

AMERICAN CONSTITUTIONALISM

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Supplementary Material

The Contemporary Era—Individual Rights/Personal Freedom and Public Morality

Whole Woman's Health v. Hellerstedt, 579 U.S. __ (2016)

Whole Woman's Health provides private gynecology and abortion services for women in cities throughout the United States, including clinics in McAllen, Beaumont, Fort Worth, San Antonio, and Austin, Texas. The Texas state legislature in 2013 enacted House Bill 2 (H.B. 2), a measure that provided two new regulations on abortion. The "admitting privileges" requirement mandated that all physicians performing abortions must have "admitting privileges at a hospital . . . not further than 30 miles from where they performed the abortion." The "surgical-center" requirement required that all abortion facilities meet the same standards for "ambulatory surgical centers" in Texas. Whole Woman's Health and other organizations providing abortion services in Texas immediately filed a lawsuit against the Commissioner of the Texas Department of State Health Services (who when the case reached the Supreme Court was John Hellerstedt), claiming that the "admitting privileges requirement" on its face was an "undue burden" on abortion that violated the due process clause of the Fourteenth Amendment. The local district court enjoined enforcement of H.B. 2, but that order was vacated by the Court of Appeals for the Fifth Circuit. Rather than appeal to the Supreme Court, Whole Woman filed a new lawsuit claiming that the "admitting privileges" requirement was unconstitutional as applied to its clinic in western Texas (McAllen) and that the "surgical requirement was unconstitutional as applied to all clinics. The district court again enjoined enforcement of the crucial provisions of H.B. 2 throughout Texas and, again, that decision was overturned by the Court of Appeals for the Fifth Circuit. Whole Woman's Health appealed to the Supreme Court of the United States.

The Supreme Court by a 5-3 vote declared the "admitting privileges" and "surgical-center requirements unconstitutional. Justice Stephen Breyer's majority opinion maintained that the constitutional issue was not precluded by Whole Woman's Health decision to abandon the first lawsuit, that the Texas laws unduly burdened the abortion choice, and the federal courts were authorized to declare a measure unconstitutional in full even when plaintiffs had argued that the statutes was merely unconstitutional as applied. Consider first the more procedural claims. What do Justices Breyer, Justice Alito and Justice Thomas think is the point of such doctrines as preclusion and severability? Who has the strongest argument? Does preclusion serve important purposes when hot button constitutional issues are litigated, or should the Supreme Court be willing to weigh in whenever the parties before the court are fully canvassing the constitutional issues. Is Justice Ginsburg right when she says the only point of the Texas legislation was to restrict abortion? What is the evidence for this proposition? Is that evidence contested? How do Justices Breyer and Thomas answer that question? Was this an instance of the court refusing to allow a state legislature to rely on sham science or an instance where the court second guessed a good faith legislative position? Does the Alito dissent maintain that the Texas legislation serves important medical purposes? Suppose Alito thought the constitutional issue not precluded? How would he have ruled on the substantive questions?

JUSTICE BREYER delivered the opinion of the Court.

....

The doctrine of claim preclusion (the here-relevant aspect of res judicata) prohibits “successive litigation of the very same claim” by the same parties. 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. . . . 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.”

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. . . . 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.

. . . . [I]n addition to asking for as-applied relief, petitioners asked for “such other and further relief as the Court may deem just, proper, and equitable.” Their evidence and arguments convinced the District Court that the provision was unconstitutional across the board. The Federal Rules of Civil Procedure state 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.” . . . Nothing prevents this Court from awarding facial relief as the appropriate remedy for petitioners’ as-applied claims.

. . . . We begin with the standard, as described in [*Planned Parenthood of Southwestern Pennsylvania v. 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.” 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.” 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.”

. . . . The rule announced in *Casey* requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer. . . . And [it] 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. . . . 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. . . .

. . . . 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.” 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%.
- 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).
- Expert testimony to the effect that complications rarely require hospital admission, much less immediate transfer to a hospital from an outpatient clinic.
- 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.”
- 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.
- 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.”

....

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. . . .

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.” 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. Eight abortion clinics closed in the months leading up to the requirement's effective date. Eleven more closed on the day the admitting-privileges requirement took effect.

Other evidence helps to explain why the new requirement led to the closure of clinics. . . . “[H]ospitals often condition admitting privileges on reaching a certain number of admissions per year.” Returning to the District Court record, we note that, in direct testimony, the president of Nova 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.” 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.

....

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.” We recognize that increased driving distances do not always constitute an “undue burden.” 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.

....

[T]he dissent suggests that one benefit of H. B. 2's requirements would be that they might "force unsafe facilities to shut down." 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." . . . Gosnell's deplorable crimes could escape detection only because his facility went uninspected for more than 15 years. Pre-existing Texas law already contained numerous detailed regulations covering abortion facilities, including a requirement that facilities be inspected at least annually. The record contains nothing to suggest that H. B. 2 would be more effective than pre-existing Texas law at deterring wrongdoers like Gosnell from criminal behavior.

....

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. 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. 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). Nationwide, childbirth is 14 times more likely than abortion to result in death, 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. . . .

....

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. In the District Court's view, the proposition that these "seven or eight providers could meet the demand of the entire State stretches credulity."

....

... [C]ommon 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 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. 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. . . .

....

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

....

... [T]he 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.

....

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. 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." Here, as in *Casey*, the relevant denominator is "those [women] for whom [the provision] is an actual rather than an irrelevant restriction."

...

JUSTICE GINSBURG, concurring.

... 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." Many medical procedures, including childbirth, are far more dangerous to patients, yet are not subject to ambulatory-surgical-center or hospital admitting-privileges requirements. 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." ...

JUSTICE THOMAS, dissenting.

.....

For most of our Nation's history, plaintiffs could not challenge a statute by asserting someone else's constitutional rights. ... 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. Those limits broke down, however, because the Court has been "quite forgiving" in applying these standards to certain claims. ... 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.

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. 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,” 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, 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,” the Court has created special rules that cede its enforcement to others.

....

I remain fundamentally opposed to the Court’s abortion jurisprudence. 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.” 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. 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.” 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.

....

. . . [B]y rejecting the notion that “legislatures, and not courts, must resolve questions of medical uncertainty,” 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.” . . . 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.” . . . Having identified medical uncertainty, *Gonzales* [*v. Carhart*] (2007) explained how courts should resolve conflicting positions: by respecting the legislature’s judgment.

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. “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.” No longer. Though the majority declines to say how substantial a State’s interest must be, one thing is clear: The State’s burden has been ratcheted to a level that has not applied for a quarter century.

....

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. 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. . . .

....

Though the tiers of scrutiny have become a ubiquitous feature of constitutional law, they are of recent vintage. Only in the 1960s 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. 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, then applied strict

scrutiny to a purportedly “fundamental” substantive due process right for the first time. Then the tiers of scrutiny proliferated into ever more gradations. *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. 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.” 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. . . .

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. . . . 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.

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

....

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.” . . . 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 judgment.

....

. . . . 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.

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.” . . .

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 "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.

... [W]hat 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." 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." 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.

... 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. ...

... 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." They describe the admitting privileges and ASC requirements as delivering a "one-two punch." They make no effort whatsoever to separate the effects of the two provisions.

... 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). 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. 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." ...

... Under our cases, petitioners must show that the admitting privileges and ASC requirements impose an "undue burden" on women seeking abortions. 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. Such a situation 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.

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. . . . 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:

. . . . 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, and they predicted that “[o]ther facilities that offer both surgical and medication abortion will be unable to offer medication abortion,” 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 unrelated law restricting the provision of family planning funds. 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.¹⁹

. . . . [I]t 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, that fact alone does not tell us whether it is an 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, 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.

. . . . The 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.

. . . . 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.

. . . . 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.

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. . . . 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.” That’s now enjoined. Patients may not be given misleading “advertising regarding the competence and/or capabilities of the organization.” Enjoined. Centers must maintain fire alarm and emergency communications systems, and eliminate “[h]azards that might lead to slipping, falling, electrical shock, burns, poisoning, or other trauma,” . . .

. . . .