No. ________

In the
Supreme Court of the United States

STEVEN T. MARSHALL, IN HIS OFFICIAL CAPACITY AS ALABAMA ATTORNEY GENERAL, ET AL.,
Petitioners,
v.
WEST ALABAMA WOMEN'S CENTER, ET AL.,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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December 20, 2018

QUESTION PRESENTED

Like several states, Alabama prohibits "dismemberment abortion." In a "dismemberment abortion," a doctor "dismember[s] a living unborn child and extract[s] him or her one piece at a time from the uterus through use of clamps, grasping forceps, tongs, scissors, or similar instruments that, through the convergence of two rigid levers, slice, crush, or grasp . . . a portion of the unborn child's body to cut or rip it off." Ala. Code § 26-23G-2(3).

Dismemberment abortion is similar to partial birth abortion, which this Court has said the government can prohibit. *Gonzales v. Carhart*, 550 U.S. 124, 133 (2007). But the court of appeals below reluctantly concluded that Alabama is prohibited from banning dismemberment abortions under this Court's more recent abortion decisions.

The question presented is:

Whether a state ban on dismemberment abortions is unconstitutional where there is a reasonable medical debate that alternatives to the banned procedure are safe?

PARTIES AND AFFILIATES

Steven T. Marshall, in his official capacity Alabama Attorney General, Petitioner

Scott Harris, in his official capacity as Alabama State Health Officer, Petitioner. (During the pendency of this matter, Mr. Harris replaced the former Alabama Health Officer, Thomas Miller, and is substituted as a party by operation of law.)

Hays Webb, in his official capacity as District Attorney for Tuscaloosa County, Alabama, Petitioner

Robert L. Broussard, in his official capacity as District Attorney for Madison County, Alabama, Petitioner

West Alabama Women's Center, on behalf of itself and its patients, Respondent

William J. Parker M.D., on behalf of himself and his patients, Respondent

Alabama Women's Center, Respondent

Yashica Robinson White, M.D., Respondent

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PETITION FOR WRIT OF CERTIORARI

Steven T. Marshall, in his official capacity as Alabama Attorney General, Thomas Miller M.D., in his official capacity as Alabama State Health Officer, 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 (collectively "Alabama") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The district court's final judgment enjoining the operation of the dismemberment abortion ban is reported at 299 F. Supp. 3d 1244 (2017), and reprinted in the appendix at 38a-134a. The Eleventh Circuit's opinion affirming is reported at 900 F.3d 1310 (CA11 2018), and reprinted in the appendix at 1a-37a.

JURISDICTION

The district court had federal question and civil rights jurisdiction. *See* 28 U.S.C. §§ 1331, 1343. The court of appeals issued the opinion under review on August 22, 2018. App. 1a. Justice Thomas extended the time to file a petition for certiorari up to and including December 20, 2018. App. 135a. This petition is timely filed within that time. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV.

The Alabama Unborn Child Protection from Dismember Abortion Act provides in pertinent part:

> Notwithstanding any other provision of law, it shall be unlawful for any individual to purposely perform or attempt to perform a dismemberment abortion and thereby kill an unborn child unless necessary to prevent serious health risk to the unborn child's mother.

Ala. Code § 26-23G-3(a)

> DISMEMBERMENT ABORTION. With the purpose of causing the death of an unborn child, purposely to dismember a living unborn child and extract him or her one piece at a time from the uterus through use of clamps, grasping forceps, tongs, scissors, or similar instruments that, through the convergence of two rigid levers, slice, crush, or grasp, or any combination of the foregoing, a portion of the unborn child's body to cut or rip it off. This

> definition does not include an abortion which uses suction to dismember the body of the developing unborn child by sucking fetal parts into a collection container. This definition includes an abortion in which a dismemberment abortion is used to cause the death of an unborn child and suction is subsequently used to extract fetal parts after the death of the unborn child.

Ala. Code § 26-23G-2(3)

INTRODUCTION

In 2016, by an overwhelming bipartisan vote, the Alabama Legislature banned a particularly gruesome type of abortion performed exclusively in the second trimester of pregnancy. The procedure is called a "dismemberment" abortion, and the name is an apt description of what takes place: a doctor rips apart a living fetus limb from limb while its heart is still beating. Although the law is a procedure "ban," its only practical requirement is that a doctor kill the unborn child through a medically appropriate procedure before removing the unborn child's body from the woman.

The court of appeals recognized the State's strong "interest in lessening, as much as it can, the gruesomeness and brutality of dismemberment abortion." App. 16a. But it nonetheless felt constrained by this Court's abortion precedents to strike down the regulation. Although the court of appeals expressed disquiet over "the aberration of constitutional law relating to abortion," it also recognized that "there is only one Supreme Court, and we are not it." App. 36a. The result was to affirm a district court judgment

that allowed abortion doctors to continue using a procedure this Court has recognized as being "as brutal, if not more, than" partial birth abortion. *Gonzales*, 550 U.S. at 160. That is, to continue dismembering living fetuses piece by piece.

Against this backdrop, this petition does not ask the Court to overturn *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). Instead, Alabama asks only that the Court confirm the continuing validity of *Gonzales v. Carhart*, 550 U.S. 124 (2007), which the court of appeals declined to apply in light of confusing language in *Whole Women's Health v. Hellerstedt*, 579 U.S. ----, 136 S.Ct. 2292 (2016). The State's law "expresses respect for the dignity of human life," and there is "medical support for [Alabama's] position" that the law does not "create[] significant health risks for women." *Gonzales*, 550 U.S. at 157, 161. The Court should grant the petition and reaffirm that the Constitution does not condemn such laws.

STATEMENT OF THE CASE

A. The dismemberment abortion act.

In 2016, the Alabama Legislature enacted the Unborn Child Protection from Dismemberment Abortion Act. The Act prohibits "dismemberment abortion," which it defines 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). Importantly, the Act does not prohibit an abortion that "uses *suction* to dismember the body of the developing un-

born child by sucking fetal parts into a collection container." *Id.* (emphasis added). Only the dismemberment of a living fetus by way of "slic[ing], crush[ing], or grasp[ing]" is illegal. *Id.*

The Act includes a robust health exception that protects a physician's exercise of medical judgment. *Id.* at §26-23G-2(6). It allows a dismemberment abortion to forestall a "serious health risk to the unborn child's mother" based on the physician's "reasonable medical judgment" as to whether an abortion would be necessary "to avert serious risk of substantial and irreversible physical impairment of a major bodily function." Ala. Code § 26-23G-2 (6). The physician is also entitled to seek confirmation of his or her medical judgment before the Board of Medical Examiners. *Id.* at § 26-23G-3 (b).

The dismemberment-abortion ban prohibits one type of surgical abortion. In the first trimester and the beginning of the second trimester, an abortion doctor uses suction instruments to cause fetal demise and remove the fetus. Tr. Vol. I at 183–84. But, around 15 weeks LMP,[1] the fetus has developed sufficiently that it cannot be killed and removed with suction. The reason is that, as one of the plaintiffs explained, "the development of the fetus means that there's going to be a larger tissue and the fetus is at that point formed" and "the [fetus's head] does not reliably collapse" with suction alone. Tr. Vol. II at 38–39; *id.* at 73.

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[1] We refer to gestational age based on weeks after the woman's last menstrual cycle and we have converted figures that base gestational age on weeks postfertilization accordingly. *See, e.g.,* Doc. 115 at 8 n.4.

Accordingly, at 15 weeks LMP, an abortion doctor uses a different surgical procedure—"dilation and evacuation" or D&E. *See* Tr. Vol. I at 184. During a D&E, the abortionist first dilates the cervix using drugs or instruments. *Gonzales*, 550 U.S. at 135. The doctor then uses surgical instruments such as forceps to grab the fetus, pull it apart, and remove it from the uterus. *Id.*

The removal of the fetus during a D&E can be accomplished in several ways. Two are relevant here.

First, in the procedure known as "intact D&E," "dilation and extraction" (D&X), or "partial-birth abortion," the abortionist may extract the entire fetus intact apart from the head, which lodges in the cervix. *Id.* at 138. With the living fetus almost completely outside of the womb, the abortionist then "forces the scissors into the base of the skull," "spreads the scissors to enlarge the opening," and places a suction catheter into that opening to vacuum out the child's brains. *Id.* at 138. The dead fetus is then removed. *Id.* Congress banned this D&E technique in the Partial-Birth Abortion Ban Act of 2003 that this Court upheld in *Gonzales*.

Second, in a "standard D&E"—the variation practiced by the plaintiffs—"the abortionist . . . use[s] instruments to grasp a portion (such as a foot or hand) of a developed *and living* fetus and drag the grasped portion out of the uterus into the vagina." *Stenberg v. Carhart*, 530 U.S. 914, 958 (2000) (Kennedy, J., dissenting) (emphasis added). He or she then "uses the traction created by the opening between the uterus and vagina to dismember the fetus, tearing the grasped portion away from the remainder of the body." *Id.* As a result, "[t]he fetus, in many cases,

dies just as a human adult or child would: It bleeds to death as it is torn limb from limb." *Id.* at 958–59. Indeed, with its heart still beating, "[t]he fetus can be alive at the beginning of the dismemberment process and can survive for a time while its limbs are being torn off." *Id.* at 959. Afterwards, "the abortionist is left with 'a tray full of pieces.'" *Id.* (citation omitted).

As with partial-birth abortion, many physicians and policymakers have raised grave moral concerns with the process of terminating a fetus by dismembering it piece by piece. Two doctors associated with Planned Parenthood once described the then-novel procedure as "an act of destruction." Doc. 81-2 at 6. "Some part of our cultural and perhaps even biological heritage recoils at a destructive operation on a form that is similar to our own . . . The sensations of dismemberment flow through the forceps like an electric current." Doc. 81-2 at 6. Similarly, a former abortionist concluded that "tearing a developed fetus apart, limb by limb, . . . is an act of depravity that society should not permit," for "[w]e cannot afford such a devaluation of human life, nor the desensitization of medical personnel that it requires." Doc. 81-15 at 4.

B. Alternatives to dismemberment

The dismemberment-abortion ban at issue in this case criminalizes some of the second type of D&E abortions discussed above. But, although it bans that type of abortion procedure, it does not eliminate the ability of women to have an abortion. This is so for two reasons.

1. First, the dismemberment-abortion ban affects a very small number of abortions. As explained above, dismemberment abortion is not performed until approximately 15 weeks of pregnancy. *See* Tr. Vol. I at 184. The most recent statistics in the record show that in 2014 approximately 93% of abortions in Alabama were performed before 15 weeks (7513 of 8080 total). Doc. 81-14 at 13. These abortions are accomplished by suction curettage or vacuum aspiration, in which the physician vacuums out the embryonic tissue, or by medication abortion, which uses medication to terminate fetal life and expel the fetal contents from the woman. Tr. Vol. I at 183–84; Doc. 54-4, ¶ 18–19. It is undisputed that the dismemberment-abortion ban does not affect any of these abortions.

2. Second, for the approximately 7% of abortions that the Act may affect, there are alternatives available that do not require a doctor to terminate fetal life by ripping a living fetus apart limb by limb. As described in more detail below, an abortionist may, first, end fetal life by an injection or by severing the umbilical cord and, then, remove the dead fetus in whatever way is appropriate.

a. Injection Methods. There are two types of injections that can be used to kill an unborn child in utero: potassium chloride and digoxin. Fetal demise can be induced by an injection of potassium chloride directly into the fetus before the fetus is removed. *See* Doc. 81-6 at 5. This method, which is performed by specialists, *see* Doc. 115 at 92–93, was introduced as early as 1988 and has grown in use ever since (including being the "preferred method of induced fetal demise" at Yale New Haven Hospital). Doc. 81-7 at 3.

Fetal demise can also be induced by an injection of digoxin. An abortion provider can inject digoxin into either the fetus or the amniotic fluid approximately twenty-four hours before the fetus is removed. Tr. Vol. II at 113. *See also* Doc. 81-1, ¶ 6. Digoxin injections "are widely used regimens" and effective at inducing fetal demise. Doc. 81-10 at 2.[2] This procedure has been used since the 1980s "without any reported major feticide-related complications" and only "mild" common reactions such as vomiting. Doc. 81-6 at 3. Unlike potassium chloride, which must be injected directly into the fetus, digoxin can be injected either into the fetus or into the amniotic fluid, and conse-

[2] *See also* Doc. 81-3 at 2 (describing digoxin to induce fetal demise as in "widespread use"); Doc. 81-11 at 3 ("Digoxin is widely used to induce fetal demise prior to second-trimester abortion . . . ."); Doc. 81-5 at 8 ("Digoxin, administered either intraamniotically or intrafetally, is commonly used by abortion providers to facilitate second-trimester D&E."); David A. Grimes et al., *Feticidal Digoxin Injection Before Dilation and Evacuation Abortion*, 85 CONTRACEPTION 140 (2012) (Plaintiffs' Exhibit 40) ("Feticidal injection of digoxin before dilation and evacuation (D&E) abortion has become common in recent years and is now a standard policy at some abortion clinics."); Kristina Tocce et al., *Feasibility, Effectiveness, and Safety of Transvaginal Digoxin Administration Prior to Dilation and Evacuation*, 88 CONTRACEPTION 706 (2013) (Plaintiffs' Exhibit 45) ("Following the passage of the Partial Birth Abortion Ban Act of 2003, many providers began inducing fetal demise prior to second-trimester abortion to avoid the risk of violating this legislation.") (footnote omitted); Aileen M. Gariepy et al., *Transvaginal Administration of Intraamniotic Digoxin Prior to Dilation and Evacuation*, 87 CONTRACEPTION 76 (2013) (Plaintiffs' Exhibit 47) (noting that "[i]nduction of fetal demise before dilation and evacuation (D&E) [including through injection of digoxin] has become common practice" after the federal Partial-Birth Abortion Ban Act).

quently, "less skill is required" for this injection. Doc. 81-6 at 5.

b. Umbilical cord transection. Umbilical cord transection (UCT) is a "feasible, efficacious and safe way to induce fetal demise." Doc. 81-13 at 5. UCT can be performed immediately before a D&E. *Id.* at 3. After dilating the woman's cervix (the first step in a D&E, *see* Doc. 54-5, ¶ 12), the abortion provider draws the umbilical cord into the cervix and then transects it. *See* Doc. 81-13 at 3; *see also* Doc. 81-1, ¶ 8. Generally, this induces fetal hemorrhage followed by death in under five minutes. *See* Doc. 81-1, ¶ 8.

Although there are disputes in the medical literature about these methods' safety and efficacy—especially when a fetus is between 14 and 18 weeks LMP—these methods of inducing fetal demise are commonly practiced in second trimester abortions. *See* Tr. Vol. II at 89–91. As this Court explained when discussing the federal partial birth abortion ban, "[i]f the intact D & E procedure is truly necessary in some circumstances, it appears likely an injection that kills the fetus is an alternative under the Act that allows the doctor to perform the procedure." *Gonzales*, 550 U.S. at 164. In fact, "some doctors" believe that the fetus's "removal will be easier" after inducing fetal demise because it "may cause contractions and make greater dilation possible" and "the fetus' body will soften." *Gonzales*, 550 U.S. at 136. In response to the federal partial-birth abortion ban, Planned Parenthood "required [the] *routine* use of digoxin for all abortions beginning at 20 weeks LMP and for abortions beginning at 18 weeks LMP if certain methods of cervical dilation were employed" for

four years. Doc. 107-1 at 1 (emphasis added); *see also* Tr. Vol. II at 79, 82–83. And Alabama physicians reported inducing fetal demise with an intra-fetal injection in 22 abortions in 2014—the most recent year with data in the record. Doc. 81-14 at 15.

C. The district court and court of appeals decisions.

Shortly after the Alabama Legislature enacted the dismemberment abortion ban, the only two abortion clinics that perform the procedure in Alabama, their doctors, and their patients sought to enjoin the law on the ground that it violates the patients' rights under the Due Process Clause of the Fourteenth Amendment. After conducting a two-day evidentiary hearing, the district court preliminarily enjoined the dismemberment-abortion ban. Doc. 116; *see also* Doc. 115 (opinion); Doc. 120 (amended order); Doc. 122 (second amended order). Following the issuance of the preliminary injunction, all parties and the district court agreed to consolidate the preliminary-injunction hearing with the trial on the merits. *See* Doc. 118; *cf.* Fed. R. Civ. P. 65 (a)(2).

The district court then entered a final judgment holding the law unconstitutional. *See* Doc. 139. Even though "the parties agree[d] that the plaintiffs brought a facial challenge to that statute," the district court's final judgment purports to grant only "as-applied" relief with respect to these plaintiffs. App. 131a. Nonetheless, by enjoining the State from enforcing the law against the only two abortion clinics that perform dismemberment abortions, the district court eliminated the law's entire field of operation.

The Eleventh Circuit Court of Appeals affirmed. The court of appeals noted that "[s]ome Supreme Court Justices have been of the view that there is constitutional law and then there is the aberration of constitutional law relating to abortion." App. 1a-2a. "If so, what we must apply here is the aberration." App. 2a. "In our judicial system, there is only one Supreme Court, and we are not it." App. 36a.

"[D]escribing dismemberment abortion for what it is," the court of appeals concluded that the dismemberment abortion ban furthers three governmental interests. App. 15a. "[T]he State 'may use its voice and its regulatory authority to show its profound respect for the life within the woman.'" App. 15a (citation omitted). The State "may regulate a 'brutal and inhumane procedure' to avoid 'coarsen[ing] society to the humanity of not only newborns, but all vulnerable and innocent human life.'" App. 15a-16a. And a State "may enact laws to protect the integrity of the medical profession, including the health and well-being of practitioners." App. 16a. For these reasons, the court of appeals held that the State has an "actual and substantial interest in lessening, as much as it can, the gruesomeness and brutality of dismemberment abortion." App. 16a.

But the court of appeals nonetheless held that the law was unconstitutional because it imposed an "undue burden" on a woman's right to terminate her pregnancy by requiring her physician to induce fetal demise before performing what would otherwise be a dismemberment abortion. App. 24a-36a. The court of appeals held that the district court did not commit clear error when it found that methods of inducing fetal demise are not "safe, effective, or available"

based on testimony about the technical difficulty of performing some of the methods of fetal demise, (App. 20a-22a), evidence of studies that no method of inducing fetal demise is 100% effective all the time, (App. 23a), evidence that inducing fetal demise may increase the side-effect and complication risk of an abortion, (App. 24a), and evidence that inducing fetal demise by way of an injection increases by one day the time required for the abortion, (App. 24a). The court of appeals ignored that (1) methods of inducing fetal demise are commonly practiced in the second trimester, including by Planned Parenthood and the doctor/plaintiffs in this case, and (2) this Court has expressly contemplated that injections may be used to kill a fetus in utero, *Gonzales*, 550 U.S. at 164.

The court of appeals distinguished this case from the partial-birth abortion ban in *Gonzales* on three grounds. First, the court of appeals held that the *Gonzales* standard for a facial claim—"medical uncertainty"—did not apply because the district court had purported to grant only as-applied relief. App. 27a. Second, the court of appeals held that the *Gonzales* standard had been effectively overruled by *Whole Women's Health v. Hellerstedt*, 579 U.S. ----, 136 S.Ct. 2292 (2016). App. 29a. Third, the court of appeals held that "the uncertainty in *Gonzales* was about whether the federal partial birth abortion ban 'would ever impose significant health risks on women'" but, "in this case the State conceded that by requiring pre-dismemberment death of the unborn child the Act would always impose some increased health risks." App. 28a-29a.

Judge Dubina concurred separately to "agree on record with Justice Thomas's concurring opinion in

Gonzales v. Carhart . . . 'that the Court's abortion jurisprudence . . . has no basis in the Constitution.'" App. 36a-37a (Dubina, J., concurring).

ARGUMENT

The lower courts were wrong to enjoin Alabama from enforcing its ban on the dismemberment of a living fetus. Federal law constitutionally prohibits partial-birth abortion. *Gonzales v. Carhart*, 550 U.S. 124, 133 (2007). And there is "no meaningful difference" between death-by-dismemberment abortion in the womb and partial-birth abortion outside it. *Hope Clinic v. Ryan*, 195 F.3d 857, 879 (7th Cir. 1999) (Posner, J., dissenting). "No reason of policy or morality that would allow the one would forbid the other." *Id.* These procedures are, in the words of Justice Ginsburg, "equally gruesome." *Gonzales*, 550 U.S. at 182 (Ginsburg, J., dissenting).

As the court of appeals expressly recognized, only this Court can resolve the inconsistency in treatment between partial-birth and dismemberment abortion. The Court should grant certiorari and reverse.

I. The court of appeals' decision is inconsistent with *Gonzales v. Carhart.*

This Court set the standard for a facial challenge to a prohibition on a method of abortion in *Gonzales v. Carhart*, 550 U.S. 124 (2007). *Gonzales* is the latest in a line of cases addressing how the "undue burden" standard of *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), applies to laws that prohibit one method of abortion. *See generally Gonzales*, 550 U.S. at 124; *Stenberg v.*

Carhart, 530 U.S. 914 (2000); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976). Such method bans impose an undue burden if—and only if—they either (1) fail to advance legitimate state interests or (2) "impose[] significant health risks" on women seeking an abortion. *Stenberg*, 530 U.S. at 931; *Danforth*, 428 U.S. at 79; *see also Gonzales*, 550 U.S. at 146.

In *Gonzales,* the Court made clear that a ban is constitutional as long as there is "medical uncertainty over whether the Act's prohibition creates significant health risks." 550 U.S. at 164. So, under *Gonzales*, if Alabama can show that there is a reasonable medical debate that alternatives to dismemberment are safe for the mother, then the Act should be upheld.

There is no question that Alabama's dismemberment abortion ban serves important and legitimate state interests. As many Justices have noted, dismemberment abortion is just as "brutal" and "equally gruesome" as partial-birth abortion, as it involves "tearing a fetus apart and ripping off its limbs," such that any distinction between the two procedures "is simply irrational." *Gonzales*, 550 U.S. at 182 (Ginsburg, J., dissenting) (internal quotation marks and citations omitted); *see also id.* at 160 (majority opinion) (recognizing that dismemberment "is in some respects as brutal, if not more, than" partial-birth abortion); *Stenberg*, 530 U.S. at 946–47 (Stevens, J., dissenting) (describing dismemberment as "equally gruesome" as partial-birth abortion). It is a legitimate state interest to ensure that, even if a life may be extinguished, society does not permit barbarism. *See, e.g.*, U.S. Const. amend. VIII (prohibiting "cruel

and unusual punishments," including cruel forms of execution); *Glass v. Louisiana*, 471 U.S. 1080, 1084 (1985) (explaining that the "inhuman and barbarous" practice of "drawing and quartering," which causes death by dismemberment, is "obvious[ly] unconstitutional[]"). The State obviously has a powerful interest in "lessening, as much as it can, the gruesomeness and brutality" of this procedure. App. 16a.

There is also no *legitimate* debate about whether, under the second part of the *Gonzales* standard, there is "medical uncertainty over whether the . . . prohibition creates significant health risks." *Gonzales*, 550 U.S. at 164. Unlike the partial-birth abortion ban in *Gonzales*, the dismemberment abortion ban includes a health exception. Moreover, the ban still allows the fetus to be removed from the womb with scissors, forceps, or other cutting instruments—it just requires the doctor to humanely terminate the fetus first. The doctor can do so by injecting digoxin or potassium chloride or by cutting the umbilical cord. If state legislatures truly enjoy "wide discretion to pass legislation in areas where there is medical and scientific uncertainty," *Gonzales*, 550 U.S. at 163, then the state's presentation here must have been sufficient to meet its burden.

The undisputed record evidence about digoxin alone establishes the requisite level of "uncertainty" under *Gonzales*:

(1) This Court has recognized that some doctors believe inducing fetal demise is actually *better* for the patient. *See Gonzales*, 550 U.S. at 136; *Carhart v. Ashcroft*, 331 F. Supp. 2d 805, 907-12 (D. Neb. 2004) (recounting detailed evidence about safety of procedures to induce fetal demise); Doc. 81-5 at 2 ("Many

clinicians believe that inducing fetal death prior to D&E results in softer macerated fetal tissues that may ease evacuation of the fetus and potentially decrease procedure time and risk of complications.").

(2) Medical literature describes using digoxin to induce fetal demise as a practice in "widespread use," Doc. 81-3 at 2, "widely used," Doc. 81-11 at 3 & Doc. 81-10 at 2, and "commonly used," Doc. 81-5 at 8.

(3) Dr. William Parker, one of the two abortion doctors in Alabama who perform dismemberment abortions, has used a digoxin injection to induce fetal demise before an abortion forty to fifty times. Tr. Vol. II at 80-81.

(4) The National Abortion Federation's textbook explains how to use digoxin to induce fetal demise before a second trimester abortion. Tr. Vol II. at 18; Cassing Hammond & Stephen Chasen, *Dilation and Evacuation*, in MANAGEMENT OF UNINTENDED AND ABNORMAL PREGNANCIES: COMPREHENSIVE ABORTION CARE (Maureen Paul et al. eds., 2009) (Defendants' Exhibit 17).

(5) For four years, Planned Parenthood required the "routine use of digoxin" for all abortions at 20 weeks and some abortions at 18 weeks. Tr. Vol. II at 79, 82-83.

(6) In 2014, the most recent year with data available, abortion doctors reported using digoxin to induce fetal demise 22 times in Alabama. Doc. 81-14 at 15.

(7) The State's expert, who taught one of the plaintiffs/abortionists in this case when she was a medical resident, testified without rebuttal that vir-

tually no additional training would be necessary for an abortion doctor to learn how to inject digoxin. Tr. Vol. II at 114 ("doing the digoxin injection into the amniotic cavity . . . would require maybe seeing a couple of additional procedures and talking to people who have done the procedures").

There is similar record evidence about potassium chloride and umbilical cord transection. Although injecting potassium chloride into a fetus requires specialized training, multiple studies show that it is safe.[3] Similarly, although umbilical cord transaction is not practiced as widely as injection methods, medical literature declares it to be a "feasible, efficacious and safe way to induce fetal demise." Doc. 81-13 at 5. As long as umbilical cord transection "is performed at the same time as the abortion procedure, it would not be expected to increase the risk beyond that inherently associated with the D&E procedure itself." Doc. 81-1, ¶ 10.

The court of appeals refused to follow *Gonzales* for three "legal" reasons. App. 26a-29a. None sufficiently distinguishes the dismemberment abortion

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[3] See Doc. 81-7 at 3; see also Doc. 81-8 at 7 ("Administration of [potassium chloride] is safe."); Doc. 81-6 at 7 ("During an international collaborative experience with selective terminations, there were no failed inductions of fetal demise by intrafetal or intrafunic injection of [potassium chloride] in 402 cases, which included gestational durations from 9 weeks until after 24 weeks."); Doc. 81-9 at 2–3 " inadvertent maternal injection or maternal absorption of potassium chloride during feticide . . . would be extremely rare if correct fetal placement of the needle is confirmed prior to the procedure"); Doc. 81-1 ¶ 9 ("The dose of potassium chloride required to induce demise would not be expected to have maternal effects, unless inadvertently injected into the maternal circulation.").

ban in this case from the partial birth abortion ban at issue there.

First, the court of appeals erroneously held that the district court converted this case from a facial into an as-applied challenge when it purported to grant an "as-applied" injunction by prohibiting the state from enforcing the ban as to the specific clinics who are the plaintiffs here. App. 26a-27a (citing App. 131a). But, no matter how the district court framed its injunction, this has always been and remains a facial challenge to a procedure ban on all fours with *Gonzales*. The plaintiffs and the State have always agreed that the plaintiffs brought, and the parties litigated, a facial challenge. App. 130a. And the evidence and reasoning the district court relied upon for its ruling concerned the law's text and general effects—not the specific circumstances of these two abortion clinics, their doctors, or patients.[4]

That the district court expressly limited its injunction to the two clinic plaintiffs—instead of expanding it to protect future, putative nonparties—did not change the substantive standard for evaluating the plaintiffs' claim. In *Gonzales*, the Court explained that an "as-applied" challenge is "the proper manner to protect the health of the woman if it can

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[4] The district court's judgment was based on the following conclusions: (1) the law purportedly reduces the number of doctors eligible to perform abortions (App. 117a); (2) the health exception is not a "fail safe," (App. 113a); (3) for "most women . . . none of the three [methods of inducing fetal demise] would be safe or feasible," (App. 111a); (4) "All women seeking a second trimester abortion in Alabama would have to endure a medically unnecessary, invasive procedure that increases the duration of the procedure as well as the risk of complications." (App. 109).

be shown that in discrete and well-defined instances a particular condition has or is likely to occur in which the procedure prohibited by the Act must be used." *Gonzales*, 550 U.S. at 167. But it is not "as-applied," as that term was used in *Gonzales*, for a court to hold that *every* clinic that performs dismemberment abortions may continue to do so with respect to *every* patient. When this Court spoke of potential "as-applied" challenges in *Gonzales*, it contemplated a lawsuit seeking relief on behalf of women sharing "a particular condition" that made them ineligible for an alternative procedure. That is not this case.

In any event, an injunction's "practical effect" controls, not its use of "magic language." *Abbott v. Perez*, 138 S. Ct. 2305, 2319 (2018). Here, the plaintiffs sought and received an injunction that prohibits the law from being enforced even as to women who safely could and would undergo a fetal demise procedure. The district court enjoined the State from enforcing the law against every person or clinic in Alabama that presently performs the procedure that the law regulates no matter their particular circumstances. App. 133a-134a. The upshot is that the law has no field of operation as to any clinic, any doctor, or any woman. That is the very definition of facial relief, not as-applied relief.

Second, contrary to the court of appeals' legal conclusion, the *Gonzales* standard for evaluating "documented medical disagreement" over "significant health risks," *Gonzales*, 550 U.S. at 162, is unchanged by *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). There, this Court examined Texas's asserted interest in women's health to de-

termine whether that interest was legitimate and whether the state laws in fact provided that medical benefit. *Id.* at 2310; *see also id.* at 2324 (Thomas, J., dissenting) ("[T]oday's opinion tells the courts that, when the law's justifications are medically uncertain, they need not defer to the legislature, and must instead assess medical justifications for abortion restrictions by scrutinizing the record themselves."). But in *Gonzales*, the question was whether a government could constitutionally prohibit one method of abortion when there is "documented medical disagreement" over whether the prohibition "would ever impose significant health risks on women." *Gonzales*, 550 U.S. at 162. That is the same question in this case, and the *Gonzales* Court answered it in the affirmative. *Id.* at 163.

Whole Women's Health did not expressly or implicitly overrule this standard. *Whole Women's Health* was about one side of the undue burden analysis; this case, like *Gonzales*, is about the other. The question in *Whole Women's Health* was whether the abortion-clinic regulation at issue even furthered the state's medical safety interest *at all*. Here, as in *Gonzales*, the question is whether the burden that the law imposes renders it unconstitutional, even though it indisputably furthers the state's interests. The Court held uncertainty was irrelevant to the first side of the analysis in *Whole Women's Health*, but dispositive as to the second in *Gonzales*. In any event, this case concerns a method ban on all fours with *Gonzales*, and lower courts are obligated to follow that most analogous precedent. *See Olatunji v. Ashcroft*, 387 F.3d 383, 399 n.1 (4th Cir. 2004) ("The Supreme Court has directed us to follow the *most analogous* Court precedent . . . when determining

what authority directly controls.") (citing *Agostini v. Felton,* 521 U.S. 203, 237 (1997) (emphasis added)); *cf. Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) ("[I]t is a commonplace of statutory construction that the specific governs the general . . . .").

Third, the court of appeals erred by requiring the state to show the absence of *any* "health risks" from the procedure ban instead of the absence of "*significant* health risks," which is the actual *Gonzales* standard. App. 28a. There is no doubt that—for the few abortions the dismemberment abortion ban affects—an additional procedure will be required to kill the unborn child before it is removed. And, of course, an additional procedure comes with additional risks.

But not every increased risk from inducing fetal demise is significant. Multiple studies show that an injection of potassium chloride is safe.[5] Likewise,

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[5] *See* Doc. 81-7 at 3; see also Doc. 81-8 at 7 ("Administration of [potassium chloride] is safe."); Doc. 81-6 at 7 ("During an international collaborative experience with selective terminations, there were no failed inductions of fetal demise by intrafetal or intrafunic injection of [potassium chloride] in 402 cases, which included gestational durations from 9 weeks until after 24 weeks."). In one study, the authors examined all cases where fetal demise was induced by an injection of potassium chloride before an abortion procedure was performed in five years at one center. See Doc. 81-9 at 2–3. They found that in all cases, the entire injection procedure took five minutes or less and no case required a second "needle insertion" or resulted in maternal complications. *Id.* at 3. Further, the authors noted that "[a]lthough . . . certainly possible," "inadvertent maternal injection or maternal absorption of potassium chloride during feticide . . . would be extremely rare if correct fetal placement of the needle is confirmed prior to the procedure." Id. at 4; see also Doc. 81-1, ¶ 9 ("The dose of potassium chloride required to

multiple studies have concluded that a digoxin injection is safe,[6] which is why Planned Parenthood allows its physicians to use digoxin.[7] Similarly, umbilical cord transection does not appreciably increase the risk of complications over those of the standard D&E procedure.[8]

Contrary to the court of appeals' conclusion, it is perfectly consistent to admit that there is a "5-10% risk" of a complication from the induction of fetal demise and also to characterize that procedure as "safe." App. 28a. This Court, for example, has recognized that the "incidence of complications [i]s 2.1%" from abortion, but it has nonetheless characterized

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induce demise would not be expected to have maternal effects, unless inadvertently injected into the maternal circulation.").

[6] Doc. 81-5 at 6 (finding that digoxin was 87% effective at inducing fetal death and that this effectiveness did not vary significantly based upon whether the injection was intrafetal or intraamniotic); Doc. 81-11 at 4 ("We found that 1.5 mg of digoxin by intraamniotic injection is effective at causing fetal demise by 24 h, but that demise is not immediate."); *see also* Tr. Vol. II at 115. Large studies have shown "no failures of causing demise" and "no injection-related complications," and other studies confirm "no adverse events suggesting digoxin toxicity." Doc. 81-6 at 5–6. The data also shows that digoxin injections create "no difference in procedure time" or "physician-reported case difficulty." *Id.* at 7; *see also* Doc. 81-8 at 7. Further, "[t]he dose of digoxin required to cause fetal demise is sufficient to result in maternal serum digoxin levels that are similar to those that would be aimed for in a woman placed on digoxin for medical indications." Doc. 81-1, ¶ 9.

[7] *See* Doc. 107-1 at 1.

[8] One study found that both major and minor complications when UCT was performed before a D&E were "comparable" to the rates of complications "in other large D&E case series." Doc. 81-13 at 5. In at least one facility, *all* abortions at or over 16 weeks gestation have been done using UCT after the passage of the federal Partial-Birth Abortion Act. *Id.* at 3.

abortion to be an "extremely safe" procedure. *Hellerstedt*, 136 S.Ct. at 2311. There is a reason the Court repeatedly used the carefully calibrated phrase "significant health risks" in *Gonzales* instead of the phase "some increased health risks," (App 28a) which is the standard the court of appeals erroneously applied. "Considerations of marginal safety, including the balance of risks, are within the legislative competence when the regulation is rational and in pursuit of legitimate ends." *Gonzales* 550 U.S. at 166.

It is untenable that the Constitution would allow the federal government to prohibit partial birth abortion but deny the States the power to prohibit dismemberment abortion. It "is simply irrational" to distinguish between the two procedures. *Gonzales*, 550 U.S. at 182 (Ginsburg, J., dissenting). "Implicitly approving such a brutal and inhumane procedure by choosing not to prohibit it will further coarsen society to the humanity of not only newborns, but all vulnerable and innocent human life, making it increasingly difficult to protect such life." *Id.* at 157 (citation omitted).

II. The question presented is of great national importance.

The constitutionality of a state ban on dismemberment abortion is an important question of national significance. At least nine states have enacted laws to ban dismemberment abortion.[9]

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[9] In addition to Alabama, Arkansas (Ark. Code Ann. §§ 20-16-1801 et. seq.), Kansas (Kan. Stat. Ann. § 65-6743), Kentucky (Ky. Rev. Stat. § 311.710 et. seq.), Louisiana (La. Rev. Stat. § 40:1061.1.1), Mississippi (Miss. Code Ann. §§ 41-41-151 through 41-41-169), Oklahoma (63 Okl. St. § 1-737.7 et seq.), Texas

Litigation over some of these similar abortion laws is pending in the Fifth Circuit, the Eighth Circuit, and multiple state courts. *See Hopkins v. Jegley*, 267 F. Supp. 2d 1024 (E.D. Ark. 2017), on appeal No. 17-2879 (8th Cir.); *Whole Women's Health v. Paxton*, 2017 U.S. Dist. LEXIS 195268 (W.D. Tex. Nov. 22, 2017), on appeal No. 17-51060 (5th Cir.).

The law at issue here is very modest. The Act does not affect any first trimester abortion or all second-trimester abortions. It does not apply to the vacuum-aspiration abortions that are commonly performed in the first trimester and the beginning of the second. Ala. Code § 26-23G-2 (3). And for those abortions to which it applies, it requests only that, before a fetus is torn apart, it should be killed in some other, more humane way. There are several well-recognized and commonly practiced ways of doing that. And one of them—a digoxin injection—is routinely performed by one of the very plaintiffs in this lawsuit. It is not unconstitutional for a state to prohibit dismemberment abortion. The Court should grant certiorari and allow these laws to go into effect.

(Tex. Health & Safety Code § 171.151 et seq.), West Virginia (W.Va. Code § 61-2-31).

Conclusion

The Court should grant certiorari and reverse the court of appeals.

Respectfully submitted,

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