

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 WHOLE WOMAN'S HEALTH, ET AL., :

4 Petitioners : No. 15-274

5 v. :

6 JOHN HELLERSTEDT, COMMISSIONER, :

7 TEXAS DEPARTMENT OF STATE HEALTH :

8 SERVICES, ET AL. :

9 - - - - - x

10 Washington, D.C.

11 Wednesday, March 2, 2016

12

13 The above-entitled matter came on for oral

14 argument before the Supreme Court of the United States

15 at 10:03 a.m.

16 APPEARANCES:

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18 Petitioners.

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20 Department of Justice, Washington, D.C.; for United

21 States, as amicus curiae, supporting Petitioners.

22 SCOTT A. KELLER, ESQ., Solicitor General of Texas,

23 Austin, Tex.; on behalf of Respondents.

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1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	STEPHANIE TOTI, ESQ.	
4	On behalf of the Petitioners	3
5	ORAL ARGUMENT OF	
6	DONALD B. VERRILLI, JR., ESQ.	
7	For United States, as amicus curiae,	
8	supporting Petitioners	24
9	ORAL ARGUMENT OF	
10	SCOTT A. KELLER, ESQ.,	
11	On behalf of the Respondents	36
12	REBUTTAL ARGUMENT OF	
13	STEPHANIE TOTI, ESQ.	
14	On behalf of the Petitioners	73
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 P R O C E E D I N G S

2 (10:03 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 this morning in Case 15-274, Whole Woman's Health v.
5 Hellerstadt.

6 Ms. Toti.

7 ORAL ARGUMENT OF STEPHANIE TOTI

8 ON BEHALF OF THE PETITIONERS

9 MS. TOTI: Mr. Chief Justice, and may it
10 please the Court:

11 The Texas requirements undermine the careful
12 balance struck in Casey between States' legitimate
13 interests in regulating abortion and women's fundamental
14 liberty to make personal decisions about their
15 pregnancies. They are unnecessary health regulations
16 that create substantial obstacles to abortion access.

17 JUSTICE GINSBURG: Ms. Toti, there is a
18 preliminary question -- would you address that -- that
19 this claim is precluded. And let's take first the claim
20 that was in the prior litigation. Let's assume that
21 they're separate claims, or let's take the admitting
22 privileges. That was argued and decided. Why isn't it
23 precluded?

24 MS. TOTI: Your Honor, it's not precluded
25 because material facts relevant to the claim developed

1 subsequent to entry of judgment in the Abbott case.

2 JUSTICE KENNEDY: But you could have
3 amended -- you could have asked for supplemental
4 briefing. I mean, the new action is filed six days
5 after the Supreme Court issues its decision in this
6 case. You could have asked for supplemental briefing?

7 MS. TOTI: In Abbott the plaintiffs brought
8 the -- the new facts to the attention of the court of
9 appeals. The court of appeals said that it would only
10 consider evidence in the trial record in rendering its
11 decision, and it held that the evidence in the trial
12 record was speculative, that there wasn't a sufficient
13 basis to conclude that any doctor would be unable to
14 obtain admitting privileges, or that any clinic would be
15 forced to close as a result of the admitting privileges
16 requirement.

17 CHIEF JUSTICE ROBERTS: But you're asking --
18 you made allegations concerning those same claims. I
19 mean, is your argument that when you have allegations on
20 a facial challenge and a facial challenge is resolved
21 against you, that all you have to do is come up with new
22 evidence and then you can start over again?

23 MS. TOTI: No, Your Honor. The -- the --
24 the evidence must be material, and it must be newly
25 developed. So newly discovered evidence wouldn't be

1 sufficient. If it was evidence that was available at
2 the time of the first suit, but the plaintiffs merely
3 hadn't discovered the evidence or didn't bring it
4 forward, that wouldn't provide the basis for a
5 subsequent suit. But evidence that develops after
6 judgment in the first suit that is material to the
7 claims does provide sufficient basis for a -- a
8 second --

9 JUSTICE KENNEDY: And what's this key new
10 evidence?

11 MS. TOTI: The -- the evidence is the clinic
12 closures that resulted from enforcement -- actual
13 enforcement of the admitting-privileges requirement. So
14 the -- the first suit was a pre-enforcement challenge.
15 It was before the law took effect, and the court
16 concluded that there was not sufficient evidence that
17 any doctor would actually be unable to obtain admitting
18 privileges, or that any clinic would actually close.

19 JUSTICE ALITO: Well, there is very little
20 specific evidence in the record in this case with
21 respect to why any particular clinic closed. Basically,
22 your argument is that the law took effect, and after
23 that point, there was a decrease in the number of
24 clinics.

25 So suppose you win here, and the State then

1 examines what happened in each of these clinics and
2 comes up with evidence showing that in quite a few
3 instances, the closure was due to other factors. And so
4 then they would -- then could they take the position,
5 well, the decision of this Court holding that the law is
6 facially unconstitutional is not binding on us by res
7 judicata, and so you would have to sue them again, and
8 they would be able to make the same argument you're
9 making now. Is that correct?

10 MS. TOTI: No, Your Honor. And --

11 JUSTICE ALITO: What's the difference?

12 MS. TOTI: Well, first of all, the State had
13 an opportunity to bring forward evidence in this case
14 about the reasons why --

15 JUSTICE ALITO: Was it that -- was that
16 their burden?

17 MS. TOTI: No, Your Honor. Not in the first
18 instance, but the plaintiffs came forward with evidence
19 and -- and the State did not offer anything to -- to
20 rebut the evidence, which was more than sufficient to
21 support the district court's finding that HB2 was the
22 cause of the clinic closures.

23 CHIEF JUSTICE ROBERTS: What -- what
24 evidence is that?

25 MS. TOTI: There are a couple of things,

1 Your Honor. Prior to HB2, in -- in the five years prior
2 to HB2, the number of clinics in the State remained
3 fairly stable. In any given year, there may have been a
4 one- to two-clinic variance. Following the enactment of
5 HB2, more than 20 clinics closed within a very short
6 period of time. The timing of the closures --

7 CHIEF JUSTICE ROBERTS: What?

8 MS. TOTI: -- alone --

9 CHIEF JUSTICE ROBERTS: I'm sorry. Yeah.
10 What is the evidence in the record that the closures are
11 related to the legislation?

12 MS. TOTI: The -- the -- the timing is part
13 of the evidence, Your Honor, and the testimony of the
14 plaintiffs about the reasons why their clinics closed.
15 So that the plaintiffs testified that clinics closed in
16 anticipation of enforcement in some cases, and in some
17 cases because of actual enforcement of the requirements.

18 JUSTICE GINSBURG: Can we go on to the
19 second piece; that is, the ambulatory surgical centers?
20 That was not part of the last case. And your position
21 on that is that that is a discrete claim, so it's not
22 barred by a claim preclusion.

23 Is that -- is that your position?

24 MS. TOTI: Yes. That's correct. And the
25 claims against the ASC requirement weren't ripe at the

1 time that the Abbott case was filed, because the final
2 implementing regulations for that statutory requirement
3 hadn't yet been adopted.

4 JUSTICE KENNEDY: Well, certainly in the
5 Federal system, and I assume in many States as well,
6 regulations sometimes take years to promulgate. I don't
7 know of any rule that says we have to wait for regular
8 -- regulations to be promulgated unless it's something
9 unanticipated. And the key objections you're making
10 were clear in the statute, anyway.

11 MS. TOTI: I would disagree that -- that the
12 extent of the burden that the law would impose was clear
13 on the face of the statute. Until those implementing
14 regulations were adopted -- and the statute provided a
15 deadline for the adoption of those regulations -- until
16 they were adopted, the plaintiffs couldn't have known
17 whether waivers or grandfathering would have been
18 permitted. And if waivers or grandfathering were
19 permitted, as they have been in every other ASC
20 requirement that's been adopted for abortion providers,
21 the burdens would have been much less, and the
22 plaintiffs would have first attempted to get licensed
23 and seek appropriate waivers before filing their suit.
24 This --

25 CHIEF JUSTICE ROBERTS: So you think you can

1 separately challenge the admitting-privilege provision
2 and the ASC provision?

3 MS. TOTI: Yes, Your Honor. Because
4 those --

5 CHIEF JUSTICE ROBERTS: So if you can
6 separately challenge them, if you challenge just the
7 admitting-privileges provision, how would you factor
8 in -- presumably, you would have to assume that the ASC
9 provision was not under challenge. So in assessing the
10 burden, you would look at just the admission privilege.
11 And vice versa, if you're challenging just the ASC
12 separately, you'd have to assume you'd assess the burden
13 solely caused by that provision.

14 It seems to me the separation of the two
15 provisions makes -- would make your case much harder.

16 MS. TOTI: I -- I would disagree with that,
17 Your Honor, because each of these requirements is
18 extremely burdensome on its own. The
19 admitting-privileges requirement, which is partially in
20 effect, has been responsible for the closure of nearly
21 half of all the abortion facilities in Texas to date.
22 And the ASC requirement, if it took effect, the
23 Respondents have stipulated that it would close any
24 remaining licensed abortion facility that was able to
25 comply with the admitting-privileges requirement.

1 So independently, each requirement is
2 extremely burdensome; and -- and collectively, the
3 one-two punch of these requirements would be responsible
4 for the -- the closure of nearly 30 --

5 JUSTICE BREYER: What I think the Chief
6 Justice asked -- I don't want to take words out of his
7 mouth -- but I think the question was, one of the two
8 lines that's been asked, is that in the district opinion
9 at page 7, the district court has said that if the ASC
10 regulation goes into effect, there will be one facility
11 left in Austin, two in Dallas, one in Fort Worth, two in
12 Houston, and either one or two in San Antonio. And
13 before that, he said that the enforcement of the
14 appointment privileges, the privileges of admission,
15 would reduce the number from 20 down to about -- from 40
16 down to about 20.

17 Now, I think the question was, what evidence
18 did those findings rest upon? As you've heard, the
19 other side, I think, say there is no such evidence, or
20 the court of appeals said there is no such evidence.

21 So can you give a brief account or page
22 numbers that will show that those findings, the
23 diminishment of the number from about 40 to about eight,
24 which is what the district court found, rested upon some
25 evidence? What was that evidence?

1 MS. TOTI: Yes, Your Honor. So initially,
2 20 clinics closed in the wake of HB2. Eight closed
3 prior to initial enforcement of the admitting-privileges
4 requirement, and 11 closed on the day that the
5 admitting-privileges requirement first took effect.

6 Respondents quibble with the evidence
7 concerning the first eight. Even if we -- and -- and
8 there is basis in the record for the district court to
9 infer that those eight closed for the same reasons as
10 all the others, but even if we --

11 CHIEF JUSTICE ROBERTS: Where -- I'm sorry
12 to interrupt you. Where in the record is that evidence?

13 MS. TOTI: Your Honor, I can provide
14 specific pin sites during my rebuttal, but the evidence
15 is in the plaintiffs' testimony about the reasons why
16 their clinics closed.

17 Each of the plaintiffs' class testified that
18 their clinics closed either in anticipation of
19 enforcement of these requirements, knowing that -- that
20 the clinic would not be able to continue operating once
21 the requirements took effect, and as a result of that,
22 either they needed to move resources to remaining
23 clinics to ensure that some clinics would continue to
24 operate in the State --

25 JUSTICE BREYER: What'd they say? Could you

1 give us any record references later or on rebuttal?

2 MS. TOTI: Yes.

3 JUSTICE ALITO: As to how many, of the total
4 that you claim closed, do you have direct evidence about
5 the reason for the closure?

6 MS. TOTI: Well, 11 of them, Your Honor,
7 closed on the day that the admitting privileges took
8 effect.

9 JUSTICE ALITO: Yeah. And as to how many --
10 how many are you claiming total closed as a result of
11 the law?

12 MS. TOTI: To -- to date, roughly 20 clinics
13 have closed.

14 JUSTICE ALITO: And of the 20, how -- as to
15 how many do you have direct evidence?

16 MS. TOTI: I -- approximately 12, Your
17 Honor, direct evidence.

18 JUSTICE ALITO: Because if -- if you go
19 through this -- now we're not talking about a huge
20 number of facilities. I really don't understand why you
21 could not have put in evidence about each particular
22 clinic and to show why the clinic closed. And as to
23 some of them, there is -- there's information that they
24 closed for reasons that had nothing to do with this law.

25 Now, maybe when you take out all of those,

1 there still would be a substantial number, and enough to
2 make your case. But I -- I don't understand why you
3 didn't put in direct evidence.

4 I mean, I could give you examples: Planned
5 Parenthood Center for Choice, Bryan, Texas. Is that one
6 of the ones you're talking about?

7 MS. TOTI: Yes, Your Honor.

8 JUSTICE ALITO: Okay. There's a news
9 report. Planned Parenthood and -- and the Huffington
10 Post reported that this was closed as a result of the
11 2011 Texas Women's Health Program bill, which cut
12 funding for family planning services. It's not the law
13 that we're talking about here.

14 MS. TOTI: Well, Your Honor, that evidence
15 is not in the record.

16 JUSTICE ALITO: Well, I understand that.
17 And you put quite a bit of evidence that's not in the
18 record in your brief. But my point is why is there not
19 direct evidence about particular clinics?

20 JUSTICE GINSBURG: You said you had direct
21 evidence for 12 clinics and you were going to supply us
22 with that -- those record citations later. That's --
23 understood you to say?

24 MS. TOTI: Yes. Yes, Your Honor.
25 Absolutely. But I think what's -- what's important to

1 keep in mind here --

2 JUSTICE KAGAN: Ms. Toti, could I -- could I
3 just make sure I understand it, because you said 11 were
4 closed on the day that the admitting-privileges
5 requirement took effect; is that correct?

6 MS. TOTI: That's correct.

7 JUSTICE KAGAN: And is it right that in the
8 two-week period that the ASC requirement was in effect,
9 that over a dozen facilities shut their doors, and then
10 when that was stayed, when that was lifted, they
11 reopened again immediately; is that right?

12 MS. TOTI: That -- that is correct, Your
13 Honor. And -- and --

14 JUSTICE KAGAN: It's almost like the perfect
15 controlled experiment as to the effect of the law, isn't
16 it? It's like you put the law into effect, 12 clinics
17 closed. You take the law out of effect, they reopen.

18 MS. TOTI: That's absolutely correct. And
19 as the State had stipulated, that's exactly what the
20 State stipulated would -- would happen. And that --
21 that stipulation is certainly direct evidence of -- of
22 the impact of the ASC requirement.

23 JUSTICE KENNEDY: The -- the State, I think,
24 is going to talk about the capacity of the remaining
25 clinics. Would it be A, proper, and B, helpful, for

1 this Court to remand for further findings on clinic
2 capacity?

3 MS. TOTI: I don't think that's necessary,
4 Your Honor. I think there is sufficient evidence in the
5 record that we have to support the district court's
6 finding that the remaining clinics, which would number
7 fewer than ten, don't have capacity to meet the
8 statewide demand that --

9 JUSTICE KENNEDY: There -- there have been
10 some changes, like a -- a major clinic -- I don't quite
11 know the adjective they use for it -- in San Antonio.
12 But there -- suppose there were evidence that there was
13 a -- a capacity and a -- and a capability to -- to build
14 these kinds of clinics, would that be of importance?
15 And then it would show that this law has an effect, and
16 a beneficial effect so far as the legislature is
17 concerned.

18 MS. TOTI: If the Court had any doubts about
19 the capacity of the remaining clinics, a remand would
20 certainly provide the Petitioners with -- with the
21 opportunity to supplement the evidence already in the
22 record. But the evidence in the record shows that --
23 supports the district court's finding that because the
24 -- the ASC requirement, the costs of it are so
25 prohibitive, it will deter new clinics from opening to

1 take the place of the ones that closed.

2 JUSTICE ALITO: Is it correct that the
3 number of ambulatory surgical centers performing
4 abortion has increased by 50 percent since this law went
5 into effect?

6 MS. TOTI: There have -- since this law has
7 taken effect, three new ambulatory surgery centers have
8 opened. And there is evidence about that at the trial,
9 and the trial court knew that that was going to happen.
10 The -- the trial court took that into account in -- in
11 making its finding. But nevertheless, there was
12 substantial evidence, including Texas's experience in
13 2003 following enactment of the ASC law for later
14 abortions, for post-16-week abortions, that shows that
15 the -- the market never adjusted and the -- the rate at
16 which those procedures occurred in Texas was --
17 drastically diminished following that enforcement of the
18 law.

19 JUSTICE ALITO: Well, one -- one quick
20 question about capacity. I don't want to take your
21 rebuttal time. But your co-counsel put in -- is also
22 litigating a case like this in Louisiana. And in that
23 case, the plaintiffs were able to put in evidence about
24 the exact number of abortions that were performed in all
25 of the facilities. Why could that not have been done

1 here? Why wasn't it done here?

2 MS. TOTI: Well, there -- there -- so I see
3 that I'm getting into my rebuttal time, Your Honor, but
4 there is evidence in the record about the -- the number
5 of abortions that were performed on an annual basis, the
6 geographic distribution of -- of those abortions. Texas
7 collects those statistics, and those -- those statistics
8 are -- are part of the record in this case.

9 JUSTICE GINSBURG: You -- you had -- we have
10 absorbed so much of your time with the threshold
11 question. Perhaps you can -- can she have some time to
12 address the merits?

13 CHIEF JUSTICE ROBERTS: Why don't -- why
14 don't you take an extra five minutes, and we'll be sure
15 to afford you rebuttal time after that?

16 MS. TOTI: Thank you, Mr. Chief Justice.

17 So fundamentally, these laws impose heavy
18 burdens on abortion access that are not medically
19 justified. And for that reason, they impose an undue
20 burden on the right to abortion.

21 CHIEF JUSTICE ROBERTS: Do you think there's
22 a rational basis for the law based on the benefits that
23 the legislature saw?

24 MS. TOTI: I do not, Your Honor, because --

25 CHIEF JUSTICE ROBERTS: Well, I thought you

1 expressly did not challenge the law as lacking a
2 rational basis.

3 MS. TOTI: We -- we did not preserve our
4 rational basis claim. The -- the district court denied
5 that claim, and -- and we haven't preserved it here.
6 Here we're focusing on -- on the undue burden. The --
7 we wouldn't concede that the law has a rational basis
8 because in fact, it undermines --

9 CHIEF JUSTICE ROBERTS: Well, we have to
10 assume it -- we have to assume it does since you're not
11 raising that challenge, don't we?

12 MS. TOTI: Because the law actually
13 undermines the State's interest in health rather than
14 advancing it by causing an increase in later abortions
15 and self-induced abortions, we wouldn't concede that
16 it's rationally related to the State's interest in
17 health, but are --

18 JUSTICE GINSBURG: You said even if the test
19 is undue burden, not rational basis.

20 MS. TOTI: That -- that's correct, Your
21 Honor. And in order to determine whether a law imposes
22 an undue burden on the abortion right, we must first
23 consider the magnitude of the burden that it imposes,
24 and then compare that burden to what the law is intended
25 to achieve to be --

1 CHIEF JUSTICE ROBERTS: I don't -- how is
2 that logical? I mean, the question is whether there's
3 an undue burden or a substantial obstacle. What -- what
4 difference does it make what the purpose behind the law
5 is in assessing whether the burden is substantial or --
6 or undue? It seems once you get past the -- the
7 assumption that the law has a rational basis and you
8 haven't challenged that, then you look at the burden or
9 the obstacle. And the purpose that the law is directed
10 to, I would think, doesn't make a difference. It's
11 either a substantial obstacle or an undue burden or it's
12 not.

13 MS. TOTI: In order to determine whether a
14 burden is undue, Your Honor, we -- we have to consider
15 what the burden is in relation to. In -- in Casey, for
16 example, in upholding the informed-consent requirements,
17 the Court first looked to the -- the State interests
18 that was being served by those requirements in -- in
19 that case, the State's interest in potential life, and
20 concluded that the requirements were reasonably designed
21 to serve that purpose by making the abortion decision
22 more informed and that --

23 CHIEF JUSTICE ROBERTS: I thought the undue
24 burden and substantial obstacle went to whether it was
25 undue in light of the woman's right to exercise her

1 right to an abortion, not with respect to the State
2 interest that's asserted.

3 MS. TOTI: Well, Your Honor, it's -- it's
4 both. Casey sought to balance the State's legitimate
5 interest in regulating abortion with the woman's
6 fundamental right with her -- her liberty to access the
7 procedure, and it -- it concluded that the State
8 couldn't impose unwarranted burdens. So where the State
9 had a good reason to impose a restriction and that
10 restriction didn't impose burdens that were undue, then
11 the restriction could stand. But where a -- a
12 restriction is unreasonable or, in -- in the language of
13 Casey, "medically unnecessary," and it's going to impose
14 burdens on access to abortion, then -- then that
15 restriction cannot be sustained under the Fourteenth
16 Amendment.

17 JUSTICE SOTOMAYOR: Can I walk through the
18 burden a moment? There's two types of early abortion
19 at -- at play here. The medical abortion, that doesn't
20 involve any hospital procedure. A doctor prescribes two
21 pills, and the women take the pills at home, correct?

22 MS. TOTI: Under Texas law, she must take
23 them at the facility, but -- but that is otherwise
24 correct.

25 JUSTICE SOTOMAYOR: I'm sorry. What? She

1 has to come back two separate days to take them?

2 MS. TOTI: That's correct, yes.

3 JUSTICE SOTOMAYOR: All right. So now, from
4 when she could take it at home, it's -- now she has to
5 travel 200 miles or pay for a hotel to get those two
6 days of treatment?

7 MS. TOTI: That's correct, Your Honor.

8 JUSTICE SOTOMAYOR: All right. Let me ask
9 you something about that two-day wait, okay, or -- or
10 that travel time. How many other States and how many
11 other recognized medical people have testified or shown
12 that there is any benefit from taking pills at the
13 facility as opposed to taking the pills at home, as was
14 the case?

15 MS. TOTI: There -- there is -- there's
16 absolutely no testimony in -- in the record and -- and
17 no evidence, you know, in -- in any of the amicus briefs
18 that there is a medical benefit to having a medication
19 abortion at a -- a multimillion-dollar surgical
20 facility. The American Medical Association and every
21 other mainstream leading medical association to consider
22 these requirements has -- has concluded that they are
23 not medically justified for a variety of reasons,
24 including that they impose these onerous burdens on
25 medical abortion, which is the earliest form of

1 abortion, and that these burdens are also imposed on
2 early surgical abortion, procedures prior to 16 weeks.
3 And as a result, women are going to be delayed later in
4 pregnancy. And there is evidence in the record that
5 following implementation of the admitting-privileges
6 requirement, in the six-month period following, there
7 was an increase in both the number and the proportion of
8 abortions being performed in the second trimester.

9 So by delaying women's access to abortion,
10 these requirements are actually increasing the risks
11 that women face.

12 JUSTICE SOTOMAYOR: If the Chief may permit
13 me to finish my two-part question?

14 CHIEF JUSTICE ROBERTS: Sure.

15 JUSTICE SOTOMAYOR: The second is the D&C,
16 the dilation and -- what's it called? Dilation and --

17 MS. TOTI: Curettage.

18 JUSTICE SOTOMAYOR: -- curettage. What is
19 the risk factor for a D&C related to abortion and a
20 non-abortion D&C? D&Cs are performed in offices for
21 lots of other conditions besides abortion.

22 Is there any evidence in the record that
23 shows that there is any medical difference in the two --
24 in the -- in the procedures that would necessitate an
25 abortion being in an ACS or not, or are abortions more

1 risky than the regular D&C?

2 MS. TOTI: No, Your Honor. The evidence in
3 the record shows that the procedures are virtually
4 identical, particularly when D&C is performed to
5 complete a spontaneous miscarriage. So when a woman
6 miscarries and then follows up with her doctor, the
7 doctor will typically perform a D&C. And that's --
8 that's virtually identical to an abortion, but it's not
9 subject to the -- the requirements of HB2.

10 JUSTICE SOTOMAYOR: So your point, I'm
11 taking, is that the two main health reasons show that
12 this law was targeted at abortion only?

13 MS. TOTI: That's absolutely correct. Yes,
14 Your Honor.

15 JUSTICE SOTOMAYOR: Is there any other --

16 CHIEF JUSTICE ROBERTS: Thank you, counsel.

17 JUSTICE SOTOMAYOR: I'm sorry.

18 Is there any other medical condition by
19 taking the pills that are required to be done in
20 hospital, not as a prelude to a procedure in hospital,
21 but an independent, you know -- I know there are cancer
22 treatments by pills now. How many of those are required
23 to be done in front of a doctor?

24 MS. TOTI: None, Your Honor. There -- there
25 are -- are no other medication requirements and no other

1 outpatient procedures that are required by law to be
2 performed in an ASC.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.
4 General Verrilli.

5 ORAL ARGUMENT OF DONALD B. VERRILLI, JR.

6 FOR UNITED STATES, AS AMICUS CURIAE,
7 SUPPORTING THE PETITIONERS

8 GENERAL VERRILLI: Mr. Chief Justice, and
9 may it please the Court:

10 The effects of the Texas law at issue in
11 this case are much more extreme than those of any
12 abortion law that this Court has considered since Casey.

13 This law closes most abortion facilities in
14 the State, puts extreme stress on the few facilities
15 that remain open, and exponentially increases the
16 obstacles confronting women who seek abortions in the
17 State. And it does all of that on the basis of a
18 medical justification that cannot withstand any
19 meaningful scrutiny that the American Medical
20 Association has told you is groundless and that the
21 district court found will actually operate in practice
22 to increase health risks to women and not decrease.

23 JUSTICE ALITO: Is this true of every
24 provision of the -- of the ASC law?

25 GENERAL VERRILLI: No, I -- I don't think it

1 is true about every provision in the regulations,
2 Justice Alito.

3 JUSTICE ALITO: Not the regulations -- yes,
4 in the regulations.

5 GENERAL VERRILLI: Yes.

6 JUSTICE ALITO: Every single provision.
7 Then why was the whole thing held to be
8 unconstitutional?

9 GENERAL VERRILLI: So I -- I agree with the
10 premise of Your Honor's question. There are some parts
11 of the regulation that I think, operating alone,
12 wouldn't have the substantial obstacle effect. In fact,
13 some parts of the regulation actually restate and
14 reauthorize regulations that were already on the books.

15 And so I suppose one could say that with
16 respect to that set of regulations, that the district
17 court could have severed them under the severability
18 clause. One could say that. Of course, they're already
19 in the preexisting regulations --

20 JUSTICE ALITO: But there are -- there are
21 things that go -- that go -- I haven't checked
22 everything as compared the abortion -- the prior
23 abortion clinic licensing law against the ASC
24 requirements, but there are some where there's an
25 increase in what's required. It seems pretty

1 reasonable.

2 Under the -- under the -- the old -- the old
3 law, there had to be a nurse, but not necessarily a
4 registered nurse. Under the new law, there has to be a
5 registered nurse who has a CPR certificate. So do you
6 think that's unreasonable to say that there has to be a
7 registered nurse who knows how to do CPR?

8 GENERAL VERRILLI: So I -- I don't want to
9 state an opinion one way or the other about that. But I
10 do want to -- what I -- but I think -- getting to the
11 point of Your Honor's question, I think the problem the
12 district court confronted here, and I think the reason
13 the district court acted reasonably, despite the
14 presence of the severability clause -- and the
15 severability clause provides an instruction that -- that
16 every provision, every clause, every word, every
17 application, every individual should be severed.

18 And the problem is -- the problem with the
19 kind that the Court noted, I think, in the Ayotte case,
20 for a court trying to apply that, the court's got to go
21 in and decide which collection of the many, many
22 requirements there ought to stand and which shouldn't,
23 and it's -- it's going to be invading --

24 JUSTICE ALITO: Well, it's all --

25 GENERAL VERRILLI: -- the State's regulatory

1 problems.

2 JUSTICE ALITO: It's work, but maybe the
3 district court should have done that work.

4 I mean, I read through this, and I was
5 surprised. I read through these regulations. I was
6 surprised by how many are completely innocuous. And
7 many of them have nothing to do -- they have to do with
8 basic safety. They don't even have anything to do, in
9 particular, with abortion. So the entrances to the
10 clinic have to be at grade level. You have to have an
11 elevator. The -- the corridors have to be wide enough
12 so that you could bring in a stretcher if somebody has
13 to be taken to the hospital. And -- and things of that
14 nature --

15 GENERAL VERRILLI: So --

16 JUSTICE ALITO: I don't know why things
17 couldn't have been severed out, if there were some that
18 were --

19 GENERAL VERRILLI: I -- I think some could
20 have been, if the Court believes a remand is appropriate
21 for the -- for the remedy to be more carefully tailored
22 in the way that the Court did in the Ayotte case. We
23 think that would be appropriate. But we do think that
24 the basic point remains that this is a substantial
25 obstacle.

1 And I would like to address two points that
2 arose during Petitioners' argument. First, closures,
3 and then, capacity.

4 With respect to closures, here's where I
5 think the record will show you taking the ASC
6 requirement first. The 13 -- there's a stipulation, JA
7 183, that all -- all clinics that weren't already closed
8 as a result of the admitting-privilege requirement
9 would -- would not be able to meet the ASC requirements;
10 and therefore, could not -- would have to cease
11 operations. Justice Kagan noted they did cease
12 operation during the period in which the law was in
13 State. There's evidence in the record with respect to
14 the seven clinics that are operated by Whole Woman's
15 Health that they -- that it was physically impossible to
16 meet the ASC construction requirements because it
17 couldn't fit on the real estate footprint that they had;
18 they couldn't meet them. There's expert testimony in
19 the record from Dr. Layne-Farrar, the economist, that
20 the cost of retrofitting these clinics to meet the
21 requirements would be between 1.6 and 2.3 million
22 dollars, which would be prohibitive; that the cost of
23 building a new facility would be at least 3.5 million
24 dollars, which would be prohibitive; and that the
25 additional operating cost of an ASC would be between

1 600,00 and a million dollars a year more. So I think
2 with respect to those, there's ample evidence.

3 With respect to the -- with respect to the
4 admitting-privileges requirement, we know that 11 of the
5 20 clinics that closed between the date when the law was
6 enacted and the effective date of the
7 admitting-privileges requirement closed on the date that
8 that requirement became effective. Seems to me the only
9 reasonable inference you can draw with respect to those
10 11 is that that law caused the closure. With respect to
11 the others, I don't think there's evidence with respect
12 to each one, but with respect to several, there is
13 evidence that they closed in advance of the effective
14 date, because they were otherwise going to have to pay a
15 licensing fee to stay open for another year, which they
16 knew they were not. And they knew they weren't going to
17 be able to stay open, and they didn't want to flush the
18 money away. So I think there's ample evidence in the
19 record with respect to causation.

20 Now, with respect to capacity, I really
21 think this is key, because I do think this is the locus
22 of the substantial obstacle problem here. With respect
23 to capacity, before this law took -- took effect, there
24 were approximately 65 to 70,000 abortions a year
25 annually. The ASC clinics that will be able to remain

1 open -- the ASC facilities that will be able to remain
2 open performed about 14,000 a year. That's what the
3 record tells you. It's Dr. Grossman's expert testimony.
4 It's in the JA from pages 225 to 259.

5 JUSTICE KENNEDY: About 20 percent.

6 GENERAL VERRILLI: 20 percent. So they'd
7 have to increase four- or five-fold in a very short
8 period of time with the -- against the backdrop of
9 having to meet the problems that the
10 admitting-privileges requirement causes.

11 Now, I understand that the Fifth Circuit
12 said that was ipse dixit, but with all due respect,
13 that's not binding on you and it's just wrong. And if
14 you look at the expert testimony at the JA pages I
15 identified, you'll see that what Dr. Grossman said first
16 was something that is just common sense, that these
17 clinics aren't going to be -- these facilities aren't
18 going to be able to increase by four or five times.

19 And second, he didn't just rely on common
20 sense. He looked at the period of time between when the
21 admitting-privileges requirement resulted in the closure
22 of 20 clinics. He looked at that period of time, and he
23 studied the number of abortions that occurred at the
24 remaining ASC facilities during that period of time.
25 And one would expect, given that half the facilities in

1 the State closed, that there would be a substantial
2 increase --

3 JUSTICE KENNEDY: Do you think the district
4 court would have had discretion -- the district court
5 having substantial equitable powers that appellate
6 courts don't -- to say we're going to stay this
7 requirement for two-and-a-half, three years, to see if
8 the capacity problem can be cured.

9 Could a -- could a district judge could
10 that?

11 GENERAL VERRILLI: You know, I -- I
12 apologize, Justice Kennedy. I haven't given that
13 question thought, and I'm loathe to opine on that
14 without having given it thought. But I do think --

15 JUSTICE KENNEDY: I mean, district judges
16 often think they can do anything.

17 (Laughter.)

18 GENERAL VERRILLI: But -- but I do think, as
19 I said, with respect to the capacity problem, the key
20 thing here is that when, in addition to these ASC
21 clinics not providing more abortions once half the
22 clinics in the State closed, you had -- and this is,
23 again, in Dr. Grossman's testimony -- significant
24 increases in the overall number of abortions,
25 particularly in the parts of the State that were far

1 away from the major cities, the northern --

2 JUSTICE ALITO: There is no evidence --

3 there's no evidence of the actual capacity of these

4 clinics. And why was that not put in? Particularly

5 since, if we look at the Louisiana case, we can see that

6 it's very possible to put it in. And some of the --

7 some of the numbers there are quite -- quite amazing.

8 There's one -- a doctor there performed 3,000 abortions

9 in a year.

10 So we don't really know what the capacity of

11 these -- of these ASC clinics --

12 GENERAL VERRILLI: Well, I think --

13 JUSTICE ALITO: -- are.

14 GENERAL VERRILLI: -- I think you have expert

15 testimony in that regard.

16 JUSTICE ALITO: Yeah. But what is it based

17 on? It's based -- you know, he -- it's not based on any

18 hard -- any hard statistics.

19 GENERAL VERRILLI: Well, it is. It's common

20 sense that you can't --

21 JUSTICE ALITO: Well, common sense --

22 GENERAL VERRILLI: But beyond that, as I

23 said, Justice Alito, they studied the period of time in

24 which half the clinics in the State were closed. And

25 you would expect that those clinics -- that the

1 additional ASCs can handle the -- the capacity, they
2 would have, and they didn't.

3 JUSTICE ALITO: He said that -- that the
4 number of -- the percentage of abortions at the ASCs
5 went down by 4.4 percent, and there was an increased
6 demand for abortion. But there's no statistic showing
7 that there actually was an increased demand for abortion
8 in Texas.

9 JUSTICE BREYER: I thought that the Grossman
10 affidavit, which I have -- I grant you, it's going on
11 the briefs -- but it said at Table -- affidavit page 9,
12 Table 2, says that the number of abortions that are, on
13 average, performed annually at the remaining clinics is
14 2,000. So let's multiply by 2, and you get 16. Let's
15 multiply by 3; you get 24. There were 70,000,
16 approximately, women who needed these procedures.

17 So I -- I had taken that. Is it that
18 accurate?

19 GENERAL VERRILLI: Yes.

20 JUSTICE BREYER: Okay.

21 GENERAL VERRILLI: In -- in the short time I
22 have remaining, I'd like to finish with one point, if I
23 could.

24 I think, ultimately, the question before you
25 is whether the right here is going to retain real

1 substance, and whether the balance -- whether the
2 balance struck in Casey still holds.

3 If that right still does retain real
4 substance, then this law cannot stand. The burdens it
5 imposes, the obstacles, are far beyond anything that
6 this Court has countenanced. And the justification for
7 it is far weaker than anything that this Court has
8 countenanced. It is an undue burden. It is the
9 definition of an undue burden.

10 And, Mr. Chief Justice, you -- in response
11 to your question, undue means excessive or unwarranted.
12 Could be excessive or unwarranted as compared to the --
13 the obstacle it imposes, certainly. But also, as
14 compared to its need.

15 CHIEF JUSTICE ROBERTS: I would have
16 thought -- Casey and Gonzales also said substantial
17 obstacle. And I would have thought that's something you
18 could look at in an objective manner. Why -- and --
19 actually, I don't understand why you're arguing the
20 opposite. I think whether it's an obstacle or a burden
21 would exist without regard to the strength of the State
22 interest. The strength of the State interest, it would
23 seem to me, is evaluated on whatever test there is with
24 respect to that legislation, and then you'd look at what
25 the impact was.

1 GENERAL VERRILLI: Well, I think it's
2 actually in the interest of government to look at it the
3 way that we're suggesting it ought to be looked at. And
4 I -- if I -- you know, if could take two minutes to
5 explain why.

6 CHIEF JUSTICE ROBERTS: Sure.

7 GENERAL VERRILLI: And I think, Mr. Chief
8 Justice, that is because, you know, it is one thing to
9 say that you're going to impose a requirement that does
10 work as much as to be the kind of obstacle that this
11 requirement -- that these requirements do, when you have
12 justification that's frankly flimsy and the American
13 Medical Association has told you was groundless. But
14 if -- if the government were able to come in -- if it
15 were us or if it were State -- were able to come in and
16 say, well, actually, this requirement is going to make a
17 difference in saving hundreds of lives, that might be a
18 burden that you would think would be acceptable, given
19 the medical benefit. That's why we think the -- the
20 test that makes sense, the best understanding of undue
21 burden, the understanding of undue burden that works
22 best for the government is the one we're suggesting.

23 But I think whichever way you look at that,
24 whether you look at it our way or whether you look at it
25 as two separate inquiries, this law, HB2, can't pass it,

1 for the reasons I said. And I think, therefore, that if
2 you do find that this law is upheld, what you will be
3 saying is that this right really only exists in theory
4 and not in fact, going forward, and that the commitments
5 that this Court made in Casey will not have been kept.

6 Thank you.

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.

8 Mr. Keller.

9 ORAL ARGUMENT OF SCOTT A. KELLER

10 ON BEHALF OF THE RESPONDENTS

11 MR. KELLER: Thank you, Mr. Chief Justice --

12 CHIEF JUSTICE ROBERTS: I suppose I
13 should -- before you get started, we'll afford you an
14 additional eight minutes. I think that's roughly --

15 MR. KELLER: An extra thank you, Mr. Chief
16 Justice, and may it please the Court:

17 Res judicata bars the facial challenges. In
18 any event, Texas acted to improve abortion safety, and
19 Planned Parenthood provides this increased standard of
20 care and has opened new ASCs. Abortion is legal and
21 accessible in Texas. All the Texas metropolitan areas
22 that have abortion clinics today will have open clinics
23 if the Court affirms, and that includes the six most
24 populous areas of Texas.

25 JUSTICE GINSBURG: Well, how many women are

1 located over 100 miles from the nearest clinic?

2 MR. KELLER: Justice Ginsburg, JA 242
3 provides that 25 percent of Texas women of reproductive
4 age are not within 100 miles of an ASC. But that would
5 not include McAllen that got as-applied relief, and it
6 would not include El Paso, where the Santa Teresa, New
7 Mexico facility is.

8 JUSTICE SOTOMAYOR: It includes --

9 JUSTICE GINSBURG: That's -- that's odd that
10 you point to the New Mexico facility. New Mexico
11 doesn't have any surgical -- ASC requirement, and it
12 doesn't have any admitting requirement. So if your
13 argument is right, then New Mexico is not an available
14 way out for Texas because Texas says to protect our
15 women, we need these things. But send them off to
16 Mexico -- New Mexico -- New Mexico where they don't get
17 it either, no admitting privileges, no ASC. And that's
18 perfectly all right.

19 Well, if that's all right for the -- the
20 women in the El Paso area, why isn't it right for the
21 rest of the women in Texas?

22 MR. KELLER: The policy set by Texas is that
23 the standard of care for abortion clinics should rise to
24 the level of ASCs for clinics, and admitting privileges
25 for doctors. Texas obviously can't tell New Mexico how

1 to regulate, but the substantial obstacle inquiry
2 examines whether there is the ability to make the
3 ultimate decision or elect the procedure. And when
4 there's --

5 JUSTICE GINSBURG: Then why should it count
6 those clinics?

7 MR. KELLER: Well, here, the evidence in the
8 record showed that this particular clinic was 1 mile
9 across the border that was still in the El Paso
10 metroplex, and women in El Paso often used that facility
11 to obtain abortions.

12 So that would go into the contextual
13 analysis of this particular as-applied challenge. This
14 doesn't go to the facial challenge, but the as-applied
15 challenge and whether women in El Paso do have access to
16 abortion.

17 In any event, over 90 percent of Texas women
18 of reproductive age live within 150 miles of an open
19 clinic as of today.

20 JUSTICE KAGAN: Mr. Keller, the -- the
21 statistics that I gleaned from the record were that
22 900,000 women live further than 150 miles from a
23 provider; 750,000, three-quarters of a million, further
24 than 200 miles. Now, that's as compared to just in
25 2012, where fewer than 100,000 lived over 150 miles, and

1 only 10,000 lived more than 200 miles away. So we're
2 going from, like, 10,000 to three-quarters of a million
3 living more than 200 miles away.

4 MR. KELLER: Well, Justice Kagan, first of
5 all, I believe the statistics at JA 242, which is their
6 expert testimony, would not account for McAllen or
7 El Paso, but in looking at the fraction of women
8 affected. And that would be the facial challenge
9 standard, that at a minimum, a large fraction of cases,
10 there would have to be invalidity even if there was an
11 undue burden.

12 The travel distance of -- even in Casey, the
13 district court found over 40 percent of Pennsylvania
14 women were going to have to travel at least one hour,
15 sometimes over three hours, and there was a 24-hour
16 waiting period. Texas reduces that waiting period to
17 two hours for traveling over 100 miles. And in Casey,
18 that was not a facial substantial obstacle.

19 Here, that relevant fraction is -- is lower.
20 And under Casey, then the facial challenge would not
21 succeed. And Petitioners have a heavy burden, and they
22 haven't shown any capacity evidence --

23 JUSTICE SOTOMAYOR: When there's a need.
24 Meaning, where are you taking an account in the
25 undue-burden analysis the value of the need being -- of

1 being imposed? Meaning, even if I grant you that in
2 some circumstances travel time is necessary because you
3 just can't get any kind of abortion clinic to go into a
4 particular area, so you might have to impose a burden
5 that might be undue in other circumstances. Where do we
6 evaluate the benefit of this burden? What -- what's the
7 need?

8 You -- you seem -- your brief seemed to be
9 telling us that there's no role for the Court to judge
10 whether there's really a health benefit to what you're
11 doing.

12 MR. KELLER: Well, there would be three
13 elements of the doctrine. There's the rational basis
14 test --

15 JUSTICE SOTOMAYOR: I'm not talking about
16 the doctrine. I'm talking about the question I asked,
17 which is, according to you, the slightest health
18 improvement is enough to impose on hundreds of thousands
19 of women -- even assuming I accept your argument, which
20 I don't, necessarily, because it's being challenged --
21 but the slightest benefit is enough to burden the lives
22 of a million women. That's your point?

23 MR. KELLER: And what -- and what Casey said
24 is the substantial obstacle test examines access to
25 abortion. Now, if a law had no health benefits,

1 presumably it would be irrational. But even their
2 expert -- and this is at JA 256 and 258 -- acknowledged
3 that some doctors do believe that there are benefits for
4 the ASC and admitting-privileges requirement --

5 JUSTICE GINSBURG: What -- what is the
6 benefit of the medical, the two pills that you take,
7 what is the benefit of having an ambulatory surgical
8 center to take two pills when there's no -- no surgical
9 procedure at all involved?

10 MR. KELLER: Two responses, Justice
11 Ginsburg. First, the complication rates are greater.
12 When there's a complication rate from a drug-induced
13 abortion, then a surgical abortion is needed as a
14 follow-up.

15 And the first lawsuit --

16 JUSTICE GINSBURG: On that complication,
17 that complication is likely to arise near the women's
18 home, much more likely to arise near her home, which the
19 30 miles has nothing to do with.

20 MR. KELLER: Well, first of all, the two
21 travel distances, that was about the drug protocol.
22 That's a different part of the bill. That was in the
23 Petitioners' first lawsuit, and they have not raised any
24 challenge to that in this lawsuit.

25 In any event, in --

1 JUSTICE GINSBURG: I'm not -- I'm not
2 talking about the prior lawsuit; I'm talking about this
3 lawsuit. You need to have access to a hospital within
4 30 miles. 30 miles of what? 30 miles of the surgical
5 center when the woman lives at a much greater distance?
6 And if she's going to go to any hospital, it will be in
7 her local community, not near the surgical center.

8 MR. KELLER: Of course, most abortions are
9 surgical abortions in the State.

10 JUSTICE GINSBURG: Well, I'm asking just
11 about the medical.

12 MR. KELLER: That's right. And also --

13 JUSTICE GINSBURG: And -- and just it's -- I
14 can't imagine. What is the benefit of having a woman
15 take those pills in an ambulatory surgical center when
16 there is no surgery involved?

17 MR. KELLER: Well, there would be surgery in
18 a complication. And all abortion clinics in Texas
19 perform surgical abortions, and that's why Petitioners
20 probably didn't defend that aspect of the judgment.

21 JUSTICE GINSBURG: If it is a complication,
22 it is not going to occur on the spot. I mean, you have
23 to concede that in -- in the case of the medical
24 abortion, the complication generally arises after the
25 woman is back at home. And then the nearest hospital

1 has nothing to do with the surgical center.

2 MR. KELLER: Although when the significant
3 majority of women are living within 50 miles of the
4 clinic, in most situations they are going to be in the
5 facility. And it is beneficial to have continuity of
6 care, to check for clinical competence, to prevent
7 miscommunication and patient abandonment to have the
8 admitting-privileges requirement.

9 In any event, the facial challenge is
10 certainly barred by res judicata. It was litigated --

11 JUSTICE KENNEDY: Before you get -- is it --
12 is the underlying premise of -- of your argument,
13 Mr. Keller, and of the State's position, that the
14 thrust, the impetus, the effect of this law is to
15 increase surgical abortions as distinct from medical
16 abortions, and that that is within the State's authority
17 to do? Because my reading indicated that medical
18 abortions are up nationwide but down significantly in
19 Texas.

20 MR. KELLER: It would certainly be
21 permissible to regulate both surgical and -- and
22 drug-induced abortions, and in drug-induced abortions,
23 since there are greater complications.

24 In the first lawsuit, Fifth Circuit noted
25 expert testimony. That was a 6 percent rate, which --

1 JUSTICE KENNEDY: But I thought an
2 underlying theme, or at least an underlying factual
3 demonstration, is that this law has really increased the
4 number of surgical procedures as opposed to medical
5 procedures, and that this may not be medically wise.

6 MR. KELLER: Yeah. Insofar as --

7 JUSTICE KENNEDY: You might say that this is
8 within the authority of the State to do, but --

9 MR. KELLER: Given the higher --

10 JUSTICE KENNEDY: And I want to know what
11 your position is on that.

12 MR. KELLER: And Justice Kennedy, given the
13 greater complication rates from drug-induced abortions,
14 the legislature would be permitted to act in that way.

15 But in any event, Petitioners have not
16 challenged that particular part of the district court's
17 holding that gave them as-applied relief on the
18 drug-induced abortion part. In the Fifth Circuit, they
19 haven't raised that.

20 What they're trying to do on the effects
21 prong is say that the remaining clinics will lack
22 capacity. But the Fifth Circuit correctly noted that
23 there is no capacity evidence in the record. They
24 didn't even try to take discovery from the
25 non-Petitioner clinics.

1 And indeed, Grossman's ipse dixit was in
2 fact ipse dixit. What he did is he looked at the number
3 of abortions and percentages that were being performed.
4 And a year earlier, ASCs had actually performed more
5 abortions, and so the inference that they were at
6 capacity cannot be drawn. And --

7 CHIEF JUSTICE ROBERTS: What -- what
8 evidence would you have put in on the capacity issue if
9 you had been afforded that opportunity?

10 MR. KELLER: Well --

11 CHIEF JUSTICE ROBERTS: Evidence that would
12 rebut the statistically significant showing on the other
13 side about capacity, and also the circumstantial
14 evidence about the timing of the -- of the closures.

15 MR. KELLER: Well, this is not in the
16 record, but in Petitioners' first lawsuit -- this is
17 Exhibit K -- to their application to vacate the stay in
18 this Court in the first lawsuit, the Abbott litigation,
19 they went clinic by clinic in a chart -- excuse me --
20 and they tried to estimate the number of abortions that
21 could be performed in those facilities. The district
22 court didn't even make a fact-finding there.

23 But the Houston Planned Parenthood ASC they
24 estimated could perform 9,000 abortions annually.
25 9,000. That's 175 a week is what their chart says.

1 JUSTICE KENNEDY: Before -- before the Act?

2 MR. KELLER: Well, yes, yes, because the
3 Houston Planned -- Planned Parenthood operates five of
4 the nine ASCs. Planned Parenthood is -- is not in this
5 lawsuit. They were in the first lawsuit. They have
6 complied with the law. They have doctors with admitting
7 privileges, and they have facilities in each of the five
8 most populous Texas cities.

9 And so if one ASC can perform 9,000
10 abortions annually, and there are going to be at least
11 eight other ASCs in Texas, plus the tenth facility, the
12 McCallen facility, that obtained as-applied relief, it
13 does not stretch credulity to believe that those
14 remaining facilities would suffice to meet the demand
15 for abortions.

16 JUSTICE BREYER: And you asked to put in
17 this evidence, and then the court said no, we will not
18 let you put in the evidence?

19 MR. KELLER: We didn't put in the evidence
20 because Petitioners bore the burden --

21 JUSTICE BREYER: I asked, did you ask to put
22 in this evidence?

23 MR. KELLER: No.

24 JUSTICE BREYER: No. Thank you very much.
25 Okay.

1 I'd like to go back to the -- the question
2 that Justice Ginsburg was asking, which is about what is
3 the benefit of this procedure.

4 There are two laws. I am focusing on the
5 first law. The first law says that a doctor at the
6 abortion clinic must have admitting privileges in a
7 hospital 30 miles within that -- nearby, right?

8 MR. KELLER: Correct.

9 JUSTICE BREYER: Okay. Prior to that law,
10 the law was that the clinic had to have a working
11 arrangement to transfer such a patient, correct? I'm
12 just reading it from this.

13 MR. KELLER: That's correct.

14 JUSTICE BREYER: Okay. So I want to know,
15 go back in time to the period before the new law was
16 passed, where in the record will I find evidence of
17 women who had complications, who could not get to a
18 hospital, even though there was a working arrangement
19 for admission, but now they could get to a hospital
20 because the doctor himself has to have admitting
21 privileges? Which were the women? On what page does it
22 tell me their names, what the complications were, and
23 why that happened?

24 MR. KELLER: Justice Breyer, that is not in
25 the record.

1 JUSTICE BREYER: But so --

2 MR. KELLER: What I'm --

3 JUSTICE BREYER: -- Judge Posner then seems
4 to be correct where he says he could find in the entire
5 nation, in his opinion, only one arguable example of
6 such a thing, and he's not certain that even that one is
7 correct.

8 So what is the benefit to the woman of a
9 procedure that is going to cure a problem of which there
10 is not one single instance in the nation, though perhaps
11 there is one, but not in Texas.

12 (Laughter.)

13 MR. KELLER: Justice Breyer, the National
14 Abortion Federation previously recommended that women
15 use abortion doctors --

16 JUSTICE BREYER: I didn't ask that. I'm
17 sure there are people who had all kinds of reasons that
18 would like to have this and so forth. And I'm not --
19 I'm just asking you, where we have a judicial duty to
20 say whether this is an undue burden upon the woman who
21 wants the abortion, there are two parts: Is she
22 burdened and what is the benefit?

23 And now on the first one, I've asked you to
24 give a single example of an instance where there was a
25 benefit, and you say, I think quite honestly, there is

1 no such burden.

2 So let's turn to the second. The second
3 one, according to the amicus briefs here, which I guess
4 I could validate, that even without the surgical center,
5 leave it out, there are risks quite correct. Those
6 risks are roughly the same as the risks that you have in
7 a dentist office when you have some surgery, where you
8 don't have an ambulatory surgical center. There are 28
9 times less than a risk of a colonoscopy, where you don't
10 have ambulatory surgical center. There are like
11 hundreds of times less -- you've seen these briefs.
12 Okay. So I read them, and you read them.

13 And so what is the benefit here to giving, I
14 mean, the woman, her risk, I can't say it's zero here,
15 this ambulatory surgical center when the risk is
16 minuscule compared to common procedures that women run
17 every day in other areas without ambulatory surgical
18 centers?

19 MR. KELLER: That has never been the test
20 under Casey about substantial obstacle. And this Court
21 in Simopoulos, even before Casey upheld an ASC
22 requirement, and there -- Virginia did not require that
23 brain surgery be performed in a hospital or an ASC.
24 That's at 5043 of the Simopoulos oral argument
25 transcript. It's because in looking at the laws, it's

1 whether the legislature has a legitimate purpose in
2 acting. Legislatures react --

3 JUSTICE SOTOMAYOR: That's interesting.

4 JUSTICE KAGAN: Well, can the legislature
5 say anything, General? I mean, if the legislature says
6 we have a -- a health-related abortion regulation here,
7 we've looked around the country and we think that there
8 are ten great hospitals in the country, you know,
9 Massachusetts General, Brigham and Women's, and we're
10 going to make all our abortion facilities conform to the
11 standards of those hospitals, and that will -- you know,
12 that will increase medical care. Now, it's true we
13 don't make anybody else doing any kind -- other kind of
14 procedure conform to those standards, but we think it
15 will increase health benefits if abortion facilities
16 conform to them. Would that be all right?

17 MR. KELLER: Under this Court's precedent,
18 abortion can be treated differently. That's Simopoulos.
19 That's Mazurek. And let's --

20 JUSTICE SOTOMAYOR: Well, wait a minute --

21 JUSTICE KAGAN: So every abortion facility
22 has to hit the standards of MGH. That would be all
23 right?

24 MR. KELLER: Well, there would have to be
25 medical evidence. It is at a minimum disputed. In

1 here, their experts have conceded that doctors believe
2 this -- this is precisely where there's a medical
3 disagreement, even if you don't accept our medical
4 testimony, although it was admitted into the record.

5 JUSTICE KAGAN: I'm sure that there's
6 medical evidence that if every hospital, if every
7 facility was as good as Massachusetts General, they
8 would be better facilities. I'm sure that you could
9 find doctors to say that, because MGH, it's a great
10 hospital. But that would be okay, even though it's not
11 applied to any other kind of facility doing any other
12 kind of procedure, even though we know that liposuction
13 is 30 times more dangerous, yet doesn't have the same
14 kinds of requirements.

15 MR. KELLER: And that was the holding in
16 Simopoulos. And in Mazurek, the Court --

17 JUSTICE SOTOMAYOR: Well, do you think --
18 would you put --

19 JUSTICE ALITO: Would it not be the case
20 that -- would it not be the case that a State could
21 increase the -- the standard of care as high as it wants
22 so long as there's not an -- an undue burden on the
23 women seeking abortion? So, you know, if they could --
24 if they could increase the standard of care up to the
25 very highest anywhere in the country and it wouldn't be

1 a burden on the women, well, that would be a benefit to
2 them. Would there be anything unconstitutional about
3 that?

4 MR. KELLER: No. Provided that women do --
5 are able to make the ultimate decision to elect the
6 procedure.

7 JUSTICE KENNEDY: But doesn't that show that
8 the undue-burden test is weighed against what the
9 State's interest is?

10 MR. KELLER: Justice Kennedy --

11 JUSTICE KENNEDY: I mean, are they -- are
12 they -- are these two completely discrete analytical
13 categories, undue burden, and we don't look at the
14 State's interest?

15 MR. KELLER: What Casey noted was that the
16 undue-burden test is, is there a purpose or an effect of
17 the substantial obstacle to access? And that's a
18 question about access. As to whether what the State's
19 interest would be, that would be going to a rational
20 basis review or maybe a purpose-based analysis. But you
21 need the clearest proof under the Court's general
22 doctrine about unconstitutional purpose. To infer that
23 there is an unconstitutional purpose when there is a
24 legitimate interest in promoting patient health, which
25 is what Texas did here -- even Roe v. Wade said that

1 States can ensure maximum safety for patients.

2 JUSTICE GINSBURG: But what is the
3 legitimate interest in protecting their health? What
4 evidence is there that under the prior law, the prior
5 law was not sufficiently protective of the women's
6 health? As I understand it, this is one of the
7 lowest-risk procedures, and you give a horrible from
8 Pennsylvania, but absolutely nothing from Texas. As far
9 as we know, this is among the most safe, the least risk
10 procedures, an early-stage abortion.

11 So what was -- what was the problem that the
12 legislature was responding to that it needed to improve
13 the facilities for women's health?

14 MR. KELLER: In Petitioner's first lawsuit,
15 Planned Parenthood admitted that over 210 women annually
16 are hospitalized because of abortion complications.
17 Here at JA 266 --

18 JUSTICE GINSBURG: As compared to
19 childbirth, many, many -- much riskier procedure, is it
20 not?

21 MR. KELLER: Well, the American Center for
22 Law and Justice and Former Abortion Providers' amicus
23 briefs dispute that. But regardless, there is
24 evidence --

25 JUSTICE GINSBURG: Is there really any

1 dispute that childbirth --

2 (Laughter.)

3 JUSTICE GINSBURG: -- is a much riskier
4 procedure than an early stage abortion?

5 MR. KELLER: Justice Ginsburg, those amicus
6 briefs point out what when you look at record linkage
7 statistic, instead of complication reporting, there may
8 be a difference. And the reason why reporting is
9 important is there's evidence in the record here that
10 abortion complications are underreported. That's at JA
11 844 and 870 to 72. In fact, Petitioner.

12 JUSTICE SOTOMAYOR: By hospitals?
13 Underreported -- most of the complications you're
14 talking about were reported at hospitals, correct?

15 Yes, there is some evidence of not reporting
16 other things outside the hospital, but you know the
17 number of -- hospitals are accurately reporting.

18 MR. KELLER: Well, abortion clinics are --
19 have to report complications in Texas. And Petitioner
20 Whole Woman's Health -- and this is at JA 606-700 --

21 JUSTICE SOTOMAYOR: Complications within
22 their clinic?

23 MR. KELLER: That's right. And in JA
24 606-700, Petitioner Whole Woman's Health --

25 JUSTICE SOTOMAYOR: What's the percentage of

1 210 from 70,000? My math is pretty horrible. It's
2 pretty small.

3 MR. KELLER: And -- and the statistic at JA
4 266 is it is lower than 1 percent. However, when there
5 are two to three women --

6 JUSTICE SOTOMAYOR: I don't mean to -- to
7 negate that one should try to avoid injury to anyone,
8 and -- and don't take my question as that, but there are
9 people who die from complications from aspirin. May be
10 unusual, but there's a certain percentage that do that.
11 Yet, we don't require that people take aspirins in ASC
12 centers or in hospitals.

13 MR. KELLER: But in examining --

14 JUSTICE SOTOMAYOR: There has to be some tie
15 between the benefit and the burden, doesn't there?

16 MR. KELLER: In examining not effect, but
17 the purpose. The constitutional analysis would be did
18 the Texas legislature have an invalid purpose? And if
19 you --

20 JUSTICE SOTOMAYOR: Well, don't you think
21 that you can read that from the fact that there are so
22 many other medical treatments whose complication rates
23 are so disproportionately higher, and the legislature is
24 only targeting abortion when there is nothing about the
25 figures before it that show a risk so unusual that it

1 needs greater attention?

2 MR. KELLER: But that would have been
3 Simopoulos; it would have been Mazurek. And this is why
4 Petitioners are trying to upset the balance that was
5 struck in Casey.

6 JUSTICE BREYER: I don't see where this fits
7 in, I mean, to the argument. I -- I don't question
8 their purpose. I won't question their purpose.

9 MR. KELLER: Good. Thank you, Justice
10 Breyer.

11 (Laughter.)

12 JUSTICE BREYER: But the -- the -- what
13 their purpose is, that they're worried about these
14 complications and they want to make life safer for the
15 women. All right? Let's take that as the purpose.

16 You said there aren't very many
17 complications. Now, would you say if you reduce the
18 number of clinics, as has been argued -- maybe it isn't
19 exactly that, but that -- and you -- you suddenly have
20 at least 10,000 -- maybe a few less, and maybe a few
21 more -- women who have to travel 150 miles to get their
22 abortion -- maybe more, maybe stay overnight, maybe try
23 to scrape together the money, you understand the
24 argument -- are there going to be more women or fewer
25 women who die of complications due to an effort to

1 create an abortion?

2 I mean, you read the briefs, and you've read
3 the same articles I have. And of course the argument is
4 if you lead to self-induced abortion, you will find many
5 more women dying. So if the concern is this tiny risk
6 of dying through a complication in a clinic, is this a
7 remedy that will in fact achieve the legislature's
8 health-saving purpose?

9 MR. KELLER: Justice Breyer, about
10 self-induced abortion, the evidence in the record on
11 that were two points of testimony, both from McAllen
12 where Petitioners prevailed, as-applied challenges could
13 be brought in areas -- for instance, if there could be
14 shown a substantial obstacle based on travel distance,
15 the four clinics that closed in West Texas between El
16 Paso and San Antonio, all those closed before the
17 admitting-privileges requirement took effect. They were
18 all Planned Parenthood facilities.

19 In Petitioners' first --

20 JUSTICE GINSBURG: Keller -- Keller --

21 JUSTICE BREYER: I'd like to hear what he
22 says.

23 JUSTICE GINSBURG: As-applied challenge is a
24 real problem with that, because suppose you bring in
25 that as-applied challenge and you're successful. You

1 can't have a creation of an ambulatory surgical center
2 on the spot.

3 I mean, these -- these -- once -- once these
4 facilities are closed, they're closed, and they can't
5 start up tomorrow. So how -- the as-applied
6 challenge -- I mean, the woman's problem would be long
7 over before this clinic, the kind of clinic they had
8 before, could be restarted.

9 MR. KELLER: Justice Ginsburg, the McAllen
10 clinic reopened, and as Justice Kagan mentioned, clinics
11 did reopen. The Lubbock facility, though, which is one
12 of the facilities in West Texas, in Petitioners' first
13 lawsuit they told this Court in their application that
14 that clinic was going to close regardless.

15 And seven of the eight clinics that closed
16 before the admitting-privileges requirement took effect,
17 and went from 41 to 33, seven of those eight were
18 Planned Parenthood clinics. Planned Parenthood is
19 complying with the law and providing that increased
20 standard of care.

21 And also, the eleven clinics that closed the
22 day that the admitting-privileges requirement took
23 effect, when it went from 33 to 22, I don't believe six
24 of those clinics can be deemed to have ceased performing
25 abortions because of that requirement. The Lubbock

1 facility was going to close anyway. Killeen had
2 admitting privileges. That's JA 401.

3 JUSTICE GINSBURG: There was a
4 stipulation -- there was a stipulation that is "No
5 currently-licensed abortion facility meets the ASC
6 requirements. Each will be prohibited from performing
7 abortions after the day the law goes into effect."
8 That's a stipulation, not a question of what evidence
9 there was for.

10 Texas stipulated that no currently-licensed
11 facility meets ASC requirements, and each will be
12 prohibited from performing abortions.

13 MR. KELLER: And that would go to the ASC
14 requirement as opposed to the facial challenge of the
15 admitting-privileges requirement. But four of the
16 facilities that reopened -- four facilities reopened of
17 those eleven when the admitting-privileges requirement
18 went into effect. That was Dallas, two at Ft. Worth,
19 one in Austin. That's JA 131, 715, 1111 and 1436. Two
20 of those were ASCs.

21 Now, when it comes to the count of ASCs,
22 there are nine ASCs performing abortion today in Texas.
23 Three opened up after House Bill 2 was passed. So in
24 examining the facial challenge to that requirement, when
25 ASCs exist --

1 JUSTICE SOTOMAYOR: Can I ask: Were they
2 opened as a result of the law, or were they planned to
3 be opened before the law went into effect? Because I
4 think that makes a difference to me if they were planned
5 to be opened. It takes quite a while to dig up the
6 money, get the investors, buy the land, do the building.
7 It seems to me that they must have been planned for a
8 while. And if they were, it was because there was a
9 need independent of the number of abortions.

10 MR. KELLER: Well --

11 JUSTICE SOTOMAYOR: In other words, it's
12 fortuitous that they've come into existence, but it was
13 in -- their need was not there -- was independent of the
14 reduced number of facilities elsewhere.

15 MR. KELLER: Legislature provided 13 months
16 to come into compliance. In addition, you could lease
17 space. Texas has over 430 -- there are 433 general ASCs
18 in Texas at the time of trial.

19 JUSTICE SOTOMAYOR: But most of them don't
20 choose to provide abortions.

21 MR. KELLER: That's correct. Of course,
22 space could be leased in those.

23 JUSTICE SOTOMAYOR: So what you don't know
24 is what -- do you have enough resources to open up an
25 ASC if you're going to do abortions? Are you going to

1 get enough developers to -- to invest in your work?

2 MR. KELLER: Yeah. The point being that
3 there are going to be at least ten clinics --

4 JUSTICE SOTOMAYOR: Can I ask about McAllen?
5 There was testimony in the record that at least four
6 doctors had -- from that spot had asked for admitting
7 privileges. Well, the Fifth Circuit's remedy only
8 provided for one doctor, Dr. Lynn, who's past retirement
9 age, to be the only doctor performing abortions in that
10 clinic.

11 Now, if the clinic had -- I don't know how
12 many it had, but it had at least four people before --
13 it seems rather callous to say as a remedy that we're
14 going to make that one doctor do the work of four, or
15 maybe more doctors who didn't get admitting privileges.
16 Why is even the Fifth Circuit's remedy reasonable?

17 MR. KELLER: Because, Justice Sotomayor,
18 that was the only named plaintiff for the as-applied --

19 JUSTICE SOTOMAYOR: But that -- but -- if --
20 yes. As applied, the A -- ASC law is affecting this
21 clinic because it can't get its doctors certified. So
22 why does it require a named plaintiff to relieve that
23 clinic of the obligation of going without admitting
24 privileges?

25 MR. KELLER: Well, that wasn't the only one

1 of the four doctors that joined this lawsuit, because
2 most of the doctors and clinics in Texas are not part of
3 this lawsuit --

4 JUSTICE SOTOMAYOR: But you just lift the
5 requirement because you know that it's the only clinic
6 in the area.

7 MR. KELLER: Well --

8 JUSTICE SOTOMAYOR: So if any doctor who's
9 licensed appropriately can get admitting privileges,
10 they should be permitted to work in that clinic.

11 Why does Dr. Lynn have to become an
12 indentured slave to ensure that women in her area are
13 provided with their fundamental right to choose?

14 MR. KELLER: Justice Sotomayor, it would not
15 be an indentured situation. If there were new facts
16 that came into being that that doctor --

17 JUSTICE SOTOMAYOR: But she wants to
18 leave --

19 MR. KELLER: -- didn't perform abortion,
20 then another doctor could bring in a future as-applied
21 challenge --

22 JUSTICE SOTOMAYOR: All right. Counsel --

23 JUSTICE KAGAN: General, could -- could I
24 ask -- could I go back to a question that -- something
25 that you said earlier? And tell me if I'm misquoting

1 you. You said that as the law is now, under your
2 interpretation of it, Texas is allowed to set much, much
3 higher medical standards, whether it has to do with the
4 personnel or procedures or the facilities themselves,
5 higher medical standards, including much higher medical
6 standards for abortion facilities than for facilities
7 that do any other kind of medical work, even much more
8 risky medical work. And you said that that was your
9 understanding of the law; am I right?

10 MR. KELLER: Correct, in this Court's -- in
11 Simopoulos.

12 JUSTICE KAGAN: And I guess I just want to
13 know why would Texas do that?

14 (Laughter.)

15 MR. KELLER: When there are complications
16 from abortion that's in the record, Texas can enact laws
17 to promote safety.

18 JUSTICE KAGAN: No, I know, but -- but the
19 assumption of the question, and I think you haven't
20 challenged this assumption, is that there are many
21 procedures that are much higher risk: Colonoscopies,
22 liposuctions, we could go on and on. And -- and you're
23 saying, that's okay, we get to set much higher standards
24 for abortion. And I just want to know why that is.

25 MR. KELLER: Justice Kagan, this bill was

1 passed in the wake of the Kermit Gosnell scandal that
2 prompted Texas and many other States to reexamine their
3 abortion regulations.

4 JUSTICE KAGAN: But, of course, the -- I
5 mean, Texas's own regulations actually have made
6 abortion facilities such that that can never happen,
7 because you have continual inspections, I mean, to your
8 credit. So that was really not a problem in Texas,
9 having a kind of rogue outfit there. Texas has taken
10 actions to prevent that.

11 So, again, I just sort of -- I'm left
12 wondering, given this baseline of regulation that
13 prevents rogue outfits of -- like that, why it is that
14 Texas would make this choice. And you say you're
15 allowed to make this choice, and we can argue about
16 that. I just want to know why Texas would make it.

17 MR. KELLER: I think the amicus brief for
18 the 121 Texas legislators that canvasses the medical
19 evidence and canvasses statements confirms that that --
20 that there were complications that these laws do have
21 benefits. And even the bill opponents said --

22 JUSTICE ALITO: Isn't it true --

23 JUSTICE KAGAN: Are you -- are you in --
24 you're not really contesting that there are greater
25 complications in abortion facilities than there are with

1 a great deal of medical procedures that do -- that are
2 not subject to the same standard of regulation.

3 MR. KELLER: Yeah, brain surgery, for
4 instance, just like Simopoulos, would almost certainly
5 have -- it -- it would have higher risk of complication.
6 But the point is to --

7 JUSTICE ALITO: General, as to -- as to
8 rogue facilities, which Justice Kagan just mentioned,
9 one of the amicus briefs cites instance after instance
10 where Whole Woman's facilities have been cited for
11 really appalling violations when they were inspected:
12 Holes in the floor where -- where rats could come in,
13 the lack of any equipment to adequately sterilize
14 instruments. Is that not the case?

15 MR. KELLER: Stories similar to that are
16 also raised in the 121 Texas legislators' amicus briefs.

17 JUSTICE SOTOMAYOR: But, I'm sorry --

18 JUSTICE ALITO: These are not stories --

19 CHIEF JUSTICE ROBERTS: Justice Alito.

20 JUSTICE ALITO: These are, as I understand
21 it, actual reports of -- of inspections of those
22 facilities.

23 MR. KELLER: The amicus briefs do discuss
24 that, and the complications from Whole Woman's Health
25 were underreported to the State. That's JA 606 to 700.

1 JUSTICE GINSBURG: Random -- Texas, under
2 the prior law, has the right to make random inspections.
3 Was -- the problem in Pennsylvania was this filthy
4 clinic hadn't been looked at by anyone from the State in
5 16 years. But Texas can go into any one of these
6 clinics and immediately -- immediately spots a violation?
7 It says you can't operate till you come up to speed.

8 So Texas has had, as Justice Kagan pointed
9 out, its own mechanism for preventing that kind of thing
10 from happening.

11 MR. KELLER: Texas did have existing
12 regulations, but increasing the standard of care is
13 valid, particularly not only in light of --

14 JUSTICE SOTOMAYOR: It's valid only if it's
15 taking care of a real problem.

16 MR. KELLER: And there were -- the --
17 abortion complications and underreported questions --

18 JUSTICE SOTOMAYOR: Well, no, no, no. A
19 real problem, meaning, Gosnell, the governor of
20 Pennsylvania, said was a regulatory failure. And only
21 in that, not -- this clinic had not been inspected for
22 15 years. He -- the doctor was fabricating his reports.
23 That could happen almost in any setting. Anyone who
24 intends to break the law is going to break the law,
25 whatever the regulatory rules are.

1 You're going to have doctors, as happened
2 pre our laws, who were performing abortions without
3 permission in their offices or without licenses. And I
4 don't want to suggest that we should presume that's
5 going to happen, but it will happen.

6 MR. KELLER: The constitutional standard for
7 whether a State can make abortion safer can't be that it
8 can only prevent the Gosnell situation, and there are
9 complications.

10 JUSTICE SOTOMAYOR: Well, but -- yeah,
11 but -- but you have to see, as Justice Breyer asked you
12 earlier, why are the problems? Isn't this a
13 self-created problem? What happened in Texas
14 independent of Gosnell that raised the Gosnell-like
15 situation in Texas that made --

16 JUSTICE ALITO: Gosnell.

17 JUSTICE SOTOMAYOR: -- the legislature so
18 concerned after so many years about taking care of this
19 greater risk in abortions, as opposed to all the other
20 procedures that are performed in non-ASC facilities?

21 MR. KELLER: Because there are complications
22 in abortion, and this was a top --

23 JUSTICE SOTOMAYOR: But there's
24 complications in colonoscopies, and colonoscopies are,
25 what, 15 times --

1 JUSTICE BREYER: 28.

2 JUSTICE SOTOMAYOR: 28. Justice Breyer just
3 corrected me.

4 (Laughter.)

5 JUSTICE SOTOMAYOR: 28 percent higher. I
6 mean --

7 MR. KELLER: But legislatures react to
8 topics that are of public concern. In Gonzales, the
9 Court noted after Dr. Haskell's procedure for partial
10 birth abortion became more of a nationwide concern,
11 States reacted. When the legislature sees that there's
12 a problem, and maybe that there wouldn't rise to the
13 same level of a Gosnell problem, but the legislature can
14 still act to make abortion safer, which is precisely
15 what Texas did here.

16 If I can address my friend's contention of
17 the record as to what clinics closed preemptively.
18 There is evidence in the record that Killeen, McCallen
19 and El Paso, three clinics, closed preemptively. They
20 brought as-applied challenges in McCallen and prevailed.
21 They brought their as-applied challenge in El Paso and
22 did not prevail. And the Killeen clinic did not seek
23 as-applied relief.

24 Indeed, if there are any future concerns,
25 as-applied challenges can be raised. For instance, the

1 wide swath of area in West Texas that does not have an
2 abortion clinic today, there was no as-applied relief
3 sought in this case. And if there were -- if it would
4 turn out that there were going to be an issue in that
5 area, a future as-applied challenge could address that
6 concern.

7 JUSTICE GINSBURG: Well, that's the problem.
8 Once a clinic closes -- you said McCallen reopened, but
9 that was very swift. Once a clinic closes, equipment
10 are gone, the doctors are gone, you can't reinstate it
11 tomorrow. It won't be there. There will be no remedy
12 for that woman who succeeds in the as-applied challenge.

13 MR. KELLER: Mr. Chief Justice, my time has
14 expired, if may address it.

15 CHIEF JUSTICE ROBERTS: Sure.

16 MR. KELLER: Except even there, the clinic
17 was not just closed for a single day. It was closed for
18 a longer period of time. And there was an El Paso
19 clinic that actually reopened also months later. So an
20 as-applied challenge could allow a clinic, if an undue
21 burden, if a substantial obstacle were shown because of
22 driving distances or capacity in the future, in that
23 discrete instance, but we're in this facial challenge
24 posture, Petitioners bear the heavy burden to show at
25 least a large --

1 JUSTICE SOTOMAYOR: Why isn't that
2 self-evident in any area that's --

3 JUSTICE KENNEDY: Sonia is off.

4 JUSTICE SOTOMAYOR: This area of western
5 Texas, it's as big as California. No? Bigger?

6 MR. KELLER: I'm not sure about California,
7 but it certainly is a large size.

8 JUSTICE SOTOMAYOR: Huge area.

9 MR. KELLER: Absolutely.

10 JUSTICE SOTOMAYOR: Why isn't it
11 self-evident if you have a law that says you can only be
12 an ACS provider, and who's going to come in and say, I
13 can't be an ACS provider, but it's an undue burden on
14 me, or it's an undue burden that's self-evident on the
15 women in that area?

16 MR. KELLER: Well, the right is possessed by
17 the women. The clinics and doctors can bring
18 challenges.

19 JUSTICE SOTOMAYOR: Exactly. So why don't
20 we take this lawsuit as those women saying just that?

21 MR. KELLER: Because there was no --

22 JUSTICE SOTOMAYOR: You can't have a law
23 that has marginal, if any, medical benefit be applied to
24 this procedure anywhere where there's an undue burden on
25 people -- on women.

1 MR. KELLER: Planned Parenthood had four
2 clinics in West Texas. They all closed before any part
3 of HB2 was actually put into effect. They could have
4 brought an as-applied challenge. They didn't. Planned
5 Parenthood did not join this lawsuit. They were part of
6 the first lawsuit. And indeed, the facial challenges
7 here are barred by res judicata and there are
8 significant record gaps.

9 JUSTICE GINSBURG: May I ask you one
10 question? You earlier in your argument, you were
11 quoting how many women are within a reasonable range of
12 the clinic. But don't we know from Casey that the focus
13 must be on the ones who are burdened and not the ones
14 who aren't burdened? There -- there is -- and the
15 district court said, you know, this is not a problem for
16 women who have means to travel, that those women will
17 have access to abortion, anyway. So -- in Texas or out
18 of Texas.

19 So Casey was quite precise in this, when
20 it's talking about husbands and notification. You don't
21 look to all the women who are getting abortions. You
22 look only to the -- to the -- the women for whom this is
23 a problem. And so the only women we would be looking at
24 is not all of the women who are -- who live in Austin or
25 in Dallas, but the women who have the problem who don't

1 live near a clinic.

2 MR. KELLER: Well --

3 JUSTICE GINSBURG: Isn't that the clear
4 message of Casey and the husband notification --

5 MR. KELLER: When a law --

6 JUSTICE GINSBURG: -- exception?

7 MR. KELLER: When a law is regulating women,
8 as it would in the spousal-notification provision, that
9 might be different. But when we're talking about doctor
10 and clinic regulations, when the law is going to have a
11 relevant effect, is going to be for every doctor and
12 every clinic, which is precisely why the Fifth Circuit
13 noted that that was the proper denominator, all women of
14 Texas reproductive age. And Petitioners have not
15 challenged that denominator holding in their opening
16 brief.

17 JUSTICE GINSBURG: But this is about -- what
18 it's about is that a woman has a fundamental right to
19 make this choice for herself. That's what we sought as
20 the starting premise. And then this is certainly
21 about -- Casey -- Casey made that plain, that it -- the
22 focus is on the woman, and it has to be on the segment
23 of women who are affected.

24 MR. KELLER: Yes. And -- and the right held
25 by women to make that ultimate decision is not burdened

1 in, at a minimum, a large fraction of cases in Texas,
2 when each metropolitan area will still have a clinic,
3 even after the law goes into effect, and future
4 as-applied challenges could address any possible
5 concerns about West Texas or otherwise.

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.

7 MR. KELLER: Thank you, Mr. Chief Justice.

8 CHIEF JUSTICE ROBERTS: Ms. Toti, you have
9 five minutes remaining.

10 REBUTTAL ARGUMENT OF STEPHANIE TOTI

11 ON BEHALF OF THE PETITIONERS

12 MS. TOTI: Thank you.

13 A few brief points. First, the record cites
14 from earlier evidence that HB2 caused clinics to close
15 in Texas. The plaintiffs testified that HB2 caused
16 clinics in Killeen, Austin, Beaumont, McAllen, and El
17 Paso to close, and that testimony is at JA 339, 715, 722
18 and 731.

19 Respondents stipulated at JA 183 and 184
20 that the ASC requirement would cause any licensed
21 abortion facility still operating on the day it took
22 effect to close.

23 Plaintiffs' Exhibit 28 at page 2, which is
24 not in the Joint Appendix but was admitted in the record
25 at 2808 and 09, demonstrates that for the five years

1 prior to the enactment of HB2, the number of abortion
2 clinics in Texas remained fairly constant.

3 And finally, at JA 229 and 1430, there is --
4 at 229, testimony from Dr. Grossman, and at 439, our
5 response to the Fifth Circuit's directive showing that
6 11 clinics closed on the day that the
7 admitting-privileges requirement was --

8 CHIEF JUSTICE ROBERTS: And that -- that's
9 the -- the last evidence was from Dr. Grossman?

10 MS. TOTI: JA 229 is from Dr. Grossman's.

11 CHIEF JUSTICE ROBERTS: At page 232, he
12 said, "I am not here offering any opinion on the cause
13 of the decline in the number of abortion facilities."

14 MS. TOTI: That's correct. Dr. Grossman did
15 not offer an opinion on that. But his testimony
16 supplies the fact, from which the district court drew
17 the inference, that 11 clinics closed on the day that
18 the State first enforced the admitting-privileges
19 requirement. The district court referred from that fact
20 that enforcement was the cause of the closure, and
21 Respondents offered no alternative explanation for why
22 there would be such a precipitous drop in the number of
23 abortion --

24 JUSTICE SOTOMAYOR: Can you tell me why
25 Planned Parenthood left the western area? The General

1 says that Planned Parenthood -- that ASC and the -- and
2 the admitting privileges had nothing to do with the
3 closures in the western area of Texas.

4 MS. TOTI: Well, the -- the two clinics in
5 El Paso, which is in -- in -- in that western region of
6 Texas that would be forced to close as a result of these
7 requirements, are not operated by Planned Parenthood.
8 Planned Parenthood doesn't have any clinics in Texas.
9 The plaintiff in this case and another independent
10 provider operate those clinics.

11 JUSTICE ALITO: And as to the -- the clinics
12 where there is direct evidence, does the direct evidence
13 show whether the cause was the admitting-privileges
14 requirement or the ASC requirement or both?

15 MS. TOTI: It -- it -- with respect to -- it
16 does specify. And some specify the admitting-privileges
17 requirement, and some specify the ASC requirement. And
18 some specify both.

19 So with respect to whether abortion can be
20 regulated differently than other medical procedures,
21 abortion can certainly be treated differently, if there
22 is a reason to treat it differently. But Texas may not
23 impose unnecessary medical regulations that burden
24 women's access to abortion.

25 In Simopoulos, the Court found that the

1 regulations of second-trimester procedures at issue in
2 that case were consistent with prevailing medical
3 standards at the time, and that was critical to the
4 court's decision.

5 That is not the case here. There is
6 extensive testimony in the record that these
7 requirements are not medically justified. They are not
8 consistent with prevailing medical standards, and their
9 amicus briefs from leading medical associations,
10 including the AMA and ACOG, confirming that.

11 JUSTICE ALITO: Do you think that Federal
12 district judges or this Court is well qualified to
13 determine whether there is a different risk, regard --
14 with respect to abortion, as compared to other
15 procedures, that may or may not have to be required --
16 may or may not have to be performed in an -- in an ASC?

17 MS. TOTI: Your Honor, district courts are
18 quite competent to determine the credibility and the
19 reliability of expert testimony. That's something
20 that's within the core competence of a trial court. And
21 the trial court in this case determined that there was
22 no credible or reliable evidence supporting Texas's
23 contentions about the medical justification for these
24 laws.

25 And, further, had Texas truly believed that

1 these laws provided some important benefit for
2 outpatient surgery, it would have made them generally
3 applicable.

4 All outpatient surgical providers would have
5 to have admitting privileges or practice in an ASC, but
6 that's not the case.

7 Texas law expressly authorizes other
8 surgical procedures, including those performed under
9 general anesthesia -- which early abortion is not -- to
10 be performed in the physician's office. And even other
11 physicians that operate at an ASC aren't required to
12 have admitting privileges. The facility is merely
13 required to have a transfer agreement. So these
14 regulations target one of the safest procedures that a
15 patient can have in an outpatient setting for the most
16 onerous regulations.

17 CHIEF JUSTICE ROBERTS: Thank you, counsel.

18 MS. TOTI: Thank you.

19 CHIEF JUSTICE ROBERTS: The case is
20 submitted.

21 (Whereupon, at 11:28 a.m., the case in the
22 above-entitled matter was submitted.)

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A	60:9,20,25 61:9 67:2,19 71:21	53:15 73:24	16:3,7 41:7 42:15 49:8,10,15,17 58:1	area 37:20 40:4 62:6,12 69:1,5 70:2,4,8,15 73:2 74:25 75:3
a.m 1:15 3:2 77:21	above-entitled 1:13 77:22	admitting 3:21 4:14,15 5:17 12:7 37:12,17,24 46:6 47:6,20 59:2 61:6 61:15,23 62:9 75:2 77:5,12	amended 4:3 Amendment 20:16 American 21:20 24:19 35:12 53:21	arguable 48:5 argue 64:15 argued 3:22 56:18 arguing 34:19 argument 1:14 2:2 2:5,9,12 3:3,7 4:19 5:22 6:8 24:5 28:2 36:9 37:13 40:19 43:12 49:24 56:7,24 57:3 71:10 73:10
abandonment 43:7	absolutely 13:25 14:18 21:16 23:13 53:8 70:9	admitting-privile... 9:1 28:8	amicus 1:21 2:7 21:17 24:6 49:3 53:22 54:5 64:17 65:9,16,23 76:9	arises 42:24 arose 28:2 arrangement 47:11 47:18 articles 57:3 as-applied 37:5 38:13,14 44:17 46:12 57:12,23,25 58:5 61:18 62:20 68:20,21,23,25 69:2,5,12,20 71:4 73:4
Abbott 4:1,7 8:1 45:18	absorbed 17:10	admitting-privile... 5:13 9:7,19,25 11:3,5 14:4 22:5 29:4,7 30:10,21 41:4 43:8 57:17 58:16,22 59:15,17 74:7,18 75:13,16	ample 29:2,18 analysis 38:13 39:25 52:20 55:17 analytical 52:12 anesthesia 77:9 annual 17:5 annually 29:25 33:13 45:24 46:10 53:15	ASC 7:25 8:19 9:2 9:8,11,22 10:9 14:8,22 15:24 16:13 24:2,24 25:23 28:5,9,16 28:25 29:25 30:1 30:24 31:20 32:11 37:4,11,17 41:4 45:23 46:9 49:21 49:23 55:11 59:5 59:11,13 60:25 61:20 73:20 75:1 75:14,17 76:16 77:5,11
ability 38:2	access 3:16 17:18 20:6,14 22:9 38:15 40:24 42:3 52:17,18 71:17 75:24	adopted 8:3,14,16 8:20	annual 17:5 annually 29:25 33:13 45:24 46:10 53:15	as-applied 37:5 38:13,14 44:17 46:12 57:12,23,25 58:5 61:18 62:20 68:20,21,23,25 69:2,5,12,20 71:4 73:4
able 6:8 9:24 11:20 16:23 28:9 29:17 29:25 30:1,18 35:14,15 52:5	account 10:21 16:10 39:6,24	adoption 8:15	anticipation 7:16 11:18	as-applied 37:5 38:13,14 44:17 46:12 57:12,23,25 58:5 61:18 62:20 68:20,21,23,25 69:2,5,12,20 71:4 73:4
abortion 3:13,16 8:20 9:21,24 16:4 17:18,20 18:22 19:21 20:1,5,14 20:18,19 21:19,25 22:1,2,9,19,21,25 23:8,12 24:12,13 25:22,23 27:9 33:6,7 36:18,20 36:22 37:23 38:16 40:3,25 41:13,13 42:18,24 44:18 47:6 48:14,15,21 50:6,10,15,18,21 51:23 53:10,16,22 54:4,10,18 55:24 56:22 57:1,4,10 59:5,22 62:19 63:6,16,24 64:3,6 64:25 66:17 67:7 67:22 68:10,14 69:2 71:17 73:21 74:1,13,23 75:19 75:21,24 76:14 77:9	accurate 33:18 accurately 54:17 achieve 18:25 57:7 acknowledged 41:2 ACOG 76:10 ACS 22:25 70:12 70:13 act 44:14 46:1 68:14 acted 26:13 36:18 acting 50:2 action 4:4 actions 64:10 actual 5:12 7:17 32:3 65:21 addition 31:20 60:16 additional 28:25 33:1 36:14 address 3:18 17:12 28:1 68:16 69:5 69:14 73:4 adequately 65:13 adjective 15:11 adjusted 16:15 admission 9:10 10:14 47:19 admitted 51:4	affidavit 33:10,11 affirms 36:23 afford 17:15 36:13 afforded 45:9 age 37:4 38:18 61:9 72:14 agree 25:9 agreement 77:13 AL 1:3,8 Alito 5:19 6:11,15 12:3,9,14,18 13:8 13:16 16:2,19 24:23 25:2,3,6,20 26:24 27:2,16 32:2,13,16,21,23 33:3 51:19 64:22 65:7,18,19,20 67:16 75:11 76:11 allegations 4:18,19 allow 69:20 allowed 63:2 64:15 alternative 74:21 AMA 76:10 amazing 32:7 ambulatory 7:19	anybody 50:13 anyway 8:10 59:1 71:17 apologize 31:12 appalling 65:11 appeals 4:9,9 10:20 APPEARANCES 1:16 appellate 31:5 Appendix 73:24 applicable 77:3 application 26:17 45:17 58:13 applied 51:11 61:20 70:23 apply 26:20 appointment 10:14 appropriate 8:23 27:20,23 appropriately 62:9 approximately 12:16 29:24 33:16	area 37:20 40:4 62:6,12 69:1,5 70:2,4,8,15 73:2 74:25 75:3 areas 36:21,24 49:17 57:13 arguable 48:5 argue 64:15 argued 3:22 56:18 arguing 34:19 argument 1:14 2:2 2:5,9,12 3:3,7 4:19 5:22 6:8 24:5 28:2 36:9 37:13 40:19 43:12 49:24 56:7,24 57:3 71:10 73:10 arises 42:24 arose 28:2 arrangement 47:11 47:18 articles 57:3 as-applied 37:5 38:13,14 44:17 46:12 57:12,23,25 58:5 61:18 62:20 68:20,21,23,25 69:2,5,12,20 71:4 73:4
abortions 16:14,14 16:24 17:5,6 18:14,15 22:8,25 24:16 29:24 30:23 31:21,24 32:8 33:4,12 38:11 42:8,9,19 43:15 43:16,18,22,22 44:13 45:3,5,20 45:24 46:10,15 58:25 59:7,12				ASCs 33:1,4 36:20 37:24 45:4 46:4 46:11 59:20,21,22

59:25 60:17 asked 4:3,6 10:6,8 40:16 46:16,21 48:23 61:6 67:11 asking 4:17 42:10 47:2 48:19 aspect 42:20 aspirin 55:9 aspirins 55:11 asserted 20:2 assess 9:12 assessing 9:9 19:5 association 21:20 21:21 24:20 35:13 associations 76:9 assume 3:20 8:5 9:8,12 18:10,10 assuming 40:19 assumption 19:7 63:19,20 attempted 8:22 attention 4:8 56:1 Austin 1:23 10:11 59:19 71:24 73:16 authority 43:16 44:8 authorizes 77:7 available 5:1 37:13 average 33:13 avoid 55:7 Ayotte 26:19 27:22	basic 27:8,24 Basically 5:21 basis 4:13 5:4,7 11:8 17:5,22 18:2 18:4,7,19 19:7 24:17 40:13 52:20 bear 69:24 Beaumont 73:16 behalf 1:17,23 2:4 2:11,14 3:8 36:10 73:11 believe 39:5 41:3 46:13 51:1 58:23 believed 76:25 believes 27:20 beneficial 15:16 43:5 benefit 21:12,18 35:19 40:6,10,21 41:6,7 42:14 47:3 48:8,22,25 49:13 52:1 55:15 70:23 77:1 benefits 17:22 40:25 41:3 50:15 64:21 best 35:20,22 better 51:8 beyond 32:22 34:5 big 70:5 Bigger 70:5 bill 13:11 41:22 59:23 63:25 64:21 binding 6:6 30:13 birth 68:10 bit 13:17 books 25:14 border 38:9 bore 46:20 brain 49:23 65:3 break 66:24,24 Breyer 10:5 11:25 33:9,20 46:16,21 46:24 47:9,14,24 48:1,3,13,16 56:6 56:10,12 57:9,21	67:11 68:1,2 brief 10:21 13:18 40:8 64:17 72:16 73:13 briefing 4:4,6 briefs 21:17 33:11 49:3,11 53:23 54:6 57:2 65:9,16 65:23 76:9 Brigham 50:9 bring 5:3 6:13 27:12 57:24 62:20 70:17 brought 4:7 57:13 68:20,21 71:4 Bryan 13:5 build 15:13 building 28:23 60:6 burden 6:16 8:12 9:10,12 17:20 18:6,19,22,23,24 19:3,5,8,11,14,15 19:24 20:18 34:8 34:9,20 35:18,21 35:21 39:11,21 40:4,6,21 46:20 48:20 49:1 51:22 52:1,13 55:15 69:21,24 70:13,14 70:24 75:23 burdened 48:22 71:13,14 72:25 burdens 8:21 17:18 20:8,10,14 21:24 22:1 34:4 burdensome 9:18 10:2 buy 60:6	capability 15:13 capacity 14:24 15:2 15:7,13,19 16:20 28:3 29:20,23 31:8,19 32:3,10 33:1 39:22 44:22 44:23 45:6,8,13 69:22 care 36:20 37:23 43:6 50:12 51:21 51:24 58:20 66:12 66:15 67:18 careful 3:11 carefully 27:21 case 3:4 4:1,6 5:20 6:13 7:20 8:1 9:15 13:2 16:22 16:23 17:8 19:19 21:14 24:11 26:19 27:22 32:5 42:23 51:19,20 65:14 69:3 75:9 76:2,5 76:21 77:6,19,21 cases 7:16,17 39:9 73:1 Casey 3:12 19:15 20:4,13 24:12 34:2,16 36:5 39:12,17,20 40:23 49:20,21 52:15 56:5 71:12,19 72:4,21,21 categories 52:13 causation 29:19 cause 6:22 73:20 74:12,20 75:13 caused 9:13 29:10 73:14,15 causes 30:10 causing 18:14 cease 28:10,11 ceased 58:24 center 13:5 41:8 42:5,7,15 43:1 49:4,8,10,15 53:21 58:1	centers 7:19 16:3,7 49:18 55:12 certain 48:6 55:10 certainly 8:4 14:21 15:20 34:13 43:10 43:20 65:4 70:7 72:20 75:21 certificate 26:5 certified 61:21 challenge 4:20,20 5:14 9:1,6,6,9 18:1,11 38:13,14 38:15 39:8,20 41:24 43:9 57:23 57:25 58:6 59:14 59:24 62:21 68:21 69:5,12,20,23 71:4 challenged 19:8 40:20 44:16 63:20 72:15 challenges 36:17 57:12 68:20,25 70:18 71:6 73:4 challenging 9:11 changes 15:10 chart 45:19,25 check 43:6 checked 25:21 Chief 3:3,9 4:17 6:23 7:7,9 8:25 9:5 10:5 11:11 17:13,16,21,25 18:9 19:1,23 22:12,14 23:16 24:3,8 34:10,15 35:6,7 36:7,11,12 36:15 45:7,11 65:19 69:13,15 73:6,7,8 74:8,11 77:17,19 childbirth 53:19 54:1 choice 13:5 64:14 64:15 72:19 choose 60:20 62:13
--	---	--	---	--

Circuit 30:11 43:24 44:18,22 72:12 Circuit's 61:7,16 74:5 circumstances 40:2 40:5 circumstantial 45:13 citations 13:22 cited 65:10 cites 65:9 73:13 cities 32:1 46:8 claim 3:19,19,25 7:21,22 12:4 18:4 18:5 claiming 12:10 claims 3:21 4:18 5:7 7:25 class 11:17 clause 25:18 26:14 26:15,16 clear 8:10,12 72:3 clearest 52:21 clinic 4:14 5:11,18 5:21 6:22 11:20 12:22,22 15:1,10 25:23 27:10 37:1 38:8,19 40:3 43:4 45:19,19 47:6,10 54:22 57:6 58:7,7 58:10,14 61:10,11 61:21,23 62:5,10 66:4,21 68:22 69:2,8,9,16,19,20 71:12 72:1,10,12 73:2 clinical 43:6 clinics 5:24 6:1 7:2 7:5,14,15 11:2,16 11:18,23,23 12:12 13:19,21 14:16,25 15:6,14,19,25 28:7,14,20 29:5 29:25 30:17,22 31:21,22 32:4,11 32:24,25 33:13	36:22,22 37:23,24 38:6 42:18 44:21 44:25 54:18 56:18 57:15 58:10,15,18 58:21,24 61:3 62:2 66:6 68:17 68:19 70:17 71:2 73:14,16 74:2,6 74:17 75:4,8,10 75:11 close 4:15 5:18 9:23 58:14 59:1 73:14 73:17,22 75:6 closed 5:21 7:5,14 7:15 11:2,2,4,9,16 11:18 12:4,7,10 12:13,22,24 13:10 14:4,17 16:1 28:7 29:5,7,13 31:1,22 32:24 57:15,16 58:4,4,15,21 68:17,19 69:17,17 71:2 74:6,17 closes 24:13 69:8,9 closure 6:3 9:20 10:4 12:5 29:10 30:21 74:20 closures 5:12 6:22 7:6,10 28:2,4 45:14 75:3 co-counsel 16:21 collection 26:21 collectively 10:2 collects 17:7 colonoscopies 63:21 67:24,24 colonoscopy 49:9 come 4:21 21:1 35:14,15 60:12,16 65:12 66:7 70:12 comes 6:2 59:21 COMMISSION... 1:6 commitments 36:4 common 30:16,19 32:19,21 49:16	community 42:7 compare 18:24 compared 25:22 34:12,14 38:24 49:16 53:18 76:14 competence 43:6 76:20 competent 76:18 complete 23:5 completely 27:6 52:12 compliance 60:16 complication 41:11 41:12,16,17 42:18 42:21,24 44:13 54:7 55:22 57:6 65:5 complications 43:23 47:17,22 53:16 54:10,13,19 54:21 55:9 56:14 56:17,25 63:15 64:20,25 65:24 66:17 67:9,21,24 complied 46:6 comply 9:25 complying 58:19 concede 18:7,15 42:23 conceded 51:1 concern 57:5 68:8 68:10 69:6 concerned 15:17 67:18 concerning 4:18 11:7 concerns 68:24 73:5 conclude 4:13 concluded 5:16 19:20 20:7 21:22 condition 23:18 conditions 22:21 confirming 76:10 confirms 64:19 conform 50:10,14	50:16 confronted 26:12 confronting 24:16 consider 4:10 18:23 19:14 21:21 considered 24:12 consistent 76:2,8 constant 74:2 constitutional 55:17 67:6 construction 28:16 contention 68:16 contentions 76:23 contesting 64:24 contextual 38:12 continual 64:7 continue 11:20,23 continuity 43:5 controlled 14:15 core 76:20 correct 6:9 7:24 14:5,6,12,18 16:2 18:20 20:21,24 21:2,7 23:13 47:8 47:11,13 48:4,7 49:5 54:14 60:21 63:10 74:14 corrected 68:3 correctly 44:22 corridors 27:11 cost 28:20,22,25 costs 15:24 counsel 23:16 24:3 36:7 62:22 73:6 77:17 count 38:5 59:21 countenanced 34:6 34:8 country 50:7,8 51:25 couple 6:25 course 25:18 42:8 57:3 60:21 64:4 court 1:1,14 3:10 4:5,8,9 5:15 6:5 10:9,20,24 11:8	15:1,18 16:9,10 18:4 19:17 24:9 24:12,21 25:17 26:12,13,19,20 27:3,20,22 31:4,4 34:6,7 36:5,16,23 39:13 40:9 45:18 45:22 46:17 49:20 51:16 58:13 68:9 71:15 74:16,19 75:25 76:12,20,21 court's 6:21 15:5 15:23 26:20 44:16 50:17 52:21 63:10 76:4 courts 31:6 76:17 CPR 26:5,7 create 3:16 57:1 creation 58:1 credibility 76:18 credible 76:22 credit 64:8 credulity 46:13 critical 76:3 cure 48:9 cured 31:8 curettage 22:17,18 curiae 1:21 2:7 24:6 currently-licensed 59:5,10 cut 13:11
D				
D 3:1 D&C 22:15,19,20 23:1,4,7 D&Cs 22:20 D.C 1:10,20 Dallas 10:11 59:18 71:25 dangerous 51:13 date 9:21 12:12 29:5,6,7,14 day 11:4 12:7 14:4 49:17 58:22 59:7				

69:17 73:21 74:6 74:17 days 4:4 21:1,6 deadline 8:15 deal 65:1 decide 26:21 decided 3:22 decision 4:5,11 6:5 19:21 38:3 52:5 72:25 76:4 decisions 3:14 decline 74:13 decrease 5:23 24:22 deemed 58:24 defend 42:20 definition 34:9 delayed 22:3 delaying 22:9 demand 15:8 33:6 33:7 46:14 demonstrates 73:25 demonstration 44:3 denied 18:4 denominator 72:13 72:15 dentist 49:7 Department 1:7,20 designed 19:20 despite 26:13 deter 15:25 determine 18:21 19:13 76:13,18 determined 76:21 developed 3:25 4:25 developers 61:1 develops 5:5 die 55:9 56:25 difference 6:11 19:4,10 22:23 35:17 54:8 60:4 different 41:22 72:9 76:13	differently 50:18 75:20,21,22 dig 60:5 dilation 22:16,16 diminished 16:17 diminishment 10:23 direct 12:4,15,17 13:3,19,20 14:21 75:12,12 directed 19:9 directive 74:5 disagree 8:11 9:16 disagreement 51:3 discovered 4:25 5:3 discovery 44:24 discrete 7:21 52:12 69:23 discretion 31:4 discuss 65:23 disproportionately 55:23 dispute 53:23 54:1 disputed 50:25 distance 39:12 42:5 57:14 distances 41:21 69:22 distinct 43:15 distribution 17:6 district 6:21 10:8,9 10:24 11:8 15:5 15:23 18:4 24:21 25:16 26:12,13 27:3 31:3,4,9,15 39:13 44:16 45:21 71:15 74:16,19 76:12,17 dixit 30:12 45:1,2 doctor 4:13 5:17 20:20 23:6,7,23 32:8 47:5,20 61:8 61:9,14 62:8,16 62:20 66:22 72:9 72:11 doctors 37:25 41:3	46:6 48:15 51:1,9 61:6,15,21 62:1,2 67:1 69:10 70:17 doctrine 40:13,16 52:22 doing 40:11 50:13 51:11 dollars 28:22,24 29:1 DONALD 1:19 2:6 24:5 doors 14:9 doubts 15:18 dozen 14:9 Dr 28:19 30:3,15 31:23 61:8 62:11 68:9 74:4,9,10,14 drastically 16:17 draw 29:9 drawn 45:6 drew 74:16 driving 69:22 drop 74:22 drug 41:21 drug-induced 41:12 43:22,22 44:13,18 due 6:3 30:12 56:25 duty 48:19 dying 57:5,6	52:16 55:16 57:17 58:16,23 59:7,18 60:3 71:3 72:11 73:3,22 effective 29:6,8,13 effects 24:10 44:20 effort 56:25 eight 10:23 11:2,7,9 36:14 46:11 58:15 58:17 either 10:12 11:18 11:22 19:11 37:17 El 37:6,20 38:9,10 38:15 39:7 57:15 68:19,21 69:18 73:16 75:5 elect 38:3 52:5 elements 40:13 elevator 27:11 eleven 58:21 59:17 enact 63:16 enacted 29:6 enactment 7:4 16:13 74:1 enforced 74:18 enforcement 5:12 5:13 7:16,17 10:13 11:3,19 16:17 74:20 ensure 11:23 53:1 62:12 entire 48:4 entrances 27:9 entry 4:1 equipment 65:13 69:9 equitable 31:5 ESQ 1:17,19,22 2:3 2:6,10,13 estate 28:17 estimate 45:20 estimated 45:24 ET 1:3,8 evaluate 40:6 evaluated 34:23 event 36:18 38:17	41:25 43:9 44:15 evidence 4:10,11 4:22,24,25 5:1,3,5 5:10,11,16,20 6:2 6:13,18,20,24 7:10,13 10:17,19 10:20,25,25 11:6 11:12,14 12:4,15 12:17,21 13:3,14 13:17,19,21 14:21 15:4,12,21,22 16:8,12,23 17:4 21:17 22:4,22 23:2 28:13 29:2 29:11,13,18 32:2 32:3 38:7 39:22 44:23 45:8,11,14 46:17,18,19,22 47:16 50:25 51:6 53:4,24 54:9,15 57:10 59:8 64:19 68:18 73:14 74:9 75:12,12 76:22 exact 16:24 exactly 14:19 56:19 70:19 examines 6:1 38:2 40:24 examining 55:13 55:16 59:24 example 19:16 48:5 48:24 examples 13:4 exception 72:6 excessive 34:11,12 excuse 45:19 exercise 19:25 Exhibit 45:17 73:23 exist 34:21 59:25 existence 60:12 existing 66:11 exists 36:3 expect 30:25 32:25 experience 16:12 experiment 14:15
---	---	---	--	--

<p>expert 28:18 30:3 30:14 32:14 39:6 41:2 43:25 76:19 experts 51:1 expired 69:14 explain 35:5 explanation 74:21 exponentially 24:15 expressly 18:1 77:7 extensive 76:6 extent 8:12 extra 17:14 36:15 extreme 24:11,14 extremely 9:18 10:2</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>fabricating 66:22 face 8:13 22:11 facial 4:20,20 36:17 38:14 39:8,18,20 43:9 59:14,24 69:23 71:6 facially 6:6 facilities 9:21 12:20 14:9 16:25 24:13 24:14 30:1,17,24 30:25 45:21 46:7 46:14 50:10,15 51:8 53:13 57:18 58:4,12 59:16,16 60:14 63:4,6,6 64:6,25 65:8,10 65:22 67:20 74:13 facility 9:24 10:10 20:23 21:13,20 28:23 37:7,10 38:10 43:5 46:11 46:12 50:21 51:7 51:11 58:11 59:1 59:5,11 73:21 77:12 fact 18:8 25:12 36:4 45:2 54:11 55:21 57:7 74:16</p>	<p>74:19 fact-finding 45:22 factor 9:7 22:19 factors 6:3 facts 3:25 4:8 62:15 factual 44:2 failure 66:20 fairly 7:3 74:2 family 13:12 far 15:16 31:25 34:5,7 53:8 Federal 8:5 76:11 Federation 48:14 fee 29:15 fewer 15:7 38:25 56:24 Fifth 30:11 43:24 44:18,22 61:7,16 72:12 74:5 figures 55:25 filed 4:4 8:1 filing 8:23 filthy 66:3 final 8:1 finally 74:3 find 36:2 47:16 48:4 51:9 57:4 finding 6:21 15:6 15:23 16:11 findings 10:18,22 15:1 finish 22:13 33:22 first 3:19 5:2,6,14 6:12,17 8:22 11:5 11:7 18:22 19:17 28:2,6 30:15 39:4 41:11,15,20,23 43:24 45:16,18 46:5 47:5,5 48:23 53:14 57:19 58:12 71:6 73:13 74:18 fit 28:17 fits 56:6 five 7:1 17:14 30:18 46:3,7 73:9,25 five-fold 30:7</p>	<p>flimsy 35:12 floor 65:12 flush 29:17 focus 71:12 72:22 focusing 18:6 47:4 follow-up 41:14 following 7:4 16:13 16:17 22:5,6 follows 23:6 footprint 28:17 forced 4:15 75:6 form 21:25 Former 53:22 Fort 10:11 forth 48:18 fortuitous 60:12 forward 5:4 6:13 6:18 36:4 found 10:24 24:21 39:13 75:25 four 30:18 57:15 59:15,16 61:5,12 61:14 62:1 71:1 four- 30:7 Fourteenth 20:15 fraction 39:7,9,19 73:1 frankly 35:12 friend's 68:16 front 23:23 Ft 59:18 fundamental 3:13 20:6 62:13 72:18 fundamentally 17:17 funding 13:12 further 15:1 38:22 38:23 76:25 future 62:20 68:24 69:5,22 73:3</p> <hr/> <p style="text-align: center;">G</p> <hr/> <p>G 3:1 gaps 71:8 general 1:19,22 24:4,8,25 25:5,9</p>	<p>26:8,25 27:15,19 30:6 31:11,18 32:12,14,19,22 33:19,21 35:1,7 50:5,9 51:7 52:21 60:17 62:23 65:7 74:25 77:9 generally 42:24 77:2 geographic 17:6 getting 17:3 26:10 71:21 Ginsburg 3:17 7:18 13:20 17:9 18:18 36:25 37:2,9 38:5 41:5,11,16 42:1 42:10,13,21 47:2 53:2,18,25 54:3,5 57:20,23 58:9 59:3 66:1 69:7 71:9 72:3,6,17 give 10:21 12:1 13:4 48:24 53:7 given 7:3 30:25 31:12,14 35:18 44:9,12 64:12 giving 49:13 gleaned 38:21 go 7:18 12:18 25:21 25:21 26:20 38:12 38:14 40:3 42:6 47:1,15 59:13 62:24 63:22 66:5 goes 10:10 59:7 73:3 going 13:21 14:24 16:9 20:13 22:3 26:23 29:14,16 30:17,18 31:6 33:10,25 35:9,16 36:4 39:2,14 42:6 42:22 43:4 46:10 48:9 50:10 52:19 56:24 58:14 59:1 60:25,25 61:3,14 61:23 66:24 67:1</p>	<p>67:5 69:4 70:12 72:10,11 Gonzales 34:16 68:8 good 20:9 51:7 56:9 Gosnell 64:1 66:19 67:8,14,16 68:13 Gosnell-like 67:14 government 35:2 35:14,22 governor 66:19 grade 27:10 grandfathering 8:17,18 grant 33:10 40:1 great 50:8 51:9 65:1 greater 41:11 42:5 43:23 44:13 56:1 64:24 67:19 Grossman 30:15 33:9 74:4,9,14 Grossman's 30:3 31:23 45:1 74:10 groundless 24:20 35:13 guess 49:3 63:12</p> <hr/> <p style="text-align: center;">H</p> <hr/> <p>half 9:21 30:25 31:21 32:24 handle 33:1 happen 14:20 16:9 64:6 66:23 67:5,5 happened 6:1 47:23 67:1,13 happening 66:10 hard 32:18,18 harder 9:15 Haskell's 68:9 HB2 6:21 7:1,2,5 11:2 23:9 35:25 71:3 73:14,15 74:1 health 1:3,7 3:4,15 13:11 18:13,17</p>
--	---	--	---	---

23:11 24:22 28:15 40:10,17,25 50:15 52:24 53:3,6,13 54:20,24 65:24 health-related 50:6 health-saving 57:8 hear 3:3 57:21 heard 10:18 heavy 17:17 39:21 69:24 held 4:11 25:7 72:24 Hellerstadt 3:5 HELLERSTEDT 1:6 helpful 14:25 high 51:21 higher 44:9 55:23 63:3,5,5,21,23 65:5 68:5 highest 51:25 hit 50:22 holding 6:5 44:17 51:15 72:15 holds 34:2 Holes 65:12 home 20:21 21:4,13 41:18,18 42:25 honestly 48:25 Honor 3:24 4:23 6:10,17 7:1,13 9:3 9:17 11:1,13 12:6 12:17 13:7,14,24 14:13 15:4 17:3 17:24 18:21 19:14 20:3 21:7 23:2,14 23:24 76:17 Honor's 25:10 26:11 horrible 53:7 55:1 hospital 20:20 23:20,20 27:13 42:3,6,25 47:7,18 47:19 49:23 51:6 51:10 54:16 hospitalized 53:16	hospitals 50:8,11 54:12,14,17 55:12 hotel 21:5 hour 39:14 hours 39:15,17 House 59:23 Houston 10:12 45:23 46:3 Huffington 13:9 huge 12:19 70:8 hundreds 35:17 40:18 49:11 husband 72:4 husbands 71:20 <hr/> I identical 23:4,8 identified 30:15 imagine 42:14 immediate 66:6 immediately 14:11 66:6 impact 14:22 34:25 impetus 43:14 implementation 22:5 implementing 8:2 8:13 importance 15:14 important 13:25 54:9 77:1 impose 8:12 17:17 17:19 20:8,9,10 20:13 21:24 35:9 40:4,18 75:23 imposed 22:1 40:1 imposes 18:21,23 34:5,13 impossible 28:15 improve 36:18 53:12 improvement 40:18 include 37:5,6 includes 36:23 37:8 including 16:12	21:24 63:5 76:10 77:8 increase 18:14 22:7 24:22 25:25 30:7 30:18 31:2 43:15 50:12,15 51:21,24 increased 16:4 33:5 33:7 36:19 44:3 58:19 increases 24:15 31:24 increasing 22:10 66:12 indentured 62:12 62:15 independent 23:21 60:9,13 67:14 75:9 independently 10:1 indicated 43:17 individual 26:17 infer 11:9 52:22 inference 29:9 45:5 74:17 information 12:23 informed 19:22 informed-consent 19:16 initial 11:3 initially 11:1 injury 55:7 innocuous 27:6 inquiries 35:25 inquiry 38:1 Insofar 44:6 inspected 65:11 66:21 inspections 64:7 65:21 66:2 instance 6:18 48:10 48:24 57:13 65:4 65:9,9 68:25 69:23 instances 6:3 instruction 26:15 instruments 65:14	intended 18:24 intends 66:24 interest 18:13,16 19:19 20:2,5 34:22,22 35:2 52:9,14,19,24 53:3 interesting 50:3 interests 3:13 19:17 interpretation 63:2 interrupt 11:12 invading 26:23 invalid 55:18 invalidity 39:10 invest 61:1 investors 60:6 involve 20:20 involved 41:9 42:16 ipse 30:12 45:1,2 irrational 41:1 issue 24:10 45:8 69:4 76:1 issues 4:5 <hr/> J JA 28:6 30:4,14 37:2 39:5 41:2 53:17 54:10,20,23 55:3 59:2,19 65:25 73:17,19 74:3,10 JOHN 1:6 join 71:5 joined 62:1 Joint 73:24 JR 1:19 2:6 24:5 judge 31:9 40:9 48:3 judges 31:15 76:12 judgment 4:1 5:6 42:20 judicata 6:7 36:17 43:10 71:7 judicial 48:19 Justice 1:20 3:3,9 3:17 4:2,17 5:9,19	6:11,15,23 7:7,9 7:18 8:4,25 9:5 10:5,6 11:11,25 12:3,9,14,18 13:8 13:16,20 14:2,7 14:14,23 15:9 16:2,19 17:9,13 17:16,21,25 18:9 18:18 19:1,23 20:17,25 21:3,8 22:12,14,15,18 23:10,15,16,17 24:3,8,23 25:2,3,6 25:20 26:24 27:2 27:16 28:11 30:5 31:3,12,15 32:2 32:13,16,21,23 33:3,9,20 34:10 34:15 35:6,8 36:7 36:11,12,16,25 37:2,8,9 38:5,20 39:4,23 40:15 41:5,10,16 42:1 42:10,13,21 43:11 44:1,7,10,12 45:7 45:11 46:1,16,21 46:24 47:2,9,14 47:24 48:1,3,13 48:16 50:3,4,20 50:21 51:5,17,19 52:7,10,11 53:2 53:18,22,25 54:3 54:5,12,21,25 55:6,14,20 56:6,9 56:12 57:9,20,21 57:23 58:9,10 59:3 60:1,11,19 60:23 61:4,17,19 62:4,8,14,17,22 62:23 63:12,18,25 64:4,22,23 65:7,8 65:17,18,19,19,20 66:1,8,14,18 67:10,11,16,17,23 68:1,2,2,5 69:7,13 69:15 70:1,3,4,8
--	--	--	---	--

70:10,19,22 71:9 72:3,6,17 73:6,7,8 74:8,11,24 75:11 76:11 77:17,19 justification 24:18 34:6 35:12 76:23 justified 17:19 21:23 76:7	44:12 46:1 52:7 52:10,11 70:3 kept 36:5 Kermit 64:1 key 5:9 8:9 29:21 31:19 Killeen 59:1 68:18 68:22 73:16 kind 26:19 35:10 40:3 50:13,13 51:11,12 58:7 63:7 64:9 66:9 kinds 15:14 48:17 51:14 knew 16:9 29:16,16 know 8:7 15:11 21:17 23:21,21 27:16 29:4 31:11 32:10,17 35:4,8 44:10 47:14 50:8 50:11 51:12,23 53:9 54:16 60:23 61:11 62:5 63:13 63:18,24 64:16 71:12,15 knowing 11:19 known 8:16 knows 26:7	23:12 24:1,10,12 24:13,24 25:23 26:3,4 28:12 29:5 29:10,23 34:4 35:25 36:2 40:25 43:14 44:3 46:6 47:5,5,9,10,15 53:4,5,22 58:19 59:7 60:2,3 61:20 63:1,9 66:2,24,24 70:11,22 72:5,7 72:10 73:3 77:7 laws 17:17 47:4 49:25 63:16 64:20 67:2 76:24 77:1 lawsuit 41:15,23,24 42:2,3 43:24 45:16,18 46:5,5 53:14 58:13 62:1 62:3 70:20 71:5,6 Layne-Farrar 28:19 lead 57:4 leading 21:21 76:9 lease 60:16 leased 60:22 leave 49:5 62:18 left 10:11 64:11 74:25 legal 36:20 legislation 7:11 34:24 legislators 64:18 legislators' 65:16 legislature 15:16 17:23 44:14 50:1 50:4,5 53:12 55:18,23 60:15 67:17 68:11,13 legislature's 57:7 legislatures 50:2 68:7 legitimate 3:12 20:4 50:1 52:24 53:3 let's 3:19,20,21	33:14,14 49:2 50:19 56:15 level 27:10 37:24 68:13 liberty 3:14 20:6 licensed 8:22 9:24 62:9 73:20 licenses 67:3 licensing 25:23 29:15 life 19:19 56:14 lift 62:4 lifted 14:10 light 19:25 66:13 lines 10:8 linkage 54:6 liposuction 51:12 liposuctions 63:22 litigated 43:10 litigating 16:22 litigation 3:20 45:18 little 5:19 live 38:18,22 71:24 72:1 lived 38:25 39:1 lives 35:17 40:21 42:5 living 39:3 43:3 loathe 31:13 local 42:7 located 37:1 locus 29:21 logical 19:2 long 51:22 58:6 longer 69:18 look 9:10 19:8 30:14 32:5 34:18 34:24 35:2,23,24 35:24 52:13 54:6 71:21,22 looked 19:17 30:20 30:22 35:3 45:2 50:7 66:4 looking 39:7 49:25 71:23	lots 22:21 Louisiana 16:22 32:5 lower 39:19 55:4 lowest-risk 53:7 Lubbock 58:11,25 Lynn 61:8 62:11
K	L			M
K 45:17 Kagan 14:2,7,14 28:11 38:20 39:4 50:4,21 51:5 58:10 62:23 63:12 63:18,25 64:4,23 65:8 66:8 keep 14:1 Keller 1:22 2:10 36:8,9,11,15 37:2 37:22 38:7,20 39:4 40:12,23 41:10,20 42:8,12 42:17 43:2,13,20 44:6,9,12 45:10 45:15 46:2,19,23 47:8,13,24 48:2 48:13 49:19 50:17 50:24 51:15 52:4 52:10,15 53:14,21 54:5,18,23 55:3 55:13,16 56:2,9 57:9,20,20 58:9 59:13 60:10,15,21 61:2,17,25 62:7 62:14,19 63:10,15 63:25 64:17 65:3 65:15,23 66:11,16 67:6,21 68:7 69:13,16 70:6,9 70:16,21 71:1 72:2,5,7,24 73:7 Kennedy 4:2 5:9 8:4 14:23 15:9 30:5 31:3,12,15 43:11 44:1,7,10				magnitude 18:23 main 23:11 mainstream 21:21 major 15:10 32:1 majority 43:3 making 6:9 8:9 16:11 19:21 manner 34:18 March 1:11 marginal 70:23 market 16:15 Massachusetts 50:9 51:7 material 3:25 4:24 5:6 math 55:1 matter 1:13 77:22 maximum 53:1 Mazurek 50:19 51:16 56:3 McAllen 37:5 39:6 57:11 58:9 61:4 73:16 McCallen 46:12 68:18,20 69:8 mean 4:4,19 13:4 19:2 27:4 31:15 42:22 49:14 50:5 52:11 55:6 56:7 57:2 58:3,6 64:5,7 68:6 meaning 39:24 40:1 66:19 meaningful 24:19 means 34:11 71:16 mechanism 66:9 medical 20:19

21:11,18,20,21,25 22:23 23:18 24:18 24:19 35:13,19 41:6 42:11,23 43:15,17 44:4 50:12,25 51:2,3,6 55:22 63:3,5,5,7,8 64:18 65:1 70:23 75:20,23 76:2,8,9 76:23 medically 17:18 20:13 21:23 44:5 76:7 medication 21:18 23:25 meet 15:7 28:9,16 28:18,20 30:9 46:14 meets 59:5,11 mentioned 58:10 65:8 merely 5:2 77:12 merits 17:12 message 72:4 metroplex 38:10 metropolitan 36:21 73:2 Mexico 37:7,10,10 37:13,16,16,16,25 MGH 50:22 51:9 mile 38:8 miles 21:5 37:1,4 38:18,22,24,25 39:1,3,17 41:19 42:4,4,4 43:3 47:7 56:21 million 28:21,23 29:1 38:23 39:2 40:22 mind 14:1 minimum 39:9 50:25 73:1 minuscule 49:16 minute 50:20 minutes 17:14 35:4 36:14 73:9	miscarriage 23:5 miscarries 23:6 miscommunication 43:7 misquoting 62:25 moment 20:18 money 29:18 56:23 60:6 months 60:15 69:19 morning 3:4 mouth 10:7 move 11:22 multimillion-doll... 21:19 multiply 33:14,15 <hr/> N <hr/> N 2:1,1 3:1 N.Y 1:17 named 61:18,22 names 47:22 nation 48:5,10 National 48:13 nationwide 43:18 68:10 nature 27:14 near 41:17,18 42:7 72:1 nearby 47:7 nearest 37:1 42:25 nearly 9:20 10:4 necessarily 26:3 40:20 necessary 15:3 40:2 necessitate 22:24 need 34:14 37:15 39:23,25 40:7 42:3 52:21 60:9 60:13 needed 11:22 33:16 41:13 53:12 needs 56:1 negate 55:7 never 16:15 49:19 64:6	nevertheless 16:11 new 1:17 4:4,8,21 5:9 15:25 16:7 26:4 28:23 36:20 37:6,10,10,13,16 37:16,25 47:15 62:15 newly 4:24,25 news 13:8 nine 46:4 59:22 non-abortion 22:20 non-ASC 67:20 non-Petitioner 44:25 northern 32:1 noted 26:19 28:11 43:24 44:22 52:15 68:9 72:13 notification 71:20 72:4 number 5:23 7:2 10:15,23 12:20 13:1 15:6 16:3,24 17:4 22:7 30:23 31:24 33:4,12 44:4 45:2,20 54:17 56:18 60:9 60:14 74:1,13,22 numbers 10:22 32:7 nurse 26:3,4,5,7 <hr/> O <hr/> O 2:1 3:1 objections 8:9 objective 34:18 obligation 61:23 obstacle 19:3,9,11 19:24 25:12 27:25 29:22 34:13,17,20 35:10 38:1 39:18 40:24 49:20 52:17 57:14 69:21 obstacles 3:16 24:16 34:5 obtain 4:14 5:17	38:11 obtained 46:12 obviously 37:25 occur 42:22 occurred 16:16 30:23 odd 37:9 offer 6:19 74:15 offered 74:21 offering 74:12 office 49:7 77:10 offices 22:20 67:3 okay 13:8 21:9 33:20 46:25 47:9 47:14 49:12 51:10 63:23 old 26:2,2 once 11:20 19:6 31:21 58:3,3 69:8 69:9 one- 7:4 one-two 10:3 onerous 21:24 77:16 ones 13:6 16:1 71:13,13 open 24:15 29:15 29:17 30:1,2 36:22 38:18 60:24 opened 16:8 36:20 59:23 60:2,3,5 opening 15:25 72:15 operate 11:24 24:21 66:7 75:10 77:11 operated 28:14 75:7 operates 46:3 operating 11:20 25:11 28:25 73:21 operation 28:12 operations 28:11 opine 31:13 opinion 10:8 26:9 48:5 74:12,15	opponents 64:21 opportunity 6:13 15:21 45:9 opposed 21:13 44:4 59:14 67:19 opposite 34:20 oral 1:13 2:2,5,9 3:7 24:5 36:9 49:24 order 18:21 19:13 ought 26:22 35:3 outfit 64:9 outfits 64:13 outpatient 24:1 77:2,4,15 outside 54:16 overall 31:24 overnight 56:22 <hr/> P <hr/> P 3:1 page 2:2 10:9,21 33:11 47:21 73:23 74:11 pages 30:4,14 Parenthood 13:5,9 36:19 45:23 46:3 46:4 53:15 57:18 58:18,18 71:1,5 74:25 75:1,7,8 part 7:12,20 17:8 41:22 44:16,18 62:2 71:2,5 partial 68:9 partially 9:19 particular 5:21 12:21 13:19 27:9 38:8,13 40:4 44:16 particularly 23:4 31:25 32:4 66:13 parts 25:10,13 31:25 48:21 Paso 37:6,20 38:9 38:10,15 39:7 57:16 68:19,21
---	---	--	---	---

<p>69:18 73:17 75:5 pass 35:25 passed 47:16 59:23 64:1 patient 43:7 47:11 52:24 77:15 patients 53:1 pay 21:5 29:14 Pennsylvania 39:13 53:8 66:3 66:20 people 21:11 48:17 55:9,11 61:12 70:25 percent 16:4 30:5,6 33:5 37:3 38:17 39:13 43:25 55:4 68:5 percentage 33:4 54:25 55:10 percentages 45:3 perfect 14:14 perfectly 37:18 perform 23:7 42:19 45:24 46:9 62:19 performed 16:24 17:5 22:8,20 23:4 24:2 30:2 32:8 33:13 45:3,4,21 49:23 67:20 76:16 77:8,10 performing 16:3 58:24 59:6,12,22 61:9 67:2 period 7:6 14:8 22:6 28:12 30:8 30:20,22,24 32:23 39:16,16 47:15 69:18 permissible 43:21 permission 67:3 permit 22:12 permitted 8:18,19 44:14 62:10 personal 3:14 personnel 63:4</p>	<p>Petitioner 54:11,19 54:24 Petitioner's 53:14 Petitioners 1:4,18 1:21 2:4,8,14 3:8 15:20 24:7 39:21 42:19 44:15 46:20 56:4 57:12 69:24 72:14 73:11 Petitioners' 28:2 41:23 45:16 57:19 58:12 physically 28:15 physician's 77:10 physicians 77:11 piece 7:19 pills 20:21,21 21:12 21:13 23:19,22 41:6,8 42:15 pin 11:14 place 16:1 plain 72:21 plaintiff 61:18,22 75:9 plaintiffs 4:7 5:2 6:18 7:14,15 8:16 8:22 16:23 73:15 plaintiffs' 11:15,17 73:23 planned 13:4,9 36:19 45:23 46:3 46:3,4 53:15 57:18 58:18,18 60:2,4,7 71:1,4 74:25 75:1,7,8 planning 13:12 play 20:19 please 3:10 24:9 36:16 plus 46:11 point 5:23 13:18 23:10 26:11 27:24 33:22 37:10 40:22 54:6 61:2 65:6 pointed 66:8 points 28:1 57:11</p>	<p>73:13 policy 37:22 populous 36:24 46:8 position 6:4 7:20 7:23 43:13 44:11 Posner 48:3 possessed 70:16 possible 32:6 73:4 Post 13:10 post-16-week 16:14 posture 69:24 potential 19:19 powers 31:5 practice 24:21 77:5 pre 67:2 pre-enforcement 5:14 precedent 50:17 precipitous 74:22 precise 71:19 precisely 51:2 68:14 72:12 precluded 3:19,23 3:24 preclusion 7:22 preemptively 68:17 68:19 preexisting 25:19 pregnancies 3:15 pregnancy 22:4 preliminary 3:18 prelude 23:20 premise 25:10 43:12 72:20 prescribes 20:20 presence 26:14 preserve 18:3 preserved 18:5 presumably 9:8 41:1 presume 67:4 pretty 25:25 55:1,2 prevail 68:22 prevailed 57:12 68:20</p>	<p>prevailing 76:2,8 prevent 43:6 64:10 67:8 preventing 66:9 prevents 64:13 previously 48:14 prior 3:20 7:1,1 11:3 22:2 25:22 42:2 47:9 53:4,4 66:2 74:1 privilege 9:10 privileges 3:22 4:14 4:15 5:18 10:14 10:14 12:7 37:17 37:24 46:7 47:6 47:21 59:2 61:7 61:15,24 62:9 75:2 77:5,12 probably 42:20 problem 26:11,18 26:18 29:22 31:8 31:19 48:9 53:11 57:24 58:6 64:8 66:3,15,19 67:13 68:12,13 69:7 71:15,23,25 problems 27:1 30:9 67:12 procedure 20:7,20 23:20 38:3 41:9 47:3 48:9 50:14 51:12 52:6 53:19 54:4 68:9 70:24 procedures 16:16 22:2,24 23:3 24:1 33:16 44:4,5 49:16 53:7,10 63:4,21 65:1 67:20 75:20 76:1 76:15 77:8,14 Program 13:11 prohibited 59:6,12 prohibitive 15:25 28:22,24 promote 63:17 promoting 52:24</p>	<p>prompted 64:2 promulgate 8:6 promulgated 8:8 prong 44:21 proof 52:21 proper 14:25 72:13 proportion 22:7 protect 37:14 protecting 53:3 protective 53:5 protocol 41:21 provide 5:4,7 11:13 15:20 60:20 provided 8:14 52:4 60:15 61:8 62:13 77:1 provider 38:23 70:12,13 75:10 providers 8:20 77:4 Providers' 53:22 provides 26:15 36:19 37:3 providing 31:21 58:19 provision 9:1,2,7,9 9:13 24:24 25:1,6 26:16 72:8 provisions 9:15 public 68:8 punch 10:3 purpose 19:4,9,21 50:1 52:16,22,23 55:17,18 56:8,8 56:13,15 57:8 purpose-based 52:20 put 12:21 13:3,17 14:16 16:21,23 32:4,6 45:8 46:16 46:18,19,21 51:18 71:3 puts 24:14</p> <hr/> <p style="text-align: center;">Q</p> <hr/> <p>qualified 76:12 question 3:18 10:7</p>
--	---	---	--	---

10:17 16:20 17:11 19:2 22:13 25:10 26:11 31:13 33:24 34:11 40:16 47:1 52:18 55:8 56:7,8 59:8 62:24 63:19 71:10 questions 66:17 quibble 11:6 quick 16:19 quite 6:2 13:17 15:10 32:7,7 48:25 49:5 60:5 71:19 76:18 quoting 71:11	reason 12:5 17:19 20:9 26:12 54:8 75:22 reasonable 26:1 29:9 61:16 71:11 reasonably 19:20 26:13 reasons 6:14 7:14 11:9,15 12:24 21:23 23:11 36:1 48:17 reauthorize 25:14 rebut 6:20 45:12 rebuttal 2:12 11:14 12:1 16:21 17:3 17:15 73:10 recognized 21:11 recommended 48:14 record 4:10,12 5:20 7:10 11:8,12 12:1 13:15,18,22 15:5 15:22,22 17:4,8 21:16 22:4,22 23:3 28:5,13,19 29:19 30:3 38:8 38:21 44:23 45:16 47:16,25 51:4 54:6,9 57:10 61:5 63:16 68:17,18 71:8 73:13,24 76:6 reduce 10:15 56:17 reduced 60:14 reduces 39:16 reexamine 64:2 references 12:1 referred 74:19 regard 32:15 34:21 76:13 regardless 53:23 58:14 region 75:5 registered 26:4,5,7 regular 8:7 23:1 regulate 38:1 43:21	regulated 75:20 regulating 3:13 20:5 72:7 regulation 10:10 25:11,13 50:6 64:12 65:2 regulations 3:15 8:2,6,8,14,15 25:1 25:3,4,14,16,19 27:5 64:3,5 66:12 72:10 75:23 76:1 77:14,16 regulatory 26:25 66:20,25 reinstate 69:10 related 7:11 18:16 22:19 relation 19:15 relevant 3:25 39:19 72:11 reliability 76:19 reliable 76:22 relief 37:5 44:17 46:12 68:23 69:2 relieve 61:22 rely 30:19 remain 24:15 29:25 30:1 remained 7:2 74:2 remaining 9:24 11:22 14:24 15:6 15:19 30:24 33:13 33:22 44:21 46:14 73:9 remains 27:24 remand 15:1,19 27:20 remedy 27:21 57:7 61:7,13,16 69:11 rendering 4:10 reopen 14:17 58:11 reopened 14:11 58:10 59:16,16 69:8,19 report 13:9 54:19 reported 13:10	54:14 reporting 54:7,8,15 54:17 reports 65:21 66:22 reproductive 37:3 38:18 72:14 require 49:22 55:11 61:22 required 23:19,22 24:1 25:25 76:15 77:11,13 requirement 4:16 5:13 7:25 8:2,20 9:19,22,25 10:1 11:4,5 14:5,8,22 15:24 22:6 28:6,8 29:4,7,8 30:10,21 31:7 35:9,11,16 37:11,12 41:4 43:8 49:22 57:17 58:16,22,25 59:14 59:15,17,24 62:5 73:20 74:7,19 75:14,14,17,17 requirements 3:11 7:17 9:17 10:3 11:19,21 19:16,18 19:20 21:22 22:10 23:9,25 25:24 26:22 28:9,16,21 35:11 51:14 59:6 59:11 75:7 76:7 res 6:6 36:17 43:10 71:7 resolved 4:20 resources 11:22 60:24 respect 5:21 20:1 25:16 28:4,13 29:2,3,3,9,10,11 29:12,19,20,22 30:12 31:19 34:24 75:15,19 76:14 Respondents 1:23 2:11 9:23 11:6 36:10 73:19 74:21	responding 53:12 response 34:10 74:5 responses 41:10 responsible 9:20 10:3 rest 10:18 37:21 restarted 58:8 restate 25:13 rested 10:24 restriction 20:9,10 20:11,12,15 result 4:15 11:21 12:10 13:10 22:3 28:8 60:2 75:6 resulted 5:12 30:21 retain 33:25 34:3 retirement 61:8 retrofitting 28:20 review 52:20 right 14:7,11 17:20 18:22 19:25 20:1 20:6 21:3,8 33:25 34:3 36:3 37:13 37:18,19,20 42:12 47:7 50:16,23 54:23 56:15 62:13 62:22 63:9 66:2 70:16 72:18,24 ripe 7:25 rise 37:23 68:12 risk 22:19 49:9,14 49:15 53:9 55:25 57:5 63:21 65:5 67:19 76:13 riskier 53:19 54:3 risks 22:10 24:22 49:5,6,6 risky 23:1 63:8 ROBERTS 3:3 4:17 6:23 7:7,9 8:25 9:5 11:11 17:13,21,25 18:9 19:1,23 22:14 23:16 24:3 34:15 35:6 36:7,12 45:7
---	--	--	---	---

R

R 3:1

raised 41:23 44:19
65:16 67:14 68:25

raising 18:11

random 66:1,2

range 71:11

rate 16:15 41:12

43:25

rates 41:11 44:13

55:22

rational 17:22 18:2

18:4,7,19 19:7

40:13 52:19

rationality 18:16

rats 65:12

react 50:2 68:7

reacted 68:11

read 27:4,5 49:12

49:12 55:21 57:2

57:2

reading 43:17

47:12

real 28:17 33:25

34:3 57:24 66:15

66:19

really 12:20 29:20

32:10 36:3 40:10

44:3 53:25 64:8

64:24 65:11

45:11 65:19 69:15 73:6,8 74:8,11 77:17,19 Roe 52:25 rogue 64:9,13 65:8 role 40:9 roughly 12:12 36:14 49:6 rule 8:7 rules 66:25 run 49:16	seen 49:11 sees 68:11 segment 72:22 self-created 67:13 self-evident 70:2,11 70:14 self-induced 18:15 57:4,10 send 37:15 sense 30:16,20 32:20,21 35:20 separate 3:21 21:1 35:25 separately 9:1,6,12 separation 9:14 serve 19:21 served 19:18 services 1:8 13:12 set 25:16 37:22 63:2,23 setting 66:23 77:15 seven 28:14 58:15 58:17 severability 25:17 26:14,15 severed 25:17 26:17 27:17 short 7:5 30:7 33:21 show 10:22 12:22 15:15 23:11 28:5 52:7 55:25 69:24 75:13 showed 38:8 showing 6:2 33:6 45:12 74:5 shown 21:11 39:22 57:14 69:21 shows 15:22 16:14 22:23 23:3 shut 14:9 side 10:19 45:13 significant 31:23 43:2 45:12 71:8 significantly 43:18 similar 65:15	Simopoulos 49:21 49:24 50:18 51:16 56:3 63:11 65:4 75:25 single 25:6 48:10 48:24 69:17 sites 11:14 situation 62:15 67:8,15 situations 43:4 six 4:4 36:23 58:23 six-month 22:6 size 70:7 slave 62:12 slightest 40:17,21 small 55:2 solely 9:13 Solicitor 1:19,22 somebody 27:12 Sonia 70:3 sorry 7:9 11:11 20:25 23:17 65:17 sort 64:11 Sotomayor 20:17 20:25 21:3,8 22:12,15,18 23:10 23:15,17 37:8 39:23 40:15 50:3 50:20 51:17 54:12 54:21,25 55:6,14 55:20 60:1,11,19 60:23 61:4,17,19 62:4,8,14,17,22 65:17 66:14,18 67:10,17,23 68:2 68:5 70:1,4,8,10 70:19,22 74:24 sought 20:4 69:3 72:19 space 60:17,22 specific 5:20 11:14 specify 75:16,16,17 75:18 speculative 4:12 speed 66:7 spontaneous 23:5	spot 42:22 58:2 61:6 spots 66:6 spousal-notificati... 72:8 stable 7:3 stage 54:4 stand 20:11 26:22 34:4 standard 36:19 37:23 39:9 51:21 51:24 58:20 65:2 66:12 67:6 standards 50:11,14 50:22 63:3,5,6,23 76:3,8 start 4:22 58:5 started 36:13 starting 72:20 state 1:7 5:25 6:12 6:19 7:2 11:24 14:19,20,23 19:17 20:1,7,8 24:14,17 26:9 28:13 31:1 31:22,25 32:24 34:21,22 35:15 42:9 44:8 51:20 65:25 66:4 67:7 74:18 State's 18:13,16 19:19 20:4 26:25 43:13,16 52:9,14 52:18 statements 64:19 States 1:1,14,21 2:7 8:5 21:10 24:6 53:1 64:2 68:11 States' 3:12 statewide 15:8 statistic 33:6 54:7 55:3 statistically 45:12 statistics 17:7,7 32:18 38:21 39:5 statute 8:10,13,14 statutory 8:2	stay 29:15,17 31:6 45:17 56:22 stayed 14:10 STEPHANIE 1:17 2:3,13 3:7 73:10 sterilize 65:13 stipulated 9:23 14:19,20 59:10 73:19 stipulation 14:21 28:6 59:4,4,8 stories 65:15,18 strength 34:21,22 stress 24:14 stretch 46:13 stretcher 27:12 struck 3:12 34:2 56:5 studied 30:23 32:23 subject 23:9 65:2 submitted 77:20,22 subsequent 4:1 5:5 substance 34:1,4 substantial 3:16 13:1 16:12 19:3,5 19:11,24 25:12 27:24 29:22 31:1 31:5 34:16 38:1 39:18 40:24 49:20 52:17 57:14 69:21 succeed 39:21 succeeds 69:12 successful 57:25 suddenly 56:19 sue 6:7 suffice 46:14 sufficient 4:12 5:1 5:7,16 6:20 15:4 sufficiently 53:5 suggest 67:4 suggesting 35:3,22 suit 5:2,5,6,14 8:23 supplement 15:21 supplemental 4:3,6 supplies 74:16 supply 13:21
---	---	--	---	---

support 6:21 15:5 supporting 1:21 2:8 24:7 76:22 supports 15:23 suppose 5:25 15:12 25:15 36:12 57:24 Supreme 1:1,14 4:5 sure 14:3 17:14 22:14 35:6 48:17 51:5,8 69:15 70:6 surgery 16:7 42:16 42:17 49:7,23 65:3 77:2 surgical 7:19 16:3 21:19 22:2 37:11 41:7,8,13 42:4,7,9 42:15,19 43:1,15 43:21 44:4 49:4,8 49:10,15,17 58:1 77:4,8 surprised 27:5,6 sustained 20:15 swath 69:1 swift 69:9 system 8:5	targeted 23:12 targeting 55:24 tell 37:25 47:22 62:25 74:24 telling 40:9 tells 30:3 ten 15:7 50:8 61:3 tenth 46:11 Teresa 37:6 test 18:18 34:23 35:20 40:14,24 49:19 52:8,16 testified 7:15 11:17 21:11 73:15 testimony 7:13 11:15 21:16 28:18 30:3,14 31:23 32:15 39:6 43:25 51:4 57:11 61:5 73:17 74:4,15 76:6,19 Tex 1:23 Texas 1:7,22 3:11 9:21 13:5,11 16:16 17:6 20:22 24:10 33:8 36:18 36:21,21,24 37:3 37:14,14,21,22,25 38:17 39:16 42:18 43:19 46:8,11 48:11 52:25 53:8 54:19 55:18 57:15 58:12 59:10,22 60:17,18 62:2 63:2,13,16 64:2,8 64:9,14,16,18 65:16 66:1,5,8,11 67:13,15 68:15 69:1 70:5 71:2,17 71:18 72:14 73:1 73:5,15 74:2 75:3 75:6,8,22 76:25 77:7 Texas's 16:12 64:5 76:22 thank 17:16 23:16	24:3 36:6,7,11,15 46:24 56:9 73:6,7 73:12 77:17,18 theme 44:2 theory 36:3 they'd 30:6 thing 25:7 31:20 35:8 48:6 66:9 things 6:25 25:21 27:13,16 37:15 54:16 think 8:25 10:5,7 10:17,19 13:25 14:23 15:3,4 17:21 19:10 24:25 25:11 26:6,10,11 26:12,19 27:19,23 27:23 28:5 29:1 29:11,18,21,21 31:3,14,16,18 32:12,14 33:24 34:20 35:1,7,18 35:19,23 36:1,14 48:25 50:7,14 51:17 55:20 60:4 63:19 64:17 76:11 thought 17:25 19:23 31:13,14 33:9 34:16,17 44:1 thousands 40:18 three 16:7 31:7 39:15 40:12 55:5 59:23 68:19 three-quarters 38:23 39:2 threshold 17:10 thrust 43:14 tie 55:14 till 66:7 time 5:2 7:6 8:1 16:21 17:3,10,11 17:15 21:10 30:8 30:20,22,24 32:23 33:21 40:2 47:15 60:18 69:13,18	76:3 times 30:18 49:9,11 51:13 67:25 timing 7:6,12 45:14 tiny 57:5 today 36:22 38:19 59:22 69:2 told 24:20 35:13 58:13 tomorrow 58:5 69:11 top 67:22 topics 68:8 total 12:3,10 Toti 1:17 2:3,13 3:6 3:7,9,17,24 4:7,23 5:11 6:10,12,17 6:25 7:8,12,24 8:11 9:3,16 11:1 11:13 12:2,6,12 12:16 13:7,14,24 14:2,6,12,18 15:3 15:18 16:6 17:2 17:16,24 18:3,12 18:20 19:13 20:3 20:22 21:2,7,15 22:17 23:2,13,24 73:8,10,12 74:10 74:14 75:4,15 76:17 77:18 transcript 49:25 transfer 47:11 77:13 travel 21:5,10 39:12,14 40:2 41:21 56:21 57:14 71:16 traveling 39:17 treat 75:22 treated 50:18 75:21 treatment 21:6 treatments 23:22 55:22 trial 4:10,11 16:8,9 16:10 60:18 76:20 76:21	tried 45:20 trimester 22:8 true 24:23 25:1 50:12 64:22 truly 76:25 try 44:24 55:7 56:22 trying 26:20 44:20 56:4 turn 49:2 69:4 two 9:14 10:7,11,11 10:12 20:18,20 21:1,5 22:23 23:11 28:1 35:4 35:25 39:17 41:6 41:8,10,20 47:4 48:21 52:12 55:5 57:11 59:18,19 75:4 two-and-a-half 31:7 two-clinic 7:4 two-day 21:9 two-part 22:13 two-week 14:8 types 20:18 typically 23:7
<hr/> T				<hr/> U
T 2:1,1 Table 33:11,12 tailored 27:21 take 3:19,21 6:4 8:6 10:6 12:25 14:17 16:1,20 17:14 20:21,22 21:1,4 35:4 41:6,8 42:15 44:24 55:8,11 56:15 70:20 taken 16:7 27:13 33:17 64:9 takes 60:5 talk 14:24 talking 12:19 13:6 13:13 40:15,16 42:2,2 54:14 71:20 72:9 target 77:14				ultimate 38:3 52:5 72:25 ultimately 33:24 unable 4:13 5:17 unanticipated 8:9 unconstitutional 6:6 25:8 52:2,22 52:23 underlying 43:12 44:2,2 undermine 3:11 undermines 18:8 18:13 underreported 54:10,13 65:25 66:17 understand 12:20

13:2,16 14:3 30:11 34:19 53:6 56:23 65:20 understanding 35:20,21 63:9 understood 13:23 undue 17:19 18:6 18:19,22 19:3,6 19:11,14,23,25 20:10 34:8,9,11 35:20,21 39:11 40:5 48:20 51:22 52:13 69:20 70:13 70:14,24 undue-burden 39:25 52:8,16 United 1:1,14,20 2:7 24:6 unnecessary 3:15 20:13 75:23 unreasonable 20:12 26:6 unusual 55:10,25 unwarranted 20:8 34:11,12 upheld 36:2 49:21 upholding 19:16 upset 56:4 use 15:11 48:15	violation 66:6 violations 65:11 Virginia 49:22 virtually 23:3,8	75:3,5 What'd 11:25 whichever 35:23 wide 27:11 69:1 win 5:25 wise 44:5 withstand 24:18 woman 23:5 42:5 42:14,25 48:8,20 49:14 69:12 72:18 72:22 woman's 1:3 3:4 19:25 20:5 28:14 54:20,24 58:6 65:10,24 women 20:21 22:3 22:11 24:16,22 33:16 36:25 37:3 37:15,20,21 38:10 38:15,17,22 39:7 39:14 40:19,22 43:3 47:17,21 48:14 49:16 51:23 52:1,4 53:15 55:5 56:15,21,24,25 57:5 62:12 70:15 70:17,20,25 71:11 71:16,16,21,22,23 71:24,25 72:7,13 72:23,25 women's 3:13 13:11 22:9 41:17 50:9 53:5,13 75:24 wondering 64:12 word 26:16 words 10:6 60:11 work 27:2,3 35:10 61:1,14 62:10 63:7,8 working 47:10,18 works 35:21 worried 56:13 Worth 10:11 59:18 wouldn't 4:25 5:4 18:7,15 25:12	51:25 68:12 wrong 30:13	175 45:25 183 28:7 73:19 184 73:19
V	W		X	2
v 1:5 3:4 52:25 vacate 45:17 valid 66:13,14 validate 49:4 value 39:25 variance 7:4 variety 21:23 Verrilli 1:19 2:6 24:4,5,8,25 25:5,9 26:8,25 27:15,19 30:6 31:11,18 32:12,14,19,22 33:19,21 35:1,7 versa 9:11 vice 9:11	Wade 52:25 wait 8:7 21:9 50:20 waiting 39:16,16 waivers 8:17,18,23 wake 11:2 64:1 walk 20:17 want 10:6 16:20 26:8,10 29:17 44:10 47:14 56:14 63:12,24 64:16 67:4 wants 48:21 51:21 62:17 Washington 1:10 1:20 wasn't 4:12 17:1 61:25 way 26:9 27:22 35:3,23,24 37:14 44:14 we'll 3:3 17:14 36:13 we're 12:19 13:13 18:6 31:6 35:3,22 39:1 50:9 61:13 69:23 72:9 we've 50:7 weaker 34:7 Wednesday 1:11 week 45:25 weeks 22:2 weighed 52:8 went 16:4 19:24 33:5 45:19 58:17 58:23 59:18 60:3 weren't 7:25 28:7 29:16 West 57:15 58:12 69:1 71:2 73:5 western 70:4 74:25		x 1:2,9	2 2 1:11 33:12,14 59:23 73:23 2,000 33:14 2.3 28:21 20 7:5 10:15,16 11:2 12:12,14 29:5 30:5,6,22 200 21:5 38:24 39:1 39:3 2003 16:13 2011 13:11 2012 38:25 2016 1:11 210 53:15 55:1 22 58:23 225 30:4 229 74:3,4,10 232 74:11 24 2:8 33:15 24-hour 39:15 242 37:2 39:5 25 37:3 256 41:2 258 41:2 259 30:4 266 53:17 55:4 28 49:8 68:1,2,5 73:23 2808 73:25
			Y	
			yeah 7:9 12:9 32:16 44:6 61:2 65:3 67:10 year 7:3 29:1,15,24 30:2 32:9 45:4 years 7:1 8:6 31:7 66:5,22 67:18 73:25 York 1:17	2 2 1:11 33:12,14 59:23 73:23 2,000 33:14 2.3 28:21 20 7:5 10:15,16 11:2 12:12,14 29:5 30:5,6,22 200 21:5 38:24 39:1 39:3 2003 16:13 2011 13:11 2012 38:25 2016 1:11 210 53:15 55:1 22 58:23 225 30:4 229 74:3,4,10 232 74:11 24 2:8 33:15 24-hour 39:15 242 37:2 39:5 25 37:3 256 41:2 258 41:2 259 30:4 266 53:17 55:4 28 49:8 68:1,2,5 73:23 2808 73:25
			Z	
			zero 49:14	
			0	
			09 73:25	
			1	
			1 38:8 55:4 1.6 28:21 10,000 39:1,2 56:20 10:03 1:15 3:2 100 37:1,4 39:17 100,000 38:25 11 11:4 12:6 14:3 29:4,10 74:6,17 11:28 77:21 1111 59:19 12 12:16 13:21 14:16 121 64:18 65:16 13 28:6 60:15 131 59:19 14,000 30:2 1430 74:3 1436 59:19 15 66:22 67:25 15-274 1:4 3:4 150 38:18,22,25 56:21 16 22:2 33:14 66:5	1 1 38:8 55:4 1.6 28:21 10,000 39:1,2 56:20 10:03 1:15 3:2 100 37:1,4 39:17 100,000 38:25 11 11:4 12:6 14:3 29:4,10 74:6,17 11:28 77:21 1111 59:19 12 12:16 13:21 14:16 121 64:18 65:16 13 28:6 60:15 131 59:19 14,000 30:2 1430 74:3 1436 59:19 15 66:22 67:25 15-274 1:4 3:4 150 38:18,22,25 56:21 16 22:2 33:14 66:5
				3
				3 3 2:4 33:15 3,000 32:8 3.5 28:23 30 10:4 41:19 42:4 42:4,4 47:7 51:13 33 58:17,23 339 73:17 36 2:11
				4
				4.4 33:5

40 10:15,23 39:13

401 59:2

41 58:17

430 60:17

433 60:17

439 74:4

5

50 16:4 43:3

5043 49:24

6

6 43:25

600,00 29:1

606 65:25

606-700 54:20,24

65 29:24

7

7 10:9

70,000 29:24 33:15

55:1

700 65:25

715 59:19 73:17

72 54:11

722 73:17

73 2:14

731 73:18

750,000 38:23

8

844 54:11

870 54:11

9

9 33:11

9,000 45:24,25 46:9

90 38:17

900,000 38:22