No. 13-60599

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JACKSON WOMEN'S HEALTH ORGANIZATION, et al.,

Plaintiffs-Appellees,

v.

MARY CURRIER, et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Mississippi, Jackson
(No. 12-346, Hon. Daniel P. Jordan, III)

Amicus Curiae Brief of
Members of the Alabama House of Representatives,
Texas House of Representatives and Texas Senate
in Support of Defendants-Appellants and
Reversal of the District Court

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 28.2.1, the undersigned counsel of record certifies that the following listed persons or entities 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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Other Interested Persons or Entities:

Amici are unaware of any other interested persons or entities.

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Amici have no parent corporations or stock of which a publicly held corporation can hold.

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

Amici are legislators from Alabama and Texas who have acted to advance their legitimate State interest in protecting maternal health by enacting laws that require abortion providers to have admitting privileges. The ability of *Amici* to ensure maximum patient safety if and when abortion is practiced within their states is threatened by the district court's analysis that disregards a state's legitimate interest in protecting maternal health.

Amici include Members of the Alabama House of Representatives, Representatives Scott Beason, Mary Sue McClurkin, Kerry Rich, and Greg Reed; Members of the Texas House of Representatives, Representatives Cecil Bell, Jr., Dwayne Bohac, Dan Branch, Tony Dale, Marsha Farney, Larry Gonzales, Lance Gooden, Susan King, Stephanie Klick, Jodie Laubenberg (author of Texas HB 2, which includes an admitting privileges requirement), Larry Phillips, Debbie Riddle, Ralph Sheffield, Ron Simmons, Paul Workman, James White, Bill Zedler and John Zerwas; Members of the Texas Senate, Senators Donna Campbell, John Carona, Bob Deuell and Craig Estes.

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[1] In accordance with Fed. R. App. P. 29, the parties have consented to the filing of this *amicus* brief. No party's counsel has authored the brief in whole or in part. No party or party's counsel has contributed money intended to fund preparing or submitting this brief. No person other than *Amici*, their members, or their counsel has contributed money that was intended to fund preparing or submitting this brief.

ARGUMENT

A consistent holding throughout the U.S. Supreme Court's decisions touching on abortion is that the State has a legitimate interest in regulating abortion providers and the practice of abortion to protect maternal health. Contrary to precedent that requires deference to the State, the district court makes a cursory dismissal of the Mississippi's legitimate interest in regulating abortion to protect maternal health. The district court's rationale creates a new "right" for abortion clinics to perpetual, unregulated existence with dangerous consequences to women's health.

I. United States Supreme Court precedent is clear that the abortion "right" is qualified by a State's legitimate interest, from the outset of pregnancy, in regulating abortion providers and the practice of abortion to protect maternal health.

From its inception in the 1973 *Roe v. Wade* decision, to its articulation in the 2007 *Gonzales v. Carhart* case—the most recent opinion related to abortion—the abortion "right" announced by the U.S. Supreme Court has been explicitly qualified. Upholding what it considered the essential holding of *Roe*, the Court in *Planned Parenthood v. Casey* asserted that "it is a constitutional liberty of the woman to have some freedom to terminate her pregnancy…. The woman's liberty is not so unlimited, however, that from the outset [of pregnancy] the State cannot

show its concern… .” 505 U.S. 833, 869 (1992). A consistent holding throughout the Court’s decisions touching on abortion is that among those concerns is the State’s legitimate interest in regulating abortion providers and the practice of abortion to protect maternal health.

A. The State’s interest in regulating abortion providers and the practice of abortion is comprehensive and “obviously extends” to ensuring the availability of post-abortive treatment and emergency care in the case of complications.

In *Roe*, while the Court established a “right” to abortion, it simultaneously expressed that “[t]he State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that [ensure] maximum safety for the patient.” *Roe v. Wade*, 410 U.S. 113, 150 (1973). The *Roe* Court found that the State’s legitimate interest in regulating abortion to protect maternal health, “obviously extends at least to [regulating] the performing physician and his staff, to the facilities involved, to the availability of after-care, and to adequate provision for any complication or emergency that may arise.” *Id.* at 150.

Preceded by the phrase “at least,” these examples clearly set a floor, not a ceiling, of the “obvious” interests a State has in protecting maternal health. Notably, the *Roe* Court’s list of the minimum “obvious” examples of measures advancing women’s health goes beyond regulating the abortion procedure itself

and extends to regulations that would ensure the availability of post-abortive after-care treatment and emergency care in the case of complications. Simply, the State's interest in maternal health is comprehensive.

B. The State's broad interest in regulating abortion to protect maternal health applies to abortions performed at any stage of pregnancy.

The Supreme Court in *Casey* stated directly that "*Roe*'s essential holding" includes "the principle that the State has legitimate interests from the outset of pregnancy in protecting the health of the woman… ." *Casey*, 505 U.S. at 846. In *Gonzales v. Carhart*, the Court further explained that "*Casey* rejected…the interpretation of *Roe* that considered all previability regulations of abortion *unwarranted*." 550 U.S. 124, 146 (2007) (emphasis added). ("The abortions affected by the Act's regulations take place both previability and postviability." *Id*. at 156). Indeed, viability is an illogical marker in the context of the long-established State interest in protecting maternal health. The interest does not derive from whether or not a fetus is able to survive outside his or her mother's womb. Rather, serious maternal health risks posed by an abortion exist, as the Court correctly identified in *Casey*, from the outset of pregnancy.

Scientific data confirms that, whether accomplished by an invasive surgical procedure or a potent drug, an abortion at any stage of pregnancy carries inherent

risks to maternal health.[2] The undisputed risks of immediate complications from abortion include blood clots, hemorrhage, incomplete abortions, infection, and injury to the cervix and other organs.[3] Immediate complications affect

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[2] In fact, the State's interest in maternal health concerns increases for later-term abortions. It is undisputed and universally accepted that the risk to maternal health from abortion increases as the pregnancy advances. Even Planned Parenthood, the largest abortion provider in the United States, agrees that abortion becomes riskier later in pregnancy. Planned Parenthood states on its national website, "The risks [of surgical abortion] increase the longer you are pregnant. They also increase if you have sedation or general anesthesia [which would be necessary at or after 20 weeks gestation]." Planned Parenthood Federation of America, *In-Clinic Abortion Procedures* (2013), available at http://www.plannedparenthood.org/health-topics/abortion/in-clinic-abortion-procedures-4359.asp (last visited Nov. 18, 2013). Scientific data from well-respected, peer-reviewed journals demonstrates the dangers inherent in abortion, especially at or after 20 weeks gestation. A well-respected peer-reviewed journal—one which is also frequently cited by abortion advocates—notes that, "Abortion has a higher medical risk when the procedure is performed later in pregnancy. Compared to abortion at eight weeks of gestation or earlier, the relative risk increases exponentially at higher gestations." (L.A. Bartlett et al., *Risk factors for legal induced abortion-related mortality in the United States*, OBSTETRICS & GYNECOLOGY 103(4):729-37 (2004)). The Bartlett study notes gestational age is the strongest risk factor for abortion-related mortality. Several other large scale studies have revealed that abortions after the first trimester (144,000 performed annually) pose more serious risks to women's physical health than first-trimester abortions. *See e.g.*, S.V. Gaufberg & P.L Dyne, ABORTION COMPLICATIONS (2012), available at http://emedicine.medscape.com/article/795001-overview (last visited Nov. 20, 2013). For a study that shows an increased risk of posttraumatic stress symptoms with late-term abortions as compared to early term abortions, *see*, P.K. Coleman et al., *Late-Term Elective Abortion and Susceptibility to Posttraumatic Stress Symptoms*, J. PREGNANCY 2010:1 (2010).

[3] The websites for abortion organizations such as Planned Parenthood and the National Abortion Federation acknowledge these risks of abortion. *See*, *e.g.*, Planned Parenthood Federation of America, *In-Clinic Abortion Procedures* (2013), available at http://www.plannedparenthood.org/health-topics/abortion/abortion-

approximately 10 percent of women undergoing abortions, and approximately one-fifth of these complications are life threatening.[4]

C. The "undue burden" standard articulated by the U.S. Supreme Court is concerned with "unnecessary" health regulations.

The Supreme Court in *Casey* also explained that the "essential holding" that "the State has legitimate interests from the outset of pregnancy in protecting the health of the woman" is *not* in conflict with the undue burden standard it defined. "These principles do not contradict one another." *Casey,* 505 U.S. at 846. In what the *Casey* Court described as its "summary" of the undue burden standard, it found: "As with any medical procedure, the State may enact regulations to further the health or safety of a woman seeking an abortion." *Id*. at 878. Notably, the Court chose to include the word "unnecessary" as it continued to explain in the next

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procedures-4359.htm (last visited Nov. 18, 2013); Planned Parenthood, *The Abortion Pill (Medical Abortion)* (2013), available at http://www.plannedparenthood.org/health-topics/abortion/abortion-pill-medication-abortion-4354.asp (last visited Nov. 18, 2013);National Abortion Federation, *Abortion Facts,* available at http://www.prochoice.org/about_abortion/fac ts/safety_of_abortion.html (last visited Nov. 18, 2013).

[4] *See* Shadigian, Elizabeth, "Reviewing the Medical Evidence: Short and Long-Term Physical Consequences of Induced Abortion," testimony before the South Dakota Task Force to Study Abortion, Pierre, South Dakota September 21, 2005, available at http://www.abortionbreastcancer.com/PHYSICAL_EFFECTS_OF_ABORTION.pdf. (last visited Nov. 21, 2013)

sentence: "Unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on that right." *Id*. at 878.

Indeed, the *Casey* Court repeatedly expressed that it was concerned not with *any* regulation on abortion but "undue," "unnecessary," "unwarranted," or "arbitrary" regulations. For example, the "right" to abortion was not described as absolute against any interference, but rather "without undue interference from the state." *Id.* at 846. The Court noted clearly that "[n]ot all government intrusion is of necessity unwarranted." *Id.* at 875. Finding that a woman's right to an abortion "derives from the Due Process Clause," the Court explained that "[t]he guarantees of due process…have in this country 'become bulwarks also against arbitrary legislation.'"), *id*. at 847 (quoting *Poe v. Ullman*, 376 U.S. 497, 541 (1961) (Harlan, J., dissenting) (quoting *Hurtando v. California*, 110 U.S. 516, 532 (1884))).

U.S. Supreme Court precedent is clear that the abortion "right" is qualified by a State's legitimate interest in regulating abortion providers and the practice of abortion to protect maternal health. That State interest is comprehensive. It exists from the outset of pregnancy and extends beyond regulating the abortion procedure itself, obviously extending to ensuring the availability of post-abortive treatment and emergency care in the case of complications.

II. The district court failed to give the required deference to the State's legitimate interest in regulating abortion providers in order to protect maternal health.

The Supreme Court in *Casey* held, "Unnecessary health regulations that have the purpose and effect of presenting a substantial obstacle…impose an undue burden." *Casey*, 505 U.S. at 878. However, the district court asserts, in a footnote, that there is an uncertainty as to how the term "unnecessary" is meant to factor into the analysis. *Jackson Women's Health Org. v. Currier*, 2013 U.S. Dist. LEXIS 53510, at *8 n.3 (S.D. Miss. Apr. 15, 2013). The district court then seemingly decides that it does not need to factor it into its analysis of the Mississippi law because "since *Casey* the Supreme Court has consistently proceeded to the purpose and effect side of the equation without considering whether a particular regulation is 'unnecessary.'" *Id*. The district court makes a cursory statement that "assuming a necessity inquiry," the Plaintiff established a likelihood of success on the merits. *Id.* Such a conclusion hardly gives appropriate deference to an important aspect of the Supreme Court's test and is inconsistent with cases following *Casey*, including the most recent Supreme Court opinion related to the merits of an abortion regulation, *Gonzales v. Carhart*.

In *Gonzales,* which upheld the federal partial-birth abortion ban, the Supreme Court made clear that it is the legislature's role to evaluate the medical evidence and determine the best way to protect women in light of that evidence.

The Court explicitly held that state and federal legislatures are given "wide discretion to pass legislation in areas where there is medical and scientific uncertainty." *Gonzales,* 550 U.S. at 163.[5] The Court further noted that legislative fact-findings are to be reviewed under "a deferential standard." *Id*. at 165.

The Court specifically concluded that the "law need 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." *Id*. at 163. The Court stated it yet another way when it said "[m]edical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts." *Id*. at 164.

Such deference to the State was not a new or anomalous construct when recognized in *Gonzales*. As the *Gonzales* Court itself noted, in the 1997 case *Mazurek v. Armstrong*, the Supreme Court upheld a Montana law that restricted the performance of abortions to licensed physicians *despite* respondents' contention that "all health evidence contradicts the claim that there is any health basis for the law." *Gonzales*, 550 U.S. at 164. In other words, deference to the legislature is appropriate even where the law allegedly is not based upon scientific facts.

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[5]Recently, this standard was followed by the Eighth Circuit Court of Appeals, upholding *en banc* South Dakota's informed consent law requiring that women be informed of the risk of suicide and suicide ideation following abortion. *Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds*, 686 F.3d 889, 900 (8th Cir. 2012).

If this is the case where there is "medical uncertainty," deference to the legislature is even more appropriate where, as noted above, the risk (to maternal health from abortion) is medically certain.

Clarifying the boundaries of the abortion "right," and the courts' role in reviewing legislation, the Court has also sharply criticized any usurpation of the legislative role in regulating abortion that "left this Court to 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.'" *Webster v. Reproductive Health Services*, 492 U.S. 490, 518-19 (1989). Likewise, in reversing a district court opinion regarding an abortion regulation, a panel of this Circuit recently observed, "a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 2013 U.S. App. LEXIS 22231, at *9 (5th Cir. Oct. 31, 2013) (quoting *F.C.C. v. Beach Commc'ns, Inc*., 508 U.S. 307, 315 (1993)).

Taken together with the Court's repeated affirmation of the states' interest in protecting women from the harms of abortion, Supreme Court precedent suggests that in order to sustain an "undue burden" claim against legislation concerning abortion that is based on a maternal health rationale, the plaintiffs challenging the

law must demonstrate that the government has no medical evidence that the regulation is rationally related to maternal health.

III. The district court's analysis creates a "right" for abortion clinics to perpetual, unregulated existence which runs counter to precedent and has dangerous consequences for women's health.

The abortion "right" announced in U.S. Supreme Court cases, including *Roe*, is not a right to the existence of abortion clinics. In fact, *Roe* expressed concern with what it called "abortion mills," noting that their reported negative impact on women's health "strengthens, rather than weakens, the State's interest in regulating the conditions under which abortions are performed." *Roe*, 410 U.S. at 150. The district court's analysis, elevating in-state "access" to an abortion clinic over the long-recognized State interest in protecting maternal health, does the reverse. It virtually immunizes abortion clinics from regulation if their failure to comply would close their doors.

In the over forty years since *Roe*, there are numerous examples demonstrating that regulation of abortion clinics is necessary. The trial of now-convicted murderer Dr. Kermit Gosnell brought some attention to the tragic impact that the "legal" abortion industry has had on women's health.[6] Gosnell's clinic was not an aberration. In fact, since 2009, abortion providers in Alabama,

[6] Among the crimes for which he was convicted, a jury found Gosnell guilty of involuntary manslaughter in the death of Karnamaya Mongar, who died in 2009 after an anesthesia overdose during an abortion.

Mississippi, and Texas, along with other states, have faced investigations and/or have been cited for violating state laws governing the provision of abortions.[7]

[7] For a copy of the Alabama Department of Health's February 2010 report on the Beacon Women's Center in Montgomery, Alabama that documents the clinic's "numerous and serious violations," *see* Statement of Deficiencies and Plan of Correction, Beacon Women's Center, dated Feb. 1, 2010, available at http://wsfa.images.worldnow.com/images/incoming/linkedwebdocs/13113.PDF (last visited Nov. 20, 2013). For a copy of the Alabama Department of Health's March 2012 report on the New Woman All Health Care Center in Birmingham, Alabama that documents deficiencies, including repeat violations, *see* Statement of Deficiencies and Plan of Correction, New Woman All Women Health Car, available at http://abortiondocs.org/wp-content/uploads/2012/04/NEW-WOMAN-ALL-WOMEN-201203011.pdf (last visited Nov. 20, 2013). For a copy of the Mississippi State Department of Health August 2009, January 2010, and August 2011 reports documenting deficiencies at Plaintiff-Appellee Jackson Women's Health Organization including failures to "maintain the structure in good repair" and "maintain a sanitary environment," *see* Statement of Deficiencies and Plan of Correction, National Women's Health Org, dated Aug. 27, 2009, available at http://abortiondocs.org/wp-content/uploads/2012/07/2009-JWHO-Health-Dept-Deficiency-Report.pdf (last visited Nov. 20, 2013); Statement of Deficiencies and Plan of Correction, National Women's Health Org, dated Jan. 14, 2010, available at http://abortiondocs.org/wp-content/uploads/2012/07/2010-JWHO-Health-Dept-Deficiency-Report.pdf (last visited Nov. 20, 2013); and Statement of Deficiencies and Plan of Correction, Jackson Women's Health Organization, dated Aug. 8, 2011, available at http://abortiondocs.org/wp-content/uploads/2012/07/2011Report.pdf (last visited Nov. 20, 2013). For a copy of the Texas Department of State Health Services report on deficiencies found at the Whole Women's Health of Fort Worth clinic, including that "the facility had not ensured a safe environment, equipped to protect the health and safety of their clients," *see,* Statement of Deficiencies and Plan of Correction, Whole Women's Health of Fort Worth, LLC, dated Mar. 15, 2011, available at http://www.texasallianceforlife.org/issues/hb2/DSHS_inspection_WWH_Fort_Worth_03_15_2011.pdf (last visited Nov. 21, 2013). For a copy of the revised proposed agreement between the Texas Commission on Environmental Quality and the Women's Whole Health of McAllen clinic for allegations including that the clinic "failed to treat and dispose pathological waste according to approved methods of treatment and disposition," *see*, Letter from Tim Haase, Manager,

However, states would be impeded from enacting new legislation or even enforcing existing laws that protect women against these dangerous providers if other courts were to adopt the district court's erroneous rationale, predicating a determination as to the constitutionality of a health regulation upon its impact on in-state "access" to abortion clinics. Contrary to the assurances made in *Roe, Casey*, and *Gonzales*, adoption of the district court's flawed analysis would permit abortion clinics, particularly in states with a limited number of abortion clinics, to run perpetually unregulated practices.

Moreover, the idea that the abortion "right" demands that abortion clinics exist within each state runs counter to other legal precedent. The Supreme Court has been consistently clear that the government has no affirmative duty to "commit any resources to facilitating abortions." *Rust v. Sullivan*, 500 U.S. 173, 201 (1991) (*citing Webster*, 492 U.S. at 511). Thus, a State may not be required to facilitate an abortion clinic in the absence of a qualified provider.

Enforcement Div., Tex. Comm'n on Envtl. Quality, to Amy Hagstrom-Miller, President, Whole Woman's Health of McAllen, LLC (Sept. 2, 2011) (attaching proposed agreed order), available at http://operationrescue.org/pdfs/TCEQ-McAllenFines.pdf (last visited Nov. 21, 2013). For a copy of the Texas Department of State Health Services report on deficiencies found at the Whole Woman's Health of San Antonio clinic, including that the clinic "failed to implement and enforce acceptable environmental controls in cleaning and preparing instruments for sterilization," *see,* Statement of Deficiencies and Plan of Correction, Whole Women's Health of San Antonio, dated Aug. 29, 2011, available at http://www.texasallianceforlife.org/issues/hb2/DSHS_inspection_WWH_San_Antonio_08_29_2013.pdf (last visited Nov. 21, 2013).

CONCLUSION

The Fifth Circuit should reject the district court's analysis which, contrary to U.S. Supreme Court precedent, makes a cursory dismissal of the State's legitimate interest in regulating abortion to protect maternal health and creates a new "right" for abortion clinics to perpetual, unregulated existence with dangerous consequences to women's health.

Respectfully submitted,

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Dated: November 25, 2013

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

   X this brief contains **3,315** words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I relied on my word processor, Microsoft Word 2010, to obtain the count.

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   s/ Mailee R. Smith
   Counsel of Record for *Amici Curiae*

   Dated: November 25, 2013

CERTIFICATE OF SERVICE

I hereby certify that on November 25, 2013, I electronically filed the foregoing *Amicus Curiae* Brief with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system. Participants in the case are registered CM/ECF users and service will be accomplished by the CM/ECF system.

s/ Mailee R. Smith
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