No. 23-0629

In the Supreme Court of Texas

STATE OF TEXAS; KEN PAXTON, in his official capacity as Attorney General of Texas; TEXAS MEDICAL BOARD; and STEPHEN BRINT CARLTON, in his official capacity as Executive Director of the Texas Medical Board,

Appellants,

v.

AMANDA ZURAWSKI; LAUREN MILLER; LAUREN HALL; ANNA ZARGARIAN; ASHLEY BRANDT; KYLIE BEATON; JESSICA BERNARDO; SAMANTHA CASIANO; AUSTIN DENNARD, D.O.; TAYLOR EDWARDS; KIERSTEN HOGAN; LAUREN VAN VLEET; ELIZABETH WELLER; DAMLA KARSAN, M.D., on behalf of herself and her patients; and JUDY LEVISON, M.D., M.P.H., on behalf of herself and her patients,

Appellees.

On Direct Appeal from the
353rd Judicial District Court, Travis County

BRIEF FOR THE STATES OF NEW YORK, CALIFORNIA, ARIZONA, COLORADO, CONNECTICUT, DELAWARE, HAWAI'I, ILLINOIS, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEVADA, NEW JERSEY, NEW MEXICO, OREGON, RHODE ISLAND, VERMONT, AND WASHINGTON, AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF APPELLEES

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**Admitted Pro Hac Vice*

TABLE OF CONTENTS

Page

INDEX OF AUTHORITIES

Cases **Page(s)**

Laws & Administrative Sources

Federal

State (alphabetical by jurisdiction)

Laws & Administrative Sources **Page(s)**

State (alphabetical by jurisdiction)

Laws & Administrative Sources **Page(s)**

Legislative Materials

Miscellaneous Authorities

Miscellaneous Authorities **Page(s)**

Miscellaneous Authorities **Page(s)**

Miscellaneous Authorities **Page(s)**

Miscellaneous Authorities **Page(s)**

Miscellaneous Authorities **Page(s)**

Miscellaneous Authorities **Page(s)**

TO THE HONORABLE SUPREME COURT OF TEXAS:

INTERESTS OF AMICI

Amici curiae are the States of New York, California, Arizona, Colorado, Connecticut, Delaware, Hawai'i, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington, and the District of Columbia.[1] Amici file this brief in support of plaintiffs-appellees and in opposition to defendants-appellants' request to vacate the district court's temporary injunction barring the State of Texas, the Attorney General, and the Executive Director of the Texas Medical Board from enforcing Texas's abortion laws[2] against pregnant patients with an emergent medical condition for whom abortion care would preserve their lives or

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[1] No fee was or will be paid for preparing this brief.

[2] The Texas abortion laws refer to (i) the historical ban on abortions, *see* Tex. Rev. Civ. Stats. arts. 4512.1–.6; Tex. Penal Code arts. 1191–1196 (1925); (ii) the trigger ban on abortions that took effect in August 2022 and subjects violators to criminal penalties, *see* Tex. Health & Safety Code §§ 170A.001–.007; Tex. Penal Code § 12.32; and (iii) Senate Bill (S.B.) 8 that was enacted in 2021 and subjects violators to civil penalties through enforcement by private individuals, *see* Tex. Health & Safety Code §§ 171.201–.208.

health. (CR.1446.[3]) The district court appropriately granted and tailored the temporary injunction to protect the interests of Texas residents and amici's residents who may temporarily be in Texas.

Amici have substantial interests in ensuring that both their own and Texas residents receive the emergency medical care at issue in this case.[4] Amici have a strong interest in protecting the rights of their residents who may need such emergency abortion care while present as students, workers, or visitors in Texas. And when Texas residents are denied emergency abortion care, many undertake lengthy travel to amici States—exacerbating the risks to their health and assuming often significant financial burdens—to receive the emergency care that they need. This places additional pressures on amici's already overwhelmed hospital systems, especially in the rural and underserved areas of amici New Mexico and Colorado that are closest to Texas. Amici thus have strong interests in ensuring that pregnant persons in Texas can obtain

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[3] Citations to the clerk's record (CR) and supplemental clerk's record (SCR) are based on the Bates pagination, not the PDF pagination.

[4] This brief addresses the equities and public interest supporting the temporary injunction. Amici's brief does not separately address the Court's jurisdiction and the merits of the statutory and constitutional claims, which are addressed by the parties to the case.

time-sensitive, emergency abortion care in Texas without undertaking significant interstate travel that exacerbates the already serious risks to their lives or health.

As the district court found and amici's experiences confirm, emergency abortion care serves the public interest and is necessary to avoid serious harmful outcomes and even death in numerous situations. The failure to provide abortion care when needed to address emergency medical conditions will cause serious patient harms and have spillover effects in many amici States. These harms provide a strong basis for the injunctive relief here.

ARGUMENT

AMICI'S EXPERIENCE CONFIRMS THAT THE EQUITIES AND PUBLIC INTEREST SUPPORT THE TEMPORARY INJUNCTION

Texas's laws bar abortions except where "a life-threatening physical condition aggravated by, caused by, or arising from a pregnancy . . . places the female at risk of death or poses a serious risk of substantial impairment of a major bodily function unless the abortion is performed or induced." Tex. Health & Safety Code § 170A.002(b)(2); *see id.* §§ 171.002(3), 171.205(a). The record of this litigation shows that physicians

are unable to, and defendants-appellants have refused to, clearly define the scope of the statutory language regarding this medical exception.[5] (*See* CR.243; SCR.15–16, 29–30.) *See also* Pls.-Appellees' Response Br. at 7–8.

Acknowledging this uncertainty and the severe penalties that may be imposed for violating Texas's abortion laws, the district court appropriately construed the medical exception to permit "abortion care where, in the physician's good faith judgment and in consultation with the pregnant patient, a pregnant person has a physical emergent medical condition." (CR.1445.) The district court further construed the medical exception to cover emergent medical conditions, including "a physical medical condition or complication of pregnancy that poses a risk of infection, or otherwise makes continuing a pregnancy unsafe for the pregnant person; a physical medical condition that is exacerbated by pregnancy, cannot be effectively treated during pregnancy, or requires

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[5] Defendants-appellants point to a legal exception for patients with ectopic pregnancy, and a recent law creating an affirmative defense to enforcement of Texas's abortion laws where the pregnant patient is diagnosed with preterm premature rupture of membranes. *See* Br. for Appellants at 3–4. Defendants-appellants have refused to clarify whether these conditions always operate to avoid penalties under Texas's abortion laws and whether the medical exception would cover other conditions. *See id.* at 28–31.

recurrent invasive intervention; and/or a fetal condition where the fetus is unlikely to survive the pregnancy and sustain life after birth." (CR.1445.) The district court's temporary injunction thus prohibits enforcement of Texas's abortion laws to the extent such enforcement would preclude emergency abortion care necessary to preserve the life or health of the pregnant patient.

As amici's experience demonstrates, this limited injunction will help safeguard the health and wellbeing of pregnant patients in Texas and reduce burdens on the already overwhelmed capacity of hospitals in amici States. The equities and "important factor of the public interest" thus support the district court's tailored injunctive relief. *See Amend v. Watson*, 333 S.W.3d 625, 630 n.4 (Tex. App.—Dallas 2009, no pet.); *see also Universal Health Servs., Inc. v. Thompson*, 24 S.W.3d 570, 578–79 (Tex. App.—Austin 2000, no pet.).

A. Pregnant Patients Will Suffer Serious Injury and Death If They Are Denied Emergency Abortion Care.

As the record in this case demonstrates, pregnant patients may face unforeseeable emergency medical conditions[6] and need expeditious access to abortion care to protect their lives and prevent severe and disabling injury to their health.[7] Prohibiting physicians from performing abortions needed to treat emergency medical conditions threatens the lives and health of pregnant patients in Texas, including residents of amici States who may temporarily be present in Texas for school, work,

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[6] Geoffrey Chamberlain & Phillip Steer, *ABC of Labour Care: Obstetric Emergencies*, 318 BMJ 1342, 1342–45 (1999) (internet); Eric Nadel & Janet Talbot-Stern, *Obstetric and Gynecologic Emergencies*, 15 Emergency Med. Clinics of N. Am. 389, 389–97 (1997); Lisa A. Wolf et al., *Triage Decisions Involving Pregnancy-Capable Patients: Educational Deficits and Emergency Nurses' Perceptions of Risk*, 52 J. Continuing Ed. Nursing 21, 21–29 (2021) (internet). (For sources available online, full URLs appear in the Table of Authorities and were last visited on November 13, 2023.)

[7] *See, e.g.*, Reuters, *Fact Check – Termination of Pregnancy Can Be Necessary to Save a Woman's Life, Experts Say* (Dec. 27, 2021) (internet) (discussing, for example, that placental abruption presents a risk of hemorrhage, which if left untreated, threatens the pregnant person's life and that preeclampsia if not treated quickly can result in the pregnant person's death); American Coll. of Obstetricians & Gynecologists, *Facts Are Important: Understanding Ectopic Pregnancy* (2022) (internet) (advising that "[a]n untreated ectopic pregnancy is life threatening; withholding or delaying treatment can lead to death").

travel, or other purposes. Such individuals with emergency medical conditions may be unable to, or suffer further injury by undertaking, travel to amici States for abortion care.[8]

A range of medical conditions can trigger an emergency requiring an abortion to save the life or health of the pregnant patient. As one example, a physician explained that a clear sign of uterine infection can be life threatening "because there is an extremely high risk that the infection inside of the uterus spreads very quickly into [the patient's] bloodstream and she becomes septic. If she continues the pregnancy it comes at a very high risk of death."[9] Cardiovascular issues and hypertensive disorders can also result in serious conditions such as

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[8] Amici States have passed laws and expended funds to ensure access to abortion in amici States. *See, e.g.*, Cal. Const. art. I, § 1.1; Assemb. B. 171, 2023–2024 Reg. Sess. (Cal. 2023); Act of Sept. 27, 2022, ch. 627, 2022 Cal. Stat. 7331; Act of June 24, 2022, ch. 42, 2022 Cal. Stat. 455; Act of Sept. 27, 2022, ch. 628, 2022 Cal. Stat. 7344; Act of Sept. 27, 2022, ch. 629, 2022 Cal. Stat. 7354; Cal. Exec. Order No. N-12-22 (June 27, 2022); Act of June 29, 2022, ch. 327, 83 Del. Laws 1, 1–5 (2022); S.B. 1 S.D. 2 (Act 002), 32nd Sess. (Haw. 2023); 775 Ill. Comp. Stat. Ann. 55/1-10 et seq.; Mass. Gen. Laws ch. 112, § 12L (2023); Mass. Gen. Laws ch. 127, § 4 (2022) (H.B. 5090); Me. Rev. Stat. Ann. tit. 22, § 1598(1-A) (2023); Minn. Stat. §§ 145.409, 548.252, 604.415, 629.02, 629.05; N.J. Stat. Ann. §§ 2A:160-14.1, 10:7-1 (2022); N.Y. Pub. Health Law § 2599-aa (2019); Wash. Rev. Code §§ 9.02.100, 10.88.250(2).

[9] Reuters, *Fact Check*, *supra*.

preeclampsia, eclampsia, and peripartum cardiomyopathy that threaten the life or health of a pregnant patient; indeed, one study found that cardiovascular conditions were responsible for approximately one third of pregnancy-related deaths in the United States.[10]

In addition, pregnant patients may present at a hospital's emergency department with emergency conditions related to the pregnancy itself, such as an ectopic pregnancy, traumatic placental abruption (separation), hemorrhages, preterm premature rupture of membranes, placenta previa, amniotic fluid embolism, intrauterine fetal death, and gestational hypertension. *See, e.g.*, *Burditt v. U.S. Dep't of Health & Hum. Servs.*, 934 F.2d 1362, 1367 (5th Cir. 1991) (affirming enforcement action against hospital where pregnant individual presented with extreme hypertension).[11] Pregnant patients with a fatal fetal diagnosis—for example,

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[10] Emily E. Petersen et al., *Vital Signs: Pregnancy-Related Deaths, United States, 2011–2015, and Strategies for Prevention, 13 States, 2013–2017*, 68 Morbidity & Mortality Wkly. Rep. 423, 424 (2019) (internet).

[11] *See also* U.S. Dep't of Health & Hum. Servs. & Dep't of Just., *Health Care Fraud and Abuse Control Program Annual Report for Fiscal Year 2019*, at 45 (2020) (internet) (describing enforcement action against hospital involving failure to appropriately provide abortion care to pregnant individual suffering from preeclampsia); U.S. Dep't of Health & Hum. Servs., Off. of Inspector Gen., *Semi-Annual Report to Congress:*

(*continued on the next page*)

acrania (lack of skull development), anencephaly (similar), or fetal anasarca (extreme full body edema signifying end of life)—or another condition that will result in a nonviable fetus may require an abortion to avoid substantial risks to the pregnant patient's life or health.[12] (*See* CR.251–253, 265–270, 273–274, 277, 282–283, 288, 296–297.) As the American College of Obstetricians and Gynecologists has explained, many such pregnancy complications "may be so severe that abortion is the only measure to preserve a woman's health or save her life."[13]

Examples abound of patients in Texas suffering egregious harm when they did not receive necessary and timely emergency care. (*See, e.g.*, CR.251–253.) A physician at an academic medical center described how a hospital asked her to accept a patient "who was already septic" after

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April 1 – September 30, 2015, at 37 (2015) (internet) (same, pregnant individual having symptoms of abdominal and lower back pain); U.S. Dep't of Health & Hum. Servs., Off. of Inspector Gen., *Semi-Annual Report to Congress: April 1, 2007 – September 30, 2007*, at 26 (2007) (internet) (same, symptoms of vaginal bleeding, cramps, and decreased fetal movement); U.S. Dep't of Health & Hum. Servs., Off. of Inspector Gen., *Semi-Annual Report to Congress: October 1, 1999 – March 30, 2000*, at 32–33 (2000) (internet) (same, symptom of sharp abdominal pain).

[12] Reuters, *Fact Check*, *supra*.

[13] American Coll. of Obstetricians & Gynecologists, *Facts Are Important: Abortion Is Healthcare* (2022) (internet).

the transferring hospital, on conscience-refusal grounds, refused to perform the abortion needed to save the patient's life and instead transferred the patient in an unstable state because the fetus had cardiac activity.[14] After S.B. 8 took effect on September 1, 2021, doctors in Texas reported postponing care "until a patient's health or pregnancy complication has deteriorated to the point that their life was in danger, including multiple cases where patients were sent home, only to return once they were in sepsis."[15]

Delaying emergency treatment presents a grave risk to patients because physicians cannot easily predict at which point during a medical emergency a pregnant patient's death is imminent.[16] Lisa Harris, a

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[14] Lori R. Freedman et al., *When There's a Heartbeat: Miscarriage Management in Catholic-Owned Hospitals*, 98 Am. J. Pub. Health 1774, 1776–77 (2008) (internet).

[15] Eleanor Klibanoff, *Doctors Report Compromising Care out of Fear of Texas Abortion Law*, Texas Trib. (June 23, 2022) (internet); *see also* Whitney Arey et al., *A Preview of the Dangerous Future of Abortion Bans—Texas Senate Bill 8*, 387 New Eng. J. Med. 388 (2022) (internet).

[16] Tina Reed, *Defining "Life-Threatening" Can Be Tricky in Abortion Law Exceptions*, Axios (June 28, 2022) (internet). For example, Utah-based obstetrician Lori Gawron explained that if a pregnant patient experiences a ruptured membrane in the second trimester, there is a much greater risk of infection to the pregnant woman, and "[i]f the infection

(*continued on the next page*)

professor of reproductive health at the University of Michigan, explained that "there are many circumstances in which it is not clear whether a patient is close to death."[17] She explained, "It's not like a switch that goes off or on that says, 'OK, this person is bleeding a lot, but not enough to kill them,' and then all of a sudden, there is bleeding enough to kill them. . . . It's a continuum, so even how someone knows where a person is in that process is really tricky."'[18] A recent study of maternal morbidity at two Texas hospitals following the enactment of S.B. 8 found that when a pregnant patient presented at the hospital with specified pregnancy complications, and an expectant-management approach was used (observation-only care until serious infection develops or the fetus no

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progresses to sepsis, the maternal life is absolutely at risk. But we can't say how long that will take or how severe the infection will get in that individual." *Id.*

[17] Aria Bendix, *How Life-Threatening Must a Pregnancy Be to End It Legally?*, NBC News (June 30, 2022) (internet).

[18] *Id.* Dr. Harris also stressed the difficulty and confusion in determining when a medical emergency becomes life-threatening enough to warrant intervention under state law, stating: "What does the risk of death have to be, and how imminent must it be? Might abortion be permissible in a patient with pulmonary hypertension, for whom we cite a 30-to-50% chance of dying with ongoing pregnancy? Or must it be 100%?" *Id.*

longer has cardiac activity), the rate of serious maternal morbidity (57%) is *almost double* the rate that occurs when the treating physician follows the standard protocol of terminating the pregnancy to preserve the pregnant patient's life or health (33%).[19]

Absent the district court's clarifying and limited injunction here, the undefined exceptions in Texas's abortion laws have created unacceptably and unnecessarily dangerous situations for pregnant patients, and great confusion and heightened liability risk for doctors. (SCR.11–12, 15, 44.)[20] Deciding when an abortion is legally permitted has "become fraught with uncertainty and legal risk," forcing doctors to "significantly alter the care they provide to women whose pregnancy complications put them at high risk of harm."[21] As the record here shows, physicians now

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[19] Anjali Nambiar et al., *Maternal Morbidity and Fetal Outcomes Among Pregnant Women at 22 Weeks' Gestation or Less with Complications in 2 Texas Hospitals After Legislation on Abortion*, 227 Am. J. Obstetrics & Gynecology 648, 648–50 (2022) (internet).

[20] *See also* Frances Stead Sellers & Fenit Nirappil, *Confusion Post-*Roe *Spurs Delays, Denials for Some Lifesaving Pregnancy Care*, Wash. Post (July 16, 2022) (internet).

[21] J. David Goodman & Azeen Ghorayshi, *Women Face Risks as Doctors Struggle With Medical Exceptions on Abortion*, N.Y. Times (July 20, 2022) (internet).

provide "substandard" care out of fear that they could lose their medical license and even face life in prison. (SCR.12, 15–16.) And countless pregnant patients in need of emergency abortion care will unnecessarily suffer serious and often permanent medical consequences such as organ damage, infertility, and even death.

B. The Lack of Emergency Abortion Care in Texas Forces Patients to Bear the Costs and Risks of Interstate Travel While Severely Burdening the Healthcare Systems of Other States.

Amici's experience demonstrates that Texas's abortion laws have forced many pregnant patients in Texas requiring urgent abortion services to undertake risky and expensive interstate travel, including to amici States. This travel can lead to additional medical complications and financial burdens, contrary to the interests of the patients, amici States, and healthcare providers.

In the first four months after Texas's six-week abortion ban went into effect, the number of Texans seeking abortion care in neighboring States increased by nearly 600%, as compared to the month before the

law's effective date.[22] Pregnant individuals have crossed state lines in huge numbers, crowding waiting rooms and leading to longer waiting times in amici's hospitals.[23] Indeed, Colorado clinics have been inundated with patients from Texas and are booked for several months. (*See* CR.256, 274.) In the one year following *Dobbs*, New Mexico (a close neighbor of Texas), Illinois, and California experienced some of the largest cumulative increases in the total number of abortions provided, ranging from 8,600 to 21,500.[24] Pregnant patients in Texas have traveled as far as

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[22] Kari White et al., Tex. Pol'y Evaluation Project, *Out-of-State Travel for Abortion Following Implementation of Texas Senate Bill 8* (Mar. 2022) (internet).

[23] *E.g.*, Angie Leventis Lourgos, *Abortions in Illinois for Out-of-State Patients Have Skyrocketed*, Chi. Trib. (Aug. 2, 2022) (internet) (reporting 700% increase in the number of out-of-state patients served in Illinois); Matt Bloom & Bente Berkland, *Wait Times at Colorado Clinics Hit Two Weeks as Out-of-State Patients Strain System*, KSUT (July 28, 2022) (internet) (100% increase in wait times after *Dobbs* decision); Cindy Carcamo, *A California Desert Town Has Long Been an Abortion Refuge for Arizona and Mexico. Now It's Overwhelmed*, L.A. Times (July 20, 2022) (internet) (513% increase in demand at 19 abortion clinics in California after *Dobbs*).

[24] Soc'y of Fam. Plan., *#WeCount Report: April 2022 to June 2023*, at 4 (Oct. 24, 2023) (internet). After *Dobbs*, clinics in California have experienced increased demand for abortions from out-of-state patients ranging from 400% to 900%. *See* Karma Dickerson, *More Out-of-State Patients Begin Arriving in California for Reproductive Health Services*,

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Washington, Maryland, New York, and the District of Columbia to obtain necessary abortion care. (*See* CR.236, 274.)[25]

A comparison of the state of affairs before and after Texas's abortion laws took effect confirms this exodus to amici States for abortion care. While the number of reported abortions in Texas has now dropped to almost none,[26] the number of abortions has surged in neighboring and other amici States. Between 2020 and 2023, New Mexico saw abortion rates increase by more than 200%. Colorado, another nearby state, provided nearly 6,000 additional abortions in 2023 as compared to 2020, reflecting an increase of approximately 90%. And California and New

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Fox 40 News (Sept. 20, 2022) (internet); KABC Television, *Planned Parenthood Centers in SoCal Report Dramatic Increase in Abortion Patients from Out of State*, ABC 7 News (July 6, 2022) (internet).

[25] For example, a hospital in New York regularly treats patients needing care for maternal fetal anomalies and maternal health risks and has reported treating patients from Texas with conditions including lethal fetal anomalies, breast cancer, and thyroid conditions that would have posed risks to the health and life of the patient had the pregnancy continued. *See also* Press Release, Off. of the Mayor of the City of N.Y., *One Year After the Dobbs Decision New York City Continues to Lead on Abortion Access* (June 23, 2023) (internet).

[26] *See* Soc'y of Fam. Plan., *#WeCount Report*, *supra*, at 13 (reporting approximately nine abortions per month in Texas post-*Dobbs*).

York recorded an increase in abortions of more than 13,000 and 9,000, respectively, in 2023 as compared to 2020.[27]

Interstate travel has increased for emergency abortion care as well. For example, one of the plaintiffs in this case (Ashley Brandt) traveled to Colorado for an abortion of one fetus with a fatal defect to preserve her health and the life of the twin fetus. (CR.258–261; SCR.28, 33–37.) Another plaintiff (Dr. Austin Dennard) traveled out of state for an abortion of her fetus with a different type of fatal defect, where continuing to carry that pregnancy to term endangered her own health by presenting serious risks of hemorrhage, abruption, infection, and malpresentation, which can in turn lead to prolonged labor and sepsis. (CR.262–263; SCR.41–44.) Four other plaintiffs (Lauren Hall, Jessica Bernardo, Taylor Edwards, and Lauren Van Vleet) received the same or other diagnoses that were fatal to the fetus and seriously risky for them, and they were forced to travel out of state to Washington, Colorado, and Maryland for an abortion. (CR.235–236, 272–274.) A seventh plaintiff (Anna Zargarian) was forced

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[27] Rose Horowitch, Dobbs*'s Confounding Effect on Abortion Rates*, The Atlantic (Oct. 26, 2023) (internet); Guttmacher Inst., *Monthly Abortion Provision Study* (2023) (internet).

to fly to Colorado after her water broke prematurely—and she remained at risk of septic shock or hemorrhaging during travel—because the physicians in Texas were afraid to provide necessary abortion care until her health deteriorated so much that she was at imminent risk of death. (CR.235, 254–257; *see also* CR.251–253, 280–281 (describing two other plaintiffs not treated by Texas doctors because the patients' health had not sufficiently deteriorated, and one patient later suffered serious and permanent health issues).)

Increased interstate travel for emergency abortion care poses unique risks and challenges for patients in Texas—including residents of amici States temporarily in Texas—who are forced to seek care out of state. Emergency departments in nearby amici States are already faced with overcrowding, long wait times, and staff shortages, especially in rural and underserved areas such as large parts of New Mexico and Colorado.[28] Patients in Texas, particularly those from rural areas, therefore must not only make arrangements to travel great distances out

[28] Stephen Bohan, *Americans Deserve Better Than 'Destination Hallway' in Emergency Departments and Hospital Wards*, STAT News (Aug. 1, 2022) (internet).

of state, but also deal with overcrowded healthcare facilities in the destination State. And in traveling long distances to obtain emergency abortion care, patients from Texas face greater out-of-pocket costs, delayed care, a higher likelihood of emergency room follow-up care, and negative mental health consequences.[29] These patients therefore suffer detrimental medical delays and financial burdens in obtaining necessary emergency abortion care that they could have received, under the otherwise accepted standard of medical care, in their home State.

Traveling out of state and delaying critical care can cause additional medical complications and require further treatment in a hospital setting, increasing both the health risks and financial burdens for Texas residents who require such care.[30] For instance, in the first half

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[29] *See* Liza Fuentes & Jenna Jerman, *Distance Traveled to Obtain Clinical Abortion Care in the United States and Reasons for Clinic Choice*, 28 J. Women's Health 1623, 1623, 1623–24 (2019) (internet); *see also* Nicole E. Johns et al., *Distance Traveled for Medicaid-Covered Abortion Care in California*, 17 BMC Health Servs. Rsch., at 1, 2, 9 (2017) (internet).

[30] *See* Laura McCamy, *Over a Year after the Supreme Court Overturned* Roe v. Wade*, the Cost of an Abortion in the US Can Be as Much as $30,000—or as Little as $150*, Bus. Insider (Oct. 21, 2023) (internet); Allison McCann, *As Abortion Access Shrinks, Hospitals Fill in the Gaps*, N.Y. Times (Oct. 23, 2023) (internet).

of 2023 as more patients were traveling to Illinois for abortion care, Illinois hospitals experienced significantly more patients with complex health issues that prevented performing an abortion in a clinic. While hospitals are equipped to provide emergency abortion care, medical care provided in hospitals is far more expensive and time-consuming than in clinics.[31] Emergency abortion care in a hospital setting may cost as much as $30,000 for a high-risk patient.[32] And Texas residents forced to seek such care out of state must either pay out of pocket or seek help from an abortion fund, which may be unable to provide help because of limited eligibility criteria or limited resources.[33]

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[31] McCann, *As Abortion Access Shrinks*, *supra*.

[32] McCamy, *Over a Year after the Supreme Court Overturned* Roe v. Wade, *supra*.

[33] McCann, *As Abortion Access Shrinks*, *supra*. Calls from Texas patients to the New York Abortion Access Fund have increased by a factor of nine since 2021, leaving the fund struggling to meet the increased demand. *See* Lola Fadulu, *New York City Welcomes Growing Number of Out-of-State Abortion Patients*, N.Y. Times (Apr. 12, 2023) (internet). California's Uncompensated Care Fund through which providers can receive compensation for providing abortion services to patients, including out-of-state patients, is available to patients without healthcare coverage whose incomes are below 400% of the federal poverty level. *See* Assemb. B. 2134, 2021–2022 Reg. Sess. (Cal. 2022); Assemb. B. 204, 2021–2022 Reg. Sess. (Cal. 2022).

Emergency rooms in other States, including many amici States, will inevitably have to absorb the need for emergency abortion care created and exacerbated by Texas's laws, placing additional strain on amici's capacity to provide emergency abortion care. New York and eight other amici States, many of which are now receiving increased numbers of patients from Texas seeking emergency abortion care, have the longest wait times for emergency treatment.[34] Even before the Texas abortion laws went into effect, amici States' emergency facilities were serving a significant number of patients seeking abortion services. For example, in 2019, New York provided 3,000 abortions for patients presenting at the emergency department, with 1,010 abortion procedures performed within the emergency department and 1,820 abortion procedures performed for persons during an inpatient stay after presenting to the emergency department. Illinois' State Medicaid program reported that out of slightly more than 23,000 pregnancies, there were 532 emergency situations involving significant heart conditions, 477 respiratory conditions (not including mild conditions), 35 kidney disorders, 33 ectopic pregnancies,

[34] *See* WRGB Staff, *New York Ranks Fourth in Longest ER Wait Times, New Study Reveals*, CBS 6 News (Aug. 21, 2023) (internet).

221 missed abortions (fetus dies or stops developing but the pregnancy continues), 68 incomplete spontaneous abortions (miscarriages), 91 cases of hemorrhaging, 40 cases of issues with the placenta, and 32 cases of sickle cell anemia.[35] Data from the Nevada Medicaid program, which only covers abortions to protect the pregnant patient's life or in cases of rape or incest, indicates that the program paid for an average of 523 covered abortions per year from 2019 to 2021, totaling 1,540 abortions.

Pursuant to federal law, amici States and providers will also inevitably have to absorb some of the costs for emergency abortion care that Texas does not provide. Amici understand the Emergency Medical Treatment and Labor Act (EMTALA), 42 U.S.C. § 1395dd, to require amici's hospitals to provide abortion services needed to stabilize an emergency medical condition. *See Ritten v. Lapeer Reg'l Med. Ctr.*, 611 F. Supp. 2d 696, 712–18 (E.D. Mich. 2009) (applying EMTALA's anti-retaliation provision to doctor who refused to transfer patient whose condition was not stable and who may have needed an abortion); *New York v. U.S. Dep't of Health & Hum. Servs.*, 414 F. Supp. 3d 475, 538

[35] All of these conditions can necessitate abortion care as stabilizing treatment. *See, e.g.*, Reuters, *Fact Check*, *supra*.

(S.D.N.Y. 2019) (holding that federal conscience rule that allowed physicians to refuse to perform or assist with abortion improperly "create[d], via regulation, a conscience exception to EMTALA's statutory mandate").[36] Amici also understand EMTALA to prohibit amici from turning patients "away from emergency rooms for non-medical reasons." *Bryan v. Rectors & Visitors of the Univ. of Va.*, 95 F.3d 349, 351 (4th Cir. 1996). Indeed, some hospitals that do not regularly provide abortion care in non-emergency settings explicitly require that treatment of emergency conditions be permitted if required under EMTALA.[37]

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[36] *See also* U.S. Dep't of Health & Hum. Servs., Ctrs. for Medicare & Medicaid Servs., *Reinforcement of EMTALA Obligations Specific to Patients Who Are Pregnant or Are Experiencing Pregnancy Loss* (2022) (internet).

[37] *See, e.g.*, Wash. State Dep't of Health, *Hospital Reproductive Health Services for Ferry County Memorial Hospital*, at pp. 1–2 (Aug. 29, 2019) (internet) (hospital does not provide abortions in non-emergency settings, but "[t]reatment of miscarriages and ectopic pregnancy would fall under the EMTALA protocols"); Wash. State Dep't of Health, *Hospital Reproductive Health Services for Lourdes Hospital*, at p. 1 (Sept. 3, 2019) (internet) (hospital does not provide abortions in non-emergency settings, but "[o]perations, treatments, and medications that have as their direct purpose the cure of a proportionately serious pathological condition of a pregnant woman (patient) are permitted when they cannot be safely postponed until the unborn child is viable, even if they will result in the death of the unborn child"); Wash. State Dep't of Health, *Hospital Reproductive Health Services for Virginia Mason Memorial Hospital*, at

(*continued on the next page*)

Meanwhile, the No Surprises Act, 42 U.S.C. § 300gg et seq., prohibits amici from billing certain patients for unanticipated emergency medical services by out-of-network providers. Such medical costs must be borne by the patient's insurer or the out-of-network provider, or shared by them. *See Texas Med. Ass'n v. U.S. Dep't of Health & Hum. Servs.*, 587 F. Supp. 3d 528, 533–34 (E.D. Tex. 2022). Accordingly, when a Texas resident cannot pay for emergency abortion care that is needed and must be provided in amici States under EMTALA, or when the No Surprises Act prohibits billing the patient for such care, amici States or private providers in amici States may be left to bear the costs of these services.

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pp. 1–2 (Aug. 30, 2019) (internet) (provides surgical abortions to treat pregnancy complications or in pregnancies involving a congenital abnormality).

PRAYER

For the reasons set forth above and in appellees' response brief, this Court should affirm the district court's ruling.

Dated: New York, New York
November 13, 2023

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was forwarded to all counsel of record by electronic filing in accordance with the Texas Rules of Appellate Procedure on November 13, 2023.

/s/ Megan O'Neill
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/s/ Megan O'Neill
MEGAN O'NEILL

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