Nos. 18-1323 and 18-1460

IN THE

Supreme Court of the United States

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 AND HOSPITALS,
Respondent.

DR. REBEKAH GEE, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE LOUISIANA DEPARTMENT OF HEALTH AND HOSPITALS,
Cross-Petitioner,

v.

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

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF FORMER FEDERAL JUDGES AND DEPARTMENT OF JUSTICE OFFICIALS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Robert A. Long, Jr.
Counsel of Record
Thomas Brugato
Nandini Singh
Christian Mott
Virginia Williamson
COVINGTON & BURLING LLP
850 Tenth Street, NW
Washington, DC 20001
rlong@cov.com
(202) 662-6000
Counsel for Amici Curiae

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INTEREST OF AMICI CURIAE

Amici curiae served as federal judges or senior officials in the United States Department of Justice.[1] As former judges and Justice Department officials, the amici curiae have a strong interest in upholding the rule of law. The amici curiae do not submit this brief to advocate in support of the correctness of this Court's cases recognizing a constitutional right to abortion and defining the scope of that right. Rather, they submit this brief to emphasize the importance of *stare decisis* to the rule of law. *Stare decisis* requires lower courts to adhere to decisions of this Court without exception, and requires this Court to adhere to its own decisions in all but the most exceptional circumstances. These principles are fundamental aspects of our constitutional system, and are essential to maintaining the rule of law.

SUMMARY OF ARGUMENT

1. Lower courts are bound by decisions of this Court. This requirement — so-called "vertical *stare decisis*" — is a fundamental component of the rule of law. Absent such a requirement, this Court could not effectively maintain uniformity in the law and consistency of judicial decision.

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[1] The amici are listed in the Appendix to this brief. *See* App., *infra*, 1a. Pursuant to Rule 37.6, the amici affirm that no counsel for a party authored this brief in whole or in part and that no person other than amici or their counsel made any monetary contributions intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), the parties have given their blanket consent to the filing of timely *amicus* briefs.

The court of appeals failed to adhere to this Court's recent decision in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). The Louisiana statute at issue in this case is materially identical to the Texas statute held unconstitutional in *Whole Woman's Health*, and the district court's findings of fact closely track those in *Whole Woman's Health*. The court of appeals nevertheless upheld the constitutionality of the Louisiana statute. In reaching that result, the court of appeals "repeat[ed] [the] mistakes" for which it was "admonished" by this Court in *Whole Woman's Health*. Pet. App. 95a (Higginbotham, J., dissenting). In addition, the court of appeals failed to respect the district court's primary role in making findings of fact and weighing the evidence.

2. The principle that this Court adheres to its own precedents — so-called "horizontal *stare decisis*" — is also essential to the rule of law. In this case, Respondent cannot carry the "heavy burden" of showing that "changes in society or the law dictate that the values served by *stare decisis* yield in favor of a greater objective." *Vasquez v. Hillery,* 474 U.S. 254, 266 (1986). In the short time that has elapsed since this Court decided *Whole Woman's Health,* the material facts have not changed. Nor has this Court's decision proved unworkable. Moreover, *Whole Woman's Health* is part of a line of precedent stretching back to *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), and *Roe v. Wade*, 410 U.S. 113 (1973). That line of precedent, in turn, forms part of an even larger body of precedent recognizing a private realm of family life which the state cannot enter absent special justification. A decision by this Court to

reconsider *Whole Woman's Health* would destabilize this entire body of law.

3. Respondent's request that the Court reconsider its third-party standing precedents raises additional concerns relating to the rule of law. For more than four decades, this Court and the lower courts consistently have held that physicians have third-party standing to assert the reproductive rights of their patients. These decisions form part of a larger body of case law, dating back more than a century, concerning third-party standing to assert violations of constitutional rights. Respondent's failure to raise any third-party standing issue in the lower courts provides an additional reason not to reconsider these third-party standing precedents in this case.

ARGUMENT

I. The Court of Appeals' Decision in This Case Undermines the Rule of Law.

A. Vertical *Stare Decisis* Is Fundamental to the Rule of Law.

The principle that lower courts must adhere to the decisions of this Court — so-called "vertical" *stare decisis* — is a fundamental aspect of our legal system that is essential to establishing and maintaining the rule of law. Justice Joseph Story provided a classic statement of the principle and the reasons for it:

> Ours is emphatically a government of laws, and not of men; and judicial decisions of the highest tribunal, by the known course of the

> common law, are considered, as establishing the true construction of the laws, which are brought into controversy before it. The case is not alone considered as decided and settled; but the principles of the decision are held, as precedents and authority, to bind future cases of the same nature. This is the constant practice under our whole system of jurisprudence. Our ancestors brought it with them, when they first emigrated to this country; and it is, and always has been considered, as the great security of our rights, our liberties, and our property. It is on this account, that our law is justly deemed certain, and founded in permanent principles, and not dependent upon the caprice, or will of particular judges.

1 Joseph Story, *Commentaries on the Constitution of the United States* § 377 (1st ed. 1833).

As Justice Story noted, this principle predates the Constitution. William Blackstone warned that failure to adhere to precedent would allow the "scale of justice" to "waver with every new judge's opinion," and risk subordinating legal principles to each individual judge's "private sentiments." 1 William Blackstone, *Commentaries* *68-69. Similarly, Alexander Hamilton observed that "all nations have found it necessary to establish one court paramount to the rest . . . to settle and declare in the last resort, a uniform rule of civil justice" and thereby "avoid the confusion . . . from the contradictory decisions of a number of independent judicatories." *The Federalist* No. 22.

This Court has long recognized that requiring lower courts to adhere to Supreme Court decisions is essential to achieving uniformity and predictability in the law. In *Martin v. Hunter's Lessee*, the Court emphasized "the importance, and even necessity of *uniformity* of decisions throughout the whole United States, upon all subjects within the purview of the constitution." 14 U.S. 304, 347-48 (1816). The Court observed that "[t]he constitution of the United States was designed for the common and equal benefit of all the people of the United States" and "[t]he judicial power was granted for the same benign and salutary purposes." *Id.* at 348. In *Cohens v. Virginia*, the Court observed that "[t]hirteen independent Courts . . . of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed." 19 U.S. 264, 415-16 (1821) (quoting *The Federalist* No. 80 (Alexander Hamilton)). As the Court later noted, "it is manifest that this ultimate appellate power in a tribunal created by the Constitution itself was deemed essential to secure the independence and supremacy of the General Government in the sphere of action assigned to it; to make the Constitution and laws of the United States uniform, and the same in every State; and to guard against evils which would inevitably arise from conflicting opinions between the courts of a State and of the United States, if there was no common arbiter authorized to decide between them." *Ableman v. Booth*, 62 U.S. 506, 518-19 (1858).

Although it is now firmly established that this Court's decisions are binding on the lower courts and

must be followed, that has not always been so. In the early Republic, the Court operated in the shadow of potential disregard of its orders. Chief Justice Marshall's opinions in formative cases such as *Marbury v. Madison*, 5 U.S. 137 (1803), and *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831), can be understood as having been written in a way that allowed the Court to assert its constitutional role without affording the President an opportunity to defy the Court's orders. *See, e.g.*, Joseph Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 Stan. L. Rev. 500, 514 (1969).

Over many decades, the Court repeatedly has reaffirmed that its decisions are authoritative and must be followed. For example, after this Court decided *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), the Arkansas legislature adopted state constitutional amendments and statutes "designed to perpetuate . . . the system of racial segregation," and based on "the premise that they [were] not bound by [the] holding in *Brown*." *Cooper v. Aaron*, 358 U.S. 1, 4, 8-12 (1958). This Court responded by reaffirming that "the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land." *Id.* at 18. To emphasize that fundamental principle, all nine members of the Court individually signed the Court's opinion in *Cooper*. *See id.* at 4.

This Court's unremitting efforts to ensure compliance with its decisions have succeeded. This can be seen simply by citing some of the decisions of this

Court that have been followed despite strong objections from the Executive Branch, including *Boumediene v. Bush*, 553 U.S. 723 (2008); *Clinton v. Jones*, 520 U.S. 681 (1997); *United States v. Nixon*, 418 U.S. 683 (1974); and *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

It is particularly important that lower federal courts consistently adhere to this Court's decisions. If "inferior" federal courts, U.S. Const. art. III, § 1, were free to disregard those decisions, this Court's function of promoting uniformity and consistency of judicial decision would be fatally compromised. The importance of that function is reflected in this Court's certiorari criteria. *See* Sup. Ct. R. 10(a)-(b). The need for uniformity also animated Congress's decision to expand the Court's certiorari jurisdiction in the 1925 "Judges' Bill," which was premised, in part, on the understanding that this Court should devote its energy and attention to "matters of large public concern," such as "preserv[ing] uniformity of decision among the intermediate courts of appeal." *Dick v. N.Y. Life Ins. Co.*, 359 U.S. 437, 452-53 (1959) (Frankfurter, J., dissenting) (quoting H.R. Rep. No. 1075, 68th Cong., 2d Sess. 2 (1925) and Statement of Chief Justice Taft, Hearings before the Committee on the Judiciary of the House of Representatives on H.R. Rep. No. 10479, 67th Cong., 2d Sess. 2 (1922)); *see also Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923) (Taft, C.J.) (certiorari jurisdiction over Circuit Courts of Appeals is designed to "secure uniformity of decision" and elevate "cases involving questions of importance which it is in the public interest to have decided by this court"). As this Court has said, "unless we wish anarchy to

prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be." *Hutto v. Davis*, 454 U.S. 370, 375 (1982) (per curiam).

Indeed, the principle that lower courts must follow this Court's decisions is so fundamental that lower courts are required to adhere to this Court's decisions even when they appear to have been implicitly overruled by subsequent decisions of this Court. *See Tenet v. Doe*, 544 U.S. 1, 10-11 (2005) ("[I]f the 'precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.'" (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989))); *State Oil v. Khan*, 522 U.S. 3, 20 (1997) ("The Court of Appeals was correct in applying [*stare decisis*] despite disagreement with [this Court's decision in] *Albrecht*, for it is this Court's prerogative alone to overrule one of its precedents."). *Cf. Spector Motor Serv. v. Walker*, 139 F.2d 809, 823 (2d Cir. 1943) (L. Hand, dissenting) ("Nor is it desirable for a lower court to embrace the exhilarating opportunity of anticipating a doctrine which may be in the womb of time, but whose birth is distant . . . .").

B. The Court of Appeals Did Not Adhere to This Court's Decision In *Whole Woman's Health*.

The court of appeals' decision in this case fails to adhere to this Court's recent decision in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). In addition, the court of appeals failed to respect the primary role of the district court in making findings of fact and weighing evidence.

In *Whole Woman's Health*, this Court considered a provision of Texas House Bill 2 ("H.B. 2"), that required a physician performing or inducing an abortion to have active admitting privileges at a hospital located not further than 30 miles from the location at which the abortion is performed or induced. The Court held that this requirement imposed an undue burden on access to abortion, and thus violated the Constitution. 136 S. Ct. at 2300.

This Court first determined that the district court had applied the correct legal standard by considering the evidence in the record, including expert testimony, and then weighing the asserted benefits of the state law against the burdens it imposed. *Id.* at 2310. The Court further held that the record contained adequate factual and legal support for the district court's conclusion that H.B. 2 imposed an undue burden on a woman's right to choose. *Id.* at 2311.

Relying on the district court's factual findings, this Court concluded that there was a "virtual absence of any health benefit" to women from the Texas admitting privileges law. *Id.* at 2313. The Court observed

that record evidence showed extremely low rates of serious complications before H.B. 2 was enacted, indicating there was "no significant health-related problem for the new law to cure." *Id.* at 2298. In addition, the State's evidence did not show that H.B. 2 advanced the state's interest in protecting women's health when compared to the pre-H.B. 2 law. *Id.* at 2311-12.

Again relying on the district court's factual findings, this Court further concluded that H.B. 2 placed a substantial obstacle in the path of women seeking an abortion. In the Court's view, the record contained sufficient evidence to support the district court's findings that H.B. 2 caused a dramatic drop in the number of clinics in Texas, led to fewer doctors performing abortions, longer waiting times, increased crowding, and increased driving distances. *Id.* at 2312-13.

This Court expressly rejected Texas's argument that H.B. 2 did not impose a substantial obstacle because the women affected by the law were not a "large fraction" of Texas woman of reproductive age. *Id.* at 2320. The Court explained that in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), the "large fraction" language referred to "'a large fraction of cases in which [the provision at issue] is *relevant*,' a class narrower than 'all women,' 'pregnant women,' or even 'the class of women seeking abortions identified by the State.'" 136 S. Ct. at 2320 (emphasis added by the Court in *Whole Woman's Health*) (quoting *Casey*, 505 U.S. at 894-95). The Court concluded: "Here, as in *Casey*, the relevant denominator is 'those [women] for whom [the

provision] is an actual rather than an irrelevant restriction.'" 136 S. Ct. at 2320 (quoting *Casey*, 505 U.S. at 895).

As the district court and the dissenting judges on the court of appeals recognized, this case parallels *Whole Woman's Health* in every relevant respect. *First*, Louisiana Act 620, La. Rev. Stat. § 40:1061.10, is "equivalent in structure, purpose, and effect to the Texas law." Pet. App. 130a. The text of Louisiana Act 620 is materially identical to the relevant text of Texas's H.B. 2: Both statutes require a physician performing an abortion to have "active admitting privileges" at a hospital within 30 miles of the facility where an abortion is performed or induced. Pet. App. 112a. Indeed, Louisiana Act 620 was modeled on H.B.2. Pet. App. 194a-196a.

Second, as in *Whole Woman's Health*, the district court found that the state law "provides no benefits to women and is an inapt remedy for a problem that does not exist." Pet. App. 215a. In Louisiana, as in Texas, legal abortions "are very safe procedures with very few complications." Pet. App. 203a. The court found that requiring abortion providers to have active admitting privileges at a nearby hospital "will not improve the safety of abortion in Louisiana." Pet. App. 215a. As in *Whole Woman's Health*, there is no evidence that the admitting privileges requirement "would have helped even one woman obtain better treatment." Pet. App. 215a.

The district court also found that admitting privileges "do not serve 'any relevant credentialing

function'" in Louisiana. Pet. App. 272a (quoting *Whole Woman's Health*, 136 S. Ct. at 2313). Louisiana hospitals regularly deny or decline to consider applications for admitting privileges for reasons other than a provider's competence at performing outpatient procedures. *See* Pet. App. 172a. Reasons for denials include the physician's expected usage of the hospital, the number of expected admissions, and the hospital's business plan. *See id.* Moreover, Louisiana hospitals — unlike Texas hospitals — can and do deny admitting privileges based on a physician's status as an abortion provider. *See* Pet. App. 174a.

The district court also determined, based on detailed factual findings, that Louisiana Act 620 places a substantial obstacle in the path of a woman seeking an abortion. The district court found that the law would cause two of the state's three abortion clinics to close and leave only a single physician performing abortions in Louisiana. *See* Pet. App. 273a. The court found that "[a] single remaining physician . . . cannot possibly meet the level of services needed" by the approximately 10,000 women who seek abortions in Louisiana each year. Pet. App. 255a. The district court further found that the reduction in the number of clinics and physicians would lead to "longer waiting times for appointments, increased crowding and increased associated health risks," in addition to a need to "travel much longer distances." Pet. App. 258a, 274a. In addition, the court found that the Louisiana law, if implemented, would leave "no physician in Louisiana providing abortions between 17 weeks and 21 weeks, six days gestation," which is the legal limit on abortions in Louisiana. Pet. App. 260a.

The court of appeals purported to follow this Court's decision in *Whole Woman's Health*, but it failed to do so in several ways. *First*, the court of appeals held that the Louisiana Act 620 does not place an undue burden on a woman's abortion rights because the statute provides some "minimal" benefits and does not place a substantial obstacle in the path of a woman's choice. Pet. App. 39a, 59a. But this Court rejected that approach in *Whole Woman's Health*. *See* 136 S. Ct. at 2300 (concluding that the Texas admitting privileges law did not "confer[ ] medical benefits sufficient to justify the burdens upon access that [it] imposes"). As the dissenting court of appeals judges explained, the panel's decision "repeats th[e] mistake" of "setting forth a test that fails to truly balance an abortion restriction's benefits against its burdens." Pet. App. 119a (Dennis, J., dissenting from the denial of rehearing en banc); *see also id.* at 95a (Higginbotham, J., dissenting) (panel majority's decision "repeats [the] mistake[]" for which this Court "admonished" the court of appeals in *Whole Woman's Health*).

Second, the court of appeals applied a heightened causation standard that attributed most of the harm to women to physicians' lack of diligence in seeking admitting privileges. As the dissenting judges explained, the court of appeals' approach is inconsistent with this Court's decision in *Whole Woman's Health*, which concluded that causation was satisfied by evidence that Texas clinics where physicians lacked admitting privileges closed immediately before and after the Texas law went into effect. *See* 136 S. Ct. at 2313; Pet. App. 124a (court of appeals applied a "more

demanding, individualized standard of proof" than this Court applied in *Whole Woman's Health*).

Third, the court of appeals disregarded this Court's conclusion in *Whole Woman's Health* that its reference to a "large fraction" of women focuses on "those [women] for whom [the provision] is an actual rather than an irrelevant restriction." 136 S. Ct. at 2320 (quoting *Casey*, 505 U.S. at 895). As the dissenting court of appeals judges explained, "[f]or those actually restricted" by Louisiana Act 620, "there is no question that the obstacle will be substantial." Pet. App. 98a (noting that over 5,000 women seeking abortions will be unable to obtain one within the state, and no woman seeking to exercise her right to seek an abortion after 16 weeks will be able to do so in Louisiana).[2]

Fourth, the court of appeals further departed from this Court's decision in *Whole Woman's Health* by failing to respect the district court's role in finding facts and weighing the evidence. Based on the evidence presented at a six-day bench trial, the district court found that, of the six doctors performing abortions when Louisiana Act 620 was enacted, only one had admitting privileges that met the Act's new requirements. *See* Pet. App. 249a. The district court found that the remaining five physicians attempted in

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[2] As Judge Higginson noted, even under the court of appeals' own fact-finding, Louisiana Act 620 "reduces Louisiana's capacity to provide abortions by 21%," which is "enough to abrogate the Act under Supreme Court law, both longstanding and recent." Pet. App. 131a (Higginson, J., dissenting from the denial of rehearing en banc).

good faith to obtain admitting privileges at a hospital within 30 miles of the clinic where they perform abortions; all five made formal applications to at least one hospital, and three of the five filed multiple applications. *See id.*

Respondent did not challenge any of these factual findings on appeal. *See* Pet. App. 68a-69a. Yet the court of appeals nevertheless re-examined the evidence, made its own findings of fact, and rejected several of the district court's findings as clearly erroneous. In so doing, the court of appeals disregarded the basic division of labor between trial courts and appellate courts and "fail[ed] to faithfully apply the well-established 'clear error' standard of review to the district court's factual findings." Pet. App. 120a.

As this Court has explained, "[t]he trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise." *Anderson v. Bessemer City*, 470 U.S. 564, 574-75 (1985); *see also Salve Regina Coll. v. Russell*, 499 U.S. 225, 231-33 (1991); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 122-23 & n.18 (1969). Consequently, "[i]f the district court's account of the evidence is plausible in light of the record . . . the court of appeals may not reverse even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Anderson*, 470 U.S. at 573-74. This standard applies with particular force to determinations concerning the credibility of witnesses. *See id.* at 575 (a trial judge's finding, internally consistent and "based on . . . the testimony of one of two or more witnesses, each of

whom has told a coherent and facially plausible story . . . not contradicted by extrinsic evidence[,]" "can virtually never be clear error."); *see also Teva Pharm. USA, Inc. v. Sandoz, Inc.*, 135 S. Ct. 831, 836-37 (2015) (applying *Anderson* in case that turned on conflicting expert testimony).

A court of appeals' failure to respect the fact-finding role of the district court is grounds for reversal. *See Ryburn v. Huff*, 565 U.S. 469, 475-77 (2012) (per curiam) (reversing court of appeals decision that "changed th[e] findings [of the District Court] in several key respects" and then analyzed the events in way that was "entirely unrealistic"); *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 856 (1982) (reversing court of appeals decision that "reject[ed] the District Court's findings simply because it would have given more weight to evidence of mislabeling than did the trial court"); *Pullman-Standard v. Swint*, 456 U.S. 273, 293 (1982) (reversing because the court of appeals found its own facts). Here, the court of appeals re-examined evidence, without regard for the district court's credibility findings and despite the fact that the district court's findings were supported by record evidence.

In short, the court of appeals failed to follow this Court's decision in *Whole Woman's Health*, and also infringed on the fact-finding role of the district court. If this Court were to affirm the court of appeals' decision, it would convey a message that it is acceptable for lower courts to engage in such behavior in order to reach a preferred result. That outcome would undermine respect for the courts and the rule of law.

II. Adherence to This Court's Recent Decision in *Whole Woman's Health* Will Reinforce the Rule of Law.

The principle that this Court nearly always adheres to its own precedents — sometimes called "horizontal *stare decisis*" — is "a foundation stone of the rule of law." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 798 (2014). "[E]ven in constitutional cases," this principle "carries such persuasive force that" the Court has "always required a departure from precedent to be supported by some 'special justification.'" *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (quoting *United States v. Int'l Bus. Machs. Corp.*, 517 U.S. 843, 856 (1996)). That "special justification" must be "something more than 'an argument that the precedent was wrongly decided.'" *Kisor v. Wilkie*, 139 S.Ct. 2400, 2422 (2019) (citing *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014)). Consequently, "every successful proponent of overruling precedent has borne the heavy burden of persuading the Court that changes in society or in the law dictate that the values served by *stare decisis* yield in favor of a greater objective." *Vasquez v. Hillery*, 474 U.S. 254, 266 (1986).

Stare decisis carries added persuasive force when the precedent at issue was recently adopted and the material facts have not changed. *See, e.g., Arizona v. Rumsey*, 467 U.S. 203, 212 (1984) (declining to overrule a case "decided only three years ago"); *Welch v. Tex. Dep't of Highways and Public Transp.*, 483 U.S. 468, 478, 486 (1987); *Vasquez*, 474 U.S. at 261; *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 162

(1975). Overruling a recent precedent, when no relevant facts have changed and the decision has not proved to be unworkable, tends to undermine public confidence that "bedrock principles are founded in the law rather than in the proclivities of individuals," *Vasquez*, 474 U.S. at 265-66. Preserving that confidence "contributes to the integrity of our constitutional system of government, both in appearance and in fact." *Id.* Indeed, "[a] basic change in the law upon a ground no firmer than a change in [the Court's] membership invites the popular misconception that this institution is little different from the two political branches of the Government. No misconception could do more lasting injury to this Court and to the system of law which it is our abiding mission to serve." *Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 636 (1974) (Stewart, J., dissenting). *See also Florida Dept. of Health and Rehab. Servs. v. Florida Nursing Home Ass'n*, 450 U.S. 147, 153 (Stevens, J., concurring) (noting "the potential damage to the legal system that may be caused by frequent or sudden reversals of direction that may appear to have been occasioned by nothing more significant than a change in the identity of this Court's personnel").

Stare decisis also carries additional force when a precedent has been reaffirmed in a line of cases stretching over a long period of time. *See, e.g., Gamble v. United States*, 139 S. Ct. 1960, 1969 (2019) ("[T]he strength of the case for adhering to [constitutional] decisions grows in proportion to their 'antiquity.'"). Overruling longstanding precedent undermines the stability and predictability of the law, *see Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989), both

essential aspects of the rule of law, *see Welch*, 483 U.S. at 478-79. Maintaining stability and predictability assumes even greater importance when the precedent at issue defines the liberties of the individual and has given rise to significant reliance interests. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851, 856 (1992). *Stare decisis* commands yet more force when a precedent has become a fixture in the culture. *See Dickerson*, 530 U.S. at 443 (declining to overrule *Miranda v. Arizona,* in part because it "has become embedded in routine police practice to the point where the warnings have become part of our national culture" (citing *Mitchell v. United States*, 526 U.S. 314, 331–332 (1999))).

These considerations weigh strongly in favor of adhering to this Court's decision in *Whole Woman's Health*. That case was decided only three years ago, and its "underpinnings" have not been "eroded" in the short time that has elapsed since this Court's decision. *Cf. Hurst v. Florida*, 136 S. Ct. 616, 623 (2016); *Randall v. Sorrell*, 548 U.S. 230, 243-44 (2006). Nor has the decision proved unworkable. To the contrary, lower courts have encountered no particular difficulty in understanding or applying it.[3] The fact that five Justices of this Court agreed with the decision in *Whole Woman's Health*, and that respected lower court judges reached similar results even before this

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[3] *See, e.g., EMW Women's Surgical Ctr., P.S.C. v. Glisson*, 2018 WL 6444391, at *28 (W.D. Ky. Sept. 28, 2018) (court applied *Whole Woman's Health* and found admitting privileges requirement unconstitutional); *Burns v. Cline*, 387 P.3d 348, 354 (Okla. 2016) (same).

Court's decision,[4] demonstrates that its holding is not "egregiously incorrect." *See Florida Dept. of Health*, 450 U.S. at 153 (Stevens, J., concurring) (a prior case "cannot be characterized as unreasonable or egregiously incorrect" where its constitutional holding "had previously been endorsed by some of our finest Circuit Judges").

Moreover, although *Whole Woman's Health* is a recent decision, it is part of a long line of decisions by this Court applying *Casey's* undue burden standard, which was itself a refinement and reaffirmation of *Roe v. Wade*, 410 U.S. 113 (1973). These cases affect the individual liberty of millions of people both directly, by protecting women's right to choose whether to have a child and what medical treatments or procedures to undergo, and indirectly, as part of a corpus of case law that protects the most sensitive areas of personal and family life from government control.

Even more broadly, this Court's decisions concerning abortion rights, from *Roe* to *Casey* to *Whole Woman's Health,* have reinforced longstanding protections for individual autonomy that have ramified throughout the Court's due process case law. In a series of cases, the Court has elaborated on the holding, common to all, that the Constitution protects a "private realm of family life," which includes family structure, *Moore v. City of E. Cleveland, Ohio*, 431

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[4] *See Planned Parenthood of Wis., Inc. v. Schimel*, 806 F.3d 908, 916 (7th Cir. 2015) (holding that Wisconsin admitting privileges requirement violated *Casey*); *Planned Parenthood Se., Inc. v. Strange*, 172 F. Supp. 3d 1275, 1288-89 (M.D. Ala. 2016) (same for Alabama admitting privileges requirement).

U.S. 494, 499 (1977) (plurality opinion), marriage, *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597-98 (2015); *Turner v. Safley*, 482 U.S. 78 (1987); *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978); *Loving v. Virginia*, 388 U.S. 1, 12 (1967), sexual relations, *Lawrence v. Texas*, 539 U.S. 558, 564 (2003), child-bearing, *Eisenstadt v. Baird*, 405 U.S. 438, 453-54 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965), child-rearing, *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923), and whether to receive medical treatment, *Vacco v. Quill*, 521 U.S. 793, 807 (1997); *Cruzan v. Dir., Missouri Dep't of Health*, 497 U.S. 261, 278 (1990). These cases, in turn, trace their origins to even earlier cases, such as *Mugler v. Kansas*, 123 U.S. 623, 660-661 (1887) (recognizing a right to manufacture food and drink for individual use).

Taken together, these decisions define a realm of deeply personal conduct that may not be regulated by the state without heightened justification, and that the state may not burden irrationally or on the basis of animus. Put differently, the abortion cases, including *Whole Woman's Health*, are part of a larger body of this Court's decisions concerning individual autonomy and intimate relationships that has developed deep roots and multiple branches.[5]

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[5] In contrast, *Payne v. Tennessee*, 501 U.S. 808 (1991), overturned a recent precedent that had not developed from a similarly interlinked doctrinal tree.

In sum, a decision by this Court to reconsider *Whole Woman's Health* absent a change in the material facts would cast doubt on a long line of decisions concerning abortion and an even larger interconnected body of case law on individual personal liberty. Such a decision would have destabilizing effects that would tend to undermine the rule of law.

III. Reconsidering Third-Party Standing Doctrine in This Case Would Undermine the Rule of Law.

After this Court entered an order staying the decision of the court of appeals, Respondent filed a conditional cross-petition challenging — for the first time in this litigation — Petitioners' third-party standing to assert that Louisiana Act 620 violates the constitutional rights of their patients. *See* No. 18-1460 Br. in Opp. 4-6 (noting Respondent's failure to raise third-party standing in the lower courts). Petitioners and other amici curiae will address the merits of the third-party standing issues, and this brief will not duplicate those arguments. Instead, this brief addresses the implications of Respondent's third-party standing argument for the rule of law.

First, in numerous decisions spanning four decades, this Court repeatedly has held that physicians and medical clinics have third-party standing to assert the reproductive rights of their patients.[6] Lower

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[6] *See, e.g., Whole Woman's Health*, 136 S. Ct. at 2301; *Gonzales v. Carhart*, 550 U.S. 124, 133 (2007); *Ayotte v. Planned*

courts, in turn, have decided a "legion" of cases that "allow an abortion provider . . . to sue to enjoin as violations of federal law . . . state laws that restrict abortion." *Planned Parenthood of Wis. v. Schmiel*, 806 F.3d 908, 910 (7th Cir. 2015). Reconsidering this large and uniform body of precedent would have a destabilizing effect on the law.

Second, this Court's precedents concerning third-party standing in abortion cases form one branch of a larger body of precedent concerning third-party standing in constitutional cases. These precedents span more than a century and a wide range of constitutional rights.[7] If the Court were to reconsider its

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Parenthood of N. New England, 546 U.S. 320, 324 (2006); *Stenberg v. Carhart*, 530 U.S. 914, 922 (2000); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 845 (1992); *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 752 (1986), *overruled in part on other grounds by Casey*, 505 U.S. 833; *Planned Parenthood of Cent. Mo. V. Danforth*, 428 U.S. 52, 62 (1976); *Singleton v. Wulff*, 428 U.S. 106, 108 (1976); *Doe v. Bolton*, 410 U.S. 179, 188 (1973).

[7] *See, e.g., Campbell v. Louisiana*, 523 U.S. 392, 400 (1998) (holding that criminal defendants have third-party standing to challenge racial discrimination in the selection of grand jurors); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 628-29 (1991) (same for civil cases); *Powers v. Ohio*, 499 U.S. 400, 415 (1991) (same for petit jurors in criminal cases); *U.S. Dep't of Labor v. Triplett*, 494 U.S. 715, 720 (1990) (attorney has third-party standing to argue that attorney's fee scheme violated client's due process rights); *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624 n.3 (1989) (attorney has third-party standing to assert that a forfeiture statute violated client's Sixth Amendment rights); *Craig v. Boren*, 429 U.S. 190, 195 (1976) (beer vendor "entitled to assert those concomitant rights of third parties that would be 'diluted or adversely affected' should her constitutional challenge fail and the statutes remain in force.");

precedents concerning third-party standing in abortion cases, it would unsettle this large and interconnected body of law, with multiple branches and deep roots.

Respondent asserts that the lower courts have "ignor[ed] this Court's general doctrine on third-party standing in abortion cases" and "effectively creat[ed] an 'abortion exception' to that doctrine." No. 18-1460 Pet. 17. To the contrary, lower courts have applied general third-party standing principles drawn from this Court's cases, which look to: (1) whether the litigant has an injury-in-fact that is sufficient for Article III standing; (2) whether the litigant has a close relationship with the third-party that makes the litigant a motivated and effective advocate for the right; and (3) whether there is "some hindrance" to the third-

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Eisenstadt v. Baird, 405 U.S. 438, 445 (1972) ("an advocate of the rights of persons to obtain contraceptives" has third-party standing to assert the rights of "those desirous of doing so"); *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965) (physicians have third-party standing "to raise the constitutional rights of married people with whom they had a professional relationship," as otherwise "[t]he rights of husband and wife . . . are likely to be diluted or adversely affected"); *Nat'l Ass'n for Advancement of Colored People v. State of Ala. ex rel. Patterson*, 357 U.S. 449, 459 (1958) (NAACP has standing to assert the constitutional rights of its members not to have their names disclosed); *Pierce v. Society of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925) (church school and private military academy have third-party standing to challenge law compelling families to send their children to public schools); *Truax v. Raich*, 239 U.S. 33 (1915) (foreign employee of an American business has third-party standing to challenge a state law imposing penalties on employers that employed a specified percentage of non-U.S. citizens).

party asserting his or her own rights.[8] Applying these principles, this Court and the lower courts have reached exactly the same results in abortion cases: both consistently have held that physicians and medical clinics have third-party standing to assert the reproductive rights of their patients.

Respondent argues that the Petitioners in this case did not make a sufficient showing that they satisfy the requirements for third-party standing. No. 18-1460 Pet. 22. In the abortion context, however, both this Court and other courts have concluded, in numerous cases extending over a long period of time, that the requirements for third-party standing are readily satisfied. Those decisions support Petitioners' third-party standing in this case. Indeed, requiring physicians who perform abortions to present extensive evidence in every case concerning each of the

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[8] *See, e.g.*, *Whole Woman's Health v. Smith*, 338 F. Supp. 3d 606, 621 (W.D. Tex. 2018); *Reprod. Health Servs. v. Strange*, 204 F. Supp. 3d 1300, 1320-25 (M.D. Ala. 2016); *Planned Parenthood Se., Inc. v. Bentley*, 951 F. Supp. 2d 1280, 1285 (M.D. Ala. 2013); *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 650 F. Supp. 2d 972, 986 (D.S.D. 2009), *rev'd in part on other grounds sub nom. Planned Parenthood Minn. v. Rounds*, 653 F.3d 662 (8th Cir. 2011). This Court has held that third-party standing is also available when "enforcement of the challenged restriction against the litigant would result indirectly in the violation of third parties' rights." *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004) (quoting *Warth v. Seldin*, 422 U.S. 490, 510 (1975)). *See also Triplett*, 494 U.S. at 720; *Caplin & Drysdale*, 491 U.S. at 624 n.3 (granting third-party standing even where one of the factors — "the ability of the person to advance his own rights" — "counsel[ed] against review").

third-party standing factors would single out plaintiffs in abortion cases for uniquely unfavorable treatment.[9]

Respondent does not appear to contest that Petitioners have Article III standing. As in *Craig*, "[t]he legal duties created by the statutory sections under challenge are addressed directly to [entities] such as [Petitioners]," and they must either "heed" them, "thereby incurring a direct economic injury" by being forced to close or significantly reduce services, or "disobey the statutory command and suffer" the consequences. 429 U.S. at 194.

Moreover, physicians have a close relationship with their patients, such that they are "fully, or very nearly, as effective a proponent of the right." *Singleton*, 428 U.S. at 114-15. The clinics and their current and future patients share a common interest in keeping abortion clinics open, which makes Petitioners "motivated, effective advocate[s]" for the right. *Powers*, 499 U.S. at 413-14. Respondent's contention that there is a conflict of interest between the Petitioners and their patients because the challenged laws are

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[9] *See, e.g.*, *Campbell*, 523 U.S. at 400 (finding hindrance based entirely on prior decision); *Aid for Women v. Foulston*, 441 F.3d 1101, 1114 (10th Cir. 2006) (finding hindrance in a non-abortion case based on other court opinions and common sense); *Pa. Psychiatric Soc'y v. Green Spring Health Servs., Inc.*, 280 F.3d 278, 290 (3d Cir. 2002) (finding third-party standing in non-abortion case based on numerous court opinions noting the "stigma associated with receiving mental health services"); *E. Coast Test Prep LLC v. Allnurses.com, Inc.*, 167 F. Supp. 3d 1018, 1022 (D. Minn. 2016) (finding a hindrance in a non-abortion case based on arguments of parties and common sense).

"health and safety regulations," *see* No. 18-1460 Pet. 21-22, disregards the district court's factual finding that Louisiana Act 620 does not, in fact, benefit the health and safety of women and instead serves only to restrict access to abortions. Pet. App. 215 a. ("The Act's requirement that abortion providers have active admitting privileges at a hospital within 30 miles does not conform to prevailing medical standards and will not improve the safety of abortion in Louisiana. It provides no benefits to women and is an inapt remedy for a problem that does not exist.").

Petitioners' patients also face at least "some hindrance" to asserting their own rights. This Court has regarded the cost of filing suit, and the limited reward to an individual patient (whose pregnancy is likely to end, one way or another, before litigation can be concluded), as a sufficient hindrance. *Campbell*, 523 U.S. at 398. In addition, the potential for violence against women who assert their reproductive rights through litigation is a significant disincentive for women to file suit. The district court found "overwhelming" evidence that "in Louisiana, abortion providers, the clinics where they work and the staff of these clinics, are subjected to violence, threats of violence, harassment and danger." Pet. App. 183a.[10] Even if the courts permit women seeking abortions to litigate as

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[10] One of the clinic plaintiffs had been "the subject of three violent attacks: once by a man wielding a sledgehammer, once by an arsonist who threw a Molotov cocktail at the clinic, and once by having a hole drilled through the wall and butyric acid poured through it." *Id.* at 185a-86a. The doctor plaintiffs had been threatened, protested at their homes, or put in fear of violence. *Id.* at 185a-89a.

"Jane Does," there is a residual risk that their identities could become known.

Finally, Respondent's failure to raise the third-party standing issue in the courts below, or during the stay proceedings in this Court, has implications for the rule of law. In her Cross-Petition, Respondent sought to excuse her failure to raise third-party standing in a timely fashion by arguing that the issue is non-waivable, and that there is a circuit split on the waivability of third-party standing. *See* No. 18-1460 Pet. 32-38. Respondent also suggested, however, that the Court can disregard her failure to raise the third-party standing issue in the lower courts, and proceed to reconsider its third-party standing precedents without deciding whether the issue is waivable or resolving the asserted split in the circuits. *See* No. 18-1460 Cert. Reply at 8-9. That approach is problematic because this Court generally does not consider issues that were not raised in the courts below. *See Delta Airlines v. August*, 450 U.S. 346, 362 (1981) (noting that a question "not raised in the Court of Appeals . . . is not properly before us"). Although the Court has discretion to make exceptions to this general rule, there appears to be no good reason to do so here.

A similar concern is raised by Respondent's contention that the lower courts "have failed to rigorously apply" the requirements of this Court's test for third-party standing. No. 18-1460 Pet. at 19. Respondent appears to be arguing that the lower courts have misapplied the proper legal standard for third-party standing. This Court generally does not consider arguments that the lower court's error consisted of

"misapplication of a properly stated rule of law." S. Ct. Rule 10. Although that principle is also prudential rather than absolute, departing from it in the absence of a good reason to do so tends to undermine respect for the law and the federal courts.

In sum, the Court should not use this case as a vehicle to re-examine its longstanding precedents concerning third-party standing in constitutional cases, because doing so would tend to destabilize the rule of law.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

Robert A. Long, Jr.
Counsel of Record
Thomas Brugato
Nandini Singh
Christian Mott
Virginia Williamson
COVINGTON & BURLING LLP
850 Tenth Street, NW
Washington, DC 20001
rlong@cov.com
(202) 662-6000

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Counsel for Amici Curiae

APPENDIX

APPENDIX

Donald B. Ayer served as Deputy Attorney General of the United States from 1989 to 1990. From 1986 to 1988, he served as Principal Deputy Solicitor General of the United States. He was the United States Attorney for the Eastern District of California from 1981 to 1986.

Charles Fried served as Solicitor General of the United States from 1985 to 1989. He served as Associate Justice of the Supreme Judicial Court of Massachusetts from 1995 to 1999.

William Royal Furgeson Jr. served as a judge of the United States District Court for the Western District of Texas from 1994 to 2013.

Timothy K. Lewis served as a judge of the United States Court of Appeals for the Third Circuit from 1992 to 1999. From 1991 to 1992 he served as judge of the United States District Court for the Western District of Pennsylvania.

A. Howard Matz served as a judge of the United States District Court for the Central District of California from 1998 to 2013.

Shira A. Scheindlin served as a judge of the United States District Court for the Southern District of New York from 1994 to 2016.

T. John Ward served as a judge of the United States District Court for the Eastern District of Texas from 1999 to 2011.

Seth P. Waxman served as Solicitor General of the United States from 1997-2001.