

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

August 18, 2021

Lyle W. Cayce
Clerk

No. 17-51060

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*; 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,

versus

KEN PAXTON, *Attorney General of Texas, in his official capacity*; SHAREN WILSON, *Criminal District Attorney for Tarrant County, in her official capacity*; BARRY JOHNSON, *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
USDC No. 1:17-CV-690

Before OWEN, *Chief Judge*, and JONES, SMITH, STEWART, DENNIS, ELROD, HAYNES, GRAVES, HIGGINSON, COSTA, WILLETT, HO, ENGELHARDT, and WILSON, *Circuit Judges*.*

JENNIFER WALKER ELROD and DON R. WILLETT, *Circuit Judges*, joined by OWEN, *Chief Judge*, and JONES, SMITH, HAYNES, HO, ENGELHARDT, and WILSON, *Circuit Judges*:**

We must decide whether the district court erred in permanently enjoining Texas’s Senate Bill 8 (SB8), which prohibits a particular type of dilation and evacuation (D&E) abortion method. SB8 refers to the prohibited method as “live dismemberment” because doctors use forceps to separate, terminate, and remove the fetus. SB8 requires doctors to use alternative fetal-death methods.

The district court declared SB8 facially unconstitutional. It held that SB8 imposes an undue burden on a large fraction of women, primarily because it determined that SB8 amounted to a ban on all D&E abortions. But viewing SB8 through a binary framework—that either D&Es can be done only by live dismemberment or else women cannot receive abortions in the second trimester—is to accept a false dichotomy. Instead, the record shows that doctors can safely perform D&Es and comply with SB8 using methods that are already in widespread use. In permanently enjoining SB8, the district

* Judges Southwick, Duncan, and Oldham are recused.

** Chief Judge Owen and Judge Haynes concur in the judgment only.

No. 17-51060

court committed numerous, reversible legal and factual errors: applying the wrong test to assess SB8, disregarding and misreading the Supreme Court's precedents in *Planned Parenthood of Southeastern Pennsylvania v. Casey* and *Gonzales v. Carhart*, and bungling the large-fraction analysis. Accordingly, we VACATE the district court's permanent injunction.

Moreover, remanding to the district court would be futile here because the record permits only one conclusion. The plaintiffs have failed to carry their heavy burden of proving that SB8 would impose an undue burden on a large fraction of women. We REVERSE and RENDER.

I.

Dilation and evacuation is an abortion method commonly used after the beginning of the 15th week. It begins with the dilation phase, which is lengthy and can take two or even three days to complete. First, the woman is given the option of conscious sedation and then is administered medication for dilation. If medication cannot alone cause sufficient dilation, the doctor injects a local anesthetic directly into the woman's cervix. After the cervix has been numbed, the doctor inserts osmotic dilators into the cervical canal, which absorb liquid and expand to allow the removal of the fetus and placenta. Starting around 18 weeks gestation, this expansion process normally happens overnight, requiring the woman to come back the next day for the rest of the abortion procedure.

Once sufficient dilation has occurred, the second phase begins and the doctor evacuates (removes) the fetus. Doctors use three main evacuation methods: (1) the suction method alone to terminate, separate, and remove the fetus; (2) suction and forceps together to terminate, separate, and remove the fetus; or (3) various fetal-death techniques (*e.g.*, digoxin injections) to terminate the fetus before using forceps (sometimes combined with suction)

No. 17-51060

to separate and remove the fetus. Unlike the dilation phase, evacuation is relatively brief and can be done in “a few minutes.”

In 2017, the Texas legislature enacted SB8, which allows any abortion accomplished by dilation and suction alone (the first method) or accomplished by fetal death caused without forceps followed by evacuation with forceps (the third method), but regulates the second method by prohibiting a doctor from using forceps to separate the fetal tissue and thereby terminate the fetus via live dismemberment.¹ SB8 states:

A person may not intentionally perform a dismemberment abortion unless the dismemberment abortion is necessary in a medical emergency.²

A “dismemberment abortion” is defined by the legislature as:

an abortion in which a person, with the purpose of causing the death of an unborn child, dismembers the living unborn child and extracts the unborn child one piece at a time from the uterus through the use of clamps, grasping forceps, tongs, scissors, or a similar instrument that, through the convergence of two rigid levers, slices, crushes, or grasps, or performs any combination of those actions on, a piece of a the unborn child’s body to cut or rip the piece from the body.³

A “medical emergency” is defined as a:

life-threatening physical condition aggravated by, caused by, or arising from a pregnancy that, as certified by a physician, places the woman in danger of death or a serious risk of substantial

¹ See Act of May 26, 2017, 85th Leg. R.S., ch. 441, § 6, 2017 Tex. Gen. Laws 1164, 1165–67 (eff. Sept. 1, 2017) (codified as Tex. Health & Safety Code §§ 171.151–.154).

² *Id.* § 171.152.

³ *Id.* § 171.151.

No. 17-51060

impairment of a major bodily function unless an abortion is performed.⁴

When a medical emergency arises, the doctor may proceed straight to live dismemberment with forceps.⁵

SB8 does not regulate the dilation phase of the abortion or any other evacuation method. SB8 does not ban the use of suction during any abortion procedure. SB8 does not prohibit a doctor from having forceps “on hand” to use after fetal death has occurred or to use if a medical emergency arises.⁶

What SB8 does do is prohibit one particular evacuation method in one particular set of circumstances—live dismemberment by forceps when a medical emergency does not exist. Thus, doctors may comply with SB8 by using only suction to achieve fetal death and remove the fetus—or, at later gestational ages, using either suction or a digoxin injection to cause fetal death before forcep-dismemberment and removal.⁷

The plaintiffs here, six abortion clinics and five individual doctors who provide abortions, brought this facial challenge against SB8 in federal court. They allege that SB8 imposes an undue burden on women seeking abortions in the second trimester of pregnancy. The defendants are various Texas law

⁴ *Id.* § 171.002.

⁵ *Id.* § 171.152.

⁶ Although SB8 prohibits using “clamps, grasping forceps, tongs, scissors, or . . . similar instrument[s]” to cause fetal death, *id.* § 171.151, we will refer to those items collectively as “forceps.”

⁷ A potassium-chloride injection and umbilical-cord transection are additional alternatives to live dismemberment, and the State presented testimony about them at the trial. As far back as *Stenberg v. Carhart*, 530 U.S. 914, 925 (2000), the Supreme Court has recognized potassium chloride, in particular, as an established method of causing fetal death. We need not discuss these additional alternatives, however, because digoxin and suction are already widely used and are alone sufficient for our holding in this case that the plaintiffs failed to prove an undue burden on a large fraction of women in the relevant circumstances.

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.