

No. 11-50814

**In the United States Court of Appeals  
for the Fifth Circuit**

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TEXAS MEDICAL PROVIDERS PERFORMING ABORTION SERVICES, doing  
business as Reproductive Services of San Antonio, a class represented by Metropoli-  
tan OBGYN, P.A.; on behalf of itself and its patients seeking abortions; ALAN  
BRAID, on behalf of himself and his patients seeking abortions,  
*Plaintiffs-Appellees,*

v.

DAVID LAKEY, Commissioner of the Texas Department of State Health Services,  
in his official capacity; MARI ROBINSON, Executive Director of the Texas Medical  
Board, in her official capacity,  
*Defendants-Appellants.*

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On Appeal from the United States District Court for the  
Western District of Texas, Austin Division  
Case No. 1:11-cv-00486-SS

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**APPELLANTS' MOTION FOR IMMEDIATE ISSUANCE OF MANDATE OR, IN THE  
ALTERNATIVE, FOR A STAY OF THE DISTRICT COURT'S PRELIMINARY-  
INJUNCTION ORDER PENDING ISSUANCE OF THE MANDATE**

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Defendants Lakey and Robinson (“State Defendants”) respectfully move this Court to direct the Clerk to issue the mandate immediately. *See* FED. R. APP. P. 41(b). In the alternative, the State Defendants ask this Court to stay the district court’s preliminary-injunction order pending the issuance of the mandate.

A few days ago, this Court entered judgment vacating the trial court’s preliminary-injunction order, which enjoins the State Defendants from enforcing several provisions of Texas House Bill 15 (“HB 15”). The Court’s mandate, however, is not scheduled to issue until the morning of February 1, 2012. FED. R. APP. P. 41(b); *see also* 5TH CIR R. 41 I.O.P. If the plaintiffs file a petition for rehearing, as we expect them to do, then the mandate will be further postponed—possibly for months. *See* FED. R. APP. P. 41(d). In *Fisher v. University of Texas*, 644 F.3d 301 (5th Cir. 2011), for example, this Court did not dispose of the disappointed litigant’s petition for rehearing until five months after the panel’s judgment had issued. *See id.* (order denying petition for rehearing en banc issued on June 17, 2011); *Fisher v. University of Texas*, 631 F.3d 213 (5th Cir. 2011) (panel decision issued on January 18, 2011).

Because the mandate has not issued, the district court’s preliminary-injunction order remains in effect and hinders the State Defendants from enforcing the provisions of HB 15. There is no justification for continuing to prevent the State from implementing the requirements of HB 15 when this Court has already determined that the district court’s preliminary-injunction order misconstrued the Supreme Court’s

precedents and violates the State's constitutional prerogatives to regulate abortion. *See, e.g.*, U.S. CONST. amend. X; U.S. CONST. art. IV, § 4.

In light of the strong public interest in prompt enforcement of a duly enacted statute, we respectfully seek immediate issuance of the mandate. *See New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers) (“[A]ny time a State is enjoined by a Court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.”). Immediate issuance of the mandate will not preclude plaintiffs from seeking en banc review, in the event that they elect to do so. *See* 16A CHARLES WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE AND PROCEDURE § 3987 (3d ed. 2008) (“If the mandate is issued before a timely petition for rehearing is filed, the court of appeals can recall the mandate if it is disposed to grant rehearing, or can simply deny the petition.”); *cf.* 5th Cir. R. 41.2 (allowing the Court to recall the mandate to prevent injustice).

In the alternative, as a different path to the same end, the State respectfully asks this Court to reconsider its order denying as moot our motion to stay the preliminary injunction pending appeal. This appeal remains *pending* until the mandate issues, and the district court's preliminary-injunction order remains in effect until that time. So our motion to stay pending appeal cannot be deemed “moot” by the Court's judgment—unless the mandate were to issue immediately. In addition, when the State Defendants asked a motions panel of this Court to stay the district court's preliminary-injunction order at the outset of this appeal, the motions panel declined to rule

on the State Defendants' request, choosing instead to expedite the appeal and carry the State's motion with the (expedited) case. *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, No. 11-50414 (5th Cir. Sept. 28, 2011). Now that the State has prevailed in its appeal, it is appropriate for this Court to grant the State's motion to stay the district court's preliminary-injunction order, without requiring the State to await the outcome of a rehearing petition that is highly unlikely to be granted and that may not even be filed.

A decision from this Court to issue the mandate immediately, or to issue a stay of the district court's preliminary-injunction order, will also promote judicial economy. If the district court's preliminary-injunction order is allowed to remain in effect, then the plaintiffs will face strong incentives to file a petition for rehearing en banc—even if their motion is meritless—because they can delay the implementation of HB 15 by delaying the issuance of this Court's mandate. *See* 5TH CIR. R. 35 I.O.P. (“Petitions for rehearing en banc are the most abused prerogative of appellate advocates in the Fifth Circuit.”). An immediate stay of the district court's preliminary-injunction order (or an immediate issuance of the mandate) will remove any incentives for the plaintiffs to file an unnecessary motion for rehearing en banc.

### **CONCLUSION**

We respectfully ask this Court to direct the Clerk to issue the mandate immediately. In the alternative, we ask this Court to issue an order staying the district court's preliminary injunction.

Respectfully submitted.

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*Counsel for Defendants-Appellants*

**CERTIFICATE OF SERVICE**

Undersigned counsel hereby certifies that, on January 12, 2012, the foregoing motion was served, via the Court's CM/ECF Document Filing System, <https://ecf.ca5.uscourts.gov/>, upon the following registered CM/ECF users:

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**CERTIFICATE OF ELECTRONIC COMPLIANCE**

Counsel also certifies that on January 12, 2012, the foregoing motion was transmitted to Mr. Lyle W. Cayce, Clerk of the United States Court of Appeals for the Fifth Circuit, via the Court's CM/ECF Document Filing System, <https://ecf.ca5.uscourts.gov/>.

Counsel further certifies that: (1) required privacy redactions have been made, 5TH CIR. R. 25.2.13; (2) the electronic submission is an exact copy of the paper document, 5TH CIR. R. 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

/s/ Jonathan F. Mitchell  
Jonathan F. Mitchell  
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**CERTIFICATE OF CONFERENCE**

On January 12, 2012, we conferred with counsel for plaintiffs, and they oppose this motion.

/s/ Jonathan F. Mitchell  
Jonathan F. Mitchell  
*Counsel for Defendants-Appellants*