No. 19-1392

IN THE

Supreme Court of the United States

THOMAS E. DOBBS, M.D., M.P.H., IN HIS OFFICIAL CAPACITY AS STATE HEALTH OFFICER OF THE MISSISSIPPI DEPARTMENT OF HEALTH, *et al.*,

Petitioners,

v.

JACKSON WOMEN'S HEALTH ORGANIZATION, ON BEHALF OF ITSELF AND ITS PATIENTS, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONERS' SUPPLEMENTAL BRIEF

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INTRODUCTION

The petition's second question presented is "Whether the validity of a pre-viability law that protects women's health, the dignity of unborn children, and the integrity of the medical profession and society should be analyzed under *Casey*'s 'undue burden' standard or *Hellerstedt*'s balancing of benefits and burdens." Pet i. As Petitioners explained in their reply brief, there is a burgeoning split of authority on that question. Reply Br. 1, 5–7 (discussing *Hopkins* v. *Jegley*, 968 F.3d 912 (8th Cir. 2020), *Whole Woman's Health* v. *Paxton*, 972 F.3d 649 (5th Cir. 2020), and *American College of Obstetricians* v. *United States Food & Drug Admin.*, 2020 WL 3960625 (D. Md. July 13, 2020)). Petitioners submit this supplemental brief to bring to the Court's attention two additional decisions that deepen the circuit split.

ARGUMENT

The Fifth Circuit's *Paxton* decision denied an appellate motion to stay a district-court order that permanently enjoined a Texas law regulating pre-viability abortions. On October 13, 2020, the Fifth Circuit issued its merits ruling. The 2-1 panel majority rejected Chief Justice Roberts' concurrence in *June Medical Services, L.L.C.* v. *Russo*, 140 S. Ct. 2103 (2020), as "the controlling formulation of the undue burden test" (i.e., applying *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U.S. 833 (1992)), and held that the Court's split decision in *June Medical* "supplies no such precedential rule on the undue burden test," so *Whole Woman's Health* v. *Hellerstedt*, 136 S. Ct. 2292 (2016), controls. *Whole Woman's Health* v. *Paxton*, __ F.3d __, 2020 WL 6042428, at *3–4 (5th Cir. Oct. 13, 2020).

In so ruling, the Fifth Circuit panel majority recognized that "when 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 the position taken by those Members who concurred in the judgment on the narrowest grounds." 2020 WL 6042428, at *4 (quoting *Marks* v. *United States*, 430 U.S. 188, 193 (1977)) (cleaned up). Yet the panel majority rejected Chief Justice Roberts' concurring *June Medical* opinion as controlling because that concurrence could not "'be viewed as a logical subset of [the] plurality's opinion." *Id.* (quoting *United States* v. *Duron-Caldera*, 737 F.3d 988, 994 n.4 (5th Cir. 2013)). Accordingly, said the majority, *Hellerstedt*'s "articulation of the undue burden test as requiring balancing a law's benefits against its burdens retains its precedential force." *Id.* The majority acknowledged that this conclusion conflicted with the Eighth Circuit's *Hopkins* decision. *Id.* at *4 n.6. Judge Willett dissented, though his dissenting opinion is forthcoming. *Id.* at n.1.

Three days later, the Sixth Circuit decided *EMW Women's Surgical Center, P.S.C.*, __ F.3d __, 2020 WL 6111008 (6th Cir. 2020), and reached the exact opposite conclusion as the Fifth Circuit panel majority in *Paxton*. *EMW* involved a Kentucky law "requiring abortion facilities to obtain transfer agreements with a local hospital and transport agreements with a local ambulance service." *Id.* at *1. The plaintiff abortion facilities challenged the requirements as imposing an undue burden on abortion access, and the district court agreed, permanently enjoining the laws. *Id.*

As in *Paxton*, the Sixth Circuit had to decide whether Kentucky's law should be analyzed using *Casey*'s undue-burden test or *Hellerstedt*'s balancing

test. And it, too, invoked the *Marks* rule of treating the position taken by the Justice who concurred in a judgment on the narrowest grounds as "the holding of the Court." *Id.* at *8 (quoting *Marks*, 430 U.S. at 193). A 2-1 panel majority concluded that "[b]ecause 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 *10. "His concurrence therefore constitutes *June Medical Services*' holding and provides the governing standard here." *Id.* (quoting *Grutter* v. *Bollinger*, 288 F.3d 732, 741 (6th Cir. 2002) (cleaned up)). Applying the test outlined in Chief Justice Roberts' concurring opinion, the panel majority upheld Kentucky's law and reversed the district court, holding 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 *14–*20.

Judge Clay dissented. He characterized the majority as "cast[ing] aside [*Hellerstedt*] in favor of Chief Justice Roberts' concurring opinion in *June Medical Services*." *Id.* at *27. And he castigated the majority's *Marks* analysis as wrongly shirking the Sixth Circuit's "duty to apply the binding precedent of" *Hellerstedt*. *Id.* "There is no basis in this Court or the Supreme Court's precedent for treating a single Justice's commentary on a prior decision in dicta as an overruling of an opinion duly issued by a majority of the Supreme Court," he concluded. *Id.* at *28.

In sum, the circuit split over the second question presented continues to grow. This case remains an ideal vehicle to promptly resolve both that question

and the first question presented—the contradictions in this Court's decisions over use of "viability" as a bright line for measuring pro-life legislation.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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