No. 19-2690

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

LITTLE ROCK FAMILY PLANNING SERVICES; ET AL.,
Plaintiffs-Appellees,

v.

LESLIE RUTLEDGE, in her official capacity as Attorney General of the State of Arkansas; ET AL.,
Defendants-Appellants.

On Appeal from the United States District Court for the Eastern District of Arkansas
No. 4:19-CV-00449 KGB (Hon. Kristine G. Baker)

Brief of Defendants-Appellants

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SUMMARY OF THE CASE AND STATEMENT REGARDING ORAL ARGUMENT

The district court preliminarily enjoined three commonsense Arkansas abortion regulations based on two equally erroneous pronouncements. *First*, it enjoined Arkansas's requirement that abortion practitioners be OBGYNs because it believed "abortion is *significantly safer* for a woman than carrying a pregnancy to term and giving birth"; therefore, it deemed additional regulation unnecessary. ADD109 (emphasis added). That conclusion defies logic and underscores that far from comparing the benefits of Arkansas's requirement to preexisting law, the district court prejudged the result. That error and its failure to consider facts on the ground in conducting the burden and large-fraction analyses require vacatur.

Second, to enjoin Arkansas's ban on aborting children solely on the basis of Down syndrome and its gestational-age deadline, the district court conjured a new, *unqualified* right to previability abortion. That unqualified right, in every sense, shockingly "[e]nshrin[es] a constitutional right to an abortion based solely on the . . . disability of an unborn child." *Box v. Planned Parenthood Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1792 (2019) (Thomas, J., concurring). But no decision from the Supreme Court nor this Court recognizes such a right. The district court's reliance on such a right to enjoin Arkansas law warrants outright reversal.

To correct those and other errors, Arkansas believes 20 minutes of oral argument per side is warranted.

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STATEMENT OF JURISDICTION

The district court had jurisdiction. 28 U.S.C. 1331, 1343(a)(3). On June 26, 2019, Judge Billy Roy Wilson entered an ex parte text order (DE14) granting Plaintiffs' motion to transfer to Judge Kristine Baker and consolidate with *Planned Parenthood of Arkansas & Eastern Oklahoma v. Jegley*, No. 4:15-CV-00784-KGB (E.D. Ark.). Judge Wilson did not address the fact that the *Jegley* plaintiffs had moved to voluntarily dismiss that case. *See* Unopposed Motion to Dismiss Without Prejudice, *Jegley*, No. 4:15-CV-00784-KGB (May 24, 2019), DE187. Arkansas filed a motion to reconsider, which was denied. JA521-27. As discussed in Arkansas's motions briefing, this Court has jurisdiction to review both the ex parte consolidation order and the order denying reconsideration. *See* Resp. in Opp'n to Mot. for Partial Dismissal (Sept. 3, 2019), ID#4826375; Resp. in Opp'n to Mot. to Exclude *Jegley* Record (Sept. 9, 2019), ID#4828437.

On August 6, the district court issued a preliminary injunction. ADD1-2. That same day, Arkansas filed a timely notice of appeal. JA2387. This Court has jurisdiction to review the preliminary-injunction order. 28 U.S.C. 1292(a).

STATEMENT OF THE ISSUES PRESENTED

1. Did the district court err in facially invalidating Arkansas's gestational-age deadline?

Apposite Authority: *Gonzales v. Carhart*, 550 U.S. 124 (2007); *Planned Parenthood Ark. & E. Okla. v. Jegley*, 864 F.3d 953 (8th Cir. 2017).

2. Announcing an absolute right to previability abortion, did the district court err in facially invalidating Arkansas's genetic-discrimination ban?

Apposite Authority: *Box v. Planned Parenthood Ind. & Ky., Inc.*, 139 S. Ct. 1780 (2019); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

3. Wrongly finding that Arkansas's OBGYN requirement has zero benefits and that it might lead *some* women to forgo or postpone abortion, the district court erroneously concluded that the requirement's benefits are substantially outweighed by its alleged burdens on a large fraction of women. Did the district court err in facially invalidating the OBGYN requirement?

Apposite Authority: *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016); *Jegley*, 864 F.3d 953; *Cincinnati Women's Servs., Inc. v. Taft*, 468 F.3d 361 (6th Cir. 2006).

4. Should this Court order random reassignment on remand?

Apposite Authority: *Sentis Grp. Inc. v. Shell Oil Co.*, 559 F.3d 888 (8th Cir. 2009).

STATEMENT OF THE CASE

Two Arkansas abortion facilities and two practitioners challenge three commonsense abortion regulations imposing a gestational-age deadline, barring discriminatory abortions, and requiring practitioner competency. They sought a preliminary injunction. Shortly after filing the complaint, Planned Parenthood of Arkansas and Eastern Oklahoma, Inc. (PPAEO) closed its Fayetteville, Arkansas, facility for unrelated reasons and withdrew from the preliminary-injunction motion, along with Stephanie Ho, who formerly performed abortions there. That left Little Rock Family Planning Services, PLLC (LRFP) and its abortion practitioner Thomas Tvedten as the sole Plaintiffs pursuing preliminary relief. On the basis of their claims, the district court facially enjoined all three challenged laws.

A. Challenged Laws

Plaintiffs brought this lawsuit less than a month before the challenged laws would take effect. *See* JA1-40.

The gestational-age deadline set a time limit for abortions. *See* Act 493, 92d Ark. Gen. Assembly, 2019 Reg. Session (Mar. 15, 2019) (to be codified at Ark. Code Ann. 20-16-2001 et seq.).[1] To comply, an abortion practitioner must first make "a determination of the probable gestational age of the unborn human being"

[1] The challenged provisions have not received code numbers, so Arkansas refers to their session-law sections.

and document that age. 2019 Ark. Acts 493, 20-16-2004(a). If the probable age is greater than 18 weeks after the first day of the woman's last menstrual period, the practitioner cannot perform the abortion unless there is a "medical emergency," or the pregnancy resulted from rape or incest. *Id.* 20-16-2004(b). Practitioners who violate that deadline face liability and professional discipline. *Id.* 20-16-2006. It creates no penalties against a woman who receives an abortion. *See id.*

Arkansas's genetic-discrimination ban proscribes "intentionally perform[ing] or attempt[ing] to perform an abortion with the knowledge that a pregnant woman is seeking an abortion solely on the basis of" a "test result," a "prenatal diagnosis," or "[a]ny other reason to believe that an unborn child has Down Syndrome." Act 619, 92d Ark. Gen. Assembly, 2019 Reg. Session (Apr. 1, 2019) (to be codified at Ark. Code Ann. 20-16-2003(a)). To ensure compliance, the genetic-discrimination ban requires abortion practitioners to inquire whether a woman seeks an abortion solely on the basis of Down syndrome. *Id.* 20-16-2003(b). Practitioners who violate the ban or fail to ensure compliance face criminal and civil liability. *Id.* 20-16-2004, -2005. The ban exempts a woman receiving an abortion from liability and treats her as a crime victim. *Id.* 20-16-2006.

The OBGYN requirement provides: "A person shall not perform or induce an abortion unless that person is a physician licensed to practice medicine in the

state of Arkansas and is board-certified or board-eligible in obstetrics and gynecology." Act 700, 92d Ark. Gen. Assembly, 2019 Reg. Session, sec. 1 (Apr. 4, 2019) (to be codified at Ark. Code Ann. 20-16-605(a)). Anyone violating this requirement is guilty of a felony and may lose his medical license. *Id.* 20-16-605(b).

B. Prehearing Proceedings Below

Plaintiffs' decision to bring this challenge at the last second created an artificially compressed litigation schedule designed to hamper Arkansas's defense. With the district court's indulgence, Plaintiffs aggressively leveraged that compressed schedule.

The day that Plaintiffs filed their complaint, they requested that this case be nonrandomly assigned to Judge Baker. JA465-66. The case was initially assigned to Judge Wilson, but before Arkansas was even served with the complaint or motion—let alone had an opportunity to oppose that motion—Judge Wilson granted it ex parte and without explanation. *See* DE14, docket below ("The Clerk of the Court is directed to transfer this case to United States District Judge Kristine Baker for consolidation with case 4:15CV00784-KGB," *PPAEO v. Jegley*).

Judge Baker denied Arkansas's motion to reconsider that ex parte order. JA521-27. Arkansas's motions briefing has already detailed the improprieties of Judge Wilson's order and Judge Baker's refusal to reconsider it. *See* Resp. in Opp'n to Mot. for Partial Dismissal at 5-14 (Sept. 3, 2019), ID#4826375. Most

importantly, although Plaintiffs point to supposed similarities between this case and *Jegley*, a constitutional challenge to *any* abortion regulation in Arkansas would share those same similarities. *See id.* 9-10.

Contemporaneous with Plaintiffs' nonrandom-assignment motion, they filed a motion for a temporary restraining order or preliminary injunction. JA58-62. Plaintiffs attached declarations from a variety of witnesses and putative experts, including Jason Lindo, an economics professor who opined on the OBGYN requirement's alleged effects. *See* JA257-94. The district court set a July 22 hearing, two days before the challenged laws' effective date. ADD2.

On Saturday, July 6—little more than a week after filing this lawsuit—Plaintiffs notified the district court that PPAEO's Fayetteville facility had closed and that PPAEO and Ho were withdrawing from the motion for preliminary relief. JA528-33. In fact, that facility had "stopped providing abortions" sometime "[e]arlier th[at] week." JA531. That closure was unrelated to Arkansas law. *See* JA530 (attributing it to "increasing problems with [a] landlord").

PPAEO Fayetteville's closure substantially changed Plaintiffs' claims. It rendered irrelevant Lindo's claim that a reduction in Fayetteville capacity—where the primary practitioner was not an OBGYN—would require "a large number of women" to travel longer distances to obtain abortions. JA258; *see* JA292 ("[T]he OBGYN Requirement [was] expected to restrict and reduce the capacity of

PPAEO Fayetteville to provide abortions."). Indeed, because of Fayetteville's closure, there is no evidence that any woman would be required to travel any farther to obtain an abortion. Instead, abortion remains available in Little Rock facilities, from any board-certified or -eligible OBGYN in Arkansas, or from neighboring States' providers. *See* JA296.

His assumptions now invalid, Lindo filed a new, *second* declaration. Although the facts had changed, Lindo's conclusions did not. JA534. Because that second declaration was filed just one week before Arkansas's deadline to respond to Plaintiffs' motion for preliminary relief, Arkansas sought to strike it; or at least to be allowed sufficient time to respond. *See* ADD2. The district court denied that request. *See* ADD2-3.

Attempting to mitigate the prejudice of responding to Plaintiffs' fact-intensive claims without access to all the facts, Arkansas also sought prehearing discovery. JA471-75; *see Comprehensive Health of Planned Parenthood Great Plains v. Hawley*, 903 F.3d 750, 755-56 (8th Cir. 2018) (emphasizing "fact-intensive nature of the constitutional test"). Arkansas's proposed discovery requests targeted the data that Lindo purportedly relied upon and information about Plaintiffs' efforts to comply with the OBGYN requirement. *See* JA477-82 (requesting, among other things, "all data on which Jason Lindo relied"). Because the district court had consolidated this case with *Jegley*, Arkansas additionally sought to require the *Jegley*

plaintiffs (also parties here) to respond to discovery requests that had been pending for over a year. *See* JA484-91. Plaintiffs objected, and the district court denied Arkansas's requests. JA545-47.

On the Thursday before the Monday, July 22 hearing, Arkansas filed a renewed motion for expedited discovery or alternatively to strike Lindo's declarations. JA1263-65. Plaintiffs had persistently refused to provide Arkansas with the data Lindo purportedly relied upon, instead insisting on an unreasonably broad protective order. JA1263-64. As with Arkansas's other efforts to obtain facts, the district court denied this motion, this time based on Plaintiffs' representations that they would produce Lindo's data upon entry of a protective order. JA1321; *see* JA1287-95 (protective order).

In the end, Plaintiffs successfully hindered Arkansas's ability to test Lindo's claims. On the same day the district court denied Arkansas's motion to strike Lindo's *second* declaration—the Friday before a Monday hearing—Plaintiffs filed a *third* Lindo declaration. JA1277-82. But Plaintiffs provided no data until the next day—a Saturday, just two days before the hearing. *See* JA2004 (describing July 20 data). And that data differed from what Plaintiffs had provided Lindo. *See* JA1819-20 (Plaintiffs' "Notice of Correction of the Record"); JA1822-24 (explaining differences); *see also* JA1652 (Lindo testimony demonstrating Arkansas had

not received his data). As a result, despite repeated discovery requests, Arkansas had to prepare for the hearing with inaccurate, incomplete data.

C. District Court's Hearing

The July 22 hearing focused on competency to perform abortions and follow-up care, and on Lindo's claims.

Frederick Hopkins, a board-certified OBGYN employed by LRFP, testified. JA1529-66. At the time, Hopkins was LRFP's only board-certified OBGYN. ADD47. He testified that performing an abortion "requires a basic understanding of gently opening the cervix, emptying it and doing that in the context often of an outpatient center." JA1543. He also explained that dilation and curettage, a common abortion technique, is also used by OBGYNs "to manage a miscarriage." JA1541-42. "[A]ll OB/GYNs," according to Hopkins, will "have been exposed to" that technique "upon completion of their residency," even if not all of them "feel comfortable or confident" at that point. JA1542. He likewise affirmed the value of board certification, noting, "I couldn't get my faculty positions at . . . all the places that I've been involved in, without having been board certified." JA1543.

Hopkins currently lives in California but travels to Arkansas one week every other month to perform abortions. JA1550-51. He "[t]ypically" works three days. JA1551. But "if it's busy and there's more demand," then he is "able to work a fourth day." *Id.* He also explained that LRFP has never "offered [him] more

money to come to Little Rock more frequently." JA1555. He admitted "[t]here's nothing that legally prevents" him from working at LRFP more frequently. JA1563.

Hopkins's testimony underscores that, if necessary, LRFP could more efficiently manage its OBGYNs' time and provide additional abortions. For instance, "on every day that [Hopkins is] working at the clinic," he "both obtain[s] informed consent and provid[es] abortion services." JA1551-52. Hopkins acknowledged that the time he spends obtaining informed consent is "time that [he is] not spending providing abortions" and that nothing requires him to *personally* obtain informed consent. JA1564-65. In fact, "any physician is qualified to obtain informed consent"—including non-OBGYNs—so Tvedten "or any other doctor could perform the informed consent[] counseling for [Hopkins's] patients." *Id.* Indeed, Hopkins already sees some patients for whom the informed-consent requirements are met by others. JA1552-53. And—other than Hopkins's unwillingness—there is no reason that he could not perform more such abortions. *See* JA1566.

Linda Prine, a pro-abortion family physician, also testified. She argued that "a clinician" does not "need to be board eligible or certified in OB/GYN to safely and effectively provide abortion care," JA1574, but she acknowledged "that two-thirds to three-quarters of abortion providers are OB/GYNs," JA1585. She also conceded that because she is not a board-certified OBGYN, JA1568, her only

knowledge of board-certification requirements is "from conversations with colleagues who are OB/GYNs, the sort of commiseration about board certification and maintenance of certification." JA1574; *see* JA1584 (admitting "no personal experience with becoming board certified in obstetrics and gynecology"). Nevertheless, she believed an abortion practitioner only needed to: (1) "be able to counsel in a nonjudgmental patient-centered way"; (2) "have the manual dexterity if they are performing surgical abortions"; and (3) "care about patients." JA1575.

The testimony of LRFP's clinical director, Lori Williams, focused on LRFP's purported efforts to hire additional staff. JA1595-1629. In 2015 and again in 2016—long before the OBGYN requirement's adoption—LRFP mailed unsolicited letters to an undefined number of Arkansas OBGYNs, seeking help from "doctors who are practicing Obstetrics," JA462, or "OB/GYN physicians," JA464. *See* JA456-57. Those letters did not specifically seek out board-certified or -eligible OBGYNs. And the 2016 letter did not mention compensation. JA464. LRFP "received no response." JA457.

Despite that lack of response, LRFP did the same thing after the OBGYN requirement's passage. JA1623-25. It simply "composed and mailed a letter to every OB/GYN licensed in the state of Arkansas." JA1606. Williams offered no evidence concerning LRFP's attempts to reach board-certified or -eligible OBGYNs who are not currently but *could become* Arkansas licensed. *See* JA1606-07.

Moreover, Williams conceded that LRFP made no "follow-up phone calls to any of these doctors to whom . . . the letters were sent." JA1623. LRFP just waited for someone to contact it. *Id.*

Williams' testimony also demonstrated that she was unfamiliar with Arkansas's abortion regulations. For instance, she incorrectly claimed that Arkansas law requires Hopkins to *personally* obtain informed consent. JA1610. But Arkansas law allows any "physician" to obtain informed consent. *See* Ark. Code Ann. 20-16-1703(b)(1). In her declaration, Williams also wrongly claimed that "[u]nder Arkansas law, LRFP cannot charge patients for the initial visit." JA458. Yet Arkansas law does not prohibit LRFP from collecting payment for the legally mandated informed-consent disclosures *after the 72-hour waiting period*. *See* Ark. Code Ann. 20-16-1703(d). Indeed, at the hearing, Williams conceded that this cost "can be added to the cost of the abortion." JA1628; *accord* JA1710 (Tvedten).

Thomas Tvedten, a plaintiff here, testified about his history of legal and professional troubles. JA1687-1715. Tvedten is an abortion practitioner who, with his wife, owns 80% of LRFP. *See* JA1614 (Williams). He settled two malpractice lawsuits related to "defect[s] in the uterine wall" that led to hospital transfers. JA1692-93. Separately, Tvedten pleaded guilty to criminal mischief related to losing his temper and attacking someone. JA1694. Professionally, in 1983 the Arkansas Medical Board determined that Tvedten "had overprescribed scheduled

medications to two patients" and required him "to relinquish[] [his] medical license for three months." JA1693-94; JA1517 (licensure file indicating Tvedten "suppl[ied] patients with Demerol injections to be injected at the[ir] discretion"). He was barred from prescribing controlled substances for 15 months. JA1693-94.

Lindo also testified. JA1629-86. He opined that the OBGYN requirement would mean that "62 to 70 percent of women who have historically obtained abortions in Arkansas will no longer be able to obtain *the same type of* [*abortion*] that they received in the past." JA1633 (emphasis added). He focused on that claim rather than his *second* declaration's assertion that 44-54% would be unable to obtain an abortion. JA541. But in any event, he conceded that his opinions were inconsistent with the facts on the ground. For instance, Lindo was unaware—until asked about it by Arkansas—that PPAEO was opening a new, larger abortion facility in Little Rock. *See* JA1666-67 ("This is the first I'm hearing of it.").

Lindo likewise admitted that his impact estimate did not account for the long-term, real-world decline in the number of Arkansas abortions. Relying on numbers dating to only 2016, Lindo "assume[d]" that future "demand will stay stable" or increase. JA1807; *accord* JA1638. But the abortion rate has actually been declining, and when confronted with that fact, Lindo conceded that abortion has undergone about "a 3 percent reduction on average a year" since 2000. JA1671. He did not explain why, if *abortion demand tended to decrease by 3% each year*,

his analysis assumed that it would remain constant or even increase if the OBGYN requirement takes effect. *See* JA2164 (Solanky) ("taking average of three years of data inflates the number of abortions, when in there is a decline in the number").

Dr. Tumulesh Solanky, a statistics professor, explained Lindo's many errors. He focused on two in particular. JA1724-51. First, Solanky explained that Lindo had manipulated abortion-trend data to claim that rates would remain static or increase. JA1725-26; *see* JA1176-79 (declaration). He explained that if Lindo had used data going back to at least 2011, it would have been "very obvious that the trend is going down." JA1726. By not accounting for this long-term abortion decline, Lindo wrongly presumed "that any time a number of abortions went down, it was due to the regulation." JA1729.

Second, Solanky explained why Lindo's capacity estimates in fact "underestimate the capacity of the clinics." JA1743. Contrary to evidence in the record that LRFP does not operate at capacity, Lindo assumed that the "maximum number of abortions" performed in the past "is the maximum capacity." JA1744. But Lindo did not support that assumption.

Finally, abortion survivor Judy McGruder testified about the impact of being pressured to abort an unborn child on the basis of Down syndrome. McGruder powerfully described how she was pressured to obtain an abortion at 20 weeks, and how aborting her unborn child impacted her. JA1792-96. Yet far from giving

McGruder's unique testimony the consideration it deserved, the district court derided it. When Arkansas noted that it would be unable to present additional testimony because the district court had limited Arkansas's time for presenting evidence, the district court gave a prolonged criticism of McGruder's testimony and questioned its value. *See* JA1798-1802; *see also* JA1810-11 (Arkansas's counsel noting inability to call Kathi Aultman due to time constraints).

The day after the hearing, Plaintiffs filed a *fourth* Lindo declaration and informed Arkansas that—despite representing they had provided the data Lindo purportedly relied upon—Plaintiffs actually provided Arkansas different, inaccurate data. JA1819-24. Yet Plaintiffs still did not then provide Arkansas with the files that Lindo supposedly relied upon. Consequently, Arkansas moved to strike Lindo's fourth, *posthearing* declaration or, at a minimum, to have an opportunity to review Lindo's actual data and question him about his posthearing declaration. The district court denied that request. JA1998-2002. Not until eight days later—*after* the district court's temporary restraining order, and *after* the parties filed supplemental preliminary-injunction briefs—did Plaintiffs finally provide Arkansas with the same data they provided Lindo. JA2003-08.

D. Posthearing Proceedings Below

On July 23—the same day that Plaintiffs filed Lindo's latest declaration and acknowledged providing Arkansas with inaccurate data—the district court entered

a temporary restraining order enjoining the gestational-age deadline, the genetic-discrimination ban, and the OBGYN requirement. In so doing, the district court indicated that it would allow further proceedings on Plaintiffs' preliminary-injunction motion. JA1829.

The district court soon set a briefing schedule and asked whether the parties desired an additional preliminary-injunction hearing. JA1985. Arkansas requested a hearing to, at a minimum, test Lindo's still-shifting representations. JA1993-97. Plaintiffs objected, and the district court declined to hold a hearing. JA2182-83. Consequently, Arkansas had no opportunity to question Lindo's latest claims or cross-examine him using the data that the Plaintiffs had provided him. Instead, the district court announced that there was "no reason to doubt [Lindo's] numerical estimates." ADD34 n.3.

E. Preliminary Injunction

On August 6, the district court preliminarily enjoined all three challenged laws. *See* ADD185-86. It treated the genetic-discrimination ban and the gestational-age deadline as blanket prohibitions on previability abortions and enjoined them with little analysis. *See* ADD84-102. In fact, although the district court wrote a 186-page order, it devoted just four pages to the gestational-age deadline and seven to the genetic-discrimination ban. Those pages amount to little more

than a conclusion that because these two laws prohibit some previability abortions, they are per se invalid. *See* ADD93, 101.

The district court devoted the bulk of its analysis to the OBGYN requirement. *See* ADD102-81. It began by declaring—as that same court has many times—that "abortion is *significantly safer* for a woman than carrying a pregnancy to term and giving birth." ADD109; *accord PPAEO v. Jegley*, No. 4:15-CV-00784, 2018 WL 3816925, at *25 n.4 (E.D. Ark. July 2, 2018); *Hopkins v. Jegley*, 267 F. Supp. 3d 1024, 1036 (E.D. Ark. 2017).

It then recited the requirement that to determine benefits, courts must "compare[]" a law's benefits against "pre-existing law." *PPAEO v. Jegley*, 864 F.3d 864, 960 n.9 (8th Cir. 2017); *see* ADD104. But rather than do that, the district court engaged in a prolonged, inexplicable discussion of the admitting-privileges requirement struck down in *Hellerstedt* and similar provisions challenged in other States. *See* ADD106-108, 114-34. Indeed, the only comparable provision that it mentioned was Mississippi's requirement that practitioners be OBGYNs. ADD133. And that case "reject[ed] the opinions of Plaintiffs' experts who testified that the ob-gyn requirement provides no benefit to Mississippi women seeking abortions"—including the opinion of Linda Prine, who testified below. *Jackson Women's Health Org. v. Currier*, 320 F. Supp. 3d 828, 837 (S.D. Miss. 2018).

Having done that, the district court then ignored evidence of the OBGYN requirement's benefits over preexisting law. It identified only four preexisting legal requirements for abortion practitioners: They must be "licensed physician[s] in Arkansas, obtain required precise consent from the patient for the procedure, keep a record that consent has been obtained, and report any abortion provided to the States." ADD149; *see* ADD134-39 (reproducing the relevant laws). In other words, prior to the OBGYN requirement any Arkansas-licensed doctor—whether family practitioner, ophthalmologist, or radiologist—could perform abortions. The district court then declared without explanation that this was good enough and declined to consider evidence that, unlike those physicians, all OBGYNs are "trained in 1st and 2nd trimester evacuation of the uterus," and to handle the "complications of abortion (spontaneous or induced)." JA1122-23. On that basis, it found the OBGYN requirement would provide few, if any, benefits. ADD140.

Turning to burdens, the district court began by declaring that Plaintiffs could not comply with the OBGYN requirement. It refused to acknowledge Plaintiffs' history of falsely claiming an inability to comply with abortion regulations, only to comply when their legal challenges are unsuccessful. *Compare Jegley*, 864 F.3d at 956 (recounting district court's finding that "medication abortion would no longer exist in Arkansas" because of supposed inability to comply), *with* Joint Mot. to Vacate Prelim. Inj., *Jegley*, No. 18-2463 (8th Cir. Nov. 5, 2018), ID#4723027 at 2-3

(after years of litigation, *Jegley* plaintiffs and LRFP suddenly complied with law they had said was impossible to comply with). It also failed to conduct any serious analysis of Plaintiffs' half-hearted attempts to locate additional board-certified or -eligible OBGYNs. Instead, like in *Jegley*, the district court merely declared that LRFP's lack of success was conclusive. ADD160. And it attempted to shore up that shaky finding with anecdotes about the supposedly unique stigma that abortion practitioners face in Arkansas, *see* ADD160-61, but ignored evidence that the same stigma exists throughout the country, *see, e.g.*, ADD25 (Virginia); ADD161 (Tennessee).

The district court then compounded those errors by refusing to acknowledge Plaintiffs' voluntary decision not to provide additional abortions. ADD157-58. For instance, nothing legally prevents Hopkins—or for that matter, Charlie Browne, a board-certified OBGYN who previously worked at LRFP—from traveling to LRFP more frequently. Both simply decline to do so. *See* ADD158-59. Yet the district court treated those self-imposed restrictions as insurmountable legal impediments and attributed any impact to Arkansas law. That error led the district court to conclude that the OBGYN requirement would dramatically reduce abortion capacity in Arkansas and impose an undue burden on a large fraction of relevant women.

The district court also wrongly assumed that any Arkansas patients seeking an abortion would have to obtain it at PPAEO Little Rock or LRFP. Neither is the case. Instead, any licensed physician in Arkansas who is a board-certified or -eligible OBGYN can provide an abortion. Additionally, the district court ignored the existence of much closer out-of-state providers. ADD162-64. And having assumed that LRFP would opt to close, the district court treated the OBGYN requirement as an "effective ban on surgical abortions." ADD168.

Next, to find a large fraction and justify facial relief, the district court declined to consider the preexisting impact of PPAEO's voluntary closure of its Fayetteville facility. It acknowledged the facility closed "due to increasing problems with a landlord." ADD56-57. Yet the district court declined to make any adjustment to Lindo's numbers to account for that impact. Instead, it simply attributed any preexisting impact (or access burdens) to the OBGYN requirement. *See, e.g.*, ADD167, 170 That grossly inflated the purported impact of Arkansas's requirement.

Finally, even if the district court's estimates had been reliable at the time, subsequent events have established they are not reliable now. In particular, the district court did not account for the fact that two board-certified OBGYNs had expressed preliminary interest in positions at LRFP "because they are not licensed to practice medicine in Arkansas." ADD160. But after the preliminary injunction,

Plaintiffs filed a notice that LRFP had hired those same two OBGYNs. JA2404-05; *see* JA2408 (clarifying that these are the same two OBGYNs). Both had "recently obtained an Arkansas medical license." JA2411; JA2414. Plaintiffs have not attempted to estimate the impact of these two new board-certified abortion practitioners on the number of abortions available in Arkansas once the OBGYN requirement takes effect. *See* JA1647-48 (Lindo agreeing he "assumed that [LRFP] would not be able to hire one or more additional OB/GYNs"). As a result, the preliminary injunction should be reversed.

STANDARD OF REVIEW

Issuance of a preliminary injunction depends on: (1) "irreparable harm"; (2) the "balance between this harm and the injury that granting the injunction will inflict"; (3) "the probability that movant will succeed on the merits"; and (4) "the public interest." *Dataphase Sys., Inc. v. CL Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981) (en banc). But when seeking to prevent "implementation of a duly enacted state statute," a movant must first make a "more rigorous showing" than usual "that it is likely to prevail on the merits." *Jegley*, 864 F.3d at 957-58 (quotation marks omitted).

Moreover, while preliminary-injunction orders are typically reviewed for abuse of discretion, "[t]hat is not true . . . where the question presented is purely one of law." *Bell v. Sellevold*, 713 F.2d 1396, 1399 (8th Cir. 1983) (R. Arnold, J.). Rather, this Court "must reverse" where "the district court has proceeded on the bais of an erroneous view of the applicable law." *Donovan v. Bierwith*, 680 F.2d 263, 269 (2d Cir. 1982) (Friendly, J.). This Court will likewise vacate an injunction based on clearly erroneous factual findings. *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 733 (8th Cir. 2008) (en banc).

SUMMARY OF THE ARGUMENT

This Court should reverse, or at least vacate, the preliminary injunction and order random reassignment on remand. The district court committed reversible legal error by declaring a novel, absolute right to previability abortion. This led it to completely bypass the undue-burden analysis when considering Arkansas's gestational-age deadline and genetic-discrimination ban. It additionally caused the district court not to see that the genetic-discrimination ban is narrowly tailored to serve Arkansas's compelling governmental interest in remedying past discrimination against people with disabilities.

When considering the OBGYN requirement, the district court failed to apply the proper standard. It first ignored this requirement's commonsense benefits. Next, relying on then-outdated data from Plaintiffs about their abortion capacity, the district court essentially found that the OBGYN requirement would unduly burden only *some* women—not a large fraction. And it attempted to bolster that supposed burden by finding that some women would lose the right to choose their preferred abortion procedure, a nonexistent right. Thus, the district court erred as a matter of law in concluding that the OBGYN requirement's benefits are substantially outweighed by its burdens.

The district court also erred as a matter of law in applying the remaining preliminary-injunction factors. In particular, it treated Plaintiffs' self-inflicted harm

as irreparable. Because of these errors, this Court should vacate the preliminary injunction—if not reverse it outright. Additionally, this Court should order random reassignment on remand.

ARGUMENT

States are entitled to regulate abortions. *Planned Parenthood v. Casey* allows regulations that have a rational basis and do not impose an undue burden. 505 U.S. 833, 878 (1992) (plurality opinion); *see Gonzales v. Carhart*, 550 U.S. 124, 158 (2007). The undue-burden analysis requires that courts consider the burdens a law imposes on abortion access together with the benefits it confers. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016). Moreover, to prevail on this facial challenge, Plaintiffs must "demonstrat[e] that 'in a large fraction of the cases in which [the law] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion.'" *Jegley*, 864 F.3d at 958 (quoting *Casey*, 505 U.S. at 895); *see Gonzales*, 550 U.S. at 167-68.

Thus, to enjoin these challenged laws, the district court needed to find their "benefits are substantially outweighed by the burdens [they] impose[] on a large fraction of women." *Jegley*, 864 F.3d at 960 n.9. Plaintiffs did not make that showing. Consequently, the district court was required to deny their preliminary-injunction motion.

I. Plaintiffs are not likely to succeed on the merits of their challenge to Arkansas's gestational-age deadline.

Arkansas's gestational-age deadline is not an 18-week ban. It does not prohibit an abortion performed to "[i]ncrease the probability of a live birth," "[p]reserve the life or health of the unborn child," "[r]emove a dead unborn child who died in utero," and other circumstances. 2019 Ark. Acts 493, 20-16-2003(1)(A). It also contains exceptions for rape or incest, and where necessary "to preserve the life of a pregnant woman." *Id.* 20-16-2004(a).

The deadline responds to evidence linking increased maternal risk to increased gestational age and seeks to limit that risk. *Id.* 20-16-2002(a)(6)-(8); *accord* ADD53. It also allows Arkansas to join the many nations limiting abortion after 18 weeks' gestation. *See* 2019 Ark. Acts 493, 20-16-2002(a) (only 7 nations permit abortion after 20 weeks' gestation; 75% prohibit abortion after 12 weeks). And the deadline recognizes that by 18 weeks, an unborn child has taken on "the human form" in all relevant respects, making the procedures for post-18-week abortions particularly barbaric. *Gonzales*, 550 U.S. at 160; *see id.* at 135-36 (describing "process of evacuating the fetus piece by piece"—how practitioner "grips a fetal part with the forceps" and continues "to pull even after meeting resistance from the cervix," which "causes the fetus to tear apart"). It also accounts for the fact that by 18 weeks, an unborn child has quickened and the mother has begun to feel the child's movements. JA1168-70.

In challenging Arkansas's gestational-age deadline, Plaintiffs made no effort to estimate the fraction of women who would be required to forgo or materially delay. Far from it: Plaintiffs' own witness testified that "[c]ases beyond 16 weeks are much less frequent." JA1575. And LRFP's clinical director testified that abortions performed after the deadline "are a very small portion of the overall cases that [LRFP] see[s]." JA1622. Without even attempting to put a number on that "very small portion," Plaintiffs cannot successfully challenge the deadline. So this Court should vacate the preliminary injunction.

Further, to the extent Arkansas's gestational-age deadline conflicts with the right recognized in *Casey*, that case and its progeny have "no basis in the Constitution." *Gonzales*, 550 U.S. at 169 (Thomas, J., concurring). To preserve that argument (and as an alternative argument for sustaining all three challenged laws), Arkansas requests that this Court hold "[n]othing in our Federal Constitution deprives the people of this country of the right to determine whether the consequences of abortion to the fetus and to society outweigh the burden of an unwanted pregnancy." *Stenberg v. Carhart*, 530 U.S. 914, 980 (2000) (Thomas, J., dissenting).

II. Arkansas's genetic-discrimination ban is constitutional.

Arkansas is entitled to prohibit abortion practitioners from discriminating against people with disabilities. The genetic-discrimination ban is a step toward

remedying a shameful history of discrimination. The district court's contrary conclusion rests entirely on discovering a previously unknown absolute right to previability abortion. But neither *Casey* nor any other Supreme Court case recognizes such an absolute right. The district court's reliance on it requires reversal.

A. Arkansas's compelling interest in protecting those with disabilities from discrimination renders the genetic-discrimination ban constitutional.

Arkansas is entitled to protect people with disabilities from discrimination, including from discriminatory abortions.

No one disputes America's shameful history of discriminating against people with disabilities—including those with Down syndrome. In the early twentieth century, municipal ordinances commonly restricted people with disabilities from appearing in public. *Tennessee v. Lane*, 541 U.S. 509, 534-35 (2004) (Souter, J., concurring); *see* Susan M. Schweik, *The Ugly Laws: Disability in Public* 1-2 (2009). And even those repugnant restrictions paled in comparison to later legislation authorizing institutionalization and much worse. *See* Robert J. Cynkar, Buck v. Bell*: "Felt Necessities" v. Fundamental Values?*, 81 Colum. L. Rev. 1418, 1433 & n.76 (1981); Adam Cohen, *Imbeciles: The Supreme Court, American Eugenics, and the Sterilization of Carrie Buck* 2, 57 (2016); *see generally* Jeffrey S. Sutton, *51 Imperfect Solutions* 84-132 (2018) (detailing history of compelled sterilization of people with developmental disabilities).

Despite advances, people with Down syndrome still face a shocking degree of discrimination. One recent article in the *Journal of Medical Ethics*, for instance, claimed that abortion was in the best interest of unborn children with Down syndrome because "bring[ing] up such children might be an unbearable burden on the family and on society as a whole." JA857. Moreover, as if that were not sufficiently chilling, that same article also claimed "that killing a newborn" with Down syndrome "could be ethically permissible." JA858.

Such attitudes have routinized abortion because of Down syndrome. This is possible due to advances in noninvasive screening beginning at ten weeks' gestational age. JA812-13. Indeed, a 2009 study noted "a 49% decrease between the expected and observed rates" of U.S. babies born with Down syndrome between 1989 and 2005. JA799. A more recent three-State study found that "the mean termination rate following a prenatal diagnosis of Down syndrome was 67%." JA906. And rates of abortions based on Down syndrome are even starker internationally: 90% in the United Kingdom, 98% in Denmark, and 100% in Iceland. JA1160. Reflecting that routinization, Plaintiffs candidly concede that they perform discriminatory abortions. *See* ADD53-54; JA1601 (agreeing LRFP has "patients who have terminated their pregnancies that involved a Down syndrome diagnosis"); *see also* JA1719-21 (PPAEO practitioner refusing to answer whether she would perform abortion sought on basis of unborn child's race).

Arkansas has a compelling interest in combating that discriminatory trend, addressing the effects of past discrimination, and reaffirming the value of every human life. *See Box v. Planned Parenthood of Indiana & Kentucky, Inc.*, 139 S. Ct. 1780, 1783 (2019) (Thomas, J., concurring) (discussing Indiana's compelling interest in prohibiting discriminatory abortions). Indeed, the Supreme Court has long recognized the States' "compelling interest in combating invidious discrimination" and eradicating the effects of past discrimination. *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 14 n.5 (1988). For instance, the government may prohibit discrimination even by private parties and even when those laws burden otherwise fundamental liberties. *See Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987).

Moreover, federal law has long recognized that eliminating invidious discrimination against the disabled is a compelling state interest. *See* 42 U.S.C. 12132 (Americans with Disabilities Act); 29 U.S.C. 794 (Rehabilitation Act). And Arkansas law has also long protected individuals from discrimination on the basis of "any sensory, mental, or physical disability." Ark. Code Ann. 16-123-107(a); *see, e.g., id.* 20-14-301, 20-79-202 (setting inclusion-promoting public polices).

Consistent with those principles, Arkansas's genetic-discrimination ban narrowly targets discriminatory abortions that devalue the lives of people with Down

syndrome. It bans only abortions performed "solely on the basis of . . . Down Syndrome." 2019 Ark. Acts 619, 20-016-2003(a)(3). It does not prohibit other kinds of abortions and only applies where the abortion practitioner knows that a woman seeks a discriminatory abortion. *Id.* Those limitations make it "perfectly tailored" to combat the evils of discriminatory abortions. *See Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1671-72 (2015) (rejecting First Amendment challenge to less-tailored political-speech regulation). Indeed, "it is hard to imagine legislation more narrowly tailored to promote" Arkansas's antidiscrimination interest. *Planned Parenthood Ind. & Ky. v. Comm'r, Ind. State Dep't of Health*, 888 F.3d 300, 316 (7th Cir. 2018) (Manion, J., concurring), *cert. denied on this issue sub nom. Box*, 139 S. Ct. 1780.

Because Arkansas's genetic-discrimination ban is narrowly tailored to promote a compelling governmental interest, it survives regardless of the applicable standard of scrutiny. For instance, Arkansas's compelling interest means that—as a matter of law—the district court could not conclude the genetic-discrimination ban's benefits are "substantially outweighed by the burdens it imposes on a large fraction of women." *Jegley*, 864 F.3d at 960 n.9. Thus, the district court erred as a matter of law in enjoining Arkansas's genetic-discrimination ban.

B. There is no right to a discriminatory abortion.

The district court avoided discussing Arkansas's compelling interest in preventing, combating, and remedying the effects of discrimination by announcing an absolute right to previability abortion. *See* ADD98 (citing *Casey*, 505 U.S. at 846). But the district court did not cite a single case from the Supreme Court or this Court recognizing such a right and invalidating a law like Arkansas's genetic-discrimination ban. *See* ADD94-102.

That is because there is no such decision. *See Box*, 139 S. Ct. at 1782. In *Box*, the Court declined to grant certiorari on "whether Indiana may prohibit the knowing provision of sex-, race-, and disability-selective abortions" because the Seventh Circuit in that case was the first court of appeals to address the question. *Id.* at 1782; *see id.* at 1784 (Thomas, J., concurring) (referring to "this issue of first impression"). Justice Thomas wrote separately to emphasize that "the constitutionality of other laws like" Arkansas's genetic-discrimination ban "remains an open question" because *Casey* "did not decide whether the Constitution requires States to allow eugenic abortions." *Id.* at 1792 (Thomas, J., concurring).

If anything, *Casey* strongly indicates the opposite. At the time of that decision, Pennsylvania had a provision banning abortions based solely on sex, but "the very first paragraph of the respondents' brief in *Casey* made it clear to the Court

that Pennsylvania's prohibition on sex-selective abortions was 'not [being] challenged.'" *Id.* A contrary position—like that adopted by the district court here—would "[e]nshrin[e] a constitutional right to an abortion based solely on the . . . disability of an unborn child" and "constitutionalize the views of the 20th-century eugenics movement." *Id.*

Moreover, *Casey* upheld a Pennsylvania parental-consent requirement that entirely barred minors who could not obtain a bypass from obtaining an abortion, which underscores that there is no absolute right to previability abortion. *See* 505 U.S. at 899; *see also Cincinnati Women's Servs., Inc. v. Taft*, 468 F.3d 361, 374 (6th Cir. 2006) ("The *Casey* Court itself was not persuaded to invalidate Pennsylvania's parental-consent requirement by record evidence showing that the requirement would altogether prevent some women from obtaining an abortion."). Likewise, *Gonzales* upheld a ban on certain kinds of abortions both *before* and after viability. 550 U.S. at 135-38.

The district court's approach makes little sense in the grand scheme of constitutional liberties. No other constitutional liberties—not speech, assembly, religion, nor even equal protection—are absolute. *See Kovacs v. Cooper*, 336 U.S. 77, 85 (1949) ("[E]ven the fundamental rights of the Bill of Rights are not absolute."); *see also Hellerstedt*, 136 S. Ct. at 2329 (Thomas, J., dissenting) ("The Court has simultaneously transformed judicially created rights like the right to abortion into

preferred constitutional rights, while disfavoring many of the rights actually enumerated in the Constitution."). Rather, every other liberty is subject to qualification where the government demonstrates a compelling governmental interest and narrow tailoring. *See, e.g.*, *Williams-Yulee*, 135 S. Ct. at 1662, 1665 (First Amendment, political speech); *Grutter v. Bollinger*, 539 U.S. 306, 326-27 (2003) (Fourteenth Amendment, race discrimination). The district court's contrary suggestion that a penumbra stands alone—and above—the most fundamental, enumerated constitutional liberties strains credulity. Therefore, the district court erred as a matter of law in concluding Plaintiffs were likely to succeed on the merits of their challenge to the genetic-discrimination ban. This Court should reverse the injunction.

III. Plaintiffs are not likely to succeed on the merits of their challenge to the OBGYN requirement.

Contrary to the district court's conclusion, the Constitution permits Arkansas to protect women from incompetent abortion practitioners. And such protection easily outweighs the phantom burdens the district court conjured. Although it purported to find a large fraction of women would face a substantial obstacle, that finding rested on many errors, including: false assumptions about Plaintiffs' ability to locate additional qualified providers; made-for-litigation capacity estimates; failing to consider PPAEO Fayetteville's unrelated closure; and a novel right to a preferred abortion methodology. Those errors fatally undermine the district court's

conclusions and mean that it could not have determined "the requirement's benefits are substantially outweighed by the burdens it imposes on a large fraction of women." *Jegley*, 864 F.3d at 960 n.9. This Court should reverse, or at least vacate, the preliminary injunction.

A. Plaintiffs lack standing to challenge the OBGYN requirement.

For starters, Plaintiffs lack standing. So the district court should never have entertained their challenge to Arkansas's OBGYN requirement. This Court should thus order dismissal of this claim.

Plaintiffs do not have first-party standing to challenge the OBGYN requirement. *See Planned Parenthood Greater Ohio v. Hodges*, 917 F.3d 908, 912 (6th Cir. 2019) (en banc) (no "Fourteenth Amendment right to perform abortions"); *see also Planned Parenthood Mid-Mo. & E. Kan., Inc. v. Dempsey*, 167 F.3d 458, 464 (8th Cir. 1999) (rejecting "notion that physicians and clinics have a fundamental constitutional right to provide abortion services").

Plaintiffs likewise lack third-party standing. Although the Supreme Court has created special third-party-standing rules for abortion cases, the district court erroneously applied those rules. *See* ADD76-81 (citing *Singleton v. Wulff*, 428 U.S. 106, 118 (1976)). The challenged provision protects women from substandard care by Plaintiffs themselves. Therefore, by definition, "the party asserting the right" does not have "a close relationship with the person who possesses the right."

Kowalski v. Turner, 543 U.S. 125, 130 (2004) (quotation marks omitted). There is no basis for applying *Singleton*. *See* Conditional Cross Pet., *Gee v. June Med. Servs.*, No. 18-1460, 2019 WL 2241856 (May 20, 2019) (presenting question whether abortion practitioners can "be presumed to have third-party standing to challenge health and safety regulations"), *cert. granted*, No. 18-1460, 2019 WL 4889928 (Oct. 4, 2019).

B. Plaintiffs can find additional, qualified abortion practitioners.

On the merits, Plaintiffs' claim fails from the outset because they have not demonstrated an inability to comply with Arkansas law. To find a substantial obstacle, the district court declared that Plaintiffs could not locate additional, qualified practitioners and would be unable to meet abortion demand. ADD156-62. But that conclusion is fundamentally flawed because Plaintiffs never made a good-faith effort to locate such practitioners. Indeed, as in *Jegley*—where Plaintiffs claimed for years that they could not locate a contract physician until they actually mounted a good-faith effort and located one—Plaintiffs' half-hearted efforts cannot support relief. *See Jegley*, 2018 WL 3816925, at *13, 15 (recounting PPAEO's and LRFP's supposed inability to comply with contract-physician requirement).

The OBGYN requirement's text does not change either abortion facility's ability to perform abortions, except insofar as they employ practitioners who are not board-certified or -eligible OBGYNs. PPAEO's two abortion practitioners are

both board-certified OBGYNs; thus, Arkansas's requirement does not impact PPAEO. ADD8-9.

At the time of the complaint, LRFP employed one board-certified OBGYN, but Tvedten and Horton—its two most prolific practitioners—are neither board certified nor eligible. *See* ADD23-24, 33, 47. Nothing legally prevents either from obtaining the appropriate certifications. In fact, Horton passed the written board-certification exam but opted against certification—*twice*. *See* ADD24-25. His voluntary decision not to obtain certification cannot justify invalidating Arkansas law. *See Gonzales*, 550 U.S. at 166 ("mere convenience" does not invalidate State's choice between "standard medical options"); *cf. June Med. Servs. L.L.C. v. Gee* (*June Medical I*), 905 F.3d 787, 807 (5th Cir. 2018) (criticizing "fail[ure] to establish a causal connection between the regulation and its burden"), *cert. granted*, No. 18-1323, 2019 WL 4889929 (Oct. 4, 2019).

Moreover, there are over 49,000 board-certified OBGYNs in the United States, with around 1,100 newly certified each year. *See* JA681, 686, 701. That makes finding additional practitioners practical. If LRFP finds one, then it "could continue providing abortions" and Arkansas's "new law would not impose an undue burden for purposes of *Whole Woman's Health*." *June Med. Servs., L.L.C. v. Gee*, 139 S. Ct. 663, 663 (2019) (Kavanaugh, J., dissenting from grant of stay application). Yet Plaintiffs have not made good-faith efforts to locate additional

practitioners. To the extent there is any burden, therefore, it is due to Plaintiffs' own conduct and that cannot be the basis for relief. *See June Medical I*, 905 F.3d at 807 ("Their inaction severs the chain of causation.").

The district court only reached a contrary conclusion by crediting Plaintiffs' self-serving representation that they had "undertaken significant efforts" to find other practitioners. ADD47-48. That representation is an overstatement. LRFP sent a generic form letter to every currently licensed Arkansas OBGYN and "talked with colleagues," including the National Abortion Federation. JA1606-07 (Williams); JA461 (letter). It never followed-up on the letter. JA1624-25. It did not send similar mailings to OBGYNs elsewhere to locate someone willing to relocate. *See* JA1625 (discussing only OBGYNs listed with Arkansas Medical Board). And there is no evidence that it recruited any OBGYNs that Tvedten previously trained. JA1702-03.

To justify ignoring those facts, the district court relied on "the harassment and stigma faced by abortion providers in Arkansas." ADD160; *accord* ADD11-13, 50. But Plaintiffs do not claim that Arkansas caused that stigma or any "[a]ctions taken by individuals to protest abortion or to intimidate those who perform it." *June Medical I*, 905 F.3d at 810 n.60. Thus, as the Fifth Circuit explained in rejecting a similar claim, they are not "attributable to the state generally

or" the challenged legislation "in particular" and "courts cannot consider them." *Id.* The district court's contrary legal error fatally undermines its conclusions.

Yet even Plaintiffs' lackluster efforts managed to locate additional, qualified practitioners. After the district court entered its order, LRFP hired *two* board-certified OBGYNs. JA2408 (Williams). One will perform abortions one day per week, and the other for one week every other month (alternating with Hopkins). JA2409. These additional practitioners demonstrate that Plaintiffs can (and did) locate additional practitioners and that LRFP can continue operations. The district court's contrary conclusion cannot stand.

C. Applying the wrong legal standard caused the district court to understate the OBGYN requirement's benefits.

The OBGYN requirement furthers Arkansas's "legitimate interest in seeing to it that abortion . . . is performed under circumstances that insure maximum safety for the patient," *Roe v. Wade*, 410 U.S. 113, 150 (1973), and "protecting the integrity and ethics of the medical profession," *Gonzales*, 550 U.S. at 157 (quotation marks omitted). Determining whether a regulation furthers those interests and benefits patients requires comparing it to preexisting law. *See Jegley*, 864 F.3d at 960 n.9. Thus, for instance, *Hellerstedt* focused on the absence of evidence showing "that, *compared to prior law* . . . the new law advanced Texas' legitimate interest in protecting women's health." 136 S. Ct. at 2311 (emphasis added).

The district court did not apply that standard. Instead, it focused on abortion in the *abstract*, declaring that additional regulation was unnecessary because "abortion is significantly safer for a woman than carrying a pregnancy to term and giving birth." ADD109; *accord* ADD15, 18, 39, 51. Far from comparing new and preexisting law, the district court ultimately grounded its benefits analysis on its view that abortion is already *safe enough*. ADD113. As support for that claim, it cited a series of advocacy pieces from groups like the National Abortion Federation arguing that requiring specialization would unnecessarily reduce abortion access. *See, e.g.*, ADD40-41, 141-42 (collecting citations from Plaintiffs' filings). But Arkansas is not required to adopt or "revise [its] standards every time the American College of Obstetricians and Gynecologists (ACOG) or similar group revises its views about what is and what is not appropriate." *Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 456 (1983) (O'Connor, J., dissenting); *see Stenberg*, 530 U.S. at 970 (Kennedy, J., dissenting) (discussing legislatures' wide discretion to address issues "even when leading members of the profession disagree with the conclusions drawn by the legislature").

Equally meritless is the district court's suggestion that Arkansas's requirement confers few benefits because it was not specifically tailored to some supposed "medical safety problem." ADD113; *see* ADD146 (suggesting that Missis-

sippi's slightly different OBGYN requirement would be "a 'better fit' with defendants' asserted interests"). No case imposes such a tailoring requirement. To the contrary, "[c]onsiderations of marginal safety, including the balance of risks, are within the legislative competence." *Gonzales*, 550 U.S. at 166; *cf. Planned Parenthood of Wis., Inc. v. Schimel*, 806 F.3d 908, 919 (7th Cir. 2015) (finding undue burden only where burden "*significantly* exceeds what is necessary to advance the state's interests" (emphasis added)).

Indeed, even if it is "not *necessary* to be an OBGYN . . . to be a competent abortion provider," that is not dispositive. ADD20 (emphasis added). Rather, as the Supreme Court has long held, States may require more qualifications than the minimum "necessary" to perform abortions. *See Mazurek v. Armstrong*, 520 U.S. 968, 973 (1997) (per curiam) (rejecting challenge to requirement that abortion practitioners be licensed physicians despite evidence that physicians' assistants could perform same function). Thus, the relevant question is not whether Arkansas's requirement is sufficiently tailored to a specific, ongoing Arkansas problem, but whether the requirement provides benefits compared to "pre-existing law." *Jegley*, 864 F.3d at 960 n.9. The district court was not entitled to sidestep that question.

Had the district court applied the appropriate standard, it could not have concluded that Arkansas's OBGYN requirement confers "little if any benefit."

ADD179. To the contrary, the requirement improves on preexisting law by imposing basic abortion-practitioner competency standards. As the district court recognized, absent the adoption of the OBGYN requirement, Arkansas law requires only that an abortion practitioner "be a licensed physician in Arkansas, obtain required precise consent from the patient for the procedure, keep a record that consent has been obtained, and report any abortion provided to the State." ADD149; *see* ADD134-38 (summarizing relevant laws, many of which *only* apply to abortion facilities that perform ten or more abortions *per month*).

Only one of those four requirements has *anything* to do with a practitioner's competency to perform abortions and handle complications. Yet even that requirement fails to ensure that practitioners have women's-healthcare or abortion experience. *See* JA1534 (Hopkins testifying that maintaining Arkansas license mostly requires "fill[ing] out an application online" and "send[ing] them a check"). Indeed, under that standard, an "ophthalmologist and radiologist" could perform abortions. *June Medical I*, 905 F.3d at 818 (under Louisiana's similar requirements, radiologist and ophthalmologist were performing abortions). And the district court did not suggest otherwise.

Arkansas's OBGYN requirement fills that regulatory gap by setting a new regulatory floor and ensuring that practitioners have extensive, relevant women's-

healthcare training. For instance, during residency, even OBGYNs "who conscientiously object to abortion" are "trained in 1st and 2nd trimester evacuation of the uterus." JA1123. Indeed, Plaintiffs conceded that OBGYN residents receive miscarriage-care training, which uses techniques identical to surgical abortions. *See* JA189 (Hopkins); JA431 (Tvedten); JA1542 (Hopkins); ADD10. Thus, even if "OBGYN residents can opt out of any abortion training," ADD145, they cannot opt out of learning the techniques needed to perform an abortion. By contrast, preexisting Arkansas law did not require practitioners have any such training.

The OBGYN requirement likewise ensures that abortion practitioners can handle complications. All OBGYN residents are trained in "handling of complications of abortion (spontaneous or induced)." JA1122; *see* JA1351 (listing milestones for OBGYN residency, including "[u]tiliz[ing] non-surgical and surgical methods to manage patients with . . . abortion (spontaneous, induced)"). That training could prove invaluable for medication-abortion patients who are more likely to require follow-up treatment and, as Plaintiffs argued in *Jegley*, could be at some distance from the contract physician who is otherwise obligated to ensure follow-up care. *See* JA1132 ("Medication abortions are riskier than aspiration abortions" and OBGYNs are trained to handle complications); *Jegley*, 2018 WL 3816925, at *38; *see also* JA1409 (describing study "report[ing] an adverse event

rate of 5.2 percent for medication abortion and 1.3 percent for aspiration abortion"); *cf.* ADD63 n.6 (erroneously claiming that this source is not in record). Moreover, even if some women could obtain follow-up treatment elsewhere, the OBGYN requirement ensures that abortion practitioners are competent to convey potentially critical information. *See* JA1133-41 (describing abortion complications). And at a minimum, the OBGYN requirement provides women experiencing complications an additional place to turn for competent reassurance and follow-up.

Requiring abortion practitioners to be trained OBGYNs additionally ensures that their skills do not decline and that they remain competent to provide specialized healthcare. Board-certified OBGYNs must meet a number of annual requirements to maintain their certification. *See* JA550-83, 1130-32 (detailing 2019's maintenance-of-certification requirements). Those requirements include completing skills assessments that "provide assurance that there has been the necessary commitment to lifelong learning and to remain current in core content of Obstetrics and Gynecology." JA566. And those requirements ensure that OBGYNs do not experience "a decline in physician knowledge and compliance with national guidelines for diagnosis and treatment over time." JA1128 (Aultman); *see* JA632-46 (meta-analysis finding "inverse relationship between the number of years that a physician has been in practice and the quality of care that the physician provides").

By contrast, the district court did not point to any similar existing requirements—let alone requirements that apply to all abortion practitioners. Instead, it relied on regulations that only apply to large abortion facilities and claimed that Arkansas's requirement was unnecessary because "Arkansas regulations require abortion providers to provide 'annual in-service education programs for professional staff' and provide 'current nursing literature and reference materials.'" ADD150 (quoting Ark. Admin. Code 007.05.2-7(D)). But those requirements, even if they were comparable to the extensive requirements for maintaining OBGYN certification, only apply to large abortion facilities that perform ten or more abortions *per month* and not smaller, occasional, or private practitioners. *See* Ark. Admin. Code 007.05.2-3(B) (defining abortion facilities); Ark. Code Ann. 20-9-302(a)(1) (requirements for facilities); Ark. Admin. Code 007.05.2-7 (same).

Additionally, Plaintiffs' own expert conceded that research demonstrates that "board-certified physicians are less likely to be disciplined by a state medical board" than others. JA1586. Thus, even if, as the district court observed, state medical boards retain the power to punish inappropriate or incompetent behavior, Arkansas certainly has an interest in ensuring lower disciplinary rates.

In the end, Arkansas's requirement reflects common sense: Only those with specialized women's-healthcare training—not radiologists, ophthalmologists, or proctologists—should be performing abortions. *See* ADD104 (acknowledging

commonsense appeal of Arkansas's requirement). That conclusion, moreover, is supported by evidence demonstrating that roughly *two-thirds* of abortion practitioners are board-certified OBGYNs, ADD144, and some 87% of American doctors hold board certification, JA623. Applying the correct legal standard would have prevented the district court from ignoring the OBGYN requirement's many benefits.

D. The OBGYN requirement does not impose significant burdens.

Arkansas's OBGYN requirement would impose few, if any, burdens, none amounting to a substantial obstacle in a large fraction of cases.

1. By failing to account for PPAEO Fayetteville's voluntary closure, the district court overstated any supposed burdens.

This case changed significantly soon after it was filed. Most importantly, after Plaintiffs filed the complaint and Lindo's impact estimate, PPAEO voluntarily closed its Fayetteville facility. JA528-33. It did so for reasons unrelated to the OBGYN requirement. *See* JA530 (attributing closure "to increasing problems with [PPAEO's] landlord"). Plaintiffs' decision to close a facility that performed 1,658 abortions from 2016 to 2019 *undoubtedly* impacted abortion access. JA263.

That is true regardless of the OBGYN requirement, and the district court needed to grapple with those changed circumstances. It did not. Instead, to determine the share of women who would forgo or materially delay due to the OBGYN

requirement, the district court simply accepted Plaintiffs' capacity estimates, divided them by the average number of abortions performed statewide each of the last three years (3,167), and attributed the resulting percentage to the OBGYN requirement. ADD170-78. On its face, that approach grossly overstates the OBGYN requirement's impact because PPAEO's voluntary Fayetteville closure—and not the OBGYN requirement—is responsible for a *significant* reduction in existing capacity. The district court erred as a matter of law in declining to grapple with the changed circumstances and attributing that percentage entirely to the OBGYN requirement.[2]

Granted, that failure was not entirely the district court's fault. It only had the evidence that Plaintiffs provided, which did not estimate Fayetteville's closure's impact. *See* JA534-42 (Lindo omitting this estimate in second declaration). The proper approach was not to ignore the changed circumstances. Rather, the district court was required to deny the preliminary injunction because Plaintiffs had failed to meet their evidentiary burden. *See Mazurek*, 520 U.S. at 972 (placing burden of persuasion on party seeking preliminary injunction). Moreover, given Plaintiffs' evidentiary failure, this Court should not merely vacate the preliminary

[2] In two footnotes, the district court suggested an impact on women who would already obtain a Little Rock abortion. *See* ADD175-76 nn.35, 43. But it ultimately refused to consider that supposed impact. *See* ADD170-78. Instead, it unambiguously "decline[d] to exclude those women who would seek abortions from PPAEO Fayetteville from the numerator of the large fraction calculation." ADD167.

injunction but reverse it since Plaintiffs failed, as a matter of law, to carry their evidentiary burden. *See F.T.C. v. Tenet Health Care Corp.*, 186 F.3d 1045, 1052, 1055 (8th Cir. 1999) (reversing preliminary injunction because FTC failed to carry burden of proof).

In addition to that fundamental error, the district court also grossly overstated the OBGYN requirement's impact when it assumed that Arkansas abortion rates would remain constant or increase. ADD170 n.28. It grounded that estimate on Lindo's selective accounting; in particular, his decision to consider abortion data going back only to 2016 in order to create a false impression that abortion rates were increasing or steady. *Id.*; *see* JA1191-92 (Solanky).

But as Solanky explained, including earlier years would have confronted Lindo with an "overall trend of decreasing numbers of abortions." JA1182; *see* JA2157 (figure illustrating long-term decline). Lindo later conceded as much. JA1671. And Plaintiffs' own filings also reflect a decline in abortion. *Compare* Am. Compl., *Jegley*, No. 4:15-CV-00784-KGB (Mar. 29, 2019), DE184 ¶ 11 (claiming one-third of women have abortions), *with* JA13 (lowering that to one-fourth). Despite that, the district court simply accepted—*sans* explanation—Lindo's representation that rates would remain constant or increase. ADD170 n.28. That error caused the district court to "overestimate[] the reduction in capac-

ity to provide abortions" and, correspondingly, the OBGYN requirement's supposed burdens. JA1182 (Solanky). Thus, as a matter of law, the district court overstated any supposed burdens, which requires vacatur at very least.

2. The district court improperly ignored alternative abortion practitioners.

The district court's impact estimates are also inflated because it refused to consider alternative practitioners. For instance, it did not consider the fact that any board-certified or -eligible OBGYN in Arkansas could perform an abortion. *See* 2019 Ark. Acts 700, 20-16-605. Instead, it simply assumed that private practitioners would continue to provide the same number of abortions that they have in the past. *See* ADD137 ("there are few private abortion providers in Arkansas"). It did not explain why, if Arkansas's two largest abortion facilities suddenly stop meeting demand, alternative practitioners could not meet part of that demand.

As important, the district court refused to consider whether women would obtain abortions from closer, out-of-state abortion facilities. The district court acknowledged that women cross state lines to obtain abortions. *See* ADD33 (finding that from May 2016 through April 2019, 87% of LRFP's patients were Arkansas residents, 7% Tennessee residents, and 2.7% Mississippi residents). In fact, Hopkins himself testified that at he performs abortions on "women, not just from Arkansas, but from neighboring states." JA1535. And though he failed to con-

sider them in estimating how many women might forgo or delay, Lindo acknowledged "there are six out-of-state abortion providers within 150 miles of Arkansas's borders that provide both medical and surgical abortions." JA1681. Thus, as Solanky explained, to properly conduct a "complete statistical analysis" and determine impacts, the district court "should at least [have] evaluate[d]" whether women are likely to go elsewhere. JA2165-66. Instead, the district court simply assumed that absent an in-state practitioner, women would forgo or materially delay.

The availability of out-of-state abortion facilities is particularly relevant here since, after PPAEO Fayetteville's closure, the closest abortion facility for women in the northwest corner of Arkansas—where Fayetteville is located—is in Tulsa, Oklahoma. *See* JA2165-66 (describing distances from various counties). Indeed, Lindo acknowledged that the Tulsa facility is closer than the Little Rock facilities, and women may obtain an abortion in Oklahoma in a single trip. *See* JA296 (identifying Tulsa as closer than Little Rock to Washington County, which includes Fayetteville); 63 Okla. Stat. 1-738.2(B)(1) (allowing initial telephonic consultation). Perhaps unsurprisingly given that proximity, even before Fayetteville's closure, Arkansas residents historically account for 2.7% of *all* Oklahoma abortions. DE44-3 at 352, docket below (2002-2018 Summary Report, Okla. Dep't of

Health). Against that backdrop, the district court was not entitled to assume away other providers.

To justify its assumption, the district court pointed to two out-of-circuit cases refusing to consider out-of-state providers where the challenged regulations would have closed a State's only provider and the only late-term abortion practitioner. *See* ADD162 (citing *Schimel*, 806 F.3d 908, and *Jackson Women's Health Org. v. Currier*, 760 F.3d 448 (5th Cir. 2014)). Even assuming that courts may ignore geographic and economic reality, those cases are readily distinguishable. The OBGYN requirement would not require any closures or leave Arkansas without a late-term practitioner. *See Whole Woman's Health v. Cole*, 790 F.3d 563, 597 (5th Cir. 2015) (explaining *Currier* rested on the fact that law would close Mississippi's only provider), *overruled on other grounds*, *Hellerstedt*, 136 S. Ct. 2292.

Likewise, the district court's reliance on *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938), is misplaced because this case does not involve equal protection (the denial of which cannot be cured by its provision elsewhere), but the obligation not to unduly burden women's right to choose an abortion under the Due Process Clause. *See Currier*, 760 F.3d at 463 (Garza, J., dissenting). In that context, whether the right articulated in *Casey* is, as a factual matter, unduly burdened depends in part on its availability in nearby jurisdictions. *See Hawley*, 903 F.3d at

755-56 (stressing "the fact-intensive nature of the constitutional test"). Thus, excluding out-of-state providers to determine the share of patients who would forgo or postpone is "legally nonsensical." *Currier*, 760 F.3d at 461 (Garza, J., dissenting); *accord A Woman's Choice-East Side Women's Clinic v. Newman*, 305 F.3d 684, 688 (7th Cir. 2002) (Easterbrook, J.) ("[T]he undue-burden standard must be applied . . . to the nation as a whole, rather than one state at a time.").

The district court's failure to consider other in-state and significantly closer out-of-state abortion practitioners demonstrates that it failed to engage in the "contextualized inquiry" that it acknowledged *Casey* requires. ADD156. That error undermines its analysis and requires vacatur.

3. The district court underestimated Plaintiffs' capacity.

The district court underestimated Plaintiffs' own capacity to perform abortions. It adopted Lindo's "assum[ption] that whatever maximum happened is the maximum that could happen." JA1743 (Solanky); *see* ADD172. For both PPAEO Little Rock and LRFP, that "underestimate[s] the capacity of the clinics." JA1743.

LRFP in particular does not provide abortions every day because, according to Tvedten, LRFP can "adequately meet the demand with providing care three days a week." JA1713; *see* JA1551 (Hopkins occasionally works additional days when "the census is high"). Lindo also acknowledged that he was "not aware of any time when" any "Little Rock abortion providers had to turn patients away because

they were at full capacity." JA1678. Thus, far from "likely overestimat[ing] each providers' capacity," ADD172, these capacity estimates conflict with evidence that Plaintiffs *do not* operate at anything close to capacity.

Plaintiffs' own testimony further underscores this point. For instance, the district court assumed that Hopkins would perform abortions two days per week every other month, and that in those two days per week he would be able to provide the maximum number he had ever provided in a given day over the past three years, 21 abortions. ADD172. It grounded that estimate on a finding that Hopkins would "spend[] a business week at LRFP during which he does informed-consent appointments one day a week and provides abortions the other two days." ADD172. But "Hopkins is not legally required to spend any of his time in Arkansas obtaining informed consent." JA1656 (Lindo); *see* Ark. Code Ann. 20-16-1703. Instead, a non-OBGYN like Tvedten or Horton could easily perform those consultations. *See* JA1709 (Tvedten testifying that "[u]nder Arkansas law, any physician" could obtain informed consents). Thus allowing Hopkins to spend five days—instead of two—performing abortions, "that would," Lindo conceded, "be a lot more capacity." JA1653-54.

The district court reached a contrary conclusion by focusing on Hopkins's preference for performing consultations and by suggesting that LRFP could not afford to retain Tvedten. *See* ADD21-22, 56. Yet whatever Hopkins's preference,

he routinely performs abortions where someone else has done the consultations. *See* JA1552-53. Besides, Hopkins's preference cannot justify enjoining an otherwise valid regulation. *Cf. Gonzales*, 550 U.S. at 166 (practitioner's "mere convenience" not constitutionally legitimate consideration). And because Tvedten and his wife own 80% of LRFP, the district court's suggestion that LRFP could not "afford to keep him on staff" to perform consultations defies logic. ADD56; *see* JA1698 (Tvedten); JA1614 (Williams).

Subsequent developments have likewise undermined the district court's capacity estimates and its conclusion that the OBGYN requirement burdens a large fraction. Although it found that Plaintiffs could not locate additional providers—thus refusing to consider how compliance might impact capacity—LRFP has now hired *two* additional board-certified OBGYNs. JA2403-16. One of those practitioners started performing abortions one day per week in October 2019, and the other will begin performing abortions for one week every other month starting in November 2019. JA2409. That development renders Lindo's already flawed capacity estimates—and the district court's derivative findings—obsolete. *See* JA1647-48 (Lindo testifying he "assumed that [LRFP] would not be able to hire one or more additional OB/GYNs"). Indeed, Lindo conceded even a *single* additional OBGYN "would substantially change [his] analysis." JA1649-50.

4. The district court did not find that a large fraction would forgo or postpone.

Even with abortion, facial challenges are disfavored and as-applied challenges remain "the basic building blocks of constitutional adjudication." *Gonzales*, 550 U.S. at 168 (quotation marks omitted). The large-fraction test creates a narrow exception for facial relief where a requirement "renders it *nearly impossible* for the women actually affected by an abortion restriction to obtain an abortion." *Cincinnati Women's Servs.*, 468 F.3d at 373 (emphasis added); *cf. Casey*, 505 U.S. at 897 (spousal-notice requirement substantial obstacle for practically all women).

Consistent with that, "[o]ther circuits that have applied the large fraction test to facial challenges to abortion regulations have . . . only found a large fraction when *practically all* of the affected women would face a substantial obstacle in obtaining an abortion." *Cincinnati Women's Servs*., 468 F.3d at 373 (emphasis added). So regulations are not facially invalid merely because they make access difficult—or even impossible—for many. *Jegley*, 864 F.3d at 960 (citing *Cincinnati Women's Servs*., 468 F.3d at 373). Thus, the Fifth Circuit recently explained that "[t]hirty percent does not approach" a large fraction, which is consistent with baseline facial-challenge principles that normally "require[] plaintiffs to establish a provision's unconstitutionality in every conceivable application." *June Medical I*, 905 F.3d at 814-15.

Here, the district court could not determine how many women might forgo or materially delay. Instead, it simply rattled off a series of estimates ranging from 43% to 70% before giving up and just asserting that the OBGYN requirement might burden "anywhere from 70-53% of women." ADD178; *see* ADD174-76 & n.43 (various estimates). The high end of that figure rests on the outlandish assumption that LRFP will close, and that entire range fails to account for the *preexisting* impact of PPAEO's voluntary closure in Fayetteville. ADD174-76. On its face, that range does not disaggregate a preexisting capacity limit from the OBGYN requirement's supposed impact.

That error alone warrants reversal because it means, at bottom, the district court—as in *Jegley*—merely concluded that *some* unknown number of women might forgo or delay. *See Jegley*, 864 F.3d at 960 (vacating same district court's order because it "did not explain or estimate how many women" it believed would forgo or delay); *see also Newman*, 305 F.3d at 699 (Coffey, J., concurring) ("[E]ven assuming in the case before us that some number of women will be burdened by the law, it is clear that a law which incidentally prevents 'some' women from obtaining abortions passes constitutional muster."); *Karlin v. Foust*, 188 F.3d 446, 486 (7th Cir. 1999) (upholding law that made "abortions more expensive and more difficult for some Wisconsin women").

Even assuming the 43% or bare majority figures that the district court threw out in footnotes might adequately control for the impact of PPAEO Fayetteville's closing (ADD175-76 nn.39, 43), those figures do not establish that a large fraction would face a substantial obstacle. Neither amounts to *practically all* women. *See June Medical I*, 905 F.3d at 814-15. Indeed, far from suggesting that Arkansas's requirement would make it nearly impossible to access abortion, they suggest that a majority or nearly a majority *would not face* a substantial obstacle and that the regulation is facially constitutional. *See Gonzales*, 550 U.S. at 167-68 (rejecting facial challenge to methodology ban that could constitutionally be applied in most cases). And even then, those figures do not account for the undisputed fact that Plaintiffs have hired two additional practitioners. As such, the district court failed to find that a large fraction would face a substantial obstacle. This Court should vacate.

5. There is no constitutional right to surgical abortion.

The district court attempted to bolster its large-fraction analysis by claiming that if Tvedten and Horton can no longer perform abortions it will be more difficult to access surgical abortions. *See* ADD169-70. The district court claimed that this would "present some burden to those women who prefer surgical abortions over medication abortions"—even women who could obtain medication abortions. ADD169.

But contrary to that holding's underlying assumption that women have a right to choose preferred abortion *methods*, "the Supreme Court has not articulated any rule that would suggest that the right to choose abortion encompasses the right to choose a particular abortion method." *Planned Parenthood Sw. Ohio Region v. DeWine*, 696 F.3d 490, 514-15 (6th Cir. 2012). Rather, where—as is undisputedly true here—a regulation leaves patients free to access a "commonly used and generally accepted [abortion] method," simple "convenience" or preference cannot prevent regulation. *Gonzales*, 550 U.S. at 166. Indeed, a different rule would conflict with *Gonzales*'s central premise that "[t]he law need not give abortion doctors unfettered choice" to use particular methodologies. *Id.* at 163. An inability to access a preferred methodology does not establish "a *substantial obstacle* for a large fraction of women in deciding whether to have an abortion." *DeWine*, 696 F.3d at 516. Rather, it merely demonstrates some women have been denied the previously unknown "right to choose a particular abortion method." *Id.* at 514-15.

Here, the district court's only attempt to justify a different approach was its suggestion that fewer surgical providers could disproportionately impact "some women" with unique conditions. *See* ADD168-69 (citing unknown share of women "for whom surgical abortions may[ ]be a better or the only option"). But to hold a statute "unconstitutional for all circumstances based on . . . possible rare circumstance[s] . . . is not appropriate under any standard for facial challenges."

Richmond Med. Ctr. for Women v. Herring, 570 F.3d 165, 175 (4th Cir. 2009) (en banc).

All told, the district court found only that "*some* women have a strong preference for surgical abortions," ADD168 (emphasis added), and that for those women, an inability to access surgical abortion is "*some* evidence of burden," ADD170 (emphasis added). "Some burden" on "some women" hardly amounts to a substantial obstacle for a large fraction of relevant women. *See Jegley*, 864 F.3d at 960. The district court's focus on burdens with no material consequence ignores the principle that all regulations affect access to some extent. The mere fact that a law "has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it." *Casey*, 505 U.S. at 874.

E. The OBGYN requirement's benefits are not substantially outweighed by its supposed burdens.

Having ignored the OBGYN requirement's benefits, the district court prejudged the outcome. It made this prejudice explicit, suggesting its "finding" that the requirement lacks benefits "may be enough to conclude that the OBGYN requirement unduly burdens the right to abortion." ADD104. But "even regulations with a minimal benefit are unconstitutional only where they present a substantial obstacle to abortion." *June Medical I*, 905 F.3d at 803. Not only that, *Jegley* specifically required the district court to analyze whether the OBGYN requirement's

"benefits are substantially outweighed by the burdens it imposes on a large fraction of women." 864 F.3d at 960 n.9.

Despite reciting *Jegley*'s substantial-outweighing standard, the district court made no attempt to quantify the degree to which it believed the supposed burdens here outweigh the OBGYN requirement's clear benefits. This portion of its order comprises two-and-a-half pages that contain little more than generalized propositions. *See* ADD178-80. The district court simply reasserted its conclusions that "the OBGYN requirement confers little if any benefit," and that the "burdens, considered cumulatively," are a "substantial[] burden[] a large fraction of women." ADD179. But those conclusions are wrong for the myriad reasons already discussed. Therefore, this Court should vacate the preliminary injunction—if not reverse it outright.

IV. The district court erred in applying the remaining preliminary-injunction factors.

The district court's application of the other preliminary-injunction factors was erroneous. In particular, it improperly disregarded the harm its preliminary injunction would inflict upon Arkansas while simultaneously ignoring the self-inflicted nature of Plaintiffs' alleged injury. *See* ADD182. A State's "inability to enforce its duly enacted plans clearly inflicts irreparable harm on the State." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018). The district court disregarded Arkansas's interest in enforcing the challenged laws because it had concluded they

are likely unconstitutional. ADD182. But that approach would make the harm inquiry irrelevant whenever a party seeks to preliminarily enjoin a state law. The likelihood-of-success inquiry would always decisively resolve the irreparable-harm inquiry. *See Hand v. Scott*, 888 F.3d 1206, 1214 (11th Cir. 2018) (holding that State "would be harmed if it could not apply its own laws . . . now, even if it might later be able to" apply altered version of law). The district court should not have ignored the irreparable harm its injunction inflicts on Arkansas.

Additionally, Plaintiffs' alleged harm is self-inflicted. They claim they cannot possibly comply with the OBGYN requirement but admit that their OBGYNs simply do not wish to provide more abortions. Such "self-inflicted wounds are not irreparable injury." *Second City Music, Inc. v. City of Chi.*, 333 F.3d 846, 850 (7th Cir. 2003); *accord Salt Lake Tribune Publ'g Co. v. AT&T Corp.*, 320 F.3d 1081, 1106 (10th Cir. 2003); *Caplan v. Fellheimer Eichen Braverman & Kaskey*, 68 F.3d 828, 839 (3d Cir. 1995). The lack of irreparable harm is another, independent reason to vacate the preliminary injunction.

V. Because of the district court's ex parte consolidation order, this Court should order random reassignment.

This Court's jurisdiction over the preliminary-injunction order gives it "a broad statutory grant of power to dispose of the case as [it] deem[s] appropriate." *Campaign for Family Farms v. Glickman*, 200 F.3d 1180, 1186 (8th Cir. 2000) (citing 28 U.S.C. 2106). Under Section 2106, this Court may "require such further

proceedings to be had as may be just under the circumstances" on remand. And this Court has specifically recognized that Section 2106 allows reassignment on remand. *See, e.g.*, *Sentis Grp. Inc. v. Shell Oil Co.*, 559 F.3d 888, 904 (8th Cir. 2009); *United States v. Tucker*, 78 F.3d 1313, 1323-24 (8th Cir. 1996). For the reasons set forth in Arkansas's motions briefing, reassignment is warranted here. *See* Resp. in Opp'n to Mot. for Partial Dismissal (Sept. 3, 2019), ID#4826375; Resp. in Opp'n to Mot. to Exclude *Jegley* Record (Sept. 9, 2019), ID#4828437.

CONCLUSION

This Court should reverse—or at least vacate—the preliminary injunction, deny Plaintiffs' motion to dismiss, and order random reassignment.

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I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,988 words, excluding the parts exempted by Fed. R. App. P. 32(f).

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/s/ Vincent M. Wagner
Vincent M. Wagner

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I certify that on October 29, 2019, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which shall send notification of such filing to any CM/ECF participants.

/s/ Vincent M. Wagner
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