No. _____

IN THE

Supreme Court of the United States

WHOLE WOMAN'S HEALTH; AUSTIN WOMEN'S HEALTH CENTER; KILLEEN WOMEN'S HEALTH CENTER; NOVA HEALTH SYSTEMS D/B/A REPRODUCTIVE SERVICES; SHERWOOD C. LYNN, JR., M.D.; PAMELA J. RICHTER, D.O.; AND LENDOL L. DAVIS, M.D., on behalf of themselves and their patients,

Applicants,

v.

KIRK COLE, M.D., Commissioner of the Texas Department of State Health Services; MARI ROBINSON, Executive Director of the Texas Medical Board, in their official capacities,

Respondents.

On Application to Stay the Mandate of the
United States Court of Appeals for the Fifth Circuit

APPLICATION FOR A STAY PENDING THE FILING AND DISPOSITION OF A PETITION FOR A WRIT OF CERTIORARI

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June 19, 2015

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To the HONORABLE ANTONIN SCALIA, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Fifth Circuit:

Plaintiffs respectfully seek a stay of the Fifth Circuit's mandate pending the filing and disposition of a petition for a writ of certiorari to prevent the abortion clinics that were able to reopen following this Court's October 14, 2014, order from having to close again. Abortion access in Texas has been sharply curtailed since a 2013 law forced nearly half of the State's 41 licensed abortion facilities to close. Without a stay, more than half of the remaining facilities would be forced to close when the Fifth Circuit's mandate issues on July 1, 2015. This would amount to a more than 75% reduction in Texas abortion facilities in just a two-year period, creating a severe shortage of safe and legal abortion services in a State that is home to more than five million reproductive–age women.

This case concerns the constitutionality of the 2013 Texas law, which the district court found "creates a brutally effective system of abortion regulation that reduces access to abortion clinics [and thereby imposes] a statewide burden for substantial numbers of Texas women," ROA.2693, purportedly in the interest of women's health. The district court permanently enjoined two of the law's requirements after finding that, although they would drastically decrease access to abortion in Texas, they would not enhance the safety of abortion in any way. Indeed, the district court concluded that the requirements are so incongruous with their stated objective of promoting women's health that the proffered rationale must be pretextual.

On October 2, 2014, the Fifth Circuit stayed the district court's judgment pending appeal, forcing over a dozen abortion facilities to close. *Whole Woman's Health v. Lakey*, 769 F.3d 285 (5th Cir. 2014). On October 14, 2014, this Court vacated the stay in substantial part, permitting those facilities to reopen. *Whole Woman's Health v. Lakey*, __ U.S. __, 135 S. Ct. 399 (2014) (mem.). The Fifth Circuit has now reversed the district court's judgment on essentially the same grounds as it had granted the stay. *Whole Woman's Health v. Cole*, No. 14-50928 (5th Cir. June 9, 2015) (*per curiam*). Under the terms of its mandate, 10 of the 19 licensed facilities currently providing abortion services in Texas would have to close pending this Court's disposition of the case and an eleventh would be limited to providing abortions to women residing in four counties using a single physician. In addition, a twelfth facility that has applied to the State's licensing agency to reopen would be prevented from doing so. Accordingly, the fate of a dozen clinics—and the many women who would otherwise obtain abortions at those clinics—will be determined by the outcome of this motion.

On June 10, 2015, one day after the Fifth Circuit issued its decision on the merits, Plaintiffs filed a motion asking the court of appeals to stay its mandate. Today, after modifying a portion of its June 9 order, the panel denied the motion for a stay with one judge noting a dissent. *Whole Woman's Health v. Cole*, No. 14-50928 (5th Cir. June 19, 2015) (Prado, J. dissenting). If the Fifth Circuit's mandate is not stayed, any victory achieved by Plaintiffs in this Court would be largely symbolic. Few clinics closed for the duration of the proceedings would be able to

reopen. Thus, the stay requested by Plaintiffs would ensure that the Court is able to grant meaningful relief if it ultimately reviews this case and that the rights of Texas women are protected in the meantime.

STATEMENT OF FACTS

I. The Challenged Requirements.

Plaintiffs are challenging two provisions of Texas House Bill 2 ("H.B. 2" or the "Act"), 83rd Leg., 2nd Called Sess. (Tex. 2013), that restrict access to safe abortion services: The "ASC requirement," Act, § 4 (codified at Tex. Health & Safety Code Ann. § 245.010(a)); 25 Tex. Admin. Code § 139.40, limits the type of facilities in which abortion procedures may be performed by mandating that the licensing standards for abortion facilities be equivalent to the licensing standards for ambulatory surgery centers, and the "admitting-privileges requirement," Act, § 2 (codified at Tex. Health & Safety Code Ann. § 171.0031(a)(1)(A)); 25 Tex. Admin Code §§ 139.53(c)(1), 139.56(a)(1), limits the pool of licensed physicians who may perform abortions by mandating that those physicians have admitting privileges at a nearby hospital.

A. The ASC Requirement.

The ASC requirement amends the existing framework for licensing abortion providers under Texas law to provide that, "[o]n and after September 1, 2014, the minimum standards for an abortion facility must be equivalent to the minimum standards . . . for ambulatory surgical centers." Tex. Health & Safety Code Ann. § 245.010(a). Prior to its enactment, any medical practice that provided 50 or more abortions on an annual basis had to be licensed as either an "abortion facility," an

"ambulatory surgical center" ("ASC"), or a hospital.[1] Tex. Health & Safety Code Ann. §§ 245.003 – 245.004; Tex. Atty. Gen. Op. GA – 0212 (July 7, 2004). Further, abortions at 16 weeks' gestational age or later could only be performed in facilities licensed as ASCs or hospitals. Tex. Health & Safety Code Ann. § 171.004. This requirement was not altered by H.B. 2 and is not challenged here.

To become licensed as an "abortion facility," a medical practice has to satisfy the standards set forth in Chapter 139 of Texas Administrative Code, Title 25. *See* 25 Tex. Admin. Code §§ 139.1 – 139.60. These rigorous standards have long included requirements concerning quality assurance, 25 Tex. Admin. Code § 139.8; unannounced inspections, 25 Tex. Admin. Code § 139.31; policy development and review, 25 Tex. Admin. Code § 139.41; organizational structure, 25 Tex. Admin. Code § 139.42; orientation, training, and review of personnel, 25 Tex. Admin. Code § 139.44; qualifications of clinical and non-clinical staff, 25 Tex. Admin. Code § 139.46; physical environment, 25 Tex. Admin. Code § 139.48; infection control, 25 Tex. Admin. Code § 139.49; patient rights, 25 Tex. Admin. Code § 139.51; medical and clinical services, 25 Tex. Admin. Code § 139.53; emergency services, 25 Tex. Admin. Code § 139.56; discharge and follow-up, 25 Tex. Admin. Code § 139.57; and anesthesia services, 25 Tex. Admin. Code § 139.59.[2]

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[1] Hospital licensure is governed by Chapter 133 of Texas Administrative Code, Title 25. *See* 25 Tex. Admin. Code §§ 133.1 – 133.169. As a practical matter, very few abortions are performed in Texas hospitals or in facilities that are below the 50-procedure threshold for licensure. *See* Trial Ex. D-48. In 2012, the vast majority of Texas abortions—approximately 80%—were performed in licensed abortion facilities. *See id.* Approximately 20% were performed in licensed ASCs. *See id.*

[2] Indeed, the pre-H.B. 2 standards for abortion facilities are comparable to the standards for ASCs enforced by the U.S. Centers for Medicare and Medicaid Services ("CMS"). *See* 42 C.F.R. §§ 416.40 –

To become licensed as an ASC, a medical practice has to satisfy the standards set forth in Chapter 135 of the same Title. *See* 25 Tex. Admin. Code §§ 135.1 – 135.56. In many respects, the standards applicable to ASCs are comparable to those applicable to abortion facilities, and in some cases, the ASC standards are less stringent.[3] Prior to H.B. 2, however, the ASC standards were more stringent than the abortion facility standards in at least two respects: (1) the ASC standards imposed detailed requirements for construction that abortion facilities were not required to meet, *see* 25 Tex. Admin. Code § 135.52; and (2) the ASC standards required a much larger nursing staff than the abortion facility standards, *compare* 25 Tex. Admin. Code § 135.15(a) *with* 25 Tex. Admin. Code § 139.46(3)(B).

Under the ASC requirement, medical practices that perform 50 or more abortion procedures annually continue to have three pathways to licensure: as abortion facilities under Chapter 139; as ASCs under Chapter 135; or as hospitals under Chapter 133. But the ASC requirement would make it substantially harder for a medical practice to become licensed as an abortion facility under Chapter 139;

416.52. CMS, however, does not require that any particular procedure be performed in an ASC, nor does it condition reimbursement for any procedure on performance in an ASC. *See generally* 72 Fed. Reg. 42470, 42511 (Aug. 2, 2007) (explaining that CMS adopted a "site-neutral" payment scheme to neutralize incentives for physicians to perform procedures in more expensive ASCs that could be done safely in office-based settings).

[3] For example, abortion facilities must be inspected at least once annually, but ASCs need only be inspected every three years. *Compare* 25 Tex. Admin. Code § 139.31(b)(1) *with* 25 Tex. Admin. Code § 135.21(a)(2). Abortion facilities are subject to more extensive reporting requirements than ASCs. *Compare* 25 Tex. Admin. Code §§ 139.4, 139.5, 139.58 *with* 25 Tex. Admin. Code § 135.26. And violations of the abortion facility regulations are punishable by criminal sanctions, civil liability, and administrative penalties, whereas violations of the ASC regulations are punishable only by administrative penalties. *Compare* 25 Tex. Admin. Code § 139.33 *with* 25 Tex. Admin. Code § 135.24.

the practice would have to meet the standards for ASCs, including those concerning construction and nursing staff size. Defendants stipulated that no medical practice currently licensed as an abortion facility would be able to maintain its licensure if the ASC requirement took effect. ROA.2290.

The Act directed the Texas Department of State Health Services ("DSHS" or the "Department") to adopt implementing regulations by January 1, 2014, and provided that facilities must be in compliance with those regulations by September 1, 2014. Act, § 11. The Department proposed regulations to implement the ASC requirement on September 27, 2013, 38 Tex. Reg. 6536-46 (Sept. 27, 2013), and adopted them on December 27, 2013, following a three-month notice-and-comment period during which 19,799 comments were submitted, 38 Tex. Reg. 9577-93 (Dec. 27, 2013). These implementing regulations amended the existing abortion facility regulations in Chapter 139 to incorporate by reference some of the ASC regulations in Chapter 135. *See* 38 Tex. Reg. 6537 (Sept. 27, 2013). But DSHS opted not to incorporate ASC regulations "in instances where Chapter 139 prescribes more stringent qualifications or safety requirements." *Id.* As a result, the standards for abortion facilities overall are not "equivalent" to the standards for ASCs; they exceed the standards for ASCs. Further, DSHS did not incorporate the ASC regulations that make facilities eligible for grandfathering and waivers from construction requirements. *See* 38 Tex. Reg. 6536, 6540 (Sept. 27, 2013) (declining to incorporate 25 Tex. Admin. Code § 135.51(a)). Thus, abortion facilities that have been operating for decades must meet the construction standards for newly-built

ASCs, and they are not eligible for waivers from those standards even though waivers are granted to ASCs "frequently" and on a purely oral basis. Designation of Deposition Testimony of Kathryn Perkins ("Perkins Dep. Tr.") at 44:6-19; 45:19-46:2.

There is one way for an abortion provider operating a licensed abortion facility to avoid compliance with the construction requirements: it can close its existing facility and buy or lease an ASC that was built prior to June 18, 2009. *See id.* at 25:11-14; 37:10-23; 25 Tex. Admin. Code §§ 135.2(9), 135.51(a). Such facilities, which comprise more than 75% of all ASCs currently operating in Texas, are exempt from construction requirements due to grandfathering. *See id.*; ROA.2290. Buying or leasing one of these facilities—for millions of dollars, *see infra* at 15—would exempt an abortion provider from having to meet these requirements. *See* Perkins Dep. Tr. at 25:11-14; 37:10-23. Understood this way, the ASC requirement in H.B. 2 does not mandate compliance with a set of minimum standards; rather, it imposes a multi-million dollar tax on the provision of abortion services.

B. The Admitting-Privileges Requirement.

The "admitting-privileges requirement" provides that "[a] physician performing or inducing an abortion must, on the date the abortion is performed or induced, have active admitting privileges at a hospital that is located not further than 30 miles from the location at which the abortion is performed or induced." Tex. Health & Safety Code Ann. § 171.0031(a)(1)(A); 25 Tex. Admin Code § 139.53(c)(1);

see 25 Tex. Admin Code § 139.56(a)(1). This requirement supersedes an existing regulation, which provided that:

> A licensed abortion facility shall have a readily accessible written protocol for managing medical emergencies and the transfer of patients requiring further emergency care to a hospital. The facility shall ensure that the physicians who practice at the facility have admitting privileges or have a working arrangement with a physician(s) who has admitting privileges at a local hospital in order to ensure the necessary back up for medical complications.

25 Tex. Admin. Code § 139.56(a) (2012). Further, all Texas physicians are subject to disciplinary action by the Texas Medical Board (the "Board") for "failure to timely respond in person . . . when requested by emergency room or hospital staff." 22 Tex. Admin. Code § 190.8(1)(F).

The Board's Executive Director testified that, from her thirteen-year tenure at the Board, which included service as Manager of Investigations and Enforcement Director, she could not identify a single instance in which a physician providing abortions failed to timely respond to a request by emergency room or hospital staff or otherwise engaged in conduct that posed a threat to public health or welfare. ROA.3310-11, ROA.3315, ROA.3317-18. In contrast, she vividly recalled "a very high-profile case of a young child who died . . . in a dental office, when anesthetic was used but the proper training and equipment was not available." ROA.3320. Dentists are not subject to an ASC or admitting-privileges requirement under Texas law.

II. The Proceedings Below.

Following a bench trial with nineteen live witnesses, the district court (Yeakel, J.) found, *inter alia*, that abortion in Texas is extremely safe, *see*

ROA.2694; the challenged requirements will not enhance the safety of abortion procedures, but will expose women to greater health risks by severely restricting the availability of legal abortion services, *see* ROA.2694-95; and the challenged requirements had and would force dozens of abortion clinics throughout Texas to close, drastically reducing the number and geographic distribution of licensed abortion providers in the State, *see* ROA.2688. Based on these findings, the district court concluded that the challenged requirements, independently and collectively, impose an undue burden on women's access to abortion in violation of the Due Process Clause of the Fourteenth Amendment. ROA.2695-96. It permanently enjoined Defendants from enforcing them. ROA.2699-701; ROA.2704.

Subsequently, Defendants sought a stay of the district court's judgment pending appeal. A divided panel of the Fifth Circuit granted the motion in nearly all respects on October 2, 2014. *See Lakey*, 769 F.3d at 285. As a result, over a dozen of Texas' remaining abortion clinics were forced to close immediately. This Court then vacated the stay in substantial part, sustaining the district court's injunction against enforcement of the ASC requirement statewide and sustaining the district court's injunction against enforcement of the admitting-privileges requirement with respect to Plaintiffs' clinics in McAllen and El Paso. *Lakey*, 135 S. Ct. at 399. As a result, the clinics that had closed following imposition of the stay were permitted to reopen.

On June 9, 2015, the Fifth Circuit issued a ruling on the merits. *Whole Woman's Health v. Cole*, No. 14-50928 (5th Cir. June 9, 2015) (*per curiam*). It held

that the ASC requirement did not amount to an undue burden on its face, *Cole*, slip op. at 31; as applied to the provision of medication abortion, *id.* at 43; or as applied to the El Paso clinic operated by Plaintiff Reproductive Services, *id.* at 55-56; but that portions of the ASC requirement amounted to an undue burden as-applied to the McAllen clinic operated by Plaintiff Whole Woman's Health, *id.* at 49. The Fifth Circuit's reasoning largely tracked that of its opinion granting the stay: the district court erred in considering whether the challenged requirements actually further the State's asserted interests in the health of abortion patients, *id.* at 36-37 (citing *Lakey*, 769 F.3d at 297); the district court erred in conducting a contextualized inquiry into the purpose of the challenged requirements that included consideration of their predictable effects, *id.* at 34 (citing *Lakey*, 769 F.3d at 295); and the district court erred in evaluating the practical impact that the closure of more than three-quarters of the State's abortion clinics would have on women's access to abortion services, *id.* at 40-41 (citing *Lakey*, 769 F.3d at 299). In addition, the Fifth Circuit held that the admitting-privileges requirement is an undue burden as applied to a single physician, Dr. Lynn, when he is working at the McAllen clinic, but not as applied to any other physician in the State. *Id.* at 52. The court did not explain the basis for this limited holding, which followed its observation that several physicians working at the McAllen clinic "were unable to obtain admitting privileges at local hospitals for reasons other than their competence." *Id.* at 51-52.

As in its opinion granting the stay, the Fifth Circuit also made an alternative holding concerning res judicata. *Compare Lakey*, 769 F.3d at 301-02 *with Cole*, slip

op. at 26-31. This time, it held that Plaintiffs' claims were barred by res judicata insofar as Plaintiffs sought facial invalidation as a remedy, but not insofar as Plaintiffs' sought as-applied relief as a remedy. *See Cole*, slip op. at 27, 44. The court reached this conclusion despite acknowledging that material facts relevant to Plaintiffs' claims against both of the challenged requirements had developed after entry of judgment in the prior case. *Id.* at 44.

The Fifth Circuit vacated most of the injunction that had been entered by the district court, but affirmed it in part and modified it in part as follows:

> (1) The State of Texas is enjoined from enforcing [certain parts of the ASC requirement related to construction and fire prevention] against the Whole Woman's Health abortion facility located at 802 South Main Street, McAllen, Texas, when that facility is used to provide abortions to women residing in the Rio Grande Valley (as defined above [to consist of Starr, Hidalgo, Willacy, and Cameron Counties]), until such time as another licensed abortion facility becomes available to provide abortions at a location nearer to the Rio Grande Valley than San Antonio; (2) The State of Texas is enjoined from enforcing the admitting privileges requirement against Dr. Lynn when he provides abortions at the Whole Woman's Health abortion facility located at 802 South Main Street, McAllen, Texas, to women residing in the Rio Grande Valley.

Id. at 52. In today's order denying Plaintiffs' motion for a stay, the court modified its judgment to provide that "the district court's injunction of the ASC requirement (as defined in the June 9 opinion) as applied to the McAllen facility shall remain in effect until October 29, 2015, at which time the injunction shall be vacated in part, as delineated and explained in our June 9 opinion." *Whole Woman's Health v. Cole*, No. 14-50928 (5th Cir. June 19, 2015) (Prado, J. dissenting). As modified, the injunction permits the McAllen clinic to provide abortion services only on a limited

basis, not to the full extent of patient demand. Only one of its physicians is permitted to provide abortions, and only to women residing in four counties.

Plaintiffs intend to file a petition for a writ of certiorari asking this Court to review the Fifth Circuit's decision.

III. The Challenged Requirements Would Drastically Reduce the Availability of Abortion Services in Texas.

The challenged requirements have already caused more than half of Texas' licensed abortion facilities to close, and absent the requested stay, they will cause more than half of those that remain to close, creating a severe shortage of abortion services in a state that "is home to the second highest number of reproductive-age women in the United States." ROA.2688. Before H.B. 2 was enacted, there were 41 licensed facilities providing abortion services in Texas, spread throughout the State. ROA.2688; ROA.2346-47. Leading up to and following implementation of the admitting-privileges requirement on October 31, 2013, that number dropped by nearly half.[4] ROA.2688; ROA.2346-47. Currently, there are 19 licensed facilities providing abortions in Texas. The Fifth Circuit's mandate would cause ten of these to close and remain closed pending final disposition of the case by this Court. Pls.'

[4] Abortion facility licenses must be renewed on a bi-annual basis. 25 Tex. Admin. Code § 139.23(b)(2). The renewal fee is $5,000 and is non-refundable. 25 Tex. Admin. Code § 139.22(a), (c). In addition, licensed abortion facilities must pay an annual assessment fee based on the number of abortions performed during the prior three-year period. 25 Tex. Admin. Code § 139.22(g). Knowing that they would not be able to comply with the challenged requirements, eight abortion facilities closed following enactment of H.B. 2 but before those requirements took effect to avoid paying these fees. *See, e.g.*, ROA.2424; ROA.2829-30; *see also* ROA.2346. Eleven more closed on the day that the admitting-privileges requirement took effect. *See id.*

Resp. at 1. In addition, as explained above, it would sharply limit the capacity of the McAllen clinic to provide abortions. *Id.* at 2.

The Fifth Circuit's mandate would also prevent the El Paso clinic from reopening. This facility ceased providing abortion services on April 11, 2014, as a result of the admitting-privileges requirement and surrendered its license on May 29, 2014, when its annual assessment was due, because the nonprofit organization that operates it could not afford to pay the required fee while not providing services. *Id.* at 2. Following this Court's October 14, 2014, order, which restored the district court's injunction with respect to the El Paso clinic, it began taking the steps required for it to resume providing abortion services in El Paso, which included signing a new lease and hiring and training new staff members to replace those who had been laid off when the facility closed. *Id.* at 2-3. On February 9, 2015, it filed an application for a new abortion facility license with the Department, together with the $5,000 application fee. *Id.* at 3. This application remains pending. *Id.* As a result, if Plaintiffs' motion for a stay is granted, the El Paso clinic will be able to reopen as soon as the Department finishes processing its application, but if the motion is denied, the El Paso clinic will be forced to remain closed.

Absent a stay, Texas' remaining abortion providers would be clustered in four metropolitan areas: Dallas-Fort Worth, Austin, San Antonio, and Houston. ROA.2687-88; ROA.2355-56, ROA.2346-47; ROA.2289-90. There would be no licensed abortion facilities west of San Antonio, ROA.2355-56, and the only abortion clinic south of San Antonio would have a highly restricted capacity, *see supra* at 11-

12. Even if women throughout Texas could navigate the distances necessary to reach the remaining few abortion providers, these facilities would not be able to meet the statewide demand for abortion services that sustained 41 abortion facilities prior to the enactment of the challenged requirements. ROA.2690-91; ROA.2352-53. Moreover, the ability of these facilities to increase their operational capacities is constrained by the admitting-privileges requirement. ROA.2352-53; ROA.2690-91. Indeed, at the time of trial, at least one of them was unable to schedule patients for abortion procedures because it did not have a doctor on staff with the required admitting privileges. ROA.2854.

The initial reduction in abortion providers following implementation of the admitting-privileges requirement had a significant negative impact on women's ability to obtain an abortion in Texas, causing a decline in the overall abortion rate[5] and an increase in the proportion of abortions performed in the second trimester. ROA.2349-50, ROA.2354, ROA.2359. The Fifth Circuit's mandate would further reduce the availability of abortion services in Texas, delaying or preventing many more women from accessing those services. ROA.2355-56.

The evidence further demonstrates that the ASC requirement imposes tremendous costs on abortion providers and will deter new facilities from taking the place of the ones forced to close. *See* ROA.2690; ROA.2330. Building a facility that

[5] Indeed, the Fifth Circuit acknowledged that 9,200 women were denied abortions during the year after the admitting-privileges requirement took effect, *Cole*, slip op. at 41-42 n.34, even though the admitting-privileges requirement was not fully in force for the whole period because, in an earlier case, the Fifth Circuit had enjoined it as to doctors with pending applications for admitting privileges, *see Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583, 600 (5th Cir. 2014).

meets the standards for new-ASC construction would cost more than $3 million. ROA.2690; ROA.2393, ROA.2403-04; ROA.2425-26; *see* Trial Ex. P-073. For many abortion clinics, lot-size constraints prevent the retrofitting of existing facilities to meet ASC standards, but where retrofitting is possible, the cost would generally exceed $1.5 million. ROA.2690; ROA.2393, ROA.2400-03; Designation of Deposition Testimony of Franz C. Theard, M.D. ("Theard Dep. Tr.") at 40:25-41:22.

Purchasing an existing ASC is similarly expensive and entails obstacles besides cost. For example, Plaintiff Whole Woman's Health sought to purchase an existing ASC in Fort Worth that was appraised for $2.3 million. ROA.3073-74. It was unable to obtain financing for the purchase despite engaging a broker who approached more than fifteen banks. ROA.3075. Leasing an existing ASC also proved difficult for abortion providers. ROA.3070-73, ROA.3075-78; Trial Ex. P-066 at 2 (restrictive covenant preventing use of ASC for abortion procedures); ROA.2425. In addition, the operating costs for an ASC exceed those for an abortion facility by $600,000 to $1 million per year. ROA.2330-31. The high costs of acquiring and operating an ASC make it unlikely that abortion-providing ASCs would be able to open outside Texas' largest metropolitan areas; patient demand for abortion services in other regions would not generate sufficient revenue to offset the fixed costs. ROA.2331.

Although some groups had announced plans to build new ASCs in Texas in the wake of H.B. 2, many have had to backtrack after encountering the obstacles described above. For example, one of Defendants' experts testified that, following

enactment of H.B. 2, the Texas Women's Reproductive Health Initiative ("TWRHI") announced plans to build multiple ASCs across Texas. ROA.3964. But by the time of trial, over a year later, TWRHI had been able to raise only $50 in donations toward this goal, and its plans to build ASCs were put on hold indefinitely. ROA.3361-62. Plaintiff Austin Women's Health Center also hoped to build an ASC, but after a feasibility study revealed that the project would be much more expensive than originally anticipated, it has put the project on hold. *See* ROA.2424-25. Likewise, Planned Parenthood of South Texas intended to open an ASC in San Antonio in September 2014, but to date, the facility still is not licensed and seeing abortion patients. Indeed, in response to a directive by the Fifth Circuit, Defendants conceded that, besides the facilities referenced in the district court record, no ASCs for abortion care have opened or even announced plans to open since trial.[6] Defs.' Resp. to Fifth Circuit Directive, Dkt. No. 00513079000 (Defs.' Resp.), at 1-2.

IV. The Challenged Requirements Do Not Enhance the Safety of Abortion Procedures.

Based on the evidence presented at trial, the district court found that, "before the act's passage, abortion in Texas was extremely safe with particularly low rates

[6] Indeed, the only new ASC for abortion services that has opened in Texas since the district court entered judgment is located in San Antonio. In development since prior to trial, *see* Designation of Deposition Testimony of Marilyn Eldridge at 105:20-107:16, the facility opened earlier this month. Nevertheless, the total number of abortion facilities in Texas has dropped by one since trial, as the admitting-privileges requirement continues to limit the pool of physicians able to provide abortions, and some clinics that are currently open have had to close for lengthy periods. The Whole Woman's Health clinic in Fort Worth, for example, was closed for four months after the last of its physicians lost his admitting privileges due to insufficient patient admissions in the preceding year.

of serious complications and virtually no deaths occurring on account of the procedure." ROA.2694. The court further found that implementation of the challenged requirements will not enhance the safety of abortion procedures, but will actually increase the health risks that abortion patients face. ROA.2694-95.

A. The ASC Requirement.

With respect to the ASC requirement, the court found that "[m]any of the building standards mandated by the act and its implementing rules have such a tangential relationship to patient safety in the context of abortion as to be nearly arbitrary."[7] ROA.2694. The ASC construction standards are intended to enhance the safety of surgeries that involve cutting into sterile body tissue by creating an ultra-sterile operating environment. ROA.2365; ROA.2457-58. But surgical abortion is not performed in this manner; rather, it entails insertion of instruments into the uterus through the vagina, which is naturally colonized by bacteria and therefore cannot be made sterile. ROA.2365; ROA.2457-58; Trial Ex. P-037 at 191

[7] Only one of Defendants' experts—Dr. Thompson—testified that the ASC requirement afforded benefits to abortion patients. Although the Fifth Circuit appears to have given considerable weight to her testimony, *see Cole*, slip op. at 22 & n.18, 31, it fails to mention that the district court did not find it credible, *see* ROA.2684, 2687, and for good reason. Dr. Thompson admitted on cross-examination that she was not familiar with the methodology utilized by the Centers for Disease Control and Prevention to collect data about abortion safety, ROA.3130-31; had not reviewed the studies relied on by Plaintiffs' experts and therefore could not assess the reliability of their methods, ROA.3131-32; could not cite any publications to support her opinions, ROA.3129-30; and had permitted Vincent Rue—an anti-abortion activist with no medical credentials hired by Texas to serve as a consultant—to draft substantive portions of her expert report and written direct testimony without her input, ROA.3106-18; Trial Exs. P-211 to P-213. She also testified that she has an ownership interest in a facility that was formerly licensed as an ASC and is currently licensed as a hospital, admitting that she has a financial incentive to refer patients to that ASC/hospital facility for treatment. ROA.3123-24. Further, Dr. Thompson's testimony was contradicted not only by the testimony of Plaintiffs' medical experts, who relied on peer-reviewed scientific articles and a learned treatise, *see* ROA.2365, 2396-98, 2457-59; Trial Ex. P-037 at 784, but also by the testimony of one of Defendants' own experts, *see* Designation of Deposition Testimony of Geoffrey Keyes, M.D. at 81:12-25, 100:4-5.

(learned treatise). Accordingly, precautions aimed at maintaining a sterile environment, beyond basic cleanliness, hand-washing and use of sterile instruments, provide no health or safety benefit to abortion patients. ROA.2365; ROA.2457-58; Trial Ex. P-037 at 784. Similarly, the nursing requirements for ASCs are geared toward surgeries that are more complex than abortion. ROA.2365; ROA.2459. Personnel typically needed for those types of surgeries, such as scrub nurses and circulating nurses, are not needed for abortion procedures. ROA.2365. It is not surprising, therefore, that a study comparing rates of complications from abortion procedures performed in Texas prior to 16 weeks' gestation found that complications do not occur with greater frequency at abortion facilities licensed under Chapter 139 than at ASCs licensed under Chapter 135. ROA.2363-67; *see also* ROA.2464.

Further, the record shows that medical abortion does not involve surgery at all. ROA.2450. As practiced in Texas, medical abortion entails the oral administration of medications—*i.e.*, the patient swallows a series of tablets. ROA.2450. Requiring those tablets to be swallowed in a multi-million dollar surgical facility does not enhance their safety or effectiveness. ROA.2695; ROA.2459.

Notably, the ASC construction standards do not represent a prevailing norm or standard of care for outpatient surgery in Texas. Texas law explicitly authorizes physicians to perform major outpatient surgeries—including those requiring general anesthesia—in their offices, which are not subject to ASC regulations,

provided that they register with the Texas Medical Board and satisfy certain training and reporting requirements. 22 Tex. Admin. Code §§ 192.1 – 192.6. "Several thousand" Texas physicians currently perform such surgeries in their offices. ROA.3319; ROA.3321. Further, relatively few Texas ASCs are subject to the construction standards set forth in Chapter 135. More than three-quarters of these facilities are exempt due to grandfathering, ROA.2290, and waivers are granted "frequently" and on an oral basis, Perkins Dep. Tr. at 44:6-19; 45:19-46:2.

Likewise, the ASC construction standards do not represent a prevailing norm or standard of care for abortion practice. The vast majority of abortion procedures in Texas and nationwide are performed in office-based settings, not ASCs or hospitals. *See* ROA.2457; ROA.2370. The American College of Obstetricians & Gynecologists ("ACOG") recognizes that abortion procedures can be safely performed in doctor's offices and clinics, and it expressly denounces the imposition of "'facility regulations that are more stringent [for abortion procedures] than for other surgical procedures of similar risk.'" ROA.2385; Trial Ex. P-192.

B. The Admitting-Privileges Requirement.

With respect to the admitting-privileges requirement, the district court found that "[e]vidence related to patient abandonment and potential improved continuity of care in emergency situations is weak in the face of the opposing evidence that such complications are exceedingly rare in Texas, nationwide, and specifically with respect to the Plaintiff abortion providers." ROA.2695. The court also found that "[a]dditional objectives proffered for the requirement, such as physician screening

and credentialing are not credible due, in part, to evidence that doctors in Texas have been denied admitting privileges for reasons not related to clinical competency."[8] ROA.2695.

For example, after the admitting-privileges requirement was enacted, four physicians affiliated with Whole Woman's Health, including Dr. Lynn, sought to obtain admitting privileges at a hospital within 30 miles of the McAllen clinic. ROA.2469; ROA.2462. All four physicians are board-certified ob-gyns with extensive experience performing abortion procedures, and three of them maintain admitting privileges at hospitals in other parts of Texas. ROA.2469; ROA.2461-62. Dr. Lynn, for instance, has admitting privileges at hospitals in San Antonio and Austin. ROA.2462. Nevertheless, for reasons wholly unrelated to their qualifications, they were unable to obtain admitting privileges. ROA.2462-64;

[8] Recent decisions from federal courts outside of Texas have also found that abortion providers are being denied admitting privileges for reasons unrelated to their competence as physicians. *See, e.g.*, *Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 458 (5th Cir. 2014) (affirming entry of preliminary injunction where abortion providers in Mississippi were denied admitting privileges for reasons unrelated to their qualifications or competence) (cert pet. pending); *Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 792 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 2841 (2014) (affirming entry of preliminary injunction where hospital officials "were emphatic that their religious beliefs would preclude their granting admitting privileges to doctors who perform abortions" and "[t]he absence of definite standards for the granting of admitting privileges makes it difficult not only to predict who will be granted such privileges at what hospitals and when, but also to prove an improper motive for denial"). Further, hospitals in Texas and nationwide use economic criteria—unrelated to a physician's qualifications—to make decisions about admitting privileges. *See, e.g.,* Tr. Exs. P-055 at LPDS-000024 (bylaws allowing hospital to require exclusive physician contracts); P-057 at DH00000008, DH00000028 (bylaws requiring physicians to perform a minimum number of procedures at hospital each year); P-076 at RGRH-000019 (bylaws allowing hospital to require exclusive physician contracts); *see generally*, Robert Steinbuch, *Placing Profits Above Hippocrates: The Hypocrisy of General Service Hospitals*, 31 U. Ark. Little Rock L. Rev. 505, 507-08 (2009) (highlighting increased use of "economic credentialing," which focuses on criteria related to a hospital's financial interests rather than a physician's qualifications); James F. Blumstein, *Of Doctors and Hospitals: Setting the Analytical Framework for Managing and Regulating the Relationship*, 4 Ind. Health L. Rev. 211, 236 (2007) (discussing recent cases suggesting that "credentialing on grounds other than medical competence is gaining judicial assent").

ROA.2469-70; ROA.3083; Trial Exs. P-068, P-071 (letters stating that hospital's decision to deny applications for admitting privileges "was **not** based on clinical competence consideration.") (emphasis in originals).

Similarly, after passage of the admitting-privileges requirement, Plaintiff Dr. Richter, who works at the El Paso clinic, was unable to obtain admitting privileges at any El Paso hospital even though she had held such privileges in the past and currently serves as a staff physician at a State-run facility in El Paso. ROA.2476-78; ROA.3006-07. One hospital C.E.O. candidly admitted that, after learning Dr. Richter was an abortion provider, the hospital combed through its bylaws looking for a reason to deny her privileges. Trial Ex. P-046 at DSHS_00003293.

Further, the record demonstrates that the standards promulgated by the nation's leading medical associations and accreditation bodies—including the American Association for Ambulatory Health Care ("AAAHC"), American Association for Accreditation of Ambulatory Surgery Facilities ("AAAASF"), Joint Commission, ACOG, American College of Surgeons ("ACS"), American Society of Anesthesiologists ("ASA"), and National Abortion Federation ("NAF")—provide that, while medical facilities are expected to have mechanisms in place to ensure that physicians are qualified to perform the procedures they provide and patients are assured continuity of care in the event of a complication, these mechanisms need not include hospital admitting privileges. ROA.2381-84; Trial Exs. P-029, P-189 to P-194. CMS regulations are consistent with these standards, *see* 42 C.F.R. §

416.41(b)(3), as was the Texas regulation that was superseded by the admitting-privileges requirement, 25 Tex. Admin. Code § 139.56(a) (2012); *supra* at 4 n.2, 8.

C. The Challenged Requirements Will Result in a Net Increase in Health Risks for Women Seeking Abortion Services.

Not only will the challenged requirements fail to enhance the safety of abortion, but by drastically reducing the number and geographic distribution of licensed abortion facilities in Texas, they will have the perverse effect of increasing health risks and diminishing continuity of care for many women seeking abortion services. The elimination of all licensed abortion providers from vast regions of Texas means that women in those regions will have to travel hundreds of miles to obtain a legal abortion in the State. *See* ROA.2353-56. Although complications from abortion are quite rare, when they do arise, it is frequently after a patient has returned home following discharge from the facility where the abortion was performed. ROA.2455-56. The farther a woman must travel to reach an abortion provider, the less likely she will be to return to that provider for follow-up care and the more dangerous it would be for her to return in the case of an emergency. *See* ROA.2455-56. Indeed, if a woman who lives outside the region where she had an abortion experiences a complication that requires hospital treatment, it would not be medically appropriate for her to travel back to that region to be treated at a hospital near the abortion facility; instead, she should seek treatment at a hospital near her home. *See* ROA.2455-56. Thus, by increasing the distance that women must travel to reach an abortion provider, the challenged requirements actually make it less likely that an abortion patient will seek follow-up care from the doctor

who performed her abortion and less likely that she would be treated by that doctor in the event of an emergency.

In addition, the increased distances that many women have to travel to reach a licensed abortion provider combined with the statewide shortage in the availability of abortion services will delay many women in obtaining an abortion, and some women will not be able to obtain an abortion at all. *See* ROA.2359-60; ROA.2387-88; *cf. Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 796 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 2841 (2014) ("Patients will be subjected to weeks of delay because of the sudden shortage of eligible doctors—and delay in obtaining an abortion can result in the progression of a pregnancy to a stage at which an abortion would be less safe, and eventually illegal."). Although abortion is safe throughout pregnancy, its risks increase with gestational age. ROA.2372; ROA.2388. As a result, women who are delayed in obtaining an abortion face greater risks than those who are able to obtain early abortions. ROA.2372, ROA.2388. Women who are unable to obtain an abortion are also at increased risk; DSHS' own data shows that, in Texas, the risk of death from carrying a pregnancy to term is 100 times higher than the risk of death from having an abortion. ROA.2950-51; *see* ROA.2377.

Further, some women who are unable to access legal abortion turn to illegal and unsafe methods of abortion. *See* ROA.2360-62. This trend has been on the rise in Texas since the first wave of clinic closures: After the admitting-privileges requirement took effect, the McAllen clinic stopped providing abortion services but

remained open for approximately four months (until it could no longer afford to do so) providing other reproductive healthcare. ROA.2468. During this period, its staff members encountered a significant increase in the number of women seeking assistance after attempting self-abortion. ROA.2471-72. Defendants also received reports during this period about women attempting to self-induce abortions and healthcare providers rendering treatment when such attempts were unsuccessful or resulted in complications. Trial Exs. P-020, P-022, P-024.

Many women in Texas are aware that misoprostol can be used to induce an abortion. ROA.2445; ROA.2435; ROA.2360. This medication is available over-the-counter in Mexico, and is widely trafficked in the Rio Grande Valley and West Texas, which border Mexico. ROA.2360. It may also be purchased illegally from the internet. ROA.2360; *see McCormack v. Hiedeman*, 694 F.3d 1004, 1008 (9th Cir. 2012) (concerning a pregnant woman who attempted abortion by ingesting drugs purchased from the internet because she could not access clinical abortion services).[9] Like any medication obtained on the black market, it can be counterfeit or used incorrectly. ROA.2445; ROA.2436; ROA.2361-62. And other methods of self-induced abortion carry even greater risks. *See generally In re J.M.S.*, 280 P.3d 410, 411 (Utah 2011) (concerning a pregnant woman who attempted abortion by soliciting a stranger to punch her in the abdomen because she could not access clinical abortion services); *Hillman v. State*, 232 Ga. App. 741, 503 S.E.2d 610, 611

[9] *See also* Emily Bazelon, *A Mother in Jail for Helping Her Daughter Have an Abortion*, N.Y. Times Magazine (Sept. 22, 2014), available at http://nyti.ms/1rhxibl. (reporting that a Pennsylvania mother of three is currently serving time in prison for helping her teenage daughter purchase abortion-inducing drugs from the internet).

(1998) (concerning a pregnant woman who attempted abortion by shooting herself in the abdomen because she could not access clinical abortion services).

ARGUMENT

I. Standard of Review

A stay pending the filing and disposition of a petition for a writ of certiorari is appropriate when there is a "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (*per curiam*). "In close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent." *Id.* Here, all of the prerequisites for the issuance of a stay are met, and the balance of equities tips decidedly in Plaintiffs' favor.

II. There is a Reasonable Probability That This Court Will Grant Certiorari.

This Court's prior intervention in the case signals a reasonable probability that the Court will grant Plaintiffs' forthcoming petition for a writ of certiorari. The standard for vacating a stay issued by a court of appeals requires, *inter alia*, that the case "'could and very likely would be reviewed here upon final disposition in the court of appeals.'" *W. Airlines, Inc. v. Int'l Bhd. of Teamsters*, 480 U.S. 1301, 1305 (1987) (O'Connor, J., in chambers) (quoting *Coleman v. Paccar, Inc.*, 424 U.S. 1301, 1304 (1976) (Rehnquist, J., in chambers)); *see also Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, ___ U.S. ___, 134 S. Ct. 506, 508-09 (2013) (Breyer, J., dissenting from denial of application to vacate stay, joined by Ginsburg,

Sotomayor, & Kagan, JJ.). Thus, in vacating the stay entered by the Fifth Circuit, a majority of the Court indicated that review of the case on writ of certiorari is likely.

In addition, the courts of appeals are divided over whether a law that restricts access to previability abortion must actually further a valid state interest, and to what extent. The Seventh and Ninth Circuits recently held that, to satisfy the undue burden standard, a law restricting abortion must actually further a valid state interest, and to an extent sufficient to counterbalance the obstacles to abortion access that it creates. *See Planned Parenthood Ariz., Inc. v. Humble*, 753 F.3d 905, 913 (9th Cir. 2014) (reversing district court's failure to enter a preliminary injunction against an Arizona admitting-privileges requirement) ("[W]e must weigh the burdens against the state's justification, asking whether and to what extent the challenged regulation actually advances the state's interests."), *cert. denied*, 135 S. Ct. 870 (2014); *Van Hollen*, 738 F.3d at 798 (affirming entry of a preliminary injunction against a Wisconsin admitting-privileges requirement) ("The cases that deal with abortion-related statutes sought to be justified on medical grounds require . . . evidence . . . that the medical grounds are legitimate . . . . The feebler the medical grounds, the likelier the burden . . . to be 'undue' in the sense of disproportionate or gratuitous.").

In contrast, the Fifth Circuit in this case rejected the argument that "the two requirements at issue are unconstitutional unless they are shown to actually further the State's legitimate interests," declaring that it "disagree[s]" with this approach. *Cole*, slip op. at 36. It also criticized the district court for examining

whether the burdens imposed by the challenged requirements are proportional to the benefits they would bestow. *Id.* at 35-36; *see also Lakey*, 769 F.3d at 297 ("In our circuit, we do not balance the wisdom or effectiveness of a law against the burdens the law imposes.") (citing *Abbott*, 748 F.3d at 593-94). Given that the circuit split implicates both the exercise of a fundamental right and the enforcement of state legislation across the country, review by this Court is likely.

III. There is a Fair Prospect That This Court Will Reverse the Fifth Circuit's Judgment.

The fact that the circuit courts are divided on the critical issue in this case itself demonstrates a fair prospect that this Court will reverse the Fifth Circuit's judgment. *See Maryland v. King*, __ U.S. __, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) ("[G]iven the considered analysis of courts on the other side of the split, there is a fair prospect that this Court will reverse the decision below."). In addition, the Fifth Circuit's decision is inconsistent with prior decisions of this Court and creates an unworkable set of standards.

A. The Fifth Circuit Applied the Undue Burden Standard Incorrectly.

The Fifth Circuit applied the undue burden standard in a manner that departs radically from this Court's precedents, rendering it a hollow protection for the liberty interest recognized in *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992). First, it erred in holding that courts may not evaluate whether laws that restrict access to abortion actually further a valid state interest. *See Cole*, slip op. at 36-37. Second, it erred in holding that the district court should not have considered the operation of the challenged requirements, the lack of medical

evidence supporting them, or their disparate treatment of abortion providers as evidence of an improper purpose. *See id. at* 32-34. Third, it erred in holding that the drastic reduction in the number and geographic distribution of abortion providers caused by the challenged requirements does not operate as a substantial obstacle to abortion access in Texas. *See id.* at 39-42. Overall, the Fifth Circuit's analysis creates a regime in which states can enact laws restricting access to abortion for pretextual reasons and escape any meaningful judicial scrutiny. It is wholly inconsistent with *Casey*'s recognition that the ability to terminate a pregnancy is a choice "central to personal dignity and autonomy . . . [and] the liberty protected by the Fourteenth Amendment," *Casey*, 505 U.S. at 851, and its admonition that "[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right," *id.* at 878.

1. An Abortion Restriction That Fails to Further a Valid State Interest Violates the Undue Burden Standard.

The Fifth Circuit declared that the district court acted in contravention of precedent when it evaluated whether the challenged requirements would actually further the State's asserted interest in the health of abortion patients. *See Cole*, slip op. at 35-37. It held, instead, that the district court should have sustained the requirements if "any conceivable rationale exists" for their enactment. *Id.* at 37 (quoting *Abbott*, 748 F.3d at 594). But it is the Fifth Circuit's rulings that contravene binding precedent. It is well settled that a State may not restrict a fundamental liberty based on the mere articulation of rational legislative objectives.

Rather, there must be a demonstrated, reasonable connection between the operation of the challenged requirements and their purpose.

Courts must make a measured assessment of whether governmental action unduly restricts a fundamental liberty and whether it is motivated by a proper regulatory aim. Requiring a reasonable fit between means and ends is part of federal courts' responsibility to safeguard fundamental rights and ensure that they are not abridged for improper reasons. Absent such an inquiry, courts could not determine whether a challenged restriction furthers a valid state interest to an extent sufficient to justify a loss of liberty or abridgement of other rights. *See, e.g.*, *Edenfield v. Fane*, 507 U.S. 761, 771 (1993) ("Without this requirement, a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression."); *cf. Lawrence v. Texas*, 539 U.S. 558, 578 (2003) ("The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."); *Romer v. Evans*, 517 U.S. 620, 632 (1996) ("[E]ven in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained. The search for the link between classification and objective gives substance to the Equal Protection Clause; it provides guidance and discipline for the legislature, which is entitled to know what sorts of laws it can pass; and it marks the limits of our own authority."); *Holt v. Hobbs*, __ U.S. __, 135 S. Ct. 853, 868 (2015) (Sotomayor, J., concurring) ("The Court is appropriately skeptical of the

relationship between the Department's no-beard policy and its alleged compelling interests because the Department offered little more than unsupported assertions in defense of its refusal of petitioner's requested religious accommodation."). For this reason, when a law restricts a fundamental liberty, a more searching inquiry than the rational basis standard articulated in *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487-88 (1955) is required: Courts must look to see whether there is a demonstrated, reasonable connection between the law and its stated purposes. *See Casey*, 505 U.S. at 848-49, 851; *United States v. Comstock*, 560 U.S. 126, 151 (2010) (Kennedy, J., concurring in the judgment).

In *Casey*, although the Court reaffirmed that a woman has the fundamental right to terminate her pregnancy prior to viability, *Casey*, 505 U.S. at 845-46, it held that the trimester framework employed in earlier cases was too rigid to permit a proper balancing of that right, which, for forty years, has facilitated "[t]he ability of women to participate equally in the economic and social life of the Nation," *id.* at 856, with a state's interest in protecting fetal life, *id.* at 872-73. As a result, the Court articulated the undue burden standard, which is intended to afford greater weight to a state's interest in fetal life from the outset of pregnancy. *See id.* at 876-77. It is not intended, however, to permit a state to restrict women's access to abortion services where the restriction is not reasonably designed to further a valid state interest, such as the protection of fetal life or the promotion of women's

health.[10] *See id.* at 885 (evaluating whether the State's legitimate interest in informed consent is "reasonably served" by the challenged waiting-period requirement).

Pursuant to this standard, the Court has never upheld a law that limits the availability of abortion services without first confirming that the law furthers a valid state interest. *See, e.g., Gonzales v. Carhart*, 550 U.S. 124, 158 (2007) ("The Act's ban on abortions that involve partial delivery of a living fetus furthers the Government's objectives."); *Casey*, 505 U.S. at 882 (Through the challenged informed consent requirements, "the State furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later . . . that her decision was not fully informed.").[11] Indeed, with respect to laws aimed at promoting health, the Court has explained that: "The existence of a compelling state interest in health . . . is only the beginning of the inquiry. The State's regulation may be upheld only if it is reasonably designed to further that state interest." *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 434

[10] "A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Casey,* 505 U.S. at 877. "A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it." *Id.* "And a statute which, *while furthering the interest in potential life or some other valid state interest*, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends." *Id.* (emphasis added).

[11] The Court's decision in *Mazurek v. Armstrong* is no exception to this rule. 520 U.S. 968 (1997). There, the Court upheld Montana's physician-only law only after concluding that it did not limit the availability of abortion services in Montana. *Id.* at 973-74. In fact, the Court concluded that the law affected "only a single practitioner" and would not require any woman seeking an abortion "to travel to a different facility than was previously available." 520 U.S. at 973-74.

(1983) (*overruled on other grounds by Casey*); *accord Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 65-67, 75-79, 80-81 (1976) (invalidating a ban on the use of a common second-trimester abortion method but upholding certain informed consent and recordkeeping requirements); *Doe v. Bolton,* 410 U.S. 179, 194-95 (1973) (invalidating a Georgia law requiring that all abortions be performed in an accredited hospital).

Thus in *Casey*, the Court upheld challenged recordkeeping and reporting requirements only after concluding that they are "reasonably directed to the preservation of maternal health." 505 U.S. at 900-01. Applying a similar analysis, the Court had previously invalidated laws enacted by the City of Akron, Ohio, and the State of Missouri requiring that second-trimester abortions be performed in accredited hospitals, *City of Akron*, 462 U.S. at 431-39; *Planned Parenthood Ass'n of Kan. City, Mo., Inc. v. Ashcroft*, 462 U.S. 476, 481-82 (1983). Based on the medical evidence presented in the respective cases, the Court concluded that the Akron and Missouri requirements "imposed a heavy, and unnecessary, burden on women's access to a relatively inexpensive, otherwise accessible, and safe abortion procedure." *Id.* at 438; *accord Ashcroft*, 462 U.S. at 481-82. In contrast, the Court upheld "Virginia regulations [that] appear[ed] to be generally compatible with accepted medical standards governing outpatient second-trimester abortions," and that the appellant did not "attack[] . . . as being insufficiently related to the State's

interest in protecting health."[12] *Simopoulos v. Virginia*, 462 U.S. 506, 517 (1983) (footnote omitted).

The Fifth Circuit acknowledged *Casey*'s holding "that a law regulating previability abortion" must be "reasonably related to (or designed to further) a legitimate state interest," *Cole*, slip op. at 11, but later said that its own decision in *Abbott* "disavowed" this inquiry and instead required the district court to sustain the challenged requirements if "any conceivable rationale exists" for their enactment, *id.* at 36-37 (quoting *Abbott*, 748 F.3d at 594). Had the Fifth Circuit employed the analysis required by *Casey*, the result in this case would have been different because the challenged requirements are not reasonably related to promoting women's health. The evidence presented at trial demonstrated that neither the ASC requirement nor the admitting-privileges requirement provides a

[12] Although *Casey* overruled certain elements of the Court's prior abortion jurisprudence, it did not overrule that jurisprudence completely. *Compare Casey*, 505 U.S. at 882 ("To the extent *Akron I* and *Thornburgh* find a constitutional violation when the government requires . . . the giving of truthful, nonmisleading information about the nature of the procedure, the attendant health risks and those of childbirth, and the 'probable gestational age' of the fetus, those cases go too far, are inconsistent with *Roe*'s acknowledgement of an important interest in potential life, and are overruled.") *with id.* at 900 ("In *Danforth*, we held that recordkeeping and reporting provisions that are reasonably directed to the preservation of maternal health and that properly respect a patient's confidentiality and privacy are permissible. We think that under this standard, all the provisions at issue here, except that relating to spousal notice, are constitutional.") (internal quotation marks omitted). To the extent that pre-*Casey* decisions fail to recognize or properly weigh the state's interest in fetal life, they are plainly abrogated by *Casey*. *See supra* at 30. But where that interest is not implicated, such as when a state is regulating in the interest of women's health, the earlier cases remain instructive on how to strike the proper balance between the woman's right and the state's asserted interest. *Compare Casey*, 505 U.S. at 878 ("Unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right.") *with City of Akron*, 462 U.S. at 431 ("We have rejected a State's attempt to ban a particular second-trimester abortion procedure, where the ban would have increased the costs and limited the availability of abortions without promoting important health benefits.") (citing *Danforth*, 428 U.S. at 77-78) *and City of Akron*, 462 U.S. at 434 ("There can be no doubt that [the challenged] second-trimester hospitalization requirement places a significant obstacle in the path of women seeking an abortion.").

health benefit to abortion patients; to the contrary, the requirements will result in a net harm to women seeking abortions. *See supra* at 9, 17. Thus, like the regulations struck down in *City of Akron* and *Ashcroft*, the requirements challenged here impose a heavy burden on women's access to abortion services while providing no discernable health benefits. For this reason, there is a fair prospect that this Court will reverse the Fifth Circuit's judgment.

2. The Purpose of the ASC Requirement Is to Reduce Women's Access to Abortion in Texas.

The Fifth Circuit was not faithful to this Court's precedents in analyzing the purpose of the challenged requirements. Many areas of constitutional law require evaluation of a law's purpose. In such cases, courts do not owe blind deference to a legislature's stated purpose. To the contrary, they must scrutinize it to ensure that it is "sincere and not a sham." *Edwards v. Aguillard*, 482 U.S. 578, 587 (1987). Here, the Fifth Circuit disregarded substantial evidence that the stated purpose of the challenged requirements, to promote the health of abortion patients, is pretextual, and their true purpose is to place substantial obstacles in the path of women seeking abortion services in Texas.[13]

First, the Fifth Circuit erroneously held that the effect of the challenged requirements cannot constitute evidence of their purpose. *Cole*, slip op. at 34. This Court has long recognized that "the effect of a law in its real operation is strong

[13] When a statute's purpose is to place a substantial obstacle in the path of a woman seeking a previability abortion, the statute "is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it." *Casey*, 505 U.S. at 877.

evidence of its object."[14] *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 535 (1993); *accord United States v. Windsor*, __ U.S. __, 133 S. Ct. 2675, 2694 (2013) (holding that a challenged statute's "operation in practice confirms [its] purpose"). The undisputed and predictable effect of the challenged requirements is compelling evidence of their purpose. Defendants stipulated that all abortion facilities licensed under Chapter 139 would be forced to close by the ASC requirement. ROA.2290. Such facilities provided 80% of abortions in Texas in the year prior to H.B. 2's enactment. *See supra* at 4, n.1. The record shows that it would cost an abortion provider over $3 million to build a new ASC and over $2 million dollars to purchase an existing ASC. *See supra* at 15. Further, the annual operating costs of an ASC are roughly $600,000 to $1 million dollars greater than those of an abortion facility licensed under Chapter 139. *See id.* Not surprisingly, these staggering costs have deterred new abortion facilities from opening in Texas, and will make it impossible for abortion providers to operate in some regions of the State. *See id.* at 14-15. Likewise, the admitting-privileges requirement was responsible for closing abortion clinics throughout Texas, and it limits the capacity of those that remain. *See supra* at 12-14. The one-two punch of the admitting-privileges requirement and the ASC requirement has resulted in a dramatic and unprecedented reduction in the availability of legal abortion services in Texas.

[14] The Fifth Circuit's reliance on *Mazurek* for a contrary proposition is misplaced. *Cole*, slip op. at 34 (quoting *Mazurek*, 520 U.S. at 972). Far from holding that purpose and effect are independent inquiries, *Mazurek* held it erroneous to conclude that a law had the purpose of imposing a substantial obstacle to abortion access when it could not possibly have that effect. *See Mazurek*, 520 U.S. at 973-74.

Contrary to the Fifth Circuit's holding, the natural consequences of the challenged requirements on women's access to abortion are a strong indication of their purpose.

Second, the Fifth Circuit erroneously held that extensive evidence that the challenged requirements will not serve their stated goal of increasing the safety of abortion procedures, which are extremely safe to begin with, *see supra* at 8-9, 16-17, cannot constitute evidence of their purpose. This Court routinely considers a law's failure to serve its stated goals as evidence of an improper purpose. *See, e.g.*, *Sorrell v. IMS Health Inc.*, __ U.S. __, 131 S. Ct. 2653, 2669 (2011) ("[The challenged statute] does not advance the State's asserted interest in physician confidentiality. The limited range of available privacy options instead reflects the State's impermissible purpose to burden disfavored speech."); *Romer*, 517 U.S. at 632 (1996) ("[The law's] sheer breadth is so discontinuous with the reasons offered for it that [it] seems inexplicable by anything but animus toward the class it affects."). Notably, in *Danforth*, this Court held that the lack of fit between Missouri's ban on saline amniocentesis as a method of second-trimester abortion and the State's asserted interest in promoting women's health suggested that the real aim of the law was to restrict the availability of second-trimester abortion services. *See* 428 U.S. at 78-79 ("[T]he outright legislative proscription of saline fails as a reasonable regulation for the protection of maternal health. It comes into focus, instead, as an unreasonable or arbitrary regulation designed to inhibit, and having the effect of inhibiting, the vast majority of abortions after the first 12 weeks."). Here, the lack of fit between the challenged requirements and Texas' asserted interest in

promoting women's health suggests that the real aim of the laws is to restrict the availability of abortion services.

Third, the Fifth Circuit erroneously held that the challenged requirements' disparate treatment of abortion providers is not evidence of an improper purpose.[15] In other contexts, the Court has recognized that laws that target a particular group for disfavored treatment are more likely to have an improper purpose than those that are neutral and generally applicable. *See, e.g.*, *Windsor*, 133 S. Ct. at 2693-94; *Church of the Lukumi*, 508 U.S. at 524; *Romer*, 517 U.S. at 633. Given that abortion is extremely safe overall and safer than many other procedures performed in outpatient settings, *see* ROA.2378-79, the targeting of abortion for heightened regulation suggests an improper purpose. Moreover, the fact that an abortion provider can avoid compliance with the construction standards by closing its existing facility and purchasing (at considerable additional expense) a grandfathered ASC, *see supra* at 7, is further evidence that the law is not designed to enhance the safety of abortion but rather to impose unnecessary and expensive burdens on abortion providers.

While none of these factors on its own is necessarily dispositive of the purpose analysis, collectively they (along with the other factors cited by the district court, *see* ROA.2696-97) lead unmistakably to the conclusion that the reasons

[15] The ASC requirement targets facilities performing first and early second-trimester abortion procedures for the imposition of construction standards that are not imposed on doctor's offices performing major outpatient surgeries and from which most ASCs are exempt due to grandfathering and waivers. *See supra* at 18-19. Further, abortion providers are the only physicians subject to an admitting-privileges requirement.

offered for the challenged requirements are pretextual, and their true purpose is to hinder women from obtaining abortion services in Texas. Accordingly, there is a fair prospect that this Court will reverse the Fifth Circuit's judgment on this ground.

3. The Drastic Reduction in the Number and Geographic Distribution of Licensed Abortion Providers Caused by the Challenged Requirements Operates as a Substantial Obstacle to Abortion Access in Texas.

The Fifth Circuit's conclusion that the drastic reduction in the number and geographic distribution of abortion providers caused by the challenged requirements does not operate as a substantial obstacle to abortion access in Texas is plainly wrong and reflects profound errors in the court's understanding and application of controlling legal principles. First, as in its earlier decision granting a stay, the Fifth Circuit focuses almost exclusively on the distances that women would have to travel to obtain abortions, suggesting that Plaintiffs cannot prevail on their undue burden claim unless they can identify the precise number of women who will have to travel more than 150 miles to obtain an abortion. *Cole*, slip op at 38-39. But "[w]hether a burden falls on a particular group is a distinct inquiry from whether it is a substantial obstacle . . . as to the women in that group." *Casey*, 505 U.S. at 887. The Fifth Circuit ignores the second inquiry, parsing the numbers of women that the challenged requirements might harm without ever considering the gravity of that harm to the women who will be affected. This approach, and the impossible evidentiary burden it imposes, is inconsistent with *Casey*, which did not create a bright-line rule concerning travel distances, or attempt to quantify with

mathematical precision the number of women for whom the spousal-notification requirement would operate as a substantial obstacle. *Casey*, 505 U.S. at 894-95. Rather, this Court drew inferences based on demographic data, the incidence of women affected by domestic violence in the published literature, and qualitative testimony concerning the impact of the requirement on such women *id.* at 888-93, which is consistent with the approach taken by the district court in this case, ROA.2691-93. Moreover, the Fifth Circuit's assertion that the district court should not have taken into account women's lived experiences is inconsistent with *Casey*, which examined the impact of the spousal notification requirement on the women it affected, noting that they were "likely to be deterred from procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases." *Casey*, 505 U.S. at 894. *See also id.* ("We must not blind ourselves to the fact[s]" [of women's lives].").[16]

The Fifth Circuit also erred in holding that it was "clearly erroneous" for the district court to conclude that the statewide reduction in abortion facilities from 41 to 8, combined with the limitation on physician eligibility to perform abortions imposed by the admitting-privileges requirement, would impact the ability of abortion facilities statewide to meet patient demand for services and lead to delays

[16] The Fifth Circuit's analysis reflects a fundamental misapprehension of this Court's decisions in *Harris v. McRae* and *Maher v. Roe*, on which the Fifth Circuit relies. *Cole*, slip op. at 41 (citing 448 U.S. 297, 316 (1980), 432 U.S. 464, 474 (1997)). Those cases, upholding the exclusion of abortion coverage from public health insurance plans, provide that "although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation." *Harris*, 448 U.S. at 316; *accord Maher*, 432 U.S. at 474. Here, the challenged requirements are plainly obstacles of the State's creation, and it was proper for the district court to consider how those obstacles would compound existing impediments to abortion access.

in access to care for many women. *Cole*, slip op. at 42. While there was ample evidence in the record to support the district court's finding—*see, e.g.,* ROA.2352-53; ROA.3338-—common sense and basic economic principles also dictate that 8 service providers cannot meet a level of demand that had recently sustained 41, particularly when they are sharply limited in their ability to add new physicians.

Further, the Fifth Circuit incorrectly concluded that the elimination of all abortion providers from the vast region of Texas west of San Antonio does not operate as a substantial obstacle to abortion access because women living there may travel to New Mexico for abortion services. *See Cole*, slip op. at 52-56. That holding is inconsistent with this Court's well-settled jurisprudence as well as its own recent holding in *Jackson Women's Health Org. v. Currier*, which concerned a Mississippi admitting-privileges requirement. *See* 760 F.3d at 457-58 ("[W]e hold that the proper formulation of the undue burden analysis focuses solely on the effects within the regulating state—here, Mississippi."). In *Casey*, for example, this Court did not consider the availability of abortion services in Ohio or New Jersey before striking down Pennsylvania's spousal notification requirement. *See* 505 U.S. at 893-94. As the Fifth Circuit correctly explained in *Currier*, there are good reasons for this approach:

> It would be exceedingly difficult for courts to engage in an as-applied analysis of an abortion restriction if we were required to consider not only the effect on abortion clinics in the regulating state, but also the law, potential changes in the law, and locations of abortion clinics in neighboring states. This concern is not farfetched. Both Alabama and Louisiana have passed similar admitting privileges regulations for abortion providers, which could lead to the closure of clinics in those states.

760 F.3d at 456 n.8. In addition, this Court has long held that "a state cannot lean on its sovereign neighbors to provide protection of its citizens' federal constitutional rights." *Id.* at 457 (citing *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 350 (1938) (equal protection)); *see also Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 76-77 (1981) (free speech); *Ezell v. City of Chicago*, 651 F.3d 684, 697 (7th Cir. 2011) (firearm rights); *Islamic Ctr. of Miss., Inc. v. City of Starkville, Miss.*, 840 F.2d 293, 298-99 (5th Cir. 1988) (free exercise).

Finally, the Fifth Circuit's ruling with respect to the McAllen clinic evinces a misunderstanding of the undue burden standard that would permit a State to drastically curtail the availability of abortion services in a given region—for no valid reason—as long as one abortion facility remains. *Cole*, slip op. at 49. The Fifth Circuit gave no consideration to the impact this one-facility rule would have on women's ability to access abortion services promptly, at early gestational ages, or on the quality and cost of abortion services offered by facilities with no competition. The Fifth Circuit's exceedingly narrow interpretation of what qualifies as a substantial obstacle under the undue burden standard is not faithful to *Casey*, where the Court made clear by striking down the spousal-notification requirement that substantial obstacles are not limited to miles traveled or hours delayed. *See* 505 U.S. at 898. An obstacle can be substantial when an abortion restriction treats women in a way that is inconsistent with the fundamental liberty and dignity that the right to make personal decisions about child-bearing protects. *See id.* at 851. Thus, in analyzing the spousal notice requirement, the Court wrote that it

embodied a view of women that was "repugnant to our present understanding . . . of the nature of the rights secured by the Constitution" and that "[t]hese considerations confirm our conclusion that [it] is invalid." *Id.* at 898. Here, the rule applied by the Fifth Circuit would allow a state, by fiat, to give one facility in a community a monopoly on providing abortion services regardless of whether its action furthers any valid state interest. It is an affront to the dignity and equality of women, who must bear the consequences of arbitrary limitations on their access to healthcare, as well as an affront to the constitutional principles underlying the protections afforded to the abortion right. *See e.g.*, *Casey*, 505 U.S. at 851.

With respect to the McAllen clinic, the limitations the Fifth Circuit imposed on the district court's injunction are arbitrary, and the injunction as modified is insufficient to protect patients' constitutional rights. Despite acknowledging "considerable evidence" that at least four physicians working at the McAllen clinic "were unable to obtain admitting privileges at local hospitals for reasons other than their competence" and that Plaintiffs "were unsuccessful in recruiting physicians to work at the McAllen facility who had admitting privileges at a local hospital," the Fifth Circuit limited the injunction against enforcement of the admitting-privileges requirement to a single physician. *Cole*, slip op. at 52. That physician does not reside in McAllen and could not provide abortions there every day. Further, despite acknowledging that the last remaining abortion clinic in Corpus Christi had closed, *id.* at 47, the Fifth Circuit limited the injunction against enforcement of both requirements to women residing in the four counties of the lower Rio Grande Valley,

id. at 43-44, 52. But for women in neighboring counties, the McAllen clinic is closer than abortion facilities in San Antonio—by a hundred miles or more in some cases.

The Fifth Circuit also erred in enjoining the ASC regulations piecemeal. Essentially, the court usurped the role that the Act assigned to DSHS: to determine which ASC regulations should apply to abortion facilities. These regulations are lengthy, complex, and contain a great deal of technical detail. *See* 25 Tex. Admin. Code §§ 135.1 – 135.56. The Fifth Circuit modified the district court's injunction, as of October 29, 2015, to cover the regulations concerning construction and fire-prevention but left the operating requirements intact, based solely on its assessment that the latter requirements would not "cause the closure of abortion facilities." *Cole*, slip op. at 51. It gave no consideration whatsoever to the rationale underlying each of the operating requirements or the extent to which those requirements are interrelated with the construction requirements.[17] This approach was wrong for two reasons. First, it "inva[des] . . . the legislative domain" in a manner that this Court has said is inappropriate. *See Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 329-30 (2006). Second, it assumes that the State can impose any regulation on an abortion clinic that would not cause it to close, even if the regulation is arbitrary or serves no valid purpose.

[17] For example, if a procedure room is no longer required to be large enough to accommodate the presence of scrub nurses and circulating nurses, then there is no reason to require that such nurses be on staff.

In sum, the Fifth Circuit's failure to apply the undue burden standard in a manner that is faithful to this Court's precedents creates a fair prospect that this Court will reverse its judgment.

B. The Fifth Circuit's Alternative Holding Concerning Res Judicata Results From a Deeply Flawed Interpretation of Preclusion Doctrine.

The Fifth Circuit's alternative holding—that Plaintiffs' "facial claims" are barred by res judicata—results from a deeply flawed interpretation of preclusion doctrine that will serve to encourage the filing of premature claims. In *Abbott*, a coalition of abortion providers that included some, but not all, of the plaintiffs in this case, filed a challenge to the admitting-privileges requirement and a provision of H.B. 2 restricting medication abortion on September 27, 2013; both provisions were scheduled to take effect on October 29, 2013. *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 951 F. Supp. 2d 891, 895 (W.D. Tex. 2013). The district court permanently enjoined the admitting-privileges requirement on October 28, 2013, but upheld the restrictions on medication abortion in large part. *Id.* at 902, 908-09. The Fifth Circuit stayed in part the district court's judgment pending appeal, *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 409 (5th Cir. 2013), and ultimately upheld both requirements, *Abbott*, 748 F.3d at 587. The *Abbott* plaintiffs did not challenge the ASC requirement. As explained above, it had a later effective date than the other provisions and required implementing regulations to give it effect. *See supra* at 6. The Fifth Circuit's ruling in this case concedes that material operative facts relevant to Plaintiffs' claims against each of the challenged requirements developed

subsequent to entry of judgment in *Abbott*, *see Cole*, slip op. at 44-46, but nevertheless holds that, insofar as Plaintiffs seek a facial remedy for prevailing on their claims, the claims are barred by res judicata.

The Fifth Circuit commits two grave analytical errors in holding that Plaintiffs' "facial claims" are barred. First, it assumes that Plaintiffs' claims against the ASC requirement arise from the same nucleus of operative facts as Plaintiffs' claims against the admitting-privileges requirement merely because they were both enacted as part of the same omnibus statute. But, as Defendants conceded in the district court, the respective claims against these two provisions required different evidentiary showings at trial. *See infra* at 47. Moreover, claims against the ASC requirement would not have been ripe when *Abbott* was brought because the implementing regulations required to give it effect had not yet been adopted; as a result, uncertainty existed about the extent of the burdens the requirement would impose on abortion facilities and, in particular, whether such facilities would be eligible for grandfathering or waivers. *See infra* at 47-50. By requiring litigants who challenge one provision of a statutory scheme to challenge all provisions simultaneously—or risk preclusion later—the Fifth Circuit's decision encourages the filing of premature claims resting on speculation, which are typically disfavored by this Court. *See infra* at 50. Second, the Fifth Circuit's analysis focused on the relief sought by Plaintiffs rather than on the facts giving rise to Plaintiffs' claims. But the doctrine of res judicata concerns claim preclusion, not relief preclusion. If, as here, a claim rests on facts that developed after the

entry of judgment in a prior case, the claim is not barred by the prior judgment and a court may award any relief that is otherwise appropriate. *See infra* at 51-52.

In addition to making these analytical errors, the Fifth Circuit also ignored Plaintiffs' argument that the claims asserted by Plaintiff Reproductive Services are not barred by res judicata because it was not a party to *Abbott*. The court stated that Plaintiffs did not contest this issue when, in fact, Plaintiffs' argued it in their briefs and Defendants responded. *See* Pls.' Resp. Br. at 54 n.32; Pls.' Reply Br. at 23-24; Defs.' Reply Br. at 23 n.7. Although Defendants argued that Reproductive Services was in privity with Dr. Richter, who was a party to *Abbott*, her status as a mere employee of the organization does not constitute adequate representation for res judicata purposes. *Taylor v. Sturgell*, 553 U.S. 880, 885 (2008) (discussing the types of legal relationships, such as guardian or fiduciary, that would subject a non-party to claim preclusion). Thus, even if the Fifth Circuit were correct that the "facial claims" in this case arise from the same nucleus of operative facts as the claims in *Abbott*, Reproductive Services' claims would not be barred by res judicata and are sufficient to support all of the facial relief awarded by the district court.

1. Plaintiffs' Claims Against the ASC Requirement Depend on a Different Nucleus of Operative Facts Than Plaintiffs' Claims Against the Admitting-Privileges Requirement, And They Were Not Ripe Until Implementing Regulations Were Adopted.

Enforcement of the ASC requirement is not part of the same "transaction, or series of connected transactions" as enforcement of any other provision of the Act, which is a predicate for res judicata. *See* Restatement (Second) of Judgments, § 24(1); *see generally United States v. Tohono O'Odham Nation*, ___ U.S. ___, 131 S.

Ct. 1723, 1730 (2011). This transactional test is "pragmatic[]," not formal, and turns on whether the two actions under consideration are based on "the same nucleus of operative facts." Restatement (Second) of Judgments, § 24(2) & cmt. (b). The test is not satisfied merely because the ASC requirement was enacted as part of an omnibus statute. The ASC requirement operates independently from the admitting-privileges requirement, as evidenced by its distinct effective date and the need for implementing regulations to give it effect. And Plaintiffs' claims against the ASC requirement called for different proof than the claims in *Abbott*. *See* ROA.2316-42 (expert testimony by economist concerning ASC requirement only); ROA.2391-2408 (expert testimony by architect concerning ASC requirement only); ROA.3933-37 (expert testimony by healthcare consultant concerning ASC requirement only). Indeed, Defendants' counsel told the district court during a pre-trial hearing about the discovery schedule that the ASC requirement raised different factual issues and would require different proof than the admitting-privileges requirement. ROA.2785-86. Accordingly, enforcement of the ASC requirement is not part of the same transaction or series of transactions as enforcement of the admitting-privileges requirement.

Further, res judicata does not preclude Plaintiffs' claims concerning the ASC requirement because those claims did not become ripe until the Department adopted the final implementing regulations for the ASC requirement on December 27, 2013, *see* 38 Tex. Reg. 9577-93 (Dec. 27, 2013), months after the district court

entered judgment in *Abbott* on October 28, 2013.[18] Prior to adoption of the final regulations, Plaintiffs did not know the extent of the burdens imposed by the ASC requirement. It was reasonable for them to anticipate that abortion facilities would be eligible for grandfathering and waivers from construction requirements because ASCs in Texas are generally eligible for those accommodations and the Act prescribes that abortion facility standards be made "equivalent" to ASC standards. *See supra* at 6. Indeed, many of the 19,799 comments submitted in response to the proposed regulations suggested that the Act required the Department to create a mechanism for abortion facilities to be grandfathered or obtain waivers. *See* 38 Tex. Reg. 9584, 9588 (Dec. 27, 2013). Had the final regulations permitted grandfathering or waivers, Plaintiffs would have attempted to become licensed before deciding whether to challenge them. Courts treat the ability of facilities to seek grandfathering and waivers as a relevant—and sometimes dispositive—consideration in assessing the constitutionality of abortion-facility licensing schemes, particularly when they impose construction requirements. *See, e.g.*, *Simopoulos*, 462 U.S. at 515 (1983) (upholding requirement that second-trimester abortions be performed in outpatient surgical facilities) ("The second category of requirements outlines construction standards for outpatient surgical clinics, but also provides that deviations from the requirements prescribed herein may be approved if it is determined that the purposes of the minimum requirements have

[18] Although the Fifth Circuit said that Plaintiffs' ripeness argument was "rather obliquely presented," *Cole*, slip op. at 29, Plaintiffs' opening brief to the Fifth Circuit argued directly that, "[p]rior to adoption of the final regulations, Plaintiffs' claims against the ASC requirement were not ripe." Pls.' Resp. Br. at 59.

been fulfilled.") (internal quotation marks omitted); *Planned Parenthood of Ind. & Ken., Inc. v. Comm'r, Ind. Dep't of Health*, No. 1:13–cv–01335–JMS–MJD, 2014 WL 6851930, at *20-22 (S.D. Ind. Dec. 3, 2014) (holding that a licensing scheme that denied abortion clinics the opportunity to seek waivers to the same extent as hospitals and ASCs violated equal protection) ("The abortion clinic waiver prohibition . . . specifically targets abortion providers that the State deems to be 'abortion clinics' by prohibiting them from obtaining a rule waiver, even in cases that will not adversely affect the health of the patients."); *Planned Parenthood of Kan. & Mid-Mo., Inc. v. Drummond*, No. 07-4164-CV-C-ODS, 2007 WL 2811407, at *8 (W.D. Mo. Sept. 24, 2007) (preliminarily enjoining an ASC requirement for abortion providers) ("[W]hether application of the New Construction regulations is a violation of Plaintiffs' constitutional rights depends on what these regulations actually require. This, in turn, depends on whether and to what extent . . . deviations and/or waivers are permitted by DHSS.").

Accordingly, the content of the final regulations was not a foregone conclusion, and prior to their adoption, Plaintiffs' claims against the ASC requirement were not ripe. *See Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 734-37 (1998) (holding that an environmental organization's claims against a resource management plan were not ripe because the plan had not yet been implemented and was still subject to refinement); *Wheaton College v. Sebelius*, 703 F.3d 551, 552-53 (D.C. Cir. 2012) (holding that a nonprofit organization's challenge to the Affordable Care Act's contraceptive benefit was not ripe because a final

regulation had not yet been adopted); *Roman Catholic Diocese of Dallas v. Sebelius*, 927 F. Supp. 2d 406, 425-26 (N.D. Tex. 2013) (same). Accordingly, those claims cannot be precluded by the earlier action. *See Aspex Eyewear, Inc. v. Marchon Eyewear, Inc.*, 672 F.3d 1335, 1342 (Fed. Cir. 2012) ("[R]es judicata requires that in order for a particular claim to be barred, it is necessary that the claim either was asserted, or could have been asserted, in the prior action. If the claim did not exist at the time of the earlier action, it could not have been asserted in that action and is not barred by res judicata."); *In re Piper Aircraft Corp.*, 244 F.3d 1289, 1298 (11th Cir. 2001).

By requiring litigants who challenge one provision of a statutory scheme to challenge all provisions simultaneously, even those awaiting the adoption of implementing regulations—or risk preclusion later—the Fifth Circuit's decision encourages the filing of premature claims that speculate about the impact a law will have. Such claims are disfavored by this Court. *See, e.g.*, *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008) (explaining that facial challenges that "rest on speculation" are disfavored because they "raise the risk of 'premature interpretation of statutes on the basis of factually barebones records.'") (quoting *Sabri v. United States*, 541 U.S. 600, 609 (2004)). For this reason alone, there is a fair prospect that this Court will reverse the Fifth Circuit's ruling on res judicata.

2. The Fifth Circuit Mistakenly Focused on the Relief Sought by Plaintiffs, Rather Than on The Facts Giving Rise to Plaintiffs' Claims.

In addition, the Fifth Circuit's res judicata analysis mistakenly focuses on the scope of the relief requested by Plaintiffs rather than on the facts that give rise to Plaintiffs' claims. *Cole*, slip op. at 27-28, 44-46. Under the Restatement's transactional test, the dispositive consideration is not the scope of relief requested in the second lawsuit (*i.e.*, whether it is facial or as-applied), but rather, whether the claims are based on material operative facts that developed subsequent to entry of judgment in the first lawsuit. *See* Restatement (Second) of Judgments, § 24 cmt. (f); *accord Stanton v. D.C. Ct. of Appeals*, 127 F.3d 72, 78-79 (D.C. Cir. 1997) (permitting successive as-applied challenges). The Fifth Circuit acknowledged that such facts developed after entry of judgment in *Abbott*, stating:

> We now know with certainty that the non-ASC abortion facilities have actually closed and physicians have been unable to obtain admitting privileges after diligent effort. Thus, the actual impact of the combined effect of the admitting privileges and ASC requirements on abortion facilities, abortion physicians, and women in Texas can be more concretely understood and measured.

Cole, slip op. at 44. It further stated that "some important facts occurred later, such as the actual closure of abortion facilities in Corpus Christi and El Paso and the physicians ultimately being denied admitting privileges after diligent effort." *Id.* at 46; *contra Abbott*, 748 F.3d at 598 ("[T]he record does not show that abortion practitioners will likely be unable to comply with the privileges requirement."). These factual developments are fatal to the court's res judicata holding. Given that new, relevant facts developed after entry of judgment in *Abbott*, Plaintiffs were not

precluded from bringing a successive suit, and the district court was not precluded from awarding any appropriate remedy.

In sum, the Fifth Circuit's deeply flawed application of res judicata warrants review by this Court and has a fair prospect of being reversed.

IV. Irreparable Harm Will Result From the Denial of a Stay.

In the absence of a stay, abortion providers and women seeking abortion services in Texas would suffer three forms of irreparable harm. First, some women would be denied the choice to terminate a pregnancy. *See supra* at 14. *Casey*'s joint opinion described this choice as being among "the most intimate and personal choices a person may make in a lifetime, . . . central to personal dignity and autonomy . . . [and] the liberty protected by the Fourteenth Amendment." *Casey*, 505 U.S. at 851. Deprivation of the liberty to make this choice constitutes a profound and irreparable harm. *See Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir., Unit B 1981); 11A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2948.1 (3d ed.) ("When an alleged deprivation of a constitutional right is involved . . . most courts hold that no further showing of irreparable harm is necessary.").

Second, women seeking abortion services would face increased risks to their health. The drastic reduction in the number of service providers would delay many women from obtaining abortions, and some women would be prevented from obtaining abortions. *See* ROA.2359-60; ROA.2387-88; *Van Hollen*, 738 F.3d at 796 ("Patients will be subjected to weeks of delay because of the sudden shortage of eligible doctors—and delay in obtaining an abortion can result in the progression of

a pregnancy to a stage at which an abortion would be less safe, and eventually illegal."). Although abortion is safe throughout pregnancy, its risks increase with gestational age. ROA.2372; ROA.2388. As a result, women who are delayed in obtaining abortions would face greater risks than those who are able to obtain early abortions. ROA.2372; ROA.2388. Women who are unable to obtain abortions would also be at increased risk; Defendants' own data show that, in Texas, the risk of death from carrying a pregnancy to term is 100 times greater than the risk of death from having an abortion. ROA.2950-51; *see* ROA.2377. Further, some women who are unable to access legal abortion would turn to illegal and unsafe methods of abortion. *See* ROA.2360-62. This trend has been on the rise in Texas since the first wave of clinics closed as a result of the admitting-privileges requirement, and it would increase if both of the challenged requirements are fully in force. ROA.2362; ROA.2445; ROA 2436.

Third, some abortion clinics forced to close or remain closed as a result of the Fifth Circuit's mandate would not be able to reopen if Plaintiffs ultimately prevailed in this Court. This, too, is a form of irreparable harm. *See Abbott*, 134 S. Ct. at 509 (Breyer, J., joined by Ginsburg, Sotomayor & Kagan, JJ., dissenting from denial of application to vacate stay) ("The longer a given facility remains closed, the less likely it is ever to reopen even if the admitting privileges requirement is ultimately held unconstitutional."); *Van Hollen*, 738 F.3d at 795-96 ("[I]f forced to comply with the statute, only later to be vindicated when a final judgment is entered, the plaintiffs will incur in the interim the disruption of the services that the abortion

clinics provide . . . . [T]heir doctors' practices will be shut down completely . . . ."); *see generally Atwood Turnkey Drilling, Inc. v. Petroleo Brasileiro, S.A.*, 875 F.2d 1174, 1179 (5th Cir. 1989) (explaining that irreparable harm occurs "where the potential economic loss is so great as to threaten the existence of the movant's business" and collecting cases).

V. The Balance of Equities Tips in Plaintiffs' Favor.

The harm that would befall Plaintiffs and their patients if the Fifth Circuit's mandate issues outweighs the harm to Defendants from having to delay and/or suspend enforcement of the challenged requirements pending final disposition of the case by this Court. The district court found that the challenged requirements do not actually advance the interests they are purportedly intended to serve, ROA.2693-94-95, and in any event, Texas has no interest in enforcing unconstitutional laws. *See Am. Civil Liberties Union v. Ashcroft*, 322 F.3d 240, 251 n.11 (2003), *aff'd and remanded*, 542 U.S. 65 (2004) ("In our earlier opinion in this case, we made clear that . . . neither the Government nor the public generally can claim an interest in the enforcement of an unconstitutional law.") (internal quotation marks omitted). On the other hand, the health, rights, and dignity of thousands of Texas women hang in the balance, along with the fate of a dozen clinics.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court stay the Fifth Circuit's mandate pending the filing and disposition of a petition for a writ of certiorari.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 19th day of June, 2015, I served the above document on the following counsel of record by electronic mail and by overnight commercial carrier.

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