No. 18-1323

IN THE

Supreme Court of the United States

JUNE MEDICAL SERVICES L.L.C., ON BEHALF OF ITS PATIENTS, PHYSICIANS, AND STAFF, D/B/A HOPE MEDICAL GROUP FOR WOMEN; JOHN DOE 1; JOHN DOE 2
Petitioners,

v.

DR. REBEKAH GEE, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE LOUISIANA DEPARTMENT OF HEALTH
Respondent.

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

BRIEF FOR CONSTITUTIONAL LAW SCHOLARS ASHUTOSH BHAGWAT, LEE C. BOLLINGER, ERWIN CHEMERINSKY, MICHAEL C. DORF, DANIEL FARBER, JOANNA L. GROSSMAN, PAMELA S. KARLAN, LEAH LITMAN, MARTHA MINOW, JANE S. SCHACTER, SUZANNA SHERRY, GEOFFREY R. STONE, DAVID A. STRAUSS, LAURENCE H. TRIBE, AND MARY ZIEGLER AS *AMICI CURIAE* SUPPORTING PETITIONERS

JOSHUA S. LIPSHUTZ
GRETA B. WILLIAMS
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 955-8500

ORIN SNYDER
Counsel of Record
KATHERINE MARQUART
GIBSON, DUNN & CRUTCHER LLP
200 Park Ave.
New York, NY 10166
(212) 351-4000
osnyder@gibsondunn.com

Counsel for Amici Curiae

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INTEREST OF *AMICI CURIAE* [1]

Amici are constitutional law scholars who teach and write in the field of constitutional law, including as it relates to regulation of abortion, and who have a shared interest in identifying the proper standards of review. This brief sets forth *Amici*'s considered understanding of the framework governing abortion regulation, as established by the decisions of this Court, and how to preserve the undue burden test as established in this Court's precedents over the last two decades. It also explains why the decision below, if permitted to stand, would threaten the uniformity and supremacy of federal law.

Amici are the following scholars:[2]

Ashutosh Bhagwat, Boochever and Bird Endowed Chair for the Study and Teaching of Freedom and Equality and Martin Luther King, Jr. Professor of Law, University of California, Davis, School of Law;

Lee C. Bollinger, President, Columbia University and Seth Low Professor of the University;

Erwin Chemerinsky, Dean and Jesse H. Choper Distinguished Professor of Law, University of California at Berkeley School of Law;

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[1] Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. The parties have filed blanket consents to the filing of *amicus curiae* briefs in accord with Supreme Court Rule 37.3.

[2] *Amici* appear in their individual capacities; institutional affiliations are listed here for identification purposes only.

Michael C. Dorf, Robert S. Stevens Professor of Law, Cornell Law School;

Daniel Farber, Sho Sato Professor of Law, University of California at Berkeley School of Law;

Joanna L. Grossman, Ellen K. Solender Endowed Chair in Women and the Law and Professor of Law, Southern Methodist University Dedman School of Law;

Pamela S. Karlan, Kenneth and Harle Montgomery Professor of Public Interest Law, Stanford Law School;

Leah Litman, Assistant Professor of Law, University of Michigan Law School;

Martha Minow, 300th Anniversary University Professor, Harvard Law School;

Jane S. Schacter, William Nelson Cromwell Professor of Law, Stanford Law School;

Suzanna Sherry, Herman O. Loewenstein Professor of Law, Vanderbilt Law School;

Geoffrey R. Stone, Edward H. Levi Distinguished Service Professor of Law, University of Chicago Law School;

David A. Strauss, Gerald Ratner Distinguished Service Professor of Law, University of Chicago Law School;

Laurence H. Tribe, Carl M. Loeb University Professor, Professor of Constitutional Law, Harvard Law School; and

Mary Ziegler, Stearns Weaver Miller Professor of Law, Florida State University College of Law.

SUMMARY OF ARGUMENT

Louisiana's Act 620 requires abortion providers to have active admitting privileges at a hospital within 30 miles of where an abortion is provided. After Representative Katrina Jackson proposed Act 620 in Louisiana in 2014, an advocacy group sent Jackson an email praising the bill because of its similarity to H.B.2, an admitting privileges law in Texas that had "tremendous success in closing abortion clinics and restricting abortion access in Texas." J.A. 558, 585–86. That comment turned out to be foreshadowing. Ultimately, H.B.2's "success" was its undoing—by imposing admitting privilege requirements on abortion doctors and clinics that could not reasonably be met, H.B.2 resulted in approximately half of Texas's abortion clinics closing, leaving a substantial number of women seeking abortions with insufficient options for obtaining them. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). In 2016, this Court applied the precedent of *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), and held that the admitting privileges requirement in H.B.2 unduly burdened women's right to an abortion and struck down the law as unconstitutional.[3] 136 S. Ct. at 2318.

The same fate should befall Act 620. The admitting privileges requirement contained in Act 620 is identical to that in H.B.2. App. 296a. In fact, Act 620 would have even *more* "success" than H.B.2 did in

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[3] *Amici* acknowledge that transgender men and non-binary persons can become pregnant and may need abortion care. We refer here and elsewhere to "women" seeking abortion simply in recognition that the vast majority of people seeking abortions are women.

Texas, in that Act 620, when passed, would have reduced the number of available abortion providers from six to just one in the entire state. App. 249a. A straightforward application of *Casey* and *Whole Woman's Health* leads to an inevitable result: Act 620 is also unconstitutional.

But when faced with the same constitutional challenge as and similar facts to those of *Whole Woman's Health*, the Fifth Circuit nevertheless upheld Act 620 by distorting this Court's well-settled precedents beyond recognition. While ostensibly applying the same legal standard to different facts, the Fifth Circuit actually rewrote the standard to exempt Act 620 from the most important aspects of *Whole Woman's Health*'s and *Casey*'s undue burden test. To affirm that decision would effectively gut the undue burden test.

This case has implications not just for abortion but for the rule of law itself. Although it is possible for the law on the books to be the same in two states but different in practice, where, as here, the district court found no relevant distinctions between Texas and Louisiana, an appeals court's contrary ruling should be viewed with extreme skepticism. Permitting lower federal courts (and by implication state courts) to circumvent those precedents of this Court with which they disagree would invite lawlessness across a wide range of subject matter areas in which the controlling legal principles take the form of balancing tests, including the Dormant Commerce Clause, procedural due process, and voting rights. Allowing recalcitrance dressed up as factual distinctions would undercut this Court's ability to ensure the uniformity and supremacy of federal law.

Louisiana and other parties have suggested that *Whole Woman's Health* should be clarified or narrowed—that is to say, overruled—but this is a poor vehicle by which to do so. The test is clear and has clearly been misapplied here. And in any event, bedrock principles of stare decisis require continued adherence to this Court's abortion rights precedents, which have been consistently applied, are eminently workable and legally and factually sound, and have induced extraordinary reliance. *Amici* respectfully request that this Court reaffirm the actual undue burden standard as articulated in *Casey* and *Whole Woman's Health* and reverse the Fifth Circuit's decision.

ARGUMENT

I. *Casey* and *Whole Woman's Health* Set Forth the Controlling Undue Burden Standard.

Under *Casey*'s twenty-seven-year-old undue burden standard, state laws that have the "purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion" prior to viability are unconstitutional. 505 U.S. at 877. Only three years ago, this Court reaffirmed the continuing vitality of *Casey* in *Whole Woman's Health v. Hellerstedt*, emphasizing that courts must weigh credible evidence to carefully balance the burdens that laws regulating abortions impose on a woman's access to abortion against their actual benefits. 136 S. Ct. at 2309. Together, *Casey* and *Whole Woman's Health* provide a framework for federal courts to ensure that state laws that purport to regulate women's health and potential human life "stri[ke] a balance" between the actual furtherance of the state's interests and protecting a woman's liberty interest in obtaining an abortion. *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007).

The most essential elements of the undue burden test are that courts (1) examine the actual benefit of the law; (2) examine the burden of the law on women's access to abortions; and (3) determine whether the law is "unduly burdensome" in light of its benefits. The Fifth Circuit's decision below, however, failed to correctly apply any of these elements.

A. *Casey* requires courts to weigh an abortion regulation's purported benefits against its burdens.

Casey considered the constitutionality of a Pennsylvania law that, among other things, required a married woman to produce proof that she notified her husband of her intended abortion before she could receive an abortion (except in emergencies); dictated "that a woman seeking an abortion . . . be provided with certain information at least 24 hours before the abortion is performed"; and required the abortion provider to fulfill certain record-keeping and reporting requirements. 505 U.S. at 844. Before analyzing these requirements, this Court reiterated "*Roe*'s essential holding," that although states have "legitimate interests" "in protecting the health of the woman and the life of the fetus that may become a child," and in preventing most abortions after viability, a woman has a right "to choose to have an abortion before viability and to obtain it without undue interference from the State." *Id.* at 846.

To reconcile these competing interests, the *Casey* plurality articulated a balancing test to analyze the constitutionality of state laws regulating abortion. *Id.* at 876. The Court was clear that both the law's benefits and burdens must be considered: even "a statute which . . . further[s] the interest in potential life or some other valid state interest" but "has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends." *Id.* at 877. Similarly, measures that purport to further the health and safety of women must in fact be necessary to those objectives. *Id.* at 878; *see also id.* ("*Unnecessary* health

regulations that have the purpose or effect of presenting a substantial obstacle . . . impose an undue burden" (emphasis added)).

In applying these standards to various provisions of the abortion law at issue in *Casey*, this Court weighed the burdens the law imposed on women seeking an abortion against the law's asserted benefits. In analyzing the law's spousal notification requirement, for example, the Court credited numerous district court findings regarding the prevalence of domestic violence and acknowledged that requiring women in abusive relationships to inform their spouses of their decision would dissuade a "significant number" of women from obtaining an abortion. *Id.* at 888–91, 893. It then considered the purported benefits of the law and deferred to the lower courts' findings that the requirement conferred little if any benefit, because most women already consult their partners before terminating a pregnancy. *Id.* at 888.

The Court then turned its attention to the law's requirement that a woman wait 24 hours after receiving information about fetal development before obtaining an abortion. In concluding that this was a permissible means of advancing the state's interest in potential life, the plurality decided that it was "not unreasonable" to impose a waiting period to make the decision to obtain an abortion "more informed and deliberate." *Id.* at 885. At the same time, it observed that the district court had not found that any potential increased costs and delays stemming from the requirement were substantial. *Id.* at 886.

With respect to the law's record-keeping and reporting requirements, the Court noted that generally, the collection of information on actual patients was "vital" to medical research, while the associated costs were only "slight." *Id.* at 901. But the Court did strike a provision requiring "reporting of, among other things, a married woman's 'reason for failure to provide notice' to her husband" of the abortion, as it "in effect requires women, as a condition of obtaining an abortion, to provide the Commonwealth with the precise information we have already recognized that many women have pressing reasons not to reveal." *Id*. As with the "spousal notice requirement," the Court found that the provision placed "an undue burden on a woman's choice," and "must be invalidated for that reason." *Id.*

B. *Whole Woman's Health* reinforced *Casey*'s requirement that courts scrutinize the evidence justifying restrictions on abortion.

Although this Court has consistently applied the undue burden test to laws regulating abortion, *see, e.g.*, *Stenberg v. Carhart*, 530 U.S. 914 (2000); *Gonzales*, 550 U.S. 124, over the years, some courts had attempted to apply a standard akin to the more deferential rational basis standard of review. *See* Linda Greenhouse & Reva B. Siegel, Casey *and the Clinic Closings: When "Protecting Health" Obstructs Choice*, 125 YALE L.J. 1428, 1460 (2016) (detailing such efforts). The Court squarely rejected those efforts in 2016 in *Whole Woman's Health*, emphasizing that "[t]he rule announced in *Casey* . . . requires that courts consider the burdens a law imposes on abortion *together with* the benefits those laws confer." 136 S. Ct.

at 2309 (emphasis added); *see also id.* (holding that it is "wrong to equate the judicial review applicable to" laws regulating abortion with "less strict review applicable" to "economic legislation").

As noted above, at issue in *Whole Woman's Health* were provisions of a 2013 Texas law (H.B.2) that included an admitting privileges requirement identical to that in Louisiana's Act 620 and an ambulatory surgical center requirement. The Court applied *Casey*'s undue burden test in invalidating both provisions. In examining the admitting privileges requirement, the Court acknowledged that the requirement was meant to ensure that women could have ready access to a hospital in the event that a complication arose after an abortion procedure. *Id*. at 2311. It then examined the record evidence—including nationwide data—and findings of the district court and concluded that H.B.2's purported credentialing function did not in fact improve patient safety or further the state's interest in protecting women's health because abortion was already "extremely safe." *Id.* at 2311–13.

On the other hand, the Court concluded that the burden H.B.2 imposed on women seeking abortions was significant: indeed, in the months prior to and including the effective date of the admitting privileges requirement, approximately half of the state's abortion clinics closed. *Id.* at 2312. The Court also concluded that it would be "difficult for doctors regularly performing abortions . . . to obtain admitting privileges at nearby hospitals" because "abortions are so safe that providers were unlikely to have any patients to admit" and there are "common prerequisites to obtaining admitting privileges that have nothing to do

with ability." *Id*. Crediting the district court's findings that plaintiffs had met their burden of proof by presenting "direct testimony" and "plausible inferences . . . from the timing of the clinic closures," the Court agreed that the closings resulted from H.B.2 and that, as a result, H.B.2 imposed an undue burden on a woman's right to an abortion and was therefore unconstitutional. *Id.* at 2313. The Court also recognized that the burdens imposed by the law—although caused by clinic closures—were not limited to such closures. *Id*. at 2318.

The Court rejected Texas's position that the provisions did not impose an undue burden "because the women affected by [the] laws are not a 'large fraction' of Texas women 'of reproductive age.'" *Id.* at 2320. The Court countered that "*Casey* used the language 'large fraction' to refer to a large fraction of cases in which the provision at issue is relevant, a class narrower than all women, pregnant women, or even the class of *women seeking abortions* identified by the State." *Id.* (internal quotation marks omitted, emphasis in original). Rather, the "relevant denominator" was "those [women] for whom [the provision] is an actual rather than an irrelevant restriction." *Id.* (internal quotation marks omitted, alterations in original). For that subset of women, the law imposed an undue burden on their access to an abortion and was therefore unconstitutional.

II. The Fifth Circuit Departed from This Court's Precedent and Fundamentally Altered the Undue Burden Standard to Uphold Act 620.

The Fifth Circuit's purported application of the undue burden test in this case bears no resemblance to the test announced by this Court in *Casey* and reaffirmed in *Whole Woman's Health*.

Act 620 fails under a straightforward application of *Casey* and *Whole Woman's Health*. As Louisiana admits, Act 620's admitting privileges requirement is "identical" to the requirement that was deemed unconstitutional in *Whole Woman's Health*. App. 296a. The district court's factual findings closely track those in *Whole Woman's Health* as well: specifically, the district court found that Act 620 "will not improve the safety of abortion in Louisiana," App. 215a, and would "cripple women's ability to have an abortion" because the approximately 10,000 women who obtain abortions in Louisiana each year "would be left with *one* [abortion] provider," App. 254a, 255a, 274a (emphasis added). Such closures would lead to "longer waiting times for appointments, increased crowding and increased associated health risks." App. 258a; *see Whole Woman's Health*, 136 S. Ct. at 2311 (finding "nothing in Texas' record evidence that shows that . . . [the law] advanced Texas' legitimate interest in protecting women's health"); *id*. at 2313 ("[T]he admitting-privileges requirement led to the closure of half of Texas' clinics, or thereabouts," which "meant fewer doctors, longer waiting times, and increased crowding.").

Despite these clear and detailed factual findings, the Fifth Circuit nevertheless upheld Act 620 on the ground that the Act would not impose a substantial

burden on access to abortion—a result directly contrary to *Whole Woman's Health*. In reaching this result, the Fifth Circuit purported to apply the undue burden standard as set forth in *Casey* and *Whole Woman's Health*, but, in fact, fundamentally altered and watered down this standard in a way that is unsupported by law.

A. Lower courts' ability to apply the undue-burden balancing test to new facts is necessarily constrained.

Where this Court articulates a legal standard that calls for balancing—like the undue burden test—lower courts are afforded some leeway in applying that standard to the facts and circumstances of cases before them. Indeed, judicial judgment is inherent in the notion of a balancing test, which involves "weigh[ing] competing rights or interests." Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 59 (1992).

Trial courts, of course, may make factual findings—by hearing testimony, reviewing evidence, making credibility assessments, and drawing inferences—and weigh the competing interests at stake in light of those factual findings. A trial court's application of a balancing test to the particular facts and circumstances of a case necessarily requires the exercise of judgment, and within a certain range, reasonable minds may differ on how much weight to ascribe to different interests. *See* Pauline T. Kim, *Lower Court Discretion*, 82 N.Y.U. L. REV. 383, 409–10 (2007) (noting that applying "a multifactor balancing test" "calls for the exercise of judgment").

But lower courts' ability to customize their approach to legal standards based on different facts is

not unlimited. All lower federal courts must "adhere not only to the holdings" of this Court's prior decisions, "but also to [this Court's] explications of the governing rules of law." *Cty. of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 668 (1989) (Kennedy, J., concurring); *see also Carey v. Musladin*, 549 U.S. 70, 79 (2006) ("Virtually every one of the Court's opinions announcing a new application of a constitutional principle contains some explanatory language that is intended to provide guidance to lawyers and judges in future cases."). This Court's guidance on the nature of a particular balancing test and how to apply that test serves as a critical check on lower courts by preventing them from altering the test's parameters. *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1177 (1989) ("[W]hen the Supreme Court of the federal system . . . decides a case, not merely the *outcome* of that decision, but the *mode of analysis* that it applies will thereafter be followed by the lower courts within that system." (emphasis in original)). Thus, although lower courts exercise judgment in applying a particular balancing test, they may not alter the balancing test itself.

Appellate courts are doubly restrained: their review of the trial court's application of a balancing test is bound not only by this Court's guidance on the nature of the balancing test, but also by their deferential standard of review of the district court's factual findings. A trial court's factual findings can be set aside only when "clearly erroneous." FED. R. CIV. P. 52(a)(6). As this Court has explained, "The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise." *Anderson v. City of Bessemer City*, 470 U.S. 564,

574 (1985). Consequently, "[i]f the district court's account of the evidence is plausible in light of the record . . . the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Id.* at 573–74. It should be uncontroversial that in reviewing trial courts' application of balancing tests, appellate courts must "devote their primary attention to [the] legal issues" in the trial court's decision and give deference to the trial court's factual findings. *Salve Regina Coll. v. Russell*, 499 U.S. 225, 231–32 (1991).

B. The Fifth Circuit impermissibly created exemptions to and shifted burdens in the undue burden test.

The Fifth Circuit exceeded its authority in upholding Act 620. As discussed *supra* at 11, Act 620 is identical in substance to H.B.2 and the district court's factual findings closely track those in *Whole Woman's Health*.[4] The Fifth Circuit nevertheless reached the opposite result by fundamentally altering key elements of the test.

First, the Fifth Circuit failed to balance the purported "minimal benefit" of Act 620 against its burdens. Central to *Whole Woman's Health* was this

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[4] As detailed in Petitioners' brief (*see* Petr. Br. 31–37), the Fifth Circuit improperly disregarded the district court's meticulous and thorough factual findings in an attempt to manufacture differences with *Whole Woman's Health*. In making its own unsupported factual findings, the Fifth Circuit disregarded the basic division of labor between trial courts and appellate courts and "fail[ed] to faithfully apply the well-established 'clear error' standard of review to the district court's factual findings." App. 120a (Dennis, J., dissenting).

Court's holding that a court must "consider the burdens a law imposes on abortion access together with the benefits those laws confer." 136 S. Ct. at 2309. Although the Fifth Circuit's decision paid lip service to the balancing of "both the benefits and burdens" required by *Whole Woman's Health*, in reality, it avoided doing any balancing analysis at all. App. 34a–35a; Petr. Br. 45–50. Nowhere in *Casey* (or *Whole Woman's Health*) did this Court suggest that a law with some—or even a substantial—benefit is exempt from *Casey*'s balancing requirement. *See* App. 30a (stating that "[h]ewing to [*Whole Woman's Health*] and *Casey*, we recognize and apply a balancing test," but "it is not a 'pure' balancing test"). An undue burden does not exist only where there is *no* benefit to the law. *See supra* at 7–8. Instead, the relevant question is whether an abortion restriction's burdens *outweigh* its benefits—an inquiry that necessarily requires an analysis of comparative rather than absolute effects. Inherent in the concept of a balancing test is the notion that where the benefits are minimal (or nonexistent), the burdens are more likely to be disproportionate. *See Whole Woman's Health*, 136 S. Ct. at 2313 (explaining that regulations are more likely to fail the undue burden test "when viewed in light of the[ir] virtual absence of any health benefit"). Yet, that analysis was entirely absent from the Fifth Circuit's decision.

Second, in analyzing the burdens imposed by Act 620, the Fifth Circuit subjected the plaintiffs to a heightened causation standard, which effectively shifted the burden to physicians to mitigate the effects of Act 620. It set aside the district court's findings that the physicians made "good-faith effort[s] to obtain [admitting] privileges," and instead declared that, in its view, the physicians "fail[ed] to apply for privileges in a reasonable manner." App. 41a–49a. It

then found that this failure was an "intervening cause" of any burden upon access, and thus, there was insufficient evidence of a causal connection between Act 620 and its burdens. App. 49a.

The Fifth Circuit's approach is contrary to the causation analysis set forth in *Whole Woman's Health*. App. 47a–49a. In *Whole Woman's Health*, this Court concluded that when clinics where physicians lacked admitting privileges closed "in the months leading up to the requirement's effective date" and "on the day the admitting-privileges requirement took effect," the "plausible inferences to be drawn from the timing of the clinic closures" was that the closures were attributable to the statute. 136 S. Ct. at 2312–13. This Court rejected the dissent's argument that because some of the clinics may have closed due to providers' retirement "or other localized factors," the burdens resulting from those closures did not "count" against the law. *Id.* at 2344–46 (Alito, J., dissenting). But even the dissent suggested that the relevant question was only to what extent "clinics closed (or experienced a reduction in capacity) for any reason unrelated to the challenged provisions of H.B.2." *Id.* at 2346. There was no question that *if* H.B.2 led to the closure, "the corresponding burden on abortion access [should] be factored into the access analysis." *Id.* By contrast, the Fifth Circuit demanded much more—searching for alternative culprits and discounting the fact that all of the difficulties facing providers resulted from Act 620.

The Fifth Circuit *also* required plaintiffs to show that the burden imposed by Act 620, no matter how onerous or unnecessary, could not be alleviated in some way before it would attribute that burden to the Act. App. 40a–41a. As Judge Higginbotham noted in his dissent, the Fifth Circuit "essentially holds that,

because private actors (the physicians) have not tried hard enough to mitigate the effects of the act (a conclusion contradicted by the district court's factual findings), those effects are not fairly attributable to the act." App. 93a. The majority attempted to justify its heightened and individualized causation analysis on the grounds that Louisiana had fewer abortion facilities and physicians than Texas, which allowed it to "examine each abortion doctor's efforts to comply with the requirements of Act 620" and the "specific by-laws of the hospitals to which each [doctor] applied." App. 40a. Yet the availability of additional evidence does not provide a basis to alter the substance of the causation standard under which that evidence is analyzed. App 125a.

Third, in analyzing whether the burdens imposed by Act 620 warranted facial invalidation, the Fifth Circuit misapplied *Casey*'s holding that a law may be facially invalidated if it imposes an undue burden in a "large fraction of the cases in which [it] is relevant." 505 U.S. at 925. The Fifth Circuit first compared the number of abortions performed annually in Louisiana (10,000) to the number of abortions performed at a clinic that would close as a result of Act 620 (3,000), and found that only one-third of women seeking abortions would be burdened by the Act. App. 55a–56a. The court then offered a "second interpretation," in which it ostensibly evaluated which of the 3,000 women who annually sought abortions at Hope Clinic were "substantially burdened" by Act 620. App. 58a–59a. Based on its prior conclusion that there was *no* undue burden, none of the women were substantially burdened. App. 59a; *see* App. 58a (rather than substantial, "[t]he burden is only potential: Doe 1's capacity can easily be absorbed by the remaining abortion doctors").

Neither of those approaches is correct. Under *Casey*, the question of whether a law is an undue burden for a large fraction of women requires examining the situation for women for whom the statute "is relevant"—not simply "'all women,' 'pregnant women,' or even 'the class of *women seeking abortions* identified by the State.'" *Whole Woman's Health*, 136 S. Ct. at 2320 (emphasis in original).

The Fifth Circuit's first analysis erroneously devalues the harm of Act 620 by examining the burden of the law on women for whom the admitting privileges requirement is not an impediment at all, rather than women who seek to use a clinic that cannot meet the admitting privileges requirement. And the admitting privileges requirement's effect is significant: the district court concluded that only one of the five doctors then providing abortions would continue operating in the state, all for reasons attributable to Act 620, App. 252a–254a, and concluded that "approximately 70% of the women in Louisiana seeking an abortion would be unable to get an abortion in Louisiana," App. 256a. The resulting burden on women who seek an abortion from clinics affected by Act 620 mirrors (indeed exceeds) the burden this Court found to be substantial in *Whole Woman's Health*. *Compare* App. 258a ("It is plain that Act 620 would result in the closure of clinics, fewer physicians, longer waiting times for appointments, increased crowding and increased associated health risks."), *with* 136 S. Ct. at 2318 ("[I]n the face of no threat to women's health, Texas seeks to force women to travel long distances to get abortions in crammed-to-capacity superfacilities" where women "are less likely to get the kind of individualized attention, serious conversation, and emotional support that doctors at less taxed facilities may have offered," while "[s]urgical centers attempting to

accommodate sudden, vastly increased demand . . . may find that quality of care declines," effects that "would be harmful to, not supportive of, women's health."). The "large fraction" principle directs courts to focus their inquiry on the effect of the law on women who will be actually restricted by the law and determine whether the law will unduly burden that population. The Fifth Circuit fell woefully short here.

In sum, the Fifth Circuit did not faithfully apply this Court's decision in *Whole Woman's Health*. The Fifth Circuit lacked the discretion to create exemptions within and re-weigh the factors in the undue burden test—yet that is precisely what the Fifth Circuit did in upholding Act 620. The Fifth Circuit thus exceeded the limits of its discretion and its decision warrants reversal.

III. If Not Repudiated, the Fifth Circuit's Circumvention of Supreme Court Precedent Will Have Far-Reaching Effects and Undermine the Uniformity and Supremacy of Federal Law.

The Fifth Circuit's decision was wrong for an additional reason: the court's misuse of the undue burden standard subverts the rule of law. Should this Court condone such misuse, it would encourage other lower courts to subvert other balancing tests—which are abundant in constitutional law—as a way to circumvent precedent with which they disagree.

Tests like the undue burden test are common in constitutional law. *See* Frank N. Coffin, *Judicial Balancing: The Protean Scales of Justice*, 63 N.Y.U. L. REV. 16, 18 (1988) (describing the widespread use of

balancing in constitutional rights analysis). Indeed, when crafting the undue burden standard in *Casey*, this Court looked to the balancing tests employed in the voting rights context, 505 U.S. at 873–74 (citing *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)), which require courts to balance the burden "[h]owever slight" on the right to vote against the government's interest, which must be "sufficiently weighty to justify the limitation," *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 190–91 (2008).

Examples of undue-burden and other balancing tests can be found across the breadth of constitutional law. Consider the Dormant Commerce Clause context, in which courts must assess whether "the burden imposed on [] commerce" by non-discriminatory laws "is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); *see also South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2091 (2018) ("States may not impose undue burdens on interstate commerce."). Likewise, in the procedural due process context, courts must weigh the benefits of additional procedures against their probable costs to determine whether the challenged procedure satisfies due process. *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).[5]

To be sure, balancing tests have sometimes come under fire in this Court, but this Court has also

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[5] Balancing tests are also prevalent in First and Fourth Amendment cases. *See, e.g.*, *Bartnicki v. Vopper*, 532 U.S. 514, 529–34 (2001) (balancing the benefits and harm of a content neutral restriction); *Samson v. California*, 547 U.S. 843, 848 (2006) (balancing individual privacy interests against legitimate government interests in determining whether a search is reasonable).

acknowledged, repeatedly, that in many instances relying solely on bright line rules is simply not possible. As Justice Scalia explained when discussing the Court's balancing approach in the Takings Clause context: "In view of the nearly infinite variety of ways in which government actions or regulations can affect property interests, the Court recognized few invariable rules in this area." *Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23, 31 (2012). The Court had "drawn some bright lines, ... [b]ut aside from the cases attended by rules of this order, most takings claims turn on situation-specific factual inquiries." *Id.* at 31–32. So too, here. "[N]o magic formula enables a court to judge, in every case," *id.*, whether and to what extent a given state law affects a woman's liberty interest in an abortion. And the interests of both sides—the state's in the health of its citizens and women in their fundamental right to an abortion—are too important to adopt rigid rules that risk very substantial under- or over-inclusiveness. The undue burden test allows courts to take meaningful facts into account; more, it furthers substantive equality because it "allow[s] decisionmakers to treat . . . cases that are substantively alike" in the same way, Sullivan, *supra*, at 66, and enhances fairness by allowing courts to consider "relevant similarities and differences," in deciding whether an outcome is substantively fair, Kim, *supra*, at 416.

But for balancing tests to work, lower courts cannot abuse the flexibility such tests offer by relying on immaterial distinctions to avoid faithfully following the Supreme Court's holdings or their animating rationales. *See Hutto v. Davis*, 454 U.S. 370, 375 (1982) ("Unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be fol-

lowed by the lower federal courts no matter how misguided the judges of those courts may think it to be.").[6] And a lower court's options are at their most limited in cases like this one—where it addresses a statute that is identical to a statute that has been struck down as unconstitutional by the Supreme Court and the district court found no relevant distinctions supporting a different result. Indeed, this Court has summarily reversed lower courts when they have invoked specious factual differences to uphold statutes almost identical to statutes this Court had previously struck down. *See*, *e.g.*, *Pavan v. Smith*, 137 S. Ct. 2075 (2017) (summarily reversing an Arkansas state court decision at odds with *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015)); *American Tradition P'ship Inc. v. Bullock*, 567 U.S. 516 (2012) (summarily overturning a Montana Supreme Court decision seeking—and failing—to distinguish a state ban of corporate contributions from the federal restriction struck down only two years earlier in *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010)).

Here, the Fifth Circuit strayed outside these constraints and upended the undue burden test by subjecting the plaintiffs to a heightened causation standard, failing to properly weigh the purported "minimal" benefits of Act 620 against its burdens, and engaging in improper fact-finding. *See supra* Part II.B. Act 620 is, by Louisiana's own admission, "identical" to H.B.2,

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[6] If some area is governed by a standard or balancing test but should instead be governed by a rule, the proper response for this Court is to replace the standard with a rule, not for lower courts to circumvent the standard. Such a change is not warranted here; however, even if it were, no proposal to replace the undue burden test with a bright line rule was briefed below, and therefore this Court should not embark on substantively rewriting or changing precedent. *See infra* Part IV.

App. 296a; yet the Fifth Circuit upheld Act 620 based on unsupportable (and unsupported) distinctions of fact.

Permitting such lower court legerdemain will diminish the utility of balancing tests in other contexts and encourage both trial and appellate courts to misuse these tests to circumvent precedent they dislike. That, in turn, will undermine the uniform and consistent application of law to all parties, as each decision will depend "upon the caprice, or will of particular judges." 3 Joseph Story, *Commentaries on the Constitution of the United States* § 377 (1st ed. 1833); *see also Whole Woman's Health*, 136 S. Ct. at 2331 (Alito, J., dissenting) (explaining that "patent refusal to apply well-established law in a neutral way is indefensible and will undermine public confidence in [courts] as fair and neutral arbiter[s]"). And enabling such lawless decision-making will leave people in the dark about what the law is, undermining our "common law tradition . . . to ensure fair notice before any deprivation of life, liberty, or property could take place, whether under the banner of the criminal or the civil law." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1228 (2018) (Gorsuch, J., concurring).

Lower courts lack the authority to disregard or trim Supreme Court precedents, even when those precedents "rest on reasons rejected in some other line of [Supreme Court] decisions." *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). That admonition applies *a fortiori* here, because no decisions of this Court cast any doubt on *Whole Woman's Health*. Accordingly, even if this Court were inclined to modify or abandon the undue burden test, the Fifth Circuit would have erred. Because, as we argue next, there is no reason to modify

or abandon that test, the error was especially egregious.

IV. Principles of Stare Decisis Require Faithful Adherence to the Undue Burden Standard.

This case presents questions about the extent to which lower courts may draw minute factual distinctions and reconfigure long-standing standards, but it is a poor vehicle for reconsidering the continued vitality of *Roe*, *Casey*, or *Whole Woman's Health*. *But see* Opp. at 39 (suggesting that if the Court does not reach Louisiana's preferred interpretation of *Whole Woman's Health*, then the decision should be "overruled"). Indeed, not one of the factors this Court has used to justify departure from precedent is present in this case. Moreover, Louisiana has waived any argument that this Court's abortion-rights case law should be overruled. Accordingly, this Court should reject Louisiana's invitation to overturn long-standing precedent or rewrite that precedent to render the undue burden test little more than a nullity.[7]

"Fidelity to precedent—the policy of stare decisis—is vital to the proper exercise of the judicial function." *Citizens United*, 558 U.S. at 377 (Roberts, C.J., concurring). Certainly, stare decisis is not a "mechanical formula of adherence to the latest decision,"

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[7] Although Louisiana suggests in passing that *Whole Woman's Health* should be overruled, it "primarily" requests that the Court "clarify" its precedent "by holding that a State establishes the 'benefits' of a challenged abortion regulation by proving the law rationally serves its intended purpose." Opp. at 36. In this context, there can be no doubt that "clarify" is a euphemism for "overturn." As noted, *Whole Woman's Health* explicitly rejected rational basis review as the correct standard for reviewing abortion regulations. *See supra* Section IB.

Helvering v. Hallock, 309 U.S. 106, 119 (1940), nor an "inexorable command," *Payne v. Tennessee*, 501 U.S. 808, 828 (1991). Overturning a long-settled precedent, however, requires "special justification"—"not just an argument that the precedent was wrongly decided." *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014). Here, there is no justification—special or otherwise—for overturning or limiting *Roe*, *Casey*, or *Whole Woman's Health*.

In evaluating the continuing force of precedent, this Court generally considers, among other things, a decision's consistency with related decisions, the workability of the rule it establishes, legal or factual developments since the decision was handed down, reliance on the decision, and the quality of the reasoning therein. *See Janus v. Am. Fed'n of State, Cty., & Mun. Emps.*, 138 S. Ct. 2448, 2478–79 (2018). Even a cursory look at these considerations compels the conclusion that there are no grounds for abandoning the Court's abortion rights precedent, nor for diluting the undue burden standard.

Consistency. To start, deference to precedent is particularly important where a rule of decision "has become settled through iteration and reiteration over a long period." *Randall v. Sorrell*, 548 U.S. 230, 244 (2006) (plurality opinion). That is precisely the situation here. This Court has faithfully adhered to *Roe*'s "central holding," *Casey*, 505 U.S. at 853, for nearly half a century. And as explained above, the most recent in this line of cases, *Whole Woman's Health*, endorsed *Casey*'s standard while striking down a burdensome admitting privileges requirement identical to the one in this case. 136 S. Ct. at 2300, 2309 (emphasis added).

Workability. Nor can there be any serious charge that the tests from *Casey* and *Whole Woman's Health* have become unworkable. An unworkable rule causes "inherent confusion" or "poses a direct obstacle to the realization of important objectives embodied in other laws." *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989). In *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), for example, this Court overruled *National League of Cities v. Usery*, 26 U.S. 833 (1976), in which it had held that states were immune from congressional regulation where state employees performed activities in "areas of traditional government functions." *Garcia*, 469 U.S. at 530. *Garcia* discarded the "traditional government functions" test as unworkable because it "did not offer a general explanation of how a 'traditional' function is to be distinguished from a 'nontraditional' one." *Id.*; *see also Swift & Co. v. Wickham*, 382 U.S. 111, 125 (1965) (overruling a decision that created an "unworkable" standard "for allocating litigation between district courts of one and three judges" because the "proper forum" could not be determined until each case was adjudicated on its merits such that the test significantly delayed the litigation process).[8]

Critically, "controversial" is not the same as "unworkable." *See Casey*, 505 U.S. at 860 ("While [the Court's decision in *Roe*] has engendered disapproval, it has not been unworkable."). Unlike the tests at is-

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[8] *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019), does not represent a departure from these basic principles. *Knick* overruled *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), because it had become unworkable due to subsequent legal developments. In addition, *Knick* involves no reliance interests.

sue in *Garcia* and *Swift*, courts have applied the undue burden test for the past twenty-seven years without serious impediment. Indeed, the district court below had no trouble methodically applying *Casey*. App. 265a–279a (granting permanent injunction against Act 620). That the Fifth Circuit then engaged in its own improper fact-finding to reach a different result in no way indicates that the undue burden test is unworkable in the first instance. The test has been *misapplied* by the Fifth Circuit, not because it is unworkable but because that court drew spurious factual distinctions and engaged in inappropriate burden shifting.

Legal or factual developments. Moreover, there has been no change in the relevant legal or factual landscape since the Court handed down *Roe*, *Casey*, or *Whole Woman's Health*. It is one thing to overrule an earlier decision when "related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine," or when "facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification." *Casey*, 505 U.S. at 854–55. But no such sea change has occurred here. *Roe* has kept pace with factual and legal underpinnings: societal understanding both of the ubiquity and safety of abortion, and of the liberty interests implicated by a woman's right to choose, have not changed in the decades since *Roe* was decided. *Compare Casey*, 505 U.S. at 864 (upholding *Roe* after noting that "neither the factual underpinnings of *Roe*'s central holding nor our understanding of it has changed"), *with Wayfair*, 138 S. Ct. at 2094 (overturning precedent because of "dra-

matic technological and social changes" in our "increasingly interconnected economy," including a marked increase in retailers selling goods remotely).[9]

Reliance. There has also been extraordinary reliance on *Roe*, *Casey*, and *Whole Woman's Health*—both at the individual and institutional levels. *See Hilton v. S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991) ("Stare decisis has added force when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response."); *Dickerson v. United States*, 530 U.S. 428, 431–32 (2000) (declining to overrule *Miranda v. Arizona*, 384 U.S. 436 (1966), despite doubts about the merits of its reasoning, because "[*Miranda*] warnings have become part of our national culture"). Throwing a woman's right to terminate a pregnancy into question would upend lives across the country, affecting everything from specific reliance on the availability of an abortion in the face of an unplanned pregnancy to broader life decisions about how to structure one's family and divide labor between spouses. *See Reproductive Health, Abortion Surveillance—Findings and Reports*, CENTERS FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/reproductivehealth/data_stats/abortion.htm (last visited Nov. 4, 2019) (reporting more than 45 million legal induced abortions between 1970 and 2015).

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[9] *Franchise Tax Board of California v. Hyatt*, 139 S. Ct. 1485 (2019), which overruled *Nevada v. Hall*, 440 U.S. 410 (1979), is in line with these precedents. *Hall* was an outlier that had been overtaken by subsequent legal developments in a way that *Roe* and *Casey* have not.

Indeed, if anything, the Court's pronouncement in *Casey* applies with increased force decades later: "[W]hile the effect of reliance on *Roe* cannot be exactly measured, neither can the certain cost of overruling *Roe* for people who have ordered their thinking and living around that case be dismissed." *Id*. at 856; *see also* Mark Tushnet, THE NEW CONSTITUTIONAL ORDER 91–92 (2003) (explaining *Roe* as "so embedded in the nation's culture that overruling it would disrupt understandings not about abortion alone, but about the role of women in society"). At this point, *Roe* has been a part of the educational and social lives of men and women for multiple generations.

Quality of reasoning. Furthermore, there is no legitimate claim that the quality of reasoning in *Roe*, *Casey*, or *Whole Woman's Health* is so faulty, so infirm, or so "manifestly erroneous" that it requires reversal. *United States v. Gaudin*, 515 U.S. 506, 521 (1995); *see, e.g.*, *Janus*, 138 S. Ct. at 2479 (overruling *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977) in part because it was "poorly reasoned" and an "anomaly" in the Court's First Amendment jurisprudence).[10] The abortion cases are well-reasoned, time-tested, and consistent with this Court's liberty jurisprudence. *Casey*, moreover, directly considered the impact of stare decisis when deciding whether to follow *Roe*. 505 U.S. at 854–61. Call it superprecedent, precedent-on-

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[10] *Janus* made clear that *Abood* was thinly reasoned and had been undermined by subsequent legal and factual developments. *See* 138 S. Ct. at 2479–80, 2483–84. In contrast, *Roe*, *Casey*, and *Whole Woman's Health* rely on a multitude of cases stretching back at this point almost a century and have not been overtaken by new facts or legal developments.

precedent, or even just precedent; *Roe* remains—despite its controversy—a foundational decision in our legal tradition.

In sum, stare decisis "contributes to the integrity of our constitutional system of government, both in appearance and in fact" by "permit[ting] society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals." *Vasquez v. Hillery*, 474 U.S. 254, 265–66 (1986). As the *Casey* plurality recognized, in the context of abortion rights, especially, "to overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question." *Casey*, 505 U.S. at 867. This Court should reject Louisiana's invitation to do just that.

CONCLUSION

For the reasons stated above and in Petitioners' brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

JOSHUA S. LIPSHUTZ
GRETA B. WILLIAMS
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 955-8500

ORIN SNYDER
Counsel of Record
KATHERINE MARQUART
GIBSON, DUNN & CRUTCHER LLP
200 Park Ave.
New York, NY 10166
(212) 351-4000
osnyder@gibsondunn.com

Counsel for Amici Curiae

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