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; 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; SHAREN WILSON, Criminal District Attorney for Tarrant County, In Her Official Capacity; BARRY JOHNSON, 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

EN BANC BRIEF FOR AMICI CURIAE STATES OF NEW YORK, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, HAWAI'I, ILLINOIS, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEVADA, NEW JERSEY, NEW MEXICO, OREGON, PENNSYLVANIA, RHODE ISLAND, 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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INTEREST OF AMICI CURIAE

Amici are the States of New York, California, Colorado, Connecticut, Delaware, Hawai'i, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, Oregon, Pennsylvania, Rhode Island, 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 by assuring the proper consideration of undue burdens placed on a woman's right to terminate a pregnancy prior to viability.

Amici have a particular interest in protecting the rights of their residents who may need medical care while present as students, workers, or visitors in Texas. Amici likewise have an interest in ensuring that all physicians, including those whom Amici duly license, are permitted to provide services in Texas that are consistent with professional standards

of care.[3] And Amici have a more general interest in assuring that each State satisfies its constitutional obligation to protect the right to terminate a pre-viability pregnancy within its borders. A substantial reduction in the availability of abortion services in one State can cause women to seek services in other States, thereby burdening the health care systems of those other States while they adjust to increased demand for services.

SUMMARY OF ARGUMENT

Under controlling Supreme Court precedent, a statute or regulation imposes an unconstitutional 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.). The district court correctly held on a well-developed record that Texas Senate Bill 8 (the Act) creates such an obstacle because it bans the dilation and evacuation (D&E) procedure that is widely recognized as the safest and most common method of pre-

[3] More than 20% of 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).

(*continued on the next page*)

viability abortion after 15 weeks.[4] In so doing, the Act runs afoul of three well-established principles that remain valid under any reading of the Supreme Court's recent decision in *June Medical Servs. L.L.C. v. Russo*, 140 S. Ct. 2103 (2020).

First, the Supreme Court has repeatedly held since *Roe* and *Casey* that any abortion restriction that effectively bans abortion at any point before viability is per se invalid. This is true no matter how compelling the State's interest in regulating abortion is. By imposing a blanket prohibition on the safest and most common method of second-trimester abortion without ensuring that a safe and reliable alternative remains available, the Act effectively bans all pre-viability abortions after around 15 weeks. The Act is therefore unconstitutional no matter what interests the State claims are served.

Second, even if the Act did not function as an outright ban, the Supreme Court has repeatedly held that a State cannot regulate abortion

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[4] 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. The duration of a woman's pregnancy is also commonly referred to by trimesters. The first trimester runs from 0 through 12 weeks, the second trimester from 13 through 26 weeks, and the third trimester from 27 weeks through the end of the pregnancy. (ROA.1592 n.6.)

in a manner that "subject[s] women to significant health risks." *Gonzales v. Carhart*, 550 U.S. 124, 161 (2007) (quotation marks and alterations omitted). That is precisely what the Act does. The district court rationally concluded based on the record before it that the Act would require women seeking an abortion after 15 weeks to undergo additional, medically unnecessary, and, in some cases, experimental procedures that would materially increase the risk of adverse health outcomes. The district court also rationally concluded that the Act would add cost and delay to an otherwise routine procedure and decrease the number of providers willing to perform second-trimester abortions. Under binding Supreme Court precedent, these burdens are more than sufficient to constitute a substantial obstacle to abortion access. And this is true regardless of whether the burdens imposed by the Act are weighed against the Act's purported benefits or viewed on their own.

Third, the Supreme Court has long held that an abortion restriction must advance a legitimate state purpose and not simply serve the impermissible purpose of making abortion services more difficult to access. This is a meaningful requirement that does not end with a State simply reciting that it has legitimate interests, such as promoting respect

for fetal life or protecting medical ethics. The State also must show that the challenged restriction in fact serves those interests in a meaningful way. Texas fails to make that showing. The Act arbitrarily bans the safest and most common method of abortion after 15 weeks, while permitting other methods of abortion that, though less safe, result in the same purported harms.

Moreover, the district court properly ruled on the plaintiffs' facial challenge to the Act, instead of considering the challenge only as applied to the facts presented here. 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 v. Hellerstedt*, 136 S. Ct. 2292, 2320 (2016) (quotation marks and alterations omitted). Here, the Act unduly burdens 100% of women for whom the restriction is relevant—namely, women in Texas who seek an abortion after 15 weeks using the standard D&E procedure. The district court rationally concluded that all such women must undergo additional, medically unnecessary fetal-demise procedures that pose a risk of adverse health outcomes, among other burdens.

ARGUMENT

POINT I

IN BANNING THE SAFEST AND MOST COMMON METHOD OF PRE-VIABILITY ABORTION AFTER 15 WEEKS, THE ACT VIOLATES A WOMAN'S CONSTITUTIONAL RIGHT TO TERMINATE A PREGNANCY BEFORE VIABILITY

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 provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." *Casey,* 505 U.S. at 878 (plurality op.); *see also Whole Woman's Health*, 136 S. Ct. at 2309 (reaffirming this standard).

In *June Medical*, the Supreme Court split over how to decide whether any such obstacles are "substantial." The four-Justice plurality adhered to the majority decision in *Whole Woman's Health*, which explained that the question whether obstacles posed by an abortion restriction are substantial cannot be determined in a vacuum, but rather require a court to "weigh the law's 'asserted benefits against the burdens' it imposes on abortion access." 140 S. Ct. at 2112 (plurality op.) (quoting *Whole Woman's Health*, 136 S. Ct. at 2310). Chief Justice Roberts, in a separate concurrence, rejected the use of balancing. In Roberts' view, the benefits of an abortion regulation are relevant only to the "threshold

requirement that the State have a legitimate purpose and that the law be reasonably related to that goal." *Id.* at 2138 (Roberts, C.J., concurring) (quotation marks omitted). If that threshold requirement is satisfied, "the only question for a court is whether a law has the effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.* (quotation marks omitted).

The panel majority correctly concluded here that, under this Court's interpretation of *Marks v. United States*, 430 U.S. 188 (1977), *see United States v. Duron-Caldera*, 737 F.3d 988, 994 n.4 (5th Cir. 2013), the fractured majority in *June Medical* did not produce a controlling opinion and that balancing thus remains the operative method for assessing whether an obstacle to abortion access is substantial under *Casey*. But the outcome of this case does not turn on whether balancing applies or not, because the Act does not pass constitutional muster either way. Indeed, the Act violates three bedrock principles that the Supreme Court has repeatedly reaffirmed and that are consistent with both the plurality opinion and the concurrence in *June Medical*.

A. The Act Is Per Se Unconstitutional Because It Effectively Bans Abortions After Fifteen Weeks.

The Supreme Court has repeatedly held that a State may not under any circumstances prohibit or ban abortions at any point prior to viability. In *Casey* and numerous subsequent cases, the Supreme Court has reaffirmed that "a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability." 505 U.S. at 879 (citing *Roe*, 410 U.S. at 153-54); *see also Whole Woman's Health*, 136 S. Ct at 2299 (reaffirming this rule); *Stenberg*, 530 U.S. at 921 (same); *Gonzales*, 550 U.S. at 146 (same). Such a prohibition is impermissible no matter what interest the State pursues because, "[b]efore viability, the State's interests are not strong enough to support a prohibition of abortions." *Casey*, 505 U.S. at 846. As a result, any abortion regulation that has the effect of prohibiting abortion prior to viability is unconstitutional, independent of the interests that the State claims are served.

Here, the Act functions as a ban on pre-viability abortions after 15 weeks because it prohibits the standard D&E procedure that the Supreme Court has repeatedly recognized as the safest and most common method of abortion at that stage of pregnancy. *See, e.g.*, *Gonzales*, 550

U.S. at 164; *Stenberg*, 530 U.S. at 924. Although the Act does not use medical terminology, it is undisputed that the statute describes and prohibits the standard D&E procedure. *See* Tex. Health & Safety Code § 171.152. The procedure is currently used for approximately 95% of all second-trimester abortions performed in the United States.[5] Given the widespread use and medical acceptance of standard D&E, States and the federal government have frequently conceded, and the Supreme Court has agreed, that a prohibition on the method would be unconstitutional. *See, e.g.*, *Stenberg*, 530 U.S. at 938 (Nebraska); *Gonzales*, 550 U.S. at 147 (United States). As these precedents recognize, laws like the Act that prohibit the standard D&E procedure in effect prevent women from exercising their constitutional right to obtain a pre-viability abortion after 15 weeks, because they force women to choose between a risky and experimental abortion and no abortion at all. No state interest is sufficient to justify a de facto ban; rather, "the 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.).

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

But even if the Act did not function as a ban, it would nevertheless be unconstitutional because, as demonstrated below, it imposes an undue burden on the right of women in Texas to terminate a pregnancy prior to viability—a burden that could not be justified by any state interests the Act purportedly serves.

B. The Act Imposes an Undue Burden Because It Subjects Women to Significant Health Risks and Other Burdens.

In assessing the constitutionality of an abortion restriction that does not outright ban pre-viability abortions, *Casey* and its progeny require courts to determine whether the restriction's purpose or effect is to create a "substantial obstacle" for women who choose to exercise their constitutional right to obtain such an abortion. *Casey*, 505 U.S. at 877 (plurality op.). As explained above, the fractured majority in *June Medical* expressed two different views on how to assess what counts as "substantial": the plurality adhered to *Whole Woman's Health*, which assessed substantiality by asking whether a law's burdens outweigh its benefits, whereas Chief Justice Roberts reasoned that substantiality should be assessed by looking only at the law's burdens. 140 S. Ct. at 2112 (plurality op.); *id.* at 2138 (Roberts, C.J., concurring).

The Justices' dispute over how to apply the *Casey* standard does not affect the outcome here, however. No matter how one assesses substantiality more generally, it is well settled that the obstacles posed by an abortion restriction are substantial if the restriction "subject[s] women to significant health risks." *Gonzales*, 550 U.S. at 161 (quotation marks and alterations omitted). 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; *see also 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"). In striking down such abortion restrictions, the Supreme Court has made clear that a State may not prohibit a method of abortion without ensuring that "a commonly used and generally accepted method" remains available. *Gonzales*, 550 U.S. at 165, 167.

These precedents recognize the obvious: an abortion restriction that "conditions a woman's constitutional right to choose on her willingness to submit herself to an additional painful, risky, and invasive procedure" unduly burdens that right. *EMW Women's Surgical Ctr., P.S.C. v. Friedlander*, 960 F.3d 785, 798 (6th Cir. 2020) (striking down Kentucky's nearly identical D&E ban on this basis). Such a restriction is necessarily invalid, regardless of its purported benefits, because a State may not advance its legitimate 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); *Danforth*, 428 U.S. at 79 (holding that state cannot require women "to terminate her pregnancy by methods more dangerous to her health than the method outlawed").

Texas concedes (Main Br. at 2, Supp. Br. at 36) that the Act can pass constitutional muster only if "safe alternatives" are available. But Texas contends (Main Br. at 29-39, Supp. Br. at 40-47) that physicians can perform second-trimester abortions either 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 suction is unavailable after 15 weeks and that the proffered methods of assuring fetal demise before undertaking a D&E procedure subject women to significant health risks because those methods entail medically unnecessary and even experimental procedures.

More specifically, digoxin injections pose an increased risk of bleeding, infection, inadvertent penetration of the bowel or bladder, and cardiac rhythm abnormalities, among other complications. (ROA.1938-1941.) Potassium chloride injections and umbilical-chord transections pose even graver risks, including cardiac arrest and death in the former case (ROA.1606, 1948-1950, 2116-2117, 2449-2450) and uterine perforation and cervical injury in the latter (ROA.1960-1961, 2114). The record also supports the district court's conclusion that, for many women, because of factors such as uterine anatomy and health conditions, these fetal-demise procedures cannot be performed at all—an outcome that often cannot be predicted until the procedure is already underway. (ROA.1603-1604, 1940, 1946-1947, 2099-2100, 2217, 2655-2656, 2665.)

Nor are the burdens imposed by the Act limited to these added health risks. The record evidence amply supports the district court's

conclusion that the Act would add a full day of delay beyond the preexisting 24-hour waiting period currently mandated by Texas law, as well as a substantial increase in the cost of the procedure. (ROA.2029-2045.) The record also contains evidence that the Act would diminish the availability of second-trimester abortion services after 15 weeks, because some medical providers would be unwilling or unable to perform the fetal-demise procedures required by the Act. (ROA.2221-2223, 2758.) These additional burdens reinforce the district court's finding that the Act places substantial obstacles in the path of women who choose to exercise their constitutional right to terminate a pregnancy before viability.

Texas's arguments on appeal (*see* Main Br. at 33-39, Supp. Br. at 40-47) boil down to a disagreement with the district court's weighing of the record evidence, specifically the expert testimony. But "the district court was not 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). And appellate courts should not "disturb the factual conclusions of the trial

court unless [they] are 'left with the definite and firm conviction that a mistake has been committed.'" *June Medical*, 140 S. Ct. at 2141 (Roberts, C.J., concurring) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)). The district court here 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. Texas therefore cannot meet its burden on appeal to show a definite and firm conviction that a mistake has been committed as to that conclusion.

Indeed, the district court findings in this case on the obstacles imposed by the Act are supported not only by the record, but also by a wealth of similar judicial determinations, including from the Sixth and Eleventh Circuit Courts of Appeals, holding that "laws banning dismemberment abortions are invalid and that fetal demise methods are not a suitable workaround." *West Ala. Women's Ctr. v. Williamson*, 900 F.3d 1310, 1327 (11th Cir. 2018) (affirming order permanently enjoining

Alabama D&E ban), *cert. denied* 139 S. Ct. 2606 (2019).[6] Texas seeks to dismiss this line of cases (Supp. Br. at 41 n.12) on the grounds that they involved different factual records and applied the balancing analysis that it now views as defunct. Neither ground diminishes the cases' persuasive value.

First, the factual record before the district court here supports the same conclusions reached in those other cases, as plaintiffs have shown (*see* Main Br. at 45-48, Supp. Br. at 34-37). This is unsurprising, given that the courts' conclusions reflect the prevailing scientific consensus on the safety and efficacy of fetal-demise procedures. The Supreme Court has explained that an appellate court's review should be "even more deferential where, as here, multiple trial courts have reached the same

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[6] *See also EMW Women's Surgical Ctr. P.S.C.*, 960 F.3d at 796 (6th Cir. 2020) (affirming order permanently enjoining Kentucky D&E ban); *Bernard v. Individual Members of Ind. Med. Licensing Bd.*, No. 18-cv-1660, 2019 WL 2717620 (S.D. Ind. June 28, 2019) (preliminarily enjoining Indiana D&E ban); *Planned Parenthood Sw. Ohio Region v. Yost*, 375 F. Supp. 3d 848 (S.D. Ohio 2019) (preliminarily enjoining Ohio D&E ban in part); *June Med. Servs. LLC v. Gee*, 280 F. Supp. 3d 849 (M.D. La. 2017) (denying Louisiana's motion to dismiss a challenge to that State's D&E ban); *Hodes & Nauser v. Schmidt*, 440 P.3d 461 (Kan. 2019) (affirming temporary injunction of Kansas D&E ban); *cf. Hopkins v. Jegley*, 968 F.3d 912 (8th Cir. 2020) (vacating order that preliminarily enjoined Arkansas D&E ban and remanding for reconsideration in light of *June Medical*).

findings and multiple appellate courts have affirmed those findings." *Glossip v. Gross*, 576 U.S. 863, 882 (2015) (deferring to district court findings that drug protocol would likely render an inmate insensate to pain during execution).

Second, the cases would not be inapposite simply because they balanced benefits and burdens to conclude that the obstacles posed by a D&E ban are substantial, even if Texas were correct that the balancing test did not survive *June Medical*. The reasoning underlying the cases would support the same ultimate conclusion, even without reaching the balancing stage of the analysis. Like the district court here, the courts in all of the cited cases found that a D&E ban exposes women seeking an abortion after 15 weeks to significant and medically unnecessary health risks. That fact alone rendered the ban unconstitutional under the Supreme Court precedent discussed above. The last step in the courts' analyses—that the purported benefits of a D&E ban are insufficient to justify the additional health risks it imposes—was unnecessary to the ultimate conclusion in each case.

None of the remaining arguments presented by Texas and its amici provide a basis to disturb the district court's findings concerning the substantial obstacles posed by the Act.

Contrary to Texas's contention (Br. at 41-42), the fetal-demise procedures required by the Act are not merely *alternative* procedures, but rather *additional* procedures, which carry their own, additional risks and costs beyond those posed by the D&E procedure itself. As the Sixth Circuit explained in rejecting an identical argument, "[f]etal-demise procedures are not, by definition, alternative procedures. A patient who undergoes a fetal-demise procedure must still undergo the entirety of a standard D&E." *EMW Women's Surgical Ctr. P.S.C.*, 960 F.3d at 798. And such "[a]dditional procedures, by nature, expose patients to additional risks and burdens." *Id.*

Despite Texas's efforts to downplay the risks posed by fetal-demise procedures, then, it cannot escape the conclusion that, by mandating these additional procedures, the Act impermissibly forces "women to use riskier methods of abortion." *Stenberg*, 530 U.S. at 931. And as the district court correctly found—in line with the numerous cases cited above—the additional risks are far from trivial. *See supra* at 14.

Finally, Louisiana Amici are wrong to argue (Main Br. at 18-21, Supp. Br. at 18-21) that, under *Gonzales*, a court must automatically defer to the legislature on the basis of any medical uncertainty. To begin, there is no medical uncertainty about the existence of the risks imposed by the medically unnecessary procedures that the Act requires. While there may be uncertainty as to whether a particular complication will arise during a particular procedure, such uncertainty is in the very nature of risk and does not make the existence of risk medically uncertain. And to the extent there is any division of medical opinion about the proper quantification of the additional risks posed, that division "at most means uncertainty, a factor that signals the presence of risk, not its absence." *Stenberg*, 530 U.S. at 936.

In any event, 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; *see also Whole Woman's Health,* 136 S. Ct. at 2310 (reaffirming this principle). 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 thus rests on a fundamental misunderstanding of *Gonzales*. *Gonzales*'s decision to uphold the abortion restriction at issue there—namely, a ban on the rarely used "intact" D&E method of abortion (also known as "dilation and extraction," or D&X)—was predicated on the availability of standard D&E as a safe alternative procedure for women seeking second-trimester abortions. 550 U.S. at 166-67.

The plaintiffs in *Gonzales* challenged a federal statute banning intact D&E on several grounds, including, as relevant here, that it lacked an exception allowing intact D&E when necessary to preserve a woman's health. *Id.* 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* Main Br. at 20, Supp. Br. at 19-20.) But *Gonzales* did not, as Louisiana Amici suggest, 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. 550 U.S. at 166-67.

For courts to determine whether a statute subjects women to "significant health risks"—and thus imposes an undue burden—they must independently assess 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. *See West Ala. Women's Ctr.*, 900 F.3d at 1310 (11th Cir. 2018).

C. The Act Is Not Reasonably Related to a Legitimate State Interest.

The Supreme Court has long held that an abortion restriction must advance a legitimate state interest and not simply serve the impermissible purpose of making abortion services more difficult to access. *Casey*, 505 U.S. at 878, 901 (plurality op.); *accord June Medical*, 140 S. Ct. at 2138 (Roberts, C.J., concurring) (describing this as a

"threshold requirement"). To satisfy this standard, it is not enough for the State simply to invoke a legitimate state interest, such as promoting respect for fetal life or protecting medical ethics. Rather, as Chief Justice Roberts reiterated in his *June Medical* concurrence, the standard requires both that "the State have a 'legitimate purpose' *and* that the law be 'reasonably related' to that goal." 140 S. Ct. at 2138 (quoting *Casey*, 505 U.S. at 878 (plurality op.), 882 (joint op.)) (emphasis added). A court must thus assess not only the legitimacy of the State's asserted interests, but also whether the means chosen by the State meaningfully advance those interests.

In this case, Texas did not establish that the Act meaningfully advances the State's asserted interests in requiring abortion procedures that promote respect for fetal life and protecting medical ethics. Texas asserted that its interests were served by redirecting women seeking pre-viability abortions after 15 weeks to the use of suction abortions, which the State claims are safe up to 17 weeks, and thereafter to one of three fetal-demise procedures to be performed before initiating the standard D&E procedure. That argument is untenable for two distinct reasons.

First, Texas failed to show how that redirection serves the interests it seeks to promote. Texas insists (Supp. Br. at 10-11), contrary to medical consensus, that suction abortions are available up to 17 weeks. But suction abortions, like D&E abortions, indisputably cause fetal death through "dismemberment" (ROA.1919, 2398), the very kind of fetal death that Texas claims the Act seeks to prevent. Thus, the Act arbitrarily distinguishes between two procedures that cause fetal death in precisely the same way. Texas further failed to demonstrate how the fetal-demise procedures that it claims are available after 17 weeks serve its stated interests. Specifically, Texas failed to explain how those procedures are any more "humane" or less likely to cause fetal pain.[7] Indeed, a digoxin injection can take many hours to take effect, and severing the umbilical cord cuts off the fetus's supply of oxygen and nutrients. And while Texas argues that use of the proffered fetal-demise procedures would promote medical ethics, the district court correctly rejected that argument and

[7] In any event, the overwhelming medical consensus is that fetal pain is not possible before at least 24 weeks (*see* ROA.2912-2913; Amicus Brief of Am. Coll. of Obstetricians & Gynecologists and the Am. Med. Assoc., at 16-21), notwithstanding Louisiana Amici's contrary assertion (Br. at 21-22). And Texas law independently prohibits abortion at that stage of the second trimester. Tex. Health & Safety Code § 171.044.

found instead that the Act would 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 (ROA.1602).

Second, the record shows that prohibiting D&E abortions would not in fact redirect women to feasible alternative procedures, as Texas claims, but would instead simply limit the availability of pre-viability second-trimester abortions. The district court correctly found, consistent with medical consensus, that suction abortions are generally not feasible after 15 weeks. (ROA.1601, 1920, 1978, 2224-2225, 2689, 2807.) Similarly, the district court correctly found that Texas's proposed fetal-demise procedures are especially risky and experimental before 18 weeks, a timeframe in which the safety and efficacy of those procedures are virtually unstudied. (ROA.1604, 1944-1945, 1990, 2660-2661.) Those well-supported findings suggest that the State's true purpose is to make abortion services unavailable in that timeframe.

POINT II

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.); *see also Whole Woman's Health*, 136 S. Ct. at 2320 (reaffirming this standard). "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." *Whole Woman's Health*, 136 S. Ct at 2319 (quotation marks omitted).

Here, the Act affects 100% of women "for whom the law is a restriction"—that is, women seeking a second-trimester abortion after 15 weeks using the standard D&E procedure. The district court rationally found that the Act requires every such woman "to undergo an unwanted,

risky, invasive, and experimental procedure in exchange for exercising her right to choose an abortion." (ROA.1611.) Texas is wrong (Main Br. at 44, Supp. Br. 49-51) to characterize the Act's burden as limited to women who suffer adverse side effects or failed injections. Rather, "in every circumstance, a fetal-demise procedure poses additional health risks beyond those present with a D&E alone, and so it always places an individual's health in jeopardy." *EMW Women's Surgical Ctr. P.S.C.*, 960 F.3d at 802 (6th Cir. 2020).[8]

Texas is also mistaken in arguing (Main Br. at 44-48, Supp. Br. at 50) that an as-applied challenge would provide sufficient recourse to women for whom a fetal-demise procedure would be contraindicated or unsafe and, thus, under *Gonzales*, the Act should not be invalidated on its face. 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

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[8] As explained above and in plaintiffs' briefs (Main Br. at 6-7, Supp. Br. at 15-17), the record belies Texas's assertion (Supp. Br. at 50) that women would not be required to undergo fetal-demise procedures before 17 weeks because "fetal demise can be obtained through suction alone through 16 weeks." Even if this were true, however, Texas's own table shows that the D&E ban would still affect a "large fraction"—indeed, over half—of all women in Texas who seek an abortion between 15 and 22 weeks.

health exception in an as-applied challenge. 550 U.S. at 167. Here, by contrast, the safety and efficacy concerns associated with Texas's fetal-demise procedures are widespread and varied. They are also difficult to predict in an individual case before initiating a medical procedure, and "those in the midst of failing procedures or suffering from side effects cannot rewind time and litigate an as-applied challenge because they will already have suffered the very harm the Constitution prohibits." *EMW Women's Surgical Ctr. P.S.C.*, 960 F.3d at 808-09. The women unduly burdened by the Act are thus not the "discrete and well-defined" group contemplated in *Gonzales*, but rather the entire relevant population of women who seek legal abortions after 15 weeks using the standard D&E procedure. The district court thus correctly concluded that the Act is unconstitutional on its face and must be permanently enjoined.

CONCLUSION

The judgment of the district court should be affirmed.

Dated: New York, NY
January 11, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(g) of the Federal Rules of Appellate Procedure, Joseph M. Spadola, 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 5,802 words and complies with the typeface requirements and length limits of Rule 32(a)(5)-(7).

/s/ Joseph M. Spadola
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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 Fifth Circuit by using the CM/ECF system on January 11, 2021. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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