No. 17-________

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When a state abortion law mandating a "contracted physician" with hospital admitting privileges would effectively ban medication abortion, offer no discernible medical benefit, and leave only one remaining abortion provider hundreds of miles away from significant population centers, does the undue burden test established in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), entitle a court to preliminarily enjoin the law without making a concrete estimate of the number of women who would be prevented or postponed in having an abortion?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners are Planned Parenthood of Arkansas & Eastern Oklahoma, d/b/a Planned Parenthood Great Plains, and Dr. Stephanie Ho, M.D. Respondents are Larry Jegley, Prosecuting Attorney for Pulaski County, Arkansas, and Matt Durrett, Prosecuting Attorney for Washington County, Arkansas.

Planned Parenthood of Arkansas & Eastern Oklahoma, d/b/a Planned Parenthood Great Plains, is a non-profit domestic corporation which is not publicly held. It is a wholly-controlled subsidiary of Planned Parenthood Great Plains which is a non-profit domestic corporation that is not publicly held and has no parent corporation. Dr. Stephanie Ho, M.D. is an individual.

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Planned Parenthood of Arkansas & Eastern Oklahoma, d/b/a Planned Parenthood Great Plains ("PPAEO"), and Dr. Stephanie Ho, M.D. (collectively "petitioners") respectfully petition the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The Eighth Circuit's opinion is reported at 864 F.3d 953 (8th Cir. 2017) and is reprinted in the Appendix to the Petition ("App.") at 1a. The opinion of the district court is unreported but is available at 2016 WL 6211310 (E. D. Ark. Mar. 14, 2016), and is reprinted at App. 17a.

JURISDICTION

The Eighth Circuit issued its decision on July 28, 2017. It entered an order denying rehearing en banc on September 27, 2017. App. 111a-112a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the U.S. Constitution provides that no state shall "deprive any person of

life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

Arkansas Code § 20-16-1504(d)[1] provides:

> (d)(1) The physician who gives, sells, dispenses, administers, or otherwise provides or prescribes the abortion-inducing drug shall have a signed contract with a physician who agrees to handle complications and be able to produce that signed contract on demand by the patient or by the Department of Health.
>
> (2) The physician who contracts to handle emergencies shall have active admitting privileges and gynecological/surgical privileges at a hospital designated to handle any emergencies associated with the use or ingestion of the abortion-inducing drug.
>
> (3) Every pregnant woman to whom a physician gives, sells, dispenses, administers, or otherwise provides or prescribes any abortion-inducing drug shall receive the name and phone number of the contracted physician and the hospital at which that physician maintains admitting privileges and which can handle any emergencies.

[1] The relevant Arkansas Code provisions are reprinted in their entirety at App. 113a-126a.

STATEMENT OF THE CASE

In 2015, Arkansas enacted an abortion restriction that is strikingly similar to a Texas law the Court later struck down in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). The Arkansas restriction, which was enacted supposedly to protect women's health, is medically unnecessary. If allowed to take effect, it would make Arkansas the *only* state to effectively ban medication abortion, a common method of early abortion that has been safely used by over two million American women since its approval in 2000. It would also leave only one remaining abortion provider in the entire State of more than 53,000 square miles.

Petitioners brought this action pursuant to 42 U.S.C. § 1983, alleging that the Arkansas law violates the Fourteenth Amendment because it imposes an undue burden on their patients' right to choose abortion. After weighing the law's virtually non-existent benefits against the severe burdens it would impose, the district court entered a preliminary injunction on the ground that petitioners are likely to prevail on the merits. The Eighth Circuit, however, reversed. The Eighth Circuit did not dispute that the law would require closure of two of the three abortion clinics in the State and effectively ban medication abortion. Nor did the Eighth Circuit reject the district court's finding that the law would provide "few, if any, tangible medical benefits." App. 6a. Yet the Eighth Circuit refused to balance the benefits and burdens of the law. According to the Eighth Circuit, a medically unnecessary law that would leave only one remaining abortion provider

hundreds of miles away from significant population centers simply cannot be preliminarily enjoined without "concrete district court findings estimating the number of women who . . . would forgo the procedure or postpone it." App. 14a.

This holding flouts this Court's decisions in *Whole Woman's Health* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). In neither case did the Court require concrete estimates of the number of women whom the laws at issue would cause to forgo or postpone abortions before invalidating – let alone preliminarily enjoining – the laws. Nor have other federal courts of appeals demanded such showings. This Court should, therefore, grant review and reverse. Indeed, the Eighth Circuit's reasoning is so similar to that which this Court already rejected in *Whole Woman's Health* that this case would be an appropriate candidate for summary reversal.

A. Statutory and Factual Background

1. *The Challenged Requirement.* Section 1504(d) of Arkansas Act 577, 90th Gen. Assemb., Reg. Sess. (Ark. 2015), *codified at* Ark. Code Ann. §§ 20-16-1501–1510 (the "Act"), imposes what the courts have called a "contracted physician" requirement. Much like the "admitting privileges" requirement at issue in *Whole Woman's Health*, it imposes criminal penalties on physicians who provide medication abortion unless they have a signed contract with a physician who has "active admitting privileges and gynecological/surgical

privileges at a hospital designated to handle any emergencies associated with the use or ingestion of the abortion-inducing drug" and who agrees to handle medication abortion complications. Ark. Code Ann. §§ 20-16-1504(d)(1, 2), 20-16-1506.

2. *Medication Abortion and its Safe Provision in Arkansas.* There are two methods of performing an abortion: medically, by administering drugs, and surgically, using instruments. App. 20a-21a. Medication abortion is available only early in a woman's pregnancy and involves a combination of two pills: mifepristone and misoprostol. App. 21a, 24a. In 2014, medication abortions accounted for 45 percent of abortions before nine weeks gestation nationwide. Rachel K. Jones & Jenna Jerman, *Abortion Incidence and Serv. Availability in the U.S., 2014*, 49 Persp. on Sexual & Reprod. Health 17, 21-22 (2017).

The district court found, the record demonstrates, and the Court has recently confirmed that medication abortion is a very safe procedure, which has been provided safely to over two million women in the United States alone. App. 75a; Eighth Circuit Joint Appendix ("J.A.") 43, 46; *Whole Woman's Health*, 136 S. Ct. at 2311 (peer-reviewed studies show a complication rate for first trimester abortion of less than one-quarter of one percent). For example, a recent, large-scale study showed that only 0.16 percent of medication abortion patients experienced a significant complication and only six out of every 10,000 patients (0.06%)

experienced complications resulting in hospital admission. J.A. 43.[2]

As the American College of Obstetricians and Gynecologists (the leading association of physicians specializing in women's health) has explained, the "contract[ed] physician" requirement "does nothing to enhance the quality or safety of abortion care." *See* Br. of *Amicus Curiae* Am. Public Health Ass'n & Am. Coll. of Obstetricians & Gynecologists in Support of Appellees at 3 (8th Cir. Nov. 10, 2016). When rare complications arise from a medication abortion, they occur after the woman has left the health center, and after she has taken the second medication at a location of her choosing. App. 29a, 57a; *see also Whole Woman's Health*, 136 S. Ct. at 2311 (recognizing there is a "delay before the onset of complications" for medication abortion

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[2] Ignoring the district court's detailed findings of fact about the overwhelming safety of medication abortion, the Eighth Circuit cited the Arkansas Legislature's finding that there were eight deaths following medication abortions. App. 3a. The Eighth Circuit, however, in no way relied on this "finding," because it found it "unnecessary to reach the issue of the contract-physician requirement's benefits." App. 15a n.9. Nor would any reliance be permissible. Courts "retain[ ] an independent . . . duty to review [legislative] factual findings where constitutional rights are at stake." *Gonzales v. Carhart*, 550 U.S. 124, 165 (2007); *accord Whole Woman's Health*, 136 S. Ct. at 2310. And the FDA has found there was no causal connection between the deaths the Arkansas Legislature cited and the medication abortion. App. 32a-33a, J.A. 436. Moreover, the FDA data largely included medication abortion regimens not routinely used today. In a study of over 700,000 medication abortions using the most common current regimen, which petitioners use, no deaths occurred, as the district court found. App. 79a.

patients). As the district court found, all of petitioners' abortion patients receive specific instructions for home care and a phone number for a 24-hour hotline staffed by a registered nurse.[3] App. 26a-27a. For the small number of patients who need or seek follow-up care, almost all have non-urgent conditions and can return to PPAEO's health center for treatment. App. 27a; *see also* App. 61a (district court noting that PPAEO's practices in this respect and others are consistent with ACOG's recommendations).

In the exceedingly rare case that the patient should be treated at a hospital or evaluated immediately, PPAEO will refer her to the emergency department of her local hospital.[4] At that hospital, "she will obtain any necessary treatment from the hospital-based physicians," App. 28a, as occurs "throughout outpatient medicine even outside the abortion context," J.A. 53. The district court further found that "emergency room physicians are well qualified to evaluate and treat most complications that can arise after a medication abortion." App. 66a. These complications

[3] The Eighth Circuit suggested, without basis, that "Planned Parenthood could unilaterally decide to discontinue its twenty-four-hour nurse-staffed phone line." App. 15a n.9. But it could not: The nurse line is *required* by Arkansas law, Ark. Admin. Code § 007.05.2-7(E), as well as good medical practice.

[4] As the district court found, the local hospital is unlikely to be where any contracted physician has admitting privileges. This is both because many women travel to access abortion and because the requirement mandates a contract with a physician who has admitting privileges at one hospital *anywhere* in the State – not near where the medication is dispensed or where the patient lives. App. 57a.

"are identical to those suffered by women experiencing miscarriage, who receive treatments in hospitals every day through emergency physicians and on-call specialists, if necessary." App. 66a-67a; *see also Whole Woman's Health*, 136 S. Ct. at 2311 (citing expert testimony explaining that abortion complications rarely result in hospital admission and when they do, the quality of care is not affected by whether the abortion provider has privileges).

In less than two percent of cases, a medication abortion will fail or be incomplete. J.A. 55. In such a case, women are offered additional medication and/or a surgical procedure to complete the abortion. This need not be done on an emergent basis, and petitioners have arrangements to refer patients to other providers in the rare event that a surgical procedure is necessary. App. 27a-28a, 61a-62a.

3. *Impact of the Requirement.* Petitioners provide a range of health care services – including medication (but not surgical) abortion – at health centers in Fayetteville and Little Rock, Arkansas. App. 23a-24a. In fiscal year 2015, PPAEO's physicians provided over 500 medication abortions in Arkansas. J.A. 34. There is only one other abortion provider in Arkansas, Little Rock Family Planning Services ("LRFP"), which offers surgical and medication abortion in Little Rock. App. 28a; J.A. 36.

Should the contracted physician requirement take effect, women seeking abortions in Arkansas will face severe burdens. None of the three health centers that

provide medication abortion in the State can comply with the requirement. PPAEO contacted every ob-gyn it could identify in the State, and none agreed to enter into the required contract. App. 99a. As the district court recognized, this is not surprising because "physicians who provide abortions or associate with physicians who provide abortions" in Arkansas "risk being ostracized from their communities and face harassment and violence toward themselves, their family, and their private practices." App. 100a. Moreover, "many private practice groups, hospitals, HMOs, and health networks" in Arkansas "will not permit physicians working for them to associate with abortion providers." App. 101a.

Thus, the contracted physician requirement will deny all women in Arkansas "a specific method of abortion, otherwise medically recognized as safe and effective." App. 92a. This will particularly affect women who strongly prefer medication abortion, including those who find it traumatic to have instruments placed in their vaginas because they are victims of rape, incest, or domestic violence, as well as women for whom medication abortion is medically indicated and safer than surgical abortion. App. 36a-37a, 97a.[5] And because

[5] The Eighth Circuit's statement that "[t]he district court and the parties generally treated LRFP's surgical-abortion services as a viable alternative to medication abortions," App. 6a, has no support in either the district court's opinion or the record. *See, e.g.*, App. 94a; Pls.' Br. in Supp. of TRO and/or Prelim. Inj., at 2, 8-9, 20, ECF No. 3 (E.D. Ark. Dec. 28, 2015) (explaining the requirement would unduly burden women who strongly prefer

PPAEO's two health centers only provide medication abortion, the requirement will leave only a single health center providing abortions in the entire State. App. 93a.[6]

Restricting abortion access to "[o]nly one provider statewide" that "will offer only surgical abortion," App. 93a, will severely impact Arkansas women – particularly low-income women and those with limited access to transportation. As the district court found, women who would have obtained medication abortions at PPAEO's Fayetteville health center will be forced to make a 380-mile round trip to Little Rock to have an abortion. App. 25a-26a. And they will be forced to make this trip twice – "resulting in over approximately ten hours of travel time," App. 92a – because of a separate Arkansas law requiring women to receive certain state-mandated information, in person, forty-eight hours before their abortion. Ark. Code Ann. § 20-16-1703. "Each time these women travel to access abortion services, they will have to arrange the necessary

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medication abortion and for whom it is medically indicated); J.A. 42-43 (same).

[6] PPAEO cannot provide surgical abortions at its Arkansas health centers without renovations that would involve considerable expense, which PPAEO cannot afford. Those renovations would be necessary both to meet the needs of patients as well as to comply with state regulations that apply to health centers providing surgical abortions, *see* Ark. Admin. Code § 007.05.2-12(G); J.A. 408.

funds, transportation, child care, and time off work required to travel." App. 34a.[7]

As the district court recognized, increased travel distances and costs can prevent some women from obtaining an abortion altogether, forcing them to carry unwanted pregnancies to term. App. 34a (citing testimony that increased travel distance of 100 miles will prevent 20-25 percent of women from obtaining abortion and longer distances will prevent even more). Women who are unable to travel these long distances may "take desperate measures, such as attempting to self-abort or seeking care from unsafe providers." App. 35a. Others will be delayed in obtaining abortions "by the increased travel distances and increases in cost, forcing these women into later abortions that are both riskier and more expensive." App. 34a, 91a; *see also* App. 92a.

B. Proceedings Below

1. Prior to the Act's effective date, petitioners filed a complaint seeking declaratory as well as preliminary and permanent injunctive relief. J.A. 1-26. After receiving an initial set of evidentiary submissions, the

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[7] While Little Rock is the most populous city in Arkansas, Fayetteville is the third largest. *See Total Population, 2012-2016 American Community Survey 5-Year Estimates*, American FactFinder, U.S. Census Bureau, https://factfinder.census.gov/ (select "Population total," "Arkansas," "Add geographies," and "Principal city"). The second largest, Fort Smith, *id.*, is only 60 miles from Fayetteville, but more than 150 from Little Rock.

district court issued a lengthy opinion preliminarily enjoining the contracted physician requirement.

In so doing, the court applied the exact test this Court later applied in *Whole Woman's Health*. It "balance[d] the asserted state interest against the purported effects," App. 82a, to determine whether the requirement imposed an undue burden. In evaluating first the State's interest in women's health, the district court found that because rare complications from medication abortion occur only after a patient has left the health center and traveled home, she is unlikely to be treated by any contracted physician. App. 57a; *see also Whole Woman's Health*, 136 S. Ct. at 2311 (citing similar finding by Texas district court). The district court also found that PPAEO's patients receive proper care in the rare event of complications. App. 58a-62a. The complications they suffer "are identical to those suffered by women experiencing miscarriage, who receive treatments in hospitals every day through emergency physicians and on-call specialists, if necessary." App. 66a-67a. Thus, the district court was "skeptical about any benefit conferred" by the contracted physician requirement, App. 62a, finding it was a "'solution in search of a problem,'" App. 62a (citation omitted).

With respect to the burdens imposed by the requirement, the district court found that the requirement would have a severe impact, eliminating medication abortion entirely and leaving the State with only one abortion provider, of surgical abortions only, in Little Rock. Thus, not only would all women have to undergo a surgical procedure, but many

women would have to travel 380-miles round trip – twice – to have it. The time and increased costs would delay some women from accessing abortion, at risk to their health, and prevent others from obtaining an abortion at all. *See supra* at A.3.

After balancing the purported benefits against the burdens, the district court concluded that petitioners "carried their burden of demonstrating . . . that they are likely to prevail on the merits and to establish that the Act's provisions create an undue burden." App. 54a.

2. The Eighth Circuit vacated the district court's preliminary injunction and remanded for further proceedings.

The Eighth Circuit accepted that, "as a result [of the requirement], the Planned Parenthood facilities in Little Rock and Fayetteville would stop offering abortion services" and "medication abortion services would no longer exist in Arkansas." App. 6a. The Eighth Circuit also declined to disturb the district court's finding that "the contract-physician requirement provide[s] few, if any, tangible medical benefits." *Id*. But instead of balancing that finding against the agreed burdens, the Eighth Circuit held the district court erred in concluding that the requirement likely imposed an undue burden. "Because the district court failed to make factual findings estimating the number of women burdened by the statute," App. 3a – that is, "the number of women" who "would forgo the procedure or postpone it," App. 14a – the Eighth Circuit reasoned that it was impossible to know without further "fact finding"

whether the requirement would impose an undue burden. App. 15a.

3. Petitioners timely filed a petition for rehearing en banc, which was denied on September 27, 2017. App. 111a-112a. Prior to the issuance of its mandate, the Eighth Circuit granted petitioners' application for a stay pending a petition for certiorari. App. 109a-110a.

REASONS FOR GRANTING THE PETITION

This Court's intervention is necessary to preserve the integrity of its recent decision in *Whole Woman's Health*. The Arkansas contracted physician requirement – like the Texas admitting privileges restriction invalidated in *Whole Woman's Health* – was passed under the guise of protecting women's health. Nevertheless, as with the Texas restriction, Arkansas cannot identify "a single instance in which the . . . requirement would have helped even one woman obtain better treatment," *Whole Woman's Health*, 136 S. Ct. at 2311. At the same time, the restriction would eliminate entirely a safe, common method of early abortion and force all women in the State to travel (twice) to a single provider in Little Rock to have a surgical procedure – thereby preventing many women from obtaining an abortion altogether and delaying many others. Worse yet, it would do so even where a medication abortion is medically indicated or strongly preferred.

Because the severe burdens the contracted physician requirement would impose far outweigh its virtually nonexistent medical benefits, a straightforward application of the undue burden test established in *Casey* and *Whole Woman's Health* mandates acceptance of the district court's preliminary injunction. But the Eighth Circuit refused to allow the district court's order to stand. The Eighth Circuit reasoned that no matter how illusory an abortion restriction's medical benefits may be, a court cannot find an undue burden (or even, as is required in the procedural setting here, the mere likelihood of one) unless and until it makes "concrete . . . findings estimating the number of women who . . . would forgo the procedure or postpone it." App. 14a.

Instead of faithfully applying *Whole Woman's Health*, the Eighth Circuit has effectively resuscitated the approach this Court rejected. Neither *Whole Woman's Health* nor the precedent on which it is built has ever required "concrete findings" or "numerical estimates" to invalidate a state abortion restriction – much less to preliminarily enjoin it. Rather, the undue burden test requires a balancing of a law's benefits against its burdens. And where, as here, any benefits are at most negligible and the burdens are obvious and significant, *Whole Woman's Health* – as well as decisions from other federal courts of appeals – dictate that the law cannot pass constitutional muster.

Certiorari is necessary to resolve these conflicts and protect women's access to abortion in Arkansas and throughout the midwest states the Eighth Circuit

covers. Indeed, because the Eighth Circuit's decision is so squarely in the teeth of *Whole Woman's Health*, the Court may wish to consider summary reversal.

I. The Eighth Circuit's refusal to find an undue burden absent a concrete estimate of the number of women who would postpone or forgo abortions flouts *Whole Woman's Health* and *Casey*.

1. This case presents virtually identical factual and legal issues as were before the Court in *Whole Woman's Health*. There, the challenged Texas law required abortion providers to have hospital admitting privileges purportedly to protect women's health. The district court found that law imposed an undue burden on affected women. But the Fifth Circuit held that the district court "erred when it balanced the efficacy of [the Texas restriction] against the burdens the provision imposed." *Whole Woman's Health v. Lakey*, 769 F.3d 285, 296 (5th Cir. 2014). "In our circuit," the Fifth Circuit pronounced, "we do not balance the wisdom or effectiveness of a law against the burdens the law imposes." *Id.* at 297.

This Court reversed, explaining that the undue burden test "requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer." *Whole Woman's Health*, 136 S. Ct. at 2309. Applying that test, the Court found the Texas restriction "br[ings] about no . . . health-related benefit," because abortion is extremely safe, "'with

particularly low rates of serious complications.'" *Id*. at 2311. Specifically, as it relates to medication abortion, the Court noted that admitting privileges would not impact the quality of care the woman received. Any rare complications that occur do not happen immediately and in such a case, the woman would seek medical attention at the hospital closest to her rather than travel farther to a hospital where a physician has admitting privileges. *Id.* In fact, there was no evidence the requirement would help "even one woman obtain better treatment." *Id*.

With respect to the other side of the balance, the Court noted that the Texas restriction "led to the closure of half of Texas' clinics" (reducing the number of providers from approximately forty to twenty). This vastly increased the number of women who would be forced to travel significant distances to obtain an abortion. *Id.* at 2313. The consequent increases in driving distances were "one additional burden, which, when taken together with others that the closings brought about, and when viewed in light of the virtual absence of any health benefit," led the Court to invalidate the requirement. *Id*.

Whole Woman's Health demands the same result here. Just like in *Whole Woman's Health*, the district court in this case explained that the Arkansas requirement was "a solution in search of a problem," App. 62a, because women who face a rare complication from a medication abortion already receive appropriate care and the requirement would do nothing to improve it. Furthermore, the district court found (and the Eighth

Circuit acknowledged) that if permitted to take effect, the requirement will close two of the State's three abortion providers. App. 6a, 93a. In fact, the Arkansas requirement is *more* burdensome than the Texas admitting privileges requirement because it will eliminate entirely a safe, early, non-surgical method of abortion and will leave only a single provider statewide. It would force women in the Fayetteville area to travel 760 miles (380 miles roundtrip, twice), App. 88a, 92a, and women in Fort Smith over 600 miles (300 miles roundtrip, twice) – to access abortion, when the Court in *Whole Woman's Health* found driving distances of 400 miles roundtrip, once, untenable. *Whole Woman's Health*, 136 S. Ct. at 2313.[8]

2. The Eighth Circuit, in vacating the district court's preliminary injunction, did not disagree with this balancing analysis; it instead refused to undertake it. Even though the district court found the benefits of the contracted physician requirement to be "low and not compelling," App. 68a, and the requirement would force women from two of the three major population centers in the State to travel hundreds of miles on multiple days to obtain abortions, the Eighth Circuit deemed it "unnecessary to reach the issue of the contract-physician requirement's benefits." App. 15a n.9.

[8] Under Texas law, women traveling over 100 miles need not make the trip twice. *See* Tex. Health & Safety Code Ann. § 171.012(a)(4) (twenty-four-hour waiting period shortened to two hours when woman lives 100 miles or more from nearest abortion provider).

This refusal to balance the burdens against the benefits disregarded entirely the Court's instruction in *Whole Woman's Health* to "consider the burdens a law imposes on abortion access *together with the benefits those laws confer*." *Whole Woman's Health*, 136 S. Ct. at 2309 (emphasis added). In evaluating the constitutionality of an abortion restriction, a court *must* engage in a balancing analysis to determine whether the burdens a restriction imposes are "undue." There is no other way to determine whether a restriction confers medical benefits that justify the burdens it imposes. And where, as here, the law confers no discernible benefit, even a modest burden is necessarily undue. *See id.* at 2313 (observing that while increased driving distance does not "always" constitute an undue burden, "the virtual absence of any health benefit" indicated that burden was undue); *see also Planned Parenthood of Wis., Inc. v. Schimel*, 806 F.3d 908, 920 (7th Cir. 2015) (holding, in the context of an admitting privileges requirement, that the "feebler the medical grounds (in this case they are nonexistent), the likelier" that any burden is undue), *cert. denied*, 136 S. Ct. 2545 (2016). In disregarding this required balancing, the Eighth Circuit has done precisely what this Court ruled was wrong for the Fifth Circuit to do.[9]

[9] The Eighth Circuit also erred in suggesting that a district court must find that a restriction's "benefits are *substantially* outweighed by the burdens it imposes." App. 16a n.9 (emphasis added). The Court has explained that a court must "weigh[ ] the asserted benefits against the burdens," *Whole Woman's Health*, 136 S. Ct. at 2310, but has never said that any burdens must

3. The Eighth Circuit grounded its refusal to engage in balancing in this Court's observation in *Casey* (which it repeated in *Whole Woman's Health*) that a law imposes an undue burden if, "in a large fraction of the cases in which [the law] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion." 505 U.S. at 895; *see also Whole Woman's Health*, 136 S. Ct. at 2320. From that passage, the Eighth Circuit deduced that to enter a preliminary injunction, "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 medical abortions in Arkansas." App. 11a. Such a finding, the Eighth Circuit continued, must include "concrete" estimates regarding how many women would "forgo" or "postpone" abortions. App. 14a. Absent such calculations, the Eighth Circuit concluded, it could not say the Arkansas requirement imposed an undue burden.

This analysis is wrong on two levels.

a. This Court in *Casey* and *Whole Woman's Health* did not require the numerical analysis the Eighth Circuit now demands – or even an estimate – when invalidating laws restricting women's access to abortion. *See Whole Woman's Health*, 136 S. Ct. at 2313; *see also Casey*, 505 U.S. at 893. Instead, in *Casey* and *Whole Woman's Health*, the Court declared that the restrictions at issue imposed an undue burden

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"substantially" outweigh any benefits for an abortion restriction to be found unconstitutional.

based on district court findings that a "significant," *Casey*, 505 U.S. at 893, and even a "*significant but ultimately unknowable*" number of women would be unduly burdened. *Whole Woman's Health v. Cole*, 790 F.3d 563, 586 (5th Cir. 2015) (Fifth Circuit opinion in *Whole Woman's Health*, citing district court finding). And it cannot be reasonably disputed that a significant number of women here would likewise be burdened by the contracted physician requirement.

Indeed, in *Whole Woman's Health*, the Fifth Circuit had imposed the very same requirement as the Eighth Circuit, vacating the district court's injunction because "it is not clear from the record what fraction of women face an undue burden." *Cole*, 790 F.3d at 589; *see also Lakey*, 769 F.3d at 296 ("[A] 'significant number' is insufficient unless it amounts to a 'large fraction.'"). This Court rejected that reasoning, facially invalidating the restrictions based on the district court's burden findings, which closely track the district court's findings in this case. *See Whole Woman's Health*, 136 S. Ct. at 2311-12; *see also Whole Woman's Health v. Lakey*, 46 F. Supp. 3d 673, 686 (W.D. Tex. 2014) ("[T]he requirement will severely limit access to abortion care for untold numbers of women throughout the state."); *id.* at 683 ("It is also impossible to divine exactly how many women in Texas may be affected by any individual factor or combination of factors to the point of not being able to exercise their right to obtain an abortion."). In short, "[c]ourts are free to base their findings on commonsense inferences drawn from the evidence." *Whole Woman's Health*, 136 S. Ct. at 2317.

And here, as in *Whole Woman's Health*, "that is what the District Court did." *Id.* It is undisputed that the Arkansas law would eliminate medication abortion and make it much harder for women far from the Little Rock area to access abortion at all. App. 6a-7a. Given the district court's findings about the law's lack of medical justification, that should have been all that was needed to affirm the preliminary injunction.[10]

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[10] The Eighth Circuit was also wrong in suggesting that only those women who would be delayed in, or prevented from, accessing an abortion could factor into the calculus. App. 14a-15a. By eliminating medication abortion, the requirement burdens each and every one of petitioners' patients – even if they are able to travel, without delay, to Little Rock for a surgical procedure (which is contrary to the district court's findings). These women will be barred entirely from having the *option* of a medical abortion – a safe, early abortion method. *See Planned Parenthood of Ariz., Inc. v. Humble*, 753 F.3d 905, 915 (9th Cir. 2014) (finding undue burden because, *inter alia*, "medication abortion is a common procedure strongly favored over surgical abortion by many women"); *see also Whole Woman's Health*, 136 S. Ct. at 2318 (noting, among requirement's burdens, that requirement might lead clinics "to find that quality of care declines"). At any rate, a significant number of women would have to travel hundreds of miles to and from Little Rock twice – "resulting in over approximately ten hours of travel time," App. 92a, as well as to "arrange the necessary funds, transportation, child care, and time off work required to travel," App. 34a. These burdens apply to all women who would have otherwise obtained an abortion in Fayetteville, regardless of whether they would be additionally burdened by being forced to delay or forgo an abortion. *See Whole Woman's Health*, 136 S. Ct. at 2302 (internal quotation omitted) (citing district court finding that Texas restrictions "erect a particularly high barrier for poor, rural, or disadvantaged women"); *see also Casey*, 505 U.S. at 886 (considering burdens on women with fewest financial resources).

b. The Eighth Circuit's holding is all the more misguided because of the procedural posture of this case: The matter was before the Eighth Circuit on an appeal from a preliminary injunction. In order to sustain such relief, a plaintiff/appellee must show merely "that [it] is *likely* to prevail on the merits." *Doram v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975) (emphasis added); *accord Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008). Equally important:

> The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held. Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits. A party thus is not required to prove his case in full at a preliminary-injunction hearing.

Univ. of Tex. v. Camenisch, 451 U.S. 390, 395 (1981).

This case reflects those less formal procedures. The district court's preliminary injunction was entered less than three months after the case was filed; it was based on written submissions following limited discovery.

Yet the Eighth Circuit completely ignored the *Camenisch* principles. As explained above, petitioners disagree that plaintiffs seeking to invalidate abortion restrictions ultimately have to quantify the number of

women affected by the law. But if they did, they most assuredly would not need to produce comprehensive and concrete statistical evidence in order to obtain a *preliminary injunction* – at least where, as here, the restriction would indisputably ban medication abortion statewide and require women in large population centers to travel hundreds of miles to obtain abortions.

II. The Eighth Circuit's approach to the undue burden standard conflicts with decisions of the Seventh and Ninth Circuits.

The Court should also grant certiorari because the Eighth Circuit's interpretation and application of the undue burden standard stands in direct conflict with precedent from the Seventh and Ninth Circuits, which faithfully apply the undue burden standard.

Unlike the Eighth Circuit, the Seventh and Ninth Circuits consider the degree to which the abortion restrictions at issue confer benefits. *See Schimel*, 806 F.3d at 912-13 (admitting privileges requirement did not improve women's health because, *inter alia*, "complications from abortion are both rare and rarely dangerous" and there was "no evidence that any . . . women received inadequate hospital care"); *see also Planned Parenthood of Ariz., Inc. v. Humble*, 753 F.3d 905, 915 (9th Cir. 2014) ("Therefore, on the current record, the Arizona law appears wholly unnecessary as a matter of women's health.") (citation and internal quotation marks omitted).

The Seventh and Ninth Circuits then balance any benefits of the abortion restriction against the burdens imposed to determine the restriction's constitutionality. As the Ninth Circuit explained, the court's role is to "weigh the burdens against the State's justification, asking whether and to what extent the challenged regulation actually advances the State's interests. If a burden significantly exceeds what is necessary to advance the State's interests, it is 'undue.'" *Humble*, 753 F.3d at 913. And "[t]he feebler the medical grounds . . . the likelier the burden on the right to abortion to be disproportionate to the benefits and therefore excessive." *Schimel*, 806 F.3d at 920.

In addition, the Seventh and Ninth Circuits do not require an estimate of the number of women burdened by the requirement. *See Schimel*, 806 F.3d 908; *Humble*, 753 F.3d 905. Indeed, the Ninth Circuit expressed concern about the very burden the Arkansas requirement imposes on *all* of petitioner's patients – i.e., denial of access to medication abortion. *See Humble*, 753 F.3d at 917 ("[T]he burden imposed by the Arizona law is undue even if some women who are denied a medication abortion under the evidence-based regimen will nonetheless obtain an abortion.").

In *Whole Woman's Health*, this Court granted certiorari in part to resolve the conflict the Fifth Circuit created with *Schimel* and *Humble*. *See* Pet. for Writ of Cert. at 15, *Whole Woman's Health*, 136 S. Ct. 2292 (No. 15-274) (arguing certiorari was warranted because the "Fifth Circuit's decision is in direct and acknowledged conflict with decisions of the Seventh and Ninth

Circuits"). And in the wake of *Whole Woman's Health*, court after court to consider requirements like the one here has concluded that this Court's decision controls and that such laws likely impose undue burdens on the right to choose abortion.[11]

The Eighth Circuit has essentially reintroduced the same conflict that previously prompted the Court to grant review in *Whole Woman's Health*. In order to ensure uniform application of the Court's precedent, this Court should grant certiorari again here.

[11] *See Currier v. Jackson Women's Health Org.*, 136 S. Ct. 2536 (2016), *partial perm. inj. granted*, Order, No. 3:12-cv-00436-DPJ-FKB (S.D. Miss. Mar. 17, 2017) (attached as Ex. 1 to Pet. for Reh'g En Banc (8th Cir. Aug. 11, 2017)); *Schimel v. Planned Parenthood of Wis., Inc.*, 136 S. Ct. 2545 (2016); Mot. to Dismiss Appeal, *Planned Parenthood Se. v. Strange*, No. 16-11867 (11th Cir. July 15, 2016) (attached as Ex. 2 to Pet. for Reh'g En Banc) (Alabama stating that "because Alabama's law is identical in all relevant respects to the law at issue in *Whole Woman's Health*, there is now no good faith argument that the law is constitutional under controlling precedent"); *June Med. Servs. LLC v. Kliebert*, No. 14-CV-00525-JWD-RLB, 2017 WL 1505596 (M.D. La. Apr. 26, 2017); Partial Judgment on Consent, *Adams & Boyle v. Slatery*, No. 3:15-cv-00705 (M.D. Tenn. Apr. 14, 2017) (attached as Ex. 3 to Pet. for Reh'g En Banc) (agreeing not to enforce admitting privileges law after *Whole Woman's Health*); *Comprehensive Health of Planned Parenthood Great Plains v. Williams*, No. 2:16-cv-4313-HFS, 2017 WL 1407656 (W.D. Mo. Apr. 19, 2017) (preliminarily enjoining admitting privileges law).

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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