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.

DAVID LAKEY, 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 Vacate the Stay of the United States Court of Appeals for the Fifth Circuit

APPLICATION TO VACATE STAY OF FINAL JUDGMENT PENDING APPEAL

STEPHANIE TOTI
Counsel of Record
DAVID BROWN
JANET CREPPS
JULIE RIKELMAN
CENTER FOR REPRODUCTIVE RIGHTS
120 Wall Street, 14th Floor
New York, NY 10005
(917) 637-3684
stoti@reprorights.org

J. ALEXANDER LAWRENCE
MORRISON & FOERSTER LLP
250 W. 55th Street
New York, NY 10019
(212) 336-8638
alawrence@mofo.com

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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 ask that the stay pending appeal entered by the Fifth Circuit be vacated. The stay permits enforcement of two provisions of Texas law that have had a devastating impact on the availability of abortion services. With the Fifth Circuit's order, which was based on a demonstrably wrong application of the undue burden standard, all but seven medical providers throughout Texas were immediately forced to stop providing abortions and turn away women with scheduled appointments.

If the stay entered by the Fifth Circuit is not vacated, the clinics forced to remain closed during the appeals process will likely never reopen. Further, women's ability to exercise their constitutional right to obtain an abortion will be lost, and their lives will be permanently and profoundly altered. Public health will also be adversely impacted. Texas has already seen a surge in illegal abortion in areas where legal abortion services are no longer available, and that trend will continue if the stay remains in place.

Before the challenged requirements were enacted in 2013, there were 41 medical practices licensed to provide abortions in Texas; there are now just seven, clustered in the four largest metropolitan areas in the eastern part of the state. There are no longer any licensed facilities providing abortions south or west of San Antonio, an area larger than most states. Vacating the stay entered by the Fifth Circuit would allow more than a dozen clinics to resume providing services,

including clinics in the southern and western parts of the state, from which women must now travel hundreds of miles to reach the closest Texas provider.

No credible evidence suggests that the challenged requirements would enhance the safety of abortion procedures. Defendants' medical experts relied not on their own specialized knowledge or experience, but on talking points provided by Vincent Rue, an anti-abortion advocate with no medical training. As reflected in the district court's factual findings, their testimony failed to rebut extensive evidence that the regulations will provide no health benefits to abortion patients and will actually result in greater health risks for many women.

Attempting to gloss over the true basis for the law, which has shuttered eighty percent of the State's abortion clinics, Defendants argue that no evidence is necessary to justify the regulations. Instead, they contend "rational speculation" that the regulations *might* provide a health benefit is sufficient to deprive millions of Texas women of meaningful access to abortion services.

Ignoring foundational principles of constitutional law, the Fifth Circuit adopted Defendants' argument, holding that the challenged requirements may be enforced without *any* inquiry into whether the requirements further the State's aims. But this Court's precedents make clear that the government may not restrict a fundamental liberty based on rational speculation alone. Rather, there must be a closer fit between the ends sought to be achieved and the means selected to do so. Any contrary rule sidelines the federal judiciary from its core duty to safeguard fundamental rights. Scrutiny of the relationship between means and ends enables

a reviewing court to make a judicial assessment of whether challenged regulations unduly restrict a fundamental liberty or are motivated by an improper objective.

The Fifth Circuit was also demonstrably wrong in holding that the challenged regulations would not operate as a substantial obstacle to abortion access, despite eliminating abortion access from vast regions of Texas and leaving just seven clinics in a state with 5.4 million women of reproductive age. Over 900,000 Texas women of reproductive age, more than a sixth of all such women in Texas, now reside more than 150 miles from the nearest Texas abortion provider, up from 86,000 prior to the enactment of the challenged Act.

To protect the rights and the health of women in Texas who will seek abortions during the pendency of this appeal, and to ensure that the Court will be able to grant meaningful relief if it ultimately reviews this case, the stay entered by the Fifth Circuit should be vacated.

STATEMENT OF FACTS

I. The Challenged Requirements.

A. The ASC Requirement.

Plaintiffs—Texas physicians and medical practices that have been providing a broad spectrum of women's healthcare for decades—are challenging two provisions of Texas House Bill 2 ("H.B. 2" or the "Act"), 83rd Leg., 2nd Called Sess. (Tex. 2013). One of these is the "ASC requirement," which provides, in relevant part, that "the minimum standards for an abortion facility must be equivalent to the minimum standards adopted under [Texas Health & Safety Code] Section 243.010 for ambulatory surgical centers." Act, § 4 (codified at Tex. Health & Safety

Code Ann. § 245.010(a)); 25 Tex. Admin. Code § 139.40. This requirement amends the existing framework for licensing abortion providers in Texas, which requires any medical practice that provides fifty or more abortions on an annual basis 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). Abortions at 16 weeks gestational age or later may only be performed in an ASC or hospital. Tex. Health & Safety Code Ann. § 171.004.

Abortion facilities are governed by Chapter 139 of Title 25 of the Texas Administrative Code. *See* 25 Tex. Admin. Code §§ 139.1 – 139.60. They have long been subject to rigorous standards, not challenged here, including 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.

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[1] As a practical matter, very few abortions are performed in Texas hospitals or in facilities that are below the fifty-procedure threshold for licensure. *See* Trial Ex. D-48. In 2012, the vast majority of Texas abortions—approximately eighty percent—were performed in licensed abortion facilities. *See id.* Approximately twenty percent were performed in licensed ASCs. *See id.*

Code § 139.56; discharge and follow-up, 25 Tex. Admin. Code § 139.57; and anesthesia services, 25 Tex. Admin. Code § 139.59.

ASCs are governed by 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. Prior to H.B. 2, however, the ASC standards were more stringent than the abortion facility standards in 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 H.B. 2, physicians may still perform abortion procedures in abortion facilities, ASCs, or hospitals, but now, abortion facilities must satisfy additional requirements. The law provides that the minimum standards for abortion facilities must be "equivalent" to the minimum standards for ASCs. To implement this requirement, the Texas Department of State Health Services ("DSHS" or the "Department") amended the abortion facility regulations in Chapter 139 to incorporate by reference the ASC regulations in Chapter 135. *See* 38 Tex. Reg. 6537 (Sept. 27, 2013).[2] But DSHS did not incorporate ASC regulations "in instances where Chapter 139 prescribes more stringent qualifications or safety requirements."

[2] Regulations to implement H.B. 2 were proposed by DSHS in September 2013, 38 Tex. Reg. 6536-46 (Sept. 27, 2013), and adopted without modification in December 2013, 38 Tex. Reg. 9577-93 (Dec. 27, 2013).

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 existing 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.") (ECF No. 181) 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 the existing facility and purchase an ASC that was built prior to June 18, 2009. *See Id.*; 25 Tex. Admin. Code §§ 135.2(d), 135.51(a). Such facilities, which comprise more than seventy-five percent of all ASCs currently operating in Texas, are exempt from new construction standards due to grandfathering. *See id.*; Joint Stipulation of Facts ("Stip.") (ECF No. 154) at ¶ 6. Purchasing one of these facilities—for more than $2 million, *see infra* at 22, 38—would exempt an abortion provider from having to meet these standards. *See* Perkins Dep. Tr. at 25:11-14; 37:10-23. In short, the ASC requirement does not actually mandate compliance with a set of minimum standards; rather, it imposes a multi-million dollar tax on the provision of abortion services.

While the district court's judgment was in effect, abortion facilities remained subject to all Chapter 139 regulations that were in force before adoption of the Act, and those regulations would be in force if the Fifth Circuit stay were vacated. Further, Plaintiffs do not challenge the requirement that, beginning at 16 weeks' gestation, all abortions must be performed in an ASC or hospital, Tex. Health & Safety Code Ann. § 171.004, and the district court's judgment did not affect that requirement.

B. The Admitting-Privileges Requirement.

The other challenged provision of H.B. 2 is the "admitting-privileges requirement," which 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." Act, § 2 (codified at Tex. Health & Safety Code Ann. § 171.0031); 25 Tex. Admin Code §§ 139.53(c), 139.56(a). The admitting-privileges requirement superseded 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). If the Fifth Circuit stay were vacated, this earlier requirement would come back into effect.

In addition, all Texas physicians are subject to disciplinary action by the Texas Medical 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 Executive Director of the Texas Medical Board testified that, from her thirteen-year tenure at the Medical 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. Trial Tr. Vol. 4 at 80:21-81:11, 85:2-14, 87:11-88:20. 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." *Id.* at 90:15-22. 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.) concluded that the challenged statutory provisions, independently and collectively, impose an undue burden on women's access to abortion services in violation of the Due Process Clause of the Fourteenth Amendment. *See* Memorandum Opinion Incorporating Findings of Fact and Conclusions of Law ("Mem. Op.") (ECF No. 198) at 16. Having "observed the demeanor of the witnesses" at trial, the district court "carefully weighed that demeanor and the witnesses' credibility in determining the facts of this case." Mem. Op. at 4 n.1. In addition, the court "thoroughly considered the testimony of both sides' expert

witnesses and [gave] appropriate weight to their testimony in selecting which conclusions to credit and upon which not to rely." *Id.* Plaintiffs called seven expert witnesses to testify at trial, and Defendants called five rebuttal expert witnesses. Notably, the district court questioned the "objectivity and reliability" of the testimony of four of Defendants' expert witnesses in light of the "considerable editorial and discretionary control over the content of the experts' reports and declarations" provided by Vincent Rue, Ph.D., a prominent anti-abortion activist with no medical training,[3] and expressed "dismay[]" over the "considerable efforts the State took to obscure Rue's level of involvement with the expert's contributions." *Id.* at 7 n.3. The court found that the testimony of Defendants' fifth expert had "fewer overall indicia of reliability" than the testimony of one of Plaintiffs' experts on the same subject. Mem. Op. at 9 n.4.

Based on the testimony of these witnesses and other evidence presented at trial, the district court found, *inter alia*, that abortion in Texas is extremely safe, *see* Mem. Op. at 14; 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 id.* at 14-15; and the challenged requirements have been forcing dozens of abortion clinics throughout

[3] Each of these witnesses initially denied the scope of Rue's involvement, but ultimately conceded that Rue drafted substantive portions of their testimony after being confronted with documentary evidence. For example, Dr. Thompson at first denied that Rue contributed substantively to her testimony, Trial Tr. Vol. 3 at 7:13-17, 8:2-3, 9:13-19, but an email sent from Rue to Dr. Thompson showed that Rue had drafted Dr. Thompson's rebuttal report before Dr. Thompson had ever seen the report of Plaintiffs' expert that she was rebutting, *id.* at 18:4-14; Trial Exs. P-211, P-212.

Texas to close, drastically reducing the number and geographic distribution of licensed abortion providers in the State, *see id.* at 8. These findings of fact, based in large part on determinations regarding the credibility of witnesses, are entitled to substantial deference on appeal. *See Anderson v. Bessemer, N.C.*, 470 U.S. 564, 573-74 (1985).

To remedy the Act's constitutional infirmities, the district court entered three independent injunctions: The first enjoins enforcement of the ASC requirement with respect to (1) facilities that were licensed abortion providers prior to September 1, 2014, but are not currently licensed as ASCs, and (2) the provision of medical abortion (*i.e.*, abortion induced with oral medications); the second enjoins enforcement of the admitting-privileges requirement with respect to Plaintiffs' clinics in McAllen and El Paso; and the third enjoins enforcement of both requirements as they operate in conjunction with respect to women seeking previability abortion services.[4] Mem. Op. at 19-21; Judgment (ECF No. 199) at 3.

Following entry of the judgment, Defendants simultaneously filed motions for a stay pending appeal in both the district court and the Fifth Circuit. The district court denied the motion on September 8, 2014 (ECF No. 208). Following oral argument, a divided panel of the Fifth Circuit granted the motion in nearly all respects on October 2, 2014. *Whole Woman's Health v. Lakey*, No. 14-50928, slip op. (5th Cir. October 2, 2014).

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[4] Alternatively, the third injunction may be interpreted as enjoining the ASC requirement only, based on its interaction with the admitting-privileges requirement. Defendants adopt a broader interpretation.

The Fifth Circuit held that Defendants were likely to prevail on the merits of their appeal. In particular, the court concluded that the district court erred in considering whether the challenged requirements would actually further the stated goal of improving women's health, *see id.* at 16 ("This approach contravenes our precedent."); that the effect of the requirements—closure of eighty percent of the State's abortion clinics and all clinics south and west of San Antonio—did not operate as a substantial obstacle to abortion access in Texas, *see id.* at 27 (holding that travel distances of 230 to 250 miles do not constitute a substantial obstacle, even in the poorest regions of the State, despite the district court's factual findings to the contrary); and that the district court erred in holding that the ASC requirement had an improper purpose based in part on its predictable impact on abortion access, *see id.* at 13 ("To the extent that the district court found an improper purpose based on the law's *effect*, the State is likely to succeed on the merits.") (emphasis in original).

In addition, the Fifth Circuit held that the "large fraction test" for facial invalidity of an abortion restriction is not satisfied absent a showing that the "vast majority" of women in Texas will be unduly burdened by the law, *see id.* at 19 n.14, even though this Court previously held that test satisfied by a restriction that burdened less than one percent of Pennsylvania women. Finally, the Fifth Circuit held that Plaintiffs' as-applied claims against the admitting privileges requirement were precluded by its prior decision in *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583 (5th Cir. 2014), even though those claims are

based on factual developments that occurred subsequent to the entry of judgment in that case, including denial of admitting privileges to physicians in the Rio Grande Valley and El Paso for reasons unrelated to their medical competence and closure of a vast number of clinics throughout Texas, including all clinics in the Rio Grande Valley, Corpus Christi, and West Texas. The Fifth Circuit held that the other three factors that must be weighed in granting a stay—irreparable harm, injury to other parties, and the public interest—supported the issuance of a stay despite acknowledging that "Plaintiffs have . . . made a strong showing that their interests will be injured by a grant of the stay." *Id.* at 31.

Despite this, the Fifth Circuit did allow a partial injunction of the ASC requirement to remain in force as applied to Plaintiff's El Paso clinic. *See Lakey*, slip op. at 28-29. But the El Paso clinic will remain unable to operate as long as the admitting-privileges requirement is in effect.

III. 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 of serious complications and virtually no deaths occurring on account of the procedure." Mem. Op. at 14. The evidence further shows 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.

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." *Id.* 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. Direct Testimony of Daniel Grossman, M.D. ("Grossman Test.") (ECF No. 161) at ¶ 42; Direct Testimony of Paul M. Fine, M.D. ("Fine Test.") (ECF No. 167) at ¶ 38. 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. Grossman Test. at ¶ 42; Fine Test. at ¶ 38; Trial Ex. P-037 at 191 (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. Grossman Test. at ¶ 42; Fine Test. at ¶ 38; P-037 at 784. Similarly, the nursing requirements for ASCs are geared toward surgeries that are more complex than abortion. Grossman Test. at ¶ 42; Fine Test. at ¶ 41. Personnel typically needed for those types of surgeries, such as scrub nurses and circulating nurses, are not needed for abortion procedures. *Id.* It is not surprising, therefore, that a study comparing rates of complications from abortion procedures performed in Texas prior to 16 weeks' gestation at different facility types found that complications do not occur with greater frequency at abortion facilities licensed under Chapter 139 than at ASCs licensed under Chapter 135. Grossman Test. at ¶¶ 41, 43-48.

Further, the record shows that medical abortion does not involve surgery at all. Fine Test. at ¶¶ 12-13. As practiced in Texas, medical abortion entails the oral

administration of medications—*i.e.*, the patient swallows a series of tablets. *Id.* Requiring those tablets to be swallowed in a multi-million dollar surgical facility does not enhance their safety or effectiveness. Mem. Op. at 15; Fine Test. at ¶ 42.

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. Trial Tr. Vol. 4 at 89:6-15, 91:3-13. 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, *see* Stip. at ¶ 6, 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. Direct Testimony of Elizabeth Gray Raymond, M.D., M.P.H. ("Raymond Test.") (ECF No. 162) at ¶¶ 43-45; Fine Test. at ¶¶ 36-37. 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.'" Raymond Test. at ¶ 45; Trial Ex. P-192.

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." Mem. Op. at 15; *see* Direct Testimony of Amy Hagstrom Miller ("Hagstrom Miller Test.") (ECF No. 171) at ¶ 7; Direct Testimony of Marilyn Eldridge ("Eldridge Test.") (ECF No. 172) at ¶ 24; Raymond Test. at ¶¶ 41-42; Fine Test. at ¶¶ 28-31. 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." Mem. Op. at 15. This evidence includes a letter from a hospital in the Rio Grande Valley stating that "[t]he decision of the Governing Board [to deny Dr. Lynn's request for admitting-privileges] was not based on clinical competence consideration." Trial Ex. P-068. It also includes the results of a DSHS investigation, which found that an El Paso hospital combed through its bylaws to find a reason to deny Dr. Richter admitting privileges after learning that she is an

abortion provider.[5] *See* Trial Ex. P-046 at DSHS_00003293; *see also* Eldridge Test. at ¶¶ 20-22.

Further, the record demonstrates that the standards promulgated by the nation's leading medical associations and accreditation bodies—including ACOG, the American College of Surgeons, the American Society of Anesthesiologists, the Accreditation Association for Ambulatory Health Care, the American Association for Accreditation of Ambulatory Surgery Facilities, and the Joint Commission (formerly the Joint Commission on Accreditation of Healthcare Organizations or "JCAHO")—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 that patients are assured continuity of care in the event of a complication, these mechanisms need not include hospital admitting privileges. Raymond Test. at ¶¶ 35-40; Trial Exs. P-029, P-189 to P-194. Regulations promulgated by the Centers for Medicare and Medicaid Services ("CMS") 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, *see* 25 Tex. Admin. Code § 139.56(a) (2012); *supra* at 7.

The evidence thus shows that neither of the challenged requirements will enhance the safety of abortion procedures. To the contrary, by drastically reducing

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[5] As documented in another recent Fifth Circuit decision, abortion providers in Mississippi were similarly denied admitting privileges for reasons unrelated to their qualifications or competence after that State enacted an admitting-privileges requirement. *See Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 458 (5th Cir. 2014) (affirming entry of preliminary injunction).

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 areas south and west of San Antonio means that women in those regions will have to travel hundreds of miles to obtain a legal abortion in Texas. *See infra* at 20. Although complications from abortion are quite rare, when they do arise it is frequently after a patient has returned home following discharge from the medical facility where the abortion was performed. Fine Test. at ¶¶ 30-31. 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 id.* Indeed, if a woman who lives outside the area where she had an abortion experiences a complication that requires hospital treatment, it would not be medically advised for her to travel back to the area to be treated at a hospital near the abortion facility. *See id.* at ¶ 31. Thus, the challenged requirements actually make it less likely that an abortion patient will seek follow-up care from her abortion provider and less likely that she would be treated by that provider 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, *see infra* at 20-21, will delay many women in obtaining an abortion, and some women will not be able to obtain an abortion at all.

See Grossman Test. at ¶¶ 27-28; Raymond Test. at ¶¶ 53-56. Although abortion is safe throughout pregnancy, its risks increase with gestational age. *Id.* at ¶¶ 16, 55. As a result, women who are delayed in obtaining an abortion face greater risks than those who are able to obtain early abortions. *Id.* Women who are unable to obtain an abortion are also at increased risk; 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. Trial Tr. Vol. 1 at 151:1-152:14; *see* Raymond Test. at tbl.2.

Further, some women who are unable to access legal abortion turn to illegal and unsafe methods of abortion. *See* Grossman Test. at ¶¶ 29-35. This trend has been on the rise in Texas since the first wave of clinic closures: After both of the clinics in the Rio Grande Valley stopped providing abortion services, staff members at the McAllen clinic operated by Whole Woman's Health encountered a significant increase in the number of women seeking assistance after attempting self-abortion. Hagstrom Miller Test. at ¶¶ 18, 19. During this period, Defendants also received reports 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. Direct Testimony of Lucila Ceballos Felix ("Felix Test.") (ECF No. 166) at ¶ 30; Grossman Test at ¶¶ 29, 30. This medication is available over-the-counter in Mexico, and is widely trafficked in the Rio Grande Valley and West Texas, which border Mexico. *Id.* at ¶ 30. It may also be purchased illegally from the internet.

Id.; *see McCormack v. Hiedman*, 694 F.3d 1004, 1008 (9th Cir. 2012) (concerning a pregnant woman who attempted abortion by ingesting drugs purchased over the internet because she could not access professional abortion services).[6] Like any medication obtained on the black market, it can be counterfeit or used incorrectly. Felix Test. at ¶ 31; Grossman Test at ¶ 33. 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 professional abortion services); *Hillman v. State*, 503 S.E.2d 610, 611 (Ga. App. 1998) (concerning a pregnant woman who attempted abortion by shooting herself in the abdomen because she could not access professional abortion services).

IV. The Challenged Requirements Have Drastically Reduced the Availability of Abortion Services in Texas.

The challenged requirements have caused the closure of dozens of abortion clinics throughout Texas, 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." Mem. Op. at 8. Before H.B. 2 was enacted, there were 41 licensed facilities providing abortion services in Texas, geographically dispersed throughout the state. Mem. Op. at 8; Grossman Test. at fig.1, tbl.1. Leading up to and following implementation of the admitting-privileges requirement on October 31,

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

2013, that number dropped by nearly half.[7] Mem. Op. at 8; Grossman Test. at fig.1, tbl.1. As a result of the stay, which permitted the ASC requirement to take effect, only seven licensed abortion providers remain in Texas, clustered in four metropolitan areas: Dallas-Fort Worth, Austin, San Antonio, and Houston.[8] Mem. Op. at 7-8; Grossman Test. at ¶ 23, fig.1, tbl.1; Stip. at ¶¶ 1-4.

There are currently no licensed abortion providers south or west of San Antonio. Grossman Test. at ¶ 23. As a result, over 900,000 Texas women of reproductive age reside more than 150 miles from the nearest Texas abortion provider, up from 86,000 prior to the enactment of H.B. 2. Mem. Op. at 9; Grossman Test. at ¶¶ 21, 23. To put this number in context, consider that twenty-five states and the District of Columbia each have a total population of reproductive-age women that is less than 900,000. *Id.* at ¶ 24, tbl.2.

Even if women throughout Texas could navigate the distances necessary to reach the remaining abortion providers, the evidence demonstrates that these facilities, which are all licensed as ASCs, are not able to meet the statewide demand for abortion services. Mem. Op. at 10-11; Grossman Test. at ¶ 20. Moreover, the

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[7] 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, some abortion facilities closed following enactment of H.B. 2 but before those requirements took effect because their licenses were up for renewal or their assessment fees were due. *See, e.g.*, Direct Testimony of Lendol L. Davis, M.D. ("Davis Test.") (ECF No. 165) at ¶ 6; Trial Tr. Vol. 1 at 30:8-31:4.

[8] Planned Parenthood of South Texas may open an eighth facility "[a]t an undisclosed date in the future" in San Antonio. Stip. at ¶ 3.

ability of these facilities to increase their operational capacities is constrained by the admitting-privileges requirement. *Id.* As Dr. Grossman testified, some are currently unable to schedule patients for abortion procedures because they do not have doctors with admitting privileges within 30 miles of that facility who are able to work at the facility on a regular basis.[9] Trial Tr. Vol. 1 at 55:2-17.

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 both a decline in the overall abortion rate and an increase in the proportion of abortions performed in the second trimester. Grossman Test. at ¶¶ 15-16, 22, 27. Implementation of the ASC requirement has further reduced the availability of abortion services in Texas, preventing or delaying many more women from accessing services. *Id.* at ¶ 23.

The reduction in the availability of abortion services operates as a substantial obstacle to abortion access throughout Texas, and perhaps nowhere more so than in the Rio Grande Valley and West Texas. Mem. Op. at 11-12. Women in the Rio Grande Valley, along Texas' southern border with Mexico, now

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[9] Contrary to the Fifth Circuit's assertion, Dr. Grossman's testimony concerning the capacity of the remaining abortion providers to meet the demand for services in Texas is not *ipse dixit*. *See Lakey*, slip op. at 21. Rather, it is based on data showing that these clinics have provided only about twenty percent of abortions in recent years and, since 2012, the number and proportion of abortions performed in these facilities have been decreasing despite increasing demand in their locations. *See* Grossman Test. at ¶ 20. Defendants' own expert, Dr. Uhlenberg, acknowledged this trend. Trial Tr. Vol. 4 at 108:16-25. The data led Dr. Grossman to conclude that these facilities "will not be able to go from providing approximately 14,000 abortions annually, as they currently are, to providing the 60,000 to 70,000 abortions that are done each year in Texas. . . ." Grossman Test. at ¶ 20. Apart from the data relied on by Dr. Grossman, common sense suggests that seven or eight service providers cannot meet a level of demand that recently sustained forty-one.

face a 400 to 500-mile round trip to obtain a legal abortion, *see Lakey*, slip op. at 27, and women in El Paso, at the Mexican border in West Texas, must now make a 1,000-mile round trip to reach a Texas abortion provider, *see id.* at 28. The record shows that many women in these regions are unable to travel long distances to access medical care because they are poor and lack access to reliable transportation, childcare, and the ability to take time off work. *See* Direct Testimony of Kristine Hopkins, Ph.D ("Hopkins Test.") (ECF No. 164) at ¶¶ 5-17; Felix Test at ¶¶ 6-32.

The evidence further demonstrates that the ASC requirement imposes tremendous costs on abortion providers and will prevent new licensed facilities from taking the place of the ones forced to close. *See* Mem. Op. at 10; Direct Testimony of Anne Layne-Farrar, Ph.D. ("Layne-Farrar Test.") (ECF No. 160) at ¶ 36. Construction of a new ASC would cost more than $3 million and take at least eighteen months to complete. Mem. Op. at 10; Direct Testimony of George W. Johannes, AIA ("Johannes Test.") (ECF No. 163) at ¶¶ 7, 40; Davis Test. at ¶¶ 11, 13; 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 most likely exceed $1.5 million. Mem. Op. at 10; Johannes Test. at ¶ 7, 32, 36; Designation of Deposition Testimony of Franz C. Theard, M.D. ("Theard Dep. Tr.") (ECF No. 181) at 40:25-41:22.

Purchasing an existing ASC is similarly expensive and entails obstacles besides cost. For example, Whole Woman's Health sought to purchase an existing ASC in Fort Worth for $2.3 million. Trial Tr. Vol. 2 at 74:12-75:16. It was unable to

obtain financing for the purchase despite engaging a broker who approached more than fifteen banks. *Id.* at 76:2-19. Leasing an existing ASC has also proven difficult for abortion providers. *Id.* at 71:11-73:15, 74:2-11, 76:25-79:21; Trial Ex. P-066 at 2 (restrictive covenant preventing use of ASC for abortion procedures); Davis Test. at ¶ 10. In addition, the operating costs for an ASC exceed those for an abortion facility by $600,000 to $1 million per year. Layne-Farrar Test. at ¶ 40. Dr. Layne-Farrar testified that the high costs of acquiring and operating an ASC make it unlikely that abortion-providing ASCs would open outside Texas' largest metropolitan areas; patient demand for abortion services in other regions would not generate sufficient revenue to offset the fixed costs, *id.* at ¶ 41.

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. Direct Testimony of Peter Uhlenberg, Ph.D. at ¶ 18. 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. Trial Tr. Vol. 4 at 131:25-132:16. Austin Women's Health Center also hoped to build an ASC, but after a feasibility study revealed that the project would be much larger and more expensive than originally anticipated, it is not clear whether it will proceed. Davis Test. at ¶¶ 11-12.

<u>ARGUMENT</u>

I. Standard of Review

"[A] Circuit Justice has jurisdiction to vacate a stay where it appears that the rights of the parties to a case pending in the court of appeals, which case could and very likely would be reviewed here upon final disposition in the court of appeals, may be seriously and irreparably injured by the stay, and the Circuit Justice is of the opinion that the court of appeals is demonstrably wrong in its application of accepted standards in deciding to issue the stay." *W. Airlines, Inc. v. Int'l Bhd. of Teamsters*, 480 U.S. 1301 (1987) (O'Connor, J., in chambers) (quoting *Coleman v. PACCAR, Inc.*, 424 U.S. 1301, 1304 (1976) (Rehnquist, J., in chambers)). Where a district court's decision "is reasoned," "presents novel and important issues," and "is supported by considerations that may be persuasive to the Court of Appeals or to this Court," an order staying that decision may be vacated even if the merits present a "close" question. *Certain Named and Unnamed Non-Citizen Children and Their Parents v. Texas*, 448 U.S. 1327, 1331-32 (1980) (Powell, J., in chambers) (vacating a Fifth Circuit order that stayed, pending appeal, an injunction preventing enforcement of a Texas statute that prohibited the use of state funds to educate immigrant children who are undocumented).

Unlike in *Abbott*, where "[r]easonable minds [could] disagree about whether the Court of Appeals should have granted a stay," there can be no disagreement here about the impact of the challenged requirements on the availability of abortion services in Texas. *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 134 S. Ct. 506, 507 (2013) (Scalia, J., joined by Thomas & Alito, JJ.,

concurring in denial of application to vacate stay). The impact is clear—and it is devastating. More than eighty percent of the abortion clinics have closed, and they will remain closed if the stay is not vacated. The district court was correct in concluding that the challenged requirements impose an undue burden on abortion access in Texas. In holding that Defendants are likely to prevail on the merits of their appeal, the Fifth Circuit committed a grievous error—one that will cause profound harm to many women throughout Texas. Accordingly, the stay entered by that court should be vacated.

II. The Fifth Circuit Was Demonstrably Wrong in Its Application of Accepted 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 Southeastern Pennsylvania v. Casey*. *See* 505 U.S. 833, 851-52 (1992) (opinion of the Court). First, it erred in holding that courts may not evaluate whether laws that restrict access to abortion actually further a valid state interest. *See Lakey*, slip op. at 16. Second, 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 18-23, 25-27. Third, it erred in holding that the district court should not have considered the operation of the challenged requirements as evidence of their purpose. *See id.* at 13.

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 ambulatory surgical center provision would actually improve women's health and safety." *Lakey*, slip op. at 16. It said, instead, that the district court should have followed *Abbott*, which held that a law restricting access to abortion can be sustained by no more than "rational speculation" about its benefits. Abbott, 748 F.3d at 594-95. But it is the Fifth Circuit's rulings that contravene binding precedent. This Court recognizes the ability to terminate a pregnancy as a fundamental liberty afforded protection by the Due Process Clause of the Fourteenth Amendment. *See, e.g., Casey*, 505 U.S. at 846. A State may not restrict a fundamental liberty based on rational speculation alone. Rather, there must be a closer fit between the ends sought to be achieved by the State and the means selected to do so. The Fifth Circuit faulted the district court for conducting the inquiry required by this Court's precedents—namely, assessing whether there is a demonstrated, reasonable connection between the statute, which restricts a fundamental liberty, and the legislature's purposes.

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 liberties. For these reasons, *Casey* requires a court reviewing a law that restricts access to abortion to evaluate, *inter alia*, whether the law actually furthers a valid state

interest. Such an inquiry does not "usurp[] the legislative power" as the Fifth Circuit contends. *Lakey*, slip op. at 17 n.11 (quoting *Abbott*, 748 F.3d at 600). To the contrary, it ensures a proper balance between the legislature and federal judiciary in order to safeguard the exercise of constitutional rights. *Cf. City of Boerne v. Flores*, 521 U.S. 507, 535-36 (1997); *Marbury v. Madison*, 1 Cranch 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). Neither the federal government nor the government of any State may restrict a fundamental liberty unless the restriction furthers a valid governmental interest to an extent sufficient to justify the loss of liberty. *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."). 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 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.[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.[11] *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."). Indeed, with respect to laws aimed at

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[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." *Id.* 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.

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 (1983); *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).[12]

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,

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[12] Several lower federal courts have recently held abortion regulations unenforceable because they limit the availability of abortion services without furthering a valid state interest. *See, e.g., Planned Parenthood Ariz., Inc. v. Humble*, 753 F.3d 905, 913 (9th Cir. 2014) (reversing district court's failure to enter preliminary injunction) ("[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."), *petition for cert. filed* (Sept. 2, 2014); *Planned Parenthood of Wisc., Inc. v. Van Hollen*, 738 F.3d 786, 798 (7th Cir. 2013) (affirming entry of preliminary injunction) ("The cases that deal with abortion-related statutes sought to be justified on medical grounds require . . . evidence . . . that the medical grounds are legitimate . . . ."), *cert. denied*, 134 S. Ct. 2841 (2014); *Planned Parenthood Se., Inc. v. Strange*, __ F. Supp. 2d __, 2014 WL 3809403, *7 (M.D. Ala. Aug. 4, 2014) (entering permanent injunction) ("[C]ourts must examine the strength of the State's justifications for regulations, not just the effects of the regulation."); *see also Currier*, 760 F.3d at 458 (affirming entry of preliminary injunction against Mississippi admitting-privileges requirement based, in part, on factors related to extent to which requirement would further a valid state interest, including "the reasons cited by the hospitals for denying admitting privileges to [abortion providers]," and "the nature and process of the admitting privileges determination."), *petition for reh'g en banc filed* (Aug. 13, 2014). *Humble*, *Van Hollen*, and *Strange* hold that a regulation must further a state interest to an extent sufficient to outweigh the burdens it imposes. *See Lakey*, slip op. at 17. Here, the challenged requirements impose burdens that are vastly out of proportion to any even speculative benefits and thus clearly fail this standard. Indeed, as detailed above, the requirements do not further a valid state interest at all.

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 Assoc. 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."[13] *Simopoulos*, 462 U.S. at 517 (footnote omitted).

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[13] 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."). 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 28. 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

The standard applied by the Fifth Circuit is blatantly inconsistent with these precedents. *See Lakey*, slip op. at 16. Indeed, the Fifth Circuit *faulted* the district court for even considering whether the laws furthered their stated purposes. *See id.* at 17 ("[T]he district court's approach ratchets up rational basis review into a pseudo-strict-scrutiny approach by examining whether the law advances the State's asserted purposes.").[14] Although the asserted rationale for the challenged requirements is the protection of women's health, the evidence presented at trial demonstrated that neither the ASC requirement nor the admitting-privileges requirement provides a health benefit to abortion patients, and in fact, the requirements will result in a net harm to women seeking abortions. *See supra* at 16-19. 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, the Fifth Circuit erred in concluding that the challenged requirements do not impose an undue burden on women's liberty interest. *See Van Hollen*, 738 F.3d at 798 (affirming entry of preliminary injunction against Wisconsin admitting-privileges requirement) ("The feebler the medical grounds, the likelier the burden . . . to be 'undue' in the sense of disproportionate or gratuitous.").

77-78) *and id.* 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.").

[14] To be clear, Plaintiffs do not seek the application of strict scrutiny, and the district court did not employ a least restrictive means analysis.

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

Prior to enactment of H.B. 2, Texas had more than 40 medical practices licensed to provide abortions throughout the State. *See supra* at 19. Nearly half of them closed as a result of the admitting-privileges requirement, and over a dozen more closed as a result of the ASC requirement. *See supra* at 19-20. Only one new provider has opened to take the place of the thirty-five that closed, which collectively provided eighty percent of all abortions in Texas in 2012. *See supra* at 20 n. 8. As a result, there are now only seven medical practices licensed to provide abortions in a state with 5.4 million women of reproductive age. *See* Mem. Op. at 8. Further, all seven are located in four metropolitan areas in the eastern part of the state. *See supra* at 20. There are no longer any licensed abortion providers south or west of San Antonio, a geographic area of staggering breadth, several times larger than the State of Mississippi. *See* Grossman Test. at fig.3. Those that remain are operating at limited capacity because the admitting-privileges requirement restricts the pool of physicians they can employ, and the high cost of compliance with the ASC requirement makes it unlikely that new facilities will open, particularly outside of Texas' largest population centers. *See supra* at 22-23. Nearly one million women of reproductive age now live more than 150 miles from the nearest Texas abortion provider, up from 86,000 prior to the enactment of H.B. 2. *See supra* at 20. In light of the drastic reduction in the number and geographic distribution of abortion providers in Texas caused by the challenged requirements,

the district court was correct that, individually and collectively, they operate as a substantial obstacle to abortion access in Texas. In reaching a contrary conclusion, the Fifth Circuit demonstrably erred in applying the undue burden standard.

The record shows that the ASC requirement operates as a substantial obstacle to abortion access. By reducing the number of abortion providers in Texas by eighty percent and eliminating abortion providers completely from vast parts of the state, the ASC requirement has created a statewide shortage of abortion services and significantly increased the distance that many women must travel to reach a licensed abortion provider. *See supra* at 19-21. Like the spousal notification provision struck down in *Casey*, the reduction in the availability of abortion services caused by the ASC requirement is "likely to prevent a significant number of women from obtaining an abortion." *Casey*, 505 U.S. at 893. The large distances that women in the southern and western parts of Texas have to travel to reach an abortion provider and the shortage of abortion services that all women in Texas now face do "not merely make abortions a little more difficult or expensive to obtain; for many women, [these impediments] will impose a substantial obstacle." *Id.* at 893-94; *cf. Van Hollen*, 738 F.3d at 796 ("Patients will be subjected to weeks of delay because of the sudden shortage of eligible doctors. . . . Some patients will be unable to afford the longer trips they'll have to make to obtain an abortion when the clinics near them shut down.").

The record also shows that the admitting-privileges requirement, as applied to Plaintiffs' clinics in McAllen and El Paso, operates as a substantial obstacle on

access to abortion. The women who were served by these clinics now must travel the longest distances to reach a Texas abortion provider. It is nearly a 500-mile round trip from McAllen to San Antonio, and it is more than a 1,000 mile round trip from El Paso to San Antonio. But the regions where the clinics are located—the Rio Grande Valley and West Texas—are among the poorest in the State; the women who live there face tremendous difficulties in traveling long distances to obtain medical care, including lack of financial resources, lack of access to reliable transportation and childcare, inability to take time off from work, and immigration status. *See supra* at 21-22; Mem. Op. at 11.

The Fifth Circuit acknowledged that the closure of the El Paso clinic created a substantial obstacle to abortion access for women in West Texas; that is why it allowed a partial injunction of the ASC requirement to remain in force with respect to the clinic. *See Lakey*, slop op. at 28-29. But unless the admitting-privileges requirement is also enjoined, the El Paso clinic cannot resume operation. There is only one physician who provides abortions at that clinic, and she has been unable to obtain admitting privileges at a hospital within 30 miles. Eldridge Test. at ¶¶ 14-17. The Fifth Circuit's failure to acknowledge that the admitting-privileges requirement operates as a substantial obstacle to abortion access for West Texas women for the same reason as the ASC requirement is demonstrably wrong.

Inexplicably, the Fifth Circuit held that closure of the McAllen clinic did not create a substantial obstacle to abortion access for women in the Rio Grande Valley, despite the lengths that women in that region must now go to reach an abortion

provider. *See Lakey*, slip op. at 27. In reaching this conclusion, the court made two critical errors in its application of the undue burden standard. First, it ignored the factual record, which demonstrated that, although some women were able to travel from the Rio Grande Valley to San Antonio to obtain abortion services after the McAllen clinic closed, many women were not able to negotiate those distances. There was a twenty percent decline in the abortion rate among women in the Rio Grande Valley following the clinic's closure, indicating that many women who would have accessed abortion services at that location either carried their pregnancies to term or obtained illegal abortions.[15] *See supra* at 17-18, 21. Even for the women who were able to reach San Antonio, given the level of economic disadvantage in the Rio Grande Valley, the 400 to 500-mile round trip likely posed a substantial obstacle requiring considerable effort and sacrifice to overcome. *See supra* at 21-22. Second, the Fifth Circuit misapplied *Casey* by suggesting it created a bright-line rule about driving distances. *Compare Casey*, 505 U.S. at 887 ("[O]n the record before us, and in the context of this facial challenge, we are not convinced that the 24-hour waiting period constitutes an undue burden.") *with Lakey*, slip op. at 26 ("[R]elying on *Casey*, we held that having to travel 150 miles from the Rio Grande Valley to Corpus Christi is not an undue burden."). The Fifth Circuit's failure to consider the record concerning the substantial obstacles that women in the Rio

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[15] The number of women from the Rio Grande Valley who are unable to obtain an abortion is likely to increase given that half the women from the region who were able to obtain abortions after the McAllen clinic closed did so at a clinic in Corpus Christi, which has now closed. *See Lakey*, slip op. at 26-27.

Grande Valley must overcome to reach an abortion provider based on a legally unsupported bright-line rule is a demonstrably wrong application of the undue burden standard.

Finally, the cumulative impact of the ASC and admitting-privileges requirements operates as a substantial obstacle for women seeking abortion services throughout Texas. The combined effect of the two requirements has left a state that had 41 licensed abortion providers before their enactment with only seven. *See supra* at 20-21. Further, those seven—the only abortion providers in Texas able to satisfy the ASC requirement—are prevented from operating at full capacity by the admitting-privileges requirement. *See supra* at 21. The district court was correct to conclude that the dramatic and unprecedented reduction in the availability of abortion services caused by the combination of these two requirements imposes a substantial obstacle to abortion access throughout Texas. *See Van Hollen*, 738 F.3d at 796 ("When one abortion regulation compounds the effects of another, the aggregate effects on abortion rights must be considered."); *see also Humble*, 753 F.3d at 915.

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

The Fifth Circuit was demonstrably wrong in its application of the purpose prong of the undue burden test.[16] The standard applied by the court of appeals

[16] 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.

would require courts to accept a legislature's stated purpose absent clear and compelling factual evidence of an improper objective. *Lakey*, slip op. at 12-13. This impossible standard finds no support in this Court's precedents, which permit an inference of pretext to be drawn from a variety of considerations, including the text of a law, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993), its effect, *id.* at 535, whether it restricts more conduct than is necessary to achieve its stated purpose, *id.* at 538, and its legislative history, *id.* at 540.

In holding that the inquiry into a law's purpose must not include an evaluation of its effect, the Fifth Circuit disregarded clear guidance from this Court. *Lakey*, slip op. at 13 ("To the extent the district court found an improper purpose based on the law's *effect*, the State is likely to succeed on the merits.") (emphasis in original). This Court has long recognized that "the effect of a law in its real operation is strong evidence of its object." *Church of the Lukumi*, 508 U.S. at 535. The Fifth Circuit's reliance on *Mazurek* for a contrary proposition is misplaced. *Lakey*, slip op. at 13 (quoting *Mazurek*, 520 U.S. at 972). Far from holding that purpose and effect are strictly 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.

Here, the ASC requirement's undisputed and predictable effect is compelling evidence of its purpose. Defendants stipulated that all abortion facilities licensed under Chapter 139 would be forced to close by the ASC requirement. Stip. at ¶ 4. Such facilities provided eighty percent of all 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 22. 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 supra* at 23. 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 supra* at 22-23. The one-two punch of the admitting-privileges requirement and the ASC requirement has resulted in a dramatic and unprecedented reduction in the availability legal abortions in Texas. The natural consequence of the law on women's access to abortion is a strong indication of its purpose.

Second, the extensive evidence that the ASC requirement will not serve its stated goal of increasing the safety of abortion procedures, which are extremely safe to begin with, *see supra* at 12-19, is a further indication of improper purpose. *Cf. Romer v. Evans*, 517 U.S. 620, 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."). In *Danforth*, the 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 ASC requirement and Texas' asserted interest in promoting women's health suggests that the real aim of the law is to restrict the availability of abortion services.

Third, as explained above, 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.[17] *See supra* at 6, 14. Given that abortion is extremely safe overall and safer than many other procedures performed in outpatient settings, *see* Raymond Test. at ¶¶ 28-30, 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 a grandfathered ASC, *see supra* at 6, 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.

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[17] The Fifth Circuit notes that ASCs providing abortions are not treated differently from other ASCs. *Lakey*, slip op. at 12. But it ignores the fact that ASCs provided only twenty percent of abortions in the year prior to H.B. 2's enactment. *See supra* at 4 n.1. Chapter 139 abortion facilities, which provided eighty percent of abortions, are not eligible for grandfathering or waivers. *See supra* at 6. Every one of these facilities that was not forced to close by the admitting-privileges requirement has been forced to close by the ASC requirement. *See* Stip. at ¶ 4.

B. The Fifth Circuit Applied the Wrong Standards in Assessing the Remedy Provided by the District Court.

The Fifth Circuit was demonstrably wrong in holding that the district court's "failure to apply the 'large fraction' test . . . weigh[s] in favor of the State's strong likelihood of success on the merits." *Lakey*, slip op. at 18. Two of the injunctions entered by the district court grant as-applied relief. The first enjoins the ASC requirement as-applied to existing licensed abortion facilities and the provision of medical abortion, and the second enjoins the admitting-privileges requirement as applied to the McAllen and El Paso clinics. Mem. Op. at 19-20; Judgment (ECF No. 199) at 2-3. Neither of these injunctions is subject to the large fraction test because neither grants facial relief.

As interpreted by Defendants, the third injunction entered by the district court enjoins the challenged requirements in all of their applications and thus qualifies as facial relief.[18] But the challenged requirements fail to further a valid state interest, *see supra* at 26-31, and are thus unconstitutional in all of their applications. Accordingly, facial invalidation is warranted irrespective of whether the large fraction test is met.[19]

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[18] Although Plaintiffs challenged the admitting-privileges requirement only as applied to the McAllen and El Paso clinics, this Court has held that, regardless of the relief requested by the parties, a court must fashion a remedy that is appropriate in light of the constitutional violation. *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 329-36 (2010). In *Citizens United*, the Court invalidated the challenged statute on its face, even though it had previously rejected a facial challenge to the statute and the plaintiff had stipulated that it was seeking only as-applied relief. 558 U.S. at 329-36.

[19] The district court's conclusion that the ASC requirement has an improper purpose also justifies facial relief irrespective of the large fraction test. *See* Mem. Op. at 16-17; *supra* at 36-39.

Even if the Fifth Circuit was correct in holding that the large fraction test is applicable, the manner in which it applied the test is inconsistent with *Casey*. There, the Court rejected the Commonwealth's argument that the spousal notification provision should not be invalidated on its face because it would affect less than one percent of women seeking abortions in Pennsylvania—namely, married women seeking abortions who would not notify their husbands absent the statutory mandate. 505 U.S. at 894. It explained that: "The analysis does not end with the one percent of women upon whom the statute operates; it begins there. . . .The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant." *Id.* Ultimately, the Court concluded that the provision must be invalidated on its face because, "in a large fraction of the cases in which [it] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion." *Id.* at 895.

Here, however, the Fifth Circuit adopted the very approach that the Court rejected in *Casey*. *Lakey*, slip op. at 20 n. 15 ("Here, we use the same denominator as the panel in *Abbott II*—[all] women seeking an abortion in Texas."). The proper denominator is not all women seeking abortion services; rather, it is women who could have accessed abortion services in Texas prior to implementation of the challenged requirements but who now face increased obstacles as a result of the laws. But what is perhaps most telling is that, even having applied the wrong legal standard, the Fifth Circuit still concluded that the challenged restrictions operate as a substantial obstacle to abortion access in approximately one out of six cases in

which they are relevant. *Lakey*, slip op. at 19. And contrary to what the Fifth Circuit concluded, that artificially-diminished number itself is a large fraction. We routinely use the word "decimate" to connote a substantial reduction in the quantity of something, and it means one out of ten. One out of six is nearly twice as large. The Fifth Circuit's insistence that "the vast majority of Texas women" must face a substantial obstacle for the large fraction test to be satisfied is flatly inconsistent with *Casey*. *Lakey*, slip op. at 19 n.14 (quoting *Abbott*, 748 F.3d at 600). Had the Court intended that to be the test, it would have said that an abortion restriction is invalid on its face if it operates as a substantial obstacle to abortion access for the *vast majority* of women in a state. It did not. In holding that 16.7% is not a large fraction of Texas women, the Fifth Circuit demonstrably erred.

The Fifth Circuit also erred in holding that the district court should have severed the ASC regulations concerning "physical plant requirements" from those concerning "operational requirements" and allowed the latter to take effect.[20] *See Lakey*, slip op. at 29-30. It would be improper for the district court to go line by line through more than 100 pages of regulations to sever individual requirements. Such detailed revision of the regulatory scheme is beyond the institutional competence of the courts, *see Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 329-30

[20] In some cases, the operational requirements make no sense when divorced from the physical plant requirements. For example, some of the operational requirements establish standards for patients in the "postanesthesia care unit," but abortion facilities would not be required to have such a unit if the physical plant requirements were not in force. *See* 25 Tex. Admin. Code § 135.11(a)(6)-(8) (incorporated by reference at 25 Tex. Admin. Code §§ 139.40(a)(1)(B)(viii)), 135.15(b)(2)(B) (incorporated by reference at 25 Tex. Admin. Code § 139.40(a)(1)(B)(xii)).

(2006), and would be contrary to Texas law, *see Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist.*, 826 S.W.2d 489, 515 (Tex. 1992) (declining to sever unconstitutional portions of school finance statute despite severability clause); *Villas at Parkside Partners v. City of Farmers Branch, Tex.*, 726 F.3d 524, 538-39 (5th Cir. 2013) (*en banc*).

C. The Fifth Circuit Applied the Doctrine of Res Judicata Incorrectly.

The Fifth Circuit ignored black-letter law in holding that Plaintiffs' as-applied claims against the admitting-privileges requirement are barred by res judicata. In *Abbott*, the Fifth Circuit denied the plaintiffs' pre-enforcement, facial challenge to the admitting-privileges requirement, but explained that "[l]ater as-applied challenges can always deal with subsequent, concrete constitutional issues." *Abbott*, 748 F.3d at 589. This case seeks to do precisely that. Because material operative facts giving rise to the claims in this case developed after the entry of judgment in *Abbott*, those claims are not barred by res judicata. *See* Restatement (Second) of Judgments, § 24 cmt. (f); *see generally United States v. Tohono O'Odham Nation*, ___ U.S. ___, 131 S. Ct. 1723, 1730 (2011).

When the court entered judgment in *Abbott*, it was not yet known that some abortion providers would be denied admitting privileges for reasons unrelated to their clinical competence, or how enforcement of the admitting-privileges requirement would ultimately impact women's access to abortion services in Texas. *See id.* at 597-98. The Fifth Circuit had found that "[a]ll of the major Texas cities, including Austin, Corpus Christi, Dallas, El Paso, Houston, and San Antonio, continue to have multiple clinics where many physicians will have or obtain

hospital admitting privileges." *Id.* But subsequent developments proved otherwise. Many cities throughout Texas lost their abortion providers. *See* Mem. Op. at 8. Both of the clinics in the Rio Grande Valley have since closed. *Compare* Grossman Test. at ¶ 11 *with Abbott II*, 748 F.3d at 597 ("[T]he statement that *both* clinics in the Rio Grande Valley will close may be disregarded as clearly erroneous based on the trial court record."). Both of the clinics in El Paso have since closed. *See* Grossman Test. at tbl.1; Stip. at ¶ 4. And, critically, the sole clinic in Corpus Christi has since closed. *See* Grossman Test. at ¶ 17. The existence of that clinic, located approximately 150 miles from the McAllen clinic, was the basis for the Fifth Circuit's conclusion that the admitting privileges requirement would not operate as a substantial obstacle to abortion access for women in the Rio Grande Valley. Since the entry of judgment in *Abbott*, the number of women living in a county farther than 150 miles from a Texas abortion provider has more than tripled. Mem. Op. at 9.

In light of the significant changes in the factual landscape between the conclusion of *Abbott* and the start of this case, it was demonstrably wrong for the Fifth Circuit to conclude that Defendants had a likelihood of prevailing on their res judicata defense on appeal.

III. The Rights of Plaintiffs and Their Patients Will Be Seriously and Irreparably Injured by the Stay.

The stay forced over a dozen abortion clinics throughout Texas to cease providing abortion services immediately. If it is not vacated, these clinics will soon have to lay off their staffs and close for good. Women who had appointments at

these clinics, which have been providing safe abortion services for years, are being turned away. The handful of abortion providers remaining in Texas do not have the capacity to treat all of these women in the upcoming months, even if the women could travel the distances necessary to reach them. As a result, many women's constitutional rights will be extinguished before the appellate process runs its course, and their lives will be permanently and profoundly altered by the denial of abortion services. As explained above, Texas women will also face increased health risks as a result of the significant reduction in the availability of abortion services. *See supra* at 16-19.

In contrast, Defendants will face minimal harm if the stay is vacated. Even if Defendants were to prevail on their appeal, they would suffer little harm in the meantime as a result of the district court's injunction. The Act was signed into law on July 18, 2013, but the ASC requirement was not set to take effect until September 1, 2014, more than a year later. Waiting a few additional months for the appellate process to conclude before enforcing that provision would not prejudice Defendants. Further, a brief toll in enforcement of the admitting-privileges requirement would not cause substantial injury to Defendants. *Cf. Van Hollen*, 738 F.3d at 793 ("It has been 40 years since *Roe v. Wade* was decided . . . and it could not have taken the State of Wisconsin all this time to discover the supposed hazards of abortions performed by doctors who do not have admitting privileges at a nearby hospital. The state can without harm to its legitimate interests wait a few months

more to implement its new law, should it prevail in this litigation.") (citations omitted).

Thus, the balance of equities weighs heavily in favor of restoring the *status quo ante* by vacating the stay.

CONCLUSION

For the reasons set forth above, Applicants respectfully request that the stay pending appeal entered by the Fifth Circuit be vacated.

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Respectfully submitted,

/S/ Stephanie Toti

Stephanie Toti
David Brown
Janet Crepps
Julie Rikelman
CENTER FOR REPRODUCTIVE RIGHTS
120 Wall Street, 14th Floor
New York, NY 10005
(917) 637-3684
stoti@reprorights.org

J. Alexander Lawrence
MORRISON & FOERSTER LLP
250 W. 55th Street
New York, NY 10019
(212) 336-8638
alawrence@mofo.com

Attorneys for Applicants

CERTIFICATE OF SERVICE

I certify that on this 6th day of October, 2014, I served the above document on the following counsel of record by electronic mail and by overnight commercial carrier.

Jonathan F. Mitchell, Solicitor General
Michael P. Murphy, Assistant Solicitor General
Beth Klusmann, Assistant Solicitor General
OFFICE OF THE ATTORNEY GENERAL
300 W. 15th Street
Austin, TX 78701

/S/ Stephanie Toti
Stephanie Toti