No. 18-1323

IN THE

Supreme Court of the United States

JUNE MEDICAL SERVICES L.L.C., ET AL.,
Petitioners,

—v.—

REBEKAH GEE, SECRETARY,
LOUISIANA DEPARTMENT OF HEALTH AND HOSPITALS,
Respondent.

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

BRIEF OF *AMICUS CURIAE* INFORMATION SOCIETY PROJECT AT YALE LAW SCHOOL IN SUPPORT OF PETITIONERS SEEKING REVERSAL

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INTEREST OF AMICI CURIAE[1]

Amicus is the Information Society Project (ISP) at Yale Law School,[2] an intellectual center exploring the implications of new technologies for law and society. The ISP focuses on a wide range of issues such as the intersections between the regulation and dissemination of information, health policy, and privacy concerns. ISP initiatives include the Program for the Study of Reproductive Justice with its associated legal clinic. Many of the scholars associated with the ISP have special expertise in First, Fourth, and Fourteenth Amendment jurisprudence, including the impact of this jurisprudence on reproductive rights and justice. These scholars share an interest in ensuring that the constitutionality of abortion regulations is determined in accordance with settled Fourteenth Amendment principles.

SUMMARY OF ARGUMENT

Act 620 (the "Act" or the "law") is Louisiana's latest attempt to make abortion as difficult to obtain as possible. It is neither health-protective as the State claims, nor is it a "pro-life" measure as the Fifth Circuit suggests obliquely. The law is an anti-abortion measure that obstructs access to a safe procedure and

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[1] The parties have granted blanket consent to amicus briefs, proof of which is filed with the Court. No counsel for a party authored the brief in whole or in part; no party or party's counsel contributed money to fund preparing or submitting the brief; and no person other than the amicus curiae or its counsel contributed money intended to fund preparing or submitting the brief.

[2] The Information Society Project does not represent the institutional views of Yale Law School, if any.

pressures women to have babies in a state with the highest maternal death rate out of 47 states measured, the tenth highest infant death rate in the nation, and the second highest rates of preterm birth and low birth weight. *See infra* at 9-10.

These dismal health indicators are not a result of conditions outside the State's control. Louisiana has spurned policies—policies that most other states have adopted—that would support women who want to have babies, would improve access to quality health care, and reduce these distressing outcomes for women and children.

As these contradictory policy choices show—obstruction of abortion on the one hand and neglect of women who want to carry to term on the other—opposition to abortion does not always come from a "pro-life" impulse. Where a law burdens abortion but lacks a valid health-protective or life-protective function, it enforces motherhood based on unfounded stereotypes about women and their proper roles in family and pubic life. It interferes with women's ability to "enjoy equal citizenship." *See Gonzales v. Carhart*, 550 U.S. 124, 171-72 (2007) (Ginsburg, J., dissenting) (internal citations and quotation marks omitted). *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), does not tolerate abortion restrictions like the Act that unduly burden women with these stereotypes and interfere with their equal citizenship stature. *Id.* at 852, 856. Accordingly, the Act is unconstitutional for the additional reason that the burdens of inequality it imposes on women are "undue." *See id.*

ARGUMENT

I. LOUISIANA BURDENS ACCESS TO ABORTION FOR NO VALID HEALTH REASON AND IN CIRCUMSTANCES THAT SHOW LITTLE COMMITMENT TO PROTECTING LIFE OR WOMEN'S HEALTH

A. The Act Deliberately Obstructs Access to Abortion Without Protecting Women's Health

Louisiana claims that the Act protects women's health.[3] But the Act targets abortion for unnecessary and burdensome regulation. It obstructs abortion, pressures women into motherhood, and puts women's health in danger. *Infra*.

This Court held in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2315 (2016), that an admitting privileges requirement was unconstitutional because it was not "based on differences between abortion and other surgical procedures" and because the evidence shows that the requirement "does not benefit patients and is not necessary." *Id.* at 2315; *see also* Brief of Petitioner at 17-22, 31, 41-43 (Nov. 25, 2019) ("Pet. Br."). As Justice Ginsburg noted in concurrence in *Whole Woman's Health*, "it is beyond rational belief that [an admitting

[3] Resps.' Br. in Opp., at 5, 25, (July 10, 2019); *Hearing on HB 388 Before the H. Comm. on the Health and Welfare*, 2014 Leg. 21–23 (La. 2014) (statement of Rep. Jackson); *Hearing on HB 388 Before the H. Comm. on the Health and Welfare*, 2014 Leg. 1–25 (La. 2014) (statement of Ms. Kliebert); *Hearing on HB 388 Before the H. Comm. on the Health and Welfare*, 2014 Leg. 8–14 (La. 2014) (statement of Dr. Cudihy).

privileges requirement] could genuinely protect the health of women, and certain that the law 'would simply make it more difficult for them to obtain abortions.'" 136 S. Ct. at 2321 (Ginsburg, J. concurring) (internal quotations omitted).

The Court's holding in *Whole Woman's Health* was not limited to the Texas law at issue there. The Court relied on nationwide data to conclude that: 1) it is extremely unlikely that a patient will suffer post-abortion complications that require emergent hospitalization; 2) most post-abortion complications do not occur immediately following the procedure or in the doctor's office, but rather occur at a later point in the patient's home; and 3) when serious complications do occur, the admitting-privileges requirement does not protect women's health. 136 S. Ct. at 2311-12.

The situation in Louisiana is identical to that in Texas in all relevant respects. In fact, three years later, there is even more national data supporting the Court's findings. Both the U.S. Department of Health and Human Services and the National Academies of Sciences Engineering & Medicine have acknowledged that admitting privileges are *not* necessary even for ambulatory surgical centers—which perform riskier and more complicated procedures than abortions, *Whole Woman's Health*, 136 S. Ct. at 2314-16—and create burdens on patient access.[4]

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[4] Medicare and Medicaid Programs; Regulatory Provisions to Promote Program Efficiency, Transparency, and Burden Reduction, 83 Fed. Reg. 47,686 (Sept. 20, 2018) (to be codified at 42 C.F.R. pt. 416) (proposing *removal* of admitting privileges or transfer requirement for ambulatory surgical centers that

Moreover, if the State truly believed that requiring abortion providers to obtain admitting privileges would benefit women's health, the State would not rely on a convoluted and burdensome process that makes it extremely difficult, and in some cases impossible, for abortion providers to obtain them. *June Medical Servs. v. Kliebert*, 250 F. Supp. 3d 27, 67 (M.D. La. 2017) ("*June Medical I*") (process for obtaining privileges "reads like a chapter in Franz Kafka's *The Trial*."). Rather than establishing a standardized process, the rules for obtaining admitting privileges are determined by each hospital's individual bylaws, *id.* at 491-92, resulting in a process that is uncertain, varies from hospital to hospital, and creates obstacles for abortion providers in particular.[5] *See also Whole Woman's Health*, 136 S. Ct. at 2312-13 ("[C]ommon prerequisites to obtaining admitting privileges [] have nothing to do with ability to perform medical procedures."). This impossible process reveals that the law's target is restricting abortion access, not improving women's health.

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receive Medicare funds, because such requirements are not necessary and create burdens); Press Release, Ctrs. for Medicare & Medicaid Servs., "CMS Proposes to Lift Unnecessary Regulations and Ease Burdens on Providers" (Sept. 17, 2018), https://go.cms.gov/2Oavpju.

[5] *June Medical I*, 250 F. Supp. 3d at 44-45; *see also* Linda Greenhouse & Reva B. Siegel, Casey *and the Clinic Closings: When "Protecting Health" Obstructs Choice*, 125 YALE L. J. 1428, 1458 n.134 (2016).

B. Louisiana's Policy Choices—as Contrasted with Comparator States Nationwide—Reflect an Anti-Abortion Bias, Not a Pro-Life Impulse

The Fifth Circuit implies that the Act *might have been* justified by an interest in potential life, given the State's longstanding opposition to abortion.[6] After the Act's passage, Louisiana's Governor and other Executive Branch officials touted the law as building on the State's efforts to "make Louisiana the most pro-life state in the nation."[7] But in this litigation, the State has disclaimed any fetal-protective justification, admitting that it would be "illicit" and "run[] afoul of *Casey*."[8] As a result, the

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[6] *See June Medical Servs. v. Gee*, 905 F.3d 787, 792 (5th Cir. 2018), *cert. granted*, 140 S. Ct. 35 (2019) ("*June Medical II*"). Although the Court of Appeals laid these breadcrumbs, it did not find that the state advanced a fetal-protective justification for the statute, nor did it hold that any fetal-protective justification could have been valid under *Casey*. *Id.*

[7] *See, e.g.*, *June Medical I*, 250 F. Supp. 3d at 56 (describing Jindal's press release and collecting evidence of floor statements made by the Act's sponsor, press releases and public statements by legislators, lobbyists from the Bio Ethics Defense Fund that helped draft Act 620, signing statements made by Governor Jindal, and a provision in the Louisiana Revised Statutes declaring a "longstanding policy . . . to protect the right to life of the unborn child from conception." (citing LA. STAT. ANN. § 40:1016.8 (2015))). *See also* Emily Lane, *Bobby Jindal Signs Anti-abortion Bill Thursday Likely to Close Clinics in Baton Rouge, New Orleans*, TIMES PICAYUNE (June 12, 2014), https://bit.ly/2LddiHR.

[8] Defs.' Mem. Supp. Summ. J., *June Medical Services v. Kliebert*, 2015 WL 10520419 at *13, 17 (M.D. La. Feb. 16, 2015); Defs.' Mot. to Recons. Rulings on Summ. J., *June Medical Services v.* Kliebert, 2015 WL 12692985 (M.D. La. June 11, 2015); Corrected

State abandoned the claim both at trial and on appeal.[9]

But there is another reason to question the Governor's claim that Louisiana's actions are pro-life and the Fifth Circuit's suggestion that the Act might be fetal protective. Louisiana's policy choices, as compared to similar states nationwide, express little commitment to the lives of women and children, and especially to the families of low-income women, ninety percent of whom are women of color.[10] Compared with other similar states, Louisiana has done very little to address the unsafe conditions of pregnancy born out in its dismal rates of maternal and infant mortality and pregnancy loss. *See infra*.

Louisiana's purported concern for potential life and women's health is belied by its failure to address its maternal mortality crisis. According to the Centers for Disease Control and Prevention ("CDC"), Louisiana ranks 49th in preterm births and low birth weight, and 41st in infant mortality among states nationwide.[11] From the period of 2012 to 2016, there

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Br. Appellant, 2017 WL 4169966 (5th Cir. Sept. 12, 2017). *See also Casey*, 505 U.S. at 877.

[9] *Id.*

[10] Ninety percent of Louisianans living in poverty are people of color. Kaiser Family Foundation, *State Health Facts: Poverty by Race/Ethnicity*, https://bit.ly/2ssavUC.

[11] *See, e.g.*, CDC, *Stats of the State of Louisiana*, U.S. DEP'T OF HEALTH & HUMAN SERVS. (Apr. 11, 2018), https://bit.ly/2OF2Afr; CDC, *Percentage of Babies Born Low Birthweight By State*, U.S. DEP'T OF HEALTH & HUMAN SERVS. (Jan 15, 2019), https://bit.ly/2Y5ccDf; CDC, *Infant Mortality Rates by State*, U.S.

were approximately 58.1 maternal deaths per 100,000 births in Louisiana, the highest maternal death rate of the forty-seven states with available data.[12] Not only does this mean that a pregnant woman in Louisiana fares worse than pregnant women in developed countries around the world,[13] Louisiana's maternal mortality rate is on par with that of countries with current or recent military conflicts, such as Syria (54.1), Iraq (58.6), and Kyrgyzstan (47.8).[14] For women of color, the situation is much worse. Black women in Louisiana are *four times* more likely to die from pregnancy-related causes than white

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DEP'T OF HEALTH & HUMAN SERVS. (Jan. 15, 2019), https://bit.ly/2P2oecA.

[12] Alison Young, *Hospitals Know How to Protect Mothers; They Just Aren't Doing It*, USA TODAY (Nov. 14, 2019), https://bit.ly/37OG8Ip (mortality rate based on source data from Agency for Healthcare Research and Quality; Health Resources and Services Administration; Centers for Disease Control and Prevention) (no data available from Alaska, New Hampshire for Vermont). Despite the data from the CDC, the Louisiana Department of Health self-reported far lower numbers. It claims a maternal mortality rate of 12.4 deaths per 100,000 births. Lynn Kieltyka et al., *Louisiana Maternal Mortality Review Report: 2011-2016*, LA DEP'T OF HEALTH (Aug. 2018), https://bit.ly/2Y6IHRK.

[13] In contrast, pregnancy- and childbirth-related deaths in 2015 were 3.8 per 100,000 live births in Finland, 7.8 in France; 4.2 in Austria; 0.7 in Iceland; 5.8 in Israel; 5.6 in Spain; and 9.2 in the United Kingdom. GBD 2015 Maternal Mortality Collaborators, *Global, Regional, and National Levels of Maternal Mortality, 1990-2015: A Systematic Analysis for the Global Burden of Disease Study 2015*, 388 LANCET 1775, 1784-85 (2016), https://bit.ly/34Ed1pa.

[14] *Id.*, at 1784-85 (2016).

women.[15] Across all racial groups in Louisiana, 45% of all pregnancy-related deaths were deemed preventable—with the state later finding timely access to care to be one of the most common contributing factors.[16]

The relative inaction of the State compared with other states nationwide, coupled with anti-abortion policies obstructing access to abortion and pressuring women into unsafe conditions of motherhood, cannot be described as "pro-life." Louisiana is not a "pro-life" state; it is merely an anti-abortion one.

1. The Louisiana Legislature Failed to Support Wanted Pregnancies

Louisiana's Legislature had at its disposal several legislative tools to support women trying to have children. First, the Louisiana Legislature has failed adequately to address the most commonly cited reason that women give when they explain their decision to have an abortion: lack of financial support.[17] In 2014, when Act 620 was passed, three-

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[15] *Louisiana Maternal Morality*, *supra* note 12, at 3, 22.

[16] *Id.*

[17] M. Antonia Biggs et al., *Understanding Why Women Seek Abortions in the US*, 13 BMC WOMEN'S HEALTH at 5 (2013) (employing data collected from 2008-2010 and finding that 40% of women cite financial reasons for seeking an abortion and 6% of women say that financial reasons are their *only reason* for seeking abortion); *see also* Lawrence B. Finer et al., *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 PERSPS. ON SEXUAL & REPROD. HEALTH 110, 112 (2005) (describing a study that employed different questions and data from 2004 and found that 73% percent of women reported

fourths of abortion patients nationwide were low-income; data available in 2014 showed that 42% of women having abortions subsisted at or below the federal poverty level and another 27% had incomes at or below 200% of the poverty level.[18] Given the centrality of financial considerations in abortion decisions (which likely play an even bigger role in the decisions of Louisiana women, since the state has one of the highest poverty rates in the country,[19] a state that wanted to protect potential life and reduce abortions would provide women the economic support to carry a pregnancy to term. Instead, Louisiana is one of only *three* states in the country that does not allow two-parent families in which neither parent has a disability to receive Temporary Assistance for Needy Families (TANF) funds, no matter their income. A family of three (one parent with two children) can make no more than $4308 a *year* or $359 *per month* to qualify for TANF benefits—the third lowest maximum eligibility level of any state, after only Alabama and Arkansas. The maximum monthly benefit for a family of three—again, a family making no more than $359 per month—is $240 per month, again the 3rd lowest state maximum benefit. The

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having an abortion because they could not afford having a baby).

[18] *June Medical I*, 250 F. Supp. 3d at 83; Jenna Jerman et al., *Characteristics of U.S. Abortion Patients in 2014 and Changes Since 2008* at 6 (2016), GUTTMACHER INST. (2016), https://bit.ly/2R7WGVL (data available in 2016 showed 49% of abortion patients lived below the federal poverty level, and 26% lived below 100-199% of the federal poverty level).

[19] Alemayehu Bishaw & Craig Benson, *Poverty Rate Drops in 20 States and the District of Columbia*, U.S. CENSUS BUREAU (Sept. 13, 2018), https://bit.ly/2sxfLGB.

median monthly cash assistance benefit nationwide is $450.[20] These levels of financial assistance are nowhere near sufficient to meet a family's basic needs.

Nor has Louisiana expanded Medicaid eligibility for pregnant women as other states have, despite the availability of matching federal funds. It was not until two years *after* Act 620 was passed, after an Executive Branch transition,[21] that Louisiana expanded Medicaid under the Affordable Care Act.[22] Despite this expansion, however, Louisiana remains one of the few states that has declined to increase the income Medicaid eligibility threshold *for pregnant women* over the threshold for the main population .[23]

Even if a woman could afford the care she needs to see her pregnancy to term, she faces many additional barriers to accessing reproductive health care to support her pregnancy. Louisiana ranks in the bottom one-third of states for access to health care providers.[24] Studies show more obstetrician-

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[20] Bejamin Goehring et al., WELFARE RULES DATABOOK: STATE TANF POLICIES AS OF JULY 2018 at 108, ADMIN. CHILDREN & FAMILIES, U.S. DEP'T HEALTH & HUMAN SERVS. (Aug. 2019), https://bit.ly/2L9YU3h.

[21] Editorial, *Stats Show That Medicaid Expansion was Best for Louisiana,* TIMES PICAYUNE (Sept. 28, 2018), https://bit.ly/2R9F4ce.

[22] *Medicaid and CHIP Income Eligibility Levels as a Percentage of the Federal Poverty Level for Children and Pregnant Women by State*, MEDICAID AND CHIP PAYMENT ACCESS COMMISSION (Apr. 2018), https://bit.ly/35OBet0.

[23] Goehring*, supra* note 20.

[24] *Dedicated Health Care Provider—Women in Louisiana*, UNITED HEALTH FOUNDATION (last accessed Dec. 1, 2019), https://bit.ly/37XGM6f (analyzing CDC data covering 2016-17);

gynecologists are moving out of Louisiana than are moving in.[25] If the 2014 Legislature had truly enacted the challenged abortion restrictions because of a desire to protect potential life, and to discourage abortion for that reason, it would have provided women with sufficient access to the medical resources that are necessary to assist in pregnancy and childbirth.

2. Louisiana Could Reduce Abortions and Improve Women's Health By Reducing Unintended Pregnancies, But Has Chosen Not To Do So

Studies concur that access to effective contraception dramatically reduces unintended pregnancies and thereby cuts abortion rates.[26]

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id. (less than one-third of Louisiana women report having a personal doctor or healthcare provider).

[25] Imam Xierali et al., *Relocation of Obstetricians-Gynecologists in the United States, 2002-2015*, 129 OBSTETRICS & GYNECOLOGY 543, 546 (2017) (identifying more OB/GYNs moving out of than into Louisiana).

[26] M.A. Biggs, et al., *Did Increasing Use of Highly Effective Contraception Contribute to Declining Abortions in Iowa?*, 91 CONTRACEPTION 167 (2015) (finding a decline in abortion followed increases in use of long-acting reversible contraception ("LARCs") in Iowa); Jeffrey F. Peipert, et al., *Preventing Unintended Pregnancies by Providing No-Cost Contraception*, 120 OBSTETRICS & GYNECOLOGY 1291 (2012) (finding that the teenage pregnancy rate among a cohort of adolescents given counseling on all reversible contraception with an emphasis on LARC methods was 6.3 per 1000, compared to that national average of 34.1 per 1000); Sue Ricketts, et al., *Game Change in Colorado: Widespread Use of Long-Acting Reversible Contraceptives and Rapid Decline in Births Among Young, Low-Income Women*, 46 PERSPS. ON SEXUAL & REPROD. HEALTH 125

Louisiana acknowledged as much in its Child Death Review Report:

> Unplanned pregnancies limit women's opportunities to improve their health prior to becoming pregnant. Improving access to family planning services can lead to an increased rate of intended pregnancies, which may be associated with fewer adverse birth outcomes.[27]

The Report recommended the State should "[i]mprove maternal health by increasing access to family planning services and quality primary care before and between pregnancies."[28]

During the Senate hearing on Act 620 in 2014, the Legislature heard testimony recommending that Louisiana focus on addressing the State's high rates of unintended pregnancy in order to reduce the

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(2014) (finding that an increase in provision of LARCs to women in Colorado as part of the Colorado Family Planning Initiative led to a 24% decline in the proportion of births that were high-risk between 2009 and 2011 and that abortion rates fell 34% and 18%, respectively, among women aged 15–19 and 20–24). *See also* Rachel K. Jones & Jenna Jerman, *Abortion Incidence and Service Availability in the United States, 2014*, 49 PERSPS. ON SEXUAL & REPROD. HEALTH 3 (2017) (drops in birth rates are better explained by increased contraception's facilitation of lower rates of unplanned pregnancy).

[27] *2014-2016 Louisiana Child Death Review: 2014-2016* at 14, LA DEP'T OF HEALTH, https://bit.ly/2Y6IHRK; *see also Louisiana Maternal Morality*, *supra* note 12, at 3, 22.

[28] *Child Death Review*, *id.*, at 14.

abortion rate.[29] But the 2014 Legislature disregarded this evidence and failed to assist women in avoiding unplanned pregnancy either by ensuring access to or educating citizens about the most effective contraceptive methods. In 2014, Louisiana ranked *46th in the nation* in meeting the contraception needs of low-income women.[30] Though many states have contraceptive equity laws, Louisiana has no laws requiring comprehensive insurance plans to cover contraception.[31] Nor does Louisiana expressly permit minors to consent to contraceptive services even though many states explicitly do so.[32] And while the majority of states mandate sex education, Louisiana

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[29] *Hearing on HB 388 Before S. Comm. On the Health and Welfare*, May 7, 2014 (La. 2014) (statement of Autumn Fawn Gandolfi).

[30] UNITED HEALTH FOUNDATION, *supra* note 24 (relying on 2014 data from the U.S. Census Bureau, American Community Survey); Reva B. Siegel, *ProChoiceLife: Asking Who Protects Life and How—Why it Matters in Law and Politics*, 93 IND. L.J. 207, 216 & n.35 (2018).

[31] *See Insurance Coverage of Contraceptives*, GUTTMACHER INST. (Nov. 1, 2019), https://bit.ly/2sxghV3 (documenting that twenty-eight states, but not Louisiana, require insurers that cover prescription drugs to provide coverage of FDA-approved prescription contraceptive drugs and devices); *see also* Siegel, *supra* note 30, at 216 n.35) (explaining that "state contraceptive equity laws are only partly superseded by federal health insurance law (they apply even if an insurance plan is grandfathered under the Affordable Care Act's contraceptive mandate) and will continue to mandate the inclusion of contraceptive coverage in health insurance plans, even if the Trump administration rolls back federal requirements" and citing sources).

[32] *Minors' Access to Contraceptive Services*, GUTTMACHER INST. (Nov. 1, 2019), https://bit.ly/2P5dTwB.

does not.[33] Louisiana is *one out of only five* states in the country that requires any institution that does provide sex education to focus on abstinence and the importance of sex only occurring only within marriage, without requiring a discussion of evidence-based medical forms of contraception or the negative health outcomes of unprotected sex.[34]

In sum, the 2014 Legislature rejected myriad policies adopted by other states to support maternal and infant health and enhance women's reproductive autonomy. Instead, the Legislature opted to obstruct abortion access, limit women's health care options, and neglect families' health care needs. Taken together, these choices demonstrate the 2014 Legislature's hostility to abortion, rather than any genuine dedication to potential life.[35] The Fifth Circuit admits as much when it relies on Louisiana statutes voicing the State's opposition to abortion as proof of the State's pro-life motivation.[36]

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[33] *See* La. Rev. Stat. § 17:281; *Sex and HIV Education*, GUTTMACHER INST. (Nov. 1, 2019), https://bit.ly/35S1enj.

[34] La. Rev. Stat. § 17:281 (2019).

[35] *June Medical I*, 250 F. Supp. 3d at 56 (citing trial Docs. 191 at 200; 196-5 at 2; 196-10 at 1). *See also* Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991, 995-96 (2017).

[36] *See June Medical II*, 905 F.3d at 792 (citing, as evidence that Act 620 can be justified as fetal-protective, a Louisiana statute codifying the State's "intent to 'regulate abortion to the extent permitted,'" and its desire to prohibit all abortions); *see* La. Rev. Stat. § 40:1061.8.

II. THE BURDENS OF INEQUALITY THAT THE ACT IMPOSES ON WOMEN ARE UNDUE

It has been the law of the land for almost fifty years that state policies that entrench stereotypes of what women *should* be are illegal.[37] In *Casey*, the Court recognized the relationship between regulation of reproduction and sex inequality, and explained that laws restricting abortion that are grounded in and further entrench unfounded stereotypes about women are unconstitutional. Almost thirty years ago, *Casey* celebrated that:

> [F]or two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.

505 U.S. at 856.

Key principles developed in equal protection jurisprudence informed the rulings in *Casey* and subsequent cases. Since the 1970s, this Court has recognized that government policies that enforce stereotypes about women violate the equal protection

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[37] *See generally* Neil S. Siegel & Reva B. Siegel, *Pregnancy and Sex Role Stereotyping: From* Struck *to* Carhart, 70 OHIO ST. L.J. 1095 (2009).

clause, as much as laws that discriminate on their face or with invidious purpose.[38] As Chief Justice Rehnquist held in *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003), laws and policies that use biological differences as an excuse to impose sex-based stereotypes, contravene the equal protection guarantee. *Hibbs* explained that regulations of pregnancy that enforce sex-role assumptions about women's role as mothers are a paradigmatic example of such unlawful sex-stereotyping.[39] *Id.* at 724-25, 731, 736.[40] *See also United States v. Virginia,* 518 U.S. 515, 533 & 542 n.12 (1996) (Physical differences between men and women "may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women").[41]

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[38] *Orr v. Orr*, 440 U.S. 268, 279 (1979) ("'No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas.'" (quoting *Stanton v. Stanton*, 421 U.S. 7, 14-15 (1975))); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Califano v. Goldfarb*, 430 U.S. 199, 207 (1977) (striking down a gender-based Social Security classification that rested on "archaic and overbroad generalizations" "such as assumptions as to [women's] dependency").

[39] *See generally*, Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. Rev. 83 (2010).

[40] *See also United Auto Workers v. Johnson Controls*, 499 U.S. 187, 211 (1991) ("It is no more appropriate for the courts than it is for individual employers to decide whether a woman's reproductive role is more important to herself and her family than her economic role.").

[41] Applying these principles, the Court struck down the spousal notice provision of the law. The Court held that a State may not

Justice Ginsburg has explained:

> [L]egal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature.

Gonzales v. Carhart, 550 U.S. 124, 171-72 (2007) (Ginsburg, J., dissenting) (internal citations and quotation marks omitted).

Expressing opposition to abortion through laws burdening and obstructing it, as the Act does, does not translate into protecting life.[42] Instead, the law—like many before it restricting access to contraception and abortion—reflects a hostility to women who decide against motherhood. This hostility is grounded in the premise that a woman's natural role is to be a mother; that motherhood takes precedence over a woman's participation in the workforce, her health, and even her life; and that a woman's interests are less important than the interest of a fertilized egg, embryo

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insist "upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture." 505 U.S. at 852.

[42] Many would point out that making legal abortions more difficult to access does not reduce the overall number of abortions; it just drives abortion underground, resulting in an increase in illegal or clandestine abortions. *Induced Abortion Worldwide: Factsheet*, GUTTMACHER INST. (Mar. 2018), https://bit.ly/2rvgx6v (discussing empirical studies from around the globe).

or fetus. It reflects and entrenches unfounded stereotypes about women. *See Casey,* 505 U.S. at 856.

The stereotyping has a more sinister twist in this case. Louisiana pushes women to remain pregnant under frightful conditions, with the second-highest risk of prenatal and neonatal deaths in the country. This Catch-22 burdens low-income women, especially low-income women of color, the most. *See supra* Argument §I.B & n.10. As we have seen, *id.*, there are many steps the 2014 Legislature could have taken, but did not, to support potential life by supporting those women who want to deliver healthy babies and raise children. These policies, which Louisiana has shunned, would respect the autonomy of low-income women who choose motherhood. Instead, the State's failure to act reflects a devaluing of these women and their families, exacerbates inequality, and further inhibits these women's ability to make significant progress towards equal citizenship.[43] *See Casey*, 505 U.S. at 856*; Virginia*, 518 U.S. at 533-34 & n.12.

Act 620 is not just unconstitutional because of the burden it places on access to abortion with no corresponding benefit. *See* Pet. Br. at 45-50. It is also unconstitutional because the burdens of inequality it imposes on women are "undue." *See Casey*, 505 U.S. at 856.

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[43] Act 620 is also consistent with a long history of attempts to regulate the reproduction of women of color and to dictate what women of color can do with their bodies. *See Brief of Amici Curiae Reproductive Justice Scholars filed in June Medical Servs. v. Gee*, Nos. 18-1323, 18-1460, at 20-21 & n.6 (filed Dec. 2, 2019).

CONCLUSION

Therefore, *amici* respectfully request that the Court reverse the opinion below and enjoin the Act.

Respectfully submitted,

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