No. 18-1323

IN THE

Supreme Court of the United States

JUNE MEDICAL SERVICES L.L.C., et al.,
Petitioners,

v.

REBEKAH GEE, Secretary,
Louisiana Department of Health and Hospitals,
Respondent.

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

BRIEF FOR STATES OF NEW YORK, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, HAWAI'I, ILLINOIS, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEW JERSEY, NEW MEXICO, NEVADA, OREGON, PENNSYLVANIA, RHODE ISLAND, VERMONT, VIRGINIA, AND WASHINGTON, AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

In *Planned Parenthood of Southeast Pennsylvania v. Casey*, 505 U.S. 833, 870 (1992) (plurality op.), this Court recognized an "unbroken commitment" to the seminal holding of *Roe v. Wade*, 410 U.S. 113 (1973): that a woman has a constitutional right to choose to terminate a pregnancy prior to viability. *Casey* concluded that, although States may take measures to promote legitimate interests such as women's health and safety, such measures are unconstitutional if they impose an undue burden on that right. Just three years ago in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), this Court reaffirmed the applica–bility of the undue-burden standard. And applying that well-established standard, the Court in *Whole Woman's Health* invalidated a Texas law that, just like the Louisiana law at issue here, required abortion providers to maintain admitting privileges at a local hospital.

Amici States address the following question:

> Whether Louisiana's admitting-privileges requirement is unconstitutional because it imposes an undue burden on the right to access abortion services, in violation of *Casey* and *Whole Woman's Health*.

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INTEREST OF THE AMICI STATES

Amici are the States of New York, California, Colorado, Connecticut, Delaware, Hawai'i, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, Nevada, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, and Washington, and the District of Columbia. Amici 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 are therefore committed to advancing their interest in promoting the health and safety of all women seeking abortion services by assuring the proper application of the undue-burden standard to prevent unwarranted burdens on a woman's right to terminate a pregnancy prior to viability.

Amici have a particular interest in protecting the rights of their residents who may need medical care while present as students, workers, or visitors in Louisiana or other States with similar admitting-privileges requirements. Amici likewise have an interest in promoting the ability of their duly licensed physicians to provide abortion services in other States when they are licensed and otherwise qualified to do so.[1] Amici also have a more general interest in

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[1] More than twenty percent of all United States doctors—over 200,000 physicians—maintain active licenses to practice medicine in more than one State. *See* Aaron Young et al., *FSMB Census of Licensed Physicians in the United States, 2018*, 105 J. Med. Reg. 7, 11 (July 2019). Such dual licensure could enable physicians, among other things, to provide medical services in States that might otherwise face a shortage of medical providers.

assuring that each State satisfies its constitutional obligation to protect the right to terminate a pregnancy within its borders. A substantial reduction in the availability of abortion services in one State can cause women to seek services in other States, thereby potentially limiting the regulatory choices available to those other States and burdening their health care systems.

Finally, Amici have a substantial interest in the fair and consistent application of well-settled precedent—including the long-recognized substantive due process right to choose to terminate a pregnancy and the undue-burden standard that governs review of regulations implicating that right. States expend considerable resources to ensure that their conduct—in the form of legislation, regulation, policy, and litigation decisions—conforms to federal constitutional standards. States make decisions regarding whether and how to exceed federal constitutional minimums with the reasonable expectation that those minimums will continue to apply both within and beyond their respective borders. And as institutional litigants in constitutional cases, States have a strong interest in ensuring that lower courts apply binding precedent faithfully and reliably. Among other harms, lower court decisions that contravene binding precedent trigger burdensome, expensive, and often time-sensitive litigation—including requests for intervention from this Court—that should be avoidable in a system that respects the rule of law.

SUMMARY OF ARGUMENT

Under long-standing Supreme Court precedent, a statute or regulation imposes an undue burden on the right to terminate a pre-viability pregnancy if its purpose or effect is to "plac[e] a substantial obstacle in the path of a woman seeking an abortion." *Casey*, 505 U.S. at 877 (plurality op.). That standard bars any abortion restriction whose benefits are not "sufficient to justify the burdens upon access." *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2300 (2016).

In *Whole Woman's Health*, this Court reaffirmed *Casey*'s undue-burden standard and applied it to strike down a Texas law that required physicians who perform abortions to obtain admitting privileges at a hospital within thirty miles of the abortion clinics at which they practice. As the Court explained, Texas's admitting-privileges requirement failed to advance the State's purported interest in women's health and resulted in overwhelming burdens on access, including the closure of half of Texas's abortion clinics. The Louisiana admitting-privileges requirement at issue in this case, also known as Act 620, was modeled after Texas's statute and is substantively identical to that law. After this Court issued its decision in *Whole Woman's Health*, the district court permanently enjoined Louisiana's statute following a careful review of the record evidence and reasoned legal analysis. A split panel of the United States Court of Appeals for the Fifth Circuit reversed the district court's decision, however, and the full court denied *en banc* rehearing in a 9 to 6 vote.

This Court's precedents require reversal of the Fifth Circuit's decision. Louisiana's admitting-privileges requirement imposes an undue burden on

the constitutional right to access abortion services for the same reasons this Court articulated in *Whole Woman's Health* when it invalidated Texas's similar requirement. Louisiana's admitting-privileges requirement, like the Texas law on which it was based, provides no health benefits, and affirmatively harms women's health by reducing access to safe and legal abortions. Louisiana's admitting-privileges requirement also imposes devastating burdens on access to abortion services. Act 620 would leave Louisiana with a single physician to serve the 10,000 women who annually obtain legal, pre-viability abortions in Louisiana, and no provider at all to serve women seeking legal pre-viability abortions after sixteen weeks of pregnancy.

In deciding this case, the Court should decline to depart from its "unbroken commitment" to the constitutional right to choose to terminate a pregnancy prior to viability. *Casey*, 505 U.S. at 870 (plurality op.). The nationwide recognition of this individual right has served the States' interest in advancing women's health for nearly fifty years. Overwhelming evidence shows that access to a full range of reproductive health care services—including abortions—improves health care outcomes for all women. Amici States have devoted substantial resources to promoting access to that range of services against the backdrop of a federal constitutional floor that protects access to abortion in every State. Departing from this well-established federal constitutional protection would undermine the reasoned judgments made by States regarding how to most effectively expend limited public resources by allowing certain States to outsource to other jurisdictions the responsibility of maintaining critical services and programs for promoting women's health.

ARGUMENT

I. The Constitution Forbids a State from Regulating Abortion in a Manner that Imposes an Undue Burden on the Right to Choose to Terminate a Pregnancy Prior to Viability.

This Court has long recognized a woman's substantive due process right to "choose to have an abortion before viability and to obtain it without undue interference from the State." *Casey*, 505 U.S. at 846; *see also Roe v. Wade*, 410 U.S. 113, 153-54 (1973). Preservation of this right "is a rule of law and a component of liberty." *Casey*, 505 U.S. at 871 (plurality op.). At the same time, the Court has recognized that there are legitimate governmental interests in regulating abortion, including the sole interest Louisiana asserts in this case: protecting women's health. *Id.* at 846. In *Casey* and the cases that followed, the Court applied a legal standard that accommodates legitimate governmental interests while at the same time ensuring "real substance to the woman's liberty to determine whether to carry her pregnancy to full term," *Casey*, 505 U.S. at 869 (plurality op.). *See also Whole Woman's Health*, 136 S. Ct at 2309; *Gonzales v. Carhart*, 550 U.S. 124, 158 (2007); *Stenberg v. Carhart*, 530 U.S. 914, 930-31 (2000). Under this standard, an abortion restriction that advances a legitimate state interest is nevertheless unconstitutional if it imposes an "undue burden" on a woman's constitutional right to choose to terminate a pregnancy prior to viability. *Whole Woman's Health*, 136 S. Ct. at 2309; *Casey*, 505 U.S. at 877 (plurality op.).

The Court has additionally made clear that the undue-burden standard is founded on three principles. First, a State may not, expressly or implicitly, "prohibit any woman from making the ultimate decision to terminate her pregnancy before viability." *Casey*, 505 U.S. at 879 (plurality op.); *see also id.* at 846; *Whole Woman's Health*, 136 S. Ct. at 2300; *Gonzales*, 550 U.S. at 146. "A statute with this purpose is invalid because the means chosen by the State to further [its] interest[s] . . . must be calculated to inform the woman's free choice, not hinder it." *Casey*, 505 U.S. at 877 (plurality op.)

Second, a statute that fails to advance any legitimate state interest cannot justify even a minimal burden on abortion access. *See id.* at 878 (plurality op.); *Whole Woman's Health*, 136 S. Ct. at 2309. An abortion restriction that serves no benefit at all advances only the impermissible goal of making abortion services more difficult to access.

Third, "a statute which, while furthering . . . [a] valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends." *Casey*, 505 U.S. at 877 (plurality op.); *Whole Woman's Health*, 136 S. Ct. at 2309. The term "substantial" is relative. A court reviewing the constitutionality of an abortion regulation must "consider the burdens a law imposes on abortion access together with the benefits those laws confer," *Whole Woman's* Health, 136 S. Ct. at 2309, and invalidate any statute whose benefits are not "sufficient to justify the burdens upon access," *id.* at 2300.

Like the Texas admitting-privileges statute invalidated in *Whole Woman's Health*, Louisiana's

substantively identical law fails to advance the only interest the State asserts: promoting women's health. A statute that fails to advance a legitimate state interest and serves only to restrict access to abortion services is invalid. And even if Louisiana's admitting-privileges requirement provided some marginal health benefits (which it does not), the law would nonetheless fail because it imposes burdens on abortion access that far outweigh any such negligible benefits.

A. States Cannot Promulgate Abortion Regulations That Purport to Promote Women's Health, but in Fact Fail to Do So.

"A purposeful state effort to undermine a constitutionally protected liberty interest is incompatible with the Constitution." *Whole Woman's Health Alliance v. Hill*, 937 F.3d 864, 877 (7th Cir. 2019). Accordingly, a State may not pass an abortion regulation that "serve[s] no purpose other than to make abortions more difficult." *Casey*, 505 U.S. at 901 (plurality op.). Every abortion regulation must be supported by a legitimate governmental interest other than restricting access to abortion. *See id.* at 878 (plurality op.); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 77-79 (1976). The sole state interest asserted by Louisiana in defense of its admitting-privileges requirement is promoting women's health. To defend its abortion restriction, however, Louisiana must do more than merely identify a permissible governmental interest. The State must also proffer evidence showing that the challenged restriction actually advances its asserted interest. "[M]yths, speculation, and conventional wisdom are not enough to justify restrictions on the right to

abortion." *Planned Parenthood of Ind. & Ky., Inc. v. Adams*, 937 F.3d 973, 984 (7th Cir. 2019). Under this Court's long-standing and unambiguous precedent, Louisiana has failed to meet its burden here.

Amici States agree that protecting women's health through the regulation of medical professionals is not just a legitimate government function, but an important one. *See Gonzales*, 550 U.S. at 158; *Casey*, 505 U.S. at 885 (plurality op.). And amici States need reasonable flexibility in regulating the practice of medicine to ensure that they can address localized concerns regarding the quality of care in their jurisdictions. States in fact have many tools at their disposal to ensure that abortion care is provided safely and reliably. Among other things, States may choose to impose various licensing and reporting requirements, so long as those requirements serve "as a legitimate means of vetting and monitoring providers" and not "simply to block access to pre-viability abortions." *Whole Woman's Health Alliance*, 937 F.3d at 868; *see also Doe v. Bolton*, 410 U.S. 179, 194-95 (1973). For example, most States require abortions to be performed by licensed health care professionals, who are subject to regulation, supervision, and discipline by state authorities.[2]

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[2] *See, e.g.*, Guttmacher Inst., *An Overview of Abortion Laws* (as of Nov. 13, 2019) (internet) (discussing laws requiring that licensed physicians perform abortions); Diana Taylor et al., *Advancing Scope of Practice to Include Abortion Care*, The APC Toolkit (2018) (internet) (discussing laws permitting licensed professionals such as nurse practitioners, midwives, and physician assistants to perform abortions). (For authorities available on the internet, URLs appears in the Table of Authorities. All webpages were last visited December 2, 2019.)

When the right to terminate a pregnancy is at stake, courts have "an independent constitutional duty" to undertake meaningful review of abortion regulations to ensure that they in fact serve the state interests asserted. *Gonzales*, 550 U.S. at 165; *accord Whole Woman's Health*, 136 S. Ct. at 2309. When the asserted governmental interest is women's health, searching judicial review channels state decision-making towards evidence-based regulation that is likely to promote women's health and discourages the enactment of regulations that, however seemingly plausible, are in fact medically misguided and may disserve women's health. While a State has broad latitude to regulate the practice of medicine, the Constitution "does not permit it to adopt abortion regulations that depart from accepted medical practice." *Simopolous v. Virginia*, 462 U.S. 506, 516 (1983).

Accordingly, this Court has consistently held that "[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion" are unconstitutional. *Whole Woman's Health*, 136 S. Ct. at 2300 (citing *Casey*, 505 U.S. at 878 (plurality op.)). In *Doe v. Bolton*—decided on the same day as *Roe v. Wade*—the Court invalidated a Georgia statute requiring that abortions be performed at hospitals accredited by the Joint Commission on Accreditation of Hospitals because the State failed to show "that only the full resources of a licensed hospital, rather than those of some other appropriately licensed institution, satisfy [its] health interests." 410 U.S. at 195. In *Planned Parenthood of Central Missouri v. Danforth*, the Court invalidated the prohibition of a particular abortion method, 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" abortions after twelve weeks of pregnancy. 428 U.S. at 79. And in *Whole Woman's Health*, this Court invalidated Texas's requirement that abortion providers have active admitting privileges at a local hospital because "there was no significant health-related problem that the new law helped to cure" in light of the fact that abortions are "extremely safe" procedures "with particularly low rates of serious complications and virtually no deaths." 136 S. Ct. at 2311. Indeed, Texas had acknowledged that there was no "instance in which the new requirement would have helped even one woman obtain better treatment." *Id.* at 2311-12.

The Fifth Circuit failed to apply this Court's binding precedents in evaluating petitioners' challenge to Louisiana's identical admitting-privileges requirement. While the court acknowledged that Louisiana, like Texas, had failed to identify "any instance in which a worse result occurred because the patient's abortion doctor did not possess admitting privileges," it found that Louisiana's law would advance women's health because it purportedly "performs a real, and previously unaddressed, credentialing function that promotes the wellbeing of women seeking abortion."[3]

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[3] The Fifth Circuit also accepted Louisiana's representation that its admitting-privileges requirement reasonably conformed to a "preexisting requirement that physicians at ambulatory surgical centers" have such privileges. (Pet. App. 36a-37a (emphasis omitted).) However, the court failed to explain how abortion procedures bear any resemblance to the procedures commonly performed at ambulatory surgical centers—i.e., upper and lower gastrointestinal endoscopies, injections into the spinal

(Pet. App. 38a-39a & n.56.) There is no legal or factual basis for that holding.

As an initial matter, the Fifth Circuit was wrong to conclude that *Whole Woman's Health* did not address the relationship between an admitting-privileges requirement and a credentialing function. To the contrary, this Court explained that the "common prerequisites to obtaining admitting privileges . . . have nothing to do with ability to perform medical procedures," and therefore squarely held that "[t]he admitting-privileges requirement does not serve any relevant credentialing function." 136 S. Ct. at 2312-13. The Fifth Circuit simply ignored that holding.

The Fifth Circuit likewise disregarded the district court's extensive factual findings confirming that the admitting-privileges requirement serves no meaningful credentialing function in Louisiana and is therefore an unconstitutional regulation.[4] (*See* Pet. App. 166a-182a, 215a-220a.) As in other States that have imposed admitting-privileges requirements that were subsequently invalidated, the criteria for granting admitting privileges in Louisiana "are multiple,

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cord, and orthopedic surgeries—so as to require conforming admitting-privileges requirements. Indeed, this Court already held in *Whole Woman's Health* that requirements applying to surgical centers are entirely irrelevant to medication abortions and are largely inappropriate for surgical abortions. *See Whole Woman's Health*, 136 S. Ct. at 2315-16.

[4] The Fifth Circuit also failed to address the district court's findings that admitting-privileges requirements are unnecessary to ensure continuity of care and are categorically opposed by the medical community. (Pet. App. 215a-217a.)

various, and unweighted."[5] (Pet. App. 168a (quotation marks and citation omitted).) These criteria vary from hospital to hospital because there are no state or federal statutes governing such criteria. (Pet. App. 168a.) "While a physician's competency is a factor in assessing an applicant for admitting privileges, it is only one factor that hospitals consider in whether to grant privileges."[6] (Pet. App. 171a.) Other criteria include "the physician's expected usage of the hospital and intent to admit and treat patients there, the number of patients the physician has treated in the hospital in the recent past, [or] the needs of the hospital or the business model of the hospital." (Pet. App. 172a.) Hospitals may also require that a physician be employed by the hospital, live or practice within a certain distance of a hospital, or, in the case of academic hospitals, that a physician be a faculty

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[5] *See, e.g.*, *Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 792 (7th Cir. 2013) (discussing Wisconsin law); *Planned Parenthood Se., Inc. v. Strange*, 33 F. Supp. 3d 1330, 1342-43 (M.D. Ala. 2014) (discussing Alabama law).

[6] Even then, the competency evaluated for purposes of deciding an admitting-privileges application may be immaterial to a physician's competency to perform abortion services. A hospital's evaluation of competency naturally focuses on competency to perform hospital procedures. (*See, e.g.,* Pet. App. 227a-228a (requiring doctor to submit documentation of cases and outcomes involving "the specific procedures" for which admitting privileges are being requested, as opposed to outpatient procedures that did not require hospitalization).) But as the record amply demonstrates, patients who receive abortions in Louisiana rarely require *any* hospital procedures as a result of receiving abortions. (Pet. App. 212a-214a.) For example, the Hope Clinic in Shreveport, which serves more than 3,000 patients per year, has in the last twenty-three years needed to transfer to a hospital for treatment only four patients (i.e., less than .006 percent). (Pet. App. 212a.)

member. (Pet. App. 172a-173a.) This Court has already concluded that such criteria bear no relationship to a physician's competence to provide abortion services. *See Whole Woman's Health*, 136 S. Ct. at 2312-13 (discussing irrelevance of criteria such as number of admissions, residency requirements, and faculty appointment status).

Even more disturbing, the Fifth Circuit ignored the district court's finding that Louisiana "hospitals can and do deny privileges for reasons directly related to a physician's status as an abortion provider." (Pet. App. 174a.) As discussed *supra* (at 6-8), the Constitution does not allow a State to bar access to abortion services based on its opposition to the procedure, whether the State does so directly or by deputizing third parties. Unlike in *Whole Woman's Health*, where the Court examined and invalidated an admitting-privileges requirement in the context of a Texas law that forbids discrimination in the granting of admitting privileges based on a physician's status as an abortion provider, *see* Tex. Occ. Code. Ann. § 103.002(b), Louisiana law does not prohibit such discrimination.[7] In fact, the record shows that Louisiana hospitals have denied—either affirmatively or constructively—applications for admitting privileges based on a physician's status as an abortion provider. (Pet. App. 174a-178a.) Because the Fifth Circuit failed to address the district court's factual findings on this point, it also failed to explain how a law could advance the State's interest in promoting quality of care in

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[7] The district court found that a federal statute prohibiting discrimination by hospitals on the basis of providing abortion services (42 U.S.C. § 300a-7(c)) did not apply to the hospitals in this case. (Pet. App. 168a.)

abortion services while at the same time allowing hospitals to prohibit otherwise qualified doctors from providing such services based on hospitals' objections to abortion.

In any event, this Court has already held that the relevant question is not whether a new law standing alone could hypothetically advance the State's interest in women's health, but whether the specific new law being challenged actually provides the asserted benefits as "compared to prior law." *Whole Woman's Health*, 136 S. Ct. at 2311. Here, there is no dispute that Louisiana extensively regulates medical professionals, and especially abortion providers, in ways that more than adequately ensure quality of care. Among other requirements, Louisiana mandates that abortion facilities be inspected annually, retain a written protocol for managing medical emergencies, and maintain a written agreement for the transfer of patients requiring further emergency care at a hospital. (Pet. App. 194a.) The availability of regulatory options under existing law highlights the extent to which an admitting-privileges requirement is unnecessary to advance the State's interest in protecting women's health. *See Whole Woman's Health*, 136 S. Ct. at 2311.

In this case, the district court also found that "abortion in Louisiana has been extremely safe, with particularly low rates of serious complications, as compared with childbirth and with medical procedures that are far less regulated than abortion." (Pet. App. 218a-219a.) And just as in *Whole Woman's Health,* the State admitted that it could not identify a single instance in which a woman would have obtained a better outcome if her abortion provider had maintained admitting privileges at a nearby hospital. (Pet.

App. 38a-39a n.56.) There was thus no basis for the Fifth Circuit to find that Louisiana's admitting-privileges requirement actually advanced women's health. *See Whole Woman's Health*, 136 S. Ct. at 2313 (finding a "virtual absence of any health benefit" from Texas's admitting-privileges requirement).

If anything, the opposite was true. The district court found on the basis of the record before it that Louisiana's admitting-privileges requirement would affirmatively undermine the State's interest in women's health by drastically reducing the availability of safe and legal abortions in Louisiana, a finding the Fifth Circuit ignored. The district court explained that the law could drive many women—especially women with limited financial resources—to self-induce abortions or to obtain unsafe abortions offered by unregulated practitioners, both of which carry substantial risks of death, complications, and other adverse outcomes. (*See* Pet. App. 215a.) As this Court has expressly held, the Constitution prohibits States from enacting abortion regulations that fail to serve a legitimate governmental interest, *Casey*, 505 U.S. at 878 (plurality op.), and likewise forbids the government from subjecting women "to significant health risks," *Gonzales*, 550 U.S. at 161. Louisiana's admitting-privileges requirement violates both proscriptions.

B. The Undue-Burden Standard Forbids Abortion Regulations Whose Burdens Outweigh Their Benefits.

The Fifth Circuit recognized that, even under its generous interpretation of the record, "the benefits conferred by Act 620 are not huge." (Pet. App. 39a.) Even this allowance is an overstatement because Act 620 confers no benefit. (*See* Pet. App. 215a, 264a.) But this Court's binding precedents make clear that Louisiana's admitting-privileges law would be unconstitutional even if it conferred the minimal benefits identified by the Fifth Circuit.

Under the undue-burden standard, a statute that advances a legitimate state interest is nevertheless unconstitutional if the burdens on abortion access imposed by that law outweigh its benefits. *See, e.g.*, *Stenberg*, 530 U.S. at 920; *Casey*, 505 U.S. at 878 (plurality op.). In *Whole Woman's Health*, this Court concluded that Texas could not justify the burdens on access imposed by its admitting-privileges requirement—including the closure of half of Texas's clinics, fewer doctors, longer waiting times, crowding, and increased travel times—even if the law had marginally advanced the State's asserted interest in women's health. 136 S. Ct. at 2313.

Contrary to the Fifth Circuit's representations (Pet. App. 47a-53a), the burdens in this case are at least as severe and significant as those examined in *Whole Woman's Health*. The district court's exhaustive factual findings established that only two of the five doctors currently providing abortions in Louisiana have been able to obtain admitting privileges, despite their comprehensive efforts to do so. (Pet. App. 160a-166a, 220a-247a.) One of these two doctors works at a

clinic in Shreveport (located in northern Louisiana), and the other doctor was able to obtain admitting privileges only at a hospital near a clinic in New Orleans (located more than 320 miles away in southern Louisiana).[8] At a minimum, the admitting-privileges requirement would reduce the number of providers in the State from five to two—a reduction that the district court correctly found would impose an undue burden on women seeking abortion services. (Pet. App. 256a-258a, 262a, 273a-274a.) But the record establishes that the requirement would likely reduce the number of providers still further, to one, because the district court expressly credited the testimony of the Shreveport doctor that, out of fear for his personal safety, he would not continue to provide abortion services if he were the last doctor to do so in the entire northern part of the State—as he would be, if the requirement took effect.[9] (Pet. App. 188a.)

Both doctors have been subjected to threats and hostility as a result of their medical practices. The clinic in Shreveport, in particular, was the target of at least three violent attacks: one by a man wielding a sledge hammer, one by an arsonist who launched a Molotov cocktail at the building, and one by an individual or group who drilled a hole in the wall of the building and poured butyric acid through it. (Pet. App. 185a-186a.) Anti-abortion activists have also

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[8] The latter physician was unable to obtain admitting privileges at a hospital that would allow him to continue to provide services at a clinic located in Baton Rouge (also located in southern Louisiana). (Pet. App. 165a.)

[9] The district court also found that Act 620 would "devastat[e]" the financial viability of the Shreveport clinic because the doctor who performed most of the services at this clinic was unable to obtain admitting privileges. (Pet. App. 256a.)

targeted the Shreveport doctor by leaving threatening flyers on his neighbor's mailboxes and harassing his patients outside the clinic. (Pet. App. 187a.) The district court therefore reasonably credited the Shreveport doctor's testimony that he would cease providing abortion services if he became further isolated as the sole provider for a substantial portion of the State.

Accordingly, if the admitting-privileges requirement were to take effect, Louisiana would be left with one abortion provider who could practice only in New Orleans and who does not perform abortions after sixteen weeks of pregnancy. (Pet. App. 164a-165a.) This single provider would be left with the logistically and physically impossible task of serving the 10,000 women who annually seek to obtain legal pre-viability abortions in Louisiana. (Pet. App. 155a, 255a-256a.) Meanwhile, women seeking abortions in Louisiana would have to travel hundreds of miles to New Orleans (or else to other States), arrange for accommodations and child care to cover any waiting-period requirements (in Louisiana, the waiting requirement currently in effect is twenty-four hours), and try to obtain permission to take the necessary time off from work. (Pet. App. 261a-265a.) As the district court correctly concluded, the heaviest burdens would fall disproportionately on indigent women who may have to sacrifice food or rent expenses, rely on abusive family members or partners, or forego obtaining an abortion altogether. (Pet. App. 261a-264a.) Under these conditions, many women will be forced to delay obtaining an abortion, which imposes physical and psychological risks, or will resort to self-induced or "black market" abortions, which can result in substantial injury or death. (*See* Pet. App. 264a.)

The Fifth Circuit nonetheless held that these undeniable burdens on access are neither caused by the challenged law nor undue. (Pet. App. 39a-53a.) That holding was erroneous for at least four reasons.

First, the Fifth Circuit applied an erroneous legal standard in evaluating whether Louisiana's admitting-privileges requirement constituted an undue burden on abortion access. Specifically, the court held that "regulations with a minimal benefit are unconstitutional only where they present a substantial obstacle to abortion," and asserted that a plaintiff challenging such a law could prevail only if an abortion restriction's "burdens *substantially* outweigh[] its benefits." (Pet App. 31a (quotation marks omitted).) The Fifth Circuit's standard contravenes this Court's binding case law, impermissibly resurrecting the same court's prior articulation of the undue-burden standard that was expressly rejected in *Whole Woman's Health*.

Casey and *Whole Woman's Health* made clear that an abortion restriction cannot survive constitutional scrutiny if it imposes greater burdens than benefits, no matter how slightly or substantially the scale tips in favor of the burdens. *Whole Woman's Health* specifically instructed that courts evaluating abortion restrictions must "consider the burdens a law imposes on abortion access *together* with the benefits those laws confer" to determine whether any burden imposed on abortion access is "undue."[10] 136 S. Ct. at 2309

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[10] As several lower courts have concluded, the notion of proportionality is critical to the undue-burden analysis: the burdens imposed by an abortion restriction must be proportional to the benefit the regulation provides. *See, e.g.*, *Planned Parenthood of Wis., Inc. v. Schimel*, 806 F.3d 908, 919 (7th Cir.

(emphasis added); *see also Casey*, 505 U.S. at 887-901 (plurality op.). Accordingly, the undue burden standard requires lower courts to "weigh[] the asserted benefits against the burdens" and invalidate a provision where the burden side of the ledger prevails. *See Whole Woman's Health*, 136 S. Ct. at 2310.

In *Whole Woman's Health*, this Court rejected the Fifth Circuit's prior version of the undue-burden test, which examined the extent of any burden imposed in a vacuum. Under that approach, an abortion restriction was constitutional as long as "(1) it d[id] not have the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus; and (2) it [was] reasonably related to (or designed to further) a legitimate state interest." *Id.* at 2309 (quoting *Whole Woman's Health v. Cole*, 790 F.3d 563, 572 (5th Cir. 2015)). As this Court explained, the first prong of the Fifth Circuit's test directly contradicted *Casey* because it could be "read to imply that a district court should not consider the existence or nonexistence of medical benefits when considering" the constitutionality of an abortion restriction. *Id.* And the second prong of the Fifth Circuit's test was erroneous because it impermissibly "equate[d] the judicial review applicable to the regulation of a constitutionally protected liberty interest with the less strict review applicable where, for example, economic legislation is at issue." *Id.*

2015); *Planned Parenthood of the Heartland, Inc. v. Iowa Bd. of Med.*, 865 N.W.2d 252, 264 (Iowa 2015); *Planned Parenthood Ariz., Inc. v. Humble*, 753 F.3d 905, 911-12 (9th Cir. 2014). In the case of health-justified abortion regulations, "[t]he feebler the medical grounds, the likelier the burden, even if slight, to be 'undue' in the sense of disproportionate or gratuitous." *Van Hollen*, 738 F.3d at 798.

The undue-burden standard applied by the Fifth Circuit in this case likewise contravenes the careful balance struck in *Casey* and *Whole Woman's Health* by putting a thumb on the scale in favor of upholding abortion restrictions. The undue-burden test is intentionally demanding: it requires that a State adequately justify a restriction on a substantive due process right that implicates an individual's interests in liberty, privacy, and bodily autonomy, among other things. Nonetheless, the Fifth Circuit continues to insist that a State can lawfully infringe upon a woman's constitutional right to choose to terminate a pre-viability pregnancy, even if the burdens imposed by that infringement outweigh the benefits offered by the challenged regulation. On that view, a lower court evaluating an abortion restriction could refuse to evaluate whether the challenged law provided any benefits at all, so long as it determined that any potential burden imposed by that law was not substantial. These are precisely the flaws that this Court identified when it rejected the Fifth Circuit's prior articulation of the undue-burden standard in *Whole Woman's Health*.

To the extent the Fifth Circuit relied (*see* Pet. App. 31a) on *Casey's* discussion of substantial obstacles to support its revised legal standard, when read in context, *Casey*'s discussion does not support the court's approach. *Casey* held that "[a] finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." 505 U.S. at 877 (plurality op.). In other words, "substantial obstacle" and "undue burden" are equivalent terms for the outcome of the balancing test mandated by *Casey* and

Whole Woman's Health; they are not references to the manner in which that balancing test is to be applied. Any law that imposes burdens on access that outweigh the benefits provided to a legitimate governmental interest creates a "substantial obstacle" or "undue burden" within the meaning of *Casey* and *Whole Woman's Health*.

Second, the Fifth Circuit's analysis of the considerable burdens imposed by Louisiana's admitting-privileges requirement was driven by a misunderstanding of the relevant law and record evidence. The court found that burdens on access were caused by the physicians' purportedly inadequate efforts to obtain admitting privileges and the Shreveport doctor's concerns about his personal safety rather than the challenged statute. (Pet. App. 39a-46a.) As explained in petitioners' brief (at 37-45), the court's determination is categorically disproven by the record and is contrary to this Court's case law on causation, including the analysis of the issue in *Whole Woman's Health*.

Third, the Fifth Circuit's discussion of other burdens such as extended wait times at clinics, increased travel distances, and financial costs was divorced from the reality of abortion access in Louisiana. (*See* Pet. App. 47a-53a.) Courts evaluate the burdens of a law "based on the reality of the abortion provider and its patients, not as it could if providers and patients had unlimited resources." *Planned Parenthood of Ind. & Ky. Inc. v. Commissioner of the Ind. State Dep't of Health*, 896 F.3d 809, 824 (7th Cir. 2018), *pet. for cert. filed*, No. 18-1019 (Feb. 4, 2019). This Court has never permitted undue-burden analysis to be rooted in fanciful speculation—rather, the Court focuses its review on the real-world

circumstances in which abortion restrictions operate. *See, e.g.*, *Whole Woman's* Health, 136 S. Ct. at 2313. Louisiana's law must therefore be evaluated against the reality that clinics cannot easily mitigate the burdens imposed by the law by recruiting additional physicians or opening new facilities. The record makes clear that doing so here would be exceedingly difficult, if not impossible, given the overall hostility to abortion providers in Louisiana. (*See* Pet. App. 183a-189a, 258a-259a.) Louisiana's law must be evaluated against the further reality that many women seeking abortion services do not generally have paid sick days, reliable child care, and access to affordable transportation and lodging, enabling them to travel to a clinic located hundreds of miles from their homes. The admitting-privileges requirement at issue here is therefore far more restrictive than any this Court has ever approved. For many women in Louisiana, it would create a world in which a choice about whether to carry a pregnancy to full term "exists in theory but not in fact," *Casey*, 505 U.S. at 872 (plurality op.).

Finally, the Fifth Circuit failed to grapple with the district court's finding that Louisiana women would no longer have access to abortions after sixteen weeks of pregnancy—therefore losing all access to legal pre-viability abortions between seventeen weeks and twenty-one weeks and six days of pregnancy. (Pet. App. 260a.) The unavailability of post-sixteen-week abortions would have especially severe consequences for women who learn of fetal anomalies or develop health complications during pregnancy, as these conditions are often detected during the second trimester.

II. The Amici States' Interests Would Be Substantially Undermined If the Court Departed from Its Precedents Prohibiting Undue Burdens on a Woman's Right to Choose to Terminate a Pregnancy Prior to Viability.

This Court's "unbroken commitment . . . to the essential holding of *Roe*" has been a fundamental principle of constitutional law for nearly fifty years. *Casey*, 505 U.S. at 870 (plurality op.); *see also Stenberg*, 530 U.S. at 921 (noting that the Court "has determined and then redetermined that the Constitution offers basic protection to the woman's right to choose"). The essence of this constitutional protection is 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.'" *Casey*, 505 U.S. at 875 (plurality op.) (quoting *Eisenstadt v. Baird,* 405 U.S. 438, 453 (1972)). The undue-burden standard adopted in *Casey* and correctly reaffirmed just three years ago in *Whole Woman's Health* is critical to ensuring that the substantive due process right to choose to terminate a pre-viability pregnancy remains a meaningful right for millions of women in the United States.

The nationwide recognition of this constitutional right has advanced the States' interest in promoting women's health in numerous respects. The American Medical Association and the American College of Obstetricians and Gynecologists have expressly advised that the best way to promote women's health is to ensure that all women have robust access to a comprehensive range of reproductive health care

services, including abortion services.[11] Studies confirm that countries with highly restrictive abortion laws have substantially worse health outcomes for women, including considerably higher rates of maternal mortality.[12]

These results have been replicated in studies of women in the United States, where research shows that health outcomes for women and children alike are worse in jurisdictions with numerous abortion restrictions.[13] For example, one recent study found that the maternal mortality rate in Texas had doubled over the span of just two years, a period of time during which access to women's health care services, including abortion services, had become more difficult to obtain.[14] Studies have also found that women who were denied abortion services and were therefore forced to carry a pregnancy to term were four times more likely to develop potentially life-threatening health conditions and were substantially more likely to experience physical violence by abusive partners or

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[11] Am. Coll. of Obstetricians and Gynecologists, *Abortion Policy* (Nov. 2014) (internet); *American Medical Ass'n, et al. v. Stenehjem*, No. 19-cv-125, Dkt. No. 1, Compl. at 5 (¶16) (D.N.D., filed June 25, 2019).

[12] *See, e.g.*, Su Mon Latt et al., *Abortion Laws Reform May Reduce Maternal Mortality: An Ecological Study in 162 Countries*, 19 BMC Women's Health art. 1 (2019).

[13] *See, e.g.*, Ibis Reproductive Health & Ctr. for Reproductive Rights, 2 *Evaluating Priorities: Measuring Women's and Children's Health and Well-Being Against Abortion Restrictions in the States* 16-19 (2017).

[14] Marian F. MacDorman, et al., *Recent Increases in the U.S. Mortality Rate: Disentangling Trends from Measurement*, 128 Obstetrics & Gynecology 447, 451-52 (2016) (internet).

family members.[15] Accordingly, a robust legal framework that protects the federal constitutional right to terminate a pre-viability pregnancy advances the States' interest in promoting women's health by limiting harmful and burdensome restrictions. And meaningful access to abortion services advances other valuable governmental interests as well, by improving socioeconomic outcomes, such as rates of educational attainment and employment.[16]

States have taken various measures to promote access to a wide range of reproductive health care services, including abortion care.[17] States have also committed extensive resources to developing and funding other types of programs shown to improve women's health care outcomes. *See* Amicus Br. for State of California et al. at 14-34, *Jackson Women's*

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[15] Caitlin Gerdts et al., *Side Effects, Physical Health Consequences & Mortality Associated with Abortion and Birth After an Unwanted Pregnancy*, 26 Women's Health Issues 55, 58-59 (2016) (internet); Sarah C.M. Roberts et al., *Risk of Violence from the Man Involved in the Pregnancy After Receiving or Being Denied an Abortion*, 12 BMC Medicine art. 144 (2014).

[16] *See, e.g.*, Anna Bernstein & Kelly Jones, *The Economic Effects of Abortion Access: A Review of the Evidence* (Ctr. for Econ. of Reproductive Health, Inst. for Women's Pol'y Research 2019) (internet).

[17] *See, e.g.*, Guttmacher Inst., *State Funding for Abortion Under Medicaid* (as of Nov. 1, 2019) (internet) (identifying sixteen States that direct Medicaid to pay for all or most medically necessary abortions); Guttmacher Inst., *Protecting Access to Clinics* (as of Nov. 1, 2019) (internet) (identifying state laws that protect safe access to abortion facilities); Henry J. Kaiser Family Found., *State Requirements for Insurance Coverage of Contraceptives* (as of May 1, 2019) (internet) (identifying fourteen States that require insurance plans to provide no-cost contraceptive coverage).

Health Org. v. Dobbs, No. 19-60455, Doc. 00515146117 (5th Cir. Oct. 4, 2019), 2019 WL 5099416 (collecting information about state initiatives to promote women's health). For example, New York has funded several initiatives to provide prenatal and postpartum care to women and families in need.[18] California provides health coverage for prenatal care to low- and middle-income pregnant women, among other services.[19] Illinois maintains a family planning program that provides pregnancy planning services to low-income individuals.[20] Likewise, New Jersey administers a comprehensive family planning program among a number of initiatives to improve reproductive, maternal, and infant health outcomes.[21]

These legislative and regulatory measures were enacted against the backdrop of a federal constitutional floor that protects access to abortion services in every State without undue governmental interference. Departing from this long-established federal constitutional protection would undermine the careful and

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[18] N.Y. State Dep't of Health, *Maternal and Infant Community Health Collaboratives Initiative* (rev. Aug. 2018) (internet).

[19] Cal. Dep't of Health Care Servs., *Info. on the Presumptive Eligibility for Pregnant Women* (Oct. 3, 2019) (internet); Cal. Dep't of Health Care Servs., *Medi-Cal Access Program* (Oct. 17, 2019) (internet); Cal. Dep't of Health Care Servs., *Office of Family Planning* (Feb. 26, 2019) (internet).

[20] Ill. Dep't of Pub. Health, *Family Planning* (internet).

[21] N.J. Dep't of Health, *Healthy Women Healthy Families* (Jan. 11, 2019) (internet); N.J. Office of the Governor, Press Release, Governor Murphy Announces Thousands of New Jersey Women Benefitting from Restoration of $7.5 Million for Women's Health Care and Family Planning Services (Jan. 31, 2019) (internet).

reasoned judgments made by States regarding how to most effectively expend limited public resources by allowing certain States to outsource the responsibility of maintaining critical services and programs for protecting women's health.

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.[22] And in recent years, several States have experienced a substantial influx of patients seeking abortions following the enactment of onerous abortion restrictions by neighboring States.[23] Of course, for many women—especially indigent women and others who are unable to travel to different jurisdictions—this Court's departure from federal constitutional protections would result in the elimination of all access to abortion services.

Amici—many of whom support and subsidize a full range of reproductive health care services within their States—stand ready and willing to provide such services to those who need them. However, if this Court abandons robust federal constitutional protections for abortion access, certain States can reasonably

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[22] Rachel Benson Gold, *Abortion and Women's Health: A Turning Point for America?* 3 (1990).

[23] *See, e.g.*, *EMW Women's Surgical Ctr. P.S.C. v. Glisson*, No. 17-cv-189, 2018 WL 6444391, at *9 (W.D. Ky. Sept. 28, 2018), *appeal filed* No. 18-6161 (Nov. 15, 2018); David Crary, *Abortions Declining in Nearly All States*, Associated Press (June 7, 2015) (internet).

expect significant and sometimes sudden increases in the number of out-of-state patients seeking abortion services in jurisdictions where they remain available. Those States can also reasonably expect meaningful increases in the number of out-of-state patients seeking later-term abortions, as many women may have to delay obtaining such services until they are able to obtain adequate funds for interstate travel. Such increases, especially when sudden, could strain these States' health care systems, impair the availability of care, and burden the reproductive choices of residents and non-residents alike. The ability of States to continue to support a wide range of reproductive health care services—including abortion as well as prenatal and postpartum care—could be substantially threatened by the responsibility of ensuring that all women in need of abortions are able to safely obtain such services somewhere in this country. This Court should affirm federal constitutional protections for abortion access to prevent certain States—namely those that would eliminate most or all abortion access within their borders—from shifting the costs of protecting women's health to States that would maintain their commitment to a woman's right to choose to terminate a pre-viability pregnancy as a basic human right and critical public health measure.

CONCLUSION

The judgment of the United States Court of Appeals for the Fifth Circuit should be reversed.

Respectfully submitted,

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