No. 13A452

In the Supreme Court of the United States

PLANNED PARENTHOOD OF GREATER TEXAS SURGICAL HEALTH SERVICES, *ET AL., Applicants,*

vs.

GREGORY ABBOTT, ATTORNEY GENERAL OF TEXAS, *ET AL., Respondents.*

ON EMERGENCY APPLICATION TO VACATE APPELLATE STAY

APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* OPPOSITION AND *AMICI CURIAE* OPPOSITION IN SUPPORT OF RESPONDENTS BY LT. GOV. DAVID DEWHURST, TEXAS STATE REPRESENTATIVES CHARLES "DOC" ANDERSON, CECIL BELL, JR., DWAYNE BOHAC, DENNIS BONNEN, GREG BONNEN, M.D., CINDY BURKETT, BILL CALLEGARI, GIOVANNI CAPRIGLIONE, TONY DALE, JOHN E. DAVIS, GARY ELKINS, PAT FALLON, ALLEN FLETCHER, DAN FLYNN, JAMES FRANK, CRAIG GOLDMAN, LINDA HARPER-BROWN, BRYAN HUGHES, JASON ISAAC, PHIL KING, STEPHANIE KLICK, MATT KRAUSE, JODIE LAUBENBERG, GEORGE LAVENDER, JEFF LEACH, RICK MILLER, JIM MURPHY, JOHN OTTO, CHRIS PADDIE, TAN PARKER, CHARLES PERRY, LARRY PHILLIPS, JIM PITTS, SCOTT SANFORD, MATT SCHAEFER, RON SIMMONS, DAVID SIMPSON, JOHN T. SMITHEE, DREW SPRINGER, JONATHAN STICKLAND, VAN TAYLOR, ED THOMPSON, STEVE TOTH, SCOTT TURNER, JAMES WHITE, PAUL WORKMAN, BILL ZEDLER, TEXAS STATE SENATORS BRIAN BIRDWELL, DONNA CAMPBELL, JOHN CARONA, BOB DEUELL, CRAIG ESTES, TROY FRASER, KELLY HANCOCK, GLENN HEGAR, JR., EDDIE LUCIO, JR., ROBERT NICHOLS, DAN PATRICK, KEN PAXTON, LARRY TAYLOR, TEXAS EAGLE FORUM, ASS'N OF AMERICAN PHYSICIANS & SURGEONS, TEXAS RIGHT TO LIFE, AND EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND

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GREGORY ABBOTT, ATTORNEY GENERAL OF TEXAS, *ET AL., Respondents.*

APPLICATION FOR LEAVE TO FILE *AMICI CURIAE*
OPPOSITION TO APPLICATION TO VACATE STAY

To the Honorable Antonin Scalia, Associate Justice of the Supreme Court, and Circuit Justice for the United States Court of Appeals for the Fifth Circuit:

Applicant Texas legislators and public-interest groups – identified in the following section and collectively "*Amici* Coalition" – respectfully request leave to file the accompanying opposition in 8½-by 11-inch format, as *amici curiae* in support of respondents, to the plaintiffs-appellees' emergency application to vacate the stay granted by the U.S. Court of Appeals for the Fifth Circuit of the permanent injunction entered in this case by the District Court.*

* By analogy to FED. R. APP. P. 29(c)(5) and this Court's Rule 37.6, counsel for applicants and *amici curiae* authored this application and opposition in whole, and no counsel for a party authored the application or opposition in whole or in part, nor did any person or entity, other than the applicants/*amici* and their counsel make a monetary contribution to preparation or submission of the application or opposition.

IDENTITY AND INTERESTS OF APPLICANTS

David Dewhurst is the Lieutenant Governor of the State of Texas. Sen. Hegar (District 18) and Rep. Laubenberg (District 89) were the sponsors in the Texas Senate and House of Representatives, respectively, of Texas House Bill 2, Act of July 18, 2013, 83rd Leg., 2nd C.S., ch. 1, Tex. Gen. Laws ("HB2"), the legislation challenged in this litigation. Reps. Anderson (District 56), Bell (District 3), Bohac (District 138), Dennis Bonnen (District 25), Greg Bonnen (District 24), Burkett (District 113), Callegari (District 132), Capriglione (District 98), Dale (District 136), J. Davis (District 129), Elkins (District 135), Fallon (District 106), Fletcher (District 130), Flynn (District 2), Frank (District 69), Goldman (District 97), Harper-Brown (District 105), Hughes (District 5), Isaac (District 45), P. King (District 61), Klick (District 91), Krause (District 93), Lavender (District 1), Leach (District 67), R. Miller (District 26), Murphy (District 133), Otto (District 18), Paddie (District 9), Parker (District 63), Perry (District 83), Phillips (District 62), Pitts (District 10), Sanford (District 70), Schaefer (District 6), Simmons (District 65), Simpson (District 7), Smithee (District 86), Springer (District 68), Stickland (District 92), Taylor (District 66), E. Thompson (District 29), Toth (District 15), Scott Turner (District 33), White (District 19), Workman (District 47), and Zedler (District 96) supported HB2 in the Texas House of Representatives. Sens. Birdwell (District 22), Campbell (District 25), Carona (District 16), Deuell (District 2), Estes (District 30), Fraser (District 24), Hancock (District 9), Lucio (District 27), Nichols (District 3), Patrick (District 7), Paxton (District 8), and Taylor (District 11) supported HB2 in the Texas Senate.

Texas Eagle Forum is a nonprofit corporation founded in 1975, incorporated in 1989, and headquartered in Dallas, Texas. Texas Eagle Forum's mission is to enable conservative and pro-family Texans to participate in the process of self-government and public policy-making so that America will continue to be a land of individual liberty, respect for family integrity, public and private virtue, and private enterprise.

Association of American Physicians and Surgeons, Inc. ("AAPS") is a nonprofit corporation founded in 1943 as an organization of physician members located throughout the Nation. For 70 years, AAPS has been dedicated to defending the practice of private, ethical medicine. AAPS has filed numerous *amicus curiae* briefs that were cited in noteworthy cases, *see, e.g., Springer v. Henry*, 435 F.3d 268, 271 (3d Cir. 2006), including decisions of this Court. *See, e.g., Stenberg v. Carhart*, 530 U.S. 914, 933 (2000).

Texas Right to Life is a non-profit organization headquartered in Houston, Texas. Texas Right to Life is a non-sectarian and non-partisan organization that seeks to articulate and to protect the right to life of defenseless human beings, born and unborn, through legal, peaceful, and prayerful means.

Eagle Forum Education & Legal Defense Fund ("Eagle Forum ELDF") is a nonprofit corporation founded in 1981 and headquartered in Saint Louis, Missouri. For more than thirty years, Eagle Forum ELDF has defended federalism and supported states' autonomy from federal intrusion in areas – like public health – that are of traditionally local concern. Further, Eagle Forum ELDF has a

longstanding interest in protecting unborn life and in adherence to the Constitution as written. Finally, Eagle Forum ELDF consistently has argued for judicial restraint under both Article III and separation-of-powers principles.

Nearly the same coalition participated as *amici curiae* in the District Court and have the parties' consent to participate as *amici curiae* in the Fifth Circuit. For the foregoing reasons, the *Amici* Coalition's members have direct and vital interests in the issues before this Court and respectfully request leave to file the accompanying opposition in support of respondents to the emergency application.

REASONS TO GRANT THE COALITION AMICUS STATUS

By analogy to Rule 37.2(b) of the Rules of the Supreme Court, the *Amici* Coalition respectfully seeks this Court's leave to file the accompanying *amici curiae* opposition in support of respondents. Given the abbreviated briefing schedule for the emergency application, the *Amici* Coalition has elected to seek leave to file their opposition as *amici curiae* before the respondents file their opposition, which denies the *Amici* Coalition the opportunity to coordinate its filing vis-à-vis arguments made by the respondents, but reduces the likelihood that the *Amici* Coalition's filing will disturb the briefing schedule.

The *Amici* Coalition respectfully submits that the proffered opposition will bring several relevant matters to the Court's attention:

- The *Amici* Coalition's opposition addresses third-party standing – including this Court's relatively recent decisions in *Kowalski v. Tesmer,* 543 U.S. 125, 128-30 (2004), and *Elk Grove Unified Sch. Dist. v. Newdow,* 542 U.S. 1, 15 (2004) – to demonstrate that abortion providers lack standing to assert the

constitutional rights of their hypothetical future patients. *See Amici* Opp'n at 3-7. Although various pre-*Kowalski* decisions have recognized abortion providers' third-party standing to assert their patients' rights, the *Amici* Coalition argues that *Kowalski* and *Newdow* narrowed that doctrine (which had been "in need of what may charitably be called clarification," *id.* at 4 (*quoting Miller v. Albright,* 523 U.S. 420, 455 n.1 (1998) (Scalia, J., concurring)), particularly with respect to hypothetical future relationships in which the plaintiff has potential conflicts of interest with the absent third parties. *Id.* at 4-6.

- The *Amici* Coalition next demonstrates that plaintiffs who cannot proceed under the elevated scrutiny accorded third-party rights holders must proceed under the rational-basis test. *See Amici* Opp'n at 7-8.
- On the merits, the *Amici* Coalition argues that the undue-burden test of *Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833, 876 (1992), has a narrower scope with respect to state laws such as HB2 that protect the women who seek abortions. Specifically, the *Amici* Coalition argues that challengers to laws that protect maternal health must first prove that such laws are unnecessary before the undue-burden inquiry even arises. Accordingly, plaintiffs' undue-burden arguments are inapposite, even if the plaintiffs had standing to raise undue-burden claims. *See Amici* Opp'n at 8-12.

- In the alternative, the *Amici* Coalition demonstrates that if the plaintiffs have standing to bring undue-burden claims and the Court needs to reach those claims, HB2 nonetheless does not impose undue burdens on abortion rights because, with respect to the greater travel times and expense allegedly associated with reaching Texas abortion facilities that will remain open after HB2 takes effect, "the incidental effect of making it more difficult or more expensive to procure an abortion" is not enough "to invalidate" a "law [that] serves a valid purpose" under *Casey, see Amici* Opp'n at 13-14 (*quoting Casey,* 505 U.S. at 874, *and citing Greenville Women's Clinic v. Comm'r,* 317 F.3d 357, 363 (4th Cir. 2002); *Women's Medical Prof'l Corp. v. Baird,* 438 F.3d 595, 598 (6th Cir. 2006); *Women's Health Ctr. of West Cnty., Inc. v. Webster,* 871 F.2d 1377, 1382 (8th Cir. 1989); *Tuscon Woman's Clinic v. Eden,* 379 F.3d 531, 547 (9th Cir. 2004)).
- Next, the *Amici* Coalition analyzes HB2 under the rational-basis test that applies to plaintiffs' challenge and demonstrate that the rational-basis test does not allow courtroom factfinding to overturn legislative judgments, but instead requires plaintiffs to negate the very connection between the legislative purpose and the legislative means. *See Amici* Opp'n at 14-16.
- Finally, the *Amici* Coalition analyze the remaining three criteria for interim relief, which tip in Texas' favor due to Providers' lack of third-party standing to enforce Roe-Casey and their unlikelihood of prevailing on the merits. *See Amici* Opp'n at 16-20.

These issues are all relevant to this Court's decision on the application to vacate the Fifth Circuit's stay, and the *Amici* Coalition respectfully submits that the opposition will aid the Court.

REASONS TO ALLOW FILING IN 8½-BY 11-INCH FORMAT

The *Amici* Coalition respectfully submits that the Court's rules require applicants to a single Justice to file in 8½-by 11-inch format pursuant to Rule 22.2, as the *Amici* Coalition has done here. If Rule 21.2(b)'s requirements for motions to the Court for leave to file an *amicus* brief applied here, however, the *Amici* Coalition would need to file 40 copies in booklet format, even though the Circuit Justice may not refer this matter to the full Court. Due to the expedited briefing schedule, the expense and especially the delay of booklet-format printing, and the rules' ambiguity on the appropriate procedure, the *Amici* Coalition has elected to file pursuant to Rule 22.2. To address the possibility that the Circuit Justice may refer this matter to the full Court, however, the *Amici* Coalition files an original plus ten copies, rather than Rule 22.2's required original plus two copies.

Should the Clerk's Office, the Circuit Justice, or the Court so require, the *Amici* Coalition commits to re-filing expeditiously in booklet format. *See* S. Ct. Rule 21.2(c) (Court may direct the re-filing of documents in booklet-format).

REQUESTED RELIEF

The *Amici* Coalition respectfully requests leave to file the accompanying opposition as *amici curiae* to Providers' application to vacate the appellate stay. In addition, the *Amici* Coalition also requests leave to file its opposition – at least initially – in 8½-by 11-inch format pursuant to Rules 22 and 33.2, rather than

booklet format pursuant to Rule 21.2(b) and 33.1.

CONCLUSION

For the foregoing reasons, the application for leave to file the *Amici* Coalition's accompanying opposition to Providers' application to vacate the appellate stay should be granted.

Dated: November 8, 2013

Respectfully submitted,

/s/ Lawrence J. Joseph

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AMICI CURIAE OPPOSITION TO APPLICATION TO VACATE APPELLATE STAY

To the Honorable Antonin Scalia, Associate Justice of the Supreme Court, and Circuit Justice for the United States Court of Appeals for the Fifth Circuit:

Amici Curiae Texas legislators and public-interest groups – identified in the accompanying application – respectfully submit that the Circuit Justice (or the full Court if referred to the full Court) should deny the emergency application to vacate the U.S. Court of Appeals for the Fifth Circuit's stay of the permanent injunction entered in this case by the District Court. The interests of the *amici curiae* ("*Amici*") joining this opposition are set out in the accompanying application for leave to file.

INTRODUCTION

Several abortion clinics and doctors (collectively, hereinafter "Providers") sued officers of Texas' Executive Branch (collectively, hereinafter "Texas") to enjoin two requirements that Texas House Bill 2, Act of July 18, 2013, 83rd Leg., 2nd C.S., ch. 1, Tex. Gen. Laws ("HB2"), places on abortion providers: (a) requiring abortion doctors to have admitting privileges at a local hospital, and (b) restricting the use of abortion-inducing drugs to the label uses approved by the federal Food & Drug Administration. The district court permanently enjoined the admitting-privilege requirement and narrowed the medication-abortion provisions, and the Fifth Circuit granted Texas' motion for an appellate stay. Providers applied to the Circuit Justice to reinstate the injunction against only the admitting-privilege requirements.

STANDARD OF REVIEW

Plaintiffs, petitioners, or applicants who seek interim relief must establish

that they likely will succeed on the merits and likely will suffer irreparable harm without relief, that the balance of equities favors them versus the defendants' harm from interim relief, and that the public interest favors interim relief. *Winter v. Natural Resources Def. Council, Inc.,* 555 U.S. 7, 20 (2008). Further, even interim relief requires standing. *City of Los Angeles v. Lyons,* 461 U.S. 95, 103 (1983). Finally, the "matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases," *Singleton v. Wulff,* 428 U.S. 106, 120-21 (1976), including arguments raised solely by *amici. Turner v. Rogers,* 131 S.Ct. 2507, 2519-20 (2011); *see also id.* at 2521 (Thomas, J., dissenting).

SUMMARY OF ARGUMENT

Providers claim that HB2 violates the undue-burden test of *Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833, 876 (1992), and thus unconstitutionally limits the abortion rights found in *Roe v. Wade*, 410 U.S. 113 (1974). This Court must deny Providers' requested relief because they lack third-party standing to assert future patients' *Roe-Casey* rights (Sections I.A-I.B) and HB2 does not exceed the state authority recognized in *Casey* (Sections II.A-II.B). To the extent that Providers have standing to enforce *their own rights,* they must proceed under the rational-basis test (Section I.C), which HB2 readily meets (Section II.C). Given Providers' low likelihood of succeeding on the merits and their lack of third-party standing, Providers do not meet the other three criteria for interim relief (Sections III.A-III.C).

ARGUMENT

I. PROVIDERS LACK STANDING TO ASSERT "UNDUE-BURDEN" RIGHTS

In addition to the familiar four-part test for interim relief, Providers also must establish their standing for interim relief. *Lyons,* 461 U.S. at 103. Standing has both a constitutional element under Article III – *i.e.,* cognizable injury to the plaintiffs, caused by the challenged conduct, and redressable by a court, *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561-62 (1992) – and prudential elements, including the need for those seeking to assert absent third parties' rights to have Article III standing and a close relationship with the absent third parties, whom a sufficient "hindrance" keeps from asserting their own rights. *Kowalski v. Tesmer,* 543 U.S. 125, 128-30 (2004). Here, Providers lack third-party standing to assert future patients' *Roe-Casey* rights. To the extent that Providers have standing at all, they must proceed under their own rights, which implicate a more deferential standard of review.

A. Prudential Limits on Third-Party Standing Bar Providers from Asserting Patients' Rights under *Roe-Casey*

While *Amici* do not dispute that practicing physicians have close relationships with their regular patients, the same is simply not true for hypothetical relationships between Providers and their *future* patients who may seek abortions at Providers' clinics: an *"existing* attorney-client relationship is, of course, quite distinct from the *hypothetical* attorney-client relationship posited here.*" Kowalski,* 543 U.S. at 131 (emphasis in original). Women do not have regular, ongoing, physician-patient relationships with abortion doctors in abortion clinics.

Before *Kowalski* was decided in 2004, "the general state of third party standing law" was "not entirely clear," *Am. Immigration Lawyers Ass'n v. Reno,* 199 F.3d 1352, 1362 (D.C. Cir. 2000), and "in need of what may charitably be called clarification." *Miller v. Albright,* 523 U.S. 420, 455 n.1 (1998) (Scalia, J., concurring). Since *Kowalski* was decided in 2004, however, hypothetical future relationships can no longer support third-party standing. As such, Providers lack third-party standing to assert *Roe-Casey* rights. Providers' invocation of third-party standing also fails for two reasons beyond *Kowalski.*[1]

First, Providers' challenge to HB2 seeks to undermine legislation that Texas enacted to protect women from abortion-industry practices,[2] a conflict of interest that strains the closeness of the relationship. Third-party standing is even less appropriate when – far from an "identity of interests"[3] – the putative third-party

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[1] Abortion providers often cite *Singleton*, 428 U.S. at 118 (plurality) for third-party standing, but the fifth vote sets a holding, *Marks v. U.S.*, 430 U.S. 188, 193 (1977), and the fifth *Singleton* vote rejected third-party standing. *Singleton,* 428 U.S. at 121-22 (Stevens, J., concurring in part).

[2] Significantly, Texas enacted HB2 in the wake of the Gosnell prosecution and the accompanying revelations about the abortion industry not only for murdering live-born, viable infants but also for endangering and even killing women abortion patients. *See In re County Investigating Grand Jury XXIII,* Misc. No. 9901-2008 (Pa. C.P. Phila. filed Jan. 14, 2011) (hereinafter, "Gosnell Grand Jury Report").

[3] *See, e.g., Lepelletier v. FDIC,* 164 F.3d 37, 44 (D.C. Cir. 1999) ("there must be an identity of interests between the parties such that the plaintiff will act as an effective advocate of the third party's interests"); *Pa. Psychiatric Soc'y v. Green Spring Health Servs.,* 280 F.3d 278, 288 (3d Cir. 2002) (asking whether "the third party … shares an identity of interests with the plaintiff"); *Region 8 Forest Serv. Timber Purchasers Council v. Alcock,* 993 F.2d 800, 810 (11th Cir. 1993)

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plaintiff's interests are *adverse* or even *potentially adverse* to the third-party rights holder's interests. *Elk Grove Unified Sch. Dist. v. Newdow,* 542 U.S. 1, 15 (2004) (rejecting third-party standing where interests "are not parallel and, indeed, are potentially in conflict"). In such cases, courts should avoid "the adjudication of rights which [the rights holders] not before the Court may not wish to assert." *Newdow,* 542 U.S. at 15 n.7. Under *Newdow,* Providers cannot ground their standing on the third-party rights of their hypothetical future potential women patients, when the goal of Providers' lawsuit is to enjoin Texas from protecting those very same women from Providers' substandard care.

Second, the instances where courts have found standing for abortion doctors typically involve laws that apply equally to *all abortions* and to *all abortion doctors,* so that the required "identity of interests" was present between the women patients who would receive the abortions and the physicians who would perform the abortions.[4] Here, by contrast, Texas regulates in the interest of pregnant women

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("relationship between the party asserting the right and the third party has been characterized by a strong identity of interests").

[4] Prior Supreme Court and Circuit decisions that found abortion doctors to have standing without expressly addressing third-party standing are inapposite for two reasons. First, decisions that considered only Article III standing without considering prudential third-party limits are not binding precedents on the unaddressed third-party issues. *Cooper Indus., Inc. v. Aviall Serv., Inc.,* 543 U.S. 157, 170 (2004). As such, those "drive-by jurisdictional rulings" have "no precedential effect" on third-party standing. *Steel Co. v. Citizens for a Better Env't.,* 523 U.S. 83, 91 (1998). Second, because this Circuit recognizes that prudential limits on standing can be waived by failing to raise them, *Bd. of Miss. Levee*

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who contemplate abortions and imposes no pertinent restrictions either on hospital-based abortions or on abortion doctors who already have (or are willing to obtain) admitting privileges. When a state relies on its interest in unborn life to insert itself into the doctor-patient relationship by regulating all abortions, the doctors and the patients may have the identical interest. Here, by contrast, all abortion doctors do not share the same interests as future abortion patients. Indeed, the Providers do not even share the same interests as all abortion doctors. Without an identity of interests between Providers and future abortion patients, the doctor-patient relationship is not close enough for third-party standing.

B. This Court Can and Should Consider Prudential Limits on Providers' Third-Party Standing to Raise the *Roe-Casey* Rights of Future Patients

In the District Court, Texas raised Providers' lack of third-party standing to enforce *Roe* and *Casey,* Texas Opp'n at 1-9 (docket item #59), but Texas did not press the issue in seeking to stay the District Court's injunction in the Fifth Circuit. Under Circuit precedent, prudential limits on justiciability may be waived, *Miss. Levee Comm'rs,* 674 F.3d at 417-18, although the circuits have split on that issue. *See, e.g., Animal Legal Defense Fund, Inc. v. Espy,* 29 F.3d 720, 723 n.2 (D.C. Cir. 1994) (prudential standing cannot be waived). To the extent that the situation here could qualify as waiver, however, that would not limit this Court's – or any federal

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Comm'rs v. EPA, 674 F.3d 409, 417-18 (5th Cir. 2012), a decision cannot be read to reject an argument *sub silentio* that a defendant *waived* by failing to raise it.

court's – authority to raise prudential limits *sua sponte:* "even in a case raising only prudential concerns, the question … may be considered on a court's own motion." *Nat'l Park Hospitality Ass'n v. DOI,* 538 U.S. 803, 808 (2003). Simply put, on questions of *judicial* restraint, the parties cannot bind the judiciary: "To the extent that questions … involve the exercise of judicial restraint from unnecessary decision of constitutional issues, the Court must determine whether to exercise that restraint and cannot be bound by the wishes of the parties." *Reg'l Rail Reorganization Act Cases,* 419 U.S. 102, 138 (1974). Indeed, simple logic dictates that judges can enforce judge-made prudential limits on justiciability, regardless of the parties' positions. Were it otherwise, judges could never adopt a new prudential limit without simultaneously rejecting it as having been waived.

C. To the Extent that They Can Establish *Their Own* Article III Standing, Providers Must Proceed under the Rational-Basis Test

When a party – like Providers here – does not possess an absentee's right to litigate under an elevated scrutiny such as the *Casey* undue-burden test, that party potentially may assert its own rights, albeit without the elevated scrutiny that applies to the absent third parties' rights:

> Clearly MHDC has met the constitutional requirements, and it therefore has standing to assert its own rights. Foremost among them is MHDC's right to be free of arbitrary or irrational zoning actions. But the heart of this litigation has never been the claim that the Village's decision fails the generous *Euclid* test, recently reaffirmed in *Belle Terre.* Instead it has been the claim that the Village's refusal to rezone discriminates against racial minorities in violation of the Fourteenth Amendment. As a corporation, MHDC has no racial identity and cannot be the direct target of the petitioners'

> alleged discrimination. In the ordinary case, a party is denied standing to assert the rights of third persons.

Village of Arlington Heights v. Metro. Housing Dev. Corp., 429 U.S. 252, 263 (1977) (citations omitted); *City of Akron v. Akron Ctr. for Reprod. Health,* 462 U.S. 416, 438 (1983) ("lines drawn … must be reasonable"). As shown in Section II.C, *infra,* Providers cannot meet this test.

II. PROVIDERS CANNOT PREVAIL ON THE MERITS

This section demonstrates that Providers are unlikely to prevail on the merits. Because Providers cannot make the showing required for the "extraordinary and drastic remedy" they seek, *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997), this Court should deny interim relief.

A. Even If *Casey* Applied, HB2 Would Not Trigger Undue-Burden Review

The *Casey* undue-burden test would not apply here, even if Providers had standing. In their cramped reading of *Casey,* Providers restrict states' latitude to protect the health and safety of women who seek abortions, which conflicts with federalism and establishes unsound policy. Under that reading, *Casey* would have weakened Texas's police power to protect its citizens in an area of traditional state and local concern (namely, public health) where the federal government lacks a corresponding police power. That would have left only the judiciary and abortion providers to protect the public from abortion providers, which is to say it would leave no one who is both qualified *and* disinterested to protect public health. *Amici* respectfully submit that that is not – and cannot be – the law.

"Throughout our history the several States have exercised their police powers

to protect the health and safety of their citizens," which "are 'primarily, and historically, ... matter[s] of local concern.'" *Medtronic, Inc. v. Lohr,* 518 U.S. 470, 475 (1996) (*quoting Hillsborough County v. Automated Med. Labs., Inc.,* 471 U.S. 707, 719 (1985)) (second and third alterations in *Medtronic*). For their part, the federal Executive and Congress lack a corresponding police power to take up the slack: "we always have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power." *U.S. v. Morrison,* 529 U.S. 598, 618-19 (2000). As indicated, if states cannot regulate the abortion industry's excesses, and the federal government cannot, that leaves only the judiciary and the abortion industry itself.

The judiciary, of course, is ill-suited by training to determine or second-guess what medical procedures are safe or necessary. *Gonzales v. Carhart,* 550 U.S. 124, 163 (2007); *cf. Parents Involved in Community Schools v. Seattle School Dist. No. 1,* 551 U.S. 701, 766 (2007) (federal courts "are not social engineers") (Thomas, J., concurring). Indeed, judges are even less qualified to practice medicine than they are to practice social engineering. Because the judiciary is not a credible regulator, Providers' narrow reading of states' flexibility under *Casey* would make abortion a self-regulated industry.

While some might argue that the public and the states should be able to trust abortion providers, that approach would be extremely naïve. Perhaps because of the politicization of this issue in the United States – caused in great part by the unprecedented *Roe* decision – abortion providers appear to regard themselves more

as civil-rights warriors than as medical providers. Unfortunately, a form of "agency capture"[5] infects at least some abortion regulators, so that – for example – "[e]ven nail salons in Pennsylvania are monitored more closely for client safety" than abortion clinics. Gosnell Grand Jury Report, at 137. Finally, many abortion providers simply cannot disclose anything negative about their abortion mission:

> Political considerations have impeded research and reporting about the complications of legal abortions. The highly significant discrepancies in complications reported in European and Oceanic [j]ournals compared with North American journals could signal underreporting bias in North America.

Jane M. Orient, M.D., *Sapira's Art and Science of Bedside Diagnosis,* ch. 3, p. 62 (Lippincott, Williams & Wilkins, 4th ed. 2009) (citations omitted); *see also* Gosnell Grand Jury Report, at 137-207 (non-enforcement by state and local regulators). For these reasons, the abortion industry's lack of transparency calls out for heightened regulation, vis-à-vis other, less-politicized medical practices.

Certainly, the abortion industry throws great public-relations and advocacy efforts into fighting disclosure of correlated health effects that other medical disciplines readily would disclose. *See, e.g., Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds,* 686 F.3d 889, 898 (8th Cir. 2012) (*en banc*)

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[5] "'Agency capture' … is the undesirable scenario where the regulated industry gains influence over the regulators, and the regulators end up serving the interests of the industry, rather than the general public." *Wood v. GMC,* 865 F.2d 395, 418 (1st Cir. 1988) (*citing* Wiley, *A Capture Theory of Antitrust Federalism,* 99 HARV. L. REV. 713, 724-26 (1986); Stewart, *The Reformation of American Administrative Law,* 88 HARV. L. REV. 1667, 1684-87, 1713-15 (1975)).

(abortion industry opposed South Dakota's requiring disclosure of abortion's correlation with suicide ideation); *K.P. v. LeBlanc,* 729 F.3d 427 (5th Cir. 2013) (abortion industry opposed Louisiana's tying limitation on liability to only those medical risks expressly disclosed in an informed-consent waiver). Claims that states target the abortion industry for *unwarranted* scrutiny have it precisely backwards.

Texas has regulated an industry that cuts corners and hides information by requiring that this industry integrate itself – through its physicians' admitting privileges – into the larger medical community. Texas thus has acted appropriately in seeking to increase the standard of care and to minimize unnecessary death and injury. Put another way, Texas has required "medically competent personnel under conditions insuring maximum safety for the woman." *Connecticut v. Menillo,* 423 U.S. 9, 10-11 (1975); *Mazurek*, 520 U.S. at 971; *Roe,* 410 U.S. at 150. Under the circumstances, "legislatures [have] wide discretion to pass legislation in areas where there is medical … uncertainty," and "medical uncertainty … provides a sufficient basis to conclude in [a] facial attack that the Act *does not* impose an undue burden." *Gonzales,* 550 U.S. at 164 (emphasis added). Significantly, the Constitution does "not give abortion doctors unfettered choice in the course of their medical practice, nor should it elevate their status above other physicians in the medical community." *Gonzales,* 550 U.S. at 163. That holding from *Gonzales* applies even more so here.

Indeed, as *Amici* read *Casey,* that is precisely what this Court intended in adopting the *Casey* framework, which balances competing state and individual

interests. Significantly, *Roe* concerned states' ability to *prohibit* abortions in the interest of the *infant* and the state's interest in that new life. By contrast, this litigation concerns the states' ability to *regulate* abortions in the interest of *pregnant women* who contemplate and receive abortions. On the application of the police power to protecting the *pregnant woman's* health, this Court never has ruled that the right to a particular abortion method trumps the states' interest in public health. As *Amici* understand *Casey,* the undue-burden test does not arise for "necessary" regulation of abortion procedures to protect women seeking an abortion. *See Casey,* 505 U.S. at 878 (only *unnecessary* regulations of women's health trigger further inquiry under *Casey*).

Specifically, following *Roe, Menillo,* and *Mazurek, Casey* allows that states "may enact regulations to further the health or safety of a woman seeking an abortion," "[a]s with any medical procedure." *Casey,* 505 U.S. at 878. The only prohibition in the *Casey* prong applicable to pregnant women is that "*[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." *Id.* (emphasis added). To unpack this language to its constituent parts, an undue-burden violation for woman-focused state regulation requires that the plaintiff establish both of two elements: (1) a woman-based health regulation is *unnecessary;* and (2) the regulation has either the purpose or effect of presenting a *substantial* obstacle. If the regulation is necessary (*i.e.,* not "unnecessary"), however, that ends the analysis: there is no *Casey-Roe* violation.

B. HB2 Does Not Impose an Undue Burden on *Roe-Casey* Rights

Although this Court should not reach the *Casey* merits at all, *see* Section I.A, *supra,* and the *Casey* undue-burden analysis does not even arise when states adopt *necessary* protections for pregnant women who seek abortions, *see* Section II.A, *supra,* HB2 would not impose an undue burden under *Casey,* even if that test applied to this litigation.

Providers do not genuinely question the value of admitting privileges; rather, they argue that local privileges will not help in all circumstances and that 25 Tex. Admin. Code §139.56 already accomplishes HB2's benefits. Providers' Application at 12-13. In a strict-scrutiny case, the availability of §139.56's lesser restrictions might be relevant, but this Court reviews the legislative choices more deferentially in this context, *Gonzales,* 550 U.S. at 164, and Providers' druthers are not the test. *Id.* at 163. Indeed, as explained in Section II.C, *infra,* §139.56 is irrelevant and *undercuts* Providers' claims.

Providers also cite the negative impact that HB2 might have on access to abortion services within parts of Texas. Providers' Application at 7-8. The appellate courts that have considered these issues have determined that *Casey* not only allows states to require abortion doctors to have admitting privileges at a local hospital as a legal matter but also does not prohibit increased travel distances to reach the facilities that remain open when, as a factual matter, state regulations indeed cause some abortion facilities to close. *Greenville Women's Clinic v. Comm'r,* 317 F.3d 357, 363 (4th Cir. 2002); *Women's Medical Prof'l Corp. v. Baird,* 438 F.3d 595, 598 (6th Cir. 2006); *Women's Health Ctr. of West Cnty., Inc. v. Webster,* 871

F.2d 1377, 1382 (8th Cir. 1989); *Tuscon Woman's Clinic v. Eden,* 379 F.3d 531, 547 (9th Cir. 2004). When a state "law … serves a valid purpose" (as HB2 does) and "has the incidental effect of making it more difficult or more expensive to procure an abortion," the added difficulty or expense "cannot be enough to invalidate it." *Casey,* 505 U.S. at 874. *Casey* requires more than Providers have alleged, much less proved.

C. HB2 Does Not Violate the Rational-Basis Test

To the extent that they have standing to challenge HB2 *without* relying on future patients' rights under *Casey,* Providers must proceed under the rational basis test, under which "[i]t is enough … that it *might be* thought that the particular legislative measure was a rational way to correct it." *Williamson v. Lee Optical of Oklahoma, Inc.,* 348 U.S. 483, 488 (1955) (emphasis added). Here, virtually every business day,[6] Texas women flow into the Texas hospital system due to abortion-related complications, many of them life-threatening. As the Eighth Circuit recognized, a similar Missouri law "furthers important state health objectives" by "ensur[ing] both that a physician will have the authority to admit his patient into a hospital whose resources and facilities are familiar to him and that the patient will gain immediate access to secondary or tertiary care." *Women's*

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[6] As *Amici* explained in District Court based on Providers' evidence, in the last year for which data are available (2010), there were 251 business days and 77,592 induced abortions in Texas, Texas Dep't of State Health Serv., Induced Terminations of Pregnancy Narrative (June 28, 2012), and thus 233 hospitalizations at the 0.3% rate cited by Providers. *See Amici Curiae* Br. at 10 n.6 (docket item #63).

Health Ctr. of West Cnty., 871 F.2d at 1381. The connection between admitting privileges and patient safety is obvious.

To overturn Texas' legislative response under the rational-basis test, Providers must do more than marshal "impressive supporting evidence … [on] the probable consequences of the [statute]" vis-à-vis the legislative purpose; they instead must negate "the *theoretical* connection" between the two. *Minnesota v. Clover Leaf Creamery Co.,* 449 U.S. 456, 463-64 (1981) (emphasis in original); *F.C.C. v. Beach Comm., Inc.,* 508 U.S. 307, 315 (1993) ("legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data"). Even if it were possible to "negate" that "*theoretical* connection" between admitting privileges and safety – and *Amici* doubt that it is – Providers certainly have not made the required showing.

Indeed, to the contrary, Providers have in essence admitted that HB2 does not violate the rational-basis test by affirmatively *relying on* 25 Tex. Admin. Code §139.56 to defeat HB2. By way of background, §139.56(a) requires that abortion facilities "shall ensure that the physicians who practice at the facility have admitting privileges or have a working arrangement with a physician(s) who has admitting privileges at a local hospital in order to ensure the necessary back up for medical complications." If HB2 has no rational relationship – indeed, no "*theoretical* connection" – with women's safety, then neither does §139.56. Unlike strict-scrutiny, the availability of less-restrictive alternatives like §139.56 does not undermine measures like HB2's admitting-privilege requirement because, with the

rational-basis test, it is "irrelevant … that other alternatives might achieve approximately the same results." *Vance v. Bradley,* 440 U.S. 93, 103 n.20 (1979); *Dallas v. Stanglin,* 490 U.S. 19, 26-28 (1989); *Massachusetts Bd. of Retirement v. Murgia,* 427 U.S. 307, 316-17 (1976). Far from proving the lack of a rational basis between safety and admitting privileges, Providers have relied on the connection between the two by relying on the safety that §139.56 provides.

III. THE OTHER INJUNCTION CRITERIA TIP IN TEXAS' FAVOR

Although the unlikelihood of Providers' prevailing on the merits should be dispositive, *Amici* also address the other three factors for interim relief. None of these factors justify reversing the Fifth Circuit.

A. Providers' Harm Is Largely Financial and Thus Not Irreparable

To demonstrate their irreparable harm required for a preliminary injunction, Providers rely both on the impact on their future patients' abortions and on their claim that their facilities will close permanently if they must close temporarily while the Fifth Circuit resolves the expedited appeal here. Providers' Application at 9-11. For stays pending appeal, the question of irreparable injury requires a two-part "showing of a threat of irreparable injury to interests that [the plaintiff] properly represents." *Graddick v. Newman,* 453 U.S. 928, 933 (1981) (Powell, J., for the Court[7]). "The first, embraced by the concept of 'standing,' looks to the status of the party to redress the injury of which he complains." *Id.* "The second aspect of the

[7] Although *Graddick* began as an application to a circuit justice, the Chief Justice referred the application to the full Court. *Graddick,* 453 U.S. at 929.

inquiry involves the nature and severity of the actual or threatened harm alleged by the applicant." *Id.* Thus, the inquiry into irreparable harm includes an inquiry into the plaintiff's standing to raise the claim for injunctive relief, as well as the requirement to *show* a sufficiently severe injury or threatened injury. Providers' showing on both prongs of the analysis falls short of the level needed for a stay.

1. Providers Lack Third-Party Standing for *Roe-Casey* Injuries

As indicated in Section I.A, *supra,* Providers lack third-party standing to assert the rights of their future patients. Under *Graddick,* therefore, the *Roe-Casey* rights of those women are not "interests that [Providers] properly represent[]." *Id.* Instead, Providers must assert their own injuries (*e.g.,* additional expense, loss of business) as the basis for their irreparable harm.

2. Providers' Business-Related Harms Are Not Irreparable

With respect to the severity of the Providers' injury or threatened injury, some circuits have held that "the elements of the preliminary injunction test are balanced, so that a stronger showing of one element may offset a weaker showing of another." *Pimentel v. Dreyfus,* 670 F.3d 1096, 1105 (9th Cir. 2012). To the contrary, however, this Court has suggested that movants must *have* a likelihood of success on the merits to obtain interim relief. *Winter,* 129 S. Ct. at 374-76; *Nken v. Holder,* 556 U.S. 418, 438 (2009) (Kennedy, J., concurring) ("When considering success on the merits and irreparable harm, courts cannot dispense with the required showing of one simply because there is a strong likelihood of the other"). Under the circumstances, it may be irrelevant how severe an injury Providers will suffer if

their likelihood of prevailing is too low. Alternatively, if this Court allows a sliding scale of irreparable harm, Providers' low likelihood of prevailing makes their business-related injuries unlikely to qualify as irreparable.

The evidence that Providers will go out of business, never to re-open, is based on Providers' narrow margins and inability to remain open during any shutdown imposed by the pendency of this litigation. Providers' Application at 10. Given the wide availability of loans to retain leases and the like, this argument is entirely financial. Moreover, this litigation will take no more than a few months, and the gap that Providers cite between the 170 days allowed for Texas hospitals to process an admission-privilege application and HB2's 90-day notice (Providers actually had much more notice) is at most 80 days. *See* Providers' Application at 10 n.7. The monetary cost to finance these facilities' necessary expenses for a few months would be trivial and typically would not qualify as irreparable harm at all. *See, e.g., Dennis Melancon, Inc. v. City of New Orleans,* 703 F.3d 262, 279-80 (5th Cir. 2012) (*citing Morgan v. Fletcher,* 518 F.2d 236, 240 (5th Cir.1975)).

B. The Balance of Equities Tips Toward Texas

The third preliminary-injunction criterion is the balance of equities, which tips in Texas' favor. At the outset, the decisions that Providers cite in their favor assume that the movant has the stronger argument on the merits. *See* Providers' Application at 14 & n.9. For example, the uncontroversial argument that the government "has no legitimate interest in enforcing an *unconstitutional* ordinance," *KH Outdoor, LLC v. City of Trussville,* 458 F.3d 1261, 1272 (11th Cir. 2006) (emphasis added), simply does not apply when the plaintiff is unlikely to prevail in

establishing the challenged ordinance's unconstitutionality. Here, assuming *arguendo* that Providers even have a claim on the merits, Providers' weak showing on the merits therefore weighs heavily against Providers.

Even if those other issues remained neutral here, Texas has sovereign interests in protecting the public health and conserving the public fisc with regard to the women patients dumped into Texas emergency rooms by the abortion industry. *See* note 6, *supra.* First, by making it impossible for any Texas-based Gosnells to continue their practices, HB2 enables Texas to fulfill its police-power obligation to ensure the health and safety of Texans. Second, the Emergency Medical Treatment and Active Labor Act, 42 U.S.C. §1395dd ("EMTALA"), requires Texas hospitals to treat these women, even if they are unable to pay for their care. In that way, Providers pass the downside costs of their abortion practices onto the Texas medical system, with which Texas obviously has an interest.[8] Insofar as the federal government recently relied on hospitals' EMTALA-imposed costs to cover uninsured patients as a basis to insert the federal government into healthcare, it would be difficult to deny Texas the right to regulate an industry whose business model calls for dumping its difficult cases into Texas' emergency rooms.

C. The Public Interest Favors Denying *Vacatur*

The fourth injunction criterion is the public interest. In litigation like this, where the parties dispute the lawfulness of government programs, this last criterion

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[8] EMTALA is an unfunded federal mandate (*i.e.,* the federal government has not provided states with funding to accomplish EMTALA's federal mandate).

collapses into the merits, 11A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FED. PRAC. & PROC. Civ.2d §2948.4, because there is a "greater public interest in having governmental agencies abide by [applicable] laws that govern their … operations." *Washington v. Reno,* 35 F.3d 1093, 1103 (6th Cir. 1994). If the Court sides with Texas on the merits, the public interest will tilt decidedly toward Texas: "It is in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy." *Burford v. Sun Oil Co.,* 319 U.S. 315, 318 (1943). For the reasons set out in Section II, *supra,* therefore, *Amici* respectfully submit that this final criterion should favor Texas.

CONCLUSION

This Court should deny Providers' application to vacate the appellate stay.

Dated: November 8, 2013

Respectfully submitted,

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CERTIFICATE AS TO FORM

Pursuant to Sup. Ct. Rules 22 and 33, I certify that the foregoing application for leave to file and the accompanying opposition are proportionately spaced, have a typeface of Century Schoolbook, 12 points, and contain 8 and 20 pages (and 1,699 and 5,261 words) respectively, excluding this Certificate as to Form, the Table of Authorities, the Table of Contents, and the Certificate of Service.

Dated: November 8, 2013

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CERTIFICATE OF SERVICE

The undersigned certifies that, on this 8th day of November 2013, one true and correct copy of the foregoing application for leave to file and the accompanying opposition was served by U.S. Priority Mail on the following counsel:

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(In addition to the foregoing service by mail, the undersigned also certifies that a PDF copy of the foregoing application for leave to file and the accompanying opposition were served via electronic mail on the parties' counsel of record.)

The undersigned further certifies that, on this 8th day of November 2013, an original and ten true and correct copies of the foregoing application for leave to file and the accompanying opposition were served on the Court by hand delivery.

Executed November 8, 2013, at Washington, DC,

/s/ Lawrence J. Joseph
Lawrence J. Joseph