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 *AMICI CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE, MISSOURI BAPTIST CONVENTION CHRISTIAN LIFE COMMISSION, AND CHRISTIAN LEGAL SOCIETY IN SUPPORT OF RESPONDENTS


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## QUESTIONS PRESENTED

1. Did the Fifth Circuit correctly determine that Texas's regulations did not constitute an "undue burden" for obtaining an abortion?

2. Even if Texas's legitimate health regulations impose a substantial burden on some women seeking abortions in Texas, did the Fifth Circuit nevertheless correctly uphold the statute against the facial challenge presented here because it did not impose an undue burden in all but those few instances?

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## INTEREST OF AMICI CURIAE[1]

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[1] Pursuant to this Court's Rule 37.3, this amicus brief is filed with the consent of the parties. Pursuant to Rule 37.6, amici curiae affirm that no counsel for any party authored this brief, and no person other than Amici Curiae, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

to help churches apply Christian principles to moral and public policy issues; and to communicate with lawmakers and courts about Baptist principles of religious liberty and the sanctity of human life, in cooperation with the churches and other MBC and SBC entities.

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## SUMMARY OF ARGUMENT

When this Court adopted the undue burden standard in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), it did not create a new standard, but borrowed the existing standard that had been articulated in concurring opinions by Justice O'Connor in several abortion cases. Those opinions provide substance as to how the standard is to be applied.

The Fifth Circuit applied the standard correctly and determined that, absent an undue burden, Texas's law requiring that abortion clinics and doctors performing abortions in the state meet the same medical standards that apply to other medical facilities and procedures, is subject only to rational basis review and are constitutionally valid.

Moreover, even if this Court were to find that Texas's law imposed an "undue burden" on some

women in the State, it is not facially invalid, either under the long-standing "no set of circumstances" test from *United States v. Salerno*, 481 U.S. 739, 745 (1987), or the arguably lower "large fraction of the cases" test from *Casey*.

## ARGUMENT

### I. Unless There Is a Substantial, "Undue" Burden, Routine Rational Basis Review Applies.

For nearly a quarter-century, abortion regulations have been governed by this Court's decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). In that case, this Court held that "*Only* where state regulation imposes an *undue burden* on a woman's ability to make this [abortion] decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause." *Id.*, at 874 (joint opinion of O'Connor, Kennedy, and Souter, JJ.) (emphasis added). The joint opinion in *Casey* deliberately substituted the "undue burden" test for the trimester framework that had been crafted in *Roe v. Wade*, 410 U.S. 113, 163-66 (1973). *Casey*, 505 U.S., at 872-76.

The "rigid" trimester framework was problematic, according to the *Casey* joint opinion, because it had the effect of deemphasizing the portion of the *Roe* decision that explicitly acknowledged the State's "important and legitimate interest in potential life." *Casey*, 505 U.S., at 871. And that led this Court in subsequent cases to decide, erroneously, "that any regulation touching upon the abortion decision must survive strict scrutiny." *Id.*, at 871-72 (quoting *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 427 (1983) ("*Akron I*")). The joint opinion in *Casey*

therefore replaced the trimester framework with the undue burden standard in order to protect "the State's permissible exercise of its powers." 505 U.S., at 872. It recognized that "not every law which makes a right more difficult to exercise is, *ipso facto,* an infringement of that right" and emphasized that:

> 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. *Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause.*

*Id.*, at 873-74 (emphasis added).

The joint opinion also made it clear that unless a state regulation imposes an *undue* burden, courts should analyze the law as they do other laws that have only an "incidental effect" on the exercise of a constitutional right, namely, by giving the States "substantial flexibility" to pursue their goals. *Id.* In other words, normal rational basis review applies when a regulation does not impose an "undue" burden.

## II. *Casey* Did Not Create the Undue Burden Standard, But Adopted the Standard That Has Long Been Discussed In Abortion Cases.

The undue burden standard adopted by the joint opinion in *Casey* is one that is very familiar to the judiciary, so there is an abundance of instructional precedent on its application. Adopting the existing standard rather than creating a new framework of review allowed this Court to utilize the discussion set out in earlier cases and thereby supply the lower courts with an intelligible system for determining how to apply it. Because the joint opinion looked to opinions in prior abortion cases, those precedents provide an additional gloss on what constitutes an "undue" burden, and describe the methodology for how to proceed in analyzing laws found *not* to impose an undue burden.

### A. The undue burden standard's evolution in the abortion context demonstrates that it is not triggered by merely incidental burdens.

This Court began to give content to the undue burden standard in the abortion context more than fifteen years before *Casey*. Shortly after this Court issued its decision in *Roe*, for example, it vacated a district court injunction against a Massachusetts statute requiring minor women to obtain parental consent before obtaining an abortion. *Bellotti v. Baird*, 428 U.S. 132, 152 (1976) ("*Bellotti I*"). In *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976), decided the same day as *Bellotti I*, this Court had invalidated "a statute that created a parental veto" on a minor's right to have an abortion, so the issue in *Bellotti I* was whether the district court should have first certified to the Massachusetts Supreme Judicial Court whether, because of the statutory allowance for a judicial bypass upon a showing of "good cause," the statute could reasonably be construed in such a way

as to cure that constitutional infirmity. *Id.*, at 148. The resolution of that question was necessary because, as the Court explained, an abortion regulation would not be unconstitutional "unless it unduly burdens the right to seek an abortion." *Id.*, at 147.[2]

While *Bellotti I* introduced language that would become the core of the Court's abortion jurisprudence, the key takeaway from both *Bellotti I* and *Danforth* is that the undue burden standard originated in the context of state regulations that struck directly at the core of a woman's right to seek an abortion. The Court's chief concern was that the state regulations gave "a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy." *Danforth*, 428 U.S., at 74. Quite unlike the issues presented in these early cases, the state regulation of abortion providers at issue here does not in any way create an "absolute veto" on the woman's choice, nor does it remove the decision of obtaining an abortion from the woman's hands.[3]

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[2] Three years later, this Court held that the Massachusetts Supreme Judicial Court's authoritative interpretation of the statute, which did not permit a judicial bypass option in most cases, "would impose an undue burden upon the exercise by minors of the right to seek an abortion." *Bellotti v. Baird*, 443 U.S. 622, 647 (1979) ("*Bellotti II*"); *see also id.*, at 648 ("[T]he constitutional right to seek an abortion may not be unduly burdened by state-imposed conditions upon initial access to court"). The state restriction at issue in *Bellotti II* is thus one that granted a third party a near-absolute veto over the woman's choice to have an abortion; it is therefore far removed from the state regulation of abortion facilities at issue here.

[3] *See also Harris v. McRae*, 448 U.S. 297, 314 (1980) (listing two examples of "unduly burdensome interference," including only

After the introduction of the undue burden concept in *Bellotti I*, the Court regularly discussed state regulations in terms of undue burdens. In a pair of 1977 abortion cases decided the same day, the Justices continued to appeal to the concept of unduly burdensome state regulation. In *Maher v. Roe*, 432 U.S. 464, 473-74 (1977), the Court reaffirmed that the constitutional right to an abortion "protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy." *See also id.*, at 473 ("[W]e have held that a requirement for a lawful abortion 'is not unconstitutional unless it unduly burdens the right to seek an abortion.'" (quoting *Bellotti I,* 428 U.S., at 147)). Once the Court held that a Connecticut regulation encouraging childbirth did not impose an undue burden on women's choice to procure an abortion, it then considered whether the regulation was "rationally related" to a "constitutionally permissible purpose," an admittedly "less demanding test of rationality." *Id.*, at 478.

Justice Brennan, dissenting with two other Justices, agreed with the majority that the relevant question in *Maher* was whether the Connecticut regulation imposed an undue burden on the woman's right to seek an abortion. *See id.*, at 489 (Brennan, J., dissenting). However, Justice Brennan also believed that regulation was an undue burden on the woman's choice because Connecticut had "advanced no compelling state interest to justify its interference in that choice." *Id.* Of course, Justice Brennan's assumption that a woman's choice to have an abortion during the first

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"severe criminal sanctions" and an "absolute requirement of spousal consent").

two trimesters of pregnancy constituted a fundamental right was repudiated by the *Maher* majority. *See id.*, at 474 (majority opinion) ("*Roe* did not declare an unqualified 'constitutional right to an abortion . . . .'"). And it was further repudiated in *Casey*. *See* 505 U.S., at 874 (joint opinion).

In *Poelker v. Doe*, 432 U.S. 519, 521 (1977) (per curiam), decided the same day as *Maher*, the Court relied on its undue-burden-based reasoning in *Maher* to uphold a St. Louis policy that provided publicly financed hospital services for childbirth, but not nontherapeutic abortions. Again, in dissent, Justice Brennan argued that the St. Louis policy constituted an undue burden on the right to seek an abortion. *See id.*, at 525 (Brennan, J., dissenting). Justice Brennan believed that the policy would have the effect of requiring indigent women to obtain abortions in clinics or private hospitals, and that women in small and/or rural communities would be especially burdened. *See id.*, at 524. Not only was Justice Brennan concerned that such clinics might be prohibitively expensive, but also that "some abortions may pose unacceptable risks if performed outside a hospital" such that the city's policy might increase, rather than reduce, the health risks associated with abortions, cutting against *Roe*'s permission of state regulation designed to *protect* maternal health. *Id.*, at 523-24. The majority rejected those arguments.

The interaction between Justice Brennan and the majority in both *Maher* and *Poelker* is thus particularly instructive. First, the majority in *Poelker* (relying on its reasoning in *Maher*), tacitly rejected Justice Brennan's argument that practical obstacles to a

woman's ability to have an elective abortion was sufficient to constitute an undue burden on her right.[4] Second, quite unlike the Texas statute at issue here, which is designed to promote health and safety, the St. Louis policy transparently favored childbirth over abortion. *Poelker*, 432 U.S., at 521. If the Court was willing to sustain that policy over the practical and geographic obstacles that Justice Brennan identified in his dissent, merely on the basis of the state's "preference" for childbirth over abortion, then it is necessarily the case that those same obstacles (assuming they even exist here) cannot trump a state regulation founded on health and safety concerns.

The Court's next significant interaction with the undue burden standard came in a series of three June 1983 decisions. Among the three cases, the most sustained treatment of the standard is found in Justice O'Connor's dissenting opinion in *Akron I*, 462 U.S., at 452 (O'Connor, J., dissenting). Justice O'Connor's reading of the Court's precedents, which eventually became the governing rule in *Casey*, did not require adherence to *Roe*'s rigid trimester framework. Instead, the undue burden standard "should be applied to the challenged regulations throughout the entire pregnancy without reference to the particular 'stage'

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[4] The *Maher* majority did imply that a state regulation would amount to an undue burden when "drastically limiting the availability and safety of the desired service." 432 U.S., at 472. However, even faced with the concerns presented in Justice Brennan's dissent in *Poelker*, which attacked the St. Louis regulation on the grounds of both availability and safety, the *Poelker* majority (which was the same majority in *Maher*) apparently rejected that such concerns amounted to a "drastic" limitation.

of pregnancy involved," she wrote. *Id.*, at 453. In particular, Justice O'Connor noted that while technological advancement had moved legitimate state regulation *forward* to the moment of childbirth and moved the point of viability *back* toward conception, the *Roe* framework was on "a collision course with itself." *Id.*, at 458. Justice O'Connor therefore sought to apply the undue burden standard during all stages of pregnancy in order to avoid leaving legislatures and (more importantly) courts with complicated judgments about health and safety that the *Roe* framework had thrust upon them both:

> The *Roe* framework is inherently tied to the state of medical technology that exists whenever particular litigation ensues. Although legislatures are better suited to make the necessary factual judgments in this area, the Court's framework forces legislatures, as a matter of constitutional law, to speculate about what constitutes "accepted medical practice" at any given time. Without the necessary expertise or ability, courts must then pretend to act as science review boards and examine those legislative judgments.

*Id.*; *see also id.* at 456 ("Irrespective of the difficulty of the task [of determining accepted medical practice], legislatures, with their superior fact-finding capabilities, are certainly better able to make the necessary judgments than are Courts"). Under her proposed application of the undue burden standard, Justice O'Connor offered some measure of leeway to States wishing to regulate abortion for reasons of health and safety, even during the first trimester. *See id.*, at 459-60.

In defining what constituted an "undue burden" during any stage of pregnancy, Justice O'Connor recognized that undue burdens had only been found "for the most part in situations involving absolute obstacles or severe limitations on the abortion decision," including criminalizations (*Roe*), prohibitions on abortion by saline amniocentesis (*Danforth*), and spousal or parental "vetoes" over the abortion decision (*Danforth* and *Bellotti II*). *See id.*, at 464. The only "undue burden" relating to medical health and safety alone was the saline amniocentesis ban in *Danforth*, because it "effectively represented 'a *complete* prohibition of abortions in certain circumstances.'" *Id.* (quoting *id.*, at 429 n.11 (majority opinion)). Of course, the Texas regulations at issue here do not constitute a "complete prohibition" of any particular procedure in any circumstance.

In analyzing the abortion regulations at issue in *Akron I*, Justice O'Connor found that several of the health-related regulations were not unduly burdensome, most notably the city's requirement that second-trimester abortions be performed in "hospitals." Justice O'Connor disagreed with the majority's conclusion that increased abortion costs and decreased availability was sufficient to render the regulations unconstitutional. First, she believed that the *challengers* of the ordinance had offered insufficient evidence that the two Akron hospitals performing second-trimester abortions had ever denied common abortion procedures to any woman, nor did the challengers offer evidence that hospitals in nearby areas did not provide them. *See id.*, at 466. Under this reasoning, the burden is on the challengers of the Texas regulations to offer uncontestable evidence of increased costs and decreased availability *beyond* those

incurred by routine state regulation. *See also id.*, at 466-67 ("A]lmost *any* state regulation . . . that the Court *would* allow . . . inevitably and necessarily entails increased costs for *any* abortion"). Second, Justice O'Connor seemed to imply that *any* rational health regulation, such as a hospitalization requirement, does not impose an undue burden because it "simply does not rise to the level of 'official interference' with the abortion decision." *See id.*, at 467 (quoting *Harris v. McRae*, 448 U.S., at 328 (White, J., concurring)). In the two other abortion-related cases handed down on the same day as *Akron I*, Justice O'Connor wrote separately to reiterate her adherence to the undue burden standard through all stages of pregnancy, a standard that required her to uphold all the challenged regulations on the basis of the position she staked out in *Akron I*. *Simopoulos v. Virgina*, 462 U.S. 506 (1983), and *Planned Parenthood Ass'n of Kansas City, Mo. v. Ashcroft*, 462 U.S. 476 (1983), involved hospitalization requirements for second-trimester abortions that had been passed by Virginia and Missouri, respectively. The majority in *Simopoulos* upheld the Virginia requirement because outpatient surgical hospitals were included in the statutory definition of "hospital," *Simopoulis*, 462 U.S., at 516. Justice O'Connor agreed that the hospitalization requirement was constitutional, but wrote separately to reiterate her view that it was constitutional because a second-trimester hospitalization requirement did not impose an undue burden on the woman's right to choose an abortion. *Id.*, at 519-20 (O'Connor, J., concurring in part and concurring in the judgment).

The majority in the *Planned Parenthood* case, on the other hand, invalidated the Missouri law because, like the one invalidated in *Akron I*, it required that

"all second-trimester abortions must be performed in general, acute-care facilities." *Planned Parenthood*, 462 U.S., at 481-82. Justice O'Connor, joined by Justices White and Rehnquist, dissented from that part of the opinion, reiterating her view that a hospitalization requirement "does not impose an undue burden on the limited right to undergo an abortion." *Id*., at 504 (O'Connor, J., concurring in part in the judgment and dissenting in part). Indeed, she went much further, noting that she would uphold the requirement even "[a]ssuming *arguendo* that the requirement was an undue burden," because "it would nevertheless 'reasonably relate[ ] to the preservation and protection of maternal health.'" *Id.* (quoting *Roe*, 410 U.S., at 163).

Between *Akron I* and *Casey*, Justice O'Connor continued to establish the contours of the undue burden standard in separate opinions. In *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986), she wrote the only opinion in the case addressing the undue burden standard and reiterated her belief that an "undue burden will generally be found 'in situations involving absolute obstacles or severe limitations on the abortion decision,' not wherever a state regulation 'may "inhibit" abortions to some degree.'" *Thornburgh*, 476 U.S. at 828 (O'Connor, J., dissenting) (quoting *Akron I*, 462 U.S., at 464 (O'Connor, J., dissenting)).

In *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), the Court addressed a series of Missouri regulations ranging from mandatory "viability" medical examinations to prohibitions on the use of public employees and facilities to perform or assist abortions not necessary to save the mother's life. A

majority of this Court upheld the restrictions at issue, with a plurality of the justices signaling either their tacit or explicit belief that *Roe* should be overruled. *See id.*, at 532 (Scalia, J., concurring in part and concurring in the judgment) (describing the plurality opinion as "effectively" overruling *Roe* and calling for its explicit repeal); *id.*, at 537 (Blackmun, J., concurring in part and dissenting in part). Justice O'Connor, however, took issue with the plurality's concern that the statute would be suspect under *Akron I* because it marginally increased the cost of an abortion. *See id.*, at 529 (O'Connor, J., concurring in part and concurring in the judgment). Repeating her dissent in *Akron I*, Justice O'Connor argued that so long as the examinations required by statute "would not be medically imprudent," they would not impose an undue burden on a woman's abortion decision. *Id.*, at 530.[5]

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[5] Justice Blackmun's dissenting opinion in *Webster* briefly addressed the undue burden standard, but only in response to the plurality's charge that the Court's existing abortion jurisprudence more resembled a code of regulations than a body of constitutional doctrine. *Webster*, 492 U.S., at 518 (plurality opinion). Justice Blackmun argued that the distinction between abortion regulation which is "unduly burdensome" and that which is not is necessarily one of degree. *See id.*, at 551 (Blackmun, J., concurring in part and dissenting in part). For example, the Court's opinions striking down a hospitalization requirement in *Akron I* was distinguishable from the one upheld in *Simopoulos* because the former "unduly burdened the right of women to terminate a pregnancy and [was] not rationally related to the State's asserted interest in the health of pregnant women, while Virginia's *substantially less restrictive* regulations were not unduly burdensome and did rationally serve the State's interest." *Id.* However, nowhere in his *Webster* opinion did Justice Blackmun attempt to operationalize the undue burden standard, and he offered no alternative to the "official interference" rationale that Justice O'Connor put forth in *McRae*, 448 U.S., at 328. Similarly, when

Throughout her opinions analyzing the undue burden standard before *Casey*, Justice O'Connor's concerns were two-fold: (1) whether the regulation conformed to medical prudence and (2) whether the regulation acted on the woman in such a way as to prevent her from acting on her decision to have an abortion. Moreover, Justice O'Connor asked only whether the regulation was rationally related to a constitutionally permissible interest,[6] such as the interest of the state in potential human life *or* in protecting maternal health.

Significantly, it was Justice O'Connor's understanding of the "undue burden" standard that was utilized in the plurality opinion she jointly authored with Justices Kennedy and Souter in *Casey*.

### B. Several lower courts have recognized that the "undue burden" test is a significant threshold.

Several lower courts applying that standard in the abortion context have recognized that "undue burden" is a significant threshold that must be crossed before

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Justice Blackmun claimed that a later Ohio law requiring parental notice for minor women seeking an abortion "unduly burdened" the minor's right to an abortion, he offered no substantive analysis defining when a burden becomes "undue." *See Ohio v. Akron Center for Reproductive Health (Akron II)*, 497 U.S. 502, 534, 540 (1990) (Blackmun, J., dissenting).

[6] *See also Hodgson v. Minnesota*, 497 U.S. 417, 459 (1990) (O'Connor, J., concurring in part and concurring in the judgment in part) ("It has been my understanding in this [abortion] area that [i]f the particular regulation does not 'unduly burde[n]' the fundamental right . . . then our evaluation of that regulation is limited to our determination that the regulation rationally relates to a legitimate state purpose").

heightened scrutiny is to be applied or an abortion regulation invalidated. In *Karlin v. Foust*, for example, the Seventh Circuit emphasized that an abortion regulation will not be rendered unconstitutional or even subjected to heightened scrutiny under the undue burden standard "merely because it operates to make it more difficult or more expensive to procure an abortion." 188 F.3d 446, 479-80 (7th Cir. 1999); *see also Greenville Women's Clinic v. Bryant*, 222 F.3d 157, 170 (4th Cir. 2000) ("Only when the increased cost of abortion is prohibitive, essentially depriving women of the choice to have an abortion, has the Court invalidated regulations because they impose financial burdens" (citing *Akron I*, 462 U.S., at 434-39); *but see Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 540 (9th Cir. 2004) (contending that "the undue burden standard is not triggered at all if a purported health regulation fails [after being reviewed with "care"] to rationally promote an interest in maternal health on its face"). Were it otherwise, the States' autonomy and the exercise of their police powers would be severely restricted, just as this Court recognized in *Braunfeld v. Brown* that applying heightened scrutiny to regulations that do not impose an undue burden "would radically restrict the operating latitude of the legislature." *Braunfeld v. Brown,* 366 U.S. 599, 605-06 (1961).

## III. The Fifth Circuit Correctly Applied the Undue Burden Standard and Found The Regulations Do Not Impose An Undue Burden.

The Fifth Circuit correctly applied the undue burden standard adopted in *Casey*. In particular, once it found that Texas's law did not impose an undue burden, the Fifth Circuit correctly assessed the law under

rational basis review. *Whole Woman's Health, Inc. v. Cole*, 790 F.3d 563, 587 (5th Cir. 2015). The Fifth Circuit's decision was consistent not only with *Casey* but also with how the undue burden standard has been applied in other contexts.

The Fifth Circuit first determined that strict scrutiny did not apply because the regulations did not strike at the abortion right itself. *Id*., at 584.[7]

The Fifth Circuit then considered whether the regulations imposed an undue burden—an alternative ground for heightened scrutiny. It rejected the district court's approach, which it described as "substituting its own judgment for that of the legislature" by concluding that an undue burden is imposed if the requirements of the statute "effectively reduce or eliminate meaningful access to safe abortion care for a significant, but ultimately unknowable, number of women throughout Texas." *Id.*, at 586. Instead, the Fifth Circuit correctly determined that the asserted burden imposed was not "undue" under a facial challenge because plaintiffs had not proved that the regulations imposed an undue burden for all or even a large fraction of women. *Id.*, at 586-87.

Finally, having determined that the Texas law did not impose an "undue" burden, the Fifth Circuit properly subjected the law to mere rational basis review. *Id.*; *see also Casey*, 505 U.S., at 874. Then the

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[7] The district court incorrectly applied the undue burden standard when it reversed which party bore the standard of proof. The court rejected the purpose of the laws stated by the legislature even though the plaintiffs failed to produce evidence "contradicting the legislature's statement of a legitimate purpose." *Cole*, 790 F.3d, at 585.

Fifth Circuit found—here agreeing with the district court—that both the admitting privileges and ambulatory surgical center requirements were rationally related to a legitimate state interest, thus satisfying rational basis review. *Id.* at 584. It therefore correctly concluded that the Texas laws are constitutional.

## IV. Even If Texas's Law Creates an Undue Burden for Some Women, the Lack of an Undue Burden On Most Means the Law Survives this Facial Challenge.

In *United States v. Salerno*, this Court declared its standard for reviewing facial challenges to statutes: "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that *no set of circumstances exists under which the Act would be valid.*" 481 U.S. 739, 745 (1987) (emphasis added). This Court has applied the *Salerno* facial challenge standard in several cases dealing with abortion. *See, e.g., Rust v. Sullivan*, 500 U.S. 173, 183 (1991); *Akron II*, 497 U.S. at 514; *Webster*, 492 U.S. at 524. Under this standard, if Texas's law could operate validly in even some circumstances, it would survive this facial challenge.

Unfortunately, by asserting in *Casey* that the spousal consent provision of the law at issue was unconstitutional because "*in a large fractio*n of the cases in which [the provision was] relevant, it [would] operate as a substantial obstacle to a woman's choice to undergo an abortion," 505 U.S., at 895 (emphasis added), the Court created a great deal of confusion in the lower courts about the continuing vitality of the *Salerno* rule in the abortion context. The Third Circuit, for example, has noted its belief that *Casey* "set a new standard for facial challenges to pre-viability

abortion laws," requiring "only that a plaintiff show an abortion regulation would be an undue burden 'in a large fraction of the cases.'" *Casey v. Planned Parenthood of Se. Pennsylvania*, 14 F.3d 848, 863 (3d Cir. 1994) (on remand) (citing *Casey*, 505 U.S., at 895); *see also*, *e.g.*, *Planned Parenthood v. Miller*, 63 F.3d 1452, 1458 (8th Cir. 1995); *Planned Parenthood of N. New England v. Heed*, 390 F.3d 53, 58 (1st Cir. 2004), *vacated on other grounds sub nom. Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320 (2006). The Fifth Circuit, on the other hand, has continued to apply the *Salerno* rule in abortion facial challenges. *Barnes v. Moore*, 970 F.2d 12, 14 and n.2 (5th Cir. 1992) (per curiam); *Barnes v. Mississippi*, 992 F.2d 1335, 1342 (5th Cir. 1993).

Regardless of which facial standard is applied, however, the Texas law at issue here is valid. Even if the "large fraction" language from *Casey* is deemed to have overruled *Salerno sub silentio* (at least in the abortion context), Texas's law would, *at a minimum*, have to impose an undue burden in a large fraction of the cases in which the provisions are relevant. Here, the Fifth Circuit correctly found that both the admitting privileges and ambulatory surgical center requirements did not impose an undue burden at all. *Supra* Part III. But even if this Court were to find the presence of an undue burden for some women, the Petitioners did not (and could not) demonstrate that any such burden fell on a large fraction of women. *Cole*, 790 F.3d at 588-90 (rejecting that *Casey* changed the threshold for facial challenges from the *Salerno* test to the "large fraction" test, but illustrating that, even if the "large fraction" test were to be used, Texas's regulations are valid since they do not impose an undue

burden on a large fraction of women for whom they are relevant).

## CONCLUSION

For the reasons noted above, the decision of the Fifth Circuit upholding Texas's reasonable efforts to protect the health and safety of women seeking abortions in the State should be affirmed.

Respectfully submitted,

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