17-2879

United States Court of Appeals for the Eighth Circuit

FREDERICK W. HOPKINS, M.D., M.P.H.,

Plaintiff-Appellee,

v.

LARRY JEGLEY, Prosecuting Attorney for Pulaski County, et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of Arkansas

BRIEF FOR *AMICUS CURIAE* STATES OF NEW YORK, CALIFORNIA, CONNECTICUT, DELAWARE, HAWAI'I, ILLINOIS, IOWA, MAINE, MARYLAND, MASSACHUSETTS, OREGON, PENNSYLVANIA, VERMONT, VIRGINIA, AND WASHINGTON, AND THE DISTRICT OF COLUMBIA IN SUPPORT OF APPELLEE

BARBARA D. UNDERWOOD
Solicitor General
ANDREA OSER
Deputy Solicitor General
ESTER MURDUKHAYEVA
Assistant Solicitor General
of Counsel

(Counsel listing continues on signature page.)

ERIC T. SCHNEIDERMAN
Attorney General
State of New York
120 Broadway
New York, NY 10271
(212) 416-6279

Dated: February 28, 2018

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

TABLE OF AUTHORITIES (cont'd)

Cases **Page(s)**

Session Laws

TABLE OF AUTHORITIES (cont'd)

State Laws **Page(s)**

TABLE OF AUTHORITIES (cont'd)

Miscellaneous Authorities **Page(s)**

INTEREST OF AMICI CURIAE

Amici are the States of New York, California, Connecticut, Delaware, Hawai'i, Illinois, Iowa, Maine, Maryland, Massachusetts, 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 have a strong interest in ensuring that their legislative judgments regarding the regulation of health care receive appropriate deference from the courts. Nonetheless, amici have an equally strong interest in protecting a woman's constitutional right to choose to terminate her pregnancy. The United States Constitution requires a meaningful and evidence-based review of all abortion restrictions to ensure that the regulations do not impose an undue burden on a woman's constitutional right to terminate a pregnancy. Accordingly, amici have a

strong interest in assuring the correct application of the well-established undue-burden standard.

Judicial scrutiny is especially important where, as here, one of the statutes at issue eliminates the safest and most common method of second-trimester pre-viability abortion without preserving a feasible, medically accepted alternative. Amici have an interest in confirming the principle that individuals cannot be compelled to choose between forgoing their constitutional rights and subjecting themselves to risky and experimental procedures. Amici also have an interest in ensuring that physicians are able to provide services that are consistent with professional standards of care.

Finally, although amici agree that the States should have considerable latitude in regulating licensed professions, both physicians and the public have a compelling interest in clear and unambiguous directives guiding the practice of medicine. Appropriate judicial review of vague statutes provides important guidance to the States and discourages unwarranted and potentially harmful regulations.

STATEMENT OF THE CASE

This case involves the constitutionality of four abortion restrictions enacted by Arkansas in early 2017. The first statute (the D&E Ban) 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* H.B. 1032, 91st Gen. Assemb., Reg. Sess. (Ark. 2017), *to be codified at* Ark. Code Ann. §§ 20-16-1801 to -1807. The purpose and effect of this statute is to prohibit the standard dilation and evacuation (D&E) procedure, which is generally regarded as the safest and most common method of second-trimester abortion. (Appendix (A.) 74-75.) Indeed, 100% of all second-trimester abortions performed in Arkansas use standard D&E. (Addendum of Appellants (Add.) 10.) Although seven other States have enacted similar D&E bans,[1] every court that has examined a D&E ban, including

[1] *See* Ala. Code §§ 26-23G-1 to -9 (2016); 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 -737.16 (2015); Tex. Health & Safety Code Ann. §§ 171.151 to 171.154 (2017); W. Va. Code § 16-2O-1 (2016).

the district court below, has enjoined it upon application of the Supreme Court's controlling undue-burden standard.[2]

The second statute (the Medical Records Mandate) imposes civil and criminal sanctions on any physician who performs an abortion without first spending "reasonable time and effort" to request and obtain the medical records of the patient's "entire pregnancy history" to ensure that the patient is not seeking a sex-selective abortion. *See* H.B. 1434, 91st Gen. Assemb., Reg. Sess. (Ark. 2017), *to be codified at* Ark. Code Ann. §§ 20-16-1801 to -1810. The statute does not define "reasonable time and effort," nor does it direct physicians to take any particular action upon receiving requested records. Although several States have enacted

---

[2] *See Whole Woman's Health v. Paxton*, No. 17-cv-690, 2017 WL 5641585 (W.D. Tex. Nov. 22, 2017) (permanently enjoining Texas statute); *West Ala. Women's Ctr. v. Miller*, No. 15-cv-497, 2017 WL 4843230 (N.D. Ala. Oct. 26, 2017) (permanently enjoining Alabama statute); *Hodes & Nauser MDs, P.A., et al. v. Schmidt & Howe*, 52 Kan. App. 2d 274, 275 (Ct. App. 2016) (preliminarily enjoining Kansas statute); Order, *Nova Health Sys. v. Pruitt*, No. CV-2015-1838 (Okla. County Dist. Ct. Oct. 28, 2015) (preliminarily enjoining Oklahoma statute). In addition, a federal district court denied the State's motion to dismiss a challenge to Louisiana'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). The D&E bans in Mississippi and West Virginia have not been challenged.

statutes prohibiting sex-selective abortions,[3] Arkansas is the only State to require collection of medical records as part of the restriction.

The third statute (the Local Disclosure Mandate) extends Arkansas's existing requirement that a physician (i) disclose the fact of an abortion obtained by a minor to her local police department, and (ii) preserve all embryonic or fetal tissue from such an abortion as evidence for a potential investigation and prosecution for rape. *See* H.B. 2024, 91st Gen. Assemb., Reg. Sess. (Ark. 2017), *to be codified at* Ark. Code Ann. § 20-16-108(a)(1). The existing requirement applies only to minors who are 13 years of age and under—the category of persons for whom any pregnancy is almost certainly the result of rape under Arkansas law. By extending the law to include persons up to and including the age of 16, the Local Disclosure Mandate covers many persons outside that category, because the legal age of consent in Arkansas is 16 years of age, and Arkansas permits 14- and 15-year-olds

---

[3] *See, e.g.*, Ariz. Rev. Stat. Ann. § 13-3603.02 (2011); Ind. Code § 16-34-4-5 (2016) (permanently enjoined in *Planned Parenthood of Ind. & Ky., Inc. v. Commissioner, Ind. State Dep't of Health*, 265 F. Supp. 3d 859, 868-69 (S.D. Ind. 2017)); N.C. Gen. Stat. § 90-21.121 (2013); S.D. Codified Laws § 34-23A-56 (2014).

to consent to sexual intercourse with a partner who is up to four years older. *See* Ark. Code Ann. §§ 5-14-101, 103, 110, 124 to 127; *see also id.* § 12-18-103(B)-(C). Failure to comply with the Local Disclosure Mandate exposes a physician to professional penalties, including license revocation. *See id.* § 12-18-108(c). No other State has a comparable abortion restriction.

The fourth statute (the Tissue Disposal Mandate) imposes criminal sanctions on physicians who fail to dispose of embryonic and fetal tissue in accordance with a state law governing consent to the disposition of the remains of a deceased person. *See* H.B. 1566, 91st Gen. Assemb., Reg. Sess. (Ark. 2017), *to be codified at* Ark. Code Ann. §§ 20-17-801 to -802. The Tissue Disposal Mandate does not address the method of fetal-tissue disposal. Arkansas law already requires health-care providers to dispose of fetal tissue in a "respectful and proper manner," including by releasing the tissue to the patient, burial, cremation or incineration. *See* Ark. Code Ann. § 20-17-801(a)(1)(A), (b)(2)(C)-(D). Arkansas law also already prohibits a physician from disposing of fetal tissue within 48 hours of a surgical abortion or miscarriage without written consent from the patient

or her spouse.[4] *See id.* § 20-17-801(b)(1). The Tissue Disposal Mandate expands those from whom consent must be obtained by requiring, among other things, the physician to notify and obtain consent to the disposal of fetal tissue from both the patient *and* her sexual partner (unless he cannot be located after reasonable effort), or, if either is a minor, from that person's parents. Although other States have enacted laws governing methods of fetal-tissue disposal,[5] Arkansas is the only State to require notification and consent to tissue disposal from any party other than the woman who obtained the abortion.

Plaintiff Frederick Hopkins is a board-certified obstetrician-gynecologist who provides abortion services at Little Rock Family Planning Services in Little Rock, Arkansas. (Add. 3.) Little Rock Family Planning Services is one of two abortion providers in Arkansas, and the

---

[4] If the patient is a minor, existing law requires written consent from "the person authorizing the medical or surgical treatment of the patient." *See* Ark. Code Ann. § 20-17-801(b)(1).

[5] *See, e.g.*, Fla. Stat. § 390.0111 (2016); Ind. Code § 16-34-3-4 (2016) (permanently enjoined in *Planned Parenthood of Ind. & Ky.*, 265 F. Supp. 3d at 872); Tenn. Code. Ann. § 68-3-506 (2016); Tex. Health & Safety Code §§ 697.001 to 697.009 (2017) (preliminarily enjoined in *Whole Woman's Health v. Hellerstedt*, No. 16-cv-1300, Dkt. No. 110 (W.D. Tex. Jan. 29, 2018)).

only provider of second-trimester abortions. (Add. 3-4.) Hopkins sued to enjoin implementation of all four statutes, arguing that they impose undue burdens on the constitutional rights of his patients to obtain pre-viability abortions. (A. 1-33.) Hopkins further argued, among other things, that the Medical Records and Tissue Disposal Mandates are impermissibly vague. (A. 28, 31.) Hopkins simultaneously moved for a preliminary injunction prohibiting enforcement of all four statutes during the pendency of the litigation. (A. 66-67.) The district court granted the preliminary injunction following briefing, evidentiary submissions, and oral argument. This appeal followed.

SUMMARY OF ARGUMENT

Under controlling Supreme Court precedent, a statute or regulation imposes an unconstitutional undue burden if it "place[s] 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). And as this Court has repeatedly acknowledged, it is "*bound* by the Supreme Court's decisions," including those addressing a woman's right to terminate a pregnancy. *Edwards v. Beck*, 786 F.3d 1113, 1117

(8th Cir. 2015) (emphasis in original); *see also MKB Management Corp. v. Stenehjem*, 795 F.3d 768, 772 (8th Cir. 2015).

Arkansas distorts the well-settled undue-burden test that this Court is required to apply. First, Arkansas erroneously contends (Br. for Arkansas (Br.) at 24) that an abortion restriction must impose "exceptional and truly significant burdens" in order to violate the Constitution. To the contrary, the Supreme Court has explained that the Constitution forbids abortion regulations that impose an "undue burden" by placing a "substantial obstacle" in the way of obtaining an abortion.

Second, Arkansas contends that a plaintiff must prove that the statute "completely fails to advance a legitimate interest" (Br. at 24.), or at least that the benefits of a particular statute "are substantially outweighed" by the statute's burdens on abortion access (Br. at 26). But the Supreme Court has repeatedly held that a statute can advance a legitimate state interest and nevertheless impose an undue burden. The fact that a statute advances a legitimate state interest is a necessary but not sufficient condition to uphold an abortion restriction. And Arkansas's fallback position squarely contradicts the Supreme Court's holding that an abortion restriction is unconstitutional unless its "benefits [are]

sufficient to justify [its] burdens upon access." *Whole Woman's Health*, 136 S. Ct. at 2300. Under that test, an abortion restriction imposes an undue burden not only when its benefits are *substantially* outweighed by its burdens, but even when its benefits are somewhat outweighed by its burdens. Under the correct application of the Supreme Court's legal standard, all four statutes impose an undue burden on a woman's right to choose to terminate her pregnancy.

The D&E Ban imposes an undue burden because it criminalizes the safest and most common form of second-trimester abortion without ensuring that safe and medically accepted alternatives are available to women who exercise their constitutional right to choose a pre-viability abortion. There is no merit to Arkansas's argument (Br. at 36-41) that a physician can avoid liability under the D&E Ban by performing an induction abortion or ensuring fetal demise prior to the procedure using digoxin injections, potassium chloride injections, or umbilical cord transections. The district court found, with ample evidentiary support, that each of these options is unavailable, experimental, or ineffective, and each unnecessarily increases the medical risks of an otherwise routine procedure. The district court reasonably rejected each option, separately

and collectively, as a feasible alternative to standard D&E. Thus, the burden imposed by the D&E Ban was substantial, amounting to essentially a prohibition on second-trimester abortions. No benefit proffered (or even hypothesized) could justify such a burden.

Arkansas is also incorrect to argue (Br. at 39) that the purported existence of "medical uncertainty" about the safety and efficacy of its proposed alternative procedures requires automatic deference to legislative judgment. The Supreme Court has expressly held that a regulation imposes an "undue burden" on the right to obtain a pre-viability abortion if it "subject[s] women to significant health risks." *Gonzales v. Carhart*, 550 U.S. 124, 161 (2007) (quotation marks and alterations omitted). Medical uncertainty about the safety and efficacy of the State's proffered alternative procedures signals the presence of such impermissible risks, and thus cannot shield a regulation from judicial review.

The district court also properly enjoined the Medical Records and Tissue Disposal Mandates. Arkansas concedes (Br. at 47, 52) that, under the district court's reading, the statutes impose an undue burden on the right to obtain an abortion. Arkansas thus argues that the statutory texts should be read more narrowly. But the Medical Records and Tissue

Disposal Mandates remain unconstitutional even under Arkansas's proposed constructions because they fail to advance legitimate state interests, impose undue burdens, and are impermissibly vague.

Finally, the district court properly enjoined the Local Disclosure Mandate as to minors who are between 14 and 16 years of age and are in lawful and consensual sexual relationships. Arkansas does not have a legitimate interest in regulating the lawful sexual activity of this discrete and well-defined group. Moreover, the Local Disclosure Mandate undermines, rather than furthers, the state interest in protecting the health and safety of minors because the law discourages young women from seeking medical care and attention.

ARGUMENT

POINT I

THE CONSTITUTION FORBIDS A STATE FROM REGULATING ABORTION IN A MANNER THAT CREATES A SUBSTANTIAL OBSTACLE TO 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 Arkansas 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.)). Accordingly, 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.

In this appeal,[6] Arkansas distorts this well-established undue-burden standard in two ways. First, Arkansas erroneously argues (Br. at

[6] As Appellee notes (Br. for Hopkins (Hopkins Br.) at 22-23), this appeal is the first time that Arkansas acknowledges that the undue-burden standard applies in this case. In the district court, Arkansas

24) that a statute creates an undue burden only where it "imposes exceptional and truly significant burdens." To be sure, the Supreme Court has recognized that a "slight" burden on the constitutional right may not be undue if it is imposed by a regulation that significantly advances a valid state interest. *See Casey*, 505 U.S. at 901 (plurality op.); *Stenberg*, 530 U.S. at 951. However, there is no ambiguity about the showing required to establish an undue burden. The Court has repeatedly defined an "undue burden" as a "substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Casey*, 505 U.S. at 877 (plurality op.); *Whole Woman's Health*, 136 S. Ct. at 2309. Thus, controlling Supreme Court law forecloses Arkansas's unsupported contention that an "undue" burden requires something more than a "substantial obstacle," namely an "exceptional" or "truly significant" burden.[7]

---

contended, contrary to well-settled law, that the undue-burden standard is irrelevant to statutes implicating any state interest other than women's health and safety. *See* Dist. Ct. Dkt. No. 23 at 37-39.

[7] To the contrary, while the *New Oxford American Dictionary* (3d ed. 2015) defines "substantial" as "of considerable importance, size, or worth," it defines "exceptional" as "unusual" or "not typical." And it defines "truly" as "to the fullest degree," and "significant" as "sufficiently great or important to be worthy of attention."

Second, Arkansas wrongly argues that a plaintiff must show that the "law completely fails to advance a legitimate interest" (Br. at 24), or at least that the law's "benefits 'are substantially outweighed by the burdens it imposes'" (Br. at 26). Neither position accords with settled Supreme Court precedent. As a threshold matter, a statute that fails to advance any legitimate state interest cannot justify even a minimal burden on abortion access. *See Casey*, 505 U.S. at 878 (plurality op.). But even a statute that advances a legitimate state interest can nevertheless impose an undue burden. The Supreme Court has itself reviewed—and invalidated—abortion regulations that rationally advanced legitimate state interests but nevertheless unduly burdened a woman's constitutional right to pre-viability abortion access. *See, e.g.*, *Stenberg*, 530 U.S. at 931; *Casey*, 505 U.S. at 893 (plurality op.). Thus, the fact that a statute advances a legitimate state interest is a necessary but not sufficient condition to uphold an abortion restriction.[8]

---

[8] For this reason, Arkansas is wrong to suggest (Br. at 24-26) that an abortion restriction survives constitutional scrutiny so long as it is "rationally connect[ed]" to a state interest. Indeed, the Supreme Court has expressly rejected the notion that "the judicial review applicable to the regulation of a constitutionally protected personal liberty interest" is

Arkansas's fallback position fares no better because it squarely contradicts the Supreme Court's holding that an abortion restriction is unconstitutional unless its "benefits [are] sufficient to justify [its] burdens upon access." *Whole Woman's Health*, 136 S. Ct. at 2300. Under governing law, an abortion restriction cannot survive constitutional scrutiny if it imposes greater burdens than benefits, no matter how slightly or substantially the scale tips in favor of the burdens. And no benefit would be sufficient to justify a burden on access that is so great as to amount to a prohibition. As the Supreme Court explained in *Casey*, "the means chosen by the State to further [its] interest . . . must be calculated to inform the woman's free choice, not hinder it." 505 U.S. at 877 (plurality op.).

Arkansas's reliance on dictum from this Court's decision in *Planned Parenthood of Ark. & E. Okla. v. Jegley*, 864 F.3d 953, 960 n.9 (8th Cir. 2017), in support of its distorted balancing test is misplaced. *Jegley* correctly noted that, as a factual matter, the "numerous burdens" imposed

---

equivalent to the "the less strict review applicable where, for example, economic legislation is at issue." *See Whole Woman's Health*, 136 S. Ct. at 2309.

by the Texas statutes at issue in *Whole Woman's Health* "substantially outweighed" those statutes' benefits. *See id.* at 958. And *Jegley* accurately quoted *Casey*'s definition of "undue burden." *See id.* But *Jegley* could not have endorsed the new legal standard proposed by Arkansas for evaluating the constitutionality of an abortion regulation, because that standard departs from controlling Supreme Court precedent.[9] Indeed, no other court has ever adopted such a standard.

Contrary to Arkansas's argument, the district court below properly stated that, in accordance with *Casey* and *Whole Woman's Health*, a "regulation will not be upheld unless the benefits it advances outweigh the burdens it imposes." (Add. 40.) The district court correctly identified and analyzed the benefits and burdens of each of the four statutes at issue, and reasonably applied the controlling undue-burden standard to hold that each of the statutes imposes an undue burden on a woman's constitutional right to choose a pre-viability abortion.

---

[9] Amici thus urge this Court to reject Arkansas's distorted balancing test. As Appellee correctly notes, however (Hopkins Br. at 26), none of the four statutes at issue here presents a close balancing question because, in each instance, the statute's burdens substantially outweigh its purported benefits.

POINT II

THE D&E BAN IMPOSES AN UNDUE BURDEN BECAUSE IT SUBJECTS WOMEN TO SIGNIFICANT HEALTH RISKS

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); *Colauitti v. Franklin*, 439 U.S. 379, 400 (1979); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 76-79 (1976); *Doe v. Bolton*, 410 U.S. 179, 197 (1973).

These precedents recognize the obvious: forcing women to choose between a risky and experimental abortion and no abortion is not a choice at all—it is effectively a ban on legal pre-viability abortions. *See Danforth*, 428 U.S. at 79. A State may not advance its legitimate governmental

interests by expressly or implicitly "prohibit[ing] pre-viability abortions." *MKB Management Corp.*, 795 F.3d at 773; *see also Edwards*, 786 F.3d at 1117; *Gonzales*, 550 U.S. at 146. Nor can a State advance its 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 D&E Ban does not use medical terminology, the statute describes and prohibits the "standard" D&E procedure. *See* Ark. Code Ann. § 20-16-1802(3)(A)(i). Standard D&E has long been recognized as the safest and most common method of second-trimester abortion. *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 nationally[10] and 100% of all second-trimester abortions performed in Arkansas (A. 113, 143). Given the widespread use and

[10] *See* Am. Coll. of Obstetricians & Gynecologists, *Second-Trimester Abortion*, 121(6) Obstetrics and Gynecology 1394-1406 (2013).

medical acceptance of standard D&E, States and the federal government routinely concede that a prohibition on the method would be an undue burden. *See, e.g.*, *Stenberg*, 530 U.S. at 938 (Nebraska); *Gonzales*, 550 U.S. at 147 (United States).

Arkansas nevertheless argues (Br. at 37-41) that the D&E Ban does not impose an undue burden because physicians can perform second-trimester abortions by induction or by D&E after first causing fetal demise using one of three methods: digoxin injection, potassium chloride injection, or umbilical cord transection. The overwhelming weight of record evidence shows that each of these proposed alternatives is either unavailable in Arkansas or is an experimental procedure whose safety and efficacy are unknown. Accordingly, none qualifies as the kind of "standard medical option[]" required by the Supreme Court to justify an abortion-method ban. *Gonzales*, 550 U.S. at 166.

Indeed, Arkansas does not seriously dispute the district court's finding that neither an induction abortion nor a D&E after a potassium chloride injection constitutes a standard medical option. Arkansas does not challenge the district court's conclusion that induction abortions are effectively unavailable because they can only be performed in a hospital

and hospitals in the State do not offer the procedure. (Add. 61-63.) Arkansas also does not dispute the district court's conclusion that no abortion provider in Arkansas has the specialized training necessary to perform potassium chloride injections, which can result in cardiac arrest and death if performed improperly. (Add. 53.) Procedures that are not available in a State are not adequate substitute methods. *See Danforth*, 428 U.S. at 77. In any event, induction abortions and potassium chloride injections are not medically appropriate alternatives for many women seeking a second-trimester abortion, and impose various burdens beyond medical risk, including delay, increased pain, and substantial financial costs. (A. 73-74, 79, 111, 114, 335.)

Although digoxin injection is an available procedure in Arkansas, it is not safe or effective enough to uphold the D&E Ban. Approximately 64% of all second-trimester abortions in Arkansas take place during the early stage of the second trimester (between 14 and 18 weeks). (A. 112, 143.) There are no medical studies of the safety and efficacy of digoxin injections performed during this early stage. (A. 77, 114-115, 447.) Indeed, there is no reported evidence of any physician even attempting a digoxin injection to induce fetal demise before 18 weeks. (A. 77, 114-115,

500-501.) Accordingly, the safety and efficacy of digoxin injections before 18 weeks are simply unknown. Moreover, the record establishes that the procedure would likely be more difficult to perform, and thus more risky and less likely to be effective, during this time period.[11] (A. 77, 114-115.) Digoxin injection during the early stage of the second trimester 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 Arkansas law and a substantial increase in the cost of the procedure. (A. 77, 114-115.)

Arkansas also fails to demonstrate that a digoxin injection used after 18 weeks is a standard medical option. While certain physicians perform digoxin injections after 18 weeks to avoid knowing violations of the federal "partial-birth abortion ban" (which includes a scienter

---

[11] Arkansas argues that the district court improperly disregarded a physician's affidavit speculating that, as compared to a later digoxin injection, an early digoxin injection should be as effective and should not have "markedly different" side effects. *See* Br. at 38 (citing A. 474-475). The physician who provided the affidavit does not perform elective abortions (A. 257), and admitted that neither he, nor any other medical professional, has ever studied the safety or efficacy of digoxin injections before 18 weeks (A. 500-501). The district court was therefore not required to credit him.

requirement not present here), the injection serves no medical purpose. (A. 76, 113-114.) At the same time, however, it adds significant delay and cost, and may impose a greater risk of known medical complications 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. (A. 76-78, 115-117, 258-259, 506-507.) The post-18-week digoxin injection also has a significant failure rate—between 5% and 10%—a rate that is even higher for women who are obese, have anatomical variations of the uterine or vagina, or have certain types of fetal positioning. (A. 77-78, 115-116, 499.) 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.[12] (A. 77-78, 113, 115-116, 258-259, 499-500.)

[12] There is no merit to Arkansas's suggestion (Br. at 38 n.7) that a physician can attempt to achieve fetal demise through a potassium chloride injection or umbilical cord transection if the first digoxin injection fails. A statute that is unconstitutional because it subjects a woman to one risky and experimental procedure cannot be saved by requiring the woman to undergo two or three risky and experimental procedures.

Finally, the district court reasonably concluded that umbilical cord transection is not a safe and effective alternative procedure. First, there are no studies about the safety and efficacy of cord transection performed before 16 weeks.[13] (A. 77, 114-115, 447-449.) As with digoxin injections, record evidence showed that the procedure would likely be more difficult and risky to perform during the early stages of the second trimester. (A. 77, 114-115, 448.) And as to post-16-week umbilical cord transections, the district court reasonably found that the single study cited by the State "does not support any conclusion about the safety of the procedure" because of various methodological flaws identified by plaintiff's expert, including the lack of a control group. (A. 447-449; *see also* Add. 54-55.) In any event, Arkansas agrees that cord transection is a difficult procedure with the potential for serious harm even after 16 weeks, including increased risk of uterine perforation, cervical injury, and bleeding. (A. 79-80, 116, 259, 448-449, 501-502.)

---

[13] Arkansas does not meaningfully dispute this finding. Instead, the State cites to a single study of *post*-16-week procedures (Br. at 40 (citing A. 247)) and asserts without explanation that the procedure is "effective and safe" at all phases of the second trimester.

The Supreme Court has been clear that a ban on an abortion method imposes an undue burden unless it permits "a commonly used and generally accepted [alternative] method." *Gonzales*, 550 U.S. at 165; *Danforth*, 428 U.S. at 77-79. Moreover, a State "cannot subject women's health to significant risks" by "forc[ing] women to use riskier methods of abortion." *Stenberg*, 530 U.S. at 931. Arkansas's alternative methods are inadequate under *Danforth*, *Stenberg*, and *Gonzales*. Even if there was some "medical uncertainty" about the safety and efficacy of Arkansas's proposed methods, Arkansas is wrong to suggest (Br. at 39) that *Gonzales* would sanction unfettered legislative discretion. Medical uncertainty about a State's proposed alternative methods "signals the presence of risk, not its absence," *Stenberg*, 530 U.S. at 937, and demonstrates that such methods are not the commonly used or generally accepted alternatives required by controlling precedent.

Gonzales involved a challenge to a federal statute banning a rarely used procedure, the "intact" D&E, on the ground that the law lacked a health exception. *See* 550 U.S. at 161. The Court noted the "documented medical disagreement" about whether intact D&E was "medically necessary" for a particular 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" for a small number of women was insufficient to facially invalidate the statute. *Id.* at 163.

Gonzales did not discuss the relevance of medical uncertainty about available alternative procedures because there was—and is—no dispute about the safety and efficacy of standard D&E, which was available to the majority of women seeking second-trimester abortions. *Id.* at 164-65, 167. By contrast, this case required the district court to examine the safety and efficacy of the alternative methods that Arkansas law would require for women to obtain a second-trimester abortion as a result of the prohibition on standard D&E.[14] Legislative deference is inappropriate

---

[14] Arkansas is thus mistaken in arguing (Br. at 42-44) that the record failed to support facial relief. In *Gonzales*, the Supreme Court suggested that 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. By

where, as here, a law would require women to submit to risky and experimental procedures in order to exercise a constitutional right.

POINT III

THE REMAINING STATUTES WERE PROPERLY ENJOINED

A. The Medical Records and Tissue Disposal Mandates Fail to Advance Legitimate State Interests, Impose Unwarranted Burdens, and Are Impermissibly Vague.

Arkansas concedes (Br. at 47, 52) that, read as Hopkins reads them, the Medical Records and Tissue Disposal Mandates impose an undue burden on the right to terminate a pregnancy. Arkansas thus argues that the statutes can—and therefore should—be read more narrowly. This Court need not decide whether the Arkansas Supreme Court would likely

---

contrast, the district court below correctly concluded that the D&E Ban affects every woman seeking a second-trimester abortion in Arkansas. (Add. 59-63.) Moreover, the safety and efficacy concerns associated with Arkansas's proposed alternative procedures are widespread and varied, and therefore difficult to predict in an individual case before initiating a medical procedure. Such circumstances would make it impossible to compile the "discrete and well-defined" group contemplated in *Gonzales*.

read the statutes as Arkansas proposes, because even as so read, the statutes are unconstitutional.[15]

As to the Medical Records Mandate, Arkansas argues (Br. at 45) that a physician is only required to "request records when a woman knows her unborn child's sex" and "only needs to request records relevant to determining whether she is seeking a sex-selective abortion." And Arkansas contends (Br. at 47) that, as so read, the statute furthers its interest in preventing sex-selective abortions. But as to how the statute serves that interest, Arkansas merely speculates that medical records might reveal a pattern of sex-selective abortion. Arkansas nowhere identifies what information in medical records might shed light on whether a past or future abortion is solely for the purpose of sex selection. And the statute itself provides physicians no direction about how to use the records to determine whether a woman is seeking an abortion for that purpose. Arkansas thus fails to demonstrate that the statute advances its stated interest.

---

[15] Amici nonetheless agree with Appellee (Hopkins Br. at 11, 38-39, 50-52) that the narrow constructions Arkansas proposes are contrary to the statutes' plain language.

As to the Tissue Disposal Mandate, Arkansas argues (Br. at 52-53) that the statute need not be read to impose affirmative notice and consent requirements at all, but rather can be read to give the patient sole control over the means of fetal-tissue disposal if she is not a minor, and if she is a minor, to one of her parents, if the provider waits five days before disposing of fetal remains. Under this construction, the Tissue Disposal Mandate would serve only to delay the disposal of fetal remains, and would not promote any legitimate state interest. Arkansas contends (Br. at 51-52) that the law promotes its interest in treating fetal remains with dignity, promoting respect for life, and safeguarding medical ethics by ensuring that fetal remains are disposed of in accordance with a parent's wishes. But these interests are fully served by existing state law, which mandates "respectful and proper" disposal of fetal tissue and requires a physician to obtain written consent from the patient about the method of disposal 48 hours before that disposal. See *supra* at 6-7. The only consequence of the Tissue Disposal Mandate, as narrowed by Arkansas, then, is to extend the waiting period from 48 hours to five days because, Arkansas says, after five days, no additional parties need be notified. So

read, however, Arkansas cannot establish how waiting an extra three days advances its interests and does not attempt to do so.

In any event, both statutes impose substantial burdens on a woman's constitutional rights and remain impermissibly vague. The Medical Records Mandate would result in substantial delay to abortion access for affected women, and would impose extensive costs on both provider and patient. The statute would also require affected women to disclose their decision to obtain an abortion to past medical providers, some of whom may respond with hostility and stigmatization. (Add. 71-76.) And even under the State's narrowed reading, the Tissue Disposal Mandate would delay the disposal of fetal remains for five days for no reason other than to evade the complicated, costly, and time-consuming notification requirements otherwise imposed. (Add. 116-126.) The Tissue Disposal Mandate would also require notification and consent of a minor patient's parents, even in instances where she received a judicial bypass. (Add. 120-121.) Finally, both provisions would impermissibly create criminal liability based on undefined conduct, such as a physician's failure to exercise "reasonable efforts" to obtain records or consent. *Cf. Suter v. Artist M.*, 503 U.S. 347, 359 (1992).

B. The Local Disclosure Mandate Imposes an Undue Burden on Minors in Lawful and Consensual Sexual Relationships.

The district court properly enjoined the Local Disclosure Mandate as to minors who are between 14 and 16 years of age and are in lawful and consensual sexual relationships. Although Arkansas has a substantial interest in the health and welfare of minors, this discrete and well-defined group is limited to young women who likely are *not* the victims of abuse. The State does not have a legitimate interest in regulating the lawful sexual activity of this group. Moreover, the Local Disclosure Mandate undermines, rather than furthers, the state interest because the law discourages young women from seeking medical care and attention for fear of disclosure of their private medical information.[16] (A. 159-160.)

The Local Disclosure Mandate imposes substantial burdens on those women who will fear retribution as a result of forced disclosure, *see Casey*, 505 U.S. at 893-94 (plurality op.), including delay in seeking abortion care and increased costs as a result of seeking an out-of-state abortion. (Add. 95-98.) In light of the limited benefits of the statute, such

[16] Amici agree with Appellee (Hopkins Br. at 47-49) that the Local Disclosure Mandate also violates his patients' right to informational privacy.

obstacles are undue burdens on the affected minors' constitutional right to abortion access.

CONCLUSION

The judgment of the district court should be affirmed.

Dated: New York, NY
February 28, 2018

Respectfully submitted,

ERIC T. SCHNEIDERMAN
Attorney General
State of New York

By: */s/ Ester Murdukhayeva*
ESTER MURDUKHAYEVA
Assistant Solicitor General

120 Broadway, 25th Floor
New York, NY 10271
(212) 416-6279

BARBARA D. UNDERWOOD
Solicitor General
ANDREA OSER
Deputy Solicitor General
ESTER MURDUKHAYEVA
Assistant Solicitor General
of Counsel

(*Counsel listing continues on next page.*)

XAVIER BECERRA
Attorney General
State of California
1300 I Street
Sacramento, CA 95814

GEORGE JEPSEN
Attorney General
State of Connecticut
55 Elm Street
Hartford, CT 06106

MATTHEW P. DENN
Attorney General
State of Delaware
Carvel State Bldg., 6th Fl.
820 N. French Street
Wilmington, DE 19801

RUSSELL A. SUZUKI
Acting Attorney General
State of Hawai'i
425 Queen Street
Honolulu, HI 96813

LISA MADIGAN
Attorney General
State of Illinois
100 W. Randolph St., 12th Fl.
Chicago, IL 60601

THOMAS J. MILLER
Attorney General
State of Iowa
1305 E. Walnut Street
Des Moines, IA 50319

(Counsel listing continues on next page.)

JANET T. MILLS
Attorney General
State of Maine
6 State House Station
Augusta, ME 04333

BRIAN E. FROSH
Attorney General
State of Maryland
200 Saint Paul Place
Baltimore, MD 21202

MAURA HEALEY
Attorney General
Commonwealth of Massachusetts
One Ashburton Place
Boston, MA 02108

ELLEN F. ROSENBLUM
Attorney General
State of Oregon
1162 Court St. N.E.
Salem, OR 97301

JOSH SHAPIRO
Attorney General
Commonwealth of Pennsylvania
Strawberry Square, 16th Fl.
Harrisburg, PA 17120

THOMAS J. DONOVAN, JR.
Attorney General
State of Vermont
109 State Street
Montpelier, VT 05609

MARK R. HERRING
Attorney General
Commonwealth of Virginia
202 North Ninth Street
Richmond, VA 23219

ROBERT W. FERGUSON
Attorney General
State of Washington
P.O. Box 40100
Olympia, WA 98504

KARL A. RACINE
Attorney General
District of Columbia
One Judiciary Square
441 4th Street, N.W.
Washington, DC 20001

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, Max Kober, 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 6,406 words and complies the typeface requirements and length limits of Rule 32(a)(5)-(7).

I further certify that this PDF file was scanned for viruses, and no viruses were found on the file.

/s/ Max Kober

CERTIFICATE OF SERVICE

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 Eighth Circuit by using the CM/ECF system on February 28, 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: February 28, 2018
New York, NY

/s/ Ester Murdukhayeva