No. _____

IN THE

Supreme Court of the United States

COMPREHENSIVE HEALTH OF PLANNED PARENTHOOD GREAT PLAINS, on behalf of itself, its patients, physicians, and staff; REPRODUCTIVE HEALTH SERVICES OF PLANNED PARENTHOOD OF THE SAINT LOUIS REGION, on behalf of itself, its patients, physicians, and staff; and DR. RONALD N. YEOMANS, M.D., on his own behalf and on behalf of his patients,

Applicants,

v.

JOSHUA D. HAWLEY, Attorney General of Missouri; RANDALL WILLIAMS, Director of the Missouri Department of Health and Senior Services, in their official capacities,

Respondents.

On Application to Vacate the Stay of the United States Court of Appeals for the Eighth Circuit

APPLICATION TO VACATE STAY OF PRELIMINARY INJUNCTION PENDING APPEAL

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INTRODUCTION

To the HONORABLE NEIL M. GORSUCH, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Eighth Circuit:

Applicants (plaintiffs and appellees in the Court of Appeals below) respectfully ask that the stay of preliminary injunction pending appeal entered by the Eighth Circuit be vacated. Applicants challenged and obtained a preliminary injunction against two Missouri abortion requirements that are virtually identical to those this Court struck down just last year in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). Respondents sought a stay of that preliminary injunction pending its appeal, and a panel of the Eighth Circuit properly denied that stay.

Respondents then petitioned the Eighth Circuit to rehear en banc the denial of their stay application. The Eighth Circuit granted en banc reconsideration and, on September 15, issued a one-line order with no opinion staying the preliminary injunction pending appeal. *See* Applicants' Appendix ("Appl. Appx.") P2, P1.

The Eighth Circuit's stay is stunning because the Missouri requirements at issue here mirror those the Court struck down in *Whole Woman's Health*. They mandate that abortion providers have a relationship with a local hospital, including admitting privileges ("Admitting Privileges requirement") and that facilities in which abortion is provided be licensed as ambulatory surgical centers ("Surgical Center requirement"). In *Whole Woman's Health*, this Court struck down these requirements as an undue burden because "neither of these provisions confers medical benefits sufficient to justify the burdens on access that each imposes." *Id.* at 2300.

The Missouri requirements too offer no health benefits and their impact on abortion access in Missouri is at least as dramatic as Texas, limiting the state to only two providers located at the very eastern and western-most edges of the state: one in St. Louis (which offers surgical and medication abortion) and one in Kansas City (which can provide only the early option of medication abortion). Without the Eighth Circuit's stay, three other health centers throughout the state would provide safe abortion care. The stay, therefore, is unnecessarily forcing Missouri women to travel hundreds of miles to access abortion without any corresponding health benefit, resulting in delays that risk their health, if they are able to access abortion at all.

The district court's preliminary injunction is, therefore, on all fours with this Court's clear and binding precedent in *Whole Woman's Health*. *See* Appl. Appx. P7; *See* Defs.' Unsealed Appendix (8th Cir. May 18, 2017) ("Resp. Stay Appx.") A778. (explaining that "the Supreme Court has spoken on this subject"). As this Court has repeatedly explained, lower courts "remain bound" by this Court's precedent unless and until this Court "see[s] fit to reconsider them." *Hohn v. United States*, 524 U.S. 236, 252–253 (1998); *Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016). There was, therefore, no reason for the Eighth Circuit to grant en banc review of the routine denial of a stay in this situation, and certainly no reason to issue a stay pending appeal.

For that reason and to protect the rights and health of the women in Missouri who will seek abortions during the pendency of Respondents' appeal, this Court should vacate the stay entered by the Eighth Circuit, as it did when faced with identical requirements that similarly burdened women's access to abortion. *See*

Whole Woman's Health v. Lakey, 135 S. Ct. 399 (2014) (vacating Fifth Circuit's stay order of district court's preliminary injunction of surgical center requirement state-wide and admitting privileges requirement as applied to McAllen and El Paso clinics); *see also Whole Woman's Health v. Cole*, 135 S. Ct. 2923 (2015) (staying Fifth Circuit's mandate pending disposition of petition for writ of certiorari); *June Med. Servs., L.L.C. v. Gee*, 136 S. Ct. 1354 (2016) (same).

As detailed below, relief as to the Admitting Privileges requirement is required to allow the resumption of services at the Columbia health center, which has completed the licensing process and is prevented from providing services to patients throughout central Missouri only by the Eighth Circuit's stay allowing continued enforcement of an admitting privileges requirement. Relief as to both the Admitting Privileges and Surgical-Center requirements is required to allow services at the Springfield and Joplin health centers, which are awaiting licensure inspection with the Springfield inspection scheduled for October 11.

BACKGROUND

A. The Missouri Requirements at Issue and Their Impact on Abortion Access

Missouri imposes several overlapping Admitting Privileges requirements on physicians providing abortions (including medication abortions), including that they have clinical privileges at a hospital within thirty miles of the health center. Mo. Code Ann. § 188.080; *see also* Mo. Code Ann. § 197.215; Mo. Code Regs. Ann. tit. 19, § 30-30.060(1)(C)(4). Again this requirement is virtually identical to the invalidated Texas requirement, which similarly imposed criminal penalties on physicians providing

abortion without privileges within thirty miles of where the abortion is performed. Tex. Health & Safety Code Ann. § 171.0031.

Missouri also requires facilities performing abortions (again including medication abortions)[1] to be licensed as a Surgical Center. Mo. Ann. Stat. §197.200. To obtain licensure, abortion facilities must comply with regulations similar to those this Court invalidated as to Texas abortion facilities, including physical facility requirement detailing minimum hallway and room sizes and requirements for HVAC systems, among many others. *See* Mo. Code Regs. Ann. tit. 19, §30-30.070; 25 Tex. Admin. Code §135.52.

As a result of the Admitting Privileges and Surgical Center requirements, there are only two abortion providers in a state that covers nearly 70,000 square miles and has a population of over six million people. One, which is built as a Surgical Center and has physicians able to maintain Admitting Privileges at a local hospital, is in St. Louis, on the eastern edge of the state. The other is in Kansas City, on the western edge of the state, and can only provide the early option of medication abortion, available the first ten weeks of pregnancy.[2]

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[1] Medication abortion is an FDA-approved method of early abortion using two medications: mifepristone (also known as RU-486 or by its commercial name Mifeprex), which blocks a hormone necessary to maintain pregnancy, and misoprostol (also known by its brand name Cytotec), which causes the uterus to contract and expel its contents in a process similar to a miscarriage.

[2] The Kansas City health center is able to provide medication abortion because of the settlement of a prior litigation challenging some aspects of the Surgical-Center requirements. Following entry of a preliminary injunction in favor of Applicant Comprehensive Health, *see Planned Parenthood of Kan. v. Drummond*, No. 07-4164-CV-C-ODS 2007 WL 2811407 (W.D. Mo. Sept. 24, 2007), Respondents (or their predecessors) agreed that the Kansas City health center is exempt from all of the physical facility requirements of the Surgical Center requirements (the very requirements Respondents now claim are critical for health and safety). They also agreed that the Kansas City

This imposes enormous burdens on women seeking abortion in Missouri. For example, women in Springfield (the third most populous city in the state) currently have to travel 430 miles round-trip to St. Louis for an abortion after ten weeks, or 325 miles round-trip to Kansas City for an early medication abortion. Women in Joplin have to travel 305 miles round-trip to Kansas City for a medication abortion, or for an abortion after ten weeks have to travel 565 miles round-trip to St. Louis (when they could otherwise obtain a surgical abortion in Springfield, which is much closer). Similarly, women in Columbia currently have to travel 245 miles round-trip to St. Louis. Furthermore, because of Missouri's waiting period law, women must make two trips to a health center at least 72 hours apart, regardless of how far they live from the provider—compounding the travel burdens imposed by the requirements.[3] *Compare* Mo. Ann. Stat. 188.027 (72 hour waiting period applies regardless of travel distance) with Tex. Health & Safety Code Ann. § 171.012(a)(4) (24-hour waiting period shortened to two hours when the woman lives 100 miles or more from the nearest abortion provider). The costs and logistics posed by the need to travel these distances are difficult for all women, but they fall particularly hard on low-income women, women who are victims of abuse, and those with medical

health center physicians may provide abortions based on admitting privileges slightly farther from the health center than permitted by the Admitting Privileges requirement. Resp. Stay Appx. A34–35, A60, A230–249. The Kansas City health center was only recently able to resume services after a long period in which its physicians did not have admitting privileges of the specific type and at the specific hospital permitted by the settlement agreement.

[3] Moreover, Missouri recently amended this requirement to require both visits to take place with the same physician. Mo. Ann. Stat. § 188.027(6) (2017). Because of constraints on physician and patient schedules this new requirement will further increase the burdens imposed on patients who, because of the requirements at issue here, have to travel across the state to access abortion.

conditions. Resp. Stay Appx. A44–45, A141, A157–58. Moreover, the time and increased costs caused by the required travel delay some women from accessing abortion, at risk to their health, and prevents others from obtaining an abortion at all. Appl. Appx. P11–12.

But for the requirements, women in these communities would not need to travel to access abortion: the Columbia and Springfield health centers would provide both medication and surgical abortion, and the Joplin health center would provide medication abortion. But they cannot because although most of Applicants' physicians hold admitting privileges, they have almost uniformly been unable to obtain (as well as to maintain) such privileges at a hospital in the required proximity to the relevant health center. And none of those health centers is built as a Surgical Center.[4]

B. *Whole Woman's Health* and Its Effect on Similar Laws

In June 2016 the Court decided *Whole Woman's Health*, and struck down the Texas surgical center and admitting privileges requirements, finding that "neither of these provisions offers medical benefits sufficient to justify the burdens upon access that each imposes." 136 S. Ct. at 2300. The impact of this ruling on similar laws in other states was immediately clear. The Court quickly denied Wisconsin's petition for

[4] The Columbia health center was exempted from many of the Surgical Center physical facility requirements as part of the settlement of previous litigation. *See* note 2, *supra*. For a period of time following the settlement, its physicians were able to comply with the Admitting Privileges requirement and the health center safely provided abortions, but it has been unable to comply with the Admitting Privileges requirement since 2015, for reasons that (as this Court recognized in *Whole Woman's Health*, *see* 136 S. Ct. at 2312–13) have nothing to do with physician qualifications.

writ of certiorari seeking review of a Seventh Circuit decision declaring that state's admitting privileges requirement unconstitutional. *Planned Parenthood of Wis., Inc. v. Schimel*, 806 F.3d 908 (7th Cir 2016), *cert denied Schimel v. Planned Parenthood of Wis., Inc.*, 136 S. Ct. 2545 (2016). It also denied review of a preliminary injunction blocking Mississippi's admitting privileges requirement, which was subsequently permanently enjoined. *See Currier v. Jackson Women's Health Org.,* 136 S. Ct. 2536 (2016); Order, *Jackson Women's Health Org. v. Currier*, No. 3:12-cv-436-DPJ-FKB (S.D. Miss. March 17, 2017), Pls.' Appx. P425 ("Defendants acknowledge that [*Whole Woman's Health*] is binding"). Alabama moved to dismiss its appeal of a decision striking down its admitting privileges law, stating that "because Alabama's law is identical in all relevant respects to the law at issue in *Whole Woman's Health*, there is now no good faith argument that the law is constitutional under controlling precedent." *Mot. to Dismiss Appeal, Planned Parenthood Se., Inc. v. Strange*, No. 16-11867 (11th Cir. July 15, 2016), Pls.'-Appellees' Appendix (8th Cir. May 26, 2015) ("Appl. Stay Appx.") P418. Louisiana's admitting privileges law was struck down, *June Med. Servs. LLC v. Kliebert*, No. 14-CV- 00525-JWD-RLB, 2017 WL 1505596 (M.D. La. Apr. 26, 2017), and Tennessee agreed not to enforce its surgical center and admitting privileges requirements. Partial Judgment on Consent, *Adams & Boyle v. Slatery*, No. 3:15-cv-00705 (M.D. Tenn. April 14, 2017), Appl. Stay Appx. P421 (agreeing *Whole Woman's Health* controls).

Indeed, the only exception to the uniform precedent applying *Whole Woman's Health* to strike down requirements similar to those in Texas is another recent Eighth

Circuit decision in which a panel, in blatant disregard of *Whole Woman's Health*, vacated a preliminary injunction against a similar Arkansas law. *Planned Parenthood of Ark. & E. Okla. v. Jegley*, 864 F.3d 953 (8th Cir. 2017); Ark. Code Ann. § 20-16-1504(d) (mandating that physicians who provide early medication abortion enter into a contract with a physician with hospital admitting privileges who has agreed to handle complications). The Eighth Circuit panel found that the preliminary injunction was entered in error even though the district court found that the requirement would eliminate medication abortion entirely throughout the state, and leave only a single, surgical abortion provider state-wide, without any attendant medical benefit. *Planned Parenthood of Ark. & E. Okla. v. Jegley*, No. 4:15-cv-00784-KGB, 2016 WL 6211310 at *18, *29–*30 (E.D. Ark. Mar. 14, 2016). A petition for rehearing en banc is pending in that case.

C. The Proceedings Below

In light of *Whole Woman's Health*, in August 2016 Applicant Comprehensive Health asked Respondent Department of Health and Senior Services ("DHSS") whether it would continue to enforce Missouri's requirements, and applied for licensure for its health centers. Resp. Stay Appx. A70, A76–79. In November 2016, DHSS made clear that it would not issue licenses to abortion facilities unless they comply with both the Admitting Privileges and Surgical Center requirements. *Id.* A71, A81–85, A91–92. Therefore, later that month, Applicants filed this lawsuit, seeking a declaratory judgment that, under *Whole Woman's Health*, the requirements are unconstitutional, and appropriate injunctive relief. *Id.* A1.

Applicants moved for a preliminary injunction and, following multiple rounds of briefing with numerous expert reports, as well as Applicants and third parties responding to discovery propounded by Respondents, *see generally* Resp. Stay Appx.; Appl. Stay Appx. P1–412, the district court preliminarily enjoined the Admitting Privileges requirement and partially preliminarily enjoined the Surgical Center requirement. Resp. Stay Appx. A791–93. The district court concluded that the record before it closely resembled the one before the Court in *Whole Woman's Health*, both in Respondents' assertion that the Admitting Privileges and Surgical Center requirements improved women's health and with respect to the burdens they impose on abortion access. Appl. Appx. P6, P14.

With respect to the State's alleged interest in women's health, both sides presented extensive evidence about the safety of abortion, including specific data from Missouri, as well as about whether an Admitting Privileges or Surgical Center requirement improves women's health. *See* Appl. Appx. P7 ("Filings of the parties have added voluminous material to the record, largely directed toward the issue of dangerousness of abortions"); Resp. Stay Appx. A289, A319, A635, A694, A718; Appl. Stay Appx. P398; Defs.' Sealed Appendix (8th Cir May 18, 2017) ("Resp. Sealed Stay Appx.") A800–A807. The district court recognized that the Court has already spoken authoritatively on these issues, Appl. Appx. P7–9., and explained that the "virtual absence of any health benefit" from the Admitting Privileges requirement "was a factor to be weighed" against the burdens imposed, and similarly recognized that the "the lack of necessity and 'nearly arbitrary' imposition of [Surgical Center]

requirements" was likely to determine the outcome of that balancing. Appl. Appx. P10, P14 *quoting Whole Woman's Health* at 2313, 2316.

On the other side of the balance, it was undisputed that the requirements had drastically limited abortion providers to the two on either end of the state. Appl. Appx. P4–7. This means that women who are in the first ten weeks of pregnancy and want to access medication abortion must travel to either Kansas City or to St. Louis, and every woman who chooses surgical abortion and/or is past ten weeks of pregnancy must travel to St. Louis to access abortion. *See* Section A *supra*. It is also undisputed that Missouri law requires a three day wait between two separate health center appointments further compounding these burdens. The district court considered Respondents' evidence attempting to suggest women were not impeded in accessing abortions and found it should not be credited because it is "generally state-wide in nature and not focused on a major area of concern, such as Central Missouri." Appl. Appx. P11. In contrast, it found Applicants' unrebutted evidence "convincingly stat[ed] sociological realities" regarding "barriers women face in accessing abortion." *Id.* at P11–12.

Thus, the district court concluded, "[t]his case is not a close one." *Id.* at P11. Because the requirements have created a situation that "requires hundreds of miles of travel, round-trip, with two trips needed unless a woman has the means and time available for a long stay in St. Louis or other rather distant clinics," without providing medical benefit, the district court preliminarily enjoined the requirements. *Id.* at P11; *see also id.* ("The lesson of [*Whole Woman's Health*] thus requires an undue burden

conclusion when, as here, major travel is needed, because the hospital affiliation requirement has made it practically impossible to staff an abortion clinic in Columbia."); *id.* P14 ("An undue burden of costliness, when balanced against the benefits, is clearly imposed in Springfield and Joplin according to the lesson of [*Whole Woman's Health*].").[5]

While the district court preliminarily enjoined the Admitting Privileges requirement in its entirety, the parties agreed to a narrow injunction of the Surgical Center requirement. Specifically, while the physical facility requirements of the Surgical Center requirement are enjoined, Missouri's remaining licensing and inspection requirements remain in place.[6] Resp. Stay Appx. A792. The injunction's narrow scope mirrors the oversight DHSS agreed to in a previous settlement agreement, *see* notes 2 and 4, *supra*, and under which the Kansas City and Columbia facilities safely provided abortions, *id.* A791–93, and also mirrors the oversight of abortion providers that remains in Texas following *Whole Woman's Health*. *See* 136

[5] Notably, in their stay briefing before the Eighth Circuit Respondents took no issue with the district court's findings about the enormous burdens the requirements place on Missouri women. *See* Mot. for Stay of Inj. Pending Appeal and for Temp. Stay Pending Decision on this Mot. (8th Cir. May 18, 2017); Defs.' Pet. for Reh'g En Banc of Mot. for Stay of Inj. Pending Appeal and Request for Temp. Stay of Inj. Pending En Banc Consideration (8th Cir. July 24, 2017).

[6] Remaining requirements include those around infection control, reporting of communicable diseases, staff qualification and training, clinical examinations and laboratory tests, information provided to patients post-procedure, emergency medications and equipment, and criteria for quality assurance programs, among many others. Mo. Code Regs. Ann. tit. 19, §30-30.060. Not only do providers have to meet the extensive remaining regulations and obtain a license from DHSS prior to providing abortions, but DHSS retains ongoing oversight of all abortion providers, including the authority to immediately suspend the license of any provider that poses a threat to public health and safety. *See* Mo. Ann. Stat. § 197.293.

S. Ct. at 2314 (listing regulations applying to abortion providers that were not contained within the ASC requirements).

Following entry of this preliminary injunction on April 19, Applicants have proceeded diligently with the licensing process so that they can provide abortions to the women of Missouri in their health centers in Columbia, Springfield, and Joplin, but DHSS's licensing of Applicants has moved slowly with none of these health centers yet to be issued a license.[7] At the same time, Respondents appealed the preliminary injunction and sought a stay of that injunction pending that appeal in both the district court and the Eighth Circuit. Both stay applications were denied. *See* Resp. Stay Appx. A797–99; Appl. Appx. P3. They then petitioned the Eighth Circuit for en banc review of the denial of their stay application. On September 12, 2017, the Eighth Circuit in a one-line order granted en banc review of the stay denial, and on September 15, 2017 issued another one-line order staying the district court's preliminary injunction pending appeal. *See* Appl. Appx. P2, P1.[8]

[7] On July 25, the Missouri legislature, which had called a special session regarding abortion, passed Senate Bill 5, which imposes numerous new restrictions on abortion. S.B. 5, 99th Leg., 2nd Extraordinary Sess. (2017 Mo.) While the bill does not change the Admitting Privileges requirement, one portion amends the surgical center licensing scheme by creating a new, statutory category of "abortion facilities." This appears to be a distinction without a difference. As Respondents told the Eighth Circuit, "[i]n fact, SB 5 is unlikely to have any impact on this appeal at all . . . because the relevant provisions of SB 5 constitute a clarifying amendment to remove any doubt that the Department has authority to issue the very regulations that are challenged in this case." Appellants' Resp. in Opp'n to Appellees' Mot. to Stay Briefing of the Merits (8th Cir. August 18, 2017).

[8] Applicants have tried to determine if the Eighth Circuit's stay order *is* that Court's en banc order granting the stay of the preliminary injunction or whether it is an administrative stay pending its consideration of the stay denial en banc. They have not received a response yet, but it is irrelevant as either way, their patients are being burdened, at risk to their health, from the Eighth Circuit's stay.

Absent relief from this Court, the Eighth Circuit's stay will prevent these health centers from providing abortion services as follows:

- **Columbia**: This health center safely provided surgical and medication abortion services for years but more recently, physicians have been unable to get local hospital admitting privileges (despite having admitting privileges in St. Louis), and thus the health center is unable to comply with the Admitting Privileges requirement. Resp. Stay Appx. A61–65. It complies with the Surgical Center requirement as modified by the prior settlement, *see supra* notes 2 and 4. The Columbia health center applied for re-licensure pursuant to the district court's preliminary injunction, on September 8, 2017, Respondents advised that it "will become licensed to operate within one or two business days of the date of this letter." Letter from D. John Sauer, Counsel for Appellants, to Michael E. Gans, Clerk of Court, U.S. Court of Appeals for the Eighth Circuit (8th Cir. Sept. 8, 2017); *see also* Letter from D. John Sauer to Michael E. Gans (8th Cir. Sept. 9, 2017) (clarifying health center referenced was Columbia). No license was issued, however, and will not be unless the stay is vacated as to the Admitting Privileges requirement.
- **Springfield**: After *Whole Woman's Health* this health center applied for licensure and awaits inspection, which Respondent has rescheduled several times and most recently scheduled for October 10–11 (initially

for medication abortion only). Although it can safely provide both medication and surgical abortion, it cannot comply with either the Admitting Privileges or the Surgical Center requirement. Resp. Stay Appx. A96–98.

- **Joplin**: This health center applied for licensure to provide only early medication abortion and too awaits inspection. It also cannot comply with either requirement.[9]

Therefore, without relief from this Court, all three of the health centers will remain unable to provide abortion services pending resolution of the appeal before the Eighth Circuit—even though the laws preventing them from doing so are surely unconstitutional under *Whole Woman's Health*.

ARGUMENT

"[A] Circuit Justice has jurisdiction to vacate a stay where it appears that the rights of the parties to a case pending in the court of appeals, which case could and very likely would be reviewed here upon final disposition in the court of appeals, may be seriously and irreparably injured by the stay, and the Circuit Justice is of the opinion that the court of appeals is demonstrably wrong in its application of accepted standards in deciding to issue the stay." *W. Airlines, Inc. v. Int'l Bhd. of Teamsters*,

[9] Despite the preliminary injunction and the clarity of *Whole Women's Health*, Applicants have continued to attempt to identify physicians to provide abortions who could comply with the Admitting Privileges requirement, and are in discussions with one who may be able to provide limited medication abortion services at the Springfield health center (though it is not clear whether his privileges comply). However, the other physicians who would provide abortions are not able to comply. At any rate, the Springfield health center is not able to comply with the Surgical Center requirement.

480 U.S. 1301, 1305 (1987) (O'Connor, J., in chambers) (quoting *Coleman v. PACCAR, Inc.*, 424 U.S. 1301, 1304 (1976) (Rehnquist, J., in chambers)); *accord Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 134 S. Ct. 506, 506 (2013) (Scalia J., concurring); *id.* at 508 (Breyer, J., dissenting).

Vacating the stay is warranted here. There can be no doubt that the Eighth Circuit was demonstrably wrong in reaching a result directly contrary to the one reached by the Court just over one year ago about virtually identical requirements. Nor can there be any doubt that these requirements have had the effect of profoundly impeding abortion access in Missouri, preventing three health centers that stand ready to provide safe abortion services from doing so, and forcing women to travel hundreds of miles to access abortions at two health centers (one of which can only provide medication abortion) located at the very edges of the state. As a result, women are being irreparably harmed in Missouri every day the stay remains in effect. For these reasons, the stay should be lifted.

I. The Eighth Circuit Erred in Concluding a Stay is Warranted.

"A stay is an intrusion into the ordinary processes of… judicial review, and…is not a matter of right, even if irreparable injury might otherwise result to the appellant." *Nken v. Holder*, 556 U.S. 418, 427 (2009) (citations and internal quotations omitted). "The party requesting a stay bears the burden of showing that circumstances justify [its entry]," *id.* at 433–34, and a stay should not issue unless four factors weigh in its favor: (1) the applicant has made a strong showing that he is likely to succeed on the merits; (2) the applicant will be irreparably injured absent a

stay; (3) issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) the public interest warrants entry of a stay. *Id.* at 425–26, 434 (internal citations omitted). The Eighth Circuit has explained that the most important factor is likelihood of success on the merits. *Brady v. Nat'l Football League*, 640 F. 3d 785, 789 (8th Cir. 2011). Here, Respondents were wholly unable to meet that burden—and in fact, every factor weighs heavily in Applicants' favor—and the Eighth Circuit erred in concluding without opinion that a stay was warranted.

A. The Requirements are Unconstitutional Under a Straightforward Application of *Whole Woman's Health.*

Respondents cannot succeed on the merits, because the district court plainly did not abuse its discretion in finding that Missouri's requirements—which are at least as medically unnecessary and burdensome as the Texas requirements struck down by the Court (as well as those struck down by numerous other courts)–likely impose an undue burden. In *Whole Woman's Health*, when invalidating Texas's requirements that physicians performing abortions have hospital admitting privileges and that abortions be provided only in health centers that meet surgical center requirements, the Court explained that the undue burden test "requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer," *Whole Woman's Health*, 136 S. Ct. at 2309, and struck down the Texas requirements because they failed the required balance.

Specifically, looking at nationwide data, the Court found that the Texas admitting privileges requirement "br[ings] about no…health-related benefit," because abortion is extremely safe, "with particularly low rates of serious

complications." *Id.* at 2311. In the rare case of a complication, the Court noted that the admitting privileges requirement would not impact the quality of care the woman received, as (1) most complications occur in the days following the abortion, "not on the spot," and patients who need care will likely seek medical attention at the hospital closest to them rather than travel further to a hospital where a physician has admitting privileges, and (2) in the "extremely unlikely" case of a complication requiring emergent hospitalization, privileges make no difference in the care a patient receives. *Id.* Moreover, the Court recognized that physicians who provide abortion are unable to obtain or maintain privileges for reasons that have nothing do with their clinical competence, and therefore, "[t]he admitting-privileges requirement does not serve any relevant credentialing function." *Id.* at 2313. In fact, there was no evidence the requirement would help "even one woman obtain better treatment." *Id.* at 2311.

Similarly, the Court found that the Texas surgical center requirement "provides no benefit" in the context of facilities that provide only medication abortion. *See Whole Woman's Health*, 136 S. Ct. at 2315 (". . .[T]he surgical-center requirement provides no benefit . . . in the context of an abortion produced through medication. . . because, in such a case, complications would almost always arise only after the patient has left the facility" and taken the second pill.) And for facilities that provide surgical abortion, it concluded that the surgical center requirements "have such a tangential relationship to patient safety in the context of abortion as to be nearly

arbitrary," as the requirement "will not [provide] better care or … more frequent positive outcomes." *Id.* at 2316 (alterations in original).

Turning to the other side of the balance, the Texas requirements "led to the closure of half of Texas's clinics," *id.* at 2313, and thus vastly increased the number of women who would be forced to travel significant distances to obtain an abortion. The consequent increases in driving distances were "one additional burden, which, when taken together with others that the closings brought about, and when viewed in light of the virtual absence of any health benefit," led this Court to invalidate both the admitting privileges and the surgical center requirements. *Id.* at 2313..

As detailed in Section C, *supra,* the district court properly applied this Court's analysis to Missouri's virtually identical Admitting Privileges and Surgical Center requirements, and concluded that for all the same reasons they do nothing to protect patient health. For that reason, any burdens they impose cannot be tolerated, but here, the burdens imposed by Missouri's requirements are even *more* extreme than Texas's. In Texas, this Court found driving distances of 200 miles untenable—even when they only had to travel to the health center once. *See Whole Woman's Health*, 136 S. Ct. at 2313. In Missouri, women must make two health center visits. And they must travel extraordinary distances to obtain the abortion. For example, women in Springfield must travel up to 430 miles, round trip to St. Louis to obtain an abortion after 10 weeks, when they could otherwise access care in their own community. And in *Whole Woman's Health* this Court held that Texas could not "in the face of no threat to women's health … force women to travel long distances to get

abortions in …superfacilities." 136 S. Ct at 2318. Here, Missouri's requirements have forced women to do exactly that: as a direct result of the Admitting Privileges and Surgical Center requirements abortion access in the state is limited to two providers at the eastern and westernmost edges of the state, one of which provides only early medication abortion. The preliminary injunction entered by the district court was proper because, like the Court's ruling in *Whole Woman's Health*, it would protect women from these burdens and actually *improve* their health by allowing them to obtain earlier abortions with less wait time and extremely reduced travel burdens.

B. Respondents' Attempts to Evade *Whole Woman's Health* Are Unavailing

While the Eighth Circuit provided no explanation for why it stayed the preliminary injunction, Respondents had argued to that Court that it should depart from the clear and binding holdings of *Whole Woman's Health*'s for three reasons: (1) Respondents had shown that abortion, as practiced in Missouri is unsafe; (2) Missouri's requirements are "unique," Mot. for Stay of Inj. Pending Appeal and Temp. Stay Pending Decision on this Mot., 13 (8th Cir. May 18, 2017) ("Resp. Stay Br."); Resp. Pet. for Reh'g En Banc of Mot. for Stay of Inj. Pending Appeal and Request for Temp. Stay of Inj. Pending En Banc Consideration, 14, 17 (8th Cir. July 24, 2017) ("Resp. En Banc Pet.").; and (3) the district court refused to consider their evidence of these differences. None of these is true.[10] In fact, the record below is entirely consistent with the record before the Court in *Whole Woman's Health*, and

[10] As noted in note 5, *supra*, in seeking the stay, Respondents did not dispute the burdens the requirements impose.

Respondents presented no evidence that would warrant a departure from the Court's holdings.

First, Respondents have not shown that abortions in Missouri carry significant health risks. Resp. Stay Br. at 13; Resp. En Banc Pet. at 14. Rather, the record shows just the opposite. Missouri's rate of abortion complications is entirely consistent with those in the widely accepted medical literature on which this Court relied. *Compare Whole Woman's Health*, 136 S. Ct. at 2311 (complication rate following abortion of 2.1%) *with* Resp. Sealed Stay Appx. A800–805 (discovery shows overall rate in St. Louis of 0.91%).[11] And, in any event, Appellants failed to advance any evidence that the requirements change either the frequency or the treatment of abortion complications. Resp. Stay Appx. A330–34, A699, A703–11.[12] Indeed, as the district court recognized, the record shows that the requirements harm patient safety by reducing access to safe and legal abortions. Resp. Stay Appx. A715–16, A782– 83. The district court was, therefore, correct to find that the record "cannot support" a

[11] In the district court Respondents fixated on the fact that in .08% of cases, or 21 patients out of nearly 25,000 over a five-year period, Missouri patients were transferred from a health center to a hospital following an abortion, but that is an extraordinarily low transfer rate. Resp. Stay Appx. 718–719; Resp. Sealed Stay Appx. A803–806; *see also* Resp. Stay Appx. A739 (at least 4 of those patients were transferred out of an abundance of caution, but did not actually receive any treatment at the hospital).

[12] Respondents' experts' justifications for the two requirements also mirrored those presented by Texas' experts that the Court has already correctly rejected. To take one example, Respondents claimed the Surgical Center requirement's physical facility requirements promote women's health because surgical abortion raises the same safety concerns as invasive surgeries commonly performed in Surgical Centers, *see* Resp. Stay Appx. A206–207, but Texas made the same argument and the Court rejected it, finding that, because abortion does not involve an incision or general anesthesia, Surgical Center requirements are "inappropriate." 136 S. Ct. at 2315–16. Respondents presented *no* evidence (nor could they) that the Surgical Center requirement promotes the health of women obtaining abortions using medications alone.

departure from the Court's conclusion that abortion is one of the safest procedures in modern medicine, and there was no basis for the Eighth Circuit to disturb that finding–much less to do so in the context of a stay pending appeal of a preliminary injunction that a panel had previously, correctly denied. Appl. Appx. P8–9, citing *Whole Woman's Health*, 136 S. Ct at 2311.

Second, Respondents' claim that Missouri's requirements are "unique," Resp. Stay Br. at 3; Resp. En Banc Pet. at 14, 17, is wrong. Indeed, Respondents did not even argue that the Admitting Privileges requirement is in any way different from Texas's; nor could they, as both require physicians to have admitting privileges at local hospitals. Mo. Code Ann. § 188.080; Tex. Health & Safety Code Ann. §171.0031. And while some of Missouri's Surgical Center requirements are waivable (and Texas's were not), Respondents overstate the relevance of waivers given that in *Whole Woman's Health*, the Court rejected Texas's argument that the Court should have gone regulation by regulation and invalidated only those with which the abortion providers could not comply. *Whole Woman's Health*, 136 S. Ct. at 2319. Rather, the Court explained, because Texas's Surgical Center requirement was facially unconstitutional, the Court was not required to "proceed in piecemeal fashion" and "invalidate . . . only those specific surgical-center regulations that unduly burden the provision of abortions, while leaving in place other surgical-center regulations." *Id.*

Finally, Respondents attempt to manufacture a legal error by claiming the district court refused to consider their evidence as to the requirements' medical benefits. Resp. Stay Br. at 15–16; Resp. En Banc Pet. at 2, 5, 14. But the district

court in fact permitted voluminous evidence to be submitted, including numerous expert declarations from both sides; permitted discovery of Applicants and third parties; and considered that evidence. Because the record in this case is consistent with the *Whole Woman's Health* record, the district court simply found it "cannot support a ruling" inconsistent with the Court's holdings. Appl. Appx. P8–9. None of Respondents' arguments has merit, and they certainly cannot justify the extraordinary step of an en banc court staying a preliminary injunction wholly in line with a recent decision of this Court.

Because the Admitting Privilege and Surgical Center requirements are unconstitutional under this Court's binding precedent, lack any medical justification, and expose women to enormous burdens at risk to their health, the Eighth Circuit's stay should be vacated.

II. Missouri Women Will Be Seriously and Irreparably Injured by the Stay

Without this Court vacating the stay, Admitting Privileges and Surgical Center requirements virtually identical to those this Court struck down in *Whole Woman's Health* as providing no health benefit will continue to profoundly restrict access to abortion services in Missouri. Women seeking abortion will be limited to two health centers on the very edges of the state when there are three health additional centers that stand ready to provide safe abortions (including the early non-surgical option of medication abortion) throughout the state. These burdens will continue to harm women for the duration of the stay. Patient need for these services is so great that since August 15, despite not being open for abortion services, the Joplin and

Springfield health centers alone have received more than 100 telephone calls from women asking if they are currently providing abortions, or when they will start. The number of women who would seek services at these health centers, as well as the Columbia health center, is of course much higher.

Absent intervention from the Court, women in Missouri who are less than ten weeks pregnant will continue to be forced to travel to either end of the state, and if they are further along or need a surgical procedure, they will have to travel to a single provider at one edge of the state. As the district court recognized this means traveling "hundreds of miles… round trip, with two trips needed unless the woman has the means and time available for a long stay in St. Louis or other rather distant [out of state] clinics," Appl. Appx. P11, in order to access abortion. This will result in some women being denied the choice to terminate a pregnancy altogether. Deprivation of the liberty to make this choice constitutes a profound and irreparable harm. *See Planned Parenthood of Minn., Inc. v. Citizens for Cmty. Action*, 558 F.2d 861, 867 (8th Cir. 1977) (plaintiffs' showing of interference "with the exercise of its constitutional rights and the rights of its patients supports a finding of irreparable injury"); *Planned Parenthood Ass'n of Cincinnati, Inc. v. Cincinnati*, 822 F.2d 1390, 1400 (6th Cir. 1987) ("[T]here is potential irreparable injury in the form of a violation of constitutional rights."); *Deerfield Med. Ctr. v. Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. 1981) (an infringement on a woman's constitutional right to have an abortion "mandates" a finding of irreparable injury because "once an infringement has occurred it cannot be undone by monetary relief"). Indeed, to prevent similar harms

this Court has several times granted stays to prevent the enforcement of abortion requirements nearly identical to those challenged here. *Whole Woman's Health v. Cole*, 135 S. Ct. 2923 (2015) (staying Fifth Circuit's mandate pending disposition of petition for writ of certiorari); *June Med. Servs., L.L.C. v. Gee*, 136 S. Ct. 1354 (2016) (same); *Whole Woman's Health v. Lakey*, 135 S. Ct. 399 (2014) (vacating Fifth Circuit's stay order of district court's preliminary injunction of surgical center requirement state-wide and admitting privileges requirement as applied to McAllen and El Paso clinics).

In contrast, Respondents will face minimal harm if the stay is vacated. As the district court properly found, "[p]rompt relief from the requirements that *Whole Woman's Health* ruled invalid would not harm [Appellants]." Resp. Stay Appx. A787. Moreover, the state has no interest in the enforcement of unconstitutional laws. *See, e.g.*, *Am. Civil Liberties Union v. Johnson*, 194 F.3d 1149, 1163 (10th Cir. 1999) ("threatened injury to [constitutional rights] outweighs whatever damage the preliminary injunction may cause Defendants' inability to enforce what appears to be an unconstitutional statute."); *Saint v. Neb. Sch. Activities Ass'n*, 684 F. Supp. 626, 628 (D. Neb. 1988) (no harm to defendant in losing the ability to enforce unconstitutional regulations).

Finally, the Eighth Circuit's stay harms the public interest by preventing or delaying women from accessing critical healthcare. *Whole Woman's Health*, the record in this case, and other courts that have addressed these issues have made clear that the requirements do nothing to protect women's health, but rather harm it by

impeding access to abortion. *Whole Woman's Health*, 136 S. Ct at 2311, 2315–16; Resp. Stay Appx A798–99. And any claim of threat to women's health ring especially hollow when the district court was careful to craft an injunction that leaves in place extensive regulation and DHSS's licensing and inspection authority. Indeed, the oversight the preliminary injunction leaves in place mirrors the oversight DHSS agreed to in the previous settlement agreement, making it disingenuous for Respondents to now assert that those requirements are critical for the health and safety of Missouri women.

Thus, there is no question that the equities warrant vacature of the Eighth Circuit's extraordinary stay.

CONCLUSION

For the reasons set forth above, Applicants respectfully request that the stay pending appeal entered by the Eighth Circuit be vacated.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 22nd day of September, 2017, I served the above document on the following counsel of record by electronic mail and by overnight commercial carrier.

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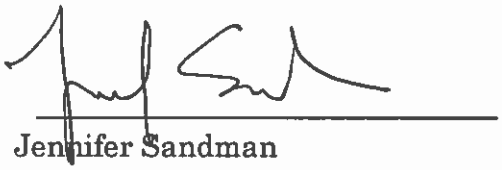

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