ALABAMA BAN ON DILATION AND EVACUATION ABORTIONS DECLARED UNCONSTITUTIONAL

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In *West Alabama Women's Center v. Williamson*, the Eleventh Circuit[1] struck down a recent Alabama statute that banned dilation and evacuation abortions, holding that the law represented an unconstitutional restriction on a woman's right to an abortion.[2]

The plaintiff clinics[3] filed suit on behalf of their present and future patients, claiming the Act was unconstitutional on its face.[4] The Unborn Child Protection from Dismemberment Abortion Act, passed in 2016, made it unlawful for a medical practitioner to "purposely perform or attempt to perform a dismemberment abortion and thereby kill an unborn child unless necessary to prevent serious health risk to the unborn child's mother."[5] Put more simply, the Act would require medical practitioners to end the life of a fetus before dismembering that fetus.[6] Violation of this prohibition would be "punishable by up to two years imprisonment and fines of $10,000."[7]

The district court assumed the State "had a legitimate interest" in passing a law with this effect, but it found "that the Act would effectively eliminate pre-viability abortion access at or after the 15-week mark" and thus ruled that the Act represented an "undue burden on abortion access," rendering it unconstitutional.[8]

In Alabama, ninety-three percent of abortions are performed before fifteen weeks of development; as a result, dismemberment abortions make up less than seven percent of abortions in the state.[9] Because a majority of the women seeking abortions are low income, both the district court and the Eleventh Circuit paid close attention to the logistical implications of the law, which might make it more difficult for women financially "to make several

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[1] The three-judge panel included the Honorable Ed Carnes, Chief Judge for the Eleventh Circuit, the Honorable Joel F. Dubina, Senior United States Circuit Judge for the Eleventh Circuit, and the Honorable Leslie J. Abrams, United States District Judge for the Middle District of Georgia.

[2] W. Ala. Women's Ctr. v. Williamson, 900 F.3d 1310, 1329 (11th Cir. 2018).

[3] The plaintiff clinics are the only clinics in Alabama that perform dismemberment abortions. *Id.* at 1315 n.3.

[4] *Id.* at 1315.

[5] ALA. CODE § 26-23G-3(a) (2016).

[6] *Williamson*, 900 F.3d at 1314 (citations omitted).

[7] *Id.* at 1314–15 (citing ALA. CODE § 26-23G-7 (2016)).

[8] *Id.* at 1315, 1318 (quotations omitted).

[9] *Id.* at 1321.

trips to a clinic or stay in its vicinity for an extended period of time."[10] Regarding the State's argument that the Act would affect only a small percentage of women seeking abortions, the court emphasized that "'[t]he proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant.'"[11]

The court began its analysis by noting that "[t]he Supreme Court has interpreted the Fourteenth Amendment to bestow on women a fundamental constitutional right of access to abortions."[12] Charting the judicial history of abortion law in the United States, the court identified the "undue burden" test articulated in *Planned Parenthood v. Casey* as the starting point for the inquiry.[13] Considering the State's argument, the court noted the qualified role of the State's intent[14] in enacting abortion-restricting legislation under *Gonzales v. Carhart*, where the Court acknowledged a state's regulatory authority to "bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn."[15] However, under *Gonzales*, a valid state interest does not revive an act that imposes an unconstitutional burden.[16]

Thus, the court concluded that "[t]he dispositive question is whether by prohibiting the dismemberment of a living unborn child the Act imposes an undue burden on a woman's right to terminate a pre-viability pregnancy."[17] To answer this question, the court asked whether alternatives existed that would allow women the same level of access to termination after

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[10] *Id.* at 1321–32.
[11] *Id.* at 1326 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 894 (1992)) (alteration in original).
[12] *Williamson*, 900 F.3d at 1316–17 (citing Roe v. Wade, 410 U.S. 113, 153–54 (1973)).
[13] *Id*. at 1317. The *Casey* test is stated as follows: "An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." *Casey*, 505 U.S. at 878. *See also* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2318 (2016) (finding an undue burden where a regulation "provide[d] few, if any, health benefits for women [and] pose[d] a substantial obstacle to women seeking abortions"); Gonzales v. Carhart, 550 U.S. 124 (2007) (upholding a federal ban on partial birth abortions—but not dismemberment abortions—where the ban advanced legitimate interests and did not pose an undue burden); Stenberg v. Carhart, 530 U.S. 914, 945–46 (2000) (striking down a Nebraska law that banned "the most commonly used method for performing previability second trimester abortions").
[14] *Williamson*, 900 F.3d at 1320.
[15] *Gonzales,* 550 U.S. at 158.
[16] *Williamson*, 900 F.3d at 1320–21 (citing *Gonzales*, 550 U.S. at 161 ("[An act's] furtherance of legitimate government interests bears upon, but does not resolve, . . . whether [that act] has the effect of imposing an unconstitutional burden on the abortion right . . . .")).).
[17] *Id.* at 1321 (citing *Whole Woman's Health*, 136 S. Ct. at 2300).

fifteen weeks.[18] The State proposed three methods that it claimed would allow practitioners to comply with the law without causing substantial harm to the mother.[19] However, the court noted that each procedure introduced additional health risks to the mother that are not present in the dismemberment procedure.[20] Moreover, two of the suggested alternatives—umbilical cord transections and potassium chloride injections—required significant technical training that would be prohibitively difficult for physicians in Alabama to obtain,[21] and the third—digoxin injections—"would increase the duration of a dismemberment abortion from one day to two, not counting the 48-hour waiting period mandated by Alabama law."[22] The court stated that this logistical hurdle would not be sufficient on its own to invalidate the Act; however, viewed in light of other factors, this information "support[s] the conclusion that the Act would 'place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.'"[23] As a result of these factors, the court found each method to be infeasible in outpatient clinics, where ninety-nine percent of abortions in Alabama are performed.[24]

The State argued that under *Gonzales*, "states may restrict an abortion method as long as there is medical uncertainty about whether the restriction creates significant health risks."[25] However, the *Gonzales* court limited this exception to facial relief, and the court in this case therefore affirmed the district court's grant of as-applied injunctive relief to the plaintiffs.[26]

Because the proposed alternative methods were infeasible, the court turned its inquiry to "whether the health exception saves the Act."[27] Under *Gonzales*, even a law lacking a health exception can be valid if it does not subject women to "significant health risks."[28] Here, although the State conceded the risks posed by these alternatives, it disputed whether those risks were "significant," arguing instead that any risk would be absolved by the

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[18] *Id.* at 1321–24. At oral argument, the State conceded that "if there [is] no safe and effective way to cause fetal demise before [dismemberment,] . . . this law would be unconstitutional." *Id.* at 1322.

[19] *Id.* These methods were "(1) injecting potassium chloride into the unborn child's heart; (2) cutting the umbilical cord in utero; and (3) injecting digoxin into the amniotic fluid. The district court found each to be infeasible." *Williamson*, 900 F.3d at 1322.

[20] *Id.* at 1324.

[21] *Id.* at 1322–23 (noting that Alabama abortion practitioners have no effective way to learn how to perform potassium chloride injections or umbilical cord transections).

[22] *Id.* at 1324.

[23] *Id.* at 1327 (quoting *Whole Woman's Health*, 136 S. Ct. at 2300).

[24] *Id.* at *8.

[25] *Williamson*, at *11 (citing *Gonzales*, 550 U.S. at 164).

[26] *Id.* at 1315, 1330.

[27] *Id.* at 1328.

[28] *Id.* at 1318 (citing *Gonzales*, 550 U.S. at 161).

health exception.[29] But this contention was undercut by the fact that the health exception, "by its express terms," would only be triggered by the State's narrow definition of a "serious health risk."[30] Moreover, the health exception is an insufficient remedy because by the time the exception is triggered, the mother may already be in significant distress.[31]

The court drew a distinction between the central issue in *Gonzales*—"whether the federal partial birth abortion ban 'would *ever* impose significant health risks on women' given the continuing availability of dismemberment abortion"[32]—and the present case, where "the State conceded that by requiring pre-dismemberment death of the unborn child the Act would *always* impose some increased health risks on women."[33] However, the court dismissed this argument, noting instead that the culmination of the district court's findings "support the conclusion that the Act would 'place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.'"[34]

Beyond the health risks posed by the Act, the potential liabilities on practitioners violating the Act would effectively end the performance of dismemberment abortion because of the risks involved in trying to comply with the Act.[35] Although the State contended that the intent requirement of the Act would "shield[] from liability practitioners who accidentally cut fetal tissue when trying to cut the umbilical cord, . . . both plaintiff practitioners testified that they would not perform cord transections if the Act came into effect.[36] The practitioners' statements undercut the State's final argument,

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[29] *Id.* at 1324–25.

[30] *Id.* at 1328. The exception applies only when necessary to avoid death or "substantial and irreversible physical impairment of a major bodily function," and thus would not be triggered by risks that are equally substantial but reversible. *Williamson*, 900 F.3d at 1328 (quoting ALA. CODE § 26-23G-2(6)).

[31] *See id.* at 1329. The court explained:

Even when all goes according to plan, after the practitioner cuts the cord, the Act requires him to wait to dismember the unborn child until its heartbeat stops. During that time—one witness testified it can take as long as 13 minutes—the patient loses blood while undergoing contractions and placental separation. As she lies bleeding on the table, the practitioner must decide whether to wait for her to bleed even more in order to trigger the health exception, or to start the dismemberment of the unborn child and risk having a jury second guess his judgment that the risk to the woman's health justified doing so.

Id.

[32] *Id.* at 1326 (quoting *Gonzales*, 550 U.S. at 162).

[33] *Id.*

[34] *Id.* at 1327 (quoting *Whole Woman's Health*, 136 S. Ct. at 2300).

[35] *Williamson*, 900 F.3d at 1329. *See also* ALA. CODE § 26-23G-2(3) (2016).

[36] *Williamson*, 900 F.3d at 1329.

demonstrating that application of the Act would result in the denial of access to pre-viability abortions in Alabama.[37]

Although it communicated an aversion to the applicable law,[38] the court concluded that its duty to apply the law of the Supreme Court required an affirmance of the district court's judgment.[39] Weighing in on this outcome, Alabama Attorney General Steve Marshall felt encouraged that the court recognized the State's legitimate interest in preventing dismemberment abortions and stated that the State's legal team will be "carefully considering" whether to petition the Supreme Court for review.[40]

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[37] *See id.* ("Given that a prosecution and adverse jury determination could result in up to two years imprisonment and a $10,000 fine, it is no surprise that both plaintiff practitioners testified that they would not perform cord transections if the Act came into effect.").

[38] *See id.* at 1314 n.1 ("Some Supreme Court Justices have been of the view that there is constitutional law and then there is the aberration of constitutional law relating to abortion. If so, what we must apply here is the aberration.") (citing *Whole Woman's Health*, 136 S. Ct. at 2321 (Thomas, J., dissenting)).

[39] *See id.* at 1330 ("Our role is to apply the law the Supreme Court has laid down to the facts the district court found. The result is that we affirm the judgment of the district court.").

[40] Press Release, Office of the Attorney General, Attorney General Steve Marshall Statement in Response to U.S. 11th Circuit Court of Appeals Ruling Against 'Alabama Unborn Child Protection from Dismemberment Abortion Act' (August 22, 2018), https://ago.alabama.gov/documents/news/AG%20Marshall%20Reacts%20to%20Abortion%20Ruling.pdf.