Nos. 18-1323, 18-1460

In the Supreme Court of the United States

JUNE MEDICAL SERVICES L.L.C., ET AL.,
Petitioners–Cross-Respondents,
v.

REBEKAH GEE, SECRETARY, LOUISIANA DEPARTMENT OF HEALTH AND HOSPITALS,
Respondent–Cross-Petitioner.

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

BRIEF OF INNER LIFE FUND AND THE INSTITUTE FOR FAITH AND FAMILY AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT–CROSS-PETITIONER

James L. Hirsen
Counsel of Record
505 S. Villa Real Drive, Suite 208
Anaheim Hills, CA 92807
(714) 283-8880
james@jameshirsen.com

Tami Fitzgerald
The Institute for Faith and Family
9650 Strickland Road
Suite 103-222
Raleigh, NC 27615
(980) 404-2880
tfitzgerald@ncvalues.org

Deborah J. Dewart
620 E. Sabiston Drive
Swansboro, NC 28584-9674
(910) 326-4554
debcpalaw@earthlink.net

Counsel for Amici Curiae

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION AND
SUMMARY OF THE ARGUMENT 2

ARGUMENT 4

I. ABORTION DEFIES NORMAL JUDICIAL STANDARDS IN BOTH THE MEDICAL AND THE CONSTITUTIONAL CONTEXT. 4

A. Abortion is the only medical procedure where health and safety regulations must meet a standard higher than rational basis. 6

B. *Whole Woman's Health v. Hellerstedt* thrust this Court back into the role of "ex officio medical board." 8

C. In abortion cases, this Court has jettisoned the *Salerno* standard applicable to facial challenges in every other context. 13

D. Third party standing rules have been distorted in abortion litigation. 14

II. ABORTION IS A MEDICAL PROCEDURE THAT HAS BEEN DECLARED A CONSTITUTIONAL RIGHT, CREATING TENSION IN THE GOVERNMENT'S REGULATORY ROLE. 14

III. CONSTITUTIONAL RIGHTS AND MEDICAL PROCEDURES ARE ANALOGOUS IN SOME RESPECTS...... 18

A. Constitutional rights and medical procedures are both subject to reasonable regulation. 18

1. Even fundamental constitutional rights are subject to reasonable regulation........................ 19

2. The practice of medicine is subject to reasonable regulation. 20

B. The government has no affirmative obligation to ensure access to abortion, either as a medical procedure or a constitutional right.................. 23

1. The government is not obligated to finance or ensure access to abortion, even when viewed as a *constitutional* right. 24

2. The government is not obligated to fund or guarantee access to abortion or any other *medical* procedure...... 25

3. The government may express a preference for childbirth over abortion. 26

C. Access to abortion is subject to factors beyond the government's control, like any other medical procedure or any constitutional right.................. 28

1. Access to abortion depends on the willingness and ability of private parties.. 29

2. Factors beyond state control impact access to abortion. 30

CONCLUSION 31

TABLE OF AUTHORITIES

CASES

Anderson v. Celebrezze,
460 U.S. 780 (1983). 19, 20

Bates v. City of Little Rock,
361 U.S. 516 (1960). 19

Beal v. Doe,
432 U.S. 438 (1977). 12, 26, 27, 28

Bellotti v. Baird,
428 U.S. 132 (1976). 11, 12

Bellotti v. Baird,
443 U.S. 622 (1979). 16, 17

Bd. of Regents of Univ. of Wis. System v. Southworth,
529 U.S. 217 (2000). 26

Bowen v. Kendrick,
487 U.S. 589 (1988). 27

City of Akron v. Akron Ctr. for Reprod. Health, Inc.,
462 U.S. 416 (1983). . . . . *passim*

Clark v. Community for Creative Non-Violence,
468 U.S. 288 (1984). 19

Connecticut v. Menillo,
423 U.S. 9 (1975). 22

DeShaney v. Winnebago County Dept. of Social Services,
489 U.S. 189 (1989). 26

Doe v. Bolton,
410 U.S. 179 (1973). 11, 21, 22

Gibson v. Florida Legislative Investigation Committee,
372 U.S. 539 (1963). 19

Ginsberg v. New York,
390 U.S. 629 (1968). 16

Gonzales v. Carhart,
550 U.S. 124 (2007). . . . . *passim*

Harris v. McRae,
448 U.S. 297 (1980). . . . . *passim*

H. L. v. Matheson,
450 U.S. 398 (1981). 26, 27

Hodgson v. Minnesota,
497 U.S. 417 (1990). 13

June Med. Servs. v. Gee,
905 F.3d 787 (5th Cir. 2018). . . . . *passim*

June Med. Servs. v. Gee,
139 S. Ct. 663 (2019). 8

Kansas v. Hendricks,
521 U.S. 346 15

Maher v. Roe,
432 U.S. 464 (1977). . . . . *passim*

Mazurek v. Armstrong,
520 U.S. 968 (1997). 7, 10

Meyer v. Nebraska,
262 U.S. 390 (1923). 24, 25

Ohio v. Akron Center for Reproductive Health,
497 U.S. 502 (1990). 13

Parham v. J. R.,
442 U.S. 584 (1979). 21

Pierce v. Society of Sisters,
268 U.S. 510 (1925). 24, 25

Planned Parenthood Assn. of Kansas City, Mo., Inc. v. Ashcroft,
462 U.S. 476 (1983). 12, 22

Planned Parenthood of Cent. Mo. v. Danforth,
428 U.S. 52 (1976). *passim*

Planned Parenthood of Wis. v. Schimel,
806 F.3d 908 (7th Cir. 2015). 5, 25, 29, 30

Planned Parenthood v. Casey,
505 U.S. 833 (1992). . . . . *passim*

Pleasant Grove City v. Summum,
555 U.S. 460 (2009). 26

Poelker v. Doe,
432 U.S. 519 (1977). 27

Roe v. Wade,
410 U.S. 113 (1973). . . . . *passim*

Rust v. Sullivan,
500 U.S. 173 (1991). 24, 27

San Antonio Independent School District v. Rodriguez,
411 U.S. 1 (1973). 18, 19

Sendak v. Arnold,
429 U.S. 968 (1976). 21

Simopoulos v. Virginia,
462 U.S. 506 (1983). 15, 16, 22

Storer v. Brown,
415 U.S. 724 (1974). 20

Thornburgh v. American College of Obstetricians and Gynecologists,
476 U.S. 747 (1986). . . . . *passim*

United States v. Salerno,
481 U.S. 739 (1987). 13

Ward v. Rock Against Racism,
491 U.S. 781 (1989). 19

Webster v. Reproductive Health Services,
492 U.S. 490 (1989). 10, 12, 26, 27

Whole Woman's Health v. Hellerstedt,
136 S. Ct. 2292 (2016). 4, 8, 13, 14

Williamson v. Lee Optical of Oklahoma, Inc.,
348 U.S. 483 (1955). 21

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. I 1, 15, 16, 19

U.S. Const. amend. V. 15

U.S. Const. amend. XIV. 15

OTHER AUTHORITIES

Laura Wolk and O. Carter Snead, *Article: Irreconcilable Differences?* Whole Woman's Health, Gonzales*, and Justice Kennedy's Vision of American Abortion Jurisprudence*, 41 Harv. J.L. & Pub. Pol'y 719 (Summer 2018) 3, 4

INTEREST OF *AMICUS CURIAE*[1]

Amici curiae respectfully urge this Court to affirm the decision of the Fifth Circuit.

Inner Life Fund is a North Carolina non-profit, tax-exempt corporation formed on June 22, 2006 to preserve and defend the customs, beliefs, values, and practices of religious faith, as guaranteed by the First Amendment, through education, legal advocacy, and other means. JFF's founder is James L. Hirsen, professor of law at Trinity Law School and Biola University in Southern California and author of New York Times bestseller, *Tales from the Left Coast*, and *Hollywood Nation*. Mr. Hirsen is a frequent media commentator who has taught law school courses on constitutional law. Co-counsel Deborah J. Dewart is the author of *Death of a Christian Nation* (2010) and holds a degree in theology (M.A.R., Westminster Seminary, Escondido, CA).

Institute for Faith and Family ("IFF") is a North Carolina nonprofit corporation established to preserve and promote faith, family, and freedom by working in various arenas of public policy to protect constitutional liberties, including the right to life. See https://iffnc.com.

---

[1] The parties have consented to the filing of this brief. *Amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

The State of North Carolina has grappled with the type of health and safety issues this case presents. Session Law 2013-366, Part IV, s. 4(c) (Senate Bill 353), effective July 29, 2013, required the State Department of Health and Human Services to amend the rules in the North Carolina Administrative Code for clinics certified by the Department to be suitable facilities for the performance of abortions under N.C.G.S. § 14-45.1; *see* Chapter 10A NCAC 14E ("*Certifications of Clinics for Abortion*"). In spite of limited improvements, the state regulations still lack adequate protections for women seeking abortions in North Carolina.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Abortion is a medical procedure with a constitutional overlay. This dual status has plagued courts and legislatures for over four decades. When courts emphasize the constitutional aspect and minimize health concerns, public health is at risk. The Court becomes an "ex officio medical board" that invalidates commonsense health regulations—if legislatures even dare to enact them in the first place—and states may neglect their enforcement obligations, resulting in poor quality health care for women. Abortion is the only *medical* procedure that compels states to fight an uphill battle to enact reasonable health and safety regulations. It is the *only* medical procedure where regulation requires more than rational basis. And it is *only* in the abortion context that this Court's standards for third party standing and facial challenges are suspended.

It has been over 25 years since this Court's landmark ruling in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), "yet its contours remain elusive." Laura Wolk and O. Carter Snead, *Article: Irreconcilable Differences?* Whole Woman's Health, Gonzales*, and Justice Kennedy's Vision of American Abortion Jurisprudence*, 41 Harv. J.L. & Pub. Pol'y 719 (Summer 2018). Confusion reigns despite critical common features that could help resolve the tension. Even fundamental rights like free speech and voting are subject to reasonable regulation. The state may regulate the practice of medicine to ensure public safety. In both cases, there is no government obligation to finance or facilitate. The state need not pay the printing or airtime costs for a speaker. The state need not fund a medical procedure or guarantee its availability—even a life-saving procedure. The same is true of abortion: The state is not a guarantor of access. Indeed, many factors are beyond state control, including indigency, demographic shifts, variations in demand, and the willingness of private parties to establish, finance, and staff clinics. The intertwined public and private forces at work make it exceedingly difficult to trace causation. Abortion clinic closures result from a multitude of causes, including the resources and decisions of private parties, as well as market forces.

ARGUMENT

I. ABORTION DEFIES NORMAL JUDICIAL STANDARDS IN BOTH THE MEDICAL AND THE CONSTITUTIONAL CONTEXT.

As a *medical procedure*, abortion is denied the deferential rational review normally applied to health and safety regulations; and as a *constitutional right*, it has often been subjected to the rigorous standard normally reserved for the most fundamental rights.

Abortion jurisprudence has taken on a life of its own that favors this "right" above all others while often sacrificing health and safety concerns. This Court has "transformed judicially created rights like abortion into preferred constitutional rights" (*Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2329 (2016) (Thomas, J., dissenting) ("*WWH*")), elevating abortion to a position not enjoyed by *any* other medical procedure *or* constitutional right. *Gonzales* and *WWH* underscore the shifting sands of abortion law. *Gonzales* respected the "wide discretion" due to legislators in the face of "medical uncertainty." *Gonzales v. Carhart*, 550 U.S. 124, 163 (2007). *WWH* abruptly cut back that discretion: "The statement that legislatures, and not courts, must resolve questions of medical uncertainty is also inconsistent with this Court's case law." *WWH*, 136 S. Ct. at 2310. As a result, *Gonzales* and *WWH* "appear to be on a collision course, leaving the proper interpretation of *Casey* an open question." *Irreconcilable Differences,* 41 Harv. J.L. & Pub. Pol'y at 751. Unlike any other *medical* procedure—even a life-saving measure—abortion has been declared a constitutional right. And unlike any other

constitutional right, abortion implicates the same health and safety interests as any comparable medical procedure. Courts must strike a delicate balance, but if they accentuate the constitutional aspect and undermine the medical side, states hesitate to enact and/or enforce health regulations and public safety is jeopardized. Constitutional rights and medical procedures share some common features, but they are not analogous at every point.

The Seventh Circuit *Schimel* ruling (2015) illustrates the confusing overlap. The circuit court rejected as "profoundly mistaken" the argument that women could access abortion across the state border: "It's hard to imagine anyone suggesting that Chicago may *prohibit* the exercise of a free-speech or religious-liberty right within its borders on the ground that those rights may be freely enjoyed in the suburbs." *Planned Parenthood of Wis. v. Schimel*, 806 F.3d 908, 918 (7th Cir. 2015) (emphasis added). This analogy is flawed because in *Schimel*, Wisconsin did not *prohibit* abortion in a specific place—availability in a neighboring area simply undercut the "undue burden" argument. *Schimel* also failed to consider that even free speech in a traditional public forum is subject to reasonable time-*place*-manner restrictions.

A. Abortion is the only medical procedure where health and safety regulations must meet a standard higher than rational basis.

Roe v. Wade unleashed a prolonged wave of litigation challenging health and safety regulations that would be routinely upheld in any other context. Post-*Roe* litigation highlights the unique character of abortion and its overlap between medical and constitutional concerns. This Court acknowledged that physicians must have room to exercise medical judgment because "abortion is a medical procedure" but lumped it in with "fundamental rights" that demand a compelling state interest. *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 427 (1983) ("*Akron I*"). According to *Akron I*, the state's interest in health becomes compelling only after the first trimester. *Id.* at 429. *Thornburgh's* reasoning is similar, drawing harsh criticism from Justice O'Connor: "Under this prophylactic test . . . the mere possibility that some women will be less likely to choose to have an abortion . . . suffices to invalidate" a state regulation. *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 829 (1986) (O'Connor, J., dissenting) (internal citations and quotation marks omitted).

In cases of this era this Court discarded its traditional deference to legislatures regulating medical practices, to the dismay of dissenting Justices: "I had thought it clear that regulation of the practice of medicine . . . was a matter peculiarly within the competence of legislatures, . . . subject to review only

for rationality." *Thornburgh*, 476 U.S. at 802 (White, J., dissenting). If strict scrutiny were consistently applied to medical procedures, "there is no telling how many state and federal statutes . . . governing the practice of medicine might be condemned." *Id.* Chief Justice Burger expressed similar concerns about the abortion rights of minors. Parents have "the inherent right and responsibility to advise their children." *Id.* at 784 (Burger, C.J., dissenting). "Can one imagine a surgeon performing an amputation or even an appendectomy on a 14-year-old girl without the consent of a parent or guardian except in an emergency situation?" *Id.* Abortion is the only *medical* procedure where states must fight an uphill battle to ensure the safety and health of women who choose it.

In *Casey*, however, this Court criticized earlier cases for requiring "any regulation touching upon the abortion decision" to satisfy strict scrutiny. *Casey*, 505 U.S. at 871. *Casey* modified the standard applied in earlier cases, reasoning that more attention should have been paid to the portions of *Roe* that underscored state interests such as the health of the woman. *Id.* It is only where the state imposes an "undue burden" on the right to make the ultimate decision that "the power of the State reach[es] into the heart of the liberty protected by the Due Process Clause." *Id.* at 874. Applying *Casey*, *Mazurek* implicitly placed the burden on those challenging a Montana law that restricted the performance of abortions to licensed physicians: "[I]t is uncontested that there was insufficient evidence of a 'substantial obstacle' to abortion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997). This is exactly where the burden should rest.

B. *Whole Woman's Health v. Hellerstedt* thrust this Court back into the role of "ex officio medical board."

Whole Woman's Health v. Hellerstedt departed from this Court's ruling in *Gonzales*, which eschewed the role of "medical board" and restored the traditional deference to legislatures—"medical uncertainty underlying a statute is for resolution by legislatures, not the courts." *Gonzales*, 550 U.S. at 163. *Casey's* undue burden standard does not require states to "attempt to reweigh the strength of the medical justification for a law by balancing it against the law's burdens." *Id*. at 166. *WWH* abandons this deferential approach by imposing a balancing test that leaves legislatures guessing as to what this Court, acting as "ex officio medical board," might uphold. *WWH*, 136 S. Ct. at 2300 (requiring "medical benefits sufficient to justify the burdens upon access" and concluding that "neither of these provisions confers medical benefits sufficient to justify the burdens upon access that each imposes"). Here, "the parties have offered, in essence, competing *predictions*" about whether doctors will be able to comply with Louisiana's admitting privileges law. *June Med. Servs. v. Gee*, 139 S. Ct. 663, 664 (2019) (Kavanaugh, J., dissenting). Such factual disputes place this Court right back in the medical advisory board role for which it is ill-equipped. *Casey* offered greater flexibility, acknowledging that a law with minimal benefits might not present a substantial obstacle and a law with minimal burdens–-even on a "large fraction" of women—would not undermine the abortion right. *June Med. Servs. v. Gee*, 905 F.3d 787, 803 (5th Cir. 2018), citing *Casey*, 505 U.S. at 874.

History shows how this Court has vacillated between usurping the role of "medical board" and deferring to legislatures—all because this one *medical* procedure (abortion) was elevated to *constitutional* status. For years courts had to balance the state's health and safety interests against legal impediments to abortion. The *Thornburgh* dissents (Chief Justice Burger and Justice White) highlight the underlying tension between the medical and constitutional aspects of abortion. This lethal combination propelled this Court into the role of "ex officio medical board"—a role for which courts and judges are not prepared. The Court stepped into this landmine as far back as *Roe* itself, establishing the state's compelling interest point "at approximately the end of the first trimester" based on "*present medical knowledge*" because of "*now-established medical fact* . . . that until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth." *Roe v. Wade*, 410 U.S. 113, 163 (1973) (emphasis added). A decade later, Justice O'Connor pointed out the inherent flaws: "The *Roe* framework . . . is clearly on a collision course with itself" because it is "inherently tied to the state of medical technology that exists whenever particular litigation ensues." *Akron I*, 462 U.S. at 458 (O'Connor, J., dissenting) (explaining that the "compelling interest" point and the point of viability will both move as medical science progresses). The *Akron* majority assumed a distinctly medical role, declaring that "present medical knowledge" justified striking down a requirement that second-trimester abortions be performed in a hospital. *Id.* at 437. The majority had no qualms about deciding that abortion was safe enough for D&E procedures performed in "an appropriate

nonhospital setting" (*id.* at 438) and that a 24-hour "inflexible waiting period" had "no medical basis" (*id.* at 450).

Roe's trimester framework implicitly appointed this Court as the nation's "*ex officio* medical board with powers to approve or disapprove medical and operative practices and standards throughout the United States." *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 99 (1976) (opinion concurring in part and dissenting in part). But in *Webste*r, this Court began to question its role as "ex officio medical board" and chip away at the "key elements" of the *Roe* framework—"trimesters and viability"—which "are not found in the text of the Constitution or in any place else one would expect to find a constitutional principle." *Webster v. Reproductive Health Services*, 492 U.S. 490, 518-519 (1989), cited by *Gonzales*, 550 U.S. at 163-164.

Pushing this Court back into the role of "ex officio medical board" improperly places the burden of proof on the state. This approach conflicts with *Casey*, *Gonzales*, and *Mazurek*, and minimizes the magnitude of the health concerns at stake. The initial burden logically falls on the party who challenges an abortion regulation—not the state. It is consistent with this Court's pronouncement in *Gonzales* to require the challenger to demonstrate an "undue burden" rather than to compel the state to marshal evidence to justify its health regulations. The state may exercise its regulatory power when "it has a rational basis to act" and "does not impose an undue burden," "all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life,

including life of the unborn." *Gonzales*, 550 U.S. at 158. *Gonzales* implicitly places the burden on the challenger. If the challenger fails to meet it, nothing beyond rational basis review is warranted. In *Doe*, although the Court disclaimed any intent to "express [an] opinion on the medical judgment involved in any particular case," it concluded that "[t]he State...has not presented persuasive data to show that only hospitals meet its acknowledged interest in insuring the quality of the operation and the full protection of the patient." *Doe v. Bolton*, 410 U.S. 179, 195 (1973). In *Akron I* this Court required the state to demonstrate a compelling interest and cautioned that "[t]he State's regulation may be upheld only if it is reasonably designed to further that state interest." *Akron I*, 462 U.S. at 434. The majority distinguished *Danforth*, where regulations passed constitutional muster, explaining that "[t]he decisive factor was that the State met its burden of demonstrating that these regulations furthered important health-related state concerns." *Id.* at 430.

Abortion providers would have this Court wind the clock back to an earlier time when the state bore the burden of proof. But *Casey's* "undue burden" standard erected a high bar for challenges to state health regulations that touch abortion. That high bar gives states breathing space to ensure the safety and health of women seeking abortions, just as with any other medical procedure. The standard is hardly novel. Even some very early cases anticipate the language in *Casey* and/or apply a comparable standard. *Bellotti v. Baird,* 428 U.S. 132, 147 (1976) ("*Bellotti I*") ("unduly burdens"); *Maher v. Roe*, 432 U.S. 464, 473 (1977)

(quoting *Bellotti I*); *Beal v. Doe*, 432 U.S. 438, 446 (1977); *Harris v. McRae*, 448 U.S. 297, 314 (1980). As Justice O'Connor explained, cases have found an undue burden mostly "in situations involving absolute obstacles or severe limitations on the abortion decision." *Akron I*, 462 U.S. at 464 (O'Connor, J., dissenting) ("In *Roe*, the Court invalidated a Texas statute that criminalized *all* abortions except those necessary to save the life of the mother.") Justice O'Connor's dissenting opinions in *Akron I*, *Ashcroft*, and *Thornburgh* all anticipate *Casey's* "undue burden" standard. *See Planned Parenthood Assn. of Kansas City, Mo., Inc. v. Ashcroft*, 462 U.S. 476, 505 (1983) (O'Connor, J., concurring in judgment in part and dissenting in part) (concurring that pathology report and parental consent requirements are valid because neither "imposes an undue burden"; dissenting from invalidation of second-trimester hospitalization requirement, which "does not impose an undue burden"); *Thornburgh*, 476 U.S. at 828 (O'Connor, J., dissenting) (heightened scrutiny should be "reserved for instances in which the State has imposed absolute obstacles or severe limitations on the abortion decision"). In *Thornburgh*, Chief Justice Burger noted that "every Member of the *Roe* Court rejected the idea of abortion on demand," so logically what *Roe* and *Doe* require is simply "that a State not create an absolute barrier to a woman's decision to have an abortion." *Id.* at 782 (Burger, C. J., dissenting), quoting *Maher v. Roe*, 432 U.S. at 481. The trend continued into the years just prior to *Casey*; *see Webster,* 492 U.S. at 529-530 (O'Connor, J., concurring in part and concurring in judgment) (expressing the view that a regulation is "not unconstitutional unless it unduly burdens the

right to seek an abortion"); *Hodgson v. Minnesota*, 497 U.S. 417, 445 (1990) (parents may not exercise "an absolute, and possibly arbitrary, veto"—citing *Danforth*, 428 U.S. at 74); *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 519-520 (1990) *("Akron II")* (parental consent requirement with judicial bypass did not "impose an undue, or otherwise unconstitutional, burden on a minor seeking an abortion").

C. In abortion cases, this Court has jettisoned the *Salerno* standard applicable to facial challenges in every other context.

In considering this pre-enforcement facial challenge, the Fifth Circuit correctly noted that "[i]n *every* other area of law, a facial challenge requires plaintiffs to establish a provision's unconstitutionality in *every* conceivable application." *June Med.*, 905 F.3d at 815, citing *United States v. Salerno*, 481 U.S. 739, 745 (1987) (emphasis added). Abortion rights plaintiffs "are excused from that demanding standard." *Id*. Instead, an abortion restriction is facially invalid if "in a *large fraction of the cases* in which it is relevant, it will operate as a substantial obstacle." *Casey*, 505 U.S. at 895; *WWH*, 136 S. Ct. at 2320 (adopting *Casey*'s large-fraction framework). No other constitutional right—and certainly no other medical procedure—is subject to such a nebulous standard.

The Louisiana legislature clearly acted with "an intent to promote women's health . . . by ensuring a higher level of physician competence and by requiring continuity of care" and conforming abortion clinics to

the *preexisting* standards applicable to all other outpatient surgical centers. *June Med.*, 905 F.3d at 805. In any other context, such a law would easily withstand rational basis scrutiny.

D. Third party standing rules have been distorted in abortion litigation.[2]

The distortion of third party standing is yet another arena in which "the Court employs a different approach to rights that it favors." *WWH*, 136 S. Ct. at 2321 (Thomas, J., dissenting). Not one plaintiff in this case is a woman complaining that Louisiana has crippled her ability to obtain an abortion. Instead, abortion providers litigate to demand the right to abandon their patients in the event of a medical emergency. Women deserve competent medical care, and if complications arise, they are entitled to continuity of care upon admission to a hospital.

II. ABORTION IS A MEDICAL PROCEDURE THAT HAS BEEN DECLARED A CONSTITUTIONAL RIGHT, CREATING TENSION IN THE GOVERNMENT'S REGULATORY ROLE.

The government's regulatory role varies considerably depending on the subject matter. Where constitutional rights are implicated, the government must exercise restraint. But when the state regulates medical procedures, it may exercise a more active role to protect public health and safety. Where abortion is

[2] This argument is covered more thoroughly by other amici.

concerned, legislatures and courts walk a treacherous tightrope.

Constitutional Rights. When regulations impact constitutional rights, the government's paramount concern is not to infringe those rights. The First Amendment provides that government shall not "abridge" freedoms of speech, press, assembly, or petition, and shall not "prohibit" the free exercise of religion. The Fifth and Fourteenth Amendments prohibit state action that "deprives" any person of life, liberty, or property without due process of law.

Medical Procedures. The government has far greater latitude to regulate the practice of medicine. "In view of its interest in protecting the health of its citizens, the State necessarily has considerable discretion in determining standards for the licensing of medical facilities." *Simopoulos v. Virginia*, 462 U.S. 506, 516 (1983). The state has discretion in the face of medical uncertainty. *See Kansas v. Hendricks,* 521 U.S. 346, 360 n. 3 (1997). Informed written consent is a standard practice that cuts across many procedures and may vary depending on surgical risk and other factors. *Danforth*, 428 U.S. at 67 ("we see no constitutional defect in requiring it only for some types of surgery . . . or where the surgical risk is elevated above a specified mortality level"). Here, the Fifth Circuit considered empirical evidence and did not foreclose a later as-applied challenge.

Abortion. Courts have generally found abortion subject to comparable regulation. *Roe v. Wade*, 410 U.S. at 150 (state has interest in the facilities and circumstances in which abortions are performed);

Simopoulos v. Virginia, 462 U.S. at 510-511 (same); *Akron I*, 462 U.S. at 428-429 (state has important interests in safeguarding health and maintaining medical standards). As in other contexts, "[m]edical uncertainty does not foreclose the exercise of legislative power." *Gonzales*, 550 U.S. at 164. Otherwise, a zero tolerance policy would invalidate many reasonable regulations merely because of disagreement among medical experts. That would be "too exacting a standard to impose on the legislative power. . .to regulate the medical profession." *Id*. at 166. This Court has validated informed consent requirements for abortion. *Casey*, 505 U.S. at 884 ("no different from a requirement that a doctor give certain specific information about any medical procedure"); *Gonzales*, 550 U.S. at 163-164 (same).

Abortion is a quintessential medical procedure that impacts health and safety—the primary concerns in this case—but it has also been elevated to constitutional status. The tension between these categories emerges in scores of cases brought before this Court over the years. Some cases lean heavily toward the constitutional side with scant consideration of health. In *Bellotti II*, e.g., this Court intentionally granted minors greater protection for abortion than for First Amendment liberties, comparing abortion to its decision in *Ginsberg v. New York*, 390 U.S. 629 (1968) rejecting a First Amendment defense to conviction for sale of sexually oriented magazines to minors. *Bellotti v. Baird*, 443 U.S. 622, 636-637 (1979) ("*Bellotti II*"). Explaining the discrepancy, this Court bluntly elevated abortion above other rights: "But we are concerned

here with a constitutional right to seek an abortion." *Id*. at 642.

Casey recognized the tension, noting that some earlier cases gave too little attention to the health interests acknowledged in *Roe*: "*Those cases decided that any regulation touching upon the abortion decision must survive strict scrutiny*, to be sustained only if drawn in narrow terms to further a compelling state interest." *Casey*, 505 U.S. at 871 (emphasis added). These earlier cases cannot all "be reconciled with the holding in Roe itself that the State has legitimate interests in the health of the woman." *Id*. This Court chose "to rely upon *Roe*" to resolve the tension (*id*.), reaffirming the state's "legitimate interests from the outset of the pregnancy in protecting the health of the woman" (*id*. at 846). Moreover, this Court called it an overstatement to describe abortion as a right to decide "without interference from the State." *Id*. at 875, citing *Danforth*, 428 U.S. at 61. Instead, the right recognized by *Roe* is the "right to be free from unwarranted governmental intrusion" in making the abortion decision. *Casey*, 505 U.S. at 875 (citation and internal marks omitted). "Not all governmental intrusion is of necessity unwarranted." *Id*. Considering the medical risks and potential complications, reasonable regulation is warranted, just as it would be for any other medical procedure.

III. CONSTITUTIONAL RIGHTS AND MEDICAL PROCEDURES ARE ANALOGOUS IN SOME RESPECTS.

Notwithstanding tension in the government's regulatory role, there are some similarities between constitutional rights and medical procedures. Both categories are subject to reasonable regulation. In both cases, the government has no affirmative duty to finance or ensure the most convenient means of access. Finally, many factors beyond state control impact the availability of a medical procedure or the means to exercise a constitutional right.

A. Constitutional rights and medical procedures are both subject to reasonable regulation.

Americans have historically treasured certain fundamental liberties. The ability to access safe medical care is also important. There are nuances applicable in each category, but in both instances the state may enact reasonable regulations.

As a medical procedure, abortion regulations should be subject to rational basis review absent a high level of deprivation. In one of the early challenges—foreshadowing *Casey's* "undue burden" standard—Justice O'Connor observed that "[t]he requirement that state interference 'infringe substantially' or 'heavily burden' a right before heightened scrutiny is applied is not novel in our fundamental-rights jurisprudence, or restricted to the abortion context." *Akron I*, 462 U.S. at 462 (O'Connor, J., dissenting), citing *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1,

37-38 (1973) (strict scrutiny applicable where legislation has "deprived," "infringed," or "interfered" with a fundamental right). Even in the First Amendment context, this Court has sometimes required substantial interference. *Id*. at 462-463, citing *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 545 (1963) ("infringe substantially"); *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960) ("significant encroachment upon personal liberty").

1. Even fundamental constitutional rights are subject to reasonable regulation.

Free speech is a cherished fundamental right. But even in a traditional public forum, where the right to speak is at its zenith, the state may impose "reasonable restrictions on the time, place, or manner of protected speech." *Ward v. Rock Against Racism,* 491 U.S. 781, 791 (1989). Such restrictions must be "justified without reference to the content of the regulated speech," "narrowly tailored to serve a significant governmental interest," and "leave open ample alternative channels for communication of the information." *Id*., citing *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

Casey noted a comparable principle: "[N]ot every law which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right." *Case*y, 505 U.S. at 873. Even where voting rights are at stake, "States are granted substantial flexibility in establishing the framework within which voters choose the candidates for whom they wish to vote." *Id*. at 873-874, citing *Anderson v. Celebrezze*, 460 U.S. 780, 788

(1983). "[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer v. Brown*, 415 U.S. 724, 730 (1974).

2. The practice of medicine is subject to reasonable regulation.

As a medical procedure, abortion is subject to reasonable regulation. Louisiana did not legislate in a vacuum. The state's Unsafe Abortion Protection Act (Act 620) serves three important purposes: (1) "a higher level of physician competence," (2) "requiring continuity of care" for women suffering complications, and (3) uniformity of regulation, i.e., bringing abortion clinics "into conformity with the *preexisting* requirement that physicians at ambulatory surgical centers (ASCs) must have privileges at a hospital within the community." *June Med.*, 905 F.3d at 805. When considering the Act, the Louisiana Senate Committee on Health and Welfare listened to testimony from women experiencing complications who were "treated *harshly* by the provider," and testimony that "established health and safety violations" by abortion clinics in the state. *Id.* at 792.

Abortion has triggered a wave of litigation challenging health and safety regulations that would never reach the courts in any other context. Louisiana's preexisting regulation of ASCs has not been challenged as unduly burdensome to patients. Even *Roe* conceded that "[the] State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that ensure maximum

safety for the patient." *Roe*, 410 U.S. at 149-150. Those interests in health and safety are "legitimate objectives, amply sufficient to permit a State to regulate abortions *as it does other surgical procedures*." *Id*. at 170-171 (Stewart, J., concurring) (emphasis added). The abortion right is "not unqualified" but rather must be weighed against "important state interests in regulation." *Id*. at 154. Similarly, *Roe's* companion case affirmed that "a pregnant woman does not have an absolute constitutional right to an abortion on her demand." *Doe v. Bolton*, 410 U.S. at 189.

It is "for the legislatures, not the courts, to balance the advantages and disadvantages" of laws regulating medical procedures. *Williamson v. Lee Optical of Oklahoma, Inc*., 348 U.S. 483, 487 (1955). In *Lee Optical*, this Court declined to invalidate a law forbidding an optician from duplicating lenses without a prescription from an ophthalmologist or optometrist. "The mode and procedure of medical diagnostic procedures is not the business of judges." *Parham v. J. R*., 442 U.S. 584, 607-608 (1979) (upholding Georgia's system for voluntary mental health commitment of juveniles at parental request). "There is nothing in the United States Constitution which limits the State's power to require that medical procedures be done safely. . . ." *Akron I*, 462 U.S. at 459-460 (O'Connor, J., dissenting), quoting *Sendak v. Arnold*, 429 U.S. 968, 969 (1976) (White, J., dissenting from summary affirmance of district court ruling invalidating Indiana law requiring that first trimester abortions be conducted by a physician in a licensed health facility). Moreover, "[m]edical uncertainty does not foreclose the exercise of legislative power" with respect to any

medical procedure, including abortion. *Gonzales v. Carhart*, 550 U.S. at 164.

Personnel and Facilities. This case involves Louisiana's regulation of the persons who perform abortions and the facilities where they are performed. Comparable regulation in any other context would easily pass judicial review. Some cases abandon the normal standard where abortion is regulated. *Ashcroft*, 462 U.S. 476 (invalidating second-trimester hospital requirement); *Akron I*, 462 U.S. at 433 (same). But that is exactly the type of legislation this Court found permissible in *Roe*—"requirements as to the qualifications of the person who is to perform the abortion" and "the facility in which the procedure is to be performed . . . whether it must be a hospital or may be a clinic or some other place of less-than-hospital status." *Roe*, 410 U.S. at 163; *see also Doe v. Bolton*, 410 U.S. at 194-195 (state may adopt standards for licensing facilities). *See also Connecticut v. Menillo,* 423 U.S. 9, 11 (1975) (state may constitutionally prohibit person with no medical training from performing abortion). "In view of its interest in protecting the health of its citizens, the State necessarily has considerable discretion in determining standards for the licensing of medical facilities." *Simopoulos v. Virginia*, 462 U.S. at 516 (upholding "outpatient surgical hospital" requirement for all second-trimester abortions).

Informed consent. Medical procedures are typically subject to informed consent provisions. *Casey* found these requirements valid for abortion, including 24-hour waiting periods, "as with any medical

procedure." *Casey*, 505 U.S. at 881, citing *Danforth*, 428 U.S. at 67. This holding overruled portions of two earlier cases. *Id*. at 882; *see Akron I*, 462 U.S. at 449-450 (inflexible waiting period allegedly had "no medical basis"). Chief Justice Burger's dissent in *Thornburgh* anticipates *Casey*: "Today the Court astonishingly goes so far as to say that the State may not even require that a woman contemplating an abortion be provided with accurate medical information concerning the risks inherent in the medical procedure which she is about to undergo. . . ." *Thornburgh*, 476 U.S. at 783 (Burger, C.J., dissenting). Yet undoubtedly "doctors routinely give similar information concerning risks in countless procedures having far less impact on life and health . . . risk[ing] a malpractice lawsuit if they fail to do so[.]" *Id*. *Casey* followed the standard for commercial speech, allowing the state to require "the giving of truthful, non-misleading information" about the procedure and attendant risks. *Casey*, 505 U.S. at 882. Moreover, as with other procedures involving another person, e.g., a kidney transplant involving a donor, the state may require information about consequences to the fetus. *Id*. at 882-883. *Casey* treated abortion as a medical procedure and not merely a constitutional liberty.

B. The government has no affirmative obligation to ensure access to abortion, either as a medical procedure or a constitutional right.

The state is not a guarantor of access to or funding for abortion. In *Harris v. McRae*, this Court upheld the Hyde Amendment's denial of public funding for abortions, noting that the Due Process Clause

"protection against unwarranted government interference with freedom of choice . . . does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom." 448 U.S. at 317-318. Even the dissent admitted that "*Roe* and its progeny" do not stand for the proposition that "the State is under an affirmative obligation to ensure access to abortions for all who may desire them." *Id.* at 330 (Brennan, J., dissenting).

1. The government is not obligated to finance or ensure access to abortion, even when viewed as a *constitutional* right.

"The Government has no constitutional duty to subsidize an activity merely because the activity is constitutionally protected." *Rust v. Sullivan*, 500 U.S. 173, 201 (1991). Moreover, "state encouragement of an alternative activity consonant with legislative policy" is not tantamount to "direct state interference with a protected activity." *Maher v. Roe*, 432 U.S. at 475 (upholding Connecticut regulation limiting Medicaid benefits for first trimester abortions to those "medically necessary"). The state may encourage actions believed to be in the public interest but crosses the constitutional line when it "attempts to impose its will by force of law." *Id.* at 476. *Meyer v. Nebraska* upheld a parent's liberty to have a child learn a foreign language. 262 U.S. 390, 400 (1923). Parents have the right to select private schooling. *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) (the state may not "standardize its children by forcing them to accept instruction from public teachers only"). Neither case

imposed a duty on the state to fund the specific right—to study a foreign language (*Meyer*) or to attend private rather than public school (*Pierce*). *Maher v. Roe*, 432 U.S. at 476-477.

No state is required to remove all roadblocks to ensure the most convenient or inexpensive means of exercising the right to abortion or any other right: "[T]here is no constitutional right to obtain an abortion at the clinic of one's choice and at the time of one's convenience, just as one's right to free speech does not apply in all places a protester might desire to complain." *Schimel*, 806 F.3d at 932 (Manion, J., dissenting). The state does not create an "undue burden" whenever a health and safety regulation "decreases the availability of qualified abortionists." *Id.* To argue otherwise implies the state has "some affirmative duty both to provide abortion services and to do so in a manner that is convenient for consumers" regardless of the healthcare providers' quality. "*The state bears no such obligation or duty*." *Id.* (emphasis added).

2. The government is not obligated to fund or guarantee access to abortion or any other *medical* procedure.

The state is not required to ensure access to *any* medical treatment—not even treatments for a terminal illness. The state is not obligated to "pay *any* of the medical expenses of indigents," although it is subject to certain constitutional principles of equality if it voluntarily provides medical benefits to alleviate poverty. *Maher v. Roe*, 432 U.S. at 469-470 (emphasis added). As this Court has recognized, "the Due Process

Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 196 (1989).

The same principles hold true for abortion. "The Constitution does not compel a state to fine-tune its statutes so as to encourage or facilitate abortions." *Akron I*, 462 U.S. at 466 (O'Connor, J., dissenting), quoting *H. L. v. Matheson*, 450 U.S. 398, 413 (1981).

3. The government may express a preference for childbirth over abortion.

"A government entity has the right to 'speak for itself.'" *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009), citing *Bd. of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 229 (2000). The state may encourage childbirth and act accordingly in its messaging and allocation of resources. *Harris v. McRae*, 448 U.S. at 325. *Roe v. Wade* "implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion." *Webster*, 492 U.S. at 506, quoting *Maher v. Roe*, 432 U.S. at 474; *see also Beal v. Doe*, 432 U.S. at 445 ("As we acknowledged in *Roe* . . . the State has a valid and important interest in encouraging childbirth.").

The state may express its preference by declining to finance abortion. *Beal v. Doe*, 432 U.S. at 447 (upholding Pennsylvania's refusal to extend Medicaid coverage to nontherapeutic abortions); *Maher v. Roe*,

432 U.S. at 473-474 (the state may implement its value judgment in favor of childbirth by allocating public funds accordingly); *Bowen v. Kendrick,* 487 U.S. 589, 596-597 (1988) (upholding the Adolescent Family Life Act's restriction of funding to "programs or projects which do not provide abortions or abortion counseling or referral"); *Rust v. Sullivan*, 500 U.S. at 201 (upholding regulations limiting ability of Title X recipients to engage in abortion-related activities).

Justice O'Connor pointed out in *Akron I* that *Roe* protects against "drastically limiting the availability and safety" of abortion (*Maher v. Roe*, 432 U.S. at 473). *Akron I*, 462 U.S. at 464 (O'Connor, J., dissenting). Prohibited state action includes imposing an "absolute obstacle" (*Danforth*, 428 U.S. at 70-71, n. 11), "official interference" or "coercive restraint" (*Harris v. McRae*, 448 U.S. at 328 (White, J., concurring)). *Id*. But a regulation is not invalid merely because it might inhibit abortions to some degree. *H. L. v. Matheson*, 450 U.S. at 413. The City of St. Louis committed "no constitutional violation . . . in electing, as a policy choice, to provide publicly financed hospital services for childbirth without providing corresponding services for nontherapeutic abortions." *Poelker v. Doe*, 432 U.S. 519, 521 (1977). *Webster, Maher*, *Beal*, *McRae*, *Poelker*, *Rust*, and *Bowen* firmly establish that the government has no obligation to commit any resources to financing or facilitating abortions.

Persuasion is also constitutional. Under *Casey's* undue burden standard, the state may "enact persuasive measures which favor childbirth over abortion, *even if those measures do not further a health*

interest." *Casey*, 505 U.S. at 886 (emphasis added). This standard aligns with earlier cases such as *Beal* and *Maher* but departs from (and partially overrules) certain intervening rulings. In the mid-1980's, this Court held that "the State may not require the delivery of information designed 'to influence the woman's informed choice between abortion or childbirth.'" *Thornburgh*, 476 U.S. at 760, quoting *Akron I*, 462 U.S., at 443-444. The Court reasoned that "much of the information required is designed not to inform the woman's consent but rather to persuade her to withhold it altogether." *Thornburgh*, 476 U.S. at 762, quoting *Akron I*, 462 U.S. at 444. The dissent, foreshadowing *Casey's* reaffirmation of the state's right to persuade, pointed out the departure from this Court's earlier decisions in *Maher*, *Beal*, and *Harris v. McRae*, which all affirm the state's right to encourage childbirth and provide "accurate information regarding abortion and its alternatives [as] a reasonable and fair means of achieving that objective." *Thornburgh*, 476 U.S. at 801-802 (White, J., dissenting).

C. Access to abortion is subject to factors beyond the government's control, like any other medical procedure or any constitutional right.

When outside factors restrict access to abortion, the state does not cause an "undue burden." As a result, state action is absent and there is no constitutional violation. The government is not in control of every factor that potentially impacts access to abortion. The multitude of factors, both within and outside the state's control, renders it difficult to trace causation precisely

and determine whether the state has imposed an "undue burden." There may be private factors at work, e.g., lack of qualified professionals willing to perform abortions, lack of privately owned clinics, indigence, demographic shifts, and market fluctuation. State regulation is only one factor among many. In a pre-enforcement challenge such as this case presents, there is precise way to predict whether and/or how the law itself might impact access.

Even when factors are within government control, not all burdens are unconstitutional. "Numerous forms of state regulation might have the incidental effect of increasing the cost or decreasing the availability of medical care, whether for abortion or any other medical procedure." *Casey*, 505 U.S. at 874; *see also Gonzales*, 550 U.S. at 157-158. Moreover, the undue burden standard does not require the state to guarantee access to abortion in a certain region or state. "The Supreme Court's abortion jurisprudence carries no intrastate guarantee." *Schimel*, 806 F.3d at 931 (Manion, J., dissenting).

1. Access to abortion depends on the willingness and ability of private parties.

Medical clinics, including June Medical Services and others that perform abortions, are typically set up by private parties who raise the necessary capital and oversee operations. Privately owned clinics, like any other business, must be financially viable to survive. Private individuals must be willing and able to do the necessary footwork. Individual health care professionals must acquire certain training so they can

meet state licensing requirements. Individuals must invest financially in facilities if clinics are to be established and continue operating. Here, the Fifth Circuit concluded that "there is an insufficient basis in the record to conclude that the law has prevented most of the doctors from gaining admitting privileges. Similarly, any clinic closures that result from the doctors' inaction cannot be attributed to Act 620." *June Med.*, 905 F.3d at 811.

This Court "has never required a state to establish a command economy in order to provide abortions." *Schimel*, 806 F.3d at 933 (Manion, J., dissenting). If the market disfavors abortion, that "is not the state's concern, but the prerogative of the purveyors of that service." *Id.* The state is "under no compulsory receivership that obligates it to intervene if the market fails to provide qualified abortionists within its boundaries. State inaction is not state action." *Id.* If the will of the private sector is lacking, the state is not obligated to fill the gap, and abortion services will be less available. But there is no "undue burden" under these circumstances.

2. Factors beyond state control impact access to abortion.

Many factors combine to render abortion more or less accessible. The state is not responsible for all of these circumstances. Indigency and all that accompanies it—issues with transportation, childcare, and employment—exemplifies this type of factor. "The indigency that may make it difficult—and in some cases, perhaps, impossible—for some women to have abortions is neither created nor in any way affected by

the Connecticut regulation." *Maher v. Roe*, 432 U.S. at 474 (upholding Connecticut Medicaid regulation that funded childbirth but not non-therapeutic abortions). This Court has long recognized the outer limits of state responsibility: "[A]lthough government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation. *Indigency falls in the latter category*." *Harris v. McRae*, 448 U.S. at 316-317 (emphasis added). The Hyde Amendment at issue in *McRae* left women with the same choices as if the government had chosen not to fund health care at all.

CONCLUSION

The Fifth Circuit decision should be affirmed.

Respectfully submitted,

James L. Hirsen
Counsel of Record
505 S. Villa Real Drive
Suite 208
Anaheim Hills, CA 92807
(714) 283-8880
james@jameshirsen.com

Deborah J. Dewart
620 E. Sabiston Drive
Swansboro, NC 28584-9674
(910) 326-4554
debcpalaw@earthlink.net

Tami Fitzgerald
The Institute for Faith and Family
9650 Strickland Road
Suite 103-222
Raleigh, NC 27615
(980) 404-2880
tfitzgerald@ncvalues.org

Counsel for Amici Curiae