IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

TEXAS MEDICAL PROVIDERS PERFORMING ABORTION SERVICES, a class represented by METROPOLITAN OB-GYN, P.A., d/b/a REPRODUCTIVE SERVICES OF SAN ANTONIO and ALAN BRAID, M.D., on behalf of themselves and their patients seeking abortions,	§	
Plaintiffs,	§	
v.	§	
DAVID LAKEY, M.D., Commissioner of the Texas Department of State Health Services, in his official capacity; MARI ROBINSON, Executive Director of the Texas Medical Board, in her official capacity; and DAVID ESCAMILLA, County Attorney for Travis County, in his official capacity and as representative of the class of all county and district attorneys in the State of Texas with authority to prosecute misdemeanors; and their employees, agents, and successors,	§	Case No. 1:11-cv-00486-SS
Defendants.	§	

BRIEF OF SENATOR DAN PATRICK AND REPRESENTATIVE SID MILLER
AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS

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Amici Senator Dan Patrick and Representative Sid Miller (the *"Amici"*) hereby submit this Brief of Senator Dan Patrick and Representative Sid Miller as *Amici Curiae* in Support of Defendants (the "Brief"):

Interest of the *Amici Curiae*

Amici are the authors of the respective bills passed by the Texas Senate and Texas House of Representatives that are the subject of this litigation. Senator Patrick was compelled to file this legislation by research and testimony from women who were denied the ability to review the sonogram or discuss the abortion procedure with the performing physician. *Amici* desire to participate in these proceedings to highlight the purposes of House Bill 15 (HB 15), explain the clear legislative intent behind the severability clause, and defend the constitutionality of the legislative decisions reflected in HB 15.

Argument

I. The legislative purposes of HB 15 are grounded in Supreme Court precedent and support the constitutionality of each independent part of HB 15.

The State has a "legitimate and substantial interest in preserving and promoting fetal life." *Gonzales v. Carhart*, 550 U.S. 124, 145 (2007). It also has "legitimate interests from the outset of [a] pregnancy in protecting the health of the woman and the life of the fetus that may become a child." *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 846 (1992). The text of HB 15 provides three independent and constitutional purposes for its passage. Although the text states that such purposes are not the only purposes supporting HB 15, they are each independently sufficient to satisfy constitutional inquiry.

The first purpose stated in the text of HB 15 is "protecting the physical and psychological health and well-being of pregnant women." Pl. Ex. 1 at 14. Texas has "a substantial government interest justifying a requirement that a woman be apprised of the health risks of abortion and

childbirth," including mental-health considerations. *Casey*, 505 U.S. at 882. Further, "[i]t cannot be questioned that psychological well-being is a facet of health." *Id.* Texas, "[i]n attempting to ensure that a woman apprehend the full consequences of her decision … furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed. If the information the State requires to be made available to the woman is truthful and not misleading, the requirement may be permissible." *Id.*

The second purpose listed in the text of HB 15 is "providing pregnant women access to information that would allow her to consider the impact an abortion would have on her unborn child." Pl. Ex. 1 at 14. The consideration of an abortion's consequences to a fetus is not contingent on the consideration of the health of the mother. Rather, those considerations provide a stand-alone basis for informed-consent legislation. There is "no reason why the State may not require doctors to inform a woman seeking an abortion of the availability of materials relating to the consequences to the fetus, even when those consequences have no direct relation to her health." *Casey*, 505 U.S. at 882. The state also has legitimate interests "in protecting the life of the fetus that may become a child." *Gonzales*, 550 U.S. at 125. Further, a statute furthering a state's "legitimate goal of protecting the life of the unborn" by "ensuring a decision that is mature and informed" is permitted "even when in so doing the State expresses a preference for childbirth over abortion." *Casey*, 505 U.S. at 883. Finally, the Supreme Court has held that "[r]egulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose." *Id.* at 877. "Unless it has that effect on her right of choice, a state measure designed to persuade

her to choose childbirth over abortion will be upheld if reasonably related to that goal." *Id.* at 878.

The State's third stated purpose supporting HB 15 is "protecting the integrity and ethical standards of the medical profession." Pl. Ex. 1 at 14. This interest is directly supported by *Gonzales v. Carhart*, which recognizes the State's "legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn." 550 U.S. at 158. *See also Washington v. Glucksberg*, 521 U.S. 702, 731 (1997) ("The State also has an interest in protecting the integrity and ethics of the medical profession"). *Gonzales* also makes clear that legislatures may impose ethical standards on the medical profession that differ from those held by individual doctors or professional medical organizations. *See* 550 U.S. at 161–63 (noting testimony from doctors who insisted that partial-birth abortion may sometimes qualify as the safest method of pregnancy termination). An abortion performed without a medical professional's full disclosure to a pregnant woman of the impact on the fetus and the potential health consequences of an abortion could undermine the woman's trust in medical professionals. This Act is intended to protect the integrity and ethics of the medical profession by establishing clear requirements that are designed to ensure the health and informed consent of a pregnant woman who is contemplating an abortion.

These three independent purposes for the enactment of HB 15, while not exhaustive of all the purposes supporting its enactment, are grounded in Supreme Court precedent. *Amici* and other Texas legislators took great care to ensure that they followed the Supreme Court's pronouncements and enacted legislation that falls within the ambit of permissible regulations in this area.

II. The severability clause of HB 15 requires an exacting analysis of each allegedly offending portion of the statute and requires the plaintiffs to bring as-applied rather than facial challenges to HB 15's provisions.

The severability clause in HB 15 reflects the legislature's intent to sever not only the clauses or provisions in the statute, but also the *discrete applications* those provisions to every person, group of persons, or circumstances. *See* HB 15 § 15 ("Every provision in this Act *and every application of the provisions in this Act* are severable from each other.") (emphasis added). This severability clause is modeled after provisions that appear in numerous federal statutes requiring severability of a statute's applications as well as clauses. *See, e.g.*, Congressional Accountability Act of 1995, Pub. L. No 104-1 § 509, 109 Stat. 3, 44 (codified at 2 U.S.C. § 1438) ("If any provision of this Act or the application of such provision to any person or circumstance is held to be invalid, the remainder of this Act and the application of the provisions of the remainder to any person or circumstance shall not be affected thereby"); § 1103 of the Social Security Act, 42 U.S.C. § 1303 (Supp. II 1936); § 15 of the National Labor Relations Act, 49 Stat 457, 29 U.S.C. § 165 (Supp. I 1935); § 11 of the Railroad Labor Act, 44 Stat. 587, 45 U.S.C. § 161 (1934); § 14 of the Agricultural Adjustment Act, 48 Stat. 39, 7 U.S.C. § 614 (1934). And this clause was specifically crafted to remove any possible doubts surrounding what the legislature "really" intended, as it declares "the legislature's intent and priority that the valid applications be allowed to stand alone," even if those valid applications reflect a small fraction of the statute's scope. HB 15 § 15. The severability clause could not be more clear: Any unconstitutional applications of a provision in HB 15 must be severed from the constitutional applications of that provision, allowing the constitutional applications to remain in force. *See Ayotte v. Planned Parenthood*, 546 U.S. 320, 330 (2006) (holding that "legislative intent" controls severability analysis); *Leavitt v. Jane L.*, 518 U.S. 137, 138 (1996) (enforcing

severability clause in Utah's anti-abortion statute while insisting that "severability is of course a matter of state law").

Because of this severability clause, the plaintiffs cannot obtain a remedy that totally enjoins a provision in HB 15 unless that provision is unconstitutional in all of its applications. Plaintiffs instead must bring as-applied challenges to the provisions in HB 15. This approach also dovetails with the Supreme Court's recent ruling in *Gonzales,* which holds that even in the absence of a severability clause, "the proper means to consider exceptions is by as-applied challenge." *Gonzales*, slip op. at 37. Moreover, when reviewing abortion statutes, "[t]he latitude given facial challenges in the First Amendment context in inapplicable." *Id.* at 37–38. *See also United States v. Salerno,* 481 U.S. 739, 745 (1987) ("The fact that [a legislative Act] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment."). The Supreme Court made clear the role of the courts when reviewing statutes: "It is neither our obligation nor within our traditional institutional role to resolve questions of constitutionality with respect to each potential situation that may develop. It would indeed be undesirable for this Court to consider every conceivable situation that might possibly arise in the application of complex and comprehensive legislation. For this reason, as-applied challenges, rather than facial challenges, are the basic building blocks on constitutional adjudication." *Gonzales*, slip op. at 38 (internal quotations and citations omitted).

III. HB 15 provides fair notice of what conduct is required.

HB 15 provides fair notice and an objective standard to determine whether the physician acquired the informed consent of the patient. It provides far more notice than the Sherman Antitrust Act's prohibition on "contracts in restraint of trade," or the prohibition on "conduct

unbecoming an officer and a gentleman" in Article 133 of the Uniform Code of Military Justice. *See, e.g., Nash v. United States,* 229 U.S. 373 (1913) (Holmes, J.) (rejecting void-for-vagueness challenge to the Sherman Antitrust Act); *Parker v. Levy*, 417 U.S. 733 (1974) (rejecting void-for-vagueness challenge to Art. 133 of the UCMJ). A statute is unconstitutionally vague only if it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute," or is so indefinite that "it encourages arbitrary and erratic arrests and convictions." *Colautti v. Franklin,* 439 U.S. 379, 390 (1979) (quoting *United States v. Harriss,* 347 U.S. 612, 617 (1954) and *Papachristou v. Jacksonville,* 405 U.S. 156, 162 (1972)). "Although the doctrine focuses both on actual notice … and arbitrary enforcement, … the more important aspect of the vagueness doctrine is not actual notice, but … the requirement that a legislature establish *minimal* guidelines to govern law enforcement. Where the legislature fails to provide such minimal guidelines, a criminal statute may permit a standardless sweep that allows policemen, prosecutors, and juries to pursue their personal predilections." *Kolender v. Lawson,* 461 U.S. 352, 357–58 (1983) (internal cites and quotes omitted) (emphasis added).

HB 15 provides not just minimal but precise guidelines as to what is required from the physician and/or sonographer and what standard their actions are to be judged by. In HB 15, the objective medical judgment standard is often employed. HB 15 requires that the physician display the sonogram images "in a quality *consistent with current medical practice* in a manner that the pregnant woman may view them." Pl. Ex. 1 at 4 (emphasis added). Similarly, the physician or a certified sonographer must "make[] audible the heart auscultation for the pregnant woman to hear, if present, in a quality *consistent with current medical practice." Id.* (emphasis added). The Seventh Circuit Court of Appeals noted that "the reasonable medical judgment standard clearly is an ascertainable and comprehensible standard that provides physicians with

more than 'fair warning' as to what conduct is expected of them … because this is the same standard by which all of their medical decisions are judged under traditional theories of tort law." *Karlin v. Foust*, 188 F.3d 446, 464 (7th Cir. 1999).

In *Doe v. Bolton*, 410 U.S. 179, 191 (1973), the Supreme Court held that a statute was not unconstitutionally vague that banned abortions unless a physician, "based upon his best clinical judgment," determined "that an abortion is necessary." *See also United States v. Vuitch*, 402 U.S. 62, 71–72 (1971). The Supreme Court went on in *Doe* to note that leaving the standard as a medical judgment "allows the attending physician the rooms he needs to make his best medical judgment. And it is room that operates for the benefit, not the disadvantage, of the pregnant woman." *Doe*, 410 U.S. at 192.

In other provisions of HB 15, the physician and/or sonographer is instructed to provide verbal descriptions "in a manner understandable to a layperson." Pl. Ex. 1 at 4. Communicating with patients in a way that they can understand and providing informed consent has been recognized law for more than 100 years. *See Pratt v. Davis*, 79 N.E. 562 (Ill. 1906).

Some states have inferred a reasonable medical standard in informed-consent statutes where none is explicitly specified. In *Reprod. Health Serv. of Planned Parenthood of St. Louis Region, Inc. v. Nixon*, 185 S.W.3d 685 (Mo. 2006), Missouri required than a physician discuss "indicators and contraindicators, and risk factors" with a patient twenty-four hours before an abortion. These terms were not defined. The Supreme Court of Missouri held that the statute was not unconstitutionally vague because the physician could use "professional judgment" regarding what would constitute "indicators and contraindicators, and risk factors" that should be discussed with the patient. *Id.* at 689; *see also State v. Presidential Women's Center*, 937 So.2d 114, 119 (Fla. 2006) (holding that Florida's informed-consent statute was not unconstitutionally vague

even though it lacked precise language because the physician could consider the individual circumstances of each patient in determining how to present information material to the patient's decision). On the other hand, HB 15 takes the extra step of enshrining a reasonable medical standard within the text itself. Thus, HB 15 is further from any constitutional boundaries than other similar legislation that has been upheld in other states.

HB 15 far exceeds the minimal guidelines necessary as to what is required and what standard is to be used by physicians and/or sonographers. HB 15 could not be used to support "arbitrary and erratic arrests and convictions." Because HB 15 provides guidance to the practicing physician and/or sonographer and the police and any prosecutors, HB 15 is not unconstitutionally vague.

IV. HB 15 requires physicians to provide only truthful, non-misleading information that is relevant to a patient's decision to have an abortion.

The State of Texas, like other states, "has an interest in ensuring so grave a choice [as an abortion] is well informed. It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know…." *Gonzalez,* 550 U.S. at 159–60. HB 15 merely mandates that a physician consulting with a patient about an abortion provide truthful, non-misleading information that is relevant to a patient's decision to have an abortion. The description of a sonogram and a heartbeat is not an ideological message. Requiring doctors to provide descriptions of sonograms and heartbeats is functionally identical to any other information that the state requires doctors to provide to their patients.

In *Casey,* the Supreme Court stated that the State may compel physicians to provide medical information prior to performing an abortion:

> All that is left of petitioners' argument is an asserted First Amendment right of a physician not to provide information about the risks of abortion, and childbirth, in a manner mandated by the State. To be sure, the physician's First Amendment rights not to speak are implicated but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State. We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here.

Casey, 505 U.S. at 884 (citations omitted). Physicians who perform abortions are not to be afforded special treatment compared to that afforded to any other physician. *See Id.* Rather, "a requirement that a doctor give a woman certain information as part of obtaining her consent to an abortion is, for constitutional purposes, no different from a requirement that a doctor give certain specific information about any medical procedure." *Id.* at 884. So long as "the information the State requires to be made available to the woman is truthful and not misleading," it "may be permissible" to compel a physician's speech that informs a patient of the procedure and its possible consequences, whether or not the information relates to the patient's health. *Id.* at 882–83. Or, as the Eighth Circuit summarized,

> *Casey* and *Gonzales* establish that, while the State cannot compel an individual simply to speak the State's ideological message, it can use its regulatory authority to require a physician to provide truthful, non-misleading information relevant to a patient's decision to have an abortion, even if that information might also encourage the patient to choose childbirth over abortion.

Planned Parenthood Minn., N.D., S.D. v. Rounds, 530 F.3d 724, 734–35 (8th Cir. 1995).

Under the statute at issue in *Casey*, physicians were required to tell the pregnant woman the "probable gestational age of the unborn child" and "the nature of the procedure;" offer printed materials that describe the fetus; and provide information regarding childbirth, paternal responsibilities, adoption, and alternatives to abortion. *Casey*, 505 U.S. at 881. Because the information was not false or misleading, this part of the statute was upheld. *Id.* at 882–83. The Supreme Court "conclude[ed] that informed choice need not be defined in such narrow terms that all considerations of the effect on the fetus are made irrelevant." *Id.*

The Eighth Circuit used the analysis in *Casey* to vacate an injunction against enforcement of a South Dakota statute requiring doctors to disclose to patients "'[t]hat the abortion will terminate the life of a whole, separate, unique, living human being,' and that 'human being' in this case means 'an individual living member of the species of Homo sapiens … during [its] embryonic [or] fetal age.'" *Rounds,* 530 F.3d at 735–36. Despite the arguable ideological slant that the language promotes, because the information is not misleading and is truthful, the statutory language is valid. *Id.* The court explained that the life-supporting "biological information about the fetus is at least as relevant to the patient's decision to have an abortion as the gestational age of the fetus, which was deemed to be relevant in *Casey." Id.* at 736. Therefore, although the information may encourage a pregnant woman not to have an abortion, "[b]ecause Planned Parenthood … failed to demonstrate the requisite likelihood of success on its claim that the disclosure required by [South Dakota's statute] is untruthful or misleading, it [did] not demonstrat[e] that there is an ideological message from which physicians need to disassociate themselves." *Id.* at 737.

Conclusion

For the forgoing reasons, *Amici* respectfully request that this Court deny Plaintiffs' request for an injunction and dismiss the case.

Respectfully submitted,

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August 5, 2011

Certificate of Service

I hereby certify that on August 5, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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