Whole Woman's Health*, the Supreme Court held that this Court erred in treating the

[1] Both the plurality and concurring opinions in *June Medical* rejected the State's arguments concerning third-party standing, leaving intact this Court's precedents holding that abortion providers have standing to assert the constitutional rights of their patients, *see June Med.*, 2020 WL 3492640, at *9-10 (plurality); *id.* at *26 n.4 (Roberts, C.J., concurring); *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583, 589 (5th Cir. 2014); *Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 334 (5th Cir. Unit B 1981), and reaffirming the Supreme Court's own "long line of well-established precedents" holding the same, *June Med.*, 2020 WL 3492640, at *10 (plurality) ("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)). *June Medical* thus provides additional support for the district court's conclusion that Plaintiffs here have third-party standing to assert the rights of their patients. *Whole Woman's Health v. Smith*, 338 F. Supp. 3d 606, 621 (W.D. Tex. 2018).

reasonably related test as a form of rational basis scrutiny. 136 S. Ct. at 2309 ("[The Court of Appeals] is wrong to equate the judicial review applicable to the regulation of a constitutionally protected personal liberty with the less strict review applicable where, for example, economic legislation is at issue."). Instead, 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 id.* at 2310 ("[T]he '*Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake.*'" (quoting *Gonzales v. Carhart*, 550 U.S. 124, 165 (2007)); *id.* at 2311 ("We have found nothing in Texas' record evidence that shows that, . . . the new law advanced Texas' legitimate interest in protecting women's health."). Nothing in the *June Medical* opinions disturbs this holding.

Here, the State has failed to demonstrate that the Challenged Laws are reasonably related to a legitimate state interest.[2] Although the district court "decline[d] to say, as a matter of law, the challenged laws do not further a valid state interest," instead "assum[ing]" that they do so, *Smith*, 338 F. Supp. 3d at 620, its factual findings support the conclusion that those laws are not reasonably related to a legitimate state interest, *id.* at 627-29.

As an initial matter, it is crucial to distinguish between legitimate state interests and illegitimate ones. Appellees do not dispute that, under controlling precedent, the State has a legitimate interest in promoting potential life through means that are "calculated to inform the woman's free choice, not hinder it." *Casey*, 505 U.S. at 877. Likewise, the State has a "legitimate interest in proper disposal of fetal remains." *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1782 (2019) (quoting *Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 452 n.45 (1983)).

[2] The Supreme Court's decision in *Box* is not pertinent to the issues on appeal in this case. *See Box*, 139 S. Ct. at 1782. The *Box* plaintiffs waived the argument that an Indiana fetal remains law imposed an undue burden on abortion, seeking only rational basis review of the law. *Id.* Upholding the law under that deferential standard, the Supreme Court emphasized that "[t]his case, as litigated, . . . does not implicate our cases applying the undue burden test to abortion regulations." *Id.*

The State also has a legitimate interest in promoting health. *See Casey*, 505 U.S. at 878. On the other hand, the State does not have a legitimate interest in "prescrib[ing] what shall be offensive," *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018); sending "a signal of official disapproval of [certain] religious beliefs," *id.*; or "prescrib[ing] what shall be orthodox in politics, nationalism, religion, or other matters of opinion," *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

The Challenged Laws are not reasonably related to the State's *legitimate* interests. First, the State conceded that the Challenged Laws do not serve an interest in health. *Smith*, 338 F. Supp. 3d at 620.

Second, the Challenged Laws do not advance the State's interest in potential life through means designed to persuade. Based on the evidence presented at trial, the district court found that "the challenged laws likely have *de minimis* persuasive effect, if any at all." *Id.* at 629. This finding is not clearly erroneous given that the State "only raise[d] this potential benefit via footnote and provide[d] no supporting evidence or argument," *id.* at 629 n.17, and it stipulated that the Challenged Laws do not require healthcare providers to discuss EFTR disposition with their patients or inform them that EFTR will be buried or cremated, ROA.2972.

Third, the Challenged Laws are not reasonably related to the State's interest in proper disposal of fetal remains because they are substantially underinclusive. They do not apply to pre-implantation embryos such as those created for use in *in vitro* fertilization; EFTR sent to a pathology or law enforcement laboratory; or EFTR passed at home following a medication abortion or spontaneous miscarriage. *See Smith*, 338 F. Supp. 3d at 638. In addition, the district court found that the State's approach to prescribing dignified disposition of EFTR is arbitrary and inconsistent in many respects. For example, the Challenged Laws prohibit grinding as a treatment option for EFTR, but they permit cremation, which requires the grinding of remains in a machine akin to a

large "blender." ROA.4560:8-20; *see Smith*, 338 F. Supp. 3d at 628. Similarly, the Challenged Laws prohibit the disposition of EFTR in medical landfills, but permit disposition in parking lots and junkyards. *Smith*, 338 F. Supp. 3d at 628. Likewise, the Challenged Laws prohibit healthcare providers from disposing of EFTR via a sanitary sewer, but they permit medication abortion patients and people who miscarry at home to do so, a practice the record shows is quite common. *Id.*; ROA.4356:3-7, 4660:9-24.

Further, the Challenged Laws' stated purpose is to "express the state's profound respect for the life of the unborn by providing for a dignified disposition of embryonic and fetal tissue remains." Tex. Health & Safety Code § 697.001. But "dignified disposition" in this formulation is simply a stand-in for the State's view of what is inoffensive or morally correct. The district court found, based on the record evidence, that people have vastly different views of what constitutes dignified disposition of EFTR based on their religious beliefs, scientific knowledge, cultural traditions, and personal experiences. *See Smith*, 338 F. Supp. 3d at 627-28, 634-35. The State cannot advance its legitimate interest in proper disposal of EFTR by improperly taking sides in a religious or cultural debate, nor by sending a message of official disapproval of some people's deeply held beliefs concerning the mystery of life. *See supra* at 3-4; *Casey*, 505 U.S. at 851.

In sum, *June Medical* provides further support for the conclusion that the Challenged Laws fail to satisfy the undue burden standard because they are not reasonably related to a legitimate state interest. This ground alone provides a sufficient basis for upholding the district court's judgment.

II. The Challenged Laws Burden Abortion Access to an Impermissible Extent.

A. This Court Must Continue to Follow *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 998, 994 n.4 (5th Cir. 2013). Where none of the opinions concurring in the judgment "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*, 737 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 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 laws violate the undue burden standard when (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. *See June Med.*, 2020 WL 3492640, at *10-11 (plurality); *id.* at *21-23 (Roberts, C.J., concurring). But they disagreed on how to determine whether the burdens imposed by a law are unconstitutional. The plurality held that the second prong of the test *requires* weighing the law's burdens against its benefits. *June Medical*, 2020 WL 3492640, at *20 (plurality). It therefore assessed the Louisiana law's burdens relative to its benefits, concluding that the burdens were undue. *Id.* The concurrence

[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)). If there is no least common denominator on which at least five Justices agree, then a decision does not produce a controlling rule that is binding in future cases. *See Gibson v. Am. Cyanamid Co.*, 760 F.3d 600, 619 (7th Cir. 2014) ("[W]hen it is not possible to discover a single standard that legitimately constitutes the narrowest ground for a decision on that issue, there is then no law of the land because no one standard commands the support of a majority of the Supreme Court." (quoting *United States v. Alcan Aluminum Corp.*, 315 F.3d 179, 189 (2d Cir. 2003)).

contended that the second prong of the test *bars* weighing a law's benefits against its burdens, confining consideration of benefits to the first prong. *Id.* at *24-25 (Roberts, C.J., concurring). It therefore assessed the magnitude of the law's burdens independently of its benefits, concluding that the burdens were substantial. *Id.* at *26 (Roberts, C.J., concurring). Because the two opinions lack a common denominator with respect to this issue, there is no rule of decision on 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. 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 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 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," *Whole Woman's Health*, 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]

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[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 *of the majority* can agree" (emphasis added)).

[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 Court. *See supra* at *6 n.3; *see also 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").

B. Because the Challenged Laws Pose Substantial Obstacles to Abortion Access, They Fail Both Formulations of the Undue Burden Test.

For the reasons set forth above and in Appellees' prior brief, the Challenged Laws fail the governing test set forth in *Whole Woman's Health* and the *June Medical* plurality opinion because they impose burdens on abortion access that are not justified by proportional benefits. *See Smith*, 338 F. Supp. 3d at 636-38; Appellees' Br. at 40-47. The Challenged Laws likewise fail the test set forth in Chief Justice Roberts' concurring opinion because they pose substantial obstacles to abortion access. Thus, even if the latter test were controlling, which Plaintiffs dispute, this Court should affirm the district court's judgment.

The district court's detailed findings of fact support the conclusion that the Challenged Laws pose substantial obstacles to abortion access in Texas. These findings are based on ample evidence, including expert and lay testimony from nineteen witnesses after a trial on the merits. First, the court found that the Challenged Laws "impose intrusive and heavy burdens" on patients, who hold diverse beliefs about the status of an embryo or fetus and the moral and spiritual implications of an abortion or miscarriage. *See* ROA.3314-18; *see also* 4441:11-4442:16. The court further found that the laws impose grief, stigma, shame, and distress on patients whose beliefs differ from the State's, ROA.3316; *see also* 4416:13-21, and deter some patients from seeking abortion or medical treatment for miscarriage, *see* ROA.3318; *see also* ROA.4092:14-17, 4104:12-13, 4135:3-18, 4288:13-18. The court relied on extensive record evidence, including uncontested testimony from a Texas obstetrician-gynecologist that many of her patients objected to a hospital policy requiring burial of EFTR, and from a miscarriage patient who sought treatment at that hospital and was "shocked and upset and confused" to learn of the policy, ROA.4086:22, felt the hospital was treating her like she was doing something wrong, ROA.4090:14-15; *accord* ROA.4090:24-4091:7, and explained that the hospital's policy exacerbated her grieving and interfered with her healing process, ROA.4089:8-17, 4090:8-21.

Second, the district court found that the Challenged Laws are a "substantial obstacle" and would "cripple the ability of healthcare providers to offer surgical abortions" due to "[t]he lack of capable and reliable options to dispose of embryonic and fetal remains." ROA.3317. The court found that the Challenged Laws would replace a "functional system for disposing of their special medical waste through a licensed medical waste vendor," ROA.3305, with a hypothetical, unregulated hodgepodge of entities "not structured or prepared to accommodate disposal of the *sui generis* category of embryonic and fetal tissue remains," ROA.3307. Ultimately, the court found that many providers would be unable to comply with the Challenged Laws and continue serving abortion and miscarriage patients. Far from "'merely mak[ing] abortions a little more difficult or expensive to obtain,'" *June Med.*, 2020 WL 3492640, at *25 (Roberts, C.J., concurring) (citation omitted), these burdens strike at the heart of the personal liberty to form and act on intimate beliefs recognized by *Casey* and reaffirmed by *June Medical*.

The district court's findings are plausible in light of the record viewed in its entirety, and many involve credibility determinations. *See, e.g.*, *Smith*, 338 F. Supp. 3d at 613, 632 n.22. *June Medical* makes clear, therefore, that disturbing those findings would constitute reversible error. 2020 WL 3492640, at *11 (plurality); *id.* at *28 (Roberts, C.J., concurring).

In addition, *June Medical* makes clear that Texas' arguments about the kinds of burdens that are cognizable under the undue burden standard are incorrect. First, contrary to the State's arguments, *see, e.g.*, Appellant's Br. at 37, 47, *June Medical* confirms that the abortion right includes protection for beliefs about the mystery of life and attributes of personhood, making burdens on those beliefs relevant to the constitutional analysis. Chief Justice Roberts's concurrence, for example, notes that *Casey* reaffirmed "'a woman's right to terminate her pregnancy before viability'" as "'the most central principle of *Roe*.'" *June Med.*, 2020 WL 3492640, at *23 (Roberts, C.J., concurring) (citation omitted). Importantly, it confirms that this right is part of a broader liberty to

"defin[e] [one's] 'own concept of existence, of meaning, of the universe, and of the mystery of human life.'" *Id.* (Roberts, C.J., concurring) (citation omitted). Thus, while the State may "'enact rules . . . designed to encourage [individuals] to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy,'" it may not simply impose its beliefs on individuals. *Id.* (Roberts, C.J., concurring) (citation omitted).

Second, *June Medical* belies Texas assertion that an obstacle is insubstantial unless it shutters an abortion clinic or prevents patients from terminating a pregnancy.[6] *See, e.g.*, Appellant's Br. 37, 39, 47. Both the plurality and the concurrence recognize that a wide range of burdens are relevant to the constitutional analysis, including longer wait times and increased crowding at abortion clinics, delays to abortion care, elevated health risks, and increased travel distances. *See id.* at *18, *21 (plurality); *id.* at *27 (Roberts, C.J., concurring). The Court also considers the disproportionate effects of the challenged law on vulnerable groups in determining whether a substantial obstacle exists. *Id.* at *18 (plurality); *id.* at *27 (Roberts, C.J., concurring) (taking into account that increased travel distance would "exacerbate th[e] difficulty" "Louisiana women already have . . . affording or arranging for transportation and childcare").

Finally, *June Medical* rejected the view of the large fraction test that Texas advances here. The plurality explained that the test 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). The concurrence tacitly joined in this holding. *See id.* at *29 (Roberts, C.J., concurring).

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[6] 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. *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).

Very truly yours,

/S/ *Stephanie Toti*

Stephanie Toti
LAWYERING PROJECT
25 Broadway, Fl. 9
New York, NY 10004
(646) 490-1083
stoti@lawyeringproject.org

Rupali Sharma
LAWYERING PROJECT
110 Winter St., No. 4
Portland, ME 04102
(908) 930-6645
rsharma@lawyeringproject.org

Molly R. Duane
Autumn C. Katz
Caroline M. Sacerdote
CENTER FOR REPRODUCTIVE RIGHTS
199 Water St., Fl. 22
New York, NY 10038
(917) 637-3600
mduane@reprorights.org
akatz@reprorights.org
csacerdote@reprorights.org

J. Alexander Lawrence
MORRISON & FOERSTER, L.L.P.
250 W. 55th St., Fl. 24
New York, NY 10019
(212) 468-8000
alawrence@mofo.com

cc: All Counsel of Record