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

APPELLEES' REPLY BRIEF

Stephanie Toti
Esha Bhandari
David P. Brown
CENTER FOR REPRODUCTIVE RIGHTS
120 Wall St., 14th Fl.
New York, NY 10005

Jan Soifer
Patrick J. O'Connell
O'CONNELL & SOIFER LLP
98 San Jacinto Blvd., Ste. 540
Austin, Texas 78701

J. Alexander Lawrence
MORRISON & FOERSTER LLP
250 W. 55th St.
New York, NY 10019

Betre M. Gizaw*
Marissa P. Harris*
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., NW, Ste. 6000
Washington, DC 20006
**Application for Fifth Circuit admission pending*

Attorneys for Plaintiffs/Appellees/Cross-Appellants

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.

Plaintiffs/Appellees/Cross-Appellants	**Counsel Who Have Appeared for Plaintiffs/Appellees/Cross-Appellants in This Case**
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. Lendol L. Davis, M.D.	Natasha Lycia Ora Bannan Esha Bhandari David Brown Janet Crepps Julie Rikelman Stephanie Toti CENTER FOR REPRODUCTIVE RIGHTS Kiersten Fletcher Betre M. Gizaw Marissa P. Harris J. Alexander Lawrence Colin M. O'Brien MORRISON & FOERSTER LLP Patrick J. O'Connell Jan Soifer O'CONNELL & SOIFER LLP John H. Bucy II

Defendants/Appellants/Cross-Appellees	**Counsel Who Have Appeared for Defendants/Appellants/Cross-Appellees in This Case**
David Lakey, M.D., Commissioner of the Texas Department of State Health Services Mari Robinson, Executive Director of the Texas Medical Board	Greg Abbott James D. Blacklock Shelley N. Dahlberg Daniel T. Hodge Erika M. Kane Beth Klusmann Philip Lionberger Jonathan F. Mitchell Michael P. Murphy Andrew S. Oldham Esteban S. M. Soto Andrew B. Stephens Enrique Varela OFFICE OF THE ATTORNEY GENERAL, STATE OF TEXAS

Other Persons with a Financial Interest in the Outcome of this Litigation

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

/S/ Stephanie Toti
Stephanie Toti
Attorney for Plaintiffs/Appellees/ Cross-Appellants

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Unable to counter the substantial body of evidence presented by Plaintiffs that the challenged requirements operate as an undue burden on abortion access in Texas, deny equal protection of the laws to abortion patients and providers, and—in the case of the admitting-privileges requirement—improperly delegate lawmaking authority to private actors, Defendants alternate between pretending that Plaintiffs' evidence does not exist, positing an evidentiary standard that would be impossible to meet with any amount of evidence, and seeking to distract the Court with disparaging statements about abortion providers from hearsay sources. None of these strategies is effective in undermining the district court's judgment. The record unequivocally demonstrates that Plaintiffs satisfied the burden of proof on their claims while Defendants failed to satisfy the burden of proof on their defenses.

I. Defendants' Counter-Statement of the Case Mischaracterizes the Record and Plaintiffs' Positions.

A. The District Court's Finding That Only Seven or Eight Abortion Clinics Would Be Able to Provide Services if the ASC Requirement Took Effect is Not Clearly Erroneous.

Contrary to Defendants' assertion, the district court did not mischaracterize the parties' stipulation. It states that every abortion provider in Texas licensed pursuant to Chapter 139 would be forced to close on September 1, 2014, absent relief from the court. ROA.2290. As a result, only seven or eight Chapter 135 providers would remain, depending on whether Planned Parenthood of South

Texas was able to open an ASC in San Antonio as planned. ROA.2346; *see also* ROA.2289-90. (Although Planned Parenthood intended to open this facility in September 2014, ROA.2290, as of today, it is still not open.) Further, the district court independently found that "few, if any, new compliant abortion facilities will open to meet the demand resulting from existing clinics' closure." ROA.2690. This finding is certainly "plausible in light of the record as a whole," *Elementis Chromium L.P. v. Coastal Sates Petroleum Co.*, 450 F.3d 607, 613 (5th Cir. 2006), which shows that it is not economically feasible for abortion facilities to operate in compliance with the ASC requirement outside Texas' largest metropolitan areas, ROA.2331, and that, even within those areas, abortion providers face tremendous obstacles in opening new, compliant facilities, ROA.2330-31; ROA.2690; ROA.2393, ROA.2403-04; ROA.2425-26; ROA.3070-78; ROA.3361-62; Trial Exs. P-066, P-073.

B. The District Court's Finding That Those Remaining Clinics Would Be Unable to Meet the Statewide Demand for Abortion Services is Not Clearly Erroneous.

Defendants' contention that Plaintiffs introduced no evidence concerning the capacity of the Chapter 135 abortion providers is belied by their six-page attempt to refute this very evidence. *See* Appellants' Reply Br. at 10-16. As explained in Plaintiffs' opening brief, this evidence is more than sufficient to sustain the district court's findings concerning the inability of the Chapter 135 abortion providers to

meet the statewide demand for abortion services. *See* Appellees' Principal & Resp. Br. at 15 n.10; 42 n.29.

Further, Defendants ignore the tremendous constraint placed on abortion-clinic capacity by the admitting-privileges requirement. They argue that, if the ASC requirement is allowed to force all of the Chapter 139 facilities to close, the doctors who currently work at those facilities "will be seeking employment from ASC abortion clinics." Appellants' Reply Br. at 14. But H.B.2 requires physicians to have admitting privileges within 30 miles of the facility where they perform abortions, so they are not free to move from one clinic to another. Tex. Health & Safety Code Ann. § 171.0031(a)(1)(A). Further, the record demonstrates that the criteria used by hospitals to grant admitting privileges are so inconsistent that abortion providers who hold admitting privileges at one hospital are often unable to obtain admitting privileges at another. *See* ROA.2469-70; ROA.2462-64; ROA.2476-77; Trial Exs. P-068, P-071.

C. Plaintiffs Demonstrated That the Operating Requirements Would Impose an Undue Burden on Abortion Access and Are Not Severable.

Although some of the ASC operating requirements are comparable to or less stringent than Chapter 139 regulations, the record shows that others, such as the nursing staff requirements, *see* 25 Tex. Admin. Code § 135.15(a), are far more burdensome while providing no health benefit to abortion patients, *see* ROA.2365;

ROA.2459. These latter requirements, in and of themselves, operate as an undue burden on abortion access.

Moreover, as explained in Plaintiffs' opening brief, the ASC regulations are not severable. *See* Appellees' Principal & Resp. Br. at 64-66. It is the job of the legislature—either on its own or by delegating authority to the Department—to determine in the first instance whether particular regulations should apply to abortion clinics; this is not an appropriate job for the district court. *See Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 329 (2006) ("[M]indful that our constitutional mandate and institutional competence are limited, we restrain ourselves from rewriting state law to conform it to constitutional requirements even as we strive to salvage it.") (internal quotation marks omitted).

Further, the standard proposed by Defendants—whether each individual clinic can comply with each individual regulation—is unworkable. There were 41 licensed abortion clinics in operation when H.B.2 was enacted. ROA.2688; ROA.2346-47. It would be absurd for the court to have to create—and the Department to have to enforce—41 customized regulatory schemes. The regulations all derive from a single statutory mandate and form a unified, interdependent scheme. *See* Tex. Health & Safety Code Ann. § 245.010(a). As a result, they must stand or fall together. *See Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist.*, 826 S.W.2d 489, 515 (Tex. 1992); *Villas*

at Parkside Partners v. City of Farmers Branch, Tex., 726 F.3d 524, 538-39 (5th Cir. 2013) (controlling plurality opinion of *en banc* court).

D. The Inability of Licensed Abortion Facilities to Become Grandfathered or Obtain Waivers Exacerbates the ASC Requirement's Constitutional Flaws.

The record shows that more than 75% of ASCs currently operating in Texas are exempt from ASC construction requirements due to grandfathering. ROA.2290. Those that are subject to the standards are "frequently" granted waivers without the need to make any written showing. Perkins Dep. Tr. at 44:6-19; 45:19-46:2. Yet abortion facilities licensed under Chapter 139, which have been operating safely for decades, are ineligible for grandfathering or waivers because of "the Legislature's unequivocal decision to place licensed abortion facilities under enhanced regulation." 38 Tex. Reg. 9583 (Dec. 27, 2013) (explaining decision not to apply ASC regulations that authorize grandfathering and waivers to licensed abortion facilities). This "disparate and arbitrary treatment" of abortion providers exacerbates the ASC requirement's constitutional flaws. ROA.2696.

Courts routinely treat the ability of facilities to obtain grandfathering and waivers as a relevant consideration in assessing the constitutionality of abortion-facility licensing schemes, particularly when they impose construction requirements. *See, e.g., Simopoulos v. Virginia*, 462 U.S. 506, 515 (1983)

(upholding requirement that second-trimester abortions be performed in outpatient surgical facilities) ("The second category of requirements outlines construction standards for outpatient surgical clinics, but also provides that 'deviations from the requirements prescribed herein may be approved if it is determined that the purposes of the minimum requirements have been fulfilled.'"); *Planned Parenthood of Kan. & Mid-Mo., Inc. v. Drummond*, 2007 WL 2811407, *8 (W.D. Mo. Sept. 24, 2007) (preliminarily enjoining an ASC requirement for abortion providers) ("[W]hether application of the New Construction regulations is a violation of Plaintiffs' constitutional rights depends on what these regulations actually require. This, in turn, depends on whether and to what extent…deviations and/or waivers are permitted by DHSS.").

Consistent with this precedent, it is typical for abortion-facility licensing schemes to permit grandfathering and/or waivers of construction requirements. *See e.g.*, Mich. Admin. Code R. 325.3868a (authorizing the department to "waive "a specific requirement of [the rules governing freestanding surgical outpatient facilities] as applied to a pregnancy termination facility"); 19 Mo. Code of State Regs. § 30-30.070(1) (allowing for "deviations from requirements on physical facilities"); Neb. Rev. St. § 71-439 (permitting the department to "waive any rule, regulation, or standard . . . relating to construction or physical plant requirements of a licensed health care facility"); Ohio Admin. Code § 3701-83-14 (allowing for

"a variance or waiver from any building or safety requirement"); 35 P.S. § 448.806 (providing under Pennsylvania law that "[f]or the purpose of applying the rules applicable to ambulatory surgical facilities" the "department shall allow the abortion facility to request an exception"); S.C. Code of Regs. R. 61-12.102(L) (permitting "exception(s) to these [abortion facility licensing] standards"); *see generally* ROA.2394-96. H.B.2's implementing regulations are thus an outlier, and the district court was correct to treat the unique burdens they impose as evidence of an improper purpose as well as an improper effect.

Further, Defendants' claim that an abortion provider can mitigate these burdens by leasing an existing ASC is refuted by the record. It shows that leasing an existing ASC is generally not a viable option for abortion providers. ROA.2425; ROA.3070-73; ROA.3075-78; Trial Ex. P-066 at 2. At the time of trial, there were 336 existing ASCs in Texas scattered throughout the State. ROA.2290. Even if an abortion provider were able to locate an existing ASC within 30 miles of where each of its physicians has admitting privileges and persuade the current occupants of the ASC to vacate the premises and move their operations elsewhere without having to pay substantial sums to get the current occupant to move, the ASC would be more expensive to operate: the annual operating costs for an ASC exceed those for a Chapter 139 abortion facility by $600,000 to $1 million. ROA.2330-31. Thus, having to abandon an existing

facility that meets the requirements of Chapter 139 to lease a facility that *does not* meet the requirements of Chapter 135 is just as much of an unconstitutional tax on abortion as having to buy such a facility.

E. The District Court Properly Credited Plaintiffs' Evidence Concerning the Decline in Abortion Rates Following Implementation of the Admitting-Privileges Requirement.

Defendants incorrectly assert that the district court failed to credit Dr. Grossman's testimony concerning declines in the abortion rate following implementation of the admitting-privileges requirement. To the contrary, this testimony supports the district court's finding that the clinic closures created substantial obstacles for women seeking abortion services in Texas. *See* ROA.2691. This Court has long held that, "[i]f 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 evidence." *Century Marine Inc. v. United States*, 153 F.3d 225, 231 (5th Cir. 1998).

Further, Defendants cite no evidence in support of their claim that Dr. Grossman's methodology is unreliable. The district court did not abuse its discretion in concluding that Dr. Grossman's methodology was sound and his conclusions reliable. Indeed, Dr. Grossman's findings were published in a major scientific journal after being subjected to a rigorous peer-review process. Dan

Grossman, *et al.*, *Change in abortion services after implementation of a restrictive law in Texas*, 90 Contraception 496, 496-501 (2014); *see Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593-94 (1993) (holding that peer review and publication are indicia of reliability). Defendants' desperate attempts to cast aspersions on Dr. Grossman's methodology, based on nothing more than the assertions of counsel, provide no basis for setting aside the district court's findings.

F. The District Court's Finding That Abortion is Extremely Safe is Not Clearly Erroneous.

The record contains overwhelming evidence to support the district court's finding 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; *see* ROA.2362-67; ROA.2370-79; ROA.2426; ROA.2449-51; ROA.2464; ROA.2468-69; ROA.2478-79.

The district court properly rejected Defendants' contention that published findings concerning abortion safety are unreliable. *See* ROA.2694 ("Giving appropriate weight to the experts' conflicting testimony, the court concludes that concerns over incomplete complication reporting and underestimated complication rates are largely unfounded and are without a reliable basis."). First, such findings do not depend on data reported by abortion providers, as Defendants contend. *See, e.g.*, ROA.2371 (describing methods used by the Centers for Disease Control and Prevention to collect information about abortion-related deaths from a variety of

sources). Like all medical research, they rely on studies designed and executed by independent researchers and draw on a variety of data sets. ROA.2372.[1]

Second, the rebuttal testimony by Drs. Thompson and Anderson wholly lacked credibility. Thompson admitted on cross-examination that she was not familiar with the methodology utilized by the Centers for Disease Control and Prevention to collect data about abortion safety, ROA.3130-31; had not reviewed the studies relied on by Plaintiffs' experts and therefore could not assess the reliability of their methods, ROA.3131-32;[2] could not cite any publications to support her opinions, ROA.3129-30; and had permitted Vincent Rue to draft

[1] One recent study examined abortion-related complications using reimbursement data from California's Medicaid program. ROA.2372-73. Because the program pays not only for abortion services but for follow-up treatment, and because women on Medicaid likely have no other way to pay for follow-up treatment, it is highly unlikely that any treatments for complications were omitted from the data set. *Id.* The findings of this study have since been accepted for publication in the Green Journal, the official, peer-reviewed journal of the American College of Obstetricians and Gynecologists. *See* Ushma D. Upadhyay, *et al.*, *Incidence of emergency department visits and complications after abortion*, 125 Obstet. Gynecol. ___ (2015) (forthcoming).

[2] For example, with respect to the California Medicaid study, Dr. Thompson testified as follows:

> ANSWER: I can't say it's correct because I haven't read the study. I don't know the details. I don't know the requirements. I don't know the reporting….
>
> QUESTION: Exactly. So you have no basis on which to criticize the methodology of the study?
>
> ANSWER: I have not read it, no.

ROA.3132.

substantive portions of her testimony without her input, ROA.3106-18, Trial Exs. P-211 to P-213. Similarly, Anderson admitted that he had no data to support his claim that abortion complications were under-reported; rather, he relied on anecdotal evidence that was at least a decade old. ROA.3174-75 ("It just seems, from my anecdotal experience, that it's more frequent than the numbers I read. But I have no data to validate that."); ROA.3183. And he, too, allowed Rue to dictate substantive portions of his testimony. ROA.3153-54; ROA.3158-62.

Defendants' unfounded accusations that Whole Woman's Health violated Texas' reporting law are both false and irrelevant to the issue of abortion safety. Defendants rely on a comparison of documents contained in Trial Ex. D-036 (complication reporting forms from WWH facilities) and Trial Ex. D-039 (internal complication logs maintained by a subset of WWH facilities in Texas) to insinuate that WWH did not report all of the complications it logged internally. But the information in the respective exhibits is not directly comparable and does not support Defendants' accusation. For example, the internal logs do not specify which clinics they originated from, ROA.3036-37, include duplicates, ROA.3038, and, in some cases, log information that does not meet the threshold for a reportable complication, ROA.3035-3036.

Further, the examples of emergency room referrals cited by Defendants note simply that patients were referred for assessment after contacting the clinic. Trial

Ex. D-039. But Defendants point to no evidence that, upon evaluation at the hospital, those patients were found to have a complication, and their own expert testified that patients sometimes seek follow-up treatment when they are not actually experiencing a complication. ROA.3178 (Q. … In your experience as an emergency room physician, is it fair to say that sometimes patients present at the emergency room that don't actually require treatment? A. Yes. They need reassurance. They're scared, but they don't actually need treatment."). Of course, alleged discrepancies in one of the Plaintiff's reporting practices have no impact on the accuracy of the studies concerning abortion safety relied on by Plaintiffs' experts; the entire discussion is merely an effort to tarnish Plaintiffs' reputations.

II. The District Court Should Have Enjoined the ASC Requirement Independently in All of Its Applications.

A. Defendants Ask This Court to Adopt an Absurd Evidentiary Standard That is Inconsistent with Controlling Supreme Court Authority.

Defendants contend that Plaintiffs cannot establish that the challenged requirements are unconstitutional without calling every healthcare provider in the State (or perhaps the nation) to testify that he or she has no immediate plans to open an abortion clinic in Texas. Such a tremendous waste of resources would be ridiculous, and is not required to establish an undue burden. Nor do Plaintiffs need to call each Texas woman of reproductive age to the stand to testify about the

obstacles that she would face in seeking an abortion while the challenged requirements were in effect.

In *Casey*, the Supreme Court concluded that the spousal-notification requirement would operate as an undue burden in a large fraction of relevant cases based on expert testimony about the impact the requirement would have on women who experienced domestic violence. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 887-98 (1992). The plaintiffs thus satisfied their burden of proof without direct testimony from abortion patients.[3] Here, Plaintiffs' reliance on expert testimony, combined with documentary evidence and testimony concerning their own firsthand experiences, is likewise sufficient to satisfy the burden of proof on each of their claims.

B. Plaintiffs Have Conclusively Demonstrated That the ASC Requirement Does Not Further Any Valid State Interest.

Defendants' ever-changing array of post-hoc justifications for the ASC requirement has yet to include one that is constitutionally sufficient. In their latest brief, Defendants identify four interests purportedly served by the ASC requirement. But the record shows that these asserted interests are not actually served by the ASC requirement.

[3] There is much practical wisdom in the Supreme Court's approach. The same obstacles that would impede a woman in accessing abortion care—whether fear of violent retribution or difficulty in travelling far from home—would impede her from testifying in court.

First, Defendants contend that the ASC requirement provides heightened accountability and monitoring mechanisms for abortion providers. But a straightforward comparison of the regulations applicable to abortion facilities and ASCs shows that the contention is false. For example, abortion facilities must be inspected at least once annually, but ASCs need only be inspected every three years. *Compare* 25 Tex. Admin. Code § 139.31(b)(1) *with* 25 Tex. Admin. Code § 135.21(a)(2). The quality assurance program required of abortion facilities is just as rigorous as the quality assurance program required of ASCs. *Compare* 25 Tex. Admin. Code § 139.8 *with* 25 Tex. Admin. Code § 135.8. Abortion facilities are subject to more extensive reporting requirements than ASCs. *Compare* 25 Tex. Admin. Code §§ 139.4, 139.5, 138.58 *with* 25 Tex. Admin. Code § 135.26. And violations of the abortion facility regulations are punishable by criminal sanctions, civil liability, and administrative penalties, whereas violations of the ASC regulations are punishable only by administrative penalties. *Compare* 25 Tex. Admin. Code § 139.33 *with* 25 Tex. Admin. Code § 135.24.

Second, the ASC requirement does not advance a state interest in ensuring licensed abortion facilities comply with "basic safety and sanitation standards." Contrary to Defendants' argument, the stringent requirements imposed by Chapter 139 do not permit "substandard clinics" to maintain licensure. These requirements cover every area of patient health and safety and ensure a sanitary environment in

abortion facilities. *See* Appellees' Principal & Resp. Br. at 3. The more onerous standards imposed by the ASC requirement do not provide added protections. ROA.2365; ROA.2396-98; ROA.2457-59; Keyes Dep. Tr. at 81:12-25; 100:4-5 ("[O]nerous doesn't translate necessarily into being better, it is just onerous").[4] Further, Defendants do not explain how the ASC requirements will "prevent lapses" in compliance. Given that Chapter 139 requires more frequent inspections and authorizes harsher penalties for noncompliance than Chapter 135, Defendants cannot even rationally speculate that the ASC requirement would serve that aim. *See* ROA.2328-2329.

Notwithstanding Defendants' efforts to disparage Plaintiffs, there is absolutely no evidence in the record that Texas' abortion facilities have failed to maintain adequate safety and sanitation standards. Despite frequent inspections of these facilities by DSHS, Defendants were not able to present any evidence of unsafe conditions.[5] The only admissible evidence Defendants cite in support of their argument is an allegation made by DSHS of a deficiency at the McAllen

[4] Defendants initially planned to call Dr. Keyes to testify at trial, but they pulled him from their slate of witnesses after he provided candid testimony at his deposition that undermined their core arguments.

[5] Notably, in response to an inquiry by a U.S. congressional committee, Texas indicated that its rigorous inspection program had detected only sixteen deficiencies at abortion clinics between 2008 and 2013 and all but one involved administrative infractions, such as failure to post the clinic's license number in advertisements. None posed any serious health risk. ROA.2325-26.

clinic, and Defendants mischaracterize the allegation: DSHS did not claim that instruments were improperly sterilized; it claimed only that certain sterilized items were labeled incorrectly.[6] Trial Ex. D-027 at 7. Even if this allegation were ultimately substantiated—which cannot be ascertained from the document in the record because it omits the clinic's response, *see* ROA.3059-62—a labeling error at a single clinic is in no way evidence of statewide failure to meet "basic safety and sanitation standards" as Defendants contend.

Third, the ASC requirement does not offer patients enhanced pain-management options. Every pain management option permissible under Chapter 135 is also permissible under Chapter 139. *Compare* 25 Tex. Admin. Code § 135.11 *with* 25 Tex. Admin. Code § 139.59.

Fourth, requiring that abortions be performed in ultra-sterile operating rooms provides no medical benefit to abortion patients because the vagina—the only part of a patient's body exposed to the external environment during an abortion procedure—is not sterile; rather, it is naturally colonized by bacteria. The district court properly rejected Dr. Thompson's testimony to the contrary. Dr. Thompson lacked credibility on the whole, and her testimony on this point was refuted not only by Plaintiffs' medical experts, but by a learned treatise and one of

[6] Defendants' improper reliance on hearsay allegations is addressed in the next section.

Defendants' experts. ROA.2365; ROA.2396-98; ROA.2457-59; Trial Ex. P-037 at 784; Keyes Dep. Tr. at 81:12-25.[7]

Notably, Defendants have not disputed the health risks that stem from delaying or foregoing a desired abortion procedure; nor have they disputed that, by substantially increasing the distance that many women will have to travel to reach a licensed abortion provider, the challenged requirements decrease the likelihood that a patient will return to her abortion provider for treatment in the event of a complication. *See* Appellees' Principal & Resp. Br. at 26-29. These undisputed facts demonstrate that, not only do the challenged requirements fail to further any valid state interest, they actually have a negative net impact on the health and

[7] Dr. Keyes testified as follows:

> Q What is…meant by the term sterile surgical procedures in that first sentence?
>
> A A procedure in which a patient is prepped and draped and those involved in the surgical procedure are also gowned and gloved with masks to try to preserve sterility.
>
> Q Are there some surgical procedures that wouldn't fall into that category?
>
> A Yes.
>
> Q Which ones?
>
> A Any colonoscopy-type procedure, vaginal procedures, intraoral procedures, although some people still do some prepping on those, but any orifice basically is not sterile, can't be sterile.

safety of women seeking abortion care. *See id.* As a result, the requirements are not even rationally related to Texas' interest in health.

C. Defendants' Efforts to Introduce Disparaging Statements About Abortion Providers Through Extra-Record Sources Are Wholly Improper.

Lacking record evidence to support their arguments, Defendants now seek to supplement the record with unreliable and prejudicial hearsay statements. These efforts are, to borrow Defendants' own words, "a backdoor (and unlawful) attempt to supplement the record by asking an appellate court to rely on hearsay that was never subjected to cross-examination or any other requirements of the Federal Rules of Evidence." Appellants' Reply Br. at 5. They are wholly improper and should be rejected. *See United States v. Okoronkwo*, 46 F.3d 426, 435 (5th Cir. 1995).

For example, Defendants attempt to impugn the quality of care provided by Plaintiffs' clinics with a dubious online news story. This article was not even introduced, let alone admitted, at trial. It would be highly improper for the Court to consider it now: it is hearsay, it is not in the record, and it is prejudicial without having any probative value.

Similarly, Defendants seek to establish through newspaper accounts that abortion providers are more prone to misconduct than other physicians. But Defendants did not introduce such evidence at trial, knowing that it would be

inadmissible and, in any event, easily rebutted. The record contains a spreadsheet produced by the Texas Medical Board summarizing 50,000 complaints against Texas physicians that were investigated between 2004 and 2014. Trial Ex. P-206 (sealed); *see* ROA.3304-10. It shows numerous instances of egregious misconduct by Texas physicians who are not abortion providers.[8]

[8] In the event the Court considers the newspaper articles cited by Defendants, it should also consider the following articles, which provide detailed accounts of some of this egregious misconduct by Texas physicians: Liz Szabo, *Doctor accused of selling false hope to families*, U.S.A. Today, July 8, 2014 (discussing case of a Houston doctor selling dubious cancer treatments to patients for large cash sums), *available at* http://www.usatoday.com/story/news/nation/2013/11/15/stanislaw-burzynski-cancer-controversy/2994561/; Saul Elbin, *Anatomy of a Tragedy*, Tex. Observer, Aug. 28, 2013 (discussing case of a Dallas neurosurgeon whose license was suspended after two patients died and four others were paralyzed as a result of his incompetence), *available at* http://www.texasobserver.org/anatomy-tragedy/; Craig Kapitan, *Dr. Day's son is killed on I-10: Apparent suicide; dad gets probation*, San Antonio Express-News, June 27, 2013 (discussing case of a San Antonio dermatologist who sexually assaulted patients and employees), *available at* http://www.mysanantonio.com/default/article/Dr-Day-s-son-is-killed-on-I-10-4624594.php; Darren Barbee, *Texas doctor's criminal prescribing led to son's death, 6 years in prison*, Ft. Worth Star-Telegram, July 3, 2012 (discussing case of an Austin emergency room doctor who illegally distributed controlled substances), *available at* http://blogs.star-telegram.com/investigations/2012/07/texas-doctors-criminal-prescribing-lead-to-sons-death-6-years-in-prison.html; Brooks Egerton, *Dallas doctor, once suspended, allegedly 'butchered' patient*, Dallas Morning News, July 2, 2012 (discussing case of a Dallas physician who allegedly "butchered" a patient during an eight-hour hernia operation in his office after returning from a suspension for medical incompetence), *available at* http://www.dallasnews.com/news/community-news/dallas/headlines/20120702-dallas-doctor-once-suspended-allegedly-butchered-patient.ece.

III. The District Court Should Not Have Dismissed Plaintiffs' Equal Protection and Improper Delegation Claims, Which Provide Alternate Grounds for Affirming Its Judgment.

A. Abortion Patients and Providers Are Not Excluded From the Protections of the Equal Protection Clause.

Defendants' argument that the Supreme Court has immunized laws burdening abortion from equal protection review is fundamentally flawed and finds no support in *Danforth, Harris*, or *Mazurek.*

The Supreme Court's analysis of the informed consent requirement in *Danforth* is inapposite for two reasons. *See Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 66-67 (1976). First, the Court was considering a substantive due process challenge to the requirement, not an equal protection challenge. *Id.* Second, the basis for the Court's decision to uphold the requirement was that it did not actually restrict abortion. *Id.* Thus, the Court's decision does not stand for the proposition, as Defendants' contend, that a state may single out abortion for any kind of requirement; rather, it stands for the proposition that, if a requirement does not restrict abortion access, then it does not matter whether the requirement is applied only to abortion. *Id.* Here, there is no question that the challenged requirements would restrict abortion access. They would close the vast majority of abortion clinics in Texas. ROA.2688. Accordingly, the reasoning applied to the informed consent provision in *Danforth* is not applicable.

Defendants cite *Harris* for the proposition that "[a]bortion is inherently different from other medical procedures[] because no other procedure involves the purposeful termination of a potential life." *Harris v. McRae*, 448 U.S. 297, 325 (1980). But the challenged regulations seek to advance the State's interest in health, not fetal life. To survive equal protection review, a law must target a group based on a unique characteristic that is related to the interest the law seeks to advance. Thus, in *City of Cleburne*, the Supreme Court struck down a zoning ordinance that targeted group homes for the mentally disabled for exclusion from certain zones because there was no relationship between the unique characteristics of people with mental disabilities and the municipality's interests in promoting public safety. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985) ("It is true…that the mentally retarded as a group are indeed different from others not sharing their misfortune….But this difference is largely irrelevant unless the [group] home and those who would occupy it would threaten legitimate interests of the city in a way that other permitted uses such as boarding houses and hospitals would not.").

Here, although abortion may be different from other medical procedures in that it involves the termination of fetal life, that difference does not create a greater need for doctors who perform abortions—as compared to other outpatient medical

procedures—to have admitting privileges at a local hospital. And it does not create a greater need for doctors who perform abortion to practice in an ASC setting.

Defendants' reliance on *Mazurek* is also misplaced. *Mazurek v. Armstrong*, 520 U.S. 968 (1997). Like *Danforth*, *Mazurek* is not an equal protection case. *Id.* at 970. Further, although the Supreme Court has held since *Roe* that states may restrict the performance of abortions to licensed physicians, it has maintained for just as long that limitations on the types of facilities in which abortions may be performed must be supported by credible medical evidence. *See* Appellees' Principal & Resp. Br. at 46 n.30.

Defendants do not contest that the challenged requirements target abortion providers for the imposition of burdensome regulations not imposed on any other medical practitioners. And they do not identify a valid state interest served by imposing these regulations on abortion providers that would not also be served by imposing them on doctors who perform procedures of equal or greater risk. Accordingly, Plaintiffs should prevail on their equal protection claim.

B. Plaintiffs' Improper Delegation Claim Is Not Foreclosed by *Abbott*.

Contrary to Defendants' argument, this Court's decision in *Abbott* does not control the disposition of Plaintiffs' improper delegation claim because the facts of this case are distinguishable from the facts in *Abbott*. *See Planned Parenthood Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583 (5th Cir. 2014).

Critically, in *Abbott*, the Court held that "the record does not show that abortion practitioners will likely be unable to comply with the privileges requirement." 748 F.3d at 598. But the record here shows just the opposite: Abortion providers in different regions of the State were denied admitting privileges for reasons unrelated to their ability to provide safe abortion care. *See* Appellees' Principal & Resp. Br. at 23-25. This change in facts warrants a different outcome in this case.[9]

IV. Defendants Failed to Satisfy the Burden of Proof on Their Res Judicata Affirmative Defense.

Defendants' arguments concerning res judicata suffer from three major flaws: (1) they rely on disputed facts that Defendants have failed to prove; (2) they focus on the nature of the relief requested by Plaintiffs rather than on the facts that give rise to Plaintiffs' claims; and (3) they misapprehend the controlling legal standard.

First, Defendants contend that res judicata is purely a matter of law, then go on for nearly a dozen pages discussing contested facts that are central to their defense. For example, Defendants contend that, as Medical Director, Dr. Richter is not a mere employee of Reproductive Services, but rather, has a status akin to that of a member of the Board of Directors. *See* Appellants' Reply Br. at 23 n.7. Yet, there is no evidence in the record supporting Defendants' characterization of the

[9] In any event, Plaintiffs seek to preserve this claim for further review.

scope of Dr. Richter's responsibilities as Medical Director, and certainly no proof that she sits on the Board of Directors (she does not). Likewise, Defendants contend that "[t]he closure of non-ASC abortion clinics in Corpus Christi and El Paso does not create 'new legal conditions' because it was inevitable at the time of the first lawsuit that H.B.2 would cause non-ASC clinics to close before September 1, 2014."[10] *Id.* at 21. But Defendants introduced no testimony or other evidence concerning when those clinics made the decision to close, and there is abundant evidence in the record that Plaintiffs and other abortion providers tried to find ways to comply with the ASC requirement—by engaging architects and real estate agents; conducting feasibility studies; attempting to raise capital, etc.—after judgment had been entered in *Abbott* on October 28, 2013. *See, e.g.*, ROA.2424-

[10] Although the State's view that the ASC requirement, on its face, imposed impossible burdens on abortion providers is telling about its purpose, Plaintiffs could not, in fact, have known the extent of the burdens imposed by the requirement until its final implementing regulations were adopted on December 27, 2013, some two months after judgment was entered in *Abbott* on October 28, 2013. The statute provides that the minimum standards for abortion facilities must be equivalent to the minimum standards for ASCs, Tex. Health & Safety Code Ann. § 245.010(a), which permit grandfathering and waivers, 25 Tex. Admin. Code § 135.51(a). During the public comment period preceding adoption of the final regulations, the Department received numerous comments urging it to make abortion facilities eligible for grandfathering and waivers. *See* 38 Tex. Reg. 9588 (Dec. 27, 2013). Plaintiffs were entitled to assume that the Department would act in good faith (though hindsight has shown otherwise), and could not have known prior to December 27, 2013, that the comments concerning grandfathering and waivers—as well as all other comments proposing amendments to the proposed regulations—would be ignored. *See* 38 Tex. Reg. 9577 (Dec. 27, 2013) ("The sections are adopted without changes to the proposed text….").

25; ROA.2472; ROA.3069-75; Theard Dep. Tr. at 40:25-41:22. Notably, the owner of the Hilltop Clinic in El Paso testified that he did not decide to close his clinic until after the final ASC regulations were adopted on December 27, 2013, and an architect assessed the facility's ability to comply with them. *Id.*

Second, Defendants' arguments about res judicata mistakenly focus on the nature of the relief requested by Plaintiffs rather than on the facts that give rise to Plaintiffs' claims. Even if Plaintiffs had sought pre-enforcement, as-applied relief from the admitting-privileges requirement in *Abbott*, they would not be precluded from seeking post-enforcement relief in this case given that material operative facts have changed. *See* Appellees' Principal & Resp. Br. at 56-58. Under the controlling standard set forth in the Restatement, the dispositive consideration is not the nature of the relief requested in the second lawsuit, but rather, whether the claims are based on material operative facts that developed subsequent to entry of judgment in the first lawsuit. *See* Restatement (Second) of Judgments, § 24 cmt. (f); *accord Stanton v. D.C. Ct. of Appeals*, 127 F.3d 72, 78-79 (D.C. Cir. 1997) (permitting successive as-applied challenges).

Third, this Court has adopted the transactional test of the Restatement (Second) of Judgments, § 24, to determine whether two lawsuits involve the same claim for preclusion purposes. *Petro-Hunt, L.L.C. v. United States*, 365 F.3d 385, 395 (5th Cir. 2004). Pursuant to that test, "[m]aterial operative facts occurring

after the decision of an action with respect to the same subject matter may…be made the basis of a second action not precluded by the first." Restatement (Second) of Judgments, § 24 cmt. (f). The older cases cited by Defendants for the proposition that new facts must be "significant" and "create new legal conditions" do not articulate a different test.[11] They simply use different words to convey that the new facts must be "material" to the claims asserted in the second lawsuit. Regardless of the verbiage used, the requirements of the test are plainly met by the dramatic reduction in the number and geographic distribution of Texas abortion providers that occurred after the admitting-privileges requirement took effect. This outcome was not anticipated by the *Abbott* Court, 748 F.3d at 597-98, and mandates a different legal result than the one reached in that case.

[11] Notably, *Hernandez v. City of Lafayette*, 699 F.2d 734, 736 (5th Cir. 1983), concerns the preclusive effect of a state-court judgment, which is controlled by state law. It has no relevance to this case, which concerns the preclusive effect of a federal-court judgment. Both *Jackson v. DeSoto Parish Sch. Bd.*, 585 F.2d 726, 729 (5th Cir. 1978), and *Wilson v. Lynaugh*, 878 F.2d 846, 850-51 (5th Cir. 1989), are principally concerned with the effect of intervening changes of law on res judicata and use the language cited above in the context of discussing that issue. In *Jackson*, for example, the Court states: "It has long been established that res judicata is no defense where, between the first and second suits, there has been an intervening change in the law or modification of significant facts creating new legal conditions. In these cases, the operation of the preclusion doctrines would result in unequal treatment of similarly situated individuals, some of whom have the misfortune to have sought legal redress at an earlier phase of legal developments." *Jackson*, 585 F.2d at 729 (citations omitted).

V. The Claims Asserted by Reproductive Services and Dr. Richter Are Not Moot.

In their reply brief, Defendants argue for the first time that there is no longer an Article III case or controversy concerning the El Paso clinic because it has not yet reopened after having been forced to close by the admitting-privileges requirement. But it is not surprising that a nonprofit medical practice unable to provide services for four months—during which time it had to close its doors, lay off its staff, move its records and equipment into storage, cancel its contracts with vendors, and give up its lease and its license—cannot immediately resume providing services.[12] As the record demonstrates, Reproductive Services fully intends to reestablish a licensed abortion facility in El Paso, ROA.2479, and it is actively taking steps to do so. Insofar as Defendants seek to prevent it from achieving that aim, there remains an ongoing case or controversy.

There is no question that the requirements of Article III were met at the outset of the case. Accordingly, the issue raised by Defendants is that of mootness, not standing. *See Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 189 (2000). Defendants bear the burden of proving

[12] In fact, Plaintiffs highlighted the very danger that clinics forced to close might face difficulties in reopening when they asked the Supreme Court to vacate the stay of the district court's judgment. *See* Application to Vacate Stay of Final Judgment Pending Appeal, *Whole Woman's Health v. Lakey*, No. 14A365, at 7 (Oct. 6, 2014).

mootness, *see Cardinal Chem. Co. v. Morton Int'l Inc.*, 508 U.S. 83, 98 (1993); 13B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3533.1 (3d ed. 2014) ("[T]he party claiming mootness has the burden of demonstrating that mootness has in fact occurred."), and they have failed to satisfy it here. A case "becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Chafin v. Chafin*, __ U.S. __, 133 S. Ct. 1017, 1023 (2013). "As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Id*. Here, Marilyn Eldridge testified unequivocally that "Reproductive Services would seek to reestablish a licensed abortion facility in El Paso" if it prevailed in the litigation. ROA.2479. Reproductive Services' intention to reestablish an abortion clinic in El Paso gives it a "concrete interest" in the outcome of the litigation sufficient to defeat Defendants' claim of mootness. *See Chafin*, 133 U.S. at 1023.

Defendants' argument that Reproductive Services signaled an intention to remain closed when it surrendered its license is specious—yet another attempt to distract attention from the merits of Plaintiffs' constitutional claims, on which Defendants cannot prevail. Defendants were aware of the license surrender two months before the trial in this case. Indeed, DSHS is the party to whom the license was surrendered. Defendants had the opportunity to seek discovery on this issue

and to cross-examine Ms. Eldridge about it at trial, but they declined to do so. This is likely because Defendants were already aware of the reason Reproductive Services surrendered its license: The nonprofit organization could not afford to pay its annual assessment fees while it was not generating any revenue, and it was being threatened with penalties by the Department for nonpayment. *See* 25 Tex. Admin. Code § 139.22(g); Appellants' Reply Br. Ex. A at 1 ("Surrendering its license prior to expiration due to cessation of operations negates this facility's required annual assessment fee….").

In addition, the collateral consequences doctrine serves to prevent mootness when a party stands to suffer collateral harm that could be mitigated by a favorable ruling from the court. *Dailey v. Vought Aircraft Co.*, 141 F.3d 224, 227 (5th Cir. 1998). Here, Defendants are investigating Reproductive Services and Dr. Richter for alleged violations of the admitting-privileges requirement during the period of time when Dr. Richter had temporary privileges at Foundation Hospital. *See* Trial Ex. P-046. Dr. Richter, in fact, is scheduled to appear in front of the Medical Board in January to answer these charges. The unresolved allegations, which could lead to the imposition of serious penalties, provide Reproductive Services and Dr. Richter with an additional concrete interest in defending the district court's judgment that the admitting-privileges requirement in unenforceable. Thus, their claims are not moot.

CONCLUSION

For the reasons set forth above and in Appellees' Principal and Response Brief, 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,

/S/ Stephanie Toti

Stephanie Toti
Esha Bhandari
David P. Brown
CENTER FOR REPRODUCTIVE RIGHTS
120 Wall Street, 14th Floor
New York, NY 10005
(917) 637-3684 (ST phone)
(917) 637-3659 (EB phone)
(917) 637-3653 (DPB phone)
stoti@reprorights.org
ebhandari@reprorights.org
dbrown@reprorights.org

Jan Soifer
Patrick J. O'Connell
O'CONNELL & SOIFER LLP
98 San Jacinto Blvd., Ste. 540
Austin, Texas 78701
(512) 583-0451 (JS phone)
(512) 852-5918 (PJO phone)
jsoifer@oconnellsoifer.com
poconnell@oconnellsoifer.com

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

Betre M. Gizaw*
Marissa P. Harris*
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., NW, Ste. 6000
Washington, DC 20006
(202) 887-8744 (BMG phone)
(202) 887-8772 (MPH phone)
bgizaw@mofo.com
mharris@mofo.com

**Application for Fifth Circuit admission pending*

Attorneys for Plaintiffs/Appellees/Cross-Appellants

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2)(C) because it contains 6,990 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.

/S/ Stephanie Toti
Stephanie Toti
Attorney for Plaintiffs/Appellees/ Cross-Appellants

CERTIFICATE OF SERVICE

I hereby certify that, on December 8, 2014, the foregoing was served on the following counsel of record at the email addresses set forth below via the CM/ECF system:

Counsel for Defendants/Appellants/Cross-Appellees

Jonathan F. Mitchell
jonathan.mitchell@texasattorneygeneral.gov

Beth Ellen Klusmann
beth.klusmann@texasattorneygeneral.gov

Michael P. Murphy
michaelp.murphy@oag.state.tx.us

Andrew S. Oldham
andy.oldham@texasattorneygeneral.gov

Counsel for *Amici Curiae*

Walter Martin Weber
wmweber@aclj-dc.org

Jay A. Sekulow
sekulow@aclj.org

Mailee Rebecca Smith
mailee.smith@aul.org

Michael J. Norton
mjnorton@alliancedefendingfreedom.org

Steven H. Aden
saden@alliancedefendingfreedom.org

Natalie Lynn Decker
ndecker@alliancedefendingfreedom.org

Catherine Glenn Foster
cfoster@alliancedefendingfreedom.org

Stephen Daniel Casey
stephen@caseylawoffice.us

Catherine Short
lldfojai@cs.com

Gregory R. Terra
greg@tcdl.org

Allan Edward Parker, Jr.
aparker@txjf.org

Lawrence John Joseph
ljoseph@larryjoseph.com

/S/ *Stephanie Toti*
Stephanie Toti