No. 13-51008

In the United States Court of Appeals for the Fifth Circuit

Planned Parenthood of Greater Texas Surgical Health Services; Planned Parenthood Center for Choice; Planned Parenthood Sexual Healthcare Services; Whole Woman's Health; Austin Women's Health Center; Killeen Women's Health Center; Southwestern Women's Surgery Center; West Side Clinic, Incorporated; Routh Street Women's Clinic; Houston Women's Clinic, each on behalf of itself, its patients and physicians; Alan Braid, M.D.; Lamar Robinson, M.D.; Pamela J. Richter, D.O., each on behalf of themselves and their patients; Planned Parenthood Women's Health Center,

Plaintiffs-Appellees,

v.

Attorney General Gregory Abbott; David Lakey, M.D.; Mari Robinson, Executive Director of the Texas Medical Board,

Defendants-Appellants.

On Appeal from the United States District Court for the Western District of Texas, Austin Division, Case No. 1:13-CV-00826

BRIEF OF THE HONORABLE DANIEL H. BRANCH AS AMICUS CURIAE IN SUPPORT OF THE APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons or entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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Planned Parenthood Center for Choice

Planned Parenthood Sexual Healthcare Services

Whole Women's Health

Austin Women's Health Center

Killeen Women's Health Center

Southwestern Women's Surgery Center

West Side Clinic, Inc.

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RULE 29(C) CERTIFICATION

Amicus curiae files this brief with the consent of all parties.

Additionally, pursuant to FED. R. APP. P. 29(c)(5), the undersigned counsel for *amicus curiae* certifies that (1) no counsel for a party authored this brief in whole or in part; (2) no party or party's counsel contributed money that was intended to fund the preparation or submission of this brief; and (3) no person or entity—other than *amicus curiae* and his counsel—contributed money that was intended to fund the preparation or submission of this brief.

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IDENTITY AND INTEREST OF AMICUS CURIAE

In their challenge to H.B. 2, Plaintiffs have called into question the motives and sincerity of the Texas legislators who supported this bill. As a member of the Legislature who specifically asked the Governor to place these issues on the legislative agenda for the special session—and who of course voted in support of H.B. 2—I submit this amicus brief in response.

Although I personally believe that *Roe v. Wade* was wrongly decided—and that such matters are properly left to the states under the Tenth Amendment of the U.S. Constitution—I conclude that H.B. 2 also passes constitutional muster under current Supreme Court precedent.

SUMMARY OF ARGUMENT

The Supreme Court has long recognized the critical role that states play in safeguarding the health and welfare of their citizens. In recognition of that great responsibility, the Texas Legislature passed H.B. 2 to protect the health and well-being of all of its citizens.

H.B. 2 contains a number of key provisions, including (1) a requirement that any physician performing or inducing an abortion have admitting privileges at a hospital that is no more than thirty miles from where the abortion is taking place; and (2) a requirement that any use of abortion-inducing drugs be limited to the protocol authorized by the United States Food and Drug Administration (FDA),

with limited exceptions. Both of these provisions are designed to ensure that Texans receive proper medical care.

The district court, however, held that the admitting-privileges requirement served no rational basis—and, in any event, constituted an undue burden on the right of Texans to procure an abortion. In addition, the district court upheld the medication limitations as constitutional, but only after carving out an additional, unnecessary exception.

The opinion below is rife with errors, as the State's brief comprehensively demonstrates. There is an obvious rational basis to the admitting-privileges requirement—safeguarding the health and safety of Texans—and the requirement does not impose an undue burden on any constitutionally protected rights.

Additionally, the district court erred in carving out an additional, overbroad exception to the medication limitations, even though H.B. 2 already provides for all exceptions necessary to survive constitutional scrutiny. There is simply no constitutional right to abortion protocols that even the FDA has not seen fit to approve.

Moreover, the ruling below is particularly flawed because of its failure to adhere to the Supreme Court's repeated admonitions that courts should defer to the judgment of the democratically elected representatives of the people when engaging in rational basis review.

ARGUMENT

I. H.B. 2's Admitting-Privileges Requirement Has a Rational Basis and Does Not Impose an Undue Burden on the Rights of Texans.

The Supreme Court has long recognized that "[r]egulations designed to foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 878 (1992). H.B. 2's admitting-privileges requirement is precisely one of those acceptable regulations that *Casey* envisioned—designed to protect the health of women and children in Texas.

The district court nonetheless struck down the admitting-privileges requirement, concluding that the requirement had no rational basis, had an invalid purpose, and had the effect of causing an undue burden on those seeking an abortion. But every single one of those conclusions suffers from fatal factual and legal flaws.

A. There is an Obviously Rational Basis for the Admitting-Privileges Requirement: Improved Patient Care.

The district court struck down the admitting-privileges requirement, because it found that the admitting privileges "have no rational relationship to improved patient care." ROA 1542.

First of all, this is simply wrong on the facts. As this Court has already explained, the State has demonstrated several valid bases for the admitting-

privileges requirement. For example, the "requirement fosters a woman's ability to seek consultation and treatment for complications directly from her physician, not from an emergency room provider." Stay Op. at 5. Additionally, "[t]here was evidence that such a requirement would assist in preventing patient abandonment by the physician who performed the abortion and then left the patient to her own devices to obtain care if complications developed." *Id.*

The admitting-privileges requirement also plays a key role in the proper credentialing of physicians. While the State already engages in initial licensing and periodic renewals, the process by which hospitals grant and renew admitting privileges provides additional safeguards—which are particularly warranted given the unique practice of abortion providers, where there is a long history of unsafe medical practices and underreported morbidity and mortality.

All of these benefits go to the heart of the State's interest in "protecting the integrity and ethics of the medical profession." *Gonzales v. Carhart*, 550 U.S. 124, 157 (2007) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 731 (1997)). Texas obviously has a "'legitimate concern for maintaining high standards of professional conduct' in the practice of medicine.'" *Id.* (quoting *Barsky v. Bd. of Regents of Univ. of N.Y.*, 347 U.S. 442, 451 (1954)).

In sum, there are ample justifications for the admitting-privileges requirement, all of which the State ably evidenced at trial. But the district court

did not credit any of those reasons, and instead supplanted its own factual conclusions for that of the legislature, declaring that the admitting-privileges requirement "fails a rational-basis review." ROA 1542.

But not only was the district court wrong in its ultimate factual conclusion, it was not the court's place to question the judgment of the Legislature in the first place. The elected representatives of the people of Texas determined—after a great deal of reasoned deliberation—that an admitting-privileges requirement would further safeguard the health of all Texans. That analysis is entitled to the utmost deference from the courts. After all, under rational basis review, "a legislative choice is not subject to courtroom factfinding." *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993). The mere fact that the district court had no choice but to weigh conflicting evidence on this issue is proof that the admitting-privileges requirement must pass rational basis review.

B. There is a Lawful and Compelling Purpose Motivating the Admitting-Privileges Requirement—And Plaintiffs Have No Evidence Proving Otherwise.

The district court also chose to attack the law through an undue burden analysis under *Casey*. This is wrong on several levels.

To begin with, the district court erred in engaging in an undue burden analysis in the first place. *Casey*'s undue burden test does not apply to abortion regulations that are necessary to safeguard the health and safety of women who are

seeking an abortion. *See Casey*, 505 U.S. at 878. Here, the admitting privileges requirement is plainly necessary to ensure that women receive proper medical care. *See supra* at 3-5.

In addition, the district court erred in concluding that the admitting-privileges requirement "does not survive the undue-burden 'purpose' inquiry." Specifically, the district court complained that "[t]he State fail[ed] to show a valid purpose for requiring that abortion providers have hospital privileges within 30 miles of the clinic where they practice." ROA 1544.

But once again, the district court has badly confused the correct legal standard. It is not the State's burden to show that there is a valid purpose behind the law. Rather, it is Plaintiffs' burden to prove an *invalid* purpose behind the requirement—because a law fails *Casey*'s purpose test only if Plaintiffs prove that it has the "purpose . . . of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Casey*, 505 U.S. at 878.

Thus, it is utterly irrelevant whether the State did or did not "show a valid purpose"—because Plaintiffs have failed to show that the motivation behind the law was to place a substantial burden on women seeking to abort a nonviable fetus.

Plaintiffs cannot point to the text of the law. As this Court has already acknowledged, "H.B. 2's text does not facially indicate that its purpose is to place

a substantial obstacle in the path of a woman seeking an abortion." Stay Op. at 9 (quotations and citation omitted).

Nor can Plaintiffs point to any anything in the record showing an improper purpose. They introduced absolutely no evidence of any invalid purpose motivating the Legislature—let alone evidence sufficient to carry their burden on this prong.

To the contrary, the record actually demonstrates several *valid* purposes for the admitting-privileges requirement. *See, e.g., supra* at 3-5; Stay Op. at 9 ("[t]here can be no doubt the government has an interest in protecting the integrity and ethics of the medical profession, . . . as well as an interest in protecting the health of women who undergo abortion procedures") (quotations and citation omitted).

C. The Admitting-Privileges Requirement Does Not Violate the "Effects" Prong of the Substantial Burden Test.

Finally, the district court also concluded that the admitting-privileges requirement "places an 'undue burden' on a woman seeking abortion services" because it "has the effect of presenting a 'substantial obstacle' to access to abortion services." ROA 1542.

But the State's briefing thoroughly debunks the district court's reasoning and factual conclusions on this point. *See* Br. of Appellants at 16-23. Put simply, the district court could not point to any credible evidence that the admitting-

privileges requirement will have an undue burden on *patients*—because there is no such evidence in the record. *See id.*

II. The District Court Erred in Crafting An Additional, Unnecessary Exception to the Medication Limitations in H.B. 2.

H.B. 2 also limits the use of abortion-inducing drugs to the protocols authorized by the FDA, with a few limited exceptions. Plaintiffs challenge this medication limitations provision, arguing that it imposes an undue burden. Essentially, Plaintiffs are asking this court to create a new constitutional right to prescribe (and be prescribed) abortion medication protocols that even the FDA itself has not approved.

The district court upheld the constitutionality medication limitations provision, but only after grafting an additional exception onto the statute: "except when a physician finds such an abortion necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." But this was an unnecessary intrusion on the role of the Legislature in crafting its statutes, as H.B. 2 already provides for all the exceptions necessary to survive constitutional scrutiny. *See* Br. of Appellants at 33-34.

Moreover, Plaintiffs are flat wrong in asserting that the Constitution requires a state to allow abortion providers to do what even the FDA has been unwilling to sanction. *Cf. Abigail Alliance for Better Access to Developmental Drugs v. von*

Eschenbach, 495 F.3d 695, 711-14 (D.C. Cir. 2007) (en banc) (rejecting constitutional right to use drugs the FDA has not yet approved).

The FDA has had numerous opportunities to revisit its protocols, but has repeatedly chosen to limit medical abortions in specific ways—and it is not the role of the courts to second-guess the finding of the Texas Legislature that any non-FDA-approved usage poses a risk to women's health. *See, e.g.*, *Gonzales*, 550 U.S. 164 (courts do not serve as "the country's *ex officio* medical board with powers to approve or disapprove medical and operative practices and standards throughout the United States") (citation and internal quotation marks omitted).

Indeed, the history of abortion-inducing medications warrants the State's restrictions. As the record below demonstrates, Planned Parenthood itself previously recommended that women be prescribed a different non-FDA approved protocol than the one that is being advocated here. Why the change? Because seven women died after using the protocol that Planned Parenthood previously recommended. *See* USCA5.634; Defs.' Ex. 14. To say that the Constitution now demands that Texas allow those same providers to administer additional non-FDA approved protocols is ridiculous.

In fact, to this day, Texas abortion providers cannot even agree on which non-FDA-approved protocol they should use. As the State demonstrated below, one of the Plaintiffs in this very case uses a dangerous non-FDA-approved

medication protocol—one that even Planned Parenthood refuses to use. *See* ROA 1959; *see also* Br. of Appellants at 36-37. It is conduct like that which plainly justifies the limitations set forth in H.B. 2.

CONCLUSION

The judgment of the district court should be reversed and H.B. 2 should be upheld in its entirety.

DATED: November 29, 2013

Respectfully submitted,

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The undersigned counsel certifies that this amicus brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief's text has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in Times New Roman, 14-point. The brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 2,029 words, excluding the parts exempted from the word-count requirement under Fed. R. App. P. 32(a)(7)(B)(iii).

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