Case No. 17-2879

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

FREDERICK W. HOPKINS,
*Plaintiff-Appellee*,

v.

LARRY JEGLEY, Prosecuting Attorney for Pulaski County; STEVEN L. CATHEY, M.D., Chair of the Arkansas State Medical Board; ROBERT BREVING, JR., M.D.; BOB E. COGBURN, M.D.; WILLIAM F. DUDDING, M.D.; OMAR T. ATIQ, M.D.; VERYL D. HODGES, D.O.; MARIE HOLDER; LARRY D. LOVELL; WILLIAM L. RUTLEDGE, M.D.; JOHN H. SCRIBNER, M.D.; SYLVIA D. SIMON, M.D.; DAVID L. STAGGS, M.D.; JOHN B. WEISS, M.D., officers and members of the Arkansas State Medical Board, and their successors in office, in their official capacities.
*Defendants-Appellants.*

On Appeal from the United States District Court
for the Eastern District of Arkansas
The Honorable Kristine Baker
(No. 2:17-0141JLR)

# BRIEF OF CONSTITUTIONAL LAW SCHOLARS LEE C. BOLLINGER, ERWIN CHEMERINSKY, WALTER DELLINGER, MICHAEL C. DORF, DANIEL FARBER, JOANNA GROSSMAN, PAMELA S. KARLAN, LEAH LITMAN, GILLIAN METZGER, JANE S. SCHACTER, SUZANNA SHERRY, GEOFFREY R. STONE, DAVID STRAUSS, LAURENCE H. TRIBE, AND MARY ZIEGLER AS *AMICI CURIAE* SUPPORTING PLAINTIFF-APPELLEE

NICOLE A. SAHARSKY
GIBSON, DUNN & CRUTCHER LLP
1050 CONNECTICUT AVENUE, NW
WASHINGTON, DC 20036
TELEPHONE: (202) 955-8500
FACSIMILE: (202) 467-0539

CAITLIN J. HALLIGAN
GIBSON, DUNN & CRUTCHER LLP
200 PARK AVENUE
NEW YORK, NY 10166
TELEPHONE: (212) 351-4000
FACSIMILE: (212) 351-4035

*Counsel for Amici Curiae*
*(Additional Counsel Listed on Next Page)*

KIRSTEN GALLER
LAUREN FISCHER
CORY BATZA
GIBSON, DUNN & CRUTCHER LLP
333 SOUTH GRAND AVENUE
LOS ANGELES, CA 90071
TELEPHONE: (213) 229-7000
FACSIMILE: (213) 229-7520

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

Page(s)

### Cases



### Rules

## INTEREST OF AMICI CURIAE

This case involves the application of settled Supreme Court precedent to four new statutes enacted by Arkansas that substantially impair reproductive rights protected by the Fourteenth Amendment. *Amici* are constitutional law scholars who teach and/or write about the Fourteenth Amendment, including as it relates to reproductive rights. They have a shared interest in ensuring that courts apply the correct legal standard to evaluate constitutional challenges to laws that affect women's reproductive rights.

*Amici* are:

**Lee C. Bollinger**, President, Columbia University;

**Erwin Chemerinsky**, Dean, University of California, Berkeley School of Law;

**Walter Dellinger**, Douglas B. Maggs Professor Emeritus of Law, Duke University School of Law;

**Michael C. Dorf**, Robert S. Stevens Professor of Law, Cornell University Law School;

**Daniel Farber**, Sho Sato Professor of Law, University of California, Berkeley School of Law;

**Joanna Grossman**, Ellen K. Solender Endowed Chair in Women and the Law, SMU Dedman School of Law;

**Pamela S. Karlan**, Kenneth and Harle Montgomery Professor of Public Interest Law, Stanford Law School;

**Leah Litman**, Assistant Professor of Law, University of California, Irvine School of Law;

**Gillian Metzger**, Stanley H. Fuld Professor of Law, Columbia Law School;

**Jane S. Schacter**, William Nelson Cromwell Professor of Law, Stanford Law School;

**Suzanna Sherry**, Herman O. Loewenstein Chair in Law, Vanderbilt University Law School;

**Geoffrey R. Stone**, Edward H. Levi Distinguished Service Professor of Law, University of Chicago School of Law;

**David Strauss**, Gerald Ratner Distinguished Service Professor of Law, University of Chicago Law School;

**Laurence H. Tribe**, Carl M. Loeb University Professor, Harvard Law School; and

**Mary Ziegler**, Stearns Weaver Miller Professor, Florida State University College of Law.

*Amici* file this brief in their individual capacities; their institutional affiliations are listed for identification purposes only.[1]

## SUMMARY OF ARGUMENT

In 2017, Arkansas enacted four laws that significantly curtail women's reproductive freedom. These laws: (1) ban the D&E (dilation and evacuation) procedure, the most commonly used method for second-trimester abortions in Arkansas; (2) require compliance with complex regulations regarding disposal of fetal tissue; (3) require disclosure to law enforcement of certain information for all patients aged 14 to 16 who obtain abortions and preservation of fetal tissue as "evidence"; and (4) require doctors to obtain unnecessary medical records that delay their patients' access to abortion.

Dr. Frederick W. Hopkins, an experienced, board-certified obstetrician-gynecologist who practices in Arkansas, challenged those laws on behalf of himself and his patients. He argues that the new laws unduly burden a woman's right to obtain an abortion and therefore are unconstitutional under the Fourteenth Amendment to the U.S. Constitution. After holding a hearing and making extensive findings of fact, the district court concluded that the challenged laws likely violate

[1] No counsel for any party authored this brief in whole or part, and no other person or entity funded the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E). The plaintiff-appellee has consented to the filing of this brief; the defendants-appellants declined to consent and so *amici* are concurrently filing a motion for leave to file this brief. *See* Fed. R. App. P. 29(a)(3).

the Constitution and issued a preliminary injunction. The State of Arkansas now appeals, contending (among other things) that the district court used the incorrect legal standard to evaluate Dr. Hopkins's constitutional claims. The State is wrong.

The Supreme Court's settled "undue burden" standard applies in this case. Under that standard, a court determines whether "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." *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2300 (2016) (internal quotation marks omitted). The Supreme Court has consistently used that standard for the past twenty-five years, and the district court applied it in this case.

The State suggests various alternative legal standards, none of which is correct. First, the State contends that a rational basis test applies when evaluating challenges to state laws that infringe on women's reproductive rights. AOB 24. Such a standard plainly contradicts controlling Supreme Court precedent and has no application where, as here, fundamental constitutional rights are at issue. Indeed, just two years ago, the Supreme Court resoundingly rejected rational basis review in *Whole Woman's Health*.

*Gonzales v. Carhart*, 550 U.S. 124 (2007), likewise does not support the State. The Supreme Court in that case applied the undue burden standard. Although the Court upheld a law banning intact D&E procedures, it did not change the legal

standard. Instead, it concluded that the State's regulation was permissible because the standard D&E procedure—the very procedure Arkansas is seeking to ban here—remained available. *Id.* at 164.

Second, the State attempts to water down the undue burden standard, to the point that it is virtually unrecognizable. AOB 24. According to the State, "a law only imposes an undue burden where its benefits 'are *substantially* outweighed by the burdens it imposes'" and that an "undue burden exists" only if the law "imposes *exceptional and truly significant* burdens." *Id.* (emphases added; internal citation omitted). But such a formulation bears no resemblance to the undue burden test that the Court announced in *Casey* and recently reaffirmed in *Whole Woman's Health*. Without Supreme Court support for its reformulation of the undue burden test, the State relies on dicta in a footnote of this Court's decision in *Planned Parenthood of Arkansas & Eastern Oklahoma v. Jegley*, 864 F.3d 953, 960 n.9 (8th Cir. 2017), petition for cert. pending, No. 17-935 (filed Dec. 21, 2017). But in *Jegley*, this Court quoted the Supreme Court's own formulation of the undue burden standard, and did not insert the additional language the State proposes here requiring that a law's burdens be "exceptional," "substantial," or "truly significant." AOB 24. The undue burden test that applies here is the same test that the Supreme Court has consistently applied in the twenty-five years since *Casey*.

Third, the State argues that a less stringent test applies when the State asserts an interest in potential life rather than a health interest. AOB Add. 40. But no matter which interest or how many interests the State asserts, a district court is required to apply the same undue burden test. Nor can the State bolster the weight given to its interest in promoting potential life by claiming additional moral interests. And however the State's interests are framed, the benefits of the law are considered together with the burdens to determine if the regulation constitutes an undue burden—exactly the test the district court applied here.

At bottom, the district court followed the correct standard when evaluating the constitutionality of the four challenged provisions. This Court therefore should affirm.

## ARGUMENT

The district court issued a preliminary injunction because it concluded that each of the four challenged Arkansas laws likely is unconstitutional. Seeking to avoid that conclusion, the State now contends that the district court used the wrong legal standard to evaluate Dr. Hopkins's constitutional claims. The district court did no such thing.

## I. The Supreme Court's Settled "Undue Burden" Framework Applies In This Case

### A. Under Settled Supreme Court Precedent, A Law Is Unconstitutional If It Places An Undue Burden On A Woman's Right To Obtain An Abortion

1. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), the Supreme Court set out the legal standard for evaluating whether asserted state interests justify restricting a woman's constitutional right to terminate her pregnancy. *Id.* at 846 (joint opinion). The Court first "reaffirmed" that the Constitution protects a woman's right "to choose to have an abortion before viability [of the fetus] and to obtain it without undue interference from the State." *Id*. The Court then set out the governing legal standard: A law is constitutional only if it does not place an "undue burden" on a woman's right to choose whether to terminate a pregnancy before viability. *Id.* at 877 (joint opinion); *see id.* at 874, 878. 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 of a nonviable fetus." *Id.* at 878 (joint opinion).

The Court chose the "undue burden" standard because it appropriately "reconciles[] the State's interest with the woman's constitutionally protected liberty interest." *Casey*, 505 U.S. at 876 (joint opinion). If the state law "has the effect of placing a substantial obstacle in the path of a woman's choice," then it is not a "permissible means" to further the asserted state interest. *Id.* at 877 (joint opinion).

Put another way, "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.*

2. In the twenty-five years since *Casey*, the Supreme Court has adhered to the "undue burden" standard. In *Stenberg v. Carhart*, 530 U.S. 914 (2000), the Court applied the "undue burden" test to evaluate a challenge to a Nebraska statute banning a particular method of abortion. The Court reaffirmed 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 915 (quoting *Casey*, 505 U.S. at 877 (joint opinion)). Using that standard, the Court found the Nebraska statute unconstitutional because it lacked an exception for the woman's health and because it would unduly burden a woman's right to obtain the commonly used D&E procedure, "thereby unduly burdening the right to choose abortion itself." *Id.* at 929-30.

The Court applied the same legal standard in *Gonzales v. Carhart*, 550 U.S. 124 (2007). The Court explained that before viability, a State may neither "prohibit any woman from making the ultimate decision to terminate her pregnancy" nor place an "undue burden" on that right. *Id.* at 146. The Court defined an "undue burden" the same way as in *Casey*: An undue burden exists if a law's "purpose or effect is to place a substantial obstacle in the path of the woman seeking an abortion before the fetus attains viability." *Id.* (quoting *Casey*, 505 U.S. at 878 (joint opinion)). The

Court found no undue burden in that case, in large part because the challenged federal law did not prohibit the "prototypical D&E procedure." *Id.* at 150, 153.

And recently, in *Whole Woman's Health*, 136 S. Ct. at 2300, 2309, the Court again used the "undue burden" standard to invalidate Texas's admitting-privileges and surgical-center requirements. The Court began its opinion by reiterating the governing legal standard: "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." *Id.* at 2300 (internal quotation marks omitted). As in *Casey*, the Court recognized that this standard requires balancing both the State's interests and the woman's constitutionally protected right, and that the challenged law must yield when it fails to confer "benefits sufficient to justify the burdens" it imposes. *Id.* at 2300, 2309. Applying "undue burden" scrutiny, the Court concluded that Texas's admitting-privileges and surgical-center requirements were just the type of "[u]nnecessary health regulations" that it had warned about in *Casey*—those that "have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion"—and therefore found them unconstitutional. *Id.* at 2300 (quoting *Casey*, 505 U.S. at 878 (joint opinion)).

### B. The District Court Applied That Settled Standard In This Case

1. The district court faithfully applied the Supreme Court's "undue burden" standard in this case. The district court began its legal analysis by stating that it would "appl[y] the 'undue burden' standard developed in *Casey*." AOB Add. 38. The Court explained—consistent with *Casey* and its progeny—that "if a government regulation has 'the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus,' the regulation is an undue burden on a woman's right to have an abortion and is unconstitutional." *Id.* (quoting *Casey*, 505 U.S. at 877 (joint opinion)).

For each new restriction on abortion, the district court made extensive findings of fact and then relied on those findings to evaluate the burden of the challenged law—just as the Supreme Court has instructed courts to do. *See Whole Woman's Health*, 136 S. Ct. at 2309-10 (approving the approach of a district court that "considered the evidence in the record—including expert evidence, presented in stipulations, depositions, and testimony" and "weighed the asserted benefits against the burdens"). The court considered the State's asserted interest in imposing the restriction; assessed the burdens that the restriction would impose on women affected by it; weighed the burdens and benefits of the law together; and then decided whether the burdens of the law were "undue burdens." And the district court used the proper frame of reference in evaluating the burdens of the challenged laws—

women who would be affected by those laws. *See Casey*, 505 U.S. at 894 (opinion of the Court). The district court ultimately concluded that each of the four challenged laws is likely unconstitutional because it unduly burdens a woman's right to obtain an abortion. AOB Add. 43-61 (D&E ban), 67-82 (medical-records mandate), 94-105 (local-disclosure mandate), 115-134 (tissue-disposal mandate).

2. The State contends that "[t]he district court did not apply the undue burden standard" and instead "created its own standard." AOB 24-29. There is no basis for that assertion. The district court set out the governing legal standard, directly quoting from the Supreme Court's decisions in *Casey* and *Whole Woman's Health*. AOB Add. 37-42. The court then applied the Supreme Court's standards to the four challenged laws, in the manner envisioned by the Supreme Court.

The State asserts (AOB 27) that the district court erred by weighing the benefits of the challenged state laws against the burdens that those laws placed on women seeking abortions. But binding Supreme Court precedent tells courts to do just that. Determining whether there is an undue burden requires "consider[ing] the burdens a law imposes on abortion access together with the benefits those laws confer." AOB Add. 39 (quoting *Whole Woman's Health*, 136 S. Ct. at 2309). The State's argument boils down to the assertion that the district court should have used a more lenient legal standard—that the burdens of the challenged laws "substantially outweigh" the benefits, AOB 27, or that the burdens are "exceptional and truly

significant," AOB 24—but (as explained below) those more lenient legal standards misstate the law.

The district court's 140-page decision, which includes 20 pages of factual findings, demonstrates the court's commitment to faithfully following the Supreme Court's guidance.

## II. The State's Alternative Legal Standards Contravene Binding Supreme Court Precedent

To challenge the preliminary injunction, the State attempts to modify the "undue burden" standard in three different ways. Each of the State's proposed tests is inconsistent with binding Supreme Court precedent and should be rejected.

### A. The State's Rational Basis Test Already Has Been Rejected By The Supreme Court

The State first attempts to reformulate the "undue burden" test as a "rational basis" test. According to the State, "An undue burden exists where a law completely fails to advance a legitimate interest (or does so in such a trifling way that it lacks any rational connection with the government interest) and imposes exceptional and truly significant burdens." *Id.* This is an amped-up version of the same argument the State made to the district court. *E.g.*, AOB Add. 41 (State argued for "minimal rational basis scrutiny").

1. The State's proposed language—"completely fails to advance a legitimate interest"; "no rational connection"; "exceptional and truly significant

burdens"—sets out a rational basis test that is flatly inconsistent with binding Supreme Court precedent. Such a standard could be appropriate if the court were evaluating a law that neither burdens constitutional rights nor employs invidious classifications. But where, as here, a woman's constitutionally protected privacy right to decide whether to bear a child is at stake, it is the undue burden standard that applies, not the lowest level of judicial scrutiny. As the Court explained in *Casey*, decisions relating to procreation and conception "involv[e] the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy" that are "central to the liberty protected by the Fourteenth Amendment." 505 U.S. at 851 (opinion of the Court). That is why state regulation must yield when it imposes an "undue burden" on the woman's right, even though the State has some power to regulate abortion.

The State therefore is wrong to say that a state law regulating abortion is constitutional so long as it furthers a "legitimate interest" and does not impose "exceptional and truly significant burdens." AOB 24. Rather, the State must demonstrate that the challenged law does not "unduly burden" the rights of the women affected. *Whole Woman's Health*, 136 S. Ct. at 2319; *see Gonzales*, 550 U.S. at 146; *Stenberg*, 530 U.S. at 915; *Casey*, 505 U.S. at 877-78 (joint opinion).

2. Less than two years ago, the Supreme Court specifically rejected the argument that rational basis review applies to laws restricting abortion. In *Whole*

*Woman's Health*, the Court applied the undue burden standard to determine whether Texas's admitting-privileges and surgical-center laws were unconstitutional. 136 S. Ct. at 2318. At the outset of its legal analysis, the Court determined that the Fifth Circuit had used the wrong legal standard. The Fifth Circuit had asked whether the challenged state law "is reasonably related to (or designed to further) a legitimate state interest." *Id.* at 2309 (quoting court of appeals' opinion). The Supreme Court rejected that test, explaining that it is "wrong to equate the judicial review applicable to the regulation of a constitutionally protected personal liberty with the less strict review applicable where, for example, economic legislation is at issue." *Id.* at 2309. The Court made clear that there is no room for a rational basis analysis in this context: "The Court of Appeals' approach simply does not match the standard that this Court laid out in *Casey*, which asks courts to consider whether any burden imposed on abortion access is 'undue.'" *Id.*

To support its claim to rational basis review, the State relies (AOB 26) on the Supreme Court's decision in *Gonzales*. According to the State, *Gonzales* holds that "'[w]here [the State] has a rational basis to act,' only requiring women to undergo significantly riskier procedures could possibly prevent it from 'us[ing] its regulatory power to bar certain procedures and substitute others.'" AOB 26 (quoting *Gonzales*, 550 U.S. at 158). The State is incorrect, and its selective quotation of *Gonzales* misstates the Court's holding.

The full context of the State's selective quotation from *Gonzales* makes clear that the Court used the undue burden standard in that case. When considering the government's asserted interests, the Court said: "Where it has a rational basis to act, *and it does not impose an undue burden*, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn." *Gonzales*, 550 U.S. at 158 (emphasis added). The "rational basis to act" language does not modify the "undue burden" standard. Rather, it is a recognition that a State must have a legitimate government purpose for enacting the regulation. But a legitimate purpose is not enough to justify a restriction on women's reproductive freedom; the State also must show that its regulation does not place an undue burden on women's reproductive rights.

The *Gonzales* Court used the same legal standard as in *Whole Woman's Health* and *Casey*. As the *Gonzales* Court explained, a State "may not impose upon [a woman's right to choose] an undue burden, which exists if a regulation's 'purpose or effect is to place a substantial obstacle in the path of the woman seeking an abortion before the fetus attains viability.'" 550 U.S. at 146 (quoting *Casey*, 505 U.S. at 878 (joint opinion)). In applying that standard, the Court conducted the balancing analysis envisioned in *Casey*, not some watered-down rational basis analysis. The Court concluded that the law did not "construct a substantial obstacle

to the abortion right" because it "allow[ed], among other means, a commonly used and generally accepted method" of abortion—the standard D&E procedure that Arkansas has now effectively banned, *id.* at 165. *See* AOB Add. 35, 55-56.

*Gonzales* thus offers no support for the State's reformulation of the undue burden test. And if there were any uncertainty on that score, the Supreme Court resolved it in *Whole Woman's Health*, when the Court definitively rejected the Fifth Circuit's rational basis test.

3. The Supreme Court's rejection of a rational basis standard necessarily follows from its recognition that the Constitution protects a woman's right to obtain an abortion. The Court has consistently reaffirmed that the constitutional right to privacy includes the right to make decisions about whether to bear a child. *See Stenberg*, 530 U.S. at 921 ("[T]his Court, in the course of a generation, has determined and then redetermined that the Constitution offers basic protection to the woman's right to choose."); *Casey*, 505 U.S. at 870 (noting the Court's "unbroken commitment . . . to the essential holding of *Roe*," which it "reaffirm[ed]") (joint opinion); *see also Planned Parenthood Minnesota, N. Dakota, S. Dakota v. Rounds*, 530 F.3d 724, 739 (8th Cir. 2008) (recognizing that "[a] woman's constitutional right to terminate her pregnancy before viability has been consistently upheld by the Supreme Court").

When a law affects the exercise of a constitutional right, it must be justified by more than a rational basis; the law must survive some form of heightened scrutiny. *See United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). In this context—state laws affecting a woman's right to terminate a pre-viability pregnancy—heightened scrutiny takes the form of the "undue burden" standard. Under that standard, state laws only pass muster if they do not place a "substantial obstacle in the path of a woman seeking an abortion" pre-viability. *Whole Woman's Health*, 136 S. Ct. at 2324 (citing *Casey*, 505 U.S. at 877 (joint opinion)). The "undue burden" standard favors protecting a woman's constitutional right; it does not allow the State to enact any regulation it chooses so long as the State's purpose is rational. As the Court has said, "the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it." *Casey*, 505 U.S. at 877 (joint opinion). The effect of restricting a woman's access to abortion "is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role." *Id.* at 852 (opinion of the Court).

### B. The State's Attempts To Reformulate The Undue Burden Standard Are Inconsistent With Binding Supreme Court Precedent

The State next contends that "a law only imposes an undue burden where its benefits are *substantially* outweighed by the burdens it imposes." AOB 24 (emphasis added). In fact, the State goes even further, claiming that a law that limits

reproductive freedom is valid unless it imposes "*exceptional and truly significant* burdens" on a woman's right to obtain an abortion. *Id.* (emphasis added). Neither formulation is correct.

1. The Supreme Court's undue burden standard requires consideration of both the State's asserted interests and the woman's right to terminate her pregnancy before viability. *See Whole Woman's Health*, 136 S. Ct. at 2309. Because it considers both the State's interests and the woman's constitutionally protected right, the Supreme Court has referred to it as a balancing test. *See, e.g.*, *id*. at 2309 (noting that *Casey* performed benefit-burden "balancing with respect to a spousal notification provision"); *Gonzales*, 550 U.S. at 146 (*Casey* "struck a balance" that "was central to its holding").

The Supreme Court struck the balance in favor of protecting women against undue burdens on the exercise of their constitutional rights. The State's proposed balancing tests (AOB 24, 27) are inconsistent with the undue burden standard, because they would put a thumb on the scale in favor of upholding state laws, allowing a law that imposes a "substantial obstacle" on access to abortion, *Whole Woman's Health*, 136 S. Ct. at 2309, so long as the law's burdens do not "substantially outweigh[]" its benefits, AOB 24.

Nowhere in *Casey*—or in any of the Court's decisions since—does the Court require that the burdens be "exceptional" or "truly significant" or that they

"substantially outweigh[]" the benefits. AOB 24. Those formulations "do[] not match the standard . . . in *Casey*, which asks courts to consider whether any burden imposed on abortion access is 'undue.'" *Whole Woman's Health*, 136 S. Ct. at 2310. After all, the test is the "undue burden" test, not the "exceptional burden" or "truly significant burden" test.

Contrary to the State's contention (AOB 24-25), *Whole Woman's Health* did not modify the undue burden test to require a showing that the challenged law "imposes exceptional and truly significant burdens." Rather, *Whole Woman's Health* reaffirmed that "the standard that th[e] Court laid out in *Casey*" simply "asks courts to consider whether any burden imposed on abortion access is 'undue.'" 136 S. Ct. at 2310. While it is true that the burdens in *Whole Woman's Health* were truly significant—many facilities would have closed, forcing women to travel long distances to obtain abortions at the few facilities remaining—the Court did not alter the undue burden test or confine its application to cases where there is a health justification for the regulation. *Id.* at 2313, 2318. Instead, it applied *Casey* and concluded that each of the challenged regulations "place[d] a substantial obstacle in the path of women seeking a previability abortion, each constitute[d] an undue burden on abortion access, . . . and each violate[d] the Federal Constitution." *Id.* at 2300 (citing *Casey*, 505 U.S. at 878 (joint opinion)).

2. To support its view, the State relies (AOB 24, 26) on a footnote in this Court's recent decision in *Planned Parenthood of Arkansas & Eastern Oklahoma v. Jegley*, 864 F.3d 953 (8th Cir. 2017). The State's reliance is misplaced.

In *Jegley*, the Court considered whether a district court erred in preliminarily enjoining enforcement of an Arkansas statute requiring abortion providers to contract with physicians who have hospital admitting privileges. 864 F.3d at 955. The Court concluded that the district court had not made sufficient factual findings to sustain a grant of facial relief, and so it reversed and remanded. *Id.* at 958-60. The Court quoted *Casey* for the governing legal standard: "A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." 864 F.3d at 958 (quoting *Casey*, 505 U.S. at 877 (joint opinion)). And the Court used *Whole Woman's Health* to further describe the test: "In *Whole Woman's Health v. Hellerstedt*, the Supreme Court clarified that this undue burden analysis 'requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer.'" *Id.* Accordingly, *Jegley* does not support the State's view that a new, different "undue burden" test applies.

Moreover, the language on which the State relies is dicta. It addresses an issue the Court expressly found "unnecessary to reach"—the benefits of the contested

regulation. *Jegley*, 864 F.3d at 960 at n.9. Further, all the Court said was that the district court's analysis gave it "some pause." *Id.* And the portion of the *Jegley* opinion the State cites is not the part of the opinion discussing the governing legal standard; it is in a footnote.

The *Jegley* Court recited the undue burden test, not the different legal test the State proposes here. This Court therefore should decline the State's invitation to read *Jegley* as setting out a new version of the "undue burden" test.[2]

### C. There Is Only One "Undue Burden" Test, And It Applies In All Cases Where Individuals Challenge State Restrictions On Abortion

The State argued to the district court that "the Supreme Court has created two distinct undue burden tests, depending on what interests the state seeks to regulate." AOB Add. 40. According to the State, "the balancing test of *Whole Woman's Health* applies only when the state's interest is in . . . a patient's health or safety" and "the lesser standard of rational basis review applies when a state regulates to promote respect for unborn life." *Id.* (internal quotation marks omitted). In its opening brief, the State renews those arguments, albeit in more subtle terms. Either way, the

[2] *Amici* believe that the *Jegley* Court misapplied the undue burden test to the facts before it and therefore have filed a brief in support of the certiorari petition in that case. *See* Constitutional Law Scholars Br. at 11-15, *Planned Parenthood of Arkansas & Eastern Oklahoma v. Jegley*, petition for cert. pending, No. 17-935 (filed Dec. 21, 2017).

arguments should be rejected because they contradict binding Supreme Court precedent.

1. There is one legal standard that applies to state laws limiting access to abortion—the standard set out in *Casey* and reaffirmed over the past twenty-five years, most recently in *Whole Woman's Health*.

According to the State, a law that bans an abortion procedure that "raise[s] significant moral and ethical concerns" "only constitutes an undue burden where those other [substituted] procedures impose significant health risks." AOB 42; *see also, e.g.*, AOB 22 (asserting that district court failed to "assess alleged burdens in light of Arkansas's significant interest in promoting respect for life"). In so arguing, the State is renewing its argument that a different—and less stringent—test applies when the State asserts a moral interest in promoting potential life. *See* AOB 23, 28, 33. That is incorrect.

The Supreme Court has never suggested that different tests apply based on the state interest asserted. To the contrary: When the Supreme Court first announced the undue burden standard in *Casey*, the Court described it as a "standard of general application." 505 U.S. at 876 (joint opinion). The Court applied that same standard when evaluating regulations that sought to further "the State's interest in fetal life." *Id.* at 877 (joint opinion). After acknowledging "the profound moral . . . implications of terminating a pregnancy," *id.* at 850 (opinion of the Court), the Court explained

that it would "employ the undue burden analysis" in order to "protect the central right recognized by *Roe v. Wade* while at the same time accommodating the State's profound interest in potential life," *id*. at 878 (joint opinion).

The Court then applied the same analysis to regulations that purportedly sought to protect women's health: "Regulations designed to foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden." *Casey*, 505 U.S. at 878 (joint opinion). In no decision has the Supreme Court taken the view that the type of state interest changes the governing legal standard. Indeed, the State's argument contravenes decades of Supreme Court precedent establishing one undue burden test that always involves benefit-burden balancing no matter what interest the State asserts. *See id.* at 876-79 (joint opinion); *Gonzales*, 550 U.S. at 157-67; *Whole Woman's Health*, 136 S. Ct. at 2309-11; *see also Stenberg*, 530 U.S. at 921 (Court's statement that it would not "revisit th[e] legal principles" set out in *Casey* but instead would simply "apply them to the circumstances of [each] case").

A less stringent version of the undue burden standard does not apply when the State asserts an interest in potential life. That was the interest asserted in *Gonzales*, and the Court applied the same undue burden test that it had applied in *Casey*. *Gonzales*, 550 U.S. at 157-60; *see also, e.g.*, *Casey*, 505 U.S. 875-76 (explaining how the undue burden standard accounts for the asserted interest in potential life) (joint opinion). At no point did the *Gonzales* Court hold that the State's interest in

potential life warranted application of a less stringent version of the undue burden test. In *Whole Woman's Health*, the Court focused on the purported health justifications for the state laws because those were the only justifications that Texas offered. The Court did not suggest that the undue burden standard only applied because the State asserted health justifications rather than an interest in potential life. Just as in *Gonzales*, the Court balanced the asserted benefits of the challenged regulations against the burdens they would impose. *Compare Whole Woman's Health*, 136 S. Ct. at 2309-11, *with Gonzales*, 550 U.S. at 157-67. The district court followed the same approach here.

2. In addition to urging this Court to apply a toothless version of the undue burden test, the State claims that the district court failed to adequately weigh the "moral and ethical benefits" of the challenged regulations, suggesting that those interests are distinct from and entitled to more weight than the State's interest in promoting fetal life. AOB 28; *see also* AOB 26, 42. But the State's interest in fetal life already takes into account moral considerations. Indeed, in *Casey*, the Court acknowledged that abortion regulations premised on protecting fetal life are designed with moral arguments in mind. 505 U.S. at 872 (joint opinion). For example, the Court noted that the "State may enact rules and regulations designed to encourage [the woman] to know that there are philosophic and social arguments of

great weight that can be brought to bear in favor of continuing the pregnancy to full term," so long as such regulations do not constitute an undue burden. *Id.*

According moral benefits additional consideration beyond the weight given to the State's interest in fetal life would undermine the distinction between abortion regulations pre- and post-viability. Post-viability, the Court has decided that the State's interest in potential life outweighs a woman's right to choose to terminate her pregnancy, except when the life or health of the woman is at stake. *Casey*, 505 U.S. at 871, 879 (joint opinion). But under the State's formulation, that interest, when combined with a separate purported moral benefit, could perhaps outweigh many burdens on abortion access—providing little protection for the woman's recognized constitutional right. *See Casey*, 505 U.S. at 879 (joint opinion).

* * * * *

The district court properly stated and applied the Supreme Court's undue burden standard in this case. The State has no legitimate grounds to complain.

## CONCLUSION

For all of the foregoing reasons, this Court should affirm the district court's order.

Dated: February 27, 2018

Respectfully submitted,

By */s/ Caitlin J. Halligan*

CAITLIN J. HALLIGAN
GIBSON, DUNN & CRUTCHER LLP

200 PARK AVENUE
NEW YORK, NY 10166
TELEPHONE: (212) 351-4000
FACSIMILE: (212) 351-4035

NICOLE A. SAHARSKY
GIBSON, DUNN & CRUTCHER LLP
1050 CONNECTICUT AVENUE, NW
WASHINGTON, DC 20036
TELEPHONE: (202) 955-8500
FACSIMILE: (202) 467-0539

KIRSTEN GALLER
LAUREN FISCHER
CORY BATZA
GIBSON, DUNN & CRUTCHER LLP
333 SOUTH GRAND AVENUE
LOS ANGELES, CA 90071
TELEPHONE: (213) 229-7000
FACSIMILE: (213) 229-7520

*Counsel for Amici Curiae*

## CERTIFICATE OF COMPLIANCE

I certify that pursuant to Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B), the *amici curiae* Brief of Constitutional Law Scholars is proportionately spaced, has a typeface of 14 point and contains 5,787 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

*/s/ Caitlin J. Halligan*
Caitlin J. Halligan

## CIRCUIT RULE 28A(h) CERTIFICATION

Pursuant to Circuit Rule 28A(h), the undersigned hereby certifies that I have filed electronically a non-scanned PDF version of this brief. I hereby certify that the file has been scanned for viruses and that it is virus-free.

*/s/ Caitlin J. Halligan*
Caitlin J. Halligan

## 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 Eighth Circuit by using the CM/ECF system on February 27, 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.

*/s/ Caitlin J. Halligan*
Caitlin J. Halligan