Nos. 18-1323, 18-1460

In the Supreme Court of the United States

JUNE MEDICAL SERVICES, ET AL., *Petitioners*,

v.

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

(For Continuation of Caption, See Inside Cover.)

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

BRIEF *AMICI CURIAE* OF UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, LOUISIANA CONFERENCE OF CATHOLIC BISHOPS, AND NATIONAL ASSOCIATION OF EVANGELICALS IN SUPPORT OF RESPONDENT AND CROSS-PETITIONER REBEKAH GEE

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v.

JUNE MEDICAL SERVICES, ET AL., *Cross-Respondents.*

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INTEREST OF *AMICI*

The *amici* are religious organizations that share a longstanding interest in the development of this Court's jurisprudence on abortion.[1] In our view, *Whole Woman's Health* v. *Hellerstedt*, 136 S. Ct. 2292 (2016), involving a law similar to the one challenged in this case, conflicts with this Court's precedents, including *Roe* v. *Wade*, 410 U.S. 113 (1973), and *Planned Parenthood* v. *Casey*, 505 U.S. 833 (1992), reflects a return to the heightened scrutiny of abortion legislation that *Casey* expressly rejected, and should be expressly overturned.

We submit this brief in support of Rebekah Gee, Respondent in No. 18-1323 and Cross-Petitioner in No. 18-1460.

SUMMARY OF ARGUMENT

Petitioners, who are doctors and a clinic that perform abortions, lack third-party standing to challenge Louisiana's admitting privileges law on behalf of their patients. The challenged law has one purpose: to safeguard the health and safety of women who need to be hospitalized because of injuries resulting from an abortion. Petitioners, on the other hand, wish to *avoid* the application of those safeguards and therefore not only fail to stand in the shoes of their patients but have interests wholly *adverse* to them.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* state that they authored this brief, in whole, and that no person or entity other than *amici* made a monetary contribution toward the preparation or submission of this brief. Counsel for all parties have filed blanket consents to the filing of amicus briefs.

Women are helped, not injured, by safety laws that facilitate their emergency transfer to a hospital, but even if particular women were injured by these laws in some way, there is nothing to prevent them from filing suit to challenge them. Because the Petitioners lack third-party standing, the decision below should be vacated and the case remanded with directions to dismiss.

If this Court concludes, however, that the Petitioners have standing, then the judgment of the Fifth Circuit should be affirmed.

This case is easily distinguishable from *Whole Woman's Health* v. *Hellerstedt ("WWH")*, 136 S. Ct. 2292 (2016). In *WWH*, this Court concluded that Texas's admitting privileges and surgical center laws would have forced most abortion clinics in that state to close, leaving only seven or eight clinics for a population of 5.4 million women of reproductive age in an area of nearly 280,000 square miles. Driving distances to obtain an abortion would have increased dramatically, it was believed, if the admitting privileges law had been given effect. Demographically and geographically, these facts are not remotely close to those presented in Louisiana. The challenged Louisiana law would not cause the closure of any clinics, and there would be no increase in driving distances. In addition, the physician-plaintiffs in this case did not make a good faith effort to obtain admitting privileges. The only apparent exception is a single physician whose absence would have been offset by the availability of other physicians, resulting in an undue burden on precisely "0% of women" in

Louisiana. *June Medical Services* v. *Gee*, 905 F.3d 787, 815 (5th Cir. 2018).

Even were it indistinguishable, however, *WWH* for several reasons is a jurisprudential anomaly that should be expressly overturned.

First, *WWH* conflicts with *Roe* v. *Wade*, 410 U.S. 113 (1973), and subsequent cases of this Court, which recognize the competence of states to regulate the qualifications of physicians who perform abortions at any stage of pregnancy. In *Roe* and post-*Roe* decisions, this Court has repeatedly affirmed that this legislative and regulatory prerogative applies throughout pregnancy. *Roe*, 410 U.S. at 165; *Connecticut* v. *Menillo*, 423 U.S. 9 (1975); *Mazurek* v. *Armstrong*, 520 U.S. 968 (1997).

Second, *WWH* adopts a benefits-burdens analysis that conflicts with the undue burden test adopted in *Planned Parenthood* v. *Casey*, 505 U.S. 833 (1992) (plurality opinion), and returns the Court to the heightened scrutiny that *Casey* expressly rejected.

Third, *WWH* concluded that it was the judiciary's role to resolve competing claims of medical experts, contrary to *Gonzales* v. *Carhart*, 550 U.S. 124 (2007), which places the resolution of such questions squarely in the hands of legislatures.

Fourth, *WWH* struck down Texas's entire law notwithstanding a rigorous severability clause, contradicting *Ayotte* v. *Planned Parenthood of Northern New England*, 546 U.S. 320 (2006), which limits legal relief in abortion cases to those portions of a challenged statute that are constitutionally flawed.

Fifth, this Court's decision in *WWH* to strike down clinic health and safety requirements under what purports to be an undue burden test cannot be reconciled with *Simopoulos* v. *Virginia*, 462 U.S. 506 (1983). If an outpatient hospitalization requirement survives the strict scrutiny test, as *Simopoulos* held, then less burdensome health and safety requirements necessarily survive the more lenient undue burden test that *Casey* adopted.

Sixth, by allowing doctors and clinics that perform abortions to relitigate their claims, *WWH* departed from settled precedent on claim preclusion, ensuring that federal courts will function as *de facto* medical review boards that are continuously in session.

If the choice is between following *Roe*, *Menillo*, *Mazurek*, *Casey*, *Gonzales*, *Ayotte*, *Simopoulos*, and other precedent on the one hand, or *WWH* on the other, this Court should follow the former and overrule the latter.

Given that this case and *WWH* involve the same underlying issue—admitting privileges on the part of doctors who provide abortions—a decision that *merely* distinguishes *WWH* without overruling it will likely lead lower courts to attempt to steer a dimly-lit middle course between the two decisions. This in turn will require lower courts to continue to parse facts and opinions regarding physician qualifications, a process more appropriate for the legislature and regulatory agencies and for which the federal judiciary is ill suited. For these reasons, *WWH* should be expressly overruled.

That *WWH* departed so dramatically from *Casey*, all the while purporting to *follow* that decision, is a testament to the confusion and uncertainty *Casey* has generated. To this day, 27 years after *Casey*, serious questions persist about its meaning and application. These questions are made all the more difficult given the absence of a discernible relationship, indeed the conflict, between the declared abortion right, on the one hand, and constitutional text, structure, and history on the other. Confusion among legislatures, lower courts, and litigants is likely to continue and to fester until such time as this Court engages in a serious reexamination of *Casey*.

ARGUMENT

I. The Petitioners Lack Third-Party Standing

Third-party standing requires a "close relationship" between the plaintiff and the person on whose behalf the plaintiff is suing. *Kowalski* v. *Tesmer*, 543 U.S. 125, 130 (2004). It also requires that the persons on whose behalf suit is filed are hindered in bringing suit themselves. *Id*.

The interests of Petitioners and their patients in this case not only fail to be "close" but are positively *adverse*. The Petitioners have a direct economic interest in avoiding the time and expense to comply with more protective health and safety standards. Their patients, on the other hand, have a clear and obvious interest in their own health and safety. The abortion providers therefore cannot stand in the shoes of their patients because the former want to avoid measures that protect the health and safety of the

latter. It is anomalous to allow such suits. *Whole Woman's Health* v. *Hellerstedt ("WWH")*, 136 S. Ct. 2292, 2321-23 (2016) (Thomas, J., dissenting); *Planned Parenthood of Wisconsin* v. *Schimel*, 806 F.3d 908, 924 (7th Cir. 2015) (Manion, J., dissenting) ("[I]n no other area of medicine [than abortion] may a doctor bring a suit on behalf of a patient solely because the doctor finds a safety regulation cumbersome.").

Relatedly, permitting doctor- and clinic-initiated suits such as this one produces an odd result: abortion providers may assert their own refusal or inability to comply with state health and safety laws as a predicate for striking them down. This is particularly so here, where the doctors and clinics "sat on their hands" instead of making good faith efforts to comply with Louisiana law. *June Medical Services* v. *Gee*, 905 F.3d 787, 807 (5th Cir. 2018). The anomalous result is to reward providers who fail to act upon, and give them a veto over, regulations that apply to them. *Gonzales* v. *Carhart*, 550 U.S. 124, 166-67 (2007) (noting the impropriety of giving abortion providers such a veto); *Greenville Women's Clinic* v. *Bryant*, 222 F.3d 157, 171 (4th Cir. 2000) (concluding that it would "irrationally hamstring the State's effort to raise the standard of care in certain abortion clinics" were the court to accede to the argument that the clinics' "performance falls so far below appropriate norms" as to necessitate an expensive upgrade of their practice).

Patients who seek or undergo an abortion are not hindered in bringing their own suit, as would be necessary to establish third-party standing on the part of their physicians. *Kowalski*, 543 U.S. at 130 (no third-party standing where injured party is

unhindered in bringing its own suit); *Roe*, 410 U.S. at 125 (holding that women seeking abortion fall into the mootness exception for cases "capable of repetition, yet evading review"); *WWH*, 136 S. Ct. at 2323 (Thomas, J., dissenting) (noting that women are unhindered in bringing lawsuits to challenge abortion regulations).

This case, brought by no patient to challenge a safety measure of which no patient complains and which any patient seeking abortion is free to challenge, should be dismissed for lack of standing.

II. On the Merits, This Case Is Distinguishable from *Whole Woman's Health* v. *Hellerstedt* ("*WWH*").

This case is easily distinguishable from *WWH*. *WWH* concluded that Texas's admitting privileges and surgical center laws would have forced most abortion clinics in that state to close, leaving only seven or eight clinics for a population of 5.4 million women of reproductive age in an area of nearly 280,000 square miles. 136 S. Ct. at 2301-02. Driving distances in Texas, this Court concluded, would have increased at exponential rates if the admitting privileges law had gone into effect. *Id*. at 2302 (noting a 350% increase in driving distances for those living more than 150 miles from an abortion clinic, and a 2,800% increase for those living more than 200 miles from a clinic, as a result of Texas's admitting privileges law).

Demographically and geographically, these facts are not remotely close to those presented in Louisiana. There was no evidence that the challenged Louisiana law (Act 620) would cause the closure of *any* abortion clinic. *June Medical Services*, 905 F.3d at 810 ("the

only permissible finding, under this record, is that *no clinic* will likely be forced to close on account of the Act") (emphasis added). "[B]ecause no clinics would close, there would be no increased strain on available facilities, as no clinic will have to absorb another's capacity." *Id*. at 811-12. There was "no increase in driving distance for any woman…." *Id*. at 811. Finally, there was "clear evidence in the record before the district court" that the doctors "failed to seek admitting privileges in good faith" or in a "reasonable manner." *Id*. The only possible exception was a single doctor whose unavailability would have been offset by other doctors. *Id.* at 815. In sum, Act 620 imposed an undue burden on precisely "0% of women," *id.*, which by any measure is not a "large fraction" of women. *See Planned Parenthood* v. *Casey*, 505 U.S. 833, 895 (1992).

III. *WWH* Conflicts with This Court's Precedents and Should Be Overruled.

A. *WWH* Conflicts with *Roe* v. *Wade* and Other Precedent of This Court.

Roe and subsequent decisions of this Court make clear that states may establish and enforce standards relating to the qualifications of persons who perform abortions, and that the competence of states to establish and enforce such standards applies throughout pregnancy. *Roe* v. *Wade*, 410 U.S. at 150, 163, 165 (the state may proscribe abortion by persons who do not satisfy physician licensure requirements established by the state); *Connecticut* v. *Menillo*, 423 U.S. 9 (1975) (*per curiam* opinion upholding Connecticut law prohibiting abortions by non-physicians at any stage of pregnancy, and summarily

reversing a lower court that held otherwise); *Mazurek* v. *Armstrong*, 520 U.S. 968 (1997) (*per curiam* opinion upholding Montana law prohibiting abortions by non-physicians and summarily reversing a lower court that held otherwise).[2]

Casey did nothing to upset this Court's conclusion in *Roe* that states can adopt and enforce physician qualification standards throughout pregnancy. Quite the contrary, seven justices in *Casey* concluded that this Court's earlier decisions had too severely and improperly restricted the power of states to promote women's health in the regulation of abortion. 505 U.S. at 871-78, 881-87 (O'Connor, Kennedy, & Souter, JJ.). The authors of *Casey*'s joint opinion concluded that this Court's earlier decisions had gone "too far" in striking down regulations that "in no real sense deprived women of the ultimate decision" whether to have an abortion. *Id*. at 875. The joint opinion rejected *Roe*'s trimester framework, holding that "the State has [a] legitimate interest[] from the outset of the pregnancy in protecting the health of the woman," and rejected strict scrutiny in favor of a more lenient undue burden standard. *Id*. at 846, 874-78. Under *Casey*, therefore, states have greater latitude to

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[2] To be sure, *Roe* states at one point that states may regulate the "qualifications" and "licensure" of "the person who is to perform the abortion" *after* the first trimester. 410 U.S. at 163. But in the next breath, the opinion states that for purposes of *Roe*'s holding, states can "define the term 'physician,' … to mean only a physician currently licensed by the State …," *id*. at 165, which is necessarily one means of regulating the qualifications of persons who, at any stage of pregnancy, perform an abortion. Any doubt on this point was laid to rest two years later in *Menillo* and reaffirmed in this Court's post-*Casey* decision in *Mazurek*.

advance the interest in maternal health than had been allowed in the two decades following *Roe*.

WWH cannot be reconciled with these decisions because it effectively second guesses the prerogative of states to establish physician qualifications, an issue that *Roe* and *Casey* hold to be entirely within the competence of legislatures, as reaffirmed in *Menillo* and *Mazurek*.

B. *WWH* Conflicts with *Planned Parenthood* v. *Casey*.

WWH adopted a test that balanced the benefits of abortion regulations against their burdens. *WWH*, 136 S. Ct. at 2309 (stating that a court must "consider *the burdens* a law [regulating abortion] imposes on abortion access together with *the benefits* those laws confer") (emphasis added).

WWH claimed to derive this test from *Casey*. *Id*. But *Casey* did not adopt or apply a balancing test. The plurality in *Casey* concluded that courts must consider whether a law (a) is reasonably related to its objectives and (b) places a substantial obstacle on the woman's decision to have an abortion. 505 U.S. at 877-78, 883, 885, 900. As this Court would reiterate 15 years later, under *Casey* a state may regulate abortion "[w]here it has a rational basis to act" and "does not impose an undue burden." *Gonzales*, 550 U.S. at 158.

And that is the test *Casey* applied. As Justice Thomas correctly noted (136 S. Ct. at 2324) in his dissent in *WWH*:

> When assessing Pennsylvania's recordkeeping requirements for abortion providers, … *Casey* did not weigh its benefits and burdens. Rather, *Casey* held that the law had a legitimate purpose because data collection advances medical research, "so it cannot be said that the requirements serve no purpose other than to make abortions more difficult." The opinion then asked whether the recordkeeping requirements imposed a "substantial obstacle," and found none. Contrary to the majority's statements [in *WWH*], *Casey* did not balance the benefits and burdens of Pennsylvania's spousal and parental notification provisions, either. Pennsylvania's spousal notification requirement, the plurality said, imposed an undue burden because findings established that the requirement would "likely … prevent a significant number of women from obtaining an abortion"—not because these burdens outweighed its benefits. And *Casey* summarily upheld parental notification provisions because even pre-*Casey* decisions had done so. [Citations omitted.]

Five years after *Casey*, the plaintiffs in *Mazurek* argued that a Connecticut law requiring that abortion be performed by a licensed physician should be struck down because "*all* health evidence contradicts the claim that there is *any* health basis" for the law. 520 U.S. at 973 (emphasis added). "But this line of argument," the Court held, "is squarely foreclosed by *Casey* itself." *Id.* "[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*. (original emphasis), quoting *Casey*, 505 U.S. at 885. Thus, this Court declined to consider the benefits of the challenged law and instead acceded to the legislature's judgment on that issue.

WWH's balancing of benefits and burdens is not only *contradicted* by the test *Casey* adopted and applied, and by *Mazurek*'s express refusal to engage in such balancing, but is closer to the strict scrutiny that seven justices in *Casey* expressly *abandoned*. *WWH*, 136 S. Ct. at 2321 (Thomas, J., dissenting) (concluding that the majority in *WWH* "eviscerates important features" of the undue burden test and "return[s] to a regime like the one that *Casey* repudiated); *Casey*, 505 U.S. at 878 (plurality) ("We reject the rigid trimester framework of *Roe*"); *id*. at 966 (Rehnquist, C.J., concurring in the judgment in part, dissenting in part) ("the Constitution does not subject state abortion regulations to heightened scrutiny"). In essence, *WWH* marks a return to the pre-*Casey* days of striking down reasonable health and safety regulations.

WWH's use of a balancing test is also anomalous for at least one additional reason. Such a test gives the unenumerated abortion right greater protection than rights enumerated in the Constitution. *WWH*, 136 S. Ct. at 2329 (Thomas, J., dissenting). This Court has held, for example, that neutral, generally applicable laws are, by that very fact, largely insulated from review under the Free Exercise Clause. *Employment Division* v. *Smith*, 494 U.S. 872 (1990). As long as

legislators and regulators do not disparage[3] or target[4] religion or religious believers, laws infringing religious liberty are permissible under *Smith* regardless of how burdensome to religious exercise or how *de minimis* the benefit.

That abortion, which is nowhere mentioned in the Constitution, should receive greater judicial solicitude than religious liberty or other rights enumerated in the Constitution is a sign of just how far *WWH* strays from constitutional text and structure.

Because it is inconsistent with *Casey* and other precedent, this Court should reject *WWH*'s balancing test.

C. *WWH* Conflicts with *Gonzales* v. *Carhart.*

WWH concluded that it is the role of the judiciary to resolve disputed medical questions in the abortion context. 136 S. Ct. at 2310 (stating that courts, not legislatures, "must resolve questions of medical uncertainty").

This contradicts *Gonzales* v. *Carhart*, which emphasizes that it is not the judiciary's role to second-guess state regulatory judgments even in the face of conflicting medical opinions. "Medical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other

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[3] *Masterpiece Cakeshop* v. *Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018).

[4] *Church of the Lukumi Babalu Aye* v. *City of Hialeah*, 508 U.S. 520 (1993).

contexts." *Gonzales*, 550 U.S. at 164; *see id*. at 163 ("The Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty."). Other precedent of this Court is to the same effect. *Mazurek*, 520 U.S. at 973 (legislatures 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*"), quoting *Casey*, 505 U.S. at 885.

This Court has rightly rejected the invitation to sit as "the country's *ex officio* medical board." *Gonzales*, 550 U.S. at 163-64, quoting *Webster* v. *Reproductive Health Services*, 492 U.S. 490, 518-19 (1989) (plurality opinion). The wisdom demonstrated in *Gonzales* of deferring to legislatures and regulatory agencies on matters of medicine is readily apparent. A legislature or administrative agency can respond quickly to new information in medicine and to changes in medical practice. Once such matters are made the subject of a constitutional decision, however, there is no advancing or retreating from that decision short of further litigation to overrule or limit it. To bar states from adopting standards with respect to physician qualifications will make this Court the *ex officio* medical board that it claims not to be.

D. *WWH* Conflicts with *Ayotte* v. *Planned Parenthood*.

In a unanimous opinion, this Court held that "when confronting a constitutional flaw in a statute, we try to limit the solution to the problem." *Ayotte* v. *Planned Parenthood of Northern New England*, 546 U.S. 320,

328 (2006). Thus, this Court "prefer[s] … to enjoin only the unconstitutional applications of a statute while leaving other applications in force, or to sever its problematic portions while leaving the remainder intact." *Id.* at 328-29 (citations omitted). The Court "tr[ies] not to nullify more of a legislature's work than is necessary, for we know that [a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people." *Id.* at 329 (internal quotation marks and citations omitted).

WWH is irreconcilable with *Ayotte*. Faced with "what must surely be the most emphatic severability clause ever written," *WWH*, 136 S. Ct. at 2331 (Alito, J., dissenting), a majority in *WWH* enjoined Texas's admitting privileges and ambulatory surgical center requirements *in their entirety*. The majority concluded that it was not required to go through the challenged law in piecemeal fashion. *Id.* at 2319-20. That remarkable holding seems to relieve those challenging the law of the obligation to prove (and the decision maker to determine) which portions of the law are unlawful. If there is some doubt as to which portions of an abortion statute are constitutional, the proper course is "to remand to the lower courts for a remedy tailored to the specific facts shown in this case, to 'try to limit the solution to the problem.'" *WWH*, 136 S. Ct. at 2353 (Alito, J., dissenting), quoting *Ayotte*, 546 U.S. at 328.

If an abortion statute has constitutional defects—the one challenged in this case has none—this Court should follow *Ayotte* and reject *WWH*'s approach to striking down more of the statute than is necessary to address those defects.

E. *WWH* Conflicts with *Simopoulos* v. *Virginia.*

Clinic safety regulations and admitting privilege requirements are companion provisions. Both further the interest in patient safety, and the only difference is that one is directed at clinics, the other at doctors.

Ten years after *Roe*, by an 8-1 vote, this Court upheld a Virginia law requiring that abortions after the first trimester be performed in an inpatient or outpatient surgical hospital. *Simopoulos* v. *Virginia*, 462 U.S. 506 (1983). *Simopoulos* concluded that "the State necessarily has considerable discretion in determining standards for the licensing of medical facilities." *Id*. at 516. Justice O'Connor concurred in part and concurred in the judgment. *Id*. at 519. Foreshadowing *Casey*, she rejected the notion that the constitutional validity of the Virginia law was "contingent in any way on the trimester" in which the hospitalization requirement was imposed. *Id*. at 520. She also concluded that the requirement was "not an undue burden." *Id*.

Simopoulos is irreconcilable with *WWH*. If, as *Simopoulos* held, a hospital requirement is constitutional in the second trimester—at a time, no less, when the Court claimed to be applying strict scrutiny—it cannot be true that a less rigorous clinic safety requirement is unconstitutional under the more lenient undue burden standard. That the hospital requirement in *Simopoulos* related only to the second trimester is today irrelevant given *Casey*'s rejection of the trimester framework and its acknowledgment that the state has a legitimate interest throughout pregnancy in protecting maternal health. Though the

majority in *WWH* tried to distinguish *Simopoulos*,[5] the two cases are irreconcilable.

F. *WWH* Conflicts with This Court's Decisions on Claim Preclusion.

There is no need to reproduce here Justice Alito's detailed and persuasive demonstration in *WWH* of how the majority in that case went awry on issues of claim preclusion. 136 S. Ct. at 2330-42 (Alito, J., dissenting). Under the majority view, and contrary to rules of claim preclusion that apply in all other cases, if a plaintiff fails to muster sufficient evidence in the first round of a challenge to an abortion law, the same plaintiff may relitigate the same issue in a subsequent case based on different or additional evidence or may raise new issues that should have been brought in the initial suit.

Giving the same abortion providers multiple bites of the same apple is a guarantee that federal courts will not only be *ex officio* medical review boards but will be continually in session, endlessly parsing through differing factual and legal claims and never reaching finality. This is properly the domain of legislatures and regulatory agencies, not courts.

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[5] The majority in *WWH* (136 S. Ct. at 2320) cited the fact that *Simopoulos* involved only a second-trimester regulation and that *Casey* had rejected the trimester framework. Those observations are correct but seem entirely irrelevant, as they fail to explain why an ambulatory surgical requirement should be an undue burden under *Casey*, as *WWH* held, when more rigorous outpatient hospital requirements survived strict scrutiny under *Roe*.

Because *WWH* fails to adhere to the same rules of claim preclusion as apply in non-abortion cases, its approach to claim preclusion should be rejected.

G. The Importance of Providing Clear Guidance to Lower Courts Counsels in Favor of Overruling *WWH*.

Given that this case and *WWH* involve the same underlying issue—admitting privileges on the part of doctors that provide abortions—a decision affirming the Fifth Circuit that *merely* distinguishes *WWH* without overruling it would likely lead lower courts to attempt to steer a dimly-lit "middle path" between the two decisions. This in turn will invite (indeed it will *require*) lower courts to engage in the kind of collection, evaluation, and parsing of facts and opinions regarding physician qualifications that is more appropriate to a legislature or regulatory agency and for which the federal judiciary is ill suited. Such a substitution of judicial for legislative and agency judgment would be out of bounds in any other context; it is no less out of bounds because this case involves abortion.

In light of *WWH*'s inconsistency with other decisions of this Court, lower courts should not be left to sort out the confusion that will remain, or to engage in the factual and legal hair-splitting that will be required, if *WWH* is left standing.

IV. *WWH* Underscores a Deeper Problem with This Court's Abortion Jurisprudence and a Need to Reexamine *Casey*.

That *WWH* could have departed so dramatically from *Casey*, all the while claiming to *follow* that decision, is a sign of the confusion and uncertainty *Casey* has generated. Today, over 25 years after *Casey* was decided, serious questions persist about its meaning and application.

The problem is three-fold.

First, *Casey* adopted what it termed an "undue burden" test but defined that contentless (and therefore ultimately subjective) test in terms of an equally contentless (and subjective) "substantial obstacle"—a problem that Justice Scalia noted from the time the test was announced. *Casey*, 505 U.S. at 986-87 (Scalia, J., concurring in the judgment in part, dissenting in part) (describing the test as "inherently manipulable," "hopelessly unworkable," and gauged to conceal "raw judicial policy choices concerning what is 'appropriate' abortion legislation"). To this day, no one can say with any assurance what an undue burden actually is.

A classic illustration of the unworkability of the undue burden test is that the justices who penned the joint opinion did not agree, even among themselves, whether laws subsequently challenged under *Casey* imposed such a burden. Justices O'Connor and Souter, for example, voted to strike down a Nebraska statute prohibiting partial-birth abortion, while Justice Kennedy voted to uphold it. *Cf. Stenberg* v. *Carhart*, 530 U.S. 914, 938 (2000) (claiming that a

"straightforward application" of *Casey* required invalidation), *with id.* at 956-79 (Kennedy, J., dissenting) (reaching the opposite conclusion). Years later, applying the undue burden test, Justice Kennedy voted to uphold a federal statute prohibiting partial-birth abortion, while Justice Souter voted to strike it down under the same test. *Cf. Gonzales*, 550 U.S. at 145-46, *with id.* at 169-71 (Ginsburg, J., dissenting, joined by Souter, J., among others).[6]

Second, Casey requires invalidation of an abortion regulation that unduly burdens the decision of a "large fraction" of women to have an abortion, but this Court has never indicated precisely how one determines the numerator and denominator of that fraction. In *WWH*, the Court adopted an interpretation of the large fraction test in which the numerator and denominator were *identical*. *WWH*, 136 S. Ct. at 2343 n.11 (Alito, J., dissenting) ("Under the Court's holding, we are supposed to use the same figure (women actually burdened) as both the numerator and the denominator. By my math, that fraction is always '1,' which is pretty large as fractions go."). If that is so, then the outcome of the undue burden test is pre-determined in every case, rigged to invalidate any abortion regulation *automatically*. This is an absurd result and cannot possibly be what *Casey* intended.

Third, what was said earlier of *WWH*'s balancing test (*see* discussion *supra* at 12-13) is also true of *Casey*'s undue burden test: the right to abortion under that test is "more ironclad even than the rights

[6] Having retired from the Court, Justice O'Connor did not participate in *Gonzales*.

enumerated in the Bill of Rights." *Planned Parenthood of Indiana & Kentucky* v. *Comm'r*, 888 F.3d 300, 310 (7th Cir. 2018) (Manion, J., concurring in the judgment in part, dissenting in part), *rev'd in part*, 139 S. Ct. 1780 (2019). When unenumerated rights are given more protection than rights actually enumerated in the Constitution, courts are more likely enforcing the personal preferences of their unelected members than the law of the land.

These three problems are made more difficult, if not insoluble, by the absence of a discernible relationship between the declared abortion right, on the one hand, and constitutional text, structure, and history on the other. The joint opinion in *Casey* concluded that the state has an "important," "legitimate," "substantial," and "profound" interest, *throughout pregnancy*, in protecting unborn human life. 505 U.S. at 875-76, 878. But if that is the case, one may ask: why is the state forbidden to prohibit abortion before viability? Neither *Roe* nor *Casey* explains—indeed, no decision of this Court has ever explained—why viability is the constitutionally meaningful point at which the state can forbid abortion. For all its length, *Casey*, expressing no apparent hesitation in jettisoning *Roe*'s trimester framework and strict scrutiny test, offered only *one sentence* to support retention of *Roe*'s viability rule, and that sentence merely *defines* viability.[7] This aspect of *Casey* continues to be a rule without a reason.

[7] 505 U.S. at 870 ("The second reason [for retaining the viability rule apart from *stare decisis*, which was presented as the first reason] is that the concept of viability, as we noted in *Roe*, is the time at which there is a realistic possibility of maintaining and

To be sure, *Roe* attempted to ground abortion in the Constitution by likening it to other personal decisions that had been held to enjoy constitutional protection, including decisions regarding procreation and contraception. *Roe*, 410 U.S. at 152-53, citing *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942), and *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972); *Roe*, 410 U.S. at 169-70 (Stewart, J., concurring) (also citing *Skinner* and *Eisenstadt*). But *Skinner* and *Eisenstadt* concerned laws in which "the government *prevented* people from having children or interfered with the decision not to *become* pregnant, which is different from protecting an unborn child in an established pregnancy." Michael F. Moses, *Institutional Integrity and Respect for Precedent: Do They Favor Continued Adherence to an Abortion Right*, 27 NOTRE DAME J. OF

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nourishing a life outside the womb, so that the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman."). As Justice Scalia observed

> The arbitrariness of the viability line is confirmed by the Court's inability to offer any justification for it beyond the conclusory assertion that it is only at that point that the unborn child's life "can in reason and all fairness" be thought to override the interests of the mother. Precisely why is it that, at the magical second when machines currently in use … are able to keep an unborn child alive apart from the mother, the creature is suddenly able (under our Constitution) to be protected by law, whereas before that magical second it was not? That makes no more sense than according infants legal protection only after the point when they can feed themselves.

Id. at 989 n.5 (Scalia, J., concurring in the judgment in part, dissenting in part) (internal citations omitted).

LAW, ETHICS & PUB. POL'Y 541, 557 (2013); *see Roe*, 410 U.S. at 159 (admitting that abortion is "inherently different" from marriage and procreation).

Roe also attempted, based on prior decisions that had declared due process protection for rights deeply rooted in the Nation's history and tradition, to locate an abortion right in history. But the attempt was spectacularly flawed. "[S]ubsequent scholarship has demonstrated conclusively that acceptance of abortion is not in any sense deeply rooted in the Nation's history and traditions. The opposite is true: it is the prohibition of abortion that has deep roots in English and American history." *Institutional Integrity and Respect for Precedent*, *supra* at 553-54; *see generally* Joseph W. Dellapenna, DISPELLING THE MYTHS OF ABORTION HISTORY xii (2006) ("The tradition of treating abortion as a crime was unbroken through nearly 800 years of English and American history until the 'reform' movement of the later twentieth century.").[8]

That the Constitution does not enshrine a right to abortion before viability (or at any other time during pregnancy) should be enough for the federal judiciary to leave this issue to the political branches, but the argument for doing so becomes even more compelling when one considers the tension—indeed, the conflict—that a judicially-crafted abortion right creates with the text, structure, and history of the Constitution. The

[8] Remarkably, the authors of *Casey*'s joint opinion claimed that "[w]e do not need to say whether each of us, had we been Members of the Court" when *Roe* was decided, "would have concluded, as the *Roe* Court did, that [states may not] ban … abortions prior to viability." 505 U.S. at 871.

notion that it is the role of the federal judiciary, and not the elected branches of government, to decide such an important question of public policy as abortion conflicts with principles of popular sovereignty and separation of powers that lie at the very core of our constitutional government. The people's own chosen representatives, who by virtue of their election and relatively short terms remain accountable to the people, are vested with exclusive lawmaking power subject only to such constraints as the people themselves have agreed to place beyond the reach of political majorities. State governments remain the repository of all political power not specifically delegated to the federal government. U.S. Const., amend. X; *Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 567 U.S. 519, 535-36 (2012). There is a constitutionally-prescribed mechanism for amending the Constitution, and the judiciary plays no role in that process. U.S. Const., art. V. Finally, all officers of the federal government, including judges, are bound by oath or affirmation to support "*this* Constitution," i.e., the Constitution which the people themselves adopted and have amended from time to time. U.S. Const., art. VI (emphasis added).

All these fundamental features of our Constitution—popular sovereignty, separation of powers, representative government, the vesting of lawmaking authority in the legislative branch, federalism, the amendment process, and the prescribed oath of office—are in serious tension, indeed in conflict, with the claim of a constitutionally-based right to an abortion.

Casey's "undue burden" and "large fraction" tests resist further refinement because they have no relation to any actual constitutional text, but were created out of whole cloth. Thus, any attempt to give content to *Casey* almost immediately founders on the fact that, unlike cases involving an actual constitutional text, there is no written expression of any constitutional value upon which to draw. To the continued dismay of legislatures, lower courts, and litigants, confusion about *Casey*'s meaning and application will continue to fester until such time as this Court engages in a meaningful reexamination of *Casey*.

CONCLUSION

The Fifth Circuit's decision should be vacated, and the case remanded with instructions to dismiss for lack of standing. If this Court concludes that the Petitioners have standing, then the judgment of the Fifth Circuit should be affirmed.

Respectfully submitted,

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