SUPREME COURT OF LOUISIANA

No. 2022-CC-1194

DOUGLAS BIENVENU, et al.
Plaintiffs/Respondents

VERSUS

DEFENDANT 1 AND DEFENDANT 2
Defendants/Applicants

c/w

JOHN DOE 1, et al.
Plaintiffs/Respondents

VERSUS

DEFENDANT 1 AND DEFENDANT 2
Defendants/Applicants

On Application for Supervisory Writ from
The Sixteenth Judicial District Court,
Parish of St. Martin, Div. F, No. 87184 c/w 87515,
The Honorable Anthony J. Saleme, Jr. Presiding

APPLICATION FOR REHEARING FILED ON BEHALF OF THE ATTORNEY GENERAL OF THE STATE OF LOUISIANA

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Pursuant to this Court's Rule IX, Attorney General Liz Murrill, in her official capacity as the Attorney General of the State of Louisiana,[1] respectfully requests rehearing and states as follows:

INTRODUCTION

This case marks a significant constitutional moment in the Court's history. Members of the Court have consistently emphasized that the powers bestowed upon our "three co-equal branches of government" must remain "separate and distinct." *Bienvenu v. Defendant 1*, No. 2023-CC-01194, 2024 WL 1229123, at *20 (La. Mar. 22, 2024) (Griffin, J., concurring). That separation of powers—dictated by the Louisiana Constitution itself—ensures "that no one branch shall exercise powers belonging to the others." *Crooks v. State through Dep't of Nat. Res.*, 2022-00625 (La. 1/27/23) 359 So. 3d 448, 450 (Griffin, J.); *see also* La. Const. art. 2, § 2. And, as Justice Crichton has explained, that separation accordingly "limits this Court's ability to expand [public] policy beyond the parameters of legislative will." *Landry v. Progressive Sec. Ins. Co.*, 2021-00621 (La. 3/25/22) 338 So. 3d 1162, 1164 (Crichton, J., concurring).

The majority opinion here, however, strikes the very heart of the separation of powers. Specifically, it holds that a policy passed unanimously by both houses of the Legislature and signed by the Governor is "unreasonable and violative of substantive due process." *Bienvenu*, 2024 WL 1229123, at *8 n.15. But the Court has never attempted to define the contours and boundaries of "substantive due process" under the Louisiana Constitution—and it does not do so in the majority opinion, nor does it conduct any substantive due process analysis. The inevitable result is open season on the separation of powers. Enterprising plaintiffs and defendants in future cases will seize on the majority opinion to assert all manner of "unreasonable" substantive due process violations. And Louisiana courts—lacking guideposts—will begin making policy decisions rather than leaving policymaking to the Legislature and the Executive.

This is precisely the danger that led the United States Supreme Court to limit the substantive due process doctrine under the federal Due Process Clause. That Court has emphasized the need for "crucial 'guideposts for responsible decisionmaking'" that can "direct and restrain our

[1] As the chief legal officer of the State, the Attorney General has express legal authority to represent the State in any proceeding challenging the constitutionality of a Louisiana statute. La. Const. art. IV, § 8; La. R.S. 49:257(C). Pursuant to La. R.S. 13:4448, this Court notified the Attorney General on September 5, 2023, that this proceeding challenges the constitutionality of La. R.S. 9:2800.9, as amended by Act 322 and Act 386. Accordingly, the Attorney General defended La. R.S. 13:4448 in the initial proceedings before this Court and now submits this application for rehearing.

exposition of the Due Process Clause." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). Indeed, absent such guideposts, substantive due process threatens to become a vehicle for "the policy preferences of the Members of this Court." *Id.* To that end, that Court principally asks whether the asserted right is, "objectively, 'deeply rooted in this Nation's history and tradition.'" *Id.* at 720–21. When such rights are at issue, any infringement is subject to strict scrutiny; when such rights are not at issue, any infringement is subject to rational-basis review. *Id.* at 721–22.

This Court should take the same restrained approach here under the Louisiana Constitution. This case arises from appalling allegations—and those allegations are important. But the Court's decision in this case is about much more than the fate of any given plaintiff or defendant. It is about strict adherence to the separation of powers and public confidence in the Court as an institution. Accordingly, the Attorney General respectfully urges the Court to order rehearing, rebriefing, and reargument on the following question presented:

> Whether *Washington v. Glucksberg* supplies the proper analytical framework for the substantive due process guarantee, if any, in Louisiana Constitution article I, section 2.

ARGUMENT

The substantive due process doctrine has been the subject of much scholarly and judicial debate for decades. But that debate is not implicated here because the only question is whether this Court should borrow the United States Supreme Court's substantive due process framework. Notably, the Court has always linked its understanding of substantive due process under the Louisiana Constitution to the United States Supreme Court's own federal substantive due process precedents. But this Court has not had an occasion to expressly adopt or reject (for purposes of the Louisiana Constitution) the United States Supreme Court's limitations on substantive due process under *Glucksberg*. The absence of guideposts to meaningfully constrain judicial discretion—combined with the majority opinion's invitation for litigants and courts to make policy judgments about the political branches' own policies—threatens to collapse the separation of powers under the Louisiana Constitution. To avoid that danger, the Court should grant rehearing and adopt the *Glucksberg* framework—and because there is no serious argument that Defendants can meet that framework, their substantive due process argument is easily defeated.

A. This Court's Substantive Due Process Cases Under the Louisiana Constitution Track Federal Precedents.

For decades, the Court has assumed that—just as under the federal Due Process Clause—there must be some sort of substantive component to the due process protection in Louisiana Constitution article I, section 2. And each time, the Court has relied on United States Supreme Court precedents to inform that understanding.

For example, in 1976, this Court confronted an argument that a particular canon in the Code of Judicial Conduct "unduly restrict[ed] [the petitioners'] right to pursue an occupation" in violation of "the due process clauses of both the state and federal constitutions." *Babineaux v. Judiciary Comm'n*, 341 So. 2d 396, 399–400 (La. 1976). The Court recognized that "[t]his argument addresses what is generally termed substantive due process." *Id.* at 400. And in rejecting the argument, the Court defined substantive due process by reference to decisions from the United States Supreme Court: "Substantive due process may be broadly defined as the constitutional guaranty that no person shall be arbitrarily deprived of his life, liberty, or property. The essence of substantive due process is protection from arbitrary and unreasonable action." *Id.* (citing *Poe v. Ullman*, 367 U.S. 497 (1961), and *Galvan v. Press*, 347 U.S. 522 (1954)); *see also Hayden v. Louisiana Pub. Serv. Comm'n*, 553 So. 2d 435, 440 (La. 1989) (citing *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1954)); *Everett v. Goldman*, 359 So. 2d 1256, 1267–68 (La. 1978) (citing *Nebbia v. New York*, 291 U.S. 502 (1934), and *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937)).

In so doing, the Court has all but said that any substantive due process guarantee in the United States and Louisiana Constitutions is one and the same. For instance, the Court has said that "legislation must have a rational relationship to a legitimate state interest in order to satisfy *the* substantive guarantee of due process in the federal and state constitutions." *State v. Griffin*, 495 So. 2d 1306, 1308 (La. 1986) (emphasis added) (citing *City of New Orleans v. Dukes*, 427 U.S. 297 (1976)). And the Court has repeated that reference to a singular guarantee at least three other times. *See State v. Edwards*, 2000-1246 (La. 6/1/01) 787 So. 2d 981, 992 (referring to "this substantive due process right" in "[t]he federal and state constitutions"); *State v. Brown*, 648 So. 2d 872, 877 (La. 1995) (referring to "the substantive guarantee of due process in the federal and state constitutions"); *Theriot v. Terrebonne Parish Police Jury*, 436 So. 2d 515, 520 (La. 1983) (referring to "[t]he substantive guarantee of due process in the federal and state constitutions").

This Court's repeated reliance on United States Supreme Court precedents to mold its substantive due process decisions under the Louisiana Constitution has been a conscious choice by the Court, not a coincidence. One reason is that, "[i]n the evolution of the state constitution's Declaration of the Right of Due Process of Law, Art. I, § 2, the scope and nature of due process were understood not solely in terms of state jurisprudence under the prior due process clause, but also in light of the much broader contemporary federal due process developments." *State v. Perry*, 610 So. 2d 746, 757 (La. 1992). Another reason is a matter of text and common sense: Because the Louisiana Constitution's "guarantee of due process does not vary semantically from the Due Process Clause of the Fourteenth Amendment," "federal jurisprudence is relevant in determining the nature and extent of La. Const. Art. I, § 2's due process protection." *Fields v. State*, 98-0611 (La. 7/8/98), 714 So. 2d 1244, 1250.

B. The Court Has Not Expressly Adopted the *Glucksberg* Framework.

Notwithstanding the Court's frequent citations of early United States Supreme Court precedents to shape substantive due process under the Louisiana Constitution, the Court has never adopted—and perhaps has never been asked to adopt—the United States Supreme Court's more recent precedents attempting to place responsible limits on the doctrine. Chief among them is *Glucksberg*—widely known as one of the United States Supreme Court's most important substantive due process decisions in the modern era.

In *Glucksberg*, the United States Supreme Court reaffirmed that the federal Due Process Clause "provides heightened protection against government interference with certain fundamental rights and liberty interests." 521 U.S. at 720. "But," the Court said, "we 'ha[ve] always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended.'" *Id.* Indeed, "[b]y extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action." *Id.* And so the Court recognized that "[w]e must therefore 'exercise the utmost care whenever we are asked to break new ground in this field,'" or else risk the doctrine becoming a vehicle for "the policy preferences of the Members of this Court." *Id.*

To avoid the serious separation-of-powers problem presented by an open-ended doctrine, the United States Supreme Court emphasized that the "substantive-due-process analysis has two

primary features." *Id.* First, "the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'" *Id.* at 720–21 (citations omitted). Second, "we have required in substantive-due-process cases a 'careful description' of the asserted fundamental [right or] liberty interest." *Id.* at 721. Putting those pieces together, "[o]ur Nation's history, legal traditions, and practices thus provide the crucial 'guideposts for responsible decisionmaking' that direct and restrain our exposition of the Due Process Clause." *Id.* (citation omitted). Put otherwise, the overarching threshold question is whether there is a "fundamental right[] found to be deeply rooted in our legal tradition." *Id.* If so, then infringement of that right is unconstitutional "'unless the infringement is narrowly tailored to serve a compelling state interest.'" *Id.* But if no such fundamental right exists, then the only question is whether the State policy at issue is "rationally related to legitimate government interests"—the most-deferential standard of review imaginable. *Id.* at 728.

In practice, moreover, the threshold fundamental-rights question is extraordinarily demanding. Justice Ginsburg's opinion for the Court in *Timbs v. Indiana*, 139 S. Ct. 682 (2019)—a case about excessive fines—canvassed everything from Magna Carta, to Blackstone, to dozens of early State constitutions. In *McDonald v. City of Chicago*, 561 U.S. 742 (2010)—a case about the right to keep and bear arms—the lead opinion similarly examined the history of the Second Amendment, early congressional debates, and again dozens of early State constitutions, federal laws, and similar evidence. And in *Glucksberg* itself—a case about the alleged right to assisted suicide—the Court looked at more than "700 years[] [of] Anglo-American common-law tradition" to determine whether the alleged right was "objectively, 'deeply rooted in this Nation's history and tradition.'" 521 U.S. at 711, 720–21.

That demanding analysis is by design: It ensures that the crucial guideposts of history and tradition—rather than unrestricted judicial policymaking—supply the answer to what rights are truly fundamental. Indeed, this Court has recognized as much, albeit in a case arising under "the Fourteenth Amendment due process clause." *See State v. Brenan*, 99-2291 (La. 5/16/00), 772 So. 2d 64, 65, 71 ("We must therefore 'exercise the utmost care whenever we are asked to break new ground in this field….'" (citing *Glucksberg*)). And yet, the Court does not appear to have ever embraced the *Glucksberg* framework for purposes of the Louisiana Constitution.

C. Rehearing is Warranted to Adopt the *Glucksberg* Framework and Prevent Irreparable Harm to the Separation of Powers.

The Court should grant rehearing to alter course and adopt the *Glucksberg* framework for purposes of substantive due process under the Louisiana Constitution. That framework: (1) is simple and straightforward; (2) is a natural step in the Court's lockstep substantive due process jurisprudence; (3) is desperately needed to preserve the separation of powers; (4) provides easier answers for the constitutional questions in this and future cases; and (5) is a suitable alternative to the majority opinion, which begs more questions than it answers.

First, the *Glucksberg* framework is principally compelling for its simplicity. As recounted above, the Court first asks whether the asserted right at issue is "objectively, 'deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if [it] were sacrificed.'" *Glucksberg*, 521 U.S. at 720–21. If it is such a fundamental right, then any infringement of that right is subject to strict-scrutiny review—that is, the government must show that "'the infringement is narrowly tailored to serve a compelling state interest.'" *Id.* at 721. But if the asserted right is not fundamental, then any infringement of that right is subject only to rational-basis review—that is, the government's infringing action need only "be rationally related to legitimate government interests" to be constitutional. *Id.* at 728.

The immediately preceding paragraph is all the Court needs to say about the law. It is eminently straightforward—and its clarity is desperately needed to guide the lower courts.

Second, adopting the *Glucksberg* framework is faithful to the Court's prior decisions—which effectively describe substantive due process under the United States and Louisiana Constitutions as one and the same. *See supra* Section A. If that remains true—as the Court has suggested for many decades—then expressly adopting the *Glucksberg* framework for purposes of the Louisiana Constitution is a natural step in this body of lockstep jurisprudence. In fact, to *not* adopt the *Glucksberg* framework would be to reject years of the Court's own cases.

Third, and more fundamentally, the *Glucksberg* framework is the only immediately available tool to prevent the dissolution of the separation of powers—and the need for such a tool is especially acute here because of the majority opinion, which invites (perhaps inadvertently) litigants and courts to find substantive due process violations any time a government action can be deemed "unreasonable." *Bienvenue*, 2024 WL 1229123, at *13 n.15. "Unreasonable" is not an actual guidepost that could constrain the judiciary. It is an open door for freewheeling judicial

policymaking, limited by nothing more than the intuition of a given judge as to what constitutes good policy or not. Indeed, "unreasonable" is no different in kind than "'arbitrary impositions'" or "'purposeless restraints'"—standards that *Glucksberg* expressly rejected because they failed to appropriately "rein in the subjective elements that are necessarily present in due-process judicial review." *Glucksberg*, 521 U.S. at 722.

But the *Glucksberg* framework avoids that Pandora's-box problem altogether by establishing clear legal standards that (a) the United States Supreme Court has applied for the past two decades and (b) ensure that the powers bestowed upon our "three co-equal branches of government" remain "separate and distinct," *Bienvenu*, 2024 WL 1229123, at *20 (Griffin, J., concurring). This Court need only adopt that framework to head off enterprising plaintiffs and defendants who would bend the majority opinion in search of new substantive due process rights.

Fourth, it is worth noting that adopting the *Glucksberg* framework can, in some cases, make much quicker work of constitutional questions. Take this case—applying *Glucksberg* here leads to rejecting Defendants' substantive due process challenge to La. R.S. 9:2800.9. That is so principally because there is no serious argument that Defendants' asserted right to invoke accrued prescription periods *that may never be revived by the Legislature* is, "objectively, 'deeply rooted in this Nation's history and tradition, and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'" *Glucksberg*, 521 U.S. at 720–21. Indeed, neither Defendants nor the majority opinion identified any such evidence or offered any such analysis. The upshot is that the asserted right is not fundamental and is, therefore, subject merely to rational-basis review: Is La. R.S. 9:2800.9 (as amended) "rationally related to legitimate government interests"? *Id.* at 728. The answer unquestionably is yes. As the majority opinion observes, the Legislature plainly sought "to revive any cause of action related to the sexual abuse of a minor that previously prescribed under any Louisiana prescriptive period." *Bienvenu*, 2024 WL 1229123, at *3. Seeking to protect child abuse victims is undeniably a legitimate government interest—and reviving prescription periods to enable such victims to pursue their claims is undeniably "rationally related" to that interest. Case closed: La. R.S. 9:2800.9 is constitutional.

Note, moreover, the key difference between that rational-basis analysis and the "unreasonableness" suggestion in footnote 15 of the majority opinion. There, the majority found La. R.S. 9:2800.9 fatally "unreasonable and violative of substantive due process" because it

"reviv[ed] claims which defendants reasonably believed were reposed for half a century or more." *Id.* at *13 n.15. As discussed above, that is just a free-floating analysis that is entirely up to a judge's whim. The proper rational-basis test, by contrast, asks about the rationality of the *relationship* between the means and the end: Here, the end is protecting child abuse victims, and the means is reviving prescription periods to allow them to sue—and the two plainly are rationally related. Whether the Court thinks this is good policy or not, this is textbook rationality that easily passes constitutional muster. Accordingly, embracing the *Glucksberg* framework has the virtue of quickly disposing of this case and future cases—in addition to protecting the separation of powers by constraining judicial review in other substantive due process cases.

Fifth, and finally, opting for the *Glucksberg* standard would avoid a number of questions raised by the majority opinion. For example, what is the substantive due process analysis Louisiana courts are supposed to apply? Footnote 15 does not conduct such an analysis, but suggests courts need look only at whether a policy is "unreasonable." But if that is so, then it is off to the races. For example, footnote 15 finds unreasonableness in the length of time that has passed—but on that account, does not *contra non valentem* pose the same substantive due process problem on these same facts? The length of time is precisely the same. More, what about zoning and property seizure laws that the Legislature wishes to pass? Those may be no good under the majority opinion because the Court has previously held that laws rendering citizens' real property "unfit for the purpose for which it was intended" would "divest" the citizens of their vested rights. *See Cash v. Whitworth*, 13 La. Ann. 401, 403 (1858). Or, what of the many times a natural disaster has hit Louisiana, and the Governor has issued an executive order suspending prescription? *E.g.*, Executive Order No. BJ 2008-92; Executive Order No. JBE 2016-53. Such executive orders, too, are now in constitutional doubt.

Respectfully, the best way to avoid opening the floodgates for these and many other questions is to grant rehearing and adopt the *Glucksberg* framework. It may not be perfect, but it is at least a sufficiently clear set of guideposts that can prevent waves of confused substantive due process litigation in Louisiana that would bog down the courts for years.

CONCLUSION

Rehearing is warranted in this monumental case—for the sake of the parties involved, for Louisiana courts, and for the separation of powers.

Respectfully submitted,

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BY /s/J. Benjamin Aguiñaga

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the above and foregoing has this date been served upon all parties to this proceeding by email or by mailing same to each by First Class United States mail, properly addressed and postage paid on this 5th day of April, 2024.

/s/ Chimène St. Amant
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