No. 15-274

In the Supreme Court of the United States

WHOLE WOMAN'S HEALTH, ET AL., PETITIONERS

v.

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

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1.a. Should the Court disregard *Planned Parenthood of Southeast Pennsylvania v. Casey*, 505 U.S. 833 (1992), *Mazurek v. Armstrong*, 520 U.S. 968 (1997) (per curiam), and *Gonzales v. Carhart*, 550 U.S. 124 (2007), and revert back to a pre-*Casey* standard requiring courts to scrutinize the medical merits of abortion regulations that raise standards of care?

1.b. Did the Fifth Circuit err in concluding that Texas's admitting-privileges and ambulatory-surgical-center requirements are facially valid, given that the benefits of raising standards of care in this context are recognized by medical experts and that an abortion facility will remain open in each area where an abortion facility will close under the Fifth Circuit's decision?

2. Did the Fifth Circuit err in concluding that res judicata bars (i) a facial challenge to the admitting-privileges requirement that was raised and resolved on the merits in a prior lawsuit by the same plaintiffs, and (ii) a facial challenge to the ambulatory-surgical-center requirement?

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INTRODUCTION

Petitioners ignore the fact that under the Fifth Circuit's decision, which granted as-applied relief in McAllen, every metropolitan area with an abortion facility operating today in Texas will still have an operating abortion facility if the ruling takes effect. There are ten facilities currently operating in Texas that perform abortions and comply with the ambulatory-surgical-center requirement. Excluding McAllen, there are only nine abortion facilities operating today that do not comply with the ambulatory-surgical-center requirement and would therefore have to close under the Fifth Circuit's ruling:

City	Abortion Facilities	
	Continuing	Closing
Austin	1	1
Dallas	2	0
Fort Worth	1	1
Houston	2	4
San Antonio	4	1
El Paso	1 (Santa Teresa, NM)	2
McAllen	1	0

See Appellants' Ltr., *Whole Woman's Health v. Cole*, No. 14-50928 (5th Cir. June 15, 2015).[1]

Texas's admitting-privileges and ambulatory-surgical-center (ASC) requirements raise the standard of care for all abortion patients. Medical experts in this case testified to the benefits of these requirements and explained how they will improve the health and safety of women. And this Court upheld an ambulatory-surgical-center requirement for second-trimester abortions under the pre-*Casey* strict-scrutiny framework. *Simopoulos v. Virginia*, 462 U.S. 506, 519 (1983).

While some abortion providers may choose to close rather than comply, petitioners did not even attempt to prove that remaining facilities will lack the capacity to perform the number of abortions sought—or that some of the other 423 ambulatory surgical centers in Texas will not begin performing abortions. So there is no evidence that women will experience any materially dif-

[1] In the few months since the Fifth Circuit requested this information in June, (1) Planned Parenthood opened an ASC in San Antonio and closed its non-ASC facility there; (2) Routh Street Women's Clinic in Dallas closed; (3) petitioner Reproductive Services opened a non-ASC facility in El Paso pursuant to the district court's injunction; and (4) an existing ASC in San Antonio (Castle Hills Surgery Center) has begun performing abortions. The Texas Department of State Health Services maintains a publicly available list of all operating ASCs in Texas that describes their offered services, including abortions. *See* https://www.dshs.state.tx.us/facilities/find-a-licensee.aspx. (last visited Oct. 5, 2015).

ferent travel distances to obtain an abortion under the Fifth Circuit's ruling.

Petitioners ask the Court to disregard nearly a quarter-century of abortion jurisprudence, including *Casey* and *Gonzales*, by overriding the medical evidence presented below and reverting back to the pre-*Casey* strict-scrutiny framework. Moreover, this case has many significant vehicle problems, including res judicata and forfeiture of arguments. The Court should deny certiorari.

STATEMENT

I. HB2 And Its Implementing Regulations.

Like other States, Texas has set health and safety standards for abortions. In 2003, the Texas Legislature enacted a requirement that abortions after 15 weeks' gestation generally must be performed in an ambulatory surgical center or hospital. *See* Tex. Health & Safety Code § 171.004. Abortion providers responded by opening four new ASCs, despite the fact that there were only 3,642 abortions performed in Texas after 15 weeks' gestation in 2003. R.3963.[2]

In 2013, the Texas Legislature enacted House Bill 2 ("HB2"). Act of July 12, 2013, 83d Leg., 2d C.S., ch. 1, 2013 Tex. Gen. Laws 5013. Petitioners challenge two provisions of HB2—its admitting-privileges and ambulatory-surgical-center requirements. Both were enacted to raise standards of care and ensure the health and safety of all abortion patients.

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[2] The Fifth Circuit electronic record on appeal is cited as R.*p*.

HB2's provisions do not apply to abortions necessary to prevent the death or permanent physical impairment of a woman. Pet. App. 182a; Tex. Health & Safety Code § 245.016; *see also* 25 Tex. Admin. Code § 139.1(b)(1)(B)(iii) (exempting offices of licensed physicians from licensure requirement if they perform 50 or fewer abortions in a 12-month period). Women who must travel more than 100 miles to an abortion facility are also exempted from the preexisting 24-hour waiting period after informed consent, as only a 2-hour waiting period would apply. Tex. Health & Safety Code § 171.012(a)(4). Further, Texas law prohibits hospitals and health care facilities from discriminating against physicians who perform abortions. Tex. Occ. Code § 103.002(b); *see also* 42 U.S.C. § 300a-7(c)(1).

Among other things, HB2 included (1) an *admitting-privileges requirement*: that abortion practitioners must hold admitting privileges at a hospital within 30 miles of where an abortion is performed; and (2) an *ambulatory-surgical-center requirement*: that licensed abortion facilities operating after September 1, 2014 must meet ambulatory-surgical-center standards. *See* Tex. Health & Safety Code §§ 171.0031(a), 245.010(a); Pet. App. 43a-44a. The rules for licensing general ASCs long pre-date HB2, and they include "Operating Requirements," "Fire Prevention and Safety Requirements," and "Physical Plant and Construction Requirements." *See* 25 Tex. Admin. Code §§ 135.1-135.56; *see also Simopoulos*, 462 U.S. at 515-16 (describing three groups of ASC standards).

HB2 left in place existing laws allowing abortions to be performed at general ASCs and hospitals, both of which are licensed by the State. Tex. Health & Safety Code § 245.004; 25 Tex. Admin. Code § 139.1(b); *see also* Tex. Health & Safety Code chs. 241, 243. Even

beyond the abortion context, ASCs perform only outpatient procedures. They therefore provide suitable care for certain surgical procedures without the full cost of hospitals, which are equipped to perform inpatient procedures too. *See Simopoulos*, 462 U.S. at 519.

Multiple abortion providers already operated ASCs in Texas when HB2 was enacted, Pet. App. 28a, and the rules implementing HB2 incorporated by reference the longstanding ASC standards. *See* 25 Tex. Admin. Code § 139.40. Petitioners complain that the Department of State Health Services did not repeal abortion-facility rules that were "more stringent" than the corresponding ASC rules. Pet. 6. But regardless of those rules, a facility need not be licensed specifically as an abortion facility to perform abortions; abortions can be performed at facilities meeting the preexisting general ASC standards, even if they are not licensed as abortion facilities. *See* Tex. Health & Safety Code § 245.004; 25 Tex. Admin. Code § 139.1(b). In any event, because some petitioners are currently licensed abortion facilities, they are, presumably, already satisfying the allegedly "more stringent" standards.

Petitioners also criticize the Department for failing to incorporate the "grandfathering" provision from the general ASC rules. Pet. 6. But this grandfathering provision was not a blanket exemption from ASC standards; it was specific to the 2009 amendments to the general ASC rules, which exempted preexisting licensed ASCs from minor updates to the require-

ments. 25 Tex. Admin. Code § 135.51(a), (c).[3] Petitioners do not assert that they meet pre-2009 ASC standards. Instead, they seek an exemption from meeting ASC requirements in their entirety.

Since HB2's enactment, four ASCs have either been opened by abortion providers or begun providing abortions, joining the six ASC abortion facilities already operating. R.2290; Appellants' Ltr., *Cole*, No. 14-50928 (5th Cir. June 15, 2015).

II. Petitioners' First Lawsuit.

In September 2013, petitioners in this case, along with other parties, filed a lawsuit challenging HB2's admitting-privileges requirement (and a separate HB2 provision regulating abortion-inducing drugs). *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 409 (5th Cir. 2013) (*Abbott I*). Petitioners sought facial invalidation of the admitting-privileges requirement, arguing that it would cause the closure of facilities thus imposing an undue burden by causing increased travel for women seeking abortions. *Id.* at 414-16.

The parties voluntarily waived a jury trial, and the bench trial was consolidated with the preliminary-injunction hearing. *See Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583, 587-88 (5th Cir. 2014) (*Abbott II*). The district court

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[3] For example, the 2009 changes to the ASC construction requirements decreased the spatial requirements for some rooms by 20 square feet, but increased others by 20 square feet. 34 Tex. Reg. 3948, 3949 (2009).

facially invalidated the admitting-privileges requirement, but the Fifth Circuit stayed that decision pending appeal. *See Abbott I*, 734 F.3d at 419. This Court denied petitioners' motion to vacate the stay. *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 134 S. Ct. 506 (2013).

On the merits, the Fifth Circuit reversed the district court and rejected the challenge to HB2's admitting-privileges requirement. *Abbott II*, 748 F.3d at 599-600. Petitioners did not seek review in this Court.

III. Petitioners' Second Lawsuit.

Six days after the Fifth Circuit upheld HB2's admitting-privileges requirement in *Abbott II*, petitioners filed this *second* lawsuit against HB2. This time, petitioners sought to enjoin the admitting-privileges requirement only as applied to practitioners at Whole Woman's Health in McAllen and Reproductive Services in El Paso. Pet. App. 27a. Petitioners also challenged the ASC requirement by raising the same travel-distance theory from their first lawsuit. *Id.* They sought facial invalidation of the ASC requirement and alternatively as-applied relief limited to those McAllen and El Paso facilities. *Id.*

A. The State moved to dismiss petitioners' claims as barred by res judicata and as legally unsustainable. *See* R.969-81. The district court rejected the State's res judicata defense, but dismissed petitioners' equal-protection, unlawful-delegation, and "arbitrary and unreasonable state action" claims. The district court also recognized the HB2 provisions' rational relation to patient health and safety. Pet. App. 176a.

B. The district court held a four-day bench trial. The parties stipulated that there were 433 ASCs in Texas, Pet. App. 29a n.15, and *at least* seven ASCs would offer abortions in Texas after September 1, 2014 (when the ASC requirement would take effect under HB2). *See* Pet. App. 28a; R.2289-90. Those ASCs are in Austin, Dallas (two), Fort Worth, Houston (two), and San Antonio. *See* R.2289-90. Moreover, as predicted at trial, Planned Parenthood has since opened an ASC in San Antonio, and Dr. Eduardo Aquino, who used to operate an abortion facility in Corpus Christi, has opened an ASC in San Antonio. *See supra* p. 2 n.1; R.2290, 3005-06. An existing ASC in San Antonio has also informed the State that it now provides abortion services, *see supra* p. 2 n.1, bringing the current total of ASCs performing abortions in Texas to ten.

Petitioners argued at trial that the ASC and admitting-privileges requirements did not "further a compelling state interest" because the requirements were a "departure from accepted medical practice." R.2615-16. Yet one of their experts admitted that whether abortions should be required to be performed in ASCs was a subject of disagreement among physicians. R.2941-42. And the president of petitioner Whole Woman's Health acknowledged that its ASC offers "more robust pain management options" for abortions than those performed at non-ASC facilities. *See* R.3068:18-3069:2.

The State also presented medical experts who testified that the ASC and admitting-privileges requirements are reasonable and effective measures to raise the standard of care for abortion patients and ensure their health and safety:

- R.3859-63 (surgical abortion should be performed in a sterile environment because it involves entry into the sterile uterus);
- R.3862-63 (procedures requiring entry into the uterus, such as dilation and curettage, are traditionally performed in ASC or hospital settings);
- R.3865 (ASCs provide accountability and monitoring mechanisms that ensure patient safety);
- R.3877 (admitting-privileges and ASC requirements are "reasonable and medically necessary" to "improve the quality of abortion care" and to "improve the postoperative management of serious post-abortion complications");
- *see* Pet. App. 32a & n.19 (admitting-privileges requirement "assures peer-review" and "protect[s] patients").

The State also introduced evidence demonstrating that abortion complications are underreported. R.3857, 3883-84; Def. Exs. 36, 39.

Petitioners' undue-burden argument alleged increased travel distances to obtain an abortion, on the inaccurate premise that Texas would have only seven ASC abortion facilities. R.2156-57, 2162, 2354-55, 2619. Petitioners did not and could not prove that the ASC requirement would subject a "large fraction" of the State's abortion patients to unduly burdensome driving distances. *See Gonzales*, 550 U.S. at 167-68. It was undisputed that the vast majority of the State's population lives within 150 miles of the ASC abortion facilities in Austin, Dallas, Fort Worth, Houston, and San Antonio. The State's expert, Todd Giberson, testified that at least 83% of Texas women of reproductive age live within 150 miles of those ASC abortion facilities. *See* R.3923-24; *see also Abbott II*, 748 F.3d at 588-89, 598 (holding, in light of this Court's guidance in *Casey*,

that driving distances of 150 miles or less are not an "undue burden"). Of the remaining 17%, 6.2% live within 150 miles of the McAllen facility (that ultimately received as-applied relief from the Fifth Circuit); 3.3% live within 150 miles of the Santa Teresa, New Mexico facility just outside El Paso; and 7.2% already did not live within 150 miles of an abortion facility at the time of trial—when the ASC requirement was not in effect. R.3928.

Petitioners made the same travel-distance argument in their as-applied challenge to the ASC and admitting-privileges requirements. As to McAllen, they argued that the requirements would force the facility to close and that the roughly 235-mile distance to San Antonio from the Rio Grande Valley of South Texas would prevent women from obtaining abortions. R.2619.

As for El Paso, petitioners argued that the only Texas abortion facility in that area would close and that patients would be forced to travel over 500 miles to the nearest *Texas* abortion facility if the ASC and admitting-privileges requirements took effect. R.2619. But a facility will remain operational in Santa Teresa, New Mexico, which is only twelve miles from the El Paso facility and only one mile from the Texas border where El Paso is located. *See* Pet. App. 72a-75a.

Although petitioners currently argue that the remaining facilities will lack the capacity to meet the demand for abortion in Texas, Pet. 34-35, petitioners did not press that theory at trial. Petitioners introduced no evidence of facility capacity, sought no discovery from any ASC facilities to determine their capacity, failed to account for the opening of new ASCs, and did not request a finding or conclusion on capacity. R.2137-66. Their sole piece of evidence is a statement

from their expert Dr. Daniel Grossman, based on his supposition rather than evidence, that in his "opinion" the existing ASCs would not be able to meet the increased demand. R.2352-53. Hence, petitioners' new capacity theory rests on an *ipse dixit* statement with no supporting data. *See* Pet. App. 56a-57a & n.34 (conclusion of Fifth Circuit that Grossman's opinion was based on "a chain of unsupported inferences" and "the record lacks any actual evidence regarding the current or future capacity" of remaining ASC abortion facilities); Pet. App. 67a n.42 (same); Pet. App. 105a-106a ("Grossman's testimony is *ipse dixit* and the record lacks any actual evidence regarding the current or future capacity of the eight clinics.").

C. On August 29, 2014, the district court issued an opinion and final judgment. The court concluded that the reduction in abortion facilities to "at most, eight," and the "lessened geographic distribution of abortion services" would mean that a "significant number" of women in Texas "will need to travel considerably further" to obtain an abortion. Pet. App. 138a-39a. The court then held that the admitting-privileges and ASC requirements did not provide sufficient medical benefits to outweigh the alleged burdens they imposed. Pet. App. 145a. The court also concluded that HB2 was enacted with an unconstitutional purpose, although it cited no evidence of the Legislature's motives. Pet. App. 148a-49a.

Regarding the admitting-privileges requirement, the district court found as-applied violations with respect to the McAllen and El Paso facilities. Pet. App. 147a, 158a. But the court also held that the admitting-privileges and ASC requirements worked together statewide to create an undue burden and declared both provisions facially unconstitutional. Pet. App. 154a.

The district court's judgment broadly enjoined the ASC requirement, but created an exception for "currently licensed ambulatory-surgical-center abortion providers" and "new abortion providers that begin offering abortion services after September 1, 2014." Pet. App. 152a. The district court invalidated the ASC requirement as applied to the provision of medication abortions statewide. Pet. App. 157a-58a. The court then enjoined application of the admitting-privileges requirement to the facilities and physicians in McAllen and El Paso. Pet. App. 158a.

Finally, and contrary to the specific relief just described, the court enjoined application of the admitting-privileges and ASC requirements as applied to *all* women seeking previability abortions in the State. Pet. App. 158a.

D. The State appealed and moved for a stay, which the Fifth Circuit granted in large part. Pet. App. 118a-19a. This Court vacated the stay in part, leaving in place the stay of the facial, statewide injunction against the admitting-privileges requirement. *Whole Woman's Health v. Lakey*, 135 S. Ct. 399 (2014).

E. On the merits, the Fifth Circuit largely ruled for the State, although it granted as-applied relief for the McAllen facility and physician. Pet. App. 3a-4a.

1. The court of appeals first rejected the district court's *sua sponte* facial invalidation of the admitting-privileges requirement. Pet. App. 35a-36a. It held that the district court had no authority to defy the ruling in petitioners' first lawsuit (*Abbott II*) or grant more relief than petitioners requested, especially given that res judicata barred that relief. *Id.*

2. The Fifth Circuit then rejected petitioners' facial challenge to the ASC requirement. Pet. App. 36a-42a. It first held that this claim was barred by res ju-

dicata. The court alternatively rejected the claim on the merits, holding that petitioners failed to prove that the ASC requirement lacked a rational basis or had the purpose or effect of creating a substantial obstacle for a large fraction of women in Texas to obtain abortions. Pet. App. 42a-58a. The Fifth Circuit also noted that this Court, in *Simopoulos*, upheld a similar ASC requirement for second-trimester abortions in Virginia even under this Court's pre-*Casey* strict-scrutiny framework. *Id.* at 11a-12a, 43a n.25 (discussing *Simopoulos*, 462 U.S. at 519).

The court likewise rejected petitioners' challenge to the ASC requirement as applied to medication abortions. Pet. App. 58a-59a. That relief, the court held, was undefended by petitioners, barred by res judicata, and erroneous on the merits. *Id.*

3. Turning to petitioners' as-applied challenges, the Fifth Circuit held that res judicata did not bar those claims, although it found this a "close question." Pet. App. 60a-63a.

Addressing McAllen, the court held that the effect of the ASC and admitting-privileges requirements created a substantial obstacle for women seeking an abortion in four counties in South Texas. Pet. App. 67a. The court based its ruling on the increased travel distance to San Antonio "*combined with*" testimony regarding the burdens uniquely faced by women in that particular area. Pet. App. 67a (emphasis in original); *see* Pet. App. 65a n.39, 142a.

However, the Fifth Circuit concluded that the district court's injunction was too broad in light of HB2's severability clause. Pet. App. 67a-68a. The court therefore narrowed the injunction to cover just the single Whole Woman's Health facility in McAllen and only the ASC physical-plant and fire-prevention provisions.

Pet. App. 70a-71a. Also, the Fifth Circuit held that this injunction would dissolve if an ASC began performing abortions in the area. Pet. App. 71a. The Court then enjoined the admitting-privileges requirement only for the named plaintiff-physician in McAllen until he or another physician there is able to secure sufficient admitting privileges. Pet. App. 71a. The relief also applied only to women in this four-county region of Texas. Pet. App. 71a.

4. Addressing El Paso, the Fifth Circuit rejected petitioners' as-applied challenge. Pet. App. 72a-76a. It held that women in the El Paso area would not face a substantial obstacle in obtaining an abortion even assuming no new ASC-compliant facilities began operating in the area, because an abortion facility remained operational just across the state line in Santa Teresa, New Mexico—less than twelve miles from the El Paso facility. Pet. App. 72a, 74a.

F. Petitioners 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. Pet. App. 77a-78a. This Court then stayed the mandate. *Whole Woman's Health v. Cole*, 135 S. Ct. 2923 (2015).

REASONS FOR DENYING THE PETITION

I. Review Of The Constitutional Questions Is Unwarranted.

Certiorari review is unwarranted on the constitutional questions because the Fifth Circuit's rejection of most of petitioners' claims was a faithful application of *Casey* and there is no entrenched split of authority on the application of *Casey*'s undue-burden test.

A. The Fifth Circuit correctly applied *Casey* in rejecting most of petitioners' claims.

Under this Court's doctrine, a State may regulate abortion as long as it "has a rational basis to act, and it does not impose an undue burden." *Gonzales*, 550 U.S. at 158. The rational-basis test is well known in the Court's jurisprudence. *See, e.g.*, *Heller v. Doe*, 509 U.S. 312, 319-20 (1993). And the undue-burden test asks simply whether the regulation has the "purpose or effect of placing a substantial obstacle in the path of a woman" seeking a previability abortion. *Casey*, 505 U.S. at 877 (plurality op.). At no point is the Court called upon to choose between competing medical opinions, nor is it required to constantly reevaluate the constitutionality of abortion regulations based on evolving medical standards. *See Gonzales*, 550 U.S. at 163-64. Rather, as in other contexts, the States are given "wide discretion" to pass medical regulations, and the existence of medical debate is sufficient to uphold the law. *Id.*

The Fifth Circuit's opinion faithfully applied *Casey* and *Gonzales* to correctly conclude that the challenged provisions of HB2 do not facially impose an undue burden. Petitioners ask this Court to depart from a quarter-century of this Court's abortion jurisprudence

by judging for itself the medical effectiveness of HB2's requirements and balancing it against the burdens purportedly caused by HB2. Pet. 15-25. In short, petitioners would have this Court 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"—a role this Court has specifically declined to assume. *Gonzales*, 550 U.S. at 162-64 (internal quotation marks and citation omitted).

1. *Casey*, *Mazurek*, and *Gonzales* did not scrutinize whether an abortion regulation is sufficiently beneficial or medically necessary.

When the Court first held that the Constitution includes the right to obtain a previability abortion, it also recognized that States could regulate doctors and medical facilities to "insure maximum safety for the patient." *Roe v. Wade*, 410 U.S. 113, 150 (1973). *Roe* however, adopted a rigid trimester framework that prohibited almost all abortion regulations before the second trimester, concluding that maternal health was not "compelling" until that point. *Id.* at 163. This framework used strict scrutiny to evaluate various abortion regulations. *Id.* at 165-66; *see Casey*, 505 U.S. at 871.

In *Casey*, the Court rejected *Roe*'s strict-scrutiny test. 505 U.S. at 872-73. 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.

Since *Casey*, the Court has upheld abortion regulations while refusing to balance the medical justifications against putative burdens. *Casey* itself 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." *Id.* at 885. At no point did the Court ask whether this regulation was sufficiently beneficial or medically necessary.

Mazurek confirmed that analyzing medical necessity and benefits was not part of the constitutional analysis. There, the Court 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 (internal quotation marks and citation 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.*

And *Gonzales* upheld a ban on partial-birth abortion without conducting a balancing analysis, requiring only that the State have "a rational basis to act" and that it not "impose an undue burden." 550 U.S. at 158. In so holding, the Court noted that the Judiciary should not "serve as the country's *ex officio* medical board." *Id.* at 163-64 (internal citation and quotation marks omitted). 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 id.* ("Medical uncertainty does not foreclose the exercise of leg-

islative power in the abortion context any more than it does in other contexts.").

2. Petitioners seek to revive the strict scrutiny analysis rejected in *Casey*.

a. Petitioners press for a constitutional test in which courts independently determine whether a State's medical regulations addressing abortion serve the State's asserted interest at some undefined level of effectiveness, and then balance that against the perceived weight of the burden. Pet. 15-25. This would return the Court to its repudiated, pre-*Casey* jurisprudence. Even then, *Simopoulos* upheld an ASC requirement for second-trimester abortions under the pre-*Casey* strict-scrutiny framework. 462 U.S. at 519. And in *Simopoulos*, Justice O'Connor would have applied the undue-burden test to uphold that ASC requirement regardless of the trimester of the pregnancy. *Id.* at 520 (O'Connor, J., concurring in part and in the judgment).

Petitioners base their argument on isolated statements in *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983) (*Akron I*), *Casey*, and *Gonzales*, none of which support their claims. Pet. 16-17, 20-22. To begin with, the 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 (cited at Pet. 20-21), is a reference to *Roe*'s strict-scrutiny framework. And *Casey* rejected strict scrutiny and replaced it with the undue-burden test. 505 U.S. at 873; *see Akron I*, 462 U.S. at 461 (O'Connor, J., dissenting) (arguing, in favor of a hospitalization requirement, that "not every regulation

that the State imposes must be measured against the State's compelling interests and examined with strict scrutiny").

Petitioners also note *Casey*'s statement that "[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle" are unconstitutional. Pet. 17. The Court has never used the phrase "unnecessary health regulations" in any other abortion case and there is no reason to believe that it adds an additional layer of scrutiny beyond the established undue-burden test articulated in multiple other passages in *Casey*, as well as *Gonzales*, 550 U.S. at 158, and *Mazurek*, 520 U.S. at 971. If anything, that phrasing of the test cuts against petitioners, as it would invalidate only those laws that are an undue burden *and also unnecessary*.

Petitioners point to this Court's decision upholding the recordkeeping and reporting requirements in *Casey* and assert that the Court determined the requirements were "reasonably directed to the preservation of maternal health." Pet. 17. That is simply an application of the rational-basis prong, which is separate from the undue-burden test. *Gonzales*, 550 U.S. at 158. It is not a weighing of benefits and burdens or an independent determination of medical necessity.

Finally, petitioners assert that *Gonzales* "confirmed the need for courts to ensure that abortion restrictions actively and effectively serve a valid state interest." Pet. 21. But *Gonzales* upheld a ban on partial-birth abortion where the medical evidence was in dispute. The Court determined that the partial-birth abortion ban had a constitutional purpose based on a "reasonable inference" that it would advance the State's interest in respect for life. *Gonzales*, 550 U.S. at 160. Contrary to petitioners' position, the Court

went on to hold that the existence of a mere medical dispute regarding whether banning partial-birth abortions created "significant health risks" was a sufficient basis to conclude that it did not impose an undue burden. *Id.* at 164.[4]

b. Petitioners' arguments regarding an impermissible purpose are also unsupported. Petitioners reraise their medical arguments. Pet. 22. *Gonzales*, however, did not conduct a medical analysis when considering a challenge to the purpose of the partial-birth abortion ban. Instead, the Court based its purpose ruling on "self-evident" conclusions and "reasonable inference[s]" demonstrating that banning partial-birth abortion promotes respect for life. 550 U.S. at 157-60. Moreover, *Mazurek* found no unconstitutional purpose in a law requiring abortions to be performed by physicians, despite the plaintiffs' claim that "all health evidence" and the "only extant study" showed no medical benefits for the law. 520 U.S. at 973.

This is in keeping with the Court's holdings that it will not infer an impermissible purpose where a legislature has "legitimate reasons" for acting. *McCleskey v. Kemp*, 481 U.S. 279, 298-99 (1987); *see Smith v. Doe*, 538 U.S. 84, 92 (2003) ("'only the clearest proof' will suffice to override" the "legislature's stated intent" (internal citation omitted)).

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[4] Petitioners suggest a different test applies to laws that promote maternal health as opposed to those that promote respect for life. Pet. 17. *Gonzales*'s use of the *Casey* undue-burden test demonstrates that the analysis is the same, regardless of the underlying law.

The Texas Legislature here sought to "increase the health and safety" of abortion patients and provide them with "the highest standard of health care." *See* Senate Comm. on Health & Human Servs., Bill Analysis, Tex. H.B. 2, 83d Leg., 2d C.S. (2013). Indeed, this Court in *Simopoulos* upheld an ASC requirement on the basis that it protects health and safety. 462 U.S. at 519. And the Court has recognized that abortion can be regulated differently than other medical procedures. *See, e.g.*, *Harris v. McRae*, 448 U.S. 297, 325 (1980).

Petitioners also urge the Court to conclude that the alleged effect of HB2 (the closure of some abortion facilities) demonstrates an unconstitutional purpose. Pet. 22-23. But effects alone cannot prove unconstitutional motive. *See, e.g.*, *Mazurek*, 520 U.S. at 972.[5] Even a legislator's awareness of possible consequences is insufficient to demonstrate an unconstitutional intent. *See, e.g.*, *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 278-79 (1979).

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[5] Petitioners assert that *Mazurek* conflated the purpose and effects inquiries. Pet. 23 n.7. But *Mazurek* did not suggest that evidence of effects sufficed to demonstrate an unconstitutional purpose. 520 U.S. at 973-74. Rather, *Mazurek* looked elsewhere for legislative purpose, stating that "[o]ne searches the Court of Appeals' opinion in vain for any mention of any evidence suggesting an unlawful motive on the part of the Montana Legislature." *Id.* at 972.

3. The Fifth Circuit correctly rejected most of petitioners' claims.

a. **Admitting-privileges requirement.** Petitioners did not bring a facial challenge to the admitting-privileges requirement in this lawsuit. Pet. App. 35a. Even if they had, it is barred by res judicata, as petitioners raised a facial challenge to the admitting-privileges requirement in their first HB2 lawsuit. *See infra* pp. 30-32.

Regardless, the admitting-privileges requirement is facially valid on the merits. It bears a rational relationship to the State's interest in patient health: it ensures doctors are qualified, promotes continuity of care in the case of complications that require hospitalization, and reduces communication errors and time delays when a patient must be treated at a hospital. R.3879-80; *see Abbott II*, 748 F.3d at 592, 599-600; *see also id.* at 595 (stating that "at least 210 women in Texas annually must be hospitalized after seeking an abortion" and that the National Abortion Federation had recommended that women choose a doctor who can admit them to a nearby hospital).

Nor does the admitting-privileges requirement impose an undue burden. As noted above, the vast majority of Texas women of childbearing age live within 150 miles of a facility that will remain operational if HB2 takes effect. *See supra* pp. 9-10. Petitioners did not introduce evidence of how many facilities permanently closed as a result of the admitting-privileges requirement, and petitioners have not identified a large fraction of Texas women who have been unable to receive an abortion because of the admitting-privileges requirement, which has been in effect since October 31, 2013. And petitioners put forth no evidence that the

remaining facilities lacked capacity to meet abortion demand, that more doctors could not perform abortions at remaining facilities, or that any of the other 423 ASCs would not start performing abortions.

With respect to the McAllen facility, the Fifth Circuit granted relief to the plaintiff-physician who sued for as-applied relief, limited to the women that he argued were unduly burdened—those in the Rio Grande Valley of South Texas. Pet. App. 71a. Petitioners cannot point to any evidence that this relief, when combined with as-applied relief from certain ASC requirements, is insufficient to alleviate any alleged undue burden in McAllen.[6]

Regarding the El Paso facility, petitioners presented no evidence that any woman would face an undue burden as a result of the admitting-privileges requirement. Another physician who performs abortions in El Paso has admitting privileges at a local hospital. Theard Dep. Excerpts 70:2-71:11. Moreover, given the proximity of an abortion facility in New Mexico, *see supra* p. 10, women in El Paso will still be able to obtain abortions with the admitting-privileges requirement in effect. *See* Pet. App. 75a-76a.

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[6] Texas has not petitioned for certiorari regarding the as-applied relief to the McAllen facility and physician because that relief turned on the admission of hearsay evidence regarding the particular burden in that area. Pet. App. 64a-67a. This fact-bound relief was based on specific evidence unique to McAllen and not present in any other area.

b. **Ambulatory-surgical-center requirement.** Even beyond the res judicata bar to petitioners' facial challenge to the ASC requirement, *see infra* pp. 30-33, the Fifth Circuit was correct that facial invalidation was improper on the merits. The ASC requirement improves the standard of care by providing heightened accountability and monitoring mechanisms for practitioners, R.3865; ensuring that patients will not be relegated to substandard clinics; ensuring enhanced pain-management options for patients, R.3068-69; and providing a sterile operating environment for surgical abortions, R.3859-63.

Even the district court agreed that the ASC requirement had a rational basis and could be applied to facilities opening after September 2014. Pet. App. 157a. Moreover, this Court in *Simopoulos* approved a surgical-center requirement for second-trimester abortions, under *Roe*'s trimester framework. 462 U.S. at 519. HB2 and the ASC regulations also have severability provisions, Pet. App. 199a-201a; 25 Tex. Admin. Code § 139.9(b), which preclude facial invalidation. *See Leavitt v. Jane L.*, 518 U.S. 137, 138-39 (1996) (per curiam).

Petitioners' theory rests on alleged (1) lack of capacity due to facility closures and (2) travel distances. Petitioners' evidence is woefully inadequate to prove that the remaining facilities will lack capacity to meet abortion demand. Since trial began, at least three new abortion-performing ASCs have opened, and another ASC has begun performing abortions. *See supra* p. 8. The district court reflexively rejected the State's position—that the remaining facilities would be able to meet the demand for abortion—as "stretch[ing] credulity." Pet. App. 141a. But the district court made no findings of fact about existing or new capacity, and pe-

titioners steadfastly avoided presenting any capacity data. The Fifth Circuit correctly held that petitioners' capacity argument was the "*ipse dixit*" of their expert, based on a "chain of unsupported inferences," and had similar problems to petitioners' admittedly inaccurate capacity predictions in their first HB2 lawsuit. Pet. App. 56a-57a.

The other undue-burden argument centers on travel distances. But with the granting of as-applied relief in McAllen and the recognition that it is not an undue burden to simply cross state lines around El Paso to receive an abortion, every metropolitan area with an abortion facility will still have an abortion facility once the ASC requirement goes into effect under the Fifth Circuit's decision. *See supra* pp. 1-2, 8. And the vast majority of Texas women of childbearing age live within 150 miles of a facility that will remain operational if HB2 takes effect. *See supra* pp. 9-10. Under *Casey*, traveling 150 miles is not an undue burden. 505 U.S. at 885-87 (upholding 24-hour waiting period despite district court findings regarding travel); *Planned Parenthood of Se. Pa. v. Casey*, 744 F. Supp. 1323, 1352 (E.D. Pa. 1990) (finding that 42% of women would have to travel at least one to three hours to reach the nearest provider).

Petitioners' repeated claim that HB2 has forced 75% of Texas abortion facilities to close lacks support. Pet. 1-2, 33-34. Petitioners' own evidence shows that at least eight of the forty-one facilities closed before either the admitting-privileges or ASC requirements were in effect. R.2346. And petitioners' expert, Grossman, explicitly stated that he was not offering an opinion on the cause for the decline of abortion facilities in Texas. R.2347-48. To suggest that HB2 is responsible for all of the closures is pure speculation.

Additionally, petitioners show no error in the Fifth Circuit's disposition of their as-applied challenges to the ASC requirement. Applying HB2's severability provisions, the Fifth Circuit granted as-applied relief to the McAllen facility from the portions of the ASC regulations about which petitioners complained, namely the physical-plant and fire-prevention requirements. Pet. App. 68a-71a. Petitioners failed to present evidence that any other ASC regulation will cause an undue burden on women seeking abortion services in the Rio Grande Valley. Pet. App. 68a (Fifth Circuit's explanation that petitioners did not identify which ASC regulations would require them to close).

With respect to the El Paso facility, the Fifth Circuit recognized that women in El Paso were already routinely crossing state lines to receive abortion services in New Mexico, despite the presence of abortion facilities in El Paso. Pet. App. 75a-76a.[7] Crossing a short distance across state lines is not an undue burden. And States are not required to affirmatively subsidize abortions. *See Harris*, 448 U.S. at 316-17. Petitioners have identified no women who will be unable to receive abortion services as a result of applying the ASC requirement in El Paso.

Finally, petitioners fail to even defend the district court's judgment enjoining the ASC requirement as

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[7] The Fifth Circuit relied on this fact and the fact that HB2 did not close all abortion facilities in the state to distinguish this case from *Jackson Women's Health Org. v. Currier*, 760 F.3d 448 (5th Cir. 2014), *petition for cert. filed*, S. Ct. No. 14-997 (Feb. 18, 2015). Pet. App. 72a-76a.

applied to medication abortions; petitioners have thus forfeited this argument. *See* Pet. App. 59a (Fifth Circuit so noting). The complication logs from petitioner Whole Woman's Health reflect dozens of patients who required surgical follow-up after an incomplete medication abortion. Def. Ex. 39. It is entirely rational for the State to require that facilities offering medication abortions be able to provide surgical follow-up with the same standards as facilities that offer surgical abortions. *See* Pet. App. 59a.

B. There is no entrenched split of authority on the governing legal standard.

Petitioners assert a division of authority on the question whether *Casey*'s undue-burden test requires courts to second-guess the strength of a law's medical justifications. Pet. 15-20. That split, however, is not entrenched. Nor have petitioners identified a circuit split on the validity of ASC or admitting-privileges requirements, despite the fact that other States have similar requirements. Following the Kermit Gosnell scandal, for example, Pennsylvania enacted an ASC requirement nearly identical to HB2's. 35 Pa. Stat. § 448.806(h)(1).

1. The Fifth Circuit's interpretation of the undue-burden standard is not only consistent with *Casey*, *Mazurek*, and *Gonzales*, *see supra* pp. 15-17, 21-27, it is also the mainstream view among the circuits, including the Fourth, Sixth, and Eighth Circuits. *See* Pet. App. 51a-52a n.33 (citing *Greenville Women's Clinic v. Bryant*, 222 F.3d 157, 170-72 (4th Cir. 2000); *Women's Med. Prof'l Corp. v. Baird*, 438 F.3d 595, 604-09 (6th Cir. 2006); *Women's Health Ctr. of W. Cnty., Inc. v. Webster*, 871 F.2d 1377, 1380-81 (8th Cir. 1989)); *see also Planned Parenthood Min., N. Dak., S. Dak. v.*

Rounds, 686 F.3d 889, 904 (8th Cir. 2012) (en banc) ("[T]he state legislature, rather than a federal court, is in the best position to weigh the divergent results and come to a conclusion about the best way to protect its populace. So long as the means chosen by the state does not impose an unconstitutional burden on women seeking abortions or their physicians, we have no basis to interfere.").

2. Petitioners rely primarily on language from the Seventh and Ninth Circuits. Pet. 17-19. But those opinions—both interlocutory—reveal a conflict with their own circuit precedent, not an entrenched split among the circuits. That leaves only language in an outlier Iowa Supreme Court opinion.

a. *Planned Parenthood of Wisconsin, Inc. v. Van Hollen*, 738 F.3d 786 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 2841 (2014), addressed a preliminary injunction of a Wisconsin admitting-privileges requirement. The law was set to go into effect days after enactment, despite the State's concessions that obtaining admitting privileges takes months and that implementing the law immediately would impede access to abortion. *Id.* at 788, 793, 795. The Seventh Circuit evaluated the law according to the preliminary-injunction standard, which requires balancing the equities. *See id.* at 795. It was also careful to point out that its decision was only preliminary and was based on a "sparse evidentiary record." *See id.* at 788, 799.

A single sentence in the court's opinion suggests that "[t]he feebler the medical grounds, the likelier the burden." *Id.* at 798. This observation was made without citation to any authority, and it does not establish that the Seventh Circuit engages in a searching inquiry that balances medical benefits of abortion regulations with costs. To the contrary, the "benefits" and

"burdens" balanced by the court concerned the immediate *implementation* of the law in the context of weighing the equities of a preliminary injunction. *See id.*

In fact, such a balancing test would conflict with the Seventh Circuit's own precedent. For example, in *Karlin v. Foust*, 188 F.3d 446, 481 (7th Cir. 1999), the court held that "a court's proper focus [in the 'undue burden' analysis] must be on the practical impact of the challenged regulation and whether it will have the likely effect of preventing a significant number of women for whom the regulation is relevant from obtaining abortions." This case is now pending on appeal, providing that court with an opportunity to clarify its views in a non-interlocutory posture. *See* No. 15-1736 (7th Cir., appeal filed Apr. 6, 2015).

b. *Planned Parenthood Arizona, Inc. v. Humble*, 753 F.3d 905 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 870 (2014), was also an interlocutory decision regarding a preliminary injunction, and that case concerned a law regulating medication abortions rather than an ASC or admitting-privileges requirement.

Insofar as the Ninth Circuit adopted a balancing approach that requires courts to second-guess the extent of a law's health benefits, the Ninth Circuit appears to have misread its own precedent. *See id.* at 912 (citing *Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 539 (9th Cir. 2004)). The Ninth Circuit's prior opinion in *Eden* made no mention of a "balancing" analysis in its discussion of the undue-burden test. *See* 379 F.3d at 539; *id.* at 541 ("*Mazurek* compels us to hold that where a health regulation of abortion is not facially pretextual or irrational with respect to the interest it purports to assert, it is subject to the 'substantial obstacle' test in Casey."). And its subsequent decision,

McCormack v. Herzog, 788 F.3d 1017, 1029 (9th Cir. 2015), said nothing about a balancing test and explained that a State may enact laws to "protect the health and safety of a woman seeking an abortion" so long as they do not "operate as a substantial obstacle to a woman's choice to undergo an abortion." To the extent that *Humble* deviates from *Eden* and *McCormack*, the Ninth Circuit is best positioned to resolve its own intra-circuit conflict.

c. The Iowa Supreme Court language that petitioners cite in *Planned Parenthood of the Heartland, Inc. v. Iowa Board of Medicine*, 865 N.W.2d 252 (Iowa 2015), conflicts with *Casey*, *Mazurek*, and *Gonzales*. *Heartland* did not consider ASC or admitting-privileges requirements, as it invalidated state regulations that banned so-called telemedicine abortions, in which the doctor is not present for medication abortions. *Id*. at 253-54. The Iowa court's adoption of a test that second-guesses medical judgments misreads *Casey*, but confined to Iowa, it does not establish an entrenched conflict warranting this Court's review.

II. Review Of The Res Judicata Question Is Unwarranted.

The Fifth Circuit's threshold ruling rejecting facial invalidation under res judicata is a correct, fact-bound holding that does not warrant certiorari review. Petitioners wish to proceed as if their first lawsuit against HB2 never happened. But they litigated that case to a final judgment, and arguments and evidence they chose not to present there are barred. *See* Pet. App. 35a-42a (explaining overlap).

A. Petitioners "do not dispute that they are identical to or in privity with the plaintiffs in *Abbott I* and *II*." Pet. App. 109a n.20. They also do not dispute that

their initial lawsuit concluded with a final judgment on the merits, rendered by a court of competent jurisdiction. Hence, the only res judicata question is whether the earlier lawsuit involved "the same claim or cause of action." *See United States v. Tohono O'Odham Nation*, 131 S. Ct. 1723, 1730 (2011); Restatement (Second) of Judgments § 19 (1982).

Petitioners do not identify a circuit split on any issue underlying the Fifth Circuit's res judicata holding. *See* Pet. 25-31. The Fifth Circuit proceeded under the accepted test, Pet. App. 37a, asking whether the second action asserts rights with respect to "all or any part of the transaction, or series of connected transactions, out of which the [first] action arose." Restatement (Second) of Judgments § 24 (1982); *see Tohono O'Odham Nation*, 131 S. Ct. at 1730.

Petitioners instead allege a "direct conflict" with *Citizens United v. FEC*, 558 U.S. 310 (2010). Pet. 27. Yet that decision did not even involve res judicata or successive lawsuits. Petitioners cite only *Citizens United*'s explanation that the difference between facial and as-applied invalidation of a law goes to the breadth of the reasoning for finding invalidity and thus the remedy employed by the court. Pet. 27. Nothing about that point forecloses a res judicata bar to claims raised in a successive lawsuit.

B. Petitioners also argue that they may obtain facial invalidation of the admitting-privileges and ASC requirements, despite the first action, because their legal theories rest on "newly-developed facts." Pet. 27-28. The Fifth Circuit correctly rejected that contention.

1. As to the admitting-privileges requirement, petitioners did not even assert a facial challenge in the district court in this lawsuit. Pet. App. 35a-36a. And

they doubly forfeited any argument on this basis by not raising it in the Fifth Circuit. Pet. App. 36a (noting that petitioners "do not dispute" that res judicata bars such facial invalidation); Appellees' Principal & Resp. Br. at 55, *Whole Woman's Health v. Cole*, No. 14-50928 (5th Cir. Nov. 24, 2014) (arguing only that their facial challenge in the first lawsuit did not preclude "subsequent, *as-applied challenges* after the statute takes effect" (emphasis added)).

In any event, Petitioners wrongly suggest that "the inability of physicians to obtain admitting privileges despite diligent effort" was not originally known. Pet. 28. That was both foreseeable and foreseen to petitioners in the first action. *See, e.g.*, Compl. ¶¶ 13, 20, 21, 50, *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, No. 1:13-cv-862 (W.D. Tex. Sept. 27, 2013) (alleging statewide effects of the admitting-privileges requirement).

2. As to the ASC requirement, petitioners note that some non-ASC abortion facilities closed once the admitting-privileges requirement took effect. Pet. 28-30. Petitioners suggest they needed to await "implementing regulations to give [the ASC requirement] effect," and specifically that the regulations could have "made abortion facilities eligible for waivers or grandfathering." Pet. 30-31. But every non-ASC facility knew at the time of the first lawsuit that continuing to provide abortions would require compliance with ASC standards once HB2 took effect. Pet. App. 38a (noting that HB2 "very clearly required facilities that perform abortions to meet the existing requirements for ASCs, which were spelled out well before the effective date"; deeming petitioners' suggestion to the contrary "disingenuous"). Tellingly, petitioners "made no effort to parse the regulations or otherwise assert anything ma-

terial" in them that was not known when HB2 was passed. Pet. App. 41a.

Petitioners' only other argument is that the Fifth Circuit is now "compelling litigants who challenge one provision of a statutory scheme to challenge all provisions simultaneously." Pet. 31. The Fifth Circuit made no such holding. Its application of res judicata rests on numerous fact-specific overlaps between petitioners' two actions alleging an undue burden on the ability to obtain abortions in Texas based on facility closures and travel distances. *See* Pet. App. 37a. The State did propose bifurcating the trial, *see* Pet. 30, but that is routinely done in complex cases for efficiency in coordinating evidence presentation. The Fifth Circuit correctly explained that the two actions involve the same parties, abortion facilities, legal standards, legislation, and legislative purpose, and that they "form a convenient trial unit because they rely on a common nucleus of operative fact." Pet. App. 37a.

III. There Are Significant Vehicle Problems.

Numerous issues make this case an inappropriate vehicle for revisiting constitutional standards.

A. **Res judicata.** Petitioners' facial challenges to HB2's requirements are barred by res judicata. *See supra* pp. 30-33. The only claims not held barred by res judicata were for relief as applied to two specific facilities, and as-applied relief was granted in part as to one (the McAllen facility). Those as-applied aspects of petitioners' challenges are fact-bound, and this Court does not traditionally review fact-bound rulings. *See* Sup. Ct. R. 10.

B. **Forfeiture.** Petitioners have forfeited several arguments.

They forfeited the argument that res judicata does not bar the district court's facial invalidation of the admitting-privileges requirement. *See supra* p. 31 (citing Pet. App. 36a). Petitioners also failed to contest that they are identical to or in privity with the plaintiffs in the first lawsuit. *See supra* p. 30.

Additionally, petitioners forfeited any argument pertaining only to medication abortions. The district court invalidated the ASC requirement as applied to the provision of medication abortions statewide. Pet. App. 58a. Although the State challenged that aspect of the judgment on appeal, petitioners "d[id] not respond with any arguments on appeal in support of this portion of the judgment." Pet. App. 59a. Such arguments are thus forfeited. *City of Springfield v. Kibbe*, 480 U.S. 257, 259 (1987) (per curiam).

Petitioners also did not dispute in the court of appeals that HB2's admitting-privileges and ASC requirements are rationally related to a legitimate state interest. Pet. App. 42a-43a ("Plaintiffs do not argue differently and, instead, focus their attack on" whether HB2 has the purpose or effect of erecting a "substantial obstacle"). Petitioners have thus forfeited their contention, in the petition, that the challenged requirements "serve no valid state interest." Pet. 2.

Further, petitioners make no argument regarding the proper standard for facial challenges to abortion regulations—whether it is the "no set of circumstances" test or the "large fraction" test. *See Gonzales*, 550 U.S. at 167. The "no set of circumstances" test is the correct test. *See United States v. Salerno*, 481 U.S. 739, 745 (1987). But even assuming arguendo that it is the "large fraction" test, petitioners raise no argument

that the relevant denominator is anything other than all women of childbearing age in Texas, as the Fifth Circuit held. Pet. App. 54a-55a.

Finally, petitioners have not even attempted to explain or cite sufficient record evidence showing whether the Fifth Circuit erred in fashioning an as-applied remedy in McAllen. *See* Pet. 34.

C. **The record.** The meager factual record precludes any meaningful application of the undue-burden test. The record and district-court findings are so lacking in important details that this case is not a suitable vehicle to review the constitutional questions. For example, petitioners presented no competent evidence that the remaining operational abortion facilities would lack capacity to perform the number of abortions sought—no data, no research, no interviews, and not even hearsay. Pet. App. 56a-57a, 105a-06a & n.16. Petitioners never even asked the district court to make a finding about capacity. R.2137-53.

Similarly, as to access to abortions, petitioners have not presented any evidence of women who will be unable to travel to an abortion facility under the Fifth Circuit's ruling, much less what fraction of women would face what the district court called an undue burden. *See supra* pp. 9-10, 25; Pet. App. 56a. The record also contains no proof substantiating petitioners' assertion that a decrease in Texas abortions was caused by HB2 as opposed to declining abortion rates nationwide. *Cf.* Pet. App. 57a n.34 (noting Grossman's concession that causality cannot be proved); R.3959 (describing the nationwide decline in the abortion rate).

D. **Standing.** The district court held that the ASC requirement could be validly applied to new abortion facilities. Pet. App. 152a, 157a. Insofar as petitioners challenge that portion of the district court's judgment, they lack standing. Petitioners do not allege that they intend to open new, non-ASC abortion facilities in Texas. Likewise, petitioners lack standing to raise potential claims of non-party abortion facilities. *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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