No.14-50928

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

WHOLE WOMEN'S HEALTH; AUSTIN WOMEN'S HEALTH CENTER; KILLEEN WOMEN'S HEALTH CENTER; NOVA HEALTH SYSTEMS, doing business as Reproductive Services; SHERWOOD C. LYNN, JR., MD., on behalf of themselves and their patients; LENDOL L. DAVIS, MD., on behalf of themselves and their patients,

Plaintiffs-Appellees-Cross-Appellants,

v.

DAVID LAKEY, M.D., Commissioner of the Texas Department of State Health Services, in his Official Capacity; MARI ROBINSON, Executive Director of the Texas Medical Board, in her Official Capacity,

Defendants-Appellants-Cross-Appellees.

On appeal from the United States District Court for the Western District of Texas, Austin Division

AMICUS CURIAE BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE AND THE HOUSTON COALITION FOR LIFE, IN SUPPORT OF DEFENDANTS-APPELLANTS AND SUPPORTING REVERSAL

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No. 14-50928

WHOLE WOMEN'S HEALTH, et al.,

Plaintiffs-Appellees-Cross-Appellants,
v.

DAVID LAKEY, et al.,

Defendants-Appellants-Cross-Appellees.

SUPPLEMENTAL CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Name	**Interest**
American Center for Law & Justice	Amicus supporting appellants; the ACLJ has no parent corporation and issues no stock
Houston Coalition for Life	Amicus supporting appellants; HCL has no parent corporation and issues no stock
Jay Alan Sekulow Stuart J. Roth Walter M. Weber CeCe Heil	Counsel for Amici

s/ Walter M. Weber
Walter M. Weber
Attorney of record for Amici

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INTEREST OF AMICUS[1]

The American Center for Law and Justice (ACLJ) is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have filed amicus briefs in numerous cases involving abortion before the Supreme Court of the United States and other federal and state courts, including the Fifth Circuit. *See*, *e.g.*, *Gonzales v. Carhart*, 550 U.S. 124 (2007); *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320 (2006); *Texas Medical Providers Performing Abortion Services v. Lakey*, 667 F.3d 570 (5th Cir. 2012). The ACLJ supports sensible measures for regulating abortion and opposes the distortion of normal legal rules in the abortion context.

The Houston Coalition for Life (HCL) owns and operates a mobile Crisis Pregnancy Center which provides free sonogram services to expectant mothers. The HCL organizes Stand & Pray events outside abortion facilities in Houston, Texas. The HCL previously appeared before

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[1] No party's counsel in this case authored this brief in whole or in part. No party or party's counsel contributed any money intended to fund preparing or submitting this brief. No person, other than amici, their members, or their counsel contributed money that was intended to fund preparing or submitting this brief.

this Court as amicus with the ACLJ in *Texas Medical Providers*, *supra*.

All parties have consented to the filing of this amicus brief.

SUMMARY OF ARGUMENT

This amicus brief makes two points regarding marketing ploys plaintiffs use to enhance their chance of litigation success. First, this Court should not adopt or employ plaintiffs' loaded phrase, "abortion care," as a euphemism for abortion. Courts ought to remain neutral and not take sides in political or cultural battles. Second, this Court should not assume that access to abortion benefits maternal health in any way. Plantiffs' assertion that abortion is much safer than childbirth is based on a deeply flawed statistical comparison and is almost certainly exactly the opposite of the truth.

ARGUMENT

I. THIS COURT SHOULD AVOID USING BIASED AND EUPHEMISTIC TERMINOLOGY LIKE "ABORTION CARE".

Abortion has a stigma. Indeed, abortion providers themselves have introduced evidence to prove the existence of this stigma. *See Planned Parenthood Southeast Inc. v. Strange*, 2014 U.S. Dist. LEXIS 106159 at *55-*56 (M.D. Ala. Aug. 4, 2014). Unsurprisingly, then, groups

attempting to legitimize or defend abortion generally avoid the term "abortion" itself, substituting phrases like "choice," "women's health," "reproductive health," or "reproductive rights." Courts, however, are not supposed to weigh in on one side or the other of a marketing campaign. This Court should therefore avoid using the euphemism "abortion care" which plaintiffs-appellees employ in this case.

The term "abortion care" as a substitute for "abortion" is apparently fairly novel. Until Judge Pregerson used the term in a 2012 opinion for the Ninth Circuit, *McCormack v. Hiedeman*, 694 F.3d 1004, 1012, 1018 (9th Cir. 2012), the phrase does not (according to a LEXIS search[2]) appear in any federal circuit court opinion, other than as a quotation of other sources or document titles. The Supreme Court (again according to LEXIS) has not used the phrase at all; nor has a majority opinion in this Circuit.

The point of the phrase "abortion care" is presumably to soften the impact of the stark word "abortion" by adding the appealing word "care." Who can be opposed to care?

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[2] The LEXIS search was for "abortion w/1 care". The search triggered some false positives, like "care – abortion" and "post-abortion care".

Whether the phrase "abortion care" proves to be an effective marketing tool for the abortion lobby remains to be seen. In any event, it is not the role of the judiciary to bolster an advocacy campaign by adopting one side's verbal engineering. "Courts are neutral arbiters charged with interpreting the law," *United States v. McCane*, 573 F.3d 1037, 1045 (10th Cir. 2009).

Moreover, the phrase "abortion care" is awkward and redundant. A surgeon does a heart bypass, not "heart bypass care." An orthodontist provides braces, not "braces care". A technician does a mammogram, not "mammogram care". And an abortionist does abortions, not "abortion care." *See also ProMedica Health Sys. v. FTC*, 749 F.3d 559, 567 (6th Cir. 2014) (following "Orwell's admonition to use concrete terms instead of vague ones, *see* Orwell, *Politics and the English Language* (1946)").

Courts by no means have a perfect record in avoiding biased language in their opinions. *E.g., New York by Vacco v. Mid Hudson Medical Group, P.C.*, 877 F. Supp. 143 (S.D.N.Y. 1995) (Baer, J.) (referring to abortion opponents by the pejorative term "anti-choice"). But that some judges have at times indulged in loaded terminology does not mean that

neutrality should not remain the ideal. This Court should refer to abortion as abortion.

II. THIS COURT SHOULD NOT RELY ON PLAINTIFFS' CANARD ABOUT ABORTION BEING SAFER THAN CHILDBIRTH.

The complaint in this case repeatedly asserts that abortion is safer than childbirth. Cplt. ¶¶ 80, 103. The complaint goes so far as to assert that the risk of maternal death is 14 times higher in childbirth than abortion. *Id*. ¶¶ 105, 130. This allegation relates to plaintiffs' claim that when abortion becomes unavailable, risk to maternal health increases. The problem is that plaintiffs' claim is unsupported and almost certainly incorrect. This Court therefore should not assume that access to abortion provides a health- or life-saving benefit to pregnant women.

Amicus ACLJ addressed this point at length in an amicus brief to the U.S. Supreme Court in 2006. *See* Amicus Br. of the American Center for Law and Justice in Support of Petitioner, *Gonzales v. Planned Parenthoood Federation of America*, No. 05-1362 (U.S. Aug. 3, 2006), *available at* http://media.aclj.org/pdf/gonzalesvppfaacljamicusbrief.pdf. More recently, a comprehensive analysis by a physician conclusively

rebuts the myth that abortion is safer than childbirth. Byron Calhoun, "Systematic Review: The maternal mortality myth in the context of legalized abortion," 80 The Linacre Q. 264 (2013) (*available at* www.aaplog.org/wp-content/uploads/2013/07/LNQ61-Maternal-Mortality-Review-7-17-13.pdf. Key points these sources make include the following:

- Deaths from abortion are underreported, and abortion data more generally is very incomplete;
- Deaths from abortion can be counted as "maternal deaths," thereby falsely inflating the measure of deaths supposedly from childbirth;
- Abortion mortality statistics do not include deaths that result indirectly from the abortion, such as increased suicide rates or longer-term fatal health consequences, even though studies show a greater risk of death from these and other causes after abortion (as opposed to childbirth);
- A high percentage of maternal deaths are associated with miscarriages early in pregnancy; but any woman who has passed that stage of pregnancy is no longer at risk of falling into this large category of maternal deaths – i.e., that particular risk category has passed; hence,

for a woman beyond that early stage of pregnancy, it makes no sense to compare abortion mortality with maternal mortality *throughout pregnancy*; the figures would have to be adjusted to subtract out deaths occurring at stages of pregnancy that have already passed; yet maternal mortality statistics do not make this adjustment and thus are not properly comparable to abortion mortality statistics;

- Maternal mortality is measured per childbirth, not per pregnancy; hence, the relevant maternal population is artificially reduced by excluding those who experience miscarriages and stillbirths, *except that* if such women die, *their deaths are included* in the maternal mortality totals; thus, the relevant baseline population is reduced by excluding cases of pregnancy losses, while the total of deaths still includes those maternal deaths resulting from these very same uncounted pregnancies; this combination inflates the reported percentage risk of childbirth (in mathematical terms, the denominator [using births, not pregnancies] of the risk fraction is reduced, while the numerator [maternal deaths] is maximized).

- The federal Centers for Disease Control (CDC) itself has admitted that the statistics for maternal mortality and abortion mortality are "conceptually different" and "used by CDC for different public health purposes," Letter of July 20, 2004 from Louise Gerberding, Director, Centers for Disease Control, to Walter M. Weber (attached to ACLJ amicus brief in *Gonzales*); i.e., for purposes of comparison they are apples and oranges.

There is strong evidence that abortion is positively detrimental to maternal health and, if anything, more likely to lead to death or other adverse consequences than is continuing the pregnancy. *See* Amicus Br. of ACLJ, *Gonzales v. Carhart*, § II (citing multiple studies). Access to abortion is no favor to women.[3]

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[3] As providers of abortion for a fee, the plaintiffs have an obvious conflict of interest in purporting to represent the rights of their patients in a challenge to the laws here, which are essentially consumer protection laws. *Amato v. Wilentz*, 952 F.2d 742, 750 (3d Cir. 1991) ("the extent of potential conflicts of interests between the plaintiff and the third party whose rights are asserted matters a good deal"). Women have an interest in reasonable, patient-protective safety measures. Providers, by contrast, have an interest in opposing *any* regulation that cuts into their volume of business or net profits. Having abortion sellers speak for abortion patrons is like having stock brokers or used car salesmen speak for their customers. The sellers have little or no incentive fairly to assert interests that make their ultimate sales less likely or less profitable.

CONCLUSION

As providers of abortions, plaintiffs naturally try to paint the rosiest picture of abortion, using slanted language and misleading statistics. This Court ought not to embrace plaintiffs' wordplay and data manipulation. This Court should reverse the district court's grant of a preliminary injunction.

Respectfully submitted,

s/ Walter M. Weber

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Nov. 10, 2014

CERTIFICATE OF SERVICE

I hereby certify that on November 10, 2014, I filed the Amicus Curiae Brief electronically with the Clerk of the United States Court of Appeals for the Fifth Circuit, using the CM/ECF system. I certify that the following participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system:

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November 10, 2014

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