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 AMICI CURIAE CHARLOTTE LOZIER INSTITUTE AND ALLIANCE FOR HIPPOCRATIC MEDICINE SUPPORTING APPELLANTS

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IDENTITY OF PARTIES, AMICI CURIAE, AND COUNSEL

The parties and their counsel are correctly identified in the parties' briefs on the merits. This brief is written on behalf of *amici curiae* Charlotte Lozier Institute and the Alliance for Hippocratic Medicine.[1]

Charlotte Lozier Institute (CLI) is a nonprofit research and education organization committed to bringing modern science to bear in life-related policy and legal decision-making. CLI's work is built on the contributions of staff and a network of over 70 Associate Scholars, who are credentialed experts in medicine, statistical analysis, sociology, science, bioethics, public health, law, and social services for women and families. CLI's researchers work in the tradition of Charlotte Denman Lozier, a 19th century feminist physician dedicated to the sanctity of life and equal opportunities for women. The U.S. Supreme Court has cited CLI's work in its published opinions. *See Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 232 n.15 (2022).

The Alliance for Hippocratic Medicine (AHM) represents over 50,000 health care professionals committed to promoting and upholding the fundamental principles of Hippocratic medicine. These principles include protecting the vulnerable at the beginning and end of life, seeking the ultimate good for the patient with compassion and moral integrity, and providing healthcare with the highest standards of excellence based on medical science.

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[1] Pursuant to Texas Rule of Appellate Procedure 11, undersigned counsel certifies that no person or entity other than *amici curiae* made a monetary contribution intended to fund the brief's preparation or submission.

Both CLI and AHM thus have an interest in ensuring that the views of physicians and researchers who do not support elective abortion are represented among the views of *amici curiae* that the Court may consider in deciding this case. Both CLI and AHM also affirm that both mother and unborn child are patients, and that physicians should seek to protect both lives if possible when caring for these patients.

Counsel for *amici* are Heather Gebelin Hacker, Andrew B. Stephens, and Bethany S. Rothwell of Hacker Stephens LLP, 108 Wild Basin Road South, Suite 250, Austin, Texas 78746.

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TO THE HONORABLE SUPREME COURT OF TEXAS:

The people of Texas, through their elected representatives in the Legislature, have chosen to value the life of unborn children. Texas law requires that doctors protect both the life of the mother and the life of the unborn child. In tragic cases where the pregnancy poses a serious danger to the mother's life or physical health, the Legislature has imposed an objective standard, requiring a doctor's "reasonable medical judgment," before ending the pregnancy. *See* Tex. Health & Safety Code § 170A.002(b)(2). "Reasonable medical judgment" is defined as "a medical judgment made by a reasonably prudent physician, knowledgeable about a case and the treatment possibilities for the medical conditions involved." *Id.* § 170A.001(4). Appellees and many *amici* argue that this exception is unworkable and, combined with other laws in Texas, creates a situation where doctors are afraid to act and women are being harmed. But *amici*, who represent medical professionals and researchers, disagree with this fearmongering. Far from unclear, these standards are not new, have never been found unworkable or vague in the abortion context or *any other medical context*, and the Court has no reason to substitute its judgment for the Legislature's in this case.[2] Instead, it is up to the medical community to act, like it has in other states and in every other medical context, to provide guidance to medical professionals if physicians genuinely believe they are unable to follow the "reasonable

[2] Though Plaintiffs claim that they are uncertain as to what the medical emergency exception allows, *e.g.* CR.491, they have not brought a vagueness challenge, CR.490-604.

judgment" standard in this context like they do in many other contexts of medical practice unrelated to abortion.

Further, the idea that physicians do not know how to treat pregnancy complications just because elective abortion is now illegal in Texas is false. There are many options short of intentionally killing the unborn child that physicians can use to treat pregnancy complications, in keeping with the fact that these physicians have not one, but two patients: mother and child. And in the tragic, rare circumstances where the baby's life cannot be saved, there is plenty of guidance available for physicians in treating those complications and taking care of the mother. That guidance came from some of the *amici* themselves—the very same organizations that are now claiming doctors cannot follow both the standard of care and the law (even though the law incorporates the standard of care).

The bottom line is that Texas physicians have been exercising "reasonable medical judgment" in treating pregnancy complications for many years. Texas laws do not require physicians to abandon a pregnant woman's medical treatment, and refusing to treat such a patient is likely malpractice, given the established standard of care.

ARGUMENT

I. "Reasonable Medical Judgment" as a Legal Standard has Existed in Texas and the United States Since at Least the 1960s and Has Never Been Found Vague.

One of the statutes at issue in this case is the Human Life Protection Act, Tex. Health & Safety Code §§ 170A.001-007 (HLPA). It states in part that "a person may not knowingly perform, induce, or attempt an abortion" but allows for an exception if a "medical emergency" is present: "[if] in the exercise of reasonable medical judgment, the pregnant female . . . has a life-threatening physical condition aggravated by, caused by, or arising from a pregnancy that 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). "Reasonable medical judgment" is defined as "a medical judgment made by a reasonably prudent physician, knowledgeable about a case and the treatment possibilities for the medical conditions involved." Tex. Health & Safety Code § 170A.001(4).

This is not a new standard, nor is it specific to abortion or even to Texas law. In the United States, "reasonable medical judgment" was born out of the relevant standard of care for physicians. *See Karlin v. Foust*, 188 F.3d 446 (7th Cir. 1999). "[T]his is the same standard by which all . . . medical decisions are judged under traditional theories of tort law," *id.* at 464—the "reasonable man" standard, but for physicians. It appeared first in situations requiring a physician to certify mental incompetence using "reasonable medical judgment" or in medical malpractice cases, establishing a zone of reasonable actions. *See Rogers v. U.S.*, 334 F.2d 931, 935 (6th Cir. 1964).

Physicians exercising reasonable judgment in treating patients within the parameters of the law is therefore not a new concept and physicians have been familiar with doing so for decades. As this Court observed in *In re State*, "a woman who meets the medical-necessity exception need not seek a court order to obtain an abortion…The law leaves *to physicians*—not judges—both the discretion and the responsibility to exercise their reasonable medical judgment, given the unique facts and circumstances of each patient." No. 23-0994, 2023 WL 8540008, at *2 (Tex. Dec. 11, 2023).

A. In Texas, the "reasonable medical judgment" standard appears in several statutory schemes as well as the medical abortion context and has never been challenged as vague.

When crafting the statutes at issue, the Legislature did not reinvent the wheel. Rather, it used standards and phrases that have been used and applied to the medical community for decades with no issue. The "reasonable medical judgment" standard is not new and has appeared in different medical statutes for many years in Texas. In Texas case law, the phrase has occurred nine times, only once at the Supreme Court, and no court in Texas has ever found it to be unworkable or unconstitutional.

1. Texas statutes have used the standard in a variety of medical situations.

This Court has long applied "the unremarkable, but foundational principle that '[a] court may not judicially amend a statute by adding words that are not contained in the language of the statute. Instead, it must apply the statute as written." *Cadena Comercial USA Corp. v. Tex. Alcoholic Beverage Comm'n*, 518 S.W.3d 318, 337 (Tex.

2017) (quoting *ExxonMobil v. Coleman*, 512 S.W.3d 895 (Tex. 2017)). Here, the district court transgressed that important principle by reading in a subjective "good faith" standard where none exists.

The "reasonable medical judgment" standard is frequently used in statutes governing the determination of mental competence or end-of-life questions. In the insurance code, a person may be determined mentally incapacitated only according to a doctor's "reasonable medical judgment." Tex. Ins. Code § 1106.004. In the statutes governing advanced directives, mental competence or incompetence is based on a finding by "reasonable medical judgment." Tex. Health & Safety Code § 166.002. It also appears in the statutes governing the revocation of a do-not- resuscitate directive. *See* Tex. Health & Safety Code § 166.205. A doctor must use their "reasonable medical judgment" to determine whether a patient is mentally incompetent and how they should be treated. *See* Tex. Health & Safety Code § 166.046. An adult patient in a treatment facility or an inmate in a state prison who is incapable of communication must be treated according to "reasonable medical judgment." *See* Tex. Health & Safety Code § 313.005. In determining whether an agent may act on behalf of the principal, the court requires a physician's certification that, "based on the attending physician's reasonable medical judgment, the principal is incompetent." Tex. Health & Safety Code §§ 166.152, .162. None of these statutes have been challenged as to constitutionality or vagueness. And even though these statutes obviously implicate important medical issues, it appears that the standard is uncontroversial, at least according to the (non-existent) litigation history.

In the abortion context, "reasonable medical judgment" has applied for over a decade. Since 2013, and well before *Dobbs*, Texas law prohibited abortions after twenty weeks post-fertilization. Tex. Health & Safety Code § 171.044. That law contains a medical exception if, "in the physician's reasonable medical judgment," an abortion is necessary to "avert the woman's death or a serious risk of substantial and irreversible physical impairment of a major bodily function." Tex. Health & Safety Code § 171.046. That law also provided that if the physician performed an abortion in that instance, they must "terminate the pregnancy in the manner that, in the physician's reasonable medical judgment, provides the best opportunity for the unborn child to survive." Tex. Health & Safety Code § 171.045. These provisions have never been challenged for vagueness.

Additionally, both the Texas and federal bans on partial-birth abortion—which both pre-date *Dobbs*—contain more stringent objective emergency exceptions that do not even allow for variance in physician judgment. *See* 18 U.S.C. § 1531(a) (prohibiting partial-birth abortion unless it "is necessary to save the life of a mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself."); Tex. Health & Safety Code § 171.102(b) (same); *see also Gonzales v. Carhart*, 550 U.S. 124, 161 (2007) (the Act "*does not* allow use of the barred procedure where 'necessary, in appropriate medical judgment, for the preservation of the . . . health of the mother.'" (emphasis added) (quoting *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 327–328 (2006)). And performing partial-birth abortions in Texas is a state jail felony. Tex. Health & Safety Code § 171.103.

2. Texas courts have never found "reasonable medical judgment" vague or confusing.

Even though "reasonable medical judgment" is used as a standard in many Texas statutes, the phrase "reasonable medical judgment" has only appeared in Texas case law nine times. It has never been questioned as unworkable or too high—and that includes cases involving both state laws and federal laws using this standard.

The Texas Supreme Court has only analyzed the objective standard once. A few months ago, in *In re State*, No. 23-0994, 2023 WL 8540008, at *3 (Tex. Dec. 11, 2023), the Court observed that the physician in the case, also a party here, did not certify that the abortion was necessary according to her "reasonable medical judgment" but only that she had a "good faith" belief that it was necessary. *Id.* at *2. This case is the most extensive examination *any* Texas court has made of the standard. The Court observed that the standard does not require that every doctor agree on the conclusion, but rather, it allows for a "zone of reasonable medical judgment." *Id.* at *3.

Other than *In re State*, several courts of appeals have mentioned the standard, but none of these cases provide any extended examination. The first time a Texas court referred to the standard was in 1987 in *Little v. Bryce*, 733 S.W.2d 937 (Tex. App.—Houston [1st Dist.] 1987). So the standard was commonly known and understood in Texas at least by 1987, if not earlier. *Id.* at 940.

In *Johnson v. PHCC-Westwood Rehab. & Health Care Ctr., LLC*, 501 S.W.3d 245, 250 (Tex. App.—Houston [1st Dist] 2016), the court of appeals examined the statutes governing when an agent can act on behalf of the principal. No one challenged

the requirement that a physician needs to certify that "according to the attending physician's reasonable medical judgment, the principal is incompetent." Tex. Health & Safety Code § 166.152. The court resolved the case without discussing the statute further. In 1996, the Houston Court of Appeals examined the Texas Natural Death Act, which required a "terminal condition" be diagnosed by a physician's "reasonable medical judgment." *Stolle v. Baylor Coll. of Med.*, 981 S.W.2d 709, 712 (Tex. App.—Houston [1st Dist.] 1998, pet denied). The standard only appeared when the court cited the statute and no one suggested the objective standard was inappropriate. *Renaissance Healthcare Sys., Inc. v. Swan*, 343 S.W.3d 571 (Tex. App.—Beaumont 2011, no pet.) was a medical malpractice case. The opinion included examinations of several expert reports, two of which referenced "reasonable medical judgment" informed by published information from the Texas Medical Board. *Id.*, 343 S.W.3d at 590. Around the same time, the court again referenced the appropriate standard of care as requiring reasonable medical judgment, informed by information received in the Texas Medical Board newsletter. *Beaumont Spine Pain & Sports Med. Clinic, Inc. v. Swan*, No. 09-10-00347-CV, 2011 WL 379168, at *3 (Tex. App.—Beaumont Feb. 3, 2011, pet. denied).

In *T.L. v. Cook Children's Medical Center*, 607 S.W.3d 9, 51 (Tex. App.—Ft. Worth 2020), a child's family challenged the hospital's decision to withdraw life sustaining treatment under Texas law. *See* Tex. Health & Safety Code § 166.046(e). Under this law, if a physician and ethics or medical committee has decided that life-sustaining treatment would be futile, the patient had an additional ten days to find a second opinion before the hospital would withdraw treatment. *Id.* The family sued

under the federal Child Abuse Prevention and Treatment Act, which requires a physician to provide appropriate treatment that would, in the physician's reasonable medical judgment, help the child. *T.L.*, 607 S.W.3d at 83. The court of appeals discussed the objective standard throughout the opinion without concern and no party objected or argued that it should have been supplanted by a lower, subjective "good faith" standard.[3]

All these cases cited the relevant statutory language, from Texas statutes or from federal statutes, without comment or challenge. No party in any of these cases claimed that the standard wrought confusion. This is not dispositive of the Plaintiffs' contentions, but it does illustrate that this standard, despite being used for decades, has been uncontroversial in Texas given a lack of litigation challenging it.

B. Texas courts have also upheld any references to "reasonably prudent physician" or similar phrases that apply the reasonable man standard to the medical context.

As stated above, the [Texas statute] defines "reasonable medical judgment" as "a medical judgment made by a reasonably prudent physician, knowledgeable about a case and the treatment possibilities for the medical conditions involved." Tex. Health & Safety Code § 170A.001(4). The "reasonably prudent physician" is also a

[3] The standard also is referenced in two other unpublished cases. Neither case offers any discussion or in-depth examination of the standard. *See Hamer v. State*, No. 11-02-00264-CR, 2003 WL 2012473, at *1 (Tex. App.—Eastland May 1, 2003, no pet.); *Lombana v. AIG Am. Gen. Life Ins. Co.*, No. 01-12-00168-CV, 2014 WL 810858 (Tex. App.—Houston [1st Dist.] Feb. 27, 2014, pet. denied).

familiar objective standard in Texas law. Rather than the "reasonably prudent person" standard familiar in tort law, physicians in malpractice cases are held to a higher standard—that of a "reasonably prudent physician," which takes into account their training and knowledge. *See, e.g.*, *Gunn v. McCoy*, 489 S.W.3d 75, 86 (Tex. App.—Houston [14th Dist.] 2016), aff'd, 554 S.W.3d 645 (Tex. 2018)); *White v. Wah*, 789 S.W.2d 312, 315–16 (Tex. App.—Houston [1st Dist.] 1990, no writ); *Wheeler v. Aldama–Luebbert*, 707 S.W.2d 213, 217 (Tex. App.—Houston [1st Dist.] 1986, no writ).

When establishing the appropriate standard of care in a medical malpractice case, the courts assess the physician's actions under this objective standard, not simply whether the physician believes in "good faith" that the treatment is appropriate. Medical malpractice cases require an expert who can "articulate the standard of care which applies to the medical services and treatment rendered on behalf of the patient alleging malpractice." *Tatom v. Guillebeau*, 686 S.W.2d 705, 706–707 (Tex. App.—Tyler 1985, no writ). "The affidavit must state the standard of care, indicate that the standard would be used by a reasonably prudent physician under the same or similar circumstances, and state that the defendant physician adhered to that standard of care." *McCord v. Avery*, 708 S.W.2d 954, 956 (Tex. App.—Fort Worth 1986, no writ); *see also Montet v. Narcotics Withdrawal Ctrs., Inc.*, No. 14-99-01401-CV, 2001 WL 1287384, at *6 (Tex. App.–Houston [14th Dist.] Oct. 25, 2001, no pet.) ("What a testifying expert personally would or would not have done or what he would like to have seen done under the same or similar circumstances is not sufficient to establish the requisite standard of care."). An entire chapter of the Texas

Civil Practice and Remedies Code—Chapter 74—governs how expert testimony can establish the necessary standard of care.

The objective standards of the HLPA—the reasonably prudent physician standard and reasonable medical judgment—are uncontroversial in Texas medical practice and in Texas law. None of these standards are new to physicians and the application of these standards to the abortion context is no exception. Doctors face tough situations and must frequently make decisions according to the standard of care to save patients' lives. Prohibiting elective abortions, while leaving an exception for medically necessary procedures, does not suddenly prevent these physicians from caring for mothers and babies. Pregnant women do not deserve a lesser standard of care, and the district court's "good faith" standard is exactly that.

C. Federal courts have upheld the "reasonable medical judgment" standard.

"Reasonable medical judgment" first appeared in federal case law in 1964 in *Rogers*, a medical malpractice claim. 334 F.2d at 935. In the abortion context, the exact phrase "reasonable medical judgment" first appeared in 1995 in *Women's Medical Professional Corp. v. Voinovich*, 130 F.3d 187 (6th Cir. 1997). *Voinovich* is the closest any court has come to finding an objective medical standard vague, but the statute had significant differences to the present ones that influenced the Sixth Circuit's decision. Relying on *Colautti v. Franklin*, 439 U.S. 379, 390 (1979), *Voinovich* held that the Ohio statutes regulating abortion were unconstitutionally vague in part because there was a combination of objective and subjective standards (good-faith and

reasonable medical judgment), without a scienter requirement. *Id.* at 204-206. In dissent from denial of certiorari for *Voinovich*, Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, rejected the Sixth Circuit's interpretation of *Colautti* as standing for the idea that any medical standard without a scienter requirement was void. Instead, it was the specific statutory language in *Colautti* that if "the fetus is viable" or "if there is sufficient reason to believe that the fetus may be viable," that was overly vague and gave no guidance. *Id.* (quoting *Colautti*, 439 U.S. at 381).

By contrast, in a case involving a Wisconsin statute with language similar to the language at issue here, the Seventh Circuit rejected a vagueness challenge where the statute contained only the objective standard "reasonable medical judgment" and no scienter standard in its medical exception provision. *Karlin*, 188 F.3d at 455, 462. First, similar to Justice Thomas's dissent, the Seventh Circuit disagreed with the Sixth Circuit's interpretation of *Colautti*, stating that the problem with the Pennsylvania statute was that it was a mixed standard, providing no clarity to the physician how he could defend his actions. *See Karlin*, 188 at 463 (quoting *Colautti*, 439 U.S. at 391). In other words, because the statute was poorly written and the Court found that the legislature had not been clear, it did not find that "imposing an objective standard on a physician's medical decisions was unconstitutional *per se* in the abortion context." *Id. Karlin* further pointed out that *Voinovich* addressed a dual objective-subjective standard and the Wisconsin statute at issue in *Karlin* (like the Texas statutes here) only imposed an objective standard on the physician's medical decisions. *Id.*

As to the "reasonable medical judgment" standard, *Karlin* acknowledged that it did not mean that every physician would agree with the action in every case, and there may be several reasonable options available to the doctor in any given situation. The question was whether the treatment was within that zone of reasonableness, informed by the physician's training and the facts of the case. *Id.* The court also pointed out that the reasonable judgment standard applied in other contexts with no issue, and that the plaintiffs failed to explain why the same standard was too vague in the abortion context and not in others:

> While physicians may feel more secure in determining that a medical emergency exists under [the statute] if they know that their emergency medical decisions need only satisfy a subjective good faith standard, a state's decision to hold a physician's emergency medical determination to an objective standard alone does not render the medical emergency provision impermissibly vague. There is no showing in other emergency contexts that an objective standard impermissibly limits a physician's discretion in making similar decisions. Plaintiffs fail to offer any compelling reason why the abortion context should be any different.

Id.

Since *Karlin*, no federal court of appeals, the United State Supreme Court, nor any Texas court has held that the objective, "reasonable medical judgment" standard for medical exceptions for abortions is unconstitutionally vague. This is despite the fact that this standard has been part of Texas laws for decades, *see* Section I.A.1 *supra*, and is part of many other states' abortion laws even pre-*Dobbs*, *see*, *e.g.*, Ga. Code § 16-12-141 (2019) (prohibiting abortions after a detectable heartbeat); Ind. Code § 16-34-2-1 (2019) (same). And the United States Supreme Court approved very similar language—"necessary, in appropriate medical judgment"—many

times, essentially requiring that all abortion laws have an exception with similar wording in order to satisfy the undue burden standard. *Ayotte*, 546 U.S. at 328 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 879 (1992) (quoting *Roe v. Wade*, 410 U.S. 110, 164-65 (1973)), citing *Thornburgh v. Am. Coll. of Obstetricians and Gynecologists*, 476 U.S. 747, 768–69 (1986); *Planned Parenthood Assn. of Kansas City, Mo., Inc. v. Ashcroft*, 462 U.S. 476, 482–486 (1983) (opinion of Powell, J.); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 79 (1976)).

The United States Supreme Court upheld the federal Partial Birth Abortion Ban Act (which is very similar to Texas's partial-birth abortion ban) against a vagueness challenge in *Gonzales*, holding that the law "provides doctors 'of ordinary intelligence a reasonable opportunity to know what is prohibited,'" and "sets forth 'relatively clear guidelines as to prohibited conduct' and provides 'objective criteria' to evaluate whether a doctor has performed a prohibited procedure." 550 U.S. at 149 (citations omitted). The Court did not appear to even question whether the emergency exception is vague. *Id.* at 147-50. And because it did not provide allowance for any variance in physician discretion, it is an even stricter objective standard. *See* 18 U.S.C. § 1531(a) (prohibiting partial-birth abortion unless it "is necessary to save the life of a mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself."); Tex. Health & Safety Code § 171.102(b) (same); *see also Gonzales*, 550 U.S. at 161 (the Act "*does not* allow use of the barred procedure where 'necessary, in appropriate medical judgment, for the preservation of the . . . health of the mother.'").

Thus, the "reasonable medical judgment" standard is not unfamiliar to abortion doctors, obstetricians, or any other physicians, nor is it unfamiliar or unprecedented in the law.

II. Texas Law and the Accepted Standard of Care Permits Physicians to Treat Life-Threatening Pregnancy Complications, and Post-*Dobbs* Confusion Has Been Caused by Ideologically Motivated Organizations.

As discussed above, the laws at issue do not contain new ideas or standards. Medical professionals have never professed an inability to abide by these standards in any other context. The tragic situations in this case should be treated like any other, and these mothers' physicians should be held to an objective standard of care just like every other doctor treating a patient. Further, the Court should rest assured that Texas law does not leave these physicians without options for treatment if a woman faces an ectopic pregnancy, a spontaneous miscarriage, previable preterm rupture of membranes, or other diagnoses during pregnancy that could pose a threat to her life or bodily function. To the extent that some physicians are confused about what treatment they may offer to avoid violating the law, that guidance should be made available by medical organizations or the Texas Medical Board, not this Court.

A. Doctors should seek to treat both patients—the mother and the baby—in these situations.

While treatment of the mother sometimes requires the ending of a pregnancy, this does not mean the purposeful destruction of a living baby is required. Doctors have always understood that sometimes a medically necessary procedure to save the life of one patient will have the unintended consequence of terminating the life of

their other patient.[4] But a physician that recognizes that she has two patients, not just one, will seek to treat both in situations where that is possible. Texas law supports that idea, *see* Tex. Health & Safety Code § 170A.002(b)(3), as does the medical community.

Obstetricians accept that an unborn baby is a patient in his or her own right. F. Gary Cunningham, et al., eds. *Williams Obstetrics* 181–343 (25th ed. 2018) (section in seminal obstetrics textbook titled "The Fetal Patient"). Physicians can now treat many previously fatal or serious fetal complications with medication or even surgery before birth.[5] The development of diagnostic technology like ultrasound and MRI, which allowed physicians to safely visualize the living unborn child in real time throughout pregnancy, "shifted the focus from the newborn, with a severe disorder that could not be corrected after birth, to the possibility of prenatal medical or surgical intervention that could help ameliorate the clinical manifestations of disease … these diagnostic capabilities led to further research … and the realization that the fetus was, and is, a patient."[6] The only time the medical view of the unborn child as a patient changes is if *the same child* is slated for abortion.[7]

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[4] *See* Jeffrey Wright, M.D., *What is NOT an Abortion?*, 37 Issues in L. & Med. 175, 175 (2022), *available at* https://issuesinlawandmedicine.com/articles/what-is-not-an-abortion/.

[5] C. Malloy, M. Chireau Wubbenhorst, T. Sander Lee, *The Perinatal Revolution*, 34 Issues in L. & Med. 15, 15 (2019), *available at* https://issuesinlawandmedicine.com/wp-content/uploads/2023/10/2.The-Perinatal-Revolution.pdf.

[6] *Id.*

[7] *See id*. at 33 ("The fetus is considered a 'person' when carried by a woman who plans to continue the pregnancy, but the fetus is not considered a person when the mother plans abortion.")

Doctors and medical professionals have both the ability and the duty to treat both patients. There are situations where the mother is in danger from the ongoing pregnancy. In those cases, the pregnancy needs to end, which may result in the death of the unborn baby. But that is not an elective abortion. Nothing in Texas law prevents a pregnant mother from receiving necessary medical care—including in the rare cases where the mother's life or bodily function is endangered by the ongoing pregnancy.[8] The Texas laws at issue here do not prevent physicians from continuing to treat these tragic cases appropriately or from caring for both mother and child. *Id.*

B. Texas law does not foreclose accepted treatment options for serious pregnancy complications.

Texas law makes plain that the removal of an unborn child who died during a miscarriage and removal of an ectopic pregnancy are not even considered abortions and are thus not prohibited. Tex. Health & Safety Code § 245.002. For other situations, if "1) [t]here is proportional danger of maternal death or severe threat to long-term organ function *and* 2) the maternal patient has provided her consent," then artificial conclusion of a pregnancy is justified.[9] Possible situations where this might be necessary include cardiovascular collapse, exogenic cesarean scar pregnancy, ec-

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[8] Ingrid Skop, M.D., Mary E. Harned, J.D., *Pro-Life Laws Protect Mom and Baby: Pregnant Women's Lives are Protected in All States*, Charlotte Lozier Inst. (Sept. 11, 2023), https://lozierinstitute.org/pro-life-laws-protect-mom-and-baby-pregnant-womens-lives-are-protected-in-all-states/.

[9] Am. Ass'n of Pro-Life Obstetricians & Gynecologists, *AAPLOG Practice Guideline 10-Concluding Pregnancy Ethically* (Aug. 2022), https://aaplog.org/wp-content/uploads/2023/04/PG-10-Concluding-Pregnancy-Ethically-updated.pdf.

topic pregnancy, active hemorrhage, intrauterine infection, preeclampsia with severe features before 22 weeks, massive placental abruption, and progressive hypertensive disorders of pregnancy.[10] There are also treatment options available to support maternal health during a high-risk pregnancy, rather than immediately suggesting abortion.[11]

As an example, one of the plaintiffs' medical situations involves previable premature rupture of membranes (PPROM), a medical condition where a woman's amniotic sac breaks before the baby is viable. Acceptable medical treatments include hospital admittance for monitoring, antibiotics, and administration of corticosteroids to stimulate growth of the baby's lungs.[12] Some mothers may choose this "watch and wait" approach if their baby is close to viability and there are no signs of infection.[13] But the standard of care also allows physicians to offer immediate separation of mother and child because of the potentially dire outcomes—and both pro-life and pro-abortion medical organizations agree on that (or at least the American College of Obstetricians & Gynecologists (ACOG) did before *Dobbs*).[14] The only difference

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[10] *Id.* at 11.

[11] *Id.*

[12] *See* Aditi Garg, Arpita Jaiswal, *Evaluation and Management of Premature Rupture of Membranes: A Review Article*, 15 Cureus 3 (2023); *available at* https://www.cureus.com/articles/125620-evaluation-and-management-of-premature-rupture-of-membranes-a-review-article#!/.

[13] Ingrid Skop, M.D., *Abortion Policy Allows Physicians to Intervene to Protect a Mother's Life*, Charlotte Lozier Inst. (May 16, 2023), https://lozierinstitute.org/abortion-policy-allows-physicians-to-intervene-to-protect-a-mothers-life/.

[14] *Id.*; *see also AAPLOG*, *Concluding Pregnancy Ethically, supra* n. 8; ACOG, *Prelabor Rupture of Membranes: ACOG Practice Bulletin, Number 217*, 3 Obstet. & Gynecol. 135 (Mar. 2020), *available*

is that the American Association of Pro-Life Obstetricians & Gynecologists (AAPLOG) advocates for induction or caesarian delivery rather than tearing the baby out in pieces via dilation and evacuation because it "shows greater respect for the human dignity of the fetus, even if she is too young or sick to survive."[15] The standard of care does not include forcing women to go home and wait to develop a dangerous infection, and neither does Texas law, which incorporates the appropriate standard of care through the "reasonable medical judgment" standard.

It is worth noting again that prior to *Dobbs*, every obstetrician already operated under the "reasonable medical judgment" standard, even for pregnancy-related emergencies. Texas prohibited abortions after 20 weeks with an exception for life or prevention of serious bodily function under the "reasonable medical judgment standard." Tex. Health & Safety Code § 171.044. At least one of the plaintiffs who testified received her baby's diagnosis after twenty weeks, so her physicians would have faced the same choice pre-*Dobbs* as they do now. *See* Resp. Br. at 10. It is unclear why suddenly this same standard is too difficult to follow. Further, only about seven to fourteen percent of obstetricians say they would perform an elective abortion when requested by a patient,[16] but all obstetricians are willing and able to intervene

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at https://journals.lww.com/greenjournal/abstract/2020/03000/prelabor_rupture_of_membranes__acog_practice.47.aspx.

[15] Skop, *Abortion Policy*, *supra* n. 12.

[16] S. Desai, R. Jones, and K. Castle, *Estimating abortion provision and abortion referrals among United States obstetrician-gynecologists in private practice*, 97 Contraception 297, 300 (2018), *available at* https://www.contraceptionjournal.org/article/S0010-7824(17)30521-8/fulltext; D. Stulberg, A. Dude, I. Dahlquist, et al., *Abortion provision among practicing obstetrician-gynecologists*, 118 Obstet.

when necessary to protect a mother's life, even when it means the baby cannot survive. Both before and after *Dobbs*, these physicians have frequently made the distinction between separations necessary to save a woman's life or health and those separations done for social, not medical, reasons. There is no reason they cannot continue to do so now.

C. The medical community can provide guidance about the standard of care, and it is their job to advise physicians how to treat both patients in tragic and difficult circumstances.

Nowhere in Texas law is there a requirement that the threat of death or bodily injury for the mother be imminent in order for the abortion exception to apply.[17] Many doctors do not read the text of the law and most have no legal training; they instead rely on governmental or medical organizations to make clear what laws affect them.[18] Media misinformation and the medical community's silence is what has continued to contribute to any confusion, not Texas law itself.[19] It appears that pro-abortion medical organizations may have purposefully generated more confusion. In November 2022, American Medical Association President Jack Resneck criticized the Texas law and claimed that it conflicted with a physician's provision of ethical medical treatment:

& Gynecol. 609, 612 (2011); *available at* https://www.sciencedirect.com/science/article/pii/S0010782417305218.

[17] *See e.g.*, Tex. Health & Safety Code § 170A.002(b)(2); Skop, *Abortion Policy*, *supra* n. 12.

[18] *See* Skop, *Abortion Policy*, *supra* n. 12.

[19] *Id.*

> Caught between good medicine and bad law, physicians struggle to meet their ethical duties to patients' health and well-being, while attempting to comply with reckless government interference in the practice of medicine that is dangerous to the health of our patients…. Under extraordinary circumstances, the ethical guidelines of the profession support physician conduct that sides with their patient's safety and health, acknowledging that this may conflict with legal constraints that limit access to abortion or reproductive care.[20]

ACOG has offered no clarification or advice to physicians attempting to navigate good patient care other than repeating "abortion is an essential component of comprehensive, evidence-based health care."[21] They argue here that appropriate medical treatment is unavailable to women in Texas now. They claim that expectant management—where a mother with a high-risk pregnancy is watched carefully—is now bad medicine, even though it was a recommended course of treatment pre-*Dobbs*. *See* ACOG Amicus Br. at 17. The Society for Maternal-Fetal Medicine, whose members specialize in high-risk obstetric care, also has not offered clarification.[22] Its members advise consulting obstetricians that they may not intervene in emergency situations, unless the threat is immediate.[23] This type of misinformation—not the law itself—has led to poor patient outcomes. Again, with the example of PPROM:

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[20] Kevin B. O'Reilly, *AMA holds fast to principle: Reproductive care is health care*, Am. Med. Ass'n (Nov. 17, 2022), https://www.ama-assn.org/delivering-care/public-health/ama-holds-fast-principle-reproductive-care-health-care.

[21] ACOG, *Statement of Policy: Abortion Policy*, (Updated May 2022) https://www.acog.org/clinical-information/policy-and-position-statements/statements-of-policy/2022/abortion-policy.

[22] Skop, *Abortion Policy*, *supra* n. 12 (citing Soc'y for Maternal-Fetal Med., *SMFM Patient Safety and Quality Resources*, https://www.smfm.org/checklists-and-safety-bundles).

[23] *Id.*

> Physicians at Southwestern Medical School in Dallas published a peer-reviewed study last summer of 26 women who were denied the option of labor induction or abortion for the potentially life-threatening situation of PPROM. Most of these women developed serious complications: 43 percent experienced uterine infection and hemorrhage; 32 percent required intensive care unit admission, surgery or hospital readmission; and only one of the babies remained alive at the time of publication. The journal article itself stated *that although the "current national standard of care [in this situation] allows… immediate delivery*," three physicians decided to deny these women the standard of care and then published the predictably poor outcomes. The authors misunderstood or misrepresented the Texas law, as they stated that it would punish a doctor with a felony for ending a pregnancy if the fetus had a heartbeat, "even in the setting of a maternal medical emergency," and reported that they could not intervene until there was an "immediate threat" to the mother's life.[24]

None of this means that the law is the source of the problem. Physicians have always been aware of the possibility of medical malpractice lawsuits and even criminal penalties where reasonable medical judgment is not appropriately exercised in some instances. *See, e.g.,* Tex. Health & Safety Code § 171.103. Yet, they have continued to function as physicians—caring for their patients in an increasingly litigious society, taking into account changing laws, patient needs, and best practice updates in their fields. ACOG has provided advice in the past for pregnancy cases involving

[24] *Id.* (emphasis added) (quoting Anjali Nambiar, Shivani Patel, Patricia Santiago-Munoz, 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. Obstet. & Gynecol. 648-50 (Jul. 2022)).

placenta accreta spectrum, critically ill patients in an intensive care unit, preeclampsia, chronic hypertension in pregnancy, and pregnancy and heart disease.[25] Nothing prevents ACOG from continuing to provide guidance for pregnancy treatment in the same way it provided guidance for its members in high-risk pregnancy situations before *Dobbs*. Stubbornly refusing to acknowledge what the law says because of a preference for legal elective abortion is disingenuous, and making Texas women and children suffer when guidance and compassionate treatment is available is unconscionable.

This Court has already highlighted a potential path forward for the Texas medical community to resolve any confusion:

> For an interpretation of the statute in the abstract, the law empowers the Texas Medical Board to issue rules to regulate the practice of medicine. Tex. Occ. Code §§ 152.001, 153.001. The Board could assess various hypothetical circumstances and provide best practices. It has provided such needed guidance in other contexts, such as its COVID-19, Guidance & Frequently Asked Questions (FAQs), available at https://www.tmb.state.tx.us/page/coronavirus."

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[25] See ACOG, *Gestational Hypertension and Preeclampsia: ACOG Practice Bulletin, Number 222*, 135 Obstet. & Gynecol. 237 (2020), *available at* https://journals.lww.com/greenjournal/abstract/2020/06000/gestational_hypertension_and_preeclampsia__acog.46.aspx; Alex Vidaeff, et al., *Chronic Hypertension in Pregnancy: ACOG Practice Bulletin, Number 203*, 133 Obstet. & Gynecol. 26 (2019), *available at* https://journals.lww.com/greenjournal/abstract/2019/01000/acog_practice_bulletin_no__203__chronic.50.aspx; Lisa M. Hollier, et al., *Pregnancy and Heart Disease: ACOG Practice Bulletin, Number 212*, 133 Obstet. & Gynecol. 320 (2019), *available at* https://journals.lww.com/greenjournal/abstract/2019/05000/acog_practice_bulletin_no__212__pregnancy_and.40.aspx; Alison G. Cahill, M.D., MSCI, et al., *Placenta Accreta Spectrum: ACOG Obstetric Care Consensus, Number 7*, 132 Obstet Gynecol 259 (2018), *available at* https://www.acog.org/clinical/clinical-guidance/obstetric-care-consensus/articles/2018/12/placenta-accreta-spectrum; ACOG, *Critical Care in Pregnancy: ACOG Practice Bulletin, Number 211*, 133 Obstet. & Gynecol. 303 (2019), *available at* https://pubmed.ncbi.nlm.nih.gov/31022122/.

In re State, No. 23-0994, 2023 WL 8540008, at *3 (Tex. Dec. 11, 2023). Once the Board has provided this guidance, it could also "request an opinion from the Attorney General, who has substantial civil-enforcement authority, regarding the legal effect of physicians' compliance with the Board's guidance." *Id.*; *see* Tex. Gov't Code § 402.042(b)(5).

This Court is not the right place to provide clarification on the standard of care in the case of pregnancy-related complications. The people of Texas have chosen to value the life of unborn children. They have also acknowledged that in some rare circumstances, a pregnant mother's life or health can be seriously threatened, and that where a physician exercises reasonable medical judgment in finding that to be true, the law does not prevent physicians from doing what is necessary to save the mother. Some people may wish the law were different, but that does not mean the Court may substitute its judgment for the Legislature's. Physicians must continue to adhere to the appropriate standard of care and stop blaming pro-life laws for their failure to intervene, and pro-abortion medical organizations should stop sowing confusion in furtherance of political goals, not patient safety.

PRAYER

The Court should vacate the district court's injunction.

Respectfully submitted.

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