Nos. 18-1323 & 18-1460

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*.

REBEKAH GEE, SECRETARY, LOUISIANA DEPARTMENT OF HEALTH AND HOSPITALS, *Petitioner*,
v.
JUNE MEDICAL SERVICES L.L.C., *ET AL.*, *Respondents*.

On Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

Brief *Amicus Curiae* of Pro-Life Legal Defense Fund, Eleanor McCullen, One Nation Under God Foundation, California Constitutional Rights Foundation, Eberle Associates, Inc., Eagle Forum Foundation, Pass the Salt Ministries, Conservative Legal Defense and Education Fund, Missionaries to the Preborn, Policy Analysis Center, and Restoring Liberty Action Committee in Support of Rebekah Gee

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INTEREST OF THE *AMICI CURIAE*[1]

Pro-Life Legal Defense Fund, One Nation Under God Foundation, California Constitutional Rights Foundation, Eagle Forum Foundation, Pass the Salt Ministries, Conservative Legal Defense and Education Fund, and Policy Analysis Center are nonprofit educational and legal organizations, exempt from federal income tax under Internal Revenue Code section 501(c)(3). Eleanor McCullen has a pro-life counseling ministry and was the lead plaintiff in McCullen v. Coakley, 573 U.S. 464 (2014). Eberle Associates, Inc. is a for-profit corporation that works with nonprofits that is headquartered in McLean, Virginia. Missionaries to the Preborn is a pro-life ministry located in Milwaukee, Wisconsin. Restoring Liberty Action Committee is an educational organization.

Amici nonprofit organizations were established, *inter alia*, for the purpose of participating in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law. Many of these amici have filed *amicus* briefs in similar cases, including the following:

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[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

- Whole Woman's Health v. Hellerstedt, No. 15-274, Brief *Amicus Curiae* of Conservative Legal Defense and Education Fund, *et al.* (U.S. Supreme Court) (February 3, 2016);

- Whole Woman's Health v. Paxton, No. 17-51060, Brief *Amicus Curiae* of Conservative Legal Defense and Education Fund, *et al.* (Fifth Circuit) (March 5, 2018); and

- Box, Commissioner, Indiana State Department of Health v. Planned Parenthood of Ind., No. 18-483, Brief *Amicus Curiae* of Pro-Life Legal Defense Fund, *et al.* (U.S. Supreme Court) (November 15, 2018).

STATEMENT OF THE CASE

In 2014, the Louisiana legislature enacted Act 620, which requires physicians performing abortions to have "active admitting privileges at a hospital that is located not further than 30 miles from the location at which the abortion is performed or induced and that provides obstetrical or gynecological health care services." Act 620, § 1(A)(2)(a). The stated purpose was to improve abortion safety, a state interest recognized by the Supreme Court in Roe v. Wade, 410 U.S. 113, 130 (1973).

Before Act 620 went into effect, plaintiffs filed suit challenging the constitutionality of the law. Of the original plaintiffs that remain parties to this suit are June Medical Services L.L.C., d/b/a Hope Medical Group for Women (an abortion clinic), and two doctors

who work there, suing on behalf of their patients — hypothetical women who might be inconvenienced by the requirements imposed by Act 620. On August 14, 2014, the district court issued a temporary restraining order, and after a bench trial, the district court granted a preliminary injunction on January 26, 2016.

On June 27, 2016, this Court issued its decision in Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016), striking down several Texas laws relating to abortion safety, including a requirement for hospital admitting privileges similar to Louisiana's Act 620 — because those laws imposed an "undue burden" on the purported constitutional right to kill an unborn baby.[2]

On April 26, 2017, the district court in this case issued a permanent injunction against Act 620, concluding that it placed an undue burden on the ability to abort a baby. On appeal, the Fifth Circuit

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[2] Although there were differing views about when a fetus became alive in 1973 when Roe was decided, the matter is no longer in dispute. While many disagree about whether an unborn fetus is a legal person before birth, modern science has settled the question of when human life begins. On a biological level, the fetus is alive from the moment of conception. *See* Fred De Miranda, When Human Life Begins (March 2004). As far back as 1857, the American Medical Association declared the fact that a fetus is alive is a matter of objective science. Roe at 141-42. Since Roe, technology has improved, making it clearly evident that a fetus is alive from conception. The invention of the electron microscope offers true photographs of fetal development. These photographs confirm that as soon as a human egg is fertilized by a sperm, it is alive and growing. *See generally* Gerd Steding, The Anatomy of the Human Embryo: A Scanning Electron-Microscope Atlas (2009).

reversed and, applying Hellerstedt, held that plaintiffs had failed to demonstrate an undue burden. The Fifth Circuit subsequently denied rehearing *en banc*, with dissents.

On April 17, 2019, plaintiffs filed a petition for *certiorari* to this Court, seeking review of the Fifth Circuit's decision on the question of whether that decision conflicts with this Court's holding in Hellerstedt. On May 20, 2019, Louisiana filed a conditional cross-petition to address the question of whether the plaintiffs had standing to challenge Act 620 on behalf of the hypothetical women. This Court granted both petitions on October 4, 2019 and consolidated the cases.

SUMMARY OF ARGUMENT

This case concerns the constitutionality of Louisiana's recently enacted Unsafe Abortion Protection Act, the stated purpose of which is to bring abortion out-patient surgery in conformity with the same set of medical standards that already apply to physicians providing similar types of medical services through out-patient service clinics.

Purporting to assert the interests of women seeking abortions, plaintiff abortion service providers have presumed both that they have standing to litigate whatever constitutional claims that women have to challenge the Louisiana law and that the law constitutes an undue burden on her access to abortion. The abortion providers are mistaken.

First, the abortion providers mistakenly assume that their interests are aligned with the women's interest in obtaining a medically safe abortion. In reality, however their interests are substantially divergent, especially in those instances involving an abortion gone wrong. Neither the testimony of abortion providers, nor the unchallenged assertions of *amici* can substitute for a showing of undue burden by real plaintiffs.

Second, the Roe-defined privacy right to abortion is unlike any other type of privacy right, in that it is conditioned upon the woman's securing the services of a state-licensed physician to both sanction and actively participate in the abortion. That requirement presupposes the state's traditional authority to credential that physician and regulate his provision of that service, such as through the enactment of Louisiana's Unsafe Abortion Protection Act.

The only way that the Louisiana law could be struck down would be for this Court to disregard its generally applicable legal principles as to issues such as standing. Sadly, for many years, this Court has fashioned a special abortion exception to many generally applicable rules of law. This Court should follow the path it set in 2018 in National Institute of Family and Life Advocates v. Becerra, 138 S. Ct. 2361 (2018) refusing to engraft abortion exceptions onto long-established legal standards.

Lastly, this case provides the Court with a vehicle to begin to unwind its fabrication that a right to end the life of a baby *in utero* can be found in the

Constitution. The Constitution was designed to protect the pre-existing and unalienable right to life, not to destroy it.

ARGUMENT

I. DISMISSAL IS REQUIRED BECAUSE PLAINTIFF ABORTION PROVIDERS HAVE NO STANDING TO CHALLENGE THE LOUISIANA LAW, POSSESSING NEITHER "REPRODUCTIVE RIGHTS" NOR A RIGHT TO ASSERT THE "REPRODUCTIVE RIGHTS" OF WOMEN SEEKING ABORTIONS.

A. Abortion Providers May Not Assert the Rights Granted to Women in Roe and Casey.

The decision of the court of appeals below to reverse the decision of the district court and render a judgment of dismissal should be upheld for the reasons set out by the Fifth Circuit and argued to this Court on brief by Louisiana. *See* Brief for the Respondent/Cross-Petitioner ("Louisiana Brief") at 53-90. However, even before reaching the merits of the Fifth Circuit's decision, there is a threshold issue to be decided regarding which *certiorari* also was granted. The circuit court's judgment of dismissal should be upheld because the plaintiffs never presented a case or controversy over which a federal court had the authority to exercise jurisdiction. *See* Article III, section 2, clause 1, U.S. Constitution.

In this Court's two most significant abortion rulings that bear on this case, Roe v. Wade, 410 U.S. 113 (1973) and Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992), this Court created, and then modified, **a woman's right** of access to abortion. As this Court explained in Casey:

> The **woman's right** to terminate her pregnancy before viability is the most central principle of *Roe v. Wade*. It is a rule of law and a component of liberty we cannot renounce. [Casey at 871 (emphasis added).]

Yet, not even one of the plaintiffs bringing the challenge to the Louisiana Act 620 is a woman who has alleged that she was seeking or wished to seek an abortion for herself in Louisiana, or anywhere else. The plaintiffs did not even include an organization purporting to act on behalf of its members who were women seeking abortions in Louisiana. Rather, the complaint was filed by doctors performing abortions, and clinics at which abortions are performed, purporting to assert vicariously a constitutional right that belonged to others.[3] There is no doubt, then, that women seeking abortion were kept on the outskirts of this litigation.

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[3] The plaintiffs who originally brought this action were: three licensed abortion clinics in Louisiana purportedly "suing on behalf of its physicians, staff and patients" and two physicians licensed to practice medicine in Louisiana purportedly "suing on his own behalf and that of his patients." June Medical Services, LLC v. Kliebert, 250 F. Supp. 3d 27, 35 (M.D. La. 2017).

Plaintiff abortion providers seek to escape the burden of complying with the Louisiana law protecting women by contending that requiring the providers to do so would have the secondary effect of making abortions more difficult to obtain, thereby bootstrapping their way to demonstrate the requisite "undue burden" on women.

It is well-established, however that constitutional challenges to state laws may only be brought by individuals who are aggrieved personally by the challenged law. *See* Kowalski v. Tesmer, 543 U.S. 125 (2004). Only in the area of abortion has the Supreme Court ignored that basic rule of law — just as it has made exceptions to the rule of law in other areas to favor abortion "rights." *See* section III, *infra*. But no case better demonstrates such abortion contamination than the case before the Court now, where: (i) plaintiffs were emboldened to file a constitutional challenge without a proper aggrieved plaintiff; (ii) defendants never raised the issue below, having become accustomed to the normal rule of law not applying to abortion cases; and (iii) neither the district court nor the court of appeals ever thought to raise this jurisdictional issue *sua sponte*. It was not until Louisiana filed its Conditional Cross-Petition in this Court that the issue was presented for resolution.

The Louisiana Brief makes a compelling case as to why the preconditions to apply this Court's doctrine of third-party standing have not been met. *See* Kowalski at 129-30. The Louisiana Brief explains why the requisite "close" relationship between plaintiffs and the third parties that the plaintiffs purport to

represent is not met. The nature of the statute involved in this case — access to a hospital for a botched abortion — exposes an area where the interests of the woman and the abortionists are most definitely not aligned. And the Louisiana Brief explains why there was no hindrance to the ability of the third parties to protect their own interests. *See* Louisiana Brief at 25-48. Additionally, the Louisiana Brief explains in detail why third-party standing cannot be waived or forfeited — an issue on which this Court granted *certiorari*. *Id*. at 48-53.

The need for real plaintiffs is not just a formalistic, albeit constitutional, requirement. These *amici* assert that it would be much more difficult for actual women plaintiffs to successfully challenge a state law than to allow abortion providers to bring the lawsuit. Indeed, allowing abortion providers to assert the rights of pregnant women has the effect of lowering the bar to establish "undue burden," making it very easy for pro-abortion judges to leap to such a finding based on judicial speculation rather than sworn testimony. Thus, if this case were dismissed and brought by actual women plaintiffs, the outcome would not be the same — but substantially different. Thus, as a litigation strategy, plaintiff lawyers can be expected to exclude pregnant women as plaintiffs because opening them up to discovery and requiring them to make a showing based on facts would make it much harder for the judge to find an actual, real-world "undue burden."

Without a woman plaintiff, a judicial finding of undue burden could be grounded in the testimony of non-party women seeking abortions. However, not

even that occurred below. As the Louisiana Conditional Cross-Petition ("Cross-Pet.") points out, "[n]ot a single abortion patient testified against Act 620." *Id.* at 7. Thus, there was no direct evidence before the district court (or the court of appeals, or the Supreme Court) to make a meaningful finding of a real, actual burden being imposed by the state law on an actual woman's effort to obtain an abortion. *Id.* at 7-8.

Second, a finding of undue burden could be grounded in the testimony of the abortion doctors and abortion clinics, or expert witnesses engaged by such plaintiffs. However, there was ample evidence that testimony would be unreliable based on "a lengthy history of abortion clinic safety violations reflecting the clinics' indifference to doctor qualifications and the threat that indifference poses to women." Louisiana Brief in Opposition at 2. Had there been real women plaintiffs, the difference in interest between the women (who presumably would want access to a hospital for a botched abortion) and the abortionists (who want to make as much money as possible) would have been made clear to the court. This divergence of interests would provide plaintiffs' counsel with an excellent reason to exclude any real women seeking abortions as plaintiffs.

Third, a finding of undue burden could be based on the unchallenged assertions of fact contained in an *amicus* brief. Once this case was before the High Court, and certiorari granted on the cross-petition to address third-party standing, the last available way to explain the burden on women seeking abortion was

through an *amicus* brief. Is it only fortuitous that such an *amicus* brief actually was filed in this case? *See* Brief for Michele Coleman Mayes, *et al.* as *Amici Curiae* (Dec. 2, 2019) ("Mayes *Amici* Brief").

However, hearing from women *amici* is no substitute for hearing from actual plaintiffs, since the issue presented is the violation of the constitutional rights of the plaintiffs — not the *amici*. Without plaintiffs asserting their own constitutional claims on the record, the court would be legislating or otherwise making policy, not adjudicating an Article III case or controversy. Rather than focusing on the right of specific women, the courts would focus on the right of the abortionists or, at best, the right to abortion in the abstract, free from evidentiary constraints.

Likely sensing the need to fill this jurisdictional gap — among the 28 *amicus* briefs filed by pro-abortion forces — 368 women "legal professionals" (including judges, lawyers, law teachers, and law students) have submitted an *amicus* brief purporting to "speak for many ... who have, like one in four American women, ... terminated a pregnancy in their lifetimes." Mayes *Amici* Brief at 2. Their brief seeks to extol the virtues of abortion and how women who have aborted their babies have enhanced their careers as a result. The brief asserts that "[f]or some Amici, the decision to access abortion was empowering...." *Id.* at 7.

The Mayes *Amici* Brief asserts that these women, including two who filed anonymously, "share their names and stories — at great personal risk and

cost...." Mayes *Amici* Brief at 25. By filing this *amicus* brief, the Mayes *amici* undermine their own contention. First, fully 366 of the 368 women identified themselves by name, despite their protestations as to the risks they run by doing so. Second, there is reason to believe that other women whose professions likely would expose them to considerably less risk of feared repercussions than *amici* would choose to make their identities known in litigation. Third, as Justice Thomas has pointed out, "women seeking abortions have successfully and repeatedly asserted their own rights before this Court...." Hellerstedt at 2323 (Thomas, J., dissenting). But there is an even more significant flaw in *amici*'s argument. There is no reason that women seeking abortions cannot sue to vindicate their own constitutional rights using pseudonyms. Indeed, just as the district court went to great lengths to protect the identities of the plaintiffs who performed abortions, doubtless, district court Judge John W. deGravelles would have provided the same protection for women seeking abortions, had any filed as plaintiffs. *See* June Med. Servs. v. Kliebert at 35. There would be absolutely no need whatsoever for a woman to weigh "the costs and risks to outing oneself," as the Mayes *amici* fear. Mayes *Amici* Brief at 26. The entire argument by these *amici* is thus designed to obfuscate, not illuminate. It provides no support whatsoever for allowing an exception to the application of the traditional rules of third-party standing.

Further, it would be difficult not to mention the insensitivity these Mayes *amici* demonstrate to the undeniable fact that, if carried out, **every** decision to

abort a baby (*see* n. 2, *supra*) is a decision that costs a baby's life. The baby's life impedes pursuit of what they termed their "personal and professional" goals. *Id.* at 2, 5-9. Almost every meaningful consideration points in one direction — the right to have the unrestricted freedom to abort at will. Contrast this *amici* brief with the opinion of the Roe Court, which ultimately favored the woman's right to abort her baby in many circumstances, but it did not do so at the expense of disregard for the life of the human fetus:

> The pregnant woman cannot be isolated in her privacy. She carries an **embryo** and, later, a **fetus**, if one accepts the medical definitions of the **developing young** in the human uterus.... The situation therefore is inherently different from ... procreation [where] it is reasonable and appropriate for a State to decide that at some point in time another interest, that ... of **potential human life**, becomes significantly involved. The woman's privacy is no longer sole and any right of privacy she possesses must be measured accordingly. [Roe at 159 (emphasis added).]

Contrary to Roe, the Mayes *amici* claim that women should have the absolute prerogative "'to control their reproductive lives.'" As "explained" by the testimony of one of the *amici*:

> **[M]y** abortion, simply and profoundly, allowed **me** to live **my** life according to **my** plans, to complete **my** law degree, and to end a relationship with someone who was **not** the

> person I wanted to marry. [Mayes *Amici* Brief at 3 (emphasis added).]

Apparently *amicus* briefs can move judges predisposed to support abortion to find a myriad of "burdens" never proved at a hearing in district court. It has happened before. Consider Justice Breyer's opinion for the Court in Hellerstedt, which explained that, in Casey, the Supreme Court "relied heavily on ... the research-based submissions of *amici* in declaring a portion of the law at issue unconstitutional." Hellerstedt at 2310 (citations omitted). And consider Justice Ginsburg's concurring opinion in Hellerstedt, which cites four *amicus* briefs to demonstrate the lack of benefits, and the imposition of burdens, of the Texas law. Hellerstedt at 2320-21 (Ginsburg, J., concurring). Providentially, Justice Thomas's dissenting opinion in Hellerstedt made clear the folly of allowing abortion providers to assert vicariously the rights of abortion-seeking women, and then having a federal court adopt the position of the abortion providers as demonstrating "undue burden" in the abstract, without the benefit of any meaningful first hand information as to "actual undue burden." As Justice Thomas put it:

> [t]he central question under the Court's abortion precedents is whether there is an **undue burden** on a woman's access to abortion.... But the Court's permissive approach to **third-party standing** encourages litigation that **deprives us of the information needed** to resolve that issue. Our precedents encourage abortion providers to sue — and our cases then **relieve them of**

> **any obligation to prove what burdens** women actually face." [Hellerstedt at 2323 (Thomas, J., dissenting) (emphasis added).]

B. The Roe Ruling Grants No Rights to Abortion Providers.

As the State Cross-Petition further demonstrates, the evidence supporting the medical providers' claim of undue burden focused on the adverse impact that the Louisiana law had on the abortion doctors — as if they had a constitutional right to provide the abortion services that they thought best for the woman. *See* Cross-Pet. at 8-10. It would be a mistake to find a right to perform abortions based upon the language in Roe that the right may be exercised only by a woman in concert with a "physician currently licensed by the State." Roe at 165.

It is true that the Roe Court laid down a detailed factual predicate defining "the right of privacy" of a woman to "terminate her pregnancy" to include review of such concerns as:

- specific and direct harm, medically diagnosable;
- "[m]aternity, or additional offspring, may force upon the woman a distressful life and future";
- "[p]sychological harm may be imminent";
- mental and physical health may be taxed by child care;
- "distress ... associated with the unwanted child";
- "the problem of bringing a child into a family already unable, psychologically ... to care for it";

- "the additional difficulties and continuing stigma of unwed motherhood may be involved." [Roe at 153.]

Naively, the Roe Court presumed that "**All** these are factors the woman and her responsible physician necessarily will consider in consultation." *Id.* (emphasis added). In fact, however, the Roe Court made no evidentiary findings that any such consultations did, or even would. occur. To the contrary, the Fifth Circuit found in this case that:

> Plaintiffs' testimony shows that the doctors' interactions with patients are limited. The Plaintiff doctors may see as many as thirty patients per day for only a few minutes each. The required pre-abortion counseling is often not provided by the doctor who performs the abortion, but by different doctors hired solely for that separate purpose. When the doctor performs a surgical abortion, the patient is under the influence of medications that can affect her consciousness. The Plaintiff clinic schedules patients for follow-up appointments after the procedure, but Plaintiffs concede many patients do not return. Apart from the brief procedure itself, an abortion provider may not interact with a given patient at all. [Cross-Pet. at 6 (citations omitted). *See also id.* at 12-13.]

In sum, "[t]he record in this case makes clear that the doctor-patient relationship ... is not 'close'" to the Roe assumption that in contrast to the back alley

assembly-line abortion available to women in states outlawing abortion under the Roe regime, the abortion decision would be made only after careful and thorough consultation with the woman's primary care or ob/gyn specialist. Remarkably, not one of the several personal testimonies submitted by Mayes *amici* fits the sanitized version described in Roe. To be sure, there are several examples of consultations involving family members, but none of those accounts even mention an attending physician even though the Roe Court rests explicitly that the privacy right, by definition, requires the consent and action of a state-licensed physician. Ironically, a wife's physician must participate in a woman exercising her privacy right, while her impregnating husband may not. *See* Planned Parenthood v. Danforth, 428 U.S. 52 (1976).[4]

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[4] *Compare* the majority opinion in Danforth at 71 ("[I]deally, the decision to terminate a pregnancy should be one concurred in by both the wife and her husband.... But it is difficult to believe that the goal of fostering mutuality and trust in a marriage ... will be achieved by giving the husband a veto power.... We recognize, of course, that when a woman [without] the approval of her husband, decides to terminate her pregnancy, it could be said that she is acting unilaterally. The obvious fact is that when the wife and the husband disagree on this decision, the view of only one of the two marriage partners can prevail. Inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor.") *with* Justice White's dissenting opinion at 93 ("A father's interest in having a child — perhaps his only child — may be unmatched by any other interest in his life. It is truly surprising that the majority finds in the United States Constitution ... a rule that the State must assign a greater value to a mother's decision to cut off a potential human life by abortion than to a father's decision to let it mature into a live child.... These are matters which a State should be able to decide free from

In their Summary of Argument, the female law professionals write that "there is nothing less at stake here than women's 'ability to control their reproductive lives' and thus 'to participate equally in the economic and social life of the Nation.'" Mayes *Amici* Brief at 3 (quoting Casey). This claim is patently false.

The Louisiana law does not impair a woman's "ability to control [her] reproductive li[fe]." There is nothing in this record to indicate that any woman's "reproductive"sexual behavior is outside her ability to control. And there is no evidence that the passage or existence of Louisiana law increases or otherwise impairs any woman's control over her own sexual behavior and, therefore, her ability to control her reproductive life.

What the record does show, however, is the unwarranted presumption underpinning the "woman's" right to choose is that she is entitled to engage in conduct that risks an "unwanted" pregnancy from which she demands deliverance at the expense of the life of an innocent baby.

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the suffocating power of the federal judge, purporting to act in the name of the Constitution.") (citations omitted) (White, J., dissenting).

II. THIS COURT'S UNDUE BURDEN TEST IS HOPELESSLY FLAWED AND SHOULD BE ABANDONED.

In 1973, this Court established a trimester framework to govern abortion regulations.[5] Just short of 20 years later, this Court reconsidered and rejected its "trimester framework." Casey at 873. Observing its operation over that relatively short span, the Court concluded its original framework to be too "rigid" — "misconceiv[ing] the nature of the pregnant woman's interest [and] undervalu[ing] the State's interest in potential life, as recognized in *Roe*." *Id.* What the abortion right needed, the Court opined, was "flexibility," not rigidity, in recognition that, "not every law which makes [the right to abortion] more difficult to exercise is, *ipso facto*, an infringement of that right." *Id.* Rather, only those regulations that impose an "undue burden" on the exercise of a woman's right to terminate her pregnancy are constitutionally invalid. *See id.* at 874-75. In sum, the Casey Court explained:

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[5] *See* Roe at 164-65. According to Roe, during the second trimester, the State, "in promoting its interest in the health of the mother, may, if it chooses regulate the abortion procedure in ways that are **reasonably related** to **maternal health**." *Id.* at 164 (emphasis added). For the third trimester, the State may "in promoting its interest in **the potentiality of human life** may, if it chooses, **regulate, and even proscribe,** abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Id.* at 164-65 (emphasis added). The Roe decision found that viability of the baby is "usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks." Roe at 160. Thus, Roe promised to allow a State to protect a baby after viability.

> 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. [*Id.* at 877 (emphasis added).]

Although the Casey Court may have hoped that future case law would clarify on which side of the undue burden standard a particular state action might fall, the actual result has been bitter inconsistencies between lower courts that have effectively undermined any form of consistent, nationalized abortion jurisprudence. *Id.* at 864-66. The fact-specific inquiry necessitated by Casey's framework is arbitrary, subject to outcome-desired decisions based on the predilections of the judge. It has failed to develop any workable standard. Opposite results being reached from similar facts and circumstances has caused much confusion among lower courts. Some courts believe the only issue is the similarity of the words to the Pennsylvania statute analyzed in Casey, and have declined to examine the facts at all. *See* Barnes v. Moore, 970 F.2d 12, 15 (5th Cir. 1992) (holding that the Mississippi statute in question was so similar to that at issue in Casey there was no need for further proceedings to examine the facts) *cert. denied*, 113 S. Ct. 656 (1992).

Dissenting in Casey, Justice Scalia warned that the plurality's refurbished "undue burden" test would ultimately fail to provide the courts with a principled basis for judicial review, contending:

> [t]he inherently **standardless** nature of this inquiry invites the district judge to give effect to his **personal preferences** about abortion. By finding and relying upon the right facts, he can invalidate, it would seem, almost any abortion restriction that strikes him as "undue" – subject, of course, to the possibility of being reversed by the court of appeals or Supreme Court that is as **unconstrained** in reviewing his decision as he was in making it. [*Id.* at 992 (Scalia, J., dissenting) (emphasis added).]

No better illustration of Justice Scalia's prediction could be found than in this case, that has returned to this Court after it had been remanded to the district court "for consideration in light of Whole Woman's Health v. Hellerstedt..." As the Fifth Circuit recounted, on remand, the district court had "invalidated [Act 620] as facially unconstitutional," but had "overlooked that the facts in the instant case are remarkably different from those that occasioned the invalidation of the Texas statute in *WWH*." *See* June Med. Servs., L.L.C. v. Gee, 905 F.3d 787, 790 (5th Cir. 2018) ("June Med."). After a comprehensive and penetrating review of the trial record in the district court,[6] the Fifth Circuit panel, by a vote of two to one, concluded that the district court was mistaken to have found that the Louisiana Act provided "'minimal' health benefits but 'substantial burdens' and ruled the Act unconstitutional on its face under [Casey]." *Id.* at

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[6] *See* June Med. at 791-816.

793. In justification, the panel asserted that it was duty bound under this Court's "highly fact-bound opinion" in Hellerstedt, to draw its own conclusion as to whether the Louisiana law imposes a "substantial burden" on a woman's access to an abortion as provided in Roe and Casey.

Reviewing the same evidentiary record, the third member of the Fifth Circuit panel chided his colleagues for "fail[ure] to meaningfully apply the undue burden test as articulated in *Casey* and clarified in WWH and fail[ure] to give the appropriate deference to the district court's opinion, essentially conducting a second trial of the facts on this cold appellate record." June Med. at 816 (Higginbotham, J., dissenting). Indeed, dissenting Judge Higginbotham challenged his colleagues:

> On a robust trial record after conducting a six-day bench trial, the district court documented its findings of benefits and burdens in a lengthy and detailed opinion. The divergence between the findings of the district court and the majority is striking — a dissonance in findings of fact inexplicable to these eyes as I had not thought that abortion cases were an exception to the coda that appellate judges are not the triers of fact. It is apparent that when abortion comes on stage it shadows the role of settled judicial rules. [*Id.*]

Judge Higginbotham's concern validates Justice Scalia's further observation in his Casey dissent that "the joint opinion's fact-intensive analysis ... does not

result in any measurable clarification of the 'undue burden' standard." Casey at 991 (Scalia, J. dissenting). Rather, he continued, the new standard would, for the most part, consist of a judge "highlight[ing] certain facts in the record," followed by a simple announcement establishing that the challenged regulation was or was not an "undue burden." *Id.*

But the case against the "undue burden" test is not just that it is "fact bound," unmoored from any legal standard. Rather, it fatally suffers from the false predicate that the "right" protected by Roe and Casey is that a woman has the right to an abortion of a nonviable fetus. She does not. Rather, it is more accurate to identify the right to a medically safe abortion. As the Roe Court observed:

> The State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient. This interest obviously extends at least to the performing physician and his staff, to the facilities involved, to the availability of after-care, and to adequate provision for any complication or emergency that might arise. The prevalence of high mortality rates at illegal "abortion mills" **strengthens**, rather than weakens, the State's interest in regulating the conditions under which abortions are performed. [Roe at 150 (emphasis added); *see also id.* at 163.]

Thus, the Roe Court resoundedly rejected the argument of Roe and her *amici* "that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses...." *Id.* at 153. Yet, that is the legal and factual predicate upon which the undue-burden doctrine rests. *See* Casey at 874-79. Instead, the Roe Court recognized that "[t]he pregnant woman cannot be isolated in her privacy" which is "inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education, [and] [t]he woman's right of privacy is no longer sole and any right of privacy she possesses must be measured accordingly." Roe at 159. As the Roe Court observed, the privacy right of a pregnant woman to an abortion is entirely dependent on the legally unenforceable right of her attending physician who, "in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State." *Id.* at 163. The State may issue regulations "reasonably relate[d] to the preservation and protection of maternal health" (*id.*):

> Examples of permissible state regulation in this area are requirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; as to the facility in which the procedure is to be performed, that is, whether it must be a less-than-hospital status; as to the licensing of the facility; and the like. [*Id.*]

According to the Fifth Circuit, "the purpose of the Act was to bring [abortion providers] 'into the same set of standards that apply to physicians providing similar types of services in [ASCs].'" June Med. at 806. Thus, "the record here indicates that the admitting-privileges requirement performs a real, and previously unaddressed, credentialing function that promotes the wellbeing of women seeking abortion." *Id*. Neither the Act's purpose nor its effect places a substantial obstacle in the path of any woman seeking an abortion as delimited in Roe.

III. THE COURT SHOULD CONTINUE THE TREND BEGUN IN NIFLA TO REFUSE TO EMBRACE ABORTION-PREDILECTION JURISPRUDENCE.

In Roe v. Wade, Justice Blackmun pledged that the Court would decide Roe "by constitutional measurement, free of emotion or of predilection." Roe at 116. Yet, that promise was kept neither in Roe nor in most of its progeny. Repeatedly, this Court has bent established principles of law as required to protect abortion rights. In short, cases that involve abortion are decided according to different standards from cases which do not.

Indeed, Roe could never have been decided as it was had the Court not created abortion exceptions to established rules of law. Then-Justice Rehnquist's dissent in Roe enumerated these exceptions, beginning with the very same principle discussed in section I, *supra*, relating to standing:

> (i) allowing a plaintiff to seek the vindication of the constitutional rights of others. *See* Roe at 171 (Rehnquist, J., dissenting).

In all, Justice Rehnquist identified 10 departures from established principles in Roe, continuing with these:

> (ii) deciding hypothetical issues not raised by the plaintiff;
> (iii) formulating a rule of constitutional law broader than required;
> (iv) creation of a new, atextual right of "privacy";
> (v) transporting the "compelling state interest" test from the Equal Protection Clause to the Due Process Clause;
> (vi) returning to Justice Peckham's view of substantive due process expressed in Lochner v. New York, 198 U.S. 45, 74 (1905);
> (vii) finding a right to an abortion "'so rooted in the traditions and conscience of our people as to be ranked as fundamental,'" despite the fact that a majority of the States had restrictions on abortion for at least a century;
> (viii) finding a right within the scope of the Fourteenth Amendment that was "apparently completely unknown to the drafters of the Amendment";
> (ix) finding a right within the scope of the Fourteenth Amendment that the drafters never intended; and
> (x) striking down the Texas law *in toto*, rather than finding the statute unconstitutional as

> applied, even though the Court conceded that at later periods of pregnancy Texas might impose limitations on abortion. *See* Roe at 172-78 (Rehnquist, J., dissenting).

Over the ensuing 35 years, three current Justices (Justices Thomas, Roberts, and Alito) and five former Justices (Chief Justices Burger and Rehnquist, and Justices O'Connor, Scalia, and Kennedy) have all bemoaned the distortion of application of general principles of law by the pro-abortion majorities.

In 1986, Justice O'Connor and then-Justice Rehnquist accused the majority of "prematurely decid[ing] serious constitutional questions on an inadequate record, in contravention of settled principles of constitutional adjudication and procedural fairness." Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 815 (1986) (O'Connor, J., dissenting). These dissenting justices described the problem that had developed during the 13 short years since Roe:

> [t]oday's decision ... makes it painfully clear that no legal rule or doctrine is safe from **ad hoc nullification** by this Court when an occasion for its application arises in a case involving state regulation of abortion.... [Thornburgh at 814 (O'Connor, J., dissenting) (citation omitted) (emphasis added).]

In 1994, Justice Scalia penned a dissent joined by Justices Kennedy and Thomas.

> The entire injunction in this case departs so far from the established course of our jurisprudence that **in any other context** it would have been regarded as a candidate for summary reversal. **But the context here is abortion**.... Today the **ad hoc nullification machine** claims its latest, greatest, and most surprising victim: the First Amendment. [Madsen v. Women's Health Center, 512 U.S. 753, 785 (1994) (Scalia, J., dissenting) (emphasis added).]

In 2000, Justice Scalia, joined by Justice Thomas, criticized the abandonment of established legal principles whenever abortion is involved:

> What is before us ... is a speech regulation directed against the opponents of abortion, and it therefore enjoys the benefit of the **"ad hoc nullification machine"** that the Court has set in motion to push aside whatever doctrines of constitutional law stand in the way of that highly favored practice.... [Hill v. Colorado, 530 U.S. 703, 741 (2000) (Scalia, J., dissenting) (emphasis added).]

Also dissenting in Hill was Justice Kennedy who, despite having joined the Court's plurality opinion in Casey, refused to abandon his commitment to the First Amendment, and expanded on Justice Scalia's analysis using the boldest terms, stating:

> The Court's holding **contradicts more than a half century of well-established First**

> **Amendment principles....** So committed is the Court to its course that it denies these protesters, in the face of what they consider to be one of life's gravest moral crises, even the opportunity to try to offer a fellow citizen a little pamphlet, a handheld paper seeking to reach a higher law. I dissent. [*Id*. at 765, 792 (Kennedy, J., dissenting) (emphasis added).]

In 2014, this Court struck down an abortion clinic "bubble zone" law for being insufficiently tailored, but did not find it to be in violation of the content neutrality principle. McCullen v. Coakley, 573 U.S. 464 (2014).[7] Justice Kennedy joined Justices Scalia and Thomas in criticizing the notion of applying a special set of rules for abortion-related cases. Concurring with the result, Justice Scalia observed:

> Today's opinion carries forward **this Court's practice of giving abortion-rights advocates a pass** when it comes to suppressing the free-speech rights of their opponents. There is an entirely separate, **abridged edition of the First Amendment** applicable to speech against abortion. [*Id*. at 497 (Scalia, J., concurring) (emphasis added).]

In a separate concurrence in McCullen, Justice Alito explained his view of the Massachusetts statute: "[s]peech in favor of the clinic and its work by employees and agents is permitted; speech criticizing

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[7] The lead plaintiff in McCullen, Eleanor McCullen, is among the *amici* joining this brief.

the clinic and its work is a crime. This is blatant viewpoint discrimination." *Id*. at 512 (Alito, J., concurring).

In 2016, Justice Thomas noted his "oppos[ition] to the Court's abortion jurisprudence" and quoted from an earlier Justice Scalia dissent, concluding that the majority decision striking down Texas' health restrictions on abortion clinics and doctors:

> exemplifies the Court's troubling tendency "to **bend the rules** when any effort to limit abortion, or even to speak in opposition to abortion, is at issue." Stenberg v. Carhart, 530 U.S. 914 (2000) (Scalia, J., dissenting). [Hellerstedt at 2321, 2324 (Thomas, J., dissenting) (emphasis added).]

In Hellerstedt, Justice Alito, joined by Chief Justice Roberts and Justice Thomas, stated that the Court was:

> **determined to strike down** two provisions of a new Texas abortion statute in all of their applications, [and] the Court simply **disregards basic rules that apply in all other cases**.... When we decide cases on particularly controversial issues, we should take special care to apply settled procedural rules in a neutral manner. The Court has not done that here. [*Id*. at 2330, 2353 (emphasis added).]

In 2018, four justices dissented when the Court found that California's compelled speech laws for pro-life clinics violated the First Amendment. *See* National Institute of Family and Life Advocates v. Becerra, 138 S. Ct. 2361 (2018) ("NIFLA"). The majority did not apply abortion jurisprudence, but instead focused on the First Amendment principles applicable to the compelled speech. The dissenters faulted the majority for **not** applying abortion jurisprudence, claiming unironically, that "the rule of law embodies evenhandedness," at least with respect to "speech related to abortion." NIFLA at 2383, 2385 (Breyer, J., dissenting).

As with NIFLA, the case now before the Court should be analyzed using long-established, general principles of law, not special rules for abortion cases. Specifically, the Court should apply traditional rules of standing and confirm that this case does not present a case or controversy under Article III.

CONCLUSION

As we begin a new year, these *amici* urge the Court to pause and assess the damage that it has done to the fabric of the nation by creation of what pro-abortion politicians call the Super-Precedent of Roe. This tragic ruling has led directly to the death of over 60 million unborn babies — of which in one recent year, 36 percent would have been born to black women[8] — accomplishing what the Eugenics

[8] Centers for Disease Control, "*Abortion Surveillance – United States, 2015*," MMWR (Nov. 23, 2018).

Movement only could have dreamed of achieving about as it pushed for abortion rights.[9]

It is time for the Court to return to truth. The American people know that there is no right to be found in the Constitution for a woman to kill her baby *in utero*, the atextual, judicially invented doctrines of "substantive due process" and "privacy" notwithstanding. Indeed, it is a "self-evident" truth that a baby in the womb is life. For this Court to continue to declare otherwise forces the nation into a world of the upside down, destroying the confidence of the people in the Court, and organically damaging the nation.

Rather, the Constitution that has been misused by this Court to justify abortion was crafted not to authorize the taking of innocent life, but rather to implement the Declaration of Independence's promise to protect the rights with which we have been endowed by our Creator, first among which was "Life."[10] It was

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[9] *See* Brief *Amicus Curiae* of Pro-Life Legal Defense Fund, Kristina Box, Commissioner v. Planned Parenthood of Ind., No. 18-483 (Nov. 15, 2018); Kristina Box, Commissioner v. Planned Parenthood of Ind., 139 S. Ct. 1780, 1783-84 (2019) (Thomas, J., concurring) ("The use of abortion to achieve eugenic goals is not merely hypothetical... Planned Parenthood founder Margaret Sanger recognized the eugenic potential of her cause.... Many eugenicists therefore supported legalizing abortion, and abortion advocates—including future Planned Parenthood President Alan Guttmacher — endorsed the use of abortion for eugenic reasons.).

[10] *See Deuteronomy* 30:19 ("I have set before you life and death, blessing and cursing: therefore choose life, that both thou and thy seed may live.").

"to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed." But with its abortion jurisprudence, this Court has become "destructive of these ends," depriving our "posterity" of the liberties we so cherish for ourselves. To this abuse of the People's Constitution, the American people do not consent. It is past time for this Court to correct the wrong that it began in 1973, and this case provides a vehicle to take at least a first step.

Respectfully submitted,

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