Nos. 18-1323, 18-1460

In the Supreme Court of the United States

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

REBEKAH GEE, SECRETARY, LOUISIANA DEPARTMENT OF HEALTH AND HOSPITALS,
Respondent–Cross-Petitioner.

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

BRIEF OF *AMICI CURIAE* REPRODUCTIVE JUSTICE SCHOLARS SUPPORTING PETITIONERS–CROSS-RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

The issue in this case is whether the Fifth Circuit's decision upholding a Louisiana law that requires physicians who perform abortions to have admitting privileges at a local hospital conflicts with this Court's binding precedent in *Whole Woman's Health v. Hellerstedt*. *Amici* are law professors who are scholars in the field of reproductive rights and justice. They have a shared interest in identifying the proper standard of review of regulations that burden the constitutional right to an abortion, recognizing that the abortion right is essential to a woman's ability to control the course that her life will take. Notably, as reproductive *justice* scholars, *Amici* appreciate that abortion access is a key element of racial justice, and they recognize that the denial of abortion access is a form of racial subordination. This brief sets forth both the *Amici*'s considered understanding of the constitutional framework governing review of abortion regulations, as established by the decisions of this Court, as well as *Amici's* understanding of the relationship between the right to an abortion and racial justice.

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[1] Pursuant to Supreme Court Rule 37.3(a), Respondent Rebekah Gee has provided blanket consent to the filing of *amicus curiae* briefs. *Amici* appear in their individual capacities; institutional affiliations are listed here for identification purposes only. All parties consent to the filing of this brief. No counsel for a party authored this brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of this brief.

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SUMMARY OF ARGUMENT

This case considers the constitutionality of Louisiana Revised Statute § 40:1061.10 ("Act 620"), which places undue burdens on women—and particularly black women—seeking abortion care in Louisiana. This Court's recent ruling in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) affirmed and clarified the application of the undue burden standard in cases that address a woman's fundamental right to access abortion: if the benefits of a law regulating the right to abortion do not outweigh the burdens the law imposes, the burden is undue and the law cannot stand.

Black women in Louisiana disproportionately live under extreme circumstances of disadvantage. They experience poverty at significantly higher rates than white women. They experience intimate partner violence and reproductive coercion at higher rates than women of other races. They have high rates of un-insurance, and many do not receive information about sexual and reproductive health in their schools. The combination of these circumstances makes access to and use of reliable contraception difficult, if not, at times, impossible. Women living in Louisiana, including black women, experience unanticipated pregnancies at higher rates than women in other parts of the country. These experiences are the legacy and continuation of a history in which black women have been subject to all manner of subjugation and reproductive control, including, among other things, forced sterilization, forced pregnancy, and forced separation of parents from their children.

This past remains deeply present in Louisiana, and Act 620 is yet another oppressive constraint on black women's ability to set the course of their reproductive futures. By placing unnecessary restrictions on abortion providers, and thereby closing abortion clinics throughout the state, Act 620 will make it significantly more difficult for black women to access abortion care. The dearth of clinics will impose greater driving distances, longer wait times, and higher costs on black women seeking to exercise their fundamental right to bodily autonomy and reproductive agency.

Advocates for racial justice have long understood the devastation caused by impediments to abortion care like Act 620, and they have recognized the critical importance of abortion access to black women and their communities. The ability to access abortion is a means of ensuring black women's agency and autonomy; it is a means of steering one's own life amidst a past and present rife with threats to black women's health and well-being. This is, in part, why black women created the reproductive justice framework, which seeks to protect and further the ability and rights of women to have or not have children, and to parent their children with dignity. The effectuation of these rights is fundamental to ensuring that black women can control their own lives, and is therefore essential to obtaining racial justice. Reproductive justice, then, *is* racial justice.

Act 620 operates directly contrary to the aims of reproductive justice by unnecessarily and dangerously hindering black women's ability to obtain abortion care. In doing so, the Act coerces black women into

pregnancy and parenthood. It also subjects black women to a host of health risks associated with pregnancy and childbirth—risks that are higher in Louisiana than in any other state in the country and higher for black women than for their white counterparts. Meanwhile, Act 620 offers no countervailing benefits. Its burdens, which are substantial and wide-ranging, are undue. The Fifth Circuit should be reversed, and the law should be struck down.

ARGUMENT

I. *WHOLE WOMAN'S HEALTH* ESTABLISHED THAT THE UNDUE BURDEN STANDARD REQUIRES REVIEWING COURTS TO WEIGH THE BENEFITS OF AN ABORTION REGULATION AGAINST THE BURDENS OF THE SAME.

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, a majority of this Court reaffirmed the central holding of *Roe v. Wade*, stating that a woman[2] has a right "to choose to have an

[2] Although this brief uses the words "woman" and "women" to refer to those who can become pregnant and who, consequently, may require abortion care, it is important to note that there are other categories of people with the capacity for pregnancy.

To explain, a person whose doctor identified them as "female" at birth due to their genital characteristics and who continues to identify as a woman later in life is considered a cisgender woman. *LGBTQ+ Definitions*, Trans Student Educ. Res., https://www.transstudent.org/definitions (last visited Nov. 25, 2019). In contrast, a person whose doctor identified them as "female" at birth, but who later identifies as another gender, would

abortion before viability and to obtain it without undue interference from the State." 505 U.S. 833, 846 (1992); *Roe v. Wade*, 410 U.S. 113 (1973). *Casey* explained that a regulation that imposes an "undue burden" on a woman's ability to obtain a pre-viability abortion violates her constitutionally protected right. *Casey*, 505 U.S. at 874. Moreover, a "finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.* at 877.

Three years ago, in *Whole Woman's Health v. Hellerstedt*, this Court clarified that the undue burden test was a rigorous standard of review, overturning a Fifth Circuit decision that had wrongly equated the undue burden standard with rational basis review. 136 S. Ct. 2292, 2309 (2016). This Court made clear that the undue burden standard is a balancing test, requiring courts to weigh the burdens that a regulation imposes on the abortion right against the benefits that the regulation confers. *Id.* In analyzing the benefits of

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be considered a transgender male or a gender nonconforming person. *Id.* Because transgender males and some gender nonconforming persons have uteruses, they—like cisgender women—can become pregnant and might require abortion care.

Thus, women are not the only people who have the capacity for pregnancy. Nevertheless, in order to comport with this Court's jurisprudence, this brief uses the language of "woman" and "women" when speaking about those who can become pregnant. That said, it is the hope of the *Amici* that, in the near future, the nation's laws, policies, and jurisprudence will reflect the reality that gender is not merely a binary between "man" and "woman," and that abortion regulations impact not just cisgender women, but rather all people who can become pregnant.

a regulation, courts must consider the evidence in the record, including the methodology used to produce the evidence. *Id.* at 2310, 2317. If the benefits of a law fail to outweigh its burdens, then the regulation must be struck down as an unconstitutional infringement of the abortion right. *Id.* at 2309. In essence, regulations that "do little or nothing for health, but rather strew impediments to abortion," cannot stand. *Id.* at 2321 (Ginsburg, J., concurring) (quoting *Planned Parenthood of Wis. v. Schimel*, 806 F.3d 908, 921 (7th Cir. 2015)).

II. WHEN ASSESSING A REGULATION'S BENEFITS AND BURDENS, COURTS MUST CONSIDER ITS REAL-WORLD IMPACTS.

This Court's precedent makes clear that courts must consider the real-world effects of a regulation when evaluating its benefits and burdens. *See Casey*, 505 U.S. at 895 (noting that a spousal consent provision would "operate as a substantial obstacle" in the lives of the married women affected by it). If a regulation will function to hinder access to abortion for a group of women and, in so doing, exacerbate the group's vulnerability, then the regulation runs afoul of the Constitution. In *Casey,* the Court engaged in this analysis when it considered a spousal notification requirement. It struck down the requirement on the basis that it would have the practical effect of hindering access to abortion for a vulnerable group of women—those who were married to abusive husbands. *See id.* at 893-94.

When analyzing the burdens that the spousal notification requirement would impose, the Court

identified the relevant class of women as "married women seeking abortions who do not wish to notify their husbands of their intentions and who do not qualify for one of the statutory exceptions to the notice requirement." *Id.* at 895. The Court found that the spousal notification requirement would impose an undue burden on the abortion rights of women in this class because it would impede them from obtaining abortions, as notifying their spouse could result in physical or emotional abuse. *See id.* at 893-894. Citing the district court's detailed statistical findings about the requirement's impacts on this group of women, and engaging in a record-specific inquiry, the Court struck down the spousal notification requirement because it imposed a substantial obstacle to abortion access for this already vulnerable population. *See id.* at 891-894, 901. Indeed, the Court recognized the need to be aware of social realities when evaluating the impact of abortion regulations. *See id.* at 894 ("We must not blind ourselves to the fact that the significant number of women who fear for their safety and the safety of their children are likely to be deterred from procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases.").

Following this line of reasoning, this Court in *Whole Woman's Health* struck down the admitting privileges requirement at issue there, emphasizing the barrier it posed to "those [women] for whom [the provision] is an actual rather than an irrelevant restriction." *Whole Woman's Health*, 136 S. Ct. at 2320 (citing *Casey*, 505 U.S. at 895) (alteration in original). This Court focused on the "particularly high barrier for poor, rural, or disadvantaged women" that the requirement posed,

noting that "women of reproductive age living significant distances from an abortion provider" would now be forced to travel long distances to receive abortion care at clinics overwhelmed by unprecedented demand. *Id.* at 2302, 2313. Because the practical effect of the admitting privileges requirement was to burden the abortion rights of a marginalized population without providing a countervailing health benefit, this Court found that the requirement was an unconstitutional undue burden. *Id.* at 2313, 2320.

Thus, when reviewing Act 620, the regulation at issue in this case, precedent establishes that this Court must consider the real-world impacts of the law. If any health benefits delivered by Act 620 are outweighed by the burdens that it, in practice, will impose on women's access to abortion, then the Court's precedents demand that Act 620 be struck down as unconstitutional.

III. ACT 620 IS UNCONSTITUTIONAL BECAUSE NOT ONLY WILL IT PRODUCE NO HEALTH BENEFITS, BUT IT ALSO WILL IMPOSE SIGNIFICANT BURDENS ON A VULNERABLE GROUP OF MARGINALIZED WOMEN—BLACK WOMEN.

As a group, women reflect incredible heterogeneity. Women have different races, socioeconomic statuses, sexualities, religions, relationships to spousal violence, etc. *See* Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 Stan. L. Rev. 1241, 1244-45 (1991). The impact that an abortion regulation will have on a woman will depend on the social conditions in which

she is living. While the social conditions in which some women live will result in an abortion regulation having little practical impact on their ability to access an abortion, the social conditions in which other women live will result in the same abortion regulation rendering abortion inaccessible to them. This Court recognized as much in its analysis of the spousal notification requirement in *Casey*. There, the Court appreciated that while the requirement would have little impact on women living in some social conditions (i.e., women who were unmarried, women whose husbands were not abusive), that same requirement would render abortion much more inaccessible to women living in other social conditions (i.e., women who were married to abusive husbands). *Casey*, 505 U.S. at 895.

In the instant case, Act 620 will particularly burden women living in some social conditions: those who are poor. The reduction of abortion services caused by Act 620 will increase the costs associated with accessing an abortion—costs associated with the longer distances that women will have to travel in order to obtain abortion care, the childcare services that they will have to purchase when they are away from home obtaining abortion care, and the wages that they will have to forfeit when taking time off of work to obtain abortion care. *See Whole Woman's Health*, 136 S. Ct. at 2313 ("We recognize that increased driving distances do not always constitute an 'undue burden.' But here, those increases are but one additional burden, which, when taken together with others that the closings brought about, and when viewed in light of the virtual absence of any health benefit, lead us to conclude that the

record adequately supports the District Court's 'undue burden' conclusion." (citations omitted)). While affluent women may be able to absorb these additional costs, poor women will be unable to do the same.

Crucially, because there is a close relationship between socioeconomic status and race in Louisiana—with black people disproportionately living in poverty in the state[3]—a burden on *poor* women is a burden on *black* women. Tragically, Act 620 will render abortion inaccessible to a large number of black women struggling under the weight of indigence in Louisiana. Accordingly, Act 620 is unconstitutional because it will impose nearly insurmountable burdens on black women's abortion access while providing no countervailing benefits.

A. Black Women Disproportionately Utilize Abortion Services in Louisiana.

For a host of reasons, black women make up a disproportionate number of the women who obtain abortions in Louisiana. In 2018, 8,097 abortions were

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[3] While black people made up only a third of the population of Louisiana in 2017, they constituted 57% of the people in poverty. *Poverty Rate by Race/Ethnicity*, Kaiser Family Found., https://www.kff.org/other/state-indicator/poverty-rate-by-raceethnicity (last visited Nov. 25, 2019) (showing that of the 792,000 people in poverty in Louisiana in 2017, 448,600 of them—or 57%—were black); *QuickFacts: Louisiana*, U.S. Census Bureau, https://www.census.gov/quickfacts/fact/table/LA/PST045218 (last visited Nov. 25, 2019) (reporting that black people comprised 32.7% of the population in Louisiana in 2018).

performed in the state.[4] *State Registrar and Vital Records: Induced Termination of Pregnancy Data*, La. Dep't of Health, http://ldh.la.gov/index.cfm/page/709 (last visited Nov. 25, 2019). Although black people constitute only a third of Louisiana's population,[5] black women made up 61% of abortion patients in 2018. *Induced Terminations of Pregnancy by Weeks of Gestation, Race, Age, and Marital Status Reported Occurring in Louisiana, 2018*, La. Dep't of Health, http://ldh.la.gov/assets/oph/Center-RS/vitalrec/leers/ITOP/ITOP_Reports/Ap18_T21.pdf (last visited Nov. 25, 2019). Thus, any regulation that makes it difficult for *women* to access abortion in Louisiana makes it difficult for *black women* to access abortion in Louisiana, as black women are overrepresented among those who require abortion care in the state.

B. Black Women Disproportionately Use Abortion Services in Louisiana Because They are Extremely Disadvantaged.

Black women in Louisiana are disproportionately reliant on abortion services because they are incredibly vulnerable.

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[4] This number fell from 10,322 in 2014. *State Registrar and Vital Records: Induced Termination of Pregnancy Data*, La. Dep't of Health, http://ldh.la.gov/index.cfm/page/709 (last visited Nov. 25, 2019).

[5] *Louisiana Population 2019*, World Population Rev., http://worldpopulationreview.com/states/louisiana-population/ (last visited Nov. 25, 2019).

1. Black Women Are Overrepresented Among Louisiana's Poor.

Black women disproportionately bear the burdens of poverty in Louisiana. Specifically, just over thirty-one percent of Black women live at or below the poverty level, compared to twenty percent of women of all races. Asha DuMonthier et al., *The Status of Black Women in the United States* 66, Inst. for Women's Policy Research (2017). Black women's median annual earnings in Louisiana are $25,000, which, tied with Mississippi, is the lowest in all states. *Id*. at 23. While women obtain abortions for numerous and often interrelated reasons, one reason that women often cite for terminating a pregnancy is that they cannot afford to raise a child. Lawrence B. Finer et al., *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 Persp. on Sexual & Reprod. Health 110, 112, 115 (2005); John S. Santelli et al., *An Exploration of the Dimensions of Pregnancy Intentions Among Women Choosing to Terminate Pregnancy or to Initiate Prenatal Care in New Orleans, Louisiana*, 96 Am. J. Pub. Health 2008, 2011-12, 2014 (2006). Thus, black women in Louisiana turn to abortion care more frequently than women of other racial groups in the state because the disproportionate indigence that they bear makes them incapable of also bearing the cost of having and raising a child.

2. Black Women Are More Likely Than Other Racial Groups to Encounter Difficulties Accessing Safe and Effective Contraception.

As a general matter, most women who have abortions do so to terminate an unintended pregnancy. *See* Finer, *supra*, at 110. Notably, researchers have documented that black women experience unintended pregnancies at higher rates than white women. *See* Susan A. Cohen, *Abortion and Women of Color: The Bigger Picture*, 11 Guttmacher Pol'y Rev. 2, 3 (2008). Black women's higher rate of unintended pregnancy is due, in significant part, to their encountering barriers to obtaining safe, effective contraception. *Id.* at 2-4. Factors that make safe, effective contraception difficult for black women to acquire include the scarcity of geographically accessible reproductive healthcare, the financial inaccessibility of more reliable, but "usually more expensive," prescription contraceptives, and a basic unavailability of general medical care. *See id.* at 4. Significantly, almost twenty-eight percent of black women in Louisiana do not have health insurance. *See* DuMonthier, *supra*, at 67. Being without health insurance, of course, makes accessing effective contraception much more difficult—thereby increasing the likelihood of an unintended pregnancy and the consequent need to turn to abortion services.

Black women's higher rates of unintended pregnancy may also be attributed to inadequate information regarding birth control and pregnancy prevention. Generally speaking, Black and Hispanic women are less likely than white women to have

correct information about prescription contraceptives, and more likely to have negative views of hormonal contraception.[6] Theresa Y. Kim et al., *Racial/Ethnic Differences in Unintended Pregnancy: Evidence From a National Sample of U.S. Women*, 50 Am. J. Preventative Med. 427, 427 (2016).

In one study of the perceptions of birth control held by low-income black women in New Orleans, the women in the study tended to view contraceptives as unpredictable, ineffective, and replete with harmful side effects. Carl Kendall et al., *Understanding Pregnancy in a Population of Inner-City Women in New Orleans: Results of Qualitative Research*, 60 Soc. Sci. & Med. 297, 308 (2005). This study's findings may be partly attributed to Louisiana public schools' failure to provide comprehensive reproductive health education. *See* La. Stat. Ann. § 17:281 (1993). Because reproductive health education instruction in Louisiana public schools must "emphasize abstinence" as a "way to avoid unwanted pregnancy," black women and girls who are educated in public schools in the state may not

[6] This is not to suggest that these negative views of contraception are unfounded. Rather, given the racist history of birth control in the United States, these views reflect a reasonable mistrust of the medical establishment. Dorothy Roberts, *Killing the Black Body: Race, Reproduction, and the Meaning of Liberty* 56 (2d ed. 2017) ("[The spread of contraceptives to American women hinged partly on its appeal to eugenicists bent on curtailing the birthrates of the 'unfit,' including Negroes. For several decades, peaking in the 1970s, government-sponsored family-planning programs not only encouraged Black women to use birth control but coerced them into being sterilized."). The racist history of contraceptive policies in the U.S. evidences just another way in which black women's reproductive autonomy has been violated historically.

get accurate information about contraception and pregnancy prevention from their schools. *See id.* § 17:281(A)(4)(b). The lack of comprehensive reproductive health education in the state's public schools may also help to explain why Louisiana's rates of teenage pregnancies and teenage births are some of the highest in the nation. *See Sexual Health Education*, Lift Louisiana, https://liftlouisiana.org/issues/sexual-health-education (last visited Nov. 25, 2019).

3. Black Women Are Less Likely Than Other Groups of Women to Be Able to Control the Conditions Under Which They Have Sex.

Because black women disproportionately live in poverty, they experience intimate partner violence at higher rates than women of other races.[7] *See* DuMonthier, *supra*, at xix. Further, black women are also more likely than women of other races to be victims of rape during their lifetimes. *See id.* at 120-21. Black women also experience reproductive coercion—where "partners actively try to impregnate their partner against their wishes, interfere with contraceptive use," pressure their partner not to use contraception, or interfere with condom use—at higher rates than white women. Charvonne N. Holliday et al., *Racial Differences in Pregnancy Intention, Reproductive Coercion, and Partner Violence Among Family*

[7] When controlling for income levels, "racial differences in rates of partner abuse frequently disappear, or become less pronounced." Carolyn M. West, *Black Women and Intimate Partner Violence: New Directions for Research*, 19 J. Interpersonal Violence 1487, 1487 (2004).

Planning Clients: A Qualitative Exploration, 28 Women's Health Issues 205, 206 (2018). The higher rate of intimate partner violence, sexual assault, and reproductive coercion among black women—coupled with their lack of safe and effective contraception—contributes to higher rates of unintended pregnancies, and therefore higher rates of abortion, among black women.

IV. BLACK WOMEN IN LOUISIANA DISPROPORTIONATELY TURN TO ABORTION BECAUSE THEY ARE TRYING TO EXACT A MODICUM OF CONTROL OVER THEIR BODIES AND LIVES.

As the previous section makes clear, black women in Louisiana are living within breathtakingly constrained social conditions. They are poor. They are uninsured. They have little to no access to contraception. They face violence in a multiplicity of forms. For black women in Louisiana, then, abortion is a tool that helps them navigate poverty, violence, and vulnerability.

Despite recent suggestions, the abortion rate among black women is not a measure of the success that eugenicists have had among Louisiana's black population. *See Box v. Planned Parenthood of Ind. and Ky.*, 139 S. Ct. 1780, 1790 (2019) (Thomas, J., concurring). Rather, the abortion rate among black women reflects the power of the forces that foist unintended pregnancy upon black women. And, importantly, the abortion rate reflects black women's defiance of those forces. It is a measure of black women's insistence upon carrying a pregnancy to term

only when they believe that they are ready for their lives to take that course. *See Gonzales v. Carhart*, 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting) ("[L]egal challenges to undue restrictions on abortion procedures … center on a woman's autonomy to determine her life course . . . .").

To suggest, as some have, that abortion in Louisiana today is in any way reminiscent of the eugenic practices of yesteryear is to disregard the concept of agency. Eugenics was about coercion; abortion in Louisiana in 2019 is about autonomy. Black women are autonomously choosing a form of healthcare that helps them negotiate the profound constraints that limit the fullness of their lives.

Indeed, *denying* abortion access to black women in Louisiana is most reminiscent of the eugenic practices of yesteryear. Abortion restrictions and eugenic sterilization "both seek to control reproductive decision making for repressive political ends." Dorothy Roberts, *Dorothy Roberts argues that Justice Clarence Thomas's* Box v. Planned Parenthood *concurrence distorts history*, U. Penn. Law (June 6, 2019), https://www.law.upenn.edu/live/news/9138-dorothy-roberts-argues-that-justice-clarence. As eugenicists sought to dictate the direction of women's reproductive capacities, proponents of abortion restrictions like Act 620 seek to dictate the direction of women's reproductive capacities. We will have moved away from our eugenic past when *women* themselves can determine what their bodies will and will not do. We will have triumphed over our eugenic history when black women *themselves* are the ones deciding whether

or not they will bring a child into this world. *Cf. Utah v. Strieff*, 136 S. Ct. 2056, 2070 (2016) (Sotomayor, J. , dissenting) ("[I]t is no secret that people of color are disproportionate victims of this type of scrutiny … [that] says that your body is subject to invasion while courts excuse the violation of your rights."). Act 620, and abortion regulations like it, allows governments and policymakers to determine women's reproductive futures. Like the horrific eugenic practices of the early twentieth century, these regulations stand in the way of women's self-determination.

It is also worth noting that the claim that abortion among black women is part of a genocidal plot against black people has reared its head—and been rejected—time and again over the years. *See* Kathryn Joyce, *Abortion as "Black Genocide": An Old Scare Tactic Re-Emerges* (Apr. 29, 2010), Political Research Assocs., https://www.politicalresearch.org/2010/04/29/abortion-as-black-genocide-an-old-scare-tactic-re-emerges. Despite these historically inaccurate and intentionally misleading claims, however, black scholars and activists devoted to racial justice have been unwavering in their support for abortion rights and access. Their support is due to their recognition of the physical and emotional burdens placed upon black women in a world in which black empowerment is linked to black reproduction. *See Our History*, SisterSong, Trust Black Women, https://trustblackwomen.org/our-roots (denying that "the oppression of black people should relegate black women to breeding machines with no right to make personal choices about family creation") (last visited Nov. 25, 2019).

Indeed, black feminists have always rejected the claim that abortion access should be limited in order to promote black liberation because they know that making abortion unavailable, for any reason, would inevitably result in black women resorting to dangerous measures, like unsafe abortion practices, in order to regain some control over their fertility. *See* Bev Cole, *Black Women and the Motherhood Myth*, *in* Linda Greenhouse & Reva B. Siegel, *Before Roe v. Wade: Voices that Shaped the Abortion Debate Before the Supreme Court's Ruling* 53 (2010). As one black feminist wrote, the "argument against legal, safe abortion is, in itself, genocidal, killing off Black women in the name of the fetus." *Id.* In the eyes of many black people devoted to racial justice, the claim that abortion is black genocide is unconvincing, as the "prospect of genocide lay on both sides of the equation. If the availability of abortion is genocidal because black fetuses will be killed, the unavailability of abortion also threatens genocide because of the lengths to which desperate black women will go to terminate an unwanted pregnancy." Khiara M. Bridges, *Elision and Erasure: Race, Class, and Gender in* Harris v. McRae, *in Reproductive Rights and Justice Stories* 118 (Melissa Murray et al. eds., 2019).

In response to the recent revival of the claim that abortion is black genocide, black feminists have been compelled to remind the world, yet again, that the assertion is simply a "misogynistic attack to shame-and-blame black women who choose abortion." SisterSong, Trust Black Women, *supra*. These black feminists deny that black women have a "racial obligation to have more babies." *Id.* They insist that

black women should only have children when their "individual circumstances" counsel that childbearing is appropriate. *Id.* Indeed, these black feminists remind us that we should trust black women to do what is best for themselves, their families, and their communities. *See id*.

Feminists of color have long recognized the importance of black women being able to decide whether or not they will become mothers. They have understood that there are forces that would compel black women into motherhood—like the forces that assert that abortion is black genocide. *See id*. Feminists of color have also understood that there are forces that would deny black women motherhood—like the forces that subjected tens of thousands of black women to forced sterilizations from the 1950s to the 1980s. *See* Khiara M. Bridges, *White Privilege and White Disadvantage,* 105 Va. L. Rev. 449, 470-72 (2019). Because feminists of color have realized that controlling black women's reproduction has been a tool of racial oppression, they have identified black women's ability to control their *own* reproduction as a key element of racial justice. Because the ability to terminate a pregnancy enables black women to control their reproduction, feminists of color consider abortion access to be essential to racial justice. For this reason, abortion access is one of the core concerns of the reproductive justice framework—the brainchild of black feminists.

V. REPRODUCTIVE JUSTICE UNDERSTANDS THE CENTRALITY OF ABORTION ACCESS TO RACIAL JUSTICE.

In the 1990s, feminists of color created the reproductive justice framework as a response to the almost exclusive attention that the largest and most powerful reproductive rights organizations had given to abortion rights. *See* Zakiya Luna & Kristin Luker, *Reproductive Justice*, 9 Ann. Rev. L. & Soc. Sci. 327, 328 (2013); Asian Cmtys. for Reprod. Justice, *A New Vision for Advancing Our Movement for Reproductive Health, Reproductive Rights and Reproductive Justice* 5 (2005), https://forwardtogether.org/wp-content/uploads/2017/12/ACRJ-A-New-Vision.pdf; *see generally* Loretta J. Ross & Rickie Solinger, *Reproductive Justice: An Introduction* (2017). The black women who were the architects of the reproductive justice framework recognized that abortion rights were essential to racial justice and reproductive freedom. Nevertheless, they felt that affluent white activists' narrow focus on abortion rights led reproductive rights organizations to ignore or deprioritize *other* issues that impacted women's reproductive lives and health. Luna & Luker, *supra*, at 333, 335. Moreover, the issues that fell under the radar at these organizations tended to be the issues that did not affect affluent white women. *See generally* Jael Silliman et al., *Undivided Rights: Women of Color Organize for Reproductive Justice* (2004). Indeed, these unnoticed or disregarded issues tended to be those that affected women of color—especially poor women of color. *See id.* While the creators of the reproductive justice framework recognized that abortion rights were crucial, they also

recognized that the legal right to abortion did not represent the full universe of concerns that women faced with respect to their reproductive lives and health.

Importantly, the feminists of color who generated the reproductive justice framework understood that the state's punitive regulation of black women's reproduction—through laws and policies that prevent them from having children, coerce them into having children, or deny them the ability to raise the children that they have—was both a cause and an effect of racial subordination. *See generally* Dorothy Roberts, *Killing the Black Body: Race, Reproduction, and the Meaning of Liberty* (2d ed. 2017). Thus, the founders of the reproductive justice framework recognized the inextricable relationship between racial oppression and reproductive oppression.

1. The Three Prongs of Reproductive Justice.

The reproductive justice framework has three prongs. *See* Luna & Luker, *supra*, at 328. Importantly, all three prongs of the framework are equally central to reproductive justice.

The first prong consists of the right *not* to have a child. *Id.* This right includes the right to prevent pregnancy through contraception as well as the right to access an abortion if one becomes pregnant. This, of course, is a right that the Court has long recognized. *See Casey*, 505 U.S. at 877 (stating that the woman herself has "the right to make the ultimate decision" of whether or not to have a child).

The second prong consists of the right *to* have a child. *See* Luna & Luker, *supra*, at 338. This right includes, *inter alia*, the ability to avoid forced sterilizations and the ability to be treated for medical conditions that may compromise the ability to conceive, maintain a pregnancy, or survive childbirth and the postpartum period. This also is a right that the Court has long recognized. *See Casey*, 505 U.S. at 851 ("Matters[] involving the most intimate and personal choices a person may make in a lifetime [are] choices central to personal dignity and autonomy, [and] are central to the liberty protected by the Fourteenth Amendment.").

The third and final prong consists of the right to parent a child with dignity. *See* Luna and Luker, *supra*, at 340. This right includes, *inter alia*, the ability of imprisoned people to give birth without being shackled and the ability of all people to provide their children safe, lead-free drinking water. The Court has come to recognize that the Constitution protects individuals' dignity in matters involving the family and parent-child relationships. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015) (noting that the "fundamental liberties protected by [the Due Process] Clause … extend to certain personal choices central to individual dignity and autonomy").

Reproductive justice centers all three prongs simultaneously. This is to say: the right *not* to have a child is as important to reproductive justice as the right *to* have a child and the right to parent one's child with dignity. Thus, the right to an abortion, a vital

component of the right *not* to have a child, is an essential element of reproductive justice.

Also, as described herein, feminists of color—black women—were the architects of the reproductive justice framework. Thus, black women who were committed to racial justice recognized the centrality of abortion rights to their lives and the lives of women like them. Eugenicists and other plotters of genocide have not thrust abortion rights on unwitting black women. Quite the contrary, black women have demanded abortion rights for themselves. They have made these demands because they understand that freedom—for themselves, for their families, for their communities, for their race—is impossible without the ability to control their reproductive capacities.

B. Reproductive Justice Teaches That the Appropriate Way to Reduce Abortion Rates Among Black Women Is Not to Coerce Them Into Motherhood, But Rather to Transform the Social Conditions Within Which They Live.

If society is interested in reducing abortion rates among black women, the reproductive justice framework directs us towards ways to accomplish that goal that also respect black women's right to make meaningful choices about their reproductive futures. Thus, it is a form of reproductive *injustice* to endeavor to lower abortion rates by imposing restrictions on abortion, as that tactic disregards women's agency and autonomy, with disproportionately negative impacts on black women.

If abortion rates among black women are high because they are mired in poverty, have little to no access to safe and effective contraception, and confront violence in their intimate lives, then efforts to reduce or eliminate poverty, increase the availability of contraception and reproductive healthcare generally, and protect women from interpersonal violence can effectively lower abortion rates among black women.

C. The Reproductive Justice Framework Recognizes That Coercing Black Women into Motherhood Is Particularly Cruel Given the U.S.'s High Rates of Black Maternal Death and Morbidity.

Maternal mortality is a growing crisis in the country. In the U.S., approximately two women die from pregnancy-related causes every day, with some 700 pregnant women or new mothers dying every year. *Pregnancy-related Deaths*, Ctrs. for Disease Control & Prevention (May 7, 2019), https://www.cdc.gov/vitalsigns/maternal-deaths/index.html. These numbers are remarkable because they mean that the likelihood that a woman will not survive pregnancy and childbirth is much greater in the U.S. than in the countries that the U.S. tends to consider its peers. Indeed, the maternal mortality ratio (MMR) in the U.S.—23.8 deaths per 100,000 live births—is approximately twice the MMR found in the United Kingdom and Canada. John A. Ozimek & Sarah J. Kilpatrick, *Maternal Mortality in the Twenty-First Century*, 45 Obstetrics & Gynecology Clinics N. Am. 175, 176-77 (2018).

The national MMR of 23.8 deaths for every 100,000 live births obscures the fact that not all women in the U.S. are similarly-situated when it comes to the likelihood that they will not survive pregnancy, childbirth, or the postpartum period. To be precise, the path to motherhood is significantly deadlier for nonwhite women, specifically black women, than it is for their white counterparts. To be clear, surviving pregnancy and childbirth is not a given for white women in the U.S. Indeed, women in twenty-four other industrialized nations have better chances of avoiding a pregnancy-related death than white women in the U.S. Amnesty Int'l, *Deadly Delivery: The Maternal Health Care Crisis in the USA* 1 (2010). As such, it is fair to say that, as a general matter, the U.S. is failing pregnant women. Nevertheless, the U.S. is failing black pregnant women *more severely* than it is failing nonblack pregnant women.

Black women are three to four times more likely to die from pregnancy-related causes than their white counterparts. Ctrs. for Disease Control & Prevention, *supra*. This racial disparity in maternal mortality has persisted across the generations. *See* Yale Global Health Justice P'ship, *When the State Fails: Maternal Mortality and Racial Disparity in Georgia* 16 (2018). Indeed, the gap has widened. *See* Elizabeth Howell, *Reducing Disparities in Severe Maternal Morbidity and Mortality*, 61 Clinical Obstetrics & Gynecology 387, 387 (2018). Eighty years ago, black women were twice as likely as white women to die on the path to motherhood. *See* Yale Global Health Justice P'ship, *supra*, at 16. Thirty years ago, black women were three times as likely as white women to die. *See id.*

Presently, black women are between three and four times as likely to die as their white counterparts. *See id.* This fact alone could cause some black women to conclude that it would be an unnecessary risk to their lives to carry a pregnancy to term.

Maternal morbidity is also a crisis in the nation. "Severe maternal morbidity" refers to cases in which a pregnant or recently postpartum woman faces a life-threatening diagnosis or must undergo a life-saving medical procedure—like a hysterectomy, blood transfusion, or mechanical ventilation—to avoid death. *See* Elizabeth Howell, *supra*, at 388. For every maternal death in the country, there are close to 100 cases of severe maternal morbidity. *See id.* As with maternal mortality, there are racial disparities in ratios of severe maternal morbidity. Presently, black women are twice as likely as their white counterparts to suffer severe maternal morbidity. Andreea A. Creanga et. al, *Racial and Ethnic Disparities in Severe Maternal Morbidity: A Multistate Analysis, 2008-2010*, 210 Am. J. Obstetrics & Gynecology 435.e1, 435.e6 (2014).

Importantly, maternal mortality and morbidity are not distributed across the country evenly. Some states have extremely low MMRs—like California, where only 7.3 women died from pregnancy-related causes for every 100,000 live births in 2013. Cal. Dep't of Pub. Health, Maternal, Child & Adolescent Health Div., *The California Pregnancy-Associated Mortality Review: Report from 2002 to 2007 Maternal Death Reviews 71* (2017). Meanwhile, other states have terribly high MMRs. Crucially, Louisiana has the highest MMR in

the country, with 77.6 women dying from pregnancy-related causes for every 100,000 live births. La. Dep't of Health, *Louisiana Maternal Mortality Review Report 2011-2016* 13 (2018), http://ldh.la.gov/assets/oph/Center-PHCH/Center-PH/maternal/2011-2016_MMR_Report_FINAL.pdf. Thus, while forcing gestation is always cruel, forcing gestation is particularly cruel in Louisiana, where women's chances of surviving pregnancy, childbirth, and the postpartum period are lower than anywhere else in the country.

Further, there is an additional cruelty involved in forcing *black* women to gestate a fetus in Louisiana: black women in the state are four times more likely to die than their white counterparts during pregnancy, childbirth, or shortly thereafter. *Id.* at 22. In 2011 – 2016, 68% of maternal deaths in Louisiana were suffered by black women. *Id.* at 21. Thus, Act 620 has the effect of forcing black women to continue a pregnancy in a state where women, generally—and black women, particularly—have the worst chances of surviving the event relative to their counterparts in other states.

It is important to note that most maternal deaths in the U.S. are preventable. Ctrs. for Disease Control & Prevention, *supra*. Indeed, researchers in Louisiana have concluded that almost half of the maternal deaths in the state could have been prevented. La. Dep't of Health, *supra*, at. 19. Accordingly, most maternal deaths—and most cases of severe maternal morbidity—should not be understood as an unfortunate, but unavoidable, consequence of pregnancy and childbirth. Instead, they are the result

of a societal failure to guard the health of women. *See id.* at 22 (observing that many social factors contribute to maternal deaths, including "racial bias and discrimination, … poverty, and racism in policies, practices and systems").

One group of researchers at Yale University emphasizes that, given the significant variation in MMR across states, the risk of dying or nearly dying from pregnancy-related causes "is not a 'natural' distribution," but rather the result of "state-by-state policies." Yale Global Health Justice P'ship, *supra*, at 21. Thus, Louisiana's disastrously high maternal mortality ratio is a product of the state's failure to institute policies that will conserve the lives of the women who reside there. Again, there is a callous brutality involved in the Louisiana legislature's passage of Act 620—which coerces women into childbearing—and the legislature's concomitant failure to ensure that women will survive the task that they have been coerced to perform.

CONCLUSION

For the foregoing reasons, *Amici Curiae* respectfully submit that the decision below should be reversed.

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