No. 18-837

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

BRIEF OF LOUISIANA, ARIZONA, ARKANSAS, FLORIDA, GEORGIA, IDAHO, INDIANA, KANSAS, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, N. DAKOTA, OHIO, OKLAHOMA, S. CAROLINA, S. DAKOTA, TEXAS, UTAH, W. VIRGINIA, AND KENTUCKY, BY AND THROUGH GOVERNOR BEVIN AS *AMICI CURIAE* SUPPORTING PETITIONERS

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QUESTION PRESENTED

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

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INTRODUCTION AND INTERESTS OF *AMICI*[1]

The question presented in this case goes to the heart of the States' authority to regulate abortion. This Court has held that States (1) have an interest in protecting and fostering respect for human life, including unborn life, and (2) have the power to regulate the medical profession, including on matters of medical judgment and ethics connected to abortion. *See Gonzales* v. *Carhart*, 550 U.S. 124 (2007). As a result, not only may States prohibit specific abortion procedures that threaten to erode respect for life, but they may balance any related medical tradeoffs when they do so, on condition that they do not unduly burden the decision to obtain an abortion. *Id.* Although the decision to obtain an abortion has been constitutionally protected, access to a particular abortion method — *even a method favored by abortion providers* — is not.

The abortion method involved in this case is an exceptionally grisly one, at least as and potentially even more so than the "partial birth" procedure at issue in *Gonzales*. The abortions here, referred to as "dismemberment" abortions, kill fetuses quite literally by tearing them limb from limb while they are still alive in the womb and possibly capable of feeling pain. The likelihood that such a procedure compromises public respect for life, not to mention the ethics of the medical profession, is unquestionably serious. Many States would prefer to prohibit the procedure altogether. But in light of applicable precedent,

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[1] Consistent with Supreme Court Rule 37.2(a), amici provided notice to the parties' attorneys more than ten days in advance of filing.

Alabama has instead sought simply to moderate the dismemberment procedure by requiring that abortion providers use available methods to kill fetuses *before* dismembering them. Alabama's regulation, including the State's implicit balance of medical options and tradeoffs, called for precisely the same judicial deference the *Gonzales* Court afforded Congress.

Instead, the lower courts appear to have assumed Alabama had to guarantee that remaining abortion procedures would be near-substitutes from a medical perspective. As *Gonzales* shows, Alabama was not so required. That conflict with Supreme Court precedent — in light of the developing landscape of abortion litigation after *Whole Woman's Health* v. *Hellerstedt*, 136 S. Ct. 2292 (2016) — calls for this Court to clarify and reaffirm States' authority to regulate abortion for moral and ethical purposes.

Amici are all States that regulate abortion in order to preserve respect for life. Several states in addition to Alabama — specifically, *amici* Louisiana, Arkansas, Kansas, Kentucky, Mississippi, Ohio, Oklahoma, Texas, and West Virginia[2]— have enacted laws that regulate dismemberment abortion in the way Alabama has. In requiring fetal demise before dismemberment, *amici* do not intend to sanction either abortion generally or the dismemberment procedure in particular. They regret that Supreme Court precedent places them in the

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[2] Ark. Code Ann. §§ 20-16-1801-1807; Kan. Stat. Ann. § 65-6743; Ky. Rev. Stat. § 311.787; La. Rev. Stat. § 40:1061.1.1; Miss. Code Ann. §§ 41-41-151-160; Ohio Rev. Code § 2919.15; Okl. St. Ann. §§ 1-737.7-.16; Tex. Health & Safety Code §§ 171.151-154; W.Va. Code § 16-20-1.

incongruous position of advocating for fetal death as a less brutal, more humane alternative to a procedure that should have no place in a civilized society. But at a minimum, *amici* strongly support the authority of States to protect both unborn life and human dignity in that small way. *Amici* thus have an interest in ensuring courts recognize that authority and scrutinize it under the appropriate standards.

STATEMENT

The panel opinion and previous decisions of this Court contain detailed descriptions of the abortion procedure involved in this case. Any discussion of the case should begin there.

As the panel aptly stated, although the medical term for the relevant abortion procedure is "Dilation and Evacuation (D & E)," the term "dismemberment abortion" is "more accurate because the method involves tearing apart and extracting piece-by-piece from the uterus what was until then a living unborn child." *W. Alabama Women's Ctr.* v. *Williamson*, 900 F.3d 1310, 1314 (11th Cir. 2018) ("*WAWC*"). The dismemberment procedure is used most often "during the 15 to 18 week stage of development, at which time the unborn child's heart is already beating." *Id.*

In a dismemberment abortion, the doctor first dilates the pregnant woman's cervix just enough to insert instruments, such as a forceps, into the uterus. The doctor then seizes parts of the fetus's body, "such as a foot or hand," and pulls those parts out of the uterus and into the vagina. *Stenberg* v. *Carhart*, 530 U.S. 914, 958 (2000) (Kennedy, J., dissenting). Because the cervical opening is not wide enough for the fetus's

body to exit, the doctor can use "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.* The fetus does not die instantly, but stays alive, heart beating, while the doctor repeats the process, tearing off one limb at a time. *Id.* at 959. In the end the fetus bleeds to death or dies from the trauma, and the doctor is left with "'a tray full of pieces.'" *Id.* (quoting Dr. Leroy Carhart, the abortion doctor who was respondent in *Gonzales* and *Stenberg*); *see also Gonzales* v. *Carhart*, 550 U.S. 124, 182 (2007) (Ginsburg, J., dissenting) (noting that dismemberment abortions, like partial birth abortions, "could equally be characterized as brutal, involving as it does tearing a fetus apart and ripping off its limbs").[3]

Alabama does not forbid abortion doctors from dismembering fetuses in the course of performing abortions. Instead, it "sought to make the procedure more humane[.]" *WAWC*, 900 F.3d at 1314. The statute at issue in this case, 1975 Ala. Code § 26-23G-2(3), does so by forbidding doctors to "dismember[] a *living* unborn child." *WAWC*, 900 F.3d at 1314. The doctor "is required to kill the unborn child *before* ripping apart its body during the extraction." *Id.* (emphasis added). Alabama included an exception to avert the mother's death or preserve her health, as defined by statute. *Id.* § 26-23G-2(6).

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[3] A recent published decision of the Fifth Circuit contains a photograph of the remains of a dismembered fetus. *See Planned Parenthood of Greater Texas Family Planning & Preventative Health Servs., Inc* v. *Smith*, ___ F.3d___, No. 17-50282, 2019 WL 244829, at *2 (5th Cir. Jan. 17, 2019).

Alabama has proposed various methods for killing the fetus before dismemberment. The principal issue is the *legal* standard for evaluating whether mandatory use of those methods in dismemberment procedures would unduly burden the decision to obtain an abortion.

SUMMARY OF ARGUMENT

The States' authority to regulate abortion for the purpose of protecting unborn life and advancing respect for life is unquestionable. *See, e.g.*, *Gonzales*, 550 U.S. at 145. Alabama defended the challenged abortion regulation on that ground. It is also beyond serious question that this abortion procedure threatens to undermine respect for life. Alabama is thus empowered to defend against that threat.

Gonzales held that when a State regulates abortions for the sake of fostering respect for life, including unborn life, it has leeway to balance that interest against possible medical tradeoffs. *Id.* at 163, 166. Even when some abortion providers consider a forbidden procedure to be medically preferable, the State's reasonable resolution of the tradeoffs prevails. Abortion providers instead must work to find abortion methods that are more consistent with respect for life. The nature of the State's interest distinguishes cases like this one and *Gonzales* from cases like *Hellerstedt*, 136 S. Ct. 2292, where the State justified its abortion regulations solely in medical terms.

The lower court misunderstood those precedents, and this Court should clarify their proper reach. The result of the panel's approach limits the authority of States to prevent abortion providers from using the methods they prefer, even when those methods offend

the interests recognized in *Gonzales*. That decision should be reversed.

ARGUMENT

I. REQUIRING DEMISE BEFORE FETUSES ARE DISMEMBERED FURTHERS STATES' INTEREST IN RESPECT FOR HUMAN LIFE.

The lower court acknowledged several "legitimate interests that animate the State's effort to prevent an unborn child from being dismembered while its heart is beating":

> First, the State "may use its voice and its regulatory authority to show its profound respect for the life within the woman." Second, it may regulate a "brutal and inhumane procedure' to avoid "coarsening society to the humanity of not only newborns, but all vulnerable and innocent human life." … The State has an actual and substantial interest in lessening, as much as it can, the gruesomeness and brutality of dismemberment abortions.

WAWC, 900 F.3d at 1320 (alteration and citations omitted).[4] In that respect, the lower court was correct: The interests cited by the State are unquestionably

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[4] The Eleventh Circuit also recognized that the State "may enact laws to protect the integrity of the medical profession, including the health and well-being of practitioners" because "[d]ismemberment abortions exact emotional and psychological harm on at least some of those who participate in the procedure or are present during it." *WAWC*, 900 F.3d at 1320. The panel reserved the question whether fetuses might feel pain when they are dismembered alive. *Id.* at 1320 n.8.

legitimate, and the fetal demise law directly serves them.

Abortion jurisprudence has always entailed a compromise between women's abortion rights and the risk that unregulated exercise of those rights will "devalue human life." *Gonzales*, 550 U.S. at 158. This Court has recognized ever since *Roe* v. *Wade* that the State has an "important and legitimate interest in protecting the potentiality of human life" before birth. 410 U.S. 113, 162 (1973). This Court has reaffirmed that interest on multiple occasions. *See Planned Parenthood of Se. Pennsylvania* v. *Casey*, 505 U.S. 833, 877 (1992) (O'Connor, J., joined by Kennedy & Souter, J.J.) (explaining that States may enact regulations that "create a structural mechanism by which the State … may express profound respect for the life of the unborn"); *Gonzales*, 550 U.S. at 145 ("[T]he government has a legitimate and substantial interest in preserving and promoting fetal life[.]"); *id.* at 157 ("The government may use its voice and its regulatory authority to show its profound respect for the life within the woman.").

The fullest discussion of the State interest in unborn human life appears in *Gonzales*. As this Court explained in that case, one way that States can vindicate their interest in promoting "[r]espect for human life," *id.* at 159, is by ensuring that abortion methods are consistent with such respect: So long as a State acts "rational[ly]" and "does not impose an undue burden" on the underlying right to an abortion, the State may "bar certain procedures and substitute others." *Id.* at 158. By limiting use of particularly "brutal" abortion procedures, *id.* at 160, States further

respect for life, both in society at large and in the medical profession in particular. They also protect women from the deep grief many of them are likely to feel if and when they later discover exactly how their unborn children were killed, *id.* at 159, while encouraging the medical profession to "find different and less shocking methods to abort the fetus[.]" *Id.* at 160.

The abortion method at issue here provides a case-in-point for when a State can invoke that interest. In a dismemberment abortion, a doctor kills a living fetus literally by tearing it apart. It is hard to exaggerate the inconsistency of killing human fetuses by dismemberment with every other modern norm of humane conduct. Nobody would euthanize her pet in that way. States may not execute prisoners in that way. *Glass* v. *Louisiana*, 471 U.S. 1080, 1084 (1985) (describing the "inhuman and barbarous" practice of "drawing and quartering" as "obvious[ly] unconstitutional[]") (Brennan, J., dissenting from denial of certiorari) (quoting *In re Kemmler*, 136 U.S. 436, 447 (1890)). If anyone tried slaughtering livestock in that way, federal law would treat it as inhumane, and thus contrary to "the public policy of the United States." *See* 7 U.S.C. § 1902 (identifying two humane methods of slaughter and classifying all others as contrary to public policy). Indeed, it is difficult to imagine any standard of ordinary decency that permits such a manner of terminating human life.

By the same token, the grisliness of such abortions implicates the State's interest in protecting respect for human life. The *Gonzales* Court relied on that interest in upholding a federal ban on "partial birth" abortion,

a similar procedure in which a doctor delivers a fetus up to the head, then kills the fetus by forcing a scissors into the skull and suctioning out the brain. 550 U.S. at 138.[5] "No one would dispute that, for many, [partial birth abortion] is a procedure itself laden with the power to devalue human life," the Court explained. *Id.* at 158. And in so doing, the Court observed that dismemberment abortions are "in some respects as brutal, *if not more*." *Id.* at 160 (emphasis added). The interests this Court recognized in *Gonzales* are just as strong here.

Alabama, among other States, has accordingly chosen to promote respect for unborn life (and related interests) by regulating dismemberment abortions: You cannot kill a living fetus by dismembering it. 1975 Ala. Code § 26-23G-2(3). If you are going to dismember a fetus, you instead must kill it first, using one of several more humane available methods (unless necessary to

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[5] Congress expressly relied on its interest in protecting respect for life in enacting the ban. *See* § 14(G), 117 Stat. 1202, note following 18 U.S.C. § 1531 ("[A] prohibition [on partial birth abortion] will draw a bright line that clearly distinguishes abortion and infanticide, that preserves the integrity of the medical profession, and promotes respect for human life[.]"); *id.* § 14(J) ("Partial-birth abortion also confuses the medical, legal, and ethical duties of physicians to preserve and promote life, as the physician acts directly against the physical life of a child[.]"); *id.* § 14(N) ("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."); *see also Gonzales*, 550 U.S. at 157 (citing the congressional findings).

avert the mother's death or preserve her health). *Id.* § 26-23G-2(6).

By any normal standard of morality and basic decency — considering the gruesomeness of the dismemberment procedure — Alabama's regulation is relatively modest. Many States, after all, would prefer to prohibit dismemberment altogether. It is also undeniably unfortunate for a State to have to defend unborn life by replacing horrific fetal deaths with more merciful ones. But States that do not sanction abortion as a rule nonetheless regard efforts to make abortion procedures marginally more humane as an important second-best means to assert their interest in respecting life.

All of this confirms that Alabama's stated interests in the fetal demise law are indeed "actual and substantial," as the panel recognized. *WAWC*, 900 F.3d at 1320. The lower court's error — as discussed in the next section — consisted, rather, in its failure to accord those interests their proper weight.

II. THE LOWER COURT FAILED TO EVALUATE THE ALLEGED BURDENS IN LIGHT OF ALABAMA'S INTERESTS.

The district court found that three potential methods for inducing fetal demise before dismemberment — potassium chloride injections, digoxin injections, and transection of the umbilical cord — are "infeasible," *WAWC*, 900 F.3d at 1322, and that requiring their use would thus impose an undue burden on the abortion decision. The panel affirmed. But as Alabama shows in its Petition, the lower courts

wildly exaggerated the difficulty of inducing fetal demise before dismemberment. Pet. at 8–11.

That in turn highlights the lower courts' *legal* error: Under *Gonzales*, when a State prohibits "brutal" or "shocking" abortion methods in order to vindicate respect for life, 550 U.S. at 160, it has no constitutional obligation to guarantee that the remaining alternative abortion methods are medically equivalent. Rather, the State retains the authority to balance the medical tradeoffs against its interest in respect for unborn life. The panel's failure to recognize the State's policy judgment departs from *Gonzales*.

A. *Gonzales* permits States to balance medical uncertainties when promoting respect for unborn life.

Gonzales started from the premise that "'the fact that [an abortion regulation] which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it.'" *Gonzales*, 550 U.S. at 157–58 (quoting *Casey*, 505 U.S. at 874) (alteration omitted). That principle controls here.

Although the *Gonzales* Court "assume[d]" that the partial birth abortion ban "would be unconstitutional … if it subjected women to significant health risks," 550 U.S. at 161 (quotes and alterations omitted), it recognized that "whether the [ban] create[d] significant health risks for women [was] a contested factual question." *Id.* Substantial evidence introduced by those challenging the ban (supported by the findings of several district court decisions) indicated that partial

birth abortion was safer for the patient than other alternatives, including dismemberment abortion. *Id.* And the partial birth abortion ban, unlike Alabama's fetal demise law, *lacked* a mother's-health exception that would make partial birth abortion available if it ever were medically necessary. *Id.* Those factors made it plausible that a prohibition on partial birth abortion would raise medical risks for at least some pregnant women seeking abortions.

The Court nonetheless resolved the balance of interests in favor of the partial birth abortion ban. It noted that legislatures have "wide discretion to pass legislation in areas where there is medical and scientific uncertainty." *Id.* at 163 (collecting cases). But more importantly, it tied that discretion to "the State's interest in promoting respect for human life at all stages in the pregnancy." *Id.* "[W]hen the regulation is rational and in pursuit of legitimate ends" — *i.e.*, when an abortion regulation is intended to defend respect for unborn life and rationally furthers that goal, as was the case in *Gonzales* — "[c]onsiderations of marginal safety, including the balance of risks, are within the legislative competence[.]" *Id.* at 166. That means that a State may ban an inhumane method of abortion even if doing so has tradeoffs: "[I]f some procedures have different risks than others, it does not follow that the State is altogether barred from imposing reasonable regulations." *Id.*

The *Gonzales* Court assumed that alternatives to partial birth abortion are available and safe for the patient. But significantly, one of the alternatives the Court considered available was "an injection that kills the fetus" if a partial birth abortion were ever "truly

necessary," one of the same alternatives that Alabama proposes here. *Id.* at 164. It was not essential to the Court's reasoning, in other words, that doctors have the option of killing fetuses by dismemberment; the Court considered the option that Alabama suggests here to be adequate as well.

Gonzales thus stands for the proposition that the State's authority to promote respect for unborn life, so long as it does not substantially burden the abortion decision, takes precedence over the ability of abortion doctors "to choose the abortion method he or she might prefer." *Gonzales*, 550 U.S. at 158; *see also Planned Parenthood Sw. Ohio Region* v. *DeWine*, 696 F.3d 490, 516 (6th Cir. 2012) ("The Court has not extended constitutional protection to a woman's preferred method, or her 'decision concerning the method' of terminating a pregnancy."). On the contrary, when the State exercises its regulatory power to ensure respect for life, the medical profession must give way and "find different and less shocking methods to abort the fetus … thereby accommodating legislative demand." *Gonzales*, 550 U.S. at 160; *id.* at 163 ("Physicians are not entitled to ignore regulations that direct them to use reasonable alternative procedures."). The balance is in the State's discretion, even if the State's policy entails medical tradeoffs.[6]

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[6] That rule was not novel to *Gonzales*, but followed from decades of this Court's holdings. In *Harris* v. *McRae*, this Court affirmed Congress's decision in the Hyde Amendment to withhold public funding from even "medically necessary" abortions. 448 U.S. 297, 315–18 (1980).

Application of *Gonzales* in this case would resolve the matter in favor of the State. Alabama identified a discrete abortion procedure — dismemberment abortion — that uniquely threatens to devalue human life and debase the medical profession. It accordingly passed a regulation that continues to permit the basic medical procedure, but requires that doctors modify it to make it less morally offensive — a modification that the *Gonzales* Court had already treated as a reasonable alternative when a similar procedure was prohibited for similar reasons. That is exactly the kind of regulation that *Gonzales* permits. Abortion providers may prefer to perform abortions the old way and may have qualms with the State's resolution of medical uncertainties, but the moral and ethical judgment is the State's to make and the medical tradeoffs are the State's to balance. Their recourse, similarly to the doctors before the Court in *Gonzales*, is to find alternative procedures as the statute requires.

B. *Hellerstedt* did not overrule *Gonzales*.

The panel's refusal to accommodate Alabama's resolution of the medical tradeoffs rested in large part on its reading of *Hellerstedt*. *WAWC*, 900 F.3d at 1325–26.[7] But it exaggerated *Hellerstedt*'s significance and misapplied it to the dismemberment abortion

[7] The panel also held that *Gonzales* only permits States to balance medical tradeoffs where (1) district courts facially invalidate abortion laws, and (2) the medical uncertainty relates only to whether a medical risk would "'*ever*'" occur, rather than to the degree of the risk. *WAWC*, 900 F.3d at 1325–25. Those distinctions make little logical or legal sense. *See* Pet. at 20–21.

statute. The lower courts' confusion about the significance of *Hellerstedt* justifies review.

1. *Hellerstedt* requires courts to conduct their own analysis of facts in the record, whether a legislature has made findings or not. 136 S. Ct. at 2310; *WAWC*, 900 F.3d at 1325–26. But what matters here is not that a federal court has independent authority to evaluate the medical effects of the State's policies (although the lower courts here erred in their factual conclusions). What matters is that the State retains authority to determine that medical tradeoffs, if any, are appropriate when balanced against the interest in respect for unborn human life. As *Gonzales* showed — this *balance* is principally the State's to make.

2. Furthermore, *Hellerstedt* (unlike *Gonzales*) did not involve a State's exercise of its authority to promote respect for unborn life. The regulations at issue in *Hellerstedt* did not ban or modify any abortion procedure and Texas did not seek to justify its regulations in moral or ethical terms at all, let alone in the ways contemplated by *Gonzales*. Instead, the *Hellerstedt* Court was faced with a set of health and safety regulations for abortion providers — specifically, a legislative change requiring abortion doctors to have admitting privileges at local hospitals and a requirement that abortion facilities comply with regulations applicable to ambulatory surgical centers. 136 S. Ct. at 2299–300. Texas justified those laws purely as health and safety regulations, also a legitimate State interest. *See* Respondents' Br., *Whole Woman's Health* v. *Hellerstedt*, 136 S. Ct. 2292 (2016) (No. 15-274), at 1 (stating that "Texas enacted [the regulations] to improve the standard of care for

abortion patients"). This Court accordingly analyzed them solely in those terms. 136 S. Ct. at 2310 (noting that in the absence of legislative findings, this Court would "infer that the legislature sought to further a constitutionally acceptable objective (namely, protecting women's health)").

Judging the regulations by the standard of health and safety, this Court determined based on Texas' record that the regulations did not actually do anything more than existing law to benefit the patient's health and safety. *Id.* at 2311 (finding "nothing in Texas' record evidence that shows that, compared to prior law, which required a 'working arrangement' with a doctor with admitting privileges, the new [abortion doctor admitting privileges] law advanced Texas' legitimate interest in protecting women's health"); *id.* at 2315 (finding "considerable evidence in the record supporting the district court's findings indicating that the [ambulatory surgical center standard law] does not benefit patients and is not necessary"). In this Court's view, their principal effect was instead to make abortion dramatically harder to access by forcing numerous clinics to close. *Id.* at 2312 (abortion doctor admitting privileges); *id.* at 2316 (ambulatory surgical center standards).

Hellerstedt and *Gonzales* are thus distinguishable in at least two ways — both of which show that this case is controlled by the latter.

First, the statute in *Gonzales*, contrary to this Court's determination about the statute in *Hellerstedt*, served the government's professed interest. The fact that the partial birth abortion ban may have "ha[d] the incidental effect of making it more difficult or more

expensive to procure an abortion" therefore was not "enough to invalidate it'" in *Gonzales*. 550 U.S. at 157–58 (quoting *Casey*, 505 U.S. at 874). Here, where there is no question that Alabama's fetal demise law advances respect for life and promotes an ethical standard in the medical profession at least commensurate with the humane treatment of criminals and animals, the same rule applies to its "incidental" effects on abortion access. That is worlds away from *Hellerstedt*, where this Court held the State had provided no proof the regulations at issue do anything more than existing law to advance patient health and safety and where the Court held the fact that they made abortions considerably more difficult to obtain was thus decisive. *Hellerstedt*, 136 S. Ct. at 2312, 2316.

Second, the government interests at issue in this case are the same as the ones in *Gonzales*, but unlike the ones in *Hellerstedt*. *Hellerstedt* holds that when a State regulates abortion services for the sake of the patient's health and safety, the regulations stand or fall based on whether the regulations' burdens significantly outweigh the regulations' health and safety benefits. A court should evaluate the facts just as they evaluate the rationality of any other State regulation "'where constitutional rights are at stake.'" *Id.* at 2310 (quoting *Gonzales*, 550 U.S. at 165) (emphasis omitted). Factual evaluation of health regulations to examine whether they serve their professed purposes and whether they create net burdens or benefits as a medical matter is a classic judicial function. For that reason, the *Hellerstedt* Court reaffirmed the importance of judicial fact finding in cases involving "medical uncertainty" about health and safety regulations. *Id.* at 2309–10.

The same is not true, though, when a State regulates abortion for the kinds of moral and ethical purposes involved here and in *Gonzales*. In those cases, a statute's moral and ethical ends are to some extent not comparable with potential tradeoffs. At the very least, judicial standards for review of the legislature's choices are lacking. When Congress determined, for example, that partial birth abortion "'confuses the medical, legal, and ethical duties of physicians to preserve and promote life,'" and that continuing to permit 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,'" *Gonzales*, 550 U.S. at 157 (quoting § 14, 117 Stat. 1202, note following 18 U.S.C. § 1531), it would have been pointless for the Court to analyze whether a prohibition "confer[red] … benefits sufficient to justify the burdens upon access[.]" *Hellerstedt*, 136 S. Ct. at 2299. Weighing the interest of fetal life against medical concerns is fundamentally a matter of policy.

3. The panel's *sole* basis for rejecting the distinction between *Gonzales* and *Hellerstedt* is that *Hellerstedt* "cited several abortion method ban cases to conclude the regulations at issue imposed an undue burden." *WAWC*, 900 F.3d at 1326 (citing *Hellerstedt*, 136 S. Ct. at 2309–10). But that misreads *Hellerstedt*: The cited pages merely cite *Gonzales* in the course of holding that "legislatures, and not courts, must resolve questions of medical uncertainty," *Hellerstedt*, 136 S. Ct. at 2309–10 — which does not speak to the State's authority to balance the relevant tradeoffs.

The lower courts, in short, have authority under *Hellerstedt* to find medical facts. But in a case like this

one, where the State has elected to regulate medicine in order to encourage respect for unborn life, how is a court to balance medical facts against the State's avowed purposes? *Gonzales* provides the answer: In that circumstance, where judicial competence is at a low ebb, "[c]onsiderations of marginal safety, including the balance of risks, are within the legislative competence[.]" *Gonzales*, 550 U.S. at 166 (emphasis added). To be sure, the court should consider the total evidence in any case, see *id.* at 165; *see also Hellerstedt*, 136 S. Ct. at 2309–10, but a legislature's reasonable resolution of medical questions in comparison with moral and ethical purposes deserves more weight in a case like this one than in a case like *Hellerstedt* — and more than the lower courts gave here.

III. AMICI STATES NEED CLARITY.

Alabama has not argued that the circuits are split on the issues raised in the Petition. However, as Alabama explains, the Petition raises serious issues of law that will likely need to be resolved sooner or later. Pet. at 24–25. That justifies this Court's prompt review.

Litigation is pending over dismemberment abortion laws in multiple courts across the Nation. *See*, *e.g.*, *Whole Woman's Health* v. *Paxton*, 280 F. Supp. 3d 938 (W.D. Tex. 2017) on appeal No. 17-51060 (5th Cir.); *June Med. Servs. LLC* v. *Gee*, 280 F. Supp. 3d 849, 869–70 (M.D. La. 2017) (denying motion to dismiss); *Hopkins* v. *Jegley*, 267 F. Supp. 2d 1024 (E.D. Ark. 2017), on appeal No. 17-2879 (8th Cir.); *EMW Women's Surgical Center, P.S.C.* v. *Beshear*, No. 3:18-cv-00224 (W.D. Ky.). Only this Court can finally resolve the constitutionality of such laws and the proper

application of *Hellerstedt* where the States' regulations are not grounded solely on promoting health and safety.

More broadly, *Hellerstedt* has sparked a new wave of litigation challenging State abortion regulations, some long-settled. Abortion providers have brought post-*Hellerstedt* challenges against regulations that this Court has upheld. *Compare Planned Parenthood of the Great Northwest* v. *Wasden*, No. 1:18-cv-00555 (D. Idaho) (challenging law requiring that abortions be performed by physicians), *with Mazurek* v. *Armstrong*, 520 U.S. 968 (1997) (upholding similar law). Some of those challenges have succeeded, with lower courts enjoining State laws that have been consistently upheld ever since *Casey*. *Compare Planned Parenthood of Indiana & Kentucky, Inc.* v. *Comm'r of Indiana State Dep't of Health*, 896 F.3d 809 (7th Cir. 2018) (invalidating requirement of an ultrasound 18 hours before abortion), *with Casey*, 505 U.S. at 882, 885 (upholding waiting period and informed consent disclosure laws).[8] Other abortion providers have been emboldened not just to challenge particular abortion regulations as unduly burdensome, but to challenge the cumulative effects of individually permissible regulations or even to bring wholesale challenges against entire abortion clinic licensing systems. *See June Med. Servs. LLC* v. *Gee*, No. 3:17-cv-404 (M.D. La.); *Jackson Women's Health Org.* v. *Currier*, No. 3:18-cv-00171 (S.D. Miss.); *Whole Woman's Health Alliance*

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[8] Kentucky's 20-year-old transfer-agreement requirement was recently struck down under *Hellerstedt*. *See EMW Women's Surgical Ctr., P.S.C.* v. *Glisson*, No. 3:17-CV-00189-GNS, 2018 WL 6444391 (W.D. Ky. Sept. 28, 2018).

v. *Paxton*, No. 1:18-cv-00500 (W.D. Tex.); *Falls Church Med. Ctr., LLC* v. *Oliver*, No. 3:18-cv-00428 (E.D. Va.). Although the plaintiffs in some cases have amended their litigation positions, abortion providers plainly believe that *Hellerstedt* created a new framework that supports broad-based cumulative burden challenges to whole legislative schemes.

In other words, abortion providers and their counsel appear to have interpreted *Hellerstedt* as declaring open season on State abortion laws (sometimes even including common sense regulations as fundamentally sound as requiring sterile instruments). *See* Jul. 26, 2018 Mem. in Supp. Mot. to Dismiss at 6-7, *June Med. Servs. LLC* v. *Gee*, No. 3:17-cv-404 (M.D. La.). Only this Court can clarify that *Hellerstedt* was not the watershed abortion providers claim it was and reaffirm the right of States to enact reasonable abortion regulations.

CONCLUSION

The Court should grant certiorari and reverse the decision of the Eleventh Circuit.

Respectfully submitted,

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