No. 13-51008

In the United States Court of Appeals for the Fifth Circuit

PLANNED PARENTHOOD OF GREATER TEXAS SURGICAL HEALTH SERVICES; PLANNED PARENTHOOD CENTER FOR CHOICE; PLANNED PARENTHOOD SEXUAL HEALTHCARE SERVICES; WHOLE WOMAN'S HEALTH; AUSTIN WOMEN'S HEALTH CENTER; KILLEEN WOMEN'S HEALTH CENTER; SOUTHWESTERN WOMEN'S SURGERY CENTER; WEST SIDE CLINIC, INCORPORATED; ROUTH STREET WOMEN'S CLINIC; HOUSTON WOMEN'S CLINIC, EACH ON BEHALF OF ITSELF, ITS PATIENTS AND PHYSICIANS; ALAN BRAID, M.D.; LAMAR ROBINSON, M.D.; PAMELA J. RICHTER, D.O., EACH ON BEHALF OF THEMSELVES AND THEIR PATIENTS; PLANNED PARENTHOOD WOMEN'S HEALTH CENTER,
Plaintiffs-Appellees,

v.

ATTORNEY GENERAL GREGORY ABBOTT; DAVID LAKEY, M.D.; MARI ROBINSON, EXECUTIVE DIRECTOR OF THE TEXAS MEDICAL BOARD,
Defendants-Appellants.

ON APPEAL FROM U.S. DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION, CIVIL NO. 1:13-CV-862, HON. LEE YEAKEL

AMICI CURIAE BRIEF OF LT. GOV. DAVID DEWHURST *ET AL.* (ADDITIONAL *AMICI* LISTED ON INSIDE FRONT COVER) IN SUPPORT OF APPELLANTS AND REVERSAL

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No. 13-51008

In the United States Court of Appeals for the Fifth Circuit

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TEXAS EAGLE FORUM

ASS'N OF AMERICAN PHYSICIANS & SURGEONS

TEXAS RIGHT TO LIFE

EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND

CERTIFICATE OF INTERESTED PERSONS

The case number is 13-51008. The case is styled as *Planned Parenthood of Greater Texas Surgical Health Services v. Abbott.* The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. The undersigned counsel also certifies that the corporate *amici curiae* (Texas Eagle Forum, Texas Right to Life, Association of American Physicians & Surgeons, and Eagle Forum Education & Legal Defense Fund) have no parent corporations, and no publicly held corporation owns ten percent or more of their stock. These presentations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Planned Parenthood of Greater Texas Surgical Health Services
Appellee

Planned Parenthood Center for Choice
Appellee

Planned Parenthood Sexual Healthcare Services
Appellee

Planned Parenthood Women's Health Center
Appellee

Whole Woman's Health
Appellee

Austin Women's Health Center
Appellee

Killeen Women's Health Center
Appellee

Southwestern Women's Surgery Center
Appellee

West Side Clinic, Inc.
Appellee

Routh Street Women's Clinic
Appellee

Houston Women's Clinic
Appellee

Alan Braid, M.D.
Appellee

Lamar Robinson, M.D.
Appellee

Pamela J. Richter, D.O.
Appellee

Gregory Abbott, Attorney General of Texas
Appellant

David Lakey, M.D., Commissioner of the Texas Department of State Health Services
Appellant

Mari Robinson, Executive Director of the Texas Medical Board
Appellant

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Dismissed Defendant bound by final judgment

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Devon Anderson, District Attorney for Harris County
Dismissed Defendant bound by final judgment

Matthew Powell, Director, Lubbock County Criminal District Attorney's Office
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Dismissed Defendant bound by final judgment

American Association of Pro-Life Obstetricians & Gynecologists
Amicus Curiae

Christian Medical Association
Amicus Curiae

Catholic Medical Association
Amicus Curiae

Physicians for Life
Amicus Curiae

National Association of Pro Life Nurses
Amicus Curiae

National Association of Catholic Nurses
Amicus Curiae

National Catholic Bioethics Center
Amicus Curiae

Texas Lt. Gov. David Dewhurst
Amicus Curiae

Texas State Representatives Charles "Doc" Anderson, Cecil Bell, Jr., Dwayne Bohac, Dennis Bonnen, Greg Bonnen, M.D., Cindy Burkett, Bill Callegari, Giovanni Capriglione, Tony Dale, John E. Davis, Gary Elkins, Pat Fallon, Allen Fletcher, Dan Flynn, James Frank, Craig Goldman, Linda Harper-Brown, Bryan Hughes, Jason Isaac, Phil King, Stephanie Klick, Matt Krause, Jodie Laubenberg, George Lavender, Jeff Leach, Rick Miller, Jim Murphy, John Otto, Chris Paddie, Tan Parker, Charles Perry, Larry Phillips, Jim Pitts, Scott Sanford, Matt Schaefer, Ron Simmons, David Simpson, John T. Smithee, Drew Springer, Jonathan Stickland, Van Taylor, Ed Thompson, Steve Toth, Scott Turner, James White, Paul Workman, and Bill Zedler
Amici Curiae

Texas State Senators Brian Birdwell, Donna Campbell, John Carona, Bob Deuell, Craig Estes, Troy Fraser, Kelly Hancock, Glenn Hegar, Jr., Eddie Lucio, Jr., Jane Nelson, Robert Nichols, Dan Patrick, Ken Paxton, and Larry Taylor
Amici Curiae

Texas Eagle Forum
Amicus Curiae

Association of American Physicians & Surgeons
Amicus Curiae

Texas Right to Life
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Counsel for Texas Legislative Amici Curiae and Amici Curiae Texas Eagle Forum, Association of American Physicians & Surgeons, Texas Right to Life, and Eagle Forum Education & Legal Defense Fund

Dated: November 25, 2013

Respectfully submitted,

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IDENTITY, INTEREST AND AUTHORITY TO FILE[1]

Amicus David Dewhurst is the Lieutenant Governor of the State of Texas.

Amici Sen. Hegar (District 18) and Rep. Laubenberg (District 89) were the sponsors in the Texas Senate and House of Representatives, respectively, of Texas House Bill 2, Act of July 18, 2013, 83rd Leg., 2nd C.S., ch. 1, Tex. Gen. Laws, the legislation challenged in this litigation.

Amici Reps. Anderson (District 56), Bell (District 3), Bohac (District 138), Dennis Bonnen (District 25), Greg Bonnen (District 24), Burkett (District 113), Callegari (District 132), Capriglione (District 98), Dale (District 136), J. Davis (District 129), Elkins (District 135), Fallon (District 106), Fletcher (District 130), Flynn (District 2), Frank (District 69), Goldman (District 97), Harper-Brown (District 105), Hughes (District 5), Isaac (District 45), P. King (District 61), Klick (District 91), Krause (District 93), Lavender (District 1), Leach (District 67), R. Miller (District 26), Murphy (District 133), Otto (District 18), Paddie (District 9), Parker (District 63), Perry (District 83), Phillips (District 62), Pitts (District 10), Sanford (District 70), Schaefer (District 6), Simmons (District 65), Simpson (District 7), Smithee (District 86), Springer (District 68), Stickland (District 92),

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[1] *Amici* file this brief with the consent of all of the parties. Pursuant to FED. R. APP. P. 29(c)(5), the undersigned counsel certifies that: counsel for *amici* authored this brief in whole; no counsel for a party authored this brief in any respect; and no person or entity – other than *amici*, their members, and their counsel – contributed monetarily to this brief's preparation or submission.

Taylor (District 66), E. Thompson (District 29), Toth (District 15), Scott Turner (District 33), White (District 19), Workman (District 47), and Zedler (District 96) supported HB2 in the Texas House of Representatives.

Amici Sens. Birdwell (District 22), Campbell (District 25), Carona (District 16), Deuell (District 2), Estes (District 30), Fraser (District 24), Hancock (District 9), Lucio (District 27), Nelson (District 12), Nichols (District 3), Patrick (District 7), Paxton (District 8), and Taylor (District 11) supported HB2 in the Texas Senate.

Amicus Texas Eagle Forum is a nonprofit organization founded in 1975, incorporated in 1989, and headquartered in Dallas, Texas. Texas Eagle Forum's mission is to enable conservative and pro-family Texans to participate in the process of self-government and public policy-making so that America will continue to be a land of individual liberty, respect for family integrity, public and private virtue, and private enterprise.

Amicus Texas Right to Life is a nonprofit organization headquartered in Houston, Texas. Texas Right to Life is a nonsectarian and nonpartisan organization that seeks to articulate and to protect the right to life of defenseless human beings, born and unborn, through legal, peaceful, and prayerful means.

Amicus Association of American Physicians and Surgeons, Inc. ("AAPS") is a nonprofit corporation founded in 1943 as an organization of physician members

located throughout the Nation. For 70 years, AAPS has been dedicated to defending the practice of private, ethical medicine. AAPS has filed numerous *amicus curiae* briefs that were cited in noteworthy cases, *see, e.g.*, *Springer v. Henry*, 435 F.3d 268, 271 (3d Cir. 2006), including decisions of the U.S. Supreme Court. *See, e.g.*, *Stenberg v. Carhart*, 530 U.S. 914, 933 (2000).

Amicus Eagle Forum Education & Legal Defense Fund ("Eagle Forum ELDF") is a nonprofit corporation founded in 1981 and headquartered in Saint Louis, Missouri. For more than thirty years, Eagle Forum ELDF has defended federalism and supported states' autonomy from federal intrusion in areas – like public health – that are of traditionally local concern. Further, Eagle Forum ELDF has a longstanding interest in protecting unborn life and in adherence to the Constitution as written. Finally, Eagle Forum ELDF consistently has argued for judicial restraint under both Article III and separation-of-powers principles.

For the foregoing reasons, the *Amici* coalition's members have direct and vital interests in the issues before this Court.

STATEMENT OF THE CASE

Several abortion clinics and doctors (collectively, hereinafter "Providers") sued officers of Texas' Executive Branch (collectively, hereinafter "Texas") to enjoin two requirements that Texas House Bill 2, Act of July 18, 2013, 83rd Leg., 2nd C.S., ch. 1, Tex. Gen. Laws ("HB2"), places on abortion providers:

(a) requiring abortion doctors to have admitting privileges at a local hospital, and (b) restricting the use of abortion-inducing drugs to the label uses approved by the federal Food & Drug Administration ("FDA"). The district court permanently enjoined the admitting-privilege requirement and narrowed the medication-abortion provisions, USCA5.1558-60, and this Court granted Texas' motion for an appellate stay. *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, No. 13-51008, 2013 WL 5857853 (5th Cir. Oct. 31, 2013). Providers applied to the U.S. Supreme Court to reinstate the injunction against only the admitting-privilege requirements, which that Court denied. *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, No. 13A452 (U.S. Nov. 19, 2013).

STATEMENT OF FACTS

Amici adopt the facts as stated by Texas. Texas Br. at 1-7. In addition, Amici also rely on the judicially noticeable legislative facts described here.

As *Amici* explained in District Court based on Providers' evidence, in the last year for which data are available (2010), there were 251 business days and almost as many hospitalizations (233 hospitalizations, based on the 0.3% rate cited by Providers applied to the 77,592 induced abortions in Texas). Texas Dep't of State Health Serv., Induced Terminations of Pregnancy Narrative (June 28, 2012); *Amici Curiae* Br. at 10 n.6 (district court docket item #63). Under the Emergency Medical Treatment and Active Labor Act, 42 U.S.C. §1395dd ("EMTALA"),

Texas hospitals must treat people in emergency rooms, regardless of their ability to pay for their care.

Significantly, Texas enacted HB2 in the wake of the Gosnell prosecution and the accompanying revelations about the abortion industry not only for murdering live-born, viable infants but also for endangering and even killing women abortion patients. *See In re County Investigating Grand Jury XXIII,* Misc. No. 9901-2008 (Pa. C.P. Phila. filed Jan. 14, 2011) (hereinafter, "Gosnell Grand Jury Report"). HB2's supporters specifically identified HB2 as helping to prevent Gosnell-like instances of substandard care:

> Higher standards could prevent the occurrence of a situation in Texas like the one recently exposed in Philadelphia, in which Dr. Kermit Gosnell was convicted of murder after killing babies who were born alive. A patient also died at that substandard clinic.

House Research Organization, Texas House of Representatives, Bill Analysis, HB 2, at 10 (July 9, 2013) (summary of supporters' arguments for HB2) (hereinafter, "House Report"). HB2's supporters argued that the "The bill would force doctors who did not have hospital admitting privileges to upgrade their standards or stop performing abortions." *Id.* at 10-11.

STANDARD OF REVIEW

This Court reviews a "district court's findings of fact only for clear error," *Elementis Chromium L.P. v. Coastal States Petroleum Co.*, 450 F.3d 607, 613 (5th

Cir. 2006), and its conclusions of law *de novo. Reich v. Lancaster,* 55 F.3d 1034, 1045 (5th Cir. 1995). Similarly, standing is reviewed *de novo. Castillo v. Cameron County,* 238 F.3d 339, 347 (5th Cir. 2001). Even where a court has discretion, a "court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990).

SUMMARY OF ARGUMENT

Providers claim that HB2 violates the undue-burden test of *Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833, 876 (1992), and thus unconstitutionally limits the abortion rights found in *Roe v. Wade,* 410 U.S. 113 (1974). This Court must deny any relief under *Roe-Casey* rights both because Providers lack third-party standing to assert the rights of future patients (Section I.A) and because HB2 does not exceed the state authority recognized in *Casey* (Sections II.A-II.B). To the extent that Providers have standing to enforce *their own rights,* they must proceed under the rational-basis test (Section I.B), which HB2 readily meets (Section II.C).

ARGUMENT

I. PROVIDERS LACK STANDING TO ASSERT "UNDUE-BURDEN" RIGHTS

The doctrine of standing has both a constitutional component derived from the case-or-controversy requirement of Article III and various judge-made prudential requirements "that are part of judicial self-government." *Lujan v.*

Defenders of Wildlife, 504 U.S. 555, 560 (1992). "In both dimensions it is founded in concern about the proper -- and properly limited -- role of the courts in a democratic society." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). Under Article III, a plaintiff must establish cognizable injury, caused by the challenged conduct, and redressable in court, *Defenders of Wildlife*, 504 U.S. at 561-62. The most relevant prudential requirement is that plaintiffs cannot assert the rights of an absent third party unless they have their own Article III standing and a close relationship with the absent third party, whom a sufficient "hindrance" keeps from asserting his or her own rights. *Kowalski v. Tesmer*, 543 U.S. 125, 128-30 (2004). As explained below, Providers lack third-party standing to assert a future patient's *Roe-Casey* rights. To the extent that Providers have standing at all, they must proceed under their own rights, which trigger a more deferential standard of review.

A. Prudential Limits on Third-Party Standing Bar Providers from Asserting Patients' Rights under *Roe-Casey*

While *Amici* do not dispute that practicing physicians have close relationships with their regular patients, the same is simply not true for hypothetical relationships between Providers and their *future* patients who may seek abortions at Providers' clinics: an *"existing* attorney-client relationship is, of course, quite distinct from the *hypothetical* attorney-client relationship posited here.*"* *Kowalski*, 543 U.S. at 131 (emphasis in original). Women do not have regular, ongoing, physician-patient relationships with abortion doctors in abortion

clinics.

Before *Kowalski* was decided in 2004, "the general state of third party standing law" was "not entirely clear," *Am. Immigration Lawyers Ass'n v. Reno*, 199 F.3d 1352, 1362 (D.C. Cir. 2000), and "in need of what may charitably be called clarification." *Miller v. Albright*, 523 U.S. 420, 455 n.1 (1998) (Scalia, J., concurring). Since *Kowalski* was decided in 2004, however, hypothetical future relationships can no longer support third-party standing. As such, Providers lack third-party standing to assert *Roe-Casey* rights. Providers' invocation of third-party standing also fails for two reasons beyond *Kowalski.*[2]

First, Providers' challenge to HB2 seeks to undermine legislation that Texas enacted to protect women from abortion-industry practices, a conflict of interest that strains the closeness of the relationship. Third-party standing is even less appropriate when – far from an "identity of interests"[3] – the putative third-party

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[2] Abortion providers often cite *Singleton v. Wulff*, 428 U.S. 106, 118 (1976) (plurality) for third-party standing, but the fifth vote sets a holding, *Marks v. U.S.*, 430 U.S. 188, 193 (1977), and the fifth *Singleton* vote rejected third-party standing. *Singleton*, 428 U.S. at 121-22 (Stevens, J., concurring in part).

[3] *See, e.g.*, *Lepelletier v. FDIC*, 164 F.3d 37, 44 (D.C. Cir. 1999) ("there must be an identity of interests between the parties such that the plaintiff will act as an effective advocate of the third party's interests"); *Pa. Psychiatric Soc'y v. Green Spring Health Servs.*, 280 F.3d 278, 288 (3d Cir. 2002) (asking whether "the third party … shares an identity of interests with the plaintiff"); *Region 8 Forest Serv. Timber Purchasers Council v. Alcock*, 993 F.2d 800, 810 (11th Cir. 1993) ("relationship between the party asserting the right and the third party has been characterized by a strong identity of interests").

plaintiff's interests are *adverse* or even *potentially adverse* to the third-party rights holder's interests. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 15 (2004) (rejecting third-party standing where interests "are not parallel and, indeed, are potentially in conflict"). In such cases, courts should avoid "the adjudication of rights which [the rights holders] not before the Court may not wish to assert." *Newdow*, 542 U.S. at 15 n.7. Under *Newdow*, Providers cannot ground their standing on the third-party rights of their hypothetical future potential women patients, when the goal of Providers' lawsuit is to enjoin Texas from protecting those very same women from Providers' substandard care.

Second, the instances where courts have found standing for abortion doctors typically involve laws that apply equally to *all abortions* and to *all abortion doctors*, so that the required "identity of interests" was present between the women patients who would receive the abortions and the physicians who would perform the abortions.[4] Here, by contrast, Texas regulates in the interest of pregnant women

[4] Prior Supreme Court and Circuit decisions that found abortion doctors to have standing without expressly addressing third-party standing are inapposite for two reasons. First, decisions that considered only Article III standing without considering prudential third-party limits are not binding precedents on the unaddressed third-party issues. *Cooper Indus., Inc. v. Aviall Serv., Inc.*, 543 U.S. 157, 170 (2004). As such, those "drive-by jurisdictional rulings" have "no precedential effect" on third-party standing. *Steel Co. v. Citizens for a Better Env't.,* 523 U.S. 83, 91 (1998). Second, because this Circuit recognizes that prudential limits on standing can be waived by failing to raise them, *Bd. of Miss. Levee Comm'rs v. EPA*, 674 F.3d 409, 417-18 (5th Cir. 2012), a decision cannot be read to reject an argument *sub silentio* that a defendant *waived* by failing to raise it.

who contemplate abortions and imposes no pertinent restrictions either on hospital-based abortions or on abortion doctors who already have (or are willing to obtain) admitting privileges. When a state relies on its interest in unborn life to insert itself into the doctor-patient relationship by regulating all abortions, doctors and patients potentially may have sufficiently aligned interests. Here, by contrast, all abortion doctors do not share the same interests as future abortion patients. Indeed, the Providers do not even share the same interests as all abortion doctors. Without an identity of interests between Providers and future abortion patients, the doctor-patient relationship is not close enough for third-party standing.

Both Texas and *Amici* argued that Providers lacked third-party standing in the district court, and the district court rejected those arguments as follows:

> The Supreme Court has consistently reviewed the substance of constitutional challenges to abortion-related statutes without specifically addressing a plaintiff's standing. *See, e.g.*, *Gonzales v. Carhart*, 550 U.S. 124 (2007); *Stenberg v. Carhart*, 530 U.S. 914 (2000); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992). That abortion providers may raise constitutional challenges to state statutes that seek to regulate abortions is now so well established in our jurisprudence it is axiomatic.

USCA5.1536-37. This analysis suffers from three independently fatal defects. First, because appellate courts "presume that federal courts lack jurisdiction unless the contrary appears affirmatively from the record," *Renne v. Geary*, 501 U.S. 312, 316 (1991), there is no such thing as "axiomatic" standing. Second, the Supreme

Court has rejected applying this type of unexamined "drive-by jurisdictional ruling" to establish jurisdiction in a case where the parties actually contest jurisdiction. *Steel Co.*, 523 U.S. at 91. Third, and most importantly, the three cited decisions involved the government's interest in the potential life of the infant, not its interest in the pregnant woman's health. As such, the primary basis to deny Providers' third-party standing – namely, conflict or potential conflict between putative third-party plaintiffs and absent rights holders – was entirely absent.

B. To the Extent that They Can Establish *Their Own* Article III Standing, Providers Must Proceed under the Rational-Basis Test

When a party – like Providers here – does not possess an absentee's right to litigate under an elevated scrutiny such as the *Casey* undue-burden test, that party potentially may assert its own rights, albeit without the elevated scrutiny that applies to the absent third parties' rights:

> Clearly MHDC has met the constitutional requirements, and it therefore has standing to assert its own rights. Foremost among them is MHDC's right to be free of arbitrary or irrational zoning actions. But the heart of this litigation has never been the claim that the Village's decision fails the generous *Euclid* test, recently reaffirmed in *Belle Terre.* Instead it has been the claim that the Village's refusal to rezone discriminates against racial minorities in violation of the Fourteenth Amendment. As a corporation, MHDC has no racial identity and cannot be the direct target of the petitioners' alleged discrimination. In the ordinary case, a party is denied standing to assert the rights of third persons.

Village of Arlington Heights v. Metro. Housing Dev. Corp., 429 U.S. 252, 263

(1977) (citations omitted); *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 438 (1983) ("lines drawn … must be reasonable"). Like the Metropolitan Housing Development Corporation ("MHDC") in *Arlington Heights*, Providers would need to proceed under the rational-basis test if they were to proceed without the elevated scrutiny afforded to third-party rights holders. As shown in Section II.C, *infra*, HB2 readily satisfies the rational-basis test.

II. HB2 DOES NOT VIOLATE THE CONSTITUTION

With both this Court and the Supreme Court having found Providers insufficiently *likely to succeed* on the merits to warrant interim relief, this Court now should find that Providers *cannot succeed* on the merits.

A. Even If *Casey* Applied, HB2 Would Not Trigger Undue-Burden Review

The *Casey* undue-burden test would not apply here, even if Providers had standing. In their cramped reading of *Casey*, Providers restrict states' latitude to protect the health and safety of women who seek abortions, which conflicts with federalism and establishes unsound policy. Under that reading, *Casey* would have weakened Texas's police power to protect its citizens in an area of traditional state and local concern (namely, public health) where the federal government lacks a corresponding police power. That would have left only the judiciary and abortion providers to protect the public from abortion providers, which is to say it would leave no one who is both qualified *and* disinterested to protect public health. *Amici*

respectfully submit that that is not – and cannot be – the law.

"Throughout our history the several States have exercised their police powers to protect the health and safety of their citizens," which "are 'primarily, and historically, ... matter[s] of local concern.'" *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996) (*quoting Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 719 (1985)) (second and third alterations in *Medtronic*). "Th[e police] power belonged to the States when the Federal Constitution was adopted," "[t]hey did not surrender it, and they all have it now." *Mugler v. Kansas*, 123 U.S. 623, 667 (1887) (internal quotations omitted). For their part, the federal Executive and Congress lack a corresponding police power to take up the slack in supplanting the states: "we always have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power." *U.S. v. Morrison*, 529 U.S. 598, 618-19 (2000). If states cannot regulate the abortion industry's excesses, and the federal government cannot, that would leave only the judiciary and the abortion industry itself.

The judiciary, of course, is ill-suited by training to determine or second-guess what medical procedures are safe or necessary. *Gonzales v. Carhart*, 550 U.S. 124, 163 (2007); *cf. Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 766 (2007) (federal courts "are not social engineers") (Thomas, J., concurring). Indeed, judges are even less qualified to practice

medicine than they are to practice social engineering. *Gonzales*, 550 U.S. at 164 (federal courts are not "'the country's *ex officio* medical board'") (*quoting Webster v. Reproductive Health Serv.*, 492 U.S. 490, 518-19 (1989) (plurality opinion)). Because the judiciary is not a credible regulator, Providers' narrow reading of states' flexibility under *Casey* would make abortion a self-regulated industry.

While some might argue that the public and the states should be able to trust abortion providers, that approach would be extremely naïve. Perhaps because of the politicization of this issue in the United States – caused in great part by the unprecedented *Roe* decision – abortion providers appear to regard themselves more as civil-rights warriors than as medical providers. Unfortunately, a form of "agency capture"[5] infects at least some abortion regulators, so that – for example – "[e]ven nail salons in Pennsylvania are monitored more closely for client safety" than abortion clinics. Gosnell Grand Jury Report, at 137. Finally, many abortion providers simply cannot disclose anything negative about their abortion mission:

> Political considerations have impeded research and reporting about the complications of legal abortions. The highly significant discrepancies in complications reported in European and Oceanic [j]ournals compared with North

[5] "'Agency capture' … is the undesirable scenario where the regulated industry gains influence over the regulators, and the regulators end up serving the interests of the industry, rather than the general public." *Wood v. GMC*, 865 F.2d 395, 418 (1st Cir. 1988) (*citing* Wiley, *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713, 724-26 (1986); Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1684-87, 1713-15 (1975)).

> American journals could signal underreporting bias in North America.

Jane M. Orient, M.D., *Sapira's Art and Science of Bedside Diagnosis*, ch. 3, p. 62 (Lippincott, Williams & Wilkins, 4th ed. 2009) (citations omitted); *see also* Gosnell Grand Jury Report, at 137-207 (nonenforcement by state and local regulators). For these reasons, the abortion industry's lack of transparency calls out for heightened regulation, vis-à-vis other, less-politicized medical practices.

Certainly, the abortion industry throws great public-relations and advocacy efforts into fighting disclosure of correlated health effects that other medical disciplines readily would disclose. *See, e.g., Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds*, 686 F.3d 889, 898 (8th Cir. 2012) (*en banc*) (abortion industry opposed South Dakota's requiring disclosure of abortion's correlation with suicide ideation); *K.P. v. LeBlanc*, 729 F.3d 427 (5th Cir. 2013) (abortion industry opposed Louisiana's tying limitation on liability to only those medical risks expressly disclosed in an informed-consent waiver). Claims that states target the abortion industry for *unwarranted* scrutiny have it precisely backwards.

Where it appears that a health-related clinical industry cuts corners and hides information, *Amici* respectively submit that states may, indeed should, respond by requiring that industry to integrate itself more fully into the larger medical community. In other words, the abortion industry – as a whole – requires systemic

controls. HB2's admitting-privilege requirement is a reasonable addition in that direction. And even if Providers here were all good actors, as opposed to bad actors elsewhere in their industry, that would not defeat the need for HB2 to regulate the bad actors.

In either case, then, Texas thus has acted appropriately in seeking to increase the standard of care and to minimize unnecessary death and injury. Put another way, Texas has required "medically competent personnel under conditions insuring maximum safety for the woman." *Connecticut v. Menillo*, 423 U.S. 9, 10-11 (1975); *Mazurek v. Armstrong*, 520 U.S. 968, 971 (1997); *Roe*, 410 U.S. at 150. Under the circumstances, "legislatures [have] wide discretion to pass legislation in areas where there is medical … uncertainty," and "medical uncertainty … provides a sufficient basis to conclude in [a] facial attack that the Act *does not* impose an undue burden." *Gonzales*, 550 U.S. at 164 (emphasis added). Significantly, the Constitution does "not give abortion doctors unfettered choice in the course of their medical practice, nor should it elevate their status above other physicians in the medical community." *Gonzales*, 550 U.S. at 163. That holding from *Gonzales* applies even more so here.

Indeed, as *Amici* read *Casey*, that is precisely what the Supreme Court intended in adopting the *Casey* framework, which balances competing state and individual interests. Significantly, *Roe* concerned states' ability to *prohibit*

abortions in the interest of the *infant* and the state's interest in that new life. By contrast, this litigation concerns the states' ability to *regulate* abortions in the interest of *pregnant women* who contemplate and receive abortions. On the application of the police power to protecting the *pregnant woman's* health, neither this Court nor the Supreme Court has ever ruled that the right to a particular abortion method trumps the states' interest in public health. As *Amici* understand *Casey,* the undue-burden test does not arise for "necessary" regulation of abortion procedures to protect women seeking an abortion. *See Casey,* 505 U.S. at 878 (only *unnecessary* regulations of women's health trigger further inquiry under *Casey*).

Specifically, following *Roe, Menillo,* and *Mazurek, Casey* allows that states "may enact regulations to further the health or safety of a woman seeking an abortion," "[a]s with any medical procedure." *Casey*, 505 U.S. at 878. The only prohibition in the *Casey* prong applicable to pregnant women is that "*[u]nnecessary* health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right." *Id.* (emphasis added). To unpack this language to its constituent parts, an undue-burden violation for woman-focused state regulation requires that the plaintiff establish both of two elements: (1) a woman-based health regulation is *unnecessary;* and (2) the regulation has either the purpose or effect of presenting a

substantial obstacle.[6] If the regulation is necessary (*i.e.*, not "unnecessary"), however, that ends the analysis: there is no *Casey-Roe* violation.

B. HB2 Does Not Impose an Undue Burden under *Casey*

Although this Court should not reach the *Casey* merits at all, *see* Section I.A, *supra*, and the *Casey* undue-burden analysis does not even arise when states adopt *necessary* protections for pregnant women who seek abortions, *see* Section II.A, *supra*, HB2 would not impose an undue burden under *Casey*, even if that test applied to this litigation.

1. The Admitting-Privilege Requirement Is Not an Undue Burden

Providers do not genuinely question the value of admitting privileges; rather, they argue that local privileges will not help in all circumstances and that 25 Tex. Admin. Code §139.56 already accomplishes HB2's benefits. Pls.' Memo. at 3-4 (district court docket item #9). In a strict-scrutiny case, the availability of §139.56's lesser restrictions might be relevant, but federal courts review the legislative choices more deferentially in this context, *Gonzales*, 550 U.S. at 164, and Providers' druthers are not the test. *Id.* at 163. Indeed, as explained in Section II.C, *infra*, §139.56 is irrelevant and *undercuts* Providers' claims.

Providers also cite the negative impact that HB2 might have on access to

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[6] As Texas argues, these are elements of Providers' case, Texas Br. at 29-30, not affirmative defenses. As such, Providers bear the burden of proof. *Id.*

abortion services within parts of Texas. Pls.' Memo. at 1 (district court docket item #9). The appellate courts that have considered these issues have determined that *Casey* not only allows states to require abortion doctors to have admitting privileges at a local hospital as a legal matter but also does not prohibit increased travel distances to reach the facilities that remain open when, as a factual matter, state regulations indeed cause some abortion facilities to close. *Greenville Women's Clinic v. Comm'r*, 317 F.3d 357, 363 (4th Cir. 2002); *Women's Medical Prof'l Corp. v. Baird*, 438 F.3d 595, 598 (6th Cir. 2006); *Women's Health Ctr. of West Cnty., Inc. v. Webster*, 871 F.2d 1377, 1382 (8th Cir. 1989); *Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 547 (9th Cir. 2004). When a state "law … serves a valid purpose" (as HB2 does) and "has the incidental effect of making it more difficult or more expensive to procure an abortion," the added difficulty or expense "cannot be enough to invalidate it." *Casey*, 505 U.S. at 874. *Casey* requires more than Providers have alleged, much less proved.

2. Restricting Abortions to FDA Labeling Is Not an Undue Burden

Providers' cramped reading of *Casey* is especially pernicious with respect to abortion-inducing drugs such as "RU-486." That reading restricts state police power to protect citizens in an area of traditional state concern (namely, public health) where the federal government not only lacks a corresponding police power, *Morrison*, 529 U.S. at 618-19, but also *expressly declined* to exercise its commerce

power (namely, *off-label* uses of FDA-approved drugs).[7] This Court simply cannot second-guess the legislative finding that self-administered second-trimester medication abortions pose risks to women's health. As *Menillo* recognized contemporaneously with *Roe*, states may require that "abortion [be] performed by *medically competent personnel under conditions insuring maximum safety* for the woman." *Id.* (emphasis added); *Mazurek*, 520 U.S. at 971 (states may limit abortion procedures to physicians). The Sixth Circuit recognized as much, holding that banning abortion methods such as off-label uses of RU-486 is not the same as banning abortion itself. *Planned Parenthood Sw. Ohio Region v. DeWine*, 696 F.3d 490, 514-15 (6th Cir. 2012). There is no right to self-administer the RU-486 drug's second dose at home.

For women within the gestational limits on the FDA-approved label, of course, the label uses and surgical abortions remain available alternatives. But even women outside the FDA-approved labeling could continue to obtain surgical abortions. The Supreme Court has never suggested, much less held, that "the right

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[7] FDA approved RU-486 under "Subpart H" for accelerated approval for drugs for serious or life-threatening illnesses such as cancer, 21 C.F.R. §§314.500-.560, notwithstanding that pregnancy is not a "serious or life-threatening illness[]" as required by Subpart H. *Id.* §314.500. Under Subpart H, "FDA will require such postmarketing restrictions *as are needed* to assure safe use" because "FDA concludes that a drug product shown to be effective can be safely used *only if distribution or use is restricted.*" *Id.* §314.520(a) (emphasis added). FDA granted the approval on September 28, 2000, *see* 73 Fed. Reg. 16,313 (2008), late in President Clinton's second term.

to choose abortion encompasses the right to choose a particular abortion method." *Id.* Given the elevated risk posed by second-trimester medication abortions and the absence of any other governmental body to regulate abortion providers, *Amici* respectfully submit that this Court cannot hold Texas' regulation of abortion providers as either being "unnecessary" or posing an "undue burden" under *Casey.*

C. HB2 Does Not Violate the Rational-Basis Test

To the extent that they have standing to challenge HB2 *without* relying on future patients' rights under *Casey*, Providers must proceed under the rational basis test, under which "[i]t is enough … that it *might be* thought that the particular legislative measure was a rational way to correct it." *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 488 (1955) (emphasis added). Here, virtually every business day, Texas women flow into the Texas hospital system due to abortion-related complications, many of them life-threatening. As the Eighth Circuit recognized, a similar Missouri law "furthers important state health objectives" by "ensur[ing] both that a physician will have the authority to admit his patient into a hospital whose resources and facilities are familiar to him and that the patient will gain immediate access to secondary or tertiary care." *Women's Health Ctr. of West Cnty.*, 871 F.2d at 1381. The connection between admitting privileges and patient safety is obvious.

To overturn Texas' legislative response under the rational-basis test,

Plaintiffs must "negative every conceivable basis which might support [the challenged statute]," including those bases on which the state plausibly *may have* acted. *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973) (internal quotations omitted); *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 462-63 (1988). In doing so, Providers must do more than marshal "impressive supporting evidence … [on] the probable consequences of the [statute]" vis-à-vis the legislative purpose; they instead must negate "the *theoretical* connection" between the two. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463-64 (1981) (emphasis in original); *F.C.C. v. Beach Comm., Inc.*, 508 U.S. 307, 315 (1993) ("legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data"). Even if it were possible to "negate" that "*theoretical* connection" between admitting privileges and safety – and *Amici* doubt that it is – Providers certainly have not made the required showing.

Indeed, to the contrary, Providers have in essence admitted that HB2 does not violate the rational-basis test by affirmatively *relying on* 25 Tex. Admin. Code §139.56 to defeat HB2. By way of background, §139.56(a) requires that abortion facilities "shall ensure that the physicians who practice at the facility have admitting privileges or have a working arrangement with a physician(s) who has admitting privileges at a local hospital in order to ensure the necessary back up for

medical complications." If HB2 has no rational relationship – indeed, no "*theoretical* connection" – with women's safety, then neither does §139.56. Unlike strict-scrutiny, the availability of less-restrictive alternatives like §139.56 does not undermine measures like HB2's admitting-privilege requirement because, with the rational-basis test, it is "irrelevant … that other alternatives might achieve approximately the same results." *Vance v. Bradley*, 440 U.S. 93, 103 n.20 (1979); *Dallas v. Stanglin*, 490 U.S. 19, 26-28 (1989); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 316-17 (1976). Far from proving the lack of a rational basis between safety and admitting privileges, Providers have relied on the connection between the two by relying on the safety that §139.56 provides.

Even if it had to prevail on an evidentiary basis here, Texas readily would do so. Texas has sovereign interests both in protecting the public health and in conserving the public fisc with regard to the women patients dumped into Texas emergency rooms by the abortion industry. Either ground provides a thoroughly rational basis for which to require the abortion industry to comply with HB2.

First, of course, Texas intended HB2 to increase the level of care provided to women seeking abortions in Texas and to avoid the operation of substandard clinics like the one operated in Philadelphia by Kermit Gosnell. *See* House Report, at 10-11. By making it more difficult for Texas-based Gosnells to continue such practices, HB2 enables Texas to meet its police-power obligation to ensure the

health and safety of Texans.

Second, as indicated, EMTALA requires Texas hospitals to treat the many women suffering from complications due to abortion – approximately one new patient per business day – even if they are unable to pay for their care. 42 U.S.C. §1395dd. In that way, Providers pass the downside costs of their abortion practices onto the Texas medical system, with which Texas obviously has an interest.[8] For example, in *Howard v. Garland*, 917 F.2d 898, 900-01 (5th Cir. 1990), this Court held that government does not violate the rational-basis test when discriminating between accredited and unaccredited providers (in *Howard*, private and commercial daycare and schools), based on a variety of beneficial inferences that the accreditation process would provide. Similarly here, requiring admitting privileges satisfies the rational-basis test because Texas is entitled to decide that the "non-accredited [providers] do[] not" "out-weigh[] the attendant negative externalities" of their operations, vis-à-vis the accredited providers. *Id.* "Negative externalities occur when the private costs of some activity are less than the total costs to society of that activity," which allows the "private parties engaging in that

[8] EMTALA is an unfunded federal mandate (*i.e.*, the federal government has not provided states funding to accomplish EMTALA's federal mandate). Insofar as the federal government recently relied on hospitals' EMTALA-imposed costs to cover uninsured patients as a basis to insert the federal government into healthcare, it would be difficult to deny Texas the right to regulate an industry whose business model calls for dumping its complications into Texas' emergency rooms.

activity essentially [to] shift some of their costs onto society as a whole." *McCloud v. Testa*, 97 F.3d 1536, 1551 n.21 (6th Cir. 1996). Providers are not entitled to operate under a business plan that shunts the cost of their hard cases onto society.

CONCLUSION

This Court should reverse the District Court and hold that HB2 is constitutional.

Dated: November 25, 2013

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CERTIFICATE OF COMPLIANCE

No. 13-51008, *Planned Parenthood of Greater Texas Surgical Health Serv. v. Abbott.*

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I hereby certify that, on November 25, 2013, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Fifth Circuit by using the Appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. I further certify that some of the participants in the case are not CM/ECF users and that, on the same date, I served a copy of the foregoing brief by U.S. Priority Mail, postage prepaid, on the following CM/ECF nonparticipants:

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