No. 17-51060

In the
United States Court of Appeals for the Fifth Circuit

WHOLE WOMAN'S HEALTH, ON BEHALF OF ITSELF, ITS STAFF, PHYSICIANS, AND PATIENTS; PLANNED PARENTHOOD CENTER FOR CHOICE, ON BEHALF OF ITSELF, ITS STAFF, PHYSICIANS, AND PATIENTS; PLANNED PARENTHOOD OF GREATER TEXAS SURGICAL HEALTH SERVICES, ON BEHALF OF ITSELF, ITS STAFF, PHYSICIANS, AND PATIENTS; PLANNED PARENTHOOD SOUTH TEXAS SURGICAL CENTER, ON BEHALF OF ITSELF, ITS STAFF, PHYSICIANS, AND PATIENTS; ALAMO CITY SURGERY CENTER, P.L.L.C., ON BEHALF OF ITSELF, ITS STAFF, PHYSICIANS, AND PATIENTS, DOING BUSINESS AS ALAMO WOMEN'S REPRODUCTIVE SERVICES; SOUTHWESTERN WOMEN'S SURGERY CENTER, ON BEHALF OF ITSELF, ITS STAFF, PHYSICIANS, AND PATIENTS; NOVA HEALTH SYSTEMS, INCORPORATED, ON BEHALF OF ITSELF, ITS STAFF, PHYSICIANS, AND PATIENTS, DOING BUSINESS AS REPRODUCTIVE SERVICES; CURTIS BOYD, M.D., ON HIS OWN BEHALF AND ON BEHALF OF HIS PATIENTS; JANE DOE, M.D., M.A.S., ON HER OWN BEHALF AND ON BEHALF OF HER PATIENTS; BHAVIK KUMAR, M.D., M.P.H., ON HIS OWN BEHALF AND ON BEHALF OF HIS PATIENTS; ALAN BRAID, M.D., ON HIS OWN BEHALF AND ON BEHALF OF HIS PATIENTS; ROBIN WALLACE, M.D., M.A.S., ON HER OWN BEHALF AND ON BEHALF OF HER PATIENTS,

Plaintiffs-Appellees,

v.

KEN PAXTON, ATTORNEY GENERAL OF TEXAS, IN HIS OFFICIAL CAPACITY; FAITH JOHNSON, DISTRICT ATTORNEY FOR DALLAS COUNTY, IN HER OFFICIAL CAPACITY; SHAREN WILSON, CRIMINAL DISTRICT ATTORNEY FOR TARRANT COUNTY, IN HER OFFICIAL CAPACITY; ABELINO REYNA, CRIMINAL DISTRICT ATTORNEY FOR MCLENNAN COUNTY, IN HIS OFFICIAL CAPACITY,

Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Texas, Austin Division
No. 1:17-cv-00690

Brief *Amicus Curiae* of Conservative Legal Defense and Education Fund, Eleanor McCullen, Pro-Life Legal Defense Fund, The Transforming Word Ministries, Pass the Salt Ministries, and Restoring Liberty Action Committee in Support of Defendants-Appellants

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March 5, 2018

Case No. 17-51060

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

WHOLE WOMAN'S HEALTH, *et al.*,

Plaintiffs-Appellees,

v.

PAXTON, *et al.*,

Defendants-Appellants.

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of 5th Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Whole Woman's Health, *et al*., Appellees

Ken Paxton, *et al.*, Appellants

Conservative Legal Defense and Education Fund, Eleanor McCullen, Pro-Life Legal Defense Fund, The Transforming Word Ministries, Pass the Salt Ministries, and Restoring Liberty Action Committee, *Amici Curiae*.

Herbert W. Titus, Jeremiah L. Morgan, William J. Olson, and Robert J. Olson, counsel for *Amici Curiae*.

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c), and 5th Circuit Rule 28.2.1, it is hereby certified that *amici curiae* Conservative Legal Defense and Education Fund, Pro-Life Legal Defense Fund, The Transforming Word Ministries, and Pass the Salt Ministries are non-stock, nonprofit corporations, have no parent companies, and no person or entity owns them or any part of them. *Amicus* Restoring Liberty Action Committee is an educational organization. *Amicus* Eleanor McCullen is an individual.

/s/ Herbert W. Titus
Herbert W. Titus,
Attorney of Record for *Amici Curiae*

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INTEREST OF *AMICI CURIAE*[1]

Conservative Legal Defense and Education Fund, Pro-Life Legal Defense Fund, The Transforming Word Ministries, and Pass the Salt Ministries are nonprofit organizations, and each is exempt from federal taxation under sections 501(c)(3) or 501(c)(4) of the Internal Revenue Code. Restoring Liberty Action Committee is an educational organization. Eleanor McCullen has a pro-life counseling ministry and was the lead plaintiff in McCullen v. Coakley, 134 S.Ct. 2518 (2014). Each of the *amici* is dedicated, *inter alia*, to the correct construction, interpretation, and application of law.

STATEMENT

Unlike Roe v. Wade, conspicuously absent from the lineup of plaintiffs in this abortion conflict is an individual pregnant mother. In her place are the abortion facilities and centers, the physicians and their staffs, and their nameless patients. The Supreme Court has allowed third party abortion providers to assert

[1] All parties have consented to the filing of this brief *amicus curiae*. No party's counsel authored the brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief. No person other than these *amici curiae*, their members or their counsel contributed money that was intended to fund preparing or submitting this brief.

such claims on behalf of women.[2] And the Complaint likewise assumes that the interests of the abortion providers and their patients are coincident. They are not. In paragraphs 30-33 of their Complaint, the providers complain about the costs and burdens placed by Texas upon the pregnant woman, "many [of which are] "obstacles accessing abortion care. Complaint ("Compl.") ¶ 31. However, the interests of abortion providers are exclusively their own economic interests. They litigate cases such as this to maintain a robust market for their chosen type of work, not to protect women, and certainly not to protect unborn children.

At the same time courts allow abortion providers to bring cases on behalf of others, they have no problem ignoring the other party that is not represented in this litigation. Not only is the baby conspicuously absent from the pleadings, but the unborn child is deliberately hidden from view by language that sanitizes what is actually happening in these abortion facilities. Indeed, the plaintiff providers bristle at the plain language describing the baby which is employed in the statute under review, faulting the Texas legislature for having failed to use their medical

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[2] *See* Whole Women's Health v. Hellerstedt, 136 S.Ct. 2292, 2321 (2016) (Thomas, J., dissenting) ("Ordinarily, plaintiffs cannot file suits to vindicate the constitutional rights of others. But the Court employs a different approach to rights that it favors. So in this case and many others, the Court has erroneously allowed doctors and clinics to vicariously vindicate the putative constitutional right of women seeking abortions.").

terminology to define the crime at issue. Compl. ¶ 36. But why would the legislature use such terminology? The Texas legislature is the State's law-making body whose job it is to define a criminal act, not to partner with a profession that once was dedicated to heal, to hide behind technical terms to camouflage the grotesque taking of innocent life. Therefore, the Texas code describes the crime as a "dismemberment abortion" — a legal term, instead of a "dilation and evacuation" — a medical term. Compl. ¶ 36. Additionally, the statute defines the victim as "an unborn child" (*id.* at ¶ 37), not as a "fetus," which is equated to just "[an]other product[] of conception" (*id*. at ¶ 44). Finally, the statute employs the common law language of causation — "causing the death of an unborn child" (*id.* at ¶ 37) — not the sterile clinical language of the doctor's office — "fetal demise" (*id.* at ¶¶ 48-52, 54-57, 59-60).

This choice of language is critical. The Texas statute is a model of clarity. It prohibits an abortion:

> in which a person, with the purpose of causing the death of an unborn child ... extracts the unborn child one piece at a time from the uterus through the use of clamps, grasping forceps, tongs, scissors, or a similar instrument that, through the convergence of two rigid levers, slices, crushes, or grasps, or performs any combination of those actions on, a piece of the unborn child's body to cut or rip the piece from the body. [*Id.* at ¶ 37.]

In contrast, the plaintiff providers describe the abortion act prohibited by the Texas law in glowing language — "the safest and most common method of abortion after approximately 15 weeks of pregnancy." *Id.* at ¶¶ 36, 41, 62, and 65. But the abortion providers spare no detail as to the three alternative abortion practices not prohibited by the Act, asserting in the process that "[t]here are no other reliable, safe, and available methods of attempting to cause fetal demise in the outpatient setting." *Id.* at ¶ 56; *see generally id.* at ¶¶ 49-59. In sum, without regard for the unborn baby and the pregnant mother, the bottom line for the abortion provider plaintiffs is that the Texas law takes away "the technique[] with which the physician is familiar and comfortable, based on his or her training and experience." *Id.* at ¶ 59.

This callous attitude reflected in the Complaint spilled over into the district court opinion, in disregard of the legitimate and compelling interest of the State of Texas to secure a modicum of humane regard for the baby being sacrificed in the womb of his mother, as ordained by the Supreme Court, but forbade by the law of God.[3]

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[3] *See* Leviticus 18:21 ("You shall not give any of your offspring to offer them to Molech....").

Although the district court almost entirely disregarded Texas' interest embodied in this statute, the nature of the state's humanitarian interest deserves serious consideration. At issue in this case is whether the Texas statute outlawing a certain method of killing an unborn baby unduly burdens a woman's access to an abortion. As Justice Kennedy put it in Gonzales v. Carhart, the government "has a legitimate and substantial interest in preserving and promoting fetal life...." *Id.,* 550 U.S. 124, 145 (2007). Thus, before proclaiming that a statute forbidding a particular abortion procedure is an undue burden, the court is duty-bound to weigh the State's interest in the life of the unborn child, lest it forget that "central premise." *Id.* at 157. While the court below acknowledged this principle, it utterly failed to apply it in this case, devoting only one short paragraph of a 26-page Memorandum Opinion to the task. *See* Whole Woman's Health v. Paxton, 2017 U.S. Dist. LEXIS 195268 at *19 (2017). In that short paragraph, the district court reduced to nothing the value of the life of the unborn child, scorned and belittled the child's humanity, and summarily dismissed the state's real and important interest in protecting the unborn child from a particularly gruesome means by which the child is put to death.

ARGUMENT

I. THE DISTRICT COURT ERRONEOUSLY RULED THAT THE STATE LAW IMPOSED AN UNDUE BURDEN ON ABORTION ACCESS.

A. The District Court Watered Down the Undue Burden Test.

The district court correctly identified the Supreme Court's controlling precedents to be Planned Parenthood of SE PA v. Casey, 505 U.S. 833 (1992); Stenberg v. Carhart, 530 U.S. 914 (2000); Gonzales v. Carhart, 550 U.S. 124 (2007); and Whole Woman's Health v. Hellerstedt, 136 S.Ct. 2292 (2016). *See* Paxton at *7-9. In its opinion, the court explained that those four cases dictate that "before fetal viability it is the right of a woman, 'to obtain an abortion without **undue interference** from the State.'" *Id*. at *7 (emphasis added) (quoting Gonzales at 145). (This test has often been referred to as the "undue burden" test.) By "undue interference," the court gleaned:

> Whether an obstacle is substantial — and a burden is therefore undue — must be judged in relation to the benefits that the law provides... Where a law's burdens exceed its benefits, those burdens are by definition undue, and the obstacles they embody are by definition substantial.... In the bitter debate surrounding whether society should sanction any abortion, "substantial" is often called upon to carry a greater weight than contextual analysis justifies. **The court construes "substantial" to mean no more and no less than "of substance**." [Paxton at *9-10 (citations omitted) (emphasis added).]

In short, the district court reduced its job to one of balancing competing interests:

> This court, in conducting an undue-burden analysis, must "consider the **burdens** a law imposes on abortion access together with the **benefits** those laws confer...." The court must "weigh[] the asserted benefits against the burdens...." Said another way, the court must answer the question, "does the benefit bring with it an obstacle of substance?" [*Id.* at *10 (citations omitted) (emphasis added).]

In effect, however, the district court transformed the "undue burden" test into an "any burden" test by utilizing a peculiar form of balancing whereby any not insubstantial burden overrides any state interest, no matter how important that state interest may be. The court:

> conclude[d] that although the Act advances a **valid state interest**, the Act "has the effect of placing a **substantial obstacle** in the path of a woman's choice, [and therefore] cannot be considered a permissible means of serving its legitimate ends...." [*Id*. at *38-39 (citations omitted) (emphasis added).]

In summary, the legal standard of undue burden applied by the district court[4] may be **paraphrased** as follows:

> Although the state has demonstrated a valid state interest in preventing the type of brutal abortions being banned, the record establishes the law imposes some additional burden for the abortionists and mothers. Since those burdens are not entirely

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[4] The Court identifies the burden on abortionists as requiring them to use a procedure that they may not prefer (Paxton at *17) and a burden on the mothers who may need to "wait an additional 24 hours, make an additional trip to the provider for a fetal-demise procedure, sustain an additional invasive, medically unnecessary procedure, and be subjected to heightened health risks." Note that, on appeal, the State of Texas contests the accuracy of these claims. App. Br. at 46.

> insubstantial, that burden must be considered undue, and therefore, no matter how important the state interest may be, the state law must fail.

The question in this case is whether this analysis employed by the district court reasonably applies the cited precedents. It does not.

B. The Supreme Court Has Never Authorized the "Undue Burden" Test to Be Watered Down.

A review of the cases cited by the district court reveals that the undue burden test it applied is not the undue burden test advanced in those decisions. But first, it should be remembered that at the beginning of this odyssey, in Roe v. Wade, 410 U.S. 113 (1973), the U.S. Supreme Court ruled that it was the atextual, penumbral "right to privacy" that protected a woman's right to abort her unborn infant. Roe applied strict scrutiny to the Texas state law, requiring the state to have a "compelling state interest" in order for the court to uphold restrictions on abortion. *Id*. at 156. There was no discussion in Roe of "undue burdens."

In 1983, Justice Sandra Day O'Connor propounded a version of the undue burden test in City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983). Again, in 1990, Justice O'Connor proposed the undue burden test in her concurring opinion in Webster v. Reproductive Health Services, 492 U.S. 490, 522 (1990), which involved a Missouri law that, *inter alia*, required parental notification for abortions performed on minors. But the Court did not adopt it.

Justice O'Connor apparently was avoiding Roe's "strict scrutiny" standard of review in her search for a new test.

In 1992, Planned Parenthood v. Casey, 505 U.S. 833 (1992), the Court finally embraced that "undue burden" test in an opinion joined in by only three of the Justices. *See id.* at 876. Justice Scalia dissented vigorously in Casey, arguing that the undue burden test was "as doubtful in application as it is unprincipled in origin ... really more than one should have to bear." Casey at 985. He further criticized its "ultimately standardless nature," terming it "a reflection of the underlying fact that the concept has no principled or coherent legal basis." *Id*. at 987.

In 2000, Justice Scalia's prediction was fulfilled, as the Supreme Court considered and invalidated a Nebraska law prohibiting partial-birth abortion. One of the two independent reasons that the Court struck down that law was that "it 'imposes an undue burden on a woman's ability' to choose a [dilation and evacuation] abortion, thereby unduly burdening the right to choose abortion itself." Stenberg v. Carhart, 530 U.S. 914, 930 (2000). However, in 2007, the Supreme Court considered another partial-birth abortion law, and employing the same undue burden test, upheld the federal Partial-Birth Abortion Ban Act of 2003. Gonzales v. Carhart, 550 U.S. 124 (2007). The Court concluded that,

because the law prohibited only an intact dilation and evacuation abortion, it did not constitute an undue burden, other dilation and evacuation procedures being still available. *Id.* at 150.

Most recently, in 2016, the Supreme Court applied the undue burden test to strike down a state law in Whole Woman's Health v. Hellerstedt, 136 S.Ct. 2292 (2016). The undue burden test was said to require that a law regulating abortion: (i) must actually further a state interest (not merely be rationally related to that interest); (ii) must have actual benefits that outweigh any burden on women's access to abortion; and (iii) any district court ruling must evaluate medical evidence and be based on those findings, but (iv) may not place dispositive weight on legislative findings.

Based on the 25-year track record of the test, it becomes increasingly clear that Justice Scalia's description of it is true — it is "standardless," opening the door to yet another variation of the "undue burden" test, as adopted by the district court below:

> 1. The importance of the state interest is irrelevant whenever a substantial burden can be identified, and
>
> 2. A burden will always be considered substantial if it is "of substance" to any degree whatsoever.

Applying the district court's variant of the "undue burden" test, there would be no burden that is too small to override the benefit, no matter how large. That certainly cannot be a faithful application of the undue burden test. However, if that were a proper understanding of the test, it would mean that the test is so deeply flawed that it should be declared unworkable.

In essence, the district court's focus on divining the correct meaning of the terms "substantial" and "undue burden" and "undue interference" is a meaningless exercise in futility, for this is not an attempt to understand constitutional language or statutory language or even regulatory language. However, there is little reason to believe that each word of this test was carefully weighed so that it could later be parsed in an attempt to reach decisions in future cases. There is significant reason to believe that this test was simply an artificial, atextual construct devised to provide the superficial patina of the "rule of law," while allowing a court to reach whatever decision it wants for any reason that appeals to it.[5] However standardless as the words of the test are, the district court certainly was not at

[5] Those reasons could include anything that may be important to the judge — his own political views, his own personal religious or irreligious views, his effort to fulfill promises made during interviews and confirmation hearings, a desire to be admired on the cocktail circuit by liberal academics and law school deans, or even a need to assuage personal guilt arising from prior personal involvement in abortions.

liberty to wholly disregard the State's legitimate interests that gave rise to the law under review.

II. THE DISTRICT COURT WRONGFULLY UNDERVALUED THE STATE'S LEGITIMATE INTEREST IN PROTECTING THE UNBORN CHILD FROM A GRUESOME DISMEMBERMENT ABORTION PROCEDURE.

A. The District Court Exhibited a Cold and Callous Disregard of the Actual Dismemberment Abortion Process Outlawed by the Texas Statute.

Citing Stenberg v. Carhart,[6] the case in which the Supreme Court struck down Nebraska's partial-birth abortion ban, the district court dispensed with any effort to describe the dismemberment abortion process actually outlawed by the Texas statute. Paxton at *18-19. Instead, the court offered only that the "evidence" presented to this Court about the standard D&E abortion procedure in second trimester pregnancies "has not materially changed in medical practice since physicians across the country began performing the procedure in the 1970's." *Id.* at *19. But the threshold question is not an evidentiary one. Rather, as Justice Kennedy observed in Gonzales v. Carhart — the case in which the Supreme Court upheld a federal ban on partial-birth abortions — the question is whether the Texas statute "furthers the legitimate interest of the Government in protecting the

[6] *Id.* at 923.

life of the fetus that may become a child." *Id.* at 146. Thrusting this question aside, the district court demeaned the State's interest in the specific abortion procedure outlawed by the statute in question with the callous observation that:

> An abortion always results in the death of the fetus. The extraction of the fetus from the womb occurs in every abortion. Dismemberment of the fetus is the inevitable result. [Paxton at *19.]

In other words, because the D&E abortion procedure inevitably results in the same end-product — a dish of dismembered baby parts, it makes no difference how those dismembered baby parts got there.

However, as defined by the Texas Act, a dismemberment abortion is an abortion "that is used to cause the death of an unborn child," by a process of "extract[ing] the unborn child one piece at a time [by] cut[ting] or rip[ping] the piece from the body." *See* Paxton at *5-6. In other words, the Texas statute bans the dismemberment as a process or method by which an abortion is effected, not the dismembered end product. Indeed, the statutory text distinguishes between an abortion using "suction to dismember the body of an unborn child," which is not banned by the law, from an abortion using "extraction to **cause the death** of an unborn child and in which suction is subsequently used to extract pieces of the unborn child after the unborn child's death." *See* Paxton at *5-6. As Justice Kennedy recalled Dr. Carhart's testimony in Stenberg:

> The fetus, in many cases, dies just as a human adult or child would: It bleeds to death as it is torn from limb from limb. The fetus can be alive at the beginning of the dismemberment process and can survive for a time while its limbs are being torn off. [Stenberg at 958-59.]

The district court would have us believe that, since the baby is going to die anyway, the State has no serious humanitarian interest in the means by which that baby's life is taken. Is that true? Does it matter to the people of the State of Texas how a man convicted of capital murder is put to death? Would it be permissible for Texas to return to the days of 13th-century England when men found guilty of treason were "drawn and quartered," at the end of which, the traitors' body would be torn in part in four different directions?[7] Indeed, would it be permissible to remove limbs from prisoners as a form of capital punishment, as was practiced in 19th century Persia?[8] Even now, in contemporary Saudi Arabia, "dismemberment" is "used as a punishment for crimes such as armed robbery in which the right hand and the left foot are both cut off."[9] In Switzerland, lobsters are killed with a

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[7] A. Fua, "What It's Like To Be Drawn And Quartered." *See also* "Drawing and quartering," Encyclopedia Britannica ("This last step was sometimes accomplished by tying each of four limbs to a different horse and spurring them in different directions.").

[8] C. Morrigan, "10 Horrifying Methods of Capital Punishment From Around the World," Thought Catalog (July 19, 2013).

[9] B. Sylvester, "10 Barbaric Forms Of Punishment Still Practiced Today," (Apr. 4, 2017).

greater degree of care and humanity than babies are in the United States.[10] As the Texas brief in this case asserts, "[o]ur society has long recognized [that] dismemberment of living beings [is] particularly cruel." App. Br. at 22. It is inexcusable for the district court to have ignored this fact.

B. The District Court's Descriptive Summary of the Evidence of the Dismemberment Process Outlawed by the Texas Statute Opinion Is Morally Vacuous.

In its brief, Texas claimed that the district court, while it "acknowledged Texas had an interest in fetal life, [it] ultimately gave it no weight." App. Br. at 26. Actually, it was worse than that. The district court refused to make any factual findings whatsoever, passing the judicial baton to other district courts, even though the record in those other courts was "substantially less developed" than the one here in which "Texas called 12 witnesses and put 83 exhibits into evidence...." *Id.* at 9. Amazingly, the trial court's response to this Herculean effort was a single sentence: "The evidence before the court is graphic and distasteful." Paxton at *19. Indeed, the district court chose to defer to others the unenviable task of describing what happens to the baby inside the womb under the standard D&E abortion process, and thereby avoided having to engage in what the

[10] L. Bever, "Another country has banned boiling live lobsters. Some scientists wonder why," *The Washington Post* (Jan. 13, 2018).

Supreme Court characterized as a "cold or callous," but indispensable, discussion, in order for the courts are to apply the "undue burden" test demanded by its abortion precedents. *See* Paxton at *18-19. *See also* Stenberg at 923.

Details matter, as is evidenced by the different outcomes in the two partial-birth abortion cases. In Stenberg, the justices examined the D&E procedure more clinically, resulting in a decision that the Nebraska partial-birth abortion statute failed the "undue burden" test. In Gonzales, however, the federal law prohibiting partial-birth abortions passed the test. Justice Kennedy, who dissented in Stenberg, wrote the majority opinion in Gonzales, in which he went beyond the clinical, quoting "another description from a nurse who witnessed [a D&E abortion], testif[ying] before the Senate Judiciary Committee:

> "Dr. Haskell went in with forceps and grabbed the baby's legs and pulled them down into the birth canal. Then he delivered the baby's body and the arms — everything but the head. The doctor kept the head right inside the uterus....
> The baby's little fingers were clasping and unclasping, and his little feet were kicking. Then the doctor stuck the scissors in the back of his head, and the baby's arms jerked out, like a startle reaction, like a flinch, like a baby does when he thinks he is going to fall."
> [Gonzales at 138-39.]

Even dissenting Justice Ginsberg acknowledged that the D&E procedure is "brutal" and "gruesome." *See* App. Br. at 1. Prior to Gonzales, Justice Stevens vented the same view — that the D&E abortion process was both gruesome and

brutal. *See* Stenberg at 946 (Stevens, J., concurring). At the trial below, Texas brought these Supreme Court precedents to the district court's attention, and put on sworn testimony affirming the inherent brutality of a "live-dismemberment abortion," including the testimony of one Dr. Levatino who "described the procedure as 'an absolutely brutal procedure in which a living human being is torn to pieces.'" *See* App. Br. at 18-19. And, what was the reaction of the district court judge to all of this? It chose two words to describe the outlawed dismemberment process: "graphic" and "distasteful," only marginally germane to the weighing process dictated by the Supreme Court's undue burden test. Paxton at *19.

Even Supreme Court justices who favor the woman's right to kill her unborn baby would give more weight to the Texas interest in the life of the unborn baby. Characterizing the dismemberment abortion process as only "distasteful," the district court's reaction is the moral equivalent of a child finding cod-liver oil so distasteful a medicine that it is worse than anything it cures. To be sure, "distasteful" is sometimes associated with such words as abominable, loathsome, repugnant, revolting, and shocking, but even those synonyms demonstrate that distasteful is a far cry from gruesome, the definition of which is horribly repugnant, not just repugnant; or causing one to shudder with horror, not just

disagreeable or disgusting to the sense of taste. Distasteful is also far afield from "brutal," the ordinary meaning of the latter being savage, cruel, or inhuman.

Although the district court judge might contend that "graphic" more than made up the gap left open by "distasteful," because his use of "graphic" in this context implies violence, such an important point should not be left to implication. There simply is no justification for substituting "graphic" and "distasteful" for the oft-used "gruesome" and "brutal" in Supreme Court decisions. And this is no idle matter, but one that goes to the very heart of the inquiry at stake here — whether failure to forbid the dismemberment process outlawed by the Texas statute here "'[i]mplicitly approv[es] 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.'" *See* Gonzales at 157.

C. The District Court Mistakenly Ruled that the State's Interest in the Humanity of the Unborn Child "Does Not Remove Weight from the Woman's Side."

According to the district court, whatever interest that Texas has "in the dignity of fetal life [i]t does not remove weight from the woman's side." Paxton at *19. This assertion is flatly untrue. In Gonzales, Justice Kennedy spent five full paragraphs addressing the impact that the method has upon the pregnant woman whose unborn child is killed in her womb.

First, he established that there is no "dispute that, for many, D&E is a procedure ... laden with the power to devalue human life." Gonzales at 158.

Second, he added, "[r]espect for human life finds an ultimate expression in the bond of love the mother has for her child," noting that "an abortion requires a difficult and painful moral decision," and noting further, that "some women come to regret their choice to abort the infant life they once created and sustained." *Id.* at 159.

Third, Justice Kennedy acknowledged that "[i]n a decision so fraught with emotional consequence some doctors may prefer not to disclose precise details of the means that will be used, confining themselves to the required statement of risks the procedure entails," "lest the usual anxiety preceding invasive medical procedures become the more intense." *Id.*

Fourth, observing that it is "precisely this lack of information concerning the way in which the fetus will be killed that is of legitimate concern to the State," Justice Kennedy asserted, that the "State has an interest in ensuring [that] so grave a choice is well-informed, [for] [i]t is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know:

that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form." *Id.* at 159-60.

Fifth, and finally, Justice Kennedy concluded, "[i]t is a reasonable inference that a necessary effect of the regulation and the knowledge it conveys will be to encourage some women to carry the infant to full term, thus reducing the absolute number of late-term abortions."

Thus, contrary to the district court findings, the dismemberment statute does "add weight to tip the balance in the State's favor." Paxton at *19.

III. THE DISTRICT COURT'S FINDINGS OF FACT WERE NOT BASED ON THE RECORD BELOW.

Appellants' brief raises the question whether the district court below actually fulfilled its duty to make findings of fact consistent with Rule 52(a), F.R. Civ. P. After a trial that lasted five days, with the testimony of 12 witnesses (*see* App. Br. at 9), Appellants assert that:

> large portions of the district court's opinion, including **factual findings**, are taken nearly verbatim from **other district courts' opinions** invalidating similar laws — but on different, substantially less developed factual records at the preliminary-injunction stage. [*Id*. (emphasis added).]

Giving several examples, the appellants demonstrate that "[t]he copying [by the district court] below extends to facts ungrounded in any testimony in this case"

and that "[o]ther findings copied by the district court from other courts' opinions and used to support the conclusions reached below are flatly contradicted by the uncontroverted testimony in this case." *Id*. at 9-10.

It is difficult to find appellate cases where the reviewing court was compelled to evaluate the work of trial judges who have ignored the record in front of it, and rather "cut and pasted" their findings of fact from previously decided cases. However, in one similar situation, the Fifth Circuit ruled that where a district court simply adopts one party's proposed findings of fact, it warrants a heightened level of review.

> The district court apparently adopted Appellee's proposed findings in support of the injunction. Such findings merit **heightened scrutiny**. Falcon Constr. Co. v. Economy Forms Corp., 805 F.2d 1229, 1232 (5th Cir.1986) ("A district court that adopts one party's suggested findings essentially verbatim **leaves doubt whether it has discharged its duty to review the evidence for itself** and reached its decision on the basis of its own evaluation for the evidence rather than that of an advocate."). [Great W. Directories v. Southwestern Bell Tel. Co., 63 F.3d 1378, 1390 n.30 (5th Cir. 1995) (emphasis added).]

See also United States v. Jenkins, 60 M.J. 27 (C.A.A.F. 2004) (remanding to a different panel of judges where "substantial" adoption of the government's statement of facts left in doubt whether the defendant received the review to which he was entitled).

In Southwestern Bell, the district court at least ruled based on something actually presented in that case. Ignoring the evidentiary record before it, the court below in this case has neither weighed the evidence before it, nor evaluated the credibility of witnesses before it as claimed. Paxton, at *5, n.5.

Although Rule 52(a)(6) permits a reviewing court to set aside findings of fact only if such findings are clearly erroneous, that rule only applies if the findings are "based on oral or other evidence." Where a district court has adopted findings of fact that were reached by another court in another case, it has failed in its duty to "find the facts specially" (Rule 52(a)(1)), and the entire judgment has a flawed foundation. The district court adopted, nearly verbatim, factual findings from Arkansas and Alabama courts' opinions, but were not in the record in this case or were contrary to the record in this case. *See* App. Br. at 9. "[Factfinding] is the basic responsibility of district courts, rather than appellate courts, and ... the Court of Appeals should not [resolve] in the first instance this factual dispute which had not been considered by the District Court." Pullman-Standard v. Swint, 456 U.S. 273, 291-92 (1982). Accordingly, the injunction issued by the district court should be vacated.

IV. ABORTION JURISPRUDENCE HAS A TRAGIC PEDIGREE.

Since the U.S. Supreme Court's decision in Roe v. Wade, the nation has been awash in the blood of innocent babies. By one estimate, in the 42 years since abortion was "legalized" in the 50 states, there have been 57,762,169 abortions in the United States as of January 21, 2015.[11] More recent estimates put abortions now in excess of 60 million.[12] From the work of undercover journalists, it appears that the abundance of dismembered babies has led to the creation of a thriving market for baby parts. Such sales are "illegal" if substantial fees that are charged are for fetal organs, but claimed to be "legal" if, as pro-abortion advocates describe it, the payments are only "reimbursement for its expenses."[13] From the Grand Jury report on its investigation into abortions performed by just one Philadelphia abortionist, Kermit Gosnell, M.D., we have learned that abortion at least sometimes involves endangering women, severing the spinal cords of babies

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[11] *See* S. Ertelt, "57,762,169 Abortions in America Since Roe vs. Wade in 1973," LifeNews.com (Jan. 21, 2015).

[12] *See* Number of Abortions — Abortion Counters.

[13] S. Almasy and E.C. McLaughlin, "Planned Parenthood exec, fetal body parts subject of controversial video," CNN (July 15, 2015).

with scissors, overdosing of patients, spreading venereal disease with infected instruments, and causing at least two deaths.[14]

Yet the entire blame cannot be placed on the Justices who voted for abortion in 1974 (Justices Blackmun, Burger, Douglas, Brennan, Stewart, Marshall, and Powell, all of whom are now deceased).[15] For the abortion industry to prosper, the courts must continue to beat back the pro-life forces in the nation, wherever and whenever they arise. Every state effort to re-establish a measure of control over abortion — whether to the method of killing, or the facilities in which the killing occurs, or otherwise — must be facially challenged in court, and enjoined even before the laws go into effect, based on flexible tests such as "undue burden." Again and again, Justice Scalia described "unelected and life tenured judges who have been awarded these extraordinary, undemocratic characteristics...." Webster at 535. And following the law now means judges applying tests fashioned to give them latitude to replace state law with their own personal preferences. All of this is yet a further indication that Justice Clarence Thomas was correct when he stated that the courts were so wedded to abortion that they were willing to throw into the

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[14] *See* C. Friedersdorf, "Why Dr. Kermit Gosnell's Trial Should Be a Front-Page Story," *The Atlantic* (Apr. 12, 2013).

[15] Only Justices White and Rehnquist dissented in Roe.

dumpster any of the rules of law by which we have been governed in favor of what he termed "abortion jurisprudence." *See, e.g.,* Gonzales at 169 (Thomas, J., dissenting).

However, in his dissent in Stenberg, Justice Scalia saw a better day ahead:

> I am optimistic enough to believe that, one day, Stenberg v. Carhart will be assigned its rightful place in the history of this Court's jurisprudence beside Korematsu and Dred Scott. The method of killing a human child—one cannot even accurately say an entirely unborn human child—proscribed by this statute is so horrible that the most clinical description of it evokes a shudder of revulsion.... The notion that the Constitution of the United States, designed, among other things, "to establish Justice, insure domestic Tranquility, ... and secure the Blessings of Liberty to ourselves and our Posterity," prohibits the States from simply banning this visibly brutal means of eliminating our half-born posterity is quite simply absurd. [*Id*. at 953.]

Justice Scalia did not live to see the day that he hoped for, and if federal judges continue to follow the calf-path[16] of "undue burden," that day will not come until Congress begins systematically to remove federal judges who constitutionally are eligible to serve only "during good behavior."[17]

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[16] S.W. Foss, *The Calf-Path* (1895) ("Because 'twas such a crooked path; But still they followed — do not laugh — The first migrations of that calf, And through this winding wood-way stalked, Because he wobbled when he walked.").

[17] For a discussion as to the original meaning of the Constitution's "good behavior" standard, *see* R. Berger, Impeachment: The Constitutional Problems (Harv. U. Press: 1974) at 127-88.

Each judge must decide for himself where his oath leads him. When Roe was decided, the technology to actually see the "silent scream" on the face of a child being aborted did not exist. However, judges today have no excuse and cannot claim to not know what is actually happening to the baby in an abortion. If each judge who ruled on a case such as this were to take the time to watch the effect of his decision in the video "Silent Scream," one must believe that the horror of abortion would abruptly be brought to an end.[18]

In any event, until Roe is overturned, the lower federal courts at a very minimum have a duty to not venture beyond Supreme Court precedents governing access to an abortion — and it was that duty which the district court utterly failed to perform.

[18] *See* B. Nathanson, M.D., The Silent Scream (American Portrait Films).

CONCLUSION

Both the injunction and the opinion of the district court should be vacated and the case remanded for with instructions to enter a judgment for the Appellants.

Respectfully submitted,

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Brief *Amicus Curiae* of Conservative Legal Defense and Education Fund, *et al*. in Support of Defendants-Appellants, was made, this 5th day of March, 2018, by the Court's Case Management/Electronic Case Files system upon the attorneys for the parties.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

IT IS HEREBY CERTIFIED:

1. That the foregoing Brief *Amicus Curiae* of Conservative Legal Defense and Education Fund, *et al*. in Support of Defendants-Appellants complies with the type-volume limitation of Fed. R. App. P. 292(a)(5) because this brief contains 6,088 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), as well as Circuit Rule 32.1, because this brief has been prepared in a proportionally spaced typeface using WordPerfect version 18.0.0.200 in 14-point Times New Roman.

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