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

REPLY BRIEF

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The Brief in Opposition is more important for what it does not say than for what it does. As expected, the Respondents fundamentally disagree with us about the correctness of the lower court's decision and the right reading of this Court's precedents. But they do not contest the importance of the question presented. Nor do they argue that this case is a bad vehicle to answer it.

I. This case presents important issues that warrant the Court's review.

As an initial matter, there is no debate that this case presents an important question that warrants this Court's review: whether a state can ban an abortionist from ripping apart a living fetus limb from limb while its heart is still beating. Multiple members of this Court have recognized that such dismemberment abortions are just as disturbing as partial-birth abortions. *See Gonzales v. Carhart*, 550 U.S. 124, 160 (2007); *id.* at 182 (Ginsburg, J., dissenting). Multiple States have banned this procedure in bipartisan legislation. *See* Pet. at 24-25. Litigation is pending over these bans accross the country. And 21 States have filed an amicus brief asking the Court to take this case. *See* Brief of Louisiana, *et al.*, at 1-3.

The Brief in Opposition does not contest the importance of the constitutionality of these procedure bans. In fact, merely describing the procedure is enough to understand why the States have a strong interest in banning it. "In this type of abortion the unborn child dies the same way anyone else would if dismembered alive." App. 14a. Although the unborn child can "survive for a time while its limbs are being

torn off," "the heartbeat cannot last." App. 14a-15a (citation and quotation marks omitted). The end result—"after the larger pieces of the unborn child have been torn off with forceps and the remaining pieces sucked out with a vacuum"—is a "tray full of pieces." App. 16a (citations and quotation marks omitted).

Because of the importance of this issue, the court of appeals practically invited this Court to intervene. It recognized that, although there are strong policies that support the State's position, "there is only one Supreme Court, and we are not it." App. 36a. Ultimately, this Court, not the lower courts of appeal, should decide whether the Constitution prohibits the states from banning dismemberment abortion.

II. The lower court's decision is inconsistent with this Court's precedents.

For the most part, the Brief in Opposition merely repeats the lower court's arguments. Unsurprisingly, the Respondents fundamentally disagree with our reading of this Court's precedents. But their disagreement does not undermine the case for certiorari. None of the Respondents' three main arguments about this Court's precedents justifies the denial of certiorari here.

First, the Respondents erroneously argue that the petition asserts only "fact-based disagreements with the decisions below." BIO at 19. But the question presented is not factual; it is about the legal standard that a state must meet to sustain the constitutionality of a law like the dismemberment abortion ban. Our position is that a lower court must apply this Court's decision from *Gonzales*: a law is constitutional if there is "medical uncertainty over whether the Act's

prohibition creates significant health risks." *Gonzales*, 550 U.S. at 164. The court of appeals expressly declined to apply that "legal" standard for "three reasons," App. 26a-28a, none of which had to do with the district court's fact-findings. *See* Pet. at 19-23.

Most importantly, the court of appeals concluded that this Court's decision in *Whole Woman's Health v. Hellerstedt,* 136 S. Ct. 2292 (2016), sub silentio overruled *Gonzales*. The Brief in Opposition doubles down on that legal argument about the appropriate legal standard. *See* BIO at 32 (arguing that "this Court's most recent abortion decision expressly rejected" the *Gonzales* standard). As explained in the petition, the lower court's legal conclusion that this Court has implicitly overruled one of its prior precedents justifies—by itself—the grant of certiorari. *See* Pet. 21-22; *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (affirming that "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions" (quotation and citation omitted)). Only this Court can reconcile the *Gonzales* standard with the loose language in *Whole Women's Health* upon which the Brief in Opposition relies.

Second, the Respondents pretend that the lower court's value-laden legal judgments about the feasibility of alternatives to dismemberment abortion are fact-findings to which deference is due. For example, the Brief in Opposition claims that the district court held that the alternative of a digoxin injection "often fails to work," is "unsafe," and "not feasible." BIO at 24. But these are not findings of fact; they are not about whether a stoplight was red or green. Instead, they are quintessential legal

judgments. There is no doubt that digoxin works 90 to 95 percent of the time. Whether that undisputed fact makes digoxin "unsafe" or "safe," whether it "often works" or "often fails to work," whether it is a "feasible" or "infeasible": these are questions of law, not questions of fact. If the states truly enjoy "wide discretion to pass legislation in areas where there is medical and scientific uncertainty," *Gonzales*, 550 U.S. at 163, then it was not up to the district court to resolve conflicting evidence and declare as fact that the State's proposed alternatives are not feasible or safe.

Third, the Brief in Opposition misreads *Gonzales* as a case about a specific procedure, not about the legal standard that must be applied to all procedure bans. Specifically, the Respondents argue that the Court in *Gonzales* upheld a ban "on the rarely used D&X method, but only because . . . the federal law in *Gonzales* preserved access to D&E, the 'usual' second-trimester abortion method." BIO at 22. The court of appeals made short work of this argument. *See* App. 32a n.16. *Gonzales* did not merely hold that Congress can ban the specific procedure at issue there—partial-birth abortion. It instead created a general legal standard to resolve challenges exactly like this one: pre-enforcement facial challenges to the constitutionality of a ban on an abortion procedures.[1]

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[1] The Respondents argue half-heartedly that the court of appeals was correct that the district court converted this facial challenge to an as-applied challenge by purporting to grant only as-applied relief. *See* BIO at 13 n.9. But there is no dispute that the State is enjoined from enforcing the ban against the only doctors and abortion clinics in Alabama who actually perform the banned procedure. The Respondents' speculation about additional doctors who might consider performing the procedure and therefore be regulated by the ban is only speculation.

Nonetheless, even Respondents' attempt to limit *Gonzales* to its facts fails to win the day. Digoxin injections, which the State proposed as an alternative to dismemberment abortions below, were specifically approved of as an alternative to partial-birth abortion in *Gonzales*. There, this Court reasoned that a partial-birth abortion ban is constitutional because, "[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. How can an injection of digoxin be a satisfactory alternative in *Gonzales*, but not here? The Respondents do not say.

III. At the very least this case should be held pending *Box v. Planned Parenthood* (Nos. 18-483 and 18-1019) and *June Medical Services, LLC v. Gee* (18A774).

The Court should grant the petition. But, at the very least, it should hold this case until it resolves three other abortion cases that raise similar legal issues.

1. The petition in *Box v. Planned Parenthood*, No. 18-483, raises similar questions about the State's authority to regulate abortion when the state's justification is the dignity of the fetus. There, the lower court struck down an Indiana law that bans certain abortions and another law that requires the humane disposal of fetal remains. *Box* has been relisted multiple times as of this writing.

2. In a second case also captioned *Box v. Planned Parenthood*, No. 18-1019, the petition (like this one) challenges the lower court's application of *Whole Women's Health v. Hellerstedt* to a state law that

advances the state's interest in potential fetal life instead of the state's interest in maternal health. *Box II* will be fully briefed at approximately the same time this petition is scheduled for conference.

3. Finally, in *June Medical Services, LLC v. Gee*, 18A774, this Court recently granted a motion to stay a Louisiana abortion law pending the disposition of the certiorari petition in that case. *June Medical*, like this case, addresses the proper application of *Whole Women's Health v. Hellerstedt*. Because the Court granted the motion to stay, there is a substantial likelihood that the Court will also grant the forthcoming petition.

If this Court addresses the merits in *Box I*, *Box II*, or *June Medical*, that ruling will warrant a GVR in the present case so that the court of appeals may consider the new precedent. Accordingly, even if the Court is disinclined to grant the petition here, it should hold this petition until after it resolves those related matters.

CONCLUSION

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

Respectfully submitted,

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