No. 18-50730

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

WHOLE WOMAN'S HEALTH; BROOKSIDE WOMEN'S MEDICAL CENTER, P.A., doing business as Brookside Women's Health Center and Austen Women's Health Center; LENDOL L. DAVIS, M.D.; ALAMO CITY SURGERY CENTER, P.L.L.C, doing business as Alamo Women's Reproductive Services; WHOLE WOMAN'S HEALTH ALLIANCE; DR. BHAVIK KUMAR,

Plaintiffs-Appellees,

v.

CHARLES SMITH, Executive Commissioner of the Texas Health and Human Services Commission, in his official capacity,

Defendant-Appellant.

On Appeal from the United States District Court
for the Western District of Texas, Austin Division

Brief of Constitutional Law Scholars Walter E. Dellinger III, Michael C. Dorf, Daniel Farber, Joanna Grossman, Leah Litman, Suzanna Sherry, Geoffrey R. Stone, and Mary Ziegler as *Amici Curiae* Supporting Plaintiffs-Appellees and Affirmance

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INTEREST OF *AMICI*

This case involves the application of well-established Supreme Court precedent to recently enacted Texas law and regulations that substantially impair the reproductive rights protected by the Fourteenth Amendment. *Amici* are constitutional law scholars who have a shared interest in ensuring that the courts apply the correct legal standard in evaluating constitutional challenges in cases affecting reproductive rights.

Amici are:

Walter Dellinger, Douglas B. Maggs Professor Emeritus of Law, Duke University School of Law;

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Mary Ziegler, Stearns Weaver Miller Professor, Florida State University College of Law.

Amici file this brief in their individual capacities. Their institutional affiliations are listed for identification purposes only.

All parties have consented to the filing of this brief.[1]

SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

Amici are not aware of any interested parties not listed in the parties' statements of interested parties.

[1] This brief was not authored in whole or in part by any party or party's counsel. No one other than *amici curiae* or their counsel (including any party or party's counsel) contributed money that was intended to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT

For 25 years, the Supreme Court has consistently applied the "undue burden" standard when evaluating abortion restrictions. Under that standard, a court first must determine whether an abortion restriction "further[s] . . . some . . . valid state interest." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 878 (1992) (plurality opinion). If the restriction does so, the court must next assess whether that restriction creates an undue burden—that is, whether the restriction's "purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." *Id.* at 878. Such a substantial obstacle exists when the burdens associated with the restriction outweigh the benefits that it confers. *See Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2300 (2016).

In this case, Plaintiffs challenge Texas laws relating to the disposal of embryonic and fetal tissue. The State argues that those laws reflect an interest in providing for "dignified disposition of embryonic and fetal tissue remains." Tex. Health & Safety Code § 697.001. But the challenged laws do not advance that interest as a practical matter, and thus do not confer any benefits that can be weighed in the undue-burden balancing analysis. "Dignity" is a highly subjective concept in this context, without any accepted, uniform definition, and the challenged laws' many gaps and inconsistencies leave them unable to advance any

such concept meaningfully. Moreover, the State did not attempt to demonstrate that these laws persuade women not to obtain abortions, and there is no basis to believe that the laws in fact advance that goal.

The challenged laws do, however, impose an onerous burden on women's protected liberty interests. Among other things, as the district court found, "viable options for disposing of [fetal remains] in compliance with the challenged laws do not exist," ROA.3307, such that the challenged laws "would likely cause a near catastrophic failure of the healthcare system designed to serve women of childbearing age" in Texas, ROA.3328.

In short, the challenged laws fail the undue burden analysis. As the district court correctly ruled, those laws therefore cannot stand.

ARGUMENT

I. There Is a Single Undue Burden Test, Consistently Applied by the Supreme Court for the Last 25 Years

1. The Due Process Clause protects the right of women "to control their reproductive lives" so that they may "participate equally in the economic and social life of the Nation." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 856 (1992) (plurality opinion). Accordingly, the Supreme Court has for many decades recognized a woman's liberty to "choose to have an abortion." *Id.* at 846; *see id.* at 851 (describing abortion as "involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy").

For the past 25 years, the Supreme Court has consistently applied a single "undue burden" test for evaluating whether restrictions on abortion unconstitutionally interfere with those liberty interests. In *Casey*, the Court concluded that an abortion-related restriction is unconstitutional if it places an "undue burden" on a woman's right to choose to terminate a pregnancy prior to viability. *Casey*, 505 U.S. at 877 (plurality opinion); *see id.* at 874, 878 (plurality opinion).

The first question under the undue burden test is whether the state law is animated by a "valid state interest" such as "furthering the interest in potential life." *Casey*, 505 U.S. at 877 (plurality opinion); *see id.* at 846 (acknowledging

that certain legitimate governmental interests in regulating abortion may exist "from the outset of the [woman's] pregnancy," including "protecting . . . the life of the fetus"). If no such valid interest exists, then the state law does not serve "legitimate ends" and cannot pass constitutional muster. *Id*. at 877; *see also*, *e.g.*, *Whole Woman's Health*, 136 S. Ct. at 2309; *Roe v. Wade*, 410 U.S. 113, 154 (1973) (stating that "important state interests in regulation" should be acknowledged in assessing constitutionality of abortion restrictions).

If the State has a legitimate interest, the undue burden standard applies to "reconcil[e] the State's interest with the woman's constitutionally protected liberty" interest. *Casey*, 505 U.S. at 876 (plurality opinion). Under that standard, a state law that is animated by a legitimate interest but that nevertheless "has the effect of placing a substantial obstacle in the path of a woman's choice" is not a "permissible means" to further the interest. *Id.* at 877 (plurality opinion); *see id.* at 878 ("An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability."). The Court thus concluded in *Casey* that "the means chosen by the State to further" its interest "must be calculated to inform the woman's free choice, not hinder it." *Id.* at 877.

The Supreme Court has consistently adhered to the undue burden standard ever since *Casey* was decided. For instance, in *Stenberg v. Carhart*, 530 U.S. 914

(2000), and *Gonzales v. Carhart*, 550 U.S. 124 (2007), the Court applied that standard to statutes that prohibited particular methods of abortion. *See Stenberg*, 530 U.S. at 921 (quoting *Casey*, 505 U.S. at 877 (plurality opinion)) (explaining that "'a law designed to further the State's interest in fetal life which imposes an undue burden on the woman's decision before fetal viability' is unconstitutional"); *Gonzales*, 550 U.S. at 156 (applying *Casey*'s "undue burden" test to determine whether a challenged law had the "purpose or effect" of "plac[ing] a substantial obstacle in the path of the woman seeking an abortion") (quoting *Casey*, 505 U.S. at 878 (plurality opinion)).

Most recently, the Supreme Court applied the undue burden standard in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), to invalidate a Texas law requiring physicians who perform abortions to have hospital admitting privileges and requiring abortion facilities to meet the standards for ambulatory surgical centers. The Court strongly reaffirmed the governing legal standard, declaring that "[t]here exists an undue burden on a woman's right to decide to have an abortion, and consequently a provision of law is constitutionally invalid, if the *purpose or effect* of the provision *is to place a substantial obstacle* in the path of a woman seeking an abortion before the fetus attains viability." *Id.* at 2300 (internal quotation marks omitted). The Court also explained that "[t]he rule announced in *Casey* . . . requires that courts consider the burdens a law imposes on abortion

access together with the benefits those laws confer," and that a challenged law must yield under the undue burden standard when it fails to confer "benefits sufficient to justify the burdens" it imposes. *Id.* at 2300, 2309; *see, e.g.*, *Casey*, 505 U.S. at 896 (plurality opinion) (discussing "balance" when addressing spousal notification requirement). The Court concluded that Texas's admitting-privileges and surgical-center requirements provided no benefits for women's health, "constitute[d] an undue burden on abortion access, and . . . violate[d] the Federal Constitution." *Whole Woman's Health*, 136 S. Ct. at 2300 (citation omitted); *see id.* at 2311 ("We have found nothing in Texas' record evidence that shows that, compared to prior law[,] . . . the new law advanced Texas' legitimate interest in protecting women's health."); *id.* at 2316.

2. Contrary to the State's contention (State Br. 27-28), nothing about this Court's analysis in *June Medical Services LLC v. Gee*, 905 F.3d 787 (5th Cir. 2018), *petition for rehearing en banc pending*, alters that analysis.[2] In *June Medical*, a case in which the mandate has not issued, a panel of this Court relied on what it described as "stark differences between the record before us and that which the Court considered in [*Whole Woman's Health*]" to rule that a particular

[2] Because appellant is a state official sued in his official capacity, this brief refers to appellant as "the State" and to his brief as "State Br."

requirement that abortion providers obtain admitting privileges at local hospitals did not constitute an undue burden. *Id.* at 791.

As appellees explain, *June Medical* cannot be read to make the existence of a "substantial obstacle" a prerequisite to engaging in the balancing of a law's benefits and burdens. *See* Appellees' Br. 30-31. The Supreme Court's decision in *Whole Woman's Health*, applying its earlier decision in *Casey*, makes clear that the balancing of benefits and burdens is the *means* of determining whether a law poses "substantial obstacle" to a woman's right to choose. *See Whole Woman's Health*, 136 S. Ct. at 2309. And *June Medical* itself expressly acknowledges "we must weigh the benefits and burdens of [the challenged law] to determine whether it places a substantial obstacle in the path of a large fraction of women seeking abortions in Louisiana." *June Medical*, 905 F.3d at 803.

II. Assuming Post-Termination "Dignity" of Fetal Tissue Is a Legitimate Objective, It Is Not Advanced by the Challenged Laws, Which Confer No Benefits

Under binding Supreme Court precedent, a State's assertion that an abortion-related restriction serves a legitimate interest does not end the analysis.[3] Rather, a court must go on to assess whether the law actually advances the interest so as to bring about some "benefit." *See Whole Woman's Health*, 136 S. Ct. at 2309-11,

[3] We take no position here on whether the State's asserted interest is legitimate (a question on which the district court declined to rule definitively). We assume *arguendo* for purposes of this brief that it is.

2314 (emphasizing that abortion restrictions are not subject merely to rational basis scrutiny, and striking down Texas laws that were purportedly enacted to advance women's health, an undisputedly legitimate government interest, but in fact "brought about no such health-related benefit"). Here, assuming that the State has a legitimate interest for purposes of the undue burden analysis in providing for "a dignified disposition of embryonic and fetal tissue remains," Tex. Health & Safety Code § 697.001, the challenged laws do not meaningfully carry out that interest by actually increasing the "dignity" associated with the disposal of the tissue in question. Accordingly, they do not give rise to any "benefits" that could be weighed in the undue burden analysis. *See Whole Woman's Health*, 136 S. Ct. at 2300 (abortion restrictions are unconstitutional if they do not "confer[] . . . benefits sufficient to justify the burdens upon access that each imposes").

First, given the subjective nature of "dignity," the State cannot show that any particular requirement it imposes in fact advances the concept. As such, the State is left with little more than the argument that the challenged laws have a dignity-conferring benefit because the State says so. The State's argument that "respect for fetal life after death is consistent with cultural norms of paying respect to bodies after an individual has died," State Br. 33, provides no answer to the question of which practices confer "dignity" on fetal tissue, or even which "cultural norms" are appropriately considered. What one religion or cultural group

may consider a dignity-conferring practice might be thought by a different group to be disrespectful or even profane, as illustrated by the disparate approaches taken by different groups to the disposition of the remains of a dead person. As the district court found,

> the Catholic Church generally prohibits the scattering of ashes from human remains because it views the scattering of ashes to be an undignified form of disposition. While the challenged laws permit the commingling of fetal remains, Catholic teaching does not accept the commingling of remains as a respectful practice. Likewise, many in the Islamic tradition consider cremation to be a prohibited practice altogether. Still others see incineration and placement in a landfill or the use of a sanitary sewer as a dignified disposal method for tissue.

ROA.3303; *see also, e.g.*, Helen T. Gray, *How Different Religions Bury Their Dead*, The Wichita Eagle, May 13, 2011 (noting that for certain branches of Judaism "cremation is a major violation of Jewish law" but that Hinduism mandates cremation). In short, as the district court observed, "treatment and disposition methods in general are not themselves inherently respectful or dignified. Instead, dignity and respect are conferred based on one's personal opinion of a given treatment or disposition option." ROA.3303.

Second, even assuming that there existed a coherent conception of what "dignified" disposition of fetal tissue might entail, the challenged laws have numerous gaps and internal inconsistencies that prevent them from advancing any such "dignity." For example, as the district court explained, although the challenged laws proscribe "grinding" as a permissible means of treating fetal

tissue, they permit cremation, which includes grinding as a necessary part of the process. ROA.3303-3304; *see* Appellees' Br. 44-45. There is no conceivable reason why grinding tissue without heating fails to confer dignity, but grinding after heating does. Similarly, the laws prohibit the scattering of the ashes of fetal tissue on a landfill, but permit scattering of such ashes on *any* other privately held land if the owner of that land gives his permission. ROA.3303-3304*; see* Appellees' Br. 45. Again, no reasonable basis exists for deeming a landfill to be inconsistent with dignity while simultaneously deeming a garbage dump, junkyard, toxic waste site, or similar location to be consistent with that concept.

Similarly, the challenged laws cover fetal tissue only in certain circumstances, thus undermining the State's assertion that the laws are necessary to confer "dignity" on such tissue. The challenged laws address only fetal tissue resulting from an abortion, miscarriage, or ectopic pregnancy, and only if the tissue is passed or removed in a healthcare facility. *See* 25 Tex. Admin. Code §§ 138.3(a) & 138.3(c). The laws do not address fetal tissue that is passed in other locations. *See id.* § 138.3(c)(5). Nor do they address fetal tissue created for possible use as part of *in vitro* fertilization procedures. *See* Appellees' Br. 4 (citing record). As the Supreme Court has recognized, such underinclusiveness is a strong sign that an abortion-related restriction does not in fact confer the benefit that a State says it does. *See Whole Woman's Health,* 136 S. Ct. at 2315 (explaining that

fact that Texas's surgical-center requirement applied only to abortion facilities, and not to different facilities performing more dangerous procedures, "indicate[d] that the . . . provision" was not "reasonably related to preserving women's health, the asserted purpos[e] of the Act in which it is found") (alterations in original; internal quotation marks omitted); *see Hopkins*, 267 F. Supp. 3d at 1104; *cf. Planned Parenthood of Indiana & Kentucky v. Comm'r of Indiana Dept of Health*, 888 F.3d 300, 309-10 (7th Cir. 2018), *reh'g en banc granted, judgment vacated*, 727 F. App'x 208 (7th Cir. 2018), *order vacated, original opinion reinstated*, No. 17-3163, 2018 WL 3655854 (7th Cir. June 25, 2018). If the practices set forth in the challenged laws were truly necessary or even useful as a dignity-conferring measure, and if the State truly wished to advance a dignity interest (rather than to attempt to place obstacles in the way of abortion facilities and the women they serve, *see* ROA.3312-3313), then the State presumably would require that all or most fetal tissue be disposed of in the same way.

Third, the challenged laws do not advance a dignity interest in such a way as to persuade women not to have abortions in the first instance. *See* State Br. 33 ("It is . . . irrelevant whether the challenged laws 'persuade' women not to have abortions."). The State itself contends that women seeking abortions may not be informed about the challenged laws, *see id.* at 16-17—and as to any such women, the laws plainly would have no persuasive effect. As to women who do learn

about the laws, *see* Appellees' Br. 13, there is no evidence in the record that the laws are likely to change anyone's decision, *ex ante*, about whether to proceed with termination of a pregnancy, rather than simply serving to stigmatize those women and impose emotional burdens. *See Margaret S.*, 794 F.2d at 1003 (Williams, J, concurring) ("Informing a woman who has just had an abortion [about the disposition of fetal remains] appears to be nothing more than a cruel tactic to induce a feeling of guilt."). And even if it is conceivable that a woman who learns of the challenged laws before proceeding with an abortion might not only factor those laws into her decision but also consider them to tilt in favor of the State's preferred outcome, it is unlikely that the laws would have more than a *de minimis* effect given the numerous existing requirements in Texas that convey a message favoring childbirth over abortion. *See* State Br. 35 (describing certain requirements in that category that passed as part of the same bill as the challenged laws); *see also Whole Woman's Health*, 136 S. Ct. at 2314 (noting that existence of "numerous detailed regulations covering abortion facilities" in Texas meant that the challenged surgical-center requirement was likely superfluous in "deterring" practices inconsistent with women's health); ROA.3304 (finding that "[t]he State of Texas already employs numerous mechanisms such as a required ultrasound, heightened informed consent disclosures, and a twenty-four-hour waiting period to

convey its preference for childbirth and ensure a woman fully appreciates the consequences of an abortion decision").

For all of those reasons, assuming the State's asserted interest here is a legitimate one, the challenged laws do not confer any benefits that can weigh in the undue burden analysis. Just as the laws at issue in *Whole Woman's Health* did not actually protect women's health, the laws at issue in this case do not actually increase the dignity associated with disposal of fetal tissue.

III. The Challenged Laws Constitute an Undue Burden on Women's Rights

The challenged laws must fail because they impose an undue burden on a woman's right to choose to terminate her pregnancy. Not only do those laws fail to give rise to any benefits, but they also impose significant burdens. Accordingly, they do not confer "benefits sufficient to justify the burdens" they impose, and thus they place a substantial obstacle in the way of a woman's right to choose abortion. *Whole Woman's Health*, 136 S. Ct. at 2300, 2309; *see, e.g.*, *Casey*, 505 U.S. at 896 (plurality opinion) (discussing "balance" of benefits and burdens); *see also, e.g.*, *Gonzales*, 550 U.S. at 146 ("[r]egulations which do no more than create a structural mechanism by which the State . . . may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose") (quoting *Casey*, 505 U.S. at 877 (plurality opinion)); *Stenberg*, 530 U.S. at 921 ("a law designed to further the

State's interest in fetal life which imposes an undue burden on the woman's decision before fetal viability is unconstitutional") (internal quotation marks omitted).

As appellees explain, the challenged laws give rise to a number of different burdens, from creating mental and emotional difficulties for women to hampering the operations of the facilities on which women seeking abortions depend. Appellees' Br. 41-44. Most concretely, as the district court found, the challenged laws threaten to "deprive healthcare providers . . . of a reliable and viable system for disposing of their embryonic and fetal tissue," thus preventing those providers from "offer[ing] surgical care for miscarriages or abortions" and likely "trigger[ing] a shutdown of . . . providers unable to cobble together a patchwork of funeral homes, crematoriums, and cemeteries to meet their disposal needs." ROA.3313-3314; *see* ROA.3314 ("Clinic closures would further constrain access to abortion in a state where access to abortion has already been dramatically curtailed."). That is so, the district court found, because only one vendor of tissue-disposal services has been willing and able to work with abortion providers in Texas and there is no evidence that sufficient treatment, transportation, and disposal mechanisms exist. ROA.3307; *see* Appellees' Br. 17-20, 43-44. The State has no viable system in place for disposing of embryonic and fetal tissue in

compliance with the challenged laws; nor has the State appropriated resources to ensure that the challenged laws operate as intended.

That is exactly the kind of burden that the Supreme Court has deemed particularly weighty. In *Whole Woman's Health*, the Court ruled that a requirement that physicians performing abortions have admitting privileges at a local hospital was an undue burden, explaining that abortion providers could not reasonably meet the requirement to maintain such a third-party relationship. *See Whole Woman's Health*, 136 S. Ct. at 2312-13. The Court also ruled that a requirement that abortion facilities satisfy the standards for surgical centers was an undue burden, concluding that the requirement was so onerous and difficult to comply with that it would cause clinics to close (and would leave the remaining clinics unable to meet the demand for abortion services). *See id.* at 2315-16.

Like the laws at issue in *Whole Woman's Health*, the laws challenged in this case—without conferring benefits of any kind—impose a requirement that abortion providers are unlikely to be able to reasonably meet and may force them to stop providing abortion services or to close altogether. Under binding precedent, that is in and of itself an undue burden, and this Court therefore can affirm the district court's judgment that the laws are unconstitutional on that basis alone. Further factoring in the additional emotional burdens that the laws will impose on some women as a condition of receiving abortions and other pregnancy-related care,

there is no question that the laws impose an undue burden on women's protected liberty interests. *See* ROA.3316.

CONCLUSION

For the foregoing reasons, the judgment should be affirmed.

DATED: January 10, 2019

Respectfully submitted,

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By: */s/ Elaine J. Goldenberg*
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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Federal Rules of Appellate Procedure 29(a)(5), 32(a)(5), 32(a)(6), and 32(a)(7)(B), the *amici curiae* Brief of Constitutional Law Scholars is proportionately spaced, has a typeface of 14 point, and contains 3852 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Fifth Circuit Rule 32.2.

DATED: January 10, 2019

By: */s/ Elaine J. Goldenberg*
ELAINE J. GOLDENBERG

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25, I hereby certify that I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system on January 10, 2019. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

DATED: January 10, 2019

By: */s/ Elaine J. Goldenberg*
ELAINE J. GOLDENBERG