

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 DOING BUSINESS AS REPRODUCTIVE
SERVICES; SHERWOOD C. LYNN, JR., M.D., ON BEHALF OF THEMSELVES AND THEIR
PATIENTS; PAMELA J. RICHTER, D.O., ON BEHALF OF THEMSELVES AND THEIR PATIENTS;
AND LENDOL L. DAVIS, M.D., ON BEHALF OF THEMSELVES AND THEIR PATIENTS,

Applicants,

v.

KIRK COLE, COMMISSIONER OF THE TEXAS DEPARTMENT OF STATE HEALTH SERVICES,
IN HIS OFFICIAL CAPACITY; MARI ROBINSON, EXECUTIVE DIRECTOR OF THE TEXAS
MEDICAL BOARD IN HER OFFICIAL CAPACITY,

Respondents.

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

**RESPONDENTS' OPPOSITION TO APPLICATION FOR A STAY PENDING THE FILING
AND DISPOSITION OF A PETITION FOR A WRIT OF CERTIORARI**

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INTRODUCTION

An abortion facility will remain open in each area where an abortion facility will close under the Fifth Circuit's decision, which largely upheld the admitting-privileges and ambulatory-surgical-center (ASC) abortion requirements of Texas House Bill 2 (HB2). 83rd Leg., 2d C.S. (Tex. 2013). Women in Texas therefore will not have to travel any materially greater distances to obtain an abortion if the Fifth Circuit's mandate issues. Plaintiffs' stay application ignores this critical fact and should be denied, as Plaintiffs' central claim throughout this litigation has been an undue-burden argument based on increased travel distances to obtain abortions.

Today, abortion facilities operate in the following Texas cities: Austin, Houston, Dallas, San Antonio, Fort Worth, McAllen, and El Paso. If the Fifth Circuit's mandate issues, each of these metropolitan areas will still have at least one operational abortion facility. It is undisputed that eight HB2-compliant facilities already exist and will continue operating in Austin, Houston (x2), Dallas (x2), San Antonio (x2), and Fort Worth (in fact, a ninth HB2-compliant facility will soon open in San Antonio). The Fifth Circuit's decision granted as-applied relief to the McAllen facility. And an abortion facility will remain operational in the El Paso metropolitan area in Santa Teresa, New Mexico—which is only twelve miles from the El Paso facility that will close and less than one mile from the Texas border. In fact, record evidence confirmed that many of the Santa Teresa facility's patients reside in El Paso.

Thus, travel distances to obtain abortions will not materially change if the mandate issues, as the following chart shows:

Location	Facilities Remaining Open	Facilities That Will Close
Austin	Planned Parenthood South Austin Clinic	Austin Women's Health Center
Dallas	Planned Parenthood of Greater Texas Surgical Health Services Southwestern Women's Surgery Center	Routh Street Women's Clinic
Fort Worth	Planned Parenthood of Greater Texas Star Clinic	Whole Woman's Health of Fort Worth
Houston	Planned Parenthood Center for Choice Texas Ambulatory Surgical Center	Houston Women's Clinic Suburban Women's Clinic NW Suburban Women's Clinic SW Women's Center of Houston
San Antonio	Whole Woman's Surgical Center Alamo Women's Reproductive Services	Whole Woman's Health of San Antonio Planned Parenthood Babcock
El Paso	Women's Reproductive Clinic (Santa Teresa, NM)	Hill Top Women's Reproductive Clinic
McAllen	Whole Woman's Health of McAllen	n/a

Perhaps recognizing this reality, Plaintiffs have shifted to the allegation—unsupported by any competent record evidence—that these remaining abortion facilities will lack the capacity to handle the demand for abortions. Plaintiffs only cite the *ipse dixit* of one expert who conducted no analysis of the capacity of the remaining facilities. The Fifth Circuit properly rejected this belated allegation.

In light of the Fifth Circuit's granting of as-applied relief in McAllen, it is far from certain that this Court will grant certiorari. Plus, there are res judicata vehicle problems, as this is the second lawsuit these Plaintiffs have brought against HB2. That is

why the Fifth Circuit made the initial holding that Plaintiffs' facial attacks on the admitting-privileges and ASC requirements are barred by res judicata.

Regardless, the State would prevail on the merits. Both the district court and Fifth Circuit concluded that the challenged provisions rationally further the State's interest in protecting women's health. Plaintiffs cannot show that the admitting-privileges or ASC requirements are facially invalid as an undue burden when HB2-compliant facilities already exist across Texas. And Plaintiffs' claim as applied to El Paso ignores the reality that an abortion facility is operating in Santa Teresa, just one mile across the Texas-New Mexico border within the El Paso metropolitan area.

At base, after having obtained as-applied relief in McAllen, Plaintiffs' claims on the merits ask this Court to revert back to pre-*Casey* doctrines applying strict scrutiny to abortion regulations. There is no reasonable probability that the Court will override *Casey*'s rejection of strict scrutiny or *Gonzales v. Carhart*, which confirmed *Casey*'s ruling that strict scrutiny is not part of this Court's abortion jurisprudence.

HB2 rationally protects women's health, and travel distances to obtain abortions will not materially change when the Fifth Circuit's mandate issues. The stay application should therefore be denied.

BACKGROUND

This case concerns two provisions of HB2. First, HB2's admitting-privileges provision requires that doctors performing abortions must have admitting privileges at a hospital within thirty miles of where the abortion is performed. TEX. HEALTH & SAFETY CODE § 171.0031(a)(1). Second, HB2's ambulatory-surgical-center (ASC) provision requires all abortion facilities to meet ambulatory-surgical-center standards.

Id. § 245.010(a); *see* 25 TEX. ADMIN. CODE § 139.40. There are three general categories of ASC regulatory standards: (1) operating requirements, *id.* §§ 135.4-.17, 135.26-.27; (2) fire prevention and general safety requirements, *id.* §§ 135.41-.43; and (3) physical plant requirements, *id.* §§ 135.51-.56.

The Fifth Circuit largely upheld these provisions, while granting as-applied relief in McAllen—a city in the Rio Grande Valley of South Texas on the border with Mexico. Given the as-applied relief in McAllen, there will still be an operational abortion facility in every area where an abortion facility will close if the mandate issues. Thus, even though the number of operational abortion facilities in Texas will decrease, women will not have to travel any significant additional distance to obtain abortions. Consequently, if the mandate issues, the status quo of how far women must travel to obtain abortions will not be altered materially.

I. ISSUING THE MANDATE WILL NOT MATERIALLY ALTER A WOMAN’S ABILITY TO OBTAIN AN ABORTION.

Women in Texas will not face a material change in access to an abortion after the mandate issues, contrary to Plaintiffs’ dire warning of “a severe shortage of abortion services.” Appl. 12. In light of the Fifth Circuit’s as-applied relief in McAllen and recognition that women in El Paso were already traveling short distances to a nearby operational abortion facility in New Mexico, allowing HB2 to take effect will not materially alter a woman’s ability to obtain an abortion.

A. There Will Still Be an Operational Abortion Facility in Each Area Where an Abortion Facility Will Close.

In light of the Fifth Circuit’s as-applied relief in McAllen, an operational abortion facility will remain in each area where an abortion facility will close. The parties

agree that of the nineteen abortion facilities operating today in Texas, ten will have to cease performing abortions until they comply with HB2's health standards. *See* Appellants' Letter, *Whole Woman's Health v. Cole*, No. 14-50928 (5th Cir. June 15, 2015); Appellees' Letter, *Whole Woman's Health v. Cole*, No. 14-50928 (5th Cir. June 12, 2015). The ten facilities that will close are located in the following cities: Houston (x4), San Antonio (x2), Austin, Dallas, Fort Worth, and El Paso. *Id.* But as explained above, each of these metropolitan areas will still have an operational abortion facility if the Fifth Circuit's mandate issues,¹ and Plaintiffs do not dispute this fact. ROA.2289-90 (stipulating to eight facilities); Theard Dep. Excerpts 72:8-74:2, 74:5-13, 79:10-16 (Santa Teresa facility).²

These undisputed facts undermine multiple statements in Plaintiffs' application. The ASC requirement will not cause a "drastic reduction" in the "geographic distribution" of abortion facilities. Appl. 28, 38. And the ASC requirement will not "eliminat[e]" "all licensed abortion providers from vast regions of Texas." Appl. 22, 40. In

¹ San Antonio will soon have a third ASC-compliant abortion facility, as the parties stipulated. ROA.2289-90. ("ROA" refers to the Fifth Circuit's electronic record on appeal.) Planned Parenthood South Texas is opening a newly constructed ASC-compliant abortion facility in San Antonio. *See* Bruce Selcraig, *S.A. Could Have Three Abortion Clinics After New Law Goes Into Effect*, SAN ANTONIO EXPRESS-NEWS, June 13, 2015, <http://bit.ly/1JTBuHX> (citing Jeffrey Hons, CEO of Planned Parenthood South Texas, as saying that the abortion provider has "finished construction on a new \$6.5 million, 22,000-square-foot clinic" and is now in the licensing process).

Also, in addition to the facility in Santa Teresa, New Mexico, an abortion facility (run by Plaintiff Whole Woman's Health) will remain operational in Las Cruces, New Mexico—which is less than 50 miles from El Paso. That facility advertises as performing abortions for "women from all over south New Mexico, West Texas, El Paso, and Juarez." WHOLE WOMAN'S HEALTH OF NEW MEXICO, <http://wholewomanshealth.com/newmexico/maps-and-directions.html> (last visited June 25, 2015).

² The deposition excerpts were not part of the electronic record, but were separately filed with the district court in hard copy.

fact, since HB2 was passed, at least three new ASCs have opened or will soon open. ROA.2289-90 (noting new Planned Parenthood facilities in San Antonio and Dallas); Appellees' Letter, *Whole Woman's Health v. Cole*, No. 14-50928 (5th Cir. June 12, 2015) (noting another new facility in San Antonio).

An amicus curiae brief recently filed with the Fifth Circuit detailed the short distances between abortion facilities that will remain open after the mandate issues and those that will close. *See* Brief of Amici Curiae Texas Alliance for Life, et al. at 8-13, *Whole Woman's Health v. Cole*, No. 14-50928 (5th Cir. June 19, 2015). The greatest distance is only 18.3 miles, between two facilities in Houston. *See id.* at 11, 13. In short, the status quo of travel distances for a woman seeking an abortion will not change materially if the mandate issues.

B. Plaintiffs Presented No Competent Evidence That Remaining Abortion Facilities Will Lack the Capacity to Perform the Number of Abortions Sought.

Contrary to Plaintiffs' repeated assertions, Appl. 14, 40, Plaintiffs presented no competent evidence that the remaining operational abortion facilities lack the capacity to perform the number of abortions sought. *See Whole Woman's Health v. Cole*, No. 14-50928, 2015 WL 3604750, at *20 (5th Cir. June 9, 2015) (per curiam) (concluding that there was no evidence that "the current ASCs are operating at full capacity or that they cannot increase capacity"). In fact, Plaintiffs never even asked the district court to make a fact finding about capacity. ROA.2137-53.

Plaintiffs base this claim on two conclusory sentences from Dr. Daniel Grossman, one of their experts. Grossman noted a decrease in the number of abortions performed at ASCs and then jumped to the conclusion that those ASCs were operating at full

capacity. ROA.2352-53. But the number of abortions that a facility currently performs does not establish anything about the *maximum* number of abortions it could perform. And Grossman did not speak to any of those providers to determine if they were operating at capacity, he identified no woman who had been turned away from an ASC because it lacked capacity, and he did not account for any new ASCs (which have now opened) or the ability of existing ASCs to expand. Grossman even had to admit that his expert colleague’s capacity prediction in Plaintiffs’ first lawsuit—that remaining abortion facilities would lack capacity to perform 22,000 abortions—turned out to be wrong. *Cole*, 2015 WL 3604750, at *20 n.34; ROA.2840. The Fifth Circuit rightly concluded that this testimony was “*ipse dixit*” and no evidence at all. *Cole*, 2015 WL 3604750, at *23 n.42 and *20 n.34 (calling Grossman’s testimony a “chain of unsupported inferences”). Plaintiffs had every opportunity to introduce evidence that there would be an abortion-capacity shortage due to HB2, but they produced nothing.

Particularly unfounded is Plaintiffs’ charge that the mandate “would sharply limit the capacity of the McAllen clinic,” Appl. 13, and not allow that facility to perform abortions “to the full extent of patient demand,” Appl. 11-12. Plaintiffs received as-applied relief in McAllen, as the Fifth Circuit affirmed the injunction as to Dr. Lynn and the Whole Woman’s Health facility in McAllen in significant part. *Cole*, 2015 WL 3604750, at *25. Plaintiffs offered no evidence or argument at trial that anyone other than women from the Rio Grande Valley (certain counties in South Texas around McAllen) obtain abortions at the McAllen facility. *See, e.g.*, ROA.2437-46 (Lucy Felix testifying solely in regard to women in the Rio Grande Valley);

ROA.2471-72 (Amy Hagstrom Miller testifying to effect of closure of McAllen facility on women in the Rio Grande Valley). Plaintiffs have no argument for why the injunction should apply to anyone other than women in the Rio Grande Valley, given that those were the women that Plaintiffs alleged faced a substantial obstacle to obtaining an abortion from HB2, as applied to the McAllen abortion facility. ROA.68-71 (Plaintiffs' complaint referring to patients in the Rio Grande Valley in describing as-applied claim). Plaintiffs likewise make the unfounded assertion that limiting the injunction to only Dr. Lynn prevents them from meeting demand for abortions in McAllen. Plaintiffs offered no evidence, argument at trial, or argument on appeal that Dr. Lynn could not meet demand at the McAllen abortion facility.

C. Issuing the Mandate Will Not Prevent Women in El Paso from Obtaining Abortions.

Even though an abortion facility will not remain operational within El Paso's city limits if the mandate issues, there will be no shortage of abortion access in El Paso.³

³ Plaintiffs are mistaken that the mandate would "prevent the El Paso clinic from reopening." Appl. 13. Reproductive Services of El Paso is not currently operating, and it would not be able to open its new abortion facility even if the Court stayed the mandate because the new facility is not covered by the district court's injunction. The district court enjoined application of the ASC requirement as to abortion facilities that were operating at the time of its judgment, but it *upheld* the ASC requirement as applied to "abortion facilities commencing operation after September 1, 2014, and which were not previously licensed abortion facilities under the Texas Health and Safety Code, Section 245." ROA.2704.

Reproductive Services is attempting to open a *new* abortion facility—not one that was "previously licensed"—and therefore this new facility is not covered by the district court's injunction. Reproductive Services of El Paso gave up its abortion license on May 29, 2014, months before the district court entered its judgment. ROA.2479. In February 2015, it submitted an application for a new license at a new location. Although the owner and name may be the same as the old facility, the facility itself is new and in a separate location, which is the relevant inquiry. *See* TEX. HEALTH &

At least two facilities that perform abortions for El Paso women will not be affected by the mandate.

The owner of the currently operating abortion facility in El Paso (Hill Top Women’s Reproductive Clinic) has another abortion facility (Women’s Reproductive Clinic) less than twelve miles away. That facility is located in Santa Teresa, New Mexico, which is part of the El Paso metropolitan area and is less than one mile from the Texas-New Mexico border. As the Fifth Circuit found, “women in El Paso can travel the short distance to Santa Teresa to obtain an abortion and, indeed, the evidence is that many did just that before H.B. 2.” *Cole*, 2015 WL 3604750, at *26.

Additionally, Plaintiff Whole Woman’s Health advertises as providing abortions to women in El Paso and West Texas from its facility in Las Cruces, New Mexico, which is less than 50 miles from the Hill Top facility in El Paso. *See supra* p.5 n.1.

* * *

When the Fifth Circuit’s mandate issues, women in Texas will not face any materially greater travel distances to obtain abortions.

II. THIS IS PLAINTIFFS’ SECOND LAWSUIT CHALLENGING PROVISIONS OF HB2.

Plaintiffs filed a previous lawsuit challenging some provisions of HB2. They expressly challenged the facial validity of HB2’s admitting-privileges requirement in that first lawsuit.⁴ The Fifth Circuit rejected their claims. *Planned Parenthood of*

SAFETY CODE § 245.002(2) (“abortion facility” is “a *place* where abortions are performed” (emphasis added)); *id.* § 245.003(b), (c) (each abortion facility must have a separate license, which is specific to the particular facility and cannot be transferred).

⁴ Plaintiffs in this second HB2 lawsuit were all plaintiffs or in privity with plaintiffs in the first HB2 lawsuit (*Abbott II*). Plaintiffs question whether Reproductive Services (who was not a plaintiff in *Abbott II*) is in privity with Dr. Richter (who was

Greater Tex. Surgical Health Servs. v. Abbott, 748 F.3d 583, 600 (5th Cir. 2014) (*Abbott II*). The court concluded that Plaintiffs had failed to prove that travel distances of 150 miles one-way were an undue burden, in light of this Court’s decision in *Planned Parenthood of Southeast Pennsylvania v. Casey*, 505 U.S. 833 (1992), upholding a 24-hour waiting period for abortions even though some women had to travel three hours one-way to the nearest facility. *Abbott II*, 748 F.3d at 598 (discussing *Casey*).

After the Fifth Circuit rejected their claims, Plaintiffs chose not to seek certiorari review in this Court and instead to abide by that final judgment. Thus, at a minimum, their facial challenge to the admitting-privileges requirement is over.

In their pending application to this Court, however, Plaintiffs attempt to combine arguments and evidence from their first lawsuit with their arguments and evidence in this lawsuit. But this suit challenges only the admitting-privileges requirement as applied in McAllen and El Paso and the ASC requirement (both facially and as-applied in McAllen and El Paso). Plaintiffs cannot use this second lawsuit to resurrect claims that were rejected or should have been raised in their first lawsuit.

Consequently, Plaintiffs’ repeated references to the “41” abortion facilities that were operating in Texas before HB2 was passed in 2013 are misleading, Appl. 1, 12,

a plaintiff in *Abbott II*). Appl. 46. But Dr. Richter was the Medical Director of Reproductive Services and the only physician to perform abortions there. ROA.2476-77. Her position as Director and employee is sufficient to put her in privity with Reproductive Services for res judicata purposes. See *Henry v. Farmer City State Bank*, 808 F.2d 1228, 1235 n.6 (7th Cir. 1986) (stating that bank’s “directors, officers, employees, and attorneys” were in privity with the bank); see also *Grynberg v. BP, P.L.C.*, 527 F. App’x 278, 282 n.4 (5th Cir. 2013) (per curiam) (citing *Henry* for proposition that CEO of a BP entity was in privity with BP).

14, 39, 40. Today, even while the ASC requirement is facially enjoined by the district court’s operative injunction, only 19 abortion facilities are operating in Texas. Plaintiffs have not proven what caused the number of abortion facilities in Texas to decrease from 41 to 19 between the passage of HB2 in 2013 and today, and plaintiffs’ expert could not state that HB2 caused this. ROA.2347-48. There are all sorts of potential factors that could cause the number of abortion facilities to decrease—including a decrease in demand for abortions. *See* David Crary, *Abortions Declining in Nearly All States*, WASH. POST, June 7, 2015, <http://wapo.st/1F3X1HJ> (national study by the Associated Press found that since 2010, the abortion rate nationwide decreased by about 12%, while it dropped by about 15% in multiple States including “liberal states such as New York, Oregon and Washington”); Erik Eckholm, *Abortions Declining in U.S., Study Finds*, N.Y. TIMES, Feb. 2, 2014, <http://nyti.ms/1fn6q25> (Guttmacher Institute found that, as of 2011, the abortion rate in this country has fallen to its lowest level in more than three decades, and state abortion laws “had only a minimal impact on the number of women obtaining abortions during the study period”). And even if Plaintiffs had proven that the admitting-privileges requirement caused some of these facilities to close, Plaintiffs are bound by a final judgment upholding the facial validity of that requirement.

III. PROCEDURAL HISTORY.

In this lawsuit, Plaintiffs brought two general claims: (1) a facial challenge to the ASC requirement, and (2) as-applied challenges in McAllen and El Paso regarding the ASC and admitting-privileges requirements. ROA.68-71. Each of these arguments, however, turned on a central claim: these provisions would force facilities to

close, thus requiring women to travel significantly further for abortions so as to create a substantial obstacle. ROA.2152-53 (requesting findings that the inability to travel will prohibit some women from obtaining abortions). As for the ASC requirement, Plaintiffs’ evidence focused exclusively on the ASC *construction* regulations—and not the *operating* regulations. ROA.2400-2404 (describing costs to build an ASC or retrofit an existing facility); ROA.2472 (explaining that the McAllen facility “does not meet ASC construction standards”). No evidence was presented that Plaintiffs would be unable to meet the ASC operating regulations.

Before trial, the district court ruled that the ASC requirement had a rational basis of protecting women’s health. ROA.2247. Following a bench trial, the district court actually upheld the ASC requirement as applied to all *new* abortion facilities and those currently operating as ASCs. ROA.2703-04. Otherwise, the district court granted Plaintiffs much of the relief they requested, finding the ASC requirement facially unconstitutional and enjoining the admitting-privileges requirement in McAllen and El Paso. ROA.2703-04. But the district court did not stop there. It *facially* enjoined the admitting-privileges requirement—ignoring the final judgment from Plaintiffs’ first lawsuit that found this provision facially constitutional (and also ignoring the fact that Plaintiffs had not requested facial invalidation of the admitting-privileges requirement in this second lawsuit). ROA.2704.

Following briefing and argument on the State’s stay motion, a motions panel of the Fifth Circuit partially stayed the district court’s judgment. *Whole Woman’s Health v. Lakey*, 769 F.3d 285, 289 (5th Cir. 2014). All three panelists agreed that the district court erred in (1) facially enjoining the admitting-privileges requirement and

(2) enjoining any portion of the ASC *operating* regulations. *Id.* at 293, 300; *see also id.* at 306 (Higginson, J., concurring in part and dissenting in part).

This Court partially vacated the Fifth Circuit’s stay—although Justices Scalia, Thomas, and Alito would have left the Fifth Circuit’s stay in place in its entirety. *Whole Woman’s Health v. Lakey*, 135 S. Ct. 399 (2014) (mem.). The Court left in place the stay of the district court’s facial injunction of the admitting-privileges requirement—that is, the claim raised and remedy sought in Plaintiffs’ first lawsuit subject to a previous final judgment. *Id.*

After full briefing and argument, the Fifth Circuit reversed the district court’s judgment in part and affirmed it in part. *Cole*, 2015 WL 3604750, at *1. First, the court rejected the facial challenge to the ASC requirement. It held that Plaintiffs’ facial challenge to the ASC requirement was barred by res judicata. *Id.* at *13-15. The court concluded, alternatively, that Plaintiffs had failed to meet their burden of proving that the ASC requirement lacked a rational basis or that it had the purpose or effect of creating a substantial obstacle for a large fraction of women in Texas to obtain abortions. *Id.* at *15-21. Second, as for the McAllen as-applied challenge, the court ruled that Plaintiff Whole Woman’s Health was entitled to relief with respect to the ASC physical-plant and fire-prevention regulations (25 TEX. ADMIN. CODE §§ 135.41, 135.51-.56) for its facility in McAllen. *Cole*, 2015 WL 3604750, at *23-25. It also held that Plaintiff Dr. Sherwood Lynn was entitled to relief from the admitting-privileges requirement for purposes of performing abortions for women of the Rio Grande Valley at the Whole Woman’s Health facility in McAllen. *Id.* Third, the court rejected the El Paso as-applied challenge. It concluded that women in the El

Paso area would not face a substantial obstacle in obtaining an abortion because an abortion facility remained operational in Santa Teresa, New Mexico—less than twelve miles from the El Paso facility. *Id.* at *25-26.

Plaintiffs asked the Fifth Circuit to stay its mandate. The court denied the request but modified its judgment so that none of the ASC regulations would go into effect in McAllen until October 29, 2015. Order, *Whole Woman’s Health v. Cole*, No. 14-50928 (5th Cir. June 19, 2015). Judge Prado would have granted the stay. *Id.*

ARGUMENT

To obtain a stay of the mandate pending a petition for a writ of certiorari, Plaintiffs must establish (1) a reasonable probability that four members of the Supreme Court would consider the underlying issue sufficiently meritorious to grant certiorari; (2) a significant possibility of reversal of the lower court’s decision; and (3) a likelihood of irreparable harm if the decision is not stayed. *S. Park Indep. Sch. Dist. v. United States*, 453 U.S. 1301, 1303 (1981) (Powell, J., in chambers). In close cases, it may also be appropriate to balance the equities of the parties and the public. *Barnes v. E-Systems, Inc. Group Hosp. Med. & Surgical Ins. Plan*, 501 U.S. 1301, 1304-05 (1991) (Scalia, J., in chambers). “Denial of such in-chambers stay applications is the norm; relief is granted only in ‘extraordinary cases.’” *Conkright v. Frommert*, 556 U.S. 1401, 1401 (2009) (Ginsburg, J., in chambers); see *Philip Morris USA, Inc. v. Scott*, 131 S. Ct. 1, 2 (2010) (Scalia, J., in chambers) (stating that the applicant requesting a stay of the lower court’s judgment pending a writ of certiorari bears a “heavy burden”).

I. A GRANT OF CERTIORARI IS FAR FROM CERTAIN.

There are multiple reasons certiorari should be denied in this case. As an initial matter, the Fifth Circuit's res judicata holdings create vehicle problems for reaching the underlying constitutional facial challenges. And the as-applied claims are fact-bound, the Fifth Circuit granted Plaintiffs as-applied relief in McAllen, and Plaintiffs' stay application basically does not argue that El Paso women will face a substantial obstacle to obtain an abortion. In light of the Fifth Circuit's as-applied relief to McAllen, this case is in a substantially different posture than when the Court previously considered the Fifth Circuit's stay.

A. Res Judicata Creates Vehicle Problems and Plaintiffs' As-Applied Claims Are Fact-Bound.

Res judicata is a serious vehicle problem that could prevent the Court from reaching the underlying facial challenges. In Plaintiffs' first lawsuit challenging HB2, the Fifth Circuit expressly rejected Plaintiffs' facial attack on the admitting-privileges requirement. And the Fifth Circuit here in this second lawsuit held that a facial attack on the ASC requirement was also barred by res judicata. *See Cole*, 2015 WL 3604750, at *12-15. The court determined that the prior facial challenge to the admitting-privileges requirement and the current facial challenge to the ASC requirement arose from the same transaction or series of connected transactions. *Id.* at*13 (noting that the challenges "involve the same parties and abortion facilities; the challenges are governed by the same legal standards; the provisions at issue were enacted at the same time as part of the same act; the provisions were motivated by a common

purpose; the provisions are administered by the same state officials; and the challenges form a convenient trial unit because they rely on a common nucleus of operative facts”).

The Fifth Circuit rejected Plaintiffs’ argument that they did not know how the ASC requirement would be implemented until after the first lawsuit, reasoning that Plaintiffs mounted a broad facial challenge to the ASC requirement and HB2 “very clearly required facilities that perform abortions to meet the existing requirements for ASCs, which were spelled out well before the effective date of this provision and, more importantly, well before the date of the *Abbott II* lawsuit.” *Id.* The court found “nothing material that evolved between the time H.B. 2 was passed and *Abbott II* was filed, on the one hand, and the time this lawsuit was filed, on the other, that justified dividing the litigation.” *Id.*

Plaintiffs’ remaining claims are fact-bound as-applied challenges limited to McAllen and El Paso. *See id.* at *23-26 (as-applied challenges resolved on application of undue burden standard to specific facts regarding McAllen and El Paso). The Court does “not grant a certiorari to review evidence and discuss specific facts.” *United States v. Johnson*, 268 U.S. 220, 227 (1925). Equally problematic for review is the fact that Plaintiffs received relief in McAllen, *Cole*, 2015 WL 3604750, at *25, and the Fifth Circuit held that El Paso women would not face a substantial obstacle in obtaining abortions, *id.* at *25-26. And Plaintiffs essentially do not argue in their stay application that HB2 as applied in El Paso will impede women in that area from obtaining abortions.

B. The Case Is In a Significantly Different Posture Than When The Court Partially Vacated the Fifth Circuit's Stay.

Plaintiffs argue that the Court's decision to partially vacate the Fifth Circuit's stay earlier in this case indicates that a certiorari grant is likely. Appl. 26. But a number of developments since the Court's partial vacatur indicate that a grant of certiorari is not a foregone conclusion.

The Fifth Circuit's merits decision relieves many of the concerns raised by Plaintiffs in their earlier application to this Court. In their application to vacate the stay pending appeal to the Fifth Circuit, for example, one of Plaintiffs' primary concerns was that women in the Rio Grande Valley would lose access to abortion services if the stay was not vacated. Appl. to Vacate Stay Pending Appeal at 21-22, No. 14A365 (Oct. 6, 2014). The Fifth Circuit has since granted relief for the McAllen abortion facility and doctor. *Cole*, 2015 WL 3604750, at *25.

Similarly, Plaintiffs worried that the stay would force women in El Paso to endure "a 1,000-mile round trip" to obtain an abortion. Appl. to Vacate at 22. But the Fifth Circuit found that "[t]here is an abortion facility approximately twelve miles away in Santa Teresa, New Mexico" and even before HB2, "more than half of the women who obtained abortions at the Santa Teresa facility were from El Paso." *Cole*, 2015 WL 3604750, at *25.

Another of Plaintiffs' concerns was the stay panel's conclusion that their as-applied challenges were barred by res judicata. Appl. to Vacate at 43. The Fifth Circuit has since held that Plaintiffs' as-applied challenges were not barred by res judicata. *Cole*, 2015 WL 3604750, at *22.

Plaintiffs also alleged that if the stay were not vacated, abortion facilities would be forced to close forever. Appl. to Vacate at 44-45. That fear has proven unfounded. The abortion facility in McAllen, for example, which closed in March 2014 after not performing abortions since November 2013, ROA.2468, was able to reopen approximately one week after the district court's injunction.⁵ And in response to an argument that the controversy regarding Reproductive Services in El Paso was moot because the facility had closed, Plaintiffs assured the Fifth Circuit that the facility intended to reopen as soon as its license was granted. *Cole*, 2015 WL 3604750, at *12 n.20 (rejecting mootness based on testimony that El Paso facility intended to reopen). Furthermore, a new HB2-compliant abortion facility—Alamo Women's Reproductive Services—has opened in San Antonio since the Court's order and another is on the verge of opening, *see supra* p.5 n.1, demonstrating that new abortion providers will be able to open after HB2 goes into effect.

C. Plaintiffs Overstate the Purported Circuit Split.

The Fifth Circuit carefully applied the Court's abortion doctrines articulated in *Gonzales v. Carhart*, 550 U.S. 124 (2007), and *Casey*. Plaintiffs claim that the Fifth Circuit created a circuit split with the Seventh and Ninth Circuits, Appl. 26-27, but that is an overstatement. Plaintiffs have not identified a circuit split on the validity of a law requiring that abortion facilities meet ambulatory-surgical-center standards. Nor has any other circuit upheld a final judgment invalidating a law requiring doctors that perform abortions to have admitting privileges at a nearby hospital.

⁵ Eric Eckholm, *Texas Abortion Clinic To Reopen After Ruling*, N.Y. TIMES, Sept. 3, 2014, <http://nyti.ms/Z8o0oz>.

Plaintiffs point to the interlocutory decision in *Planned Parenthood of Wisconsin, Inc. v. Van Hollen*, 738 F.3d 786 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 2841 (2014), to argue that, contrary to the Fifth Circuit in this case, the Seventh Circuit balanced the medical justification for an abortion regulation against the burden it imposes. Appl. 26. But the Seventh Circuit balanced the injuries to both parties, which is precisely what any court does when reviewing a preliminary injunction. The key factor for the Seventh Circuit in reviewing that preliminary injunction was that Wisconsin’s admitting-privileges requirement was going to take effect just days after it was enacted. The law there was enacted on a Friday and required compliance by the following Monday, even though it was undisputed that “it takes a minimum of two or three months to obtain admitting privileges.” 738 F.3d at 788, 795. The court upheld the preliminary injunction after concluding that the harm the plaintiffs faced (the law would have “wreaked havoc with the provision of abortions in Wisconsin,” *id.* at 792) was far greater than any harm faced by the State from the delayed implementation of the statute (“The state can without harm to its legitimate interests wait a few months more to implement its new law,” *id.* at 793). *Id.* at 795. The Seventh Circuit’s analysis thus was in the context of reviewing a preliminary injunction, where a key concern was balancing the equities on a “sparse evidentiary record.” *See id.* at 788, 799.

Texas law is fundamentally different. *See Abbott II*, 748 F.3d at 596 (distinguishing *Van Hollen* from the challenge to HB2). HB2 gave abortion providers fourteen

months to comply with the ASC requirement and over 100 days for physicians performing abortions to obtain admitting privileges. *See* Act of July 12, 2013, 83rd Leg., 2d C.S., ch. 1, §§ 1–12, 2013 Tex. Gen Laws 5013, 5013-20.

The other case cited by Plaintiffs as creating a circuit split, *Planned Parenthood Arizona, Inc. v. Humble*, 753 F.3d 905 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 870 (2014), is also distinguishable. Like *Van Hollen*, *Humble* was an interlocutory decision addressing a lawsuit at the preliminary-injunction stage, and that case concerned a law regarding medication abortions, not an ASC or admitting-privileges requirement. *See id.* Insofar as the Ninth Circuit adopted a balancing test that requires courts to scrutinize the degree of medical benefits achieved through an abortion regulation, the Ninth Circuit may very well have misread its own—pre-*Gonzales*—precedent. 753 F.3d at 912 (citing *Tucson Woman’s Clinic v. Eden*, 379 F.3d 531, 539 (9th Cir. 2004)).

Regardless, as explained below, to the extent any court embraced Plaintiffs’ balancing analysis, it has misread this Court’s abortion doctrines. *See infra* pp.22-25. So even if the circuits disagree about whether balancing is part of the *Casey/Gonzales* test, the Court should wait to resolve the split in a case unlike this one, where the Fifth Circuit faithfully applied the Court’s undue-burden precedent. *Cf. Estelle v. Gamble*, 429 U.S. 97, 115 (1976) (Stevens, J., dissenting) (noting that “the Court seldom takes a case merely to reaffirm settled law”).

II. THERE IS NO SIGNIFICANT POSSIBILITY OF REVERSAL ON THE MERITS.

The State would prevail on the merits. First off, as explained above, Plaintiffs’ facial challenge is precluded by res judicata. And even if the Court could reach the

underlying constitutional question, the State would prevail under this Court’s established abortion doctrines. Plaintiffs appear to be asking the Court to revert back to pre-*Casey* holdings by asserting a constitutional violation on the basis that an abortion regulation does not have sufficient medical benefits—even when the law has a rational basis and has neither the purpose nor effect of creating a substantial obstacle for a woman to obtain an abortion. Appl. 31-33. But *Casey* and *Gonzales* confirm that an abortion regulation is valid when (1) the State “has a rational basis to act,” *Gonzales*, 550 U.S. at 158; and (2) the regulation does not “have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion,” *Casey*, 505 U.S. at 878 (joint op.).

A. The Court’s Abortion Doctrine Asks Whether a Law Has a Rational Basis and Whether a Law Has the Purpose or Effect of Creating a Substantial Obstacle.

Instead of relying on *Casey* and *Gonzales*, Plaintiffs concoct a novel constitutional test by piecing together various doctrines regarding strict scrutiny, *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 434 (1983) (*Akron I*), overruled in part by *Casey*, 505 U.S. 833; the First Amendment, *Edenfield v. Fane*, 507 U.S. 761, 771 (1993); substantive due process beyond the abortion context, *Lawrence v. Texas*, 539 U.S. 558, 578 (2003); equal protection, *Romer v. Evans*, 517 U.S. 620, 632 (1996); and the Religious Land Use and Institutionalized Persons Act, *Holt v. Hobbs*, 135 S. Ct. 853, 868 (2015) (Sotomayor, J., concurring). Appl. 29-32. In short, Plaintiffs believe that even when abortion regulations do not create a substantial obstacle, courts must still scrutinize them to ensure that they entail a certain degree of medical ben-

efits that outweigh any alleged burdens. Appl. 26 (positing that an abortion regulation must “actually further a valid state interest . . . to an extent sufficient to counterbalance the obstacles to abortion access that it creates”); *see also* Appl. 28-34.

But this Court’s doctrinal test since *Casey* asks simply whether the statute has a rational basis and whether it has the purpose or effect of placing a substantial obstacle in the path of a woman seeking a pre-viability abortion. *Gonzales*, 550 U.S. at 158; *Casey*, 505 U.S. at 878. This is not a balancing test that scrutinizes various medical requirements about which there may be disagreement among experts. As *Gonzales* noted, the Court does do not “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.” 550 U.S. at 163-64 (internal citation and quotation marks omitted).

1. *Casey* and *Gonzales* Did Not Adopt a Balancing Test That Scrutinizes the Degree of Medical Benefits.

The Court has repeatedly upheld abortion regulations that rationally relate to the State’s legitimate interest in protecting women’s health, without trying to determine whether they entail a sufficient degree of medical benefits. Beginning in *Roe*, the Court recognized the State’s interest in protecting women’s health:

The State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient. This interest obviously extends at least to the performing physician and his staff, to the facilities involved, to the availability of after-care, and to adequate provision for any complication or emergency that might arise.

Roe v. Wade, 410 U.S. 113, 150 (1973). *Roe* also established a trimester framework that did not permit the State to enact regulations designed to promote women’s

health until the second trimester, when *Roe* claimed the State’s interest became “compelling.” *Id.* at 163.

The Court reevaluated and rejected *Roe*’s trimester framework in *Casey*, while maintaining *Roe*’s central holding regarding the right to a pre-viability abortion. 505 U.S. at 873. In its place, *Casey* adopted the undue-burden test, which renders a law invalid if “its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.” *Id.* at 878. In so holding, the Court recognized that “the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman.” *Id.* at 846. The Court also held that “[t]he fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it.” *Id.* at 874 (quoted in *Gonzales*, 550 U.S. at 157-58). As long as the State’s regulations are rational and do not have the purpose or effect of creating a substantial obstacle, the laws are valid.

Applying this test, the Court in *Casey*, *Gonzales*, and *Mazurek v. Armstrong*, 520 U.S. 968 (1997) (per curiam), upheld abortion regulations without balancing the medical benefits of the regulation with its alleged burdens. Beginning in *Casey*, the Court upheld a challenge to the requirement that a *physician* provide the patient with informed consent information, “even if an objective assessment might suggest that those same tasks could be performed by others.” 505 U.S. at 885. At no point did the Court ask whether this regulation produced a sufficient amount of medical benefits. Instead, *Casey* upheld the law because it had a rational basis and did not create a substantial obstacle.

Gonzales, likewise, upheld a ban on partial-birth abortion without conducting a balancing analysis, noting that the Court should not “serve as the country’s *ex officio* medical board.” 550 U.S. at 163-64 (internal citation and quotation marks omitted). There, the very existence of “medical uncertainty over whether the [partial-birth abortion ban] creates significant health risks” provided “a sufficient basis to conclude in this facial attack that the Act does not impose an undue burden.” *Id.* at 164; *see also id.* (“Medical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts.”).

And *Mazurek* upheld a requirement that abortions be performed by 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.” 520 U.S. at 973 (citation and internal quotation marks omitted). The Court held that the plaintiffs’ argument that “all health evidence contradicts the claim that there is any health basis’ for the law” was “squarely foreclosed by *Casey* itself.” *Id.* Plaintiffs have no response to *Mazurek*’s rejection of their medical-benefits argument other than to point out that there was also no substantial obstacle—because no woman would have to travel farther as a result of the physician-only requirement. Appl. 31 n.11. That, of course, is simply the substantial-obstacle inquiry adopted in *Casey* and used in *Gonzales*; it is not some balancing test that scrutinizes the degree of medical benefits. And here, even if a small fraction of women may have to travel a short distance further to obtain abortions if the mandate issues, that is not a substantial obstacle as

operational abortion facilities will remain in each metropolitan area where facilities will close.

2. Plaintiffs Ask the Court to Reinstitute Strict Scrutiny, Which Was Rejected by *Casey*.

Casey and *Gonzales* confirm that the State simply has to show that its abortion regulations have a rational basis and do not have the purpose or effect of creating a substantial obstacle. States do not have to make the additional showing that their regulations have a sufficient amount of medical benefits when weighed against the burdens. By arguing that States should have to make this additional showing, Plaintiffs are trying to reinstitute the strict-scrutiny analysis rejected by *Casey*.

Plaintiffs rely on the pre-*Casey* statement in *Akron I* that “[t]he existence of a compelling state interest in health . . . is only the beginning of the inquiry” and that “[t]he State’s regulation may be upheld only if it is reasonably designed to further that state interest.” *Akron I*, 462 U.S. at 434; Appl. 31-32. This portion of *Akron I* did not survive *Casey*. *Akron I* was relying on *Roe*’s holding that maternal health did not become compelling until the second trimester of pregnancy. 462 U.S. at 429, 434. *Casey*, however, recognized that the State’s legitimate interests in protecting a woman’s health exist from the outset of her pregnancy. 505 U.S. at 846; *see id.* at 873 (rejecting *Akron I*’s strict-scrutiny analysis and holding that the State has a legitimate interest in protecting women’s health).

Plaintiffs correctly note that *Gonzales* said the partial-birth abortion ban “further the Government’s objectives.” Appl. 31. This, though, is a basic application of the rational-basis test, and not a rigorous review of the medical benefits of that law. Indeed, that quote in *Gonzales* was followed by an explanation that Congress “could

. . . conclude” that ethical concerns justified the ban, that the Court lacked “reliable data” on partial-birth abortion’s effect on women, and that a “reasonable inference” suggested the law was effective. 550 U.S. at 158-60. There was not, as Plaintiffs would have required, an evidentiary showing by Congress that the ban entailed a sufficient degree of medical benefits that outweighed its burdens. Instead, the Court found that the law had a rational basis and did not impose a substantial obstacle.

The same holds true for Plaintiffs’ reference to *Casey*’s statement that the informed consent requirements “further[]” a legitimate purpose of ensuring that women seeking an abortion are fully educated about their choice. Appl. 31 (quoting *Casey*, 505 U.S. at 882). The Court conducted no balancing analysis and just recognized that the informed-consent requirement was rationally related to the State’s interest without creating a substantial obstacle.

B. The Ambulatory-Surgical Center Requirement Is Facially Constitutional.

Plaintiffs’ stay application focuses on a facial attack of the ASC requirement. Under *Casey* and *Gonzales*, the ASC requirement is valid. It is supported by a rational basis as acknowledged by both courts below, has no improper purpose, and imposes no substantial obstacle.

1. Plaintiffs Failed to Prove the Law Lacks a Rational Basis.

As the Fifth Circuit and the district court both recognized, the Legislature had a rational basis for enacting the ASC requirement—namely to protect the health of women seeking abortions. *Cole*, 2015 WL 3604750, at *15; ROA.2247. Moreover, the district court refused to enjoin the ASC requirement as to any *new* abortion facilities, further demonstrating that the court believed there was a rational basis to justify the

requirement going forward. ROA.2703-04. And even though the State had no obligation to produce evidence supporting the rationality of its law, *e.g.*, *Heller v. Doe*, 509 U.S. 312, 320 (1993), it did so anyway.

Plaintiffs do not deny that the State has a legitimate interest in protecting women's health, nor could they in light of *Casey*. 505 U.S. at 846 (recognizing the State's legitimate interest in protecting women's health from the outset of pregnancy). The ASC requirement improves the standard of care for women seeking abortions by providing heightened accountability and monitoring mechanisms for abortion practitioners, ROA.3865; ensuring that patients will not be relegated to substandard clinics; ensuring enhanced pain-management options for abortion patients, ROA.3068-69 (acknowledging that ASCs offer "more robust pain management options"); and providing a sterile operating environment for surgical abortions, ROA.3859-63.

Aside from the closure of abortion facilities, Plaintiffs offer no argument that the ASC requirement and accompanying regulations are not rationally related to protecting women's health and safety. The ASC regulations, for example, require that a registered nurse be on duty whenever a patient is on the premises, 25 TEX. ADMIN. CODE § 135.15(a)(4); a quality assurance program exists that includes peer review of all professional and technical activities of personnel, *id.* § 135.8(a); a patient safety program is established for identifying the cause of adverse events and developing an action plan to remedy them, *id.* § 135.27; a facility must have a fire alarm system, *id.* § 135.41(d); and a facility must have an HVAC system to ensure a sterile surgical

environment, *id.* § 135.52. By requiring facilities to meet those standards, the ASC regulations further the State’s legitimate interest in protecting women’s health.

In arguing that the ASC requirement is unnecessary and irrational, Plaintiffs deny that abortion is an invasive procedure that should be performed in a sterile environment. Appl. 17-18. Plaintiffs continue to insist that, because the vagina is naturally colonized by bacteria, “basic cleanliness,” “hand-washing,” and “sterile instruments” are all that is necessary to safely perform an abortion. Appl. 18. Plaintiffs’ position fails to recognize that the cervix and intra-uterine cavity are sterile, as explained in testimony from one of the State’s experts. ROA.3860. That testimony, furthermore, established that a pregnant uterus is softer, more easily torn, and more engorged with blood, making the patient more at risk for complications. ROA.3862. The risks include infection and life-threatening hemorrhage, which can lead to hysterectomy and death. ROA.3863.

As described by the same expert, a surgical abortion is similar to the performance of a dilation and curettage (D&C). ROA.3861. During a D&C, the patient is anesthetized, washed, and covered with sterile drapes to limit contamination. ROA.3861. The surgeon assesses the opening of the cervix and, if it is not open, dilates the cervix with metal dilators. ROA.3861. Dilation can be extremely painful, and the patient often requires more than local anesthetics. ROA.3861 Dilation continues until the cervix opening is large enough to insert the curette. ROA.3861 The surgeon uses the curette to remove tissue within the uterus, inspects the uterus for bleeding, and removes the instruments. ROA.3861-62. Accompanying the surgeon are a circulating

nurse, either a scrub nurse or technician, the anesthesia team, and sometimes a medical student. ROA.3861. According to the State’s expert, D&Cs are traditionally performed in an ASC or hospital setting.⁶ ROA.3861

Plaintiffs make no argument and put on no evidence that it is inappropriate to perform abortions in ASCs or that ASC regulations harm women’s health. Plaintiffs simply claim that the regulations are not worth the burden they allegedly create. Plaintiffs are therefore asking for scrutiny far beyond the rational-basis test.

2. Plaintiffs Failed to Prove the Law Has an Impermissible Purpose.

Plaintiffs continue to assert that the Texas Legislature had an impermissible purpose when it enacted the ASC requirement, despite the Legislature’s stated purpose of improving the health, safety, and standard of care for abortion patients. *See, e.g.*, Senate Comm. on Health & Human Servs., Bill Analysis, Tex. H.B. 2, 83d Leg., 2d C.S. (2013) (“H.B. 2 seeks to increase the health and safety” of abortion patients and to provide them with “the highest standard of health care”). *Casey* makes clear that these are legitimate purposes for States to enact abortion regulations.

⁶ Plaintiffs attack the testimony of Dr. Mayra Thompson, one of the State’s experts, for not adequately critiquing the journal articles on which their experts rely. Appl. 17 n.7. But Dr. Thompson’s expertise stems from her experience of practicing obstetrics and gynecology for 30 years. ROA.3137-40. Plaintiffs also incorrectly suggest that Thompson’s testimony was drafted by Dr. Vincent Rue, the State’s litigation consultant. Appl. 17 n.7. As Thompson testified under oath, she formed her own opinions and drafted her own expert report. ROA.3111, 3117. She relied on Rue’s assistance in putting her own words into a format appropriate for an expert report in a lawsuit. *Id.* Plaintiffs’ assertion that Thompson is unreliable because she once had a financial interest in an ASC, Appl. 17 n.7, is puzzling, given that many of Plaintiffs’ witnesses have a financial interest in ensuring that abortions do not have to be performed in facilities meeting ASC standards.

The Court has held that, where “there [are] legitimate reasons for the . . . Legislature to adopt and maintain” a law, courts “will not infer a discriminatory purpose.” *McCleskey v. Kemp*, 481 U.S. 279, 298-99 (1987). Accordingly, courts should “ordinarily defer to the legislature’s stated intent,” and “only the clearest proof” will suffice to “override” that consideration. *Smith v. Doe*, 538 U.S. 84, 92 (2003) (internal citation omitted); see *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997) (“[W]e ordinarily defer to the legislature’s stated intent.”); *Flemming v. Nestor*, 363 U.S. 603, 617 (1960) (“[O]nly the clearest proof could suffice to establish the unconstitutionality of a statute on [the] ground [of improper legislative motive].”). To prove an unconstitutional purpose, a party must establish that a legislature “selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’” any potential adverse effects. *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

Plaintiffs’ primary argument on purpose is simply to rehash their argument of the law’s effects and ask the Court to infer, from that alone, an unconstitutional motive. Appl. 34-36. Effects alone cannot prove unconstitutional motive. The Court “do[es] not assume unconstitutional legislative intent even when statutes produce harmful results.” *Mazurek*, 520 U.S. at 972. And an actor’s awareness of possible consequences is insufficient to demonstrate an unconstitutional intent. See, e.g., *Feeney*, 442 U.S. at 278-79. Moreover, because women will not face an undue burden and new ASCs are opening, the law’s effects have not hindered access to abortion.

Plaintiffs also assert—without any evidence—that HB2 caused a decline in abortions in Texas. See Appl. 14 & n.5. In support of this proposition, they misleadingly say that “the Fifth Circuit acknowledged that 9,200 women were denied abortions

during the year after the admitting-privileges requirement took effect.” Appl. 14 n.5. The Fifth Circuit simply noted the testimony of plaintiffs’ own expert (Grossman): there was a decrease of 9,200 abortions in Texas in the previous year, but Grossman admitted that he “cannot prove causality between the State restrictions and falling abortion rate.” *See Cole*, 2015 WL 3604750, at *27 n. 34. There are many factors that could cause changes in the number of abortions performed, and plaintiffs did not establish that HB2 caused a decrease in abortions. *See David Crary, Abortions Declining in Nearly All States*, WASH. POST, June 7, 2015, <http://wapo.st/1F3X1HJ> (declining teen pregnancy rate a “major factor” in the double-digit drop in the abortion rate since 2010); Erik Eckholm, *Abortions Declining in U.S., Study Finds*, N.Y. TIMES, Feb. 2, 2014, <http://nyti.ms/1fn6q25> (the “growing use, especially among younger women, of nearly foolproof long-term contraceptives” may explain the sharp decline in abortion rates since 2010).⁷

Next, Plaintiffs again raise their argument on medical necessity, claiming the ASC requirement is unnecessary and, therefore, must have been prompted by an unconstitutional motive. Appl. 36-37. This Court has routinely held that in areas of

⁷ Similarly, Plaintiffs claim that “[k]nowing that they would not be able to comply with the challenged requirements, eight abortion facilities closed following enactment of H.B. 2 but before those requirements took effect.” Appl. 12 n.4; *see also* Appl. 35. But the evidence they cite says nothing of the kind. Instead, the evidence shows only that Plaintiff Killeen Women’s Health Center gave up its license in June 2014 (after HB2 took effect) to avoid the license-renewal fee. ROA.2424, 2828-30. Further, Grossman (whose facility-closure chart Plaintiffs cite, ROA.2346) explicitly stated that he was not “offering any opinion on the cause of the decline in the number of abortion facilities from November 2012 to April 2014.” ROA.2347-48.

medical uncertainty, legislatures have much leeway. *Gonzales*, 550 U.S. at 164; *Mazurek*, 520 U.S. at 973; *Casey*, 505 U.S. at 885. And both the Fifth Circuit and the district court found the ASC requirement was rationally related to the goal of protecting women’s health. *Cole*, 2015 WL 3604750, at *15; ROA.2247.

Finally, Plaintiffs assert that the Legislature’s “disparate treatment” of abortion providers is evidence of unconstitutional motive, citing their argument that ASCs built before June 18, 2009, “are exempt from construction requirements due to grandfathering.” Appl. 7 (cited at Appl. 37). That assertion is incorrect: the vast majority of the construction requirements Plaintiffs challenge apply to all ASCs regardless of when they were built. It is therefore incorrect to state that ASCs built before 2009 do not have to meet construction requirements. Plaintiffs’ characterization of the ASC requirement as a “multi-million dollar tax on the provision of abortion services” is without merit. Appl. 7.

One provision of the Texas Administrative Code exempts previously licensed ASCs from complying with changes to the ASC construction requirements adopted in 2009. 25 TEX. ADMIN. CODE § 135.51(a). The 2009 modifications to the ASC regulations were only minor alterations to pre-existing construction regulations—not draconian new standards. *Compare id.* § 135.52, with 23 Tex. Reg. 12337-49 (Dec. 4, 1998) (prior version of § 135.52); *see also* 34 Tex. Reg. 3948 (June 12, 2009).⁸ ASCs

⁸ The changes to the construction requirements in § 135.52 were summarized as “decreas[ing] the spatial requirement for the general storage from 50 to 30 square feet per operating room; add[ing] the requirement for a hand washing fixture in the postoperative recovery suite; delet[ing] the requirement for emergency eyewash; increas[ing] the spatial requirement for the treatment room from 100 to 120 square feet; increas[ing] the spatial requirement for the examination room from 80 to 100

licensed before 2009, including those that performed abortions, were exempted from these alterations. 25 TEX. ADMIN. CODE § 135.51. But they were in no way exempted from the construction requirements generally, and Plaintiffs offer no evidence that they could have been licensed as ASCs under the pre-2009 standards.⁹

In any event, because of the unique nature of the abortion procedure, the Court has held on several occasions that abortion providers may be singled out for regulation. *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 66-67 (1976) (upholding requirement of written consent for abortion even though not imposed on other surgical procedures); *Harris v. McRae*, 448 U.S. 297, 325 (1980) (“Abortion is inherently different from other medical procedures”). Plaintiffs’ evidence is insufficient to prove an unconstitutional motive.

3. Plaintiffs Failed to Prove the ASC Requirement Creates a Substantial Obstacle For Women to Obtain Abortions.

The ASC requirement does not facially create an undue burden, because it does not impose a substantial obstacle for a large fraction of Texas women to obtain abortions (assuming arguendo that the large-fraction test is the proper inquiry for facial validity in the abortion context). *See Gonzales*, 550 U.S. at 167 (declining to decide whether the “no set of circumstances” or “large fraction” test applies to facial challenges of abortion regulations). As a result of the Fifth Circuit’s ruling, each metropolitan area that has an abortion facility today will have one when the Fifth Circuit’s mandate issues. Plaintiffs have not explained why this creates an undue burden on

square feet; add[ing]the requirement for a soap dispenser at each hand washing facility.” 34 Tex. Reg. 3948.

⁹ The “waivers” Plaintiffs mention, Appl. 6-7, are given based on the date of an ASC’s construction—not on whether it provides abortions.

a large fraction of women seeking a pre-viability abortion. They have not presented any evidence of women who will be unable to travel to an abortion facility if the mandate issues. Plaintiffs obtained as-applied relief in McAllen. And they ignore the reality that women in El Paso are able to travel to the abortion facility in Santa Teresa, or even Plaintiff Whole Woman's Health's facility in Las Cruces, to receive an abortion.

The testimony of the State's expert confirms that HB2's effect on travel distances will be minimal. Approximately 83.3% of women aged 15-44 in Texas live within 150 miles of a pre-existing ASC abortion facility. ROA.3928. An additional 6.2% live within 150 miles of the McAllen facility, which will remain operational under the Fifth Circuit's ruling; another 3.3% live within 150 miles of the operational facility in Santa Teresa, New Mexico. ROA.3928. The remaining 7% live in more remote areas of the State that did not have abortion facilities when this lawsuit was filed, much less when the Fifth Circuit ruled on June 9, 2015. ROA.3928. So the remaining 7% would have to travel more than 150 miles regardless of whether the mandate issues. In short, almost 93% of women aged 15-44 in Texas will still live within 150 miles of an abortion facility if the Fifth Circuit's ruling goes into effect, and the remaining 7% still will not live within 150 miles of an abortion facility even if the mandate is stayed.

Plaintiffs wrongly assert that there was "ample evidence" to support a finding that the remaining abortion facilities will lack the capacity to meet patient demand. Appl. 39-40. As explained earlier, the sum total of Plaintiffs' evidence is the *ipse dixit* statement of one of their experts. *See supra* pp.6-8. Plaintiffs try to rehabilitate this

belated claim by asserting that “common sense” and “basic economic principles” support their argument. Appl. 40. Not only is this no substitute for evidence when the Court is asked to strike down the duly enacted law of a State, but common sense and economic principles indicate the opposite. There is no evidence of a lack of current capacity at remaining abortion facilities. Nor is there evidence that remaining abortion facilities could not increase capacity even assuming *arguendo* they lacked current capacity. Market participants frequently increase the supply of services to meet demand. Indeed, the evidence here shows that, since HB2 passed, at least three ASC abortion facilities have opened or will soon open—including a third ASC facility in San Antonio. *See supra* p.5 n.1.

Unable to demonstrate that the ASC requirement creates a substantial obstacle, Plaintiffs rely on irrelevant facts and unsupported assertions. Plaintiffs revert to arguing about “41” abortion facilities, even though they acknowledge that there are only 19 operating today even as the ASC requirement is enjoined.¹⁰ *Compare* Appl. 2 (stating 19 facilities are operating today), *with* Appl. 39 (making an argument based on 41 facilities). They claim there will be a “drastic reduction” in the “geographic distribution” of providers, Appl. 38, when there will be virtually no change in light of the Fifth Circuit’s granting of as-applied relief in McAllen. And their repeated reference to the “elimination of all licensed abortion providers from vast regions of Texas” is

¹⁰ Plaintiffs reach the 41 figure by including all facilities that were open in the months before HB2 became law. ROA.2346. But they have not proven what caused the number of abortion facilities to decrease from 41 to 19 today, and there are many factors that could have caused the decrease. Further, to the extent any facility closed because of the admitting-privileges requirement, Plaintiffs are bound by the final judgment in *Abbott II* that upheld the facial validity of that requirement.

entirely without factual support. Appl. 22, 40. Every region—and each metropolitan area—that has an abortion provider today will still have one if the mandate issues.

C. Plaintiffs Have Not Demonstrated Any Error in the Fifth Circuit’s As-Applied Rulings.

1. Plaintiffs’ argument about the scope of as-applied relief they obtained in McAllen is meritless. Appl. 41-42. There is only one abortion facility in McAllen (Whole Woman’s Health); only one physician performing abortions in McAllen brought suit (Dr. Lynn); only one group of women is implicated by Plaintiffs’ as-applied McAllen claim (those who live in the Rio Grande Valley); and Plaintiffs complained about only one portion of the ASC regulations (the construction requirements). Plaintiffs’ allegations and evidence formed the basis of the Fifth Circuit’s modification of the district court’s injunction. Plaintiffs now appear to complain about a lack of competition among abortion providers in McAllen. Appl. 41-42. The Constitution does not guarantee multiple abortion facilities to choose from. The Fifth Circuit’s *granting* of as-applied relief to the Plaintiff abortion facility and physician in McAllen is not an “affront to the dignity and equality of women.” Appl. 42.

Plaintiffs’ argument that the Fifth Circuit “usurped” the role of the Texas Department of State Health Services by severing some of the ASC regulations as applied in McAllen is contradicted by the regulations themselves. Appl. 43. The agency’s regulations—in addition to HB2 itself—expressly included a strong severability clause: “the department intends . . . every provision, section, subsection, sentence, clause, phrase, or word . . . remain severable;” “if the application of any provision of this chapter is determined by a court of competent jurisdiction to impose an impermissible

or undue burden on any pregnant woman or group of pregnant women, the application of the chapter to those women will be severed;” and “to the extent that any parts or applications of this chapter or this section are enjoined, the department may enforce the parts and applications of this chapter that do not violate the Constitution or impose an undue burden on women seeking abortions.” 25 TEX. ADMIN. CODE § 139.9; *see also* Act of July 12, 2013, 83d Leg., 2d C.S., ch. 1, § 10(b), 2013 Tex. Gen. Laws 5013, 5019 (severability provision of HB2).

The Court has repeatedly held that courts should apply state severability provisions. *Leavitt v. Jane L.*, 518 U.S. 137, 138-39 (1996) (per curiam) (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 “explicit[] stat[ement]” of severability); *see also Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 330-31 (2006) (holding that “the touchstone for any decision about remedy is legislative intent” and remanding to determine “whether New Hampshire’s legislature intended” courts to sever unconstitutional applications of an abortion statute).

Plaintiffs complained only about the ASC’s *construction* regulations despite the clear severability language. They cannot now sweep in all of the ASC regulations contrary to the clear severability clauses.

2. Plaintiffs have also failed to demonstrate that the Fifth Circuit erred in denying as-applied relief in El Paso. Crossing state lines by traveling to Santa Teresa—which is within the El Paso metropolitan area and less than one mile from the Texas-

New Mexico border—does not impose a substantial obstacle to obtaining an abortion.¹¹ Even before HB2 was enacted, “more than half of the women who obtained abortions at the Santa Teresa facility were from El Paso.” *Cole*, 2015 WL 3604750, at *25. Plaintiffs do not dispute this. In fact, they seek to take advantage of the situation, as Plaintiff Whole Woman’s Health has a facility in Las Cruces that advertises as performing abortions for women in El Paso and West Texas. *Supra* p.5 n.1.

Instead of alleging a substantial obstacle preventing women from obtaining abortions, Plaintiffs claim that the State cannot avoid its “responsibility” by causing women to seek abortions in other States, citing *Jackson Women’s Health Organization v. Currier*, 760 F.3d 448, 457 (5th Cir. 2014), *petition for cert. filed*, (U.S. Feb. 18, 2015) (No. 14-997). Appl. 40-41. But the Fifth Circuit correctly distinguished its own precedent, noting that the admitting-privileges requirement in *Jackson* eliminated all abortion facilities within Mississippi, whereas the ASC requirement left multiple facilities open in Texas. *Cole*, 2015 WL 3604750, at *26. The court also recognized the reality that “Texas women regularly *choose to have an abortion in New Mexico* independent of the actions of the State.” *Id.* at *26. That is sufficient to show that women in El Paso do not face a substantial obstacle to obtaining an abortion by traveling the short distance, within the same metropolitan area, to the facility in Santa Teresa.

¹¹ *Casey* facially invalidated a spousal-notification requirement, explaining that “[a] husband has no enforceable right to require a wife to advise him before she exercises her personal choices.” 505 U.S. at 898. There was thus no reason for the Court there to consider travel distances and any alleged burden from crossing state lines in that facial challenge, whereas here travel distances and an alleged burden from crossing state lines are the basis for Plaintiffs’ as-applied challenge regarding El Paso. *Cf.* Appl. 40.

III. PLAINTIFFS FAILED TO DEMONSTRATE IRREPARABLE INJURY.

Plaintiffs first allege that if the mandate issues “some women” would be denied abortions. Appl. 52. That is unfounded speculation. Plaintiffs cite only the discredited testimony of Grossman addressing increased travel distances and capacity shortages. *See id.* (citing page 14 of their Application, which cites Grossman’s testimony on that issue). After reviewing the record, the Fifth Circuit concluded that Grossman’s opinion on the capacity of abortion facilities “is *ipse dixit*, and the record lacks evidence on this subject.” *Cole*, 2015 WL 3604750, at *27 n.42; *20 and n.39 (same). Moreover, any allegation of denied abortions due to travel distances is unfounded, as already explained. Not only does Plaintiffs’ argument lack evidentiary support, it is contradicted by the fact that the mandate will not impede any women in any area of the State from obtaining an abortion. *See supra* p.4.

Plaintiffs also argue that women would face increased health risks if the mandate issues because some unidentified women would be delayed in obtaining abortions and others would be denied abortions due to increased travel distances and reduced capacity. Appl. 52-53. This just repeats the previous assertion of irreparable harm and is baseless for the same reasons. No woman will face materially different access to abortion after the mandate issues.

Finally, Plaintiffs claim that “some abortion clinics” that are not in compliance with HB2 will close forever. Appl. 53-54. Plaintiffs, however, offered no evidence that their facilities would not be able to reopen if they prevail. In fact, all of the evidence is to the contrary. As discussed earlier, *see supra* p.18, the McAllen facility—closed for months—was able to reopen within one week of the district court’s injunction. And

the El Paso facility—closed for over a year—claims to stand ready to open as soon as they obtain a license to operate. *See supra* p.18.

IV. THE BALANCE OF THE EQUITIES FAVORS THE STATE.

The State’s interest in enforcing its laws outweighs Plaintiffs’ interests. Women will not face any materially greater travel distances to obtain abortions if the mandate issues. *See supra* p.4. And the State suffers irreparable injury each day it is prevented from “employ[ing] a duly enacted statute.” *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers). The continued suspension of the State’s laws, which further women’s health, accordingly harms the public interest.

CONCLUSION

Plaintiffs’ stay application should be denied.

Respectfully submitted.

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I certify that this document has been filed with the clerk of the court and served via electronic mail and Federal Express on this the 25th day of June, 2015, upon:

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