NO. 20-1375

IN THE
Supreme Court of the United States

KRISTINA BOX, COMMISSIONER, INDIANA STATE DEPARTMENT OF HEALTH, ET AL.,

Petitioners,

v.

PLANNED PARENTHOOD OF INDIANA AND KENTUCKY, INC.,

Respondent.

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

BRIEF OF SUSAN B. ANTHONY LIST AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

Amicus Curiae Susan B. Anthony List ("SBA" or "SBA List") is a "pro-life advocacy organization," *Susan B. Anthony List* v. *Driehaus*, 573 U.S. 149, 153 (2014) (cleaned up), dedicated to reducing and ultimately eliminating abortion by electing leaders and advocating for laws that save lives, with a special calling to promote pro-life women leaders.

SBA List is deeply involved in the process of persuading fellow citizens of the rightness of its cause and effecting change through political processes. SBA List combines politics with policy, investing heavily in voter education, to ensure that pro-life Americans know where their lawmakers stand on protecting the unborn, and in issue advocacy, advancing pro-life laws through direct lobbying and grassroots campaigns.

SBA List has a strong interest in ensuring that States continue to promote legislation that protects expectant mothers and nascent life. States can only do that if courts afford legislatures the appropriate solicitude on questions of medical and scientific judgment. Courts should not substitute subjective attitudes toward pro-life legislation for legal evaluation of it. SBA List thus has a particular interest in this Court's resolution of the appropriate standard for evaluating pro-life legislation.

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amicus and its counsel made any monetary contribution intended to fund the preparation or submission of this brief. Counsel were timely notified of this brief as required by Supreme Court Rule 37.2, and all parties consented to its filing.

SUMMARY OF THE ARGUMENT

When a majority of Justices are unable to agree on the reasoning in support of a judgment, *Marks* v. *United States* directs lower courts to apply the opinion of the Justice who "concurred in the judgment[ ] on the narrowest grounds." 430 U.S. 188, 193 (1977). But *Marks* did not define what made an opinion the "narrowest grounds," so lower courts have filled the gap. The result is multiple, divergent, circuit tests, a conflict that results in *Marks* being applied differently depending on where a lawsuit happens to be filed. Without this Court's intervention, that divide will only grow, exacerbating differences in how litigants are treated.

Nowhere is that fracture more evident than in the abortion context. Just last year, this Court issued a splintered "4-1-4 decision" that has "left significant confusion in its wake." *Hughes* v. *United States*, 138 S. Ct. 1765, 1779 (2018) (Sotomayor, J., concurring). In *June Medical Services LLC* v. *Russo*, this Court split on what standard courts apply when evaluating laws that protect expectant mothers and nascent life. 140 S. Ct. 2103 (2020). A plurality of four justices thought that courts must "independently . . . review the legislative findings upon which an abortion-related statute rests and to weigh the law's 'asserted benefits against the burdens' it imposes on abortion access." *Id.* at 2112 (quoting *Whole Woman's Health* v. *Hellerstedt*, 136 S. Ct. 2292, 2310 (2016)).

But the Chief Justice, writing for himself, concurred only in the judgment. He concluded that an abortion regulation's benefits are relevant only "in considering the threshold requirement that the State

have a 'legitimate purpose' and that the law be 'reasonably related to that goal.'" *Id.* at 2138 (Roberts, C.J., concurring in the judgment) (quoting *Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833, 878, 882 (1992) (plurality opinion)). And so "long as that showing is made," the Chief Justice wrote, "the only question for a court is whether a law has the 'effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.'" *Ibid.* (Roberts, C.J., concurring in the judgment) (quoting *Casey*, 505 U.S. at 877 (plurality opinion)). Thus, according to the Chief Justice, courts should *not* balance a pro-life law's benefits against its purported burdens. All four dissenting Justices agreed with the Chief Justice on the propriety of applying the substantial-obstacle test to pro-life laws rather than an unmoored balancing test. *Id.* at 2182 (Kavanaugh, J., dissenting) ("[F]ive Members of the Court reject the *Whole Woman's Health* cost-benefit standard.").

Attempting to apply *Marks*, the circuits have divided sharply over which opinion controls. Two circuits have squarely held that "the Chief Justice's position is the narrowest under *Marks*" and "therefore constitutes *June Medical Services'* holding and provides the governing standard." *EMW Women's Surgical Ctr.* v. *Friedlander*, 978 F.3d 418, 433 (6th Cir. 2020); *Hopkins* v. *Jegley*, 968 F.3d 912, 916 (8th Cir. 2020) (per curiam) ("Chief Justice Roberts's separate opinion in *June Medical* . . . is controlling."). That includes the Chief Justice's understanding that courts must not weigh an abortion regulation's benefits against the burdens it imposes.

Instead, when evaluating pro-life legislation, the Sixth and Eighth Circuits first determine whether the legislation is "reasonably related to a legitimate state interest." *June Med. Servs.*, 140 S. Ct. at 2135 (Roberts, C.J., concurring in the judgment) (cleaned up). Then they ensure that the legislation does not have "the effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.* at 2138 (Roberts, C.J., concurring in the judgment) (cleaned up).

The Fifth and Seventh Circuits take a different view. In *Whole Woman's Health* v. *Paxton*, the Fifth Circuit reasoned that "[i]n *June Medical*, the only common denominator between the plurality and the concurrence is their shared conclusion that the challenged Louisiana law constituted an undue burden." 972 F.3d 649, 652 (5th Cir. 2020) (*Paxton I*). That same panel reaffirmed this position later in the litigation. 978 F.3d 896, 904 (5th Cir. 2020) (*Paxton II*). The question is now being considered by the Fifth Circuit en banc. 978 F.3d 974 (5th Cir. 2020).

And in this case, the Seventh Circuit likewise split from its sister circuits and held that, although the Chief Justice's concurrence was "the narrowest basis for the judgment," the only guidance it provided was "giving stare decisis effect to *Whole Woman's Health* v. *Hellerstedt*." *Planned Parenthood of Ind. & Ky.* v. *Box*, 991 F.3d 740, 741 (7th Cir. 2021). That, the panel held, was the only "critical sliver of common ground between the plurality and the concurrence." *Id.* at 748.

The Seventh Circuit panel classified everything else in the Chief Justice's opinion—everything that the other circuits have treated as binding—as mere "dicta." *Id.* at 749. Accordingly, the panel held that "the balancing test set forth in *Whole Woman's Health* remains binding precedent." *Id.* at 752.

This divide requires the Court's attention. "The *Marks* rule is controversial," so the Court should take this opportunity to elucidate that rule and give the lower courts a unified approach on how to "determin[e] the holding of a decision when there is no majority opinion." *Ramos* v. *Louisiana*, 140 S. Ct. 1390, 1430 (2020) (Alito, J., dissenting). This would be of great benefit to litigants and lower courts within and without the context of litigation over pro-life legislation.

At the very least, this Court should clarify that the Chief Justice's concurring opinion in *June Medical* controls and that, under his approach, an abortion regulation's benefits are not balanced against its burdens. Instead, as *Casey* explained, courts must ask whether an abortion regulation has "the effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus"—and otherwise follow the "traditional rule that state and federal legislatures have wide discretion to pass legislation in areas where there is medical and scientific uncertainty." *June Med. Servs.*, 140 S. Ct. at 2136, 2138 (Roberts, C.J., concurring in the judgment) (cleaned up). The substantial-obstacle test gives appropriate deference to lawmaking bodies while constraining lower courts from striking down legislation based on subjective objections to pro-life protections.

ARGUMENT

I. There is an intractable circuit split over *Marks* and how to determine which Justice "concurred in the judgments on the narrowest grounds."

At the Founding, most courts—including this one—followed "the seriatim delivery of the judgment of each judge individually." M. Todd Henderson, *From Seriatim to Consensus and Back Again: A Theory of Dissent*, 2007 SUP. CT. REV. 283, 292 (2008). That practice changed when John Marshall became Chief Justice. Marshall recognized that the "Court would be better, perhaps more efficient at deciding cases and making law, if it spoke with one voice." *Id.* at 283. Accordingly, he established "an 'Opinion of the Court' that would speak for all Justices through a single voice." *Id.* at 313. That practice survives to this day.

But sometimes "the Justices fail to converge on a single majority rationale for a decision." Ryan C. Williams, *Questioning* Marks*: Plurality Decisions and Precedential Constraint*, 69 STAN. L. REV. 795, 798 (2017). In those situations, there is no single voice that the lower courts can heed. Initially, when this Court splintered, "only the *results* of [such] plurality decisions were considered authoritative." Mark Alan Thurmon, Note, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 DUKE L.J. 419, 420 (1992). But "[a]s plurality decisions became more common," courts began to apply different approaches. *Ibid.*

Some lower courts "simply followed plurality opinions as though they were Opinions of the Court." Thurmon, 42 DUKE L.J. at 420. Others "looked for a logical connection or implicit agreement between the plurality and concurring opinions." *Ibid.* The divergence led this Court to try and "end this confusion." *Ibid.* But the only guidance offered came from "a single sentence of a decision handed down more than four decades ago." Williams, 69 STAN. L. REV. at 798. That guidance dictates that, "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks*, 430 U.S. at 193 (cleaned up).

This rule, though "easily stated," has proven difficult to apply. *Grutter* v. *Bollinger*, 539 U.S. 306, 325 (2003) (quoting *Nichols* v. *United States*, 511 U.S. 738, 745–46 (1994)). Indeed, for nearly 45 years now, it has consistently "baffled and divided" the lower courts. *Ibid.* (cleaned up). *Marks* itself offers no theory on what, exactly, constitutes the "narrowest grounds." And despite several opportunities to do so, this Court has not set forth a definitive standard. See *Ramos*, 140 S. Ct. at 1430 (Alito, J., dissenting) ("[T]wo terms ago, we granted review in a case that implicated [*Marks*'s] meaning. But we ultimately decided the case on another ground." (citation omitted)). So the lower courts have charted their own courses on what opinion controls when this Court fractures, with predictably divergent results.

A. The lower courts have developed at least three frameworks to determine what opinion constitutes the "narrowest grounds."

The lower courts have developed at least three interpretive approaches to determine which Justices' opinion occupies the "narrowest grounds."

Under the first approach, courts consider the "narrowest grounds" to be that opinion which "is a logical subset of other, broader opinions." *King* v. *Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc). "Stated differently, *Marks* applies when, for example, the concurrence posits a narrow test to which the plurality must necessarily agree as a logical consequence of its own, broader position." *United States* v. *Epps*, 707 F.3d 337, 348 (D.C. Cir. 2013) (cleaned up). At least eight courts have, at one time, explicitly used this approach. *E.g.*, *United States* v. *Davis*, 825 F.3d 1014, 1021–22 (9th Cir. 2016) (en banc) ("A fractured Supreme Court decision should only bind the federal courts of appeal when a majority of the Justices agree upon a single underlying rationale and one opinion can reasonably be described as a logical subset of the other."); *Gibson* v. *Am. Cyanamid Co.*, 760 F.3d 600, 619 (7th Cir. 2014); *United States* v. *Duron-Caldera*, 737 F.3d 988, 994 n.4 (5th Cir. 2013); *United States* v. *Cundiff*, 555 F.3d 200, 210 (6th Cir. 2009); *United States* v. *Robison*, 505 F.3d 1208, 1221–22 (11th Cir. 2007); *United States* v. *Carrizales-Toledo*, 454 F.3d 1142, 1151 (10th Cir. 2006) ("[T]he *Marks* rule produces a determinate holding only when one opinion is a logical subset of other, broader opinions." (cleaned up)); *United States* v. *Alcan Aluminum Corp.*, 315 F.3d 179, 189 (2d Cir. 2003).

At times, however, the "logical subset" approach has not "translate[d] easily" the divergence amongst the Justices. *United States* v. *Johnson*, 467 F.3d 56, 63–64 (1st Cir. 2006). To simplify matters, some courts developed the second approach: classifying the "median" opinion as controlling. To these courts, the narrowest opinion comes from the Justice who finds him- or herself "in the middle." *Annex Books, Inc.* v. *City of Indianapolis*, 581 F.3d 460, 465 (7th Cir. 2009).

Courts that use this method believe that "whenever possible, there [should] be a single legal standard . . . that . . . when properly applied, produce[s] results with which a majority of the Justices in the case articulating the standard would agree." *Planned Parenthood of Se. Pa.* v. *Casey*, 947 F.2d 682, 693 (3d Cir. 1991), *aff'd in part, rev'd in part, and remanded*, 505 U.S. 833 (1992). And these courts believe it is the "middle-ground opinion [that] will produce results that represent a subset of the results generated by the other opinions." *United States* v. *Duvall*, 740 F.3d 604, 610 (D.C. Cir. 2013) (Kavanaugh, J., concurring in the denial of rehearing en banc). At least three courts—the Third, Seventh, and Tenth Circuits—have used this method. *Annex Books, Inc.*, 581 F.3d at 465; *Green* v. *Haskell Cnty. Bd. of Comm'rs*, 568 F.3d 784, 807 n.17 (10th Cir. 2009); *Casey*, 947 F.2d at 693 ("Where a Justice or Justices concurring in the judgment . . . articulates a legal standard which, when applied, will necessarily produce results with which a majority of the Court from that case would agree, that standard is the law of the land.").

In the third camp are those courts that consider *all* opinions—dissents as well as concurrences—"to determine each proposition where five or more Justices agree." Michael L. Eber, Comment, *When the Dissent Creates the Law: Cross-Cutting Majorities and the Prediction Model of Precedent*, 58 EMORY L.J. 207, 210 (2008). At least two courts—the First and Third Circuits—have followed this model. *United States* v. *Donovan*, 661 F.3d 174, 182 (3d Cir. 2011) ("[W]e have looked to the votes of dissenting Justices [to see] if they, combined with votes from the plurality or concurring opinions, establish a majority view on the relevant issue."); *Johnson*, 467 F.3d at 65 ("Since *Marks,* several members of the Court have indicated that whenever a decision is fragmented such that no single opinion has the support of five Justices, lower courts should examine the plurality, concurring and dissenting opinions to extract the principles that a majority has embraced."); accord *Duvall*, 740 F.3d at 609 (Kavanaugh, J., concurring in the denial of rehearing en banc) ("The point of *Marks*, however, is for lower courts to reach results with which a majority of the Supreme Court in the relevant precedent would *agree*.").

B. Even courts that have adopted the same framework differ substantially on how to apply that framework.

The lower courts' disagreement over which framework best interprets *Marks*'s edict illustrates only half the problem. Even when courts agree generally on the test to apply, differences over details abound, particularly over the test's purpose.

For instance, courts might use the same framework to interpret *Marks* but disagree over the purpose behind the rule. Does *Marks* "promote predictability in the law by ensuring lower court adherence to Supreme Court precedent[?]" *Casey*, 947 F.2d at 693. Relatedly, should courts use *Marks* to find "a single legal standard for the lower courts to apply in similar cases[?]" *EMW Women's Surgical Ctr.*, 978 F.3d at 434. Might the purpose behind the *Marks* rule instead be to "produce *results*," not rules, "with which a majority of the Court in that case necessarily would agree[?]" *Duvall*, 740 F.3d at 608 (Kavanaugh, J., concurring in the denial of rehearing en banc) (emphasis added). *Marks* definitively answers none of these questions and, after four decades, the lower courts have not coalesced around any clear solution. Rather, the longer *Marks* percolates, the more the lower courts disagree.

Worse, one disagreement begets another. Courts that agree on the framework but disagree on the purpose often reach conflicting results. The Sixth Circuit, for instance, sees *Marks* as "requir[ing] that, whenever possible, there be a single legal standard for the lower courts to apply in similar cases." *EMW Women's Surgical Ctr.*, 978 F.3d at 434. Yet "[m]any—if not most—plurality decisions involve situations in which the rationales of the various judgment-supportive opinions overlap in some respect but diverge in others." Williams, 69 STAN. L. REV. at 810. A narrow "common denominator" between the plurality and the concurrence likely will not yield a workable standard. Thus, "strict adherence to the common denominator approach" would make finding a holding nearly impossible for "many, if not most,

plurality opinions." Justin F. Marceau, *Lifting the Haze of* Baze*: Lethal Injection, The Eighth Amendment, and Plurality Opinions*, 41 ARIZ. ST. L.J. 159, 172–73 (2009). To obtain a single legal standard, then, the Sixth Circuit applies the entire rationale from the narrowest opinion. It treats that opinion as "the Court's opinion . . . entitled to as much authority and respect as any other opinion of the Supreme Court," even if only one Justice issues the opinion. *EMW Women's Surgical Ctr.*, 978 F.3d at 436; accord *Duvall*, 740 F.3d at 611 (Kavanaugh, J., concurring in the denial of rehearing en banc) ("The binding opinion from a splintered decision is as authoritative for lower courts as a nine-Justice opinion. . . . That is true even if only one Justice issues the binding opinion." (cleaned up)).

But other courts, like the Seventh Circuit here, apply *Marks* only when a splintered decision has identifiable common ground. These courts infer no duty "to bring symmetry to any 'doctrinal disarray' [they] might encounter" between the Justices' various approaches. *Box*, 991 F.3d at 748. Nor do they think that *Marks* "command[s] lower courts to find a common denominator—to find an implicit consensus among divergent approaches—where there is actually none." *Ibid.* If *Marks* forced a single legal standard, then these courts fear that a lone Justice would have "the ability to write obiter dicta" into "national law." *Id.* at 747, 750. That cannot be the case, so these courts tend to identify only narrow agreement, if any, among the Justices.

Courts might also agree on the framework but still disagree over what makes an opinion "narrow." Both the Sixth and Seventh Circuits ostensibly follow the "logical subset" approach. But the Sixth Circuit defines "narrow" as that opinion which is "the least . . . far-reaching." *Cundiff*, 555 F.3d at 209; accord *Johnson*, 467 F.3d at 60; *Johnson* v. *Bd. of Regents of the Univ. of Ga.*, 263 F.3d 1234, 1247 (11th Cir. 2001). In constitutional cases, that means the narrowest opinion is the one "whose rationale would uphold the fewest laws going forward" (if the fractured decision upheld the law), or, conversely, the one "whose rationale would invalidate the fewest laws going forward" (if the fractured decision struck down the law). *EMW Women's Surgical Ctr.*, 978 F.3d at 431–32. Conversely, the Seventh Circuit explicitly rejects this idea and instead adheres strictly to its conception of "common ground" as narrow. *Box*, 991 F.3d at 750.

Even absent disagreement, lower courts will sometimes blur or gloss over the distinctions between frameworks, creating analytical confusion. Williams, 69 STAN. L. REV. at 807. The lower courts have, for instance, treated the "logical subset" and the "median" approaches as if they were but two prongs of the same test. Marceau, 41 ARIZ. ST. L.J. at 170 n.49 (citing *Lebanon Farms Disposal, Inc.* v. *Cnty. of Lebanon*, 538 F.3d 241 (3d Cir. 2008); *United States* v. *Williams*, 435 F.3d 1148 (9th Cir. 2006)). And courts tend to espouse one view of *Marks* only to later espouse a different view, suggesting that the chosen approach may be driven by results rather than a strict reading of *Marks*. Compare, *e.g.*, *Green*, 568 F.3d at 807 n.17 (using the "median" method), with *Carrizales-Toledo*, 454 F.3d at 1151 (applying the

"logical subset" method); see also *Davis*, 825 F.3d at 1021 ("Our cases interpreting *Marks* have not been a model of clarity."). As the Eleventh Circuit has candidly acknowledged, it has "taken as many as three different approaches [to *Marks*]—or we at least have articulated our approach three different ways—when confronting other fragmented Supreme Court decisions." *Lisk* v. *Lumber One Wood Preserving, LLC*, 792 F.3d 1331, 1337 (11th Cir. 2015).

Without this Court's intervention, this confusion will continue, and the circuit split will deepen. And the damage will not be limited to the circuits' views of *Marks*. More often than not, this Court's splintered decisions arise in cases involving controversial constitutional issues. For example, this Court has issued fractured opinions on everything from abortion, *June Med. Servs.*, 140 S. Ct. at 2103; *Casey*, 505 U.S. at 833; *Webster* v. *Reproductive Health Servs.*, 492 U.S. 490 (1989), to gun control, *McDonald* v. *City of Chicago*, 561 U.S. 742 (2010), to voting rights, *Crawford* v. *Marion Cnty. Election Bd.*, 553 U.S. 181 (2008), to the Commerce Clause's scope, *Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 567 U.S. 519 (2012). Without a clarification of *Marks*, there is an open invitation for lower courts to construe *Marks* in a way that will allow the decision-making panel to identify and apply the rule of law in an outcome-determinative manner.

Inevitably, these conflicts over *Marks* cause derivative circuit splits on substantive issues. This has the effect of unnecessarily adding repeat cases to this Court's docket.

Indeed, on no less than four occasions, this Court has had to address an issue twice because the lower courts split over how to apply the Court's original, fractured decision. *Hughes*, 138 S. Ct. at 1772 (resolving circuits' interpretations of *Freeman* v. *United States*, 564 U.S. 522 (2011)); *Grutter*, 539 U.S. at 325 (clarifying fractured decision in *Regents of the Univ. of Cal.* v. *Bakke*, 438 U.S. 265 (1978)); *City of Burlington* v. *Dague*, 505 U.S. 557, 559 (1992) (examining "question . . . essentially identical to the one [] addressed" in *Pennsylvania* v. *Del. Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987)); *Nichols* v. *United States*, 511 U.S. 738, 746 (1994) (reexamining fractured decision in *Baldasar* v. *Illinois*, 446 U.S. 222 (1980)). And no issue highlights this fracas more than abortion.

II. There is an intractable circuit split over what opinion from *June Medical* constitutes the "narrowest grounds."

Add to the chaos of *Marks* "the state of utter entropy" of this Court's abortion jurisprudence. *June Med. Servs.*, 140 S. Ct. at 2152 (Thomas, J., dissenting). Even before *June Medical*, that jurisprudence attracted criticism from "Members of the Court" and "defied consistent application by the lower courts." Cf. *Pearson* v. *Callahan*, 555 U.S. 223, 235 (2009). *June Medical*'s fractured nature—and the lower courts' myriad ways to deal with it—has made the problem worse. As the panel below recognized, "the scope of *June Medical* and the effect of the [Chief Justice's concurring opinion] has been controversial." *Box*, 991 F.3d at 751. The circuit split is intractable, with one circuit even at war with itself on the issue.

A. The lower courts have split over how to apply the Chief Justice's concurring opinion.

One circuit, the Eighth, has concluded that Chief Justice Roberts' entire concurring opinion controls. *Hopkins*, 968 F.3d at 915; accord *Little Rock Family Planning Servs.* v. *Rutledge*, 984 F.3d 682, 687 n.2 (8th Cir. 2021) ("Chief Justice Roberts's concurring opinion is controlling."). In doing so, the court held that the "appropriate inquiry under *Casey* is whether the law poses 'a substantial obstacle' or 'substantial burden.'" *Hopkins*, 968 F.3d at 915. It rejected the idea that "the undue burden standard requires courts to weigh the law's asserted benefits against the burdens it imposes on abortion access." *Id.* at 914 (quoting *June Med. Servs.*, 140 S. Ct. at 2135 (Roberts, C.J., concurring in the judgment)). On the contrary, the Eighth Circuit, following the Chief Justice, said that "a weighing of costs and benefits of an abortion regulation" was for legislatures, not the courts. *Id.* at 915. And those legislatures have "wide discretion to pass legislation in areas where there is medical and scientific uncertainty." *Ibid.* (emphasis omitted).

By contrast, the Seventh Circuit here concluded that the Chief Justice's concurring opinion controls only to "giv[e] stare decisis effect to *Whole Woman's Health* v. *Hellerstedt*." *Box*, 991 F.3d at 741. The Seventh Circuit therefore did the very thing that the Eighth Circuit said that *June Medical* forbade: it applied the "balancing test set forth in *Whole Woman's Health*" and measured the challenged regulation's benefits against its burdens. *Id.* at 752.

Emphasizing how "challenging and fluid" the situation is, *id.* at 751 n.7, the Sixth Circuit has adopted *both* sides of the split. Initially, the Sixth Circuit, like the Eighth, treated the Chief Justice's opinion as controlling in its entirety. *EMW Women's Surgical Ctr.*, 978 F.3d at 433. The court therefore measured whether the pro-life legislation in question had the effect of placing a substantial obstacle in the path of a woman seeking an abortion, but the court did not weigh those burdens against the regulation's purported benefits, leaving such determinations "to the state's medical and scientific judgments." *Id.* at 433.

But in a later opinion a Sixth Circuit panel criticized the *EMW* panel for taking on the "vexing task of deciding which opinion [from *June Medical*] control[led]." *Bristol Reg'l Women's Ctr., P.C.* v. *Slatery*, 988 F.3d 329, 336 (6th Cir. 2021). This new panel concluded that, in the end, the *EMW* panel's task was "much ado about nothing." *Ibid.* Although the new panel purported not to "resolve the issue of *EMW*'s precedential value," it nonetheless proceeded to "consider the burdens a law imposes on abortion access together with the benefits those laws confer." *Id.* at 337–38, 340. In light of this internal split, the Sixth Circuit decided to take up the issue en banc. *Bristol Reg'l Women's Ctr., P.C.* v. *Slatery*, __ F.3d __, 2021 WL 1589336 (6th Cir. Apr. 23, 2021).[2]

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[2] The en banc court will likely reaffirm *EMW*'s conclusion that the Chief Justice's entire concurring opinion controls. In a separate case, the en banc Sixth Circuit stated that "the test articulated in *EMW*"—in other words, the test found in the Chief Justice's concurrence—"is the controlling law of our Circuit." *Preterm-Cleveland* v. *McCloud*, __ F.3d __, 2021 WL 1377279, at

The Fifth Circuit is also internally divided on the issue. Like the Seventh Circuit, the Fifth initially held that *June Medical*'s only precedential value was "that the challenged Louisiana law posed an undue burden on women seeking an abortion." *Paxton I*, 972 F.3d at 653. The court thus "applied *Hellerstedt*'s balancing test." *Ibid.* And it doubled down on that position later in the litigation. *Paxton II*, 978 F.3d at 904 ("In other words, the plurality's and concurrence's descriptions of the undue burden test are not logically compatible, and *June Medical* thus does not furnish a controlling rule of law on how a court is to perform that analysis. Instead, *Whole Woman's Health*'s articulation of the undue burden test as requiring balancing a law's benefits against its burdens retains its precedential force." (cleaned up)). But then a majority of the Fifth Circuit vacated the panel's conclusion and agreed to take up the issue en banc. 978 F.3d at 974.

And that's just the circuit courts. The district courts have also been all over the map on the issue. *Whole Woman's Health Alliance* v. *Hill*, 493 F. Supp. 3d 694, 733–34 (S.D. Ind. 2020) (holding that the Chief Justice's opinion controls only to say that "the Louisiana statute imposed an undue burden on a woman's right to access abortion"); accord *Am. Coll. of Obstetricians & Gynecologists* v. *FDA*, 472 F. Supp. 3d 183, 209 (D. Md. 2020) ("Accordingly, *June Medical Services* is appropriately considered to have been

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*8 (6th Cir. Apr. 13, 2021) (en banc) (plurality opinion); see also *id.* at *29 (Kethledge, J., concurring in part and concurring in the judgment) ("[U]nder [*EMW*], the law of our circuit already is that the Chief Justice's opinion from [*June Medical*] is the controlling opinion from that case.").

decided without the need to apply or reaffirm the balancing test of *Whole Woman's Health*, not that *Whole Woman's Health* and its balancing test have been overruled."); *Adams & Boyle, P.C.* v. *Slatery*, 494 F. Supp. 3d 488, 2020 WL 6063778, at *56 (M.D. Tenn. 2020) (applying the balancing test); but see *Memphis Ctr. for Reproductive Health* v. *Slatery*, 2020 WL 4274198, at *14 (M.D. Tenn. July 24, 2020) ("An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." (citations omitted)).

B. This Court should confirm that the Chief Justice's concurrence sets the standard for analyzing the validity of pro-life protections.

Even if this Court decides not to clarify *Marks*, it should still clarify *June Medical*. Cf. *Grutter*, 539 U.S. at 325 ("It does not seem useful to pursue the *Marks* inquiry to the utmost logical possibility when it has so obviously baffled and divided the lower courts that have considered it." (cleaned up)). And given the "[l]egal clashes [that] have erupted nationally over the vexing interplay between *Marks* and *June Medical*," this Court should do so promptly. *Paxton II*, 978 F.3d at 919 (Willett, J., dissenting). Contrary to the panel's holding below, the Chief Justice's concurring opinion sets out how courts should evaluate abortion regulations. For no matter how this Court treats *Marks*—no matter which lower court's approach, if any, is correct—the Chief Justice concurred on the "narrowest grounds."

Start with the "median" approach, the easiest to apply. The Chief Justice's opinion sits between the plurality's broad "grand balancing test" on the one hand and the dissenting opinions' various approaches on the other hand, thus putting the Chief Justice "in the middle." See *Annex Books, Inc.*, 581 F.3d at 465. That's how the Eighth Circuit concluded that the Chief Justice's opinion controlled. *Hopkins*, 968 F.3d at 915 ("Chief Justice Roberts's vote was necessary in holding unconstitutional Louisiana's admitting-privileges law, so his separate opinion is controlling.").

Moreover, if *Marks* allows courts to count the votes from all opinions, then it is clear that "five Members of the Court reject[ed] the *Whole Woman's Health* cost-benefit standard." *June Med. Servs.*, 140 S. Ct. at 2182 (Kavanaugh, J., dissenting).

But even under the stricter "logical subset" approach, the Chief Justice's concurring opinion controls. Think of the plurality's rationale in mathematical terms: "substantial obstacle + insignificant benefits = undue burden." *Paxton II*, 978 F.3d at 917 (Willett, J., dissenting). Then consider the Chief Justice's rationale in those same terms: "substantial obstacle = undue burden." *Ibid.* (Willett, J., dissenting). Like a Russian nesting doll, the Chief Justice's formula fits within the plurality's formula. See Lewis A. Kornhauser & Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 CAL. L. REV. 1, 45–48 (1993) (arguing that *Marks* only works if a concurring rationale "fit[s] within [the plurality's rationale] like Russian dolls"). For the Chief Justice did not "reject the plurality's test in its entirety." *Paxton II*, 978 F.3d at 919 (Willett, J., dissenting). Instead, he "only reject[ed] the plurality's

added observation concerning the weighing of the law's asserted benefits." *Ibid.* (Willett, J., dissenting) (cleaned up). "In other words, remove the few pages of the plurality's benefits analysis, and the Chief Justice is on board with the opinion." *Ibid.* (Willett, J., dissenting) (cleaned up). That makes the Chief Justice's opinion "both a subset of, and a narrower holding than, the plurality opinion." *Ibid.* (Willett, J., dissenting).

The panel below sidestepped this conclusion by suggesting that the only common ground between the plurality and the Chief Justice was "giving stare decisis effect to *Whole Woman's Health* v. *Hellerstedt*." *Box*, 991 F.3d at 741. As Judge Kanne noted in dissent, that conclusion "is imprecise." *Id.* at 755 (Kanne, J., dissenting). Both the Chief Justice and the plurality did agree that *Hellerstedt* earned stare decisis respect. The plurality thought that *Hellerstedt*'s *test* garnered that respect, hence the need to evaluate an abortion regulation's purported benefits. But nowhere did "the Chief Justice suggest that *Whole Woman's Health*'s formulation of a balancing test is entitled to *stare decisis* effect." *Id.* at 755 (Kanne, J., dissenting). The Chief Justice believed this "grand balancing test" a departure from *Casey*'s undue-burden standard. Such a departure was not entitled to *stare decisis*. *June Med. Servs.*, 140 S. Ct. at 2135 (Roberts, C.J., concurring in the judgment) (cleaned up). Instead, the Chief Justice thought that only *Hellerstedt*'s *conclusion* deserved stare decisis respect—that "Texas's law imposed a substantial obstacle requires the same determination about Louisiana's law." *Id.* at 2139 (Roberts, C.J., concurring in the judgment).

No one questions, then, that the plurality and the Chief Justice agree that *Hellerstedt*'s result garners *stare decisis* effect. But the two opinions also overlap on the test to get there—namely, on the "finding of a substantial obstacle." *Box*, 991 F.3d at 753 (Kanne, J., dissenting). Under both the plurality and the Chief Justice's rationale, courts must determine whether an abortion regulation has "the effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *June Med. Servs.*, 140 S. Ct. at 2138 (Roberts, C.J., concurring in the judgment) (cleaned up); *id.* at 2120 (plurality opinion) ("[A] statute which . . . has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends." (cleaned up)). That, contrary to the Seventh Circuit's conclusion, is the true common denominator between the two approaches. *Box*, 991 F.3d at 755 (Kanne, J., dissenting).

In the end, that most "courts [have] reached the same conclusion while applying different standards . . . is strong[ ] evidence" that the Chief Justice's opinion controls. *Id.* at 757 (Kanne, J., dissenting). The Seventh Circuit was incorrect to reach a different outcome. This Court should grant the State's petition and reverse, clarifying the correct standard for evaluating pro-life legislation.

* * *

Split decisions are "a familiar feature of the Court's decisionmaking." Williams, 69 STAN. L. REV. at 799. They tend to "occur in cases involving especially difficult and highly salient legal issues on which public opinion is sharply divided." *Id.* at 799–800 (quoting Pamela C. Corley, *Uncertain Precedent: Circuit Court Responses to Supreme Court Plurality Opinions*, 37 AM. POL. RES. 30, 32 (2009)). And "decades of experience with *Marks* suggests that" the lower courts will never organically converge on an interpretation. *Id.* at 859. Thus, the "doctrinal confusion among lower courts regarding the proper application of *Marks*" will continue to produce "a series of longstanding circuit splits . . . from lower courts' disagreements regarding how the narrowest grounds rule should apply to particular Supreme Court plurality decisions." *Id.* at 807. This Court should end that confusion and clarify how the lower courts should identify the "narrowest grounds."

Even if the Court does not decide the best interpretative framework for *Marks*, it should at least resolve the circuit split that *Marks* has produced here: which opinion from *June Medical* controls. In doing so, this Court should clarify that the Chief Justice's concurrence controls, and that courts should not apply a balancing test when they evaluate legislation that protects pregnant mothers and the nascent life they carry. Instead, as has been the case for three decades, courts should evaluate whether such legislations place a substantial obstacle on abortion access.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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