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

BRIEF OF AMICI CURIAE ETHICS & RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONFERENCE AND LUTHERAN CHURCH–MISSOURI SYNOD IN SUPPORT OF RESPONDENT/CROSS-PETITIONER

ALEXANDER DUSHKU
R. SHAWN GUNNARSON
Counsel of Record
JAMES C. PHILLIPS
JESSICA A. HORTON
KIRTON | MCCONKIE
36 South State Street
Suite 1900
Salt Lake City, Utah 84111
(801) 328-3600
sgunnarson@kmclaw.com

Counsel for Amici Curiae

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Amici are religious organizations with a shared commitment to religious freedom under the First Amendment. Although we have serious religious objections to abortion under many circumstances, we do not contest that this Court's precedents declare a constitutional right to abortion. We are submitting this brief to propose an alternative approach to the question presented that more closely tracks this Court's long-established substantive due process jurisprudence under the Fourteenth Amendment.

SUMMARY OF ARGUMENT

The question presented asks whether the Fifth Circuit's decision conflicts with *Whole Woman's Health* v. *Hellerstedt*, 136 S. Ct. 2292 (2016). See Pet. Br. i. Fairly included in that question is whether the undue burden test applied in *Hellerstedt* and the decision below reflects the correct standard under the Due Process Clause of the Fourteenth Amendment for laws like Louisiana Act 620, La. Stat. § 40:1061.10.

Multiple decisions hold that a woman has a fundamental right to obtain an abortion before her unborn child is viable. See, *e.g.*, *Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833, 877 (1992) (plurality opinion). While we have grave concerns about those decisions, we do not question them here. This brief explains instead why the Court should abandon the undue

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[1] Pursuant to Rule 37.3, counsel for all parties have submitted letters to the clerk expressing their blanket consent to *amicus curiae* briefs. Pursuant to Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part and that no entity or person, other than *amici*, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief.

burden test in cases challenging the validity of laws that regulate medical professionals who perform abortions.

The undue burden test is the incorrect standard for such laws. That test applies heightened scrutiny to health-and-safety regulations. This is a sharp departure from the usual rule under the Fourteenth Amendment, which measures the validity of health-and-safety legislation by ordinary rational basis review. Moreover, the undue burden test as applied to medical regulations affecting abortion providers bears no relation to the text or history of the Fourteenth Amendment.

Stare decisis poses no impediment to discarding the undue burden test as to such regulations. Although adherence to precedent generally promotes consistency and integrity, its dictates are less urgent when it comes to constitutional interpretation. *Casey*'s reasons for applying the undue burden test to laws regulating abortion providers are unpersuasive. Applying the undue burden test to medical regulations is inconsistent with other related decisions. And the test has proved unworkable in the lower courts. Finally, abortion providers have no reasonable reliance interest on the undue burden test as a shield from valid health-and-safety regulations.

In cases contesting the constitutionality of laws regulating abortion providers, the undue burden test should give way to the standard described in *Washington* v. *Glucksberg*, 521 U.S. 702 (1997). As the controlling standard for substantive due process, *Glucksberg* offers a precise standard grounded in history and tradition. That familiar standard ought to determine whether Louisiana Act 620 denies petitioners due process of law. If the Act violates a

fundamental right, strict scrutiny applies. If not, the Act should be presumed valid unless it fails ordinary rational basis review. Petitioners do not assert a fundamental right of their own, and the fact that nine states including Louisiana require abortion providers to have similar hospital admittance privileges makes the existence of a fundamental right to avoid hospital-admittance requirements unlikely. And there is no evidence that Act 620 prevents a single woman from obtaining an abortion. It follows that Act 620 is subject to ordinary rational basis review.

Act 620 readily meets that standard. It serves Louisiana's interest in protecting the health of women seeking an abortion—an interest that this Court's decisions since *Roe* have deemed legitimate. Requiring medical professionals who perform abortions to have admittance privileges at a nearby hospital is rationally related to that interest. It is eminently rational to insist that physicians who perform abortions make advance arrangements with a nearby hospital to ensure a woman's safety and continuity of care in case of an emergency.

Act 620 is, in short, a valid exercise of Louisiana's authority to enact reasonable health-and-safety measures. The Act does not target abortion providers for unique burdens; it only holds such providers to the same standard already required of other surgical centers. As such, Act 620 poses at most an incidental burden and not an infringement of the abortion right. It follows that Louisiana's effort to protect women's health and safety should be sustained.

ARGUMENT

I. The undue burden test should not govern laws regulating abortion providers.

A. Applying the undue burden test to such medical regulations is incorrect.

1. The petitioners' case necessarily turns on whether *Casey*'s undue burden test controls the validity of Louisiana Act 620. It should not.

In *Casey*, the joint opinion by Justices O'Connor, Kennedy, and Souter concludes that "the undue burden standard is the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty." 505 U.S. at 876 (plurality opinion). The plurality explains that a law imposes an undue burden on the abortion right when it "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. This undue burden test governs *both* laws that "prohibit any woman from making the ultimate decision to terminate her pregnancy before viability" *and* "regulations to further the health or safety of a woman seeking an abortion." *Id.* at 878, 879.

To bolster this conclusion, *Casey* cites *Carey* v. *Population Services International*, 431 U.S. 678 (1977). See 505 U.S. at 875. *Carey* held that the same level of judicial scrutiny should be directed at "state regulations that burden an individual's right to decide to prevent conception or terminate pregnancy" as to "state statutes that prohibit the decision entirely." 431 U.S. at 688. *Carey* explained that equivalent treatment is justified not because such regulations are "an independent fundamental right," but because

"such access is essential to exercise of the constitutionally protected right of decision in matters of childbearing." *Id.* Guided by *Carey*, *Casey* held that the same undue burden standard applies to laws seeking to protect maternal health as to laws restricting the abortion right. See 505 U.S. at 878 (plurality opinion).

Yet subjecting these different categories of legislation to the same constitutional standard is inconsistent with *Casey*'s recognition that "not every law which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right." *Id.* at 873. *Casey* points out, for instance, that "not every ballot access limitation amounts to an infringement of the right to vote." *Ibid.* By the same token, not every regulation affecting abortion offends due process. "The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it." *Id.* at 874.

Laws that prevent a woman from obtaining an abortion are unlike laws regulating medical professionals who perform an abortion. Contrast Louisiana Act 620 with the Mississippi statute recently declared unconstitutional by the Fifth Circuit. That statute imposed an outright ban on abortions after fifteen weeks' gestation. *Jackson Women's Health Org.* v. *Dobbs*, No. 18-60868, 2019 WL 6799650, at *1 (5th Cir. Dec. 13, 2019). Compared with that ban, Louisiana's requirement that abortion doctors have admitting privileges at a nearby hospital is an incidental burden indeed.

This distinction between laws that incidentally burden a fundamental right and laws infringing that

right is principled and logical. Marriage and the use of contraceptives are fundamental rights. See *Loving* v. *Virginia*, 388 U.S. 1, 12 (1967); *Eisenstadt* v. *Baird*, 405 U.S. 438, 453 (1972). But laws regulating wedding chapels and pharmacists are not, for that reason, constitutionally suspect. See *Zablocki* v. *Redhail*, 434 U.S. 374, 386 (1978) (denying that "every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny"). The same is true of other fundamental rights like the right to vote, *Bullock* v. *Carter*, 405 U.S. 134, 143, (1972), and the right to a free press, *Cohen* v. *Cowles Media Co.*, 501 U.S. 663, 669 (1991).

2. Applied to medical regulations, the undue burden test pays scant respect to legitimate governmental interests. *Casey* affirmed that the government has legitimate interests "in protecting the health of the woman." 505 U.S. at 846 (majority opinion); accord *id.* at 871, 878 (plurality opinion). That holding is consistent with *Roe* v. *Wade*, which noted the state's "important and legitimate interest in preserving and protecting the health of the pregnant woman." 410 U.S. 113, 162 (1973). *Roe* further explained that the interest in protecting a woman's health extends to the conditions under which an abortion is performed. See *id.* at 150 (recognizing the state's "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 in maternal health and safety extends to "adequate provision for any complication or emergency that might arise." *Ibid.* *Roe*'s companion case, *Doe* v. *Bolton*, confirmed the state's interest in ensuring that abortions are performed safely—including laws requiring an abortion provider to have "arrangements

with a nearby hospital to provide such [emergency] services." 410 U.S. 179, 195 (1973).

In practice, *Casey*'s undue burden test fails to vindicate the state's legitimate interest in maternal health. That test condemns "[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion." 505 U.S. at 878 (plurality opinion). Rather than directing courts to respect the interest in maternal health and safety, the undue burden test invites a probing reconsideration of factually intensive judgments reached by elected lawmakers. As applied to health-and-safety measures, the undue burden test fails to honor the state interests that *Casey*, *Roe*, and *Doe* identified as legitimate.

3. Applied to laws regulating abortion providers, the undue burden test bears no relation to the text or history of the Fourteenth Amendment. *Casey* declared that "[c]onstitutional protection of the woman's decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment." *Id.* at 846 (majority opinion). But *Casey* makes no such claim for the derivation of the undue burden test. Its application to "[r]egulations designed to foster the health of a woman seeking an abortion" stands in midair. *Id.* at 878 (plurality opinion). A judge-made standard authorizing a federal court to set aside a state law as unconstitutional should bear some fair connection with the words of the Constitution on whose authority the court purports to act. Applied to medical regulations, *Casey's* undue burden standard lacks that essential connection.

Dissenting members of the *Casey* Court noted the undue burden test's lack of a constitutional foundation. See *id.* at 964, 966 (Rehnquist, C.J., concurring in part and dissenting in part) (describing the undue burden test as "created largely out of whole cloth" and "plucked from nowhere"); *id.* at 987 (Scalia, J., concurring in part and dissenting in part) (criticizing the undue burden test as "ultimately standardless" and as a "concept [with] no principled or coherent legal basis").

The lack of any connection with the Constitution renders the undue burden test flawed as a measure of the validity of state medical regulations. Applying a judge-made standard with "little or no cognizable roots in the language or even the design of the Constitution," *Moore* v. *City of E. Cleveland, Ohio*, 431 U.S. 494, 544 (1977) (White, J., dissenting), deprives the American people of "the precious right to govern themselves." *Obergefell* v. *Hodges*, 135 S. Ct. 2584, 2624 (2015) (Roberts, C.J., dissenting). By enforcing such a groundless standard, the Court "unavoidably pre-empts for itself another part of the governance of the country without express constitutional authority." *Moore*, 431 U.S. at 544 (White, J., dissenting); see also *Glucksberg*, 521 U.S. at 720 ("By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action.").

With these glaring defects, the undue burden test should not control whether a law regulating medical care in the abortion context satisfies the Due Process Clause.

B. *Stare decisis* poses no impediment to overruling the undue burden test as to medical regulations affecting abortion providers.

1. *Stare decisis* "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne* v. *Tennessee*, 501 U. S. 808, 827 (1991). But *stare decisis* is not "an inexorable command." *Id.* at 828. A more flexible approach toward constitutional precedent is proper because "correction through legislative action is practically impossible." *Ibid.* (quoting *Burnet* v. *Coronado Oil & Gas Co.*, 285 U.S. 393, 407 (1932) (Brandeis, J., dissenting)); see also *Knick* v. *Twp. of Scott, Pa.*, 139 S. Ct. 2162, 2177 (2019) ("The doctrine is at its weakest when [the Court] interpret[s] the Constitution, * * * because only this Court or a constitutional amendment can alter our holdings." (internal quotation marks omitted)).

Precedent sometimes deserves reconsideration. Otherwise, "segregation would be legal, minimum wage laws would be unconstitutional, and the Government could wiretap ordinary criminal suspects without first obtaining warrants." *Citizens United* v. *Fed. Election Comm'n*, 558 U.S. 310, 377 (2010) (Roberts, C.J., concurring). Determining when to set aside precedent depends on "several factors," including "the quality of [its] reasoning, the workability of the rule it established, its consistency with other related decisions, * * * and reliance on the decision." *Knick*, 139 S. Ct. at 2178 (quoting *Janus* v. *Am. Federation of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2478 (2018)). Each of these factors counts against preserving the undue burden test as the standard for medical regulations affecting abortion providers.

2. *Casey*'s reasons for applying undue burden to such regulations are unpersuasive. "An important factor in determining whether a precedent should be overruled is the quality of its reasoning." *Janus*, 138 S. Ct. at 2479. *Knick* recognized that contested precedent "was not just wrong," but also that "[i]ts reasoning was exceptionally ill founded." 139 S. Ct. at 2178. Also, that precedent "ha[d] come in for repeated criticism over the years from Justices of this Court and many respected commentators." *Id.*

The same objections arise when applying the undue burden test to health-care regulations affecting abortion providers. The *Casey* plurality articulated the test, not as a definitive interpretation of the Fourteenth Amendment, but as "the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty." 505 U.S. at 876 (plurality opinion). Other than a quotation from *Carey*, the *Casey* plurality failed to offer any explanation why laws regulating abortion providers merit the same standard as laws restricting the abortion right. That misguided equivalence is contrary to *Casey*'s principle that "not every law which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right." *Id.* at 873. Even if a regulation of abortion providers ought to be subject to heightened scrutiny, *Casey* does not explain which health regulations are "unnecessary" or when the lawmaker has acted with the forbidden "purpose or effect," when "some abortion regulations * * * in no real sense deprive[ ] women of the ultimate decision." *Id.* at 875, 878.

Used to identify invalid abortion regulations, the undue burden test has earned sustained criticism by

members of the Court and respected commentators.[2] With such persistent criticism, *Casey*'s undue burden test as the standard for medical regulations affecting abortion providers cannot "contribute to the stable and orderly development of the law." *Citizens United*, 558 U.S. at 380 (Roberts, C.J., concurring).

3. *Stare decisis* is likewise not warranted because measuring health-care regulations of abortion providers by the undue burden test is inconsistent with related decisions. See *Janus*, 138 S. Ct. at 2478. In *Janus* the Court found support for rejecting precedent because the case was "an 'anomaly' in our First Amendment jurisprudence." *Id.* at 2483. Likewise, *Knick* jettisoned a longstanding precedent, in part, because it "conflicted with much of [the Court's] takings jurisprudence." 139 S. Ct. at 2178. *Casey*'s application of the undue burden test to laws regulating abortion providers is also an outlier.

Numerous decisions under the Fourteenth Amendment's Due Process Clause hold that states may enact health-and-safety regulations as long as such laws satisfy rational basis. *Williamson* v. *Lee Optical of Okla., Inc.*, 348 U.S. 483, 491 (1955); see also *Lange-Kessler* v. *Dep't of Educ. of N.Y.*, 109 F.3d 137, 141 (2d Cir. 1997) (a law requiring midwives to have formal education and a written practice agreement with a licensed physician or hospital satisfied rational basis review). Yet medical regulations affecting abortion

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[2] See, *e.g.*, *Casey*, 505 U.S. at 945 (Rehnquist, C.J., concurring in part and dissenting in part); *Stenberg* v. *Carhart*, 530 U.S. 914, 955 (2000) (Scalia, J., dissenting); *id.* at 982 (Thomas, J., dissenting); Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 Harv. L. Rev. 26, 110 (2000) (criticizing the undue burden standard); Michael W. McConnell, *Ways to Think About Unenumerated Rights*, 2013 U. Ill. L. Rev. 1985, 1987 (same).

providers get heightened scrutiny. See *Hellerstedt*, 136 S. Ct. at 2309–10.

Even the *Casey* plurality conceded inconsistences with how the fundamental right of abortion is treated compared to other constitutional rights, such as free speech. See 505 U.S. at 873 (plurality opinion). Chief Justice Rehnquist lamented that abortion law "must therefore be recognized as *sui generis*, different in kind from the others that the Court has protected under the rubric of personal or family privacy and autonomy." *Id.* at 952 (Rehnquist, C.J., concurring in part and dissenting in part) (citation omitted). Unlike other fundamental rights, applying the undue burden test to medical regulations affecting abortion providers has no support in history and tradition. See *Glucksberg*, 521 U.S. at 720–21.

4. *Stare decisis* is also unwarranted here because applying the undue burden test to medical regulations has proved unworkable. See *Janus*, 138 S. Ct. at 2486. When experience condemns a precedent as "unworkable or are badly reasoned, this Court has never felt constrained to follow [it]." *Payne*, 501 U.S. at 827 (citation omitted). On this principle, the Court recently overturned a precedent allowing unions to compel the payment of dues because the rule was "no longer a clear or easily applicable standard." *Janus*, 138 S. Ct. at 2484 (cleaned up). Similarly, *Knick* abandoned a procedural requirement for takings claimants because the requirement "proved to be unworkable in practice." 139 S. Ct. at 2178; accord *Vieth* v. *Jubelirer*, 541 U.S. 267, 305–06 (2004).

The unworkability of the undue burden test for medical regulations affecting abortion providers was evident at the outset. See *Casey*, 505 U.S. at 986 (Scalia, J., concurring in part and dissenting in part)

(criticizing the undue burden test as "inherently manipulable and * * * hopelessly unworkable in practice"). Even committed defenders of abortion rights fret that the undue burden test "leaves an incredible amount to the discretion of lower court judges." Ruth Marcus, *Court's Ruling Assures More Abortion Litigation*, Wash. Post, July 1, 1992, at A1, A7 (quoting National Abortion Rights Action League (NARAL) Legal Director Dawn Johnsen).

Lower courts have struggled to apply the undue burden test to laws regulating abortion providers with any consistency. Compare, *e.g.*, *Greenville Women's Clinic* v. *Comm'r, S.C. Dep't of Health & Envtl. Control*, 317 F.3d 357 (4th Cir. 2002) (rejecting facial challenge to South Carolina law requiring abortion clinic doctors to have admitting privileges at a local hospital), with *Jackson Women's Health Org.* v. *Currier*, 760 F.3d 448 (5th Cir. 2014) (granting a preliminary injunction against a Mississippi statute requiring abortion clinic doctors to have admitting privileges at a local hospital), and *Planned Parenthood of Wis., Inc.* v. *Schimel*, 806 F.3d 908 (7th Cir. 2015) (voiding Wisconsin law requiring physicians performing abortions to have hospital admitting privileges within 30 miles of where the abortion is performed).

Lower court judges have expressed their frustration with the subjectivity of the undue burden test in cases challenging health-and-safety regulations. See *Planned Parenthood of Ind. & Ky., Inc.,* v. *Box*, No. 17-2428, slip op. at 3–4 (7th Cir. Oct. 30, 2019) (Easterbrook, J., concurring in the denial of rehearing en banc) ("How much burden is 'undue' is a matter of judgment, * * * a matter of weighing costs against benefits, which one judge is apt to do differently from another."); *Barnes* v. *Mississippi*, 992 F.2d 1335, 1337

(5th Cir. 1993) ("[P]assing on the constitutionality of state statutes regulating abortion after *Casey* has become neither less difficult nor more closely anchored to the Constitution."). More than two decades of conflict and confusion in the adjudication of laws regulating abortion providers forcefully demonstrates the unworkability of the undue burden test in this context. Cf. *Vieth*, 541 U.S. at 305 (long experience demonstrated that the precedent "is incapable of principled application").

5. No reasonable reliance interests preclude reconsideration of the undue burden test in the area of medical regulations. See *Janus*, 138 S. Ct. at 2479. Abortion providers cannot reasonably rely on the undue burden test to shield them from valid medical regulations. Laws regulating abortion providers often serve to protect women, and challenging them serves the self-interest of abortion providers in avoiding or minimizing their regulatory burden. Given that conflict of interest, deferring to abortion providers' reliance on the undue burden test can subvert women's existing right to obtain an abortion under safe medical conditions. See, *e.g.*, *Greenville Women's Clinic*, 317 F.3d at 363 ("[R]equirements of having admitting privileges at local hospitals and referral arrangements with local experts are so obviously beneficial to patients.").

For these reasons, *stare decisis* does not preclude the Court from reconsidering and overruling *Casey*'s undue burden test as applied to medical regulations affecting abortion providers. Setting aside this test in this context would strengthen the rule of law—not undermine it. See *Citizens United*, 558 U.S. at 378 (Roberts, C.J., concurring) ("[W]hen fidelity to any

particular precedent does more to damage th[e] constitutional ideal [of the rule of law] than to advance it, we must be more willing to depart from that precedent.").

II. *Washington* v. *Glucksberg* should control whether medical regulations affecting abortion providers offend the Fourteenth Amendment.

A. *Glucksberg* is the controlling standard for substantive due process.

The Fourteenth Amendment guarantees that no State shall "deprive any person of life, liberty, or property without due process of law." U.S. Const. amend. XIV, § 1. From its inception, this clause has been interpreted to protect certain substantive rights "no matter what process is provided." *Reno* v. *Flores*, 507 U.S. 292, 302 (1993). But this power to recognize and enforce unenumerated rights is deeply controversial. *Lochner* v. *New York*, 198 U.S. 45 (1905), exemplified an era of constitutional adjudication, during which democratically enacted legislation was repeatedly struck down based on a contrived right of contract. Later the Court repudiated the use of substantive due process to engage in judicial policymaking. See *Williamson*, 348 U.S. at 488 ("The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions because they may be unwise, improvident, or out of harmony with a particular school of thought."). To avoid reviving the damaging errors of the *Lochner* era, the Court is "reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and

open-ended." *Collins* v. *City of Harker Heights, Tex.*, 503 U.S. 115, 125 (1992).

Decades of painstaking jurisprudential development have identified history and tradition as "guideposts" that put meaningful constraints on the power to declare fundamental rights. *Ibid.* In particular, the Court has embraced "a process whereby the outlines of the 'liberty' specially protected by the Fourteenth Amendment * * * have at least been carefully refined by concrete examples involving fundamental rights found to be deeply rooted in our legal tradition." *Glucksberg*, 521 U.S. at 722; accord *Michael H.* v. *Gerald D.*, 491 U.S. 110, 122 (1989) (plurality opinion) ("In an attempt to limit and guide interpretation of the Clause," an asserted liberty interest must "be an interest traditionally protected by our society."). Experience has shown that "this approach tends to rein in the subjective elements that are necessarily present in due-process judicial review." *Glucksberg*, 521 U.S. at 722.

In *Glucksberg*, the Court described this "established method of substantive-due-process analysis." *Id.* at 720. First, there must be "a 'careful description' of the asserted fundamental liberty interest." *Id.* at 721 (quoting *Flores*, 507 U.S. at 302). Second, an asserted interest, so described, must be one of "those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Id.* at 720–21 (citations omitted). A law that infringes a fundamental right is invalid unless it is "narrowly tailored to serve a compelling state interest." *Id.* at 721. When an asserted liberty interest does not qualify as fundamental, the

law must "be rationally related to legitimate government interests." *Id.* at 728.

As the culmination of a long effort to tame substantive due process, *Glucksberg* is a landmark of constitutional law. But it hardly stands alone. See *Dist. Attorney's Office for Third Jud. Dist.* v. *Osborne*, 557 U.S. 52, 72 (2009); *Flores*, 507 U.S. at 303; *United States* v. *Salerno*, 481 U.S. 739, 751 (1987). See generally *Obergefell*, 135 S. Ct. at 2618 (Roberts, C.J., dissenting) ("Although the Court articulated the importance of history and tradition to the fundamental rights inquiry most precisely in *Glucksberg*, many other cases both before and after have adopted the same approach."). *Glucksberg* thus provides the general standard that controls claims of substantive due process.

Skeptics might object that *Glucksberg* was overruled by *Obergefell*. Not so. To be sure, the Court in *Obergefell* declined to apply *Glucksberg*. See 135 S. Ct. at 2602 (describing the *Glucksberg* standard as "inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy"). In the majority's view, the Court had "rejected that [historically grounded] approach, both with respect to the right to marry and the rights of gays and lesbians." *Ibid.*[3] But neither area is implicated in this case.

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[3] Although *Obergefell* correctly says that decisions affirming rights for gays and lesbians did not rest on history and tradition, that description is questionable with respect to marriage. See *Kerry* v. *Din*, 135 S. Ct. 2128, 2135 (2015) (plurality opinion) (denying that the right-to-marry decisions establish "a free-floating and categorical liberty interest in marriage * * * sufficient to

Even if *Obergefell* casts a shadow on the applicability of the *Glucksberg* standard in cases involving the fundamental right to marry and LGBT rights, that fact does not detract from *Glucksberg*'s validity as the controlling standard for other rights grounded in substantive due process. In fact, lower courts continue to apply *Glucksberg* as the standard for fundamental rights. See, *e.g.*, *In re U.S. Office of Pers. Mgmt. Data Sec. Breach Litig.*, 928 F.3d 42, 72 (D.C. Cir. 2019) (asserting a right to "avoid[ ] disclosure of personal matters"); *St. Joan Antida High Sch. Inc.* v. *Milwaukee Pub. Sch. Dist.*, 919 F.3d 1003, 1009 (7th Cir. 2019) (asserting a right to "free transportation for private-school students"); *Stormans, Inc.* v. *Wiesman*, 794 F.3d 1064, 1086–87 (9th Cir. 2015) (asserting a right not to dispense abortifacient drugs). *Glucksberg* is the reigning standard for substantive due process.

B. *Glucksberg* should control the validity of Louisiana Act 620.

For due process claims challenging medical regulations affecting abortion providers, the undue burden test should give way to *Glucksberg* as the controlling standard. Making that doctrinal shift would base the adjudication of such challenges on history and tradition, rather than on a heavily criticized judicial standard. See 521 U.S. at 720–21. Under that approach, laws infringing a fundamental right will

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trigger constitutional protection whenever a regulation in any way touches upon an aspect of the marital relationship"); *Zablocki*, 434 U.S. at 399 (Powell, J., concurring) ("The Due Process Clause requires a showing of justification 'when the government intrudes on choices concerning family living arrangements' in a manner which is contrary to deeply rooted traditions." (quoting *Moore*, 431 U.S. at 499)).

receive strict scrutiny, while health-and-safety laws that do not violate the abortion right will receive ordinary rational basis review.

Selecting a legal standard with a foundation in American law and tradition will increase the legitimacy of decisions in this highly contested area. Controversy follows when decisions tend to reflect the predilections of individual judges. See *Moore*, 431 U.S. at 503 (White, J., dissenting). By contrast, a legal standard grounded in constitutional text and history will tend in time to diminish controversy.

Applying *Glucksberg* to laws regulating abortion providers will reverse the baneful trends we describe above. Armed with a judicially manageable standard, lower courts can more readily decide cases without rendering irreconcilable conflicts. Lawmakers, health-care regulators, and abortion providers alike will have greater predictability when assessing the constitutionality of proposed and existing laws and regulations. Elected legislators can more effectively protect maternal health through reasonable regulations placed on abortion providers as members of the medical profession.[4] And by affirming *Glucksberg* the

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[4] *Hellerstedt*'s conception of the undue burden test discourages legislative efforts to regulate abortion providers by authorizing courts to second-guess the costs and benefits of a particular regulatory solution. See 136 S. Ct. at 2309 ("courts [must] consider the burdens a law imposes on abortion access together with the benefits those laws confer"). This mode of judicial analysis essentially lets in *Lochner* at the back door. See *Lochner*, 198 U.S. at 58 ("There is, in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health, or the health of the individuals who are following the trade of a baker.").

sudden appearance of historically ungrounded unenumerated rights will not undermine rights expressly enumerated in the Constitution.

The *Glucksberg* framework enables a court to sift violations of the fundamental right from incidental regulations affecting the exercise of that right. When a due process claim fails the rigorous inquiry into history and tradition, a court will employ rational basis review. See *Glucksberg*, 521 U.S. at 720. Either standard enables a court to void truly arbitrary laws.

The possibility of legislative pretext is no reason to hold onto the undue burden standard. Applying heightened scrutiny to all regulations affecting abortion providers rests on the premise that such regulations inevitably or most often manifest an unlawful purpose. But pretext is immaterial for other constitutional rights. See, *e.g.*, *Whren* v. *United States*, 517 U.S. 806, 812–13 (1996) (rejecting pretext as irrelevant in a search-and-seizure case). And this Court "do[es] not assume unconstitutional legislative intent even when statutes produce harmful results." *Mazurek* v. *Armstrong*, 520 U.S. 968, 972 (1997) (per curiam) (citing *Washington* v. *Davis*, 426 U.S. 229, 246 (1976)). Other fundamental rights are protected by evaluating whether a particular restriction invades the right itself. That approach is no less adequate for medical regulations affecting abortion providers.

Nor is the undue burden test justified for such regulations merely because "access is essential to exercise * * * the constitutionally protected right of decision in matters of childbearing." *Carey*, 431 U.S. at 688. This argument proves too much. Medical regulations that burden abortion providers are not necessarily burdens on the abortion right, any more

than environmental regulations that burden the manufacture of printing presses pose an intolerable burden on the right to a free press. Imposing heightened judicial scrutiny on all regulations affecting abortion providers prevents elected lawmakers from protecting a government interest that the Court has repeatedly declared legitimate. See *Casey*, 505 U.S. at 871 (plurality opinion). This is especially problematic when decisions under the Due Process Clause generally affirm the authority of lawmakers to enact health-and-safety regulations without substantial judicial oversight. See *Williamson*, 348 U.S. at 487–88. In an extreme case, a law framed as a medical regulation might infringe the abortion right. When that occurs the contested law would be subject to strict scrutiny. Cf. *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 531 (1993) (laws that suppress the free exercise of religion are not neutral or generally applicable and must therefore survive strict scrutiny).

Adopting *Glucksberg* as the controlling standard for laws regulating abortion providers does not affect the validity or scope of the protected liberty interest in obtaining an abortion pre-viability. *Casey*, 505 U.S. at 846 ("Constitutional protection of the woman's decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment."). The sole focus of our argument is on the correct constitutional standard for medical regulations affecting abortion providers.

C. Under *Glucksberg*, Louisiana Act 620 does not infringe on a fundamental right.

Petitioners do not articulate a fundamental right of their own. See Pet. Br. 21 (arguing that setting

aside *Hellerstedt* would "effectively strip *a woman's right to abortion* of its status as a fundamental right") (emphasis added). Nor could they. Petitioners are an abortion clinic and two unnamed Louisiana physicians. *Id.* at ii. A "careful description," *Glucksberg*, 521 U.S. at 721, of their asserted liberty interest is whether the Due Process Clause protects a right to perform an abortion without admittance privileges to a hospital within 30 miles. Even without extensive historical research, such a right seems improbable. *Roe*—the decision inaugurating a federal right to abortion—acknowledged that "[t]he 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." 410 U.S. at 150. *Doe* confirmed the validity of laws ensuring that an abortion facility has in place "arrangements with a nearby hospital to provide such [emergency] services." 410 U.S. at 195. That petitioners' alleged fundamental right would nullify laws merely requiring an "arrangement[ ] with a nearby hospital" counts heavily against it. *Ibid.*

Petitioners' asserted right to be free of state hospital-privileges requirements would call into questions the validity of statutes in eight states besides Louisiana. Four states (Arizona, Kansas, Missouri, and North Dakota) have virtually the same 30-mile hospital-privileges requirement as Louisiana Act 620.[5] Tennessee similarly requires abortion providers to

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[5] See Ariz. Rev. Stat. § 36-449.03(C)(3) (requiring physicians with "admitting privileges at a health care institution that is classified * * * as a hospital * * * and that is within thirty miles of the abortion clinic" to be "available * * * [f]or a surgical abortion"); Kan. Stat. § 65-4a08(b) (same); Mo. Rev. Stat. § 188.080 (same); N.D. Cent. Code § 14-02.1-04(1) (same).

have admittance privileges to a hospital within the same or adjoining county. See Tenn. Code § 39-15-202(j)(1). And three other states (Florida, Idaho, and Indiana) require abortion providers to have hospital admittance privileges or transfer agreements, in the event that a woman requires emergency care.[6]

Petitioners have no fundamental right to perform an abortion without having admitting privileges at a nearby hospital. Such a liberty interest is neither "deeply rooted in this Nation's history and tradition" nor "implicit in the concept of ordered liberty." *Glucksberg*, 521 U.S. at 721 (citations omitted). Louisiana Act 620 is consistent with history and tradition—not contrary to it.

Nor is there good reason to conclude that Louisiana Act 620 violates the fundamental right of women seeking an abortion. Regulating the practice of medicine is a legitimate government interest that does not, as a rule, prevent a woman from obtaining an abortion. See *Casey*, 505 U.S. at 878 (plurality opinion) ("As with any medical procedure, the State may enact regulations to further the health or safety of a woman seeking an abortion."); accord *Gonzales* v. *Carhart*,

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[6] See Fla. Stat. § 390.012(5)(c)(1) (requiring hospital admitting privileges "within reasonable proximity to the clinic, unless the clinic has a written patient transfer agreement with a hospital within reasonable proximity to the clinic"); Idaho Code § 18-617(2) (requiring "the ability to provide surgical intervention" or, when a physician lacks "admitting privileges at a local hospital," an abortion provider must have a documented plan "to provide such emergency care through other qualified physicians who have agreed in writing to provide such care"); Ind. Code § 16-34-2-4.5(a) (requiring "admitting privileges in writing" within the same or an adjacent county, or to have "a written agreement with a physician who has" such admitting privileges).

550 U.S. 124, 157 (2007) ("Under our precedents it is clear the State has a significant role to play in regulating the medical profession."). Even a hospital-privileges law that has "the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it." *Casey*, 505 U.S. at 874 (plurality opinion).

Neither petitioners nor the women they purport to represent has a fundamental right for abortions to be performed by physicians without hospital admittance privileges.

D. Under *Glucksberg*, Louisiana Act 620 is subject to ordinary rational basis review.

Glucksberg teaches that because Louisiana Act 620 does not implicate a fundamental right, ordinary rational basis review applies. See 521 U.S. at 728. That standard requires a law to be "rationally related to legitimate government interests." *Ibid.*

The elements of ordinary rational basis review are familiar. A law subject to this form of judicial scrutiny carries "a strong presumption of validity." *FCC* v. *Beach Commc's, Inc.*, 508 U.S. 307, 314 (1993). The party attacking its constitutionality must rebut any reasonable basis supporting it, and "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *Id.* at 315.

Adhering to these principles "preserve[s] to the legislative branch its rightful independence and its ability to function." *Ibid.* (citation omitted). That is the whole point of the rational basis standard—to exercise judicial modesty under the Due Process Clause

for the purpose of leaving elected lawmakers generally free to shape and reshape public policy. The long struggle to overcome *Lochner* taught that "it is for the legislature, not the courts, to balance the advantages and disadvantages" of legislation. *Williamson*, 348 U.S. at 487; accord *Obergefell*, 135 S. Ct. at 2616 (Roberts, C.J., dissenting) ("The need for restraint in administering the strong medicine of substantive due process is a lesson this Court has learned the hard way.").

Since the demise of *Lochner*, rational basis has been the governing standard for due process claims challenging health and safety regulations. See *Carolene Products Co.* v. *United States*, 323 U.S. 18, 31–32 (1944) (rejecting a due process challenge to a conviction under the Filled Milk Act "without a clear and convincing showing that there is no rational basis for the legislation; that it is an arbitrary fiat"); *Williamson*, 348 U.S. at 487–88 (affirming a state regulation of opticians against a due process challenge).

This well-established approach is consistent with the Court's treatment of abortion-related regulations. Only last term the Court applied rational basis review to an Indiana law regulating abortion providers' disposal of fetal remains. *Box* v. *Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1781–82 (2019) (per curiam). Although that decision formally rested on the litigant's "assumption that the law does not implicate a fundamental right," *id.* at 1781, its significance is unmistakable. All but three members of the Court joined an opinion endorsing rational basis—not the undue burden test—as the correct standard for laws that do not infringe the abortion right itself.

Any concern about applying rational basis rather than undue burden to laws regulating abortion providers is misplaced since such laws already receive more relaxed scrutiny. In *Mazurek*, 520 U.S. at 968, the Court sustained the validity of a statute requiring all abortion providers to be licensed physicians. While purporting to apply the undue burden test, the Court found no evidence that the statutory requirement interfered with the abortion right and declined to infer an improper legislative purpose from a difference of opinion over whether requiring abortions to be performed by a physician reduces the risks to a woman's health. The Court held that "this line of argument is squarely foreclosed by *Casey* itself" and stressed that "the Constitution gives the States broad latitude to decide that particular functions may be performed only by licensed professionals, even if an objective assessment might suggest that those same tasks could be performed by others." *Id.* at 973 (quoting *Casey*, 505 U.S. at 885) (emphasis omitted). A similar provision withstood constitutional challenge in *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983), *overturned on other grounds by Casey*, 505 U.S. 833. There the Court reiterated that "to ensure the safety of the abortion procedure, the States may mandate that only physicians perform abortions." *Id.* at 447. Likewise, *Connecticut* v. *Menillo*, 423 U.S. 9, 11 (1975) (per curiam), upheld a statute also requiring abortions to be performed by licensed doctors. In the Court's view, "the State's interest in maternal health" justified the physician-only law on the assumption that an abortion must be "performed by medically competent personnel under conditions insuring maximum safety for the woman." *Ibid.*

Like any other health-and-safety measure that does not restrict a fundamental right, Louisiana Act 620 should be measured by ordinary rational basis review.

III. Louisiana Act 620 readily satisfies rational basis review.

A. The State of Louisiana has a legitimate interest in protecting the health and safety of women who obtain an abortion.

Louisiana Act 620 requires an abortion provider to have "active admitting privileges at a hospital that is located not further than thirty miles from the location at which the abortion is performed or induced and that provides obstetrical or gynecological health care services." Act 620 § 1(A)(2)(a). The Court of Appeals found that this requirement was intended "to promote women's health * * * by ensuring a higher level of physician competence and by requiring continuity of care." Pet. App. 35a. The State's interest in promoting the health of women seeking an abortion is unmistakably legitimate.

This Court's decisions repeatedly affirm that a state's interest in preserving maternal life and health is valid. See *Casey*, 505 U.S. at 846 ("[T]he State has legitimate interests from the outset of the pregnancy in protecting the health of the woman."); accord *Roe*, 410 U.S. at 162 ("[T]he State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman."). This general interest in maternal health specifically extends to "regulating the conditions under which abortions are performed." *Id.* at 150. Permissible regulations include an "adequate provision for any complication or emergency that might arise." *Ibid.* And *Doe* added—

in terms remarkably prescient about laws like Louisiana Act 620—that a state could validly require an abortion clinic to institute "arrangements with a nearby hospital to provide [emergency] services." 410 U.S. at 195.

The interest in maternal health that Act 620 serves is comfortably within the range of health-and-safety concerns for which Louisiana is free to legislate. See *Women's Health Ctr. of W. Cty., Inc.* v. *Webster*, 871 F.2d 1377, 1381 (8th Cir. 1989) (upholding a state law requiring that abortion doctors have admitting privileges at a hospital within 30 miles, in part because the law "furthers important state health objectives").

B. Act 620 is rationally related to the State's legitimate interest.

Given the State's legitimate interest in maternal health, "[t]he only remaining question, then, is whether [Louisiana's] law is rationally related" to that interest. *Box*, 139 S. Ct. at 1782. "[T]he State need not have drawn 'the perfect line,' as long as 'the line actually drawn [is] a rational one.'" *Ibid.* (citations omitted). By that generous standard, Act 620 is no doubt rationally related to Louisiana's legitimate interest in protecting maternal health.

First, an abortion carries the potential for serious health risks to a woman. Two of this case's abortion providers have perforated a woman's uterus while performing an abortion—a complication that required emergency hospitalization. See Br. in Opp.13. It is entirely rational, as well as humane, for the State to ensure that women seeking an abortion will receive prompt emergency care if necessary. See *Greenville Women's Clinic*, 317 F.3d at 363 ("[R]equirements of

having admitting privileges at local hospitals and referral arrangements with local experts are so obviously beneficial to patients."); *Planned Parenthood of Greater Tex. Surgical Health Servs.* v. *Abbott*, 748 F.3d 583, 594 (5th Cir. 2014) ("[T]he State's articulation of rational legislative objectives, which was backed by evidence placed before the state legislature, easily supplied a connection between the admitting-privileges rule and the desirable protection of abortion patients' health.").

Second, Act 620 does not target abortion doctors for unusual burdens. The Act simply holds abortion doctors to the same standard as other doctors performing equivalent medical procedures. Compare Act 620, § 1(A)(2)(a), with La. Admin. Code tit. 48, Pt I, § 4541(A), (B) (ambulatory surgical centers), *id.* tit. 46, Pt XLV, § 7309(A)(2) (office based surgery), and *id.* tit. 46, Pt XLV, § 7303 (same). It is entirely rational for Louisiana to give pregnant women the same protection as other surgical patients.

Third, Act 620 is a measured response to an unfortunate history of regulatory noncompliance and incompetence. Louisiana abortion providers have been repeatedly disciplined for regulatory violations—violations that have sometimes been so serious that the Fifth Circuit labeled them as "horrifying." Pet. App. 38a n.56; see also Br. in Opp. 10–12 & nn.4–5. Act 620 would also enable the state to discourage noncompliance by including abortion providers in the National Practitioner Data Bank, so that malpractice or misconduct can be more effectively monitored and penalized. See *id.* at 6. In addition, abortion clinics in the state often fail to vet the competency of doctors hired to perform abortions—in one instance even hiring an ophthalmologist to perform abortions. See *id.*

at 9. Act 620 responds by requiring physicians to be "a member in good standing of the medical staff" of a licensed hospital "with the ability to admit a patient and to provide diagnostic and surgical services." Act 620, § 1(A)(2)(a).

In all these ways, Act 620 is rationally related to Louisiana's interest in ensuring medically safe conditions for women seeking an abortion. Because Act 620 satisfies ordinary rational basis review, the statute is constitutional.

CONCLUSION

The Court should adopt *Glucksberg* as the standard for assessing the constitutionality of medical regulations affecting abortion providers and affirm the Fifth Circuit's decision below.

Respectfully submitted,

ALEXANDER DUSHKU
R. SHAWN GUNNARSON
Counsel of Record
JAMES C. PHILLIPS
JESSICA A. HORTON
KIRTON | MCCONKIE
36 South State Street
Suite 1900
Salt Lake City, Utah 84111
(801) 328-3600
sgunnarson@kmclaw.com

Counsel for Amici Curiae

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