No. 15-274

In The Supreme Court of the United States

WHOLE WOMAN'S HEALTH; AUSTIN WOMEN'S HEALTH CENTER; KILLEEN WOMEN'S HEALTH CENTER; NOVA HEALTH SYSTEMS D/B/A REPRODUCTIVE SERVICES; SHERWOOD C. LYNN, JR., M.D.; PAMELA J. RICHTER, D.O.; AND LENDOL L. DAVIS, M.D., ON BEHALF OF THEMSELVES AND THEIR PATIENTS,

Petitioners,

v.

KIRK COLE, M.D., COMMISSIONER OF THE TEXAS DEPARTMENT OF STATE HEALTH SERVICES; MARI ROBINSON, EXECUTIVE DIRECTOR OF THE TEXAS MEDICAL BOARD, IN THEIR OFFICIAL CAPACITIES,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF *AMICI CURIAE* 163 MEMBERS OF CONGRESS IN SUPPORT OF WHOLE WOMAN'S HEALTH, ET AL.

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A complete list of the 39 U.S. Senators and the 124 Members of the House of Representatives participating as *Amici* is provided in an appendix to this brief. Among them are:

SEN. HARRY REID *Senate Democratic Leader*	REP. NANCY PELOSI *House Democratic Leader*
SEN. PATTY MURRAY	SEN. RICHARD BLUMENTHAL
Lead Senate Amici on Brief	
REP. DIANA DEGETTE	REP. LOUISE SLAUGHTER
Lead House Amici on Brief	
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SEN. PATRICK LEAHY *Ranking Member*, *Senate Committee on Judiciary*	REP. JOHN CONYERS, JR. *Ranking Member*, *House Committee on Judiciary*

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INTERESTS OF *AMICI CURIAE*[1]

Amici curiae are members of the United States Congress[2] who are bound to support and defend the Constitution, and all share a concern for the continued vitality and advancement of constitutional protections for all of our respective constituents. These constitutional protections include the principles enunciated by this Court encompassed by the right to privacy. Accordingly, we are compelled to affirm and stand up for the principles first recognized in *Roe v. Wade*, 410 U.S. 113 (1973), which were reaffirmed as the law in the United States in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 871 (1992), and the continued integrity of a woman's right to decide whether to continue or terminate a pregnancy without unnecessary governmental interference. As a fundamental right guaranteed by the Constitution, and one that strikes at the heart of ordered liberty and individual autonomy – indeed, one recognized by 63 percent of our country[3] –

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[1] *Amici* affirm that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief and written consent is on file with the Clerk.

[2] A list of the Members of Congress participating as *amici* appears in an appendix to this brief.

[3] Pew Research Center, *Roe v. Wade at 40: Most Oppose Overturning Abortion Decision*, Religion & Public Life (Jan. 16, 2013), http://www.pewforum.org/2013/01/16/roe-v-wade-at-40/.

a woman's right to decide whether to carry a pregnancy to term or to seek critical medical services, including abortion, should be insulated from the shifting political rhetoric and interest groups whose sole purpose is to erode the right to choose to bring a pregnancy to term afforded to women under *Roe*.

Moreover, this Court's interpretation of the Fourteenth Amendment directly affects how Congress and state legislatures draft, consider and enact laws. *Amici* seek to protect the integrity of the Constitution and the legislative process, which is undermined when unnecessary and politically targeted legislation, like the ambulatory surgical center ("ASC") and admitting privileges requirements in Texas House Bill 2 ("H.B. 2"),[4] is passed for pretextual purposes. The lack of credible evidence that such requirements serve any governmental interest and the undue burden imposed on women seeking to exercise their constitutional rights, including increases in costs, delays and health risks to women, demonstrates H.B. 2's pretextual nature. *Amici* are also deeply mindful of the importance of protecting women's healthcare access and constitutional rights, while ensuring against the unnecessary political interference with a woman's right to seek lawful medical care. *Amici* recognize that H.B. 2 and other laws like it serve to disempower the poorest and most vulnerable women. Accordingly, like all legislation that contravenes

[4] House Bill 2, 83rd Leg., 2nd Called Sess. (Tex. 2013); and 25 Tex. Admin. Code §§ 139.40, 139.53 and 139.56.

bedrock principles of the Constitution, this Court must invalidate H.B. 2 and hold that it is unconstitutional.

SUMMARY OF THE ARGUMENT

The Constitution secures to all Americans a right to personal liberty and autonomy over their bodily integrity. This liberty extends to the right of all women in the United States to decide whether to carry a pregnancy to term. These rights are both settled law and broadly supported by the American public, and should not be subjected to the vagaries of shifting political rhetoric.

But, such protections are meaningless without true access to exercising these rights. H.B. 2 imposes a pair of targeted regulations of abortion providers that burden the ability of women to access lawful abortion services. H.B. 2's ASC and admitting privileges requirements create unnecessary and prohibitive obstacles to the practice of abortion in Texas. Under the law, more than 75 percent of the abortion clinics in Texas will be forced to close, causing countless women significantly greater difficulty and cost in attempting to exercise their constitutionally-protected right to decide whether to carry a pregnancy to term. Indeed, for many of these women, H.B. 2 effectively forecloses this right altogether.

Texas is not alone – it is one front in a troubling multistate effort to hinder women's reproductive rights. These states are creating a patchwork of restrictive abortion laws directly attacking settled legal precedent protecting women's rights. This patchwork is the deliberate effort of a centralized campaign to design laws intended to deny access to lawful abortion services under the pretext of protecting women's health. Yet, these laws are wholly unnecessary for safe medical practice and their enforcement will cause undue delays for women seeking lawful abortion services and needlessly increase the medical risk of the procedure. The impact of onerous laws like H.B. 2 could soon be felt nationwide, as success at the state level has emboldened opponents of reproductive rights to introduce similar legislation in Congress and push for other restrictions on women's health care providers.

States have made women's ability to exercise their fundamental rights dependent on where they live by targeting a medical procedure and attempting to regulate it out of existence. This Court should not let these constitutional guarantees be so easily circumvented. We urge this Court to vindicate these rights by invalidating H.B. 2 as an undue burden on the liberty, respect and dignity guaranteed by the Constitution.

ARGUMENT

POINT I

ALL WOMEN HAVE THE RIGHT TO CHOOSE WHETHER TO CARRY A PREGNANCY TO TERM AND TO MAKE THAT DECISION FREE FROM UNNECESSARY STATE INTERFERENCE

A. This Court Recognizes the Constitution's Guarantee of Privacy Protects a Woman's Right to Choose Free From Unnecessary Governmental Interference

All U.S. citizens have the right to personal liberty and autonomy over their bodily integrity. These personal liberties emanate from the Constitution's right to privacy, which is well-established by this Court and a part of the essential rights understood by American society.[5] The Constitution's guarantee of privacy protects certain rights that are "'fundamental' or 'implicit in the concept of ordered liberty'"[6] from "undue" governmental interference.[7]

Over forty years ago, in *Roe*, this Court recognized the right to privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy" prior to viability.[8] This Court in *Roe*

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[5] *Roe v. Wade*, 410 U.S. 113, 152-153 (1973); *see also Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

[6] *Roe*, 410 U.S. at 152 (internal citation omitted).

[7] *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992).

[8] *Roe*, 410 U.S. at 153.

appreciated the physical and psychological toll on women should abortion be banned and recognized it is the responsibility of a woman and her physician, not the state, to decide whether a pre-viability abortion is appropriate under the circumstances.[9] This Court's decision in *Roe* "confirmed once more that the protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person."[10] Moreover, in *Roe*, this Court found the right to terminate a pregnancy followed fully and consistently with other fundamental liberty interests involving exceedingly personal decisions about subjects including "marriage, procreation, contraception, family relationships, and child rearing and education."[11]

In *Casey*, this Court reaffirmed "[t]he woman's right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade*," and that *Roe*'s holding "is a rule of law and a component of liberty we cannot renounce."[12] Indeed, in *Casey* this Court found "[a]n entire generation has come of age free to assume *Roe*'s concept of liberty in defining the capacity of women to act in society, and to make reproductive decisions; no erosion of principle going to liberty or personal autonomy has left *Roe*'s central

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[9] *Id*. at 153.

[10] *Lawrence v. Texas*, 539 U.S. 558, 565 (2003) (Kennedy, J.).

[11] *Roe*, 410 U.S. at 153-154 (internal citation omitted).

[12] *Casey*, 505 U.S. at 871.

holding a doctrinal remnant. . . ."[13] The *Casey* Court made clear *Roe* remains the law of the land: "[a]fter considering the fundamental constitutional questions resolved by *Roe,* principles of institutional integrity, and the rule of *stare decisis*, we are led to conclude this: the essential holding of *Roe v. Wade* should be retained and once again reaffirmed."[14]

Moreover, in *Casey*, this Court again reiterated that certain "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education" "involv[e] the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy" and "are central to the liberty protected by the Fourteenth Amendment."[15] Specifically, the Court reasserted that this right is rooted in the Due Process Clause of the Fourteenth Amendment, "a promise of the Constitution that there is a realm of personal liberty which the government may not enter."[16] In *Casey*, this Court understood that notwithstanding the personal beliefs of its Justices, its "obligation is to define the liberty of all, not to mandate our own moral code."[17]

In *Casey*, this Court also saw fit "to give some real substance to the woman's liberty to determine

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[13] *Id.* at 860.

[14] *Id*. at 845-846.

[15] *Id*. at 851.

[16] *Id.* at 847.

[17] *Id.* at 850.

whether to carry her pregnancy to full term."[18] Thus, this Court held state statutes and regulations which "impos[e] an undue burden on a woman's ability to make this decision" unjustifiably "reach into the heart of the liberty protected by the Due Process Clause."[19] A state statute imposes an undue burden when it "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[20]

In explaining the "undue burden" standard, this Court set forth that "[a] statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it."[21] Furthermore, in describing an unconstitutional statute, this Court in *Casey* established that even a statute premised upon a "valid state interest" which "has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends."[22]

Accordingly, *Casey* reaffirmed the essential holding of *Roe*, and made clear the U.S. would not return to a pre-*Roe* landscape. Furthermore, in *Casey*, this Court established the "undue burden" standard

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[18] *Id*. at 869.

[19] *Id*. at 874.

[20] *Id*. at 877.

[21] *Id*.

[22] *Id*.

governing all state and federal legislation covering the provision of abortion services.[23] The "undue burden" standard prevents legislators from enacting legislation related to abortion that creates substantial obstacles to a woman's access to the full range of reproductive health care, including lawful abortion services.

B. Pretextual State Legislation Like H.B. 2 Creates an Undue Burden Which Erodes Women's Access to Lawful Abortion Services

No one disputes that states may generally adopt public health regulations under their police power.[24] Nor do we contest that certain regulations of abortion which are truly designed to protect public health are in the public's best interest. States have significant, but not unlimited discretion, to regulate health care and establish health care policy on a number of issues. However, state laws may not restrict federal constitutional rights.

This Court must ensure the constitutional rights of all Americans are protected and enforced, and that access to critical medical services is not unduly

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[23] *Id.* at 876.

[24] *See Hillsborough Cty., Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 719 (1985) ("[T]he regulation of health and safety matters is primarily, and historically, a matter of local concern.").

burdened by unnecessary state legislation.[25] Our nation's citizenry looks to this Court to protect against invasions of liberty, and "[t]he identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution."[26] It is the responsibility of this Court to ensure that the rule of law established in *Roe* and reaffirmed in *Casey* is not rendered meaningless by unconstitutional infringements perpetrated by state legislatures, which place an undue burden upon a woman's right to access lawful medical services, including abortion. In short, this Court must ensure that all constitutional rights are not only protected, but also exercisable. As states seek to limit, or entirely eliminate, access to lawful abortion and medical services, a woman's ability to exercise her fundamental rights becomes dependent upon where she lives and the moral views of her state's legislators. One's freedom to exercise a fundamental right must not be tied to the state in which she lives. Court action is required to ensure the right to decide whether and when to have a child and to effectuate that decision does not become state-dependent.

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[25] *See Casey*, 505 U.S. at 878 ("Unnecessary 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.").

[26] *Obergefell v. Hodges*, 135 S.Ct. 2584, 2598 (2015) (Kennedy, J.).

Many states, however, have unjustifiably determined it is within their power to impose an undue burden upon this right and to deprive citizens of their liberty. These unconstitutional state actions deeply affect the course of many women's lives. Under the false pretenses of protecting women's health and safety, these states advance onerous legislation unrelated to women's health, compliance with which is prohibitively expensive for most operating clinics performing abortions. When these clinics can no longer operate without violating state law, they are left with no choice but to shut down. These laws, commonly known as "TRAP laws" (Targeted Regulations of Abortion Providers), purport to advance women's health and safety by regulating who can perform abortions and in what setting, but instead only burden a woman's right to decide whether to terminate a pregnancy. As more abortion clinics are forced to close, women are denied access to their right to choose whether to carry a pregnancy to term. As of December 2015, five states have ASC requirements[27] akin to H.B. 2 and nine states have comparable admitting privileges laws.[28]

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[27] Michigan, Missouri, Pennsylvania, Tennessee and Virginia have ASC laws comparable to H.B. 2. *See* Texas Policy Evaluation Project Fact Sheet, dated July 6, 2015, http://www.utexas.edu/cola/txpep/_files/pdf/ASC%20fact%20sheet%20updated%20July%206.pdf.

[28] Those nine states are Alabama (Ala. Code § 26-23E-4 (2014)); Kansas (30 Kan. Reg. 1473 (Oct. 27, 2011) (§ 28-34-132(b))); Louisiana (La. Rev. Stat. § 40:1299.35.2; 48 La. Admin. Code Pt. I, 4423); Missouri (Mo. Rev. Stat. § 188.080 (2012)); Mississippi (Miss. Code. Ann. § 41-75-1(f) (2013)); North Dakota

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Critically, "[a]n abortion-restricting statute sought to be justified on medical grounds requires not only reason to believe . . . that the medical grounds are valid, but also reason to believe that the restrictions are not disproportionate, in their effect on the right to an abortion, to the medical benefits that the restrictions are believed to confer and so do not impose an 'undue burden' on women seeking abortions."[29]

The supposed safety-related need for these exceedingly stringent laws is refuted by the minute risk of death and complications associated with abortion procedures. The overall risk of death from an abortion is 0.6 per 100,000 procedures (0.0006 percent). The risk of death associated with childbirth, 8.8 per 100,000 live births (0.0088 percent), is 14 times greater than abortion.[30] Further, the risk of major complications following the procedure, defined as those "requiring hospital admission, surgery, or blood transfusion," was only 0.23 percent.[31] Tellingly,

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(N.D. Cent. Code ch. 14-02.1 (2011); Oklahoma (Okla. Stat. Ann. tit. 63, § 1-748(B) (2013)); Tennessee (Tenn. Code Ann. § 39-15-202 (West 2015)) and Wisconsin (Wis. Stat. Ann. § 253.095 (2014)).

[29] *Planned Parenthood of Wisconsin, Inc., et al. v. Schimel*, 806 F.3d 908, 919 (7th Cir. 2015) (Posner, J.) (citations omitted).

[30] Elizabeth Raymond & David Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 Obstetrics & Gynecology 215, 216 (Feb. 2012) (using national data).

[31] Ushma D. Upadhyay, et al., *Incidence of Emergency Department Visits and Complications After Abortion*, 125 Obstetrics & Gynecology 175, 175, 181 (2015) (using 2009-2010 abortion

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other outpatient procedures routinely performed in doctor's offices without legal restrictions have substantially higher risks of complication than those associated with a first-trimester abortion; "the rate of complications resulting in hospitalization from colonoscopies done for screening purposes is four times the rate of complications requiring hospitalization from first-trimester abortions."[32]

In the instant matter, Texas claims requiring abortions to be performed in ASCs would ensure safer procedures, yet it fails to cite any credible or medically accurate evidence to that end. Leading medical organizations including the American College of Obstetricians and Gynecologists, the American Medical Association, the American Academy of Family Physicians and the American Osteopathic Association, documented in their Brief in Support of Petitioners' Petition for a Writ of Certiorari that "[r]equiring that an abortion clinic meet the standards for ASCs is medically unnecessary because of the nature and relative simplicity of the abortion procedures and because the complication rate associated with these procedures is exceptionally low."[33]

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data of women using the fee-for-service California Medicaid program).

[32] *Schimel*, 806 F.3d at 914 (internal citations omitted).

[33] Brief for American College of Obstetricians and Gynecologists, et al. as *Amici Curiae* Supporting Petitioners on Petition for a Writ of Certiorari, *Whole Woman's Health v. Cole* (No. 15-274) (2015), at 9.

Further, "[a]bortion procedures . . . do not require an incision into a woman's body and do not entail exposure of sterile tissue to the external environment, and performance of such procedures does not require a hospital-based or related out-patient setting."[34]

Similar to the ASC requirement, Texas' proposed admitting privileges requirement will not enhance the safety of abortion procedures, because like the Wisconsin statute at issue in *Schimel*, "nothing in the statute requires an abortion doctor who has admitting privileges to care for a patient who has complications from an abortion."[35] Further, a hospital may deny a physician admitting privileges for countless business and political reasons, such as whether the physician is a member of the hospital's faculty, how many surgeries the physician is likely to perform and the number of procedures the physician has completed in the past. Additionally, the admitting privileges requirement would be of little help to women should they face one of the rare complications associated with abortion, as "the average Texas county is now 111 miles from the nearest clinic"[36] and therefore, as

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[34] *Id*. at 9.

[35] *Schimel*, 806 F.3d at 915.

[36] Kim Soffen, *How Texas Could Set National Template for Limiting Abortion Access*, N.Y. Times (Aug. 19, 2015), http://www.nytimes.com/2015/08/20/upshot/how-texas-could-set-national-template-for-limiting-abortion-access.html?_r=0.

they would for any emergent medical condition, "women are likely to seek postabortion care at an [emergency department] near their home."[37] The very limited risks of complication associated with abortion do not warrant the imposition of unnecessarily high restrictions which limit the ability of physicians to provide these critical services. As Judge Posner wrote for the Seventh Circuit in *Schimel*, "[o]pponents of abortion reveal their true objectives when they procure legislation limited to a medical procedure – abortion – that rarely produces a medical emergency. A number of other medical procedures are far more dangerous to the patient than abortion, yet their providers are not required to obtain admitting privileges anywhere, let alone within 30 miles of where the procedure is performed."[38]

Should H.B. 2 be permitted to take effect, it would place an undue burden upon a woman's right to choose whether to carry a pregnancy to term, in clear violation of *Casey* and *Roe*. The number of abortion clinics in Texas would decrease by more than 75 percent, forcing women to travel further distances and incur higher costs to access their right to choose whether to terminate a pregnancy.[39] As the *Casey* Court made clear, "the means chosen by the State to further the interest in potential life must be calculated

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[37] Upadhyay, et al., *supra* note 31, at 176.

[38] *Schimel*, 806 F.3d at 921.

[39] Petition for Writ of Certiorari, *Whole Woman's Health v. Cole* (No. 15-274) (2015), at 33-34.

to inform the woman's free choice, not hinder it."[40] Texas' attempt to impede access to abortion under the guise of concern over women's health and safety must be recognized for what it really is: an undue burden upon a woman's right to decide whether to carry her pregnancy to term.

POINT II

STATES ARE CREATING A PATCHWORK OF ACCESS TO ABORTION FACILITIES AND LAWFUL MEDICAL SERVICES

States across the country are imposing onerous restrictions on the right to choose to terminate a pregnancy, creating a deprivation of rights and liberty for women in certain states. Texas is not alone in enacting pretextual abortion laws like H.B. 2. Today, a woman's ability to exercise her Fourteenth Amendment rights depends heavily on where she lives. Critically, the effect of this legal "patchwork" creates a deprivation of constitutional rights and infringements upon women's personal liberty which this Court must correct. The hurdles women face in three such states – Texas, Mississippi, and Louisiana – epitomize the burdens many others are placing on women's constitutional right to decide whether to carry a pregnancy to term.

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[40] *Casey*, 505 U.S. at 877 (internal citation omitted).

A. Various States Continue to Pass TRAP Legislation Unduly Burdening Women's Access to Abortion Facilities and Lawful Medical Services

Texas

H.B. 2 creates an undue burden on a woman's right to exercise her right to choose whether to carry a pregnancy to term by imposing formidable barriers to physicians providing abortion services in the first place. Since April 2013 (when the legislature began drafting H.B. 2), the number of abortion clinics operating in Texas fell by more than half.[41] For many clinics, complying with the unnecessarily high facility standards imposed by H.B. 2 is prohibitively costly and burdensome. For instance, in order to comply with H.B. 2's ASC requirements, the Whole Woman's Health facility in McAllen would need to build an entirely new facility costing $3.4 million – an unaffordable burden for a clinic serving primarily low-income women.[42] To avoid closing down entirely, facilities would be forced to pass the cost of these upgrades to patients through higher medical fees, increasing the patients' financial burden. And for

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[41] Texas Policy Evaluation Project, *Abortion Wait Times in Texas: The Shrinking Capacity of Facilities and the Potential Impact of Closing Non-ASC Clinics*, 1 (Oct. 5, 2015), http://www.utexas.edu/cola/orgs/txpep (hereinafter *Abortion Wait Times*).

[42] *See Whole Woman's Health v. Cole*, 790 F.3d 563, 595 n.43 (5th Cir.), *modified*, 790 F.3d 598 (5th Cir. 2015), *cert. granted*, No. 15-274, 2015 WL 5176368 (U.S. Nov. 13, 2015).

physicians, complying with the admitting privileges requirement is highly difficult, as hospitals frequently refuse to grant such privileges in the face of public pressure from anti-abortion activists or from business interests, making them very difficult to acquire.[43] H.B. 2's admitting privileges provision thus adds to the difficulty abortion clinics encounter hiring physicians in the face of public opposition and threats.[44]

The impact of these two restrictions makes it significantly harder to obtain a legal abortion in Texas. Since H.B. 2's admitting privileges requirement took effect, women are forced to wait more than 20 days or even longer for an abortion in some parts of Texas.[45] This waiting period will grow even longer if the law's ASC requirements are allowed to take effect.[46]

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[43] *See Whole Woman's Health v. Lakey*, 46 F. Supp. 3d 673, 685 (W.D. Tex. 2014), *aff'd in part, vacated in part*, *rev'd in part sub nom*. *Whole Woman's Health v. Cole*, 790 F.3d 563 (5th Cir. 2015), *modified*, 790 F.3d 598 (5th Cir. 2015), *cert. granted*, No. 15-274, 2015 WL 5176368 (U.S. Nov. 13, 2015) (finding "doctors in Texas have been denied privileges for reasons not related to clinical competency").

[44] *See Schimel*, 806 F.3d at 917 (finding clinics impeded from hiring doctors by "vilification, threats, and sometimes violence directed against abortion clinics and their personnel. . . .").

[45] *Abortion Wait Times*, *supra* note 41, at 2; *see also Schimel*, 803 F.3d at 918 (Posner, J.) (Wisconsin admitting privilege requirement causing eight to ten week delay in obtaining an abortion imposed an undue burden).

[46] *Abortion Wait Times*, *supra* note 41, at 6.

The increased waiting times caused by H.B. 2 will delay first-trimester abortions into the second trimester, increasing the costs and health risks faced by women seeking to exercise their constitutional rights. The cost of an abortion increases substantially with each additional week in the second trimester, exacerbating the barriers caused by state efforts to limit the allowed window for accessing legal abortion services. For example, while the median cost of a surgical abortion at 10 weeks gestation is $495, a surgical abortion at 20 weeks generally costs at least $1,350.[47] This later procedure involves greater skill and resources, typically taking two or more days to complete.[48] Women who face long travel due to clinic closures are thus forced to incur additional costs from transportation, missed work, child care and overnight expenses. Those who cannot afford these out-of-pocket costs must forego a constitutionally-protected medical procedure, may be forced to carry an unwanted pregnancy to term, and face additional economic hardship.

The additional costs imposed on women by H.B. 2 are compounded by unnecessary health risks. While abortion (even in the second trimester) is a very safe procedure, the risk of complications increases by

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[47] *See* Jenna Jerman & Rachel K. Jones, *Secondary Measures of Access to Abortion Services in the United States, 2011 and 2012: Gestational Age Limits, Cost, and Harassment*, 24 Women's Health Issues 419, 419 (2014).

[48] *See id.*

nearly 50 percent from the first trimester to the second.[49] Mortality risk increases as abortion is delayed later into pregnancy, rising by 38 percent every week after eight weeks of gestation.[50] Therefore, by forcing women in Dallas-Fort Worth to wait nearly three additional weeks for an abortion despite its extremely low rate of complications, H.B. 2's provider regulations impose an undue burden by substantially increasing the risks of the procedure for these women.[51]

Moreover, the longer wait times caused by H.B. 2 increase the likelihood many Texas women will run out of time to obtain a lawful abortion. Texas prohibits all abortions after 20 weeks.[52] By forcing women

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[49] *Compare* Tracy A. Weitz, et al., *Safety of Aspiration Abortion Performed by Nurse Practitioners, Certified Nurse Midwives, and Physician Assistants Under a California Legal Waiver*, 103 Am. J. Pub. Health 454, 457-58 (Mar. 2013) (finding only 0.87 percent of first-trimester aspiration abortions involve complications, 96 percent of which were minor), *with* Anna C. Frick, et al., *Effect of Prior Cesarean Delivery on Risk of Second-Trimester Surgical Abortion Complications*, 115 Obstetrics & Gynecology 760, 763 (2010) (finding 1.3 percent of second trimester abortions involve complications).

[50] Linda A. Bartlett, et al., *Risk Factors for Legal Induced Abortion-Related Mortality in the United States*, 103 Obstetrics & Gynecology 729, 729 (Apr. 2004).

[51] *Schimel*, 806 F.3d at 920 (Posner, J.) (Wisconsin TRAP law imposed an undue burden in part by increasing waiting times which would "compel some women to defer abortion to the second trimester of their pregnancy – which the studies we cited earlier find to be riskier than a first-trimester abortion.").

[52] Tex. Health & Safety Code Ann. § 171.044.

to wait 20 days or more to undergo the procedure, H.B. 2 works in concert with Texas's 20-week ban to tightly narrow the window of time women can lawfully obtain abortion services. Given the 75 percent reduction in the number of abortion clinics in Texas because of H.B. 2, the 20-week limitation clock will undoubtedly run out on many women who sought care weeks earlier but had to wait long periods of time because of clinic closures created by H.B. 2.

The pretextual justification for H.B. 2 given by Texas lawmakers is to promote women's health and medical safety. However, this purported interest was belied by the theatrics of the bill's supporters during floor debate. Rather than identify actual evidence supporting improved medical outcomes or care, the bill's sponsor, state Rep. Jodie Laubenberg, began the House debate by placing a pair of baby shoes on the dais to "represent aborted babies who can't speak out against the procedure."[53] State Rep. Jason Villalba displayed a sonogram image of his child in utero, declaring, "I will fight, and I will fight, and I will fight to protect my baby."[54] These histrionics not only undermine the credibility of the claim that H.B. 2 promotes women's health and safety, but subvert the integrity of the legislative process.

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[53] David Saleh Rauf & Kolten Parker, et al., *Abortion bill gets initial OK in House*, Houston Chron. (July 9, 2013), http://www.houstonchronicle.com/news/houston-texas/houston/article/Abortion-bill-gets-initial-OK-in-House-4656088.php.

[54] *See id.*

When the Texas Senate passed its version of H.B. 2 (known as S.B. 5), Texas Lieutenant Governor David Dewhurst revealed the true motivations behind the law by celebrating on Twitter with a map of the statewide clinic closures resulting from the bill.[55] The map was captioned, "If SB5 passes, it would essentially ban abortion statewide," to which Dewhurst posted: "We fought to pass SB5 thru the Senate last night, [and] this is why!"[56]

By burdening providers, clinics and patients with unnecessarily onerous laws, the Texas legislature makes it exceedingly difficult to obtain and perform abortions in the state. These laws shutter abortion clinics and impose greater costs and danger on women seeking lawful medical care. These laws were passed to deliberately interfere with Texas women's fundamental constitutional rights.

Mississippi

Restrictive laws enacted by state legislators in Mississippi have left women in the state with just one clinic (in Jackson) where they can obtain lawful abortion services. Mississippi requires abortion clinics to comply with facility standards comparable

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[55] @DavidHDewhurst, Twitter.com, June 19, 2013, https://twitter.com/DavidHDewhurst/status/347363442497302528/photo/1 (last visited Dec. 6, 2015).

[56] *Id.*

to those for ASCs.[57] In 2012, legislators targeted the sole remaining abortion clinic by passing a new law requiring physicians performing abortions to hold admitting privileges at a local hospital.[58] While this bill was again purportedly portrayed to protect women's health, the bill's author, state Rep. Sam Mims, said, "The intent of the legislation is to cause fewer abortions. So if the clinic in Jackson had to shut down, then I think it is a positive day for the unborn."[59] Governor Phil Bryant openly admitted the purpose of the new law was to "try to end abortion in Mississippi."[60] Governor Bryant further declared that when it comes to the last abortion clinic, his "goal, of course, is to shut it down."[61] Mississippi's two physicians providing abortions – both of whom fly into Mississippi from out of state – found it impossible to comply with the new law, as local hospitals refused to

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[57] *See* Guttmacher Institute, *State Policies in Brief*, Dec. 1, 2015, http://www.guttmacher.org/statecenter/spibs/spib_TRAP.pdf.

[58] *See* Miss. Code. Ann. § 41-75-1(f).

[59] MJ Lee, *Bill dooms only Miss. abortion clinic*, Politico (Apr. 5, 2012), http://www.politico.com/story/2012/04/bill-dooms-only-miss-abortion-clinic-074871.

[60] *See* Irin Carmon, *Mississippi's last abortion clinic fights to stay open – and out of SCOTUS*, MSNBC.com (Apr. 22, 2015), http://www.msnbc.com/msnbc/mississippis-last-abortion-clinic-fights-stay-open-and-out-scotus.

[61] Associated Press, *Legal woes for Mississippi's only abortion clinic*, USA Today (Jan. 11, 2013), http://www.usatoday.com/story/news/nation/2013/01/11/abortion-mississippi-women-clinic/1828289/.

grant admitting privileges.[62] Because this law would have shuttered Mississippi's last abortion clinic, the Fifth Circuit enjoined the law from taking effect, finding the plaintiff "demonstrated a substantial likelihood of success on its claim that [the] admission-privileges requirement imposes an undue burden on a woman's right to choose an abortion in Mississippi."[63]

Louisiana

Louisiana's restrictions on abortion similarly impose significant barriers for a woman to exercise her constitutional rights. These restrictions have left Louisiana with only six doctors at five clinics performing abortions.[64]

Louisiana imposes a variety of stringent facilities requirements on its abortion clinics, including requiring that clinics comply with standards comparable to those for ASCs.[65] In 2014, the legislature passed into law, and the Governor signed, a requirement that

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[62] *See* Laura Bassett, *Mississippi's Only Abortion Clinic Fights To Stay Open*, Huffington Post (Nov. 28, 2012), http://www.huffingtonpost.com/2012/11/28/mississippi-abortion-clinic_n_2205153.html?utm_hp_ref=tw.

[63] *See Jackson Women's Health Organization v. Currier*, 760 F.3d 448, 459 (5th Cir. 2014).

[64] Janet McConnaughey, *Testimony: Abortion clinic likely to close if law enforced*, Shreveport Times (June 22, 2015), http://www.shreveporttimes.com/story/news/local/louisiana/2015/06/22/trial-challenging-louisianas-abortion-law-opens/29108551/.

[65] *See* Guttmacher Institute, *supra* note 57.

physicians performing abortions have admitting privileges at a local hospital. Physicians face difficulty complying with such a requirement, since many Louisiana hospitals require doctors to serve on their faculty before granting admitting privileges.[66] Others require doctors to commit to a minimum number of patient admissions – an unfeasible requirement given how rarely physicians need to refer patients to hospitals due to abortion complications.[67] Moreover, only one physician who performs abortions in the entire state has admitting privileges.[68] In 2014, a federal district court temporarily enjoined the law's admitting privileges requirement.[69]

B. The Proliferation of Laws Like the Provisions of H.B. 2 Result from a Centralized Campaign to Overturn *Roe v. Wade*

The proliferation of restrictive abortion laws like H.B. 2 across the states in recent years is no coincidence. These laws reflect a concerted effort to undermine this Court's holdings in *Roe* and *Casey* by securing the enactment of pretextual health and

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[66] *See* Julie O'Donoghue, *The fight over Louisiana's new abortion law: 4 interesting facts*, New Orleans Times-Picayune (Aug. 28, 2014), http://www.nola.com/politics/index.ssf/2014/08/louisiana_abortion_bill.html.

[67] *See id.*

[68] *See id.*

[69] *See June Med. Servs., LLC v. Caldwell*, No. 3:14-CV-00525-JWD, 2014 WL 4296679 (M.D. La. Aug. 31, 2014).

safety laws that chip away at women's constitutional rights. Their ultimate goal, however, is not to promote women's health and safety, but to achieve the reversal of *Roe*,[70] which this Court reaffirmed was settled law in *Casey*.[71]

This campaign is led by organizations like Americans United for Life ("AUL"), a Washington, D.C.-based anti-abortion interest organization.[72] AUL aims to subvert *Roe* through a "deliberate, legal strategy"[73] designed to pass new laws restricting reproductive rights and to "prevent[ ] the passage and implementation of laws permitting or expanding

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[70] *See Abortion*, AUL.org, http://www.aul.org/issue/abortion/ (last visited Dec. 18, 2015) (AUL is working toward "*Roe*'s ultimate reversal.").

[71] *See Casey*, 505 U.S. at 869 (reaffirming "the essence of *Roe*'s original decision").

[72] *See Abortion*, AUL.org, http://www.aul.org/issue/abortion/ (last visited Dec. 18, 2015) (AUL is "saving the lives of children in the womb through a systematic and strategic state-by-state effort, taking tactical steps that provide incremental gains today while laying the groundwork for much larger gains in the future. . . ."). Other organizations, including the National Right to Life's State Legislative Center and the Susan B. Anthony List, also promote legislation curtailing women's access to abortion. *See State Legislative Center*, NRLC.org, http://www.nrlc.org/statelegislation/ (last visited Dec. 18, 2015); *Our Legislative Priorities*, SBA-LIST.org, https://www.sba-list.org/legislative-priorities (last visited Dec. 18, 2015).

[73] Americans United for Life, *Annual Report 2013-14*, at 3, http://aul.org/wp-content/uploads/2014/08/aul-annual-report-2013-web.pdf.

abortion. . . ."[74] AUL is the architect behind many TRAP laws, which have no real purpose other than to increase the hurdles for abortion providers and to make it more expensive and unnecessarily burdensome for them to provide lawful abortion services.[75]

Since 2006, AUL has published an annual compendium of its model TRAP laws in a legislative playbook called *Defending Life*.[76] Each year, AUL distributes this playbook to lawmakers across the country, providing states with a "how-to guide" for restricting women's access to the full range of legal reproductive care, including abortion. The 2015 edition of *Defending Life* contained more than 20 separate pieces of model TRAP legislation, including laws like the ones here that impose stringent facility requirements on abortion clinics and mandate that physicians who perform abortions obtain admitting privileges at local hospitals.[77] AUL's publication of *Defending Life* corresponds with a surge in the number

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[74] *Issues*, AUL.org, http://www.aul.org/issue/ (last visited Dec. 4, 2015).

[75] *See* Rachel Benson Gold & Elizabeth Nash, *TRAP Laws Gain Political Traction While Abortion Clinics – and the Women They Serve – Pay the Price*, Guttmacher Pol'y Rev. (2013), https://www.guttmacher.org/pubs/gpr/16/2/gpr160207.html.

[76] *See* Americans United for Life, *Defending Life 2015*, at 276, http://aul.org/downloads/defending-life-2015/AUL_Defending_Life_2015.pdf.

[77] *See generally id.*

of restrictive abortion laws being passed by the states.[78]

In 2013, AUL began a concentrated effort to enact new TRAP laws under the false pretense of promoting women's health. AUL freely admitted that one of the primary "achieve[ments]" of a successful legislative effort would be to prevent abortions by shuttering abortion clinics entirely, noting that "babies will be saved from abortion, as *abortion clinics often choose to close their doors* rather than bring clinics in line with necessary health regulations."[79]

AUL's TRAP law playbook has been particularly influential in Texas. In 2010, Texas Governor Rick Perry praised *Defending Life* for supplying "ammunition in a fight that is far from over."[80] Anti-abortion legislators in Texas then drew on the model legislation in *Defending Life* to craft the proposals that became H.B. 2. AUL reported that H.B. 2's ASC

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[78] *See* Heather D. Boonstra & Elizabeth Nash, *A Surge of State Abortion Restrictions Puts Providers – and the Women They Serve – in the Crosshairs*, Guttmacher Pol'y Rev. (2013), http://www.guttmacher.org/pubs/gpr/17/1/gpr170109.html.

[79] Americans United for Life, *Annual Report 2013-14*, at 13, http://aul.org/wp-content/uploads/2014/08/aul-annual-report-2013-web.pdf (emphasis added).

[80] Americans United for Life, *Defending Life 2010*, at 5, *available at* http://www.aul.org/downloads/defending-life-2010.pdf.

provision, in particular, was "inspired by AUL's Abortion Patient Enhanced Safety Act."[81]

Following the passage of H.B. 2, Governor Perry wrote the introduction to AUL's *Defending Life 2014*, urging policymakers in other states to draw from the AUL playbook. "AUL plays a key role in developing and promoting legislation in all 50 states," Governor Perry wrote. "What we accomplished here in Texas last year can be done anywhere. There are many ideas and suggestions contained in the pages of this volume to help you do just that."[82]

Over the course of its initiative in 2013 and 2014, AUL was highly effective at securing passage of new TRAP laws. Specifically:

- Seven states – Alabama, North Dakota, Wisconsin, Texas, Oklahoma, Indiana and Louisiana – adopted laws requiring physicians performing abortions to obtain admitting privileges at local hospitals.[83]

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[81] Americans United for Life & AUL Action, *2013 State Legislative Report*, at 2, *available at* http://www.aul.org/wp-content/uploads/2013/09/2013-State-Session-Report.pdf ("2013 AUL Legislative Report").

[82] Americans United for Life, *Defending Life 2014*, at 14, http://aul.org/downloads/defending_life_2014.pdf.

[83] *See* 2013 AUL Legislative Report; Americans United for Life & AUL Action, *2014 State Legislative Report*, http://www.aul.org/wp-content/uploads/2014/07/2014-State-Session-Report.pdf ("2014 AUL Legislative Report").

- Three states – Alabama, Texas and Oklahoma – adopted laws imposing more stringent facilities regulations on abortion clinics.[84]

In total, five states now force abortion clinics to meet ASC standards comparable to H.B. 2's, and nine states require abortion clinicians to have comparable admitting privileges.[85]

AUL is handing the states the "ammunition" in a national attack on women's settled constitutional rights. These attacks are designed to create significant obstacles to prevent women from seeking lawful medical care and to return to a pre-*Roe* landscape. Their agenda-driven effort jeopardizes the health of countless women and imperils them from freely exercising their constitutional rights without undue burden.

In sum, states across the country are enacting a patchwork of laws that unduly burden women's right to decide whether to carry a pregnancy to term under the false pretense of protecting women's health. In these states, women are subjected to a pre-*Roe* reality this Court long ago rejected, facing prohibitive state-imposed hurdles to exercising their constitutional rights to bodily autonomy and dignity. This Court should protect these fundamental rights from state

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[84] *See* 2013 AUL Legislative Report; 2014 AUL Legislative Report.

[85] *See supra* notes 27 & 28.

circumvention and invalidate wholly pretextual laws like H.B. 2.

C. H.B. 2's ASC and Admitting Privileges Requirements have Already Impacted Access to Lawful Abortion Services Within Texas

H.B. 2 has already had a dramatic impact within Texas and placed an undue burden on many women by limiting their access to lawful medical care and abortion services. Since April 2013, the number of facilities providing abortion care in the state has dropped from 41 to fewer than 20.[86] In Dallas, one of Texas' largest metropolitan areas, a clinic that performed 350-500 procedures per month closed in June 2015, leaving only two open facilities in Dallas and increasing wait time to as much as 20 days.[87] Women now have to drive longer, and often prohibitive, distances to have an abortion. Already, the number of women of reproductive age in Texas living more than 50 miles from a clinic providing abortion services in Texas increased from 816,000 in May 2013 to 1,680,000 by April 2014. If the ASC requirement is

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[86] *Whole Woman's Health v. Lakey*, 46 F. Supp. 3d 673, 681 (W.D. Tex. 2014), *aff'd in part, vacated in part, rev'd in part sub nom*. *Whole Woman's Health v. Cole*, 790 F.3d 563 (5th Cir. 2015), *modified*, 790 F.3d 598 (5th Cir. 2015), *cert. granted*, No. 15-274, 2015 WL 5176368 (U.S. Nov. 13, 2015).

[87] *Abortion Wait Times*, *supra* note 41, at 2 (updated Nov. 25, 2015).

allowed to go into effect, the number of impacted women will increase to 1,960,000.[88] Moreover, the number of women of reproductive age in Texas living more than 100 miles from a clinic providing abortions in Texas increased from 417,000 in May 2013 to 1,020,000 by April 2014; if the ASC requirement goes into effect the number of women impacted will increase to 1,335,000.[89]

Unfortunately, both history and surveys of current trends demonstrate that without access to local clinics and safe abortion providers, many Texas women are likely to try to end their pregnancies on their own, sometimes using dangerous methods. Based on surveys of women aged 18 to 49 from before H.B. 2 went into effect, one study estimates that between 100,000 to 240,000 women have tried to end a pregnancy on their own, using methods including herbs, getting hit or punched in the abdomen, using alcohol or illicit drugs, or taking hormonal pills.[90]

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[88] Texas Policy Evaluation Project, *Access to Abortion Care in the Wake of H.B. 2* (July 1, 2014), http://www.utexas.edu/cola/txpep/_files/pdf/AbortionAccessafterH.B.2.pdf. The numbers cited assume Whole Woman's Health McAllen will not be providing abortion services.

[89] *Id.* The number of women of reproductive age in Texas living more than 200 miles from a clinic providing abortions in Texas increased from 10,000 in May 2013 to 290,000 by April 2014. If the ASC requirement goes into effect this number will increase to 752,000.

[90] D. Grossman, et al., *Knowledge, opinion and experience related to abortion self-induction in Texas, Texas Policy Evaluation*

(Continued on following page)

With further closing of clinics because of H.B. 2, the number of dangerous self-inducements will only escalate with the impact to women meaning less safe and more restrictive medical care contra to H.B. 2's stated "intent."[91]

Moreover, low-income women of Texas' rural Rio Grande Valley were disproportionately impacted by H.B. 2 when Whole Woman's Health was forced to close. Many spoke out about their experiences at a public community hearing on March 9, 2015 in McAllen, Texas. When Whole Woman's Health McAllen clinic closed, some women were forced to drive four hours away to San Antonio to receive abortion care.[92] Some women were unable to find a clinic to help inform them of their choices, even when they recognized their pregnancies early enough to be eligible for care.[93] One of the women who testified acknowledged the reality that without a viable, safe option for an abortion, many women in the Rio Grande Valley turn to self-inducement: "[M]ost women do not stop seeking an abortion if they have decided to get one, and instead they turn to self-administered methods that

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Project (Nov. 17, 2015), at 2, https://utexas.app.box.com/KOESelfInductionResearchBrief.

[91] World Health Organization, *Preventing Unsafe Abortion* (July 2015), *available at* http://www.who.int/mediacentre/factsheets/fs388/en/ (finding that in countries with illegal abortions, unsafe abortion is a leading cause of maternal death).

[92] Nuestro Texas, *¡Somos Poderosas!: A Human Rights Hearing in the Rio Grande Valley* 22 (2015).

[93] *Id.* at 23.

can be unsafe and ineffective, such as herbs, drinks, or physical injury. . . ."[94] Women in the Rio Grande are suffering not only from lack of abortion services, but from lack of women's health services generally, including access to primary health care and contraception.[95] Within Texas, it is the poor, rural populations that have been most gravely injured by H.B. 2, populations that governments should take greater care to protect.[96]

POINT III

THIS COURT MUST STRIKE DOWN PRETEXTUAL LAWS LIKE H.B. 2 BEFORE THEY ARE IMPLEMENTED NATIONWIDE

The impact of H.B. 2 on the state of Texas has been dire, placing an undue burden on Texas women seeking to exercise their lawful constitutional right to

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[94] *Id.*

[95] Texas Policy Evaluation Project, *How Abortion Restrictions Would Impact Five Areas of Texas* 3 (2013) (women's access to contraception in the Lower Rio Grande Valley is "extremely limited" because of the location of providers and the level of funding will not reach the large number of women in need of low cost services); *see also* Texas Policy Evaluation Project, *Family Planning and Primary Health Care Programs in Texas: How Well Are They Working?* (Mar. 12, 2015), http://www.utexas.edu/cola/txpep/_files/pdf/FamilyPlanningandPrimaryHealthCareTexas.pdf.

[96] Women in the Lower Rio Grande Valley have among the highest rates of poverty in Texas. Nuestro Texas, *A Reproductive Justice Agenda for Latinas* 6 (2015).

seek medical care. Laws similar to H.B. 2, however, have proliferated across a number of states and have even now made their way to Congress.

It is no secret that federal lawmakers in Congress, in their effort to defy *Roe* and *Casey*, seek to enact similar legislation on a national level. As of the date of this brief, S.78, the "Pregnant Women Health and Safety Act," introduced by Senator David Vitter, is pending in Congress.[97] The proposed law requires doctors who perform an abortion to have admitting privileges at a hospital "to which the physician can travel in one hour or less."[98] Furthermore, the proposed law requires any abortion clinic receiving any federal funds or assistance "be in compliance with the requirements existing on the date of enactment of this Act for ambulatory surgery centers under title XVIII of the Social Security Act."[99] Earlier versions of this same bill were introduced in 2008, 2009, 2011 and 2013, a strong indication that even if this bill is not enacted, more like it will soon follow. In the 114th Congress alone, there have been 40 legislative attacks seeking to undermine a woman's constitutionally protected right to decide to terminate a pregnancy, and the House and Senate have voted a total of seventeen times on such legislation. For instance, H.R. 36, the "Pain-Capable Unborn Child Protection

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[97] S. 78, 114th Cong. (2015).

[98] *Id*. at § 2(c)(1).

[99] *Id.* at § 3(a)(2).

Act," introduced by Sen. Lindsey Graham and Rep. Trent Franks, was recently rejected by the Senate in September 2015 after being passed by the House by a vote of 242-182. This proposed law would have imposed a ban on any abortion after 20 weeks – similar to the 20-week ban currently in Texas – and which has been found to be unconstitutional by other courts.[100]

A. With States and Congressional Legislators Seeking to Enact Laws Similar to H.B. 2, Now is the Time for the Supreme Court to Rule Against their Constitutionality

At the time of writing, 26 States have TRAP laws or policies in effect – laws that regulate abortion providers and go beyond what is necessary to protect women's health and safety.[101] If H.B. 2 is upheld and the Court effectively endorses such pretextual laws undercutting *Roe* and *Casey*, women nationwide will be denied the exercise of their right to decide to terminate a pregnancy.[102]

As noted earlier, the more TRAP laws are allowed to go into effect, the more clinics will close,

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[100] H.R. 36, 114th Cong. (2015).

[101] H. Boonstra & E. Nash, *supra* note 78.

[102] Already, the majority of women now live in states that restrict abortion rights in multiple ways; between 2000 and 2013, the proportion of women living in restrictive states almost doubled from 31 percent to 56 percent. *See id*.

leaving women without access to safe abortions. The United States already has a shortage of clinics available to women seeking lawful abortion services. In 2011, 89 percent of counties in the United States had no clinic (abortion or non-specialized), and 38 percent of women aged 15 to 44 lived in those counties.[103] And the closure of even one facility has the potential to affect several hundreds, or even thousands of women.[104] Left without the right guaranteed to them by the Constitution and reinforced by the Court in *Casey*, many women will be left with the Hobson's choice between carrying an unwanted and life-altering pregnancy to term or attempting some type of medically unsound self-inducement technique described above. Whereas an early abortion carries very little risk of complication,[105] childbirth is 14 times more likely than abortion to result in death, and the complication rate associated with abortion is much lower than that found in childbirth.[106]

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[103] Guttmacher Institute, *State Facts About Abortion: Texas State Center* (2014), http://www.guttmacher.org/pubs/sfaa/texas.html.

[104] *See, e.g., Schimel*, 806 F.3d at 917 (finding closure of the Affiliated Medical Services clinic would have severe repercussions, and the remaining clinics would not be able to absorb the demand for abortion clinics without a vast expansion).

[105] Tracy A. Weitz, et al., *supra* note 49, at 458-59.

[106] Elizabeth Raymond & David Grimes, *supra* note 30, at 217; Upadhyay, PhD, MPH, et al., *supra* note 31, at 175; *see also Schimel*, 806 F.3d at 918.

Other women will be forced to wait until the second trimester for an abortion, either because the remaining clinics will be overloaded with patients,[107] or because of the great travel distances between clinics. As stated above, while second trimester abortions are safe, there is an increased risk associated with abortions after the first trimester.[108] Given that the "overwhelming majority of second-trimester patients would have preferred to have had their abortion earlier," it is particularly egregious to subject them to increased dangers beyond their control.[109] Factors that go into the decision to delay abortions until the second trimester include cost and access barriers, and "[i]n part because of their increased vulnerability to these barriers, low-income women and women of color are more likely than are other women to have second trimester abortions."[110] The increased barriers created by H.B. 2-type TRAP laws will only increase the number of second trimester abortions, and increasingly target the most vulnerable women in our nation.

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[107] *Abortion Wait Times*, *supra* note 41, at 1.

[108] Bartlett, et al., *supra* note 50, at 729.

[109] Rachel K. Jones & Lawrence B. Finer, *Who has second-trimester abortions in the United States?* 85 Guttmacher Institute, Contraception 1, 6 (June 2012) (author version).

[110] Bonnie Scott Jones & Tracy A. Weitz, *Legal Barriers to Second-Trimester Abortion Provision and Public Health Consequences*, 99 Am. J. of Pub. Health 623, 624 (Apr. 2009).

Most women who seek abortion services are low-income,[111] and it is women living below the poverty line – approximately 11.5 million as of 2011[112] – that will suffer the greatest undue burden if H.B. 2 and other laws like it are allowed to proliferate.[113] On top of being more likely to seek second-trimester abortions, these are the women who already face federal and state restrictions on public and private insurance coverage of abortion;[114] who will be most burdened by a greater than 100-mile trip to seek abortion services;[115] who are five times more likely to

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[111] Reproductive Health Project, *Two Sides of the Same Coin: Integrating Economic and Reproductive Justice* (2015), http://rhtp.org/abortion/documents/TwoSidesSameCoinReport.pdf, at 1.

[112] United States Census Bureau, *Poverty Status of the Population by Sex and Age: 2011*, https://www.census.gov/population/age/data/2012comp.html. This number includes women from ages 15-44.

[113] American College of Obstetricians and Gynecologists, *Committee Opinion Number 613* 5 (Nov. 2014).

[114] *Id.* at 4.

[115] *See, e.g.*, *Schimel*, 806 F.3d at 919 ("[M]ore than 50 percent of Wisconsin women seeking abortions have incomes below the federal poverty line and many of them live in Milwaukee (and some north or west of that city and so even farther away from Chicago). For them a round trip to Chicago, and finding a place to stay overnight in Chicago should they not feel up to an immediate return to Wisconsin after the abortion, may be prohibitively expensive. . . . These women may also be unable to take the time required for the round trip away from their work or the care of their children.").

have unintended pregnancies;[116] who are more likely to remain in poverty if denied an abortion;[117] and who are more likely to lack other women's health services.[118] We have a great interest in not allowing these low-income women to continue to be disempowered economically by H.B. 2 and laws like it.

Furthermore, it is important to consider that clinics that would close under laws like H.B. 2 often provide much more than abortion services. These clinics often are a community's safety-net provider of family planning services, cancer screenings, pap smears and other vital women's health services. This fact is especially true for low-income and rural women.

The Court should not allow pretextual laws like H.B. 2 to continue to proliferate across the country. The result will be an undue burden on the right secured by *Roe* and upheld in *Casey*. It is our national responsibility to secure access to the right to everyone, particularly low-income women who are likely to feel the impact the most. States must not be permitted to obstruct access to the rights recognized by *Roe* and *Casey* through deliberate legislative attacks.

[116] Guttmacher Institute, *Fact Sheet: Unintended Pregnancy in the United States* (2015).

[117] Reproductive Health Project, *supra* note 111, at 2.

[118] American College of Obstetricians and Gynecologists, *supra* note 113, at 5.

CONCLUSION

For the foregoing reasons, *amici* urge this Court to reverse the Fifth Circuit's decision in *Whole Woman's Health v. Cole* and declare H.B. 2 unconstitutional.

Respectfully submitted,

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January 4, 2016

APPENDIX

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APPENDIX A

Amici Curiae – Members of Congress

39 United States Senators

Sen. Tammy Baldwin

Sen. Michael F. Bennet

Sen. Richard Blumenthal

Sen. Cory A. Booker

Sen. Barbara Boxer

Sen. Sherrod Brown

Sen. Maria Cantwell

Sen. Benjamin L. Cardin

Sen. Thomas R. Carper

Sen. Christopher A. Coons

Sen. Richard J. Durbin

Sen. Dianne Feinstein

Sen. Al Franken

Sen. Kirsten E. Gillibrand

Sen. Martin Heinrich

Sen. Mazie K. Hirono

Sen. Tim Kaine

Sen. Angus S. King, Jr.

Sen. Amy Klobuchar

Sen. Patrick Leahy

Sen. Edward J. Markey

Sen. Claire McCaskill

Sen. Robert Menendez
Sen. Jeff Merkley
Sen. Barbara A. Mikulski
Sen. Christopher Murphy
Sen. Patty Murray
Sen. Bill Nelson
Sen. Gary Peters
Sen. Harry Reid
Sen. Bernard Sanders
Sen. Brian Schatz
Sen. Charles E. Schumer
Sen. Jeanne Shaheen
Sen. Debbie Stabenow
Sen. Jon Tester
Sen. Mark R. Warner
Sen. Sheldon Whitehouse
Sen. Ron Wyden

124 Members of the U.S. House of Representatives

Rep. Alma Adams
Rep. Pete Aguilar
Rep. Karen Bass
Rep. Joyce Beatty
Rep. Ami Bera
Rep. Donald S. Beyer Jr.

Rep. Earl Blumenauer
Rep. Suzanne Bonamici
Rep. Robert A. Brady
Rep. Corrine Brown
Rep. Julia Brownley
Rep. G. K. Butterfield
Rep. Lois Capps
Rep. Tony Cárdenas
Rep. André Carson
Rep. Kathy Castor
Rep. Judy Chu
Rep. David N. Cicilline
Rep. Katherine M. Clark
Rep. Yvette D. Clarke
Rep. Wm. Lacy Clay
Rep. Emanuel Cleaver
Rep. Steve Cohen
Rep. Gerald E. Connolly
Rep. John Conyers, Jr.
Rep. Joseph Crowley
Rep. Elijah E. Cummings
Rep. Danny K. Davis
Rep. Diana DeGette
Rep. Rosa L. DeLauro
Rep. Suzan K. DelBene

Rep. Mark DeSaulnier
Rep. Theodore E. Deutch
Rep. Lloyd Doggett
Rep. Tammy Duckworth
Rep. Donna F. Edwards
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Rep. Eliot L. Engel
Rep. Elizabeth H. Esty
Rep. Sam Farr
Rep. Chaka Fattah
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Rep. Lois Frankel
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Rep. Janice Hahn
Rep. Alcee L. Hastings
Rep. James A. Himes
Rep. Rubén Hinojosa
Rep. Eleanor Holmes Norton
Rep. Michael Honda
Rep. Steny H. Hoyer

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Rep. Steve Israel
Rep. Sheila Jackson Lee
Rep. Hakeem Jeffries
Rep. Eddie Bernice Johnson
Rep. Henry C. “Hank” Johnson, Jr.
Rep. Marcy Kaptur
Rep. William R. Keating
Rep. Robin L. Kelly
Rep. Joseph P. Kennedy
Rep. Daniel T. Kildee
Rep. Ron Kind
Rep. John B. Larson
Rep. Brenda Lawrence
Rep. Barbara Lee
Rep. Sander M. Levin
Rep. John Lewis
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