No. 15-274

IN THE

Supreme Court of the United States

WHOLE WOMAN'S HEALTH, *et al.*,

Petitioners,

KIRK COLE, COMMISSIONER, TEXAS DEPARTMENT OF STATE HEALTH SERVICES, *et al.*,

Respondents.

On Petition For Writ of Certiorari
From The United States Court of Appeals
For The Fifth Circuit

BRIEF FOR NATIONAL ABORTION FEDERATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF *AMICUS CURIAE* NATIONAL ABORTION FEDERATION[1]

The National Abortion Federation ("NAF") submits this *amicus* brief in support of the Petition for a Writ of Certiorari filed by Petitioners 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 September 2, 2015.

NAF is the professional association of abortion providers. Its mission is to ensure safe, legal, and accessible abortion care, which promotes health and justice for women. NAF's members include nearly 400 private and non-profit clinics, Planned Parenthood affiliates, women's health centers, physicians' offices, and hospitals. Together they care for half the women who choose abortion in the U.S. and Canada each year, including Texas women. NAF is the leading organization offering accredited continuing medical education to health care professionals in all aspects of abortion care. Its member providers adhere to NAF's evidence-based *Clinical Policy Guidelines* ("CPGs"), which set the standard for quality abortion care.

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[1] The parties in this case have consented to the filing of this brief. Pursuant to Rule 37.6, *Amicus Curiae* states that no counsel for a party has authored this brief, in whole or in part, and no person, other than *Amicus Curiae* or its counsel, has made a monetary contribution to the preparation or submission of this brief.

NAF also operates a toll-free Hotline, which was established in 1979 to help women access unbiased information and referrals to NAF member providers offering safe, high-quality abortion care. The Hotline receives thousands of calls each week from women, their partners, families, and friends. The Hotline offers factual information about pregnancy and abortion; confidential, non-judgmental support; referrals to quality abortion providers in the caller's area; limited financial assistance; help understanding state abortion restrictions; and case management for women facing difficult choices regarding their health care.

NAF and its members thus have a direct and deep-seated interest in this litigation, and in the well-settled constitutional right this Court reaffirmed in *Planned Parenthood v. Casey*. NAF respectfully asks that this Court consider this *amicus* brief in connection with Petitioners' petition for certiorari review.

SUMMARY OF ARGUMENT

Texas House Bill 2 ("H.B.2")[2] is an unprecedented infringement upon Texas women's right to choose abortion care without undue state interference. It also constitutes a direct assault on the principles this Court held to be the law of the land in *Casey*. The Texas legislators and elected officials who sponsored and supported H.B.2 bluntly

[2] 83rd Leg., 2nd Spec. Sess. (Tex. 2013), codified at Tex. Health & Safety Code Ann. §§171.0031, 171.041 to .048, 171.061 to .064, 245.010 to .011.

acknowledged that their overarching intent was to end or sharply curtail access to abortion care in Texas, and it is undeniable that the corresponding impact on Texas women has been to severely restrict their access. *See infra* note 3. As the District Court found, H.B.2 immediately halved the number of Texas abortion providers. *See Whole Woman's Health v. Lakey*, 46 F. Supp. 3d 673, 681 (W.D. Tex. 2014). But for this Court's intervention and interim stay, H.B.2 would have eliminated more than 75% of Texas abortion providers.

If the Fifth Circuit's mandate is permitted to take effect, the anticipated result will be devastating. Ten or fewer providers will remain in Texas, as compared with the more than 40 providers that were in existence immediately prior to H.B.2's enactment. Moreover, apart from a McAllen abortion care provider that would be subject to highly restrictive conditions imposed by the Fifth Circuit, those providers that remain will be confined to four metropolitan areas—hundreds of miles away from many low-income and underserved communities that most need quality care. Based on the impact thus far, the handful of remaining providers will not be able to compensate for the forced shutdown of the majority of Texas' abortion providers. Rather, the remaining providers will be overburdened, delaying access to abortion care and creating unnecessary hurdles for women who choose to exercise the fundamental right this Court reaffirmed in *Casey*. The factual record confirms that new facilities are unlikely to replace the ones shuttered by H.B.2., given that the statute imposes onerous, cost-prohibitive, and medically unnecessary

building and staffing requirements. Restricting access to abortion care was the intent of this law, and it is thus unsurprising that H.B.2 has had its desired result.

The burden H.B.2 imposes on Texas women is substantial. As the factual record below confirms, many Texas women—including women from low-income and immigrant communities—would be required to travel hundreds of miles, or leave Texas entirely, to access clinical care. The hardships and costs associated with significant travel are substantial for many women. When considered in light of other Texas laws requiring mandatory waiting periods and repeat visits for certain procedures, those burdens are even more onerous. The result is a substantial obstacle and undue burden on a woman's right to choose abortion care.

The burdens imposed by H.B.2 also create unnecessary health risks for many women who already have inadequate access to basic health care. The limited availability of appointments and lengthy distances required to travel to a provider mean that many women are pushed later into their pregnancies before they can access the abortion care they need. The resulting delay is significant. Although abortion care is one of the safest medical procedures, the risk of complications—as with pregnancy generally—increases as pregnancy progresses. Additionally, delays past Texas' 20-week limit prevents women from obtaining abortion care altogether, with limited exceptions. Tex. Health & Safety Code Ann. § 171.044 (West 2014). The practical burdens imposed by H.B.2 invariably will lead women to

resort to less safe alternatives, such as self-medicating. Evidence exists that some Texas women already have taken this route due to strict abortion restrictions and the lack of accessible providers. Further decreasing access will only exacerbate this problem.

For many Texas women, H.B.2 thus creates an impermissible obstacle to accessing abortion care. This law imposes an unconstitutional burden on Texas women, and must be struck down.

ARGUMENT

In *Casey*, this Court instructed states that they may not enact laws "designed to strike at the right [to abortion] itself." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 874 (1992). Consequently, this Court held that states may not impose an "undue burden" on that right by enacting laws having "the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Casey*, 505 U.S. at 877. Anticipating restrictions like the Texas law at issue here, the Court cautioned:

> As with any medical procedure, the State may enact regulations to further the health or safety of a woman seeking an abortion. *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.*

Casey, 505 U.S. at 878 (emphasis added).

Both the purpose and effect of H.B.2 is to present a "substantial obstacle" to Texas women seeking abortion care. *Casey*, 505 U.S. at 877. Legislators and elected officials at the highest levels of Texas government have stated unequivocally that the real purpose of H.B.2 was to make "abortion, at any stage, a thing of the past" and to "essentially ban abortion statewide"—a reality that was candidly embraced by the law's supporters in their Fifth Circuit Court of Appeals briefing.[3] As the District Court found, H.B.2's purported health benefits are nonexistent, and have "such a tangential relationship to patient safety in the context of abortion as to be nearly arbitrary." *Lakey*, 46 F. Supp. 3d at 684. H.B.2 puts abortion care effectively out of reach for a significant number of Texas women and should be struck down.

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[3] *See* Brief of *Amici Curiae* Women Injured by Abortion and an Abortion Survivor at 2, *Whole Woman's Health v. Lakey*, No. 14-50928 (5th Cir. Nov. 10, 2014) (suggesting H.B.2 is good law because women are "far better protected by no access than access" to abortion care). Then-Governor Rick Perry, who signed the bill into law and made it part of his broader initiative to "make abortion, at any stage, a thing of the past," stated bluntly with respect to H.B.2 that "[t]he ideal world is one without abortion. Until then, we will continue to pass laws to ensure that they are rare as possible." Olga Khazan, *The Difficulty of Getting an Abortion in Texas*, The Atlantic, January 14, 2014; Erica Hellerstein, *The Rise of the DIY Abortion in Texas*, The Atlantic, June 27, 2014 [hereinafter "*Rise of the DIY Abortion*"]; *see also Lakey*, 46 F. Supp. 3d at 685; ROA 2625.

I. H.B.2 HAS DRAMATICALLY REDUCED THE AVAILABILITY OF ABORTION CARE IN TEXAS

Texas is the second-largest state in the U.S., both by population and geographic area, and home to approximately 5.4 million women of reproductive age. Texas also has the highest proportion of citizens without medical insurance of any state in the nation, and consistently rates near the bottom of national health care access rankings. Kinsey Hasstedt, *The State of Sexual and Reproductive Health and Rights in the State of Texas: A Cautionary Tale*, 17 Guttmacher Policy Review 14, 14 (2014). The state's abysmal health care record has led to poor outcomes for pregnant women and staggering racial disparities in care. For example, the State Task Force on Maternal Mortality and Morbidity reported last year that while there were 24.4 pregnancy-related deaths per 100,000 overall births in Texas in 2011, among African-American women there were 67.3 such deaths per 100,000 live births. The Task Force concluded that pregnancy-related deaths are on the rise, and that between 20% and 50% are preventable. *See* Department of State Health Services, *Maternal Mortality and Morbidity Task Force Report*, at 6 (Sept. 2014), *available at* https://www.dshs.state.tx.us/legislative/2014/Attachment1-MMMTF-LegReport-FCHS-1-081214.pdf.

Prior to H.B.2's passage, there were more than 40 abortion providers in Texas. These providers were located in 16 cities, ranging from El Paso in the west to Beaumont in the east, and from McAllen and Harlingen in the south to Dallas/Fort-

Worth and Lubbock in the north and north-central, respectively. After H.B.2, this broad geographic coverage ceased and the number of providers plummeted to 18. *See* Brief in Support of Writ of Certiorari at 33, *Whole Woman's Health, et al. v. Cole*, No. 15-274 (filed Sept. 2, 2015) [hereinafter "Certiorari Brief"].

If the Fifth Circuit's decision is allowed to stand, only ten or fewer providers are likely to remain in Texas, all but one of which will be clustered in Texas' four principal metropolitan areas of Dallas/Fort-Worth, Austin, San Antonio, and Houston.[4] This 75% reduction will leave the vast majority of Texas communities without *any* access to abortion care. Indeed, it was undisputed before the District Court that the entire western half of the state—covering over 130,000 square miles—would be utterly devoid of any abortion care providers whatsoever. *See Lakey*, 46 F. Supp. 3d at 681.

Moreover, although a few facilities may be able to comply with H.B.2's ambulatory surgical center ("ASC") requirements, most cannot. Many of these requirements impose arbitrary rules for construction-related conditions such as square footage requirements, ceiling finishes, number and placement of janitorial closets and parking spaces, which have no impact on, or connection to, the

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[4] The lone facility located outside these cities is Whole Woman's Health's clinic in McAllen, Texas. Yet, under the Fifth Circuit's ruling, that clinic may only serve women from the immediately contiguous counties, who will be served by only one post-retirement age, part-time doctor. *See* Certiorari Brief at 34.

quality of abortion care. As the District Court found, the evidentiary record confirms that the expense of updating facilities to comply with H.B.2's laundry list of technical requirements is extraordinary and prohibitive. *See Lakey*, 46 F. Supp. 3d at 682 (costs of retrofitting existing facilities "undisputedly approach 1 million dollars and will most likely exceed 1.5 million dollars"). Likewise, it cannot be assumed that future clinics will be built to replace the ones that have closed. As the District Court correctly recognized, building a new clinic that could meet H.B.2's lengthy requirements would entail significant expense and the acquisition of substantially greater amounts of property. *See Id.* ("[A] new compliant clinic will likely exceed three million dollars.").[5]

In addition to these physical and construction requirements, physicians must hold admitting privileges at a hospital located within 30 miles of the clinic. Given recent experience, it is difficult for even well-qualified doctors to obtain such privileges when they are associated with an abortion care provider. Manny Fernandez, *Abortion Law Pushes Texas Clinics to Close Doors*, New York Times, Mar. 6,

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[5] Moreover, efforts by some abortion providers to co-locate in existing ASCs have not been successful. One of the glaring inequities imposed by H.B.2 is that it demands that abortion providers comport fully with all existing ASC standards, while providers of non-abortion medical services are "grandfathered" and exempted from the new facility standards. *See Lakey*, 46 F. Supp. 3d at 680-81 (noting that more than 78% of existing Texas ASCs for non-abortion care are grandfathered).

2014, http://www.nytimes.com/2014/03/07/us/citing-new-texas-rules-abortion-provider-is-shutting-last-clinics-in-2-regions.html?_r=0 ("[N]early all of [Whole Woman's Health's] doctors were unable to obtain admitting privileges at nearby hospitals . . . some hospitals declined to even provide doctors with applications for admitting privileges").

As the trial record established, and as many NAF members have found first-hand, qualified physicians are routinely denied admitting privileges without any justification, requiring the closing of multiple providers even in major metropolitan areas. *See Lakey*, 46 F. Supp. 3d at 681 ("Abortion clinics where doctors were previously able to comply with [H.B.2's] admitting privilege requirement will close in Corpus Christi, San Antonio, Austin, El Paso, Houston, and Dallas."). The requirement has been an insurmountable burden even for those providers that have been able to comply with H.B.2's other requirements.

For example, both NAF member Routh Street Women's Clinic ("Routh Street") and NAF member Southwestern Women's Surgery Center ("Southwestern Dallas"), an ASC in Dallas, have seen how difficult it is to meet H.B.2's admitting privileges requirements. Many Texas hospitals require that their physicians handle a fixed number of hospital admissions annually. Due to the high safety rate of abortion care, however, very few patients experience complications requiring hospitalization, and abortion providers whose sole practice is abortion care consequently admit very few patients to the hospital. *Cf. Planned Parenthood*

Se., Inc. v. Strange, 33 F. Supp. 3d 1330, 1344 (M.D. Ala. 2014) (doctors who obtained admitting privileges could lose them if they did not treat a sufficient number of patients in the hospital that issued the privileges). Routh Street, which closed its doors in June of 2015 as a direct result of H.B.2, has described the admitting privileges requirement as "devastating" and cited it as the main factor contributing to their closure. Although Routh Street's medical director was able to obtain admitting privileges, he needed to maintain a separate full-time OB/GYN practice in order to generate the 48 annual hospital admissions necessary to retain those privileges. Not surprisingly, operating two full-time medical practices proved unsustainable, and Routh Street was forced to close after 36 years of providing high-quality abortion care to Texas women.

The experience of Texas abortion providers has been consistent with that of abortion providers in other states with new admitting privileges requirements. Across the country, abortion providers routinely are denied admitting privileges for reasons wholly unrelated to their medical skills or qualifications. *See, e.g.*, *Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 451 n.3 (5th Cir. 2014) (hospitals' justification for denying admitting privileges to abortion providers included "'[t]he nature of your proposed medical practice is inconsistent with this Hospital's policies and practices as concerns abortion and, in particular, elective abortion,' and '[t]he nature of your proposed medical practice would lead to both an internal and external disruption of the Hospital's function and

business within this community.'"); *Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 792 (7th Cir. 2013) (recognizing "resistance" that doctors could face when seeking admitting privileges, "given the widespread hostility to abortion and the lack of any likely benefit to a hospital from granting such privileges to an abortion doctor"), *cert. denied*, 134 S. Ct. 2841 (2014).

II. TEXAS' REMAINING PROVIDERS CANNOT REPLACE THE SERVICES THAT WERE LOST AS A RESULT OF H.B.2

Before the District Court, Texas stipulated to the fact that only six existing clinics would not be closed by H.B.2's facilities requirements. ROA 2289-90. The State later attempted to make light of that admission by speculating that other providers may perhaps open, or that existing providers might increase their capacity. However, no speculation or guesswork is required to identify H.B.2's real impact on NAF's members, as most of those providers have already closed due to the law.

The notion that the few remaining providers could meet the demand of all Texas women—requiring ten providers to accommodate a level of patient demand that previously kept more than 40 providers busy—strains credulity. *See Lakey*, 46 F. Supp. 3d at 682. To care for this many patients, the remaining providers would have to vastly increase their caseload. *See* Brian M. Rosenthal, Mark Collette, *Women Seeking Abortions Scramble to Find Places To Go*, Houston Chronicle (October 10, 2014), http://www.houstonchronicle.com/news/

houston-texas/houston/article/Women-seeking-abortions-scramble-to-find-places-5815451.php ("Administrators at six of the facilities said they annually perform about 15,000 abortions combined—just 22 percent of the 68,298 procedures in the state in 2012"). Existing Texas abortion care providers were already operating at full capacity prior to H.B.2: it is clear that a much-reduced number of providers would be incapable of meeting this need.

For example, Routh Street reported that it provided an average of 68 abortion procedures per week in 2013; in 2015, after other providers started to close, it provided an average of 96 abortion procedures per week. At times, Routh Street's 67-person waiting area was so full that many patients were required to sit on the floor or wait outside. Its efforts to handle the increase in patients necessitated a tremendous amount of overtime for its staff, as well as expanded hours and days of providing care, but even then Routh Street could not fully accommodate all of the patients left stranded by the closure of other providers. This increased workload took its toll on Routh Street's physicians and staff, hastening the clinic's closure. Following Routh Street's closure, patients seeking care must now find somewhere else to go.

Compounding the critical shortage of Texas providers is the reality that all remaining non-ASC facilities will also be forced to close if the Fifth Circuit's mandate goes into effect. In Houston, for example, non-ASC providers currently are seeing a high volume of patients. Houston is the fourth most populous city in the U.S., with 6.3 million

inhabitants spread over approximately 650 square miles. If the Fifth Circuit's mandate takes effect, only two ASC abortion providers will be left to serve the entire city. The Fifth Circuit's decision with regard to Whole Woman's Health of McAllen similarly highlights the current provider shortage. Under the Fifth Circuit's ruling, that provider remains open with only one post-retirement age, part-time doctor, rather than the four well-qualified full-time doctors who had been unable to secure local admitting privileges. *See Whole Woman's Health v. Cole*, 790 F.3d 563, 596 (5th Cir. 2015). With less than a quarter of its physicians remaining, this provider certainly cannot serve more patients now than before H.B.2, just as the few providers that remain in Texas cannot compensate for the providers that have closed as a result of H.B.2.

Likewise, if the Fifth Circuit's mandate goes into effect, the remaining ASC providers—which are already stretched to capacity—will be unable to meet the need for abortion care in Texas. Recent research confirms that wait times at ASCs have already increased significantly since portions of H.B.2 went into effect, underscoring that these ASCs are not even meeting the existing demand, even with help from the several non-ASCs still providing care. *See* Daniel Grossman et al., *Abortion Wait Times in Texas: The Shrinking Capacity of Facilities and the Potential Impact of Closing Non-ASC Clinics*, Texas Policy Evaluation Project (2015), *available at* http://www.utexas.edu/cola/txpep/research-briefs/wait-times-research-brief.php [hereinafter "*Wait Times in Texas*"].

The experience of NAF member Southwestern Dallas also indicates that ASCs are operating at capacity and will be unable to handle the large influx of patients expected if the Fifth Circuit's mandate goes into effect. That provider is now seeing twice as many patients as it did before H.B.2, and providing approximately 180 procedures per week, as compared with 115 per week before the statute was enacted. Southwestern Dallas has doubled its administrative staff since April 2014 and expanded its procedure days. Despite those efforts, however, it will not be able to meet increased patient demand if other providers were to close as a result of H.B.2. Even with the expansion efforts, Southwestern Dallas must still turn away many women due to its inability to handle additional patients. Southwestern Dallas has also indicated that it may have difficulty sustaining its increased capacity given the high degree of burn-out experienced by staff due to long hours, and that the legal and political uncertainty has affected its ability to retain personnel.

III. H.B.2 IMPOSES AN UNDUE BURDEN ON TEXAS WOMEN

The substantial restrictions already imposed by H.B.2 have already unduly burdened Texas women, increasing the distance most women must travel to reach an abortion provider; reducing the number of available appointments; delaying abortion care; and making abortion care more expensive and sometimes more complicated. H.B.2's medically unnecessary requirements are not trivial inconveniences that can be easily overcome,

particularly for women who are low-income or live in rural communities. Rather, they are substantial obstacles and many women have effectively lost the option of safe, affordable, and timely abortion care. Taken together, H.B.2's barriers to access impose just the sort of undue burden on Texas women's access to abortion care that this Court held unconstitutional in *Casey*. *See Casey*, 505 U.S. 845. Nor are these barriers justified by any offsetting medical benefit to women.

First, it is undisputed that many Texas women will need to travel tremendous distances to see an abortion provider if H.B.2's challenged provisions are not set aside. Remaining clinics will be located in only a handful of cities, requiring even more women to travel hundreds of miles to seek care from a Texas provider. *See* Kim Soffen, *How Texas Could Set National Template for Limiting Abortion Access*, N.Y. Times (August 19, 2015), http://www.nytimes.com/2015/08/20/upshot/how-texas-could-set-national-template-for-limiting-abortion-access.html?_r=0 (noting that "[a] fifth of Texas counties, primarily in the western half of the state, are more than 100 miles farther from a clinic today than they were in 2012."). Traveling great distances imposes significant hardships for many women, including the cost of gasoline or bus fare; lost compensation or risking termination from employment by taking time off from work; and the cost of childcare and staying overnight in a distant city.

Especially considering the significant impact that these restrictions already have had on low-

income Texas women, this travel-related burden is not trivial. According to U.S. Census Bureau data, the poverty rate for women living in Texas' border region—where only the McAllen clinic will remain open, subject to the Fifth Circuit's onerous restrictions—is twice that of the non-border region, with 88% of Texas-Mexico border counties having a median income below the state level. As Texas' own Health and Human Services Commission has recognized, the border counties comprise a "less healthy population with less means to pay for health care." TEXAS HEALTH AND HUMAN SERVICES COMMISSION, FACTORS INFLUENCING HEALTH CARE ON THE TEXAS-MEXICO BORDER 7 (2014), *available at* http://www.hhsc.state.tx.us/reports/2015/Factors-Influencing-Health-Care.pdf. Many Texas women simply cannot afford hundreds of dollars for a trip to an abortion provider. *See* ROA at 2471 (testimony confirming that despite financial assistance in the form of gas cards and bus tickets, for the "vast majority" of women, "other obstacles prevented them from making the trip to San Antonio . . . includ[ing] the inability to take the required length of time off from work and the inability to secure childcare for that length of time").

NAF's members are very familiar with the burdens that increased travel distances have had on Texas women, and frequently hear from women who must travel over 100 miles for abortion care. Since the passage of H.B.2, the NAF Hotline has been flooded with calls from Texas women desperately seeking timely abortion care. Some women have had to rely on public transportation or friends and family to travel to their appointments; others have had to

pawn or sell personal items, such as furniture or wedding rings, to pay for the additional costs.

NAF Hotline data reflects that Texas women have been required to travel increasingly long distances and over state lines to receive abortion care. For example, the number of Texas women that the NAF Hotline has assisted in receiving abortion care in New Mexico has increased dramatically, from 21 patients in 2013 to 81 patients in the first eight months of 2015. Likewise, NAF member Hope Medical Group for Women ("Hope Medical") in Shreveport, Louisiana, has seen a marked increase in Texas patients, from 15.56% in 2011 to 22.77% in 2014. Data from NAF member Southwestern Women's Options in Albuquerque, New Mexico, ("Southwestern Albuquerque") similarly confirms that the number of pre-20 week patients traveling from Texas has more than tripled, from 19 patients in the first quarter of 2012 to 67 patients in the first quarter of 2015. Even with these efforts, however, out-of-state providers have not been able to accommodate all of the women who H.B.2 has left without abortion care options. Nor should they be required to. *See Jackson Women's Health*, 760 F.3d at 458 (Plaintiff "demonstrated a substantial likelihood of proving that . . . effectively closing the one abortion clinic in [Mississippi] has the effect of placing a substantial obstacle in the path of a woman seeking an abortion in Mississippi").

Patient stories from the NAF Hotline also underscore the extreme hardships that Texas women have faced following the passage of H.B.2. For example, the NAF Hotline recently heard from

"Cara,"[6] who lives in Killeen with her three children. She recently lost her job and was struggling to make ends meet when she found out she was pregnant. Cara decided that lawful abortion care was the right decision for her and her family, but even after asking friends and family for help she was not able to save enough money for her procedure without the help of abortion funds. The nearest abortion care provider was nearly 130 miles away, which meant she also had to find the funds to pay for gas, and ultimately was required to rely on a last-minute loan. Cara was unable to find someone to drive her to and from her procedure—a six hour round-trip drive—and had to go alone. This visit constituted a severe hardship for her and her family, and for many Texas women those hardships would have presented an insurmountable obstacle.

Indeed, many courts have recognized the undue burdens that long-distance travel places on low-income women. *See Planned Parenthood Ariz., Inc. v. Humble*, 753 F.3d 905, 916 (9th Cir. 2014) (observing that increased costs "to the patient for transportation, gas, lodging and the time she must take off from work" are "significant and sometimes prohibitive" for women living in poverty), *cert. denied*, 135 S.Ct. 870 (2014); *Van Hollen*, 738 F.3d at 796 ("Some patients will be unable to afford the longer trips they'll have to make to obtain an abortion when the clinics near them shut down."). As one court has noted:

> For [women living in poverty], going to

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[6] Patient name changed to protect her privacy.

> another city to procure an abortion is particularly expensive and difficult. Poor women are less likely to own their own cars and are instead dependent on public transportation, asking friends and relatives for rides, or borrowing cars; they are less likely to have internet access; many already have children, but are unlikely to have regular sources of child care; and they are more likely to work on an hourly basis with an inflexible schedule and without any paid time off.

Strange, 33 F. Supp. 3d at 1357.

These burdens are further magnified in light of the fact that many women must make more than one trip to a clinic. In Texas, there is a 24-hour mandatory waiting period between a required ultrasound and an abortion procedure. Tex. Health & Safety Code Ann. § 171.012 (West 2014). Therefore, many women must spend at least an extra night in a hotel or pay for several rounds of travel, unless they qualify for an exception. Moreover, for medical, rather than surgical, abortion care, Texas law effectively requires four visits to the provider, encompassing an initial ultrasound, two separate visits for medical abortion care, and a follow-up visit 14 days later. *See* Tex. Health & Safety Code Ann. §§ 171.012.a.4, 171.063.e (West 2014)). H.B.2's restrictions require Texas women to incur substantial travel and lodging costs unless they happen to live—and are able to obtain an appointment—in one of the few major cities that has

an abortion provider. This constitutes a substantial obstacle to exercising the right recognized in *Casey*. *See* 505 U.S. at 877.

Second, H.B.2 imposes unnecessary health risks that are not counterbalanced by any compelling need on the part of the State. NAF members and the NAF Hotline report that Texas women already must wait longer to receive care, given the high patient volume and limited availability of qualified providers. A recent study shows that some of the ASCs currently providing abortion care may not be able to increase the number of abortion procedures they provide, given their consistently long wait times. For example, in the summer of 2015, providers in both Austin and Fort Worth saw wait times increase to as long as 23 days. *See Wait Times in Texas*. Likewise, Hope Medical has informed NAF that some Texas women are waiting for three weeks just to obtain a first visit, and many are forced to travel out-of-state to Louisiana to seek care.

This delay is more than a minor inconvenience, as the costs and risks associated with abortion care increase as a pregnancy progresses. As the District Court correctly recognized, "[h]igher health risks associated with increased delays in seeking early abortion care, risks associated with longer distance automotive travel on traffic-laden highways, and the act's possible connection to observed increases in self-induced abortions almost certainly cancel out any potential health benefit." *Lakey*, 46 F. Supp. 3d at 684. Research suggests that women are already being pushed later into their pregnancies: in the six months after H.B.2's

admitting privileges requirement was implemented, 13.9% of abortion procedures in Texas were provided at 12 weeks of pregnancy or later, compared to 10.7% in 2012. *See* Daniel Grossman *et al.*, *The Public Health Threat of Anti-Abortion Legislation*, 89 Contraception 73, 73-74 (2014) [hereinafter "*Public Health Threat*"].

If the Fifth Circuit's mandate is permitted to take effect, and the remaining non-ASC providers are forced to close, research confirms that wait times will further increase dramatically at several remaining ASCs. As wait times grow, the proportion of second-trimester abortion care will increase. If wait times were to increase to 20 days—which researchers indicate is currently happening in Dallas and Fort Worth—the number of second trimester abortion procedures would nearly double. *See Wait Times in Texas* (finding that wait times that consistently average 10 days in Austin, Dallas-Fort Worth and Houston would increase the proportion of statewide abortion procedures provided in the second trimester from 10.5% to 13.5%, and that average wait times of 20 days would increase the proportion to 19.5%, "translat[ing] to about 5,700 more abortion procedures delayed to the second trimester due to increased wait times"). NAF member Southwestern Dallas reinforced this projection, observing that they have seen more patients coming later in their first trimester, which changes both their procedure options and the amount of time they must stay at the facility. Likewise, Southwestern Albuquerque is seeing additional low-income Texas women later in their second trimester due to reduced access to both first

and second trimester abortion care in Texas.

Delays increase cost because later abortion procedures are lengthier and sometimes require additional personnel. *See* Ushma D. Upadhyay *et al.*, *Denial of Abortion Because of Provider Gestational Age Limits in the United States*, Am. J. Pub. Health (Sept. 2014) ("Because later abortions are more complex procedures, often occurring over 2 or more days, they are also more costly . . . . [T]he average cost for an abortion at 10 weeks is $543 compared with $1562 for an abortion at 20 weeks"). Thus, the damage is two-fold: in addition to making abortion care harder to obtain and pushing women into later procedures—some into their second trimester—H.B.2 effectively prices many women out of receiving abortion care.

Third, H.B.2 could have direct health consequences for women who choose less safe alternatives if they cannot obtain safe, legal abortion care due to the financial and logistical obstacles imposed by Texas law. Experience shows that the lack of legal abortion care options will not stop women from seeking to terminate their pregnancies. Some women will instead resort to self-medicating without the proper knowledge to safely induce abortion. Some Texas women are already trying to induce abortion on their own, using methods that are *rumored* to terminate pregnancy, regardless of their actual medical safety or efficacy. *See Rise of the DIY Abortion* ("'[Women] are going to figure out ways to have an abortion . . . . I even have patients that call, and after we tell them that we can't offer abortions anymore, they'll just say, 'That's fine. I'm going to

figure out a way to do this on my own.'"); *Public Health Threat* at 73 ("7% of women reported taking something on their own in order to try to end their current pregnancy before coming to the abortion clinic").

NAF members have first-hand experience with patients who have attempted to self-induce abortion. For example, one doctor at a Texas provider treated a patient and found parsley in her vagina from a misguided attempt to self-induce abortion. Other providers have found that women have "tried something" prior to coming to a clinic for assistance. Further, women who experience complications from improper use of medications or other remedies may delay or forgo medical treatment for fear of prosecution. *See* Andrea Rowan, *Prosecuting Women for Self-Inducing Abortion: Counterproductive and Lacking Compassion*, 18 Guttmacher Policy Review 70 (2015), *available at* http://www.guttmacher.org/pubs/gpr/18/3/gpr180701 5.html.

The facts demonstrate that safe, legal abortion care to which Texas women have a constitutional right is increasingly unavailable because of the undue burdens imposed by H.B.2. This Court has acknowledged that abortion care is one of "the most intimate and personal choices a person may make in a lifetime[,] . . . central to personal dignity and autonomy," and a key factor allowing "women to participate equally in the economic and social life of the Nation." *Casey*, 505 U.S. at 851, 856. H.B.2 denies Texas women their dignity, eliminates the vast majority of Texas

abortion providers, and exposes women to enhanced health risks without any corresponding benefits.

CONCLUSION

For all of the reasons stated above, H.B.2 imposes a substantial obstacle to abortion access and unduly burdens the rights protected by the due process clause of the Fourteenth Amendment. *See Casey*, 505 U.S. at 846. This Court should grant certiorari and reverse the decision of the Fifth Circuit in its entirety.

Respectfully submitted,

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