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

REPLY BRIEF IN SUPPORT OF MOTION FOR STAY PENDING APPEAL

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The Court should not have found the Rule facially unconstitutional or enjoined its enforcement across the board, and nothing in the plaintiffs' brief comes close to justifying the facial relief that they insisted upon. The defendants have made a strong showing of likely success on appeal, and the Court should stay its preliminary injunction.

I. The Rule Is "Reasonably Related" To A "Legitimate Purpose"

The parties agree that Chief Justice Roberts's concurrence in *June Medical* supplies the governing standard. *See June Medical Services LLC v. Russo*, 140 S. Ct. 2103, 2135 (2020) (Roberts, C.J., concurring in the judgment) ("Under *Casey*, abortion regulations are valid so long as they do not pose a substantial obstacle and meet the threshold requirement of being 'reasonably related' to a 'legitimate purpose.'" (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 878, 882 (1992) (joint opinion)). But the plaintiffs insist that the "threshold" requirement of being "reasonably related to a legitimate purpose" imposes a standard more stringent than rational-basis review—although they never explain what, exactly, this "form of heightened scrutiny"[1] entails. None of the plaintiffs' arguments have merit.

The plaintiffs begin by observing that the Supreme Court has "never applied" the rational-basis test to an abortion regulation. Opp. at 3–4. But the defendants are not claiming that abortion regulations must be upheld whenever they survive rational-basis review. The issue is what is needed to satisfy the "*threshold* requirement" described in Chief Justice Roberts's *June Medical* concurrence—*before* the Court goes on to consider whether the abortion restriction imposes a "substantial obstacle." No one is claiming that rational-basis review is the exclusive test for courts to apply when assessing the constitutionality of abortion restrictions—and the defendants assuredly agree with the plaintiffs' claim that "some form of heightened scrutiny applies." Opp.

1. Opp. at 4.

at 4. The defendants are claiming only that rational-basis review applies at the *threshold* stage of the undue-burden inquiry.

The plaintiffs also cite *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), which rebuked the Fifth Circuit for applying the version of the "undue-burden test" that Chief Justice Roberts later adopted in his *June Medical* concurrence—and insisted that courts must "balance" the medical benefits of an abortion regulation against the burdens that it imposes. *See id.* at 2309. The plaintiffs are certainly correct to observe that *Hellerstedt* rejected the Fifth Circuit's interpretation of the undue-burden test, which considered only whether an abortion law has a rational basis and imposes substantial obstacle to abortion access. *See id.* But this portion of *Hellerstedt* was repudiated in Chief Justice Roberts's *June Medical* concurrence, which rejected *Hellerstedt*'s "balancing" and adopted the Fifth Circuit's approach to the undue-burden standard. *See June Medical*, 140 S. Ct. at 2135 (Roberts, C.J., concurring in the judgment) ("Nothing about *Casey* suggested that a weighing of costs and benefits of an abortion regulation was a job for the courts."). The plaintiffs want to pretend that *Hellerstedt*'s reasoning remains good law because Chief Justice Roberts said that "[w]e should respect the statement in [*Hellerstedt*] that it was applying the undue burden standard of *Casey*." Opp. at 4 (quoting *June Medical*, 140 S. Ct. at 2138 (Roberts, C.J., concurring in the judgment). But the Chief Justice made clear that he was preserving only the outcome in *Hellerstedt*, and the reasoning of the opinion. *See June Medical*, 140 S. Ct. at 2139 (Roberts, C.J., concurring in the judgment) ("In this case, *Casey*'s requirement of finding a substantial obstacle before invalidating an abortion regulation is therefore a sufficient basis for the decision, as it was in [*Hellerstedt*]."").

The plaintiffs note that Chief Justice Roberts observed that *Casey* had discussed the "benefits" of an abortion regulation when considering the "threshold requirement" of having a "reasonable relation" to a "legitimate purpose." Opp. at 4 (quoting

June Medical, 140 S. Ct. at 2138 (Roberts, C.J., concurring in the judgment)). But that proves nothing. Rational-basis review allows a court to consider the benefits of an abortion regulation, and nothing in *Casey* nor Chief Justice Roberts's *June Medical* concurrence indicates that the Court was applying some variant of heightened scrutiny at the "threshold" stage.

Most damaging of all is the plaintiffs' failure to cite *any* case—from *any* court—that has equated "reasonably related" to a "legitimate purpose" with anything other than rational-basis review. The plaintiffs do not contest or rebut the cases cited in our motion that treat these standards as synonymous—and many of those cases are binding on this panel. *See* Mot. to Stay at 3 ("[T]he Supreme Court and the Eighth Circuit have repeatedly equated the so-called "reasonable relation" test with rational-basis review."); *id.* at 3–4 (citing authorities). The plaintiffs acknowledge that *EMW Women's Surgical Center, P.S.C. v. Friedlander*, 978 F.3d 418, 433 (6th Cir. 2020), supports our interpretation of Chief Justice Roberts's *June Medical* concurrence, although they claim that this ruling is "wrongly decided." Opp. at 5 n.6. But the plaintiffs must overcome more than *Friedlander*; they must also overcome the cases outside the abortion context that equate "reasonably related" to a "legitimate purpose" with rational-basis review. They have not made any attempt to do so.

As a fallback, the plaintiffs argue that the Rule fails rational-basis review—even though the defendants' expert presented unrebutted claims that the Rule can improve patient safety by allowing the physician to determine: (1) whether the patient has already aborted before receiving misoprostol; (2) whether the patient is experiencing complications from the first drug (mifeprex); and (3) whether the patient needs pain control before taking misoprostol. *See* Harrison Decl., ECF No. 19-2, at ¶¶ 31–34. The plaintiffs complain that the Rule does not explicitly require a physician to take these steps before dispending misoprostol, but the Rule still provides the opportunity for the physician to check for these conditions—as well as the opportunity for the

patient to report or discuss them with her doctor before taking the misoprostol. That is more than enough to establish a rational relation between the rule and patient safety. *See Box v. Planned Parenthood of Indiana & Kentucky, Inc.*, 139 S. Ct. 1780, 1782 (2019) (abortion regulations need not be "perfectly tailored" to survive rational-basis review). The plaintiffs note that rational-basis review is "not 'toothless,'"[2] but is highly deferential—indeed, it is the most deferential standard of review known to law. *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."); *Steffan v. Perry*, 41 F.3d 677, 685 (D.C. Cir. 1994) ("It is hard to imagine a more deferential standard than rational basis").

II. The Rule Does Not Impose A Substantial Obstacle On A Large Fraction Of Abortion Patients

The plaintiffs insisted that this Court issue a facial preliminary injunction, which enjoins the defendants from enforcing the Rule in any situation. In doing so, they undertook a heavy burden, as "facial challenges are disfavored"[3]—even in abortion litigation. Under the somewhat more favorable rules that govern facial challenges in abortion cases, a plaintiff must prove that the challenged restriction will impose a substantial obstacle on a "large fraction" of patients for whom the restriction is relevant. *See Planned Parenthood of Arkansas & Eastern Oklahoma v. Jegley*, 864 F.3d 953, 958–59 (8th Cir. 2017). Absent such evidence, a plaintiff challenging an abortion restriction is limited to as-applied relief. Yet the plaintiffs put this Court to an all-or-nothing choice, as they demanded a categorical preliminary injunction rather than one tailored to the categories of patients who would encounter "undue burdens" on account of the Rule. *See* Pls.' Br. in Support of Mot. for TRO and PI, ECF No. 4.

2. Opp. at 13 (citation omitted).
3. *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450 (2008).

The plaintiffs do not contest the defendants' claim that the relevant denominator for the "large fraction" inquiry includes *all* abortion patients in South Dakota. Nor could the plaintiffs contest this claim, as they insisted throughout this litigation that the Rule will affect *every* abortion patient in South Dakota—including those seeking surgical abortions—by reducing appointments and increasing wait times. *See* Pls.' Br. in Support of Mot. for TRO and PI, ECF No. 4, at 16–17. So the Rule is "relevant" to every abortion patient in South Dakota, and the denominator for the large-fraction analysis includes every abortion patient in the state.

The plaintiffs insist that 100% of patients seeking drug-induced abortions—which amounts to 40% of all abortion patients in South Dakota—will encounter a "substantial obstacle" from the Rule because (according to the plaintiffs) the Rule will make it infeasible for providers to continue offering drug-induced abortions, leaving surgical abortion as the only option. But the mere inability to obtain one's preferred *method* of abortion does not constitute a "substantial obstacle," and the plaintiffs cite no authority to support their claim that a "substantial obstacle" is imposed whenever an abortion patient is denied her first-choice method of pregnancy termination. Drug-induced abortions were not even legal in the United States until the FDA approved the drugs in 2000, and no court ever held that a "substantial obstacle" or "undue burden" was imposed during that time when every abortion patient in America was denied access to drugs that were freely available in Europe. *Casey* prohibits states from imposing "a substantial obstacle to a woman's choice *to terminate her pregnancy*." *Casey*, 505 U.S. at 874 (emphasis added). It does not prohibit obstacles to a woman's choice of the *method* by which she terminates her pregnancy. Many patients who prefer drug-induced abortion are still willing to undergo a surgical abortion or are largely indifferent between the options. The Rule does not impose a "substantial obstacle" on these patients. And the plaintiffs presented no data or estimates of the number of patients who would encounter "substantial obstacles" to obtaining

an abortion if only surgical abortion were available. *See* Mot. for Stay at 9–10. So they have failed to show that a "large fraction" of patients will be unduly burdened by the Rule.

The plaintiffs make vague assertions that the rule will reduce the total number of abortions that providers can offer. *See* Opp. at 9. But the plaintiffs do not provide an estimate of the number of surgical abortions that they can perform, nor do they explain how this will be insufficient to meet the statewide demand for abortion. There were only 125 *total* abortions performed in South Dakota in 2020 (the most recent year for which data are available), and abortion rates have been dropping steadily for the last three decades. *See* South Dakota 2020 Report of Induced Abortions at 1 ("There were 125 abortions performed in South Dakota in 2020.") (ECF No. 19-1); *see also* Pam Belluck, *America's Abortion Rate Has Dropped to Its Lowest Ever*, New York Times (Sept. 18, 2019), available at https://nyti.ms/33WQhFT. The plaintiffs do not even assert—let alone prove—that they are incapable of performing 125 surgical abortions per year in South Dakota. Claiming that the rule will reduce "available appointments" by 30% proves nothing,[4] because the plaintiffs refuse to tell us *how many* appointments will be available for surgical abortions once the rule takes effect, and they do not show how they would be incapable of accommodating what is already a very low statewide demand for abortion. Nor do the plaintiffs claim that they are maxing out their current "available appointments." It could very well be that some of these "available appointments" are going unfilled, so that a 30% reduction in "available appointments" will have only a negligible effect on patient wait times.

Most importantly, the plaintiffs have made no attempt to calculate or estimate the *number* of patients who will be unable to obtain surgical abortions (or who face health risks from being forced to delay their abortion) after the Rule takes effect. Merely

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4. Opp. at 9 ("Plaintiffs would need to reduce appointments by 30%").

being required to wait for an abortion does not impose an undue burden, so long as the wait does not prevent the patient from obtaining an abortion or subject the patient to unacceptable health risks. *See Casey*, 505 U.S. at 881–87 (rejecting facial challenge to 24-hour waiting requirement); *see also id*. at 846 (undue burden is imposed by "a substantial obstacle to the woman's effective *right to elect the procedure*." (emphasis added)); *id*. at 877 ("Regulations . . . are permitted, if they are not a substantial obstacle *to the woman's exercise of the right to choose*." (emphasis added)). So the plaintiffs have not shown that a "large fraction" of abortion patients will be unduly burdened—and they have not provided data or evidence that allows the Court to determine whether the "large fraction" test has been satisfied. Musing that the rule would "profoundly impact patients" is insufficient. Opp. at 9. The "large fraction" test requires evidence of the *number* of patients who will be unduly burdened by the rule, and how that number compares to the total number of patients for whom the rule is relevant. *See Jegley*, 864 F.3d at 958–60.

Finally, the plaintiffs claim that the rule will unduly burden abortion patients by requiring them to make an additional trip to obtain misoprostol. *See* Opp. at 10–11. This does not impose an "undue burden" because any patient can avoid the extra trip by opting for surgical abortion. And the plaintiffs have no evidence that the extra trip will deter *any* abortion patient from obtaining an abortion. Traxler's declaration contains nothing but speculation and conjecture. *See* Traxler Decl., ECF No. 5, at ¶ 75 ("I am also concerned that some patients may not be able to make the third trip to get the misoprostol during the medically-appropriate 24-to-48 hour window."). And the plaintiffs' brief does not even attempt to apply the "large fraction" test to their driving-distance claim. Courts have repeatedly rejected facial challenges to waiting periods and ultrasound laws that require abortion patients to make extra trips. *See Casey*, 505 U.S. at 881–87 (rejecting facial challenge to 24-hour waiting requirement); *Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds*, 530

F.3d 724, 732–33 (8th Cir. 2008) (en banc) (same). It defies those precedents to claim that a regulation that requires yet another trip to the abortion clinic is facially unconstitutional.

III. The Rule Does Not Violate The Equal-Protection Clause

The plaintiffs' equal-protection is subject to rational-basis review, and it easily satisfies that standard for the reasons provided in Section I, *supra*.

IV. The Remaining Factors Favor A Stay

The plaintiffs' analysis of the remaining stay factors rests on their conclusion that the Rule is unconstitutional. If the Court rejects that view and finds that the defendants are likely to prevail on appeal, it should stay the preliminary injunction pending appeal.

CONCLUSION

The motion for stay pending appeal should be granted.

Respectfully submitted.

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