

No. 15-0688

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**In the Supreme Court of Texas**

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JACK PIDGEON AND LARRY HICKS,  
*Petitioners,*

v.

MAYOR SYLVESTER TURNER AND CITY OF HOUSTON,  
*Respondent.*

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On Petition for Review from the  
Fourteenth Court of Appeals, Houston, Texas  
Nos. 14-14-00899-cv, 14-14-00932-cv

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**PETITIONERS' MOTION FOR REHEARING**

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## PETITIONERS' MOTION FOR REHEARING

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TO THE HONORABLE SUPREME COURT OF TEXAS:

Petitioners Jack Pidgeon and Larry Hicks respectfully move for rehearing of this Court's denial of their petition for review. We do not make this request lightly, and we are grateful for the Court's attention to the petition and its request for briefing on the merits. But it is urgent that this Court step in and instruct the district court to narrowly construe the ruling in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015)—and the urgency has only grown since we filed our brief on the merits. Justice Devine's dissent, along with recent rulings of federal courts that continue to abuse the judicial power by imposing ideologies that cannot be found anywhere in the Constitution, make it imperative for this Court to grant the petition for review and announce that the

courts of this State must construe *Obergefell* and similar rulings as narrowly as possible.

**I. THERE IS NO “FUNDAMENTAL RIGHT” FOR MARRIED COUPLES TO RECEIVE TAXPAYER-FUNDED BENEFITS OR SUBSIDIES**

As Justice Devine observed in his dissent, there cannot possibly be a substantive “fundamental right” to spousal employee benefits under the Constitution. *See* App. A. Both the Constitution and the Supreme Court’s decisions give States discretion to decide the benefits (if any) that they offer to the spouses of state employees—and a State could choose to abolish all spousal employee benefits without running afoul of the Constitution or the Supreme Court’s “substantive due process” doctrine. *See* Cass R. Sunstein, *The Right To Marry*, 26 Cardozo L. Rev. 2081, 2092 (2005) (“[E]xisting doctrine does not require economic benefits to be provided to married people as such.”). No city employee—whether heterosexual or homosexual—has a “fundamental right” to receive employee benefits for his or her spouse.

And it is perfectly constitutional for the government to offer benefits or subsidies to *some* married couples while withholding those benefits from others. This was done before *Obergefell*, and it continues to this day. The federal tax code, for example, provides a “child tax credit” to married couples who have children—but only if the child is under the age of 17 and a U.S. citizen or U.S. resident alien. *See* 26 U.S.C. § 24(c). And the tax credit is phased out for married couples whose joint adjusted gross income exceeds \$110,000. *See*

26 U.S.C. § 24(b). So childless married couples are deprived of this subsidy—as are high-income married couples. None of this violates the supposed “right to marry” that the Supreme Court asserted in *Obergefell*.<sup>1</sup> And married couples who are denied this tax credit have not been “exclude[d] . . . from civil marriage” on the same terms and condition as other couples. *Obergefell*, 135 S. Ct. at 2605.

Same-sex couples who are denied spousal employee benefits have not been “exclude[d] . . . from civil marriage” either. And *Obergefell* specifically limited its holding to laws that *exclude* same-sex couples *from civil marriage*; it did not purport to invalidate laws that withhold taxpayer subsidies from same-sex couples, or laws that withhold employee benefits from same-sex spouses. *See Obergefell*, 135 S. Ct. at 2605 (“[T]he State laws challenged by Petitioners in these cases are now held invalid *to the extent they exclude same-sex couples from civil marriage* on the same terms and conditions as opposite-sex couples.”) (emphasis added).

Justice Devine is not the only jurist to recognize that *Obergefell* does not enshrine a substantive constitutional right to spousal benefits from the government. A federal district court in New York held on June 27, 2016, that *Obergefell* does not establish a right to immigration benefits for one’s alien spouse:

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<sup>1</sup> Indeed, this practice is constitutional even though it withholds subsidies from married couples who exercise what the Supreme Court has described as a “fundamental” right—the right to decide “whether to bear or beget a child.” *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

[T]his is not a case concerning the right to marry, or even the right to marry the person of one's choosing. These rights were already realized by Plaintiff when he married his wife in 2006. Instead, this case is about the right to obtain a visa for an alien spouse. Plaintiff argues that this right stems from an expanded view of the fundamental right to marry, which "necessarily incorporates the right . . . to live together as husband and wife." Opp'n at 20. . . . Inferences derived from dicta in a near-century old case cannot overcome the consistent voice of today's courts, which even under a dramatically expanded understanding of fundamental rights have found that there is no such right to immigration benefits for one's alien spouse.

*Parella v. Johnson*, --- F. Supp. 3d ----, 2016 WL 3566861, \*10 (attached to motion as App. B). This new authority confirms what Justice Devine said: *Obergefell* establishes a substantive right only to have one's marriage licensed and recognized by the State, not to obtain any type of government benefits for one's spouse.

## **II. THIS COURT SHOULD INSTRUCT STATE COURTS TO NARROWLY CONSTRUE *OBERGEFELL* BECAUSE THE RULING HAS NO BASIS IN THE CONSTITUTION**

The Supreme Court's ruling in *Obergefell* imposes a "right" that cannot be found anywhere in the Constitution. And the Court's opinion does not even attempt to explain how the language of the fourteenth amendment could support the idea that States must license and recognize marriages between homosexual couples. There is much discussion of "fundamental rights" and "equal dignity," but those phrases do not appear in the Constitution and cannot be invoked to thwart a State's duly enacted laws.

This does not mean that the Court’s ruling in *Obergefell* should be defied—but it should be construed as narrowly as possible. *Obergefell* violates the tenth amendment by intruding on powers reserved to the States, and this Court should not aggravate that unconstitutional intrusion by allowing *Obergefell* to further undermine the State’s policies. See *Graves v. New York*, 306 U.S. 466, 491–92 (1939) (Frankfurter, J., concurring) (“[T]he ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it.”).

The need for this Court to narrowly construe *Obergefell* and clarify state law on same-sex-benefits issues has become even more urgent since we filed our brief on the merits last May. On June 27, 2016, the Supreme Court issued its ruling in *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) (App. C), and held that a Texas law that protects the safety of abortion patients must give way to a court-created right to abortion that cannot be found anywhere in the Constitution. See John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920 (1973). The Supreme Court also disregarded the rules of res judicata and refused to enforce a severability clause in the state’s abortion law, even though the Court’s precedents had held emphatically that severability was a matter of state law that binds the federal courts. See *Dorcy 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.”); *Virginia v. Hicks*, 539 U.S. 113, 121 (2003) (“Severab[ility] is of course a matter of state law. See *Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996)

(per curiam)”). It is clear that the current Supreme Court will continue to use its power to advance the ideology of the sexual revolution until there is a change of membership. And that makes it all the more urgent for this Court to narrowly construe the *Obergefell* ruling and provide clarity for Texans and Texas courts to avoid disrespect of the Constitution and the rule of law.

### **III. THIS COURT SHOULD INSTRUCT STATE COURTS TO NARROWLY CONSTRUE *OBERGEFELL* BECAUSE IT THREATENS THE RELIGIOUS FREEDOM OF THOSE WHO OPPOSE HOMOSEXUAL BEHAVIOR**

There have been further developments since we submitted our brief on the merits that highlight the need for this Court to step in and instruct the state judiciary to narrowly construe *Obergefell*. It is well known that the homosexual-rights movement is not content with the judicial imposition of same-sex marriage in all 50 States; it is also seeking to coerce people of faith who oppose homosexual behavior into participating in same-sex marriage ceremonies. And it has enlisted business corporations to lobby ferociously against any legislative proposal that might protect Christian business owners and employees from being compelled to act in a manner contrary to their sincerely held religious beliefs. See Richard A. Epstein, *The War Against Religious Liberty*, available at <http://www.hoover.org/research/war-against-religious-liberty> (last visited October 3, 2016).

*Obergefell* has emboldened federal judges to go a step beyond even that, by holding that it is *unconstitutional* for a state to enact a religious-freedom law that would shield Christians and others who oppose same-sex marriage

from government penalties for refusing to participate in same-sex marriage ceremonies. On June 30, 2016—52 days after filing the petitioners’ brief on the merits—U.S. District Judge Carlton W. Reeves held that Mississippi violated the Constitution by enacting a law that protects churches, religious organizations, and private citizens from being compelled to participate in same-sex weddings. *See Barber v. Bryant*, --- F. Supp. 3d ----, 2016 WL 3562647 (attached to motion App. D). Judge Reeves held that the State *lacked a rational basis* for enacting this law, and held further that the State violated the establishment clause by enacting a law to protect the religious freedom of its residents. *Id.* at \*21–\*23, \*27–\*32.

But the notion that a freedom-of-conscience law such as this could violate the Constitution is preposterous. American law has long protected and accommodated the conscientious scruples of individuals and institutions who cannot participate in certain activities on account of their religious beliefs or moral convictions. Those who do not believe in swearing oaths are permitted to affirm. *See* U.S. Const. art. II, § 1, ¶ 8; *id.* art. VI, ¶ 3. Pacifists are exempted from military conscription. *See Gillette v. United States*, 401 U.S. 437 (1971). And opponents of abortion are protected from retaliation or discrimination when they refuse to participate in abortion-related activities. *See, e.g.*, 42 U.S.C. § 238n; *see also* Lucas Mlsna, *Stem Cell Based Treatments and Novel Considerations for Conscience Clause Legislation*, 8 Ind. Health L. Rev. 471, 480 (2011). But now it is not enough for same-sex marriage to be made into a constitutional right; we now have federal judges expanding on *Obergefell* by

nullifying conscience-protection laws and declaring that the Constitution requires a regime in which private citizens can be compelled to participate in same-sex marriage ceremonies against their deeply held religious or moral convictions.

\* \* \*

The recent rulings in *Bryant* and *Whole Woman's Health*, and the arguments in *Parella* and Judge Devine's dissent from this Court's denial of the petition, reinforce the need for this Court to save Texas from unchecked ideological rulings from the federal judiciary. We respectfully ask the Court to reconsider its denial of our petition for review, and to grant the petition and hold that *Obergefell* should be narrowly construed by the courts of this State.

### CONCLUSION

The petition for rehearing should be granted, the petition for review should be reinstated.

Respectfully submitted.

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## **CERTIFICATE OF COMPLIANCE**

I certify that this document contains 1,868 words, excluding the portions described in Texas Rule of Appellate Procedure 9.4(i)(1).

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# APPENDIX

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v.

MAYOR SYLVESTER TURNER AND CITY OF HOUSTON, RESPONDENTS

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ON PETITION FOR REVIEW FROM THE  
COURT OF APPEALS FOR THE FOURTEENTH DISTRICT OF TEXAS

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JUSTICE DEVINE, dissenting to the denial of the petition for review.

Without substantial discussion or analysis, the court of appeals assumed that because the United States Supreme Court declared couples of the same sex have a fundamental right to marry, the Equal Protection Clause of the Fourteenth Amendment requires cities to offer the same benefits to same-sex spouses of employees as to opposite-sex spouses. *See Parker v. Pidgeon*, 477 S.W.3d 353, 354–55 (Tex. App.—Houston [14th Dist.] 2015) (per curiam). I disagree. Marriage is a fundamental right. Spousal benefits are not. Thus, the two issues are distinct, with sharply contrasting standards for review. Because the court of appeals’ decision blurs these distinctions and threatens constitutional standards long etched in our nation’s jurisprudence, I would grant review.

## I

A 2001 amendment to the Houston City Charter prohibits the City from “provid[ing] employment benefits, including health care, to persons other than employees, their legal spouses and

dependent children.” Houston, Tex., Charter, art. II, § 22. Because Texas law defined marriage to exist only between persons of the opposite sex, same-sex partners were accordingly not entitled to receive such benefits. In November 2013, however, the City announced it would change course. It began offering benefits such as health insurance to same-sex partners of City employees if they married in a state that recognized same-sex marriage. It did so despite a Texas law expressly prohibiting it from giving effect to a “right or claim to any . . . benefit . . . asserted as a result of a marriage between persons of the same sex.” TEX. FAM. CODE § 6.204(c)(2).

Two Houston taxpayers sued the City and its Mayor (collectively, the “City”), seeking temporary and permanent injunctions prohibiting the City from providing benefits to same-sex spouses of City employees married in other states. *See Williams v. Lara*, 52 S.W.3d 171, 179 (Tex. 2001) (“Taxpayers in Texas have standing to enjoin the illegal expenditure of public funds . . .”). The City countered with a plea to the jurisdiction. After the trial court denied the City’s plea and granted a temporary injunction, the City filed an interlocutory appeal. TEX. CIV. PRAC. & REM. CODE § 51.014(a)(4), (8).

While the City’s appeal was pending, the Supreme Court of the United States decided *Obergefell v. Hodges*, announcing that “same-sex couples may exercise the fundamental right to marry in all States,” and “there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the grounds of its same-sex character.” 135 S. Ct. 2584, 2607–08 (2015). Citing *Obergefell*, the court of appeals reversed the trial court’s temporary injunction and remanded for further proceedings. 477 S.W.3d at 354–55.

The taxpayers petitioned for review in this Court, urging that *Obergefell* does not require the City to offer employment benefits to same-sex spouses of City employees and Texas law prohibits the City from doing so. The City responded that this Court lacks jurisdiction over this interlocutory appeal and the Constitution requires the City to extend benefits to all spouses of City employees.

## II

*Obergefell* concerned access to marriage, not an Equal Protection challenge to the allocation of employment benefits. The court of appeals apparently assumed that, if the Supreme Court concluded no government interest justifies recognizing marriage as only between couples of the opposite sex, then no interest justifies offering different benefits to same-sex and opposite-sex spouses of City employees. But, as discussed below, marriage—not spousal employment benefits—is a fundamental right, and laws limiting access to a fundamental right receive stricter scrutiny than laws distributing government benefits. As the majority in *Obergefell* recognized, “the Constitution contemplates that democracy is the appropriate process for change” when fundamental rights are not at stake. 135 S. Ct. at 2605.

By assuming the wrong level of scrutiny, the court of appeals removed an important policy decision from the democratic process, preventing the State from pursuing legitimate and important government interests. The court of appeals’ error and the uncertainty it creates vests this Court with jurisdiction, *see Dallas Area Rapid Transit v. Amalgamated Transit Union Local No. 1338*, 273 S.W.3d 659, 667 (Tex. 2008), and I believe we should grant review to correct it.



## A

It is well settled that laws abridging a fundamental right or classifying persons according to “race, alienage, or national origin” receive stricter scrutiny than those that do not. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985). Strict scrutiny “is a searching examination,” *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2419 (2013), demanding that the law be “narrowly tailored to serve a compelling government interest,” *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1672 (2015); *Fisher*, 133 S. Ct. at 2419. Only compelling interests justify such restrictions, and even then there must be a close fit between the restrictions and their goal. *Cleburne*, 473 U.S. at 440.

Strict review gives way to substantial deference when fundamental rights or protected classes are not at stake. In such cases, “courts generally view constitutional challenges with the skepticism due respect for legislative choices demands.” *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 426 (2010) (footnote omitted); see *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 366 (2001). Legislation is generally “presumed to be valid” if the distinctions made by the statute are “rationally related to a legitimate state interest.” *Cleburne*, 473 U.S. at 440.

These divergent levels of scrutiny serve a purpose: they balance the government’s power to act in the public good against individual liberty and freedom. From the Founding to modern times, it has always been understood that legislatures, rather than courts, decide what policies are in the people’s best interest. In Alexander Hamilton’s words, “[t]he legislature . . . prescribes the rules by which the duties and rights of every citizen are to be regulated,” whereas the judiciary “may truly be said to have neither force nor will, but merely judgment.” *THE FEDERALIST* NO. 78, at 490 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961). These same principles emerge in the

“minimum ‘rational-basis review’” applicable to general social and economic legislation. *See Garrett*, 531 U.S. at 366. When fundamental rights and protected classes are not at stake, the legislature may identify goals and take rational steps toward them.

The court of appeals upset this balance between the judiciary and the legislature by inappropriately applying strict scrutiny. The Supreme Court’s holding in *Obergefell* hinged on marriage’s status as a fundamental right. *Obergefell*, 135 S. Ct. at 2604. This case, however, involves employment benefits, which the City obviously has no constitutional duty to offer to its employees, let alone their spouses. Though the laws in *Obergefell* denying access to marriage were subject to strict scrutiny, the laws in this case allocating benefits among married couples are not.

Indeed, criteria that cannot be used to restrict marriage may still be relevant when allocating benefits. Consider, for example, that the Supreme Court allowed the government to condition continued eligibility for child disability benefits on not marrying someone who did not also qualify for these benefits, even though the government obviously could not bar disabled persons from marriage for failing this requirement. *Califano v. Jobst*, 434 U.S. 47, 58 (1977). Similarly, the Supreme Court allowed Congress to grant continued social security survivor’s benefits to widows who remarried after 60, but terminate the same benefits to divorced persons who remarried after 60. *Bowen v. Owens*, 476 U.S. 340, 341–42, 350 (1986). This condition was acceptable for allocating benefits, but could not have been used to prevent anyone from marrying. The same distinction applies here.

The City, however, emphasizes *Obergefell*’s holding that states may not “exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.” *Obergefell*,

135 S. Ct. at 2605. But *Obergefell* concerned same-sex couples’ right to marry—i.e., to enter into marriage—and must be interpreted accordingly. In Texas, both same- and opposite-sex couples must obtain a marriage license from a county clerk. TEX. FAM. CODE § 2.001(a). They must generally be over 18 years of age, *id.* § 2.101, should provide proof of their age and identity, *id.* § 2.005(a), and should not be closely related to the intended spouse or be already married to someone else, *id.* §§ 2.004(b)(5)–(6), .009(a)(5). These are the types of “terms and conditions” that the Supreme Court held states must allow same-sex couples to enter into marriage on. *Obergefell* did not require that the same benefits be provided to all.

Thus, claims by same-sex spouses of City employees to employment benefits do not enjoy the benefit of strict scrutiny. Indeed, in *Romer v. Evans*, the Supreme Court considered whether a law denying special protections to homosexuals had “a rational relation to some legitimate end.” 517 U.S. 620, 631 (1996). In *United States v. Windsor*, the Court examined whether federal law defining marriage as between a man and a woman had a “legitimate purpose.” 133 S. Ct. 2675, 2696 (2013). And in *Obergefell*, when the majority conceded that democracy is normally “the appropriate process for change,” it made an exception only for laws abridging fundamental rights, without suggesting that same-sex couples are a suspect class. 135 S. Ct. at 2605.

Admittedly, the *Obergefell* majority assumed same- and opposite-sex couples would receive the same benefits, reasoning that “[w]ere the Court to stay its hand to allow slower, case-by-case determination of the required availability of specific public benefits to same-sex couples, it still would deny gays and lesbians many rights and responsibilities intertwined with marriage.” *Id.* at 2606. The Court described the many benefits married couples enjoy, noting that no difference exists

“between same- and opposite-sex couples with respect to” how the states have “contributed to the fundamental character” of marriage by tying so many rights and responsibilities to it. *Id.* at 2601. Yet, the fact remains that, at most, the majority merely *described* the benefits that states confer on married couples and *assumed* states would extend them to all married couples. Generalized assumptions about state laws do not constitute a legal holding, much less sweep aside well-established standards of review.

Lest there be any doubt about *Obergefell*’s limited role when fundamental rights are not at stake, the Supreme Court has repeatedly (even more recently than *Obergefell*) admonished that

[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [other courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.

*Hurst v. Florida*, 136 S. Ct. 616, 623 (2016) (alteration in original) (quoting another source); *see also Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). To the extent *Obergefell*’s wording casts doubt on the traditional deference owed to the democratic process when neither fundamental rights nor suspect classes are involved, we must still follow the Supreme Court’s well-established Equal Protection jurisprudence.

## B

The “[i]nherent differences between men and women” are, as Justice Ginsburg once explained, “cause for celebration.” *United States v. Virginia*, 518 U.S. 515, 533 (1996). The “two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both.” *Id.* (alteration in original) (quoting *Ballard v. United States*, 329 U.S. 187, 193

(1946)). Surely the same is true in marriage, the closest and most intimate of communities in our nation. Yet, by applying strict scrutiny, the court of appeals foreclosed any argument that the State has a legitimate or important interest in celebrating these differences when they occur in marriage.

Consider the State's interest in encouraging procreation. The State may well have believed that offering certain benefits to opposite-sex couples would encourage procreation within marriage. After all, benefits such as health insurance provide financial security as couples decide whether to have a child. An opposite-sex marriage is the only marital relationship where children are raised by their biological parents. In any other relationship, the child must be removed from at least one natural parent, perhaps two, before being adopted by her new parent(s). This does not diminish any child's inherent dignity, a fact the City presumably recognizes by extending benefits to their employees' children regardless of the employees' marital status. But it does explain why the State might choose to direct resources to opposite-sex couples.

Conversely, at least five justices of the Supreme Court have reasoned that the government has a compelling interest in ensuring access to contraception. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2785–86 (2014) (Kennedy, J., concurring); *id.* at 2787, 2799 (Ginsburg, J., dissenting, joined by Justices Breyer, Kagan, and Sotomayor). Obviously, any government interest in providing access to contraceptives is linked to opposite-sex couples: they must plan *not* to get pregnant, whereas same-sex couples must undergo extensive planning and preparation before adopting or using in-vitro fertilization. Again, differences exist between same- and opposite-sex couples, and such differences may explain the State's allocation of benefits.

Admittedly, the State’s policy is not perfect. Not all opposite-sex couples want, or are even capable of, procreation. But if rational-basis review instead of strict scrutiny applies, then the imperfections are not fatal. “The rationality commanded by the Equal Protection Clause does not require States to match [class] distinctions and the legitimate interests they serve with razorlike precision.” *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 83–84 (2000) (discussing age discrimination). At times, the State may rely on one characteristic—such as the opposite-sex nature of a marriage—as a proxy for other abilities—such as procreation within marriage—that relate to the State’s interests. *See id.* at 84 (discussing age as a proxy for other traits). It is enough that there is “a rational reason for the difference” in treatment. *Engquist v. Or. Dep’t of Agric.*, 553 U.S. 591, 602 (2008).

The State’s policy is viable even under intermediate scrutiny, which is traditionally reserved for gender-based discrimination. *See, e.g., Virginia*, 518 U.S. at 532–33 (discussing gender discrimination). Such discrimination “violates equal protection unless it serves important governmental objectives and [] the discriminatory means employed are substantially related to the achievement of those objectives.” *United States v. Morrison*, 529 U.S. 598, 620 (2000) (internal quotation marks omitted). Although sex-based distinctions must rest on more than “overbroad generalizations about the different talents, capacities, or preferences of males and females,” government may still recognize physical and inherent differences between men and women. *Virginia*, 518 U.S. at 533.

Chief among the “biological difference[s]” recognized by the Court is the capacity for childbirth. *See Nguyen v. INS*, 533 U.S. 53, 64 (2001). For example, that the mother but not the father must be physically present at their child’s birth justifies different naturalization requirements

for children born abroad to an American father as opposed to an American mother. *Id.* at 64, 66–67. That “[o]nly women may become pregnant” justifies criminalizing a man’s act of having sexual intercourse with an underage female without similarly penalizing women for having intercourse with an underage male. *See Michael M. v. Super. Ct. of Sonoma Cnty.*, 450 U.S. 464, 471–73 (1981) (plurality opinion). And that only opposite-sex couples may procreate justifies limiting government incentives and security for childbearing to spouses of the opposite sex from the City’s employees.

Some may argue that animus motivated Texas’ law. When the legislature acts only out of “animus toward the class it affects,” the law lacks a legitimate basis and is facially invalid. *Romer*, 517 U.S. at 632, 635–36 (striking down provision of Colorado Constitution); *see also Windsor*, 133 S. Ct. at 2693. Yet, for the provision to be facially unconstitutional, there must be “no set of circumstances under which [it] would be valid,” or it must lack any “plainly legitimate sweep.” *United States v. Stevens*, 559 U.S. 460, 472–73 (2010) (quoting other sources); *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008).

Here, insofar as the Texas law allocates benefits that were granted to encourage procreation within a family, the law clearly has a legitimate sweep. The constitutionality of the Defense of Marriage Act, struck down in *United States v. Windsor*, is irrelevant. The Court in *Windsor* held Congress had no legitimate purpose in withholding federal marital rights and responsibilities from same-sex couples validly married under state law. *Windsor*, 133 S. Ct. at 2693–94. But the Court’s reasoning emphasized that Congress could not defy the classification already made by state law, and it did not prohibit states from deciding on their own how to allocate marital benefits. *See id.*

If the government may extend benefits to some disabled persons but disqualify others based on who they marry, *Jobst*, 434 U.S. at 57–58, or provide survivors’ benefits to some widows who remarry but deny them to others, *Bowen*, 476 U.S. at 350, then surely the State may limit spousal employment benefits to spouses of the opposite sex. Only these spouses are capable of procreation within their marriage, and the State has an interest in encouraging such procreation. The State’s policy “seeks to foster the opportunity for meaningful parent-child bonds to develop,” and therefore “has a close and substantial bearing on the governmental interest in the actual formation of that bond.” *See Nguyen*, 533 U.S. at 70. By misapplying *Obergefell*, the court of appeals overlooked this legitimate and important interest.

\* \* \*

Texas, as it allocates benefits to employees’ spouses, may recognize the differences between same- and opposite-sex spouses. To withhold this decision from the people is to undermine precedent, democracy, and the limited role of courts in our nation. It bears repeating that the Supreme Court in *Obergefell* embraced “democracy [as] the appropriate process for change, so long as that process does not abridge fundamental rights.” 135 S. Ct. at 2605. I would take the Court at its word. Because the court of appeals did not, I respectfully dissent to the denial of the petition for review.

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John P. Devine  
Justice

Opinion delivered: September 2, 2016



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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

ALFRED PARELLA,

Plaintiff,

-against-

1:15-cv-0863 (LEK/DJS)

JEH JOHNSON, Secretary, Department  
of Homeland Security, *et al.*,

Defendants.

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**MEMORANDUM-DECISION and ORDER**

**I. INTRODUCTION**

Plaintiff Alfred Parella (“Plaintiff”) commenced this action against various officers and employees of the United States (collectively, “Defendants”), alleging violations of his constitutional rights and of the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 551 *et seq.* Dkt. No. 1 (“Complaint”). Specifically, Plaintiff challenges orders of the United States Citizenship and Immigration Services (“USCIS”)<sup>1</sup> denying petitions that sought to classify his alien wife as an immediate relative and thereby obtain lawful permanent residence for her. Compl. ¶¶ 6-7, 25-33; Dkt. Nos. 1-1 to -3 (“Exhibits 1-3”); see also 8 U.S.C. §§ 1151(b)(2)(A)(i), 1154(a)(1)(A)(i). These petitions were denied because 8 U.S.C. § 1154(a)(1)(A)(viii)(I) removes the right to petition from any “citizen of the United States who has been convicted of a specified offense against a minor, unless the Secretary of Homeland Security, in the Secretary’s sole and unreviewable discretion, determines that the citizen poses no risk to the alien with respect to whom [the] petition . . . is

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<sup>1</sup> USCIS is a part of the Department of Homeland Security.

filed.” See Compl. ¶ 7; Exs. 1-3.<sup>2</sup>

On October 9, 2015, Defendants filed a Motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim. Dkt. No. 10 (“Motion”); see also Dkt. Nos. 13 (“Opposition”); 14 (“Reply”). For the reasons stated below, Defendants’ Motion is granted.

## **II. BACKGROUND**

### **A. Plaintiff’s Criminal History and the Adam Walsh Act**

The following facts are taken from the Complaint and are assumed to be true for purposes of Defendants’ Motion. Plaintiff is a United States citizen who, in 2000, was convicted by the New York state courts of sexual abuse in the first degree. Compl. ¶ 8; see also N.Y. PENAL LAW § 130.65(1) (“A person is guilty of sexual abuse in the first degree when he or she subjects another person to sexual contact . . . [b]y forcible compulsion.”). The victim of this offense was a minor. Compl. ¶ 7; see also Ex. 2 at 2 (noting that Plaintiff was “charged with sexually abusing a 15 year old girl”).

In 2006, Congress passed the Adam Walsh Child Protection and Safety Act (“AWA”), Pub. L. No. 109-248, 120 Stat. 587 (2006). In relevant part, the AWA barred United States citizens from petitioning for the classification of an alien as the citizen’s immediate relative when the citizen “has been convicted of a specified offense against a minor, unless the Secretary of Homeland Security, in the Secretary’s sole and unreviewable discretion, determines that the citizen poses no risk to the alien with respect to whom [the] petition . . . is filed.” 8 U.S.C. § 1154(a)(1)(A)(viii)(I); see also 42

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<sup>2</sup> “On a motion to dismiss, the court may consider ‘any written instrument attached to [the complaint] as an exhibit or any statements or documents incorporated in it by reference.’” Yak v. Bank Brussels Lambert, 252 F.3d 127, 130 (2d Cir. 2001) (alteration in original) (quoting Cortec Indus., Inc. v. Sum Holding L.P., 949 F.2d 42, 47 (2d Cir. 1991)).

U.S.C. § 16911(7), (14) (defining the term “specified offense against a minor”).<sup>3</sup> Plaintiff’s conviction for sexual abuse in the first degree qualifies under the AWA as a specified offense against a minor. Compl. ¶ 7; see also Exs. 1-3.

On February 8, 2007, without notice-and-comment rulemaking, “USCIS issued a policy memorandum adopting a new standard” for making the determination that “the citizen poses no risk to the alien” as required by the AWA. Compl. ¶¶ 37-38; Memorandum from Michael Aytes, Assoc. Dir., USCIS, to Reg’l Dirs. et al. (Feb. 8, 2007) (“Aytes Memo”). Under the Aytes Memo, a citizen seeking approval of a petition who has been convicted of a specified offense against a minor “must submit evidence of rehabilitation and any other relevant evidence that clearly demonstrates, *beyond any reasonable doubt*, that he or she poses no risk to the safety and well-being of his or her intended beneficiary(ies).” Aytes Memo at 5 (emphasis added); accord Compl. ¶ 39. Pursuant to the Aytes Memo, this demonstration is required even when “none of the intended beneficiaries are children,” in which case the question is “whether the petitioner poses any risk to the safety or well-being of the adult beneficiary.” Aytes Memo at 7; accord Compl. ¶ 39.

On September 24, 2008, “USCIS issued another memorandum regarding AWA cases”—again without notice-and-comment rulemaking procedures—“transmit[ting] a Standard Operating Procedure . . . for the adjudication of [petitions] under the [AWA].” Compl. ¶¶ 40, 44-45; Memorandum from Donald Neufeld, Acting Assoc. Dir., USCIS, to Field Leadership (Sept. 24, 2008) (“Neufeld Memo”). The Neufeld Memo states that:

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<sup>3</sup> The Secretary of Homeland Security has delegated authority to make the “no risk” determination to USCIS. Dep’t of Homeland Sec. Delegation No. 0150.1 § II(W) (June 5, 2003); see also 8 C.F.R. § 2.1 (“The Secretary of Homeland Security may, in the Secretary’s discretion, delegate any such authority or function to any official, officer, or employee of the Department of Homeland Security . . .”).

USCIS interprets the “poses no risk to the beneficiary” provision to mean that the petitioner must pose no risk to the safety or well-being of the beneficiary, including the principal beneficiary and any alien derivative beneficiary. A petitioner who has been convicted of a specified offense against a minor must submit evidence that clearly demonstrates, beyond any reasonable doubt, that he or she poses no risk to the safety and well-being of his or her intended beneficiary(ies). Generally, rehabilitation is paramount to the “poses no risk” determination.

Neufeld Memo at 9; Compl. ¶ 43. The Neufeld Memo also notes that, “given the nature and severity of many of the underlying offenses and the intent of the AWA, approval recommendations should be rare.” Neufeld Memo at 2 (emphasis omitted).

### **B. Plaintiff’s Petitions and Administrative Appeal**

In 2006, Plaintiff married his wife, Olga Parella, who is a foreign national. Compl. ¶¶ 11, 19, 25.<sup>4</sup> On February 7, 2007, Plaintiff filed a Petition for Alien Relative, or Form I-130, seeking classification of his wife as an immediate relative and a corresponding change in her immigration status. Compl. ¶ 29; Ex. 1 at 4.<sup>5</sup> On September 24, 2007, USCIS responded to the petition with a “Request for Evidence and Notice of Intent to Deny” (“RFE/NOID”) based on Plaintiff’s conviction for sexual abuse, and Plaintiff was given 30 days to respond with evidence showing that he poses no risk to his alien spouse. Ex. 1 at 4. Plaintiff submitted a significant amount of evidence in response to the RFE/NOID. See id. at 4-5. Despite this evidence, USCIS denied Plaintiff’s petition, finding that his “evidence does not demonstrate, beyond a reasonable doubt, that [Plaintiff] pose[s] no risk

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<sup>4</sup> Plaintiff also states that their marriage is “a loving and nurturing relationship” and that his wife was “fully aware of the facts and circumstances of his conviction and freely chose to marry him and live with him.” Compl. ¶¶ 10-11.

<sup>5</sup> For this Exhibit, the Court uses the pagination assigned by the Court’s Electronic Court Filing (“ECF”) system.

to the safety and well-being of [his] beneficiary.” Id. at 4, 9-10; Compl. ¶ 30.

On August 2, 2010, Plaintiff again filed a Form I-130 to classify his wife as an immediate relative. Compl. ¶ 31; Ex. 2 at 1. “On July 6, 2011, USCIS requested that [Plaintiff] submit evidence that demonstrates, beyond any reasonable doubt, that [he] pose[s] no risk to the safety and well-being of the beneficiary.” Ex. 2 at 3. Again, Plaintiff submitted evidence in response to this demand. See id. at 3-4. On January 19, 2012, USCIS again concluded, “in its exercise of sole and unreviewable discretion, that [Plaintiff] ha[s] not sufficiently demonstrated that [he] pose[s] no risk to the beneficiary” and accordingly denied his petition. Id. at 4; Compl. ¶ 32. Plaintiff then appealed this determination to the Board of Immigration Appeals (“BIA”). Compl. ¶ 33; Ex. 3. On March 24, 2015, the BIA denied Plaintiff’s appeal, holding that the BIA “lack[s] jurisdiction to review [USCIS’s] risk determination,” since the AWA provides that this “determination lies within the sole and unreviewable discretion of the Secretary.” Ex. 3.

### **C. Procedural History**

On July 7, 2015, Plaintiff filed this lawsuit, seeking relief from the denials of his I-130 petitions. Compl. In the Complaint, Plaintiff sets out six causes of action: (1) application of the AWA against Plaintiff is an unconstitutional ex post facto application of law, (2) the denial of Plaintiff’s petitions violates his right to procedural and substantive due process, (3) the AWA’s petition bar is an unconstitutionally excessive punishment, (4) USCIS’s interpretation of the AWA (pursuant to the Aytes and Neufeld Memos) is arbitrary and capricious in violation of the APA, (5) USCIS was required to employ notice-and-comment rulemaking in the adoption of the Aytes and Neufeld Memos, and (6) the Aytes and Neufeld Memos exceed USCIS’s statutory authority. Compl. ¶¶ 51-115.

On October 9, 2015, Defendants moved to dismiss the Complaint, arguing that the Court lacks subject matter jurisdiction over Plaintiff's procedural due process claim and Plaintiff's APA claims. Mot.; see also Dkt. No. 10-1 ("Defendants' Memorandum") at 5. Defendants contend that 8 U.S.C. § 1252(a)(2)(B) bars the Court from reviewing these claims, since the statute strips courts of jurisdiction to review any "decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under [the immigration code] to be in the discretion of the Attorney General or the Secretary of Homeland Security." Additionally, Defendants moved to dismiss any remaining claims on the ground that Plaintiff's Complaint fails to state a claim for which relief may be granted. Mot.; Defs.' Mem. at 10-25.

### **III. LEGAL STANDARD**

#### **A. Subject Matter Jurisdiction**

Rule 12(b)(1) of the Federal Rules of Civil Procedure allows motions to dismiss for lack of subject matter jurisdiction. "Dismissal of a case for lack of subject matter jurisdiction under Rule 12(b)(1) is proper 'when the district court lacks the statutory or constitutional power to adjudicate it.'" Ford v. D.C. 37 Union Local 1549, 579 F.3d 187, 188 (2d Cir. 2009) (quoting Makarova v. United States, 201 F.3d 110, 113 (2d Cir. 2000)).

When the challenge to subject matter jurisdiction is facial—namely, when it is "based solely on the allegations of the complaint or the complaint and exhibits attached to it"—the Court must accept the plaintiff's factual allegations as true and draw "all reasonable inferences in favor of the plaintiff." Carter v. HealthPort Techs., LLC, No. 15-1072, 2016 WL 2640989, at \*6 (2d Cir. May 10, 2016) (quoting Lunney v. United States, 319 F.3d 550, 554 (2d Cir. 2003)). If, however, the jurisdictional challenge is based on factual evidence provided by the defendant, "plaintiffs will need

to come forward with evidence of their own to controvert that presented by the defendant.” Id. at \*7. In such a case, “[t]he plaintiff bears the burden of proving subject matter jurisdiction by a preponderance of the evidence.” Aurecchione v. Schoolman Transp. Sys., Inc., 426 F.3d 635, 638 (2d Cir. 2005).

### **B. Failure to State a Claim**

To survive a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, a “complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). A court must accept as true the factual allegations contained in a complaint and draw all inferences in favor of the plaintiff. See Allaire Corp. v. Okumus, 433 F.3d 248, 249-50 (2d Cir. 2006). A complaint may be dismissed pursuant to Rule 12(b)(6) only when it appears that there are not “enough facts to state a claim to relief that is plausible on its face.” Twombly, 550 U.S. at 570. Plausibility requires “enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of [the alleged misconduct].” Id. at 556. The plausibility standard “asks for more than a sheer possibility that a defendant has acted unlawfully.” Iqbal, 556 U.S. at 678 (citing Twombly, 550 U.S. at 556). “[T]he pleading standard Rule 8 announces does not require ‘detailed factual allegations,’ but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” Id. (citing Twombly, 550 U.S. at 555). Where a court is unable to infer more than the mere possibility of the alleged misconduct based on the pleaded facts, the pleader has not demonstrated that she is entitled to relief and the action is subject to dismissal. See id. at 678-79.



#### IV. DISCUSSION

##### A. Subject Matter Jurisdiction

“Federal courts are courts of limited jurisdiction,” and “possess only that power authorized by Constitution and statute.” Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994). The extent of this power is limited where, as here, Congress imposes specific jurisdictional restrictions by statute. Specifically, 8 U.S.C. § 1252(a)(2)(B) provides that “no court shall have jurisdiction to review . . . any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under [the immigration code] to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of [asylum].”

Defendants in this case argue that this provision precludes review of USCIS’s decisions on Plaintiff’s I-130 petitions, thus barring Plaintiff’s procedural due process and APA claims. Mot.; Defs.’ Mem. at 5. Defendants are partially correct: while the Court cannot hear Plaintiff’s claim that USCIS’s decisions were arbitrary and capricious (and thus in violation of the APA), the Court does have subject matter jurisdiction to hear Plaintiff’s constitutional claims and his other APA claims (namely his claims that the Aytes and Neufeld Memos were improperly adopted and exceed statutory authority).

The question for each claim in determining whether the Court has subject matter jurisdiction is whether or not the claim constitutes a challenge to USCIS’s exercise of discretion. See 8 U.S.C. § 1252(a)(2)(B); see also 5 U.S.C. § 701(a)(2) (prohibiting judicial review when “agency action is committed to agency discretion by law”). Any challenge to USCIS’s no risk determination itself is barred because the statute expressly leaves this determination to “the Secretary’s sole and

unreviewable discretion.” 8 U.S.C. § 1154(a)(1)(A)(viii)(I); see also Heckler v. Chaney, 470 U.S. 821, 830 (1985) (finding judicial review under the APA unavailable “when Congress has expressed an intent to preclude judicial review” or when “the statute . . . can be taken to have ‘committed’ the decisionmaking to the agency’s judgment absolutely”). Accordingly, insofar as Plaintiff’s Complaint states any claim that USCIS’s decisions with respect to his particular case were arbitrary and capricious, the Court lacks subject matter jurisdiction to hear it.<sup>6</sup> See Ruiz v. Mukasey, 552 F.3d 269, 276 n.5 (2d Cir. 2009) (“[F]actual determinations regarding whether an applicant convicted of an offense against a minor will pose a risk to the alien on whose behalf an I-130 application is filed are committed to the ‘unreviewable discretion’ of the Secretary of Homeland Security.”).

This commitment to agency discretion must also bar the Court’s review of whether the adoption of the standards specified in the Aytes and Neufeld Memos was similarly arbitrary and capricious. If the decision as to whether a petitioner poses no risk to an alien beneficiary is left to “the Secretary’s sole and unreviewable discretion,” the Secretary’s choice of guidelines specifying how USCIS is to exercise this discretion also cannot be subject to judicial review. See Struniak v. Lynch, No. 15-CV-1447, 2016 WL 393953, at \*8 (E.D. Va. Jan. 29, 2016) (“The weighing of individual pieces of evidence cannot yield a final result if one does not know how much weight is necessary to reach a conclusion. In light of this reality, the Secretary of Homeland Security has established, via the Aytes Memorandum, that discretion should only be exercised in favor of making a ‘no risk’ determination if there is evidence sufficient to conclude beyond a reasonable doubt that a

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<sup>6</sup> Plaintiff repeatedly states in his papers that he “does not challenge” USCIS’s “‘no risk’ determination” itself. E.g., Opp’n at 5-7.

petitioner poses no risk to his beneficiary. . . . Because the burden of proof, like the weighing of evidence, is a necessary component in formulating a discretionary determination, § 1252(a)(2)(B)(ii) withdraws subject matter jurisdiction to review the burden employed.”). As such, the Court lacks subject matter jurisdiction to hear Plaintiff’s arbitrary-and-capricious claims.

The Court does, however, possess jurisdiction to hear Plaintiff’s remaining procedural and constitutional claims, including his claims that the standards expressed in the Aytes and Neufeld Memos were ultra vires and were required to undergo notice and comment. These claims do not constitute a challenge to USCIS’s exercise of discretion, but instead challenge the agency’s actions as procedurally or constitutionally unlawful.

The Second Circuit recently addressed the distinction between challenges to the Secretary’s exercise of discretion and procedural and constitutional challenges in Mantena v. Johnson, 809 F.3d 721 (2d Cir. 2015), a case concerning the revocation of an employment visa petition. There, the court reiterated that “the Secretary may well not have complete discretion over the *procedure* for making a decision, even if the *substantive* decision falls within his discretion.” Id. at 729. In Mantena, the plaintiff challenged the Secretary’s decision on the ground that it failed to comply with the Department’s own regulations. Id. at 728-29. Accordingly, the Circuit found that § 1252(a)(2)(B)’s jurisdictional bar did not apply and that the district court should have reached the merits of the plaintiff’s complaint. Id. at 728-30; accord Kurapati v. U.S. Bureau of Citizenship & Immigration Servs., 775 F.3d 1255, 1261-62 (11th Cir. 2014). While the challenge in Mantena was based on an I-140 petition and a failure to comply with regulations, its reasoning equally applies to an I-130 petition and a challenge based on a failure to comply with statutes (namely, the APA and the AWA itself).

Defendants also argue that the Court lacks subject matter jurisdiction to hear Plaintiff's procedural due process claim, but Mantena similarly forecloses this argument. It makes no difference whether the procedural requirement stems from the agency's own regulation, a federal statute, or from the Constitution itself: compliance with the law (and especially with the Constitution) is not subject to the agency's discretion. See Garcia v. Neagle, 660 F.2d 983, 988 (4th Cir. 1981) ("Where the controlling statute indicates that particular agency action is committed to agency discretion, a court may review the action if there is a claim that the agency has violated constitutional, statutory, regulatory or other restrictions, but may not review agency action where the challenge is only to the decision itself." (citing Ness Inv. Corp. v. USDA, 512 F.2d 706, 715 (9th Cir. 1975))). Indeed, in Mantena, the district court found subject matter jurisdiction over the plaintiff's procedural due process claim and proceeded to address it on the merits, a path that the Circuit did not disturb. See 809 F.3d at 727; see also Reynolds v. Johnson, 628 F. App'x 497, 498 (9th Cir. 2015) (reversing the district court for finding a lack of subject matter jurisdiction over the plaintiff's constitutional claim concerning the AWA); Makransky v. Johnson, No. 15-CV-1259, 2016 WL 1254353, at \*3-4 (E.D.N.Y. Mar. 29, 2016) (finding subject matter jurisdiction over a constitutional challenge to the AWA). Additionally, "where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear . . . in part to avoid the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." Webster v. Doe, 486 U.S. 592, 603 (1988).

For the reasons stated above, Plaintiff's arbitrary-and-capricious APA claims, Compl. ¶¶ 87-94, are dismissed for lack of subject matter jurisdiction. For Plaintiff's remaining claims, the Court finds that it does have subject matter jurisdiction and thus proceeds to consider whether Plaintiff

successfully states a claim for which relief may be granted.

## **B. Failure to State a Claim**

### *1. Ex Post Facto Law*

The Constitution prohibits the adoption of any ex post facto law, U.S. CONST. art. I, § 9, cl. 3, a mandate that prevents “retroactive application of penal legislation,” Landgraf v. USI Film Prods., 511 U.S. 244, 266 (1994). In United States v. Ward, 448 U.S. 242 (1980), the Supreme Court outlined a two-part test for determining whether a statutory provision is civil or criminal in nature, and thus whether the Ex Post Facto Clause applies. “First, we have set out to determine whether Congress, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other. Second, where Congress has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect as to negate that intention.” Id. at 248-49 (citation omitted); accord Doe v. Pataki, 120 F.3d 1263, 1274-75 (2d Cir. 1997).

Addressing the first prong, the AWA lists titles for the relevant sections as “Immigration Law Reforms to Prevent Sex Offenders from Abusing Children,” and “Barring Convicted Sex Offenders from Having Family-Based Petitions Approved.” Pub. L. No. 109-248, tit. IV, 120 Stat. 587, 622. Nothing in these titles suggests that the provisions in question are intended to be punitive instead of designed to prospectively guard potential immigrants from previously convicted sex offenders. The only nonconclusory allegation on this point provided by Plaintiff is a reference to a speech by Senator Patrick Leahy, in which the Senator argues that the relevant section of the AWA could “harshly and unnecessarily penalize *people seeking entry to the United States who have a family member in the country.*” 152 Cong. Rec. S8028 (2006) (emphasis added); Compl. ¶ 57.

Even if Senator Leahy’s individual speech could be said to “indicate[] an intention” of Congress, Ward, 448 U.S. at 248, his language plainly reflected a concern that the AWA would “harshly and unnecessarily penalize” the *beneficiary*, not the citizen petitioner. As such, Plaintiff has alleged no facts—and the Court can find none—showing that the immigration provision of the AWA was designed to punish people previously convicted of sex crimes, rather than to protect potential immigrants as a forward-looking, civil statute.

Turning to the second prong of the Ward test, “[t]he *Ex Post Facto* Clause does not preclude [Congress] from making reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences.” Smith v. Doe, 538 U.S. 84, 103-04 (2003) (upholding the application of Alaska’s sex offender registration system to offenders convicted prior to the system’s adoption). In determining whether such a regulatory consequence is excessively punitive so as to make the provision penal instead of civil, “[t]he question is whether the regulatory means chosen are reasonable in light of the nonpunitive objective.” Id. at 105. In this case, barring persons convicted of sex crimes against children from petitioning for family-based visas is reasonable in light of the statute’s objective, namely protecting potential beneficiaries from harm that could come from establishing residency in the United States with an immigration status that is dependant upon the petitioner. Though Plaintiff includes allegations suggesting that the AWA’s provisions are not very effective at achieving its stated goals, see Compl. ¶ 56, the government is not required to adopt the best or narrowest statute to avoid its classification as penal, see Smith, 538 U.S. at 105 (“The excessiveness inquiry of our *ex post facto* jurisprudence is not an exercise in determining whether the legislature has made the best choice possible to address the problem it seeks to remedy.”).

Other courts that have addressed this issue have also concluded that the AWA is a civil provision not subject to the Ex Post Facto Clause. *E.g.*, Makransky, 2016 WL 1254353, at \*6; Suhail v. U.S. Attorney Gen., No. 15-CV-1259, 2015 WL 7016340, at \*8-9 (E.D. Mich. Nov. 12, 2015). Because the provision challenged by Plaintiff is not penal in nature, it is not subject to the prohibition of the Ex Post Facto Clause.

## *2. Constitutionally Excessive Punishment*

The Eighth Amendment to the Constitution prohibits the infliction of “cruel and unusual punishments.” This text has been interpreted to prohibit punishments that are excessive in relation to the crime, as “it is a precept of justice that punishment for crime should be graduated and proportioned to [the] offense.” Atkins v. Virginia, 536 U.S. 304, 311 (2002) (alteration in original) (quoting Weems v. United States, 217 U.S. 349, 367 (1910)); *see also* Rummel v. Estelle, 445 U.S. 263, 291 (1980) (Powell, J., dissenting) (“[T]he Eighth Amendment prohibits grossly excessive punishment.”).

Similar to the Court’s ex post facto analysis above, a statute or other governmental act must be penal in nature—either on its face or because of its effect—in order to invite scrutiny as cruel and unusual punishment under the Eighth Amendment. *See* Trop v. Dulles, 356 U.S. 86, 94-95 (1958) (basing Eighth Amendment analysis of a citizenship-stripping statute on a “[d]etermination of whether th[e] statute is a penal law”); *see also* Austin v. United States, 509 U.S. 602, 609-11 (1993) (analyzing whether forfeiture should be understood as punishment, and thus whether it is subject to Eighth Amendment scrutiny); Makransky, 2016 WL 1254353, at \*6 (employing the same analysis for the AWA). Because the challenged provision of the AWA is not penal in nature, it cannot constitute cruel and unusual punishment that is contrary to the Eighth Amendment.

### 3. *Due Process*

In addition to his Eighth Amendment and ex post facto claims, Plaintiff also alleges that both the procedures used and the substance of USCIS's decision violated his right to due process. Compl. ¶¶ 65-79. As discussed below, even assuming that Plaintiff has a protected interest sufficient to warrant procedural protections, due process was afforded in USCIS's denials of his I-130 petitions. Additionally, the substantive component of the Due Process Clause does not create a fundamental right to the admission of an alien spouse. As such, Plaintiff's due process claims must be dismissed.

#### a. Procedural Due Process

The procedural component of the Due Process Clause prevents the deprivation of a protected interest absent the provision of sufficient procedural protections. Thus, the inquiry into a procedural due process claim is a two-prong test: "(1) whether plaintiffs possessed a protected liberty or property interest, and, if so, (2) what process plaintiffs were due before they could be deprived of that interest." Adams v. Suozzi, 517 F.3d 124, 127 (2d Cir. 2008) (quoting Sealed v. Sealed, 332 F.3d 51, 55 (2d Cir. 2003)); see also Zinermon v. Burch, 494 U.S. 113, 126 (1990) ("[T]o determine whether a constitutional violation has occurred, it is necessary to ask what process the State provided, and whether it was constitutionally adequate.").

While Plaintiff must establish both of these prongs in order to successfully state a procedural due process claim, the Court need not reach the question of whether there is a protected liberty interest in the approval of an I-130 petition sufficient to invoke constitutional procedure



requirements.<sup>7</sup> This is because, under the Supreme Court’s procedural due process precedent, sufficient process was provided in this case.

“Due process . . . is a flexible concept that varies with the particular situation.” Zinermon, 494 U.S. at 127. The amount of process that is due is generally determined by balancing three distinct factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

Examining the Mathews v. Eldridge factors suggests that minimum procedural protections are required in making the discretionary no risk determination under the AWA. Even assuming that the private interest in obtaining legal immigration status for an alien spouse is significant, the other factors weigh heavily against Plaintiff’s position in this case. The risk of erroneous deprivation is effectively zero where, as here, the determination is entirely within the agency’s discretion. Furthermore, the procedures afforded here allowed Plaintiff to submit substantial evidence regarding why he presented no risk to his proposed beneficiary; any additional procedures on this

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<sup>7</sup> While the Court ultimately decides this case on other grounds, the case Plaintiff uses to support his argument that he has a protected interest in the approval of his I-130 petition is plainly inapplicable here. Plaintiff cites to Ching v. Mayorkas, 725 F.3d 1149, 1155 (9th Cir. 2013), in which the Ninth Circuit found a property right in the approval of an I-130 petition only because the petitioner there was “entitled, as a matter of right, to the approval of his petition.” Because Plaintiff is not entitled to approval of his I-130 petition, and in fact is barred from approval in the absence of discretionary relief from the Secretary, the reasoning of Ching cannot support Plaintiff’s claims. Second Circuit case law similarly suggests that there is not a protected interest in this case. See Azizi v. Thornburgh, 908 F.2d 1130, 1134-36 (2d Cir. 1990).

point would provide minimum additional value to USCIS's determination. Finally, the government's interest in maintaining simple procedures is strong given the entirely discretionary nature of the no risk determination.

Also instructive on this point is the Supreme Court's recent case of Kerry v. Din, 135 S. Ct. 2128 (2015). In Din, the Court addressed the denial of a spousal visa application under the Immigration and Nationality Act's bar against visas for aliens who engaged in "terrorist activity," 8 U.S.C. § 1182(a)(3)(B). 135 S. Ct. at 2132. The notice of denial provided no explanation or reasoning other than that the denial was made under § 1182(a)(3)(B). Id. The citizen spouse brought suit, claiming that the lack of explanation for the visa denial violated her right to procedural due process. Id. Although the case led to a significantly fractured Court, the controlling opinion—authored by Justice Kennedy—found that "even assuming [Din] has [a protected liberty] interest, the Government satisfied due process when it notified Din's husband that his visa was denied under the immigration statute's terrorism bar." Id. at 2139 (Kennedy, J., concurring in the judgment). The procedural safeguards in that case were extremely minimal, see id. at 2144 (Breyer, J., dissenting) (arguing that "neither spouse here has received any procedural protection"), but the Court nevertheless found that sufficient constitutional process was afforded to Din.

Plaintiff claims that the Due Process Clause "requires a petitioner to have a meaningful opportunity to respond to the evidence, to make an argument against a proposed deprivation and to face his accusers." Compl. ¶ 74.<sup>8</sup> Even if Plaintiff were entitled to all of these protections, there are

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<sup>8</sup> Plaintiff's additional claim that "procedural due process requires . . . the right to appeal," Compl. ¶ 73, is simply incorrect, see United States v. MacCollom, 426 U.S. 317, 323 (1976) (plurality opinion) ("The Due Process Clause of the Fifth Amendment does not establish any right to an appeal . . ."). Plaintiff is also incorrect in saying that he "is left with no avenue to seek review of the agency's decisions," Compl. ¶ 78, as the Court fully reviews Plaintiff's constitutional and

no allegations in the Complaint suggesting that they were denied to him.<sup>9</sup> Here, Plaintiff submitted a significant quantity of evidence and received written decisions detailing the evidence presented and describing the Secretary's denial of the discretionary relief sought. See Exs. 1-2. The Complaint fails to allege any specific procedural requests that were denied, any evidence that he was barred from presenting, or any events suggesting that the USCIS agents did not evaluate his petition in a fair and unbiased manner.<sup>10</sup> See Compl. ¶¶ 72-76. Conclusory allegations that Plaintiff's rights were violated, without specific facts showing what procedures were denied to him, cannot formulate a successful Fifth Amendment claim.

The only remaining allegation concerning procedural due process reflects Plaintiff's argument that "the [Aytes and Neufeld] memoranda dictate that the agency is already prejudiced against such petitions and states approval should be 'rare,'" and that, accordingly, Defendants' "adoption of a policy of presumptive denial and their elevating the burden of proof . . . violates the Plaintiff's right to due process." Compl. ¶¶ 75-76. This allegation has nothing to do with the procedural protections afforded in Plaintiff's attempt to make a no risk demonstration, but instead challenges the Secretary's determination of how he will exercise his discretion. Plaintiff cannot repackage his arbitrary-and-capricious claim in a constitutional wrapping, and as such, this claim must be dismissed.

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remaining APA claims in this opinion.

<sup>9</sup> Indeed, Plaintiff's Opposition only argues that "Plaintiff's substantive due process rights have been violated." Opp'n at 13. Because the Complaint does attempt to state a procedural due process claim, however, see Compl. ¶¶ 72-78, the Court addresses this claim here.

<sup>10</sup> The possible sole exception to this is Plaintiff's claim that the Aytes and Neufeld Memos themselves biased the reviewing USCIS agents by creating a presumption against a no risk determination. See Compl. ¶¶ 75-76. This argument is further addressed below.

b. Substantive Due Process

In addition to the procedural protections afforded by the Fifth Amendment, the Supreme Court has also interpreted the Due Process Clause to include a substantive component. See, e.g., Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 848-50 (1992) (describing the standard for adjudicating substantive due process claims). This substantive due process “protects individual liberty against ‘certain government actions regardless of the fairness of the procedures used to implement them.’” Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992) (quoting Daniels v. Williams, 474 U.S. 327, 331 (1986)).

In evaluating a substantive due process claim, “the first step is to determine whether the asserted right is ‘fundamental.’” Leebaert v. Harrington, 332 F.3d 134, 140 (2d Cir. 2003). “Rights are fundamental when they are ‘implicit in the concept of ordered liberty,’ or ‘deeply rooted in this Nation’s history and tradition.’” Immediato v. Rye Neck Sch. Dist., 73 F.3d 454, 460-61 (2d Cir. 1996) (quoting Palko v. Connecticut, 302 U.S. 319, 325-26 (1937), overruled on other grounds by Benton v. Maryland, 395 U.S. 784 (1969); Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977)). If a right is fundamental, strict scrutiny applies and any restriction on the right must be narrowly tailored to serve a compelling governmental interest. Leebaert, 332 F.3d at 140; Immediato, 73 F.3d at 460. “Where the claimed right is not fundamental, the governmental regulation need only be reasonably related to a legitimate state objective.” Immediato, 73 F.3d at 461 (citing Reno v. Flores, 507 U.S. 292, 303-06 (1993); Bowers v. Hardwick, 478 U.S. 186, 196 (1986), overruled on other grounds by Lawrence v. Texas, 539 U.S. 558 (2003)).

In his Complaint, Plaintiff argues that the AWA—and USCIS’s denial of Plaintiff’s petitions under the AWA—violates his “fundamental right to marry and live with his spouse as husband and

wife.” Compl. ¶ 71; accord id. ¶ 68. As such, the Court must address whether the right to live in the United States with one’s alien spouse is a fundamental right subject to the substantive due process protections of the Fifth Amendment.

At the outset, it is plainly correct that the Supreme Court has long recognized a fundamental right to marry. See, e.g., Loving v. Virginia, 388 U.S. 1 (1967) (overturning bans on interracial marriages); Zablocki v. Redhail, 434 U.S. 374 (1978) (striking down a statute that required court approval in order for persons failing to make child support payments to marry); Turner v. Safley, 482 U.S. 78 (1987) (invalidating a regulation that restricted marriage access for prison inmates). The most recent apex of this principle is found in the Supreme Court’s same-sex marriage cases, United States v. Windsor, 133 S. Ct. 2675 (2013), and Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

Plaintiff extensively cites these marriage cases in his Complaint and Opposition. See Compl. ¶ 70 & n.1; Opp’n at 17-20. It is important to note, however, that all of these cases reflected one of two fundamental rights: the fundamental right to marry, and the fundamental right to marry the person of one’s choice. The Supreme Court’s decision in Obergefell further explains that the fundamental right to marry the person of one’s choosing is derived in part from the right to equal protection under the law, and thus the prevention of discrimination against protected classes should be seen as a core component of the Court’s jurisprudence in this area. See 135 S. Ct. at 2602-04 (explaining how, within the marriage context, “[t]he Due Process Clause and the Equal Protection Clause are connected in a profound way”); see also Windsor, 133 S. Ct. at 2693-96 (same).<sup>11</sup>

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<sup>11</sup> Plaintiff attempts just such an argument in his Opposition. Opp’n at 20 (“[The AWA] is a law that targets a politically disfavored group, sex offenders, not for reasons like government efficiency but rather to impose a ‘disadvantage, a separate status, and so a stigma upon’ them.”

But this is not a case concerning the right to marry, or even the right to marry the person of one's choosing. These rights were already realized by Plaintiff when he married his wife in 2006. Instead, this case is about the right to obtain a visa for an alien spouse. Plaintiff argues that this right stems from an expanded view of the fundamental right to marry, which "necessarily incorporates the right . . . to live together as husband and wife." Opp'n at 20. In support of this proposition, Plaintiff points to the Supreme Court's language in Meyer v. Nebraska, in which the Court listed—without engaging in present-day substantive due process analysis—a number of rights denoted by the liberty interest in the Due Process Clause, including the right "to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." 262 U.S. 390, 399 (1923).<sup>12</sup> Inferences derived from dicta in a near-century old case cannot overcome the consistent voice of today's courts, which even under a dramatically expanded understanding of fundamental rights have found that there is no such right to immigration benefits for one's alien spouse. See Morales-Izquierdo v. Dept. of Homeland Sec., 600 F.3d 1076, 1091 (9th Cir. 2010) (finding no substantive due process right for U.S. citizens to live with their alien spouses), overruled in part on other grounds by Garfias-Rodriguez v. Holder, 702 F.3d 504 (9th Cir. 2012) (en banc); Struniak, 2016 WL 393953, at \*14-18 (denying a substantive due process claim against the AWA); Burbank v. Johnson, No. 14-CV-292, 2015 WL 4591643,

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(quoting Windsor, 133 S. Ct. at 2693)). Simply put, sex offenders are not a protected class. Roe v. Marcotte, 193 F.3d 72, 82 (2d Cir. 1999); Taylor v. N.Y. State Dep't of Corr. Servs., No. 07-CV-1288, 2009 WL 3522781, at \*2 (N.D.N.Y. Oct. 29, 2009).

<sup>12</sup> Meyer itself concerned a criminal conviction under "[a]n act relating to the teaching of foreign languages in the state of Nebraska." 262 U.S. at 396-97.

at \*7-8 (E.D. Wash. July 29, 2015) (same); Cardenas v. United States, No. 12-CV-346, 2013 WL 4495795, at \*7 (D. Idaho Aug. 19, 2013) (“[T]here is no constitutional right to reside with one’s spouse in the United States.”); see also Boyal v. Napolitano, No. 09-CV-3263, 2011 WL 864618, at \*4 (E.D. Cal. Mar. 10, 2011) (noting the existence of “clear case law holding that there is no substantive due process right to reside with one’s spouse”).

The uniformity of these cases is not surprising, since even if there were a fundamental right to live with one’s spouse when both partners are citizens of the United States, the immigration context of this case significantly alters the constitutional analysis. “In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens,” Mathews v. Diaz, 426 U.S. 67, 79-80 (1976), and “‘over no conceivable subject is the legislative power of Congress more complete than it is over’ the admission of aliens,” Fiallo v. Bell, 430 U.S. 787, 792 (1977) (quoting Oceanic Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909)). “Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control.” Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 210 (1953). The expansion of substantive due process into the realm of immigration thus cannot be “deeply rooted in this Nation’s history and tradition,” Immediato, 73 F.3d at 460-61 (quoting Moore, 431 U.S. at 503), and requiring the government to admit any alien who is married to a U.S. resident is not “implicit in the concept of ordered liberty,” id. (quoting Palko, 320 U.S. at 325-26).

“[J]udicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground” in the field of substantive due process. Collins, 503 U.S. at 125. In light of this principle, the Court will not expand its understanding of the constitutional marriage right in a

manner that contradicts the traditional sovereign prerogative concerning immigration. As discussed earlier in the ex post facto context, the AWA's immigration provision is reasonably related to a legitimate governmental objective, namely the prevention of harm to potential immigration beneficiaries by convicted sex offenders. See Immediato, 73 F.3d at 461 (applying rational basis review when the claimed right is not fundamental).<sup>13</sup> As such, Plaintiff cannot prevail on his substantive due process claim.

#### 4. *APA Claims*

Plaintiff's final two claims arise under the APA, which requires notice and comment procedures for the enactment of new rules and prohibits agency action "in excess of statutory . . . authority." 5 U.S.C. §§ 553, 706(2)(C). The factual predicate for both is the adoption of the Aytes and Neufeld Memos, with Plaintiff complaining that the procedures used in their adoption and the evaluative standards they espouse violate the APA and AWA's statutory requirements. See Compl. ¶¶ 95-116. Because the Aytes and Neufeld Memos are exempt from the APA's notice and comment requirements, and fit within the broad discretion afforded to the Secretary under the AWA, Plaintiff's remaining APA claims must be dismissed.

##### a. Notice and Comment Rulemaking

The APA typically requires agencies to propose and adopt new rules using a notice-and-comment rulemaking process, in which a notice of proposed rulemaking is published in the Federal Register and interested persons are allowed to submit their views to the agency before the rule is finally adopted. 5 U.S.C. § 553(b)-(c). A key exception to this rulemaking procedure exists,

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<sup>13</sup> Nowhere in Plaintiff's papers does he suggest that the AWA does not survive rational basis review. See Compl.; Opp'n.



however, where the rule in question is “interpretative” (or “interpretive” as it is commonly referred to by the courts). Id. § 553(b)(A).

“While the APA does not define interpretative (nor interpretive) rules, courts have developed several general formulations in order to distinguish interpretive rules from those that are ‘substantive’ or ‘legislative,’ which must comply with the notice and comment provisions of the APA.” Sweet v. Sheahan, 235 F.3d 80, 90 (2d Cir. 2000). Legislative rules “grant[] rights, impose[] obligations, or produce[] other significant effects on private interests.” White v. Shalala, 7 F.3d 296, 303 (2d Cir. 1993) (quoting Perales v. Sullivan, 948 F.3d 1348, 1354 (2d Cir. 1991)). More simply put, “[l]egislative rules have the force of law.” N.Y.C. Emps.’ Ret. Sys. v. SEC, 45 F.3d 7, 12 (2d Cir. 1995). “Interpretive rules, on the other hand, do not create rights, but merely ‘clarify an existing statute or regulation.’” Id. (quoting White, 7 F.3d at 303). Quoting the D.C. Circuit, another Second Circuit case described four questions used in making this determination:

(1) whether in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties, (2) whether the agency has published the rule in the Code of Federal Regulations, (3) whether the agency has explicitly invoked its general legislative authority, or (4) whether the rule effectively amends a prior legislative rule. If the answer to any of these questions is affirmative, we have a legislative, not an interpretive rule.

Sweet, 235 F.3d at 91 (quoting Am. Mining Congress v. Mine Safety & Health Admin., 995 F.2d 1106, 1112 (D.C. Cir. 1993)).

In this case, the Aytes and Neufeld Memos are properly classified as interpretive rules. The Memos do not create generally applicable law or policy, but instead direct USCIS field agents as to how the agency (and by extension, the Secretary) would like them to exercise its “sole and unreviewable discretion” in making the AWA’s no risk determination. The Memos do not have the

force of law, see N.Y.C. Emps.’ Ret. Sys., 45 F.3d at 12, and the answer to each of the four questions discussed in Sweet suggests an interpretive rule, see 235 F.3d at 91. At least one other court has also found that the Aytes and Neufeld Memos are interpretive for purposes of the APA. See Makransky, 2016 WL 1254353, at \*7-8. As such, USCIS was not required to engage in notice and comment rulemaking before adopting the Aytes and Neufeld Memos.

b. Ultra Vires

Plaintiff also argues that the policies found within the Aytes and Neufeld Memos exceed the statutory authority granted to the Secretary under the AWA, specifically focusing on the adoption of a “beyond any reasonable doubt” standard for the approval of a no risk determination. Compl. ¶¶ 106-12.<sup>14</sup> According to Plaintiff, this “‘beyond any reasonable doubt’ standard violates the plain language of the statute and is inconsistent with the law,” in part because normal visa adjudications rely on the lower “preponderance of the evidence” standard. Compl. ¶¶ 106-07. As such, the Court must examine whether the AWA can permit the adoption of this heightened standard for the Secretary’s grant of discretionary relief.

While agency interpretations of the statutes they administer are often afforded significant deference under Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837,

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<sup>14</sup> Though not reflected in the ultra vires section of his Complaint, Plaintiff also argues that the “presumption of denial” expressed in the Aytes and Neufeld Memos is “found nowhere in the statute” and thus violates the APA. Opp’n at 24-25. The sole case cited by Plaintiff for the proposition that a presumption of denial violates the APA is Director, Office of Workers’ Compensation Programs, Department of Labor v. Greenwich Collieries, 512 U.S. 267, 280-81 (1994), in which the Court struck down a regulation that shifted the burden of proof *away* from the petitioner, who was seeking benefits under the Black Lung Benefits Act. This case only serves to rebut Plaintiff’s point, since far from prohibiting any presumption of denial, Greenwich Collieries reiterates the APA’s general position that the proponent of an order or petition—in this case, Plaintiff—carries the burden of proof. Cf. 5 U.S.C. § 556(d) (noting that, in hearings, “the proponent of a rule or order has the burden of proof”).

842-43 (1984), this respect for an agency’s interpretation depends upon the degree of authority delegated to the agency and the manner in which it adopted the challenged rule, see United States v. Mead Corp., 533 U.S. 218, 226-27 (2001) (“We hold that administrative implementation of a particular statutory provision qualifies for Chevron deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.”). Here, however, the Court need not determine whether the Aytes and Neufeld Memos warrant Chevron deference, because the Memos represent a valid exercise of statutory authority even under the limited deference of Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944); see also Reno v. Koray, 515 U.S. 50, 61 (1995) (finding that an “internal agency guideline, which is akin to an ‘interpretive rule’ that ‘do[es] not require notice and comment,’ is still entitled to some deference” (alteration in original) (quoting Shalala v. Guernsey Mem’l Hosp., 514 U.S. 87, 99 (1995))).

Starting with the language of the statute, the provision in question states that the right to petition for immediate relatives “shall not apply to a citizen of the United States who has been convicted of a specified offense against a minor, unless the Secretary of Homeland Security, in the Secretary’s sole and unreviewable discretion, determines that the citizen poses no risk to the alien with respect to whom a petition . . . is filed.” 8 U.S.C. § 1154(a)(1)(A)(viii)(I). It is important to note what interpretation of this section is being challenged. USCIS does not claim that this section creates or requires the use of a “beyond any reasonable doubt” standard. Instead, the Memos explain how USCIS will exercise the Secretary’s discretion when making no risk determinations under the AWA, including by requiring the submission of “evidence that clearly demonstrates, beyond any reasonable doubt, that [the petitioner] poses no risk to the safety and well-being of his or

her intended beneficiary(ies).” Aytes Memo at 5. Thus, the question is whether USCIS’s interpretation of the statute as *permitting* the use of this heightened standard before granting discretionary relief is acceptable.

Skidmore holds that the degree of deference afforded to an interpretation “depend[s] upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.” 323 U.S. at 140. Given the plain text of the statute, which grants “sole and unreviewable discretion” to the Secretary in making no risk determinations, an interpretation of § 1154(a)(1)(A)(viii)(I) as allowing the adoption of a beyond any reasonable doubt standard—or any other standard, for that matter—fits the clearest reading of the statute, and certainly survives review under Skidmore. The AWA provides the Secretary with total discretion on how to make the no risk determination. Requiring a heightened showing by petitioners in these circumstances—a position that USCIS has consistently taken and explains in the Aytes and Neufeld Memos—clearly fits the statute’s intent and discretionary scheme. Because requiring petitioners to make the no risk demonstration “beyond any reasonable doubt” is a legitimate exercise of the Secretary’s discretion under the AWA, the agency’s interpretation of that statute is proper and the adoption of the Aytes and Neufeld Memos was not ultra vires.

Insofar as the Complaint also alleges that applying the AWA is ultra vires when the petition’s beneficiary is an adult, see Compl. ¶ 113, this argument is clearly belied by the text of the statute. The statute requires a no risk determination for any “alien with respect to whom a petition . . . is filed,” 8 U.S.C. § 1154(a)(1)(A)(viii)(I), and does not make any distinction between adult and child beneficiaries. “If the intent of Congress is clear, that is the end of the matter; for the

court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” Chevron, 467 U.S. at 842-43. Here, the plain text of the statute requires a no risk determination for every beneficiary, including adults. USCIS’s compliance with the plain text of the statute cannot give rise to an ultra vires APA claim.

Though not discussed in his Opposition, Plaintiff’s Complaint also keys in on the language of § 1154(a)(1)(A)(i), claiming that the AWA can only prohibit him from “filing” an I-130 petition, but that once a petition is filed, it cannot be denied on account of his status as a convicted sex offender. Compl. ¶ 114. This argument is obviously unavailing. First, Plaintiff’s interpretation is absurd on its face. Under his view, if a USCIS agent fails to tackle a petitioner before his papers reach their inbox, they would be forced to approve the petition despite the clear intentions of Congress. “Where an examination of the statute as a whole demonstrates that a party’s interpretation would lead to ‘absurd or futile results . . . plainly at variance with the policy of the legislation as a whole,’ that interpretation should be rejected.” Yerdon v. Henry, 91 F.3d 370, 376 (2d Cir. 1996) (alteration in original) (quoting EEOC v. Commercial Office Prods. Co., 486 U.S. 107, 120 (1988)). Second, Plaintiff’s reading ignores the plain language of § 1154(a)(1)(A)(viii)(I), which states that the entire petitioning procedure “shall not apply to a citizen of the United States who has been convicted of a specified offense against a minor” absent discretionary relief from the Secretary. For all of these reasons, Plaintiff has failed to state a claim under the APA for which relief may be granted.

#### IV. CONCLUSION

Accordingly, it is hereby:

**ORDERED**, that, for the reasons stated above, Defendants’ Motion (Dkt. No. 10) is

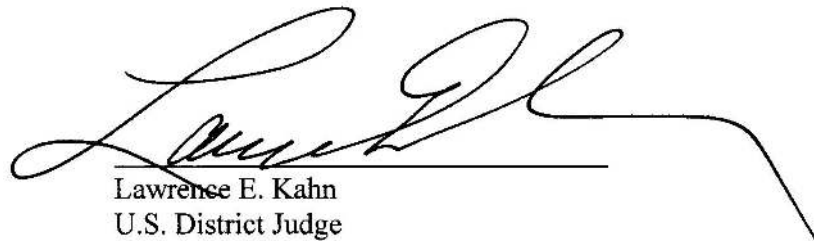
**GRANTED;** and it is further

**ORDERED,** that Plaintiff's Complaint (Dkt. No. 1) is **DISMISSED with prejudice;** and it is further

**ORDERED,** that the Clerk of the Court serve a copy of this Memorandum-Decision and Order on all parties in accordance with the Local Rules.

**IT IS SO ORDERED.**

DATED: June 27, 2016  
Albany, New York



Lawrence E. Kahn  
U.S. District Judge

C

## Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

## SUPREME COURT OF THE UNITED STATES

## Syllabus

WHOLE WOMAN'S HEALTH ET AL. *v.* HELLERSTEDT,  
COMMISSIONER, TEXAS DEPARTMENT OF STATE  
HEALTH SERVICES, ET AL.CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR  
THE FIFTH CIRCUIT

No. 15–274. Argued March 2, 2016—Decided June 27, 2016

A “State has a legitimate interest in seeing to it that abortion . . . is performed under circumstances that insure maximum safety for the patient.” *Roe v. Wade*, 410 U. S. 113, 150. But “a statute which, while furthering [a] valid state interest, has the effect of placing a substantial obstacle in the path of a woman’s choice cannot be considered a permissible means of serving its legitimate ends,” *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U. S. 833, 877 (plurality opinion), and “[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right,” *id.*, at 878.

In 2013, the Texas Legislature enacted House Bill 2 (H. B. 2), which contains the two provisions challenged here. The “admitting-privileges requirement” provides that a “physician performing or inducing an abortion . . . must, on the date [of service], have active admitting privileges at a hospital . . . located not further than 30 miles from the” abortion facility. The “surgical-center requirement” requires an “abortion facility” to meet the “minimum standards . . . for ambulatory surgical centers” under Texas law. Before the law took effect, a group of Texas abortion providers filed the *Abbott* case, in which they lost a facial challenge to the constitutionality of the admitting-privileges provision. After the law went into effect, petitioners, another group of abortion providers (including some *Abbott* plaintiffs), filed this suit, claiming that both the admitting-privileges and the surgical-center provisions violated the Fourteenth Amendment, as interpreted in *Casey*. They sought injunctions preventing enforcement of the admitting-privileges provision as applied to physi-



## Syllabus

cians at one abortion facility in McAllen and one in El Paso and prohibiting enforcement of the surgical-center provision throughout Texas.

Based on the parties' stipulations, expert depositions, and expert and other trial testimony, the District Court made extensive findings, including, but not limited to: as the admitting-privileges requirement began to be enforced, the number of facilities providing abortions dropped in half, from about 40 to about 20; this decrease in geographical distribution means that the number of women of reproductive age living more than 50 miles from a clinic has doubled, the number living more than 100 miles away has increased by 150%, the number living more than 150 miles away by more than 350%, and the number living more than 200 miles away by about 2,800%; the number of facilities would drop to seven or eight if the surgical-center provision took effect, and those remaining facilities would see a significant increase in patient traffic; facilities would remain only in five metropolitan areas; before H. B. 2's passage, abortion was an extremely safe procedure with very low rates of complications and virtually no deaths; it was also safer than many more common procedures not subject to the same level of regulation; and the cost of compliance with the surgical-center requirement would most likely exceed \$1.5 million to \$3 million per clinic. The court enjoined enforcement of the provisions, holding that the surgical-center requirement imposed an undue burden on the right of women in Texas to seek previability abortions; that, together with that requirement, the admitting-privileges requirement imposed an undue burden in the Rio Grande Valley, El Paso, and West Texas; and that the provisions together created an "impermissible obstacle as applied to all women seeking a previability abortion."

The Fifth Circuit reversed in significant part. It concluded that res judicata barred the District Court from holding the admitting-privileges requirement unconstitutional statewide and that res judicata also barred the challenge to the surgical-center provision. Reasoning that a law is "constitutional if (1) it does not have the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus and (2) it is reasonably related to . . . a legitimate state interest," the court found that both requirements were rationally related to a compelling state interest in protecting women's health.

*Held:*

1. Petitioners' constitutional claims are not barred by res judicata. Pp. 10–18.

(a) Res judicata neither bars petitioners' challenges to the admitting-privileges requirement nor prevents the Court from awarding fa-

## Syllabus

cial relief. The fact that several petitioners had previously brought the unsuccessful facial challenge in *Abbott* does not mean that claim preclusion, the relevant aspect of res judicata, applies. Claim preclusion prohibits “successive litigation of the very same claim,” *New Hampshire v. Maine*, 532 U. S. 742, 748, but petitioners’ as-applied postenforcement challenge and the *Abbott* plaintiffs’ facial pre-enforcement challenge do not present the same claim. Changed circumstances showing that a constitutional harm is concrete may give rise to a new claim. *Abbott* rested upon facts and evidence presented before enforcement of the admitting-privileges requirement began, when it was unclear how clinics would be affected. This case rests upon later, concrete factual developments that occurred once enforcement started and a significant number of clinics closed.

Res judicata also does not preclude facial relief here. In addition to requesting as-applied relief, petitioners asked for other appropriate relief, and their evidence and arguments convinced the District Court of the provision’s unconstitutionality across the board. Federal Rule of Civil Procedure 54(c) provides that a “final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings,” and this Court has held that if the arguments and evidence show that a statutory provision is unconstitutional on its face, an injunction prohibiting its enforcement is “proper,” *Citizens United v. Federal Election Comm’n*, 558 U. S. 310, 333. Pp. 10–15.

(b) Claim preclusion also does not bar petitioners’ challenge to the surgical-center requirement. In concluding that petitioners should have raised this claim in *Abbott*, the Fifth Circuit did not take account of the fact that the surgical-center provision and the admitting-privileges provision are separate provisions with two different and independent regulatory requirements. Challenges to distinct regulatory requirements are ordinarily treated as distinct claims. Moreover, the surgical-center provision’s implementing regulations had not even been promulgated at the time *Abbott* was filed, and the relevant factual circumstances changed between the two suits. Pp. 16–18.

2. Both the admitting-privileges and the surgical-center requirements place a substantial obstacle in the path of women seeking a previability abortion, constitute an undue burden on abortion access, and thus violate the Constitution. Pp. 19–39.

(a) The Fifth Circuit’s standard of review may be read to imply that a district court should not consider the existence or nonexistence of medical benefits when deciding the undue burden question, but *Casey* requires courts to consider the burdens a law imposes on abortion access together with the benefits those laws confer, see 505 U. S.,

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at 887–898. The Fifth Circuit’s test also mistakenly equates the judicial review applicable to the regulation of a constitutionally protected personal liberty with the less strict review applicable to, *e.g.*, economic legislation. And the court’s requirement that legislatures resolve questions of medical uncertainty is inconsistent with this Court’s case law, which has placed considerable weight upon evidence and argument presented in judicial proceedings when determining the constitutionality of laws regulating abortion procedures. See *id.*, at 888–894. Explicit legislative findings must be considered, but there were no such findings in H. B. 2. The District Court applied the correct legal standard here, considering the evidence in the record—including expert evidence—and then weighing the asserted benefits against the burdens. Pp. 19–21.

(b) The record contains adequate legal and factual support for the District Court’s conclusion that the admitting-privileges requirement imposes an “undue burden” on a woman’s right to choose. The requirement’s purpose is to help ensure that women have easy access to a hospital should complications arise during an abortion procedure, but the District Court, relying on evidence showing extremely low rates of serious complications before H. B. 2’s passage, found no significant health-related problem for the new law to cure. The State’s record evidence, in contrast, does not show how the new law advanced the State’s legitimate interest in protecting women’s health when compared to the prior law, which required providers to have a “working arrangement” with doctors who had admitting privileges. At the same time, the record evidence indicates that the requirement places a “substantial obstacle” in a woman’s path to abortion. The dramatic drop in the number of clinics means fewer doctors, longer waiting times, and increased crowding. It also means a significant increase in the distance women of reproductive age live from an abortion clinic. Increased driving distances do not always constitute an “undue burden,” but they are an additional burden, which, when taken together with others caused by the closings, and when viewed in light of the virtual absence of any health benefit, help support the District Court’s “undue burden” conclusion. Pp. 21–28.

(c) The surgical-center requirement also provides few, if any, health benefits for women, poses a substantial obstacle to women seeking abortions, and constitutes an “undue burden” on their constitutional right to do so. Before this requirement was enacted, Texas law required abortion facilities to meet a host of health and safety requirements that were policed by inspections and enforced through administrative, civil, and criminal penalties. Record evidence shows that the new provision imposes a number of additional requirements that are generally unnecessary in the abortion clinic context; that it

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provides no benefit when complications arise in the context of a medical abortion, which would generally occur after a patient has left the facility; that abortions taking place in abortion facilities are safer than common procedures that occur in outside clinics not subject to Texas' surgical-center requirements; and that Texas has waived no part of the requirement for any abortion clinics as it has done for nearly two-thirds of other covered facilities. This evidence, along with the absence of any contrary evidence, supports the District Court's conclusions, including its ultimate legal conclusion that requirement is not necessary. At the same time, the record provides adequate evidentiary support for the District Court's conclusion that the requirement places a substantial obstacle in the path of women seeking an abortion. The court found that it "strained credulity" to think that the seven or eight abortion facilities would be able to meet the demand. The Fifth Circuit discounted expert witness Dr. Grossman's testimony that the surgical-center requirement would cause the number of abortions performed by each remaining clinic to increase by a factor of about 5. But an expert may testify in the "form of an opinion" as long as that opinion rests upon "sufficient facts or data" and "reliable principles and methods." Fed. Rule Evid. 702. Here, Dr. Grossman's opinion rested upon his participation, together with other university researchers, in research tracking the number of facilities providing abortion services, using information from, among other things, the state health services department and other public sources. The District Court acted within its legal authority in finding his testimony admissible. Common sense also suggests that a physical facility that satisfies a certain physical demand will generally be unable to meet five times that demand without expanding physically or otherwise incurring significant costs. And Texas presented no evidence at trial suggesting that expansion was possible. Finally, the District Court's finding that a currently licensed abortion facility would have to incur considerable costs to meet the surgical-center requirements supports the conclusion that more surgical centers will not soon fill the gap left by closed facilities. Pp. 28–36.

(d) Texas' three additional arguments are unpersuasive. Pp. 36–39.

790 F. 3d 563 and 598, reversed and remanded.

BREYER, J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined. GINSBURG, J., filed a concurring opinion. THOMAS, J., filed a dissenting opinion. ALITO, J., filed a dissenting opinion, in which ROBERTS, C. J., and THOMAS, J., joined.

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NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

## SUPREME COURT OF THE UNITED STATES

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No. 15–274

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WHOLE WOMAN’S HEALTH, ET AL., PETITIONERS *v.*  
JOHN HELLERSTEDT, COMMISSIONER, TEXAS  
DEPARTMENT OF STATE HEALTH SERVICES, ET AL.

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

[June 27, 2016]

JUSTICE BREYER delivered the opinion of the Court.

In *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U. S. 833, 878 (1992), a plurality of the Court concluded that there “exists” an “undue burden” on a woman’s right to decide to have an abortion, and consequently a provision of law is constitutionally invalid, if the “*purpose or effect*” of the provision “*is to place a substantial obstacle* in the path of a woman seeking an abortion before the fetus attains viability.” (Emphasis added.) The plurality added that “[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right.” *Ibid.*

We must here decide whether two provisions of Texas’ House Bill 2 violate the Federal Constitution as interpreted in *Casey*. The first provision, which we shall call the “*admitting-privileges requirement*,” says that

“[a] physician performing or inducing an abortion . . . must, on the date the abortion is performed or induced, have active admitting privileges at a hospital

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that . . . is located not further than 30 miles from the location at which the abortion is performed or induced.” Tex. Health & Safety Code Ann. §171.0031(a) (West Cum. Supp. 2015).

This provision amended Texas law that had previously required an abortion facility to maintain a written protocol “for managing medical emergencies and the transfer of patients requiring further emergency care to a hospital.” 38 Tex. Reg. 6546 (2013).

The second provision, which we shall call the “*surgical-center requirement*,” says that

“the minimum standards for an abortion facility must be equivalent to the minimum standards adopted under [the Texas Health and Safety Code section] for ambulatory surgical centers.” Tex. Health & Safety Code Ann. §245.010(a).

We conclude that neither of these provisions confers medical benefits sufficient to justify the burdens upon access that each imposes. Each places a substantial obstacle in the path of women seeking a previability abortion, each constitutes an undue burden on abortion access, *Casey, supra*, at 878 (plurality opinion), and each violates the Federal Constitution. Amdt. 14, §1.

## I

## A

In July 2013, the Texas Legislature enacted House Bill 2 (H. B. 2 or Act). In September (before the new law took effect), a group of Texas abortion providers filed an action in Federal District Court seeking facial invalidation of the law’s admitting-privileges provision. In late October, the District Court granted the injunction. *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 951 F. Supp. 2d 891, 901 (WD Tex. 2013). But three days later, the Fifth Circuit vacated the injunction,

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thereby permitting the provision to take effect. *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F. 3d 406, 419 (2013).

The Fifth Circuit subsequently upheld the provision, and set forth its reasons in an opinion released late the following March. In that opinion, the Fifth Circuit pointed to evidence introduced in the District Court the previous October. It noted that Texas had offered evidence designed to show that the admitting-privileges requirement “will reduce the delay in treatment and decrease health risk for abortion patients with critical complications,” and that it would “‘screen out’ untrained or incompetent abortion providers.” *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F. 3d 583, 592 (2014) (*Abbott*). The opinion also explained that the plaintiffs had not provided sufficient evidence “that abortion practitioners will likely be unable to comply with the privileges requirement.” *Id.*, at 598. The court said that all “of the major Texas cities, including Austin, Corpus Christi, Dallas, El Paso, Houston, and San Antonio,” would “continue to have multiple clinics where many physicians will have or obtain hospital admitting privileges.” *Ibid.* The *Abbott* plaintiffs did not file a petition for certiorari in this Court.

## B

On April 6, one week after the Fifth Circuit’s decision, petitioners, a group of abortion providers (many of whom were plaintiffs in the previous lawsuit), filed the present lawsuit in Federal District Court. They sought an injunction preventing enforcement of the admitting-privileges provision as applied to physicians at two abortion facilities, one operated by Whole Woman’s Health in McAllen and the other operated by Nova Health Systems in El Paso. They also sought an injunction prohibiting enforcement of the surgical-center provision anywhere in Texas.

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They claimed that the admitting-privileges provision and the surgical-center provision violated the Constitution's Fourteenth Amendment, as interpreted in *Casey*.

The District Court subsequently received stipulations from the parties and depositions from the parties' experts. The court conducted a 4-day bench trial. It heard, among other testimony, the opinions from expert witnesses for both sides. On the basis of the stipulations, depositions, and testimony, that court reached the following conclusions:

1. Of Texas' population of more than 25 million people, "approximately 5.4 million" are "women" of "reproductive age," living within a geographical area of "nearly 280,000 square miles." *Whole Woman's Health v. Lakey*, 46 F. Supp. 3d 673, 681 (2014); see App. 244.

2. "In recent years, the number of abortions reported in Texas has stayed fairly consistent at approximately 15–16% of the reported pregnancy rate, for a total number of approximately 60,000–72,000 legal abortions performed annually." 46 F. Supp. 3d, at 681; see App. 238.

3. Prior to the enactment of H. B. 2, there were more than 40 licensed abortion facilities in Texas, which "number dropped by almost half leading up to and in the wake of enforcement of the admitting-privileges requirement that went into effect in late-October 2013." 46 F. Supp. 3d, at 681; App. 228–231.

4. If the surgical-center provision were allowed to take effect, the number of abortion facilities, after September 1, 2014, would be reduced further, so that "only seven facilities and a potential eighth will exist in Texas." 46 F. Supp. 3d, at 680; App. 182–183.



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5. Abortion facilities “will remain only in Houston, Austin, San Antonio, and the Dallas/Fort Worth metropolitan region.” 46 F. Supp. 3d, at 681; App. 229–230. These include “one facility in Austin, two in Dallas, one in Fort Worth, two in Houston, and either one or two in San Antonio.” 46 F. Supp. 3d, at 680; App. 229–230.

6. “Based on historical data pertaining to Texas’s average number of abortions, and assuming perfectly equal distribution among the remaining seven or eight providers, this would result in each facility serving between 7,500 and 10,000 patients per year. Accounting for the seasonal variations in pregnancy rates and a slightly unequal distribution of patients at each clinic, it is foreseeable that over 1,200 women per month could be vying for counseling, appointments, and follow-up visits at some of these facilities.” 46 F. Supp. 3d, at 682; cf. App. 238.

7. The suggestion “that these seven or eight providers could meet the demand of the entire state stretches credulity.” 46 F. Supp. 3d, at 682; see App. 238.

8. “Between November 1, 2012 and May 1, 2014,” that is, before and after enforcement of the admitting-privileges requirement, “the decrease in geographical distribution of abortion facilities” has meant that the number of women of reproductive age living more than 50 miles from a clinic has doubled (from 800,000 to over 1.6 million); those living more than 100 miles has increased by 150% (from 400,000 to 1 million); those living more than 150 miles has increased by more than 350% (from 86,000 to 400,000); and those living more than 200 miles has increased by about 2,800% (from 10,000 to 290,000). After September 2014, should the surgical-center requirement go into effect, the number of women of reproductive age living significant distances from an abortion

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provider will increase as follows: 2 million women of reproductive age will live more than 50 miles from an abortion provider; 1.3 million will live more than 100 miles from an abortion provider; 900,000 will live more than 150 miles from an abortion provider; and 750,000 more than 200 miles from an abortion provider. 46 F. Supp. 3d, at 681–682; App. 238–242.

9. The “two requirements erect a particularly high barrier for poor, rural, or disadvantaged women.” 46 F. Supp. 3d, at 683; cf. App. 363–370.

10. “The great weight of evidence demonstrates that, before the act’s passage, abortion in Texas was extremely safe with particularly low rates of serious complications and virtually no deaths occurring on account of the procedure.” 46 F. Supp. 3d, at 684; see, *e.g.*, App. 257–259, 538; see also *id.*, at 200–202, 253–257.

11. “Abortion, as regulated by the State before the enactment of House Bill 2, has been shown to be much safer, in terms of minor and serious complications, than many common medical procedures not subject to such intense regulation and scrutiny.” 46 F. Supp. 3d, at 684; see, *e.g.*, App. 223–224 (describing risks in colonoscopies), 254 (discussing risks in vasectomy and endometrial biopsy, among others), 275–277 (discussing complication rate in plastic surgery).

12. “Additionally, risks are not appreciably lowered for patients who undergo abortions at ambulatory surgical centers as compared to nonsurgical-center facilities.” 46 F. Supp. 3d, at 684; App. 202–206, 257–259.

13. “[W]omen will not obtain better care or experience more frequent positive outcomes at an ambulatory surgi-

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cal center as compared to a previously licensed facility.” 46 F. Supp. 3d, at 684; App. 202–206.

14. “[T]here are 433 licensed ambulatory surgical centers in Texas,” of which “336 . . . are apparently either ‘grandfathered’ or enjo[y] the benefit of a waiver of some or all” of the surgical-center “requirements.” 46 F. Supp. 3d, at 680–681; App. 184.

15. The “cost of coming into compliance” with the surgical-center requirement “for existing clinics is significant,” “undisputedly approach[ing] 1 million dollars,” and “most likely exceed[ing] 1.5 million dollars,” with “[s]ome . . . clinics” unable to “comply due to physical size limitations of their sites.” 46 F. Supp. 3d, at 682. The “cost of acquiring land and constructing a new compliant clinic will likely exceed three million dollars.” *Ibid.*

On the basis of these and other related findings, the District Court determined that the surgical-center requirement “imposes an undue burden on the right of women throughout Texas to seek a previability abortion,” and that the “admitting-privileges requirement, . . . in conjunction with the ambulatory-surgical-center requirement, imposes an undue burden on the right of women in the Rio Grande Valley, El Paso, and West Texas to seek a previability abortion.” *Id.*, at 687. The District Court concluded that the “two provisions” would cause “the closing of almost all abortion clinics in Texas that were operating legally in the fall of 2013,” and thereby create a constitutionally “impermissible obstacle as applied to all women seeking a previability abortion” by “restricting access to previously available legal facilities.” *Id.*, at 687–688. On August 29, 2014, the court enjoined the enforcement of the two provisions. *Ibid.*

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## C

On October 2, 2014, at Texas' request, the Court of Appeals stayed the District Court's injunction. *Whole Woman's Health v. Lakey*, 769 F. 3d 285, 305. Within the next two weeks, this Court vacated the Court of Appeals' stay (in substantial part) thereby leaving in effect the District Court's injunction against enforcement of the surgical-center provision and its injunction against enforcement of the admitting-privileges requirement as applied to the McAllen and El Paso clinics. *Whole Woman's Health v. Lakey*, 574 U. S. \_\_\_\_ (2014). The Court of Appeals then heard Texas' appeal.

On June 9, 2015, the Court of Appeals reversed the District Court on the merits. With minor exceptions, it found both provisions constitutional and allowed them to take effect. *Whole Women's Health v. Cole*, 790 F. 3d 563, 567 (*per curiam*), modified, 790 F. 3d 598 (CA5 2015). Because the Court of Appeals' decision rests upon alternative grounds and fact-related considerations, we set forth its basic reasoning in some detail. The Court of Appeals concluded:

- The District Court was wrong to hold the admitting-privileges requirement unconstitutional because (except for the clinics in McAllen and El Paso) the providers had not asked them to do so, and principles of res judicata barred relief. *Id.*, at 580–583.
- Because the providers could have brought their constitutional challenge to the surgical-center provision in their earlier lawsuit, principles of res judicata also barred that claim. *Id.*, at 581–583.
- In any event, a state law “regulating previability abortion is constitutional if: (1) it does not have the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus; and (2) it is reasonably related to (or designed to further) a legiti-

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mate state interest.” *Id.*, at 572.

- “[B]oth the admitting privileges requirement and” the surgical-center requirement “were rationally related to a legitimate state interest,” namely, “rais[ing] the standard and quality of care for women seeking abortions and . . . protect[ing] the health and welfare of women seeking abortions.” *Id.*, at 584.

- The “[p]laintiffs” failed “to proffer competent evidence contradicting the legislature’s statement of a legitimate purpose.” *Id.*, at 585.

- “[T]he district court erred by substituting its own judgment [as to the provisions’ effects] for that of the legislature, albeit . . . in the name of the undue burden inquiry.” *Id.*, at 587.

- Holding the provisions unconstitutional on their face is improper because the plaintiffs had failed to show that either of the provisions “imposes an undue burden on a large fraction of women.” *Id.*, at 590.

- The District Court erred in finding that, if the surgical-center requirement takes effect, there will be too few abortion providers in Texas to meet the demand. That factual determination was based upon the finding of one of plaintiffs’ expert witnesses (Dr. Grossman) that abortion providers in Texas “‘will not be able to go from providing approximately 14,000 abortions annually, as they currently are, to providing the 60,000 to 70,000 abortions that are done each year in Texas once all’” of the clinics failing to meet the surgical-center requirement “‘are forced to close.’” *Id.*, at 589–590. But Dr. Grossman’s opinion is (in the Court of Appeals’ view) “‘*ipse dixit*’”; the “‘record lacks any actual evidence regarding the current or future capacity of the eight clinics’”; and there is no “evidence in the record that” the providers that currently meet the surgical-center requirement “are operating at full capacity or that they cannot increase capacity.” *Ibid.*

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For these and related reasons, the Court of Appeals reversed the District Court's holding that the admitting-privileges requirement is unconstitutional and its holding that the surgical-center requirement is unconstitutional. The Court of Appeals upheld in part the District Court's more specific holding that the requirements are unconstitutional as applied to the McAllen facility and Dr. Lynn (a doctor at that facility), but it reversed the District Court's holding that the surgical-center requirement is unconstitutional as applied to the facility in El Paso. In respect to this last claim, the Court of Appeals said that women in El Paso wishing to have an abortion could use abortion providers in nearby New Mexico.

## II

Before turning to the constitutional question, we must consider the Court of Appeals' procedural grounds for holding that (but for the challenge to the provisions of H. B. 2 as applied to McAllen and El Paso) petitioners were barred from bringing their constitutional challenges.

## A

*Claim Preclusion—Admitting-Privileges Requirement*

The Court of Appeals held that there could be no facial challenge to the admitting-privileges requirement. Because several of the petitioners here had previously brought an unsuccessful facial challenge to that requirement (namely, *Abbott*, 748 F. 3d, at 605; see *supra*, at 2–3), the Court of Appeals thought that “the principle of res judicata” applied. 790 F. 3d, at 581. The Court of Appeals also held that res judicata prevented the District Court from granting facial relief to petitioners, concluding that it was improper to “facially invalidat[e] the admitting privileges requirement,” because to do so would “gran[t] more relief than anyone requested or briefed.” *Id.*, at 580. We hold that res judicata neither bars petitioners' challenges

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to the admitting-privileges requirement nor prevents us from awarding facial relief.

For one thing, to the extent that the Court of Appeals concluded that the principle of res judicata bars any facial challenge to the admitting-privileges requirement, see *ibid.*, the court misconstrued petitioners' claims. Petitioners did not bring a facial challenge to the admitting-privileges requirement in this case but instead challenged that requirement as applied to the clinics in McAllen and El Paso. The question is whether res judicata bars petitioners' particular as-applied claims. On this point, the Court of Appeals concluded that res judicata was no bar, see 790 F. 3d, at 592, and we agree.

The doctrine of claim preclusion (the here-relevant aspect of res judicata) prohibits "successive litigation of the very same claim" by the same parties. *New Hampshire v. Maine*, 532 U. S. 742, 748 (2001). Petitioners' postenforcement as-applied challenge is not "the very same claim" as their preenforcement facial challenge. The Restatement of Judgments notes that development of new material facts can mean that a new case and an otherwise similar previous case do not present the same claim. See Restatement (Second) of Judgments §24, Comment *f* (1980) ("Material operative facts occurring after the decision of an action with respect to the same subject matter may in themselves, or taken in conjunction with the antecedent facts, comprise a transaction which may be made the basis of a second action not precluded by the first"); cf. *id.*, §20(2) ("A valid and final personal judgment for the defendant, which rests on the prematurity of the action or on the plaintiff's failure to satisfy a precondition to suit, does not bar another action by the plaintiff instituted after the claim has matured, or the precondition has been satisfied"); *id.*, §20, Comment *k* (discussing relationship of this rule with §24, Comment *f*). The Courts of Appeals have used similar rules to determine the contours of a new

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claim for purposes of preclusion. See, e.g., *Morgan v. Covington*, 648 F. 3d 172, 178 (CA3 2011) (“[R]es judicata does not bar claims that are predicated on events that postdate the filing of the initial complaint”); *Ellis v. CCA of Tenn. LLC*, 650 F. 3d 640, 652 (CA7 2011); *Bank of N. Y. v. First Millennium, Inc.*, 607 F. 3d 905, 919 (CA2 2010); *Smith v. Potter*, 513 F. 3d 781, 783 (CA7 2008); *Rawe v. Liberty Mut. Fire Ins. Co.*, 462 F. 3d 521, 529 (CA6 2006); *Manning v. Auburn*, 953 F. 2d 1355, 1360 (CA11 1992). The Restatement adds that, where “important human values—such as the lawfulness of continuing personal disability or restraint—are at stake, even a slight change of circumstances may afford a sufficient basis for concluding that a second action may be brought.” §24, Comment *f*; see *Bucklew v. Lombardi*, 783 F. 3d 1120, 1127 (CA8 2015) (allowing as-applied challenge to execution method to proceed notwithstanding prior facial challenge).

We find this approach persuasive. Imagine a group of prisoners who claim that they are being forced to drink contaminated water. These prisoners file suit against the facility where they are incarcerated. If at first their suit is dismissed because a court does not believe that the harm would be severe enough to be unconstitutional, it would make no sense to prevent the same prisoners from bringing a later suit if time and experience eventually showed that prisoners were dying from contaminated water. Such circumstances would give rise to a new claim that the prisoners’ treatment violates the Constitution. Factual developments may show that constitutional harm, which seemed too remote or speculative to afford relief at the time of an earlier suit, was in fact indisputable. In our view, such changed circumstances will give rise to a new constitutional claim. This approach is sensible, and it is consistent with our precedent. See *Abie State Bank v. Bryan*, 282 U. S. 765, 772 (1931) (where “suit was brought



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immediately upon the enactment of the law,” “decision sustaining the law cannot be regarded as precluding a subsequent suit for the purpose of testing [its] validity . . . in the lights of the later actual experience”); cf. *Lawlor v. National Screen Service Corp.*, 349 U. S. 322, 328 (1955) (judgment that “precludes recovery on claims arising prior to its entry” nonetheless “cannot be given the effect of extinguishing claims which did not even then exist”); *United States v. Carolene Products Co.*, 304 U. S. 144, 153 (1938) (“[T]he constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist”); *Nashville, C. & St. L. R. Co. v. Walters*, 294 U. S. 405, 415 (1935) (“A statute valid as to one set of facts may be invalid as to another. A statute valid when enacted may become invalid by change in the conditions to which it is applied” (footnote omitted)); *Third Nat. Bank of Louisville v. Stone* 174 U. S. 432, 434 (1899) (“A question cannot be held to have been adjudged before an issue on the subject could possibly have arisen”). JUSTICE ALITO’s dissenting opinion is simply wrong that changed circumstances showing that a challenged law has an unconstitutional effect cannot give rise to a new claim. See *post*, at 14–15 (hereinafter the dissent).

Changed circumstances of this kind are why the claim presented in *Abbott* is not the same claim as petitioners’ claim here. The claims in both *Abbott* and the present case involve “important human values.” Restatement (Second) of Judgments §24, Comment *f*. We are concerned with H. B. 2’s “effect . . . on women seeking abortions.” *Post*, at 30 (ALITO, J., dissenting). And that effect has changed dramatically since petitioners filed their first lawsuit. *Abbott* rested on facts and evidence presented to the District Court in October 2013. 748 F. 3d, at 599, n. 14 (declining to “consider any arguments” based on “developments since the conclusion of the bench trial”).

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Petitioners' claim in this case rests in significant part upon later, concrete factual developments. Those developments matter. The *Abbott* plaintiffs brought their facial challenge to the admitting-privileges requirement *prior to its enforcement*—before many abortion clinics had closed and while it was still unclear how many clinics would be affected. Here, petitioners bring an as-applied challenge to the requirement *after its enforcement*—and after a large number of clinics have in fact closed. The postenforcement consequences of H. B. 2 were unknowable before it went into effect. The *Abbott* court itself recognized that “[l]ater as-applied challenges can always deal with subsequent, concrete constitutional issues.” *Id.*, at 589. And the Court of Appeals in this case properly decided that new evidence presented by petitioners had given rise to a new claim and that petitioners' as-applied challenges are not precluded. See 790 F. 3d, at 591 (“We now know with certainty that the non-[surgical-center] abortion facilities have actually closed and physicians have been unable to obtain admitting privileges after diligent effort”).

When individuals claim that a particular statute will produce serious constitutionally relevant adverse consequences before they have occurred—and when the courts doubt their likely occurrence—the factual difference that those adverse consequences *have in fact occurred* can make all the difference. Compare the Fifth Circuit's opinion in the earlier case, *Abbott*, *supra*, at 598 (“All of the major Texas cities . . . continue to have multiple clinics where many physicians will have or obtain hospital admitting privileges”), with the facts found in this case, 46 F. Supp. 3d, at 680 (the two provisions will leave Texas with seven or eight clinics). The challenge brought in this case and the one in *Abbott* are not the “very same claim,” and the doctrine of claim preclusion consequently does not bar a new challenge to the constitutionality of the admitting-privileges requirement. *New Hampshire v. Maine*,

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532 U. S., at 748. That the litigants in *Abbott* did not seek review in this Court, as the dissent suggests they should have done, see *post*, at 10, does not prevent them from seeking review of new claims that have arisen after *Abbott* was decided. In sum, the Restatement, cases from the Courts of Appeals, our own precedent, and simple logic combine to convince us that res judicata does not bar this claim.

The Court of Appeals also concluded that the award of facial *relief* was precluded by principles of res judicata. 790 F. 3d, at 581. The court concluded that the District Court should not have “granted more relief than anyone requested or briefed.” *Id.*, at 580. But in addition to asking for as-applied relief, petitioners asked for “such other and further relief as the Court may deem just, proper, and equitable.” App. 167. Their evidence and arguments convinced the District Court that the provision was unconstitutional across the board. The Federal Rules of Civil Procedure state that (with an exception not relevant here) a “final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings.” Rule 54(c). And we have held that, if the arguments and evidence show that a statutory provision is unconstitutional on its face, an injunction prohibiting its enforcement is “proper.” *Citizens United v. Federal Election Comm’n*, 558 U. S. 310, 333 (2010); see *ibid.* (in “the exercise of its judicial responsibility” it may be “necessary . . . for the Court to consider the facial validity” of a statute, even though a facial challenge was not brought); cf. Fallon, *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1339 (2000) (“[O]nce a case is brought, no general categorical line bars a court from making broader pronouncements of invalidity in properly ‘as-applied’ cases”). Nothing prevents this Court from awarding facial relief as the appropriate remedy for petitioners’ as-applied claims.

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## B

*Claim Preclusion—Surgical-Center Requirement*

The Court of Appeals also held that claim preclusion barred petitioners from contending that the surgical-center requirement is unconstitutional. 790 F. 3d, at 583. Although it recognized that petitioners did not bring this claim in *Abbott*, it believed that they should have done so. The court explained that petitioners' constitutional challenge to the surgical-center requirement and the challenge to the admitting-privileges requirement mounted in *Abbott*

“arise from the same ‘transactio[n] or series of connected transactions.’ . . . The challenges involve the same parties and abortion facilities; the challenges are governed by the same legal standards; the provisions at issue were enacted at the same time as part of the same act; the provisions were motivated by a common purpose; the provisions are administered by the same state officials; and the challenges form a convenient trial unit because they rely on a common nucleus of operative facts.” 790 F. 3d, at 581.

For all these reasons, the Court of Appeals held petitioners' challenge to H. B. 2's surgical-center requirement was precluded.

The Court of Appeals failed, however, to take account of meaningful differences. The surgical-center provision and the admitting-privileges provision are separate, distinct provisions of H. B. 2. They set forth two different, independent requirements with different enforcement dates. This Court has never suggested that challenges to two different statutory provisions that serve two different functions must be brought in a single suit. And lower courts normally treat challenges to distinct regulatory requirements as “separate claims,” even when they are part of one overarching “[g]overnment regulatory scheme.”

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18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* §4408, p. 52 (2d ed. 2002, Supp. 2015); see *Hamilton’s Bogarts, Inc. v. Michigan*, 501 F.3d 644, 650 (CA6 2007).

That approach makes sense. The opposite approach adopted by the Court of Appeals would require treating every statutory enactment as a single transaction which a given party would only be able to challenge one time, in one lawsuit, in order to avoid the effects of claim preclusion. Such a rule would encourage a kitchen-sink approach to any litigation challenging the validity of statutes. That outcome is less than optimal—not only for litigants, but for courts.

There are other good reasons why petitioners should not have had to bring their challenge to the surgical-center provision at the same time they brought their first suit. The statute gave the Texas Department of State Health Services authority to make rules implementing the surgical-center requirement. H. B. 2, §11(a), App. to Pet. for Cert. 201a. At the time petitioners filed *Abbott*, that state agency had not yet issued any such rules. Cf. *EPA v. Brown*, 431 U. S. 99, 104 (1977) (*per curiam*); 13B Wright, *supra*, §3532.6, at 629 (3d ed. 2008) (most courts will not “undertake review before rules have been adopted”); *Natural Resources Defense Council, Inc. v. EPA*, 859 F.2d 156, 204 (CA10 1988).

Further, petitioners might well have expected that those rules when issued would contain provisions grandfathering some then-existing abortion facilities and granting full or partial waivers to others. After all, more than three quarters of non-abortion-related surgical centers had benefited from that kind of provision. See 46 F. Supp. 3d, at 680–681 (336 of 433 existing Texas surgical centers have been grandfathered or otherwise enjoy a waiver of some of the surgical-center requirements); see also App. 299–302, 443–447, 468–469.

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Finally, the relevant factual circumstances changed between *Abbott* and the present lawsuit, as we previously described. See *supra*, at 14–15.

The dissent musters only one counterargument. According to the dissent, if statutory provisions “impos[e] the same kind of burden . . . on the same kind of right” and have mutually reinforcing effects, “it is evident that” they are “part of the same transaction” and must be challenged together. *Post*, at 20, 22. But for the word “evident,” the dissent points to no support for this conclusion, and we find it unconvincing. Statutes are often voluminous, with many related, yet distinct, provisions. Plaintiffs, in order to preserve their claims, need not challenge each such provision of, say, the USA PATRIOT Act, the Bipartisan Campaign Reform Act of 2002, the National Labor Relations Act, the Clean Water Act, the Antiterrorism and Effective Death Penalty Act of 1996, or the Patient Protection and Affordable Care Act in their first lawsuit.

For all of these reasons, we hold that the petitioners did not have to bring their challenge to the surgical-center provision when they challenged the admitting-privileges provision in *Abbott*. We accordingly hold that the doctrine of claim preclusion does not prevent them from bringing that challenge now.

\* \* \*

In sum, in our view, none of petitioners’ claims are barred by *res judicata*. For all of the reasons described above, we conclude that the Court of Appeals’ procedural ruling was incorrect. Cf. Brief for Professors Michael Dorf et al. as *Amici Curiae* 22 (professors in civil procedure from Cornell Law School, New York University School of Law, Columbia Law School, University of Chicago Law School, and Duke University Law School) (maintaining that “the panel’s procedural ruling” was “clearly incorrect”). We consequently proceed to consider the merits of petitioners’ claims.

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## III

*Undue Burden—Legal Standard*

We begin with the standard, as described in *Casey*. We recognize that the “State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient.” *Roe v. Wade*, 410 U. S. 113, 150 (1973). But, we added, “a statute which, while furthering [a] valid state interest, has the effect of placing a substantial obstacle in the path of a woman’s choice cannot be considered a permissible means of serving its legitimate ends.” *Casey*, 505 U. S., at 877 (plurality opinion). Moreover, “[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right.” *Id.*, at 878.

The Court of Appeals wrote that a state law is “constitutional if: (1) it does not have the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus; and (2) it is reasonably related to (or designed to further) a legitimate state interest.” 790 F. 3d, at 572. The Court of Appeals went on to hold that “the district court erred by substituting its own judgment for that of the legislature” when it conducted its “undue burden inquiry,” in part because “medical uncertainty underlying a statute is for resolution by legislatures, not the courts.” *Id.*, at 587 (citing *Gonzales v. Carhart*, 550 U. S. 124, 163 (2007)).

The Court of Appeals’ articulation of the relevant standard is incorrect. The first part of the Court of Appeals’ test may be read to imply that a district court should not consider the existence or nonexistence of medical benefits when considering whether a regulation of abortion constitutes an undue burden. The rule announced in *Casey*, however, requires that courts consider the burdens a law imposes on abortion access together with the benefits

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those laws confer. See 505 U. S., at 887–898 (opinion of the Court) (performing this balancing with respect to a spousal notification provision); *id.*, at 899–901 (joint opinion of O'Connor, KENNEDY, and Souter, JJ.) (same balancing with respect to a parental notification provision). And the second part of the test is wrong to equate the judicial review applicable to the regulation of a constitutionally protected personal liberty with the less strict review applicable where, for example, economic legislation is at issue. See, e.g., *Williamson v. Lee Optical of Okla., Inc.*, 348 U. S. 483, 491 (1955). The Court of Appeals' approach simply does not match the standard that this Court laid out in *Casey*, which asks courts to consider whether any burden imposed on abortion access is "undue."

The statement that legislatures, and not courts, must resolve questions of medical uncertainty is also inconsistent with this Court's case law. Instead, the Court, when determining the constitutionality of laws regulating abortion procedures, has placed considerable weight upon evidence and argument presented in judicial proceedings. In *Casey*, for example, we relied heavily on the District Court's factual findings and the research-based submissions of *amici* in declaring a portion of the law at issue unconstitutional. 505 U. S., at 888–894 (opinion of the Court) (discussing evidence related to the prevalence of spousal abuse in determining that a spousal notification provision erected an undue burden to abortion access). And, in *Gonzales* the Court, while pointing out that we must review legislative "factfinding under a deferential standard," added that we must not "place dispositive weight" on those "findings." 550 U. S., at 165. *Gonzales* went on to point out that the "*Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake.*" *Ibid.* (emphasis added). Although there we upheld a statute regulating abortion, we did not do so solely on the basis of legislative findings



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explicitly set forth in the statute, noting that “evidence presented in the District Courts contradicts” some of the legislative findings. *Id.*, at 166. In these circumstances, we said, “[u]ncritical deference to Congress’ factual findings . . . is inappropriate.” *Ibid.*

Unlike in *Gonzales*, the relevant statute here does not set forth any legislative findings. Rather, one is left to infer that the legislature sought to further a constitutionally acceptable objective (namely, protecting women’s health). *Id.*, at 149–150. For a district court to give significant weight to evidence in the judicial record in these circumstances is consistent with this Court’s case law. As we shall describe, the District Court did so here. It did not simply substitute its own judgment for that of the legislature. It considered the evidence in the record—including expert evidence, presented in stipulations, depositions, and testimony. It then weighed the asserted benefits against the burdens. We hold that, in so doing, the District Court applied the correct legal standard.

## IV

*Undue Burden—Admitting-Privileges Requirement*

Turning to the lower courts’ evaluation of the evidence, we first consider the admitting-privileges requirement. Before the enactment of H. B. 2, doctors who provided abortions were required to “have admitting privileges *or* have a working arrangement with a physician(s) who has admitting privileges at a local hospital in order to ensure the necessary back up for medical complications.” Tex. Admin. Code, tit. 25, §139.56 (2009) (emphasis added). The new law changed this requirement by requiring that a “physician performing or inducing an abortion . . . must, on the date the abortion is performed or induced, have active admitting privileges at a hospital that . . . is located not further than 30 miles from the location at which the abortion is performed or induced.” Tex. Health & Safety

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Code Ann. §171.0031(a). The District Court held that the legislative change imposed an “undue burden” on a woman’s right to have an abortion. We conclude that there is adequate legal and factual support for the District Court’s conclusion.

The purpose of the admitting-privileges requirement is to help ensure that women have easy access to a hospital should complications arise during an abortion procedure. Brief for Respondents 32–37. But the District Court found that it brought about no such health-related benefit. The court found that “[t]he great weight of evidence demonstrates that, before the act’s passage, abortion in Texas was extremely safe with particularly low rates of serious complications and virtually no deaths occurring on account of the procedure.” 46 F. Supp. 3d, at 684. Thus, there was no significant health-related problem that the new law helped to cure.

The evidence upon which the court based this conclusion included, among other things:

- A collection of at least five peer-reviewed studies on abortion complications in the first trimester, showing that the highest rate of major complications—including those complications requiring hospital admission—was less than one-quarter of 1%. See App. 269–270.
- Figures in three peer-reviewed studies showing that the highest complication rate found for the much rarer second trimester abortion was less than one-half of 1% (0.45% or about 1 out of about 200). *Id.*, at 270.
- Expert testimony to the effect that complications rarely require hospital admission, much less immediate transfer to a hospital from an outpatient clinic. *Id.*, at 266–267 (citing a study of complications occurring within six weeks after 54,911 abortions that had been paid for by the fee-for-service California Medicaid Program finding that the incidence of complications was 2.1%, the incidence of

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complications requiring hospital admission was 0.23%, and that of the 54,911 abortion patients included in the study, only 15 required immediate transfer to the hospital on the day of the abortion).

- Expert testimony stating that “it is extremely unlikely that a patient will experience a serious complication at the clinic that requires emergent hospitalization” and “in the rare case in which [one does], the quality of care that the patient receives is not affected by whether the abortion provider has admitting privileges at the hospital.” *Id.*, at 381.
- Expert testimony stating that in respect to surgical abortion patients who do suffer complications requiring hospitalization, most of these complications occur in the days after the abortion, not on the spot. See *id.*, at 382; see also *id.*, at 267.
- Expert testimony stating that a delay before the onset of complications is also expected for medical abortions, as “abortifacient drugs take time to exert their effects, and thus the abortion itself almost always occurs after the patient has left the abortion facility.” *Id.*, at 278.
- Some experts added that, if a patient needs a hospital in the day or week following her abortion, she will likely seek medical attention at the hospital nearest her home. See, *e.g.*, *id.*, at 153.

We have found nothing in Texas’ record evidence that shows that, compared to prior law (which required a “working arrangement” with a doctor with admitting privileges), the new law advanced Texas’ legitimate interest in protecting women’s health.

We add that, when directly asked at oral argument whether Texas knew of a single instance in which the new requirement would have helped even one woman obtain better treatment, Texas admitted that there was no evidence in the record of such a case. See Tr. of Oral Arg. 47.

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This answer is consistent with the findings of the other Federal District Courts that have considered the health benefits of other States' similar admitting-privileges laws. See *Planned Parenthood of Wis., Inc. v. Van Hollen*, 94 F. Supp. 3d 949, 953 (WD Wis. 2015), *aff'd sub nom. Planned Parenthood of Wis., Inc. v. Schimel*, 806 F. 3d 908 (CA7 2015); *Planned Parenthood Southeast, Inc. v. Strange*, 33 F. Supp. 3d 1330, 1378 (MD Ala. 2014).

At the same time, the record evidence indicates that the admitting-privileges requirement places a “substantial obstacle in the path of a woman’s choice.” *Casey*, 505 U. S., at 877 (plurality opinion). The District Court found, as of the time the admitting-privileges requirement began to be enforced, the number of facilities providing abortions dropped in half, from about 40 to about 20. 46 F. Supp. 3d, at 681. Eight abortion clinics closed in the months leading up to the requirement’s effective date. See App. 229–230; cf. Brief for Planned Parenthood Federation of America et al. as *Amici Curiae* 14 (noting that abortion facilities in Waco, San Angelo, and Midland no longer operate because Planned Parenthood is “unable to find local physicians in those communities with privileges who are willing to provide abortions due to the size of those communities and the hostility that abortion providers face”). Eleven more closed on the day the admitting-privileges requirement took effect. See App. 229–230; Tr. of Oral Arg. 58.

Other evidence helps to explain why the new requirement led to the closure of clinics. We read that other evidence in light of a brief filed in this Court by the Society of Hospital Medicine. That brief describes the undisputed general fact that “hospitals often condition admitting privileges on reaching a certain number of admissions per year.” Brief for Society of Hospital Medicine et al. as *Amici Curiae* 11. Returning to the District Court record, we note that, in direct testimony, the president of Nova

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Health Systems, implicitly relying on this general fact, pointed out that it would be difficult for doctors regularly performing abortions at the El Paso clinic to obtain admitting privileges at nearby hospitals because “[d]uring the past 10 years, over 17,000 abortion procedures were performed at the El Paso clinic [and n]ot a single one of those patients had to be transferred to a hospital for emergency treatment, much less admitted to the hospital.” App. 730. In a word, doctors would be unable to maintain admitting privileges or obtain those privileges for the future, because the fact that abortions are so safe meant that providers were unlikely to have any patients to admit.

Other *amicus* briefs filed here set forth without dispute other common prerequisites to obtaining admitting privileges that have nothing to do with ability to perform medical procedures. See Brief for Medical Staff Professionals as *Amici Curiae* 20–25 (listing, for example, requirements that an applicant has treated a high number of patients in the hospital setting in the past year, clinical data requirements, residency requirements, and other discretionary factors); see also Brief for American College of Obstetricians and Gynecologists et al. as *Amici Curiae* 16 (ACOG Brief) (“[S]ome academic hospitals will only allow medical staff membership for clinicians who also . . . accept faculty appointments”). Again, returning to the District Court record, we note that Dr. Lynn of the McAllen clinic, a veteran obstetrics and gynecology doctor who estimates that he has delivered over 15,000 babies in his 38 years in practice was unable to get admitting privileges at any of the seven hospitals within 30 miles of his clinic. App. 390–394. He was refused admitting privileges at a nearby hospital for reasons, as the hospital wrote, “not based on clinical competence considerations.” *Id.*, at 393–394 (emphasis deleted). The admitting-privileges requirement does not serve any relevant credentialing function.

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In our view, the record contains sufficient evidence that the admitting-privileges requirement led to the closure of half of Texas' clinics, or thereabouts. Those closures meant fewer doctors, longer waiting times, and increased crowding. Record evidence also supports the finding that after the admitting-privileges provision went into effect, the "number of women of reproductive age living in a county . . . more than 150 miles from a provider increased from approximately 86,000 to 400,000 . . . and the number of women living in a county more than 200 miles from a provider from approximately 10,000 to 290,000." 46 F. Supp. 3d, at 681. We recognize that increased driving distances do not always constitute an "undue burden." See *Casey*, 505 U.S., at 885–887 (joint opinion of O'Connor, KENNEDY, and Souter, JJ.). But here, those increases are but one additional burden, which, when taken together with others that the closings brought about, and when viewed in light of the virtual absence of any health benefit, lead us to conclude that the record adequately supports the District Court's "undue burden" conclusion. Cf. *id.*, at 895 (opinion of the Court) (finding burden "undue" when requirement places "substantial obstacle to a woman's choice" in "a large fraction of the cases in which" it "is relevant").

The dissent's only argument why these clinic closures, as well as the ones discussed in Part V, *infra*, may not have imposed an undue burden is this: Although "H. B. 2 caused the closure of *some* clinics," *post*, at 26 (emphasis added), other clinics may have closed for other reasons (so we should not "actually count" the burdens resulting from those closures against H. B. 2), *post*, at 30–31. But petitioners satisfied their burden to present evidence of causation by presenting direct testimony as well as plausible inferences to be drawn from the timing of the clinic closures. App. 182–183, 228–231. The District Court credited that evidence and concluded from it that H. B. 2 in fact

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led to the clinic closures. 46 F. Supp. 3d, at 680–681. The dissent’s speculation that perhaps other evidence, not presented at trial or credited by the District Court, might have shown that some clinics closed for unrelated reasons does not provide sufficient ground to disturb the District Court’s factual finding on that issue.

In the same breath, the dissent suggests that one benefit of H. B. 2’s requirements would be that they might “force unsafe facilities to shut down.” *Post*, at 26. To support that assertion, the dissent points to the Kermit Gosnell scandal. Gosnell, a physician in Pennsylvania, was convicted of first-degree murder and manslaughter. He “staffed his facility with unlicensed and indifferent workers, and then let them practice medicine unsupervised” and had “[d]irty facilities; unsanitary instruments; an absence of functioning monitoring and resuscitation equipment; the use of cheap, but dangerous, drugs; illegal procedures; and inadequate emergency access for when things inevitably went wrong.” Report of Grand Jury in No. 0009901–2008 (1st Jud. Dist. Pa., Jan. 14, 2011), p. 24, online at <http://www.phila.gov/districtattorney/pdfs/grandjurywomensmedical.pdf> (as last visited June 27, 2016). Gosnell’s behavior was terribly wrong. But there is no reason to believe that an extra layer of regulation would have affected that behavior. Determined wrongdoers, already ignoring existing statutes and safety measures, are unlikely to be convinced to adopt safe practices by a new overlay of regulations. Regardless, Gosnell’s deplorable crimes could escape detection only because his facility went uninspected for more than 15 years. *Id.*, at 20. Pre-existing Texas law already contained numerous detailed regulations covering abortion facilities, including a requirement that facilities be inspected at least annually. See *infra*, at 28 (describing those regulations). The record contains nothing to suggest that H. B. 2 would be more effective than pre-existing

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Texas law at deterring wrongdoers like Gosnell from criminal behavior.

## V

*Undue Burden—Surgical-Center Requirement*

The second challenged provision of Texas' new law sets forth the surgical-center requirement. Prior to enactment of the new requirement, Texas law required abortion facilities to meet a host of health and safety requirements. Under those pre-existing laws, facilities were subject to annual reporting and recordkeeping requirements, see Tex. Admin. Code, tit. 25, §§139.4, 139.5, 139.55, 139.58; a quality assurance program, see §139.8; personnel policies and staffing requirements, see §§139.43, 139.46; physical and environmental requirements, see §139.48; infection control standards, see §139.49; disclosure requirements, see §139.50; patient-rights standards, see §139.51; and medical- and clinical-services standards, see §139.53, including anesthesia standards, see §139.59. These requirements are policed by random and announced inspections, at least annually, see §§139.23, 139.31; Tex. Health & Safety Code Ann. §245.006(a) (West 2010), as well as administrative penalties, injunctions, civil penalties, and criminal penalties for certain violations, see Tex. Admin. Code, tit. 25, §139.33; Tex. Health & Safety Code Ann. §245.011 (criminal penalties for certain reporting violations).

H. B. 2 added the requirement that an “abortion facility” meet the “minimum standards . . . for ambulatory surgical centers” under Texas law. §245.010(a) (West Cum. Supp. 2015). The surgical-center regulations include, among other things, detailed specifications relating to the size of the nursing staff, building dimensions, and other building requirements. The nursing staff must comprise at least “an adequate number of [registered nurses] on duty to meet the following minimum staff requirements: director



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of the department (or designee), and supervisory and staff personnel for each service area to assure the immediate availability of [a registered nurse] for emergency care or for any patient when needed,” Tex. Admin. Code, tit. 25, §135.15(a)(3) (2016), as well as “a second individual on duty on the premises who is trained and currently certified in basic cardiac life support until all patients have been discharged from the facility” for facilities that provide moderate sedation, such as most abortion facilities, §135.15(b)(2)(A). Facilities must include a full surgical suite with an operating room that has “a clear floor area of at least 240 square feet” in which “[t]he minimum clear dimension between built-in cabinets, counters, and shelves shall be 14 feet.” §135.52(d)(15)(A). There must be a preoperative patient holding room and a postoperative recovery suite. The former “shall be provided and arranged in a one-way traffic pattern so that patients entering from outside the surgical suite can change, gown, and move directly into the restricted corridor of the surgical suite,” §135.52(d)(10)(A), and the latter “shall be arranged to provide a one-way traffic pattern from the restricted surgical corridor to the postoperative recovery suite, and then to the extended observation rooms or discharge,” §135.52(d)(9)(A). Surgical centers must meet numerous other spatial requirements, see generally §135.52, including specific corridor widths, §135.52(e)(1)(B)(iii). Surgical centers must also have an advanced heating, ventilation, and air conditioning system, §135.52(g)(5), and must satisfy particular piping system and plumbing requirements, §135.52(h). Dozens of other sections list additional requirements that apply to surgical centers. See generally §§135.1–135.56.

There is considerable evidence in the record supporting the District Court’s findings indicating that the statutory provision requiring all abortion facilities to meet all surgical-center standards does not benefit patients and is not

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necessary. The District Court found that “risks are not appreciably lowered for patients who undergo abortions at ambulatory surgical centers as compared to nonsurgical-center facilities.” 46 F. Supp. 3d, at 684. The court added that women “will not obtain better care or experience more frequent positive outcomes at an ambulatory surgical center as compared to a previously licensed facility.” *Ibid.* And these findings are well supported.

The record makes clear that the surgical-center requirement provides no benefit when complications arise in the context of an abortion produced through medication. That is because, in such a case, complications would almost always arise only after the patient has left the facility. See *supra*, at 23; App. 278. The record also contains evidence indicating that abortions taking place in an abortion facility are safe—indeed, safer than numerous procedures that take place outside hospitals and to which Texas does not apply its surgical-center requirements. See, e.g., *id.*, at 223–224, 254, 275–279. The total number of deaths in Texas from abortions was five in the period from 2001 to 2012, or about one every two years (that is to say, one out of about 120,000 to 144,000 abortions). *Id.*, at 272. Nationwide, childbirth is 14 times more likely than abortion to result in death, *ibid.*, but Texas law allows a midwife to oversee childbirth in the patient’s own home. Colonoscopy, a procedure that typically takes place outside a hospital (or surgical center) setting, has a mortality rate 10 times higher than an abortion. *Id.*, at 276–277; see ACOG Brief 15 (the mortality rate for liposuction, another outpatient procedure, is 28 times higher than the mortality rate for abortion). Medical treatment after an incomplete miscarriage often involves a procedure identical to that involved in a nonmedical abortion, but it often takes place outside a hospital or surgical center. App. 254; see ACOG Brief 14 (same). And Texas partly or wholly grandfathered (or waives in whole or in part the surgical-center

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requirement for) about two-thirds of the facilities to which the surgical-center standards apply. But it neither grandfathered nor provides waivers for any of the facilities that perform abortions. 46 F. Supp. 3d, at 680–681; see App. 184. These facts indicate that the surgical-center provision imposes “a requirement that simply is not based on differences” between abortion and other surgical procedures “that are reasonably related to” preserving women’s health, the asserted “purpos[e] of the Act in which it is found.” *Doe*, 410 U. S., at 194 (quoting *Morey v. Doud*, 354 U. S. 457, 465 (1957); internal quotation marks omitted).

Moreover, many surgical-center requirements are inappropriate as applied to surgical abortions. Requiring scrub facilities; maintaining a one-way traffic pattern through the facility; having ceiling, wall, and floor finishes; separating soiled utility and sterilization rooms; and regulating air pressure, filtration, and humidity control can help reduce infection where doctors conduct procedures that penetrate the skin. App. 304. But abortions typically involve either the administration of medicines or procedures performed through the natural opening of the birth canal, which is itself not sterile. See *id.*, at 302–303. Nor do provisions designed to safeguard heavily sedated patients (unable to help themselves) during fire emergencies, see Tex. Admin. Code, tit. 25, §135.41; App. 304, provide any help to abortion patients, as abortion facilities do not use general anesthesia or deep sedation, *id.*, at 304–305. Further, since the few instances in which serious complications do arise following an abortion almost always require hospitalization, not treatment at a surgical center, *id.*, at 255–256, surgical-center standards will not help in those instances either.

The upshot is that this record evidence, along with the absence of any evidence to the contrary, provides ample support for the District Court’s conclusion that “[m]any of the building standards mandated by the act and its im-

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plementing rules have such a tangential relationship to patient safety in the context of abortion as to be nearly arbitrary.” 46 F. Supp. 3d, at 684. That conclusion, along with the supporting evidence, provides sufficient support for the more general conclusion that the surgical-center requirement “will not [provide] better care or . . . more frequent positive outcomes.” *Ibid.* The record evidence thus supports the ultimate legal conclusion that the surgical-center requirement is not necessary.

At the same time, the record provides adequate evidentiary support for the District Court’s conclusion that the surgical-center requirement places a substantial obstacle in the path of women seeking an abortion. The parties stipulated that the requirement would further reduce the number of abortion facilities available to seven or eight facilities, located in Houston, Austin, San Antonio, and Dallas/Fort Worth. See App. 182–183. In the District Court’s view, the proposition that these “seven or eight providers could meet the demand of the entire State stretches credulity.” 46 F. Supp. 3d, at 682. We take this statement as a finding that these few facilities could not “meet” that “demand.”

The Court of Appeals held that this finding was “clearly erroneous.” 790 F. 3d, at 590. It wrote that the finding rested upon the “*ipse dixit*” of one expert, Dr. Grossman, and that there was no evidence that the current surgical centers (*i.e.*, the seven or eight) are operating at full capacity or could not increase capacity. *Ibid.* Unlike the Court of Appeals, however, we hold that the record provides adequate support for the District Court’s finding.

For one thing, the record contains charts and oral testimony by Dr. Grossman, who said that, as a result of the surgical-center requirement, the number of abortions that the clinics would have to provide would rise from “14,000 abortions annually” to “60,000 to 70,000”—an increase by a factor of about five. *Id.*, at 589–590. The District

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Court credited Dr. Grossman as an expert witness. See 46 F. Supp. 3d, at 678–679, n. 1; *id.*, at 681, n. 4 (finding “indicia of reliability” in Dr. Grossman’s conclusions). The Federal Rules of Evidence state that an expert may testify in the “form of an opinion” as long as that opinion rests upon “sufficient facts or data” and “reliable principles and methods.” Rule 702. In this case Dr. Grossman’s opinion rested upon his participation, along with other university researchers, in research that tracked “the number of open facilities providing abortion care in the state by . . . requesting information from the Texas Department of State Health Services . . . [, t]hrough interviews with clinic staff[,] and review of publicly available information.” App. 227. The District Court acted within its legal authority in determining that Dr. Grossman’s testimony was admissible. See Fed. Rule Evid. 702; see also *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U. S. 579, 589 (1993) (“[U]nder the Rules the trial judge must ensure that any and all [expert] evidence admitted is not only relevant, but reliable”); 29 C. Wright & V. Gold, *Federal Practice and Procedure: Evidence* §6266, p. 302 (2016) (“Rule 702 impose[s] on the trial judge additional responsibility to determine whether that [expert] testimony is likely to promote accurate factfinding”).

For another thing, common sense suggests that, more often than not, a physical facility that satisfies a certain physical demand will not be able to meet five times that demand without expanding or otherwise incurring significant costs. Suppose that we know only that a certain grocery store serves 200 customers per week, that a certain apartment building provides apartments for 200 families, that a certain train station welcomes 200 trains per day. While it is conceivable that the store, the apartment building, or the train station could just as easily provide for 1,000 customers, families, or trains at no significant additional cost, crowding, or delay, most of us

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would find this possibility highly improbable. The dissent takes issue with this general, intuitive point by arguing that many places operate below capacity and that in any event, facilities could simply hire additional providers. See *post*, at 32. We disagree that, according to common sense, medical facilities, well known for their wait times, operate below capacity as a general matter. And the fact that so many facilities were forced to close by the admitting-privileges requirement means that hiring more physicians would not be quite as simple as the dissent suggests. Courts are free to base their findings on commonsense inferences drawn from the evidence. And that is what the District Court did here.

The dissent now seeks to discredit Dr. Grossman by pointing out that a preliminary prediction he made in his testimony in *Abbott* about the effect of the admitting-privileges requirement on capacity was not borne out after that provision went into effect. See *post*, at 31, n. 22. If every expert who overestimated or underestimated any figure could not be credited, courts would struggle to find expert assistance. Moreover, making a hypothesis—and then attempting to verify that hypothesis with further studies, as Dr. Grossman did—is not irresponsible. It is an essential element of the scientific method. The District Court's decision to credit Dr. Grossman's testimony was sound, particularly given that Texas provided no credible experts to rebut it. See 46 F. Supp. 3d, at 680, n. 3 (declining to credit Texas' expert witnesses, in part because Vincent Rue, a nonphysician consultant for Texas, had exercised "considerable editorial and discretionary control over the contents of the experts' reports").

Texas suggests that the seven or eight remaining clinics could expand sufficiently to provide abortions for the 60,000 to 72,000 Texas women who sought them each year. Because petitioners had satisfied their burden, the obligation was on Texas, if it could, to present evidence

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rebutting that issue to the District Court. Texas admitted that it presented no such evidence. Tr. of Oral Arg. 46. Instead, Texas argued before this Court that one new clinic now serves 9,000 women annually. *Ibid.* In addition to being outside the record, that example is not representative. The clinic to which Texas referred apparently cost \$26 million to construct—a fact that even more clearly demonstrates that requiring seven or eight clinics to serve five times their usual number of patients does indeed represent an undue burden on abortion access. See Planned Parenthood Debuts New Building: Its \$26 Million Center in Houston is Largest of Its Kind in U. S., *Houston Chronicle*, May 21, 2010, p. B1.

Attempting to provide the evidence that Texas did not, the dissent points to an exhibit submitted in *Abbott* showing that three Texas surgical centers, two in Dallas as well as the \$26-million facility in Houston, are each capable of serving an average of 7,000 patients per year. See *post*, at 33–35. That “average” is misleading. In addition to including the Houston clinic, which does not represent most facilities, it is underinclusive. It ignores the evidence as to the Whole Woman’s Health surgical-center facility in San Antonio, the capacity of which is described as “severely limited.” The exhibit does nothing to rebut the commonsense inference that the dramatic decline in the number of available facilities will cause a shortfall in capacity should H. B. 2 go into effect. And facilities that were still operating after the effective date of the admitting-privileges provision were not able to accommodate increased demand. See App. 238; Tr. of Oral Arg. 30–31; Brief for National Abortion Federation et al. as *Amici Curiae* 17–20 (citing clinics’ experiences since the admitting-privileges requirement went into effect of 3-week wait times, staff burnout, and waiting rooms so full, patients had to sit on the floor or wait outside).

More fundamentally, in the face of no threat to women’s

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health, Texas seeks to force women to travel long distances to get abortions in crammed-to-capacity superfacilities. Patients seeking these services are less likely to get the kind of individualized attention, serious conversation, and emotional support that doctors at less taxed facilities may have offered. Healthcare facilities and medical professionals are not fungible commodities. Surgical centers attempting to accommodate sudden, vastly increased demand, see 46 F. Supp. 3d, at 682, may find that quality of care declines. Another commonsense inference that the District Court made is that these effects would be harmful to, not supportive of, women's health. See *id.*, at 682–683.

Finally, the District Court found that the costs that a currently licensed abortion facility would have to incur to meet the surgical-center requirements were considerable, ranging from \$1 million per facility (for facilities with adequate space) to \$3 million per facility (where additional land must be purchased). *Id.*, at 682. This evidence supports the conclusion that more surgical centers will not soon fill the gap when licensed facilities are forced to close.

We agree with the District Court that the surgical-center requirement, like the admitting-privileges requirement, provides few, if any, health benefits for women, poses a substantial obstacle to women seeking abortions, and constitutes an “undue burden” on their constitutional right to do so.

## VI

We consider three additional arguments that Texas makes and deem none persuasive.

First, Texas argues that facial invalidation of both challenged provisions is precluded by H. B. 2's severability clause. See Brief for Respondents 50–52. The severability clause says that “every provision, section, subsection, sentence, clause, phrase, or word in this Act, and every application of the provision in this Act, are severable from



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each other.” H. B. 2, §10(b), App. to Pet. for Cert. 200a. It further provides that 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.” *Ibid.* That language, Texas argues, means that facial invalidation of parts of the statute is not an option; instead, it says, the severability clause mandates a more narrowly tailored judicial remedy. But the challenged provisions of H. B. 2 close most of the abortion facilities in Texas and place added stress on those facilities able to remain open. They vastly increase the obstacles confronting women seeking abortions in Texas without providing any benefit to women’s health capable of withstanding any meaningful scrutiny. The provisions are unconstitutional on their face: Including a severability provision in the law does not change that conclusion.

Severability clauses, it is true, do express the enacting legislature’s preference for a narrow judicial remedy. As a general matter, we attempt to honor that preference. But our cases have never required us to proceed application by conceivable application when confronted with a facially unconstitutional statutory provision. “We have held that a severability clause is an aid merely; not an inexorable command.” *Reno v. American Civil Liberties Union*, 521 U. S. 844, 884–885, n. 49 (1997) (internal quotation marks omitted). Indeed, if a severability clause could impose such a requirement on courts, legislatures would easily be able to insulate unconstitutional statutes from most facial review. See *ibid.* (“It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government”

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(internal quotation marks omitted)). A severability clause is not grounds for a court to “devise a judicial remedy that . . . entail[s] quintessentially legislative work.” *Ayotte v. Planned Parenthood of Northern New Eng.*, 546 U. S. 320, 329 (2006). Such an approach would inflict enormous costs on both courts and litigants, who would be required to proceed in this manner whenever a single application of a law might be valid. We reject Texas’ invitation to pave the way for legislatures to immunize their statutes from facial review.

Texas similarly argues that instead of finding the entire surgical-center provision unconstitutional, we should invalidate (as applied to abortion clinics) only those specific surgical-center regulations that unduly burden the provision of abortions, while leaving in place other surgical-center regulations (for example, the reader could pick any of the various examples provided by the dissent, see *post*, at 42–43). See Brief for Respondents 52–53. As we have explained, Texas’ attempt to broadly draft a requirement to sever “applications” does not require us to proceed in piecemeal fashion when we have found the statutory provisions at issue facially unconstitutional.

Nor is that approach to the regulations even required by H. B. 2 itself. The statute was meant to require abortion facilities to meet the integrated surgical-center standards—not some subset thereof. The severability clause refers to severing applications of words and phrases *in the Act*, such as the surgical-center requirement as a whole. See H. B. 2, §4, App. to Pet. for Cert. 194a. It does not say that courts should go through the individual components of the different, surgical-center statute, let alone the individual *regulations* governing surgical centers to see whether those requirements are severable from each other as applied to abortion facilities. Facilities subject to some subset of those regulations do not qualify as surgical centers. And the risk of harm caused by inconsistent

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application of only a fraction of interconnected regulations counsels against doing so.

Second, Texas claims that the provisions at issue here do not impose a substantial obstacle because the women affected by those laws are not a “large fraction” of Texan women “of reproductive age,” which Texas reads *Casey* to have required. See Brief for Respondents 45, 48. But *Casey* used the language “large fraction” to refer to “a large fraction of cases in which [the provision at issue] is *relevant*,” a class narrower than “all women,” “pregnant women,” or even “the class of *women seeking abortions* identified by the State.” 505 U. S., at 894–895 (opinion of the Court) (emphasis added). Here, as in *Casey*, the relevant denominator is “those [women] for whom [the provision] is an actual rather than an irrelevant restriction.” *Id.*, at 895.

Third, Texas looks for support to *Simopoulos v. Virginia*, 462 U. S. 506 (1983), a case in which this Court upheld a surgical-center requirement as applied to second-trimester abortions. This case, however, unlike *Simopoulos*, involves restrictions applicable to all abortions, not simply to those that take place during the second trimester. Most abortions in Texas occur in the first trimester, not the second. App. 236. More importantly, in *Casey* we discarded the trimester framework, and we now use “viability” as the relevant point at which a State may begin limiting women’s access to abortion for reasons unrelated to maternal health. 505 U. S., at 878 (plurality opinion). Because the second trimester includes time that is both previability and postviability, *Simopoulos* cannot provide clear guidance. Further, the Court in *Simopoulos* found that the petitioner in that case, unlike petitioners here, had waived any argument that the regulation did not significantly help protect women’s health. 462 U. S., at 517.

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For these reasons the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

GINSBURG, J., concurring

**SUPREME COURT OF THE UNITED STATES**

No. 15–274

WHOLE WOMAN’S HEALTH, ET AL., PETITIONERS *v.*  
JOHN HELLERSTEDT, COMMISSIONER, TEXAS  
DEPARTMENT OF STATE HEALTH SERVICES, ET AL.

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

[June 27, 2016]

JUSTICE GINSBURG, concurring.

The Texas law called H. B. 2 inevitably will reduce the number of clinics and doctors allowed to provide abortion services. Texas argues that H. B. 2’s restrictions are constitutional because they protect the health of women who experience complications from abortions. In truth, “complications from an abortion are both rare and rarely dangerous.” *Planned Parenthood of Wis., Inc. v. Schimel*, 806 F. 3d 908, 912 (CA7 2015). See Brief for American College of Obstetricians and Gynecologists et al. as *Amici Curiae* 6–10 (collecting studies and concluding “[a]bortion is one of the safest medical procedures performed in the United States”); Brief for Social Science Researchers as *Amici Curiae* 5–9 (compiling studies that show “[c]omplication rates from abortion are very low”). Many medical procedures, including childbirth, are far more dangerous to patients, yet are not subject to ambulatory-surgical-center or hospital admitting-privileges requirements. See *ante*, at 31; *Planned Parenthood of Wis.*, 806 F. 3d, at 921–922. See also Brief for Social Science Researchers 9–11 (comparing statistics on risks for abortion with tonsillectomy, colonoscopy, and in-office dental surgery); Brief for American Civil Liberties Union et al. as *Amici Curiae* 7 (all District Courts to consider admitting-

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privileges requirements found abortion “is at least as safe as other medical procedures routinely performed in outpatient settings”). Given those realities, it is beyond rational belief that H. B. 2 could genuinely protect the health of women, and certain that the law “would simply make it more difficult for them to obtain abortions.” *Planned Parenthood of Wis.*, 806 F. 3d, at 910. When a State severely limits access to safe and legal procedures, women in desperate circumstances may resort to unlicensed rogue practitioners, *faute de mieux*, at great risk to their health and safety. See Brief for Ten Pennsylvania Abortion Care Providers as *Amici Curiae* 17–22. So long as this Court adheres to *Roe v. Wade*, 410 U. S. 113 (1973), and *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U. S. 833 (1992), Targeted Regulation of Abortion Providers laws like H. B. 2 that “do little or nothing for health, but rather strew impediments to abortion,” *Planned Parenthood of Wis.*, 806 F. 3d, at 921, cannot survive judicial inspection.

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## SUPREME COURT OF THE UNITED STATES

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

[June 27, 2016]

JUSTICE THOMAS, dissenting.

Today the Court strikes down two state statutory provisions in all of their applications, at the behest of abortion clinics and doctors. That decision exemplifies the Court’s troubling tendency “to bend the rules when any effort to limit abortion, or even to speak in opposition to abortion, is at issue.” *Stenberg v. Carhart*, 530 U. S. 914, 954 (2000) (Scalia, J., dissenting). As JUSTICE ALITO observes, see *post* (dissenting opinion), today’s decision creates an abortion exception to ordinary rules of res judicata, ignores compelling evidence that Texas’ law imposes no unconstitutional burden, and disregards basic principles of the severability doctrine. I write separately to emphasize how today’s decision perpetuates the Court’s habit of applying different rules to different constitutional rights—especially the putative right to abortion.

To begin, the very existence of this suit is a jurisprudential oddity. Ordinarily, plaintiffs cannot file suits to vindicate the constitutional rights of others. But the Court employs a different approach to rights that it favors. So in this case and many others, the Court has erroneously allowed doctors and clinics to vicariously vindicate the putative constitutional right of women seeking abortions.

This case also underscores the Court’s increasingly

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common practice of invoking a given level of scrutiny—here, the abortion-specific undue burden standard—while applying a different standard of review entirely. Whatever scrutiny the majority applies to Texas' law, it bears little resemblance to the undue-burden test the Court articulated in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U. S. 833 (1992), and its successors. Instead, the majority eviscerates important features of that test to return to a regime like the one that *Casey* repudiated.

Ultimately, this case shows why the Court never should have bent the rules for favored rights in the first place. Our law is now so riddled with special exceptions for special rights that our decisions deliver neither predictability nor the promise of a judiciary bound by the rule of law.

## I

This suit is possible only because the Court has allowed abortion clinics and physicians to invoke a putative constitutional right that does not belong to them—a woman's right to abortion. The Court's third-party standing jurisprudence is no model of clarity. See *Kowalski v. Tesmer*, 543 U. S. 125, 135 (2004) (THOMAS, J., concurring). Driving this doctrinal confusion, the Court has shown a particular willingness to undercut restrictions on third-party standing when the right to abortion is at stake. And this case reveals a deeper flaw in straying from our normal rules: when the wrong party litigates a case, we end up resolving disputes that make for bad law.

For most of our Nation's history, plaintiffs could not challenge a statute by asserting someone else's constitutional rights. See *ibid.* This Court would “not listen to an objection made to the constitutionality of an act by a party whose rights it does not affect and who has therefore no interest in defeating it.” *Clark v. Kansas City*, 176 U. S. 114, 118 (1900) (internal quotation marks omitted). And



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for good reason: “[C]ourts are not roving commissions assigned to pass judgment on the validity of the Nation’s laws.” *Broadrick v. Oklahoma*, 413 U. S. 601, 610–611 (1973).

In the 20th century, the Court began relaxing that rule. But even as the Court started to recognize exceptions for certain types of challenges, it stressed the strict limits of those exceptions. A plaintiff could assert a third party’s rights, the Court said, but only if the plaintiff had a “close relation to the third party” and the third party faced a formidable “hindrance” to asserting his own rights. *Powers v. Ohio*, 499 U. S. 400, 411 (1991); accord, *Kowalski, supra*, at 130–133 (similar).

Those limits broke down, however, because the Court has been “quite forgiving” in applying these standards to certain claims. *Id.*, at 130. Some constitutional rights remained “personal rights which . . . may not be vicariously asserted.” *Alderman v. United States*, 394 U. S. 165, 174 (1969) (Fourth Amendment rights are purely personal); see *Rakas v. Illinois*, 439 U. S. 128, 140, n. 8 (1978) (so is the Fifth Amendment right against self-incrimination). But the Court has abandoned such limitations on other rights, producing serious anomalies across similar factual scenarios. Lawyers cannot vicariously assert potential clients’ Sixth Amendment rights because they lack any current, close relationship. *Kowalski, supra*, at 130–131. Yet litigants can assert potential jurors’ rights against race or sex discrimination in jury selection even when the litigants have never met potential jurors and do not share their race or sex. *Powers, supra*, at 410–416; *J. E. B. v. Alabama ex rel. T. B.*, 511 U. S. 127, 129 (1994). And vendors can sue to invalidate state regulations implicating potential customers’ equal protection rights against sex discrimination. *Craig v. Boren*, 429 U. S. 190, 194–197 (1976) (striking down sex-based age restrictions on purchasing beer).

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Above all, the Court has been especially forgiving of third-party standing criteria for one particular category of cases: those involving the purported substantive due process right of a woman to abort her unborn child. In *Singleton v. Wulff*, 428 U. S. 106 (1976), a plurality of this Court fashioned a blanket rule allowing third-party standing in abortion cases. *Id.*, at 118. “[I]t generally is appropriate,” said the Court, “to allow a physician to assert the rights of women patients as against governmental interference with the abortion decision.” *Ibid.* Yet the plurality conceded that the traditional criteria for an exception to the third-party standing rule were not met. There are no “insurmountable” obstacles stopping women seeking abortions from asserting their own rights, the plurality admitted. Nor are there jurisdictional barriers. *Roe v. Wade*, 410 U. S. 113 (1973), held that women seeking abortions fell into the mootness exception for cases “‘capable of repetition, yet seeking review,’” enabling them to sue after they terminated their pregnancies without showing that they intended to become pregnant and seek an abortion again. *Id.*, at 125. Yet, since *Singleton*, the Court has unquestioningly accepted doctors’ and clinics’ vicarious assertion of the constitutional rights of hypothetical patients, even as women seeking abortions have successfully and repeatedly asserted their own rights before this Court.<sup>1</sup>

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<sup>1</sup> Compare, e.g., *Gonzales v. Carhart*, 550 U. S. 124 (2007), and *Stenberg v. Carhart*, 530 U. S. 914 (2000); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U. S. 833, 851 (1992) (assuming that physicians and clinics can vicariously assert women’s right to abortion), with, e.g., *Leavitt v. Jane L.*, 518 U. S. 137, 139 (1996) (*per curiam*); *Hodgson v. Minnesota*, 497 U. S. 417, 429 (1990); *H. L. v. Matheson*, 450 U. S. 398, 400 (1981); *Williams v. Zbaraz*, 448 U. S. 358, 361 (1980); *Harris v. McRae*, 448 U. S. 297, 303 (1980); *Bellotti v. Baird*, 428 U. S. 132, 137–138 (1976); *Poelker v. Doe*, 432 U. S. 519, 519 (1977) (*per curiam*); *Beal v. Doe*, 432 U. S. 438, 441–442 (1977); *Maher v. Roe*, 432 U. S. 464, 467 (1977) (women seeking abortions have capably asserted their own

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Here too, the Court does not question whether doctors and clinics should be allowed to sue on behalf of Texas women seeking abortions as a matter of course. They should not. The central question under the Court's abortion precedents is whether there is an undue burden on a woman's access to abortion. See *Casey*, 505 U. S., at 877 (plurality opinion); see Part II, *infra*. But the Court's permissive approach to third-party standing encourages litigation that deprives us of the information needed to resolve that issue. Our precedents encourage abortion providers to sue—and our cases then relieve them of any obligation to prove what burdens women actually face. I find it astonishing that the majority can discover an “undue burden” on women's access to abortion for “those [women] for whom [Texas' law] is an actual rather than an irrelevant restriction,” *ante*, at 39 (internal quotation marks omitted), without identifying how many women fit this description; their proximity to open clinics; or their preferences as to where they obtain abortions, and from whom. “[C]ommonsense inference[s]” that such a burden exists, *ante*, at 36, are no substitute for actual evidence. There should be no surer sign that our jurisprudence has gone off the rails than this: After creating a constitutional right to abortion because it “involve[s] the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy,” *Casey*, *supra*, at 851 (majority opinion), the Court has created special rules that cede its enforcement to others.

## II

Today's opinion also reimagines the undue-burden standard used to assess the constitutionality of abortion restrictions. Nearly 25 years ago, in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U. S. 833, a plurality of

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rights, as plaintiffs).

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this Court invented the “undue burden” standard as a special test for gauging the permissibility of abortion restrictions. *Casey* held that a law is unconstitutional if it imposes an “undue burden” on a woman’s ability to choose to have an abortion, meaning that it “has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.” *Id.*, at 877. *Casey* thus instructed courts to look to whether a law substantially impedes women’s access to abortion, and whether it is reasonably related to legitimate state interests. As the Court explained, “[w]here it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power” to regulate aspects of abortion procedures, “all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn.” *Gonzales v. Carhart*, 550 U. S. 124, 158 (2007).

I remain fundamentally opposed to the Court’s abortion jurisprudence. *E.g.*, *id.*, at 168–169 (THOMAS, J., concurring); *Stenberg*, 530 U. S., at 980, 982 (THOMAS, J., dissenting). Even taking *Casey* as the baseline, however, the majority radically rewrites the undue-burden test in three ways. First, today’s decision requires courts to “consider the burdens a law imposes on abortion access together with the benefits those laws confer.” *Ante*, at 19. Second, today’s opinion tells the courts that, when the law’s justifications are medically uncertain, they need not defer to the legislature, and must instead assess medical justifications for abortion restrictions by scrutinizing the record themselves. *Ibid.* Finally, even if a law imposes no “substantial obstacle” to women’s access to abortions, the law now must have more than a “reasonabl[e] relat[ion] to . . . a legitimate state interest.” *Ibid.* (internal quotation marks omitted). These precepts are nowhere to be found in *Casey* or its successors, and transform the undue-burden test to something much more akin to strict scrutiny.

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First, the majority’s free-form balancing test is contrary to *Casey*. When assessing Pennsylvania’s recordkeeping requirements for abortion providers, for instance, *Casey* did not weigh its benefits and burdens. Rather, *Casey* held that the law had a legitimate purpose because data collection advances medical research, “so it cannot be said that the requirements serve no purpose other than to make abortions more difficult.” 505 U. S., at 901 (joint opinion of O’Connor, KENNEDY, and Souter, JJ.). The opinion then asked whether the recordkeeping requirements imposed a “substantial obstacle,” and found none. *Ibid.* Contrary to the majority’s statements, see *ante*, at 19, *Casey* did not balance the benefits and burdens of Pennsylvania’s spousal and parental notification provisions, either. Pennsylvania’s spousal notification requirement, the plurality said, imposed an undue burden because findings established that the requirement would “likely . . . prevent a significant number of women from obtaining an abortion”—not because these burdens outweighed its benefits. 505 U. S., at 893 (majority opinion); see *id.*, at 887–894. And *Casey* summarily upheld parental notification provisions because even pre-*Casey* decisions had done so. *Id.*, at 899–900 (joint opinion).

Decisions in *Casey*’s wake further refute the majority’s benefits-and-burdens balancing test. The Court in *Mazurek v. Armstrong*, 520 U. S. 968 (1997) (*per curiam*), had no difficulty upholding a Montana law authorizing only physicians to perform abortions—even though no legislative findings supported the law, and the challengers claimed that “all health evidence contradict[ed] the claim that there is any health basis for the law.” *Id.*, at 973 (internal quotation marks omitted). *Mazurek* also deemed objections to the law’s lack of benefits “squarely foreclosed by *Casey* itself.” *Ibid.* Instead, the Court explained, “the Constitution gives the States broad latitude to decide that particular functions may be performed only by licensed

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professionals, *even if an objective assessment might suggest that those same tasks could be performed by others.*" *Ibid.* (quoting *Casey*, *supra*, at 885; emphasis in original); see *Gonzales*, *supra*, at 164 (relying on *Mazurek*).

Second, by rejecting the notion that "legislatures, and not courts, must resolve questions of medical uncertainty," *ante*, at 20, the majority discards another core element of the *Casey* framework. Before today, this Court had "given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty." *Gonzales*, 550 U. S., at 163. This Court emphasized that this "traditional rule" of deference "is consistent with *Casey*." *Ibid.* This Court underscored that legislatures should not be hamstrung "if some part of the medical community were disinclined to follow the prescription." *Id.*, at 166. And this Court concluded that "[c]onsiderations of marginal safety, including the balance of risks, are within the legislative competence when the regulation is rational and in pursuit of legitimate ends." *Ibid.*; see *Stenberg*, *supra*, at 971 (KENNEDY, J., dissenting) ("the right of the legislature to resolve matters on which physicians disagreed" is "establish[ed] beyond doubt"). This Court could not have been clearer: Whenever medical justifications for an abortion restriction are debatable, that "provides a sufficient basis to conclude in [a] facial attack that the [law] does not impose an undue burden." *Gonzales*, 550 U. S., at 164. Otherwise, legislatures would face "too exacting" a standard. *Id.*, at 166.

Today, however, the majority refuses to leave disputed medical science to the legislature because past cases "placed considerable weight upon the evidence and argument presented in judicial proceedings." *Ante*, at 20. But while *Casey* relied on record evidence to uphold Pennsylvania's spousal-notification requirement, that requirement had nothing to do with debated medical science. 505 U. S., at 888–894 (majority opinion). And while *Gonzales* ob-

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served that courts need not blindly accept all legislative findings, see *ante*, at 20, that does not help the majority. *Gonzales* refused to accept Congress' finding of "a medical consensus that the prohibited procedure is never medically necessary" because the procedure's necessity was debated within the medical community. 550 U. S., at 165–166. Having identified medical uncertainty, *Gonzales* explained how courts should resolve conflicting positions: by respecting the legislature's judgment. See *id.*, at 164.

Finally, the majority overrules another central aspect of *Casey* by requiring laws to have more than a rational basis even if they do not substantially impede access to abortion. *Ante*, at 19–20. "Where [the State] *has a rational basis to act* and it does not impose an undue burden," this Court previously held, "the State may use its regulatory power" to impose regulations "in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn." *Gonzales, supra*, at 158 (emphasis added); see *Casey, supra*, at 878 (plurality opinion) (similar). No longer. Though the majority declines to say how substantial a State's interest must be, *ante*, at 20, one thing is clear: The State's burden has been ratcheted to a level that has not applied for a quarter century.

Today's opinion does resemble *Casey* in one respect: After disregarding significant aspects of the Court's prior jurisprudence, the majority applies the undue-burden standard in a way that will surely mystify lower courts for years to come. As in *Casey*, today's opinion "simply . . . highlight[s] certain facts in the record that apparently strike the . . . Justices as particularly significant in establishing (or refuting) the existence of an undue burden." 505 U. S., at 991 (Scalia, J., concurring in judgment in part and dissenting in part); see *ante*, at 23–24, 31–34. As in *Casey*, "the opinion then simply announces that the provision either does or does not impose a 'substantial

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obstacle' or an 'undue burden.'" 505 U. S., at 991 (opinion of Scalia, J); see *ante*, at 26, 36. And still "[w]e do not know whether the same conclusions could have been reached on a different record, or in what respects the record would have had to differ before an opposite conclusion would have been appropriate." 505 U. S., at 991 (opinion of Scalia, J.); cf. *ante*, at 26, 31–32. All we know is that an undue burden now has little to do with whether the law, in a "real sense, deprive[s] women of the ultimate decision," *Casey, supra*, at 875, and more to do with the loss of "individualized attention, serious conversation, and emotional support," *ante*, at 36.

The majority's undue-burden test looks far less like our post-*Casey* precedents and far more like the strict-scrutiny standard that *Casey* rejected, under which only the most compelling rationales justified restrictions on abortion. See *Casey, supra*, at 871, 874–875 (plurality opinion). One searches the majority opinion in vain for any acknowledgment of the "premise central" to *Casey*'s rejection of strict scrutiny: "that the government has a legitimate and substantial interest in preserving and promoting fetal life" from conception, not just in regulating medical procedures. *Gonzales, supra*, at 145 (internal quotation marks omitted); see *Casey, supra*, at 846 (majority opinion), 871 (plurality opinion). Meanwhile, the majority's undue-burden balancing approach risks ruling out even minor, previously valid infringements on access to abortion. Moreover, by second-guessing medical evidence and making its own assessments of "quality of care" issues, *ante*, at 23–24, 30–31, 36, the majority reappoints this Court as "the country's *ex officio* medical board with powers to disapprove medical and operative practices and standards throughout the United States." *Gonzales, supra*, at 164 (internal quotation marks omitted). And the majority seriously burdens States, which must guess at how much more compelling their interests must be to pass muster



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and what “commonsense inferences” of an undue burden this Court will identify next.

## III

The majority’s furtive reconfiguration of the standard of scrutiny applicable to abortion restrictions also points to a deeper problem. The undue-burden standard is just one variant of the Court’s tiers-of-scrutiny approach to constitutional adjudication. And the label the Court affixes to its level of scrutiny in assessing whether the government can restrict a given right—be it “rational basis,” intermediate, strict, or something else—is increasingly a meaningless formalism. As the Court applies whatever standard it likes to any given case, nothing but empty words separates our constitutional decisions from judicial fiat.

Though the tiers of scrutiny have become a ubiquitous feature of constitutional law, they are of recent vintage. Only in the 1960’s did the Court begin in earnest to speak of “strict scrutiny” versus reviewing legislation for mere rationality, and to develop the contours of these tests. See Fallon, *Strict Judicial Scrutiny*, 54 UCLA L. Rev. 1267, 1274, 1284–1285 (2007). In short order, the Court adopted strict scrutiny as the standard for reviewing everything from race-based classifications under the Equal Protection Clause to restrictions on constitutionally protected speech. *Id.*, at 1275–1283. *Roe v. Wade*, 410 U. S. 113, then applied strict scrutiny to a purportedly “fundamental” substantive due process right for the first time. *Id.*, at 162–164; see Fallon, *supra*, at 1283; accord, *Casey*, *supra*, at 871 (plurality opinion) (noting that post-*Roe* cases interpreted *Roe* to demand “strict scrutiny”). Then the tiers of scrutiny proliferated into ever more gradations. See, e.g., *Craig*, 429 U. S., at 197–198 (intermediate scrutiny for sex-based classifications); *Lawrence v. Texas*, 539 U. S. 558, 580 (2003) (O’Connor, J., concurring in judgment) (“a more searching form of rational basis review” applies to

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laws reflecting “a desire to harm a politically unpopular group”); *Buckley v. Valeo*, 424 U. S. 1, 25 (1976) (*per curiam*) (applying “‘closest scrutiny’” to campaign-finance contribution limits). *Casey*’s undue-burden test added yet another right-specific test on the spectrum between rational-basis and strict-scrutiny review.

The illegitimacy of using “made-up tests” to “displace longstanding national traditions as the primary determinant of what the Constitution means” has long been apparent. *United States v. Virginia*, 518 U. S. 515, 570 (1996) (Scalia, J., dissenting). The Constitution does not prescribe tiers of scrutiny. The three basic tiers—“rational basis,” intermediate, and strict scrutiny—“are no more scientific than their names suggest, and a further element of randomness is added by the fact that it is largely up to us which test will be applied in each case.” *Id.*, at 567; see also *Craig, supra*, at 217–221 (Rehnquist, J., dissenting).

But the problem now goes beyond that. If our recent cases illustrate anything, it is how easily the Court tinkers with levels of scrutiny to achieve its desired result. This Term, it is easier for a State to survive strict scrutiny despite discriminating on the basis of race in college admissions than it is for the same State to regulate how abortion doctors and clinics operate under the putatively less stringent undue-burden test. All the State apparently needs to show to survive strict scrutiny is a list of aspirational educational goals (such as the “cultivat[ion of] a set of leaders with legitimacy in the eyes of the citizenry”) and a “reasoned, principled explanation” for why it is pursuing them—then this Court defers. *Fisher v. University of Tex. at Austin, ante*, at 7, 12 (internal quotation marks omitted). Yet the same State gets no deference under the undue-burden test, despite producing evidence that abortion safety, one rationale for Texas’ law, is medically debated. See *Whole Woman’s Health v. Lakey*, 46 F. Supp.

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3d 673, 684 (WD Tex. 2014) (noting conflict in expert testimony about abortion safety). Likewise, it is now easier for the government to restrict judicial candidates' campaign speech than for the Government to define marriage—even though the former is subject to strict scrutiny and the latter was supposedly subject to some form of rational-basis review. Compare *Williams-Yulee v. Florida Bar*, 575 U. S. \_\_\_, \_\_\_–\_\_\_ (2015) (slip op., at 8–9), with *United States v. Windsor*, 570 U. S. \_\_\_, \_\_\_ (2013) (slip op., at 20).

These more recent decisions reflect the Court's tendency to relax purportedly higher standards of review for less-preferred rights. *E.g.*, *Nixon v. Shrink Missouri Government PAC*, 528 U. S. 377, 421 (2000) (THOMAS, J., dissenting) ("The Court makes no effort to justify its deviation from the tests we traditionally employ in free speech cases" to review caps on political contributions). Meanwhile, the Court selectively applies rational-basis review—under which the question is supposed to be whether "any state of facts reasonably may be conceived to justify" the law, *McGowan v. Maryland*, 366 U. S. 420, 426 (1961)—with formidable toughness. *E.g.*, *Lawrence*, 539 U. S., at 580 (O'Connor, J., concurring in judgment) (at least in equal protection cases, the Court is "most likely" to find no rational basis for a law if "the challenged legislation inhibits personal relationships"); see *id.*, at 586 (Scalia, J., dissenting) (faulting the Court for applying "an unheard-of form of rational-basis review").

These labels now mean little. Whatever the Court claims to be doing, in practice it is treating its "doctrine referring to tiers of scrutiny as guidelines informing our approach to the case at hand, not tests to be mechanically applied." *Williams-Yulee*, *supra*, at \_\_\_ (slip op., at 1) (BREYER, J., concurring). The Court should abandon the pretense that anything other than policy preferences underlies its balancing of constitutional rights and inter-

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ests in any given case.

#### IV

It is tempting to identify the Court's invention of a constitutional right to abortion in *Roe v. Wade*, 410 U. S. 113, as the tipping point that transformed third-party standing doctrine and the tiers of scrutiny into an unworkable morass of special exceptions and arbitrary applications. But those roots run deeper, to the very notion that some constitutional rights demand preferential treatment. During the *Lochner* era, the Court considered the right to contract and other economic liberties to be fundamental requirements of due process of law. See *Lochner v. New York*, 198 U. S. 45 (1905). The Court in 1937 repudiated *Lochner*'s foundations. See *West Coast Hotel Co. v. Parrish*, 300 U. S. 379, 386–387, 400 (1937). But the Court then created a new taxonomy of preferred rights.

In 1938, seven Justices heard a constitutional challenge to a federal ban on shipping adulterated milk in interstate commerce. Without economic substantive due process, the ban clearly invaded no constitutional right. See *United States v. Carolene Products Co.*, 304 U. S. 144, 152–153 (1938). Within Justice Stone's opinion for the Court, however, was a footnote that just three other Justices joined—the famous *Carolene Products* Footnote 4. See *ibid.*, n. 4; Lusky, Footnote Redux: A *Carolene Products* Reminiscence, 82 Colum. L. Rev. 1093, 1097 (1982). The footnote's first paragraph suggested that the presumption of constitutionality that ordinarily attaches to legislation might be “narrower . . . when legislation appears on its face to be within a specific prohibition of the Constitution.” 304 U. S., at 152–153, n. 4. Its second paragraph appeared to question “whether legislation which restricts those political processes, which can ordinarily be expected to bring about repeal of undesirable legislation, is to be

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subjected to more exacting judicial scrutiny under the general prohibitions of the [14th] Amendment than are most other types of legislation.” *Ibid.* And its third and most familiar paragraph raised the question “whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.” *Ibid.*

Though the footnote was pure dicta, the Court seized upon it to justify its special treatment of certain personal liberties like the First Amendment and the right against discrimination on the basis of race—but also rights not enumerated in the Constitution.<sup>2</sup> As the Court identified which rights deserved special protection, it developed the tiers of scrutiny as part of its equal protection (and, later, due process) jurisprudence as a way to demand extra justifications for encroachments on these rights. See Fallon, 54 UCLA L. Rev., at 1270–1273, 1281–1285. And, having created a new category of fundamental rights, the Court loosened the reins to recognize even putative rights like abortion, see *Roe*, 410 U. S., at 162–164, which hardly implicate “discrete and insular minorities.”

The Court also seized upon the rationale of the *Carolene Products* footnote to justify exceptions to third-party standing doctrine. The Court suggested that it was tilting the analysis to favor rights involving actual or perceived minorities—then seemingly counted the right to contra-

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<sup>2</sup>See Fallon, Strict Judicial Scrutiny, 54 UCLA L. Rev. 1267, 1278–1291 (2007); see also Linzer, The *Carolene Products* Footnote and the Preferred Position of Individual Rights: Louis Lusky and John Hart Ely vs. Harlan Fiske Stone, 12 Const. Commentary 277, 277–278, 288–300 (1995); *Skinner v. Oklahoma ex rel. Williamson*, 316 U. S. 535, 544 (1942) (Stone, C. J., concurring) (citing the *Carolene Products* footnote to suggest that the presumption of constitutionality did not fully apply to encroachments on the unenumerated personal liberty to procreate).

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ception as such a right. According to the Court, what matters is the “relationship between one who acted to protect the rights of a minority and the minority itself”—which, the Court suggested, includes the relationship “between an advocate of the rights of persons to obtain contraceptives and those desirous of doing so.” *Eisenstadt v. Baird*, 405 U. S. 438, 445 (1972) (citing *Sedler, Standing to Assert Constitutional Jus Tertii in the Supreme Court*, 71 Yale L. J. 599, 631 (1962)).

Eighty years on, the Court has come full circle. The Court has simultaneously transformed judicially created rights like the right to abortion into preferred constitutional rights, while disfavoring many of the rights actually enumerated in the Constitution. But our Constitution renounces the notion that some constitutional rights are more equal than others. A plaintiff either possesses the constitutional right he is asserting, or not—and if not, the judiciary has no business creating ad hoc exceptions so that others can assert rights that seem especially important to vindicate. A law either infringes a constitutional right, or not; there is no room for the judiciary to invent tolerable degrees of encroachment. Unless the Court abides by one set of rules to adjudicate constitutional rights, it will continue reducing constitutional law to policy-driven value judgments until the last shreds of its legitimacy disappear.

\* \* \*

Today's decision will prompt some to claim victory, just as it will stiffen opponents' will to object. But the entire Nation has lost something essential. The majority's embrace of a jurisprudence of rights-specific exceptions and balancing tests is “a regrettable concession of defeat—an acknowledgement that we have passed the point where ‘law,’ properly speaking, has any further application.” Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1182 (1989). I respectfully dissent.

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**SUPREME COURT OF THE UNITED STATES**

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No. 15–274

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WHOLE WOMAN’S HEALTH, ET AL., PETITIONERS *v.*  
JOHN HELLERSTEDT, COMMISSIONER, TEXAS  
DEPARTMENT OF STATE HEALTH SERVICES, ET AL.

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

[June 27, 2016]

JUSTICE ALITO, with whom THE CHIEF JUSTICE and  
JUSTICE THOMAS join, dissenting.

The constitutionality of laws regulating abortion is one of the most controversial issues in American law, but this case does not require us to delve into that contentious dispute. Instead, the dispositive issue here concerns a workaday question that can arise in any case no matter the subject, namely, whether the present case is barred by *res judicata*. As a court of law, we have an obligation to apply such rules in a neutral fashion in all cases, regardless of the subject of the suit. If anything, when a case involves a controversial issue, we should be especially careful to be scrupulously neutral in applying such rules.

The Court has not done so here. On the contrary, determined to strike down two provisions of a new Texas abortion statute in all of their applications, the Court simply disregards basic rules that apply in all other cases.

Here is the worst example. Shortly after Texas enacted House Bill 2 (H. B. 2) in 2013, the petitioners in this case brought suit, claiming, among other things, that a provision of the new law requiring a physician performing an abortion to have admitting privileges at a nearby hospital is “facially” unconstitutional and thus totally unenforceable. Petitioners had a fair opportunity to make their case,

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but they lost on the merits in the United States Court of Appeals for the Fifth Circuit, and they chose not to petition this Court for review. The judgment against them became final. *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 951 F. Supp. 2d 891 (WD Tex. 2013), *aff'd in part and rev'd in part*, 748 F. 3d 583 (CA5 2014) (*Abbott*).

Under the rules that apply in regular cases, petitioners could not relitigate the exact same claim in a second suit. As we have said, “a losing litigant deserves no rematch after a defeat fairly suffered, in adversarial proceedings, on an issue identical in substance to the one he subsequently seeks to raise.” *Astoria Fed. Sav. & Loan Assn. v. Solimino*, 501 U. S. 104, 107 (1991).

In this abortion case, however, that rule is disregarded. The Court awards a victory to petitioners on the very claim that they unsuccessfully pressed in the earlier case. The Court does this even though petitioners, undoubtedly realizing that a rematch would not be allowed, did not presume to include such a claim in their complaint. The Court favors petitioners with a victory that they did not have the audacity to seek.

Here is one more example: the Court's treatment of H. B. 2's “severability clause.” When part of a statute is held to be unconstitutional, the question arises whether other parts of the statute must also go. If a statute says that provisions found to be unconstitutional can be severed from the rest of the statute, the valid provisions are allowed to stand. H. B. 2 contains what must surely be the most emphatic severability clause ever written. This clause says that every single word of the statute and every possible application of its provisions is severable. But despite this language, the Court holds that no part of the challenged provisions and no application of any part of them can be saved. Provisions that are indisputably constitutional—for example, provisions that require facili-



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ties performing abortions to follow basic fire safety measures—are stricken from the books. There is no possible justification for this collateral damage.

The Court’s patent refusal to apply well-established law in a neutral way is indefensible and will undermine public confidence in the Court as a fair and neutral arbiter.

## I

Res judicata—or, to use the more modern terminology, “claim preclusion”—is a bedrock principle of our legal system. As we said many years ago, “[p]ublic policy dictates that there be an end of litigation[,] that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties.” *Baldwin v. Iowa State Traveling Men’s Assn.*, 283 U. S. 522, 525 (1931). This doctrine “is central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdictions. . . . To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.” *Montana v. United States*, 440 U. S. 147, 153–154 (1979). These are “vital public interests” that should be “‘cordially regarded and enforced.’” *Federated Department Stores, Inc. v. Moitie*, 452 U. S. 394, 401 (1981).

The basic rule of preclusion is well known and has been frequently stated in our opinions. Litigation of a “cause of action” or “claim” is barred if (1) the same (or a closely related) party (2) brought a prior suit asserting the same cause of action or claim, (3) the prior case was adjudicated by a court of competent jurisdiction and (4) was decided on the merits, (5) a final judgment was entered, and (6) there is no ground, such as fraud, to invalidate the prior judg-

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ment. See *Montana, supra*, at 153; *Commissioner v. Sunnen*, 333 U. S. 591, 597 (1948); *Cromwell v. County of Sac*, 94 U. S. 351, 352–353 (1877).

A

I turn first to the application of this rule to petitioners' claim that H. B. 2's admitting privileges requirement is facially unconstitutional.

Here, all the elements set out above are easily satisfied based on *Abbott*, the 2013 case to which I previously referred. That case (1) was brought by a group of plaintiffs that included petitioners in the present case, (2) asserted the same cause of action or claim, namely, a facial challenge to the constitutionality of H. B. 2's admitting privileges requirement, (3) was adjudicated by courts of competent jurisdiction, (4) was decided on the merits, (5) resulted in the entry of a final judgment against petitioners, and (6) was not otherwise subject to invalidation. All of this is clear, and that is undoubtedly why petitioners' attorneys did not even include a facial attack on the admitting privileges requirement in their complaint in this case. To have done so would have risked sanctions for misconduct. See *Robinson v. National Cash Register Co.*, 808 F. 2d 1119, 1131 (CA5 1987) (a party's "persistence in litigating [a claim] when res judicata clearly barred the suit violated rule 11"); *McLaughlin v. Bradlee*, 602 F. Supp. 1412, 1417 (DC 1985) ("It is especially appropriate to impose sanctions in situations where the doctrines of *res judicata* and collateral estoppel plainly preclude relitigation of the suit").

Of the elements set out above, the Court disputes only one. The Court concludes that petitioners' prior facial attack on the admitting privileges requirement and their current facial attack on that same requirement are somehow not the same cause of action or claim. But that conclusion is unsupported by authority and plainly wrong.

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## B

Although the scope of a cause of action or claim for purposes of res judicata is hardly a new question, courts and scholars have struggled to settle upon a definition.<sup>1</sup> But the outcome of the present case does not depend upon the selection of the proper definition from among those adopted or recommended over the years because the majority's holding is not supported by any of them.

In *Baltimore S. S. Co. v. Phillips*, 274 U. S. 316 (1927), we defined a cause of action as an “actionable wrong.” *Id.*, at 321; see also *ibid.* (“A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show”). On this understanding, the two claims at issue here are indisputably the same.

The same result is dictated by the rule recommended by the American Law Institute (ALI) in the first Restatement of Judgments, issued in 1942. Section 61 of the first Restatement explains when a claim asserted by a plaintiff in a second suit is the same for preclusion purposes as a claim that the plaintiff unsuccessfully litigated in a prior case. Under that provision, “the plaintiff is precluded from subsequently maintaining a second action based upon the same transaction, if the evidence needed to sustain the second action would have sustained the first action.” Restatement of Judgments §61. There is no doubt that this rule is satisfied here.

The second Restatement of Judgments, issued by the ALI in 1982, adopted a new approach for determining the scope of a cause of action or claim. In *Nevada v. United States*, 463 U. S. 110 (1983), we noted that the two Restatements differ in this regard, but we had no need to determine which was correct. *Id.*, at 130–131, and n. 12.

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<sup>1</sup>See, e.g., Note, Developments in the Law: Res Judicata, 65 Harv. L. Rev. 818, 824 (1952); Cleary, Res Judicata Reexamined, 57 Yale L. J. 339, 339–340 (1948).

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Here, the majority simply assumes that we should follow the second Restatement even though that Restatement—on the Court's reading, at least—leads to a conclusion that differs from the conclusion clearly dictated by the first Restatement.

If the second Restatement actually supported the majority's holding, the Court would surely be obligated to explain why it chose to follow the second Restatement's approach. But here, as in *Nevada, supra*, at 130–131, application of the rule set out in the second Restatement does not change the result. While the Court relies almost entirely on a comment to one section of the second Restatement, the Court ignores the fact that a straightforward application of the provisions of that Restatement leads to the conclusion that petitioners' two facial challenges to the admitting privileges requirement constitute a single claim.

Section 19 of the second Restatement sets out the general claim-preclusion rule that applies in a case like the one before us: "A valid and final personal judgment rendered in favor of the defendant bars another action by the plaintiff on the same claim." Section 24(1) then explains the scope of the "claim" that is extinguished: It "includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose." Section 24's Comment *b*, in turn, fleshes out the key term "transaction," which it defines as "a natural grouping or common nucleus of operative facts." Whether a collection of events constitutes a single transaction is said to depend on "their relatedness in time, space, origin, or motivation, and whether, taken together, they form a convenient unit for trial purposes." *Ibid.*

Both the claim asserted in petitioners' first suit and the claim now revived by the Court involve the same "nucleus of operative facts." Indeed, they involve the very same

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“operative facts,” namely, the enactment of the admitting privileges requirement, which, according to the theory underlying petitioners’ facial claims, would inevitably have the effect of causing abortion clinics to close. This is what petitioners needed to show—and what they attempted to show in their first facial attack: not that the admitting privileges requirement had *already* imposed a substantial burden on the right of Texas women to obtain abortions, but only that it *would have* that effect once clinics were able to assess whether they could practicably comply.

The Court’s decision in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U. S. 833 (1992), makes that clear. *Casey* held that Pennsylvania’s spousal notification requirement was facially unconstitutional even though that provision had been enjoined prior to enforcement. See *id.*, at 845. And the Court struck down the provision because it “*will impose* a substantial obstacle.” *Id.*, at 893–894 (emphasis added). See also *id.*, at 893 (“The spousal notification requirement *is thus likely to prevent* a significant number of women from obtaining an abortion” (emphasis added)); *id.*, at 894 (Women “*are likely to be deterred* from procuring an abortion” (emphasis added)).

Consistent with this understanding, what petitioners tried to show in their first case was that the admitting privileges requirement would cause clinics to close. They claimed that their evidence showed that “at least one-third of the State’s licensed providers *would stop* providing abortions once the privileges requirement took effect.”<sup>2</sup>

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<sup>2</sup>Brief for Plaintiffs-Appellees in *Abbott*, No. 13–51008 (CA5), p. 5 (emphasis added); see also *id.*, at 23–24 (“[T]he evidence established that as a result of the admitting privileges requirement, approximately one-third of the licensed abortion providers in Texas *would stop* providing abortions. . . . As a result, one in three women in Texas *would be unable* to access desired abortion services. . . . [T]he immediate, widespread reduction of services caused by the admitting privileges re-

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Agreeing with petitioners, the District Court enjoined enforcement of the requirement on the ground that “there *will be* abortion clinics *that will close*.” *Abbott*, 951 F. Supp. 2d, at 900 (emphasis added). The Fifth Circuit found that petitioners’ evidence of likely effect was insufficient, stating that petitioners failed to prove that “any woman *will lack* reasonable access to a clinic within Texas.” *Abbott*, 748 F. 3d, at 598 (some emphasis added; some emphasis deleted). The correctness of that holding is irrelevant for present purposes. What matters is that the “operative fact” in the prior case was the enactment of the admitting privileges requirement, and that is precisely the same operative fact underlying petitioners’ facial attack in the case now before us.<sup>3</sup>

### C

In light of this body of authority, how can the Court maintain that the first and second facial claims are really

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quirement *would produce* a shortfall in the capacity of providers to serve all of the women seeking abortions” (emphasis added)).

<sup>3</sup> Even if the “operative facts” were actual clinic closures, the claims in the two cases would still be the same. The Court suggests that many clinics closed between the time of the Fifth Circuit’s decision in the first case and the time of the District Court’s decision in the present case by comparing what the Court of Appeals said in *Abbott* about the effect of the admitting privileges requirement alone, 748 F. 3d, at 598 (“All of the major Texas cities . . . continue to have multiple clinics where many physicians will have or obtain hospital admitting privileges”), with what the District Court said in this case about the combined effect of the admitting privileges requirement and the ambulatory surgical center requirement, 46 F. Supp. 3d 673, 680 (WD Tex. 2014) (Were the surgical center requirement to take effect on September 1, 2014, only seven or eight clinics would remain open). See *ante*, at 14–15. Obviously, this comparison does not show that the effect of the admitting privileges requirement alone was greater at the time of the District Court’s decision in this second case. Simply put, the Court presents no new clinic closures allegedly caused by the admitting privileges requirement beyond those already accounted for in *Abbott*, as I discuss, *infra*, at 15–17, and accompanying notes.

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two different claims? The Court’s first argument is that petitioners did not bring two facial claims because their complaint in the present case sought only as-applied relief and it was the District Court, not petitioners, who injected the issue of facial relief into the case. *Ante*, at 11. (After the District Court gave them statewide relief, petitioners happily accepted the gift and now present their challenge as a facial one. See Reply Brief 24–25 (“[F]acial invalidation is the only way to ensure that the Texas requirements do not extinguish women’s liberty”).) The thrust of the Court’s argument is that a trial judge can circumvent the rules of claim preclusion by granting a plaintiff relief on a claim that the plaintiff is barred from relitigating. Not surprisingly, the Court musters no authority for this proposition, which would undermine the interests that the doctrine of claim preclusion is designed to serve. A “fundamental precept of common-law adjudication is that an issue once determined by a competent court is conclusive.” *Arizona v. California*, 460 U. S. 605, 619 (1983). This interest in finality is equally offended regardless of whether the precluded claim is included in a complaint or inserted into the case by a judge.<sup>4</sup>

Another argument tossed off by the Court is that the judgment on the admitting privileges claim in the first case does not have preclusive effect because it was based on “the prematurity of the action.” See *ante*, at 11–12 (quoting Restatement (Second) of Judgments §20(2)). But this argument grossly mischaracterizes the basis for the judgment in the first case. The Court of Appeals did not hold that the facial challenge was premature. It held that the evidence petitioners offered was insufficient. See

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<sup>4</sup>I need not quibble with the Court’s authorities stating that facial relief can sometimes be appropriate even where a plaintiff has requested only as-applied relief. *Ante*, at 15. Assuming that this is generally proper, it does not follow that this may be done where the plaintiff is precluded by res judicata from bringing a facial claim.

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*Abbott*, 748 F. 3d, at 598–599; see also n. 9, *infra*. Petitioners could have sought review in this Court, but elected not to do so.

This brings me to the Court's main argument—that the second facial challenge is a different claim because of “changed circumstances.” What the Court means by this is that petitioners now have better evidence than they did at the time of the first case with respect to the number of clinics that would have to close as a result of the admitting privileges requirement. This argument is contrary to a cardinal rule of *res judicata*, namely, that a plaintiff who loses in a first case cannot later bring the same case simply because it has now gathered better evidence. Claim preclusion does not contain a “better evidence” exception. See, e.g., *Torres v. Shalala*, 48 F. 3d 887, 894 (CA5 1995) (“If simply submitting new evidence rendered a prior decision factually distinct, *res judicata* would cease to exist”); *Geiger v. Foley Hoag LLP Retirement Plan*, 521 F. 3d 60, 66 (CA1 2008) (Claim preclusion “applies even if the litigant is prepared to present different evidence . . . in the second action”); *Saylor v. United States*, 315 F. 3d 664, 668 (CA6 2003) (“The fact that . . . new evidence might change the outcome of the case does not affect application of claim preclusion doctrine”); *International Union of Operating Engineers-Employers Constr. Industry Pension, Welfare and Training Trust Funds v. Karr*, 994 F. 2d 1426, 1430 (CA9 1993) (“The fact that some different evidence may be presented in this action . . . , however, does not defeat the bar of *res judicata*”); Restatement (Second) of Judgments §25, Comment *b* (“A mere shift in the evidence offered to support a ground held unproved in a prior action will not suffice to make a new claim avoiding the preclusive effect of the judgment”); 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* §4403, p. 33 (2d ed. 2002) (Wright & Miller) (*Res judicata* “ordinarily applies despite the availability of new evidence”); Restate-



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ment of Judgments §1, Comment *b* (The ordinary rules of claim preclusion apply “although the party against whom a judgment is rendered is later in a position to produce better evidence so that he would be successful in a second action”).

In an effort to get around this hornbook rule, the Court cites a potpourri of our decisions that have no bearing on the question at issue. Some are not even about *res judicata*.<sup>5</sup> And the cases that do concern *res judicata*, *Abie State Bank v. Bryan*, 282 U. S. 765, 772 (1931), *Lawlor v. National Screen Service Corp.*, 349 U. S. 322, 328 (1955), and *Third Nat. Bank of Louisville v. Stone*, 174 U. S. 432, 434 (1899), endorse the unremarkable proposition that a prior judgment does not preclude new claims based on acts occurring after the time of the first judgment.<sup>6</sup> But petitioners’ second facial challenge is not based on new acts postdating the first suit. Rather, it is based on the same underlying act, the enactment of H. B. 2, which allegedly posed an undue burden.

I come now to the authority on which the Court chiefly relies, Comment *f* to §24 of the second Restatement. This is how it reads:

“Material operative facts occurring after the decision of an action with respect to the same subject matter

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<sup>5</sup>See *ante*, at 13 (citing *United States v. Carolene Products Co.*, 304 U. S. 144, 153 (1938), and *Nashville, C. & St. L. R. Co. v. Walters*, 294 U. S. 405, 415 (1935)).

<sup>6</sup>The Court’s contaminated-water hypothetical, see *ante*, at 12–13, may involve such a situation. If after their loss in the first suit, the same prisoners continued to drink the water, they would not be barred from suing to recover for subsequent injuries suffered as a result. But if the Court simply means that the passage of time would allow the prisoners to present better evidence in support of the same claim, the successive suit would be barred for the reasons I have given. In that event, their recourse would be to move for relief from the judgment. See Restatement (Second) of Judgments §73.

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*may* in themselves, or taken in conjunction with the antecedent facts, comprise a transaction which *may* be made the basis of a second action not precluded by the first. See Illustrations 10–12. Where important human values—such as the lawfulness of a continuing personal disability or restraint—are at stake, even a slight change of circumstances *may* afford a sufficient basis for concluding that a second action may be brought.” (Emphasis added.)

As the word I have highlighted—“may”—should make clear, this comment does not say that “[m]aterial operative facts occurring after the decision of an action” always or even usually form “the basis of a second action not precluded by the first.” Rather, the comment takes the view that this “may” be so. Accord, *ante*, at 11 (“[D]evelopment of new material facts *can* mean that a new case and an otherwise similar previous case do not present the same claim” (emphasis added)). The question, then, is *when* the development of new material facts should lead to this conclusion. And there are strong reasons to conclude this should be a very narrow exception indeed. Otherwise, this statement, relegated to a mere comment, would revolutionize the rules of claim preclusion—by permitting a party to relitigate a lost claim whenever it obtains better evidence. Comment *f* was surely not meant to upend this fundamental rule.

What the comment undoubtedly means is far more modest—only that in a few, limited circumstances the development of new material facts should (in the opinion of the ALI) permit relitigation. What are these circumstances? Section 24 includes three illustrative examples in the form of hypothetical cases, and none resembles the present case.

In the first hypothetical case, the subsequent suit is based on new events that provide a basis for relief under a

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different legal theory. Restatement (Second) of Judgments §24, Illustration 10.

In the second case, a father who lost a prior child custody case brings a second action challenging his wife's fitness as a mother based on "subsequent experience," which I take to mean subsequent conduct by the mother. *Id.*, Illustration 11. This illustration is expressly linked to a determination of a person's "status"—and not even status in general, but a particular status, fitness as a parent, that the law recognizes as changeable. See Reporter's Note, *id.*, §24, Comment *f* (Illustration 11 "exemplifies the effect of changed circumstances in an action relating to status").

In the final example, the government loses a civil anti-trust conspiracy case but then brings a second civil anti-trust conspiracy case based on new conspiratorial acts. The illustration does not suggest that the legality of acts predating the end of the first case is actionable in the second case, only that the subsequent acts give rise to a new claim and that proof of earlier acts may be admitted as evidence to explain the significance of the later acts. *Id.*, Illustration 12.

The present claim is not similar to any of these illustrations. It does not involve a claim based on postjudgment acts and a new legal theory. It does not ask us to adjudicate a person's status. And it does not involve a continuing course of conduct to be proved by the State's new acts.

The final illustration actually undermines the Court's holding. The Reporter's Note links this illustration to a Fifth Circuit case, *Exhibitors Poster Exchange, Inc. v. National Screen Service Corp.*, 421 F. 2d 1313 (1970). In that case, the court distinguished between truly postjudgment acts and "acts which have been completed [prior to the previous judgment] except for their consequences." *Id.*, at 1318. Only postjudgment acts—and not postjudgment consequences—the Fifth Circuit held, can

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give rise to a new cause of action. See *ibid.*<sup>7</sup>

Here, the Court does not rely on any new acts performed by the State of Texas after the end of the first case. Instead, the Court relies solely on what it takes to be new consequences, the closing of additional clinics, that are said to have resulted from the enactment of H. B. 2.

D

For these reasons, what the Court has done here is to create an entirely new exception to the rule that a losing plaintiff cannot relitigate a claim just because it now has new and better evidence. As best I can tell, the Court's new rule must be something like this: If a plaintiff initially loses because it failed to provide adequate proof that a challenged law will have an unconstitutional effect and if subsequent developments tend to show that the law will in fact have those effects, the plaintiff may relitigate the same claim. Such a rule would be unprecedented, and I am unsure of its wisdom, but I am certain of this: There is no possible justification for such a rule unless the plaintiff, at the time of the first case, could not have reasonably shown what the effects of the law would be. And that is not the situation in this case.

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The Court does not contend that petitioners, at the time

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<sup>7</sup>See also *Sutcliffe v. Epping School Dist.*, 584 F. 3d 314, 328 (CA1 2009) (“[W]hen a defendant is accused of . . . acts which though occurring over a period of time were substantially of the same sort and similarly motivated, fairness to the defendant as well as the public convenience may require that they be dealt with in the same action, and the events are said to constitute but one transaction” (internal quotation marks omitted)); *Monahan v. New York City Dept. of Corrections*, 214 F. 3d 275, 289 (CA2 2000) (“Plaintiffs’ assertion of new incidents arising from the application of the challenged policy is also insufficient to bar the application of *res judicata*”); *Huck v. Dawson*, 106 F. 3d 45, 49 (CA3 1997) (applying *res judicata* where “the same facts that resulted in the earlier judgment have caused continued damage”).

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of the first case, could not have gathered and provided evidence that was sufficient to show that the admitting privileges requirement *would cause* a sufficient number of clinic closures. Instead, the Court attempts to argue that petitioners could not have shown at that time that a sufficient number of clinics *had already closed*. As I have explained, that is not what petitioners need to show or what they attempted to prove.

Moreover, the Court is also wrong in its understanding of petitioners' proof in the first case. In support of its holding that the admitting privileges requirement now "places a 'substantial obstacle in the path of a woman's choice,'" the Court relies on two facts: "Eight abortion clinics closed in the months leading up to the requirement's effective date" and "[e]leven more closed on the day the admitting-privileges requirement took effect." *Ante*, at 24. But petitioners put on evidence addressing exactly this issue in their first trial. They apparently surveyed 27 of the 36 abortion clinics they identified in the State, including all 24 of the clinics owned by them or their coplaintiffs, to find out what impact the requirement would have on clinic operations. See Appendix, *infra* (App. K to Emergency Application To Vacate Stay in *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, O. T. 2013, No. 13A452, Plaintiffs' Trial Exh. 46).

That survey claimed to show that the admitting privileges requirement would cause 15 clinics to close.<sup>8</sup> See *ibid*. The Fifth Circuit had that evidence before it, and did not refuse to consider it.<sup>9</sup> If that evidence was sufficient to

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<sup>8</sup>As I explain, *infra*, at 29, and n. 18, some of the closures presumably included in the Court's count of 19 were not attributed to H. B. 2 at the first trial, even by petitioners.

<sup>9</sup>The *Abbott* panel's refusal to consider "developments since the conclusion of the bench trial," 748 F. 3d, at 599, n. 14, was not addressed to the evidence of 15 closures presented at trial. The Court of Appeals in

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show that the admitting privileges rule created an unlawful impediment to abortion access (and the District Court indeed thought it sufficient), then the decision of the Fifth Circuit in the first case was wrong as a matter of law. Petitioners could have asked us to review that decision, but they chose not to do so. A tactical decision of that nature has consequences. While it does not mean that the

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fact credited that evidence by *assuming* “some clinics may be required to shut their doors,” but it nevertheless concluded that “there is no showing whatsoever that *any* woman will lack reasonable access to a clinic within Texas.” *Id.*, at 598. The *Abbott* decision therefore accepted the factual premise common to these two actions—namely, that the admitting privileges requirement would cause some clinics to close—but it concluded that petitioners had not proved a burden on access regardless. In rejecting *Abbott*’s conclusion, the Court seems to believe that *Abbott* also must have refused to accept the factual premise. See *ante*, at 13–15.

Instead, *Abbott*’s footnote 14 appears to have addressed the following post-trial developments: (1) the permanent closure of the Lubbock clinic, Brief for Plaintiffs-Appellees in *Abbott* (CA5), at 5, n. 3 (accounted for among the 15 anticipated closures, see Appendix, *infra*); (2) the *resumption* of abortion services in Fort Worth, Brief for Plaintiffs-Appellees, at 5, n. 3; (3) the *acquisition* of admitting privileges by an Austin abortion provider, *id.*, at 6, n. 4; (4) the *acquisition* of privileges by physicians in Dallas and San Antonio, see Letter from J. Crepps to L. Cayce, Clerk of Court in *Abbott* (CA5, Jan. 3, 2014); (5) the *acquisition* of privileges by physicians in El Paso and Killeen, see Letter from J. Crepps to L. Cayce, Clerk of Court in *Abbott* (CA5, Mar. 21, 2014); and (6) the enforcement of the requirement against one Houston provider who lacked privileges, see *ibid.* (citing Texas Medical Board press release). In the five months between the admitting privileges requirement taking effect and the Fifth Circuit’s *Abbott* decision, then, the parties had ample time to inform that court of post-trial developments—and petitioners never identified the 15 closures as new (because the closures were already accounted for in their trial evidence). In fact, the *actual* new developments largely favored the State’s case: In that time, physicians in Austin, Dallas, El Paso, Fort Worth, Killeen, and San Antonio were able to come into compliance, while only one in Houston was not, and one clinic (already identified at trial as expected to close) closed permanently. So *Abbott*’s decision to ignore post-trial developments quite likely favored petitioners.

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admitting privileges requirement is immune to a facial challenge, it does mean that these petitioners and the other plaintiffs in the first case cannot mount such a claim.

## 2

Even if the Court thinks that petitioners' evidence in the first case was insufficient, the Court does not claim that petitioners, with reasonable effort, could not have gathered sufficient evidence to show with some degree of accuracy what the effects of the admitting privileges requirement would be. As I have just explained, in their first trial petitioners introduced a survey of 27 abortion clinics indicating that 15 would close because of the admitting privileges requirement. The Court does not identify what additional evidence petitioners needed but were unable to gather. There is simply no reason why petitioners should be allowed to relitigate their facial claim.

## E

So far, I have discussed only the first of the two sentences in Comment *f*, but the Court also relies on the second sentence. I reiterate what that second sentence says:

“Where important human values—such as the lawfulness of a continuing personal disability or restraint—are at stake, even a slight change of circumstances may afford a sufficient basis for concluding that a second action may be brought.” Restatement (Second) of Judgments §24, Comment *f*.

The second Restatement offers no judicial support whatsoever for this suggestion, and thus the comment “must be regarded as a proposal for change rather than a restatement of existing doctrine, since the commentary refers to not a single case, of this or any other United States court.” *United States v. Stuart*, 489 U. S. 353, 375 (1989) (Scalia,

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J., concurring in judgment). The sentence also sits in considerable tension with our decisions stating that res judicata must be applied uniformly and without regard to what a court may think is just in a particular case. See, e.g., *Moitie*, 452 U. S., at 401 (“The doctrine of res judicata serves vital public interests beyond any individual judge’s ad hoc determination of the equities in a particular case”). Not only did this sentence seemingly come out of nowhere, but it appears that no subsequent court has relied on this sentence as a ground for decision. And while a few decisions have cited the “important human values” language, those cases invariably involve the relitigation of personal status determinations, as discussed in Comment *f*’s Illustration 11. See, e.g., *People ex rel. Leonard HH. v. Nixon*, 148 App. Div. 2d 75, 79–80, 543 N. Y. S. 2d 998, 1001 (1989) (“[B]y its very nature, litigation concerning the *status* of a person’s mental capacity does not lend itself to strict application of res judicata on a transactional analysis basis”).<sup>10</sup>

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In sum, the Court’s holding that petitioners’ second facial challenge to the admitting privileges requirement is not barred by claim preclusion is not supported by any of

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<sup>10</sup>See also *In re Marriage of Shaddle*, 317 Ill. App. 3d 428, 430–432, 740 N. E. 2d 525, 528–529 (2000) (child custody); *In re Hope M.*, 1998 ME 170, ¶5, 714 A. 2d 152, 154 (termination of parental rights); *In re Connors*, 255 Ill. App. 3d 781, 784–785, 627 N. E. 2d 1171, 1173–1174 (1994) (civil commitment); *Kent V. v. State*, 233 P. 3d 597, 601, and n. 12 (Alaska 2010) (applying Comment *f* to termination of parental rights); *In re Juvenile Appeal (83–DE)*, 190 Conn. 310, 318–319, 460 A. 2d 1277, 1282 (1983) (same); *In re Strozzi*, 112 N. M. 270, 274, 814 P. 2d 138, 142 (App. 1991) (guardianship and conservatorship); *Andrulonis v. Andrulonis*, 193 Md. App. 601, 617, 998 A. 2d 898, 908 (2010) (modification of alimony); *In re Marriage of Pedersen*, 237 Ill. App. 3d 952, 957, 605 N. E. 2d 629, 633 (1992) (same); *Friederwitzer v. Friederwitzer*, 55 N. Y. 2d 89, 94–95, 432 N. E. 2d 765, 768 (1982) (child custody).



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our cases or any body of lower court precedent; is contrary to the bedrock rule that a party cannot relitigate a claim simply because the party has obtained new and better evidence; is contrary to the first Restatement of Judgments and the actual rules of the second Restatement of Judgment; and is purportedly based largely on a single comment in the second Restatement, but does not even represent a sensible reading of that comment. In a regular case, an attempt by petitioners to relitigate their previously unsuccessful facial challenge to the admitting privileges requirement would have been rejected out of hand—indeed, might have resulted in the imposition of sanctions under Federal Rule of Civil Procedure 11. No court would even think of reviving such a claim on its own. But in this abortion case, ordinary rules of law—and fairness—are suspended.

## II

## A

I now turn to the application of principles of claim preclusion to a claim that petitioners did include in their second complaint, namely, their facial challenge to the requirement in H. B. 2 that abortion clinics comply with the rules that govern ambulatory surgical centers (ASCs). As we have said many times, the doctrine of claim preclusion not only bars the relitigation of previously litigated claims; it can also bar claims that are closely related to the claims unsuccessfully litigated in a prior case. See *Moitie, supra*, at 398; *Montana*, 440 U. S., at 153.

As just discussed, the Court's holding on the admitting privileges issue is based largely on a comment to §24 of the second Restatement, and therefore one might think that consistency would dictate an examination of what §24 has to say on the question whether the ASC challenge should be barred. But consistency is not the Court's watchword here.

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Section 24 sets out the general rule regarding the “[s]plitting” of claims. This is the rule that determines when the barring of a claim that was previously litigated unsuccessfully also extinguishes a claim that the plaintiff could have but did not bring in the first case. Section 24(1) states that the new claim is barred if it is “any part of the transaction, or series of connected transactions, out of which the action arose.”

Here, it is evident that petitioners’ challenges to the admitting privileges requirement and the ASC requirement are part of the same transaction or series of connected transactions. If, as I believe, the “transaction” is the enactment of H. B. 2, then the two facial claims are part of the very same transaction. And the same is true even if the likely or actual effects of the two provisions constitute the relevant transactions. Petitioners argue that the admitting privileges requirement and the ASC requirements *combined* have the effect of unconstitutionally restricting access to abortions. Their brief repeatedly refers to the collective effect of the “requirements.” Brief for Petitioners 40, 41, 42, 43, 44. They describe the admitting privileges and ASC requirements as delivering a “one-two punch.” *Id.*, at 40. They make no effort whatsoever to separate the effects of the two provisions.

## B

The Court nevertheless holds that there are two “meaningful differences” that justify a departure from the general rule against splitting claims. *Ante*, at 16. Neither has merit.

## 1

First, pointing to a statement in a pocket part to a treatise, the Court says that “courts normally treat challenges to distinct regulatory requirements as ‘separate claims,’ even when they are part of one overarching ‘[g]overnment

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regulatory scheme.” *Ante*, at 16–17 (quoting 18 Wright & Miller §4408, at 54 (2d ed. 2002, Supp. 2016)). As support for this statement, the treatise cites one case, *Hamilton’s Bogarts, Inc. v. Michigan*, 501 F. 3d 644, 650 (CA6 2007). Even if these authorities supported the rule invoked by the Court (and the Court points to no other authorities), they would hardly be sufficient to show that “courts normally” proceed in accordance with the Court’s rule. But in fact neither the treatise nor the Sixth Circuit decision actually supports the Court’s rule.

What the treatise says is the following:

“Government *regulatory schemes* provide regular examples of circumstances in which regulation of a single business by many different provisions *should lead* to recognition of separate claims when the business challenges different regulations.” 18 Wright & Miller §4408, at 54 (emphasis added).

Thus, the treatise expresses a view about what the law “should” be; it does not purport to state what courts “normally” do. And the recommendation of the treatise authors concerns different provisions of a “regulatory scheme,” which often embodies an accumulation of legislative enactments. Petitioners challenge two provisions of one law, not just two provisions of a regulatory scheme.

The Sixth Circuit decision is even further afield. In that case, the plaintiff had previously lost a case challenging one rule of a state liquor control commission. 501 F. 3d, at 649–650. On the question whether the final judgment in that case barred a subsequent claim attacking another rule, the court held that the latter claim was “likely” not barred because, “although [the first rule] was challenged in the first lawsuit, [the other rule] was not,” and “[t]he state has not argued or made any showing that [the party] should also have challenged [the other rule] at the time.” *Id.*, at 650. To say that these authorities provide

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meager support for the Court's reasoning would be an exaggeration.

Beyond these paltry authorities, the Court adds only the argument that we should not “encourage a kitchen-sink approach to any litigation challenging the validity of statutes.” *Ante*, at 17. I agree—but that is not the situation in this case. The two claims here are very closely related. They are two parts of the same bill. They both impose new requirements on abortion clinics. They are justified by the State on the same ground, protection of the safety of women seeking abortions. They are both challenged as imposing the same kind of burden (impaired access to clinics) on the same kind of right (the right to abortion, as announced in *Roe v. Wade*, 410 U. S. 113 (1973), and *Casey*, 505 U. S. 833). And petitioners attack the two provisions as a package. According to petitioners, the two provisions were both enacted for the same illegitimate purpose—to close down Texas abortion clinics. See Brief for Petitioners 35–36. And as noted, petitioners rely on the combined effect of the two requirements. Petitioners have made little effort to identify the clinics that closed as a result of each requirement but instead aggregate the two requirements' effects.

For these reasons, the two challenges “form a convenient trial unit.” Restatement (Second) of Judgments §24(2). In fact, for a trial court to accurately identify the effect of each provision it would also need to identify the effect of the other provision. Cf. *infra*, at 30.

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Second, the Court claims that, at the time when petitioners filed their complaint in the first case, they could not have known whether future rules implementing the surgical center requirement would provide an exemption for existing abortion clinics. *Ante*, at 17. This argument is deeply flawed.

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“Where the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect.” *Regional Rail Reorganization Act Cases*, 419 U. S. 102, 143 (1974). And here, there was never any real chance that the Texas Department of State Health Services would exempt existing abortion clinics from all the ASC requirements. As the Court of Appeals wrote, “it is abundantly clear from H. B. 2 that all abortion facilities must meet the standards already promulgated for ASCs.” *Whole Woman’s Health v. Cole*, 790 F. 3d 563, 583 (2015) (*per curiam*) (case below). See Tex. Health & Safety Code Ann. §245.010(a) (West Cum. Supp. 2015) (Rules implementing H. B. 2 “must contain minimum standards . . . for an abortion facility [that are] equivalent to the minimum standards . . . for ambulatory surgical centers”). There is no apparent basis for the argument that H. B. 2 permitted the state health department to grant blanket exemptions.

Whether there was any real likelihood that clinics would be exempted from *particular* ASC requirements is irrelevant because both petitioners and the Court view the ASC requirements as an indivisible whole. Petitioners told the Fifth Circuit in unequivocal terms that they were “challeng[ing] H. B. 2 broadly, with no effort whatsoever to parse out specific aspects of the ASC requirement that they f[ou]nd onerous or otherwise infirm.” 790 F. 3d, at 582. Similarly, the majority views all the ASC provisions as an indivisible whole. See *ante*, at 38 (“The statute was meant to require abortion facilities to meet the integrated surgical-center standards—not some subset thereof”). On this view, petitioners had no reason to wait to see whether the Department of State Health Services might exempt them from some of the ASC rules. Even if exemptions from some of the ASC rules had been granted, petitioners and the majority would still maintain that the provision of

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H. B. 2 making the ASC rules applicable to abortion facilities is facially unconstitutional. Thus, exemption from some of the ASC requirements would be entirely inconsequential. The Court has no response to this point. See *ante*, at 17.

For these reasons, petitioners' facial attack on the ASC requirements, like their facial attack on the admitting privileges rule, is precluded.

### III

Even if *res judicata* did not bar either facial claim, a sweeping, statewide injunction against the enforcement of the admitting privileges and ASC requirements would still be unjustified. Petitioners in this case are abortion clinics and physicians who perform abortions. If they were simply asserting a constitutional right to conduct a business or to practice a profession without unnecessary state regulation, they would have little chance of success. See, *e.g.*, *Williamson v. Lee Optical of Okla., Inc.*, 348 U. S. 483 (1955). Under our abortion cases, however, they are permitted to rely on the right of the abortion patients they serve. See *Doe v. Bolton*, 410 U. S. 179, 188 (1973); but see *ante*, at 2–5 (THOMAS, J., dissenting).

Thus, what matters for present purposes is not the effect of the H. B. 2 provisions on petitioners but the effect on their patients. Under our cases, petitioners must show that the admitting privileges and ASC requirements impose an “undue burden” on women seeking abortions. *Gonzales v. Carhart*, 550 U. S. 124, 146 (2007). And in order to obtain the sweeping relief they seek—facial invalidation of those provisions—they must show, at a minimum, that these provisions have an unconstitutional impact on at least a “large fraction” of Texas women of reproductive age.<sup>11</sup> *Id.*, at 167–168. Such a situation

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<sup>11</sup>The proper standard for facial challenges is unsettled in the abor-

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could result if the clinics able to comply with the new requirements either lacked the requisite overall capacity or were located too far away to serve a “large fraction” of the women in question.

Petitioners did not make that showing. Instead of offering direct evidence, they relied on two crude inferences. First, they pointed to the number of abortion clinics that closed after the enactment of H. B. 2, and asked that it be inferred that all these closures resulted from the two challenged provisions. See Brief for Petitioners 23–24. They made little effort to show why particular clinics closed. Second, they pointed to the number of abortions performed annually at ASCs before H. B. 2 took effect and, because this figure is well below the total number of abortions performed each year in the State, they asked that it be inferred that ASC-compliant clinics could not meet the demands of women in the State. See App. 237–238. Peti-

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tion context. See *Gonzales*, 550 U. S., at 167–168 (comparing *Ohio v. Akron Center for Reproductive Health*, 497 U. S. 502, 514 (1990) (“[B]ecause appellees are making a facial challenge to a statute, they must show that no set of circumstances exists under which the Act would be valid” (internal quotation marks omitted)), with *Casey*, 505 U. S., at 895 (opinion of the Court) (indicating a spousal-notification statute would impose an undue burden “in a large fraction of the cases in which [it] is relevant” and holding the statutory provision facially invalid)). Like the Court in *Gonzales*, *supra*, at 167–168, I do not decide the question, and use the more plaintiff-friendly “large fraction” formulation only because petitioners cannot meet even that test.

The Court, by contrast, applies the “large fraction” standard without even acknowledging the open question. *Ante*, at 39. In a similar vein, it holds that the fraction’s “relevant denominator is ‘those [women] for whom [the provision] is an actual rather than an irrelevant restriction.’” *Ibid.* (quoting *Casey*, 505 U. S., at 895). I must confess that I do not understand this holding. The purpose of the large-fraction analysis, presumably, is to compare the number of women *actually* burdened with the number *potentially* burdened. Under the Court’s holding, we are supposed to use the same figure (women actually burdened) as both the numerator and the denominator. By my math, that fraction is always “1,” which is pretty large as fractions go.

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tioners failed to provide any evidence of the actual capacity of the facilities that would be available to perform abortions in compliance with the new law—even though they provided this type of evidence in their first case to the District Court at trial and then to this Court in their application for interim injunctive relief. Appendix, *infra*.

A

I do not dispute the fact that H. B. 2 caused the closure of some clinics. Indeed, it seems clear that H. B. 2 was intended to force unsafe facilities to shut down. The law was one of many enacted by States in the wake of the Kermit Gosnell scandal, in which a physician who ran an abortion clinic in Philadelphia was convicted for the first-degree murder of three infants who were born alive and for the manslaughter of a patient. Gosnell had not been actively supervised by state or local authorities or by his peers, and the Philadelphia grand jury that investigated the case recommended that the Commonwealth adopt a law requiring abortion clinics to comply with the same regulations as ASCs.<sup>12</sup> If Pennsylvania had had such a requirement in force, the Gosnell facility may have been shut down before his crimes. And if there were any similarly unsafe facilities in Texas, H. B. 2 was clearly intended to put them out of business.<sup>13</sup>

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<sup>12</sup>Report of Grand Jury in No. 0009901–2008 (1st Jud. Dist. Pa., Jan. 14, 2011), p. 248–249, online at <http://www.phila.gov/districtattorney/pdfs/grandjurywomensmedical.pdf> (all Internet materials as last visited June 24, 2016).

<sup>13</sup>See House Research Org., Laubenberg et al., Bill Analysis 10 (July 9, 2013), online at <http://www.hro.house.state.tx.us/pdf/ba832/hb0002.pdf> (“Higher standards could prevent the occurrence of a situation in Texas like the one recently exposed in Philadelphia, in which Dr. Kermit Gosnell was convicted of murder after killing babies who were born alive. A patient also died at that substandard clinic”). The Court attempts to distinguish the Gosnell horror story by pointing



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While there can be no doubt that H. B. 2 caused some clinics to cease operation, the absence of proof regarding the reasons for particular closures is a problem because some clinics have or may have closed for at least four reasons other than the two H. B. 2 requirements at issue here. These are:

1. *H. B. 2's restriction on medication abortion.* In their first case, petitioners challenged the provision of H. B. 2 that regulates medication abortion, but that part of the statute was upheld by the Fifth Circuit and not relitigated in this case. The record in this case indicates that in the first six months after this restriction took effect, the number of medication abortions dropped by 6,957 (compared to the same period the previous year). App. 236.
2. *Withdrawal of Texas family planning funds.* In 2011, Texas passed a law preventing family planning grants to providers that perform abortions and their affiliates. In the first case, petitioners' expert admitted that some clinics closed "as a result of the defunding,"<sup>14</sup> and as discussed below, this withdrawal appears specifically to have caused multiple clinic closures in West Texas. See *infra*, at 29, and n. 18.
3. *The nationwide decline in abortion demand.* Petitioners' expert testimony relies<sup>15</sup> on a study from the Guttmacher Institute which concludes that "[t]he national abortion rate has resumed its decline, and no evidence was found that the overall drop in abortion incidence was related to the decrease in providers or to

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to differences between Pennsylvania and Texas law. See *ante*, at 27–28. But Texas did not need to be in Pennsylvania's precise position for the legislature to rationally conclude that a similar law would be helpful.

<sup>14</sup> Rebuttal Decl. of Dr. Joseph E. Potter, Doc. 76–2, p. 12, ¶32, in *Abbott* (WD Tex., Oct. 18, 2013) (Potter Rebuttal Decl.).

<sup>15</sup> See App. 234, 237, 253.

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*restrictions implemented between 2008 and 2011.’’* App. 1117 (direct testimony of Dr. Peter Uhlenberg) (quoting R. Jones & J. Jerman, *Abortion Incidence and Service Availability In the United States, 2011, 46 Perspectives on Sexual and Reproductive Health* 3 (2014); emphasis in testimony). Consistent with that trend, “[t]he number of abortions to residents of Texas declined by 4,956 between 2010 and 2011 and by 3,905 between 2011 and 2012.” App. 1118.

4. *Physician retirement (or other localized factors).* Like everyone else, most physicians eventually retire, and the retirement of a physician who performs abortions can cause the closing of a clinic or a reduction in the number of abortions that a clinic can perform. When this happens, the closure of the clinic or the reduction in capacity cannot be attributed to H. B. 2 unless it is shown that the retirement was caused by the admitting privileges or surgical center requirements as opposed to age or some other factor.

At least nine Texas clinics may have ceased performing abortions (or reduced capacity) for one or more of the reasons having nothing to do with the provisions challenged here. For example, in their first case, petitioners alleged that the medication-abortion restriction would cause at least three medication-only abortion clinics to cease performing abortions,<sup>16</sup> and they predicted that “[o]ther facilities that offer both surgical and medication abortion will be unable to offer medication abortion,”<sup>17</sup> presumably reducing their capacity. It also appears that several clinics (including most of the clinics operating in West Texas, apart from El Paso) closed in response to the

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<sup>16</sup> Complaint and Application for Preliminary and Permanent Injunction in *Abbott* (WD Tex.), ¶¶10, 11 (listing one clinic in Stafford and two in San Antonio).

<sup>17</sup> *Id.*, ¶88.

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unrelated law restricting the provision of family planning funds.<sup>18</sup> And there is reason to question whether at least two closures (one in Corpus Christi and one in Houston) may have been prompted by physician retirements.<sup>19</sup>

Neither petitioners nor the District Court properly addressed these complexities in assessing causation—and for no good reason. The total number of abortion clinics in the State was not large. Petitioners could have put on evidence (as they did for 27 individual clinics in their first case, see Appendix, *infra*) about the challenged provisions’ role in causing the closure of each clinic,<sup>20</sup> and the court could have made a factual finding as to the cause of each

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<sup>18</sup>In the first case, petitioners apparently did not even believe that the abortion clinics in Abilene, Bryan, Midland, and San Angelo were made to close because of H. B. 2. In that case, petitioners submitted a list of 15 clinics they believed would close (or have severely limited capacity) because of the admitting privileges requirement—and those four West Texas clinics are *not* on the list. See Appendix, *infra*. And at trial, a Planned Parenthood executive specifically testified that the Midland clinic closed because of the funding cuts and because the clinic’s medical director retired. See 1 Tr. 91, 93, in *Abbott* (WD Tex., Oct. 21, 2013). Petitioners’ list and Planned Parenthood’s testimony both fit with petitioners’ expert’s admission in the first case that some clinics closed “as a result of the defunding.” Potter Rebuttal Decl. ¶32.

<sup>19</sup>See Stoelje, Abortion Clinic Closes in Corpus Christi, San Antonio Express-News (June 10, 2014), online at <http://www.mysanantonio.com/news/local/article/Abortion-clinic-closes-in-Corpus-Christi-5543125.php> (provider “retiring for medical reasons”); 1 Plaintiffs’ Exh. 18, p. 2, in *Whole Woman’s Health v. Lakey*, No. 1:14-cv-284 (WD Tex., admitted into evidence Aug. 4, 2014) (e-mail stating Houston clinic owner “is retiring his practice”). Petitioners should have been required to put on proof about the reason for the closure of particular clinics. I cite the extrarecord Corpus Christi story only to highlight the need for such proof.

<sup>20</sup>This kind of evidence was readily available; in fact, petitioners deposed at least one nonparty clinic owner about the burden posed by H. B. 2. See App. 1474. And recall that in their first case, petitioners put on evidence purporting to show how the admitting privileges requirement would (or would not) affect 27 clinics. See Appendix, *infra* (petitioners’ chart of clinics).

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closure.

Precise findings are important because the key issue here is not the number or percentage of clinics affected, but the effect of the closures on women seeking abortions, *i.e.*, on the capacity and geographic distribution of clinics used by those women. To the extent that clinics closed (or experienced a reduction in capacity) for any reason unrelated to the challenged provisions of H. B. 2, the corresponding burden on abortion access may not be factored into the access analysis. Because there was ample reason to believe that some closures were caused by these other factors, the District Court's failure to ascertain the reasons for clinic closures means that, on the record before us, there is no way to tell which closures actually count. Petitioners—who, as plaintiffs, bore the burden of proof—cannot simply point to temporal correlation and call it causation.

## B

Even if the District Court had properly filtered out immaterial closures, its analysis would have been incomplete for a second reason. Petitioners offered scant evidence on the capacity of the clinics that are able to comply with the admitting privileges and ASC requirements, or on those clinics' geographic distribution. Reviewing the evidence in the record, it is far from clear that there has been a material impact on access to abortion.

On clinic capacity, the Court relies on petitioners' expert Dr. Grossman, who compared the number of abortions performed at Texas ASCs before the enactment of H. B. 2 (about 14,000 per year) with the total number of abortions per year in the State (between 60,000–70,000 per year). *Ante*, at 32–33.<sup>21</sup> Applying what the Court terms “common

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<sup>21</sup>In the first case, petitioners submitted a report that Dr. Grossman coauthored with their testifying expert, Dr. Potter. 1 Tr. 38 in *Lahey* (Aug. 4, 2014) (*Lahey* Tr.). That report predicted that “the shortfall in

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sense,” the Court infers that the ASCs that performed abortions at the time of H. B. 2’s enactment lacked the capacity to perform all the abortions sought by women in Texas.

The Court’s inference has obvious limitations. First, it is not unassailable “common sense” to hold that current utilization equals capacity; if all we know about a grocery store is that it currently serves 200 customers per week, *ante*, at 33, that fact alone does not tell us whether it is an

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capacity due to the admitting privileges requirement will prevent at least 22,286 women” from accessing abortion. Decl. of Dr. Joseph E. Potter, Doc. 9–8, p. 4, in *Abbott* (WD Tex., Oct. 1, 2013). The methodology used was questionable. See Potter Rebuttal Decl. ¶18. As Dr. Potter admitted: “There’s no science there. It’s just evidence.” 2 Tr. 23 in *Abbott* (WD Tex., Oct. 22, 2013). And in this case, in fact, Dr. Grossman admitted that their prediction turned out to be wildly inaccurate. Specifically, he provided a new figure (approximately 9,200) that was less than half of his earlier prediction. 1 *Lahey* Tr. 41. And he then admitted that he had not proven any causal link between the admitting privileges requirement and that smaller decline. *Id.*, at 54 (quoting Grossman et al., Change in Abortion Services After Implementation of a Restrictive Law in Texas, 90 *Contraception* 496, 500 (2014)).

Dr. Grossman’s testimony in this case, furthermore, suggested that H. B. 2’s restriction on medication abortion (whose impact on clinics cannot be attributed to the provisions challenged in this case) was a major cause in the decline in the abortion rate. After the medication abortion restriction and admitting privileges requirement took effect, over the next six months the number of medication abortions dropped by 6,957 compared to the same period in the previous year. See App. 236. The corresponding number of surgical abortions rose by 2,343. See *ibid*. If that net decline of 4,614 in six months is doubled to approximate the annual trend (which is apparently the methodology Dr. Grossman used to arrive at his 9,200 figure, see 90 *Contraception*, *supra*, at 500), then the year’s drop of 9,228 abortions seems to be *entirely* the product of the medication abortion restriction. Taken together, these figures make it difficult to conclude that the admitting privileges requirement actually depressed the abortion rate *at all*.

In light of all this, it is unclear why the Court takes Dr. Grossman’s testimony at face value.

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overcrowded minimart or a practically empty supermarket. Faced with increased demand, ASCs could potentially increase the number of abortions performed without prohibitively expensive changes. Among other things, they might hire more physicians who perform abortions,<sup>22</sup> utilize their facilities more intensively or efficiently, or shift the mix of services provided. Second, what matters for present purposes is not the capacity of just those ASCs that performed abortions prior to the enactment of H. B. 2 but the capacity of those that would be available to perform abortions after the statute took effect. And since the enactment of H. B. 2, the number of ASCs performing abortions has increased by 50%—from six in 2012 to nine today.<sup>23</sup>

The most serious problem with the Court's reasoning is that its conclusion is belied by petitioners' own submissions to this Court. In the first case, when petitioners asked this Court to vacate the Fifth Circuit's stay of the District Court's injunction of the admitting privileges

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<sup>22</sup>The Court asserts that the admitting privileges requirement is a bottleneck on capacity, *ante*, at 34, but it musters no evidence and does not even dispute petitioners' own evidence that the admitting privileges requirement may have had *zero* impact on the Texas abortion rate, n. 21, *supra*.

<sup>23</sup>See Brief for Petitioners 23–24 (six centers in 2012, compared with nine today). Two of the three new surgical centers opened since this case was filed are operated by Planned Parenthood (which now owns five of the nine surgical centers in the State). See App. 182–183, 1436. Planned Parenthood is obviously able to comply with the challenged H. B. 2 requirements. The president of petitioner Whole Woman's Health, a much smaller entity, has complained that Planned Parenthood “put[s] local independent businesses in a tough situation.” Simon, Planned Parenthood Hits Suburbia, Wall Street Journal Online (June 23, 2008) (cited in Brief for CitizenLink et al. as *Amici Curiae* 15–16, and n. 23). But as noted, petitioners in this case are not asserting their own rights but those of women who wish to obtain an abortion, see *supra*, at 24, and thus the effect of the H. B. 2 requirements on petitioners' business and professional interests are not relevant.

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requirement pending appeal, they submitted a chart previously provided in the District Court that detailed the capacity of abortion clinics after the admitting privileges requirement was to take effect.<sup>24</sup> This chart is included as an Appendix to this opinion.<sup>25</sup> Three of the facilities listed on the chart were ASCs, and their capacity was shown as follows:

- Southwestern Women’s Surgery Center in Dallas was said to have the capacity for 5,720 abortions a year (110 per week);
- Planned Parenthood Surgical Health Services Center in Dallas was said to have the capacity for 6,240 abortions a year (120 per week); and

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<sup>24</sup>See Appendix, *infra*. The Court apparently brushes off this evidence as “outside the record,” *ante*, at 35, but it was filed with this Court by the same petitioners in litigation closely related to this case. And “we may properly take judicial notice of the record in that litigation between the same parties who are now before us.” *Shuttlesworth v. Birmingham*, 394 U. S. 147, 157 (1969); see also, *e.g.*, *United States v. Pink*, 315 U. S. 203, 216 (1942); *Freshman v. Atkins*, 269 U. S. 121, 124 (1925).

<sup>25</sup>The chart lists the 36 abortion clinics apparently open at the time of trial, and identifies the “Capacity after Privileges Requirement” for 27 of those clinics. Of those 27 clinics, 24 were owned by plaintiffs in the first case, and 3 (Coastal Birth Control Center, Hill Top Women’s Reproductive Health Services, and Harlingen Reproductive Services) were owned by nonparties. It is unclear why petitioners’ chart did not include capacity figures for the other nine clinics (also owned by non-parties). Under Federal Rule of Civil Procedure 30(b)(6), petitioners should have been able to depose representatives of those clinics to determine those clinics’ capacity and their physicians’ access to admitting privileges. In the present case, petitioners in fact deposed at least one such nonparty clinic owner, whose testimony revealed that he was able to comply with the admitting privileges requirement. See App. 1474 (testimony of El Paso abortion clinic owner, confirming that he possesses admitting privileges “at every hospital in El Paso” (filed under seal)). The chart states that 14 of those clinics would not be able to perform abortions if the requirement took effect, and that another clinic would have “severely limited” capacity. See Appendix, *infra*.

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- Planned Parenthood Center for Choice in Houston was said to have the capacity for 9,100 abortions a year (175 per week).<sup>26</sup> See Appendix, *infra*.

The average capacity of these three ASCs was 7,020 abortions per year.<sup>27</sup> If the nine ASCs now performing abortions in Texas have the same average capacity, they have a total capacity of 63,180. Add in the assumed capacity for two other clinics that are operating pursuant to the judgment of the Fifth Circuit (over 3,100 abortions per year),<sup>28</sup> and the total for the State is 66,280 abortions per year. That is comparable to the 68,298 total abortions performed in Texas in 2012, the year before H. B. 2 was enacted, App. 236,<sup>29</sup> and well in excess of the abortion rate

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<sup>26</sup>The Court nakedly asserts that this clinic “does not represent most facilities.” *Ante*, at 35. Given that in this case petitioners did not introduce evidence on “most facilities,” I have no idea how the Court arrives at this conclusion.

<sup>27</sup>The Court chides me, *ante*, at 35, for omitting the Whole Woman’s Health ASC in San Antonio from this average. As of the *Abbott* trial in 2013, that ASC’s capacity was (allegedly) to be “severely limited” by the admitting privileges requirement. See Appendix, *infra* (listing “Capacity after Privileges Requirement”). But that facility came into compliance with that requirement a few months later, see Letter from J. Crepps to L. Cayce, Clerk of Court in *Abbott* (CA5, Jan. 3, 2014), so its precompliance capacity is irrelevant here.

<sup>28</sup>Petitioner Whole Woman’s Health performed over 14,000 abortions over 10 years in McAllen. App. 128. Petitioner Nova Health Systems performed over 17,000 abortions over 10 years in El Paso. *Id.*, at 129. (And as I explain at n. 33, *infra*, either Nova Health Systems or another abortion provider will be open in the El Paso area however this case is decided.)

<sup>29</sup>This conclusion is consistent with public health statistics offered by petitioners. These statistics suggest that ASCs have a much higher capacity than other abortion facilities. In 2012, there were 14,361 abortions performed by six surgical centers, meaning there were 2,394 abortions per center. See Brief for Petitioners 23; App. 236. In 2012, there were approximately 35 other abortion clinics operating in Texas, see *id.*, at 228 (41 total clinics as of Nov. 1, 2012), which performed 53,937 abortions, *id.*, at 236 (68,298 total minus 14,361 performed in surgical centers). On average, those other clinics each performed



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one would expect—59,070—if subtracting the apparent impact of the medication abortion restriction, see n. 21, *supra*.

To be clear, I do not vouch for the accuracy of this calculation. It might be too high or too low. The important point is that petitioners put on evidence of actual clinic capacity in their earlier case, and there is no apparent reason why they could not have done the same here. Indeed, the Court asserts that, after the admitting privileges requirement took effect, clinics “were not able to accommodate increased demand,” *ante*, at 35, but petitioners’ own evidence suggested that the requirement had *no* effect on capacity, see n. 21, *supra*. On this point, like the question of the reason for clinic closures, petitioners did not discharge their burden, and the District Court did not engage in the type of analysis that should have been conducted before enjoining an important state law.

So much for capacity. The other<sup>30</sup> potential obstacle to abortion access is the distribution of facilities throughout the State. This might occur if the two challenged H. B. 2 requirements, by causing the closure of clinics in some rural areas, led to a situation in which a “large fraction”<sup>31</sup> of women of reproductive age live too far away from any open clinic. Based on the Court’s holding in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U. S. 833, it appears that the need to travel up to 150 miles is not an undue burden,<sup>32</sup> and the evidence in this case shows that

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53,937÷35=1,541 abortions per year. So surgical centers in 2012 performed 55% more abortions per facility (2,394 abortions) than the average (1,541) for other clinics.

<sup>30</sup>The Court also gives weight to supposed reductions in “individualized attention, serious conversation, and emotional support” in its undue-burden analysis. *Ante*, at 36. But those “facts” are not in the record, so I have no way of addressing them.

<sup>31</sup>See n. 11, *supra*.

<sup>32</sup>The District Court in *Casey* found that 42% of Pennsylvania women “must travel for at least one hour, and sometimes longer than three

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if the only clinics in the State were those that would have remained open if the judgment of the Fifth Circuit had not been enjoined, roughly 95% of the women of reproductive age in the State would live within 150 miles of an open facility (or lived outside that range before H. B. 2).<sup>33</sup> Because the record does not show why particular facilities closed, the real figure may be even higher than 95%.

We should decline to hold that these statistics justify the facial invalidation of the H. B. 2 requirements. The

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hours, to obtain an abortion from the *nearest* provider.” 744 F. Supp. 1323, 1352 (ED Pa. 1990), *aff'd* in part, *rev'd* in part, 947 F.2d 682 (CA3 1991), *aff'd* in part, *rev'd* in part, 505 U.S. 833 (1992). In that case, this Court recognized that the challenged 24-hour waiting period would require some women to make that trip twice, and yet upheld the law regardless. See *id.*, at 886–887.

<sup>33</sup>Petitioners' expert testified that 82.5% of Texas women of reproductive age live within 150 miles of a Texas surgical center that provides abortions. See App. 242 (930,000 women living more than 150 miles away), 244 (5,326,162 women total). The State's expert further testified, without contradiction, that an additional 6.2% live within 150 miles of the McAllen facility, and another 3.3% within 150 miles of an El Paso-area facility. *Id.*, at 921–922. (If the Court did not award statewide relief, I assume it would instead either conclude that the availability of abortion on the New Mexico side of the El Paso metropolitan area satisfies the Constitution, or it would award as-applied relief allowing petitioner Nova Health Systems to remain open in El Paso. Either way, the 3.3% figure would remain the same, because Nova's clinic and the New Mexico facility are so close to each other. See *id.*, at 913, 916, 921 (only six women of reproductive age live within 150 miles of Nova's clinic but not New Mexico clinic).) Together, these percentages add up to 92.0% of Texas women of reproductive age.

Separately, the State's expert also testified that 2.9% of women of reproductive age lived more than 150 miles from an abortion clinic before H. B. 2 took effect. *Id.*, at 916.

So, at most, H. B. 2 affects no more than  $(100\% - 2.9\%) - 92.0\% = 5.1\%$  of women of reproductive age. Also recall that many rural clinic closures appear to have been caused by other developments—indeed, petitioners seemed to believe that themselves—and have certainly not been shown to be caused by the provisions challenged here. See *supra*, at 29, and n. 18. So the true impact is almost certainly smaller than 5.1%.

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possibility that the admitting privileges requirement *might* have caused a closure in Lubbock is no reason to issue a facial injunction exempting Houston clinics from that requirement. I do not dismiss the situation of those women who would no longer live within 150 miles of a clinic as a result of H. B. 2. But under current doctrine such localized problems can be addressed by narrow as-applied challenges.

## IV

Even if the Court were right to hold that *res judicata* does not bar this suit and that H. B. 2 imposes an undue burden on abortion access—it is, in fact, wrong on both counts—it is still wrong to conclude that the admitting privileges and surgical center provisions must be enjoined in their entirety. H. B. 2 has an extraordinarily broad severability clause that must be considered before enjoining any portion or application of the law. Both challenged provisions should survive in substantial part if the Court faithfully applies that clause. Regrettably, it enjoins both in full, heedless of the (controlling) intent of the state legislature. Cf. *Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996) (*per curiam*) (“Severability is of course a matter of state law”).

## A

Applying H. B. 2’s severability clause to the admitting privileges requirement is easy. Simply put, the requirement must be upheld in every city in which its application does not pose an undue burden. It surely does not pose that burden anywhere in the eastern half of the State, where most Texans live and where virtually no woman of reproductive age lives more than 150 miles from an open clinic. See App. 242, 244 (petitioners’ expert testimony that 82.5% of Texas women of reproductive age live within 150 miles of open clinics in Austin, Dallas, Fort Worth,

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Houston, and San Antonio). (Unfortunately, the Court does not address the State's argument to this effect. See Brief for Respondents 51.) And petitioners would need to show that the requirement caused specific West Texas clinics to close (but see *supra*, at 29, and n. 18) before they could be entitled to an injunction tailored to address those closures.

## B

Applying severability to the surgical center requirement calls for the identification of the particular provisions of the ASC regulations that result in the imposition of an undue burden. These regulations are lengthy and detailed, and while compliance with some might be expensive, compliance with many others would not. And many serve important health and safety purposes. Thus, the surgical center requirements cannot be judged as a package. But the District Court nevertheless held that all the surgical center requirements are unconstitutional in all cases, and the Court sustains this holding on grounds that are hard to take seriously.

When the Texas Legislature passed H. B. 2, it left no doubt about its intent on the question of severability. It included a provision mandating the greatest degree of severability possible. The full provision is reproduced below,<sup>34</sup> but it is enough to note that under this provision

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<sup>34</sup>The severability provision states:

“(a) If some or all of the provisions of this Act are ever temporarily or permanently restrained or enjoined by judicial order, all other provisions of Texas law regulating or restricting abortion shall be enforced as though the restrained or enjoined provisions had not been adopted; provided, however, that whenever the temporary or permanent restraining order or injunction is stayed or dissolved, or otherwise ceases to have effect, the provisions shall have full force and effect.

“(b) Mindful of *Leavitt v. Jane L.*, 518 U. S. 137 (1996), in which in the context of determining the severability of a state statute regulating abortion the United States Supreme Court held that an explicit state-

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“every provision, section, subsection, sentence, clause, phrase, or word in this Act, and every application of the provisions in this Act, are severable from each other.” H. B. 2, §10(b), App. to Pet. for Cert. 200a. And to drive home the point about the severability of applications of the law, the provision adds:

“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 sev-

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ment of legislative intent is controlling, it is the intent of the legislature that every provision, section, subsection, sentence, clause, phrase, or word in this Act, and every application of the provisions in this Act, are 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. The legislature further declares that it would have passed this Act, and each provision, section, subsection, sentence, clause, phrase, or word, and all constitutional applications of this Act, irrespective of the fact that any provision, section, subsection, sentence, clause, phrase, or word, or applications of this Act, were to be declared unconstitutional or to represent an undue burden.

“(c) [omitted—applies to late-term abortion ban only]

“(d) If any provision of this Act is found by any court to be unconstitutionally vague, then the applications of that provision that do not present constitutional vagueness problems shall be severed and remain in force.” H. B. 2, §10, App. to Pet. for Cert. 199a–201a.

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ered 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." *Ibid.*

This provision indisputably requires that all surgical center regulations that are not themselves unconstitutional be left standing. Requiring an abortion facility to comply with any provision of the regulations applicable to surgical centers is an "application of the provision" of H. B. 2 that requires abortion clinics to meet surgical center standards. Therefore, if some such applications are unconstitutional, the severability clause plainly requires that those applications be severed and that the rest be left intact.

How can the Court possibly escape this painfully obvious conclusion? Its main argument is that it need not honor the severability provision because doing so would be too burdensome. See *ante*, at 38. This is a remarkable argument.

Under the Supremacy Clause, federal courts may strike down state laws that violate the Constitution or conflict with federal statutes, Art. VI, cl. 2, but in exercising this power, federal courts must take great care. The power to invalidate a state law implicates sensitive federal-state relations. Federal courts have no authority to carpet-bomb state laws, knocking out provisions that are perfectly consistent with federal law, just because it would be too much bother to separate them from unconstitutional provisions.

In any event, it should not have been hard in this case for the District Court to separate any bad provisions from the good. Petitioners should have identified the particular provisions that would entail what they regard as an undue expense, and the District Court could have then concentrated its analysis on those provisions. In fact, petitioners

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*did* do this in their trial brief, Doc. 185, p. 8 in *Lakey* (Aug. 12, 2014) (“It is the construction and nursing requirements that form the basis of Plaintiffs’ challenge”), but they changed their position once the District Court awarded blanket relief, see 790 F. 3d, at 582 (petitioners told the Fifth Circuit that they “challenge H. B. 2 broadly, with no effort whatsoever to parse out specific aspects of the ASC requirement that they find onerous or otherwise infirm”). In its own review of the ASC requirement, in fact, the Court follows petitioners’ original playbook and focuses on the construction and nursing requirements as well. See *ante*, at 28–29 (detailed walkthrough of Tex. Admin. Code, tit. 25, §§135.15 (2016) (nursing), 135.52 (construction)). I do not see how it “would inflict enormous costs on both courts and litigants,” *ante*, at 38, to single out the ASC regulations that this Court and petitioners have both targeted as the core of the challenge.

By forgoing severability, the Court strikes down numerous provisions that could not plausibly impose an undue burden. For example, surgical center patients must “be treated with respect, consideration, and dignity.” Tex. Admin. Code, tit. 25, §135.5(a). That’s now enjoined. Patients may not be given misleading “advertising regarding the competence and/or capabilities of the organization.” §135.5(g). Enjoined. Centers must maintain fire alarm and emergency communications systems, §§135.41(d), 135.42(e), and eliminate “[h]azards that might lead to slipping, falling, electrical shock, burns, poisoning, or other trauma,” §135.10(b). Enjoined and enjoined. When a center is being remodeled while still in use, “[t]emporary sound barriers shall be provided where intense, prolonged construction noises will disturb patients or staff in the occupied portions of the building.” §135.51(b)(3)(B)(vi). Enjoined. Centers must develop and enforce policies concerning teaching and publishing by staff. §§135.16(a), (c). Enjoined. They must obtain in-

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formed consent before doing research on patients. §135.17(e). Enjoined. And each center “shall develop, implement[,] and maintain an effective, ongoing, organization-wide, data driven patient safety program.” §135.27(b). Also enjoined. These are but a few of the innocuous requirements that the Court invalidates with nary a wave of the hand.

Any responsible application of the H. B. 2 severability provision would leave much of the law intact. At a minimum, both of the requirements challenged here should be held constitutional as applied to clinics in any Texas city that will have a surgical center providing abortions (*i.e.*, those areas in which there cannot possibly have been an undue burden on abortion access). Moreover, as even the District Court found, the surgical center requirement is clearly constitutional as to new abortion facilities and facilities already licensed as surgical centers. *Whole Woman's Health v. Lakey*, 46 F. Supp. 3d 673, 676 (WD Tex. 2014). And we should uphold every application of every surgical center regulation that does not pose an undue burden—at the very least, all of the regulations as to which petitioners have never made a specific complaint supported by specific evidence. The Court's wholesale refusal to engage in the required severability analysis here revives the “antagonistic ‘canon of construction under which in cases involving abortion, a permissible reading of a statute is to be avoided at all costs.’” *Gonzales*, 550 U. S., at 153–154 (quoting *Stenberg v. Carhart*, 530 U. S. 914, 977 (2000) (KENNEDY, J., dissenting); some internal quotation marks omitted).

If the Court is unwilling to undertake the careful severability analysis required, that is no reason to strike down all applications of the challenged provisions. The proper course would be to remand to the lower courts for a remedy tailored to the specific facts shown in this case, to “try to limit the solution to the problem.” *Ayotte v. Planned*



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*Parenthood of Northern New Eng.*, 546 U. S. 320, 328 (2006).

V

When we decide cases on particularly controversial issues, we should take special care to apply settled procedural rules in a neutral manner. The Court has not done that here.

I therefore respectfully dissent.

Appendix to opinion of ALITO, J.

## APPENDIX

App. K to Emergency Application To Vacate Stay in O. T.  
2013, No. 13A452, Plaintiffs' Trial Exh. 46

Clinic Name	Clinic Location	Capacity after Privileges Requirement	Notes	
Austin Women's Health Center	Austin, TX	100% of prior capacity		ASC
International Healthcare Solutions	Austin, TX			
South Austin Health Center (PP)	Austin, TX	none		X
Whole Women's Health Austin	Austin, TX	100% of prior capacity		
Whole Women's Health Beaumont	Beaumont, TX	100% of prior capacity		
Coastal Birth Control Center	Corpus Christi, TX	prob. 100% of prior capacity		
Abortion Advantage	Dallas, TX	none		
Northpark Medical Group	Dallas, TX			
Dallas Surgical Health Services Center	Dallas, TX	120 per week		X
Routh Street Women's Clinic	Dallas, TX	20 per week	Down from ~60 per week	
Southwestern Women's	Dallas, TX	110 per week		
Hill Top Women's Reproductive Health Services	El Paso, TX	prob. 100% of prior capacity		
Reproductive Services	El Paso, TX	none		
Southwest Fort Worth Health Center (PP)	Fort Worth, TX	none		
West Side Clinic	Fort Worth, TX	none		
Whole Woman's Health Fort Worth	Fort Worth, TX	none		
Harlingen Reproductive Services	Harlingen, TX	none		
Affordable Women's Health Center	Houston, TX			
AAA Concerned Women's Center	Houston, TX			
Aaron Women's Clinic	Houston, TX			
Texas Ambulatory Surgical Center	Houston, TX			X
Alto Women's Center	Houston, TX			
Houston Women's Clinic	Houston, TX	130 per week		
Planned Parenthood Center for Choice	Houston, TX	175 per week		X
Suburban Women's Clinic (SW)	Houston, TX			
Suburban Women's Clinic (NW)	Houston, TX			
Planned Parenthood Center for Choice Stafford	Stafford (not in county)	none		
Killeen Women's Health Center	Killeen, TX	none		
Planned Parenthood Women's Health Center	Lubbock, TX	none		
Whole Women's Health of McAllen	McAllen, TX	none		
Dr. Braid (Alamo Women's Reproductive Services)	San Antonio, TX	100% of prior capacity		
Planned Parenthood Babcock Sexual Healthcare	San Antonio, TX	40/week for ALL San Antonio PP locations		
Planned Parenthood Bandera Rd Sexual Healthcare	San Antonio, TX	none		
Planned Parenthood Northeast Sexual Healthcare	San Antonio, TX	none		
Whole Woman's Health San Antonio	San Antonio, TX	severely limited		X
Audre Rapoport Women's Health Center (PP)	Waco, TX	none		

D

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI  
NORTHERN DIVISION**

**RIMS BARBER; CAROL BURNETT;  
JOAN BAILEY; KATHERINE  
ELIZABETH DAY; ANTHONY LAINE  
BOYETTE; DON FORTENBERRY;  
SUSAN GLISSON; DERRICK JOHNSON;  
DOROTHY C. TRIPLETT; RENICK  
TAYLOR; BRANDILYNE MANGUM-  
DEAR; SUSAN MANGUM; JOSHUA  
GENERATION METROPOLITAN  
COMMUNITY CHURCH; CAMPAIGN  
FOR SOUTHERN EQUALITY; and  
SUSAN HROSTOWSKI**

**PLAINTIFFS**

**V.**

**CAUSE NO. 3:16-CV-417-CWR-LRA  
*consolidated with*  
CAUSE NO. 3:16-CV-442-CWR-LRA**

**PHIL BRYANT, Governor; JIM HOOD,  
Attorney General; JOHN DAVIS, Executive  
Director of the Mississippi Department of  
Human Services; and JUDY MOULDER,  
State Registrar of Vital Records**

**DEFENDANTS**

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**MEMORANDUM OPINION AND ORDER**

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The plaintiffs filed these suits to enjoin a new state law, “House Bill 1523,” before it goes into effect on July 1, 2016. They contend that the law violates the First and Fourteenth Amendments to the United States Constitution. The Attorney General’s Office has entered its appearance to defend HB 1523. The parties briefed the relevant issues and presented evidence and argument at a joint hearing on June 23 and 24, 2016.

The United States Supreme Court has spoken clearly on the constitutional principles at stake. Under the Establishment Clause of the First Amendment, a state “may not aid, foster, or

promote one religion or religious theory against another.” *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). “When the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality, there being no neutrality when the government’s ostensible object is to take sides.” *McCreary Cnty., Kentucky v. ACLU of Kentucky*, 545 U.S. 844, 860 (2005) (citation omitted). Under the Equal Protection Clause of the Fourteenth Amendment, meanwhile, a state may not deprive lesbian and gay citizens of “the protection of general laws and policies that prohibit arbitrary discrimination in governmental and private settings.” *Romer v. Evans*, 517 U.S. 620, 630 (1996).

HB 1523 grants special rights to citizens who hold one of three “sincerely held religious beliefs or moral convictions” reflecting disapproval of lesbian, gay, transgender, and unmarried persons. Miss. Laws 2016, HB 1523 § 2 (eff. July 1, 2016). That violates both the guarantee of religious neutrality and the promise of equal protection of the laws.

The Establishment Clause is violated because persons who hold contrary religious beliefs are unprotected – the State has put its thumb on the scale to favor some religious beliefs over others. Showing such favor tells “nonadherents that they are outsiders, not full members of the political community, and . . . adherents that they are insiders, favored members of the political community.” *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309-10 (2000) (quotation marks and citation omitted). And the Equal Protection Clause is violated by HB 1523’s authorization of arbitrary discrimination against lesbian, gay, transgender, and unmarried persons.

“It is not within our constitutional tradition to enact laws of this sort.” *Romer*, 517 U.S. at 633. The plaintiffs’ motions are granted and HB 1523 is preliminarily enjoined.

## **I. The Parties**

### **A. Plaintiffs**

The plaintiffs in this matter are 13 individuals and two organizations – Joshua Generation Metropolitan Community Church (JGMCC) and the Campaign for Southern Equality (CSE).

All of the individual plaintiffs are residents, citizens, and taxpayers of Mississippi who disagree with the beliefs protected by HB 1523. They fall into three broad and sometimes overlapping categories: (1) clergy and other religious officials whose religious beliefs are not reflected in HB 1523; (2) members of groups targeted by HB 1523; and (3) other citizens who, based on their religious or moral convictions, do not hold the beliefs HB 1523 protects.

The first group includes Rev. Dr. Rims Barber, Rev. Carol Burnett, Rev. Don Fortenberry, Brandiilyne Mangum-Dear, Susan Mangum, and Rev. Dr. Susan Hrostowski. Rev. Dr. Barber is an ordained minister in the Presbyterian church. Rev. Burnett is an ordained United Methodist minister. Rev. Fortenberry is an ordained United Methodist minister and the retired chaplain of Millsaps College. Mangum-Dear is the pastor at JGMCC, while Mangum is the director of worship at that church. Rev. Dr. Hrostowski is the vicar of St. Elizabeth's Episcopal Church in Collins, Mississippi, as well as an employee of the University of Southern Mississippi.

Katherine Elizabeth Day, Anthony (Tony) Laine Boyette, Dr. Susan Glisson, and Renick Taylor comprise the second group of plaintiffs.<sup>1</sup> Day is a transgender woman; Boyette is a transgender man. Dr. Glisson, an employee of the University of Mississippi, is unmarried and in a long-term sexual romantic relationship with an unmarried man. Taylor is a gay man who is engaged to his male partner. The couple plans to marry in the summer of 2017.

The third group of individual plaintiffs includes Joan Bailey, Derrick Johnson, and Dorothy Triplett. Bailey is a retired therapist whose practice was primarily devoted to lesbians.

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<sup>1</sup> Mangum-Dear, Mangum, and Rev. Dr. Hrostowski also fall into this group.

Johnson is the Executive Director of the Mississippi State Conference of the NAACP, and Triplett is a retired government employee and a longtime activist.

JGMCC is a ministry in Forrest County, Mississippi, whose members fall into all three categories. It “welcomes all people regardless of age, race, sexual orientation, gender identity, or social status.” Docket No. 1, ¶ 16, in Cause No. 3:16-CV-417 [hereinafter *Barber*]. In particular, the church sponsors “a community service ministry that promotes LGBT+ equality.” *Id.* Approximately 90% of its members in Forrest County identify as LGBT. Transcript of Hearing on Motion for Preliminary Injunction at 168, *Barber v. Bryant*, No. 3:16-CV-417 (S.D. Miss. June 23, 2016) [hereinafter Tr. of June 23]. There are over 400 Metropolitan Community Churches worldwide. *Id.*

CSE is a non-profit organization that works “across the South to promote the full humanity and equality of lesbian, gay, bisexual, and transgender people in American life.” Docket No. 2-2, at 2, in Cause No. 3:16-CV-442 [hereinafter *CSE IV*]. It is based in North Carolina but has worked in Mississippi since 2012. *Id.* CSE claims to advocate for Mississippians in all three categories of plaintiffs. *Id.* at 4.

## **B. Defendants**

Governor Phil Bryant is sued in his official capacity as the chief executive of the State of Mississippi. State law charges him with the responsibility to “see that the laws are faithfully executed.” Miss. Code Ann. § 7-1-5(c).

Attorney General Jim Hood is also sued in his official capacity. Among his powers and duties, he is required to “intervene and argue the constitutionality of any statute when notified of a challenge.” *Id.* § 7-5-1; see *In the Interest of R.G.*, 632 So. 2d 953, 955 (Miss. 1994).

John Davis is the Executive Director of the Mississippi Department of Human Services. Under Mississippi Code § 43-1-2(5), he is tasked with implementing state laws protecting children. One of the offices under his purview, the Division of Family and Children's Services, is "responsible for the development, execution and provisions of services" regarding foster care, adoption, licensure, and other social services. Miss. Code Ann. § 43-1-51.<sup>2</sup>

Judy Moulder is the Mississippi State Registrar of Vital Records. She is responsible for "carry[ing] into effect the provisions of law relating to registration of marriages." *Id.* § 51-57-43. HB 1523 requires Moulder to collect and record recusal notices from persons authorized to issue marriage licenses who wish to *not* issue marriage licenses to certain couples due to a belief enumerated in HB 1523. HB 1523 § 3(8)(a).

## **II. Factual and Procedural History**

### **A. Same-Sex Marriage**

Because HB 1523 is a direct response to the Supreme Court's 2015 same-sex marriage ruling, it is necessary to discuss the background of that ruling.

This country had long debated whether lesbian and gay couples could join the institution of civil marriage. *See, e.g.,* Andrew Sullivan, *Here Comes the Groom*, The New Republic, Aug. 27, 1989. The debate played itself out on the local, state, and national levels via constitutional amendments, legislative enactments, ballot initiatives, and propositions.

In its most optimistic retelling, "[i]ndividuals on both sides of the issue passionately, but respectfully, attempted to persuade their fellow citizens to accept their views." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2627 (2015) (Scalia, J., dissenting). *But see* David Carter, *Stonewall: The Riots that Sparked the Gay Revolution* 109-10, 183-84 (2004) (describing the 1966

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<sup>2</sup> During the 2016 legislative session, Mississippi's lawmakers created the Department of Child Protective Services, a standalone agency independent of the Department of Human Services. *See* 2016 Miss. Laws, SB 2179. The new department was created upon passage, but the bill allows a transition period of up to two years. *Id.*



Compton's Cafeteria riots by transgender citizens in San Francisco, and the famous 1969 Stonewall riots in New York City). Less charitably, but also true, is the reality that every time lesbian and gay citizens moved one step closer to legal equality, voters and their representatives passed new laws to preserve the status quo.

In the 1990s, for example, Hawaii's same-sex marriage lawsuit inspired the federal Defense of Marriage Act (DOMA) and a wave of state-level "mini-DOMAs." *Campaign for Southern Equality v. Bryant*, 64 F. Supp. 3d 906, 915 (S.D. Miss. 2014) [hereinafter *CSE I*]. Mississippi's politicians joined the movement by issuing an executive order and passing a law banning same-sex marriage. *Id.* It was not until 2013 that DOMA was struck down in part. *United States v. Windsor*, 133 S. Ct. 2675 (2013). Mississippi's mini-DOMA lasted until 2015. *CSE I*, 64 F. Supp. 3d at 906.

In the early 2000s, *Lawrence v. Texas* and *Goodridge v. Department of Public Health*, cases that found in favor of lesbian and gay privacy and marriage rights, respectively, resulted in a wave of state constitutional amendments banning same-sex marriage. *CSE I*, 64 F. Supp. 3d at 915. Mississippians approved such a constitutional amendment by the largest margin in the nation. *Id.*; see Michael Foust, 'Gay Marriage' a Loser: Amendments Pass in all 11 States, Baptist Press, Nov. 3, 2004.

The lawfulness of same-sex marriage was finally resolved in 2015. The Supreme Court ruled in *Obergefell v. Hodges* that same-sex couples must be allowed to join in civil marriage "on the same terms and conditions as opposite-sex couples." 135 S. Ct. at 2605. The decision applies to every governmental agency and agent in the country. "The majority of the United States Supreme Court dictates the law of the land, and lower courts are bound to follow it."

*Campaign for Southern Equality v. Mississippi Dep't of Human Servs.*, --- F.3d ---, 2016 WL 1306202, at \*14 (S.D. Miss. Mar. 31, 2016) [hereinafter *CSE III*].

Many celebrated the ruling as overdue. Others felt like change was happening too quickly.<sup>3</sup> And some citizens were concerned enough to advocate new laws “to insulate state officials from legal risk if they do not obey the decision based on a religious objection.”<sup>4</sup> Lyle Denniston, *A Plea to Resist the Court on Same-Sex Marriage*, SCOTUSblog, July 9, 2015.

The Supreme Court’s decision *had* taken pains to reaffirm religious rights. Its commitment to the free exercise of religion is important and must be quoted in full.

Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. . . . In turn, those who believe allowing same-sex marriage is proper or indeed essential, whether as a matter of religious conviction or secular belief, may engage those who disagree with their view in an open and searching debate. The Constitution, however, does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex.

*Obergefell*, 135 S. Ct. at 2607.

“As the *Obergefell* majority makes clear, the First Amendment must protect the rights of [religious] individuals, even when they are agents of government, to *voice* their personal objections – this, too, is an essential part of the conversation – but the doctrine of equal dignity prohibits them from *acting on* those objections, particularly in their official capacities, in a way that demeans or subordinates LGBT individuals . . . .” Laurence H. Tribe, *Equal Dignity*:

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<sup>3</sup> It is fair to say that same-sex marriage rights went “from unthinkable to the law of the land in just a couple of decades.” Nate Silver, *Change Doesn’t Usually Come This Fast*, FiveThirtyEight, June 26, 2015.

<sup>4</sup> Sadly, this was predicted years ago. In 1999, four members of Congress expressed concern that religious freedom legislation “would not simply act as a shield to protect religious liberty, but could also be used by some as a sword to attack the rights of many Americans, including unmarried couples, single parents, lesbians and gays.” H.R. Rep. No. 106-219, at 41 (1999), *available at* 1999 WL 462644.

*Speaking Its Name*, 129 Harv. L. Rev. F. 16 (Nov. 10, 2015). *Obergefell*'s author, Justice Kennedy, had also reaffirmed this principle in *Burwell v. Hobby Lobby Stores*. “[N]o person may be restricted or demeaned by government in exercising his or her religion. Yet neither may that same exercise unduly restrict other persons . . . in protecting their own interests.” 134 S. Ct. 2751, 2786-87 (2014) (Kennedy, J., concurring).

In the immediate wake of *Obergefell*, the Fifth Circuit issued a published opinion declaring that “*Obergefell*, in both its Fourteenth and First Amendment iterations, is the law of the land and, consequently, the law of this circuit and should not be taken lightly by actors within the jurisdiction of this court.” *Campaign for Southern Equality v. Bryant*, 791 F.3d 625, 627 (5th Cir. 2015) [hereinafter *CSE II*]. The court issued the mandate forthwith. *Id.*

A few hours later, with this mandate in hand, this Court issued a Permanent Injunction and a Final Judgment enjoining enforcement of Mississippi’s statutory and constitutional same-sex marriage ban. The Attorney General’s Office soon advised Circuit Clerks to issue marriage licenses “to same-sex couples on the same terms and conditions accorded to couples of the opposite sex.” *In re Steve Womack*, 2015 WL 4920123, at \*1 (Miss. A.G. July 17, 2015).

In physics, every action has its equal and opposite reaction. In politics, every action has its predictable overreaction. Politicians reacted to the Hawaiian proceedings with DOMA and mini-DOMAs. *Lawrence* and *Goodridge* birthed the state constitutional amendments. And now *Obergefell* has led to HB 1523. The next chapter of this back-and-forth has begun.

## **B. House Bill 1523**

Mississippi’s highest elected officials were displeased with *Obergefell*. Governor Bryant stated that *Obergefell* “usurped [states’] right to self-governance and has mandated that states must comply with federal marriage standards—standards that are out of step with the wishes of

many in the United States and that are certainly out of step with the majority of Mississippians.”<sup>5</sup>

Governor Phil Bryant, *Governor Bryant Issues Statement on Supreme Court Obergefell*

*Decision*, June 26, 2015.<sup>6</sup>

Legislative leaders felt similarly. Lieutenant Governor Tate Reeves, who presides over the State Senate, called the decision an “overreach of the federal government.” Geoff Pender, *Lawmaker: State Could Stop Marriage Licenses Altogether*, The Clarion-Ledger, June 26, 2015.<sup>7</sup>

Speaker of the House Philip Gunn said *Obergefell* was “in direct conflict with God’s design for marriage as set forth in the Bible. The threat of this decision to religious liberty is very clear.”

*Id.*<sup>8</sup> Representative Andy Gipson, Chairman of the House Judiciary B Committee, pledged to study whether Mississippi should stop issuing marriage licenses altogether. *Id.*<sup>9</sup>

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<sup>5</sup> Governor Bryant’s statement is only partially true. While states have mostly been permitted to regulate marriage within their borders, the Supreme Court has stepped in to ensure that “self-governance” complies with equal protection. See *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (“Marriage is one of the basic civil rights of man, fundamental to our very existence and survival. To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes . . . is surely to deprive all the State’s citizens of liberty without due process of law.”).

<sup>6</sup> The Governor’s remarks sounded familiar. In the mid-1950s, Governor J.P. Coleman said that *Brown v. Board of Education* “represents an unwarranted invasion of the rights and powers of the states.” Charles C. Bolton, William F. Winter and the New Mississippi: A Biography 97 (2013). In 1962, before a joint session of the Mississippi Legislature – and to a “hero’s reception” – Governor Ross Barnett was lauded for invoking states’ rights during the battle to integrate the University of Mississippi. Charles W. Eagles, *The Price of Defiance: James Meredith and the Integration of Ole Miss 1961-1964* (2009) [hereinafter *Price of Defiance*].

<sup>7</sup> The State has objected to the Court’s use of newspaper articles. In an Establishment Clause challenge, however, a District Court errs when it takes “insufficient account of the context in which the statute was enacted and the reasons for its passage.” *Salazar v. Buono*, 559 U.S. 700, 715 (2010). The Fifth Circuit agrees: “context is critical in assessing neutrality” in this area of the law. *Doe v. Beaumont Indep. Sch. Dist.*, 240 F.3d 462, 473 (5th Cir. 2001).

<sup>8</sup> Using God as a justification for discrimination is nothing new. It was Governor Barnett who proclaimed that “[t]he Good Lord was the original segregationist. He made us white, and he intended that we stay that way.” *Price of Defiance* at 282. Warping the image of God was not reserved to Mississippi politicians. In testimony before Congress during the debate on the Civil Rights Act of 1964, a Maryland businessman testified before a Senate committee that “God himself was the greatest segregationist of all time as is evident when he placed the Caucasians in Europe, the black people in Africa, the yellow people in the Orient and so forth.” Linda C. McClain, *The Civil Rights Act of 1964 and “Legislating Morality”: On Conscience, Prejudice, and Whether “Stateways” Can Change “Folkways”*, 95 B.U. L. Rev. 891, 917 (2015). He continued, “Christ himself never lived an integrated life, and . . . when he chose His close associates, they were all white. This doesn’t mean that He didn’t love all His creatures, but it does indicate that He didn’t think we had to have all this togetherness in order to go to heaven.” *Id.*

<sup>9</sup> The suggestion was (again) familiar. A few months after the Supreme Court’s decision in *Brown*, Mississippians – those who were permitted to vote, that is – “voted two to one approving a constitutional amendment abolishing the state schools system if it integrated.” Dennis J. Mitchell, *A New History of Mississippi* 404 (2014).

The angst was not limited to the executive and legislative branches. Two Justices of the Mississippi Supreme Court also expressed their disgust with *Obergefell*. In 2014, a lesbian had petitioned that body for the right to divorce her wife in a Mississippi court. *Czekala-Chatham v. State ex rel. Hood*, --- So. 3d ---, 2015 WL 10985118 (Miss. Nov. 5, 2015). While her case was pending, the U.S. Supreme Court handed-down *Obergefell*. Although a majority of the Mississippi Supreme Court concluded that *Obergefell* resolved her case in her favor, Justices Dickinson and Coleman argued that the *Obergefell* Court had legislated from the bench and overstepped its authority. *Id.* at \*3 (Dickinson, J., dissenting). They opined that “state courts are not required to recognize as legitimate legal authority a Supreme Court decision that is in no way a constitutional interpretation,” and claimed “a duty to examine those decisions to make sure they indeed are constitutional interpretations, rather than . . . an exercise in judicial will.” *Id.* at \*4, \*6.<sup>10</sup> *Obergefell* was “[w]orthy only to be disobeyed,” they said. *Id.* at \*5.

Mississippi’s legislators formally responded to *Obergefell* in the next legislative session.<sup>11</sup> Speaker Gunn drafted and introduced HB 1523, the “Protecting Freedom of Conscience from Government Discrimination Act.”<sup>12</sup> The bill overwhelmingly passed both chambers, and the Governor signed it into law on April 5, 2016. It goes into effect on July 1.

HB 1523’s meaning is contested. A layperson reading about the bill might conclude that it gives a green light to discrimination and prevents accountability for discriminatory acts.

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<sup>10</sup> But see *James v. City of Boise, Idaho*, 136 S. Ct. 685, 686 (2016) (per curiam) (“The Idaho Supreme Court, like any other state or federal court, is bound by this Court’s interpretation of federal law. The state court erred in concluding otherwise.”).

<sup>11</sup> This had happened before in the religious liberty context. In 1994, “[o]n a wave of public sentiment and indignation over the treatment of a Principal . . . who allowed students to begin each school day with a prayer over the intercom, the Mississippi legislature passed the School Prayer Statute at issue here.” *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 277 (5th Cir. 1996). The statute was unconstitutional. *Id.*

<sup>12</sup> “‘After the Supreme Court decision in *Obergefell* (v. Hodges), it became apparent that there would be a head-on collision between religious convictions about gay marriage and the right to gay marriage created by the decision,’ [Speaker] Gunn said.” Adam Ganucheau, *Mississippi’s ‘Religious Freedom’ Law Drafted Out of State*, Mississippi Today, May 17, 2016. One commentator concluded that “HB 1523 was hatched” after the issuance of this Court’s Permanent Injunction. Sid Salter, *Constitutional Ship has Sailed on Same-Sex Marriage*, The Clarion-Ledger, May 8, 2016. “Clearly, House Bill 1523 seeks to work around the federal *Obergefell* decision at the state level.” *Id.*

Arielle Dreher, *Hundreds Rally to Repeal HB 1523, State Faces Deadline Today Before Lawsuit*, Jackson Free Press, May 2, 2016 (quoting Chad Griffin, President of the Human Rights Campaign, as saying, “it’s sweeping and allows almost any individual or organization to justify discrimination against LGBT people, against single mothers and against unwed couples.”). Someone else reading the same article might conclude that HB 1523 simply “reinforces” the First Amendment. *Id.* (quoting Speaker Gunn as saying the gay community “can do the same things that they could before”). So any discussion should begin with the plain text of the bill.

HB 1523 enumerates three “sincerely held religious beliefs or moral convictions” entitled to special legal protection. They are,

- (a) Marriage is or should be recognized as the union of one man and one woman;
- (b) Sexual relations are properly reserved to such a marriage; and
- (c) Male (man) or female (woman) refer to an individual’s immutable biological sex as objectively determined by anatomy and genetics at time of birth.

HB 1523 § 2. These will be referred to as the “§ 2” beliefs.

The bill then says that the State of Mississippi will not “discriminate” against persons who act pursuant to a § 2 belief. *Id.* §§ 3-4.<sup>13</sup> For example, if a small business owner declines to provide goods or services for a same-sex wedding because it would violate his or her § 2 beliefs, HB 1523 allows the business to decline without fear of State “discrimination.”

“Discrimination” is defined broadly. It covers consequences in the realm of taxation, employment, benefits, court proceedings, licenses, financial grants, and so on. In other words, the State of Mississippi will not tax you, penalize you, fire you, deny you a contract, withhold a diploma or license, modify a custody agreement, or retaliate against you, among many other

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<sup>13</sup> HB 1523 § 9(2)-(3) defines “State government” to include private persons, corporations, and other legal entities.

enumerated things, for your § 2 beliefs. *Id.*<sup>14</sup> An organization or person who acts on a § 2 belief is essentially immune from State punishment.<sup>15</sup>

The Governor’s signing statement recognized that consequences under federal law are unchanged. States “lack authority to nullify a federal right or cause of action they believe is inconsistent with their local policies.” *Haywood v. Drown*, 556 U.S. 729, 736 (2009).

Parts of the law provide fodder for both its opponents and its proponents. One section of HB 1523 guarantees that the State will not take adverse action against a religious organization that declines to solemnize a wedding because of a § 2 belief. *Id.* § 3. There is nothing new or controversial about that section. Religious organizations already have that right under the Free Exercise Clause of the First Amendment.

Citizens also enjoy substantial religious rights under existing state law. The Mississippi Constitution ensures that “the free enjoyment of all religious sentiments and the different modes of worship shall be held sacred,” and “no preference shall be given by law to any religious sect or mode of worship.”<sup>16</sup> Miss. Const., § 18. In addition, a 2014 law called the “Mississippi Religious Freedom Restoration Act” (RFRA) states that the government “may substantially burden a person’s exercise of religion *only* if it demonstrates that application of the burden to the person: (i) Is in furtherance of a compelling governmental interest; and (ii) Is the least restrictive means of furthering that compelling governmental interest.” Miss. Code Ann. § 11-61-1(5)(b) (emphasis added). HB 1523 does not change either of these laws.<sup>17</sup>

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<sup>14</sup> This is more expansive than other anti-discrimination laws, such as Title VII or Title IX.

<sup>15</sup> The broad immunity provision may violate the Mississippi Constitution, which provides that “every person for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice shall be administered without sale, denial, or delay.” Miss. Const. § 24.

<sup>16</sup> Despite the inclusive language just quoted, § 18 of the Mississippi Constitution then says that “[t]he rights hereby secured shall not be construed . . . to exclude the Holy Bible from use in any public school.”

<sup>17</sup> Mississippi’s RFRA is also part of the political back-and-forth on LGBT rights. “State-based RFRA’s were passed to preemptively provide religious exemptions to people in advance of a Supreme Court ruling on gay marriage, [Professor Doug] NeJaime said.” Alana Semuels, *Should Adoption Agencies Be Allowed to Discriminate Against*



We return to HB 1523. Several parts of the bill are unclear. One says the State will not take action against foster or adoptive parents who intend to raise a foster or adoptive child in accordance with § 2 beliefs. HB 1523 § 3(3). It is not obvious how the State would respond if the child in urgent need of placement was a 14-year-old lesbian.

Another section discusses a professional's right to refuse to participate in "psychological, counseling, or fertility services" because of a § 2 belief. *Id.* § 3(4). But some professions' ethical rules prohibit "engag[ing] in discrimination against prospective or current clients . . . based on . . . gender, gender identity, sexual orientation, [and] marital/ partnership status," to name a few categories. American Counseling Association, Code of Ethics § C.5 (2014). Under HB 1523, though, a public university's faculty must confer a degree upon, and the State must license, a person who refuses to abide by her chosen profession's Code of Ethics.<sup>18</sup>

Section 3(8)(a) of the law, in contrast, is crystal clear. It says that a government employee with authority to issue marriage licenses may recuse herself from that duty if it would violate one of her § 2 beliefs. HB 1523 § 3(8)(a). The employee must provide prior written notice to the State Registrar of Vital Records and be prepared to "take all necessary steps to ensure that the authorization and licensing of any legally valid marriage is not impeded or delayed as a result of any recusal." *Id.* The State's attorneys agree that this section "effectively amends Mississippi County Circuit Clerks' Office's marriage licensing obligations under state law by specifying conditions under which a clerk's employee may recuse himself or herself from authorizing or licensing marriages." Docket No. 41, at 6, in Cause No. 3:14-CV-818.

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*Gay Parents?*, The Atlantic, Sept. 23, 2015. Mississippi's RFRA fits this timeline perfectly. In summer 2013, the Supreme Court's ruling in *United States v. Windsor* foreshadowed an imminent victory for same-sex marriage. A few months later, Mississippi's elected officials enacted the State RFRA.

<sup>18</sup> Relatedly, in other states, citizens have successfully sued so-called "gay conversion" therapists for consumer fraud and professional malpractice. See Olga Khazan, *The End of Gay Conversion Therapy*, The Atlantic, June 26, 2015. HB 1523 § 4 would bar a Mississippi court from enforcing such a verdict.



The significance of this section is in the eye of the beholder. The plaintiffs argue that it facilitates discrimination against LGBT Mississippians by encouraging clerks to opt-out of serving same-sex couples.

HB 1523's defenders respond that the bill protects *against* discrimination by ensuring that clerks do not have to violate their religious beliefs. When Senator Jenifer Branning shepherded the bill through the Senate floor debate, she argued that the legislation actually *lifts* a burden imposed by *Obergefell*.<sup>19</sup> H.B. 1523, Debate on the Floor of the Mississippi Senate, at 7:02 (Mar. 31, 2016) (statement of Sen. Jenifer Branning) [hereinafter Senate Floor Debate]. In her view, HB 1523 is "balancing" legislation allowing those who oppose same-sex marriage to continue to perform their jobs with a "clear conscience," while protecting the rights of same-sex couples to receive a marriage license from another clerk. *Id.* at 26:55, 32:27.<sup>20</sup>

### C. These Suits

On June 3, 2016, Rev. Dr. Barber, Rev. Burnett, Bailey, Day, Boyette, Rev. Fortenberry, Dr. Glisson, Johnson, Triplett, Taylor, Mangum-Dear, Mangum, and JGMCC filed the first suit encompassed by this Order. *See* Docket No. 1, in *Barber*. They asserted Establishment and Equal Protection claims against Governor Bryant, General Hood, Executive Director Davis, and Registrar Moulder. *Id.* They requested a declaratory judgment that HB 1523 is unconstitutional on its face, as well as preliminary and permanent injunctive relief enjoining its enforcement.

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<sup>19</sup> Mississippi does not have formal legislative history; however, the Mississippi College School of Law's Legislative History Project archives the floor debate for bills that pass. The HB 1523 videos are available at [http://law.mc.edu/legislature/bill\\_details.php?id=4621&session=2016](http://law.mc.edu/legislature/bill_details.php?id=4621&session=2016). Unofficial transcripts were also introduced into evidence. *See* Docket No. 33-14, in *CSE IV*.

<sup>20</sup> These arguments are apparently increasingly common. *See* Douglas Nejaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 Yale L.J. 2516, 2560-61 (2015) (arguing that proponents of traditional morality "now emphasize different justifications for excluding same-sex couples from marriage -- for example, that marriage is about biological procreation or that preserving 'traditional marriage' protects religious liberty. At the same time, in anticipation of the possibility of defeat, they argue for exemptions from laws that recognize same-sex marriage. In so doing, they shift from speaking as a majority enforcing customary morality to speaking as a minority seeking exemptions based on religious identity.").

CSE and Rev. Dr. Hrostowski sued the same defendants on June 10, 2016. *See* Docket No. 1, in *CSE IV*. They asserted an Establishment Clause claim and sought the same relief as the *Barber* plaintiffs. *Id.*

The various plaintiffs conferred and moved to consolidate. The State was prepared to argue *Barber*, but objected to consolidation to avoid an abbreviated briefing schedule and a hearing in *CSE IV*. *See* Docket No. 22, in *Barber*. During a status conference, the Court heard the parties' positions and granted the State its requested response deadline. The Court also delayed the motion hearing – which was converted into a joint hearing – by two days. The State renewed its objection to the consolidated hearing and was overruled. These reasons follow.

The State essentially argued that there were too many HB 1523-related lawsuits – there are four – to fully prepare for a hearing in *CSE IV*. It entered into the record a Mississippi Today article in which General Hood said, “I and over half of our lawyers in the Civil Litigation Division are working overtime and weekends attempting to prepare for the hearings.” Docket No. 22-2, in *Barber*. General Hood added that budget cuts prevented him from hiring an expert to prepare “for the highly specialized area of the law seldom litigated in Mississippi -- the Establishment Clause.” *Id.* (ellipses omitted).

The first hurdle for the State is the substantial overlap in subject matter between *Barber* and *CSE IV*. The similar briefing suggests that little additional work was required to defend *CSE IV*. *Barber*, in fact, has a greater number of substantive claims than *CSE IV*. Having prepared for the more comprehensive hearing, it is difficult for the State to object to the narrower one.

The second, more significant problem with the State's argument is the utter predictability of these lawsuits. The media started reporting the likelihood of litigation on April 5, the day the Governor signed HB 1523 into law. *See, e.g.,* Arielle Dreher, ‘Total Infringement’: Governor

*Signs HB 1523 Over Protests of Business Leaders, Citizens*, Jackson Free Press, Apr. 5, 2016 (“You will see several lawsuits filed before it becomes law if the governor signs it,” one attorney said); Caray Grace, *Local Residents and City Leaders React to House Bill 1523*, WLOX, Apr. 5, 2016 (“the lawyers were already starting to draft up lawsuits so that as soon as he signed it, they could start filing them,” said [Molly] Kester.”).

General Hood apparently knew these lawsuits were coming as early as April 5, when he said he would make “case-by-case” decisions on whether to defend the lawsuits, and warned that the bill doesn’t override federal or constitutional rights. *Legal Pressure May Be Ahead for Mississippi Law Denying Service to Gays*, Chicago Tribune, Apr. 5, 2016.

The media even telegraphed the exact Establishment Clause arguments the plaintiffs eventually asserted. In early April, the press reported that 10 law professors from across the country released a memorandum outlining several ways in which HB 1523 violates the Establishment Clause. *See* Sierra Mannie, *Will Mississippi’s “Religious Freedom” Act Impact Children in Public and Private Schools?*, The Hechinger Report, Apr. 8, 2016. In May, Jackson attorney Will Manuel, a partner at Bradley LLP, said, “[b]y only endorsing certain religious thought, I believe it is in violation of the Establishment Clause of the First Amendment which prohibits government from establishing or only protecting one religion. That should be a fairly clear cut constitutional challenge.” Ted Carter, *Feds Unlikely to Ignore Mississippi’s HB1523, Lawyers Say*, Mississippi Business Journal, May 26, 2016; *see also* Arielle Dreher, *HB 1523: Bad for the Business Sector*, Jackson Free Press, June 8, 2016 (noting other legal concerns).

Perhaps the State’s best argument against a hearing in *CSE IV* was that it would be unprepared to cross-examine religion experts because it did not have time to find its own

expert.<sup>21</sup> Its objection fell flat when its attorneys filed the article in which General Hood said that *budget cuts* caused the lack of expert assistance.<sup>22</sup> If budget cuts explain the State's lack of expert assistance, no extension of time could have helped it prepare for a hearing.

For these reasons, the hearings were consolidated. Now, having considered the evidence and heard oral argument, the motions for preliminary injunction have been consolidated into this Order. The cases remain their separate identities pending further motion practice.

That brings us to the State's initial legal arguments.

### **III. Threshold Questions**

#### **A. Standing**

The State first challenges the plaintiffs' capacity to bring these suits.

The United States Constitution limits the jurisdiction of federal courts to actual cases and controversies. U.S. Const. art. III, § 2. "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Raines v. Byrd*, 521 U.S. 811, 818 (1997) (quotation marks and citation omitted). "The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." *Flast v. Cohen*, 392 U.S. 83, 99 (1968).

As the party seeking to invoke this Court's jurisdiction, the plaintiffs must demonstrate all three elements of standing: (1) an injury in fact that is concrete and particularized as well as imminent or actual; (2) a causal connection between the injury and the defendant's conduct; and

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<sup>21</sup> The Court has sought to understand what kind and amount of evidence would show a forbidden religious preference. In this case, it finds the plain language of HB 1523 and basic knowledge of local religious beliefs to be sufficient. Today's outcome is informed by but does not turn on the expert testimony heard in *CSE IV*.

<sup>22</sup> It also weakens the State's objection to the Court's use of newspaper articles.

(3) that a favorable decision is likely to redress the injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

In a standing analysis, the court “must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party.” *Warth v. Seldin*, 422 U.S. 490, 501-02 (1975). Standing is not handed out in gross. *CSE III*, 2016 WL 1306202, at \*2. A case with multiple plaintiffs can move forward as long as one plaintiff has standing as to each claim. *CSE I*, 64 F. Supp. 3d at 916.

### **1. Injury in Fact**

To establish an injury in fact, the plaintiffs must show “an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical.” *Lujan*, 504 U.S. at 560 (quotation marks and citation omitted). An injury is particularized if it “affect[s] the plaintiff in a personal and individual way.” *Id.* at 560 n.1. An injury is concrete when it is “real, not abstract.” *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1556 (2016) (quotation marks and citation omitted). Intangible injuries can satisfy the concreteness requirement. *Id.* at 9. A plaintiff must demonstrate “that he has sustained or is immediately in danger of sustaining some direct injury.” *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983) (quotation marks and citations omitted).

#### **a. Equal Protection Injuries**

The *Barber* plaintiffs in category two – *i.e.*, the LGBT plaintiffs and Dr. Glisson – allege that HB 1523 violates their rights under the Equal Protection Clause of the Fourteenth Amendment.<sup>23</sup> Claims under the Equal Protection Clause can include both tangible and intangible injuries. As noted in *Heckler v. Matthews*,

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<sup>23</sup> In discussing the Equal Protection claim, references to LGBT citizens should also be read to include unmarried-but-sexually-active citizens. The latter group may have been a collateral consequence of HB 1523.

discrimination itself, by perpetuating archaic and stereotypic notions or by stigmatizing members of the disfavored group as innately inferior and therefore as less worthy participants in the political community, can cause serious noneconomic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group.

465 U.S. 728, 739-40 (1984) (quotation marks and citation omitted). “Stigmatic injury stemming from discriminatory treatment is sufficient to satisfy standing’s injury requirement if the plaintiff identifies some concrete interest with respect to which he or she is personally subject to discriminatory treatment and that interest independently satisfies the causation requirement of standing doctrine.” *CSE I*, 64 F. Supp. 3d at 917 (quotation marks and citation omitted).

The State first challenges standing on the basis that the plaintiffs’ injuries are speculative and not imminent, arguing that the plaintiffs have not alleged the denial of any right or benefit as a result of HB 1523. It points to *Clapper v. Amnesty International, USA*, which held that “[a]lthough imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is *certainly* impending.” 133 S. Ct. 1138, 1147 (2013) (quotation marks and citation omitted).

This language, however, supports that the plaintiffs *do* have imminent injuries. If it goes into effect on July 1, plaintiffs say, HB 1523 will subject them to a wide range of arbitrary denials of service at the hands of public employees and private businesses.

The plaintiffs also say that HB 1523 will limit the protections LGBT persons currently have under state, county, city, and public school anti-discrimination policies. In the City of Jackson, for example, a municipal ordinance provides protection from discrimination on the basis of religion, sexual orientation, and gender identity, among other characteristics. Docket No. 32-17, in *Barber*. This ordinance protects several of the plaintiffs. *Id.* The plaintiffs then point to

University of Southern Mississippi’s (USM) anti-discrimination policy, which guarantees equal access to “educational, programmatic and employment opportunities without regard to” religion, sexual orientation, or gender identity. Docket No. 32-18, in *Barber*. If HB 1523 goes into effect, USM’s policy cannot be fully enforced. USM employees who invoke a § 2 belief will enjoy enhanced protection to decline to serve others on the basis of sexual orientation, and USM will not be able to discipline those employees who violate its internal anti-discrimination policy.<sup>24</sup>

In this context, the imminent injury to the plaintiffs, other LGBT persons, and unmarried persons is exactly the same as the injury recognized by the Supreme Court in *Romer*. In striking down an amendment to Colorado’s constitution, the Court found that:

Amendment 2 bars homosexuals from securing protection against the injuries that these public accommodations laws address. That in itself is a severe consequence, but there is more. Amendment 2, in addition, nullifies specific legal protections for this targeted class in all transactions . . . . Not confined to the private sphere, Amendment 2 also operates to repeal and forbid laws or policies providing specific protection for gays or lesbians from discrimination by every level of Colorado government.

517 U.S. at 629.

A closer analogue is difficult to imagine. As in *Romer*, HB 1523 “withdraws from homosexuals, [transgender, and unmarried-but-sexually-active persons,] but no others, specific legal protection from the injuries caused by discrimination, and it forbids the reinstatement of these laws and policies.” *Id.* at 627. If individuals had standing to file *Romer* before Amendment 2 went into effect, these plaintiffs may certainly do the same.

The State’s argument overlooks the fundamental injurious nature of HB 1523 – the establishment of a broad-based system by which LGBT persons and unmarried persons can be subjected to differential treatment based solely on their status. This type of differential treatment

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<sup>24</sup> Imagine that two USM students, who are a gay couple, walk into the cafeteria but are refused service because of the worker’s religious views. Could that employee be disciplined for refusing service? It is not clear what remedy they would have to remove the sting of humiliation.

is the hallmark of what is prohibited by the Fourteenth Amendment. *See New York City Transit Auth. v. Beazer*, 440 U.S. 568, 587 (1979) (“The [Equal Protection] Clause announces a fundamental principle: the State must govern impartially.”). To put it plainly, the plaintiffs’ injuries are “certainly impending” today, and without Court intervention, the plaintiffs will suffer actual injuries. *Clapper*, 133 S. Ct. at 1147.

The State then argues that the plaintiffs lack standing because they are not the “objects” of HB 1523. The argument comes from *Lujan*’s statement that “standing depends considerably upon whether the plaintiff is himself an object of the” government’s action or inaction at issue. *Lujan*, 504 U.S. at 561. The true objects of the law, the State claims, are those persons who want to freely exercise a § 2 belief. Docket No. 30, at 18, in *Barber*.

The Court is not persuaded. A robust record shows that HB 1523 was intended to benefit some citizens at the expense of LGBT and unmarried citizens. At oral argument, the State admitted that HB 1523 was passed in direct response to *Obergefell*, stating, “after *Obergefell*, citizens who hold the beliefs that are protected by 1523 were effectively told by the U.S. Supreme Court, *Your beliefs are garbage*.” Transcript of Hearing on Motion for Preliminary Injunction at 324, *Barber v. Bryant*, No. 3:16-CV-417 (S.D. Miss. June 24, 2016) [hereinafter Tr. of June 24].

It is therefore difficult to accept the State’s implausible assertion that HB 1523 was intended to protect certain religious liberties and simultaneously ignore that the bill was passed because same-sex marriage was legalized last summer. *See Romer*, 517 U.S. at 626.

Members of the LGBT community and persons like Dr. Glisson will suffer a concrete and particular injury as a result of HB 1523. Part of the injury is stigmatic, *see CSE I*, 64 F. Supp. 3d at 917, but that stigmatic injury is linked to the tangible rights that will be taken away



on July 1, including the tangible rights *Obergefell* extended. There are almost endless explanations for how HB 1523 condones discrimination against the LGBT community, but in its simplest terms it denies LGBT citizens equal protection under the law. Thus, those plaintiffs who are members of the LGBT community, as well as Dr. Glisson, have demonstrated an injury in fact sufficient to bring their Equal Protection claim.

#### **b. Establishment Clause Injuries**

All plaintiffs have asserted Establishment Clause claims.

In Establishment Clause actions, the injury in fact requirement may vary from other types of cases. *See Doe v. Tangipahoa Parish Sch. Bd.*, 473 F.3d 188, 194 (5th Cir. 2006). “The concept of injury for standing purposes is particularly elusive in Establishment Clause cases.” *Id.*

Plaintiffs can demonstrate “standing based on the direct harm of what is claimed to be an establishment of religion” or “on the ground that they have incurred a cost or been denied a benefit on account of their religion.” *Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 129-30 (2011). Courts also recognize that taxpayers have standing to challenge direct government expenditures that violate the Establishment Clause. *Id.* at 138-39; *see Flast*, 392 U.S. at 106. The Supreme Court has found standing in a wide variety of Establishment Clause cases “even though nothing was affected but the religious or irreligious sentiments of the plaintiffs.” *Catholic League for Religious & Civil Rights v. City & Cnty. of San Francisco*, 624 F.3d 1043, 1049-50 (9th Cir. 2010) (en banc) (collecting cases).

In *Croft v. Governor of Texas*, the Fifth Circuit concluded that a citizen had standing to challenge a public school’s daily moment of silence because his children were enrolled in the school and were required to observe the moment of silence. 562 F.3d 735, 746 (5th Cir. 2009)

[hereinafter *Croft I*]. This injury was sufficient because the plaintiff and his family demonstrated that they were exposed to and injured by the mandatory moment of silence. *Id.* at 746-47.<sup>25</sup>

In our case, the State contends that the plaintiffs’ alleged non-economic injuries are insufficiently particular and concrete. It cites *Valley Forge Christian College v. Americans United for Separation of Church and State*, which found that:

[the plaintiffs] fail to identify any personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by the observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Art. III, even though that disagreement is phrased in constitutional terms.

454 U.S. 464, 485-86 (1982).

In *Valley Forge*, an organization and four of its employees who lived in the Washington D.C. area challenged the constitutionality of a land conveyance from a government agency to a religious-affiliated education program in Pennsylvania. *Id.* at 468-69. The plaintiffs had learned of the land conveyance from a press release. *Id.* at 469. They merely observed the alleged constitutional violation from out-of-state.

The facts in the present case are quite different. Here, the plaintiffs are 13 individuals who reside in Mississippi, a Mississippi church, and an advocacy organization with members in Mississippi. The plaintiffs may have become aware of HB 1523 from news, friends, or social media, but regardless of how they learned of the legislation, it is set to become the law of *their state* on July 1. It will undeniably impact their lives. The enactment of HB 1523 is much more than a “psychological consequence” with which they disagree, it is allegedly an endorsement and elevation by *their* state government of specific religious beliefs over theirs and all others.

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<sup>25</sup> The Fifth Circuit distinguished *Croft* from *Doe v. Tangipahoa Parish School Board*, where it had declined to find standing in a case challenging prayers at school board meetings because the plaintiffs had never attended a school board meeting.

A more applicable case is *Catholic League*. There, the plaintiffs included a Catholic civil rights organization and devout Catholics who lived in San Francisco. 624 F.3d at 1048. They sued over a municipal resolution that expressly denounced Catholicism and the Catholic Church's beliefs on same-sex couples. *Id.* at 1047. The appellate court found that they had standing to bring such a case against their local government.

Similarly, today's individual plaintiffs have attested that they are citizens and residents of Mississippi, they disagree with the religious beliefs elevated by HB 1523, HB 1523 conveys the State's disapproval and diminution of their own deeply held religious beliefs, HB 1523 sends a message that they are not welcome in their political community, and HB 1523 sends a message that the state government is unwilling to protect them. *See, e.g.*, Docket Nos. 32-2; 32-3; 32-5 (all in *Barber*).

Plaintiff Taylor, for example, is "a sixth-generation Mississippian" and "former Navy combat veteran." Docket No. 32-8, in *Barber*. He is also a gay man engaged to be married next year. *Id.* Taylor thinks HB 1523 is hostile toward his religious values and targets LGBT persons. *Id.*

Dr. Glisson describes herself as "a member of the Southern Baptist Church co-founded by my grandparents" who has "studied and reflected upon my faith choice almost all my life." Docket No. 32-6, in *Barber*. "I am convinced that the heart of the Gospel is unconditional love. To condemn the presence of God in another human being, especially using faith claims or scripture to do so, is wrong and violates all of the tenets of my Christian faith." *Id.*

Dorothy Triplett explained her religious objections in detail. "I am a Christian, and nowhere in scripture does Jesus the Christ condemn homosexuality," she said. Docket No. 32-9, in *Barber*. "He instructed us to love our neighbors as ourselves. In St. Paul's Letter to the

Galatians 3:28: New Revised Standard Version (NRSV): ‘There is no longer Jew or Greek, there is no longer slave or free, there is no longer male or female; for all of you are one in Christ Jesus.’” *Id.*

Based on their allegations and testimony, each individual plaintiff has adequately alleged cognizable injuries under the Establishment Clause. The “sufficiently concrete injur[ies]” here are the psychological consequences stemming from the plaintiffs’ “exclusion or denigration on a religious basis within the political community.” *Catholic League*, 624 F.3d at 1052; *see Awad*, 670 F.3d at 1123.

Their injuries are also imminent. HB 1523 is set to become law on July 1. “There is no need for [the plaintiffs] to wait for actual implementation of the statute and actual violations of [their] rights under the First Amendment where the statute” violates the Establishment Clause. *Ingebretson v. Jackson Public Sch. Dist.*, 88 F.3d 274, 278 (5th Cir. 1996).

## **2. Causation**

The State next argues that the plaintiffs have not shown that their injuries have a causal connection to the defendants’ conduct. It cites *Southern Christian Leadership Conference v. Supreme Court of Louisiana* for the proposition that an injury cannot be the result of a third party’s independent action, and instead must be traceable to the named parties. 252 F.3d 781, 788 (5th Cir. 2001). The contention here is that any injuries will be caused by third parties – like a clerk who refuses to promptly issue a marriage license to a same-sex couple – and therefore that the plaintiffs should sue those third parties.

The argument is unpersuasive. On July 1, the plaintiffs will be injured by the state-sponsored endorsement of a set of religious beliefs over all others. *See Santa Fe*, 530 U.S. at 302; *Awad v. Ziriox*, 754 F. Supp. 2d 1298, 1304 (W.D. Okla. 2010). Regardless of any third-

party conduct, the bill creates a statewide two-tiered system that elevates heterosexual citizens and demeans LGBT citizens. The plaintiffs' injuries are therefore caused by the State – and specifically caused by the Governor who signed HB 1523 bill into law – and will at a minimum be enforced by officials like Davis and Moulder.

In addition, in similar cases under the Establishment and Equal Protection Clauses, the Supreme Court has found a state's governor to be a proper defendant for the causal connection requirement of standing. *E.g.*, *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Romer*, 517 U.S. at 620.

Accordingly, the plaintiffs have demonstrated that there is a causal connection between their injuries and the defendants' conduct.

### **3. Redressability**

The final prong of standing requires the plaintiffs to demonstrate that a favorable judicial decision will redress their grievances. *Lujan*, 504 U.S. at 561. The State argues that “Plaintiffs would still be facing their same alleged injury tomorrow if the Court preliminary enjoins the named Defendants today.” Docket No. 30, at 24, in *Barber*. It fails to support this claim with any further argument or facts.

“[W]hen the right invoked is that of equal treatment, the appropriate remedy is a mandate of *equal* treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class.” *Heckler*, 465 U.S. at 740 (quotation marks and citation omitted). “By declaring the [statute] unconstitutional, the official act of the government becomes null and void.” *Catholic League*, 624 F.3d at 1053.

Here, the harm done by HB 1523 would be halted if the statute is enjoined. Nothing in the plaintiffs' briefs, oral argument, or testimony indicates that they expect a favorable ruling to change the hearts and minds of Mississippians opposed to same-sex marriage, transgender

equality, or sex before marriage. They simply ask the Court to enjoin the enforcement of a state law that both permits arbitrary discrimination based on those characteristics and endorses the majority's favored religious beliefs. That is squarely within the Court's ability. *See Awad v. Ziriax*, 670 F.3d 1111, 1119 (10th Cir. 2012).

"Even more important, a declaratory judgment would communicate to the people of the plaintiffs' community that their government is constitutionally prohibited from condemning the plaintiffs' religion, and that any such condemnation is itself to be condemned." *Catholic League*, 624 F.3d at 1053.

The Court concludes that the individual plaintiffs have standing to bring these claims.

#### **4. Associational Standing**

In some instances, organizations may bring suit on behalf of their members. To establish associational standing, the organization must show that: (1) its members would have standing to sue on their own behalf; (2) the interests it seeks to safeguard are germane to the organization's purpose; and (3) neither the claim asserted nor the requested relief necessitate the participation of individual members. *Hunt v. Washington State Apple Advertising Comm'n.*, 432 U.S. 333, 343 (1977).

JGMCC seeks associational standing as a church with many LGBT members and a community service ministry that promotes LGBT+ equality. Because members of the church have standing to bring suit on their own behalf – at least two of its members are individual plaintiffs – the first element of associational standing is satisfied. Ensuring that its members are not discriminated against on the basis of sexual orientation, gender identity, or religion is undoubtedly germane to its purpose. And JGMCC's facial challenge does not require the participation of individual members. JGMCC has associational standing.

The same is true for CSE. That organization also has a member participating in this lawsuit, is aligned with the arguments and relief sought in this suit, and need not have additional members to assert its particular cause of action. It has associational standing. *Accord CSE I*, 64 F. Supp. 3d at 918; *CSE III*, 2016 WL 1306202, at \*11.

## **B. *Ex Parte Young***

The next issue is whether these defendants are properly named in this suit.

### **1. Legal Standard**

Under the Eleventh Amendment, citizens cannot sue a state in federal court. U.S. Const. amend. XI; *see Hutto v. Finney*, 437 U.S. 678, 699 (1978). In *Ex parte Young*, however, the Supreme Court carved out a narrow exception to this rule. 209 U.S. 123 (1908). The resulting *Ex parte Young* “fiction” holds that “because a sovereign state cannot commit an unconstitutional act, a state official enforcing an unconstitutional act is not acting for the sovereign state and therefore is not protected by the Eleventh Amendment.” *Okpalobi v. Foster*, 244 F.3d 405, 411 (5th Cir. 2001) (en banc). When a plaintiff sues a state official in his official capacity for constitutional violations, the plaintiff is not filing suit against the individual, but instead the official’s office, and can proceed with the constitutional claims. *Will v. Michigan Dep’t of State Police*, 491 U.S. 58, 70 (1989).

The *Ex parte Young* fiction requires that the state officer have “some connection with the enforcement of the act” or be “specially charged with the duty to enforce the statute,” and also that the official indicate a willingness to enforce it. *Ex parte Young*, 209 U.S. at 157, 158. The officer’s authority to enforce the act does not have to be found in the challenged statute itself; it is sufficient if it falls within the official’s general duties to enforce related state laws.

“In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.” *Verizon Maryland, Inc. v. Public Service Comm’n of Maryland*, 535 U.S. 635, 645 (2002) (quotation marks, citation, and brackets omitted).

## 2. Discussion

All four defendants – the Governor, the Attorney General, the Executive Director of the Department of Human Services, and the Registrar of Vital Records – are state officials sued in their official capacities. These suits are effectively brought against their various offices. All four defendants also have a connection to the enforcement of HB 1523.

Although Governor Bryant is the chief executive of the State, *Ex parte Young* does not permit a suit against a governor solely on the theory that he is “charged with the execution of all of its laws.” *Ex parte Young*, 209 U.S. at 157. A more specific causal connection is required. *Id.* That connection is satisfied here. The Governor is the manager and supervisor of his staff, so he is personally required to enforce HB 1523’s terms prohibiting adverse action against any of his employees who exercise a § 2 belief. Since the Governor has also indicated his willingness to enforce HB 1523 to the full extent of his authority, he is a proper defendant. *See* CB Condez, *Mississippi Governor: Christians Would Line up for Crucifixion Before Abandoning Faith*, The Christian Times, June 2, 2016 (“[HB 1523’s critics] don’t know that if it takes crucifixion, we will stand in line before abandoning our faith and our belief in our Lord and Savior Jesus Christ,’ [Governor Bryant] said.”).<sup>26</sup>

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<sup>26</sup> The Governor’s remarks are reminiscent of what Circuit Judge Tom P. Brady, later Mississippi Supreme Court Justice Brady, warned in his infamous Black Monday Speech. Judge Brady called on others to disobey *Brown v. Board of Education* by saying, “We have, through our forefathers, died before for our sacred principles. We can, if necessary, die again.” Stephen J. Whitfield, *A Death in the Delta: The Story of Emmett Till* 10 (1988).



In Establishment and Equal Protection Clause cases in particular, governors are often properly included as named defendants. *See Romer*, 517 U.S. at 620 (Gov. Roy Romer); *Edwards v. Aguillard*, 482 U.S. 578 (1987) (Gov. Edwin W. Edwards); *Wallace*, 472 U.S. at 38 (Gov. George C. Wallace); *Croft v. Perry*, 624 F.3d 157 (5th Cir. 2010) (Gov. Rick Perry, as the sole defendant) [hereinafter *Croft II*]; *Croft I*, 562 F.3d at 735 (same).

General Hood is the state's chief law enforcement officer, but his general duty to represent the state in litigation is inadequate to invoke the *Ex parte Young* exception. Like the Governor, though, HB 1523 prohibits General Hood from taking any action against one of his employees who acts in accordance with a § 2 belief. The Attorney General's Office employs hundreds of people across Mississippi, so he may very well be confronted with an HB 1523 issue.

Executive Director Davis, until authority is formally transferred to the new Department of Child Protective Services, is responsible for administering a variety of social programs. *See* Miss. Code Ann. § 43-1-51. HB 1523 has at least two sections that fall under his purview. *See* HB 1523 § 3(2)-(3). Under HB 1523, for example, DHS cannot take action against a foster or adoptive parent who violates DHS policies based on a § 2 belief. Davis's attorneys have given every impression that he will fully enforce his duties under HB 1523.

As discussed above, Registrar Moulder is responsible for executing state laws concerning registration of marriages. *See* Miss. Code Ann. § 51-57-43. HB 1523 adds a new responsibility to her existing obligations: she must record the recusal of any circuit clerk who refuses to issue a marriage license because of a § 2 belief. HB 1523 § 3(8)(a). Thus, she has a connection with HB 1523's enforcement. Her counsel has also indicated her intent to comply with her new duties.

Lastly, the plaintiffs' requested relief also satisfies the Eleventh Amendment and *Ex parte Young*. In both cases, they have requested declaratory and prospective injunctive relief that would enjoin the enforcement of HB 1523 and prevent state officials from acting contrary to well-established precedent. Courts frequently grant this type of relief against state officials in constitutional litigation. *See, e.g., Romer*, 517 U.S. at 620; *Wallace*, 472 U.S. at 38.

Accordingly, the *Ex parte Young* exception to the Eleventh Amendment applies and these suits may proceed to seek declaratory and injunctive relief against these defendants.

#### **IV. Motion for Preliminary Injunction**

##### **A. Legal Standard**

To receive a preliminary injunction, the movant must show “(1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable harm if the injunction is not granted; (3) that the threatened injury outweighs any harm that the injunction might cause to the defendant; and (4) that the injunction will not disserve the public interest.” *Opulent Life Church v. City of Holly Springs, Miss.*, 697 F.3d 279, 288 (5th Cir. 2012) (citation omitted). “Each of these factors presents a mixed question of fact and law.” *Id.* (citation omitted).

“A preliminary injunction is an extraordinary remedy. It should only be granted if the movant has clearly carried the burden of persuasion on all four . . . prerequisites.” *Miss. Power & Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618, 621 (5th Cir. 1985).

“The purpose of a preliminary injunction is always to prevent irreparable injury so as to preserve the court’s ability to render a meaningful decision on the merits. It often happens that this purpose is furthered by preservation of the status quo, but not always.” *Canal Auth. of State of Fla. v. Callaway*, 489 F.2d 567, 576 (5th Cir. 1974).

## **B. Substantial Likelihood of Success on the Merits**

The movant's likelihood of success is determined by substantive law. *Valley v. Rapides Parish Sch. Bd.*, 118 F.3d 1047, 1051 (5th Cir. 1997). "To successfully mount a facial challenge, the plaintiffs must show that there is no set of circumstances under which [HB 1523] is constitutional. If the plaintiffs successfully show [it] to be unconstitutional in every application, then that provision will be struck down as invalid." *Croft II*, 624 F.3d at 164.

### **1. The Equal Protection Clause**

Under the Fourteenth Amendment, a state may not "deprive any person of life, liberty, or property, without due process of the law; nor deny any person within its jurisdiction equal protection of the laws." U.S. Const. amend. XIV, § 1.

The Equal Protection Clause of this Amendment means that "all persons similarly circumstanced shall be treated alike." *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (citation omitted). The primary intent of the Equal Protection Clause was to require states to provide the same treatment for whites and freed slaves concerning personhood and citizenship rights enumerated in the Civil Rights Act of 1866.<sup>27</sup>

The Equal Protection Clause is no longer limited to racial classifications. That is not because racial discrimination and racial inequality have ceased to exist. Rather, as discrimination against groups becomes more prominent and understood, we turn to the Equal Protection clause to attempt to level the playing field. *Compare Bradwell v. Illinois*, 83 U.S. 130 (1872) (denying women equal protection of the laws) with *United States v. Virginia*, 518 U.S. 515 (1996)

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<sup>27</sup> United States Senator Jacob Howard introduced the Fourteenth Amendment in the Senate. "This abolishes all class legislation in the States and does away with the injustice subjecting one caste of persons to a code not applicable to another," he said. "It prohibits the hanging of a black man for a crime for which the white man is not to be hanged. It protects the black man in his fundamental rights as a citizen with the same shield which it throws over the white man. Is it not time, Mr. President, that we extend to the black man . . . the equal protection of law?" Cong. Globe, 39th Cong., 1st Sess. 2766 (1866).

(recognizing that women are entitled to equal protection of the laws). “A prime part of the history of our Constitution . . . is the story of the extension of constitutional rights and protections to people once ignored or excluded.” *Virginia*, 518 U.S. at 557; *see* Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. Chi. L. Rev. 1161, 1163 (1988) (“The Equal Protection Clause . . . has been understood as an attempt to protect disadvantaged groups from discriminatory practices, however deeply engrained and longstanding.”). One hundred and fifty years after its passage, the Fourteenth Amendment remains necessary to ensure that all Americans receive equal protection of the laws.

Sexual orientation is a relatively recent addition to the equal protection canon. In 1996, the Supreme Court made it clear that arbitrary discrimination on the basis of sexual orientation violates the Equal Protection Clause. *See Romer*, 517 U.S. at 635. Seven years later, the Court held that the Constitution protects LGBT adults from government intrusion into their private relationships. *See Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

“After *Romer* and *Lawrence*, federal courts began to conclude that discrimination on the basis of sexual orientation that is not rationally related to a legitimate governmental interest violates the Equal Protection Clause.” *Gill v. Delvin*, 867 F. Supp. 2d 849, 856 (N.D. Tex. 2012). Now, *Obergefell* makes clear that LGBT citizens have “equal dignity in the eyes of the law. The Constitution grants them that right.” 135 S. Ct. at 2608.

**a. Animus**

“The Constitution’s guarantee of equality must at the very least mean that a bare [legislative] desire to harm a politically unpopular group cannot justify disparate treatment of

that group.” *Windsor*, 133 S. Ct. at 2693 (citation omitted). Laws motivated by “an improper animus” toward such a group require special scrutiny. *Id.*

When examining animus arguments, courts look at “the design, purpose, and effect” of the challenged laws. *Id.* at 2689; *see also Romer*, 517 U.S. at 627-28. The *Windsor* Court, for example, considered DOMA’s title, one House Report from the bill’s legislative history, and the law’s “operation in practice.” *Windsor*, 133 S. Ct. at 2693-94. From these it found that DOMA has a “principal purpose . . . to impose inequality,” places same-sex couples in second-tier relationships, “demeans the couple, whose moral and sexual choices the Constitution protects,” and “humiliates tens of thousand of children now being raised by same-sex couples.” *Id.* at 2694. The Court concluded that “the history of DOMA’s enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages . . . was more than an incidental effect of the federal statute. It was its essence.” *Id.* at 2693.

Animus was also a critical part of the Court’s analysis in *Romer*, where plaintiffs brought a pre-enforcement facial challenge to Amendment 2 of the Colorado Constitution. 517 U.S. at 623. “[T]he impetus for the amendment and the contentious campaign that preceded its adoption came in large part from [anti-discrimination] ordinances that had been passed in various Colorado municipalities.” *Id.* Voters approved Amendment 2 to invalidate those ordinances and preclude “all legislative, executive, or judicial action at any level of state or local government designed to protect the status of persons based on the homosexual, lesbian or bisexual orientation, conduct, practices or relationships.” *Id.* at 620. In striking down Amendment 2 as an unconstitutional act of majority animus against a minority group, the Supreme Court wrote that “[a] state cannot so deem a class of persons a stranger to its laws.” *Id.* at 635.

The State argues that the plaintiffs have failed to show that the motivation behind the passage of HB 1523 was driven by “animus,” “irrational prejudice,” or “desire to harm” anyone. Docket No. 30, at 36, in *Barber*. Certainly, discerning the actual motivation behind a bill can be treacherous. But *Romer* and *Windsor* are instructive. This Court need only apply *Romer* and *Windsor* to ascertain that the design, purpose, and effect of HB 1523 is to single out LGBT and unmarried citizens for unequal treatment under the law.

### 1. Design and Purpose

The State says the primary motivating factor behind HB 1523 was to address the denigration and disfavor religious persons felt in the wake of *Obergefell*. Tr. of June 24 at 324, 327. The sponsors of the bill presented it to their respective chambers as post-*Obergefell* legislation.<sup>28</sup> A number of news articles confirmed the same.<sup>29</sup>

HB 1523’s title, the “Protecting Freedom of Conscience from Government Discrimination Act,” obviously implies that the purpose of the legislation was to halt governmental discrimination.

The legislative debate fleshes out the intended meaning of that title. Senator Willie Simmons asked whether the government was discriminating against religious citizens. Senate Floor Debate at 28:44. Senator Branning responded, “it potentially could.” *Id.* at 28:44. Later,

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<sup>28</sup> Representative Gipson said HB 1523 would merely “add an additional layer of protection that currently does not exist in the post-*Obergefell*” world. H.B. 1523, Debate on the Floor of the Mississippi House of Representatives, at 6:24 (Feb. 19, 2016) (statement of Rep. Andy Gipson). Senator Branning introduced HB 1523 as “post-*Obergefell* balancing legislation . . . presenting a solution to the crossroads we find ourselves in today as a result of *Obergefell v. Hodges*.” Senate Floor Debate at 2:16, 32:20. She later added that although Mississippians may have religious beliefs against gambling, the death penalty, alcohol, and payday loan interest rates, HB 1523 is “very specific to same-sex marriage.” *Id.* at 37:20.

<sup>29</sup> As Speaker Gunn said shortly after the decision was handed-down, “I don’t care what the Supreme Court says. Marriage will always be between one man and one woman in holy matrimony.” Emily Wagster Pettus, *House Speaker Protested by Flag Supporters at Neshoba*, Hattiesburg American, July 30, 2015. Representative Andy Gipson agreed. “What the Supreme Court’s decision does not and cannot change is the firmly held conviction of faith of myself and most Mississippians. We still believe that marriage is defined by God as the union of one man and one woman.” Pender, *supra*. Representative Gipson is correct: the Supreme Court cannot change his beliefs, nor does it intend to.

though, she wholeheartedly agreed with one of her colleagues that the government does not want to protect people of faith, and that it is time for people of faith to say, ‘enough is enough.’ *Id.* at 50:30. She agreed that the bill would ensure that LGBT citizens would not be able to sue a baker, florist, or other business for declining to serve them. *Id.* at 53:36. She agreed that the intent of the bill was to “level the playing field,” ensure that certain groups had equal rights but not “special rights,” and not “reverse discriminate against people.” *Id.* at 54:15 (quoting Sen. Filingane).

The Senate debate also revealed another purpose of HB 1523. Senator Simmons asked if a Baptist college’s refusal to employ lesbian and gay citizens was a form of discrimination. *Id.* at 31:29. Senator Branning responded, “if this bill passed, it would not be.” *Id.* at 31:29.

The title, text, and history of HB 1523 indicate that the bill was the State’s attempt to put LGBT citizens back in their place after *Obergefell*. The majority of Mississippians were granted special rights to not serve LGBT citizens, and were immunized from the consequences of their actions. LGBT Mississippians, in turn, were “put in a solitary class with respect to transactions and relations in both the private and governmental spheres” to symbolize their second-class status. *Romer*, 517 U.S. at 627. As in *Romer*, *Windsor*, and *Obergefell*, this “status-based enactment” deprived LGBT citizens of equal treatment and equal dignity under the law. *Romer*, 517 U.S. at 635.

## 2. Effect

Next up is the impact HB 1523 will have on LGBT Mississippians. Although the bill is far-reaching and could have consequences in many areas of daily life, *Romer* suggests that this Court should devote attention to HB 1523’s effect on existing anti-discrimination laws and policies. The Court turns to that narrow issue now.

As a state law, HB 1523 would preempt, or invalidate, all city, county, and public school ordinances and policies that prohibit discrimination on the basis of sexual orientation or gender identity. *See* HB 1523 § 8(2)-(3). The same was true in *Romer*.

The plaintiffs submitted two policies that HB 1523 would invalidate in part: the City of Jackson’s recent anti-discrimination ordinance and USM’s anti-discrimination policy. Docket Nos. 32-17 and 32-18, in *Barber*. Both protect citizens from sexual orientation and gender identity discrimination in a variety of contexts.

HB 1523 would have a chilling effect on Jacksonians and members of the USM community who seek the protection of their anti-discrimination policies. If HB 1523 goes into effect, neither the City of Jackson nor USM could discipline or take adverse action against anyone who violated their policies on the basis of a § 2 belief.

The State attempts to distance HB 1523 from Amendment 2 in *Romer* by arguing that HB 1523 does not “expressly prohibit[] any law meant to protect gay or lesbian citizens from discrimination.” Docket No. 30, at 40, in *Barber*. Sentences later, though, the State identifies the problem with its argument: “H.B. 1523 would invalidate local ordinances only to the extent those ordinances do not provide the same level of protection for religious freedom and free exercise as provided by H.B. 1523.” *Id.* at 41. But no other local ordinance or policy purports to do what HB 1523 does. The State has not pointed to any existing anti-discrimination ordinance or policy that would survive HB 1523’s preemptive reach.

In a last-gasp attempt to distinguish HB 1523 from Amendment 2, the State then contends that HB 1523 “is actually strikingly similar” to Jackson and USM’s policies because they all prohibit discrimination on the basis of religion. *Id.* at 40-41. The argument ignores the critical difference: Jackson and USM’s anti-discrimination policies provide equal protection



regardless of religion, sexual orientation, or gender identity. HB 1523 draws a stark line, with LGBT and unmarried-but-sexually-active citizens on one side, and everyone else on the other.

As in *Romer* and *Windsor*, the effect of HB 1523 would demean LGBT citizens, remove their existing legal protections, and more broadly deprive them their right to equal treatment under the law.

#### **b. Scrutiny**

This brings the Court to whether the government has a legitimate basis for HB 1523. While most laws classify and make distinctions, all laws do not violate equal protection. *Romer*, 517 U.S. at 631. The Supreme Court has attempted to reconcile this dilemma by holding that “if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end.” *Id.* (citation omitted).

“When social or economic legislation is at issue, the Equal Protection Clause allows States wide latitude, and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes.” *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (citation omitted). “But we would not be faithful to our obligations under the Fourteenth Amendment if we apply so deferential a standard to every classification. . . . Thus we have treated as presumptively invidious those classifications that disadvantage a suspect class, or that impinge upon the exercise of a fundamental right.” *Plyler*, 457 U.S. at 216-17.

Neither the Supreme Court nor the Fifth Circuit “has recognized sexual orientation as a suspect classification or protected group; nevertheless, a state violates the Equal Protection Clause if it disadvantages homosexuals for reasons lacking any rational relationship to legitimate

governmental aims.”<sup>30</sup> *Johnson v. Johnson*, 385 F.3d 503, 530-31 (5th Cir. 2004) (citation and brackets omitted). “Rational basis review places the burden of persuasion on the party challenging a law, who must disprove every conceivable basis which might support it.” *Windsor v. United States*, 699 F.3d 169, 180 (2d Cir. 2012) (quotation marks and citations omitted). “So the party urging the absence of any rational basis takes up a heavy load.” *Id.* This means the government usually prevails.

Even under this generous standard, HB 1523 fails. The State contends that HB 1523 furthers its “legitimate governmental interest in protecting religious beliefs and expression and preventing citizens from being forced to act against those beliefs by their government.” Docket No. 30, at 37-38, in *Barber*. This is a legitimate governmental interest, but not one with any rational relationship to HB 1523.

The Supreme Court “has long recognized that the government may accommodate religious practices without violating the Establishment Clause.” *Cutter v. Wilkinson*, 544 U.S. 709, 713 (2005) (citations and ellipses omitted). The First Amendment, the Mississippi Constitution, and Mississippi’s RFRA all protect Mississippi’s citizens’ religious exercise – and in a broader way than HB 1523. Mississippi’s RFRA in particular states that the government “may substantially burden a person’s exercise of religion *only* if it demonstrates that application of the burden to the person: (i) Is in furtherance of a compelling governmental interest; and (ii) Is the least restrictive means of furthering that compelling governmental interest.” Miss. Code Ann.

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<sup>30</sup> In *CSE I*, this Court discussed the doctrinal instability on the proper standard of review. 64 F. Supp. 3d at 928. “The circuit courts of appeal are divided on which level of review to apply to sexual orientation classifications. In the Second Circuit, homosexuals compose a quasi-suspect class that is subject to heightened scrutiny. In this circuit, sexual orientation classifications are subject to rational basis review.” *Id.* (quotation marks, citations, and brackets omitted). Then as now, the Court questions whether sexual orientation should be afforded rational basis review. *Id.* (“If this court had the authority, it would apply intermediate scrutiny to government sexual orientation classifications.”). *Obergefell* did not resolve the dispute. When Judge Jordan examined *Obergefell* earlier this year, however, he concluded that “the [Supreme] Court applied something greater than rational-basis review.” *CSE III*, 2016 WL 1306202, at \*13. As this Court is bound by Fifth Circuit precedent, it will consider HB 1523 under rational basis review.

§ 11-61-1(5)(b) (emphasis added). Its plain language provides substantial protection from governmental discrimination on the basis of religious exercise.

Mississippi's RFRA grants *all* people the right to seek relief from governmental interference in their religious exercise, not just those who hold certain beliefs. This critical distinction between RFRA and HB 1523 cannot be overlooked.

Although states are permitted to have more than one law intended to further the same legitimate interest, HB 1523 does not advance the interest the State says it does. Under the guise of providing additional protection for religious exercise, it creates a vehicle for state-sanctioned discrimination on the basis of sexual orientation and gender identity. It is not rationally related to a legitimate end.

The State then claims that HB 1523 “is about the people of conscience who need the protection of H.B. 1523, and does not ‘target’ Plaintiffs.”<sup>31</sup> Docket No. 30, at 3, in *Barber*. The argument is unsupported by the record. It is also inconceivable that a discriminatory law can stand merely because creative legislative drafting limited the number of times it mentioned the targeted group. The Court cannot imagine upholding a statute that favored men simply because the statute did not mention women.

The State next focuses on marriage licenses. It contends that because HB 1523 does not allow the denial, delay, or impediment of marriage licenses, that licenses are issued on the same terms as opposite-sex couples. Thus, the State argues, there is no differential treatment that would constitute a violation of the Equal Protection Clause. *Id.* at 6. The only way a same-sex couple could be treated differently, it says, is if the issuance of their marriage license was “*impeded or delayed as a result of any recusal.*” *Id.*

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<sup>31</sup> Rather than protect its citizens from “government discrimination,” HB 1523 could actually subject more citizens to federal civil rights lawsuits. Persons feeling emboldened by HB 1523 may not understand that the law provides immunity only from State sanctions.

To the contrary, the recusal provision itself deprives LGBT citizens of governmental protection from separate treatment. “A law declaring that in general it shall be more difficult for one group of citizens to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.” *Romer*, 517 U.S. at 633. There cannot be one set of employees to serve the preferred couples and another who is ‘willing’ to serve LGBT citizens with a “clear conscience,” as Senator Branning put it. Such treatment viscerally confronts same-sex couples with the same message of inferiority and second-class citizenship that was rejected in *Romer*, *Lawrence*, *Windsor*, *CSE I*, *Obergefell*, and *CSE II*.

On this point, it is important to note that HB 1523’s supposed protection against any delayed service applies only to marriage licenses and some health care issues. Tr. of June 24 at 339. The other areas of permissible discrimination – counseling, fertility services, etc. – do not place any duty on the recusing individual to ensure that LGBT citizens receive services.<sup>32</sup>

The State is correct that no one can predict how many LGBT citizens may be denied service under HB 1523. But it cannot be disputed that the broad language of the bill “identifies persons by a single trait and then denies them protection across the board.” *Romer*, 517 U.S. at 633. Thus, the State cannot prevail on its argument that HB 1523’s plain language does not create a separate system designed to diminish the rights of LGBT citizens.

The deprivation of equal protection of the laws is HB 1523’s very essence. *See Windsor*, 133 S. Ct. at 2693. It violates the Fourteenth Amendment.

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<sup>32</sup> There is an almost endless parade of horrors that could accompany the implementation of HB 1523. Although the Court cannot imagine every resulting factual scenario, HB 1523’s broad language “identifies persons by a single trait and then denies them protection across the board.” *Romer*, 517 U.S. at 633.

## 2. The Establishment Clause

### a. General Principles

The First Amendment begins with the words, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . . .” U.S. Const. amend. I.

“The Establishment and Free Exercise Clauses of the First Amendment are not the most precisely drawn portions of the Constitution.” *Walz v. Tax Comm’n of City of New York*, 397 U.S. 664, 668 (1970). The Supreme Court has “struggled” to chart a path respecting both of them. *Id.* It is a thankless task. Part of the difficulty lies in the fact that each Clause is “cast in absolute terms” and would “clash with the other” if taken to its logical conclusion. *Id.* at 668-69; *see also Lynch v. Donnelly*, 465 U.S. 668, 678 (1984).

The Supreme Court has repeatedly rejected the notion that *states* may establish religion because the text of the Establishment Clause only references *Congress*. *See Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 8 (1947); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). In truth, “[t]he very language of the Establishment Clause represented a significant departure from early drafts that merely prohibited a single national religion, and the final language instead extended [the] prohibition to state support for religion in general.” *McCreary Cnty.*, 545 U.S. at 878 (quotation marks and citation omitted).

Another popular misconception holds that the Establishment Clause is in error since the Constitution does not contain the phrase “separation of Church and State.” Adherents of this belief have read the text correctly but missed its meaning. “There cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated.” *Zorach v. Clauson*, 343 U.S. 306, 312 (1952).

Nor was the Establishment Clause forced upon the sovereign states by an overreaching federal government. Far from being a federal mandate, the Clause “was the democratic response of the American community to the particular needs of a young and growing nation, unique in the composition of its people.” *McCullum v. Bd. of Ed. of Sch. Dist. No. 71, Champaign Cnty., Ill.*, 333 U.S. 203, 215-16 (1948) (Frankfurter, J., concurring).

In any event, the Supreme Court has emphasized that “there is room for play in the joints” between the two Clauses. *Locke v. Davey*, 540 U.S. 712, 718 (2004) (quotation marks and citation omitted). It has sought to “chart a course that preserve[s] the autonomy and freedom of religious bodies while avoiding any semblance of established religion.” *Walz*, 397 U.S. at 672.

#### **b. Historical Context**

America as a whole is “a rich mosaic of religious faiths.” *Town of Greece, N.Y. v. Galloway*, 134 S. Ct. 1811, 1849 (2014) (Kagan, J., dissenting). Here, 80% of Mississippians identify as Christians.<sup>33</sup> Tr. of June 24 at 250.

Given the pervasiveness of Christianity here, some Mississippians might consider it fitting to have explicitly Christian laws and policies. They also might think that the Establishment Clause is a technicality that lets atheists and members of minority religions thwart their majority (Christian) rule.<sup>34</sup>

The public may be surprised to know the true origins of the Establishment Clause. As chronicled by the Supreme Court, history reveals that the Clause was not originally intended to protect atheists and members of minority faiths. It was written to protect Christians from other Christians. *See Wallace*, 472 U.S. at 52 & n.36. Only *later* were other faith groups protected.

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<sup>33</sup> A full 30% of Mississippians are white evangelical Christians. Tr. of June 24 at 250.

<sup>34</sup> The feeling is understandable. Headlines trumpet perceived anti-Christian conduct, inflaming passions. *See, e.g., Kate Royals, Brandon Band Reportedly Not Allowed to Perform Christian Hymn*, The Clarion-Ledger, Aug. 22, 2015. But, of course, “[t]he First Amendment is not a majority rule.” *Town of Greece*, 134 S. Ct. at 1822.

The story behind this begins with the colonists.<sup>35</sup> “It is a matter of history that [the] practice of establishing governmentally composed prayers for religious services was one of the reasons which caused many of our early colonists to leave England and seek religious freedom in America.” *Engel v. Vitale*, 370 U.S. 421, 425 (1962). For decades at a time in 16th- and 17th-century England, Christian sects fought each other to control the Book of Common Prayer, in order to amend it and advance their particular beliefs. *Id.* at 425-27. The fighting was disruptive and deadly. *Id.* at 426. Those in power occasionally executed their opponents. *Id.* at 427 n.8. Some of the persecuted fled to America. *Id.* at 425.

The Puritans, for example, were originally a religious minority in England that “rejected the power of the civil government to prescribe ecclesiastical rules.” C. Scott Pryor & Glenn M. Hoshauer, *Puritan Revolution and the Law of Contracts*, 11 Tex. Wesleyan L. Rev. 291, 309 (2005). They specifically opposed the monarch’s “requirement that clergy wear particular vestments while celebrating the liturgy.” *Id.* at 308 n.94 (quotation marks and citation omitted). Today it is *inconceivable* that the *government* could require clergy to wear particular clothing.<sup>36</sup> But the Puritans were disparaged for their opposition and other beliefs. *Id.* at 309. Thousands left.

In the New World, several colonies established their particular Christian beliefs as their official religion. *Engel*, 370 U.S. at 427-28; *see also McCollum*, 333 U.S. at 214 (Frankfurter, J., concurring). That again proved unsatisfactory.

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<sup>35</sup> “History provides enlightenment; it appraises courts of the subtleties and complexities of problems before them.” *Jaffree v. Wallace*, 705 F.2d 1526, 1532 (11th Cir. 1983).

<sup>36</sup> In seeing the Establishment Clause as a sword wielded against the majority, we forget that the Establishment Clause is actually a shield protecting religion from governmental meddling. Who wants the government dictating their priest, rabbi, or imam’s clothing? It’s difficult to imagine a greater violation of American law and custom. *See, e.g., McCollum*, 333 U.S. at 232 (“If nowhere else, in the relation between Church and State, ‘good fences make good neighbors.’”) (Frankfurter, J., concurring); *Engel*, 370 U.S. at 430 (“the people’s religions must not be subjected to the pressures of government”); *Engel*, 370 U.S. at 431 (“[The Establishment Clause’s] first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government *and to degrade religion.*”); *see also Lee v. Weisman*, 505 U.S. 577, 589-90 (1992).

For one, state-established religion was perceived as a *British* custom – not something independent, revolutionary Americans would want to retain. *Engel*, 370 U.S. at 427-28. Baptists especially “chafed under any form of establishment.” *Larson v. Valente*, 456 U.S. 228, 244 & n.19 (1982). They argued that if the British had no right to tax Americans, then it was also unjust for them to be taxed to support an official religion they denied. *Id.*

And then there was the division-of-power problem. In Virginia, the established Episcopal Church became a minority when the Presbyterians, Lutherans, Quakers, and Baptists banded together “into an effective political force.” *Engel*, 370 U.S. at 428. Faced with the prospect of losing power, James Madison and Thomas Jefferson persuaded the Virginia Assembly to pass its famous “Virginia Bill for Religious Liberty.” *Everson*, 330 U.S. at 12.<sup>37</sup>

By the time the Constitution was adopted, therefore,

there was a widespread awareness among many Americans of the dangers of a union of Church and State. These people knew, some of them from bitter personal experience, that one of the greatest dangers to the freedom of the individual to worship in his own way lay in the Government’s placing its official stamp of approval upon one particular kind of prayer or one particular form of religious services. They knew the anguish, hardship and bitter strife that could come when zealous religious groups struggled with one another to obtain the Government’s stamp of approval from each King, Queen, or Protector that came to temporary power. . . . The First Amendment was added to the Constitution to stand as a guarantee that neither the power nor the prestige of the . . . Government would be used to control, support or influence the kinds of prayer the American people can say—that the people’s religions must not be subjected to the pressures of government for change each time a new political administration is elected to office.

*Engel*, 370 U.S. at 429-30; see *Lee v. Weisman*, 505 U.S. 577, 591-92 (1992) (“in the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce”).

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<sup>37</sup> “Madison’s vision—freedom for all religion being guaranteed by free competition between religions—naturally assumed that every denomination would be equally at liberty to exercise and propagate its beliefs. But such equality would be impossible in an atmosphere of official denominational preference.” *Larson*, 456 U.S. at 245.



This history involved disputes between Christians. Americans were weary of the British and then Colonial back-and-forth between Catholics and Protestants, Episcopalians and Presbyterians, and so on. It was better to have a neutral government than to constantly struggle for power – or live under the yoke of a rival sect for decades at a time.

“[T]he Establishment Clause must be interpreted by reference to historical practices and understandings.” *Town of Greece*, 134 S. Ct. at 1819 (quotation marks and citation omitted). The essential insight from history is that the First Amendment was originally enacted to prohibit a state from creating second-class Christians. And while the law has expanded to protect persons of other faiths, or no faith at all, the core principle of government neutrality between religious sects has remained constant through the centuries.<sup>38, 39</sup>

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<sup>38</sup> In 1833, Justice Joseph Story wrote that “[t]he real object of the amendment was, not to countenance, much less to advance, Mahometanism, or Judaism, or infidelity, by prostrating christianity; but to exclude all rivalry among christian sects.” *Wallace*, 472 U.S. at 52 n.36 (quoting 2 J. Story, *Commentaries on the Constitution of the United States* § 1877, at 594 (1851)). (Despite the 1851 date, the *Commentaries* were first published in 1833.)

In 1870, “Judge Alphonso Taft, father of the revered Chief Justice, . . . stated the ideal of our people as to religious freedom as one of ‘absolute equality before the law, of all religious opinions and sects.’” *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 214-15 (1963).

In 1871, the Court found that American “law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.” *Watson v. Jones*, 80 U.S. 679, 728 (1871).

In 1890, the Court held that the First Amendment was intended “to prohibit legislation for the support of any religious tenets.” *Davis v. Beason*, 133 U.S. 333, 342 (1890), *abrogated by Romer*, 517 U.S. at 620.

In 1952, the Court wrote that Americans “sponsor an attitude on the part of government that shows no partiality to any one group. . . . The government must be neutral when it comes to competition between sects.” *Zorach*, 343 U.S. at 313-14.

In 1968, the Court held that a state could not “aid, foster, or promote one religion *or religious theory* against another,” and that the First Amendment “forbids . . . the preference of a religious doctrine.” *Epperson*, 393 U.S. at 104, 106 (emphasis added). That case in particular concluded that Arkansas and Mississippi’s “anti-evolution” statutes violated the Establishment Clause by giving preference to “a particular interpretation of the Book of Genesis by a particular religious group.” *Id.* at 101, 103 & n.11.

In 1971, the Court found that “as a general matter it is surely true that the Establishment Clause prohibits government from abandoning secular purposes in order to put an imprimatur on one religion, or on religion as such, or to favor the adherents of any sect or religious organization.” *Gillette v. United States*, 401 U.S. 437, 450 (1971) (upholding religious exemption law where “no particular sectarian affiliation or theological position is required.”).

In 1982, the Court wrote that “[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.” *Larson*, 456 U.S. at 244.

In 1985, Justice Sandra Day O’Connor wrote that the Establishment Clause “preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred.” *Wallace*, 472 U.S. at 70 (O’Connor, J., concurring).

In 1987, the Court invalidated a Louisiana law giving “preference to those religious groups which have as one of their tenets the creation of humankind by a divine creator.” *Edwards*, 482 U.S. at 593.

**c. HB 1523**

The question now is whether, in light of history and precedent, HB 1523 violates the Establishment Clause. The Court concludes that it does in at least two ways.

**i. HB 1523 Establishes Preferred Religious Beliefs**

First, HB 1523 establishes an official preference for certain religious beliefs over others.

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In 1989, the Court said it had “come to understand the Establishment Clause to mean that government may not promote or affiliate itself with any religious doctrine or organization.” *Cnty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 590 (1989), *abrogated by Town of Greece*, 134 S. Ct. at 1811. “Whatever else the Establishment Clause may mean . . . , it certainly means at the very least that government may not demonstrate a preference for one particular sect or creed.” *Id.* at 605.

Also in 1989, the Court wrote that it was “settled jurisprudence that the Establishment Clause prohibits government from . . . [placing] an imprimatur on one religion, or on religion as such, or to favor the adherents of any sect or religious organization.” *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 8-9 (1989) (quotation marks and citations omitted).

In 1992, the Court held that “the central meaning of the Religion Clauses of the First Amendment . . . is that all creeds must be tolerated and none favored.” *Lee*, 505 U.S. at 590.

In 1994, the Court reaffirmed that “proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of neutrality toward religion, favoring neither one religion over others nor religious adherents collectively over nonadherents.” *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 696 (1994) (quotation marks and citations omitted). *Kiryas Joel* struck down a New York statute that delegated state authority “to a group defined by its character as a religious community, in a legal and historical context that gives no assurance that governmental power has been or will be exercised neutrally.” *Id.*

In 1995, the Court held that the Establishment Clause is satisfied “when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse.” *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 839 (1995).

In 2005, the Court wrote that there is “[m]anifesting a purpose to favor one faith over another, or adherence to religion generally, clashes with the understanding, reached after decades of religious war, that liberty and social stability demand a religious tolerance that respects the religious views of all citizens.” *McCreary Cnty.*, 545 U.S. at 860 (quotation marks, citations, and ellipses omitted).

In 2010, the Court justified a cross on public property in part by noting that its placement “was not an attempt to set the *imprimatur* of the state on a particular creed.” *Salazar v. Buono*, 559 U.S. 700, 715 (2010).

All in all, “[i]t is firmly established that the government violates the establishment clause if it discriminates among religious groups.” Erwin Chemerinsky, *Constitutional Law* § 12.2.2 (5th ed. 2015).

<sup>39</sup> The Arkansas law struck down in *Epperson* was adapted from a Tennessee law that had already been repealed. One commenter had this to say about the Tennessee law:

Much wonder has been expressed both in this country and in Europe as to the factors which made such legislation possible. These factors were three in number: (1) an aggressive campaign by a militant minority of religious zealots of the “Fundamentalist” faith; (2) lack of knowledge of modern scientific and religious thought in the rural districts which control Tennessee politically; (3) political cowardice and demagoguery.

William Waller, *The Constitutionality of the Tennessee Anti-Evolution Act*, 35 Yale L.J. 191 (1925).

Under applicable precedent, “when it is claimed that a denominational preference exists, the initial inquiry is whether the law facially differentiates among religions” or “differentiate[s] among sects.” *Hernandez v. C.I.R.*, 490 U.S. 680, 695 (1989) (citation omitted).

“We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.” *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). In an Establishment Clause challenge, though, a court must also take consider “the context in which the statute was enacted and the reasons for its passage.” *Salazar v. Buono*, 559 U.S. 700, 715 (2010); *Doe v. Beaumont Indep. Sch. Dist.*, 240 F.3d 462, 473 (5th Cir. 2001).

Section 2 of HB 1523 begins, “[t]he sincerely held religious beliefs or moral convictions protected by this act are the belief or conviction that: . . . .” HB 1523 § 2. It then enumerates three beliefs entitled to protection. In the remainder of the bill, every protection from discrimination is explicitly tied to the § 2 beliefs.

On its face, HB 1523 constitutes an official preference for certain religious tenets. If three specific beliefs are “protected by this act,” it follows that every other religious belief a citizen holds is *not* protected by the act. Christian Mississippians with religious beliefs contrary to § 2 become second-class Christians. Their exclusion from HB 1523 sends a message “that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members.” *McCreary Cnty.*, 545 U.S. at 860. The same is true for members of other faith groups who do not subscribe to the § 2 beliefs.

The State suggests that the bill is neutral because it does not name a denomination. The argument is foreclosed by *Larson*, which struck down a Minnesota statute that had made

“explicit and deliberate distinctions between different religious organizations” without identifying any denomination by name. 456 U.S. at 246 n.23.

For Reverends Barber, Burnett, Fortenberry, and Hrostowski (who are Presbyterian, United Methodist, United Methodist, and Episcopalian, respectively), their religious values cause them to believe that same-sex couples may marry in a Christian ceremony blessed by God. They also believe that same-sex couples may consummate that marriage as any other. As Rev. Dr. Hrostowski testified, “sex is a gift from God, and it is precious and wonderful and should be treated as such,” but § 2’s definition of sex is “incomplete because now holy matrimony is available to again both straight and gay couples.” Tr. of June 23 at 126.

The Reverends, however, are not entitled to any of the protections of HB 1523. The bill instead shows the State’s favor for the exact *opposite* beliefs by giving special privileges to citizens who hold § 2 beliefs. In so doing the State indicates that the Reverends hold disfavored, minority beliefs, while citizens who hold § 2 beliefs are preferred members of the majority entitled to a broad array of special legal immunities. *See McCreary Cnty.*, 545 U.S. at 860.<sup>40</sup>

The First Amendment prohibits states from putting their thumb on the scales in this way. Laws must make religious rights and protections available “on an equal basis to both the Quaker and the Roman Catholic.” *Larson*, 456 U.S. at 245, 246 n.23. “[L]egislators—and voter—are required to accord to their own religions the very same treatment given to small, new, or unpopular denominations.” *Id.* at 245, 246 n.23. But HB 1523 favors Southern Baptist over

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<sup>40</sup> One of the more unique conflicts between religious belief and § 2 was elicited during Rabbi Jeremy Simons’ testimony. He explained that as early as 1800 years ago, Judaism recognized “four distinct genders that are possible, male, female, then a category called tumtum, which is someone whose gender is essentially ambiguous, unable to be ascertained and then androgenous, someone who displays both sex characteristics.” Tr. of June 23 at 105. Rabbi Simons said that rabbis in that era “truly struggle[d] with it, in what to do in these cases where it is ambiguous. But what you don’t see is them condemning the child or saying that this child cannot be a part of the community or is any less human or holy than anyone else.” *Id.*

Unitarian doctrine, Catholic over Episcopalian doctrine, and Orthodox Judaism over Reform Judaism doctrine, to list just a few examples.<sup>41</sup>

Some Jewish and Muslim citizens may sincerely believe that their faith prevents them from participating in, recognizing, or aiding an interfaith marriage. *See, e.g.,* Alex B. Leeman, *Interfaith Marriage in Islam: An Examination of the Legal Theory Behind the Traditional and Reformist Positions*, 84 Ind. L.J. 743, 755-56 (2009) (relaying that under “classical Shari’a regulations: a Muslim man may marry a Christian or Jewish woman but no other unbeliever; a Muslim woman may not marry a non-Muslim under any circumstances. . . . Some Muslim clerics . . . have discouraged interfaith unions altogether.”); Zvi H. Triger, *The Gendered Racial Formation: Foreign Men, “Our” Women, and the Law*, 30 Women’s Rts. L. Rep. 479, 520 (2009) (“Interfaith marriage is not simply prohibited by Judaism; it is also not recognized (if performed elsewhere) due to its categorization as an inherently meaningless act. . . . Although Israeli law does not allow interfaith marriages regardless of the sex of the Jewish partner, Israeli culture[] disproportionately scorns Jewish women who cohabit with or marry non-Jewish men.”). Why should a clerk with such a religious belief not be allowed to recuse from issuing a marriage license to an interfaith couple, while her coworkers have the full protections of HB 1523?

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<sup>41</sup> *See* Southern Baptist Convention, Position Statements (“We affirm God’s plan for marriage and sexual intimacy – one man, and one woman, for life. Homosexuality is not a ‘valid alternative lifestyle.’”); Unitarian Universalist Association, Marriage Equality (“UU congregations and clergy have long recognized and celebrated same-sex marriages within our faith tradition.”); U.S. Conference of Catholic Bishops, Issues and Action, Same Sex Unions, Backgrounder on Supreme Court Marriage Cases (“The USCCB supports upholding the right of states to maintain and recognize the true meaning of marriage in law as the union of one man and one woman.”); Docket No. 2-1, at 11-13, in *CSE IV* (letter from the Bishop of The Episcopal Church in Mississippi permitting same-sex religious marriage as of June 3, 2016); Tr. of June 23 at 97-110 (expert testimony on views of same-sex marriage and transgender persons among Jewish denominations); Seth Lipsky, *U.S. Gay Marriage Ruling Puts Orthodox Jews on Collision Course With American Law*, Haaretz, June 28, 2015; *see generally* Docket No. 2-2, at 7, in *CSE IV* (resolution of the United Church of Christ supporting same-sex religious marriage); Brief for President of the House of Deputies of the Episcopal Church, et al. as Amici Curiae Supporting Petitioners, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-574); Brief for Major Religious Organizations as Amici Curiae Supporting Respondents, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-574). To be clear, Rabbi Simons’ testimony indicated that the term “Orthodox” encompasses a variety of different sects of Judaism, some of which may permit same-sex marriage. Tr. of June 23 at 108-09. Most Jews in Mississippi belong to the Reform denomination and support same-sex marriage, he said. *Id.* at 96.

The State argues that there is no religious preference because some members of *all* religious traditions are opposed to same-sex marriage. That is, because some Unitarians, some Episcopalians, and some Reform Jews oppose same-sex marriage, HB 1523 is neutral between religious sects. *See* Docket No. 38-2, at 2, in *Barber*.

Every group has its iconoclasts. The larger the group, the more likely it will have someone who believes the sun revolves around the Earth, a doctor who thinks smoking unproblematic, or a Unitarian opposed to same-sex religious marriage. But most people in a group share most of that group's beliefs. That is the point of being in a *group*. And in the HB 1523 context, the State has favored certain *doctrines*, regardless of how many individuals deviate from official doctrine on an issue.<sup>42</sup>

The State's *we-prefer-some-members-of-all-religions* argument also fails to understand another function of the Establishment Clause. "Intrafaith differences . . . are not uncommon among followers of a particular creed," the Supreme Court once wrote, in its typical understated fashion. *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 715-16 (1981); *see Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015). It is precisely because those internal disputes are common – and contentious – that the framers long ago decided that the government should stay out of those battles, for the benefit of both sides. *See, e.g.*, Sarah McCammon, *Conservative Christians Grapple With Whether 'Religious Freedom' Includes Muslims*, National Public Radio, June 29, 2016 (describing one ongoing internal debate).

Rev. Burnett's testimony illustrates the problem nicely. She said her church, the United Methodist Church, opposes same-sex religious marriage but is in the process of reconsidering its

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<sup>42</sup> The Supreme Court has rejected this kind of sophistry: "the Establishment Clause forbids subtle departures from neutrality, religious gerrymanders, as well as obvious abuses." *Gillette v. United States*, 401 U.S. 437, 452 (1971). Courts are expected to look beyond superficial explanations. *Stone v. Graham*, 449 U.S. 39, 41 (1980) (per curiam); *see Edwards v. Aguillard*, 482 U.S. 578, 585-86 (1987) (invalidating Louisiana statute under the Establishment Clause although the statute's "stated purpose" was "to protect academic freedom").

position. Tr. of June 23 at 158. Rev. Burnett objected to what she perceived as the State of Mississippi's attempt to weigh in on that doctrinal debate via HB 1523. *Id.* at 159.

Governor Bryant is also a member of the United Methodist Church. *See* David Brandt, *Mississippi Church a Window into National Gay Rights Debate*, Assoc. Press, Apr. 12, 2016. There are same-sex couples in his congregation. *Id.*

HB 1523 violates the Establishment Clause because it chooses sides in this internal debate. In so doing it says persons like Gov. Bryant are favored and persons like Rev. Burnett are disfavored. So the fact that some members of all religions oppose same-sex marriage does not mean the State is being neutral. It means the State is inserting itself into any number of intrafaith doctrinal disputes, tipping the scales toward some believers and away from others. That is something it cannot do. “[T]he people’s religions must not be subjected to the pressures of government.” *Engel*, 370 U.S. at 430.

The State then argues that HB 1523 is defensible as supporting moral values, not religious beliefs. As the testimony in this case showed, however, religious beliefs are inextricably intertwined with moral values. Plus, the Free Exercise Clause only protects “beliefs rooted in *religion*.” *Thomas*, 450 U.S. at 713 (citations omitted and emphasis added). So the State cannot simultaneously contend that HB 1523 is a reasonable accommodation of religious exercise and that it protects only moral beliefs. If HB 1523 was passed to encourage exclusively moral values, it was not passed to further the free exercise of religion.

Because § 2 “clearly grants denominational preferences of the sort consistently and firmly deprecated in [Supreme Court] precedents,” the law must be treated as “suspect” and subject to strict scrutiny. *Larson*, 456 U.S. at 246-47. That means § 2 “must be invalidated unless it is justified by a compelling governmental interest, and unless it is closely fitted to further that



interest.” *Id.* The *Lemon* test need not be applied. *Id.* at 252 (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971)); *see also Hernandez*, 490 U.S. at 695; *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 339 (1987).<sup>43</sup>

“For an interest to be sufficiently compelling to justify a law that discriminates among religions, the interest must address an identified problem that the discrimination seeks to remedy. [The government] must identify an actual concrete problem – mere speculation of harm does not constitute a compelling state interest.” *Awad*, 670 F.3d at 1129 (quotation marks, citations, and brackets omitted).

As mentioned, the State says HB 1523 is justified by a compelling government interest in accommodating the free exercise of religion. The underlying premise of this interest is that members of some religious sects believe that any act which brings them into contact with same-sex marriage or same-sex relationships makes the believer complicit in the same-sex couples’ sin, in violation of the believer’s own exercise of religion. *See Douglas Nejaime & Reva B. Siegel, Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 Yale L.J. 2516, 2522-23 & n.23 (2015). The idea is that baking a cake for a same-sex wedding “makes a baker complicit in a same-sex relationship to which he objects.” *Id.* at 2519.

The problem is that the State has not identified any actual, concrete problem of free exercise violations. Its defense speaks in generalities, but “Supreme Court case law instructs that overly general statements of abstract principles do not satisfy the government’s burden to articulate a compelling interest.” *Awad*, 670 F.3d at 1130 (collecting cases). Mississippi has run

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<sup>43</sup> The Court need not consider the bill’s “secular purpose.” *See Doe*, 240 F.3d at 468; Chemerinsky § 12.2.2 (noting similarities between neutrality analysis and elements of the *Lemon* test). If it did, however, it would conclude that HB 1523 “was not motivated by any clearly secular purpose – indeed, the statute had *no* secular purpose,” for the reasons listed in *Wallace*, 472 U.S. at 56. *See also Edwards*, 482 U.S. at 592.



into the same hurdle Oklahoma did in *Awad*: its attorneys have not identified “even a single instance” where *Obergefell* has led to a free exercise problem in Mississippi. *Id.*

In this case, moreover, it is difficult to see the compelling government interest in favoring three enumerated religious beliefs over others. “[T]he goal of basic ‘fairness’ is hardly furthered by the Act’s discriminatory preference” for one set of beliefs. *Edwards*, 482 U.S. at 588. It is not within our tradition to respect one clerk’s religious objection to issuing a same-sex marriage license, but refuse another clerk’s religious objection to issuing a marriage license to a formerly-divorced person. The government is not in a position to referee the validity of Leviticus 18:22 (“Thou shalt not lie with mankind, as with womankind: it is abomination.”) versus Leviticus 21:14 (“A widow, or a divorced woman, or profane, or an harlot, these shall he not take.”).<sup>44, 45</sup>

Even if HB 1523 had encouraged the free exercise of *all* religions, it does not actually contribute anything toward that interest. Again, as discussed above, a clerk with a religious objection to same-sex marriage may invoke existing constitutional and statutory defenses without HB 1523. *E.g.*, *Hobbie v. Unemployment Appeals Comm’n of Florida*, 480 U.S. 136, 140 (1987). The State has not identified a purpose behind HB 1523 “that was not fully served by” prior laws. *Wallace*, 472 U.S. at 59.

Finally, the State claims that HB 1523 is akin to a federal statute permitting persons to opt-out of performing abortions. The comparison is inapt. For one, that statute is neutral to the extent it prohibits retaliation against doctors who decline to provide abortions as well as doctors

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<sup>44</sup> All quotes from and citations to the Bible are drawn from the King James Version.

<sup>45</sup> We do not single out religious beliefs in this way. No state law explicitly allows persons to decline to serve a payday lender based on a religious belief that payday lending violates Deuteronomy 23:19. No state law explicitly allows recusals because of a belief that wearing “a garment mingled of linen and wool[]” is forbidden. *Leviticus* 19:19. If a marriage license was withheld for “foolish talking” or “jesting,” *see* Ephesians 5:4, we would undoubtedly have many fewer marriages.

who choose to provide abortions. *See* 42 U.S.C. § 300a-7(c)-(e). HB 1523 is not so even-handed. Tr. of June 24 at 327.

It is true that part of the abortion statute permits individuals or entities to opt-out of performing all abortions. *Id.* § 300a-7(b). That still is not analogous to HB 1523. If doctors can opt-out of all abortions, the apples-to-apples comparison would let clerks opt-out of issuing all marriage licenses. A clerk who transfers from the marriage licensing division to the court filings division, for example, would be honoring her religious beliefs by declining to be involved in a same-sex marriage, but would not be picking and choosing which persons to serve.

The Court now turns to why that kind of selective service is unlawful.

## **ii. HB 1523's Accommodations Injure Other Citizens**

HB 1523 also violates the First Amendment because its broad religious exemption comes at the expense of other citizens.

Supreme Court precedent has repeatedly upheld “legislative exemptions [for religion] that did not, or would not, impose substantial burdens on nonbeneficiaries while allowing others to act according to their religious beliefs.” *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n.8 (1989) (collecting cases). A religious accommodation which does no harm to others is much more likely to survive a legal challenge than one which does.

*Estate of Thornton v. Caldor* is a good example of this principle at work. In that case, a Connecticut statute gave workers an “absolute right not to work on their chosen Sabbath.” 472 U.S. 703, 704-05 (1985). Donald Thornton invoked the statute and chose not to work on Sundays. The resulting conflict with his employer led Thornton to quit. Litigation ensued.

The Supreme Court invalidated the Connecticut law. The statute violated the Establishment Clause by requiring that “religious concerns automatically control over all secular

interests at the workplace.” *Id.* at 709. The statute did not take into account “the imposition of significant burdens on other employees required to work in place of the Sabbath observers.” *Id.* at 710. “Other employees who have strong and legitimate, but non-religious, reasons for wanting a weekend day off have no rights under the statute,” the Court found, and it was wrong to make them “take a back seat to the Sabbath observer.” *Id.* at 710 n.9. Because “[t]he statute has a primary effect that impermissibly advances a particular religious practice,” it violated the First Amendment. *Id.* at 710.

HB 1523 fails this standard. The bill gives persons with § 2 beliefs an absolute right to refuse service to LGBT citizens without regard for the impact on their employer, coworkers, or those being denied service. Like *Caldor*, it contains “no exception [for] when honoring the dictates of [religious] observers would cause the employer substantial economic burdens or when the employer’s compliance would require the imposition of significant burdens on other employees required to work in place of the [religious] observers.” *Caldor*, 472 U.S. at 709-10.

*Burwell v. Hobby Lobby* confirms this ‘do no harm’ principle. In that case, the Court relieved three closely-held corporations from federal contraceptive regulations which substantially burdened the corporate owners’ religious beliefs. 134 S. Ct. at 2759. At first blush that sounds analogous to HB 1523: if the corporate owners could opt-out of the federal regulation, why can’t clerks opt-out of serving same-sex couples? The difference is that the *Hobby Lobby* Court found that the religious accommodation in question would have “precisely zero” effect on women seeking contraceptive coverage, and emphasized that corporations do not “have free rein to take steps that impose disadvantages on others.” *Id.* at 2760 (quotations marks, citation, and ellipses omitted). The critical lesson is that religious accommodations must be

considered in the context of their impact on others. *See also Bullock*, 489 U.S. at 14 (striking down Texas law requiring non-religious periodicals to subsidize religious periodicals).

Unlike *Hobby Lobby*, HB 1523 disadvantages recusing employees' coworkers and results in LGBT citizens being personally and immediately confronted with a denial of service. The bill cannot withstand the *Caldor* line of cases. As Judge Learned Hand once said, "[t]he First Amendment gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities." *Caldor*, 472 U.S. at 710 (quotation marks, citation, and ellipses omitted).

For these reasons, the plaintiffs are substantially likely to succeed on their claim that HB 1523 violates the First and Fourteenth Amendments.<sup>46, 47</sup>

### **C. Irreparable Harm**

The plaintiffs are then required to demonstrate "a substantial threat of irreparable harm if the injunction is not granted." *Opulent Life Church*, 697 F.3d at 288. They must show "a significant threat of injury from the impending action, that the injury is imminent, and that money damages would not fully repair the harm." *Humana, Inc. v. Jacobson*, 804 F.2d 1390, 1394 (5th Cir. 1986). "An injury is irreparable only if it cannot be undone through monetary remedies." *Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. 1981) (citation omitted).

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<sup>46</sup> A point of clarification is in order. The Establishment Clause claim brought by all of the plaintiffs is substantially likely to succeed in declaring § 2 of the bill unconstitutional. The *Barber* plaintiffs' Equal Protection Clause claim is also substantially likely to secure that result as to § 2, but may in fact enjoin the entire bill, as in *Romer*. The question is moot at this juncture because an injunction as to § 2 renders every other section inoperable as a matter of law. The result is that the HB 1523 is entirely "immobilized." *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612, 2632 n.1 (2013) (Ginsburg, J., dissenting)

<sup>47</sup> In Establishment Clause cases, a finding of substantial likelihood of success on the merits has led the Fifth Circuit to suggest that the final three factors of preliminary injunctive relief require only cursory review. *See Doe v. Duncanville Indep. Sch. Dist.*, 994 F.2d 160, 166 (5th Cir. 1993). Nevertheless, the Court will proceed to the conclusion of the formal legal analysis.

The plaintiffs have sufficiently shown that HB 1523 represents an imminent and “substantial threat to [their] First Amendment rights. Loss of First Amendment freedoms, even for minimal periods of time, constitute irreparable injury.” *Ingebretsen*, 88 F.3d at 280 (citations omitted). This applies with equal force to the Equal Protection claim, since the plaintiffs are substantially likely to be irreparably harmed by the unequal treatment HB 1523 sets out for them. *CSE I*, 64 F. Supp. 3d at 950.

As a result, this element is satisfied. *Accord Doe v. Duncanville Indep. Sch. Dist.*, 994 F.2d 160, 166 (5th Cir. 1993).

#### **D. Balance of Hardships**

Here, the plaintiffs must show that the injuries they will suffer if HB 1523 goes into effect outweigh any harm that an injunction may do to the State. If a court has found irreparable harm, a party opposing injunctive relief will “need to present powerful evidence of harm to its interests” to prevent the scales from weighing in the movant’s favor. *Opulent Life Church*, 697 F.3d at 297. On the other hand, “the injunction usually will be refused if the balance tips in favor of defendant.” 11A Charles A. Wright et al., *Fed. Prac. & Proc.* § 2948.2 (3d ed.).

The State contends that granting an injunction will result in the “irreparable harm of denying the public interest in the enforcement of its laws.” Docket No. 28, at 34, in *CSE IV* (quotation marks and citation omitted). This argument will be taken up with the public interest factor.

The State also says that enjoining HB 1523 would impose a hardship on conscientious objectors who are presently being denied the free exercise of their religion. Even setting aside the State’s lack of support for this contention, the Fifth Circuit has not looked favorably upon this argument in similar Establishment Clause litigation. An injunction that enjoins HB 1523 will

preserve the status quo, so it “would not affect [citizens’] existing rights to the free exercise of religion and free speech. Therefore, [citizens] continue to have exactly the same constitutional right to pray as they had before the statute was enjoined.” *Ingebretsen*, 88 F.3d at 280. Since *Ingebretsen* was decided, moreover, Mississippi has enacted its own RFRA to provide additional protection to religious Mississippians.

The Court concludes that the plaintiffs’ constitutional injuries outweigh any injury the State suffers from an injunction that preserves the status quo.

#### **E. Public Interest**

Lastly, the plaintiffs must show that a preliminary injunction will not disserve the public interest. “Focusing on this factor is another way of inquiring whether there are policy considerations that bear on whether the order should issue.” *Wright et al.* § 2948.4.

The State argues that the public interest is served by enforcing its democratically adopted laws. The government certainly has a powerful interest in enforcing its laws. That interest, though, yields when a particular law violates the Constitution. In such situations “the public interest is not disserved by an injunction preventing its implementation.” *Opulent Life Church*, 697 F.3d at 298 (citations omitted); *accord Ingebretsen*, 88 F.3d at 280.

In this case, it is also relevant that Mississippi has been subjected to widespread condemnation and an economic boycott as a result of HB 1523’s passage. *See*, Docket Nos. 32-11 (letter to Mississippi’s leaders from nearly 80 CEOs urging HB 1523’s repeal as “bad for our employees and bad for business”); 32-12 (statement of Mississippi Manufacturers Association opposing HB 1523); 32-13 (statement of Mississippi Economic Council opposing HB 1523); 32-19 (newspaper article indicating opposition to HB 1523 from nearly every Mayor on the Mississippi Gulf Coast); 32-20 (statement of the Gulf Coast Business Council describing “the

growing list of negative impacts” of HB 1523 on the State economy), all in *Barber*; see also Sherry Lucas, *MS Theater Groups Worry About HB 1523 Fallout*, The Clarion-Ledger, June 13, 2016 (reporting that copyright holders are presently prohibiting Mississippians from performing *West Side Story*, *Footloose*, *Wicked*, *Godspell*, and *Pippin*). The public interest is served by bringing this boycott to an end.

#### **F. Other Considerations**

The plaintiffs have made other First Amendment arguments and noted a preemption theory concerning 42 U.S.C. § 1983. In light of the substantive claims addressed above, and appreciating “the haste that is often necessary” in preliminary injunction proceedings, the Court declines to take up those other theories of relief at this time. *Monumental Task Comm., Inc v. Foux*, --- F. Supp. 3d ---, 2016 WL 311822, at \*3 (E.D. La. Jan. 26, 2016).

#### **V. Conclusion**

Religious freedom was one of the building blocks of this great nation, and after the nation was torn apart, the guarantee of equal protection under law was used to stitch it back together. But HB 1523 does not honor that tradition of religion freedom, nor does it respect the equal dignity of all of Mississippi’s citizens. It must be enjoined.

The motions are granted.

**IT IS HEREBY ORDERED** that the defendants; their officers, agents, servants, employees, and attorneys; and any other persons who are in active concert or participation with the defendants or their officers, agents, servants, employees, or attorneys; are hereby preliminarily enjoined from enacting or enforcing HB 1523.

**SO ORDERED**, this the 30th day of June, 2016.

s/ Carlton W. Reeves  
UNITED STATES DISTRICT JUDGE