No. 15-1200

# In The Supreme Court of the United States

BRAD D. SCHIMEL, *et al.*,

*Petitioners,*

v.

PLANNED PARENTHOOD OF WISCONSIN, INC., *et al.*,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit**

## RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI


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## COUNTER-STATEMENT OF QUESTIONS PRESENTED

(1) Whether the Court should grant certiorari to review the scope of injunctive relief when the question was not properly preserved and the court of appeals' decision is a straightforward application of the undue burden standard of *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), to the well-supported factual findings of the district court.

(2) Whether the Court should grant certiorari to consider a question regarding "subjective" legislative purpose when that question was not properly preserved, subjective legislative purpose was not the basis of the court of appeals' decision, and to the extent that the court of appeals evaluated the legislative purpose of the challenged law under *Casey*, it only considered objective evidence of purpose consistent with precedent.

## PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners accurately list the parties to this proceeding. Planned Parenthood of Wisconsin, Inc. is a non-profit domestic corporation. It is not publicly held and has no parent corporation. Milwaukee Women's Medical Services d/b/a Affiliated Medical Services is a for-profit domestic corporation. It is not publicly held and has no parent corporation.

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## INTRODUCTION

After a trial on the merits, the district court issued a ninety-page opinion finding that: (1) far from protecting women's health, Wisconsin's admitting privileges requirement, Section 1 of 2013 Wisconsin Act 37, Wis. Stat. § 253.095 (the "Act"), would put women's health at risk, Pet. App. 70a-71a, 129a-30a, 173a-74a; and (2) the Act would cause an eight to ten week delay for abortions throughout the state, *id.* at 163a, which would push some women to later procedures that entail more risk, and would also prevent a substantial number of women from getting an abortion at all, *id.* at 164a. The district court thus held the Act unconstitutional and permanently enjoined its enforcement. The Seventh Circuit affirmed. Like the district court, the court of appeals found that the "medical grounds" for the Act were "nonexistent," *id.* at 28a, 32a, and that it would "actually endanger women's health," *id.* at 28a. Moreover, in addition to the lack of "any benefit" to women's health, *id.* at 19a, the court of appeals found that if the Act took effect some women would have to forgo first-trimester abortions and instead get second-trimester ones, which present greater risks, and other women would be unable to get an abortion at all, *id.* at 23a.

Faced with these thorough, factually supported, and well-reasoned findings, Petitioners resort to seeking review on issues that were neither raised nor ruled on by the court below. On this basis alone, this Court should deny the writ.

Moreover, even had the questions been properly preserved, this case does not present issues warranting this Court's review. As to Question 1 (the scope of relief), Petitioners are attempting to camouflage their disagreement with the district court's well-supported factual findings by pointing to cases in which other courts reached different conclusions based on the different facts before them. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), however, requires courts to engage in precisely that type of fact-specific analysis, and following its commands does not create a circuit split. Petitioners have likewise failed to identify any circuit split regarding Question 2 (legislative purpose). In any event, review of this question is not warranted because the court of appeals neither held the statute unconstitutional because of a finding of an improper legislative purpose nor did it evaluate the "subjective motives" of the Wisconsin legislators.

For all of these reasons, the writ should be denied.



## COUNTER-STATEMENT OF THE CASE

### A. The Proceedings Below

Respondents, two entities and two physicians who provide abortions, brought this challenge to the Act, which requires that all physicians who perform abortions have "admitting privileges in a hospital within 30 miles of the location where the abortion is to be performed." Wis. Stat. § 253.095(2). The Act was "passed

precipitously," Pet. App. 78a, and was scheduled to take effect a mere three days after its enactment, even though it can take up to ten months to obtain the required admitting privileges.[1] *Id.* at 6a.

This lawsuit ensued. After entering preliminary injunctive relief, which was affirmed on appeal, Pet. App. 3a,[2] the U.S. District Court for the Western District of Wisconsin held a full trial on the merits. During that trial, the district court heard fact and opinion testimony from eighteen witnesses proffered by the parties, each of whom was subject to cross-examination, as well as from a court-appointed neutral medical expert, the chair of the Department of Obstetrics and Gynecology at Northwestern University's Feinberg School of Medicine. *Id.* at 73a-74a.

In its decision, the district court made detailed findings of fact regarding the lack of any medical need for the Act and the devastating impact it would have on women seeking abortions in Wisconsin. The district court found the credibility of nearly all of Petitioners' experts questionable.[3] Based on those findings, the district court held that the Act imposed an undue burden

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[1] Signed by the Governor on a Friday, the Act would have taken effect on the following Monday.

[2] This Court denied Petitioners' request to review the Seventh Circuit's affirmance of the preliminary injunction. 134 S. Ct. 2841 (2014).

[3] *See, e.g.*, Pet. App. 110a (regarding John Thorp: finding "little to credit in [his] opinions of the relative risks of abortion to child birth or comparable invasive procedures" in "light of the deep flaws in his analysis and his testimony, which often came off more as advocacy th[a]n expert opinion"); *see also*, *e.g.*, *id.* at

on women seeking abortions under the standard announced by this Court in *Casey* and permanently enjoined its enforcement.[4]

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105a-06a n.16 (stating "the court's general concern about Dr. Thorp's ability to be objective is supported by certain hyperbolic statements in his report, as well as by the argumentative nature of his contributions during the colloquy with the court" and his "flippant[ ] suggest[ion] that the court 'knock a [percentage] point off' to account for overlap among the studies he cited"); *id.* at 120a n.24 (finding the "weight to be given to Dr. Linn's testimony was . . . called into question" because he could not explain the "intended meaning of some parts of his own report," and because of "his own, admitted interest in reducing access to abortions and in particular . . . in closing [Respondent] AMS"); *id.* at 124a-25a n.25 (finding that Dr. Merrill's testimony was "tainted by his direct involvement in advocating for the passage of the challenged Act, having proposed [it] to Wisconsin Right to Life"); *id.* at 120a n.24, 127a, & n.27 (questioning Dr. James Anderson's credibility). The district court's credibility findings have been echoed by other courts receiving testimony from some of the same witnesses in favor of similar restrictions. *See* Brief for the American Civil Liberties Union et al. as *Amici Curiae* Supporting Petitioners at 25-27, *Whole Woman's Health v. Hellerstedt*, No. 15-274 (U.S. 2016).

[4] The district court also held, in the alternative, that the Act was unconstitutional because (1) its purpose was "to impose a substantial obstacle on women's right to abortions in Wisconsin," in violation of *Casey*, Pet. App. 71a; (2) it violated the non-delegation doctrine of the due process clause by "leaving to private hospitals the authority to deny admitting privileges for reasons other than a physician's competence without any means for appeal," *id.*; and (3) it violated Respondents' equal protection and due process rights because there was "no rational reason" to treat physicians who perform abortions differently than those "who regularly perform equally or more risky outpatient procedures," *id*. *See also id.* at 174a-82a. The court of appeals did not reach any of these alternative grounds for the permanent injunction.

The Seventh Circuit affirmed the district court's ruling that the Act was unconstitutional and upheld the injunction. As the court of appeals stated, "[w]hen the transfer agreements *and* the availability of emergency-room care *and* the rarity of complications of abortion that require hospitalization are compared to the impact this statute would have on access to abortion in Wisconsin, it is apparent that defendants have failed to make a dent in the district court's opinion granting the permanent injunction sought by the plaintiffs." Pet. App. 35a.

### B. The Act Does Not Protect Women's Health and Unjustifiably Burdens Wisconsin Women.

1. The absence of any medical justification for the Act is detailed in the trial court's extensive factual findings, which establish that:

- "[T]he overwhelming evidence demonstrates that abortion is safe . . . [and] the rates of complications are very low." Pet. App. 114a; *id.* at 10a (complications are "both rare and rarely dangerous").
- Abortions are "safer or comparable in safety to other outpatient procedures," Pet. App. 115a, including operative colonoscopy, egg retrieval for in vitro fertilization, loop electrosurgical excision procedure ("LEEP"), hysteroscopy, cervical biopsies, and endometrial biopsies. *Id.* at 115a-16a.

- Wisconsin does not require doctors who provide these other outpatient procedures to have admitting privileges. Pet. App. 101a, 103a, 115a-16a, 176a; *id.* at 13a, 15a; *see also id*. at 31a ("A number of other medical procedures are far more dangerous to the patient than abortion yet their providers are not required to obtain admitting privileges anywhere, let alone within 30 miles of where the procedure is performed.").

- As required by Wisconsin regulation, Wis. Admin. Code § MED 11.04(1)(g), Respondents have arrangements with a local hospital for the admission of patients in the rare event of an emergency. Pet. App. 122a, 129a. Providers of other outpatient procedures, again including those that entail comparable or greater risks, are not required to have such arrangements. *Id.* at 122a.

- In the rare event that complications arise from an abortion, they are treated, in the "vast majority" of cases, in an outpatient setting. Pet. App. 117a.

- In the even rarer event that a patient requires hospital-based care for a complication, "advance transfer agreements and a call to the receiving hospital's emergency department from the physician who performed the abortion are the most important factors in ensuring continuity of care," according to "a consensus among

the parties and their experts." Pet. App. 122a, 129a.

- Respondents' protocols, which are consistent with the practice guidelines of the American College of Obstetricians and Gynecologists ("ACOG"), ensure both. Respondents arrange for an ambulance, send copies of the patient's medical record, and speak with the receiving hospital. Pet. App. 122a-23a.

- If a transfer from a clinic to the hospital is required, there is "no assurance that a patient would be transferred to the hospital for which the treating physician has admitting privileges." Pet. App. 127a, 130a. Rather, the emergency medical service "is most likely to transport the patient to the closest hospital, which in many cases may not be . . . the one where the treating physician has admitting privileges." *Id.* at 127a.

- Because many of Respondents' patients travel to obtain abortions, they are unlikely to be in the vicinity of a hospital close to the clinic if a complication arises after discharge from the clinic, and thus the admitting privileges requirement would likewise not be relevant. Pet. App. 128a-29a.

- "[E]mergency rooms treat patients without regard to whether the treating physician has admitting privileges," Pet. App.

125a, and "are trained to manage obstetric-gynecologic complications, and will consult with an ob-gyn when appropriate," *id.* at 126a.

- Requiring admitting privileges is out of step with the modern practice of medicine. Experts on both sides of the case "presumed that the outpatient physician would *not* continue to treat a complication requiring hospitalization, rather this would be for a surgeon at the hospital or the ER doctor to manage." Pet. App. 124a.
- Petitioners could not identify a single woman injured as a result of a Wisconsin abortion provider not having admitting privileges, Pet. App. 118a-21a; *id.* at 33a-34a, and, according to the court, this "lack of *any* evidence demonstrating that [the Act] addresses a known problem is telling," *id.* at 121a.

On appeal, the Seventh Circuit concluded that the record abundantly supported these findings, Pet. App. 9a, and held that the Act does not " 'further[ ] the legitimate interest' of the state in advancing women's health," *id.* at 19a. For similar reasons, the state's leading medical associations opposed the Act, including the Wisconsin Medical Society and ACOG. *Id.* at 13a, 77a. Both organizations also submitted an amicus brief along with the American Medical Association ("AMA") in support of Respondents in the court of appeals. *Id*. at 9a.

2. The extensive trial record also fully supports the district court's findings with respect to the burdens imposed by the Act. In particular, the district court found that the Act would force women throughout the state to delay obtaining an abortion for eight to ten weeks, forcing them to have later procedures that entail more risks, and would prevent a "substantial number" of women from getting an abortion at all. Pet. App. 163a-71a.

Only four clinics that provide outpatient abortion remain in Wisconsin: one (in Milwaukee) is operated by Respondent Milwaukee Women's Medical Services d/b/a Affiliated Medical Services ("AMS"), and the other three (in Milwaukee, Madison and Appleton) are operated by Respondent Planned Parenthood of Wisconsin ("PPW"). Pet. App. 80a-81a. By the time of trial, the Act, if it had been permitted to take effect, would have closed AMS. *Id.* at 160a. This is because AMS's co-owners and physicians – Dr. Dennis Christensen, a board-certified ob-gyn with over thirty-five years' experience and an Adjunct Clinical Associate Professor at the University of Wisconsin School of Medicine and Public Health, and Dr. Bernard Smith, AMS's Medical Director, who has over thirty years' experience providing abortions exclusively in an outpatient setting, *id.* at 82a-83a – are unable to obtain admitting privileges at a hospital within thirty miles of their clinic. *Id.* at

89a, 153a, 155a-56a, 160a.[5] Although "Drs. Christensen and Smith are the most experienced providers of abortion in Wisconsin" and Dr. Christensen "has trained countless doctors in [abortion] procedures at the University of Wisconsin Medical School," *id.* at 132a, they are facially ineligible for admitting privileges because they "lack recent experience in performing inpatient medical procedures for which hospitals would grant admitting privileges." *Id.* at 29a; *see also id.* at 147a, 153a-55a.[6]

As the district court further found, the closure of AMS would have a tremendous negative impact on the ability of women throughout the state to get abortions. Pet. App. 163a. AMS provides approximately 2,500 abortions a year (approximately 40% percent of the abortions performed in Wisconsin) and is the only outpatient clinic in Wisconsin providing abortions at or after nineteen weeks of pregnancy. *Id.* at 22a-23a,

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[5] Petitioners attempt to re-litigate whether Drs. Christensen and Smith could have secured privileges, Pet. 9, 24, but they ignore the district court's well-supported findings that they are facially ineligible for privileges and that their assessment that their chances of gaining admitting privileges were "slim to none," Pet. App. 155a, was credible. *Id.* at 148a, 155a-56a. There can be no suggestion that these findings are clearly erroneous, and, in any event, this Court does not grant certiorari to correct factual errors.

[6] The courts below similarly found that AMS cannot stay open by hiring new doctors due to a combination of the "vilification, threats, and sometimes violence directed against abortion clinics and their personnel," other barriers such as the professional stigmatization of abortion and "contractual limitations on their practice," as well as the difficulties of securing admitting privileges. Pet. App. 21a-22a; *see also id.* at 143a-46a, 160a-61a.

161a-62a, 174a. Were AMS to close, "a substantial number of women will be prevented from obtaining abortions (at least, safe ones)," *id.* at 171a, because of three "immediate, identifiable" burdens on Wisconsin women, as the district court found and the court of appeals confirmed, *id.* at 163a, 22a-27a.

*First*, the district court found that "PPW will not be able to absorb the demand for abortions should AMS close," Pet. App. 161a, resulting in "an eight to ten week wait" for an abortion in Wisconsin given PPW's own physician shortage, difficulty in recruiting physicians, as well as lack of space, support staff, equipment and infrastructure. *Id.* at 161a-64a; *see also id.* at 23a. This delay would cause "obvious ripple effects on the availability for all abortions." *Id.* at 163a-64a. "Some women would have to forgo first-trimester abortions and instead get second-trimester ones, which are more expensive and present greater health risks. Other women would be unable to obtain any abortion, because the delay would push them past" the point at which Planned Parenthood performs abortions. *Id.* at 23a, 164a; *see also id.* at 24a ("For the longer the waiting list for an abortion, the more women who want to have early-term abortions will perforce end up having late-term ones, which are more dangerous.").

*Second*, if the Act were upheld, "faced with a lack of options in Wisconsin, women will be required to travel out of state, most likely to Chicago to obtain abortions." Pet. App. 164a. "While a trip from Milwaukee to Chicago might not pose an issue for women of means (even relatively modest means), women seeking

abortions nationally, particularly in Wisconsin, are poor, very poor." *Id.* "For them a round trip to Chicago, and finding a place to stay overnight in Chicago should they not feel up to an immediate return to Wisconsin after the abortion, may be prohibitively expensive." *Id.* at 27a-28a. As the district court found, "the increased costs – both tangible and intangible of travel to Chicago – will prevent . . . particularly poor women[ ] from obtaining abortions." *Id.* at 172a.

*Third*, the law will eliminate access to abortion in Wisconsin for women seeking it at nineteen weeks of pregnancy or after, forcing them "to travel out of state to access care," because "AMS is currently the only clinic providing those services in Wisconsin." Pet. App. 169a. The "evidence at trial, credited by the district judge, was that 18 to 24 percent of women who would need to travel to Chicago or the surrounding area for an abortion would be unable to make the trip," *id.* at 27a, 167a-68a, and thus be unable to obtain an abortion at all.

The district court further found that the Act would, as a result, "impose significant health risks on women in Wisconsin." Pet. App. 173a. "[W]omen who continue unwanted pregnancies will face increased health risks associated with childbirth, as well as attendant health concerns." *Id.* Moreover, in "the face of lack of access to safe, affordable and timely abortions, women may seek out unregulated options." *Id.* Thus, as the court of appeals noted, the Act would "actually endanger women's health." *Id.* at 28a.

## REASONS FOR DENYING THE WRIT

### I. THE PETITION SHOULD BE DENIED BECAUSE PETITIONERS DID NOT PRESERVE THE QUESTION PRESENTED ABOUT FACIAL RELIEF, THERE IS NO CIRCUIT SPLIT, AND THE DECISION BELOW IS A STRAIGHTFORWARD APPLICATION OF *PLANNED PARENTHOOD v. CASEY*.

1. Petitioners have failed to preserve the question they present regarding the scope of the permanent injunction. They never contended in the court of appeals that facial relief was unavailable based on the fact that PPW physicians possessed the required admitting privileges as of the time of trial. Petitioners never once cited *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320 (2006), and never cited *Gonzales v. Carhart*, 550 U.S. 124 (2007), to support an argument that as-applied relief was the proper remedy. Consequently, the court below never reached this issue. The question presented, therefore, was not properly preserved, and that alone is a sufficient reason to deny the petition. *See, e.g.*, *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 109 (2001) (dismissing certiorari as improvidently granted, stating "[w]e ordinarily 'do not decide in the first instance issues not decided below'") (citation omitted); *Glover v. United States*, 531 U.S. 198, 205 (2001); Stephen M. Shapiro et al., *Supreme Court Practice* 508 (10th ed. 2013) (observing that when a "petition raises questions that

were not decided by the court below because they were not raised," it is "ordinarily fatal to the petition").

2. Perhaps recognizing that they waived the question they present to this Court, Petitioners try to manufacture an issue they think worthy of review. They erroneously claim the federal circuit courts are split because three courts have "upheld admitting-privileges requirements against facial challenges." Pet. 19.

However, as the court of appeals recognized in this case, in both *Greenville Women's Clinic v. Bryant*, 222 F.3d 157 (4th Cir. 2000), and *Planned Parenthood of Greater Texas Surgical Health Services v. Abbott*, 748 F.3d 583 (5th Cir. 2014), cited by Petitioners, the courts applied *Casey* to the particular facts before them. Pet. App. 29a; *see Greenville Women's Clinic*, 222 F.3d at 170-71; *Abbott*, 748 F.3d at 597-99. Despite the different outcomes, such fact-specific, record-dependent applications of the *Casey* standard do not create a split meriting the Court's review, particularly given that *Casey* by its own terms requires a fact-specific analysis. *See, e.g.*, *Casey*, 505 U.S. at 887-94 (striking abortion restriction after carefully reviewing the facts of record).[7]

[7] Notably, the language Petitioners cite from *Abbott* regarding the impropriety of a facial challenge addressed an entirely different provision of the Texas law, which restricted medication abortion, and whether that restriction required a health exception. 748 F.3d at 604.

The third case Petitioners cite, *Women's Health Center of West County, Inc. v. Webster*, 871 F.2d 1377 (8th Cir. 1989), also has no bearing on the question of appropriate relief. In that case, only one physician in the entire state (at a practice with other physicians who could comply) was unable to comply with the requirement, and "there [was] simply no evidence that any woman seeking an abortion has been or will be hindered from obtaining an abortion by reason of the [privileges requirement]." *Id.* at 1381. Furthermore, the evidence in that case – now decades old and contrary to the substantial evidence in this case – showed that it was the "accepted medical practice in Missouri" at the time for physicians to have surgical privileges, and the Missouri law at issue permitted physicians to have surgical privileges anywhere in the United States. *Id.* The *Webster* court held that, given the lack of burden on women and the evidence justifying the requirement at the time, no relief was warranted. Thus, it is irrelevant to the question of the appropriate scope of relief in this case.

3. Searching for yet another basis for this Court's review, Petitioners also incorrectly suggest that the lower courts "remain" divided as to which test to apply to determine the facial validity of abortion restrictions: the "large fraction" test of *Casey* or the "no set of circumstances" test of *United States v. Salerno*, 481 U.S. 739 (1987). Pet. 22. Once again, Petitioners failed to preserve the question for review, never contending below that *Salerno* rather than *Casey* provided the

standard for awarding facial relief in challenges to restrictions on abortions. Instead, Petitioners suggest, in a footnote, that the Court "could" add a third question presented rather than explicitly proposing such a question directly. Pet. 23 n.16. In any event, there is no important or recurring conflict meriting this Court's review regarding the appropriate standard for review of abortion restrictions. In the very cases identified by Petitioners, the three circuits in fact applied the "large fraction" test of *Casey*. *Abbott*, 748 F.3d at 588-89; *Richmond Med. Ctr. for Women v. Herring*, 570 F.3d 165, 174 (4th Cir. 2009); *Zbaraz v. Madigan*, 572 F.3d 370, 381 (7th Cir. 2009).

4. Finally, the decision below does not merit further review because the Act poses an undue burden under a straightforward, fact-bound application of *Casey*.

As an initial matter, this Court has never upheld a law that limits the availability of abortions without first confirming that it furthers a valid state interest. *See, e.g.*, *Casey*, 505 U.S. at 882 (through the challenged informed consent requirements, the "State furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later . . . that her decision was not fully informed"); *Gonzales*, 550 U.S. at 128 ("The Act's ban on abortions . . . furthers the Government's objectives."). In *Casey*, the Court upheld challenged recordkeeping and reporting requirements only after concluding that they were "reasonably directed to the preservation of maternal health." 505 U.S. at 900.

Faithfully applying this standard to the record before it, the court of appeals held that the Act does not "'further[] the legitimate interest' of the state in advancing women's health." Pet. App. 19a. Indeed, the court of appeals held that, to the contrary, the Act would "actually endanger women's health." *Id.* at 28a; *see also id.* at 173a (Act would "impose significant health risks on women in Wisconsin"). In *Gonzales*, this Court made clear that if a regulation of abortion "'subject[ed] [women] to significant health risks,'" it is "unconstitutional." *Gonzales*, 550 U.S. at 161 (alteration in original) (citation omitted).

The best Petitioners can muster in response is to point to testimony from defense witnesses whom the district court found to lack credibility. Pet. 10-12.[8] Petitioners also claim that the court-appointed neutral expert testified that admitting privileges were beneficial, *id.* at 11, but they mischaracterize his testimony, as the court of appeals noted. Pet. App. 34a.[9] Contrary

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[8] *See supra* note 3.

[9] Petitioners repeatedly cite to the example of Kermit Gosnell as supposedly providing medical support for the Act, but they rely largely on newspaper articles and the dissent in the court of appeals, rather than evidence of record. Pet. 4, 5, 10-11, 17, 35. More fundamentally, and as the district court observed, "[t]he problem with citing to the outrageous facts involving Dr. Gosnell is that there was no lack of regulations, but rather a lack of enforcement. Pennsylvania had at its disposal the ability to shut Gosnell down much earlier through the state's medical licensing regulations." Pet. App. 136a n.31; *see also* Brief for Ten Pennsylvania Abortion Care Providers as *Amici Curiae* in Support of Petitioners, *Whole Woman's Health v. Hellerstedt*, No. 15-274 (U.S. 2016).

to Petitioners' argument that the district court "disregarded" the State's evidence, Pet. 13, the district court carefully weighed all of the evidence and found that the Act would harm, rather than further, women's health, and the court of appeals properly affirmed the permanent injunction.

Similarly, with respect to the burdens that would be imposed by the Act, Petitioners ignore the district court's finding that the Act's closure of AMS will substantially burden *all* women seeking abortions because it will overwhelm the ability of PPW to provide services to women who need them, causing an eight to ten week delay in the availability of abortions, pushing all women into later (and therefore riskier) abortions, and preventing some women from getting an abortion at all. Pet. App. 23a; *id.* at 27a, 171a (Act will prevent a "substantial number of women" from obtaining abortions). The Act would further prevent all women seeking abortions at or after nineteen weeks of pregnancy from obtaining them in Wisconsin. *Id.* at 23a-24a. Those burdens are precisely the type of "substantial obstacle" that the State cannot validly place in the path of women seeking abortions. *Casey*, 505 U.S. at 877.

Petitioners nowhere contend that the findings about the Act's burdens are clearly erroneous, just as they utterly failed to rebut the evidence of that burden at trial. Pet. App. 23a (noting that trial testimony was "uncontradicted"). Instead, Petitioners argue that patients can travel to Chicago for an abortion, Pet. 24-25, effectively conceding the lack of availability of in-state

abortions should the Act take effect while at the same time ignoring the district court's finding, credited by the court of appeals, that such travel itself would prevent 18 to 24 percent of such women from obtaining an abortion and delay many others. Pet. App. 27a, 167a-69a.[10]

And finally, Petitioners ignore entirely the impact of the Act on PPW. Indeed, without preliminary injunctive relief, which gave the physicians time to apply for privileges, "two of the state's four abortion clinics . . . would have had to shut down," including one of PPW's health centers, "and the capacity of a third clinic [PPW's Milwaukee health center] to perform abortions would have shrunk in half." Pet. App. 8a. What is more, although the PPW physicians were able to obtain privileges while the preliminary injunction was in effect because their practices outside of PPW included some inpatient care, *id.* at 147a-48a, "Planned Parenthood's clinics could also face having to close or significantly reduce the abortions they perform, within a few years, despite currently having doctors with admitting privileges." *Id.* at 22a. That is because hospitals require ongoing inpatient activity to maintain admitting privileges and given how safe abortion is, those physicians are unlikely to have such activity, placing their ability to maintain those privileges going forward at risk. *Id.* at 22a, 146a-49a, 157a-59a.

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[10] The court of appeals properly held, moreover, that the availability of out-of-state abortions is legally irrelevant, rejecting Petitioners' claim that the fact that abortions are available in Chicago could sustain the law. Pet. App. 24a.

Under a straightforward application of *Casey*, the Act poses an undue burden, the courts below properly and permanently enjoined it, and this Court's review is not warranted.

## II. THE QUESTION OF "SUBJECTIVE" LEGISLATIVE PURPOSE WAS NOT PROPERLY PRESERVED, IS NOT THE SUBJECT OF A CIRCUIT SPLIT OR THE BASIS OF THE DECISION BELOW, AND TO THE EXTENT THE COURT OF APPEALS EVALUATED THE ACT'S PURPOSE, IT CONSIDERED ONLY OBJECTIVE EVIDENCE IN A MANNER CONSISTENT WITH PRECEDENT.

1. As with Petitioners' first question presented, Petitioners' question whether a court may consider the "subjective" motive of the legislature in assessing a claim under *Casey*'s purpose prong was also not properly preserved in the courts below. Petitioners never presented the question, and the court of appeals never addressed it. This alone is fatal to the Petition. *See supra* at 13.

2. Nor is there any circuit split on the question presented by Petitioners. The cases Petitioners identify as creating a split pointed to *objective* evidence of legislative intent in evaluating claims that legislation restricting abortion was passed with an unlawful purpose in violation of *Casey*. For example, in *Okpalobi v. Foster*, 190 F.3d 337 (5th Cir. 1999), *vacated on other grounds on reh'g en banc*, 244 F.3d 405 (5th Cir. 2001), the Fifth Circuit, citing to this Court's prior decisions,

noted that "in conducting its impermissible purposes inquiries, the Court has looked to various types of evidence, including the language of the challenged act, its legislative history, the social and historical context of the legislation, or other legislation concerning the same subject matter as the challenged measure." *Id.* at 365 (citations omitted). In *Jane L. v. Bangerter*, 102 F.3d 1112 (10th Cir. 1996), the Tenth Circuit considered the same sort of objective evidence of legislative purpose, including the legislature's establishment of a litigation trust account, the law's blatant disregard of this Court's "repeated directive that viability is a matter for an attending physician to determine," and the State's admission in its appellate briefs of the improper intent of the law. *Id.* at 1116-17.[11]

3. Even if there were such a split, this case would not be a vehicle to resolve it. Petitioners insist that the *only possible* explanation for the court of appeals' conclusion that the Act violates the Fourteenth Amendment is its consideration of evidence of a purpose to restrict access to abortion. Pet. 1. But the court of appeals struck the Act because it has the constitutionally

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[11] Similarly, in *Armstrong v. Mazurek*, 94 F.3d 566 (9th Cir. 1996), *cert. granted, judgment rev'd*, 520 U.S. 968 (1997), the Ninth Circuit stated that "[s]uch a forbidden purpose may be gleaned both from the structure of the legislation and from examination of the process that led to its enactment." *Id.* at 567 (citation omitted). This Court's reversal of that decision had nothing to do with the type of evidence the courts below considered. Instead, the Court reasoned that the evidence of purpose in that case was insufficient to enjoin the restriction at issue. 520 U.S. at 972-74.

invalid *effect* of imposing an undue burden on women's ability to access abortion in Wisconsin without any offsetting benefit to women's health. Pet. App. 27a-28a. The court of appeals discussed legislative purpose in connection with its conclusions that the Act does not further women's health and that the Act's burdens, accordingly, are "undue." *Id.* at 19a (Act would "substantially curtail[] the availability of abortion in Wisconsin, without conferring an offsetting benefit (or indeed any benefit) on women's health"). The court of appeals did not hold that the Act was unconstitutional because it was enacted with the improper purpose of creating a substantial obstacle to abortion, and certainly any discussion of the Act's purpose does not vitiate the *independent* determination – reached by both the district court and the court of appeals – that the Act has the unconstitutional effect of imposing such an obstacle.

4. Furthermore, to the extent the court of appeals addressed the Wisconsin legislature's purpose for the Act, the court of appeals never looked to "subjective" evidence of that purpose. Rather, the court considered the same types of objective evidence that this Court has considered appropriate.[12] For example, this Court has long recognized that "the effect of a law in its real operation is strong evidence of its object."

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[12] Nor did the district court engage in a "subjective" inquiry into the Act's purpose. Petitioners suggest that the court did by inserting the word "subjective" into a quotation that does not in fact contain that word. Pet. 14; Pet. App. 175a.

*Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 535 (1993); *see also United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013) (explaining that a statute's "operation in practice confirms [its] purpose"). In determining the object of a law, this Court also evaluates such "objective factors" as the "specific series of events leading to the enactment" and its legislative history. *Church of the Lukumi Babalu Aye*, 508 U.S. at 540; *Edwards v. Aguillard*, 482 U.S. 578, 594 (1987) ("A court's finding of improper purpose behind a statute is appropriately determined by the statute on its face, its legislative history, or its interpretation by a responsible administrative agency."). The cases cited by Petitioners also make this clear. *See, e.g.*, *United States v. Lovett*, 328 U.S. 303, 307 (1946) (considering the "circumstances leading to [the] passage" of a statute to understand its purpose); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 n.16 (1975) (examining "the legislative scheme and its history" to consider legislative purpose).[13]

This mode of inquiry has enabled the Court to identify pretextual laws in a variety of constitutional

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[13] Petitioners' citation to *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991), is inapposite. That case acknowledges that inquiries into legislative purpose are appropriate in cases "where the very nature of the constitutional question requires [this] inquiry," *Id.* at 377 n.6 (alteration in original) (citation and internal quotation marks omitted). This is precisely the case here. The test the Court laid out in *Casey* is whether the challenged law has "the *purpose* or effect of placing a substantial obstacle in the path of a woman seeking an abortion." 505 U.S. at 877 (emphasis added).

contexts and prevent them from infringing on constitutional rights. *See, e.g.*, *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 574-75 (2011) ("[The challenged statute] does not advance the State's asserted interest in physician confidentiality. The limited range of available privacy options instead reflects the State's impermissible purpose to burden disfavored speech."); *Edwards*, 482 U.S. at 586-89 (reasoning that a statute's stated purpose of protecting academic freedom was a pretext for endorsing religion because the statute was not reasonably designed to protect academic freedom); *Romer v. Evans*, 517 U.S. 620, 635 (1996) ("The breadth of the amendment is so far removed from these particular justifications that we find it impossible to credit them.").

The court of appeals considered such objective evidence of legislative purpose as the Act's two-day window for compliance, even though it takes months for physicians to obtain privileges, Pet. App. 6a[14]; the lack of supporting medical evidence in the legislative history, *id.* at 13a; the fact that Wisconsin does not require admitting privileges for other outpatient procedures, even those more dangerous than abortion, *id*. at

[14] Petitioners complain about the court of appeals' reliance on this factor because this deadline resulted from the "default operation of Wisconsin law." Pet. 34. But as Petitioners know, the Wisconsin legislature regularly opts out of this default by specifying effective dates for legislation, *see, e.g.*, 2015 Wis. Act 17; 2015 Wis. Act 18, even sometimes setting different effective dates within the same piece of legislation. *see, e.g.*, 2015 Wis. Act 16, § 7. The two-day deadline for compliance, furthermore, was out of step with the other states to have passed such laws, which "have allowed *much* longer implementation than a weekend." Pet. App. 7a.

17a-18a; and the Act's private remedy, which permits the father or grandparent of the fetus to obtain damages even if the woman is not harmed by an abortion performed in violation of the Act, *id*. at 18a.[15] Each is precisely the type of objective evidence courts consider in evaluating legislative purpose, and thus is appropriate in evaluating whether a law has an unlawful purpose in violation of *Casey*. Whether it is appropriate to consider "subjective" legislative evidence in addition to (or in place of) such objective evidence is simply not an issue because the courts below had no such evidence before them.

Finally, this case does not present the Court with the opportunity to "make clear that, where the 'natural and reasonable effect' of a law does not impose an undue burden on abortion access, that law is constitutional" without regard to the Act's purpose. Pet. 27. The Act, if permitted to take effect, would in fact devastate access to abortion in Wisconsin, making plain that the decision below does not present a vehicle to address that question.



[15] Petitioners suggest that the Wisconsin legislature did not know that the Act would shut down AMS and therefore could not have acted with the purpose of shutting down clinics, citing an inaccurate local newspaper report when the bill was pending. Yet the very same article also accurately notes that the Act would have shut down one of the other clinics, rendering Petitioners' suggestion wholly without merit. Pet. 9 n.10.

## CONCLUSION

For all of the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

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