No. 14-50928

In the United States Court of Appeals for the Fifth Circuit

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,

Plaintiffs/Appellees/Cross-Appellants,

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,

Defendants/Appellants/Cross-Appellees.

On Appeal from the United States District Court for the Western District of Texas, Austin Division
Case No. 1:14-CV-284-LY

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CERTIFICATE OF INTERESTED PERSONS

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

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Other Texas abortion providers; Texas hospitals; Texas ambulatory surgical centers

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STATEMENT CONCERNING ORAL ARGUMENT

By Order dated October 13, 2014, this Court granted the parties' motion for expedited consideration. It has set oral argument for January 7, 2015.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES

Page

TABLE OF AUTHORITIES

Page

TABLE OF AUTHORITIES

Page

TABLE OF AUTHORITIES

Page

STATUTES AND RULES

TABLE OF AUTHORITIES

Page

OTHER AUTHORITIES

TABLE OF AUTHORITIES

Page

JURISDICTIONAL STATEMENT

The district court had subject-matter jurisdiction over this case pursuant to 28 U.S.C. § 1331 because it arises under the Constitution, laws or treaties of the United States. This Court has appellate jurisdiction under 28 U.S.C. § 1291 because the appeal is taken from a final decision of a United States district court. The judgment appealed from was entered on August 29, 2014. Defendants filed a notice of appeal that same day, and Plaintiffs filed a notice of cross-appeal on September 10, 2014. This appeal is from a final judgment that disposes of all the parties' claims.

STATEMENT OF THE ISSUES

Whether provisions of Texas law that do not enhance the safety of abortion procedures but drastically reduce the number and geographic distribution of abortion providers in the State are unconstitutional.

Whether the district court erred in declining to invalidate the ASC requirement independently in all of its applications.

Whether the district court erred in dismissing Plaintiffs' equal protection and unlawful delegation claims.

STATEMENT OF THE CASE

I. The Challenged Requirements.

A. The ASC Requirement.

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 care. The "ASC requirement," provides 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, which requires any medical practice that provides fifty or more abortions on an annual basis to be licensed as 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.

[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-048. 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.*

Abortion facilities are governed by Chapter 139 of Texas Administrative Code Title 25. *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. 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 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 H.B.2, physicians may still perform abortion procedures in abortion facilities, ASCs, or hospitals, but now, abortion facilities must satisfy additional requirements.[2] 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).[3] But DSHS did not 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.

[2] In 2003, Texas enacted a law requiring that abortions at 16 weeks' gestational age and later be performed in an ASC or hospital. Tex. Health & Safety Code Ann. § 171.004. Abortions at those gestational ages may not be performed in an abortion facility licensed under Chapter 139. *See id.* As a result, the ASC requirement challenged here applies only to abortions performed prior to 16 weeks. Plaintiffs have not challenged the 2003 law, and it is not affected by the district court's judgment.

[3] 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).

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.") 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 purchase 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 new construction standards due to grandfathering. *See id.*; ROA.2290. Purchasing one of these facilities—for more than $2 million, *see infra* at 45—would exempt an abortion provider from having to meet these standards. *See* Perkins Dep. Tr. at 25:11-14; 37:10-23. Understood this way, the ASC requirement 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.

Plaintiffs are also challenging the "admitting-privileges requirement" of H.B.2, 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(a)(1)(A)); 25 Tex. Admin Code §§ 139.53(c)(1), 139.56(a)(1). 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).

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. 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.2696. But it

carved out an exception from this holding for new healthcare providers seeking to enter the abortion field, stating that the ASC requirement "does not act as an undue burden on new abortion providers that begin offering abortion services after September 1, 2014, and which were not previously licensed abortion providers." ROA.2699.

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. ROA.2699-701; ROA.2704.

Following entry of judgment, Defendants filed a notice of appeal, ROA.2706-08, and Plaintiffs filed a notice of cross-appeal, identifying the following issues: whether the district court erred in declining to invalidate the ASC requirement independently in all of its applications, and whether the district court

erred in dismissing Plaintiffs' equal protection and unlawful delegation claims,[4] ROA.4464-66. In addition, Defendants filed simultaneous motions for a stay pending appeal in the district court and this Court. The district court denied the motion on September 8, 2014. ROA.4373-74. Following oral argument, a divided panel of this Court granted the motion in nearly all respects on October 2, 2014. *See Whole Woman's Health v. Lakey*, 769 F.3d 285 (5th Cir. 2014).

The motion panel held that Defendants were likely to prevail on the merits of their appeal. In particular, the panel 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 297; in holding that the closure of clinics responsible for providing 80% of the State's abortion procedures, including all clinics south and west of San Antonio, operated as a substantial obstacle to abortion access in Texas, *see id.* at 303; and in further holding that the ASC requirement had an improper purpose, *see id.* at 294-95. In addition, the motion panel held that Plaintiffs' as-applied claims against the admitting-privileges requirement were precluded by the judgment in *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583 (5th Cir. 2014). *Id*. at 301-02.

Subsequently, the Supreme Court vacated the stay entered by the motion panel with reference to the district court's order "enjoining the admitting-privileges

[4] Those claims were dismissed by Order dated August 1, 2014. ROA.2245-46.

requirement as applied to the McAllen and El Paso clinics" and "enjoining the ambulatory surgical center requirement." *Whole Woman's Health v. Lakey*, ___ U.S. ___, 2014 WL 5148719, *1 (Oct. 14, 2014). Such a vacatur may be granted only upon a showing 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, 1305 (1987) (O'Connor, J., in chambers) (quoting *Coleman v. PACCAR, Inc.*, 424 U.S. 1301, 1304 (1976) (Rehnquist, J., in chambers)); *accord Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, __ U.S. ___, 134 S. Ct. 506, 506 (2013) (Scalia, J., joined by Thomas & Alito, JJ., concurring in denial of application to vacate stay); *id.* at 507-09 (Breyer, J., joined by Ginsburg, Sotomayor & Kagan, JJ., dissenting from denial of application to vacate stay).

III. Plaintiffs Have Been Providing Safe Reproductive Healthcare Services to Texas Women for Decades.

Plaintiff Nova Health Systems d/b/a Reproductive Services ("Reproductive Services") is a nonprofit organization founded by Marilyn Eldridge and her late husband, Myron Chrisman, who was a Christian minister. ROA.3020-21. Its mission is to provide high-quality and affordable reproductive healthcare services,

including abortion services, to women in underserved communities.[5] ROA.2474; ROA.3021. Ms. Eldridge graduated from the University of Texas Law School in 1963, one of only five women in her graduating class. ROA.3019-20. Because she is a woman, she could not at that time get a job as a lawyer in Texas. ROA.3020. Instead, she began to volunteer at Planned Parenthood, and eventually founded Reproductive Services with Rev. Chrisman. ROA.3020-21. In March 1973, following the Supreme Court's decision in *Roe v. Wade*, Reproductive Services opened the first nonprofit abortion clinic in Texas. ROA.3021. It operated continuously in the State until its El Paso facility (the "El Paso clinic") was forced to close earlier this year because it could not meet the admitting-privileges requirement. ROA.2474. It is now taking steps to reopen.

Plaintiff Pamela J. Richter, D.O., served as Medical Director of the El Paso clinic for the past 20 years. ROA.2476-77, ROA.2479. Dr. Richter is a board-eligible family-medicine physician licensed to practice medicine in Texas. ROA.2476. She graduated from the Texas College of Osteopathic Medicine in 1983, then completed an internship at the Corpus Christi Osteopathic Hospital.

[5] In 1987, the principals of Reproductive Services founded a nonprofit organization called Adoption Affiliates, whose mission is to make professional, nonjudgmental adoption services available to women with unintended pregnancies. ROA.2474-75. Adoption Affiliates personnel worked on-site at the El Paso clinic to assist women who wished to place their children for adoption. ROA.2474-75; ROA.3022-23. Over the years, it facilitated the placement of more than 800 children. ROA.3022.

ROA.2476. Dr. Richter is a warm and caring physician with an excellent bedside manner. ROA.2476; ROA.3012. In addition to her work with Reproductive Services, she also works for the State of Texas as a staff physician at the state-supported living center ("State Center") in El Paso, operated by the Texas Department of Aging and Disability Services. ROA.2476. There, she provides general medical care and gynecological services to people with intellectual and developmental disabilities. ROA.2476.

Plaintiff Whole Woman's Health has been providing high-quality reproductive healthcare services, including abortion services, to Texas women for over a decade. ROA.2467; ROA.3090-91. It offers a safe and supportive environment to women seeking abortion services and prides itself on providing a holistic approach to abortion care that includes counseling services and emotional support for patients. ROA.3069; ROA.3090-91. It currently operates licensed abortion facilities in Fort Worth, San Antonio, and McAllen (the "McAllen clinic").[6] *See* ROA.2467. In addition, it operates a licensed ASC in San Antonio. ROA.2467. Until recently, Whole Woman's Health also operated licensed abortion facilities in Austin and Beaumont. ROA.2467. Those facilities closed as a result of the Act. ROA.2467.

[6] The McAllen clinic closed following implementation of the admitting-privileges requirement, but has been able to reopen pursuant to the district court's judgment.

Plaintiff Sherwood C. Lynn, Jr., M.D., is a board-certified ob-gyn with over 38 years of experience practicing medicine. ROA.2461. He has served as the Medical Director of the Whole Woman's Health facilities in San Antonio, and he also provides abortion services at the McAllen clinic. ROA. 2461-62. Although Dr. Lynn retired from most facets of his medical practice in 2006, he continues to provide abortion services because he believes that there is a critical need for those services but not enough physicians in Texas willing to provide them. ROA.2461.

Plaintiff Austin Women's Health Center operates a licensed abortion facility in Austin. Until recently, its affiliate, Plaintiff Killeen Women's Health Center, operated a licensed abortion facility in Killeen. In anticipation of the ASC requirement's implementation, that facility closed when its license came up for renewal. ROA.2424; ROA.2829-30. Together, Austin Women's Health Center and Killeen Women's Health Center (collectively, the "Health Centers") have provided high-quality reproductive healthcare services, including abortion services, to Texas women for over 35 years. ROA.2423. Throughout that time, Plaintiff Lendol L. "Tad" Davis, M.D., a board-certified ob-gyn, has served as the Medical Director of those facilities. ROA.2423.

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

The challenged requirements have caused more than half of Texas' licensed abortion providers to close, and absent the relief granted by the district court,

would have caused the closure of over a dozen more, 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.[7] ROA.2688; ROA.2346-47. If the ASC requirement were to take effect, only seven licensed abortion providers would remain in Texas, clustered in four metropolitan areas: Dallas-Fort Worth, Austin, San Antonio, and Houston.[8] ROA.2687-88; ROA.2355-56, ROA.2346-47; ROA.2289-90. There would be no licensed abortion providers south or west of San Antonio. ROA.2355-56. The district court found that, as a result, over 900,000 Texas women of reproductive age would reside more than 150 miles from

[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.*, ROA.2424; ROA.2829-30.

[8] Planned Parenthood of South Texas intends to open an eighth facility in San Antonio "[a]t an undisclosed date in the future." ROA.2290. As of today, that facility has not opened.

the nearest Texas abortion provider, up from 86,000 prior to the enactment of H.B.2.[9] ROA.2689; ROA.2353, ROA.2355-56.

Even if women throughout Texas could navigate the distances necessary to reach the remaining abortion providers, the unrebutted evidence demonstrates that these facilities, which are all licensed as ASCs, are not able to meet the statewide demand for abortion services. 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. Indeed, some have been unable to schedule patients for abortion procedures because they do not have doctors with the required admitting privileges who are able to work at the facility on a regular basis.[10] ROA.2854.

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[9] Defendants assert that H.B.2 resulted in the elimination of abortion providers from only four Texas cities: Beaumont, Corpus Christi, El Paso, and McAllen. But the district court found that H.B.2 caused the elimination of abortion providers from several other cities, as well, including Killeen, where Plaintiff Killeen Women's Health Center was forced to close, and Harlingen, where Defendants stipulated that the sole abortion provider ceased providing services after the admitting-privileges requirement took effect. *See* ROA.2688; ROA.2424; ROA.2290. Defendants' unsupported assertion is blatantly contradicted by the record and provides no basis to disturb the district court's finding.

[10] Contrary to Defendants' assertion, Dr. Grossman's testimony concerning the capacity of the remaining abortion providers to meet the demand for services in Texas is not "bald conjecture." *See* Appellants' Br. at 12. Rather, it is based on data showing that these clinics have only provided about 20% of abortions in recent years and, as a result of the admitting-privileges requirement, the number and proportion of abortions performed in these facilities have been decreasing despite increasing demand in their communities. *See* ROA.2352-53. Defendants'

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 and an increase in the proportion of abortions performed in the second trimester. ROA.2349-50, ROA.2354, ROA.2359. Reversal of the district court's judgment would further reduce the availability of abortion services in Texas, preventing or delaying many more women from accessing services. ROA.2355-56. While this reduction would operate as a substantial obstacle to abortion access throughout Texas, it would have the most drastic impact in the Rio Grande Valley and West Texas. ROA.2691-92. Women in the Rio Grande Valley, along Texas' southern border with Mexico, would face a 400 to 500-mile round trip to obtain a legal abortion, *see* ROA.2430, and women in El Paso, at the Mexican border in West Texas, would have to make a 1,100-mile round trip to reach a Texas abortion provider, *see* ROA.2480. The record shows that many women in these regions are unable to travel long distances to access medical care because they are poor and

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own expert, Dr. Uhlenberg, acknowledged this trend. ROA.3338. 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…." ROA.2352-53. Apart from the data relied on by Dr. Grossman, common sense suggests that seven or eight providers cannot meet a level of demand that recently sustained forty-one.

lack access to reliable transportation, childcare, and the ability to take time off work.[11] *See* ROA.2410-14; ROA.2430-36.

The evidence further demonstrates that the ASC requirement imposes tremendous costs on abortion providers and will prevent new facilities from taking the place of the ones forced to close. *See* ROA.2690; ROA.2330. Building a facility that meets the standards for new-ASC construction would cost more than $3 million and take at least eighteen months to complete. ROA.2690; ROA.2393, ROA.2403-04; ROA.2425-26; 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.

[11] The burden of travel on women in the Rio Grande Valley and West Texas is not alleviated even with the availability of financial assistance. Following the closure of both abortion clinics in the Rio Grande Valley, Whole Woman's Health worked with a nonprofit organization to provide gas cards or bus tickets to women who presented at the McAllen clinic seeking abortion services, to enable them to travel to San Antonio. ROA.2471. Even though every woman who presented at the McAllen clinic was offered such assistance—50 to 60 women per week over a four-month period—only about eight or nine women in total accepted a gas card or bus ticket from Whole Woman's Health. ROA.3066-67. Many declined the assistance because they could not arrange for childcare or take off from work long enough to make such a lengthy trip. ROA.2471. Others had a lawful immigration status that permitted them to be present in the border region, but not to travel as far north as San Antonio. ROA.2471.

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 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. 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, the Health Center has put the project on hold.[12] *See* ROA.2425.

V. The Challenged Requirements Would 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." 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

[12] Defendants quote misleadingly from the record concerning the efforts of Plaintiffs and other abortion providers to comply with the ASC requirement. *See* Appellants' Br. at 10. As explained above, although Plaintiffs and others sought ways to continue providing abortion services in the event that the ASC requirement took effect, undisputed evidence shows that they have not been successful. *See supra* at 18-19. During the period of time when the ASC requirement was in force, after this Court entered a stay of the district court's judgment but before the Supreme Court vacated it, all of the abortion facilities licensed pursuant to Chapter 139 did, indeed, close, and only seven licensed abortion providers remained in operation. Defendants, who immediately sent surveyors out to the clinics to ensure that they had ceased providing services, cannot dispute this fact without violating their obligation of truthfulness.

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." 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. ROA.2365; ROA.2457-58; 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.[13] 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

[13] One of Defendants' experts claimed that abortions should be performed in an ultra-sterile environment to maintain the sterility of the uterus. *See* Appellants' Br. at 13. But, unlike with hysterectomy or C-section, the uterus is not exposed to the external environment during an abortion procedure. Thus, while it is important that instruments entering the uterus be sterile, no medical benefit is provided by maintaining heightened sterility in the external environment. ROA.2365; ROA.2457-58; Trial Ex. P-037 at 784 ("Routine sterile precautions…are unnecessary."). The district court's decision to reject the testimony of Defendants' expert in favor of the testimony of Plaintiffs' experts and a learned treatise was not clearly erroneous. *See infra* at 33-34.

for abortion procedures. ROA.2459. 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.2364, ROA.2365-67; *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. ROA.2385; ROA.2457. 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."[14] 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.

Every hospital within 30 miles of the McAllen clinic requires, as a condition of granting admitting privileges, that an application be signed by a "designated alternate" physician willing to attend to the applicant's patients when the applicant is unavailable. ROA.2462-63; ROA.2469; ROA.3083. The designated alternate physician must already have admitting privileges at the hospital. If an application is not signed by a designated alternate physician, it will not be considered, regardless of whether the applicant meets the hospital's other requirements.

[14] As documented in this Court's recent decision in *Jackson Women's Health Org. v. Currier*, 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* 760 F.3d 448, 458 (5th Cir. 2014) (affirming entry of preliminary injunction).

ROA.2462-63; ROA.2469; ROA.3083. Although Whole Woman's Health and Dr. Lynn reached out to numerous physicians with admitting privileges in the McAllen area, only one was willing to serve as a designated alternate physician for the doctors affiliated with the McAllen clinic, and that physician had privileges at only one area hospital: Doctors Hospital at Renaissance. ROA.2469-70; ROA.2463; ROA.2964-66. Thus, for reasons unrelated to their qualifications, the physicians affiliated with the McAllen clinic were unable to satisfy the application criteria for any hospital but Doctors Hospital at Renaissance. ROA.2470; ROA.2463. There, the first step in applying for admitting privileges is to submit a written request for an application. ROA.2470; ROA.2463. In September 2013, all four physicians submitted such requests. ROA.2470; ROA.2463; Trial Ex. P-069. In response, each of the physicians received a letter stating that, based on the recommendation of the hospital's Credentials Committee, the Medical Executive Committee was denying the physician's request for an application. ROA.2470; ROA.2463-64; Trial Exs. P-068, P-071. The letters noted that the "decision of the Governing Board was **not** based on clinical competence consideration." Trial Exs. P-068, P-071 (emphasis in original).

Similarly, after passage of the admitting-privileges requirement, Dr. Richter sought to obtain admitting privileges at a hospital within 30 miles of the El Paso clinic. ROA.2477. Although she maintained admitting privileges at an El Paso

hospital in the past, she has been unable to secure permanent admitting privileges in El Paso since the admitting-privileges requirement was enacted. ROA.2476-77; ROA.3006-07. She was granted temporary privileges at Foundation Surgical Hospital for 120 days, but the hospital denied her application for permanent privileges by letter, stating that: "it is the decision of the Governing Body to deny your application for the reason that you do not meet requirement [sic] for successfully completing a residency in the field of specialty for which clinical privileges are required." ROA.2478; Trial Ex. P-030. This was curious because the application form for family medicine privileges at this hospital indicates that completion of a family medicine residency is not required if the physician can demonstrate "active participation in the examination process leading to certification in family practice…." Trial Ex. P-062. In fact, Dr. Richter had registered to take the board examination for family medicine in November 2014, which was the next available testing period.[15] ROA.2478. The hospital's C.E.O. candidly told a DSHS investigator that, after learning Dr. Richter was an abortion provider, the hospital combed through its own bylaws looking for a reason to deny her privileges. Trial Ex. P-046 at DSHS_00003293.

[15] Dr. Richter was board certified in family medicine from 1990 to 2009. ROA.2476. She did not seek recertification after 2009 because the nature of her practice at that time did not require board certification. ROA.2476.

Further, the record demonstrates that the standards promulgated by the nation's leading medical associations and accreditation bodies 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. 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 6.

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

Not only would the challenged requirements fail to enhance the safety of abortion procedures, but by drastically reducing the number and geographic distribution of licensed abortion facilities in Texas, they would 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 would have to travel hundreds of miles to obtain a legal abortion in Texas. *See infra* at 40-42. 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. ROA.2455-56. The farther a woman must travel to reach an abortion provider, the less likely she would 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 would 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 would have to travel to reach a licensed abortion provider combined with the statewide shortage in the availability of abortion services, *see infra* at 40-42, would delay many women in obtaining an abortion, and some women would not be able to obtain an abortion at all. *See* ROA.2359-60; ROA.2387-88. 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 both of the clinics in the Rio Grande Valley stopped providing abortion services, staff members at the McAllen clinic encountered a significant increase in the number of women seeking assistance after attempting self-abortion. ROA.2471-72. 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. ROA.2435-36; 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. Hiedman*, 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).[16] Like any medication obtained on the black market, it can be counterfeit or used incorrectly. 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*, 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 clinical abortion services).

SUMMARY OF ARGUMENT

In 1973, the U.S. Supreme Court held that Texas could not ban abortion within its borders. *Roe v. Wade*, 410 U.S. 113, 153 (1973). Texas now seeks to do indirectly what, for forty years, it has been unable to do directly: eliminate millions of women's access to safe and legal abortion services. With the pretext of advancing women's health, Texas has enacted a pair of restrictions that single out abortion from all other medical procedures for the imposition of requirements that will not enhance patient health or safety and are impossible for most abortion

[16] *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 currently serving time in prison for helping her teenage daughter purchase abortion-inducing drugs from the internet), *available at* http://nyti.ms/1rhxibl.

providers to meet. The district court was correct in holding that these laws impose an undue burden on abortion access in violation of the Due Process Clause of the Fourteenth Amendment.

The challenged requirements fail the undue burden test for three independent reasons: First, they fail to further Texas' interest in women's health or any other valid state interest. Second, they operate as a substantial obstacle to abortion access in Texas by forcing the clinics responsible for performing 80% of abortion procedures in the State to close, preventing the remaining clinics from operating at full capacity, and deterring new clinics from opening. Third, the purpose of the laws is to reduce women's access to abortion services, as evidenced by their impact on the availability of abortion services, the lack of fit between their requirements and their purported goal of protecting women's health, and their targeting of abortion providers with restrictions that are not imposed on healthcare providers performing more dangerous procedures in outpatient settings. The district court was correct in holding that, overall, the challenged requirements impose an undue burden on abortion access in Texas, but it erred in holding that the ASC requirement, on its own, does not impose an undue burden when applied to new abortion providers seeking to enter the field.

In addition, both of the challenged requirements violate the Equal Protection Clause, and the admitting-privileges requirement constitutes an unlawful

delegation of governmental authority to private parties. The district court erred in dismissing these claims, and they provide alternate grounds on which this Court may affirm its judgment.

Conversely, the district court was correct in rejecting Defendants' res judicata defense, on which Defendants bear the burden of proof. Plaintiffs' claims in this case depend on material operative facts that occurred after judgment was entered in *Abbott* and thus are not precluded.

Finally, facial invalidation is the appropriate remedy for the constitutional violations proven at trial. Given that the challenged requirements fail to further a valid state interest and have an improper purpose, they are unconstitutional in all of their applications. Alternatively, facial invalidation of the challenged requirements is warranted because they operate as a substantial obstacle to abortion access in a large fraction of the cases in which they are relevant. At an absolute minimum, however, Plaintiffs are entitled to as-applied relief for the McAllen and El Paso clinics, a conclusion that Defendants contest only in a perfunctory manner.

ARGUMENT

I. The Standard of Review Requires This Court to Credit the District Court's Factual Findings.

Defendants fail to identify the standard of review applicable to the district court's judgment as required by Fed. R. App. P. 28(a)(8)(B) (incorporated by

reference into Fed. R. App. P. 28.1(c)(1)). This is not surprising given that the applicable standard of review is fatal to many of Defendants' arguments.

Following a bench trial, a district court's findings of fact "must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility." Fed. R. Civ. P. 52(a)(6); *see Elementis Chromium L.P. v. Coastal States Petroleum Co.*, 450 F.3d 607, 612 (5th Cir. 2006). A finding of fact is not clearly erroneous "if it is plausible in the light of the record read as a whole." *Id.* at 613 (internal quotation marks omitted). "This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently." *Anderson v. Bessemer, N.C.*, 470 U.S. 564, 573 (1985). "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous. *Id.* Further, "[w]hen findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said."[17] *Id.* at 575.

[17] Additionally, a court need not make explicit each factual finding underpinning its holding. "If a trial judge fails to make a specific finding on a particular fact, the reviewing court may assume that the court impliedly made a finding consistent with its general holding so long as the implied finding is supported by the

Here, the district court "observed the demeanor of the witnesses" and "carefully weighed that demeanor and the witnesses' credibility in determining the facts of this case." ROA.2684. 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." ROA.2684. 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,[18] and expressed "dismay[]" over the "considerable efforts the State took to obscure Rue's level of involvement with the expert's contributions."[19] ROA.2687. The court found that

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evidence." *Century Marine Inc. v. United States*, 153 F.3d 225, 231 (5th Cir. 1998).

[18] 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, ROA.3104-06, 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 that she was rebutting, ROA.3115; Trial Exs. P-211, P-212.

[19] Two of Defendants' experts, Dr. Anderson and Dr. Uhlenberg, also testified in a recent case concerning an Alabama admitting-privileges law. The district court in

the testimony of Defendants' fifth expert had "fewer overall indicia of reliability" than the testimony of one of Plaintiffs' experts on the same subject. ROA.2689. Defendants ask this Court to disregard many of the district court's factual findings, but they do not argue—much less demonstrate—that any of those findings are clearly erroneous. Accordingly, Defendants' efforts to substitute their own view of the facts for the district court's findings must be rejected.

The district court's conclusions of law are reviewed de novo. *Elementis Chromium L.P.*, 450 F.3d at 612.

II. The District Court Correctly Held That the Challenged Requirements Impose an Undue Burden on Access to Abortion in Texas.

It is undisputed that the Due Process Clause of the Fourteenth Amendment prohibits Texas from enacting laws that impose an undue burden on access to abortion services. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 874 (1992). "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

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that case also concluded that their testimony lacked credibility. *See Planned Parenthood Southeast, Inc. v. Strange*, __ F. Supp. 2d ___, 2014 WL 5339294 at *5 (M.D. Ala. Oct. 20, 2014) ("Whether Anderson lacks judgment, is dishonest, or is profoundly colored by his bias, his decision to adopt Rue's supplemental report and submit it to the court without verifying the validity of its contents deprives him of credibility."), *id.* at *12 ("[T]he court did not credit Uhlenberg's testimony.").

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). Here, the district court correctly held that the challenged requirements impose an undue burden on access to abortion. It erred, however, in limiting its holding with respect to the ASC requirement to existing licensed abortion facilities. *See* ROA.2699.

A. Neither Requirement Furthers a Valid State Interest.

Pursuant to the undue burden standard, the Supreme Court has never upheld a law that limits the availability of abortion services without first confirming that the law furthers a valid state interest.[20] *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

[20] 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.

discover later…that her decision was not fully informed."); *id.* at 885 (evaluating whether the State's legitimate interest in informed consent is "reasonably served" by the challenged waiting-period requirement). 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 (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).[21]

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

[21] This Court has long held that, "based on the rationale for *stare decisis* articulated by the *Casey* plurality,…the 'central holdings' of pre-*Casey* decisions remain intact" to the extent not inconsistent with *Casey*. *Barnes v. Mississippi*, 992 F.2d 1335, 1337 (5th Cir. 1993).

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." *Simopoulos v. Virginia*, 462 U.S. 506, 517 (1983) (footnote omitted).

Consistent with these precedents, this Court has held that "the constitutionality of an abortion regulation…turns on an examination of [both] the importance of the state's interest in the regulation and the severity of the burden that regulation imposes on the woman's right to seek an abortion." *Barnes*, 992 F.2d at 1339. In a recent decision, it affirmed the entry of a preliminary injunction against a Mississippi admitting-privileges requirement based in part on evidence showing that, as applied to the plaintiffs, the requirement would not further a valid

state interest.[22] *Currier*, 760 F.3d at 458 ("In reaching this determination, we look to the entire record and factual context in which the law operates, including…the reasons cited by the hospitals for denying admitting privileges to Dr. Parker and Dr. Doe…and the nature and process of the admitting privileges determination."); *accord Planned Parenthood of Wisc., Inc. v. Van Hollen*, 738 F.3d 786, 798 (7th Cir. 2013) (affirming entry of preliminary injunction against a Wisconsin admitting-privileges requirement), *cert. denied*, 134 S. Ct. 2841 (2014); *Planned Parenthood Se., Inc. v. Strange*, __ F. Supp. 2d __, 2014 WL 3809403, *49 (M.D. Ala. Aug. 4, 2014) (holding unconstitutional an Alabama admitting-privileges requirement).

Here, the evidence demonstrated that the challenged requirements are not reasonably designed to further the State's interest in health, and in fact, that they would result in a net harm to women seeking abortions. *See supra* at 26-29. Thus, like the regulations struck down in *City of Akron*, *Ashcroft*, and *Currier*, the

[22] Defendants and some courts, *see Planned Parenthood Arizona, Inc. v. Humble*, 753 F.3d 905, 914 (9th Cir. 2014), *petition for cert. filed* (Sept. 2, 2014); *Strange*, 2014 WL 3809403 at *7, interpret *Abbott* as stating a contrary rule. But *Abbott* need not be read in this way. There, the Court held only that abortion regulations that purport to serve the State's interest in health are subject to "*Casey*'s undue burden balancing test" rather than "strict scrutiny," and that they are independently subject to rational basis review. 748 F.3d at 590. It did not hold that *Casey*'s balancing test excludes consideration of the extent to which an abortion regulation furthers a valid state interest. Nonetheless, if the decision in *Abbott II* is inconsistent with earlier decisions of this Court and the Supreme Court, it should not be followed.

requirements challenged here impose a heavy burden on women's access to abortion services while providing no discernable health benefits. This alone provides an adequate basis for holding them unconstitutional.[23]

Notably, Defendants do not argue that the challenged requirements actually further a valid State interest, and they point to no evidence in the record that would support such a claim. They argue only that "one could rationally speculate that this law *might* provide *some* benefit to patients." Appellants' Br. at 29 (emphasis in original). But rank speculation does not provide a sufficient basis for "intrud[ing] upon a protected liberty." *Casey*, 505 U.S. at 851. Further, Defendants have given up arguing that the ASC requirement is even speculatively related to patient health and safety.[24] They now contend that the benefit that might be provided by the law

[23] Recent decisions from other circuits hold that, to satisfy the undue burden standard, a regulation must further a state interest to an extent sufficient to outweigh the burdens it imposes. *See Humble*, 753 F.3d at 914; *Van Hollen*, 738 F.3d at 798, *Strange*, 2014 WL 3809403 at *5. Although this Court has not expressly adopted such an approach, it is consistent with *Abbott*'s characterization of the undue burden standard as a "balancing test." 748 F.3d at 590. 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.

[24] Defendants take this approach for good reason. Only one of their medical experts—Dr. Thompson—testified about the ASC requirement, and the district court found that her testimony lacked credibility. *See* ROA.2687. Instead, after "thoroughly consider[ing]" the evidence, the district court concluded that "Plaintiffs have demonstrated that women will not obtain better care or experience more frequent positive outcomes at an ambulatory surgical center as compared to a previously licensed [abortion] facility." ROA.2694.

is related to pain management—specifically that the ASC requirement enables abortion providers to offer more robust pain management options to their patients. *See* Appellants' Br. at 28-29. But this post-hoc justification for the law is plainly spurious. Abortion clinics were expressly authorized to offer a full range of pain management options prior to H.B.2. *See* 25 Tex. Admin. Code § 139.59(a) (2012). And forcing a woman to travel hundreds of miles to return home following her abortion does not decrease the pain that she will experience as a result of the procedure.[25]

Defendants offer no theory whatsoever as to how the admitting-privileges requirement advances the State's interest in health given Plaintiffs' proof that at least five abortion providers were denied admitting privileges by hospitals in McAllen and El Paso for reasons unrelated to their clinical competence. *See supra* at 23-25.

B. Each Requirement Operates as a Substantial Obstacle to Abortion Access by Drastically Reducing the Number and Geographic Distribution of Texas Abortion Providers.

Defendants do not dispute that the admitting-privileges requirement forced the closure of the McAllen and El Paso clinics, as well as other abortion providers

[25] Because the ASC requirement fails to further a valid state interest, it imposes an undue burden in all of its applications. The district court therefore erred in holding that it would not operate as an undue burden when applied to abortion providers that seek to become licensed in the future. *See* ROA.2699.

throughout Texas. *See supra* at 13-14. As a result, absent the relief granted by the district court, women in the Rio Grande Valley would have to travel an additional 400-500 miles round-trip to reach a Texas abortion provider,[26] and women in El Paso would have to travel an additional 1,100 miles round-trip to reach a Texas abortion provider.[27] *See supra* at 16. It is likewise undisputed that the ASC requirement would cause the vast majority of remaining abortion providers to close, *see supra* at 13-14, and the district court found that it would deter new providers from entering the field, *see* ROA.2690.[28] If the ASC requirement were

[26] In arguing that this large increase in travel distance does not operate as a substantial obstacle, Defendants ignore the factual record, which shows 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. *See* ROA.2349-51 (noting a 20% decline in the abortion rate among women in the Rio Grande Valley following the closure); ROA.2471 (testifying that many women in the Rio Grande Valley were unable to travel as far north as San Antonio despite being offered financial assistance).

[27] Defendants' argument that the El Paso clinic's closure does not operate as a substantial obstacle because women in West Texas can seek abortion services in another state is foreclosed by this Court's decision in *Currier*. *See* 760 F.3d at 457.

[28] Despite the district court's finding that "few, if any, new compliant abortion facilities will open to meet the demand resulting from existing clinics' closure," ROA.2690, Defendants claim that Plaintiffs "did not prove that no new HB2-compliant abortion providers will emerge in the Rio Grande Valley (or El Paso)," Appellants' Br. at 49. But the district court's finding is undoubtedly "plausible in the light of the record," *Elementis Chromium L.P.*, 450 F.3d at 613, which includes evidence that it is not economically feasible for abortion facilities to operate in compliance with the ASC requirement outside Texas' largest metropolitan areas,

in effect today, there would be, at most, eight licensed abortion providers in the entire State, down from 41 prior to the enactment of H.B.2, and they would be clustered in four metropolitan areas with no providers south or west of San Antonio. *See supra* at 14-16. Overall, more than 900,000 women of reproductive age would live farther than 150 miles from the nearest Texas abortion provider, up from 86,000 prior to the enactment of H.B.2. *See supra* at 14-15. Moreover, the remaining abortion providers would have to increase their collective capacity by 400% to meet the statewide demand for abortion services, but the admitting-privileges requirement would limit their ability to hire new physicians.[29] *See supra* at 15-16.

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and that, even within those areas, many desiring to build ASCs dedicated to abortion care have been unable to do so because of the tremendous expense involved, *see supra* at 17-19.

[29] Defendants ask this Court to ignore the district court's finding—supported by Plaintiffs' evidence and admissions by Defendants' expert, *see supra* at 15 n.10, that the seven or eight abortion providers that would remain in Texas lack the capacity to meet the statewide demand for abortion services that sustained 41 abortion providers prior to H.B.2. *See* ROA.2691. Instead, Defendants contend that, because "a surgical abortion takes 2-10 minutes," it would be easy for the remaining providers to increase the volume of procedures they perform. Appellants' Br. at 35. But Defendants ignore the fact that the 2-10 minute surgery is merely one part of the abortion procedure. First, the patient must provide a medical history and undergo counseling, a physical examination, laboratory tests, and a mandatory ultrasound examination. *See* Tex. Health & Safety Code § 171.012(a)(4); 25 Tex. Admin. Code §§ 139.51(4), 139.52, 139.53(a)(4). Patients who reside more than 100 miles from the clinic must also observe a two-hour waiting period. Tex. Health & Safety Code § 171.012(a)(4). Following the procedure, patients must spend time in the recovery room and then return for a

Based on the evidence presented at trial, which included testimony concerning the obstacles that some women face in traveling outside of their communities to access abortion services, *supra* at 16-17; the decline in the abortion rate and increase in the proportion of second-trimester abortions following the first wave of clinic closures, *supra* at 16; the inability of existing ASCs to increase their capacity despite increasing demand for their services, *supra* at 15 n.10; and the increased incidence of women attempting self-abortion, *supra* at 28, the district court concluded that "[t]he clinic closings attributable to the act's two requirements will undeniably reduce meaningful access to abortion care for women throughout Texas," and that "the practical impact on Texas women due to the clinics' closure statewide would operate for a significant number of women in Texas just as drastically as a complete ban on abortion," ROA.2690-91. Accordingly, the challenged requirements—individually and collectively—impose substantial obstacles on women seeking previability abortion services. *See Casey*, 505 U.S. at 893-94 (holding that a spousal-notification requirement imposed a substantial obstacle on Pennsylvania women because a "significant number of women…are

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follow-up examination. 25 Tex. Admin. Code §§ 139.53(a)(8), 139.53(a)(11), 139.57(a)(3). More importantly, abortion clinics are not assembly lines seeking to maximize efficiency; they are medical practices that strive to provide compassionate and individualized care. Defendants' suggestion that clinics should try to find ways—like staying open into the night—to treat a higher volume of patients and devote less time to each patient's needs is not consistent with the Act's purported purpose of improving the quality of patient care.

likely to be deterred from procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases."); *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….").

Given the district court's finding that the high cost of acquiring and operating a facility that meets ASC standards will prevent "new compliant abortion facilities" from opening, even where unmet demand for services exists, ROA.2690, it was error for the court to conclude that the ASC requirement would not act as an undue burden when applied to healthcare providers that seek to enter the abortion field in the future, ROA.2699.

C. The Purpose of the Requirements is to Reduce Women's Access to Abortion in Texas.

The district court correctly held that the ASC requirement has an improper purpose, and the record supports the conclusion that the admitting-privileges requirement does, too. Contrary to Defendants' contentions, courts are not bound to accept a state's articulation of the purpose of a regulation if the proffered purpose is a mere "sham." *Okpalobi v. Foster*, 190 F.3d 337, 354 (5th Cir. 1999) (quoting *Edwards v. Aguillard*, 482 U.S. 578, 586-87 (1987)), *superseded on other grounds on reh'g en banc*, 244 F.3d 405 (5th Cir. 2001). And Plaintiffs are not required to present evidence concerning the motivations of individual lawmakers,

which are often irrelevant to the analysis. *See, e.g.*, *Rosentiel v. Rodriguez*, 101 F.3d 1544, 1552 (8th Cir. 1996) ("[A]n isolated statement by an individual legislator is not a sufficient basis from which to infer the intent of that entire legislative body…."). Rather, the district court's approach, looking at the totality of the circumstances including the practical operation of the challenged requirement and the fit between means and ends, is the appropriate one. *See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977); *Okpalobi*, 190 F.3d at 355-56; *Van Hollen*, 738 F.3d at 790-91.

The Supreme 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. 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. ROA.2290. Such facilities provided 80% of all abortions in Texas in the year prior to H.B.2's enactment. *See supra* at 2 n.1. The record shows that it would cost an abortion provider over $3 million to build a new ASC and over $2 million to purchase an existing ASC. *See supra* at 17-18. Further, the annual operating costs of an ASC are roughly $600,000 to $1 million greater than those of an abortion facility licensed under Chapter 139. *See supra* at 18. Not surprisingly, these staggering

costs have deterred new abortion facilities from opening in Texas, and would make it impossible for abortion providers to operate in some regions of the State. *See supra* at 18. 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 15. The one-two punch of the admitting-privileges requirement and the ASC requirement would result in a dramatic and unprecedented reduction in the availability of legal abortions in Texas. The natural consequence of these laws on women's access to abortion is a strong indication of their purpose.

Second, the 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 19-26, is a further indication of improper purpose.[30] *Cf. Romer v. Evans*, 517 U.S. 620, 632 (1996) ("[The law's] sheer

[30] Defendants' reliance on *Mazurek* to support a contrary proposition is misplaced. There, the Court concluded that a law affecting "only a single practitioner," which would not require any woman seeking an abortion "to travel to a different facility than was previously available," could not have been intended to create a substantial obstacle to abortion access. 520 U.S. at 973-74. In addition, the Court noted that its prior cases "left no doubt that, to ensure the safety of the abortion procedure, the States may mandate that only physicians perform abortions." *Id.* at 974-75 (quoting *City of Akron*, 462 U.S. at 447); *accord Connecticut v. Menillo*, 423 U.S. 9, 11 (1975); *Roe*, 410 U.S. at 165. Cases in that same line, however, made clear that limitations on the types of facilities in which abortions may be performed would not be upheld unless supported by credible medical evidence. *See, e.g., City of Akron*, 462 U.S. at 431-39 (striking down a second-trimester hospitalization

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 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, 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

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requirement); *Ashcroft*, 462 U.S. at 481-82 (same); *Bolton*, 410 U.S. at 194-95 (striking down a blanket hospitalization requirement). Here, the lack of credible medical evidence supporting the challenged requirements combined with the devastating impact they would have on abortion access is strong evidence that they serve an improper purpose.

and waivers. *See supra* at 21-22. Similarly, the admitting-privileges requirement conditions provision of abortion services on compliance with an arbitrary and burdensome prerequisite that no other healthcare providers are required to meet. 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 ASC construction standards by closing its existing facility and purchasing a grandfathered ASC, *see supra* at 5, 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.

III. The District Court Erred in Dismissing Plaintiffs' Equal Protection Claim, Which Provides an Alternate Ground for Affirmance.

No valid state interest is advanced by targeting abortion providers for heightened regulation. Accordingly, Plaintiffs' equal protection claim provides an alternate basis for striking down the challenged requirements. Just as a law that burdens a protected liberty must further a valid state interest to satisfy the Due Process Clause, a classification that burdens a protected liberty must further a valid state interest to satisfy the Equal Protection Clause.[31] *Cf. supra* at 35-40. "Moral

[31] "[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." *Romer v. Evans*, 517 U.S. 620, 632 (1996). "By

disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause because legal classifications must not be 'drawn for the purpose of disadvantaging the group burdened by the law.'" *Lawrence v. Texas*, 539 U.S. 558, 583 (2003) (O'Connor, J., concurring in the judgment) (quoting *Romer*, 517 U.S. at 633).

Here, the challenged regulations target abortion providers with burdensome restrictions that are not imposed on any other Texas healthcare providers even though abortion is far safer than many other procedures commonly performed in outpatient settings and was already highly regulated prior to H.B.2's enactment. *See supra* at 14, 26. This disparate treatment of abortion providers does not further Texas' interest in health or any valid state interest. *Cf. Eisenstadt v. Baird*, 405 U.S. 438, 450-52 (1972) (holding that State's asserted interest in health did not justify targeting unmarried people for ban on use of contraceptives); *see also Romer*, 517 U.S. at 635 (holding that State's asserted interest in respect for its citizens' freedom of association did not justify constitutional amendment targeting gay, lesbian, and bisexual persons for exclusion from protections of anti-discrimination laws); *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 448-50 (1985) (holding that State's asserted interests in public safety did not

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requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Id.* at 633.

justify targeting a group home for the mentally disabled for a permit requirement); *Plyler v. Doe*, 457 U.S. 202, 227-30 (1982) (holding that State's asserted interest in preserving its limited resources for the education of lawful residents did not justify targeting undocumented immigrant children for exclusion from the public school system); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 535-38 (1973) (holding that the government's asserted interest in preventing fraud did not justify targeting households containing one or more unrelated persons for exclusion from the food stamps program). Accordingly, the challenged requirements violate the Equal Protection Clause.

IV. The District Court Erred in Dismissing Plaintiffs' Unlawful Delegation Claim, Which Provides an Alternate Ground for Affirmance.

The district court erred in dismissing Plaintiffs' unlawful delegation claim against the admitting privileges requirement. *See* ROA.2246. Longstanding principles of due process hold that: (1) states may not authorize private parties to act against third-party liberty or property interests in ways that the state itself could not act; and (2) for a delegation of governmental authority to be constitutional, states must retain the ability to review private parties' exercise of governmental discretion. *See, e.g., State of Wash. ex. rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928) (striking down a law preventing certain uses of land unless two-thirds of the property owners in the immediate vicinity consented in writing); *Birth Control Ctrs., Inc. v. Reizen*, 508 F. Supp. 1366, 1374 (E.D. Mich. 1981), *aff'd on*

other grounds, 743 F.2d 352 (6th Cir. 1984) (holding that a law requiring abortion clinics to have a backup agreement with a physician who had staff privileges at a local hospital "violate[d] due process concepts because [it] delegate[d] a licensing function to private entities without standards to guide their discretion"); *Hallmark Clinic v. N.C. Dep't of Human Res.*, 380 F. Supp. 1153, 1158 (E.D.N.C. 1974) (striking down a requirement that abortion providers maintain a written transfer agreement or admitting privileges with a hospital because "the state…placed no limits on the hospital's decision to grant or withhold a transfer agreement"). The record shows that the admitting-privileges requirement violates both principles for delegation of authority.

In the first place, as illustrated by abortion providers' attempts to obtain admitting privileges in McAllen and El Paso, H.B.2 gives hospitals unconstitutionally broad discretion to deny admitting privileges to physicians who provide abortions for reasons wholly unrelated to their clinical competence. Although Texas law requires hospitals to apply their criteria for assessing admitting-privileges applications with consistency, it leaves hospitals with broad discretion to set those criteria in the first instance. The record shows that every hospital within 30 miles of the McAllen clinic requires, as a condition of granting admitting privileges, that an application be signed by a "designated alternate" physician who already has admitting privileges at that hospital. *See supra* at 23.

As a result, four board-certified, highly-experienced physicians from Whole Woman's Health were excluded from consideration for admitting privileges by all but one hospital within 30 miles of the McAllen clinic. *See supra* 24. And the one hospital at which those physicians could meet the designated-alternate-physician requirement declined their requests for applications, without even stating the reason for doing so, except to note that it was "not based on clinical competence consideration." *See supra* 24. Similarly, a hospital within 30 miles of the El Paso clinic at which Dr. Richter—a board-eligible physician who had previously maintained admitting privileges in the community—applied, denied her request for admitting privileges because she had not completed a residency in the area of family medicine, despite the hospital's own rules providing that residency in family medicine is not required in her circumstances. *See supra* at 24-25.

The record therefore demonstrates that H.B.2 permits hospitals to apply criteria for granting admitting privileges that are unrelated to a physician's clinical competence. This is precisely the sort of arbitrary result that the nondelegation doctrine guards against: Texas cannot delegate power to a private party to set criteria for providing abortions that it could not itself exercise. *See Tucson Women's Clinic v. Eden*, 379 F.3d 531, 556 (9th Cir. 2004) (holding that the nondelegation doctrine prohibits the state from delegating to a third party the power to prohibit physicians from providing abortions based on criteria that would

be illegitimate for the state to impose); *Hallmark Clinic*, 380 F. Supp. at 1158-59 ("The state cannot grant hospitals power it does not have itself.").

The admitting-privileges requirement also violates the second principle for the delegation of authority because there is insufficient oversight of hospitals' decisions concerning admitting privileges. Neither the McAllen hospital's decision to withhold applications from the physicians affiliated with Whole Woman's Health nor the El Paso hospital's decision to deny Dr. Richter's application for permanent admitting privileges is subject to review by the State. This sort of unreviewable power over a liberty or property interest is the *sine qua non* of unlawful delegation and it renders the admitting-privileges requirement unconstitutional. *See, e.g.*, *Roberge*, 278 U.S. at 122 (finding due process violation where "[t]here is no provision for review under the ordinance; [the private property owners'] failure to give consent is final"); *cf. Women's Med. Prof'l Corp. v. Baird*, 438 F.3d 595, 610 (6th Cir. 2006) (holding nondelegation doctrine inapplicable where state could waive hospital transfer agreement requirement).

Therefore, as the record in this case demonstrates, the admitting-privileges requirement is an unlawful delegation of governmental authority. This conclusion provides an alternate basis for affirming the district court's injunction against the admitting-privileges requirement.

V. The District Court Correctly Rejected Defendants' Res Judicata Defense.

Contrary to Defendants' contentions, Defendants bear the burden of proving res judicata, which is an affirmative defense; Plaintiffs do not bear the burden of disproving it. *See Taylor v. Sturgell*, 553 U.S. 880, 907 (2008) (citing 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4405, at 83 (2d ed. 2002)). The district court correctly held that Defendants failed to carry this burden. Indeed, they introduced no proof on this issue whatsoever.

To establish res judicata, Defendants must show, *inter alia*, that *Abbott* and this case involve the same claims.[32] *See Petro-Hunt, L.L.C. v. United States*, 365 F.3d 385, 395 (5th Cir. 2004). Under the transactional test of the Restatement (Second) of Judgments, which this Court applies to determine whether two lawsuits involve the same claims, *see id.*, "[m]aterial operative facts occurring after the decision of an action with respect to the same subject matter may in themselves, or taken in conjunction with the antecedent facts, comprise a

[32] Defendants must also show that the two cases involve the same claimants. *Petro-Hunt, L.L.C.*, 365 F.3d at 395. Reproductive Services was not a party to *Abbott*, and contrary to Defendants' assertions, Dr. Richter's status as a mere employee of Reproductive Services does not constitute adequate representation for the purpose of claim preclusion. *See Taylor* 553 U.S. at 885 (discussing the types of legal relationships, such as guardian or fiduciary, that would subject a non-party to claim preclusion).

transaction which may be made the basis of a second action not precluded by the first." Restatement (Second) of Judgments, § 24 cmt. (f). Further, "[w]here important human values—such as the lawfulness of a continuing personal disability or restraint—are at stake, even a slight change of circumstances may afford a sufficient basis for concluding that a second action may be brought." *Id.* Accordingly, this Court has consistently held that res judicata does not serve to bar claims that depend on facts occurring after the entry of a prior judgment. *See, e.g., Blair v. City of Greenville*, 649 F.2d 365, 368 (5th Cir. Unit A 1981); *Kilgoar v. Colbert Cnty. Bd. of Educ.*, 578 F.2d 1033, 1035 (5th Cir. 1978) ("The district court erred in dismissing the case because of res judicata. Claims based on conduct subsequent to prior litigation are not precluded."); *Dawkins v. Nabisco, Inc.*, 549 F.2d 396, 397 (5th Cir. 1977); *Exhibitors Poster Exch., Inc. v. Nat. Screen Serv. Corp.*, 421 F.2d 1313, 1318 (5th Cir. 1970).

The rule typically prevents a pre-enforcement, facial challenge to a statute from precluding parties from bringing subsequent, as-applied challenges after the statute takes effect. *See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 322 F.3d 1064, 1080 (9th Cir. 2003) ("Often, an as-applied challenge will not be precluded by an earlier facial challenge because the 'transactional nucleus of facts' surrounding the enactment of a regulation will be different from the nucleus of facts involved when that regulation is applied to a

particular property."); *cf. Stanton v. D.C. Ct. of Appeals*, 127 F.3d 72, 78-79 (D.C. Cir. 1997) (permitting successive as-applied challenges). Only in cases where the subsequent, post-enforcement challenge involves no new facts will it be precluded by an earlier denial of pre-enforcement relief. *See Tahoe-Sierra Preservation Council, Inc.*, 322 F.3d at 1080. *Abbott* itself recognized this principle, explaining that, although it was denying the plaintiffs' pre-enforcement, as-applied challenge, "[l]ater as-applied challenges can always deal with subsequent, concrete constitutional issues." *Abbott*, 748 F.3d at 589.

Here, Plaintiffs' claims concerning the admitting-privileges requirement depend on material operative facts that occurred after judgment was entered in *Abbott*.[33] In particular, it was not known then how many abortion providers would be unable to obtain admitting privileges or how enforcement of the admitting-privileges requirement would ultimately impact women's access to abortion services in Texas.[34] *See id.* at 597-98. Based on the facts that were known at the

[33] The district court entered judgment in that case on October 28, 2013, before the admitting-privileges requirement took effect. The appellate panel declined to consider any facts that occurred subsequently. *See Abbott*, 748 F.3d at 599 n.14 ("To the extent that the State and Planned Parenthood rely on developments since the conclusion of the bench trial and during this appeal, we do not consider any arguments based on those facts, nor do we rely on any facts asserted in amicus briefs. This opinion[] is confined to the record before the trial court.").

[34] Contrary to Defendants' contentions in this case, the plaintiffs' allegations concerning the likely impact of the admitting-privileges requirement were hotly

time, this Court concluded 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 subsequently, many cities throughout Texas lost their abortion providers: Both of the clinics in the Rio Grande Valley closed, both of the clinics in El Paso closed; and the sole clinic in Corpus Christi closed. *See* ROA.2688, ROA.2344, ROA.2347, ROA.2352, ROA.2346.

The existence of the Corpus Christi clinic, located approximately 150 miles from the McAllen clinic, was the basis for *Abbott*'s conclusion that "[t]he record…does not indicate that the admitting-privileges requirement imposes an undue burden by virtue of the potential increase in travel distance in the Rio Grande Valley." *Abbott*, 748 F.3d at 597-98 ("The Rio Grande Valley…has four counties…and travel between those four counties and Corpus Christi, where abortion services are still provided, takes less than three hours on Texas highways (distances up to 150 miles maximum and most far less."). As a result of its closure, absent the district court's injunction, women in the Rio Grande Valley would have to make a 400-500-mile round-trip to reach a Texas abortion provider. *See supra* at 16. And women in El Paso would have to make a 1,100-mile round-

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contested in *Abbott*. *See Abbott*, 748 F.3d at 593 ("The State…attacked Planned Parenthood's evidence as to the effects of the admitting-privileges requirement.")

trip to reach a Texas abortion provider. *See supra* at 16. Overall, the number of women living in a county farther than 150 miles from a Texas abortion provider more than quadrupled following entry of judgment in *Abbott* and that number would more than double if the ASC requirement were enforced. ROA.2689. Moreover, it was not known at the time of judgment in *Abbott* that the physicians at Plaintiffs' clinics in McAllen and El Paso would be denied admitting privileges for reasons unrelated to their clinical competence. *See supra* at 22-25. In claiming this fact was uncontested in *Abbott*, Defendants misrepresent both their position in that case and this Court's decision. *See 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 changes in material operative facts are fatal to Defendants' res judicata defense.

In sum, *Abbott* rejected the plaintiffs' pre-enforcement, facial challenge to the admitting-privileges requirement as speculative, holding that there was insufficient evidence that the harms predicted by the plaintiffs would actually materialize. But it stated that "[l]ater as-applied challenges can always deal with subsequent, concrete constitutional issues." *Abbott*, 748 F.3d at 589. Following entry of judgment in that case, concrete harms did materialize as physicians were denied admitting privileges for reasons unrelated to their qualifications; clinics all across Texas were forced to close, including the Corpus Christi clinic the existence

of which had been a key factor in the *Abbott* decision; and the distances that women had to travel to reach a licensed abortion provider increased substantially. The doctrine of res judicata does not preclude Plaintiffs from bringing new claims against the admitting-privileges requirement to remedy the constitutional violations caused by these changed circumstances.

Likewise, res judicata does not preclude Plaintiffs' claims concerning the ASC requirement. The regulations implementing that requirement were not adopted until December 27, 2013, *see* 38 Tex. Reg. 9577-93 (Dec. 27, 2013), well after this Court entered judgment in *Abbott*. Prior to adoption of the final regulations, Plaintiffs' claims against the ASC requirement were not ripe. *See Wheaton College v. Sebelius*, 703 F.3d 551, 552-53 (D.C. Cir. 2012) (holding that nonprofit organization's challenge to the Affordable Care Act's contraceptive benefit was not ripe pending adoption of final regulation); *Roman Catholic Diocese of Dallas v. Sebelius*, 927 F. Supp. 2d 406, 425-26 (N.D. Tex. 2013) (same); *see also Choice Inc. of Tex. v. Greenstein*, 691 F.3d 710, 717 (5th Cir. 2012) (holding that claims against a Louisiana statute authorizing administrative action against abortion facilities would not be ripe until such action was taken). Accordingly, they 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).

Further, 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. *Petro-Hunt, L.L.C.*, 365 F.3d at 395-96 (quoting Restatement (Second) of Judgments, § 24(1)). 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*." *Id.* (emphasis in original); *accord* 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 concerning the ASC requirement required different proof than the claims in *Abbott*. *See* ROA.2316-42 (expert testimony by economist concerning ASC requirement); ROA.2391-2408 (expert testimony by architect concerning ASC requirement); ROA.3933-37 (expert testimony by healthcare consultant concerning ASC requirement); ROA.2785-86 (Defendants' counsel explaining to the court during a

pre-trial hearing that the ASC requirement raised different factual issues and would require different proof than the admitting-privileges requirement). Accordingly, enforcement of the ASC requirement is not part of the same transaction or series of transactions as enforcement of the admitting-privileges requirement.

VI. Facial Invalidation of Each Requirement is the Appropriate Remedy for the Constitutional Violations Proven at Trial.

A. The Challenged Requirements Are Unconstitutional in All of Their Applications.

Because each of the challenged requirements fails to further a valid state interest, *supra* at 35-40, 48-50, and has an improper purpose, *supra* at 44-48, each is unconstitutional in all of its applications. Accordingly, facial invalidation is warranted regardless of whether the large-fraction test is met.[35]

B. The Challenged Requirements Operate as a Substantial Obstacle to Abortion Access in a Large Fraction of Relevant Cases.

Alternatively, facial invalidation of the challenged requirements is warranted

[35] Although Plaintiffs challenged the admitting-privileges requirement as applied to the McAllen and El Paso clinics, the district court was required to tailor its remedy to the scope of the constitutional violation proven at trial. *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 329-36 (2010). In *Citizens United*, for example, the Supreme 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. *Id*; *see generally* Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1339 (2000) ("Once a case is brought, no general categorical line bars a court from making broader pronouncements of invalidity in properly 'as-applied' cases.").

because they operate as a substantial obstacle to abortion access in a large fraction of the cases in which they are relevant. *See Casey*, 505 U.S. at 895.

In *Casey*, the Supreme Court invalidated Pennsylvania's spousal-notification requirement 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." *Casey*, 505 U.S. at 895. In reaching this conclusion, the Court did not seek to ascertain the precise number of women who would be deterred from seeking abortions by the law. Instead, it identified the population of women who would be affected by the law, then considered whether its burden was of a type that would operate as a substantial obstacle for a significant number of them. *See Casey*, 505 U.S. at 894 ("We must not blind ourselves to the fact that the *significant number* of women who fear for their safety and the safety of their children are likely to be deterred from procuring an abortion….") (emphasis added). Here, the district court properly conducted the same analysis. Relying on the evidence presented at trial, it concluded that the closure of clinics responsible for providing 80% of all abortion procedures in Texas "would operate for a significant number of women in Texas just as drastically as a complete ban on abortion." ROA.2691.

Defendants are wrong in insisting that only women left more than 150 miles from a Texas abortion provider will experience a substantial obstacle. Both *Casey*

and *Abbott* require a contextualized analysis of the burdens that women will face based on the evidentiary record. *See Casey*, 505 U.S. at 886-87 (evaluating burdens imposed by increased travel distances "on the record before us, and in the context of this facial challenge"); *Abbott*, 748 F.3d at 598 (same). Neither case creates a bright line rule.

But even if we limit the analysis to women left more than 150 miles from a Texas abortion provider, the large-fraction test is satisfied. Defendants contend that the relevant fraction is 10%. Although they are not explicit about the denominator they use to arrive at this fraction, it appears they are counting all Texas women of reproductive age in their denominator. This approach is inconsistent with *Casey*, which held that the proper denominator for the fraction is the population of women for whom the law imposes a meaningful burden, not the total population of women to whom the law applies. *See Casey*, 505 U.S. at 894. Defendants contend that the fraction's numerator should be 900,000—the number of women of reproductive age that the district court found would live more than 150 miles from an abortion provider if the ASC requirement were in effect, ROA.2689—minus 7%. This, too, is incorrect. Defendants misrepresent the record when they claim that one of their experts testified that, of the 17% of reproductive-age women who would live more than 150 miles from an abortion provider, "7% live outside that range for reasons unrelated to H.B.2." Appellants'

Br. at 30. In fact, that witness testified that Defendants' counsel asked him to assume that fact was true and that he had no independent knowledge of it. ROA.3924. Further, Defendants have failed to demonstrate that the district court's findings on this issue, which depend in part on credibility determinations, *see* ROA.2689, are clearly erroneous. *See supra* at 33-34.

Nevertheless, even having applied the wrong legal standard to uncredited facts, Defendants still concluded that the challenged restrictions operate as a substantial obstacle to abortion access for one out of every ten women in Texas. Notwithstanding Defendants' naked assertion to the contrary, 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 precisely one out of ten.

Given that the challenged requirements would close clinics throughout Texas responsible for providing 80% of all abortion procedures in the State, prevent the remaining clinics from operating at full capacity, and deter new clinics from opening, *see supra* at 13-19, the district court was correct in concluding that they will operate as a substantial obstacle to abortion access in a large fraction of the cases in which they are relevant. *See Casey*, 505 U.S. at 895.

C. The Act's Severability Clause Cannot Preclude a Court from Granting Facial Relief.

Defendants' argument that facial relief is "precluded" by the Act's

severability clause, Appellants' Br. at 33, ignores controlling Supreme Court precedent, *see Casey*, 505 U.S. at 894 (holding that facial invalidation of an abortion restriction is appropriate where the restriction would operate as a substantial obstacle in a large fraction of relevant cases); *see also Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 329-30 (2006) (holding that, while legislative intent is the touchstone for decisions about remedy, it is not dispositive). Notwithstanding *Casey*'s articulation of the large-fraction test, Defendants contend that "[t]he district court was obligated to sever and leave in place any applications of HB2 that were not proven to impose an 'undue burden' on abortion patients." Appellants Br. at 33. This argument is contrary to the Supremacy Clause, U.S. Const. art. VI, para. 2, and must be rejected.

Defendants' argument that the district court should have gone line by line through more than 100 pages of regulations to sever individual requirements is also incorrect. Such detailed revision of the requirements would be an invasion of the legislative domain. *See Ayotte*, 546 U.S. at 329-30. It would also be contrary to Texas law because the ASC standards form an interrelated and unified regulatory scheme. *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) ("[T]he constitutional defects we have found pertain not to individual statutory provisions but to the

scheme as a whole. It is the system that is invalid, and not merely a few of its components."); *Villas at Parkside Partners v. City of Farmers Branch, Tex.*, 726 F.3d 524, 538-39 (5th Cir. 2013) (*en banc*) ("Thus, we conclude that the Ordinance's provisions are so 'essentially and inseparably connected in substance' that, despite the presence of a severability clause, they are not severable under Texas law.").

Further, Defendants ignore Plaintiffs' evidence concerning the ASC standards that incorporate by reference the requirements of Chapter 20 of the 2003 edition of the National Fire Protection Association 101: Life Safety Code ("NFPA 101").[36] The record demonstrates that it is inappropriate to subject abortion facilities to these standards and that Plaintiffs' facilities cannot satisfy them. ROA.2398-99, ROA.2400, Trial Exs. P-117 to P-123.

D. At a Minimum, Plaintiffs Are Entitled to As-Applied Relief for the McAllen and El Paso Clinics.

At an absolute minimum, Plaintiffs are entitled to relief from the challenged requirements for the McAllen and El Paso clinics. Defendants contest this conclusion only in a perfunctory manner. *See, e.g.*, Appellants' Br. at 18 ("At most, the plaintiffs' factual claims (if assumed to be true) could justify as-applied relief limited to the McAllen and El Paso areas—the only areas where the closure

[36] These are contained in numerous regulations throughout subchapters B and C of Chapter 135.

of abortion clinics would increase driving distances for patients seeking abortions in Texas."), *id.* at 30 ("[N]early all of that 10% resides in either El Paso or the Rio Grande Valley, which can be addressed with as-applied relief rather than statewide invalidation.").

CONCLUSION

For the reasons set forth above, Plaintiffs/Appellees/Cross-Appellants respectfully request that this Court affirm the judgment of the district court insofar as it enjoins each of the challenged requirements in its entirety.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2)(B) because it contains 16,228 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared using Microsoft Word 2013 in 14-point Times New Roman font, which is a proportionally spaced typeface.

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CERTIFICATE OF SERVICE

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