No. 15-274

In The Supreme Court of the United States

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

v.

JOHN HELLERSTEDT, M.D., COMMISSIONER OF THE TEXAS DEPARTMENT OF STATE HEALTH SERVICES; MARIROBINSON, EXECUTIVE DIRECTOR OF THE TEXASMEDICAL BOARD, IN THEIR OFFICIAL CAPACITIES

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

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

In an attempt to defend medically unjustified requirements that would close 75% of Texas's abortion facilities, Respondents ask this Court to reject well-supported factual findings and apply a toothless undue burden standard. Neither is warranted on this record under faithful application of this Court's precedents.

As established at trial, the challenged requirements would force the vast majority of Texas abortion facilities to close, causing a shortage of abortion providers in Texas's four largest metropolitan areas and the complete elimination of abortion providers from the rest of the State. If these facilities were providing substandard care that posed a threat to patient health or safety, then Texas would be justified in shutting them down. But they have a long record of providing safe abortion care, which Respondents do not dispute. Nor do Respondents dispute that sharply curtailing access to safe abortion threatens women's health: Women who are delayed in accessing abortion face increased health risks, particularly when delayed past the first trimester. And some women who are unable to access legal abortion attempt self-abortion using dangerous methods.

Respondents attempt to divorce HB2 from these devastating impacts by arguing that the law is not the cause of clinic closures. This is a smokescreen. Respondents offer no alternative explanation for why more than 20 licensed abortion facilities that had operated for years closed following HB2's enactment, including 11 on the day the admitting-privileges

requirement took effect. Further, they *stipulated* that, if the ASC requirement took effect, any licensed abortion facility still operating would be forced to close "[a]s a result" of it. JA 183-84.

Respondents engage in further misdirection by implying that, but for HB2, Texas abortion providers would be wholly unregulated. On the very first page of their brief, Respondents declare that HB2 was enacted in response to the grand jury report in the Kermit Gosnell case, which called for Pennsylvania abortion facilities to be regulated as ASCs so they would be inspected annually. Respondents fail to mention, however, that before HB2, Texas abortion facilities were inspected annually, while Texas ASCs were inspected only once every three years. *Compare* 25 Tex. Admin. Code § 139.31(b)(1), *with* 25 Tex. Admin. Code § 135.21(a)(2). They also omit that Texas abortion facilities have long been subject to strict regulations, which include detailed standards concerning personnel; physical environment; infection control; medical services; emergency services; follow-up care; recordkeeping; and reporting. *See* 25 Tex. Admin. Code §§ 139.1 – 139.60. These regulations already provided Texas with the necessary tools to detect and eliminate substandard providers.

Despite Respondents' efforts to muddy the waters, this remains clear: The ASC and admitting-privileges requirements would force dozens of facilities with a long history of providing safe abortions to close, eroding abortion access and putting women throughout Texas at risk of harm. Upholding the requirements under these circumstances based on the mere assertion of a

health rationale—or the aberrant testimony of the State's medical witnesses, whom the district court found lacking in credibility—would eviscerate the undue burden standard. The result would be a legal regime in which a woman's right to end a pregnancy "exists in theory but not in fact." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 872 (1992) (joint opinion of O'Connor, Kennedy & Souter, JJ.). That outcome cannot be reconciled with *Casey*'s recognition that the right to obtain an abortion is central to a woman's dignity, autonomy, equality and bodily integrity. As the controlling joint opinion explained, "it falls to [the Court] to give some real substance to the woman's liberty to determine whether to carry her pregnancy to full term." *Id.* at 869. Petitioners urge the Court to do so again by striking down the Texas requirements as an undue burden.

ARGUMENT

I. THE DISTRICT COURT'S FACTUAL FINDINGS, WHICH ARE ENTITLED TO SUBSTANTIAL DEFERENCE, MUST NOT BE SET ASIDE.

Respondents seek to relitigate each contested factual issue, as if the trial never happened, relying heavily on testimony that the district court rejected. But reviewing courts "must not … set aside" a district court's "[f]indings of fact" unless they are "clearly erroneous." Fed. R. Civ. P. 52(a)(6). This "clear command" has no exceptions. *Teva Pharm. USA, Inc. v. Sandoz, Inc.*, 135 S. Ct. 831, 836-37 (2015) (internal quotation marks omitted). "[A]ppellate courts must constantly have in mind

that their function is not to decide factual issues *de novo*." *Anderson v. City of Bessemer*, 470 U.S. 564, 573 (1985) (internal quotation marks omitted).

The Fifth Circuit did not set aside any of the district court's findings about the medical evidence in this case. The only finding it did set aside—that fewer than 10 abortion facilities would be unable to meet the statewide demand for services—is amply supported by evidence. *See infra* at 12-13.

A. The District Court Found That Respondents' Expert Witnesses Lacked Credibility.

The district court made adverse credibility and reliability findings about all of Respondents' expert witnesses, including Drs. Thompson and Anderson, their only medical experts. Pet. App. 136a, 139a. It found that Vincent Rue's role in drafting and editing their expert reports and written testimony undermined the credibility and reliability of their opinions. Pet. App. 136. Respondents continue to downplay Rue's involvement, but evidence supports the district court's finding that Rue played a significant and substantive role in formulating their experts' testimony.

For example, an email from Rue to Dr. Thompson concerning her expert report—styled as a "rebuttal" report—stated:

> Mayra—
>
> I forgot to send this report to you as well. I am still drafting and will keep you posted.
>
> Vince.

JA 1066. Rue's email attached one of the expert reports that Dr. Thompson was supposed to rebut. *Id.* Thus, Rue was drafting her rebuttal to a report that she had not yet seen. Another email from Rue to Dr. Thompson, sent on the day that her report was due, stated:

> Mayra—
>
> I tried to use as much of your material as I could. Time ran out and this is the best I could do.
>
> * * *
>
> Vince

JA 1071.

Additional facts support the district court's determination that the testimony of Respondents' medical experts deserves no weight. Dr. Thompson based her opinions on uninformed speculation. *See generally* Record 1617-27. She cited no medical evidence to support her views, only a public opinion poll. JA 853, 956-57. She failed to review the principal studies on which Petitioners' experts relied and had no knowledge of their methodologies. JA 958-59. She was also unfamiliar with pre-HB2 standards for abortion facilities and how they compared to ASC standards. JA 852-53; Record 1620-21.

Similarly, Dr. Anderson acknowledged that he had not reviewed all of the sources he cited, JA 983-85, and that his opinions about abortion safety were based solely on "anecdotal experience" prior to 2005. JA 1004, 1013. He candidly admitted that he had "no data to validate" his opinions. JA 1004.

B. The District Court Found That the Texas Requirements Would Not Benefit Women's Health.

ASC Requirement. Respondents ask the Court to set aside the district court's finding that the ASC requirement would not enhance the safety of abortion based on the discredited testimony of Dr. Thompson, their only medical expert to testify about that requirement. Dr. Thompson based her opinion that the ASC requirement would benefit abortion patients on her false assumption that abortion facilities are currently "unregulated." JA 853. She testified that, "in an ASC or hospital setting, the patient is monitored by a licensed medical practitioner and nursing staff who are trained to recognize the[] risks and complications." JA 850. But the same is true of a licensed abortion facility operating under pre-HB2 standards. *See* 25 Tex. Admin. Code §§ 139.46(3)(A)-(B), 139.53(a)(4)-(11).

Dr. Thompson was also incorrect that Texas ASCs are subject to more rigorous accountability mechanisms than Texas abortion facilities. The quality assurance program required of licensed abortion facilities is just as rigorous as the quality assurance program required of ASCs. *Compare* 25 Tex. Admin. Code § 139.8, *with* 25 Tex. Admin. Code § 135.8. Licensed abortion facilities are subject to more frequent inspections than ASCs. *Compare* 25 Tex. Admin. Code § 139.31(b)(1), *with* 25 Tex. Admin. Code § 135.21(a)(2). They are also subject to more extensive reporting requirements. *Compare* 25 Tex. Admin. Code §§ 139.4, 139.5, 139.58, *with* 25 Tex. Admin. Code § 135.26. And, unlike ASC standards, abortion facility standards are enforced through

criminal sanctions and civil liability, in addition to administrative penalties. *Compare* 25 Tex. Admin. Code § 139.33, *with* 25 Tex. Admin. Code § 135.24.

Respondents also rely on Dr. Thompson's unsubstantiated claim that "D&C procedures for non-pregnant women are performed in ASC's or hospital settings due to the need for patient safety." JA 849; *see* Resp'ts' Br. 40. But the weight of the evidence demonstrates that many procedures comparable to abortion—including D&C for both pregnant and non-pregnant women—are routinely and safely performed in physicians' offices rather than ASCs or hospitals. JA 254, 342, 376-77; *see also* ACOG/AMA Br. 14. And Dr. Thompson's latest affidavit, provided in support of an amicus brief, states that "[m]ost physicians, *who perform D and C procedures in their offices (in non-pregnant patients)* allow 30 to 45 minutes per procedure." *See* Former Abortion Providers Br. C5 (emphasis added).[1]

Admitting-Privileges Requirement. Respondents ask the Court to set aside the district court's finding

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[1] Additionally, Respondents misrepresent that ASCs are able to offer more robust pain management options than licensed abortion facilities. By law, licensed abortion facilities are permitted to offer the same range of pain management options as ASCs. *Compare* 25 Tex. Admin. Code § 139.59(a)(1), *with* 25 Tex. Admin. Code § 135.11(a). In practice, Whole Woman's Health offers additional pain management options—deep sedation and general anesthesia—at its ASC because it provides post-16-week procedures there. *See* JA 717, 807-08. These forms of pain management are not typically used for first- and early second-trimester abortions. *See* JA 374, 717, 726.

that the admitting-privileges requirement would not enhance the safety of abortion based on Dr. Anderson's discredited and unsubstantiated testimony.[2] Dr. Anderson speculated that the admitting-privileges requirement would serve a credentialing function. But the record shows that abortion providers are routinely denied admitting privileges for reasons unrelated to their clinical competence. *See* Pet'rs' Br. 22. Often, doctors who specialize in abortion care are unable to meet hospitals' minimum patient admission requirements because abortion is such a safe procedure that patients rarely require hospitalization. *See* JA 267, 730; Med. Staff Br. 33-34.[3]

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[2] Every district court to consider a similar requirement—including a Wisconsin court that appointed a neutral medical expert to inform its review—has made similar findings. *See Planned Parenthood of Wis., Inc. v. Van Hollen*, 94 F. Supp. 3d 949, 953-54 (W.D. Wis. 2015), *aff'd sub nom., Planned Parenthood of Wis. v. Schimel*, 806 F.3d 908 (7th Cir. 2015); *see also June Med. Servs., LLC* v. *Kliebert*, No. 14–CV–00525–JWD–RLB, 2016 WL 320942, at *24, *39 (M.D. La. Jan. 26, 2016), *appeal filed*, No. 16-30116 (5th Cir. Feb. 10, 2016); *Planned Parenthood Se. v. Strange*, 33 F. Supp. 3d 1330, 1372, 1376 (M.D. Ala. 2014); *Jackson Women's Health Org. v. Currier*, 940 F. Supp. 2d 416, 418 (S.D. Miss. 2013), *aff'd as modified*, *Jackson Women's Health Org. v. Currier*, 760 F.3d 448 (5th Cir. 2014), *petition for cert. filed*, No. 14-997 (Feb. 19, 2015).

[3] Further, recent high-profile cases involving Texas doctors show that the privileging process is not an effective means of weeding out substandard practitioners. *See generally* Pl. Exh. 206 (Record 3376, 3377) (spreadsheet summarizing Texas Medical Board investigations); Sarah Kaplan, *'Sociopath' neurosurgeon accused of intentionally botching operations*, Wash. Post (Aug. 25, 2015), http://wpo.st/0SpC1; Saul Elbein, (Footnote continued on following page)

The district court also had good reason to reject Dr. Anderson's speculation that admitting privileges might improve a patient's continuity of care if the patient requires hospital treatment following an abortion. Most complications from abortion arise after the patient has returned home. JA 267, 278, 381-82, 717. If a complication requires hospital treatment, the patient therefore would (and should) seek care at a hospital near her home. JA 278, 383. By forcing women to travel farther from home to reach an abortion facility, HB2 makes it unlikely that a patient would seek treatment at a hospital near that facility in the event of a complication. Thus, HB2's implementing regulations require abortion facilities to provide their patients with "the name and telephone number of the nearest hospital to the home of the pregnant woman at which an emergency arising from the abortion would be treated," rather than the name and telephone of the hospital where the abortion provider has admitting privileges. 25 Tex. Admin. Code § 139.56(a)(2)(B).

Finally, Respondents repeatedly mischaracterize a 2000 National Abortion Federation ("NAF") brochure, which is not part of the record in this case. The brochure advises that a doctor who performs abortions "should be able to admit patients to a nearby hospital."[4] A number of different

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Bad Medicine, Tex. Observer (Nov. 10, 2011), http://www.texasobserver.org/bad-medicine/.

[4] http://web.archive.org/web/20000918203719/http://prochoice.org/pregnant/goodcare.htm.

mechanisms would accomplish this goal, including a transfer agreement with the hospital or an agreement with another physician who has admitting-privileges there. The NAF brochure, like the 2004 Statement of Core Principles also cited by Respondents, is thus consistent with the Texas requirement predating HB2, which permitted an agreement with another physician as an alternative to admitting privileges. *See* Pet'rs' Br. 8-9; JA 283-85, 378. It is not consistent with HB2's inflexible admitting-privileges requirement.

C. The District Court Found That the Texas Requirements Would Cause Widespread Clinic Closures.

The district court found that HB2 would cause the "elimination of more than 30 previously operating abortion facilities." Pet. App. 144a; *accord* Pet. App. 138a. More than 20 of these had already closed by the time of trial. Respondents' contention that these closures were a mere coincidence, unrelated to HB2, is specious.

The timing of the closures alone suffices to support the inference that HB2 was their cause. Eight clinics closed around the time of HB2's enactment, in anticipation of its enforcement. *See* Pet. App. 138a; JA 229; Pet'rs' Br. 23. Eleven more closed on the day that the admitting-privileges requirement took effect. *See* Pet. App. 138a; JA 229. Several more have closed since then. JA 229, 1430. This precipitous decline in the number of Texas abortion clinics is unprecedented. Indeed, in the five years preceding HB2's enactment, the number of licensed abortion facilities remained fairly constant—ranging

from 38 to 42. Pl. Exh. 28 at 2 (Record 2808, 2809). Further, Petitioners expressly testified that their clinics had closed in anticipation or as a consequence of HB2's enforcement. *See* JA 339, 715, 722, 731.

Moreover, Respondents stipulated that the ASC requirement would force each licensed abortion facility that remained open at the time of trial to close. Respondents contend that Petitioners misrepresent the stipulation, but it speaks for itself:

> 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.

JA 183-84.

Respondents point to a filing in *Abbott* as evidence that the Lubbock clinic closed for reasons unrelated to HB2. That filing shows just the opposite. The Lubbock clinic closed because of the admitting-privileges requirement on the day that the Fifth Circuit's ruling permitted it to take effect. *See* JA 229; *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 419 (5th Cir. 2013). Following its loss in the Fifth Circuit, the Lubbock clinic decided to withdraw from the litigation. Emergency Appl. to Vacate Stay at 7, *Abbott*, 134 S. Ct. 506 (2013) (No. 13A452).[5]

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[5] Respondents correctly note inconsistencies between Dr. Grossman's testimony and the map appended to Petitioners' (Footnote continued on following page)

D. The District Court Found That Fewer Than 10 Abortion Facilities Could Not Meet Statewide Demand for Services.

The district court found that fewer than 10 facilities—all ASCs—would provide abortions in Texas if the ASC requirement took effect, and those facilities would be unable to meet the statewide demand that had recently sustained 41 abortion facilities. Pet. App. 141a. This finding is supported by extensive record evidence, including "historical data pertaining to Texas's average number of abortions" and testimony concerning "the seasonal variations in pregnancy rates." *Id.* Dr. Grossman's testimony, which the Fifth Circuit incorrectly labeled as *ipse dixit*, Pet. App. 56a, provides further support.[6] Dr. Grossman reviewed data showing that ASCs provided only 20% of abortions in Texas and,

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opening brief. Petitioners made an error in transferring the data to the map. But the map was not part of the evidence before the district court. Its purpose was merely to serve as a visual aid. Dr. Grossman's testimony about the number and geographic distribution of Texas abortion facilities over time is correct in all respects and not disputed by Respondents.

[6] Although seven expert witnesses testified for Petitioners at trial, Respondents' brief focuses exclusively on Dr. Grossman. The district court made favorable credibility findings about Dr. Grossman, Pet. App. 139a, who is a highly qualified physician and researcher, Pl. Exh. 2 (Record 2808, 2809). Respondents' targeted efforts to discredit him may be related to the State's ongoing political conflict with the Texas Policy Evaluation Project, a research team that includes Dr. Grossman. *See, e.g.*, Sarah Kaplan, *Texas health official out of job over study favorable to Planned Parenthood*, Wash. Post (Feb. 19, 2016), http://wpo.st/p2PD1.

following implementation of the admitting-privileges requirement, the number and proportion of abortions performed in those facilities decreased despite increasing market share, indicating an "inability to increase capacity." JA 237-38. These data led Dr. Grossman to conclude that the facilities would not be able to quadruple the number of procedures they perform, which would be necessary to meet statewide demand. *Id.* Common sense and basic economic principles further support that conclusion, especially because the admitting-privileges requirement restricts abortion facilities' ability to add new doctors. *See* Pet. App. 141a ("That the State suggests that these … providers could meet the demand of the entire state stretches credulity."); *Planned Parenthood of Wis., Inc. v. Schimel*, 806 F.3d 908, 920 (7th Cir. 2015) ("[O]ne wouldn't think it necessary to parade evidence that the remaining clinics would find it extremely difficult to quadruple their capacity ….").

Respondents protest Petitioners' citation of a post-trial study showing that wait times for appointments at abortion facilities in some Texas cities have already become quite long. But the study merely confirms what the evidence in the record shows: that the Texas requirements would delay women from accessing abortion, causing an increase in second-trimester procedures. *See* JA 234, 237, 241, 248. Respondents' concern about citation of extra-record sources does not appear to extend to their own citation of the Gosnell grand jury report, the 2000 NAF brochure, and various amicus briefs.

II. THE TEXAS REQUIREMENTS VIOLATE THE UNDUE BURDEN STANDARD.

A. The Undue Burden Standard Requires Meaningful Scrutiny of Laws That Restrict Access to Abortion.

Casey made clear that the Fourteenth Amendment requires courts to scrutinize abortion restrictions to ensure (1) that they serve a permissible purpose, and (2) that they do not impose burdens on abortion access that are undue. *See* 505 U.S. at 877. Courts could not fulfill this obligation if they were required to give uncritical deference to a legislature's finding that a law is a reasonable means of promoting women's health. *See Gonzales v. Carhart*, 550 U.S. 124, 166 (2007) ("Uncritical deference to Congress' factual findings … is inappropriate."); *see also City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 465 (1983) (O'Connor, J., joined by White & Rehnquist, JJ., dissenting) ("This does not mean that in determining whether a regulation imposes an 'undue burden' on the *Roe* right that we defer to the judgments made by state legislatures.").

Fidelity to *Casey* requires that the Court reject the overly deferential standard urged by Respondents and conduct an independent assessment of whether the burdens imposed by the Texas requirement are undue. *See* 505 U.S. at 855 (explaining that "the required determinations fall within judicial competence"). The standard urged by Respondents mirrors that applied by the dissenting Justices in *Casey*, who criticized the undue burden standard for requiring courts "to closely scrutinize all types of abortion regulations." *Id.* at 945 (Rehnquist, C.J.,

joined by White, Scalia & Thomas, JJ., dissenting). They would have upheld the spousal notification requirement because "[t]he Pennsylvania legislature was in a position to weigh the likely benefits of the provision against its likely adverse effects, and presumably concluded, on balance, that the provision would be beneficial." *Id.* at 976.

The controlling opinion rejected this approach as insufficiently protective of a fundamental right that is "[a]t the heart" of the personal liberty protected by the Fourteenth Amendment. *Id.* at 851. Instead, it conducted an independent assessment of the spousal notification requirement, concluding that the requirement was unconstitutional because it imposed heavy burdens on some women that were not justified by a sufficiently strong state interest. *Id.* at 887-98 ("The husband's interest … does not permit the State to empower him with this troubling degree of authority over his wife.").

Respondents argue that *Casey* did not require evidence that the informed consent requirements served Pennsylvania's interest in women's health. But those requirements were not justified on health grounds. Rather, they were justified as a means of serving the State's interest in potential life. *See id.* at 882-87. *Casey* concluded that they were reasonably designed to further that interest and the burdens they imposed were not substantial in light of it. *See id.*

Respondents' argument that Petitioners are not entitled to strict scrutiny is also a straw man. At no stage of this litigation have Petitioners asked for strict scrutiny, under which laws "are presumptively

unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015). Instead, Petitioners prevailed at trial by proving that the Texas requirements impose an *undue burden* on the abortion right. The record demonstrates that the requirements create substantial obstacles to abortion access but are not reasonably designed to promote women's health. Pet. App. 141a-147a.

B. Respondents' Reliance on *Gonzales*, *Mazurek*, and *Simopoulos* Is Misplaced.

Respondents' contention that *Gonzales* requires mechanical deference to the legislature any time a single doctor expresses support for a law—even when the doctor's views are inconsistent with prevailing medical standards, unsupported by data, and lacking in credibility—makes a mockery of the undue burden standard. *Gonzales* does not stand for the proposition that a court must uphold an objectively unreasonable health regulation merely because some doctors hold the subjective opinion that it is beneficial. To the contrary, *Gonzales* held that a legislature is not barred from enacting "legitimate abortion regulations" merely because some doctors hold the subjective opinion that they are harmful. *See* 550 U.S. at 166; *see also Stenberg v. Carhart*, 530 U.S. 914, 964-65 (2000) (Kennedy J., joined by Rehnquist, CJ., dissenting) (criticizing the Court for "[c]asting aside the views of distinguished physicians and the statements of leading medical organizations"). Rather, for the undue burden standard to have any force, courts must be permitted to consider the quality and weight of the medical

evidence when discharging their "independent constitutional duty" to determine whether an abortion regulation is legitimate. *Gonzales*, 550 U.S. at 165.

Gonzales ultimately concluded that the challenged ban on a method of second-trimester abortion was facially valid based on four factors that are not present here: First, the ban served an important governmental interest unrelated to women's health—namely, respect for life. *Id.* at 156-60. Here, women's health is the only interest the Texas requirements purportedly serve. If they fail as reasonable health regulations, then they serve no valid purpose at all.

Second, the district court findings in *Gonzales* demonstrated medical uncertainty about whether the ban would ever impose significant health risks on women. *See id.* at 162. These findings included that "[t]here continues to be a division of opinion among highly qualified experts regarding the necessity or safety of intact D&E;" and the Government's "expert witnesses reasonably and effectively refuted [the plaintiffs'] proffered bases for the opinion that [the banned procedure] has safety advantages over other second-trimester abortion procedures." *Id.* (quoting district court opinions). Here, in contrast, the district court credited the testimony of Petitioners' experts and made adverse credibility findings about Respondents' experts. *See supra* at 4-5. It concluded, unequivocally, that the Texas requirements would not provide a material health benefit to women seeking abortion, but instead would subject those women to "[h]igher health risks" because of "delays in seeking early abortion care,"

"longer distance automotive travel," and "observed increases in self-induced abortions." Pet. App. 145a-147a. Its findings are consistent with the findings of each district court that has considered similar laws and every mainstream medical association that has considered HB2, including the American Medical Association ("AMA"). *See supra* at 6-10, 13; ACOG/AMA Br. 4-5, Pub. Health Br. 3-4. Thus, there is no uncertainty about the medical benefits of the Texas requirements: They are illusory.

Third, in *Gonzales*, safe alternatives to the banned procedure were easily accessible. 550 U.S. at 164. The same is not true here. Throughout most of Texas, women would have two alternatives to a closed clinic—travel a long distance, which is not easy, or attempt to self-induce an abortion, which is not safe.

Fourth, *Gonzales* held that any woman facing individualized harm from the ban could bring a future as-applied challenge. *Id.* at 167-68. That is not the case here. If the Texas requirements were upheld, many clinics would close permanently. Staff would be laid off, equipment sold, and facilities repurposed. If a woman subsequently came forward who was unable to access abortion at one of the remaining facilities, a court could not order the clinic that used to be in her community to spring back into existence. Thus, unlike in *Gonzales*, a future as-applied challenge could not provide an adequate remedy for a woman facing harm from the challenged laws.

Mazurek is also inapposite. There, the Court determined that the challenged statute would not

impact abortion access, noting that "only a single practitioner is affected" and "no woman seeking an abortion would be required … to travel to a different facility than was previously available." *Mazurek v. Armstrong*, 520 U.S. 968, 973-74 (1997) (per curiam). Petitioners do not dispute that "laws that are harmless or that have only an incidental effect on abortion require little justification." *Planned Parenthood Ariz., Inc. v. Humble*, 753 F.3d 905, 913 (9th Cir. 2014) (internal quotation marks omitted), *cert. denied*, 135 S. Ct. 870 (2014). The Texas requirements, however, are far from harmless; they would drastically reduce the number and geographic distribution of abortion facilities in Texas. *See* Pet. App. 138a-139a.

Finally, *Simopoulos* did not create a categorical rule permitting states to require that all abortions be performed in an ASC or hospital, as Respondents contend. Instead, it held that "Virginia's requirement that *second-trimester* abortions be performed in *licensed clinics* is not an unreasonable means of furthering the State's compelling interest in [women's health]." *Simopoulos v. Virginia*, 462 U.S. 506, 519 (1983) (emphasis added). The Court explained that "the Virginia regulations appear to be generally compatible with accepted medical standards" and declined to probe further because "appellant has not attacked [the regulations] as being insufficiently related to the State's interest in protecting health." *Id.* at 517. The Court also cautioned that, although a state "has considerable discretion in determining standards for the licensing of medical facilities," "its discretion does not permit it to adopt abortion regulations that depart from

accepted medical practice." *Id.* at 516. In a pair of companion cases, the Court struck down requirements that second-trimester abortions be performed in licensed hospitals because they were based on outdated medical standards. *See Akron*, 462 U.S. at 435-37, *overruled in part on other grounds by Casey*, 505 U.S. at 870, 882-87; *Planned Parenthood Ass'n of Kan. City, Inc. v. Ashcroft*, 462 U.S. 476, 481-82 (1983).

Far from establishing a categorical rule, these cases make clear that the constitutionality of an abortion-facility licensing requirement depends on the reasonableness of the standards it imposes. Texas's ASC requirement is unreasonable because it applies to pre-16-week abortions, including medical abortions, *see* Pet'rs' Br. 5-6, 8; it departs from accepted medical practice, JA 262-63, 286-89, 376-77; ACOG/AMA Br. 10-15; Soc'y Hosp. Med. Br. 8-17; and it imposes "a heavy, and unnecessary, burden on women's access to a relatively inexpensive, otherwise accessible, and safe abortion procedure," *Akron*, 462 U.S. at 438; *accord* Pet. App. 138a-148a. Further, unlike the Virginia law in *Simopoulos*, the Texas ASC requirement does not permit abortion facilities to obtain "deviations from the requirements" (*i.e.*, waivers) in appropriate circumstances. *Simopoulos*, 462 U.S. at 515; *contra* 38 Tex. Reg. 9588 (Dec. 27, 2013).[7]

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[7] Respondents are incorrect that the grandfathering exception to Texas's ASC construction standards applies only to the 2009 amendments. Texas first adopted ASC construction standards in 1986. *See* 11 Tex. Reg. 2163-75 (May 9, 1986) (Footnote continued on following page)

C. The Health Rationale Offered to Justify the Texas Requirements Is a Pretext for Hindering Abortion Access.

Although courts generally presume that legislatures act with a permissible purpose, there is sufficient evidence here to overcome the presumption. *See* Pet'rs' Br. 35-43. Respondents claim that it was reasonable for the legislature to rely on testimony from medical witnesses about the benefits of the ASC and admitting-privileges requirements. But, like the doctors who testified at trial, the doctors who testified before the Legislature appeared wholly unfamiliar with the existing licensing standards for abortion facilities. *See* Resp'ts' Br. 34, 39-40. The witnesses merely touted the benefits of having minimum safety standards and some mechanism to ensure accountability, apparently believing that the choice facing

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(adopted in 11 Tex. Reg. 4413-29 (Oct. 24, 1986)), http://texashistory.unt.edu/explore/collections/TR/. The original standards largely exempted existing facilities from compliance, *see id.* at 2165-66, as did amendments in 1998 and 2009, *see* 23 Tex. Reg. 12327 (Dec. 4, 1998) (adopting 25 Tex. Admin. Code § 135.51, under which "[l]icensed ASCs which are not remodeling … have a choice to maintain compliance with … the standards under which [they were] licensed"); 34 Tex. Reg. 3948 (June 12, 2009) (readopting 25 Tex. Admin. Code § 135.51 "without changes"). Consequently, ASCs licensed before 1986 are largely exempt from construction standards; ASCs licensed between 1986 and 1998 are subject only to the 1986 standards; and ASCs licensed between 1998 and 2009 are subject only to the 1998 standards. Further, all ASCs are eligible for waivers from construction standards, which are granted "frequently" and on a purely oral basis. JA 1374-75.

legislators was between HB2's requirements or no regulation whatsoever. *See id.* The Legislature may not enact a law restricting a fundamental right based on such a misperception.

Respondents also attempt to depict the Texas requirements as a reasonable response to Kermit Gosnell's crimes. The facts show otherwise. The Gosnell grand jury report describes a horrific scene that would have been apparent to any health inspector who set foot in that facility. It calls on Pennsylvania to regulate abortion facilities as ASCs so that they will be "inspected annually and held to the same standards as all other outpatient procedure centers." Resp'ts' Br. 1 (quoting Grand Jury Rep. 16). But in Texas, licensed abortion facilities were already subject to annual inspections and more rigorous monitoring and accountability mechanisms than ASCs. *See supra* at 6-7.

The inspection process for Texas abortion facilities is thorough:

> While on site, DSHS investigative staff starts with a tour of the facility, which includes an inspection of procedure rooms to ensure that the facility complies with acceptable infection control protocols. DSHS reviews the facility's internal policies, as well as a sample of patient medical records. The investigator interviews facility staff to determine whether the facility is operating in accordance with the facility's established policies and procedures, to ensure staff is knowledgeable of such, and to ascertain

> whether the facility complies with state licensing rules.

Pl. Exh. 28 at 3; *see* 25 Tex. Admin. Code § 139.31. DSHS is authorized to "refuse to issue or renew a license" or to "suspend, place on probation, or revoke the license" of any facility that is not in compliance with licensure standards or otherwise poses a threat to patient health or safety. 25 Tex. Admin. Code § 139.32(a)-(b).

Layering unreasonable regulations on top of reasonable ones does not deter bad actors like Gosnell who have no problem breaking the law. JA 205. Instead, it makes women more vulnerable to them by driving responsible, law-abiding doctors out of practice. Respondents have not identified any gaps in the existing standards that HB2's requirements are reasonably designed to fill, nor have they made any effort to identify benefits that those requirements provide over and above the existing standards. That is because the requirements were not designed to improve the safety of abortion facilities. They were designed to shut those facilities down.[8]

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[8] Pennsylvania's recently-enacted ASC requirement authorizes abortion facilities to seek waivers and exempts facilities that exclusively perform medical abortions. Pa. Abortion Providers Br. 16-17. Texas is the only state with an ASC requirement that does not permit abortion facilities to seek waivers. *See* Mich. Comp. Laws Ann. § 333.20115(4); Mo. Code Regs. tit. 19, § 30-30.070(1); Tenn. Comp. R. & Regs. 1200-08-10-.09(1); 12 Va. Admin. Code § 5-412-80.

III. STATEWIDE INVALIDATION IS THE PROPER REMEDY.

Respondents' contentions about the proper remedy in this case are flawed for several reasons. First, Respondents presume that an undue burden can exist only if a woman must travel more than 150 miles to reach an abortion provider. But obstacles besides travel distances can hinder a woman's access to abortion. *See* Pet. App. 144a ("It is ... unrealistic to conclude that absolute travel distance is the only meaningful obstacle raised by [HB2's] elimination of more than 30 previously operating abortion facilities."). And the analysis does not end with the magnitude of the burden a law imposes. A court must also determine whether that burden is undue in relation to the interest the law serves.

Second, Respondents fail to propose a workable alternative to facial invalidation. *Casey* invalidated the spousal notification requirement on its face even though it imposed an undue burden on less than one percent of Pennsylvania women because a narrower remedy, one that applied only to women with abusive spouses, would have been impractical to administer. *See* 505 U.S. at 894-95. Here, too, a narrower remedy would be unworkable. The district court found that HB2 will undoubtedly prevent some women from accessing abortion and significantly delay others, but those women cannot be identified with precision now. Nor could a future as-applied challenge provide an adequate remedy because, once a clinic closes, it cannot spring back into existence to serve an individual facing an undue burden. *See supra* at 18. Consequently, facial invalidation is the

only way to ensure that the Texas requirements do not extinguish women's liberty.

Third, Respondents' severability arguments are inconsistent with Texas law. The individual components of the ASC requirement are not severable under Texas law because they form an interrelated and unified regulatory scheme. *See Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist.*, 826 S.W.2d 489, 514-15 (Tex. 1992) (declining to sever unconstitutional portions of school finance statute despite severability clause); *Villas at Parkside Partners v. City of Farmers Branch*, 726 F.3d 524, 538-39 (5th Cir. 2013) (en banc), *cert. denied*, 134 S. Ct 1491 (2014) ("[W]e conclude that the Ordinance's provisions are so essentially and inseparably connected in substance that, despite the presence of a severability clause, they are not severable under Texas law.") (internal quotation marks omitted).

IV. RES JUDICATA DOES NOT BAR PETITIONERS' CLAIMS.

Respondents do not contest the Fifth Circuit's conclusion that facts material to Petitioners' undue burden claims—including widespread clinic closures—developed after judgment was entered in *Abbott*. *See* Pet. App. 60a. Because Petitioners' claims are based on newly developed facts, they are not barred by res judicata. *See* Pet'rs' Br. 57.

CONCLUSION

This Court should reverse the Fifth Circuit's judgment.

Respectfully submitted,

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