No. 15-1200

In the Supreme Court of the United States

BRAD D. SCHIMEL, ATTORNEY GENERAL OF WISCONSIN, *ET AL.*, PETITIONERS,

v.

PLANNED PARENTHOOD OF WISCONSIN, INC., *ET AL.*, RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

BRAD D. SCHIMEL
Attorney General

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE
17 West Main Street
Madison, WI 53703
tseytlinm@doj.state.wi.us
(608) 267-9323

MISHA TSEYTLIN
Solicitor General
Counsel of Record

LUKE N. BERG
Deputy Solicitor General

Attorneys for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

REPLY TO BRIEF IN OPPOSITION

In the first question presented, Petitioners explained that the Seventh Circuit's unprecedented facial invalidation of Wisconsin's admitting-privileges requirement was contrary to the decisions of every other court of appeals. In the second question, Petitioners argued that the Seventh Circuit's holding as to the alleged motivations of the Wisconsin legislature raised a circuit split as to the role, if any, such motives play in this context. In their Opposition, Respondents fail to identify *any* other court of appeals decision facially invalidating an abortion regulation in like circumstances, and appear confused as to the correct answer on the legislative motives question.

As the Petition made plain, the Seventh Circuit's facial decision is simply indefensible. To the extent that the two questions presented are not settled definitively by *Whole Woman's Health v. Hellerstedt*, No. 15-274, Petitioners respectfully request that this case be set for merits briefing and argument.

I. Respondents Have No Answer For The Argument That The Seventh Circuit's Facial Holding Is Entirely Unprecedented

The Petition argued that the Seventh Circuit's facial invalidation of Wisconsin's admitting-privileges requirement is worthy of this Court's review because it created a division of authority with the Fourth,

Fifth, and Eighth Circuits. Pet. 18–20. More generally, the Seventh Circuit's decision is the *only* non-vacated, post-*Casey* court of appeals case facially invalidating *any* abortion regulation that most doctors already complied with. Pet. 20. And, on the merits of this facial validity issue, the Seventh Circuit's unprecedented decision is wrong under the "large fraction" approach articulated in *Gonzales v. Carhart*, 550 U.S. 124, 167–68 (2007), for at least four independently sufficient reasons. Pet. 23–26.[1]

A. Respondents first rely upon a meritless assertion of waiver. Br. in Opp. 13. But Petitioners *consistently* argued below that Respondents failed to "demonstrate[ ] that the [law] would be unconstitutional in a large fraction of relevant cases," which is the same argument as the first question presented. Br. of Defs.-Appellants 31–32, App. Dkt. 13, No. 15-1736 (quoting *Gonzales*, 550 U.S. at 167–68); *id.* at 33 ("The longer wait times would only constitute an undue burden if they prevented a significant number of women from obtaining an abortion."); Defs.' Post-Trial Br. 48–49, D. Ct. Dkt. 255 ("*Gonzales* . . . limits

[1] The Petition noted that the Seventh Circuit's decision is also contrary to the "no set of circumstances" approach articulated in *United States v. Salerno*, 481 U.S. 739, 745 (1987), and *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 514 (1990), Pet. 23, but explained that it was unnecessary to determine whether this more demanding (for the challenger) approach applies here because the law is facially valid under either standard, Pet. 23 n.16.

the availability of facial challenges in abortion litigation. No longer may courts resort to total, facial invalidation [as a result of] only a few applications of an abortion statute . . . .”). Notably, Petitioners raised the facial argument below with much more specificity than did the United States in *Carhart v. Gonzales*, 413 F.3d 791 (8th Cir. 2005), where the government's appellate brief mentioned the “large fraction” standard just one time and only when discussing certain pregnancy complications. Appellant's Br., Carhart v. Gonzales, 2004 WL 5355340 at *51, No. 04-3379 (filed Nov. 29, 2004).

Contrary to Respondents' assertion, the issue in the first question presented is not the “scope of [the appropriate] relief.” Br. in Opp. 2, 15. Rather, it is whether Respondents satisfied the “large fraction” standard to support their facial claim. Compl. 17, D. Ct. Dkt. 1. Petitioners plainly made this “large fraction” argument below to oppose Respondents' facial claim, meaning that this Court should grant review and then issue the same disposition as it did in *Gonzales*. *See* 550 U.S. at 168 (“Respondents have not demonstrated that the Act, as a facial matter . . . imposes an undue burden on a woman's right to abortion . . . .”).

B. Respondents have no serious response to Petitioners' argument that the Seventh Circuit's decision is irreconcilable with the decisions of the Fourth, Fifth, and Eighth Circuits in analogous challenges to admitting-privileges requirements, or the broader

point that the Seventh Circuit's facial decision is entirely unprecedented in post-*Casey* jurisprudence. Pet. 18–20.

With regard to the Seventh Circuit decision's incompatibility with the Fourth and Fifth Circuits' rejection of facial challenges to other States' admitting-privileges laws, *see Greenville Women's Clinic v. Bryant*, 222 F.3d 157 (4th Cir. 2000) (*Greenville I*), *Greenville Women's Clinic v. Commissioner, South Carolina Department of Health & Environmental Control*, 317 F.3d 357 (4th Cir. 2002) (*Greenville II*), and *Planned Parenthood of Greater Texas Surgical Health Services v. Abbott*, 748 F.3d 583 (5th Cir. 2014), Respondents rest upon a boilerplate assertion that those cases involved "fact-specific, record-dependent" issues. *See* Br. in Opp. 14. Tellingly, Respondents fail to identify even a single "fact" relating to the South Carolina and Texas admitting-privileges laws that made those laws more facially suspect than Wisconsin's law.

And as to the Eighth Circuit's rejection of a facial challenge to Missouri's admitting-privileges law, *Women's Health Center of West County, Inc. v. Webster*, 871 F.2d 1377 (8th Cir. 1989), Respondents place great emphasis on the fact that "only one physician in the entire state (at a practice with other physicians who could comply) was unable to comply." Br. in Opp. 15. This is a deeply ironic argument given that it is undisputed that only two abortion doctors in all of Wisconsin lack admitting privileges at local hospitals, and those doctors did not seek admitting privileges at

fifteen out of seventeen eligible hospitals. App. 153a; App. 66a (Manion, J., dissenting).

More generally, Respondents fail to identify *any* post-*Casey* decision, from *any* other federal Court of Appeals, facially invalidating *any* abortion regulation that most doctors have already complied with. Pet. 20. This silence is a concession that the Seventh Circuit's decision is unprecedented.

C. Respondents' other arguments seeking to defend the Seventh Circuit's unprecedented facial holding are entirely meritless.

First, Respondents suggest that Wisconsin's admitting-privileges law does not further *any* legitimate state interest. Br. in Opp. 17–18. This is contrary to the Fourth, Fifth, and Eighth Circuits' conclusions as to the legitimate interests served by admitting-privileges requirements. *Greenville I*, 222 F.3d at 169; *Greenville II*, 317 F.3d at 363; *Abbott*, 748 F.3d at 594–95. And in addressing the cascade of evidence the State placed before the district court as to the law's benefits, Pet. 10–12, Respondents rely upon the fact that the district court "weighed all of the evidence" and found it wanting, Br. in Opp. 18–19. That is the same argument this Court rejected in *Gonzales*, where two district courts concluded that the United States presented insufficient medical evidence in support of an abortion regulation. Here, just as in *Gonzales*, "[t]he evidence presented [at trial] . . . demonstrates both sides have medical support for

their position," 550 U.S. at 161, which disagreement is insufficient for purposes of a "facial attack," *id.* at 163.

Second, Respondents claim that the closure of AMS would burden "*all* women seeking abortions," Br. in Opp. 18 (emphasis in original), because the only two abortion doctors in Wisconsin that lack admitting privileges at local hospitals both work at AMS. As a threshold matter, Respondents have no answer for Petitioners' point that a *facial* attack based upon just two doctors is categorically impermissible, given that the remaining Wisconsin abortion doctors have such privileges. Pet. 23; *see Gonzales*, 550 U.S. at 167; *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329 (2006). In any event, the inability of two doctors to perform abortions in Milwaukee does not satisfy the undue burden standard. Among many other problems, Pet. 23–26, Respondents have no answer for the fact that Dr. Christensen holds admitting privileges in Madison and could perform abortions at Planned Parenthood's Madison clinic, a clinic that he founded. Pet. 24. For women that do not wish to travel less than two hours from Milwaukee to Chicago to obtain abortions, including abortions after 19 weeks, Pet. 24–25, Dr. Christensen could choose to perform those abortions in Madison. It is thus plain that Respondents' concern is not with the undue burden on women, but with protecting AMS's business model against regulations that its employees want to avoid.

Finally, Respondents point out that some Planned Parenthood doctors lacked admitting privileges when the law was enacted and speculate that some of these doctors "could" lose privileges in the future. Br. in Opp. 19. These arguments do not support the Seventh Circuit's decision. The question before the Seventh Circuit was whether Wisconsin's law justified a permanent injunction because, absent such relief, the law placed an "undue burden" on a "large fraction" of women. *Gonzales*, 550 U.S. at 167. A permanent injunction, in turn, requires a showing that the plaintiff "has suffered an irreparable injury," such that only injunctive relief can prevent further injury. *See eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). Given that it is undisputed that the Planned Parenthood doctors have admitting privileges and did at the time of the trial, App. 156a–57a, there is simply no justification for *any* permanent injunctive relief as to those doctors, let alone *facial* relief. Put another way, because the preliminary injunction already prevented any even arguable harm to the Planned Parenthood doctors who have now obtained admitting privileges, there can be no justification in equity for permanent relief. If circumstances change in the future with regard to these doctors, such that they would suffer irreparable injury absent further relief, they can seek such relief at that time.

II. Respondents' Apparent Confusion As To The Role Of Legislative Motives In This Area Of Law Only Highlights The Division Of Authority On The Second Question

The Petition's second question presented addressed the issue that this Court specifically left open in *Mazurek v. Armstrong*, 520 U.S. 968 (1997) (per curiam): whether legislative motives can require facially invaliding an otherwise valid abortion regulation. *Id.* at 972. Since *Mazurek*, a well-recognized division of lower court authority has arisen as to how courts must treat allegations of improper motives in this area of law. Pet. 26–30. The Petition argued that this Court should definitively hold that where an abortion regulation "is supported by valid neutral justifications, those justifications should not be disregarded simply because [other considerations] may have provided one motivation for the votes of individual legislators." *Crawford v. Marion Cty. Election Bd.,* 553 U.S. 181, 204 (2008) (plurality opinion). Pet. 31–33.

A. Respondents lead their answer to the second question with another meritless claim of waiver. Br. in Opp. 20. In fact, Petitioners, before the Seventh Circuit, cited *Mazurek*, explaining that this decision "cast[s] doubt 'that a legislative *purpose* to interfere with the constitutionally protected right to abortion without the *effect* of interfering with that right' would be unconstitutional." Br. of Defs.-Appellants 35–36, App. Dkt. 13, No. 15-1736 (quoting *Mazurek*, 520 U.S.

at 972). And while Petitioners did not urge the Seventh Circuit to hold that legislative motives are irrelevant in this area of law, that is only because such an argument would have been contrary to Seventh Circuit precedent. *See Karlin v. Foust*, 188 F.3d 446, 493, 496 (7th Cir. 1999). As this Court has explained, parties need not "demand overruling of a squarely applicable, recent circuit precedent" to preserve an issue for this Court's review. *S*ee *United States v. Williams*, 504 U.S. 36, 44 (1992).

B. Respondents downplay the widely acknowledged circuit split on this issue, Pet. 26–30, asserting that courts have looked to "objective evidence of legislative purpose," including "legislative history [and] the social and historical context of the legislation." Br. in Opp. 20–21 (citation omitted). Respondents even defend the decision this Court vacated in *Mazurek* as consistent with their view. Br. in Opp. 21 n.11. Respondents misunderstand the circuit split and the question presented. The issue is that courts disagree as to whether, and to what extent, legislative motives can serve as a basis for invalidating abortion regulations. Pet. 27–29. That is not a question of the type of evidence about motives that can be considered—for example, whether statements found in "legislative history" are to be considered "subjective" or "objective" evidence, Br. in Opp. 20–21—but whether the inquiry into why legislators acted should be conducted at all when the State has articulated an objectively valid reason for the law, which law does not impose a substantial obstacle on abortion access.

C. Respondents assert that the Seventh Circuit never reached the legislative motives question, claiming that the court only focused upon the law's effects. Br. in Opp. 21–22. If this were correct, then there would be no reason for the Seventh Circuit to have opined upon the Wisconsin legislature's "true objectives," or to discuss that the lack of a grace period in the law was "difficult to explain save as a method of preventing abortions" and "[c]onfirmatory evidence" of an unlawful purpose. App. 8a, 18a, 31a. Indeed, Respondents ultimately *defend* the Seventh Circuit's inquiry into legislative motives as proper, Br. in Opp. 24–25, which defeats entirely their claim that the court never engaged in the inquiry to begin with.

Importantly, the Seventh Circuit unquestionably believes that what it has described as the "purpose argument" provides an independent basis for facially invalidating an otherwise lawful abortion regulation. Oral Argument at 32:53, No. 13-2726. The Seventh Circuit made that plain not only in the decision on review, but in its decision upholding the district court's preliminary injunction, App. 192a–93a, and the distressing questions it asked at two different oral arguments. Pet. 7, 14–15. Unless this Court makes clear that the Seventh Circuit's inquiry into legislative motives is not appropriate, the State faces a serious threat of once again having its legislature's motives impugned during any remand that may be ordered in light of *Whole Woman's Health v. Hellerstedt*, No. 15-274. Pet. 2; Wis. Amicus Br. 8–12, No. 15-274.

D. When Respondents turn to the merits of Petitioners' argument that the rule this Court adopted in cases such as *Crawford* should apply to abortion regulations, Pet. 31–33, they demonstrate confusion as to the issues at stake. In most areas of constitutional law, the only relevant inquiry is whether the objective justifications for the law that the State offers survive the relevant constitutional test. *See Crawford*, 553 U.S. at 204 (plurality opinion). Only in a "very limited and well-defined class of cases" is inquiry into legislative motives permissible, and only "where the very nature of the constitutional question requires [this] inquiry," *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 377 n.6 (1991) (quoting *United States v. O'Brien*, 391 U.S. 367, 383 n.30 (1968)), such as in cases of racial, gender, and religious discrimination, Pet. 32 (collecting examples). Respondents refuse to explain why Due Process Clause challenges to abortion regulations should fall within this "very limited" class, instead citing a series of cases that largely come from the already-recognized racial and religious discrimination categories. Br. in Opp. 23–24.[2]

---

[2] In a footnote, Respondents appear to suggest that *Casey* held that abortion regulations fall within this "very limited" class where inquiries into legislative motives are permissible. Br. in Opp. 23 n.13. But *Mazurek* made plain that this is simply not an accurate characterization of *Casey* and that this issue remains an open question. 520 U.S. at 972. And *Gonzales* casts further doubt on Respondents' claim. *See* App. 56a (Manion, J., dissenting); *accord Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 460 n.4 (5th Cir. 2014) (Garza, J., dissenting).

Finally, when Respondents attempt to defend the Seventh Circuit's legislative motives inquiry, they only demonstrate their confusion as to the issues at stake. Respondents assert that the facts the Seventh Circuit relied upon—especially that the legislature did not change the default rule for when laws go into effect—are "objective" evidence of legislative motive, as opposed to some other form of so-called "'subjective' legislative evidence." Br. in Opp. 25. But the question presented and circuit split deal with whether, and to what extent, courts are permitted to inquire as to the motives—i.e., *subjective motivations*—of legislators, not the sort of "evidence" that can be considered as part of a motives inquiry. Under Petitioners' position, for example, legislators' failure to depart from the default rule for when laws go into effect is irrelevant if the law they adopted is supported by objectively valid reasons—such as protecting women's health and preventing a monster like Gosnell from slipping through the cracks in Wisconsin—and does not impose an undue burden on abortion access. Respondents appear to disagree, although it is not entirely clear the doctrinal basis for their position. What *is* clear is that the issue that *Mazurek* left open is causing confusion in the lower courts, and thus this question is worthy of review.

The petition should be granted.

Respectfully submitted,

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE
17 West Main Street
Madison, WI 53703
tseytlinm@doj.state.wi.us
(608) 267-9323

BRAD D. SCHIMEL
Attorney General

MISHA TSEYTLIN
Solicitor General
Counsel of Record

LUKE N. BERG
Deputy Solicitor General

June 2016