No. 14A365

In the Supreme Court of the United States

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

v.

DAVID LAKEY, M.D., COMMISSIONER OF THE TEXAS DEPARTMENT OF STATE HEALTH SERVICES; MARI ROBINSON, EXECUTIVE DIRECTOR OF THE TEXAS MEDICAL BOARD,
Respondents.

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

MEMORANDUM IN OPPOSITION TO EMERGENCY APPLICATION TO VACATE FIFTH CIRCUIT'S STAY PENDING APPEAL

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The plaintiffs' request to vacate the stay is unwarranted because the Fifth Circuit's opinion is unassailable and faithfully applies the post-*Casey* jurisprudence of this Court. Vacatur is doubly unwarranted because abortion remains widely available in Texas—even after HB2's provisions have taken full effect. It is undisputed that the vast majority of Texas residents (more than 83%) still live within comfortable driving distance (150 miles) of an HB2-compliant abortion provider. A very small portion of those 83% live materially further from an open clinic today than they did before HB2 went into effect. Another 6–7% or so live outside that distance for reasons having nothing to do with HB2: They live in Lubbock, Amarillo, or Midland/Odessa, or other far-flung regions of the State where the absence of an abortion provider is not alleged to be caused by HB2. Of the remaining 9.5%, approximately 6.2% live in the Rio Grande Valley in south Texas, from which abortion can be accessed by driving approximately 230–250 miles—an inconvenience, but still a manageable one. *Casey* upheld a 24-hour waiting period that effectively doubled driving distances for *all* abortion patients in the State—some of whom already had to drive hundreds of miles to their nearest abortion clinic. Laws that result in travel distances of 250 miles cannot be deemed "undue burdens" after *Casey*—especially when Texas mitigates these travel burdens by exempting women who must travel more than 100 miles to a clinic from its 24-hour waiting period. *See* Tex. Health & Safety Code § 171.012(a)(4). The remaining 3.3% reside in the El Paso area in far west Texas, where the El

Paso metropolitan area contains a clinic unaffected by HB2 because it happens to be less than a mile across the state line in New Mexico.

Immediately before HB2 took effect on November 1, 2013, there were abortion providers only in the following nine cities: Austin, Beaumont, Corpus Christi, Dallas, El Paso, Fort Worth, McAllen, Houston, and San Antonio. After HB2 took full effect on October 3, 2014, there were still abortion providers in the five most populous of these nine cities—Austin, Dallas, Fort Worth, Houston, and San Antonio. HB2 has (at least temporarily) resulted in the absence of abortion services in only four Texas cities: Beaumont, Corpus Christi, El Paso, and McAllen. But Beaumont is a small city only 85 miles from Houston. Corpus Christi is 143 miles from San Antonio, and McAllen is 240 miles from San Antonio. And residents of El Paso and far West Texas can easily obtain abortions in Santa Teresa, New Mexico—at a clinic less than one mile from the Texas–New Mexico border and only 12 miles from the now-closed Reproductive Services abortion clinic. *See* Theard Dep. (designated at doc. 130-1) 72:8–74:2, 74:5–13, 79:10–16.

Even if one thought that some or all of these travel distances qualified as "undue burdens" (and they don't), that could justify at most as-applied relief limited to individual abortion clinics in Beaumont, Corpus Christi, El Paso, or McAllen (though only the El Paso and McAllen clinics are plaintiffs here). It cannot conceivably justify the statewide injunctive relief that the district court imposed, and especially not when this Court has instructed that plaintiffs seeking facial invalidation must show, at an absolute minimum,

that a law unduly burdens a "large fraction" of abortion patients to whom the law is irrelevant. *See Gonzales v. Carhart*, 550 U.S. 124, 167–68 (2007).

In the end, the plaintiffs' application relies on vague hyperbole at the expense of data and evidence. *See, e.g.*, App. at 1 ("devastating impact on the availability of abortion services"). The plaintiffs have produced not one iota of evidence that the remaining HB2-compliant providers are unable to handle the statewide demand for abortion. They chose to focus their case at trial on the alleged burdens in discrete regions of the State—the Rio Grande Valley and El Paso—eschewing any attempt to prove that HB2 would cause a *statewide* shortage of abortion providers. Yet now their application to this Court repeatedly asserts, based on sheer speculation, that HB2-compliant providers (who were not parties to this lawsuit and from whom the plaintiffs took no discovery) lack the capacity to handle the statewide demand for abortion, and they expect the Court to accept this as fact based on nothing more than their say-so. But it is helpful to remember that these plaintiffs, their attorneys, and their expert witnesses have a history of making dire and unsupported claims that never materialize after the challenged law takes effect. The last time the plaintiffs were before this Court, they insisted that if the Court allowed HB2's admitting-privileges law to take effect, then 20,000 women each year in Texas would be unable to obtain abortions from any abortion provider in the State on account of insufficient capacity at the clinics. *See Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 134 S. Ct. 506, 509 (2013) (Breyer, J., dissenting) ("Applicants assert that

20,000 women in Texas will be left without service.").[1] But the plaintiffs now admit that those claims have been proven false. Trial Tr. (doc. 192) at 41:2–17 (agreeing that decline is "significantly lower" than what was predicted). And they did not even allege at trial that *any* patient has been turned away from *any* abortion clinic on account of insufficient capacity—even though the admitting-privileges law had been in effect for nine months before the start of trial. The plaintiffs' latest "lack of capacity" claim should be met with a skeptical judicial eye and a demand for supporting evidence (of which there is none).

Finally, it bears noting that Planned Parenthood, the State's largest abortion provider, owns the majority of existing HB 2-compliant clinics and is not suing to block the law. Instead Planned Parenthood complied with the by converting or constructing new ASC facilities. Behind the plaintiffs' impassioned rhetoric, this case is more about who will be performing abortions in Texas than it is about whether they will be performed.

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[1] *See also* Emergency Application to Vacate Stay at 2, *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, No. 13A452 (U.S., filed Nov. 4, 2013). ("[T]his forced cessation of services and reduction in capacity will prevent, each year, approximately 20,000 Texas women who would have otherwise had an abortion from accessing this constitutionally protected health care service."); *id.* at 8 ("[A]pproximately 20,000 women annually will no longer be able to access abortion due to the shortfall in capacity among remaining providers."); *id.* at 9 n.4 ("The Fifth Circuit … ignored the undisputed evidence that approximately 20,000 women will be denied abortion each year as a result of the law *solely* because of the inability of the remaining clinics to absorb the patient volume."); *id.* at 16 ("If *Casey*'s undue burden standard means anything, it must mean that a law that forces a third of the providers in the state to cease providing abortions and prevents approximately 20,000 women a year from accessing safe abortion services is unconstitutional.").

STATEMENT OF THE CASE

On July 18, 2013, the Governor signed House Bill 2 (HB2).[2] HB2 contains four provisions regulating abortions: it bans abortion after 20 weeks post-fertilization, requires drug-induced abortions to follow the protocol established by the Food and Drug Administration, requires abortion practitioners to hold admitting privileges at a hospital within 30 miles of where the abortion is performed, and requires licensed abortion clinics operating after September 1, 2014, to meet the standards of ambulatory surgical centers (ASCs). HB2 includes a "comprehensive and careful severability provision," *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583, 589 (5th Cir. 2014) (*Abbott II*), which requires reviewing courts to sever not only the textual provisions of HB2, but also the statute's applications to individual abortion providers. *See* HB2, § 10(b) ("[I]t is the intent of the legislature that every provision, section, subsection, sentence, clause, phrase, or word in this Act, *and every application of the provisions in this Act*, are severable from each other.") (emphasis added). HB2 was scheduled to take effect on October 29, 2013.

After HB2 was enacted, the Texas Department of Health Services issued rules to implement the ambulatory-surgical-center requirement. These "ASC rules" are codified at 25 Texas Administrative Code §§ 135.1–135.56. Subchapter A contains the "operating requirements." These include a re-

[2] Act of July 12, 2013, 83d Leg., 2d C.S., ch. 1, 2013 Tex. Gen. Laws 5013.

quirement that the ASC maintain a "governing body," *see id.* § 135.4; a list of "patient rights," *see id.* § 135.5; rules governing medical records, *see id.* § 135.9; and a requirement of an "organized nursing service" supervised by a "qualified registered nurse," *see id.* § 135.15. Subchapter B has the "fire prevention and safety requirements." These include rules governing fire alarms and fire extinguishers, *see id.* § 135.41, and rules governing the handling of inflammable materials, *see id.* § 135.43. Finally, subchapter C includes the "physical plant and construction requirements." *See id.* §§ 135.51–135.56. Texas's regulations of abortion clinics incorporate these and other provisions of chapter 135 by reference. *See id.* § 139.40. Each discrete ASC requirement is severable from the remaining requirements. *See id.* § 139.9(b) ("[E]very provision, section, subsection, sentence, clause, phrase, or word in this chapter and each application of the provisions of this chapter remain severable from every other provision, section, subsection, sentence, clause, phrase, word, or application of this chapter."). Both HB2 and its implementing rules provided a 13-and-a-half-month window for abortion clinics to comply; the new ASC rules would not take effect until September 1, 2014, even though the law was signed on July 18, 2013.

On September 27, 2013, the plaintiffs filed a lawsuit that challenged only the admitting-privileges requirement and the regulations of abortion-inducing drugs. The plaintiffs demanded total, across-the-board invalidation of the admitting-privileges requirement, and declined to request a more limited remedy that would enjoin the admitting-privileges law only as applied to

abortion practitioners who could prove that the law would impose an "undue burden" on their patients. The district court enjoined the admitting-privileges requirement across the board, but the Fifth Circuit stayed that decision pending appeal. *See Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 419 (5th Cir. 2013) (*Abbott I*). The plaintiffs asked this Court to vacate the stay pending appeal, but that motion was denied in a 5-4 vote. *See Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 134 S. Ct. 506 (2013). Eventually a merits panel of the Fifth Circuit reversed the district court and rejected the plaintiffs' challenge to HB2's admitting-privileges law. *See Abbott II*, 748 F.3d at 600. On April 10, 2014, the plaintiffs moved for re-hearing en banc; the Fifth Circuit has not yet ruled on their motion. HB2's admitting-privileges law was in full effect from November 1, 2013, until August 29, 2014.

On April 2, 2014, the plaintiffs filed a second lawsuit that renews their challenge to the admitting-privileges rule. This time the plaintiffs sought a limited remedy that would enjoin the admitting-privileges law as applied to two abortion clinics: Whole Woman's Health in McAllen and Reproductive Services in El Paso. The current lawsuit also challenges HB2's ambulatory-surgical-center requirements (which the plaintiffs never challenged in the previous lawsuit), seeking both facial invalidation and, as a fallback option, as-applied relief limited to the McAllen and El Paso clinics.

The plaintiffs in this second lawsuit are only a subset of the State's abortion providers—and only a subset of the plaintiffs that sued the State in the

earlier HB2 proceeding. Planned Parenthood, the State's largest abortion provider, is not participating in this second lawsuit, even though Planned Parenthood was the lead plaintiff in the previous lawsuit against the State's admitting-privileges laws and its regulations of abortion-inducing drugs. *See Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 951 F. Supp. 2d 891, 895 (W.D. Tex. 2013). Numerous other abortion providers that joined the previous lawsuit against HB2 are not participating in this case, including Alamo Women's Reproductive Services in San Antonio, Southwestern Women's Surgery Center (an ASC facility), West Side Clinic, Inc., Routh Street Women's Clinic, and Houston Women's Clinic. There appears to be a division in strategy among the State's abortion providers over how to respond to the State's ambulatory-surgical-center law. Some providers, like Planned Parenthood, have sought to comply with the new law by modifying their existing clinics, building new clinics that comply with HB2, or leasing space in licensed ambulatory surgical centers. Others, like Whole Woman's Health, have decided to sue. That makes it all but impossible for the plaintiffs to prove what the *statewide* effects of the State's ASC law will be when most of the State's abortion providers have not participated in any capacity in this lawsuit. Not only are most providers not plaintiffs, but the providers who did sue decided not to seek discovery from those who didn't. As explained below, the plaintiffs did not even attempt to discover or introduce evidence regarding their speculative assertion that the HB2-compliant providers cannot satisfy the demand for abortion in Texas.

The district court held a four-day trial on August 4–7, 2014. The parties entered into a carefully crafted stipulation in which they agreed to the following facts. First, the parties stipulated that *at least* seven licensed ambulatory surgical centers would offer abortion services in Texas after September 1, 2014. These abortion-performing ASCs would be located in Austin, Dallas, Fort Worth, Houston (two), and San Antonio (two). *See* Joint Stip. to Facts (doc. 154) ¶¶ 1–2. Second, the parties stipulated that Planned Parenthood intended to open a new abortion-performing ASC in San Antonio "[a]t an undisclosed date in the future." Joint Stip. to Facts ¶ 3. Finally, the parties stipulated that "[n]o facility licensed by the State of Texas as an abortion facility currently satisfies the ASC requirement of HB2. As a result, each of these facilities will be prohibited from providing abortion services effective September 1, 2014." Joint Stip. to Facts ¶ 4.

It is important to emphasize what the stipulation does not entail. The parties did not stipulate that these seven or eight ASCs would be the *only* abortion providers operating in Texas after September 1.[3] Specifically, the parties did not stipulate that no new HB2-compliant abortion providers would emerge before or after September 1. And they did not stipulate that

[3] The district court's opinion incorrectly states that the parties stipulated that these eight clinics would be the "only" clinics in the State. Mem. Op. (doc. 198) at 7. The stipulation was carefully worded to avoid that concession. The State did not stipulate that no new ASC abortion clinics would open before or after September 1, 2014, and it was the plaintiffs' burden to prove with evidence that Planned Parenthood and other abortion providers who are not parties to this lawsuit would not be opening any new ASC clinics in Texas. The plaintiffs provided no evidence of this.

currently licensed abortion facilities would be unable to provide abortion services by buying, building, or leasing space at a licensed ambulatory surgical center. The parties stipulated only that currently licensed abortion clinics would be unable to perform abortions *at their currently licensed abortion facility*. *See* Joint Stip. to Facts ¶ 4 ("No *facility licensed by the State of Texas as an abortion facility* currently satisfies the ASC requirement of HB2. As a result, each of *these facilities* will be prohibited from providing abortion services effective September 1, 2014.") (emphasis added).[4] The plaintiffs, however, want the courts simply to *assume* that these seven or eight abortion-performing ASCs will be the only remaining abortion providers in Texas. Yet the plaintiffs bear the burden of proof, and they must *prove* that HB2 will leave the State with only seven or eight abortion providers. They have not even attempted to carry their burden of proof on this question. Most of the State's abortion providers are not even parties to this lawsuit, and the plaintiffs introduced zero evidence that these non-party providers have no plans to buy, build, or lease a licensed ambulatory surgical center that would perform abortions. In fact, testimony from all three plaintiff clinics—Whole Woman's Health, Reproductive Services, and the Health Centers—indicated that the clinic owners or their affiliates are exploring the opening of new ASC facilities in the event the lawsuit is unsuccessful. *See* Trial Tr.

[4] Abortions in Texas can be performed at any licensed ambulatory surgical center, and it need not be licensed as an abortion facility to perform abortions. *See* Tex. Health & Safety Code § 245.004(a)(3).

(doc. 192) Vol. 1 at 29:18–30:2, 31:5–32:7; Trial Tr. (doc. 193) Vol. 2 at 6:7–7:22, 71:11–21, 73:24–74:16. Two of the three clinic owners testified that they themselves or their close associates were actively pursuing this option at the time of trial. *See* Trial Tr. Vol. 1 at 29:18–30:2, 31:5–32:7; Trial Tr. Vol. 2 at 6:7–7:22.

At trial, the plaintiffs presented three different theories of "undue burden." First, the plaintiffs argued that HB2 would increase driving distances for some abortion patients. Their expert Daniel Grossman opined that 930,000 women of reproductive age will live more than 150 miles from an abortion clinic after the ASC rules take effect. *See* Grossman Direct (doc. 163) ¶ 23; *see also* Plfs.' Proposed Findings of Fact and Conclusions of Law (doc. 136) FOF ¶ 66; *see also* Mem Op. at 9 (adopting Grossman's numbers).[5] But the plaintiffs encountered an insurmountable obstacle in their quest for *facial* state-wide invalidation of the ASC law: They could not prove that the ASC law would subject a "large fraction" of the State's abortion patients to unduly burdensome driving distances—and this Court has held that an abortion law cannot be *facially* invalidated unless the plaintiffs prove, at the very least, that it imposes an undue burden "in a large fraction of relevant cases." *Gonzales*, 550 U.S. at 167–68; *see also id.* at 168 ("As-applied

[5] Grossman's 930,000 number is misleadingly large, because it includes women who live in areas of the State (such as Lubbock, Amarillo, and Midland/Odessa) where the absence of an abortion clinic within 150 miles pre-dates HB2 and is not alleged to have anything to do with HB2. And of course, most of these 930,000 "women of reproductive age" will never seek an abortion at any point in their lifetime.

challenges are the basic building blocks of constitutional adjudication.") (citation and internal quotation marks omitted).

The defendants presented unrebutted expert testimony that at least 83% of Texas women would live within 150 miles of one of the ASC abortion clinics stipulated to remain in operation—and an additional 7% live outside that range for reasons not alleged to be related to HB2. *See* Giberson Direct (doc. 175(3)) at 6–7. Because the law of the Fifth Circuit had established that driving distances of 150 miles or fewer are not an "undue burden," *see Abbott II*, 748 F.3d at 599, that means that at least 90% of Texas women will not encounter an "undue burden" caused by HB2. The plaintiffs did not even argue that this could satisfy the "large fraction" test. And nearly all of that 10% resides in either the El Paso or Rio Grande Valley areas, which could be addressed by the Plaintiffs' as-applied challenges rather than by statewide invalidation. *See* Giberson Direct at 11.

On top of that, HB2's severability clause requires courts to sever not only the provisions of HB2, but also the statute's *applications* to individual abortion providers:

> Mindful of *Leavitt v. Jane L.*, 518 U.S. 137 (1996), in which in the context of determining the severability of a state statute regulating abortion the United States Supreme Court held that an explicit statement of legislative intent is controlling, it is the intent of the legislature that every provision, section, subsection, sentence, clause, phrase, or word in this Act, *and every application of the provisions in this Act*, are severable from each other. If any application of any provision in this Act to any person, group of persons, or circumstances is found by a court to be in-

> valid, the remaining applications of that provision to all other persons and circumstances shall be severed and may not be affected. All constitutionally valid applications of this Act shall be severed from any applications that a court finds to be invalid, leaving the valid applications in force, because it is the legislature's intent and priority that the valid applications be allowed to stand alone. Even if a reviewing court finds a provision of this Act to impose an undue burden in a large or substantial fraction of relevant cases, the applications that do not present an undue burden shall be severed from the remaining provisions and shall remain in force, and shall be treated as if the legislature had enacted a statute limited to the persons, group of persons, or circumstances for which the statute's application does not present an undue burden. The legislature further declares that it would have passed this Act, and each provision, section, subsection, sentence, clause, phrase, or word, and all constitutional applications of this Act, irrespective of the fact that any provision, section, subsection, sentence, clause, phrase, or word, or applications of this Act, were to be declared unconstitutional or to represent an undue burden.

See HB2, § 10(b) (emphasis added); *see also Leavitt*, 518 U.S. at 138–39 (requiring federal courts to enforce severability clauses in state abortion statutes). Applying HB2's requirements to abortion clinics in Austin, Dallas, Fort Worth, Houston, or San Antonio, will not increase driving distance significantly for *any* abortion patient, because HB2-compliant abortion providers remain available in each of those cities. *See* Joint Stip. to Facts ¶¶ 1–3. *At most*, the plaintiffs' driving-distance theory could support as-applied relief limited to the abortion clinics located outside of Austin, Dallas, Fort Worth, Houston, and San Antonio; it cannot conceivably support facial, statewide invalidation of the ASC law. *See Gonzales*, 550 U.S. at 167–68; *Abbott II*, 748 F.3d at 589 ("Even when considering facial invalidation of a state statute, the

court must preserve the valid scope of the provision to the greatest extent possible.").

Second, the plaintiffs suggested that the remaining ASC abortion clinics would be unable to handle the statewide demand for abortion.[6] But the plaintiffs did not introduce one shred of evidence of clinic capacity at trial, and they did not even attempt to take discovery from the seven ASC clinics to determine their capacity to handle the increased workload. The plaintiffs decided not even to introduce evidence about the capacity of the one ASC clinic that they own, the Whole Woman's Health facility in San Antonio. Indeed, the plaintiffs did not so much as propose a finding of fact to the district court regarding the capacity of the seven or eight ASC abortion providers. Surely the plaintiffs—who understand the abortion field as well as anyone—would have made a case for lack of capacity if there was a case to be made. But they didn't even try. And for good reason: the only evidence in the record bearing on the capacity question comes from the plaintiffs' own witnesses, who testified that a surgical abortion takes between two and ten minutes,

[6] Grossman offered a bald conjecture that the seven or eight ASC abortion providers would be unable to handle the statewide demand for abortion: "My opinion is that these existing ASCs as a group will not be able to go from providing approximately 14,000 abortions annually, as they currently are, to providing the 60,000 to 70,000 abortions that are done each year in Texas once all of the non-ASC clinics are forced to close." Grossman Direct ¶ 20. But Grossman offered *nothing* to support that statement. No data, no research, no interviews, not even hearsay. That is not permissible opinion testimony. An expert opinion must be reasoned, employ the methodology of a discipline, and be founded on data. *See* Fed. R. Evid. 702; *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592–93 (1993). Grossman's bald assertion fails this standard and cannot qualify as evidence.

and that it takes only 14–16 minutes to perform an abortion and prepare the operating room for the next patient. *See* Fine Direct (doc. 167) ¶ 9; Trial Tr. Vol. 1 at 91:1–13.

These numbers mathematically refute any suggestion that seven or eight ASC clinics—many of which have multiple operating rooms—lack the capacity to perform the roughly 68,000 abortions sought annually in Texas, which includes 50,000 surgical abortions. *See* Grossman Direct Table 2 (noting number of abortions in 2012). By expanding its hours of operation and employing physicians and staff from nearby closed clinics, a single ASC could perform an extraordinarily high number of abortions annually. If the plaintiffs disagreed with this, they should have presented evidence to the contrary at trial.

Third, the plaintiffs presented experts who complained that the ASC law (in their view) did not "enhance the safety" of abortion procedures. It is not clear how that has relevance to the "undue burden" standard; this Court has upheld many abortion regulations that were not shown to enhance patient safety. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 885–87 (1992) (upholding 24-hour waiting period); *id.* at 884–85 (upholding statute requiring a licensed physician, rather than a qualified assistant, to provide information relevant to informed consent, and giving the States "broad latitude to decide that particular functions may be performed only by licensed professionals, *even if an objective assessment might suggest that those same tasks could be performed by others.*") (emphasis added); *Mazurek v. Armstrong*, 520

U.S. 968, 973–76 (1997) (upholding law requiring abortions to be performed by licensed physicians, even though "the only extant study comparing the complication rates for first-trimester abortions performed by [physician-assistants] with those for first-trimester abortions performed by physicians found no significant difference") (internal quotation marks omitted); *Gonzales*, 550 U.S. at 132–33 (upholding ban on partial-birth abortion).

In all events, the State's experts opined that the State's ASC law *would* enhance patient safety for several reasons. First, surgical abortion should be performed in a sterile operating environment because it involves entry into the sterile uterus. *See* Thompson Direct (doc. 175(1)) ¶¶ 17, 20, 22. (The plaintiffs' experts emphasized that the vagina is not sterile and is naturally colonized by bacteria, but surgical abortion involves entry not only into the vagina but also the uterus, which is sterile.) Second, other procedures that involve entry into the uterus, such as dilation and curettage, are traditionally performed in an ASC or hospital setting for that reason. *See id.* ¶¶ 22–23. Finally, ASCs provide heightened accountability and monitoring mechanisms that ensure patient safety. *See id.* ¶ 27.

The plaintiffs made two crucial concessions regarding the medical benefits of the State's ASC law. First, the plaintiffs' expert Dr. Elizabeth Raymond acknowledged that health-care providers disagree over whether an ASC requirement would benefit the health and safety of abortion patients:

> Q. Thank you. And you would also agree with me, wouldn't you, that there are at least some health care providers who be-

> lieve requiring a clinic to be an ASC benefits the health and safety of a woman choosing to undergo an abortion?
> A. It's my understanding that's true, yes.
> Q. And also some physicians believe that because during an abortion a woman's cervix and uterus, which are -- are sterile, are penetrated during that procedure, that an abortion is considered an invasive -- an invasive procedure, correct?
> A. Yes.
> Q. And just so the record is clear, you do disagree with those health care providers, right?
> A. That I disagree with?
> Q. You disagree with those health care providers?
> A. Yes.

See Trial Tr. Vol. 1 at 142:22–143:11. When health-care providers and medical experts disagree over the health-and-safety benefits of a law—and the plaintiffs' and the State's experts not only disagreed but acknowledged the existence of disagreement within the medical community—the legislature is entitled to resolve that dispute. *See Gonzales*, 550 U.S. at 163 ("The Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty."); *id.* at 157 ("[T]he State has a significant role to play in regulating the medical profession."). Federal courts are not to serve as "the country's *ex officio* medical board with powers to approve or disapprove medical and operative practices and standards throughout the United States." *Id.* at 164 (citation and internal quotation marks omitted).[7]

[7] The plaintiffs try to get around *Gonzales* by disparaging the State's expert witnesses. This falls flat for several reasons. First, the district court held that the ASC requirement is rationally related to the State's interest in the health and safety of abortion patients. *See* Order on Defs.' Mot. to Dismiss (doc. 148) at 12–13; Mem. Op. at 6. Despite the district court's misgivings about the law's efficacy and purposes, the court's rational-basis hold-

Second, even the plaintiffs acknowledge that abortions performed in ASCs offer improved pain-management options to patients. Amy Hagstrom Miller, the President and CEO of Whole Woman's Health, testified that abortions performed in Whole Woman's Health's ambulatory surgical cen-

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ing admits the existence of rational medical disagreement about the law's stated justifications. Thus, while the district court accorded more weight to the plaintiffs' expert testimony, it did not completely discount the testimony of the defendants' experts, as the plaintiffs ask this Court to do. It bears repeating that the existence of genuine medical disagreement about the merits of the ASC requirement was also admitted by the plaintiffs' own expert witness. *See* Trial Tr. Vol. 1 at 142:22–143:11.

Second, the plaintiffs' fixation on the role of Dr. Vincent Rue is a red herring. Each of the State's experts testified that the expert alone formulated the medical opinions and that Dr. Rue assisted only with word-smithing, research, and other tasks commonly performed by attorneys or other assistants to expert witnesses. *See* Trial Tr. (doc. 195) Vol. 3 at 38:19–39:7, 46:1–47:11; Trial Tr. (doc. 194) Vol. 4 at 21:18–22:9, 139:13–23. Dr. Rue's experience assisting other states in a similar capacity in similar cases made him an asset to the State's defense, particularly in light of the very short amount of time the State had to prepare for this expert-heavy trial. Dr. Rue was not a witness for the State, and his history in the pro-life community no more impugns the State's expert testimony than does the political and professional backgrounds of the lawyers at the Center for Reproductive Rights, who undoubtedly provided similar assistance to their experts in the preparation of their testimony. Indeed, the journal article at the heart of Dr. Grossman's testimony was co-authored by lead plaintiff counsel Stephanie Toti. *See* Elizabeth G. Raymond, Daniel Grossman, Mark A. Weaver, Stephanie Toti, Beverly Winikoff, *Mortality of Induced abortion, other outpatient surgical procedures, and common activities in the United States*, Contraception, Volume 90, Issue 5, Pages 476–479, November 2014; Trial Tr. Vol. 4 at 141:9–142:12. Drs. Grossman and Fine are abortion doctors. *See* Fine Direct ¶ 2; Trial Tr. Vol. 1 at 51:1–6. And Drs. Raymond, Grossman, and Fine are all employed by abortion-advocacy organizations. *See* Fine Direct ¶ 1; Grossman Direct ¶¶ 2–3; Raymond Direct (doc. 162) ¶ 1. All of this is unexceptional—and the State did not bother making a spectacle over it at trial—because as one would expect, experts and consultants who are willing to assist abortion providers in attacking abortion regulations tend to support abortion rights, while experts and consultants who are willing to testify in favor of abortion restrictions tend in the opposite direction. The question for the Court is whether a rational medical disagreement exists. The district court—and even one of the plaintiffs' own expert witnesses—believed that one does, and the Fifth Circuit was not demonstrably wrong in reaching the same conclusion.

ter offer "more robust pain management options" than those performed in non-ASC abortion clinics:

> Q. Is there a difference in the scope of services that are provided at the Corpus Christi clinic and your Whole Woman's Health ASC in San Antonio?
>
> A. Yes. Both in medical care and what I would call, sort of, you know, the comprehensive care model. Both. So in San Antonio we have an ambulatory surgical center. Prior to HB 2, we offered care through the 24th week of pregnancy. Now we offer care to the 20th week of pregnancy. We're also able to offer more robust pain management options in the ambulatory surgical center setting.

Trial Tr. Vol. 2 at 69:18–70:2. Even in this Court, the plaintiffs are careful not to assert that the ASC law provides *no* benefit to patients; they instead make the more limited claim that the law does not "enhance the safety of abortion procedures." But States are allowed to enact laws that improve the standard of care by making abortions less painful—even if one were to accept the plaintiffs' hotly disputed claim that the law would not enhance the "safety" of the procedure.

On Friday, August 29, 2014, the district court issued a memorandum opinion and final judgment. The opinion held that the ambulatory-surgical-center standards should be facially invalidated as an "undue burden," but it did not find or even assert that the ASC law will impose an undue burden on a "large fraction" of the State's abortion patients—and it conducted no analysis of the "fraction" of patients that will encounter undue burdens on account of the ASC law. Indeed, the "large fraction" test is not even men-

tioned in the district court's opinion—even though the State had repeatedly cited the language from *Gonzales* that forbids facial invalidation absent proof of an undue burden on a "large fraction" of patients to whom the law is relevant. *See, e.g.*, Defs.' Post-Trial Br. (doc. 184) 8–9, 15–17.

The district court's opinion also held that the ASC statute was enacted with the "purpose" of imposing an undue burden on abortion patients. *See* Mem. Op. at 16. But it cites no evidence of the legislature's motives for enacting HB2, despite this Court's clear instruction that such evidence is needed to support an unconstitutional-purpose finding. *See Mazurek*, 520 U.S. at 972 (rejecting purpose challenge to abortion regulation due to the lack "of any evidence suggesting an unlawful motive on the part of the Montana Legislature"). And the district court declared the ASC standards unconstitutional as applied to drug-induced abortions, because "any medical justification for the requirement is at its absolute weakest in comparison with the heavy burden it imposes." Mem. Op. at 18. Near the end of the opinion, the district court noted HB2's severability clause and held that the State may enforce its ASC standards against "currently licensed ambulatory-surgical-center abortion providers in Texas" and "new abortion providers that begin offering abortion services after September 1, 2014." Mem. Op. at 19.

As for the admitting-privileges law, the district court's opinion held that it is "constitutionally impermissible" "as applied to the Rio Grande Valley and El Paso clinics." Mem. Op. at 16. But then the opinion concludes with the following paragraph:

> However, when the two provisions [ASC and admitting privileges] are considered together, they create a scheme that effects the closing of almost all abortion clinics in Texas that were operating legally in the fall of 2013. Thus, the overall effect of the provisions is to create an impermissible obstacle as applied to all women seeking a previability abortion. The court will thus enjoin the enforcement of both provisions on the basis that they act together to create an undue burden on a woman seeking a previability abortion by restricting access to previously available legal facilities.

Mem. Op. at 21. This appears to invalidate the admitting-privileges law across the board, or at least as applied to all "previously available legal facilities."[8] But the plaintiffs had not even asked the court for statewide relief against the admitting-privileges law; they brought an as-applied challenge that sought relief only for the McAllen and El Paso clinics. *See Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 458 (5th Cir. 2014) (holding that district court may not facially enjoin admitting-privileges law when the plaintiffs brought only an as-applied challenge).

The district court's judgment largely tracks the opinion, although there are some discrepancies. The judgment first declares that the statute requiring abortion clinics to comply with the State's ASC standards is unconstitutional "[a]s to all abortion facilities in the State," with exceptions for previously licensed ASCs and abortion clinics opening after September 1, 2014. *See* Final Judgment (doc. 199) at 3. The judgment also states that the ASC

[8] It is not clear from the district court's opinion whether "previously available legal facilities" refers to abortion clinics that were open immediately before the district court's ruling, or those that were open immediately before the admitting-privileges law took effect, or those that were open at any point in time before the district court's ruling.

statute is unconstitutional "[a]s applied to the provision of medical abortion."[9] *Id.* The judgment then declares that the admitting-privileges statute "is unconstitutional as applied to Plaintiffs Whole Woman's Health and Sherwood Lynn with respect to the operation of an abortion facility in McAllen, Texas, and Plaintiffs Nova Health Systems and Pamela Richter with respect to the operation of an abortion facility in El Paso, Texas." *Id.*

But the judgment may actually swallow all of these caveats, because it also declares that "the two portions of Texas Health and Safety Code, Sections 245.010(a) [ASC] and 171.0031(a)(1) [admitting privileges], create an impermissible obstacle *as applied to all women seeking a previability abortion*." Final Judgment at 3 (emphasis added). The simplest reading of this language is that it purports to blocks the State from enforcing the ASC *and* admitting-privileges statutes against *any* abortion provider—present or future—that performs previability abortions, even though the final paragraph in the court's opinion seems to say that the laws would be blocked only to the extent they "restrict[] access to *previously available* legal facilities." Mem. Op. at 21 (emphasis added). Again, this relief was not even requested by the plaintiffs. The judgment concludes by enjoining the state defendants from

[9] The judgment does not mention the administrative regulations that require abortion clinics to comply with the State's ASC rules, *see* 25 Tex. Admin. Code § 139.40, §§ 135.1–135.56, nor does it mention the administrative regulations requiring abortion practitioners to hold hospital-admitting privileges, *see id.* § 139.56. In what appears to be an oversight, the judgment does not declare the administrative regulations unconstitutional or enjoin the State's officers from enforcing them.

"enforcing the above-listed portions of sections of the Texas Health and Safety Code to the extent stated herein." Final Judgment at 3.

The State immediately appealed and moved for a stay pending appeal. After holding oral arguments, the Fifth Circuit stayed most of the district court's ruling. *Whole Woman's Health v. Lakey*, No. 14-50928, 2014 WL 4930907 (5th Cir. Oct. 2, 2014). Now the applicants want this Court to vacate the court of appeals's stay, a ruling that would reinstate the district court's opinion and judgment in its entirety while the parties litigate their appeal in the Fifth Circuit. To obtain this relief, the applicants must first show that the court of appeals was "demonstrably wrong in its application of accepted standards in deciding to issue the stay." *See Coleman v. Paccar, Inc.*, 424 U.S. 1301, 1304 (1976) (Rehnquist, J., in chambers). They must also show that their rights "may be seriously and irreparably injured by the stay." *Id.* Finally, the applicants must show that this case "could and very likely would be reviewed here upon final disposition in the court of appeals." *Id.* The emergency application fails to make any of these three required showings.

I. THE COURT OF APPEALS WAS NOT DEMONSTRABLY WRONG IN ITS APPLICATION OF ACCEPTED STANDARDS

In determining whether to stay a judgment pending appeal, a court must consider four factors: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will

be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. *See Hilton v. Braunskill*, 481 U.S. 770, 776 (1987).

The court of appeals considered each of these factors and concluded that the State had made a strong likelihood-of-success showing on most of the issues presented on the appeal. The plaintiffs now must show that the court of appeals was not merely wrong, but "demonstrably wrong," for reaching this conclusion. The plaintiffs come nowhere close to showing that the court of appeals was "demonstrably wrong" in its analysis.

A. The Court of Appeals Was Not Demonstrably Wrong For Staying The District Court's Statewide Injunction Against The Admitting-Privileges Law.

The court of appeals stayed the district court's decision to issue a statewide injunction against the admitting-privileges law because the plaintiffs did not bring a facial challenge against the admitting-privileges law. Rather, the plaintiffs sought only as-applied relief against the State's admitting-privileges law, limited to two abortion clinics: one in El Paso, and one in McAllen. Compl. (doc. 1) ¶¶ 138–51. *See Whole Woman's Health*, 2014 WL 4930907, at *2; *see also id.*, at *16 (Higginson, J., concurring in part and dissenting in part) ("I agree with a stay of the district court's facial invalidation of the admitting-privileges requirement because the plaintiffs did not request that relief."). In addition, the statewide injunction was "directly contrary to [Fifth Circuit] precedent," which had earlier rejected a facial challenge to

the admitting-privileges law in *Abbott II*, 748 F.3d at 599–600. By granting statewide relief that no party had requested, the district court effectively reinstated its original judgment from October 28, 2013—the judgment that panels of the Fifth Circuit unanimously stayed (and unanimously reversed) in *Abbott I* and *Abbott II*.

The district court's actions were indefensible. First, its judgment reinstated a remedy that the Fifth Circuit had specifically rejected in *Abbott I* and *Abbott II*. The plaintiffs make no effort to explain how a district court—which is bound to follow the precedents of the court of appeals—can issue a remedy that the court of appeals had explicitly disavowed in an earlier published decision. And they do not explain how a court of appeals can be "demonstrably wrong" for staying a district-court remedy that directly contradicts the binding precedent of that court. To say that the court of appeals was "demonstrably wrong" for staying this aspect of the district court's judgment is to deny the obligation of district courts to follow appellate-court precedent.

Second, the plaintiffs never asked the court for statewide injunctive relief against the admitting-privileges law, and for good reason: any such claim would be barred by res judicata. The plaintiffs had already litigated and lost their facial challenge to HB2's admitting-privileges law in *Abbott II*. *See* 748 F.3d at 599–600. They cannot take a second bite at the apple, and the district court cannot give them a second bite at the apple by *sua sponte* enjoining the admitting-privileges law on a statewide basis.

Third, the district court never so much as mentioned—let alone applied—the "large fraction" test that the plaintiffs must (at an absolute minimum) satisfy before an abortion law can be invalidated on its face. *See Gonzales*, 550 U.S. at 167–68.

The plaintiffs do not acknowledge the district court's obligation to follow appellate-court precedent and make no effort to reconcile the district court's statewide injunction against the admitting-privileges law with the Fifth Circuit's binding pronouncement in *Abbott II*. If the district court believed that *Abbott II* was wrongly decided, the proper response is to respectfully express its disagreement while denying statewide injunctive relief, and urge the plaintiffs to appeal his adverse judgment and ask the en banc Fifth Circuit or the Supreme Court to overrule *Abbott II*. A court of appeals cannot countenance the defiance that the district court displayed. And it cannot be deemed "demonstrably wrong" for staying a district-court remedy that directly contradicts the precedent from the court of appeals.

B. The Court of Appeals Was Not Demonstrably Wrong For Staying The District Court's Unconstitutional-Purpose Finding.

The district court held that the Texas legislature enacted the ASC statute for the "purpose" of imposing an undue burden on abortion patients, but there are no findings or evidence to support that conclusion. And there is zero evidence in the record that the legislature's purpose for enacting the ASC requirement was to impose an unconstitutional "undue burden" in the path

of abortion patients. Not a single witness at trial testified regarding the motivations of any member of the legislature. No expert opined that the legislature had acted with the purpose of imposing unconstitutional "undue burdens" on abortion patients, and no fact witness testified about any legislative communications or statements that might reveal a constitutionally impermissible motive on the part of the legislature. As in *Mazurek*, 520 U.S. at 972, "[o]ne searches the [district court's] opinion in vain for any mention of any evidence suggesting an unlawful motive on the part of the [Texas] Legislature."

The district court thought that the supposed "dearth of credible evidence" that abortions in ASCs have "better patient health outcomes" is evidence of unconstitutional purpose. Mem. Op. at 16; *see also* App. at 38 ("[E]vidence that the ASC requirement will not serve its stated goal of increasing the safety of abortion procedures … is a further indication of improper purpose."). That line of argument was squarely rejected by *Mazurek*, which the district court did not cite:

> Respondents claim in this Court that the Montana law must have had an invalid purpose because "all health evidence contradicts the claim that there is any health basis" for the law. Brief in Opposition 7. Respondents contend that "the only extant study comparing the complication rates for first-trimester abortions performed by [physician-assistants] with those for first-trimester abortions performed by physicians found no significant difference." *Ibid.* But this line of argument is squarely foreclosed by *Casey* itself. In the course of upholding the physician-only requirement at issue in that case, we emphasized that "[o]ur cases reflect the fact that the Constitution gives the

> States broad latitude to decide that particular functions may be performed only by licensed professionals, *even if an objective assessment might suggest that those same tasks could be performed by others.*" 505 U.S., at 885 (emphasis added)."

520 U.S. at 973. So too here. A State may conclude that abortions should be performed only in licensed ASCs, even if an "objective assessment might suggest" that non-ASCs are also up to the task. The district court and the plaintiffs' disagreement with the legislature's policy judgment is not grounds for an unconstitutional-purpose finding, any more than it was in *Mazurek*.

And even if the district court were correct to note the "dearth of credible evidence" that the ASC requirement will produce "better patient health outcomes," the legislature may still have believed in good faith that the ASC law *would* improve patient health and safety. The plaintiffs bore the burden of producing proof that improper purposes rather than a good-faith belief in the law's stated justifications motivated the legislature, and they produced no evidence on this score. Finally, even construing all the evidence in plaintiffs' favor, it is undisputed that the ASC requirement improves the standard of care by providing more robust pain-management options to abortion patients. *See* Thompson Direct ¶¶ 20–21; Trial Tr. Vol. 2 at 69:18–70:2. That is a valid legislative purpose, and it is undisputed that the ASC law will have this effect.

The district court (and the plaintiffs) also try to infer an unconstitutional legislative purpose from the Department of State Health Services' alleged decision to deny "grandfathering" or "waivers" to previously existing clin-

ics; the district court declared that this subjected abortion clinics to "disparate and arbitrary treatment." Mem. Op. at 16. But the district court and the plaintiffs' claims that the State has discriminated against abortion clinics by refusing to "grandfather" or exempt pre-existing clinics from the ASC requirements is patently false. *See id.* Abortion clinics are treated no differently from any other medical building that seeks to be licensed as an ASC, and no medical building in Texas gets exempted from an ASC licensing requirement because it happened to be in use before it sought to obtain an ASC license. There is one provision of the Texas Administrative Code that exempts *previously licensed ASCs* from complying with changes to the ASC construction requirements that were adopted June 18, 2009. *See* 25 Tex. Admin. Code § 135.51(a). But this grandfathering provision applies equally to abortion-clinic ASCs and non-abortion ASCs—so long as those abortion clinics were licensed as ASCs before June 18, 2009. The State does not require *previously licensed ASCs* to tear down their previously approved buildings and construct new ones whenever the State tweaks provisions in the ASC building code. And the State has exempted the abortion clinics that obtained ASC licenses before June 18, 2009, from the 2009 construction requirements—just as it has exempted every other previously licensed ASCs in the State from those specific requirements.[10]

[10] DSHS did not adopt 25 Texas Administrative Code § 135.51(a) by reference into the new abortion facility regulations because those regulations apply only to *licensed abortion clinics* that must now meet ASC standards post-HB2. Abortion clinics that are licensed as

At the same time, *every* medical building in Texas (including abortion clinics) that seeks to be licensed as an ASC after June 18, 2009, must comply with the post-2009 requirements. The State never gives a blanket exemption from its ASC requirements simply because a building was used for medical purposes before it sought to obtain an ASC license. For the district court and the plaintiffs to assert that the State *must* provide this blanket exemption to pre-existing abortion clinics—when this allowance is not extended to any other building that seeks to become licensed as an ASC—is untenable. And it is surely wrong for the district court to accuse the state of engaging in "disparate and arbitrary treatment" when it treats abortion clinics exactly the same as any other building that seeks to be licensed as an ASC. And in any event, this alleged arbitrary treatment was a post-enactment decision of the Department of State Health Services, not the Texas Legislature. There is no basis on which to infer a *pre-enactment* Legislative motive from the *post-enactment* behavior of a regulatory agency that is not subject to the day-to-day oversight of the Legislature. *See Mazurek*, 520 U.S. at 972 (demanding proof of *legislative* motive to sustain purpose challenge to abortion statute).

Finally, this Court has long rejected the plaintiffs' suggestion that "the targeting of abortion for heightened regulation suggests an improper purpose." App. at 39. States are permitted to subject abortions to rules and regulations that are not imposed on other surgical procedures. *See Casey*, 505

ASCs are governed by the ASC rules in 25 Texas Administrative Code ch. 135 and are fully subject to section 135.51(a)(1)'s grandfathering provision.

U.S. at 852 ("Abortion is a unique act."); *Harris v. McRae*, 448 U.S. 297, 325 (1980) ("Abortion is inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life."); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 66–67 (1976) (upholding written consent requirement for abortion, when no written consent was needed for any other surgical procedure). States may require abortions to be performed by licensed physicians, even if they allow non-physicians to deliver babies. *See Mazurek*, 520 U.S. at 973. And States may subject abortion procedures to 24-hour waiting periods and informed-consent rules that are not imposed on other surgical procedures. *See Casey*, 505 U.S. at 881–87.

C. The Court of Appeals Was Not Demonstrably Wrong To Stay The District Court's Facial Invalidation Of The ASC Law.

The district court's decision to facially invalidate the ASC standards cannot be sustained for a simple reason: There is no finding or claim in the district court's opinion that HB2 will unduly burden a "large fraction" of Texas abortion patients. And no such finding from the district court could have survived appellate review. Unrebutted evidence at trial conclusively proved that the vast majority of Texas abortion patients live within 150-mile driving distances of Austin, Dallas, Fort Worth, Houston, or San Antonio—and each of these cities will host at least one ASC abortion provider after September 1, 2014. And the plaintiffs did not even attempt to discover or in-

troduce evidence suggesting that the ASC clinics in these cities could not handle the post-HB2 demand for abortion. There is no basis for concluding that the ASC standards impose an "undue burden" on any patient living within reasonable driving distances of those cities, and there is no way for the plaintiffs to show that a "large fraction" of patients will encounter undue burdens when the vast majority of the State's population lives near an ASC abortion clinic.

The district court's opinion is careful to avoid any claim that the ASC rules will unduly burden a "large fraction" of the State's abortion patients. Instead, the opinion makes vague assertions that a "significant number" of patients will experience increased travel distances. *See* Mem. Op. at 9 ("[A] *significant number* of the reproductive-age female population of Texas will need to travel considerably further in order to exercise its right to a legal previability abortion.") (emphasis added); *id.* at 11 ("[T]he court concludes that the practical impact on Texas women due to the clinics' closure statewide would operate for a *significant number* of women in Texas just as drastically as a complete ban on abortion."). That is not a basis on which a court may *facially* invalidate an abortion law. Even if a "significant number" of patients will encounter undue burdens or substantial obstacles, that cannot justify facial invalidation under this Court's precedents unless that "significant number" amounts to a "large fraction" of Texas's abortion patients. The Court could not have made this more clear in *Gonzales v. Carhart*. *See* 550 U.S. at 167–68 ("[R]espondents have not demonstrated that the Act

would be unconstitutional in a large fraction of relevant cases."). The district court did not undertake this inquiry, opting instead to replace this Court's "large fraction" standard with a more plaintiff-friendly "significant number" test. That alone warranted a stay of the district court's ruling.

The district court was not unaware of *Gonzales* or its requirement that abortion litigants seeking facial invalidation prove, at an absolute minimum, that the law unduly burdens a "large fraction" of abortion patients. Its refusal to acknowledge or apply the "large fraction" test stems from the fact that the trial evidence could not support a finding that a "large fraction" of the State's abortion patients would encounter undue burdens on account of the ASC rules. The plaintiffs' expert Daniel Grossman opined that HB2 will increase driving distances for abortions, but the plaintiffs did not dispute the methodology or conclusions of the defendant's expert, Todd Giberson, who demonstrated that even under the worst-case scenario envisioned by the plaintiffs, at least 83% of Texas women will live within 150 miles of an ASC abortion clinic—and another 7% or so live outside that range for reasons not alleged to be related to HB2. Giberson Direct at 6–7. *Casey* establishes that travel distances of 150 miles do not qualify as an "undue burden," because it upheld Pennsylvania's 24-hour waiting period even though the district court specifically found that it would be "particularly burdensome" for patients who must travel long distances, 505 U.S. at 885–86, and even though the Pennsylvania law would double the travel distances for "the thousands of Pennsylvania women who [already] travel *hundreds of miles* to obtain an abor-

tion," Brief for Petitioners, 1992 WL 551419, at *10, *Casey*, 505 U.S. 833, Nos. 91-744 & 91-902 (1992) (citations omitted and emphasis added). In any event, even if 150 miles is an undue burden in some cases, nearly all of the 83% within the 150-mile range have not had their distance from the nearest abortion facility materially impacted by HB2, because they reside in or around major metropolitan areas containing a clinic. Of the 83%, only the relatively small populations of the Beaumont and Corpus Christi areas can be said to have had their distance to the nearest clinic materially increased under HB2.

That means that at least 90% of Texas women will not even arguably encounter an "undue burden" caused by HB2. 10% does not qualify as a "large fraction," and facial invalidation is particularly inappropriate because nearly all of that 10% resides in either the El Paso or Rio Grande Valley areas, which can be addressed by the Plaintiffs' as-applied challenges rather than by statewide invalidation. *See* Giberson Direct at 11; *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329 (2006) (declaring that "the 'normal rule' is that 'partial, rather than facial, invalidation is the required course,' such that a 'statute may ... be declared invalid to the extent that it reaches too far, but otherwise left intact'"); *Abbott II*, 748 F.3d at 589 ("Even when considering facial invalidation of a state statute, the court must preserve the valid scope of the provision to the greatest extent possible.").

The plaintiffs' only response to Giberson is to say that 930,000 women of reproductive age will live outside the 150-mile boundary. Grossman Direct

¶ 24; *see also* Plfs.' FOF/COL, FOF ¶ 66. As we have noted, this 930,000 number is misleadingly high because it includes women who live in populated areas, such as Lubbock, Amarillo, and Midland/Odessa, where the absence of an abortion clinic within 150 miles is not even alleged to be caused by HB2. *See* Giberson Direct at 6–7; *see* note 5, supra. When Grossman's number is stripped of these populations, it amounts to little more than the total number of reproductive-age women in the El Paso and Rio Grande Valley areas. Giberson Direct at 11.[11] Those areas were the subject of the plaintiffs' regional, as-applied challenges. Thus, there is no evidence that even a significant number—much less a large fraction—of women outside those two regions fall outside the 150-mile distance on account of HB2. Facial invalidation was particularly inappropriate when there is no evidence of *any* burdens outside of two discrete regions—and the alleged burdens in those

[11] Giberson testified based on 2010 Census block-level data that the total number of reproductive-age Texas women who live outside the 150-mile radius of an existing ASC clinic due to the closure of clinics in McAllen and El Paso is 462,622. *See* Giberson Direct at 11. That is roughly half of Grossman's 930,000 number. The other half is made up almost entirely of (1) the relevant population of the Lubbock-Amarillo-Midland/Odessa areas (227,708), where the recent closure of a clinic in Lubbock is not alleged to have been caused by HB2; (2) smaller metropolitan areas (33,589); and (3) various far-flung rural areas of the state where the absence of a clinic is not related to HB2 (111,573). *Id.* The remainder is 94,508. Excluding the Laredo area (56, 379), which lies just outside the 150-mile range but has quick access to San Antonio via Interstate 35, yields an even smaller remainder, nearly all of which is attributable to the fact that Grossman's starting point (930,000 outside 150 miles) is slightly higher than Giberson's (891,888 outside 150 miles). The bottom line is that the 930,000 number repeatedly highlighted by the plaintiffs is almost entirely made up of the populations of El Paso, the Rio Grande Valley, and areas where no one has alleged that the absence of a clinic is due to HB2. A statewide injunction cannot draw its justification from that figure.

two regions could be addressed by as-applied relief if a court considers those burdens "undue." *See Ala. State Fed'n of Labor, Local Union No. 103 v. McAdory*, 325 U.S. 450, 465 (1945) ("When a statute is assailed as unconstitutional we are bound to assume the existence of any state of facts which would sustain the statute in whole or in part.").

Following the plaintiffs' lead, the district court eschewed any "large fraction" analysis and relied on what it described as a "significant number" of patients who will encounter greater driving distances. Mem. Op. at 9, 11. But a law cannot be *facially* invalidated unless the plaintiffs prove an undue burden on a "large fraction" of the State's abortion patients—not a large (or "significant") raw number. The plaintiffs and the district court gave up on trying to prove a "large fraction" in the face of Giberson's undisputed testimony. That compelled a judgment for the State on the facial challenge.[12]

[12] The district court claimed, without explanation, to find more "indicia of reliability" in Grossman's numbers than in Giberson's. Mem. Op. at 9 n.4. The court made this finding despite the plaintiffs' failure to seriously dispute Giberson's calculations and despite the fact that Grossman's and Giberson's numbers are not materially in conflict. *Compare* Grossman Direct ¶ 23 (estimating that 930,000 "women of reproductive age in Texas" would live "more than 150 miles from a clinic providing abortion in Texas") *with* Giberson Direct at 11 (estimating that 891,888 Texas women aged 15–44 would live 150 miles from an abortion clinic). Giberson used census-block level analysis normally used for redistricting purposes to determine with precision the number of residents within 150 miles of the relevant clinic addresses. Giberson Direct at 6. Grossman's analysis employed county-wide calculations of affected populations, much less precise than census-block calculations employed by Giberson. The numbers ended up being similar. The difference between Grossman's number (930,000) and Giberson's number (891,888) is 38,112, which amounts to .72% of reproductive-age Texas women. Thus, substituting Grossman's numbers for Giberson's adds less than 1% to the fraction of the population that will fall outside the 150-mile range due to HB2. Regardless of which experts' numbers are used, the fraction of Texas abortion patients alleged to fall outside of 150 miles of a clinic because of HB2 is not large.

The district court's statewide relief is also precluded by HB2's "comprehensive and careful severability provision," *Abbott II*, 748 F.3d at 589, which requires courts to sever not only the provisions of HB2, but also the statute's applications to individual abortion providers. *See* HB2, § 10(b). *See Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 501 & n.14 (1985) (enforcing an application-severability requirement in a state statute that contained an overbroad definition of prurience, and holding that "facial invalidation of the statute was . . . improvident"); *Wyoming v. Oklahoma*, 502 U.S. 437, 460–61 (1992) ("Severability clauses may easily be written to provide that if application of a statute to some classes is found unconstitutional, severance of those classes permits application to the acceptable classes."); Richard H. Fallon, Jr., et al., *Hart and Wechsler's The Federal Courts and the Federal System* 180–84 (5th ed. 2003) ("The notion that statutes are typically 'separable' or 'severable,' and that invalid applications can somehow be severed from valid applications without invalidating the statute as a whole, is deeply rooted in American constitutional law."). The district court was obligated to sever and leave in place any applications of HB2 that were not proven to impose an "undue burden" on abortion patients. The plaintiffs produced no evidence that the closure of non-ASC abortion clinics in Austin, Fort Worth, Dallas, Houston, or San Antonio would impose an "undue burden" on patients in those cities, and the closures of those clinics will not contribute to increased driving distances when ASC clinics remain available in those cities. The district court suggests (although it does not find) that clinic closures may leave

the remaining providers unable to handle the statewide demand for abortion. Mem. Op. at 11. But the plaintiffs presented no evidence that the seven or eight stipulated ASC abortion clinics lack the capacity to handle the statewide demand, and they did not propose a finding of fact to this effect. Findings or suggestions of insufficient capacity must be based on trial evidence, not conjecture. *Abbott II*, 748 F.3d at 604 (explaining that courts "must base decisions on facts, not hypothesis and speculation"). Without citing any evidence provided by the plaintiffs (because there was none), the district court simply asserted that the State's claim that the eight remaining clinics could satisfy statewide demand "stretches credulity." Mem. Op. at 11. That approach improperly shifts the burden of proof to the State. *See Abbott II*, 748 F.3d at 597 ("[T]he burden of proving the unconstitutionality of abortion regulations falls squarely on the plaintiffs."). The plaintiffs bore the burden to prove that the remaining clinics could not satisfy demand, and they did not even attempt to carry that burden.

If such a lack-of-capacity case could ever be made, the plaintiffs and their lawyers—who are intimately familiar with the abortion field—could surely have made it. But their own evidence belies any suggestion that the existing ASC clinics cannot handle the increased demand for their services that will result from the closure of nearby clinics. The plaintiffs' witnesses testified that a surgical abortion takes between two and ten minutes, and that it takes only 14–16 minutes to perform an abortion and prepare the operating room for the next patient. *See* Fine Direct (doc. 167) ¶ 9; Trial Tr. (doc. 192) Vol. 1

at 91:1–13. This is the *only* evidence in this record bearing on clinic capacity. And as a matter of simple mathematics, these numbers refute any suggestion that seven or eight ASC clinics—many of which have multiple operating rooms—lack the capacity to perform the roughly 68,000 abortions sought annually in Texas, which includes 50,000 surgical abortions. Grossman Direct Table 2 (noting number of abortions in 2012). The question of clinic capacity is multi-faceted: Can the ASC clinics expand their hours to accommodate increased demand? Can they employ doctors and staff who formerly worked for now-closed non-ASC clinics? Could they use the increased revenue streams to expand their capacity even further? Isn't it likely that if a small number of providers is performing nearly all the procedures in a large metropolitan area, competitors will soon find it profitable to open new facilities? The answer to each of these questions would seem to be "Yes," and it was the plaintiffs' burden to make a contrary showing. They made no attempt to do so, instead focusing the entirety of their case on the alleged burdens in the El Paso and Rio Grande Valley areas.[13]

None of the remaining discussion in the district court's opinion can justify facial validation of the ASC rules. Its purported findings are vague, conclusory, and unsupported by any references to trial evidence. Yet a finding of

[13] And even if there were evidence of insufficient capacity in an area of the State that already contains an ASC clinic, there must be *additional* evidence and findings that these problems will unduly burden a "large fraction" of the State's abortion patients. There is nothing of the kind in this record.

"undue burden" must be based on evidence in the trial record; a trial court cannot simply assert that an "undue burden" exists based on its own conjecture. *See Abbott II*, 748 F.3d at 604. Much of what the district court says is irrelevant to the undue-burden inquiry, such as its beliefs regarding the medical need for the law, its beliefs regarding whether the burdens are "appropriately balanced by a credible medical or health rationale," or the relative health risks of abortion compared to other procedures. Mem. Op. at 15. The district court had already found that the State had a rational basis for enacting the ASC requirements. Indeed, the court repeated that holding in this order. Mem. Op. at 6. Once rational-basis review is satisfied, the *only* remaining question is whether those requirements have the purpose or effect of imposing a "substantial obstacle" in the path of patients seeking previability abortions—and that has nothing to do with the medical justification for the law. *See Casey*, 505 U.S. at 878; *see also Gonzales*, 550 U.S. at 164 (federal courts are not to serve as "the country's *ex officio* medical board"). And it has long been settled that States may impose abortion-specific regulations without extending those requirements to other, more dangerous procedures. *See Danforth*, 428 U.S. at 67 (requirement of written consent for abortion not unconstitutional even though not imposed on other surgical procedures). Most importantly, however, the district court fails to make the finding that needs to be made for facial invalidation: That the ASC requirements will unduly burden a "large fraction" of the State's abortion patients.

Finally, even if one were to accept the "balancing test" approach proposed by the plaintiffs—in which the burdens of the law are weighed against its medical benefits—there still is no conceivable basis for *statewide* invalidation of the ASC requirement. That is because the plaintiffs failed to establish that the ASC requirement imposes *any burden at all* on the vast majority of Texans, who live in or near the five major metropolitan areas that already contain an abortion-performing ASC. Rather than presenting any evidence of statewide problems, the plaintiffs focused their case entirely on two discrete regions of the State—the El Paso and Rio Grande Valley areas. These discrete areas of the State were the subject of the plaintiffs' as-applied challenges, and relief on these as-applied claims (though unjustified) would completely alleviate the alleged travel burdens on which the plaintiffs focused their case at trial. There simply is no evidence in this record that any patient in the Houston, Dallas, San Antonio, Austin, or Fort Worth regions will encounter *any* burdens in obtaining an abortion as a result of HB2. As a result, there is no basis for a statewide undue-burden finding.

All of the plaintiffs' impassioned rhetoric about long travel distances across vast swaths of a large state is relevant only to their as-applied claims in El Paso and the Rio Grande Valley. The plaintiffs are attempting to leverage their evidence about the impact of HB2 on discrete regions of the State to support a claim for statewide invalidation for which there is no evidentiary basis. Neither this Court's precedents nor HB2's binding severability clause permit that maneuver. To get a statewide injunction, the plaintiffs must

demonstrate a statewide injury. Their allegations of injury in discrete, far-flung parts of the State—even if fully credited—are insufficient to support statewide invalidation of the ASC requirement, particularly when as-applied relief would fully address those concerns.

The plaintiffs undertook a "heavy burden" in bringing a facial challenge against HB2's ambulatory-surgical-center standards, and they were required to prove that each of these standards will impose an "undue burden" on a "large fraction" of the State's abortion patients. *See Gonzales*, 550 U.S. at 167–68. The plaintiffs did not attempt to make this showing, and the district court granted relief only by changing the legal standard established by this Court for facial challenges to abortion laws. The State is likely to succeed on its appeal of this decision.

D. The Court of Appeals Was Not Demonstrably Wrong To Conclude That The Plaintiffs' Challenges To The Admitting-Privileges Law Are Barred By Res Judicata.

The plaintiffs' as-applied challenges to the admitting-privileges law are barred by res judicata. The plaintiffs challenged the admitting-privileges requirement in the earlier HB2 lawsuit, and they could have sought as-applied relief for the McAllen and El Paso clinics in that proceeding. But the plaintiffs in the initial HB2 lawsuit eschewed any request for as-applied relief against the admitting-privileges law, and forced the courts to choose between total invalidation of HB2's admitting-privileges requirement or no relief. *See* Compl. (doc. 1) ¶¶ 5, 90, *Planned Parenthood of Greater Tex. Surgical Health*

Servs. v. Abbott, No. 1:13-cv-862-LY (W.D. Tex.); *see also* Trial Tr. (doc. 101), *Abbott*, No. 1:13-cv-862-LY, Vol. 3 at 29:5–8 ("[U]nder *Casey*, the proper remedy is facial invalidation."), and 59:4–6 ("[T]he appropriate remedy here is . . . facial invalidation."). Having lost that gambit, the plaintiffs cannot turn around and file a new lawsuit seeking the more limited, as-applied relief that they should have asked for in the original proceeding. *See In re Howe*, 913 F.2d 1138, 1144 n.10 (5th Cir. 1990) ("A party may not avoid the preclusive affect of res judicata by asserting a new theory or a different remedy.").

The doctrine of res judicata blocks any claims for which: (1) the parties are identical to or in privity with the parties in a previous lawsuit; (2) the previous lawsuit has concluded with a final judgment on the merits; (3) the final judgment was rendered by a court of competent jurisdiction; and (4) the same claim or cause of action was involved in both lawsuits. *See Petro-Hunt, L.L.C. v. United States*, 365 F.3d 385, 395 (5th Cir. 2004). The plaintiffs and the district court do not contest the first three elements of the State's res judicata defense.[14] But the district court held that the plaintiffs' serial challenges to the admitting-privileges law do *not* involve the "same claim or cause of action" because the plaintiffs' current lawsuit "relies on facts that

[14] Doctors Lynn and Davis were not parties to the earlier proceeding, but they were in privity with Whole Woman's Health and Austin Women's Health Center, which sued on their behalf. *See* Compl. ¶¶ 13–14, *Abbott*, No. 1:13-CV-862-LY (stating that clinics were suing "on behalf of" their "physicians"). And Reproductive Services is in privity with Dr. Richter, who sued in the initial lawsuit challenging HB2. *Id.* ¶ 21.

occurred after judgment was rendered in the previous lawsuit and that were not considered by either this court or the appellate court." *See* Order on Defs.' Mot. to Dismiss (doc. 148) at 7. The district court noted that the plaintiffs only recently learned that the McAllen and El Paso physicians would "ultimately be unable to obtain admitting privileges despite efforts to secure them." *Id.* at 8. The district court also relied on the plaintiffs' allegation that an increased number of McAllen patients attempted self-abortion after the McAllen clinic ceased offering abortions on November 1, 2013. *Id.*

The district court erred by allowing these new factual allegations to overcome the State's res judicata defense. A litigant cannot establish a new "claim" or "cause of action" simply by alleging new facts that arose after judgment in the previous lawsuit. The test is whether the claims in the first and second lawsuits arise from the same "transaction" or "series of connected transactions." *Petro-Hunt*, 365 F.3d at 395–96. This transactional test is satisfied so long as the plaintiffs' claims arise from the "same nucleus of operative facts." *In re Southmark Corp.*, 163 F.3d 925, 934 (5th Cir. 1999). And new factual allegations establish a different *nucleus* of *operative* facts only when the new facts are "significant" and create "new legal conditions." *Hernandez v. City of Lafayette*, 699 F.2d 734, 737 (5th Cir. 1983); *Jackson v. DeSoto Parish Sch. Bd.*, 585 F.2d 726, 729 (5th Cir. 1978).

The formal rejection of the doctors' applications for hospital admitting privileges does not create "new legal conditions" or establish a different "nucleus of operative fact." It was uncontested at the time of the first law-

suit that the doctors at Reproductive Services in El Paso and Whole Woman's Health in McAllen lacked hospital admitting privileges and would cease providing abortions once HB2 took effect on October 29, 2013. *See* Compl. ¶ 21, *Abbott*, 1:13-CV-862-LY ("Dr. Richter does not have admitting privileges at any hospital, and therefore if the admitting privileges requirement takes effect, she will be forced to stop providing abortion care."); *id.* ¶ 13 ("If the admitting privileges requirement of the Act is allowed to take effect, WWH will stop providing abortions altogether at … McAllen."); *id.* ¶ 50 ("If allowed to take effect on October 29, the admitting privileges requirement . . . will cause the sole abortion facilities in . . . McAllen to cease providing abortions."). The plaintiffs could have used those uncontested facts—if combined with proof that closure of the El Paso or McAllen clinics would impose an "undue burden" on abortion patients—to seek as-applied relief that would keep those clinics open until an abortion practitioner secured the required admitting privileges. The district court did not consider this as-applied relief because the plaintiffs never asked for it, choosing instead to insist on facial invalidation as their only requested remedy.[15]

[15] Judge Higginson suggested that the formal denial of the physicians' applications meant that "the availability of abortion services for women living near the McAllen and El Paso clinics has concretely changed," but he did not explain how the availability had changed and it is impossible to see how it could have changed. *See Whole Woman's Health*, 2014 WL 4930907, at *16 n.1 (Higginson, J., concurring in part and dissenting in part). None of the physicians practicing at those clinics could perform abortions when the initial lawsuit was brought, and none of them could perform abortions after their applications were formally denied by the hospitals.

The rejection of the doctors' applications does not create "new legal conditions" because it does not expand the claims or relief that the plaintiffs could have sought in the initial lawsuit. It would be a different situation if the doctors *had* the required admitting privileges during the first trial, but the hospitals unexpectedly pulled their privileges after entry of final judgment. But the plaintiffs do not deny that their as-applied claims were ripe in the earlier lawsuit—all they had to do was ask the court for an injunction limited to the El Paso and McAllen clinics. Instead, the plaintiffs refused to request as-applied relief as a fallback option and made a tactical decision to force the courts into an all-or-nothing choice. Res judicata prohibits them from seeking that relief now.[16]

The plaintiffs suggest that *Abbott II* exempts them from the doctrine of res judicata because the court of appeals wrote that "[l]ater as-applied challenges can always deal with subsequent, concrete constitutional issues." App. at 43. That contention is meritless for numerous reasons. First, the *Abbott II* opinion does not purport to alter the law of claim preclusion or exempt the plaintiffs from the requirements of that doctrine. Second, the *Abbott II* panel has no power to change the law of claim preclusion, which is grounded in pronouncements from the Supreme Court and must be obeyed by every inferior tribunal. *See, e.g.*, *Allen v. McCurry*, 449 U.S. 90, 94 (1980); *Brown v.*

[16] The alleged increase in self-abortions is likewise insufficient to establish a different "nucleus" of operative facts. The plaintiffs presented no admissible evidence of this at trial, and the district court did not make any finding that self-abortion increased after its judgment in the initial HB2 trial.

Felsen, 442 U.S. 127, 131 (1979). Third, *Abbott II* was not opining on the plaintiffs' constitutional challenges to HB2, but on the general duty of federal courts to respect severability clauses in state legislation. Here is the relevant context of the Fifth Circuit's discussion:

> Federal courts are bound to apply state law severability provisions. *Leavitt v. Jane L.*, 518 U.S. 137, 138–39 (1996). Even when considering facial invalidation *of a state statute*, the court must preserve the valid scope of the provision to the greatest extent possible. Later as-applied challenges can always deal with subsequent, concrete constitutional issues.

Abbott II, 748 F.3d at 589 (emphasis added). Finally, even if *Abbott II* were purporting to opine on the plaintiffs' ability to bring subsequent lawsuits against HB2's admitting-privileges requirement, its discussion would be dictum because the parties did not litigate that question and it had nothing to do with the issues resolved on appeal. *See, e.g.*, Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 Stan. L. Rev. 953 (2005); Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. Rev. 1249 (2006). *Abbott II* did not exempt abortion clinics from the law of res judicata, as the plaintiffs appear to believe.

The plaintiffs also mislead this Court by suggesting that *Abbott II* found or assumed that one of two abortion clinics in the Rio Grande Valley would remain open. *Abbott II* held that there was no undue burden regardless of whether one or both of the clinics in the Valley would close. *Compare* App. at 44 *with Abbott II*, 748 F.3d at 597 ("As an initial matter, the statement that *both* clinics in the Rio Grande Valley will close may be disregarded as clearly

erroneous based on the trial court record.… *Even if we were to accept that both clinics in the Rio Grande Valley were about to close as a result of the admitting privileges provision, however, this finding does not show an undue burden*.") (emphasis added).

Finally, the plaintiffs suggest that the closure of the Corpus Christi clinic should establish a different "nucleus of operative fact," but they never presented this argument to the Fifth Circuit or the district court. *See* Opp. to Emergency Mot. to Stay at 22–25, *Whole Woman's Health v. Lakey*, No. 14-50928 (5th Cir.); Plfs.' Mem. of Law in Opp. To Defs.' Mot. to Dismiss (doc. 57) at 3–9. A court of appeals cannot be deemed "demonstrably wrong" for failing to accept an argument that was never presented to it. And in all events, the plaintiffs never explain how the closure of the Corpus Christi clinic creates "new legal conditions" when patients from McAllen remain capable of traveling to San Antonio and even Houston for abortions. Grossman Direct ¶ 17 (stating that approximately half of the patients from the Rio Grande Valley received abortions in cities other than Corpus Christi following the implementation of the admitting-privileges requirement). There will never be finality in abortion litigation if plaintiffs can re-open constitutional challenges to abortion laws whenever an abortion clinic closes or a practitioner retires or moves. Finally, this argument does nothing to help the El Paso clinic refute the State's res judicata defense.

E. The Court of Appeals Was Not Demonstrably Wrong In Finding That The Closure Of The McAllen Clinic Will Not Impose An Undue Burden On Abortion Patients.

The McAllen clinic ceased offering abortions on November 1, 2013, although it remained open until March 6, 2014. Hagstrom Miller Direct (doc. 171) ¶ 3. During the nine-month window between November 1, 2013, and the start of trial on August 4, 2014, patients in the Rio Grande Valley had to seek abortions elsewhere in Texas. Yet the plaintiffs did not produce *any* evidence that *any* patient in the Rio Grande Valley was unable to obtain a legal abortion during that nine-month time period—or that any patient encountered "substantial obstacles" in doing so. Amy Hagstrom Miller provided vague, hearsay anecdotes about patients who she claims declined referrals to Whole Woman's Health's San Antonio office. *See* Hagstrom Miller Direct ¶ 18. But Hagstrom Miller does not know (and did not testify) whether these unnamed patients obtained legal abortions in Corpus Christi or Houston or elsewhere, nor does she have any knowledge of whether they encountered substantial obstacles in those efforts.

What's more, the plaintiffs acknowledged that patients from the Rio Grande Valley successfully obtained abortions in Corpus Christi, San Antonio, and Houston between November 2013 and April 2014. *See* Grossman Direct ¶ 17. The plaintiffs and their experts—who had every incentive to uncover just a single patient who was unable to obtain an abortion on account of HB2—were unable to identify *any* patient who experienced a "substantial

obstacle" due to the closure of the McAllen clinic.[17] And no abortion patient from the Rio Grande Valley testified that the closure of the McAllen clinic presented any hardships in the nine-month period between November 1, 2013, and August 4, 2014.

The plaintiffs' claim of a "twenty percent decline in the abortion rate among women in the Rio Grande Valley following the clinic's closure" is not based on reliable data and the district court did not credit it. Neither should this Court. Dr. Grossman did not explain to the district court how he arrived at his numbers, but simply presented them in a table. Grossman Direct Table 2. The defendants' expert, Dr. Peter Uhlenberg, provided the court with a critique of Grossman's methods. *See* Uhlenberg Direct (doc. 178(2)) ¶¶ 9–10. Specifically, Grossman relied on "estimates provided by unidentified 'knowledgeable sources', unnamed former employees of closed or nonresponsive abortion clinics, data from unidentified abortion clinics 'in the community', and … unreported 'internal estimates.'" *Id.* ¶ 10. Indeed, Grossman admitted during cross-examination that his estimates of the number of abortions performed in Corpus Christi came from an anonymous

[17] Grossman testified that he interviewed 20 women who were turned away from clinics that were unable to perform abortions on account of HB2's admitting-privileges law. 18 of those 20 women successfully obtained abortions at other clinics. Grossman testified that "there were two women who did not obtain the abortion," and he "believe[d]" that one of those two was from the Rio Grande Valley. But he did not say whether those two women were *unable* to obtain an abortion or simply changed their minds and decided not to obtain one. Trial Tr. Vol. 1 at 46:23–48:3.

source in Houston. *See* Trial Tr. Vol. 1 at 42:12–44:2.[18] The plaintiffs are comparing data provided by anonymous sources using undisclosed methods involving "estimates" and guesswork. For the plaintiffs to represent their alleged "twenty percent decline" as established fact is the height of sophistry. *See* App. at 35.

The court of appeals correctly relied on *Casey* to conclude that a 250-mile trip from the Rio Grande Valley to San Antonio is not an "undue burden." *See Whole Woman's Health*, 2014 WL 4930907, at *13 ("Considering that *Casey* upheld travel times of six hours (increases of three hours) and that women in the Rio Grande Valley traveling to San Antonio have less total travel time than women affected by the Pennsylvania law in *Casey*, the State has a strong likelihood of success on its appeal of the injunctions of both requirements as applied to the McAllen clinic."). The plaintiffs try to get around *Casey* by claiming that patients in the Rio Grande Valley face "economic disadvantage," but there was no evidence in the record that *any* patient in the Rio Grande encountered a "substantial obstacle" in seeking abortions in other cities while the McAllen clinic was closed. Vague allusions to "economic disadvantage" are not sufficient to distinguish *Casey*—especially when the plaintiffs have no evidence that the nine-month closure

[18] The official, reported number of abortions performed in Texas from November 2013 through April 2014 is not yet reflected in available Department of State Health Services' data.

of the McAllen clinic imposed "substantial obstacles" in the path of a single abortion patient.

F. The Court Of Appeals Was Not Demonstrably Wrong To Enforce The Severability Requirements Of Texas Administrative Code § 139.9.

The State's ambulatory-surgical-center regulations impose many different requirements, each of which is severable from each other:

> Consistent with the intent of the Legislature, the department intends, that with respect to the application of this chapter to each woman who seeks or obtains services from a facility licensed under this chapter, every provision, section, subsection, sentence, clause, phrase, or word in this chapter and each application of the provisions of this chapter remain severable from every other provision, section, subsection, sentence, clause, phrase, word, or application of this chapter.

25 Tex. Admin. Code § 139.9(b). The district court (and the plaintiffs) refused to acknowledge the severability of the State's ASC rules and insisted on treating all of the State's ASC rules as a non-severable package that stands or falls together. But federal courts must enforce severability clauses in state abortion provisions. *See Leavitt*, 518 U.S. at 139–40 (holding that "[s]everability is of course a matter of state law" and rebuking the Tenth Circuit for refusing to enforce a state abortion statute's severability clause); *Dorchy v. Kansas*, 264 U.S. 286, 290 (1924) (holding that a state court's "decision as to the severability of a provision is conclusive upon this Court."). And section 139.9 required the district court to limit its relief to the specific

ASC requirements that would allegedly cause abortion clinics to close and impose an "undue burden" on abortion patients.

It was indefensible for the district court to enjoin the State from enforcing *all* of its ambulatory-surgical-center rules against the plaintiffs. The plaintiffs complained about only two provisions in the State's ASC rules: the building-design requirements in 25 Texas Administrative Code § 135.52, and the nursing-staff requirements in 25 Texas Administrative Code § 135.15(a). *See* Plfs.' Trial Br. (doc. 185) at 8 ("It is the construction and nursing requirements that form the basis of Plaintiffs' challenge."); *see also* App. at 5. The plaintiffs admitted that most of the remaining ASC standards were "comparable to" or *less* stringent than the existing state regulations for abortion clinics. *See* Plfs.' Trial Br. at 7–8. And many of the ASC requirements are entirely benign and cannot plausibly be characterized as an unconstitutional "undue burden." *See, e.g.*, 25 Tex. Admin. Code § 135.5 (protections for patient medical records); *id.* § 135.52(h)(4) (prohibiting asbestos-tainted insulation); *id.* § 135.52(e)(1)(F) (requiring "[a] liquid or foam soap dispenser" at "each hand-washing facility.").

In addition, the plaintiffs did not allege or prove that any ASC rule other than section 135.52 would cause an abortion clinic to close. And they did not introduce any evidence that their clinics (or other clinics) are unable to comply with the remaining ASC requirements—including the nursing-staff requirements of section 135.15(a). Amy Hagstrom Miller, for example, testified that Whole Woman's Health's clinics do not meet "ASC construction

standards," but she never testified that her clinics are unable to comply with the nursing-staff requirements, the fire prevention and safety requirements, or any of the ASC "operating requirements." Hagstrom Miller Direct ¶ 22. And the district court did not make any findings that these requirements will cause any abortion clinic to close or impose an "undue burden." Its opinion discussed only the building and construction requirements of the State's ASC rules, and its relief should have been limited to those specific requirements. Mem. Op. at 9 (stating that the ASC requirement forces clinics to meet "enhanced standards for new construction").

The plaintiffs do not deny that their clinics are able to comply with the "operating requirements" of the State's ASC regulations. Instead, the plaintiffs insist that the entire litany of ASC rules should be enjoined simply because a few discrete requirements will cause abortion clinics to close. That is not a lawful option when state law mandates severability. *See Leavitt*, 518 U.S. at 139–40. The plaintiffs do not even cite *Leavitt*, yet they contend that the Fifth Circuit should have defied the severability requirements (and *Leavitt*) because "[i]t would be improper for the district court to go line by line through more than 100 pages of regulations to sever individual requirements." App. at 42. But it was the *plaintiffs'* responsibility to identify the specific provisions in the ASC rules that would cause their clinics to close, and prove in court that *those provisions* would impose an "undue burden" on abortion patients. The plaintiffs did not do this, because they refuse to acknowledge that state severability requirements are binding, and they con-

tinue to demand total, across-the-board invalidation despite a severability clause that requires courts to limit their remedies and preserve as much of the State's law as possible. The court of appeals was not "demonstrably wrong" to follow *Leavitt* rather than the plaintiffs' invitation to defy it.

G. The Plaintiffs' Remaining Arguments Are Without Merit.

The plaintiffs' arguments rest on an improvised variant of the "undue burden" standard that bears no resemblance to the post-*Casey* jurisprudence of this Court. To begin, there is no requirement that the State prove in court that HB2 "actually further[s] the stated goal of improving women's health." App. at 11. So long as HB2 is rationally related to a legitimate state interest (and everyone agrees that it is), the *sole* remaining question is whether it 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; *see also Gonzales*, 550 U.S. at 146. And this Court has repeatedly upheld abortion health-and-safety regulations without demanding that those laws "actually further the stated goal of improving women's health." *See, e.g.*, *Casey*, 505 U.S. at 885 (upholding statute requiring a licensed physician, rather than a qualified assistant, to provide information relevant to informed consent, and giving the States "broad latitude to decide that particular functions may be performed only by licensed professionals, *even if an objective assessment might suggest that those same tasks could be performed by others*") (emphasis added); *Mazurek*, 520 U.S. 973 (upholding law requiring abortions to be performed

by licensed physicians, even though "the only extant study comparing the complication rates for first-trimester abortions performed by [physician-assistants] with those for first-trimester abortions performed by physicians found no significant difference").

Second, it does not matter whether the ASC law "represent[s] a prevailing norm or standard of care." App. at 14. *Casey* upheld Pennsylvania's informed-consent law, even though the district court in that case had entered factual findings that Pennsylvania's law conflicted with "standard medical practice." *See Planned Parenthood of Se. Pa. v. Casey*, 744 F. Supp. 1323, 1353 (E.D. Pa. 1990) ("214. . . . *Content-based informed consent is contrary to the standard medical practice* that informed consent be specifically tailored to the needs of the specific patient." (emphasis added)). The petitioners' brief in *Casey* had also argued that Pennsylvania's informed-consent law contradicted accepted medical practice. *See* Brief for Petitioners, 1992 WL 551419, at *9, *Casey*, 505 U.S. 833, Nos. 91-744 & 91-902 (1992) (arguing that Pennsylvania's informed-consent law "intrudes heavily on physicians' discretion by requiring them to supply a specified package of information to all patients. This conflicts with the accepted medical practice of giving patients information tailored to their individual needs and circumstances . . . ."). But this Court upheld the law notwithstanding these concerns, and without reversing the district court's finding as clearly erroneous. *Casey*, 505 U.S. at 883; *see also Gonzales,* 550 U.S. at 163 ("The law need not give abortion doctors unfettered choice in the course of their medical practice . . . ."); *id.* at 157

("[T]he State has a significant role to play in regulating the medical profession.").

The plaintiffs' arguments are relics of the "strict scrutiny" that this Court used to apply to abortion regulations, as evidenced by their reliance on pre-*Casey* opinions such as *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 434 (1983). *See* App. at 29–30. But the Court no longer inquiries into whether abortion regulations are "compatible with accepted medical standards." App. at 30 (quoting *Simopoulos v. Virginia*, 462 U.S. 506, 517 (1983)). The court of appeals cannot be deemed "demonstrably wrong" for applying *Casey*'s "undue burden" standard rather than the more demanding requirements of pre-*Casey* decisions.

Finally, the plaintiffs try to satisfy the "large fraction" requirement of *Gonzales* by shrinking the denominator of the fraction. *See* App. at 41 ("The proper denominator is not all women seeking abortion services; rather it is women who could have accessed abortion service in Texas prior to implementation of the challenged requirements but who now face increased obstacles as a result of the law."). The plaintiffs' argument is untenable for many reasons. First, *Casey* permits courts to exclude from the denominator only patients "for whom the law is *irrelevant*." *Casey*, 505 U.S. at 894 (emphasis added). But the ASC law is "relevant" to *every* abortion patient in Texas. Every patient who seeks an abortion in Texas must obtain their abortion in an ASC, so every patient will face new limits on their choice of abortion provider. Second, the plaintiffs have no evidence of the number of abortion pa-

tients who "could have accessed abortion service in Texas" before HB2 but who "but who now face increased obstacles" (whatever that means). Indeed, the plaintiffs do not even hazard a guess at the number of patients who fall into this category. The plaintiffs bear the burden of proving that they satisfy the "large fraction" test, and this is woefully insufficient to carry that burden. Third, the plaintiffs' approach turns the "large fraction" test into a non-falsifiable tautology. Although they do not go so far as to say that the denominator should include only the women who will face "undue burdens," their approach allows any court to shrink the denominator enough to ensure facial invalidation if that is the outcome the court wants. *Cf. Gonzales*, 550 U.S. at 188 (Ginsburg, J., dissenting). *Gonzales* emphatically rejected this approach to the "large fraction" test.

Indeed, *Gonzales* left open the question whether facial challenges in abortion cases are to be governed by the "large fraction" test or the more demanding "no set of circumstances" standard. *See Gonzales*, 550 U.S. at 167 (observing that "[w]hat [the plaintiff's] burden consists of in the specific context of abortion statutes has been a subject of some question," citing *Akron*'s "no set of circumstances" standard and *Casey*'s "large fraction" test, but concluding that "[w]e need not resolve that debate"). The Fifth Circuit's decision to stay the district court's facial invalidation of the ASC law would not have been "demonstrably wrong" even if it had employed the "no set of circumstances" standard. The plaintiffs cannot fault the court of appeals for how it applied the more pro-plaintiff "large fraction" test when the

court of appeals could have applied an even more stringent standard without contradicting this Court's pronouncement in *Gonzales*.

II. The Applicants' Rights Will Not Be Seriously And Irreparably Injured By The Stay.

Even if the applicants could somehow show that the court of appeals was "demonstrably wrong" to stay the district court's judgment, they still cannot obtain a vacatur of the stay. The applicants must also show that their "rights" may be "seriously and irreparably injured by the stay." *Coleman*, 424 U.S. at 1304. It is not enough to show that they will suffer "irreparable harm"; they must show that this "harm" deprives them of their federally protected "rights."

This Court has never held that abortion providers have a federally protected right to perform abortions. The right established in *Casey* protects the rights of abortion patients to obtain previability abortions free of "undue burdens" imposed by the State; there is no federally protected "right" of abortion providers to remain in business. *See* 505 U.S. at 877 (holding that a finding of undue burden requires proof that the law has "the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus"). The applicants' complaints about abortion clinics closing are relevant only to the extent they deprive *patients* of their right to obtain previability abortions free of undue burdens.

And in all events, the plaintiffs' claims of irreparable injury are exaggerated and unsupported by evidence. The plaintiffs, for example, claim that "the clinics forced to remain closed during the appeals process will likely never be reopened." App. at 1; *id.* at 44 ("If it is not vacated, these clinics will soon have to lay off their staffs and close for good."). The plaintiffs made an identical claim when they sought emergency relief from this Court in the previous HB2 lawsuit:

> Finally, and significantly for purposes of this application, clinics forced to close as a result of the stay are likely never to reopen even if the District Court injunction is ultimately affirmed. App. J at 3-4 (Potter Trial Tr.); App. I at 3 (Hagstrom-Miller Trial Tr.); App. D at 8 (Hagstrom-Miller Dec.) … Thus, if the Fifth Circuit's stay is allowed to stand, it will immediately—and in the long run—dramatically reduce the availability of abortion in Texas, regardless of the outcome of this case on the merits.

Emergency Application to Vacate Stay at 10, *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, No. 13A452 (U.S., filed Nov. 4, 2013). Yet when the district court enjoined the admitting-privileges law on August 29, 2014, Whole Woman's Health's McAllen clinic was up and running by September 6, 2014—even though it had been shuttered since March 6, 2014. Erik Eckholm, *Texas Abortion Clinic to Reopen After Ruling*, N.Y. Times (Sept. 3, 2014), available at http://www.nytimes.com/2014/09/04/us/texas-abortion-clinic-to-reopen-after-court-ruling.html?_r=0. The plaintiffs' predictions of permanent, irreversible closures are nothing but self-serving speculation refuted by their past behavior, and they do not signal

anything about an abortion clinic's capacity to re-open after closure. Far more telling is what actually happened in the wake of the district court's ruling—and Whole Woman's Health had no problems re-starting its operations within days after it secured relief from the district court.

The plaintiffs' repeated allegations of a "surge in illegal abortion" are likewise unsupported by evidence, and the district court made no finding that this has occurred. *See* App. at 1, 18, 35. Amy Hagstrom Miller's claim that her McAllen staff observed a "significant increase" in attempted self-abortions after HB2 took effect is double hearsay and cannot supply a basis for judicial factfinding. (It is also far too vague: How much of an increase? Over what time frames? How many patients were doing this before HB2?) Even if Hagstrom Miller's assertion were proven with admissible and reliable evidence, it still would not establish that HB2 caused these anonymous patients to take this action. Correlation is not proof of causation, and there could be countless other factors influencing these patients' decisions. Third-hand anecdotes do not explain why these unidentified patients made the decisions that they made—which makes these anecdotes incapable of proving that any of these patients' decisions are attributable to HB2 rather than other factors.

Conclusion

The motion to vacate the Fifth Circuit's stay pending appeal should be denied.

Respectfully submitted.

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