No. _____

In The
Supreme Court of the United States

WHOLE WOMAN'S HEALTH; AUSTIN WOMEN'S HEALTH CENTER; KILLEEN WOMEN'S HEALTH CENTER; NOVA HEALTH SYSTEMS D/B/A REPRODUCTIVE SERVICES; SHERWOOD C. LYNN, JR., M.D.; PAMELA J. RICHTER, D.O.; AND LENDOL L. DAVIS, M.D., ON BEHALF OF THEMSELVES AND THEIR PATIENTS, 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, RESPONDENTS.

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

PETITION FOR A WRIT OF CERTIORARI

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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). It held that a restriction on this liberty is impermissible if it amounts to an undue burden. *Id.* at 876-77. 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.

The questions presented are:

(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?

QUESTIONS PRESENTED – Continued

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 percent 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 Fifth Circuit's opinion is reported at 790 F.3d 563 and reprinted in the Appendix to the Petition ("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 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 App. 79a-127a. The district court's opinion is reported at 46 F. Supp. 3d 673 and reprinted at App. 128a-159a. The district court's unpublished order granting in part and denying in part Respondents' motion to dismiss is reprinted at App. 160a-179a.

JURISDICTION

The Fifth Circuit entered judgment on June 9, 2015. App. 1a. 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; House Bill 2 ("H.B. 2" or the "Act"), 83rd Leg., 2nd Called Sess. (Tex. 2013); and 25 Tex. Admin. Code §§ 139.40, 139.53, and 139.56, which are reproduced at App. 180a; 181a-202a; 203a-208a; 209a-214a; and 215a-216a.

INTRODUCTION

This case will determine whether Texas can force more than 75 percent of the State's abortion clinics to

close by enforcing a pair of statutory requirements that serve no valid state interest. The Fifth Circuit upheld the requirements despite findings by the district court that they will not advance the State's asserted interest in promoting women's health but will instead jeopardize women's health by drastically reducing access to safe and legal abortion services throughout the State. The Fifth Circuit's ruling rests on its determination that the undue burden standard does not require—or even permit—inquiry into the extent to which an abortion restriction furthers a valid state interest. It stands in direct conflict with decisions of the Seventh and Ninth Circuits and the Iowa Supreme Court, which hold that courts must examine the extent to which laws regulating abortion actually further a valid state interest in assessing whether the burdens they impose on abortion access are undue.

In rejecting the inquiry mandated by its sister circuits and the Iowa Supreme Court, the Fifth Circuit departs radically from this Court's precedents, permitting states to restrict abortion based on the mere articulation of rational legislative objectives, regardless of whether the restrictions are reasonably designed to further those objectives. Further, the Fifth Circuit's conclusion that the challenged requirements do not have the purpose or effect of creating substantial obstacles to abortion access, even though they would cause a massive reduction in the number and geographic distribution of abortion providers in Texas, cannot be reconciled with this

Court's decisions. Overall, the Fifth Circuit renders the undue burden standard a toothless protection for the fundamental liberty recognized in *Casey*, which has facilitated the "ability of women to participate equally in the economic and social life of the Nation" for more than four decades. *Casey*, 505 U.S. at 856.

If allowed to take effect, the Fifth Circuit's decision would cause profound and irreparable harm to the rights, health, and dignity of women throughout Texas, the second most populous state in the nation. This Court has described the decision to have an abortion as one of "the most intimate and personal choices a person may make in a lifetime[,] . . . central to personal dignity and autonomy." *Id*. at 851. But the challenged requirements "would operate for a significant number of women in Texas just as drastically as a complete ban on abortion." App. 141a. They would delay or prevent thousands of women from obtaining abortions and lead some to resort to unsafe or illegal methods of ending an unwanted pregnancy. To prevent such irreparable harm from occurring on a large scale, this Court has intervened in the case twice already—first after the Fifth Circuit stayed the district court's judgment and again after the Fifth Circuit issued its ruling on the merits. It should now grant review.

This case also presents a res judicata question. The Fifth Circuit's application of res judicata is so obviously and egregiously improper that it begs review by this Court. The court of appeals held that Petitioners' undue burden claims were *not precluded*

to the extent they sought as-applied relief from the challenged requirements, but were precluded to the extent they sought facial relief. This conclusion is baffling. Res judicata bars claims, not remedies. The doctrine cannot be used to limit the scope of relief that a court may grant following the adjudication of an otherwise valid claim. Equally baffling is the Fifth Circuit's ruling that res judicata requires litigants to challenge all provisions of an omnibus statute at the same time—even those provisions awaiting the adoption of implementing regulations. If allowed to stand, this ruling would create perverse incentives for future litigants in a wide variety of cases, encouraging the filing of premature claims that speculate about a law's impact. Although the Court need not reverse the Fifth Circuit's res judicata holding to reach the constitutional issues, given that the holding did not extend to what the Fifth Circuit characterized as Petitioners' "as-applied" claims, the Court should nevertheless grant review on the res judicata question to correct the Fifth Circuit's egregious errors and ensure that Petitioners are able to obtain complete relief from the challenged requirements.

STATEMENT OF THE CASE

A. Statutory And Regulatory Background

On July 18, 2013, Texas enacted H.B. 2, an omnibus statute that imposes a variety of requirements on abortion providers. The Act's provisions include an "admitting-privileges requirement," Act § 2 (codified at Tex. Health & Safety Code Ann.

§ 171.0031(a)(1)(A)); 25 Tex. Admin. Code §§ 139.53(c)(1), 139.56(a)(1), and an "ASC requirement," Act § 4 (codified at Tex. Health & Safety Code Ann. § 245.010(a)); 25 Tex. Admin. Code § 139.40.

The admitting-privileges requirement provides that "[a] physician performing or inducing an abortion must, on the date the abortion is performed or induced, have active admitting privileges at a hospital that is located not further than 30 miles from the location at which the abortion is performed or induced." Tex. Health & Safety Code Ann. § 171.0031(a)(1)(A). It was scheduled to take effect on October 29, 2013. Act § 12.

The ASC requirement amends the existing framework for licensing abortion providers under Texas law to provide 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]." Tex. Health & Safety Code Ann. § 245.010(a). The Act directed the Texas Department of State Health Services ("DSHS") 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.

DSHS proposed regulations to implement the ASC requirement on September 27, 2013, 38 Tex. Reg. 6536-46 (Sept. 27, 2013), and adopted them on December 27, 2013, following a three-month-long

notice-and-comment period during which 19,799 comments were submitted, 38 Tex. Reg. 9577-93 (Dec. 27, 2013). These implementing regulations amended the existing abortion facility regulations to incorporate by reference some of the regulations governing ASCs. *See* 38 Tex. Reg. 6537. But DSHS opted not to incorporate regulations governing ASCs "in instances where [the existing abortion facility regulations] prescribe[ ] more stringent qualifications or safety requirements." *Id.* Further, DSHS decided not to incorporate the ASC regulations providing for grandfathering and waivers from construction requirements. *See* 38 Tex. Reg. 6537, 6540 (declining to incorporate 25 Tex. Admin. Code § 135.51(a)). Consequently, while ASCs are generally eligible for grandfathering and waivers that will not adversely impact patient health or safety, abortion facilities operating under the ASC requirement are not. As a result of these choices made by DSHS, the standards for abortion facilities overall are not "equivalent" to the standards for ASCs; they are far more burdensome than the standards for ASCs.

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*, challenging two provisions of H.B. 2 that were scheduled to take effect on October 29, 2013: the admitting-privileges requirement and a provision regulating medical abortions (*i.e.*, abortions performed using medication rather than surgery). The

challengers asserted that the two provisions violated the Due Process Clause of the Fourteenth Amendment and requested declaratory and injunctive relief.

Simultaneously with filing the case, the plaintiffs moved for a preliminary injunction. Pursuant to Federal Rule of Civil Procedure 65(a)(2), the district court (Yeakel, J.) consolidated the hearing on that motion with the trial on the merits. *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 951 F. Supp. 2d 891, 896 (W.D. Tex. 2013). The trial commenced on October 21, 2013, less than one month after the case was filed. Given the expedited nature of the proceedings, there was no opportunity for pre-trial discovery. Further, the defendants were permitted, over the plaintiffs' objection, to submit all testimonial evidence by declaration. As a result, the plaintiffs had no opportunity to depose any of the defendants' witnesses or to cross-examine them at trial.

On October 28, 2013, the district court issued an opinion and judgment holding the admitting-privileges requirement unconstitutional in all of its applications and the medical-abortion provision unconstitutional in discrete applications. *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 that

judgment in large part on March 27, 2014,[1] *see Abbott*, 748 F.3d at 587.

With respect to the admitting-privileges requirement, the Fifth Circuit's analysis was highly fact-dependent, as the district court's analysis had been. Based on the pre-enforcement, trial court record,[2] the Fifth Circuit held that the plaintiffs had failed to meet their burden of proving that the admitting-privileges requirement imposed an undue burden on abortion access because "[a]ll of the major Texas cities, including Austin, Corpus Christi, Dallas, El Paso, Houston, and San Antonio, continue to have multiple clinics where many physicians will have or obtain hospital admitting privileges." *Id*. at 598. In addition, the court concluded that the evidence available at the time failed to show "that abortion practitioners will likely be unable to comply with the privileges requirement." *Id*.

C. District Court Proceedings

After the Fifth Circuit permitted the admitting-privileges requirement to take effect on October 31,

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[1] The Fifth Circuit upheld the admitting-privileges requirement generally but held that it "may not be enforced against abortion providers who timely applied for admitting privileges under the statute but are awaiting a response from the hospital." *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583, 605 (5th Cir. 2014).

[2] The Fifth Circuit declined to consider developments that occurred after the admitting-privileges requirement took effect on October 31, 2013. *See Abbott*, 748 F.3d at 599 n.14.

2013, numerous abortion clinics throughout Texas were forced to close. In addition, on December 27, 2013, DSHS adopted final rules to implement the ASC requirement. *See* 38 Tex. Reg. 9577-93 (Dec. 27, 2013). As adopted, those rules would have forced the vast majority of remaining abortion clinics to close, eliminating all abortion clinics located south and west of San Antonio (including in Corpus Christi and El Paso) and leaving fewer than ten clinics to serve the second largest state in the United States by both population and area.[3]

In light of these factual developments, Petitioners filed this case on April 2, 2014, to challenge the admitting-privileges and ASC requirements on Fourteenth Amendment grounds. Petitioners requested specific declaratory and injunctive relief from the challenged requirements, as well as "such other and further relief as the Court may deem just, proper, and equitable." Fifth Circuit Record on Appeal ("ROA") at 72.

Respondents moved to dismiss Petitioners' complaint, asserting that Petitioners' claims were barred by res judicata and also failed on the merits as a matter of law. The district court (Yeakel, J.) rejected Respondents' res judicata defense because facts

[3] United States Census Bureau, *U.S. and World Population Clock* (2014), http://www.census.gov/popclock/; United States Census Bureau, *State Area Measurements and Internal Point Coordinates* (2010), http://www.census.gov/geo/reference/state-area.html.

material to Petitioners' claims had occurred after judgment had been entered in *Abbott*. *See* App. 168a-170a. On the merits, the district court held that some of Petitioners' claims failed as a matter of law, but it sustained Petitioners' claims that the admitting-privileges and ASC requirements violated the Due Process Clause by imposing an undue burden on access to abortion. App. 178a.

The court held a bench trial on those claims commencing on August 4, 2014. On August 29, 2014, based on the evidence presented, which included the testimony of nineteen live witnesses, the court found, *inter alia*, that abortion in Texas is extremely safe, *see* App. 145a-146a; the challenged requirements will not enhance the safety of abortion procedures but rather will expose women to greater health risks by severely restricting the availability of legal abortion services, *see* App. 146a-147a; and the challenged requirements had and would force dozens of abortion clinics throughout Texas to close, drastically reducing the number and geographic distribution of licensed abortion providers in the State, *see* App. 138a-139a.

The district court concluded that the challenged 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." App. 147a. It further concluded that "the severity of the burden imposed by both requirements is not balanced by the weight of the interests underlying them." App. 145a. As a result, the district court held that the

challenged requirements impose an undue burden on abortion access. App. 148a. Its judgment set 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 to the extent they had been declared unconstitutional. App. 158a.

D. 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, forcing over a dozen of Texas' remaining abortion clinics to close immediately. App. 97a-98a; 119a. 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 sustaining the district court's injunction against enforcement of the admitting-privileges requirement with respect to Petitioners' clinics in McAllen and El Paso. *Whole Woman's Health v. Lakey*, 135 S. Ct. 399 (2014) (mem.). As a result, the clinics that had closed following imposition of the stay were able to reopen.

On June 9, 2015, the Fifth Circuit issued a ruling on the merits. 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 physical-plant requirements on the McAllen

clinic. App. 70a. It similarly held that the admitting-privileges requirement does not amount to an undue burden, except as applied to one of the physicians affiliated with the McAllen clinic, Dr. Lynn. 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.

Id. 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." App. 78a.

The Fifth Circuit's ruling hinged on its determination that the undue burden standard does not require—or even permit—inquiry into the extent to which an abortion restriction furthers a valid state interest. App. 48a-49a. ("[T]he district court concluded that H.B. 2 would not further the State's interests in maternal health and increased quality of care. In defense of this approach, [Petitioners] argue that the two requirements at issue are unconstitutional unless they are shown to actually further the State's legitimate interests. We disagree with the [Petitioners] and the district court's approach.") (footnote omitted). The court of appeals explained that its prior decision in *Abbott* had "disavowed the inquiry employed by the district court," and instead required an abortion restriction to be sustained if "any conceivable rationale exists" for its enactment. App. 49a-50a. Respondents satisfied this standard, the court concluded, by asserting a health rationale for the challenged requirements, even though the district court had found that:

- "[Petitioners] . . . demonstrated that women will not obtain better care or experience more frequent positive outcomes at an ambulatory surgical center as compared to a previously licensed facility," App. 146a;
- "Many of the building standards mandated by the act and its implementing

rules have such a tangential relationship to patient safety in the context of abortion as to be nearly arbitrary," *Id.*;

- "[O]bjectives proffered for the [admitting-privileges] requirement . . . are not credible due, in part, to evidence that doctors in Texas have been denied privileges for reasons not related to clinical competency," App. 147a; and
- "Higher health risks associated with increased delays in seeking early abortion care, risks associated with longer distance automotive travel on traffic-laden highways, and the act's possible connection to observed increases in self-induced abortions almost certainly cancel out any potential health benefit," App. 146a.

With respect to Respondents' res judicata defense, the Fifth Circuit held that Petitioners' undue burden claims were not barred by res judicata insofar as Petitioners sought partial invalidation as a remedy, because material facts had developed after entry of judgment in *Abbott*. App. 60a-63a. But it held that res judicata barred the same undue burden claims insofar as Petitioners sought facial invalidation as a remedy, App. 35a-36a; 59a, even though the newly developed facts concerned the statewide impact of the challenged requirements, App. 60a.

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.).

REASONS FOR GRANTING THE WRIT

I. CERTIORARI IS WARRANTED ON THE CONSTITUTIONAL QUESTIONS.

a. The Fifth Circuit's decision is in direct and acknowledged conflict with decisions of the Seventh and Ninth Circuits and the Iowa Supreme Court.

The courts of appeals are divided on the important question of whether, when reviewing a law that regulates abortion on the basis of women's health, a court must examine the extent to which the law actually promotes women's health in determining whether the burdens it imposes on abortion access are undue. The Seventh and Ninth Circuits answer this question affirmatively, as this Court's precedents require. The Fifth Circuit, in contrast, proscribes such an inquiry, maintaining that a law regulating abortion access must be sustained if "any conceivable rationale" exists for its enactment, App. 50a, a position that cannot be reconciled with this Court's decisions. The Iowa Supreme Court recently recognized this conflict, and it joined the Seventh and Ninth Circuits in repudiating the Fifth Circuit's approach.[4]

[4] In discussing the circuit split on this issue, the Ninth Circuit and Iowa Supreme Court both interpret the Sixth Circuit's opinion in *Planned Parenthood Southwest Ohio Region v. DeWine*, 696 F.3d 490 (6th Cir. 2012), as implicitly adopting

(Continued on following page)

In *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. at 845-46. The Court held, however, that the trimester framework employed in earlier cases was too rigid to permit a proper balancing of that liberty with a state's interest in protecting fetal life. The Court replaced the trimester framework with the undue burden standard to afford greater weight to a state's interest in fetal life from the outset of pregnancy. *See id.* at 876-77. The Court explained that: "A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[5] *Id*. at 877.

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the same position as the Fifth Circuit. *See Planned Parenthood Ariz., Inc. v. Humble*, 753 F.3d 905, 914 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 870 (2014) (citing *DeWine*, 696 F.3d at 513-18); *Planned Parenthood of the Heartland, Inc. v. Iowa Bd. of Med*., 865 N.W.2d 252, 264 (Iowa 2015) (citing same). Although that would signify an even deeper split in authority, Petitioners confine the discussion here to cases that explicitly address the issue on which this Court's review is sought.

[5] The undue burden standard emerged from a long line of cases addressing the protections afforded to individual liberties, and it is an essential component of the continued development of that jurisprudence. Those cases make clear that states may not restrict a fundamental liberty based on the mere articulation of rational legislative objectives; to the contrary, burdens on individual liberty are permissible only to the extent they yield an important public benefit. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) ("The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.").

"A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it." *Id.* "And a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends." *Id.*

With respect to laws aimed at promoting the state's interest in women's health, this Court explained that, although "the State may enact regulations to further the health or safety of a woman seeking an abortion[,]. . . . [u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right." *Id*. at 878. Applying this standard, the Court upheld challenged recordkeeping and reporting requirements only after concluding that they were "'reasonably directed to the preservation of maternal health'" and the burdens they imposed were slight. *Id.* at 900-01 (quoting *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 80 (1976)).

Consistent with *Casey*, the Seventh Circuit requires meaningful scrutiny of laws that restrict abortion access in the interest of promoting women's health to ensure that the restrictions actually serve that interest. *See Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 798 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 2841 (2014). In *Van Hollen*, the

court affirmed entry of a preliminary injunction against enforcement of a Wisconsin admitting-privileges law after concluding that the evidence in the record failed to establish that the law would provide any health benefit. *Id.* The court explained: "The cases that deal with abortion-related statutes sought to be justified on medical grounds require not only evidence (here lacking as we have seen) that the medical grounds are legitimate but also that the statute not impose an 'undue burden' on women seeking abortions." *Id.* The court further held that "[t]he feebler the medical grounds, the likelier the burden, even if slight, to be 'undue' in the sense of disproportionate or gratuitous." *Id.*

The Ninth Circuit has adopted a similar approach. In *Humble*, it held that the district court had abused its discretion by failing to preliminarily enjoin enforcement of an Arizona law restricting medical abortion, because the record contained "no evidence whatsoever that the law furthers any interest in women's health." *Humble*, 753 F.3d at 914. The court explained that whether a law is an "[u]nnecessary health regulation[ ]" as that term is used in *Casey* "depends on whether and how well it serves the state's interest." *Id.* at 913. The Ninth Circuit acknowledged the Fifth Circuit's contrary conclusion and rejected it. *Id.* at 914.

Recently, the Iowa Supreme Court joined these courts of appeals in holding that *Casey* requires meaningful judicial scrutiny of laws burdening abortion to ensure that such laws serve a valid state

interest to an extent sufficient to justify the burdens they impose. *Planned Parenthood of the Heartland*, 865 N.W.2d at 264. The court declared: "Like the Seventh and Ninth Circuits, we believe the 'unnecessary health regulations' language used in *Casey* requires us to weigh the strength of the state's justification for a statute against the burden placed on a woman seeking to terminate her pregnancy when the stated purpose of a statute limiting a woman's right to terminate a pregnancy is to promote the health of the woman." *Id.* It, too, expressly rejected the approach taken by the Fifth Circuit. *Id.*

The Fifth Circuit's decision in this case thus stands in direct and acknowledged conflict with the decisions of these other courts. Indeed, it specifically rejected the approach to the undue burden standard adopted in *Van Hollen*, declaring that, "[i]n our circuit, we do not balance the wisdom or effectiveness of a law against the burdens the law imposes." App. 51a. Had the Fifth Circuit been faithful to *Casey* and adopted the view of the undue burden standard employed by the other courts, the outcome of this case would have been different, because the district court concluded that "the severity of the burden imposed by both requirements is not balanced by the weight of the interests underlying them," App. 145a, and indeed, that the challenged requirements fail to promote women's health at all, App. 146a-147a.

Accordingly, this Court's review is warranted to resolve the split in authority caused by the Fifth Circuit's erroneous interpretation of the undue burden

standard and restore uniformity to the application of the Fourteenth Amendment's Due Process Clause.

b. The Fifth Circuit's decision is in conflict with Casey *and other relevant decisions of this Court.*

The Fifth Circuit departed radically from this Court's precedents both in refusing to conduct the meaningful review required by the undue burden standard and in concluding—based on its overly deferential review—that the admitting-privileges and ASC requirements do not have the purpose or effect of creating substantial obstacles to abortion access in Texas. By upholding laws that would cause a significant reduction in the availability of abortion services while failing to actively and effectively further any valid state interest, the Fifth Circuit renders the undue burden standard a hollow protection for the liberty protected by *Casey*.

The Fifth Circuit flouted longstanding precedent in holding—contrary to the Seventh and Ninth Circuits and the Iowa Supreme Court—that the undue burden standard does not require—or even permit—courts to evaluate the extent to which abortion restrictions further a valid state interest. This Court has long maintained that, when reviewing an abortion restriction: "The existence of a compelling state interest in health . . . is only the beginning of the inquiry. The State's regulation may be upheld only if it is reasonably designed to further that state interest." *City of Akron v. Akron Ctr. for Reprod. Health,*

Inc., 462 U.S. 416, 434 (1983), *overruled in part on other grounds by Casey*, 505 U.S. at 870, 882-87; *accord Danforth*, 428 U.S. at 65-67, 75-79, 80-81. As explained in the prior section, *Casey* merged that inquiry into the undue burden standard.[6] *See* 505 U.S. at 900 (quoting *Danforth*, 428 U.S. at 80).

This Court's subsequent decision in *Gonzales* confirmed the need for courts to ensure that abortion restrictions actively and effectively serve a valid state interest. *See Gonzales v. Carhart*, 550 U.S. 124, 160 (2007) (examining the manner in which the challenged law furthered the government's interest in respect for life). This Court emphasized that courts should not blindly defer to legislative findings; rather, they "retain[ ] an independent constitutional duty to review [such] findings where constitutional rights are at stake." *Id.* at 165.

The Fifth Circuit acknowledged that this Court's precedents require "a law regulating previability abortion" to be "reasonably related to (or designed to further) a legitimate state interest." App. 15a (citing *Casey*, 505 U.S. at 878). Nevertheless, the Fifth

[6] Further, *Casey*'s inclusion of a purpose prong in the undue burden standard demonstrates that laws restricting abortion may not be sustained based on the mere articulation of rational legislative objectives. Rather, courts must examine whether such laws are reasonably designed to serve the state's asserted interests. A court could not adequately assess whether a law is pretextual if, as the Fifth Circuit held, examination of the fit between its means and ends were forbidden.

Circuit held that its own decision in *Abbott* "disavowed" the need for an inquiry into the extent to which an abortion restriction furthers the state's asserted interest. App. 49a-50a (citing *Abbott*, 748 F.3d at 594). Such blatant defiance of this Court's precedents calls for review.

The Fifth Circuit's analysis of the purpose of the challenged requirements also conflicts with this Court's decisions. For example, the Fifth Circuit erroneously held that the failure of the challenged requirements to benefit women's health does not constitute evidence of their purpose. This Court, however, routinely considers a law's failure to serve its stated goals as evidence of an improper purpose. *See, e.g.*, *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2669 (2011); *Romer v. Evans*, 517 U.S. 620, 632 (1996). Notably, in *Danforth*, this Court held that the lack of fit between Missouri's ban on saline amniocentesis as a method of second-trimester abortion, and the State's asserted interest in promoting women's health suggested that the real aim of the law was to restrict the availability of second-trimester abortion services. *See* 428 U.S. at 78-79 ("[T]he outright legislative proscription of saline fails as a reasonable regulation for the protection of maternal health. It comes into focus, instead, as an unreasonable or arbitrary regulation designed to inhibit, and having the effect of inhibiting, the vast majority of abortions after the first 12 weeks.").

Similarly, the Fifth Circuit improperly held that the effect of the challenged requirements cannot

constitute evidence of their purpose. App. 46a. This Court has long recognized that "the effect of a law in its real operation is strong evidence of its object."[7] *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) (holding that a challenged statute's "operation in practice confirms [its] purpose"). The Fifth Circuit also rejected the disparate treatment of abortion providers as evidence of an improper purpose despite the many decisions of this Court recognizing that laws targeting a particular group for disfavored treatment are more likely to have an improper purpose than those that are neutral and generally applicable. *See, e.g.*, *Windsor*, 133 S. Ct. at 2693-94; *Romer*, 517 U.S. at 633; *Church of the Lukumi*, 508 U.S. at 524.

Finally, the Fifth Circuit's analysis of the effects of the challenged requirements cannot be reconciled with this Court's decisions, which require courts to conduct a contextualized analysis of a law's impact on women's ability to access abortion services. In *Casey*, for example, the Court held that a spousal-notification requirement created a substantial obstacle to abortion access, because married women

[7] The Fifth Circuit's reliance on *Mazurek v. Armstrong*, 520 U.S. 968 (1997), for a contrary conclusion is misplaced. App. 46a. Far from holding that purpose and effect are independent inquiries, *Mazurek* held it erroneous to conclude that a law had the purpose of imposing a substantial obstacle to abortion access when it could not possibly have had that effect. *See* 520 U.S. at 973-74.

affected by domestic violence were "likely to be deterred from procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases." 505 U.S. at 894. In reaching this conclusion, the Court drew inferences based on demographic data, the incidence of women affected by domestic violence, and qualitative testimony concerning the expected impact of the spousal-notification requirement on such women, explaining that "[w]e must not blind ourselves to the fact[s]" of women's lives. *Id.* at 888-94. The Fifth Circuit, however, rebuked the district court for conducting the same kind of analysis, holding it was wrong to conclude that the admitting-privileges and ASC requirements created substantial obstacles to abortion access based on its finding that:

> [T]ravel distances [resulting from widespread clinic closures] combine[ ] with the following practical concerns to create a *de facto* barrier to abortion for some women: "lack of availability of child care, unreliability of transportation, unavailability of appointments at abortion facilities, unavailability of time off from work, immigration status and inability to pass border checkpoints, poverty level, the time and expense involved in traveling long distances, and other, inarticulable psychological obstacles."

App. 55a. The Fifth Circuit's refusal to permit the district court to examine the increased obstacles that women would face in accessing abortion services as a

result of the challenged requirements cannot be reconciled with *Casey*.

Further, the Fifth Circuit's failure to find that the abrupt closure of more than 75 percent of Texas abortion clinics would create substantial obstacles to abortion access makes a mockery of the standard articulated in *Casey*. Such a steep decline in the number of abortion providers—without any change in the demand for abortion services—"does not merely make abortions a little more difficult or expensive to obtain." *Casey*, 505 U.S. at 893. Instead, as the district court found, it would "undeniably reduce meaningful access to abortion care for women throughout Texas[,]. . . . operat[ing] for a significant number of women . . . just as drastically as a complete ban on abortion." App. 141a. Under this Court's precedents, such effects are constitutionally impermissible.

In sum, certiorari is warranted because the Fifth Circuit's decision is in direct conflict with relevant decisions of this Court.

II. CERTIORARI IS WARRANTED ON THE RES JUDICATA QUESTION.

a. The Fifth Circuit's adherence to a rigid dichotomy between facial and as-applied challenges is in conflict with this Court's decision in Citizens United.

After concluding that Petitioners' "as-applied" undue burden claims were not barred by res judicata

because they are based on facts that occurred after judgment was entered in *Abbott*,[8] App. 60a, the Fifth Circuit erred in holding that the very same undue burden claims were barred to the extent they sought facial invalidation of the challenged requirements.[9] Res judicata precludes claims, not remedies. The doctrine—intended to promote judicial economy and

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[8] It is well-settled that 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) ("Material operative facts occurring after the decision of an action with respect to the same subject matter may in themselves, or taken in conjunction with the antecedent facts, comprise a transaction which may be made the basis of a second action not precluded by the first. . . . Where important human values . . . are at stake, even a slight change of circumstances may afford a sufficient basis for concluding that a second action may be brought.").

[9] The Court can reach the constitutional questions without reversing the Fifth Circuit's application of res judicata. Petitioners' "as-applied" claims provide a vehicle for the Court to resolve the split in authority concerning the extent to which a law that restricts abortion must further a valid state interest. And if the Court were to conclude that the challenged requirements constitute an undue burden in all or a large fraction of their applications, it would be free to invalidate them broadly. *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 320, 331 (2010) (quoting 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."). Nevertheless, in an excess of caution, Petitioners ask the Court to grant certiorari on the res judicata question to ensure that they are able to obtain complete relief from the challenged requirements.

avoid the costs of redundant litigation—is not intended to limit the scope of relief that a court may grant following the adjudication of an otherwise 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 otherwise appropriate. The Fifth Circuit's adherence to a rigid dichotomy between facial and as-applied challenges is in direct conflict with this Court's precedents, most notably *Citizens United*. *See* 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.").[10]

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[10] *Accord Citizens United*, 558 U.S. at 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.").

The Fifth Circuit's error is particularly egregious given that the newly-developed facts on which it relies 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* 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.[11] 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.

The Fifth Circuit's application of res judicata thus evinces a fundamentally flawed understanding of the distinction between facial and as-applied challenges. The consequences of this error are serious and far-reaching, threatening to further muddle

[11] Indeed, it was the absence of these facts from the pre-enforcement record in *Abbott* that led the Fifth Circuit to reverse the district court's judgment granting facial relief. *See Abbott*, 748 F.3d at 597-99.

an area of jurisprudence that is already racked with confusion and distort the adjudication of challenges to a broad array of statutory provisions. Accordingly, this Court should grant review.

b. The Fifth Circuit's improper application of res judicata to bar multiple challenges to an omnibus statute creates perverse incentives for future litigants.

"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.* § 24 cmt. b.

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. ROA.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 it would impose, because they did not know whether abortion facilities would be eligible for waivers or grandfathering on equivalent terms with ASCs.[12] Had the regulations made abortion

[12] 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 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.") (internal quotation marks omitted); *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

(Continued on following page)

facilities eligible for waivers or grandfathering, Petitioners would have applied for such administrative relief and attempted to become licensed. If successful, they would not have challenged the ASC requirement in court.

By compelling litigants who challenge one provision of a statutory scheme to challenge all provisions simultaneously—even those awaiting the adoption of implementing regulations—or risk preclusion later, the Fifth Circuit's decision encourages the filing of premature claims that speculate about the impact a law will have. Such claims are disfavored by this Court. *See, e.g.*, *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008). Thus, certiorari is warranted to prevent the Fifth Circuit's improper application of res judicata from creating perverse incentives for future litigants in a wide range of cases.

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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.").

III. CERTIORARI IS NEEDED TO AVOID A DRASTIC REDUCTION IN ACCESS TO SAFE ABORTION SERVICES IN THE SECOND MOST POPULOUS STATE IN THE NATION.

The outcome of this case is a matter of exceptional importance because the rights, health, and dignity of thousands of women are at stake. Texas is the second most populous state in the nation—home to 5.4 million women of reproductive age. App. 53a. More than 60,000 of those women choose to have an abortion each year. App. 56a. If the Court declines to review this case, its stay of the Fifth Circuit's mandate would immediately terminate. The resulting reduction in the number and geographic distribution of abortion providers means that many of those women would be significantly delayed in accessing abortion services, and some would be unable to access such services at all. *See* App. 141a-144a; *Van Hollen*, 738 F.3d at 796 ("Patients will be subjected to weeks of delay because of the sudden shortage of eligible doctors—and delay in obtaining an abortion can result in the progression of a pregnancy to a stage at which an abortion would be less safe, and eventually illegal."). Further, every woman in Texas would have to live under a legal regime that fails to respect her equal citizenship status and would force her to grapple with unnecessary and substantial obstacles as a condition of exercising her protected liberty.

This Court has described the decision to have an abortion as one of "the most intimate and personal

choices a person may make in a lifetime, . . . central to personal dignity and autonomy." *Casey*, 505 U.S. at 851. It explained that "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education" are "central to the liberty protected by the Fourteenth Amendment." *Id.*; *accord Obergefell v. Hodges*, 135 S. Ct. 2584, 2597-98 (2015). Thus, the right at issue in this case is of exceptional importance, and the ultimate disposition of this case will have a profound effect on the lives of thousands of women and their families. It will also have a profound effect on the nation's understanding of the meaning of the liberty protected by the Fourteenth Amendment and the nature and extent of the burdens that a state can make an individual endure as a condition of exercising that liberty.

Prior to the enactment of H.B. 2, there were more than 40 facilities providing abortions in Texas, dispersed throughout the State. App. 138a. To date, that number has dwindled to 18.[13] If the stay entered by this Court is terminated, that number would fall to ten. That would amount to a net reduction in abortion facilities of more than 75 percent in a

[13] Since this Court stayed the Fifth Circuit's mandate on June 29, 2015, an additional clinic in Dallas closed as a result of the admitting-privileges requirement. Only one of the two physicians working at the clinic prior to H.B. 2's enactment was able to maintain hospital admitting-privileges. The clinic operated for as long as it could with a single physician but ultimately could not sustain its practice with that limitation on its capacity.

two-year period. Further, one of the remaining ten clinics—Whole Woman's Health of McAllen—would be limited to employing a single physician to provide abortions, even though at least four physicians were providing abortions there prior to implementation of H.B. 2. App. 70a-71a. The sole physician permitted by the Fifth Circuit to practice at the McAllen clinic is past retirement age and unable to work there full-time. ROA.2461. The McAllen clinic would also be limited to treating patients who reside in the four counties of the Lower Rio Grande Valley. Under the terms of the Fifth Circuit's ruling, it would have to turn away women from neighboring counties. App. 71a. Thus, its capacity to meet patient demand in the region would be extremely limited. The next closest abortion provider would be in San Antonio, well over 200 miles away. *See* App. 65a.

Apart from the McAllen clinic, Texas' remaining abortion providers would be clustered in four metropolitan areas: Dallas-Fort Worth, Austin, San Antonio, and Houston. App. 28a. There would be no licensed abortion facilities west of San Antonio, a region occupying over a hundred-thousand square miles, and the only abortion clinic south of San Antonio would be the McAllen clinic. Even if women throughout Texas could navigate the vast distances necessary to reach the remaining few abortion providers, the district court found that these facilities would not be able to meet the statewide demand for abortion services that sustained more than 40 abortion facilities prior to the enactment of the challenged requirements. *See*

App. 141a. Moreover, the ability of these remaining facilities to increase their operational capacities would be constrained by the admitting-privileges requirement. Indeed, at the time of trial, at least one of them was unable to schedule patients for abortion procedures because it did not have a doctor on staff with the required admitting privileges. ROA.2854. And the district court found that, because of the tremendous costs of compliance with the ASC requirement, "few, if any, new compliant abortion facilities will open to meet the demand resulting from existing clinics' closure." App. 140a.

The initial reduction in abortion providers following implementation of the admitting-privileges requirement had a significant negative impact on women's ability to obtain an abortion in Texas, causing delays in obtaining services that led to an increase in the proportion of abortions performed in the second trimester and preventing some women from accessing abortion services at all. ROA.2349-50, ROA.2354, ROA.2359. Allowing the Fifth Circuit's decision to stand would further reduce the availability of abortion services in Texas, exacerbating these impacts.

Women who are delayed in obtaining an abortion face greater health risks than those who are able to obtain early abortions because the risks of abortion, although slight throughout pregnancy, increase with gestational age. ROA.2372. Women who are unable to obtain an abortion are also at increased risk; DSHS's own data shows that, in Texas, the risk of

death from carrying a pregnancy to term is 100 times greater than the risk of death from having an abortion. ROA.2950-51; *see also* ROA.2377.

In addition, some women who are unable to access legal abortion turn to illegal and unsafe methods of ending a pregnancy. *See, e.g.*, *McCormack v. Hiedeman*, 694 F.3d 1004, 1008 (9th Cir. 2012) (concerning a pregnant woman who attempted abortion by ingesting drugs purchased from the internet because she could not access clinical abortion services); *In re J.M.S.*, 280 P.3d 410, 411 (Utah 2011) (concerning a pregnant woman who attempted abortion by soliciting a stranger to punch her in the abdomen because she could not access clinical abortion services); *Hillman v. State*, 503 S.E.2d 610, 611 (Ga. Ct. App. 1998) (concerning a pregnant woman who attempted abortion by shooting herself in the abdomen because she could not access clinical abortion services).[14] This trend has been on the rise in Texas since the first wave of clinic closures, and it is expected to increase if the availability of safe and legal abortion services remains severely restricted by H.B. 2. *See* ROA.2468; ROA.2471-72; Trial Exs. P-020, P-022, P-024.

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[14] *See also* Emily Bazelon, *A Mother in Jail for Helping Her Daughter Have an Abortion*, N.Y. Times Mag. (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).

Accordingly, even if the Court were ultimately to address the questions presented here in other cases, the harm done to Texas women in the meantime could not be undone. Certiorari is therefore warranted in this case to avoid the profound and irreparable harm that would result from allowing the Fifth Circuit's decision to go unreviewed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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