No. 17-935

IN THE

Supreme Court of the United States

PLANNED PARENTHOOD OF ARKANSAS & EASTERN OKLAHOMA, d/b/a PLANNED PARENTHOOD GREAT PLAINS; and DR. STEPHANIE HO, M.D., on behalf of themselves and their patients,

Petitioners,

v.

LARRY JEGLEY, Prosecuting Attorney for Pulaski County; and MATT DURRETT, Prosecuting Attorney for Washington County, in their official capacities, their agents, and successors,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

REPLY BRIEF FOR PETITIONERS

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The State spends most of the Brief in Opposition protesting that "[t]his case is not *Whole Woman's Health*." BIO 18 (citing *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016)). But this case is *Whole Woman's Health* in every way that matters. Effectively replicating the "admitting privileges" requirement in *Whole Woman's Health*, the Arkansas statute here requires medication abortion providers to contract with a physician with hospital admitting privileges. Like Texas in *Whole Woman's Health*, Arkansas claims it enacted its statute to protect women's health. Yet the district court could not discern "any benefit conferred by this provision." Pet. App. 62a. The district court also found that the Arkansas requirement—again, just like Texas's admitting privileges requirement—would "have the effect of placing a substantial obstacle in the path" of women seeking abortions. *Id.* 54a.

As in *Whole Woman's Health*, the district court balanced the virtually nonexistent benefits and the burdens of the Arkansas restriction and determined that it could not withstand scrutiny. But the Eighth Circuit refused to allow the restriction to be enjoined even preliminarily, imposing a new prerequisite for such relief that district courts make "concrete" findings quantifying the number of women who "would forgo [abortions] or postpone" them. Pet. App. 14a.

Forced to defend this holding, the State cannot do so. The most it musters is the contention that abortion restrictions cannot be enjoined unless they would burden a "significant" number of women. But the district court's extensive findings make clear that the contracted physician requirement would eliminate

two of three abortion providers in the State, prevent all women throughout the State from obtaining a medication abortion, and require approximately half of the women who would otherwise have obtained medication abortions to instead travel hundreds of miles over two separate trips to receive surgical abortions. These effects would constitute a significant impact by any measure—one that at the very least justifies a preliminary injunction.

I. There is no meaningful difference between the "contracted physician" requirement here and the "admitting privileges" requirement in *Whole Woman's Health*.

The State strains to create daylight between its contracted physician requirement and the admitting privileges law in *Whole Woman's Health.* But the State's efforts fail. *Whole Woman's Health* mandates that courts "consider the burdens a law imposes on abortion access together with the benefits those laws confer." 136 S. Ct. at 2309. Here, the supposed benefits of the Arkansas requirement, the burdens it imposes, and the resulting balance are indistinguishable from those in *Whole Woman's Health.*

1. *Benefits*. Citing legislative findings, the State first asserts that medication abortion "presents a different risk profile than surgical abortion." BIO 4. *Whole Woman's Health*, however, flatly rejected the notion that "legislatures, and not courts, must resolve [such] questions." 136 S. Ct. at 2310. Rather, "the constitutionality of laws regulating abortion procedures" depends upon "evidence and argument presented in judicial proceedings." *Id.* And here the district court found—as other courts have—that medication abortion is "medically safe" and can be "a

safer option with a lower risk of complications" than surgical abortion. Pet. App. 35a, 37a; *see also, e.g.*, *Planned Parenthood Ariz., Inc. v. Humble*, 753 F.3d 905, 908 (9th Cir.), *cert. denied*, 135 S. Ct. 870 (2014) ("medication abortion is extremely safe and safer than the alternative surgical procedure") (citation omitted).

At any rate, the State's opaque reference to medication abortion's "unique risk profile," BIO 21, does nothing to establish that the contracted physician requirement would confer any benefit. In *Whole Woman's Health*, this Court noted that the State did not identify "a single instance in which the new requirement would have helped even one woman obtain better treatment." 136 S. Ct. at 2311-12. So too here. Not one of Arkansas's medical experts identified any instance where the contracted physician requirement would have helped even a single patient. *See, e.g.*, Pet. App. 67a. And after reviewing that evidence, the district court found that "the contract-physician requirement provided few, if any, tangible medical benefits." *Id.* 6a. Ignoring these findings, as the State does, does not make them go away—much less establish that they are "clearly erroneous," Fed. R. Civ. P. 52(a)(6).[1]

2. *Burdens*. The State cannot differentiate the burdens that the contracted physician requirement would impose from those that the admitting privileges requirement in *Whole Woman's Health* imposed.

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[1] Contrary to the State's assertion, petitioners do not "acknowledge that the contract-physician requirement mandates 'good medical practice' and will benefit patients." BIO 7-8; *see also id.* 21. Rather, petitioners used that phrase to describe their nurse-staffed phone line, required by a separate Arkansas regulation. Pet. 7 n.3.

a. The law in *Whole Woman's Health* would have required the majority of Texas's abortion clinics to stop providing services. 136 S. Ct. at 2301. The district court here likewise found that the Act would cause two of the State's three abortion providers to stop providing abortions altogether. Pet. App. 93a. "[A]ll three Arkansas health centers [would] no longer offer medication abortion," thereby leaving women with a single location where they could obtain only surgical procedures. *Id.*

Although the Eighth Circuit accepted these findings, Pet. App. 6a, the State suggests that insufficient evidence supports them, BIO 6 n.3. But petitioners proved that if the contracted physician requirement were to take effect, Arkansas would be left with a "sole abortion provider" that "would only administer surgical abortions." Pet. App. 6a. As the district court found, petitioners first exhausted their "physician contacts throughout Arkansas," and then sent a letter to OBGYNs throughout the State seeking a contracted physician. *Id.* 37a. They obtained no positive responses. *Id.*

The State now grumbles that the letter sent to OBGYNs did not explicitly offer payment—an argument not raised below, and therefore waived. At any rate, this Court did not consider financial incentives in its analysis of the admitting privileges restriction in *Whole Woman's Health*. Instead, the Court recognized that the local hostility associated with abortion prevented the plaintiffs from complying with the admitting privileges requirement. 136 S. Ct. at 2312. That same public hostility problem is present here. *See* Pet. App. 37a-38a. Physicians in Arkansas have declined to contract with petitioners because

they would "risk being ostracized from their communities and face harassment and violence." *Id.*

This reality also disposes of the State's contention that Arkansas's contracted physician requirement should be sustained because it is comparable to Texas's working arrangement provision, which was not challenged in *Whole Woman's Health*. BIO 20-21. Unlike the Arkansas law, the Texas provision allows physicians to enter a working arrangement *without* public disclosure. *See* 25 Tex. Admin. Code § 139.56 (2009) (working arrangement provision does not require a written contract, nor that the abortion provider distribute the physician's name and contact information to patients).

b. The State also disputes that the travel burdens that the clinic closures would cause here are comparable to those in *Whole Woman's Health*. BIO 23-24. The State is again mistaken.

In *Whole Woman's Health*, the Court concluded that requiring women to make one roundtrip drive between 300 and 400 miles long, considered alongside other burdens and in light of the "virtual absence of any health benefit," demonstrated that the admitting privileges requirement imposed an undue burden. 136 S. Ct. at 2313. The district court correctly reached the equivalent conclusion here. Pet. App. 68a-69a. Travel from Fayetteville (where abortions would no longer be available) to Little Rock (where the only remaining abortion provider in Arkansas would be) is 380 miles roundtrip. *Id.* 92a. And because of Arkansas's waiting period requirement, women would have to make this trip not just once, but twice. Pet. 18; *see also id.* 10-11 (laying out negative consequences following from increased travel burdens); Pet. App. 34a-35a (same).

The State suggests that women could reduce their travel burden by going instead to Tulsa, Oklahoma—a 226-mile roundtrip journey from Fayetteville—to obtain abortions. BIO 7; *see* Pet. App. 104a (driving distance). But the obligation to respect constitutional rights "cannot be cast by one State upon another, and no State can be excused from performance by what another State may do or fail to do." *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 350 (1938). Therefore, the district court here correctly concluded—in line with *Whole Woman's Health*—that "the proper formulation of the undue burden analysis focuses solely on the effects within the regulating state." Pet. App. 102a-103a (quoting *Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 457 (5th Cir. 2014), *cert. denied*, 136 S. Ct. 2536 (2016)).

Moreover, the State's suggestion that women go to another state to obtain abortions—despite Arkansas's inability to regulate beyond its borders—belies its claim that the contracted physician requirement is designed to protect women's health. As the district court in *Whole Woman's Health* put it: "If the State's true purpose in enacting the [requirement at issue] is to protect the health and safety of [the State's] women who seek abortions, it is disingenuous and incompatible with that goal to argue that [the State's] women can seek abortion care in a state with lesser regulations." *Whole Woman's Health v. Lakey*, 46 F. Supp. 3d 673, 685-86 (W.D. Tex. 2014).

II. The Eighth Circuit had no basis for demanding concrete findings regarding the number of women who would forgo or postpone abortions.

Turning at last to the question presented, the State strangely suggests that petitioners do not

challenge "the Eighth Circuit's conclusion that the district court did not make findings necessary to justify facial relief." BIO 25. But the correctness of that conclusion is exactly what petitioners challenge. And the Eighth Circuit's conclusion is flatly contrary to this Court's precedent.

1. The State does not seriously defend the Eighth Circuit's demand for concrete findings regarding the number of women whom the contracted physician requirement would cause to "forgo" or "postpone" abortions, Pet. App. 14a. Nor could it. The district court in *Whole Woman's Health* explained that it was "impossible to divine exactly how many women" would have been forced by Texas's admitting privileges law to forgo abortions. *Whole Woman's Health v. Lakey*, 46 F. Supp. 3d at 683. It nonetheless enjoined the law because a "significant but ultimately unknowable" number of women would be unduly burdened. *Id.* at 686. This Court upheld that permanent injunction, also without quantifying the number of women who would have had to forgo or postpone abortions.

2. The State is left, therefore, to claim that petitioners failed to show that a "significant" number or "large fraction" of women would be unduly burdened by the requirement. BIO 25-26. But the district court's findings clearly meet that test.

a. As the Eighth Circuit recognized, "the 'relevant denominator' here is women seeking medication abortions in Arkansas," for whom the contracted physician requirement is an "actual rather than an irrelevant restriction." Pet. App. 11a (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 894-95 (1992)). The contracted physician requirement would unduly burden *all* of these women because it would

deny them a "medically safe," non-invasive procedure available "very early in the pregnancy." Pet. App. 35a, 46a. It would require all women who choose abortion to have a surgical procedure, without any attendant medical benefit. Common sense dictates that being required to undergo surgery for no medically necessary reason is an undue burden. *Cf. Birchfield v. North Dakota*, 136 S. Ct. 2160, 2176-78, 2184-85 (2016) (blood tests that "pierc[e] the skin" are "significantly more intrusive" than breath tests and thus require warrants).

Citing *Gonzales v. Carhart*, 550 U.S. 124 (2007), the State objects that women have no right "to use particular abortion methodologies." BIO 30. But *Gonzales* announced no such sweeping proposition. Instead, *Gonzales* held that the government may bar a seldom-used abortion procedure used later in pregnancy when the ban advances important state interests and "implicates additional ethical and moral concerns that justify a special prohibition." *Gonzales*, 550 U.S. at 158. None of this is present here. *Gonzales* most certainly does not support a law effectively banning a common, safe, early, and non-surgical method of abortion, especially when that law has been found *not* to advance any state interest. *See* Pet. App. 62a.[2]

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[2] The State also relies on a decision from the Sixth Circuit, *Planned Parenthood Southwest Ohio Region v. DeWine*, 696 F.3d 490 (6th Cir. 2012). *See* BIO 29. But the Ohio law upheld in *DeWine*, unlike the Arkansas requirement here, did not result in an outright ban on medication abortion in the state. Rather, it banned one method of medication abortion for two weeks of pregnancy. *DeWine*, 696 F.3d at 508 (Moore, J., dissenting in part). In any event, *DeWine* predates *Whole Woman's Health*.

b. Even if having to undergo surgery instead of taking medication were not alone an undue burden when no medical benefit results, the contracted physician requirement still would impose an undue burden on a large fraction of Arkansas women who would otherwise obtain medication abortions. Approximately one-half of women who seek medication abortions in Arkansas receive care in Fayetteville. *See* Pet. App. 85a-86a. Because the district court found that the contracted physician requirement would cause the Fayetteville clinic to stop providing that service, women who would have otherwise sought abortions there would have to travel back and forth to Little Rock (twice) for surgical procedures. *Id.* 93a. Just as in *Whole Woman's Health*, that increased travel burden, when "taken together with other[] [burdens] that the closings [would bring] about, and when viewed in light of the virtual absence of any health benefit," establish an undue burden for all Fayetteville-area residents who would have to go to Little Rock. 136 S. Ct. at 2313.

The State's only response is that when the district court catalogued the consequences of these increased travel distances, it said that "some women"—as opposed to a "significant" number of women—would encounter various obstacles. BIO 25-27. But the district court used the phrase "some women" not to mean a small number of women, but rather to describe the distinct groups who would be burdened by increased travel in different ways. So, for example, it contrasted "some women" who would be "delayed by the increased travel distances and increases in costs," Pet. App. 34a, with other women who would be unable to make the trip at all, *id.* 90a-91a. And the district court's findings just recounted make clear that the

number of women seeking medication abortions who would be unduly burdened by the contracted physician requirement is significant by any measure.

3. At the very least, the district court's twenty pages of findings are more than sufficient to justify its preliminary injunction. The State, in fact, never answers petitioners' contention that preliminary injunctions may be entered based on "evidence that is less complete than in a trial on the merits." Pet. 23 (quoting *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981)).

Even if this Court did nothing more than reinforce the rules for preliminarily enjoining abortion restrictions enacted under a pretext of protecting women's health, that would be well worth the effort. Arkansas is not alone in passing such laws in recent years. *See* Pet. 26 n.11. Allowing these laws to take effect makes it more difficult to obtain abortions and can require women to have less safe procedures later in their pregnancies. And the longer it takes for an unconstitutional law to be nullified, the more women will be denied access to abortion altogether. *See, e.g.*, *Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 795-96 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 2841 (2014).

Furthermore, forced closures can also make it difficult or impossible for clinics to resume services when a law is later held unconstitutional. During the *Whole Woman's Health* litigation, for example, the Texas admitting privileges requirement forced a clinic in El Paso to close. Over the next several months, the clinic had to "lay off its staff, move its records and equipment into storage, cancel its contracts with vendors, and give up its lease and its license." *Whole*

Woman's Health v. Cole, 790 F.3d 563, 580 n.20 (5th Cir. 2015). Preliminary injunctions are a vital means of preventing such harms.

III. The Eighth Circuit's decision reinstates a conflict among the federal courts of appeals.

When this Court decided *Whole Woman's Health* two years ago, it resolved a circuit split over how to analyze abortion restrictions enacted in the name of women's health. *See* Pet. 24-26. The Eighth Circuit's decision has reopened this split by requiring district courts to undertake the unnecessary—and likely "impossible," *Whole Woman's Health v. Lakey*, 46 F. Supp. 3d at 683—task of concretely estimating the number of women whom an abortion restriction would cause to "forgo" or "postpone" abortions, Pet. App. 11a-13a. This decision conflicts with those of the Seventh and Ninth Circuits, which (consistent with *Whole Woman's Health*) balance the benefits against the burdens without requiring such numerical estimates. Pet. 25.

The State says this is not "the kind of deep split" that warrants review. BIO 37. But the Court granted review in *Whole Woman's Health* to resolve the same split (the only difference being that the Fifth Circuit, instead of the Eighth, disagreed with the Seventh and Ninth Circuits). If this Court does not summarily reverse, it should grant plenary review to settle this conflict once and for all.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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