No. 15-274

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, PETITIONERS

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

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONERS

J. ALEXANDER LAWRENCE
MORRISON & FOERSTER LLP
250 W. 55th Street
New York, NY 10019

MARC A. HEARRON
MORRISON & FOERSTER LLP
2000 Pennsylvania Avenue, NW
Washington, DC 20006

JAN SOIFER
PATRICK J. O'CONNELL
O'CONNELL & SOIFER LLP
98 San Jacinto Blvd., Suite 540
Austin, TX 78701

Counsel for Petitioners

STEPHANIE TOTI
Counsel of Record
DAVID BROWN
JANET CREPPS
JULIE RIKELMAN
CENTER FOR REPRODUCTIVE RIGHTS
199 Water Street, 22nd Floor
New York, NY 10038
(917) 637-3684
stoti@reprorights.org

LEAH M. LITMAN
1563 Massachusetts Avenue
Cambridge, MA 02138

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

I.

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, this Court reaffirmed that the decision to end a pregnancy prior to viability is a fundamental liberty protected by the Due Process Clause. 505 U.S. 833, 845-46 (1992) (opinion of the Court). It held that a restriction on this liberty is impermissible if it amounts to an undue burden. *Id.* at 876-77 (joint opinion of O'Connor, Kennedy & Souter, JJ.). Under this standard, states may not enact "[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion." *Id.* at 878.

(a) When applying this standard, does a court err by refusing to consider whether and to what extent laws that restrict abortion for the stated purpose of promoting health actually serve the government's interest in promoting health?

(b) Did the Fifth Circuit err in concluding that this standard permits Texas to enforce, in nearly all circumstances, laws that would cause a significant reduction in the availability of abortion services while failing to advance the State's interest in promoting health—or any other valid interest?

II.

Did the Fifth Circuit err in holding that res judicata provides a basis for reversing the district court's judgment in part?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners are 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., plaintiffs below.

None of the corporate Petitioners has a parent company, and no publicly held company owns 10% or more of any corporate Petitioner's stock.

Respondents are Kirk Cole, M.D., in his official capacity as Commissioner of the Texas Department of State Health Services, and Mari Robinson, in her official capacity as Executive Director of the Texas Medical Board, defendants below.

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OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Fifth Circuit is reported at 790 F.3d 563 and reprinted in the Appendix to the Petition for a Writ of Certiorari ("Pet. App.") at 1a-76a. The Fifth Circuit's order modifying this opinion and denying a stay of the mandate is reported at 790 F.3d 598 and reprinted at Pet. App. 77a-78a. The Fifth Circuit's earlier opinion staying the district court's judgment in part is reported at 769 F.3d 285 and reprinted at Pet. App. 79a-127a. The district court's opinion is reported at 46 F. Supp. 3d 673 and reprinted at Pet. App. 128a-159a. The district court's unpublished order granting in part and denying in part Respondents' motion to dismiss is reprinted at Pet. App. 160a-179a.

JURISDICTION

The Fifth Circuit entered judgment on June 9, 2015. Petitioners filed a petition for a writ of certiorari on September 2, 2015, and this Court granted it on November 13, 2015. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

This case involves U.S. Const. amend. XIV, § 1; Texas House Bill 2 ("HB2" or the "Act"), 83rd Leg., 2nd Called Sess. (Tex. 2013); and 25 Tex. Admin. Code §§ 139.40, 139.53, 139.56, which are reproduced at Pet. App. 180a; 181a-202a; 203a-208a; 209a-214a; and 215a-216a, respectively.

INTRODUCTION

Casey reaffirmed "the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State." 505 U.S. at 846. This protected liberty, which guarantees every woman the ability to make personal decisions about family and childbearing, effectuates vital constitutional values, including dignity, autonomy, equality, and bodily integrity. *See id.* at 851, 856-57. *Casey* also reaffirmed that states have a legitimate interest in potential life. *Id.* at 846. In so doing, it made clear that "[t]hese principles do not contradict one another," *id.*, and are reconciled in the undue burden standard, *id.* at 876. The standard gives real substance to "the urgent claims of the woman to retain the ultimate control over her destiny and her body," *id.* at 869, while permitting laws that are designed to inform her decision, *id.* at 877. Under no circumstances, however, may a state enact "[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion." *Id.* at 878.

The decision below departed radically from these fundamental principles. The Fifth Circuit reversed the district court's faithful application of *Casey*, holding that the mere assertion of a health rationale is sufficient to justify the imposition of significant burdens on the abortion right—even when the health rationale is weak or serves as a pretext for hindering a woman's choice. It upheld a pair of Texas laws that are the epitome of unnecessary health regulations. The first requires that medical facilities where abortions are performed meet standards designed for ambulatory surgery centers ("ASCs"), even though

abortion facilities operating under existing standards have a demonstrated record of safety. The second requires that physicians who provide abortions have admitting privileges at a local hospital, even though abortion patients rarely require hospitalization and physicians who provide other kinds of outpatient care are not required to have admitting privileges.

The Texas requirements will not enhance abortion safety. Abortion is one of the safest and most common procedures in contemporary medicine. It typically involves either taking medication or undergoing a ten-minute procedure, without general anesthesia, in the outpatient setting of a doctor's office or clinic. Complications from abortion are extremely rare, both in absolute terms and relative to other common outpatient procedures. The district court found that the Texas requirements would not serve the State's asserted interest in promoting women's health, noting that many of the standards "have such a tangential relationship to patient safety in the context of abortion as to be nearly arbitrary." Pet. App. 146a.

Those requirements will instead make it harder for women to end a pregnancy safely by reducing their access to legal abortion. *See* Pet. App. 146a. Together, the requirements would close more than 75% of Texas abortion facilities and deter new ones from opening. Indeed, more than half of these facilities are currently closed because the admitting-privileges requirement is largely in effect. The impact of these closures has been dire, delaying many women—and preventing others—from obtaining a legal abortion. This, in turn, has led to an increase in abortions later in pregnancy and in illegal abortions.

The Fifth Circuit's decision to uphold the Texas requirements without meaningful inquiry into whether they serve the State's asserted interest subverts the careful balance struck in *Casey*. It also renders the undue burden standard a hollow protection for a right that is crucial to women's full realization of the personal liberty guaranteed by the Fourteenth Amendment. Accordingly, it should be reversed.

STATEMENT

A. Statutory and Regulatory Background

On July 18, 2013, Texas enacted HB2, an omnibus statute that regulates abortion. This legislation did not write on a blank slate. Despite the exceptional safety of abortion, the procedure was highly regulated in Texas prior to HB2's enactment.

1. The ASC Requirement

Texas law has long required medical practices that provide 50 or more abortions per year to obtain an "abortion facility" license.[1] Tex. Health & Safety Code Ann. §§ 245.003–245.004; Tex. Atty. Gen. Op. GA-0212 (July 7, 2004). Licensed abortion facilities must satisfy rigorous standards, which include requirements concerning quality assurance; unannounced inspections; organizational structure; orientation, training, and review of personnel; staff qualifications; physical environment; infection control; patient rights; medical and clinical services; emergency services; discharge and follow-up; and an-

[1] Hospitals and ASCs are exempt from this requirement. Tex. Health & Safety Code Ann. § 245.004.

esthesia services. *See* 25 Tex. Admin. Code §§ 139.1–139.60.

In 2003, Texas enacted a law prohibiting licensed abortion facilities from performing abortions after 16 weeks of pregnancy.[2] *See* Tex. Health & Safety Code Ann. § 171.004. The law provides that such procedures may be performed only in hospitals and ASCs. *Id.* It had an immediate and devastating effect on women's access to those procedures. In the year following its enactment, there was a precipitous decline in the number of post-16-week procedures performed in Texas and a fourfold increase in the number of Texas residents who obtained those procedures in other states. *See* Silvie Colman & Ted Joyce, *Regulating Abortion: Impact on Patients and Providers in Texas*, 30 J. Pol'y Analysis & Mgmt. 775, 777 (2011), discussed at J.A. 209-10, 248-49, 290. There is no evidence, however, that it improved patient outcomes.

HB2 imposes a similar restriction on early abortions, threatening to impede access to those procedures, too. It provides that "**the minimum standards for an abortion facility [codified in Chapter 139 of Title 25 of the Texas Administrative Code] must be equivalent to the minimum standards . . . for ambulatory surgical centers [codified in Chapter 135 of the same Title]**." Act § 4 (codified at Tex. Health & Safety Code Ann. § 245.010(a)) (reprinted at Pet. App. 194a); 25 Tex. Admin. Code § 139.40 (reprinted at Pet. App. 203a-208a) (the "ASC requirement"). This provision permits licensed abortion facilities to con-

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[2] This law is not challenged here.

tinue providing abortions up to 16 weeks, but requires those facilities to meet the same standards as ASCs.[3]

In the year prior to HB2's enactment, there were more than 40 facilities in Texas that provided abortions. Pet. App. 138a; J.A. 228-31. Six of them were ASCs; the others were licensed abortion facilities. J.A. 231. The ASCs were clustered in Texas's four largest metropolitan areas and performed roughly 20% of all abortions. *See* J.A. 231, 242; Def. Exh. 048 (Record 2808, 2809). The licensed abortion facilities were geographically dispersed and performed roughly 80% of abortions.[4] *See* Pet. App. 138a; J.A. 231; Def. Exh. 048. Respondents stipulated that the ASC requirement would cause all of the licensed abortion facilities to close. J.A. 183-84.

As implemented by the Texas Department of State Health Services ("DSHS"), the ASC requirement imposes burdensome staffing and construction standards on licensed abortion facilities. For example, it

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[3] The Act directed the Texas Department of State Health Services 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 agency proposed regulations on September 27, 2013, 38 Tex. Reg. 6536-46 (Sept. 27, 2013), and adopted them on December 27, 2013, following a notice-and-comment period, 38 Tex. Reg. 9577-93 (Dec. 27, 2013). The regulations largely retained the existing standards for licensed abortion facilities while incorporating by reference selected ASC standards—those that the agency deemed more stringent than existing abortion facility standards. *See* 38 Tex. Reg. 6537.

[4] Less than 1% of Texas abortions are performed in hospitals. J.A. 197; Def. Exh. 048.

mandates a much larger nursing staff than had been previously required. *Compare* 25 Tex. Admin. Code § 135.15(a)(3) *with* 25 Tex. Admin. Code § 139.46(3)(B). It also mandates that facilities be designed to have a one-way traffic pattern; include a full surgical suite with an operating room that has "a clear floor area of at least 240 square feet," 25 Tex. Admin. Code § 135.52(d)(15)(A); meet other spatial requirements, 25 Tex. Admin. Code § 135.52(d); and have an advanced heating, ventilating, and air conditioning ("HVAC") system, 25 Tex. Admin. Code § 135.52(g)(5). To satisfy these standards, a facility would need to be at least 6,650 square feet in area, which is much larger than most licensed abortion facilities. J.A. 297, 307-09. Of the seven clinics operated by Petitioners, only three are built on lots large enough to accommodate the expansion that would be necessary. J.A. 297, 309. The cost of expanding those clinics to comply with ASC standards ranges from $1.7 to $2.6 million. J.A. 309-11. The cost of building a new facility that complies with ASC standards is over $3 million, exclusive of the cost of acquiring land. J.A. 311-12. Further, as a result of the larger building footprint and increased staffing, the annual cost of operating an abortion facility that meets ASC standards is roughly $600,000 to $1 million greater than the annual cost of operating an abortion facility that met the prior standards. J.A. 208-09.

Few ASCs in Texas are held to strict compliance with these standards. They are eligible to seek waivers from DSHS, and such waivers are granted "frequently," and on a "purely oral basis." J.A. 1374-75. Licensed abortion facilities subject to HB2's ASC requirement are not treated similarly. As a result of

DSHS's rulemaking, they are not eligible for waivers nor are they eligible to be grandfathered under their existing standards. *See* 38 Tex. Reg. 9588. DSHS also decided that facilities specializing in medical abortion (*i.e.*, abortion induced using medication, not surgery) must comply with the ambulatory *surgical* center requirement. *Id.*

2. The Admitting-Privileges Requirement

One of the standards Texas applies to licensed abortion facilities concerns the provision of "emergency services." 25 Tex. Admin. Code § 139.56. Prior to HB2, it provided in relevant part:

> (a) 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:
>
> (1) 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.

38 Tex. Reg. 6546 (emphasis added). This regulation offered facilities two options for compliance: ensure that physicians working at the facility have admitting privileges or ensure that they have an agreement with another physician who has admitting privileges.

HB2 eliminated the second option. It includes a provision requiring 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 and provides obstetrical or gynecological health care services**." Act § 2 (codified at Tex. Health & Safety Code Ann. § 171.0031(a)(1)(A)) (reprinted at Pet. App. 182a-183a); 25 Tex. Admin Code §§ 139.53(c)(1) (reprinted at Pet. App. 213a-214a), 139.56(a)(1) (reprinted at Pet. App. 215a) (the "admitting-privileges requirement").[5] The requirement applies to all physicians who perform abortions irrespective of the type of facility in which the abortion is performed.

HB2's insistence that every physician who performs abortions have hospital admitting privileges is inconsistent with the requirements imposed on all other outpatient surgical providers, which are more flexible. *See, e.g.*, 22 Tex. Admin. Code §§ 192.1-192.6 (physicians may perform surgery in their offices without admitting privileges); 25 Tex. Admin. Code § 135.11(b)(19) (physicians may perform surgery in an ASC if they have admitting privileges **or** the facility has a transfer agreement with a hospital); 42 C.F.R. § 416.41(b)(3) (same). It is also inconsistent with the standards of leading medical associations and accreditation bodies. J.A. 279-85.

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[5] This provision was scheduled to take effect on October 29, 2013. Act § 12.

B. The *Abbott* Litigation

On September 27, 2013, a group of Texas abortion providers filed a case captioned *Planned Parenthood of Greater Texas Surgical Health Services v. Abbott* to challenge two provisions of HB2 scheduled to take effect on October 29, 2013, including the admitting-privileges requirement. Simultaneously with filing the case, the plaintiffs moved for a preliminary injunction. The district court (Yeakel, J.) consolidated the hearing on that motion with the trial on the merits.[6] *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 951 F. Supp. 2d 891, 896 (W.D. Tex. 2013). On October 28, 2013, the district court issued an opinion and judgment holding the admitting-privileges requirement unconstitutional. *Id.* at 901, 907-08. The Fifth Circuit stayed the district court's judgment in large part on October 31, 2013—permitting the admitting-privileges requirement to take effect on that day, *see Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 416, 419 (5th Cir. 2013)—and reversed the district court's judgment in large part on March 27, 2014, *see Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583, 587 (5th Cir. 2014).

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[6] The trial commenced on October 21, 2013, less than one month after the case was filed. Given the expedited schedule, there was no pre-trial discovery. Further, the defendants were permitted, over the plaintiffs' objection, to submit all testimonial evidence by declaration. The plaintiffs therefore had no opportunity to depose the defendants' witnesses or cross-examine them at trial.

The Fifth Circuit found insufficient evidence of an undue burden, concluding—based on the pre-enforcement, trial court record—"that abortion practitioners will likely be unable to comply with the [admitting-] privileges requirement." *Id.* at 598. The court of appeals further concluded that "[a]ll of the major Texas cities, including Austin, Corpus Christi, Dallas, El Paso, Houston, and San Antonio, [would] continue to have multiple clinics where many physicians will have or obtain hospital admitting privileges." *Id.*

C. Developments Subsequent to Entry of Judgment in *Abbott*

After the admitting-privileges requirement took effect on October 31, 2013, many abortion facilities throughout Texas were forced to close. *See* Pet. App. 138a. Then, on December 27, 2013, DSHS adopted final rules to implement the ASC requirement. 38 Tex. Reg. 9577-93 (Dec. 27, 2013). Rejecting numerous public comments, DSHS did not permit licensed abortion facilities to seek waivers and grandfathering, even though ASCs are eligible for those administrative accommodations, and it did not exempt facilities specializing in medical abortion from compliance with ASC standards. 38 Tex. Reg. 9588. As adopted, the rules would have forced all of the remaining licensed abortion facilities to close, leaving only a handful of ASCs, clustered in four metropolitan areas, to provide abortions in Texas. In light of these factual developments, Petitioners filed this case on April 2, 2014, to challenge the ASC and admitting-privileges requirements.

D. District Court Proceedings

Petitioners are healthcare providers with a long history of providing safe abortion services. Whole Woman's Health has been operating in Texas for more than a decade, providing high-quality reproductive healthcare that includes abortion. J.A. 715, 831. It currently operates licensed abortion facilities in Fort Worth, San Antonio, and McAllen (the "McAllen clinic"). *See* J.A. 715. In addition, it operates a licensed ASC in San Antonio. J.A. 715. Prior to HB2, Whole Woman's Health also operated licensed abortion facilities in Austin and Beaumont. J.A. 715. Sherwood C. Lynn, Jr., M.D., a board-certified obstetrician-gynecologist ("ob-gyn"), has worked at several Whole Woman's Health facilities, including the McAllen clinic. J.A. 391-92. Although Dr. Lynn retired from most facets of his medical practice in 2006, he continues to provide abortion services because he believes that there is a critical need for those services but a shortage of physicians willing to provide them in Texas. J.A. 390.

Austin Women's Health Center currently operates a licensed abortion facility in Austin. Prior to HB2, an affiliated facility, Killeen Women's Health Center, operated in Killeen. Together, these facilities (the "Health Centers") have provided comprehensive reproductive healthcare, including abortion, to Texas women for over 35 years. J.A. 339. Throughout that time, Lendol L. "Tad" Davis, M.D., a board-certified ob-gyn, has served as the Health Centers' Medical Director. J.A. 338-39.

Nova Health Systems d/b/a Reproductive Services ("Reproductive Services") is a nonprofit organization founded by Marilyn Eldridge and her late husband,

who was a Christian minister. J.A. 755. Its mission is to provide affordable reproductive healthcare, including abortion, to women in underserved communities. J.A. 724, 756. Reproductive Services currently operates a licensed abortion facility in El Paso (the "El Paso clinic").[7] Pamela J. Richter, D.O., a board-eligible family-medicine physician, has served as the El Paso clinic's Medical Director for more than 20 years. J.A. 726. Dr. Richter also works for the State, serving as a staff physician at a facility operated by the Texas Department of Aging and Disability Services. J.A. 727.

The district court (Yeakel, J.) held a bench trial beginning on August 4, 2014. The trial included testimony from 19 live witnesses, 12 of whom testified as experts. The district court "observed the demeanor of the witnesses" and "carefully weighed that demeanor and the witnesses' credibility in determining the facts of this case." Pet. App. 132a-133a. In addition, the district court "thoroughly considered the testimony of both sides' expert witnesses and [gave] appropriate weight to their testimony in selecting which conclusions to credit and upon which not to rely." Pet. App. 133a. Notably, the district court questioned the "objectivity and reliability" of the

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[7] In 1987, the principals of Reproductive Services founded the nonprofit organization Adoption Affiliates, whose mission is to make nonjudgmental adoption services available to women with unintended pregnancies. J.A. 725. Over the years, it has facilitated the placement of more than 800 children. J.A. 756. Adoption Affiliates personnel work on-site at the El Paso clinic to assist women who wish to place children for adoption. J.A. 725, 757.

testimony of Respondents' expert witnesses in light of the "considerable editorial and discretionary control over the content of the experts' reports and declarations" provident

ed by Vincent Rue, Ph.D., a prominent anti-abortion activist with no medical training, and expressed "dismay[]" over the "considerable efforts the State took to obscure Rue's level of involvement with the experts' contributions."[8] Pet. App. 136a.

The evidence at trial established five key facts:

1. Abortion is a safe procedure that rarely results in complications requiring hospital admission.

Abortion techniques are classified into two broad categories—surgical and medical. J.A. 374. In a surgical abortion, the provider uses instruments to evacuate the contents of the uterus. J.A. 374. Despite being characterized as "surgical," the procedure involves no incision or suturing. J.A. 374. Rather, it

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[8] Other courts have made similar findings about the State's witnesses. *See, e.g.*, *Planned Parenthood Se., Inc. v. Strange*, 33 F. Supp. 3d 1381, 1388 (M.D. Ala. 2014) ("Whether Anderson lacks judgment, is dishonest, or is profoundly colored by his bias, his decision to adopt Rue's supplemental report and submit it to the court without verifying the validity of its contents deprives him of credibility."); *id.* at 1395 ("[T]he court did not credit Uhlenberg's testimony."); *see also Planned Parenthood of Wis., Inc. v. Van Hollen*, 94 F. Supp. 3d 949, 973 n.24 (W.D. Wis.) ("Dr. Rue ghost wrote or substantively edited portions of some of defendants' experts' reports."), *aff'd sub nom. Planned Parenthood of Wis., Inc. v. Schimel*, 806 F.3d 908 (7th Cir. 2015).

entails insertion of instruments into a body cavity (the uterus) through a natural orifice (the vagina). J.A. 374. The procedure is short in duration, typically lasting two to ten minutes. J.A. 374. Surgical abortions performed in the first trimester and early second trimester generally do not entail the use of general anesthesia. J.A. 374. Instead, a local anesthetic is applied to the patient's cervix, which connects the vagina to the uterus. J.A. 374. Sometimes minimal or moderate sedation is also used. J.A. 374-75. Surgical abortion procedures at these gestational ages utilize the same technique as dilation and curettage ("D&C") performed for diagnostic purposes or to treat a miscarriage.[9] J.A. 375.

In a medical abortion, medications are used to terminate a pregnancy—most commonly mifepristone, followed one to two days later by misoprostol. J.A. 375. Mifepristone blocks the hormone, progesterone. J.A. 375. Without progesterone, the lining of the uterus breaks down and pregnancy cannot continue. J.A. 375. After mifepristone has exerted its effects, misoprostol causes the uterus to contract and expel its contents. J.A. 375-76. Under Texas law, these medications must be taken orally and cannot be used after 49 days of pregnancy as measured from a women's last menstrual period ("lmp"). *See* Act § 3D (codified at Tex. Health & Safety Code Ann. §§ 171.061-171.064); *Abbott*, 748 F.3d at 600-01.

Abortion procedures, whether surgical or medical, rarely result in complications requiring hospital ad-

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[9] Texas law does not require doctors who perform D&Cs to have admitting privileges or practice in an ASC.

mission. J.A. 265-71. Studies consistently report the rate of major complications during or after an abortion as less than one-half of one percent—often, much less. J.A. 267-71. Moreover, deaths from legal abortion are extremely rare. J.A. 263-66. Nationwide, the mortality rate for legal abortion has been fairly stable for the past 30 years at approximately 0.69 deaths per 100,000 procedures. J.A. 263-66. The rate is even lower in Texas—approximately 0.27 deaths per 100,000 abortions in recent years. J.A. 538. By comparison, the mortality ratio for pregnancy in Texas is about 27 deaths per 100,000 live births. J.A. 538. Thus, a woman in Texas is currently 100 times more likely to die from carrying a pregnancy to term than from having an abortion in a licensed abortion facility subject to pre-HB2 standards.

Many common outpatient procedures have complication rates that are comparable to—or higher than—abortion procedures. These include colonoscopy, most cosmetic surgeries, and vasectomy. J.A. 254, 275-77, 342, 377. Further, procedures that are performed under general anesthesia entail heightened risks. J.A. 375, 380; Pl. Exh. 037 at 784 (Record 3378, 3378-79).

The "great weight of the evidence" led the district court to conclude that, "before the act's passage, abortion in Texas was extremely safe with particularly low rates of serious complications and virtually no deaths occurring on account of the procedure." Pet. App. 145a. The district court further found that "[a]bortion, as regulated by the State before the enactment of [HB2], has been shown to be much safer, in terms of minor and serious complications, than

many common medical procedures not subject to such intense regulation and scrutiny." Pet. App. 145a-146a.

2. The ASC requirement provides no health benefit to abortion patients.

ASCs developed as an alternative to inpatient hospital care for surgical procedures that could be safely performed in an outpatient setting. ASCs offer patients undergoing such procedures two principal benefits over hospitals: lower cost and reduced exposure to contagions. ASCs were never intended for procedures that are routinely performed in physicians' offices or clinics. *See generally* H.R. Rep. No. 96-1167 at 390-91 (1980). Federal Medicare regulations recognize that, when a procedure is safely and commonly performed in an office-based setting, moving it to an ASC would increase its cost without benefitting the patient. Accordingly, those regulations seek to "neutralize" financial incentives for physicians to move their office-based surgeries to ASCs. 71 Fed. Reg. 49506, 49639 (Aug. 23, 2006); *see* 42 C.F.R. § 416.171(d).

The vast majority of abortions in Texas and nationwide are performed in office-based settings, not hospitals. As performed in those settings, abortion has an excellent safety record. *See supra* pp. 16-17. Moving abortion procedures from the clinics in which they have been safely performed for decades into ASCs would substantially increase their cost (and limit their availability) without improving their safety.

The district court found that "women will not obtain better care or experience more frequent positive

outcomes at an ambulatory surgical center as compared to a previously licensed facility." Pet. App. 146a. Indeed, 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 licensed abortion facilities subject to pre-HB2 standards than at ASCs. J.A. 257-59; *see also* J.A. 394.

This is not surprising given 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." Pet. App. 146a. For example, medical abortion entails the oral administration of medications—*i.e.*, the patient swallows a series of tablets. J.A. 375. Requiring those tablets to be swallowed in a multi-million dollar surgical facility does not enhance their safety or effectiveness. *See* Pet. App. 146a; J.A. 387-88.

The ASC requirement does not benefit surgical abortion patients, either. ASC construction standards are intended to enhance the safety of surgeries that involve cutting into sterile body tissue by reducing the likelihood of infection. J.A. 256, 386. But surgical abortion is not performed in this manner; rather, it entails insertion of instruments through the vagina into the uterus. *See supra* p. 15. Because the vagina, like other bodily orifices, is not sterile, precautions aimed at maintaining a sterile operating environment provide no benefit for abortion procedures. J.A. 256, 386-87, 1317-18; Pl. Exh. 037 at 191, 784. Instead, abortion providers must ensure that instruments that enter the uterus are sterile. J.A. 256, 386-87, 1317-18; Pl. Exh. 037 at 784. This does

not require a facility with a one-way traffic pattern, full surgical suite, or advanced HVAC system. Similarly, the staffing requirements for ASCs are geared toward surgeries that are more complex than abortion. J.A. 256, 387.

3. The admitting-privileges requirement provides no health benefit to abortion patients.

Admitting privileges signify that a physician is a member of a hospital's medical staff and is able to treat patients at that hospital. A physician who performs surgery in an outpatient setting does not need admitting privileges to ensure that his or her patient receives prompt treatment at a hospital in the event of an emergency. If a complication requiring hospitalization arises while the patient is still in the outpatient facility, the patient would typically be transported by ambulance to a hospital, along with a copy of the patient's medical records. J.A. 380-82. The outpatient physician would telephone the emergency room to inform the attending physician about the patient's case.[10] J.A. 381-82. Similarly, if a complication requiring hospitalization arises after the patient has returned home, the patient would typically be instructed to seek care at an emergency room near the patient's home. J.A. 383. Again, the outpatient physician would communicate by phone with hospital staff and transmit a copy of the patient's medical records. This is standard practice in

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[10] Federal law prohibits hospitals participating in the Medicare program from turning away patients in emergency circumstances. *See* Emergency Medical Treatment & Active Labor Act ("EMTALA"), 42 U.S.C. § 1395dd.

all fields of medicine, not just abortion care, as Respondents' own experts acknowledged. *See* J.A. 380-82, 1355-56, 1302-04. Indeed, the trend in medicine is towards a "hospitalist" model of inpatient care. Under this model, physicians practicing in outpatient settings transfer patients requiring inpatient care to physicians who practice exclusively in a hospital setting. J.A. 378-79.

In the rare instances when complications from abortion occur, they typically arise after a patient has returned home following a procedure. J.A. 382. This is true of all complications arising from medical abortion because the medications involved take time to exert their effects. J.A. 382. Thus, many abortion patients would not seek care at a hospital within 30 miles of the facility where their abortion was performed even if their abortion provider had admitting privileges there; in the extremely rare event that a complication requiring hospitalization develops, the patient would and should seek treatment at the nearest hospital. J.A. 278, 382-83. By increasing the distances that women must travel to reach an abortion facility, HB2 makes it less likely, not more likely, that a patient would seek emergency care at a hospital nearby the facility.

Further, hospital admitting privileges are not a reliable indicator of a physician's professional competence. Some doctors have admitting privileges despite a demonstrated lack of competence.[11] And

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[11] *See, e.g.*, Mary Efurd, *Anatomy of a Tragedy*, Texas Observer (Aug. 28, 2013), http://www.texasobserver.org/anatomy-tragedy/ (reporting that a Dallas neurosurgeon whose negli-

(Footnote continued on following page)

others are denied admitting privileges for reasons wholly unrelated to their competence. *See generally* Craig W. Dallon, *Understanding Judicial Review of Hospitals' Physician Credentialing & Peer Review Decisions*, 73 Temp. L. Rev. 597, 622 (2000) ("[C]oncerns about potential liability, profitability and economic considerations have . . . affected credentialing decisions in recent years."). Texas hospitals are particularly ill-equipped to judge the professional competence of abortion providers, given that they have so little experience with abortion procedures. Less than 1% of Texas abortions are performed in hospitals. J.A. 197; Def. Exh. 048.

The bylaws of Texas hospitals contain a hodgepodge of criteria for granting admitting privileges to physicians, some of which relate solely to the hospital's economic interests. For example, many hospitals require that a physician admit a minimum number of patients or perform a minimum number of procedures at the hospital on an annual basis. *See, e.g.*, Pl. Exh. 057 at 3.5.15 (Record 3377, 3378) (requiring physicians with active admitting privileges to use the hospital for "at least 24 major procedures annually"). Many also reserve admitting privileges for physicians whose services are consistent with the hospital's "business plan," *see, e.g.*, Pl. Exh. 065 at 2.1.2(a) (Record 3377, 3378), and/or "staff development plan," *see, e.g.*, Pl. Exh. 059 at 3.2.3 (Record 3377, 3378), or who belong to designated practice

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gence "had left two patients dead and four paralyzed in a series of botched surgeries" was able to maintain admitting privileges at area hospitals); *see also* Pl. Exh. 206 (Record 3376, 3377).

groups that enter into exclusive contracts with the hospital, *see, e.g.*, Pl. Exh. 076 at 3.2.2 (Record 3377, 3378).

The district court found that the "physician screening and credentialing" rationale offered to support HB2's admitting-privileges requirement was "not credible due, in part, to evidence that doctors in Texas have been denied privileges for reasons not related to clinical competency." Pet. App. 147a. For example, Dr. Lynn and three of his colleagues at Whole Woman's Health received letters from a McAllen hospital noting that the denial of their respective requests for an application for admitting privileges "was **not** based on clinical competence consideration." Pl. Exh. 068 (J.A. 604-05, 562) (emphasis in original); Pl. Exh. 071 (J.A. 835, 829) (emphasis in original); *see* J.A. 393-94, 719-20.

Further, HB2's requirement that a physician obtain admitting privileges at a hospital *within 30 miles* of the abortion facility where the physician practices does not serve a credentialing function. Dr. Lynn has admitting privileges at hospitals in Austin and San Antonio. J.A. 394. If the law's objective were to confirm a physician's credentials, Dr. Lynn's privileges at those hospitals would suffice. But HB2 would bar Dr. Lynn from providing abortions at the McAllen clinic because he does not have admitting privileges at a hospital within 30 miles of that facility.

4. Together, the requirements would force more than 75% of Texas abortion facilities to close, limit the capacity of those that remain, and deter new abortion facilities from opening.

Before HB2, there were more than 40 facilities providing abortions in Texas, spread throughout the State. *See* Pet. App. 138a; J.A. 229-31. Six of these were ASCs, and the rest were licensed abortion facilities. Leading up to and following implementation of the admitting-privileges requirement on October 31, 2013, the total number of facilities providing abortions dropped by nearly half.[12] *See* Pet. App. 138a; J.A. 229-31. Further, many of those that remained were forced to operate at diminished capacity because the admitting-privileges requirement prevented some of their physicians from continuing to provide services.

Independently, the ASC requirement would force all of the licensed abortion facilities in Texas to close. J.A. 183-84. There are currently nine ASCs provid-

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[12] Abortion facility licenses must be renewed on a bi-annual basis. 25 Tex. Admin. Code § 139.23(b)(2). The $5,000 renewal fee is non-refundable. 25 Tex. Admin. Code § 139.22(a), (c). In addition, licensed abortion facilities must pay an annual assessment fee based on the number of abortions performed during the prior three-year period. 25 Tex. Admin. Code § 139.22(g). Knowing that they would not be able to comply with the challenged requirements, some abortion facilities closed following enactment of HB2 but before those requirements took effect because their licenses were up for renewal or their assessment fees were due. *See, e.g.*, J.A. 339-40, 403.

ing abortions in Texas,[13] and those are the only abortion facilities that would remain in the State apart from the McAllen clinic discussed below. *See* J.A. 1433-34. The nine ASCs are clustered in four metropolitan areas: Dallas-Fort Worth, Houston, Austin, and San Antonio. None is located west or south of San Antonio, a vast geographic area that is larger than California.

The limited relief provided to the McAllen clinic by the Fifth Circuit is likely insufficient to permit the clinic to continue providing abortion services. *See infra* p. 29; J.A. 1431. Even if the clinic were able to come into compliance with the ASC staffing mandates, as required by the decision below, the Fifth Circuit imposed limitations on the clinic's operational capacity that would severely restrict its ability to provide abortions. In particular, the McAllen clinic would be limited to employing a single physician—Dr. Lynn—to provide abortions, even though at least four physicians were providing abortions there prior to HB2. Pet. App. 70a-71a. And Dr. Lynn, who is past retirement age, would be unable to work at the clinic full time. J.A. 390. The McAllen clinic would also be limited to treating patients who reside in the four counties of the Lower Rio Grande Valley. Pet. App. 71a (citing Pet. App. 59a). It would have to turn away women from neighboring counties, as well as women from other parts of Texas where the abortion facilities have closed or the wait times for an ap-

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[13] Planned Parenthood's San Antonio ASC is now open. *See* J.A. 183, 1433.

pointment with an abortion provider have become weeks long.

Thus, together, the challenged requirements would eliminate more than three-quarters of Texas's abortion facilities and limit the capacity of the remaining few. Further, the high costs of compliance with the ASC requirement would deter new abortion providers from opening, particularly outside of Texas's largest cities. J.A. 207-10. As a result, the district court found that "few, if any, new compliant abortion facilities will open to meet the demand resulting from existing clinics' closure." Pet. App. 140a.

The initial reduction in abortion providers as a result of the admitting-privileges requirement had a profound effect on women's access to abortion services. Many women were delayed in accessing abortion, leading to an increase in the proportion of abortions performed in the second trimester. *See* J.A. 248. Others were prevented from accessing abortion altogether. *See* J.A. 234-35, 241, 248-49. Allowing the Fifth Circuit's decision to stand would further reduce the availability of abortion in Texas, worsening these effects.

5. The drastic reduction in access to legal abortion services harms women's health.

Rather than enhancing the safety of women seeking abortions, the Texas requirements would actually subject them to greater health risks. *See* Pet. App. 146a. Widespread clinic closures have already been delaying women's access to abortion. As of September 2015, women had to wait two to three weeks, on average, for an initial appointment with an abortion

provider in the Dallas-Fort Worth area. *See* Texas Policy Evaluation Project, *Abortion Wait Times in Texas* at 2 (Nov. 25, 2015), https://utexas.app.box.com/AbortionWaitTimeBrief. Wait times in Austin were also lengthy. *Id.* If the Fifth Circuit's decision were permitted to stand, nine more clinics would be forced to close and the McAllen clinic's capacity would be sharply limited, *see* J.A. 1430-31, leading to even longer wait times. Although abortion is safe throughout pregnancy, women able to have early abortions face a reduced risk of complications.[14] Conversely, women who are delayed in obtaining an abortion face increased risks.

Women who are unable to obtain an abortion also face increased risks. 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. J.A. 538.

Further, some women who are unable to access legal abortion turn to illegal and unsafe methods of ending a pregnancy. *See* J.A. 249-53. This trend has been on the rise in Texas since HB2 began closing licensed abortion facilities: Remaining clinics have encountered a significant increase in the number of women seeking assistance after attempting self-abortion. *See* J.A. 721-22. Respondents have also received reports about women attempting to self-

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[14] The overall mortality rate for abortion is approximately 0.69 deaths per 100,000 abortions. J.A. 263-64. For abortions performed in the first trimester, the rate is roughly 0.40 deaths per 100,000 abortions, and for abortions performed before 8 weeks lmp, the rate is roughly 0.10 deaths per 100,000 abortions. J.A. 265-66.

induce abortions and healthcare providers rendering treatment when such attempts were unsuccessful or resulted in complications. Pl. Exh. 020 (J.A. 589-93, Record 2808, 2809); Pl. Exh. 022 (J.A. 594-98, Record 2808, 2809); Pl. Exh. 024 (J.A. 599-602, Record 2808, 2809).

Many women in Texas are aware that misoprostol can be used to induce an abortion. J.A. 250-51, 369. This medication is available over-the-counter in Mexico, and is widely trafficked in the Rio Grande Valley and West Texas, which border Mexico. J.A. 250. It may also be purchased illegally from the internet. J.A. 250; *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).[15] Like any medication obtained on the black market, it can be counterfeit or used incorrectly. J.A. 369, 252. 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); *Hillman v. State*, 503 S.E.2d 610, 611 (Ga. Ct. App. 1998) (concerning a pregnant woman who

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[15] *See also* Emily Bazelon, *A Mother in Jail for Helping Her Daughter Have an Abortion*, N.Y. Times Magazine, Sept. 22, 2014, 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).

attempted abortion by shooting herself in the abdomen).[16]

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Based on this evidence, the district court concluded that the Texas requirements impose an undue burden on abortion access. Pet. App. 148a. It entered judgment on August 29, 2014, setting forth a series of declarations concerning the requirements' constitutional deficiencies, the broadest of which declared both requirements unconstitutional "as applied to all women seeking a previability abortion," and permanently enjoined their enforcement. Pet. App. 158a.

E. Appellate Proceedings

Respondents moved for an emergency 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. Pet. App. 79a-127a. On October 14, 2014, this Court vacated the stay in substantial part, sustaining the district court's injunction against enforcement of the ASC requirement statewide and enforcement of the admitting-privileges requirement with respect to the McAllen and El Paso clinics. *Whole Woman's Health v. Lakey*, 135 S. Ct. 399 (2014) (mem.).

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[16] *See also* Erik Eckholm, *Tennessee Woman Tried Coat-Hanger Abortion, Police Say*, N.Y. Times, Dec. 15, 2015, at A26, http://nyti.ms/1ZaZU6a (reporting that a Tennessee woman was recently arrested for attempting to end her pregnancy using a coat hanger).

On June 9, 2015, the Fifth Circuit issued a ruling on the merits. Pet. App. 1a-76a. The per curiam opinion held that the ASC requirement does not amount to an undue burden on abortion access, except to the extent it imposes construction requirements on the McAllen clinic. Pet. App. 70a. It similarly held that the admitting-privileges requirement does not amount to an undue burden, except as applied to Dr. Lynn when working at the McAllen clinic. Pet. App. 71a. The Fifth Circuit vacated most of the district court's injunction 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.

Pet. App. 71a. The Fifth Circuit subsequently 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." Pet. App. 78a.

On June 29, 2015, this Court stayed the Fifth Circuit's mandate pending the timely filing and disposition of a petition for a writ of certiorari. *Whole Woman's Health v. Cole*, 135 S. Ct. 2923 (2015) (mem.). It granted certiorari on November 13, 2015. *Whole Woman's Health v. Cole*, 136 S. Ct. 499 (2015) (mem.).

SUMMARY OF ARGUMENT

The decision below distorts the careful balance struck in *Casey* by adopting an overly deferential standard for reviewing abortion restrictions. Under *Casey*, a law imposes an undue burden, and is therefore invalid, "if its purpose or effect is to place substantial obstacles in the path of a woman seeking an abortion before the fetus attains viability." *Casey*, 505 U.S. at 878. The ASC and admitting-privileges requirements—which fail to promote women's health but would force the vast majority of Texas abortion facilities to close—have both this purpose and this effect. Only by adopting a standard that demands blind deference to legislative enactments could the Fifth Circuit sustain these laws.

The purpose prong of the undue burden standard requires courts to confirm that abortion restrictions are reasonably designed to serve a valid state inter-

est and that they do so in a permissible way. Restrictions that "serve no purpose other than to make abortions more difficult" are invalid. *Id.* at 901. The Texas requirements are not reasonably designed to serve—and, indeed, fail to serve—the State's interest in promoting the health of women seeking abortions. Abortion is an extremely safe procedure, as demonstrated by decades of national and Texas data, and it was subject to robust regulation by Texas prior to HB2. The challenged requirements will not enhance its safety: The record shows that "women will not obtain better care or experience more frequent positive outcomes at an ambulatory surgical center as compared to a previously licensed facility." Pet. App. 146a. It further shows that the admitting-privileges requirement lacks "a credible medical or health rationale." Pet App. 147a. In short, the State's purported health concerns are nothing more than a pretext for restricting access to abortion.

The undisputed and predictable effect of the Texas requirements reveals their true purpose—to close the vast majority of Texas abortion clinics. So, too, does their targeted application. The laws single out abortion for heightened medical regulation, even though it is safer than many other common medical procedures.

The effects prong of the undue burden standard requires a court to consider the severity of the obstacle a law places in the path of women seeking abortion relative to the strength of the state's interest in enforcing the law. Only by considering the strength of a state's interest can a court determine whether a restriction is "undue" or "unwarranted." *Casey*, 505 U.S. at 874-75. The Texas requirements impose sub-

stantial obstacles on women seeking abortion by drastically reducing the number and geographic distribution of abortion facilities in the State. The resulting shortage of such facilities means that women will have long waits to get an appointment with an abortion provider, and thus will have abortions later in pregnancy. Many women will have to travel far from home to reach an abortion facility, which makes the abortion process significantly more costly, time-consuming, and stressful. Those without the resources to travel will be prevented from obtaining a legal abortion, leading some to attempt an illegal one.

The imposition of these obstacles is not warranted by Texas's interest in enforcing the ASC and admitting-privileges requirements. Neither requirement furthers the State's interest in promoting women's health. To the contrary, each increases the risks that women face by significantly reducing their access to legal abortion services. The burdens imposed by these laws are so grossly disproportionate to any possible health benefit that they are plainly "undue."

The availability of abortion services in neighboring states does not mitigate the impermissible effect of the challenged requirements in Texas. As the Fifth Circuit correctly recognized in another recent case, "the proper formulation of the undue burden analysis focuses solely on the effects within the regulating state." *Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 457 (5th Cir. 2014), *petition for cert. filed* (Feb. 18, 2015) (No. 14-997).

The appropriate remedy is statewide invalidation of the Texas requirements. They are unconstitutional in all of their applications or, at a minimum, in a

large fraction of the cases in which they are relevant. This is true with respect to the admitting-privileges requirement notwithstanding that Petitioners did not expressly request statewide invalidation of that provision in their Complaint. *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 331 (2010).

Finally, the Fifth Circuit erred in holding that res judicata bars Petitioners' undue burden claims to the extent that they seek facial invalidation. Res judicata bars claims, not remedies. The Fifth Circuit likewise erred in holding that Petitioners should have challenged the ASC requirement in *Abbott,* even though DSHS had not yet adopted final implementing regulations that indicated the extent of the burdens that compliance with the requirements would impose. Allowing the Fifth Circuit's res judicata holding to stand would encourage the filing of premature claims that speculate about the impact a law will have.

The Fifth Circuit's judgment should be reversed.

ARGUMENT

I. THE TEXAS REQUIREMENTS VIOLATE THE UNDUE BURDEN STANDARD

The Texas requirements violate the undue burden standard because they drastically reduce women's access to legal abortion services while failing to further the State's asserted interest in women's health. *Casey* reaffirmed that the decision to end a pregnancy prior to viability is a fundamental right protected by the Due Process Clause. *See* 505 U.S. at 845-46. It adopted the undue burden standard as "the appropriate means of reconciling the State's interest [in protecting potential life] with the woman's constitu-

tionally protected liberty." *Id.* at 876. Pursuant to this standard, "[a]n undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." *Id.* at 878. The Court explained that, "[a]s with any medical procedure, the State may enact regulations to further the health or safety of a woman seeking an abortion." *Id.* However, "[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.*

The purpose and effect prongs of the undue burden standard are independent, but they are informed by related considerations. Each requires meaningful judicial review to prevent unjustified intrusions on a woman's constitutionally protected liberty. To withstand review under the purpose prong, an abortion restriction must be reasonably designed to serve a valid state interest, and it must serve that interest through permissible means. To withstand review under the effects prong, the restriction must advance the state's interest to an extent sufficient to warrant the obstacles it imposes on women seeking abortion.

The Texas requirements fail on both counts. They are designed to close abortion clinics—not to promote women's health—and they impose unwarranted burdens on abortion access. Fidelity to *Casey* and this Court's subsequent precedents requires that they be struck down.

A. The Texas Requirements Have an Impermissible Purpose

Casey explained that, while states have a legitimate interest in protecting potential life, they may advance that interest only through means "calculated to inform the woman's free choice, not hinder it." *Id.* at 877. A state therefore acts with an unconstitutional purpose if it uses constitutionally impermissible means to advance its interest in potential life.[17] *See id.*

The Texas requirements cannot be sustained on the basis of the State's interest in potential life because they do not advance that interest in a permissible way: They are not designed to inform a woman's decision about whether to have an abortion, and they do not "create a structural mechanism by which the State . . . may express profound respect for the life of the unborn." *Id.*

That leaves Texas with its asserted interest in women's health. But three factors expose the requirements' health rationale as a pretext: they are

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[17] A finding of unconstitutional purpose is not a condemnation of the values of abortion opponents. *See Casey*, 505 U.S. at 850 ("Men and women of good conscience can disagree . . . about the profound moral and spiritual implications of terminating a pregnancy."); *cf. Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015) ("Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here."). Rather, the purpose prong serves to ensure that the means used to regulate abortion respect the dignity and autonomy of women, reconciling those aspects of personal liberty with a state's legitimate interests in regulation.

not reasonably designed to promote women's health; their undisputed and predictable effect is to close the vast majority of Texas abortion facilities; and they single out abortion for heightened medical regulation, even though obtaining an abortion in Texas is extremely safe and other common outpatient procedures entail greater risks.

The true purpose of the Texas requirements—the only purpose those requirements actually serve—is to create obstacles to abortion access for the sake of hindering women who seek the procedure. That purpose is impermissible under *Casey*. *See* 505 U.S. at 877.

1. The Texas requirements are not reasonably designed to promote women's health

The purpose prong of the undue burden standard requires courts reviewing abortion restrictions to confirm that the restrictions are reasonably designed to serve a valid state interest in a permissible way. Restrictions that "serve no purpose other than to make abortions more difficult" are invalid. *Id.* at 901. When applying the undue burden standard, this Court has never upheld a law that limits the availability of abortion services without first confirming that the law is reasonably designed to serve a valid state interest. In *Casey*, for example, the Court held that the informed consent requirement "further[ed] the legitimate purpose of reducing the risk that a woman may elect an abortion" without being fully informed. *Id.* at 882. It held that the parental consent requirement furthered the same purpose with respect to minors. *See id.* at 899. It likewise held that the recordkeeping and reporting requirements furthered a valid interest in promoting wom-

en's health. *See id.* at 900-01 ("The collection of information with respect to actual patients is a vital element of medical research, and so it cannot be said that the requirements serve no purpose other than to make abortions more difficult.").

Similarly, in *Gonzales v. Carhart*, after noting that "[t]he Act's purposes are set forth in recitals preceding its operative provisions," 550 U.S. 124, 156 (2007), the Court engaged in a lengthy analysis of the ways in which the law furthered those purposes. *See id.* at 156-60. Only after confirming that the purposes were permissible and the law was reasonably designed to further them did the Court conclude that the purpose prong of the undue burden standard was satisfied. *See id.* at 160.

These decisions make clear that a court should not blindly accept the rationale a state offers for an abortion restriction, and for good reason. A state could easily disguise impermissible efforts to hinder abortion as permissible efforts to promote women's health. Only by assessing whether a restriction is reasonably designed to serve its stated purpose can a court ensure that the State's rationale does not disguise an effort "to make abortions more difficult." *Casey*, 505 U.S. at 901.

This mode of inquiry has enabled the Court to identify pretextual laws in a variety of constitutional contexts and prevent them from infringing on constitutional rights. *See, e.g.*, *Sorrell v. IMS Health Inc.*, 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.");

Edwards v. Aguillard, 482 U.S. 578, 586-89 (1987) (reasoning that a statute's stated purpose of protecting academic freedom was a pretext for endorsing religion because the statute was not reasonably designed to protect academic freedom) ("While the Court is normally deferential to a State's articulation of a secular purpose, it is required that the statement of such purpose be sincere and not a sham.").

This Court's analysis of abortion restrictions is no exception. For example, in *Planned Parenthood of Central Missouri v. Danforth*, the Court held that the failure of Missouri's ban on a method of second-trimester abortion to serve the State's asserted interest in women's health suggested that the real aim of the law was to restrict the availability of second-trimester abortion services. 428 U.S. 52, 78-79 (1976) ("[T]he outright legislative proscription of [the method] 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.").[18]

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[18] Although *Casey* overruled certain elements of this Court's prior abortion jurisprudence, it did not overrule that jurisprudence completely. To the extent that pre-*Casey* decisions fail to recognize or properly weigh a state's interest in potential life, they are abrogated by *Casey*. 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, as *Casey* recognized. *See, e.g.*, 505 U.S. at 897 ("The principles that guided the Court in *Danforth* should be our guides today."); *id.*
(Footnote continued on following page)

Here, "[t]he great weight of the evidence" demonstrated that the ASC and admitting-privileges requirements are not reasonably designed to advance the State's interest in women's health. Pet. App. 145a-147a. Indeed, the district 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," and that women would face "[h]igher health risks" as a result of insufficient access to legal abortion. Pet. App. 146a.

These findings were amply supported by the trial evidence, which showed that: abortion was extremely safe in Texas prior to HB2; the ASC standards were designed for surgeries that are more complex than abortion and entail exposing sterile tissue to the external environment; hospital admitting privileges are a poor indicator of abortion provider competence; and hospital admitting privileges are not needed to ensure continuity of care in the rare event that an abortion patient experiences a complication requiring hospitalization. *See supra* pp. 16-22. The evidence further showed that women who are delayed or prevented from accessing abortion services face greater health risks than those who are able to access early abortion care.[19] *See supra* pp. 25-27.

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at 900 (incorporating by reference a standard set forth in *Danforth*).

[19] Thus, a law *reasonably* designed to enhance the safety of abortion would focus on eliminating barriers to early abortion access, not erecting additional ones.

In addition, the district court correctly recognized that the State's asserted interest in women's health would not be advanced in any way by compelling women in West Texas to travel to New Mexico—which has neither an ASC nor an admitting-privileges requirement—to obtain abortion services. *See* Pet. App. 149a.

The Texas requirements utterly fail as reasonable regulations of women's health, demonstrating that promoting women's health is not their true purpose. *Cf. Danforth*, 428 U.S. at 78-79.

2. The undisputed and predictable effect of the Texas requirements is to close abortion clinics

The undisputed and predictable effect of the challenged requirements—to close the vast majority of Texas abortion facilities—is further evidence of an impermissible purpose. The admitting-privileges requirement has already shuttered more than half of the abortion facilities that operated in Texas prior to HB2, and it limits the capacity of those that remain. *See supra* p. 23. Respondents stipulated that the ASC requirement would force all abortion facilities previously licensed under Chapter 139 to close. J.A. 183-84. Such facilities provided 80% of abortions in Texas in the year prior to HB2's enactment. *See* Def. Exh. 048. The one-two punch of the admitting-privileges requirement and ASC requirement would thus "undeniably reduce meaningful access to abortion care for women throughout Texas." *See* Pet. App. 141a.

The Court has long recognized that "the effect of a law in its real operation is strong evidence of its ob-

ject." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 535 (1993); *accord United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013) (explaining that a statute's "operation in practice confirms [its] purpose"). In *Mazurek v. Armstrong*, for example, the Court concluded that a statute did not have the purpose of creating a substantial obstacle to abortion access when the statute could not possibly have that effect. 520 U.S. 968, 973-74 (1997). The claim that the statute's purpose was to hinder abortion access was "positively contradicted by the fact that only a single practitioner [was] affected" and "that no woman seeking an abortion would be required by the new law to travel to a different facility than was previously available." *Id.*

This case presents the opposite scenario. The fact that the challenged requirements would drastically reduce the number and geographic distribution of abortion facilities in Texas—while failing to provide any health or safety benefit to abortion patients—confirms that their purpose is to create substantial obstacles for women seeking abortion services in Texas.

3. The Texas requirements single out abortion for heightened medical regulation

Abortion is an extremely safe procedure that rarely results in complications. *See supra* pp. 16-17. This is not surprising given that medical abortion does not entail surgery and surgical abortion is short in duration, does not require an incision, and is typically performed without general anesthesia. *See supra* pp. 14-15. Abortion is "much safer, in terms of minor and serious complications, than many common medical procedures." Pet. App. 145a-146a.

Further, the record shows no problem with abortion safety in Texas that would signal a need for heightened regulation. The district court found that "before the act's passage, abortion in Texas was extremely safe with particularly low rates of serious complications and virtually no deaths occurring on account of the procedure." Pet. App. 145a. Indeed, the Executive Director of the Texas Medical Board 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 engaged in conduct that posed a threat to public health or welfare.[20] J.A. 1216-17, 1221, 1223-24.

Nevertheless, the Texas requirements single out abortion from all other outpatient procedures for more burdensome regulation. No other physicians are required by Texas law to maintain admitting privileges at a local hospital. *See supra* pp. 9-10. Likewise, no other physicians are required to practice in an ASC. To the contrary, Texas law explicitly authorizes physicians to perform major outpatient surgeries, including those requiring general anesthesia, in their offices. 22 Tex. Admin. Code §§ 192.1-192.6. "Several thousand" Texas physicians currently do so. J.A. 1225-26.

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[20] In contrast, she vividly recalled "a very high-profile case of a young child who died . . . in a dental office, when anesthetic was used but the proper training and equipment was not available." J.A. 1227. Dentists are not subject to an ASC or admitting-privileges requirement under Texas law.

States may regulate abortion consistently with other medical procedures. *See, e.g.*, *Casey*, 505 U.S. at 878 ("*As with any medical procedure*, the State may enact regulations to further the health or safety of a woman seeking an abortion." (emphasis added)); *id.* at 884 ("[T]he doctor-patient relation here is entitled to the same solicitude it receives in other contexts."). States may not, however, single out abortion from comparable medical procedures for medical regulation that is different and more burdensome—unless the regulation is aimed at an aspect of abortion that is unique. The Texas requirements do not regulate unique aspects of abortion. Rather, they regulate abortion as a form of outpatient surgery, and they could easily be applied to all outpatient surgeries.

The Court has often observed that laws targeting a particular group for disfavored treatment are more likely to have an impermissible purpose than those that are generally applicable. *See, e.g., Windsor*, 133 S. Ct. at 2693-94; *Church of the Lukumi*, 508 U.S. at 524; *Romer v. Evans*, 517 U.S. 620, 633 (1996). The fact that the Texas requirements target abortion for heightened medical regulation when abortion is safer than many other common medical procedures provides further evidence that the purpose of the requirements is to place substantial obstacles in the path of women seeking abortions in Texas.

* * *

The Fifth Circuit's refusal to treat any of these factors as "competent evidence" of an improper purpose prevented it from probing Texas's asserted rationale for the challenged requirements in the manner required by *Casey*. Pet. App. 47a. The re-

sult was a decision that rubberstamps a pair of restrictions with a constitutionally impermissible objective.

B. The Texas Requirements Operate as a Substantial Obstacle to Abortion Access

In addition to having an impermissible purpose, the Texas requirements also have an impermissible effect. As the district court found, "the requirements, independently and when viewed as they operate together, have the ultimate effect of erecting a substantial obstacle for women in Texas who seek to obtain a previability abortion." Pet. App. 147a.

1. Whether an obstacle is substantial depends in part on the strength of a state's interest in imposing it

The Fifth Circuit's conclusion that widespread clinic closures would not operate as a substantial obstacle to abortion access rests on a fundamental misconception of the undue burden standard and the constitutional values that underlie it. The undue burden standard strikes a careful balance between a woman's liberty to make decisions about childbearing—which the Court recognized as "central to personal dignity and autonomy," *Casey*, 505 U.S. at 851, and the "ability of women to participate equally in the economic and social life of the Nation," *id.* at 856—with "the State's profound interest in potential life," *id.* at 878. As *Casey* made clear, its focus is on whether burdens on access to abortion are "unwarranted." *See, e.g.*, *id.* at 875 (explaining that the constitutionally protected right is the right "'to be free from *unwarranted* governmental intrusion into matters so fundamentally affecting a person as the deci-

sion whether to bear or beget a child.'") (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)) (emphasis added).

Accordingly, in determining whether an obstacle is substantial such that it imposes an undue burden on abortion access, a court must consider the severity of the obstacle relative to the strength of the state's interest in imposing it. Only by considering the strength of the state's interest can a court determine whether a restriction is "undue" or "unwarranted." *Id.* at 874-75. When the state regulates abortion for the purpose of promoting women's health, any obstacle it imposes on women seeking abortion must be warranted by the health benefits of the law. Otherwise, the law is an "[u]nnecessary health regulation," and the burden it imposes on women is undue. *Id.* at 878.

The Seventh Circuit recently described how the undue burden standard functions where the state restricts abortion in the name of women's health:

> An abortion-restricting statute sought to be justified on medical grounds requires not only reason to believe . . . that the medical grounds are valid, but also reason to believe that the restrictions are not disproportionate, in their effect on the right to an abortion, to the medical benefits that the restrictions are believed to confer and so do not impose an "undue burden" on women seeking abortions. . . . To determine whether the burden imposed by the statute is "undue" (excessive), the court must weigh the burdens against

> the state's justification, asking whether and to what extent the challenged regulation actually advances the state's interests.

Schimel, 806 F.3d at 919 (some internal quotation marks omitted). Other courts have described the undue burden standard in similar terms when striking down unnecessary health regulations that target abortion. *See, e.g.*, *Planned Parenthood Ariz., Inc. v. Humble*, 753 F.3d 905, 912 (9th Cir.), *cert. denied*, 135 S. Ct. 870 (2014); *Planned Parenthood Se., Inc. v. Strange*, 33 F. Supp. 3d 1330, 1341 (M.D. Ala. 2014); *Planned Parenthood of the Heartland, Inc. v. Iowa Bd. of Med.*, 865 N.W.2d 252, 264 (Iowa 2015).

In contrast, the Fifth Circuit held (in this case)[21] that the district court erred when it considered the strength of the State's interests in enforcing the challenged requirements. *See* Pet. App. 48a-51a. The Fifth Circuit maintained that the undue burden standard does not require—or even permit—any scrutiny of the extent to which an abortion restriction advances a valid state interest. *See* Pet. App. 48a-51a. It insisted a court's role is limited to

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[21] In other cases, the Fifth Circuit has adopted a different position. *See, e.g.*, *Barnes v. Mississippi*, 992 F.2d 1335, 1339 (5th Cir. 1993) ("[A] regulation that places a burden on the exercise of the abortion right is constitutional unless the burden is 'undue.' . . . As long as *Casey* remains authoritative, the constitutionality of an abortion regulation thus turns on an examination of the importance of the state's interest in the regulation and the severity of the burden that regulation imposes on the woman's right to seek an abortion."); *see also Currier*, 760 F.3d at 458.

conducting rational basis review in its most deferential form. Pet. App. 24a. Under this approach, a restriction on a woman's constitutionally protected liberty is valid if "any conceivable rationale exists for an enactment." Pet. App. 50a. Indeed, the Fifth Circuit said that, "[b]ecause the [rational basis] 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." Pet. App. 50a.

The Fifth Circuit's blind deference to the Texas legislature cannot be reconciled with this Court's precedents. Rational basis review was rejected by *Casey*, which explained that greater scrutiny is required when governmental action "intrude[s] upon a protected liberty." 505 U.S. at 851. *Gonzales* later confirmed that: "The Court retains an independent constitutional duty to review [legislative] findings where constitutional rights are at stake." 550 U.S. at 165. The Fifth Circuit's insistence that "[i]t 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" is an utter abdication of this constitutional obligation. Pet. App. 49a-50a. Indeed, its approach renders courts powerless to ensure that a woman's liberty is not infringed for reasons that are feeble or pretextual. Likewise, it prevents courts from fulfilling their obligation to ensure that a woman is not made to endure needless obstacles or affronts to her dignity as a condition of exercising her constitutional right.

If the undue burden standard required courts to consider the severity of the burdens imposed by abor-

tion restrictions in a vacuum, without reference to the strength of a state's interests in enforcing them, then it could, in some cases, require invalidation of laws that are actually necessary to protect women's health. The Fifth Circuit's recent decision concerning a Mississippi admitting-privileges requirement illustrates this point. *See Currier*, 760 F.3d at 458. There, the law threatened to close the State's only abortion clinic. *See id.* Mississippi argued that the law should not be deemed a substantial obstacle based solely on that effect because such a precedent would prevent it from enforcing any health regulation, no matter how vital, that would close the clinic. *See id.* Responding to the State's concern, the Fifth Circuit explained that its decision to preliminarily enjoin enforcement of the requirement was based on "the entire record and factual context in which the law operates," including factors related to the strength of the State's interest in enforcing the law, such as "the reasons cited by the hospitals for denying admitting privileges to [abortion providers]" and "the nature and process of the admitting-privileges determination." *Id.*

2. The Texas requirements create obstacles to abortion access that are not warranted by their impact on women's health

The district court correctly concluded that "the severity of the burden imposed by both requirements is not balanced by the weight of the interests underlying them." Pet. App. 145a. In reversing its judgment, the Fifth Circuit erred both in its assessment of the severity of the burden imposed on women seeking abortion in Texas and in its failure to evaluate

that burden relative to the strength of the State's interest in enforcing the requirements.

With respect to the severity of the burden, the record demonstrates that each of the challenged requirements would impose significant obstacles on women seeking abortions. Each would drastically reduce the number and geographic distribution of abortion providers in Texas, substantially increasing the wait time for appointments at abortion facilities and the distances that many women would have to travel to reach those facilities. *See supra* pp. 23-26.

Delays in abortion access impose heavy burdens on women. As gestational age increases, the duration, complexity, and cost of an abortion procedure increase, as does the risk of complications. *See* J.A. 215, 265-66, 388. Further, the longer a woman remains pregnant, the more difficult it becomes for her to keep the fact of her pregnancy confidential, and the fewer options she has concerning the method of abortion. A woman delayed past 49 days lmp, for example, may no longer have a medical abortion under Texas law; she must instead have a surgical procedure. *See* Act § 3D; *Abbott*, 748 F.3d at 600-01. A woman delayed past 20 weeks "post-fertilization" may no longer have an abortion at all under Texas law. Act § 3C (codified at Tex. Health & Safety Code Ann. §§ 171.041-171.048).

Long-distance travel also imposes heavy burdens on women. The district court found that "increased travel distances *combine* with practical concerns unique to every woman," to create barriers to abortion access. Pet. App. 142a (emphasis in original). These practical concerns include "lack of availability of child care, unreliability of transportation, unavail-

ability 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." Pet. App. 142a. The district court also noted that "[t]he act's two requirements erect a particularly high barrier for poor, rural, or disadvantaged women throughout Texas, regardless of the absolute distance they may have to travel to obtain an abortion." Pet. App. 144a.

The Fifth Circuit rejected this contextualized analysis of how the clinic closures would impact Texas women. Pet. App. 55a. In its view, the baseline challenges that certain women face, such as lack of access to child care and unreliable transportation, are irrelevant to the undue burden analysis because they were not created by "the law itself." Pet. App. 55a. Rather than acknowledge how the Texas requirements operate in the real world, the Fifth Circuit applied a bright-line rule to assess whether the admitting-privileges and ASC requirements created substantial obstacles for women. Pursuant to this rule, if a single abortion provider remains within a 150-mile radius of a woman's residence, then she does not face a substantial obstacle to accessing abortion, regardless of her individual circumstances or the number of other women dependent on the same provider. *See* Pet. App. 52a, 55a, 66a-67a, 71a, 75a-76a.

This "150-mile" bright-line rule cannot be reconciled with this Court's precedents. In *Casey*, for example, the Court held that the spousal notification requirement created a substantial obstacle to abor-

tion access in part because married women who experienced domestic violence were "likely to be deterred from procuring an abortion" by fear that the required notification would trigger violence against themselves or their children. 505 U.S. at 894. The Court explained that "[w]e must not blind ourselves" to the practical impact of the law on women in abusive marriages. *Id.* But the Fifth Circuit's logic would compel courts to do exactly that because the law itself did not create those abusive relationships.

The Fifth Circuit mistakenly relied on *Casey*'s analysis of the two-trip requirement to support its adoption of a bright-line rule. It reasoned that, because *Casey* upheld the provision, which would require some women to travel a total of 150 miles to obtain an abortion, travel distances less than 150 miles could *never* amount to a substantial obstacle. *See* Pet. App. 66a-67a (citing *Abbott*, 748 F.3d at 598). As with the spousal notification provision, however, *Casey* performed a contextualized analysis of the two-trip requirement's impact on affected women, relying on the record evidence; it did not announce a bright-line rule. *See* 505 U.S. at 886-87 (noting that its conclusion was based "on the record before us"). Further, *Casey* held that the burdens imposed by the two-trip requirement served Pennsylvania's interest in informed consent. *Id.* at 885. The burdens imposed by the Texas requirements, in contrast, serve no valid interest. Burdening abortion for the sake of burdening abortion is plainly forbidden by *Casey*. *See id.* at 877.

The Fifth Circuit thus compounded its error by refusing to consider whether the burdens imposed by the Texas requirements are warranted by the

strength of the State's interests in enforcing them. While the burdens imposed by the laws are heavy, the strength of the State's interests are weak. Abortion as practiced in Texas before HB2 was extremely safe—100 times safer than the alternative, childbirth. *See supra* pp. 16-17. The challenged requirements are not reasonably designed to enhance its safety. *See supra* pp. 17-22. To the contrary, they diminish abortion's safety by delaying women's access to the procedure, causing women to have later abortions, which entail greater risks. *See supra* pp. 25-26. The requirements are also responsible for a rise in attempts at self-induced abortion. *See supra* pp. 26-27. This practice likewise entails greater risks than an abortion in a medical facility subject to pre-HB2 standards.

The Texas requirements thus fail to further a valid state interest to an extent sufficient to justify the burdens they impose on abortion access.

3. The impermissible effect of the Texas requirements is not mitigated by the availability of abortion in other states

The Fifth Circuit erred in holding that the complete elimination of abortion providers from the vast region of Texas west of San Antonio, which comprises more than half of Texas's total area, would not operate as a substantial obstacle to abortion access because women in that region could travel to New Mexico to obtain an abortion.[22] *See* Pet. App. 72a-

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[22] Prior to HB2, there were six abortion clinics in this region: one in Abilene, two in El Paso, one in Lubbock, one in Midland, and one in San Angelo. *See* J.A. 229. Currently, only the two

(Footnote continued on following page)

76a. The availability of abortion services in neighboring states does not mitigate the impermissible effect of the challenged requirements in Texas. As the Fifth Circuit correctly recognized in the Mississippi admitting-privileges case, "the proper formulation of the undue burden analysis focuses solely on the effects within the regulating state." *Currier*, 760 F.3d at 457 ("[A] state cannot lean on its sovereign neighbors to provide protection of its citizens' federal constitutional rights."); *accord Schimel*, 806 F.3d at 918-19. Indeed, in holding that Pennsylvania's spousal notification requirement imposed an undue burden on abortion access, *Casey* did not consider the availability of abortion in New York or other neighboring states as a mitigating factor. *See* 505 U.S. at 887-98.

This is consistent with the Court's approach in other areas of constitutional law. In *Gaines v. Canada*, for example, the Court held that the equal protection violation caused by a policy excluding African-American students from admission to the University of Missouri's law school was not mitigated by a program that would pay the costs for those students to attend law school in an adjacent state. *See* 305 U.S. 337, 350 (1938). It explained that: "[N]o State can be excused from performance [of a constitutional mandate] by what another State may do or fail to do. That separate responsibility of each State within its own sphere is of the essence of statehood maintained under our dual system." *Id.*

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in El Paso remain. If the Fifth Circuit's judgment were affirmed, both of these clinics would have to close.

II. THE PROPER REMEDY IS STATEWIDE INVALIDATION OF THE TEXAS REQUIREMENTS

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

The Texas requirements serve an impermissible purpose. *See supra* pp. 35-44. They also fail to advance a valid state interest to an extent sufficient to warrant the burdens they impose on women. *See supra* pp. 49-53. Consequently, they are unconstitutional in all of their applications. Statewide invalidation of the requirements is therefore the appropriate remedy.

This is true with respect to the admitting-privileges requirement notwithstanding that Petitioners did not expressly request statewide invalidation of that provision in their Complaint.[23] The district court had an obligation to tailor its remedy to the scope of the constitutional violation proven at trial. *See Citizens United*, 558 U.S. at 331 (holding a statutory provision unconstitutional on its face, even though the plaintiff had challenged it only on an as-applied basis) ("[T]he distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge . . . . [I]t goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint."); *accord id.* at

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[23] Petitioners requested several forms of as-applied relief from that provision, as well as "such other and further relief as the Court may deem just, proper, and equitable." J.A. at 167.

375 (Roberts, C.J., joined by Alito, J., concurring) ("Because it is necessary to reach Citizens United's broader argument that *Austin* should be overruled, the debate over whether to consider this claim on an as-applied or facial basis strikes me as largely beside the point."); *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2458 (2015) (Scalia, J., joined by Roberts, C.J., & Thomas, J., dissenting) ("[T]he effect of a given case is a function not of the plaintiff's characterization of his challenge, but the narrowness or breadth of the ground that the Court relies upon in disposing of it . . . . I see no reason why a plaintiff's self-description of his challenge as facial would provide an independent reason to reject it unless we were to delegate to litigants our duty to say what the law is."); *see generally* Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1339 (2000) ("[O]nce a case is brought, no general categorical line bars a court from making broader pronouncements of invalidity in properly 'as-applied' cases.").

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

Alternatively, statewide invalidation of the Texas requirements is warranted because they operate as a substantial obstacle to abortion access in a large fraction of the cases in which they are relevant. *See Casey*, 505 U.S. at 895. In *Casey*, the Court invalidated the spousal notification provision on its face because, "in a large fraction of the cases in which [it] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion." *Id.* In reaching this conclusion, the Court did not determine

the precise number of women who would be hindered from seeking abortions. Instead, it identified the population of women who would be affected—women who experienced domestic violence—and then considered whether the burden imposed by the law would operate as a substantial obstacle for a significant number of those women. *Id.* at 894.

Here, the Texas requirements would close more than three-quarters of the abortion clinics in the State, Pet. App. 138a, prevent the remaining clinics from operating at full capacity, *see* J.A. 237-38, and deter new clinics from opening, Pet. App. 140a. The resulting shortage of abortion providers would prevent some women from obtaining abortions and make it much harder for others to do so. The district court concluded that "the act's ambulatory-surgical-center requirement, combined with the already in-effect admitting-privileges requirement, creates a brutally effective system of abortion regulation that reduces access to abortion clinics," Pet. App. 144a, and that "the practical impact on Texas women due to the clinics' closure statewide would operate for a significant number of women in Texas just as drastically as a complete ban on abortion," Pet. App. 141a. These unwarranted burdens, like the burdens imposed by the spousal notification provision, operate as a substantial obstacle to abortion access in a large fraction of relevant cases. *Cf. Casey*, 505 U.S. at 895.

III. RES JUDICATA DOES NOT BAR ANY OF PETITIONERS' CLAIMS

A. Res Judicata Does Not Limit the Scope of Relief That a Court May Grant Following Adjudication of a Valid Claim

After concluding that Petitioners' "as-applied" undue burden claims were not barred by res judicata because they were based on facts that occurred after judgment was entered in *Abbott*,[24] Pet. App. 60a, the Fifth Circuit erred in holding that the very same claims were barred to the extent they sought facial invalidation of the challenged requirements. Res judicata precludes claims, not remedies. The doctrine—intended to promote judicial economy and avoid the costs of redundant litigation—is not intended to limit the scope of relief that a court may grant following the adjudication of a valid claim. 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 remedy that is appropriate. The Fifth Circuit's adherence to a rigid dichotomy between facial and as-applied challenges is improper and thoroughly distorted its res judicata analysis. *See* Pet. App. 36a-42a, 60a-63a.

The Fifth Circuit's error is particularly egregious given that the newly-developed facts on which it re-

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[24] Res judicata does not preclude claims based on material facts that occurred after judgment was entered in a prior case. *See Lawlor v. Nat'l Screen Serv. Corp.*, 349 U.S. 322, 328 (1955); Restatement (Second) of Judgments § 24 cmt. f (Am. Law Inst. 1982).

lied to conclude that Petitioners' as-applied claims are not precluded concern the *statewide* effects of the challenged requirements—namely, widespread clinic closures; the inability of physicians to obtain admitting privileges despite diligent effort; and the impact of the diminished pool of doctors and facilities providing abortions on women's access to those services. *See* Pet. App. 60a ("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."). These facts plainly support the district court's award of facial relief. Accordingly, the Fifth Circuit had no tenable grounds for concluding that the newly-developed facts were material to Petitioners' undue burden claims only insofar as those claims sought as-applied relief.

B. The Fifth Circuit's Improper Application of Res Judicata Encourages the Filing of Premature Claims

The Fifth Circuit also erred in holding that Petitioners should have challenged the ASC requirement in *Abbott*, even though DSHS had yet to adopt final implementing regulations that indicated the extent of the burdens that compliance with the requirements would impose. "The preclusive effect of a federal-court judgment is determined by federal common law," *Taylor v. Sturgell*, 553 U.S. 880, 891 (2008), which prescribes a transactional test to determine whether two cases involve the same claim

for res judicata purposes, *see generally United States v. Tohono O'Odham Nation*, 131 S. Ct. 1723, 1730 (2011); Restatement (Second) of Judgments § 24. This test is "pragmatic[]," not formal, and turns on whether the claims under consideration are based on a "common nucleus of operative facts." Restatement (Second) of Judgments §§ 24(2); 24 cmt. b. "Among the factors relevant to a determination whether the facts are so woven together as to constitute a single claim are their relatedness in time, space, origin, or motivation, and whether, taken together, they form a convenient unit for trial purposes." *Id.*

Although the Fifth Circuit paid lip service to this test, it failed to apply it faithfully. The test is not satisfied merely because the ASC requirement was enacted as part of an omnibus statute that also included the provisions challenged in *Abbott*. The ASC requirement operates independently from those provisions, as evidenced by its distinct effective date and the need for implementing regulations to give it effect. Further, Petitioners' claims against the ASC requirement called for different proof than the claims in *Abbott*. Indeed, during a pre-trial hearing, Respondents' counsel advocated bifurcating the trial, because the ASC requirement raised different factual issues and would require different proof than the admitting-privileges requirement. Record 2785-86.

Critically, before December 27, 2013, when DSHS adopted final regulations to implement the ASC requirement, Petitioners did not know the extent of the burdens that the requirement would impose because they did not know whether abortion facilities would

be eligible for waivers or grandfathering on equivalent terms with ASCs.[25] Had the regulations made abortion facilities eligible for waivers or grandfathering, Petitioners would have applied for such administrative relief and attempted to become licensed instead of challenging the ASC requirement.

By compelling litigants who challenge one provision of a statutory scheme to challenge all provisions

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[25] Courts generally treat the ability of facilities to seek waivers and grandfathering 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 v. Virginia*, 462 U.S. 506, 515 (1983) (upholding requirement that second-trimester abortions be performed in licensed hospitals, defined to include certain outpatient surgical facilities) ("The second category of requirements outlines construction standards for outpatient surgical clinics, but also provides that 'deviations from the requirements prescribed herein may be approved if it is determined that the purposes of the minimum requirements have been fulfilled.'"); *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r, Ind. Dep't of Health*, 64 F. Supp. 3d 1235, 1260 (S.D. Ind. 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 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.").

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).

CONCLUSION

For the foregoing reasons, the Fifth Circuit's judgment should be reversed.

Respectfully submitted,

STEPHANIE TOTI
Counsel of Record
DAVID BROWN
JANET CREPPS
JULIE RIKELMAN
CENTER FOR REPRODUCTIVE RIGHTS
199 Water Street, 22nd Floor
New York, NY 10038
(917) 637-3684
stoti@reprorights.org

LEAH M. LITMAN
1563 Massachusetts Ave.
Cambridge, MA 02138

J. ALEXANDER LAWRENCE
MORRISON & FOERSTER LLP
250 W. 55th Street
New York, NY 10019

MARC A. HEARRON
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., N.W.
Washington, DC 20006

JAN SOIFER
PATRICK J. O'CONNELL
O'CONNELL & SOIFER LLP
98 San Jacinto Blvd., Ste. 540
Austin, TX 78701

Counsel for Petitioners

DECEMBER 28, 2015

App. 1

Impact of HB2 on the Geographic Distribution of Abortion Facilities in Texas