No. 15-274

In the Supreme Court of the United States

WHOLE WOMAN'S HEALTH, *et al.*,
Petitioners,

v.

KIRK COLE, COMMISSIONER, 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 *AMICI CURIAE* OF TEN PENNSYLVANIA ABORTION CARE PROVIDERS IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

Amici curiae[1] are ten providers of high-quality reproductive health care in Pennsylvania with expertise in providing safe abortions. *Amici* provide general reproductive health care, including family planning services, testing and treatment for sexually transmitted infections, cancer screening, pregnancy testing, and medical and surgical abortion care to patients throughout the Commonwealth of Pennsylvania and its neighboring states. Collectively, they provide over 90% of abortions in Pennsylvania.

Two of the *amici* were plaintiffs in *Planned Parenthood Southeastern Pa. v. Casey,* 505 U.S. 833 (1992). Most of the *amici* have been abortion care providers for decades, throughout which their medical practice has been regulated by, *inter alia,* the Pennsylvania Abortion Control Act, 18 Pa. Cons. Stat. §§ 3201-3220 (2015), and a body of abortion-specific regulations. *See* Ambulatory Gynecological Surgery in Hospitals and Clinics, 28 Pa. Code §§ 29.31-29.42 (2015). The Commonwealth of Pennsylvania has licensed, certified or registered each of the *amici* to provide abortion care under its extensive regulatory framework. The individual statements of interest of the *amici* are contained in the appendix to this brief.

Amici submit this brief in support of Petitioners Whole Woman's Health, *et al*., to assist the Court by

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[1] *Amici* have received written consent from all parties to submit this brief. Copies of the parties' written consents are submitted with this brief. No counsel for a party authored this brief in whole or in part. No party or party's counsel financially supported this brief, and no one other than *amici* and their counsel financially contributed to this brief.

critically examining a principal justification advanced in support of the Texas regulatory scheme: that such a scheme will stop the next Kermit Gosnell, the infamous Philadelphia criminal, from preying on vulnerable women seeking abortions. Far from protecting women's health and safety, the Texas regulations heavily burden high-quality providers without medical justification, and thereby threaten to drive patients to medically-unsupervised home remedies or to criminals, like Kermit Gosnell, who endanger women's lives.

Amici are keenly aware of the dangers posed by rogue practitioners such as Kermit Gosnell. They also know, however, that delaying or denying ready access to safe, affordable abortion services as a result of medically-unnecessary governmental regulation is dangerous precisely because it creates the very environment in which unscrupulous criminals like Kermit Gosnell can operate. *Amici* recognize the value and importance of safe medical practice that protects women's health, and they strive to maintain the highest standards of care, whether or not required by regulation. Regulation that effectively promotes safety and health – in reproductive health care and in medical care generally – is a legitimate exercise of governmental authority and supported by *amici*. But *amici* – and other responsible providers – must speak out when states attempt to impose regulation that passes the tipping point – that goes beyond protecting health or promoting safety and instead adds burdens that threaten the ability of responsible practitioners to meet the need for reproductive health care, including abortions. These regulations increase the likelihood of more Kermit Gosnells, contrary to the argument of

those who use his example to support onerous and unnecessary regulation of abortion.

SUMMARY OF ARGUMENT

The tragic saga of Kermit Gosnell is indeed a cautionary tale. But the caution it teaches is not the need for more draconian regulation of abortion providers – as advocates of the imposition of ambulatory surgical center and admitting privilege requirements have suggested. Rather, Gosnell's conviction of a multitude of crimes, including first-degree murder, teaches that, for a criminal who is willing to completely disregard the well-being of his patients and to violate countless statutes and regulations, the mere existence of such laws is worthless as a deterrent. Piling on still more medically-unnecessary requirements in the hope of deterring future criminals who have such flagrant disregard for the law from pursuing similar heinous actions is a fool's errand.

The statutes and regulations in force in Pennsylvania during the time Gosnell operated his so-called Women's Medical Society in West Philadelphia provided more than ample grounds to shut him down and bring him to justice. These laws, which did not require that doctors who provide abortion care obtain hospital admitting privileges or that abortion clinics meet the standards of an ambulatory surgical center, were more than sufficient to prevent Gosnell from victimizing women had there not been a massive failure on the part of public officials – including health and medical licensing authorities – to inspect, investigate or prosecute Gosnell's total disregard, not only of specific regulation of abortion but also laws of

general application, including criminal laws proscribing murder. Shockingly, it was a February 2010 raid on Gosnell's clinic relating to illegal prescription drug activity – culminating after a months-long drug-trafficking investigation by federal and state authorities – that ultimately exposed the many other atrocities and crimes occurring there.

The Gosnell saga also cautions that regulation of abortion providers, with no benefit to women's health or safety, will create the very environment in which criminals like Gosnell can prosper. Forcing many responsible, law-abiding providers out of business by burdening them with unnecessary requirements they cannot meet or unjustified expenses they cannot afford will not reduce the demand for abortion. Rather, it will drive women who need abortions to the "black market" of back-alley abortions and into the hands of unscrupulous criminals like Kermit Gosnell. It will also eliminate the responsible providers who are a vital link in reporting criminals like Gosnell. As the record before the Court demonstrates, Texas's ambulatory surgical center and admitting privilege requirements threatens just such a nightmare scenario.

ARGUMENT

I. REGULATORY SCHEMES THAT CLOSE DOWN SAFE ABORTION CARE PROVIDERS ARE COUNTERPRODUCTIVE AND ENDANGER WOMEN'S HEALTH.

Those who defend ambulatory surgical center (ASC) regulations and hospital admitting privilege requirements for abortion care providers, like the ones at issue in this case, often cite the cautionary tale of Kermit Gosnell, a physician who was convicted in 2013 of atrocities against women and newborns at the Women's Medical Society in West Philadelphia, which Gosnell owned and operated. Texas's legislative history provides one such instance. *See* Texas House of Representatives, House Research Org., HB 2 Analysis, at 10 (July 9, 2013) (citing Gosnell in summary of supporters' arguments for HB 2); *see also Planned Parenthood v. Van Hollen,* 738 F.3d 786, 802 (7th Cir. 2013) (Manion, J., concurring) (stating that Wisconsin admitting privilege requirement was a "response to the dangers (graphically illustrated by Dr. Gosnell's case) to women's health and the right to freely exercise their choice"). The basic thrust of this argument is that the extensive regulations developed for ASCs are a necessary precaution against the next Gosnell; and conversely, had there been ASC regulations in place at the time in Pennsylvania, Gosnell's facility would never have existed.

This argument is one manifestation of a growing trend that seeks to justify arduous regulatory standards for abortion providers as necessary to protect women's health and safety. *See Whole Woman's Health v. Cole,* 790 F.3d 563, 576 (5th Cir. 2015) (discussing

that Texas legislature's stated purpose for enacting admitting privileges and ambulatory surgical center provisions was "to raise the standard and quality of care for women seeking abortions and to protect the health and welfare of women seeking abortions"); *see generally* Linda Greenhouse & Reva Siegel, Casey *and the Clinic Closings: When "Protecting Health" Obstructs Choice*, 125 Yale L.J. (forthcoming 2016), *available at* https://www.law.yale.edu/system/files/documents/pdf/Faculty/caseyclinic.pdf.

However, as *amici* are well aware from their experience in Pennsylvania, extensive regulations like those at issue in this case are not the answer to preventing the next Gosnell, who was a criminal violating a plethora of generally applicable laws as well as abortion-specific laws and regulations then in existence. To the contrary, when abortion is regulated so excessively that many safe and competent providers shut down, the environment is ripe for a provider like Gosnell – who demonstrated a complete lack of respect for the law – to fill the void. Therefore, abortion requirements like those in the Texas statute are actually counterproductive to their stated goal, because the medically-unnecessary burdens they impose drive high-quality, law-abiding providers from the market while doing nothing to forestall a criminal like Gosnell.

A. Ambulatory surgical center and admitting privilege requirements would not have stopped Kermit Gosnell's illegal practice because he was already flouting the extensive set of laws and regulatory requirements on the books in Pennsylvania.

Kermit Gosnell was not just a substandard medical practitioner; he was also a criminal. The belief that Gosnell's crimes can be attributed to weak abortion laws, and that new, more extensive regulation is needed, does not withstand scrutiny. An examination of the Gosnell case and the law that governed abortion care at the time of his arrest establishes that, had they been enforced by Pennsylvania authorities, the existing criminal laws and regulatory framework for abortion (which were at the time among the strictest in the nation) were more than sufficient to force Gosnell out of business. Moreover, Gosnell was a rogue criminal who flagrantly and purposely operated outside the bounds of the law. Whether there had been 5 or 500 laws and regulations governing abortion providers, Gosnell would have violated them in order to turn a profit by exploiting vulnerable women. In other words, ambulatory surgical center and admitting privilege requirements would surely not have stopped him because he had no respect for the law whatsoever.

As chronicled in detail in the Report of the Grand Jury that investigated his activities,[2] Gosnell's filthy

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[2] Report of County Investigating Grand Jury XXIII, Misc. No. 0009901-2008 (Phila. C.P. Jan. 14, 2011) ("GJ Rep."), *available at* http://www.phila.gov/districtattorney/pdfs/grandjurywomensmedical.pdf.

and hazardous facility was illegal and bore no resemblance to a professional medical office:

- The clinic was foul-smelling. Blood spattered the floors and patient chairs. The stirrups on a procedure table were caked with dried blood. Flea-infested cats freely roamed the clinic and defecated and urinated in patient care areas. GJ Rep. at 2, 20, 45-46.
- Because Gosnell failed to pay the bills of a medical disposal contractor, months-worth of medical waste and products of conception were piled up in the basement. GJ Rep. at 45-48.
- Much of the medical equipment, including critical emergency equipment, was broken or outdated. GJ Rep. at 7-8, 20-21, 125-27.
- The emergency exit was padlocked shut, and the key to the lock was lost. GJ Rep. at 2, 8, 21, 129.

These conditions were not just shocking, they also violated numerous Pennsylvania regulations. [3]

Simply put, Gosnell's practices and policies were outrageous violations of a myriad of existing laws and regulations and bore no resemblance to the ethical and legal practice of medicine, regardless of the field. Gosnell's surgical techniques did not even loosely approximate any medically recognized pregnancy

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[3] *See, e.g.*, 28 Pa. Code § 29.33(1) (requiring every abortion facility to have readily available equipment and drugs necessary for resuscitation); *id.* § 29.33(2) (mandating available resuscitation equipment when anesthesia is used); *id.* § 29.33(15) (mandating proper handling and timely removal of medical waste and products of conception).

termination procedure practiced today. *Compare* F. Gary Cunningham, M.D., et al., *Williams Obstetrics* 350-78 (24th ed. 2014) (describing abortion methods) with GJ Rep. at 28-31, 105-116 (describing Gosnell practices of drugging patients unconscious while inducing labor). As Joanne Pescatore, a lead prosecutor on the case, explained: "[Gosnell] does not know how to do an abortion." Maryclaire Dale, *Women: Pa. Abortions Left Us Sterile, Near Death*, HuffPost Politics (January 22, 2011, 9:42 P.M.) http://www.huffingtonpost.com/huff-wires/20110122/us-abortion-clinic-investigation/.

Under Gosnell's scheme – which a jury found to be a criminal enterprise – the more he subverted existing laws and regulations, the more money he made and the more he was able to prey upon desperate, marginalized women. Gosnell's bizarre, dangerous and illegal practices included:

- Gosnell and his staff used unsterilized instruments on patients. Disposable medical supplies were re-used over and over. Several patients complained about contracting venereal diseases after procedures. GJ Rep. at 2, 20-21, 48-50.

- Unlicensed, untrained staff, including a high school intern, routinely administered powerful sedatives to patients, often without supervision and when Gosnell was not present. GJ Rep. at 7, 26-37, 50-53, 57-60, 67-70.

- Two unlicensed medical school graduates regularly saw, diagnosed and treated patients

and prescribed medicine, often when Gosnell was not present. GJ Rep. at 2, 39-44.

- Patients chose their own level of sedation without any professional guidance and based not on medical considerations, but rather on personal preference and ability to pay. GJ Rep. at 53-57.

- Untrained staff performed ultrasounds on patients, the results of which were often manipulated by Gosnell to make it appear that the gestational age of the fetus was less than Pennsylvania's 24-week limit. GJ Rep. at 3-4, 78-83.

This egregious conduct not only goes far beyond all notions of safe and responsible medical care, it is criminal.[4] In May 2013, a jury in Philadelphia convicted Gosnell of three first-degree murder charges, as well as an involuntary manslaughter charge stemming from the death of a patient who could not be timely evacuated after she lost consciousness not because of complications from an abortion procedure

[4] Many of these practices also violated Pennsylvania's abortion laws and regulations. *See, e.g.,* 18 Pa. Cons. Stat. § 3210 (requiring physicians to "perform or cause to be performed such medical examinations and tests as a prudent physician would consider necessary [for] an accurate diagnosis" of gestational age); *id.* § 3212 (prohibiting "infanticide"); 28 Pa. Code § 29.33(11) (requiring that qualified and trained medical personnel administer anesthesia); *id.* § 29.33(12) (stating that facilities must maintain a list of qualified medical personnel to administer anesthesia and develop written procedures governing anesthesia administration); *id.* § 29.33(13) (mandating that patients in recovery from anesthesia must be supervised constantly until released by a registered or licensed practical nurse).

but rather because Gosnell's untrained staff administered excessive and inappropriate sedation. *See* GJ Rep. at 117-136. He was also convicted of two dozen charges of performing an abortion beyond the 24-week gestational limit and a host of other crimes including infanticide, conspiracy and running a corrupt organization. *See* Jon Hurdle & Trip Gabriel, *Philadelphia Abortion Doctor Guilty of Murder in Late-Term Procedures*, The New York Times (May 13, 2013); Linda Dahlstrom, *Abortion doctor Kermit Gosnell convicted of first-degree murder*, U.S. News (May 13, 2013, 2:42 P.M.), http://usnews.nbcnews.com/_news/2013/05/13/18232657-abortion-doctor-kermit-gosnell-convicted-of-first-degree-murder?lite.

Gosnell's crimes were not the result of a dearth of criminal laws and abortion regulations. Pennsylvania's existing laws—including an abortion statute which for many years ranked among the most restrictive in the nation—were more than sufficient to close Gosnell's practice and bring him to justice, which would have happened sooner had those laws only been enforced. *See* GJ Rep. at 215-16 (concluding there were "ample grounds" to revoke approval of Gosnell's facility under Pennsylvania's abortion regulations alone and noting that the Department of Health finally exercised this authority against Gosnell in 2010). Pennsylvania's governor at the time, Tom Corbett, admitted as much: "Laws are already on the books that should have prevented this situation." Mark Scoloforo, *Gov. Tom Corbett Removes Workers in Abortion Clinic Probe*, 6abc.com (Feb. 11, 2011 1:42 P.M.), http://6abc.com/archive/7960303/. Governor Corbett squarely leveled blame, not at the legislature for failing to enact sufficiently strict regulations of abortion clinics, but at

public officials who did not enforce the already-existing laws: "It happened because people weren't doing their jobs, plain and simple." *Id*. As Carol Aichele, then-Pennsylvania Secretary of State, similarly explained in an editorial after the Gosnell conviction, "Part of the tragedy of this story is that state officials, charged with protecting the public health, failed to act." Carol Aichele, *How PA is Making Sure the Gosnell Case Doesn't Happen Again: As I See It*, Harrisburg Patriot News (May 28, 2013). As these state officials made plain, the law provided ample authority to stop Kermit Gosnell, but – just as he did not heed those laws – state authorities did not enforce them.

Importantly, it was the eventual enforcement of *these existing laws and regulations,* which was finally triggered after a raid on Gosnell's facility to investigate illegal drug-trafficking, that shut down Gosnell's criminal enterprise and sent him to prison. The extensive body of regulations that existed in Pennsylvania at the time was multi-faceted and addressed numerous areas of abortion practice, virtually every one of which Gosnell flouted without detection by Pennsylvania's officials. The regulations covered facility ownership, governance, and management; qualifications of medical staff; quality assurance and improvement; nursing services; pharmaceutical services; medical records; laboratory and radiology services; environmental services; fire and safety services; and construction standards. *See* Ambulatory Gynecological Surgery in Hospitals and Clinics, 28 Pa. Code §§ 29.31-29.42. Specific provisions included hospital transfer agreements for emergency services; equipment requirements for administering anesthesia; licensing requirements for clinical staff;

laboratory and pathology requirements; and mandatory blood tests specific to abortion care.[5]

Reporting requirements while Gosnell was in operation were also robust and were also breached by Gosnell. GJ Rep. at 171 (noting that Gosnell "simply made up" the data he reported). Under the Pennsylvania Abortion Control Act, providers were required to register with the Department of Health, *see* 18 Pa. Cons. Stat. § 3207(b), and were subject to extensive reporting requirements for each abortion procedure, *see* 18 Pa. Cons. Stat. § 3214(a), as well as quarterly aggregate reports. *See* 18 Pa. Cons. Stat. § 3214(f). Any physician who treated an abortion complication was required to report it to the Department of Health. *See* 18 Pa. Cons. Stat. § 3214(h). Any abortion provider that performed 100 or more procedures in a year was required to register with the Patient Safety Authority[6] and comply with the state's

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[5] Like Pennsylvania, Texas extensively regulated abortion facilities prior to the passage of HB 2 and had more than adequate authority to protect patients from substandard practitioners. Licensed abortion facilities in Texas were subject to regulations addressing patient care, infection control, personnel, physician qualifications, emergency protocols, recordkeeping, reporting, and physical plant requirements. *See* 25 Tex. Admin. Code §§ 139.41-139.60 (2012). All abortion facilities were subject to unannounced on-site inspections by the Texas Department of State Health Services at least once per year. 25 Tex. Admin. Code § 139.31 (2012).

[6] The Pennsylvania Patient Safety Authority is an independent state agency established under Act 13 of 2002, the Medical Care Availability and Reduction of Error (MCARE) Act. It is charged with taking steps to reduce and eliminate medical errors through the collection of data, identification of problems, and

patient safety reporting and quality assurance requirements. *See* 40 Pa. Stat. §§ 1303.101-1303.105. This system requires inspections, the formation of a patient safety committee that must meet at least quarterly to review patient care issues, and prompt reporting of serious events, infrastructure failures, and incidents.

Providers working under this existing regulatory framework, like *amici*, have consistently maintained extraordinarily safe operations. *See* Pa. Dept. of Health, *2010 Pennsylvania Abortion Statistics* (showing complication rate of 0.12%); Pa. Dept. of Health, *2009 Pennsylvania Abortion Statistics* (showing complication rate of 0.16%). As the Gosnell Grand Jury concluded, even when Pennsylvania authorities were derelict in their duties, "Many organizations that perform safe abortion procedures do their own monitoring and adhere to strict, self-imposed standards of quality" and achieve "excellent safety records . . . ." GJ Rep. at 136. In the same vein, "The doctors [the Grand Jury] heard from, and the organizations that refer women to abortion providers, told us that the reputable providers comply with all of the state regulations and more. Annual inspections are not an issue with them. Many clinics in Pennsylvania are already inspected by NAF, whose standards are, in many ways, more protective of

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recommendation of solutions that promote patient safety in hospitals, ambulatory surgical facilities, birthing centers, and abortion facilities. *See* Pennsylvania Patient Safety Authority, *2014 Annual Report 1* (Apr. 30, 2014), *available at* http://patientsafetyauthority.org/PatientSafetyAuthority/Documents/Annual_Report_2014.pdf.

women's safety than are the state's regulations." *Id.* at 148.[7]

To be clear, *amici* do not endorse all of the onerous regulations imposed by Pennsylvania. To the contrary, many of those costly regulations offer virtually no health or safety benefit and are overly burdensome. The point is not that the regulatory structure in place at the time Gosnell was commiting his crimes was necessary to promote safety or health. Rather, the point is that Gosnell violated even the most basic, non-controversial health care regulations and laws.

Kermit Gosnell could have been stopped much sooner had the existing laws been enforced. Given his complete disregard for legal authority, piling ambulatory surgical center or hospital admitting privilege requirements on top of an already extensive, but unenforced, regulatory regime such as that in Pennsylvania would have done nothing to deter him

[7] Nearly all of the freestanding clinics – including most of *amici* – are members of the National Abortion Federation ("NAF"), Planned Parenthood Federation of America, or both. In order to maintain membership in these national organizations, members must meet exacting requirements and pass a thorough inspection on a regular basis by professionals trained specifically in the provision of safe abortion care. The current NAF Clinical Policy Guidelines can be found at: http://prochoice.org/education-and-advocacy/2015-clinical-policy-guidelines/.

because he almost certainly would have defied them as well.[8]

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[8] The Gosnell Grand Jury Report recommended that Pennsylvania's version of the requirements for ambulatory surgical centers be applied to abortion clinics in Pennsylvania. GJ Rep. at 248-50. However, when the Pennsylvania General Assembly was considering legislation to impose those requirements, Philadelphia District Attorney Seth Williams, who oversaw the Grand Jury investigation, wrote to the leadership of the House of Representatives stating that the bill under consideration "goes beyond the scope of the grand jury report." He further commented that "The Grand Jurors *did not* recommend that the Legislature change the definition of an [outpatient] surgical facility to include *all* abortion clinics," pointing specifically to a clinic that uses only local anesthesia and performs simple vacuum procedures as one that did not need further regulation. Letter from D.A. R. Seth Williams to Hon. Mike Turzai & Hon. Frank Dermody dated May 3, 2011 (emphasis in original), *reprinted in In letter obtained by CP, the D.A. Criticizes Baker's Abortion Bill*, Philadelphia City Paper (May 5, 2011), http://citypaper.net/Blogs/In-letter-obtained-by-CP-the-DA-criticizes-Bakers-abortion-bill/.

In any event, Pennsylvania's ASC regulations – which *amici* submit are unnecessary and overly burdensome – differ in critical respects from the requirements of the Texas statute. First, Pennsylvania, unlike Texas, permits abortion facilities, like all other medical facilities subject to ambulatory surgical regulations, to apply for exceptions from particular regulations, upon a showing that "the policy and objectives [of the regulation] are otherwise met, or . . . compliance would create an unreasonable hardship and an exception would not impair or endanger the health, safety or welfare of a patient." 28 Pa. Code § 51.31 (2015). Second, Pennsylvania has a tiered regulatory system, so that providers who use levels of anesthesia that subject patients to relatively greater risk or treat patients with more serious conditions are subject to more onerous regulation than providers who treat relatively healthy patients and use only local or topical anesthesia, and Pennsylvania's ambulatory surgical regulations do not apply

B. Medically unnecessary regulation of abortion, like the Texas regulations at issue here, creates the conditions in which marginal or illegal practitioners like Kermit Gosnell can thrive.

That women were victimized by Gosnell in an era of legal abortion speaks to the public health danger created when safe, competent abortion care is inaccessible to many women. Rather than protecting public health, medically-unnecessary over-regulation that forces many safe, responsible providers to shut their doors effectively opens the door for criminal, rogue practitioners to thrive.

The crux of Gosnell's illegal practice was to prey upon vulnerable women who were not in a position to access medically safe abortion care. "We think the reason no one acted is because the women in question were poor and of color, because the victims were infants without identities, and because the subject was the political football of abortion." GJ Rep. at 13. As

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to non-surgical medical abortions. 28 Pa. Code § 551.3 (2015) (defining classification levels); 28 Pa. Code § 551.31 (2015) (establishing tiered licensure requirements). By contrast, the Texas statute imposes onerous requirements on all abortion clinics with no possibility of exceptions. *See Whole Woman's Health, et al. v. Lakey, et al.,* 46 F.Supp.3d 673, 682 (W.D. Tex. 2014) (stating that ASC requirement applies equally to all abortions, even to those clinics that administer medical abortion only and do not provide surgical care, and that "[n]otably, grandfathering of existing facilities and the granting of waivers from specific requirements is prohibited for abortion providers, although other types of ambulatory-surgical facilities are frequently granted waivers or are grandfathered").

Carole Joffe, one of the leading academics in the field of abortion, has observed:

> In a horribly unfair vicious cycle, the poorest women often take time to raise the funds for an abortion, and then find themselves past the cutoff for procedures available early on – and facing a higher cost for an abortion. When women in these situations realize that they neither have the funds to pay for a later procedure, and/or can't find a reputable provider that will perform their procedures after 24 weeks, they end up at places like [Gosnell's clinic].

Carole Joffe, *Learning the Right Lessons from the Philadelphia Abortion Clinic Disaster*, RH Reality Check (April 16, 2013 10:11 A.M.), http://rhrealitycheck.org/article/2013/04/16/learning-right-lessons-philadelphia-abortion-clinic-disaster/.

Draconian regulatory regimes are fertile territory for criminals like Gosnell for two reasons –they reduce accessibility to abortions and they enhance the stigma that has attached to abortion.

Experience shows that medically unnecessary regulation of abortion will create a void that criminals like Gosnell will rush to fill. Two studies by California State University economist Marshall Medoff examining this issue illustrate how this happens. On the one hand, over-regulation of abortion does not affect demand for abortion, as women will continue to seek abortions regardless of the regulations in effect. Marshall H. Medoff, *State Abortion Policies, Targeted Regulation of Abortion Provider Laws, and Abortion*

Demand, 27 Rev. Pol. Research 577 (2010). On the other hand, over-regulation of abortion does affect the number of facilities that provide abortions by reducing the number of safe, competent providers. Marshall H. Medoff, *The Relationship Between State Abortion Policies and Abortion Providers*, 26 Gender Issues 224 (2009). Combining the results of these two studies, which analyze nationwide data, including data from Pennsylvania, shows that, even though the number of women seeking abortion will be constant, over-regulation will mean there are not enough high quality facilities to provide safe abortions.[9]

History has shown that, when this happens, women turn elsewhere – to unsafe or illegal providers such as Gosnell, or to self-administered remedies. Researchers in many fields have found this to be true, including a very recent study about self-induced abortion in Texas that concluded, "legal restrictions on abortion tend to increase unsafe abortion, but do not reduce the overall

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[9] Pennsylvania's experience bears this out. According to the Guttmacher Institute, the most reliable source for abortion data in the United States, from 2000 until 2011 (the year after Gosnell was arrested), the number of abortions in Pennsylvania remained relatively steady (with a spike in 2008), but Pennsylvania experienced a large drop in the number of abortion providers during that period.

Year	Abortions	Providers
2000	39,670	73
2005	38,110	56
2008	46,670	50
2011	39,197	47

All data available at Guttmacher Institute, *State Data Center*, http://www.guttmacher.org/datacenter/trend.jsp.

incidence of abortion." Daniel Grossman et al., *Knowledge, Opinion, and Experience Related to Abortion Self-Induction in Texas* (Nov. 17, 2015), *available at* http://www.ibisreproductivehealth.org/sites/default/files/files/publications/TxPEP_KnowledgeOpinionExperience%20with%20self%20induction_Research%20Brief_17Nov2015.pdf; *see also* Marge Berer, *National Laws and Unsafe Abortion: The Parameters of Change*, 12 Repro. Health Matters 24 (Supp.: Abortion Law, Policy and Practice in Transition), at 1 (2004) (finding that, internationally, more restrictive abortion laws lead to greater incidence of unsafe abortion).

Abortion stigma also allows a criminal like Gosnell to flourish.[10] Abortion stigma is defined as "a negative attribute ascribed to women who seek to terminate a pregnancy that marks them, internally or externally, as inferior to ideals of womanhood." Anuradha Kumar, et al., *Conceptualising Abortion Stigma*, 11 Culture, Health & Sexuality 625 (2009). In other words, abortion stigma leads women who have abortions to feel shame about choosing to do something that society views as inconsistent with being a woman. Abortion stigma is heightened by unnecessary regulation of the procedure. Regulations of abortion that do not advance health or safety, like those Texas requirements at

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[10] One of Gosnell's former patients explained that her decision to seek care from Gosnell instead of from a more reputable provider was dictated by her fear of encountering anti-abortion protesters. *See* Maryclaire Dale, "Pennsylvania Abortion Clinic Left Patients Sterile & Near Death, Women Claim," AP/The Huffington Post, posted Jan. 23, 2011 and updated May 25, 2011, *available at* http://www.huffingtonpost.com/2011/01/23/pennsylvania-abortion-clinic_n_812700.html (Gosnell patient went to Philadelphia Planned Parenthood first but was frightened away by protesters).

issue, suggest that abortion is unsafe and abnormal, two important components of the shame that is a part of abortion stigma. "Legal restrictions . . . in the United States make it more difficult for women to obtain abortions and reinforce the notion that abortion is morally wrong." Alison Norris, et al., *Abortion Stigma: A Reconceptualization of Constituents, Causes, and Consequences*, 21 Women's Health Issues 549, 551 (2011).

Ironically, over-regulation that feeds abortion stigma serves to protect criminals like Kermit Gosnell. When women are isolated and shamed about their decision to have an abortion, they are reluctant to report a rogue provider. After all, if abortion is so unsafe and so different from ordinary health care that it needs extra precautions from the state, then women who experience an abortion provider who, like Gosnell, provides highly unsafe care using substandard techniques, will think they are entitled to nothing better than a modern-day version of the "back alley" abortion. *Id.* at 552. As a reporter who interviewed many women who went to Gosnell summarized, "That Gosnell was able to practice so long, leaving such a wide wake of misery, is no surprise to some of his former patients. Abortion, some say, carries such a stigma that they were too ashamed to report their alleged mistreatment." Dana DiFilippo, *Victims Say Abortion Doctor Scarred Them for Life*, Phil. Inquirer (Jan. 21, 2011).

This connection with abortion stigma helps explain why Gosnell's patients did not report him for so long. In a world in which they felt ashamed of their decision to have a lawful, constitutionally-protected medical

procedure, they probably expected to receive poor care. Moreover, abortion stigma also helps explain why further medically-unnecessary regulation of abortion would be counterproductive. It would send a message even more forcefully that abortion is an aberrant, illicit medical procedure, a procedure that women should expect only the Kermit Gosnells of the world to provide. That a criminal practitioner like Gosnell could operate in an era of legal abortion is a direct consequence of abortion stigma.

By forcing responsible providers to shutter, by increasing appointment wait times, by increasing costs, and by intensifying abortion stigma, enforcement of Texas's ASC and admitting privilege requirements will create a climate in which rogue practitioners like Gosnell can flourish.

II. A STRONG NETWORK OF SKILLED ABORTION PROVIDERS IS THE BEST DEFENSE AGAINST UNPRINCIPLED AND UNSAFE PRACTITIONERS.

Pennsylvania's experience shows that responsible abortion providers, such as *amici*, are well-positioned to be whistleblowers and the first line of defense against illegal practitioners. Providers like these, for whom patient health and safety are paramount, have a strong incentive to root out substandard facilities run by criminals like Gosnell in order to protect their reputations and women who need their care.

Consistent with this strong incentive, Pennsylvania's reproductive health care providers encouraged and assisted patients in making complaints about Gosnell to state authorities. *See* GJ Rep. at 196.

At least one provider attempted to file a complaint against Gosnell with the Board of Medicine on behalf of a patient, but was informed that the Board would not accept a third-party complaint. *See id.* at 197. Another provider served as an expert witness for the prosecution at Gosnell's criminal trial. *See* Statement of Interest of Charles Benjamin, D.O.; *see also* Emad Khalil, *Philly M.E. Not Sure if Babies in Abortion Clinic Were Born Alive*, NBC News (April 15, 2013 5:59 P.M.) http://www.nbcphiladelphia.com/news/local/Philly-ME-Not-Sure-if-Babies-in-Abortion-Clinic-Were-Born-Alive-203098271.html. This article presents the "stark comparison" between Gosnell's practices and Dr. Benjamin's practices based on Dr. Benjamin's expert testimony. For example, Dr. Benjamin testified that "he must always be in attendance during drug and anesthesia administration, along with any patient visitation…[that his clinical and private practice equipment is] annually inspected as checked, that his clinic is [NAF] certified, and is inspected every 2-3 years…[and] his autoclave machines are tested weekly to make sure his tools are properly sanitized." *See* Khalil, *supra*. The providers and their community allies educated the prosecution team about technical aspects of medically recognized abortion protocols. *See* Appendix, Statement of Interest of Berger & Benjamin.

Pennsylvania abortion providers also reported another marginal provider, Stephen Brigham, to the Pennsylvania medical licensing authorities. *See* Eyal Press, *A Botched Operation,* New Yorker, Feb. 3, 2014, *available at* http://www.newyorker.com/magazine/2014/02/03/a-botched-operation (describing reports by other abortion providers that led to the closure of Brigham's facilities by Pennsylvania Department of Health).

Because they were able to win patients' trust, these providers were an important source of intelligence about substandard or marginal practitioners. Had public officials heeded providers' complaints about Gosnell and had providers been treated as partners, they could have served as the link between Gosnell's victims and public health, professional licensure, and law enforcement authorities, and thereby hastened the end of his criminal enterprise.

If Texas shuts down safe providers, the link between its most vulnerable patients and the government agencies that could protect them will be severed, and Texas's ability to detect and thwart the next Gosnell will be compromised.

CONCLUSION

Amici respect the value of regulation that protects the health and safety of women who seek abortions and other reproductive care, and they deliver care safely and with the highest regard for their patients' health, whether or not required to do so by regulation. But regulation that adds nothing to health or safety and that merely burdens reputable providers – like the challenged provisions of the Texas statute – is doubly pernicious. By driving some of those providers out of business, those regulations deprive women of access to safe abortions and provide fertile ground for criminal opportunists like Gosnell to prosper. By contrast, enjoining the unnecessary and burdensome provisions of the Texas statute will foster women's health and safety by permitting responsible providers to continue to offer high-quality abortion care to their patients.

Respectfully submitted,

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APPENDIX

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INTEREST OF INDIVIDUAL *AMICI CURIAE*

ALLEGHENY REPRODUCTIVE HEALTH CENTER

Allegheny Reproductive Health Center ("ARHC"), founded in 1975, is a reproductive health care facility located in Pittsburgh, Pennsylvania. ARHC draws patients from a large portion of Pennsylvania, West Virginia and Ohio. ARHC is licensed by the Pennsylvania Department of Health and is a member of the National Abortion Federation and the Abortion Care Network, a national association for independent, community-based, abortion care providers and their allies.

ALLENTOWN WOMEN'S CENTER

Allentown Women's Center ("AWC"), founded in 1978, is a reproductive health care facility located in Bethlehem, Pennsylvania. AWC draws its patients from Pennsylvania, southern New York, and western New Jersey. AWC is licensed by the Pennsylvania Department of Health and is a member of the National Abortion Federation, the Abortion Care Network, and the Gay and Lesbian Medical Association.

BERGER AND BENJAMIN, LLP

Berger and Benjamin, LLP, founded in 1978, is a small, community-based outpatient facility located in urban Philadelphia, Pennsylvania. Berger and Benjamin draws the majority of its patients from urban Philadelphia with additional patients coming from surrounding metropolitan areas. Berger and Benjamin is certified by the Pennsylvania Department of Health and accredited by the American Association for

Accreditation of Ambulatory Surgery Facilities and is a member of the National Abortion Federation. The Medical Director of the practice, Dr. Charles Benjamin, testified as a clinical expert for the prosecution in the criminal trial of Kermit Gosnell.

DELAWARE COUNTY WOMEN'S CENTER

Delaware County Women's Center ("DCWC"), founded in 2013, is a reproductive health care facility located in Chester, Pennsylvania. DCWC is registered with the Pennsylvania Department of Health and is a member of the National Abortion Federation and the Abortion Care Network.

HILLCREST WOMEN'S MEDICAL CENTER

Hillcrest Women's Medical Center, Harrisburg ("Hillcrest"), founded in 1976, is a reproductive health care facility located in Harrisburg, Pennsylvania. Hillcrest draws patients from the entire state of Pennsylvania and the bordering states of Maryland, New York and New Jersey. Hillcrest is certified by the Pennsylvania Department of Health and accredited by the American Association for Accreditation of Ambulatory Surgery Facilities. It is a member of the National Abortion Federation.

MAZZONI CENTER

Mazzoni Center, founded in 1979, is a primary care facility offering reproductive care located in Philadelphia, Pennsylvania. Mazzoni Center draws patients from the greater Philadelphia area. Mazzoni Center is registered with the Pennsylvania Department of Health.

PHILADELPHIA WOMEN'S CENTER

The Philadelphia Women's Center ("PWC"), founded in 1972, is a reproductive health care facility located in Philadelphia, Pennsylvania. PWC draws patients from several geographic areas, including Pennsylvania, Maryland, New Jersey and Delaware. PWC is licensed by the Pennsylvania Department of Health and is a member of the National Abortion Federation and Abortion Care Network.

PLANNED PARENTHOOD KEYSTONE

Planned Parenthood Keystone ("PPKey"), formed in 2013 after a series of mergers, is a reproductive health care organization which operates 15 health centers serving residents of 37 counties in eastern and central Pennsylvania. PPKey operates six health centers that provide abortions. The PPKey health centers that provide surgical abortion are certified by the Pennsylvania Department of Health as required by state law. PPKey is an affiliate of Planned Parenthood Federation of America and a member of the National Abortion Federation.

PLANNED PARENTHOOD SOUTHEASTERN PENNSYLVANIA

Planned Parenthood Southeastern Pennsylvania ("PPSP"), founded in 1929, is a reproductive health care organization that operates 11 health centers in southeastern Pennsylvania. PPSP draws patients from Chester, Montgomery, Delaware, and Philadelphia counties in Pennsylvania. PPSP operates four health centers that provide abortions. The PPSP health centers that provide surgical abortion are licensed or certified by the Pennsylvania Department of Health as

required by state law. PPSP is an affiliate of Planned Parenthood Federation of America.

PLANNED PARENTHOOD OF WESTERN PENNSYLVANIA, INC.

Planned Parenthood of Western Pennsylvania, Inc. ("PPWP"), founded in 1930, is a reproductive health care organization that operates seven health centers in western Pennsylvania. PWPP draws patients from Pennsylvania, Ohio and West Virginia. PPWP provides abortions at one of its health centers in Pittsburgh which is licensed by the Pennsylvania Department of Health. PPWP is an affiliate of Planned Parenthood Federation of America.