No. 17-51060

In the United States Court of Appeals for the Fifth Circuit

WHOLE WOMAN'S HEALTH, On Behalf of Itself, Its Staff, Physicians and Patients, *et al.*,

Plaintiffs – Appellees,

v.

KEN PAXTON, Attorney General of Texas, In His Official Capacity, *et al.*,

Defendants – Appellants.

On Appeal from the United States District Court
for the Western District of Texas, Austin Division
No. 1:17-CV-00690-LY

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

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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 may be 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, Texas instead sought simply to moderate the dismemberment procedure by requiring that abortion providers use available methods to kill fetuses *before* dismembering them. Texas' 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, however, failed to apply settled law to Texas's statute. It instead applied a more searching review, holding *inter alia* that Texas is categorically prohibited from seeking to make dismemberment abortions less brutal and more humane, and that the State had to guarantee that remaining abortion procedures would be near-substitutes from a medical perspective. As *Gonzales* shows, Texas was required to do no such thing. Because these legal errors (among others) infected the district court's analysis, its decision should be reversed.

Amici are all States that regulate abortion in order to preserve respect for life. Several states in addition to Texas—specifically, *amici* Alabama, Arkansas, Kansas, Louisiana, Mississippi, Oklahoma, and West Virginia—have enacted laws that regulate dismemberment abortion in the way Texas 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 less brutal and more 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.

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[1] *Compare* Act of May 26, 2017, 85th Leg., R.S. ch. 441, § 6, 2017 Tex. Sess. Law Serv. 1167-68 (West) (to be codified at Tex. Health & Safety Code Ch. 171, Subchapter G, §§ 171.151–.154); *with* 1975 Ala. Code § 26-23G-2(3); 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; W.Va. Code § 16-2O-1.

STATEMENT OF THE ISSUES

Whether States have an interest in regulating dismemberment abortions to further respect for human life, including unborn life at all stages of gestation.

Whether States have the authority to balance medical uncertainties when they regulate dismemberment 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. Texas defended the challenged abortion regulation on that ground here. It is also beyond serious question that the abortion procedure at issue here threatens to undermine respect for life. Texas is thus empowered to defend against that threat and to do so at whatever stage of pregnancy it arises.

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 solely 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.[2] That analysis contradicts the Supreme Court's holding in *Gonzales*, and the decision should therefore be reversed.

[2] The district court relied in part on the decisions of other courts, including that of an Alabama district court currently on appeal to the Eleventh Circuit. ROA.1597. *Amici*, as well as Texas, advance these same arguments in that case. *See Amicus* of Louisiana, *et al.*, *West Alabama Women's Center v. Miller*, No. 17-15208 (11th Cir. Jan. 30, 2018).

ARGUMENT

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

Texas asserted below that its fetal demise law was intended to "advance[] respect for the dignity of the life of the unborn and protect[] the integrity of the medical profession." ROA.1599. The district court "assume[d] without deciding the legitimacy of these interests," *id.*; *see also* ROA.1613 ("The court further concludes that … the Act advances a valid state interest[.]")—but held that they deserved "only marginal consideration" in this case. ROA.1612. The interests cited by the State are *unquestionably* legitimate, however, and they apply here with full vigor.

A. The State Has An Interest in Showing Respect for Unborn Life.

Abortion jurisprudence 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. Ever since *Roe v. Wade*, the Supreme Court has recognized 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, JJ.) (explaining 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.").

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," 550 U.S. 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. By limiting use of particularly "brutal" abortion procedures, *id.* at 160, States further respect for life 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 its interest in respect for life. In a dismemberment abortion, as Texas explains in its opening brief, a doctor kills a living fetus by tearing it apart. *See* Texas' Brief on the Merits at 4–8, 17–20.

The doctor first dilates the pregnant woman's cervix just enough to insert instruments, such as 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. Tex. Penal Code § 42.092 (animal cruelty statute). 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[]") (Brennan, J., dissenting from denial of certiorari) (quoting *In re Kemmler*, 136 U.S. 436, 447 (1890)). 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. "No one would dispute that, 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.

Texas, 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. If you are going to dismember a fetus, you instead must kill it first, using one of several available more humane methods. Texas included an exception applicable if such an abortion is a medical emergency, as defined by statute. Tex. Health & Safety Code § 171.152; *id.* § 171.002(3).

By any normal standard of basic human decency—considering the gruesomeness of the dismemberment procedure—Texas' 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 human 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.

Not only are Texas's stated interests legitimate in theory, but they are directly implicated by the abortion procedures involved in this case. The district court committed legal error to the extent it held otherwise.

B. That Interest Applies to Dismemberment Abortions at All Stages of Pregnancy.

Although it acknowledged the State's interest in the abstract, the district court gutted its substance: It held that the State's interest in expressing respect for unborn life "ha[s] its primary application once the fetus is capable of living outside the womb," and deserves "only marginal consideration" before then. ROA.1612. That distinction is critical here because—as the district court acknowledged—Texas

already prohibits abortions of viable fetuses. *See* Tex. Health & Safety Code § 171.044 (prohibiting abortion of fetuses after 20 weeks post-conception); ROA.1599. States, in the court's view, only have a meaningful interest in showing respect for *viable* fetuses, and the fetuses to be protected from live dismemberment in Texas are not old enough.

The district court cited no authority for its holding that unborn life can only matter to a State when it is sufficiently developed. On the contrary, that rule contradicts *Casey* in several respects. The Supreme Court majority held in that case that "the State has legitimate interests *from the outset of the pregnancy* in protecting … the life of the fetus that may become a child." 505 U.S. at 846 (majority) (emphasis added). Viability, according to the *Casey* Court, marks not the point when the State can legitimately express respect for life, but the point when the State can *prohibit* abortion altogether except where the mother's health is at risk, *id.* at 879 (O'Connor, Kennedy, and Souter, JJ.)—as Texas and several other States have chosen to do.

Cases have accordingly allowed States to express respect for unborn life at all stages of pregnancy, without hinting that the State's

interest in doing so only springs into being as the fetus reaches full term or even viability *Casey* itself, for example, upheld informed consent laws and waiting period requirements applicable to pre-viability abortions. 505 U.S. at 902 (statutory appendix). And *Gonzales* described *Casey* as "confirm[ing] the State's interest in promoting respect for human life at *all stages in the pregnancy*." 550 U.S. at 163 (emphasis added)

The district court's error in dismissing the State's interest in pre-viability life was a legal error that infected the court's factual analysis. The district court's opinion should be reversed for that reason alone.

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

The district court enjoined Texas' dismemberment abortion statute as facially unconstitutional because—even assuming the validity of the State's interest—it found that requiring fetal demise before dismemberment imposes an undue burden on the abortion decision. That holding is erroneous on multiple grounds.

Some of the district court's reversible errors are easy to identify. As an initial matter, the district court applied the wrong legal standard to Plaintiffs' facial undue burden challenge. The district court held that

Plaintiffs could establish facial invalidity by proving that Texas's law creates an undue burden in a "large fraction" of cases. ROA.1609, *see also* ROA.1611 (holding that "Plaintiffs have carried their burden of demonstrating that the Act creates an undue burden for a large fraction of women"). The Fifth Circuit, however, has held that facial challenges to abortion laws "will succeed only where the plaintiff shows that there is *no* set of circumstances under which the statute would be constitutional." *See Barnes v. State of Miss.*, 992 F.2d 1335, 1342 (5th Cir. 1993); *Barnes v. Moore*, 970 F.2d 12, 14 n.2 (5th Cir. 1992).[3] The district court thus granted Plaintiffs' facial challenge without holding Plaintiffs to the burden of proof this Court requires.

In addition, many of the district court's factual findings are clearly erroneous. The district court entirely overlooked the fact that abortions can be performed by suction up to 17 weeks, *see* Texas' Brief on the Merits at 33, after which fetal demise methods are well-studied and highly effective. As to digoxin injection the district court found a failure

[3] The Supreme Court has not resolved the question. *See, e.g.*, *Janklow v. Planned Parenthood, Sioux Falls Clinic*, 517 U.S. 1174, 1177–80 (1996) (Scalia, J., dissenting from denial of certiorari). Although other circuits have adopted the "large fraction" test, Louisiana in particular urges that this Court is bound by its longstanding precedent.

rate of between 5 and 10 percent. The record, however, shows not only that the rate is far lower, but that the chemical can be administered a second time in the event it fails at first. *See id.* at 44–45. In another finding, the district court found that requiring fetal demise would lead to a 24-hour delay in obtaining an abortion but the record shows it can be accomplished while cervical dilation occurs—often in a matter of minutes or hours. *Id.* at 46.

But even more significantly, the district court's legal conclusion as to substantial burden simply 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* Texas asserted. Because the district court applied the wrong legal standard, its decision should be reversed.

A. Texas Is Not Categorically Prohibited from Requiring Fetal Demise Before Dismemberment.

The district court's decision rested in part on a holding that *regardless* of the State's interest in respect for unborn life, the Supreme Court forbids Texas to require fetal demise before dismemberment. According to the district court, *Gonzales* and *Stenberg* establish that "laws with the effect of banning the standard D&E procedure result in

an undue burden upon a woman's right to have an abortion and are therefore unconstitutional[.]" ROA.1596. The district court also held that "adding an additional step to an otherwise safe and commonly used procedure"—*e.g.*, requiring fetal demise before dismemberment—creates an undue burden "in and of itself[.]" ROA.1602–03. That is a dramatic overreading of the Supreme Court's cases.

The statute at issue in *Stenberg* was intended to ban partial birth abortions. The State *conceded* that the law would impose an undue burden if it "applie[d] to the more commonly used [dismemberment] procedure as well," 530 U.S. at 938, and so the Court was faced only with a narrow issue of statutory interpretation, *i.e.*, determining which procedures the statute's text covered. The Court "agree[d] with the [lower court] that it does so apply" to dismemberment abortions, and so invalidated the law. *Id.* Texas, in contrast, has elected to hold Plaintiffs to their burden of factual proof instead of conceding that requiring fetal demise before dismemberment would impose an undue burden. *Stenberg*'s relevance is therefore limited. In *Gonzales*, the Court concluded that the federal partial-birth abortion statute did *not* prohibit dismemberment abortions as well, and so had no occasion to consider

whether a fetal demise law like Texas's would have caused an undue burden. 550 U.S. at 151–54.

Gonzales actually contradicts the district court's view that Texas may not require the "additional step" of fetal demise before "an otherwise safe and commonly used" abortion procedure. ROA.1602–03. The *Gonzales* Court observed that "an injection that kills the fetus"—one of the very same fetal demise methods Texas urges here—"is an alternative … that allows the doctor to perform the [partial-birth abortion] procedure." 550 U.S. at 164; *see also id.* at 136 ("Some doctors, especially later in the second trimester, may kill the fetus a day or two before performing the surgical evacuation. They inject digoxin or potassium chloride into the fetus, the umbilical cord, or the amniotic fluid.").[4] It makes no sense to infer that the *Gonzales* Court considered such an injection to be a constitutionally viable "alternative" for one procedure but not the other. *Gonzales* therefore means that requiring

[4] The district court twisted the *Gonzales* Court's words on this point, saying that the only alternative *Gonzales* considered available was dismemberment *without* demise. ROA.1595–96. That cannot be squared with the Court's express reference to "*an injection that kills the fetus*" as such an "alternative." 550 U.S. at 164 (emphasis added).

an additional procedure to meliorate an abortion *can* be legitimate—the very opposite of the district court's interpretation.

Ultimately, moreover, it makes no sense to treat any particular abortion procedure as subject to special constitutional protections. *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."). While the Constitution has been interpreted to protect abortion decisions, medical procedures and medical science change. The importance of any particular medical procedure for abortion depends on the state of medical science at any given time and need not be enshrined in the Constitution forever.

All of this demonstrates that the way to analyze Texas's law is through the ordinary undue burden analysis—not the supposed *per se* rule the district court employed.

B. *Gonzales* Permits States to Balance Medical Uncertainties When Promoting Respect for Unborn Life.

This case is controlled by the reasoning of *Gonzales*, which 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). 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 premise proved essential to the *Gonzales* Court's holding, 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 Texas' 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.* (emphasis added) "[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.*

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. 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.").

Application of *Gonzales* in this case would resolve the matter in favor of the State. Texas identified a discrete abortion procedure 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 brutal and more humane—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.

C. *Hellerstedt* Did Not Overrule *Gonzales*.

Instead of applying *Gonzales* according to its terms, the district court employed a different analysis: The district court started from the premise that the Supreme Court's decision invalidating various Texas abortion regulations in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), radically revised the undue burden analysis that had prevailed since *Casey*.

Under the new analysis, a court evaluates abortion regulations under a crude balancing test, which a statute passes only if its medical benefits outweigh its burdens. ROA.1594 ("Where a law's burdens exceed its benefits, those burdens are by definition undue, and the obstacles they embody are by definition substantial."); ROA.1611. According the district court, a "substantial" burden is "no more and no less than [one] 'of substance.'" ROA.1594. That is false on two levels: first, because it misconstrues the meaning of a "substantial" burden, and second, because it is ill-suited to a case like this one, where a State regulates to encourage respect for unborn life.

1. The district court misconstrued the nature of a "substantial" burden.

The undue burden standard that the Supreme Court established in *Casey* is not consistent with the pure balancing approach the district court devised. Under *Casey*, an "undue burden is 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). And not all burdens are great enough to be "substantial": An "incidental" burden that "mak[es] it more difficult or more expensive to procure an abortion *cannot* be enough to invalidate" an abortion regulation *unless* the burden amounts to a substantial obstacle. 505 U.S. at 874 (emphasis added). It follows that some burdens are "substantial" and others are not, with the difference hinging on how heavily the burden falls on women.

Hellerstedt did not purport to change that standard. In *Hellerstedt*, the Supreme Court determined that the laws at issue would create substantial burdens under the *Casey* standard—for example, clinic overcrowding, long queues for abortion access, and dramatic increases in driving distances. *Hellerstedt*, 136 S. Ct. at 2313.

Although the Court did balance the statute's benefits and alleged burdens against each other, *see, e.g.*, *id.* at 2299, it did not do away with *Casey*'s rule requiring that only sufficiently severe burdens can be "substantial." Because it has never been expressly overruled, the *Casey* standard remains binding. *See Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower court] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

By holding that burdens of abortion laws can be undue "by definition" when they exceed medical benefits and that a "substantial" burden is merely a burden "of substance," ROA.1594, the district court failed to recognize that not all incidental burdens are serious enough to be substantial.

2. The district court failed to recognize the State's right to express respect for unborn life.

As shown above, *Gonzales* establishes that a legislature *can* bar particular abortion procedures in order to express respect for unborn life, and that it can do so even if remaining procedures come with

additional 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.[5] It follows that the district court erred in holding that the constitutionality of a law intended to show respect for human life hinges on a crude balancing of medical benefits and tradeoffs. ROA.1594.

Hellerstedt did not change that rule. Unlike *Gonzales*, *Hellerstedt* did not involve the 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 terms of showing respect for unborn life 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

[5] 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; *see* ROA.1600. 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.

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"). 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 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 the 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 purposes involved here and in *Gonzales*. In those cases, a

legislature's interests are to some extent incommensurable with potential tradeoffs. At the very least, judicial standards for review of the legislature's choices are lacking. 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 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 showing respect for fetal life by prohibiting the brutal and inhuman dismemberment of an unborn child while its heart still beats 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 other legitimate purposes such as showing respect for unborn human life deserves more weight in a case like this one than in a case like *Hellerstedt*—and more than the district court gave here.

The district court's reasoning actually *demonstrates* the State's point that the procedure coarsens and then decreases respect for human life. In its reach to graft *Hellerstedt* onto *Gonzales*, the district court not only diminished to the point of ignoring the State's interest in showing respect for unborn life, but went so far as to conclude that ripping a live human fetus limb-from-limb is essentially no different from inducing fetal demise first because "[a]n abortion always results in the death of the fetus. The extraction of the fetus from the womb occurs in every abortion. Dismemberment is the inevitable result." ROA.1601.

In other words, the human fetus is going to die anyway, so it matters not how it dies. Such reasoning is *entirely* contrary to the Supreme Court's conclusion in *Gonzales*.

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 Texas' 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 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 of animals and criminals 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

courts scrutinize such regulations under the appropriate standards. The Court should reverse the district court's opinion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 5, 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 6,259 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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Dated: March 5, 2018