Nos. 18-1323, 18-1460

In the Supreme Court of the United States

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

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

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

BRIEF FOR *AMICUS CURIAE* RIGHT TO LIFE OF MICHIGAN SUPPORTING RESPONDENT-CROSS-PETITIONER

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QUESTION PRESENTED

Amicus curiae focuses on the following issue:

Whether the Fifth Circuit's decision upholding Louisiana's law requiring physicians who perform abortions to have admitting privileges at a local hospital conflicts with this Court's binding precedent in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016)?

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STATEMENT OF IDENTITY AND INTERESTS OF *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37, *amicus curiae*, Right to Life of Michigan (hereinafter RTL) submits this brief supporting Respondent, Dr. Rebekah Gee, Secretary, Louisiana Department of Health and Hospitals.[1]

RTL is a nonpartisan, nonsectarian, nonprofit organization of caring people, united to protect the precious gift of human life from fertilization to natural death. RTL encourages community participation in programs that foster respect and protection for human life. RTL gives a voice to the voiceless on life issues like abortion, infanticide, euthanasia, and physician-assisted suicide. RTL educates people on these issues and motivates them to action.

RTL fights for the defenseless and most vulnerable human beings, born and unborn.

Amicus curiae understands the constitutional means for amending the Constitution. Within these constitutional parameters, RTL pursues passage and ratification of a Human Life Amendment. *Amicus curiae* also understands the proper scope of the Article III judicial power and the proper role of the federal

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[1] All parties have consented to the filing of the *amicus curiae* brief in this matter. *Amicus* further state that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this *amicus* brief.

judiciary in our constitutional republic. From its experience, it holds special knowledge helpful to this Court about the impact of an unelected judiciary changing the meaning of constitutional provisions like the Due Process Clause of the 14th Amendment. *Amicus curiae,* therefore, files this brief to preserve the constitutional principle of separation of powers and to defend the dignity of human life.

INTRODUCTION

In 1973, the citizens of the vast majority of states, through their elected representatives, legislatively proscribed abortion. This Court in *Roe v. Wade*, 410 U.S. 113 (1973) reaffirmed a court-created right of privacy/personal autonomy. *Roe* extended this judicially contrived constitutional liberty to include the right to abort an unborn child. In doing so, *Roe* enacted its now infamous trimester test. *Roe's* judge-crafted trimester policy soon collided with itself. This happened when scientific advances made survival of the unborn child outside the womb possible earlier and earlier in pregnancy, while advances in abortion techniques enabled abortionists to kill the child closer and closer to childbirth. This Court, therefore, judicially evolved its policy. *Planned Parenthood of Se. Pa. v. Casey,* 505 U.S. 833, 869 (1992). Current Court policy now requires state laws protecting the life of the mother and her unborn child to meet a court-enacted undue burden test. *Id.*; *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) (applying the test to strike down a Texas statute requiring abortionists to hold local hospital privileges).

The Fifth Circuit U.S. Court of Appeals distinguished *Whole Woman's Health* in upholding a hospital privileges law enacted by the Louisiana legislature. *June Medical Services, LLC v. Gee*, 905 F.3d 787 (5th Cir. 2018). Petitioners contend the holding in *Whole Woman's Health* controls under *stare decisis*.

SUMMARY OF THE ARGUMENT

Petitioner's resolution of the question before this Court presupposes the existence of a 14th Amendment liberty interest in abortion. This presupposition is wrong.

This Court in *Roe* and its progenitor precedents incorrectly concluded that the meaning of the 14th Amendment included a liberty interest in the right to abort an unborn child as part of one's personal autonomy. Not a single word uttered or written in the promulgation of the 14th Amendment, however, even remotely suggests that the Amendment includes a right to abortion. Undeniably, it is clear from the historical discussion that the authors of the Amendment never contemplated including such a diabolical entitlement. Indeed, judicially contriving such a liberty interest destabilizes representative constitutional governance because it: 1) exceeds the scope of the Judicial Power, 2) bypasses constitutionally required processes for amending the Constitution, 3) undermines the institutional legitimacy of the judiciary, and 4) fails to adequately address the profound government interest in protecting unborn human life.

Petitioner contends that simply because the erroneous decisions in *Roe* and its progeny occurred, that they must stand. That is wrong. Incorrectly decided extra-constitutional decisions must not stand. When, as here, the factual and legal grounds for a court decision are incorrect, policy arguments supporting *stare decisis* do not justify perpetuation of those errors. Likewise, when a court decision extra-constitutionally creates a rule, policy arguments supporting *stare decisis* lack merit.

Because the 14th Amendment does not include the liberty to kill an unborn child, the Louisiana law at issue cannot violate the 14th Amendment. This Court should, therefore, overrule *Roe*.

Finally, even if this Court does not overrule *Roe's* illegitimately created right to abortion now, this Court should uphold the Louisiana statute under the "undue burden" standard used in *Roe's* progeny, including *Whole Women's Health*.

ARGUMENT

I. THE LOUISIANA LAW DOES NOT INTERFERE WITH A LIBERTY INTEREST PROTECTED BY THE 14TH AMENDMENT

The 14th Amendment to the United States Constitution states: "…nor shall any State deprive any person of life, liberty, or property, without due process of law…" U.S. Const. amend. XIV.

The Constitution is not just a set of guidelines. It is the framework on which *we the people* constructed our government and our legal system. The words of the Constitution both create the Supreme Court's authority and give it definition. Highly qualified draftsmen crafted those words quite clearly to express a simple meaning. Faithful adherence to those words serve as the touchstone for measuring the fulfillment of this Court's solemn duty. Every Justice taking the oath of office swears to uphold the Constitution as written, not as he or she prefers it be written.

Honestly discerning and applying the truthful meaning that the Drafters originally embodied in the Constitution's language should be this Court's high calling. Making those words instead mean what contemporary judges prefer them to mean, is the first step on the path to tyranny. For example, in *Dred Scott v. Sandford*, an unelected Supreme Court deemed some human life unworthy of Constitutional protection based on the color of one's skin. 60 U.S. 393 (1857). That judicially contrived policy further separated a divided nation, precipitating a bloody civil war.

After the Civil War, the people of the United States formally invalidated *Dred Scott's* diabolical decree by ratifying the Fourteenth Amendment. U.S. Const. amend. XIV.

Proving that "those who cannot remember the past are condemned to repeat it,"[2] this Court in *Roe v. Wade*, 410 U.S. 113 (1973), again deemed some human life unworthy of constitutional protection. Here the Court incorrectly declared provisions of the 14th Amendment to include a liberty interest in aborting an unborn child based upon the child's age.

A. An Honest Understanding of the True Meaning of the 14th Amendment Does Not Include a Liberty Intertest Protecting a Right to Abort an Unborn Child

Petitioner contends Louisiana's law interferes with a 14th Amendment liberty interests found to exist by this Court in *Roe* and its progenitor precedents. Resolution of the issue before this Court, therefore, presupposes the existence of a 14th Amendment liberty interest in abortion. Unfortunately for Petitioner, that presupposition is incorrect.

Accordingly, to properly resolve the issue here, this Court must necessarily revisit its core precedent in *Roe*. When doing so, this Court must correct any error there as to whether the meaning of 14th Amendment includes a liberty interest in the right to abort an unborn child. This Court has long sought to honor its

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[2] George Santayana, *THE LIFE OF REASON*, at 284, Scribner's, (1905).

duty of determining, rather than altering, constitutional meaning by understanding such meaning in its historical context. *See, e.g., Marsh v. Chambers*, 463 U.S. 783, 790 (1983) (explaining how historical evidence shows not just what the draftsmen intended a constitutional provision to mean, but also how they thought it applied).

The debates of Congress and documents of the state legislatures, that ratified the 14th Amendment, provide "the most direct and unimpeachable indication of original purpose . . . ." Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 Harv. L. Rev. 1, 7 (1955).

Most of the discussion in the first session of the 39th Congress related to the subject matter of the 14th Amendment. CONG. GLOBE, 39TH CONG., 1ST SESS. *passim* (1866). This discussion included governance of the South, readmission of Southern States, Union loyalty, issues concerning the newly freed black race, and the distribution of powers between the states and the federal government. *Id.* The bulk of the session-long debate concerned the following measures: the Freedman's Bureau Bill (vetoed by the president), the Civil Rights Act of 1866, (enacted over a veto), and the 14th Amendment itself. *Id.* The first two of these measures were statutes, passed in response to the Black Codes. *Id.* Their premise was the protection of the newly freed black race. *Id.;* Richard Kluger, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 46 (1st ed.1976).

Not a single word uttered or written in the promulgation of the 14th Amendment even remotely suggested that the Amendment included a liberty interest in the right to kill one's unborn child. CONG. GLOBE, 39TH CONG., 1ST SESS. *passim* (1866). Indeed, it is clear from the historical discussion that the authors of the Amendment never contemplated including such a diabolical entitlement. *Id.*

Moreover, for the *Roe* Court to reach the result it did, it "had to find within the scope of the 14th Amendment a right that was apparently completely unknown to the drafters of the Amendment." *Roe,* 410 U.S. at 174 (Rehnquist, C.J., dissenting). To illustrate, Connecticut proscribed abortion as early as 1821. *Id.* By the time adoption of the 14th Amendment occurred in 1868, state and territorial legislatures had enacted at least 36 laws proscribing abortion. *Id.* at 174-175.

This Court's abortion decisions, therefore, incorrectly declare the meaning of the 14th Amendment to include a right to abortion. This Court should correct that error by overruling *Roe* and its progeny. Correctly understood, the 14th Amendment does not include a liberty interest to abort an unborn child. The Louisiana statute at issue, therefore, cannot violate the 14th Amendment.

B. Stare Decisis Does Not Control this Court Where Resolution of the Issue, as Here, Presupposes and Relies upon Wrongly Decided Precedent

Stare decisis should not control this Court when a precedent relied upon was, as here, wrongly decided. *Roe* and its progenitor precedents erroneously concluded, both as matter of fact and law, that the meaning of the 14th Amendment included the right to kill one's unborn child as part of one's personal autonomy.[3] Because of the error, *Roe* and its progeny deem abortion a fundamental constitutional liberty. *See, e.g., Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). Desiring to continue this fatal error, Petitioner argues:

> Adherence to precedent is 'a foundation stone of the rule of law.'" *Kisor v. Wilkie*, 139 S. Ct. 2400, 2422 (2019) (quoting Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 798 (2014)). Such fidelity "'promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'" *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015) (quoting Payne v. Tennessee, 501 U.S. 808, 827 (1991)). Stare decisis thus functions as "a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a

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[3] *See* Section I. A. of this *amicus* brief.

> jurisprudential system that is not based upon 'an arbitrary discretion.'" *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989) (quoting The Federalist No. 78, p. 490 (H. Lodge ed. 1888) (A. Hamilton)). Pet'rs' Br. at 21.

Policy arguments supporting *stare decisis* hold no merit, however, in cases like *Dred Scott, Roe*, or *Whole Women's Health,* when the Court decision relied upon was incorrect and extra-constitutional.

Petitioner contends that simply because the decisions in *Roe* and its progeny occurred, that they must stand. But incorrect decisions require correction, not preservation. This Court should not adhere to *Roe's* error for the sake of "predictability" or "consistency". Being consistently and predictably wrong is no virtue. This Court should instead set a new life-affirming precedent in accordance with the Constitution; it should do so now, before its current precedent deprives another human life of his or her liberty.

C. Stare Decisis Does Not Control This Court Where Underlying Precedent is Extra-Constitutional and Undermines Representative Constitutional Governance and the Rule of Law

Stare decisis should not bind this Court when a precedent relied upon was, as here, extra-constitutional.

Proponents of evolving judicial preferences wrongly claim that by amending the Constitution from the bench, unelected judges can bestow new meanings and

even new rights and understandings for the people.[4] In this jurisprudential wonderland, judges wrongly see the Constitution as an evolving organism, the meaning of which they believe their office empowers them to manipulate. Becoming Platonic philosopher kings, they rule by judicial fiat, unbound by the constraints of the Constitution's actual language. At great risk to our Republic, the Court's abortion decisions embed this tyrannical principle in American constitutional jurisprudence.

Roe, with its progenitor precedents and progeny, supplants our politically accountable system of governance with an unelected judiciary's own protean preferences. In doing so, this Court's abortion jurisprudence: 1) exceeds the scope of the Judicial Power, 2) bypasses constitutionally required processes for amending the Constitution, 3) undermines the judiciary's institutional legitimacy, and 4) fails to adequately address the profound government interest in protecting unborn human life.

1) Roe's Abortion Jurisprudence Exceeds the Scope of the Article III Judicial Power

Roe, its progeny, and its progenitor precedents, all acted outside this Court's constitutional authority by exercising will instead of judgement. These decisions dangerously undermine constitutional representative governance under the Rule of Law.

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[4] Disturbingly, it stands to reason that a democratically unaccountable judiciary capable of giving rights and understandings is equally efficient at taking them away.

The American judiciary holds a special role and duty in the constitutional order. As Judge Robert Bork observed:

> The judiciary's great office is to preserve the constitutional design. It does this not only by confining Congress and the President to the powers granted them by the Constitution and seeing that the powers granted are not used to invade the freedoms guaranteed by the Bill of rights, but also, and equally important, by ensuring that the democratic authority of the people is maintained in the full scope given by the Constitution.

Robert Bork, THE TEMPTING OF AMERICA (Touchstone, 1990) 65.

The words and structure of the American Constitution contemplate a judicial branch with no power to make or enforce laws.[5] No enumerated judicial power exists for the judiciary to amend the Constitution or evolve the meaning of its provisions. It is undisputed that

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[5] Article III provides:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish... The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . to Controversies to which the United States shall be a Party . . .

U.S. Const, art. III, §§ 1 and 2.

> [t]he Federal Government 'is acknowledged by all, to be one of enumerated powers.' That is, rather than granting general authority to perform all the conceivable functions of government, the Constitution lists, or enumerates, the Federal Government's powers. . . . The enumeration of powers is also a limitation of powers, because '[t]he enumeration presupposes something not enumerated.' The Constitution's express conferral of some powers makes clear that it does not grant others. And the Federal Government 'can exercise only the powers granted to it.

Cf. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2577 (2012) (internal citations omitted) (quoting *McCulloch v. Maryland,* 17 U.S. 316, 404-405 (1819)); U.S. Const. art. I, § 8, cls. 5, 7, 12; *Gibbons v. Ogden*, 9 U.S. (1 Wheat.) 1, 194-95 (1824).

The *Roe* Court exceeded the scope of the Article III Judicial Power. In *Roe*, the 14th Amendment served as the applicable constitutional Rule of Law. Instead of finding and applying a truthful understanding of the meaning of the 14th Amendment, the *Roe* Court conjured a new understanding and meaning into existence.

Nothing in Article III empowers the Court to change or "evolve" the Constitution. Moreover, nothing in *Marbury v. Madison*'s ubiquitous assertion that it is the province of the Court to say what the law is, empowers the Court to say instead what it prefers the law to be. 5 U.S. (1 Cranch) 137 (1803).

The *Roe* Court, venturing far beyond the scope of its Article III powers, improperly evolved the true understanding of the 14th Amendment from something designed to protect the inherent value of human life, to instead include a fictitious liberty interest in the right to abortion. In doing so, a politically unaccountable Court created *ex nihilo* an entitlement to kill an unborn child, all because a group of unelected Justices preferred it so.

Hamilton explains why wilful judicial policymaking improperly conflicts with the Constitution's design for republican governance:

> It can be of no weight to say that the courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions ....The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body.

THE FEDERALIST NO. 78 (Alexander Hamilton)

The Constitution, therefore, assumes a jurisprudence obligating the judiciary to honestly apply constitutional provisions according to their true meaning.

When, as in *Roe*, policy preferences of politically unaccountable judges instead supplant policies of the people's representatives, government ceases to represent the people. As early as 1823, Thomas Jefferson observed the threat to republican governance from the judiciary exercising will instead of judgment:

> Their decisions, seeming to concern individual suitors only, pass silent and unheeded by the public at large; that these decisions nevertheless become law by precedent, sapping by little and little the foundations of the Constitution, and working it's change by construction, before any one has perceived that this invisible and helpless worm has been busily employed in consuming it's substance.

Thomas Jefferson, October 31, 1823, Letter from Thomas Jefferson to Adamantios Coray, https://founders.archives.gov/documents/Jefferson/98-01-02-3837 (last visited December 29, 2019).

Stare decisis should not bind this Court when a precedent relied upon extra-constitutionally exceeds the scope of the Article III Judicial Power. *Amicus curiae*, therefore, urge this Court to overrule *Roe.*

2) Roe's Abortion Jurisprudence Bypasses Article V's Constitutionally Required Processes for Amending the Constitution

Judicially evolving the meaning of provisions in the Constitution, as *Roe* did, bypasses constitutionally required political processes that specifically require involvement of politically accountable state legislatures. Article V of the Constitution, in pertinent part, provides:

> The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for

> proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress. . . .

U.S. Const. art. V.

Thus, although in *Roe* the judicial branch held the power to honestly say what the provisions of the 14th Amendment truthfully meant, that power did not extend to amending or evolving that meaning. The Constitution delegates and reserves such power to amend only to those politically accountable to the people.

Again, *stare decisis* should not control this Court when a precedent relied upon was, as here, extra-constitutional. Judicially amending the meaning of a constitutional provision, as *Roe* did, usurps the people's authority contrary to Article V's explicit processes. *Roe*, in doing so, undermined republican governance and the Rule of Law. This Court should, therefore, overrule *Roe* now.

3) Roe's Abortion Jurisprudence Threatens the Judiciary's Institutional Legitimacy

The Constitution expressly delegates specific lawmaking powers to the Congress and specific enforcement powers to the President. U.S. Const. arts. I and II. These enumerated powers provide legitimacy when Congress or the President act pursuant to such

powers while carrying out their respective constitutional roles. Unlike these enumerated legislative and executive powers, the Constitution's delegation of the Judicial Power includes no specific enumerated powers to the judiciary to carry out its constitutional role of resolving cases and controversaries. Nonetheless, the people entrust the nation's judiciary to independently resolve disputes arising under the Constitution and laws of the United States. This trust exists only because the people continue to perceive the exercise of judicial power as legitimate. The judiciary's duty to apply the Rule of Law, as understood and expressed by the people's representatives, preserves this legitimacy. To facilitate this calling, Article III inoculates the judiciary against political interference from the Congress and President by giving lifetime tenure to Federal Judges. U.S. Const. art. III. Federal Judges hold lifetime appointments so that they may apply existing law to resolve disputes without fear of political consequences.

With constitutionally instituted independence comes responsibility. The principle of independence only preserves institutional legitimacy of the judiciary if the judiciary exercises judgment based on what the constitutional provision says, not based on what the judiciary, as in *Roe*, wills it to say.

Under the guise of exercising judicial review, *Roe* temporally retained an illusion of institutional legitimacy – while stealthily amending the Constitution from the bench. Corrupting its constitutionally approved independence (ironically designed to guard against political influence), *Roe's*

imperious policymaking reigns at the cost of its own institutional legitimacy. When politically unaccountable judges evolve meaning and amend policy promulgated by the people's representatives, it is not surprising when the masses reject it as illegitimate (as they did in *Dred Scott* and in *Roe*).

In opposing ratification of the Constitution, the anti-federalists foresaw the threat to representative governance from an unchecked independent judiciary:

> …[the authors of the constitution] have made the judges independent, in the fullest sense of the word. There is no power above them, to control any of their decisions. . . . In short, they are independent of the people, of the legislature, and of every power under heaven. *Men placed in this situation will generally soon feel themselves independent of heaven itself.*

Brutus, The Power of the Judiciary*, The New-York Journal*, New York City, March 20, 1788, http://resources.utulsa.edu/law/classes/rice/Constitutional/AntiFederalist/78.htm (last visited Dec. 29, 2019) (italics added).

Thomas Jefferson, although on the other side of the debate, nonetheless likewise understood how an independent judiciary could lead to an abuse of power:

> The constitution… is a mere thing of wax in the hands of the judiciary, which they may twist, and shape into any form they please. It should be remembered, as an axiom of eternal truth in politics, that whatever power in any government is independent, is absolute also; in theory only,

> at first, while the spirit of the people is up, but in practice, as fast as that relaxes. Independence can be trusted nowhere but with the people in mass.

Thomas Jefferson, September 6, 1819 Letter from Thomas Jefferson to Spenser Roane, https://founders.archives.gov/documents/Jefferson/98-01-02-0734 (last visited Dec. 29, 2019).

The concern of an independent judiciary undercutting its own institutional legitimacy, continues to hold merit. The judiciary's solemn duty requires adherence to the Rule of Law, as expressed in the Constitution. This duty requires it to resist the temptation to use its independence, as it did in *Roe*, to impose its will over that of the people. The Constitution guarantees politically accountable representative governance. Usurpation of that authority by the judiciary undermines institutional legitimacy. This Court should, therefore, overrule *Roe* now.

4) Roe and its Progeny Inadequately Address the Profound Government Interest in Protecting the Inherent Value of Unborn Human Life

This Court's precedents correctly recognize that the government holds a "legitimate and substantial interest in preserving and promoting fetal life." *See, e.g., Gonzales v. Carhart* (*Carhart II*), 550 U.S. 124, 145 (2007); *see also Roe v. Wade*, 410 U.S. at 150 (recognizing government interest in protecting life of the mother). Nonetheless, this Court's abortion jurisprudence enabled the killing of over 60 million

unborn babies in the United States since *Roe*. *See* www.numberofabortions.com (last visited Dec. 29, 2019).

Roe and its progeny uphold the right to abortion as part of a judicially-created right to privacy and personal autonomy. If freedom over one's body does not legitimize the use of illicit drugs, though, it ought not legitimize the killing of a vulnerable unborn human being. *See, e.g.,* MICH. COMP. LAWS § 333.7404

Likewise, a child in the womb holds property rights, and such rights can even result in appointment of a guardian ad litem to protect the unborn child's interest. *See, e.g.,* MICH. COMP. LAWS § 600.2045. If we, as a matter of public policy, go to such lengths to protect the unborn child's property interests, ought we not also protect his or her life? Paradoxically, unless the killing of an unborn child occurs via abortion, causes of action exist for wrongful death or other tortious injuries committed against the unborn child. *See, e.g., Womack v. Buchhorn,* 384 Mich. 718 (1971); *O'Neill v. Morse,* 385 Mich. 130 (1971)

Moreover, the classic Hippocratic Oath recognizes the inherent value of human life at all stages, providing in pertinent part: "I will not give to a woman an abortive remedy." Ludwig Edelstein, THE HIPPOCRATIC OATH (Johns Hopkins Press 1943). Every physician knows that abortion stops an unborn child's beating heart. If a physician seeks to protect prenatal development now though, they must constrain themselves – not by science or the Hippocratic Oath, but by the philosophy of an unelected Court.

Recognizing the inherent value of God-given human life, a majority of state legislatures protected life in the womb prior to *Roe*. When the people participated, government chose to recognize the inherent value of an unborn child's life. Whatever rights the judicially preferred class protected in *Roe* has, they end where another life begins. At such a point in time, this Court's duty to protect life arises. *Roe* neglected that duty and, thus, facilitated one of the greatest tragedies in human history. This Court holds the opportunity and the obligation to right that great wrong. May it have the integrity and fortitude to do so.

To preserve the dignity of human life, and restore representative constitutional governance, this Court should overrule *Roe* now.

II. THE LOUISIANA LAW DOES NOT POSE AN UNDUE BURDEN

Even if this Court chooses to not overrule its erroneous decision in *Roe* now, the Court should still uphold the Fifth Circuit's decision. The Louisiana Law is not an undue burden.

A. *Whole Woman's Health* Does Not Invalidate All Laws Requiring Hospital Admitting Privileges

Whole Woman's Health did not hold all laws requiring hospital admitting privileges unconstitutional.[6] Instead, the Court's analysis rested

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[6] A State can, and should, protect the health and safety of women obtaining surgical procedures. Indeed, the State holds an important interest in protecting its citizens and furthering

exclusively upon the factual record. *Whole Woman's Health,* 136 S. Ct. 2292, 2310. The Court considered whether requiring abortionists to hold hospital admitting privileges, within a 30-miles radius of an abortion clinic, caused an undue burden. *Id.* The Court ruled that evidence in the record demonstrated the 30-mile radius caused an undue burden. The Court based its decision on the testimony of experts and abortion information obtained within the State of Texas. This Court enumerated its purely factual basis for the decision in a bullet-pointed list. *Id.* at 2311. Additionally, the Court noted that the attorney representing Texas admitted, during oral argument, that the State had no specific evidence to show the 30-mile radius requirement had improved the medical care of any specific woman since its enactment. *Id.* at 2311-12. The Court also noted that Texas' extensive pre-existing regulation of abortion facilities fortified its decision that the 30-mile radius regulation created an undue burden, and was not merely a regulation needed to protect health and safety.

The Louisiana law requires that an abortionist hold "active admitting privileges," and be "a member in good standing of the medical staff" of a licensed hospital,

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excellence in matters concerning their health. *Gonzales v. Carhart*, 550 U.S. 124, 157 (2007) ("[I]t is clear the State has a significant role to play in regulating the medical profession."); *Washington v. Glucksberg,* 521 U.S. 702, 731 (1997) (the State "has an interest in protecting the integrity and ethics of the medical profession."). And this Court has recognized the importance of not only protecting the woman who obtains the abortion, but also the "the life within the woman" who is the target of the abortion. *Gonzales,* 550 U.S. at 157.

"with the ability to admit a patient and to provide diagnostic and surgical services to such patient[.]" Act 620, § 1(A)(2)(a). Both the legislative record and the lower court's factual record, are replete with evidence establishing Louisiana's history of serious health and safety troubles amongst its abortion providers. ROA.11221–11223, ROA.11225–11228, ROA.11256–11260, ROA.11262–11263, ROA.11264–11265, ROA.11266–11269.

Moreover, the Act brings the State's abortion regulations into conformance with its requirements for doctors who perform other outpatient surgeries. *Id.* (*i.e.*, the act disallows abortion clinics from providing surgical procedures with subpar, inadequately licensed physicians).

Unlike the record in *Whole Woman's Health*, existing Louisiana regulations do not provide meaningful review of its abortionists' credentials, or disciplinary or malpractice history. Further, the record shows that abortionists in Louisiana are exempt from the normal regulations in place for all other office-based surgeries. LA. ADMIN. CODE § 46:7309(A)(2); *id.* § 46:7303. No undue burden exists when a State enacts health and safety legislation that merely holds an abortionist to the same standards it requires for all other physicians.

Whole Woman's Health's did not create a bright line rule against States that require abortionists to hold hospital admittance privileges. If this Court wanted to create a bright line rule, it would have expressly ruled so. Instead, the Court followed its balancing framework set forth in *Casey*, 112 S. Ct. 2791, and

Gonzales, 550 U.S. at 146. The Louisiana law provides necessary and legitimate health and safety protection for women, and rests on a very different record than the Texas law in *Whole Woman's Health*.

B. This Court's Current Policy Requires an Actual and Undue Burden, not a Potential Burden

Petitioners have only established a potential burden, not an actual and undue burden. *Whole Woman's Health* presented an *as-applied* challenge that overturned the State's regulations when facts in the record, not predictions, demonstrated the regulation caused a substantial obstacle.

Here, Petitioners failed to establish any *actual* burden imposed by the Louisiana law. *See* Pet. App. 45a-46a, 55a-56a. This Court has not and should not start overturning and permanently enjoining important State health and safety regulations based on conjecture. *Whole Woman's Health* required *an actual factual record*, not the mere assertion of a hypothetical or potential burden.

CONCLUSION

For the foregoing reasons, *amicus curiae* urges this Court to overrule *Roe* and uphold the Judgment of the Court of Appeals in this case.

Respectfully submitted,

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