No. 13A452

In the Supreme Court of the United States

PLANNED PARENTHOOD OF GREATER TEXAS SURGICAL HEALTH SERVICES, ET AL.,
Applicants,

v.

GREGORY ABBOTT, Attorney General of Texas, ET AL.,
Respondents.

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

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

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TO THE HONORABLE ANTONIN SCALIA, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE FIFTH CIRCUIT:

The Texas Legislature enacted House Bill 2 ("HB2") to protect both public health and potential human life. Only one of HB2's provisions is at issue here—its requirement that doctors who perform abortions hold admitting privileges at hospitals within 30 miles of where the abortion is performed. The admitting-privileges requirement protects public health by "foster[ing] a woman's ability to seek consultation and treatment for complications directly from her physician" and by deterring "patient abandonment." CA5 Op. at 5. And it's not just the Texas Legislature that sees the wisdom in HB2's admitting-privileges requirement; the National Abortion Federation has counseled patients to "make sure" that their doctor is "able to admit patients to a nearby hospital (no more than 20 minutes away)." Ex. A, at 1–2. The applicants in this case disagree with the medical judgments made by the Texas Legislature, but federal courts 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." *Gonzales v. Carhart*, 550 U.S. 124, 164 (2007) (citation and internal quotation marks omitted); *see also id.* at 162–63 (upholding abortion regulation where "[t]here is documented medical disagreement whether the Act's prohibition would ever impose significant health risks on women").

If the applicants want to convert their medical disagreement into a constitutional claim, they must show (at a minimum) that HB2's admitting-privileges

requirement imposes an "undue burden" on a "large fraction" of abortion patients. *See id.* at 167; *but cf. id.* (noting that applicability of "large fraction" test "has been a subject of some question" and "[w]e need not resolve that debate"). The applicants do not even engage that question in their brief. Indeed, the applicants have abandoned almost all of the admitting-privileges arguments that they pressed in the district court—including their claim that HB2 would cause patients in West Texas to travel hundreds of miles to receive abortions, and that *any* amount of travel distance can sum to an undue burden. All that is left of their merits argument is a conclusory sentence, unadorned by analysis or reasoning. *See* Emergency App. at 16 ("If *Casey*'s undue burden standard means anything, it must mean that a law that forces a third of the providers in the state to cease providing abortions and prevents approximately 20,000 women a year from accessing safe abortion services is unconstitutional."). That falls far short of the showing that the applicants must make to justify striking down a state statute on its face.

The applicants focus almost exclusively on their claim that "approximately 20,000 Texas women" will be unable to obtain abortions each year on account of HB2's hospital-admitting privileges requirement. *See* Emergency App. at 2. But a litigant does not establish a factual proposition by asserting it to be so. The only "evidence" that the applicants produced at trial to support that claim was an expert opinion from Joseph Potter. But the applicants never bother to mention that the State so demolished Potter's credibility that the district court refused to credit his

opinions or analysis, and refused to enter any finding that any woman would be prevented from obtaining abortions on account of the admitting-privileges requirement. *Compare* Plaintiffs' Proposed Findings of Fact at 17 ¶ 9 (asking the district court to enter a finding that "[o]ver 22,000 women each year will be prevented from obtaining an abortion."), *with* Dist. Op. at 6–13; *see also* CA5 Op. at 11 ("Planned Parenthood contended at trial that approximately 22,000 women across Texas would not have access to a physician who performs abortions. *The district court did not make such a finding, and Planned Parenthood does not challenge the failure to make such a finding in the present proceeding.*") (emphasis added). Instead, the district court rested its "undue burden" holding solely on its findings that unspecified "abortion clinics . . . will close," and that "[t]he record reflects that 24 counties in the Rio Grande Valley would be left with no abortion provider because those providers do not have admitting privileges and are unlikely to get them." Dist. Op. at 11. The court of appeals correctly concluded that these factual findings were insufficient to support facial invalidation of the State's admitting-privileges requirement, and the applicants do not even argue that the court of appeals was "demonstrably wrong" for rejecting the district court's analysis.

BACKGROUND

I. HB2

The Texas Legislature enacted HB2 to promote the health and safety of Texas women and to advance the State's interest in protecting potential human life. *See* Act

of July 12, 2013, 83rd Leg. 2d C.S., ch. 1, Tex. Sess. Law Serv. 4795-802 (codified at TEX. HEALTH & SAFETY CODE §§ 171.0031, 171.041–.048, 171.061–.064, 245.010–.011). Among HB2's provisions is a requirement that physicians who perform abortions maintain admitting privileges at a hospital within 30 miles of where the abortion is performed. The Legislature had ample justification for enacting this requirement as a health-and-safety regulation. Even the National Abortion Federation has recognized that the health and safety of abortion patients is enhanced when the doctor performing the abortion holds admitting privileges at a nearby hospital. In a publication issued several years ago, the National Abortion Federation offered two specific recommendations to abortion patients searching for a doctor:

> (1) She or he should be a physician who is licensed by the state. In a few states, other medical professionals may perform abortions legally.
>
> (2) In the case of emergency, the doctor should be able to admit patients to a nearby hospital (no more than 20 minutes away).

National Abortion Federation, *Having an Abortion? Your Guide to Good Care* (2000) (attached as Exhibit A). HB2 follows this advice and ensures that all Texas women seeking abortions, and not just some of them, will be treated by a physician who can ensure the highest standards of care—as well as continuity of care—in case of a medical emergency.

Texas law also ensures that doctors who perform abortions will not encounter discrimination from the hospitals that must decide whether to award them admitting privileges. Not only does Texas law prohibit hospitals from discriminating against

doctors who perform abortions, it also confers a private right of action on victims of this unlawful discrimination. *See* TEX. OCC. CODE § 103.002(b); TEX. OCC. CODE § 103.003 (providing remedies such as an injunction requiring the hospital to extend admitting privileges to the victim, plus back pay with 10 percent interest). These state-law prohibitions supplement the federal Church Amendment, which prohibits hospitals that receive federal funds from discriminating against physicians that perform abortions. *See* 42 U.S.C. § 300a-7(c)(1).

The Texas Legislature also followed the guidance of this Court in enacting HB2's admitting-privileges requirement. The precedents of this Court give States latitude to establish qualifications for abortion providers. *See Mazurek v. Armstrong*, 520 U.S. 968, 973 (1997) (per curiam) ("[T]he Constitution gives the States broad latitude to decide that particular functions may be performed only by licensed professionals, *even if an objective assessment might suggest that those same tasks could be performed by others.*") (emphasis in original) (citations and internal quotation marks omitted). And although opponents of HB2 have questioned whether the admitting-privileges requirement would produce health-and-safety benefits sufficient to outweigh the costs that would be imposed on abortion providers, the federal courts are not to serve as "the country's *ex officio* medical board with powers to approve or disapprove medical and operative practices and standards throughout the United States." *Gonzales,* 550 U.S. at 163 (citation and internal quotation marks omitted). When medical opinion diverges on the proper standards of practice, legislatures have

discretion to resolve those disagreements. *See id.* ("The law need not give abortion doctors unfettered choice in the course of their medical practice."); *id.* at 157 ("[T]he State has a significant role to play in regulating the medical profession."); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 885-86 (1992) (upholding Pennsylvania's informed-consent law, even though the district court in that case had entered findings of fact that Pennsylvania's law conflicted with "standard medical practice," and even though the petitioners' brief in *Casey* had argued that Pennsylvania's informed-consent law contradicted accepted medical practice). And there were certainly reasonable grounds for the Legislature to decide that doctors performing abortions should hold admitting privileges at a nearby hospital.

Many distinguished medical experts support the admitting-privileges requirement that the Texas Legislature enacted. Dr. John Thorp, a professor of obstetrics and gynecology at the University of North Carolina at Chapel Hill School of Medicine,[1] believes that admitting privileges improve outcomes for abortion patients, and cites over thirty peer-reviewed medical journals to support that claim:

> There are four main benefits supporting the requirement that operating surgeons hold local hospital admitting and staff privileges: (a) it provides a more thorough evaluation mechanism of physician competency which better protects patient safety; (b) it acknowledges and

[1] Until recently, Dr. Thorp directed the Family Planning Fellowship and Residency programs at UNC, and members of his unit staffed the abortion services at the UNC academic health center. *See* Thorp Decl. ¶¶ 3–8. Dr. Thorp serves as journal referee for 39 medical journals, including the New England Journal of Medicine, and serves as the deputy editor-in-chief of the British Journal of Obstetrics & Gynecology, an international journal which is considered one of the most important in the field. *Id.*

> enables the importance of continuity of care; (c) it enhances inter-physician communication and optimizes patient information transfer and complication management; and (d) it supports the ethical duty of care for the operating physician to prevent patient abandonment.

Thorp Decl. ¶¶ 32 (attached as Exhibit B). A study that examines physicians without admitting privileges whose patients were emergently hospitalized and treated by a hospitalist reports that approximately half of those patients were admitted with at least one medication error. *Id.* ¶¶ 42, 47 (citing Unroe, K. T., et al., *Inpatient Medication Reconciliation at Admission and Discharge*, 8 AM. J. GERIATRIC PHARMACOTHERAPY 115–26 (2010)). And a joint commission of hospitals, including Johns Hopkins, Mayo Clinic, and New York Presbyterian, concluded that "80 percent of serious medical errors involve miscommunication between caregivers when patients are transferred or handed-off." *Id.* ¶ 48.

An admitting-privileges requirement also reduces the practice of itinerant surgery, which endangers both maternal and fetal health:

> It prevent[s] itinerant surgeons from being allowed to abandon their patients if complications arise and emergent follow-up intervention is necessary. Itinerant surgery was expressly proscribed by the American College of Surgeons at the turn of the last century[,] believing that the surgeon has a moral, ethical and legal obligation to give patients upon whom he/she has operated his personal attention, and to attend his patients postoperatively. The Inspector General of the U.S. Department of Health & Human Services in 1989 concluded: There is a higher-than-average risk of poor quality care in itinerant surgery.

Id. ¶ 59. The Texas Legislature also heard testimony from Dr. Mikeal Love, an OB/GYN in Austin, Texas, who trained at one of the largest abortion facilities in

Louisville, Kentucky, and who served as the Chairman of the OB/GYN Section of St. David's Medical Center in Austin. Dr. Love testified that "[r]equiring hospital privileges for physicians who perform abortions is the general standard of care." Love Decl. ¶ 4 (attached as Exhibit D). The Texas Legislature acted well within its prerogatives to regulate the medical profession by heeding these concerns and requiring abortion practitioners to secure admitting privileges at a nearby hospital. *See Gonzales,* 550 U.S. at 157, 163.

But before HB2 could take effect, the applicants brought a pre-enforcement facial challenge, seeking to invalidate the admitting-privileges requirement in its entirety and permanently enjoin its enforcement. *See* Compl. at 27–31; 3.TR.29:5–8 ("[U]nder *Casey*, the proper remedy is facial invalidation."); 3.TR.59:4–6 ("[T]he appropriate remedy here is a facial challenge—I mean is facial invalidation.").

The applicants eschewed any type of as-applied challenge to this law even though this Court warned in *Gonzales* that pre-enforcement facial challenges "impose a heavy burden upon the parties maintaining the suit" and that "[a]s applied challenges are the basic building blocks of constitutional adjudication." 550 U.S. at 167–68 (citation and internal quotation marks omitted); *see also id.* at 167 ("The latitude given facial challenges in the First Amendment context is inapplicable here."); *id.* at 167–68 (holding that litigants bringing preenforcement, facial challenges to abortion laws must show, at the very least, that the law "would be unconstitutional in a large fraction of relevant cases"). The applicants also demanded facial invalidation

in the teeth of HB2's severability clause, which requires reviewing courts to sever the statute's applications to each individual physician and preserve the applications that will not impose an "undue burden" on women seeking abortions:

> [E]very application of the provisions in this Act[ ] [is] severable from each other. If any application of any provision in this Act to any person, group of persons, or circumstances is found by a court to be invalid, the remaining applications of that provision to all other persons and circumstances shall be severed and may not be affected. All constitutionally valid applications of this Act shall be severed from any applications that a court finds to be invalid, leaving the valid applications in force, because it is the legislature's intent and priority that the valid applications be allowed to stand alone. Even if a reviewing court finds a provision of this Act to impose an undue burden in a large or substantial fraction of relevant cases, the applications that do not present an undue burden shall be severed from the remaining provisions and shall remain in force, and shall be treated as if the legislature had enacted a statute limited to the persons, group of persons, or circumstances for which the statute's application does not present an undue burden. . . .

HB2 § 10(b).

Yet the applicants decided to force the courts into an all-or-nothing choice: total facial invalidation of the admitting-privileges requirement, or nothing. Maintaining this stance in the face of *Gonzales* and the statute's severability clause was a high-risk-high-reward strategy—especially given this Court's holdings that state severability law is binding on federal courts. *See Leavitt v. Jane L.*, 518 U.S. 137, 138–40 (1996) (per curiam) (holding that "[s]everability is of course a matter of state law" and rebuking the court of appeals for refusing to enforce a state abortion statute's "explicit[ ] stat[ement]" of severability); *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 the constitutional applications of an abortion statute). The applicants' gambit worked in the district court, but it failed in the court of appeals. And it will fail in every court that follows this Court's pronouncements on the enforcement of state severability law and the availability of facial challenges in abortion cases.

II. THE DISTRICT COURT'S RULING

After a three-day trial, the district court gave the applicants what they asked for: total facial invalidation of HB2's admitting-privileges requirement. The district court gave three independent reasons for its decision to invalidate the admitting-privileges requirement in its entirety. None of the reasons it gave were capable of sustaining its judgment.

First, the district court claimed that "admitting privileges have no rational relationship to improved patient care." Dist. Op. at 11. The court faulted the State for "provid[ing] no evidence" of medical need for the law, and relied on the applicants' evidence to conclude that admitting privileges have "no rational relationship to improved patient care." *Id.* at 10–11. But a court is forbidden to use evidence to invalidate a statute under rational-basis review. *See FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993) (holding that a legislative decision "is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data"). Rational-basis review asks only whether it is *possible to*

imagine that hospital-admitting privileges could improve patient care, and HB2 easily satisfies that standard given that the parties' experts locked horns on this issue. *See, e.g.*, Love Decl. ¶¶ 4-13 (opining that admitting-privileges requirement improves patient care by providing for continuity of care and protecting patients from poorly trained doctors); Thorp Decl. ¶¶ 32-54 (explaining that admitting-privileges requirement helps ensure continuity of care and doctor qualifications).

Second, the district court claimed that the admitting-privileges provision "places an 'undue burden' on a woman seeking abortion services" because it necessarily "has the effect of presenting a 'substantial obstacle' to access to abortion services." Dist. Op. at 11. But the district court presented no findings, evidence, or argument to support this claim. The district court noted that "abortion clinics . . . will close." *Id.* But the closure of abortion clinics cannot be an undue burden absent findings or evidence that *patients* will encounter a substantial obstacle to obtaining abortions from other providers. *See Casey*, 505 U.S. at 877 (holding that an abortion regulation is unconstitutional only when it has "the purpose or effect of placing a substantial obstacle in the path of a *woman* seeking an abortion of a nonviable fetus") (emphasis added).

The district court made no findings regarding which clinics would close, nor did it make any findings regarding the effect of the alleged closures on patients seeking abortions. The only discussion about the effects on abortion *patients* appears in a single sentence: "The record reflects that 24 counties in the Rio Grande Valley

would be left with no abortion provider because those providers do not have admitting privileges and are unlikely to get them."[2] Dist. Op. at 11. That does not establish a "substantial obstacle" because it is undisputed that abortions will remain available in Corpus Christi, which is only 150 miles from the Mexico border (and 100 miles or less from the northern reaches of the Rio Grande Valley). *See id.* *Casey* establishes that travel distances of that sort do not qualify as an "undue burden," because it upheld Pennsylvania's 24-hour waiting period even though the district court specifically found that this requirement would be "particularly burdensome" for patients who must travel long distances, 505 U.S. at 885–86, and even though the petitioners' brief in *Casey* noted that the Pennsylvania law would double the travel distances for "the thousands of Pennsylvania women who travel *hundreds* of miles to obtain an abortion," Pet'rs Br., 1992 WL 551419, at *10 (citations omitted) (emphasis added).

Finally, the district court found that "the hospital-admitting privileges provision does not survive the undue-burden 'purpose' inquiry," because "[t]he State fails to show a valid purpose for requiring that abortion providers have hospital privileges within 30 miles of the clinic where they practice." Dist. Op. at 13. This was wrong for numerous reasons. First, the district court improperly shifted the burden of proof

[2] The district court did not specify what in the record reflected the fact that "24 counties in the Rio Grande Valley would be left with no abortion provider," and in all events the Rio Grande Valley comprises only *four* counties: Starr, Hidalgo, Willacy, and Cameron. The identity of the 20 remaining counties remains a mystery.

to the State. The *applicants* must prove that the State enacted HB2's hospital-admitting-privileges requirement for an improper purpose; it is not the State's burden to "show a valid purpose" for the abortion laws that it enacts. *See Mazurek*, 520 U.S. at 972 (rejecting a "purpose" challenge to a law requiring physicians to perform abortions because there was no "evidence suggesting an unlawful motive on the part of the Montana Legislature" and holding that the applicants must produce "*some* evidence of that improper purpose in order to avoid a nonsuit."). Second, an abortion law violates *Casey*'s "purpose" prong only if it has the "purpose . . . *of placing a substantial obstacle* in the path of a woman seeking an abortion of a nonviable fetus." 505 U.S. at 877. The district court did not make any findings that Texas enacted HB2's hospital-admitting-privileges requirement for *that* purpose, which is the only purpose that can justify an "undue burden" finding. Third, the applicants *did not even argue* that Texas enacted HB2's hospital-admitting-privileges requirement with the "purpose" of imposing a substantial obstacle on abortion patients. And the applicants introduced no evidence of the Legislature's purpose, leaving the district court without any means to find an impermissible purpose except by shifting the burden of proof to the State.

The district court also refused to acknowledge or enforce HB2's severability clause, which requires reviewing courts to sever the applications of the admitting-privileges requirement to each individual physician and preserve the applications that do not impose an "undue burden" on women seeking abortions. The district court

did not explain how HB2's hospital-admitting-privileges requirement could impose an "undue burden" as applied to physicians in Dallas, Houston, San Antonio or Austin—where numerous abortion practitioners already hold hospital-admitting privileges. And the district court did not mention *Leavitt* or *Ayotte*'s severability holdings. *See* State's Trial Brief at 14-15, 20.

Finally, the district court refused to apply the test for facial invalidation that this Court established in *Gonzales*, which requires litigants bringing preenforcement, facial challenges to abortion regulations to prove, at an absolute minimum, that the law will impose an unconstitutional undue burden "in a large fraction of relevant cases." 550 U.S. at 167–68. The district court ignored this standard, and offered only a conclusory assertion that "Planned Parenthood's facial challenge to this provision may be maintained and the provision is unconstitutional." Dist. Op. at 13.

III. THE COURT OF APPEALS'S STAY

On October 31, 2013, a unanimous panel of the court of appeals stayed the district court's injunction of the hospital-admitting privileges requirement. In determining whether to stay a judgment pending appeal, a court must consider four factors: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. *See Hilton v. Braunskill*, 481 U.S. 770, 776 (1987).

The court of appeals found that the State made a strong showing that it will succeed on appeal. It held that the district court misapplied the rational-basis test, and that Texas needed only to provide a "conceivable state of facts that could provide a rational basis" for an admitting-privileges requirement. CA5 Op. at 5 (quoting *Beach Commc'ns, Inc.*, 508 U.S. at 313); *see also* CA5 Op. at 5 ("The State offered evidence that such a requirement fosters a woman's ability to seek consultation and treatment for complications directly from her physician, not from an emergency room provider. There was evidence that such a requirement would assist in preventing patient abandonment by the physician who performed the abortion and then left the patient to her own devices to obtain care if complications developed.").[3] The court of appeals also disapproved the district court's decision to facially invalidate the hospital-admitting privileges requirement under the "undue burden" test. Citing *Gonzales*, the court of appeals noted that pre-enforcement facial challenges "impose 'a heavy burden' upon the part[y] maintaining the suit," and that the applicants must at the very least prove that the admitting-privileges requirement will impose an undue burden "in a large fraction of the cases" in which it is relevant. CA5 Op. at 10

[3] The applicants suggest that the court of appeals engaged in improper appellate factfinding by "rely[ing]" on evidence "that the District Court did not credit." *See* Emergency App. at 9 n.5. Hardly. The court of appeals did not credit these opinions from the State's experts or find them to be correct. It cited the State's experts to establish *the existence of disagreement* on whether an admitting-privileges requirement can improve patient safety. The mere existence of disagreement is enough to prove that a law has a rational basis. *See Nat'l Paint & Coatings Ass'n v. City of Chicago*, 45 F.3d 1124, 1127 (7th Cir. 1995) ("[Under rational-basis review,] to say that such a dispute exists—indeed, to say that one may be *imagined*—is to require a decision for the state. Outside the realm of 'heightened scrutiny' there is therefore never a role for evidentiary proceedings.").

(quoting *Gonzales*, 550 U.S. at 167). The court of appeals acknowledged that "Planned Parenthood contended at trial that approximately 22,000 women across Texas would not have access to a physician who performs abortions," but it noted that "[t]he district court did not make such a finding, and Planned Parenthood does not challenge the failure to make such a finding in the present proceeding." CA5 Op. at 11. The court of appeals then held that the district court's finding that 24 counties in the Rio Grande Valley would be left without an abortion provider was insufficient to establish "an undue burden in a large fraction of relevant cases." CA5 Op. at 11; *see also id.* at 12–14.

The court of appeals also found that the State would suffer irreparable injury from the inability to enforce its laws, and that the public interest favors the enforcement of democratically enacted legislation. *Id.* at 19 (citing *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, Circuit Justice); *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, Circuit Justice) ("[A]ny time a State is enjoined by a Court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury."); *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 704 (5th Cir. 1997), *abrogated on other grounds by Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006)); *see also Virginian Ry. Co. v. Sys. Fed'n No. 40*, 300 U.S. 515, 552 (1937) (noting that carrying the statutory policy of the Legislature "is in itself a declaration of public interest."). Finally, the court of appeals observed that "Planned Parenthood has also made a strong showing that their interests would be harmed by

staying the injunction," but "given the State's likely success on the merits, this is not enough, standing alone, to outweigh the other factors." CA5 Op. at 19.

Now the applicants want this Court to vacate the court of appeals's stay, a ruling that would reinstate the district court's opinion and judgment while the parties litigate their appeal in the Fifth Circuit. To obtain this relief, the applicants must first show that the court of appeals was "demonstrably wrong in its application of accepted standards in deciding to issue the stay." *See Coleman v. Paccar, Inc.*, 424 U.S. 1301, 1304 (1976) (Rehnquist, J., in chambers). They must also show that their rights "may be seriously and irreparably injured by the stay." *Id.* Finally, the applicants must show that this case "could and very likely would be reviewed here upon final disposition in the court of appeals." *Id.* The emergency application fails to make any of these three required showings.

ARGUMENT

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

The applicants criticize the decision to issue the stay on two grounds. First, they claim that the court of appeals should not have found that the State was likely to succeed on appeal. *See* Emergency App. at 15. Second, they argue that the alleged harms to the applicants should have outweighed considerations of the State's likelihood of success of appeal. *See id.* at 2–3, 14. Neither of these shows that the court of appeals was "demonstrably wrong" to issue a stay.

A. The Fifth Circuit Was Not Demonstrably Wrong For Concluding That The State Was Likely To Succeed On Appeal.

The applicants do not defend *any* of the district court's rationales for invalidating the admitting-privileges requirement. They do not present any argument that the admitting-privileges requirement fails the rational-basis test, that it was enacted with the "purpose" of imposing a "substantial obstacle" in the path of women seeking abortions, or that the absence of abortion providers in 24 counties along the Rio Grande Valley qualifies as an "undue burden" that justifies facial invalidation of the statute. Nor do they criticize the court of appeals for rejecting the district court's rationales.

Instead, the applicants' entire explanation for how the court of appeals was "demonstrably wrong" appears in a single conclusory sentence: "If *Casey*'s undue burden standard means anything, it must mean that a law that forces a third of the providers in the state to cease providing abortions and prevents approximately 20,000 women a year from accessing safe abortion procedures is unconstitutional." Emergency App. at 16. There are many problems with this statement.

First, the district court refused to make any findings that HB2's admitting-privileges requirement would force one-third of the state's abortion providers to cease offering the procedure, or that it would prevent *any* woman (let alone 20,000 women per year) from obtaining an abortion. *See* Dist. Op. at 6-13; CA5 Op. at 11. And the district court declined to enter these findings even though the applicants had

proposed specific findings of fact to this effect. *See* Plaintiffs' Proposed FOFs at 9 ¶ 44 ("As a result of the admitting privileges requirement, more than one-third of the state's licensed abortion facilities will be forced to stop offering abortion altogether, eliminating services entirely in Fort Worth, Harlingen, Killeen, Lubbock, McAllen, and Waco. Potter Decl. ¶ 6."); *id.* at 10 ¶ 46 ("As a result of the admitting privileges requirement, over 22,000 women each year will be unable to secure a safe and legal abortion in Texas. Potter Decl. ¶ 7."). The only evidence that the applicants offered to prove these contentions was an opinion from expert witness Joseph Potter, but the district court refused to credit Potter's testimony and did not rely on it.

The applicants are essentially arguing that the court of appeals was "demonstrably wrong" for refusing to engage in de novo appellate factfinding by accepting an expert opinion that the district court refused to credit. *See* CA5 Op. at 11 (acknowledging that "Planned Parenthood contended at trial that approximately 22,000 women across Texas would not have access to a physician who performs abortions" but noting that "[t]he district court did not make such a finding, and Planned Parenthood does not challenge the failure to make such a finding in the present proceeding. The district court made findings only with regard to 24 counties in the Rio Grande Valley."). But it is not the job of a court of appeals to supplement a district court's findings of fact with its own de novo factual determinations. Indeed, the court of appeals would have been "demonstrably wrong" if it had followed the course urged by the applicants and treated Potter's testimony as established fact.

The applicants try to get around this problem by falsely telling this Court that Potter's claims were "undisputed." *See* Emergency App. at 7; *id.* at 9 n.4; *id.* at 9 n.5. But the State and its experts have vigorously attacked Potter's methodology and conclusions from the outset, and continue to contest them on appeal and in this Court. *See* State's Trial Brief at 33–35 (attacking Potter's methodology and the admissibility of his opinions under *Daubert*); Uhlenberg Decl. ¶ 9 (attached as Exhibit E) ("Dr. Potter's assertion that 'at least one third of currently licensed clinics will stop providing abortions' cannot be accepted as fact."); *id.* ¶ 8 (criticizing Potter for accepting "responses by the abortion clinics" as "accurate forecasts"); *id.* ¶ 13 (disputing Potter's "assum[ption] that abortion clinics would not provide more abortions if the demand for abortions increased."); *id.* ¶ 14 (disputing Potter's "assumption that the demand for abortions in Texas in 2014 would be identical to the number performed in Texas in 2011"); *id.* ¶ 15 ("[I]t is my professional opinion that the unpublished results of Dr. Potter's study are not trustworthy."); 1.TR.206:1–9 (questioning whether Potter "did any research" regarding new clinics that may increase capacity); 1.TR.207–08 (questioning Potter about lack of economic analysis done in predicting clinic closures); 1.TR.218, 223, 225 (questioning Potter about the source of information from which he estimated clinic closures and reduced capacity); Texas Emergency Mtn. to Stay at 6–7 n.1. The applicants apparently believe that calling Potter's opinions "undisputed" will persuade this Court that the Fifth Circuit should have credited Potter even though the district court didn't. But it only

highlights the applicants' inability to provide any substantive defense of Potter's methodology and conclusions.

Far from "demonstrably wrong," the court of appeals's (and the district court's) refusal to rely on Potter's testimony was absolutely correct. Potter's declarations and testimony are not credible and fail to satisfy the reliability standards of Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S 579, 595 (1993). Potter opined that "at least one third of currently licensed clinics will stop providing abortions entirely" on account of the admitting-privileges requirement. *See* Potter Decl. ¶ 6; 2.TR.12–13. But Potter did not apply any methodology to reach that conclusion; he admitted that he relied exclusively on statements of predicted clinic closures *from the applicants and their lawyers* and from other unknown individuals who were interviewed by an abortion provider with whom Potter works. 1.TR.204:19–21; 1.TR.208:1–3; 1.TR.218:6–10; 1.TR.223:4-7; *see also* 2.TR.23:20–25 ("Q. [T]here was no specific science in determining that those same clinics were going to close, correct? A. We are using information that was obtained by—from Plaintiffs and by Dr. Grossman from providers. *There's no science there.*") (emphasis added); Potter Rebuttal Decl. ¶ 16 ("The primary source of this information was the plaintiff clinics' own statements concerning their anticipated closure or cessation of abortion services, either directly to us or through counsel.").

Potter also opined that the "capacity" of the remaining abortion providers in Texas would amount to no more than 43,850 abortions per year, and he used that

number to reach his conclusion that 22,286 women per year would be unable to obtain abortions on account of the admitting-privileges requirement. Potter Decl. ¶¶ 7, 12, Table 3; 2.TR.13. How did Potter come up with that 43,850 figure? *By asking the plaintiff abortion clinics* and other abortion providers throughout the State what their post-HB2 "capacity" would be. Potter Rebuttal Decl. ¶¶ 18, 21. There is no scientific methodology involved in asking abortion-clinic operators what their "capacity" is and then copying their self-serving hearsay statements into an expert-witness declaration.

Potter's "opinions" regarding closures and capacity are nothing more than hearsay statements from the applicants and their fellow abortion providers laundered through an expert. Potter applied no scientific methodology; he simply parroted the applicants' allegations and presented them to the district court in the form of an expert-witness opinion. Abortion-clinic operators cannot circumvent the rules of evidence by funneling hearsay allegations of their capacity through an expert witness. *See Williams v. Illinois*, 132 S. Ct. 2221, 2241 (2012) (instructing trial courts to "screen out experts who would act as mere conduits for hearsay"). If the applicants want to establish that an abortion clinic will close in response to an admitting-privileges requirement, or that an abortion provider will accept no more than a certain number of patients per year, then they must present documentation and sworn testimony from the abortion providers and subject those witnesses to cross-examination. This is especially true when abortion providers are trying to persuade a court to invalidate the

admitting-privileges requirement, and therefore have every incentive to underreport their capacity and overstate their likelihood of closure to Potter's investigators.

Potter's testimony suffers from many other problems; we will mention just a few of them here. First, Potter assumed that every abortion practitioner in Texas who lacked hospital-admitting privileges on the date that the applicants filed their complaint is unable to obtain hospital-admitting privileges and will never be able to obtain them in the future. That is not a tenable assumption. Qualified physicians can obtain hospital-admitting privileges; St. David's Medical Center in Austin, for example, will issue them to physicians who can demonstrate training and competence. *See* Love Decl. ¶ 11. And abortion-performing doctors have great incentives to find a hospital that will grant them admitting privileges now that HB2 has been allowed to take effect; those incentives were muted when Potter prepared his expert opinions because of the pending litigation.

Second, Potter assumed that no new clinics will open in Texas after the admitting-privileges requirement takes effect, and that no new physicians will begin performing abortions in Texas after that date. *See* 1.TR.205:23–25 ("I do not foresee substantial increases in capacity due to the opening of new clinics."). This assumption is also indefensible. *See, e.g.,* D. Wray, "Texas Law Prompts Creation of More Abortion Clinics (And One Will be in Houston)," CBS Dallas/Fort Worth, Non-Profit Looks to Build Clinics Meeting New Abortion Standard, Oct. 9, 2013, at http://dfw.cbslocal.com/2013/10/09/non-profit-looks-to-build-clinics-meeting-new-

abortion-standards (last visited on November 12, 2013) (reporting that Texas Women's Reproductive Health Initiative, Inc., plans to open three new abortion clinics in Houston, Austin and San Antonio by September 2014). When Texas enacted a law in 2004 requiring abortions after 15 weeks gestation to be performed in ambulatory surgical centers (ASCs), four new ASCs emerged to meet the demand within three years. *See* Uhlenberg Decl. ¶ 11. More importantly, Potter's opinion that no new clinics or physicians will emerge in Texas is not based on any research, analysis, or scientific methodology; it is an ipse dixit unsupported by evidence or data. *See* 1.TR.206:1–15.

Third, Potter assumed that post-HB2 demand for abortions in Texas would equal 2011 levels, even though the national abortion rate has been dropping at a slow but steady pace since 1995. Although Potter acknowledged that "the number of abortions in Texas declined between 2008 and 2011," his Rebuttal Declaration proclaims that "it is highly unlikely that the downward trend in abortion numbers will continue in Texas past 2011, as the state drastically cut the funding for family planning." *See* Potter Rebuttal Decl. ¶¶ 24–25. At trial, however, Potter admitted that the number of abortions performed in Texas *declined* between 2011 and 2012, notwithstanding his prediction that the 2011 cuts in family planning would stop the decline. *See* 1.TR.219–20. Potter's predictions regarding future demand for abortions in Texas are not based on reliable principles and methods, and Potter's training as a demographer gives him no expertise or specialized knowledge in prognosticating the

number of women in Texas who will seek abortions in 2014. Potter is just talking off the cuff, and that is not an acceptable basis for an expert-witness opinion.

Finally, Potter assumed that none of the clinics that he projected to close in response to HB2 would have closed due to other reasons. That assumption has already been proven false. A footnote in the applicants' emergency application tells us that "Planned Parenthood Women's Health Center"—one of the clinics that Potter had projected for closure—has withdrawn from the litigation and has permanently ceased offering abortions in Lubbock. *See* Emergency App. at 7 n.3. The applicants do not explain why the Lubbock clinic halted operations, but news reports reveal that Planned Parenthood Women's Health Center was subsumed by Generation Covenant in an asset purchase on October 30, 2013. *See, e.g.*, http://www.everythinglubbock.com/story/story-behind-stopping-abortions-in-lubbock/d/story/XFJSPur1-U6GleLYUjahRQ (last visited on November 12, 2013); http://www.everythinglubbock.com/story/new-details-planned-parenthood-no-more-in-lubbock/d/story/-zX_vYc3N0WEzGOFpaUCag (last visited on November 12, 2013). Generation Covenant does not perform abortions. *Id.*

The closure of Planned Parenthood's Lubbock clinic has nothing to do with HB2, as the transaction between Planned Parenthood Women's Health Center and Generation Covenant was executed *before* the admitting-privileges requirement took effect. So any alleged "lack of capacity" that results from the closure of the Lubbock clinic cannot be attributed to the admitting-privileges requirement. The applicants

recognize as much, because they no longer tout Potter's claim that the admitting-privileges requirement will prevent 22,286 women each year from obtaining abortions. *See* Potter Rebuttal Decl. at 26; 1.TR.181:20–22. In the Fifth Circuit, the applicants relied on Potter to proclaim that "*more than 22,000 women* will no longer be able to access abortion due to the shortfall in capacity among remaining providers." Resp. to CA5 Emergency Stay App. at 7. But in this Court, the applicants claim only that "*approximately 20,000 women* annually will no longer be able to access abortion due to the shortfall in capacity among remaining providers."[4] Not even the applicants believe that Potter's numbers are reliable; they cannot fault the court of appeals as "demonstrably wrong" for failing to credit an expert conclusion that has been proven false and that the applicants no longer stand behind.

Potter assumed that in a world without HB2's hospital-admitting privileges requirement, every abortion clinic in Texas would remain open indefinitely. That is untenable, as evidenced by the sale of Planned Parenthood Women Health Center to Generation Covenant. And Potter himself recognized that nine abortions clinics in Texas closed between 2011 and 2013 for reasons that had nothing to do with HB2. *See* Potter's Rebuttal Decl. ¶ 22; *id.* at 23. Potter has no basis for assuming that the closure of abortion clinics would magically cease, and that the clinics that he projected

[4] Potter estimated that the Lubbock abortion clinic would have performed 2,015 this year. PX 46. It appears that the applicants have come up with their "approximately 20,000" number by subtracting the 2,015 from Potter's original "22,286" figure. But the applicants do not explain the methodology they used in amending Potter's formula, leaving everyone to guess at how the sale of the Lubbock abortion clinic affects their bottom-line conclusion.

for closure or reduced capacity would have remained at full capacity but for the admitting-privileges requirement. Physicians will retire or move, properties will be sold, entities will merge. Potter made no effort to account for these contingencies.

It is hardly surprising that the district court refused to credit Potter's testimony or rely on it in any way. Yet the applicants expect this Court to treat Potter's testimony as if it were holy writ. The applicants first task, however, is to explain how Potter's analysis can satisfy the reliability standards of Federal Rule of Evidence 702 and *Daubert*. Their second task is to explain how this Court can accept Potter's analysis and conclusions in light of the State's many objections to his methodology. Their third task is to explain how the Supreme Court of the United States can engage in de novo appellate factfinding, and credit an expert opinion that neither the district court nor the court of appeals was willing to rely upon. The applicants do not even begin to undertake these projects in their application to this Court. Pretending that Potter's claims were "undisputed" and hoping that this Court will overlook the problems that dissuaded the district court from relying on Potter is not sufficient. The court of appeals cannot be deemed "demonstrably wrong" for following the district court's lead and refusing to credit Potter.

* * *

The applicants also make no effort to explain how the district court could facially invalidate the admitting-privileges requirement in light of *Gonzales v. Carhart* and the statute's severability clause. The applicants ask this Court to reinstate the

district court's across-the-board injunction of the admitting-privileges requirement, but it does not endeavor to explain how that remedy can be squared with this Court's precedents on facial challenges and severability law.

As the court of appeals recognized, *Gonzales* limits the federal courts' authority to impose the remedy of facial invalidation in cases challenging abortion laws. *See* CA5 Op. at 10. A litigant seeking facial invalidation of an abortion statute must show at the very least that the law will impose an undue burden "in a large fraction of the cases in which [it] is relevant." *See Gonzales*, 550 U.S. at 167 (quoting *Casey*, 505 U.S. at 895). Even if a court were to accept Potter's testimony, the applicants must still explain how this justifies *facial* invalidation of the statute under the "large fraction" test, rather than a more narrow remedy extending only to the providers whose services are needed to ensure that no backlog in services will occur. The applicants do not provide any analysis of the "large fraction" issue, and act as though they are entitled to facial invalidation as a matter of right.

The court of appeals correctly held that the admitting-privileges requirement is "relevant" to every woman in Texas who seeks an abortion, because it applies to any physician who performs an abortion in Texas. *See* CA5 Op. at 11. The applicants do not question the court of appeals' conclusion that the denominator of the "fraction" consists of all women seeking abortions in Texas, approximately 68,000 per year. Yet even if a court were to accept the hearsay allegations of clinic closures and capacity that the applicants have transmitted through Potter, the numerator would be

"approximately 20,000" women per year—yielding a fraction of less than one-third. The applicants make no effort to explain how a fraction of less than one-third can qualify as a "large fraction" under *Gonzales*. Indeed, if any fraction less than one-half can be deemed "large," then the test for facial invalidation needs to be renamed as the "significant fraction" or "substantial fraction" test. The applicants' predictions of clinic closures and capacity can at most support an as-applied challenge whose remedy extends only to the abortion providers needed to prevent a backlog. *See Ala. State Fed'n of Labor, Local Union No. 103 v. McAdory*, 325 U.S. 450, 465 (1945) ("When a statute is assailed as unconstitutional we are bound to assume the existence of any state of facts which would sustain the statute in whole or in part.").

The applicants face yet another insurmountable problem in their quest for facial invalidation: HB2's severability clause requires reviewing courts to sever not only the provisions of HB2, but also the statute's applications to every individual physician:

> [E]very application of the provisions in this Act[ ] [is] severable from each other. If any application of any provision in this Act to any person, group of persons, or circumstances is found by a court to be invalid, the remaining applications of that provision to all other persons and circumstances shall be severed and may not be affected. All constitutionally valid applications of this Act shall be severed from any applications that a court finds to be invalid, leaving the valid applications in force, because it is the legislature's intent and priority that the valid applications be allowed to stand alone. Even if a reviewing court finds a provision of this Act to impose an undue burden in a large or substantial fraction of relevant cases, the applications that do not present an undue burden shall be severed from the remaining provisions and shall remain in force, and shall be treated as if the legislature had enacted a statute

> limited to the persons, group of persons, or circumstances for which the statute's application does not present an undue burden. . . .

HB2, § 10(b). That means that even if HB2's hospital-admitting-privileges requirement imposes an "undue burden" on abortion patients when applied to certain physicians, those applications must be severed, and the applications that do not impose an "undue burden" on abortion patients must be allowed to remain in force. The district court refused to enforce the severability clause. Instead, it permanently enjoined the State from enforcing the admitting-privileges requirement against *any* physician who ever performs abortions in Texas—regardless of whether the statute's application to that particular physician will impose an "undue burden" on abortion patients. Final Judgment at 2. The district court never even attempted to explain how HB2's admitting-privileges requirement could impose an "undue burden" as applied to physicians in Dallas, Houston, San Antonio or Austin—where there are already numerous abortion practitioners with hospital-admitting privileges.

The applicants' only answer to HB2's severability clause has been to ask the courts to ignore it. *See, e.g.,* Plaintiffs' Reply Brief in Support of PI at 8–12. That's not an option. Federal courts are bound to follow state severability law, especially in abortion cases. *See Leavitt*, 518 U.S. at 138–39 (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); *Ayotte*, 546 U.S. at 330–31 (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); *see also Dorchy v. Kansas*, 264 U.S. 286, 290 (1924) (holding that a state court's "decision as to the severability of a provision is conclusive upon this Court"). And this Court has long enforced severability clauses that sever not only the statutory provisions, but also the applications of those provisions to each individual and circumstance. *See Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 501 & n.14 (1985) (enforcing an application-severability requirement in a state statute that contained an overbroad definition of prurience, holding that "facial invalidation of the statute was . . . improvident"); *Wyoming v. Oklahoma*, 502 U.S. 437, 460–61 (1992) ("Severability clauses may easily be written to provide that if application of a statute to some classes is found unconstitutional, severance of those classes permits application to the acceptable classes."); Richard H. Fallon, Jr., et al., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 180–84 (5th ed. 2003) ("The notion that statutes are typically 'separable' or 'severable,' and that invalid applications can somehow be severed from valid applications without invalidating the statute as a whole, is deeply rooted in American constitutional law.")

If the applicants want this Court to reinstate a district-court ruling that refused to enforce HB2's severability clause, they must explain how this Court can disregard the severability clause while remaining faithful to *Leavitt*, *Ayotte*, and *Dorchy*. Unless the applicants can present an argument that defends the district court for ignoring

HB2's severability clause, they cannot fault the court of appeals for staying the district court's decision to facially invalidate the statute.

B. The Court of Appeals Was Not "Demonstrably Wrong" For Declining To Give Controlling Weight To The Applicants' Allegations Of Harm.

The applicants also argue that the court of appeals should have given controlling weight to the harms that the applicants alleged would result from a stay. *See* Emergency App. at 2–3; 14; *see also* CA5 Op. at 19 (recognizing that "Planned Parenthood has . . . made a strong showing that their interests would be harmed by staying the injunction," but concluding that "given the State's likely success on the merits, this is not enough, standing alone, to outweigh the other factors."). The applicants believe that the alleged harm to the applicants should have trumped the court of appeals's assessment of the other factors.

The court of appeals cannot be deemed "demonstrably wrong" for declining to give controlling weight to one factor when applying a four-factor test. Whether to issue a stay requires a court to consider: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. *See Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). "Where the lower court has already performed this task in ruling on a stay application, its decision is entitled to weight and should not lightly be disturbed." *Williams v. Zbaraz*, 442 U.S. 1309, 1312

(1979) (Stevens, J., in chambers). A Circuit Justice's review of these decisions is deferential, *see Coleman*, 424 U.S. at 1304, and it almost impossible to attack a decision that balances competing interests as "demonstrably wrong."

The applicants grossly mischaracterize the court of appeals's application of the *Hilton v. Braunskill* test. The court of appeals did not "rel[y] almost entirely on its determination that Respondents would prevail on the merits." Emergency App. at 2-3. Rather, the court of appeals found that the State had satisfied the first, second, and fourth factors. *See* CA5 Op. at 19 (finding that the State would be irreparably injured absent a stay from denying the State the ability to enforce its laws); *id.* (finding that the "public interest" factor favored the State because when "the State is the appealing party, its interest and harm merges with that of the public") (citing *Nken v. Holder*, 556 U.S. 418, 435 (2009)). This was not a ruling that relied "almost entirely" on the State's likelihood of success on appeal.

The applicants also suggest that the court of appeals regarded a "state's interest in enforcement of its laws" as "sufficient to tip the balance of harm in the state's favor." Emergency App. at 14. But the court of appeals never held that the "balance of harm" favored the State. It held that the State was entitled to a stay because the State was likely to succeed on appeal, would suffer harm absent a stay, and because the public interest favored a stay. Those three factors taken together prevailed over the harms that the applicants alleged. *See* CA5 Op. at 19. And the applicants'

contention that the State would suffer *no* harm if the stay were vacated[5] is flatly contradicted by decisions holding that a State suffers irreparable injury whenever it is enjoined from enforcing its validly enacted laws. *See Maryland v. King*, 133 S. Ct. at 3; *New Motor Vehicle Bd.*, 434 U.S. at 1351 ("[A]ny time a State is enjoined by a Court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury."); *Coal. for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997) ("[I]t is clear that a state suffers irreparable injury whenever an enactment of its people . . . is enjoined.").

II. THE APPLICANTS' RIGHTS WILL NOT BE SERIOUSLY AND IRREPARABLY INJURED BY THE STAY.

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

This Court has never held that abortion providers have a federally protected right to perform abortions. The right established in *Casey* protects the rights of abortion *patients* to obtain previability abortions free of "undue burdens" imposed by

[5] *See* Emergency App. at 11 ("Respondents Will Not Be Harmed If The Fifth Circuit's Stay is Vacated.").

the State; there is no federally protected "right" of abortion providers to remain in business. 505 U.S. at 877 (holding that a finding of undue burden requires proof that the law has "the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus"). The applicants' complaints about abortion clinics closing are relevant only to the extent they deprive *patients* of their right to obtain previability abortions free of undue burdens.

The applicants do not appear to contest the court of appeals's decision to reject the allegations of increased travel distances as an "undue burden." *See* Emergency App. at 8–9 n.4. And for good reason: The applicants' own evidence revealed that over 90% of abortion patients in Texas will live within 100 miles of an abortion clinic even after HB2 takes effect. *See* Potter Decl. ¶ 11; Pls.' Prelim. Inj. Mot. at 8. And the patients who will travel the longest distances live in Northwest Texas, where the long travel distances are caused by Generation Covenant's purchase of Planned Parenthood's Lubbock clinic rather than HB2's admitting-privileges requirement. Potter Decl. at 26; 1.TR.190–91. In all events, *Casey* establishes that travel distances in the hundreds of miles do not qualify as an "undue burden," because it upheld Pennsylvania's 24-hour waiting period even though the district court specifically found that this requirement would be "particularly burdensome" for patients who must travel long distances, 505 U.S. at 885–86, and even though the petitioners' brief in *Casey* noted that the Pennsylvania law would double the travel distances for "the thousands of Pennsylvania women who travel hundreds of miles to obtain an

abortion," 1992 WL 551419, at *10 (citations omitted). *See also Fargo Women's Health Org. v. Schafer*, 18 F.3d 526, 533 (8th Cir. 1994) (upholding a 24-hour waiting period and holding that "[w]e do not believe a . . . single trip, *whatever the distance to the medical facility*, create[s] an undue burden") (emphasis added); *Karlin v. Foust*, 188 F.3d 446, 481 (7th Cir. 1999) ("[I]nconvenience, even severe inconvenience, is not an undue burden.").

Instead, the applicants pin their case on the idea that the remaining abortion clinics in Texas lack the "capacity" to accommodate the 60,000 or so patients who are expected to seek abortions each year. *See* Emergency App. at 8–9. The applicants claim that tens of thousands of these women will be unable to schedule an abortion appointment at *any* clinic in the State, and that those who can will suffer "delays." *Id.* at 9. The only support for this claim comes from the applicants' hearsay claims of abortion-clinic capacity that are funneled through Potter's testimony, which no court has credited and which does not meet the standards for reliable expert opinion. *See* Part I, *supra*. But even apart from Potter, the admitting-privileges requirement has now been in effect for twelve days. There is no longer any role for speculation about what might happen if the admitting-privileges requirement takes effect. The law *is* in effect, and there is reason to believe that backlog and delays have not occurred. *See* Texas Alliance for Life Amicus Brief. That post-HB2 abortion providers in Texas may very well have the "capacity" to handle the demand for abortion among Texas residents shows why "it is an abuse of discretion for a district judge to issue a pre-

enforcement injunction while the effects of the law (and reasons for those effects) are open to debate." *A Woman's Choice-East Side Women's Clinic v. Newman*, 305 F.3d 684, 693 (7th Cir. 2002) (Easterbrook, J.).

III. THIS CASE IS NOT LIKELY TO BE REVIEWED IN THIS COURT UPON FINAL DISPOSITION IN THE COURT OF APPEALS.

Even if the applicants could show both that the court of appeals was "demonstrably wrong" and that their "rights" will be "seriously and irreparably injured by the stay," they *still* cannot obtain a vacatur because they cannot show that this case is likely to be reviewed in this Court after the Fifth Circuit rules on the appeal. The applicants' burden on this issue is almost insurmountable, because it is nearly impossible to demonstrate that this Court will be "likely" to review a decision and opinion that have yet to be issued by the court of appeals. *See Certain Named and Unnamed Non-Citizen Children and Their Parents v. Texas*, 448 U.S. 1327, 1331 (1980) (Powell, J., in chambers) (noting that only in "exceptional" cases will a litigant be able to establish before decision by the Court of Appeals that this Court is likely to grant certiorari).

No federal court of appeals has ruled on whether admitting-privileges requirements comply with the "undue burden" standard. The Fifth Circuit has fast-tracked this appeal and calendared the case for oral argument for January. When it issues its ruling, it will likely become the first court of appeals to weigh in on this issue. The applicants do not cite any cases in which this Court has granted certiorari

to resolve a division of authority between a court of appeals and a federal district court, and the rules of this Court do not consider that grounds for certiorari. *See* SUP. CT. R. 10(a)–(c).

The only way this case could possibly become certworthy is if the Seventh Circuit rules on Wisconsin's admitting-privileges requirement before the Fifth Circuit rules on the constitutionality of Texas's law, *and* the Fifth Circuit rules in a manner that creates a conflict with the Seventh Circuit's ruling. The applicants do not allege that this scenario is "likely," and it is highly unlikely, especially when the Wisconsin and Texas cases are likely to turn on features unique to each State's abortion market. *See Planned Parenthood of Wisconsin v. Van Hollen*, No. 3:13-CV-00465, 2013 WL 3989238, at *5-*6 (D. Wis. Aug. 2, 2013); *see also id.*, at *12 n.27 (State wrongly conceding that it bore the burden of proof). Even then, a 1-1 circuit split generally needs more percolation before this Court decides to intervene. ROBERT L. STERN ET AL., SUPREME COURT PRACTICE at 246–47 (9th ed. 2007); William J. Brennan, Jr., *Some Thoughts on the Supreme Court's Workload*, 66 JUDICATURE 230, 233 (1983) ("[T]here is already in place, and has been ever since I joined the Court, a policy of letting tolerable conflicts go unaddressed until more than two courts of appeals have considered a question.").

In the 21 years since *Casey*, this Court has reviewed "undue burden" claims on writ of certiorari in only three situations: (1) a conflict of authority among the courts of appeals, *see Stenberg v. Carhart*, 530 U.S. 914, 923–24 (2000); (2) a court of appeals's

decision invalidating a federal statute, *see Gonzales*, 550 U.S. at 132–33; and (3) a court of appeals's decision invalidating a law that this Court has previously upheld as constitutional, *see Mazurek*, 520 U.S. at 973; *Lambert v. Wicklund*, 520 U.S. 292, 293 (1997) (per curiam); *Leavitt*, 518 U.S. at 144–45; *Ayotte*, 546 U.S. at 320. The last time this Court resolved an "undue burden" challenge to an abortion regulation was seven terms ago, in *Gonzales*, 550 U.S. at 150–56. The thought that this Court would grant certiorari to review the decision of the merits panel in this case is hard to imagine.

CONCLUSION

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

Respectfully submitted.

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I certify that a copy of this Memorandum In Opposition To Emergency Application To Vacate Fifth Circuit's Stay Pending Appeal has been sent via electronic mail and Federal Express on November 12, 2013, to:

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