17-51060

United States Court of Appeals for the Fifth Circuit

WHOLE WOMAN'S HEALTH, On Behalf of Itself, Its Staff, Physicians and Patients; PLANNED PARENTHOOD CENTER FOR CHOICE, On Behalf of Itself, Its Staff, Physicians, and Patients; PLANNED PARENTHOOD OF GREATER TEXAS SURGICAL HEALTH SERVICES, On Behalf of Itself, Its Staff, Physicians, and Patients; PLANNED PARENTHOOD SOUTH TEXAS SURGICAL CENTER, On Behalf of Itself, Its Staff, Physicians, and Patients; ALAMO CITY SURGERY CENTER, P.L.L.C., On Behalf of Itself, Its Staff, Physicians, and Patients, doing business as Alamo Women's Reproductive Services; SOUTHWESTERN WOMEN'S SURGERY CENTER, On Behalf of Itself, Its Staff, Physicians, and Patients; NOVA HEALTH SYSTEMS, INCORPORATED, On Behalf of Itself, Its Staff, Physicians, and Patients, doing business as Reproductive Services; CURTIS BOYD, M.D., On His Own Behalf and On Behalf of His Patients; JANE DOE, M.D., M.A.S., On Her Own Behalf and On Behalf of Her Patients; BHAVIK KUMAR, M.D., M.P.H., On His Own Behalf and On Behalf of His Patients; ALAN BRAID, , M.D., On His Own Behalf and On Behalf of His Patients; ROBIN WALLACE, M.D., M.A.S., On Her Own Behalf and On Behalf of Her Patients,

Plaintiffs-Appellees,

v.

KEN PAXTON, Attorney General of Texas, In His Official Capacity; FAITH JOHNSON, District Attorney for Dallas County, In Her Official Capacity; SHAREN WILSON, Criminal District Attorney for Tarrant County, In Her Official Capacity; ABELINO REYNA, Criminal District Attorney for McLennan County, In His Official Capacity,

Defendants-Appellants.

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

BRIEF FOR AMICI CURIAE STATES OF NEW YORK, CALIFORNIA, CONNECTICUT, DELAWARE, HAWAI'I, ILLINOIS, IOWA, MARYLAND, MASSACHUSETTS, NEW JERSEY, OREGON, PENNSYLVANIA, VERMONT, VIRGINIA, AND WASHINGTON, and the DISTRICT OF COLUMBIA IN SUPPORT OF APPELLEES

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that, in addition to the persons and entities listed in the Appellants' and Appellees' Certificates of Interested Persons, the following listed persons and entities—amici curiae and their counsel—as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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American Medical Association

Eagle Forum Education and Legal Defense Fund

Conservative Legal Defense and Education Fund

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Pro- Life Legal Defense Fund

Transforming Word Ministries

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/s/ Ester Murdukhayeva

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INTEREST OF AMICI CURIAE

Amici are the States of New York, California, Connecticut, Delaware, Hawai'i, Illinois, Iowa, Maryland, Massachusetts, New Jersey, Oregon, Pennsylvania, Vermont, Virginia, and Washington, and the District of Columbia. Amici agree that "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992). Amici are therefore committed to advancing their interest in promoting the health and safety of all women seeking abortion services without creating unwarranted obstacles to a woman's right to terminate a pregnancy. Amici also have an interest in ensuring that all physicians are permitted to provide services that are consistent with professional standards of care.

Both interests are threatened by the statute at issue here, because the statute prohibits physicians from providing second-trimester abortion services with the safest procedure available for women after 15 weeks of pregnancy. Residents of amici States may need medical care while present as students, workers, or visitors in Texas or other States

with similar statutes; and physicians licensed in amici States may also practice medicine in Texas or other States with similar statutes.[1] Amici's interest in the provision of abortion services in a safe manner thus extends to both patients and physicians who may be residents of amici States but present in Texas and affected by the law at issue here.

STATEMENT OF THE CASE

This case involves the constitutionality of Senate Bill 8 (the "Act"), an abortion restriction enacted by Texas in June 2017. The Act imposes civil and criminal sanctions on any physician who performs an abortion that "dismembers" a "living unborn child" with the purpose of causing that unborn child's death, unless such a procedure is necessary to prevent a "serious health risk to the pregnant woman." *See* S.B. 8, 85th Leg., Reg. Sess. (Tex. 2017), *codified at* Tex. Health & Safety Code §§ 171.151 to .154. By its terms, the Act's prohibition on "dismemberment abortion" only extends to "the use of clamps, grasping forceps, tongs, scissors, or a

[1] More than 20% of all American doctors—over 200,000 physicians—maintain active licenses to practice medicine in more than one State. *See* Aaron Young et al., *A Census of Actively Licensed Physicians in the United States*, 103(2) J. Med. Reg. 7, 10 (2017).

similar instrument," and expressly excludes "an abortion that uses suction to dismember the body of an unborn child." Tex. Health & Safety Code § 171.151. The parties have agreed that the Act requires a physician to cause fetal demise by terminating the fetal heartbeat before undertaking an abortion procedure that involves any of the prohibited instruments.

The purpose and effect of this statute is to prohibit the standard dilation and evacuation (D&E) procedure, which is widely regarded as the safest and most common method of second-trimester abortion after 15 weeks.[2] (Record on Appeal (ROA.) 1927.) Although seven other States have enacted similar D&E bans,[3] every court that has examined a D&E

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[2] Medical literature refers to the gestational age of a fetus as the number of weeks after a woman's last menstrual period (LMP). Unless otherwise noted, amici will refer to this measure of gestational age.

[3] *See* Ala. Code §§ 26-23G-1 to -9 (2016); Ark. Code. Ann. §§ 2-16-1801 to -1807; Kan. Stat. Ann. §§ 65-6743 to -6749 (2015); La. Rev. Stat. Ann. § 40:1061.1.1 (2016); Miss. Code Ann. §§ 41-41-151 to -169 (2016); Okla. Stat. tit. 63, §§ 1-737.7 to .16 (2015); W. Va. Code § 16-2O-1 (2016).

ban, including the district court below, has enjoined it upon application of the Supreme Court's controlling undue-burden standard.[4]

Plaintiffs are seven medical clinics and three individual physicians who provide second-trimester abortion services in Texas. (ROA.1588.) Plaintiffs sued to enjoin implementation of the Act, arguing that it imposed an undue burden on the constitutional rights of their patients to obtain pre-viability abortions. (ROA.43-61.) In August 2017, the district court entered a temporary restraining order prohibiting enforcement of the Act. (ROA.786-802.) The parties agreed to extend the temporary restraining order through discovery and trial. (ROA.1055-1058.)

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[4] *See West Ala. Women's Ctr. v. Miller*, No. 15-cv-497, 2017 WL 4843230 (M.D. Ala. Oct. 26, 2017) (permanently enjoining Alabama statute); *Hopkins v. Jegley*, No. 17-cv-00404, 2017 WL 3220445 (E.D. Ark. July 28, 2017) (preliminarily enjoining Arkansas statute); *Hodes & Nauser, MDs, P.A. v. Schmidt*, 52 Kan. App. 2d 274, 275 (2016) (preliminarily enjoining Kansas statute); Order, *Nova Health Sys. v. Pruitt*, No. 2015-cv-1838 (Okla. County Dist. Ct. Oct. 28, 2015) (preliminarily enjoining Oklahoma statute). In addition, a federal district court denied Louisiana's motion to dismiss a challenge to that State's D&E ban, which has not taken effect pursuant to stipulation. *See June Med. Servs. LLC v. Gee*, No. 16-cv-444, 2017 WL 5505536 (M.D. La. Nov. 16, 2017). To date, the D&E bans in Mississippi and West Virginia have not been challenged.

In November 2017, following a five-day bench trial, the district court entered judgment in favor of plaintiffs and issued a permanent injunction. With a fully developed record before it, the district court found that standard D&E is the predominant method of second-trimester abortion after 15 weeks because a physician can no longer use suction to complete the procedure during this stage. (ROA.1601.) And the district court held that the Act imposes an undue burden because it adds a risky, invasive, and medically unnecessary step to an otherwise safe and commonly used procedure, and because it delays and increases the costs of second-trimester abortions. (ROA.1602-1603, 1610-1611.) The district court further held that the three procedures that Texas has identified as measures to stop the fetal heartbeat in utero—digoxin injections, potassium chloride injections, and umbilical cord transections—are experimental, risky to women, and sometimes ineffective, and thus that the Act impermissibly bans the principal method of post-15-week pre-viability abortions without preserving a safe and medically accepted alternative. (ROA.1603-1609.)

SUMMARY OF ARGUMENT

Under controlling Supreme Court precedent, a statute or regulation imposes an unconstitutional undue burden if its purpose or effect is to "place a substantial obstacle in the path of a woman seeking an abortion." *Casey*, 505 U.S. at 877 (plurality op.); *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016). That standard bars any abortion restriction whose benefits are not "sufficient to justify [the] burdens upon access." *Whole Woman's Health*, 136 S. Ct. at 2300.

Texas and its amici agree that the undue-burden standard applies to this case. They nonetheless contend (Br. for Appellants (Br.) at 41-43; Br. for Amici Curiae State of Louisiana et al. (Louisiana Amici Br.) at 24-31) that when an abortion restriction is enacted to promote respect for fetal life and to protect medical ethics, rather than to advance women's health, a balancing test is an inappropriate way to assess whether a burden is undue. But they are mistaken; the Supreme Court has made clear that the balancing test set forth in *Casey* and *Whole Woman's Health* applies to *all* abortion restrictions.

Moreover, the Supreme Court has specifically addressed how to balance the conflicting interests implicated by an abortion-method

restriction that purportedly advances a State's interests in promoting respect for fetal life and protecting medical ethics. Such a restriction imposes an undue burden if it "subject[s] women to significant health risks." *Gonzales v. Carhart*, 550 U.S. 124, 161 (2007). The district court correctly held here that the Act imposes an undue burden because it criminalizes the safest and most common form of second-trimester abortion after 15 weeks without ensuring that safe and medically accepted alternatives remain available to women who exercise their constitutional right to choose to terminate a pregnancy.

There is no merit to Texas's argument (Br. at 28-39) that a physician can safely perform a second-trimester abortion while avoiding liability under the Act by performing a suction abortion or by ensuring fetal demise prior to a D&E procedure by using digoxin injections, potassium chloride injections, or umbilical cord transections. Ample record evidence supports the district court's factual findings that each of these options is either unavailable, experimental, or ineffective, and each unnecessarily increases the medical risks of an otherwise routine procedure. The district court thus reasonably rejected each option, separately and collectively, as a feasible alternative to standard D&E,

particularly after 15 weeks of pregnancy. The burden imposed by the Act is therefore undue, amounting to essentially a prohibition on legal second-trimester abortions after 15 weeks. No benefit proffered (or even hypothesized) could justify such a burden.

Louisiana and other State amici (Louisiana Amici) are incorrect to argue (Louisiana Amici Br. at 18-21) that the purported existence of "medical uncertainty" about the safety and efficacy of Texas's proposed alternative procedures establishes the need for deference to the legislative decision to prohibit standard D&E. To the contrary, medical uncertainty about the safety and efficacy of the State's proffered alternative procedures signals the presence of impermissible risks and requires courts to evaluate whether by imposing those risks on women the challenged statute imposes an undue burden.

Finally, the district court properly sustained the challenge to this statute on its face. Such relief is appropriate when an abortion restriction creates a substantial obstacle for a large fraction of "those women for whom the provision is an actual rather than an irrelevant restriction." *Whole Woman's Health*, 136 S. Ct. at 2320 (quotation marks, alterations, and citation omitted). Contrary to Texas's argument (Br. at 44), the

appropriate denominator in this case is not all women in Texas who obtain an abortion, but rather, all women in Texas who seek an abortion after 15 weeks using the standard D&E procedure. The district court reasonably found that the Act imposes a substantial obstacle for a large fraction of this group.

ARGUMENT

POINT I

THE CONSTITUTION FORBIDS A STATE FROM REGULATING ABORTION IN A MANNER THAT IMPOSES AN UNDUE BURDEN ON A WOMAN'S RIGHT TO CHOOSE TO TERMINATE A PREGNANCY

The Supreme Court has long recognized a woman's substantive due process right to "choose to have an abortion before viability and to obtain it without undue interference from the State." *Casey*, 505 U.S. at 846 (plurality op.); *see also Roe v. Wade*, 410 U.S. 113, 153-54 (1973). Preservation of this right "is a rule of law and a component of liberty." *Casey*, 505 U.S. at 871 (plurality op.). At the same time, the Supreme Court has recognized that there are legitimate governmental interests in regulating abortion, including several of the interests that Texas identifies in this case, such as promoting respect for potential life and

protecting the integrity of the medical profession. *See Gonzales*, 550 U.S. at 157-58. In *Casey* and the numerous cases that followed, the Court struck a balance between these concerns with a legal standard that accommodates legitimate governmental interests while at the same time ensuring "real substance to the woman's liberty to determine whether to carry her pregnancy to full term." *Casey*, 505 U.S. at 869 (plurality op.); *see also Whole Woman's Health*, 136 S. Ct at 2309; *Gonzales*, 550 U.S. at 158; *Stenberg v. Carhart*, 530 U.S. 914, 930-31 (2000).

An abortion restriction is unconstitutional if it imposes an "undue burden" on a woman's constitutional right to choose an abortion. *Casey*, 505 U.S. at 877 (plurality op.). Under this standard, "'a statute which, while furthering a valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends.'" *Whole Woman's Health*, 136 S. Ct. at 2309 (alterations omitted) (quoting *Casey*, 505 U.S. at 877 (plurality op.)). Further, a court reviewing the constitutionality of an abortion regulation must "consider the burdens a law imposes on abortion access together with the benefits those laws confer," *id.*, and

invalidate any statute whose benefits are not "sufficient to justify [the] burdens upon access," *id.* at 2300.

Texas and Louisiana Amici argue that *Whole Woman's Health* created a "health-benefit-balancing test" that does not apply where a State "has invoked its separate state interest in respecting life." *See* Br. at 41; Louisiana Amici Br. at 25-27. This argument misunderstands the Supreme Court's case law. The Supreme Court did not invent a balancing test only to evaluate the asserted health benefits in *Whole Woman's Health*, but rather applied "[t]he rule announced in *Casey*" to the facts of the case presented. *Whole Woman's Health*, 136 S. Ct. at 2309. The Court expressly noted that *Casey* "performed this balancing" when evaluating a spousal notification provision and a parental notification provision, neither of which implicated the State's interest in women's health. *Id.*; *see also Casey*, 505 U.S. at 887-901 (plurality op.).

The balancing test set forth in *Casey* and *Whole Woman's Health* is a lynchpin of the undue-burden analysis, because a court cannot evaluate whether a burden on abortion access is excessive or unwarranted without evaluating the extent to which a statute advances legitimate state interests. *See Casey*, 505 U.S. at 878 (plurality op.); *Planned Parenthood*

of Wisc., Inc. v. Schimel, 806 F.3d 908, 919-20 (7th Cir. 2015); *Planned Parenthood of Ariz., Inc. v. Humble*, 753 F.3d 905, 911-15 (9th Cir.), *cert. denied*, 135 S. Ct. 870 (2014). Contrary to Louisiana Amici's suggestion (Louisiana Amici Br. at 24-31), the Supreme Court has performed a balancing analysis in every abortion case it has considered, including *Gonzales*. *See* 550 U.S. at 161 (analyzing benefits of ban on "intact" D&E), 164 (concluding that burdens are minimal because the prohibited procedure is rarely used and standard D&E remained available).

Louisiana Amici erroneously suggest (Louisiana Amici Br. at 28-29) that the balancing test requires a court to "weigh[] the interest of showing respect for fetal life" against the burdens imposed by a particular statute. But the benefits analysis does not require the court to evaluate the weight of the asserted state interest. Rather, the review focuses on the extent to which an abortion restriction actually advances a legitimate state interest, or whether the restriction serves only the impermissible purpose of making abortion more difficult to access. *See Whole Woman's Health*, 136 S. Ct. at 2312, 2316. The test proposed by Louisiana Amici would impermissibly relieve a State from its obligation to show that an abortion restriction actually advances the State's legitimate interest in

something other than prohibiting abortion. *See Casey*, 505 U.S. at 901 (plurality op.).

In this case, Texas did not establish that the Act meaningfully advances its asserted interests in promoting respect for fetal life and protecting medical ethics.[5] After all, the Act inexplicably distinguishes between "dismemberment" caused by forceps and "dismemberment" caused by suction, permitting the latter, even though both methods involve the dismemberment of a live fetus. *See* Tex. Health & Safety Code § 171.151. Assuming for the sake of argument that suction abortions can be performed up to 17 weeks, as Texas asserts (but see *infra* at __), the consequence of the Act would be to induce pregnant women and their doctors to choose suction abortions rather than D&E abortions. But it is undisputed that suction abortions cause fetal death through dismemberment, just as D&E abortions do. (ROA.1919, 2398.) The two procedures therefore involve precisely the same purported harm. The arbitrary

[5] It is true that Texas also asserts (Br. at 24) an interest in avoiding fetal pain. But the medical consensus is that fetal pain is not possible before at least 24 weeks LMP. (ROA.2912-2913.) *See also* Br. for Appellees (Pl. Br.) at 39. And Texas law independently prohibits abortion at that stage of the second trimester. *See* Tex. Health & Safety Code § 171.044.

distinction between them thus suggests that the true purpose of the Act is to prohibit pre-viability abortions after 15 weeks, when, according to medical consensus, suction is no longer feasible. *See Whole Woman's Health*, 136 S. Ct. at 2315-16 (finding that challenged building standards did not serve State's identified interest because they were "nearly arbitrary" in nature).

In addition, Texas failed to explain why its preferred method of injection "into the fetal abdomen (thorax), head, or heart" (Br. at 37) is necessarily a more "humane" procedure than standard D&E. And Texas failed to articulate how the Act promotes any accepted principle of medical ethics. To the contrary, as the district court correctly found (ROA.1602), the Act would instead interfere with physicians' ethical obligations to promote the safety and welfare of patients and to refrain from subjecting patients to medically unnecessary, painful, and invasive procedures.

Of course, even when an abortion restriction furthers legitimate government interests, a court must consider whether the statute also "has the effect of imposing an unconstitutional burden on the abortion right." *Gonzales*, 550 U.S. at 161. As explained *infra* at __, the Act

functions as a ban on legal abortions after 15 weeks. No benefit is sufficient to justify a burden on access that is so great as to amount to a prohibition. "[T]he means chosen by the State to further [its] interest . . . must be calculated to inform the woman's free choice, not hinder it." *Casey*, 505 U.S. at 877 (plurality op.). But even if the Act did not function as an outright ban, it would nevertheless impose substantial burdens on women in Texas seeking to exercise their constitutional right to choose an abortion—burdens that could not be justified by whatever benefits the Act purportedly provides.

POINT II

THE ACT IMPOSES AN UNDUE BURDEN BECAUSE IT SUBJECTS WOMEN TO SIGNIFICANT HEALTH RISKS

The Supreme Court has explained how to balance the benefits and burdens of a statute that, like the Act, is purportedly aimed at advancing a State's interests in promoting respect for fetal life and protecting medical ethics. Such a regulation imposes an "undue burden" on a woman's right to terminate a pregnancy if it "subject[s] women to significant health risks." *Gonzales*, 550 U.S. at 161 (quotation marks and alterations omitted). Accordingly, a State may not prohibit a method of

abortion without ensuring that "a commonly used and generally accepted method" remains available. *Id.* at 165, 167. The Supreme Court has "repeatedly invalidated statutes that in the process of regulating the methods of abortion, imposed significant health risks" by compelling "women to use riskier methods of abortion." *Stenberg*, 530 U.S. at 931 (emphasis omitted); *see also Thornburg v. American Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 768-69 (1986) (invalidating on its face a statute compelling abortion providers to use a procedure that "require[s] a 'trade-off' between the woman's health and fetal survival"); *Colautti v. Franklin*, 439 U.S. 379, 400 (1979) (same); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 76-79 (1976) (invalidating ban on safest and most common method of second-trimester abortion at the time); *Doe v. Bolton*, 410 U.S. 179, 197 (1973) (invalidating statute that interfered with a "woman's right to receive medical care in accordance with her licensed physician's best judgment").

These precedents recognize the obvious: by forcing women to choose between a risky and experimental abortion and no abortion at all, the Act in effect bans abortions for those women. *See Danforth*, 428 U.S. at 79. And that is precisely what the Act does for women in Texas who seek

legal second-trimester abortions after 15 weeks. The State may not advance its legitimate interests by expressly or implicitly "prohibit[ing] any woman from making the ultimate decision to terminate her pregnancy before viability." *Casey*, 505 U.S. at 879 (plurality op.). Nor can a State advance such interests by "endanger[ing] a woman's health." *Stenberg*, 530 U.S. at 931; *see also Casey*, 505 U.S. at 893 (plurality op.) (rejecting spousal-notification requirement because it could subject women to physical and psychological abuse). Thus, a statute is unconstitutional if it forces a woman and her physician "to terminate her pregnancy by methods more dangerous to her health than the method outlawed." *Danforth*, 428 U.S. at 79.

Although the Act does not use medical terminology, the statute describes and prohibits the standard D&E procedure. *See* Tex. Health & Safety Code § 171.152. Standard D&E has long been recognized as the safest and most common method of second-trimester abortion after 15 weeks. *See, e.g.*, *Gonzales*, 550 U.S. at 164; *Stenberg*, 530 U.S. at 924. The procedure is currently used for approximately 95% of all second-trimester

abortions performed in the United States.[6] Given the widespread use and medical acceptance of standard D&E, States and the federal government have frequently conceded that a prohibition on the method would impose an undue burden. *See, e.g.*, *Stenberg*, 530 U.S. at 938 (Nebraska); *Gonzales*, 550 U.S. at 147 (United States).

Texas acknowledges (Br. at 2) that the Act can pass constitutional muster only if "safe alternatives are available." But Texas contends (Br. at 29-39) that physicians can perform second-trimester abortions by suction or by D&E after first causing fetal demise using one of three methods: digoxin injection, potassium chloride injection, or umbilical cord transection. Ample evidence in the record, however, supports the district court's factual findings that each of these proposed alternatives is either unavailable after 15 weeks or is an experimental procedure whose safety and efficacy are unknown.

Texas's arguments on appeal largely boil down to a disagreement with the district court's weighing of the record evidence, specifically the expert testimony. *See* Br. at 33-39. But "the district court was not

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[6] *See* Am. Coll. of Obstetricians & Gynecologists, *Second-Trimester Abortion*, 121 Obstetrics & Gynecology 1394 (2013).

obligated to accept or even credit the testimony of [the State's] experts." *Albany Ins. Co. v. Anh Thi Kieu*, 927 F.2d 882, 894 (5th Cir. 1991). "It is settled law that the weight to be accorded expert opinion evidence is solely within the discretion of the judge sitting without a jury." *Pittman v. Gilmore*, 556 F.2d 1259, 1261 (5th Cir. 1977). The district court reviewed the record evidence and made findings based on "the greater weight of the credible evidence." (ROA.1591.) The weight of record evidence amply supports the district court's conclusion that none of Texas's four alternative procedures qualifies as the kind of "standard medical option[]" required by the Supreme Court. *Gonzales*, 550 U.S. at 166.

First, although Texas asserts (Br. at 33) that suction can be used to perform abortions up to 17 weeks, the record establishes the contrary. Medical opinion overwhelmingly concludes that suction cannot be used alone after 15 weeks; instead the procedure would also require the use of forceps or other instruments, and would thereby risk violating the Act, which specifically prohibits the dismemberment of a live fetus with the use of such instruments. (ROA.1601; *see also* Pl. Br. at 6-7.) Accordingly, suction abortions are not available in practice for women seeking an abortion in Texas after 15 weeks. Under the Act, suction may not be an

available alternative at an even earlier stage—between 13 and 15 weeks. Anatomical limitations can render the procedure ineffective. (ROA.2204-2205.) But those limitations will not always be apparent at the outset, and thus it will be impossible to determine whether the procedure can be completed without the aid of forceps or other instruments. (ROA.2205.) Therefore, many physicians will be reluctant to perform suction abortions even at that early stage for fear of needing prohibited instruments to complete the procedure and thereby violating the Act.

Second, although digoxin injection is an available procedure in Texas, it is not safe or effective enough to warrant upholding the Act. The use of digoxin injection before 18 weeks falls outside the standard of care in the United States because there are no medical studies of the safety or efficacy of the procedure at that stage of pregnancy. (ROA.1928, 1944, 2208-2209.) Moreover, the record established that the procedure would likely be more difficult to perform, and thus riskier to women and less likely to be effective, at that stage. (ROA.1947.) Digoxin injection before 18 weeks would also create additional burdens that are medically unwarranted, including a full day of delay beyond the preexisting 24-

hour waiting period currently mandated by Texas law, and a substantial increase in the cost of the procedure. (ROA.2029-2045.)

Texas also failed to demonstrate that a digoxin injection used after 18 weeks is a standard medical option. While the record showed that certain physicians perform digoxin injections after 18 weeks, such injections have a significant failure rate—between 5% and 10%—a rate that is even higher for women who are obese, have anatomical variations of the uterus or vagina, or have certain types of fetal positioning. (ROA.1936, 1946-1949, 2099-2300.) Under current law, physicians who perform digoxin injections are able to continue with the standard D&E procedure if the injection fails, but would no longer be able to do so under the Act. And there are no studies of the safety or efficacy of using a second digoxin injection to induce fetal demise where the first does not work. (ROA.1946.) Even if successful, the digoxin injection adds significant delay and cost, and may impose a greater risk of known medical complications to women compared to standard D&E without the use of digoxin, including bleeding, infection, inadvertent penetration of the bowel or bladder, nausea and vomiting, and cardiac rhythm abnormalities. (ROA.1938-1941.)

Third, the district court reasonably concluded that abortion providers in Texas do not have the specialized training and high-grade equipment necessary to perform potassium chloride injections, which can result in cardiac arrest and death if performed improperly. (ROA.1606, 1948-1950, 2116-2117, 2449-2450.) In addition, potassium chloride injections are not medically appropriate for many women, and impose various burdens beyond medical risk, including increased pain, and substantial financial costs. (ROA.1952-1953.)

Finally, the district court had ample reason to conclude that umbilical cord transection is not a safe and effective alternative procedure. As with digoxin and potassium chloride injections, record evidence showed that the procedure would likely be more difficult and riskier to perform during the early stages of the second trimester. (ROA.1960, 2032-2033, 2114-2115.) The district court was entitled to disregard the single study of cord transection cited by the State, given various methodological flaws identified by plaintiffs' expert, including the lack of a control group. (ROA.1956-1957.) In any event, the district court correctly found on the basis of the record before it that cord transection is a difficult procedure with the potential for serious harm,

including increased risk of uterine perforation, cervical injury, and bleeding. (ROA.1960-1961, 2114.)

Thus, at a minimum, the record evidence established substantial medical uncertainty about the safety and efficacy of Texas's proposed alternative methods. Louisiana Amici are wrong to argue (Louisiana Amici Br. at 19-21) that, under *Gonzales*, a court must automatically defer to the legislature where any amount of medical uncertainty exists. To the contrary, "the division of medical opinion about the matter at most means uncertainty, a factor that signals the presence of risk, not its absence." *Stenberg*, 530 U.S. at 936. The presence of risk, in turn, demonstrates that the State's proposed substitutes to the standard D&E procedure are not the commonly used or generally accepted alternatives required by controlling precedent. The Supreme Court has made clear that, where the constitutional right to obtain an abortion is at stake, courts "retain[] an independent constitutional duty to review" the legislation and determine whether it imposes an undue burden. *Gonzales*, 550 U.S. at 165. A State cannot shield its abortion regulations from all judicial review merely by identifying medical or scientific

disputes, especially where, as here, the very existence of such disputes is directly relevant to the application of the controlling legal standard.

Louisiana Amici's argument rests on a fundamental misunderstanding of *Gonzales*. *Gonzales* involved a challenge to a federal statute banning a rarely used procedure, the "intact" D&E. The plaintiffs in *Gonzales* challenged the statute on several grounds, including, as relevant here, that it lacked an exception allowing intact D&E when necessary to preserve a woman's health. *See* 550 U.S. at 161. The Supreme Court noted that there was "documented medical disagreement" about whether intact D&E was "medically necessary" for a "discrete and well-defined" class of women, and thus, whether prohibiting the procedure subjected those women to a significant health risk. *Id*. at 162-63, 167. It was undisputed, however, that the alternative procedure available—standard D&E—was a "safe," "commonly used and generally accepted method" of abortion for most women. *Id*. at 164-65, 167. Accordingly, the Court held that uncertainty about whether the prohibited procedure was ever "medically necessary" was insufficient to invalidate the statute on its face. *Id*. at 163. And the Court suggested that those women for whom intact D&E was arguably medically

necessary could challenge the statute's lack of a health exception in an as-applied challenge. *Id*. at 167.

Louisiana Amici pluck *Gonzales*'s discussion of "medical uncertainty" out of context and argue that it should govern this case. *See* Louisiana Amici Br. at 20. But *Gonzales* did not, as Louisiana Amici suggest (Br. at 21), hold that state legislatures may resolve all medical uncertainty against the women seeking abortions. In *Gonzales,* the uncertain question was whether the prohibited procedure was medically necessary for a small group of women; the Court concluded it could resolve the question against the challengers without subjecting anyone to harm so long as it left open the possibility of an as-applied challenge. By contrast, the uncertain question in this case is whether the methods permitted under Texas's statute are safe and effective alternative procedures for the overwhelming majority of women who will be required to use them as a result of the prohibition on standard D&E. Here, resolving the question against the plaintiffs would impermissibly subject large numbers of women to an unjustifiable risk of harm. *Gonzales* did not address that situation: it did not discuss medical uncertainty about alternatives to intact D&E, because there was, and is, no dispute about

the safety and efficacy of the main available alternative, standard D&E. In fact, *Gonzales*'s outcome was predicated on the availability of standard D&E as a safe alternative procedure for women seeking second-trimester abortions. *Gonzales*, 550 U.S. at 166-67.

It is simply impossible to determine whether a statute subjects women to "significant" health risks—and thus imposes an undue burden—without assessing the extent and nature of medical uncertainty about the procedures to which women would necessarily be relegated in the absence of the prohibited procedure. *Gonzales* does not hold otherwise.

POINT III

AN ABORTION RESTRICTION IS FACIALLY UNCONSTITUTIONAL WHEN, AS HERE, IT IMPOSES AN UNDUE BURDEN ON A LARGE FRACTION OF AFFECTED WOMEN

In *Casey* and *Whole Woman's Health*, the Supreme Court explained that a statute is facially unconstitutional if "it will operate as a substantial obstacle to a woman's choice to undergo an abortion" in "a large fraction of the cases in which" the law is relevant. *Casey*, 505 U.S. at 894-95 (plurality op.); *Whole Woman's Health*, 136 S. Ct. at 2320. "The proper focus of the constitutional inquiry is the group for whom the law

is a restriction, not the group for whom the law is irrelevant." *Casey*, 505 U.S. at 894 (plurality op.). Thus, the appropriate denominator in the "large fraction" analysis is "a class narrower than 'all women,' 'pregnant women,' or even 'the class of women seeking abortions identified by the State.'"[7] *Whole Woman's Health*, 136 S. Ct at 2319.

Texas ignores this case law (and the record evidence) and asserts (Br. at 44) that the Act "would not be implicated by abortions under 17 weeks because suction will cause the death of the fetus," and thus, the Act "would only potentially affect about 3% of abortions in Texas." Texas is mistaken as a factual matter, because the Act implicates abortions after 15 weeks. See *supra* at __. But, in any event, the appropriate denominator is *not* "the class of women seeking abortions identified by the State"—it is the class of women "for whom the law is a restriction," that is, those women seeking a second-trimester abortion after 15 weeks using the standard D&E procedure. Even if that class is a small

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[7] Louisiana Amici erroneously argue (Louisiana Amici Br. at 14) 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." This Court is bound by *Casey* and *Whole Woman's Health*, both of which apply the large fraction standard for facial relief.

percentage of the women who seek an abortion in Texas, "[t]he analysis does not end with the one percent of women upon whom the statute operates; it begins there." *Casey*, 505 U.S. at 894 (plurality op.).

The district court correctly concluded that the Act creates a substantial obstacle for a large fraction of affected women. (ROA.1611.) The Act requires every woman who seeks a second-trimester abortion after 15 weeks, and would otherwise obtain a standard D&E, "to undergo an unwanted, risky, invasive, and experimental procedure in exchange for exercising her right to choose an abortion." (ROA.1611.) Texas is also mistaken in arguing (Br. at 44-48) that, under *Gonzales*, the Act should not be invalidated on its face because the State's alternative procedures will affect different women in different ways. In *Gonzales*, the Supreme Court suggested that a member of the "discrete and well-defined" group of women for whom intact D&E was arguably medically necessary could challenge the statute's lack of a health exception in an as-applied challenge. 550 U.S. at 167. Here, by contrast, the safety and efficacy concerns associated with Texas's proposed alternative procedures are widespread and varied, and also difficult to predict in an individual case before initiating a medical procedure. The pregnant women subjected to

an undue burden by the Act are thus not the "discrete and well-defined" group contemplated in *Gonzales*, but rather the much larger number of women who seek legal abortions after 15 weeks using the standard D&E procedure.

CONCLUSION

The judgment of the district court should be affirmed.

Dated: New York, NY
April 18, 2018

Respectfully submitted,

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Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, Will Sager, an employee in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 5,606 words and complies with the typeface requirements and length limits of Rule 32(a)(5)-(7).

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I hereby certify that I electronically filed the accompanying Brief with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system on April 18, 2018.

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No. 17-51060 Whole Woman's Health, et al v. Ken Paxton, et al
USDC No. 1:17-CV-690

Dear Ms. Murdukhayeva,

The following pertains to your brief electronically filed on April 18, 2018.

We filed your brief. However, you must make the following corrections within the next 14 days.

You need to correct or add:

The name, office address, and telephone number of counsel representing the party for whom the brief is filed should appear on the cover. See FED R. APP. P. 32(a)(2)(F).

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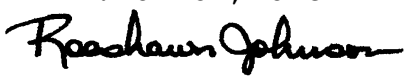

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