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; NOVA HEALTH SYSTEMS, INCORPORATED, On Behalf of Itself, Its Staff, Physicians, and Patients, doing business as Reproductive Services; 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; FAITH JOHNSON, District Attorney for Dallas County, In Her Official Capacity; SHAREN WILSON, Criminal District Attorney for Tarrant County, In Her Official Capacity; ABELINO REYNA, Criminal District Attorney for McLennan County, In His Official Capacity,

Defendants-Appellants.

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

BRIEF OF ALLIANCE DEFENDING FREEDOM AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS AND FOR REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Under Fed. R. App. P. 26.1 and 5th Cir. R. 26.1, Amicus Curiae Alliance Defending Freedom states that it is a non-profit organization, has no parent corporation, and does not issue stock.

Dated: December 9, 2020

Respectfully submitted,

/s/ Elissa M. Graves
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SUPPLEMENTAL CERTIFICATE OF INTERESTED PARTIES

Amicus is unaware of any additional interested parties not listed in the Appellants' and Appellees' statements of interested parties.

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IDENTITY OF AMICUS CURIAE[1]

This legal challenge concerns the constitutionality of a Texas law prohibiting dismemberment abortions prior to the death of the unborn child. Alliance Defending Freedom is a nonprofit, public interest legal organization that provides strategic planning, training, funding, and direct litigation services to protect constitutional freedoms. Amicus has a strong interest in the Courts applying the correct legal standard when evaluating constitutional challenges to abortion regulations following the Supreme Court's fractured opinion in *June Medical Services v. Russo*, 140 S. Ct. 2103 (2020).

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), amicus states that no counsel for any party authored this brief in whole or in part, and no person or entity, other than amicus and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

INTRODUCTION

This case involves the solemn issue of how to value human life. The State of Texas enacted Senate Bill 8, prohibiting "dismemberment abortions" (clinically known as Dilation and Evacuation), prior to fetal death. What the law forbids is causing an unborn child's death by "corporal dismemberment," in which the child dies "by bleeding to death as his or her body is torn apart." *Whole Woman's Health v. Paxton*, 978 F.3d 896, 913 (Willet, J., dissenting). SB 8 prohibits the use of this gruesome procedure before the death of the unborn child. A panel of this Court held that SB 8 is unconstitutional under *June Medical Services v. Russo*, 140 S. Ct. 2103 (2020), a case about Louisiana's admitting-privileges requirement for abortion providers.

No opinion in *June Medical* commanded majority support. A four-Justice plurality held that—*after* conducting *Casey*'s substantial-obstacle analysis—courts should judge for themselves a law's benefits and then balance them against the law's purported burdens, citing *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). In essence, the plurality asked "whether the law burdens a very large fraction of the people that it burdens," *June Medical,* 140 S. Ct. at 2176 (Gorsuch, J. dissenting), even though *Casey* conducted no such analysis.

Chief Justice Roberts corrected this error in a narrower opinion concurring in the judgment that binds this Court. *See Marks* v. *United States*, 430 U.S. 188, 193 (1977) (when "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.") (cleaned up). The Chief Justice's concurrence applied *Casey*'s unvarnished undue burden test. *June Medical*, 140 S. Ct. at 2135–37 (Roberts, C.J., concurring). "Laws that do not pose a *substantial obstacle* to abortion access are permissible, so long as they are reasonably related to a legitimate state interest." *Id.* at 2135 (cleaned up) (emphasis added). No balancing of benefits and burdens is required. *Id.* at 2138.

A split panel of this Court rejected the Chief Justice's concurrence in *June Medical* as "the controlling formulation of the undue burden test," concluding that the plurality's reading of *Hellerstedt* controls. *Paxton*, 978 F.3d at 903. It did so even though the Eighth Circuit previously held in *Hopkins v. Jegley*, 968 F.3d 912 (8th Cir. 2020), "that Chief Justice Roberts' separate opinion in *June Medical* is controlling because his vote was necessary to enjoining Louisiana's admitting-privileges law." *Paxton,* 978 F.3d. at 904 & n.5. Shortly after the panel ruled, the Sixth Circuit agreed with the Eighth Circuit. *EMW Women's Surgical Ctr. v. Friedlander*, 978 F.3d 418 (6th Cir. 2020).

The panel majority stood alone. Amicus urges this Court to join the Eighth and Sixth Circuit and hold that, under *Marks*, Chief Justice Roberts' concurrence is the binding opinion from *June Medical*.

ARGUMENT

I. The Supreme Court's splintered opinion in *June Medical Services v. Russo* garnered no majority opinion.

In *June Medical*, the Supreme Court invalidated a Louisiana law that required "any doctor who performs abortions to hold active admitting privileges at a hospital that is located not further than thirty miles from the location at which the abortion is performed or induced and that provides obstetrical or gynecological health care services." *June Medical*, 140 S. Ct. at 2113 (cleaned up). The plurality applied a balancing test based on its understanding of *Hellerstedt*, 136 S. Ct. 2292. The plurality's test "requires courts independently to review the legislative findings upon which an abortion-related statute rests and to weigh the law's asserted benefits against the burdens it imposes on abortion access." *June Medical*, 140 S. Ct. at 2112.

Chief Justice Roberts concurred in the result, but not the reasoning of the four-justice plurality opinion. He authored a separate opinion that concluded "[u]nder *Case*y, the State may not impose an undue burden on the woman's ability to obtain an abortion. A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus. Laws that do not pose a substantial obstacle to abortion access are permissible, so long as they are reasonably

related to a legitimate state interest." *June Medical*, 140 S. Ct. at 2135 (Roberts, C.J., concurring) (cleaned up).

The Chief Justice rejected the plurality's assumption that a balancing test was announced in *Hellerstedt*, explaining that "[n]othing about *Casey* suggested that a weighing of costs and benefits of an abortion regulation was a job for the courts. On the contrary, we have explained that the traditional rule that state and federal legislatures have wide discretion to pass legislation in areas where there is medical and scientific uncertainty is consistent with *Casey*." 140 S. Ct. at 2136. Rather, *Casey* "focuses on the existence of a substantial obstacle. . . ." *Id.* And *Hellerstedt* did nothing more than apply *Casey*. *Id.* at 2138.

Chief Justice Roberts criticized the plurality's holding as "inviting a grand balancing test in which unweighted factors mysteriously are weighed." *Id.* at 2135 (cleaned up). Under this balancing test, courts "would be asked in essence to weigh the State's interest in protecting the potentiality of human life and the health of the woman, on the one hand, against the woman's liberty interest in defining her own concept of existence, of meaning, of the universe, and of the mystery of human life on the other." *Id.* at 2136. But this is impossible: "[t]here is no plausible sense in which anyone, let alone this Court, could objectively assign weight to such imponderable values and no meaningful way to compare them if there were." *Id.*

Chief Justice Roberts affirmed that the applicable inquiry under *Casey*'s undue burden standard is whether a law imposes a "substantial obstacle" on a woman's ability to obtain an abortion. *June Medical*, 140 S. Ct. at 2138

II. Chief Justice Roberts' concurring opinion in *June Medical* rejected a balancing test for analyzing abortion regulations and his opinion is controlling.

Chief Justice Roberts' opinion was the narrowest grounds for holding Louisiana's admitting-privileges law unconstitutional, so his concurrence controls. *See Marks*, 430 U.S. at 93 (when "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.")

Of the three federal appellate courts to have considered this issue, two have held that Chief Justice Roberts' concurrence is binding under *Marks*. *Hopkins v. Jegley*, 968 F.3d 912 (8th Cir. 2020), *EMW Women's Surgical Ctr. v. Friedlander*, 978 F.3d 418 (6th Cir. 2020). *But see Paxton*, 978 F.3d 896 (5th Cir. 2020). This Court should likewise find the Chief Justice's concurrence controlling.

A. The Eighth Circuit held that Chief Justice Roberts' concurrence is the binding opinion in *June Medical.*

In *Hopkins v. Jegley*, the Eighth Circuit gave the Chief Justice's opinion the weight to which it is entitled under *Marks*. 968 F.3d at 914–

15. "Chief Justice Roberts' vote was necessary in holding unconstitutional Louisiana's admitting-privileges law, so his separate opinion is controlling." *Id*. at 915 (citing *Marks*, 430 U.S. at 193). The court reversed and remanded a district court decision enjoining a series of Arkansas abortion regulations. *Id*. at 916. This was necessary because "the district court—without the benefit of Chief Justice Roberts's separate opinion in *June Medical*—applied the *Whole Woman's Health* [*v. Hellerstedt*] cost-benefit standard to the challenged laws." *Id*. at 915 (citations omitted).

Chief Justice Roberts "discussed at length the undue burden standard articulated in" *Casey*, "in which the Court held that a state cannot 'impose an undue burden on the woman's ability to obtain an abortion.' Chief Justice Roberts rejected the 'observation' made in [*Hellerstedt*] and again by the plurality 'that the undue burden standard requires courts to weigh the law's asserted benefits against the burdens it imposes on abortion access.'" *Hopkins*, 968 F.3d at 914 (citing *June Medical*, at 2135 (Roberts, C.J., concurring)). The "appropriate inquiry" is the standard in *Casey*: "whether the law poses 'a substantial obstacle' or 'substantial burden, not whether benefits outweighed burdens.'" *Id*. at 915 (citing *June Medical*, 140 S. Ct. at 2137 (Roberts, C.J., concurring)).

The Chief Justice also parted ways with *Hellerstedt*'s statement that it is "inconsistent with this Court's case law" to say "that legislatures, and not courts, must resolve questions of medical

uncertainty." *Hopkins*, 968 F.3d at 916 (cleaned up). As the Eighth Circuit recognized, Chief Justice Roberts, in contrast, "emphasized the 'wide discretion' that courts must afford to legislatures in areas of medical uncertainty." *Id.* (quoting *June Medical*, 140 S. Ct. at 2136 (Robert, C.J., concurring)).

B. The Sixth Circuit also held that Chief Justice Roberts' concurrence is the binding opinion of *June Medical*.

EMW Women's Surgical Center v. Friedlander involved a Kentucky law "requiring abortion facilities to obtain transfer agreements with a local hospital and transport agreements with a local ambulance service." 978 F.3d at 422–23. The plaintiff abortion facilities challenged the requirements as imposing an undue burden on abortion access, and the district court agreed, permanently enjoining the law. *Id.* at 423. The Sixth Circuit faced the same question as this Court: whether Kentucky's law should be analyzed using *Casey*'s undue-burden test or the *June Medical* plurality's balancing test. It, too, invoked *Marks* and deemed the Chief Justice's narrower concurrence "the holding of the Court." *Id.* at 431 (quoting *Marks*, 430 U.S. at 193).

In full agreement with the Eighth Circuit, the Sixth Circuit held that "[i]n a fractured decision where two opinions concur in the judgment, an opinion will be the narrowest under *Marks* if the instances in which it would reach the same result in future cases form 'a logical subset' of the

instances in which the other opinion would reach the same result." 978 F.3d 431. "[B]ecause the Court invalidated the Louisiana statute at issue, the narrowest opinion concurring in the judgment [in *June Medical*] is the one that would strike down the fewest laws regulating abortion in future cases." *Id.* at 432. "Because all laws invalid under the Chief Justice's rationale are invalid under the plurality's, but not all laws invalid under the plurality's rationale are invalid under the Chief Justice's, the Chief Justice's position is the narrowest under *Marks*," *id.* at 433, "constitutes *June Medical Services*' holding and provides the governing standard here." *Id.*

Applying the test outlined in Chief Justice Roberts' concurring opinion, the Sixth Circuit upheld Kentucky's law and reversed the district court. *Id.* at 442–46, 448. It concluded that Kentucky's requirements were reasonably related to a legitimate state interest and did not have the effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus. *Id.* at 442–46.

Under Chief Justice Roberts' concurring opinion, the *Casey* "undue burden" test is the governing standard. The *June Medical* plurality's balancing test is not the law, as both the Sixth and Eighth Circuits have already held. This Court should faithfully apply *Casey*'s "substantial obstacle" framework to SB 8.

C. Judge Willett's dissent correctly concludes that the Chief Justice's concurring opinion controls.

Judge Willett dissented from the panel decision because he correctly concluded that Chief Justice Roberts' concurrence controls. He reasoned that, under *Marks*, "'[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 judgment on the narrowest grounds.' In other words, the absence of a decisional rule doesn't mean the absence of binding precedent." *Paxton*, 978 F.3d at 915–16 (Willett, J., dissenting) (citing *Marks*, 430 U.S. at 193).

Judge Willett noted this Court's clarification that the *Marks* "principle 'is only workable where there is some common denominator upon which all of the justices of the majority can agree.' If a concurrence 'can be viewed as a logical subset' of the plurality, thus yielding outcome convergence, the concurrence controls." *Id.* at. 916 (citing *United States v. Duron-Caldera*, 737 F.3d 988, 994 n. 4 (5th Cir. 2013)).

In *June Medical*, "the Chief Justice does not reject the plurality's test in its entirety. Instead, he adopts the plurality's substantial obstacle analysis, which takes up most of the plurality's opinion. After agreeing with that analysis, he concludes that finding a substantial obstacle before invalidating an abortion regulation is therefore a sufficient basis for that decision." *Id.* at 919. Chief Justice Roberts "only rejects the plurality's

added observation concerning the weighing of the law's asserted benefits." *Id.* at 919. For these reasons, "Chief Justice Roberts' *June Medical* concurrence [] is both a subset of, and a narrower holding than, the plurality opinion." *Id.*

When *Marks* applies, Judge Willett correctly notes that "its precedential force is absolute: 'The binding opinion from a splintered decision is as authoritative for lower courts as a nine-Justice opinion. This is true even if only one Justice issues the binding opinion.'" *Id.* (citing *United States v. Duvall*, 740 F.3d 604, 611 (D.C. Cir. 2013) (Kavanaugh, J., concurring)) (cleaned up).

Chief Justice Roberts' concurrence is therefore binding on this Court. The panel majority erred in casting the Chief Justice's concurrence aside and applying the plurality's balancing test instead.

CONCLUSION

The Texas law challenged here seeks to make a gruesome abortion procedure "less brutal and more humane." *Paxton*, 978 F.3d at 912 (Willett, J., dissenting). "Human dignity should prevail even when—*especially* when—human life" ends. *Id.* (emphasis in original). SB 8 reflects this important principle.

Applying the appropriate legal standard when courts evaluate the constitutionality of abortion regulations designed to promote the government's interest in preserving the dignity and value of human life

is of the utmost importance. Because Chief Justice Roberts' concurrence applying *Casey*'s substantial burden test is the narrowest opinion concurring in the judgment, this Court is bound by it. *See Marks*, 430 U.S. at 193. Under *Casey*, "[l]aws that do not pose a substantial obstacle to abortion access are permissible" if they meet rational basis review. *June Medical*, 140 S. Ct. at 2135 (Roberts, C.J., concurring) (internal citations omitted). That legal standard applies here.

Amicus urges this Court to reverse the district court's order enjoining SB 8, which rests on an ad hoc balancing test a majority of the Supreme Court explicitly rejected.

Respectfully submitted,

/s/ Elissa M. Graves

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December 9, 2020

CERTIFICATE OF COMPLIANCE

This amicus brief complies with the page limitation of Fed. R. App. P. 29(a)(5) and Circuit R. 29 because it consists of 2,488 words and does not exceed 6,500 words.

This amicus brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 365 in 14-point Century Schoolbook font.

/s/ Elissa M. Graves
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Dated: December 9, 2020

CERTIFICATE OF SERVICE

I hereby certify that on December 9, 2020, the foregoing amicus brief was filed electronically with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit through the Court's CM/ECF system. I certify that all participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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