No. 15-274

In the
Supreme Court of the United States

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

Petitioners,

v.

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

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF INSTITUTE FOR WOMEN'S POLICY RESEARCH, NATIONAL ASSOCIATION OF SOCIAL WORKERS, TEXAS CHAPTER OF NATIONAL ASSOCIATION OF SOCIAL WORKERS, AND RE:GENDER AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

SUSAN J. KOHLMANN*
KATYA JESTIN
ALISON I. STEIN
JENNER & BLOCK LLP
919 Third Ave.
New York, NY 10022
(212) 891-1600
skohlmann@jenner.com
*Counsel of Record

MATTHEW S. HELLMAN
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000

Counsel for Amici Curiae
Additional counsel listed on inside cover

JEREMY H. ERSHOW*
JESSICA A. MARTINEZ
JENNA E. ROSS
GRETCHEN O. STERTZ
JENNER & BLOCK LLP
919 Third Ave.
New York, NY 10022
(212) 891-1600
Additional Counsel for Amici Curiae

**Admitted only in New Jersey, not admitted in New York. Practicing under the supervision of the partnership of Jenner & Block, LLP.*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Amici are organizations committed to improving the health and well-being of women and children nationally and in the state of Texas. As set forth in this brief, the questions presented by this case are highly relevant to achieving these goals.

Amicus curiae the Institute for Women's Policy Research ("IWPR") is a leading economic and public policy think tank founded in 1987 that focuses on quantitative and qualitative analysis of issues particularly relevant to women and their families. IWPR works with policymakers, scholars, and public interest groups to design, execute, and disseminate research that illuminates economic and social policy issues affecting women and families and to build a network of individuals and organizations that conduct and use women-oriented policy research. For 20 years, IWPR's flagship research product has been its "Status of Women in the States" reports, which analyze data on a wide range of topics at the local, state, national, and international levels, including economic security and access to health care. IWPR has released reports in

[1] No person or entity other than *Amici* and their counsel authored this brief or made a monetary contribution to the preparation or submission of this brief. Counsel of record for the parties have consented to the filing of this brief, and letters of consent are being filed with the Clerk of the Court pursuant to Supreme Court Rule 37.

varying years on each individual U.S. state and Washington, D.C., including a report on Texas, which was completed with the help of a distinguished advisory group representing academia, women's centers, and women's foundations in Texas. IWPR has also released national reports with data on the status of women in each of the 50 states and Washington, D.C. in 1996, 1998, 2000, 2002, 2004, and 2015. These reports include a focus on general health care as well as reproductive health and rights, measuring nine indicators in each area and assigning ranks and letter grades to each state. In addition, the reports provide data on other variables of interest, including behaviors such as smoking, drinking alcohol, and eating fruits and vegetables, all of which are pertinent to women's health outcomes. In the process of producing these national reports, including an upcoming report on the states of the U.S. South, IWPR staff members continue to work closely with advisors in Texas, including policymakers, scholars, and service providers working on the ground in the state.

Amicus curiae the National Association of Social Workers ("NASW") is the largest association of professional social workers in the United States, with over 130,000 members in 55 chapters. Among other organizational purposes, NASW develops policy statements on issues of importance to the social work profession. Consistent with those statements, NASW supports providing adequate health services regardless

of financial status, race and ethnicity, age, or employment status, and developing adequate funding for, and increased research on, health services and issues that address disparities in these areas for diverse populations of women. *Amicus curiae* the Texas Chapter of NASW has 5,800 members and works on issues impacting the quality of and access to health care for women and their families across the state of Texas. The Texas Chapter of NASW has a Women's Issues Committee devoted to these issues.

Amicus curiae Re:Gender, formerly the National Council for Research on Women, works to end gender inequity by exposing root causes and advancing research-informed action. Through its network comprised of more than 400 institutions and individuals from academia, business, government, labor, philanthropy, and nonprofit organizations, Re:Gender's cross-sector approach connects researchers with those who use research in their work. Re:Gender bridges sectoral and geographic silos to help create new research agendas, shape policy, and drive on-the-ground strategies. Re:Gender has a number of long-standing connections to academic and community-based organizations in the South. Recently, researchers, activists, advocates, policy thinkers, and philanthropists came together for its National Annual Summit in Atlanta—*Through a Gender Lens: Precarity, Sexual Violence and the U.S. South*.

SUMMARY OF ARGUMENT

By many measures, women and their families in Texas are struggling with poor health outcomes. Women in Texas have a lower life expectancy than the national average. Texas women are more likely to die from heart disease and cervical cancer, to be obese or overweight, and to suffer from diabetes than the average American woman. Just three states have a higher percentage of women reporting that they have not seen a doctor in the past year due to cost. And overall, Texas women report no better than poor or fair health more frequently than women in all but ten other states.

Sadly, these poor conditions for women's health also contribute to poor health and well-being for the children of Texas. Texas's child and teen mortality and obesity rates are higher than the national average, and Texas has the greatest number of children of any state who are insurance-eligible but unenrolled.

These poor outcomes in part reflect policy choices of the Texas legislature. The Texas legislature has opted not to implement specific programs that would dramatically improve women's and children's access to health care—policies that many other states across the country have adopted. For example, even though Texas has a higher percentage of adult women who are uninsured than every other state in the country, Texas has rejected federal insurance funding even for alternative coverage mechanisms—mechanisms that have been approved by states across the political

spectrum—that would provide basic health care access to hundreds of thousands of poor, uninsured Texas women.

Amici recognize the deep disagreement, both legal and political, that attends the questions presented by this case. But what should be beyond dispute is that women and children in Texas should not suffer from markedly worse health and access to health care than women and children in the rest of the United States. Thus, when Texas claims that it passed Texas House Bill No. 2 ("H.B. 2") to raise the standard of care and ensure the health and safety of women and their families, this Court should assess that claim in the context of Texas's sustained failure to improve the health and welfare of women and children in Texas.

ARGUMENT

I. Texas Is Struggling With Poor Health and Well-Being Outcomes For Women and Their Families.

Texas fares poorly on the key metrics that organizations use to assess women's overall well-being and health care access in various states. In its 2015 Status of Women in the States report, IWPR ranked Texas 47th among all states based on a variety of indicators including health and well-being, reproductive rights, and poverty and opportunity.[2] Another

[2] Cynthia Hess et al., Inst. for Women's Policy Research, *The Status of Women in the States 2015*, xxii (May 2015), http://statusofwomendata.org/app/uploads/2015/02/Status-of-

organization ranked Texas 45th overall based on certain economic security, leadership, and health indices. The same study gave Texas an "F" on the health factors examined in the study, including access to insurance coverage and maternal and infant mortality rates.[3] The life expectancy of Texas women is shorter than the life expectancy of women in the nation as a whole, as measured in 2010.[4] And 20.6% of Texas women reported fair or poor health in 2014—a greater proportion of the state's female population than the proportion reporting fair or poor health in all but ten other states.[5]

As set forth herein, a careful review of the facts sheds light on many of these poor metrics and general

---

Women-in-the-States-2015-Full-National-Report.pdf.

[3] Anna Chu & Charles Posner, Ctr. for Am. Progress Action Fund, *Fact Sheet: The State of Women in Texas*, 1 (Sept. 2013), https://www.americanprogress.org/wp-content/uploads/2013/09/StateOfWomen_Texas.pdf.

[4] Haidong Wang et al., Inst. for Health Metrics & Evaluation, *Left behind: widening disparities for males and females in US county life expectancy, 1985-2010* (July 2013), http://www.healthdata.org/research-article/left-behind-widening-disparities-males-and-females-us-county-life-expectancy-1985 (Texas spreadsheet, 2010 life expectancy figures). While female life expectancy improved nationwide by 3.0 years between 1985 and 2010, female life expectancy in Texas improved by only 2.4 years during that same time period. *Id.*

[5] Henry J. Kaiser Family Found., *Percent of Adults Reporting Fair or Poor Health Status, by Gender*, State Health Facts, http://kff.org/other/state-indicator/percent-of-adults-reporting-fair-or-poor-health-by-gender/#map (last visited Dec. 21, 2015).

indicators of well-being. As of 2014, Texas had the second-highest percentage of adult women in the country who had no personal doctor or health care provider, at 26.5%.[6] Difficulty affording medical care may be the culprit, as from 2012-2014 only three states had a higher percentage of women reporting that they had not seen a doctor in the previous twelve months due to cost.[7]

It is unsurprising then that, in 2013, Texas had the highest percentage of births to women receiving no or late prenatal care among the 40 states evaluated.[8] Data from the Centers for Disease Control and Prevention (the "CDC") show that, in 2013, 10% of babies in Texas were born to a woman who did not receive prenatal care until her third trimester, or received no prenatal

---

[6] Henry J. Kaiser Family Found., *No Personal Doctor/Health Care Provider for Adults by Gender*, State Health Facts, http://kff.org/disparities-policy/state-indicator/no-personal-doctorhealth-care-provider-for-adults-by-gender (last visited Dec. 21, 2015).

[7] Henry J. Kaiser Family Found., *Percent of Adult Women Who Did Not See a Doctor in the Past 12 Months Due to Cost, by Race/Ethnicity*, State Health Facts, http://kff.org/womens-health-policy/state-indicator/percent-of-adult-women-who-did-not-see-a-doctor-in-the-past-12-months-due-to-cost-by-raceethnicity/#table (last visited Dec. 21, 2015).

[8] Annie E. Casey Found., *Births to Women Receiving Late or No Prenatal Care*, Kids Count Data Center, http://datacenter.kidscount.org/data/Tables/11-births-to-women-receiving-late-or-no-prenatal-care#ranking/2/any/true/36/any/266 (last visited Dec. 21, 2015). This source considers late prenatal care to be care beginning in the third trimester of pregnancy.

care at all.[9] Comparatively, only 6% of children nationally had mothers who received late or no prenatal care.[10] Significantly fewer Black and Hispanic women than White women in Texas receive prenatal care in the first trimester: based on data through 2013, over 70% of White women received first trimester care, compared with less than 60% of Hispanic women and just over 50% of Black women.[11] Prenatal care, which is vital to protecting the health of mothers and infants, includes such basic care as the diagnosis and treatment of health complications as well as counseling about diet and the avoidance of illegal drugs, alcohol, and smoking.[12] According to the Texas Department of State Health Services, inadequate prenatal care may lead to low birth weight babies, preterm deliveries, infant mortality, and maternal mortality.[13]

Texas women suffer from poor health in many other ways. In 2012, the cervical cancer rate in Texas was 9.0 incidences per 100,000 women, compared to the national rate of 7.4 incidences per 100,000 women.[14] The death

---

[9] *Id.*

[10] *Id.*

[11] Tex. Dep't of State Health Servs., *The Health Status of Texas 2014*, 19 (Oct. 2014), http://www.dshs.state.tx.us/chs/HealthStatusTexas2014.pdf.

[12] *Id.*

[13] *Id.*

[14] Henry J. Kaiser Family Found., *Cervical Cancer Incidence Rate per 100,000 Women*, State Health Facts, http://kff.org/other/state-indicator/cervical-cancer-rate (last visited Dec. 21, 2015). Texas

rate from cervical cancer in Texas was 2.8 for every 100,000 women in that same year, while the rate nationally was 2.3 per 100,000 women.[15] Rates for Hispanic women in Texas are more dire still. While nationally 2.7 of every 100,000 Hispanic women die of cervical cancer, in Texas the rate is 3.9 of every 100,000.[16] When it comes to breast cancer, Black women in Texas face worse outcomes than Black women nationwide, with a breast cancer mortality rate of 32.2 deaths per 100,000 Black female Texas residents, as compared to the national rate among Black women of 30.2 per 100,000, and a national rate for all women of 21.3 per 100,000.[17] This is the eleventh-worst rate nationwide for Black women.[18]

In addition to these above-average cancer rates, Texas women are more likely to be obese or overweight and to suffer from diabetes than women in other

---

had the seventh-highest rate of cervical cancer among the 48 states reporting data and Washington, D.C. *Id.*

[15] Henry J. Kaiser Family Found., *Cervical Cancer Deaths per 100,000 Women*, State Health Facts, http://kff.org/other/state-indicator/cervical-cancer-death-rate (last visited Dec. 21, 2015). Texas had the eighth-highest cervical cancer death rate among states reporting sufficient data in 2012. *Id.*

[16] Henry J. Kaiser Family Found., *Cervical Cancer Deaths per 100,000 Women by Race/Ethnicity*, State Health Facts, http://kff.org/other/state-indicator/cervical-cancer-death-rate-by-re (last visited Dec. 21, 2015).

[17] Hess et al., *supra* note 2, at 222.

[18] *Id.*

states.[19] In fact, 10.4% of Texas women suffer from diabetes, a higher rate than 37 other states and Washington, D.C.[20] In 2013, Texas women died from heart disease at a higher rate than the national average; Hispanic women in Texas had the fourth-highest mortality rate from heart disease compared to their counterparts in other states that reported data.[21] Finally, IWPR's 2015 rankings placed Texas 41st among the states with respect to the occurrence of both Chlamydia and AIDS among women,[22] and the CDC reports that Texas had the third-highest number of HIV diagnoses in 2013.[23]

The health care challenges facing Texas women have a clear impact on their children and families. A sick mother will be hindered in providing income or care for her children. Children from low-income families with uninsured parents are three times more likely to be eligible for insurance but remain uninsured, as compared to children in families with insured

---

[19] Henry J. Kaiser Family Found., *Overweight and Obesity Rates for Adults by Gender*, State Health Facts, http://kff.org/other/state-indicator/adult-overweightobesity-rate-by-gender (last visited Dec. 21, 2015); Hess et al., *supra* note 2, at 224.

[20] Hess et al., *supra* note 2, at 224.

[21] *Id.* at 220.

[22] *Id.* at 195.

[23] Ctrs. for Disease Control and Prevention, *Texas – 2015 State Health Profile*, 1 (2015), http://www.cdc.gov/nchhstp/stateprofiles/pdf/Texas_profile.pdf.

parents.[24] Children born to mothers who do not receive prenatal care are three times more likely to have low birth weights and five times more likely to die as babies than those whose mothers obtain prenatal care.[25] Poor maternal health continues to affect children's well-being beyond infancy: researchers from the University of Houston found that the poor health of a mother can contribute to a family's risk of falling into low food security, characterized by inadequate food quality and quantity.[26] Indeed, Texas has a higher food insecurity rate than the national average based on data from 2012-2014.[27]

---

[24] Ctr. on Budget and Policy Priorities & Georgetown Univ. Health Policy Inst. Ctr. for Children and Families, *Expanding Coverage for Parents Helps Children: Children's Groups Have a Key Role in Urging States to Move Forward and Expand Medicaid*, 1, http://www.cbpp.org//sites/default/files/atoms/files/expanding-coverage-for-parents-helps-children7-13.pdf (last visited Dec. 21, 2015).

[25] Office on Women's Health, *Prenatal Care Fact Sheet*, Womenshealth.gov, http://womenshealth.gov/publications/our-publications/fact-sheet/prenatal-care.html (last visited Dec. 21, 2015).

[26] Marisa Ramirez, *UH Research: Healthy Mom = Healthy Family*, Univ. of Houston (Apr. 27, 2015), http://www.uh.edu/news-events/stories/2015/April/427MothersDay.php.

[27] Alisha Coleman-Jensen et al., *Household Food Security in the United States in 2014*, ERR-194, U.S. Dep't of Agric. Econ. Research Serv., 18, 20 (Sept. 2015), http://www.ers.usda.gov/media/1896841/err194.pdf. The U.S. Department of Agriculture defines food insecurity as the inability

A wealth of data shows that children in Texas are, in fact, suffering. The United Health Foundation cites childhood poverty as a health challenge facing Texas.[28] Census data show that more than 1.7 million Texas children under age eighteen lived in poverty in 2014.[29] This is nearly a quarter of all children in Texas.[30] In addition, this number *increased* considerably from 2000 to 2011, at a faster rate than the growth of the population of children.[31] While Texas's child population grew by 18% during this period, the number of children living in poverty grew by 47%.[32]

The combination of poverty and lack of health care access has translated into poor health outcomes for children. As of 2013, Texas had the fifth-highest

---

to acquire adequate food for one or more household members due to limited resources. *Id.* at 8.

[28] America's Health Rankings, United Health Found., *State Data: Texas*, http://www.americashealthrankings.org/TX (Measures tab) (last visited Dec. 21, 2015).

[29] U.S. Census Bureau, *Under Age 18 in Poverty*, Small Area Income and Poverty Estimates, http://www.census.gov/did/www/saipe/data/interactive/saipe.html?s_appName=saipe&map_yearSelector=2014&map_geoSelector=u18_c&s_measures=u18_snc&s_state=48&menu=grid_proxy (last visited Dec. 21, 2015).

[30] *Id.*

[31] *See* Ctr. for Pub. Policy Priorities, *Investing in Our Future: 2013 State of Texas, Children Texas KIDS COUNT Annual Data Book*, Texas Kids Count Project, 21 (2013), http://forabettertexas.org/images/CPPP13_KC-databook-v27.pdf.

[32] *Id.*

obesity rate among high school students in the nation.[33] Texas child and teen death rates are higher than the national average, at 25 per 100,000 children and teenagers.[34] For these reasons and others, Kids Count ranked Texas in the bottom ten states for overall child well-being and child health in 2015.[35]

In sum, by many measures, women and children in Texas face some of the worst health conditions in the United States.

---

[33] Trust for America's Health & Robert Wood Johnson Found., *The State of Obesity in Texas: Childhood Obesity*, The State of Obesity, http://stateofobesity.org/states/tx (last visited Dec. 21, 2015). As of 2011, Texas also had the tenth-highest obesity rate in the nation among 10- to 17-year-olds. *Id.*

[34] Annie E. Casey Found., *Child And Teen Death Rate: 2013*, Kids Count Data Center, http://datacenter.kidscount.org/data/tables/7243-child-and-teen-death-rate?loc=45&loct=2#detailed/2/45/true/36/any/14285,17513 (last visited Dec. 21, 2015).

[35] Annie E. Casey Found., *2015 Data Book: State Trends in Child Well-Being*, Kids Count Data Center, 13, 17 (2015), http://www.aecf.org/m/resourcedoc/aecf-2015kidscountdatabook-2015.pdf. This overall rank was based on sixteen key indicators of child well-being across four categories: health, economic well-being, education, and family and community. Factors considered include rates of low-birthweight babies, children without insurance, child and teen deaths, teens who abuse alcohol or drugs, teen births, and children living in high-poverty areas.

II. Texas's Policy Choices Contribute to Texas Women's Poor Health Care and Poor Health Outcomes.

Texas contends that it passed H.B. 2 to protect women. But H.B. 2 was enacted within a broader context in which the Texas legislature has neglected the pressing health care needs of Texas women and their families. As discussed above, Texas women have some of the worst health outcomes in the country. Yet, as discussed below, the Texas legislature has repeatedly chosen to make it *more* difficult for its women and children—particularly its low-income women and children—to access basic, front-line health services.

A. Home to Some of the Highest Uninsurance Rates in the Country, Texas Has Chosen to Deny Federally Funded Coverage to Hundreds of Thousands of Women Below the Poverty Line.

Texas women have among the worst access to health care in the country. Using the Census Bureau's March 2015 Current Population Survey, the Kaiser Family Foundation estimates that nearly two million adult Texas women under 65 lack health insurance.[36] That is 22% of Texas women aged 19-64, which is a

[36] Henry J. Kaiser Family Found., *Health Insurance Coverage of Women 19-64*, State Health Facts, http://kff.org/other/state-indicator/nonelderly-adult-women (last visited Dec. 21, 2015).

higher percentage of adult women who are uninsured than in any other state.[37] Many of Texas's uninsured adults do not have access to employer-provided coverage and would struggle to afford insurance on their own.[38]

That the poor lack health insurance is hardly surprising or specific to Texas. But, in 30 of the 50 states and Washington, D.C., this general phenomenon is ameliorated by the fact that nearly all low-income uninsured adult citizens are eligible for Medicaid or an equivalent substitute.[39] In Texas, however, the only nonpregnant adults eligible for Medicaid are those who both (a) have children, and (b) earn less than 15% of the federal poverty level—a mere $247 per month for a family of three in 2014.[40] This is the second-most

---

[37] *Id.*

[38] Rachel Garfield et al., Henry J. Kaiser Family Found., *New Estimates of Eligibility for ACA Coverage among the Uninsured*, 4 tbl.1 (Oct. 2015), http://files.kff.org/attachment/issue-brief-new-estimates-of-eligibility-for-aca-coverage-among-the-uninsured.

[39] MaryBeth Musumeci & Robin Rudowitz, Henry J. Kaiser Family Found., *The ACA and Medicaid Expansion Waivers*, 1-4, (Nov. 2015), http://files.kff.org/attachment/issue-brief-the-aca-and-medicaid-expansion-waivers.

[40] Ctr. for Medicaid and CHIP Servs., *State Medicaid and CHIP Income Eligibility Standards* (Oct. 1, 2014), http://www.medicaid.gov/medicaid-chip-program-information/program-information/downloads/medicaid-and-chip-eligibility-levels-table.pdf; Ctr. for Medicaid and CHIP Servs., *State Medicaid and CHIP Income Eligibility Standards Expressed in Monthly Income, Household Size of Three* (Oct. 1, 2014), http://www.medicaid.gov/medicaid-chip-program-

stringent income limit for parental Medicaid coverage in the country, exceeded only by Alabama at 13% of the federal poverty level.[41] Covering only the poorest of the poor, and only parents at that, Texas Medicaid provides health coverage for a small fraction of its low-income population. The remainder, who generally forego care or rely upon uncompensated care from hospitals,[42] includes 766,000 adult Texans who are below the federal poverty level and are ineligible for federal tax credits.[43] A majority—approximately 421,000 of them—are women.[44]

---

information/program-information/downloads/medicaid-and-chip-eligibility-levels-table_hhsize3.pdf.

[41] Ctr. for Medicaid and CHIP Servs., *State Medicaid and CHIP Income Eligibility Standards* (Oct. 1, 2014), http://www.medicaid.gov/medicaid-chip-program-information/program-information/downloads/medicaid-and-chip-eligibility-levels-table.pdf.

[42] The Texas Hospital Association estimates that Texas hospitals provide $5.5 billion in uncompensated care annually. Tex. Hosp. Ass'n, *State's Inaction on Coverage for the Working Poor Has Consequences for Uninsured, Taxpayers, Hospitals*, http://www.tha.org/HealthCareProviders/Issues/HealthCareCoverage/StatesInactiononCoF0933/index.asp (last visited Dec. 21, 2015).

[43] Rachel Garfield & Anthony Damico, Henry J. Kaiser Family Found., *The Coverage Gap: Uninsured Poor Adults in States that Do Not Expand Medicaid – an Update*, 8 tbl.2 (Oct. 2015), http://files.kff.org/attachment/issue-brief-the-coverage-gap-uninsured-poor-adults-in-states-that-do-not-expand-medicaid-an-update.

[44] *Id.* at 7 tbl.1, 8 tbl.2.

It is entirely avoidable that these 421,000 women lack basic health coverage. *Amici* recognize that the Medicaid expansion provisions of the Affordable Care Act—under which the federal government would pay a minimum of 90% of Medicaid expenses for low-income individuals[45]—have been the subject of both legal and political dispute. But even other states that have not accepted the Medicaid expansion have done far better than Texas in providing health coverage to low-income women. As of November 2015, seven states received approval to implement the Medicaid expansion through an approved alternative coverage mechanism: Arkansas, Iowa, Michigan, Pennsylvania, Indiana, New Hampshire, and Montana.[46] Arizona has an alternative coverage application pending as of November 2015;[47] Louisiana's legislature has established a funding source to cover the state's contribution towards the insurance expansion;[48] and, in Alabama, an advisory committee

---

[45] The proposed expansion was part of the Affordable Care Act and made optional by this Court's decision in *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012). *See Financing*, Medicaid.gov, http://www.medicaid.gov/affordablecareact/provisions/financing.html (last visited Dec. 21, 2015).

[46] Musumeci & Rudowitz, *supra* note 39, at 1.

[47] *Id.*

[48] Associated Press, *Louisiana's financing plan for Medicaid expansion receives final passage*, Times-Picayune (June 2, 2015), http://www.nola.com/politics/index.ssf/2015/06/louisiana_medicaid_finance_pla.html; Advisory Bd. Co., *Where the states stand on Medicaid expansion* (Nov. 23, 2015), https://www.advisory.com/daily-

convened by the governor recommended accepting the federal offer unanimously.[49] But, in Texas, proposals to adopt a "Texas solution" have failed to gain traction.[50] In sum, the fact that Texas has not implemented basic coverage for women's health care that other states of all political stripes have achieved makes Texas nearly unique in its decision not to provide such coverage or to explore ways to provide it.

---

briefing/resources/primers/medicaidmap ("[I]n June 2015, the Louisiana state Legislature passed a veto-proof bill to create a funding plan for Medicaid expansion."); *see* Louisiana State Legislature, *2015 Regular Session: HCR75*, https://www.legis.la.gov/legis/BillInfo.aspx?i=227792 (last visited Dec. 21, 2015).

[49] Brian Lyman, *Bentley task force backs expanded Medicaid*, Montgomery Advertiser (Nov. 18, 2015), http://www.montgomeryadvertiser.com/story/news/politics/southunionstreet/2015/11/18/bentley-task-force-expand-medicaid-alabama/75992648 ("A task force created by Gov. Robert Bentley voted Wednesday to recommend Medicaid expansion, citing the potential public health and economic benefits and the need to keep state hospitals open.").

[50] Robert T. Garrett, *Zerwas: Bill to push 'Texas solution' on Medicaid is dead*, Dallas Morning News: Trail Blazers Blog (May 7, 2013), http://trailblazersblog.dallasnews.com/2013/05/zerwas-bill-to-push-texas-solution-on-medicaid-is-dead.html; Marcia Davis, *Texas stalls on Medicaid funding*, Daily Trib. (Apr. 29, 2015), http://www.dailytribune.net/news/texas-stalls-on-medicaid-funding/article_6d4e0bbe-eecd-11e4-9cfe-C7f786f81066.html; Tex. Legislature Online, *History: H.B. 3791*, http://www.legis.state.tx.us/BillLookup/History.aspx?LegSess=83R&Bill=HB3791 (last visited Dec. 21, 2015) (showing bill did not pass Calendars stage).

The lack of access to health insurance affects not just women, but their children as well. The Texas Children's Health Insurance Program ("CHIP") requires a child to be without access to private health coverage for 90 days before the child can enroll in the program, subject to certain exceptions.[51] As recognized by the 33 states that have no CHIP waiting periods[52]—including Kentucky, Ohio, and West Virginia—state-mandated waiting periods create a coverage gap that needlessly plunges children into the ranks of the uninsured at crucial moments in their development. The elimination of waiting periods in many states has contributed to a substantial reduction in the number of eligible-but-uninsured children since 2008.[53] Texas, however, still has over 500,000 children who are CHIP- or Medicaid-eligible but unenrolled, the highest number of any state.[54] The CHIP participation rate for eligible children in Texas was 82% in 2011, significantly lower

---

[51] Tricia Brooks et al., Kaiser Comm'n on Medicaid and the Uninsured, *Modern Era Medicaid: Findings from a 50-State Survey of Eligibility, Enrollment, Renewal, and Cost-Sharing Policies in Medicaid and CHIP as of January 2015*, 29 (Jan. 2015), http://files.kff.org/attachment/report-modern-era-medicaid-findings-from-a-50-state-survey-of-eligibility-enrollment-renewal-and-cost-sharing-policies-in-medicaid-and-chip-as-of-january-2015.

[52] *Id.*

[53] Genevieve M. Kenney et al., Urban Inst., *Medicaid/CHIP Participation Rates Among Children: An Update*, 1-3 (Sept. 2013), http://www.rwjf.org/content/dam/farm/reports/issue_briefs/2013/rwjf407769.

[54] *Id.* at 3.

than the national average; in contrast, nineteen states and Washington, D.C. had participation rates of 90% or higher.[55]

B. Texas Has Restricted Funding for Family Planning Services, Affecting the Health of Many Texas Women.

In the absence of a comprehensive insurance scheme, robust state family planning programs enable women of all income and insurance levels to access core family planning and women's health services such as contraception, breast and cervical cancer screenings, and sexually transmitted infection testing and treatment. In Texas and throughout the United States, public funding for family planning programs has long allowed low-income, uninsured women—disproportionately women of color—to access sexual health care even if they lacked broader access to the health care system.[56] Under Texas's current and recent

---

[55] *Id.* at 1-2.

[56] *See* Alina Salganicoff et al., Henry J. Kaiser Family Found., *Women and Health Care in the Early Years of the Affordable Care Act: Key Findings from the 2013 Kaiser Women's Health Survey*, 2-3 (May 2014), https://kaiserfamilyfoundation.files.wordpress.com/2014/05/8590-women-and-health-care-in-the-early-years-of-the-affordable-care-act.pdf (noting that Medicaid beneficiaries and uninsured women "have much higher reliance on [community health centers and family planning] clinics than privately-insured women," and that women who are younger, Hispanic, low-income, or uninsured are also more likely to lack connections to care such as a regular clinician).

leadership, however—the same leadership responsible for H.B. 2—Texas has weakened this important safety net considerably.

For years, Texas maintained the Women's Health Program, using state funding allocations and federal funds received through a Medicaid Research and Demonstration Family Planning Waiver, to pay for critical family planning services for low-income women in the state.[57] In 2011, the Texas legislature slashed its family planning budget—by nearly 66%—from $111 million to $37.9 million for the 2012-2013 biennium.[58] In so doing, it also established a tiered funding system that placed specialized family planning providers[59] in its

---

[57] Texas applied for, and previously received, federal funding under a Section 1115 Research and Demonstration Waiver pursuant to the Social Security Act. Texas's Women's Health Program was initially approved, and mostly funded, as a Section 1115 demonstration project. *See* Tex. Health and Human Servs. Comm'n, *State of Texas 1115(a) Research & Demonstration Waiver*, 3 (2011), http://www.medicaid.gov/medicaid-chip-program-information/by-topics/waivers/1115/downloads/tx/tx-womens-health-waiver-pa.pdf.

[58] Kari White et al., *The Impact of Reproductive Health Legislation on Family Planning Clinic Services in Texas*, 105 Am. J. Pub. Health 851, 852 (2015); Stacey Pogue, Ctr. for Pub. Policy Priorities, *Sizing Up the 2014-15 Texas Budget: Family Planning*, 3 (Aug. 15, 2013), http://forabettertexas.org/images/HC_2013_08_PP_Budget_FamilyPlanning.pdf.

[59] Specialized family planning providers are nonpublic entities that provide family planning services but do not provide comprehensive primary and preventive care services. *See* Tex. Gov't Code § 531.0025.

lowest tier, ensuring that these clinics received little of the money earmarked for family planning services.[60] Certain other restrictions led the federal government to cancel federal Medicaid family planning funds for the Women's Health Program—a loss of approximately 90% of the program's funding.[61]

The one-two punch of state funding cuts and the loss of federal funding created substantial barriers to health care access for many Texas women in the form of fewer clinics and more costly family planning services. Health care providers of all types closed or reduced services in response to loss of funding stemming from the 2011 family planning budget cuts, leaving some areas of the state with no state-funded family planning clinics.[62] Between fiscal year 2011 and fiscal year 2013, the use of the Texas Women's Health Program declined by more than 25% overall, with up to a 64% decline in use in the hardest-hit regions.[63] Approximately 82

---

[60] White, *supra* note 58, at 852-53.

[61] Leighton Ku et al., *Policy Research Brief No. 31: Deteriorating Access to Women's Health Services in Texas: Potential Effects of the Women's Health Program Affiliate Rule*, Geiger Gibson/RCHN Cmty. Health Found. Research Collaborative, 3, 5 (Oct. 11, 2012), http://s3.amazonaws.com/static.texastribune.org/media/documents/GWU_WHP_study.pdf; Jim Forsyth, *Government to shut down Texas women's health program*, Reuters (Mar. 16, 2012), http://www.reuters.com/article/2012/03/16/us-usa-contraception-texas-idUSBRE82E1CR20120316.

[62] Pogue, *supra* note 58, at 1-2.

[63] Tex. Health and Human Servs. Comm'n, *Texas Women's Health*

medical facilities closed or discontinued family planning services as a consequence of decreased funding; many other providers reduced hours and implemented higher cost-sharing.[64] One recent study found that 25% of publicly funded family planning clinics in Texas closed in 2011-2013, and the clinics that remained open served only 54% of the clients they had previously served.[65]

The consequences of Texas's policymaking on family planning services have hit minority communities particularly hard. For example, by 2012, nine out of 32 family planning clinics in the Rio Grande Valley that received state funding had closed.[66] Meanwhile, the cost of services for patients increased exponentially beyond what low-income women could afford. Costs in this area for a month's supply of contraception and the

---

Program: Savings and Performance Reporting, 2-3 (Jan. 2015), http://www.hhsc.state.tx.us/reports/2015/tx-womens-health-program-rider-44-report.pdf. The Commission calculated the difference in service utilization by comparing the total number of women who had a Medicaid claim for Texas Women's Health Program services in fiscal year 2013 with fiscal year 2011.

[64] Tex. Policy Evaluation Project, Univ. of Tex. at Austin, *2011 Texas Legislation Lead to Family Planning Clinic Closures, Reduced Services, and Uncertain Future* (Apr. 6, 2015), http://www.utexas.edu/cola/txpep/releases/ajph2015-release.php.

[65] White, *supra* note 58, at 851.

[66] Nat'l Latina Inst. for Reprod. Health & Ctr. for Reprod. Rights, *Nuestra Voz, Nuestra Salud, Nuestro Texas: The Fight for Women's Reproductive Health in the Rio Grande Valley*, 6 (Nov. 2013), http://www.nuestrotexas.org/pdf/NT-spread.pdf. The Rio Grande Valley is an area of Texas with a disproportionately high number of low-income, minority communities. *See id.* at 14-15.

fee for an annual exam have tripled or quadrupled since 2010.[67] Tests such as ultrasounds, mammograms, and pap tests—once offered widely by clinics at highly subsidized rates—are increasingly unavailable.[68] More and more, women are being forced to seek preventive care from private doctors who charge rates higher than many women can afford, and the referrals to these doctors expire before many women can pull together enough money to use them.[69]

The negative effects of the 2011 funding cuts were dire enough that the Texas legislature partially changed course in 2013, increasing its budget to expand primary health care services for low-income, uninsured Texans in 2014-2015, with a portion of those funds expected to go to family planning services.[70] Even this

---

[67] *Id.* at 7.

[68] *Id.*

[69] *Id.*; *see also* Tex. Women's Healthcare Coal., *Texas Women's Healthcare in Crisis*, 5 (2013), http://www.texaswhc.org/wp-content/uploads/2013/01/Texas-Womens-Healthcare-in-Crisis.pdf.

[70] Tex. Dep't of State Health Servs., *Primary Health Care and Expanded Primary Health Care Services FY 2014 Annual Report*, 3 (May 2015), https://www.dshs.state.tx.us/phc/pdf/2014-PHC_EPHC-Report.doc. The Texas legislature also appropriated $71.3 million to the Texas Women's Health Program for the 2014-15 biennium in order to replace lost federal funding. *See* Pogue, *supra* note 58, at 6. However, the state-funded Texas Women's Health Program, while providing many crucial family planning services, does not cover other services, such as follow-up pap smears, pregnancy testing, and visits for sexually transmitted infection testing only. *See* Tex. Dep't of State Health Servs., *Self-Evaluation Report Submitted to the Sunset Commission*, 204

increase, however, is insufficient to restore what women were able to access prior to 2011, let alone to raise levels close to what Texas women need. Although the expanded funding program expects that 60% of its clients will receive family planning services, there is no mechanism to ensure that it reaches this target; in fiscal year 2014, for example, only about seven million dollars in family planning service costs were reimbursed out of about 42 million dollars reimbursed for medical services through the primary health care and expanded primary health care program.[71] Finally, even if Texas were to meet its goal, the funding would still not cover all of the more than one million Texas women aged 20-44 who need publicly-supported preventive care and family planning services.[72]

The Texas legislature has also passed legislation that restricts women's access to breast and cervical cancer screening. The Texas Breast and Cervical Cancer Services Program ("BCCS"), in partnership with the CDC, has provided breast and cervical cancer screening to uninsured and underinsured Texas women for decades.[73] The 84th Legislature recently passed H.B. 1, which requires that providers participating in

---

(Sept. 2013), www.dshs.state.tx.us/sunset/DSHS-SER-Sep-2013-acc.pdf.

[71] Pogue, *supra* note 58, at 8-9; Tex. Dep't of State Health Servs., *FY 2014 Annual Report*, *supra* note 70, at 3, 6.

[72] *Texas Women's Healthcare in Crisis*, *supra* note 69, at 2, 4.

[73] *See Self-Evaluation Report Submitted to the Sunset Commission*, *supra* note 70, at 185-90.

the BCCS program also be eligible to participate in the Texas Women's Health Program, thereby extending certain restrictions to providers of cancer screening for women.[74] These requirements prevent certain providers in Texas from accessing funds to cover cancer screenings for low-income women,[75] which disproportionately impacts women of color.[76]

In sum, by cutting the women's health care safety net, even as it refuses to take action to provide general coverage to its low-income and uninsured women, Texas has acted contrary to the health care needs of Texas women.

---

[74] Nat'l Latina Inst. for Reprod. Health, *Nuestro Texas: An Analysis of the 84th Texas Legislative Session*, 2-3 (Aug. 2015), http://www.nuestrotexas.org/wp-content/uploads/2015/08/Nuestro-Texas_An-Analysis-of-the-84th-Texas-Legislative-Session_EN-FINAL.pdf.

[75] *Id.*

[76] In 2014, BCCS served 33,599 Texas women, the majority of whom were Latina/Hispanic. *See* Dani McClain, *How Texas Politicians Just Made Finding a Lump in Your Breast Even Scarier*, The Nation (June 4, 2015), http://www.thenation.com/article/how-texas-politicians-just-made-finding-lump-your-breast-even-scarier. Latina/Hispanic women comprised the majority of those served by BCCS in prior years as well. *See, e.g.*, *Self-Evaluation Report Submitted to the Sunset Commission*, *supra* note 70, at 190.

III. The Court Should Consider Texas's Poor Health and Well-Being Outcomes and Texas's Failure to Implement Certain Policies in Assessing the Stated Purpose of H.B. 2.

Although Texas has justified H.B. 2 as legislation intended to improve the health of women in the state, Texas's track record suggests otherwise. This Court should take into account Texas's failure to implement various health promotion policies as it assesses whether the purpose behind H.B. 2 withstands constitutional scrutiny.

Legislative purpose is a necessary component in any undue burden analysis. As this Court held in the seminal case of *Planned Parenthood of Southeastern Pennsylvania v. Casey*, "[u]nnecessary health regulations that have the *purpose* or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right." 505 U.S. 833, 878 (1992) (emphasis added). In *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007), this Court emphasized that *Casey* "struck a balance" between a woman's right to access an abortion and the state's interest in protecting the life of the unborn. In applying that standard, the Court explicitly noted the importance of legislative purpose, explaining that, where a state "has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate

interests in regulating the medical profession in order to promote respect for life." *Id.* at 158.

In *Gonzales*, this Court emphasized that courts must independently review the factual findings underpinning the legislature's stated purpose "where constitutional rights are at stake." *Id.* at 165. Just over a month ago, the Seventh Circuit followed this mandate and found that "a statute that curtails the constitutional right to an abortion . . . cannot survive challenge without evidence that the curtailment is justifiable by reference to the benefits conferred by the statute." *Planned Parenthood of Wisconsin, Inc. v. Schimel*, 806 F.3d 908, 921 (7th Cir. 2015).

This focus on purpose in the reproductive rights context is in keeping with the Court's careful review of purpose in other contexts. *See United States v. Windsor*, 133 S. Ct. 2675, 2693-94 (2013) ("The history of DOMA's enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages . . . was more than an incidental effect of the federal statute. . . . DOMA's operation in practice confirms this purpose.").

In short, as this Court carefully evaluates Texas's stated purpose for passing H.B. 2—improving the health of women and their families—it should consider the poor health and well-being outcomes of women and children in Texas, as well as Texas's failure to undertake basic health reforms that would improve those outcomes.

CONCLUSION

For the foregoing reasons, *Amici* urge this Court to reverse the judgment below.

Respectfully submitted,

SUSAN J. KOHLMANN*
KATYA JESTIN
ALISON I. STEIN
JENNER & BLOCK LLP
919 Third Ave.
New York, NY 10022
(212) 891-1600
skohlmann@jenner.com
**Counsel of Record*

MATTHEW S. HELLMAN
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000