No. 15-274

In the Supreme Court of the United States

WHOLE WOMAN'S HEALTH, ET AL., PETITIONERS

v.

KIRK COLE, COMMISSIONER, TEXAS DEPARTMENT OF STATE HEALTH SERVICES, ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING REVERSAL

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QUESTION PRESENTED

The United States will address the following question:

Whether the challenged provisions of Texas law impose an undue burden on the right of Texas women to terminate their pregnancies.

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INTEREST OF THE UNITED STATES

This Court granted review to resolve whether certain provisions of a Texas statute constitute an "undue burden" on a woman's right to obtain a previability abortion. Pet. i. The United States has filed briefs as an amicus curiae in cases in which this Court has set forth and considered the "undue burden" standard. See *Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833 (1992); *Stenberg* v. *Carhart*, 530 U.S. 914 (2000). Moreover, Congress has enacted laws relating to abortion,[1] and may legislate further in that area in the

[1] See Exec. Order No. 13,535, 3 C.F.R. 201 (2010 comp.) (discussing Hyde Amendment and Church Amendment); see also, *e.g.*, 18 U.S.C. 1531 (prohibiting partial-birth abortions); 10 U.S.C. 1093 (limitation on Department of Defense funds); 25 U.S.C. 1676 (limitation on Indian Health Service funds); 18 U.S.C. 248 (Freedom of Access to Clinic Entrances Act).

future. The United States therefore has an interest in clarification of the relevant legal principles.

STATEMENT

1. a. On July 18, 2013, Texas enacted H.B. 2, 83d Leg., 2d Spec. Sess. (Tex. 2013) (H.B. 2 or the Act), a statute "relating to the regulation of abortion procedures, providers, and facilities." Pet. App. 181a. As relevant here, H.B. 2 imposed substantial new obligations both on physicians who provide abortion services and on the facilities where those services are performed. In particular, the Act requires physicians who perform abortions to have admitting privileges at local hospitals and requires abortion facilities to meet state standards governing ambulatory surgical centers (ASCs).[2]

As to admitting privileges, the Act 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." Pet. App. 183a (codified at Tex. Health & Safety Code Ann. § 171.0031(a)(1)). That hospital must be one that "provides obstetrical or gynecological health care services." *Ibid.*[3]

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[2] A number of States have enacted similar requirements. See, *e.g.*, *Planned Parenthood of Wis., Inc.* v. *Schimel*, 806 F.3d 908, 911 (7th Cir. 2015); States of N.Y. et al. Cert. Amicus Br. 9-10. In the rare circumstances in which federal law permits expenditure of federal funds or use of federal facilities for abortions, see, *e.g.*, 10 U.S.C. 1093, the federal government does not impose comparable requirements.

[3] The physician must also "provide the pregnant woman" with a way to reach the physician (or the facility where the physician

The new admitting-privileges requirement supersedes a preexisting Texas law on management of post-abortion medical issues. That law required an abortion clinic to "have a readily accessible written protocol for managing medical emergencies and the transfer of patients requiring further emergency care to a hospital," and permitted a physician at the clinic without admitting privileges to have "a working arrangement" with a doctor who did. 25 Tex. Admin. Code § 139.56(a) (2012).

As to the ASC requirement, the Act provides that "the minimum standards for an abortion facility must be equivalent to the minimum standards * * * for ambulatory surgical centers." Pet. App. 194a (codified at Tex. Health & Safety Code Ann. § 245.010(a)).[4] ASCs "operate[] primarily to provide surgical services to patients who do not require overnight hospital care." Tex. Health & Safety Code Ann. § 243.002(1). Under Texas law, ASCs are subject to various staffing, fire-prevention, and physical-plant standards, including a square-footage requirement and "plumbing, heating, lighting, ventilation, and other design standards." *Id.* § 243.010. Under H.B. 2, the ASC requirement applies to all abortion facilities, including those that provide only medical abortions, a procedure that involves no "surgical services" at all. Pet. App.

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works) "24 hours a day" and with "the name and telephone number of the nearest hospital to the home of the pregnant woman at which an emergency arising from the abortion would be treated." Pet. App. 183a.

[4] An abortion facility is "a place where abortions are performed." Tex. Health & Safety Code Ann. § 245.002(2). Performing an abortion includes providing a patient with medication to induce an abortion. See *id.* § 245.002(1).

139a-140a. Moreover, by regulation, licensed abortion facilities alone are excluded from grandfathering provisions that exempt ASCs from construction requirements other than those that were in place when those ASCs were "originally licensed." 25 Tex. Admin. Code § 135.51(a)(1)-(2); see *id.* § 139.40(a) and (d)(3) (applying most ASC rules to abortion facilities, but excepting the grandfathering rule). And abortion facilities alone are ineligible for waivers that ASCs may seek. 38 Tex. Reg. 9588 (Dec. 27, 2013); Pet. App. 140a.

Under a provision enacted in 2003, Texas law requires abortions performed after 16 weeks of gestation to take place in an ASC or a hospital. Tex. Health & Safety Code Ann. § 171.004. Accordingly, the new ASC requirement affects only facilities that perform abortions within the first 16 weeks of a woman's pregnancy.[5]

b. Texas law also includes a number of other forms of abortion regulation. For example, "a person may not establish or operate an abortion facility in [Texas] without an appropriate license." Tex. Health & Safety Code Ann. § 245.003; see *id.* § 245.004 (exceptions for certain facilities falling under separate licensing regimes). Such a facility is subject to health-related standards, see, *e.g.*, 25 Tex. Admin. Code § 139.49, and to "random, unannounced" inspections, Tex. Health & Safety Code Ann. § 245.006—and its license may be immediately suspended or revoked "when the

[5] H.B. 2 includes other restrictions not at issue here. Among other things, the Act bars an abortion after the first 20 weeks of pregnancy, Pet. App. 185a; see *id.* at 185a-186a (exceptions), and bars provision of "an abortion-inducing drug" without following the protocol on "the final printed label," *id.* at 191a.

health and safety of persons are threatened," *id.* § 245.012(c). In addition, only a licensed physician can perform an abortion, *id.* § 171.003; the physician must carry out a sonogram, display the images so "that the pregnant woman may view them," and ensure that the pregnant woman is provided with information that "describe[s] the unborn child and list[s] agencies that offer alternatives to abortion," *id.* § 171.012(a); and the physician may perform the abortion only after a waiting period, which is 24 hours for women who live within 100 miles of "the nearest abortion provider," *id.* § 171.012(b); see *id.* § 171.0124 (exception).

2. In 2013, a group of clinics and physicians brought a pre-enforcement challenge to the admitting-privileges requirement. Pet. App. 26a-27a. The district court concluded that the requirement was facially unconstitutional and granted an injunction barring its enforcement. But the Fifth Circuit stayed the injunction, thus allowing the requirement to take effect, and then reversed on the merits. *Planned Parenthood of Greater Tex. Surgical Health Servs.* v. *Abbott*, 748 F.3d 583, 586-587, 605 (2014); see *Planned Parenthood of Greater Tex. Surgical Health Servs.* v. *Abbott*, 134 S. Ct. 506, 506 (2013) (denying application to vacate Fifth Circuit's stay). "Before the enactment of [H.B. 2], there were more than 40 licensed abortion facilities providing abortion services throughout Texas," but "[t]hat number dropped by almost half leading up to and in the wake of enforcement of the admitting-privileges requirement." Pet. App. 138a.

3. In 2014, a group of clinics and physicians filed suit in the instant case. Pet. App. 26a-27a & n.14. That suit challenged the admitting-privileges requirement, as applied to Texas clinics in El Paso and

McAllen, under the Due Process Clause. It also challenged the ASC requirement, both facially and as applied to those two clinics, on the same ground. *Id.* at 130a-132a.

The district court held a bench trial on the due process claims at which 19 witnesses testified. Pet. Br. 13. Having "observed the demeanor" of those witnesses and "carefully weighed that demeanor and the witnesses' credibility," Pet. App. 132a n.1; see *id.* at 136a n.3 (explaining facts that undermined "credibility and weight" of State's expert testimony), the court ruled that the admitting-privileges and ASC requirements—both separately and "considered together"—impose an "undue burden on the right of women * * * to seek a previability abortion," *id.* at 153a-154a; see *id.* at 133a-135a (citing *Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833 (1992)).

That ruling was based on a number of factual findings. First, the district court found that neither the admitting-privileges requirement nor the ASC requirement has a medical justification. The court explained that the admitting-privileges requirement would neither improve patient care in emergencies nor ensure that physicians had sufficient credentials. Pet. App. 147a. As to patient care, the court found that "[e]vidence related to patient abandonment and potential improved continuity of care in emergency situations is weak in the face of the opposing evidence that such complications are exceedingly rare in Texas, nationwide, and specifically with respect to the Plaintiff abortion providers." *Ibid.* And the court concluded that the "physician screening and credentialing" objectives were "not credible" given "evidence that

doctors in Texas have been denied privileges for reasons not related to clinical competency." *Ibid.*

The district court deemed the medical basis for the ASC requirement equally insubstantial. The court found that "women will not obtain better care or experience more frequent positive outcomes at an [ASC] as compared to a previously licensed facility," explaining that "[m]any of the building standards * * * have such a tangential relationship to patient safety in the context of abortion as to be nearly arbitrary." *Id.* at 146a. The court also noted that abortion is much safer "than many common medical procedures not subject to" comparable requirements. *Ibid.*; see *id.* at 145a ("abortion in Texas was extremely safe" and concerns about "underestimated complication rates are * * * without a reliable basis").

Second, the district court found that the two requirements interposed substantial obstacles to obtaining an abortion. Prior to H.B. 2, there were more than 40 abortion facilities in Texas; as noted, p. 5, *supra* (quoting Pet. App. 138a), in the wake of the admitting-privileges requirement, the number of abortion facilities in Texas had dropped by almost half. Implementation of the ASC requirement promised to have an equally dramatic effect. The court found that the cost of compliance with the ASC requirement for each abortion facility "will undisputedly approach 1 million dollars and will most likely exceed 1.5 million dollars." Pet. App. 140a. And the district court concluded that such facilities would have no means to avoid the ASC requirement, even though 336 out of the 433 licensed ASCs in Texas "are apparently either 'grandfathered' or enjoying the benefit of a waiver of some or all" of the ASC standards. *Id.* at 137a (citation omitted).

The net result, the court found, is that "only seven facilities and a potential eighth will exist in Texas that will not be prevented by the [ASC] requirement from performing abortions." *Id.* at 136a; see Pet. Br. 23-24 & n.13 (noting that facility has opened in San Antonio and so nine facilities would remain). "[A]bortion providers will remain only in Houston, Austin, San Antonio, and the Dallas/Fort Worth metropolitan region," Pet. App. 138a, leaving no providers in the vast area south and west of San Antonio. The closure of abortion facilities that occurred in light of the admitting-privileges requirement had, the court found, already increased the number of Texas women of reproductive age living more than 200 miles away from a Texas clinic from 10,000 to 290,000—and the additional closures that would be caused by the ASC requirement would increase that number to 750,000. *Id.* at 138a-139a; see *ibid.* (number of women of reproductive age living more than 150 miles from a clinic would increase to 900,000).

The district court stated that the "practical impact" of such distances would "operate for a significant number of women in Texas just as drastically as a complete ban on abortion." Pet. App. 141a. Moreover, the court found, even were women able to overcome the obstacles associated with travel—which loom particularly large for poor and rural women—the remaining clinics would be unable to "meet the demand of the entire state." *Id.* at 140a-142a (relying on "historical data"); see *id.* at 140a (finding that few new facilities would open). Thus, the court explained, Texas women would face "[h]igher health risks associated with increased delays in seeking early abortion care, * * * longer distance automotive travel on

traffic-laden highways, and the [A]ct's possible connection to observed increases in self-induced abortions." *Id.* at 146a. The court concluded that the two new requirements, in conjunction with Texas's existing restrictions on abortion (including a waiting period), "create[] a brutally effective system of abortion regulation that reduces access to abortion clinics[,] thereby creating a statewide burden for substantial numbers of Texas women." *Id.* at 144a.

Finding the obstacles substantial and the burden undue, the district court enjoined the admitting-privileges and ASC requirements both statewide and as applied to clinics in McAllen and El Paso. Pet. App. 153a-154a. The court focused on the effects of the requirements, *id.* at 145a, 147a-148a, but also found that the ASC requirement had the purpose of placing unreasonable obstacles in the path of a woman seeking an abortion, *id.* at 148a-150a.

4. A divided panel of the court of appeals granted an emergency stay of most aspects of the district court's injunction. Pet. App. 118a-119a. This Court granted in part and denied in part an application to vacate that stay. 135 S. Ct. at 399. That action permitted "the district court's order enjoining the [ASC] requirement" and "the district court's order enjoining the admitting-privileges requirement as applied to the McAllen and El Paso clinics" to go into effect. *Ibid.*

5. In a per curiam opinion, the court of appeals largely reversed the district court's judgment. Pet. App. 1a-76a. The court concluded that facial challenges to the admitting-privileges requirement and the ASC requirement are barred by res judicata. *Id.* at 35a-42a. The court also rejected petitioners' facial

challenge to the latter requirement on the merits. *Id.* at 42a-59a.

In making that merits ruling, the court of appeals held that the undue-burden inquiry does not permit analysis of whether a challenged state law "actually further[s] the State's legitimate interests." Pet. App. 49a. The court stated that "[i]n our circuit, we do not balance the wisdom or effectiveness of a law against the burdens the law imposes." *Id.* at 51a n.33 (citation omitted); see *id.* at 48a-51a (concluding that district court erroneously "substitut[ed] its own judgment for that of the legislature" by "weigh[ing] the burdens and medical efficacy of the[] two requirements"). In addition, the court held that an undue burden exists only if the law is invalid in a quantifiably "large fraction of the cases in which the law is relevant," *id.* at 47a; see *id.* at 52a, and that the relevant denominator in this case was all women of reproductive age in Texas, *id.* at 54a-55a. The court found that an insufficiently large fraction of Texas women would have to travel long distances to obtain abortions, and it rejected the district court's finding that the small number of clinics that would remain under H.B. 2 would be unable to satisfy statewide demand. *Id.* at 55a-57a (characterizing expert testimony as "*ipse dixit*").

As to petitioners' as-applied challenge to the two new requirements, the court of appeals rejected the challenge with respect to the El Paso clinic, stating that women in El Paso could readily travel to New Mexico to obtain an abortion (instead of traveling over 550 miles to obtain one in Texas). Pet. App. 72a-76a. But the court accepted in part the as-applied challenge with respect to the McAllen clinic, noting that its closure would cause women in the Rio Grande

Valley to face "difficulties" and to travel hundreds of miles each way to obtain an abortion. *Id.* at 59a, 65a-67a, 71a. The court enjoined Texas from (1) enforcing certain ASC requirements against the McAllen clinic "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," and (2) enforcing the admitting-privileges requirement against one particular physician who works at the McAllen clinic, but only when his patients are "women residing in the Rio Grande Valley." *Id.* at 67a, 71a; see *id.* at 78a.

6. On June 29, 2015, this Court stayed the Fifth Circuit's mandate. 135 S. Ct. at 2923.

SUMMARY OF ARGUMENT

In *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 U.S. 833 (1992), this Court "struck a balance." *Gonzales* v. *Carhart*, 550 U.S. 124, 146 (2007). The Court sought to accommodate the State's "legitimate interests from the outset of the pregnancy in protecting the heath of the woman and the life of the fetus that may become a child," *Casey*, 505 U.S. at 846, while ensuring that there is "real substance to the woman's liberty to determine whether to carry her pregnancy to full term," *id.* at 869 (plurality opinion).

Under *Casey*, "[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion" are an impermissible "undue burden" on constitutionally protected due process rights. 505 U.S. at 878 (plurality opinion). The *Casey* standard appropriately gives the governmental interest in women's health and welfare substantial weight in the analysis—but that interest does not justify Texas's admitting-privileges

requirement or ASC requirement. Those requirements are unnecessary to protect—indeed, would harm—women's health, and they would result in closure of three quarters of the abortion clinics in the State, thus placing substantial obstacles in the path of women seeking previability abortions.

First, the challenged requirements do not produce actual health benefits. The district court found that before enactment of H.B. 2 abortion in Texas was extremely safe, with a very low rate of complications. The court found that the admitting-privileges requirement would not improve care in emergencies or ensure that physicians were adequately credentialed. And the court found that the ASC requirement would not reduce health risks or lead to better outcomes.

The court of appeals did not question the accuracy of those findings. But the court put the findings aside on the ground that the undue-burden test did not permit analysis of whether the challenged requirements "actually further[ed] the State's legitimate interests." Pet. App. 49a. That ruling was erroneous. To determine whether an abortion regulation is unnecessary and whether it imposes an undue burden, a court must decide whether the regulation actually is warranted, which requires ascertaining whether any benefits attach to it. The court of appeals' contrary rule would reduce this aspect of the undue-burden test to mere rational basis review—an approach that this Court has already rejected.

Second, the Texas requirements constitute substantial obstacles for women seeking abortions and impose an undue burden on their due process rights. The district court found that as a result of the challenged requirements many clinics would close and

hundreds of thousands of Texas women would be forced to travel great distances if they sought access to the nearest abortion facility. The court also found that requiring women to travel such distances to obtain abortions would operate in conjunction with other obstacles to create "a brutally effective system of abortion regulation" that would operate "for a significant number of women in Texas just as drastically as a complete ban on abortion." Pet. App. 141a, 144a. And the court found that the few clinics that could remain open would be unable to accommodate the demand of the entire State. That state of affairs, the court determined, would actually harm women's health.

The court of appeals nevertheless concluded that there was insufficient proof that the requirements would unduly burden a large enough number of Texas women. That conclusion is flawed. Among other errors, the court incorrectly required proof of the exact number of women who would experience substantial obstacles; assessed the significance of the obstacles by looking to a group of women whom the court found would not be affected by the law; and discounted difficulties arising from the interaction of the law with the realities of women's lives.

This Court has upheld a number of different abortion regulations under the *Casey* standard, and other regulations could well survive application of that standard. But the requirements at issue here are far more restrictive than any this Court has yet approved in applying the undue-burden test, and they undermine the very governmental interest they purport to advance. For many women in Texas, they would create a legal regime in which a real choice about whether to carry a pregnancy to full term "exists in theory

but not in fact." *Casey*, 505 U.S. at 872 (plurality opinion). If the balance this Court struck in *Casey* is to retain its vitality, the Texas restrictions here must be invalidated.

ARGUMENT

A. The Balance Struck By *Casey*'s Undue-Burden Standard Gives Significant Weight To The Governmental Interest In Ensuring Women's Health While Protecting Women's Liberty

The Due Process Clause protects the right of women "to control their reproductive lives" so that they may "participate equally in the economic and social life of the Nation." *Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833, 856 (1992); cf. *Obergefell* v. *Hodges*, 135 S. Ct. 2584, 2597-2599 (2015). Accordingly, this Court has long recognized a woman's liberty to "choose to have an abortion before viability and to obtain it without undue interference from the State." *Casey*, 505 U.S. at 846; see *id.* at 851 (describing abortion as "involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy").

At the same time, there are legitimate governmental interests in regulating abortion that exist "from the outset of the [woman's] pregnancy." *Casey*, 505 U.S. at 846; see, *e.g.*, *Stenberg* v. *Carhart*, 530 U.S. 914, 956-957 (2000) (Kennedy, J., dissenting). Those interests include "protecting * * * the life of the fetus that may become a child." *Casey*, 505 U.S. at 846; see *Gonzales* v. *Carhart*, 550 U.S. 124, 163 (2007). They also include the only interest on which Texas has relied in this case: "protecting the health of the woman" who seeks to obtain an abortion. *Casey*, 505 U.S. at 846; see Pet. App. 145a. Legislating to "regulat[e]

the medical profession" is a traditional government function, *Gonzales*, 550 U.S. at 158; see *id.* at 157 (citing *Washington* v. *Glucksberg*, 521 U.S. 702, 731 (1997), and *Barsky* v. *Board of Regents of the Univ. of the State of N.Y.*, 347 U.S. 442, 451 (1954)), and "[t]he State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient," *Roe* v. *Wade*, 410 U.S. 113, 150 (1973); see *id.* at 149 (noting government interest in "health and medical standards"); *Casey*, 505 U.S. at 885 (plurality opinion) ("the Constitution gives the States broad latitude to decide that particular functions may be performed only by licensed professionals").

In *Casey*, this Court "struck a balance," *Gonzales*, 550 U.S. at 146, adopting a legal standard that accommodates the State's "legitimate interests from the outset of the pregnancy in protecting the heath of the woman and the life of the fetus," *Casey*, 505 U.S. at 846, while ensuring that there is "real substance to the woman's liberty to determine whether to carry her pregnancy to full term," *id.* at 869 (plurality opinion). When a State seeks to promote those legitimate interests by regulating previability abortions, it not only must have "a rational basis to act," *Gonzales*, 550 U.S. at 158, but also must avoid so impinging on a woman's constitutional liberty as to create an "undue burden" on her right to choose to terminate her pregnancy. *Casey*, 505 U.S. at 877 (plurality opinion); see *id.* at 874-875 (explaining women's right to be free from "unwarranted governmental intrusion") (citation omitted); *id.* at 876 ("[T]he undue burden standard is the

appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty.").

"A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Casey*, 505 U.S. at 877 (plurality opinion). Accordingly, while a State may, "[a]s with any medical procedure, * * * enact regulations to further the health or safety of a woman seeking an abortion," any "[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; see *ibid.* ("Regulations designed to foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden."); *id.* at 900-901 (upholding medical recordkeeping and reporting requirement that was "reasonably directed to the preservation of maternal health") (citation omitted). Imposition of such an undue burden impermissibly "reach[es] into the heart of the liberty protected by the Due Process Clause." *Id.* at 874.

The balance struck by the *Casey* undue-burden standard has now been in place, and has been applied by this Court and lower courts, for decades. See, *e.g.*, *Mazurek* v. *Armstrong*, 520 U.S. 968, 976 (1997) (per curiam); *Gonzales*, 550 U.S. at 161. Application of that standard guards against government action that would tip the balance such that a woman's right to choose abortion "exists in theory but not in fact." *Casey*, 505 U.S. at 872 (plurality opinion); see *id.* at 875. It also ensures that governmental interests, which involve "grave and serious issues," are not undervalued. *Stenberg*, 530 U.S. at 957 (Kennedy, J.,

dissenting); see *Casey*, 505 U.S. at 874-875 (plurality opinion).

B. The Texas Requirements Are Unnecessary Health Regulations

Under this Court's precedents, a court reviewing a government regulation alleged to "foster the health of a woman seeking an abortion," *Casey*, 505 U.S. at 878 (plurality opinion), should inquire whether the regulation is "reasonably directed to the preservation of maternal health" or whether it is "[u]nnecessary" and therefore serves only "to make abortions more difficult," *id.* at 878, 900-901 (citation omitted); cf. *id.* at 884-885 (inquiring whether a law is a "substantial obstacle" in "practical terms"). Here, as the district court found after careful consideration of the evidence and the witnesses' credibility, the admitting-privileges requirement and the ASC requirement are not necessary, or even useful, to protect women's health. See Pet. App. 132a & n.1, 136a & n.3, 145a-150a.[6] Those findings do not resolve an issue of medical uncertainty in a manner different from that chosen by the legislature, see *Gonzales*, 550 U.S. at 163-164; rather, with respect to those particular requirements, the district court's findings make clear that no medical uncertainty exists.

1. a. The district court found as fact that the admitting-privileges requirement did not protect women's health by either (1) preventing "patient abandonment" and improving "continuity of care in

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[6] The district court found that the burdens resulting from the requirements would actually lead to "[h]igher health risks" for Texas women, which would "cancel out" any conceivable "health benefit." Pet. App. 146a; see p. 27, *infra* (discussing burdens).

emergency situations" or (2) ensuring "physician screening and credentialing." Pet. App. 147a. The court found that "[t]he great weight of the evidence demonstrates that, before the [A]ct's passage, abortion in Texas was extremely safe with particularly low rates of serious complications and virtually no deaths"—and that any "concerns over incomplete complication reporting and underestimated complication rates are * * * without a reliable basis." *Id.* at 145a; see *id.* at 147a ("complications are exceedingly rare in Texas, nationwide, and specifically with respect to the Plaintiff abortion providers"). The court also made a finding that the asserted interest in improved patient care in emergencies was "weak in the face of" the rarity of complications, and that evidence on "credentialing" physicians was "weak and speculative" in light of the fact that "doctors in Texas have been denied privileges for reasons not related to clinical competency." *Id.* at 147a; see Am. Coll. of Obstetricians & Gynecologists, Am. Med. Ass'n, et al. Cert. Amicus Br. 16-20 (AMA Cert. Amicus Br.) (admitting-privileges requirement is "inconsistent with prevailing medical practices" and "provides no medical benefit to women").

The district court's findings on the safety of abortions reflect a strong medical consensus. See, *e.g.*, *Planned Parenthood of Wis., Inc.* v. *Schimel*, 806 F.3d 908, 912-913 (7th Cir. 2015) (citing, *e.g.*, Tracy A. Weitz et al., *Safety of Aspiration Abortion Performed by Nurse Practitioners, Certified Nurse Midwives, and Physician Assistants Under a California Legal Waiver*, 103 Am. J. Pub. Health 454, 457-458 (2013), and Kelly Cleland et al., *Significant Adverse Events and Outcomes After Medical Abortion*, 121 Obstetrics

& Gynecology 166, 169 (2013)); see also *Stenberg*, 530 U.S. at 923-924 (discussing "particular[] safe[ty]" of common method for first-trimester abortions). Because abortion is such a safe procedure and so rarely results in complications, measures aimed at facilitating treatment in a hospital—beyond the existence of a "protocol for managing medical emergencies and the transfer of patients requiring further emergency care," 25 Tex. Admin. Code § 139.56(a) (2012), which Texas law required prior to the enactment of H.B. 2—are unnecessary.

But even if emergencies were more common, the admitting-privileges requirement would not improve patient care. When a patient seeks care at an emergency room, clinicians there arrange for treatment of an emergency condition regardless of whether she can pay, see 42 U.S.C. 1395dd(b)(1) (covering Medicare-participating hospitals); Timothy Stoltzfus Jost, *Health Care at Risk* 13 (2007) ("[v]irtually all" hospitals participate in Medicare), and the physician who performed the abortion can communicate with those clinicians as needed—whether or not the physician has privileges at that hospital. And assuming the physician did have such privileges, H.B. 2 does not require that he or she actually go to the hospital where the patient has been taken and admit or treat the patient there. See Pet. App. 183a. Indeed, a patient may end up at a hospital (having, for instance, taken medication at a clinic and then returned home) where even a physician who meets the new requirement has no privileges—a circumstance that is especially likely if the patient lives more than 30 miles away from the clinic. See *ibid.* (requiring that patient receive "the name and telephone number of the near-

est hospital to the home of the pregnant woman at which an emergency * * * would be treated"). It is no doubt for reasons such as those that Texas does not require physicians who perform other outpatient procedures, including many that are riskier than abortion, to maintain admitting privileges. See *id.* at 145a-147a; see also 25 Tex. Admin. Code §§ 135.4(c)(11)(B), 135.11(b)(19) (transfer agreement with hospital is permissible alternative to admitting privileges outside abortion context); Pet. Br. 9, 42.

In addition, there is no meaningful link between the required grant of admitting privileges and a physician's skill in abortion-related medical care. Doctors may be denied admitting privileges on grounds unrelated to their medical skill, including that—because they perform abortions, which almost never require a hospital visit—they do not perform a certain minimum number of hospital-based procedures in a given year. Pet. Br. 21 (citing record); see also *Schimel*, 806 F.3d at 917.[7] As the court of appeals noted, doctors involved in this case were specifically told that they were denied admitting privileges for a reason unrelated to "clinical competence." Pet. App. 64a. In addition, a physician could have admitting privileges at a prestigious institution but still fail to comply with the 30-mile limitation established by the Texas law. See Pet. Br. 22 (petitioner Dr. Lynn has admitting privileges at hospitals more than 30 miles from facility where he works).

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[7] While discrimination in the grant of admitting privileges based on performance of abortions is forbidden, see Tex. Occ. Code Ann. § 103.002(b); see also 42 U.S.C. 300a-7(c) (covering hospitals that receive certain funds), it is difficult to know when such discrimination may underlie a hospital's decision.

b. The district court also found as fact that the ASC requirement would not advance maternal health. The court determined 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," given that abortions had long been performed safely with a negligible rate of complications in the absence of such a regulation. Pet. App. 145a-146a. Indeed, the court explained, the physical-plant standards for ASCs, which would be cost-prohibitive for most Texas clinics, had "such a tangential relationship to patient safety in the context of abortion as to be nearly arbitrary." *Id.* at 146a; see *id.* at 139a-140a. That was particularly true with respect to medication-induced abortions, which do not involve any intrusion into the human body by a physician and therefore need not take place in a surgical facility. *Id.* at 146a. But even with respect to other types of abortions, the court ruled, "risks are not appreciably lowered for patients who undergo abortions at [ASCs] as compared to nonsurgical-center facilities." *Ibid.*

Those findings, which are supported by the judgment of the medical community, see, *e.g.*, AMA Cert. Amicus Br. 5-6 (ASC requirement is "devoid of any medical or scientific purpose"), are confirmed by the fact that "common medical procedures" highly similar to or less safe than abortion are not subject to an ASC requirement in Texas. Pet. App. 145a-146a; see generally Carol Sanger, *About Abortion: The Complications of the Category*, 54 Ariz. L. Rev. 849, 852 (2012) ("abortion has become the most regulated medical procedure in the United States"). For instance, dilation and curettage—a procedure sometimes used in

first-trimester abortions, see R. Kulier et al., *Surgical Methods for First Trimester Termination of Pregnancy*, Cochrane Database of Systematic Reviews (2001)—need not take place in an ASC when a physician employs it to remove tissue from inside the uterus after a miscarriage. See Pet. Br. 15 & n.9; see also AMA Cert. Amicus Br. 13-14. Nor need certain invasive procedures such as colonoscopy, which has a much higher rate of complications than abortion does, see *Schimel*, 806 F.3d at 914-915, be performed in an ASC in Texas. See Tex. Health & Safety Code Ann. § 243.004 ("office or clinic of a licensed physician, dentist, or podiatrist" does not need to be licensed as ASC); 25 Tex. Admin. Code § 135.19 (same); 22 Tex. Admin. Code § 192.1 *et seq.* (Texas Medical Board regulation of "office-based anesthesia services") (capitalization omitted); Pet. Br. 42; see also, *e.g.*, *Doe* v. *Bolton*, 410 U.S. 179, 193-195 (1973); Justin Kugler, *A Doctor's Answer to Texas' Abortion Law*, Hous. Chron. Blog (Sept. 29, 2013).

2. The court of appeals did not question the accuracy of the factual findings on lack of medical necessity (or medical usefulness), but it deemed them irrelevant to the constitutional analysis. Citing circuit precedent, the Fifth Circuit held that the undue-burden test did not allow for any examination of whether a challenged state law "actually further[s] the State's legitimate interests," and that the district court had therefore erred by inquiring into the "medical efficacy" of the two requirements. Pet. App. 48a-49a (citing *Abbott*, 748 F.3d at 594); see *id.* at 48a-51a & n.33 ("In our circuit, we do not balance the wisdom or effectiveness of a law against the burdens the law imposes.") (citation omitted). That holding was incorrect. In de-

termining whether a health regulation is "[u]nnecessary" and whether it imposes an "undue" burden, a court must move beyond a rational basis analysis and examine the regulation's actual benefits. See *Casey*, 505 U.S. at 878, 884-885, 900-901 (plurality opinion).

Rational basis review is, of course, highly deferential, asking only whether "there is an evil at hand for correction" and whether "it might be thought that the particular legislative measure was a rational way to correct it." *Williamson* v. *Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955); see, *e.g.*, *Levin* v. *Commerce Energy, Inc.*, 560 U.S. 413, 426 (2010). The district court here found that protecting women's health is a rational basis for taking action to regulate the practice of medicine by requiring medical practitioners and facilities to meet certain standards. See Pet. App. 135a, 173a-174a. This Court has frequently emphasized the leeway that States have to act in that area, which is in the heartland of their traditional power to ensure the health and welfare of their citizens. See, *e.g.*, *Glucksberg*, 521 U.S. at 731-732; *Lee Optical*, 348 U.S. at 487-491; *Barsky*, 347 U.S. at 451; cf. *Purity Extract & Tonic Co.* v. *Lynch*, 226 U.S. 192, 204-205 (1912).

But rational basis review is only part of the required inquiry. See *Gonzales*, 550 U.S. at 158 ("Where it has a rational basis to act, *and* it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life." (emphasis added)); *Casey*, 505 U.S. at 845 (rejecting contention that "the rational relationship test" should be adopted "as the sole criterion of

constitutionality"). The balance that this Court struck in *Casey* calls for an examination of whether a health-related regulation is "[u]nnecessary," 505 U.S. at 878 (plurality opinion), and whether the burden imposed by such a regulation is "undue," *id.* at 876-879—that is, whether it is "[e]xcessive or unwarranted." *Black's Law Dictionary* 1759 (10th ed. 2014); accord *Random House Webster's Unabridged Dictionary* 2066 (2d ed. 2001).

It is not possible to decide whether a burden is excessive or unwarranted without knowing what benefits accompany the burden. See, *e.g.*, *Schimel*, 806 F.3d at 919-920; *Planned Parenthood Ariz., Inc.* v. *Humble*, 753 F.3d 905, 913 (9th Cir.), cert. denied, 135 S. Ct. 870 (2014); cf., *e.g.*, *Anderson* v. *Celebrezze*, 460 U.S. 780, 788-790 (1983) (balancing of benefits and "burdens" in context of voting and associational rights). For instance, a law barring a person who lacks any medical training from performing abortions for others likely carries such substantial benefits that it is warranted in virtually every circumstance. See, *e.g.*, *Mazurek*, 520 U.S. at 974-975 (collecting cases upholding requirement that abortion be performed by physician). And even a law that confers little or no benefit may still be warranted if it imposes little or no burden. See *Casey*, 505 U.S. at 884-885 (plurality opinion); cf. *Mazurek*, 520 U.S. at 971-973.

Deciding whether and to what extent abortion-related requirements confer medical benefits does not consist merely of accepting legislative findings or abstract hypotheses about what good the law might conceivably accomplish. As this Court has emphasized, the courts evaluating a restriction on abortion have "an independent constitutional duty to review [a

legislature's] factual findings where constitutional rights are at stake." *Gonzales*, 550 U.S. at 165; see *ibid.* (certain legislative findings were "incorrect" or "superseded"). Thus, when upholding a requirement for medical recordkeeping and reporting in *Casey*, the Court did not simply agree that the requirement might be of some theoretical benefit; rather, the Court ascertained that the requirement was "reasonably directed" to the asserted goal of protecting women's health. 505 U.S. at 900 (plurality opinion) (citation omitted); see *id.* at 900-901 ("collection of information with respect to actual patients is a vital element of medical research").[8] Such "required determinations fall within judicial competence." *Id.* at 855.

Of course, as this Court has recognized, at times there is real "medical and scientific uncertainty" concerning the necessity of a particular health-related measure and the burdens associated with it. *Gonzales*, 550 U.S. at 163; see *id.* at 164-165. In that circumstance, a legislature has traditionally been given "wide discretion to pass legislation" that resolves the uncertainty in one direction or the other by choosing among "reasonable alternative[s]." *Id.* at 163 (citing, *inter alia*, *Marshall* v. *United States*, 414 U.S. 417, 427 (1974)). But this case does not involve that kind of uncertainty (and the court of appeals did not deter-

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[8] In *Simopoulos* v. *Virginia*, 462 U.S. 506 (1983), a pre-*Casey* decision in which the Court upheld a "requirement that second-trimester abortions be performed in licensed clinics," the Court likewise evinced a willingness to look behind an asserted purpose, while recognizing that "the State necessarily has considerable discretion in determining standards for the licensing of medical facilities." *Id.* at 516, 519; see *id.* at 516-519 (challenger had not "attacked [the requirement] as being insufficiently related to the State's interest in protecting health").

mine otherwise, see Pet. App. 50a-51a). The district court said that its findings were supported by the great weight of the evidence, and it specifically discounted contrary testimony advanced by the State's witnesses. *E.g.*, *id.* at 132a n.1, 136a n.3, 145a. Moreover, peer-reviewed research and the opinions of leading medical organizations are in full accord with the court's conclusions. See, *e.g.*, pp. 18-19, 21, *supra*.

The court of appeals was thus mistaken in foreclosing any inquiry into whether the challenged Texas requirements will have real-world benefits. *Casey*'s undue-burden standard requires a balance of both the legitimate interest of the State and the liberty interest of women. A determination that the State's requirements are "[u]nnecessary health regulations," *Casey*, 505 U.S. at 878 (plurality opinion), is highly relevant to that balance.

C. The Texas Requirements Present Substantial Obstacles To Women Seeking Abortions And Impose An Undue Burden

If H.B. 2 were permitted to take full effect, the vast majority of the abortion clinics that operated in Texas before enactment of that law would be shut down, resulting in substantial obstacles for women seeking a previability abortion. In light of the district court's conclusion—consistent with the consensus of the medical community—that the challenged restrictions in H.B. 2 are neither necessary nor even useful for protecting women's health, the restrictions constitute an undue burden and cannot stand.

1. The district court ruled that the Texas requirements constitute substantial obstacles for women seeking a previability abortion and amount to an undue burden. Pet. App. 147a. The court found that the

requirements would force closure of all but a small number of clinics in the State, and that those closures would require many women to travel long distances to obtain the necessary medical care, which would amount to a complete barrier to abortion for many "poor, rural, or disadvantaged women." *Id.* at 144a; see *id.* at 141a ("clinics' closure * * * would operate for a significant number of women in Texas just as drastically as a complete ban on abortion"); *id.* at 142a, 149a-150a (noting combined effect of new requirements and existing obstacles). The court also found that the remaining clinics would be unable to accommodate the demands placed on their services, thus burdening every woman seeking "counseling, appointments, and follow-up visits" at those facilities. *Id.* at 141a. And the court found that "[h]igher health risks" would result from "increased delays in seeking early abortion care, * * * longer distance automotive travel * * *, and the [A]ct's possible connection to observed increases in self-induced abortions." *Id.* at 146a; see *id.* at 65a (court of appeals' discussion of relevant evidence). The court concluded that the "statewide burden for substantial numbers of Texas women" is "compelling evidence of a substantial obstacle" and is not "balanced" by any benefits arising from enforcement of the challenged requirements. *Id.* at 144a-145a.

That conclusion is correct. The admitting-privileges requirement and ASC requirement are not so modest in their effects that "no woman seeking an abortion would be required * * * to travel to a different facility than was previously available." *Mazurek*, 520 U.S. at 974. They do not leave open a readily available alternative means for the affected women

to obtain an abortion in Texas. See *Gonzales*, 550 U.S. at 164-165. And they do not merely have an "incidental effect" of making it somewhat "more difficult or more expensive to procure an abortion." *Casey*, 505 U.S. at 874 (plurality opinion). Rather, they interpose a substantial barrier to termination of pregnancy—one that is not warranted by any valid medical concern—because they will result in closure of so many of the facilities in Texas where an abortion can be obtained. See *id.* at 884-885 (asking whether a law "would amount in practical terms to a substantial obstacle"); *Planned Parenthood Se., Inc.* v. *Bentley*, 951 F. Supp. 2d 1280, 1287-1288 (M.D. Ala. 2013) (collecting cases finding substantial obstacle under similar circumstances); cf. *Carey* v. *Population Servs. Int'l*, 431 U.S. 678, 689 (1977); S. Rep. No. 117, 103d Cong., 1st Sess. 17 (1993) (expressing concern, in enacting Freedom of Access to Clinic Entrances Act, at prospect that "[a]bortion may remain a legal option in this country, but there will be so few providers that access will become limited and in some cases unavailable") (citation omitted). Allowing those requirements to remain in place would therefore "thwart [the] implementation" of this Court's decisions upholding the due process right to seek a previability abortion, *Casey*, 505 U.S. at 867, by unjustifiably interfering with women's constitutionally protected liberty.

2. The court of appeals reached a different conclusion. The court ruled that the new requirements would not amount to substantial obstacles for a large enough number of pregnant women (except as applied to a single clinic in McAllen and a single geographically defined set of women). The court also rejected as clearly erroneous the factual finding that the small

number of remaining clinics could not handle the demands of the entire State, and on that basis rejected the proposition that all Texas women of reproductive age seeking an abortion would face obstacles. And the court looked to a clinic outside the State to assess the substantiality of the obstacle that would be faced by women in the western portion of Texas. See Pet. App. 52a-59a, 63a-76a.

That reasoning is flawed. First, the court of appeals was wrong to demand evidence of a precise "number or fraction of reproductive-age women who would be burdened" by the requirements. Pet. App. 52a n.33; see *id.* at 53a. Although *Casey* observed that the spousal-notification requirement would constitute a substantial obstacle in a "large fraction" of relevant cases, 505 U.S. at 895, it did not require empirical evidence of the exact numbers affected—nor would such evidence have been available, given the obvious difficulty of predicting how many women in a particular State would be dissuaded by a spousal-notification requirement from obtaining an abortion. See *id.* at 888-892 (relying on general data about the frequency of abuse). Rather, *Casey* contemplated a commonsense inquiry as to whether a requirement was likely to substantially interfere with the abortion right for the women it affected, and it deemed the spousal-notification requirement to be an undue burden because it was "likely to prevent *a significant number of women*" in the affected group "from obtaining an abortion." *Id.* at 893-894 (emphasis added); see *id.* at 893 (the regulation would interpose a substantial obstacle for "many women"); *id.* at 895. The district court made equivalent findings here. See, *e.g.*, Pet. App. 141a ("clinics' closure * * * would operate for a

significant number of women in Texas just as drastically as a complete ban on abortion").

Second, having concluded that the only women in Texas who would be burdened by the new requirements would be women who would have to travel long distances, the court of appeals erred in focusing its analysis on all women of reproductive age in Texas. See Pet. App. 53a. *Casey* made clear that "[t]he proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant." 505 U.S. at 894; see *id.* at 894-895 (stating that "[t]he analysis does not end with the one percent of women upon whom the statute operates"); see also *id.* at 887 (plurality opinion) (asking whether a substantial obstacle existed for the "particular group" on whom the "particular burden" of a law fell). Thus, in considering the spousal-notification requirement, *Casey* looked at the impact of the requirement on "married women seeking abortions who do not wish to notify their husbands of their intentions," *id.* at 895 (opinion of the Court)—not on all married women seeking abortions, or on every woman seeking an abortion regardless of her marital status. Some women who did not wish to notify their husbands could in fact provide that notification with little consequence, but many could not do so without risking violence, and therefore would not. See *ibid.* Here, some women who have to travel long distances to reach an abortion clinic will do so without difficulty because (for example) they have ample funds, a forgiving job, and an understanding family. But a significant percentage of women will have great difficulty bridging those distances—thus increasing the risk to

their health through delay—or will be entirely unable to do so. See Pet. App. 137a-150a.

Third, the court of appeals stated that consideration of factors external to the requirements themselves—such as inability to travel due to poverty—was irrelevant to the undue-burden analysis. See Pet. App. 55a-56a. That limitation is also inconsistent with this Court's precedent. *Casey* struck down the spousal-notification requirement on the ground that it would effectively bar from obtaining an abortion any woman who might subject herself or her children to abuse if she gave the required notification. 505 U.S. at 892-895. The obstacles associated with the requirements at issue in this case are of a similar character; the undue burden arises from the way that the law interacts with the facts of women's lives, and those facts must therefore be taken into consideration. See *id.* at 894 ("We must not blind ourselves to the fact that [a] significant number of women * * * are likely to be deterred from procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases."). The cases on which the court of appeals relied (Pet. App. 55a-56a) do not undermine that principle, since they address governmental refusals to fund abortions rather than laws that "interfere[]" with the private exercise of women's rights. *Maher* v. *Roe*, 432 U.S. 464, 474-475 (1977); see *Harris* v. *McRae*, 448 U.S. 297, 313-318 (1980) (upholding Hyde Amendment).

Fourth, the court of appeals was wrong to discount the factual finding that a small number of clinics in a small number of metropolitan areas could not reasonably take the place of the more than 40 clinics that operated across the State before H.B. 2 was enacted.

That finding did not rest merely on the testimony of a single expert witness, as the court of appeals suggested, see Pet. App. 56a-57a; the district court looked to "historical data" on the number of abortions and used that data to demonstrate that if the requirements were permitted to stand then "over 1,200 women per month could be vying" for care at a single facility, *id.* at 141a; see *ibid.* ("That the State suggests that * * * seven or eight providers could meet the demand of the entire state stretches credulity."); see also *Schimel*, 806 F.3d at 920. Moreover, the testimony of the expert in question was supported by peer-reviewed research, including data on the ability of Texas ASCs providing abortions to increase their capacity, and the district court was entitled to rely on it. See 8/4/14 Tr. 51-57; D. Ct. Doc. 161, at 9-10. The number of women to whom the requirements would pose a substantial obstacle, then, is much larger than the court of appeals acknowledged.

Finally, the Fifth Circuit erred by using an abortion clinic in New Mexico as a sort of safety valve in the analysis—one that would reduce the distances that women in El Paso (at the far western edge of Texas) would need to travel to seek an abortion. See Pet. App. 72a-76a; see also *id.* at 149a (New Mexico clinic is not subject to an ASC requirement). Each State is "responsible for its own laws establishing the rights and duties of persons within its borders"; that responsibility "cannot be cast by one State upon another, and no State can be excused from performance by what another State may do." *Missouri ex rel. Gaines* v. *Canada*, 305 U.S. 337, 350 (1938); see *Jackson Women's Health Org.* v. *Currier*, 760 F.3d 448, 455-456 (5th Cir. 2014) (noting that "in *Casey*, the [Court] did not

consider the availability of abortions in states surrounding Pennsylvania in invalidating the spousal notification law"), petition for cert. pending, No. 14-997 (filed Feb. 18, 2015). Were the rule otherwise, one State would have greater freedom than its neighbor to enact abortion restrictions merely by virtue of having moved sooner to put them into place.

3. *Casey* recognized that governmental interests in regulating abortion exist from the beginning of a woman's pregnancy and that those interests can be given effect so long as the burden they impose on a woman's rights is not undue. On that basis, this Court has upheld a record-keeping and reporting requirement, a waiting period, an informed-consent requirement, a parental-consent requirement, restrictions on who can perform various tasks, and a prohibition on a particular procedure. See *Casey*, 505 U.S. at 881-887, 899-900 (plurality opinion); *id.* at 887-898 (opinion of the Court); *Mazurek*, 520 U.S. at 974-976; *Gonzales*, 550 U.S. at 168. Other sorts of abortion-related regulations, expressing the "intent of the elected representatives of the people," *Ayotte* v. *Planned Parenthood of N. New Eng.*, 546 U.S. 320, 329 (2006) (quoting *Regan* v. *Time, Inc.*, 468 U.S. 641, 652 (1984) (plurality opinion)), may well be permissible under the *Casey* standard. But the admitting-privileges requirement and the ASC requirement are different. They do not serve—in fact, they disserve—the government's interest in protecting women's health, and they would close most of the clinics in Texas, leaving many women in that State with a constitutional right that "exists in theory but not in fact." *Casey*, 505 U.S. at 872 (plurality opinion). If the Texas restrictions survive, little is left of the balance *Casey* struck.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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