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,

Defendants-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,

Plaintiffs-Appellees.

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

BRIEF OF DISABILITY RIGHTS ORGANIZATIONS AND PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES

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INTEREST OF AMICI CURIAE[1]

The interests of the following amici are implicated in this case because people with disabilities will be uniquely harmed by the confusion caused by the Texas abortion bans' narrow medical exceptions:

Disability Rights Education and Defense Fund ("DREDF") is a national cross-disability law and policy center that protects and advances the civil and human rights of people with disabilities through legal advocacy, training, education, and legislation and public policy development. It is committed to increasing accessible and equally effective health care for people with disabilities and eliminating persistent health disparities and barriers that affect the length and quality of their lives. DREDF's work is based on the knowledge that people with disabilities of varying racial and ethnic backgrounds, ages, genders, and sexual orientations are fully capable of achieving self-sufficiency and contributing to their communities with access to needed services and support.

Women Enabled International ("WEI") advances human rights and justice at the intersection of gender and disability to challenge exclusionary, unjust systems and support the leadership and center the voices of women, girls, and gender-diverse people with disabilities globally. It envisions a world where the

[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than amici curiae's pro bono counsel made a monetary contribution intended to fund the brief's preparation or submission.

human rights and inherent dignity of women, girls, and gender-diverse people with disabilities are fully realized and recognized. WEI pioneered the application of an intersectional gender and disability framework to international human rights advocacy and has effectively worked to amplify the voices of women and gender-diverse people with disabilities in spaces where their rights are discussed and where decisions affecting their lives are made.

The American Association of People with Disabilities ("AAPD") works to increase the political and economic power of people with disabilities and to advance their rights. A national cross-disability organization, AAPD advocates for full recognition of the rights of over 60 million Americans with disabilities.

The Autistic Self Advocacy Network ("ASAN") is a national, private, nonprofit organization, run by and for autistic individuals. ASAN provides public education and promotes public policies that benefit autistic individuals and others with developmental or other disabilities. ASAN's advocacy activities include combating stigma, discrimination, and violence against autistic people and others with disabilities; promoting access to health care and long-term supports in integrated community settings; and educating the public about the access needs of autistic people. ASAN takes a strong interest in cases that affect the rights of autistic individuals and others with disabilities to participate fully in community life and enjoy the same rights as others without disabilities.

Autistic Women & Nonbinary Network ("AWN") provides community support and resources for Autistic women, girls, transfeminine and transmasculine nonbinary people, trans people of all genders, Two Spirit people, and all people of marginalized genders or of no gender. AWN is committed to recognizing and celebrating diversity and the many intersectional experiences in our community. AWN's work includes solidarity aid, community events, publications, fiscal support, and advocacy to empower disabled and autistic people in their fight for disability, gender, and racial justice. We believe in reproductive health, rights, and justice.

The Bazelon Center for Mental Health Law ("Bazelon Center") is a non-profit legal advocacy organization dedicated to advancing the rights of people with disabilities, including people with mental health, developmental, and intellectual disabilities, for over 50 years. The Bazelon Center seeks a society where people with disabilities live with autonomy, dignity, and opportunities, supported by law, policy, and practices that help them reach their full potential.

Disability Rights Advocates ("DRA") is based in Berkeley, California, with offices in New York City, New York and Chicago, Illinois. DRA is a national nonprofit public interest legal center recognized for its expertise on issues affecting people with disabilities. DRA is dedicated to ensuring dignity, equality, and opportunity for people with all types of disabilities, and to securing their civil

rights. To accomplish those aims, DRA represents clients with disabilities who face discrimination or other violations of federal or state civil rights or federal constitutional protections in complex, system-changing class action and impact litigation. DRA is generally acknowledged to be one of the leading public interest disability rights litigation organizations in the country, taking on precedent-setting disability rights class actions across the nation.

The National Health Law Program ("NHeLP") is a national legal advocacy organization that works on behalf of low-income individuals and families to advocate for a health care system that will ensure all people have access to quality and comprehensive health care.

The Texas Civil Rights Project ("TCRP") is a nonprofit organization that advocates for the civil rights of Texans in and out of the courts. For more than thirty years, TCRP has brought a wide range of lawsuits on behalf of Texans with disabilities to ensure access to public accommodations and the ballot box, to ensure equitable access to immigration processes, and to challenge injustices in the criminal legal system. Through work with its clients and community partners, TCRP has grown increasingly concerned about the impact of Texas abortion bans on Texas's most vulnerable populations on whose behalf TCRP advocates--specifically including individuals who are incarcerated and those living in and passing through the Texas borderlands.

Professor Ruth Colker (JD) is a Distinguished University Professor and the Heck Faust Memorial Chair in Constitutional Law at the Moritz College of Law, The Ohio State University. She is the author of 16 books and over 50 law review articles. She is one of the country's preeminent scholars in constitutional law and disability discrimination. The United States Supreme Court has twice cited her work.

Professor Robyn M. Powell (PhD, JD) is an associate professor of law at the University of Oklahoma College of Law, where she teaches Family Law, Disability Law, Professional Responsibility, and Public Health Law. She is a nationally recognized expert on disability rights and justice for disabled parents. Dr. Powell's scholarship focuses on the intersection of disability law, family law, reproductive justice, and health policy. She examines how laws, policies, and stigma impede the reproductive autonomy and parenting rights of people with disabilities. Her research reveals how abortion restrictions disproportionately harm disabled people by infringing on their right to make decisions about their own bodies and futures. As both a scholar and a disabled woman, she champions disability perspectives in conversations about reproductive justice. Her work aims to advance the rights of disabled people to self-determination in all aspects of life, including parenthood and reproduction.

The interests of *amici* and their members and constituents are implicated in this case because people with disabilities will be uniquely harmed by the inconsistency of the statutes in question and resulting confusion regarding when doctors may provide abortion care to their patients under the medical exceptions to Texas' abortion bans. As a result of the statutes' confusing language, Texas medical professionals are deterred from providing necessary abortion care to people whose life, health, or fertility are put at risk by pregnancy for fear of criminal prosecution, harsh civil penalties, and/or revocation of their medical license. This reluctance to provide necessary medical care will disproportionately harm people with disabilities because they are at higher risk for severe pregnancy- and birth-related complications and death than non-disabled people. *See generally* Jessica Gleason et al., *Risk of Adverse Maternal Outcomes in Pregnant Women with Disabilities* ("*Gleason, Adverse Maternal Outcomes*"), JAMA NETWORK OPEN (Dec. 15, 2021), https://tinyurl.com/58fxzvh9 . These higher rates of severe pregnancy-related morbidities and maternal mortality for people with disabilities mean that there is a higher probability that people with disabilities will need to access abortion care under the medical exceptions to the abortion bans. As such, the disability community has a vested interest in the resolution of this uncertainty as well as a broad interpretation of the scope of the medical exceptions.

The interests of *amici* and their members and constituents are also implicated in this case because of the importance of reproductive and bodily autonomy for the disability community, considering the dark history in the United States of reproductive oppression of people with disabilities. This history included eugenic policies favoring forced institutionalization, forced sterilization, and limitations on the ability of people with disabilities to get married and have sex before the age of 45. *See* Robyn Powell, *Disability Reproductive Justice*, 170 UNIV. PENN. L. REV. 1851, 1856-1860 (2022) https://tinyurl.com/yrdpuwvr (detailing the history of reproductive oppression of people with disabilities in the United States). In the late nineteenth century and early twentieth century, eugenicists "endorsed policies that encouraged procreation among favored groups of people while restricting procreation, including compulsory sterilization, segregation of institutionalized individuals by sex, and prohibition of marriage of those deemed to have 'hereditary defects.'" *Id*. at 1857 (citing Adam Cohen, IMBECILES: THE SUPREME COURT, AMERICAN EUGENICS, AND THE STERILIZATION OF CARRIE BUCK 5 (2016)). For instance, in 1927, the Supreme Court held that forced sterilization of the "feeble-minded" was constitutional. *Buck v. Bell*, 274 U.S. 200, 205, 207 (1927). Following *Buck*, over 70,000 Americans were forcibly sterilized. *See The Supreme Court Ruling That Led To 70,000 Forced Sterilizations*, NAT'L PUB. RADIO (Mar. 7, 2016), https://tinyurl.com/4peh4cbm.

Contemporarily, women with disabilities are far more likely to face sexual violence than their non-disabled counterparts, making access to abortion care an even more essential part of preserving the bodily autonomy of people with disabilities. *See* Erika Harrell, *Crime Against Persons with Disabilities, 2009-2019–Statistical Tables*, U.S. DEP'T OF JUST. 1, 4 (2021), https://tinyurl.com/muzwjs84 (noting that women with disabilities are greater than three times more likely to be sexually assaulted or raped than people without disabilities.)

This historical and contemporary context makes the legal protection of abortion under the medical exceptions to abortion bans absolutely necessary. Ideally, people with disabilities would be entitled to get abortions without having to experience a medical emergency that threatens their health or lives, but the Supreme Court's precedent-thwarting decision in *Dobbs v. Jackson Women's Health Org.* stripped Americans of this right. *See generally, Dobbs*, 142 S. Ct. 2228, 2283 (2022). In light of this reality, the medical exceptions to abortion bans are imperative to protecting the health and lives of people with disabilities who are at higher risk for severe pregnancy and birth-related complications and death than non-disabled people. Given these considerations and the following arguments, *amici* respectfully urge the Court to protect the lives, health, fertility, and bodily autonomy of pregnant people with disabilities by affirming the District Court's grant of a temporary injunction enjoining the enforcement of the bans against

physicians providing abortion care that they have determined, in their good faith judgment, to be necessary in light of the pregnant person's health risks.

BACKGROUND

This case considers the language of Texas's abortion bans, codified at 1925 Tex. Penal Code Arts. 1191–1194, 1196 (the "Pre-Roe Ban"), Tex. Health & Safety Code §§ 170A *et seq*. (the "Trigger Ban"), and Tex. Health & Safety Code §§ 171.002, 171.203-205 ("S.B. 8"). More specifically, this case considers the "medical exceptions" to these Texas abortion bans.

As detailed in the party briefs, the medical exceptions to the several abortion bans are substantially inconsistent and differently worded. Further, the State has provided no guidance on the meaning of important words that affect the scope of the exceptions and do not have a consistent meaning in medical practice (for example, "risk" versus "serious risk"). The Pre-Roe Ban contains an exception for "an abortion procured or attempted by medical advice for the purpose of saving the life of the mother." 1925 Tex. Penal Code Art. 1196.[2] Punishment for violation of the Pre-Roe ban is jail time ranging from 2 to 10 years. 1925 Tex. Penal Code Art. 1191. The medical exception to the Trigger Ban applies when:

> (1) the person performing, inducing, or attempting the abortion is a licensed physician; (2) in the exercise of reasonable medical judgment, the pregnant

[2] The Supreme Court found the ban to be unconstitutional in 1973 in *Roe v. Wade*, but Defendant Ken Paxton, the Attorney General of Texas, took the position that the Pre-Roe ban was immediately enforceable after *Roe v. Wade* was overturned in *Dobbs*. PLS. AM. PET. ¶ 319.

> female on whom the abortion is performed, induced, or attempted 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; and (3) the person performs, induces, or attempts the abortion in a manner that, in the exercise of reasonable medical judgment, provides the best opportunity for the unborn child to survive unless, in the reasonable medical judgment, that manner would create: (A) a greater risk of the pregnant female's death; or (B) a serious risk of substantial impairment of a major bodily function of the pregnant female.

Tex. Health & Safety Code §170A.002(b). The medical exception does not apply when the abortion is performed to prevent a pregnant person from harming themselves. Tex. Health & Safety Code §170A.002(c). "Reasonable medical judgment" is defined in the Trigger Ban 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). Punishment for a violation of the Trigger Ban includes civil fines, criminal prosecution, and/or medical license revocation. Tex. Health & Safety Code §§ 170A.005, 170A.004, 170A.007.

Finally, the medical exception under S.B. 8 applies when "a physician believes a medical emergency exists." Tex. Health & Safety Code §171.205. A "medical emergency" is defined as "a life-threatening physical condition aggravated by, caused by, or arising from a pregnancy that, as certified by a physician, places the woman in danger of death or a serious risk of substantial impairment of a major bodily function unless an abortion is performed." Tex.

Health & Safety Code §171.002(3). All abortions performed under the exception must be documented in detail by the performing physician and reported to the state. Tex. Health & Safety Code §§ 171.008, 171.205, 245.011(c)(10), (11). Violators are subject to civil penalties as well as a "bounty hunting" civil enforcement scheme that allows any person to seek statutory damages of $10,000 or more for each abortion performed by the violator. Tex. Health & Safety Code §§ 171.207-211. While the Trigger Ban and S.B. 8 distinguish medical care for purposes of treating an ectopic pregnancy or spontaneous abortion (miscarriage) from induced abortion covered under these bans, the Pre-Roe ban makes no such distinction. Tex. Health & Safety Code §245.002(1).

As illustrated by the above summary, there are significant inconsistencies in the language of the exceptions. These inconsistencies, a lack of clarity about the meaning of significant words in the statutory scheme (for example, the use of "risk" or "serious risk" in relation to health in both laws compared to the use of "risk of death" in Trigger Ban and "danger of death" in S.B. 8) and inconsistent language about physicians' discretion and intent under the medical exceptions have led to uncertainty in the medical community in Texas about the scope of the exceptions. As a result, physicians in Texas are deterred from providing abortions under the medical exceptions in light of the professional, civil, and criminal

penalties they may face if their interpretation of the exceptions is wrong. People with disabilities are disproportionately harmed as a result.

SUMMARY OF THE ARGUMENT

This uncertainty and the resulting chilling effect on physicians' willingness to provide abortions under the medical exceptions to Texas' abortion bans disproportionately harms people with disabilities who are more likely to rely on the medical exceptions than non-disabled people. The medical exceptions are more likely to be utilized by disabled people for several reasons: people with disabilities are more at risk for severe maternal morbidities and maternal mortality during their pregnancy than non-disabled people; pregnancy can exacerbate pre-existing conditions and disability-related health outcomes for people with disabilities; and non-disabled people may develop pregnancy-related disabilities or health conditions during pregnancy that put their life and health at risk. All these realities make abortion access under the medical exceptions to the abortion bans incredibly important to protect the lives, health, and fertility of people with disabilities.

Further, people with disabilities already face a multitude of barriers to accessing health care, so the additional uncertainty regarding the scope of the medical exceptions to the abortion bans increases the likelihood of total denial of health-preserving and life-saving care. Additionally, restricting access to abortion care does not protect people with disabilities or advance any claimed state interest

in preventing discrimination—it exacerbates the discrimination that disabled people face by essentially forcing them to carry potentially life-threatening pregnancies to term and stripping them of bodily autonomy and self-determined futures. Finally, people with disabilities have the right to protect their lives, which is inclusive of their health, under the Texas Constitution. As such, access to abortion care under the medical exceptions to the Texas abortion bans is essential to protecting the lives of people with disabilities who are more likely to need abortion care due to serious medical complications related to pregnancy. As such, the Court must clarify that the scope of the medical exceptions includes life-saving and health-preserving care that a provider deems necessary in their good faith, professional discretion.

ARGUMENT

I. TEXAS' ABORTION BANS AND THE CURRENT CONFUSION REGARDING THE APPLICABILITY OF THE MEDICAL EXCEPTIONS HAVE CAUSED A HEALTH CARE CRISIS THAT DISPROPORTIONATELY HARMS PEOPLE WITH DISABILITIES.

Texas' abortion bans at issue in this case threaten both the freedom and property of physicians who perform abortions by imposing felony life sentences, revocation of medical licenses, and harsh civil penalties that can be enforced by the State or private citizens. These statutes and the uncertainty about their medical exceptions leave many pregnant people, especially those with disabilities, without

timely access to necessary medical care due to the atmosphere of fear providers face from these laws. People with disabilities become pregnant at roughly equivalent rates to those without disabilities but have a much higher risk for severe pregnancy and birth-related complications and death, and, thus, are more likely to need access to abortion care under the medical exception. *See* Gleason, *Adverse Maternal Outcomes* at 2. Therefore, it is imperative that doctors can confidently use their professional medical judgment to provide life-saving and health-preserving abortion care to people with disabilities without fear of penalty or prosecution.

A. People With Disabilities Are More At Risk For Severe Maternal Morbidities And Maternal Mortality During Their Pregnancies Than Non-Disabled People.

The consequences of being forced to continue a pregnancy can be especially severe for people with disabilities, who are at higher risk of complications during pregnancy or childbirth due to a spectrum of disabilities and related socioeconomic factors. *See* Willi Horner-Johnson et al., *Pregnancy among U.S. Women: Differences by Presence, Type, and Complexity of Disability*, 214(4) AM. J. OBSTET. & GYNECOL. 529e.1, 529e.8 (Apr. 2016). Pregnant people with physical, intellectual, and sensory disabilities have a significantly higher risk of nearly all adverse maternal outcomes. *See* Gleason, *Adverse Maternal Outcomes* at 4. These potentially life-threatening complications include more than twice the risk for

severe preeclampsia; six times the risk for thromboembolism (blood clots in the lungs or veins of the legs); four times the risk for cardiovascular events (including heart attacks and other disorders of the heart and blood vessels); and nearly three times the risk for infection. *Id.* at 4—6. Even more concerningly, pregnant people with disabilities are eleven times more at risk for maternal mortality than those without disabilities. *Id*. at 5—6.

Specific types of disability have also been linked with life- and health-threatening pregnancy complications. People with sensory, intellectual, and developmental disabilities face an increased risk of gestational diabetes and hypertensive disorders, as well as a significant risk for cesarean delivery. Lesley A. Tarasoff, et al., *Maternal Disability & Risk for Pregnancy, Delivery, and Postpartum Complications: A Systematic Review & Meta-Analysis*, AM. J. OBSTET. & GYNECOL. (Jan. 2020), https://tinyurl.com/h45fexs7. People with physical disabilities may experience "more caesarean complications than nondisabled [people], because they are more prone to infections and poor reactions to anesthesia, more likely to have prior abdominal operations, and less able to perform the tasks necessary to recover from surgery or adapt to the resulting loss of function." Sonja Sharp, *Disabled Mothers-to-Be Face Indignity: 'Do you have a man? Can you have sex?'*, LOS ANGELES TIMES (Sept. 30, 2021), https://tinyurl.com/2y3ccnen (noting that, despite these risks, "the reflexive thing

[for health care providers] to do is deliver by C-section"). Having epilepsy is linked to pregnancy complications, including increased risk of death, preeclampsia, premature delivery or rupture of membrane, and chorioamnionitis, an infection of the placenta and the amniotic fluid. Sima I. Patel & Page B. Pennel, *Mgmt. of Epilepsy During Pregnancy: An Update*, 9(2) THERAPEUTIC ADVANCES IN NEUROLOGICAL DISORDERS 118, 124 (2016). People with diabetes have increased risks of "spontaneous abortion, fetal anomalies, preeclampsia, fetal demise, macrosomia, neonatal hypoglycemia, and neonatal hyperbilirubinemia, among others," Am. Diabetes Ass'n, *Standards of Med. Care in Diabetes—2018*, 41 DIABETES CARE S137, S137 (2018). Pregnant people with achondroplasia, the most common type of dwarfism, have an increased risk of cardiac abnormalities, recurrent respiratory infections, issues with anesthetics, increased cesarean delivery rates, and higher preterm birth risk. Rauf Melekoglu et al., *Successful obstetric and anaesthetic management of a pregnant woman with achondroplasia*, BMJ CASE REP. 2017 (Oct. 25, 2017), https://tinyurl.com/26239dyj.

If the current chaos of Texas' abortion bans and their confusing medical exceptions continues, people with disabilities will be one of the groups most harmed. The confusing, inconsistent, and limited health exceptions of the statutes do little to remedy concerns that patients must be actively dying to receive abortion care without penalty. Requiring a pregnant person with a disability to deteriorate

before receiving necessary care is contrary to any other area of medicine and will certainly result in worse health outcomes or even death. With higher rates of maternal mortality and severe pregnancy complications, people with disabilities will face the worst outcomes as a result of the lack of clarity regarding the medical exceptions scope.

B. Pregnancy Can Worsen Disability-Related Health Outcomes And Pre-Existing Conditions For People With Disabilities.

Pregnancy can often worsen the health outcomes for people with disabilities by exacerbating disability-related symptoms, contributing to pregnancy-related complications, or requiring the discontinuation of medications for their disability during pregnancy due to risks of fetal harm. For example, a recent study found that the cessation of a highly effective and well-tolerated treatment for relapsing-remitting multiple sclerosis (MS), Natalizumab, directly before or during pregnancy resulted in MS relapses during pregnancy or postpartum. Kerstin Hellwig et al. *Multiple Sclerosis Disease Activity and Disability Following Discontinuation of Natalizumab for Pregnancy*, JAMA NETWORK OPEN (Jan. 24, 2022), https://tinyurl.com/yb9x4y7c. People with disabilities that affect heart health can also face life-threatening risks from pregnancy, which increase stress on the heart and circulatory system and can worsen their health condition. *Heart*

conditions and pregnancy: Know the risks, MAYO CLINIC (Aug. 10, 2023), https://tinyurl.com/367cw7.

People with mental health disabilities are often advised or required to avoid or discontinue psychiatric medication for the duration of pregnancy due to the risk of harm to the fetus. However, many of these medications cannot be discontinued immediately without risking severe withdrawal side-effects. For example, people with bipolar disorder are often advised to discontinue mood-stabilizing medication during pregnancy. During pregnancy, 70.8% of the women with bipolar disorder experienced at least one mood episode, and the risk of recurrence was significantly higher in women who discontinued treatment with mood stabilizers (85.5%) than those who maintained treatment (37.0%). Adele C. Viguera, *Risk of recurrence in women with bipolar disorder during pregnancy: prospective study of mood stabilizer discontinuation*, AM. J. PSYCHIATRY 2007 Dec;164(12):1817-24; quiz 1923. doi: 10.1176/appi.ajp.2007.06101639. Abrupt cessation of benzodiazepines, which are commonly used to treat severe anxiety, can cause "life-threatening" symptoms, and therefore, most patients are required to taper the medication over eight to twelve weeks. Jonathan Brett & Bridin Murnion, *Mgmt. of Benzodiazepine Misuse & Dependence*, 38(5) AUSTRALIAN PRESCRIBER 152, 154 (Oct. 2015) (risk of seizures); Jennifer Pruskowski, et al., *Deprescribing & Tapering Benzodiazepines #355*, 21(7) J. PALLIATIVE MED. 1040, 1040 (2018).

The Texas medical exceptions create continued confusion for providers who must assess when they may provide necessary abortion care under an environment of legal uncertainty. For individuals with disabilities, pregnancy can result in long-term or potentially life-threatening health consequences that exacerbate their disabilities. People with psychological conditions, for example, may suffer acute mental health crises when forced to carry a health- or life-threatening pregnancy, especially if they have been required to discontinue medication. Many people with disabilities would face severe risks to their physical and mental health without the ability to terminate a pregnancy, and very few of those risks can be resolved under the Texas statutes' narrow and inconsistent medical exceptions.

C. Non-Disabled Individuals Can Develop Pregnancy-Related Disabilities Or Health Conditions While Pregnant That Put Their Health And Life At Risk.

Pregnancy can result in the development of health- or life-threatening conditions or disabilities for individuals without pre-existing disabilities; therefore, the ability to access abortion without delay is essential healthcare. The vast majority of maternal disabilities stem from health complications that are a direct result of pregnancy or childbirth, including severe bleeding, infection, obstructed or prolonged labor, and pregnancy-induced hypertension, but can also be caused by illnesses that are aggravated by pregnancy, such as anemia, cardiac disease, hepatitis, sexually transmitted infections (STIs, including HIV/AIDS), and

diabetes. Lori Ashford, *Hidden Suffering: Disabilities From Pregnancy and Childbirth in Less Developed Countries*, POPULATION REFERENCE BUREAU (Aug. 2002), https://tinyurl.com/2sjuxehk. For example, one study had 138 participants report pregnancy as the cause for their chronic physical disability even when researchers specifically requested participants not to report pregnancy-related difficulties. Lisa Iezzoni et al., *Conditions causing disability and current pregnancy among US women with chronic physical disabilities*, 52(1) MED. CARE. 2014 JAN 20-5. Additionally, gestational diabetes can be associated with progression to type 1 or type 2 diabetes after delivery. Anna-Maaria Auvinen et al., *Type 1 and type 2 diabetes after gestational diabetes: a 23 year cohort study,* DIABETOLOGIA (Jul. 2020), https://tinyurl.com/2efzswuu.

Pregnancy can result in life-threatening and/or health-harming conditions or disabilities that continue well after the pregnancy, even for individuals who had no prior disability, which Texas' current medical exceptions do not consider. Physicians must be able to provide care to patients and counsel them on the best medical options to preserve their health and lives without fear of retribution from the state or other private citizens. The confusing language of the medical exceptions has a chilling effect on providers' ability to provide this quality care, which will result in worse health outcomes for both people with disabilities and people who may develop disabilities or health conditions as a result of pregnancy.

II. TEXAS' ABORTION BANS AND THE CURRENT CONFUSION REGARDING THE APPLICABILITY OF THE MEDICAL EXCEPTIONS IMPOSE ESPECIALLY SEVERE HARMS ON PEOPLE WITH DISABILITIES, WHO ALREADY FACE WIDESPREAD DISCRIMINATION, INCLUDING IN HEALTH CARE.

Individuals with disabilities already face a host of barriers to receiving needed abortion care, and these barriers are only exacerbated by the lack of clarity in Texas' medical exceptions. As noted above, pregnancy can cause dangerous health consequences for people with disabilities, which makes access to care under the medical exceptions even more important. But as it stands, the confusing medical exceptions to Texas' abortion bans create additional barriers to care for people with disabilities who already experience extremely inequitable access to health care services.

According to the Centers for Disease Control, people with disabilities encounter attitudinal, communication, physical, policy, programmatic, social and transportation barriers to accessing health care. *Disability Barriers to Inclusion*, CTRS. FOR DISEASE CONTROL & PREVENTION (accessed Nov. 9, 2023), https://tinyurl.com/2skdxpaa. It is no surprise, then, that health care providers generally underserve people with disabilities due to "a lack of provider competency on the needs of people with disabilities, lack of accommodations in [facilities], lack of transportation accessibility, and centuries of abuse and ill treatment by the medical establishment that has undermined trust." Autistic Self

Advocacy Network*, Access, Autonomy and Dignity: Abortion Care for People with Disabilities* at 12 ("ASAN, *Abortion Care*") (citing U.S. Centers for Medicare & Medicaid Services, *Improving Health Care for Adults with Disabilities: An Overview of Federal Data Sources* at 1 (Dec. 2020), https://tinyurl.com/yckj4dnh ("Adults with disabilities are almost twice as likely to report unmet health care needs due to barriers they face in accessing care.")).[3] Additionally, a 2022 study exploring doctors' views towards patients with disabilities revealed that many doctors harbor explicitly discriminatory attitudes towards people with disabilities that often bleed into their treatment of these patients:

> Many physicians also expressed explicit bias toward people with disabilities and described strategies for discharging them from their practices. Physicians raised concerns about the expense of providing physical and communication accommodations, including insufficient reimbursement for physicians' efforts and competing demands for staff time and other practice resources. Many participants described caring for very few patients who need accommodations, with little acknowledgment that the barriers to obtaining care and inability to track or respond to accommodation needs could lead to an under-identification of the number of people with disabilities who seek care.

[3] The inadequacy of health care for patients with disabilities disparately impacts BIPOC (Black, Indigenous, People of Color) and LGBTQ people with disabilities, who face additional barriers in accessing health care stemming from "a history and current practice of abuse, systemic racism, and bias in health care that also undermines trust in providers." ASAN, Abortion Care at 12. For instance, BIPOC people with disabilities endure "lack of language access, [] not having their symptoms taken seriously, [ ] having their expressed health goals ignored," and much more. *Id*. at 10; *see also* Autistic Self Advocacy Network, *Access, Autonomy & Dignity: People with Disabilities and the Right to Parent* at 8 (Sept. 2021), https://tinyurl.com/32xavr95 ("ASAN, Right to Parent") (noting the lack of access to high-quality, culturally responsive prenatal health care is "further exacerbated by the structural racism driving the crisis in maternal health outcomes in the United States and the disproportionate harm to BIPOC birthing people").

Tara Lagu et al., '*I Am Not the Doctor For You': Physicians' Attitudes About Caring For People With Disabilities*, 10 HEALTH AFFAIRS VOL. 41 1387, 1392-1393 (2022), https://tinyurl.com/cve6t7r5. Further, many physicians' offices lack accessible medical equipment, meaning "many people with mobility impairments cannot get on to examination tables and chairs, be weighed, or use X-ray and other imaging equipment." Elizabeth Pendo, *Reducing Disparities Through Health Care Reform: Disability and Accessible Medical Equipment*, 4 UTAH L. REV. 1057 (2010), https://tinyurl.com/muxft93j.

People with disabilities receive particularly inadequate care when it comes to reproductive health. They encounter "frequent discrimination from providers who are ignorant of the specific challenges they face," particularly in the context of maternal and prenatal health care. ASAN, *Right to Parent* at 9. Providers routinely are unwilling to provide reproductive health care to people with disabilities or are unable to competently do so, including because they are "ill equipped to offer high-quality, culturally responsive care" and do not dedicate the resources necessary to understand disability-specific concerns related to pregnancy and childbirth. *Id.*; *see also* Lesley A. Tarasoff, "*We don't know. We've never had anybody like you before": Barriers to Perinatal Care for Women with Physical Disabilities*, 10(3) DISABILITY HEALTH J. 426, 426-33 (July 2017), https://tinyurl.com/2k4dbcbs; *see also* Nat'l Council on Disability, *The Current State of Health Care for People with*

Disabilities ("NCD*, Current State of Health*") (2009), https://tinyurl.com/bparvcat. Providers also express "negative attitudes" about people with disabilities being pregnant and becoming parents. ASAN, *Right to Parent* at 8; *see also* Robyn Powell, *Disabled People Still Don't Have Reproductive Freedom*, DAME (July 26, 2021), https://tinyurl.com/3y3jbjzr (reporting the experience, as a person with disability, of being offered multiple hysterectomies by doctors on "an assumption that [she] should not have children" and discussing the "enduring belief that disabled people . . . are unfit to raise children"). As a result, people with disabilities often "are deterred from accessing prenatal care" and other forms of reproductive health care. ASAN, *Right to Parent* at 8.

Confusion concerning the medical exceptions to Texas' abortion bans deter physicians from providing needed abortion care and exacerbate the divide between medical providers and their disabled patients. Providers were already failing to meet adequate standards of care in the provision of reproductive healthcare for people with disabilities before the *Dobbs* decision, and people with disabilities are likely to experience a worsening of reproductive healthcare outcomes post-*Dobbs* due to a combination of physicians' lack of clarity about the scope of the exceptions, and lack of understanding about disability-specific concerns for pregnancy. Physicians' deterrence from providing needed abortion care under the medical exceptions will further undermine trust in healthcare providers for people

with disabilities who have experienced a history of bias and barriers in the health care system. Therefore, Texas' medical exceptions must have a clear standard that includes both health-preserving and live-saving care to ensure that people with disabilities can access necessary health care.

Where pregnant people with disabilities are unable to access health- or life-saving abortion care in their own state, it may be necessary to travel to another state where they can lawfully access this needed health care. According to a 2019 study, the average resident was expected to experience a 249-mile increase in travel distance to access abortion care once Roe was overturned. *See* David. S. Cohen et al., *The New Abortion Battleground* 123 Colum. L. Rev. 1, 11 (2023), https://tinyurl.com/mspnxban (citing Caitlin Myers, Rachel Jones & Ushma Upadhyay, *Predicted Changes in Abortion Access and Incidence in a Post-Roe World*, 100 Contraception 367, 369 (2019)). This reality is especially troublesome for people with disabilities who face pervasive transportation barriers, even within their city of residence, including "lack of public transportation in suburban and rural areas, difficulty scheduling rides, and difficulty relying on paratransit to get to appointments on time" that affect their ability to access medical care generally. *See* NCD, *Current State of Health*. For people with disabilities who must travel out of their city or state of residence to access necessary care, inaccessible air travel is a common problem. Amanda Morris, *Embarrassing, Uncomfortable and Risky:*

What Flying is Like for Passengers Who Use Wheelchairs, NEW YORK TIMES (Aug. 8, 2022), https://tinyurl.com/9yh8pm2y (reporting the experience, as a person with a disability and wheelchair user, of being physically dropped by airline employees assisting him in transferring to his seat, being unable to use airplane restrooms, receiving no help with his checked luggage, and having to wait extended periods of time for assistance getting on and off the plane); *see also* Ned S. Levi, *Airlines Damage Passenger Wheelchairs and Lose Mobility Devices at a Rate of More than 200 a Week*, TRAVELERS UNITED (Aug. 7, 2023), https://tinyurl.com/yht3eczp (noting that in 2022, U.S. airlines reported 11,389 mishandled wheelchairs and scooters). While non-disabled pregnant people may be able to travel out of state on short notice to receive needed abortion care, pervasive transportation barriers leave people with disabilities with an increased need for localized care that is protected by Texas' medical exceptions to the abortion bans and is inclusive of both their lives and health.

Further, people with disabilities face a host of financial barriers to care. People with disabilities are two times more likely to live in poverty than non-disabled people, and federally funded Medicaid or Medicare programs are the primary insurance providers for people with disabilities in the United States. Pam Fessler, *Why Disability and Poverty Still Go Hand In Hand 25 Years After Landmark Law*, NAT'L PUBLIC RADIO (Jul.23, 2015),

https://tinyurl.com/2p995psw; *see also* Nat'l Council on Disability, *Rocking the Cradle: Ensuring the Rights of Parents with Disabilities and Their Children* 178 (Sept. 27, 2012), https://tinyurl.com/5zsh9xam ("NCD, *Rocking the Cradle*"). Under the Hyde Amendment, federal funds may not be used to provide abortion care except in cases of rape, incest, or life endangerment of the pregnant person. Congressional Research Service, *The Hyde Amendment: An Overview* 1 (2022), https://tinyurl.com/3smhyes8. Some states provide additional state funds for insurance coverage of abortion care for those covered by Medicaid, but Texas does not. *State Funding of Abortions Under Medicaid*, KAISER FAMILY FOUNDATION (Jun. 1, 2023), https://tinyurl.com/msfwxrd6. As such, people with disabilities who are likely to be covered by Medicaid lack insurance coverage for medically necessary abortions if they are not at risk of death. This means that abortion care to preserve the health of the pregnant person may be financially inaccessible to people with disabilities who are covered by Medicaid or Medicare, which may have devastating consequences. Because of the confusion regarding the scope of the medical exceptions and the resulting chilling effect on the provision of abortion care under the exceptions in Texas, people with disabilities who need to access health- or fertility-preserving care face the compounding financial barriers of paying for the procedure itself and paying for out-of-state travel (if travel is accessible in the first place). Since people with disabilities are more likely to live

in poverty than non-disabled people, the compounding costs may result in a total denial of necessary care for people with disabilities living in Texas.

The combined effect of these many different barriers to utilizing health care generally and the chilling effect on the provision of abortion care due to Texas' confusing medical exceptions mean that people with disabilities are at extremely high risk of total denial of medically necessary abortion care within Texas, while facing substantial travel and financial barriers to accessing such health-preserving abortion care outside of Texas. As such, the Court must clarify that the scope of the medical exceptions includes both life-saving and health-preserving care that a provider deems necessary in their good faith, professional discretion.

III. RESTRICTING ACCESS TO ABORTION CARE DOES NOT PROTECT PEOPLE WITH DISABILITIES OR ADVANCE ANY CLAIMED STATE INTEREST IN OPPOSING DISCRIMINATION.

Defendants argue that the abortion bans and their medical exceptions are subject to rational basis review because abortion "is not a fundamental constitutional right" after the United States Supreme Court's decision in *Dobbs*. DEFS.' AM. PLEA AND RESP. at 42 (citing *Dobbs v. Jackson Women's Health Org*. 142 S. Ct. 2228, 2283 (2022). The State further argues that the medical exceptions pass rational basis review because the state has a legitimate government interest in the "prevention of discrimination on the basis of race, sex, or disability." *Id*. at 43 (citing *Dobbs*, 142 S. Ct. at 2284).

Making it incredibly difficult for a group of pregnant people, including pregnant people with disabilities, to access abortion does not protect people with disabilities from discrimination, as the State contends. Rather, the medical exceptions' narrowness and inconsistency conflict with core tenets of the disability rights movement, including bodily autonomy and reproductive freedom. As leading disability rights activist Rebecca Cokley has aptly observed, "The right to decide what happens to our bodies is a fundamental principle in the disability community, and with good reason." Rebecca Cokley, *The Anti-Abortion Bill You Aren't Hearing About*, Rewire News Group (May 20, 2019), https://tinyurl.com/mw96mb32 ; *see also* ASAN, *Abortion Care* at 4 ("People with disabilities understand all too well how society, the medical establishment, other systems, and even other individuals feel ownership over their own bodies . . . [and] are frequently told how to live, whether they can or should have children, whether they can or should have sex, what interventions they 'need' for their bodies or minds, among other intrusions.").

As scholars and disability rights advocates have underscored, paternalistic justifications for infringing on the autonomy and self-determination of people with disabilities are patronizing and dehumanizing. *See* Samuel R. Bagenstos & Margo Schlanger, *Hedonic Damages, Hedonic Adaptation, and Disability*, 60 VAND. L. REV. 745, 795 (2007), https://tinyurl.com/45d8nj6s ("[P]aternalism has

historically been one of the most significant contributors to the disadvantages people with disabilities experience. Non-disabled parents, teachers, doctors, rehabilitation counselors, employers, and others have arrogated to themselves the prerogative to decide what is best for people with disabilities.").

Far from protecting people with disabilities from discrimination, the abortion bans and their narrow and confusing medical exceptions disproportionately threaten the health and lives of people with disabilities by making it nearly impossible for them to access life-saving or health-preserving abortion care. Measures like pro-information campaigns about disabilities, improving the quality of education for children with disabilities, strengthening the State's support for people with disabilities, and ending forced institutionalization, all would advance the lives of people with disabilities without coercion. Texas, however, has declined to adopt many such measures. Instead, it seeks to co-opt the notion of disability rights to dismantle reproductive rights. But in invoking disability rights for this end, the State fails to recognize that both the disability rights movement and the reproductive justice movement are united in the pursuit of autonomy, dignity, equality, and self-determination. Instead, the bans and their confusing medical exceptions exacerbate discrimination against people with disabilities by worsening reproductive care access disparities and endangering lives.

IV. DISABLED PEOPLE HAVE THE RIGHT TO PROTECT THEIR LIFE AND HEALTH UNDER THE TEXAS CONSTITUTION.

A. The Texas Constitution Protects Pregnant People With Disabilities From Deprivation Of Their Right To Life.

The Texas Constitution clearly proclaims that "no citizen of this State shall be deprived of life." Tex. Const. art. I, §19. As this Court has held, "legal rights [are] contingent upon live birth" under common-law rule, and this legal right would include a right to life for a person from birth to death. *Fort Worth Osteopathic Hosp., Inc. v. Reese*, 148 S.W.3d 94, 96 (Tex. 2004); *see also Witty v. Am. Gen. Capital Distrib., Inc.*, 727 S.W.2d 503, 506 (Tex. 1987). Therefore, it should be indisputable that a pregnant person – including a pregnant person with disabilities – holds a right to life which cannot be infringed upon by the State's demands to carry a life-threatening pregnancy.

Furthermore, the abortion bans and their unclear medical exceptions cannot survive any level of constitutional review. Where a fundamental right or suspect class is at issue, state action must "be narrowly tailored to serve a compelling government interest." *Richards v. League of United Latin Am. Citizens*, 868 S.W.2d 306, 311 (Tex. 1993). Fundamental rights are derived from the "express and implied protections of personal liberty recognized in federal and state constitutions." *Spring Branch I.S.D. v. Stamos*, 695 S.W.2d 556, 560 (Tex.1985). It would be difficult to find a right more deeply rooted than a person's right to life,

which is explicitly recognized by the Texas Constitution. While the State may argue that they have an interest in protecting "potential life," it is the actual life of the pregnant person that the State has a clear interest in protecting. The status of pregnancy does not result in the surrender of a person's legal rights, especially their right to life, inclusive of their health. There is no other form of life-saving healthcare to which Texas has denied its citizens clear access. People with disabilities, who face much higher rates of severe maternal morbidities and maternal mortality, have a vested right to protect their lives, inclusive of their health, under the Texas Constitution.

B. The Texas Constitution Gives Texans an Affirmative Right to Equality That is Violated by the Bans and Their Confusing Medical Exceptions

The Texas Constitution also explicitly protects "equal rights." Tex. Const. art. 1, § 3. This is an affirmative, inherent right guarantee that is superior to the state's police powers. Under Texas' abortion bans and confusing medical exceptions, people with disabilities are not granted equal protection of the laws. Because people with disabilities are more likely than non-disabled people to experience severe maternal morbidities and maternal mortality, people with disabilities are more likely than their non-disabled counterparts to need access to abortion care under the medical exceptions to the abortion bans. As such, the narrow and confusing promulgation of the exceptions discriminates against people

with disabilities by disproportionately denying them life-saving and health-preserving care.

CONCLUSION

In light of these considerations, *amici* respectfully request that the Court affirms the district court's temporary injunction and denial of the plea to the jurisdiction in order to protect the lives and health of pregnant people and pregnant people with disabilities.

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CERTIFICATE OF COMPLIANCE

I certify that this Brief complies with the typeface requirements of Tex. R. App. P. 9.4(3) because it has been prepared in a conventional typeface no smaller than 14-point for text and 12-point for footnotes. This document also complies with the word-count limitations of Tex. R. App. P. 9.4(i), if applicable, because it contains 9,041 words, excluding any parts exempted by Tex. R. App. P. 9.4(i)(l).

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CERTIFICATE OF SERVICE

A true and correct copy of the foregoing brief has been served on counsel of record for both parties through electronic service on November 21, 2023.

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