No. 14-284

In The Supreme Court of the United States

WILLIAM HUMBLE, DIRECTOR OF THE ARIZONA DEPARTMENT OF HEALTH SERVICES, IN HIS OFFICIAL CAPACITY,

Petitioner,

v.

PLANNED PARENTHOOD ARIZONA, INC.; WILLIAM RICHARDSON, M.D.; AND WILLIAM H. RICHARDSON M.D., P.C., d/b/a TUCSON WOMEN'S CENTER,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

(1) Should the Court grant certiorari to review an interlocutory Court of Appeals decision entering a preliminary injunction when there is a significant, unresolved dispute as to the meaning and scope of the challenged law and the case may be mooted by the outcome of a pending state court adjudication?

(2) Should the Court grant certiorari to review the Court of Appeals' application of the undue burden standard of *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), when the Court of Appeals' decision was tied to a preliminary record in which the state of Arizona presented no evidence?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner does not accurately list the Respondents in the caption of the case. The Respondents are Planned Parenthood Arizona, Inc.; William Richardson, M.D.; and William H. Richardson, M.D., P.C., d/b/a Tucson Women's Center.

Planned Parenthood Arizona, Inc. is a non-profit domestic corporation. It is not publicly held and has no parent corporation. William Richardson, M.D., is an individual. William H. Richardson, M.D., P.C., d/b/a Tucson Women's Center is a domestic professional corporation. It is not publicly held and has no parent corporation.

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COUNTER-STATEMENT OF THE CASE

The Petition seeks review of an interlocutory order of the U.S. Court of Appeals for the Ninth Circuit finding that Respondents were likely to succeed in showing that a new Arizona abortion restriction unduly burdens women seeking abortion. The lower court reached this conclusion based on "uncontroverted evidence" that the law, which Petitioner maintains is a safety measure, offers no safety advantage at all – indeed, it would mandate less safe treatment – and "would significantly reduce the number of Arizona women who obtain abortions." Pet. App. 24, 23.

This straightforward application of the Court's jurisprudence to the preliminary record in this case does not merit review. Review is even more inappropriate here because there is a significant, unresolved dispute about the meaning and scope of the challenged law and because the case may be mooted by the outcome of a pending state court adjudication.

A. The Challenged Law[1]

The Arizona law at issue in this case reverses more than a decade of medical progress in the provision of safe, early, medical (i.e., non-surgical) abortion.

[1] Respondents have challenged both a 2012 law, Ariz. Rev. Stat. § 36-449.03(E)(6), and a 2014 regulation implementing that law, Ariz. Admin. Code § R9-10-1508(G), which are referred to together herein as "the Arizona law."

Since at least 2001, women in Arizona who are no more than nine weeks pregnant who choose abortion have been able to utilize medications alone ("medication abortion") to end their pregnancies. Medication abortion involves two kinds of prescription pills, mifepristone and misoprostol. *See* Pet. App. 3-6; *see also* 9th Cir. ECF No. 24-3 at 36-40.[2]

By the time that mifepristone was approved by the U.S. Food and Drug Administration ("FDA") in 2000, studies already showed that a protocol different from the one that appears on the mifepristone label was superior and could be safely and effectively used later in pregnancy (up to nine weeks rather than seven). Therefore, the overwhelming majority of the more than two million American women who have safely used mifepristone to terminate an early pregnancy have followed an "evidence-based" protocol different from the one on the mifepristone label. *See* Pet. App. 4-5; 9th Cir. ECF No. 24-3 at 43-44.[3] Evidence-based use is common in medicine and has been recognized as good medical practice by the FDA. Pet. App. 8-9. In fact, the medication abortion protocol used by Respondents "is considered the best-practices, 'evidence-based' medicine by practicing doctors in Arizona and elsewhere, and endorsed by the American College of Obstetricians and Gynecologists

[2] Mifepristone is sometimes known as RU-486 or by its brand name, Mifeprex.

[3] As the district court noted, evidence-based use is also "[l]ess accurately described as 'off-label' use." Pet. App. 36 n.4.

(ACOG) and the American Medical Association (AMA)." *Id.* at 36.

The Arizona law bans all medication abortion. It requires abortion providers, when performing a medication abortion, to comply with "the protocol that is authorized by the United States food and drug administration and that is outlined in the final printing labeling instructions [("FPL")] for that medication, drug, or substance." Ariz. Rev. Stat. § 36-449.03(E)(6); Ariz. Admin. Code § R9-10-1508(G). But only mifepristone has an FPL outlining a medication abortion protocol. Misoprostol does not; "[t]he FDA has approved misoprostol only for the treatment of stomach ulcers." Pet. App. 3-4. Because the Arizona law requires all abortion-inducing medications to be used as described in the FPL "for that medication," the law prohibits the use of misoprostol in medication abortion, thereby banning the procedure altogether. *See id.* at 13.

Petitioner maintains, however, that the Arizona law does not ban medication abortion, but rather, allows it to be performed according to the outdated protocol on the mifepristone label (an "FPL mandate"). In particular, under Petitioner's interpretation, the Arizona law bans medication abortion entirely after seven weeks (when it is otherwise available until nine) and requires that, if medication abortion is offered, women follow a rarely used, outdated, and less effective protocol that requires three times more mifepristone, an extra clinic visit,

and extra costs. *See id.* at 3-7.[4] The Ninth Circuit noted that "[t]he parties disagree about the correct interpretation of the Arizona law," but decided not to "resolve this dispute" at the preliminary injunction stage, instead "assum[ing] for the purposes of [its] analysis that [Petitioner's] interpretation of the law is correct." *Id.* at 13.

B. The Proceedings Below

Prior to the Arizona law taking effect, Respondents sued alleging, *inter alia*, that the law imposes an undue burden on their patients' right to choose abortion, and sought a preliminary injunction.[5] In support of that motion, Respondents proffered significant "uncontroverted evidence," Pet. App. 24, from fact and expert witnesses. That evidence demonstrated that, regardless of whether the Arizona law is a complete ban on medication abortion or an FPL mandate, it has no benefit for women's health, and indeed it would harm women because it either eliminates the only non-surgical option for ending an early pregnancy or requires women to use "a less safe, less

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[4] Petitioner actually admitted below that he does not know what the Arizona law does. Answering Br. at 20, 9th Cir. ECF No. 33-1. Instead of offering one explanation, he proposed two "alternative" readings: one where the Arizona law regulates misoprostol and the other where it does not. *Id*. at 19-21.

[5] Although the 2012 statute was in effect, it was without force until Petitioner promulgated regulations to enforce it, which he did not propose until November 2013. Those regulations were scheduled to take effect on April 1, 2014.

effective treatment regimen." *Id.*; *see also id.* at 36 ("Plaintiffs' evidence reflects that there is a clear advantage" to the banned protocol, which "has a lower rate of ongoing pregnancies and fewer surgical interventions are necessary to complete the abortion procedure").

Respondents also presented undisputed evidence that the Arizona law, while not furthering the state's interest in women's health, would "significantly reduce the number of Arizona women who receive abortions." Pet. App. 23. Respondents "provided specific reasons" why the Arizona law would likely force the only abortion provider in northern Arizona – a primarily rural area larger than most states, that is home to a large Native American population – to stop offering abortions. *Id.* The cessation of abortion services at this health center, which is located in Flagstaff and can only offer medication abortion, would require women in northern Arizona to make "on average, a 321-mile round trip" to access abortion. *Id.*; *see also id.* ("Some women will have to travel up to 744 miles round-trip."). Women would have to make this trip at least two times (or stay away from home overnight) to access surgical abortion because Arizona law imposes a mandatory waiting period; to obtain a medication abortion under an FPL mandate, women would have to make this trip four times. *Id.* at 3-4.[6] Respondents' undisputed evidence demonstrated

[6] The Ninth Circuit's conclusions were supported by other undisputed evidence, including that when Planned Parenthood

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that the "increased costs," *id.* at 22, and the "increas[ed] health risks" the Arizona law would cause, *id.* at 23, along with the fact that "some women so strongly prefer medication abortion, and so object to surgical abortion," *id.* at 22, would impose substantial obstacles on women's ability to access abortion.[7]

Petitioner, by contrast, opted not to put on any evidence at the preliminary injunction stage, relying solely on the Arizona Legislature's 2012 legislative findings. *See* Pet. App. 11-12 ("[Petitioner] had not presented any evidence to support its legislative findings or to show that the law actually advances women's health."). These findings contain obvious inaccuracies and internal contradictions. As the Ninth Circuit explained,

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Arizona's ("PPAZ") Flagstaff health center previously stopped providing abortions, "48 percent fewer women in northern Arizona received medication abortions from PPAZ and 35 percent fewer received any abortion at all from PPAZ," even though it operates the closest Arizona abortion clinic to Flagstaff, in Glendale. Pet. App. 23. Respondents also presented data showing that following the implementation of an FPL mandate in Ohio, the number of medication abortions performed by Planned Parenthood of Greater Ohio "dropped by almost 65 percent," and a health center that had provided only medication abortions "was forced to stop providing abortions entirely." *Id.* at 22.

[7] This is particularly so for survivors of rape or sexual abuse because medication abortion is less invasive, as well for women who "have medical conditions that make medication abortion significantly safer than surgical abortion." Pet. App. 6.

> The district court found that the Arizona legislature provided no "supporting evidence for any asserted legislative fact." The court observed that "the risks associated with medication abortions, relied on by the State as the reason for adopting the [on-label] protocol, have been substantially reduced or eliminated" by the evidence-based regimen. . . . For example, the Arizona legislature cited the dangerousness of mifepristone in support of requiring the on-label regimen, but the on-label regimen requires three times *more* mifepristone than the evidence-based regimen.

Id. at 10, 20.[8]

The district court nevertheless denied Respondents' motion for a preliminary injunction. Respondents immediately appealed and were granted an emergency injunction pending appeal. On June 3, 2014, the

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[8] Several *amici* rely on, and attempt to bolster, the legislative findings before this Court. Not only are many of the facts they cite not in the record, but the evidence actually in the record demonstrates how false and/or misleading the findings are. *See* 9th Cir. ECF 34-3 at 46-51. This is not surprising given that the findings were copied essentially verbatim from those drafted by Americans United for Life, which is a group committed "to end[ing] abortion," not to improving health care for women. *See* Americans United For Life, *Abortion-Inducing Drug Safety Act: Model Legislation and Policy Guide for the 2012 Legislative Year*, http://www.aul.org/wp-content/uploads/2012/01/Abortion-Inducing-Drugs-Safety-Act-2012-LG.pdf (last visited Nov. 5, 2014); *Recognition of the Unborn and Newly Born*, Americans United for Life, http://www.aul.org/issue/legal-recognition/ (last visited Nov. 5, 2014).

Ninth Circuit held that "[o]n the record before us, . . . the district court abused its discretion when it held that plaintiffs were unlikely to succeed on the merits of their undue burden claim." *Id.* at 24.

In addition to this pending federal action, Respondents have filed an action in the Maricopa County Superior Court, challenging the Arizona law purely on state law grounds. Respondents allege that the Arizona law violates the Arizona Constitution because it impermissibly delegates legislative authority to drug manufacturers, and that Ariz. Admin. Code § R9-10-1508(G) violates Arizona common law because the process by which it was promulgated contravenes the administrative agency's own rules. *See Planned Parenthood Arizona, Inc. v. Humble*, No. CV2014-006633 (Super. Ct. of Ariz. Maricopa Cnty.). Respondents' motion for summary judgment and Petitioner's motion to dismiss in that case are set for hearing on December 5, 2014.

REASONS FOR DENYING THE PETITION

I. THE INTERLOCUTORY NATURE OF THE DECISION BELOW, A PREDICATE DISPUTE OVER THE MEANING OF THE ARIZONA LAW, AND A PENDING STATE COURT CHALLENGE ALL RENDER THIS CASE AN UNSUITABLE VEHICLE FOR REVIEW.

The interlocutory posture of this case alone warrants denying the Petition. The Ninth Circuit was

clear that it was considering only whether the district court abused its discretion in denying a preliminary injunction on the record before it, which included ample evidence that the Arizona law would harm women's health and substantially restrict their access to abortion, and no evidence at all to the contrary. *See* Pet. App. 24 (concluding "on the record before us" that the district court abused its discretion). But given the uncertainty over the correct construction of the law and the separate state action challenging it on state law grounds, review is particularly unwarranted.

The Court has stated repeatedly that it will only grant certiorari to review interlocutory judgments in rare or extraordinary circumstances. *See, e.g.*, *Office of Senator Mark Dayton v. Hanson*, 550 U.S. 511, 515 (2007) (holding that no "special circumstances" existed to justify the exercise of the Court's discretionary certiorari jurisdiction); Stephen M. Shapiro, et al., SUPREME COURT PRACTICE 285 (10th ed. 2013) ("[I]n the absence of some such unusual factor, the interlocutory nature of a lower court judgment will generally result in a denial of certiorari."). This is so even in cases that present questions of undoubted importance. *See Mount Soledad Mem'l Ass'n v. Trunk*, 132 S. Ct. 2535, 2536 (2012) (Alito, J., concurring); *Va. Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring).

Neither rare nor extraordinary circumstances exist in this case to justify granting certiorari before final judgment. To the contrary, this case presents a particularly unsuitable vehicle for review at this time

because of a predicate question of state law that remains unresolved. *See DTD Ents. v. Wells*, 130 S. Ct. 7, 8 (2009) (Roberts, Kennedy, Sotomayor, JJ., concurring) (concurring in denial of certiorari because the "petition [wa]s interlocutory" and predicated on an unresolved question of state law even though "the petition for certiorari does implicate issues of constitutional significance"). Respondents maintain that, under its plain meaning, the Arizona law bans all medication abortion. Pet. App. 13. This is because, as Respondents explained, the Arizona law prohibits using misoprostol other than as described in its FPL and that label does not relate to abortion in any way. *See* Counter-Statement of the Case, § A, *supra*. At least one state court that has reviewed a law similarly worded to the Arizona law agreed that it banned the use of misoprostol for medication abortion, therefore prohibiting all medication abortion. *See Cline v. Okla. Coal. for Reprod. Justice*, 313 P.3d 253, 259, 262 (Okla. 2013).[9]

Although the Ninth Circuit recognized that the parties "disagree about the correct interpretation of

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[9] A North Dakota trial court also ruled that a similarly worded law banned medication abortion entirely. *See MKB Mgmt. Corp. v. Burdick*, No. 09-2011-CV-02205, slip op. at 21 (N.D. E. Cent. Jud. Dist. Ct. July 15, 2013). Although the North Dakota Supreme Court recently reversed the district court's decision to declare that law unconstitutional, there was no consensus among the five North Dakota Supreme Court Justices about the scope of the statute. *See* ___ N.W.2d ___, 2014 WL 5450069 (N.D. Oct. 28, 2014).

the Arizona law," Pet. App. 13, the Petition does not so much as mention this dispute. However, as the Court has noted, "premature adjudication of constitutional questions" is particularly inadvisable before a "novel state Act" has been "reviewed by the State's highest Court." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 79 (1997). Here, adjudication would be premature because the construction of the Arizona law would "materially change the nature of the problem" before the Court for at least two reasons. *Bellotti v. Baird*, 428 U.S. 132, 146-47 (1976) (quoting *Harrison v. NAACP*, 360 U.S. 167, 177 (1959)).

First, the circuit split upon which Petitioner relies would not exist if the Arizona law bans medication abortion entirely. Both the Sixth Circuit's decision in *Planned Parenthood Southwest Ohio Region v. DeWine*, 696 F.3d 490 (6th Cir. 2012), and, to the limited extent it addressed medication abortion at all, the Fifth Circuit's decision in *Planned Parenthood of Greater Texas Surgical Health Services v. Abbott*, 748 F.3d 583 (5th Cir. 2014), concerned differently-worded state statutes that no party claimed were complete bans. That is, unlike here, there was no dispute that the Ohio and Texas laws allowed some non-surgical abortions using mifepristone and misoprostol. *See Abbott*, 748 F.3d at 600-01 (law permits medication

abortion until seven weeks); *DeWine*, 696 F.3d at 499 (same).[10]

Second, the burdens posed by a complete ban on medication abortion in Arizona would be different from the burdens imposed by a law that allows medication abortion for some Arizona women under outdated and inferior protocols. Thus, because "the nature and substance of plaintiffs' constitutional challenge [may be] drastically altered if the statute is read another way," *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 395 (1988), review is inappropriate when either the district court or the Ninth Circuit may yet ask the Arizona Supreme Court to offer a definitive construction of the Arizona law. *See* Ariz. Rev. Stat. § 12-1861 (allowing the Arizona Supreme Court to answer questions certified to it by any federal court).[11]

Finally, review would also be premature at this time because there is a separate, pending challenge to the Arizona law on state law grounds that may

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[10] There are numerous differences between the Arizona law and the Texas law. *See infra* note 14.

[11] Indeed, this Court's decision not to review a similar Oklahoma law came *after* the Oklahoma Supreme Court had construed that statute. *See Cline v. Okla. Coal. for Reprod. Justice*, 313 P.3d 253 (Okla. 2013) (answering certified question), 134 S. Ct. 550 (2013) (dismissing certiorari as improvidently granted). Likewise, the Sixth Circuit's decision in *DeWine* was preceded by a construction of the Ohio statute by the Ohio Supreme Court. *See Cordray v. Planned Parenthood Cincinnati Region*, 911 N.E.2d 871 (Ohio 2009).

render this case moot. The state law challenge is proceeding far more quickly towards final judgment than this case, with a summary judgment hearing set for December 5, 2014, and a decision possible by early 2015. *See* Counter-Statement of the Case, § B, *supra*. Should the Arizona courts strike the Arizona law on state law grounds, this case will likely be moot before final judgment on the federal constitutional claims can be reached.

II. THIS INTERLOCUTORY APPEAL DOES NOT PRESENT A CONFLICT THAT WARRANTS REVIEW AT THIS TIME.

Petitioner claims that review of the interlocutory opinion below is necessary to resolve a conflict between that ruling and the Fifth Circuit's decision in *Abbott* and the Sixth Circuit's decision in *DeWine*. *See* Pet. 11-20. When the facts of those cases are considered, there is no real conflict with the preliminary decision below. Instead, the different rulings about different medication abortion restrictions reflect the type of fact-bound decisions that do not merit the Court's review.

As an initial matter, there is no important or recurring conflict with respect to the specific type of abortion restriction in this case – a limitation on women's access to medication abortion. *See* Shapiro, et al., *supra*, at 246-47 (conflicts of authority typically do not merit review until they become important and recurring). Such restrictions have been the subject of

limited legislation and litigation. No state in the Ninth Circuit other than Arizona has any type of restriction on medication abortion at all.

In this way, this case is unlike *Mazurek v. Armstrong*, 520 U.S. 968 (1997), upon which Petitioner relies. Pet. 10-11. In *Mazurek*, one of the reasons the Court gave for hearing the case in an interlocutory posture was that the Ninth Circuit's decision striking down Montana's physician-only law would impact six other states in the Circuit that also had physician-only laws. *See* 520 U.S. at 975. That is simply not the case here. Indeed, only a handful of states nationwide have either banned or restricted the use of mifepristone,[12] and there is no case concerning the overall constitutionality of such a restriction other than this one currently pending in any federal court.[13]

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[12] Those states are Arizona, North Dakota, Ohio, Oklahoma, and Texas. Ariz. Rev. Stat. § 36-449.03(E)(6); Ariz. Admin. Code § R9-10-1508(G); N.D. Cent. Code Ann. § 14-02.1-03.5; Ohio Rev. Code Ann. § 2919.123; Okla. Stat. Ann. tit. 63, § 1-729a; Tex. Health & Safety Code Ann. §§ 171.061-171.064.

[13] The *DeWine* case is still pending, but only on the limited issue of whether the Ohio law requires an exception for those women for whom medication abortion has significant safety advantages. 696 F.3d at 494. There is only one challenge pending in state court, purely under state law, *see Okla. Coal. for Reprod. Justice v. Cline*, 2014 OK 91, ___ P.3d ___ (Okla. Nov. 4, 2014) (entering temporary injunction and remanding to trial court), in addition to the recent North Dakota Supreme Court ruling which also involved only state law claims, *see supra* note 9.

Moreover, a more careful look at the three cases that Petitioner claims create the split – this case, *Abbott*, and *DeWine* – reveals no conflict about the constitutionality of a medication abortion restriction. In *Abbott*, the Fifth Circuit specifically did *not* address the constitutionality of the Texas medication abortion restriction because that issue was not before that court. 748 F.3d at 601 ("Neither party challenges the district court's conclusion" rejecting plaintiffs' facial challenge to medication abortion restriction). The *only* question about medication abortion that the Fifth Circuit considered in *Abbott* was whether the Texas law's failure to allow medication abortion after seven weeks "facially require[s] a court-imposed exception for the life and health of the woman." *Id.* at 604. Thus, the Fifth Circuit simply did not evaluate whether a restriction on medication abortion that either entirely bans the procedure or "would significantly reduce the number of . . . women who obtain abortions," Pet. App. 23, likely poses an undue burden.[14]

Although the Sixth Circuit in *DeWine* did evaluate the constitutionality of a law restricting medication

[14] The Texas statute is also different from the Arizona law in several key respects. First, the Texas statute is not a complete ban on medication abortion with mifepristone because it explicitly allows medication abortion under the "Mifeprex regimen." *See* Tex. Health & Safety Code Ann. § 171.061(6). Further, unlike the Arizona law, the Texas statute explicitly allows physicians to use not only the dosage amounts on the Mifeprex label, but also a different dosage amount. *See id.* § 171.063(b).

abortion, the Ohio law explicitly applied only to mifepristone and did not restrict the off-label use of misoprostol.[15] More importantly, any conflict between *DeWine* and this case reflects a fact-bound application of legal principles. Indeed, the Sixth Circuit framed its decision in terms of a failure of proof. *See, e.g.*, *DeWine*, 696 F.3d at 514 ("[T]he record simply does not give rise to a reasonable inference that the Act imposes a substantial obstacle for Ohio women deciding whether to abort a pregnancy."); *id*. at 514 n.1 ("Planned Parenthood has not carried its [evidentiary] burden in this case.").

The preliminary record here as compared to the record considered in *DeWine* differs in important ways. There, "[t]he parties dispute[d] whether the medical community accepts that the alternative protocols cause fewer side effects or have a higher success rate than the FDA-approved regimens." *DeWine*, 696 F.3d at 497. Here, Respondents presented "uncontroverted evidence," Pet. App. 24, that the evidence-based protocol they use "is considered the best practices" and has a "clear advantage" over the FPL protocol, including because it results in a lower rate of ongoing pregnancies and requires fewer

[15] Ohio Rev. Code § 2919.123(A) ("No person shall knowingly . . . prescribe RU-486 (mifepristone) to another for the purpose of inducing an abortion" except "in accordance with all provisions of federal law that govern the use of RU-486 (mifepristone) for inducing abortions."); *see DeWine*, 696 F.3d at 494 n.2 (the Ohio law "does not explicitly ban or regulate the prescription of misoprostol").

surgical interventions to complete the abortion. *Id.* at 36. Indeed, some of the evidence critical to the Ninth Circuit's ruling was simply not available at the time that the *DeWine* case was litigated. For example, the Ninth Circuit relied on a large-scale 2014 study about the safety of the evidence-based regimen used by Respondents, *id.* at 6, and the reduction in medication abortion in Ohio after the law challenged in *DeWine* took effect, *id.* at 22.

Respondents' uncontroverted evidence also establishes that the Arizona law would impose a much more significant burden on women's access to abortion than the Ohio statute at issue in *DeWine* because of differences in the prevalence of medication abortion in the two states, the size of the states, and the overall availability of abortion services. In Arizona, approximately 43 percent of all eligible women chose medication abortion over surgical abortion in 2012. Pet. App. 6. The analogous statistic for Ohio women was disputed in *DeWine*, but it was somewhere between 17 and 31 percent. *See* 696 F.3d at 498, 514. Arizona is also much larger than Ohio, meaning that many women in Arizona have to travel hundreds of miles each way to access abortion (and would have to make this trip four times to obtain a medication abortion). Pet. App. 22-23. There were no such large travel distances present in *DeWin*e. *See generally* 696 F.3d at 494-98. And, here, enforcing the law would render abortion entirely unavailable in a part of Arizona larger than Ohio itself. *See* Pet. App. 23.

Finally, the legal theories pursued by plaintiffs in this case and in *DeWine* are different. As described by the Sixth Circuit, the plaintiffs in *DeWine* made two claims about how the Ohio restriction imposed an undue burden: (i) it imposed a complete ban on medication abortion between seven and nine weeks of pregnancy, and (ii) it substantially increased the cost of medication abortion by requiring a higher dosage of mifepristone. 696 F.3d at 514-17. By contrast, Respondents focused their undue burden claim on the arguments that the Arizona law would reduce the number of women who can obtain an abortion at all and would relegate *every* Arizona woman seeking an early, non-surgical abortion to undergo what the AMA and ACOG have confirmed is a less safe (and less effective and more burdensome) medication regimen. Pet. App. 5, 20-24. Thus, the Sixth Circuit's ruling in *DeWine* was based on both different facts and different arguments than those considered by the Ninth Circuit in this case.

Petitioner nevertheless alleges that there is an emerging disagreement in the Circuits regarding the proper application of the undue burden standard to abortion restrictions that purport to protect women's health and safety, and that the Court should hear this case to resolve that disagreement. But this case is a particularly poor vehicle for the Court to consider that question because, as discussed above, the Ninth Circuit's ruling was tied to the preliminary record before it. *See* Pet. App. 24 (concluding "on the record before us" that the district court abused its discretion).

If the Court believes that this legal issue merits review, the proper course would be to await a petition after the facts have been developed at a full trial on the merits and a final judgment has been entered, or from another court's decision raising the same question on a fuller record.

At this point in time, *Abbott* and *DeWine* are the only recent circuit court decisions reviewing a final judgment that discuss the application of the undue burden standard to a purported safety measure.[16] However, in addition to *Abbott*, there are several such cases currently working their way through the federal courts.[17] Waiting to resolve any disagreement would

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[16] Petitioner claims that the Seventh Circuit's decision in *Planned Parenthood of Wisconsin, Inc. v. Van Hollen*, 738 F.3d 786 (7th Cir. 2013), "[f]urther [d]emonstrates that [t]his Court's [r]eview [i]s [n]ecessary to [c]larify the [u]ndue [b]urden [s]tandard's [c]orrect [a]pplication." Pet. 18. However, as Petitioner recognizes, that was an interlocutory appeal where the Seventh Circuit's decision affirming the preliminary injunction turned on the limited evidentiary record before it and the fact that abortion providers had only two days to obtain the admitting privileges required by the Wisconsin law. *See* 738 F.3d 786, *cert. denied*, 134 S. Ct. 2841 (2014); *see also* Pet. 18-20.

[17] *See, e.g.*, *Whole Woman's Health v. Lakey*, ___ F. Supp. 2d ___, 2014 WL 4346480 (W.D. Tex. Aug. 29, 2014) (final judgment after trial), *appeal docketed*, No. 14-50928 (5th Cir. Sep. 2, 2014); *Planned Parenthood Se., Inc. v. Strange*, ___ F. Supp. 2d ___ 2014 WL 3809403 (M.D. Ala. Aug. 4, 2014) (final judgment after trial and appeal expected after order issues regarding scope of relief); *Planned Parenthood of Wis., Inc. v. Van Hollen*, No. 13-cv-465 (W.D. Wis.) (awaiting final judgment from trial held in May 2014).

also have the benefit of allowing further percolation in the appellate courts on the legal issues raised by these abortion restrictions.[18]

Finally, Petitioner is wrong that review is warranted now because the opinion below "will have consequences in the eight other States in the Ninth Circuit." Pet. 11. The only other undue burden case pending in any federal court in the Ninth Circuit of which Respondents are aware is *McCormack v. Hiedeman*, 900 F. Supp. 2d 1128 (D. Idaho 2013), *argued* No. 13-35401 (9th Cir. July 18, 2014), in which standing is the primary issue on appeal. Therefore, not only do no states in the Ninth Circuit have any type of restriction on medication abortion at all, but there are also no cases pending likely to be affected by the Ninth Circuit's legal analysis.

For all of these reasons, this case does not present a conflict among the Circuits warranting this Court's review at this time.

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[18] In fact, *Abbott* may not be the last word from the Fifth Circuit on this question, as a different panel of the Fifth Circuit found that a Mississippi admitting privileges requirement similar to the one at issue in *Abbott* was likely unconstitutional, and a petition for rehearing en banc is pending in that case. *See Jackson Women's Health Org. v. Currier*, 760 F.3d 448 (5th Cir. 2014), *petition for reh'g en banc pending*, Doc. No. 00512733094 (filed Aug. 13, 2014). Thus, it is possible that the Fifth Circuit will clarify or modify its formulation of the undue burden standard as stated in *Abbott*.

III. THE PETITION SHOULD BE DENIED BECAUSE THE DECISION BELOW CORRECTLY APPLIED THIS COURT'S PRECEDENT.

The opinion below also does not merit further review because it is a straightforward, fact-bound application of this Court's decisions in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), and *Gonzales v. Carhart*, 550 U.S. 124 (2007). Properly applying this Court's precedent, the Ninth Circuit concluded that "*[o]n the current record*, the Arizona law imposes an undue – and therefore unconstitutional – burden on women's access to abortion." Pet. App. 26 (emphasis added).

In *Casey*, the Court reaffirmed that a woman has the fundamental right to terminate her pregnancy prior to viability. *Casey*, 505 U.S. at 845-46. The *Casey* plurality also articulated the undue burden standard, which affords greater weight to a state's interest in fetal life from the outset of pregnancy than was permitted under the trimester framework created by *Roe v. Wade*, 410 U.S. 113 (1973). *See Casey*, 505 U.S. at 876-77. *Casey* does not, however, permit a state to restrict women's access to abortion services where the restriction is not reasonably designed to further a valid state interest. *See id.* at 885 (evaluating whether the State's legitimate interest in informed

consent is "reasonably served" by the challenged waiting-period requirement).[19]

Pursuant to the undue burden standard, the Court has never upheld a law that limits the availability of abortion services without first confirming that it furthers a valid state interest. *See, e.g.*, *Gonzales*, 550 U.S. at 158 ("The Act's ban on abortions that involve partial delivery of a living fetus furthers the Government's objectives."); *Casey*, 505 U.S. at 882 (through the challenged informed consent requirements, "the State furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later . . . that her decision was not fully informed."). Indeed, in *Casey*, the Court upheld challenged recordkeeping and reporting requirements only after concluding that they were "reasonably directed to the preservation of maternal health." 505 U.S. at 900-01 (quoting *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 80 (1976)).

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[19] "A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.* at 877. "A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it." *Id.* "And a statute which, *while furthering the interest in potential life or some other valid state interest*, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends." *Id.* (emphasis added).

Although Petitioner repeatedly criticizes the Ninth Circuit's legal analysis, the Court has never adopted the sort of deferential rational basis review that Petitioner advances in evaluating an abortion restriction. *See Casey*, 505 U.S. at 845-46 (declining to overturn *Roe* and adopt a rational relationship test); *see also Gonzales*, 550 U.S. at 166 (considering the evidence presented by both sides and explaining that "[u]ncritical deference" to legislative findings "is inappropriate"). Indeed, if the Court had, it could not have upheld a law requiring a minor to seek the consent of her parent before having an abortion while at the same time striking down a law requiring a married woman first to notify her spouse. *See* Pet. App. 17 (in *Casey*, "[t]he Court distinguished parental consent from spousal [notification] based on the state's comparatively weaker justification in the second instance" because "[w]hile the state could assume that minors might not realize their own best interests, it could not 'adopt a parallel assumption about adult women'" (quoting *Casey*, 505 U.S. at 895)).

Applying this precedent to the record before it, the Ninth Circuit properly took into account the fact that although Petitioner claims the Arizona law is necessary to protect women's health, he relied solely on unsupported legislative findings. As this Court held in *Gonzales*, such findings alone are insufficient because "[t]he Court retains an independent constitutional duty to review factual findings." 550 U.S. at 165. Indeed here, the Arizona law's findings are

irrational on their face. *See, e.g.*, Pet. App. 20 ("[T]he Arizona legislature cited the dangerousness of mifepristone in support of requiring the on-label regimen, but the on-label regimen requires three times *more* mifepristone than the evidence-based regimen.").

The Ninth Circuit also properly considered Respondents' undisputed evidence that the Arizona law would affirmatively harm women's health by, at the very least, requiring "a less safe, less effective treatment regimen." Pet. App. 24; *see also id.* at 6-7 (FPL regimen has four times the risk of requiring surgical follow-up). Petitioner has not contended that the lower courts' findings in this case are clearly erroneous, nor could he, given the absence of contrary record evidence. The evidence here amply supported the Ninth Circuit's conclusion that a preliminary injunction was warranted because "on the current record, the Arizona law appears wholly unnecessary as a matter of women's health." *Id.* at 20 (citation and internal punctuation omitted).

In addition, the "uncontroverted evidence" in the preliminary record supports the Ninth Circuit's conclusion that "the Arizona law substantially burdens women's access to abortion services." Pet. App. 24. In particular, Respondents "provided specific reasons, tied to the predicted decrease in women who would obtain medication abortions" why the only abortion provider in an extremely large region of the state would likely be unable to provide abortions at all, which "would significantly reduce the number of Arizona women who obtain abortions." *Id.* at 23

(women in Northern Arizona would have to travel up to over seven hundred miles roundtrip to the nearest surgical abortion provider). In other parts of the state, the Arizona law would cause increased costs and require additional clinic visits that the undisputed record showed "would reduce the number of women who receive abortions," as well as impose pointless other burdens and health risks on them. *Id.* at 22.

Petitioner's reliance on *Mazurek* to suggest that evidence does not matter in evaluating an abortion restriction purportedly designed to advance women's health is unfounded. *See* Pet. 20-22. The *Mazurek* Court upheld Montana's physician-only law only after concluding that it did not limit access to abortion in Montana. 520 U.S. at 973-74. Indeed, unlike the evidence before the Ninth Circuit in this case, the evidence before the Court in *Mazurek* established that "no woman seeking an abortion would be required by the new law to travel to a different facility than was previously available." *Id.* at 974.

Finally, Petitioner is mistaken that the Court's decision in *Gonzales* gives legislatures carte blanche to ban any abortion method as long as another method remains available. *See* Pet. 23. This case is nothing like *Gonzales*. First, unlike the two abortion methods at issue in *Gonzales*, which were both surgical and similar from the patient's perspective, the Arizona law deprives many women of the only non-surgical, non-invasive way to end an early pregnancy. *See* Pet. App. 25-26. Second, the Arizona law bans a much more common method of abortion. *Compare* Pet. App.

6 (more than 40 percent of eligible Arizona women choose medication abortion) with *Stenberg v. Carhart*, 530 U.S. 914, 924 (2000) (procedures *not* banned under *Gonzales* "account[ ] for about 95% of all abortions performed from 12 to 20 weeks of gestational age"). Third, the *Gonzales* Court indicated that the restriction there was justified because the banned procedure "implicates additional ethical and moral concerns that justify a special prohibition." 550 U.S. at 158. That cannot be the case here, where the Arizona law bans a safe, early method of abortion using medications alone.

The burdens found by the lower court here are precisely the sorts of "substantial obstacles" that the state cannot validly place in a woman's path, particularly during the earliest days of her pregnancy. *Casey*, 505 U.S. at 877.[20] There is, therefore, nothing extraordinary about the Court of Appeals' grant of preliminary relief on the record before it, and nothing to warrant the Court's review at this preliminary stage of this case.

[20] *Casey*'s use of the term "substantial" (not absolute or insurmountable) obstacle and this Court's repeated statement that laws imposing significant health risks unduly burden women both suggest that Petitioner's claim that such obstacles cannot be "undue" is wrong. *See Gonzales*, 550 U.S. at 161; *Casey*, 505 U.S. at 880; *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328 (2006).

CONCLUSION

For all of the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

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