No. 15-274

IN THE

Supreme Court of the United States

WHOLE WOMAN'S HEALTH, *et al.*,

Petitioners,

v.

KIRK COLE, COMMISSIONER OF THE TEXAS DEPARTMENT OF STATE HEALTH SERVICES, *et al.*,

Respondents.

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

BRIEF FOR THE STATES OF NEW YORK, CALIFORNIA, CONNECTICUT, HAWAI'I, ILLINOIS, MAINE, MARYLAND, MASSACHUSETTS, OREGON, VERMONT, VIRGINIA, AND WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Amici States address the following question:

Does a law that restricts access to abortion services for the stated purpose of promoting the government interest in women's health impose an undue burden on the right to obtain an abortion if the law does not actually advance that interest?

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INTEREST OF AMICI CURIAE[1]

Amici are the States of New York, California, Connecticut, Hawai'i, Illinois, Maine, Maryland, Massachusetts, Oregon, Vermont, Virginia, and Washington. Amici seek to ensure the availability of safe, medically sound abortion services within their borders. Amici recognize that some forms of regulations enacted to promote women's health may implicate the constitutional right to obtain an abortion to the extent that they increase the cost of providing abortions, restrict who may perform them, or impose compliance burdens on providers. Amici are committed to advancing their interest in the safety of women seeking abortion services without creating unwarranted obstacles to women's access to those services. Amici may have reached different conclusions regarding the precise balance that should be struck between regulating the safety of abortion services and maintaining access to those services. But they share the goal of striking an appropriate balance between these fundamental concerns, and have an interest in obtaining greater clarity regarding the scope of their authority to regulate abortion services toward that end.

Amici also have an interest in ensuring that courts afford the proper degree of deference to their legislative judgments regarding the appropriate forms of abortion regulations enacted to promote women's health. As a general matter, the States'

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[1] Amici States submit this brief under Supreme Court Rule 37.4. Counsel of record for all parties received timely notice of amici States' intent to file this brief.

judgments regarding the best means to protect the health of their citizens should be accorded substantial deference. Amici do not lightly invite greater judicial scrutiny of those judgments. Nonetheless, uncritical deference where state abortion regulations do not serve their purported goal of protecting women's health would fail to give sufficient protection to the constitutional right to obtain an abortion. Proper respect for the right requires courts to review abortion regulations assertedly enacted to promote women's health to determine whether they actually do so. Appropriate judicial review provides guidance to the States, channeling their decision-making toward evidence-based abortion regulations and discouraging ineffective, or even counter-productive, regulations.

SUMMARY OF ARGUMENT

This case presents the question of how to evaluate whether regulations of abortion services assertedly enacted to increase the safety of those services impose an unwarranted—and thus undue—burden on the constitutional right to obtain an abortion. The answer to this question is vitally important, both to protect the exercise of the constitutional right and to assure the States' ability to regulate abortion services in furtherance of their interest in promoting women's health.

At issue are two provisions of Texas law that the State has principally defended as measures to promote the health of women seeking abortions. One provision mandates that abortion facilities comply with the stringent requirements applicable to ambulatory surgical centers (the "ASC requirement");

the other requires that any physician performing an abortion have admitting privileges at a hospital located within thirty miles of the place where the abortion is performed (the "admitting-privileges requirement"). (Pet. App. 24a–25a, 182a–183a, 194a.) In the decision below, a panel of the Fifth Circuit, following circuit precedent, held that these regulations did not impose an undue burden on the abortion right, notwithstanding the district court's express finding on the basis of the evidence before it that the regulations would do little if anything to reduce the already extremely low risks associated with abortion procedures and could instead create significant additional risks for women seeking abortions. (*See* Pet. App. 47a–51a, 145a–147a.)

There is a square conflict among the lower courts regarding the proper standard for reviewing the constitutionality of abortion regulations assertedly enacted to promote women's health that have the effect of restricting access to abortion services. In the view of the Fifth Circuit, as reflected in the decision below, state legislative judgments regarding the safety of abortion services are entitled to near-total deference, and an abortion regulation assertedly enacted to promote women's health will be viewed as a legitimate health measure if any plausible justification exists to support it, even in the face of strong evidence that the regulation does not actually advance the State's interest. Two other courts of appeals and one state high court have concluded, in contrast, that the burden imposed by an abortion regulation assertedly enacted to promote women's health is undue if the State is unable to demonstrate that the regulation is reasonably related to that interest.

The Court should grant certiorari to resolve this conflict. The conflict is squarely presented by this case, given the district court's express finding that the challenged regulations have no valid medical justification and would not make abortions safer. This case thus provides a good vehicle to resolve the conflict. The conflict is also well-presented for the Court's review because it has been thoroughly vetted by the lower courts. And the Court should resolve the conflict now to avoid continuing confusion over the proper standard for judicial review of abortion regulations assertedly enacted to promote women's health. Many other States have enacted laws similar to those at issue here, and some of those laws are also being challenged in the courts.

Moreover, identifying the proper standard for reviewing abortion regulations assertedly enacted to promote women's health is an important issue for the States, which are responsible both for protecting the public health and for safeguarding their citizens' constitutional rights. The States have a strong interest in having such regulations subjected to an appropriate level of judicial review—one that respects their authority to regulate for the health of their citizens, but also prevents unwarranted burdens on the right to obtain an abortion. The version of the undue-burden standard adopted by the Fifth Circuit, which gives uncritical deference to legislative judgments, fails to give proper weight to the constitutional right to obtain an abortion. Properly applied, the undue-burden standard would require courts to invalidate seemingly beneficial but medically unfounded measures that, like the regulations at issue here, do not promote the health of pregnant women and could instead make abortions less safe.

The prospect of review under such a standard would encourage States to adopt, in the first instance, evidence-based regulations that are more likely to advance the States' interest in women's health. In the long run, it also would help to preserve the deference due to state judgments in areas of medical or scientific uncertainty, where States traditionally have great latitude to act. That deference could ultimately be eroded if States are permitted to use it as a license to disregard strong medical or scientific evidence and enact unsound and burdensome abortion regulations.

ARGUMENT

It is an essential "component of liberty" that a woman may choose to terminate a pregnancy prior to the fetus's viability. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 871 (1992) (plurality op.). This right precludes a State from imposing an "undue burden" on a woman's choice to obtain an abortion prior to viability. *Id.* at 877. A State may, "[a]s with any medical procedure, . . . enact regulations to further the health or safety of a woman seeking an abortion." *Id.* at 878. But "[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right." *Id.*

At issue here is how to identify "unnecessary health regulations" that unduly burden a woman's right to obtain an abortion. The Court should grant certiorari to resolve the conflict among the lower courts on this question, which is squarely presented here and will affect the constitutionality of abortion regulations in numerous States. In resolving this

conflict, the Court should confirm that the undue-burden standard requires courts to undertake meaningful review of abortion regulations assertedly enacted to promote women's health. The identification of the proper standard of review is an important issue for the States. Proper judicial review will both guide state decision-making toward more medically sound abortion regulations and, in the long run, prevent erosion of the deference ordinarily due to state health judgments.

I. The Court Should Resolve the Conflict Among the Lower Courts Regarding the Proper Application of the Undue-Burden Standard to Abortion Regulations Assertedly Enacted to Promote Women's Health.

A. The Conflict Is Squarely Presented by This Case.

The lower courts are sharply divided as to whether the undue-burden standard requires a court to evaluate whether an abortion regulation assertedly enacted to promote the health of pregnant women actually advances that interest. In the decision below, the Fifth Circuit rejected petitioners' constitutional challenge to the ASC and admitting-privileges requirements, notwithstanding the district court's findings on the basis of the evidence before it that those requirements will not reduce the already low risks associated with having an abortion, and that any conceivable benefit of the regulations will be "cancel[ed] out" by the risks associated with delayed abortions, longer travel distances, and self-induced abortions by women prevented from accessing safe abortion services. (Pet. App. 145a–147a.) The Fifth

Circuit did not treat these findings as dispositive because, under circuit precedent, a court applying the undue-burden standard may not "substitut[e] its own judgment for that of the legislature," and must accept "'any conceivable rationale'" offered to justify a regulation of abortion services assertedly enacted to promote women's health. (Pet. App. 50a–51a (quoting *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583, 594 (5th Cir. 2014)).) The court stated that "'[i]t is not the courts' duty to second guess legislative factfinding, improve on, or cleanse the legislative process by allowing relitigation of facts that led to the passage of a law.'" (Pet. App. 49a–50a (quoting *Abbott*, 748 F.3d at 594).)

Under the Fifth Circuit's conception of the undue-burden standard, courts thus have no meaningful role to play in ensuring that abortion regulations assertedly enacted to protect women's health in fact respond to recognized health risks, are medically sound, or are reasonably likely to achieve their intended result. As petitioners have explained (Pet. 15–20), this uncritical approach to legislative health judgments conflicts with the approach of two other federal courts of appeals and one state high court, which requires States to establish that regulations assertedly enacted to promote women's health are likely to make abortions safer. *See Planned Parenthood of the Heartland, Inc. v. Iowa Bd. of Med.*, 865 N.W.2d 252, 268–69 (Iowa 2015); *Planned Parenthood Az., Inc. v. Humble*, 753 F.3d 905, 911–15 (9th Cir.), *cert. denied*, 135 S. Ct. 870 (2014); *Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 798–99 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 2841 (2014).

This issue has sufficiently percolated in the lower courts, producing clearly divergent approaches articulated in reasoned opinions. And this case squarely presents the conflict for the Court's review. As noted, the Fifth Circuit did not disturb the district court's findings that Texas's ASC and admitting-privileges requirements are unwarranted and potentially detrimental to women's health. (*See* Pet. App. 145a–147a.) Thus, this Court's determination of how the undue-burden standard applies to abortion regulations assertedly enacted to promote women's health could be dispositive in this case: if the standard requires that such an abortion regulation be reasonably likely to advance a valid state interest, the challenged regulations would fail under the district court's findings.

B. Resolving the Conflict Now Is Important to the States.

The resolution of this disagreement should not wait because it will affect, and likely determine, the constitutionality of abortion regulations in numerous other States. Laws regulating abortion services assertedly to promote women's health have recently proliferated. *See* Guttmacher Inst., *Laws Affecting Reproductive Health and Rights: 2012 State Policy Review;* Gillian E. Metzger, *Abortion, Equality, and Administrative Regulation*, 56 Emory L.J. 865, 871 (2007). These laws vary in their particulars, but "in general they impose licensing requirements, authorize state inspections, regulate wide-ranging aspects of abortion providers' operations—including, for example, staff qualifications and minimum

hallway dimensions—and impose civil and criminal penalties for noncompliance."[2] Metzger, *supra*, at 871. These "regulations are not intended to further the state's interest in protecting fetal life, nor to support women's liberty. Instead, they are justified solely as measures advancing the state's interest in protecting maternal health." *Id.* at 885.

At recent count, twenty-seven States in addition to Texas have enacted licensing requirements for abortion facilities, many of them comparable to Texas's ASC requirement, and sixteen States in addition to Texas have enacted legislation requiring abortion providers to hold hospital admitting privileges or enter into similar arrangements. *See, e.g.*, Guttmacher Inst., *State Policies in Brief: Targeted Regulation of Abortion Providers*, tbl. (Oct. 1, 2015) (detailing different "facility" and "clinician" requirements). Many of these regulations have been or currently are the subject of constitutional challenges asserting that they impose an undue burden on the right to obtain an abortion because, among other things, they lack medical justification. *See, e.g.*, *Planned Parenthood of Wis., Inc. v. Van Hollen*, — F. Supp. 3d —, 2015 WL 1285829, at *11–*25 (W.D. Wis. Mar. 20, 2015) (on remand from the Seventh Circuit, finding a "tenuous link, if any, between the proffered justifications and the State's evidence" in support of Wisconsin's admitting-privileges require-

[2] Other laws impose conditions on the administration of abortion-inducing drugs, such as requiring that the drugs be administered according to a less effective prescribing regimen. *See, e.g.*, *Humble*, 753 F.3d at 909–10 (Arizona law); *Planned Parenthood Sw. Ohio Region v. DeWine*, 696 F.3d 490, 493–94, 496 (6th Cir. 2012) (Ohio law).

ment), *appeal docketed*, No. 15-1736 (7th Cir. Apr. 6, 2015) (argued Oct. 1, 2015); *Planned Parenthood Se., Inc. v. Strange*, 33 F. Supp. 3d 1330, 1363–76 (M.D. Ala. 2014) (invalidating Alabama's admitting-privileges requirement on similar grounds).

Until the Court clarifies how the undue-burden standard applies to such regulations, the constitutionality of these and other abortion regulations assertedly enacted to promote women's health will remain in doubt. And States contemplating whether to enact such regulations will lack guidance regarding the scope of their authority or the considerations that should inform their decision whether to do so. The Court's resolution of this issue will also help to define the States' authority to adopt other types of health-related abortion regulations in the future, perhaps in response to advances in medical practice or other changed circumstances. Because regulations assertedly enacted to promote women's health can dramatically limit access to abortion services—by forcing abortion facilities to close or barring physicians from performing abortions, as the district court found will occur in Texas (Pet. App. 143a–144a; *see* Pet. 32–37)—delay in resolving the constitutionality of these regulations could result in substantial, possibly irreparable harm to pregnant women. The Court should resolve this question now.

II. The Court Should Grant Review to Clarify That State Health Judgments Regarding Abortion Regulations Are Entitled to Some Deference, but Not Uncritical Deference.

The Court also should grant review because the degree of deference properly owed to the States' health judgments regarding abortion services is an important issue for the States. As petitioners have explained (Pet. 20–22), the Court's precedents require courts to carefully review whether an abortion regulation assertedly enacted in the interest of women's health is likely to advance that interest. The uncritical deference that the Fifth Circuit's approach affords to unfounded state health judgments fails to protect the abortion right from unnecessary infringement. This extreme deference also threatens to undermine the States' legitimate claim to deference when they address subjects of true medical or scientific uncertainty.

A. Proper Judicial Review Safeguards Against Unwarranted Burdens on the Abortion Right by Guiding State Decision-Making.

The more searching review described by this Court's precedents prevents unwarranted burdens on the abortion right by "provid[ing] guidance and discipline for the legislature," *Romer v. Evans*, 517 U.S. 620, 632 (1996). By requiring a State to show that it has an "interest which can justify its intrusion into the personal and private life of the individual," *Lawrence v. Texas*, 539 U.S. 558, 578 (2003), this review channels women's-health-related abortion regulations toward evidence-based measures that are likely to promote women's health. Such review

provides an important check against seemingly plausible, but medically unfounded, abortion regulations that unnecessarily burden access to abortion services or even make abortions less safe.

In particular, such review may encourage legislatures to pay closer attention to the views of the medical community in formulating abortion regulations designed to promote women's health. The Court has itself often looked to the medical community for guidance regarding the reasonableness of health-related abortion regulations. Accepted medical standards help to define the bounds of the States' authority because, while "the State necessarily has considerable discretion" in selecting health regulations, this "discretion does not permit it to adopt abortion regulations that depart from accepted medical practice." *Simopoulos v. Virginia*, 462 U.S. 506, 516–17 (1983). Thus, when a regulation restricts access to abortion services, and "present medical knowledge convincingly undercuts [the State's] justification" for the measure, *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 437 (1983) (quotation marks and citation omitted), *overruled on other grounds*, *Casey*, 505 U.S. at 870, the burden imposed by the regulation should be regarded as undue.

Had the Texas Legislature considered accepted medical standards, its decision to adopt the challenged regulations might have been different, because prominent medical groups strongly opposed the regulations' enactment. The leading national organization of obstetricians and gynecologists described the regulations as "over-reaching measures" that were "not based on sound science," despite the organization's "efforts to provide the [Texas] legislature with

the best available medical knowledge." Am. Cong. of Obstetricians & Gynecologists, Ob-Gyns Denounce Texas Abortion Legislation: Senate Bill 1 and House Bill 2 Set Dangerous Precedent (July 2, 2013). And the Texas Hospital Association warned the Legislature that the admitting-privileges requirement was "not the appropriate way" to ensure "high-quality care" for patients. Glenn Hegar, Texas Hospital Association's Statement in Opposition to Section 2 of the Committee's Substitute for Senate Bill 5 (n.d). The prospect that the legislation's grounding in medical evidence would face meaningful judicial scrutiny might have encouraged the Texas Legislature to heed these concerns. *Cf.* Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue*, 42 Wm. & Mary L. Rev. 1575, 1687–89 (2001) (asserting that judicial rules requiring legislative fact-finding where "the most vital constitutional interests are at stake" may encourage "a thoughtful reevaluation and reshaping of policy proposals" by "slowing down the policymaking process and by bringing into sharper focus the potential costs of legislative action").

Providing a check on medically unfounded legislation and encouraging consideration of sound medical practice are particularly important for abortion regulations assertedly enacted to promote women's health. As the Ninth Circuit has observed, when a State regulates abortion services to advance its distinct interest in preserving fetal life, "whatever obstacles th[e] law places in the way of women seeking abortions logically serve the interest the law purports to promote—fetal life—because they will prevent some women from obtaining abortions."

Humble, 753 F.3d at 912 (quotation marks omitted). But where a State assertedly acts to further its interest in promoting women's health, "a law that is poorly drafted or which is a pretext for anti-abortion regulation can both place obstacles in the way of women seeking abortions *and* fail to serve the purported interest very closely, or at all." *Id.* (quotation marks omitted).

It is not merely a theoretical concern that States will enact unwarranted or counterproductive abortion regulations in the name of promoting women's health. This Court has confronted several seemingly beneficial regulations—such as laws requiring that all abortions be performed in hospitals or banning particular abortion methods as unsafe—that in fact failed to respond to any discernable health risk and lacked the support of medical evidence. *See Akron Ctr. for Reprod. Health*, 462 U.S. at 433–34 (invalidating hospitalization requirement for first-trimester abortions); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 77–79 (1976) (invalidating prohibition of abortions by saline amniocentesis, which "fail[ed] as a reasonable regulation for the protection of maternal health"). Moreover, the proliferation in recent years of abortion regulations assertedly enacted to promote women's health has generated numerous successful legal challenges asserting that the regulations fail to respond to a legitimate health risk and do little to make abortions safer. See *supra* at 9–10. This Court should grant review to clarify that the undue-burden standard precludes such medically unwarranted burdens on the constitutional right to obtain an abortion.

B. Proper Judicial Review May Prevent the Erosion of Deference to State Health Judgments in Areas of Medical or Scientific Uncertainty.

The States have a strong interest in ensuring that their judgments receive an appropriate degree of deference when they exercise their authority to promote health, and in particular to ensure the safety of medical procedures. *See Gonzales v. Carhart*, 550 U.S. 124, 165 (2007); *Casey*, 505 U.S. at 878 (plurality op.). But the uncritical deference extended by the Fifth Circuit's approach ultimately may disserve that interest.

In the decision below, the Fifth Circuit relied on the principle that state judgments are entitled to substantial deference when they address matters involving "medical uncertainty." (Pet. App. 51a.) It is true that the States have "wide discretion" to act where medicine or science does not provide clear guidance. *Gonzales*, 550 U.S. at 163. The States prize that discretion as an essential component of their traditional role in protecting the public health. As this Court has recognized, irreconcilable medical or scientific disagreement should not "tie the State's hands," *Kansas v. Hendricks*, 521 U.S. 346, 360 n.3 (1997), because States addressing potential threats to their citizens' health, and facing "opposing theories" of what should be done, must, "of necessity, . . . choose between them," *Jacobson v. Massachusetts*, 197 U.S. 11, 30–31 (1905). Courts rightly "should be cautious not to rewrite legislation" where a State makes such a choice. *Hendricks*, 521 U.S. at 360 n.3 (quotation marks omitted).

Here, however, the district court found on the basis of the record before it that neither the extremely low risk to women's health from abortion procedures before the enactment of the challenged legislation, nor the tenuous connection between the legislation and the State's professed health concerns, was subject to serious dispute (see *supra* at 6–7)—much less "fraught with medical and scientific uncertaint[y]" of the kind that would give the State special latitude to act, *Hendricks*, 521 U.S. at 360 n.3 (quotation marks omitted). Moreover, even if there were some medical or scientific uncertainty here, this Court has made clear that, where the constitutional right to obtain an abortion is at stake, courts "retain[] an independent constitutional duty to review [legislatures'] factual findings." *Gonzales*, 550 U.S. at 165.

The uncritical deference that the Fifth Circuit nonetheless afforded the legislation violates the principles of both *Hendricks* and *Gonzales,* and permits legislatures to burden the right to obtain an abortion without actual justification. In the long run, courts are more likely to defer to the States' health judgments on matters involving genuine medical or scientific dispute if States have not misused their regulatory authority to impose restrictions on access to abortion services that are demonstrably unhelpful or even harmful. Careful judicial review of state health judgments where the constitutional right to obtain an abortion is at stake thus tends to preserve, rather than diminish, the States' authority to act in the interest of public health.

CONCLUSION

The petition for a writ of certiorari should be granted.

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