No. 18-837

IN THE

# Supreme Court of the United States

SCOTT HARRIS, IN HIS OFFICIAL CAPACITY
AS STATE HEALTH OFFICER, ET AL.,

*Petitioners*,

—v.—

WEST ALABAMA WOMEN'S CENTER, ET AL.,

*Respondents.*

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

## BRIEF IN OPPOSITION


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## QUESTION PRESENTED

An Alabama statute prohibits physicians from performing an abortion using the dilation and evacuation ("D&E") method, "the most commonly used method for performing previability second trimester abortions," *Stenberg v. Carhart*, 530 U.S. 914, 945 (2000), and the method used for 99% of abortions occurring at and after 15 weeks of pregnancy in Alabama. Following a bench trial, the district court found that the ban would eliminate previability abortion access in the state starting at 15 weeks of pregnancy, because the procedures proposed by Petitioners for complying with the law are not feasible and would, if used, subject women to "'significant health risks.'" Pet. App. 87a (quoting *Gonzales v. Carhart*, 550 U.S. 124, 161 (2007)).

The question presented is:

Whether the Eleventh Circuit correctly held that a ban on the "usual abortion method in [the second] trimester," *Gonzales*, 550 U.S. at 135, is unconstitutional as applied to Respondents, where all three of the proposed means for complying with the law are not feasible and would subject women to significant health risks?

## PARTIES TO THE PROCEEDING

Petitioners, defendants in the district court and appellants in the court of appeals, are Scott Harris, in his official capacity as Alabama State Health Officer; Steven T. Marshall, in his official capacity as Alabama Attorney General; Hays Webb, in his official capacity as District Attorney for Tuscaloosa County, Alabama; and Robert L. Broussard, in his official capacity as District Attorney for Madison County, Alabama.

Respondents, plaintiffs in the district court and appellees in the court of appeals, are West Alabama Women's Center, on behalf of itself and its patients; Willie J. Parker, M.D., on behalf of himself and his patients; Alabama Women's Center, on behalf of itself and its patients; and Yashica Robinson White, M.D., on behalf of herself and her patients.

## RULE 29.6 CORPORATE DISCLOSURE STATEMENT

No respondent has a parent corporation and no publicly held company owns 10% or more of any respondent corporation's stock.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### CASES

**STATUTES**

## INTRODUCTION

This case concerns Respondents' challenge to an Alabama statute (the "Act") banning the principal second-trimester abortion method, dilation and evacuation ("D&E"). That procedure is not only the most commonly used second-trimester abortion method, *see Gonzales v. Carhart*, 550 U.S. 124, 135 (2007), it is the only outpatient abortion method available in Alabama starting at 15 weeks, accounting for 99% of abortions in the state from that point onward. Throughout this case, Petitioners conceded that a ban on D&E without feasible, safe alternatives is unconstitutional, and they rested their defense of the Act on the factual contention that there are three medical procedures physicians could safely rely upon to continue providing abortions at and after 15 weeks without triggering the ban. The district court heard extensive expert testimony on the factual basis for this assertion at a bench trial and, in its detailed and well-supported findings, determined that Petitioners' assertion is incorrect. Like every fact-finder to have addressed the issue, the district court found that the procedures are infeasible and would, if used, subject women to significant health risks. The district court thus found that enforcement of the statute would cause Alabama women to "lose their right to pre-viability abortion access at or after 15 weeks," thereby imposing an insurmountable obstacle to abortion. Pet. App. 120a.

In a unanimous opinion authored by Chief Judge Edward Earl Carnes, the court below concluded that the ban imposes an unconstitutional undue burden. Faithfully applying this Court's precedents to the facts established by the district court's detailed fact-finding, the court of appeals held

that the substantial and insurmountable obstacles to abortion access imposed by the Act are unconstitutional. That decision is correct under long-established precedent. Further, the decision does not conflict with any decision of any federal court of appeals or state court of last resort, and Petitioners do not contend otherwise. At base, the petition is premised on Petitioners' disagreement with the district court's detailed factual findings—findings amply supported not only by the medical evidence, but by the concessions of Petitioners' own medical expert. Yet neither here nor before the court of appeals have Petitioners challenged any finding as clearly erroneous, and in any event, Petitioners' disagreement with the district court's findings does not warrant this Court's review.

The petition should be denied.

## COUNTERSTATEMENT OF THE CASE

### A. Factual Background

Respondents are two board-certified obstetrician-gynecologists (the "Physicians") and the clinics where they practice (the "Clinics"). The Clinics are two of five abortion clinics in Alabama. These five clinics collectively provide over 99% of abortions in the state. Pet. App. 83a–85a. Abortion services are all but unavailable in Alabama hospitals; fewer than 0.3% of abortions in the state are performed in hospitals. *Id.*; *see also* Pet. App. 126a n.39. The respondent Clinics are the only abortion clinics in Alabama that perform abortions at and after approximately 15 weeks, and they provide virtually

all abortions in Alabama from this point onward. Pet. App. 85a.[1] Although most of the Clinics' patients seek abortions prior to 15 weeks, the Clinics care for hundreds of women seeking abortion services at and after 15 weeks each year. Pet. App. 45a. All such abortions are performed using the D&E method that the challenged statute would prohibit. *Id.*

Most of Respondents' patients are low-income. Pet. App. 65a. The Clinics' patients seek abortion care for a variety of medical, familial, and personal reasons. Tr. Vol. I at 93–94; Doc. 54-5, ¶ 11. Moreover, for many women seeking abortions after the first trimester, there are additional considerations at play, including the diagnosis of a serious health condition in the woman or fetus later in pregnancy; difficulty making financial or logistical arrangements to access care; and difficult social circumstances, including domestic violence. Tr. Vol. I at 93–94; Doc. 54-5, ¶ 11.

### B. The Act

Enacted in 2016, Alabama Code Section 26-23G-3 criminalizes intentionally performing a "dismemberment abortion," defined as "dismember[ing] a living unborn child and extract[ing] him or her one piece at a time from the uterus through use of clamps, grasping forceps, tongs, scissors, or similar instruments." Ala. Code § 26-23G-2(3). The Act's sole exception is for an abortion that is "necessary" to "avert [the woman's] death or to avert serious risk of substantial and

[1] Like Petitioners and the courts below, Respondents refer to weeks of pregnancy as measured from the last menstrual period.

irreversible physical impairment of a major bodily function, not including psychological or emotional conditions," *id.* §§ 26-23G-2(6), 26-23G-3(a). The Act's penalties include two years' imprisonment and $10,000 in fines. *Id.* § 26-23G-7.

Although "dismemberment abortion" is not a recognized medical term, it is undisputed that the procedure prohibited by the Act is D&E, Pet. App. 76a, the "usual abortion method" in the second trimester, *Gonzales*, 550 U.S. at 135. Before 15 weeks, a surgical abortion is performed using the aspiration method, which entails dilating a woman's cervix and using suction to empty the contents of the uterus. Starting around 15 weeks, suction alone is insufficient, and physicians performing outpatient abortions use the D&E method. Pet. App. 82a–83a. To perform a D&E, the physician dilates the cervix only enough to allow the safe passage of instruments, which the physician uses to remove the fetus and other contents of the uterus, often in conjunction with suction. *Id.* "Because the opening of the cervix is too small for the entire fetus to pass, separation of fetal tissues occurs during the process of removing the fetus." Pet. App. 82a. As such, D&E constitutes an illegal "dismemberment abortion" under the Act. *Id.*

Starting around 15 weeks, D&E is the only abortion method that can be performed outside a hospital; it accounts for 95% of second-trimester abortions nationally and 99% of abortions after 15 weeks in Alabama. Pet. App. 83a–84a.[2] D&E is the

[2] As discussed below, an uncommon method, D&X, involves dilating the cervix enough to remove the fetus intact. Pet. App.

standard of care for second-trimester abortion according to the American Congress of Obstetricians and Gynecologists, which opposes D&E bans like the Act.[3] Because the Act prohibits the only outpatient abortion method available from 15 weeks onward, and because there are no feasible, safe alternatives, the district court found that the Act's enforcement would result in women being "altogether unable to access a safe abortion at or after 15 weeks of pregnancy." Pet. App. 108a.

### C. Decisions Below

1. Before the Act took effect, Respondents sought a temporary restraining order and preliminary injunction. Petitioners conceded that "[i]f there [is] no safe and effective way" to continue to perform D&E abortions under the Act, then "this law would be unconstitutional." Pet. App. 19a. Their defense of the Act rested on the factual assertion that physicians could cause fetal demise before performing a D&E and thereby continue providing abortions without triggering the ban, which applies by its terms only when the fetus is "living." Ala. Code § 26-23G-2(3). Petitioners argued that physicians could use three additional procedures

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82a n.19. This method was banned by federal law in 2003. *Gonzales*, 550 U.S. at 168. In contemporary medicine, the only alternative to D&E is labor induction. Pet. App. 84a. Induction can only be performed in a hospital over a period of many hours or days; it is "more expensive, difficult, and stressful for the patient"; and it is all but unavailable to women in Alabama. Pet. App. 84a & n.22. Petitioners have not suggested that it is a feasible alternative to D&E. Pet. App. 84a n.22.

[3] *See* Am. Cong. Obstetricians and Gynecologists C.A. Amicus Br. 8.

to cause demise before performing the D&E procedure: injection of potassium chloride, injection of digoxin, or umbilical cord transection. If fetal demise could be achieved in these ways, Petitioners argued, the ban would not burden women's right to obtain a second-trimester abortion. Respondents disputed the feasibility and safety of all three procedures. In particular, Respondents argued that the procedures could not be used to achieve fetal demise because they were extremely challenging, ineffective, and/or experimental, and each procedure would, if used, subject women to significant health risks. To resolve these factual questions, the district court held an evidentiary hearing at which four expert obstetrician-gynecologists testified.

Based on this expert testimony and the record evidence, the district court found that the core assertions underlying Petitioners' defense of the Act—that the proposed procedures afford a feasible means for the Physicians to continue providing abortions from 15 weeks onward, and that the procedures would not subject patients to significant health risks—were factually incorrect. Pet. App. 111a, 120a. In its decision, the court made extensive factual findings, resulting in the conclusion that because no feasible and safe alternatives to D&E are available, the Act would cause Alabama women to "lose their right to pre-viability abortion access at or after 15 weeks." *Id.*[4]

[4] The district court initially blocked enforcement of the Act in a preliminary injunction decision. After the parties moved to consolidate the preliminary injunction hearing with the trial on the merits, the court expanded upon its findings and conclusions in its final decision. Pet. App. 38a.

In particular, the court found that, like the Physicians, most doctors performing D&Es nationwide do not attempt to induce fetal demise using any of Petitioners' proposed procedures. Pet. App. 113a. Petitioners assert that fetal demise procedures "are commonly practiced in second trimester abortions," Pet. 10, but the district court found not only that the procedures are "rare," Pet. App. 113a, but also that they are almost never performed in the 15- to 18-week period, when the vast majority of D&Es occur, Pet. App. 110a–11a.[5] The minority of physicians who do attempt to induce demise generally do so late in the second trimester in order to comply with the federal Partial-Birth Abortion Ban. Tr. Vol. I at 66–67. But importantly, under that law, when a doctor cannot induce demise because, for example, the demise procedure "failed to work," the doctor "still ha[s] the option of performing standard D&E without fetal demise." Pet. App. 111a–12a. That is not an option under the Act. *See* Ala. Code § 26-23G-3(a).

The court made detailed findings explaining that none of Petitioners' proposed procedures is a feasible means to ensure fetal demise, and that each would, if used, subject women to significant health

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[5] The testimony Petitioners cite for their assertion that fetal demise procedures are common says precisely the opposite—namely, that only "a minority of doctors" attempt demise procedures prior to performing a D&E. Tr. Vol. II at 90. Petitioners' own expert testified that he had no reason to think the procedures are "in widespread use," and that at the University of Alabama Hospital at Birmingham where he practices, they do not use "any method to induce fetal demise on a regular basis." Tr. Vol. II at 135–38, 151.

risks. As detailed below, those findings were supported not only by the weight of the medical evidence, but by numerous concessions of Petitioners' own expert.

*a. Potassium Chloride Injection*

The first procedure, potassium chloride injection, requires an "invasive and painful" injection with a "long surgical needle" through the woman's abdomen and, under ultrasound guidance, into the fetal heart, which is extremely small. Pet. App. 92a–93a. The district court found that the Physicians cannot use potassium chloride injections to comply with the Act because the procedure is "extremely challenging" to perform safely and is practiced only by highly trained subspecialists, Pet. App. 93a–94a, as conceded by Petitioners and their expert, Pet. 18 (the procedure requires specialized training); Tr. Vol. II at 118–19 (Petitioners' expert testifying that the procedure is "technically difficult"). As the court found, the procedure is taught only in specialized three-year maternal-fetal-medicine fellowship programs that train obstetricians to care for patients with high-risk pregnancies. No training outside such programs is available, and even if it were, the court found that it would take years for the Physicians to become proficient. Establishing competency would require observing as many as 100 to 200 injections, yet "even a major academic hospital such as the University of Alabama at Birmingham has a caseload of fewer than 10" such procedures annually. Pet. App. 94a–95a. The court further found that even for trained specialists, such injections are impossible to perform on patients with certain common physical traits—including obesity and fibroids (benign uterine growths)—because these

conditions make it difficult or impossible to inject the fetal heart. Pet. App. 95a. Approximately 40% of the Clinics' patients are obese and more than half have fibroids. Pet. App. 96a.

The court further found that using potassium chloride injections would subject women to significant health risks. Pet. App. 95a. Potassium chloride can cause cardiac arrest if inadvertently injected into the woman's vasculature. *Id.* (reviewing report of a woman who "suffered cardiac arrest because potassium chloride was accidently injected into one of her blood vessels"). Infection—including sepsis, a life-threatening systemic infection—is likewise among the procedure's "inherent risks." *Id.*

*b. Digoxin Injection*

The district court found that Petitioners' second proposed fetal demise procedure, digoxin injection, likewise fails to afford a feasible means to provide D&E under the ban and would subject women to significant health risks. Digoxin is administered by a "painful and invasive" intra-abdominal injection into the fetus or amniotic fluid using a long surgical needle. Pet. App. 97a. It is not a feasible means to comply with the Act, the court found, because the drug has an unacceptably high failure rate of up to 15 percent. Pet. App. 98a.[6] A physician cannot know in advance which injections will work and which will not, and administering multiple injections when the drug fails "is not acceptable medical practice" because, as Petitioners'

[6] *See also* Tr. Vol II at 142 (Petitioners' expert conceding that the drug fails in up to ten percent of cases); Pet. 23 n.6 (citing evidence showing failure rate of 13%).

expert conceded, the safety and efficacy of consecutive injections has never been studied. *Id.*; *see also* Tr. Vol. II at 142. The court further found that while 80% of D&Es in Alabama take place before 18 weeks, digoxin is—as acknowledged by Petitioners' expert—virtually untested at that point in pregnancy; as a result, its use would be medically unsupported "experimenta[tion]" for the vast majority of D&Es. Pet. App. 99a. Additionally, as with potassium chloride, injections of digoxin cannot be performed on many women with common physical traits such as obesity or uterine fibroids, which prevent the needle from reaching the target. Pet. App. 98a; *see also* Tr. Vol. II at 143 (Petitioners' expert so conceding). And because digoxin takes up to 24 hours to cause demise—when it works at all—it would extend the time for "the procedure from one day to two," necessitating an additional trip to the clinic beyond the two trips, at least 48 hours apart, already mandated by Alabama law. Pet. App. 102a–03a. The court found that the additional "financial and logistical burden" of making three trips over four days would prevent some low-income women from having "an abortion at all." Pet. App. 103a–05a.[7]

The court also found that digoxin subjects women to "significant health risks." Pet. App. 99a. As

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[7] The petition asserts that digoxin "is routinely performed" by one of the Physicians. Pet. 25. That is false. One of the Physicians has never performed the procedure. Tr. Vol. I at 201. The other last administered the drug seven years ago, and even then (1) never did so before 18 weeks, when most D&Es occur (because it is untested before then), and (2) when digoxin failed to cause demise, performed a D&E anyway, which is forbidden by the Act. Pet. App. 101a–02a.

Petitioners' own expert conceded, digoxin injections expose women to a "5-10% risk of spontaneous onset of labor, rupture of the membranes or development of intrauterine infection," along with risks of "bleeding, infection, and inadvertent penetration of the bowel or bladder with the needle." Doc. 81-1, ¶ 9. And, as the district court recognized, major medical associations, including the Society of Family Planning, have disapproved of digoxin use because of "the harm of the documented increase in spontaneous labor and extramural delivery" triggered by the drug. Pet. App. 100a–01a (quotation marks and citation omitted). The court found "no dispute among experts" that digoxin injections cause a 600 percent increase in hospitalization among D&E patients. Pet. App. 99a–100a.

*c. Umbilical Cord Transection*

The court found that the third proposed procedure, severing or transecting the umbilical cord, is likewise not a feasible means to comply with the Act, and that its use would subject women to significant health risks. Pet. App. 85a–92a. As an initial matter, cord transection is not "commonly used and generally accepted." *Gonzales*, 550 U.S. at 165. Instead, as the court found, "it is, for all intents and purposes, an experimental procedure." Pet. App. 88a, 91a. In the world's medical literature, there is just one "flaw[ed]" and "unreliable" study on cord transection. Pet. App. 89a.

Moreover, the court found that cord transection is "technically difficult, and sometimes impossible," to perform. Pet. App. 85a. Cord transection "requires a physician to identify, reach, and transect a flimsy, roughly yarn-sized cord

without any visualization aid." Pet. App. 86a. Because the procedure "involves searching blindly for the umbilical cord," Pet. App. 88—which is tiny and difficult to palpate—the court found that it can be impossible for physicians to locate and transect or sever the cord. And even if the physician is able to locate the cord, it is often impossible to transect the cord without also severing fetal tissue, which would violate the Act. Pet. App. 86a–87a; *see also* Tr. Vol. II at 125–26 (Petitioners' expert so conceding). The court further found that "no training is available for doctors within Alabama to learn to perform" this "experimental" and "technically challenging procedure," and that, "given the climate of hostility and the difficulty of hiring doctors willing and able to perform abortions in Alabama," it would not be possible to recruit physicians who have already been trained. Pet. App. 91a.

The court also found that cord transection subjects women to "significant health risks," including hemorrhage, infection, and damage to the uterus. Pet. App. 87a–88a (citing *Gonzales*, 550 U.S. at 161). Such risks would be "amplified" in outpatient settings like the Clinics that lack access to hospital resources, including blood banks. Pet. App. 88a. As an expert who had attempted the procedure "credibly testified," cord transection subjects patients to unacceptable medical risks. Pet. App. 87a. The expert observed women "having contractions, undergoing placental separation, and losing blood" during efforts to locate and transect the cord, and

ceased attempting the procedure precisely because of the risks it imposed. *Id.*[8]

In sum, because no fetal demise procedure affords a feasible, safe way to continue providing abortions at and after 15 weeks under the Act, the court concluded that enforcing the Act would cause Alabama women to lose their right to pre-viability abortion access starting at 15 weeks. Pet. App. 120a. The court thus permanently enjoined the Act's enforcement as applied to Respondents.[9]

2. The court of appeals unanimously affirmed in an opinion by Chief Judge Carnes. The court recognized that "three legitimate interests . . . animate" the Act—(1) showing "'respect for the life within the woman,'" (2) preventing the "'coarsen[ing]'" of society, and (3) protecting "the integrity of the medical profession." Pet. App. 15a–

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[8] Petitioners cite their expert's testimony that cord transection "would not be expected to increase the risk[s]." Pet. 18. But the district court discredited this testimony because it was "largely theoretical and not based on experience"; indeed, their expert "has never attempted" to perform the procedure. Pet. App. 106a.

[9] Petitioners assert that the as-applied injunction was functionally equivalent to facial relief because under it, "the law has no field operation as to any clinic, any doctor, or any woman." Pet. 20. That is incorrect. The as-applied injunction blocks the law's enforcement against Respondents, but the law remains in effect for other physicians in Alabama. Among the doctors not covered by the injunction is Petitioners' own medical expert, who testified that he performs a limited number of D&E procedures in cases of "serious or life-limiting lethal fetal conditions" at the University of Alabama at Birmingham. Tr. Vol. II at 112. The as-applied injunction does not apply to those procedures.

16a (quoting *Gonzales*, 550 U.S. at 157).[10] But as the court reasoned—and as Petitioners conceded—even where the state's interests are legitimate, if "'there [were] no safe and effective way to cause fetal demise'" before the abortion, then "'this law would be unconstitutional.'" Pet. App. 19a (quoting Petitioners' admission).

The court of appeals reviewed the record and concluded that the district court's detailed factual findings about the feasibility and safety of the fetal demise procedures were not clearly erroneous. Pet. App. 25a. Indeed, Petitioners made no attempt to argue otherwise with respect to even a single factual finding. As the court explained, "[t]he district court heard the testimony, including that of competing experts, and thoroughly explained its resolution of all the material conflicts in the evidence." *Id*. The district court's "findings about the fetal demise methods—their attendant risks; their technical difficulty; their untested nature; the time and cost associated with performing them; the lack of training opportunities; and the inability to recruit experienced practitioners to perform them—support the conclusion that the Act would place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." Pet. App. 31a (quotation marks and citation omitted). And, as the

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[10] Notwithstanding the assertions of Petitioners' *amici*, Petitioners never attempted to assert that the Act "is designed to avoid fetal pain." Pet. App. 78a–79a & n.18; *accord* Pet. App. 16a n.8. The district court found—and Petitioners "d[id] not dispute"—that fetal pain is not a biological possibility until 29 weeks, well beyond the legal limit for abortion in Alabama. Pet. App. 79a n.18.

Eleventh Circuit recognized, the district court was not alone in finding that the proposed demise procedures were infeasible and pose significant health risks. Every fact-finder to have considered the feasibility and safety of those procedures has reached the same conclusions. Pet. App. 31a n.15 (citing decisions by four district courts making comparable factual findings).[11]

The court of appeals noted that two important concessions reinforced the district court's finding that fetal demise procedures carry "'significant health risks.'" Pet. App. 25a (quoting *Gonzales*, 550 U.S. at 161). First, Petitioners' "own expert admitted that two of the fetal demise methods," potassium chloride and digoxin, "posed serious health risks." Pet. App. 26a.[12] And second, Petitioners themselves conceded that there was "*no uncertainty* that [requiring fetal demise] raises the risk some." Pet. App. 25a n.11 (emphasis added).

The court rejected Petitioners' argument that *Gonzales* barred the district court from examining

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[11] The court of appeals rejected Petitioners' argument that the Act's health exception and intent provision rendered the ban constitutional. Petitioners' contentions focused on those provisions' application to the cord transection procedure, but as the Eleventh Circuit explained, the arguments were premised on factually inaccurate characterizations of the procedure that were refuted by the district court's unchallenged findings. Pet. App. 32a–36a.

[12] As noted above, the district court found that Petitioners' expert's opinion on the remaining procedure—cord transection—was not credible because he had no experience with it and his opinions were speculative. Pet. App. 106a; *see also* Note 8, *supra*.

the medical evidence to determine the feasibility and safety of fetal demise procedures. As the court explained, "the uncertainty in *Gonzales* was about whether the federal partial birth abortion ban 'would *ever* impose significant health risks on women,'" given the continuing availability of D&E. Pet. App. 28a (quoting *Gonzales*, 550 U.S. at 162). In this case, by contrast, Petitioners "conceded that . . . the Act would *always* impose some increased health risks on women." Pet. App. 28a. Moreover, as the court recognized, this Court's decisions "refute[]" the argument that "'legislatures, and not courts, must resolve questions of medical uncertainty.'" Pet. App. 27a–28a (quoting *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309–10 (2016)). As this Court recently affirmed, courts "'retain[] an independent constitutional duty to review factual findings where constitutional rights are at stake.'" Pet. App. 28a (quoting *Whole Woman's Health*, 136 S. Ct. at 2310, in turn quoting *Gonzales*, 550 U.S. at 165). The court likewise noted that "the 'medical uncertainty' sentence in *Gonzales* was pegged to facial relief, not to as-applied relief, which is what was granted in this case." Pet. App. 26a (quoting *Gonzales*, 550 U.S. at 164).

## REASONS FOR DENYING THE PETITION

The question presented in the petition does not warrant this Court's review. There is no conflict among lower courts, and Petitioners do not argue otherwise. Petitioners' principal argument for certiorari is that the Eleventh Circuit "refused to follow" *Gonzales v. Carhart*, 550 U.S. 124 (2007), but the court did no such thing. Pet. 18. The court faithfully applied *Gonzales* to the facts established by the district court's detailed and thorough fact-finding, correctly holding that under this Court's precedents, including *Gonzales*, a state may not erect the insurmountable obstacle to pre-viability abortion imposed by the Act. Petitioners' real grievance is their dissatisfaction with the district court's well-explained fact-finding, but neither here nor in the court of appeals have they challenged even one such finding as clearly erroneous.

The petition should be denied.

### I. THERE IS NO CONFLICT OF AUTHORITY FOR THIS COURT TO RESOLVE.

The decision below does not conflict with the decision of any other federal court of appeals or state court of last resort. No such court has even rendered a decision addressing the constitutionality of a comparable statute criminalizing the D&E method. While litigation over similar laws is pending in the Fifth and Eighth Circuits, those courts have not issued decisions, much less decisions that conflict with the decision below. *See Hopkins v. Jegley*, 267 F. Supp. 3d 1024 (E.D. Ark. 2017), *appeal docketed*, No. 17-2879 (8th Cir.); *Whole Woman's Health v. Paxton*, 280 F. Supp. 3d 938 (W.D. Tex. 2017), *appeal*

*docketed*, No. 17-51060 (5th Cir.). It would be premature for this Court to review the question here in the absence of any conflict among the circuits.

Indeed, there is no conflict between the Eleventh Circuit's decision and that of any court at any level. The two district courts to have addressed similar D&E method bans ruled consistently with the decisions below, finding as a factual matter that fetal demise procedures are infeasible and significantly risk-enhancing, and concluding as a legal matter that the resultant burdens on abortion access imposed substantial obstacles. *See Hopkins*, 267 F. Supp. 3d at 1064; *Paxton*, 280 F. Supp. 3d at 952–53. And lower courts that have addressed method bans that did not expressly ban D&E but were drafted so broadly that their prohibitions nevertheless encompassed it have universally held such laws unconstitutional under this Court's precedents. *See, e.g.*, *Northland Family Planning Clinic v. Cox*, 487 F.3d 323, 339 (6th Cir. 2007), *cert. denied*, 552 U.S. 1096 (2008); *Hope Clinic v. Ryan*, 249 F.3d 603, 604–05 (7th Cir. 2001) (per curiam); *Causeway Med. Suite v. Foster*, 221 F.3d 811, 812 (5th Cir. 2000); *Planned Parenthood of Cent. N.J. v. Farmer*, 220 F.3d 127, 144–46 (3d Cir. 2000). The decision below is fully consistent with those decisions as well.

In short, no lower court disagreement is implicated by this case.

## II. PETITIONERS' DISAGREEMENT WITH THE DISTRICT COURT'S FACTUAL FINDINGS DOES NOT WARRANT THIS COURT'S REVIEW.

The petition is premised chiefly on Petitioners' disagreement with the district court's factual findings concerning the feasibility and safety of fetal demise procedures, a fact-bound inquiry that does not merit this Court's review—even if Petitioners had challenged the findings as clearly erroneous, which they have not done. Petitioners contend, for example, that "the state's presentation here must have been sufficient" on the question of whether potassium chloride injections carry significant health risks, Pet. 16–18, notwithstanding the serious risks found by the district court and conceded by their expert, Pet. App. 26a. Similarly, Petitioners assert that they "must have" adduced adequate proof concerning the use of digoxin, Pet. 16, notwithstanding findings (again supported by their own expert's admissions) that the drug is experimental and untested at the time in pregnancy when the overwhelming majority of D&Es are performed, Pet. App. 99a. And they highlight their expert's opinions on cord transection, Pet. 18, notwithstanding the district court's unchallenged finding that the testimony was not credible because the expert had no experience with the procedure, Pet. App. 106a.

These fact-based disagreements with the decisions below do not warrant this Court's review. This Court "do[es] not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). That policy applies with particular force to "factual

determinations in which the district court and the court of appeals have concurred." *Branti v. Finkel*, 445 U.S. 507, 512 n.6 (1980); *see* Pet. App. 25a ("The district court . . . thoroughly explained its resolution of all the material conflicts in the evidence."). And it applies with still greater rigor here, where Petitioners have not attempted to argue—either in the petition or in their submissions to the Eleventh Circuit—that even a single factual finding was clearly erroneous.

Petitioners' account of the feasibility and risks of the medical procedures in question is, as the Eleventh Circuit correctly recognized, at odds not only with the district court's detailed findings, but with their own expert's testimony. Their disagreement with the factual determinations in the decisions below does not present an issue worthy of this Court's review.

## III. THE DECISION BELOW IS CORRECT, AND DOES NOT CONFLICT WITH *GONZALES v. CARHART*.

The Eleventh Circuit's unanimous decision upholding the district court's as-applied injunction against the Act is also correct. The Act prohibits the only abortion method available to Respondents' patients starting at 15 weeks, and the district court's extensive findings make clear that the procedures Petitioners propose to perform abortions at this stage are in fact infeasible and would, if used, subject women to significant health risks. As a result, under the Act, women in Alabama would "lose their right to pre-viability abortion access at or after 15 weeks." Pet. App. 120a. The Eleventh Circuit correctly

determined that the result is an undue burden under this Court's decisions.

1. Under well-settled precedent, a law with the purpose or effect of imposing a substantial obstacle in the path of a woman seeking a pre-viability abortion is unconstitutional. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2299 (2016); *Gonzales*, 550 U.S. at 146; *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 878 (1992). Applying this standard, this Court has consistently held unconstitutional prohibitions on an abortion method that do not leave in place a medically proven, feasible, and safe alternative. This Court has never upheld a prohibition of the standard, primary abortion method at any stage because of the self-evident burdens on abortion access such a ban would impose. *See Gonzales*, 550 U.S. at 164–65.

This Court first considered an abortion method ban in *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976). At issue was a prohibition on saline amniocentesis, which was then the dominant second-trimester abortion method. *Id.* at 78. This Court rejected the state's assertion that physicians could continue providing abortions by relying upon alternative methods, explaining that one proposed alternative was "used only on an experimental basis" and the remaining two would "force[] a woman and her physician to terminate her pregnancy by methods more dangerous to her health than the method outlawed." *Id.* at 77–79. The ban on the standard abortion method thus would have "inhibit[ed] the vast majority of abortions after the first 12 weeks" and was unconstitutional. *Id.* at 79.

The Court reached the same result in *Stenberg v. Carhart*, in which it considered a ban on a little-used abortion method—D&X—that was drafted so broadly that it also prohibited D&E, "the most commonly used method for performing previability second trimester abortions." 530 U.S. 914, 945 (2000). As in *Danforth*, the Court held that a prohibition of the standard method for providing second-trimester abortions was unconstitutional. *Id.* The statute "impose[d] an undue burden on a woman's ability to choose a D&E abortion, thereby unduly burdening the right to choose abortion itself." *Id.* at 930 (internal quotation marks and citation omitted).[13]

In *Gonzales*, this Court upheld a more narrowly crafted federal prohibition on the rarely used D&X method, but only because unlike the state law in *Stenberg*, the federal law in *Gonzales* preserved access to D&E, the "usual" second-trimester abortion method. 550 U.S. at 135. The continued availability of D&E, the Court reasoned, ensured abortion access even when the uncommon method was banned, and as a result, the restriction on D&X did not impose an undue burden. *Id.* at 164; *accord Stenberg*, 530 U.S. at 967 (Kennedy, J., dissenting) (banning only the rare D&X method "denies no woman a safe abortion"). But a different result obtains where a prohibition does not preserve a "standard," feasible alternative, *Gonzales*, 550 U.S.

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[13] The statute in *Stenberg* had the effect of prohibiting the performance of a D&E on "a living" fetus, 530 U.S. at 922 (citation omitted), but did not apply if fetal demise had already occurred. This fact was immaterial to the outcome, even though the Court was well aware of fetal demise procedures. *Id.* at 925.

at 166, or where the statute would subject women to "significant health risks," *id.* at 161. As this Court held in distinguishing the state law invalidated in *Stenberg,* the federal prohibition on an uncommon method is "different from" a ban on the "dominant second-trimester abortion method." *Id.* at 164–65. The federal ban preserved access to D&E, "a commonly used and generally accepted method, *so* it does not construct a substantial obstacle to the abortion right." *Id.* at 165 (emphasis added).

2. The Eleventh Circuit correctly applied this precedent in holding that a ban on an abortion method is unconstitutional where proposed alternatives are not "effective" and "available," and/or where use of those alternatives would subject women to "significant health risks." Pet. App. 24a–25a (citing *Gonzales*, 550 U.S. at 161). Indeed, as noted above, Petitioners conceded as much, acknowledging that "[i]f there [is] no safe and effective way to cause fetal demise" prior to performing a D&E, "this law would be unconstitutional." Pet. App. 19a. And the Eleventh Circuit correctly concluded that the district court's "thoroughly explained" findings established that all of Petitioners' proposed fetal demise procedures were infeasible and would subject women to significant health risks. Pet. App. 25a. Accordingly, "the Act would 'place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.'" Pet. App. 31a (quoting *Whole Woman's Health*, 136 S. Ct. at 2300).

With respect to the proposed fetal demise procedures, the factual findings established that none affords a feasible means for the Physicians to provide D&E abortions without triggering the ban.

Based on "expert evidence," *Whole Woman's Health*, 136 S. Ct. at 2310, the district court found that the Physicians cannot use potassium chloride injections to comply with the Act because safe administration of these challenging injections requires great technical skill that would be impossible for them to acquire, and because the injections cannot be performed on women with common traits like obesity and fibroids, Pet. App. 94a–95a.[14] Similarly, the district court found that administering digoxin is not feasible because, as conceded by Petitioners' expert, it has an unacceptably high failure rate and the safety and efficacy of consecutive injections is untested; it is unstudied and experimental during the time in pregnancy when the overwhelming majority of D&Es take place (15–18 weeks); like potassium chloride, it is impossible to administer to many women; and its use would require women to make three trips to the clinic over four days, which would impose substantial logistical and financial obstacles to the vast majority of women seeking second-trimester abortions in Alabama. Pet. App. 98a–105a. Likewise, the district court found that cord transection is not a feasible means to comply with the Act because it is unreliable, technically challenging, and untested. Pet. App. 85a–91a. Thus, none of Petitioners' proposed procedures comes close to ensuring the availability of abortion services that D&E—the "commonly used and generally accepted" abortion method—provided in *Gonzales*. 550 U.S. at 165.

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[14] *See also* Pet. 8 (conceding that the procedure is "performed by specialists"); *id.* 18 (the procedure "requires specialized training"); Tr. Vol. II at 118–19 (Petitioners' expert testifying that the procedure is "technically difficult").

Without any workable means to continue providing D&E abortions without violating the Act, enforcement of the ban would cause Alabama women to "lose their right to pre-viability abortion access at or after 15 weeks." Pet. App. 120a.[15]

The factual findings further establish that each of the fetal demise procedures would, if used, expose women seeking an abortion at or after 15 weeks to "significant health risks." *Gonzales*, 550 U.S. at 161.[16] Requiring women to undergo painful intra-abdominal injections of potassium chloride or digoxin would subject them to risk of bowel and bladder injury, infection, and bleeding, according to the testimony of Petitioners' own expert. Pet. App. 26a n.12. Additionally, mandated use of potassium chloride would, as Petitioners' expert conceded, subject women to risk of cardiac arrest. *Id.* Mandatory administration of digoxin would, as

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[15] As the district court found, the only alternative to D&E in modern medicine is labor induction, which can only be performed in a hospital over a period of hours or days. Pet. App. 84a & n.22. Given that "Alabama hospitals provide very few abortions"—just 0.3% of abortions in the state are performed in hospitals—neither induction nor any other form of hospital-based care is a feasible alternative, and Petitioners have never contended otherwise. Pet. App. 83a–84a.

[16] Petitioners repeatedly assert that the court of appeals refused to ask whether the health risks were significant, and instead "requir[ed] the state to show the absence of *any* health risks." Pet. 22 (quotation marks omitted); *id.* at 24. That is false. Both courts below expressly and repeatedly framed the inquiry as whether the procedures subject women to "significant health risks," and correctly answered that question in the affirmative. *See, e.g.*, Pet. App. 10a, 25a, 80a, 87a, 99a, 108a, 110a.

Petitioners' expert admitted, cause up to 10% of women to suffer extramural delivery and its attendant risk of hemorrhage, *id.*, and would cause a six-fold increase in hospitalization, Pet. App. 99a. A woman required to undergo cord transection would be at heightened risk for uterine perforation and serious blood loss, although a precise measure of the procedure's harms is impossible because so little research exists on this experimental method. Pet. App. 87a, 90a. Petitioners conceded that there is "*no uncertainty*" that all of these procedures "increase the risks" to women. Pet. App. 24a–25a & n.11 (emphasis added). The contrast between the significant risks of these procedures—virtually all of which were conceded by Petitioners' own expert—and the uniform agreement among "[e]xperts testifying for both sides" in *Gonzales* that D&E "was safe" could not be more stark. 550 U.S. at 164 (quotation marks and citation omitted).

Moreover, all of the district courts to have examined this issue have similarly found that none of the proposed fetal demise procedures affords a feasible means to ensure demise, and that each subjects women to significant health risks. *See Paxton*, 280 F. Supp. 3d at 949–52; *Hopkins*, 267 F. Supp. 3d at 1039–42, 1058–64; *see also Planned Parenthood of Cent. N.J. v. Verniero*, 41 F. Supp. 2d 478, 500 (D.N.J. 1998), *aff'd sub nom. Planned Parenthood of Cent. N.J. v. Farmer*, 220 F.3d 127 (3d Cir. 2000); *Evans v. Kelley*, 977 F. Supp. 1283, 1301 (E.D. Mich. 1997); *cf. Glossip v. Gross*, 135 S. Ct. 2726, 2740 (2015) ("Our review is even more deferential where, as here, multiple trial courts have reached the same finding, and multiple appellate courts have affirmed those findings.").

The Act prohibits "the only abortion method that can be performed in an outpatient setting in Alabama at or after 15 weeks" without any feasible means for compliance apart from turning away women seeking abortions from that point forward. Pet. App. 83a. The courts below correctly held that result is an undue burden under this Court's precedents.

3. Petitioners object to this straightforward conclusion by misreading *Gonzales* and mischaracterizing the decisions and record below. The petition misstates the applicable standard, contending that a state is at liberty to ban *any* abortion method, even the only method available, so long as it can show "reasonable medical debate" over whether the ban "creates significant health risks." Pet. 15. And Petitioners compound this error by simply ignoring the district court's factual findings and their own expert's numerous concessions on the core factual questions of the case. As the court of appeals determined, Petitioners "cannot win the factual battle," "[n]or the legal one." Pet. App. 26a.

a. First, Petitioners' framing of the legal standard ignores outright the question of whether an abortion method ban actually preserves abortion access through a proven, feasible alternative, which this Court has long held is central to the analysis. In *Gonzales*, the Court repeatedly emphasized that it was only because the ban on D&X preserved access to "a commonly used and generally accepted method" (D&E) that the federal statute did not impose an undue burden. 550 U.S. at 165. Had the prohibition reached D&E, this Court held, it would have "impose[d] an undue burden, as a facial matter,

because its restrictions on second-trimester abortions [would have been] too broad." *Id.* at 150. That is precisely what Alabama's law does. *See also Stenberg*, 530 U.S. 967 (Kennedy, J., dissenting) (ban on D&X "denies no woman a safe abortion" because "proven safe procedures remain available even for this patient"). Similarly, in invalidating the ban on the then-dominant second-trimester abortion method in *Danforth*, the Court emphasized the "limitations on the availability" of a proposed alternative, which had been "used only on an experimental basis until less than two years before" the ban was enacted. 428 U.S. at 77. Contrary to Petitioners' contentions, this Court has never so much as suggested that a theoretical alternative proven by the medical evidence to be infeasible in practice could justify a prohibition of the only available abortion method.

Not only does the petition flatly ignore precedent establishing that purported alternatives must be feasible, but it pretends that the district court's findings on the infeasibility of fetal demise procedures do not exist. The district court found—and the Eleventh Circuit confirmed—that Petitioners' proposed procedures would not preserve access to abortion under the Act because they are, *e.g.*, "extremely challenging," Pet. App. 93a; "unreliable," Pet. App. 110a; and "unstudied," Pet. App. 110a.

b. Second, given the fact that the district court's findings on the feasibility and safety of the procedures in question were founded largely upon *undisputed* expert testimony—with Petitioners' own expert having conceded virtually every key fact—Petitioners' reliance on *Gonzales*'s medical uncertainty discussion is thoroughly misplaced. In

*Gonzales*, this Court concluded that there was "documented medical disagreement whether the Act's prohibition would *ever* impose significant health risks on women" because there was a genuine "division of opinion" in the testimony of "highly qualified experts" on that question. 550 U.S. at 162 (emphasis added, quotation marks and citation omitted); *see also id.* at 162–63 (quoting trial court findings that the government's "expert witnesses reasonably and effectively refuted" plaintiffs' expert testimony on medical risks).[17]

Here, by contrast, nearly all of the district court's findings reflected a *consensus* among the medical experts, with Petitioners' expert having conceded most core facts concerning the feasibility and risks of the procedures in question. Among numerous other examples, all experts below agreed that (1) digoxin often fails to work and is untested at the point in pregnancy when most D&Es take place; (2) potassium chloride injections are technically difficult to perform, require advanced training, and can cause the woman to go into cardiac arrest if the drug is misplaced into the woman's vasculature; and (3) cord transection is all but unstudied, and it is not always possible to locate the cord. *See* Tr. Vol. II at 113, 118–19, 121, 125–27, 138–39, 142, 146 (Petitioners' expert so testifying).

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[17] The Court likewise emphasized in *Gonzales* that the "three District Courts that considered the Act's constitutionality appeared to be in some disagreement on this central factual question." 550 U.S. at 162. As noted above, the opposite is true here—every fact-finder to have addressed the question has found that the procedures proposed by Petitioners are infeasible and would subject women to significant health risks.

Indeed, to the extent there is medical disagreement in this case, it is between Petitioners and their own expert. *Compare, e.g.*, Doc. 81-1, ¶ 9 (Petitioners' expert admitting that digoxin imposes a "5-10% risk of spontaneous onset of labor, rupture of the membranes, or development of intrauterine infection," along with risks of "bleeding, infection, and inadvertent penetration of the bowel or bladder with the needle"), *and* Tr. Vol. II at 149–50 (Petitioners' expert conceding that it is "unreasonable" to subject women to the procedure's "additional risks"), *with* Pet. 23 ("digoxin injection is safe"). The unanimity among experts here is not remotely comparable to the genuine testimonial disagreement in *Gonzales*, and Petitioners cannot shoehorn this case into *Gonzales*'s medical uncertainty discussion by closing their eyes to their expert's numerous admissions.

c. Third, Petitioners misunderstand *Gonzales*'s statement concerning the relevance of "medical uncertainty." 550 U.S. at 164. In *Gonzales*, medical disagreement arose over whether the ban on a little-used procedure would ever subject any woman to significant medical risk in the absence of a statutory health exception. *Id.* There was no uncertainty that the standard method preserved by the statute, D&E, was feasible and safe; that procedure was the "commonly used and generally accepted" method, and "[e]xperts testifying for both sides agreed [that D&E] was safe." *Id.* at 164–65 (quotation marks and citation omitted). What was medically uncertain was "whether the Act's prohibition [on the little-used D&X procedure] would *ever* impose significant health risks on women," given that the statute preserved access to the standard,

undisputedly safe D&E method. *Id.* at 162 (emphasis added). Faced with the unimpeded availability of D&E and medical disagreement over whether D&X "*is ever necessary* to preserve a woman's health," this Court held that facial invalidation of the statute was not warranted, because women denied D&X could have a D&E and would suffer no burden. *Id.* at 166–67 (emphasis added). In short, where an abortion method ban preserves access to the indisputably safe and feasible standard method, and where there is uncertainty over whether banning a rarely-used method would *ever* expose any women to significant health risks, facial invalidation of the ban for lack of a health exception is inappropriate. *Id.* The Court acknowledged that an as-applied challenge could be pursued were a case to arise where there was no feasible alternative to D&X.

But as the decision below correctly recognized, this case presents precisely the opposite scenario. Pet. App. 28a. The method prohibited here is the standard operating procedure, the heartland of second-trimester abortion care, whereas the procedures Petitioners invoke as a means to comply with the ban are medically disfavored and unreliable outliers. Pet. App. 111a–13a. There is no disagreement in the case over whether the "barred procedure is ever necessary," *Gonzales*, 550 U.S. at 166–67; it is the *only* outpatient procedure available at and after 15 weeks, accounting for 99% of abortions after that point in Alabama, Pet. App. 83a–84a. And far from there being medical uncertainty here over whether the Act "would ever impose significant health risks on women," *Gonzales*, 550 U.S. at 162, Petitioners *conceded* that the procedures they propose would subject *all* affected women to

increased medical risks—including, *inter alia*, risk of cardiac arrest (for potassium chloride), a six-fold increase in complications requiring hospitalization (for digoxin), and risk of hemorrhage and damage to the uterus (for cord transection). Pet. App. 26a & n.11, 87a–88a, 95a, 99a. In invoking medical uncertainty as the basis for defending the ban under these circumstances, Petitioners turn *Gonzales* on its head.

Moreover, *Gonzales* concluded that the uncertainty in that case precluded *facial* invalidation of the D&X ban. Here, the district court enjoined the Alabama law only as applied to Respondents, and did not invalidate it in all its applications. Thus, as the court of appeals noted, *Gonzales*'s medical uncertainty discussion is also inapplicable here because facial invalidation is not at issue. Pet. App. 26a.

Finally, this Court's most recent abortion decision expressly rejected Petitioners' sweeping contention "that legislatures, and not courts, must resolve questions of medical uncertainty," holding that the argument "is . . . inconsistent with this Court's case law." *Whole Woman's Health*, 136 S. Ct. at 2310. Petitioners' only response is to assert that this holding is inapplicable because this Court applies one undue burden test to health-based regulations and another to abortion method bans, or permits judicial scrutiny of the evidence with respect to a law's benefits but not its burdens. Pet. 21. As the Eleventh Circuit determined, there is "no support" for this proposition. Pet. App. 28a. To the contrary, in reviewing the importance of district court fact-finding—including the "expert evidence" on an abortion regulation's "benefits" and "burdens"—

*Whole Woman's Health* reaffirmed and expressly quoted *Gonzales*'s statement that courts "'*retain[] an independent constitutional duty to review factual findings where constitutional rights are at stake*.'" 136 S. Ct. at 2310 (emphasis in original) (quoting *Gonzales*, 550 U.S. at 165).

* * *

As the district court found and the court of appeals affirmed, enforcement of the Act against Respondents would cause Alabama women to "lose their right to pre-viability abortion access at or after 15 weeks," thereby imposing an undue burden. Pet. App. 120a. The decision below affirming the as-applied injunction is correct, conflicts with no decision from this Court or any other court, and does not warrant this Court's review.

## CONCLUSION

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

Respectfully Submitted,

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