No. 13-51008

In the United States Court of Appeals for the Fifth Circuit

PLANNED PARENTHOOD OF GREATER TEXAS SURGICAL HEALTH SERVICES, PLANNED PARENTHOOD CENTER FOR CHOICE, PLANNED PARENTHOOD SEXUAL HEALTHCARE SERVICES, PLANNED PARENTHOOD WOMEN'S HEALTH CENTER, WHOLE WOMAN'S HEALTH, AUSTIN WOMEN'S HEALTH CENTER, KILLEEN WOMEN'S HEALTH CENTER, SOUTHWESTERN WOMEN'S SURGERY CENTER, WEST SIDE CLINIC, INC., ROUTH STREET WOMEN'S CLINIC, HOUSTON WOMEN'S CLINIC, each on behalf of itself, its patients and physicians, ALAN BRAID, M.D., LAMAR ROBINSON, M.D., PAMELA J. RICHTER, D.O., each on behalf of themselves and their patients,

Plaintiffs-Appellees,

v.

GREGORY ABBOTT, Attorney General of Texas; DAVID LAKEY, M.D., Commissioner of The Texas Department of State Health Services; MARI ROBINSON, Executive Director of the Texas Medical Board; DAVID ESCAMILLA, County Attorney for Travis County; CRAIG WATKINS, Criminal District Attorney for Dallas County; DEVON ANDERSON, District Attorney for Harris County; MATTHEW POWELL, Director of the Lubbock County Criminal District Attorney's Office; JAMES E. NICHOLS, County Attorney for Bell County; JOE SHANNON, JR., Criminal District Attorney for Tarrant County; RENE GUERRA, Criminal District Attorney for Hidalgo County; SUSAN D. REED, Criminal District Attorney for Bexar County; ABELINO REYNA, Criminal District Attorney for McLennan County; JAIME ESPARZA, District Attorney for El Paso County; each in their official capacities, as well as their employees, agents,

Defendants-Appellants.

On Appeal from the United States District Court for the Western District of Texas, Austin Division
Case No. 1:13-cv-862

EMERGENCY MOTION TO STAY FINAL JUDGMENT PENDING APPEAL, AND MOTION FOR A COMPRESSED BRIEFING SCHEDULE AND EXPEDITED CONSIDERATION AT THE JANUARY SITTING

NATURE OF THE EMERGENCY

This summer the Texas Legislature passed HB 2, which requires that physicians who perform abortions obtain admitting privileges at a hospital within 30 miles of where the abortion is performed. This admitting-privileges requirement was scheduled to take effect on October 29, 2013, but it was permanently enjoined in its entirety on October 28, 2013, by the Austin Division of the Western District of Texas (Honorable Lee Yeakel) after a three-day bench trial. The district court took that extraordinary step without citing (much less purporting to satisfy) the constitutional standard for facial challenges, without confronting the statute's severability clause, and without finding a single burden on a single abortion patient that the Supreme Court of the United States has characterized as "undue." Indeed, the plaintiffs acknowledged that HB 2 would impose little or no burden on tens of thousands of the State's abortion patients, as their expert found that more than 90% of them would remain able to secure an abortion within 100 miles of their residence. But the district court's ruling is so aggressive that it ignores those concessions and sweeps more broadly than even the plaintiffs were willing to argue.

Texas seeks a stay of that final judgment pending appeal. We did not first seek a stay in the district court because it would have been impracticable, given that HB 2 is scheduled to take effect on October 29, 2013. *See* FED. R. APP. P. 8(a)(2)(A)(i). Texas respectfully requests that the Court decide this motion, if possible, by the evening of October 29, 2013. The State also respectfully urges the

Court to set an expedited briefing schedule that will allow for a hearing at the next practically available sitting in January.

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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ARGUMENT AND AUTHORITIES

I. THE COURT SHOULD STAY THE DISTRICT COURT'S JUDGMENT PENDING APPEAL.

In deciding whether to stay final injunctive relief, a four-factor test applies. *See Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977) ("(1) Has the petitioner made a strong showing that it is likely to prevail on the merits of its appeal? . . . (2) Has the petitioner shown that without such relief, it will be irreparably injured? . . . (3) Would the issuance of a stay substantially harm other parties interested in the proceedings? . . . (4) Where lies the public interest?").

A. Texas Is Likely To Prevail on the Merits.

HB 2's hospital-admitting-privilege requirement cannot be enjoined on a pre-enforcement, facial challenge because there is no evidence—and no findings in the district court's opinion—that *any* woman will face *any* obstacles to obtaining an abortion if the law takes effect. More egregiously, the district court refused to enforce HB 2's severability clause, despite Supreme Court rulings requiring federal courts to enforce state severability law. *See, e.g., Leavitt v. Jane L.*, 518 U.S. 137, 138–39 (1996) (per curiam). And the court further erred by facially invalidating the statute when this circuit allows facial invalidation only when there is "no set of circumstances" in which the law's application is constitutional. *See Barnes v. Mississippi*, 992 F.2d 1335, 1342 (5th Cir. 1993). Finally, the district court carved out an overbroad and unnecessary

"health" exception to the requirement that physicians follow the FDA protocol when dispensing abortion-inducing drugs.

1. The District Court Erred By Facially Invalidating HB 2's Admitting-Privileges Requirement When There Is No Evidence And No Findings That Any Patient Will Face Any Obstacle To Obtaining An Abortion.

Under the "undue burden" standard, 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." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992) (emphasis added). One will search the district court's opinion in vain for a statement or finding that *any* woman will face *any* obstacle—let alone a "substantial" obstacle—to obtaining an abortion on account of HB 2's admitting-privileges requirement. That alone merits reversal. A law cannot be enjoined as an "undue burden" without evidence or findings that abortion *patients* (not abortion providers) will encounter "substantial obstacles" on account of that law.

The district court thought it could nevertheless invalidate HB 2's admitting-privileges requirement for three reasons. First, the court claimed that "admitting privileges have no rational relationship to improved patient care." Op. at 11. Second, the court found that HB 2's requirement has the "effect" of imposing a "substantial obstacle" because it may cause some clinics to close. *Id.* Third, the court found that "the State fails to show a valid purpose" for requiring abortion practitioners to hold hospital-admitting privileges. *Id.* at 13. Each of these conclusions is mistaken, and

each is irrelevant to the question presented by *Casey*: Whether the admitting-privileges requirement will place a substantial obstacle in the path of a *woman* seeking an abortion. 505 U.S. at 877.

Consider first the district court's conclusion that the hospital-admitting-privileges requirement lacks a rational basis. The court reached this conclusion after faulting the State for "provid[ing] no evidence" of medical need for the law, and relied on the plaintiffs' evidence to conclude that admitting privileges have "no rational relationship to improved patient care." Op. at 10–11. But a court is forbidden to consider evidence when conducting rational-basis review. Under that standard, a legislative decision "is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993). The test is whether it is *possible to imagine* that hospital-admitting privileges could improve patient care, and HB 2 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); *see also 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."). The plaintiffs never even argued that the hospital admitting-privileges requirement failed rational-basis review—doubtless because they understood the rational-basis standard and realized that they could not possibly meet it.

Next, the district court claimed that the hospital-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." 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 is not an undue burden absent findings or evidence that *patients* will encounter a substantial obstacle to obtaining abortions from other providers. 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 in the district court's opinion 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." *Id.* That observation does not establish a "substantial obstacle." To begin, the plaintiffs' own evidence shows that abortions currently are performed in only 13 of Texas's 254 counties. *See* Potter Rebuttal Decl. Table 3. The lack of an abortion provider in 24 counties is

hardly remarkable when 241 of the State's 254 counties lacked a provider *before* HB 2 took effect. And 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.* The district court did not make any findings that abortion patients in the Rio Grande Valley would be unable to obtain abortions in Corpus Christi, or that they would encounter "substantial obstacles" in doing so. *See Greenville Women's Clinic v. Bryant*, 222 F.3d 157, 170 (4th Cir. 2000) (rejecting an "undue burden" challenge to a South Carolina abortion regulation that caused a Beaufort clinic to close, because "no evidence suggests that women in Beaufort could not go to the clinic in Charleston, some 70 miles away").

Casey establishes that travel distances in the range of 100–150 miles do not qualify as an "undue burden," because it upheld Pennsylvania's 24-hour waiting period even though the district court specifically found that 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). *Casey* held that these added travel burdens were neither "undue" burdens nor "substantial" obstacles—even as it accepted the district court's finding that "the waiting period has the effect of 'increasing the cost and risk of delay of abortions.'" 505 U.S. at 886. If Pennsylvania can enforce a law that causes abortion patients who

must already travel more than one hundred miles to make an additional hundred-mile trip, it follows that Texas can enact a law that allegedly causes some patients to travel 150 miles to Corpus Christi—especially when Texas (unlike Pennsylvania) exempts patients who must travel more than 100 miles from the requirement to wait 24 hours after informed consent before the abortion can be performed. TEX. HEALTH & SAFETY CODE § 171.012(a)(4). The district court made no effort to explain how the added travel burdens imposed by Pennsylvania's 24-hour waiting period are *not* "undue," but the added travel burdens allegedly imposed by Texas's hospital-admitting-privileges requirement *are* "undue." *See 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.").

As for the effects of HB 2's admitting-privileges requirement on abortion patients outside of the Rio Grande Valley, the district court's opinion offers radio silence. No findings, no evidence, no discussion of whether and how abortion patients outside the Rio Grande Valley will encounter "substantial obstacles" from the alleged clinic closures. This is due in part to the plaintiffs' failure to present reliable evidence of the effects of HB 2 on patients seeking abortions.[1] It is also due to the

[1] The only "evidence" that the plaintiffs produced regarding HB 2's effects on patients was an analysis performed by expert witness Dr. Joseph Potter. The district court did not so much as

fact that it is impossible to uncover evidence of the effects of HB 2's hospital-admitting-privileges requirement when the law has never been allowed to take effect. "[I]t 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—E. Side Women's Clinic v. Newman*, 305 F.3d 684, 693 (7th Cir. 2002). Nowhere is that more evident than in the district court's opinion in this case.

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." Op. at 13. This is wrong for numerous reasons. First, the district court improperly shifted the burden of proof to the State. It is the *plaintiffs'* responsibility to prove that the State enacted HB 2'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 v. Armstrong*, 520 U.S. 968, 972 (1997) (rejecting a "purpose" challenge to a law requiring

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mention Potter in its memorandum opinion, and for good reason. Potter's declaration asserted that "at least one third of currently licensed clinics will stop providing abortions entirely," but it did not apply any methodology to reach that conclusion, and did not explain how Potter came up with that figure. *See* Potter Decl. ¶ 6. At trial, it was revealed that Potter did not conduct any investigation or independent analysis. Instead, he relied on self-serving statements of predicted clinic closures *from the plaintiffs* 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. Potter then assumed that the remaining providers would be unable to expand their practices without any evidence to support this assumption, and in the face of evidence to the contrary. 1.TR.206:1-15; *see also* 1.TR.198:4-14. His analysis is nothing more than a collection of allegations by the plaintiffs.

physicians to perform abortions because there was no "evidence suggesting an unlawful motive on the part of the Montana Legislature" and that holding that the plaintiffs 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 HB 2's hospital-admitting-privileges requirement for *that* purpose, which is the only purpose that can justify an "undue burden" finding. Third, the plaintiffs *did not even argue* that the Texas enacted HB 2's hospital-admitting-privileges requirement with the "purpose" of imposing a substantial obstacle on abortion patients. And they 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.

2. The District Court Erred By Refusing To Enforce HB 2's Severability Clause.

The district court committed further error by failing to sever, and leave in effect, the applications of HB 2's hospital-admitting-privileges requirements that will not impose "substantial obstacles" on patients seeking abortions. HB 2 contains a strong severability clause, which requires reviewing courts to sever not only the provisions of HB 2, 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. . . .

HB 2, § 10(b). That means that even if HB 2's hospital-admitting-privileges requirement imposes an "undue burden" on abortion patients when applied to certain physicians (such as those in the Rio Grande Valley), those unconstitutional applications must be severed, and the applications that do not impose an "undue burden" must remain in force. HB 2's hospital-admitting-privileges requirement cannot possibly 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.

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); *see also Voting for Am., Inc. v. Steen*, No. 12- 40914, 2013 WL 5493964, at *13 (5th Cir. Oct. 3, 2013) ("Severability is a state law issue that binds federal courts."). And section 10(b) is as clear a statement of

legislative intent as one can possibly imagine. *See Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 330–31 (2006) (holding that "the touchstone for any decision about remedy is legislative intent" and remanding to determine "whether New Hampshire's legislature intended" courts to sever unconstitutional applications of an abortion statute). Yet the district court ignored the requirement to sever the constitutional applications of the statute, perhaps because the plaintiffs insisted on bringing a facial challenge and expressly disclaimed any as-applied challenge to the hospital admitting privileges requirement. 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 plaintiffs are free to litigate their case as they see fit, but that does not excuse the district court from enforcing HB 2's binding severability language and preserving the applications of HB 2 that will not impose "substantial obstacles" on abortion patients.

3. The District Court Violated The Law Of This Circuit By Facially Invalidating HB 2's Hospital-Admitting-Privileges Requirement Without Finding The Law Unconstitutional In Every One Of Its Applications.

Even apart from the severability clauses in HB 2, the plaintiffs' facial challenge to HB 2's hospital-admitting-privileges requirement must *still* be rejected. The law of this Court forbids facial challenges unless the plaintiff shows that the law is invalid in all its applications; the only exception to this requirement is for First Amendment cases. *See Voting for Am., Inc.*, 2013 WL 5493964, at *2 ("With the exception of First

Amendment cases, a facial challenge will succeed only if the plaintiff establishes that the act is invalid under all of its applications."); *Barnes*, 992 F.2d at 1342 (holding that in an abortion case, "[a] facial challenge will succeed only where the plaintiff shows that there is *no* set of circumstances under which the statute would be constitutional"). The district court failed to acknowledge these cases or explain how the plaintiffs could maintain a facial challenge in light of their requirements.

The plaintiffs did not even attempt to satisfy circuit law by proving HB 2's hospital-admitting-privileges requirement unconstitutional in *all* its applications. Instead, the plaintiffs argued—in direct contravention of the law of this Court—that the district court could facially invalidate HB 2 if it imposed an undue burden in a "large fraction" of relevant cases. 3.TR.31:2-3; 3.TR.57:24-58:11. This "large fraction" approach to facial invalidation of abortion laws finds support in some circuits, but not in this Court. *Compare Isaacson v. Horne*, 716 F.3d 1213, 1230–31 (9th Cir. 2013), *with Barnes*, 992 F.2d at 1342. And the Supreme Court has not overruled *Barnes*; to the contrary, the Supreme Court has declined to resolve whether facial challenges to abortion regulations are governed by the "no set of circumstances" test of this Court or the "large fraction" test propounded by the plaintiffs. *See Gonzales v. Carhart*, 550 U.S. 124, 167 (2007) ("We need not resolve that debate.").

Even if this Court were to disregard *Barnes* and apply the "large fraction" test, the plaintiffs *still* failed to carry their burden of proof. Under the worst-case scenario presented by the plaintiffs' expert witness, *only one out of twelve* abortion patients in

Texas would be required to travel more than 100 miles to obtain an abortion—a traveling distance that the plaintiffs claimed would constitute an "undue burden." Potter Decl. ¶ 11; Pls.' Prelim. Inj. Mot at 8. A "large fraction" this is not. Yet the district court facially invalidated HB 2's hospital-admitting privileges requirement even though the plaintiffs were unable to satisfy the more lenient "large fraction" test that they had proposed—and without so much as explaining the standard for facial challenges that the court was applying.

4. The District-Court Decisions From Other Courts Offer No Support For The District Court's Ruling In This Case.

The district court noted that three other district courts have *preliminarily* enjoined hospital-admitting-privileges requirements. *See* Op. at 13 n.9 (citing *Planned Parenthood Se., Inc. v. Bentley*, No. 2:13-CV-405-MHT, 2013 WL 3287109 (M.D. Ala. June 28, 2013), *Jackson Women's Health Org. v. Currier*, 878 F. Supp. 2d 714 (S. D. Miss. 2012); *Planned Parenthood of Wis. v. Van Hollen*, No. 3:13-CV-00465, 2013 WL 3989238 (D. Wis. Aug. 2, 2013)). Opinions of federal district courts have no precedential value and may be followed only to the extent they offer persuasive reasons for their decision. *See, e.g.*, *Camreta v. Greene*, 131 S. Ct. 2020, 2033 n.7 (2011) ("A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case.") (citation and internal quotation marks omitted). None of these opinions offer

persuasive reasons for *permanently* enjoining HB 2's hospital-admitting-privileges requirement.

First, none of the statutes in those cases contained the severability language that appears in HB 2. Had those district courts adjudicated a challenge to HB 2, they would have been compelled to enforce the severability clause and reject the facial challenge that the plaintiffs were presenting in those cases, absent proof that the law imposed a "substantial obstacle" in *all* its applications.

Second, none of the cases cited by the district court answer the arguments that the State is presenting here. The district courts in *Bentley* and *Van Hollen*, for example, never attempted to explain how increased travel costs violate the "undue burden" standard when *Casey* upheld a 24-hour waiting requirement that imposed considerable travel costs on abortion patients. *Bentley* and *Van Hollen* also applied the "large fraction" test for facial challenges rather than the "no set of circumstances" test that applies in the Fifth Circuit. *Bentley*, 2013 WL 3287109, at *4 n.4; *Van Hollen*, 2013 WL 3989238, at *16 n.30. And the defendants in *Van Hollen* conceded that the State bore the burden of proving that the hospital-admitting privileges advanced maternal health; the State of Texas has made no such concession here. Finally, *Jackson Women's Health Center* is not on point because the law would have closed the last remaining abortion clinic in Mississippi; no one alleges that HB 2 will have that effect in Texas.

Third, all of those cases cited by the district court involved preliminary injunctions, not final judgments. At the preliminary-injunction stage, the plaintiffs

need only show a "likelihood" of success on the merits. The plaintiffs' burden is much higher at this stage of the proceedings: They must *prove* by a preponderance of admissible trial evidence that a hospital-admitting-privileges requirement unduly burdens abortion patients. None of the cases cited provide that proof, and none of them makes factual findings based on trial evidence. Far more persuasive (and relevant) is the Eighth Circuit's ruling in *Women's Health Center v. Webster*, 871 F.2d 1377, 1380–81 (8th Cir. 1989), which upheld Missouri's requirement that abortion-performing doctors hold surgical privileges at some hospital in the State.

5. The District Court Erred By Carving Out A Broad "Health Exception" To The State's Regulations Of Abortion-Inducing Drugs.

HB 2 requires physicians who dispense abortion-inducing drugs to follow the FDA's protocol for these drugs, which prohibits doctors from prescribing these drugs more than 49 days after the patient's last menstrual period ("LMP"). The district court found that some patients have medical conditions, such as extreme obesity or uterine fibroids, that can make first-trimester surgical abortion "extremely difficult or impossible." Op. at 20 n.18. The court then proceeded to carve out a "health exception" that allows abortion providers to violate *all* of the State's regulations of abortion-inducing drugs, whenever HB2 prohibits a medication abortion that a "physician determines in appropriate medical judgment" is "necessary for the preservation of the life or health of the mother." Judgment at 2. This was error for three reasons.

First, the notion that the Constitution *compels* the States to go beyond what the FDA has been willing to approve regarding the use of abortion-inducing drugs is not tenable. Before the FDA approved the Mifeprex regimen in 2001, abortion patients could not obtain *any* drug-induced abortions, no matter how impractical or risky a surgical abortion might be for any individual patient. Surely a State in 2000 would not violate the Constitution if it awaited FDA approval before allowing its residents to use abortion-inducing drugs, even if an individual patient could demonstrate a strong medical need for those drugs. *Cf. Abigail Alliance for Better Access to Developmental Drugs v. von Eschenbach*, 495 F.3d 695, 711–14 (D.C. Cir. 2007) (en banc) (patients have no constitutional rights to use drugs that the FDA has not approved as "safe" and "effective"). It follows that States may similarly limit the use of abortion-inducing drugs (and other medications) to the specific protocols approved by the FDA. If doctors and patients have a constitutional right to disregard the FDA's protocols when the physician deems it necessary for the patient's life or health, then it is hard to see how this principle could not extend to the use of drugs that the FDA has refused to approve. Individual doctors do not have a constitutional right to second-guess the FDA's medical judgments, and the Constitution provides no remedy simply because a judge concludes that the FDA has been too slow to approve a drug or update a protocol. *See Gonzales*, 550 U.S. at 164 (holding that 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.") (citation and internal quotation marks omitted).

Second, patients with conditions that make surgical abortions impractical will *still* have access to abortion-inducing drugs up to 49 days LMP under the State's law. The district court never explained why the availability of abortion-inducing drugs up to 49 days LMP imposes an "undue burden" or a "substantial obstacle" on this subset of patients. In a footnote, the district court speculated that it is "possible" that some patients "may discover pregnancy or elect abortion during the period from 50 to 63 days LMP." Op. at 22 n.20. But the district court admitted that no data to this effect were introduced at trial, and in all events there will *always* be a cut-off point at which abortion-inducing drugs can be used. Even under the ACOG protocol favored by the plaintiffs, abortion-inducing drugs are available only until 63 days LMP, and that regime does not impose an unconstitutional "undue burden" simply because it is possible to imagine that some patients will not discover their pregnancy or make up their minds about abortion until after that 63-day window.

Third, the health exception carve-out in the district court's judgment is far too broad. The district court enjoined the State from enforcing not only the FDA protocol, but also: (1) The requirement that the physician "examine the pregnant woman and document, in the woman's medical record, the gestational age and intrauterine location of the pregnancy," TEX. HEALTH & SAFETY CODE § 171.063(c); (2) The requirement that the physician "schedule a follow-up visit for the woman to

occur not more than 14 days after the administration or use of the drug," TEX. HEALTH & SAFETY CODE § 171.063(e); and (3) The requirement that the physician "make a reasonable effort to ensure that the woman returns" for her follow-up visit, TEX. HEALTH & SAFETY CODE § 171.063(f). There is no justification for enjoining the enforcement of *these* requirements, which have nothing to do with patients' access to mifepristone abortions and serve only to protect the health of patients who opt for that procedure.

The district court compounded its error by excusing physicians from complying with the State's regulations of abortion-inducing drugs whenever they "determine[] in appropriate medical judgment" that the use of abortion-inducing drugs "is necessary for the preservation of the life or health of the mother." Judgment at 2. *Gonzales v. Carhart* holds that health-exception carve-outs may be considered "if it can be shown that in *discrete and well-defined instances* a particular condition has or is likely to occur in which the procedure prohibited by the Act must be used." 550 U.S. at 167 (emphasis added). But the district court did not limit its injunction to the "discrete and well-defined instances" described in its opinion. *See* Op. at 18 n. 20 (noting that evidence indicated that surgical abortions may be risky for patients who are "extremely obese, have uterine fibroids distorting normal anatomy, have a uterus that is very flexed, or have certain uterine anomalies"). Instead, the district court created a vague exception that can be invoked by any abortion-performing physician who opines that the use of abortion-inducing drugs after 49

days LMP will benefit his patient's "health." Undefined health exceptions of this sort effectively allow abortion practitioners to disregard state law. *See United States v. Vuitch*, 402 U.S. 62, 72 (1971) (construing an undefined "health" exception in a D.C. abortion statute broadly to include "psychological as well as physical well-being."). That is why Congress refused to provide an open-ended "health" exception in the statute banning partial-birth abortions.

HB 2 already provides an exception to accommodate patients whose lives or physical health are endangered by the statute's regulations on the use of abortion-inducing drugs. *See* HB 2 § 1(4)(B) ("[T]his Act does not apply to abortions that are necessary to avert the death or substantial and irreversible physical impairment of a major bodily function of the pregnant woman."). That suffices to satisfy constitutional requirements, and the district court had no grounds for converting the statute's well-defined exception into a vague and amorphous "health" exception.

B. The Remaining Factors Favor the State.

Refusing to stay the district court's injunction will prevent the State from enforcing a duly enacted statute. HB 2 passed with overwhelming majorities, and enjoining democratically enacted legislation harms a State's officials by keeping them from implementing the will of the people that they represent. *See Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers); *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers) ("[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.").

A stay that allows HB 2 to take effect will not substantially injure abortion patients. The plaintiffs argue that some clinics may close, but *Roe* and *Casey* protect only abortion patients from undue burdens, not abortion clinics. The plaintiffs have offered testimony by abortion providers that, like any business owners, would rather not comply with additional regulation, but plaintiffs have offered no evidence of even a single patient who will be unduly burdened by HB 2.

Finally, a stay pending appeal is in the public interest by definition. A stay of the preliminary injunction would allow Defendants to carry out the statutory policy of the Legislature, which "is in itself a declaration of the public interest." *Virginian Ry. Co. v. Sys. Fed'n No. 40*, 300 U.S. 515, 552 (1937).

II. TEXAS RESPECTFULLY URGES THIS COURT TO SET THIS APPEAL FOR EXPEDITED CONSIDERATION AT THE JANUARY SITTING.

The State respectfully urges this Court to set this appeal for expedited consideration at the January sitting. There appears to be too little time to brief this case for a December hearing. The January sitting, however, is still within reach, if the briefing schedule is compressed. The State has an unquestionable interest in enforcing its duly enacted statutes without delay. *See Shelby County v. Holder*, 133 S. Ct. 2612 (2013). To accommodate this interest, the State agrees to present its case on a

shortened briefing schedule—even if it means that the State gets less time to brief its appeal than the plaintiffs. The State stands ready to file its opening brief within 7 to 10 days of the Court's briefing schedule, giving the plaintiffs as much as 21 days to respond, and leaving 2 or 3 days for the State's reply.

The district court refused to enjoin all of HB 2's requirements that abortion clinics follow the FDA's protocol in prescribing abortion-inducing drugs, (requirements that the plaintiffs alleged would cause irreparable harm to their clinics), so the plaintiffs have a similar incentive to expedite the briefing if they choose to cross-appeal from the district court's judgment.

* * *

The *Casey* standard does not ask whether a law imposes an "undue burden" on abortion providers, but on abortions patients. *Casey*, 505 U.S. at 877 (stating test as whether 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 district court lost sight of this basic principle by equating the potential closure of abortion clinics with a constitutionally impermissible "undue burden." The State is likely to win reversal of the district court's judgment, and the judgment should be stayed pending appeal.

CONCLUSION

The emergency motion for stay pending appeal should be granted. The motion for a compressed briefing schedule and expedited consideration at the January sitting should be granted.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of October, 2013, a copy of this Emergency Motion was served, via the Court's CM/ECF Document Filing System, https://ecf.ca5.uscourts.gov/, upon Plaintiffs' counsel.

/s/ Jonathan F. Mitchell
Jonathan F. Mitchell
Counsel for Appellants

CERTIFICATE OF COMPLIANCE

Counsel also certifies that on October 29, 2013, the foregoing Emergency Motion of Appellants' to Stay Final Judgment Pending Appeal was transmitted to Mr. Lyle W. Cayce, Clerk of the United States Court of Appeals for the Fifth Circuit, via the Court's CM/ECF Document Filing System, https://ecf.ca5.uscourts.gov/.

Counsel further certifies that: (1) required privacy redactions have been made, 5TH CIR. R. 25.2.13; (2) the electronic submission is an exact copy of the paper document, 5TH CIR. R. 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

/s/ Jonathan F. Mitchell
Jonathan F. Mitchell
Counsel for Appellants

CERTIFICATE OF CONFERENCE

On October 28, 2013, plaintiffs indicated by way of e-mail to the Court that they oppose this motion and intend to file an opposition.

/s/ Jonathan F. Mitchell
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