Nos. 18-1323, 18-1460

IN THE

Supreme Court of the United States

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

Petitioners,

v.

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

Respondent.

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

Cross-Petitioner,

v.

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

Cross-Respondents.

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

BRIEF OF *AMICI CURIAE* 197 MEMBERS OF CONGRESS IN SUPPORT OF PETITIONERS

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Sen. Chuck Schumer
Sen. Dianne Feinstein
Sen. Patty Murray
Sen. Richard Blumenthal
Speaker Nancy Pelosi
Rep. Frank Pallone, Jr.
Rep. Jerrold Nadler
Rep. Diana DeGette
Rep. Barbara Lee
Rep. Judy Chu

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INTERESTS OF *AMICI CURIAE*[1]

Amici curiae are members of Congress who are bound to support and defend the Constitution, and who share a concern for the continued vitality and advancement of constitutional protections of individual rights. These constitutional protections include the principles enunciated by this Court, as firmly encompassed by the right to privacy, that a woman has the right to decide to terminate a pre-viability pregnancy without undue governmental interference. Accordingly, *amici* defend the principles recognized by this Court in *Roe v. Wade*, 410 U.S. 113 (1973), which were reaffirmed as the law of the land in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 871 (1992), and most recently in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). As a fundamental right guaranteed by the Constitution, and one that strikes at the heart of ordered liberty and individual autonomy, a woman's right to decide to seek an abortion should be insulated from the rhetoric and interests of groups whose sole purpose is to undermine *Roe* and eliminate the fundamental rights enunciated in that case.

Amici also have a particularly strong interest in this case, because this Court's interpretation of the Constitution and its guarantees of individual rights directly affects how legislators draft, consider, and enact

1. *Amici* affirm that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission. Written consent by the parties for all *amicus curiae* briefs is on file with the Clerk.

laws. This Court's constitutional review of legislation is an essential component of our federalist system of government and the checks and balances that sustain it. Compliance with this Court's precedent is incumbent on all state legislatures, and their failure to adhere to such precedent endangers the foundations of this very system.

Moreover, as legislators, *amici* seek to protect the integrity of the legislative process, which is undermined when unnecessary, politically targeted, and intentionally unconstitutional legislation is enacted for pretextual reasons—like the admitting privileges requirements set forth in Act 620. Virtually identical Texas legislation has already been found unconstitutional by this Court for the same reason that the District Court below found Act 620 unconstitutional: admitting privileges requirements serve no medical benefit, while imposing undue burdens on access to abortion through increased costs and reduced availability of care. These burdens cause unnecessary delays and impose health risks to women. As legislators, *amici* attach considerable significance to legislative intent in the review and construction of statutory provisions. The true, and often overt, intent of legislators behind pretextual laws like Act 620, which have no demonstrable medical benefit, is to severely restrict, and ultimately eliminate, access to legal abortion under the guise of patient welfare. Louisiana's state legislature exceeded the constitutional boundaries recognized by this Court. *Amici* have a profound interest in ensuring the legislative process is faithful to our constitutional system of government and the fundamental protections therein.

As legislators, *amici* also have an especially strong interest in this case, as it implicates the doctrine of *stare decisis*, which is of vital importance to protecting

constitutional rights. During the confirmation process, *amici* members of the Senate query each nominee to this Court on their commitment to adhere to *stare decisis*, demonstrating the significance the Senate places on upholding this doctrine. Given it was a mere three years ago that this Court struck down as unconstitutional a materially identical state law, the principles of *stare decisis* and adherence to the rule of law are of particular import in this matter.

Amici are also mindful of the importance of protecting against improper interference with a woman's right to seek lawful medical care. *Amici* recognize that Act 620 and other laws like it often disproportionately disempower the most vulnerable women. Accordingly, like all legislation that contravenes bedrock principles of the Constitution, Act 620 should be invalidated as unconstitutional.

SUMMARY OF THE ARGUMENT

As this Court's precedent in *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey* makes clear, the Constitution secures a right to personal privacy, which encompasses the right to terminate a pregnancy prior to viability. This Court reaffirmed that precedent just three years ago in *Whole Woman's Health v. Hellerstedt*, and it remains the law in this country.

The law at issue here, Louisiana's Act 620, defies this Court's precedent, notwithstanding that state legislatures are bound by the U.S. Constitution. Such defiance undermines our nation's confidence in the legislative process and violates the rule of law. It also results in inconsistent enforcement of constitutional rights

across the nation, where the ability to obtain a safe and constitutionally-protected abortion is no longer an equal right guaranteed to all, but rather is dependent on where one lives or one's ability to access it.

This Court should reverse the Fifth Circuit's decision in *June Medical Services L.L.C. v. Gee*, 905 F.3d 787 (5th Cir. 2018) and declare Act 620 unconstitutional because, as other courts that have considered admitting privileges laws have similarly found, Act 620 does not redress any identified medical concern or offer any medical benefit—certainly none that outweighs the significant burdens it creates. While Act 620 purports to improve women's health and safety, the law will actually make it more difficult for women in Louisiana to obtain safe medical care. As with other statutes targeting abortion providers and facilities, the actual legislative intent here is to mandate requirements so difficult to fulfill that the inevitable outcome is the shuttering of abortion clinics and elimination of safe and legal abortions. Indeed, if Act 620 goes into effect, Louisiana will have only a single clinic providing abortion services in the entire state.

This case is significant not just for Louisiana. Act 620 represents but one example of a recent wave of state legislation designed to impede access to abortion services and undermine this Court's holdings in *Roe*, *Casey*, and *Whole Woman's Health*. These state laws go far beyond what is necessary to ensure patient safety. As with Act 620, these laws reflect those states' attempts to revisit settled constitutional law, and many lawmakers, apparently emboldened by the change in composition of the Court, have openly admitted as much.

In blatant defiance of the Constitution and this Court's prior holdings, states like Louisiana burden women's ability to exercise their fundamental rights through pretextual laws that purport to address problems that do not exist. The result is a patchwork of access to safe and legal abortion. This Court's precedent and the rule of law should prevail, and the rights established by the Constitution, as upheld by this Court, must be respected across the entire nation. We urge this Court to vindicate these rights by reversing the Fifth Circuit's decision in *June Medical Services L.L.C. v. Gee* and declaring Act 620 unconstitutional.

ARGUMENT

I. THE RIGHT TO DECIDE WHETHER AND WHEN TO HAVE A CHILD AND THE RIGHT TO EFFECTUATE THAT DECISION IS PROTECTED BY THE UNITED STATES CONSTITUTION.

Forty-six years ago in *Roe v. Wade*, this Court held that the right of personal privacy embedded in our Constitution, which this Court had applied to decisions relating to "marriage, procreation, contraception, family relationships, and child rearing and education,"[2] "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy" prior to viability.[3]

This Court upheld and reinforced *Roe* in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, where it made clear that "[t]he woman's right to terminate

2. *Roe v. Wade*, 410 U.S. 113, 153-154 (1973) (internal citations and quotations omitted).

3. *Id.* at 153.

her pregnancy before viability is the most central principle of *Roe v. Wade*" and "is a rule of law and a component of liberty we cannot renounce."[4] In *Casey,* this Court established the "undue burden" standard, and further underscored the reliance interest at stake should *Roe* be overruled, finding immeasurable "the certain cost of overruling *Roe* for people who have ordered their thinking and living around that case[.]"[5] The reliance interest at stake and the cost of overruling *Roe* has grown substantially in the 27 years since *Casey* was decided.

As recently as three years ago, in *Whole Woman's Health*, this Court reaffirmed a woman's constitutional right to seek an abortion and emphasized that the "undue burden" standard established in *Casey* "requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer."[6] In analyzing the constitutionality of Texas' House Bill 2 ("H.B. 2")[7] using the "undue burden" test, this Court held that H.B. 2's admitting privileges requirement failed to "confer[] medical benefits sufficient to justify the burdens upon access" that this requirement imposed.[8] The Court concluded that H.B. 2 placed "a 'substantial obstacle in the path of a woman's choice,'" because it resulted in the closure of half of the state's abortion clinics, in violation

4. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 871 (1992).

5. *Id.* at 856.

6. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016).

7. Tex. Health & Safety Code Ann. § 171.0031 (West 2013).

8. *Whole Woman's Health*, 136 S. Ct. at 2300.

of *Casey* and *Roe*.[9] Thus, just three years ago, this Court reaffirmed the continued validity of the undue burden test established in *Casey* and again upheld a woman's fundamental right to choose as a decision that must be shielded from unjustified state interference.[10]

Accordingly, the right to decide to terminate a pregnancy prior to viability is established precedent and this Court has made clear that it is the law for this country. State regulations cannot place an "undue burden" on a woman's right to seek an abortion before viability; stated otherwise, state laws that have "the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus" are unconstitutional.[11]

II. RESPECT FOR THE RULE OF LAW IS CRITICAL TO OUR NATION.

Finding Act 620 unconstitutional is particularly appropriate considering that the constitutional issues implicated by its passage were already analyzed at length by this Court in *Whole Woman's Health*. As the Court recognized in *Casey*, the issues presented in a case such as this one are:

> [T]he sort of intensely divisive controversy reflected in *Roe* and those rare, comparable cases, [where this Court's] decision has a dimension that the resolution of the normal case

9. *Id.* at 2312 (citing *Casey*, 505 U.S. at 877), 2316.

10. *Id.* at 2300.

11. *Casey*, 505 U.S. at 877.

> does not carry. . . . But whatever the premises of opposition may be, only the most convincing justification under accepted standards of precedent could suffice to demonstrate that a later decision overruling the first was anything but a surrender to political pressure, and an unjustified repudiation of the principle on which the Court staked its authority in the first instance. So to overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question.[12]

There is no compelling reason here to upend this settled precedent, and no change of circumstances between *Whole Woman's Health* and this action that justifies a different outcome. Act 620 implicates the exact same constitutional issues and threatens the same essential rights.

Laws like Act 620, enacted in defiance of this Court's constitutional pronouncements, undermine our nation's confidence in the legislative process and the rule of law. As members of Congress, *amici* have the strongest interest in maintaining the integrity of the legislative process and ensuring that the stated purpose of legislation is, in fact, the true motivation for its passage and, conversely, that legislation actually serves its stated purpose. Laws

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12. *Id*. at 866-867; *see also Whole Woman's Health,* 136 S. Ct. at 2321 ("So long as this Court adheres to *Roe v. Wade* . . . and *Planned Parenthood of Southeastern Pa. v. Casey* . . ., Targeted Regulation of Abortion Providers laws like H.B. 2 that 'do little or nothing for health, but rather strew impediments to abortion[ ]' . . . cannot survive judicial inspection.") (Ginsburg, J., concurring) (citations omitted).

that purport to address a problem that does not exist and instead seek to controvert the rule of law detract from the validity of the legislative process. The judiciary plays a fundamental role in ensuring that the other branches of government do not exceed constitutional limits, and that laws based on pretext, or designed to erode established law, are struck down.[13] When legislatures intentionally enact unconstitutional laws, it is the responsibility of the courts to protect the sanctity of vital constitutional rights: "[t]he Court's power lies . . . in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands."[14]

A. State Legislatures Are Bound by This Court's Precedent.

For nearly half a century, as discussed above, this Court has reaffirmed that the Constitution guarantees a woman's right to terminate her pregnancy without unnecessary government intrusion.[15]

State legislators, like *amici*, take an oath to uphold the Constitution and they are, thus, "under constitutional

13. *Cf. Department of Commerce v. New York*, 139 S. Ct. 2551, 2574-2576 (2019).

14. *Casey*, 505 U.S. at 865.

15. *See Roe v. Wade*, 410 U.S. 113, 153 (1973) ("This right of privacy . . . founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."); *Casey*, 505 U.S. at 869 ("We conclude that the basic decision in *Roe* was based on a constitutional analysis which we cannot now repudiate.").

mandate to take affirmative action to accord the benefit of this right to all those within their jurisdiction."[16] As a result, as this Court held in *Cooper v. Aaron*, constitutional rights "can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes . . . whether attempted 'ingeniously or ingenuously.'"[17] As Justice Frankfurter recognized in his concurrence in that case:

> [T]he responsibility of those who exercise power in a democratic government is not to reflect inflamed public feeling but to help form its understanding . . . . Compliance with decisions of this Court, as the constitutional organ of the supreme Law of the Land, has often, throughout our history, depended on active support by state and local authorities. It presupposes such support. To withhold it, and indeed **to use political power to try to paralyze the supreme Law, precludes the maintenance of our federal system as we have known and cherished it for one hundred and seventy years**.[18]

Legislative disobedience with this Court's constitutional pronouncements necessarily undermines

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16. *Bush v. Orleans Par. Sch. Bd.*, 190 F. Supp. 861, 864 (E.D. La. 1960), *aff'd*, 365 U.S. 569 (1961), and *aff'd sub nom.*, *City of New Orleans, Louisiana v. Bush*, 366 U.S. 212 (1961).

17. *Cooper v. Aaron*, 358 U.S. 1, 17 (1958) (citing *Smith v. Texas*, 311 U.S. 128, 132 (1940)).

18. *Id.* at 26 (emphasis added).

the integrity of, and the public's confidence in, the legislature and the legislative process (as well as the judiciary that fails to correct such legislative overreach). Moreover, such disobedience threatens the vitality of constitutional protections afforded to all. Adherence by the states to constitutional principles is "indispensable for the protection of the freedoms guaranteed by our fundamental charter for all of us."[19] Thus, "Chief Justice Marshall spoke for a unanimous Court in saying that: 'If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery . . . .'"[20]

B. The Right to Access Abortion Care Should Not Depend on One's Domicile.

Constitutional rights must be enforced consistently across the country. The importance of uniformity in guaranteeing basic constitutional protections is embodied in the Constitution itself, through both the Supremacy Clause and the establishment in Article III, of "one supreme Court."[21] This Court long ago recognized:

> [T]he importance, and even necessity of uniformity of decisions throughout the whole United States, upon all subjects within the purview of the constitution. Judges of equal learning and integrity, in different states, might

19. *Id.* at 20.

20. *Id.* at 18 (quoting *United States v. Peters*, 5 Cranch 115, 136 (1809)).

21. U.S. Const. art. VI, art. III § 1.

> differently interpret a statute, or a treaty of the United States, or even the constitution itself: If there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties, and the constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states. The public mischiefs that would attend such a state of things would be truly deplorable.[22]

Non-uniform recognition of federal constitutional rights creates a patchwork of laws in which one's constitutional protections are honored or denied based solely on where one lives, which threatens the foundations of our federalist system of government.

This Court's constitutional pronouncements establish a minimum level of protection below which state legislation may not descend.[23] Thus, while states are free to innovate

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22. *Martin v. Hunter's Lessee*, 14 U.S. 304, 347-348 (1816). *See also Cohens v. State of Virginia*, 19 U.S. 264, 416 (1821) (recognizing "the necessity of uniformity"); *Supreme Court Chief Justice Roberts*, C-SPAN (June 19, 2009), https://www.c-span.org/video/?286078-1/supreme-court-chief-justice-roberts, at 18:16 (recognizing importance of uniformity by declaring "our main job is to try to make sure federal law is uniform across the country").

23. *See, e.g.*, *Smith v. Robbins*, 528 U.S. 259, 273 (2000) ("allowing the States wide discretion, **subject to the minimum requirements of the Fourteenth Amendment**, to experiment with solutions to difficult problems of policy") (emphasis added); *Sailors v. Bd. of Ed. of Kent Cty.*, 387 U.S. 105, 109 (1967) (recognizing

and serve as "laboratories for experimentation" in our democracy,[24] state powers "must be exercised consistently with federal constitutional requirements as they apply to state action."[25] The vitality of constitutional rights must withstand the crossing of state lines, and the Constitution itself cannot be left vulnerable to legislative balkanization, affording disparate protections for basic rights for individuals across the nation. Yet, as shown by the varying state laws enacted in the past two years (*see infra* Part IV), this is precisely the result of non-uniform application of this Court's precedents. The entire populace is entitled to the equal implementation of this Court's constitutional jurisprudence, not just those who live in states that choose to respect it.

C. This Court's Decision in *Whole Woman's Health* Warrants Reversal of the Fifth Circuit's Decision.

Following both *Casey* and *Whole Woman's Health*, states are constrained from enacting admitting privileges requirements for abortion providers that do not protect women's health or safety, but do restrict access to abortion. This Court has already declared facially unconstitutional a statutory provision enacted in Texas that was materially identical to that at issue here.[26] Yet

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states' legislative discretion unless it "runs afoul of a federally protected right").

24. *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2673 (2015).

25. *Cooper*, 358 U.S. at 19.

26. *See infra* at Part III.

the Fifth Circuit's decision below fails to conform to this Court's recent precedent and is constitutionally untenable. If that decision is allowed to stand, the constitutional protections recognized in *Whole Woman's Health* will extend no further than the Texas border, effectively impeding the ability of a woman in Louisiana to exercise the constitutional right that this Court most recently defended for her neighbor in Texas.[27]

This Court should reverse the decision below and ensure that a woman does not forfeit the right to effectuate her decision to seek an abortion simply because of where she lives.

III. ACT 620'S ADMITTING PRIVILEGES REQUIREMENT PROVIDES NO MEDICAL BENEFIT AND WILL UNDULY BURDEN LOUISIANA WOMEN.

Other courts that have considered admitting privileges laws have likewise found that they confer no medical benefit.[28] "Act 620 was modeled after similar

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27. Louisiana is not the only state that has enacted legislation that unduly burdens a woman's access to abortion. *See* Part IV, *infra*.

28. *See Planned Parenthood of Wis., Inc. v. Van Hollen*, 94 F. Supp. 3d 949, 953 (W.D. Wis. 2015), *aff'd sub nom.*, *Planned Parenthood of Wis., Inc. v. Schimel*, 806 F. 3d 908, 921 (7th Cir. 2015) ("And comparably in our case the requirement of admitting privileges cannot be taken seriously as a measure to improve women's health because the transfer agreements that abortion clinics make with hospitals, plus the ability to summon an ambulance by a phone call, assure the access of such women to a nearby hospital in the event of a medical emergency."); *Planned*

laws which have had the result of closing abortion clinics in other states"[29]; indeed, Act 620 is materially identical to Texas' H.B. 2 in both its substance and its pretextual character. Like its Texas counterpart, Louisiana's Act 620 requires physicians who perform an abortion to "[h]ave active admitting privileges at a hospital located not further than thirty miles from the location at which the abortion is performed or induced and that provides obstetrical or gynecological health care services."[30] Admitting privileges requirements generate from the same wellspring as other abortion restrictions, and are simply backdoor attempts to eliminate abortion by making safe, legal abortion effectively unobtainable.

The Louisiana legislature purportedly enacted Act 620 to improve the health and safety of women seeking an abortion.[31] Yet, "abortion has consistently been one of the safest medical procedures performed in the United States,"[32] and the District Court here found as

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Parenthood Southeast, Inc. v. Strange, 33 F. Supp. 3d 1330, 1378 (M.D. Ala. 2014) (finding that admitting privileges requirements do not provide health benefits to women undergoing abortions).

29. *June Medical Services LLC v. Kliebert*, 250 F. Supp. 3d 27, 55 (M.D. La. 2017), *rev'd*, *June Medical Services L.L.C. v. Gee*, 905 F.3d 787 (5th Cir. 2018).

30. La. Rev. Stat. Ann. § 40:1061.10(A)(2)(a) (2016).

31. *Kliebert*, 250 F. Supp. at 58-59.

32. Brief of *Amici Curiae* American College of Obstetricians and Gynecologists, et al. in Support of Petitioners on Petition for a Writ of Certiorari, *June Medical Services L.L.C. et al. v. Gee* (No. 18-1323) (2019) ("ACOG Brief"), at 8; *see also Whole Woman's Health v. Lakey*, 46 F. Supp. 3d 673, 685 (W.D. Tex. 2014)

much.[33] Hospitalization following an abortion is rare, and "most studies regarding office-based clinics reported a less than 0.5 percent risk of hospitalization following a first-trimester aspiration abortion (the most frequent type of abortion)."[34] In finding Act 620 unconstitutional, the District Court below similarly found that "[l]egal abortions in Louisiana are very safe procedures with very few complications."[35] Critically, the District Court noted the lack of evidence demonstrating a medical need for or benefit from the legislation: "The record does not contain any evidence that complications from abortion were being treated improperly, nor any evidence that any negative outcomes could have been avoided if the abortion provider had admitting privileges at a local hospital."[36] Consistent with this Court's analysis in *Whole Woman's Health*, the District Court below then assessed the burdens caused by Act 620, finding that "approximately 70% of the women in Louisiana seeking an abortion would be unable to get an abortion in Louisiana,"[37] as Act 620 would leave only one clinic and one provider able to perform abortions across the state, and thus force patients to travel greater

("Evidence related to patient abandonment and potential improved continuity of care in emergency situations is weak in the face of the opposing evidence that such complications are exceedingly rare in Texas [and] nationwide.").

33. *Kliebert*, 250 F. Supp. 3d at 64-65 ("Admitting privileges do little to advance and are not necessary for continuity of care . . . . Continuity of care can be accomplished by communicating with the physician to whom the patient's care is being turned over.").

34. ACOG Brief, *supra* note 32, at 9 (citations omitted).

35. *Kliebert*, 250 F. Supp. 3d at 59.

36. *Id.* at 86-87.

37. *Id.* at 80.

distances, wait longer to be treated, and potentially resort to unsafe abortion procedures.[38] Here, as in *Whole Woman's Health*, "the record adequately supports the District Court's 'undue burden' conclusion."[39]

This drastic reduction in services will disproportionately burden low-income women and women of color. The District Court found that "[t]he vast majority of women who undergo abortions in Louisiana are poor" and "[a]s a result of that poverty, the burden of traveling farther to obtain an abortion would be significant, fall harder on these women than those who are not poor and cause a large number of these women to either not get an abortion, perform the abortions themselves, or have someone who is not properly trained and licensed perform it."[40] Moreover, "[m]any Louisiana women have difficulty affording or arranging for transportation and childcare on the days of their clinic visits, in addition to the challenge of affording the abortion itself. [] Increased travel distance to clinics exacerbates the difficulty of securing transportation."[41] The burden is compounded in this case because of Louisiana's requirement that women seeking abortions, including women living more than one hundred fifty miles from a clinic, undergo an ultrasound at least 24 hours before the procedure.[42] As the District Court found, "[w]omen who must travel increased distances to

38. *Id.* at 81-82, 87-88.

39. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2313 (2016) (citation omited).

40. *Kliebert*, 250 F. Supp. 3d at 59.

41. *Id.* at 83 (citations omitted).

42. La. Rev. Stat. Ann. § 40:1061.10(D)(2) (2016).

access abortion will in many cases have to take at least two days off from work, which has financial costs if the time off is unpaid, as is often the case in low-wage jobs. [] Many women are even at risk of losing their jobs for taking time off."[43] The District Court further found that "[i]ntercity travel for low-income women presents a number of significant hurdles, including the logistics and cost of transportation, the costs associated with time off from work, and childcare costs."[44] Given that in 2015, approximately 70% of abortions in Louisiana were obtained by women of color, it is likely that women of color will similarly be disproportionately impacted.[45]

In *Whole Woman's Health*, this Court held that there was "nothing in Texas' record evidence that shows that, compared to prior law," the admitting privileges requirement "advanced Texas' legitimate interest in protecting women's health," but that "the record evidence indicates that the admitting-privileges requirement places a 'substantial obstacle in the path of a woman's choice.'"[46] Similarly, the District Court below found that Louisiana's "admitting privileges requirement [] provides no significant health benefits to women. As in [*Whole Woman's Health*], Defendant has presented no credible

43. *Kliebert*, 250 F. Supp. 3d at 83.

44. *Id.*

45. *See* Tara C. Jatlaoui et al., *Abortion Surveillance – United States, 2015*, 67 MMWR Surveillance Summaries 13, Nov. 23, 2018, Table 13 (data showing that 70.4% of reported abortions in 2015 in Louisiana were obtained by women of color).

46. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2311-2312 (2016) (citing *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 877 (1992)).

evidence showing that, compared to prior law, Act 620 advances the state's interest in protecting women's health and safety."[47] As this Court set forth in *Whole Woman's Health*, other courts have similarly found the lack of medical benefit to women provided by admitting privileges requirements.[48]

There is ample reason for this Court to be dubious of Louisiana's asserted interest in protecting women's health and safety, as demonstrated by the words of the state's then-Governor Jindal, who explained at the time of enactment that Act 620 would "'build upon the work . . . done to make Louisiana the most pro-life state in the nation.'"[49] Louisiana's true motivation behind Act 620, to eliminate legal abortion, is further underscored by its legislature's codification of its opposition to abortion and passage of a "trigger law" to immediately outlaw abortion in the event *Roe* is overturned:

> Further, the Legislature finds and declares that the longstanding policy of this State is to protect the right to life of the unborn child from conception by prohibiting abortion impermissible only because of the decisions of the United States Supreme Court and that,

47. *Kliebert*, 250 F. Supp. 3d at 86 (citation omitted).

48. *Whole Woman's Health*, 136 S. Ct at 2312 (citing *Planned Parenthood of Wis., Inc. v. Van Hollen*, 94 F. Supp. 3d 949, 953 (W.D. Wis. 2015), *aff'd sub nom.*, *Planned Parenthood of Wis., Inc. v. Schimel*, 806 F. 3d 908 (7th Cir. 2015); *Planned Parenthood Southeast, Inc. v. Strange*, 33 F. Supp. 3d 1330, 1378 (M.D. Ala. 2014) (finding that admitting privileges requirements do not provide health benefits to women undergoing abortions)).

49. *Kliebert*, 250 F. Supp. 3d at 56 (internal citations omitted).

> therefore, if those decisions of the United States Supreme Court are ever reversed or modified or the United States Constitution is amended to allow protection of the unborn then the former policy of this State to prohibit abortions shall be enforced.[50]

Act 620, disguised as an effort to promote women's health, in reality provides no medical benefit and, instead, imposes significant obstacles for, and undue burden on, women seeking abortions.

IV. STATES ARE PASSING A WAVE OF INTENTIONALLY UNCONSTITUTIONAL ANTI-ABORTION LAWS, FLOUTING HOLDINGS OF THIS COURT AND THE PRINCIPLES OF THE CONSTITUTION.

Louisiana's continued defense of a patently unconstitutional law is part of a concerted effort on behalf of states and state legislatures to enact and defend laws designed solely to impede the ability of women in their respective states to access abortion services and to undermine this Court's holdings in *Roe*, *Casey*, and *Whole Woman's Health*.

Amici recognize that states have the power to regulate on matters of public health and to establish health care policies within their borders. State legislatures, however, may not enact laws that contravene the federal Constitution, nor enact laws that depart from established Supreme Court precedent regarding access to and the regulation of abortion.

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50. La. Rev. Stat. Ann. § 40:1061.8 (2015).

Nonetheless, like Louisiana, many states have recently passed legislation imposing undue burdens upon the right to a pre-viability abortion in direct contravention of *Roe*, *Casey*, and *Whole Woman's Health*. Such legislation takes the form of strict regulations on abortion clinics that go far beyond what is necessary to ensure patient safety, or outright pre-viability abortion bans, including so-called "fetal heartbeat laws." Certain states have enacted both types. In passing these laws, states explicitly admit that their purpose is to directly flout the rights guaranteed under the Constitution pursuant to *Roe*, *Casey*, and *Whole Woman's Health*. State legislatures appear emboldened by the change of composition on this Court and may be acting under the presumption that a differently-composed Court will abandon established precedent and ignore the rule of law. Such an affront to the Constitution constitutes an impermissible use of the states' police power.

A. States Have Enacted Targeted Regulation of Abortion Providers or TRAP Laws.

Under the false pretenses of protecting women's health, many states have recently enacted strict regulations on abortion clinics. These clinical regulations, known as Targeted Regulation of Abortion Providers or TRAP laws, are passed with the knowledge and hope that they will shutter clinics that provide abortion services by making compliance so onerous and expensive as to make such services unattainable.[51] One such law is Act 620, at issue here; another was the materially identical Texas

51. Guttmacher Institute, *Targeted Regulation of Abortion Providers* (2019), https://www.guttmacher.org/state-policy/explore/targeted-regulation-abortion-providers.

law, H.B. 2, held unconstitutional by this Court in *Whole Woman's Health*.

B. States Are Implementing Pre-Viability Abortion Bans.

Furthermore, a number of states have recently gone even further and passed laws that intentionally defy the viability standard set forth in *Roe, Casey*, and *Whole Woman's Health*.[52] Thirteen of those state laws have been enjoined by court order, either preliminarily or permanently, with many of the presiding District Courts noting that the laws are designed to attack this Court's well-established precedent.[53]

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52. Guttmacher Institute, *State Bans on Abortion Throughout Pregnancy* (2019), https://www.guttmacher.org/state-policy/explore/state-policies-later-abortions.

53. *See MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768 (8th Cir. 2015); *Edwards v. Beck*, 786 F.3d 1113 (8th Cir. 2015); *Isaacson v. Horne*, 716 F.3d 1213 (9th Cir. 2013); *Robinson v. Marshall*, No. 2:19CV365-MHT, 2019 WL 5556198 (M.D. Ala. Oct. 29, 2019); *SisterSong Women of Color Reprod. Justice Collective v. Kemp*, No. 1:19-CV-02973-SCJ, 2019 WL 4849448 (N.D. Ga. Oct. 1, 2019); *Reprod. Health Servs. of Planned Parenthood of St. Louis Region, Inc. v. Parson*, 389 F. Supp. 3d 631 (W.D. Mo. 2019), *modified sub nom.*, *Reprod. Health Servs. of Planned Parenthood of the St. Louis Region, Inc. v. Parson*, No. 2:19-CV-4155-HFS, 2019 WL 4740511 (W.D. Mo. Sept. 27, 2019); *Preterm-Cleveland v. Yost*, 394 F. Supp. 3d 796 (S.D. Ohio 2019); *Jackson Women's Health Org. v. Dobbs*, 379 F. Supp. 3d 549 (S.D. Miss. 2019); Order Granting Stipulated Preliminary Injunction as to State Defendants, *Planned Parenthood of Utah v. Miner*, (D.C. Utah April 18, 2019) (No. 19-cv-00238-CW); *Bryant v. Woodall*, 363 F. Supp. 3d 611 (M.D.N.C. 2019); *EMW Women's Surgical Ctr., P.S.C. v. Beshear*, No. 3:19-CV-178-DJH, 2019 WL 1233575 (W.D. Ky. Mar. 15, 2019); *Planned Parenthood of the Heartland, Inc. v.*

These laws include either pre-viability bans or so-called "fetal heartbeat bans" that are effectively pre-viability bans. For example, in 2019 alone, Missouri enacted a ban on abortion after eight weeks;[54] Georgia passed a ban after the detection of fetal cardiac activity, which is effectively after six weeks;[55] and Alabama has a near outright ban, imposing criminal liability on abortion providers for performing abortions in most cases.[56] Mississippi legislators enacted a law banning abortion after fifteen weeks,[57] and when that law was enjoined, Mississippi legislators doubled down, enacting a more draconian law that effectively bans abortion after six weeks by prohibiting a person from performing an abortion once fetal cardiac activity has been detected.[58]

The passage of these pre-viability bans perpetuates the campaign by these states to have this Court revisit settled law. Many state lawmakers and governors have openly admitted their goal of eliminating legal abortion in their respective states. For example, after signing the fifteen-week ban into law in Mississippi, Governor Bryant tweeted about how "proud"[59] he was to sign a bill

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Reynolds, No. EQCE83074, 2019 WL 312072 (Iowa Dist. Jan. 22, 2019); *Jackson Women's Health Org. v. Currier*, 349 F. Supp. 3d 536 (S.D. Miss. 2018).

54. Mo. Ann. Stat. § 188.056 (West 2019).

55. H.B. 481 § 4, 155th Gen. Assemb., Reg. Sess. (Ga. 2019).

56. H.B. 314, Reg. Sess. (Ala. 2019).

57. H.B. 1510, 2018 Leg., 133d Sess. (Miss. 2018).

58. S.B. 2116, 2019 Leg., 134th Sess. (Miss. 2019).

59. Phil Bryant (@PhilBryant MS), Twitter (March 19, 2018, 2:12pm), https://twitter.com/PhilBryantMS/

that will help further his long-time goal to "end abortion" in Mississippi.[60] In Georgia, Governor Kemp made the following campaign promise:

> [A]s we advance pro-life legislation, battle in the courtroom, and wait on the Supreme Court to overturn Roe v. Wade, our state must double down on the application of pro-life laws that currently exist. Through the Department of Community Health, we can ensure that the letter – and spirit – of the law is being enforced at clinics across the state. As governor, I will make enforcement a priority.[61]

After the eight-week ban passed the Missouri Senate, legislators issued a statement that was tweeted by the Missouri Senate Republicans celebrating "one of

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status/975842416287715328 ("I was proud to sign House Bill 1510 this afternoon. I am committed to making Mississippi the safest place in America for an unborn child, and this bill will help us achieve that goal.").

60. Phil Bryant, Miss. Governor, *State of the State Address* (Jan. 22, 2014), http://www.jacksonfreepress.com/news/2014/jan/22/gov-bryants-state-state-speech ("[O]n this unfortunate anniversary of Roe versus Wade, my goal is to end abortion in Mississippi."); *see also Governor Phil Bryant Gives His First State of the State Address* (Jan. 25, 2012), https://www.governorbryant.ms.gov/Pages/_Governor-Phil-Bryant-Gives-His-First-State-Of-The-State-Address.aspx ("Please rest assured that I also have not abandoned my hope of making Mississippi abortion free.").

61. Kemp for Governor, *Kemp: I'll Sign, Fight for Pro-Life Legislation*, https://www.kempforgovernor.com/posts/news/kemp-i%E2%80%99ll-sign-fight-pro-life-legislation (last visited Nov. 22, 2019).

the most pro-life bills in the United States," which "would outlaw abortion in Missouri upon the reversal of Roe v. Wade."[62] Similarly, in a statement in support of Alabama's near outright abortion ban, Lieutenant Governor Ainsworth emphasized that "[i]t is important that we pass this statewide abortion ban legislation and begin a long overdue effort to directly challenge Roe v. Wade."[63] Once the Alabama ban passed, in her signing statement, Governor Ivey stated openly that legislators were specifically defying the Constitution in order "for the U.S. Supreme Court to revisit this important matter."[64]

United States District Courts reviewing these bans, however, have overwhelmingly held them to be blatantly unconstitutional. For instance, calling it "one of the most restrictive abortion laws in the country,"[65] the District Court for the Southern District of Mississippi permanently enjoined Mississippi's fifteen-week ban, concluding that: "The State chose to pass a law it knew was unconstitutional to endorse a decades-long campaign,

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62. Missouri Senate Republicans (@MoSenateGOP), Twitter (May 16, 2019 2:01am), https://twitter.com/MoSenateGOP/status/1128948606378156035.

63. Will Ainsworth (@willainsworthAL), Twitter (May 9, 2019) retweet of Lauren Walsh (@LaurenWalshTV), Twitter (May 9, 2019 12:01pm), https://twitter.com/LaurenWalshTV/status/1126562951836635138.

64. *Governor Ivey Issues Statement After Signing the Alabama Human Life Protection Act* (May 15, 2019), https://governor.alabama.gov/statements/governor-ivey-issues-statement-after-signing-the-alabama-human-life-protection-act.

65. *Jackson Women's Health Org. v. Currier*, 349 F. Supp. 3d 536, 537 (S.D. Miss. 2018).

fueled by national interest groups, to ask the Supreme Court to overturn *Roe v. Wade*."[66] In Missouri, the District Court for the Western District of Missouri enjoined that state's eight-week ban prior to its taking effect, reasoning that:

> While federal courts should generally be very cautious before delaying the effect of State laws, the sense of caution may be mitigated when the legislation seems designed, as here, as a protest against Supreme Court decisions. . . . **The hostility to, and refusal to comply with, the Supreme Court's abortion jurisprudence is most obviously demonstrated in the attempt to push "viability" protection downward in various weekly stages to 8 weeks [from the patient's last menstrual period]**. This is contrary to repeated, clear language of the Court.[67]

The District Court for the Northern District of Georgia preliminarily enjoined the state's six-week ban, rejecting Georgia's argument that the law in this area is "unsettled," particularly "[i]n the face of this clear Supreme Court precedent, established nearly a half-century ago in *Roe* and reaffirmed decades later in *Casey* and subsequent

66. *Id.* at 542. The District Court saw through Mississippi's disingenuous professed interest in women's health, calling it "pure gaslighting . . . legislation like [the fifteen-week ban] is closer to the old Mississippi—the Mississippi bent on controlling women and minorities." *Id.* at 540 n22.

67. *Reprod. Health Servs. of Planned Parenthood of St. Louis Region, Inc. v. Parson*, 389 F. Supp. 3d 631, 637 (W.D. Mo. 2019).

cases."[68] The District Court was unequivocal: "What is clearly defined . . . is that under no circumstances whatsoever may a State prohibit or ban abortions at any point prior to viability, no matter what interests the State asserts to support it."[69]

Prior to this recent flurry of pre-viability bans, the Eighth Circuit had already held similar bans in Arkansas[70] and North Dakota to be unconstitutional.[71] This Court denied *certiorari* in both those cases, rendering the Eighth Circuit's decisions the final word on the constitutionality of the states' respective fetal cardiac activity bans. Despite the rulings by the Eighth Circuit and the series of District Court decisions finding such pre-viability bans to be unconstitutional, state legislatures continue to introduce such laws at an alarming pace. Indeed, legislatures in Florida, Maryland, Minnesota, Texas, and West Virginia have all introduced patently unconstitutional laws premised on prohibiting abortions after the detection of fetal cardiac activity, all in contravention of the principles this Court set forth in *Roe*, *Casey*, and *Whole Woman's Health*.

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68. *SisterSong Women of Color Reprod. Justice Collective v. Kemp*, No. 1:19-CV-02973-SCJ, 2019 WL 4849448, at *12 (N.D. Ga. Oct. 1, 2019).

69. *Id.* (citing *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 846, 879 (1992)).

70. *Edwards v. Beck*, 8 F. Supp. 3d 1091, 1097 (E.D. Ark. 2014), *aff'd*, 786 F.3d 1113 (8th Cir. 2015).

71. *MKB Management Corp. v. Stenehjem*, 795 F.3d 768, 772 (2015).

C. States' Anti-Abortion Laws Derive From the Deliberate Campaign of Anti-Choice Interest Groups.

The state laws described above, like Act 620 in Louisiana and H.B. 2, invalidated in *Whole Woman's Health*, perpetuate the brazen campaign pushed by anti-choice interest groups to use state police power to undermine access to safe and legal abortions and, ultimately, to overturn *Roe*. Despite this Court's pronouncements in *Casey* that a "woman's right to terminate her pregnancy before viability is the most central principle of *Roe*" and it is a "rule of law and a component of liberty that we cannot renounce,"[72] these organizations seek to "keep[] *Roe unsettled, unworkable, & obsolete*."[73]

Though they are not health care organizations, these anti-choice organizations distribute to both state and federal legislators model legislation designed to appear to protect women's health. In reality, this model legislation serves to restrict women's access to abortion and other reproductive health care services. The systematic, state-by-state adoption of these unconstitutional laws, like Louisiana's Act 620, is part and parcel of the strategy to erode the protections set forth in *Roe*, *Casey*, and *Whole Woman's Health* until they are no longer meaningful.

These anti-choice interest groups are unabashed regarding their goal to take advantage of changes in

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72. *Casey*, 505 U.S. at 871 (1992).

73. Americans United For Life, *Defending Life 2019*, at 12, https://aul.org/wp-content/uploads/2019/04/Defending-Life-2019.pdf.

the composition of this Court as part of their strategy to undermine the foundations of *Roe*. Settled constitutional principles, however, cannot be subject to shifting political winds, much less the influence of groups that seek to put their own political agenda above the holdings of this Court. Nor should settled constitutional principles be vulnerable to changes in the composition of the Supreme Court. As Justice Ginsburg emphasized at the end of her dissent in *Gonzalez v. Carhart*:

> [T]he Court, differently composed than it was when we last considered a restrictive abortion regulation, is hardly faithful to our earlier invocations of "the rule of law" and the "principles of *stare decisis*." Congress imposed a ban despite our clear prior holdings that the State cannot proscribe an abortion procedure when its use is necessary to protect a woman's health . . . . Although Congress' findings could not withstand the crucible of trial, the Court defers to the legislative override of our Constitution-based rulings . . . . A decision so at odds with our jurisprudence should not have staying power.[74]

This Court should decline to reexamine its precedents in this area. If *stare decisis* is to mean anything, it must be that this Court's prior decisions are entitled to a measure of deference such that they are not freely jettisoned simply because current members of the Court would have decided them differently.[75]

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74. *Gonzalez v. Carhart*, 550 U.S. 124, 191 (2007) (citation omitted).

75. *Id.* at 190-91 ("[T]he very concept of the rule of law underlying our own Constitution requires such continuity over

Indeed, contrary to the pronouncements of these anti-choice interest groups, the principles of *Roe* and *Casey* are not "unsettled." *This Court has held consistently held that Roe and Casey's principles remain firmly in place.* Nevertheless, those principles remain under direct attack by state legislatures that enact flatly unconstitutional laws, like Act 620, and the other state laws described above. Act 620 is an impermissible and unconstitutional challenge to this Court's precedents and it should be soundly struck down by the Court.

CONCLUSION

For the foregoing reason, *amici* urge this Court to reverse the Fifth Circuit's decision below and declare Act 620 unconstitutional.

Respectfully submitted,

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time that a respect for precedent is, by definition, indispensable." (citing *Casey*, 505 U.S. at 854)).

APPENDIX

APPENDIX — *AMICI CURIAE* MEMBERS OF CONGRESS

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