No. 20-1434

# In the Supreme Court of the United States

LESLIE RUTLEDGE, ATTORNEY GENERAL OF THE STATE OF ARKANSAS, ET AL., PETITIONERS,

*v.*

LITTLE ROCK FAMILY PLANNING SERVICES, ET AL.

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

## BRIEF OF *AMICUS CURIAE* CHARLOTTE LOZIER INSTITUTE SUPPORTING PETITIONERS

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## INTRODUCTION AND INTEREST OF AMICUS[1]

The Court now has before it two good vehicles that it can use to bring uniformity to the lower courts' understanding of how to interpret and apply last Term's splintered opinion in *June Medical Services* v. *Russo*, 140 S. Ct. 2103 (2020)—the present petition, and the petition in No. 20-1375 in *Box* v. *Planned Parenthood*. Such uniformity is badly needed: Lower courts have been vocal about their difficulties in applying *June Medical*. And these difficulties have arisen largely because of the challenge of applying *Marks* v. *United States*, 430 U.S. 188 (1977), which lower courts must consult to determine which—if any—of the opinions in *June Medical* is controlling.

This confusion about how to apply *Marks* has now caused *three* layers of circuit splits: One is a split over the proper application of *Marks* itself. The second is that, because the circuits have adopted different approaches for applying *Marks*, they have come to different conclusions about whether the *June Medical* plurality or concurrence controls. And the third—which has developed since the Petition was filed—concerns the constitutionality of anti-eugenics abortion restrictions and is due in part to

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[1] No one other than The Charlotte Lozier Institute and its attorneys authored any part of this brief or made a monetary contribution to fund its preparation or submission. All parties have consented to its filing of this brief and were notified more than ten days before it was due.

disagreements over the proper application of *June Medical*.

This Court is the only body that can bring order to this chaos. And it should act quickly before the States and abortion providers expend their limited time and resources attempting to determine what should be a settled standard for assessing the constitutionality of state abortion regulations. Failure to act now could cause the already divergent approaches to *Marks* and *June Medical* to create even more circuit splits over the constitutionality of other abortion regulations.

The confusion over the precedential effect of *June Medical* is of substantial interest to *amicus* Charlotte Lozier Institute, the education and research arm of the Susan B. Anthony List. The Institute is named after a 19th Century feminist physician who, like Susan B. Anthony, championed women's rights without sacrificing either equal opportunity or the lives of the unborn. The Institute studies and writes about federal and state policies—including those related to abortion—and their impact on women's health and on child and family well-being.

## STATEMENT

Based on overwhelming evidence that women are significantly more likely to abort babies diagnosed with Down syndrome when presented with inexact information and faulty interpretation, in 2019, Arkansas enacted the Down Syndrome Discrimination by Abortion Act to protect babies from being aborted solely based on a Down syndrome diagnosis. Pet. 4-10.

A handful of abortion providers alleged that the law unconstitutionally interfered with their patients' perceived "right to obtain abortions, for whatever reason, pre-viability." *Id.* at 10.

Claiming that under *Casey*, "*no* state interest could ever sustain any prohibition of pre-viability abortion," the district court preliminarily enjoined against the Act's enforcement. Pet. 10-11. The Eighth Circuit grudgingly affirmed because, under its interpretation of the Chief Justice's *June Medical* concurrence, even with valid state interests, "the only question for a court is whether a law [places] a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." Pet. App. 9a (quoting *June Medical*, 140 S. Ct. at 2138). Because of this, the Eighth Circuit claimed it had no choice but to automatically deem the law invalid. Pet. 11; Pet. App. 10a.

Two concurrences further expressed discontent with the panel's decision. One emphasized the present "significant" and "unconsidered" balancing of interests when a woman seeks an abortion solely because of a Down syndrome diagnosis. Pet. App. 15a (Shepherd, J., concurring). The other focused on a state's compelling interest in preventing a "new eugenics movement" from destroying humanity's diversity through discriminatory abortions of babies diagnosed with Down syndrome. Pet. App. 19a (Erickson, J., concurring). Yet, notwithstanding these critical considerations, in the panel's view, "the precedent forecloses a balancing of the state's actual interests

against the woman's right to choose in enacting" the Act. Pet. App. 20a.

The Eighth Circuit's reluctant opinion, along with the insightful concurring opinions, strongly signals the need for this Court to take up this case, thus preventing the ongoing culling of potential Down syndrome citizens.

## ADDITIONAL REASONS FOR GRANTING THE PETITION

Petitioners have well explained the need for this Court to grant certiorari in order to resolve the question of which of *June Medical*'s opinions controls (see Pet. 29-32) and, as a result, whether courts are allowed to consider state interests at all when assessing the constitutionality of abortion restrictions (*ibid.*). *Amicus* offers a few additional reasons why it is imperative that this Court promptly resolve this issue.

### I. This Court should grant certiorari to resolve the growing circuit split over which opinion from *June Medical* controls.

*Amicus* begins by highlighting the extensive challenges lower court judges have recounted when applying *June Medical*, then offers more details about the circuit split on that question—based in part on developments since the petition was filed.

### A. Lower courts have openly struggled with the uncertainty wrought by *June Medical*.

The lower courts are clearly struggling to understand how to apply *June Medical*. Although both the plurality and the Chief Justice's concurrence in that case endorsed the "substantial obstacle" test first set out in *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 U.S. 833 (1992), the lower courts have found that defining "whether [a] law creates a 'substantial obstacle'" for women seeking an abortion is "a question more easily asked than answered *because* the [Supreme] Court has suggested differing ways of identifying a 'substantial obstacle.'" *Preterm-Cleveland* v. *McCloud,* 2021 WL 1377279, at *8 (6th Cir. Apr. 13, 2021) (en banc) (Batchelder, J.) (emphasis added). This has led multiple judges to decry the "vexing task" of determining what standard to apply. Sixth Circuit Judge Karen Moore, for example, has concluded *June Medical* has unfortunately "muddied" the "waters" about what standard courts should apply to state laws regulating abortions. *Bristol Reg. Women's Ctr., P.C.* v. *Slatery*, 988 F.3d 329, 335 (6th Cir. 2021). Others have agreed.[2]

1. With no single opinion commanding a majority in *June Medical*, lower courts have been forced to

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[2] See *Bristol Reg. Women's Ctr. P.C.* v. *Slaterly*, 988 F.3d 329, 336 (6th Cir. 2021) (Moore, J.), vacated in *Bristol Reg'l Women's Ctr., P.C.* v. *Slatery*, No. 20-6267, 2021 WL 1589336, at *1 (6th

apply *Marks* v. *United States*, 430 U.S. 188 (1977), to determine which—if any—opinion controls. But *Marks* is notoriously opaque in its own right. Judge Moore recently called *Marks* a "morass" that "is as confusing as it is difficult to apply." *Preterm-Cleveland*, 2021 WL 1377279, at *31 (Moore, J., dissenting). Unsurprisingly, applying that precedent to *June Medical* has brought little clarity: In the words of Fifth Circuit Judge Don Willett, "[l]egal clashes have erupted nationally over the vexing interplay between *Marks* and *June Medical*." *Whole Woman's Health* v. *Paxton*, 978 F.3d 896, 919 (5th Cir. 2020) (Willett, J., dissenting). Of the four circuits that have tried to apply *Marks* to *June Medical*, three have done

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Cir. 2021) (granting rehearing en banc); *EMW Women's Surgical Ctr., P.S.C.* v. *Friedlander*, 978 F.3d 418, 431 (6th Cir. 2021) (Larsen, J.); cf. *Whole Woman's Health* v. *Paxton*, 978 F.3d 896, 919 (5th Cir. 2020) (Willett, J., dissenting), vacated in *Whole Woman's Health* v. *Paxton*, 978 F.3d 974 (5th Cir. 2020) (granting rehearing en banc).

so over fiery dissents,[3] two have gone en banc,[4] and one has had a subsequent panel refuse to fully credit its analysis.[5]

The Sixth Circuit's recent en banc decision in *Preterm-Cleveland* exemplifies this chaos, producing five concurring and six dissenting opinions. Even with all that ink spilled, the judges still failed to reach a consensus as to which opinion from *June Medical* controls.[6]

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[3] See *Whole Woman's Health* v. *Paxton*, 978 F.3d 896, 919 (5th Cir. 2020) (Willet, J., dissenting), vacated in *Whole Woman's Health* v. *Paxton*, 978 F.3d 974 (5th Cir. 2020) (granting rehearing en banc); *EMW Women's Surgical Ctr., P.S.C.* v. *Friedlander*, 978 F.3d 418, 448 (6th Cir. 2020) (Clay, J., dissenting); *Bristol Regional Women's Ctr.* v. *Slatery,* 988 F.3d 329, 344 (6th Cir. 2020) (Thapar, J., dissenting), vacated in *Bristol Reg'l Women's Ctr., P.C.* v. *Slatery*, No. 20-6267, 2021 WL 1589336, at *1 (6th Cir. 2021); *Planned Parenthood of Indiana & N. Ky.*, 991 F.3d 740, 752 (7th Cir. 2021) (Kanne, J., dissenting).

[4] *Preterm-Cleveland*, 2021 WL 1377279; *Whole Woman's Health* v. *Paxton*, 978 F.3d 974 (5th Cir. 2020) (granting rehearing en banc and vacating panel decision).

[5] *Bristol Reg. Women's Ctr.*, 988 F.3d at 337 (finding *EMW*'s conclusion that Chief Justice Roberts' concurring opinion in *June Medical* controlled was dicta).

[6] *Preterm-Cleveland*, 2021 WL 1377279, at *34 (Moore, J., dissenting) ("Unless all nine members of the majority are willing to admit openly that [the challenged law] would be unconstitutional both under the *June Medical* plurality and under *Gonzalez*—and, as we know, they won't—the majority's conclusion that the *June Medical* concurrence controls is not precedential.").

2. Of course, not all judges have found applying *June Medical* to be difficult. Sixth Circuit Judge Bernice Donald recently stated that "[a]t times edicts passed down from the Supreme Court are ambiguous. This one is not." *Preterm-Cleveland*, 2021 WL 1377279, at *46 (Donald, J., dissenting). Likewise, Judge Willett initially opined that, although "[t]he opinions [in *June Medical*] are splintered," the "takeaway seems clear." *Whole Woman's Health* v. *Paxton*, 972 F.3d 649, 654 (5th Cir. 2020) (Willett, J., dissenting).

But both of those statements appeared in dissenting opinions. And Judge Donald and Judge Willett disagree *with each other* on the ultimate question of whether to adopt the plurality or the Chief Justice's concurrence from *June Medical*.

The confusion over *June Medical* is not going to resolve itself. This Court is the only body that can bring order to the chaos by providing the lower courts with a clear standard.

### B. The circuit split has grown deeper (and more complicated) since the petition.

The lower courts' expressions of frustration detailed above might be less concerning if the circuits—after wrestling with the "vexing task" of applying *June Medical*—had reached a uniform conclusion about which opinion (or part of an opinion) controls. But, as the petition demonstrates, they have not. Pet. 29-32. Instead, the confusion has created a circuit split—a split that has only grown more

complicated and contentious since Arkansas filed its petition—that this Court should resolve by granting certiorari.

1. Just one month after *June Medical* was decided, the Eighth Circuit held that, because "Chief Justice Robert's [sic] vote was necessary in holding unconstitutional Louisiana's admitting-privileges law *** his separate opinion is controlling." *Hopkins* v. *Jegley*, 968 F.3d 912, 915 (8th Cir. 2020) (per curiam). The panel also quoted Justice Kavanaugh's dissenting opinion in *June Medical*, which emphasized that "five Members of the [Supreme] Court [had] reject[ed] the *Whole Woman's Health* cost-benefit standard." *Id.* (quoting *June Medical*, 140 S. Ct. 2103, 2182 (2020) (Kavanaugh, J., dissenting)). In doing so, the Eighth Circuit made clear that it considered the Chief Justice's *entire* opinion to be binding, including his wholesale rejection of the *Whole Woman's Health* cost-benefit balancing test, which he considered dicta. Accordingly, the Eighth Circuit vacated the district court's preliminary injunction of four abortion-related regulations because the injunction had been issued under "the *Whole Woman's Health* cost-benefit standard." *Id.* The panel therefore "remand[ed] for reconsideration in light of Chief Justice Roberts's separate opinion."[7] *Id.* at 916.

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[7] The lower court has openly flouted this instruction on remand, concluding that "*June Medical* in the Eighth Circuit opinion is referring to" the *"plurality opinion"* in "*June Medical*

The Eighth Circuit reaffirmed its position that "Chief Justice Roberts's opinion is controlling" in this case. Pet. App. 5a, n.2. In its view—as Judge Ralph Erickson explained in a separate concurring opinion—"precedent foreclose[d] a balancing of the state's actual interest against the woman's right to choose," making it impossible for the State's anti-eugenics law to survive. *Id.* at 20a. As a result, two of the three judges on the panel called for this Court to reconsider *Casey*. *Id.* at 15a (Shepherd, J., concurring); *id.* at 18a (Erickson, J., concurring).

2. By contrast, the Seventh Circuit held that only a small cutting of Chief Justice Roberts's opinion controls, specifically those portions that overlap with the plurality opinion. *Planned Parenthood of Ind. & N. Ky.* v. *Box*, 991 F.3d 740, 748-749 (7th Cir. 2021). According to the panel, this overlap is limited to "one critical sliver of common ground between the plurality and the concurrence: [that] *Whole Woman's Health* was entitled to stare decisis effect on essentially identical facts." *Id.* at 748. According to the Seventh Circuit, everything else in the Chief Justice's opinion was "obiter dicta." *Id.* at 749. As a result, in the Seventh Circuit, *Whole Woman's Health*—including its cost-benefit analysis—"remains precedent binding on lower courts." *Id.* at 752. The majority reasoned that "[t]he opinions in *June Medical* show that

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*Services* v. *Russo*, 140 S. Ct. 2103 (2020) (*plurality opinion).*" *Hopkins* v. *Jegley*, No. 4:17-cv-00404, 2020 WL 7632075, at *19 (E.D. Ark. Dec. 12, 2020).

constitutional standards for state regulations affecting a woman's right to choose to terminate a pregnancy are not stable, *but they have not been changed*, at least not yet." *Id.* at 749 (emphasis added).[8]

3. The Fifth Circuit has taken a third approach, finding that *no* opinion from *June Medical* is controlling: Because "the plurality's and concurrence's descriptions of the undue burden test are not logically compatible, *** *June Medical* thus does not furnish a controlling rule of law on how a court is to perform that analysis." *Whole Woman's Health* v. *Paxton*, 978 F.3d 896, 904 (5th Cir. 2020), vacated in *Whole Woman's Health* v. *Paxton*, 978 F.3d 974 (5th Cir. 2020) (granting rehearing en banc). Therefore, as in the Seventh Circuit, "*Whole Woman's Health's* articulation of the undue burden test as requiring balancing a law's benefits against its burdens retains its precedential force." *Ibid.* Although the Fifth Circuit vacated this most recent opinion when it granted en

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[8] In issuing an injunction that was ultimately stayed by this Court, the District of Maryland has come to this same conclusion. *ACOG* v. *U.S. FDA*, 472 F. Supp. 3d 183, 209 (D. Md. 2020) ("To the extent that there is a 'common denominator,' it is that the five Justices agreed that a 'substantial obstacle' based solely on consideration of burdens is *sufficient* to satisfy the undue burden standard, not that it is *necessary*. Accordingly, *June Medical Services* is appropriately considered to have been decided without the need to apply or reaffirm the balancing test of *Whole Woman's Health*, not that *Whole Woman's Health* and its balancing test have been overruled."), injunction vacated, *FDA* v. *ACOG*, 141 S. Ct. 578 (2021).

banc review,[9] it left in place a previous panel decision that came to the same conclusion.[10]

4. Meanwhile, the Sixth Circuit has been unable to come to an internal consensus about which opinion from *June Medical* controls, creating a contentious intra-circuit split that en banc review has failed to resolve. In *EMW Women's Surgical Center, P.S.C.* v. *Friedlander*, the court initially agreed with the Eighth Circuit that Chief Justice Roberts's concurrence controlled, albeit for different reasons, namely, because his approach would "invalidate the fewest laws going forward." 978 F.3d 418, 432–433 (6th Cir. 2020). But this did not settle the matter. In *Bristol Regional Women's Center* v. *Slatery*, a subsequent

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[9] *Whole Woman's Health* v. *Paxton*, 978 F.3d 974 (5th Cir. 2020) (vacating decision and granting rehearing en banc).

[10] *Whole Woman's Health* v. *Paxton*, 972 F.3d 649, 653 (5th Cir. 2020) (holding that because there is so little overlap between the plurality and concurrence, "the full extent of *June Medical*'s ratio decidendi" is limited to the conclusion "that the challenged Louisiana law posed an undue burden on women seeking an abortion," leaving "*Hellerstedt*'s formulation of the test" to "govern this case") (citation omitted).

The District of Guam has recently taken a similar approach, refusing to factor *June Medical* into its undue burden analysis at all. *Raidoo* v. *Camacho*, No. 21-00009, 2021 WL 1589260, at *3 n.2 (D. Guam Apr. 23, 2021) ("While the Ninth Circuit has not yet analyzed the meaning of *June Medical*, the Ninth Circuit expressly held in *Humble* [a case decided in 2014] that the undue burden test 'requires us to weigh the extent of the burden against the strength of the state's justification in the context of each individual statute or regulation.' Therefore, this court applies the undue burden test as articulated in *Humble*.")

panel suggested that *EMW*'s "lengthy analysis *** of the *June Medical* opinions" was "much ado about nothing" because the "Kentucky transfer and transport law [challenged in *EMW* may] have been valid under *either*" the *June Medical* plurality or its concurrence. 988 F.3d 329, 336 (6th Cir. 2021) (emphasis added). This is because,

> [w]here a panel *** is faced with two different standards for addressing a particular issue, but choosing between them would not change the outcome of the case due to the nature of the underlying facts, the panel's choice between the two standards is dicta because it is not necessary to the determination of the issue on appeal.

*Id.* at 337 (cleaned up). But the *Bristol* panel stopped shy of holding that *EMW*'s adoption of the Chief Justice's framework was "dicta," concluding instead that it was unnecessary to "resolve the issue of *EMW*'s precedential value, let alone the questions that would follow as to which understanding of *Casey*'s undue burden standard controls." *Id.* at 337–338.[11]

The Sixth Circuit later sought to settle the matter through an en banc rehearing of *Preterm-Cleveland* v. *McCloud*, a case in which the panel decision had been

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[11] Less than three weeks ago, the Sixth Circuit vacated the panel decision and granted en banc review. *Bristol Regional Women's Ctr., P.C.* v. *Slatery*, 2021 WL 1589336 (6th Cir. Apr. 23, 2021).

issued before *June Medical*.[12] Like the case here, *Preterm-Cleveland* concerned the constitutionality of an Ohio anti-eugenics statute, which prohibits doctors from performing abortions in situations where they know the woman is seeking it because the baby has been diagnosed with Down Syndrome. As mentioned above, the en banc court issued a torrent of concurring and dissenting opinions.[13] Judge Batchelder—backed by a majority of the judges on the en banc court—doubled down on *EMW*, holding that the Chief Justice's test in *June Medical* was "the controlling law of our Circuit." *Preterm-Cleveland*, 2021 WL 1377279, at *8. But six judges in the majority then signed on to a concurring opinion (also by Judge Batchelder) arguing that the anti-eugenics law being challenged would *also* be unconstitutional under the *June Medical* plurality's balancing test. *Id.* at *13. In addition, Judge Sutton and Judge Bush both opined that because this Court has "never considered an anti-eugenics statute before," that there is "no reason" that the "undue burden test applies at all." *Id.* at *17 (Sutton, J., concurring); at *22 (Bush, J., concurring).

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[12] The panel decision issued in October 2019. *Preterm-Cleveland* v. *Himes*, 940 F.3d 318 (6th Cir. 2019).

[13] *Preterm-Cleveland* v. *McCloud*, 2021 WL 1377279, at *13 (Batchelder, J., concurring); at *17-19 (Sutton, J., concurring); at *19-21 (Griffin, J., concurring); at *21-29 (Bush, J., concurring); at *29 (Kethledge, J., concurring); at *29-30 (Cole, C.J., dissenting); at *30-40 (Moore, J., dissenting); at *40-45 (Clay, J., dissenting); at *45-46 (Gibbons, J., dissenting); at *46 (White, J., dissenting); at *46-62 (Donald, J., dissenting).

Although all of these judges were careful to state that these extra analyses of the law were "dicta," *id.* at *13, *17, *22, the bulk of the dissenting judges have signaled they believe the concurrences nullify the precedential value of the majority's holding. As Judge Moore, writing for six dissenting judges put it, "the majority's determination that the *June Medical* concurrence controls has binding force only if nine members of this court agree that [the challenged statute] is constitutional under the *June Medical* concurrence *alone*." *Id.* at *34 (Moore, J., dissenting).

Right or wrong, Judge Moore—who authored the *Bristol* opinion casting aspersions on *EMW*—has signaled that she and her colleagues will not feel bound to apply the Chief Justice's test in future cases. Perhaps that is why the Sixth Circuit recently took the highly unusual—and controversial—step of leapfrogging the panel stage and granting initial en banc review in another abortion-related case.[14]

In short, three circuits have reached three different conclusions about the impact of *June Medical* on subsequent abortion cases, and another has been unable to reach an internal consensus even with the benefit of en banc proceedings. The Court should grant

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[14] *Bristol Regional Women's Ctr.* v. *Slatery*, No. 20-6267 (6th Cir. 2021) (granting petition for initial hearing en banc), https://www.courthousenews.com/wp-content/uploads/2021/04/TNAbortion.pdf.

review before this circuit split deepens and grows even more complicated.

## II. Review is needed to resolve the more general circuit split over the proper application of *Marks*.

The rapidly developing circuit split over which opinion from *June Medical* controls is the byproduct of an older, deeper circuit split about the proper test for applying *Marks*. There this Court instructed that, when no opinion in a Supreme Court case garners the support of a majority of the Justices, lower courts should adopt the "position taken by the [Justice or Justices] who concurred in the judgments on the narrowest grounds" as "the holding of the Court." *Id.* at 193. In subsequent cases, this Court has acknowledged that *Marks* has "baffled and divided the lower courts that have considered it," yet has declined to revisit it or provide further instruction.[15]

Resolving that split will not only settle the controversy over the anti-eugenics abortion restrictions at issue in this case but will also allow the Court to avoid a multitude of more specific circuit splits down the road.

1. Professor Ryan Williams has identified at least three distinct models for applying *Marks* that are currently employed by the lower courts:

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[15] See *Grutter* v. *Bollinger*, 539 U.S. 306, 325 (2003) (quoting *Nichols* v. *United States*, 511 U.S. 738, 745–746 (1994)).

> The first of these approaches interprets *Marks* as limited to a narrow subset of plurality decisions reflecting a clearly discernable "implicit consensus" or "common denominator" among the Justices. The second approach understand *Marks* as an instruction to lower courts to identify the opinion in a plurality decision that reflects the judgment-critical vote—typically the fifth concurring vote—and treat that opinion as the Court's holding. The third and final approach looks for points of majority consensus among different factions of concurring and dissenting Justices on distinct legal issues raised by the plurality decision.[16]

The *June Medical* split described here illustrates well what happens when different jurisdictions adopt different formulations of *Marks*: they create more circuit splits. The Fifth and Seventh Circuits have both adopted variations of the "least common denominator" test.[17] The Eighth Circuit, by contrast, has adopted the "Fifth Vote" approach, although by quoting Justice Kavanaugh's dissent it also provided

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[16] Ryan C. Williams, *Questioning* Marks*: Plurality Decisions & Precedential Constraints*, 69 Stan. L. Rev. 795, 806-807 (2017).

[17] *Whole Woman's Health* v. *Paxton*, 972 F.3d 649, 652-653 (5th Cir. 2020) (looking for the "common denominator"); *PPINK* v. *Box*, 991 F.3d 740, 746 (7th Cir. 2021) (looking for the "'narrowest ground' that is a logical subset of the reasoning in other opinions concurring in the judgment").

a subtle nod to the issue-by-issue approach.[18] And the conflicting opinions out of the Sixth Circuit are, in part, based on a disagreement over which interpretation of *Marks* should control. In *EMW*, the majority applied yet another approach to that precedent—finding the narrowest opinion to be the one that would "invalidate the fewest laws going forward"[19]—while the dissent was looking for implicit consensus.[20]

2. Unless the Court grants the petition in this case, a deepening of the circuit split over *June Medical* appears inevitable, especially given the existing circuit split over *Marks*. The First,[21] Second,[22]

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[18] *Hopkins* v. *Jegley*, 968 F.3d 912, 915 (8th Cir. 2020) ("Chief Justice Robert's [sic] vote was necessary in holding unconstitutional Louisiana's admitting-privileges law, so his separate opinion is controlling.").

[19] *EMW Women's Surgical Ctr., P.S.C.* v. *Friedlander*, 978 F.3d 418, 431-432 (6th Cir. 2021).

[20] *Id.* at 456-458 (Clay, J., dissenting).

[21] *See Fernandes* v. *Costa Bros. Masonry, Inc.*, 199 F.3d 572, 580 (1st Cir. 1999) ('[I]nferior courts should give effect to the narrowest ground upon which a majority of the Justices supporting the judgment would agree.'").

[22] *United States* v. *Alcan Aluminum Corp.*, 315 F.3d 179, 189 (2d Cir. 2003) ("This rule only works in instances where 'one opinion can meaningfully be regarded as 'narrower' than another—only when one opinion is a logical subset of other, broader opinions,' that is to say, only when that narrow opinion is the common denominator representing the position approved by at least five justices.").

Fourth,[23] Tenth,[24] and Eleventh[25] Circuits have each adopted some variation of the least common denominator rule. By contrast, the Third Circuit[26]—like the Eighth Circuit—has adopted the Fifth Vote test, while the Federal Circuit[27] has chosen an issue-

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[23] *United States* v. *Halstead,* 634 F.3d 270, 278 (4th Cir. 2011) ("The holding of *Santos* must thus be distilled by looking to the holdings of the component opinions . . ." focusing on the "narrowest sense" and on what the five justices "agreed").

[24] *United States* v. *Ethan Guillen*, No. 20-2004, 2021 WL 1623353, at *13 (10th Cir. Apr. 27, 2021) ("[A] concurring opinion in a splintered Supreme Court decision is the narrowest under *Marks*, and thus produces a determinate holding, when it is 'a logical subset' of the other opinion(s) concurring in the judgment.").

[25] *Flanigan's Enterprises, Inc. of Georgia* v. *City of Sandy Springs, Georgia*, 703 F. App'x 929, 936 (11th Cir. 2017) ("[H]is concurrence is binding only to the extent that it can be harmonized with the plurality's opinion.").

[26] *B.H. ex rel. Hawk* v. *Easton Area Sch. Dist*., 725 F.3d 293, 310–11 (3d Cir. 2013) ("But that justice's separate opinion 'can assuredly narrow what the majority opinion holds, by explaining the more limited interpretation adopted by that necessary member of the majority.' In that case, the linchpin justice's views are 'the least common denominator' necessary to maintain a majority opinion.") (citation omitted).

[27] *Franklin Fed. Sav. Bank* v. *United States*, 431 F.3d 1360, 1368 (Fed. Cir. 2005) ("The plurality and the dissent agreed that the parties could have contracted only for temporary forbearance, but disagreed as to whether a clear statement was necessary. Because the plurality required a clear statement to legitimate a temporary forbearance, its view is narrower than the dissent, which found binding temporary forbearance without the need for a clear statement. We must treat the narrower view as the holding of the Court.").

by-issue approach, which includes consideration of the views of the dissenting Justices. Meanwhile, the D.C.[28] and Ninth[29] Circuits do not consistently apply any single approach to *Marks*, but instead flip-flop among multiple standards.

3. The *Marks* circuit split has also caused the circuits to diverge on other important issues, including the interpretation of the federal money laundering statute[30] and the Clean Water Act.[31] Further delay will only lead to more splits in other areas.

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[28] Compare *United States* v. *Duvall,* 740 F.3d 604, 610 (D.C. Cir. 2013) (Kavanaugh, J.) (Fifth Vote) with *King* v. *Palmer*, 950 F.2d 771, 781 (D.C.Cir.1991) (en banc) (least common denominator).

[29] Compare *Tekoh* v. *Cty. of Los Angeles,* No. 18-56414, 2021 WL 139725 (9th Cir. Jan. 15, 2021) (least common denominator) with *United States* v. *Williams*, 435 F.3d 1148, 1157 (9th Cir. 2006) (issue-by-issue, including dissents).

[30] See*, e.g.*, *Garland* v. *Roy*, 615 F.3d 391, 403 (5th Cir. 2010) (identifying a four-way circuit split over proper application of *Marks* to *United States* v. *Santos*, 553 U.S. 507 (2008), and adopting a fifth approach); compare United *States* v. *Spencer*, 592 F.3d 866, 879-880 & n.4 (8th Cir. 2010); *United States* v. *Demarest,* 570 F.3d 1232, 1242 (11th Cir.2009); *United States* v. *Howard,* 309 F. App'x. 760, 771 (4th Cir. 2009) (unpublished) with *United States* v. *Lee,* 558 F.3d 638, 643 (7th Cir. 2009); *United States* v. *Yusuf,* 536 F.3d 178, 186 n. 12 (3d Cir. 2008) and *United States* v. *Van Alstyne,* 584 F.3d 803, 814 (9th Cir. 2009) and *United States* v. *Kratt,* 579 F.3d 558, 562 (6th Cir. 2009).

[31] See Melissa M. Berry, et. al., *Much Ado About Pluralities*, 15 Va. J. Soc. Pol'y & L. 299 (2008) (identifying circuit split over

By granting certiorari here, the Court can kill multiple birds with one stone—giving lower courts guidance on how to apply *Marks* while resolving the *June Medical* circuit split, and possibly other splits, in the process.

## III. Any delay in resolving these critical issues will unnecessarily consume scarce resources.

By granting certiorari and resolving the *June Medical* and *Marks* circuit splits now, the Court can save States and medical providers time and money, while at the same time preserving valuable judicial resources.

1. At least twenty-three abortion-related cases are now pending in the circuit courts, and many others are pending in federal district and state courts around the country.[32] These cases are not all unique: many are similar challenges to comparable abortion regulations passed in different jurisdictions.

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proper interpretation of the Clean Water Act caused by different approaches to applying *Marks* to *Rapanos* v. *United States*, 547 U.S. 715 (2006)); compare *United States* v. *Gerke Excavating, Inc.*, 464 F.3d 723, 724 (7th Cir. 2006); *N. Cal. Riv. Watch* v. *City of Healdsburg*, 496 F.3d 993, 999-1000 (9th Cir. 2007); *United States* v. *Robinson*, 505 F.3d 1208, 1221 (11th Cir. 2007) with *United States* v. *Johnson*, 467 F.3d 56, 63-64 (1st Cir. 2006).

[32] See Mary E. Harned, *Abortion Cases in The Higher Federal Courts: Clarification Needed After* June Medical, Charlotte Lozier Institute (Apr. 19, 2021), https://lozierinstitute.org/abortion-cases-in-the-higher-federal-courts-clarification-needed-after-june-medical/.

Yet the lack of consensus about which opinion from *June Medical* controls complicates these suits, prolonging litigation and forcing the parties to waste resources and time arguing about the appropriate standard of review in every case. And, at least in the Sixth Circuit, the need to debate these issues has not been reduced even after multiple cases at the panel stage and one completed en banc review.

2. If allowed to languish, these circuit splits will likely force this Court (and others) to confront even *more* abortion-related controversies, creating a cascade of additional circuit splits about the constitutionality of specific types of abortion regulations, as this case demonstrates. A third layer of circuit split—over the constitutionality of anti-eugenics abortion restrictions specifically—has developed since the Petition was filed: The Sixth Circuit upheld one such law in contrast to the Seventh and Eighth Circuits which had previously struck down others—in part because the three circuits were applying three different analytical frameworks.[33] The *June Medical* circuit split could cause similar splits to quickly form on other recurring issues, such as second-

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[33] Compare *Preterm-Cleveland* v. *McCloud*, 2021 WL 1377279 (6th Cir. 2021) (en banc) (applying multiple standards) with *PPINK* v. *Comm'r*, 888 F.3d 300 (7th Cir. 2018) (striking down laws under *Whole Woman's Health v. Hellerstedt,* 136 S. Ct. 2292 (2016)), cert. denied *Box* v. *PPINK*, 139 S. Ct. 1780 (2019) and Pet. App. 7a-10a (striking down laws under Chief Justice Roberts's concurrence).

trimester dismemberment abortion bans,[34] informed consent laws,[35] telemedicine restrictions,[36] and clinic licensing requirements.[37]

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[34] The Eighth Circuit—which applies the Fifth Vote test and therefore adopted Chief Justice Roberts's concurrence in *June Medical* in full—recently vacated a district court's preliminary injunction of Arkansas' second trimester dismemberment abortion ban. *Hopkins* v. *Jegley*, 968 F.3d 912 (8th Cir. 2020). The Fifth Circuit—which under its least common denominator test found that no opinion from *June Medical* was controlling—refused to stay a preliminary injunction of an almost identical law. *WWH* v. *Paxton*, 972 F.3d 649 (5th Cir. 2020).

[35] Lawsuits challenging state mandatory disclosure laws are pending in district courts in the Sixth and Seventh Circuits. *Planned Parenthood of Tenn. & N. Miss.* v. *Slatery*, No. 3:20-cv-00704 (M.D. Tenn.); *Whole Woman's Health* v. *Rokita*, No. 1:18-cv-1904 (S.D. Ind.). The Seventh Circuit has applied the least common denominator test to *June Medical* to conclude that *Hellerstedt*'s balancing test remains the standard. The Sixth Circuit has not reached a consensus about the appropriate standard for applying *Marks* or *June Medical*.

[36] Lawsuits challenging telemedicine abortion restrictions are pending in district courts in the Seventh and Ninth Circuits. *WWH* v. *Rokita*, No. 1:18-cv-1904 (S.D. Ind.); *Raidoo* v. *Camacho*, No. 21-00009 (D. Guam). As stated, the Seventh Circuit has applied the least common denominator test to conclude that *Hellerstedt*'s balancing test applies. The Ninth Circuit has not weighed in on which *June Medical* opinion controls, but at least at times has counted dissenting votes when applying *Marks*.

[37] Clinic licensure laws are being challenged in the Fifth and Seventh Circuits. *Planned Parenthood Gulf Coast* v. *Russo*, No. 18-30699 (5th Cir.); *WWH* v. *Rokita*, No. 1:18-cv-1904 (S.D. Ind.). While both circuits currently require courts to apply *Hellerstedt*'s balancing test, that could change after the Fifth Circuit issues its en banc opinion in *Whole Woman's Health* v. *Paxton*.

It is thus in the interest of judicial economy— as well as in the interests of preserving the litigants' time and resources—that this Court act quickly and grant certiorari to resolve the circuit splits caused by *June Medical* and *Marks*.

## CONCLUSION

This Court's splintered decision in *June Medical* has left in its wake enormous confusion in the lower courts about which standard to apply when assessing the constitutionality of state abortion regulations. A pre-existing circuit split over how to apply *Marks* has only exacerbated the problem. *Amicus* respectfully urges this Court to step in and resolve these circuit splits by granting certiorari in this case and/or No. 20-1375.

Respectfully submitted,

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