

17-50154

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 Austin 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; NOVA HEALTH
SYSTEMS, INCORPORATED, doing business as Reproductive Services,

Plaintiffs-Appellees,

—v.—

DOCTOR JOHN HELLERSTEDT, M.D.,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN

BRIEF FOR *AMICUS CURIAE*
INFORMATION SOCIETY PROJECT AT YALE LAW SCHOOL
IN SUPPORT OF PLAINTIFFS-APPELLEES

PRISCILLA J. SMITH
Counsel of Record
YALE LAW SCHOOL
319 Sterling Place
Brooklyn, New York 11238
(718) 399-9241
priscilla.smith@yale.edu

Attorney for Amicus Curiae
Information Society Project
at Yale Law School

SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

Pursuant to Fifth Circuit Rule 29.2, the undersigned counsel certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1, in addition to those already listed in the parties' briefs and the other amicus briefs, 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.

Amicus Curiae

Information Society Project at The Yale Law School

Counsel for *Amicus Curiae*

Priscilla J. Smith
YALE LAW SCHOOL
319 Sterling Place
Brooklyn, NY 11238
(718) 399-9241

Respectfully submitted,

/s/ Priscilla J. Smith
Priscilla J. Smith

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
INTEREST OF THE AMICUS CURIAE	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	4
I. Casey's Record-Based Balancing Test, As Clarified in <i>Whole Woman's Health I</i>, Applies in this Case.	4
II. Under Casey's Record-Based Balancing Test, Texas's Inconsistency in Service of the Claimed State Interest in Potential Life Weakens the Strength of that Interest in this Case.	7
A. Texas's Regulations Treat Fetal Tissue Disposal Inconsistently.	7
B. Texas's Other Relevant Policy Choices Demonstrate an Inconsistent Regard for Potential Life.	12
i. Texas Fails to Protect Potential Life By Supporting Wanted Pregnancies.	12
ii. Texas Fails to Protect Potential Life By Reducing the Number of Unwanted Pregnancies and Thus the Number of Abortions.	16
C. Other Values Motivate Targeted Regulation of Abortion in This Case, Weakening the State's Interest in Potential Life in the Casey Balance.	18
CONCLUSION	20

CERTIFICATE OF COMPLIANCE..... 21

CERTIFICATE OF SERVICE..... 22

Table of Authorities

	<u>Page(s)</u>
CASES	
<i>Gonzales v. Carhart</i> , 550 U.S. 124 (2007)	2, 6, 9
<i>Planned Parenthood of Se. Pa. v. Casey</i> , 505 U.S. 833 (1992)	<i>passim</i>
<i>Whole Woman’s Health v. Hellerstedt</i> , 136 S. Ct. 2292 (2016)	<i>passim</i>
<i>Whole Woman’s Health v. Hellerstedt</i> , No. A-16-CA-1300-SS, Order (W.D. Tex. Jan. 27, 2017).....	9, 10, 11
STATUTES AND REGULATIONS	
Family Medical Leave Act (FMLA) of 1993, 29 U.S.C. § 2601 (2012).....	14
Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e (2012)	14
Tex. Loc. Gov’t Code §180.004 (2001)	15
OTHER AUTHORITIES	
Jessica Belasco, <i>Behind from the Start: Why Some Women Aren’t Receiving Prenatal Care</i> , SAN ANTONIO EXPRESS-NEWS (Jan. 16, 2016), https://www.centerforhealthjournalism.org/fellowships/projects/behind-start-why-some-women-arent-receiving-early-prenatal-care	13
M. Antonia Biggs et al., <i>Understanding Why Women Seek Abortions in the US</i> , 13 BMC WOMEN’S HEALTH 29 (2013).....	13
Natalia Birgisson, et al., <i>Preventing Unintended Pregnancy: The Contraceptive CHOICE Project in Review</i> , 24 J. WOMEN’S HEALTH 349 (2015)	16
CTRS. FOR DISEASE CONTROL & PREVENTION, YOUTH RISK BEHAVIOR SURVEILLANCE: UNITED STATES, 2009 (June 4, 2010), https://www.cdc.gov/mmwr/pdf/ss/ss5905.pdf	17

Lawrence B. Finer et al., *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 PERSP. SEXUAL & REPROD. HEALTH 110-18 (2005) 13, 14

Linda Greenhouse & Reva B. Siegel, *Casey and the Clinic Closings: When “Protecting Health” Obstructs Choice*, 125 Yale L.J. 1428, 1446-49 (2016) (discussing abortion exceptionalism and targeted restrictions of abortion providers under *Casey*) 7

Linda Greenhouse & Reva B. Siegel, *The Difference a Whole Woman Makes: Protection for the Abortion Right After Whole Woman’s Health*, 126 YALE L.J. F.149 (2016), <http://www.yalelawjournal.org/forum/the-difference-a-whole-woman-makes> (TAN 42-44)..... 7

Lyanna A. Guarecuco, *Lawmaker: Criminalizing Abortion Would Force Women to be “More Personally Responsible,”* TEXAS OBSERVER (Jan. 23, 2017), <https://www.texasobserver.org/texas-lawmaker-no-abortion-access-would-force-women-to-be-more-personally-responsible-with-sex/>..... 19

GUTTMACHER INST., *CONTRACEPTION COUNTS: RANKING STATE EFFORTS* (2006), <https://www.guttmacher.org/sites/default/files/pdfs/pubs/2006/2/23/IB2006n1.pdf>; *see also Insurance Coverage of Contraceptives*, GUTTMACHER INST. (Mar. 1, 2017), <https://www.guttmacher.org/state-policy/explore/insurance-coverage-contraceptives> 16

GUTTMACHER INST., *United States Abortion Demographics*, <https://www.guttmacher.org/united-states/abortion/demographics>..... 14

Christine Markham et al., *Adolescent Sexual Behavior: Examining Data from Texas and the U.S.*, J. APPLIED RES. ON CHILD.: INFORMING POL’Y FOR CHILD. AT RISK, Oct. 2011 17

Medicaid Coverage for Pregnant Women Remains Critical For Women’s Health, NATIONAL WOMEN’S LAW CENTER (May 2015)..... 13

NAT’L P’SHIP FOR WOMEN & FAMILIES, BY THE NUMBERS: WOMEN CONTINUE TO FACE PREGNANCY DISCRIMINATION IN THE WORKPLACE AN ANALYSIS OF U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION CHARGES (FISCAL YEARS 2011 – 2015) (Oct. 2016), <http://www.nationalpartnership.org/research-library/workplace-fairness/pregnancy-discrimination/by-the-numbers-women-continue-to-face-pregnancy-discrimination-in-the-workplace.pdf>..... 14, 15

NAT’L P’SHIP FOR WOMEN AND FAMILIES, *Reasonable Accommodations for Pregnant Workers: State and Local Laws*, (May 2017), available at <http://www.nationalpartnership.org/research-library/workplace-fairness/pregnancy-discrimination/reasonable-accommodations-for-pregnant-workers-state-laws.pdf> 15

Deborah Netburn, *After Texas Stopped Funding Planned Parenthood, Low-Income Women Had More Babies*, L.A. TIMES (Feb 3, 2016), <http://www.latimes.com/science/sciencenow/la-sci-sn-planned-parenthood-texas-births-20160203-story.html> 13

Jeffrey F. Peipert et al., *Preventing Unintended Pregnancies by Providing No-Cost Contraception*, 120 OBSTET. & GYNECOL. 1291 (2012) 16

Cassandra Pollock, *Study: A Quarter of Texas Public Schools No Longer Teach Sex Ed*, TEX. TRIBUNE (Feb. 14, 2017), <https://www.texastribune.org/2017/02/14/texas-public-schools-largely-teach-abstinence-only-sex-education-repor/> 18

Molly Redden, *Texas has Highest Maternal Mortality Rate in Developed World, Study Finds*, GUARDIAN (Aug. 20, 2016) (citing M.F. MacDorman et al., *Recent Increase in the U.S. Maternal Mortality Rate: Disentangling Trends from Measurement Issues* 128 OBSTETRICS & GYNECOLOGY 447-455 (2016)) <https://www.theguardian.com/us-news/2016/aug/20/texas-maternal-mortality-rate-health-clinics-funding> 12, 13

Amanda J. Stevenson et al., *Effect of Removal of Planned Parenthood from the Texas Women’s Health Program*, 374 NEW ENG. J. MED. 853-60 (2016)) 16, 17

Trenholm C, et al., *Impacts of Four Title V, Section 510 Abstinence Education Programs Final Report*. Princeton, NJ: Mathematic Policy Research; submitted to U.S. Dept. Health & Human Services, Assistant Secretary for Planning and Evaluation, (2007)..... 18

UNITED HEALTH FOUND., AMERICA’S HEALTH RANKINGS, 2016 HEALTH OF WOMEN AND CHILDREN REPORT (2016)
http://www.americashealthrankings.org/explore/2016-health-of-women-and-children-report/measure/Family_planning/state/TX 16

INTEREST OF AMICUS CURIAE¹

Amicus is the Information Society Project (ISP) at Yale Law School,² an intellectual center exploring the implications of new technologies for law and society. The ISP focuses on a wide range of issues such as the intersections between the regulation and dissemination of information, health policy, privacy concerns, First Amendment, Fourteenth Amendment, and reproductive rights jurisprudence. Many of the scholars associated with the ISP have special expertise in First, Fourth and Fourteenth Amendment jurisprudence and share an interest in ensuring that the constitutionality of abortion regulations is determined in accordance with settled Fourteenth Amendment principles.

SUMMARY OF ARGUMENT

First, contrary to the State of Texas's claim, *Planned Parenthood v. Casey's*³ record-based balancing test, as clarified last summer in *Whole Woman's Health v. Hellerstedt*,⁴ applies to abortion regulations justified pursuant to the state's interest

¹ This brief is filed with the consent of the parties as required under F.R.A.P. 29. No counsel for a party authored the brief in whole or in part; no party or party's counsel contributed money to fund preparing or submitting the brief; and no person other than the amicus curiae or their counsel contributed money intended to fund preparing or submitting the brief.

² This brief has been filed on behalf of a Center affiliated with Yale Law School but does not purport to present the school's institutional views, if any.

³ 505 U.S. 833 (1992).

⁴ 136 S. Ct. 2292 (2016).

in potential life, just as it does to health-justified abortion regulations. In fact, in applying *Casey*'s record-based balancing test, the Court in *Whole Woman's Health I* cited directly to circumstances in which the Court applied the test to regulations justified pursuant to the interest in potential life, such as the parental notification and spousal notification provisions at issue in *Casey*, as well as the "partial-birth abortion" ban in *Gonzales v. Carhart*.⁵ Under the *Casey* balancing test, as clarified in *Whole Woman's Health I*, courts must: *first*, conduct an independent record-based analysis of whether an abortion regulation actually serves a valid state interest; and *then*, consider benefits conferred by service of a valid interest, if any, in light of burdens imposed to determine whether the burdens are "undue," as in "unwarranted."⁶

Whole Woman's Health I and the Court's other precedents also provide guidance for courts applying the balancing test. In cases involving regulations justified pursuant to the state's interest in health or the state's interest in potential life, the Court applies a "singling out" analysis. The Court compares treatment of the abortion procedure to treatment of other comparable procedures, as part of its determination of whether the regulation *actually* serves the claimed state interest, and if so, how much. The "singling out" analysis tells us whether the state is

⁵ 550 U.S. 124 (2007).

⁶ 136 S. Ct. at 2309.

consistent or inconsistent, whether it singles out abortion for regulations while leaving other situations where the interest would also be served unregulated. The district court was correct to apply this analysis in this case.

There is, however, another type of inconsistency that should be considered when interrogating the claimed state interest. Where the state claims, as Texas does here, to serve the interest in potential life, especially the state's expressive interests, inconsistency in the state's expression of respect for potential life in other areas altogether, such as support for wanted pregnancies or reduction of abortion through reduction of the need for abortion, should be examined. This type of inconsistency can have a tangible impact on any expressive value of a law. Like the message of a parent who instructs "do as I say, not as I do," a state's message in these circumstances is undermined, or at least weakened, by its inconsistency.

Texas chooses many fetal protective policies in circumstances that reduce women's autonomy, by restricting and reducing access to abortions. As amicus shows below, Texas at the same time declines to adopt many fetal protective policies in circumstances that would respect women's autonomy; these policies include medical and economic support for pregnant women who want to carry to term. Texas also declines to adopt autonomy-respecting policies that would reduce abortion by increasing access to, or education about, contraception; these policies assist women in avoiding unwanted pregnancy and thus can significantly reduce

abortions. These inconsistent choices with respect to protection of potential life reveal that other values are in play, motivating Texas’s choices, values reflecting the state’s views of gender, appropriate sexual activity, and the size of government. Where these other values determine when Texas will act to protect potential life, any fetal protective expression of the abortion regulation is weakened.

ARGUMENT

I. ***Casey’s Record-Based Balancing Test, as Clarified in *Whole Woman’s Health I*, Applies in this Case.***

As the Court held in *Whole Woman’s Health I*, “[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.”⁷ Only by balancing benefits and burdens can a court determine whether a burden imposed by an abortion access is “undue,” as in disproportionate or gratuitous.⁸ In other words, a finding that a burden is “undue,” or as *Casey* often put it, “unwarranted,”⁹ is a relative judgment.

In clarifying *Casey’s* “undue burden” standard in *Whole Woman’s Health*, the Supreme Court rejected this Court’s articulation of the *Casey* standard.¹⁰ Under the proper balancing test, courts must consider whether an abortion regulation law

⁷ 136 S. Ct. at 2309-10.

⁸ *Id.* at 2309.

⁹ *See, e.g., Casey*, 505 U.S. at 851; *id.* at 876.

¹⁰ *Id.* at 2309-10 (noting that this Court’s “approach simply does not match the standard that this Court laid out in *Casey*”).

serves a valid state interest in women’s health or potential life.¹¹ Instead, as the Court emphasized, determining what benefits a law confers, if any, is necessary to the balancing test required by *Casey*. After all, only by considering burdens a law imposes in light of any benefits a law confers can a court determine whether “any burden imposed on abortion access is ‘undue.’”¹²

The Court also explicitly rejected this Court’s attempt to revive a rational basis standard of review for abortion regulations that called for complete deference to the State’s claim that the legislation actually served the claimed interest.¹³ Instead, the Court emphasized that when considering whether and to what extent an abortion regulation serves the claimed state interest and confers benefits, courts must conduct independent examinations of the record. Courts do not defer to, nor place dispositive weight on, legislative factfindings, much less claims made by the state in litigation.¹⁴ Instead, district courts must, as did the court below in this case

¹¹ *Id.* at 2309 (rejecting “impl[ication] that a district court should not consider the *existence or nonexistence* of medical benefits when considering whether a regulation of abortion constitutes an undue burden”) (emphasis added).

¹² *Id.* at 2310.

¹³ *Id.* at 2309 (noting that it “is wrong to equate the judicial review applicable to the regulation of a constitutionally protected personal liberty with the less strict review applicable where, for example, economic legislation is at issue.”).

¹⁴ *Id.* at 2310 (“ ‘*Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake.*’ ”) (emphasis in original) (quoting *Gonzales*, 550 U.S. at 165); *id.* at 2310 (pointing to reliance in *Casey* on the “District Court’s factual findings and the research-based submissions of

and in *Whole Woman's Health I*, “give significant weight to evidence in the judicial record,” and then “weigh[] the asserted benefits against the burdens.”¹⁵ This is “the correct legal standard.”¹⁶

Contrary to Defendants’ claim, *Whole Woman's Health I* made explicit that *Casey's* record-based balancing test applies equally to abortion regulations justified pursuant to a state’s interest in protecting potential life. The defendant’s suggestion to the contrary,¹⁷ blatantly conflicts with the Court’s decision, barely one year old, in *Whole Woman's Health I*.

In fact, the Court in *Whole Woman's Health I* specifically cited those portions of *Casey* in which the Court performed what it called the “same balancing” with respect to the spousal notice provision and the parental notification provisions of the Pennsylvania law at issue, both of which were justified pursuant to the interest in potential life.¹⁸ The Court also referenced its review of potential life-

amici”); *id.* (noting that in *Gonzales v. Carhart* evidence proved some Congressional findings wrong).

¹⁵ *Whole Woman's Health I*, 136 S. Ct. at 2310.

¹⁶ *Id.*

¹⁷ *See* Appellants’ Br. at 21-22.

¹⁸ *Id.* at 2309.

justified regulations in *Casey* and *Gonzales* as examples of the type of independent judicial review of record evidence of the benefits of a law that is required.¹⁹

II. Under *Casey*'s Record-Based Balancing Test, Texas's Inconsistency in Service of the Claimed State Interest in Potential Life Weakens the Strength of that Interest in this Case.

The question in this case is how the court should determine the weight of the putative fetal-protective benefits of the law. Again, *Whole Woman's Health I* provides clear guidance.

A. Texas's Regulations Treat Fetal Tissue Disposal Inconsistently.

In *Whole Woman's Health I*, policies of abortion exceptionalism that singled out abortion for regulation,²⁰ leaving other medical procedures of similar risk unregulated, called into question whether and how the abortion regulation served the claimed interest, and reduced the weight the interest deserved in the *Casey* balance.²¹ In balancing benefits against burdens the Supreme Court was attentive to the state's decision to target and single out abortion for onerous health

¹⁹ *Id.* at 2310 (discussing review of evidence related to prevalence of spousal abuse in *Casey*); *id.* (emphasizing the Court's refusal to defer to factual findings in *Gonzales*).

²⁰ See generally Linda Greenhouse & Reva B. Siegel, *Casey and the Clinic Closings: When "Protecting Health" Obstructs Choice*, 125 *Yale L.J.* 1428, 1446-49 (2016) (discussing abortion exceptionalism and targeted restrictions of abortion providers under *Casey*); Linda Greenhouse & Reva B. Siegel, *The Difference a Whole Woman Makes: Protection for the Abortion Right After Whole Woman's Health*, 126 *YALE L.J.* F.149 (2016), <http://www.yalelawjournal.org/forum/the-difference-a-whole-woman-makes> (TAN 42-44).

²¹ See *Whole Woman's Health I*, 136 S. Ct. at 2309.

regulation that the state did not impose on medical procedures of equal or greater risk:

Nationwide, childbirth is 14 times more likely than abortion to result in death, but Texas law allows a midwife to oversee childbirth in the patient's own home. Colonoscopy, a procedure that typically takes place outside a hospital (or surgical center) setting, has a mortality rate 10 times higher than an abortion (the mortality rate for liposuction, another outpatient procedure, is 28 times higher than the mortality rate for abortion). Medical treatment after an incomplete miscarriage often involves a procedure identical to that involved in a nonmedical abortion, but it often takes place outside a hospital or surgical center. And Texas partly or wholly grandfathers (or waives in whole or in part the surgical-center requirement for) about two-thirds of the facilities to which the surgical-center standards apply. But it neither grandfathers nor provides waivers for any of the facilities that perform abortions. These facts indicate that the surgical-center provision imposes "a requirement that simply is not based on differences" between abortion and other surgical procedures "that are reasonably related to" preserving women's health, the asserted "purpos[e] of the Act in which it is found."²²

The Court also noted that "there was no significant health-related problem that the new law helped to cure" that could have justified the targeting.²³

Thus, in *Whole Woman's Health I*, Texas's policy singling out abortion for selective regulation undermined its claim that the regulation there served the claimed interest in protecting women's health, and thus reduced the weight it deserved in the *Casey* balance. The Court repeatedly observes that the restrictions

²² *Id.* at 2315 (citations omitted).

²³ *Id.* at 2311; *id.* at 2311-12 (Texas admitted that there was no evidence in the record of "a single instance in which the new requirement would have helped even one woman obtain better treatment").

served little or no health benefit, and takes account of many ways the law adversely affected women's access. The Court concluded, "We agree with the District Court that the surgical-center requirement, like the admitting-privileges requirement, provides few, if any, health benefits for women . . ." ²⁴

Gonzales is not to the contrary. The Court held there that singling out abortion to ban one particular method was warranted. The Court found the banned procedure uniquely "brutal," and "shocking." As the Court put it:

Congress could nonetheless conclude that the type of abortion proscribed by the Act *requires specific regulation* because it implicates additional ethical and moral concerns that justify a special prohibition. Congress determined that the abortion methods it proscribed had a "disturbing similarity to the killing of a newborn infant," . . . and thus it was concerned with "draw[ing] a bright line that clearly distinguishes abortion and infanticide." ²⁵

Thus, the law served the state's "legitimate interest in regulating the medical profession in order to promote respect for life, including life of the unborn." ²⁶

In this case, the lower court applied the Supreme Court's singling out analysis to preliminarily enjoin Texas' fetal tissue disposal regulations, regulations that putatively serve the states interest in potential life. ²⁷ The court pointed out that

²⁴ *Id.* at 2318.

²⁵ 550 U.S. at 158 (emphasis added).

²⁶ *Id.*

²⁷ *Whole Woman's Health v. Hellerstedt*, No. A-16-CA-1300-SS, Order at 8 (W.D. Tex. Jan. 27, 2017) ("*Whole Woman's Health II*") (Record on Appeal 17-

since 1989 Texas regulated the disposal by health care facilities of all human tissue, whether from surgery, autopsy, or an abortion in the same manner, and allowed health care providers to use any one of seven methods, all of which insured sanitary disposal of human tissue.²⁸ Thus, the regulations allowed all human medical waste, whether from a child, an adult, or a previable fetus, “to be treated uniformly in a single stream.”²⁹

The challenged regulations, however, single out “fetal tissue” from all other human tissue and limit its disposal to one of three methods, all of which involve some sort of “interment.”³⁰ The regulations further single out abortion providers by exempting from the new regulations “fetal tissue that is expelled or removed from the human body once the person is outside of a health care facility.”³¹ As the court noted, Texas “does not offer any reason why fetal tissue must be treated differently at home compared to in a doctor’s office.”³² The court also questioned whether the

50154.609). Citation to the Record on Appeal will hereafter be made in the form “ROA Page #”.

²⁸ See *Whole Woman’s Health II*, at *5-6 (ROA 17-50154.606-07). As in *Whole Woman’s Health I*, the court found that once again there was no public health problem to warrant the change in the regulations, and the state concurred. *Id.*

²⁹ *Id.* at *6 (ROA 17-50154.607). Occasionally, Plaintiffs’ patients would choose “cremation or burial, for a lost pregnancy, and plaintiffs would refer those patients to funeral homes.” *Id.*

³⁰ *Id.* at *7 ((ROA 17-50154.608).

³¹ *Id.* at *8 (ROA 17-50154.609).

³² *Id.*

state had an interest in protecting potential life after abortion “when there is no potential life to protect.”³³ The court further noted that Texas “undercuts the strength of the asserted benefit” by allowing the exemption from the law and based on other factors indicating no special regard for fetal tissue, such as allowing freezing of tissue and comingling of fetal tissue from different fetuses.³⁴ The court also noted the many revisions made to the regulations’ claimed purpose in the legislative history. The State flip-flopped from a claim that the regulations would protect public health and safety, eventually landing on the claim that the regulations “promote respect for life and dignity of the unborn.”³⁵ Weighing these factors, the court held that the State’s “inconsistency [in treating fetal tissue] reduces the strength of the asserted benefit,” finding that that benefit was “weak.”³⁶

The court concluded:

It is reasonable to conclude the burdens on abortion exceed any benefit. On one side of the equation DSHS has placed its weak purported benefit of protecting the dignity of the unborn, and on the other side Plaintiffs have placed evidence the Amendments increase costs for healthcare providers, enhance the stigma on women associated with miscarriage and abortion care, and create potentially devastating logistical challenges for abortion providers throughout Texas.³⁷

³³ *Id.* at *16 (ROA 17-50154.617).

³⁴ *Id.* at *18 (ROA 50154.619).

³⁵ *Id.* at *8 (ROA 17-50154.609).

³⁶ *Id.* at *21 (ROA 17-50154.622).

³⁷ *Id.* (ROA 17-50154.622).

While the trial court in this case invokes evidence of abortion exceptionalism in Texas to suggest that the state's interest in protecting potential life might be a pretext for restricting abortions, the Supreme Court's opinion in *Whole Woman's Health* employs evidence of singling out abortion providers to question the benefit of a restriction without expressly alleging pretext. Still, the Court's deep skepticism of the state's actual motivation shines through the opinion, and the weight of the state's interest in the balance is significantly diminished as a result.

B. Texas's Other Relevant Policy Choices Demonstrate an Inconsistent Regard for Potential Life.

Judge Sparks demonstrates selectivity in Texas' regulation of fetal tissue disposal. But this was not the only respect in which the state was selective in protecting potential life. There are many bodies of law that protect incipient and newly born life and shape incentives for abortion.

i. Texas Fails to Protect Potential Life By Supporting Wanted Pregnancies.

In 2016, at the time of the Court's decision in *Whole Woman's Health I*, pregnancy-related death in Texas was higher than in any other state and the rest of the developed world, a rate that doubled in the period from 2010 to 2014.³⁸ In the

³⁸ Molly Redden, *Texas has Highest Maternal Mortality Rate in Developed World, Study Finds*, GUARDIAN (Aug. 20, 2016) (citing M.F. MacDorman et al., *Recent*

midst of this crisis, the state nonetheless decided to cut its family planning budget in 2011 by sixty-six percent, forcing many clinics that provide contraception and medical care for pregnant women to shut down.³⁹ Over the next three years, the number of births to women receiving no prenatal care in Texas increased fivefold.⁴⁰ Choosing to shut down health clinics that provide prenatal care—when newborns of mothers without prenatal care are five times more likely to die than those born to mothers who do receive prenatal care—is a policy choice that endangers, rather than protects, potential life.⁴¹

Increase in the U.S. Maternal Mortality Rate: Disentangling Trends from Measurement Issues 128 OBSTETRICS & GYNECOLOGY 447-455 (2016)) <https://www.theguardian.com/us-news/2016/aug/20/texas-maternal-mortality-rate-health-clinics-funding>.

³⁹ The 2011 Texas defunding was a 66% cut to family-planning grants that led 82 clinics to close, one-third of which were Planned Parenthood affiliates. Deborah Netburn, *After Texas Stopped Funding Planned Parenthood, Low-Income Women Had More Babies*, L.A. TIMES (Feb 3, 2016), <http://www.latimes.com/science/sciencenow/la-sci-sn-planned-parenthood-texas-births-20160203-story.html>; Redden, *supra* note 38.

⁴⁰ Jessica Belasco, *Behind from the Start: Why Some Women Aren't Receiving Prenatal Care*, SAN ANTONIO EXPRESS-NEWS (Jan. 16, 2016), <https://www.centerforhealthjournalism.org/fellowships/projects/behind-start-why-some-women-arent-receiving-early-prenatal-care>.

⁴¹ Medicaid Coverage for Pregnant Women Remains Critical For Women's Health, NATIONAL WOMEN'S LAW CENTER (May 2015) (citing U.S. Dep't of Health and Human Services, *Prenatal Services*, <http://mchb.hrsa.gov/programs/womeninfants/prenatal.html>). Moreover, Twenty-eight percent of Texas women of child-bearing age do not have health insurance. Yet Texas has not chosen to expand Medicaid to help close this gap. Jessica Belasco, *Behind from the Start*, *supra* note 24.

When women are asked about their reasons for deciding to end a pregnancy, forty percent or more cite financial reasons.⁴² In fact, forty-nine percent of the women who choose to end pregnancies live below the federal poverty level, and seventy-five percent are poor or low-income.⁴³ Thirty-eight percent of women report that they decided to end a pregnancy because a pregnancy would interfere with their job, employment, or career.⁴⁴ The fear is well founded. Even with the protections of federal laws such as the Pregnancy Discrimination Act⁴⁵ and the Family and Medical Leave Act,⁴⁶ pregnant women lose their jobs at a significant rate.⁴⁷ Nearly one third of the claims alleging discriminatory discharge filed at the

⁴² M. Antonia Biggs et al., *Understanding Why Women Seek Abortions in the US*, 13 BMC WOMEN'S HEALTH 29 (2013) (employing data collected from 2008-2010); cf. Lawrence B. Finer et al., *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 PERSP. SEXUAL & REPROD. HEALTH 110-18 (2005) (describing a study that employed different questions and data from 2004 and found that 73% percent of women reported having an abortion because they could not afford having a baby).

⁴³ *United States Abortion Demographics*, GUTTMACHER INST. <https://www.guttmacher.org/united-states/abortion/demographics>.

⁴⁴ See Finer *supra* note 42.

⁴⁵ Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e (2012).

⁴⁶ Family Medical Leave Act (FMLA) of 1993, 29 U.S.C. § 2601 (2012).

⁴⁷ See NAT'L P'SHIP FOR WOMEN & FAMILIES, BY THE NUMBERS: WOMEN CONTINUE TO FACE PREGNANCY DISCRIMINATION IN THE WORKPLACE AN ANALYSIS OF U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION CHARGES (FISCAL YEARS 2011 – 2015) (Oct. 2016), <http://www.nationalpartnership.org/research-library/workplace-fairness/pregnancy-discrimination/by-the-numbers-women-continue-to-face-pregnancy-discrimination-in-the-workplace.pdf> (analyzing the nearly 31,000 claims of

Equal Employment Opportunity Commission were filed by women alleging they were discharged for becoming pregnant. Many pregnant women alleged their employers refused minor job modifications they needed to keep working.⁴⁸

Given the centrality of financial considerations in decisions about having children, a state that wanted to protect potential life and reduce abortions could provide additional economic support to those women who wanted to carry a pregnancy to term but did not have the resources to care for a (or another) child. At the very least, the state could provide job protections to pregnant women, requiring employers to make reasonable accommodations that would allow pregnant workers to keep their jobs. Texas, however, has only limited protections for county and municipal pregnant workers,⁴⁹ while many other states have broader protections for all pregnant workers in the state.⁵⁰

pregnancy discrimination filed with the EEOC and state-level fair employment agencies between October 2011 and September 2015).

⁴⁸ *Id.* (documenting the more than 650 charges by women alleging they were not provided the reasonable workplace accommodations they needed between October 2014 and September 2015).

⁴⁹ Texas's law protects county or municipal pregnant employees only. Under that law a county or municipal employer is required to make a reasonable effort to accommodate an employee who is determined by a physician to be partially physically restricted by a pregnancy. Tex. Loc. Gov't Code §180.004 (2001).

⁵⁰ NAT'L P'SHIP FOR WOMEN AND FAMILIES, *Reasonable Accommodations for Pregnant Workers: State and Local Laws*, (May 2017), available at <http://www.nationalpartnership.org/research-library/workplace->

ii. **Texas Fails to Protect Potential Life By Reducing the Number of Unwanted Pregnancies and Thus the Number of Abortions.**

Nor does Texas assist women in avoiding unplanned pregnancies, such as by insuring access to, and education concerning, the most effective contraceptives. Increased access to contraception reduces unplanned pregnancies and, as a result, the number of abortions.⁵¹ Texas' record in this regard is unimpressive.

Texas ranks 47th among the states in the U.S. for meeting the contraception needs of poor women in the state,⁵² and ranks 48th for general contraception access.⁵³ This poor record cannot be attributed solely to the state's economic

[fairness/pregnancy-discrimination/reasonable-accommodations-for-pregnant-workers-state-laws.pdf](#).

⁵¹ Public health data demonstrates the relationship between improving contraceptive access and reducing abortions, both nationally Natalia Birgisson, et al., *Preventing Unintended Pregnancy: The Contraceptive CHOICE Project in Review*, 24 J. WOMEN'S HEALTH 349 (2015); Jeffrey F. Peipert et al., *Preventing Unintended Pregnancies by Providing No-Cost Contraception*, 120 OBSTET. & GYNECOL. 1291 (2012), and in Texas, Amanda J. Stevenson et al., *Effect of Removal of Planned Parenthood from the Texas Women's Health Program*, 374 NEW ENG. J. MED. 853-60 (2016)).

⁵² UNITED HEALTH FOUND., AMERICA'S HEALTH RANKINGS, 2016 HEALTH OF WOMEN AND CHILDREN REPORT (2016) http://www.americashealthrankings.org/explore/2016-health-of-women-and-children-report/measure/Family_planning/state/TX.

⁵³ GUTTMACHER INST., CONTRACEPTION COUNTS: RANKING STATE EFFORTS (2006) <https://www.guttmacher.org/sites/default/files/pdfs/pubs/2006/2/23/IB2006n1.pdf>; see also *Insurance Coverage of Contraceptives*, GUTTMACHER INST. (Mar. 1, 2017), <https://www.guttmacher.org/state-policy/explore/insurance-coverage-contraceptives>.

circumstances. Texas recently *gave up* \$35 million a year in federal Medicaid funds in order to block Planned Parenthood from serving as a Medicaid provider, even though none of these funds would support abortion, but a significant amount of the money would support contraceptive access. In the first eighteen months after the change thousands of women stopped getting long-acting birth control, and Medicaid pregnancies increased by 27 percent, according to a research paper published last year in *The New England Journal of Medicine*.⁵⁴

Nor does the State adopt policies to educate young people about how to use contraception to avoid pregnancy, even though half of the State's high school students are sexually active.⁵⁵ A quarter of the state's public school districts offered no sex education at all, and nearly sixty percent used abstinence-only education programs during the same period.⁵⁶ Evidence shows that abstinence programs are not working to stop sexual activity.⁵⁷

⁵⁴ Stevenson et al., *Removal of Planned*, 374 *NEW ENG. J. MED.* 853-60, *supra* note 51.

⁵⁵ Christine Markham et al., *Adolescent Sexual Behavior: Examining Data from Texas and the U.S.*, *J. APPLIED RES. ON CHILD.: INFORMING POL'Y FOR CHILD. AT RISK*, Oct. 2011, (reporting evidence suggesting that a quarter of middle school students and half of high school students are sexually experienced); *see also* *CTRS. FOR DISEASE CONTROL & PREVENTION, YOUTH RISK BEHAVIOR SURVEILLANCE: UNITED STATES, 2009* (June 4, 2010), <https://www.cdc.gov/mmwr/pdf/ss/ss5905.pdf> (reporting that 51.6 % of Texas high school students have had sex).

⁵⁶ Cassandra Pollock, *Study: A Quarter of Texas Public Schools No Longer Teach Sex Ed*, *TEX. TRIBUNE* (Feb. 14, 2017), (citing *TEX. FREEDOM NETWORK EDUC.*

C. Other Values Motivate the Targeted Regulation of Abortion in This Case, Undermining the State’s Claim, and Weakening the State’s Interest in Potential Life in the *Casey* Balance.

The State’s failure to serve its claimed interest in potential life in the areas outlined above, its failure to make policy choices that would reduce the need for abortions and provide additional support for developing life in utero, call into question its claim that it is regulating in the interest of potential life. In our federated system, the state may make policy choices which reflect the distinctive ways that Texans reason about the regulation of sex and the redistribution of property. But we should be clear that Texas is protecting potential life in ways that many other states do not—in ways that reflect this state’s distinctive views about women⁵⁸ and property—and, importantly, *is not* protecting or expressing respect

FUND, CONSPIRACY OF SILENCE: SEXUALITY EDUCATION IN TEXAS PUBLIC SCHOOLS IN 2015-16, <http://a.tfn.org/sex-ed/executive-summary-web.pdf>), <https://www.texastribune.org/2017/02/14/texas-public-schools-largely-teach-abstinence-only-sex-education-repor/>.

⁵⁷ A long-awaited, federally-funded evaluation of four carefully selected abstinence-only education programs, published in April 2007, showed that youth enrolled in the programs were no more likely than those not in the programs to delay sexual initiation, to have fewer sexual partners, or to abstain entirely from sex. Trenholm C, *et al.*, *Impacts of Four Title V, Section 510 Abstinence Education Programs Final Report*. Princeton, NJ: Mathematic Policy Research; submitted to U.S. Dept. Health & Human Services, Assistant Secretary for Planning and Evaluation, (2007).

⁵⁸ For example, one Texas legislator openly advocates abortion restrictions as a substitute for contraception, using the threat of pregnancy and birth as a means of controlling sexual activity. This legislator has proposed a bill allowing prosecutors to charge women and abortion providers with murder, reasoning that the threat of

for potential life in ways that many other states do. The fact that these other values, views of sex and property are motivating the policy choices in this case, should be part of the court's calculus.

These state choices shape both the meaning and the effects of the state's new fetal remains regulation, and undermine its claim that the law successfully protects or expresses respect for life. Texas's inconsistency in its actions with respect to potential life, its contradictory behavior especially with respect to women with wanted pregnancies, demonstrates that other values, values reflecting views about women, sex and property, are the motivating factors behind its targeted regulation of abortion to serve its claimed interest. Even if these values do not constitute

incarceration "would 'force' women to be 'more personally responsible' with sex" and "would reduce the number of pregnancies 'when they know that there's repercussions.'" Lyanna A. Guarecuco, *Lawmaker: Criminalizing Abortion Would Force Women to be "More Personally Responsible,"* TEXAS OBSERVER (Jan. 23, 2017), <https://www.texasobserver.org/texas-lawmaker-no-abortion-access-would-force-women-to-be-more-personally-responsible-with-sex/>. Defending his proposed bill to allow prosecutors to charge women and providers with murder for abortion, State Representative Tony Tinderholt observed:

Right now, it's real easy. Right now, they don't make it important to be personally responsible because they know that they have a backup of 'oh, I can just go get an abortion.' Now, we both know that consenting adults don't always think smartly sometimes. But consenting adults need to also consider the repercussions of the sexual relationship that they're gonna have, which is a child.

Id.

unlawful purposes,⁵⁹ where these other values motivate the law and explain why Texas chooses to act to promote potential life in some circumstances and chooses not to act in others, Texas's contradictory policy choices deserve consideration as judges weigh the benefit and burdens of the law.

CONCLUSION

For the foregoing reasons, the district court's decision should be affirmed.

Respectfully submitted,

/s/ PRISCILLA J. SMITH

PRISCILLA J. SMITH
YALE LAW SCHOOL
319 STERLING PLACE
BROOKLYN, NY 11238
PRISCILLA.SMITH@YALE.EDU

Counsel for Amicus Curiae

July 12, 2017

⁵⁹ *Cf Casey*, 505 U.S. at 893-97 (giving husbands dominion over wife's decision promoted gender stereotypes that are "no longer consistent with our understanding of the family, the individual, or the Constitution.").

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that this brief complies with the type-volume limitation and typeface requirements of Fed. R. App. Proc. 32, because it contains 4,804 words, excluding the portions of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), and has been prepared in a proportionally spaced typeface using Times New Roman 14-point font in Microsoft Word.

DATED: July 12, 2017

/s/ Priscilla Joyce Smith
PRISCILLA JOYCE SMITH

CERTIFICATE OF SERVICE

I hereby certify that on July 17, 2017, this proposed sufficient brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: 1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; 2) the electronic submissions is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and 3) the document is free of viruses.

DATED: July 17, 2017

/s/ Priscilla Joyce Smith
PRISCILLA JOYCE SMITH