No. 17-2879

United States Court of Appeals

For the

Eighth Circuit

Frederick W. Hopkins, M.D., M.P.H.,

Plaintiff-Appellee,

v.

Larry Jegley, Prosecuting Attorney for Pulaski County, and successors in office, in his official capacity; Steven L. Cathey, M.D., Chair of the Arkansas State Medical Board, and successors in office, in his official capacity;

(for continuation of caption see reverse side of cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS
NO. 4:17-CV-00404-KGB (HONORABLE KRISTINE G. BAKER)

PLAINTIFF-APPELLEE'S PETITION FOR REHEARING AND REHEARING EN BANC

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FEDERAL RULE OF APPELLATE PROCEDURE 35(b)(1) STATEMENT

The panel decision requires rehearing or rehearing en banc because it conflicts with governing Supreme Court precedent on exceptionally important questions concerning fundamental constitutional rights. More broadly, the decision improperly accords single Justices, dissents, or panels in this circuit the power to overrule Supreme Court precedent before the Court itself has done so. It should be withdrawn to restore the hierarchy of our judicial system and a uniform national rule of law.

The panel opinion directly conflicts with *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) (*WWH*), flouting that still-binding precedent. To do so, it misapplies *Marks v. United States*, 430 U.S. 188, 193 (1977), and erroneously uses a concurrence's dicta and the dissents in the Supreme Court's fractured decision in *June Medical Services L.L.C. v. Russo*, 140 S. Ct. 2103 (2020), to purportedly change the undue burden standard required by *WWH*.

In *June Medical*, four Justices joined a plurality opinion invalidating a Louisiana law that required doctors who provide abortions to have hospital admitting privileges. They applied the undue burden standard specified by the Court in *WWH*, which had invalidated a virtually identical Texas admitting privileges law under that standard. The Chief Justice delivered the critical fifth vote in *June Medical* to invalidate the Louisiana law. He relied on *stare decisis*,

while observing in dicta continuing disagreements with *WWH*'s articulation of the undue burden standard, where he had dissented. 140 S. Ct. at 2134 (Roberts, C.J., concurring).

The divided opinions supporting the judgment in *June Medical* are not license to wipe away earlier and unequivocal majority holdings. Under the *Marks* rule, a fractured decision reflecting different rationales produces a holding only on the narrowest grounds—or lowest common denominator—of the concurring votes. 430 U.S. at 193. In *June Medical*, that common denominator was *stare decisis* and the continued application of *WWH*. Indeed, the Chief Justice himself made this point clear: "The question" in *June Medical* was "not whether *Whole Woman's Health* was right or wrong, but whether to adhere to it in deciding" a factually parallel challenge to an admitting-privileges requirement. 140 S. Ct. at 2133. A four-Justice plurality and the Chief Justice answered yes, and that alone is the holding of the *June Medical* Court.

As such, and contrary to the panel's mistaken view, neither the *June Medical* concurrence nor its dissents altered the *WWH* standard, which requires courts to balance the benefits against the burdens in determining whether restrictions on abortion are undue. 136 S. Ct. at 2310. Indeed, the very notion that the Chief Justice's dicta could be combined with the dissents' views to somehow rewrite prior binding precedent turns the *Marks* analysis and the doctrine of *stare decisis*

on their heads. *See Ferina v. United States*, 340 F.2d 837, 839 (8th Cir. 1965) (courts of appeals are "obliged to rigorously apply prevailing, majority precedent" announced by the Supreme Court, not a dissenting opinion). Rehearing is necessary to correct the panel's fundamental errors in applying *WWH, June Medical*, and *Marks*, and to prevent those errors from causing others in this circuit.

STATEMENT OF THE CASE

A. Procedural History

Dr. Frederick Hopkins, who provides abortions at Little Rock Family Planning Services, sued to block four Arkansas laws that restrict abortion. After receiving evidence and evaluating all of the necessary factors, the District Court for the Eastern District of Arkansas preliminarily enjoined each law. *Hopkins v. Jegley*, 267 F. Supp. 3d 1024 (E.D. Ark. 2017), *amended*, 2017 WL 6946638 (E.D. Ark. Aug. 2, 2017).

The district court found Dr. Hopkins likely to prevail in showing that all four laws violated fundamental liberty rights under the Fourteenth Amendment: (1) the law barring dilation and evacuation abortion procedures, Ark. Code Ann. §§ 20-16-1801 to 20-16-1807 (the D&E Ban); (2) the law mandating searches for patients' medical records, Ark. Code Ann. § 20-16-1904(b)(2) (the Medical Records Mandate); (3) the law requiring disclosure of 14- to 16-year-olds' abortions to local police, *see* Ark. Code Ann. § 12-18-108(a)(1) (the Local

Disclosure Mandate); and (4) the law setting rules for who controls embryonic or fetal tissue disposal, *see* Ark. Code Ann. § 20-17-801(b)(1)(B), (b)(2)(C) (the Tissue Disposal Mandate). It found that each one likely imposed an undue burden, that (2) and (4) were likely unconstitutionally vague, and that (3) likely invaded the right to informational privacy. *Hopkins*, 267 F. Supp. 3d at 1051-1110.

The State appealed. A panel of this Court heard argument in December 2018. In 2019, the Court requested and the parties filed supplemental briefing on the effect on this case, if any, of *Box v. Planned Parenthood of Indiana & Kentucky, Inc.*, 139 S. Ct. 1780 (2019) (per curiam). The panel later *sua sponte* held the appeal in abeyance pending the Supreme Court's decision in *June Medical Services L.L.C. v. Russo*, 140 S. Ct. 2103 (2020).

B. The Panel's Decision to Vacate and Remand

On August 7, 2020, the panel issued a published per curiam decision that vacated the district court's preliminary injunction and remanded for reconsideration "in light of Chief Justice Roberts's separate opinion in *June Medical*," which the panel deemed "controlling." *Hopkins v. Jegley*, 2020 WL 4557687, at *3 (8th Cir. Aug. 7, 2020). As the panel described, Chief Justice Roberts provided the fifth vote in favor of the judgment striking down the Louisiana admitting-privileges law in *June Medical*. He agreed with the four-Justice plurality that "Louisiana's law cannot stand under [the Court's]

precedents." *Id*. at *1 (quoting *June Med.*, 140 S. Ct. at 2134 (Roberts, C.J., concurring in the judgment)). "Under '[t]he legal doctrine of *stare decisis*,' Chief Justice Roberts explained," the Court must "treat like cases alike" and on that basis found the Louisiana law unconstitutional, following *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) (holding Texas admitting-privileges law unconstitutional). *Hopkins*, 2020 WL 4557687, at *1 (quoting *June Med.*, 140 S. Ct. at 2134).

The panel decision, however, also improperly treated Chief Justice Roberts's critique of *WWH*'s formulation of the undue burden standard in his *June Medical* concurrence as controlling precedent. In the panel's view, Chief Justice Roberts's concurring opinion, joined by no other Justice, had the effect of overruling the balancing test the Court required courts to apply in *WWH*. In the panel's view, lower courts must now apply a new two-part test set forth in Chief Justice Roberts's opinion under which: (1) the court must examine the restriction's stated benefits and determine whether the restriction has a legitimate state purpose and is reasonably related to that purpose, and (2) if so, the court must determine "whether a law has the effect of placing a substantial obstacle in the path of a woman seeking an abortion." *Id*. at *2 (internal quotation marks omitted).

The panel referenced *Marks v. United States*, 430 U.S. 188, 193 (1977), and concluded that, because Chief Justice Roberts's vote was necessary in holding the

Louisiana admitting-privileges law unconstitutional, his entire "separate opinion is controlling." *Hopkins*, 2020 WL 4557687, at *2. The panel further stated that, "[i]n light of Chief Justice Roberts's separate opinion, 'five Members of the Court reject[ed] the *Whole Woman's Health* cost-benefit'" weighing. *Id.* (quoting *June Med.*, 140 S. Ct. at 2182 (Kavanaugh, J., dissenting)).

The panel vacated the preliminary injunction and remanded for reconsideration under "Chief Justice Roberts's separate opinion in *June Medical*, which is controlling, as well as the Supreme Court's decision in *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780 (2019) (per curiam)." *Hopkins*, 2020 WL 4557687, at *3. The panel decision did not offer any explanation of *Box*'s relevance to this case.

ARGUMENT

I. Rehearing Is Necessary Because the Panel Decision Erroneously Held That the *June Medical* Concurrence Overruled *WWH's* Undue Burden Standard.

The panel decision conflicts with the Supreme Court's holdings in both *WWH* and *Marks* by erroneously ruling that dicta in the Chief Justice's *June Medical* concurrence somehow overruled *WWH*'s explicit requirements for the undue burden standard. The panel decision contravenes first principles of *stare decisis* and disregards that overruling a Supreme Court majority decision's mandated test requires decisive action by that Court, not merely critiques in one

later concurrence or dissents. *See Agostini v. Fenton*, 521 U.S. 203, 237 (1997) (courts of appeals should not conclude that the Court has overruled prior precedent "by implication"; they should continue to apply directly applicable precedent and leave to the Supreme Court "the prerogative of" ultimately overruling its precedents if it decides to take that weighty and unusual step). This decision must be reheard to bring Eighth Circuit law back in harmony with Supreme Court precedent and to correct far-reaching errors that destroy national uniformity in binding constitutional law. *See* Fed. R. App. P. 35(b)(1).

The *WWH* Court held that the undue burden standard "requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer." 136 S. Ct. at 2309. In so doing, *WWH* explicitly rejected the test applied by the Fifth Circuit, holding that court's "articulation of the relevant standard incorrect" in at least two respects: (1) it failed to weigh the benefits of the challenged laws against their burdens and (2) it was "wrong to equate the judicial review applicable to the regulation of a constitutionally protected personal liberty" with rational basis review. *Id*. Applying the correct undue burden balancing test, and relying on the district court's factual findings regarding benefits and burdens, *WWH* struck down a Texas admitting privileges law. *Id*. at 2310-11.

Four years after *WWH*, a plurality and a concurring opinion provided the five votes to strike down a virtually identical Louisiana abortion restriction in *June*

Medical. As required by *WWH*, the *June Medical* plurality "weigh[ed] the law's 'asserted benefits against the burdens it imposes' on abortion access," and found those burdens undue. 140 S. Ct. at 2112-13 (quoting *WWH*, 136 S. Ct. at 2310); *see also, e.g.*, *id.* at 2120-21 (affirming district court's conclusion that, "even if [the law] could be said to further women's health to some marginal degree, the burdens it imposes far outweigh any such benefit" (internal quotation marks omitted)). Based on its review of the district court's fact findings "both as to burdens and as to benefits," the plurality agreed with "its determination that Louisiana's law poses a 'substantial obstacle' to women seeking an abortion; . . . that the law offers no significant health-related benefits; and . . . that the law *consequently* imposes an 'undue burden' on a woman's constitutional right to choose to have an abortion." *Id.* at 2132 (emphasis added).

Chief Justice Roberts concurred in the judgment that Louisiana's law was unconstitutional. He did not join the plurality, but wrote separately to say that the "principles of *stare decisis*" required the Court to reach the same result in *June Medical* as it did in *WWH*. *Id.* at 2133-34 (Roberts, C.J., concurring). Although the Chief Justice dissented in *WWH* and continued to believe it was wrongly decided, he stressed that the key question for the Court "is not whether *Whole Woman's Health* was right or wrong, but whether to adhere to it in deciding the present case." *Id.* at 2133. Because *June Medical* involved a law "nearly identical

to the Texas law struck down four years ago in *Whole Woman's Health*," and "[*s*]*tare decisis* instructs us to treat like cases alike," the Chief Justice determined that the result in *June Medical* was controlled by the result in *WWH*. *Id.* at 2133, 2141-42; *see also id.* at 2141 n.6 ("I cannot view the record here as in any pertinent respect sufficiently different from that in *Whole Woman's Health* to warrant a different outcome").

Now the panel decision flouts *WWH*, erroneously affording the Chief Justice's dicta, along with other negative views in the *June Medical* dissents, controlling weight to overrule *WWH*'s requirements. The panel does this despite *June Medical*'s grounding in *stare decisis* and explicit declaration that the validity of the *WWH* precedent was *not* at issue.

The panel misapplies *Marks* to reach this result. *Hopkins*, 2020 WL 4557687, at *1. Under *Marks*, 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.'" 430 U.S. at 193 (emphasis added). The Supreme Court has used "lowest common denominator or narrowest ground" interchangeably in this context. *Nichols v. United States*, 511 U.S. 738, 745 (1994) (internal quotation marks omitted); *see also United States v. Bailey*, 571 F.3d 791, 798 (8th Cir. 2009) (recognizing that application of the *Marks* rule requires "overlap"—a narrower

explanation for the judgment by some Justice or Justices that entirely fits within the rationale offered by the other Justices concurring in the result).

The lowest common denominator among the five concurring votes in *June Medical* is that *WWH* and *stare decisis* required the Court to hold the same abortion restriction unconstitutional in Louisiana as *WWH* had in Texas. All five Justices in the plurality and concurrence recognized that *WWH* remains a binding precedent and that the Court must treat like cases alike. Under *Marks*, this narrow overlap among those Justices concurring in the judgment represents the holding of the Court in *June Medical*.

Accordingly, the benefits-burdens balancing that *WWH* requires courts to do when evaluating abortion restrictions remains the law. The panel opinion conflicts with *WWH* by adopting as controlling the Chief Justice's critique of that binding authority and his alternate proposal for evaluating the constitutionality of abortion restrictions, which would not require courts to balance an abortion restriction's benefits against its burdens. To be sure, Chief Justice Roberts's concurrence in *June Medical* reprises his critique of the majority decision in *WWH*, where he dissented. But that individual commentary is dicta; it was not necessary to his vote to reverse the lower court in *June Medical*. More to the point, a single Justice's

commentary cannot rewrite a Supreme Court precedent.[1] *See Am. Coll. of Obstetricians & Gynecologists v. F.D.A.*, 2020 WL 3960625, at *17 (D. Md. July 13, 2020) (rejecting the argument that Chief Justice Roberts's concurrence altered the *WWH* standard and holding that *WWH* remains "the most recent majority opinion delineating the full parameters of the undue burden test").

The panel likewise erred by invoking the *June Medical dissents* to try to bootstrap the Chief Justice's dicta into binding precedent. *See Hopkins*, 2020 WL 4557687, at *2. *Marks* is explicit that the Court's holding can reflect the positions of only those Justices "who concurred in the judgment[]." 430 U.S. at 193 (internal quotation marks omitted). Reliance on dissenting votes in *June Medical* to purportedly reverse the earlier majority decision in *WWH* directly contravenes *Marks*. As above, it turns *stare decisis* and majority decision-making on its head. This Court has rightly rejected a similar approach before: "We cannot read the conglomeration of the dissenting opinions of four Justices combined with the concurring opinion of the Chief Justice to constitute binding precedent[.]" *United*

[1] To the extent that the Chief Justice's concurrence in *June Medical* suggests that *WWH* itself did not require a balancing test, that suggestion is contradicted by the clear holding of *WWH*, 136 S. Ct. at 2309, and rejected by even the *June Medical* dissenters, *see, e.g.*, *June Med.*, 140 S. Ct. at 2154 (Alito, J., dissenting, in section joined by Thomas, Gorsuch, and Kavanaugh, JJ.) ("[T]he plurality adheres to the balancing test adopted in *Whole Woman's Health*."); *id*. at 2181 (Gorsuch, J., dissenting) ("At no point [in *Whole Woman's Health*] did the Court hold that the burdens imposed by the Texas law alone—divorced from any consideration of the law's benefits—could suffice to establish a substantial obstacle.").

States v. Anderson, 771 F.3d 1064, 1068 n.2 (8th 2014) (rejecting the argument that a concurrence and dissents in *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012), affected the continuing validity of earlier Eighth Circuit decisions interpreting the Commerce Clause and Necessary and Proper Clause); *see also King v. Palmer*, 950 F.2d 771, 783-84 (D.C. Cir. 1991) (en banc) (courts are not "free to combine a dissent with a concurrence to form a *Marks* majority"); *Gibson v. Am. Cyanamid Co.*, 760 F.3d 600, 619-21 (7th Cir. 2014) (same).

The panel cannot properly rely on concurrence dicta or the dissents to predict the future or somehow transform positions not part of the *June Medical* judgment into controlling ones. Instead, outlier positions cannot reverse majority Supreme Court holdings like *WWH* unless and until they ground at least five votes comprising a new judgment of the Court. *See United States v. Pope*, 910 F.3d 413, 416 (8th Cir. 2018) ("it is the Supreme Court's prerogative alone to overrule its cases, regardless of whether doubts have been raised as to the continuing validity"); *United States v. Cannon*, 750 F.3d 492, 505 (5th Cir. 2014) ("[A]bsent a clear directive from the Supreme Court, we are bound by prior precedents."); *Evans v. Sec'y, Fla. Dep't of Corrs.*, 699 F.3d 1249, 1261 (11th Cir. 2012) (courts of appeals "must not, to borrow Judge Hand's felicitous words, 'embrace the exhilarating opportunity of anticipating' the overruling of a Supreme Court

decision'"). The panel's direction to the district court to apply a new "controlling" test was improper.

Separately, the panel decision also sows confusion by seeming to rebuke the district court for recognizing the role of judicial fact-finding in constitutional cases and making factual findings in order to apply the undue burden test. *Hopkins*, 2020 WL 4557687, at *2. Not only *WWH*, but also the Supreme Court's holdings in *Gonzales v. Carhart*, 550 U.S. 124, 165-66 (2007), and earlier cases require courts not to defer unquestioningly to legislative findings but to instead review evidence in the judicial record (including expert evidence and fact declarations) and make factual findings in the course of applying the undue burden standard. *WWH*, 136 S. Ct. at 2310 ("The statement that legislatures, and not courts, must resolve questions of medical uncertainty" is "inconsistent with this Court's case law."); *Gonzales*, 550 U.S. at 165 (rejecting any "dispositive weight" for legislative findings and reaffirming courts' "independent constitutional duty" to consider factual evidence). The need for judicial examination of the facts is especially apparent when the legislature itself has offered no relevant findings, as here. *See WWH*, 136 S. Ct. at 2310; *Hopkins*, 267 F. Supp. 3d at 1057-58, 1086, 1098.

In *June Medical*, moreover, the Chief Justice himself relied on detailed district court fact-findings and concluded that those "bind us in this case." 140 S.

Ct. at 2140-41 (Roberts, C.J., concurring). Chief Justice Roberts's mention of some deference to legislatures in his *June Medical* concurrence does not purport to (and cannot) alter or overrule the many Supreme Court decisions mandating an independent role for judicial fact-finding to ensure the full protection of constitutional rights. Upon rehearing of the panel decision to restore the governing undue burden standard in this circuit, this Court should also remove the panel's misleading objection to factual findings and reference to deference.

II. Rehearing Should Also Make Clear that *Box*, Strictly Cabined by the Supreme Court Itself, Has No Relevance in this Case.

Finally, the panel also erred in vacating and remanding to the district court for "reconsideration in light of" the Supreme Court's decision in *Box v. Planned Parenthood*. Unlike the plaintiff in this case who brought an undue burden challenge to a law relating to the disposal of tissue from an abortion, the plaintiffs in *Box* challenged a disposal law solely on rational basis grounds.[2] The Court took pains to distinguish its ruling in *Box* from challenges to abortion regulations decided under the undue burden standard, emphasizing that, because the plaintiffs had only brought the rational basis claim, "[t]his case . . . does not implicate our

[2] Whereas the Indiana law at issue in *Box* determined the permitted methods of tissue disposition after abortion, the law here imposes an elaborate scheme of rights as to who controls decision-making about disposal. *See* Ark. Code Ann. §§ 20-17-802(a), 20-17-102(d)(1) (describing the rank order of those individuals given the "right to control the disposition of the remains").

cases applying the undue burden test to abortion regulations," 139 S. Ct. at 1782; *see also id.* at 1781 (the challengers in *Box* "never argued that Indiana's law creates an undue burden on a woman's right to obtain an abortion"). The Supreme Court recognized that other cases had raised "challenges to . . . disposition laws under the undue burden standard," but that its *Box* "opinion expresses no view on the merits of those challenges." *Id.* at 1782. Thus, the panel's direction that the district court rely on *Box* contradicts the Supreme Court's explicit rulings in that very case and invites the district court and other courts within this circuit to commit constitutional error.

CONCLUSION

For all these reasons, rehearing of the panel decision is required to restore national uniformity in constitutional standards. The panel decision conflicts with *WWH*, *June Medical*, and *Marks*. And neither those decisions nor *Box* supports any reconsideration of the district court's well-founded determinations that each challenged Arkansas law imposes an undue burden on plaintiff's patients' liberty rights. Upon rehearing, the preliminary injunction should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this petition complies with the requirements of Federal Rules of Appellate Procedure 32(a)(5)(A), 32(a)(6), 35(b)(2)(A), and 40(b)(1) because it contains 3,525 words, excluding those portions exempted by Rule 32(f), in 14-point Times New Roman font as counted by Microsoft Word, the word-processing system used to generate this document.

I further certify that the petition has been submitted in Portable Document Format (PDF), which was generated by printing to PDF from the original word processing file so that the electronic version may be searched and copied, and that this file has been scanned for viruses and is virus free to the best of my knowledge.

Ruth E. Harlow
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Counsel for Plaintiff-Appellee

CERTIFICATE OF SERVICE

I hereby certify that on August 21, 2020, I electronically filed the foregoing petition with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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