No. 17-51060

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

WHOLE WOMAN'S HEALTH, On Behalf of Itself, Its Staff, Physicians and Patients, *et al.*

Plaintiffs-Appellees,

v.

KEN PAXTON, Attorney General of Texas, In his Official Capacity, *et al.*

Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Texas, Austin Division

Brief of Constitutional Law Scholars Lee C. Bollinger, Erwin Chemerinsky, Walter E. Dellinger III, Michael C. Dorf, Daniel Farber, Joanna Grossman, Pamela S. Karlan, Leah Litman, Gillian Metzger, Jane Schacter, Suzanna Sherry, Geoffrey R. Stone, David Strauss, Laurence H. Tribe, and Mary Ziegler as *Amici Curiae* Supporting Plaintiffs-Appellees and Affirmance

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INTEREST OF *AMICI*

This case involves the application of well-established Supreme Court precedent to a recently enacted Texas law that substantially impairs the reproductive rights protected by the Fourteenth Amendment by banning the most common method of performing abortions in the second trimester of pregnancy. *Amici* are constitutional law scholars who have a shared interest in ensuring the courts apply the correct legal standard in evaluating constitutional challenges in cases affecting reproductive rights.

Amici are:

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Amici file this brief in their individual capacities. Their institutional affiliations are listed for identification purposes only.

All parties have consented to the filing of this brief.[1]

SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

Amici are not aware of any interested parties not listed in the parties' statements of interested parties.

[1] This brief was not authored in whole or in part by any party or party's counsel. No one other than *amici curiae* or their counsel (including any party or party's counsel) contributed money that was intended to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT

For 25 years, the Supreme Court has consistently applied the "undue burden" standard when evaluating the constitutionality of abortion restrictions. Under that standard, if a restriction's "purpose or effect is to place a substantial obstacle in the path of the woman seeking an abortion before the fetus attains viability," then an undue burden exists and the restriction must be struck down as unconstitutional. *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 878 (1992) (plurality opinion)). The Court has made clear that a restriction that imposes meaningful health risks on women constitutes an undue burden, regardless of the nature of the state's asserted justification for the restriction.

In this case, appellants and their *amici* seek to alter the undue burden analysis in a number of ways that this Court should reject. First, they contend that a more relaxed legal standard for assessing the constitutionality of an abortion restriction applies if the state asserts an interest in fetal life rather than in a woman's health. That contention is wrong. The undue burden standard, which requires balancing of the benefits and burdens of the challenged enactment to determine if the burden is "undue," is equally applicable no matter what interest a state claims is advanced by an abortion restriction.

Second, appellants and their *amici* argue that this Court should defer to a legislature's decision to bar particular abortion procedures even if remaining procedures impose additional health risks on women. That argument flies in the face of binding Supreme Court precedent, including the recent decision in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), which made clear that no such deference is warranted. It misreads *Gonzales v. Carhart*, the authority on which the argument is purportedly based, which upheld a ban on a particular abortion procedure only because the very procedure at issue in this case—which is safe and widely used—remained available. And it incorrectly posits that an interest in fetal life weighs so heavily in the analysis that virtually no burden can be undue—an approach that cannot be reconciled with the Supreme Court's decisions.

Finally, appellants and their *amici* ask this Court to misapply Supreme Court precedent stating that an abortion restriction is facially unconstitutional when it unduly burdens a "large fraction" of the women that it affects. They variously ask the Court to abandon the "large fraction" analysis altogether; to expand the denominator to encompass all women seeking abortions in Texas, including women seeking first-trimester abortions involving a medical procedure unaffected by the challenged restriction; or to shrink the numerator by including only women who would actually suffer medical complications as a result of new and risky

procedures. None of those requests comports with the law, under which the only pertinent question is whether a large fraction of women who would otherwise undergo the standard second-trimester abortion procedure will face increased medical risk or other undue burdens such as cost and delay.

The district court applied the correct standards when evaluating the facial constitutionality of the challenged provision. This Court therefore should affirm the judgment.

ARGUMENT

I. There Is A Single Undue Burden Test, Which Has Been Consistently Applied By The Supreme Court For The Past 25 Years Regardless Of The State Interest Asserted

1. The Due Process Clause protects the right of women "to control their reproductive lives" so that they may "participate equally in the economic and social life of the Nation." *Casey*, 505 U.S. at 856. Accordingly, the Supreme Court has for many decades recognized a woman's liberty to "choose to have an abortion." *Id.* at 846; *see id.* at 851 (describing abortion as "involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy").

For the past 25 years, the Supreme Court has consistently applied a single test for evaluating whether restrictions on abortion unconstitutionally interfere with those liberty interests. In *Casey*, the Court concluded that an abortion-related

restriction is unconstitutional if it places an "undue burden" on a woman's right to choose to terminate a pregnancy prior to viability. *Casey*, 505 U.S. at 877 (plurality opinion); *see id.* at 874, 878 (plurality opinion). The Court explained that "[a]n 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." *Id.* at 878 (plurality opinion).

In adopting the undue burden standard, the Supreme Court acknowledged that certain governmental interests in regulating abortion may exist "from the outset of the [woman's] pregnancy," including "protecting . . . the life of the fetus." *Casey*, 505 U.S. at 846. But the Court selected the standard precisely to "reconcile[] the State's interest with the woman's constitutionally protected liberty" interest. *Id.* at 876 (plurality opinion). Under that standard, a state law that "has the effect of placing a substantial obstacle in the path of a woman's choice" is not a "permissible means" to further the asserted state interest. *Id.* at 877 (plurality opinion). The Court thus concluded in *Casey* that "the means chosen by the State to further" its asserted interest "must be calculated to inform the woman's free choice, not hinder it." *Id.*

The Supreme Court has consistently adhered to the undue burden standard ever since *Casey* was decided. In *Stenberg v. Carhart*, 530 U.S. 914 (2000), the Court applied that standard to strike down a Nebraska statute banning a particular

method of abortion. The Court explained that "'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 (plurality opinion)). Under that standard, the Court reasoned, the Nebraska law could not be sustained. The law lacked an exception permitting use of the procedure when required to preserve a woman's health, although the Court "has made clear that a State may promote but not endanger a woman's health when it regulates the methods of abortion." *Id.* at 931. In addition, the law applied to the "commonly used D&E procedure"—the very procedure at issue in the instant case—and thereby "unduly burden[ed] the right to choose abortion itself." *Id.* at 929-30, 938; *see id.* at 945-46 ("[U]sing this law some present prosecutors and future Attorneys General may choose to pursue physicians who use D&E procedures, the most commonly used method for performing previability second trimester abortions. . . . The result is an undue burden upon a woman's right to make an abortion decision.").

In *Gonzales v. Carhart*, 550 U.S. 124 (2007), the Supreme Court applied the undue burden standard once again, although this time it sustained the challenged law. *Gonzales* involved a federal law that prohibited a particular form of the D&E procedure—so-called "intact" D&E. The Court explained that, before viability, a state may not place an "undue burden" on a woman's right to terminate a

pregnancy or "prohibit any woman from making the ultimate decision to terminate." *Id.* at 146. Applying *Casey*'s definition of "undue burden," the Court asked whether the federal law had the "purpose or effect" of "plac[ing] a substantial obstacle in the path of the woman seeking an abortion." *Id.* (quoting *Casey*, 505 U.S. at 878 (plurality opinion)). The Court found that no undue burden existed, relying heavily on the fact that the challenged law did not prohibit what the Texas law challenged here forbids, namely, the "prototypical D & E procedure." *Id.* at 150, 153; *see id.* at 154 (emphasizing that law did not "prohibit standard D & E"); *id.* at 164-65 ("Here the Act allows . . . a commonly used and generally accepted method, so it does not construct a substantial obstacle to the abortion right."); *id.* at 167 (relying on "safe alternatives" to banned procedure).

Most recently, the Supreme Court applied the undue burden standard in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), to invalidate a Texas law requiring physicians who perform abortions to have hospital admitting privileges and requiring abortion facilities to meet the standards for ambulatory surgical centers. The Court strongly reaffirmed the governing legal standard, declaring that "[t]here 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." *Id.* at 2300 (internal

quotation marks omitted). The Court also explained that "[t]he rule announced in *Casey* . . . requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer," and that a challenged law must yield under the undue burden standard when it fails to confer "benefits sufficient to justify the burdens" it imposes. *Id.* at 2300, 2309; *see, e.g.*, *Casey*, 505 U.S. at 896 (discussing "balance" when addressing spousal notification requirement). The Court concluded that Texas's admitting-privileges and surgical-center requirements were unconstitutional because they were "[u]nnecessary health regulations"—ones that "place[d] a substantial obstacle in the path of women seeking a previability abortion, . . . constitute[d] an undue burden on abortion access, and . . . violate[d] the Federal Constitution." *Id.* at 2300 (citation omitted).

2. Appellants and their *amici* contend that a legal standard other than the one described above applies if the state asserts an interest in "respecting unborn life" rather than in "protecting patient health." Appellants' Br. 41; *see* Br. of the Attorneys General of the States of Louisiana *et al.* (State *Amici* Br.) 24-25. That contention is incorrect. The undue burden standard consistently applied by the Supreme Court over the last quarter century is equally applicable no matter the nature of the interest that a state asserts is advanced by an abortion restriction.

In adopting the undue burden standard in *Casey*, the Supreme Court made clear that the standard applies any time a state attempts to restrict abortion and thus

impinges on a woman's ability to make "choices central to [her] personal dignity and autonomy." *Casey*, 505 U.S. at 851. The Court stated that it was adopting a "standard of general application" in this area, regardless of whether a challenged statute furthers an "interest in potential life or some other valid state interest." *Id.* at 876-77 (plurality opinion). And the Court applied the undue burden standard to (among other things) a law setting forth an "informed consent requirement" that was explicitly "designed to further the State's interest in fetal life." *Id.* at 881 (plurality opinion).

The asserted government interest in *Stenberg* and *Gonzales*, which involved restrictions on methods of abortion, was likewise an interest related to respect for fetal life rather than to patient health. The Supreme Court applied the undue burden test in those cases too. *See Stenberg*, 530 U.S. at 921 (discussing "law designed to further the State's interest in fetal life") (citing *Casey*, 505 U.S. at 877 (plurality opinion)); *Gonzales*, 550 U.S. at 146 (explaining that "we must determine whether the Act furthers the legitimate interest of the Government in protecting the life of the fetus").

In all of those cases, the Court considered both the benefits and the burdens associated with the abortion restriction before it. And in all of those cases—even where the state claimed an interest regarding the fetus rather than regarding the health of the woman—the Court weighed any burdens on a woman's health

strongly in the balance. *See, e.g.*, *Gonzales*, 550 U.S. at 161 (discussing "health risks" to women); *Stenberg*, 530 U.S. at 937-38 (discussing possibility that "the absence of a health exception will place women at an unnecessary risk"); *see also Casey*, 505 U.S. at 896 (emphasizing that it is the woman whose choice is at stake "who physically bears the child" and is most "directly and immediately affected by the pregnancy"); *cf. Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 77-79 (1976) (prior to adoption of undue burden test, noting risks to women's health in striking down state abortion restriction).

Of course, the Supreme Court has applied the undue burden standard in cases—such as *Whole Woman's Health*—in which the interest asserted by the state is different than the interest asserted in this case. In *Whole Woman's Health*, the state claimed that its law was justified solely by concerns for women's health. *See Whole Woman's Health*, 136 S. Ct. at 2310. But that simply reinforces the universal applicability of the undue burden standard in assessing the constitutionality of any law relating to abortion. This Court should reject the invitation to deviate from the undue burden standard, as explicated by the Supreme Court in *Casey*, *Stenberg*, *Gonzales*, and *Whole Woman's Health*, based on the state's asserted reason for enacting the provision at issue in this case.

II. Under The Undue Burden Test, The State's Interest In Fetal Life Does Not Justify Imposition Of Meaningful Medical Risks Or Any Other Substantial Obstacle To A Woman's Choice

1. Under the undue burden test, various types of burdens may constitute a substantial obstacle to a woman's ability to choose an abortion. For example, some laws are unconstitutional because (as in *Whole Woman's Health*) they impose unwarranted delay or make it more difficult for a woman to access a facility where she can obtain an abortion. *See Whole Woman's Health*, 136 S. Ct. at 2300. Other laws are unconstitutional because (as in *Casey*) they subject a woman to a risk of harm from her partner, or deter her from obtaining an abortion that she would otherwise have because she fears the possibility of such harm. *See Casey*, 505 U.S. at 897.

Among the burdens that the Supreme Court has deemed "undue," and therefore unconstitutional, is a meaningful health-related risk. In *Whole Woman's Health*, the Court explained that laws with effects that "would be harmful to, not supportive of, women's health" place an unconstitutional undue burden on women's rights. 136 S. Ct. at 2318. In *Gonzales*, the Court stated that, under precedents controlling on this Court, an abortion-related prohibition is unconstitutional if it subjects women to "significant health risks"—although the Court did not state that a health risk must necessarily be significant in order to amount to an undue burden. 550 U.S. at 161 (citation omitted). And in *Casey*, the

Court upheld an informed consent provision that it deemed not to "impose[] a real health risk," suggesting that if such a risk had existed the result would have been different. 505 U.S. at 886 (plurality opinion).[2] Regardless of the state interest asserted or the benefits on the state's side of the balance, if an abortion restriction creates a meaningful health risk for women, its burdens necessarily outweigh its benefits.[3]

2. In arguing that Texas's law banning the standard D&E procedure is constitutional, State *Amici* contend that "*Gonzales* establishes that a legislature can bar particular abortion procedures in order to express respect for unborn life . . . even if remaining procedures come with additional health risks." State *Amici* Br. 24-25; *see id.* at 1, 3, 6; *see also* Appellants' Br. 1, 2, 11, 16 (relying heavily on *Gonzales*). That statement mischaracterizes *Gonzales* and misunderstands the Supreme Court precedent that governs this Court.

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[2] In addition, in *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976), which predated the Supreme Court's articulation of the undue burden standard in *Casey*, the Court observed, in striking down a law banning the standard method of second-trimester abortion, that "as a practical matter, [the law] forces a woman and her physician to terminate her pregnancy by methods more dangerous to her health than the method outlawed." *Id.* at 79.

[3] Appellants' citation of the Court's statement in *Casey* that a state may "enact persuasive measures which favor childbirth over abortion, even if those measures do not further a health interest" does not undermine that conclusion. Appellants' Br. 42 (quoting 505 U.S. at 886 (plurality opinion)). A state may promote a variety of interests. But what a state may *not* do is promote *any* interest in such a way as to harm women's health or impose a meaningful medical risk on women.

a. In *Gonzales*, the Court upheld a federal law banning "intact" D&E, a relatively uncommon second-trimester abortion procedure. 550 U.S. at 136. The Court's decision in *Gonzales* turned on the finding that there were no meaningful medical risks imposed on women by banning the procedure at issue in that case. *Id.* at 161. In the Court's view, the safety benefit associated with allowing physicians to perform the intact D&E procedure was only "marginal" and thus amounted to no more than "mere convenience." *Id.* at 166.

The Court reached that conclusion only because of the continued availability of the standard second-trimester abortion procedure that is banned under the Texas law at issue in this case. Because the federal statute challenged in *Gonzales* did not "prohibit the [standard] procedure," it did not constitute an undue burden. 550 U.S. at 150, 156; *see Danforth*, 428 U.S. at 77-79 (ruling that a state law banning saline amniocentesis, then the most common method of second-trimester abortion, was unconstitutional).

It is clear that if the statute at issue in *Gonzales* had barred the standard procedure—as the law at issue here does—then the Supreme Court would have deemed the law invalid. That was the precise situation in *Stenberg*, in which the Court struck down Nebraska's ban on the intact D&E procedure because the Nebraska law could be read also to proscribe standard "D&E procedures, the most commonly used method for performing previability second trimester abortions."

Stenberg, 530 U.S. at 945. The crucial difference in *Gonzales* was that the law was more carefully drafted so as to exclude the standard D&E from its prohibition. *See Gonzales*, 550 U.S. at 154 ("Here, by contrast, interpreting the Act so that it does not prohibit standard D & E is the most reasonable reading and understanding of its terms."). *Gonzales* thus cannot be read to support the constitutionality of a law that imposes medical harms on women through mandating use of untested, risky procedures.

b. State *Amici* rely on *Gonzales*' statement that "[c]onsiderations of marginal safety, including the balance of risks, are within the legislative competence" to contend that courts must—in any case where fetal life is asserted as a state interest—defer to the legislature's decision to enact the law. *See* State *Amici* Br. 30. That contention is incorrect. It ignores explicit Supreme Court precedent to the contrary and disregards critical differences between *Gonzales* and the instant case.

First, that view was argued and flatly rejected in *Whole Woman's Health*. The Court explained there that "[t]he statement that legislatures, and not courts, must resolve questions of medical uncertainty is . . . inconsistent with this Court's case law." *Whole Woman's Health*, 136 S. Ct. at 2310; *see id.* ("[T]he Court, when determining the constitutionality of laws regulating abortion procedures, has placed considerable weight upon evidence and argument presented in judicial

proceedings."); *see also Casey*, 505 U.S. at 855 (noting that the "required determinations" under the undue burden test "fall within judicial competence"). That alone is dispositive of State *Amici*'s argument.

Second, State *Amici* both overstate the scope of *Gonzales* and ignore key factual differences between that case and this one. While the Court noted in *Gonzales* that some consideration of legislative findings may be warranted under certain limited circumstances, the Court was careful to explain that a court has an "independent constitutional duty to review [a legislature's] factual findings where constitutional rights are at stake." 550 U.S. at 165. In cases like this one, where the legislature made no findings and no statement about any purported medical uncertainty, there is nothing that a court even could consider.[4] *See Whole Woman's Health*, 136 S. Ct. at 2310 ("Unlike in *Gonzales*, the relevant statute here does not set forth any legislative findings. . . . For a district court to give significant weight to evidence in the judicial record in these circumstances is consistent with this Court's case law."). In the absence of any explicit legislative statement about the factual underpinnings of the challenged law, State *Amici*'s argument boils down to the suggestion that courts should ignore their "independent constitutional duty" to assess the constitutionality of a statute and uphold any abortion restriction

[4] In noting the absence of legislative findings, we do not mean to imply that sham legislative findings could suffice to uphold the law challenged here.

when a state asserts in litigation that the statute was intended to express support for fetal life. That is not, and cannot be, the law.

Third, State *Amici* mischaracterize *Gonzales* by failing to recognize that case's key premise that an abortion restriction cannot survive the undue burden test if it imposes meaningful health risks on women. The Court decided in *Gonzales* that there was sufficient material in the record and in judicial findings of fact to support the legislature's conclusion that the law at issue did not threaten women's safety, even if the question was not wholly undisputed. The Court explained that the law did not pose that threat because the standard procedure, which had been found to be "generally the safest method of abortion during the second trimester," remained available. *Gonzales*, 550 U.S. at 164 ("[a]s we have noted, the Act does not proscribe D & E," which was "found [by a district court] to have extremely low rates of medical complications" and by another to be "the safest method of abortion"). It was only against the backdrop of those judicial findings about the safety and availability of the standard procedure that the court was willing to place "deferential" but not "dispositive weight" on legislative findings regarding medical uncertainty. *Id.* at 165 ("Here the Act allows . . . a commonly used and generally accepted method, so it does not construct a substantial obstacle to the abortion

right."); *cf. Stenberg*, 530 U.S. at 939 (noting statute "imposes an 'undue burden'" because it "applies to the more commonly used D & E procedure").[5]

For all of those reasons, far from being analogous to *Gonzales*, this case is the obverse. *Gonzales* upheld a ban on a less common procedure when the standard—and indisputably safe—procedure, which was widely used, remained available. But Appellants here would ban the very procedure the availability of which was necessary to the Court's conclusion in *Gonzales*. And unlike in *Gonzales*, the district court here found that the additional steps the state seeks to tack onto the standard procedure are medically unnecessary, uncommonly used, and untested ones that increase the medical risks to women. *See, e.g.*, ROA.1610-11. *Gonzales* does not support upholding an abortion restriction in such circumstances.

3. In addition to relying on *Gonzales*, Appellants and the State *Amici* also suggest more generally that in applying the undue burden test the state's interest in fetal life must weigh so heavily in the balance of benefits and burdens that it

[5] Appellants suggest that the Supreme Court stated in *Gonzales* that digoxin or potassium chloride injections were among the safe alternatives that supported upholding the ban at issue in that case. Appellants' Br. 32. The Court did not do so. No finding about the efficacy or safety of either type of injection was necessary to decide the case, and the Court did not make such a finding. *See Gonzales*, 550 U.S. at 164. To the contrary, the Court noted explicitly that some "doctors refrain from injecting chemical agents, believing it adds risk with little or no medical benefit." *Id.* at 136.

necessarily justifies an abortion restriction. *See, e.g.*, Appellants' Br. 41-43; State *Amici* Br. 24-25. That suggestion, too, is incorrect. Even assuming that a state restriction actually does something to *advance* an interest in fetal life (or a related interest), which should not be assumed merely because the state claims that such an interest underlies the law, that interest does not have sufficient weight to justify a restriction that places a substantial obstacle in the path of a woman seeking an abortion.

There is no question that the State has an interest in fetal life. *See Casey*, 505 U.S. at 846 (collecting cases). That interest is a legitimate purpose for some abortion-related laws. *See Gonzales*, 550 U.S. at 161. For example, post-viability, that interest can be expressed by a ban on abortions (with adequate life and health exceptions). *See Stenberg*, 530 U.S. at 914. Pre-viability, it can be expressed through laws that are intended to persuade a woman not to choose an abortion so long as they do not otherwise impose a substantial obstacle to that choice. *See, e.g.*, *Casey*, 505 U.S. at 872-73 (plurality opinion); *id.* at 877-78 (plurality opinion).

But an interest in fetal life plainly does not tip the undue burden balancing such that virtually no burden imposed in the service of the interest can be found to be undue. *See Gonzales*, 550 U.S. at 161 ("furtherance of legitimate government interests bears upon, but does not resolve," the question whether a law "has the

effect of imposing an unconstitutional burden on the abortion right"). That approach improperly discounts the powerful interests on the woman's side of the ledger—including her health and her constitutionally protected liberty interest in making choices fundamental to her personhood and dignity. *See Casey*, 505 U.S. at 851. And if that approach were correct, in *Gonzales*—a case in which the state's asserted interest was the same interest asserted here—the Court would not have so readily acknowledged that meaningful health risks are unacceptable because they constitute an undue burden. *See* 505 U.S. at 164.

Rather, before viability, an abortion restriction that expresses the state's interest in fetal life is insufficiently weighty to justify placing a substantial obstacle in the way of a woman's choice. *See Gonzales*, 505 U.S. at 146 ("[r]egulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, *if they are not a substantial obstacle to the woman's exercise of the right to choose*") (quoting *Casey*, 505 U.S. at 877 (plurality opinion)) (emphasis added); *Stenberg*, 530 U.S. at 915 ("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") (internal quotation marks omitted); *see also Casey*, 505 U.S. at 877 (plurality opinion). If a statute does interpose such a substantial obstacle, then it "cannot be considered a *permissible* means of serving"

even "legitimate ends," whatever those ends may be. *Whole Woman's Health*, 136 S. Ct. at 2309 (quoting *Casey*, 505 U.S. at 877 (plurality opinion)) (emphasis added).

Because the law at issue here bans a safe and widely used abortion procedure unless doctors first perform an additional, medically unnecessary, invasive procedure, *see* ROA.1610-11, the proper considerations that figure in the balancing are the effects of the law on the women whose medical care would thereby be altered. Those considerations include medical risks, any medical benefits, and any other real-world implications for women's ability to exercise their choice (*e.g.*, delay, increased costs, or the effective unavailability of an abortion at a certain stage of gestation because (for example) doctors cease performing any D&E procedure because they fear prosecution under the challenged law). *See Whole Woman's Health*, 136 S. Ct. at 2300 (a challenged law is invalid under the undue burden standard when it fails to confer "benefits sufficient to justify the burdens" it imposes).

III. Under The "Large Fraction" Test Applicable When Considering Facial Challenges to Abortion Restrictions, The Law At Issue Here Is Facially Invalid

1. In *Casey*, the Supreme Court struck down a spousal-notification requirement on its face on the ground that the requirement would constitute a substantial obstacle to women's choice in a "large fraction" of relevant cases.

Casey, 505 U.S. at 895. In deciding which group of women was affected by the requirement, *Casey* explained that "[t]he proper focus of constitutional inquiry is the group for whom the law is a restriction." 505 U.S. at 894 (citation omitted); *see id.* at 894-95; *see also id.* at 887 (plurality opinion) (looking to "particular group" on whom "particular burden" of a law fell). As to the spousal-notification requirement, *Casey* explained, the question was the impact of the requirement on "married women seeking abortions who do not wish to notify their husbands of their intentions," *id.* at 895—not on the larger group of all married women seeking abortions. *Id.* at 897. *Casey* then concluded that the requirement at issue was unconstitutional on its face because it was "likely to" burden unduly "a significant number of women" in the affected group. *Id.* at 893-94; *see id.* at 893 (requirement would impose substantial obstacle for "many women"); *id.* at 895; *id.* at 897 (women are affected "[w]hether the prospect of notification itself deters [them] from seeking abortions, or whether the husband, through physical force or psychological pressure or economic coercion, prevents his wife from obtaining an abortion until it is too late"); *see also Gonzales*, 550 U.S. at 167 (applying "large fraction" test without taking a position on its correctness).

In *Whole Woman's Health*, the Supreme Court again applied the "large fraction" test to strike down state abortion restrictions on a facial challenge. *See Whole Woman's Health*, 136 S. Ct. at 2320. The Court explained that "*Casey* used

the language 'large fraction' to refer to 'a large fraction of cases in which [the provision at issue] is *relevant*.'" *Id.* (quoting *Casey*, 505 U.S. at 894-95 (emphasis in original). The Court emphasized that, "as in *Casey*, the relevant denominator" is the "women for whom [the provision] is an actual rather than an irrelevant restriction." *Id.* (quoting *Casey*, 505 U.S. at 895). With respect to the restrictions at issue, the Court explained, the relevant denominator was not all women of "reproductive age," but rather women who would be affected by the law requiring physicians to have hospital admitting privileges and requiring abortion facilities to operate as surgical centers. *Id.*

2. The district court correctly applied the "large fraction" test in this case in ruling that "Plaintiffs have carried their burden of demonstrating that the Act creates an undue burden." ROA. 1611; *see id.* at 1609. State *Amici* nevertheless contend that the district court committed "reversible error" because this Court "has held that facial challenges to abortion laws will succeed only where the plaintiff shows that there is no set of circumstances under which the statute would be constitutional." State *Amici* Br. 13-14 (internal quotation marks omitted) (citing *Barnes v. Mississippi*, 992 F.2d 1335, 1342 (5th Cir. 1993), and *Barnes v. Moore*, 970 F.2d 12, 14 n.2 (5th Cir. 1992)).

That contention—which appellants do not advance, *see* Appellants' Br. 43 n.8—is incorrect. *Barnes v. Mississippi* did not address *Casey* and relied only on

decisions that predated it. 992 F.2d at 1342. Moreover, the discussion of the standard for a facial challenge in that case was dicta. *See id.* *Barnes v. Moore* cited the *dissent* in *Casey* in support of its statement that a facial challenge requires unconstitutionality in every possible set of circumstances, while noting in a footnote that "[t]he *Casey* joint opinion may have applied a somewhat different standard in striking down" abortion-related restrictions. 970 F.2d at 14 n.2. Both cases pre-dated the Supreme Court's approving discussion of the "large fraction" test in *Whole Woman's Health*. And neither case can prevail in the face of the decisions of the Supreme Court, which are controlling in this and every circuit.[6]

3. Appellants accept the applicability of the "large fraction" test, but they ask this Court to misapply it.

First, although Appellants are not clear about the issue, Appellants appear to incorrectly suggest that the proper denominator for the "large fraction" test is all women seeking abortions in Texas, whatever the stage of their pregnancies and regardless of the procedure that a physician would employ in carrying out an

[6] Indeed, subsequent to the decisions on which State *Amici* rely, this Court has acknowledged that the "large fraction" test is applicable to facial challenges to abortion laws. Although *Whole Woman's Health v. Cole*, 790 F.3d 563 (5th Cir. 2015), *rev'd*, 136 S. Ct. 2292 (2016), used an incorrect denominator in applying that test, *see* 136 S. Ct. at 2320, the Court correctly recognized in that case that *Casey* and its progeny mandated use of the test, and did not understand this Court's precedent to say otherwise, *see* 790 F.3d at 590 (citing *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583 (5th Cir. 2014)).

abortion. Appellants argue, for instance, that the challenged law "would only potentially affect about 3% of abortions in Texas" because most abortions are carried out at an early stage of pregnancy during which the D&E procedure is not medically indicated. Appellants Br. 44. That argument is wrong. As Appellants elsewhere seem to accept, *see* Appellants' Br. 43-44, under *Casey* and *Whole Woman's Health* the group of women "affected" by the Texas law at issue here is all women as to whom a physician would use the standard D&E procedure absent the law—not all women seeking abortions. As the Supreme Court has done on several occasions, this Court should reject appellants' effort to increase the size of the denominator in an effort to make the fraction of women affected seem small. *See Whole Woman's Health*, 136 S. Ct. at 2320; *Casey*, 505 U.S. at 894-97.

Second, Appellants incorrectly argue that the numerator for the "large fraction" test—that is, the number of women as to whom the law would present a substantial obstacle—is tiny because the medically unnecessary "fetal demise" procedures Appellants mandate as necessary additions to the standard D&E procedure will impose burdens only in "rare" cases. Appellants' Br. 48; *see id.* at 44-47. For instance, Appellants claim that only a small number of women will experience the medical failures and complications that the district court identified as risks associated with the various "fetal demise" procedures that Appellants discuss. *See id.* at 44-46.

That analysis is wrong. Appellants contend that the statute requires physicians to add additional, medically unnecessary, and risky steps to the standard D&E procedure. *See, e.g.*, Appellants' Br. 7 ("SB8 does not prohibit D&E abortions when one of several alternative techniques is used to cause fetal demise before beginning the surgical abortion procedure."). That requirement affects *all* women seeking second-trimester abortions who would otherwise have the standard D&E procedure without the additional steps. Under the Texas law, *each* woman seeking such an abortion would be unable to obtain the safest method of abortion appropriate to her gestational stage and would face increased risk from the unnecessary procedures—some of which are so difficult and unstudied as to be essentially experimental, *see* ROA.1604-06, 1608, 1610-11—without knowing in advance whether she would, in fact, be one of those as to whom those procedures would fail or lead to various medical problems. The existence of that risk, and the associated uncertainty, is itself a significant burden. And a woman unwilling to accept the risk, or unable to muster the means to make an additional visit to a physician, or as to whom the additional procedures are unavailable or medically contradicted, would be unable to have an abortion at all. *See Casey*, 505 U.S. at 897 (women are affected by spousal notification requirement "[w]hether the prospect of notification itself deters [them] from seeking abortions, or whether" as a result of the notification they are "prevent[ed] . . . from obtaining an abortion

until it is too late"); *see also* Appellees' Br. 7-17 (discussing findings and evidence on risk and delay). The possibility that women will lose access to second-trimester abortions entirely is a very real one, as some physicians will stop offering such abortions altogether for fear of being prosecuted under the challenged law if they cannot successfully induce fetal demise using one of the untested procedures that the law mandates. *See* ROA.1609 ("none of the proposed fetal-demise methods is feasible for any physician other than a specialist in maternal-fetal medicine, without substantial additional training, to induce fetal demise in utero in all instances"); *cf. Stenberg*, 530 U.S. at 945. This Court therefore should reject Appellants' suggestion that the numerator of the large fraction test consists only of those women who, *ex post*, would actually suffer some difficulties or complications in the course of physicians' attempts to cause fetal demise before beginning the medically safe and long-accepted D&E procedure.

CONCLUSION

For the foregoing reasons, the judgment should be affirmed.

DATED: April 18, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Federal Rules of Appellate Procedure 29(a)(5), 32(a)(5), 32(a)(6), and 32(a)(7)(B), the *amici curiae* Brief of Constitutional Law Scholars is proportionately spaced, has a typeface of 14 point, and contains 6476 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

By: */s/ Elaine J. Goldenberg*
ELAINE J. GOLDENBERG

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25, I hereby certify that I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system on April 18, 2018. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

DATED: April 18, 2018

By: */s/ Elaine J. Goldenberg*
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