No. 15-274

In The Supreme Court of the United States

WHOLE WOMAN'S HEALTH, *ET AL.*,
Petitioners,

v.

JOHN HELLERSTEDT, 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 LIVE ACTION *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST[1]

At the time of its decision in *Roe v. Wade*, 410 U.S. 113 (1973)("*Roe*"), this Court acknowledged its "awareness" of "the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires." *Id.* at 116. In the forty-three years since *Roe*, the "emotional nature" of the controversy and its "vigorous opposing views" have not ebbed in the slightest.

Live Action is a new media nonprofit organization dedicated to building a culture of life and advancing human rights. As relevant herein, Live Action is dedicated to educating the public about the "vigorous opposing views" surrounding abortion and the practices of those who provide abortion services. While Live Action seeks to protect the vulnerable lives of the preborn through the elimination of abortion, it also seeks to further the health and safety of the women who nonetheless decide to have an abortion. As the theme of this year's March For Life put it: "To be pro-life is to be pro-woman."

Live Action uses investigative journalism, factual research and data analysis to prepare such information for dissemination to the public. Because of Live Action's undercover investigative work, it has

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[1] Counsel for both parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person other than Amicus or its counsel made any monetary contribution to the preparation or the submission of this brief.

a unique "inside" perspective into abortion facilities. For example, Live Action's video footage shows facility workers repeatedly lying to women about:

- how developed their babies are and whether or not the preborn can feel pain during an abortion (https://www.youtube.com/watch?v=Q04-l2cm1oQ); and

- the potential complications of abortionprocedures and whether the facility had previous abortion-induced emergencies that sent clients to the emergency room (https://www.youtube.com/watch?v=pSoPys6KybI)

Live Action investigations also found abortionists:

- trying to cover up sex crimes committed against minors by offering to provide abortions and not alert law enforcement, as legally required (https://liveaction.org/monalisa/);

- promoting sex-selective abortions (https://liveaction.org/gendercide/); and

- admitting that they would break the law by refusing to perform mandatory life-saving procedures on babies born alive from botched abortions (http://liveaction.org/inhuman/investigation-2-washington-d-c/).

Live Action's investigations revealed examples of these types of violations at multiple facilities, fairly demonstrating repeated questionable and unethical conduct. Such behavior shows that the abortion industry regularly puts its own interests above those of its patients as well as the law. When it comes to health and safety standards, these practices can have literally deadly consequences.

Live Action was founded in 2003 by then fifteen year-old Californian Lila Rose. A core mission of Live Action is to speak for those - born and preborn - whose voices might not otherwise be heard in this "sensitive and emotional" controversy, on precisely these types of issues. On behalf of its many constituents nationwide, it is a privilege for Live Action to speak on their behalf to this Court as well.

SUMMARY OF ARGUMENT

Roe and its progeny have always recognized the right of states to regulate aspects of abortion practice. A woman's "right" to have an abortion "is not absolute, and is subject to some limitations; and . . . at some point, the state interests as to protection of health, medical standards, and prenatal life, become dominant." *Roe* at 155-156. Or, as the Court's Joint Opinion by Justices O'Connor, Kennedy and Souter in *Casey*, put it perhaps best: "the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 846 (1992)("Casey").

In furtherance of these state interests, in July 2013, "the State of Texas passed H.B. 2, which contained various provisions relating to abortion." *Whole Woman's Health, et al. v. Cole, et al.*, No. 14-50928, Mem. Op. 1, 18 (5th Cir. June 9, 2015)("*Cole*"). One provision "requires a physician performing an abortion to have admitting privileges at a hospital within thirty miles of the location where the abortion is performed (the 'admitting privileges requirement')." *Id.* A "second provision requires all abortion clinics to comply with standards set for ambulatory surgical centers (the 'ASC requirement')." *Id.* Both of these provisions were added to the Texas Health & Safety Code for the stated purpose of "rais[ing] the standard and quality of care for women seeking abortions and . . . protect[ing] the health and welfare of women seeking abortions." *Id.*

Before this Court, Petitioners attack these provisions of H.B. 2 as "failing to advance the State's interest in promoting health - or any other valid interest." *Petition For Writ Of Certiorari* at i.[2] This is an "absolute" position. Petitioners do not claim that H.B. 2 fails to advance the State's interests enough; rather they claim that it fails to advance these state interests *at all*. This absolute position is, however, absolutely wrong.

There are many reported incidents, some compiled by Live Action and detailed herein, of woeful

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[2] The unidentified "other" interest, as *Casey* recognized, is the life growing inside the pregnant woman seeking an abortion. This is not just "any other" interest, as Petitioners attempt to downplay it.

abortion facility health failures across the country. Health and safety regulations have been repeatedly violated, as have proper health and safety practices. The health - indeed the very lives - of women have been repeatedly compromised as a result. These incidents show a real world need for greater health and safety protections in abortion practice. There is, thus, a self-evident advancement of the state's interests through the enactment of statutes providing such protections like H.B. 2.

In view of the documented record of these repeated health and safety difficulties in the abortion industry, it appears disingenuous for the abortion providers to maintain their absolutist position that statutory provisions like those in H.B. 2 completely fail to advance *any* state interest in promoting health. It seems insincere to claim that such statutory provisions are wholly *unnecessary*, because women's health during abortions is somehow already perfectly protected. It is nothing new for the abortion industry to take such self-serving positions to justify its actions on points of criticism, especially its own health and safety record.

The true national health and safety record of the abortion industry amply justifies the State of Texas' desire to "raise the standard and quality of care for women seeking abortions and to protect the health and welfare of women seeking abortions" through the enactment of H.B. 2. There is nothing illegitimate about such a well-grounded decision, and this Court is in no position otherwise to second-guess the reasons for its enactment. Such legislative determinations by the elected representatives of a

State's citizenry are entitled to deference, even if others might disagree with them. The decision below upholding the State of Texas' enactment of H.B. 2 should be affirmed.

ARGUMENT

Because the subject matter of this case is abortion, it has generated great interest. However, the case is actually quite straightforward, and its resolution is controlled by existing precedent. In the Joint Opinion for the Court in *Casey*, this Court held that pre-viability "[r]egulations designed to foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden." *Casey* at 877. The Court then further explained that: "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.*" *Id.* at 878 (emphasis added). H.B. 2 creates no such "substantial obstacle."

I.

H.B. 2's HEALTH PROVISIONS ARE NOT UNNECESSARY

We live in an uncertain world. As a result, we can expect emergencies to occur at abortion facilities. We can also expect medical malpractice and other negligence to happen at those facilities. And unfortunately, if the past is prologue, we can expect criminal misconduct in some facilities as well. Each time such events re-occur, the health of women undergoing an abortion in those facilities is put in jeopardy. Some pregnant women have even lost their lives when abortion facilities have been unable to address these situations adequately.

For present purposes, there are two aspects to this problem: 1) the availability of proper surgical conditions and equipment at abortion facilities; and 2) the continuity of information and care for patients who have to be transferred from the facility to a hospital because of their condition. The ASC requirement of H.B. 2 addresses the first aspect,[3] while the "admitting privileges" requirement

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[3] The petitioners' expert below opined that "the ASC's requirement's construction standards were 'largely aimed at maintaining a sterile operating environment." *Cole* at 22 n. 17. The State's expert testified "that the sterile environment of an ASC was medically beneficial because surgical abortion involves invasive entry into the uterus, which is sterile. Accordingly, the State's expert opined that abortion procedures should 'be performed in an ASC where the higher standard of care is required so as to better protect the patient's health and safety.'" *Id.* at 22.

addresses the second.[4]

The case of Kermit Gosnell provides a horrifying example of both risks that pregnant women seeking an abortion can suffer. As a Pennsylvania grand jury concluded, the inadequate conditions at Gosnell's abortion facility combined with his refusal to cooperate with the local hospital led to the death of his patient, Nepalese refugee Karnamaya Mongar:

> Office workers had her sign various forms that she could not read, and then began doping her up. She received repeated unmonitored, unrecorded intravenous injections of Demerol, a sedative seldom used in recent years because of its dangers. …
>
> After several hours, Mrs. Mongar simply stopped breathing. When employees finally noticed, Gosnell was called in and briefly attempted to give CPR. He couldn't use the defibrillator (it was broken); nor did he administer emergency medications that might have restarted her heart. After further crucial delay, paramedics finally arrived, but first the clinic staff hooked up machinery

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[4] As the State's expert testified below, "the physician performing the abortion 'is the most knowledgeable about the procedure and the patient,' whereas an emergency room 'physician has no prior relationship with the abortion patient and is unfamiliar with her medical history and preferences.' Thus, it was the State's expert's opinion that the admitting privileges requirement would lead to greater continuity of care, increased quality of care, and fewer risks from complications." *Cole* at 23 n. 19.

> and rearranged Mongar's body to make it look like they had been in the midst of a routine, safe abortion procedure.
>
> Even then, there might have been some slim hope of reviving Mrs. Mongar. The paramedics were able to generate a weak pulse. But, because of the [narrow] cluttered hallways and the padlocked emergency door, it took them over twenty minutes just to find a way to get her out of the building.
>
> Doctors at the hospital managed to keep her heart beating, but they never knew what they were trying to treat, because Gosnell and his staff lied about how much anesthesia they had given, and who had given it.[5]

A. Ambulatory Surgical Centers

True Stories: Regrettably, Gosnell's case is not the only example of unconscionable harm befalling women patients in abortion facilities due to lack of adequate medical conditions. On July 20, 2012, twenty four-year-old Tonya Reaves began bleeding shortly after her 11 a.m. abortion at a Planned Parenthood abortion facility in Chicago. [6] Twelve

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[5] Report of the Grand Jury, IN THE COURT OF COMMON PLEAS FIRST JUDICIAL DISTRICT OF PENNSYLVANIA CRIMINAL TRIAL DIVISION, MISC. NO. 0009901-2008, Grand Jury XXIII: C-17 (found at: http://www.phila.gov/districtattorney/pdfs/grandjurywomensmedical.pdf (pp. 7-8)).

[6] Steve Miller, *Documents Shed Light on Woman's Death After Abortion*, CBS CHICAGO (July 24, 2012)(found at:,

hours later, Tonya died at a nearby hospital.[7] The Medical Examiner's autopsy report revealed that pieces of placenta were still attached to the inside of her womb and that an extensive uterine perforation caused her enormous internal bleeding.[8] Tonya had languished for over five hours (from 11 a.m. to 4:30 p.m.) at the abortion clinic before being taken to a hospital, where her treatment by the trauma team came too late to save her life.[9] An examination of phone records indicates that no 911 call was ever made from the abortion facility for emergency assistance to Tonya.[10]

A Live Action investigative report in 2012 revealed that, at Planned Parenthood facilities alone, there had been fourteen cases of serious medical emergencies within the prior twenty-four months. *See* https://www.youtube.com/watch?v=pSoPys6KybI (LiveActionAdvocate.org). To make matters even worse, the investigative report also details Planned Parenthood personnel refusing to disclose those emergencies to women asking about the health and

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http://chicago.cbslocal.com/2012/07/24/documents-shed-light-on-womans-death-after-abortion/).

[7] Cassy Fiano, *Autopsy Report Points to Planned Parenthood's Negligence in Tonya Reaves' Death*, LIVE ACTION NEWS (Sept. 12, 2012)(found at: http://liveactionnews.org/autopsy-report-points-to-planned-parenthoods-negligence-in-tonya-reaves-death/).

[8] *Id.*

[9] *Id.*

[10] Steven Ertelt, *Autopsy Proves Planned Parenthood Killed Woman in Botched Abortion*, LifeNews.com (Sept. 11, 2012) (found at http://www.lifenews.com/2012/09/ 11/autopsy-proves-planned-parenthood-killed-woman-in-botched-abortion/).

safety risks and record during abortions at those very same clinics. The report also reveals one Planned Parenthood facility in Virginia Beach directing an ambulance responding to its 911 call to drive around to the back door of the clinic - presumably so no one would see it.

This record of abortion facility emergencies and dishonesty is frightening.[11] Planned Parenthood holds itself out as running state-of-the-art abortion facilities. One can only wonder then what kinds of emergencies are happening without disclosure at the lesser known clinics, like Gosnell's "house of horrors." Every woman expects and deserves better treatment than this.

Regulatory Compliance: Recent investigations in Delaware, Florida, South Carolina and Georgia have all found violations of state law licensing and/or health requirements. *See* (Delaware) Kristi Burton Brown, *Planned Parenthood, Left to Itself, Becomes Another House of Horrors*, Live Action News (Apr. 10, 2013)(found at: http://liveactionnews.org/planned-parenthood-left-to-itself-becomes-another-house-of-horrors/); (Florida) Danny Burton, *Florida*

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[11] In its Mammosham Investigation, Live Action found Planned Parenthood facilities around the nation admitting that they did not provide mammograms, despite the public claim of Planned Parenthood CEO Cecile Richards that Planned Parenthood did provide mammograms to women. *See Mammosham Project: False Mammogram Claims by Planned Parenthood*, Live Action, investigative videos dated Oct. 1, 2015 and March 29, 2011 (found at: http://liveaction.org/planned-parenthood-false-mammogram-claims/).

Not Backing Down in Case Against Planned Parenthood, Live Action News (Aug. 21, 2015)(found at: http://liveactionnews.org/florida-not-backing-case-planned-parenthood/)(performance of illegal second trimester abortions); (South Carolina) Calvin Freiburger*, 2 of 3 Abortion Mills in South Carolina May Close After State Suspends Licenses*, Live Action News (Sept. 11, 2015)(found at: http://liveactionnews.org/breaking-two-south-carolinas-three-abortion-clinics-suspended-face-possible-closure/#more-73745)(at Planned Parenthood, health inspectors found 21 violations, including expired medications, incomplete records, improper disposal of infectious waste, and noncompliance with the Women's Right to Know Act, which imposes a 24-hour waiting period, along with information on fetal development and ultrasound services, before abortion); (Georgia) Carole Novielli, *Georgia TV Station Uncovers Health Violations at Multiple Abortion Clinics*, Live Action News (Dec. 14, 2015)(found at: http://liveactionnews.org/georgia-tv-station-uncovers-health-violations-at-multiple-abortion-clinics/).

Even in Pennsylvania, which increased its inspections of abortion facilities after the Gosnell tragedy detailed above, two other facilities remain open which have been in and out of compliance with state law for years. The violations at those clinics include: failure to perform required tests on women prior to abortions, no emergency call system in the operating room or recovery area, lack of appropriate electrical testing, the combining of clean and soiled work areas, failure to complete the required background checks on its employees who worked

directly with children, failure to comply with state law regarding potentially abused minors, the discarding of standard practice for decontamination of surgical instruments in favor of Planned Parenthood's own standards, and the storage of aborted babies in a janitor's closet. *See* Kristi Burton Brown, *Planned Parenthood Caught Illegally Storing Aborted Babies in Janitor's Closet*, Live Action News (Nov. 20, 2015)(found at: http://liveactionnews.org/planned-parenthood-caught-storing-babies-janitors-closet/).[12]

The examples above are just a few of the many. *See generally* Cassy Fiano, *Gosnell is not alone: Why we need more investigations and stricter regulations*, Live Action News (Jan. 7, 2016)(found at: http://liveactionnews.org/gosnell-not-alone-need-investigations-stricter-regulations/). To say that the abortion industry is poor at self-regulation is an understatement; it is completely incompetent at doing so.

Medical opinion: Respected medical professionals have spoken out on the rationality of ASC standards for abortion facilities. Dr. Geoffrey Keyes, President of the American Association for Accreditation of Ambulatory Surgery Facilities explains that

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[12] While the storage of aborted babies in a janitor's closet is admittedly shocking to think about, it is regrettably on par with other recent stories reported concerning the disposal of aborted fetuses at a landfill in Ohio. *See e.g.*, Cassy Fiano, *Ohio AG: Planned Parenthood Has Been Illegally Disposing Aborted Babies in Landfills*, Live Action News (Dec. 11, 2015)(available at: http://liveactionnews.org/ohio-planned-parenthood-disposing-aborted-babies-landfills/).

appropriate medical care for patients is the central issue.

> The argument on one side is that people who are demanding licensing and accreditation are anti-abortion. Those who don't want it, are pro-abortion. I don't think that's the issue….There is nothing wrong with having standards to adhere to when you are performing procedures on patients.

See Sifferlin, Alexandra, *Texas Abortion Bill: Is There a Medical Case for More Regulation of Outpatient Clinics?*, TIME (July 3, 2013)(found at: http://healthland.time.com/2013/07/03/texas-abortion-bill-is-there-a-medical-case-for-more-regulation-of-outpatient-procedures/).

Speaking generally about ASC standards, Dr. Robert Glatter, an emergency medicine physician at Lenox Hill Hospital in New York told TIME:

> Although there is added cost for the setup and accreditation of such facilities, it protects both physicians as well as patients, and thus creates standards for care and safety. Without strict regulation, oversight, and minimum standards, patients can be at risk for adverse outcomes.

The elimination of such risks, of course, is the paradigmatic Hippocratic goal.

B. Hospital Admitting Privileges

True Stories: While hospitals may well treat women regardless of the abortionists' admitting privileges,

without these privileges, the continuity of care is damaged and women's lives are at risk as emergency room doctors spend valuable time trying to piece together a life-threatening medical situation. The woman is the one who suffers from the lack of continuity which can cause such inadequate care.

In 2013, two women from Colorado and West Virginia filed complaints based on the dangerous treatment they received at abortion facilities. Though the cases were dismissed on legal grounds, what both women suffered through was horrific.

40-year old Ayanna Byer, sued Planned Parenthood in Colorado after a botched abortion which she tried to halt after realizing that she had not received any anesthesia for the surgical abortion. But the doctor proceeded against her wishes. Several days later she arrived at the emergency room with extreme pain and bleeding due to fetal tissue that had been left inside her uterus.[13] The physician on call for the emergency room wrote an appropriately scathing certified review following the high risk emergency surgery he had to perform on Ms. Byer:[14]

> It is not acceptable to refer your patients to the emergency department and assume the on-call doctor will take care of any

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[13] *See* Complaint in *Byer v. Doe*, CO El Paso City. Dist. Ct. 4th JD, Case No. 13CV1045 (Feb. 6, 2013)(found at: http://www.adfmedia.org/files/ByerComplaint.pdf).

[14] Certified Review by Steven A. Foley, M.D., in *Byer v. Doe*, CO El Paso Cnty. Dist. Ct. 4th JD, Case No. 13CV1045 (Feb. 6, 2013)(found at: http://www.adfmedia.org/ files/ByerFoley Statement.pdf).

> complications and assume all the risk associated with the complications.
>
> No practicing physician can maintain privileges to practice and perform surgery if they do not provide specific coverage for their patients in case of a complication. It is considered abandonment of your patient.

Itai Gravely underwent a botched abortion that left her in severe pain and bleeding. Her complaint[15] states that more than three hours passed from the time she called an ambulance to the time emergency room doctors were able to determine that her 13-week-old baby's skull had been left inside her body - a fact which her abortionist presumably knew and should have shared with the ER doctors at the outset.

Surely it is rational for the state to insist that abortionists stop abandoning their patients at the moment of danger and possible death, and to determine that continuity of care is essential to the safety of women.[16] The course of a woman's treatment may be very different if the person who

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[15] *See* Complaint in *Gravely v. Stephens*, Circuit Ct. of Kanawha Cnty., W. Va., Civil Action No. 13C1104 (June 7, 2013)(found at: http://www.adfmedia.org/files/GravelyComplaint.pdf).

[16] *Cf. Casey* at 885 ("Our cases reflect the fact that the Constitution gives the States broad latitude to decide that particular functions may be performed only by licensed professionals, even if an objective assessment might suggest that those same tasks could be performed by others. *See Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955)").

just performed her abortion is involved. The information an abortionist can provide could be life-saving, especially in cases where time is of the essence.

The February 7, 2013 death of Jennifer Morbelli, a 29 year-old schoolteacher from White Plains, New York may be the most tragic example of the danger women are put in when an abortionist has no admitting privileges. Abortionist LeRoy Carhart instructed his patients to call him if they experienced complications instead of telling them to go to an emergency room immediately.[17] This is what happened when Morbelli's family tried to call Carhart:

> By Thursday [after her abortion was complete], Jennifer was experiencing chest pains. The family tried repeatedly to reach "circuit abortionist" Dr. Carhart, who was unavailable… Jennifer's condition deteriorated so much that at 5:00 am, her mother…chauffeured her again…to Shady Grove Adventist Hospital in Rockville, Maryland.

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[17] *See* Cassy Fiano, *Carhart's Emergency Abortion Hotline Sends Patients to Horse Business*, Live Action News (Feb. 18, 2013)(found at: http://liveactionnews.org/carharts-emergency-abortion-hotline-sends-patients-to-horse-business/)(photo of Carhart's instructions states: "If you feel that something is wrong and you need to be seen **do not go to the ER**, call and we will meet you at the clinic." (Emphasis added). One of the staff is identified as Carhart's wife "Mary" and the phone number to call was to their "horse equipment business").

> As Jennifer's life was slipping away, LeRoy Carhart was called but was unavailable to provide "informational assistance" to medical personnel. … [A]mniotic fluid in her womb spilled into her bloodstream, making it impossible for her blood to clot. Jennifer coded six times before dying. Carhart did eventually check in by phone, but he failed to make it to the hospital before Jennifer died.

Inhuman: Undercover in American's Late-Term Abortion Industry, *Jennifer Morbelli's Story*, LIVE ACTION (found at: https://liveaction.org/inhuman/jennifer-morbellis-story/).

Pregnant women are not the only ones who face risk when an abortionist refuses to cooperate with a hospital, sometimes their babies do as well. In *Cormier v. Karpen*, patient Cormier asserted that Karpen refused to refer her to a hospital when she changed her mind and wanted to reverse her abortion. *See* Plaintiff's Original Petition, *Cormier v. Karpen*, No. 93-33063, Dist. Ct. of Harris Cnty., Tex., 152nd Jud. Dist. (found at: http://operationrescue.org/pdfs/Nicholette.pdf). Cormier ultimately went to a hospital despite Karpen's refusal to refer her. She delivered a living 1 lb. 13 oz. baby girl who she named Ashley.[18]

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[18] Women can and do change their minds about abortions, even at the last minute like Ashley Cormier's mother did. *See 10 Women Who Decided To Stop Or Reverse Their Abortion*, Live Action News (Jan. 2016)(found at: http://liveactionnews.org/women-who-changed-their-minds-about-their-abortion/). When this happens, then ensuring the health and safety of the preborn lives those women are

Little Ashley Cormier was born and experienced life outside the womb because her mother was able to get to a hospital for care beyond that being "provided" by her abortionist. She is not the only one. In 2015, Melissa Ohden testified before Congress about how she also survived a botched abortion as an infant because she was able to be cared for in a hospital. *See* http://judiciary.house.gov/cache/files/38cc6128-84f3-4752-9c57-438096d3e3bd/melissa-ohden-testimony.pdf. The examples of Ashley and Melissa, and who knows how many unreported others, testify to the importance of effective hospital care for women who experience abortion malpractice, both for themselves and for the precious lives within them.[19]

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carrying also becomes a paramount state interest, as this Court recognized in *Casey*.

[19] Although this case is primarily about the woman abortion patient's health and safety, it is also an indisputable fact that - for a variety of reasons - some babies are born alive in abortion facilities. The health and safety of *those* babies must therefore be taken into account as well. Live Action's investigations have uncovered numerous instances where abortion providers have exhibited complete disregard for their health care obligations to babies born alive in abortion facilities. Live Action's "Inhuman" investigation (Documented here: http://liveaction.org/inhuman/) related the story of "Angele," who gave birth to her living son in an abortion facility's bathroom in Florida. Since the baby had survived the abortion, the clinic locked mother and son in the bathroom, and attempted to bar ambulance workers, called by "Angele's" friend, from entering. Baby Rowan died. Also, from the Inhuman Fact Sheet (http://liveaction.org/inhuman/center-facts-phoenix-az/) on an abortion facility in Phoenix, Arizona:

Medical opinion: Medical experts and doctors have also testified in court that requiring physician admitting privileges helps to ensure that women receive better care. For example, Dr. Geoffrey Keyes, president of the American Association for Accreditation of Ambulatory Surgical Facilities (AAAA-SF), testified in Alabama that his organization "would not look favorably" on abortion facilities and doctors where "[t]here's no continuity of care, no credentialing of physicians in the community."[20] As a Report of a Joint Commission of many of the nation's leading hospitals, including Johns Hopkins, Mayo Clinic and New York Presbyterian - "80 percent of serious medical errors

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> Finally, and most shockingly, both Dr. Mercer and "Linda," the clinic counselor, assure our investigator that they will not resuscitate" if her baby is born alive. In fact, Dr. Mercer tells her not to go to the hospital if she starts to deliver a live baby because "emergency room physicians would treat you as though you were someone with a desired pregnancy… they would intervene." The abortion clinic, however, would "absolutely not" try to save the baby. The counselor admits that babies have been born alive after abortions at this clinic. Our investigator then asks, "So you would just let it die on its own if it was whole and breathing?" "Mm-hm, mm-hm. They will not resuscitate."

[20] Brian Lyman, *State Witness: Admitting Privileges Can Help Patients*, MONTGOMERY ADVERTISER (June 5, 2014)(found at: http://www.montgomeryadvertiser.com/story/news/politics/southunionstreet/2014/06/05/state-witness-admitting-privileges-can-help-patients/10016215/).

involve miscommunication between caregivers when patients are transferred or handed off."[21]

Similarly, Dr. John Thorp, a board certified Ob/Gyn, noted that common-sense admitting privilege requirements allow for more thorough evaluation of the competency of doctors, ensure vital continuity of care for patients, facilitate better communication between doctors and hospitals regarding patient information and potential complications, and validate important ethical considerations by preventing patient abandonment. In his view, "[s]uch tremendous benefits for the health and safety of women should compel every state to enact physician-admitting requirements." *See* n. 21 *supra*. Dr. Thorp also cited analysis and statistics noting that "73 percent of ERs nationwide . . . lack adequate on-call coverage by specialist physicians, including Ob/Gyns. Thus, requiring abortion providers to obtain admitting privileges will reduce the delay in treatment and decrease health risk for abortion patients with critical complications." *Id.*[22]

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[21] Anna Higgins, *Improve Women's Health Care with Physician Admitting Privilege Laws*, AMERICAN THINKER (August 20, 2014)(found at: http://www.americanthinker.com/2014/08/improve_womens_health_care_with_physician_admitting_privilege_laws.html#ixzz3yrlqXNHQ).

[22] The wisdom of hospital admission privileges has been recognized outside the abortion arena as well. On August 29, 2014, NBC News Chief Medical Editor, Dr. Nancy Snyderman, spoke out about the hospitalization of comedian Joan Rivers (who died after emergency complications from otherwise "routine" outpatient surgery). Video Report: http://www.newsbusters.org/blogs/jill-stanek/2014/09/01/nbcs-dr-nancy-snyderman-joan-rivers-emergency-underlines-importance-hos#sthash.RPoshRfx.dpuf.

C. The Legal Consequence Of Uncertainty

Petitioners contend, as a 2-1 Seventh Circuit panel apparently accepted in *Planned Parenthood of Wisconsin, Inc. v. Schimel*, 806 F.3d 908 (7th Cir. 2015)("Schimel"), that H.B. 2's ASC and admitting privileges provisions do nothing to advance the protection of women's health and safety or any other state interest. This is a theoretical position, necessarily based on the premise that if things go as planned, then ambulatory surgical centers and hospital admitting privileges theoretically add nothing to the safe practice of abortion. As the factual examples and medical opinions recounted above all too readily reveal, events do not always unfold as they should in abortion facilities and medical emergencies do indeed arise. The Petitioners' certainty that nothing could or does go medically wrong at abortion facilities is a self-serving fantasy, as Karnamaya Mongar's experience proves all too well.

Once this uncertainty is recognized then, as the Fifth Circuit properly found, this Court's holding in *Gonzales v. Carhart*, 550 U.S. 124 (2007) becomes central: "The Court has given state and federal

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> "The really important thing here is that every time you think you're going to have a procedure, no matter how minor, you have to constantly remind yourself that although these things are rare, they can happen. And one more thing I should say, make sure your doctor has admitting privileges to the local hospital, because in this case it may well have saved Joan Rivers' life."

legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty. . . . Medical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts." *Cole* at 16 (quoting *Gonzales*). Legislative bodies are more appropriately equipped than courts for dealing with society's solutions to an uncertain world, as well as being politically accountable for them. *See Gonzales*, 550 U.S. at 166 ("considerations of marginal safety, including the balance of risks, are within the legislative competence").

This Court noted in *Roe*, "the State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient." *Roe* at 150 (emphasis added). That is precisely what H.B. 2 endeavors to ensure. By increasing ambulatory surgical center requirements and imposing hospital admitting privileges, the Texas Legislature was plainly trying to raise the ceiling for women's health care during abortion, rather than preserving the floor for such care. Such a choice between medical advancement and the status quo has always been viewed as the State's decision to make. *Cf. Whalen v. Roe*, 429 U.S. 589, 603 (1977)(practice of medicine has always been subject to reasonable licensing and regulation by the State).

In light of the foregoing, petitioners' claim that H.B. 2 was enacted for the unexpressed purpose of blocking abortions rings especially hollow. As the Fifth Circuit recognized, this Court's own precedents

in *Mazurek* and *Casey* "squarely foreclose" this argument:

> Respondents claim in this Court that the Montana law must have had an invalid purpose because all health evidence contradicts the claim that there is any health basis for the law. . . . But this line of argument is squarely foreclosed by *Casey* itself. In the course of upholding the physician-only requirement at issue in that case, we emphasized that '[o]ur cases reflect the fact that the Constitution gives the States broad latitude to decide that particular functions may be performed only by licensed professionals, *even if an objective assessment might suggest that those same tasks could be performed by others*.'

Cole at 14 (quoting *Mazurek v. Armstrong*, 520 U.S. 968, 973 (1997)).

As a matter of law, therefore, Texas must be found to have enacted H.B. 2 for its stated reason of "rais[ing] the standard and quality of care for women seeking abortions and . . . protect[ing] the health and welfare of women seeking abortions." As both courts below found: "both the admitting privileges and ASC requirements [are] rationally related to a legitimate state interest." *Cole* at 31. And as a matter of fact, H.B. 2 has already had a positive impact protecting women seeking abortions in Texas.

Douglas Karpen is a Houston abortionist who stopped practicing because of his inability to comply

with by H.B. 2's admission privileges requirement. Karpen's dangerous practices not only endangered women, but they also cost the lives of preborn children. A video located at this link (http://liveaction.org/inhuman/ gosnell-is-not-alone-douglas-karpen-houston-tx/) shows three whistleblowers from Karpen's abortion facility exposing the barbarity and complete lack of basic humanity and safety, including the killing of babies who were born alive and who may have survived if medical care were provided. As Live Action reported:

> Karpen's former assistants accused the abortionist of committing abortions after the Texas limit of 24 weeks' gestation and killing "three to four" born-alive babies a day by cutting their spinal cords, forcing instruments into the soft spots of their heads, or even twisting their heads off their necks.
>
> The former assistants recalled the infants' little torsos rising and falling with each breath: "It was still alive because it was still moving and you could see the stomach breathing." Karpen would then "force [the instrument] through the stomach." …
>
> "Sometimes he couldn't get the fetus [sic] out . . . he would yank pieces - piece by piece . . ." said Deborah Edge, who assisted Karpen during abortions. "And I'm talking about the whole floor dirty. I'm talking about me drenched in blood."

> Edge also described "several occasions" of women going into labor after Karpen inserted too many laminaria, quickly widening the cervix. "Sometimes they would get to the clinic and they wouldn't make it to the OR room [sic] because they're in a line . . . and on some occasions we had women that were - um, the fetus [sic] were falling into the toilet."
>
> Karpen's former assistants also accused him of "ripping the uterus and not letting the patients know, trying to stitch them back together and send them back home with the package of gauze . . . but never telling the woman, Hey, I ripped your cervix.'"

The State of Texas and the women of Texas seeking abortions are all certainly better off without Karpen.

II.

H.B. 2's HEALTH PROVISIONS IMPOSE NO UNDUE BURDEN

"Regulations designed to foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden." *Casey* at 877. "The very notion that the State has a substantial interest in potential life leads to the conclusion that not all regulations must be deemed unwarranted. Not all burdens on the right to decide whether to terminate a pregnancy will be undue. In our view, the undue burden standard is the appropriate means of

reconciling the State's interest with the woman's constitutionally protected liberty." *Id.* "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." *Id.* at 878 (emphases added).

The Joint Opinion in *Casey* also provided clear examples of what did not constitute a "substantial obstacle" under the foregoing test. For example, with respect to the waiting period before it, the *Casey* Court wrote: "We do not doubt that, as the District Court held, the waiting period has the effect of "increasing the cost and risk of delay of abortions," but the District Court did not conclude that the increased costs and potential delays amount to substantial obstacles." *Casey* at 886 (citation omitted). Similarly, then-Chief Justice Rehnquist recognized in his separate opinion in *Casey*: "Petitioners are correct that such a provision will result in delays for some women that might not otherwise exist, therefore placing a burden on their liberty. But the provision in no way prohibits abortions …." *Casey* at 944, 969 (Rehnquist, J., concurring in part, dissenting in part). The Joint Opinion also went into even greater detail:

> As our jurisprudence relating to all liberties save perhaps abortion has recognized, not every law which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right. An example clarifies the point.

> We have held that not every ballot access limitation amounts to an infringement of the right to vote. Rather, the States are granted substantial flexibility in establishing the framework within which voters choose the candidates for whom they wish to vote. The abortion right is similar. Numerous forms of state regulation might have the incidental effect of increasing the cost or decreasing the availability of medical care, whether for abortion or any other medical procedure. *The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it.*

Casey at 873-874 (emphasis added; citations omitted). In sum, incidental effects of making abortions more difficult, more expensive and/or more time-consuming to obtain are NOT the types of "substantial obstacles" that constitute an "undue burden" according to this Court's precedents.[23]

A. The Decision Below

After reviewing the testimony and evidence from the district court, the Fifth Circuit largely ruled for the Respondents and correctly reversed the district court's decision to enjoin certain of H.B. 2's provisions. Following the logic of this Court's

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[23] *See* also *Gonzales v. Carhart*, *supra* (holding that a federal law criminalizing partial-birth abortion did not violate Casey because it did not impose an "undue burden").

decision in *Casey*, the Fifth Circuit found that the law furthered the legitimate state purpose of protecting pregnant women's health and that the "incidental" effects of complying with the law did not constitute substantial obstacles to women procuring abortions. The Fifth Circuit's decision also to afford Petitioners some limited relief below amply evidences the great care that Court took in resolving this sensitive case.

ASCs: Because a surgical abortion is typically an outpatient procedure, the Texas Legislature intended for H.B. 2 to bring abortion facilities under the umbrella of ambulatory surgical treatment centers ("ASCs"), which are the types of facilities that offer general outpatient surgeries in the state. The ASC requirements include provisions ranging from placing a liquid or foam dispenser at each hand washing facility to physical plant requirements involving fire safety mechanisms and plumbing. *Cole* at 19, 22. This is precisely the kind of legislation this Court had in mind in *Simopoulos v. Virginia* when it held that "[i]n view of its interest in protecting the health of its citizens, the State necessarily has considerable discretion in determining standards for the licensing of medical facilities." 462 U.S. 506, 516 (1983).

Despite the teachings of *Casey* and *Simopoulos*, the Seventh Circuit recently held that legislatures may enact such requirements "in the name of protecting the health of women who have abortions, yet as in this case the specific measures they support may do little or nothing for health, but rather strew impediments to abortion." *Schimel* at 921. In

reaching that conclusion, the Seventh Circuit cited the lack of evidence of complications from abortion for concluding that the legislature must have hidden its true intent of ending abortion under the guise of promoting women's health. But as demonstrated above, there is ample evidence that complications from abortions are significant health problems in the real world. When abortion facilities do not meet sensible commonsense standards, medical complications inevitably follow. Just ask Jennifer Morbelli's family.

Admitting Privileges: The Texas Legislature also enacted H.B. 2 to require abortionists to have admitting privileges at a local hospital. As the Fifth Circuit found, this requirement was intended to ensure the continuity of care for a compromised patient between the abortion facility and the hospital to which she is transferred. In *Schimel*, the Seventh Circuit deemed this requirement unconstitutional as well because of its conclusion that "complications from an abortion are both rare and rarely dangerous—a fact that further attenuates the need for abortion doctors to have admitting privileges." *Schimel* at 912. Once again however, as demonstrated above, real world abortion experience shows ample evidence that medical complications *do* indeed arise during abortions and that those complications can be deadly *dangerous* when they do.

The Real World: Petitioners' challenges to H.B. 2 proceed from the same flawed premise as that accepted by the Seventh Circuit majority in *Schimel*. This premise is that abortions are perfectly safe,

with no need for additional medical protections, because complications are so rare. But what is the test for such "rarity"? Is it strictly a numerical counting of events or does it include the end result of those events as well? Should a health and safety provision be rejected because it might only be needed to save the life of one woman? Two, three, four, . . . ? And why isn't a legislative body the right entity to make that decision for its particular state? If the State of Texas wants to try to ensure that not even a single woman dies because of a medical emergency during abortion, isn't it entitled to do so? Doesn't a State have the right to raise the ceiling of future care for all patients within its borders rather than risking the health or safety of even one patient to the floor of past medical practice? Certainly, if Illinois were to choose to alter its regulatory scheme for abortion clinics in response to the tragic death of Tonya Reaves, such legislative reaction would be well within the state's legitimate interest of protecting the health and safety of its women.

In the real world, there is nothing "undue" about whatever burdens are imposed by H.B. 2 in its efforts to protect the lives of such women and the preborn lives within them. To the contrary, those burdens are only incidental to a due regard for their health and safety. With regard to the ASC requirements, the record below indicates that "[s]even ASCs in five major Texas cities (Austin, Dallas, Fort Worth, Houston and San Antonio) were licensed to perform abortions and would be able to continue providing abortions after the ASC requirement went into effect," and that another abortion provider "planned to open an [additional]

ASC in San Antonio" in the future. *Cole* at 21. Based on this record, the Fifth Circuit logically concluded that "[t]he fact that there are currently licensed ASCs in Texas where abortions are performed and that abortion providers have plans to open more attests that it is indeed possible for abortion providers to comply with the ASC requirement." *Id.* at n.15.

With regard to the admitting privileges requirement, the record below reflects Petitioners complaint that "abortion physicians were being denied admitting privileges, not because of their level of competence, but for various other reasons." *Cole* at 23. But those physician "admitting privilege" decisions are made by individual hospitals, not mandated by the State and certainly not ordained by anything in H.B. 2. Whether or not a particular doctor is given admitting privileges by an individual hospital is, thus, NOT an obstacle - let alone a substantial obstacle - created by the Texas Legislature's enactment of H. B. 2. Under H.B. 2, each individual hospital could also just as easily grant all of those doctors admitting privileges. H.B. 2 does not predetermine the result of those decisions one way or the other. [24]

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[24] Of course, if a hospital refuses admitting privileges to a doctor, it may be an indicator of the physician's abilities (or lack thereof), another traditionally accepted means for the State to ensure that its women are in competent hands. For example, Dr. Carhart, the abortionist whose lack of care led to the death of Jennifer Morbelli, did not have admitting privileges in any of the states he traveled to perform late-term abortions. *See* n. 17 *supra*. But other, properly qualified physicians apparently had no difficulty obtaining

Overall, implementation of H.B. 2's provisions may require some women seeking abortions in Texas to travel somewhat farther, to wait somewhat longer and even to pay somewhat more to procure an abortion. But, as then-Chief Justice Rehnquist noted in *Casey*, "the provision[s] in no way prohibit[] abortion." Under this Court's precedents, incidental effects of making abortions more difficult, more expensive and/or more time-consuming to obtain are simply NOT the types of "substantial obstacles" that constitute an "undue burden." Yet those are exactly the type of burdens being complained about by Petitioners here, and they should be promptly rejected here as well.

Do Petitioners really believe that women in Texas have a constitutional right to assert that a particular amount of waiting time is too long or that a 150 miles driving distance is too far to travel? How could such a "right" be administered nationally when traffic congestion in Manhattan or Los Angeles might cause a patient to endure an even greater amount of time to travel a shorter distance than elsewhere? Or in South Dakota where a single abortion clinic[25] has to be traveled to by all women in the State regardless of their starting point, which might be as much as six hours away? And how does

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such privileges. *See* Hearing on H.B. 2816 Before the H. Comm. on State Affairs, 83d Leg., R.S. (March 27, 2013)(Rep. Laudenberg stating that "already two-thirds of [doctors performing abortions] do have admitting privileges").

[25] *See* State Facts About Abortion, by Guttmacher Institute: https://www.guttmacher.org/pubs/sfaa/pdf/south_dakota.pdf)

one compare such interests between women in the small State of Rhode Island and those in the massive State of Alaska? Are Rhode Islanders' rights somehow greater than Alaskans' by the sheer happenstance of geography? And what about cross-border travelers? As the Fifth Circuit found below: "although the nearest abortion facility in Texas is 550 miles away from El Paso, there is evidence that women in El Paso can travel the short distance to Santa Teresa [New Mexico] to obtain an abortion and, indeed, the evidence is that many did just that before H.B. 2." *Cole* at 55. These are all just incidental logistical effects. Nothing more and nothing less.

Fortunately, there is no constitutional obligation for this Court to become such a nationwide traffic controller for abortion patients. It is within the state's purview to determine if a regulation is rational for its own citizens, and it is not the right of any particular industry to demand that its own services be more accessible and cost-effective to the public. If any other elective medical industry complained that rational state regulations were increasing the transportation costs, childcare costs, waiting time, or travel of its patients, this would be considered a problem of the industry itself or simply an unpleasant part of a patient's exercise of choice in obtaining an elective procedure. The state has no constitutional responsibility to ensure that every patient has low-cost transportation, an elimination of wait time, or short travel to every elective medical procedure. Meeting the business interests of the abortion industry is hardly the duty of the state.

CONCLUSION

As this Court recognized in *Casey*:

> Abortion is a unique act. It is an act fraught with consequences for others: for the woman who must live with the implications of her decision; for the persons who perform and assist in the procedure; for the spouse, family, and society which must confront the knowledge that these procedures exist, procedures some deem nothing short of an act of violence against innocent human life; and, depending on one's beliefs, for the life or potential life that is aborted.

Casey at 852. One of those consequences is the health risk to the mother arising from unforeseen emergencies, medical negligence and/or criminal misconduct during the course of an abortion. Because of the inextricable link between the mother and baby through pregnancy, that consequence carries over to the potential life she is carrying *in utero* as well. Real-world health risks naturally and undeniably apply to both the mother and to the potential life within her during an abortion. No one should want a pregnant mother to face a scintilla more of that risk than absolutely necessary in this situation.

It does no good for Petitioners to deny this reality to effectively maintain that health and safety interests will not be advanced by H.B. 2's provisions. How could it not possibly advance women's health interests to have the benefit of an "ambulatory

surgical center" available during an abortion? And how could it not possibly advance women's health interests to have their abortionists fully "admitted" to a nearby hospital where those women might have to be transferred to in the event something goes horribly wrong during the abortion?

In its *parens patriae* responsibility for the health and safety of its citizens (and potential citizens), the sovereign State of Texas has decided that women seeking abortions within the state should be afforded the two additional health and safety protections provided by H.B. 2. Instead of being lauded for these efforts "to raise the standard and quality of care for women seeking abortions and to protect the health and welfare of women seeking abortions," however, Texas has been vilified. There is no warrant for that.

It is indisputable that some women experience medical catastrophes at abortion facilities, and that some women suffer greatly as a result. Some women even die. It is also indisputable, as the tragic death of Joan Rivers readily reveals, that there are significant - and potentially life-threatening results - associated with seemingly routine medical procedures. Anyone who has had to give informed consent to such a procedure understands the reality of such risks. It is precisely why such informed consent is required. Thus, the reality of the risks of potential complications in our uncertain modern world is simply undeniable. This Court should recognize them, just as the State of Texas did.

At bottom, there is no reason for this Court to undo the carefully crafted and sovereign work of the Texas State Legislature in enacting this law "to raise the standard and quality of care for women seeking abortions and to protect the health and welfare of women seeking abortions." The State is only required to draw a "rational" line to achieve such legitimate government purposes, not a "perfect line." *Armour v. City of Indianapolis, Ind.*, 132 S.Ct. 2073, 2083 (2012). Here, Texas has plainly done so.

Expert testimony below indicated that H.B. 2's ASC and admitting privileges requirements "result in patients receiving a higher quality of care." *Cole* at 22-23 n.18. That is precisely what a State should seek for its citizens. That is protective of women's health, not destructive of it.

The decision below should be affirmed.

Respectfully submitted,

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