No. 17-15208

In the United States Court of Appeals for the Eleventh Circuit

WEST ALABAMA WOMEN'S CENTER, *et al.*, on behalf of themselves and their patients,

Plaintiffs – Appellees,

v.

DR. THOMAS M. MILLER, in his official capacity as State Health Officer, *et al.*,

Defendants – Appellants.

On Appeal from the United States District Court
for the Middle District of Alabama
No. 2:15-CV-00497-MHT-TFM

BRIEF OF THE ATTORNEYS GENERAL OF THE STATES OF LOUISIANA, ARIZONA, ARKANSAS, FLORIDA, GEORGIA, IDAHO, INDIANA, KANSAS, MICHIGAN, MISSOURI, NEBRASKA, NEVADA, NORTH DAKOTA, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, UTAH, WEST VIRGINIA, AND WISCONSIN; PAUL R. LEPAGE, GOVERNOR OF MAINE; GOVERNOR PHIL BRYANT OF THE STATE OF MISSISSIPPI; AND THE COMMONWEALTH OF KENTUCKY BY AND THROUGH GOVERNOR MATT BEVIN, AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS AND REVERSAL

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CERTIFICATE OF INTERESTED PERSONS

Except for the following, all parties appearing before the district court and in this Court are listed in the Brief for Appellants.

The States of Louisiana, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Maine, Michigan, Mississippi, Missouri, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, West Virginia, and Wisconsin did not participate in the district court below, but will participate as *amici curiae* for Appellants before this Court.

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INTRODUCTION AND INTEREST OF *AMICI*

The question raised by the district court's decision goes to the heart of the States' authority to regulate abortion. The Supreme Court has held that States (1) have an interest in protecting and fostering respect for human life, including unborn life, and (2) have the power to regulate the medical profession, including on matters of medical judgment and ethics connected to abortion. *See Gonzales v. Carhart*, 550 U.S. 124 (2007). As a result, not only may States prohibit specific abortion procedures that threaten to erode respect for life, but they may balance any related medical tradeoffs when they do so, on condition that they do not unduly burden the decision to obtain an abortion. *Id.* Although access to an abortion is constitutionally protected, access to a particular abortion method — *even a method favored by abortion providers* — is not.

The abortion method involved in this case is an exceptionally grisly one, at least as and potentially even more so than the "partial birth" procedure at issue in *Gonzales*. The abortions here, referred to as "dismemberment" abortions, kill fetuses quite literally by tearing them limb from limb while they are still alive in the womb. The potential that widespread performance of such a procedure will compromise public

respect for life, not to mention the ethics of the medical profession, is unquestionably serious. Many States would prefer to prohibit the procedure altogether. But in light of applicable precedent, Alabama has instead sought simply to moderate the dismemberment procedure by requiring that abortion providers use available methods to kill fetuses *before* dismembering them. Alabama's regulation, including the State's implicit balance of medical options and tradeoffs, called for precisely the same judicial deference that the Supreme Court afforded Congress in *Gonzales*.

The district court failed to do so, however. It instead applied a more searching review, explicitly assuming (erroneously) that the State had to guarantee that remaining abortion procedures would be near-substitutes from a medical perspective. As *Gonzales* shows, Alabama was required to do no such thing. Because the district court analyzed this case under the wrong legal standards, its decision should be reversed.

Amici are all States that regulate abortion in order to preserve respect for life, including several that have enacted regulations on dismemberment abortions similar to Alabama's. Several states in addition to Alabama — specifically, *amici* Arkansas, Kansas, Louisiana,

Mississippi, Oklahoma, Texas, and West Virginia — have enacted laws that regulate dismemberment abortion in the way Alabama has.[1]

In requiring fetal demise before dismemberment, *amici* do not intend to sanction either abortion generally or the dismemberment procedure in particular. They regret being placed in the incongruous position of advocating for fetal death as a humane alternative to a procedure that should have no place in a civilized society. But in light of precedent, *amici* strongly support the authority of States to protect both unborn life and human dignity in that small way, and thus have an interest in ensuring that courts scrutinize such regulations under the appropriate standards.

STATEMENT OF THE ISSUES

Whether States have an interest in regulating dismemberment abortions to further respect for human life, including unborn life.

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[1] *See* Ark. Code Ann. §§ 20-16-1801–1807; Kan. Stat. Ann. § 65-6743; La. Rev. Stat. § 40:1061.1.1; Miss. Code Ann. §§ 41-41-151–160; Okl. St. Ann. §§ 1-737.7–.16; Tex. Health & Safety Code §§ 171.151–154; W.Va. Code § 16-2O-1.

Whether States have the authority to balance medical uncertainties when they regulate abortion in the interest of respecting life, and whether they are entitled to judicial deference when they do so.

SUMMARY OF THE ARGUMENT

The States' authority to regulate abortion for the purpose of protecting unborn life and advancing respect for life is well-established and unquestioned. *See*, *e.g.*, *Gonzales*, 550 U.S. at 145. Alabama defended the challenged abortion regulation on that ground here, and the district court rightly treated its justifications as legitimate. It is also beyond serious question that the abortion procedure at issue here threatens to undermine respect for life. Alabama is thus empowered to defend against that threat.

The Supreme Court held in *Gonzales* that when a State regulates abortions for the sake of fostering respect for life, including unborn life, it has leeway to balance that interest against possible medical tradeoffs. *Id.* at 163, 166. Even when some abortion providers consider a forbidden procedure to be medically preferable, the State's reasonable resolution of the tradeoffs prevails. Abortion providers instead must work to find abortion methods that are more consistent with respect for life. The

nature of the State's interest distinguishes cases like this one and *Gonzales* from cases like *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), where the State justified its abortion regulations in *medical* terms and the Court evaluated them as such.

The district court in this case instead reasoned from the assumption that even when a State wishes to regulate abortion for the sake of respect for life, the State cannot prevent abortion providers from using the methods they prefer. That analysis contradicts the Supreme Court's holding in *Gonzales*, and the decision should therefore be reversed.

ARGUMENT

I. REQUIRING DEMISE BEFORE FETUSES ARE DISMEMBERED FURTHERS STATES' INTEREST IN RESPECT FOR HUMAN LIFE.

The Alabama fetal demise law, as the district court acknowledged, was intended to "advance[e] respect for human life; promot[e] [the] integrity and ethics of the medical profession; and promot[e] respect for life, compassion, and humanity in society at large." *W. Alabama Women's Ctr. v. Miller*, No. 2:15-CV-497-MHT, 2017 WL 4843230, at *15 (M.D. Ala. Oct. 26, 2017). The district court "assume[d] the legitimacy of these interests." *Id.* In that respect, the district court was correct: The interests

cited by the State are unquestionably legitimate, and the fetal demise law directly serves them.

The Supreme Court has recognized ever since *Roe v. Wade* that the State has an "important and legitimate interest in protecting the potentiality of human life" before birth. 410 U.S. 113, 162 (1973). The Court has reaffirmed that interest on multiple occasions. *See Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 877 (1992) (O'Connor, J., joined by Kennedy & Souter, J.J.) (explaining that States may enact regulations that "create a structural mechanism by which the State … may express profound respect for the life of the unborn"); *Gonzales*, 550 U.S. at 145 ("[T]he government has a legitimate and substantial interest in preserving and promoting fetal life[.]"); *id.* at 157 ("The government may use its voice and its regulatory authority to show its profound respect for the life within the woman."). Abortion jurisprudence thus has always entailed a compromise between women's abortion rights and the risk that unregulated exercise of those rights will "devalue human life." *Gonzales*, 550 U.S. at 158.

The fullest discussion of the State interest in unborn human life appears in *Gonzales*. As the Supreme Court explained in that case, one

way that States can vindicate their interest in promoting "[r]espect for human life," *id.* at 159, is by ensuring that abortion *methods* are consistent with such respect: So long a State acts "rational[ly]" and "does not impose an undue burden" on the underlying right to an abortion, the State may "bar certain procedures and substitute others." *Id.* at 158.[2] By limiting use of particularly "brutal" abortion procedures, *id.* at 160, States further respect for life, both in society at large and in the medical profession in particular. They also protect women from the deep grief many of them are likely to feel if and when they later discover exactly how their unborn children were killed, *id.* at 159, while encouraging the medical profession to "find different and less shocking methods to abort the fetus[.]" *Id.* at 160.

The abortion method at issue here provides a case-in-point for when a State can invoke that interest. In a dismemberment abortion, as Alabama explains in its opening brief, a doctor kills a living fetus literally by tearing it apart. The doctor first dilates the pregnant woman's cervix

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[2] The term "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." *Casey*, 505 U.S. at 877 (plurality) (emphasis added).

just enough to insert instruments, such as a forceps, into the uterus. The doctor then seizes parts of the fetus's body, "such as a foot or hand," and pulls those parts out of the uterus and into the vagina. *Stenberg v. Carhart*, 530 U.S. 914, 958 (2000) (Kennedy, J., dissenting). Because the cervical opening is not wide enough for the fetus's body to exit, the doctor can use "the traction created by the opening between the uterus and vagina to dismember the fetus, tearing the grasped portion away from the remainder of the body." *Id.* The fetus does not die instantly, but stays alive, heart beating, while the doctor repeats the process, tearing off one limb at a time. *Id.* at 959. In the end the fetus bleeds to death or dies from the trauma, and the doctor is left with "'a tray full of pieces.'" *Id.* (quoting Dr. Leroy Carhart, the abortion doctor who was respondent in *Gonzales* and *Stenberg*).

It is hard to exaggerate the inconsistency of killing human fetuses by dismemberment with *every other modern norm of humane conduct*. Nobody would euthanize her pet in that way. States may not execute prisoners in that way. *Glass v. Louisiana*, 471 U.S. 1080, 1084 (1985) (describing the "inhuman and barbarous" practice of "drawing and quartering" as "obvious[ly] unconstitutional[]"). If anyone tried

slaughtering livestock in that way, federal law would treat it as inhumane, and thus contrary to "the public policy of the United States." *See* 7 U.S.C. § 1902 (identifying two humane methods of slaughter and classifying all others as contrary to public policy). Indeed, it is difficult to imagine *any* standard of ordinary decency that permits such a manner of terminating human life.

By the same token, the grisliness of such abortions implicates the State's interest in protecting respect for human life. The Supreme Court in *Gonzales* relied on that interest in upholding a federal ban on "partial birth" abortion, a similar procedure in which a doctor delivers a fetus up to the head, then kills the fetus by forcing a scissors into the skull and suctioning out the brain. 550 U.S. at 138.[3] "No one would dispute that,

[3] Congress expressly relied on its interest in protecting respect for life in enacting the ban. *See* § 14(G), 117 Stat. 1202, note following 18 U.S.C. § 1531 ("[A] prohibition [on partial birth abortion] will draw a bright line that clearly distinguishes abortion and infanticide, that preserves the integrity of the medical profession, and promotes respect for human life[.]"); *id.* § 14(J) ("Partial-birth abortion also confuses the medical, legal, and ethical duties of physicians to preserve and promote life, as the physician acts directly against the physical life of a child[.]"); *id.* § 14(N) ("Implicitly approving such a brutal and inhumane procedure by choosing not to prohibit it will further coarsen society to the humanity of not only newborns, but all vulnerable and innocent human life, making it increasingly difficult to protect such life."); *see also Gonzales*, 550 U.S. at 157 (citing the congressional findings).

for many, [partial birth abortion] is a procedure itself laden with the power to devalue human life," the Court explained. *Id.* at 158. And in so doing, the Court observed that dismemberment abortions are "in some respects as brutal, *if not more*." *Id.* at 160 (emphasis added). The interests the Court recognized in *Gonzales* are just as strong here.

Alabama, among other States, has accordingly chosen to promote respect for unborn life (and related interests) by regulating dismemberment abortions: You cannot kill a living fetus by dismembering it. 1975 Ala. Code § 26-23G-2(3). If you are going to dismember a fetus, you instead must kill it first, using one of several available, more humane methods. Alabama included an exception applicable if such an abortion is necessary to avert the mother's death or preserve her health, as defined by statute. *Id.* § 26-23G-2(6).

By any normal standard of morality and basic decency — considering the gruesomeness of the dismemberment procedure — Alabama's regulation is relatively modest. Many States, after all, would prefer to prohibit dismemberment altogether. It is also undeniably unfortunate for a State to have to defend unborn life by substituting more merciful fetal deaths for horrific ones. But States that do not sanction

abortion as a rule nonetheless regard efforts to make abortion procedures marginally more humane as an important second-best means to assert their interest in respecting life.

All of this confirms that Alabama's stated interests in the fetal demise law are indeed legitimate. *W. Alabama Women's Ctr.*, 2017 WL 4843230, at *15. There should be no question in that regard on appeal. The district court's error — as discussed in the next section — consisted, rather, in its failure to accord those interests their proper weight.

II. THE DISTRICT COURT FAILED TO EVALUATE THE ALLEGED BURDENS IN LIGHT OF ALABAMA'S INTERESTS.

The district court enjoined Alabama's dismemberment abortion statute because it found that known methods of killing fetuses before dismemberment are potentially riskier, less reliable, or harder to obtain than dismembering the living fetus in the first instance. *See W. Alabama Women's Ctr.*, 2017 WL 4843230, at *15–16. The court thus concluded that requiring fetal demise before a dismemberment abortion substantially burdens abortion rights.

As an initial matter, many of the district court's factual findings about fetal demise methods are erroneous. As to digoxin injection, for example, the district court found that the injection would require women

to "make an additional trip to the clinic 24 hours prior to their [abortion] appointment," supposedly a "serious logistical obstacle." *Id.* at *25. Although the plaintiff doctors in this case perform dismemberment abortions in one day, *see* Tr. Vol. I at 185; Tr. Vol. II at 40, such abortions usually involve two appointments a day apart to allow time for cervical dilation, *see* Doc. 81-8 at 2, 5,[4] so the digoxin injection would make little "logistical" difference if any. As to potassium chloride injections, the district court stated that "[n]o systemic study on the efficacy or safety of the procedure before standard D & E is available," *see W. Alabama Women's Ctr.*, 2017 WL 4843230, at *22, ignoring the fact that Alabama introduced *two* studies into the record, both of which found the procedure safe (for the patient) and effective. Docs. 81-7, 81-9.

But of particular importance to *amici* is the fact that the district court's legal conclusion as to substantial burden cannot be squared with *Gonzales*, which required the district court to evaluate the fetal demise law's alleged burdens in light of the particular interests Alabama

[4] *See also Surgical Abortion Procedures*, American Pregnancy Association (updated Jan. 26, 2017), *available at* http://americanpregnancy.org/unplanned-pregnancy/surgical-abortions/.

asserted. Because the district court applied the wrong legal standard, its decision should be reversed.

A. *Gonzales* permits States to balance medical uncertainties when promoting respect for unborn life.

Gonzales started from the premise that "'the fact that [an abortion regulation] which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it.'" *Gonzales*, 550 U.S. at 157–58 (*quoting Casey*, 505 U.S. at 874) (alteration omitted). An important consequence of that premise is that when a State prohibits "brutal" or "shocking" abortion methods in order to vindicate respect for life, *id.* at 160, it has no constitutional obligation to guarantee that the remaining abortion methods are medically equivalent.

That proved essential to the *Gonzales* Court's reasoning, in light of the medical evidence it confronted. Although the Court "assume[d]" that the partial birth abortion ban "would be unconstitutional … if it subjected women to significant health risks," 550 U.S. at 161 (quotes and alterations omitted), it recognized that "whether the [ban] create[d] significant health risks for women [was] a contested factual question." *Id.* Substantial evidence (including the findings of several district court

decisions) indicated that partial birth abortion was safer for the patient than other alternatives, including dismemberment abortion. *Id.* And the partial birth abortion ban, unlike Alabama's fetal demise law, lacked a mother's-health exception that would make partial birth abortion available if it ever were medically necessary. *Id.* Those factors made it plausible that legal unavailability of partial birth abortion would raise medical risks for at least some pregnant women seeking abortions.

The Court nonetheless resolved the balance of interests in favor of the partial birth abortion ban. It noted that legislatures have "wide discretion to pass legislation in areas where there is medical and scientific uncertainty." *Id.* at 163 (collecting cases). But more importantly, it tied that discretion to "the State's interest in promoting respect for human life at all stages in the pregnancy." *Id.* "[W]hen the regulation is rational and in pursuit of legitimate ends" — *i.e.*, when an abortion regulation is intended to defend respect for unborn life and rationally furthers that goal, as was the case in *Gonzales* — "[c]onsiderations of marginal safety, including the balance of risks, are within the legislative competence[.]" *Id.* at 166. That means that a State may ban an inhumane method of abortion *even if* doing so has tradeoffs:

"[I]f some procedures have different risks than others, it does not follow that the State is altogether barred from imposing reasonable regulations." *Id.*

The *Gonzales* Court assumed that alternatives to partial birth abortion that are safe for the patient would be available. But significantly, one of the alternatives the Court considered available if partial birth abortion were ever "truly necessary" was "an injection that kills the fetus," the same alternative that Alabama proposes here. *Id.* at 164.[5] It was not essential to the Court's reasoning, in other words, that doctors have the option of killing fetuses by dismemberment; the Court considered the option that Alabama requires here to be adequate as well.

Gonzales thus stands for the proposition that the State's authority to promote respect for unborn life, so long as it does not substantially burden the abortion decision, takes precedence over the ability of abortion doctors "to choose the abortion method he or she might prefer." *Gonzales*, 550 U.S. at 158. Abortion doctors and their patients do not have

[5] *Compare W. Alabama Women's Ctr.*, 2017 WL 4843230, at *32 (commenting that the *Gonzales* "relied heavily on the fact that" dismemberment abortion "would remain available to all women," but omitting the *Gonzales* Court's reference to fetal demise methods).

a right to any particular method of abortion. *Planned Parenthood Sw. Ohio Region v. DeWine*, 696 F.3d 490, 516 (6th Cir. 2012) ("The Court has not extended constitutional protection to a woman's preferred method, or her 'decision concerning the method' of terminating a pregnancy."). On the contrary, when the State exercises its regulatory power to ensure respect for life, the medical profession must give way and "find different and less shocking methods to abort the fetus … thereby accommodating legislative demand." *Gonzales*, 550 U.S. at 160; *id.* at 163 ("Physicians are not entitled to ignore regulations that direct them to use reasonable alternative procedures."). The balance is in the State's discretion, even if the State's policy entails medical tradeoffs.

Application of *Gonzales* in this case would resolve the matter in favor of the State. Alabama identified a discrete abortion procedure — dismemberment abortion — that uniquely threatens to devalue human life and debase the medical profession. It accordingly passed a regulation that continues to permit the basic medical procedure, but requires that doctors modify it to make it less morally offensive — a modification that the *Gonzales* Court had already treated as a reasonable alternative when a similar procedure was prohibited for similar reasons. That is exactly

the kind of regulation that *Gonzales* permits. Abortion providers may prefer to perform abortions the old way and may have qualms with the State's resolution of medical uncertainties, but the moral judgment is the State's to make and the medical tradeoffs are the State's to balance. Their recourse, similarly to the doctors before the Court in *Gonzales*, is to find alternative procedures as the statute requires.

B. The district court erred in distinguishing *Gonzales*.

Instead of applying *Gonzales* according to its terms, the district court employed a different analysis. The district court's reasoning involved two important premises, neither of which is consistent with the Supreme Court's abortion caselaw.

1. Danforth *does not control.*

In evaluating the legal adequacy of fetal demise methods, the district court turned not to *Gonzales*, but to the Supreme Court's 40-year old decision in *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976), which predated not only *Gonzales* but the undue burden framework established by *Casey*. *See W. Alabama Women's Ctr.*, 2017 WL 4843230, at *15, *28. According to the district court, *Danforth* stands for the proposition that "[a] regulation that 'as a practical matter, forces a woman and her physician to terminate her pregnancy by methods more

dangerous to her health than the method outlawed' cannot withstand constitutional challenge." *Id.* at *28 (quoting *Danforth*, 428 U.S. at 79).[6]

That is a false premise. The Supreme Court's *Casey* framework, to begin with, is not consistent with the kind of bright-line rule the district court assumed: An "incidental" burden that "mak[es] it more difficult or more expensive to procure an abortion *cannot* be enough to invalidate"

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[6] The district court justified that position with reference to its own views of policy and medical decision making:

> [W]ould we want ourselves, our spouses, or our children to undergo an unnecessary medical procedure for which the documented safety and effectiveness is comparably lacking? The court finds that the State should not ask otherwise of Alabama women seeking pre-viability abortions.

W. Alabama Women's Ctr., 2017 WL 4843230, at *28. The implication is that Alabama's elected leaders lack concern for the health of their *own* families and constituents — and that they must be lectured on their obligations, and ultimately compelled to provide the proper degree of care, by a federal court.

That is an affront to Alabama's legislators and citizens, not to mention those of other States that have chosen to regulate dismemberment abortion in similar ways. It is also a profoundly unhelpful way of depicting the views of people who sincerely aim to *protect* human life.

Most importantly, it substitutes the district court's preferred policies for those of Alabama's government, which is constitutionally empowered to weigh medical tradeoffs in ways that the district court may not prefer so long as it does not create a substantial obstacle to abortion decisions. *Casey*, 505 U.S. at 877 (plurality).

an abortion regulation *unless* the burden amounts to a substantial obstacle. *Casey*, 505 U.S. at 874 (emphasis added). Incidental effects on a mother's health, in other words, are simply factors to be evaluated under the undue burden standard.

The Supreme Court made *Casey*'s effect explicit in *Gonzales*. As shown above, a legislature *can* bar particular abortion procedures even if remaining procedures come with other potential health risks. 550 U.S. at 166. The State is not even categorically obligated to provide an exception for the mother's health when it does so. *Id.* at 161. Thus, insofar as *Danforth* previously suggested a categorical rule against abortion regulations that lead to new health risks, it has been overruled in that respect and provides the district court with no support.

2. Hellerstedt *did not overrule* Gonzales.

The district court also relied heavily on the Supreme Court's decision invalidating various Texas abortion regulations in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). The district court treated *Hellerstedt* as diminishing the degree of deference owing to the Alabama legislature's policy judgments, especially in the absence of express legislative fact findings about methods of inducing fetal demise.

W. Alabama Women's Ctr., 2017 WL 4843230 at *32. *Hellerstedt*, however, is distinguishable and does not overrule the key principles that *Gonzales* established.

It is certainly true — so far as it goes — that *Hellerstedt* requires courts to conduct their own analysis of facts in the record, whether a legislature has made findings or not. 136 S. Ct. at 2310. But that misses the truly important point. What matters here is not that the district court has independent authority to evaluate the medical effects of the State's policies (although the district court here erred in its factual conclusions), but the fact that the State retains authority to determine that medical tradeoffs, if any, are appropriate when balanced against the need to show respect for unborn human life. The *facts* can be resolved in court, but the *balance* is the State's to make.

Hellerstedt, unlike *Gonzales*, did not involve a State's exercise of its authority to promote respect for unborn life. The regulations at issue in *Hellerstedt* did not ban or modify any abortion procedure and Texas did not seek to justify its regulations in moral terms at all, let alone in the ways contemplated by *Gonzales*. Instead, the *Hellerstedt* Court was faced with a set of health and safety regulations for abortion providers —

specifically, a legislative change requiring abortion doctors to have admitting privileges at local hospitals (instead of merely contracting with a doctor who held such privileges) and a requirement that abortion facilities comply with regulations applicable to ambulatory surgical centers. 136 S. Ct. at 2299–300. Texas justified those laws purely as health and safety regulations, also a legitimate State interest. *See* Respondents' Br., *Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) (No. 15-274), at 1 (stating that "Texas enacted [the regulations] to improve the standard of care for abortion patients"). [7] The Court accordingly analyzed them solely in those terms. 136 S. Ct. at 2310 (noting that in the absence of legislative findings, the Court would "infer that the legislature sought to further a constitutionally acceptable objective (namely, protecting women's health)").

Judging the regulations by the standard of health and safety, the Court determined that the regulations did not actually do anything more

[7] For that matter, the abortion regulation at issue in *Danforth* was defended as a health regulation as well. *See* 428 U.S. at 58 (citing a "legislative finding that the method of abortion known as saline amniocentesis 'is deleterious to maternal health'").

than existing law to benefit the patient's health and safety. *Id.* at 2311 (finding "nothing in Texas' record evidence that shows that, compared to prior law, which required a 'working arrangement' with a doctor with admitting privileges, the new [abortion doctor admitting privileges] law advanced Texas' legitimate interest in protecting women's health"); *id.* at 2315 (finding "considerable evidence in the record supporting the district court's findings indicating that the [ambulatory surgical center standard law] does not benefit patients and is not necessary"). In the Court's view, their principal effect was instead to make abortion dramatically harder to access by forcing numerous clinics to close. *Id.* at 2312 (abortion doctor admitting privileges); *id.* at 2316 (ambulatory surgical center standards).

Hellerstedt and *Gonzales* are thus distinguishable in at least two ways — both of which show that this case is controlled by the latter.

First, the statute in *Gonzales*, unlike the Court's determination of the statute in *Hellerstedt*, actually served the government's professed interest. The fact that the partial birth abortion ban may have "ha[d] the incidental effect of making it more difficult or more expensive to procure an abortion" therefore was not "enough to invalidate it'" in *Gonzales*. 550 U.S. at 157–58 (*quoting Casey*, 505 U.S. at 874). Here, where there is *no*

question that Alabama's fetal demise law advances respect for life, the same rule applies to its "incidental" effects on abortion access. That is worlds away from *Hellerstedt*, where the Court held the regulations at issue did not actually do anything more than existing law to advance patient health and safety and where the Court held the fact that they made abortions considerably more difficult to obtain was thus decisive. *Hellerstedt*, 136 S. Ct. at 2312, 2316.

Second, the government interests at issue in this case are the same as the ones in *Gonzales*, but unlike the ones in *Hellerstedt*. *Hellerstedt* holds that when a State regulates abortion services for the sake of the patient's health and safety, the regulations stand or fall based on whether the regulations' burdens significantly outweigh the regulations' health and safety benefits. A court should evaluate the facts just as they evaluate the rationality of any other State regulation "'where constitutional rights are at stake.'" *Id.* at 2310 (*quoting Gonzales*, 550 U.S. at 165) (emphasis omitted). Factual evaluation of health regulations for whether they serve their professed purposes and for whether they create net burdens or benefits as a medical matter, naturally, is a classic judicial function. For that reason, the *Hellerstedt* Court reaffirmed the

importance of judicial fact finding in cases involving "medical uncertainty" about health and safety regulations. *Id.* at 2309–10.

The same is not true, though, when a State regulates abortion for the kinds of moral purposes involved here and in *Gonzales*. In those cases, a statute's moral ends are to some extent incommensurable with potential tradeoffs. At the very least, judicial standards for review of the legislature's choices are lacking.[8] When Congress determined, for example, that partial birth abortion "'confuses the medical, legal, and ethical duties of physicians to preserve and promote life,'" and that continuing to permit it "'will further coarsen society to the humanity of not only newborns, but all vulnerable and innocent human life, making it increasingly difficult to protect such life,'" *Gonzales*, 550 U.S. at 157 (*quoting* § 14, 117 Stat. 1202, note following 18 U.S.C. § 1531), it would

[8] The district court quoted a Seventh Circuit decision in another admitting privileges case, where the panel explained that "[t]he feebler the medical grounds" for an abortion regulation, "the likelier the burden, even if slight, to be 'undue' in the sense of disproportionate or gratuitous." *Planned Parenthood of Wisconsin, Inc. v. Van Hollen*, 738 F.3d 786, 798 (7th Cir. 2013). But the district court *altered* the quotation, substituting "*state interest*" for "medical grounds." *W. Alabama Women's Ctr.*, 2017 WL 4843230 at *5 (emphasis added). That alteration conceals a leap beyond existing law. Medical justifications can certainly be balanced against medical burdens; it does not follow that *all* State interests necessarily can be.

have been pointless for the Court to analyze whether a prohibition "confer[red] … benefits sufficient to justify the burdens upon access[.]" *Hellerstedt*, 136 S. Ct. at 2299. Weighing the interest of fetal life against medical concerns is fundamentally a matter of policy.

Just so here. The district court certainly has authority under *Hellerstedt* to find certain medical facts. But in a case like this one, where the State has elected to regulate medicine in order to encourage respect for unborn life, how is the district court to balance medical facts against the State's avowed purposes? *Gonzales* provides the answer: In that circumstance, where judicial competence is at a low ebb, "[c]onsiderations of marginal safety, including the balance of risks, are within the *legislative* competence[.]" *Gonzales*, 550 U.S. at 166 (emphasis added). To be sure, the court should consider the total evidence in any case, *see id.* at 165; *see also Hellerstedt*, 136 S. Ct. at 2309–10, but a legislature's reasonable resolution of medical questions in comparison with moral purposes deserves more weight in a case like this one than in a case like *Hellerstedt* — and more than the district court gave here.

* * * *

Faced in this case with a law that serves the legitimate State purpose of furthering respect for life, the district court should have recognized that incidental effects on abortion access are permissible under *Gonzales*. It should also have accorded greater weight to Alabama's balancing of medical facts against the State's interest. It did neither of those things and thus committed reversible error.

CONCLUSION

It bears repeating that the *amici* States do not intend to sanction abortion generally. They regret being placed in a position of advocating for fetal death as a humane alternative to a procedure that should have no place in a civilized society — a situation that only highlights how absurdly far judicial decisions regarding unborn human life have departed from authorities barring inhumane treatment to animals and criminals who are facing the death penalty. But in light of precedent, *amici* strongly support the authority of States to protect both the life and dignity of unborn life in that small way, and thus have an interest in ensuring that courts scrutinize such regulations under the appropriate standards. The Court should reverse the district court's opinion and vacate the preliminary injunction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 30, 2018, I filed the foregoing document through the Court's CM/ECF system, which will serve an electronic copy on all registered counsel of record.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because the brief contains 5,435 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. R. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Century Schoolbook font.

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