UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

Planned Parenthood Minnesota, North Dakota, South Dakota, et al.,

Plaintiffs,

v.

Kristi Noem, et al.,

Defendants.

Case No. 4:22-cv-04009-KES

MOTION FOR STAY PENDING APPEAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Other Authorities

On February 8, 2022, this Court entered a preliminary injunction that restrains the defendants from enforcing a portion of South Dakota Administrative Rule 44:67:04:13, which prohibits abortion providers from dispensing mifepristone and misoprostol simultaneously, and compels abortion patients to return to their provider between 24 and 72 hours after ingesting mifepristone to obtain the misoprostol that will complete their abortion.[1] The defendants intend to appeal the Court's order and respectfully request a stay pending appeal. *See* Fed. R. App. P. 8(a)(1)(A) (requiring parties seeking a stay pending appeal to first request that relief from the district court).[2]

In deciding whether to stay a preliminary injunction pending appeal, a court must consider four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). Each of these factors favors a stay.

1. It is unclear whether the Court's injunction protects only the named plaintiffs, or whether it operates as a "universal" injunction that prohibits the defendants from enforcing the disapproved portion of the rule against anyone. In the "conclusion," the Court's order says that "[t]he state defendants are enjoined from enforcing the third appointment for the dispensing of misoprostol and the mandatory delay accompanying the third appointment," which implies that the injunction has a universal scope. *See* Order, ECF No. 26, at 40. In the next sentence, however, the Court says that "[t]he state defendants are enjoined from enforcing the pertinent part of the Rule against Planned Parenthood," which suggests that the injunction shields only the named plaintiffs. The defendants respectfully ask the Court to clarify the scope of its injunction before the defendants seek relief on appeal.
2. We have conferred with the plaintiffs and they oppose this motion and intend to file a written response.

I. The Defendants Are Likely To Succeed On The Merits Of Their Appeal

The Court's decision to facially enjoin the enforcement of the Rule[3] is unlikely to be sustained on appeal. First, the Eighth Circuit is likely to reject this Court's refusal to apply rational-basis review when asking whether the Rule is "reasonably related" to a "legitimate state interest." *See* Order, ECF No. 26, at 23–28. Second, the plaintiffs failed to produce evidence that the Rule will unduly burden a "large fraction" of abortion patients for whom the Rule is relevant—and they certainly did not make a "clear showing" that a large fraction of abortion patients will be unduly burdened by the Rule. *See Winter v. Natural Resources Defense Council*, 555 U.S. 7, 20 (2008) ("[I]njunctive relief . . . may only be awarded upon *a clear showing* that the plaintiff is entitled to such relief." (emphasis added)). Third, the defendants' appeal of the Court's equal-protection holding is likely to succeed because the Court misapplied both the undue-burden standard and the rational-basis test.

A. The Plaintiffs' Appeal Is Likely To Succeed Because The Rule Is "Reasonably Related" To A "Legitimate Purpose"

A court may not enjoin the enforcement of the Rule unless it: (1) imposes a "substantial obstacle" to abortion access; or (2) is not "reasonably related" to a "legitimate state interest." *June Medical Services LLC v. Russo*, 140 S. Ct. 2103, 2135 (2020) (Roberts, C.J., concurring in the judgment); *Hopkins v. Jegley*, 968 F.3d 912, 915 (8th Cir. 2020) (holding that "Chief Justice Roberts's . . . opinion" in *June Medical* "is controlling"). The Court held that the Rule is *not* "reasonably related" to a "legitimate" state interest, and it refused to equate this standard with rational-basis review. *See* Order, ECF No. 26, at 25 ("[T]he court will not apply rational basis review

3. For simplicity and ease of exposition, we will use "the Rule" to describe the portion of Rule 44:67:04:13 that this Court enjoined the defendants from enforcing.

and will apply the Supreme Court's analysis in *Hellerstedt* and *Gonzales* to this threshold issue."). The Court's conclusion and analysis on this issue are unlikely to survive appellate review.

The "threshold requirement" in Chief Justice Roberts's *June Medical* concurrence is rational-basis review. Asking whether a law is "*reasonably* related" to a "legitimate state interest" is no different from asking whether a law is "*rationally* related" to a "legitimate state interest." The words "rational" and "reasonable" are synonyms. *See* rational, dictionary.com (defining "rational" as "agreeable to reason; reasonable; sensible"), https://bit.ly/3uJLvGF. And the Supreme Court and the Eighth Circuit have repeatedly equated the so-called "reasonable relation" test with rational-basis review. *See, e.g.*, *Friedman v. Rogers*, 440 U.S. 1, 17 (1979) (holding that a rule governing the membership of a state's optometry board was "related reasonably" to a "legitimate purpose," and equating that standard with whether a law is "rationally related to a legitimate state interest" and the hyper-deferential standard for reviewing challenges to local economic regulations); *Honeywell, Inc. v. Minnesota Life & Health Insurance Guaranty Ass'n*, 110 F.3d 547, 554–55 (8th Cir. 1997) (en banc) ("[T]he modern framework for substantive due process analysis concerning economic legislation requires only an inquiry into whether the legislation is reasonably related to a legitimate governmental purpose. . . . which articulate[s] a rational basis test."); *Parrish v. Mallinger*, 133 F.3d 612, 614–15 (8th Cir. 1998) ("Legislation authorizing the paying of an inmate's restitution debt out of his prison account 'is reasonably related to a legitimate governmental purpose' and therefore satisfies the modern, highly deferential substantive due process standard."); *Casbah, Inc. v. Thone*, 651 F.2d 551, 557 (8th Cir. 1981) ("Where no suspect classifications are involved and no fundamental rights, the question under equal protection analysis is whether the legislation is reasonably related to a legitimate state purpose. Similarly, we apply here the rational basis standard of review." (citations omitted)). In addition, the Sixth Circuit

has specifically equated the "threshold requirement" in Chief Justice Roberts's *June Medical* concurrence with rational-basis review:

> Under the Chief Justice's controlling opinion, a law regulating abortion is valid if it satisfies two requirements. First, it must be "'reasonably related' to a legitimate state interest." . . . [T]his requirement is met whenever a state has a rational basis to . . . use its regulatory power . . .

EMW Women's Surgical Center, P.S.C. v. Friedlander, 978 F.3d 418, 433 (6th Cir. 2020) (citations and some internal quotation marks omitted).

The Court claimed that it need not apply rational-basis review because of language that appears in *Casey*, *Hellerstet*, and *Gonzales*. *See* Order, ECF No. 26, at 23–25. But none of those cases were purporting to interpret or apply the "threshold requirement" from Chief Justice Roberts's *June Medical* concurrence. The relevant passage from *Casey* reads as follows:

> [A] statute which, while furthering . . . [a] valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends.

Id. at 23–24 (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 877 (1992)). This passage is explaining the "substantial obstacle" prong of the undue-burden test—which is a separate inquiry from whether a law is "reasonably related" to a "legitimate state interest." *See June Medical*, 140 S. Ct. at 2135 (Roberts, C.J., concurring in the judgment) ("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."). It is of course true that laws that impose a "substantial obstacle" to abortion access are impermissible under *Casey*, but that has nothing to do with whether the threshold requirement of a "reasonable relation" to a "legitimate state interest" has been met.

The Court also relied on this passage from *Hellerstedt*:

> The Court of Appeals wrote that a state law is "constitutional if: (1) it does not have the purpose or effect of placing a substantial obstacle in

> the path of a woman seeking an abortion of a nonviable fetus; and (2) it is reasonably related to (or designed to further) a legitimate state interest." The Court of Appeals went on to hold that "the district court erred by substituting its own judgment for that of the legislature" when it conducted its "undue burden inquiry," in part because "medical uncertainty underlying a statute is for resolution by legislatures, not the courts."
>
> The Court of Appeals' articulation of the relevant standard is incorrect. The first part of the Court of Appeals' test may be read to imply that a district court should not consider the existence or nonexistence of medical benefits when considering whether a regulation of abortion constitutes an undue burden. The rule announced in *Casey*, however, requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer. And the second part of the test 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. The Court of Appeals' approach simply does not match the standard that this Court laid out in *Casey*, which asks courts to consider whether any burden imposed on abortion access is "undue."

Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2309–10 (2016) (citations omitted); *see also* Order, ECF No. 26, at 24 (quoting part of this passage). But this portion of the *Hellerstedt* was repudiated by Chief Justice Roberts's concurrence in *June Medical*, which backed the Fifth Circuit's interpretation of the "undue burden" test and rejected the characterization adopted by the *Hellerstedt* majority. *See June Medical*, 140 S. Ct. at 2135–39 (Roberts, C.J., concurring in the judgment); *see also id.* at 2135 ("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."); *Hopkins*, 968 F.3d at 915 ("Chief Justice Roberts's . . . opinion" in *June Medical* "is controlling").

Finally, this Court relied on *Hellerstedt*'s description of *Gonzales v. Carhart*, 550 U.S. 124 (2007), which held that courts have an independent obligation review legislative findings that appear in statutes:

> [I]n *Gonzales* the Court, while pointing out that we must review legislative "factfinding under a deferential standard," added that we must not "place dispositive weight" on those "findings." *Gonzalez* went on to point out that the "Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake."

Hellerstedt, 136 S. Ct. at 2310. But no one in this case is asking a court to accept the truth of any "findings" that appear in the Rule or any other enactment. Instead, the parties are disputing whether the "threshold" reasonable-relation test in the Chief Justice's *June Medical* concurrence requires anything other than rational-basis review. *Gonzales* has nothing to say on that question.

The Court's opinion is also problematic because it never explains *what*, exactly, the "threshold" reasonable-relation test requires. The Court made clear that it was rejecting the defendants' request to apply rational-basis review. *See* Order, ECF No. 26, at 25 ("[T]he Court will not apply rational-basis review"). But it takes a theory to beat a theory,[4] and if the Court is rejecting rational-basis review then it needs to describe and justify the standard of review that it *is* applying. The Court's opinion does not say whether it is applying intermediate scrutiny, strict scrutiny, *Hellerstedt*'s benefits vs. burdens analysis, or something else.[5] And it does not explain how a "reasonable relation" test can trigger anything more than conventional rational-basis review.

As best we can tell, the Court's opinion appears to be applying some type of "heightened" rationality review that: (1) considers only the purposes declared by the state's officials ex ante, and refuses to consider after-the-fact rationales offered by the

4. *See* Richard A. Epstein, *Common Law, Labor Law, and Reality: A Rejoinder to Professors Getman and Kohler*, 92 Yale L.J. 1435, 1435 (1983).
5. The Court's opinion does say that it will "apply the Supreme Court's analysis in *Hellerstedt* and *Gonzales* to this threshold [reasonable relation] issue," Order, ECF No. 26, at 25, but it does not purport to weigh the benefits and burdens of the Rule in this portion of its opinion, and there are no "findings" in the Rule that a Court could review under *Gonzales*.

state's lawyers and expert witness; and (2) allows courts to determine whether Rule actually achieves those publicly announced purposes, rather than asking whether it is possible to imagine that the Rule might advance those interests. *See* Order, ECF No. 26, at 25–28. The Court acknowledged, for example, that the state has "legitimate" interests in requiring physicians to dispense abortion drugs in person because the in-person dispensing requirement can help detect contraindications and prevent telemedicine abortions. *See id.* at 27. But the Court found that a requirement to dispense misoprostol in a separate follow-up visit (as opposed to dispensing mifeprex and misoprostol together) was not "reasonably related" to those interests, because (according to the Court) the extra appointment and time delay needed to obtain misoprostol will "increase the risks to patients' health." *Id.* at 28. The Court did not consider the declaration of the defendants' expert, which noted that requiring patients to return to the clinic before receiving misoprostol will improve patient safety by: (1) allowing the physician to determine whether the patient has already aborted before receiving the second drug,[6] which removes the risk of complications from the unnecessary ingestion of misoprostol; (2) allowing a physician to determine whether the patient is experiencing complications from the first drug (mifeprex) that might require a surgical completion of the abortion; and (3) allowing a physician to assess the patient's needs for pain control before the misoprostol is administered. *See* Harrison Decl., ECF No. 19-2, at ¶¶ 31–34.

The standard of review that the Court applied is unknown to the law, and it bears no resemblance to the conventional rational-basis scrutiny that should have used in assessing whether the Rule is "reasonably related" to a "legitimate state interest." *June Medical*, 140 S. Ct. at 2135 (Roberts, C.J., concurring in the judgment). On rational-basis review, a court is not to determine whether the Rule will actually improve or

6. Approximately 1 out of 20 (5%) of patients who take mifeprex (the first drug) will abort before taking misoprostol. *See* Harrison Decl., ECF No. 19-2, at ¶ 31.

undermine patients' health. The Court's role is only to ask whether it is *possible to imagine* that the Rule might do something to advance the state's interests in patient safety. *See FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993) (under rational-basis review, a legislative decision "is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data."). The Rule easily passes this threshold test. *See Trump v. Hawaii*, 138 S. Ct. 2392, 2420 (2018) ("[T]he Court hardly ever strikes down a policy as illegitimate under rational basis scrutiny.").

B. The Plaintiffs' Appeal Is Likely To Succeed Because The Plaintiffs Failed To Produce Evidence Showing That A "Large Fraction" Of Abortion Patients Will Be Unduly Burdened By The Rule

The Court enjoined the defendants from enforcing the disputed portion of the Rule in any situation. *See* Order, ECF No. 26, at 40. But a "facial" remedy of that sort cannot be sustained unless the plaintiffs show that the Rule will impose an undue burden on a "large fraction" of patients for whom the rule is relevant. *See Planned Parenthood of Arkansas & Eastern Oklahoma v. Jegley*, 864 F.3d 953, 958–59 (8th Cir. 2017); *In re Rutledge*, 956 F.3d 1018, 1032 (8th Cir. 2020); *see also Gonzales v. Carhart*, 550 U.S. 124, 167–68 (2007). The Court acknowledged the "large fraction" requirement, yet it held that the plaintiffs had shown that a "large fraction" of abortion patients would be unduly burdened by the Rule. *See* Order, ECF No. 26, at 31–34. None of the Court's arguments are likely to survive appeal.

First, the Court concluded that the Rule would eliminate access to drug-induced abortions in South Dakota, and found that this would "unduly burden" 100% of South Dakota abortion patients seeking drug-induced abortions. *See* Order, ECF No. 26, at 31 ("[T]he court finds that the effect of eliminating medication abortion for all patients who seek a medication abortion at Planned Parenthood is a substantial obstacle for 100% of relevant cases, which constitutes a large fraction."). But the Court

used the wrong denominator, because the Court acknowledged that the elimination of drug-induced abortions will affect *all* abortion patients in South Dakota—including patients seeking surgical abortions—by reducing available appointments and increasing wait times for the remaining surgical-abortion slots. *See* Order, ECF No. 26, at 34 (holding that the Rule unduly burdens seeking surgical abortions by reducing available appointments); Defs.' Br., ECF No. 4, at 16 ("Patients are currently scheduled about 4 weeks out just to meet existing demand. Under the Rule, patients would have to be scheduled even further out given that there would be substantially fewer appointments available." (citation omitted)). The Court cannot claim that the Rule is not "relevant" to patients seeking surgical abortions and simultaneously hold that the Rule unduly burdens those patients.

The Court also used the wrong numerator, because an abortion patient is not "unduly burdened" by the Rule if she remains willing and able to obtain a surgical abortion. The "undue burden" test asks whether a pregnant woman will encounter a substantial obstacle in obtaining an abortion—not whether she will encounter a substantial obstacle in obtaining her preferred method of abortion. *See Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 874 (1992) (an undue burden exists if the state imposes "a substantial obstacle to a woman's choice *to terminate her pregnancy*" (emphasis added)); *Gonzales v. Carhart*, 550 U.S. 124 (2007) (federal statute criminalizing partial-birth abortion does not impose an "undue burden"); *Whole Woman's Health v. Paxton*, 10 F.4th 430, 453 (5th Cir. 2021) (statute outlawing dismemberment abortions did not impose undue burden "[b]ecause there are safe, medically recognized alternatives to live-dismemberment-by-forceps D&E (suction and digoxin)"). The Court noted that *some* abortion patients may encounter "substantial obstacles" if forced to choose between surgical abortion and continuing their pregnancy, such as patients who are contraindicated for surgical abortion. *See* Order, ECF No. 26, at 31. But the Court made no attempt to estimate or calculate this fraction

of abortion patients, and the plaintiffs failed to produce evidence that would allow any court to make these estimations or calculations. *See Planned Parenthood of Arkansas & Eastern Oklahoma v. Jegley*, 864 F.3d 953, 958–59 (8th Cir. 2017) (district court must "determine" and "estimate" the number of women who would encounter substantial obstacles when conducting a "large fraction" analysis). Instead, the Court assumed that a pregnant woman has a constitutional right to choose the *method* by which she aborts their unborn child, a stance that is incompatible with *Gonzales* and the FDA's decade-long refusal to approve the use of abortion drugs in the United States. *See Benten v. Kessler*, 505 U.S. 1084, 1084 (1992).

Second, the Court concluded that *some* patients will miss or delay their follow-up appointment for misoprostol after ingesting mifeprex (the first abortion drug), putting them at risk of hemorrhage or other complications that can arise from failing to take misoprostol within 24 to 72 hours after mifeprex. *See* Order, ECF No. 26, at 32. But the Court made no attempt to estimate or calculate the number of patients that will miss or delay their follow-up misoprostol appointment, and it did not determine whether those patients constitute a "large fraction" of abortion patients for whom the Rule is relevant. Instead, the Court declared that *every* patient seeking a drug-abortion is at "risk" of missing or delaying their misoprostol appointment, and that this risk imposes a "substantial obstacle" on "*all* patients seeking a medication abortion." *Id.* (emphasis added).

The Court's analysis is untenable. A Court cannot facially enjoin the enforcement of an abortion regulation based on a harm that will befall only a small fraction of abortion patients—and it cannot circumvent the "large fraction" test by claiming that every patient is at "risk" of encountering a harm that will actually affect only a small number of individuals. If this maneuver were allowed, then the partial-birth abortion ban in *Gonzales* would be unconstitutional on its face, because every pregnant woman faces a "risk" that a partial-birth abortion might be necessary to preserve her health.

See Gonzales, 550 U.S. at 166–67 (acknowledging the "uncertainty" over whether partial-birth abortion might be "necessary to preserve a woman's health"). Indeed, every abortion regulation would be facially unconstitutional on the Court's view, because there is always a "risk" that an abortion regulation might cause an unexpected or unintended harm to a patient. 24-hour waiting periods, for example, impose a "risk" that the patient will be unable or unwilling to return to the clinic after providing informed consent, but a court cannot facially enjoin the enforcement of a waiting period by claiming that every abortion patient is at "risk" of encountering this substantial obstacle. *See Casey*, 505 U.S. at 881–87 (rejecting facial challenge to Pennsylvania's 24-hour waiting period).

Third, the Court held that the Rule would increase travel costs for patients seeking drug-induced abortions. *See* Order, ECF No. 26, at 32–33. But the Court made no attempt to determine the number or fraction of patients who would encounter "substantial obstacles" from having to make an extra trip to the abortion clinic. Many patients can easily make the extra trip to the clinic—and those patients will not be "unduly burdened" by the Rule. Other patients will switch to surgical abortion to avoid the extra trip, and those patients will not be encumbered by a substantial obstacle either. The Court must estimate the fraction of patients that will encounter substantial obstacles from requiring a separate appointment to obtain misoprostol, as well as the fraction of patients that will not encounter such obstacles. But the plaintiffs failed to produce data or evidence that would allow these estimates to be made.

Observing that 24% of South Dakota abortion patients travel 150 miles round trip for each visit to the clinic proves nothing,[7] because many of these patients are seeking surgical abortions and will not need to make an additional trip. In addition,

7. *See* Order, ECF No. 26, at 32–33.

many patients seeking drug-induced abortions can make the extra trip without encountering a substantial obstacle, or will opt for surgical abortions if the extra trip is costly or inconvenient. The Court also notes that 39% of South Dakota abortion patients are at or below 110% of the federal poverty level, but this observation is meaningless because abortion funds are available to defray the costs for indigent patients,[8] and the plaintiffs failed to provide evidence on the number of indigent patients who are incapable of obtaining aid from abortion funds or who will forgo abortion on account of the added travel costs. The Court's observation that "just over half" of abortion patients lack a college degree, and its claim that these patients therefore "have a low degree of flexibility to leave work,"[9] is nothing but rank speculation. And the Court's claim that the 22% of patients who had drug-induced abortions at 10 weeks will encounter a "risk" that the separate-appointment requirement will "push them past 11 weeks LMP when medication abortion is safest"[10] fails to account for the fact that those patients can still obtain surgical abortions and can seek drug-induced abortions earlier in their pregnancy.

Finally, the Court held that the Rule will unduly burden patients seeking *any* type of abortion in South Dakota by reducing available appointments. *See* Order, ECF No. 26, at 34. But the Court made no attempt to estimate or determine the number or fraction of patients that would encounter substantial obstacles on account of this reduced availability. Instead, the Court declared that all patients will encounter an "added risk" of delayed services, and that this *risk* imposes a "substantial obstacle for a large fraction of abortion services." *Id*. But the plaintiffs must show that the reduced appointments *will* impose substantial obstacles on a large fraction abortion patients,

8. *See* https://abortionfunds.org
9. Order, ECF No. 26, at 33.
10. Order, ECF No. 26, at 33.

not that they *might* impose such an obstacle. And the Court cannot remedy the plaintiffs' evidentiary shortcomings by allowing the mere "risk" of a delayed appointment to qualify as an undue burden—and then claiming that this "risk" imposes a substantial obstacle on every abortion patient in the state.

C. The Plaintiffs' Appeal Of The Court's Equal-Protection Holding Is Likely To Succeed

The Court purported to apply the "undue burden" test to the plaintiffs' equal-protection claim. *See* Order, ECF No. 26, at 38 ("The standard of review for regulations that 'touch upon the right to an abortion' is the undue burden standard."). But then the Court did exactly what Chief Justice Roberts's concurrence in *June Medical* said *not* to do: It considered the medical necessity of the Rule along with its burdens and obstacles. *See id.* at 38 ("[T]he third trip and mandatory delay are *medically unnecessary*, they increase health risks for medication abortions patients, and they impose substantial obstacles for medication abortion patients and all abortion patients." (emphasis added)); *id.* ("[T]he Rule is an unnecessary regulation."); *id.* ("Applying the undue burden standard, the court finds that the third appointment and mandatory delay required by the Rule are *unnecessary regulations* and constitute an undue burden on a patient's right to choose an abortion." (emphasis added)). Medical necessity is irrelevant when applying the undue-burden standard—so long as the Rule passes the threshold requirement of having a "reasonable relation" to a "legitimate state interest." *See June Medical*, 140 S. Ct. at 2138 (Roberts, C.J., concurring in the judgment) ("So long as that [threshold] showing is made, 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 nonviable fetus.'" (emphasis added) (citation omitted)). Federal courts are not to serve as country's "*ex officio* medical board with powers to approve or disapprove medical and operative practices and standards throughout the United States." *Gonzales*, 550 U.S. at 164 (citations and internal quotation marks omitted).

The Court also held that the Rule fails rational-basis review because "the record clearly shows that misoprostol is safer when taken in the context of medication abortion than when taken for other medical purposes." Order, ECF No. 26, at 39. But a regulation does not fail rational-basis review because it is underinclusive, and South Dakota may choose to impose safety regulations only on abortion-related uses of misoprostol—even if non-abortion uses of misoprostol present similar or greater dangers. *See Dandridge v. Williams*, 397 U.S. 471, 486–87 (1970) ("[T]he Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all."); *id.* ("The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific." (citation and internal quotation marks omitted)); *Vance v. Bradley*, 440 U.S. 93, 108 (1979) ("Even if the classification involved here is to some extent both underinclusive and overinclusive, and hence the line drawn by Congress is imperfect, it is nevertheless the rule that in a case like this perfection is by no means required") (citation and internal quotation marks omitted). More importantly, the Rule's distinction between abortion and non-abortion uses of misoprostol "is not subject to courtroom fact-finding" and "may be based on rational speculation unsupported by evidence or empirical data." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993). It is rational to believe that the Rule might improve safety for some abortion patients, for the reasons provided in Dr. Harrison's declaration. *See* Harrison Decl., ECF No. 19-2, at ¶¶ 31–34. That patient safety might also be enhanced (or further enhanced) by extending the Rule's requirements to non-abortion uses of misoprostol does nothing to defeat the rationality of the Rule.

D. The Plaintiffs Are Likely To Succeed On Their Appeal Of The Remaining Preliminary-Injunction Factors

The Court's analysis of the remaining preliminary-injunction factors depends on the Court's untenable conclusion that the Rule is facially unconstitutional. The plaintiffs cannot show that their patients will suffer irreparable harm absent a showing that the Rule is unconstitutional under the standard set forth in Chief Justice Roberts's *June Medical* concurrence. And they cannot show that the balance of equities or the public interest tilts in their favor unless the Rule is unconstitutional. Because the plaintiffs are likely to prevail on their appeal of the district court's constitutional ruling, the Court's analysis of the remaining preliminary-injunction factors are equally unlikely to survive appeal.

II. The Remaining Factors Favor A Stay

The defendants will suffer irreparable injury absent a stay because the district court's injunction prevents the State from enforcing a duly enacted law. *See Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers). A stay pending appeal is also in the public interest, as the Rule reflects the will of South Dakota's elected officials and "is in itself a declaration of the public interest." *Virginian Ry. Co. v. Sys. Fed'n No. 40*, 300 U.S. 515, 552 (1937). And the plaintiffs will not suffer substantial injury from a stay because they can still perform surgical abortions after the rule takes effect, and they have not shown or even alleged that compliance with the rule will cause them "substantial" harm of the sort that counsels against a stay. They have not alleged that their business will close or that their livelihoods will be threatened, or even that they will lose revenue that they cannot recover at the end of trial on account of sovereign immunity. *See Philip Morris USA Inc. v. Scott*, 561 U.S. 1301, 1034 (2010) (Scalia, J., in chambers).

CONCLUSION

The motion for stay pending appeal should be granted.

Respectfully submitted.

JONATHAN F. MITCHELL*
Texas Bar No. 24075463
Mitchell Law PLLC
111 Congress Avenue, Suite 400
Austin, Texas 78701
(512) 686-3940 (phone)
(512) 686-3941 (fax)
jonathan@mitchell.law

* admitted *pro hac vice*

JASON RAVNSBORG
Attorney General of South Dakota

/s/ Jeffery J. Tronvold
JEFFERY J. TRONVOLD
Deputy Attorney General
1302 East Highway 14, Suite 1
Pierre, South Dakota 57501-8501
(605) 773-3215 (phone)
jeffery.tronvold@state.sd.us

Counsel for Defendants

Dated: February 15, 2022

CERTIFICATE OF SERVICE

I certify that on February 15, 2022, I served this document through CM/ECF upon:

Stephanie Amiotte
Andrew Malone
American Civil Liberties Union of North Dakota, South Dakota, and Wyoming
Post Office Box 91952
Sioux Falls, South Dakota 57109
(605) 332-2508
samiotte@aclu.org
amalone@aclu.org

Diana O. Salgado
Planned Parenthood Federation of America
1110 Vermont Avenue, NW, Suite 300
Washington, District of Columbia 20005
(212) 261-4399
diana.salgado@ppfa.org

Michael Drysdale
Dorsey & Whitney LLP
50 South Sixth Street, Suite 1500
Minneapolis, Minnesota 55402
(612) 340-5652
drysdale.michael@dorsey.com

Counsel for Plaintiffs

/s/ Jeffery J. Tronvold
Jeffery J. Tronvold
Counsel for Defendants