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; 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; NOVA HEALTH SYSTEMS, INCORPORATED, ON BEHALF OF ITSELF, ITS STAFF, PHYSICIANS, AND PATIENTS, DOING BUSINESS AS REPRODUCTIVE SERVICES; 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; FAITH JOHNSON, DISTRICT ATTORNEY FOR DALLAS COUNTY, IN HER OFFICIAL CAPACITY; SHAREN WILSON, CRIMINAL DISTRICT ATTORNEY FOR TARRANT COUNTY, IN HER OFFICIAL CAPACITY; ABELINO REYNA, 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, Austin Division
No. 1:17-CV-00690-LY

BRIEF OF THE STATES OF LOUISIANA, ALABAMA, ALASKA, ARIZONA, ARKANSAS, FLORIDA, GEORGIA, IDAHO, INDIANA, KANSAS, KENTUCKY, MISSISSIPPI, MISSOURI, NEBRASKA, NORTH DAKOTA, OHIO, OKLAHOMA, SOUTH CAROLINA, TENNESSEE, UTAH AND WEST VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS

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INTEREST OF *AMICI*

Amici are States that regulate abortion to promote respect for life. A dozen States—specifically, Alabama, Arkansas, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Nebraska, North Dakota, Ohio, Oklahoma, and West Virginia—have passed laws like Texas's that prohibit live dismemberment abortion.[1] *Amici* thus have an interest in ensuring that courts scrutinize such regulations under the appropriate legal standards, consistent with Supreme Court precedent. The district court in this case failed to do so. Further, the panel majority's decision to disregard the Chief Justice's controlling opinion in *June Medical Services LLC v. Russo* affects abortion-related cases some *amici* States have pending, including one in this Circuit involving a law similar to the Texas law at issue here.[2] And the district court's devaluation of the States' recognized interest in protecting unborn life departs from precedent and

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[1] *Compare* Tex. Health & Safety Code §§ 171.151–.154 *with* Ala. Code § 26-23G-2(3); Ark. Code §§ 20-16-1801–1807; Ind. Code §§ 16-34-2-1(c); 16-34-2-9; 16-34-2-10; Kan. Stat. § 65-6743; Ky. Rev. Stat. § 311.787; La. Rev. Stat. § 40:1061.1.1; Miss. Code §§ 41-41-151–157; Neb. Rev. Stat. §§ 28-326(4), 28-347–.28:347.06; N.D. Cent. Code §§ 14-02.1–04.2; Ohio Rev. Stat. § 2919.15; 63 Okla. Stat. §§ 1-737.7–.16; W.Va. Code § 16-20-1.

[2] A challenge to Louisiana's law prohibiting live dismemberment abortions is pending in federal district court. *See June Med. Servs. LLC v. Russo*, No. 3:16-cv-00444-BAJ-RLB (M.D. La. filed Jul. 1, 2016).

usurps power that constitutionally belongs to state legislatures, an issue of vital concern to the *amici* States.

SUMMARY OF THE ARGUMENT

The district court's erroneous application of Supreme Court precedent resulted in a shocking holding affirmed by the panel majority: Texas cannot legally prevent an abortionist from tearing apart developed unborn children limb from limb inside the womb while they are alive. *See Whole Woman's Health v. Paxton*, 978 F.3d 896 (5th Cir. 2020), *reh'g en banc granted, op. vacated*, 978 F.3d 974 (5th Cir. 2020) (*WWH*). But as Justice Thomas recently observed, "[t]he notion that anything in the Constitution prevents States from passing laws prohibiting the dismembering of a living child is implausible." *Harris v. W. Ala. Women's Ctr.*, 139 S. Ct. 2606, 2607 (2019) (Thomas, J., concurring). Further, as Judge Willett's dissent forcefully demonstrates, the district court's decision is clearly erroneous based on the factual record, *WWH*, 978 F.3d at 923-28 (Willett, J., dissenting), and rife with legal errors. *See id.* at 914. *Amici* write to highlight four reasons this Court should reverse:

First, the district court (and the panel majority) failed to apply the correct standard to the Texas law. The panel majority's error in disregarding *June Medical Services, LLC v. Russo*, 140 S. Ct. 2103 (2020), and applying the balancing test it attributed to *Whole Woman's Health v.*

Hellerstedt, 136 S. Ct. 2292 (2016), put this Court's precedent at odds with the Supreme Court.

Second, even aside from *June Medical*, the district court's decision is inconsistent with established law. The district court invented, then applied, its own erroneous definition of "substantial obstacle," which functionally reduced the established undue burden test to an "*any* burden" test. *See Whole Woman's Health v. Paxton*, 280 F. Supp. 3d 938, 944 (W.D. Tex. 2017). The district court further erred in facially invalidating the law despite *no* evidence that a large fraction of women would be unduly burdened. Thus, the district court's analysis cannot be squared with either *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992),[3] or *Gonzales v. Carhart*, 550 U.S. 124 (2007).

Third, the district court contradicted binding precedent by dramatically undervaluing the State's interest in protecting unborn life while simultaneously holding that the abortion right is essentially absolute. *See WWH*, 978 F.3d at 913, 922, 928 (Willett, J., dissenting). To the contrary, the State has a "legitimate and substantial interest in preserving and promoting fetal life," *Gonzales*, 550 U.S. at 145, from the beginning of pregnancy, *Casey*, 505 U.S. at 846. And that interest justifies doing exactly what Texas did here—restricting a brutal,

[3] All citations to *Casey* refer to the plurality opinion, unless otherwise noted.

gruesome, and inhumane abortion procedure. *See Gonzales*, 550 U.S. at 158-60.

Fourth, the district court overlooked the Supreme Court's admonition in *Gonzales* that the "traditional rule" is that state legislatures have "wide discretion to pass legislation in areas where there is medical and scientific uncertainty." 550 U.S. at 163. That "traditional rule" should decide this case. Even if the Court set aside plaintiffs' own documents and testimony showing that alternatives to live dismemberment abortion are safe and effective, the State's evidence at minimum supports a conclusion that there is "uncertainty." The Court is thus obligated—under precedent just reemphasized by *June Medical*—to allow the Legislature to weigh that medical evidence and make that policy decision.

The State's interest in preventing fetal pain is another indisputably compelling interest justifying the Texas Legislature's policy choice. But the district court ignored that interest, and the panel majority judicially declared that fetal pain is not a legitimate state interest before 24 weeks because it is impossible for a fetus to feel pain. Not only does that determination ignore a state legislature's authority to weigh the evidence, it is already outdated based on new research. *See WWH*, 978 F.3d at 910. That perfectly illustrates the folly of judicial usurpation of state legislatures' policymaking role.

The en banc Court should align the abortion jurisprudence of this Circuit with Supreme Court precedent and the Constitution.

ARGUMENT

I. THE DISTRICT COURT'S OPINION IS ERRONEOUS BECAUSE IT APPLIES A BALANCING TEST.

The district court upheld Texas's reasonable restriction on live dismemberment abortions by applying a balancing test it attributed to *Hellerstedt*. *Whole Woman's Health*, 280 F. Supp. 3d at 947-53. But as the controlling opinion in *June Medical* makes clear, the governing standard is *Casey*'s substantial-obstacle test. Because the district court applied a "now-defunct balancing test," *WWH*, 978 F.3d at 928 (Willett, J., dissenting), and did not consider whether the Texas law imposed a substantial obstacle on abortion access for a large fraction of women, *Casey*, 505 U.S. at 874-75, 877, 895, the district court opinion must be reversed.[4]

[4] Because the district court applied the wrong legal standard, its factfinding is entitled to no deference. *See City of Alexandria v. Brown*, 740 F.3d 339, 350 (5th Cir. 2014) ("Should the district court apply the wrong legal standard in making its factual findings, this court then reviews the district court's factual findings de novo."); *see also Abbott v. Perez*, 138 S. Ct. 2305, 2326 (2018) ("[W]hen a finding of fact is based on the application of an incorrect burden of proof, the finding cannot stand.").

A. The Panel Majority's Conclusion that a Balancing Test Applies to Abortion Regulations Notwithstanding *June Medical* Is Incorrect.

The panel majority held that *June Medical* did not produce a controlling rule of law. *WWH*, 978 F.3d at 904. It accordingly upheld the district court's application of a balancing test on the ground that *June Medical* left *Hellerstedt*'s supposed "balancing" test intact. *Id.*; *see also id.* at 915 (Willett, J., dissenting) ("The majority opinion in this case defies the Chief Justice's controlling opinion in *June Medical* and instead clings to the *Hellerstedt* balancing test, the same balancing test that 'five Members of the Court reject[ed]'—irrefutably—a few months ago."). But as Judge Willett concluded, "[p]roper application of the *Marks* rule dictates otherwise." *Id.* at 915 (Willett, J., dissenting) (footnote omitted).

Ordinarily, in cases like *June Medical* where a Supreme Court decision produces no majority opinion, courts determine the controlling rule of law using the rule of *Marks v. United States*, 430 U.S. 188 (1977): "[T]he holding of the Court" in such cases "may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Id.* at 193 (citation omitted). The panel majority held *Marks* did not apply to *June Medical* because it found the plurality opinion and the Chief Justice's concurrence "are not logically compatible" and lacked a "common denominator." *WWH*, 978 F.3d at 904.

But these conclusions "collapse under scrupulous analysis of *June Medical* and our caselaw on the proper application of *Marks*." *Id.* at 916

(Willett, J., dissenting). As Judge Willett explained, the clear "common denominator" between the plurality and concurring opinions was the finding of a substantial obstacle, which was the basis for enjoining the law. *Id.* at 916-19. The *June Medical* plurality and the Chief Justice parted ways on the balancing aspect of the plurality's decision. In other words, "the Chief Justice's test is a narrower version of the plurality's test and thus a logical subset of it." *Id.* at 917. Put another way, the Chief Justice's opinion is narrower than the plurality's because it comes to the same conclusion (the existence of a substantial obstacle) with a less far-reaching analysis that reconciles *Hellerstedt* with prior cases such as *Casey*. Under a fair analysis of *Marks*, the Chief Justice's opinion controls.

B. The Panel Majority's Application of *Hellerstedt* Balancing and Disregard of *June Medical* Contradicts Two Other Circuits.

Judge Willett's analysis is reinforced by two other Circuits. The Eighth Circuit, citing *Marks*, held that "Chief Justice Robert[s'] vote was necessary in holding unconstitutional Louisiana's admitting-privileges law, so his separate opinion is controlling." *Hopkins v. Jegley*, 968 F.3d 912, 915 (8th Cir. 2020). The panel majority, however, found this decision irrelevant because it did not "interpret[]" *Marks* or employ the Fifth Circuit's "common denominator" interpretation. *WWH*, 978 F.3d at 904 n.5. But as explained above, and in Judge Willett's dissent, the "common

denominator" requirement is satisfied here. *See id.* at 916-19 (Willett, J., dissenting).

Even if it were true that the Eighth Circuit merely "cited" *Marks*, *id.* at 904 n.5, the Sixth Circuit went far beyond that. In a thorough analysis citing both Sixth Circuit and Supreme Court precedent, it also concluded Chief Justice Roberts' opinion controls. *EMW Women's Surgical Ctr., P.S.C. v. Friedlander*, 978 F.3d 418, 431-37 (6th Cir. 2020). The panel majority's conclusion is thus out of step with other Circuits on the issue. This Court should follow the reasoning of its sister Circuits and hold that the Chief Justice's opinion is the controlling opinion.

C. The Panel Majority Failed to Consider Other Important Factors in Deciding Not to Follow *June Medical*.

In discounting *June Medical*, the panel majority also ignored the Supreme Court's actions after *June Medical*. Shortly after *June Medical* was decided, the Court vacated two Seventh Circuit decisions applying balancing tests to abortions laws, and remanded for further consideration in light of *June Medical*. *See Box v. Planned Parenthood of Ind. & Ky., Inc.*, No. 19-816, 2020 WL 3578672, *1 (U.S. Jul. 2, 2020); *Box v. Planned Parenthood of Ind. & Ky., Inc.*, No. 18-1019, 2020 WL 3578669, *1 (U.S. Jul. 2, 2020). Those decisions "suggest[] the High Court rejected a balancing test and expects the Seventh Circuit to apply the more lenient undue-burden framework outlined in the Chief Justice's concurrence." *See WWH*, 978 F.3d at 920 (Willett, J., dissenting); *see also Friedlander*,

978 F.3d at 433 n. 9 ("If the Court believed that the balancing approach was the appropriate test, it is unclear why it issued these orders.").

The panel majority dismissed the significance of five Justices in *June Medical* rejecting a balancing test. *WWH*, 978 F.3d at 904 & n.5. While it is true that this five-Justice agreement may not form a majority opinion in that particular case, this Court should not ignore the Supreme Court's actions in *granting*, vacating, and remanding cases applying the balancing test in the wake of *June Medical*. It would make little sense for this Court to "cling" to *Hellerstedt* balancing when a majority of the Supreme Court rejected it in *June Medical* and then continued to reject it in subsequent actions. Such circumstances underscore that applying the Chief Justice's opinion as controlling under *Marks*—including its rejection of the balancing test—is the correct course of action.

II. EVEN IF BALANCING APPLIES, THE DISTRICT COURT STILL ERRED BECAUSE ITS DECISION IS INCONSISTENT WITH *CASEY* AND *GONZALES*.

Even if a balancing test were required, it does not *displace* the substantial-obstacle test required by *Casey*. The district court failed to respect that rule, instead rewrote the meaning of "substantial obstacle," and then failed to hold plaintiffs to their high evidentiary burden on a facial challenge. Thus, even if the district court's balancing of burdens against benefits were valid in theory, it is invalid in application.

A. The District Court's Invention of a New Definition for "Substantial Obstacle" Contradicts *Casey*.

Neither *June Medical* nor *Hellerstedt* repudiated *Casey*'s substantial-obstacle standard. The *Hellerstedt* majority and the two opinions supporting the judgment in *June Medical* all insisted that they were applying *Casey*. *June Med.*, 140 S. Ct. 2103, 2138-39 (Roberts, C.J., concurring in the judgment) (citing *Hellerstedt*, 136 S. Ct. at 2296, 2309, 2310); *id.* at 2120 (plurality op.). *Hellerstedt* began with the premise that under *Casey* abortion plaintiffs must show that a regulation places "'a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.'" *Id.* at 2133 (quoting *Casey*, 505 U.S. at 877). And *Casey* made clear that abortion plaintiffs' burden is not met if a regulation merely makes abortion more expensive or inconvenient: "Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause." 505 U.S. at 874. A "substantial obstacle," rather, is one that deprives the woman of "the ultimate decision" whether to abort her child. *Id.* at 875.

Here, the district court purported to consider whether the Texas law imposed a "substantial obstacle" under *Casey*, but its analysis bears no resemblance to *Casey* or *Hellerstedt*.

Supplying its own meaning of "substantial obstacle," the district court functionally reduced the undue burden test to an "any burden" test.

Specifically, the district court defined "substantial obstacle" to mean "no more and no less than 'of substance.'" *Id.* at 944. Instead of determining whether the Texas law would prevent a large fraction of women from making the "ultimate decision" whether to abort, *Casey*, 505 U.S. at 875, 877, 879, the district court considered whether "the benefit [of the law] bring[s] with it an obstacle of substance." *Whole Woman's Health*, 280 F. Supp. 3d at 944. By considering whether the burdens of SB8 are "of substance" rather than whether they create a "substantial obstacle" to a woman's exercise of her decision to abort within the meaning of *Casey*, 505 U.S. at 893-94, the district court reduced plaintiffs' burden of proof dramatically, contrary to both *Casey* and *Hellerstedt*.[5] Thus, regardless of the applicability of *June Medical* and the *Hellerstedt* balancing test, the district court's decision warrants reversal as a matter of law.

[5] The district court also attempted to bootstrap plaintiffs' challenge to SB8 to separate burdens supposedly imposed by other Texas laws. *See Whole Woman's Health*, 280 F. Supp. 3d at 952 ("If the Act alone does not create an undue burden, its interaction with other Texas law pushes the previability-abortion burden on a woman seeking a second-trimester abortion above the undue threshold."). Precedent does not support such analysis, and this Court should explicitly reject this reasoning. *See In re Gee*, 941 F.3d 153, 171-73 (5th Cir. 2019) (declining to rule on the merits of plaintiffs' "cumulative-effects challenge" to abortion regulations but noting that such a claim is "unprecedented" and stating that "[t]he Supreme Court has not blessed such a claim. To the contrary, the Court has analyzed abortion provisions separately rather than cumulatively."); *see also June Medical*, 140 S. Ct. at 2138 (Roberts, C.J., concurring in the judgment) ("The upshot of *Casey* is clear: The several restrictions that did not impose a substantial obstacle were constitutional, while the restriction that did impose a substantial obstacle was unconstitutional.").

B. The District Court Failed to Hold Plaintiffs to the Burden Required to Facially Invalidate the Law.

The district court did not stop at rewriting the substantial obstacle test. It also facially invalidated Texas's dismemberment abortion regulation by excusing plaintiffs from their "heavy burden" to prove that the law is an undue burden for a "large fraction" of women for whom the law is "relevant." *Casey*, 505 U.S. at 895; *Gonzales*, 550 U.S. at 167-68.

Because the district court erroneously determined that prohibiting live dismemberment abortions imposed a burden "of substance" on *every* woman receiving the procedure, it bypassed identifying the fraction of women who face a substantial obstacle. *Whole Woman's Health*, 280 F. Supp. 3d at 952-53; *see also WWH*, 978 F.3d at 911 ("[T]he law imposes an undue burden on *every* Texas woman"). When the burden is framed properly, however, it is clear that plaintiffs came nowhere near producing enough evidence to support a facial challenge. Plaintiffs failed to identify or quantify any *actual* women who would be deprived of their decision to obtain an abortion due to the Texas law. *WWH*, 978 F.3d at 932 (Willett, J., dissenting). Instead, plaintiffs appear to argue that *possible* special cases—*i.e.*, an unknown number of hypothetical women for whom alternative abortion procedures may not work for some reason—are enough to render the statute invalid in *all* applications. *Id.* at 931-32.

But the statute "applies to all instances in which the doctor proposes to use the prohibited procedure, not merely those in which the

woman suffers from medical complications." *Gonzales*, 550 U.S. at 168. The question in a facial challenge, then, is not whether *any* woman is burdened, nor whether *some* women may be prevented from receiving an abortion at all, but whether the population of women prevented from receiving an abortion constitutes a "large fraction" of women to whom the law applies. That makes sense, because it is "neither [the Court's] obligation nor within [the Court's] traditional institutional role to resolve questions of constitutionality with respect to each potential situation that might develop." *Id.* (citing *United States v. Raines*, 362 U.S. 17, 21 (1960)).

There is no such showing on this record. "Even crediting Plaintiffs' arguments regarding the 'risks' of the three fetal-demise procedures . . . those arguments do not apply to all pregnant women between 15–20 weeks' gestation." *WWH*, 978 F.3d at 931 (Willett, J., dissenting). Women between 15-17 weeks' gestation can undergo an abortion where suction alone causes fetal death, which does not even implicate the law. *Id.* The record also shows digoxin is widely used to cause fetal demise between 18-22 weeks' gestation. *See id.* Yet plaintiffs *speculate* that alternatives might not work for "some women." *Id.* That is not enough to show a burden for a "large fraction" of women.

To defeat a facial challenge, similarly, the State "need only show 'the availability of . . . safe alternatives' to live dismemberment"—as Texas has done—not that "every alternative works every time for every

woman." *Id.* at 932 (Willett, J., dissenting). It would be impossible to meet such a burden because *no* medical procedure is guaranteed to work 100% of the time. If plaintiffs are correct that the Texas law might deprive women of the decision to abort, the proper vehicles are as-applied challenges, the "basic building blocks of constitutional adjudication." *Gonzales*, 550 U.S. at 168 (citation omitted). Under *Casey* and *Gonzales*, the district court cannot facially invalidate a state law based on speculative effects on an unknown number of unidentifiable, hypothetical women.

III. THE DISTRICT COURT DEVALUED THE STATE'S INTEREST IN PROTECTING UNBORN LIFE.

The district court's conclusion that Texas cannot prohibit live dismemberment abortions relied on its "dismissive finding that the State's interest in fetal life is 'only marginal,' while the woman's right to an abortion is 'absolute.'" *WWH*, 978 F.3d at 922 (Willett, J., dissenting) (quoting *Whole Woman's Health*, 280 F. Supp. 3d at 953). In doing so, it "turn[ed] the clock back to the pre-*Casey* days where state interests in fetal life were minimized to the point of nonexistence." *Id.* The district court admitted what it was doing: "The State's position is that the [abortion] right and the [State's] interest are entitled to equal weight. But this is incorrect. That the right is dominant over the interest is self-evident." *Whole Woman's Health*, 280 F. Supp. 3d at 953. And not only did the district court wrongly minimize the State's interest, its analysis

elevates the abortion right above other constitutional rights—even enumerated ones—which is far above what even *Roe* contemplated. Such serious error cannot stand.

A. States Have a Significant Interest in Protecting Fetal Life Throughout Pregnancy.

Like any other constitutional right, the right to abortion is *not* absolute. *See id.* at 913. *Roe* itself makes that clear: "The privacy right involved, therefore, cannot be said to be absolute. . . . the right of personal privacy includes the abortion decision, but . . . this right is not unqualified and must be considered against important state interests in regulation." *Roe v. Wade*, 410 U.S. 113, 154 (1973); *see also In re Abbott*, 954 F.3d 772, 784-86 (5th Cir. 2020) (affirming the abortion right is not unqualified and rejecting argument that abortion rights must be treated more favorably than other rights in a public health crisis). Nor is there a "constitutional right to any particular abortion procedure." *In re Abbott*, 956 F.3d at 713; *see also Gonzales*, 550 U.S. at 158 ("[T]he State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn.").

Neither is the right to abortion sacrosanct before viability. The district court asserted that "[t]he State's legitimate concern with the preservation of the life of the fetus is an interest having its primary application once the fetus is capable of living outside the womb." *Whole*

Woman's Health, 280 F. Supp. 3d at 953. But this analysis is flatly contrary to controlling precedent. The Supreme Court has made clear since *Casey* that the State has a legitimate interest "*from the outset of the pregnancy* in protecting the health of the woman and the life of the fetus that may become a child." 505 U.S. at 846 (emphasis added); *see also 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."). *Gonzales* itself upheld a ban on a gruesome procedure that applied to previability abortions. *Id.* at 156. Rather than correcting this erroneous analysis, the panel majority doubled down, "spurn[ing] what the Supreme Court has called the State's 'legitimate and substantial interest in preserving and promoting fetal life' as 'minimal at most.'" *WWH*, 978 F.3d at 913 (Willett, J., dissenting); *see also id.* at 911. Not only is "such breezy disregard . . . unserious," *id.* at 913 (Willett, J., dissenting), as explained above, it is contrary to established precedent.

The Supreme Court has been clear that States may assert their recognized interest in protecting the unborn by doing *exactly* what Texas and other States have done—prohibiting brutal and inhumane abortion procedures. As the Court explained in *Gonzales*, States can vindicate their interest in promoting "[r]espect for human life," by ensuring that abortion methods do not disrespect the humanity of a living human fetus,

though unborn. 550 U.S. at 159. So long as 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 the use of particularly "brutal" abortion procedures, *id.* at 160, States further their legitimate interest in promoting societal respect for unborn life. They also protect women from the deep grief many feel when they later discover how their unborn children were killed. *Id.* at 159-60. And they establish ethical boundaries for the medical profession as well. That concern is especially salient here, where the evidence in the record shows that abortion providers do not tell women that their second trimester abortion will involve pulling the limbs off their unborn child with forceps while she is alive and that the child bleeds to death in the process. ROA.4300-02, 4317-19, 4328-32. Instead, abortion clinics hide behind clinical terms and "coy euphemisms." *See WWH*, 978 F.3d at 912 (Willett, J., dissenting). As pointed out by *Gonzales*, the law at issue here also supports the State's interest in encouraging the medical profession to "find different and less shocking methods to abort the fetus." 550 U.S. at 160. Indeed, abortion providers did just that after *Gonzales* by prescribing one of the very alternative procedures proposed here—digoxin injections—as a way for clinics to comply with the law or avoid live births. *See WWH*, 978 F.3d at 926 (Willett, J., dissenting); ROA.1934, 1992, 4307, 4327, 4438-43, 4494,

4783. Texas's law is thus constitutional for the same reasons that *Gonzales* upheld the Partial Birth Abortion Ban Act.

Devaluing the State's interests as less important than a woman's unfettered access to a specific, needlessly brutal type of abortion commits the very judicial error the Chief Justice attributes to balancing in his *June Medical* concurrence: The district court (and the panel majority) "act[ed] as legislators, not judges," which "result[ed] in nothing other than an 'unanalyzed exercise of judicial will' in the guise of a 'neutral utilitarian calculus.'" *June Med.*, 140 S. Ct. at 2136 (Roberts, C.J., concurring in the judgment). The Court should correct this error.

IV. THE DISTRICT COURT USURPED THE STATE'S POLICYMAKING AUTHORITY IN AREAS OF MEDICAL UNCERTAINTY.

SB8 prohibits dilation and evacuation (D&E) abortions performed on a live fetus with forceps. *See* Tex. Health & Safety Code §§ 171.151–.153. Plaintiffs contend this is a *de facto* ban on all D&E abortions because, they claim, alternative procedures are unsafe, risky, and unreliable. But the record evidence of plaintiffs' statements to their patients and clinical practices contradicts their claims. *See, e.g.*, ROA.2047, 2169, 2247-49, 2774, 4307, 4312, 4314, 4327, 4421, 4438-43. Based on that evidence alone, there is no genuine uncertainty about whether alternatives exist that allow second trimester abortions to continue to be performed without violating Texas law. But even if there were a genuine dispute regarding those facts, Supreme Court precedent

requires that the State's judgment in weighing the risks, not a court's, carries the day. The district court's decision to ignore that precedent warrants reversal.

A. Even If Uncertainty Existed, the State Is Permitted to Prohibit that Barbaric Procedure.

Tearing apart a live fetus, which dies in the womb from bleeding to death while its limbs are being torn off, is gruesome and barbaric. *Gonzales* held that where a ban on a gruesome or barbaric procedure "allows, among other means, a commonly used and generally accepted method . . . it does not construct a substantial obstacle to the abortion right." 550 U.S. at 165. The *Gonzales* dissent took issue with the majority's reliance on feticidal injections as alternatives to the partial-birth abortion method at issue in that case, arguing that inducing fetal death by injection "poses tangible risk and provides no [health] benefit to the woman," and [i]n some circumstances, injections are 'absolutely [medically] contraindicated.'" *Id.* at 180 n.6 (Ginsburg, J., dissenting) (alteration in original) (citation omitted). But those arguments did not carry the day, and *Gonzales* instead provides a road map here.

Gonzales acknowledged "[t]here is documented medical disagreement whether the Act's prohibition [on partial-birth abortion] would ever impose significant health risks on women." *Id.* at 161-62. Thus, "the question bec[ame] whether the Act can stand while this medical uncertainty persists." *Id.* at 163. The Court's answer: "The

Court's precedents instruct that the Act can survive this facial attack." *Id.* Why? Because "[t]he Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty." *Id.* Otherwise, courts would be required to "'serve as the country's *ex officio* medical board with powers to approve or disapprove medical and operative practices and standards throughout the United States.'" *Id.* at 163-64 (quoting *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 518-19 (1989)). As Chief Justice Roberts reiterated in *June Medical*, this "'traditional rule'" is 'consistent with *Casey*.'" *June Med.*, 140 S. Ct. at 2136 (Roberts, C.J., concurring in the judgment) (quoting *Gonzales*, 550 U.S. at 163).

The State thus does not have to prove that alternatives to a banned abortion procedure are safer, beneficial, or available for every woman. *See Gonzales*, 550 U.S. at 164 ("Medical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts."); *Mazurek v. Armstrong*, 520 U.S. 968, 973 (1997) (per curiam) (upholding a restriction on the performance of abortions to licensed physicians despite the plaintiffs' contention that "all health evidence contradicts the claim that there is any health basis for the law."). Yet that is just the burden the district court placed on Texas. *See, e.g., Whole Woman's Health*, 280 F. Supp. 3d at 950 (finding that because "digoxin injection is not a feasible method of, in all instances, inducing

fetal demise . . .in all instances the procedure would create a substantial obstacle to [a] woman's right to an abortion.")

The Texas law does not prohibit D&E abortions altogether—it merely requires that they be performed more humanely by inducing death before a live fetus is dismembered with forceps. The record here establishes several safe, effective ways to do that. Disagreement among medical professionals on that point does not doom Texas's law. Rather, "[t]he medical uncertainty . . . provides a sufficient basis to conclude in this facial attack that the Act does not impose an undue burden." *Gonzales,* 550 U.S. at 164.

B. Even If Evidence of Fetal Pain Is Not Certain, a State May Legislate to Protect Against It.

A dispute in the medical literature regarding fetal pain does not preclude States from legislating to prevent it. Texas argues here that the possibility of fetal pain justifies its requirement that abortion doctors kill the fetus more humanely before ripping her apart with forceps while she is alive. The district court ignored that interest despite extensive record evidence. *See generally Whole Woman's Health*, 280 F. Supp. 3d at 938-54. The panel majority went even further astray, rejecting even the possibility of fetal pain "before at least 24 weeks LMP." *WWH*, 978 F.3d at 910. But that conclusion is inconsistent with *Gonzales*'s "traditional rule" that state legislatures, not courts, make that call.

Research refutes the panel majority's sweeping assertion of scientific fact. Less than a month before the panel majority opinion was issued, new research concluded fetal pain is evident in the second half of pregnancy and is possible earlier. *See* Carlo V. Bellieni, *Analgesia for fetal pain during prenatal surgery: 10 years of progress*, Pediatric Res. (Sept. 24, 2020).[6] It also rejects the theory presented by one of the Plaintiffs' experts in his three-year-old testimony that fetuses cannot feel pain until *birth* because they are in a constant state of sleep or sedation. *Id.*, *see also* ROA.2907-10.

The Bellieni article also notes that recently, a prominent researcher in the field who has "always excluded the possibility of fetal pain has changed his conclusions, due to the new evidence." *Id.* That researcher—who favors abortion rights—published an article explaining his change of heart:

> Overall, the evidence, and a balanced reading of that evidence, points towards an immediate and unreflective pain experience mediated by the developing function of the nervous system from as early as 12 weeks. That moment is not categorical . . . Nevertheless, we no longer view fetal pain (as a core, immediate, sensation) in a gestational window of 12-24 weeks as impossible based on the neuroscience.

Stuart W.G. Derbyshire & John C. Bockmann, *Reconsidering fetal pain*, J. Med. Ethics 46, 3-6 (2020).[7]

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[6] Available at https://www.nature.com/articles/s41390-020-01170-2.
[7] Available at https://jme.bmj.com/content/46/1/3.full.

The panel opinion is therefore already outdated. That demonstrates why it is a mistake for courts to make determinations in areas of developing science or medicine instead of deferring to the judgment of state legislatures. *See June Med.*, 140 S. Ct. at 2136 (Roberts, C.J., concurring in the judgment); *Gonzales*, 550 U.S. at 163. By making such determinations, courts handcuff States from responding to developing evidence. Legislatures, not courts, are more able to nimbly respond to advancements in science and technology. They can meet each session, review current evidence, and tailor policy accordingly. If courts take on that role, it could be years before precedent is overturned because of developments in science.

This Court should correct the panel majority's erroneous conclusion that States are powerless to protect the unborn from being killed by brutal and inhumane procedures when developing science says they may feel pain. The Court should also reemphasize proper constitutional roles and affirm that it is legislatures, not courts, that must make such policy choices. That applies even in the face of scientific uncertainty—and even when regulating abortion.

CONCLUSION

The Court should reverse the judgment below.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that on December 9, 2020, 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 5,508 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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