No. 15-274

IN THE

Supreme Court of the United States

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

Petitioners,

v.

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

Respondents.

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

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

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QUESTION PRESENTED

Amici States address the following question:

When applying the undue-burden standard, does a court err by refusing to consider whether and to what extent laws that restrict abortion for the stated purpose of promoting health actually serve the government's interest in promoting health?

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INTEREST OF AMICI CURIAE

Amici are the States of New York, California, Connecticut, Delaware, Hawai'i, Illinois, Iowa, Maine, Maryland, Massachusetts, Oregon, Vermont, Virginia, Washington, and the District of Columbia. Amici States agree that "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992). Amici States are therefore committed to advancing their interest in promoting the safety of abortion services without creating unwarranted obstacles to a woman's right to terminate a pregnancy.

Amici have an interest in ensuring that their legislative judgments regarding the appropriate forms of health regulation receive the proper degree of deference from the courts. As a general matter, the States' 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 to state judgments regarding the regulation of abortion services would fail to give sufficient protection to the constitutional right to terminate a pregnancy, and would permit a State, by invoking its interest in health, to impose an unwarranted burden on that right. Proper respect for the right requires courts to engage in meaningful review of abortion regulations assertedly enacted to advance a State's interest in women's health, in order to determine whether the regulations actually advance that interest and whether they impose a burden on the right that is warranted by a benefit to

health. Appropriate judicial review provides guidance to the States, channeling their decision-making toward evidence-based regulations and discouraging unwarranted and even harmful abortion regulations.

Amici also have an interest in ensuring that each State satisfies its constitutional obligation to protect the right to terminate a pregnancy within its borders. Residents of the Amici States should be able to exercise their constitutional rights in any State to which they may travel. Moreover, a substantial reduction in the availability of abortion services in one State is likely to cause some women to seek services in other States, thereby potentially limiting the regulatory choices available to those States and burdening their health-care systems. Amici thus have an interest in confirming the principle that the extent to which abortion services may be available in a neighboring State is irrelevant to the question whether a State's regulation imposes an undue burden on the abortion right.

SUMMARY OF ARGUMENT

This case presents the question of how to evaluate whether regulations of abortion services assertedly enacted to make those services safer impose an unwarranted—and thus undue—burden on the constitutional right to terminate a pregnancy. At issue are two provisions of a Texas law, known as House Bill 2 (HB2), that the State has defended as measures to promote the health of women seeking abortions. One provision of HB2 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, the Fifth Circuit upheld these regulations, both on their face and as applied to the sole abortion clinic then remaining in Texas located within 550 miles of El Paso, concluding that the regulations did not impose an undue burden on abortion access. (*See* Pet. App. 47a–51a, 72a–76a.)

The Fifth Circuit's application of the undue-burden standard fails to protect the right to terminate a pregnancy from unwarranted and burdensome health regulations. Properly applied, the undue-burden standard requires an examination of the State's justification for burdening that right and the extent of the burden imposed. The Fifth Circuit made critical errors in both parts of this analysis.

First, in examining the justification for burdening the right, the Fifth Circuit erred by affording uncritical deference to the State's health-based judgments. The undue-burden standard instead requires courts to undertake meaningful review of the justification for regulations assertedly enacted to promote women's health. This more exacting review requires a State to demonstrate that a challenged regulation will actually advance its interest in women's health. Review under this standard allows States to advance their stated interest, while safeguarding the right to terminate a pregnancy from unjustified infringements. The prospect of such review also encourages States to adopt evidence-based regulations that will advance their interest in women's health without imposing unnecessary obstacles to abortion access.

And, contrary to the Fifth Circuit's suggestion, the regulations at issue here do not implicate an area fraught with medical or scientific uncertainty that would warrant special solicitude for state health judgments. Rather, as the district court found, the minimal risks associated with abortions and the negligible value of the measures at issue for promoting women's health are well understood and not subject to legitimate dispute.

Second, in analyzing the extent of the burden imposed by the ASC and admitting-privileges requirements as applied to women in El Paso, the Fifth Circuit erred by considering the availability of abortion services in the neighboring State of New Mexico. This Court should reject that approach because it misapprehends the fundamental principle, affirmed by the Court in analogous contexts, that each State bears an independent obligation to ensure that its laws do not infringe the constitutional rights of persons within its borders. By disregarding this principle, the Fifth Circuit validated restrictions that effectively deny women the ability to access abortion services in their home State and force them to travel elsewhere to access those services.

The Fifth Circuit's cross-borders analysis would have serious adverse consequences for the States. If the constitutionality of a State's abortion regulation could turn on the current availability of abortion services in neighboring States, (a) that State would have greater regulatory discretion than its neighbors, which could not thereafter similarly rely on the availability of abortion services in the first State to justify their own regulations, and (b) the constitutionality of the first State's regulations would be subject to revision as conditions changed in neighbor-

ing States. Moreover, States would be able to shift to neighboring States the responsibility for protecting access to abortion services, and thereby strain the health-care systems of those States.

ARGUMENT

No State may impose an undue burden on a woman's right to choose to terminate her pregnancy prior to viability. *Casey*, 505 U.S. at 877 (plurality op.). 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.* As these principles suggest, and as discussed in more detail below, evaluating the constitutionality of a regulation that limits access to abortion services for the asserted purpose of promoting women's health requires examination of two factors. The first is the State's justification for burdening the right, which must be analyzed in light of evidence regarding the health risks that the State's regulation is purportedly designed to mitigate and the likelihood that it will mitigate those risks. The second is the extent of the burden imposed, including whether that burden is warranted by any health benefit the regulation is likely to achieve.

In the decision below, the Fifth Circuit held that Texas's ASC and admitting-privileges requirements did not on their face impose an undue burden on the right, in part because they were not wholly irrational. The court reached this conclusion despite the district court's 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.) The Fifth Circuit further concluded that the regulations did not impose an undue burden even as applied to the lone abortion facility then remaining in Texas located within 550 miles of El Paso; the court reasoned that women in the western part of the State could access abortion services at a currently existing facility across the state border in New Mexico.[1] (Pet. App. 72a–76a.)

With these conclusions, the Fifth Circuit made critical errors in applying both parts of the undue-burden analysis to Texas's ASC and admitting-privileges requirements.

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[1] Prior to HB2, there were two abortion clinics operating in El Paso. (*See* Joint App. 229.) One closed as a result of the admitting-privileges requirement before the district court entered its injunction. In describing the effect of the legislation, the courts below made reference only to the remaining clinic, which would have been forced to close by the ASC requirement had that requirement not been enjoined. Petitioners advise that both clinics are now operating under the district court's injunction, as maintained by this Court's stay of the Fifth Circuit's mandate. (*See* Pet. Br. 52 n.22.)

I. The Undue-Burden Standard Forbids Abortion Regulations That Purport to Promote Women's Health but Actually Fail to Do So.

In examining the justification for the ASC and admitting-privileges requirements, the Fifth Circuit accepted uncritically the State's assertion that the requirements would advance its interest in promoting women's health by making abortion procedures safer. The court did so despite the district court's findings on the basis of the evidence before it that the challenged requirements would not in fact advance the State's purported health interest. Instead, the district court found, the requirements would not reduce the already low risks associated with having an abortion, and any conceivable benefit of the regulations would 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 refused to treat these findings as dispositive. It reasoned that a court applying the undue-burden standard may not "substitut[e] its own judgment for that of the legislature" (Pet. App. 51a), and must accept "'any conceivable rationale'" offered to justify a regulation of abortion services assertedly enacted to promote women's health (Pet. App. 50a (quoting *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583, 594 (5th Cir. 2014))). The court noted further 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).) Thus, under the Fifth Circuit's conception of the undue-burden standard, courts have no meaningful role in ensuring that abortion regulations assertedly enacted to promote women's health in fact respond to recognized health risks and serve to mitigate them.

The uncritical deference afforded by the Fifth Circuit to Texas's health judgments fails to protect against laws with "the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus," *Casey*, 505 U.S. at 877 (plurality op.). As explained by petitioners (Pet. Br. 36–38) and discussed below, the undue-burden standard requires more searching review. That review is essential in order to avoid unnecessary burdens on the constitutional right to terminate a pregnancy, and does not intrude on the States' legitimate authority to regulate in the interest of health.

A. The Undue-Burden Standard Requires Meaningful Judicial Review of Abortion Regulations That Purport to Promote Women's Health.

This Court has consistently, and for good reason, refused to afford uncritical deference to a State's judgment that a particular regulation of abortion services will promote women's health.

Casey explained that the very essence of the right it was reaffirming was the "right 'to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.'" *Id.* at 875 (plurality op.) (quoting *Eisenstadt v. Baird,* 405 U.S. 438, 453 (1972)). Thus, the States may enact legiti-

mate regulations "designed to foster the health of a woman seeking an abortion," but not "[u]nnecessary health regulations" that present significant obstacles to access to abortion services. *Id.* at 878. And since *Casey*, the Court has stated that the undue-burden standard does not permit courts to accept a State's health judgments uncritically. Instead, a court "retains an independent constitutional duty to review factual findings" by the legislature where the constitutional right to obtain an abortion is at stake. *Gonzales v. Carhart*, 550 U.S. 124, 165 (2007).

The Court applied these same principles before *Casey* when evaluating abortion regulations assertedly enacted to promote women's health. In each instance, the Court carefully examined the support for the legislature's judgment that the regulation would actually advance that interest, rather than deferring to a proffered justification that met the low bar of rationality.

On this basis, the Court twice invalidated regulations that failed to respond to any discernible health risk and lacked the support of medical evidence. In reviewing a regulation that required all second-trimester abortions to be performed in hospitals, the Court noted that "impressive evidence," including the official position of the American College of Obstetricians and Gynecologists, established that abortion procedures during the second trimester "may be performed as safely in an outpatient clinic." *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 437 (1983), *overruled on other grounds*, *Casey*, 505 U.S. at 870. The Court also invalidated a prohibition of a particular abortion method, saline amniocentesis, concluding that the ban "fail[ed] as a reasonable regulation for the protection of maternal

health," and was instead "an unreasonable or arbitrary regulation designed to inhibit, and having the effect of inhibiting, the vast majority of abortions after the first 12 weeks," *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 77–79 (1976).

And when the Court upheld the constitutionality of measures assertedly aimed at promoting health, it did so on the basis that the measures would advance that state interest. Thus, it upheld a requirement that all second-trimester abortions be performed in an outpatient surgical hospital, on the basis of a finding that "accepted medical standards" at the time appeared to support such a requirement—and the point was essentially uncontested because the appellant did not even assert that the requirement was "insufficiently related to the State's interest in protecting health." *Simopoulos v. Virginia*, 462 U.S. 506, 517 (1983); *see also Connecticut v. Menillo*, 423 U.S. 9, 10–11 (1975) (per curiam) (upholding law requiring that abortions be performed by physicians on the ground that the law would improve the safety of abortions).

Casey's adoption of the undue-burden standard did not disturb this precedent. Rather, it addressed a different aspect of the prior law. As the Court recently explained, "[a] central premise of the [*Casey*] opinion was that the Court's precedents after *Roe* [*v. Wade*, 410 U.S. 113 (1973),] had 'undervalue[d] the State's interest in potential life.'" *Gonzales*, 550 U.S. at 157 (quoting *Casey*, 505 U.S. at 873). *Casey* rejected *Roe*'s trimester framework because that framework had required the invalidation of "[m]easures aimed at ensuring that a woman's choice contemplates the consequences for the fetus," *Casey*, 505 U.S. at 873 (plurality op.), and thus had failed to

"fulfill *Roe*'s own promise that the State has an interest in protecting fetal life or potential life," *id.* at 876. The undue-burden standard afforded States the flexibility they required to balance "[t]he woman's right to terminate her pregnancy before viability," which is "the most central principle of *Roe v. Wade*," with the States' interest in promoting fetal life. *Id.* at 871. The standard did not displace the requirement of prior law that regulations enacted to further a State's separate interest in women's health would actually advance that interest.[2]

Consistent with this understanding, several lower courts have recently concluded that the undue-burden standard, properly understood, requires a State to demonstrate that a regulation assertedly enacted to promote women's health would actually advance the State's interest. *See Planned Parenthood of Wisc., Inc. v. Schimel*, 806 F.3d 908, 919 (7th Cir. 2015); *Planned Parenthood of the Heartland, Inc. v.*

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[2] The review of health regulations described in the Court's pre-*Casey* decisions is fully consistent with *Casey*'s treatment of a statute requiring that informed consent to abortion procedures be obtained by a physician. *See Casey*, 505 U.S. at 884–85. In *Casey* the Court had no reason to address the extent to which this requirement would actually advance a state interest, because the Court concluded that the requirement did not impose any substantial burden at all, much less a burden that was "undue." Unlike here, there was "no evidence" in *Casey* that the requirement "would amount in practical terms to a substantial obstacle to a woman seeking an abortion." *Id.* at 884. Therefore, the Court merely satisfied itself that the requirement had a rational basis, *id.* 884–85 (citing *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483 (1955)), without addressing the standard that would have to be met by a regulation that in fact imposed a substantial obstacle.

Iowa Bd. of Med., 865 N.W.2d 252, 264 (Iowa 2015); *Planned Parenthood Ariz., Inc. v. Humble*, 753 F.3d 905, 911–15 (9th Cir.), *cert. denied*, 135 S. Ct. 870 (2014). Abortion restrictions that a State cannot support in this way constitute an undue burden on the abortion right. The Court should apply that test to the Texas restrictions at issue here.

B. Meaningful Judicial Review Discourages the Enactment of Unwarranted Health Regulations.

Providing a judicial 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 when 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). The undue-burden standard must allow courts to identify pretextual or misguided health justifications for regulations that would unnecessarily burden a woman's right to choose to terminate her pregnancy.

Meaningful review of state health judgments also protects that right against unwarranted interference 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), the review channels legislation toward evidence-based measures that are likely to promote women's health. And such review discourages the enactment of seemingly plausible, but medically unfounded, abortion regulations that unnecessarily burden access to abortion services or even make abortions less safe.

It is not merely a theoretical concern that States will enact burdensome abortion regulations in the name of promoting health. Laws regulating abortion services assertedly to promote women's health have proliferated in recent years. *See* Guttmacher Inst., *Laws Affecting Reproductive Health and Rights: 2012 State Policy Review*;[3] 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." Metzger, *supra*, at 871. Other laws impose conditions on the administration of abortion-inducing drugs, such as

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[3] *Available at* http://www.guttmacher.org/statecenter/updates/2014/statetrends42014.html.

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, 495–496 (6th Cir. 2012) (Ohio law), or prohibiting the prescription of those drugs via telemedicine, *see Planned Parenthood of the Heartland*, 865 N.W.2d at 264 (Iowa law). At recent count, twenty-six States in addition to Texas have enacted licensing requirements for abortion facilities, many of them comparable to Texas's ASC requirement, and fifteen States in addition to Texas have enacted legislation requiring abortion providers to hold hospital admitting privileges or enter into other arrangements for hospital admission. *See, e.g.*, Guttmacher Inst., *Targeted Regulation of Abortion Providers*, tbl. (State Policies in Brief, Dec. 1, 2015) (detailing "facility" and "clinician" requirements).[4]

The prospect of meaningful judicial review of such measures may encourage legislatures to pay closer attention to the views of the medical community before invoking an interest in women's health to justify burdensome abortion regulations. 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

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[4] *Available at* http://www.guttmacher.org/statecenter/spibs/spib_TRAP.pdf.

medical practice." *Simopoulos*, 462 U.S. at 516–17. Thus, when a regulation restricts access to abortion services, and "present medical knowledge convincingly undercuts [the State's] justification" for the measure, *Akron Ctr. for Reprod. Health*, 462 U.S. at 437 (quotation marks and citation omitted), the burden imposed by the regulation should be regarded as undue.

A legislature knowing that its enactment would be reviewed to assure that it would actually advance the asserted health interest might be more reluctant to proceed with legislation that, like HB2, was strongly and publicly opposed by prominent medical groups.[5] The prospect of such review might also provide a basis for legislators concerned about avoiding unwarranted burdens on abortion access to oppose their colleagues' misguided proposals. *Cf.* Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of*

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[5] The leading national organization of obstetricians and gynecologists described HB2 as containing "over-reaching measures" that were "not based on sound science," despite the organization's "efforts to provide the 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), *available at* http://www.acog.org/About_ACOG/News_Room/News_Releases/2013/ObGyns_Denounce_Texas_Abortion_Legislation. The Texas Hospital Association warned the Texas 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), *available at* http://www.tha.org/HealthCareProviders/Advocacy/CommentLetters/THA Testimony in opposition to SB 5 (special session).pdf.

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").

C. The Deference Due to State Judgments on Matters of Medical Uncertainty Is Inappropriate for Abortion Regulations Like Those at Issue Here.

In the decision below, the Fifth Circuit mistakenly invoked 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. That discretion is an essential component of the States' traditional role in protecting public health. But the deference accorded in those circumstances serves a specific function that has nothing to do with the abortion regulations at issue here, which implicate no legitimate medical uncertainty.

As this Court has recognized, truly irreconcilable medical or scientific disagreement should not "tie the State's hands," *Kansas v. Hendricks*, 521 U.S. 346, 360 n.3 (1997), because the States' duty to address potential threats to their citizens' health may require them to legislate before these disputes have been resolved. Lacking perfect knowledge and facing potential threats to public health, States presented with "opposing theories" must, "of necessity, . . . choose

between them." *Jacobson v. Massachusetts*, 197 U.S. 11, 30–31 (1905) (upholding constitutionality of mandatory-vaccination program). Because courts are no better situated than legislatures to resolve serious scientific disputes, they "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).

As important as this principle is for state regulatory authority, however, it is not a license for States to disregard medical evidence and impose unwarranted burdens on important constitutional rights. Thus, as already noted, this Court has affirmed that even where there is medical or scientific uncertainty, courts have "an independent constitutional duty" to review legislative findings when the constitutional right to obtain an abortion is at stake. *Gonzales*, 550 U.S. at 165. That principle alone refutes the Fifth Circuit's extension of uncritical deference to Texas's health-based justifications.

Moreover, the fact that in this case the State was able to adduce some expert testimony in support of its position does not make the justification for the ASC and admitting-privileges requirements a question "fraught with medical and scientific uncertainties" of the kind that would give the State special latitude to act, *Hendricks*, 521 U.S. at 360 n.3 (quotation marks omitted). The district court considered the conflicting testimony of the parties' experts and provided a well-founded explanation for crediting the petitioners' experts over the State's[6] and for finding the absence

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[6] In particular, the district court discredited the testimony of the State's experts in part because of "ample evidence" that "a

(*continues on next page*)

of any serious dispute about either (a) the extremely low risk to women's health from abortion procedures before the enactment of the ASC and admitting-privileges requirements, or (b) the likelihood that any conceivable benefit of the restrictions would be canceled out by the health risks those restrictions would cause. (*See* Pet. App. 136a, 145a–147a.) In these circumstances, there was no basis for the Fifth Circuit to invoke medical uncertainty to justify the State's serious burden on the exercise of the constitutional right.

II. The Availability of Abortion Services in Other States Does Not Permit a State to Impose an Undue Burden on Abortion Access Within the State.

As the Court has explained, an abortion regulation that has the effect of placing "a substantial obstacle" in the path of a woman seeking to terminate a previability pregnancy imposes an undue burden. *Casey,* 505 U.S. at 878 (plurality op.). The undue-burden inquiry thus requires an examination of the extent of the burden a regulation imposes to determine whether it is "substantial" for constitutional purposes. In examining the extent of the burden imposed by Texas's ASC and admitting-privileges requirements as applied to women in the El Paso area, the court below improperly considered the availability of abortion services in a neighboring

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non-physician consultant for the State" had exercised "considerable editorial and discretionary control over the contents of the experts' reports and declarations" submitted by the State. (Pet. App. 136a n.3.)

State. The Fifth Circuit recognized that the Texas requirements would have forced the closure of the sole clinic then remaining in El Paso, and that the nearest facility in Texas was more than 550 miles away.[7] (Pet. App. 72a.) Because the need to travel such a distance, considered alone, would constitute an undue burden for women in and near El Paso (*see* Pet. App. 52a), the court upheld the requirements as applied on the ground that abortion services would remain available to women in the El Paso area across the state border, in Santa Teresa, New Mexico.

As explained by petitioners (Pet Br. 52–53) and further discussed below, the Fifth Circuit fundamentally misconceived a State's obligation to avoid creating substantial obstacles to abortion access. Under this Court's rulings in analogous contexts, the obligation to preserve the constitutional rights of persons within a State rests with that State individually and is unaffected by the choices of other States. That obligation applies with full force to a woman's right to terminate a pregnancy. Allowing States to rely on the availability of abortion services in neighboring States would have serious adverse consequences, both for women seeking abortions and for neighboring States.

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[7] As noted in footnote 1 above, the enactment of HB2 had caused another clinic in El Paso to close before the district court entered its injunction.

A. Each State Is Responsible for Ensuring That Its Regulations Do Not Impose an Undue Burden on the Abortion Right Within Its Borders.

In defense of the ASC and admitting-privileges requirements as applied to the El Paso clinic, Texas invoked the availability of abortion services across the state border in New Mexico. (*See* Pet. App. 73a.) By accepting this defense, the Fifth Circuit disregarded the fundamental principle that each State bears an independent obligation to ensure that its regulations do not infringe the constitutional rights of persons within its borders.

1. This Court has rejected the notion that a State "can be excused from performance" of its constitutional obligations "by what another State may do or fail to do." *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 350 (1938). The obligation to respect the constitutional rights of persons within its borders "is imposed by the Constitution upon the States severally as governmental entities," with "each responsible for its own laws establishing the rights and duties of persons within its borders." *Id.* This principle flows from fundamental considerations of federalism: it is "of the essence of statehood maintained under our dual system" that each State has this "separate responsibility . . . within its own sphere." *Id.* The substantial measure of sovereignty that the States enjoy within their borders carries with it the responsibility to ensure that they do not infringe the exercise of constitutional rights within their borders.

The Court enunciated this principle in a challenge by an unsuccessful African American applicant to the law school of the University of

Missouri during the era of *de jure* separate-but-equal educational institutions. The Court rejected the State's assertion that it could discharge its obligation to provide legal education to African Americans by paying for the applicant to attend law school in a neighboring State. Rather, the Court held, the obligation to maintain a law school open to African Americans did not depend on whether other States at that moment provided such instruction, but instead was a "plain duty" that "would exist because it rested upon the State independently of the action of other States." *Id.* It thus was "impossible to conclude that what otherwise would be an unconstitutional discrimination, with respect to the legal right to the enjoyment of opportunities within the State, can be justified by requiring resort to opportunities elsewhere." *Id.*

The Court applied the same reasoning in the First Amendment context, holding that a municipality could not lawfully impose a time, place, and manner restriction that totally barred nude dancing, even though nude dancing was "amply available in close-by areas outside the limits of the Borough." *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 76 (1981). The Court reasoned that "'[o]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.'" *Id.* at 76–77 (quoting *Schneider v. New Jersey*, 308 U.S. 147, 163 (1939)). The Court further noted the instability of the rule urged by the municipality, given that the neighboring community where nude dancing reportedly was still permitted was free to impose its own restrictions on the practice. *Id.* at 76. That change would likely have

rendered the ordinance at issue unconstitutional even under the municipality's reasoning.

States thus cannot defend a restriction of the exercise of a constitutional right on the ground that the right may be exercised in another jurisdiction. Indeed, were the rule otherwise, the results in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), and *Lawrence v. Texas*, 539 U.S. 558 (2003), might well have been different. In *Obergefell*, which held that the Due Process Clause required Michigan, Ohio, Kentucky, and Tennessee to grant marriage licenses to same-sex couples, *see* 135 S. Ct. at 2607, it did not matter that same-sex couples could already obtain marriage licenses in one of the seventeen States that had by then legalized same-sex marriage by statute or state judicial ruling, *see id.* at 2611, App. B. And in *Lawrence,* which held that the Due Process Clause precluded Texas from criminalizing sexual relations between same-sex couples, *see* 539 U.S. at 578, the Court did not examine the extent to which such couples could travel to other States where the conduct was lawful. These decisions confirm that the obligation to refrain from infringing constitutional rights is the "separate responsibility of each State within its own sphere," *Gaines*, 305 U.S. at 350.[8]

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[8] One federal court of appeals applied this principle to the exercise of Second Amendment rights. The court noted that it would be "hard to imagine anyone suggesting that Chicago may prohibit the exercise of a free-speech or religious-liberty right within its borders on the rationale that those rights may be freely enjoyed in the suburbs," and concluded that this "sort of argument should be no less unimaginable in the Second Amendment context." *Ezell v. City of Chicago*, 651 F.3d 684, 697 (7th Cir. 2011).

2. The same principle applies to abortion regulations assertedly enacted to promote women's health. Indeed, this Court has never considered the availability of abortion services in other jurisdictions when evaluating whether an abortion regulation imposed an undue burden. And two federal courts of appeals have affirmatively applied *Gaines* to state admitting-privileges requirements that, like the Texas restrictions at issue here, would have forced the closure of abortion facilities in the respective States and required women to seek abortions in neighboring States. *See Schimel*, 809 F.3d at 919; *Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 457 (5th Cir. 2014), *petition for cert. filed*, No. 14-997 (U.S. Feb. 18, 2015) (No. 14-997); *see also Framingham Clinic, Inc. v. Bd. of Selectmen of Southborough*, 373 Mass. 279, 287 (1977) (invalidating town zoning ban on abortion clinics, explaining that the town could not "justify its own exclusionary rule by saying that a woman might overcome it by going elsewhere in the Commonwealth").

In *Currier,* another panel of the Fifth Circuit, examining the constitutionality of a Mississippi law, specifically recognized that the undue-burden inquiry permits a court to look "only at the ability of Mississippi women to exercise their right within Mississippi's borders." 760 F.3d at 457. The law there would have required doctors performing abortions to have admitting privileges at a nearby hospital, and would have forced the closure of the only licensed abortion facility in the State. *Id.* at 450. The court recognized that *Gaines* precluded Mississippi from "lean[ing] on its sovereign neighbors to provide protection of its citizens' federal constitutional rights." *Id.* at 457.

The dissenting judge in *Currier* would have limited *Gaines* to its equal-protection context, reasoning that the Equal Protection Clause imposes an affirmative duty on States—the duty to provide equal services to all persons within their borders. *Currier*, 760 F.3d at 463 (Garza, J., dissenting). But this argument ignores the fact that *Schad* applied the same principle to a challenge under the First Amendment which, like the due-process right at issue here, requires States to refrain from obstructing the exercise of constitutional rights. The right protected in *Casey* is also a right to be free of state interference: the right of a woman "to choose to have an abortion before viability and to obtain it without undue interference from the State." 505 U.S. at 846.

Moreover, the attempt to limit *Gaines* relies on an immaterial distinction. *Gaines, Schad,* and *Casey* each concern the State's obligation to refrain from limiting access to certain services or activities. To be sure, the constitutional source of the obligation was different in each case: *Gaines* concerned an equal-protection right of access to legal education, while *Schad* concerned a First Amendment right of access to certain performances, and *Casey* concerned the substantive-due-process right of access to abortion services. But the cross-border principle is the same: just as a jurisdiction could not limit access to law schools (*Gaines*) or to dance performances (*Schad*) by pointing to their availability in a neighboring jurisdiction, so too here the State cannot limit access to abortion services on the ground that they are available in another State.

3. The Fifth Circuit below attempted to distinguish *Gaines* on the basis that it would "ignore reality" to ascribe constitutional significance to state borders in the "particular and peculiar" circumstance that half of the patients at the New Mexico clinic already came from El Paso prior to HB2. (Pet. App. 74a.). Even if some El Paso residents voluntarily choose to travel to the abortion clinic in New Mexico, however, that voluntary choice does not permit Texas to justify abortion regulations that would impose a substantial obstacle to obtaining an abortion within the State.

The harm identified in *Gaines*—deprivation of services within the State on a constitutionally impermissible basis—does not depend on how difficult it would be to obtain services in another jurisdiction, or how many people might voluntarily choose to obtain services elsewhere without the compulsion of the challenged legislation. Indeed, in *Gaines*, this Court found it "beside the point" that a "sound, comprehensive, valuable legal education" may have been available to Missouri's African American students at the law schools of neighboring States. 305 U.S. at 348–49 (quotation marks omitted). The "basic consideration" was "not as to what sort of opportunities other States provide, or whether they are as good as those in Missouri, but as to what opportunities Missouri itself furnishes to white students and denies to negroes solely upon the ground of color." *Id.* at 349. And in *Schad*, the burden of travel to a neighboring municipality was likely minimal, yet the Court had no difficulty concluding that requiring a person to exercise a constitutional right elsewhere was impermissible. *See* 452 U.S. at 76–77.

As these decisions confirm, there is a fundamental difference between the voluntary use of services

in other States and the compelled use of such services as a result of a law that limits access to services in a person's own State. To be sure, women seeking to terminate a pregnancy have the constitutionally protected right to travel to another State to "seek[] the medical services that are available there." *Doe v. Bolton*, 410 U.S. 179, 200 (1973). But "[t]he proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom it is irrelevant." *Casey*, 505 U.S. at 894. Thus, the fact that some women may have chosen to exercise their constitutional right to terminate a pregnancy by crossing a state border does not permit a State to burden or ban the exercise of the right within the State. Just as citizens should be able to travel to other States "uninhibited by statutes, rules, or regulations," *Saenz v. Roe*, 526 U.S. 489, 499 (1999) (quotation marks omitted), they should also be free from statutes, rules, or regulations that effectively compel them to travel elsewhere for constitutionally protected services when those services would otherwise be available nearer to home. No woman should be required to leave her home State to exercise the constitutional right to terminate a pregnancy because of restrictions imposed by her home State.

Moreover, by relying on a clinic in New Mexico to mitigate the burden otherwise imposed by the law on women in the El Paso area, Texas and the Fifth Circuit establish that the law is unnecessarily burdensome as applied to those women. Texas claims that its regulations will promote women's health. Any purported health benefit of its regulations, however, could affect only procedures taking place in Texas itself, where the regulations apply. Consequently, if the regulations eliminate all in-state abortion services

for women in El Paso, and thus send them out of State for services, those women will receive no corresponding health benefit from the regulations, even if there otherwise were one. As to those women, the burden of the regulations would be entirely unwarranted within the meaning of *Casey*.[9] *See Casey,* 505 U.S. at 875 (plurality op.).

4. The Fifth Circuit below also attempted to limit *Gaines* to the situation where a State "completely shunted its responsibility onto other states," whereas HB2 permits some abortion facilities to operate, and therefore to that extent does not completely shift

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[9] Lower courts have properly recognized that the burden imposed by an abortion regulation purportedly enacted to promote health must be proportional to the benefit that the regulation is expected to provide. *See Schimel*, 806 F.3d at 919; *Planned Parenthood of the Heartland*, 865 N.W.2d at 264; *Humble*, 753 F.3d at 911–12; *cf. City of Boerne v. Flores*, 521 U.S. 507, 530 (1997) ("Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one."). A requirement of proportionality between benefits and burdens follows from *Casey*'s discussion of the undue-burden standard. The plurality opinion likened the undue-burden standard to the standards applied in ballot-access cases that "grant substantial flexibility" to the States to set rules for elections. *Casey*, 505 U.S. at 873–74 (plurality op.) (citing *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983), and *Norman v. Reed*, 502 U.S. 279 (1992)). That case law requires a court to "determine the legitimacy and strength" of the "precise interests" that the State has proffered to justify the burdens of an election restriction, and then to "consider the extent to which those interests make it necessary to burden the plaintiff's rights." *Anderson*, 460 U.S. at 789. *Casey* concluded that "[t]he abortion right is similar." 505 U.S. at 874 (plurality op.). A law that requires the women in El Paso to travel in order to obtain constitutionally protected services, but provides no corresponding benefit, necessarily imposes a disproportionate burden.

responsibility to other States. (Pet. App. 74a.) There is no reason, however, to distinguish between a bar to exercise of the right that operates over an entire State and one that operates in only part of it. *Gaines* stated categorically that unconstitutional restrictions cannot be redeemed by "resort to opportunities elsewhere" for the exercise of the burdened right. 305 U.S. at 350.

The district court found (Pet. App. 142a, 150a), and the Fifth Circuit appears to have assumed (*see* Pet. App. 72a–76a), that having to drive more than 550 miles to obtain an abortion would constitute an undue burden for women in the El Paso area, and thus that the challenged restrictions would be unconstitutional as applied to the El Paso clinic, absent consideration of the New Mexico clinic. For women in El Paso, then, the effect of the restrictions would be tantamount to a total ban on access to abortion services within Texas. And such a local ban is no more defensible by reference to abortion services available in other States than a total state-wide ban on abortions would be. It is irrelevant to this as-applied challenge if women elsewhere in the State do not face as onerous a barrier to the exercise of their constitutional right.

B. The Fifth Circuit's Cross-Borders Analysis Would Have Serious Adverse Consequences for Neighboring States.

The Fifth Circuit's cross-borders analysis would present significant problems for the States. Of course, legitimate state regulation that does not infringe the exercise of a constitutional right within the State's borders may incidentally affect neighboring States. The cross-borders analysis, however, would allow a

State to construct substantial obstacles to abortion access within its borders, and then rely on the availability of abortion services in neighboring States to justify the otherwise unconstitutional regulation. In other words, it would permit a State to impose restrictions that, by design, would require women who seek abortions to exercise their right in a neighboring State—and thereby adversely affect the neighboring State in at least two ways. First, the analysis would allow a State to rest the constitutionality of its abortion regulations on the availability of abortion services in another State. That dependence would have implications both for the regulatory authority of the neighboring State, which would be unable to similarly rely on abortion services in the first State to justify its own restrictions, and for the continued constitutionality of the first State's abortion regulations as conditions change in the neighboring State. Second, the analysis would allow a State to strain the health-care systems of its neighbors by requiring those neighbors to provide abortion services to women unable to access those services in their home State. These considerations provide further reason to reject the Fifth Circuit's cross-borders analysis.

1. The cross-borders analysis would make the constitutionality of a State's abortion regulations dependent on the availability of abortion services in other States. The result of such dependency would be two-fold: it could limit the regulatory authority of the State's neighbors, and it would create uncertainty about the future constitutionality of the State's regulations as conditions change in the neighboring State.

First, allowing consideration of abortion services in neighboring States could constrain the regulatory

choices available to those neighbors and create pressure to regulate. If one State curtailed abortion services in reliance on the services provided in another State, that second State could not do the same thing because there would be no abortion services available in the first State on which to rely. Thus, the first State to enact a regulation that depends on the availability of abortion services in neighboring States would have broader latitude to regulate those services than its neighbors.

The very specter of such an outcome could create a competition of sorts between neighboring States to see which can enact such regulations first. A rule that puts States at odds in this way limits the flexibility they otherwise would have to design measures most suited to their individual circumstances in furtherance of their legitimate interests, and even provides an incentive to adopt measures in haste that might not in fact further those interests.

These results confirm the wisdom of the Court's statement that each State is "responsible for its own laws establishing the rights and duties of persons within its borders." *Gaines*, 305 U.S. at 350. To avoid interfering with the regulatory choices of neighboring States, each State's regulations should be allowed to stand or fall based on their effects within the State's borders alone.

Second, the cross-borders analysis would produce uncertainty as to the ongoing constitutionality of the first State's regulations because, in any neighboring State, the status of governmental regulation and the resulting availability of services—as a result not only of new regulations, but also enforcement of existing regulations—is always subject to change. With this

concern in mind, the Court in *Schad* rejected a rule that would have relied on existing conditions in other jurisdictions to justify an otherwise unconstitutional burden. *See* 452 U.S. at 76. This concern applies with particular force to the ASC and admitting-privileges requirements at issue here. Some of Texas's neighbors have already imposed, or have enacted legislation that will soon impose, admitting-privileges and facility requirements much like Texas's, and these requirements may cause the closure of abortion facilities in those jurisdictions. *See* Guttmacher Inst., *Targeted Regulation of Abortion Providers*, *supra*, tbl. The constitutionality of Texas's abortion restrictions should not turn on such a potentially changing circumstance.

2. The Fifth Circuit's analysis would also allow a State to intentionally impose significant burdens on the health-care systems of neighboring States and the residents of those States who rely on them.

History shows that many women will cross state lines, if they have the means to do so, when abortions are unavailable in their States of residence. For example, in the period of less than three years after New York liberalized its abortion laws in 1970, nearly 350,000 women came from other States where abortions were entirely or largely unavailable. Rachel Benson Gold, *Abortion and Women's Health: A Turning Point for America?* 3 (1990). So too in recent years several States have experienced a substantial influx of patients seeking abortions following the enactment of onerous abortion restrictions by neighboring States. In Louisiana, the number of abortions performed annually rose by 12 percent between 2010 and 2014, and in Michigan the number increased by 18.5 percent over the same period, due

in part to the enactment of abortion restrictions by Texas, Mississippi, and Ohio that forced clinics in those States to close. David Crary, "Abortions Declining in Nearly All States," Associated Press, June 7, 2015.[10]

The district court below found that, as a result of HB2, "over 1,200 women per month could be vying for counseling, appointments, and follow-up visits" at the remaining abortion clinics within Texas. (Pet. App. 141a.) Given this demand for services, as well as the fact that the nearest Texas clinic from El Paso is over 550 miles away, it is predictable that many Texans who would not previously have travelled to the clinic in neighboring New Mexico would do so now, including from a far wider region than the cross-border El Paso metropolitan area.

A significant increase in the number of women entering neighboring States could strain the health-care systems of those neighbors. To be sure, clinics in some areas may have excess capacity, or may be able over time to expand their services to meet increased demand. But any number of factors, some within the control of the neighboring State and some not, may make it difficult for the clinics of neighboring States to do so. As the Seventh Circuit concluded with regard to Wisconsin's admitting-privileges law, it "would be costly and could even be impossible" for existing clinics to expand to meet demand after other clinics were forced to close. *Schimel*, 806 F.3d at 918. The court noted in particular the difficulty of

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[10] *Available at* http://bigstory.ap.org/article/0aae4e73500142e5b8745d681c7de270/ap-exclusive-abortions-declining-nearly-all-states.

recruiting new providers as a result of admitting-privileges requirements and also "intense opposition to abortion" that results in "vilification, threats, and sometimes violence directed against abortion clinics and their personnel." *Id*. at 917. Moreover, physician licensure is a state matter, meaning that doctors displaced by onerous regulations in one State cannot always readily relocate to a neighboring State to help meet increased demand there. And a neighboring State could have regulations of its own that would inhibit the expansion of existing clinics.

Any strain on the health-care systems of neighboring States would in turn have repercussions for the women of those States because it would interfere with their access to abortion services within their home State. As a result, onerous abortion regulations enacted in one State could impose obstacles to the ability of residents of the neighboring State to access abortion services.

Moreover, funding abortions for indigent women from out of state could divert scant health-care resources away from services for state residents. With only limited exceptions, federal Medicaid regulations do not require States to cover medical services received out of state. *See* 42 C.F.R. § 431.52(b). Thus, even indigent women who reside in States that offer Medicaid coverage for abortion services could be unable to avail themselves of that coverage if they had to seek abortion services in another State. *See* Guttmacher Inst., *State Funding of Abortion Under Medicaid*, at 1 & tbl. (State Policies in Brief, Dec. 1, 2015) (stating that in

seventeen States Medicaid covers all or most medically necessary abortions).[11] Such women would have to rely on charity funds, which are themselves limited.

The constitutional right to travel requires States to treat a resident of another State as a "welcome visitor." *Saenz*, 526 U.S. at 500. This requirement limits the ability of States to impose residency restrictions on out-of-state patients' access to medical services in the State. *See Doe*, 410 U.S. at 200 (invalidating statutory requirement of state residency for abortions); *cf. Mem. Hosp. v. Maricopa County*, 415 U.S. 250, 269–70 (1974) (invalidating statute requiring year of county residence before eligibility for free nonemergency care). Indeed, this Court has held that the right to travel barred a State from imposing a durational-residency restriction for medical services for the purpose of addressing concerns, much like those enumerated above, that "an influx of newcomers" would "dilute the quality of services provided to longtime residents" and direct "limited public health resources to serve an expanded pool of recipients." *Maricopa County*, 415 U.S. at 266. Thus, the right to travel generally requires States to accept the burdens incident to the presence of nonresidents within their borders, including the burdens of providing them with health care. Those burdens, however, ordinarily are shared equally among the States as their citizens move freely around the Nation. By allowing a State to justify an otherwise unconstitutional abortion restriction on the basis of

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[11] *Available at* http://www.guttmacher.org/statecenter/spibs/spib_SFAM.pdf.

the availability of abortion services in neighboring States, the cross-borders analysis distorts the free movement of citizens among the States. As a result, it causes the costs of providing abortion services to flow one way, from States that have enacted restrictions that create substantial obstacles to abortion access within their borders to States that regulate within constitutional bounds. Basic principles of federalism, and basic respect for the abortion right, forbid that result.

CONCLUSION

The Fifth Circuit's judgment should be reversed.

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