No. 14-50928

In the United States Court of Appeals for the Fifth Circuit

WHOLE WOMAN'S HEALTH; AUSTIN WOMEN'S HEALTH CENTER; KILLEEN WOMEN'S HEALTH CENTER; NOVA HEALTH SYSTEMS D/B/A REPRODUCTIVE SERVICES; SHERWOOD C. LYNN, JR., M.D.; PAMELA J. RICHTER, D.O.; and LENDOL L. DAVIS, M.D., on behalf of themselves and their patients,

Plaintiffs/Appellees/Cross-Appellants,

v.

KIRK COLE, M.D., Commissioner of the Texas Department of State Health Services; MARI ROBINSON, Executive Director of the Texas Medical Board, in their official capacities,

Defendants/Appellants/Cross-Appellees.

On Appeal from the United States District Court for the Western District of Texas, Austin Division
Case No. 1:14-CV-284-LY

APPELLEES' MOTION TO STAY THE MANDATE PENDING THE FILING OF A PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF INTERESTED PERSONS

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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Other Persons with a Financial Interest in the Outcome of this Litigation

Other Texas abortion providers; Texas hospitals; Texas ambulatory surgical centers

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The district court's judgment in this case permanently enjoined two provisions of Texas House Bill 2 ("H.B. 2" or the "Act"), 83rd Leg., 2nd Called Sess. (Tex. 2013), which would have drastically reduced the number and geographic distribution of abortion clinics in Texas. This Court's decision dated June 9, 2015, affirmed in part, modified in part, vacated in part, and reversed in part that judgment, and will require clinics throughout Texas that have provided safe abortion services for decades to close or remain closed. Plaintiffs respectfully ask the Court to stay its mandate to preserve abortion access for all Texas women while Plaintiffs file a petition for a writ of certiorari in the Supreme Court.

BACKGROUND

On August 29, 2014, the district court permanently enjoined two provisions of the Act: the "ASC requirement," Act, § 4 (codified at Tex. Health & Safety Code Ann. § 245.010(a)); 25 Tex. Admin. Code § 139.40, which requires that the licensing standards for abortion facilities be equivalent to the licensing standards for ambulatory surgery centers ("ASCs"), and the "admitting-privileges requirement," Act, § 2 (codified at Tex. Health & Safety Code Ann. § 171.0031(a)(1)(A)); 25 Tex. Admin Code §§ 139.53(c)(1), 139.56(a)(1), which requires that physicians who perform abortions have admitting privileges at a hospital located within 30 miles of where they perform abortions. ROA.2681-2705. The admitting-privileges requirement had been in effect since October 31,

2013, and nearly half of Texas's abortion clinics closed leading up to or immediately following its implementation. ROA.2688. The ASC requirement was scheduled to take effect on September 1, 2014. *Id*. On October 2, 2014, this Court stayed the district court's judgment in nearly all respects, permitting the ASC requirement to take effect and causing the immediate closure of over a dozen additional abortion clinics. *See Whole Woman's Health v. Lakey*, 769 F.3d 285 (5th Cir. 2014). On October 14, 2014, the stay was vacated in large part, however, by the Supreme Court, allowing many clinics that had closed to reopen. *See Whole Woman's Health v. Lakey*, __ U.S. __, 135 S. Ct. 399 (2014).[1]

Yesterday, this Court issued a decision affirming in part, modifying in part, vacating in part, and reversing in part the district court's judgment. *Whole Woman's Health v. Cole*, No. 14-50928 (5th Cir. June 9, 2015). In the normal course of events, the mandate would issue on July 1, 2015, forcing numerous clinics that are currently open to once again close and preventing others from re-opening. *See* Fifth Cir. R. 41 I.O.P. ("Absent a motion for stay or a stay by operation of an order, rule, or procedure, mandates will issue promptly on the 8th day after the time for filing a petition for rehearing expires; or after entry of an order denying the petition."). Plaintiffs intend to file a petition for a writ of

[1] Plaintiffs applied to Justice Scalia, as Circuit Justice, to vacate the stay, and he referred the application to the full Court.

certiorari in the Supreme Court, and they seek a stay of the mandate from this Court while that petition is pending.

ARGUMENT

I. Standard of Review.

Federal Rule of Appellate Procedure 41(d)(2) authorizes this Court to stay its mandate pending the filing of a petition for a writ of certiorari in the Supreme Court. Such a stay is appropriate when: (1) there is a reasonable probability that the Supreme Court will grant certiorari; (2) there is a significant possibility that the decision of the court of appeals will be reversed; and (3) it is likely that irreparable harm will occur in the absence of a stay. *See Baldwin v. Maggio*, 715 F.2d 152, 153 (5th Cir. 1983). As set forth below, all three factors are satisfied in this case.

II. There Is a Reasonable Probability That the Supreme Court Will Grant Certiorari.

In their opening brief on the merits, Defendants acknowledged that the Supreme Court is likely to review this case following this Court's disposition of it. *See* Appellants' Br. (Doc. 00512824386) at 17 ("[T]he Supreme Court is likely to review this case on writ of certiorari . . . ."). Accordingly, this factor is not in dispute.

The Supreme Court's prior intervention in the case strongly indicates that it is likely to grant certiorari. The standard for vacating a stay issued by a court of appeals includes that the case "'could and very likely would be reviewed here upon

final disposition in the court of appeals.'" *W. Airlines, Inc. v. Int'l Bhd. of Teamsters*, 480 U.S. 1301, 1305 (1987) (O'Connor, J., in chambers) (quoting *Coleman v. Paccar, Inc.*, 424 U.S. 1301, 1304 (1976) (Rehnquist, J., in chambers)); *see also Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, ___ U.S. ___, 134 S. Ct. 506, 508-09 (2013) (Breyer, J., dissenting from denial of application to vacate stay, joined by Ginsburg, Sotomayor, & Kagan, JJ.). Thus, the fact that the Supreme Court previously vacated a substantial portion of the stay entered by this Court indicates that it is "very likely" that the Supreme Court will grant Plaintiffs' petition for a writ of certiorari.

III. There Is a Significant Possibility That This Court's Decision Will Be Reversed.

The standard for granting a stay pending the filing of a petition for a writ of certiorari does not require there to be a substantial likelihood that the decision of the court of appeals will be reversed; only a "significant possibility" of reversal is required. *Baldwin*, 715 F.2d at 153. Here, such a significant possibility exists for several reasons.

First, the Supreme Court's October 14, 2014 decision to vacate the stay issued by the earlier panel required it to conclude that this Court was "demonstrably wrong in its application of accepted standards." *W. Airlines, Inc.*, 480 U.S. at 1305; *accord Abbott*, 134 S. Ct. at 506 (Scalia, J., joined by Thomas & Alito, JJ., concurring in denial of application to vacate stay); *id.* at 507-09 (Breyer,

J., joined by Ginsburg, Sotomayor & Kagan, JJ., dissenting from denial of application to vacate stay). The earlier panel's decision focused largely on the merits of the case, and the basis for this Court's decision to reverse the district court's judgment is substantially the same as the basis for that October 2, 2014 decision to stay the district court's judgment pending appeal. For example, both decisions rejected the argument that, to satisfy the undue burden standard, laws that restrict access to abortion must further a valid state interest, holding instead that such laws must be sustained if any conceivable rationale exists for their enactment. *See Cole*, slip op. at 36-37 (citing *Lakey*, 769 F.3d at 297). Likewise, both held that the proper denominator for the large fraction test is all women of reproductive age, rather than the subset of women for whom the law would be a meaningful burden (which, in *Casey*, was less than one percent of women seeking abortions). *See Cole*, slip op. at 40 (citing *Lakey*, 769 F.3d at 299); *contra Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 894-95 (1992) (joint opinion of O'Connor, Kennedy & Souter, JJ.). Further, both decisions declined to follow the Supreme Court's holding in *Citizens United* that, regardless of the relief requested by the parties, a court is required to tailor its remedy to the scope of the constitutional violation proven at trial, *see Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 329-36 (2010), instead holding that "it was inappropriate for the district court to grant unrequested relief in a constitutional challenge."

Cole, slip op. at 25-26 (citing *Lakey*, 769 F.3d at 293). Similarly, both decisions declined to follow the Supreme Court's holding in *Church of Lukumi* that "the effect of a law in its real operation is strong evidence of its object," *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 535 (1993), instead holding that "an impermissible purpose [cannot] be inferred from the effect of the law," *Cole*, slip op. at 34 (citing *Lakey*, 769 F.3d at 295). Accordingly, the Supreme Court is likely to conclude that this Court's decision on the merits of the appeal is demonstrably wrong in its application of accepted standards for the same reasons that it concluded this Court's decision on Defendants' stay motion was demonstrably wrong in its application of accepted standards.

Second, the Supreme Court has never upheld a law that would require over 80% of a state's abortion clinics to close. Indeed, none of the requirements upheld in *Casey* and *Carhart* threatened the closure of a single clinic. *See Gonzales v. Carhart*, 550 U.S. 124, 168 (2007) (upholding a ban on a certain method of second-trimester abortion); *Casey*, 505 U.S. at 881-87, 899-901 (upholding an informed-consent requirement; a 24-hour waiting period; a parental-consent requirement; and recordkeeping and reporting requirements). And the Supreme Court upheld a physician-only requirement in *Mazurek* only after finding that it would affect "only a single practitioner" and that no woman seeking an abortion would be required "to travel to a different facility than was previously available."

Mazurek v. Armstrong, 520 U.S. 968, 973-74 (1997). Here, the impact of the Act is sweeping and unprecedented. The district court found that it would force 80% of the abortion clinics in Texas to close, prevent the remaining clinics from operating at full capacity, and deter new clinics from opening. ROA.2688. Given that the Act impedes abortion access to a degree far greater than any statute ever upheld by the Supreme Court, there is a significant possibility that this Court's decision upholding the Act will be reversed.

Third, this Court's decision directly conflicts with prior decisions of the Supreme Court, this Court, and courts in other circuits.[2] As explained in Plaintiffs' merits briefs, the Supreme Court has never upheld a law that limits the availability of abortion services without first confirming that the law furthers a valid state interest. *See, e.g.*, *Carhart*, 550 U.S. at 158 ("The Act's ban on abortions that involve partial delivery of a living fetus furthers the Government's objectives."); *Casey*, 505 U.S. at 882 ("[Through the challenged informed consent requirements,] the State furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later…that her decision was not fully informed."); *id.* at 885 (evaluating whether the State's legitimate interest in informed consent is "reasonably served" by the challenged waiting-period

[2] This also contributes to the likelihood that the Supreme Court will grant Plaintiffs' petition for a writ of certiorari.

requirement). Indeed, with respect to laws aimed at promoting health, the Supreme Court has explained that: "The existence of a compelling state interest in health . . . is only the beginning of the inquiry. The State's regulation may be upheld only if it is reasonably designed to further that state interest." *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 434 (1983) (*overruled on other grounds by Casey*); *accord Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 65-67, 75-79, 80-81 (1976) (invalidating a ban on the use of a common second-trimester abortion method but upholding certain informed consent and recordkeeping requirements); *Doe v. Bolton*, 410 U.S. 179, 194-95 (1973) (invalidating a Georgia law requiring that all abortions be performed in an accredited hospital).

This Court's decision is in conflict with these precedents, despite its prior holding that "based on the rationale for *stare decisis* articulated by the *Casey* plurality, . . . the 'central holdings' of pre-*Casey* decisions remain intact" to the extent not inconsistent with *Casey*. *Barnes v. Mississippi*, 992 F.2d 1335, 1337 (5th Cir. 1993). As noted above, this Court rejected the argument that "the two requirements at issue are unconstitutional unless they are shown to actually further the State's legitimate interests," *Cole*, slip op. at 36, holding instead that the requirements must be sustained if "'any conceivable rationale exists'" for their enactment, *id.* at 37 (quoting *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583, 594 (5th Cir. 2014)).

Further, the decision in this case is in conflict with recent decisions from courts in other circuits, which have held abortion regulations unconstitutional because they would limit the availability of abortion services without furthering a valid state interest. *See, e.g.*, *Planned Parenthood Ariz., Inc. v. Humble*, 753 F.3d 905, 913 (9th Cir. 2014) (reversing district court's failure to enter preliminary injunction) ("[W]e must weigh the burdens against the state's justification, asking whether and to what extent the challenged regulation actually advances the state's interests."), *cert. denied*, __ U.S. __, 135 S. Ct. 870 (2014); *Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 798 (7th Cir. 2013) ("*Van Hollen I*") (affirming entry of a preliminary injunction) ("The cases that deal with abortion-related statutes sought to be justified on medical grounds require . . . evidence . . . that the medical grounds are legitimate . . . ."), *cert. denied*, 134 S. Ct. 2841 (2014); *Planned Parenthood of Wis., Inc. v. Van Hollen*, No. 13-cv-465-wmc, 2015 WL 1285829, at *1 (W.D. Wis. Mar. 20, 2015) ("*Van Hollen II*") (entering a permanent injunction) ("[T]he State has failed to meet its burden of demonstrating through credible evidence a link between the admitting privileges requirement and a legitimate health interest."); *Planned Parenthood Se., Inc. v. Strange*, 33 F. Supp. 3d 1330 (M.D. Ala. 2014) (holding the challenged regulation unconstitutional) ("[C]ourts must examine the strength of the State's justifications for regulations, not just the effects of the regulation.") (internal quotations omitted); *accord*

Jackson Women's Health Org. v. Currier, 760 F.3d 448, 458 (5th Cir. 2014) (affirming entry of a preliminary injunction against a Mississippi admitting-privileges requirement based, in part, on factors related to extent to which requirement would further a valid state interest, including "the reasons cited by the hospitals for denying admitting privileges to [abortion providers]," and "the nature and process of the admitting privileges determination."). There is no way to reconcile the outcomes in those cases with the decision in this case.

Those cases further hold that the burdens imposed by an abortion restriction must be proportional to the benefits it provides. *See Humble*, 753 F.3d at 914; *Van Hollen I*, 738 F.3d at 798, *Van Hollen II*, 2015 WL 1285829, at *37-38; *Strange*, 33 F. Supp. 3d at 1377-78. This Court's decision flatly rejected that interpretation of the undue burden standard. *See Cole*, slip op. at 38 n.33 ("'In our circuit, we do not balance the wisdom or effectiveness of a law against the burdens the law imposes.'") (quoting *Lakey*, 769 F.3d at 297).

Given the Supreme Court's consistent practice of requiring laws that restrict abortion access to further a valid state interest and the split in authority concerning whether the burdens imposed by an abortion restriction must be proportional to its benefits, there is a significant possibility that this Court's decision will be reversed.

IV. It Is Likely That Irreparable Harm Will Occur in the Absence of a Stay.

In the absence of a stay, abortion providers and women seeking abortion services in Texas are likely to suffer three forms of irreparable harm. First, both abortion providers and their patients will suffer a deprivation of constitutional rights, which is irreparable harm *per se*. *See, e.g.*, *Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir., Unit B 1981).

Second, women seeking abortion services will face increased risks to their health. The greater distances that many women will have to travel to reach a licensed abortion provider combined with the statewide shortage in the availability of abortion services will delay many women in obtaining an abortion, and some women will not be able to obtain an abortion at all. *See* ROA.2359-60; ROA.2387-88; *Van Hollen I*, 738 F.3d at 796 ("Patients will be subjected to weeks of delay because of the sudden shortage of eligible doctors—and delay in obtaining an abortion can result in the progression of a pregnancy to a stage at which an abortion would be less safe, and eventually illegal."). Although abortion is safe throughout pregnancy, its risks increase with gestational age. ROA.2372, ROA.2388. As a result, women who are delayed in obtaining an abortion face greater risks than those who are able to obtain early abortions. ROA.2372, ROA.2388. Women who are unable to obtain an abortion are also at increased risk; DSHS' own data shows that, in Texas, the risk of death from carrying a

pregnancy to term is 100 times greater than the risk of death from having an abortion. ROA.2950-51; *see* ROA.2377. Further, some women who are unable to access legal abortion will turn to illegal and unsafe methods of abortion. *See* ROA.2360-62. This trend has been on the rise in Texas since the first wave of clinics closed as a result of the admitting-privileges requirement, and will increase if both of the challenged requirements are fully in force. ROA.2471-72; ROA.2362.

Third, some abortion clinics forced to close or remain closed as a result of this Court's decision will not be able to reopen if Plaintiffs ultimately prevail at the Supreme Court. That, too, is a form of irreparable harm. *See Abbott*, 134 S. Ct. at 509 (Breyer, J., joined by Ginsburg, Sotomayor & Kagan, JJ., dissenting from denial of application to vacate stay) ("The longer a given facility remains closed, the less likely it is ever to reopen even if the admitting privileges requirement is ultimately held unconstitutional."); *Van Hollen I*, 738 F.3d at 795-96 ("[I]f forced to comply with the statute, only later to be vindicated when a final judgment is entered, the plaintiffs will incur in the interim the disruption of the services that the abortion clinics provide . . . . [T]heir doctors' practices will be shut down completely . . . ."); *see generally Atwood Turnkey Drilling, Inc. v. Petroleo Brasileiro, S.A.*, 875 F.2d 1174, 1179 (5th Cir. 1989) (explaining that irreparable

harm occurs "where the potential economic loss is so great as to threaten the existence of the movant's business" and collecting cases).

Thus, all three requirements for the Court to stay its mandate pending the filing of Plaintiffs' petition for a writ of certiorari in the Supreme Court are satisfied.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that this Court stay its mandate pending the filing of a petition for a writ of certiorari in the Supreme Court.

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