No. 18-1323

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.

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

BRIEF OF LGBTQ ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

Interest of Amici Curiae 1

Summary of Argument 1

Argument 2

I. Allowing States to Force the Closure of Abortion Clinics Based on Pretextual Reasons Will Harm LGBTQ People by Eliminating Essential Providers of Health Care 2

A. Forcing Clinics to Close for Specious Reasons Would Eliminate Critical Health Care Services Essential to LGBTQ People 2

B. The Loss of These Essential Providers Will Worsen Health Disparities for LGBTQ People 6

II. This Court Should Reject Louisiana's Attempt to Assert a Pretextual Interest to Circumvent the Facts and This Court's Precedent 11

A. Courts Are Critical Gatekeepers in Carefully Assessing the Validity of Asserted Rationales for Laws That Restrict Constitutional Liberties 11

B. The Historical Use of Unsupported Health and Safety Rationales to Justify Laws Infringing on the Protected Liberties of Vulnerable Groups Underscores the Need for Close Judicial Scrutiny of Louisiana's Rationales 12

C. Courts Increasingly Repudiate Unsupported Claims in Assessing Laws That Restrict the Fundamental Liberties of LGBTQ People 20

D. Louisiana's Attempt to Distinguish This Case from *Whole Woman's Health v. Hellerstedt* by Asserting Another False Rationale Must Fail 23

E. This Court Should Reject Louisiana's Attempt To Circumvent Clear Precedent by Recasting the Facts To Engineer Its Desired Outcome 25

Conclusion 29

Appendix 30

TABLE OF AUTHORITIES

Cases Page(s)

Boutilier v. Immigration & Naturalization Serv.,
387 U.S. 118 (1967) 15, 16

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274 U.S. 200 (1927) 13, 14

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559 P.2d 1340 (Wash. 1977) 17

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730 So. 2d 1190 (Ala. 1998) 19

June Med. Servs., LLC v. Gee,
905 F.3d 787 (5th Cir. 2018).............24, 25, 27, 28

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250 F. Supp. 3d 27 (M.D. La. 2017)..............23, 24

Lawrence v. Texas,
539 U.S. 558 (2003) 20

Lofton v. Sec'y of Dept. of Children and Family Servs.,
358 F.3d 804 (11th Cir. 2004).............................18

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135 S. Ct. 2584 (2015)....................................22, 25

In re Opinion of the Justices,
162 So. 123 (Ala. 1935) 14

Pavan v. Smith,
137 S. Ct. 2075 (2017)...26

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No. CV2015003153, 2015 WL 12990015
(Ark. Cir. Dec. 01, 2015) 25

People v. Chapman,
4 N.W.2d 18 (Mich. 1942) 15

Romer v. Evans,
517 U.S. 620 (1996)..18, 20

S v. S,
608 S.W.2d 64 (Ky. Ct. App. 1980)......................19

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249 Cal. App. 2d 58 (1967)...................................17

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505 S.W.3d 169 (Ark. 2016)...........................26, 27

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Sandy E. James et al., *The Report of the 2015 U.S. Transgender Survey*, NAT'L CTR. FOR TRANSGENDER EQUALITY 5 (2016), https://perma.cc/8GDT-3ZAJ (last visited Nov. 30, 2019) 8

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INTEREST OF AMICI CURIAE

Amici are organizations dedicated to protecting the rights and liberties of vulnerable groups, including lesbian, gay, bisexual, transgender, and queer (LGBTQ) people, people of color, women, and people with disabilities.* They have substantial expertise related to the impact of disruptions in access to culturally-competent healthcare on members of the LGBTQ community. Their expertise bears directly on the issues before the Court.

SUMMARY OF ARGUMENT

An abortion clinic's closure most apparently impacts those seeking reproductive health care. Less well-known is the impact of such a closure on LGBTQ individuals seeking essential health care services. Members of the LGBTQ community have historically struggled to access basic health care because of stigma arising from social and political beliefs about sex, gender roles, and childbearing. This stigma has led the LGBTQ population to experience significant health disparities compared to other populations.

For many LGBTQ individuals, reproductive health care clinics have stepped in to offer affirming environments in which to receive care. The LGBTQ community looks to abortion clinics to provide contraception and abortion services, and also wellness services, examinations, STI testing and treatment, hormone replacement therapy, and insemination services. These clinics provide these healthcare services in a safe, nurturing, and

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* Pursuant to Supreme Court Rule 37.6, counsel for amicus curiae state that no counsel for a party authored this brief in whole or in part, and no person, other than amicus curiae or its counsel, made a monetary contribution intended to fund its preparation or submission. All parties were timely notified and consented in writing to the filing of this brief.

affirming environment—free from the discrimination and mistreatment often faced by LGBTQ individuals in the larger health care system.

It is notable, then, that Louisiana Revised Statutes § 40:1061.10 (Act 620)—which would shutter all but one abortion provider in the State of Louisiana—and similar laws in other states have been passed under the guise of "public health." In fact, such laws would dramatically *worsen* the "public health" of the LGBTQ community, whose members face remarkable barriers in accessing healthcare from traditional sources. If allowed to go into effect, laws like Act 620 would lead to the loss of trusted sources of essential healthcare for LGBTQ individuals. It could cause some of these individuals to face potential life-threatening conditions that may go untreated for years.

This is far from the first time in American history that government bodies have used junk science and unsupported public health allegations to harm the LGBTQ community. And this Court has traditionally stood at the forefront of guarding this community from the harms posed by pseudoscience. So too here, this Court should look past the State of Louisiana's spurious health claims—as well as its unavailing attempt to circumvent this Court's binding precedent—and declare Act 620 unconstitutional.

ARGUMENT

I. Allowing States to Force the Closure of Abortion Clinics Based on Pretextual Reasons Will Harm LGBTQ People by Eliminating Essential Providers of Health Care

A. Forcing Clinics to Close for Specious Reasons Would Eliminate Critical Health Care Services Essential to LGBTQ People

Act 620 provides no health benefits to patients and would result in the loss of all but one abortion provider in the entire State of Louisiana. In striking down an identical

admitting privilege law in Texas three years ago, this Court recognized that where a restriction targeting abortion providers fails to "confer[] medical benefits sufficient to justify the burdens upon access," it fails the undue burden analysis. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2300 (2016). It is therefore essential that this Court apply its own precedent from *Whole Woman's Health* and send a clear message that restrictions that shut clinics down with no attendant benefits will not be tolerated in any state.

The primary reason to prevent states from driving abortion clinics out of business is, of course, to ensure that those in need of abortion services, including LGBTQ people, are able to obtain them. But additional reasons are less apparent. In recent years, many reproductive health care providers have filled a critical gap in the provision of health care to the LGBTQ community. These clinics have created welcoming spaces by providing health care services designed to serve LGBTQ people, who otherwise face pervasive discrimination in the health care system. They have created nondiscriminatory environments for LGBTQ people to receive care, from contraception and abortion care to general wellness services to more specific services for transgender patients, including hormone therapy. These clinics are particularly well-suited to provide LGBTQ care because of their expertise in providing services that are stigmatized, such as abortion, contraception, and screening and treatment for sexually transmitted infections (STIs). These providers recognize that LGBTQ people face bias in the health care system and need competent, affirming services from practitioners who understand the harmful effects of stigma. "Being able to treat LGBTQ patients means 'understanding that LGBT people in our society experience discrimination,

victimization and bullying.'"[1] Comprehensive reproductive health care providers occupy a critical niche within the health care system precisely because they provide services that many will not; this forms an important component of the cultural competency that they bring to LGBTQ health care.

The clinics in Louisiana that currently provide abortion care, and which are threatened by Act 620, also offer a range of other services to their communities. Hope Medical Group provides contraception, pregnancy testing and counseling, adoption referrals, and community and health professional education programs. JA 18–19. Women's Clinic and Delta Clinic provide pregnancy testing, contraception, and ultrasound services. JA 1121.

Nationwide, abortion clinics that have developed expertise in offering stigmatized care serve LGBTQ patients with a range of services, including those offered by the clinics in Louisiana. For example, Maine Family Planning offers primary care, birth control, abortion, and other medical services with an emphasis on the needs of LGBTQ patients. Its Transgender Health Services program includes hormone therapy, onsite self-injection lessons, referrals to specialty providers (mental, behavioral, and medical), yearly wellness visits, preventive care, birth control and safer sex supplies, STI testing and treatment, and abortion for patients of any gender.[2] Cedar River Clinics in Washington provides family planning services, abortion care, and a dedicated LGBTQ health care program offering a range of wellness services (annual pelvic and breast exams, cancer screenings, HIV and STI

[1] Alex Berg, *Cuts to Planned Parenthood a Scary Prospect for Some LGBTQ Patients*, NBC NEWS (July 21, 2017, 11:53 AM), https://perma.cc/U56W-VRDR (last visited Nov. 27, 2019).

[2] *See LGBTQ+ Healthcare*, MAINE FAMILY PLANNING, https://perma.cc/KR5B-QSPJ (last visited Nov. 27, 2019).

testing, and safer sex education); services for transgender patients (hormone therapy, surgical referrals, postsurgical follow-up, and clerical services for gender marker changes); and insemination services for those seeking to conceive in furtherance of its mission to facilitate the full range of choices around family formation.[3] Allentown Women's Center in Bethlehem, Pennsylvania, features its "Trans Health" program prominently on its home page, right next to abortion and gynecological services. The clinic "strives to provide compassionate caring and accessible reproductive healthcare. Our safe and affirming services include hormone replacement therapy, assistance with legal document changes, upper/lower exams, self-injection instruction, referrals, transition care, and abortion care."[4]

Planned Parenthood affiliates have similarly provided critical services for the LGBTQ community.[5] One hundred Planned Parenthood health centers provide hormone therapy for transgender people, many in communities and locales where care is difficult to find.[6] Dr. Alex Keuroghlian, director of the National LGBT Health Education Center and assistant professor of psychiatry at Harvard Medical School, has recognized the dearth of health care providers for LGBTQ people. "I hear

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[3] *LGBTQ Wellness Services*, CEDAR RIVER CLINICS, https://www.cedarriverclinics.org/lgbtqwellness/ (last visited Nov. 27, 2019).

[4] *See Trans Health*, ALLENTOWN WOMEN'S CENTER, https://www.allentownwomenscenter.com/trans-health/ (last visited Nov. 27, 2019).

[5] *See LGBT Services*, PLANNED PARENTHOOD, https://perma.cc/C7RC-XM38 (last visited Nov. 27, 2019).

[6] *See* Leana S. Wen, *Innovation, Courage, and Social Justice: A Reflection on Baltimore and Looking Forward to Planned Parenthood*, HEALTH AFF. (Nov. 14, 2018), http://archive.is/tw70y (last visited Nov. 27, 2019).

frequently about lesbian and bisexual-identified women and transgender patients who report the only place they can get safe care in areas where there isn't some kind of designated LGBTQ practice is often Planned Parenthood."[7]

If states are allowed to drive abortion clinics out of business using pretextual rationales, the results will be devastating not only for the country, but for LGBTQ people in particular, many of whom will lose trusted sources of essential health care. This will only worsen longstanding and persistent health disparities for this community.

B. The Loss of These Essential Providers Will Worsen Health Disparities for LGBTQ People

Despite gains in social acceptance and legal equality, LGBTQ people still face considerable stigma and prejudice that surfaces in many contexts: education, employment, military service, family recognition, and health care, among others. Homophobia and transphobia manifest in the health care context through discrimination and mistreatment by health care providers and institutions. This discrimination and mistreatment create barriers to health care access for LGBTQ people, who often have few alternatives for sources of care, leading to health disparities between LGBTQ and non-LGBTQ people. The loss of culturally-competent providers will only worsen this problem.

LGBTQ people of all ages face widespread discrimination in health care on the basis of their sexual orientation and gender identity. The U.S. Department of Health and Human Services (HHS) Healthy People 2020 Initiative recognizes that "LGBT individuals face health disparities linked to societal stigma, discrimination, and denial

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[7] Berg, *supra* note 1 (quoting Dr. Keuroghlian).

of their civil and human rights."[8] This surfaces in a wide variety of contexts, including counseling and mental health care services, fertility services, and even basic care for infants and children.[9] LGBTQ people of color are particularly vulnerable to discrimination, which often results in their having either significantly reduced access or no access at all to health care.[10]

In 2009, Lambda Legal found that 56 percent of lesbian, gay, and bisexual survey respondents experienced health care discrimination, including refusals of care, excessive precautions used by health care professionals, and physically rough or abusive behavior by those professionals.[11] The survey also found that 70 percent of transgender and gender-nonconforming respondents and 63 percent of respondents living with HIV/AIDS had experienced health care discrimination.

In another more recent survey, the Center for American Progress (CAP) found that among transgender people who had visited a doctor or health care provider's office in the past year, 29 percent reported that a doctor or other health care provider refused to see them because of

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[8] *Lesbian, Gay, Bisexual, and Transgender Health*, U.S. DEPT. OF HEALTH & HUMAN SERVS., https://perma.cc/4WUD-5ARV (last visited Nov. 27, 2019).

[9] *See* Ryan Thoreson, *"All We Want Is Equality:" Religious Exemptions and Discrimination against LGBT People in the United States*, HUMAN RIGHTS WATCH 18–22 (Feb. 2018), https://perma.cc/7HP6-8QFS (last visited Nov. 27, 2019).

[10] *See generally* Ning Hsieh & Matt Ruther, *Despite Increased Insurance Coverage, Nonwhite Sexual Minorities Still Experience Disparities In Access To Care*, 36 HEALTH AFF. 1786 (2017).

[11] *When Health Care Isn't Caring: Lambda Legal's Survey on Discrimination Against LGBT People and People Living with HIV*, LAMBDA LEGAL 5 (2010), https://perma.cc/G27B-7A68 (last visited Nov. 27, 2019) (surveying 4,916 total respondents).

their actual or perceived gender identity.[12] CAP also found that 12 percent were denied care related to gender transition, 21 percent were subjected to harsh or abusive language, and 29 percent experienced unwanted physical contact from a doctor or other health care provider (such as fondling, sexual assault, or rape).

Because of this discrimination, LGBTQ people disproportionately encounter barriers in the health care system. For example, the National Center for Transgender Equality's 2015 U.S. Transgender Survey indicated that 23 percent of respondents did not see a provider for needed health care because of fears of mistreatment or discrimination.[13] The survey found that in Louisiana, 27% avoided seeking medical care due to fears of mistreatment, and 35% did not see a doctor when needed because they could not afford it.[14]

When LGBTQ patients are turned away or refused treatment, it is much harder—and sometimes simply not possible—for them to find a viable alternative. In the CAP study, nearly one in five LGBTQ people, including 31 percent of transgender people, said that it would be very difficult or impossible to get the health care they need at another hospital if they were turned away.[15] That rate was substantially higher for LGBTQ people living in non-

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[12] Shabab Ahmed Mirza & Caitlin Rooney, *Discrimination Prevents LGBTQ People from Accessing Health Care,* CTR. FOR AM. PROGRESS (Jan. 18, 2018, 9:00 AM), https://perma.cc/D6D2-DSFF (last visited Nov. 27, 2019).

[13] Sandy E. James et al., *The Report of the 2015 U.S. Transgender Survey*, NAT'L CTR. FOR TRANSGENDER EQUALITY 5 (2016), https://perma.cc/8GDT-3ZAJ (last visited Nov. 30, 2019) (surveying 27,715 respondents from all fifty states).

[14] *2015 U.S. Transgender Survey: Louisiana State Report*, NAT'L CTR. FOR TRANSGENDER EQUALITY 3 (2017), https://perma.cc/87BG-R3AX (last visited Nov. 30, 2019).

[15] Mirza & Rooney, *supra* note 12.

metropolitan areas, with 41 percent reporting that it would be very difficult or impossible to find an alternative provider. For these patients, being turned away by a medical provider is not just an inconvenience. It often means being entirely denied care with nowhere else to go. A study of African American sexual minority women in the South found that 59.4% of study participants had no primary care provider.[16] The same study found that sexual minority women and girls are more likely to become pregnant at some point in their lifetime than are their heterosexual counterparts and that they also have lower rates of hormonal contraception use.[17]

Barriers found in the health care system itself are exacerbated by lack of health insurance. A survey of data from 2000 to 2007 found that compared with women in different-sex relationships, women in same-sex relationships were significantly less likely to have health insurance coverage, were less likely to have had a checkup within the past year, were more likely to report unmet medical needs, and were less likely to have had a recent mammogram or Pap test.[18] A 2014 Gallup survey found that LGBTQ individuals are more likely to be uninsured than their non-LGBTQ counterparts.[19]

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[16] Madina Agénor et al., *Sexual Orientation and Sexual and Reproductive Health among African American Sexual Minority Women in the U.S. South*, 26 WOMEN'S HEALTH ISSUES 612, 615 (2016).

[17] *Id.* at 617

[18] Thomas Buchmueller, Christopher S. Carpenter, *Disparities in Health Insurance Coverage, Access, and Outcomes for Individuals in Same-Sex Versus Different-Sex Relationships, 2000–2007*, 100 AM. J. PUB. HEALTH 489, 489 (2010).

[19] Gary J. Gates, *In U.S., LGBT More Likely Than Non-LGBT to Be Uninsured*, GALLUP (Aug. 26, 2014), https://perma.cc/23JG-QCGZ (last visited Nov. 30, 2019).

Discrimination and barriers to access are problems for sexual minority women with respect to reproductive health care, making the continued availability of culturally-competent providers and clinics particularly important. Sexual minority women are less likely to use birth control and make regular gynecological visits than are their heterosexual counterparts; they are also more likely to report unmet medical needs than are heterosexual women.[20] Adult and adolescent sexual minority women are at greater risk of unintended pregnancy than are their heterosexual counterparts.[21] Queer women also are subjected to a higher rate of forced sexual encounters with men; one study found that 43% of lesbians reported being victims of sexual assault, making access to resources in cases of unintended pregnancy critical.[22]

LGBTQ youth are at particular risk. Due to pressures to prove they are heterosexual, lesbian and bisexual youth are at higher risk of experiencing unintended pregnancies than are heterosexual youth.[23] Access to family

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[20] Bethany G. Everett & Stefanie Mollborn, *Examining Sexual Orientation Disparities in Unmet Medical Needs Among Men and Women*, 33 POPULATION RES. POL'Y REV. 553, 553–77 (2014).

[21] Bethany G. Everett et al., *Sexual Orientation Disparities in Mistimed and Unwanted Pregnancy Among Adult Women*, 49 PERSPECTIVES ON SEXUAL AND REPRODUCTIVE HEALTH 157, 163–64 (2017).

[22] Emily F. Rothman et al., *The Prevalence of Sexual Assault Against People Who Identify as Gay, Lesbian, or Bisexual in the United States: A Systematic Review*, 12 TRAUMA, VIOLENCE, & ABUSE 55 (2011).

[23] *See generally* Lisa L. Lindley & Katrina M. Walsemann, *Sexual Orientation and Risk of Pregnancy Among New York City High-School Students*, 105 AM. J. PUB. HEALTH 1379, 1383–84 (2015); Karen Schantz, *Pregnancy Risk Among Bisexual, Lesbian, and Gay Youth: What Does Research Tell Us?*, ACT FOR YOUTH CTR. OF EXCELLENCE 4 (Apr. 2015), https://perma.cc/JH9N-3TM5 (last visited Nov. 30, 2019) (summarizing research).

planning and other reproductive health care is therefore essential for this group of young people. A lack of connection to competent, nondiscriminatory health care resources also isolates LGBTQ youth, making them more susceptible to self-destructive behavior patterns.[24] Isolation often continues into adulthood, when LGBTQ populations are more likely to experience depression and engage in high-risk behaviors as a result.[25]

In recognition of these challenges, the National Institutes of Health formally designated sexual and gender minorities as a health disparity population in 2016.[26] If states are allowed to target abortion clinics with burdensome regulations that yield no health benefits, and in so doing force clinics to cease operations, the resulting harms will include the elimination of competent, non-discriminatory providers and worsening of existing health care disparities for LGBTQ people.

II. This Court Should Reject Louisiana's Attempt to Assert a Pretextual Interest to Circumvent the Facts and This Court's Precedent

A. Courts Are Critical Gatekeepers in Carefully Assessing the Validity of Asserted Rationales for Laws That Restrict Constitutional Liberties

When fundamental constitutional liberties are at stake, courts serve the vital function of carefully

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[24] *See* Colleen S. Poon & Elizabeth M. Saewyc, *Out Yonder: Sexual-Minority Adolescents in Rural Communities in British Columbia*, 99 AM. J. PUB. HEALTH 118, 122–23 (2008).

[25] *See* Trish Williams et al., *Peer Victimization, Social Support, and Psychosocial Adjustment of Sexual Minority Adolescents*, 34 J. YOUTH & ADOLESCENCE 471 (2005).

[26] Eliseo J. Pérez-Stable, *Director's Message*: *Sexual and Gender Minorities Formally Designated as a Health Disparity Population for Research Purposes*, NAT'L INST. ON MINORITY HEALTH AND HEALTH DISPARITIES (Oct. 6, 2016), https://perma.cc/GDU9-7PDY (last visited Nov. 30, 2019).

evaluating the asserted justifications for laws abridging those liberties. That responsibility is just as strong, and the required scrutiny just as searching, when the government's justification for a restriction on liberty is based on an asserted interest in advancing public health or safety. Facially, such health-related objectives may be "perfectly legitimate," *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 643 (1974), but when a law restricts fundamental constitutional rights, this Court has emphasized the need to carefully scrutinize the scientific basis for the restriction to determine "whether the rules sweep too broadly." *Id.* at 644 (holding that a public school policy requiring female teachers to take mandatory unpaid maternity leave in the final four or five months of pregnancy could not be justified based on an interest in keeping physically unfit teachers out of the classroom, on the ground that the policy "applies even when the medical evidence as to an individual woman's physical status might be wholly to the contrary"); *see also United States v. Virginia*, 518 U.S. 515, 549 (1996) (rejecting argument that Virginia Military Institute's males-only admission policy was justified based on different "learning and developmental needs" and "psychological and sociological differences" between men and women).

The *amici* who present this brief speak from experience about how individuals and groups, including LGBTQ people, have suffered impermissible deprivations of liberty under overly deferential judicial review of purportedly "scientific" rationales for oppressive laws.

B. The Historical Use of Unsupported Health and Safety Rationales to Justify Laws Infringing on the Protected Liberties of Vulnerable Groups Underscores the Need for Close Judicial Scrutiny of Louisiana's Rationales

Some of the most shameful moments in our legal history have resulted when courts failed to examine and

reject empirically indefensible claims asserted to justify infringing upon the protected liberties of disfavored or vulnerable groups. Courts have identified "conceivable rationale[s]" for anti-miscegenation laws, laws barring women from certain professions, forced sterilization of those deemed genetically "unfit," and criminalization of same-sex intimacy, even as those policies defied the established science and medical knowledge of their time. Only by undertaking a meaningful examination of a state's asserted public health rationales can the Court give due weight to women's liberty and dignity and properly assess the validity of a state's restriction on access to a fundamental right.

In the early twentieth century, champions of eugenic pseudo-science promoted forced sterilization of the "socially inadequate" as a means to improve society. They sought to cleanse the nation's gene pool of "the feebleminded, the insane, the criminalistic, the epileptic, . . . the blind, the deaf, [and] the deformed," among others. *See* Paul A. Lombardo, *Medicine, Eugenics, and the Supreme Court: From Coercive Sterilization to Reproductive Freedom*, 13 J. CONTEMP. HEALTH L. & POL'Y 1, 3 (1996). Proponents of eugenic ideology pursued their social program in the courts "in large measure by portraying their legal program as a public health initiative." *Id.* at 4. The failure of courts to adequately scrutinize the rationales offered for these programs allowed them to pass legal muster.

The embrace of eugenics by many states notoriously led to the forced sterilization of Carrie Buck, a young woman in the custody of the Virginia State Colony for Epileptics and Feeble Minded. *Buck v. Bell*, 274 U.S. 200, 205 (1927). In a case subsequently cited at the Nuremberg trials in defense of Nazi sterilization practices, the Supreme Court affirmed a state statute that provided for the forced sterilization of so-called "mental defectives," proclaiming

that "experience has shown that heredity plays an important part in the transmission of insanity, imbecility, etc." *Id.* at 205–06. The Court held, in haunting language, that the state properly possessed the authority to undertake forced sterilizations "in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind." *Id.* at 207.

Many of the same eugenics-driven laws also authorized the sterilization, forced commitment, and criminal prosecution of LGBTQ people.

In 1935, for example, the Governor of Alabama sought judicial guidance regarding the constitutionality of a law authorizing the involuntary sterilization of certain individuals. The act provided for the sterilization of individuals in mental hospitals who were deemed to be "afflicted with mental disease which may have been inherited or which … is likely to be transmitted to descendants, such as the various grades of mental deficiency, those suffering from perversions, [and] constitutional psychopathic personalities." *In re Opinion of the Justices*, 162 So. 123, 124–25 (Ala. 1935). Included in the broad scope of the act were "any sexual pervert, Sadist, homosexualist [sic], Masochist, [or] Sodomist." *Id.* While the court advised the governor that the law failed to provide constitutionally sufficient procedural protections, the court stated in no uncertain terms that "[w]e do not doubt the police power of the state to provide for the sterilization of the subjects enumerated in the bill when the proper method is prescribed for the ascertainment or adjudication of their status . . . ." *Id.* at 128.

A 1942 decision of the Michigan Supreme Court upheld the involuntary institutionalization of an adult male alleged to have "committed in private . . . an act of gross

indecency with another male person. . . ." *People v. Chapman*, 4 N.W.2d 18, 22 (Mich. 1942). In affirming the lower court decision, the court accepted the conflation of gay identity and pedophilia by two psychiatrists who had examined the petitioner and concluded that he "must be considered a distinct sexual menace and a source of serious concern in a free community not only because of his homosexual practices but also his psychosexual deviation is very likely to assume a much more ominous manifestation, that of pedophilia (the use of children as sexual objects)." *Id.* The court upheld the petitioner's involuntary institutionalization because "[t]here is little likelihood that his desire for sexual gratification by abnormal methods can be overcome soon and further activity of a similar nature may be expected if he is allowed freedom of access in a free community." *Id.*

The Michigan court conceded that the forced institutionalization statute was "not perfect." *Id.* at 607 (citation omitted). It was, however, "expressive of a state policy apparently based on the growing belief that, due to the alarming increase in the number of degenerates, criminals, feeble-minded and insane, our race is facing the greatest peril of all time." *Id.* Disinclined to assess the veracity of that "peril," the court simply concluded that "it is our duty to sustain the policy which the state has adopted." *Id.*

Two decades later, the Supreme Court endorsed the baseless and homophobic notion that LGBTQ people pose a threat to public health in affirming a deportation order against Clive Michael Boutilier, a Canadian man who confessed to "shar[ing] an apartment with a man with whom he had had homosexual relations." *Boutilier v. Immigration & Naturalization Serv.*, 387 U.S. 118, 120 (1967). Based on Mr. Boutilier's account of his sexual history, the Public Health Service determined that he was "afflicted with a . . . psychopathic personality. . . ." *Id*. Deportation

proceedings were instituted pursuant to a provision of the Immigration and Nationality Act excluding immigrants deemed to be "feeble-minded," "insane," or "afflicted with psychopathic personality." Brief for Respondent at 20–21, *Boutilier*, 387 U.S. 118 (No. 66-440), 1967 WL 113946, at *20-21. On appeal, the government defended the validity of the deportation proceedings by citing legislative history stating that the provision excluding individuals "afflicted with psychopathic personality or a mental defect … is sufficiently broad to provide for the exclusion of homosexuals and sex perverts." *Id.* at *22. Despite the submission of statements from "an extraordinary collection of scientific experts, including Sigmund Freud, Alfred Kinsey, and Margaret Mead, who claimed that homosexuality was not, per se, a sign of psychopathology," the Court adopted the government's position and affirmed the deportation of Mr. Boutilier on the sole basis of his sexual orientation. Marc Stein, Boutilier *and the U.S. Supreme Court's Sexual Revolution*, 23 LAW & HIST. REV. 491, 511 (2005); *see also Boutilier*, 387 U.S. at 125. Only the dissent offered any resistance to the notion that all "homosexual" persons were properly classified as psychopaths. *See id.* at 128 (Douglas, J., dissenting) (disputing that homosexuality is necessarily a form of psychopathy and calling for individualized assessments).

Even as the specter of sexual psychopathology began to fade, state legislatures continued to cast LGBTQ persons as posing a grave threat to public health and safety. State legislatures enacted laws banning "homosexuals" from public employment, on the theory that allowing LGBTQ people to participate in the workforce would threaten the welfare and safety of society. Courts repeatedly deferred to state enactments of public employment bans, particularly in the area of education, in which states and localities frequently asserted, without any credible social scientific evidence, that LGBTQ teachers would

prey upon children or "convert" them into sexual deviants.

In *Sarac v. State Board of Education*, a state appellate court upheld the revocation of a gay teacher's professional credential on the grounds that "[h]omosexual behavior has long been contrary and abhorrent to the social mores and moral standards of the people of California as it has been since antiquity to those of many other peoples." 249 Cal. App. 2d 58, 63 (1967). Invoking the conflation of gay identity and pedophilia and observing the teacher's "necessarily close association with children in the discharge of his professional duties as a teacher," the court deferred to the state's asserted interest in protecting children. *Id.* at 63–64. In reaching that conclusion, the court failed to cite, observe, or demand any evidence that rates of pedophilia were higher among LGBTQ persons than among heterosexual persons, or that the particular teacher in question had any history of pedophilia. The court concluded that the revocation of the petitioner's teaching credential raised no "constitutional questions whatsoever." *Id.* at 64; *see also Gaylord v. Tacoma Sch. Dist. No. 10*, 559 P.2d 1340, 1346–47 (Wash. 1977) (en banc) (upholding the termination of a gay high school teacher and citing with alarm the "danger of encouraging . . . approval and . . . imitation" of homosexuality among students).

Courts continued to regard being gay, lesbian, or bisexual as dangerous and socially deviant long after "homosexuality" was removed from the Diagnostic and Statistical Manual of Mental Disorders ("DSM") in 1973. *See* Ryan Goodman, *Beyond the Enforcement Principle: Sodomy Laws, Social Norms, and Social Panoptics*, 89 CAL. L. REV. 643, 725 (2001). That year, the American Psychiatric Association formally declared that being gay, lesbian, or bisexual "does not constitute a psychiatric disorder" and "implies no impairment in judgment, stability,

reliability, or general social or vocational capabilities." Brief of the American Psychiatric Association et al. as Amicus Curiae, *Romer v. Evans*, 517 U.S. 620 (1996) (No. 94-1039), 1995 WL 17008445, at *3. Despite the growing scientific consensus that being gay, lesbian, or bisexual is not an illness or a disorder that can or should be changed, states continued to enact oppressive and punitive statutes directed at LGBTQ people. Time and again, the courts dispensed with a critical assessment of the evidence cited by the states, instead endorsing sources that lacked any indicia of scientific methodology or credibility.

The idea that LGBTQ people represent a unique and potent threat to youth also extended into the private sphere, leading to laws prohibiting LGBTQ people from adopting children and to widespread court decisions denying custody to LGBTQ parents. Appellate courts frequently upheld these discriminatory policies without undertaking a reasoned analysis of the justifications supplied by the state as a veneer for the laws' homophobic purposes. For example, in *Lofton v. Secretary of Department of Children and Family Services*, the Eleventh Circuit upheld a Florida state law banning adoption by any "homosexual" person. 358 F.3d 804, 806 (11th Cir. 2004). The court acknowledged the "social science research and the opinion of mental health professionals and child welfare organizations . . . that there is no child welfare basis for excluding homosexuals from adopting." *Id.* at 824. Nonetheless, the court held that the state need not base its policy on evidence, finding the presumed superiority of opposite-sex parents "to be one of those 'unprovable assumptions' that nevertheless can provide a legitimate basis for legislative action." *Id.* at 819–20 (citation omitted); *see also id.* at 825 ("[W]e must credit any conceivable rational reason that the legislature might have for choosing not to alter its statutory scheme in response to this recent social science research.").

In *Ex Parte J.M.F.*, 730 So. 2d 1190 (Ala. 1998), the Alabama Supreme Court upheld a decision to remove custody from a child's mother solely on the grounds that she was a lesbian. In so doing, the court acknowledged that a "number of scientific studies as to the effect of child-rearing by homosexual couples … suggest[] that a homosexual couple with good parenting skills is just as likely to successfully rear a child as is a heterosexual couple." *Id.* at 1195. The court nonetheless held that it was reasonable for the trial court to have deferred to the conclusion of a single report by a law professor who had long advocated against marriage and parenting by same-sex couples. *Id.* at 1196; *see also* Carlos A. Ball & Janice Farrell Pea, *Warring with Wardle: Morality, Social Science, and Gay and Lesbian Parents*, 1998 U. ILL. L. REV. 253, 338.

In some cases, courts deemed even rank speculation sufficient to support the removal of children from the custody of their LGBTQ parents. For example, a Kentucky appeals court relied on the admitted speculation of a psychologist to reverse a lower court's decision that had allowed a lesbian mother to retain custody of her child. *S v. S*, 608 S.W.2d 64, 66 (Ky. Ct. App. 1980). Rather than requiring any credible scientific evidence on the issue, the court simply accepted a psychologist's contention that despite the absence of any actual data, "it [was] reasonable to suggest that [the child] may have difficulties in achieving a fulfilling heterosexual identity of her own in the future." *Id.*; *see also Ward v. Ward*, 742 So. 2d 250, 252–54 (Fla. Dist. Ct. App. 1996) (concluding that child's "problematic behavior," such as wearing men's cologne, demonstrated that she was being harmed by living with lesbian mother and awarding custody to the father, who had been convicted of murdering his first wife), *opinion withdrawn, appeal dismissed as moot August 1, 1997*.

This dark chapter in our nation's history illustrates starkly how critical it is that courts examining state-

sanctioned deprivations of liberty and dignity look with a critical eye on the factual bases offered for these abuses.

C. Courts Increasingly Repudiate Unsupported Claims in Assessing Laws That Restrict the Fundamental Liberties of LGBTQ People

In contrast to this history of deference to prejudice and stereotypes, courts in recent years have subjected governmental justifications for infringing upon the liberty of LGBTQ people to meaningful review, including by examining their purported scientific bases. This Court, in particular, has repeatedly upheld the constitutional liberties of LGBTQ people by declining to accept the empirical fallacies on which past cases have relied.

In *Lawrence v. Texas*, 539 U.S. 558 (2003), the Court declined to defer to the state's asserted justifications for restricting the liberty of LGBTQ people. In overturning *Bowers v. Hardwick*, 478 U.S. 186 (1986), and striking down a Texas statute criminalizing same-sex intimacy, the Court repudiated its past failure to question the premises on which *Bowers* had relied. The Court critiqued "the historical grounds relied upon in *Bowers*" as "more complex than the majority opinion and the concurring opinion [in *Bowers*] . . . indicate." *Id.* at 571. In a powerful vindication of the courts' gatekeeping responsibility, the Court lamented its past failure to "take account of other authorities pointing in an opposite direction" from those cited in *Bowers*. *See id.* at 572. The decision represents not only a watershed defense of constitutional liberty, but also a commanding call upon courts to employ greater rigor in analyzing laws that abridge the fundamental freedoms of historically disfavored groups. *See also Romer v. Evans*, 517 U.S. 620, 635 (1996) (striking down state constitutional amendment prohibiting state and local anti-discrimination protections for LGBTQ people because "[t]he breadth of the amendment is so far removed from [the]

particular justifications that we find it impossible to credit them").

More recently, this Court squarely confronted the unsupported social science rationales advanced to support federal and state laws excluding same-sex couples from the freedom to marry. In *United States v. Windsor*, 570 U.S. 744 (2013), the Court affirmed the Second Circuit's judgment that Section 3 of the Defense of Marriage Act (DOMA) was unconstitutional. In defense of DOMA, Respondent Bipartisan Legal Advisory Group of the U.S. House of Representatives (BLAG) made a litany of claims purporting to be based in science and public health about the protection of children, asserting that "a child's biological mother and father are the child's natural and most suitable guardians and caregivers. . . ." Respondent's Brief on the Merits, *Windsor*, 570 U.S. 744 (No. 12-307), 2013 WL 267026, at *47. In a familiar pattern, BLAG also defended the law on the basis of asserted scientific uncertainty, arguing that there was "ample room for a wide range of rational predictions about the likely effects" of recognizing the marriages of same-sex couples, and that such uncertainty counseled against judicial involvement. *Id.* at *42.

In *Windsor*, as in this case, professional public health and sociological associations weighed in strongly and unequivocally: "[T]he claim that same-sex parents produce less positive child outcomes than opposite-sex parents . . . contradicts abundant social science research." Brief for the American Sociological Association (ASA) as Amicus Curiae, *Windsor*, 570 U.S. 744 (No. 12-307), 2013 WL 4737188, at *3. Citing "nationally representative, credible, and methodologically sound social science studies," the ASA concluded that "the overwhelming scientific evidence shows clearly that same-sex couples are equally capable of generating positive child outcomes." *Id.* at *4, *6. The ASA took BLAG's unsupported social science claims

head on, observing that the respondent "rel[ied] on studies analyzing, inter alia, stepparents, single parents, and adoptive parents—none of which address same-sex parents or their children—in order to make speculative statements about the wellbeing of children of same-sex parents" and concluding that "[s]uch inappropriate, methodologically baseless comparisons provide no factual support" for BLAG's contentions. *Id.* at *22. This Court credited the professional organizations and the social science consensus regarding same-sex parenting, finding not only that the federal government's refusal to recognize the marriages of same-sex couples "impose[s] a disadvantage, a separate status, and so a stigma" on same-sex relationships, but also that it "humiliates tens of thousands of children now being raised by same-sex couples" and "makes it . . . more difficult for [them] to understand the integrity and closeness of their own family." *Windsor*, 570 U.S. at 770-72.

The Court's decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), similarly repudiates erroneous, outdated, and irrelevant rationales for denying same-sex couples the right to marry. There, this Court "exercised reasoned judgment" in identifying the human liberty interests at stake in marriage bans and evaluating the countervailing arguments. *Id.* at 2598. The Court credited the scientific consensus that "sexual orientation is both a normal expression of human sexuality and immutable" and the social science demonstrating that marriage "affords the permanency and stability important to children's best interests." *Id.* at 2596, 2600. With respect to the respondents' sociological prediction that allowing same-sex couples to marry would "lead[] to fewer opposite-sex marriages," the Court determined that the respondents simply "have not shown a foundation for the conclusion that allowing same-sex marriage will cause the harmful outcomes they describe." *Id.* at 2606–07. Like *Lawrence* and *Windsor*,

Obergefell advances our respect for fundamental individual liberties and also models the appropriate and essential role of the courts in critically examining public health and sociological justifications offered to support abridgements of personal freedom.

Increasingly in recent times, courts have played their rightful role in guarding against the use of pseudo-science to harm historically vulnerable groups. They have refused to permit states and other public entities to use a mere assertion of scientific uncertainty, unsupported by substantial evidence, as carte blanche to abridge core individual liberties. Courts have demanded that lawmakers base laws on more than bias and paternalism. These decisions draw on the best traditions of our legal history.

D. Louisiana's Attempt to Distinguish This Case from *Whole Woman's Health v. Hellerstedt* by Asserting Another False Rationale Must Fail

Just over three years ago, this Court issued its decision in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), which involved a challenge to two restrictions on abortion care enacted by the state of Texas. One such restriction was a requirement that a doctor performing abortion services must have admitting privileges at a hospital within thirty miles of the site where the abortion would be performed. In striking down that requirement as unconstitutional, this Court held that "there was no significant health-related problem that the [admitting privileges] law helped to cure" and that "the admitting-privileges requirement does not serve any relevant credentialing function." *Id.* at 2311, 2313.

Act 620's requirements are identical to those in the Texas law that was invalidated by this Court. *June Medical Services v. Kliebert*, 250 F. Supp. 3d 27, 87 (M.D. La. 2017). In fact, the Louisiana law was modeled on the Texas law which had the result of "closing abortion clinics and restricting abortion access in Texas." *Id.* at 56. The state

and the Fifth Circuit went to great lengths to avoid the clearly applicable holding of *Whole Woman's Health* by painting a distorted factual picture and asserting yet another pretextual rationale by claiming that the restrictions serve a "credentialing" function. However, leading medical and public health organizations have strongly opposed admitting-privilege requirements for abortion as medically and scientifically unwarranted.[27]

The district court in this case, fulfilling its "'constitutional duty' to look beyond a State's assertions for restricting access to abortion to evaluate whether the restrictions at issue will actually advance any legitimate interests," *June Medical Services LLC*, 250 F. Supp. 3d at 32, held Louisiana's admitting-privileges law unconstitutional. *Id*. at 35. The court found that "[Act 620's] requirement that abortion providers have active admitting privileges … does not conform to prevailing medical standards and will not improve the safety of abortion in Louisiana."

The Fifth Circuit reversed on the grounds that the facts in Louisiana were "remarkably different from those that occasioned the invalidation of the Texas statute in [*Whole Woman's Health*]." *June Medical Services, LLC v. Gee*, 905 F.3d 787, 791 (5th Cir. 2018). The majority sought to depict the impact on Louisiana abortion providers and their patients as insubstantial, particularly as

[27] American College of Obstetricians and Gynecologists (ACOG), Comm. on Health Care for Underserved Women, Committee Opinion No. 613, Increasing Access to Abortion, 124 Obstetrics & Gynecology 1060, 1062 (2014) (reaff'd 2019) (explaining that the College opposes medically unnecessary admitting privileges requirements); ACOG, College Statement of Policy, Abortion Policy 2 (2014) (opposing "unnecessary regulations that limit or delay access to care"), http://bit.ly/2q2iAyu (last visited Nov. 30, 2019); *see also* ACOG, Statement of Policy, Legislative Interference with Patient Care, Medical Decisions, and the Patient-Physician Relationship (2013) (reaff'd 2016), http://bit.ly/34AC10B (last visited Nov. 30, 2019).

compared to what had occurred in Texas following enactment of that state's identical law. In dissent, Judge Higginbotham sharply criticized the majority for "conducting a second trial of the facts" rather than deferring to the district court as it should have. *Id*. at 816.

E. This Court Should Reject Louisiana's Attempt To Circumvent Clear Precedent by Recasting the Facts To Engineer Its Desired Outcome

Amici are acutely aware that achieving recognition of a fundamental right by this Court rarely ends the battle for full enjoyment of that right, as those with opposing views will often continue to press their side with the hope that a new day and, perhaps, a new Court, might bring about a different result. This Court's 2015 decision in *Obergefell*, affirming marriage equality nationwide (in which amici were involved) and subsequent attempts by states to circumvent that decision, provide a clear example.

Obergefell held that same-sex couples have a fundamental right both to marry and to all of the "government rights, benefits, and responsibilities" tethered to marriage under state and federal law. 135 S. Ct. at 2601. Yet barely two weeks later, two married same-sex couples—Marisa and Terrah Pavan, and Leigh and Jana Jacobs—were forced to file a lawsuit challenging Arkansas's refusal to recognize both spouses as parents on their children's birth certificates, notwithstanding an Arkansas law requiring both a child's birth mother and her "husband" to be listed on the birth certificate. *See Pavan v. Smith, M.D., MPH*, No. CV2015003153, 2015 WL 12990015 (Ark. Cir. Dec. 01, 2015). The trial court ordered the state to comply with *Obergefell* and to list both spouses on the birth certificates, recognizing that failing to do so would deny married same-sex couples one of the most important benefits of marriage. *Id.* at *7–*8.

On appeal, a divided Arkansas Supreme Court reversed. Despite *Obergefell*'s clear protection of the "constellation of benefits that the Stat[e] ha[s] linked to marriage," the court claimed that *Obergefell* somehow "did not address" the Arkansas birth certificate framework. *Smith v. Pavan*, 505 S.W.3d 169, 176 (Ark. 2016), *cert. granted, judgment rev'd*, 137 S. Ct. 2075 (2017). In the Arkansas Supreme Court's view, the birth certificate law "center[ed] on the relationship of the biological mother and the biological father to the child, not on the marital relationship of husband and wife." 505 S.W.3d at 178. Notwithstanding the fact that married different-sex parents are deemed legal parents regardless of biology, the majority found that *Obergefell* did not control.

In *Pavan v. Smith*, 137 S. Ct. 2075 (2017), this Court rejected that claim in short order, in a summary reversal. It reiterated *Obergefell*'s rule that marriage must be available to same-sex couples "on the same terms and conditions" applied to different-sex couples. *Id.* at 2078. This Court rejected the state court's disregard for *Obergefell*'s plain text, noting that "birth and death certificates" were among the "rights, benefits, and responsibilities" of marriage expressly enumerated in *Obergefell. Id*. Despite the Arkansas court's attempt to reframe the birth certificate law as "simply a device for recording biological parentage" unrelated to any state interest in marriage, this Court held that because husbands automatically appeared on birth certificates without regard to biological connection, the same rule must apply to a birth mother's female spouse. *Id.* at 2078–79.

States hostile to abortion are employing the same tactic now, and this Court should follow its own example set in *Pavan*.

In this case, faced with the need to get out from under the binding precedent of *Whole Woman's Health*, Louisiana tried, and is still trying, to argue that this case is

factually and legally distinct. It claims that the benefits are different because the law purportedly serves a "credentialing" function, even if the state is unable to demonstrate any health or safety benefits for patients. Brief of Louisiana in Opposition to Certiorari, *June Medical Services L.L.C. v. Gee*, —U.S.— (No. 18-1823), 2019 WL 3338150, at *12. The Fifth Circuit agreed that a "previously unaddressed credentialing function" is different enough to salvage a law in the absence of rigorous scientific evidence that it protects health, *June Med. Servs. L.L.C.*, 905 F.3d at 806—even though this Court found in *Whole Woman's Health* that "the admitting-privileges requirement does not serve any relevant credentialing function." 136 S. Ct. at 2313. What the state is trying to do, and what the Fifth Circuit endorsed, is reminiscent of the Arkansas Supreme Court in *Pavan* holding that recording biological parentage differs sufficiently from a benefit of marriage to escape *Obergefell*'s binding precedent. *Pavan*, 505 S.W.3d at 178.

The parallels between the cases continue. Just as the Arkansas court declined even to acknowledge that the state listed a birth mother's husband on the birth certificate regardless of whether he had any biological connection to the child, the Fifth Circuit ignored large swaths of the record that showed clearly that *Whole Woman's Health* should control. It refused to rule on the actual facts in the record about how many doctors could not get admitting privileges and how many clinics therefore would have to close because of the law.

Pavan and *June Medical* are both examples of lower courts seeking to avoid the clear command of this Court's precedent. The Arkansas high court held that the birth certificate issue was factually and legally distinct from *Obergefell's* clear holding, when in reality, *Obergefell* left no possible grounds for distinguishing between married couples. The only way around fully binding

precedent was for the Arkansas court to assert a new, pretextual interest, characterizing the birth certificate statutes as serving a biological registration function, and ignoring the state's clear discrimination between same-sex and different-sex married parents. That is exactly what the Fifth Circuit did below, holding that a "previously unaddressed credentialing function" sufficed to get around the lack of actual, evidence-based health benefits, *June Med. Servs. L.L.C*, 905 F.3d at 806, and ignoring or actively rejecting every fact about burdens in the record that made the case indistinguishable from *Whole Woman's Health*.

This Court has recognized that the right to reproductive autonomy is fundamental and plays an essential role in securing women's ability to participate as equal members of our society. In order to fulfill its critical constitutional function of safeguarding fundamental liberties, this Court must reaffirm its precedents requiring courts to subject health-based rationales for regulating abortion providers to meaningful review. That was a core holding of this Court a mere three years ago, and it mandates reversal of the decision below.

CONCLUSION

The Court should reverse the decision below.

Respectfully submitted.

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APPENDIX

APPENDIX

List of Amici

Athlete Ally

Bay Area Lawyers for Individual Freedom (BALIF)

Equality California

Equality North Carolina

Evan Wolfson, Founder of Freedom to Marry

Family Equality

FreeState Justice

GLBTQ Legal Advocates & Defenders

GLMA: Health Professionals Advancing LGBTQ Equality

Human Rights Campaign

Lambda Legal Defense and Education Fund, Inc.

Mazzoni Center

Modern Military Association of America (MMAA)

Movement Advancement Project (MAP)

National Center for Lesbian Rights

National Center for Transgender Equality

National Equality Action Team

National LGBTQ Task Force

Silver State Equality-Nevada

The National LGBT Bar Association

Transgender Law Center

Transgender Legal Defense and Education Fund

Whitman-Walker Health