No. 14-50928

In the United States Court of Appeals for the Fifth Circuit

WHOLE WOMAN'S HEALTH; AUSTIN WOMEN'S HEALTH CENTER; KILLEEN WOMEN'S HEALTH CENTER; NOVA HEALTH SYSTEMS, DOING BUSINESS AS REPRODUCTIVE SERVICES; SHERWOOD C. LYNN, JR., M.D., ON BEHALF OF THEMSELVES AND THEIR PATIENTS; PAMELA J. RICHTER, D.O., ON BEHALF OF THEMSELVES AND THEIR PATIENTS; LENDOL L. DAVIS, M.D., ON BEHALF OF THEMSELVES AND THEIR PATIENTS,
Plaintiffs-Appellees / Cross-Appellants,

v.

DAVID LAKEY, M.D., COMMISSIONER OF THE TEXAS DEPARTMENT OF STATE HEALTH SERVICES, IN HIS OFFICIAL CAPACITY; MARI ROBINSON, EXECUTIVE DIRECTOR OF THE TEXAS MEDICAL BOARD, IN HER OFFICIAL CAPACITY,
Defendants-Appellants / Cross-Appellees.

ON APPEAL FROM U.S. DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION, CIVIL NO. 1:14-CV-284, HON. LEE YEAKEL

***AMICI CURIAE* BRIEF OF SIXTY-EIGHT TEXAS STATE LEGISLATORS AND FOUR PUBLIC-INTEREST GROUPS (*AMICI* LISTED ON INSIDE FRONT COVER) IN SUPPORT OF APPELLANTS/CROSS-APPELLEES IN SUPPORT OF REVERSAL**

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TEXAS EAGLE FORUM, ASS'N OF AMERICAN PHYSICIANS & SURGEONS, TEXAS RIGHT TO LIFE, AND EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND

CERTIFICATE OF INTERESTED PERSONS

The case number is 14-50928. The case is styled as *Whole Woman's Health v. Lakey*. 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.

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and Don Huffines
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IDENTITY, INTEREST AND AUTHORITY TO FILE[1]

The interests and identify of the *amici curiae* joining this brief (collectively, "*Amici*") are set forth in the accompanying addendum. As Texas legislators, Texas residents, and interested public-interest groups, *Amici* have direct and vital interests in the issues before this Court.

STATEMENT OF THE CASE

Several abortion clinics and doctors (collectively, hereinafter "Providers") have 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) requiring abortion facilities to meet the structural requirements applicable to ambulatory surgical centers ("ASCs").

Constitutional Background

"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, ... matters of local concern." *Medtronic, Inc. v. Lohr*, 518 U.S. 470,

[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.

475 (1996) (interior quotations and alterations omitted). For their part, the federal Executive and Congress lack a corresponding police power: "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).

Notwithstanding this state dominance on issues public health, the U.S. Supreme Court has created a woman's right to abort a non-viable fetus, first as an implicit right to privacy and subsequently as a substantive due-process right to liberty. *Roe v. Wade*, 410 U.S. 113 (1974); *Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833 (1992). Under *Casey,* 505 U.S. at 878, States retain the right to regulate abortions both in the interest of the unborn child and in the interest of maternal health, provided that they do not impose an undue burden on a pregnant woman's *Roe-Casey* rights. But 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 v. Carhart,* 550 U.S. 124, 163 (2007), because federal courts are not "'the country's *ex officio* medical board.'" *Id.* at 164 (*quoting Webster v. Reproductive Health Serv.,* 492 U.S. 490, 518-19 (1989) (plurality opinion)). In particular, "legislatures [have] wide discretion to pass legislation in areas where there is medical … uncertainty," which "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). With respect to maternal health, States may require "medically competent personnel under conditions insuring maximum safety for the woman." *Connecticut v. Menillo,* 423 U.S. 9, 10-11 (1975); *accord Mazurek v. Armstrong*, 520 U.S. 968, 971 (1997); *Roe,* 410 U.S. at 150.

Statutory Background

As relevant here, HB2 provides three protections of maternal health: (1) it limits the performance of "medication abortions" (*i.e.,* drug-induced abortions) to those performed in conformance with the regimen approved by the federal Food & Drug Administration, TEX. HEALTH & SAFETY CODE §171.063(a)(1)-(2) (HB2 §3); (2) it requires abortion doctors to have admitting privileges at a hospital within thirty miles of the abortion clinic, *id.* §171.0031(a)(1) (HB2 §2); and (3) it requires abortion clinics to meet the standards applicable to ambulatory surgical centers ("ASCs"), *id.* §245.010(a) (HB2 §4). 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 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. Other facets of the Gosnell Grand Jury Report are discussed as factual background, on which the Legislature plausibly may have relied in enacting HB2. *See* Section I.A.1, *infra.*

Litigation Background

This case represents Providers' second suit against HB2 and the same District Judge's second permanent injunction against the law. This Court rejected the first permanent injunction, first issuing a stay in *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott,* 734 F.3d 406 (5th Cir. 2013), then vacating the injunction in *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott,* 748 F.3d 583 (5th Cir. 2014) ("*Abbott II*"). Similarly here, a motions panel of this Court issued a stay against the District Court's permanent injunction. *Whole Woman's Health v. Lakey,* 769 F.3d 285 (5th Cir. 2014). The

Supreme Court vacated the stay in part. *See* Section II.C, *infra*.

Factual Background

Amici adopt the facts stated by Texas. Texas Br. at 8-13. In addition, as outlined here, *Amici* also rely on the Gosnell Grand Jury Report and other legislative facts on which the Legislature plausibly may have relied in enacting HB2. *See* Section I.A.1, *infra.* Even at the low complication rates claimed by the abortion industry, the high number of abortions in Texas results in numerous cases annually where women are hospitalized due to complications. *See* Texas Dep't of State Health Serv., 2012 Induced Terminations of Pregnancy (June 25, 2014) (68,298 induced abortions in Texas in 2012). 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. Thus, HB2 plainly addresses not only a public-health problem borne by Texas women seeking abortions, but also an expense imposed on the Texas public-health system by abortion providers who shunt their hard cases onto the public via EMTALA.

Under the heading "Who Could Have Prevented All this Death and Damage?," the Gosnell grand jury found that Pennsylvania's failure to regulate abortion providers as ambulatory surgical centers contributed to the death of at least one patient:

> Had [the Pennsylvania Department of Health ("DOH")] treated the clinic as the ambulatory surgical facility it was, DOH inspectors would have assured that the staff were all licensed, that the facility was clean and sanitary, that anesthesia protocols were followed, and that the building was properly equipped and could, at least, accommodate stretchers. Failure to comply with these standards would have given cause for DOH to revoke the facility's license to operate.

Gosnell Grand Jury Report, at 215; *see also id.* at 21, 45, 77-78, 129, 139-41, 155.

Further, a variant of "agency capture[2]" and "political correctness" infects the administrative regulation of the abortion industry, 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. In order to avoid placing limits on abortion-access rights, regulators do not adequately enforce public-health rules:

> [Pennsylvania Department of Health Senior Counsel Kenneth] Brody confirmed some of what [Janice] Staloski [the Director of the Pennsylvania Department of Health unit responsible for overseeing abortion clinics] told the Grand Jury. He described a meeting of high-level government officials in 1999 at which a decision was made not to accept a recommendation to reinstitute regular inspections of abortion clinics. The reasoning, as Brody recalled, was: "there was a concern that if they did

[2] "'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* John Shepard Wiley Jr., *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713, 724-26 (1986); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1684-87, 1713-15 (1975)).

> routine inspections, that they may find a lot of these facilities didn't meet [the standards for getting patients out by stretcher or wheelchair in an emergency], and then there would be less abortion facilities, less access to women to have an abortion."

Gosnell Grand Jury Report, at 147 (fourth alteration in original). The same phenomenon also appears in the medical literature:

> 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 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 (non-enforcement by state and local regulators). In short, a legislature could rationally conclude that the abortion industry is an unsuitable candidate for self-regulation.

Indeed, quite to the contrary, 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). For all these reasons, legislators had a plausible factual basis to conclude that the public health required that the abortion industry face more stringent regulation.[3]

SUMMARY OF ARGUMENT

The District Court violated *Casey* and *Abbott II* by: (1) substituting its factual findings for the Legislature's findings under the rational-basis test, (2) balancing its policy concerns for the Legislature's under the undue-burden test, (3) substituting its own substantial-number test for the *Casey* large-fraction test for facial invalidation, and (4) declining to implement HB2's severability clause. In addition, the District Court's undue-burden analysis impermissibly expanded substantive *Roe-Casey* due-process rights without meeting the criteria required by *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997), both by failing to consider access to out-of-state abortion clinics and by considering "practical concerns" not caused by Texas. For all these reasons, as well as the *res judicata* effect of *Abbott II*, Providers' challenge to HB2 must fail.

[3] As Texas explains, HB2 simply imposes the statewide ASC requirements on abortion clinics. *See* Texas Br. at 37-38. Thus, rather than imposing *heightened scrutiny* on the abortion industry vis-à-vis other types of medical practices, HB2 merely applied the *same* ASC standards that apply statewide.

ARGUMENT

I. THE DISTRICT COURT DID NOT FOLLOW BINDING SUPREME COURT AND CIRCUIT PRECEDENT

The District Court applied the wrong standard of review for abortion laws under Circuit and Supreme Court precedents including *Abbott II, Casey,* and *Gonzales,* extended abortion rights without following the required *Glucksberg* analysis, and failed to heed HB2's "comprehensive and careful severability provision" under *Abbott II.* Each of these departures from Circuit precedent requires reversal.

A. The District Court Failed to Apply the *Abbott II* Standard for Rational-Basis and Undue-Burden Review of Abortion Laws

Leaving to Section II, *infra,* the District Court's specific errors, the District Court erred more generally by failing to apply the *Abbott II-Casey* standard of review. Specifically, the District Court's undue-burden analysis relies on three factors – increased travel times to clinics, capacity at fewer clinics to meet increased demand, and HB2's perceived lack of health benefits to balance out any decreased access –and then fails to apply the correct standard for facial challenges. As discussed in Section II, *infra,* these general errors require reversal of each of the District Court's findings against HB2. In this section, *Amici* identify the areas where the District Court applied the wrong mode of analysis.

Under *Casey* and *Gonzales,* courts evaluate abortion regulations under both the rational-basis test and the undue-burden test. *Abbott II,* 748 F.3d at 589-90.

Although it recognized the need to apply both tests, the District Court erred in questioning HB2's rationality as an undue burden when that issue instead belongs under the rational-basis test. Unlike *Roe* (which concerned States' ability to *prohibit* abortions in the interest of the *unborn child* and the state's interest in that new life), this litigation concerns the States' ability to *regulate* abortions in the interest of *maternal health.* Specifically, *Casey* allows States to "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). The undue-burden test is shorthand for the "substantial-obstacle" prong, whereas the "unnecessary-regulation" prong invokes the rational-basis test. As shown below, HB2 satisfies both tests.

1. Rational-Basis Review Does Not Allow Courtroom Fact Finding to Displace Plausible Legislative Findings

As even the District Court recognized, HB2 satisfies the rational-basis test. ROA.2686. Under that test, "[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). Moreover, unlike strict scrutiny, the rational-basis test does not require narrow tailoring, and

legislatures are free to tackle one aspect of a regulatory concern, without addressing all others. *Id.* at 489 ("the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind"); *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 315-17 (1976). Here, HB2 clearly meets the rational-basis test.

Based on the legislative facts that *Amici* set out in the Factual Background, *supra*, Texas could rationally conclude that the abortion industry's lack of transparency calls out for *heightened regulation*, vis-à-vis other, less-politicized medical practices. Thus, claims that States target the abortion industry for *unwarranted* scrutiny have it precisely backwards. Texas has regulated an industry that cuts corners and hides information by requiring that this industry integrate itself into the larger medical community. In doing so, Texas has done no more than to require "medically competent personnel under conditions insuring maximum safety for the woman." *Menillo*, 423 U.S. at 10-11; *Mazurek*, 520 U.S. at 971; *Roe*, 410 U.S. at 150. "[L]egislatures [have] wide discretion to pass legislation in areas where there is medical … uncertainty," which "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). Providers cannot claim "unfettered choice in the course of their medical practice" because the Constitution does not "elevate their status above other physicians in the medical community." *Id.* at 163.

That holding from *Gonzales* applies even more so here.

To prevail, rational-basis plaintiffs like Providers 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). Further, it is enough that a plausible policy *may have guided* the decisionmaker and that "the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational." *Nordlinger v. Hahn*, 505 U.S. 1, 11-12 (1992) (citations omitted, emphasis added). Here, Texas women regularly flow into the Texas hospital system due to abortion-related complications, many of them life-threatening. The connection of HB2's requirements to patient safety is obvious.

To overturn Texas's legislative response under the rational-basis test, 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 HB2's requirements and safety – and *Amici* doubt that it is – Providers have certainly not made the required showing.[4]

2. Undue-Burden Review Does Not Balance Legislative Choices

The District Court violated this Circuit's framework for evaluating abortion laws by interjecting its own public-policy views about HB2 after conceding that HB2 met the rational-basis test. While the phrase "undue burden" perhaps begs the question, linguistically, about which burdens are "due" and which are "undue," that is neither an open question in this Circuit nor what the Supreme Court meant by adopting the phrase in *Casey*.

First, as *Abbott II* made clear, the undue-burden test does not allow courts to balance competing interests: "In our circuit, we do not balance the wisdom or effectiveness of a law against the burdens the law imposes." *Whole Woman's*

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[4] With regard to HB2's admitting-privileges requirement, Providers in essence admit 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); *Murgia*, 427 U.S. at 316-17.

Health, 769 F.3d at __, No. 14-50928, slip op. at 16 (*citing Abbott II*, 748 F.3d at 593-94, 597); *Harris v. McRae*, 448 U.S. 297, 325-26 (1980) ("[i]t is not the mission of this Court or any other to decide whether the balance of competing interests … is wise social policy"); *cf. Lee Optical*, 348 U.S. at 487 ("it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement"). Accordingly, the District Court was wrong to interject its views on the wisdom of HB2 at the undue-burden inquiry.

Second, as the Supreme Court explained, "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." *Casey*, 505 U.S. at 877. The question is whether "a substantial obstacle" exists, not whether that obstacle serves a worthy purpose. Perhaps "impermissible burden" would have been a more accurate shorthand, linguistically, but the clear implication is that the mere phrase "undue" does not itself invite any speculation on which burdens are due or undue.[5]

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[5] In finding an undue burden, the District Court also considered any burdens posed by HB2 cumulatively with numerous "practical concerns" such as poverty that are unrelated to HB2. ROA.2691. Simply put, the government need not lower its standards or otherwise subsidize poverty with respect to abortion rights: "although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation." *McRae*, 448 U.S. at 316. In expanding the *Roe-Casey* right to consider a pregnant woman's personal situation, the District Court impermissibly expanded a substantive-due-

Providers' cramped alternate reading of *Casey* would restrict States' latitude to protect the health and safety of abortion patients, which would conflict with federalism and establish 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), *Medtronic*, 518 U.S. at 475, where the federal government lacks a corresponding police power. *Morrison*, 529 U.S. at 618-19. That would leave 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. The judiciary, of course, is ill-suited by training to determine or second-guess what medical procedures are safe or necessary. *Gonzales*, 550 U.S. at 163-64 (federal courts are not "the country's *ex officio* medical board") (interior quotations omitted); *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. Because the judiciary is not a credible regulator, Providers' narrow reading of States' flexibility under *Casey* would make abortion a

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process right without first addressing the *Glucksberg* analysis. *See* Section I.B, *infra.*

self-regulated industry.

3. The District Court's "Significant-Number" Analysis Falls Short of the "Large-Fraction" or "No-Circumstances" Showing Required in Facial Challenges to Abortion Laws

The District Court failed to follow Supreme Court and Circuit precedent on how pervasively a law must violate an applicable restriction before a court will invalidate the law *on its face*, as opposed to merely enjoining any unlawful *applications* of the law. Two strands of Supreme Court precedent – the *Salerno* no-set-of-circumstances test and the *Casey* large-fraction test – guide this inquiry, *U.S. v. Salerno*, 481 U.S. 739, 745 (1987); *Casey*, 505 U.S. at 895, but the District Court adopted its own "significant-number" test. That is reversible error.

Consistent with the Supreme Court's holdings, this Court already has held that either the no-set-of-circumstances test or the large-fraction test applies to cases like this, *Abbott II*, 748 F.3d at 588-89, so this Court must reject the District Court's alternate, weaker test. Upon doing so, the Court also must reject Providers' anticipated fall-back arguments that (a) one-sixth of the affected population is a sufficiently large fraction for facially invalidating a statute, and (b) the fraction here should be larger because the Court should use a smaller denominator. Providers are wrong on both counts.

First, and more easily, the one-sixth fraction represents 900,000 women of reproductive age who live more than 150 miles from an abortion clinic, divided by

5.4 million Texas women of reproductive age. *See* Texas Br. at 31.[6] Although the large-fraction issue first arose in *Casey* in a situation that involved married women (*i.e.*, a subset of the total population), *Casey*, 505 U.S. at 894, here we have a law that applies to every abortion facility statewide. As such, the proper denominator for a facial challenge on HB2's impacts is the statewide population of women of reproductive age.

Second, while there admittedly is some complexity as to the correct standard to apply to facial challenges, the result is the same, whichever test this Court uses. Specifically, while it remains unclear whether courts should use the *Salerno* no-set-of-circumstances test or the *Casey* large-fraction test, it is unnecessary to settle that debate because Providers fail under either test. *Gonzales*, 550 U.S. at 167-68 (declining to resolve debate); *Abbott II*, 748 F.3d at 588-89 (same). Even assuming *arguendo* that the large-fraction test is valid, that test merely relaxes the *Salerno* test. Whereas *Salerno* required 100% of the applications to violate the statutory or constitutional requirement for facial challenges, the large-fraction test relaxes the requirement to allow facial challenges against laws with *some* valid applications, provided that a large fraction of cases violate the law. Viewed that way, it would

[6] In fact, the appropriate fraction is no more than an eighth, rather than a sixth. As Texas explains, approximately 227,700 of those 900,000 women already lived more than 150 miles from an abortion clinic, before Texas enacted HB2. *See id.* at 31 n.10. Accordingly, the relevant fraction is no higher than 900,000 minus 227,700 divided by 5.4 million (*i.e.*, approximately an eighth).

be remarkable to consider one-sixth as a large fraction of the alternative *Salerno* requirement (namely, six-sixths).

B. This Court Should Reject or Narrow the *JWHO* Right of Intrastate Access to Abortion Clinics

In finding an undue burden for El Paso, the District Court considered travel times to other parts of Texas, without considering a New Mexico-based abortion provider within the El Paso metropolitan area. This line of reasoning expands upon the controversial *Jackson Women's Health Org. v. Currier,* 760 F.3d 448 (5th Cir. 2014) ("*JWHO*") holding that the undue-burden analysis considers only in-state abortion clinics, disregarding alternatives available just over the state line. *JWHO* (for which a petition for rehearing *en banc* is pending) is untenable for two reasons, and this Court certainly should not *extend* its flawed analysis.[7]

First, the *JWHO* majority relied on prior decisions that did not consider out-of-state clinics – as well as a Fifth Circuit panel decision that the *en banc* Court vacated on jurisdictional grounds – to infer that the undue-burden test affirmatively

[7] The motions panel here recognized that the *JWHO* majority's "reliance on [*Missouri ex rel. Gaines v. Canada,* 305 U.S. 337 (1938)] … may have meant to apply its limitation only to states where all the abortion clinics would close," but declined to narrow *JWHO* to that holding at the motions stage of this proceeding. *Whole Woman's Health,* 769 F.3d at __, No. 14-50928, slip op. at 29. At the merits stage, here, however, for reasons that Mississippi did not raise, this Court should either reject *JWHO* outright or, at least, decline to extend *JWHO* to States in which some abortion clinics remain open.

excludes out-of-state clinics. None of these authorities carry any weight.[8] The failure of *Casey* and other appellate decisions to consider out-of-state clinics is not precedential: "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Cooper Indus., Inc. v. Aviall Serv., Inc.*, 543 U.S. 157, 170 (2004) (interior quotations omitted). Quite simply, "cases cannot be read as foreclosing an argument that they never dealt with." *Waters v. Churchill*, 511 U.S. 661, 678 (1994). Any contrary argument is untenable.

Second, *Casey* did not find a right to burden-free intrastate access to abortion clinics, and – as the *JWHO* dissent recognized – the *JWHO* panel therefore *expanded* the substantive due-process rights recognized in *Casey*. 760 F.3d at 468 (Garza, J., dissenting). In doing so, the majority recognized a new substantive due-process right without the analysis required by *Glucksberg*. Under *Glucksberg*, however, no such right exists.

After *Casey*, the Supreme Court prospectively foreclosed using the Due Process Clause to create new substantive rights without a painstaking analysis,

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[8] "For a court to pronounce upon the meaning or the constitutionality of … federal law when it has no jurisdiction to do so is, by very definition, for a court to act *ultra vires*." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101-02 (1998). "[L]ack of subject matter jurisdiction goes to the very power of a court to hear a controversy," and the "earlier case can be accorded no weight either as precedent or as law of the case." *U.S. v. Troup*, 821 F.2d 194, 197 (3d Cir. 1987) (interior quotations omitted); *Orff v. U.S.*, 358 F.3d 1137, 1149-50 (9th Cir. 2004).

requiring "the utmost care … lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the [federal judiciary]." *Glucksberg*, 521 U.S. at 720. Under that analysis, to "extend[] constitutional protection to an asserted right or liberty interest," the right or interest must be both "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Id.* at 720-21. Even those who believe that a right to intrastate access to abortion clinics could meet the second prong must admit that it cannot meet the first.

Under *Glucksberg*, then, federal courts cannot expand *Casey*, at the expense of limiting States' reserved police-power and Tenth Amendment rights: "Having sworn off the habit of venturing beyond Congress's intent, we will not accept [the] invitation to have one last drink." *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001) (declining to expand an existing implied right of action after having prospectively rejected the creation of such rights of action).[9] Similarly here, federal courts cannot expand *Casey* without satisfying *Glucksberg*. Indeed, the case for incrementally

[9] In *Sandoval*, 532 U.S. at 287, the Supreme Court declined to expand the existing implied right of action for Title VI statutory violations to include an implied right of action for Title VI regulatory violations. As with *Glucksberg* and new substantive-due-process rights, the Supreme Court had since rejected its prior practice of reading implied rights into statutes. *Cannon v. Univ. of Chicago*, 441 U.S. 677, 689 (1979). In both cases, the Court's rejection applies *prospectively*, even in areas in which courts previously have acted under the now-rejected policy of judicially creating new rights.

expanding the judicially-recognized right in *Sandoval* was much stronger than the case for recognizing an expanded abortion right in *JWHO* or here. In *Sandoval*, Congress has more than twenty years' notice that the Supreme Court would reject future implied rights, and yet Congress did not amend Title VI. Here, by contrast, the question is not one of Congress amending a statute, and "only a constitutional amendment, or the wisdom of a majority of justices overcoming the strong pull of *stare decisis*, will permit that or similar laws to again take effect." *Abbott II*, 748 F.3d at 594. This Court should use this litigation as an opportunity either to recognize that *JWHO* did not address *Glucksberg* (and thus cannot bind panels of this Court) or, *at least*, to narrow *JWHO* to its facts (namely, situations where an abortion law closes the every single abortion clinic in a state).

C. The District Court Failed to Apply HB2's Severability Clause

The District Court's facial invalidation of aspects of HB2 is inconsistent with HB2's severability clause. *See Whole Women's Health,* 769 F.3d at __, No. 14-50928, slip op. 29-30. In *Abbott II*, this Court recognized the need to consider this "comprehensive and careful severability provision," both because state severability provisions bind federal courts and because "[e]ven when considering facial invalidation of a state statute, the court must preserve the valid scope of the provision to the greatest extent possible." 748 F.3d at 589. Consistent with that holding, this Court granted a further "grace period" for "abortion providers who

applied for admitting privileges within [HB2's] grace period … but are awaiting a response from a hospital." 748 F.3d at 600. As signaled by the motions panel here, the District Court's failure to consider severability is error.

This Court should forcefully reject the District Court's observation that it "plainly cannot be" that a state severability clause could "preclude a facial challenge to the act under existing abortion-regulation jurisprudence" and thereby "purport to act to abrogate the rights guaranteed by the United States Constitution." ROA.2699. The District Court's reasoning suffers from both a *non sequitur* in logic and a lack of jurisdiction.

First, limiting the scope of a challenge to exclude valid applications of HB2 does not abrogate any federal rights. It simply withdraws the ability of plaintiffs with *some* valid claims to obtain an overbroad remedy that would prohibit some conduct that *does not violate any federal rights.* As this Court already has explained in connection with HB2's severability clause, the District Court would have that obligation, even without the severability clause: "Even when considering facial invalidation of a state statute, the court must preserve the valid scope of the [statute] to the greatest extent possible." *Abbott II*, 748 F.3d at 589. Insofar as a federal court's jurisdiction over a non-consenting State extends only to ongoing *violations* of federal law, *Green v. Mansour*, 474 U.S. 64, 66-67 (1985), HB2's severability clause cannot abrogate any federal rights.

Second, there simply is no right to facial challenges, much less to overbroad facial challenges. Instead, "as-applied challenges are the basic building blocks of constitutional adjudication." *Gonzales*, 550 U.S. at 168 (interior and alterations omitted). Where a representative plaintiff's claims are sufficiently common with others' claims, Rule 23 allows class actions, FED. R. CIV. P. 23(a), but defendants have the due-process opportunity to help define an appropriate class. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550-51 (2011). Outside of these general principles of federal litigation, state law does indeed define the contours of civil-rights cases under 42 U.S.C. §1983. *See* 42 U.S.C. §1988(a).[10] Under §1988(a), in the absence of controlling federal law, federal courts apply "the common law, as modified by state constitution or statute," provided that "it is not inconsistent with the Constitution and laws of the United States." *Hickey v. Irving Indep. Sch. Dist.*, 976 F.2d 980, 982 (5th Cir. 1992). As indicated, it is not "inconsistent" with federal law to prohibit overbroad remedies or to require resort to class actions under the Federal rules or the "basic building block" of as-applied challenges.

II. HB2 DOES NOT VIOLATE THE CONSTITUTION

Once this Court rejects how the District Court's standard of review departed from the binding Circuit and Supreme Court precedents discussed in Section I,

[10] The "Title 24" in §1988(a) includes §1983. *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 544 n.7 (1972).

supra, the rejection of the District Court's specific findings clearly follows. Significantly, not even the entire Texas abortion industry challenges HB2 in this litigation. If some elements of the industry can meet HB2's requirements, but these challengers cannot, Texas women deserve HB2's safety protections from the non-challenging elements of that industry. Regulated industries do not – and cannot – have a heckler's (or slacker's) veto over reasonable state regulation, allowing even the laxest operators to invalidate regulations by threatening to close shop and therefore underserve the market for their services.

A. The ASC Requirements Do Not Violate the Constitution

The ASC requirements are intended to save lives, and this Court should not second-guess Texas's exercise of its police power on this public-health issue. *See* Section I.A, *supra*. Significantly, the Gosnell grand jury identified regulating abortion clinics as ASCs as one action that could have saved lives. Gosnell Grand Jury Report, at 215; *see also id.* at 21, 45, 77-78, 129, 139-41, 155. Insofar as federal courts are not "the country's *ex officio* medical board," *Gonzales*, 550 U.S. at 164 (interior quotations omitted), this Court should confirm that here.

1. The ASC Requirements Are Facially Constitutional

For the variety of reasons outlined in Section I, *supra*, the District Court erred in finding HB2 to impose an undue burden under *Casey*. 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. Travel distances up to 150 miles satisfy the undue-burden test, *Abbott II*, 748 F.3d at 597-98, and the District Court's departures from *Abbott II* for McAllen and El Paso impermissibly expanded *Roe-Casey* rights without the required *Glucksberg* analysis. *See* Section II.A.2, *infra*.

2. The ASC Requirements Are Constitutional as Applied to McAllen and El Paso

The District Court erred in finding that HB2's admitting-privilege and ASC requirements, "acting in conjunction," constitute an undue burden on *Roe-Casey* rights. ROA.2698. To make this finding, the District Court erred in all of the ways identified in Section II.A.1, *supra*, for Providers' facial challenge, especially in failing to follow the required *Glucksberg* analysis before expanding substantive *Roe-Casey* rights under the Due Process Clause. *See* Section I.B, *supra*. Nothing in *Casey* or any other relevant or controlling appellate decision holds that federal courts cannot consider convenient, out-of-state access to abortion clinics when determining whether a state action imposes an undue burden on women seeking abortions. Texans in El Paso have easy access to the New Mexico clinic, and the District Court's ignoring that access is reversible error. Similarly, the District Court erred in conflating its "practical concerns" with the burdens allegedly imposed by HB2, ROA.2691, which also would expand *Roe-Casey* rights without

the required *Glucksberg* analysis. *See* note 5, *supra*. This Court already has held that traveling distances up to 150 miles do not constitute an undue burden, based on similar or greater distances' not imposing undue burdens in *Casey*. Nothing about McAllen or El Paso changes the analysis from *Abbott II*.

3. The ASC Requirements Are Constitutional with Respect to Medication Abortions

Apparently reasoning that a surgical center is not required to take medication, the District Court premised its invalidation of the ASC requirements as applied to medication abortions on a balancing test. ROA.2698. As explained in Section I.A.2, *supra*, however, the undue-burden test does not allow that balancing. The public-health concerns with medication abortions include hemorrhaging and septic shock, both of which could have led the Legislature to require stretcher access to patients inside abortion clinics. Lack of stretcher access was one of the factors that the Gosnell grand jury found to have caused death in the Gosnell clinic. Gosnell Grand Jury Report, at 215. For that reason, HB2 satisfies the rational-basis prong of the inquiry, *Lee Optical*, 348 U.S. at 488-89, and thus satisfies the Constitution.

B. The Admitting-Privilege Requirements Do Not Violate the Constitution

This Court should reject the abortion industry's attempt to relitigate HB2's admitting-privilege requirements, both facially and as applied. As with the ASC

requirements, these requirements are reasonably intended to protect the public health, and this Court has no basis on which to reject that goal.

1. The Admitting-Privilege Requirements Are Facially Constitutional

Although *Amici* respectfully submit that Providers' as-applied challenge to HB2's admitting-privilege requirements for women in McAllen and El Paso is an impermissible end run around this Court's *Abbott II* decision upholding HB2 against Providers' prior challenge to those requirements, *see* Section II.D, *infra* (discussing the *res judicata* effect of *Abbott II* here), the District Court did them one better by facially invalidating those requirements as to all women in Texas. Even if the panel here finds the District Court's decision legally defensible, Circuit precedent nonetheless requires narrowing the injunction to the relief that Providers requested. *JWHO,* 760 F.3d at 458. As *Abbott II* held, however, admission-privilege requirements do not violate the undue-burden or rational-basis tests. 748 F.3d at 590-600. The District Court's contrary suggestion ignores this Court's *Abbott II* holding.

2. The Admitting-Privilege Requirements Are Constitutional as Applied to McAllen and El Paso

As explained in Section II.A.2, *supra,* the District Court erred in concluding that HB2's admitting-privilege and ASC requirements "acting in conjunction" constitute an undue burden on *Roe-Casey* rights. ROA.2698. The District Court's

analysis did not follow *Casey* or *Abbott II*, and it violated *Glucksberg*.

C. The Supreme Court's Vacating Part of this Court's Stay Does Not Affect this Court's Analysis of the Issues Presented Here

By order dated October 14, 2014, the Supreme Court vacated the portions of this Court's stay related to the admitting-privilege requirements as applied to the McAllen and El Paso clinics and to the ASC requirements. Because the Court did not explain its reasoning, it is impossible to determine whether the Court's pause related to irreparable harm or to the merits. *See Whole Woman's Health v. Lakey,* No. 14A365 (U.S. Oct. 14, 2014). But even assuming that the Supreme Court's concern related to the merits, *Nken v. Holder*, 556 U.S. 418, 425-26 (2009), this Court can neither "equate[] 'likelihood of success' with 'success'" nor "ignore[] the significant procedural differences between" interim relief and final judgments. *Univ. of Texas v. Camenisch,* 451 U.S. 390, 394 (1981). Simply put, "findings of fact and conclusions of law made by a court granting [or denying interim relief] are not binding … on the merits." *Id.* at 395. As such, the Supreme Court's recent order leaves Circuit precedent unchanged.

D. *Res Judicata* Bars Providers' Claims and Issues

Consistent with the Latin meaning of *res judicata,* this "thing" already has been adjudicated: HB2 is lawful.

In addition to the claim preclusion pressed by Texas, *see* Texas Br. at 18-26, r*es judicata* also bars parties or those in privity with them from re-litigating any

issues actually determined in a prior proceeding. *U.S. v. Shanbaum,* 10 F.3d 305, 310-11 (5th Cir. 1994). *Amici* agree with Texas that *claim preclusion* bars this entire action because Providers could have included these claims in the *Abbott* litigation, but write separately here to address the binding effect of *Abbott II* under *issue preclusion.* "[U]nlike [with] claim preclusion, the subject matter of the later suit need not have any relationship to the subject matter of the prior suit" for issue preclusion to apply, *Shanbaum,* 10 F.3d at 311, instead binding litigants to any "trustworthy determination of a given issue of fact or law" from the prior litigation. *Id.* As indicated in Sections I.A.1-I.A.3, *supra,* the *Abbott II* decision resolved as a matter of Circuit precedent how courts in this Circuit must evaluate claims like the ones that Providers make here. But even if *Abbott II* did not set Circuit precedent, the *Abbott II* standard-of-review holdings would nonetheless be binding, as between these parties, as a matter of issue preclusion.

CONCLUSION

For the foregoing reasons and those argued by Texas, this Court should – once again – reverse the District Court and hold that HB2 is constitutional.

Dated: November 10, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

No. 14-50928, *Whole Woman's Health v. Lakey.*

1. The foregoing brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because the brief contains 7,000 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii) and Circuit Rule 32.2.

2. The foregoing brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

Dated: November 10, 2014

Respectfully submitted,

/s/ Lawrence J. Joseph

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No. 14-50928

In the United States Court of Appeals for the Fifth Circuit

WHOLE WOMAN'S HEALTH; AUSTIN WOMEN'S HEALTH CENTER; KILLEEN WOMEN'S HEALTH CENTER; NOVA HEALTH SYSTEMS, DOING BUSINESS AS REPRODUCTIVE SERVICES; SHERWOOD C. LYNN, JR., M.D., ON BEHALF OF THEMSELVES AND THEIR PATIENTS; PAMELA J. RICHTER, D.O., ON BEHALF OF THEMSELVES AND THEIR PATIENTS; LENDOL L. DAVIS, M.D., ON BEHALF OF THEMSELVES AND THEIR PATIENTS,
Plaintiffs-Appellees / Cross-Appellants,

v.

DAVID LAKEY, M.D., COMMISSIONER OF THE TEXAS DEPARTMENT OF STATE HEALTH SERVICES, IN HIS OFFICIAL CAPACITY; MARI ROBINSON, EXECUTIVE DIRECTOR OF THE TEXAS MEDICAL BOARD, IN HER OFFICIAL CAPACITY,
Defendants-Appellants / Cross-Appellees.

ON APPEAL FROM U.S. DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION, CIVIL NO. 1:14-CV-284, HON. LEE YEAKEL

ADDENDUM TO *AMICI CURIAE* BRIEF OF SIXTY-EIGHT TEXAS STATE LEGISLATORS AND FOUR PUBLIC-INTEREST GROUPS (*AMICI* LISTED ON INSIDE FRONT COVER) IN SUPPORT OF APPELLANTS/CROSS-APPELLEES IN SUPPORT OF REVERSAL

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In the United States Court of Appeals for the Fifth Circuit

LIST OF *AMICI CURIAE:*

TEXAS STATE REPRESENTATIVES TEXAS STATE REPRESENTATIVES CHARLES "DOC" ANDERSON, CECIL BELL, JR., DWAYNE BOHAC, DENNIS BONNEN, GREG BONNEN, M.D., CINDY BURKETT, GIOVANNI CAPRIGLIONE, JOHN E. DAVIS, PAT FALLON, ALLEN FLETCHER, DAN FLYNN, JAMES FRANK, 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, 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 AND TEXAS STATE REPRESENTATIVES-ELECT RODNEY ANDERSON, WAYNE FAIRCLOTH, MARK KEOUGH, BROOKS LANDGRAF, DADE PHELAN, MATT RINALDI, MIKE SCHOFIELD, MATT SHAHEEN, STUART SPITZER, MOLLY S. WHITE, AND JOHN WRAY

TEXAS STATE SENATORS BRIAN BIRDWELL, DONNA CAMPBELL, JOHN CARONA, BRANDON CREIGHTON, BOB DEUELL, CRAIG ESTES, TROY FRASER, KELLY HANCOCK, GLENN HEGAR, JR., EDDIE LUCIO, JR., JANE NELSON, ROBERT NICHOLS, CHARLES PERRY, CHARLES SCHWERTNER, AND LARRY TAYLOR AND TEXAS STATE SENATORS-ELECT BOB HALL AND DON HUFFINES

TEXAS EAGLE FORUM, ASS'N OF AMERICAN PHYSICIANS & SURGEONS, TEXAS RIGHT TO LIFE, AND EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND

IDENTITY AND INTERESTS OF *AMICI CURIAE*

Amici Sen. Hegar (Dist. 18) and Rep. Laubenberg (Dist. 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. Sen. Hegar is the Comptroller-Elect of Public Accounts.

Amici Reps. Anderson (Dist. 56), Bell (Dist. 3), Bohac (Dist. 138), Dennis Bonnen (Dist. 25), Greg Bonnen (Dist. 24), Burkett (Dist. 113), Capriglione (Dist. 98), J. Davis (Dist. 129), Fallon (Dist. 106), Fletcher (Dist. 130), Flynn (Dist. 2), Frank (Dist. 69), Harper-Brown (Dist. 105), Hughes (Dist. 5), Isaac (Dist. 45), P. King (Dist. 61), Klick (Dist. 91), Krause (Dist. 93), Lavender (Dist. 1), Leach (Dist. 67), R. Miller (Dist. 26), Murphy (Dist. 133), Otto (Dist. 18), Parker (Dist. 63), Phillips (Dist. 62), Pitts (Dist. 10), Sanford (Dist. 70), Schaefer (Dist. 6), Simmons (Dist. 65), Simpson (Dist. 7), Smithee (Dist. 86), Springer (Dist. 68), Stickland (Dist. 92), E. Thompson (Dist. 29), Toth (Dist. 15), Scott Turner (Dist. 33), White (Dist. 19), Workman (Dist. 47), and Zedler (Dist. 96) supported HB2 in the Texas House of Representatives. *Amici* Reps.-Elect Anderson (Dist. 105), Keough (Dist. 15), Schofield (Dist. 132), Shaheen (Dist. 66), and Wray (Dist. 10) have been elected to succeed Representatives who supported HB2 in the prior legislative session, and they continue their District's support of HB2. *Amici* Reps.-

Elect Faircloth (Dist. 23), Landgraf (Dist. 81), Phelan (Dist. 21), Rinaldi (Dist. 115), Spitzer (Dist. 4), and White (Dist. 55) support HB2.[‡‡‡]

Amici Sens. Birdwell (Dist. 22), Campbell (Dist. 25), Carona (Dist. 16), Creighton (Dist. 4), Deuell (Dist. 2), Estes (Dist. 30), Fraser (Dist. 24), Hancock (Dist. 9), Lucio (Dist. 27), Nelson (Dist. 12), Nichols (Dist. 3), Schwertner (Dist. 5), and Taylor (Dist. 11) supported HB2 in the Texas Senate. *Amicus* Sen. Perry (Dist. 28) supported HB2 in the Texas House of Representatives in the last legislative session. *Amici* Sens.-Elect Hall (Dist. 2) and Huffines (Dist. 16) have been elected to succeed Senators who supported HB2 in the prior legislative session, and they continue their District's support of HB2.[§§§]

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

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[‡‡‡] Reps. Bell, Bohac, Burkett, Flynn, Harper-Brown, Isaac, King, Krause, Laubenberg, Leach, R. Miller, Paddie, Simmons, Simpson, Smithee, Springer, White, and Workman also joined the "44 Texas Legislators" *amicus* brief filed by Americans United for Life. The Office of the Clerk has advised *Amici* here that legislators may join more than one *amicus* brief filed by other *amicus* parties.

[§§§] Sens. Carona, Deuell, Estes, Hancock, Nichols, Perry, and Taylor also joined the "44 Texas Legislators" *amicus* brief filed by Americans United for Life. *See* note ‡‡‡, *supra.*

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.

CERTIFICATE OF SERVICE

No. 14-50928, *Whole Woman's Health v. Lakey.*

I hereby certify that, on November 10, 2014, 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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