No. 18-1323

**In The**
**Supreme Court of the**
**United States**

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JUNE MEDICAL SERVICES L.L.C., *et al., Petitioners,*
*v.*
DR. REBEKAH GEE, in her official capacity as Secretary of the Louisiana Department of Health,
*Respondent.*

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

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# Brief of Amici Curiae Louisiana Family Forum, Dr. James Dobson Family Institute, and 25 Additional Family Policy Organizations Supporting Respondent

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Renee K. Carlson
TRUE NORTH LEGAL
2855 Anthony Ln South
Minneapolis, MN 55418
Ph.: 612/789-8811
Email: rcarlson@truenorthlegalmn.org

Anita Y. Milanovich
*Counsel of Record*
MILANOVICH LAW, PLLC
100 E. Broadway Street
The Berkeley Room
Butte, Montana 59701
Ph.: 406/589-6856
Email: aymilanovich@milanovichlaw.com


December 27, 2019

## QUESTION PRESENTED

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*.

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## STATEMENT OF INTEREST[1]

Amici Louisiana Family Forum, Dr. James Dobson Family Institute, and 25 additional family policy organizations are Judeo-Christian nonprofit organizations that promote research and education to encourage, strengthen and protect American families, including pro-life policies. They are identified in full as follows:

Louisiana Family Forum; Dr. James Dobson Family Institute; Alaska Family Action; Center for Arizona Policy; California Family Council; Delaware Family Policy Council; Florida Family Policy Council; Hawaii Family Forum; The Family Leader (Iowa); Indiana Family Institute; Family Policy Alliance of Kansas; The Family Foundation (Kentucky); Texas Values; Massachusetts Family Institute; Michigan Family Forum; Minnesota Family Council; Mississippi Center for Public Policy; Montana Family Foundation; Nebraska Family Alliance; Cornerstone Action of New Hampshire; Family Policy Alliance of New Jersey; Family Policy Alliance of New Mexico; New Yorkers for Constitutional Freedoms; North Carolina Family Policy Council; Citizens for Community Values (Ohio); Family Action Council of Tennessee; and Wisconsin Family Council.

Amici file this brief supporting Respondent because this Court's current abortion jurisprudence not

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[1] No counsel for a 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 its preparation or submission. The parties received timely notice of and have consented to the filing of this brief.

only makes it difficult to educate the public and influence public policy on lawful pro-life measures, but has weakened the public's confidence in an impartial justice system and the Rule of Law.

## SUMMARY OF THE ARGUMENT

Since *Planned Parenthood v. Casey,* the Court has employed an undue burden standard that lacks an objective framework, requiring lower courts to conclude that a previability, abortion-related law is (or is not) an "undue burden" on or a "substantial obstacle" to a woman's right to an abortion without providing any legal criteria for such a conclusion beyond the four laws analyzed in *Casey* itself. The result has been unpredictable, inconsistent lower court decisions, requiring this Court to render the ultimate resolution on every type of abortion law. *Whole Women's Health v. Hellerstedt*'s "burdens/benefits" analysis has fared no better.

This Court should incorporate First Amendment jurisprudential principles to establish objective analysis in the abortion context. In the free speech realm, the Court addresses burdens on free speech by applying levels of scrutiny to free speech regulations based on whether those regulations are content-neutral or content-based. Likewise, in the free exercise realm, the Court applies scrutiny review based on the general applicability of the law at issue.

Adopting a similar framework for previability abortion-related challenges would address *Casey*'s undue burden concerns in a manner consistent with *Casey* while establishing an objective test that provides courts and legislatures with much needed guideposts as they review and adopt laws, respectively. It would also promote public confidence in the judiciary and the Rule of Law.

Under such a framework, Louisiana's admitting privileges requirement would be constitutional as an abortion-neutral regulation that is narrowly tailored

to serve the State's substantial interest in the health of the woman and the life of the unborn.

## ARGUMENT

### I. The Court Should Rectify Abortion Jurisprudence's Unworkable Standards.

#### A. Abortion Jurisprudence Is A Subjective Standard of Review.

In *Planned Parenthood v. Casey,* a plurality of the Court established a new, post-*Roe* standard of review to govern legal challenges to pre-viability abortion regulations. 505 U.S. 833, 869-879 (1993) (opinion of O'Connor, Kennedy, and Souter, JJ.). Specifically, the plurality adopted the undue burden standard, explaining that "[a] finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Casey*, 505 U.S. at 877. These two principles—"undue burden" and "substantial obstacle"—are not criteria, but are conclusions that lower courts are required to reach as they seek to follow *Casey*. *Id.*

The inevitable result of this jurisprudence has been that lower courts have little objective guidance. While *Casey* itself provides lower courts with four examples of how an "undue burden" conclusion is reached—three provisions upheld, a fourth struck down, *Casey*, 505 U.S. at 879-901—such examples at best result in an ad hoc approach for lower court review. Different courts, both within and among the circuits, arrive at different conclusions, with some concluding the facts would uphold the law, while others would strike down a substantially similar law because of small factual differences they believe

distinguish the law from other decisions and from *Casey*.[2]

For example, in cases that address 24-hour waiting periods, the lower courts have followed *Casey*'s lead in likewise upholding such provisions. *See, e.g., Eubanks v. Schmidt*, 126 F. Supp. 2d 451 (W.D. Ky. 2000) (upholding a 24-hour waiting period statute);

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[2]Legal scholarship is not short of analysis discussing the fractioned jurisprudence regarding abortion regulations analyzed under *Casey*. *See* Charles Adside, III, *Undue Schizophrenia: Split Decisions, Confused Scholars and Reversing Unworkable Abortion Precedent* 54 Willamette L. Rev. 220, 221 (2019) (concluding that the "Court's failure to concretely define the [undue burden] standard has spurred contradictory interpretations across different jurisdictions with irreconcilable results, diminishing *Casey's* precedential value."); Khiara M. Bridges, *"Life" in the Balance: Judicial Review of Abortion Regulations*, 46 U.C. Davis L. Rev. 1285, 1336 (2013) (discussing how "*Casey* did very little to explain the [undue] standard and how courts should use it."); Catherine Gamper, *A Chill Wind Blows: Undue Burden in the Wake of Whole Women's Health v. Hellerstedt*, 76 Md. L. Rev. 792 (2017) (noting that in "the wake of the *Hellerstedt* decision, state laws aiming to regulate abortion are in a precarious position…because, as a result of the holding, future application of the undue burden test remains unclear."); Kate L. Fetrow, *Taking Abortion Rights Seriously: Toward A Holistic Undue Burden Jurisprudence*, 70 Stan. L. Rev. 319 (2018) ("Determining whether a burden is undue confounds legislatures and courts alike … [and] scholarship on the undue burden standard has, for the most part, focused on offering critiques of the standard rather than discussing how the existing standard should be understood and applied.").

*Tucson Women's Center v. Arizona Medical Bd.*, 666 F. Supp. 2d 1091 (D. Ariz. 2009) (same). However, where challenged laws are less directly comparable to those addressed in *Casey*, the case law begins to diverge. *See, e.g., Planned Parenthood Minnesota, North Dakota, South Dakota v. Daugaard*, 799 F. Supp. 2d 1048 (D.S.D. 2011) (striking down a 72-hour waiting period statute); *Planned Parenthood of Ind. and Ky., Inc. v. Comm'r of Ind. Dep't of Health,* 896 F.3d 809 (7th Cir. 2018), *pet. cert. pending* No. 18-1019 (filed Feb. 4, 2019) (striking down an informed consent requirement for an ultrasound 18 hours prior to an abortion procedure).

Fundamentally, *Casey* forces courts to adopt an essentially legislative role, deciding for themselves whether legislative interests and findings are sufficient, or can be outweighed by evidence from the abortion providers—who typically challenge abortion-related laws and who often have mixed priorities.[3] *See Casey,* 505 U.S. at 965 (Rehnquist, C.J.,

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[3]Abortion providers rarely have an ongoing doctor/patient relationship with pregnant women. Even obstetricians, who develop relationships with pregnant women throughout their pregnancy, typically do not even schedule their first patient visit until at least 8 weeks gestation. *See Your First Prenatal Visit,* American Pregnancy Association (Oct. 21, 2019), https://americanpregnancy.org/planning/first-prenatal-visit/. Approximately 66% of abortions occur before 8 weeks gestation. *Abortion After the First Trimester*, Planned Parenthood (Feb. 2014), https://www.plannedparenthood .org/files/5113/9611/5527/Abortion_After_first_trimester.pdf. So an abortion provider's relationship with a pregnant woman for most abortion procedures is almost purely surgical, and not the

concurring and dissenting in part) ("This may or may not be a correct judgment, but it is quintessentially a legislative one"); *Whole Women's Health v. Hellerstedt,* 136 S. Ct. 2292, 2325 (2016) (Thomas, J., dissenting) (discussing how abortion jurisprudence has evolved to no longer respect the legislature's judgment).

This outcome was anticipated by Chief Justice Rehnquist in his plurality opinion in *Casey*, which described the undue burden standard as "a standard which … will not … result in the sort of 'simple limitation,' easily applied … it is a standard which is not built to last." *Casey*, 505 U.S. at 964-65. He observed:

> In evaluating abortion regulations under that standard, judges will have to decide whether they place a "substantial obstacle" in the path of a woman seeking an abortion. … In that this standard is based even more on a judge's subjective determinations than was the trimester framework, the standard will do nothing to prevent judges from roaming at large in the constitutional field guided only by their personal views.

*Casey,* 505 U.S. at 965 (Rehnquist, C.J., concurring and dissenting in part) (internal citations omitted).

This type of judicial unpredictability is not unfamiliar to the Court. Establishment Clause jurisprudence suffers from standards "not built to last" as well.

In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Court identified a three-part test to assess whether a

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extensive doctor/patient relationship that eventually develops between a pregnant woman and her obstetrician.

law violated the Establishment Clause: first, whether the law in question served a secular purpose, *id.* at 612; second, whether the primary effect of the law advanced nor inhibited religion, *id.* at 612; and last, whether the law fostered excessive entanglement of religion. *Id.* at 613. The result? Case decisions like *Van Orden v. Perry,* 545 U.S. 677 (2005) and *McCreary County v. ALCU*, 545 U.S 844 (2005), which, decided by the Court on the same day, upheld as constitutional a 6 foot monument of the Ten Commandments in front of a state capitol, *Van Orden,* 545 U.S at 681, but enjoined posting of the Ten Commandments in courthouses, *McCreary,* 545 U.S at 881.

The *Van Orden* Court observed:

> Over the last 25 years, we have sometimes pointed to *Lemon v. Kurtzman* as providing the governing test in Establishment Cause challenges. Compare *Wallace v Jaffree*, 472 U.S. 38 … (1985) (applying *Lemon*), with *Marsh v. Chambers,* 463 U.S. 783 … (1983) (not applying *Lemon*). Yet, just two years after *Lemon* was decided, we noted that the factors identified in *Lemon* serve as "no more than helpful signposts." *Hunt v. McNair,* 413 U.S. 734 … (1973). Many of our recent cases simply have not applied the *Lemon* test. See, *e.g.*, *Zelman v. Simmons-Harris,* 536 U.S. 639 … (2002); *Good News Club v. Milford Central School*, 533 U.S. 98 … (2001). Others have applied it only after concluding that the challenged practice was invalid under a different Establishment Clause test.

545 U.S. at 686.[4] Abortion jurisprudence suffers from the same difficulties.

The Court in *Hellerstedt*, perhaps recognizing the lack of meaningful framework for reaching a *Casey* undue burden conclusion, adopted a new, "burden and benefits" balancing approach, extrapolated from the *Casey* plurality's analysis of spousal consent and parental notification laws. *Hellerstedt,* 136 S. Ct. at 2309. But this approach does little to provide objective guidance. As occurred in the Establishment Clause context, *Hellerstedt* does little to help *Casey* and abortion law jurisprudence, as is demonstrated here.

*Hellerstedt*'s effort to clarify the undue burden standard failed to provide meaningful jurisprudential clarity in what should have been the easiest circumstance to apply it: another admitting privileges case. *See Hellerstedt,* 136 S. Ct. at 2326 (Thomas, J., dissenting) ("Today's opinion does resemble *Casey* in one respect: After disregarding significant aspects of the Court's prior jurisprudence, the majority applies the undue-burden standard in a way that will surely mystify lower courts for years to come.").

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[4] Indeed, the Court (or pluralities within it) after *Lemon* proposed different Establishment Clause analyses. In *Allegheny v. ALCU*, 492 U.S. 573 (1989), Justice O'Connor, casting the deciding vote, adopted the "reasonable observer" test, finding government actions unconstitutional where a reasonable observer would believe that they endorse or disapprove religion. *Id.* at 631. And in *Lee v. Weisman*, 505 U.S. 577 (1992), the Court used the "coercion" test, which reviews as a preliminary question whether the government is coercing the support or participation in religion or its exercise. *Id.* at 587, 592.

This case was remanded by the Court in 2016 for consideration in light of *Hellerstedt*. *See June Med. Servs., L.L.C. v. Gee*, 905 F.3d 787, 791 (5th Cir. 2018). The district court reviewed the facts and "balanced" them to conclude that Act 620—an admitting privileges case just like *Hellerstedt*—to be invalid. *June Med. Servs. LLC v. Kliebert*, 250 F. Supp. 3d 27, 35 (M.D. La. 2017). On appeal, the Fifth Circuit identified facts it held were "remarkably different" from those pertinent in *Hellerstedt* that tipped the balance, and so upheld the Act. *Gee,* 905 F.3d at 791. And now it is again before the Court.

Lower court decisions continue to function as sui generis and fact-specific, with this Court perpetually faced with resolving the inevitable court conflicts that result.

**B. Current Abortion Jurisprudence Harms the Courts and Legislative Efforts.**

This type of judicial review is problematic, for at least two reasons.

As the *Casey* majority acknowledged, public confidence in the judiciary is—and ought to be—a legitimate consideration of the Court. *Casey*, 505 U.S. at 867 (discussing how the unnecessary overruling of precedent erodes confidence in the judiciary); *see also Williams-Yulee v. Florida Bar,* 575 U.S. 433, 447 (2015) ("The concept of public confidence in judicial integrity does not easily reduce to precise definition, nor does it lend itself to proof by documentary record. But no one denies that it is genuine and compelling."). With courts left with subjective analysis and apparent (if not actual) personal preferences to decide what is a culturally controversial issue, the impartiality of the Court is called into question:

> [S]o many of our citizens (good people, not lawless ones, on both sides of this abortion issue, and on various sides of other issues as well) think that [the] Justices should properly take into account their views, as though [they] were engaged not in ascertaining an objective law but in determining some kind of social consensus.

*Casey,* 505 U.S. at 999 (Scalia, J., concurring in the judgment in part and dissenting in part). *See also Casey,* 505 U.S at 966 (Rehnquist, C.J., concurring and dissenting in part) ("Under the guise of the Constitution, this Court will still impart its own preferences on the States in the form of a complex abortion code."); *id.* at 991-92 ("We do not know whether the same conclusions could have been reached on a different record, or in what respects the record would have had to differ before an opposite conclusion would have been appropriate. The inherently standardless nature of this inquiry invites the district judge to give effect to his personal preferences about abortion. By finding and relying upon the right facts, he can invalidate, it would seem, almost any abortion restriction that strikes him as 'undue'—subject, of course, to the possibility of being reversed by a court of appeals or Supreme Court that is as unconstrained in reviewing his decision as he was in making it.").

Moreover, legislators—and those like amici, who seek to educate the public and influence public policy—are left with little insight on how to lawfully pursue the state's twin substantial interests in preserving the health of women and the life of unborn children within their borders without exposing the state to costly litigation.

This problem should rectified. And it can be—through a more faithful reading of *Casey* and the adoption of a more objective framework already employed by this Court within which courts—and legislatures—can work.

## II. Abortion Jurisprudence Should Incorporate First Amendment Jurisprudence to Establish an Objective Standard of Review.

Conceptually, *Casey*'s "undue burden" concerns are not foreign to constitutional analysis. In other constitutional contexts, burden concerns are also addressed, through more objective criteria the Court has established.

First Amendment jurisprudence provides the clearest and most comprehensive guidance.

### A. Free Speech Jurisprudence Addresses Burdens.

In the free speech context, the Court has recognized that the enumerated right to free speech is not absolute, *see, e.g., U.S. v. Stevens,* 559 U.S. 460, 468 (2010) ("the First Amendment has permitted restrictions upon the content of speech in a few limited areas, and has never included a freedom to disregard these traditional limitations.") (internal citations omitted), and has established a robust framework for ensuring that the right is not infringed without satisfying the appropriate level of judicial scrutiny.

In assessing the appropriate level of scrutiny, the Court is mindful of the degree of burden a law imposes on speech. *See Davis v. FEC*, 554 U.S. 724, 740 (2008) ("Because § 319(a) imposes a substantial burden on the exercise of the First Amendment right to use personal funds for campaign

speech, that provision cannot stand unless it is justified by a compelling state interest") (internal quotation omitted); *Doe v. Reed*, 561 U.S. 186, 196 (2010) ("To withstand this scrutiny, "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights.") (quoting *Davis*, 554 U.S. at 744 (citing *Buckley*, 424 U.S. at 68, 71 (1978)). And an important component of that burden analysis is whether a law is content-neutral or content-based.

Content-based restrictions on speech, which seek to regulate the content of speech itself, are subject to strict scrutiny: they must be narrowly tailored to serve a compelling interest. *See, e.g., Reed v. Town of Gilbert,* 135 S. Ct. 2218, 2227 (2015). But content-neutral regulations are analyzed within a somewhat different framework.

To assess content-neutrality (or whether a law is a time, place, or manner restriction), the Court first inquires:

> whether the government has adopted a regulation of speech because of disagreement with the message it conveys. … A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. … Government regulation of expressive activity is content neutral so long as it is *justified* without reference to the content of the regulated speech.

*Ward v. Rock Against Racism*, 491 U.S. 781, 791-92 (1989) (internal citations omitted) (emphasis in original).

Next, content-neutral laws:

> must be narrowly tailored to serve the government's legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so. Rather, the requirement of narrow tailoring is satisfied so long as the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.

*Id.* at 798-99 (internal citations omitted). "The validity of [content-neutral] regulations does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests or the degree to which those interests should be promoted." *Ward,* 491 U.S. at 800 (citations omitted).

Last, a content-neutral law must leave open ample alternative channels of communication, a requirement that is "easily met" where the law does not ban expression itself. *Ward,* 491 U.S. at 802.

The Court's distinction between content-neutral laws, which are not intended to chill speech (though may incidentally affect speech), and content-based laws, which target or ban speech, provides a concrete, objective framework within which to assess and conclude that an "undue burden" on speech has or has not occurred.

### B. Free Exercise Jurisprudence Addresses Burdens.

Free exercise jurisprudence adheres to an objective framework similar to that followed in free speech jurisprudence to resolve challenges to laws that burden or pose obstacles to the enumerated right to freely exercise religion.

A law affecting the exercise of religion that is neutral and generally applicable is constitutional: "if prohibiting the exercise of religion (or burdening the activity of printing) is not the object of the [law] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." *Emp't Div. v. Smith*, 494 U.S. 872, 878 (1990). Such a law is not subject to strict scrutiny "even if the law has the incidental effect of burdening a particular religious practice." *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 533 (1993). However, '[a] law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Id.*

The object of a law is determined first by its text: "the minimum requirement of neutrality is that a law not discriminate on its face." *Id.* But other relevant criteria include:

> "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body."

*Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018) (quoting *Church of Lukumi Babalu Aye,* 508 U.S. at 540).

Here, too, the Court provides a concrete, objective framework for determining whether a law unduly burdens the free exercise of religion.

### C. The First Amendment's Analytical Framework Is Consistent With *Casey*.

Abortion jurisprudence should adopt the free speech and free exercise analysis described above to

provide a concrete roadmap for when to conclude a law unduly burdens abortion rights.[5] And it can do so within the parameters laid out in *Casey*.

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[5] While some Justices on the Court have raised concerns about the merit of levels of scrutiny as a judicial construct, *see, e.g., Hellerstedt,* 136 S. Ct. at 2326-2327 (Thomas, J., dissenting), such review provides notice and relative predictability to legislatures, parties, and courts as to what information is relevant for a meritorious challenge, and a clearer framework for judicial review. *Casey,* 505 U.S at 965 (Rehnquist, C.J., concurring in part and dissenting in part). It also affords better protection of constitutional rights than do subjective tests. *See Citizens United v. FEC,* 558 U.S. 310, 326-27 (2010) ("We must decline to draw, and then redraw, constitutional lines …. this undertaking would require substantial litigation over an extended time, all to interpret a law that beyond doubt discloses serious First Amendment flaws. The interpretive process itself would create an inevitable, pervasive, and serious risk of chilling protected speech pending the drawing of fine distinctions that, in the end, would themselves be questionable."); *id.* at 329 ("We decline to adopt an interpretation that requires intricate case-by-case determinations to verify whether political speech is banned …"); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 469 (2007) (Roberts, C.J.) ("To safeguard this liberty, the proper standard … must be objective, focusing on the substance of the communication rather than amorphous considerations of intent and effect. ... It must entail minimal if any discovery, to allow parties to resolve disputes quickly without chilling speech through the threat of burdensome litigation. … And it must eschew the open-ended rough-and-tumble of factors, which invites complex argument in a trial court and a virtually inevitable appeal.") (citations omitted).

Just as free speech and free exercise are not absolute freedoms, so too a woman's right to terminate her pregnancy is not absolute: "it is a constitutional liberty of the woman to have *some* freedom to terminate her pregnancy." *Casey*, 505 U.S. at 869 (emphasis added). That "the woman's liberty is not so unlimited, … that from the outset the State cannot show its concern for the life of the unborn" justifies a distinction between a content neutral law, which allows States to regulate based on concern for the health and safety of the woman, and a law restricting the right to terminate a pregnancy outright, for which the State only "at a later point in fetal development [has an] interest in life [of] sufficient force so that the right of the woman to terminate the pregnancy can be restricted." *Casey,* 505 U.S. at 869.

Likewise, *Casey* contemplated neutrality considerations like those raised in free speech and free exercise contexts, observing that "[a]ll abortion regulations interfere to some degree with a woman's ability to decide whether to terminate her pregnancy," *Casey*, 505 U.S. at 875, and that:

> The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it.

*Casey*, 505 U.S. at 874.

And just as in speech contexts the Court has recognized cognizable State interests, *see, e.g., Buckley,* 424 U.S. at 66-68 (recognizing anticorruption, informational, and enforcement interests), so to the Court has recognized cognizable State interests in the abortion context: "the State

has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child." *Casey*, 505 U.S. at 846; *id.* at 876 ("The very notion that the State has a substantial interest in potential life leads to the conclusion that not all regulations must be deemed unwarranted.").

So, for example, a 24-hour waiting period like that considered in *Casey* would still be constitutional. Under First Amendment principles, such waiting periods are a content neutral law. They do not prohibit or ban an abortion from occurring, but instead are a time-place-manner restriction. They serve a substantial interest in protecting the health, including the mental health, of a woman by ensuring her decision is more informed and deliberate. Emergency exceptions like those in *Casey* ensure the requirement isn't broader than necessary. And so such waiting periods are not an unconstitutional, undue burden on the right to an abortion. *Compare with Casey,* 505 U.S. at 887 ("we are not convinced that the 24-hour waiting period constitutes an undue burden").

Likewise, an informed consent requirement would be constitutional because it does not prohibit an abortion but rather, ensures that a woman is provided with truthful information about the procedure she is about to undergo. *Casey,* 505 U.S. at 883. This is simply a time-place-manner restriction that serves a profound state interest in the health and safety of the woman. *Casey,* 505 U.S. at 882 ("In attempting to ensure that a woman apprehend the full consequences of her decision, the State furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later,

with devastating psychological consequences, that her decision was not fully informed."). And it is generally applicable. *Id.* at 884 ("a requirement that a doctor give a woman certain information as part of obtaining her consent to an abortion is, for constitutional purposes, no different from a requirement that a doctor give certain specific information about any medical procedure."). So informed consent laws, too, are not an unconstitutional, undue burden. *Compare with id.* ("This requirement cannot be considered a substantial obstacle to obtaining an abortion, and, it follows, there is no undue burden.").

Incorporating a First Amendment framework would benefit the courts and legislature. Legislatures would know how to lawfully advance their substantial interests in the health of women and the life of unborn children, and courts would be more readily able to evaluate such legislation when challenged without risk of personal preference or subjective interpretation of the facts coloring their analysis. The result would leave to this Court the resolution of jurisprudential, rather than fact-intensive, disputes as to how the framework applies, as occurs in First Amendment contexts. *See, e.g., Reed,* 135 S. Ct. 2218 (reversing the Ninth Circuit to apply content-based analysis rather than content-neutral analysis to a speech regulation).

## III. Employing First Amendment Principles, Louisiana's Admitting Privileges Requirement Is Constitutional.

Louisiana Revised Statute Section 40:1061.10 ("Act 620") states that:

> (2) On the date the abortion is performed or induced, a physician performing or inducing an abortion shall: (a) Have active admitting privi-

> leges at a hospital that is located not further than thirty miles from the location at which the abortion is performed or induced and that provides obstetrical or gynecological health care services. For purposes of this Section, "active admitting privileges" means that the physician is a member in good standing of the medical staff of a hospital that is currently licensed by the department, with the ability to admit a patient and to provide diagnostic and surgical services to such patient consistent with the requirements of Paragraph (A)(1) of this Subsection.

Act 620 "serves purposes unrelated to" the right to an abortion—on its face, it contemplates that an abortion will occur: "[o]n the date the abortion is performed or induced, …" *Id.* It simply establishes a medical requirement for those abortion procedures.

Such medical requirements exist in Louisiana in other medical contexts as well. *See* La. Admin. Code § 48:4541(A), (B) (2019) (requiring doctors who perform surgeries at Louisiana ambulatory surgical center have admitting privileges at a local hospital); *id.* at § 46:7309(A)(2) (requiring doctors who perform simple office-based surgeries either (1) maintain staff privileges to perform the same procedure at a hospital in "reasonable proximity" (in most cases within 30 miles), or (2) have completed a residency in the field covering the procedure). Act 620 is thus an "abortion-neutral," generally applicable law. That some abortion providers may be prevented from performing abortions is simply an incidental effect of Act 620. *See Church of Lukumi Babalu Aye*, 508 U.S. at 533.

As the record shows, Act 620 was adopted to promote both substantial interests identified in *Casey*: maternal health, *Gee*, 905 F.3d at 791, and "an underlying interest in protecting unborn life," *id.* at 792. It serves Louisiana's substantial state interest in protecting both the health of the woman undergoing an abortion by ensuring the abortion occurs in "'a safe environment and in a safe manner that offers women the optimal protection and care of their bodies.'" *Id.* at 791 (quoting testimony of Rep. Katrina Jackson). And it generally serves Louisiana's substantial state interest in protecting unborn life by "'regulating abortion to the extent permitted'" because the State's "longstanding policy is that 'the unborn person is a human being from the time of conception on and is, therefore, a legal person … entitled to the right to life.'" *Id.* at 792 (quoting La. Rev. Stat. § 40:1061.8).

Act 620 is not broader than necessary to serve these substantial interests. While it prohibits abortions conducted by abortion providers without admitting privileges, this scope is necessary to protect against the evil the Act combats: risks to the health of the woman arising from complications needing emergent attention. *See Frisby* v. *Schultz*, 487 U.S., 474, 486 (1988) ("Complete prohibition was necessary because the substantial evil … was not merely a possible byproduct of the activity, but was created by the medium of expression itself") (internal citations omitted).

Last, because Act 620 does not ban the right to an abortion, alternative channels remain available. Women seeking abortions can secure them from abortion providers with admitting privileges. *See Ward,* 491 U.S. at 802 (the guideline "does not

attempt to ban any particular manner or type of expression at a given place or time. … Rather, the guideline continues to permit expressive activity … and has no effect on the quantity or content of that expression beyond regulation the extent of amplification.").

Analyzed under First Amendment principles, Louisiana's admitting privileges requirement is constitutional.

## CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the court below.

Respectfully submitted,

Renee K. Carlson
TRUE NORTH LEGAL
2855 Anthony Ln South
Minneapolis, MN 55418
Ph.: 612/789-8811
Email: rcarlson@
truenorthlegalmn.org

Anita Y. Milanovich
*Counsel of Record*
MILANOVICH LAW, PLLC
100 E. Broadway Street
The Berkeley Room
Butte, Montana 59701
Ph.: 406/589-6856
Email: aymilanovich@
milanovichlaw.com