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VIA CM/ECF

Mr. Lyle W. Cayce, Clerk
U.S. Court of Appeals for the Fifth Circuit
600 S. Maestri Place
New Orleans, LA 70130-3408

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

Dear Mr. Cayce:

Per the Court's order of June 29, 2020, the State submits this supplemental letter brief addressing the impact of the Supreme Court's decision in *June Medical Services v. Russo*, Nos. 18-1323, 18-1460, 2020 WL 3492640 (U.S. June 29, 2020).

June Medical confirms that the district court's injunction is unlawful in at least three ways. First, *June Medical* underscores that Plaintiffs lack standing. *June Medical* permits abortion providers in some circumstances to sue to challenge regulatory burdens that implicate *access* to abortion. But providers do not have standing to sue on behalf of what they imagine their patients' subjective *beliefs* to be.

Second, *June Medical* confirms that this case is governed by *Casey*'s undue-burden standard—not the amorphous cost-benefit balancing test Plaintiffs propose. Under the *Casey/June Medical* standard, the only questions are whether Texas's fetal-remains law is reasonably related to a legitimate state interest—it is—and

whether it creates a substantial obstacle to abortion access—it does not. The law thus must be upheld.

Third, *June Medical* confirms that only evidence, not Plaintiffs' speculation, counts in the undue-burden analysis. The *June Medical* plurality detailed over the course of many pages the plaintiff doctors' efforts to comply with Louisiana's admitting-privileges law. By contrast, the Plaintiffs here have offered *zero* evidence. *June Medical* forecloses their effort to invalidate Texas law with hypothesis and say-so.

I. Plaintiffs Lack Standing To Raise an Undue-Burden/Freedom-of-Belief Claim on Behalf of Their Patients.

Five members of the Court in *June Medical* rejected Louisiana's argument that abortion providers lack third-party standing to challenge laws restricting access to abortion. *Id.* at *8-*10 (plurality op.); *id.* at *26 n.4 (Roberts, C.J., concurring in the judgment). After first concluding Louisiana waived the argument, the plurality noted that the Court has "long permitted abortion providers to invoke the rights of their actual or potential patients in challenges to abortion-related regulations." *Id.* at *9 (plurality op.). But every case the plurality cited concerns *access* to abortion. None concerns patients' subjective "beliefs" about abortion. That difference is key, and requires the conclusion that Plaintiffs in this case lack standing.

When it comes to challenging regulations that restrict abortion access, the *June Medical* plurality explained that providers are "far better positioned than their patients to address the burdens of compliance" and may represent those who "seek access to their market or function." *Id.* at *10. Moreover, providers' obligation to

comply with the law "eliminates any risk that their claims [on behalf of their patients] are abstract or hypothetical." *Id.*

But a provider's "burdens of compliance" and a patient's "access to [the] market" are irrelevant when the claim rests on a patient's subjective beliefs. While a court may assume that abortion patients wish to be able to access abortion, it cannot assume that those patients subjectively believe that fetal remains should be placed in a landfill following incineration. And in any event, the record confirms that Plaintiffs have no idea what their patients believe about the disposition of fetal remains, because they have never asked them. *See* Appellant's Br. 16-17. That makes Plaintiffs' claim "abstract or hypothetical," and beyond the federal courts' jurisdiction.

II. The *Casey* Undue-Burden Test Controls.

Turning to the merits, *June Medical* confirms that *Casey*'s undue-burden standard governs Plaintiffs' claims. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 878 (1992) (plurality op.); Appellant's Br. 27 (setting out *Casey* test). Under that test, a regulation of previability abortion is constitutional if it (1) is reasonably related to a legitimate state interest, and (2) does not pose a substantial obstacle to abortion. *June Med.*, 2020 WL 3492640, at *23 (Roberts, C.J., concurring in the judgment); *Casey*, 550 U.S. at 878 (plurality op.). That test does not permit the Court to engage in a freestanding, amorphous balancing of a law's benefits and burdens. *Cf.* Appellees' Br. 30 (improperly asking this Court to engage in a balancing test). Because Texas's fetal-remains law is plainly related to a legitimate interest and imposes no obstacle whatsoever to obtaining abortion, it is necessarily lawful.

In applying the *Casey* standard, *June Medical* resolves a point the parties in this case had previously disputed. The State has always asked this Court to evaluate the fetal-remains law against the undue-burden standard by looking for a substantial obstacle. *See* Appellant's Br. 27. Plaintiffs, by contrast, have asked the Court to apply a different test, purportedly grounded in *Whole Woman's Health v. Hellerstedt*, whereby the Court should "consider the burdens a law imposes on abortion access together with the benefits those laws confer." 136 S. Ct. 2292, 2309 (2016); Appellees' Br. 29. To Plaintiffs, that language requires the Court to assess only whether the benefits of Texas's law are sufficiently salutary to justify its burdens. Appellees' Br. 30. Plaintiffs believe that even if a law does not pose a substantial burden, it nevertheless is unconstitutional if its benefits do not outweigh its burdens. *See id.*

June Medical confirms that the State has it right and Plaintiffs have it wrong. Chief Justice Roberts' concurrence in *June Medical* is controlling and explicit: There is no balancing test. 2020 WL 3492640, at *23-*26 (Roberts, C.J. concurring in the judgment);[1] *see also id.* at *63 (Kavanaugh, J., dissenting) (noting "the *Whole Woman's Health* cost-benefit standard" is not the law). All analysis in *Whole Woman's Health* simply referred to the two parts of the undue-burden test—a legitimate state interest (benefit) and a substantial obstacle (burden). *Id.* at *25 (Roberts, C.J., concurring in the judgment). As the Chief Justice noted, the *Whole Woman's Health* majority stated that it was applying *Casey*, not changing it. *Id.* at *26.

[1] As the narrowest ground for the Supreme Court's decision to reverse, Chief Justice Roberts' concurrence is controlling. *Marks v. United States*, 430 U.S. 188, 193 (1977).

Nothing in the *June Medical* plurality suggests otherwise. The plurality did not criticize or disagree with the Chief Justice's concurrence. Instead, the plurality affirmed that "[s]ince *Casey*, we have repeatedly reiterated that the plaintiff's burden in a challenge to an abortion regulation is to show that the regulation's 'purpose or effect' is to 'plac[e] a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.* at *21 (plurality op.) (quoting *Casey*, 505 U.S. at 877 (plurality op.)); *see also Gonzales v. Carhart*, 550 U.S. 124, 146 (2007) (stating that "[r]egulations which do no more than create a structural mechanism by which the State . . . may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose") (cleaned up).

That language confirms two important points. First, Plaintiffs have *always* been required to prove a substantial obstacle. Their attempt to create a lower legal standard for themselves has been improper from the start, and their misreading of *Whole Woman's Health* is (and has always been) wrong.

Second, the district court's decision is plainly wrong even under the *Casey/June Medical* standard. To be sure, the district court purported to balance benefits and burdens, ROA.3317-19, but it also determined that Texas's law created a substantial obstacle without any balancing, as it would cause a "shutdown of women's healthcare providers." ROA.3317-18; *see also* ROA.3317 (stating that the lack of disposition options is a "substantial obstacle"), 3319 (stating that the law is a "substantial obstacle" to all women who disagree with it), 3328 (stating that the law creates a "substantial obstacle[] . . . while offering minimal benefits"). Its balancing

analysis was wrong both then and now, but no remand is needed, because the district court was explicit that it would have declared Texas's law unconstitutional even absent balancing. As a result, there is no need to remand for the district court to reconsider its ruling in light of *June Medical*. The Court should decide this appeal now without remand. And as set out below, the only permissible disposition is reversal.

III. *June Medical* Confirms Plaintiffs' Evidence Regarding Abortion Access Is Insufficient.

Since the start of this litigation, Plaintiffs have supported their claims of a substantial burden with exactly zero evidence. While *June Medical* reached its result with careful study of the district court record, 2020 WL 3492640, at *11 (plurality op.), no such record exists here. The district court made no evidentiary determinations that merit deference. *June Medical*'s fact-intensive analysis only underscores Plaintiffs' inability to point to any a substantial obstacle.

A. Texas's fetal-remains law is reasonably related to a legitimate state interest.

The fetal-remains law easily satisfies the undue-burden standard's "threshold requirement that the State have a 'legitimate purpose' and that the law be 'reasonably related to that goal.'" *Id*. at *25 (Roberts, C.J., concurring in the judgment). The Supreme Court has already said as much. *Box v. Planned Parenthood of Indiana and Kentucky, Inc.*, 139 S. Ct. 1780 (2019), held that (1) Indiana has a "legitimate interest in proper disposal of fetal remains," and (2) Indiana's fetal-remains law, which required abortion clinics to dispose of fetal remains through burial or cremation, is rationally related to that interest. *Id.* at *1 (cleaned up).

Texas, likewise, has a legitimate interest in the proper disposal of fetal remains, and its fetal-remains law is reasonably related to that interest, as it provides methods for properly disposing of those remains. Tex. Health & Safety Code § 697.004. The district court did not disagree; it "assumed," in the absence of evidence to the contrary, that "the challenged laws further a legitimate state interest." ROA.3294-302. So Texas's fetal-remains law satisfies the first element of the undue-burden test. *See* Appellant's Br. 28-34; Reply Br. 14-17.

B. Plaintiffs failed to prove a substantial obstacle to abortion access.

As to the second part of the undue-burden test, the *June Medical* plurality proceeded in two steps, asking (1) whether the doctors made good-faith efforts to comply with Louisiana's law, and (2) whether any resulting clinic closures would cause a substantial obstacle to abortion access. *June Med.*, 2020 WL 3492640, at *12-*19 (plurality op.). Here, Plaintiffs made no effort to comply with the fetal-remains law, and Plaintiffs presented no evidence of the impact of any hypothetical clinic closures on women in Texas. Reversal thus is warranted.

1. Plaintiffs were required to, but did not, make a good-faith effort to comply with the fetal-remains law.

The *June Medical* plurality began its analysis by first considering whether the Louisiana doctors made a good-faith effort to obtain admitting privileges. *Id.* at *12-*17. As Chief Justice Roberts explained, the "good-faith" finding "was necessary to ensure that the physicians' inability to obtain admitting privileges was attributable to

the new law rather than a halfhearted attempt to obtain privileges." *Id.* at *28 (Roberts, C.J., concurring in the judgment). Only then could clinic closures be blamed on Louisiana's law, rather than the doctors' lack of effort. *Id.*; *see also id.* at *43 (Alito, J., dissenting) (acknowledging importance of good-faith finding).

The plurality's opinion went doctor-by-doctor, step-by-step, through each application and inquiry the doctors made and the responses they received. *Id.* at *14-*17 (plurality op.). The plurality noted that the district court supervised those efforts for over one and a half years as the doctors attempted to obtain privileges at thirteen different hospitals. *Id.* at *13. While the plurality and dissent disagreed about the level of zeal the doctors exhibited, it was undisputed that the doctors made at least a minimal effort to comply.

The same cannot be said here, where Plaintiffs made no effort whatsoever to comply with the fetal-remains statute. The record shows that Plaintiffs made no attempt to contact any of the 1300 licensed funeral homes, 164 licensed crematories, their own medical-waste vendor, or any cemetery in Texas in an attempt to comply with Texas's law. Appellant's Br. 10-11, 37. Instead, they preferred litigation. Appellant's Br. 10. But as all nine members of the Supreme Court have made clear, an attempt to comply is essential in order to find that it is the challenged law, not the doctor's personal choices, that will cause clinics to close and burden women. *June Med.*, 2020 WL 3492640, at *14-*17 (plurality op.); *id.* at *28 (Roberts, C.J., concurring in the judgment); *id.* at *43 (Alito, J., dissenting). Plaintiffs ignored that requirement, and in so doing, left this Court with only one option: reversal.

2. Plaintiffs failed to present evidence of the law's impact on women's access to abortion.

Having determined that the Louisiana doctors were unable to obtain privileges, the *June Medical* plurality then considered the impact that would have on the availability of abortion in Louisiana. *Id.* at *17-*19 (plurality op.). The Court mapped out the location of each clinic in Louisiana that currently operated and that would continue to operate if the law took effect. *Id.* at *17-*18. It considered the number of abortions performed at each clinic and by each doctor in Louisiana, how many more abortions a doctor could perform, and whether there would be a limit on later-term abortions if certain clinics closed. *Id.* at *18-*19. Only then did the plurality conclude that the law was a substantial obstacle. *Id.* at *19.

The district court did none of that in this case because Plaintiffs presented none of that evidence. There is no evidence of how many abortion providers there are in Texas, where they are located, how many abortions non-Plaintiff clinics can perform, and whether they can absorb any new patients. Instead, Plaintiffs admitted that they have not taken any steps to determine what they would do if required to comply with Texas's law. Appellant's Br. 11.

The State's briefs explain in more detail the numerous flaws in the district court's opinion, the additional gaps in the evidentiary record, and the evidence the State presented of Plaintiffs' options for compliance. Under the analysis performed in *June Medical*, Plaintiffs' evidence is not sufficient to support the district court's determination that Texas's fetal-remains law will pose a substantial obstacle.

IV. Plaintiffs' Freedom-of-Belief Claim Remains Legally and Factually Flawed.

The Court should not expand the right to abortion to include Plaintiffs' novel freedom-of-belief claim. Appellant's Br. 44-47; Reply Br. 18-23. *June Medical* offers no support to Plaintiffs' legal theory, as it focuses, like every other abortion case, on abortion access, not beliefs. 2020 WL 3492640 at *12-*19 (plurality op.). Further, Chief Justice Roberts' concurrence appears to steer the Court away from making the value judgments that would be inherent in recognizing a freedom-of-belief claim based on personal feelings of shame, stigma, and dignity. *Id.* at *23 (Roberts, C.J., concurring in the judgment) (opining that it is not "plausible" for courts to weigh "such imponderable values" as the woman's "own concept of existence"). Moreover, Plaintiffs do not know what their patients believe about fetal-remains disposition or how it will affect them. Appellant's Br. 16-17. There is, therefore, no evidence that a belief that fetal remains should be placed in a landfill or sewer would somehow create a substantial obstacle to abortion for a large fraction of women.

* * *

June Medical emphasized the importance of evidence, but no evidence supports Plaintiffs' claims here. The district court's findings of fact are clearly erroneous, and its conclusions of law are flawed. The only proper disposition is reversal.

Sincerely,

/s/ Kyle D. Hawkins
Kyle D. Hawkins
Solicitor General
Counsel of Record for Defendant-Appellant

cc: All counsel of record (via CM/ECF)