No. 15-274

In The Supreme Court of the United States

WHOLE WOMAN'S HEALTH; AUSTIN WOMEN'S HEALTH CENTER; KILLEEN WOMEN'S HEALTH CENTER; NOVA HEALTH SYSTEMS D/B/A REPRODUCTIVE SERVICES; SHERWOOD C. LYNN, JR., M.D.; PAMELA J. RICHTER, D.O.; AND LENDOL L. DAVIS, M.D., ON BEHALF OF THEMSELVES AND THEIR PATIENTS, PETITIONERS,

v.

KIRK COLE, M.D., COMMISSIONER OF THE TEXAS DEPARTMENT OF STATE HEALTH SERVICES; MARI ROBINSON, EXECUTIVE DIRECTOR OF THE TEXAS MEDICAL BOARD, IN THEIR OFFICIAL CAPACITIES, RESPONDENTS.

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

REPLY BRIEF FOR PETITIONERS

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Respondents do not dispute that Texas has lost more than half of its abortion facilities since 2013, when House Bill 2 ("H.B. 2"), 83rd Leg., 2nd Called Sess. (Tex. 2013) was enacted. Nor do they dispute that, absent review by this Court, Texas would lose nearly half of those that remain. Instead, they maintain—as the Fifth Circuit did—that courts should play no role in ensuring that laws reducing abortion access are justified.

The Fifth Circuit's approach to the undue burden standard—prohibiting meaningful scrutiny of the extent to which an abortion restriction furthers a valid state interest—stands in stark contrast to the approach taken by the Seventh and Ninth Circuits and the Iowa Supreme Court—mandating meaningful scrutiny to ensure that an abortion restriction advances a state interest to an extent sufficient to justify the burdens it imposes. Respondents' attempts to minimize the importance of this split are unavailing. The lack of uniformity in the application of the Fourteenth Amendment's protection of liberty urgently requires this Court's review.

The laundry list of alleged vehicle problems presented by Respondents is likewise unavailing. Most of these purported problems rest on misrepresentations of Petitioners' arguments. None renders this case an unsuitable vehicle for resolving the critically important questions presented.

A. There Is A Direct And Acknowledged Split In Authority Over The Important Constitutional Questions Presented In This Case.

Respondents cannot credibly dispute the existence of a split in authority concerning the judicial inquiry required by the undue burden standard. The Seventh and Ninth Circuits, as well as the Iowa Supreme Court, maintain that courts must engage in meaningful scrutiny of laws that restrict access to abortion to ensure that they actively and effectively serve a valid state interest. *See* Pet. 15-19. Further, these courts maintain that the interest must be advanced to an extent sufficient to justify the burdens the restriction imposes on abortion access. *See id.*

The Fifth Circuit, in contrast, prohibits courts from scrutinizing an abortion restriction to determine whether it is reasonably designed to advance the State's asserted interest, characterizing this inquiry as improper second-guessing of the legislature. *See* App. 49a-51a. Despite this Court's insistence that the judiciary "retains an independent constitutional duty to review [a legislature's] factual findings where constitutional rights are at stake," *Gonzales v. Carhart*, 550 U.S. 124, 165 (2007), the Fifth Circuit maintains that "[i]t is not the courts' duty to second guess legislative factfinding, improve on, or cleanse the legislative process by allowing relitigation of the facts that led to the passage of a law," App. 49a-50a (quoting *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583, 594 (5th Cir. 2014)). As a result, it upheld Texas' admitting-privileges and

ambulatory surgical center ("ASC") requirements despite the district court's findings that neither requirement would actually serve the State's interest in health. *See id.* at 49a.

Unable to dispute the existence of a split in authority, which these courts themselves acknowledge, Respondents instead try to minimize its importance by arguing that *Van Hollen* and *Humble* are inconsistent with earlier precedent in their respective circuits. Br. in Opp. 28-29 (citing *Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786 (7th Cir. 2013) and *Planned Parenthood Ariz., Inc. v. Humble*, 753 F.3d 905 (9th Cir. 2014)). Even if this were true, it would not eliminate the need for this Court to resolve the split and restore uniformity to the interpretation of the Fourteenth Amendment. But Respondents' contention that those decisions are at odds with earlier precedent is an utter fiction. Like *Van Hollen*, the Seventh Circuit's decision in *Karlin v. Foust* recognized that a court reviewing an abortion restriction must consider both the extent to which it furthers a valid state interest and the magnitude of the obstacles to abortion access it creates, describing the required inquiry as "two-fold." 188 F.3d 446, 481 (7th Cir. 1999). Likewise, there is no inconsistency between the Ninth Circuit's decision in *Humble* and its decision in *Tucson Woman's Clinic v. Eden*, 379 F.3d 531 (9th Cir. 2004). Indeed, *Humble* expressly

relies on *Eden* in describing the applicable standard.[1] *See Humble*, 753 F.3d at 912.

This Court's review is needed to resolve the direct and acknowledged split in authority over the important constitutional issues in this case.

B. The Interpretation Of The Undue Burden Standard Adopted By The Seventh And Ninth Circuits And The Iowa Supreme Court Is Faithful To This Court's Precedents.

Respondents' defense of the Fifth Circuit's decision relies on a misinterpretation of this Court's abortion jurisprudence. *Casey* and subsequent decisions applying the undue burden standard make clear that courts reviewing abortion restrictions must confirm that they are reasonably designed to serve the state's

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[1] Respondents' reliance on *McCormack v. Herzog*, 788 F.3d 1017, 1029 (9th Cir. 2015), is also misplaced. There, the Ninth Circuit struck down a pre-viability ban on abortion because such a law is *per se* unconstitutional under *Casey*, and it further struck down a second-trimester hospitalization requirement on the ground that this Court has invalidated identical requirements in the past. *See id.* at 1029-30. The Ninth Circuit did not assess the extent to which the former requirement furthered the State's interest in potential life because, under *Casey*, banning abortion is an impermissible means of serving that interest, *see Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992), and it did not assess the extent to which the latter requirement furthered the State's interest in health because this Court had already done so in prior cases, *see, e.g.*, *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 435-37 (1983).

asserted interest. *See* Pet. 20-22. Respondents' contention that *Casey* did not inquire into the medical necessity of a requirement that physicians make certain statutory disclosures proves nothing to the contrary. The Court determined that the requirement was reasonably designed to serve the State's interest in potential life; further inquiry into whether the requirement served the State's interest in health was therefore unnecessary. *Casey*, 505 U.S. at 885.

Respondents similarly misconstrue *Mazurek*. There, the Court determined that the statute under review would not impact abortion access, noting that "only a single practitioner is affected" and "no woman seeking an abortion would be required by the new law to travel to a different facility than was previously available." *Mazurek v. Armstrong*, 520 U.S. 968, 973-74 (1997). Petitioners do not dispute that "laws that are 'harmless' or that have only an 'incidental effect' on abortion require little justification." *Humble*, 753 F.3d at 913. The challenged Texas requirements, however, are far from harmless; they would drastically reduce the number and geographic distribution of abortion facilities in Texas.

Respondents also draw the wrong conclusions from *Gonzales*. There, the Court undertook an extensive inquiry into the extent to which the challenged ban on a method of second-trimester abortion served the government's interest in potential life. *Gonzales*, 550 U.S. at 158-60. Ultimately, the Court concluded that the strength of the law's justification was sufficient to support proscription of a relatively

uncommon method of second-trimester abortion, even though it would be insufficient to support the more burdensome proscription of the "dominant" method. *Id.* at 165 (distinguishing *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 77-79 (1976)).

Contrary to Respondents' arguments, *Gonzales* made clear that courts have a threshold obligation to evaluate the medical evidence presented to them to determine whether or not medical uncertainty exists. *See id.* at 162-63. Here, the district court conducted the inquiry required by *Gonzales* and determined that no medical uncertainty exists: it made unequivocal findings that the challenged requirements would not benefit women's health.[2] App. 146a-47a. In reaching this conclusion, the district court found that the medical evidence presented by Respondents was unreliable, in part because Vincent Rue, Ph.D., a prominent anti-abortion activist with no medical training, had exercised "considerable editorial and discretionary control over the content of the experts' reports and declarations." *Id*. at 136a.

Further, Petitioners do not seek application of strict scrutiny, as Respondents contend. At no stage of this case have Petitioners asked the court to employ a least restrictive means analysis. Petitioners

[2] The Fifth Circuit did not hold any of these findings to be clearly erroneous, and Respondents have not sought review of the Fifth Circuit's decision in this regard. Thus, these findings are now beyond contention.

rely on pre-*Casey* decisions only to the extent that *Casey*, itself, did so. *See Casey*, 505 U.S. at 874 ("For the most part, the Court's early abortion cases adhered to th[e] view [expressed here]."); *id.* at 897 ("The principles that guided the Court in *Danforth* should be our guides today."); *id.* at 900 (incorporating by reference a standard set forth in *Danforth*).

Finally, Respondents' reliance on *Simopoulos* is misplaced. *Simopoulos* was one of three companion cases in which the Court invalidated laws requiring second-trimester abortions to be performed in accredited hospitals, *Akron*, 462 U.S. at 431-39; *Planned Parenthood Ass'n of Kan. City, Mo., Inc. v. Ashcroft*, 462 U.S. 476, 481-82 (1983), but upheld a licensure requirement for second-trimester abortion providers that afforded more flexibility, including the ability to seek waivers from construction requirements. *Simopoulos v. Virginia*, 462 U.S. 506, 515, 518-19 (1983). The Court explained that, although an abortion regulation need not "correspond perfectly in all cases to the asserted state interest," the lines it draws "must be reasonable." *Akron*, 462 U.S. at 438. Based on the medical evidence presented in the respective cases, the Court concluded that the hospital requirements "imposed a heavy, and unnecessary, burden on women's access to a relatively inexpensive, otherwise accessible, and safe abortion procedure." *Id.* In contrast, the more flexible requirement permitting waivers "appear[ed] to be generally compatible with accepted medical standards governing outpatient second-trimester abortions,"

and the petitioner did not "attack[ ] them as being insufficiently related to the State's interest in protecting health." *Simopoulos*, 462 U.S. at 517 (footnote omitted). Here, of course, Petitioners did contest the medical justification for the admitting-privileges and ASC requirements, and the evidence demonstrated that these requirements are contrary to accepted medical standards.[3] ROA.2381-87.

C. Closure Of More Than Seventy-Five Percent Of Texas' Abortion Facilities Will Have A Devastating Impact.

Respondents are willfully blind to the impact that closure of more than three-quarters of Texas' abortion facilities will have on the health and rights of Texas women. Their contention that every metropolitan area that currently has an abortion facility will continue to have one if the Fifth Circuit's mandate issues is misleading for several reasons.[4]

First, it ignores that the State already has a deficit of abortion providers. Half of Texas' abortion

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[3] Respondents incorrectly assert that Pennsylvania has enacted an "ASC requirement nearly identical to H.B.2's." Br. in Opp. 27. The Pennsylvania statute, unlike H.B. 2, permits waivers and excludes facilities that provide only medical abortions. *See* 35 Pa. Stat. §§ 448.806(h)(3); 448.802a.

[4] In addition, Respondents erroneously report that the Castle Hills Surgery Center in San Antonio is currently performing abortions. In fact, this facility no longer has any relationship with an abortion provider able to satisfy the admitting-privileges requirement. A call to the facility will confirm that it no longer offers abortion services.

facilities closed leading up to and immediately following implementation of the admitting-privileges requirement. Many areas that used to have an abortion provider—and that would have one again if the district court's decision were affirmed—do not have one now.

Second, Respondents count an abortion facility in New Mexico—not subject to the challenged requirements—among the facilities that would remain open if the Fifth Circuit's mandate were to take effect. But the entire region of Texas west of San Antonio—over 100,000 square miles in area—would be devoid of abortion facilities.

Third, Respondents treat the McAllen clinic as if it is on equal terms with the others. In fact, under the terms of the Fifth Circuit's judgment, it would be subject to extensive restrictions that would sharply limit its ability to provide abortion services. *See* Pet. 33-34.

Fourth, Respondents fail to acknowledge that reducing the number of abortion facilities in a metropolitan area creates barriers to abortion access. Take Houston for example. The metropolitan area is home to more than six million people. Prior to the enactment of H.B. 2, ten abortion facilities operated there. Currently, there are six. If the Fifth Circuit's mandate issues, only two would remain. Two facilities cannot adequately serve a population the size of Houston's, which supported ten a short time ago, particularly when the admitting-privileges requirement

limits the physicians who can provide abortions there.

Many of the currently operating clinics are struggling to keep up with patient demand; some have wait times of three weeks or more for an initial appointment. *See* Nat'l Abortion Fed'n Amicus Br. 21. These wait times will only increase if more clinics are forced to close. Further, women unable to make the trip to one of the remaining clinics are left with only two options: carry an unwanted pregnancy to term or attempt an illegal abortion. This Court's review is urgently needed to ensure that the health and rights of women throughout Texas are not compromised by a set of unconstitutional restrictions.

D. The Alleged Vehicle Problems Are Illusory.

In a last-ditch effort to persuade this Court against review, Respondents present a laundry list of alleged vehicle problems. None has merit.

First, the Fifth Circuit's res judicata ruling does not present a vehicle problem. The court's conclusion that Petitioners are precluded from obtaining a facial remedy on their undue burden claims is based on a fundamental misconception of preclusion doctrine and cannot withstand review. *See* Pet. 25-29. Accordingly, res judicata does not provide an independent basis for sustaining the Fifth Circuit's judgment.

Second, Respondents' arguments about forfeiture are meritless. For example, Respondents contend that Petitioners forfeited the argument that "res

judicata does not bar the district court's facial invalidation of the admitting-privileges requirement" by not making a more specific request for such relief in their Complaint. Br. in Opp. 31-32. But, in addition to their specific requests for relief, Petitioners asked the district court to grant "such other and further relief as the Court may deem just, proper, and equitable," ROA.72, and presented evidence at trial establishing that the admitting-privileges requirement was unconstitutional in all—or, at the very least, a large fraction—of relevant applications. This Court has made clear that, in cases concerning the abridgment of constitutional rights, the remedy a court may grant is not constrained by the parties' characterizations of certain claims as facial or as-applied. *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 320, 331 (2010). Thus, Petitioners have forfeited nothing. Should this Court grant review, it would be free to prescribe any remedy it deems appropriate.

Similarly, Petitioners have not forfeited their argument that the ASC requirement is unconstitutional as applied to the provision of medical abortion. The requirement is unconstitutional as applied to medical abortion for the same reason that it is unconstitutional in general—it restricts abortion access while failing to serve the State's interest in health. As explained in Petitioners' Fifth Circuit brief: "As practiced in Texas, medical abortion entails the oral administration of medications—*i.e.*, the patient swallows a series of tablets. Requiring those tablets to be swallowed in a multi-million dollar surgical facility

does not enhance their safety or effectiveness." Appellees' Principal & Resp. Br. 21 (citations omitted).

Nor have Petitioners forfeited the argument that the challenged requirements are irrational. Although Petitioners maintain that the undue burden standard requires a level of scrutiny that is more robust than the type of rational basis review typically applied to economic regulations, they have also maintained that the challenged requirements are not rationally related to the State's interest in health because they would actually impair—not benefit—the health of women seeking abortions. *See, e.g.*, Appellees' Reply Br. 17-18 ("These undisputed facts demonstrate that, not only do the challenged requirements fail to further any valid state interest, they actually have a negative net impact on the health and safety of women seeking abortion care. As a result, the requirements are not even rationally related to Texas' interest in health.") (citations omitted).

Respondents' contention that "petitioners make no argument regarding the proper standard for facial challenges to abortion regulations," Br. in Opp. 34, is spurious, given that Petitioners devoted six pages in their Fifth Circuit brief to this topic. Appellees' Principal & Resp. Br. 61-66.

Respondents' final argument about forfeiture, that "petitioners have not even attempted to explain or cite sufficient record evidence showing whether the Fifth Circuit erred in fashioning an as-applied remedy in McAllen," Br. in Opp. 35, seems to confuse the

purpose of a certiorari petition with the purpose of a merits brief. It does not demonstrate forfeiture by Petitioners and, as with the other forfeiture arguments, does not demonstrate a vehicle problem.

Third, Respondents contend that this case is an unsuitable vehicle for resolving the important constitutional questions presented because it has a "meager factual record." *Id*. But the trial record includes the testimony of nineteen live witnesses—as well as additional witnesses whose deposition testimony was admitted under Federal Rule of Civil Procedure 32—and several volumes of documentary evidence. Respondents' argument is nothing more than a challenge to the district court's factual findings. The time for that has passed.

Fourth and finally, Respondents contest Petitioners' standing to defend certain aspects of the relief granted by the district court. But this is merely a reframing of Respondents' faulty argument that the facial remedy granted by the district court is overbroad. Respondents do not dispute that Petitioners had standing at the outset of the case to challenge the admitting-privileges and ASC requirements, nor do they contend that intervening facts rendered Petitioners' claims moot. Thus, there is no jurisdictional bar to Petitioners' defense of the district court's judgment on appeal.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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