No. 16-17296

United States Court of Appeals

for the

Eleventh Circuit

WEST ALABAMA WOMEN'S CENTER, on behalf of themselves and their patients, WILLIAM J. PARKER, M.D., on behalf of himself and his patients, ALABAMA WOMEN'S CENTER, YASHICA ROBINSON WHITE,

Plaintiffs-Appellees,

– v. –

DONALD E. WILLIAMSON, in his official capacity as State Health Officer, *et al.*,

Defendants,

THOMAS M. MILLER, Dr., in his official capacity as State Health Officer, LUTHER J. STRANGE, III, in his official capacity as Alabama Attorney General, LYN HEAD, in her official capacity as District Attorney for Tuscaloosa County, ROBERT L. BROUSSARD, in his official capacity as District Attorney for Madison County,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, CASE NO.2:15-CV-00497-MHT-TFM

BRIEF FOR *AMICUS CURIAE* CENTER FOR REPRODUCTIVE RIGHTS IN SUPPORT OF APPELLEES AND AFFIRMANCE

GENEVIEVE E. SCOTT
JANET CREPPS
MOLLY DUANE
CENTER FOR REPRODUCTIVE RIGHTS
Attorneys for Amicus Curiae
199 Water Street, 22nd Floor
New York, New York 10038
(917) 637-3600

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Except for the following, all parties appearing before the district court and this Court are listed in the Brief for Appellants, Appellees, and Amici.

The Center for Reproductive Rights did not participate in the district court below, but will appear as *amici curiae* for Appellees before this Court.

Crepps, Janet – Counsel for Amicus Center for Reproductive Rights.

Duane, Molly – Counsel for Amicus Center for Reproductive Rights.

Scott, Genevieve - Counsel for Amicus Center for Reproductive Rights.

The Center for Reproductive Rights has no parent corporation and no publicly owned corporation owns 10% or more of its stock.

Respectfully submitted this 1st day of May, 2017.

/s/ Genevieve E. Scott
Genevieve E. Scott
Janet Crepps
Molly R. Duane
CENTER FOR REPRODUCTIVE RIGHTS
199 Water Street, 22nd Floor
New York, NY 10038
Telephone: (917) 637-3605
Fax: (917) 637-3666
gscott@reprorights.org
jcrepps@reprorights.org
mduane@reprorights.org

Counsel for Amicus Curiae, Center for Reproductive Rights

TABLE OF CONTENTS

Page(s)

TABLE OF CITATIONS

Page(s)

CASES

OTHER AUTHORITIES

INTEREST OF AMICUS

The Center for Reproductive Rights ("CRR") is a global human rights organization that uses the law to advance reproductive freedom as a fundamental right that all governments are legally obligated to respect, protect, and fulfill. In the United States, CRR's work focuses on ensuring that all people have access to a full range of high-quality reproductive health care. Since its founding in 1992, CRR has been actively involved in nearly all major litigation in the U.S. concerning reproductive rights, in both state and federal courts, including most recently, serving as lead counsel for the plaintiffs in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

As lead counsel in *Whole Woman's Health*, and an organization that regularly litigates in federal and state courts to ensure that women's access to abortion is not impermissibly burdened, CRR has an interest in ensuring that the undue burden standard set forth in *Whole Woman's Health* is faithfully articulated and applied by lower courts.

All parties have consented to the filing of this brief. No party's counsel authored this brief in whole or part, or contributed money to fund its preparation or submission. No person, other than amicus herein, contributed money to fund the preparation or submission of this brief.

Amicus hereby adopt the arguments of Appellees in toto.

STATEMENT OF THE ISSUES

Whether the district court acted properly in applying the undue burden standard applicable to abortion restrictions, articulated ten months ago by the Supreme Court in *Whole Woman's Health v. Hellerstedt*, and correctly declined to apply a deferential standard of review that the *Whole Woman's Health* Court considered and rejected.

SUMMARY OF THE ARGUMENT

In its recent opinion in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), the Supreme Court once again reaffirmed that the right to abortion receives meaningful protection under the Constitution. *Id.* at 2309. The Court also reiterated that the undue burden test is a fact-based and context-specific inquiry that requires courts to weigh the benefits of an abortion restriction against the burdens it creates. In making this inquiry, courts must thoroughly examine the evidence regarding both burdens and benefits. Judicial deference to the legislature is limited, and courts must assess and resolve questions of medical uncertainty. If the established benefits of a restriction do not outweigh the burdens it imposes, those burdens are undue and the law is unconstitutional. *Id.* at 2309-10.

In *Whole Woman's Health*, the Supreme Court upheld a district court's evidence-based determination that two medical regulations applicable to abortion were unconstitutional because they did not, in fact, protect patients' health, and

imposed numerous burdens on abortion access. *Id.* at 2299. In doing so, it rejected Texas's argument, which Appellants and amici Attorneys General of Louisiana, et al. (hereafter "Attorneys General amici") are again making here, that the undue burden test requires judicial deference to legislatures and that courts should rubber stamp restrictions on abortion whenever the phrase "medical uncertainty" is invoked. *Id.* at 2310. Rather, *Whole Woman's Health* reaffirmed that where women's constitutionally protected right to access abortion is at stake, courts retain an independent constitutional duty to review evidence as to both the burdens a law imposes and the actual benefits it confers. *Id.* at 2309-10.

The Supreme Court's decisions in *Stenberg* and *Gonzales* make clear that a ban on dilation and evacuation ("D&E") procedures, like the Alabama law, imposes an undue burden on women seeking second-trimester abortions. *See Stenberg v. Carhart*, 530 U.S. 914, 945-46 (2000); *Gonzales v. Carhart*, 550 U.S. 124, 164 (2007). Appellants have established no facts to lead to a different conclusion here. In arguing to the contrary, Appellants ignore the actual holdings of *Stenberg* and *Gonzales*, which are that a ban on D&E is unconstitutional under the undue burden standard, and that a ban on a different method, which the Court found was arguably never necessary to allow women to obtain a safe and legal abortion, is constitutional precisely because of the continued availability of D&E. The State and Attorneys General amici ask this Court to do nothing less than ignore the Supreme Court's

binding decisions, flout the rule of law, and strip the right to abortion of any meaningful protection.

The district court correctly applied the undue burden standard of review required under the Supreme Court's binding precedent in *Whole Woman's Health*. Its holding that Plaintiffs/Appellees have shown a substantial likelihood of success on the merits, and its issuance of a preliminary injunction, should therefore be affirmed.

ARGUMENT

I. The Alabama Ban On D&E Procedures Must Be Reviewed Under The Undue Burden Standard Applied In *Whole Woman's Health*.

Whole Woman's Health, decided just ten months ago, affirms that abortion is a fundamental constitutional right, and that restrictions on abortion must satisfy the undue burden test, regardless of the state interest they purport to further. This test, first adopted in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), requires courts to thoroughly assess the evidence in each challenge to an abortion restriction, and weigh the established benefits of a law against the burdens it imposes on women seeking abortion. *Whole Woman's Health* rejected a deferential standard of review, as it was not supported by the Court's precedent, would divest courts of their authority to review the evidentiary record, and would rob women of their liberty interest. Yet this is the very same standard which Appellants and the Attorneys General amici here advocate. Moreover, *Whole*

Woman's Health holds, as did *Gonzales*, *Stenberg*, and *Casey* before it, that neither the standard nor its application varies based on the government interests asserted in support of the restriction: For each restriction, courts must review the record evidence and balance the law's established benefits against the burdens it creates, affording only limited deference to the legislature.

A. The Undue Burden Standard Applies To All Abortion Restrictions.

The Supreme Court's decision in *Whole Woman's Health* applies to all restrictions on access to abortion, regardless of the asserted state justification for the law. *Whole Woman's Health* reaffirmed the Supreme Court's plurality opinion in *Casey*, which established that a restriction on abortion is impermissible if it amounts to an "undue burden." "An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." *Casey*, 505 U.S. at 878. In adopting this standard in *Casey*, the Court recognized both that women have liberty interests in making personal decisions about family and childbearing, and that states have valid interests in protecting both "the health of the woman" and "potential life." *Id*. at 846. Accordingly, the undue burden test, like many standards in constitutional law, is a balancing test. The state's interests, whatever they may be, are balanced against the burdens imposed on women's liberty. Indeed, in applying the undue burden standard in *Casey*, the Court applied the same analysis and factual

inquiry to restrictions intended to promote the state's interest in potential life and to those asserted to protect women's health. *See id.* at 882-900.

The Court's analysis of the requirement that physicians notify the spouses of married women seeking abortions is instructive in understanding the application of the undue burden standard. The Court considered "a husband's interest in the potential life of the child" as well as "a wife's liberty" in obtaining an abortion. *Id.* at 898. The Court expressed concern that married women who experienced domestic violence were "likely to be deterred from procuring an abortion" by fear of violence triggered by the notification. *Id.* at 894. With this concern in mind, the Court concluded that "[t]he husband's interest in the life of the child . . . does not permit the State to empower him with this troubling degree of authority over his wife." *Id.* at 898. In other words, the Court balanced the interest in potential life against the burdens on women's liberty, ultimately concluding that the notification requirement created a substantial obstacle to abortion in a large fraction of the relevant cases, and was thus an unconstitutional undue burden. *Id.* at 895 (noting that the law's "real target is . . . married women seeking abortions who do not wish to notify their husbands" and for "a large fraction of the cases in which [the law] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion," and thus "[i]t is an undue burden, and therefore invalid").

Accordingly, the notion that *Casey*'s undue burden balancing test applies only to laws that promote women's health and not to laws that promote potential life, is divorced from both the facts and reasoning of *Casey*.

B. *Whole Woman's Health* Affirms The Undue Burden Test.

Whole Woman's Health refined how courts must weigh the state's interest in regulating abortion against a law's burdens on women under the undue burden test. In applying *Casey*'s undue burden standard, the Court clarified that courts must afford only limited deference to the legislature, thoroughly consider the evidence in the record, and then weigh the benefits of a law against the burdens that it imposes.

Appellants' and Attorneys General amici's cursory treatment of *Whole Woman's Health* reflect a puzzling misunderstanding of its binding effect on this Court. *See* Appellants' Br. at 19;[1] Attorneys General Br. at 17-22. *Whole Woman's Health* is controlling and forecloses the arguments that *Gonzales* applied a different standard and that courts should defer to the legislature when laws are justified by interests other than women's health.[2]

---

[1] Appellants do not cite *Whole Woman's Health* at all. They refer only to a dissent in that case. Appellants' Br. at 19. But even that opinion acknowledged that "[t]oday's decision requires courts to 'consider the burdens a law imposes on abortion access together with the benefits those laws confer.'" 136 S. Ct. at 2324 (Thomas, J., dissenting) (quoting majority opinion).

[2] *See* Attorneys General Br. at 20-21 ("[W]hen a State regulates abortion for the kinds of moral purposes involved here and in *Gonzales*. . . . a statute's moral ends are to some extent incommensurable with potential tradeoffs. At the very least,

It is beyond dispute that the Supreme Court's rulings on federal matters are binding on litigants and on lower courts in future cases. *See, e.g.*, *Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016) (per curiam) ("Our decisions remain binding precedent until we see fit to reconsider them . . . ." (quoting *Hohn v. United States*, 524 U.S. 236, 252-53 (1998))). Lower courts may not limit the force of Supreme Court opinions by implication. *Id.* It should go without saying that a state's government may not advance an argument in litigation that was flatly rejected by the Supreme Court mere months before. And yet, that is what Appellants and Attorneys General amici have done. *Whole Woman's Health*, decided just months ago, explicitly rejected the test that they urge here.

1. The Court In Whole Woman's Health *Applied* Casey*'s Undue Burden Test.*

Whole Woman's Health applied *Casey*'s undue burden standard. The opinion begins by stating:

---

judicial standards for review of the legislature's choices are lacking. When Congress determined [in *Gonzales*] . . . that partial birth abortion . . . 'will further coarsen society to the humanity of not only newborns, but all vulnerable and innocent human life . . .' it would have been pointless for the Court to analyze whether a prohibition 'confer[red] . . . benefits sufficient to justify the burdens upon access[.]' Weighing the interest of fetal life against medical concerns is fundamentally a matter of policy. In that circumstance, where judicial competence is at a low ebb, '[c]onsiderations of marginal safety, including the balance of risks, are within the *legislative* competence.'" (some alterations in original) (citations omitted)); *see id.* at 17 ("[T]he moral judgment is the State's to make and the medical tradeoffs are the State's to balance.").

> In *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 878 . . . (1992), a plurality of the Court concluded that there "exists" an "undue burden" on a woman's right to decide to have an abortion, and consequently a provision of law is constitutionally invalid, if the "*purpose or effect*" of the provision "*is to place a substantial obstacle* in the path of a woman seeking an abortion before the fetus attains viability." (Emphasis added.)

Whole Woman's Health, 136 S. Ct. at 2299; *see also id.* at 2309 ("We begin with the standard, as described in *Casey*.").

And since *Whole Woman's Health*, courts analyzing abortion restrictions premised on interests other than women's health, including the court below, have uniformly rejected an undue burden standard that ignores *Casey*. *See Planned Parenthood of Ind. & Ky., Inc. v. Commissioner* ("*PPINK II*"), No. 1:16-CV-01807-TWP-DML, __ F. Supp. 3d __, 2017 WL 1197308, at *5 (S.D. Ind. March 31, 2017) ("The premise of the State's argument—that different standards are applied in *Casey* and *Whole Woman's Health*—is belied by those decisions. . . . Given that the Supreme Court made clear in *Whole Woman's Health* that it was applying *Casey*, it inexorably follows that there are not two distinct undue burden tests applied in *Casey* and *Whole Woman's Health*."), *appeal docketed*, No. 17-1883 (7th Cir. April 27, 2017); *Whole Woman's Health v. Hellerstedt* ("*Whole Woman's Health II*"), No. A-16-CA-1300-SS, __ F. Supp. 3d __, 2017 WL 462400, at *7 (W.D. Tex. Jan. 27, 2017) ("[The State's] argument a different test applies when the State expresses respect for the life of the unborn is a work of fiction, completely unsupported by

reading the sections of Supreme Court opinions [the State] cites in context."), *appeal docketed*, No. 17-50154 (5th Cir. Mar. 1, 2017); *Planned Parenthood of Ind. & Ky., Inc. v. Commissioner* ("*PPINK I*"), 194 F. Supp. 3d 818, 828 (S.D. Ind. 2016) ("[T]he State simply ignores that the Supreme Court in *Casey* 'struck a balance' between this interest [in potential life] and a woman's liberty interest in obtaining an abortion."). The district court's ruling below that "[t]he *Casey* undue-burden standard . . . governs" the "fetal-demise law", *W. Ala. Women's Ctr. v. Miller*, No. 2:15-CV-497-MHT, __ F. Supp. 3d __, 2016 WL 6395904, at *16 (M.D. Ala. Oct. 27, 2016), is therefore both proper and unremarkable.

2. Whole Woman's Health *Makes Clear That The Undue Burden Standard Is An Evidence-Based Balancing Test.*

Whole Woman's Health also clarifies that "[t]he rule announced in *Casey* . . . requires that courts consider the burden a law imposes on abortion access together with the benefits those laws confer," to determine "whether any burden imposed on abortion access is 'undue.'" *Id.* at 2309-10 (citing *Casey*, 505 U.S. at 887-901). A court must "consider[] the evidence in the record," and "then weigh[] the asserted benefits against the burdens." *Id.* at 2310. Where a law fails to confer "benefits sufficient to justify the burdens," those burdens are "undue"—that is to say, unconstitutional. *Id.* at 2300. Again, there is nothing in *Whole Woman's Health* stating or suggesting that this rule applies only in some cases. *See PPINK II*, 2017 WL 1197308, at *6 ("[T]he Supreme Court in *Whole Woman's Health* directly

points to abortion regulations challenged in *Casey* that were not justified as promoting women's health as support for its conclusion that the undue burden test requires balancing the burdens against the benefits of [a] challenged law.").

Whole Woman's Health also makes clear that in applying the undue burden standard, the role of the judiciary is not simply to defer to the legislature, but to thoroughly examine the evidentiary record. The Court explained that "when determining the constitutionality of laws regulating abortion procedures, [the Court] has placed considerable weight upon evidence and argument presented in judicial proceedings." 136 S. Ct. at 2310. It is the role of the courts, and not the legislatures, to "resolve questions of medical uncertainty." *Id.* Even where a restriction is supported by legislative findings, judicial deference is limited, and findings are not given "dispositive weight." *Id.* (quoting *Gonzales*, 550 U.S. at 165); *see also id.* ("*Gonzales* went on to point out that the '*Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake*.'" (quoting *Gonzales*, 550 U.S. at 165)).

Whole Woman's Health's reliance on *Gonzales* in affirming the independent role of the courts to review the established facts, wholly undermines the repeated assertions by Appellants, echoed by the Attorneys General amici, that *Gonzales*

applied a different analysis that dictates the outcome of this case.[3] Here, where there are no legislative findings to support the ban, and therefore no question of deference, the district court "applied the correct legal standard" by "consider[ing] the evidence in the record—including expert evidence . . . and testimony." *See Id.*

Appellants seek to evade the directive of *Whole Woman's Health* that courts carefully review all of the record evidence by positing that "[m]ost of the factual issues" in this case "are legislative," rather than "adjudicative" facts, and as to such facts, courts should defer to the legislature and the Supreme Court. Appellants' Br. at 12-13. Notably, Appellants cite no Supreme Court or Eleventh Circuit precedent in support of this argument. Rather, the Supreme Court made clear in *Gonzales*, and reaffirmed in *Whole Woman's Health*, that "where constitutional rights are at stake," courts retain an "independent constitutional duty" to review legislative findings. *Gonzales*, 550 U.S. at 165; *Whole Woman's Health*, 136 S. Ct. at 2310.[4]

[3] The suggestion by the Attorneys General amici that "a legislature's reasonable resolution of medical questions deserves more weight in a case like this one than in a case like [*Whole Woman's Health*]," Attorneys General Br. at 21-22, finds no support in either *Whole Woman's Health* or *Gonzales*, which articulate the same standard of limited deference in assessing restrictions based on patient health and other interests.

[4] Appellants' repeated disparaging references to the undue burden standard as a "pure balancing test" or an "open-ended balancing test," s*ee* Appellants' Br. at 10, 16, 20, 21, are simply a variation on their incorrect assertion that courts should defer to the legislature when assessing restrictions alleged to advance potential life.

If, as Appellants and the Attorneys General amici suggest, courts should defer to the legislature in any case in which the State asserts an interest other than women's health, *Whole Woman's Health* would be rendered meaningless, as the State could easily manufacture an "incommeasurable" moral interest, *see* Attorneys General Br. at 21, to support virtually any restriction. Moreover, the Supreme Court has placed limits on the government's ability to prescribe a particular view of morality. *See W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official . . . can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."); *see also Lawrence v. Texas*, 539 U.S. 558, 577 (2003) ("[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice . . . ." (internal quotation marks omitted)).

Since *Whole Woman's Health*, other courts considering laws justified on grounds other than women's health have undertaken the factual inquiry and balancing of benefits and burdens mandated by that decision. For example, in *PPINK II*, 2017 WL 1197308 (granting preliminary injunction), the court reviewed a new requirement that women be offered the opportunity to see an ultrasound image at least eighteen hours prior to an abortion. Previous law already required the offer,

but without the mandatory delay. The State asserted that the law furthered both its interests in promoting potential life and promoting women's health. *See id.* at *15-20. The court properly applied the same standard in assessing the extent to which the law advanced either of the asserted interests. *Id.* The Court concluded, based on a "near absence of evidence" that the new law advanced the State's asserted interests, weighed against the concrete burdens created by the additional trip to the clinic required by the eighteen-hour delay, that Plaintiffs had established a likelihood of success on the merits of their undue burden claim. *Id.* at *22.

3. Whole Woman's Health *Rejected Identical Arguments For Deferential Review Of Abortion Restrictions.*

Whole Woman's Health also rejected the overly deferential test that the Appellants and Attorneys General amici advocate. In the opinion reversed by the *Whole Woman's Health* Court, the Fifth Circuit described *Casey* as holding that a law is constitutional under the undue burden standard if: "(1) it does not have the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus; and (2) it is reasonably related to (or designed to further) a legitimate state interest." *Whole Woman's Health v. Cole*, 790 F.3d 563, 572 (5th Cir. 2015), *rev'd sub nom. Whole Woman's Health v. Hellerstedt*, 136 S. Ct. at 2292. The Supreme Court described this articulation as "incorrect," and explicitly rejected the notion that judicial review under the undue burden test is equivalent to "the less strict review applicable where, for example, economic

legislation is at issue." *Whole Woman's Health*, 136 S. Ct. at 2309-10 (citing *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 491 (1955)). The Court explained that the Fifth Circuit's approach "simply does not match the standard that this Court laid out in *Casey*." *Id.* at 2310. Thus, in assessing a restriction under the undue burden standard, it is not enough that a restriction bears a "rational relation to [its] objective." *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. at 491. Such a limited inquiry is inadequate to protect the "constitutionally protected personal liberty" at stake because it does not assess whether the burden is "undue," which requires weighing the law's actual benefits against its burdens. *See Whole Woman's Health*, 136 S. Ct. at 2309.[5]

The Court further rejected the Fifth Circuit's holding that "'the district court erred by substituting its own judgment for that of the legislature' when it conducted its 'undue burden inquiry,' in part because 'medical uncertainty underlying a statute is for resolution by legislatures, not the courts.'" *Id.* at 2309 (quoting 790 F. 3d at 587) (additional citations omitted). As the Court explained, "[t]he statement that legislatures, and not the court, must resolve questions of medical uncertainty is also inconsistent with this Court's case law." *Id.* at 2310. The Court also rejected as

[5] Thus, the assertions by the Attorneys General amici that the State need only act "rationally," Attorneys General Br. at 7, and that the D&E ban "directly serves" the State's asserted interest, *id.* at 5, with no evidentiary support, are directly contrary to *Whole Woman's Health*.

incorrect an articulation of the undue burden test that does "not consider the existence or nonexistence of . . . benefits when considering whether a regulation of abortion constitutes an undue burden." *Id.* at 2309; *see also id.* at 2311 (finding nothing in the record evidence showing that the admitting privileges law advanced the State's asserted interest).

Whole Woman's Health also states, explicitly, that the undue burden balancing test applies when courts review laws asserted to further an interest other than women's health. *See id.* at 2309 ("The rule announced in *Casey* . . . requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer. *See* 505 U.S. at 887-898 (performing this balancing with respect to a spousal notification provision); *id*., at 899-901 (same balancing with respect to a parental notification provision)." (additional citations omitted)). The *Whole Woman's Health* opinion does not state that its force is restricted to just a certain kind of abortion regulation.

One only need to compare the arguments Texas made before the Supreme Court with those that Appellants and Attorneys General amici make here to see that they are substantively identical and therefore unavailing: Texas, just like the Appellants here, argued that *Gonzales* prohibits courts from balancing the benefits of an abortion restriction against the burdens:

- *Compare*: "[T]he undue-burden test analyzes the degree of an abortion law's burden to determine whether it imposes a substantial obstacle to abortion

> access; it does not reweigh the the [sic] medical justifications for a law by balancing them against the law's burdens. [*Gonzales*, 550 U.S.] at 166." Brief for Respondents, *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) (No. 15-274), 2016 WL 344496 ("Texas's Br."), at *15.

- *With*: "[T]he *Gonzales* standard permits courts to examine only whether such a method ban furthers legitimate interests and whether there is documented medical support for concluding that the ban does not impose significant health risks on women. *Gonzales* does not permit courts to engage in a pure balancing test." Appellants' Br. at 16.

The Supreme Court rejected this reading of *Gonzales*. *See Whole Woman's Health*, 136 S. Ct. at 2309.

Similarly, Texas, just like Appellants here, argued that there is no role for the courts in assessing the benefits and burdens of an abortion restriction:

- *Compare*: "*Gonzales* confirmed that the balancing of risks and benefits is left to legislatures: 'Considerations of marginal safety, *including the balance of risks*, are *within the legislative competence* when the regulation is rational and in pursuit of legitimate ends.' [*Gonzales*, 550 U.S.] at 166 (emphases added)." Texas's Br. at *25-26.

- *With*: "Where the safety considerations—'including the balance of risks'—are 'marginal,' they are within the competence of the legislature to regulate. *Gonzales*, 550 U.S. at 166." Appellants' Br. at 19.

Again, the Supreme Court already rejected this argument. *See Whole Woman's Health*, 136 S. Ct. at 2310. Appellants cannot succeed in this Court where Texas already failed in the Supreme Court. Appellants' and Attorneys General amici's invitation that this Court should do what the Supreme Court flatly rejected just ten months ago demonstrates remarkable disregard for basic principles of precedent, and for the Supreme Court's authority. The invitation should be rejected.

II. *Gonzales* Does Not Dictate A Different Standard And Instead Supports Appellees' Argument That The D&E Ban Imposes An Undue Burden.

Appellants and the Attorneys General amici rely almost exclusively on *Gonzales* to support their arguments in support of Alabama's ban on D&E procedures, asserting that whenever a state passes a restriction justified by an interest in fetal life, and whenever the phrase "medical uncertainty" is invoked, courts have no role in weighing the benefits of the law against its burdens. This reading of *Gonzales* is misplaced for two key reasons. First, the Supreme Court applies the undue burden standard to laws banning methods of abortion. Prior to *Gonzales*, the Court in *Stenberg* reviewed a ban on D&E procedures and found that it imposed an undue burden because it banned the most commonly used method of second-trimester abortion. *Stenberg* was affirmed, not overruled, by *Gonzales*. The *Gonzales* Court likewise applied *Casey*'s undue burden standard, not the truncated analysis Appellants and Attorneys General amici suggest. In considering the burdens imposed by the law at issue, *Gonzales* did not afford blind deference to the legislature; rather, it upheld a ban on a procedure used in a minority of cases because it left access to D&E untouched.

Second, as discussed above, the Supreme Court only ten months ago reaffirmed the applicability of the undue burden standard to laws that restrict access to abortion, and held that it is the province of courts to balance the asserted benefits

of a law against the burdens it imposes on women's access to abortion. Applying that standard here, where Appellants have not presented evidence that would lead to a different conclusion than that reached in *Stenberg*, the ban is clearly unconstitutional.

A. *Stenberg* Applied The Undue Burden Standard And Held A Ban On D&E Procedures Unconstitutional.

The Supreme Court applied the undue burden standard when it struck down a law banning the most common method of second-trimester abortion in *Stenberg*. The law at issue in *Stenberg* purported to ban "D&X" procedures (a procedure used in a minority of cases) to "show concern for the life of the unborn." *Stenberg*, 530 U.S. at 931. The Court concluded, however, that the law was drafted so broadly that it banned all D&E procedures, the most common method of second-trimester abortion. *Id*. at 938.

The Court reiterated that under *Casey*, "'a law designed to further the State's interest in fetal life which imposes an undue burden on the woman's decision before fetal viability' is unconstitutional." *Id.* at 921 (quoting *Casey*, 505 U.S. at 877). The Court therefore concluded that because the law allowed prosecution of those "who use D&E procedures, the most commonly used method for performing previability second trimester abortions," it imposed an undue burden upon a woman's right to make an abortion decision," and was consequentially unconstitutional. *Id.* at 945-46.

B. *Gonzales* Applied *Casey*'s Undue Burden Standard.

In *Gonzales*, the Court reviewed a federal ban that, unlike the statute reviewed in *Stenberg*, did not encompass all D&E procedures, but was limited to only D&X procedures. 550 U.S. at 164 ("[T]he Act does not proscribe D & E."). In reviewing the restriction, which the government justified based on interests related to "potential life," *id*. at 157-58, the Court again applied the undue burden standard adopted in *Casey*, *id*. at 146 (The State "may not impose upon this right an undue burden, which exists if a regulation's 'purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.'" (quoting *Casey*, 505 U.S. at 878)); *see also id*. at 156 ("Under the principles accepted as controlling here, the Act, as we have interpreted it, would be unconstitutional 'if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.'" (quoting *Casey*, 505 U.S. at 878)). *Gonzales* itself thus confirms that the undue burden standard is the applicable legal standard in this case.

Moreover, *Gonzales* does support an argument that the state can ban D&E procedures. In *Gonzales*, the Court, in finding that the law did not impose an undue burden, made clear that the continued availability of D&E was critical to its decision. *Id*. at 164, 166-77. The Court in fact distinguished *Stenberg*, explaining that while

the statute in *Stenberg* operated as a ban on both D&X and D&E, the law before the Court in *Gonzales* was upheld in part because it did not prohibit D&E procedures. *Id*. at 151-54.

In addition, in upholding the ban on D&X procedures, the *Gonzales* Court distinguished an earlier case, *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976), in which the Court struck down a ban on the then-dominant second-trimester method. The *Gonzales* Court explained that unlike the ban in *Danforth*, the ban on D&X still allowed "a commonly used and generally accepted method" referring to D&E. *Gonzales*, 550 U.S. at 165. The Court's prior holdings that a ban on the most common method of second-trimester abortion is unconstitutional, including under an undue burden analysis, was affirmed, not overruled, by *Gonzales*.

Appellants and the Attorneys General amici seek to avoid application of the undue burden test described *supra*, arguing that *Gonzales* applied a less deferential standard to laws justified by the state's asserted interest in potential life, in effect requiring courts to rubber stamp such restrictions. *See* Appellants' Br. at 17-18, 20; Attorneys General Br. at 13-14. However, that reading of *Gonzales*, based on statements taken out of context, is plainly inconsistent with *Gonzales* itself. Nothing in *Gonzales* suggests such an outcome, and *Whole Woman's Health* forecloses any argument to the contrary. *See* 136 S. Ct. at 2310.

Indeed, the *Gonzales* Court weighed the benefits conferred by the restriction against its burdens. The Court's discussion of the government's asserted interests illustrates this point. Throughout its discussion, the Court tied its findings that the Act advanced the State's interests to specific aspects of the banned procedure, ultimately concluding that "Congress could . . . conclude that the type of abortion proscribed [here, compared to the D&E procedure,] requires specific regulation because it implicates additional ethical and moral concerns that justify a special prohibition." 550 U.S. at 158. *Gonzales* itself therefore contradicts the assertion by Appellant's and the Attorneys General amici that the holding in that case forecloses consideration of whether or to what extent Alabama's ban on D&E procedures actually advances the State's asserted interests. Appellants, however, have provided no evidence that a contrary result from *Stenberg* and *Gonzales* should be reached here.

C. *Gonzales* Directs Courts To Afford Only Limited Legislative Deference When Reviewing Abortion Restrictions.

Appellants and the Attorneys General amici also incorrectly rely on *Gonzales* to argue that, in considering the burdens imposed by the ban on D&E, this court should defer to the legislature on questions of medical uncertainty.

Appellants argue that an abortion restriction "can withstand facial scrutiny if there is 'medical uncertainty'" over whether it "create[s] 'significant health risks.'" Appellants' Br. at 14 (citing *Stenberg* and *Gonzales*). Aside from its obvious cruelty

towards women, who would be subjected against their will to "medical uncertainty" over "significant health risks," this argument quite plainly ignores *Whole Woman's Health*'s instruction that "[t]he statement that legislatures, and not courts, must resolve questions of medical uncertainty is also inconsistent with this Court's case law." 136 S. Ct. 2310. The Court explained that:

> [I]n *Gonzales* the Court, while pointing out that we must review legislative "factfinding under a deferential standard," added that we must not "place dispositive weight" on those "findings." 550 U.S., at 165. *Gonzales* went on to point out that the "*Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake*." *Ibid.* (emphasis added). Although there we upheld a statute regulating abortion, we did not do so solely on the basis of legislative findings explicitly set forth in the statute, noting that "evidence presented in the District Courts contradicts" some of the legislative findings. *Id.* at 166. In these circumstances, we said, "[u]ncritical deference to Congress' factual findings . . . is inappropriate." *Ibid.*

136 S. Ct. at 2310 (additional citations omitted). Thus, both *Whole Woman's Health* and *Gonzales* reject this claim.

Further, as discussed above, in *Gonzales*, the Court upheld a ban on a procedure used in a minority of cases where the most common method of second-trimester abortion remained available. 550 U.S. at 151-54, 165. The Appellants' and Attorneys General amici's argument turns the reasoning of *Gonzales* on its head, asserting that legislatures could ban even the most common method of abortion, provided that there is medical uncertainty about the safety of any remaining

alternatives.[6] Indeed, this case proves the point. Appellants would have this Court ignore the district court's findings that none of the proposed methods of demise are feasible, due to the fact that they are insufficiently studied and in some instances experimental. The fact that the State can point to isolated passages from the medical literature, does not support its contention that the law does not impose an undue burden on women. *Gonzales* does not sanction the imposition of additional unnecessary procedures with no established medical benefit or medical experimentation on women seeking abortions. Likewise, a standard that treats the forced administration of such a procedure as a mere "medical tradeoff"[7] cannot be squared with the context-specific balancing of the state's asserted interests against

[6] The Attorneys General amici incorrectly argue that the *Gonzales* Court simply assumed that safe alternatives to D&X were available. To the contrary, it was uncontested that D&E was a safe alternative. *Gonzales*, 550 U.S. at 164. Further, to the extent that Appellants or Attorneys General amici rely on the fact that fetal demise was discussed as an alternative in *Gonzales*, the Court discussed the possibility that a demise procedure could be used in a case where physicians believed that D&X was "truly necessary" for the patient, such that the benefits of inducing demise outweighed the risks. *Id.* The Court did not hold or even suggest that demise procedures could serve as a constitutional alternative to D&E, the most common method of second trimester abortion. *Id.*

[7] *See* Attorneys General Br. at 14-15 ('"[W]hen the regulation is rational and in pursuit of legitimate ends"—i.e., when an abortion regulation is intended to defend respect for unborn life and rationally furthers that goal, as was the case in *Gonzales*—'[c]onsiderations of marginal safety, including the balance of risks, are within the legislative competence[.]' That means that a State may ban an inhumane method of abortion *even if* doing so has tradeoffs." (alternations in original) (citations omitted)).

the burdens on women's liberty interest which is mandated by the Court in *Whole Woman's Health*. 136 S. Ct. at 2310-14.

Finally, the Appellants and Attorneys General amici improperly conflate the undue burden analysis applicable to a claim as a whole with its application to the narrower claim that it lacks an adequate health exception, arguing that a statute never imposes an undue burden unless it imposes significant health risks. Appellants Br. at 18-19; Attorneys General Br. at 13-14. However, a law may impose an undue burden regardless of whether it has a legally sufficient exception for the life or health of the mother that prevents the imposition of significant health risks. *See Stenberg*, 530 U.S. at 930 (holding that ban on both D&X and D&E was unconstitutional for two independent reasons: first that the law lacked an exception for the preservation of the health of the mother, and second that it imposed an undue burden on a woman's ability to choose a D&E abortion). The *Gonzales* and *Stenberg* Courts addressed whether the bans at issue would impose significant health risks in response to claims that the challenged provisions lacked adequate health exceptions. The Appellants have not raised that claim here; rather, they have claimed that a ban on "the most commonly used method for performing previability second trimester abortions," imposes an undue burden on their patients. *Stenberg*, 530 U.S. at 945. The significant health risks language that Appellants and Attorneys General amici rely on is therefore irrelevant to the undue burden claim before this Court.

CONCLUSION

For the foregoing reasons and for those set forth in the Brief of Appellees, the District Court's preliminary injunction should be affirmed.

Respectfully submitted,

/s/ Genevieve E. Scott
Genevieve E. Scott
Janet Crepps
Molly Duane
CENTER FOR REPRODUCTIVE RIGHTS
199 Water Street, 22nd Floor
New York, NY 10038
Telephone: (917) 637-3605
Fax: (917) 637-3666
gscott@reprorights.org
jcrepps@reprorights.org
mduane@reprorights.org

Counsel for Amicus Curiae, Center for Reproductive Rights

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). This brief contains 6,387 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). Microsoft Word 2013 was used to calculate the word count.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). This brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point, Times New Roman font.

/s/ Genevieve E. Scott
Genevieve E. Scott

CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system on May 1, 2017. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ Genevieve E. Scott
Genevieve E. Scott