No. _____

IN THE

Supreme Court of the United States

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

Applicants,

v.

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

Respondents.

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

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

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June 19, 2015

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

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

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

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

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

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

STATEMENT OF FACTS

I. The Challenged Requirements.

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

A. The ASC Requirement.

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

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

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

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

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

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

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

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

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

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

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

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

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

B. The Admitting-Privileges Requirement.

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

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

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

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

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

II. The Proceedings Below.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. The ASC Requirement.

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

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

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

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

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

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

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

B. The Admitting-Privileges Requirement.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ARGUMENT

I. Standard of Review

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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No. _____

IN THE

Supreme Court of the United States

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

Applicants,

v.

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

Respondents.

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

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

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June 19, 2015

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED
June 9, 2015

Lyle W. Cayce
Clerk

No. 14-50928

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

Plaintiffs-Appellees – Cross-Appellants

v.

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

Defendants-Appellants – Cross-Appellees

Appeals from the United States District Court
for the Western District of Texas

Before PRADO, ELROD, and HAYNES, Circuit Judges.

PER CURIAM:

Plaintiffs, Texas abortion providers, sued State of Texas officials ("the State")[1] seeking declaratory and injunctive relief against the enforcement of

[1] The Plaintiffs include Whole Woman's Health; Austin Women's Health Center; Killeen Women's Health Center; Nova Health Systems d/b/a Reproductive Services; and Sherwood C. Lynn, Jr., M.D., Pamela J. Richter, D.O., and Lendol L. Davis, M.D., on behalf of themselves and their patients. The Defendants are Kirk Cole, M.D., Commissioner of the Texas Department of State Health Services, and Mari Robinson, Executive Director of the Texas Medical Board, in their official capacities.

recent amendments to Texas's law regulating abortions. *See* 2013 Texas House Bill No. 2 ("H.B. 2").[2] Plaintiffs challenge H.B. 2's physician admitting privileges requirement as applied to a McAllen and an El Paso abortion facility. Plaintiffs also challenge H.B. 2's requirement that abortion facilities satisfy the standards set for ambulatory surgical centers facially and as applied to the McAllen and El Paso abortion facilities. The district court enjoined enforcement of both requirements "*as applied to all women seeking a previability abortion*," and as applied to the McAllen and El Paso abortion facilities. *Whole Woman's Health v. Lakey*, 46 F. Supp. 3d 673, 676 (W.D. Tex. 2014) (emphasis added). The State appeals the entry of declaratory and injunctive relief.[3] Plaintiffs cross-appeal the dismissal of their additional equal-protection and unlawful-delegation claims.

After carefully considering the record in light of the parties' extensive written and oral arguments, we AFFIRM the district court's dismissal of the Plaintiffs' equal-protection and unlawful-delegation claims, AFFIRM in part and MODIFY in part the district court's injunction of the admitting privileges and ASC requirements as applied to McAllen, VACATE the district court's injunction of the admitting privileges requirement as applied to "all women seeking a previability abortion," and REVERSE the district court's facial injunction of the ASC requirement, injunction of the ASC requirement in the context of medication abortion, and injunction of the admitting privileges and

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[2] Act of July 12, 2013, 83rd Leg., 2d C.S., ch. 1, §§ 1–12, 2013 Tex. Sess. Law Serv. 4795–802 (West) (codified at TEX. HEALTH & SAFETY CODE ANN. §§ 171.0031, 171.041–.048, 171.061–.064, & amending §§ 245.010–.011; amending TEX. OCC. CODE ANN. §§ 164.052 & 164.055).

[3] As discussed more fully below, upon the State's motion, a panel of this court partially stayed the district court's judgment pending appeal. *See Whole Woman's Health v. Lakey*, 769 F.3d 285 (5th Cir. 2014). Upon Plaintiffs' application, the Supreme Court vacated the stay in part. *See Whole Woman's Health v. Lakey*, 135 S. Ct. 399 (2014).

ASC requirements as applied to El Paso.

In plain terms, H.B. 2 and its provisions may be applied throughout Texas, except that Supreme Court precedent requires us to partially uphold the district court's injunction of the ASC requirement as applied to the Whole Woman's Health abortion facility in McAllen, Texas, and to uphold the district court's injunction of the admitting privileges requirement as applied to Dr. Lynn when he is working at the McAllen facility.

I. Jurisprudential Background

So that our decision may benefit from a full understanding of the pertinent historical and jurisprudential context, we begin by reviewing the regulation of abortion and related Supreme Court cases.

A. Roe v. Wade

The Supreme Court's modern abortion jurisprudence began in 1973 with the landmark case *Roe v. Wade*, 410 U.S. 113 (1973). As with the case before us, *Roe* dealt with a challenge to Texas's regulation of abortion. Texas's penal code made it a crime punishable by imprisonment to procure or attempt to procure an abortion unless medically necessary to save the life of the mother. *Id.* at 117–18 & n.1. Unlike the law presently challenged, the Texas law was not of recent vintage. First enacted in 1854 with few substantial modifications, it was a century old at the time of *Roe*. *See id.* at 116, 119. Nor was Texas's law unique; a majority of the states had similar laws. *See id.* at 116, 118 & n.2.

Reviewing Texas's statute against a backdrop of varying state regulations of abortion, *Roe* assessed the states' interests in regulating abortion, acknowledging a legitimate interest in women's health:

> The State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under

> circumstances that insure maximum safety for the patient. This interest obviously extends at least to the performing physician and his staff, to the facilities involved, to the availability of after-care, and to adequate provision for any complication or emergency that might arise.

Id. at 150. The Court likewise credited an interest in protecting potential life: "as long as at least *potential* life is involved, the State may assert interests beyond the protection of the pregnant woman alone." *Id.*

Most significantly, however, the Court recognized a constitutional right of privacy "broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Id.* at 153. While "[t]he Constitution does not explicitly mention any right of privacy," *id.* at 152, the Court relied on its cases recognizing a right of personal privacy in other contexts, which it found to be rooted in the "Fourteenth Amendment's concept of personal liberty and restrictions upon state action," *id.* at 153.

Considering these competing concepts, the Court "conclude[d] that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation." *Id.* at 154. It thus fashioned a constitutional framework that conditioned the states' ability to regulate abortion on a fetus's viability. It held that states may not proscribe abortion prior to viability—the point at which "the fetus then presumably has the capability of meaningful life outside the mother's womb." *Id.* at 163. After viability, generally at the end of the second trimester, states could proscribe or regulate abortion except when an abortion was necessary to preserve the life or health of the mother. *Id.* at 163–64. The Court drew this line because it believed the interest in potential life to be compelling only after viability. *See id.* at 163.

The Court drew a second line at the end of the first trimester of pregnancy. During the first trimester, states were precluded from interfering with a woman's choice to obtain an abortion. *Id.* From the beginning of the second trimester onward, *Roe* held that "a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health." *Id.* "Examples of permissible state regulation in this area are requirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status; as to the licensing of the facility; and the like." *Id.* The Court drew this line because it believed the interest in the health of the mother became compelling only after the first trimester. *See id.* (crediting evidence "that until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth"). Measured against *Roe*'s framework, Texas's law proscribing abortion at all stages of pregnancy was held unconstitutional. *Id.* at 166.

B. The Supreme Court's Review of Abortion Regulations Following Roe

In the approximately twenty-year period following *Roe*, it became a regular practice of the Supreme Court to consider the constitutionality of state abortion regulations. *Roe* was explicitly reaffirmed twice during this period, *see Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 759 (1986); *Akron v. Akron Ctr. for Reprod. Health, Inc.* (*Akron I*), 462 U.S. 416, 420 (1983), before its framework was modified in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). Because *Roe* allowed regulations during the second trimester that were "reasonably related to maternal health," 410 U.S. at 164, the Court had to determine the reasonableness of various health regulations. Some health-based regulations

extended into the first trimester, some regulations were based on an interest in potential life but extended into the first or second trimester, and other regulations were said to be justified by interests not recognized in *Roe*. As the Supreme Court reviewed these regulations, two considerations often played a part in the analysis: (1) whether the regulation placed a substantial obstacle in the path of a woman's choice to obtain an abortion;[4] and (2) whether the regulation was reasonably related to a legitimate government interest.[5]

Relevant here, the Supreme Court addressed various state laws regulating the facilities in which abortions are performed.[6] In *Doe v. Bolton*,

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[4] *See, e.g.*, *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 828 (1986) (O'Connor, J., dissenting); *Simopoulos v. Virginia*, 462 U.S. 506, 520 (1983) (O'Connor, J., concurring in part and concurring in the judgment); *Akron v. Akron Ctr. for Reprod. Health, Inc.* (*Akron I*), 462 U.S. 416, 434–35, 445 (1983), *overruled in part by Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833 (1992); *id.* at 453 (O'Connor, J., dissenting); *Harris v. McRae*, 448 U.S. 297, 315 (1980); *Bellotti v. Baird* (*Bellotti II*), 443 U.S. 622, 647 (1979) (Powell, J., plurality opinion); *Maher v. Roe*, 432 U.S. 464, 473–74 (1977); *Bellotti v. Baird* (*Bellotti I*), 428 U.S. 132, 147 (1976).

[5] *See, e.g.*, *Hodgson v. Minnesota*, 497 U.S. 417, 436 (1990) (Stevens, J., plurality opinion); *Thornburgh*, 476 U.S. at 828 (O'Connor, J., dissenting); *Simopoulos*, 462 U.S. at 519; *Akron I*, 462 U.S. at 453 (O'Connor, J., dissenting); *McRae*, 448 U.S. at 324; *Doe v. Bolton*, 410 U.S. 179, 194 (1973); *see also Roe v. Wade*, 410 U.S. 113, 164 (1973) (allowing regulations during the second trimester that were "reasonably related to maternal health").

[6] While not as pertinent to this case, the Supreme Court has addressed various other abortion regulations. The Court has interpreted the Constitution to permit states and the federal government to allocate resources so as to fund childbirth, but not fund abortion or the providing of information about abortion—thus encouraging childbirth over abortion. *See, e.g.*, *Rust v. Sullivan*, 500 U.S. 173, 201–03 (1991); *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 507–10 (1989); *McRae*, 448 U.S. at 318; *Maher*, 432 U.S. at 474. The Supreme Court also upheld general informed consent provisions that required a woman to certify in writing that she consented to an abortion. *See Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 65–67 (1976). On the other hand, the Court struck down "abortion regulations designed to influence the woman's informed choice between abortion or childbirth" by requiring the giving of information that goes "far beyond merely describing the general subject matter relevant to informed consent." *Akron I*, 462 U.S. at 444–45, *overruled by Casey*, 505 U.S. at 881–83; *see also Thornburgh*, 476 U.S. at 760, 763, *overruled by Casey*, 505 U.S. at 881–83. The Court also struck down requirements that the information necessary for informed consent be provided by a physician twenty-four hours prior to the abortion, *see Akron I*, 462 U.S. at 448–51, *overruled by Casey*, 505 U.S. at 884–87, and that a woman obtain

410 U.S. 179 (1973), the Court considered a requirement that all abortions be performed "in a hospital licensed by the State Board of Health and also accredited by the Joint Commission on Accreditation of Hospitals" ("JCAH"). *Id.* at 184. The Court held that the requirement did not withstand constitutional scrutiny because it was "not based on differences that are reasonably related to the purposes of the Act in which it is found." *Id.* at 194 (internal quotation marks omitted). In so concluding, the Court explained that the JCAH standards were general hospital standards not specific to abortion and the state did not require that the performance of non-abortion surgeries be constrained to JCAH-accredited hospitals. *See id.* at 193. The Court further found the regulation unconstitutional under *Roe* because it applied to abortions performed during the first trimester. *Id.* at 195.

In *Akron I*, 462 U.S. 416, *overruled in part by Casey*, 505 U.S. 833, the Court parsed how stringently states could regulate abortion to protect a mother's health at different stages of pregnancy. It explained that even during the first trimester, "[c]ertain regulations that have no significant impact on the woman's exercise of her right may be permissible where justified by important state health objectives." *Id.* at 430. The Court required these regulations to "not interfere" with the doctor-patient consultation or the woman's choice to obtain an abortion. *Id.* During the second trimester, it allowed states to "regulate the abortion procedure to the extent that the regulation reasonably

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consent from her spouse to obtain an abortion, *see Danforth*, 428 U.S. at 69. Furthermore, the Court declared unconstitutional laws that "impose a blanket provision . . . requiring the consent of a parent or person *in loco parentis* as a condition for abortion of an unmarried minor . . . . [I]f the State decides to require a pregnant minor to obtain one or both parents' consent to an abortion, it also must provide an alternative procedure whereby authorization for the abortion can be obtained." *Bellotti II*, 443 U.S. at 643 (internal quotation marks omitted).

relates to the preservation and protection of maternal health" and does not "depart from accepted medical practice." *Id.* at 430–31 (internal quotation marks omitted). The Court applied these principles to invalidate a city ordinance that only allowed abortions in facilities that were part of a full-service hospital. *See id.* at 432–33. The Court held the ordinance "place[d] a significant obstacle in the path of women seeking an abortion" in the form of higher costs to obtain an abortion, increased travel distances, and additional health risks due to increased travel. *Id.* at 434–35. Further, the Court found the health justification for the requirement undercut by "present medical knowledge" that abortions during the second trimester could safely be performed in a physician's office. *Id.* at 437.

In contrast, in *Simopoulos v. Virginia*, 462 U.S. 506, the Supreme Court upheld a state requirement that all second-trimester abortions be performed in a state-licensed "outpatient surgical hospital." *Id.* at 515. The Court explained that the law differed materially from that in *Akron I*:

> The requirements at issue [in *Akron I*] mandated that all second-trimester abortions must be performed in general, acute-care facilities. In contrast, the Virginia statutes and regulations do not require that second-trimester abortions be performed exclusively in full-service hospitals. Under Virginia's hospitalization requirement, outpatient surgical hospitals may qualify for licensing as "hospitals" in which second-trimester abortions lawfully may be performed.

Id. at 516 (citation and internal quotation marks omitted). Virginia's law required outpatient surgical hospitals to meet standards in the following categories: (1) "organization, management, policies, procedures, and staffing"; (2) "construction standards," including for "public areas, clinical areas, laboratory and radiology services, and general building"; and (3) "patient care services," including anesthesia, laboratory, pathology, sanitation, laundry,

physical plant, medical records, emergency services, and evacuation planning. *Id.* at 515–16 (internal quotation marks omitted).

The Court held that Virginia's outpatient-surgical-hospital requirement was "not an unreasonable means of furthering the State's compelling interest in protecting the woman's own health and safety." *Id.* at 519 (citation and internal quotation marks omitted). The Court explained that, "[i]n view of its interest in protecting the health of its citizens, the State necessarily has considerable discretion in determining standards for the licensing of medical facilities." *Id.* at 516. Unlike in *Akron I*, the Court concluded "[o]n their face, the Virginia regulations appear to be generally compatible with accepted medical standards governing outpatient second-trimester abortions." *Id.* at 517. The Court also saw "no reason to doubt that an adequately equipped clinic could, upon proper application, obtain an outpatient hospital license permitting the performance of second-trimester abortions." *Id.* at 518–19.

C. Planned Parenthood of Southeastern Pennsylvania v. Casey

Nineteen years after *Roe*, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), a divided Court revisited *Roe*. In a joint opinion, Justices O'Connor, Kennedy, and Souter announced the judgment of the Court and delivered the opinion of the Court as to some parts. *Id.* at 843–44. Although parts of the joint opinion were a plurality not joined by a majority of the Court, the joint opinion is nonetheless considered the holding of the Court under *Marks v. United States*, 430 U.S. 188, 193 (1977), as the narrowest position supporting the judgment.[7]

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[7] *See Stenberg v. Carhart*, 530 U.S. 914, 952 (2000) (Rehnquist, C.J., dissenting) ("Despite my disagreement with the opinion, under the rule laid down in [*Marks*], the *Casey* joint opinion represents the holding of the Court in that case."); *K.P. v. LeBlanc*, 729 F.3d 427, 442 n.93 (5th Cir. 2013); *see, e.g.*, *Stenberg*, 530 U.S. at 921 (majority opinion) (applying *Casey*'s joint opinion).

The Court first reaffirmed *Roe*'s "essential holding" that before viability a woman has a constitutional right to choose to terminate her pregnancy.[8] *See* 505 U.S. at 870–71. The Court went on, however, to modify the jurisprudence, reasoning that the legitimate interests of the states as recognized in *Roe* were "given too little acknowledgment and implementation by the Court in its subsequent cases," which decided that "any regulation touching upon the abortion decision must survive strict scrutiny, to be sustained only if drawn in narrow terms to further a compelling state interest." *Id.* at 871 (citing by example *Akron I*, 462 U.S. at 427). The Court found it "an overstatement to describe [the abortion right] as a right to decide whether to have an abortion 'without interference from the State.'" *Id.* at 875 (quoting *Danforth*, 428 U.S. at 61). Those cases that struck down an abortion regulation, "which in no real sense deprived women of the ultimate decision. . . . went too far." *Id.* Thus, the Court concluded that, in practice, *Roe*'s trimester framework had not given proper effect to the states' legitimate interests, which the Court found exist *throughout pregnancy*. *See id.* at 872–73, 875–76.

Accordingly, the Court held that a law, to infringe the right recognized in *Roe*, must do more than simply make the right more difficult to exercise. It must impose an *undue burden* on the exercise of that right:

> Numerous forms of state regulation might have the incidental effect of increasing the cost or decreasing the availability of medical care, whether for abortion or any other medical procedure. The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be

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[8] The Court recognized that "time has overtaken some of *Roe*'s factual assumptions," because modern science and "advances in neonatal care have advanced viability to a point somewhat earlier." *Casey*, 505 U.S. at 860 (comparing *Roe*, 410 U.S. at 160, with *Webster*, 492 U.S. at 515–16).

> enough to invalidate it. Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause.

Id. at 874. "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. The Court also indicated that if a law does not impose an undue burden on a woman's right to choose an abortion, the law is constitutional so long as it is reasonably related to, or designed to further, a legitimate state interest:

> Unless it [imposes an undue burden] on her right of choice, a state measure *designed to* persuade her to choose childbirth over abortion will be upheld *if reasonably related to* that goal. Regulations *designed to* foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden.

Id. at 878 (emphasis added). Stated more simply, *Casey* held that a law regulating previability abortion is constitutional if: (1) it does not have the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus; and (2) it is reasonably related to (or designed to further) a legitimate state interest. *See id.*

Overruling precedent, the Court applied this test to uphold the state's requirement that a physician provide the woman information on the risks of abortion, the gestational age of the child, alternatives to abortion, and available assistance if the woman chose to proceed to natural birth. *See id.* at 881–83 (overruling *Akron I*, 462 U.S. at 444, and *Thornburgh*, 476 U.S. at 762). It found the requirement was "a reasonable measure to ensure an informed choice, one which might cause the woman to choose childbirth over abortion," serving the state's "legitimate goal of protecting the life of the unborn." *Id.* at 883. The Court concluded that "[t]his requirement cannot be considered a

substantial obstacle to obtaining an abortion, and, it follows, there is no undue burden." *Id.*[9]

The Court separately upheld a 24-hour waiting period requirement. It found it reasonable to conclude that "important decisions will be more informed and deliberate if they follow some period of reflection," and held that "[i]n theory, at least, the waiting period is a reasonable measure to implement the State's interest in protecting the life of the unborn." *Id.* at 885 (overruling *Akron I*, 462 U.S. at 450). The Court addressed the district court's finding that the 24-hour waiting period, combined with the driving distances to abortion providers, would often produce delays of more than one day, and "for those women who have the fewest financial resources, those who must travel long distances, and those who have difficulty explaining their whereabouts to husbands, employers, or others, the 24-hour waiting period will be particularly burdensome." *Id.* at 886 (internal quotation marks omitted). Despite acknowledging that "the waiting period ha[d] the effect of increasing the cost and risk of delay of abortions," the Court held that the findings did not demonstrate an undue burden. *Id.* (internal quotation marks omitted). The Court reasoned that, although the district court found the requirement imposed a heavier burden on some women, "[a] particular burden is not of necessity a substantial obstacle. Whether a burden falls on a particular group is a distinct inquiry from whether it is a substantial obstacle even as to the women in that group." *Id.* at 887.

The Supreme Court also facially invalidated Pennsylvania's requirement that, prior to obtaining an abortion, a married woman state that she notified

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[9] The Court also upheld a requirement that a *physician* must provide the information. *See* 505 U.S. at 884–85 (overruling *Akron I*, 462 U.S. at 448).

her spouse that she planned to obtain an abortion. *See id.* at 887–98. In light of the domestic abuse that might result from some women notifying their spouses, the Court held that the requirement had the effect of placing a substantial obstacle in the path of a woman's choice to obtain an abortion:

> The spousal notification requirement is thus likely to prevent a significant number of women from obtaining an abortion. It does not merely make abortions a little more difficult or expensive to obtain; for many women, it will impose a substantial obstacle. 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 as surely as if the Commonwealth had outlawed abortion in all cases.

Id. at 893–94. Pennsylvania argued that, even given this conclusion, the statute should not be *facially* invalidated because only 20% of women who obtained an abortion were married and 95% of those women voluntarily notified their spouses, resulting in the requirement affecting less than 1% of women seeking an abortion in Pennsylvania. *See id.* at 894. The Court rejected this argument and facially invalidated the requirement because "in a large fraction of the cases in which [it] is relevant, it [would] operate as a substantial obstacle to a woman's choice to undergo an abortion." *Id.* at 895.[10]

D. Application of Casey

Since *Casey*, the Court has applied the undue burden test three times. In *Mazurek v. Armstrong*, 520 U.S. 968 (1997) (per curiam), the Court reversed an injunction of Montana's requirement that only physicians perform

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[10] The Court reasoned:

> The analysis does not end with the one percent of women upon whom the statute operates; it begins there. Legislation is measured for consistency with the Constitution by its impact on those whose conduct it affects. . . . The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant.

Id. at 894.

abortions. The Court concluded that the law did not create a substantial obstacle to abortion. *See id.* at 973–74. The Court also rejected the argument that an invalid purpose was proven by a lack of medical evidence:

> Respondents claim in this Court that the Montana law must have had an invalid purpose because all health evidence contradicts the claim that there is any health basis for the law. . . . But this line of argument is squarely foreclosed by *Casey* itself. In the course of upholding the physician-only requirement at issue in that case, we emphasized that "[o]ur cases reflect the fact that the Constitution gives the States broad latitude to decide that particular functions may be performed only by licensed professionals, *even if an objective assessment might suggest that those same tasks could be performed by others*."

Id. at 973 (alteration in original) (quoting *Casey*, 505 U.S. at 885).

The two other post-*Casey* cases dealt with prohibitions on what has been termed partial-birth abortion, and the cases resulted in divergent conclusions. *Stenberg v. Carhart* involved a Nebraska law making it a felony to perform a partial-birth abortion unless necessary to save the life of the mother. 530 U.S. 914, 921–22 (2000). The Supreme Court held that the law was facially unconstitutional for two reasons. First, the Court found impermissible the lack of a health exception to allow for the partial-birth abortion procedure if necessary to preserve the life *or health* of the mother (as opposed to an exception solely to save the life of the mother, which the statute did contain). *Id.* at 930. Although Nebraska argued that a health exception was unnecessary because other abortion procedures could be safely used, the Court found this argument contradicted by evidence presented in the district court. *Id.* at 931–37. The Court explained that division of medical opinion on the subject favored a health exception. *Id.* at 937. Second, the Court held the law unconstitutional because it had the "effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus" by encompassing

within its statutory definition not only partial-birth abortion, but also the abortion procedure most commonly used during the second trimester of pregnancy—dilation and evacuation ("D&E"). *Id.* at 938 (citation and internal quotation marks omitted).

Gonzales v. Carhart, 550 U.S. 124 (2007), upheld as facially constitutional the Partial-Birth Abortion Ban Act of 2003 ("the Act"), 18 U.S.C. § 1531, which Congress drafted in response to *Stenberg*. *See* 550 U.S. at 132–33, 141. Congress made factual findings that "[a] moral, medical, and ethical consensus exists that the practice of performing a partial-birth abortion . . . is a gruesome and inhumane procedure that is never medically necessary." *Id.* at 141 (alteration in original) (internal quotation marks omitted). Significantly, the Supreme Court interpreted the language of the Act to be more specific and precise than the language of the statute in *Stenberg*, such that it prohibited *only* partial-birth abortion and did not encompass the commonly used D&E procedure. *See id.* at 133, 150–56. The Act contained an exception if the procedure was necessary "to save the life of a mother," which tracked the Nebraska exception struck down in *Stenberg*. *Compare id.* at 141, *with Stenberg*, 530 U.S. at 921–22.

The Supreme Court applied *Casey*'s undue burden test, "assum[ing its] principles for the purpose of th[e] opinion." 550 U.S. at 146. The Court found, based on Congress's stated reasons for the Act and a "description of the prohibited abortion procedure," that the purpose of the Act was to: (1) "express[] respect for the dignity of human life"; and (2) "protect[] the integrity and ethics of the medical profession." *Id.* at 156–57 (internal quotation marks omitted). Referencing *Casey*, the Court held that the Act was grounded in a legitimate purpose because "government may use its voice and its regulatory authority to show its profound respect for the life within the woman." *Id.* at

157. In explaining why *Casey*'s purpose prong was satisfied, the Court described a rational basis test:

> Where it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn.

Id. at 158.

The Court then applied *Casey*'s "effect" prong, asking whether the Act had the effect of imposing an undue burden by barring partial-birth abortion while not including a health exception. *See id.* at 161–67. The Court explained that "the Act would be unconstitutional, under precedents we here assume to be controlling, if it subject[ed] [women] to significant health risks." *Id.* at 161 (alteration in original) (internal quotation marks omitted). However, the Court noted "documented medical disagreement whether the Act's prohibition would ever impose significant health risks," *id.* at 162, and held that this medical uncertainty foreclosed facially invalidating the act based on an undue burden:

> The question becomes whether the Act can stand when this medical uncertainty persists. The Court's precedents instruct that the Act can survive this facial attack. The Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty.
>
> . . . Physicians are not entitled to ignore regulations that direct them to use reasonable alternative procedures. The law need not give abortion doctors unfettered choice in the course of their medical practice, nor should it elevate their status above other physicians in the medical community. . . .
>
> Medical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts. The medical uncertainty over whether the Act's prohibition creates significant health risks provides a sufficient basis to conclude in this facial attack that the Act does not impose an undue burden.

Id. at 163–64 (citations omitted).

Accordingly, having concluded that the Act did not have the purpose or effect of imposing an undue burden on a woman's right to choose an abortion in a large fraction of relevant cases,[11] the Court upheld the Act against facial challenge. *Id.* at 167–68.

E. This Court's Decision in Abbott II

With this history in mind, in *Planned Parenthood of Greater Texas Surgical Health Services v. Abbott* (*Abbott II*)—an earlier case in which we addressed the constitutionality of the admitting privileges requirement in H.B. 2—we summarized those standards that are also applicable to this case:

> A trio of widely-known Supreme Court decisions provides the framework for ruling on the constitutionality of H.B. 2. In *Roe v. Wade*, the Court held that the Fourteenth Amendment's concept of personal liberty encompasses a woman's right to end a pregnancy by abortion. *Roe v. Wade*, 410 U.S. 113, 153 (1973). In *Casey*, the Court reaffirmed what it regarded as *Roe*'s "essential holding," the right to abort before viability, the point at which the unborn life can survive outside of the womb. *Casey*, 505 U.S. at 870, 878. Before viability, the State may not impose an "undue burden," defined as any regulation that has the purpose or effect of creating a "substantial obstacle" to a woman's choice. *Id.* at 874, 878. In *Gonzales*, the Court added that abortion restrictions must also pass rational basis review. *Gonzales*, 550 U.S. at 158 (holding that the State may ban certain abortion procedures and substitute others provided that "it has a rational basis to act, *and* it does not impose an undue burden" (emphasis added)).

748 F.3d 583, 589–90 (5th Cir.), *reh'g en banc denied*, 769 F.3d 330 (5th Cir. 2014).

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[11] The Court acknowledged without deciding the issue of whether a facial challenge required showing that the law is unconstitutional in all circumstances or, as described in *Casey*, only in a large fraction of the cases in which the law is relevant. *See id.* at 167–68.

II. Factual and Procedural Background of this Case

Having set the stage, we now turn to the matters at issue in this case. In 2013, the State of Texas passed H.B. 2, which contained various provisions relating to abortions. H.B. 2 has four primary provisions, of which the Plaintiffs challenge two. The first challenged provision requires a physician performing an abortion to have admitting privileges at a hospital within thirty miles of the location where the abortion is performed (the "admitting privileges requirement"). *See* TEX. HEALTH & SAFETY CODE ANN. § 171.0031(a)(1) (West Supp. 2014). We addressed an earlier facial challenge to this provision in *Abbott II*, 748 F.3d 583.[12] The second provision requires all abortion clinics to comply with standards set for ambulatory surgical centers (the "ASC requirement").[13] *See* TEX. HEALTH & SAFETY CODE ANN. § 245.010(a) (West Supp. 2014). Clinics had until September 2014, nearly fourteen months after H.B. 2 was passed, to comply with the ASC requirement. *Id.* The Texas Legislature's stated purpose for enacting these provisions was to raise the standard and quality of care for women seeking abortions and to protect the health and welfare of women seeking abortions. *See* Senate Comm. on Health & Human Servs., Bill Analysis, Tex. H.B. 2, 83d Leg., 2d C.S. 1 (2013). H.B. 2 contains a "comprehensive and careful severability provision," *Abbott II*, 748 F.3d at 589, as do the implementing regulations. *See* H.B. 2 § 10(b); 25 TEX. ADMIN. CODE § 139.9.

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[12] The admitting privileges requirement went into effect on October 31, 2013. The district court enjoined the provision, but we stayed the injunction on October 31, 2013, *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott (Abbott I)*, 734 F.3d 406, 419 (5th Cir. 2013), and thereafter vacated the injunction, *see Abbott II*, 748 F.3d at 605.

[13] An ambulatory surgical center is "a facility that operates primarily to provide surgical services to patients who do not require overnight hospital care." TEX. HEALTH & SAFETY CODE ANN. § 243.002(1) (West 2010).

Adopted in December 2013, the regulations implementing the ASC requirement mandate that abortion facilities satisfy the standards applicable to ASCs in addition to any standards specifically applicable to abortion facilities. *See* 25 TEX. ADMIN. CODE § 139.40; 38 Tex. Reg. 9577 (Dec. 27, 2013). The regulatory standards for ASCs fall into three categories: (1) operating requirements, including requirements for records systems, patient rights, quality assurance, staffing, and cleanliness, 25 TEX. ADMIN. CODE §§ 135.4–.17, 135.26–.27; (2) fire prevention and general safety requirements, *id.* §§ 135.41–.43; and (3) physical plant requirements, which include location, physical construction, electrical, plumbing, and HVAC requirements, *id.* §§ 135.51–.56.

Shortly after H.B. 2 was passed, some of the same parties named in this case[14] sued the State of Texas seeking to invalidate certain provisions of H.B. 2, specifically, the admitting privileges requirement and the provision requiring compliance with the FDA protocol for what is known as "medication abortions" (the use of drugs to induce an abortion rather than performing a surgical procedure) (the "medication abortion provision"). In that case, the district

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[14] Planned Parenthood, the largest provider of abortion services in Texas, is not a party to this lawsuit, although it was a named plaintiff in *Abbott II*. Lamar Robinson, M.D. was a named plaintiff in *Abbott II* and was originally a named plaintiff in this case. However, on June 3, 2014, he filed a Notice of Voluntary Dismissal because he obtained admitting privileges at a hospital within thirty miles of the clinic at which he provided abortions.

Otherwise, Plaintiffs largely overlap with the plaintiffs in *Abbott II*. Whole Woman's Health, Austin Women's Health Center, Killeen Women's Health Center, and Dr. Richter were plaintiffs in *Abbott II*. 748 F.3d 583 Doctors Lynn and Davis were not parties in *Abbott II*, but Whole Woman's Health and Austin Women's Health Center, respectively, sued on their behalf. *See* Complaint, Doc. No. 1, ¶¶ 13–14, *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, No. 1:13-CV-862-LY (W.D. Tex.) (stating that clinics were suing "on behalf of" their "physicians"). Reproductive Services was not a plaintiff in *Abbott II*, but Dr. Richter, its medical director and sole abortion-performing physician, was a plaintiff. *See id.* ¶ 21.

court granted relief to the plaintiffs in part, *see Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 951 F. Supp. 2d 891, 909 (W.D. Tex. 2013), and we first granted a stay, *see Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott* (*Abbott I*), 734 F.3d 406, 419 (5th Cir. 2013), and later affirmed in part and reversed in part, *see Abbott II*, 748 F.3d at 605. The time for seeking certiorari from the United States Supreme Court passed, and no petition was filed. In that earlier challenge to H.B. 2, the Plaintiffs did not raise any issues regarding the ASC requirement.

Instead, they waited until April of 2014, one week after the adverse decision in *Abbott II*, to file this lawsuit challenging Texas's requirement that abortion facilities satisfy the standards set for ASCs. Together with a facial challenge to the ASC requirement, they also challenged the admitting privileges requirement and the ASC requirement as applied to Whole Woman's Health's abortion facility in McAllen and Reproductive Services' abortion facility in El Paso. In addition, the Plaintiffs challenged H.B. 2 on several other grounds, including that it denies equal protection, unlawfully delegates lawmaking authority, and constitutes arbitrary and unreasonable state action. Before trial, the district court granted the State's motion to dismiss claims based on these other grounds.

After a four-day bench trial employing a highly-abbreviated format for the presentation of evidence, the district court enjoined enforcement of the admitting privileges requirement and ASC requirement "*as applied to all women seeking a previability abortion*," and as applied to the McAllen and El Paso abortion facilities. *Lakey*, 46 F. Supp. 3d at 676, 687 (emphasis added). The district court also enjoined the ASC requirement as applied to medication abortions. *Id.*

At trial, the parties stipulated to the following facts. Seven ASCs in five

major Texas cities (Austin, Dallas, Fort Worth, Houston, and San Antonio) were licensed to perform abortions and would be able to continue providing abortions after the ASC requirement went into effect. No other facility in Texas licensed to perform abortions satisfied the ASC requirement, and, thus, these other facilities would be prohibited from performing abortions after the ASC requirement went into effect on September 1, 2014. The parties further stipulated that Planned Parenthood of South Texas planned to open an ASC in San Antonio in September 2014. The district court accepted these stipulated facts, stating that the ASC requirement would "reduce the number of licensed abortion-providing facilities to, at most, eight." *Id.* at 681.[15] The district court also found that Texas had over forty abortion clinics prior to H.B. 2, but the district court did not discuss whether some of these clinics may have closed for reasons unrelated to H.B. 2.[16] *See id.* Both parties offered expert testimony at trial as to the increased travel distances that women would face to obtain an abortion due to H.B. 2. The district court credited the testimony of the

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[15] The State points out that it did not stipulate that *only* eight abortion facilities would remain in Texas, arguing that currently licensed abortion facilities that do not comply with the ASC requirement might buy, build, or lease a licensed ASC. The parties stipulated that there were "433 licensed ambulatory surgical centers in Texas." There was testimony at trial that Dr. Davis and Austin Woman's Health Center purchased land in Austin with plans to open an ASC in the future and that Reproductive Services hoped to open an ASC in San Antonio. The fact that there are currently licensed ASCs in Texas where abortions are performed and that abortion providers have plans to open more attests that it is indeed possible for abortion providers to comply with the ASC requirement. Conversely, the Plaintiffs offered testimony that their efforts to lease an existing ASC failed primarily due to hostility to abortion. The evidence thus showed that there will be *at least* eight licensed ASCs in Texas where abortions are performed.

[16] For example, we noted in *Abbott I* and *II* that abortion facilities had difficulty recruiting physicians with admitting privileges because a large proportion of physicians performing abortions were over the age of 60 and had already retired or were planning to retire. *Abbott I*, 734 F.3d at 415; *Abbott II*, 748 F.3d at 591. In addition, we noted that some physicians felt deterred by the terms of their existing employment or were concerned about private discrimination. *Abbott II*, 748 F.3d at 591, 599.

Plaintiffs' expert, Dr. Grossman, and found that, due to H.B. 2, "a significant number of the reproductive-age female population of Texas will need to travel considerably [farther] in order to" obtain an abortion. *Id.* at 681–82.

Regarding the ASC requirement, the Plaintiffs offered expert testimony that "abortions can be safely performed in office-based settings, such as doctors' offices and specialized clinics," and that "there is no medical basis for requiring facilities in which abortions are performed to meet ASC standards."[17] Despite H.B. 2's severability clause and the fact that many of the ASC standards seem benign and inexpensive, *see, e.g.*, 25 TEX. ADMIN. CODE § 135.52(e)(1)(F) ("A liquid or foam soap dispenser shall be located at each hand washing facility."), Plaintiffs conceded at oral argument that they made no effort to narrow their challenge to any particular standards of the ASC provision of H.B. 2 or its accompanying regulations. Instead, they ask us to invalidate the entire ASC requirement.

In opposition, the State offered expert testimony that the sterile environment of an ASC was medically beneficial because surgical abortion involves invasive entry into the uterus, which is sterile. Accordingly, the State's expert opined that abortion procedures should "be performed in an ASC where the higher standard of care is required so as to better protect the patient's health and safety."[18]

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[17] Plaintiffs offered expert testimony that the ASC requirement's construction standards were "largely aimed at maintaining a sterile operating environment," which is not necessary for surgical abortion because "it entails insertion of instruments into the uterus through the vagina, which is naturally colonized by bacteria." Plaintiffs also offered expert testimony that abortion procedures do not necessitate large operating rooms or scrub nurses and circulating nurses, as are required for ASCs. The Plaintiffs' expert also explained that medication abortions do not involve surgery but entail the oral administration of medications; accordingly, the expert concluded that there is "no medical basis for requiring medical abortion to be provided in an ASC."

[18] The State's expert explained that other procedures requiring entry into the uterus,

Like the Plaintiffs, the district court made no effort to write narrowly, finding that the entirety of the ASC requirement was not medically necessary and that its burdens outweighed any benefits, including that: (1) "women will not obtain better care or experience more frequent positive outcomes at an [ASC] as compared to a previously licensed facility"; (2) "it is unlikely that the stated goal of the requirement—improving women's health—will actually come to pass"; and (3) "the severity of the burden imposed by both requirements is not balanced by the weight of the interests underlying them." *Lakey*, 46 F. Supp. 3d at 684.

Regarding the as-applied challenge to the admitting privileges requirement, the State offered expert testimony that this requirement leads to greater continuity of care and "assures peer-review of abortion providers by requiring them to be credentialed and hold admitting privileges at a local hospital, thereby protecting patients from less than qualified providers."[19] Conversely, the Plaintiffs offered testimony that abortion physicians were being denied admitting privileges, not because of their level of competence, but for various other reasons, including: outright denial of admitting privileges with no explanation other than that it "was not based on clinical competence,"

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such as dilation and curettage, are traditionally performed in an ASC or hospital settings for that reason. The State's expert further explained that ASC requirements as to accountability and monitoring mechanisms ensure patient safety and that other requirements regarding follow up and continuity of care result in patients receiving a higher quality of care.

[19] The State's expert opined that the physician performing the abortion "is the most knowledgeable about the procedure and the patient," whereas an emergency room "physician has no prior relationship with the abortion patient and is unfamiliar with her medical history and personal preferences." Thus, it was the State's expert's opinion that the admitting privileges requirement would lead to greater continuity of care, increased quality of care, and fewer risks from complications. *See also Abbott II*, 748 F.3d at 595 ("Requiring abortion providers to have admitting privileges would also promote the continuity of care in all cases, reducing the risk of injury caused by miscommunication and misdiagnosis when a patient is transferred from one health care provider to another.").

and having not completed a medical residency even though the bylaws of the hospital did not require such. As with the ASC requirement, the district court ultimately found the admitting privileges requirement was not medically justifiable and that the burdens it imposed were not outweighed by any potential health benefits. *See id.* at 684–85.

The State appeals the entry of declaratory and injunctive relief. Plaintiffs cross-appeal the dismissal of their equal-protection and unlawful-delegation claims and the district court's failure to hold the ASC requirement unconstitutional as applied to future abortion providers. As part of its appeal, the State sought a stay of the district court's order pending resolution of the appeal, and a motions panel of this court stayed in part the district court's injunction. *See Whole Woman's Health v. Lakey*, 769 F.3d 285, 305 (5th Cir.), *vacated in part*, 135 S. Ct. 399 (2014). In turn, the Supreme Court modified this court's order pending full consideration of the appeal and maintained the status quo by continuing the district court's injunction of the ASC requirement as well as the district court's injunction of the admitting privileges requirement as applied to the McAllen and El Paso facilities. *See Whole Woman's Health v. Lakey*, 135 S. Ct. 399 (2014).[20]

[20] In its reply brief, the State argues 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 in light of the district court's injunction and the Supreme Court continuing that injunction pending appeal. We conclude that this issue is not moot as the State suggests. The El Paso abortion facility was no longer able to provide abortions after April 2014 because its physician, Dr. Richter, no longer had admitting privileges at a local hospital. The Plaintiffs returned the facility's license because they could not afford to pay its annual assessment fees while it was not generating revenue. The facility has not immediately resumed providing services because, during the four months that it was closed, 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. The president of the organization that ran the facility testified that if it was successful in this lawsuit, it would "seek to reestablish a licensed abortion facility in El Paso." Because the admitting privileges requirement arguably contributed to the closure of the El Paso facility and there is uncontested testimony that the facility will seek to reopen

III. Standard of Review

We review the district court's factual findings for clear error, its legal conclusions *de novo*, and its ultimate decision to enjoin enforcement of H.B. 2 for abuse of discretion. *See Abbott II*, 748 F.3d at 589. In so doing, we are not bound by the determinations of the motions panel, which considered during an abbreviated proceeding whether an emergency stay should be granted. *See Lakey*, 769 F.3d at 305; *Abbott I*, 734 F.3d at 419 (citing *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 704 (5th Cir. 1997)). Further, no guidance can be gleaned from the Supreme Court's vacating portions of the stay without explanation, as we cannot discern the underlying reasoning from the one-paragraph order.

IV. Admitting Privileges Requirement – Facial Challenge

By facially invalidating the admitting privileges requirement, the district court granted more relief than anyone requested or briefed. *See Lakey*, 46 F. Supp. 3d at 677 ("[T]he two portions of Texas Health and Safety Code, Sections 245.010(a) and 171.0031(a)(1), create an impermissible obstacle *as applied to all women* seeking a previability abortion." (emphasis added)). Not only was it inappropriate for the district court to grant unrequested relief in a constitutional challenge to a state law, *see Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 458 (5th Cir. 2014) (narrowing a district court's apparent facial relief, which the court held "was an overly broad remedy in an as-applied challenge"), *petition for cert. filed*, S. Ct. No. 14-997 (Feb. 18, 2015), but in so doing, the district court also ran directly afoul of the holding and

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upon a favorable resolution of this case, the parties still have a concrete interest in this controversy such that it is not moot. *See Chafin v. Chafin*, 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." (internal quotation marks omitted)).

mandate of *Abbott II*, 748 F.3d at 598–600, and the principle of res judicata. *See Lakey*, 769 F.3d at 293. By granting a broad injunction against the admitting privileges requirement "as applied to all women seeking a previability abortion," the district court resurrected the facial challenge put to rest in *Abbott II*.[21] However much a district court may disagree with an appellate court, a district court is not free to disregard the mandate or directly applicable holding of the appellate court. *See United States v. Teel*, 691 F.3d 578, 582–83 (5th Cir. 2012) (describing the law-of-the-case doctrine and mandate rule). We need not spend more time on this well-settled proposition—which plaintiffs do not dispute—and, instead, VACATE this portion of the district court's order.

V. ASC Requirement – Facial Challenge

A. Res Judicata

The State of Texas argues that these Plaintiffs previously challenged H.B. 2 in *Abbott II* without addressing the ASC requirement and, therefore, res judicata bars the current facial challenge.[22] For their part, the Plaintiffs argue that they could not have brought a challenge sooner because they did not know how the statute would be implemented until the implementing regulations went into effect. The district court agreed with Plaintiffs and rejected the State's res judicata defense at the motion to dismiss stage. It also concluded that challenges to the admitting privileges requirement and the ASC requirement represent different claims and causes of action. We reverse.

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[21] The only exception to our disallowing the facial challenge in *Abbott II* was that we did not reverse the district court's injunction with respect to physicians whose application for admitting privileges was still pending at the time H.B. 2 went into effect. *See Abbott II,* 748 F.3d at 605.

[22] Although the State did not raise this argument in its briefing on the emergency stay motion, it did raise the issue in its motion to dismiss before the district court.

Res judicata bars any claims for which: (1) the parties are identical to or in privity with the parties in a previous lawsuit; (2) the previous lawsuit has concluded with a final judgment on the merits; (3) the final judgment was rendered by a court of competent jurisdiction; and (4) the same claim or cause of action was involved in both lawsuits. *Petro-Hunt, L.L.C. v. United States*, 365 F.3d 385, 395 (5th Cir. 2004). The Plaintiffs do not contest the first three elements of the State's res judicata defense, but contend that the "claims" are different. However, res judicata bars even unfiled claims if they arise out of the same transaction and "could have been raised" in the prior litigation. *Allen v. McCurry*, 449 U.S. 90, 94 (1980).

Contrary to the district court's conclusion, the present facial challenge to the ASC requirement and the prior facial challenge to the admitting privileges requirement in *Abbott II* arise from the same "transaction[] or series of connected transactions." *Petro-Hunt*, 365 F.3d at 395–96 (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 24(1) (1982)). The challenges involve the same parties and abortion facilities; the challenges are governed by the same legal standards; the provisions at issue were enacted at the same time as part of the same act; the provisions were motivated by a common purpose; the provisions are administered by the same state officials; and the challenges form a convenient trial unit because they rely on a common nucleus of operative facts. *See id.* at 396 (describing the relevant considerations for the fourth prong of the res judicata analysis).

The Plaintiffs' assertion that they could not have previously challenged the ASC requirement because they did not know how it would be implemented until the regulations were set forth is disingenuous, particularly in this litigation. As Plaintiffs admitted at oral argument, they challenge H.B. 2 broadly, with no effort whatsoever to parse out specific aspects of the ASC

requirement that they find onerous or otherwise infirm. H.B. 2 very clearly required facilities that perform abortions to meet the existing requirements for ASCs, which were spelled out well before the effective date of this provision and, more importantly, well before the date of the *Abbott II* lawsuit: "On and after September 1, 2014, *the minimum standards for an abortion facility must be equivalent to the minimum standards adopted under Section 243.010 for ambulatory surgical centers*." TEX. HEALTH & SAFETY CODE ANN. § 245.010(a) (emphasis added). The law does not allow several bites at the same apple, even if from a different quadrant of the apple. *See Southmark Corp. v. Coopers & Lybrand* (*In re Southmark*), 163 F.3d 925, 934 (5th Cir. 1999) ("[*R*]*es judicata*[] bars the litigation of claims that either have been litigated or should have been raised in an earlier suit."); David P. Currie, *Res Judicata: The Neglected Defense*, 45 U. CHI. L. REV. 317, 325 (1978) ("[T]o allow a party to advance arguments in a second proceeding that he could have made in a prior proceeding . . . imposes unnecessary costs on both opposing parties and the judicial system."). We do not suggest here that future lawsuits against this provision based upon specific facts arising in the future would be barred (*i.e.*, as-applied challenges).[23] However, given the broad nature of this litigation, we discern nothing material that evolved between the time H.B. 2 was passed and *Abbott II* was filed, on the one hand, and the time this lawsuit was filed, on the other, that justified dividing the litigation.[24]

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[23] Similarly, we conclude, *infra*, that the district court correctly ruled that res judicata does not bar the as-applied challenges here.

[24] Plaintiffs argue that they did not know whether existing facilities would be "grandfathered." Nothing in the language of the legislation allows "grandfathering" of existing abortion facilities. Existing ASC facilities were already "grandfathered." In any event, this argument would at most support only a challenge to the lack of "grandfathering," not the broad-based challenge actually filed and the broad relief granted.

Although rather obliquely presented, Plaintiffs may be arguing that the challenge to the ASC requirement would not have been ripe at the time *Abbott II* was filed in the district court. "[T]he ripeness inquiry focuses on whether an injury that has not yet occurred is sufficiently likely to happen to justify judicial intervention." *Pearson v. Holder*, 624 F.3d 682, 684 (5th Cir. 2010) (alteration in original) (internal quotation marks omitted). "To determine if a case is ripe for adjudication, a court must evaluate (1) the fitness of the issues for judicial decision, and (2) the hardship to the parties of withholding court consideration. The fitness and hardship prongs must be balanced . . . ." *Texas v. United States*, 497 F.3d 491, 498 (5th Cir. 2007) (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967)). "A court should dismiss a case for lack of 'ripeness' when the case is abstract or hypothetical. . . . A case is generally ripe if any remaining questions are purely legal ones; conversely, a case is not ripe if further factual development is required." *Orix Credit Alliance, Inc. v. Wolfe*, 212 F.3d 891, 895 (5th Cir. 2000).

Resolution of whether the ASC requirement is facially unconstitutional did not need to await promulgation of regulations that simply carried out the unambiguous mandate of H.B. 2. *Cf. Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 201 (1983) ("The question of pre-emption is predominantly legal, and although it would be useful to have the benefit of California's interpretation . . . , resolution of the pre-emption issue need not await that development."). This is especially true because H.B. 2's precise and mandatory language did not leave the Department of State Health Services discretion as to the standards that would apply to abortion facilities. *Cf. Sch. Dist. of Pontiac v. Sec'y of U.S. Dep't of Educ.*, 584 F.3d 253, 262 (6th Cir. 2009) (en banc) (reasoning that the action did not depend on decisions made by state authorities, who did not have the discretion to change the impact

of the law at issue). Instead, it is abundantly clear from H.B. 2 that all abortion facilities must meet the standards already promulgated for ASCs. This inevitable application of the ASC standards to abortion facilities supports deciding its constitutionality prior to the promulgation of implementing regulations. *See Pearson*, 624 F.3d at 684 ("'Where the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect.'" (quoting *Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 143 (1974))); *Fla. State Conference of NAACP v. Browning*, 522 F.3d 1153, 1164 (11th Cir. 2008). Indeed, for these reasons, at the time of *Abbott II*, a facial challenge to the ASC requirement would not have been "abstract or hypothetical." *Orix*, 212 F.3d at 895 (citation omitted). Importantly, Plaintiffs made no effort to parse the regulations or otherwise assert anything material in the district court or on appeal with respect to the facial challenge that was not known the day H.B. 2 passed. The district court's broad-brush striking of the entire statute also reflects nothing that needed to await further developments following H.B. 2's enactment.

In addition to the fitness prong, the hardship-to-the-parties analysis supports the conclusion that this issue should have been resolved at the time of *Abbott II*. It would have been in the interest of the non-ASC abortion facilities to know at the earliest possible time whether H.B. 2 was unconstitutional or whether they were required to begin making modifications or buying or renting space to comply with the ASC requirement. *See Pac. Gas & Elec. Co*, 461 U.S. at 201–02. It would have imposed a hardship on abortion facilities to require them to bring this challenge only after final agency regulations were promulgated, forcing them to either begin compliance measures or risk facing only a brief period to comply if the ASC requirement

was ultimately upheld upon later challenge. *See id.* Furthermore, trying this facial challenge separately from the two facial challenges brought in *Abbott II* imposed a hardship on the State by requiring it to defend H.B. 2 against constitutional challenge in a piecemeal and duplicative fashion. Accordingly, we conclude that the district court erred in its ruling on the res judicata defense to this facial challenge to the ASC requirement.

B. Merits

Even if our conclusion as to res judicata is incorrect, the facial challenge to the ASC requirement fails on the merits as well. Thus, for the purpose of completeness, we address the facial challenge, assuming *arguendo* that res judicata does not bar the challenge.

1. Rational Basis

The stated purpose of H.B. 2 was to raise the standard and quality of care for women seeking abortions and to protect the health and welfare of women seeking abortions. *See* Senate Comm. on Health & Human Servs., Bill Analysis, Tex. H.B. 2, 83d Leg., 2d C.S. 1, 2 (2013). Relying on *Abbott II*, the district court concluded that both the admitting privileges and ASC requirements were rationally related to a legitimate state interest. We agree: *Abbott II* held that the admitting privileges requirement is supported by a rational basis, 748 F.3d at 593–96, and in this case, the State supported the medical basis for both requirements with evidence at trial. *See Lakey*, 769 F.3d at 294.[25] Plaintiffs do not argue differently and, instead, focus their attack on

[25] *See also Simopoulos*, 462 U.S. at 519 (concluding that Virginia's outpatient-surgical-hospital requirement for second trimester abortion was "not an unreasonable means of furthering the State's compelling interest in 'protecting the woman's own health and safety'" (quoting *Roe*, 410 U.S. at 150)); *Roe*, 410 U.S. at 163 ("Examples of permissible state [health regulations] are requirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; as to the facility in which the procedure is to

whether the challenged provision has "the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Casey*, 505 U.S. at 877.

2. Purpose Prong

Texas's stated purpose for enacting H.B. 2 was to provide the highest quality of care to women seeking abortions and to protect the health and welfare of women seeking abortions.[26] There is no question that this is a legitimate purpose that supports regulating physicians and the facilities in which they perform abortions.[27] The district court found that this was not the real purpose of the law and instead concluded "that the ambulatory-surgical-center requirement was intended to close existing licensed abortion clinics." *Lakey*, 46 F. Supp. 3d at 685.

The district court first found an impermissible purpose from the fact that the implementing regulations did not provide licensed abortion facilities a grandfathering exception to the standards applicable to ASCs, even though a grandfathering provision applied to existing ASCs—what it described as "disparate and arbitrary treatment." *Id.* The State argues that the district court misunderstood the application of the ASC grandfathering provision

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be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status; as to the licensing of the facility; and the like.").

[26] *See* Senate Comm. on Health & Human Servs., Bill Analysis, Tex. H.B. 2, 83d Leg., 2d C.S. 1 (2013) ("H.B. 2 seeks to increase the health and safety of a woman who chooses to have an abortion by requiring a physician performing or inducing an abortion to have admitting privileges at a hospital and to provide certain information to the woman."); *id.* at 2 ("Moving abortion clinics under the guidelines for ambulatory surgical centers will provide Texas women choosing abortion the highest standard of health care.").

[27] *See Roe*, 410 U.S. at 150 ("The State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient. This interest obviously extends at least to the performing physician and his staff, to the facilities involved, to the availability of after-care, and to adequate provision for any complication or emergency that might arise.").

because it applies to all ASCs—including ASCs that currently provide abortions—such that they do not have to comply with new construction requirements as the ASC standards are modified. *See* 25 TEX. ADMIN. CODE § 135.51(a). In this regard, the State correctly points out that ASCs that provide abortions are treated no differently than any other ASC. *See Lakey*, 769 F.3d at 294. Even assuming *arguendo* there is some "disparate treatment," the lack of a grandfathering provision is simply evidence that the State truly intends that women only receive an abortion in facilities that can provide the highest quality of care and safety—the stated legitimate purpose of H.B. 2. Another consideration is that the impact of a lack of grandfathering is lessened by the legislature allowing nearly fourteen months for existing abortion facilities to comply. *See* TEX. HEALTH & SAFETY CODE ANN. § 245.010(a) (September 1, 2014, effective date).[28] In addition, because there are 433 ASCs in Texas, the legislature logically could have inferred that abortion providers could easily rent space at existing ASCs. The district court's inferences from the mere fact of the law itself are thus not supported.

The district court further found an impermissible purpose likely due to "the dearth of credible evidence supporting the proposition that abortions performed in ambulatory surgical centers have better patient health outcomes compared to clinics licensed under the previous regime." *Lakey*, 46 F. Supp. 3d at 685.[29] The district court erred in its conclusion. In *Mazurek*, the

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[28] Further, the Plaintiffs do not argue that it is impossible for abortion providers to comply with the ASC requirement, only costly and difficult.

[29] The district court also inferred an impermissible purpose from the State's attorneys arguing that women in El Paso would not face an undue burden because they could simply travel to New Mexico, a state without a requirement that abortions be performed in an ASC. We agree with the State that an improper legislative purpose cannot be inferred from an argument raised by its lawyers more than a year after H.B. 2 was enacted.

Supreme Court rejected the argument that the law at issue "must have had an invalid purpose because all health evidence contradicts the claim that there is any health basis for the law." 520 U.S. at 973 (internal quotation marks omitted). Likewise, in *Gonzales*, the Court explained that legislatures have "wide discretion to pass legislation in areas where there is medical and scientific uncertainty" and that medical uncertainty, as the record demonstrates is present here, does not lead to the conclusion that a law is unconstitutional. 550 U.S. at 163.

The Plaintiffs also argue that an impermissible purpose can be inferred from the effect of the law—the closure of a majority of abortion facilities in Texas. This argument is foreclosed by *Mazurek*, in which the Supreme Court explained that courts "do not assume unconstitutional legislative intent even when statutes produce harmful results." 520 U.S. at 972; *see Lakey*, 769 F.3d at 295 (citing *Mazurek*, 520 U.S. at 972); *cf. Casey*, 505 U.S. at 874 ("The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it.").

Plaintiffs bore the burden of proving that H.B. 2 was enacted with an improper purpose. *See Abbott II*, 748 F.3d at 597. They failed to proffer competent evidence contradicting the legislature's statement of a legitimate purpose for H.B. 2. *See Mazurek*, 520 U.S. at 972 (noting that there must be "*some* evidence" of improper purpose); *see also Abbott II*, 748 F.3d at 597; *Lakey*, 769 F.3d at 294–95 (stating that the district court cited no record evidence of improper purpose). All of the evidence referred to by the district court is purely anecdotal and does little to impugn the State's legitimate reasons for the Act. Plaintiffs failed to prove that H.B. 2 "serve[s] no purpose other than to make abortions more difficult." *Casey*, 505 U.S. at 901.

3. Effect Prong

Facial challenges relying on the effects of a law "impose a heavy burden upon the parties maintaining the suit." *Gonzales*, 550 U.S. at 167 (internal quotation marks omitted). In the abortion context, it is unclear whether a facial challenge requires showing that the law is invalid in all applications (the general test applied in other circumstances) or only in a large fraction of the cases in which the law is relevant (the test applied in *Casey*). *See id.*; *Abbott II*, 748 F.3d at 588–89. In both *Gonzales* and *Abbott II*, the challenged provisions were upheld because even the less deferential, large-fraction test was not satisfied. *See Gonzales*, 550 U.S. at 167–68; *Abbott II*, 748 F.3d at 600. Here, the district court facially invalidated both the admitting privileges and ASC requirements without so much as mentioning either test. Instead, it based its holding on a finding that the two requirements worked together, along with other state requirements, to "effectively reduce or eliminate meaningful access to safe abortion care for a *significant, but ultimately unknowable, number of women* throughout Texas." *Lakey*, 46 F. Supp. 3d at 686 (emphasis added). This analysis runs afoul of *Casey*, *Gonzales*, and *Abbott II*, which require, at a minimum, a "large fraction." *Lakey*, 769 F.3d at 296 (quoting *Abbott II*, 748 F.3d at 600); *see also Gonzales*, 550 U.S. at 167–68; *Casey*, 505 U.S. at 895.[30]

As support for its holding that H.B. 2's admitting privileges and ASC requirements constituted an undue burden, the district court also weighed the

[30] Plaintiffs cite the use of the phrase "significant number" in *Casey* as support for the district court's approach. *See, e.g.*, 505 U.S. at 893–94 ("The spousal notification requirement is thus likely to prevent a significant number of women from obtaining an abortion."). However, in *Casey*, unlike here, the Court went on to find that this significant number amounted to "a large fraction." *Id.* at 895.

burdens and medical efficacy of these two requirements. *Lakey*, 46 F. Supp. 3d at 684 ("[T]he severity of the burden imposed by both requirements is not balanced by the weight of the interests underlying them."). In so doing, the district court concluded that H.B. 2 would not further the State's interests in maternal health and increased quality of care.[31] In defense of this approach, Plaintiffs argue that the two requirements at issue are unconstitutional unless they are shown to actually further the State's legitimate interests. We disagree with the Plaintiffs and the district court's approach.

In *Abbott II*, the district court similarly held that the admitting privileges requirement "does nothing to further" the State's interest in maternal health, although it performed this analysis as part of the rational basis inquiry. *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 951 F. Supp. 2d 891, 900 (W.D. Tex. 2013). In *Abbott II,* we held that the inquiry was "wrong on several grounds" and explained that "the fundamental question is whether Planned Parenthood has met its burden to prove that the admitting privileges regulation imposes an undue burden on a woman's ability to choose an abortion." 748 F.3d at 590. *Abbott II* thus disavowed the inquiry employed by the district court:

> It is not the courts' duty to second guess legislative factfinding, improve on, or cleanse the legislative process by allowing relitigation of the facts that led to the passage of a law. Under rational basis review, courts must presume that the law in question is valid and sustain it so long as the law is rationally related to a legitimate state interest. As the Supreme Court has

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[31] *See Lakey*, 46 F. Supp. 3d at 684 ("[W]omen will not obtain better care or experience more frequent positive outcomes at an [ASC] as compared to a previously licensed facility."); *id.* ("[I]t is unlikely that the stated goal of the [ASC] requirement—improving women's health—will actually come to pass."); *id.* ("The court finds no particularized health risks arising from abortions performed in nonambulatory-surgical-center clinics which countenance the imposition of the [ASC] requirement . . . .").

> often stressed, the rational basis test seeks only to determine whether any conceivable rationale exists for an enactment. Because the determination does not lend itself to an evidentiary inquiry in court, the state is not required to prove that the objective of the law would be fulfilled.

748 F.3d at 594 (citations and internal quotation marks omitted).[32] In addition, in *Gonzales,* in the course of applying the effect portion of the undue-burden inquiry, the Court made clear that medical uncertainty underlying a statute is for resolution by legislatures, not the courts. *See* 550 U.S. at 163 ("The Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty."); *id.* at 164 ("Medical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts."); *id.* at 166 ("Considerations of marginal safety, including the balance of risks, are within the legislative competence when the regulation is rational and in pursuit of legitimate ends."). Thus, we conclude that the district court erred by substituting its own judgment for that of the legislature, albeit this time in the name of the undue burden inquiry. *See Lakey*, 769 F.3d at 297 ("Under our precedent, we have no authority by which to turn rational basis into strict

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[32] As they did in *Abbott II*, Plaintiffs again argue that *Akron I* and *Barnes* require the more demanding approach employed by the district court. *Compare* Pls.' Br. 35–38 (citing, *inter alia*, *Akron I*, 462 U.S. at 430–31, and *Barnes v. Mississippi*, 992 F.2d 1335, 1339 (5th Cir. 1993)), *with* Brief of Plaintiffs-Appellees at 15–17, *Abbott II*, 748 F.3d 583 (No. 13-51008) (same). As we explained in *Abbott II*, *Casey* overruled major portions of *Akron I* and replaced *Akron*'s strict scrutiny test with the undue burden analysis. *See* 748 F.3d at 590 (citing *Casey*, 505 U.S. at 871). In *Barnes*, we described *Casey* as holding that "the constitutionality of an abortion regulation . . . turns on an examination of the *importance* of the state's interests in the regulation and the severity of the burden that regulation imposes on a woman's right to seek an abortion." 992 F.2d at 1339 (emphasis added). *Barnes* nevertheless examined the state's interest without considering the extent to which the challenged law furthered that interest and without conducting a balancing test. *See id.* at 1339–40; *Lakey*, 769 F.3d at 298.

scrutiny under the guise of the undue burden inquiry.").[33]

Turning to the direct application of the large fraction test to the facts of this case, the parties' arguments focused on the number of women who faced increased travel distances due to the closure of abortion facilities. In particular, the arguments centered around those women who would face travel distances (one-way) of over 150 miles in light of *Abbott II*'s holding that "an increase of travel of less than 150 miles for some women is not an undue burden under *Casey*." 748 F.3d at 598. The district court credited the testimony of the Plaintiffs' expert, Dr. Grossman, and found that: (1) after the admitting privileges requirement went into effect, approximately 400,000 women of reproductive age would face travel distances of more than 150 miles; and (2) once both the admitting privileges and ASC requirements went into effect,

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[33] Plaintiffs filed a Rule 28(j) letter referencing the recent district court opinion in *Planned Parenthood of Wis., Inc. v. Van Hollen*, No. 3:13-cv-465, 2015 U.S. Dist. LEXIS 35389 (W.D. Wis. Mar. 20, 2015). This case follows the standards announced in *Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 2841 (2014), which requires balancing the burdens imposed by a law against its medical benefits, and which we distinguished in *Abbott II*, 748 F.3d at 596. "In our circuit, we do not balance the wisdom or effectiveness of a law against the burdens the law imposes." *Lakey*, 769 F.3d at 297 (citing *Abbott II*, 748 F.3d at 593–94); *accord Women's Med. Prof'l Corp. v. Baird*, 438 F.3d 595, 604–09 (6th Cir. 2006); *Greenville Women's Clinic v. Bryant*, 222 F.3d 157, 170–72 (4th Cir. 2000); *Women's Health Center of W. Cnty., Inc. v. Webster*, 871 F.2d 1377, 1380–81 (8th Cir. 1989). Even if some balancing were appropriate, we are unsure that the Seventh Circuit's balancing test—pursuant to which even a slight or *de minimis* burden could be "undue"—is faithful to *Casey*, which requires a *substantial* obstacle. *See Planned Parenthood of Wis. v. Doyle*, 162 F.3d 463, 478 (7th Cir. 1998) (Manion, J., dissenting) ("To fail the undue burden test, the alternatives to the [outlawed procedure] must . . . present a substantial obstacle to a woman obtaining an abortion . . . [but] [t]here is no suggestion in the court's opinion that the risks are more than "*de minimis*."); *see also Casey*, 505 U.S. at 926 (Blackmun, J., dissenting in part) ("Our precedents and the joint opinion's principles require us to subject all non-*de-minimis* abortion regulations to strict scrutiny."); *cf. Goss v. Lopez*, 419 U.S. 565, 576 (1975) (noting that procedural due process analysis only applies when a deprivation is more than *de minimis*). In any event, and although we do not reach the issue here, we note that applying any balancing test would be difficult on this record because plaintiffs have not introduced evidence from which we could discern the number or fraction of reproductive-age women who would be burdened, unduly or otherwise.

approximately 900,000 women of reproductive age would face travel distances of more than 150 miles. *See Lakey*, 46 F. Supp. 3d at 681–82.

Although Dr. Grossman and the district court did not mention percentages or fractions, using the district court's finding that there were approximately 5.4 million women of reproductive age in Texas, *see id.* at 681, the following percentages and fractions are derived: (1) 7.4% or 1/13 of women of reproductive age faced travel distances of 150 miles or more after the admitting privileges requirement went into effect; and (2) 16.7% or 1/6 of women of reproductive age would face travel distances of 150 miles or more after both requirements went into effect.

The motions panel majority found that these numbers did not satisfy the large fraction test:

> Even assuming, *arguendo*, that 150 miles is the relevant cut-off, this is nowhere near a "large fraction." *See Abbott II,* 748 F.3d at 600. As discussed above, the *Casey* plurality, in using the "large fraction" nomenclature, departed from the general standard for facial challenges. The general standard for facial challenges allows courts to facially invalidate a statute only if "no possible application of the challenged law would be constitutional." *Abbott II*, 748 F.3d at 588. In other words, the law must be unconstitutional in 100% of its applications. We decline to interpret *Casey* as changing the threshold for facial challenges from 100% to 17%.

769 F.3d at 298; *see also Abbott II*, 748 F.3d at 598 (holding that 10% did not amount to a large fraction). We agree and adopt this reasoning.

In defense of the district court's judgment, the Plaintiffs hardly argue that these numbers amount to a large fraction. Instead, they try to shift the discussion to making the denominator not all women of reproductive age in Texas, but "the population of women for whom the law imposes a meaningful burden." They fail to specify what that number would be or how it might be

derived. In addition, the Plaintiffs' approach would appear to "make the large fraction test merely a tautology, always resulting in a large fraction. The denominator would be women that Plaintiffs claim are unduly burdened by the statute, and the numerator would be the same." *Lakey*, 769 F.3d at 299. In *Casey*, the Court explained that the denominator was the group of women to whom the law was "relevant" or a "restriction." 505 U.S. at 894–95. Because H.B. 2 applies to all abortion providers and facilities in Texas, and the Plaintiffs argued that abortion clinics all across the state would likely be required to close, we used all women of reproductive age or women who might seek an abortion as the denominator in *Lakey, Abbott II*, and *Abbott I*. *See Lakey*, 769 F.3d at 299 ("Here, the ambulatory surgical center requirement applies to every abortion clinic in the State, limiting the options for all women in Texas who seek an abortion. The appropriate denominator thus includes all women affected by these limited options."); *Abbott II*, 748 F.3d at 598, 600; *Abbott I*, 734 F.3d at 414. Plaintiff's new denominator is inconsistent with our binding decision in *Abbott II*.

In reaching its conclusion that H.B. 2's requirements imposed an undue burden on a significant number of women, the district court also found that travel distances combined with the following practical concerns to create a *de facto* barrier to abortion for some women: "lack of availability of child care, unreliability of transportation, unavailability of appointments at abortion facilities, unavailability of time off from work, immigration status and inability to pass border checkpoints, poverty level, the time and expense involved in traveling long distances, and other, inarticulable psychological obstacles." *Lakey*, 46 F. Supp. 3d at 683. On this point, we agree with the motions panel majority: "We do not doubt that women in poverty face greater difficulties. However, to sustain a facial challenge, the Supreme Court and this circuit

require Plaintiffs to establish that the law itself imposes an undue burden on at least a large fraction of women. Plaintiffs have not done so here." *Lakey*, 769 F.3d at 299; *see Abbott I*, 734 F.3d at 415 (holding that "obstacle[s]" that are "unrelated to the hospital-admitting-privileges requirement" are irrelevant to the undue-burden inquiry in a facial challenge); *cf. McRae*, 448 U.S. at 316 ("The financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency."); *Maher*, 432 U.S. at 474 (reasoning that "[t]he indigency that may make it difficult—and in some cases, perhaps, impossible—for some women to have abortions is neither created nor in any way affected by the" state's regulation). Moreover, even accepting the district court's finding on this point, it is not clear from the record what fraction of women face an undue burden due to this combination of practical concerns and the effects of H.B. 2. *Cf. Casey*, 505 U.S. at 887 (noting, based on similar factual findings, that "[a] particular burden is not of necessity a substantial obstacle").

Finally, in reaching its holding, the district court also accepted the finding of Dr. Grossman that the ASCs providing abortions in Texas "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 once all of the non-ASC clinics are forced to close." As the motions panel majority observed, Dr. Grossman's opinion "is *ipse dixit* and the record lacks any actual evidence regarding the current or future capacity of the eight clinics." *Lakey*, 769 F.3d at 300.[34] Further, as the motions panel majority

[34] Dr. Grossman based his opinion on a chain of unsupported inferences. *See Lakey*, 769 F.3d at 300. First, he found that in cities with both ASC and non-ASC abortion facilities, some non-ASC facilities provided more abortions while some ASCs provided fewer abortions.

recognized, there does not appear to be any evidence in the record that the current ASCs are operating at full capacity or that they cannot increase capacity. *See id.* Thus, the district court's determination on this point is unsupported by evidence and, therefore, is clearly erroneous. *See id.*

Because the Plaintiffs failed to prove that the ASC requirement imposes an undue burden on a large fraction of women for whom it is relevant, we conclude that the district court erred in striking down the ASC requirement as a whole as facially invalid. *See Gonzales*, 550 U.S. at 167–68; *Abbott II*, 748 F.3d at 588–89, 598–600.[35]

C. ASC Requirement and the Provision of Medication Abortion

In addition to challenging the ASC requirement as facially unconstitutional, Plaintiffs challenged the ASC requirement as

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From the increased amount of abortions at some of the non-ASC facilities, Dr. Grossman concluded that there was an increased demand for abortions in that city. Conversely, Dr. Grossman found the decrease in the amount of abortions at some ASCs to be "likely indicative of their inability to increase capacity in the face of growing demand." Dr. Grossman ultimately concluded that this purported inability to increase capacity at ASCs "may be a result of the admitting privileges requirement."

There were similar problems with Plaintiffs' evidence in *Abbott II*. As we noted in *Lakey*:

> [A]n expert who was part of the same research team as Dr. Grossman offered similarly unsupported conjecture [in *Abbott II*] when predicting that, as a result of the *admitting privileges requirement,* approximately 22,000 women in Texas would be unable to obtain abortions. On cross-examination in [*Lakey*], Dr. Grossman admitted that his colleague's earlier predictions proved to be inaccurate. Dr. Grossman testified in [*Lakey*] that there had been a decrease of only 9,200 abortions and that the decrease could not be wholly ascribed to the admitting privileges requirement. Indeed, Dr. Grossman acknowledged on cross-examination that in his team's published, peer-reviewed article, the researchers qualified their findings by noting that they "cannot prove causality between the State restrictions and falling abortion rate."

769 F.3d at 300 n.16.

[35] Given our holding, we also reject the Plaintiffs' argument on cross-appeal that the district court erred by excepting from its facial injunction of the ASC requirement "abortion providers that seek to become licensed in the future."

unconstitutional statewide in the context of the provision of medication abortion (in which drugs, as opposed to surgical procedures, are used to induce an abortion). On this claim, the district court concluded that the ASC requirement was invalid "specifically as applied to the provision of medication abortions," with the entirety of the district court's analysis being that in this context "any medical justification for the requirement is at its absolute weakest in comparison with the heavy burden it imposes." *Lakey*, 46 F. Supp. 3d at 686. The State appeals this portion of the district court's judgment, pointing out that the district court's conclusion is improperly based solely on its belief that the law is medically unjustified.

The Plaintiffs do not respond with any arguments on appeal in support of this portion of the judgment. For the same reasons that we hold the district court erred in facially invalidating the ASC requirement, we conclude that the record and district court's opinion do not justify statewide invalidation of the ASC requirement in the context of medication abortions: (1) res judicata bars this claim, as it arises out of the same transaction as the claims in *Abbott II* and it "could have been raised" in *Abbott II*, *Allen*, 449 U.S. at 94; and (2) the ASC requirement in the context of medication abortion is rationally related to a legitimate state interest and has not been shown to have an improper purpose or impose an undue burden on a large fraction of women for whom it is relevant, *Gonzales*, 550 U.S. at 167–68.

VI. As-Applied Challenges

In *Abbott II*, we rejected the facial challenge to the admitting privileges requirement but noted that an as-applied challenge to the Rio Grande Valley (which is comprised of Starr, Hidalgo, Willacy, and Cameron County,

hereinafter collectively, "Rio Grande Valley")[36] may be appropriate based upon the evidence presented in that case. *See Abbott II*, 748 F.3d at 589 ("Later as-applied challenges can always deal with subsequent, concrete constitutional issues."). Plaintiffs have thus asserted such an as-applied challenge related to a facility in McAllen, as well to a facility in El Paso that was not previously discussed.

A. Res Judicata for As-Applied Challenges

The State makes the same res judicata arguments as to these challenges as it does for the facial challenge. The res judicata analysis is different, however, when we address the as-applied challenges because, as we suggested in *Abbott II*, the actual factual development may be different than anticipated in a facial challenge setting. We now know with certainty that the non-ASC abortion facilities have actually closed and physicians have been unable to obtain admitting privileges after diligent effort. Thus, the actual impact of the combined effect of the admitting privileges and ASC requirements on abortion facilities, abortion physicians, and women in Texas can be more concretely understood and measured. *See Hernandez v. City of Lafayette*, 699 F.2d 734, 737 (5th Cir. 1983) (addressing whether the changes are "significant" and create "new legal conditions" (internal quotation marks omitted)).

Our sister circuits have confronted the issue of how the ripeness analysis (a subsidiary consideration in the res judicata analysis discussed above) differs between a facial challenge and an as-applied challenge. The Eleventh Circuit has explained:

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[36] Plaintiffs' expert, Dr. Grossman, used the term "Lower Rio Grande Valley" to describe the area comprising the following four counties: Starr, Hidalgo, Willacy, and Cameron. *See also Abbott II*, 748 F.3d at 597 ("The Rio Grande Valley . . . has four counties.").

> Because the question of ripeness depends on the timing of the adjudication of a particular issue, it applies differently to facial and as-applied challenges. A facial challenge asserts that a law *always* operates unconstitutionally . . . . In the context of a facial challenge, a purely legal claim is presumptively ripe for judicial review because it does not require a developed factual record. An as-applied challenge, by contrast, addresses whether a statute is unconstitutional on the facts of a particular case or to a particular party. Because such a challenge asserts that a statute cannot be constitutionally applied in particular circumstances, it necessarily requires the development of a factual record for the court to consider.

Harris v. Mexican Specialty Foods, Inc., 564 F.3d 1301, 1308 (11th Cir. 2009) (citations and internal quotation marks omitted). The First Circuit has explained this approach as well:

> [A] challenge to a rule or statute may be ripe for adjudication on the question of facial constitutionality and yet not be ripe for adjudication on the question of constitutionality as applied. *See, e.g.*, *Grayned v. City of Rockford*, 408 U.S. 104, 121 & n.50 (1972) (upholding noise control ordinance but reserving decision on constitutionality of possible applications); *Times Film Corp. v. City of Chicago*, 365 U.S. 43 (1961) (upholding ordinance requiring licensing of films prior to public exhibition) *and Teitel Film Corp. v. Cusack*, 390 U.S. 139 (1968) (invalidating same ordinance as applied); *Adler v. Board of Education*, 342 U.S. 485 (1952) (upholding New York statutory scheme for identifying and removing subversive school teachers) *and Keyishian v. Board of Regents*, 385 U.S. 589 (1967) (invalidating portions of same statutory scheme as applied).

Kines v. Day, 754 F.2d 28, 31 (1st Cir. 1985). Other courts have concluded that an as-applied challenge was not ripe although a facial challenge was ripe. *See* 13B CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3532.3 (3d ed. 1998) ("A number of other cases in more general settings reflect similar distinctions between the ripeness of broad attacks on the legitimacy of any regulation and the nonripeness of more particular attacks on more specific

applications."); *see, e.g.*, *Richmond Med. Ctr. for Women v. Herring*, 570 F.3d 165, 180 (4th Cir. 2009) (en banc); *Sam & Ali, Inc. v. Ohio Dep't of Liquor Control*, 158 F.3d 397, 398–400 (6th Cir. 1998); *Hotel Emps. & Rest. Emps. Int'l Union v. Nev. Gaming Comm'n*, 984 F.2d 1507, 1512–13 (9th Cir. 1993).

Although we agree with the State that some aspects of the as-applied challenge were extant at the time the *Abbott II* litigation was filed, some important facts occurred later, such as the actual closure of abortion facilities in Corpus Christi and El Paso and the physicians ultimately being denied admitting privileges after diligent effort. *Cf. Orix*, 212 F.3d at 895 ("[A] case is not ripe if further factual development is required." (citation omitted)). We disclaimed reliance on such facts in *Abbott II*, 748 F.3d at 589 ("Later as-applied challenges can always deal with subsequent, concrete constitutional issues."); *id.* 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 . . . ."). Although Plaintiffs could have foreseen (and did foresee) some of these closures and admitting privilege rejections, the State suggested that we could not know these matters with certainty at the time, and we deferred consideration of these facts to a time when they were more concretely presented. That time arrived, and the district court correctly held it was not precluded from addressing the actual facts in the as-applied context. Thus, although it is a close question, we conclude that the district court did not err in denying relief to the State on this defense as to the McAllen and El Paso as-applied challenges.

B. McAllen

Whole Woman's Health operates a licensed abortion facility in McAllen that is not an ASC and which resides on a lot that the Plaintiffs' expert, George

W. Johannes, testified would not allow for expansion to meet the ASC construction standards. Testimony showed that four physicians[37] of Whole Woman's Health unsuccessfully sought admitting privileges from hospitals within thirty miles of the clinic, with one of the hospitals notifying them that the denial of admitting privileges "was not based on clinical competence." Whole Woman's Health has been unsuccessful in recruiting physicians with admitting privileges to work at the McAllen facility. It contends, then, that the ASC and admitting privileges requirements will prevent it from providing abortions. The McAllen clinic ceased providing abortions on November 1, 2013.

While women in the Rio Grande Valley could previously travel 150 miles or less to Corpus Christi to obtain an abortion, *see Abbott II*, 748 F.3d at 597–98, the abortion facility in Corpus Christi has now closed. The State argues that women in the Rio Grande Valley continue to be able to obtain abortions in San Antonio and Houston, where the abortion facilities now nearest to them are located. Indeed, Plaintiffs' expert, Dr. Grossman, concluded that fifty percent of the women from the Rio Grande Valley were previously obtaining abortions somewhere other than Corpus Christi, even before that clinic closed. Nonetheless, the closure of the Corpus Christi clinic means that all women in the Rio Grande Valley will have to travel approximately 235 miles[38] to San Antonio or farther to obtain an abortion. In addition, the president and CEO of Whole Woman's Health, Amy Hagstrom Miller, and a certified community health worker, Lucila Ceballos Felix, testified regarding the difficulties that

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[37] Of those four, only Dr. Lynn is a party to the case. The other three were neither named as parties nor identified in the district court; their names were redacted from exhibits.

[38] The record reflects that the distance between McAllen, which is located near the center of the Rio Grande Valley, and the center of San Antonio is approximately 235 miles. The distance between McAllen and the ASC-compliant clinic in San Antonio, based on the address information in the parties' Joint Stipulation to Facts, is 234 miles.

women in the Rio Grande Valley faced after the McAllen facility ceased performing abortions, including that the clinic saw an increase in self-attempted abortion and some women indicated they would be unable to make the trip from McAllen to San Antonio or Houston to obtain an abortion.[39]

In *Abbott II*, relying on *Casey*, we held that having to travel 150 miles from the Rio Grande Valley to Corpus Christi to obtain an abortion was not an undue burden for purposes of the facial challenge raised there and that "*Casey* counsels against striking down a statute solely because women may have to travel long distances to obtain abortions." 748 F.3d at 598. *Casey* permitted even farther distances than 150 miles because it involved a 24-hour waiting period and women in 62 of Pennsylvania's 67 counties were required to travel for one to more than three hours one way to obtain an abortion. *See Lakey*, 769 F.3d at 303 (citing *Abbott II*, 748 F.3d at 598).[40]

We recognize that any statement of "how far is too far" will involve some imprecision. *Casey* suggested that three hours (one way) was not too far.[41]

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[39] While some of Hagstrom Miller's testimony, and that of Ceballos Felix, appears to be hearsay (or even double hearsay in the case of the interviews by other employees of the clinic), the record is unclear whether the State objected on these grounds. Moreover, the district court relied on Hagstrom Miller's and Ceballos Felix's entire testimony for its findings that women in the Rio Grande Valley faced "practical concerns" and the State did not challenge these findings as clear error. We conclude that the district court's findings are not clearly erroneous. *See Abbott II*, 748 F.3d at 589 (noting the standard); *Reich v. Lancaster*, 55 F.3d 1034, 1045 (5th Cir. 1995) ("The trial judge's unique perspective to evaluate the witnesses and to consider the entire context of the evidence must be respected." (internal quotation marks omitted)).

[40] Texas has a 24-hour waiting period, but the waiting period is reduced to 2 hours for women who certify that they live "100 miles or more from the nearest [licensed] abortion provider." *See* TEX. HEALTH & SAFETY CODE ANN. § 171.012(a)(4) (West Supp. 2014).

[41] *Casey* even suggested that doubling what amounted to a six-hour round trip was not an undue burden. 505 U.S. at 887 ("[T]he District Court did not conclude that the waiting period is [a substantial] obstacle even for the women who are most burdened by it. Hence, on the record before us . . . we are not convinced that the 24-hour waiting period constitutes an undue burden."). The district court in *Casey* noted that the waiting period doubled travel

Abbott II held that 150 miles is not too far and concluded that *Casey* suggested that no distance, standing alone, could be too far. 748 F.3d at 598. We hold that, in the specific context of this as-applied challenge as to the McAllen facility, the 235-mile distance presented, *combined with* the district court's findings,[42] are sufficient to show that H.B. 2 has the "effect of placing a substantial obstacle in the path of a woman seeking an abortion." *Casey*, 505 U.S. at 877. Therefore, we hold that the district court did not err in enjoining the ASC requirement "as applied" to the McAllen facility. However, we conclude that the injunction was overbroad as it fails to recognize that the Corpus Christi facility (or one like it) could reopen in the future. Thus, we modify the injunction to apply to the McAllen facility until such time as another licensed abortion facility becomes available to provide abortions at a location nearer to the Rio Grande Valley than San Antonio.

"We also must consider the proper place of H.B. 2's comprehensive and careful severability provision . . . ." *Abbott II*, 748 F.3d at 589 (citing *Leavitt v. Jane L.*, 518 U.S. 137, 138–39 (1996)). H.B. 2's severability provision directs that "every provision, section, subsection, sentence, clause, phrase, or word" is severable and that it is the intention of the legislature that only those portions

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distances for some women who were more than three hours (one-way) from the nearest clinic. *Planned Parenthood of Se. Pa. v. Casey*, 744 F. Supp. 1323, 1352 (E.D. Pa. 1990), *aff'd in part, rev'd in part*, 947 F.2d 682 (3d Cir. 1991), *aff'd in part, rev'd in part*, 505 U.S. 833 (1992). See also *Abbott II*, 748 F.3d at 598, which cited the district court's opinion in *Casey* and noted the distances involved.

[42] *See supra* note 39 and accompanying text. We note that our resolution of this as-applied challenge does not depend on the testimony of Plaintiffs' expert, Dr. Grossman (or any related findings by the district court), as to the percentage of women in Texas driving more than 150 miles or the capacity of abortion facilities to handle any changes in, or reallocation of, demand. As we noted earlier, Dr. Grossman's testimony on the capacity of remaining ASC abortion facilities is *ipse dixit*, and the record lacks evidence on this subject. *See supra* note 34 and accompanying text.

of the act or regulations that impose an undue burden be invalidated, with all others left in place. H.B. 2, § 10(b). The implementing regulations include similar language. *See* 25 TEX. ADMIN. CODE § 139.9. It is thus necessary to "sever [H.B. 2 and the implementing regulations'] problematic portions while leaving the remainder intact." *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 329 (2006). The Plaintiffs have been careful to avoid identifying which specific portions of the ASC standards contribute to the closure of abortion facilities, and the district court did not sever out only the problematic portions. We are thus forced to perform this analysis without the benefit of their input.

The regulatory standards for ASCs fall into three categories: (1) operating requirements, 25 TEX. ADMIN. CODE §§ 135.4–.17, 135.26–.27; (2) requirements related to fire prevention, general safety, and handling of hazardous materials, *id.* §§ 135.41–.43; and (3) physical-plant requirements, *id.* §§ 135.51–.56. The Plaintiffs put forth expert testimony that abortion facilities could not meet the ASC standards because they would be required to modify their existing buildings to meet the physical-plant requirements, corresponding to §§ 135.51–.56, and the fire-prevention requirements, corresponding to § 135.41.[43] In the same manner, the district court's findings

[43] The parties stipulated that the McAllen clinic did not comply with the ASC requirement, but did not stipulate as to the feasibility of Whole Woman's Health operating an ASC-compliant facility in the future. The parties also did not stipulate whether other ASC-compliant clinics might open in the Rio Grande Valley.

The parties offered conflicting expert testimony regarding whether Whole Woman's Health could renovate its current facility. Plaintiffs' expert, George W. Johannes, inspected several of Plaintiffs' facilities to determine how the ASC requirement would affect their operations. He testified that none of Plaintiffs' clinics, including the one in McAllen, were built on a large enough footprint to accommodate an ASC-compliant facility. Moreover, he testified that only three of the clinics had sufficient land to expand their footprints. McAllen was not one of those three. Johannes estimated that the cost of expanding these clinics ranged from $1.7 million to $2.6 million. He testified that to build a new ASC-compliant

with respect to the prohibitive effects of the ASC requirement focused on the structural modifications or new buildings that would be required by these standards. While the Plaintiffs also complained of the nursing requirements at § 135.15(a), we are not aware of any record evidence that complying with the nursing requirements would cause the closure of abortion facilities. The Plaintiffs admitted that the remaining operational requirements were comparable to the standards with which abortion facilities were already required to comply. Therefore, we conclude that the district court erred by not constraining its injunction to only those regulations that create an undue burden, namely, § 135.51–.56 (physical plant) and § 135.41 (fire prevention). *See Lakey,* 769 F.3d at 304. We modify the injunction as to McAllen to enjoin only the enforcement of the ASC physical-plant and fire-prevention standards, as described more fully below. *See* §§ 135.41, 135.51–.56.

With respect to the admitting privileges requirement, Whole Woman's

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facility would cost $3.4 million, not including the price of land. His testimony reflects that Whole Woman's Health could not expand the McAllen facility, but would have to relocate either by obtaining new land and constructing a $3.4 million dollar facility, or leasing an existing ASC-compliant facility at a different location. Hagstrom Miller similarly testified that Whole Woman's Health in McAllen could not comply with the ASC requirement.

The state agreed that it would be expensive for Whole Woman's Health to acquire or build an ASC-compliant facility, but nevertheless argued that doing so would be feasible. The State's expert, Deborah Kitz, testified that the McAllen clinic could reduce its costs by running more efficiently and reducing the management fee it pays to Whole Woman's Health, which she testified was significantly above the average rate. The State's expert also disagreed with Plaintiffs' expert, testifying that the McAllen facility already had sufficient space to renovate into an ASC-compliant facility and would not even need to relocate.

The district court determined that the Plaintiffs' expert was more credible, finding that the cost of complying with the ASC requirement was upwards of $1.5 million for clinics that could renovate their existing facilities, and over $3 million for those that had to acquire land and construct a new facility. It determined that the McAllen clinic was an "[e]xisting clinic[], unable to meet the financial burdens imposed by the new regulatory regime, and w[ould] close as a result." On appeal, the State did not challenge these findings as clear error. Accordingly, we accept the district court's findings with respect to the prohibitive costs of upgrading or relocating the McAllen clinic.

Health presented considerable evidence that Plaintiff Dr. Lynn and three unidentified physicians working at the McAllen facility were unable to obtain admitting privileges at local hospitals for reasons other than their competence. Plaintiffs also presented evidence that they were unsuccessful in recruiting physicians to work at the McAllen facility who had admitting privileges at a local hospital. Accordingly, we conclude that the district court's injunction of the admitting privileges requirement as applied to the McAllen facility when utilizing Dr. Lynn at that specific facility should be upheld, as described more fully below.

To sum up, we affirm in part and modify in part the district court's injunction of the admitting privileges and ASC requirements as applied to McAllen, as follows: (1) The State of Texas is enjoined from enforcing § 135.51–.56 and § 135.41 of the ASC regulations against the Whole Woman's Health abortion facility located at 802 South Main Street, McAllen, Texas, when that facility is used to provide abortions to women residing in the Rio Grande Valley (as defined above), until such time as another licensed abortion facility becomes available to provide abortions at a location nearer to the Rio Grande Valley than San Antonio; (2) The State of Texas is enjoined from enforcing the admitting privileges requirement against Dr. Lynn when he provides abortions at the Whole Woman's Health abortion facility located at 802 South Main Street, McAllen, Texas, to women residing in the Rio Grande Valley. The remainder of the injunction as to the McAllen facility is vacated.

C. El Paso Abortion Facility

Reproductive Services operates a licensed abortion facility in El Paso that is not an ASC. The physician at this facility, Dr. Richter, applied for admitting privileges at three hospitals but was only able to obtain temporary

privileges at one hospital. These privileges were later revoked.[44] Reproductive Services has been unsuccessful in recruiting physicians with admitting privileges to work at the El Paso facility. After Dr. Richter's temporary admitting privileges were revoked in April 2014, the El Paso facility stopped providing abortions and eventually closed. The closest Texas abortion facility that will remain open is in San Antonio, over 550 miles away. There is an abortion facility approximately twelve miles away in Santa Teresa, New Mexico. Prior to H.B. 2, more than half of the women who obtained abortions at the Santa Teresa facility were from El Paso.

The State argues the closure of the El Paso abortion facility will not impose an undue burden because women in this area can travel to the Santa Teresa facility. The Plaintiffs contend that this argument is precluded by *Jackson Women's Health Organization v. Currier,* 760 F.3d 448, 457–58 (5th Cir. 2014), *petition for cert. filed*, S. Ct. No. 14-997 (Feb. 18, 2015), where we held that a statute that would have the effect of closing the only abortion facility in the state could not be upheld based upon evidence of facilities in other states. In that case, although Mississippi's admitting privileges requirement for abortion physicians was shown to cause the closure of the only abortion clinic in the state, women could travel to abortion facilities outside the state. *Id.* at 451, 455. The State argues that *Jackson* is distinguishable

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[44] Plaintiffs state that the hospital denied Dr. Richter admitting privileges because she was an abortion provider. As emphasized in *Abbott II*, Texas and federal law prohibit discrimination on this basis and Texas provides a private cause of action to challenge such discrimination. *See* 748 F.3d at 598 & n.13 (citing TEX. OCC. CODE ANN. §§ 103.002(b), 103.003, and 42 U.S.C. § 300a-7(c)). This undermines the argument that the admitting privileges requirement is the *cause* of the closure of the facility since the suggestion is that the cause is actually unlawful discrimination for which state law provides Dr. Richter a remedy. However, because we conclude that the closure of the El Paso facility, whatever its cause, does not create an undue burden on a woman's right to choose an abortion, we need not address this issue further.

because, unlike in Mississippi, H.B. 2 will not cause the closure of all abortion facilities in Texas. The Plaintiffs did not respond to this argument in their merits briefs. The motions panel acknowledged *Jackson* and noted that "the situation in Texas is markedly different from that in Mississippi" because H.B. 2 would not close the last clinic in the state. *Lakey*, 769 F.3d at 304. However, the motions panel declined "to construe [*Jackson*'s] broad language so narrowly in [an] emergency stay proceeding." *Id.* As discussed above, a motions panel proceeding is an abbreviated one; having now considered the matter in full, we conclude that *Jackson* is distinguishable.

In *Jackson*, we relied on *State of Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938), an equal protection case in which the University of Missouri denied admission to Gaines because he was African-American and offered him a stipend to attend school in an adjacent state. We explained that "*Gaines* simply and plainly holds that a state cannot lean on its sovereign neighbors to provide protection of its citizens' federal constitutional rights." 760 F.3d at 457. In this case, unlike in *Gaines* and *Jackson*, the State has not completely shunted its responsibility onto other states. H.B. 2 does not result in the closure of all abortion providers in the state: at least eight ASCs will continue to provide abortions in Texas. *See Lakey*, 769 F.3d at 304 ("Given the panel's reliance on *Gaines*, the panel may have meant to apply its limitation only to states where all the abortion clinics would close."). In addition, the principle relied on by *Jackson* has little traction in this as-applied challenge because prior to H.B. 2, half of the patients at the Santa Teresa clinic came from El Paso, which is in the same cross-border metropolitan area as Santa Teresa.[45]

[45] We note that this analysis would likely be different in the context of an international border, and we disclaim any suggestion that the analysis here applies to a city across an international border from a United States city in question.

This demonstrates that Texas women regularly *choose to have an abortion in New Mexico* independent of the actions of the State. Given these facts particular and peculiar to El Paso, it would ignore reality in this as-applied challenge to "focus[] solely on the effects within the regulating state," as we did in *Jackson*. 760 F.3d at 457.

Unlike the city of Jackson, Mississippi, which is 175–200 miles from the borders of Tennessee and Louisiana, the evidence in this case shows that El Paso and Santa Teresa are part of the same metropolitan area, though separated by a state line, and that people regularly go between the two cities for commerce, work, and medical care. No such situation was presented by the evidence or considered by the panel in *Jackson*. Taking the Plaintiffs' version of *Jackson*, a clinic just over the line in Texarkana, Arkansas, would not be a fact that could be considered by a court in Texarkana, Texas. An injunction is an equitable remedy, and it would be wholly inequitable to ignore the reality of metropolitan areas that straddle state lines and in which people regularly travel back and forth in commerce. *See Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311–12 (1982) (explaining that "an injunction is an equitable remedy," which does not "issue[] as of course or to restrain an act the injurious consequences of which are merely trifling" (citation and internal quotation marks omitted)). To the extent that *Jackson* can be read to so provide, it is dicta as that situation was simply not presented in that case.

Therefore, although the nearest abortion facility in Texas is 550 miles away from El Paso, there is evidence that women in El Paso can travel the short distance to Santa Teresa to obtain an abortion and, indeed, the evidence is that many did just that before H.B. 2. Accordingly, because H.B. 2 does not place a substantial obstacle in path of those women seeking an abortion in the El Paso area, we hold that the district court erred in sustaining Plaintiffs' as-

applied challenge in El Paso.

VII. Plaintiffs' Cross-Appeal

The Plaintiffs appeal the district court's dismissal of their equal protection and unlawful delegation claims. For substantially the same reasons as the district court stated in its order dismissing these claims, we affirm the judgment of the district court on these claims.

Accordingly, the district court's judgment is AFFIRMED in part, MODIFIED in part, VACATED in part, and REVERSED in part.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 14-50928

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

Plaintiffs - Appellees - Cross-Appellants

v.

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

Defendants - Appellants - Cross-Appellees

Appeals from the United States District Court for the Western District of Texas, Austin

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Before PRADO, ELROD, and HAYNES, Circuit Judges.

O R D E R:

On June 9, 2015, we issued an opinion in *Whole Woman's Health v. Cole*, No. 14-50928, 2015 U.S. App. LEXIS 9699 (5th Cir. Jun. 9, 2015). We now MODIFY our opinion and judgment of June 9, 2015 to provide that the district

court's injunction of the ASC requirement (as defined in the June 9 opinion) as applied to the McAllen facility shall remain in effect until October 29, 2015, at which time the injunction shall be vacated in part, as delineated and explained in our June 9 opinion.

The unopposed Motion to Become an Amicus Party and to File Amicus Brief, filed June 15, 2015, is GRANTED.

The opposed Appellees' Motion to Stay the Mandate, filed June 10, 2015, is DENIED. Judge Prado respectfully dissents from the denial of the motion to stay.