No. 17-51060

In the United States Court of Appeals for the Fifth Circuit

WHOLE WOMAN'S HEALTH, ON BEHALF OF ITSELF, ITS STAFF, PHYSICIANS AND PATIENTS, ET AL.,
Plaintiffs-Appellees,

v.

KEN PAXTON, ATTORNEY GENERAL OF TEXAS, IN HIS OFFICIAL CAPACITY, *ET AL.*,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION,
NO. 1:17-CV-00690-LY, HON. LEE YEAKEL

BRIEF FOR *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF APPELLANTS AND REVERSAL

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CERTIFICATE OF INTERESTED PERSONS

The case number is 17-51060. The case is styled as *Whole Woman's Health v. Paxton.*

The undersigned counsel of record certifies that – in addition to the persons and entities listed in the appellants' Certificate of Interested Persons – 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, with all of the listed persons or entities being either *amici curiae* or counsel for *amici curiae*. The undersigned counsel also certifies that *amicus curiae* Eagle Forum Education & Legal Defense Fund has no parent corporations, and no publicly held corporation owns ten percent or more of it stock. These presentations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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IDENTITY, INTEREST AND AUTHORITY TO FILE

Amicus curiae Eagle Forum Education & Legal Defense Fund ("EFELDF") files this brief with the consent of the parties.[1] Founded in 1981 by Phyllis Schlafly, EFELDF is a nonprofit corporation headquartered in Saint Louis. For more than thirty-five years, EFELDF has defended federalism and supported states' autonomy from federal intrusion in areas – like public health – that are of traditionally local concern. Further, EFELDF has a longstanding interest in protecting unborn life and in adherence to the Constitution as written. Finally, EFELDF consistently has argued for judicial restraint under both Article III and separation-of-powers principles. For all the foregoing reasons, EFELDF has a direct and vital interest in the issues before this Court.

STATEMENT OF THE CASE

Following the Supreme Court's rejection of Texas's House Bill 2 ("HB2") in *Whole Woman's Health v. Hellerstedt*, 136 S.Ct. 2292 (2016), several abortion providers (collectively, "Providers") now challenge Texas's Senate Bill 8 ("SB8") on their own behalf, as well as the behalf of their staffs and patients. Importantly, HB2 concerned ambulatory-surgical-center and admission-privilege requirements to

[1] Pursuant to FED. R. APP. P. 29(c)(5), the undersigned counsel certifies that: counsel for *amicus* authored this brief in whole; no party's counsel authored this brief in any respect; and no person or entity – other than *amicus* and its counsel – contributed monetarily to this brief's preparation or submission.

benefit the abortion patients, whereas SB8 bans dismembering fetuses alive – known as pre-demise dilation and extraction ("D&E") –by requiring that the physician induce pre-dismemberment demise. The District Court found SB8 unconstitutional, and Texas appealed.

Constitutional Background

Although "the several States [historically] 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, 475 (1996) (internal quotations and alterations omitted), the Supreme Court has found in the Fourteenth Amendment 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*, states retain the right to regulate abortions, provided that they do not impose an "undue burden" – which is "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," 505 U.S. at 877 (emphasis added) – on pregnant women's *Roe-Casey* rights. *Id.* at 878. Nothing in *Hellerstedt* changed the *Casey* test regarding the substantiality of the burden.

Within those bounds, 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." *Id.* at 164 (emphasis added). That said, mere legislative findings alone – while viewed deferentially – do not warrant "dispositive weight." *Hellerstedt*, 136 S.Ct. at 2310 (*citing Gonzales*, 550 U.S. at 165). In sum, all that *Hellerstedt* accomplished was to reject the exclusive use of the rational-basis test, without weighing an abortion provision's benefits and burdens.

Factual Background

EFELDF adopts the facts as stated in Texas's brief. *See* Texas Br. 3-8.

SUMMARY OF ARGUMENT

Jurisdictionally, Providers lack the close relationship with their *future* patients required for third-party standing to assert women's *Roe-Casey* rights (Sections I.A-I.B), which means that Providers must proceed under the rational-basis test for their economic injuries, without the elevated scrutiny that courts afford to *Roe-Casey* rights (Section I.D). Although Texas does not press the issue of Providers' lacking

third-party standing to raise their patients' *Roe-Casey* rights, this Court can consider the issue *sua sponte*, even if Texas waived the issue (Section I.C). Before this Court rushes to evaluate a constitutional *Roe-Casey* issue, *amicus* EFELDF respectfully submits that this Court should assure itself that the issue is even presented here.

On the merits, the District Court misapplied *Hellerstedt* by failing to consider Texas's evidence in support of SB8 and by insisting on balancing only benefits to maternal health, without considering Texas's fetal-life rationale for SB8 (Section II.A). SB8's ban of death-by-dismemberment abortions includes both ethics- and health-related benefits to balance against its very minor burdens, thus satisfying a *Hellerstedt*-style balancing, even if that balancing applied here (Section II.B). Under the *Casey* large-fraction test, the portion of impacted women seeking second-trimester abortions affected by the ban would be less than a tenth from digoxin alone, making a facial challenge unsustainable here (Section II.D).

ARGUMENT

I. BEFORE REACHING A CONSTITUTIONAL QUESTION ON *ROE-CASEY* RIGHTS, THIS COURT SHOULD DECIDE WHETHER PROVIDERS CAN ASSERT PATIENTS' *ROE-CASEY* RIGHTS.

Under Article III, federal courts cannot issue advisory opinions and instead must focus on cases or controversies presented by affected parties. *Muskrat v. U.S.*, 219 U.S. 346, 356-57 (1911). Standing doctrine measures the necessary effect on plaintiffs under a tripartite test: cognizable injury to the plaintiffs, causation by the

challenged conduct, and redressable by a court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992). In addition to that constitutional baseline, standing doctrine also includes prudential elements, including the need for those seeking to assert absent third parties' rights to have their own Article III standing and a close relationship with the absent third parties, whom a sufficient "hindrance" keeps from asserting their own rights. *Kowalski v. Tesmer*, 543 U.S. 125, 128-30 (2004). Further, because "standing is not dispensed in gross," *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996), plaintiffs must establish standing for each form of relief that they request.

The constitutional and prudential limits on standing are critical threshold issues that federal judges should consider before displacing the laws enacted by duly elected legislatures:

> All of the doctrines that cluster about Article III – not only standing but mootness, ripeness, political question, and the like – relate in part, and in different though overlapping ways, to … the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government.

Allen v. Wright, 468 U.S. 737, 750 (1984) (internal quotations omitted). These limitations "assume[] particular importance in ensuring that the Federal Judiciary respects the proper – and properly limited – role of the courts in a democratic society." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (citations and internal quotations omitted). Under these limitations, the preliminary injunction

must be vacated.

A. Notwithstanding *Hellerstedt*, Providers lack third-party standing to raise the *Roe-Casey* rights of prospective patients.

As a threshold matter, litigants generally must protect their own rights, not the rights of absent third parties. *Kowalski*, 543 U.S. at 128-30. Here, this Court should hold that Providers lack third-party standing to assert *future* patients' *Roe-Casey* rights and thus must sue under his own rights, which implicate a lower standard of review. Nothing in *Hellerstedt* authorizes abortion doctors to assert the *Roe-Casey* rights of prospective patients.[2] Instead, Supreme Court precedent makes clear that Providers lack standing to assert future patients' *Roe-Casey* rights.

B. Current third-party standing law does not support Providers' right to raise future patients' *Roe-Casey* rights.

While EFELDF does not dispute that physicians have close relationships with their regular patients, the same is simply not true for hypothetical relationships between Providers and their *future* abortion patients. 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

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[2] Although a *Hellerstedt* dissent raised third-party standing, 136 S.Ct. at 2321-23 (Thomas, J., dissenting), the majority was silent on standing. Accordingly, *Hellerstedt* is non-precedential on the issue: "drive-by jurisdictional rulings of this sort … have no precedential effect." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 91 (1998).

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.

Further, the instances where federal courts have found standing for abortion doctors 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. Here, all abortion doctors do not share the same interests as future abortion patients; moreover, Providers do not share the same interests as all abortion doctors, and indeed not all Providers share the same interest as other Providers. Without an identity of interests between Providers and future abortion patients, the doctor-patient relationship is not close enough for third-party standing.[3]

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[3] The abortion industry sometimes cites Richard H. Fallon, Jr., *"As-Applied and Facial Challenges and Third-Party Standing,"* 113 HARV. L. REV. 1321 (2000) to support third-party standing. To the contrary, the law review article recognizes that its exceptions to third-party standing arise in First Amendment "overbreadth" cases and instances when *state-court appeals* reach the U.S. Supreme Court. *Id.* at 1359-

C. Whether or not Texas's failure to raise third-party standing constitutes waiver, this Court can raise the issue *sua sponte*.

As in *Hellerstedt*, Texas has not questioned Providers' third-party standing on appeal. The circuits are split on whether prudential limits on justiciability – such as third-party standing – are waivable, *compare Bd. of Miss. Levee Comm'rs v. EPA*, 674 F.3d 409, 417-18 (5th Cir. 2012) *with Animal Legal Defense Fund, Inc. v. Espy*, 29 F.3d 720, 723 n.2 (D.C. Cir. 1994), and it is not clear that *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S.Ct. 1377, 1386-88 (2014), resolved that split. *Lexmark* concerned the jurisdictional versus prudential status of the zone-of-interest test applied to whether a party had a statutory cause of action, *id.*, but that does not answer the question whether third-party (or *jus tertii*) standing is jurisdictional and thus non-waivable.

Even if waiver applied to *the parties*, however, that would not limit *this Court's* authority to raise prudential limits *sua sponte*: "even in a case raising only prudential concerns, the question … may be considered on a court's own motion." *Nat'l Park Hospitality Ass'n v. DOI*, 538 U.S. 803, 808 (2003). On questions of *judicial* restraint, the parties obviously cannot bind the judiciary: "To the extent that questions … involve the exercise of judicial restraint from unnecessary decision of

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60 & n.196; *City of Chicago v. Morales*, 527 U.S. 41, 55 n.22 (1999). Those circumstances are obviously not present in an abortion case initiated in federal court.

constitutional issues, the Court must determine whether to exercise that restraint and cannot be bound by the wishes of the parties." *Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 138 (1974). *Amicus* EFELDF respectfully submits that this Court both can and should evaluate Providers' right to assert third-party rights.

D. Providers cannot assert *Roe-Casey* rights, even if they have economic standing to challenge SB8's regulation of their business.

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, the 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, [Metropolitan Housing Development Corporation] 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). For example, the Eighth Circuit recently held that economic and aesthetic injuries do not authorize nonresidents to raise the equal-

protection and due-process rights of residents to vote for a trolley district. *Glickert v. Loop Trolley Transp. Dev. Dist.*, 792 F.3d 876, 880-82 (8th Cir. 2015). Like the development corporation in *Arlington Heights* and the nonresidents in *Glickert*, Providers would need to proceed under the rational-basis test (*i.e.*, without the elevated scrutiny afforded to third-party rights holders), if they were to proceed with this litigation. Thus, depending on the resolution of the third-party standing issue, this Court might not need to apply *Hellerstedt* at all. Notwithstanding the waiver issue, *see* Section I.C, *supra*, the doctrine of constitutional avoidance should compel this Court to assure itself that a *Roe-Casey* constitutional issue is present here, before deciding that constitutional issue.

II. SB8 DOES NOT VIOLATE THE CONSTITUTION OR UNLAWFULLY RESTRICT *ROE-CASEY* RIGHTS.

The District Court held that SB8 presents an undue burden on women's Roe-Casey rights, notwithstanding the validity of Texas's asserted interest. That holding is error, based on several threshold errors in applying the controlling precedents of this Court and the U.S. Supreme Court.

A. The District Court fundamentally misunderstood and misapplied *Hellerstedt*.

Before addressing SB8 particularly, it is worth considering the *Hellerstedt* holding and the standards that courts must use to analyze governmental regulation of *Roe-Casey* rights. Simply put, the District Court misunderstood *Hellerstedt*.

Hellerstedt amended the *Casey* undue-burden analysis to include a balancing test when the state claimed that a regulation benefited maternal health, *Hellerstedt*, 136 S.Ct. at 2309, but did not otherwise significantly alter *Roe-Casey* rights. Before applying this standard to the abortion provisions at issue here, this subsection analyzes both the undue-burden test and *Hellerstedt*.

Under *Casey* as modified by *Hellerstedt*, "courts consider the burdens a law imposes on abortion access together with the benefits those laws confer," *Hellerstedt*, 136 S.Ct. at 2309, but only in instances where a state claims a benefit to women's health from its regulation. That minor change did not entitle the District Court to ignore Texas's evidence or shift the burden of proof from Providers to Texas. Instead, *Hellerstedt* merely required that – for laws that aim to protect maternal health – the undue-burden analysis weigh a law's benefits to the affected women versus its burden on their *Roe-Casey* rights. *Hellerstedt*, 136 S.Ct. at 2309. *Hellerstedt* did not narrow that weighing analysis to consider only women's health benefits or switch the burden of proof to governmental defendants.

Before considering Texas's plight in *this litigation*, it is worth considering how fate conspired against Texas in *Hellerstedt*. In *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583 (5th Cir. 2014), the Fifth Circuit rejected the very balancing that *Hellerstedt* later required: "In our circuit, we do not balance the wisdom or effectiveness of a law against the burdens the law imposes."

Whole Woman's Health v. Lakey, 769 F.3d 285, 297 (5th Cir. 2014) (*citing Abbott*, 748 F.3d at 593-94, 597). Indeed, in *Abbott*, it was Texas that submitted evidence "that the admitting-privileges requirement will reduce the delay in treatment and decrease health risk for abortion patients with critical complications" and the abortion industry that "had not provided sufficient evidence that abortion practitioners will likely be unable to comply with the privileges requirement." *Hellerstedt*, 136 S.Ct. at 2301 (interior quotations omitted). In the follow-on *Hellerstedt* litigation over the same Texas law, however, it was Texas that failed to submit undue-burden evidence that *Abbott* had already found irrelevant.[4]

The failure by Texas to submit evidence in *Hellerstedt* – for whatever reason – in defense of House Bill 5 does not have a preclusive effect on Texas in this separate litigation over Senate Bill 8. *Wilson v. Lynaugh*, 878 F.2d 846, 850 n.10 (5th Cir.

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[4] *Hellerstedt* repeatedly found that Texas failed to submit evidence on key issues under the undue-burden test as modified by *Hellerstedt*. 136 S.Ct. at 2311-12 ("We have found nothing in Texas' record evidence that shows that, compared to prior law (which required a "working arrangement" with a doctor with admitting privileges), the new law advanced Texas' legitimate interest in protecting women's health," and "when directly asked at oral argument whether Texas knew of a single instance in which the new requirement would have helped even one woman obtain better treatment, Texas admitted that there was no evidence in the record of such a case"); *id.* at 2313 ("dissent's speculation that perhaps other evidence, not presented at trial or credited by the District Court, might have shown that some clinics closed for unrelated reasons does not provide sufficient ground to disturb the District Court's factual finding on that issue"); *id.* at 2316 (the "upshot is that this record evidence, along with the absence of any evidence to the contrary, provides ample support for the District Court's conclusion").

1989) (*res judicata* requires that "the same cause of action must be involved in both cases"). Due process cannot bind Texas forever to repeat the litigation decisions it made in *Hellerstedt*. Indeed, in extricating the abortion industry from the preclusive effects of *Abbott*, the *Hellerstedt* majority issued a paean to due process. *See* 136 S.Ct. at 2304-09. *Hellerstedt* itself acknowledged the weakness of *stare decisis* for holdings reached by a party's waiver of an issue, 136 S.Ct. at 2320, and "cases cannot be read as foreclosing an argument that they never dealt with." *Waters v. Churchill*, 511 U.S. 661, 678 (1994). Unlike in *Hellerstedt*, the courts here must contend with the evidence that Texas proffers to support its laws.

Significantly, *Hellerstedt* concerned maternal health in the form of abortion facilities' proximity to a hospital and the standards for their physical plant. 136 S.Ct. at 2300 (discussing Texas admitting-privilege and ambulatory-surgical-center laws). Consequently, the only evidentiary issues weighed in *Hellerstedt* concerned women's health, because women's health was the only factual dispute. Accordingly, the Court weighed the health-related pluses and minuses of the two maternal-health provisions at issue in *Hellerstedt* for Texas women's *Roe-Casey* rights.

That narrow focus on health in *Hellerstedt* does not translate over to all other abortion-related litigation under the undue-burden test. Put another way, a child torn apart inside the womb does not care about the facility in which those injuries occur or its proximity to a hospital. The relevant state and public interests – namely, fetal

life – is distinct from an abortion patient's health-related interest in safe access to abortions. Nothing in *Hellerstedt* prohibits courts from including non-health benefits in the *Hellerstedt* balancing, or – alternatively – nothing in *Hellerstedt* requires balancing when the state does not claim to be protecting maternal health. Indeed, removing important state and public interests from the analysis would *sub silentio* have overruled *Casey* and *Gonzales*, *see Casey*, 505 U.S. at 886 ("under the undue burden standard a State is permitted to enact persuasive measures which favor childbirth over abortion, even if those measures do not further a health interest"), which would be preposterous for a decision that took this Court to task for not following *Casey*.

B. Barring death-by-dismemberment abortions does not impose an undue burden on *Roe-Casey* rights.

If this Court evaluates SB8 by weighing the law's various benefits against its burdens on *Roe-Casey* rights, SB8 clearly survives Providers' facial challenge. Thus, Providers have not met their burden of proving the substantiality of the burden that Texas has imposed vis-à-vis the benefits.

Although the district court considered only the ban's health-related benefits to pregnant women, the *Casey* analysis upheld in *Hellerstedt* allows states to press *non-health* interests: "under the undue burden standard a State is permitted to enact persuasive measures which favor childbirth over abortion, *even if those measures do not further a health interest*." *Casey*, 505 U.S. at 886 (emphasis added). As

demonstrated by *Gonzales* with respect to partial-birth abortions, there is ample room within the undue-burden test for restrictions like SB8. But in addition to those ethical concerns, there is also a health-based case for ensuring pre-dismemberment demise, based not only on the pregnant woman's emotional well-being but also on the ease of removal if demise precedes dismemberment.

First, in upholding the federal ban on partial-birth abortions, the Supreme Court has already used the same analysis to uphold banning partial-birth abortions, a procedure that is "indistinguishable" in its brutality from D&E dismemberment abortions. *Stenberg v. Carhart*, 530 U.S. 914, 962 (2000) (Kennedy, J., dissenting); *Gonzales*, 550 U.S. at 182 (Ginsburg, J., dissenting). While that alone should suffice, it bears emphasis that the ban does not *bar* second-trimester abortions: it merely prohibits performing an abortion a certain way, namely, by dismembering the unborn child alive.

Second, in addition to those ethical issues, ensuring pre-dismemberment demise is overwhelmingly preferred by abortion patients, ROA.2613, 4427, 4438, 4504, 4507, with many providers concurring if only for patients' emotional benefit. *Gonzales*, 550 U.S. at 159-60 (describing a "self-evident … struggle with grief more anguished and sorrow more profound" from appreciating, after the fact, the particulars of partial-birth abortion). The health-based benefits of pre-dismemberment demise alone justify SB8.

Finally, if the undue-burden test required balancing for measures like SB8, it would bear emphasis that the burdens imposed are slight. *See* Texas Br. 28-39, 44-45. As such, the burdens do not rise to the substantial level required by *Casey*.

C. Providers have not made the showing required in a facial challenge.

Hellerstedt relied on the *Casey* large-fraction test over the *Salerno* no-set-of-circumstances test to determine the viability of a facial challenge. *Hellerstedt*, 136 S.Ct. at 2320; *compare Casey,* 505 U.S. at 895 *with U.S. v. Salerno,* 481 U.S. 739, 745 (1987). Under that test, the "relevant denominator is those women for whom the provision is an actual rather than an irrelevant restriction," and the facial challenge can proceed where the resulting fraction is sufficiently large. *Hellerstedt*, 136 S.Ct. at 2320 (alterations and internal quotations omitted). Here, the fraction is quite small, less than *one tenth* from digoxin alone.[5] Accordingly, there is no basis for Providers to prevail in a facial challenge.

CONCLUSION

This Court should reverse the District Court and vacate the injunction.

[5] Although Texas correctly challenges the District Court's finding digoxin to fail five to ten percent of the time, *see* Texas Br. at 44, this Court could take the District Court's erroneously large worst-case scenario (ten percent) to establish that SB8 is permissible is facially valid in ninety percent of all instances.

Dated: March 5, 2018

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CERTIFICATE OF COMPLIANCE

No. 17-51060, *Whole Woman's Health v. Paxton.*

1. The foregoing brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because the brief contains 3,820 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: March 5, 2018

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CERTIFICATE REGARDING ELECTRONIC SUBMISSION

No. 17-51060, *Whole Woman's Health v. Paxton.*

I hereby certify that: (1) any required privacy redactions have been made; (2) the electronic submission of this document is an exact copy of the corresponding paper document; and (3) the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

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CERTIFICATE OF SERVICE

No. 17-51060, *Whole Woman's Health v. Paxton.*

I hereby certify that, on March 5, 2018, 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.

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