No. 17-935

IN THE

Supreme Court of the United States

PLANNED PARENTHOOD OF ARKANSAS AND EASTERN OKLAHOMA, d/b/a PLANNED PARENTHOOD GREAT PLAINS, ET AL.,

Petitioners,

v.

LARRY JEGLEY, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR CONSTITUTIONAL LAW PROFESSORS LEE C. BOLLINGER, ERWIN CHEMERINSKY, WALTER DELLINGER, MICHAEL C. DORF, DANIEL FARBER, JOANNA GROSSMAN, LEAH LITMAN, GILLIAN E. METZGER, JANE S. SCHACTER, SUZANNA SHERRY, GEOFFREY R. STONE, DAVID A. STRAUSS, LAURENCE TRIBE, AND MARY ZIEGLER AS AMICI CURIAE SUPPORTING PETITIONERS

KIMBERLY A. PARKER
ARIEL E. WARNER
MARK JIA
JOSHUA C. ABBUHL
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000

ALAN E. SCHOENFELD
Counsel of Record
WILMER CUTLER PICKERING HALE AND DORR LLP
7 World Trade Center
New York, NY 10007
(212) 937-7518
alan.schoenfeld@wilmerhale.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

Page(s)

DOCKETED CASES

OTHER AUTHORITIES

STATEMENT OF INTEREST OF AMICI CURIAE[1]

This case presents an issue that is of considerable importance to this Court as an institution, and to women in their everyday lives—whether courts and states remain bound by *Whole Woman's Health* v. *Hellerstedt*, 136 S. Ct. 2292 (2016). The court of appeals' decision threatens to empty *Hellerstedt* of any significance beyond its facts, even though *Hellerstedt* explicitly rejected several aspects of the legal analysis that the court of appeals had relied on in that case. Allowed to stand, the Eighth Circuit's decision could embolden other states and other circuits to ignore *Hellerstedt*'s clear directives.

Amici are constitutional law scholars who teach and/or write on the Fourteenth Amendment, including as it relates to the regulation of abortion, and who have a shared interest in identifying the proper standards of review governing such claims.

Amici are the following scholars:

Lee C. Bollinger, President, Columbia University;

Erwin Chemerinsky, Dean and Jesse H. Choper Distinguished Professor of Law, University of California at Berkeley School of Law;

Walter E. Dellinger III, Douglas B. Maggs Professor Emeritus of Law, Duke University School of Law;

---

[1] No counsel for a party authored this brief in whole or in part, and no entity or person, other than amici curiae and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for the parties received notice of amici's intent to file this brief at least 10 days prior to its due date. All parties consent to the filing of this brief.

Michael C. Dorf, Robert S. Stevens Professor of Law, Cornell Law School;

Daniel Farber, Sho Sato Professor of Law, University of California at Berkeley School of Law;

Joanna Grossman, Ellen K. Solender Endowed Chair in Women and the Law and Professor of Law, Southern Methodist University Dedman School of Law;

Leah Litman, Assistant Professor of Law, University of California, Irvine School of Law;

Gillian E. Metzger, Stanley H. Fuld Professor of Law, Director, Center for Constitutional Governance, Columbia Law School;

Jane Schacter, William Nelson Cromwell Professor of Law, Stanford Law School;

Suzanna Sherry, Herman O. Loewenstein Professor of Law, Vanderbilt Law School;

Geoffrey Stone, Edward H. Levi Distinguished Service Professor of Law, University of Chicago Law School;

David A. Strauss, Gerald Ratner Distinguished Service Professor of Law, University of Chicago Law School;

Laurence Tribe, Carl M. Loeb University Professor, Professor of Constitutional Law, Harvard Law School;

Mary Ziegler, Stearns Weaver Miller Professor, Florida State University College of Law.

Amici file this brief in their individual capacities; their institutional affiliations are listed for identification purposes only.

SUMMARY OF ARGUMENT

Arkansas law provides that every physician who provides an abortion-inducing drug must have a signed contract with a physician who has admitting privileges at a hospital and will handle any complications from the drug. There is no medical reason to apply that requirement to providers of medication abortion, which is extremely safe and rarely, if ever, results in complications that require emergency care. Doing so would also eliminate medication abortion in the State entirely, and eliminate abortion services at two of the State's three abortion facilities.

After making detailed factual findings on the law's lack of any medical basis and its effects on the availability of abortion, the district court preliminarily enjoined the requirement. The court of appeals vacated that injunction, insisting that the district court make additional particularized and unnecessary findings of fact that this Court has never required as part of the undue burden standard. This unwarranted departure from *Whole Woman's Health* v. *Hellerstedt*, 136 S. Ct. 2292 (2016), and other cases threatens to undermine this Court's clear instructions regarding the undue burden standard.

Hellerstedt should have put the debate over the undue burden standard to rest. The Eighth Circuit's error counsels in favor of granting this petition to resolve any lingering confusion or disagreement among the courts of appeals.

ARGUMENT

I. *HELLERSTEDT* CONFIRMED THE FRAMEWORK FOR ASSESSING ABORTION REGULATIONS FOR UNDUE BURDENS

Hellerstedt reaffirmed *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*'s standard for evaluating whether abortion regulations impose an undue burden on women's access to abortion. Under that framework, a court must consider the burdens and benefits of a challenged regulation. This requires the court to evaluate the degree to which a law impedes access to abortion and the degree to which a law advances the State's purported interest. From that evidence, the court can conclude whether the restriction imposes an undue burden on a woman's decision to have an abortion. This framework ensures that States with legitimate concerns about women's health or fetal life may legislate in ways that actually address those concerns, while at the same time preserving women's autonomy to decide to end their pregnancies.

A. *Hellerstedt* Intervened To Preserve *Casey*'s Undue Burden Standard

The Fourteenth Amendment's Due Process Clause protects a woman's fundamental liberty interest to decide whether to carry a pregnancy to term. *Roe* v. *Wade*, 410 U.S. 113 (1973). The Supreme Court reaffirmed this basic principle in *Casey*, stating that "matters [] involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment." *Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833, 851 (1992). But, recognizing that the State may also have

legitimate interests in regulating abortion, *Casey* "struck a balance" between those interests and a woman's right to choose to have an abortion. *Gonzales* v. *Carhart*, 550 U.S. 124, 146 (2007). Under the post-*Casey* consensus, a State may enact an abortion restriction to protect women's health or potential life, but only if that restriction does not constitute an undue burden on a woman's decision to have an abortion. *Casey*, 505 U.S. at 846, 877. A state regulation imposes an undue burden if it "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.* at 877.

In determining whether provisions of Pennsylvania state law imposed an "undue burden," the Court assessed both the weight of the State's interests as well as the limitations the State had created on women's access to abortion procedures. For example, in concluding that a Pennsylvania recordkeeping and reporting law did not constitute an undue burden, the Court relied on two key determinations: first, that patient information was "a vital element of medical research," and, second, that the attendant imposition on abortion access was *de minimis*. *See Casey*, 505 U.S. at 901-902 ("At most [the requirements] might increase the cost of some abortions by a slight amount."). In upholding an informed-consent requirement, the Court highlighted the benefits of ensuring that women be fully apprised of the consequences of their decision. *Id.* at 881-883. In invalidating a spousal-notification requirement, the Court recognized the burdens the requirement imposed on women in abusive relationships. *Id.* at 887-898. Summing up the undue burden standard, *Casey* made clear that while "the State may enact regulations to further the health or safety of a woman seeking an abortion," "[*u*]*nnecessary* health regulations that have

the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right." *Id.* at 878 (emphasis added).

Because the Court permitted States to regulate abortion to protect women's health and safety, certain States enacted abortion restrictions that purported to make abortion safer. Some laws would have required abortion providers to acquire admitting privileges at nearby hospitals. *See, e.g.*, *Jackson Women's Health Org.* v. *Currier*, 760 F.3d 448, 457-458 (5th Cir. 2014) (Mississippi). Others would have mandated that abortion facilities meet all regulatory requirements for ambulatory surgical centers. *See, e.g.*, *Whole Woman's Health* v. *Hellerstedt*, 136 S. Ct. 2292, 2314 (2016) (Texas).

Despite differences in form, these laws shared several important similarities. First, their purported medical justifications were unsupported in the scientific literature. The highly sterile environment of an ambulatory surgical center, for instance, offers no marginal health benefit to women receiving medication abortions, or other abortion procedures that do not require incisions. *See* ACOG et al. Amicus Br. 12, *Whole Woman's Health* v. *Cole*, No. 15-274 (U.S. Oct. 5, 2015) ("[T]here has never been a substantial argument in any accepted scientific or medical literature that further sterility precautions would improve the already exceptionally low complication rate associated with abortions."). Second, the principal effect of the laws was to force clinics to close: An admitting privileges law in Mississippi would have eliminated the State's sole abortion provider, *Currier*, 760 F.3d at 457-458, while a combination of both types of abortion restrictions would have forced approximately three quarters of Texas's forty abortion facilities to close, *Hellerstedt*, 136 S. Ct. at 2301. And state lawmakers were keenly

aware that the restrictions would impede women's access to reproductive care. For example, before enacting a restriction that applied only to abortion providers, the then-Texas Lieutenant Governor tweeted a map illustrating all of the Texas abortion clinics that would be forced to shut down, with the caption: "'We fought to pass S.B. 5 thru the Senate last night, & this is why!'" Greenhouse & Siegel, *The Difference a Whole Woman Makes: Protection for the Abortion Right After* Whole Woman's Health, 126 Yale L.J. F. 149, 153 (2016); *see also id.* at 151.

Courts and States offered different ways that these laws could be analyzed within *Casey*'s undue burden framework. The Seventh and Ninth Circuits held that the undue burden standard required considering the actual benefits and burdens of an abortion restriction. *See Planned Parenthood of Wis., Inc.* v. *Schimel*, 806 F.3d 908, 919-922 (7th Cir. 2015); *Planned Parenthood of Ariz., Inc.* v. *Humble*, 753 F.3d 905, 912 (9th Cir. 2014). In contrast, the Fifth Circuit maintained that it did not need to make independent findings about the benefits and burdens of abortion restrictions that purported to protect women's health. Under this approach, any abortion restriction with a hypothetical or theoretical connection to women's health passed rational-basis review, regardless of how tenuous the evidence revealed the health justifications to be. As the Fifth Circuit articulated, "[n]othing in the Supreme Court's abortion jurisprudence deviates from the essential attributes of the rational basis test, which affirms a vital principle of democratic self-government[:] It is not the courts' duty to second guess legislative factfinding[.]" *Planned Parenthood of Greater Tex. Surgical Health*

Servs. v. *Abbott*, 748 F.3d 583, 594 (5th Cir. 2014).[2] In another case, the Fifth Circuit criticized the district court for "evaluat[ing] whether the ambulatory surgical center provision would actually improve women's health and safety," declaring instead that "[i]n our circuit we do not balance the wisdom or effectiveness of a law against the burdens the law imposes." *Whole Woman's Health* v. *Lakey*, 769 F.3d 285, 297 (5th Cir. 2014).

This understanding of the undue burden test prompted the Court to grant certiorari in *Whole Woman's Health* v. *Hellerstedt*, 136 S. Ct. 2292 (2016).

B. *Hellerstedt* Confirmed That Courts Must Scrutinize Both The Benefits And Burdens Of Abortion Regulations

This Court rejected the Fifth Circuit's approach in *Hellerstedt*.

At issue in *Hellerstedt* were two purportedly health-justified Texas regulations, one requiring abortion providers to have admitting privileges at nearby hospitals, and the other requiring abortion clinics to meet the healthcare standards required of ambulatory surgical centers. *See Hellerstedt*, 136 S. Ct. at 2300. The district court had found that neither regulation provided meaningful benefits to women's health, *see Whole Woman's Health* v. *Lakey*, 46 F. Supp. 3d 673, 684 (W.D. Tex. 2014), and that the regulations would substantially limit women's access to abortion, *id.* at 680-683 (finding that the regulations would result in the closure of approximately thirty of Texas's forty abor-

[2] The Fifth Circuit considered whether the law imposed an undue burden only as a tertiary concern, after determining that the statute passed rational-basis review. 748 F.3d at 597-599.

tion clinics). The district court accordingly concluded that the regulations imposed an undue burden on abortion access and enjoined them. *Id.* at 687.

The Fifth Circuit vacated the injunction. In its view, the district court had committed numerous errors, such as failing to make an explicit finding that the regulations imposed a substantial burden on a particular "large fraction" of women, *Whole Woman's Health* v. *Cole*, 790 F.3d 563, 586 (5th Cir. 2015) (per curiam), failing to give sufficient deference to the state legislature, *id.* at 587, and balancing the regulation's burdens against its benefits, *id.* at 572. *See also Lakey*, 769 F.3d at 297 ("In our circuit, we do not balance the wisdom or effectiveness of a law against the burdens the law imposes.").

This Court reversed, finding the Fifth Circuit's application of the undue burden standard to be inadequate to safeguard women's constitutionally-protected interests. To prevent similar mistakes, the Court carefully explained each step of its undue burden analysis, and in doing so, provided clear instructions as to how the test should be applied.

At the heart of the Court's opinion is its instruction to "consider the burdens a law imposes on abortion access together with the benefits those laws confer." *Hellerstedt*, 136 S. Ct. at 2309. Otherwise, a court cannot determine whether a regulation's "benefits [are] sufficient to justify the burdens upon access that [the regulation] imposes." *Id.* at 2300. Thus, courts are supposed to identify the purported justification of an abortion regulation, consider the extent to which the regulation actually advances that interest, and compare the regulation's actual health benefits to the burdens it imposes on abortion access. *See id.* at 2311-2312, 2314-2316. Faithfully applying these instructions would pre-

vent States from imposing unnecessary regulations that lower the quality of care, substantially limit abortion access, and fail to provide health benefits.

The Court's analysis also provided several clear principles to guide the undue burden analysis. For example, the Court repeatedly emphasized the "virtual absence of *any* health benefit" from either Texas regulation, *Hellerstedt*, 136 S. Ct. at 2313 (emphasis added). *See id.* at 2311 (noting the regulation provides "no … health-related benefit"); *id.* at 2315 (noting the regulation "does not benefit patients"). Health-justified regulations that do nothing to improve women's health must be viewed with skepticism because they are likely to fall into the category of "[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion," of which *Casey* forewarned. *Id.* at 2309 (quoting *Casey*, 505 U.S. at 878); *see also Planned Parenthood of Wis., Inc.* v. *Van Hollen*, 738 F.3d 786, 798 (7th Cir. 2013) ("The feebler the medical grounds, the likelier the burden, even if slight, to be 'undue' in the sense of disproportionate or gratuitous.").

The Court also made plain that district courts need not make numerically specific findings like those the Eighth Circuit called for before finding that facial relief is warranted. In *Cole*, the Fifth Circuit had rejected the district court's analysis because the district court did not make an explicit finding that the regulations would impose an undue burden on a "large fraction" of Texas women. *See* 790 F.3d at 586. Even though the district court had weighed evidence of the regulations' benefits and burdens and found that a "*significant, but ultimately unknowable*" number of women would face an undue burden, the Fifth Circuit maintained that facial relief was not warranted because it was insuffi-

ciently clear that the regulations would burden a "large fraction" of women for whom the regulations were relevant. *See id.* This Court held that the district court developed a sufficiently robust record relating to the regulations' benefits and burdens, weighed the benefits against the burdens, and concluded that each regulation imposed an undue burden on abortion access. *See Hellerstedt*, 136 S. Ct. at 2310-2318.

These principles, taken together, demonstrate *Hellerstedt*'s key lesson that the undue burden analysis cannot ignore the actual benefits and burdens of an abortion restriction. If a regulation like this does not actually benefit women's health, and just makes it much harder for women to access a medical procedure universally deemed safe, then *Hellerstedt* compels the conclusion that the regulation is an undue burden on abortion access.

II. THE EIGHTH CIRCUIT MISAPPLIED *HELLERSTEDT*

The Eighth Circuit's vacatur of the district court's preliminary injunction rested on a fundamental misapplication of *Hellerstedt*. This Court should therefore grant certiorari and reverse. Indeed, given the Eighth Circuit's reliance on the very reasoning rejected in *Hellerstedt*, summary reversal would be appropriate.

A. The Eighth Circuit's Errors Are Identical To Those Committed By The Fifth Circuit In *Hellerstedt*

The Eighth Circuit's errors mirror those made by the Fifth Circuit in *Hellerstedt*. Those errors stem from the Eight Circuit's refusal to consider the burdens and benefits of Arkansas's contract-physician requirement.

Hellerstedt made clear that the Fifth Circuit's application of the undue burden standard was "incorrect" because it could be "read to imply that a district court should not consider the existence or nonexistence of medical benefits when considering whether a regulation of abortion constitutes an undue burden." 136 S. Ct. at 2309. Despite this instruction, the Eighth Circuit "f[ound] it unnecessary to reach the issue of the [regulation's] benefits." Pet. App. 15a n.9.

Hellerstedt also made clear that the undue burden standard does not require specific numerical estimates of the number of women who would forgo or postpone their abortions. 136 S. Ct. at 2312 (describing the burdens as the number of clinics closed and the locations of remaining abortion providers); *id.* at 2316-2317 (same); *id.* at 2313 (describing the number of women who would live farther from abortion clinics, which "do[es] not always constitute an 'undue burden'"); *see also id.* at 2310-2318; Litman, *Unduly Burdening Women's Health: How Lower Courts are Undermining* Whole Woman's Health *v.* Hellerstedt, 116 Mich. L. Rev. Online 50, 54 (2017) (noting that "[t]here were zero findings in *Hellerstedt* on the number of women who would be required to postpone abortions, or an estimate on the number of women who 'would be unduly burdened.'"). The Fifth Circuit had required courts to explicitly find that a specific "large fraction" of women would be unduly burdened. Texas urged this Court to adopt the Fifth Circuit's rule, but this Court declined to do so. *See Hellerstedt*, 136 S. Ct. at 2320 ("Texas claims that the provisions at issue here do not impose a substantial obstacle because the women affected by those laws are not a 'large fraction' of Texan women 'of reproductive age,' which Texas reads *Casey* to have required.").

Despite this clear guidance, the Eighth Circuit justified its decision not to consider the regulation's benefits on the ground that the district court had failed to make the very finding that the Fifth Circuit held was required and this Court held was not. According to the Eighth Circuit, "the district court was required to make a finding that the Act's contract-physician requirement is an undue burden for a large fraction of women seeking medication abortions in Arkansas." Pet. App. 11a. Because the district court did not provide precise estimates as to "how many women would face increased travel distances," "the number of women who would forgo abortions," or "the number of women who would postpone their abortions," *id.* 11a-14a, the Eighth Circuit viewed its undue-burden analysis as fatally flawed. The court of appeals therefore vacated the district court's injunction, and remanded so that the district court could make the required "concrete" findings. *Id.* 14a-16a.

The mismatch between the Eighth Circuit's specific requirements and *Hellerstedt*'s actual requirements is also apparent in the Eighth Circuit's discussion of increased travel distances. The Eighth Circuit rejected the district court's finding that many women would face increased travel distances because the district court failed to specify whether the phrase "women in the Fayetteville area" referred to the city, Washington County (where Fayetteville is located), or surrounding counties. Pet. App. 12a. In *Hellerstedt*, however, the Court relied on a district court opinion that did not further define the phrase, "women in the border communities of the Rio Grande Valley and El Paso," when concluding that those individuals would "be affected most heavily due to longer travel distances." *Lakey*, 46 F. Supp. 3d at 683. Other courts of appeals have relied on

similarly descriptive findings without requiring additional specificity or numerical findings. *Schimel*, 806 F.3d at 918 (finding that travel distances would burden "some women who live close to Milwaukee"); *Humble*, 753 F.3d at 916 (discussing travel burdens on "women in Northern Arizona"). The Eighth Circuit therefore erred by imposing a set of arbitrary and unnecessary findings of fact that are not required in the Court's case law.

Because of the Eighth Circuit's dubious requirement that courts concretely estimate the number of women who would forego abortions, among other things, the Eighth Circuit never considered whether the contract-physician requirement provided any benefits.[3] As a result, the Eighth Circuit's analysis failed to account for *Hellerstedt*'s directive that lower courts should take special care when confronted with regulations that provide no meaningful benefit to women's health. Regulations are more likely to fail the undue burden test "when viewed in light of the[ir] virtual absence of any health benefit." *Hellerstedt*, 136 S. Ct. at 2313. Here, the Eighth Circuit noted the district court's finding that "the contract-physician requirement provided few, if any, tangible medical benefits" and that "the [S]tate's overall interest in the regulation of medication abortions through the [contract-physician] requirement is low and not compelling." Pet. App. 6a (quotation marks omitted). Yet it never con-

[3] The Eighth Circuit did, however, suggest that, in considering the law's benefits, it could not and would not focus on whether the law improved health outcomes relative to abortion providers' existing protocols. Speculating that "Planned Parenthood could unilaterally decide to discontinue" the myriad protocols it has adopted to ensure patients' safety, the Eighth Circuit maintained that it could only assess whether the law improved health outcomes relative to "pre-existing law." Pet. App. 15a n.9.

sidered the regulation's nonexistent benefits, and thus could not have faithfully applied *Hellerstedt*.

The Court has long warned against "[*u*]*nnecessary* health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion." *Casey*, 505 U.S. at 878 (emphasis added). A regulation that provides few, if any, medical benefits is plainly "unnecessary." Permitting the Eighth Circuit to ignore the fact that the contract-physician requirement failed to improve women's health greatly increases the risk that such unnecessary regulations are sustained in the future.

B. The Eighth Circuit's Failure To Follow *Hellerstedt* Allowed A Manifestly Unconstitutional Abortion Restriction To Stand

Arkansas's contract-physician requirement fails under a straightforward application of *Hellerstedt*. Based on the evidence before it, the district court was "skeptical about *any* benefit conferred by th[e] provision," Pet. App. 62a (emphasis added), because the contract-physician requirement did not improve the continuity of care for women receiving medication abortions over current practices. *Id.* 56a-68a. The overwhelming scientific consensus is that medication abortions are safe. *See, e.g.*, American Congress of Obstetricians and Gynecologists, *ACOG Statement on Medication Abortion* (Mar. 30, 2016). The rate of complications during first-trimester abortions, including complications requiring hospital admission, is less than 0.25%. *Hellerstedt*, 136 S. Ct. at 2311. Like abortion regulations purportedly protecting women's health previously invalidated by the Court, the contract-physician requirement is a "solution in search of a problem." Pet. App. 62a.

In addition to offering no medical benefits, the contract-physician requirement will severely burden access to abortion and impact the quality of care that women seeking abortions will receive. The requirement would completely eliminate the option of medication abortion in Arkansas, even though it is a safe, common, and preferred method of abortion. This Court has stated on several occasions that eliminating such common alternatives can be probative of undue burdens. *See Gonzales*, 550 U.S. at 165 (reasoning that banning one abortion method was permissible because it did not affect a "commonly used and generally accepted method"); *Stenberg* v. *Carhart*, 530 U.S. 914, 945 (2000) (finding a ban on "the most commonly used method for performing previability second trimester abortions" was an undue burden). Losing access to a safe and widely preferred method of abortion will diminish the quality of reproductive care available to Arkansas women.

The requirement would also prevent two of the State's three abortion clinics from performing abortions at all. As a result, only one facility in Little Rock will remain to serve the entire state. The lack of abortion access in Fayetteville would force women in the area to travel 380-miles round trip (twice) to Little Rock (a total of 760 miles) to obtain a surgical abortion. Pet. App. 7a, 12a. The result is that many women will be unable to obtain abortions. Other women will have to significantly delay their abortions, increasing the risk to their health, *Hellerstedt*, 136 S. Ct. at 2311 (noting that the small risk of abortion-related complications nearly doubles between the first and second trimester, from less than 0.25% to 0.45%). Still others will likely seek care from "unlicensed rogue practitioners … at great risk to their health and safety." *Id.* at 2321 (Ginsburg, J., con-

curring). And those who are able to make it to Little Rock will likely see "quality of care decline[]" as a result of more concentrated demand. *Id.* at 2318.

A common-sense assessment of the district court's findings dictates the conclusion that the burdens imposed by the contract-physician requirement place a substantial obstacle in the path of all women seeking medication abortions in Arkansas and a similarly significant impediment for women seeking surgical abortions from a clinic that will now face concentrated demand. Given the high burdens and non-existent health benefits, the Eighth Circuit should have concluded that the contract-physician requirement would impose an undue burden.

C. The Court Should Grant Review And Reverse The Eighth Circuit's Decision

The Eighth Circuit's distortion of the undue burden standard will contribute to confusion among federal courts and allow lower courts to continue to undermine the constitutional rights protected by *Hellerstedt*.

In the absence of the Court's intervention, women seeking abortions in Arkansas will suffer irreparable harm. If the Court denies review, medication abortion will be completely unavailable, and two of the State's three abortion facilities will no longer provide abortions. The aftermath of *Hellerstedt* forewarns that these clinics may never again provide abortion. Litman, 116 Mich. L. Rev. Online at 59-60 & n.67 (citing Novack, *How Texas's Anti-Abortion Lawmakers Win Even While Losing in Court*, Texas Observer, June 20, 2017 (noting that the implementation of HB 2, the contested provision in *Hellerstedt*, resulted in closure of over half the state's clinics, and that only three have

reopened)). There is thus a genuine threat that abortion access will be permanently curtailed, regardless of whether these restrictions are ultimately invalidated. *Id.* at 60.

This Court should grant review and reverse the Eighth Circuit's decision. Given the similarity between the errors in the Eighth Circuit's reasoning and the Fifth Circuit's reasoning in *Hellerstedt*, summary reversal would be appropriate.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

KIMBERLY A. PARKER
ARIEL E. WARNER
MARK JIA
JOSHUA C. ABBUHL
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000

ALAN E. SCHOENFELD
Counsel of Record
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
New York, NY 10007
(212) 937-7518
alan.schoenfeld@wilmerhale.com

FEBRUARY 2018