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

PLANNED PARENTHOOD MINNESOTA, NORTH DAKOTA, SOUTH DAKOTA, and SARAH A. TRAXLER, M.D.;	)	
Plaintiffs,	)	
v.	)	**CASE NO. 4:22-cv-04009-KES**
KRISTI NOEM, Governor, JOAN ADAM, Interim Secretary of Health, Department of Health, and PHILIP MEYER, D.O., President, South Dakota Board of Medical and Osteopathic Examiners, in their official capacities,	)	
Defendants.	)	

PLAINTIFFS' OPPOSITION TO
DEFENDANTS' MOTION FOR STAY PENDING APPEAL

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TABLE OF CONTENTS

For over twenty years, patients in South Dakota, like those nationwide, have had the option of choosing a safe, early abortion using medications alone. Yet in January 2022, the South Dakota Department of Health (the "Department") promulgated Rule 44:67:04:13 (the "Rule") which would end that option by making South Dakota the only state where medication abortion patients must make three separate trips to meet with a physician at state-mandated time intervals—a requirement the state's only abortion provider cannot comply with.[1] After briefing and argument, this Court preliminarily enjoined the Rule in a thorough and well-reasoned 40-page opinion, finding that Plaintiffs made a clear showing that they were likely to succeed in proving its unconstitutionality.[2]

Discontent with this outcome, Defendants now ask for a stay pending appeal,[3] but they meet none of the required factors. Critically, Defendants have not shown that they are likely to succeed on the merits. This Court found that Plaintiffs had clearly established the Rule's unconstitutionality on several bases: that it is not reasonably related to a legitimate government purpose under *June Medical Services L.L.C. v. Russo*, 140 S. Ct. 2103, 2138 (2020) (Roberts, C.J., concurring); that it will unduly burden a large fraction of patients using any numerator or denominator; and that it violates Equal Protection under any standard of review, including the

[1] The Rule also contains other provisions not at issue in this litigation.

[2] Defendants take issue with the scope of the preliminary injunction, but this academic exercise has no practical effect in this case. Plaintiffs have made clear that they are suing "on their own behalf and on behalf of PPMNS's current and future physicians, employees, staff, servants, officers, and agents who participate in abortions, and on behalf of their current and future patients seeking medication abortion services." Compl. ¶ 18, ECF No. 1. Planned Parenthood Minnesota, North Dakota, South Dakota (PPMNS) is the only general abortion provider in South Dakota. Defendants' suggestion, then, that the preliminary injunction might apply to other abortion providers, has always been mysterious to Plaintiffs.

[3] Defendants have also appealed and petitioned for the same relief (without waiting for this Court to act on this motion) in the U.S. Court of Appeals for the Eighth Circuit. Those motions remain pending. They also petitioned for expedited consideration of their motion for a stay, but ultimately withdrew that request.

standard of review Defendants propose. Defendants have not made a "strong showing" that they are likely to succeed in challenging any of these holdings, much less all of them. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987).

Nor are Defendants any more likely to succeed on the other factors for a stay pending appeal. They have established neither irreparable harm nor any harm that outweighs that which would befall Plaintiffs and their patients. The only harm Defendants claim is their inability to enforce an unconstitutional administrative rule that is the first of its kind, furthers no health interest, and harms patients. Indeed, Defendants seem to concede that the Rule—promulgated in the name of patient safety—is likely to harm patients, but claim they are entitled to a stay because not *enough* patients will be harmed. *See* Br. in Opp'n to Pls.' Mot. for Prelim. Inj. at 18, ECF No. 19; Mem. Op. & Order Granting Pls.' Mot. for Prelim. Inj. (hereinafter "Op.") at 13–14, ECF No. 26. In contrast, the preliminary injunction maintains the status quo and allows Plaintiffs to continue practicing medicine according to the universally-recognized standard of care, as they have for the last 20 years.

There is no reason that Defendants' appeal should not proceed in due course with the preliminary injunction ordered by this Court in place.

ARGUMENT[4]

"A stay is an intrusion into the ordinary process[] of . . . judicial review, and . . . is not a matter of right." *Nken v. Holder*, 556 U.S. 418, 427 (2009) (cleaned up). It can only issue if four factors weigh in its favor: (1) a strong showing the applicant is likely to succeed on the merits; (2) irreparable injury absent a stay; (3) whether issuance of the stay will substantially injure other

[4] In the interest of brevity, Plaintiffs refrain from recounting all of the facts of this case, which have been developed in prior briefing and summarized in this Court's Memorandum Opinion and Order. Pls.' Br. in Supp. of Mot. for Prelim. Inj. & TRO at 2–8, ECF No. 4; Op. at 2–19.

interested parties; and (4) the public interest. *Id.* at 425–26, 434. The most important factor is likelihood of success. *Brady v. Nat'l Football League*, 640 F.3d 785, 789 (8th Cir. 2011) (per curiam). "The party requesting a stay bears the burden of showing that the circumstances justify [its entry]." *Nken*, 556 U.S. at 433–34. Defendants cannot meet that burden.

I. Defendants Have Not Made a Strong Showing of Success on the Merits.

Defendants cannot make the required "strong showing" that they are likely to succeed on the merits. Instead, they rehash arguments that this Court already considered and properly rejected: maintaining that they are likely to succeed on appeal because the Rule is rationally related to a legitimate state interest, because it would not unduly burden a large fraction of patients, and because it complies with equal protection. These arguments misconstrue decades of abortion law and other precedent and ignore this Court's well-supported factual findings. None is likely to be successful on appeal.

A. The Rule Is Not Reasonably Related to a Legitimate Purpose.

The parties agree that the Eighth Circuit has adopted Chief Justice Roberts' *June Medical* concurrence under which an abortion regulation is unconstitutional if it fails a "threshold requirement" that it be "reasonably related" to a "legitimate purpose." *June Med. Servs.*, 140 S. Ct. at 2138; *see Hopkins v. Jegley*, 968 F.3d 912, 915 (8th Cir. 2020). This Court properly applied this test: it looked at "the purposes [of the Rule] as stated by the executive branch" and found that rather than further the state's interest, the Rule's "third appointment and time delay for misoprostol increase the risks to patients' health." Op. at 28.

Defendants fault this conclusion, claiming that "[t]he 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." Mot. for Stay Pending Appeal (hereinafter "Stay Mot.") at 8, ECF No. 27 (emphasis in original). But the Supreme Court has never applied this extraordinarily deferential test to an

abortion regulation. Indeed, Defendants' argument was squarely considered and rejected in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016) ("[It] 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." (citing *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 491 (1955))). In his *June Medical* concurrence, Chief Justice Roberts did not overrule any longstanding abortion jurisprudence, including *Hellerstedt*. 140 S. Ct. at 2138–39 ("We should respect the statement in *Whole Woman's Health* that it was applying the undue burden standard of *Casey*.").

Defendants confuse the order of events when they claim that this Court erred by considering *Hellerstedt*, *Gonzales v. Carhart*, 550 U.S. 124 (2007), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 883 (1992) because "none of those cases were purporting to interpret or apply the 'threshold requirement' from Chief Justice Roberts's *June Medical* concurrence." Stay Mot. at 4. As Chief Justice Roberts made clear, *he* was the one relying on these cases, particularly *Casey*, as setting out the relevant test; and rather than "repudiate[]" *Hellerstedt*, as Defendants suggest, *id.* at 5, the Chief Justice interpreted that case's analysis of benefits as *going to* the threshold requirement. *See June Med. Servs.*, 140 S. Ct. at 2138 (Roberts, C.J., concurring) (rejecting a balancing test of benefits and burdens and interpreting benefits as going to the "threshold requirement"). At no point did he suggest that *Hellerstedt* was wrong to reject rational basis review nor did he criticize the *June Medical* district court for making factual findings on the law's benefits.

The conclusion that some form of heightened scrutiny applies is inescapable.[5] As even the cases cited by Defendants confirm, the sort of rational basis review for which they advocate is not

[5] Defendants make much of the fact that the Court did not name the standard it was using. Stay Mot. at 6–7. Whether it is called reasonable relation, rational basis with bite, heightened or

appropriate when fundamental rights are at stake. *See* Stay Mot. at 3–4; *Friedman v. Rogers*, 440 U.S. 1, 17 (1979) (applying rational basis "[u]nless a classification trammels fundamental personal rights"); *Honeywell, Inc. v. Minn. Life & Health Ins. Guar. Ass'n*, 110 F.3d 547, 554–55 (8th Cir. 1997) (applying rational basis for "economic legislation"); *Parrish v. Mallinger*, 133 F.3d 612, 614–15 (8th Cir. 1998) (applying rational basis in part because no constitutional rights implicated); *Casbah, Inc. v. Thone*, 651 F.2d 551, 557 (8th Cir. 1981) (applying rational basis "[w]here no suspect classifications are involved and no fundamental rights" were at issue). There can be no doubt that laws restricting abortion access implicate fundamental rights. *See, e.g.*, *Casey*, 505 U.S. at 834, 851 (the "decision whether to bear or beget a child" is one of those "fundamental[]" choices that is "central to the liberty protected by the Fourteenth Amendment" (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972))).

Therefore, courts must look at the available record evidence when determining whether an abortion restriction is "reasonably related to"—or "furthers"—the state's asserted purpose. *June Med. Servs.*, 140 S. Ct. at 2138 (Roberts, C.J., concurring) (quoting *Casey,* 505 U.S. at 878); *see also*, *e.g.*, *Gonzales*, 550 U.S. at 158 (2007) ("The Act's ban on abortions that involve partial delivery of a living fetus furthers the Government's objectives."); *Casey*, 505 U.S. at 900–901 (upholding recordkeeping and reporting requirements only after concluding they were "reasonably directed to the preservation of maternal health" (quoting *Planned Parenthood of Cent. Mo. v. Danforth,* 428 U.S. 52, 80 (1976))).[6] Nothing in the case law offers support for the bold assertion

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intermediate scrutiny, or something else entirely is irrelevant to its substance: this Court properly asked whether the Rule "further[s]" a legitimate state interest. Op. at 23–28.

[6] Although Defendants are correct that the Sixth Circuit has found that rational basis review applies, *see EMW Women's Surgical Center, P.S.C. v. Friedlander*, 978 F.3d 418, 433 (6th Cir. 2020), that decision was wrongly decided and is not binding on this Court. Furthermore, even the court in *EMW Women's Surgical Center* did not "imagine" its own rationale for the challenged restriction, but looked to the district court's factual findings. *See id.* at 439 ("The district court

that courts no longer "retain[] an independent constitutional duty to review factual findings where constitutional rights are at stake." *Gonzales*, 550 U.S. at 165. *Gonzales*'s guidance is not limited to mere "'findings' that appear in the Rule or any other enactment," Stay Mot. at 6, but describes the court's general obligations when considering constitutional questions. *Gonzales*, 550 U.S. at 165 ("In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function." (quoting *Crowell v. Benson*, 285 U.S. 22, 60 (1932))).

Properly applying this standard, as this Court did, there is no doubt that the Rule does not "further[] [a] valid state interest."[7] *Casey,* 505 U.S. at 877. As Defendants do not contest, requiring patients to return for a third visit for misoprostol is not reasonably related to the Executive Order.[8] Even Governor Noem has recently stated that the goal of her Executive Order was "just not making telemedicine, chemical abortions more available over the internet or over the phone with strangers," *Noem speaks on Haugaard's anti-abortion bill, critical race theory and marijuana*, Dakota News Now (Feb. 17, 2022), https://www.dakotanewsnow.com/2022/02/17/noem-speaks-haugaards-anti-abortion-bill-critical-race-theory-marijuana/. And rather than further patient health, "the third appointment and time delay for misoprostol increase the risks to patients' health." Op. at 28.

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found that it is sometimes necessary to transfer a patient from an abortion facility to an emergency room because of an abortion-related complication.").

[7] Although Defendants suggest that this language refers to the substantial obstacle "prong" of the undue burden analysis, Stay Mot. at 4, a plain reading shows otherwise, as the phrase "while furthering . . . a valid state interest" appears as its own clause describing the term "statute." *Casey*, 505 U.S. at 877.

[8] The Court properly declined to consider any post-hoc rationales for the Rule. *See United States v. Virginia*, 518 U.S. 515, 533 (1996) (plurality opinion) (finding that "[t]he justification must be genuine, not hypothesized or invented *post hoc* in response to litigation," in an intermediate scrutiny analysis).

As Plaintiffs argued below, even if rational basis does apply, the Rule does not meet even this standard. Pls.' Reply Br. in Supp. of Mot. for Prelim. Inj. (hereinafter "Pls.' Reply Br.") at 11–12, ECF No. 24. Defendants provide three post-hoc rationales for the Rule: (1) it "ensure[s]" that a physician determines whether the patient has already aborted before administering the misoprostol; (2) it allows a physician to determine whether the patient is experiencing complications from taking mifepristone; and (3) it allows a physician to assess the patient's needs for pain control before the misoprostol is administered. Harrison Decl. at ¶¶ 31–34, ECF No. 19-2; Stay Mot. at 7. But the Rule does not contemplate that physicians examine patients when they return for a third visit, much less determine whether they have already aborted (which would require an ultrasound or testing),[9] are experiencing complications, or need additional pain control. The Rule only mandates that a physician hand patients misoprostol. Even if courts need only "ask whether it is *possible to imagine* that the Rule might do something to advance the state's interest in patient safety," Stay Mot. at 8, it is impossible to do so here. Rational basis review is not "toothless." *Kansas City Taxi Cab Drivers Ass'n, L.L.C. v. City of Kansas City*, 742 F.3d 807, 810–11 (8th Cir. 2013).

Plaintiffs are therefore likely to succeed on their claim that the Rule "fails to meet th[e] threshold requirement" and "should be enjoined on this basis alone." Op. at 28.

B. The Rule Poses a Substantial Obstacle for a Large Fraction of Patients.

Defendants have also failed to make a strong showing that the Court erred in holding that "Planned Parenthood has made a clear showing that the third appointment and mandatory delay impose substantial obstacles on a large fraction of relevant cases regardless of whether the relevant

[9] Defendants seem to think it notable that a minority of patients abort from just the first medication, but what is notable is that not even their expert considers a third visit to pick up misoprostol required for patient safety. Harrison Decl. at ¶¶ 10–14.

cases consist of all abortions in South Dakota or the smaller subset of medication abortions only."[10] Op. at 34. As they did in prior briefing, Defendants' arguments rest on the incorrect assumption that a substantial obstacle must be a complete one. Stay Mot. at 9. Although the Eighth Circuit has held that the number of patients who forego an abortion may be *relevant*, *Planned Parenthood of Ark. & E. Okla v. Jegley*, 864 F.3d 953, 959 (8th Cir. 2017), it is not *determinative*. In fact, in *June Medical*, Chief Justice Roberts accepted the finding that "longer waiting times, and increased crowding," as well as increased travel times, all amounted to a substantial obstacle without finding that they prevented access altogether. 140 S. Ct. at 2140 (Roberts, C.J., concurring).

As this Court correctly found, 100% of medication abortion patients, or 40% of all abortion patients, would be impacted by the Rule because Plaintiffs would not be able to comply, thereby eliminating medication abortion access entirely. In support of their position that patients do not have a right to their "preferred method" of abortion, Defendants cite to *Gonzales* and *Whole Woman's Health v. Paxton*, 10 F.4th 430, 453 (5th Cir. 2021). Stay Mot. at 9. But both of these cases involved bans on a procedural method of abortion based on the state's claimed interest in fetal life that left patients the option of another method that, from a patients' perspective, was very similar. Indeed, the *Gonzales* court specifically supported its conclusion that the ban did not impose an undue burden with the fact that comparable alternatives (including the *banned* method itself in some circumstances) were available. 550 U.S. at 164.[11] However, a medication abortion and a procedural abortion are not comparable. As this Court properly found, "procedural abortion[]

[10] Defendants claim that the court "used the wrong denominator." Stay Mot. at 8–9. But this Court found that the Rule was an undue burden using either the denominator Defendants criticize (patients seeking medication abortion) or that which they favor (all patients seeking abortion). Op. at 14–15.

[11] Even in *Gonzales*, the court left open the possibility that certain patients could petition for as-applied relief, 550 U.S. at 124, which the Court also granted here, Op. 34–35 n.3, and which Defendants do not challenge in their motion.

is more invasive—a fact that imposes an obstacle for patients who prefer the flexible timing and lesser degree of bodily invasion of a medication abortion." Op. at 31. Neither *Gonzales* nor *Paxton* permit what Defendants suggest South Dakota can do: force 40% of patients to have a procedure in which instruments are inserted into their vaginas when they would prefer (and for some, it would be safer and medically indicated) to use medications alone.[12]

Alternatively, this Court also properly found that shifting to only providing procedural abortions would also profoundly impact patients. Because procedural abortions take longer to complete, Plaintiffs would need to reduce appointments by 30%, "congest[ing] Planned Parenthood's already busy schedule of procedural abortions, and thus [negatively affecting] . . . the availability of procedural abortions." Op. at 34. Defendants' complaints about the conclusion that this would burden a large fraction of patients are misplaced. Stay Mot. at 12–13. As this Court explained, Planned Parenthood is the only provider in the state, it provides only first-trimester abortions, it is "already scheduling abortions four weeks out," and "[a]bortions are safer and lower risk when performed earlier in gestation." Op. at 34. It was findings like these—not a "number or fraction" of patients, Stay Mot. at 11—that led the Supreme Court to invalidate the regulations at issue in *June Medical* and *Hellerstedt*. *See June Med. Servs.*, 140 S. Ct. at 2140 (Roberts, C.J., concurring) (considering "longer waiting times for appointments," "increased crowding," "difficulty affording or arranging for transportation and childcare on the days of their clinic visits," and "[i]ncreased travel distance" (citations omitted)); *Hellerstedt*, 136 S. Ct. at 2318 (examining "long distances," "crammed-to-capacity superfacilities," and "waiting rooms so full, patients had to sit on the floor or wait outside"). As the Eighth Circuit has made clear, the large fraction

[12] Defendants also cite *Benten v. Kessler*, 505 U.S. 1084, 1084 (1992), but, as Plaintiffs explained in their reply brief, that case, which deals with the importation of mifepristone prior to FDA approval, has no bearing here. Pls.' Reply Br. at 18 n.11.

calculation does not require the "mathematical precision" for which Defendants advocate. *Jegley*, 864 F.3d at 960.

This Court even considered the scenario where Plaintiffs could continue to provide medication abortions under the Rule—a position not even taken by Defendants. In addition to the significant travel and logistical burdens imposed by the Rule, Op. at 3, 32–33, the Court concluded that "[t]he requirement of a third appointment necessarily puts all medication abortion patients at greater risk of hemorrhage or other complications," and "[t]hose unnecessary risks are burdens in themselves," Op. at 32. Defendants claim that this analysis is "untenable" because "[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." Stay Mot. at 10. But it is Defendants' argument that is untenable because that is precisely what the Supreme Court did in *Casey* when it struck down a spousal notification law that "likely" affected a "significant number of women" out of the *1%* of patients obtaining abortions for whom the law was relevant. 505 U.S. at 894; *see also June Med. Servs.*, 140 S. Ct. at 2137 (Roberts, C.J., concurring). Equally untenable is Defendants' stunning position that it is of no import 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," Stay Mot. at 10 (emphasis omitted), just as long as not too many patients are harmed.

Finally, while Defendants accuse this Court of "rank speculation," *id.* at 12, they are the ones guilty of this offense, making numerous baseless assertions, including that "[m]any patients can easily make the extra trip"; that "[o]ther patients will switch to surgical abortion to avoid the

extra trip"[13]; and that "abortion funds are available to defray the costs for indigent patients," among others. *Id.* at 11–12. There is *zero* evidence in the record from which to deduce these astounding conclusions.[14]

Quite the opposite, Plaintiffs provided evidence from two experts to support this Court's well-reasoned conclusion that that the Rule will likely pose a substantial obstacle to a "large fraction" of relevant patients using any numerator and any denominator. *See, e.g.*, *Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452, 1462 n.10 (8th Cir. 1995) (facially enjoining an abortion restriction in part because at least 18% of minors would have no bypass option).

C. The Rule Fails Equal Protection Review.

Defendants have also not made a strong showing that the Court's Equal Protection holding was erroneous. Based on the Eighth Circuit's observation in *Planned Parenthood of Mid-Missouri & Eastern Kansas, Inc. v. Dempsey*, 167 F.3d 458, 464 (8th Cir. 1999), that "[s]ince *Casey*, we have applied the undue burden test in cases involving legislation that affects the right to abortion," this Court found that "the Rule's disparate treatment of misoprostol and abortion patients taking misoprostol violates the equal protection clause" because "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." Op. at 38–39. Defendants' argument that "[m]edical necessity is irrelevant when applying the undue-burden standard," Stay Mot. at 13, is belied by decades of precedent. *See* Section I.A, *supra*.

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[13] As is clear from the Court's opinion, the increased travel percentages reflect only medication abortion patients, Op. at 3, contrary to Defendants' assertion, Stay Mot. at 11.

[14] Defendants' claim that the District Court's reliance on patients' poverty is "meaningless," Stay Mot. at 12, also shows complete disregard for the lived experiences of low-income patients, most of whom who are parents, may have inflexible jobs, and are trying to navigate a labyrinth of restrictions. *See* Op. at 33.

Separately, the Court properly concluded that the Rule does not pass rational basis review because it is completely divorced from the state's purported health justifications. *See* Op. at 39. As this Court explained, "under the Rule, patients are allowed to self-administer misoprostol when taken for purposes other than medication abortion," including to manage a miscarriage, despite that "the record clearly shows that misoprostol is safer when taken in the context of medication abortion than when taken for other medical purposes." *Id.*; *see also id.* at 11 ("Use of misoprostol to address incomplete abortion, management of postpartum hemorrhage, and miscarriage management involves a higher risk of bleeding than for use in a medication abortion."). As Plaintiffs explained in their motion for preliminary injunction, miscarriage was initially covered by the Rule, but was removed following comments submitted by the South Dakota State Medical Association and others about the harms the Rule would cause. As a result, the Rule only applies to misoprostol used for abortion. Defendants claim this underinclusivity cannot be a basis on which to strike down the law, but as this Court properly found, it goes directly to the Rule's lack of any rational basis. Op. at 39; *see also Romer v. Evans*, 517 U.S. 620, 632 (1996) ("[this] amendment seems inexplicable by anything but animus toward the class it affects"); *Ranschburg v. Toan,* 709 F.2d 1207, 1211 (8th Cir. 1983) ("An intent to discriminate is not a legitimate state interest."). For this reason as well, Defendants have failed to make the "strong showing" of success on the merits required for a stay pending appeal.

II. The Remaining Factors Weigh Against Issuing a Stay.

The remaining three factors also weigh against a stay pending appeal. Any "irreparable harm" caused by not being able to enforce the Rule does not occur if "that [law] is unconstitutional." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018). On the contrary, if the Rule goes into effect, Plaintiffs' patients will be deprived of their constitutional rights. Op. at 35.

"[T]hreatened injury to [constitutional rights] outweighs whatever damage the preliminary injunction may cause Defendants' inability to enforce what appears to be an unconstitutional statute." *Am. Civil Liberties Union v. Johnson*, 194 F.3d 1149, 1163 (10th Cir. 1999) (citation omitted). A stay would also harm the public interest. As this Court rightly noted, "[t]here is a public interest in protecting the right to choose an abortion. And the public has a clear interest in ensuring the supremacy of the United States Constitution. While the public also has an interest in the enforcement of state administrative rules, that interest is secondary to [these other interests]." Op. at 37.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that Defendants' motion be denied.

Dated: March 8, 2022

Respectfully submitted,

/s/ Stephanie Amiotte

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CERTIFICATE OF COMPLIANCE

This brief complies with South Dakota Local Civil Rule 7.1(B)(1) because—according to Microsoft Word 2018, the word processing program used to draft this brief—it contains 4331 words, not including the cover page, table of contents, signature block, certificate of service and this certificate. *See* D.S.D. Civ. LR 7.1(B)(1).

This 8th day of March, 2022.

/s/ Stephanie Amiotte

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CERTIFICATE OF SERVICE

I certify that on the 8th day of March, 2022, I electronically filed the foregoing brief with the Clerk of the Court for the United States District Court for the Southern Division of the District of South Dakota by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

/s/ Stephanie Amiotte

Stephanie Amiotte