Nos. 18-1323, 18-1460

In The Supreme Court of the United States

JUNE MEDICAL SERVICES, L.L.C., et al.,

Petitioners,

v.

REBECCA GEE,

Respondent.

REBECCA GEE,

Cross-Petitioner,

v.

JUNE MEDICAL SERVICES, L.L.C., et al.,

Cross-Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF *AMICUS CURIAE* STATE OF IDAHO IN SUPPORT OF RESPONDENT/ CROSS-PETITIONER

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INTEREST OF THE *AMICUS CURIAE* STATE[1]

Idaho is one of many States with physician-only laws[2] currently being challenged in lawsuits by abortion providers in which lower courts are interpreting the impact of *Whole Woman's Health v. Hellerstedt*, 136 S. Ct 2292 (2016) ("*WWH*") on this Court's abortion precedent.[3] Abortion providers and lower courts have

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[1] In compliance with Supreme Court Rule 37.2(a), counsel of record for all parties received timely notice of *amicus curiae*'s intention to file this brief. Blanket consent for the filing of *amicus* briefs was granted by Petitioners/Cross-Respondents on October 24, 2019 and by Respondent/Cross-Petitioner on November 8, 2019.

[2] The reference to "physician-only laws" means state laws and regulations that limit the performance of abortions to only physicians (and in Montana to physicians and physician assistants).

[3] In the last three years following this Court's decision in *WWH*, abortion providers have sought to invalidate physician-only laws, among others, and the holding in *Mazurek v. Armstrong*, 520 U.S. 968, 974-75 (1997), in the following lawsuits:

- *June Med. Servs., LLC v. Gee*, No. 3:17-cv-00404-BAJ-RLB (M.D. La.), filed on June 27, 2017 and challenging La. Stat. Ann. §§ 14:32.1 and 14:32.9 (hereinafter "**Louisiana physician-only lawsuit**");
- *Weems v. Montana*, No. ADV 2018-73 (Lewis & Clark Cty. D. Ct., Mont.), filed on January 30, 2018 and challenging Mont. Code Ann. § 50-20-109(1)(a) (hereinafter "**Montana physician-only lawsuit**");
- *Jackson's Women's Health Org. v. Currier*, No. 3:18-cv-00171-CWR-FKB (S.D. Miss.), filed on March 19, 2018 and challenging Miss. Code Ann. § 41-75-1(f) (hereinafter "**Mississippi physician-only lawsuit**");
- *Whole Woman's Health All. v. Paxton*, No. 1:18-cv-00500 (W.D. Tex.), filed on June 14, 2018 and challenging Tex. Health & Safety Code Ann. §§ 171.003, 171.063(a)(1), 245.010(b); 25 Tex. Admin. Code

§§ 139.2(1), 139.53(a)(7) (hereinafter "**Texas physician-only lawsuit**");

- *Falls Church Med. Ctr., LLC v. Oliver*, No. 3:18-cv-00428-HEH (E.D. Va.), filed on June 20, 2018 and challenging Va. Code Ann. § 18.2-72 (hereinafter "**Virginia physician-only lawsuit**");
- *Whole Woman's Health All. v. Hill*, No. 1:18-cv-01904-SEB-MJD (S.D. Ind.), filed on June 21, 2018 and challenging Ind. Code § 16-34-2-1(a)(1)(A) and 410 Ind. Admin. Code 26-13-2(b) (hereinafter "**Indiana physician-only lawsuit**");
- *Planned Parenthood of the Great Northwest, et al. v. Wasden, et al.*, No. 1:18-cv-00555-BLW (D. Ct. Idaho), filed on December 14, 2018 and challenging Idaho Code §§ 18-608A and 18-605(3) (hereinafter "**Idaho physician-only lawsuit**");
- *Planned Parenthood of Wisc., Inc. v. Kaul*, No. 3:19-cv-00038-wmc (W.D. Wisc.), filed on January 16, 2019 and challenging Wis. Stat. § 940.15(5) and Wis. Admin Code Med. § 11.03 (hereinafter "**Wisconsin physician-only lawsuit**");
- *Planned Parenthood Ariz., Inc. v. Brnovich*, No. 4:19-cv-00207 (D. Ariz.), filed on April 11, 2019 and challenging Ariz. Rev. Stat. §§ 36-2155 and 36-2153(E) (hereinafter "**Arizona physician-only lawsuit**"); and
- *Doe v. Minnesota*, No. 62-CV-19-3868 (Ramsey Cty. D. Ct., Minn.), filed on May 29, 2019 and challenging Minn. Stat. § 145.412, subd. 1(1) (hereinafter "**Minnesota physician-only lawsuit**").

In addition, *Jenkins v. Almy*, No. 2:17-cv-00366-NT (D. Me.) was filed on August 20, 2017 challenging Me. Rev. Stat. Ann. tit. 22, § 1598 (hereinafter "**Maine physician-only lawsuit**"), Maine's physician-only law**,** but Maine has settled that case, resulting in a stipulated dismissal. It was also reported that abortion providers filed a lawsuit challenging Alaska's physician-only law on December 12, 2019. Andrew Kitchenman, *Planned Parenthood sues Alaska over law requiring abortion providers to be doctors*, ALASKA PUB. MEDIA & KTOO-JUNEAU (Dec. 12, 2019),

taken *WWH* as an invitation to reexamine numerous baseline abortion regulations that States understood to have long been upheld as constitutional by this Court. As a result, numerous established abortion regulations previously thought to be settled for years, are now being subjected to a state-by-state fact and record specific reexamination by lower courts, under an unclear balancing test that lends no predictability as to how to apply this Court's precedent. States need clear guidance from this Court regarding: (1) the role of *WWH* and the Court's abortion precedent; (2) how to apply *WWH* going forward; and (3) whether States will continue to have any meaningful space to advance their legitimate interests in abortion regulation. This brief attempts to point out some of the live, practical, and real-world confusion States face in defending their abortion regulations post-*WWH*.

SUMMARY OF THE ARGUMENT

Lower courts perceive a tension between *WWH* and this Court's earlier precedent, leaving them hesitant to enforce precedent that preceded *WWH*. States are uncertain about how to proceed when their laws are challenged as an undue burden. Thus, as the Court decides the issues in this appeal, it should confirm the decisional baselines on which States may rely in abortion jurisprudence. The Court should also clarify that

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https://www.alaskapublic.org/2019/12/12/planned-parenthood-sues-alaska-over-law-requiring-abortion-providers-to-be-doctors/.

States are not required to prove their laws are "necessary" or survive strict scrutiny under *WWH*. The Court should confirm that the "benefit" States must articulate and prove in the undue burden analysis is that the regulation at issue advances a legitimate State interest, not that it confers some unspecified number of benefits on women seeking abortions or their providers. The Court should also reject the argument that *WWH* established a proportional balancing test as part of the undue burden analysis. And the Court should hold that when an abortion regulation is challenged as an undue burden, plaintiffs must affirmatively establish causation and prove the regulation proximately caused the burdens they claim. Absent these clarifications, the right recognized in *Roe v. Wade*, 410 U.S. 113 (1973), will be expanded in ways that mark a drastic departure from our Nation's understanding of the Constitution.

ARGUMENT

A. This Court's prior precedent is being called into question in lawsuits around the country, and States need clear guidance about how to apply *WWH*.

Decades of this Court's binding abortion decisions are being called into question in numerous lawsuits filed across the country following *WWH*.[4] Abortion

[4] *See* footnote 3 above; *see also* Appendix attached hereto ("App.") at 3-5, 8-10, 12-13, 25-26, 29.

providers like Petitioners (collectively, "June Medical") are attacking regulations that have been in place for years, using a united argument that "*all* abortion restrictions must be evaluated under the undue burden framework, which requires a highly fact- and context-specific analysis whose outcome may vary based on the specific record presented."[5] They have also taken *WWH* as an opportunity to essentially argue for strict scrutiny of all abortion regulations.

Questions remain, however, whether this Court intended *WWH* to have a wide-sweeping invalidating effect on its prior precedent, and whether abortion regulations challenged as undue burdens are subject to strict scrutiny. If the Court did not intend for *WWH* to upset settled abortion precedent, it should clarify that in this case. Similarly, if the Court did not intend to subject abortion regulations to strict scrutiny, it should clarify that now. Clarity is needed because a practical and consistent consequence from the Court's *WWH* decision is that States are currently struggling with a U.S. Supreme Court abortion decision that "deliver[s] neither predictability nor the promise of a judiciary bound by the rule of law." *WWH*, 136 S. Ct. at 2321 (Thomas, J., dissenting). The Court's decision in this case should deliver clear guidance on how States must proceed.

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[5] *See* Idaho physician-only lawsuit, Dkt. 43 at 9 (emphasis added); Virginia physician-only lawsuit, Dkt. 25 at 11-12; Maine physician-only lawsuit, Dkt. 46 at 17-18, 20-25.

1. If the Court did not intend for *WWH* to unsettle its prior precedent, it should reaffirm the decisional baselines that States may rely on in abortion jurisprudence.

In addition to deciding whether *WWH* has *stare decisis* effect on the constitutionality of all similarly situated admitting privileges in the Nation, the Court should clarify the role of its earlier abortion precedent in a post-*WWH* world. Namely, the Court should reaffirm the validity of existing physician-only precedent and clarify the scope of *WWH* as to other abortion restrictions.

Prior to *WWH*, States relied on at least two settled constitutional baselines in abortion jurisprudence, deriving from the Court's recognition of state police power in its precedent: (1) the basic notion that States could require that abortion providers be licensed; and (2) the power to restrict the performance of abortions to physicians only. *See Mazurek v. Armstrong*, 520 U.S. 968, 974-75 (1997) (citation omitted); *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 884-85 (1992); *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 447 (1983) (citations omitted), *overruled on other grounds by Casey*, 505 U.S. 833; *Simopoulos v. Virginia*, 462 U.S. 506, 519 (1983); *Connecticut v. Menillo*, 423 U.S. 9, 10-11 (1975); *Roe v. Wade*, 410 U.S. 113, 163 (1973); *Doe v. Bolton*, 410 U.S. 179, 200-01 (1973). As the Seventh Circuit has recently noted:

> The Court's recognition of the state's power to license abortion care providers stretches back

> to *Roe v. Wade*'s companion case, *Doe v. Bolton*, 410 U.S. 179, 200-01, 93 S. Ct. 739, 35 L.Ed.2d 201 (1973). The appellant in *Bolton* did not challenge the state's requirement that abortions be provided only by licensed physicians. The Court confirmed the legitimacy of that type of restriction in later cases. In *Simopoulos v. Virginia*, 462 U.S. 506, 103 S.Ct. 2532, 76 L.Ed.2d 755 (1983), it held that a state could require second-trimester abortions to be performed in licensed clinics, because it was "not an unreasonable means of furthering the State's compelling interest in 'protecting the woman's own health and safety.'" *Id.* at 519, 103 S.Ct. 2532 (quoting *Roe v. Wade*, 410 U.S. 113, 150, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973)). *Casey* expanded on this point. 505 U.S. at 885, 112 S.Ct. 2791. There the Court said that "[o]ur cases reflect the fact 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*. By the mid-1990s, the proposition that a state may require only licensed physicians to perform an abortion was so well established that a lower court's contrary conclusion merited summary reversal. *See Mazurek v. Armstrong*, 520 U.S. 968, 973-74, 117 S.Ct. 1865, 138 L.Ed.2d 162 (1997).

Whole Woman's Health All. v. Hill, 937 F.3d 864, 874 (7th Cir. 2019). And specifically with respect to state physician-only laws, state and federal courts fully

apprehended that the Court's holding in *Mazurek* stood for the proposition that States could limit the performance of abortions to physicians without resort to factual inquiry.[6]

After the Court's *WWH* decision, from 2017 to 2019, abortion providers around the country systematically filed lawsuits to begin eliminating state abortion regulations in place for years; those which States understood had long been upheld as constitutionally permissible by this Court.[7] And lower courts interpreting *WWH* in these cases perceive a tension between *WWH* and prior binding U.S. Supreme Court abortion precedent, precluding them from summarily disposing of claims attacking baseline laws that have long been

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[6] *See Planned Parenthood Ariz., Inc. v. Am. Ass'n of Pro-Life Obstetricians & Gynecologists*, 257 P.3d 181, 195 (Ariz. Ct. App. 2011) (quoting *Mazurek*, 520 U.S. at 974-75); *Gonzales v. Carhart*, 550 U.S. 124, 163-64 (2007) (citing *Mazurek* as an example of a case where legislative judgment was upheld "despite the respondents' contention 'all health evidence contradicts the claim that there is any health basis for the law' "); *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 412 (5th Cir. 2013) (describing *Mazurek* as "the longstanding recognition by the Supreme Court that a State may constitutionally require that only a physician may perform an abortion"); *A Woman's Choice-E. Side Women's Clinic v. Newman*, 305 F.3d 684, 688 (7th Cir. 2002) (stating the Court in *Mazurek*, "held it constitutional to prevent non-physicians from performing abortions without factual inquiries into whether other medical professionals could do the job as safely, and how much prices may be elevated by a physician-only rule").

[7] *See* footnote 3 above.

settled.[8] As a result, States are left mystified as to the impact of this Court's prior precedent after *WWH*.

For example, in Idaho, as in other States, abortion providers have pending substantive due process claims attacking the constitutionality of long-standing physician-only laws.[9] Abortion providers claim that State physician-only laws have the effect of placing an undue burden on a woman's ability to choose an early abortion because the laws limit a woman's access to abortion providers. They resurrect the argument explicitly rejected by this Court in *Mazurek* almost two decades ago, that advanced practice clinicians ("APCs"), such as nurse practitioners and certified midwives, can perform early abortions just as competently and effectively as physicians. They ask the courts to enjoin physician-only laws as applied to all APCs in the state.[10] These plaintiffs seek to *expand* access to

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[8] App. at 3-5, 8-10, 12-13, 26, 29; Idaho physician-only lawsuit, Dkt. 54 (___ F. Supp. 3d. ___, 2019 WL 3325800); Virginia physician-only lawsuit, Dkt. 52.

[9] The following physician-only lawsuits raise these allegations in similar complaints: Idaho physician-only lawsuit, Dkt. 1; Montana physician-only lawsuit, Comp. for Declaratory & Injunctive Relief; Wisconsin physician-only lawsuit, Dkt. 1; Arizona physician only-lawsuit, Dkt. 1 (2019 WL 1571191). In addition, the Maine physician-only lawsuit, Dkt. 1, was similar to the Idaho, Montana, Wisconsin, Arizona physician-only lawsuits, but the case in Maine has been settled, resulting in a stipulated dismissal.

[10] *See id*.

abortion to make the procedure more conveniently available for women.[11]

In response, Idaho argued that plaintiffs' attacks on its physician-only laws are precluded by this Court's decision in *Mazurek*, 520 U.S. at 974-75 (citation omitted), which relied on a line of U.S. Supreme Court precedent and held: "to ensure the safety of the abortion procedure, the States may mandate that only physicians perform abortions."[12] The *Mazurek* plaintiffs, like plaintiffs in pending cases across the country, argued Montana's physician-only law was an undue burden on a woman's right to an abortion and a violation of the equal protection clause.[13] *See Armstrong v. Mazurek*, 906 F. Supp. 561, 564 (D. Mont. 1995). The *Mazurek* plaintiffs were licensed physicians performing abortion services in Montana, and one physician assistant-certified, Susan Cahill. 906 F. Supp. at 563 n.1.

The *Mazurek* plaintiffs argued, just like plaintiffs across the country do now, that all "available evidence shows that properly trained physician assistants are capable of performing first-trimester abortions with complication rates equal to or lower than corresponding rates for physicians." 906 F. Supp. at 566; Resp'ts' Br., *Mazurek*, 520 U.S. 968 (No. 96-1104), 1997 WL 33484620, at *7. They also argued, just like plaintiffs

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[11] *See id.*; *see also* Virginia physician-only lawsuit, Dkt. 41.

[12] Idaho physician-only lawsuit, Dkt. 33-1 at 27; *see* Virginia physician-only lawsuit, Dkt. 21 at 2-4; Dkt. 23 at 2-4; Maine physician-only lawsuit, Dkt. 39 at 15-16.

[13] *See* footnote 9 above.

across the country do now, that certain APCs performed many procedures equally or more complex than medication and aspiration abortions and with comparable or even greater risk.[14] Resp'ts' Br., *Mazurek*, 520 U.S. 968 (No. 96-1104), 1997 WL 33484620, at *4. And, finally, the *Mazurek* plaintiffs, just like the plaintiffs across the country do now, argued the effect of the physician-only restriction was to reduce the ability of women to obtain an abortion. 906 F. Supp. at 566.

The district court in *Mazurek* applied the undue burden standard to Montana's law and denied plaintiffs' request for a preliminary injunction, finding that plaintiffs failed to present sufficient evidence that the law had an improper purpose. *Id.* at 565-67. The district court concluded it was "unlikely that the plaintiffs [would] prevail upon their suggestion that the requirement constitut[ed] an 'undue burden' within the meaning of *Casey*." *Id*. at 567.

Plaintiffs appealed the preliminary injunction denial to the Ninth Circuit, which reversed the district court's decision. *See Armstrong v. Mazurek*, 94 F.3d 566, 568 (9th Cir. 1996). The Ninth Circuit "concluded" without ruling "upon the propriety of a preliminary injunction . . . that appellants present[ed] claims having at least the minimum 'fair chance of success.'" *Id.* (citation omitted). While the Ninth Circuit did not explain its rationale, it must have believed the plaintiffs had made sufficient showing that properly trained physician assistants could safely perform certain

[14] *See id*.

abortions. The Ninth Circuit remanded the case to the district court to reconsider the "balance of hardships" and to determine whether entry of a preliminary injunction was warranted. *Id.*

Montana sought a writ of certiorari to this Court. In its Petition for Writ of Certiorari, Montana argued that: (1) it was "settled" law that States could limit the performance of abortions to physicians; (2) "[o]nly early intervention by this Court will impress upon panels like that below the obligation to adhere to binding precedent"[;] and (3) the Ninth Circuit erred in directing the district court to engage in a factual inquiry into whether the "physicians only" provision served a legitimate health function. (Pet. For Writ of Certiorari at 9-10, 16-20, *Mazurek*, 520 U.S. 968 (No. 96-1104)). The *Mazurek* plaintiffs primarily opposed the petition on the grounds that the Court should not grant certiorari on an appeal of an (incomplete) ruling on a motion for preliminary injunction, but they also argued the precedent was not settled and that the medical justifications for the law had changed since it was enacted. Resp'ts' Br., *Mazurek*, 520 U.S. 968 (No. 96-1104), 1997 WL 33484620, at *9-15.

This Court agreed with Montana and took the unusual step of granting certiorari to correct the Ninth Circuit's "clearly erroneous" decision "under [its] precedent." *Mazurek*, 520 U.S. at 975. Without reference to any sort of fact-specific analysis, the Court concluded the Ninth Circuit's conclusion that plaintiffs had a "fair chance of success" was inconsistent with *Casey*. *Id*. at 971. The Court reached this decision solely on

the basis of its prior precedent, without analyzing the purpose or effect of the challenged law. *See id*. at 971-76. Because the Court concluded in *Casey* that States may require physicians give informed consent disclosures to patients, as opposed to other qualified individuals, the Court reasoned that States must also be able to restrict the performance of abortions to physicians. *Id*. at 971. The Court continued, "[t]he Court of Appeals' decision is also contradicted by our repeated statements in past cases . . . that the performance of abortion may be restricted to physicians." *Id*. at 974 (discussing the decisions of *Roe*, *Menillo*, and *Akron*).

This Court also rejected plaintiffs' argument that the Montana law must have had improper purpose because "'all health evidence contradicts the claim that there is any health basis'" for the law. *Id.* at 973 (citation omitted). The Court wrote:

> [T]his line of argument is squarely foreclosed by *Casey* itself. In the course of upholding the physician-only requirement at issue in that case, we emphasized that "[o]ur cases reflect the fact 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. (quoting *Casey*, 505 U.S. at 885).

This Court's ruling in *Mazurek* established a bright line rule that physician-only laws do not, in and of themselves, constitute an undue burden on a

woman's right to an abortion. The Court's rationale underlying its decision was not fact-specific. Unlike the district court's fact-based purpose or effect analysis, the Court relied on its prior precedent to determine that a physician-only law, standing alone, could not be an undue burden on a woman's right to an abortion. In fact, one of the rationales for granting certiorari was to avert the "real threat" of legal action against "the six other States in the Ninth Circuit that have physician-only requirements." 520 U.S. at 975. The Court's decision was intended, and acted, as a shield against the threat of legal action for those six States: a result that would have been left in doubt had the Court been engaging in a fact-specific purpose or effect analysis.

The Court's precedent in *Mazurek* is now in doubt, even though this Court gave no indication that *WWH* was meant to overrule *Mazurek*. *See WWH*; *and see Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016) (per curiam) (quoting *United States v. Hatter*, 532 U.S. 557, 567 (2001) (noting it is the Supreme Court's prerogative alone to overrule one of its precedents) (remaining citations omitted). Lower courts are not dismissing claims attacking physician-only laws out of hand, in line with this Court's precedent. Instead, States are being forced to litigate whether the benefits of their once settled physician-only laws justify the alleged burdens of the law under an enhanced standard of review.

In the Idaho physicians-only lawsuit, the U.S. District Court in Idaho has concluded that *Mazurek*—and the line of U.S. Supreme Court precedent relied on in *Mazurek*—does not control the disposition of plaintiffs'

due process claim, reasoning that *WWH* limited the effect of *Mazurek* to the facts and evidence at issue in the state of Montana in 1997.[15] The district court in Idaho stated "[t]hat the Supreme Court upheld one state's physician-only statute on one set of facts does not close the courthouse door to Idaho plaintiffs alleging that Idaho's Physician-Only Law unduly burdens patients in Idaho."[16] As a result, and despite the fact that this Court has already held that *Casey* foreclosed fact-based inquiry into physician-only laws, the district court in Idaho is set to weigh the benefits of Idaho's physician-only laws against the alleged burdens those laws create in Idaho. The decision has cast into doubt this Court's holding that "States have 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."[17] The Idaho district court—and likely others to follow—accepted the abortion providers' unified argument that the undue burden test, as articulated in *WWH*, can be used to invalidate even settled laws.[18]

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[15] Idaho physician-only lawsuit, Dkt. 54 (___ F. Supp. 3d ___, 2019 WL 3325800) at 8-11.

[16] *Id*. at 9.

[17] *See id.* at 8-11; *see also* Idaho physician-only lawsuit, Dkt. 43 at 9-12.

[18] *See* Idaho physician-only lawsuit, Dkt. 54 (___ F. Supp. 3d ___, 2019 WL 3325800) at 9, 11; *and see* Idaho physician-only lawsuit, Dkt. 43 at 9.

The Idaho court's perception of tension between *WWH* and *Mazurek* evidences the potential for lower courts to call into question virtually every other U.S. Supreme Court case that has ever upheld an abortion regulation, despite *WWH*'s decision indicating nothing to that effect. Here, as the Court decides whether *WWH* precludes subsequent challenges to similarly situated admitting privileges in other States, the Court should also clarify whether States can rely on its prior precedent that upheld certain decisions as constitutional baselines, without resort to factual inquiry. These baselines include at a minimum, a State's basic ability to require that abortion providers be licensed and a State's power to restrict the performance of abortions to only physicians.

In addition, other abortion regulations previously upheld under *Casey*, but not analyzed under a benefits-and-burdens analysis, are now being challenged and are subjected to reexamination. *See WWH*, 136 S. Ct. at 2324 (Thomas, J., dissenting). These include certain parental notification requirements,[19]

[19] Parental notification requirements are being challenged in the Indiana physician-only lawsuit, Dkt. 1 ¶¶ 67, 141-151; Minnesota physician-only lawsuit, Compl. (2019 WL 2303811) ¶¶ 212-237; Montana physician-only lawsuit, Compl. ¶ 21; and Texas physician-only lawsuit, Dkt. 1 (2018 WL 3121180) ¶¶ 133-148.

informed consent,[20] 24-hour waiting periods,[21] record-keeping requirements for abortion providers,[22] and various licensing and qualification provisions.[23] These laws were upheld by this Court because they were "not efforts to sway or direct a woman's choice, but rather are efforts to enhance the deliberative quality of [a woman's decision] or are neutral regulations on the health aspects of her decision." *Casey*, 505 U.S. at 916-17; *see also Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52 (1976); *see Planned Parenthood Ass'n of Kansas City, Mo., Inc. v. Ashcroft*, 462 U.S. 476 (1983); *Roe*, 410 U.S. at 150; *Simopoulos*, 462 U.S. 506.

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[20] Informed consent requirements are being challenged in the Indiana physician-only lawsuit, Dkt. 1 ¶¶ 67, 122-140; Louisiana physician-only lawsuit, Dkt. 87 (2018 WL 3708150) ¶¶ 60.f, 105-108, 114-119; Minnesota physician-only lawsuit, Compl. (2019 WL 2303811) ¶¶ 126-161, 181-188; and Texas physician-only lawsuit, Dkt. 1 (2018 WL 3121180) ¶¶ 111-132.

[21] Waiting periods are being challenged in the Arizona physician-only lawsuit, Dkt. 1 (2019 WL 1571191) ¶¶ 4, 141-167; Indiana physician-only lawsuit, Dkt. 1 ¶¶ 67-68, 122-124, 130.d; Minnesota physician-only lawsuit, Compl. (2019 WL 2303811) ¶¶ 162-180; Mississippi physician-only lawsuit, Dkt. 23 (2018 WL 6120525) ¶¶ 85-106; Texas physician-only lawsuit, Dkt. 1 (2018 WL 3121180) ¶¶ 111-115, 116.d, 117-132, 145.a; and Virginia physician-only lawsuit, Dkt. 41 ¶¶ 74-75, 208-241.

[22] Recordkeeping requirements are being challenged in the Louisiana physician-only lawsuit, Dkt. 87 (2018 WL 3708150) ¶¶ 5, 59.b, 59.e, 60.j, 61, 69, 78-88.

[23] Licensing requirements are being challenged in the Indiana physician-only lawsuit, Dkt. 1 ¶¶ 62-68; Mississippi physician-only lawsuit, Dkt. 23 (2018 WL 6120525) ¶¶ 57-84; Texas physician-only lawsuit, Dkt. 1 (2018 WL 3121180) ¶¶ 69-76, 77.b, 79-82; and Virginia physician-only lawsuit, Dkt. 41 ¶¶ 66-71, 103-128, 168-193.

Again, unless this Court intended *WWH* to serve as an invitation to unsettle its prior precedent regarding such regulations, the Court should make clear that its decisions continue to have precedential effect going forward.

B. The Court should uphold the Fifth Circuit's application of *WWH* and provide further clarity on how *WWH* must be applied in future cases.

With respect to abortion regulations, this Court has acknowledged that States have legitimate interests in: (1) seeing that abortion, like any other medical procedure, is performed under circumstances that ensures maximum safety for the patient; (2) regulating the medical profession in order to promote respect for life, including the life of the unborn; (3) protecting the health of the woman and the life of the fetus that may become a child; (4) preserving potential life; (5) assuring that a woman's consent to an abortion is fully informed; and (6) advancing the state of medical knowledge concerning maternal health and prenatal life. *See Roe*, 410 U.S. at 150; *Gonzales v. Carhart*, 550 U.S. 124, 157-58 (2007); *Casey*, 505 U.S. at 846.

In this case, the Court should uphold the Fifth Circuit's application of *WWH*, else the undue burden standard is toothless. Yet even affirming the Fifth Circuit here, still leaves States uncertain about how to proceed under *WWH*. The Court should address this uncertainty because plaintiffs across the Nation

advance an interpretation of *WWH* that would invalidate any recognized State interest.

Abortion providers in lawsuits across the country maintain an essentially uniform interpretation of *WWH*. First, as set forth above, they argue that all abortion regulations—both old and new—are subject to a state-by-state fact and record specific examination, irrespective of the State's interest. Second, abortion providers advocate for strict scrutiny as part of the undue burden standard, placing on States the burden to disprove that their laws are "unnecessary."[24] Third, they assert States must identify and prove that their laws confer a number of benefits on women seeking abortions or their providers.[25] Fourth, abortion providers argue the balancing test under *WWH* is proportional: meaning any purported benefits of the law must be equal to or greater than the purported burdens of

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[24] Idaho physician-only lawsuit, Dkt. 1 ¶ 27; Indiana physician-only lawsuit, Dkt. 1 ¶¶ 6, 46, 69-70, 101(b)-(c), 130(c), 130(e), 176, 195; Louisiana physician-only lawsuit, Dkt. 87 (2018 WL 3708150) ¶¶ 5(ii), 40, 59(e)-(f), 59(h)-(i), 59(k), 61, 77, 85, 97, 102-103, 106, 110, 113, 145, 175; Minnesota physician-only lawsuit, Compl. (2019 WL 2303811) ¶¶ 5, 34, 76, 92, 111, 115, 125, 150, 161, 180, 188, 209, 237, 245; Mississippi physician-only lawsuit, Dkt. 23 (2018 WL 6120525) ¶¶ 6, 42, 57, 60, 68, 72, 117, 119, 129-130; Texas physician-only lawsuit, Dkt. 1 (2018 WL 3121180) ¶¶ 5, 59, 62, 91(b), 91(d), 116(c), 116(e), 196; Virginia physician-only lawsuit, Dkt. 41 ¶¶ 3, 4(b), 4(e), 5, 8-9, 64-65, 75, 87, 90, 92-93, 101, 110, 112, 119-120, 122, 140-141, 169, 173-174, 177, 198, 209, 230-232, 234, 249-250; Arizona physician-only lawsuit, Dkt. 1 (2019 WL 1571191) ¶¶ 5, 10, 14, 37, 40, 45, 75, 81, 86, 113, 117, 185, 188.

[25] *See* Br. for Pet'rs at 45, 47; *and see* footnote 9 above.

the law in order to be upheld, and vice versa.[26] Fifth and finally, abortion providers argue that they should only be required to show what is akin to "but for" causation, provable by circumstantial or common sense evidence that the law at issue caused the burdens they allege.[27] The Court should reject these interpretations.

1. The Court should clarify that abortion regulations are not subject to strict scrutiny.

Relying on the Court's statement that "*unnecessary* health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right," abortion providers advocate for applying strict scrutiny to abortion regulations. *WWH*, 136 S. Ct. at 2309 (alteration omitted) (citation omitted). They do this by arguing that State laws are "unnecessary" in advancing any legitimate State interest, requiring States to prove the opposite.[28] The Court first used the phrase "unnecessary health regulations" in *Casey*, and discussed it again in *WWH* when it upheld the district

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[26] *See* Br. for Pet'rs at 46, 49; Indiana physician-only lawsuit, Dkt. 1 ¶¶ 4, 8, 85, 103, 119, 138, 150, 156, 177; Louisiana physician-only lawsuit, Dkt. 87 (2018 WL 3708150) ¶¶ 9, 105, 193; Mississippi physician-only lawsuit, Dkt. 23 (2018 WL 6120525) ¶¶ 5, 105, 127; Texas physician-only lawsuit, Dkt. 1 (2018 WL 3121180) ¶¶ 3, 81, 93, 109, 131, 147, 154, 180; Virginia physician-only lawsuit, Dkt. 41 ¶¶ 2-3, 64, 128, 187; Arizona physician-only lawsuit, Dkt 1. (2019 WL 1571191) ¶¶ 12, 15, 86, 141, 150.

[27] Br. for Pet'rs at 39-40; Idaho physician-only lawsuit, Dkt. 43 at 14-15.

[28] *See* footnote 26 above.

court's finding that the surgical center requirements were "not necessary." *Casey*, 505 U.S. at 878; *WWH*, 136 S. Ct. at 2315-16. Following *WWH*, lower courts have incorporated a necessity finding into their undue burden analysis. *See June Med. Servs., LLC v. Kliebert*, 250 F. Supp. 3d 27, 89 (M.D. La. 2017) (finding Act 620 does not benefit patients and is not necessary), judgment reversed by *June Med. Servs., LLC v. Gee*, 905 F.3d 787 (5th Cir. 2018); *Whole Woman's Health All. v. Hill*, 388 F. Supp. 3d 1010, 1048 (S.D. Ind. 2019) (finding that the licensing regulations at issue provided marginal benefits and that a licensing requirement was not necessary to achieve the State's proffered ends). The result is that States are left to guess whether their challenged abortion regulations must survive strict, or at least enhanced, scrutiny to be upheld, *i.e.*, that they must prove that the regulation is necessary to advance a legitimate State interest. *See*, *e.g.*, *Burson v. Freeman*, 504 U.S. 191, 199 (1992) (discussing strict scrutiny as requiring a State to do more than assert a compelling State interest, but also demonstrate that its law is necessary to serve the asserted interest).

This Court has not retreated from its prior recognition that "the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and *the life of the fetus that may become a child*." *Casey*, 505 U.S. at 846 (emphasis added). "[T]he interest in protecting potential life is not grounded in the Constitution" but is instead, "an indirect interest supported by both humanitarian and pragmatic concerns." *Id*. at 914. The State also "has a legitimate

interest in minimizing" the offense of abortion. *Id*. at 915. As a result, the State "may express a preference for normal childbirth." *Id*. at 872 (alteration omitted) (citation omitted).

As a result, state abortion regulations should not be subject to strict scrutiny. To require such is a regression to the standard rejected in *Casey*, particularly where the State's interest at issue is to protect the life of a fetus that may become a child.[29]

If the Court intended state abortion regulations to be subject to strict or even intermediate scrutiny, it should say so. If not, the Court should affirm the Fifth Circuit's analysis of the benefit advanced by Louisiana

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[29] The following cases followed the Court's decision in *Roe*: *Hodgson v. Minnesota*, 497 U.S. 417, 450 (1990) (invalidating two-parent notice requirement as it does not reasonably further any legitimate State interest); *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 760, 765-66 (1986), *overruled by Casey*, 505 U.S. at 882 (invalidating various informed consent and reporting requirements); *Akron*, 462 U.S. 416 at 450-51 (invalidating parental consent, informed consent, 24-hour waiting period, and disposal of fetal remains requirements); *Bellotti v. Baird*, 443 U.S. 622 (1979) (invalidating parental consent requirement); *Colautti v. Franklin*, 439 U.S. 379, 396, 401 (1979) (invalidating viability-determination requirement and standard-of-care provision); *Sendak v. Arnold*, 429 U.S. 968 (1976) (affirming lower court's invalidation of statute requiring that first trimester abortions be performed by a physician in a licensed hospital or licensed health facility); *Danforth*, 428 U.S. at 71, 74, 83 (invalidating spousal consent, parental consent, and preservation of fetal life no matter the stage of pregnancy requirements); *Bolton*, 410 U.S. at 194, 198-200 (invalidating accreditation, hospital committee approval, two-doctor concurrence, and residency requirements).

in this case and make clear that when an abortion regulation is challenged as an undue burden, States are not required to prove that the abortion regulation at issue is necessary to advance a legitimate state interest. *See June Med. Servs. L.L.C.*, 905 F.3d at 805-07.

2. If States must prove their laws confer a "benefit," the benefit should be that the regulation advances the State's purported interest.

In *WWH*, the Court stated that "[t]he rule announced in *Casey* . . . requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer." *WWH*, 136 S. Ct. at 2309 (citing *Casey*, 505 U.S. at 887-98) (remaining citations omitted). The Court also upheld the district court's undue burden finding in *WWH*, because the district court considered the evidence in the record and then weighed the asserted benefits against the burdens. *Id*. at 2310. Abortion providers like June Medical have interpreted *WWH* as requiring States to now prove that their laws confer a list of medically recognizable benefits on women seeking abortions or their providers, which must outweigh the alleged burdens, else the laws cannot stand. This interpretation should be rejected and the Court should clarify the State's burden in defending their laws under *WWH*.

At the outset, the Court should reaffirm *Casey* and affirm the Fifth Circuit's analysis here, that the benefit States must articulate and prove is that the law at

issue advances the interest it purports to serve, not that the law at issue confers a certain number of benefits on women seeking abortions, or their providers. This is no small difference. If the Court does not reaffirm this requirement, the personal freedom articulated in *Roe* will be transformed in ways that are constitutionally impermissible. And the Due Process Clause will be converted into a tool that places an affirmative duty on States to confer benefits on women seeking abortions, or the providers who perform them, in order for their regulations to be upheld. This is an extraordinary result.

In *Roe*, the U.S. Supreme Court recognized a woman's protected right to privacy in her decision to have an abortion based upon the Fourteenth Amendment. 410 U.S. at 153. But the Court also held that this right, like other fundamental rights, is not absolute or unqualified. *Id*. at 153-54. The Court has not hesitated to reject attempts to turn a limitation on government power into an affirmative obligation on the States. *Id.*; *see also Maher v. Roe*, 432 U.S. 464, 473-74 (1977); *Harris v. McRae*, 448 U.S. 297, 314-15 (1980).

For example, in *Maher*, the Court held that the Constitution did not require Medicaid participating States to pay for nontherapeutic abortions when they pay for childbirth. 432 U.S. at 474. The Court noted that *Roe* protects a woman from "unduly burdensome interference with her freedom to decide whether to terminate her pregnancy." *Id.* at 473-74. However, *Roe* "implies no limitation on the authority of the State to make a value judgment favoring childbirth over

abortion, and to implement that judgment by the allocation of public funds." *Id.* at 474.

The Court refined its decision in *Maher* three years later when it decided *Harris*. In *Harris*, plaintiffs challenged the Hyde Amendment. 448 U.S. at 300-01. The Supreme Court relied on the reasoning in *Maher*, *id.* at 313-15, and held that a woman's freedom of choice does not carry with it a *constitutional entitlement* to the financial resources to avail herself of the full range of protected choices and "does not confer an entitlement to such funds as may be *necessary to realize all of the advantages of that freedom*," *id*. at 316-18 (emphasis added). And, the government "need not remove" obstacles "not of its own creation." *Id*. at 316. In *Maher*, the regulation at issue did not impose on the right recognized in *Roe* as it was unlike regulations involving government compulsion.

Significantly, and as the *Harris* Court confirmed, the Due Process Clause generally does not place affirmative duties on the States. *Id*. at 317-18. "Although the liberty protected by the Due Process Clause affords protection against unwarranted government interference with freedom of choice in the context of certain personal decisions, it does not confer an entitlement to such funds as may be necessary to realize all of the advantages of that freedom." *Id*. "To hold otherwise would mark a drastic change in our understanding of the Constitution." *Id*. at 318. "Nothing in the Due Process Clause supports such an extraordinary result." *Id*. (footnote omitted).

Here, the problem with requiring States to confer a number of benefits on women seeking abortions is being played out in states like Idaho, Wisconsin, Arizona, and Montana, in response to attacks on their physician-only laws.[30] The plaintiffs in these physician-only lawsuits allege that physicians can currently only perform abortions on certain days of the week.[31] In Idaho and Maine, abortion providers argue APCs should be allowed to perform early abortions so women can obtain such abortions six days per week.[32] There are no allegations that the physician-only laws themselves restrict or limit the performance of abortions to certain days of the week.[33] Nor do those physician-only laws limit how many physicians can perform abortions in each State, nor the locations, nor hours of operations for abortion services.[34] Nonetheless, abortion providers seek a constitutional remedy to expand abortion access to accommodate their physician recruiting, retention and scheduling issues.

Requiring States to prove their laws confer a benefit on women seeking abortions, or their providers, before such laws can be upheld will require States to fine-tune their statutes so that their laws impose no impediment to abortion absent a substantial, evidently provable governmental interest. This upends the role

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[30] *See* footnote 9 above.

[31] *Id*.

[32] Idaho physician-only lawsuit, Dkt. 1 ¶ 94; Maine physician only lawsuit, Dkt. 1 ¶ 149.

[33] *See* footnote 9 above.

[34] *Id*.

of the Constitution and basic notions of federalism. *See H.L. v. Matheson*, 450 U.S. 398, 413 (1981) (noting the "Constitution does not compel a State to fine-tune its statutes so as to encourage or facilitate abortions"). The proper inquiry with respect to the "benefit" of the law at issue in the undue burden analysis, should be whether there is evidence that the law furthers a legitimate interest, not that it confers a certain number of benefits on women seeking abortions or the providers who perform such abortions. The Court should thus confirm what States must prove in terms of the "benefit" of their laws post-*WWH*.

3. The Court should reject that *WWH* articulated a proportional balancing test and should require proximate causation.

The Court should reject the position asserted by June Medical, and others, that *WWH* articulated a proportional balancing test, requiring courts to invalidate an abortion regulation upon a showing that the purported burdens outweigh the benefits of the law. The Court should also reject the argument that where an abortion regulation confers no medical benefit, it is *ipso facto* an undue burden. Similarly, the Court should uphold the Fifth Circuit's holding that a minimal benefit, even on a large fraction of women, does not undermine the right to abortion, because any burden—in order for it to be undue—must be substantial. *June Med. Servs. L.L.C.*, 905 F.3d at 803. A contrary interpretation would gut the undue burden standard articulated in *Casey*. Finally, the Court should affirm that

plaintiffs challenging abortion regulations as an undue burden must affirmatively prove that the law proximately caused the burdens they allege.

First, a proportional balancing test in the undue burden analysis would invalidate laws that have no, or a mere tangential, relationship to the burdens alleged. With respect to challenging a State's physician-only law, for example, even if every woman who wanted to obtain an early abortion was able to secure one in a particular state, the law could still be invalidated under a proportional balancing test. A State could articulate and prove that its physician-only law: (1) furthers the State's interest in ensuring that abortions are performed in the safest environment; and (2) creates a structural mechanism that expresses the State's profound respect for potential life. However, this law could still be invalidated by a more numerous list of burdens that the government did not cause or create and irrespective of whether those burdens amount to a substantial obstacle. As evidenced by the landscape of physician-only challenges, this is precisely what is happening.

As is currently alleged across the country, abortion providers list the following on the "burdens" side of the ledger when challenging physician-only laws: (1) abortions are safe;[35] (2) abortion complications are low (and rare); (3) States have a physician

[35] Abortions in and of themselves are not "safe." Abortions can only be safe if they are performed by qualified medical providers who follow the standard of care.

shortage; (4) physicians have other obligations, such as teaching and other careers, preventing them from performing more abortions; (5) women must travel to obtain an abortion; (6) it is harder for women of color to obtain abortions; (7) it is harder for poor and low income women to obtain abortions; (8) low income women have more unintended pregnancies and therefore higher abortion rates; (9) it is difficult for women who must keep their abortions secret to obtain abortions; (10) it is difficult for women who must arrange for child care to obtain abortions; (11) there are no publicly available abortion clinics offering evening or weekend appointments; (12) the inability to have an abortion on demand may prohibit a woman's preferred abortion method; and (13) the risks of complication rise with the duration of pregnancy.[36] Yet, many of these "burdens" are due to circumstances beyond a State's control—for example a physician's choice to perform, or the operating hours of a clinic, or the location of a clinic. Yet, the choices of the providers are being used to create a State burden. And other "burdens" used to attack abortion regulations, such as physician shortages for certain procedures or the need for travel to access certain medical procedures, are not unique to women seeking abortions. They can equally apply to the citizens of the entire state. Allowing these types of burdens to invalidate an abortion regulation under a proportional balancing test, without proximate

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[36] *See* footnote 9 above.

causation, is contrary to existing precedent and a distortion of *WWH*. *Casey* never intended such a result.

Casey and subsequent cases decided under *Casey* have long recognized that not just any alleged burden will invalidate a State's abortion regulation—only those that strike at the right itself by creating a substantial obstacle in the path of women seeking a previability abortion:

> As our jurisprudence relating to all liberties save perhaps abortion has recognized, not every law which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right. An example clarifies the point. We have held that not every ballot access limitation amounts to an infringement of the right to vote. Rather, the States are granted substantial flexibility in establishing the framework within which voters choose the candidates for whom they wish to vote. *Anderson v. Celebrezze*, 460 U.S. 780, 788, 103 S.Ct. 1564, 1569, 75 L.Ed.2d 547 (1983); *Norman v. Reed*, 502 U.S. 279, 112 S.Ct. 698, 116 L.Ed.2d 711 (1992).
>
> The abortion right is similar. Numerous forms of state regulation might have the incidental effect of increasing the cost or decreasing the availability of medical care, whether for abortion or any other medical procedure. 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. Only where

> state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause.

Casey, 505 U.S. at 873-74.

Under abortion providers' interpretation of *WWH*, plaintiffs can fail to point to any specific abortion that could not or did not take place in a given time period, but still invalidate physician-only laws because their list of alleged burdens is longer than the benefits State legislatures are able to identify. Similarly, plaintiffs can point to a list of "burdens" that were not caused by the law at issue and then argue the law exacerbates those burdens, resulting in a compounding effect that amounts to an undue burden.[37] In such cases, States have no guidance about how to rebut these cumulative effects, especially when the effects are only tangentially related to the law.

The Court should affirm the Fifth Circuit's interpretation of *WWH*, that laws conferring even a minimal benefit in advancing a State's legitimate interest, or no benefit at all, are not unconstitutional so long as the regulation at issue does not place a substantial burden on a woman's right to choose a pre-viability abortion. *June Med. Servs., LLC*, 905 F.3d at 803; *and see*, *e.g.*, *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 509-11 (1989). In other words, the Court should confirm that any alleged burdens claimed by plaintiffs

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[37] *See* footnote 9 above.

challenging an abortion regulation must be substantial in order to be undue.

Second, abortion providers, like June Medical, urge this Court to adopt a causation standard akin to a "but for" standard, provable by circumstantial or "common sense" evidence that the law causes the burdens they allege. (Br. for Pet'rs at 39-40.) They also claim that it is error for a court to look at evidence of an intervening cause or event that can break the chain of causation—such as a provider's insufficient effort to comply with the law. (*Id.*) The Court should reject the causation standard urged by June Medical.

The focus of *Roe* was on protecting women from *governmental* interference or compulsion when deciding whether to terminate or continue a pregnancy. "[T]he right in *Roe v. Wade* can be understood only by considering both the woman's interest and the nature of the State's interference with it." *Maher*, 432 U.S. at 473. If abortion providers claim that a regulation causes an unconstitutional burden on women, they should be required to prove that the regulation at issue was the proximate cause of the burdens they allege. This ensures that only burdens resulting from State interference or compulsion are remedied. *See Martinez v. California*, 444 U.S. 277, 284-85 (1980). In contrast, "[d]eparture from the standard of direct causation leads to a line-drawing problem that would allow unrelated decisions to inform the undue-burden inquiry," such as those discussed above. *June Med. Servs. L.L.C.*, 905 F.3d at 811. The results are that abortion regulations could be invalidated even where no government

compulsion exists and "the independent choice of a single physician could determine the constitutionality of a law." *Id*. at 807.

As the Fifth Circuit set forth, those who challenge an abortion regulation as undue should be required to put on affirmative evidence that the regulation caused the purported burdens alleged. *Id*. The Court should affirm the Fifth Circuit and clarify that plaintiffs who challenge an abortion regulation as an undue burden must prove the regulation at issue is the proximate cause of the burdens they allege. This means that intervening causes can also break the chain of causation. *Utah v. Strieff*, 136 S. Ct. 2056, 2072-73 (2016) (Kagan & Ginsburg, JJ., dissenting) (citing *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 658-59 (2008) (explaining that a party cannot "establish [] proximate cause" when "an intervening cause break[s] the chain of causation between" the act and the injury)) (remaining citation omitted).

C. States must have meaningful space to further their legitimate interests in regulating abortion.

One quote from *Casey* appears true today: "[w]hether or not a new social consensus is developing on [the abortion right], its divisiveness is no less today than in 1973, and pressure to overrule the decision, like pressure to retain it, has grown only more intense." *Casey*, 505 U.S. at 869. It is doubtful that any case can resolve the deeply divisive issue of abortion.

On one extreme, abortion providers oppose *any* regulation that is unique to them or the abortion procedure. They argue that abortion should be treated as any other medical procedure such as tonsillectomies, colonoscopies, and tooth extraction. On the other extreme, there are citizens who stand ready to vote for laws that would overturn the holding in *Roe*. But "the goal of constitutional adjudication is not to remove inexorably 'politically divisive' issues from the ambit of the legislative process, but is, rather, to hold true the balance between that which the Constitution puts beyond the reach of the democratic process and that which it does not." *Webster*, 492 U.S. at 494.

It cannot be denied that "[a]bortion is inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life." *Harris*, 448 U.S. at 325. A one-sided undue burden test that ostensibly favors those who challenge abortion regulations will intensify the divisiveness of abortion. Similarly, failing to uphold decisional baselines, like physician-only laws, radically undermines established precedent and the States' attendant reliance interests. The Court should avoid these results.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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