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

BRIEF FOR THE RESPONDENT/CROSS-PETITIONER

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QUESTIONS PRESENTED

1. Do abortion providers have third-party standing to challenge health and safety regulations on behalf of their patients absent a "close" relationship with their patients and a "hindrance" to their patients' ability to sue on their own behalf?

2. Are objections to prudential standing subject to waiver or forfeiture?

3. Does *Whole Woman's Health* v. *Hellerstedt*, 136 S. Ct. 2292 (2016), foreclose lower courts from evaluating challenges to States' abortion clinic safety regulations in light of a case's specific factual record?

PARTIES TO THE PROCEEDING

The Respondent/Cross-Petitioner is Dr. Rebekah Gee, Secretary of the Louisiana Department of Health ("LDH"), sued in her official capacity. LDH was formerly referred to as the Louisiana Department of Health & Hospitals. To avoid confusion, this brief will refer to Dr. Gee as "Louisiana."

The Petitioners/Cross-Respondents are June Medical Services L.L.C., d/b/a Hope Medical Group for Women ("Hope"), and two pseudonymous abortion providers proceeding as Dr. John Doe 1 and Dr. John Doe 2. To avoid confusion, this brief will refer to the Petitioners/Cross-Respondents as "Plaintiffs."

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INTRODUCTION

Plaintiffs ask this Court to exempt abortion providers from generally applicable principles of standing and precedent. The Court should decline the invitation and reaffirm that abortion regulations must be reviewed under the same neutral principles that apply in all other constitutional cases.

Plaintiffs are an abortion clinic and two doctors. Claiming to represent (unidentified) abortion patients, they challenge a Louisiana health statute designed to protect those very patients from unscrupulous and incompetent abortion providers. But Plaintiffs fail to meet the difficult test for "third-party standing" to assert someone else's rights. There is no reason to believe Plaintiffs' patients are hindered in challenging the law if they wish to do so; women seeking abortions have litigated their own constitutional challenges many times before. And there is a serious conflict of interest between Plaintiffs—who have a lengthy history of what the Fifth Circuit called "horrifying" health and safety violations—and the patients for whom they purport to speak. Under normal standing rules, Plaintiffs' attempt to invoke third-party standing must fail as a matter of law.

On the merits, Plaintiffs assert that the outcome of this case is dictated by *Whole Woman's Health* v. *Hellerstedt*, 136 S. Ct. 2292 (2016), which enjoined the enforcement of a similar law—but based on a very different regulatory context and record. In *this* case the record shows not only that the challenged law serves specific public-health needs in Louisiana, but that the

law's alleged burdens are illusory. Plaintiffs effectively seek an abortion-specific exemption from the general rule that a "statute may be invalid as applied to one state of facts and yet valid as applied to another." *Dahnke-Walker Milling* v. *Bondurant*, 257 U.S. 282, 289 (1921).

The Fifth Circuit carefully applied *Hellerstedt* to the extensive factual record in this case, and found that the challenged Louisiana law did not impose a substantial obstacle to abortion. This Court does not typically consider issues "when the asserted error consists of erroneous factual findings," S. Ct. R. 10, and Plaintiffs offer no reason to second-guess the Fifth Circuit's comprehensive analysis of the record.

In sum, this case is controlled by either of two longstanding, generally applicable principles of constitutional adjudication: A party cannot generally assert someone else's rights, especially in the face of a conflict of interest, and an earlier decision hinging on the application of law to facts is not dispositive when a subsequent case presents material factual differences. There is no reason to depart from those principles merely because this case involves regulation of abortion procedures. The Court should dismiss Plaintiffs' claim for lack of jurisdiction or affirm the judgment below on the merits.

OPINIONS BELOW

The opinion of the district court is reported at 250 F. Supp. 3d 27 (M.D. La. 2017) and reprinted in the Appendix to the Petition ("Pet. App.") at 132a–279a. The Fifth Circuit panel decision is reported at 905 F.3d 787 (2018) and reprinted at Pet. App. 1a–103a. The Fifth Circuit's denial of Plaintiffs' petition for rehearing *en banc* is reported at 913 F.3d 573 (2019) and reprinted at Pet. App. 104a–131a.

JURISDICTION

Plaintiffs timely filed a petition for certiorari April 17, 2019, No. 18-1323. See 28 U.S.C. § 2101(c); 28 U.S.C. § 1254(1). Louisiana timely filed a Cross-Petition under Rule 12.5 on April 23, 2019, No. 18-1460, denying that this Court or the lower courts had jurisdiction to address the merits of Plaintiffs' substantive due process claims because Plaintiffs lack third-party standing to raise those claims. This Court granted certiorari on both the petition and cross-petition on October 4, 2019.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Petition, No. 18-1323, involves U.S. Const. amend. XIV, § 1, as well as La. Rev. Stat. 40:1061.10 and its implementing regulations. Relevant portions of these provisions are reproduced at Pet. App. 285a–290a.

The Cross-Petition, No. 18-1460, involves U.S. Const. art. III, § 2, which provides in relevant part:

"The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority[.]"

STATEMENT OF THE CASE

A. Factual Background

1. Enactment and rationale of Act 620

Louisiana began licensing abortion clinics through the Louisiana Department of Health ("LDH") after reports surfaced of clinics' shockingly unsanitary and dangerous conditions. See Executive Order MJF 99-5, Declaration of Public Health and Safety Emergency (Feb. 5, 1999) (signed by Gov. Mike Foster).[1] In 2003, clinics came under LDH supervision though a licensing regime. 29 La. Reg. 902–908 (June 20, 2003). Louisiana has developed a system of licensing requirements and other laws intended to protect the health and safety of women seeking abortions.

a. In the 2014 Legislative Session, the state legislature enacted Act 620, which improves abortion safety by means of doctor credentialing. Act 620 requires that physicians performing abortions "[h]ave active admitting privileges at a hospital that is located not further than thirty miles from the location at which the abortion is performed or induced and that

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[1] Louisiana's efforts to regulate abortions prior to this date were challenged in court. See, *e.g.*, *Margaret S.* v. *Edwards*, 488 F. Supp. 181 (E.D. La. 1980).

provides obstetrical or gynecological health care services." Act 620, § 1(A)(2)(a).[2] A physician has "active admitting privileges" if he "is a member in good standing of the medical staff" of a licensed hospital, "with the ability to admit a patient and to provide diagnostic and surgical services to such patient[.]" *Id.* The penalty for violation of that requirement is a fine of "not more than four thousand dollars per violation." *Id.* § 1(A)(2)(c). Act 620 has a broad severability clause that provides "every application of this statute to every individual woman shall be severable from each other," and that even if Act 620 imposes an undue burden on some women, it should remain in effect in all circumstances where it does not impose an undue burden. *Id.* § 3.

The Legislature enacted Act 620 after committee hearings with extensive testimony. Witnesses for the bill—including two highly credentialed doctors later accepted as Louisiana's experts at trial—testified that (1) Louisiana abortion clinics have a long, disturbing history of serious health and safety problems, among other failures of legal compliance; (2) abortion carries known risks of serious complications that may require intervention in a hospital; (3) the process for obtaining admitting privileges serves to vet physician competency; (4) competent abortion providers would be able to obtain privileges; and (5) the Act would bring

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[2] The Act amended La. Rev. Stat. 40:1299.35.2, which has been recodified at La. Rev. Stat. 40:1061.10. Pet. App. 286a–287a.

abortion practice into conformity with the privileges requirements for doctors performing other outpatient surgeries. *E.g.*, ROA.11221–11223, ROA.11225–11228, ROA.11256–11260, ROA.11262–11263, ROA.11264–11265, ROA.11266–11269. The Legislature anticipated that Act 620 would ensure continuity of care for women who experience complications following an abortion.

Act 620's improvements to credentialing had other likely benefits. By ensuring abortion providers obtain hospital privileges, Act 620 also would guarantee inclusion of those providers in the National Practitioner Data Bank ("NPDB"), which tracks malpractice and other misconduct by doctors. See National Practitioner Data Bank, "About Us" (available at https://tinyurl.com/npdbabout); see also 42 U.S.C. § 11131 *et seq.*; *id.* § 1396r–2; *id.* § 1320a–7e. In the same way, requiring hospital affiliations would bring Louisiana abortion doctors under the oversight of the "Joint Commission," a national accrediting body that covers hospitals. JA 212–213; see also The Joint Commission, Hospital Accreditation (available at https://tinyurl.com/sngyeaq).

b. Regulation of credentialing standards for Louisiana surgical venues is nothing new. Louisiana, as a means of ensuring patient health and safety, has required licensing for ambulatory surgical centers ("ASCs") for more than 40 years. La. Rev. Stat. 40:2131 *et seq.* The licensing requirements impose a condition that doctors performing surgeries at ASCs

have admitting privileges at a local hospital, *in addition to* requiring that the facilities maintain a written hospital transfer agreement establishing procedures for emergency admissions. La. Admin. Code § 48:4541(A), (B) (2019); see also *id.* § 48:4535(E)(1) (2014) (former ASC regulation); ROA.10154–10155. Louisiana additionally requires that doctors who perform office-based surgeries either (1) maintain staff privileges to perform the same procedure at a hospital in "reasonable proximity" (in most cases within 30 miles), or (2) have completed a residency in the field covering the procedure. See La. Admin. Code § 46:7309(A)(2); *id.* § 46:7303.

Yet until Act 620's enactment in 2014, abortion clinics fell into a facility licensing gap. Abortion clinics, although performing thousands of abortion procedures a year, were subject to a far more lenient requirement that there be "one physician present who has admitting privileges or has a written transfer agreement with a physician[] who has admitting privileges at a local hospital to facilitate emergency care." *Id.* § 48:4407(A)(3) (2003). The compliance history of clinics and the disciplinary history of abortion doctors showed this was inadequate to protect women and girls from sub-standard credentialing and clinic practices where doctors demonstrated little or no accountability. Act 620 corrected the gap.

Although various abortion advocates and clinic staff testified against the law before the Legislature, no abortion doctor or patient testified against it. ROA.11248.

2. Act 620's effects

Many of the usual guardrails that protect patients from incompetent and unethical doctors are absent from Louisiana's abortion clinics. Louisiana abortion clinics perform no meaningful review of a doctor's credentials, disciplinary history, or malpractice history. And their patients need continuity of care when they suffer from complications.

a. At the time this lawsuit was filed, six doctors, (Drs. John Doe 1–6),[3] were contracted with five then-operating clinics:

- Does 1 and 3 at June Medical Services L.L.C., d/b/a Hope Medical Group for Women ("Hope") in Shreveport;
- Doe 2 at Bossier City Medical Suite ("Bossier") in Bossier City;
- Does 5 and 6 at Women's Health Care Center ("Women's Health") in New Orleans;
- Does 2 and 4 at Causeway Medical Clinic ("Causeway") in Metairie, in the New Orleans area; and
- Doe 5 at Delta Clinic ("Delta") in Baton Rouge.

[3] The doctors' names are under seal. ROA.13153. Though some are women, for ease of discussion, Louisiana will follow the lower courts in employing male pronouns. Pet. App. 5a n.4.

Hope does not vet the competency of doctors it hires. Doe 3, the medical director at Hope, acknowledged he performs *no* background check, nor does he inquire into an applicant's previous training. JA 248–250. He also admitted he hired a radiologist and an ophthalmologist to perform abortions. JA 246–247.

Hope's lack of credentialing is typical of Louisiana abortion clinics, which, "beyond ensuring that the provider has a current medical license, do not appear to undertake *any* review of a doctor's competency." Pet. App. 35a–36a (emphasis added); JA 248–250; see also, *e.g.*, ROA.14155 (116:14–25), ROA.14156 (117–119); Report of the Grand Jury at 259–260, Misc. No. 0009901-2008 (Pa. C.P. 1st Jud. Dist. Jan. 14, 2011) ("Gosnell Grand Jury Report") (available at https://tinyurl.com/gosnellgjr) (discussing failure of a Louisiana clinic owner to supervise contractors in other States, including Dr. Kermit Gosnell in Pennsylvania). Unsurprisingly, Louisiana has a long, disturbing history of abortion doctors' malpractice and professional discipline.[4]

The clinics' lack of credentialing, moreover, exists against a backdrop of serious regulatory violations the Fifth Circuit characterized as "horrifying." Pet. App.

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[4] See ROA.14024 (31:21–38:7), ROA.15066–15078; *In the Matter of: Kevin Govan Work*, No. 2019-A-011 (La. Bd. Med. Exam'rs Apr. 15, 2019); *In the Matter of: Victor Brown*, No. 06-A-021 (La. Bd. Med. Exam'rs Sept. 17, 2007); *In the Matter of: A. James Whitmore*, No. 00-A-021 (La. Bd. Med. Exam'rs Jan. 22, 2002).

38a n.56. Hope has been cited for improper administration of intravenous medications and gas, JA 154:3–8, failure to document patients' physical examinations, JA 155:5-12, administration of anesthesia by unqualified employees, JA 155–156, inaccurate reporting of abortion procedures to the State, JA 165–167, and "irregularity" in calculation of medication dosages, JA 170:3–6, among other serious violations. In 2012, LDH revoked Hope's license for failure to comply with health and safety regulations. JA 158–161, ROA.11474–11477.

Other evidence confirmed Hope's lack of concern with patient care. Doe 1, another abortion doctor at Hope, testified he had not even read Hope's policies and procedures for patient safety. JA 780–781. Although Hope provides a phone number for after-hours emergencies, the clinic's lay administrator answers it. JA 116–117, JA 119. Thus, someone with no medical training decides over the phone whether a patient's symptoms are abnormal, how the patient should handle her medical issues, and whether to refer the patient to a doctor or hospital. JA 116–117.

Hope's record is not unique. As recently as February 2019, Delta was subject to an "immediate jeopardy" action by LDH involving Doe 2. See Supp. App. 10, 17, 26.[5] Other clinics and their staff admitted to

[5] A motion for leave to file the Supplemental Appendix and Supplemental Sealed Appendix is being filed concurrently with this brief.

similar health and safety violations and poor compliance. See ROA.14023–14025 (36:6–41:2), ROA.14049–14056 (161:7–191:1).

The consequences of the clinics' lack of credentialing and serious safety violations are impossible to quantify, for Plaintiffs' knowledge of any patient's post-operative health is limited at best. Few women return for a follow-up appointment. JA 130–131, JA 447–448. Consequently, Plaintiffs and the other clinics admit they have no idea how many complications result from abortions they perform. JA 130–131, JA 135–136, JA 447–451, JA 1342–1344 (80:3–82:12); ROA.14034 (92:7–22).

Act 620—which makes hospital credentialing a threshold for performing abortions in Louisiana—offers a partial solution. Louisiana's expert on credentialing, Dr. Robert Marier, testified that hospitals undertake a detailed examination of a doctor's competency before granting privileges. JA 817–818. Doe 3 agreed, based on his own experience on hospital credentialing committees, see JA 247:7–25, JA 248:1–13, as did Plaintiffs' expert. See JA 1042:17–25, JA 1045:17–25, JA 1091:7–21, ROA.10864; see also ROA.14155 (116:14–25), ROA.14156 (117–119). Hospitals also perform ongoing peer review of their doctors' competency, a process that revealed "gross violation" of a consent order and led to a lifetime limitation on the practice of obstetrics and gynecology for one abortion provider. *In the Matter of: Victor Brown*, No. 06-A-021 at 1–2.

b. Moreover, hospital admitting privileges help to ensure appropriate care for women who suffer complications. Previously, Louisiana abortion clinics were required to maintain a transfer agreement with a local hospital. La. Admin. Code § 48:4407(A)(3) (2003). But Hope had been cited for relying only on a *verbal* transfer agreement, JA 175:2–13, which even Plaintiffs' expert agreed was inconsistent with the standard of care. JA 1105–1106. Not only did the admitting privileges requirement address the regulatory gap between abortion clinics and ASCs, but requiring clinic doctors to have admitting privileges in addition to or in lieu of a transfer agreement also helps guard against patient abandonment if the patient needs hospitalization. JA 1085–1085 (discussing risk of patient abandonment).

The need for additional oversight as well as efficient, direct hospital transfers and continuity of care for abortion patients is not theoretical. Does 1 and 3 on separate occasions perforated a woman's uterus during an abortion, requiring immediate hospitalization. But Doe 3 recounted at trial that—thanks to his admitting privileges as an obstetrician/gynecologist at local hospitals—he accompanied both patients to the hospital and repaired the damage. JA 216:14–23, JA 251:11–25, JA 252:1–13, JA 218:9–21. Even Plaintiffs' expert agreed admitting privileges contribute to continuity of care in cases of surgical complications. ROA.7484–7485, ROA.10864–10865. So did a Louisiana abortion clinic administrator. ROA.14044–14045 (114:12–116:16).

c. The evidence established that Louisiana abortion doctors *can* and *do* obtain qualifying admitting privileges.

Four of the six Does had obtained and maintained admitting privileges before Act 620. Doe 3 maintained qualifying admitting privileges for decades at two Shreveport-area hospitals, including a Catholic hospital, and at least three other doctors had maintained privileges as well. JA 209–210, JA 242, JA 381–382, ROA.14137 (18:17–25, 19:1–15), ROA.905. Doe 3 maintained privileges, in part, to care for patients who experienced complications at Hope. ROA.12791. Doe 3 admitted that to his knowledge, "providing abortion services in the Shreveport area was not an impediment to [his] having admitting privileges at any of" the hospitals where he was affiliated. JA 242; see also, *e.g.*, JA 262, JA 272–273. Even Plaintiffs' trial experts maintain privileges at hospitals in other States. JA 281–282, JA 1035.

The record discloses few, if any, practical obstacles to abortion doctors obtaining privileges in Louisiana. Discrimination by hospitals against abortion providers violates federal law. See 42 U.S.C. § 300a–7(c)(1)(B); *Planned Parenthood of Greater Tex. Surgical Health Servs.* v. *Abbott*, 748 F.3d 583, 599 n.13 (5th Cir. 2014); *Planned Parenthood of Wis.* v. *Van Hollen*, 738 F.3d 786, 791–92 (7th Cir. 2013). Under state law and the rules of the National Provider Data Bank, Louisiana hospital privileging includes due process and appeal rights. 42 U.S.C. §§ 11111(a), 11112; La. Rev. Stat. 37:1301; see *Granger* v. *Christus Health*

Cent. La., 2012-1892 (La. 6/28/13), 144 So. 3d 736, 758; *Fontenot* v. *Sw. La. Hosp. Ass'n*, 2000-00129 (La. App. 3 Cir. 12/6/00), 775 So. 2d 1111, 1119. Consequently, Louisiana hospitals and courts provide protections for applicants. Every one of the substantially complete hospital bylaws in the record contains or references such protections. ROA.9192, ROA.9265, ROA.9388, ROA.9421–9433, ROA.9528–9537, ROA.9726–9738, ROA.10326–10331, ROA.10458, ROA.10532–10541, ROA.10625–10630, ROA.10706–10718, ROA.12139–12140, ROA.12635–12645.

Louisiana hospitals, to facilitate access by doctors, also offer "courtesy" privileges to doctors who rarely admit patients. JA 810–812, JA 831–832, JA 863:13–20, JA 866–872. All of the bylaws in the record offer courtesy privileges. ROA.9154, ROA.9250, ROA.9378, ROA.9509, ROA.9642–9643, ROA.10315–10316, ROA.10371, ROA.10512–10513, ROA.10593, ROA.10660–10662, ROA.10678–10679, ROA.12125, ROA.12565–12566. Doe 3 admitted he "sure could" continue to admit patients if he held courtesy privileges at his hospital. JA 240–241. While the case was pending, Doe 5 obtained qualifying courtesy privileges in New Orleans. ROA.14038 (108:18–25), ROA.14343, ROA.14347–14349. Doe 2 obtained courtesy privileges as well. JA 1462.

3. Louisiana abortion clinics and doctors

a. Hope, Delta, and Women's Health—Louisiana's current abortion clinics—are businesses that exchange medical services for a fee. They are operated

by absentee owners with no medical training or community ties.[6]

Louisiana clinics pay doctors on a per-procedure basis.[7] Interactions between doctors and patients are limited; the doctors see many patients per day for procedures that are typically completed in minutes.[8]

Other factors further attenuate connections between abortion doctors and their patients. State-mandated pre-abortion counseling is often provided by doctors contracted solely for that separate purpose. JA 784–785. When a doctor performs a surgical abortion,

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[6] Leroy Brinkley—who contracted with Kermit Gosnell—owned Delta Women's Clinic in Baton Rouge. Gosnell Grand Jury Report at 41; Louisiana Secretary of State, Delta Women's Clinic (available https://tinyurl.com/deltawomens). Delta closed and re-opened as "Delta Clinic, Inc.," a Delaware Corporation registered and doing business in Baton Rouge with Brinkley as its president, after federal actions against Brinkley. See *United States* v. *Clinical Leasing Serv.*, 759 F. Supp. 310 (E.D. La. 1990), *aff'd* 925 F.2d 120 (5th Cir. 1991), *reh'g denied*, 930 F.2d 394 (5th Cir. 1991); *United States* v. *Clinical Leasing Serv.*, 982 F.2d 900, 901, 904 nn.9–10 (5th Cir. 1992); Louisiana Secretary of State, Delta Clinic (https://tinyurl.com/deltaclinic).

[7] JA 243, JA 447–448, ROA.14030 (75:10–76:19), ROA.14032 (83:24–84:1); JA 1337 (59:2–6).

[8] JA 206–207 (Doe 3 performs up to 30 abortions per day when at the clinic), JA 243 (up to six an hour). Doe 1 performs 2,100 procedures per year, plus consultations, working only three days a week. Pet. App. 51a; JA 769, JA 786; see also ROA.10162 (Plaintiffs' expert opining that "a surgical abortion procedure typically lasts two to ten minutes"), ROA.11481–11486, ROA.14144 (70:9–10).

the patient is under the influence of medications that affect her consciousness. JA 223, JA 286–287.

More often than not, neither the clinic nor the abortion doctor interacts with a patient apart from the brief procedure. ROA.14146–14147 (80:23–81:1). Clinics schedule patients for follow-up appointments, but most never return.[9] Some patients actively avoid even the *possibility* of further contact. ROA.14034 (91:6–24).

b. The doctors' and clinics' status changed throughout this litigation. Doe 4—in his 80's—retired. ROA.3966; Pet. App. 11a. Causeway and Bossier also closed for reasons unrelated to Act 620. Pet. 6 n.4. Doe 2 affiliated with Hope as a backup when Bossier closed.

Does 1, 2, 4, 5, and 6 did not have current privileges when Act 620 was enacted. During the litigation, hospitals in New Orleans granted privileges to Does 2 and 5. JA 391–392, JA 1334 (37:22–38:1).

Doe 2 did not obtain privileges near Hope in the Shreveport area. Doe 5 did not obtain privileges near Delta in Baton Rouge. And Does 1 and 6 did not receive privileges at any hospital. The most apparent

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[9] See JA 130–131 (Hope's administrator testifying that "a pretty high number of [the clinic's] patients don't follow-up at all"), JA 447–448 (discussing Doe 2's deposition testimony that "that about 20 to 30 percent at most, return[ed] for their post-abortion checkup"); see also ROA.14034 (90:1–92:6), ROA.14146–14147 (80:4–81:1), JA 1342 (80:3–16) (lack of follow-up at other clinics).

reason for the failures to obtain qualifying admitting privileges was that Does 2, 5, and 6 did not make good-faith efforts to do so.

Doe 2 did not even *attempt* to apply at two Shreveport-area hospitals. Most notably, he did not apply where he previously held privileges and where Doe 3 has privileges now. JA 405–406, JA 453:6–15; Pet. App. 42a–43a. At one hospital where Doe 2 did apply, he gave evasive answers on his application, ROA.12051, refused to follow basic instructions, provided insufficient documentation, then declined to remedy these defects after the hospital sent a follow-up request. JA 1443–1446. Some documents call into question whether Doe 2 intended to obtain privileges at all. JA 1452–1453.

Doe 5 likewise obstructed his own success. He failed to make good-faith efforts to complete the application process at a Baton Rouge hospital willing to grant privileges. ROA.9925, JA 1334–1335 (39:20–41:1). Doe 6 applied to only *one* of *nine* qualifying hospitals in the New Orleans area and, notably, did not apply to the hospital where Doe 5 was granted privileges. Pet. App. 24a; ROA.10787, ROA.14057 (247:7–248:5).[10]

[10] Several abortion doctors declared or testified that they refused to apply to hospitals affiliated with the Catholic Church. See JA 405–406 (Doe 2), ROA.9925 (Doe 5), ROA.10786 (Doe 6); see also ROA.9948 (Hope's administrator discussing Doe 1's ap-

Doe 1's good faith was also questionable. See JA 733 (admitting he originally applied for privileges for addiction medicine practice), ROA.11800, ROA.13024. In any event, Doe 1 seems to fall in the category of practitioners the law is intended to guard against—doctors who are *unqualified*. Doe 1, a graduate of a medical school in the Dutch Caribbean, JA 670:10–15, JA 761:12–14, claims to be a specialist in "Family Medicine and Addiction Medicine"—but has never *practiced* family medicine. JA 671:13–20, JA 761:21–23. Doe 1 conceded he had no training in abortion practice during medical school or his residency; he was taught on-the-job by Doe 3. JA 696:2–14, JA 761–762, JA 229–230. Doe 1's ability to recognize and surgically manage predictable complications of abortions appears severely limited. ROA.15295. When Doe 1 punctured a patient's uterus, it was Doe 3 who fixed it precisely because Doe 1 was not capable of doing so.

Although the parties agreed that Doe 5's privileges in New Orleans satisfied Act 620, they disputed whether Doe 2's privileges did. To resolve the issue, Kathy Kliebert, then-Secretary of LDH, submitted a sworn declaration stating Doe 2's privileges *would* satisfy Act 620. ROA.10800–10802. She testified to that effect at trial. JA 587–589. Plaintiffs, nevertheless, continued to argue Doe 2's privileges did *not* meet the requirements of Act 620. JA 397:5–11. The district

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plications), ROA.10174–10175 (Plaintiffs' expert). But Doe 3 conceded he had privileges at a Catholic hospital, where other doctors are aware he performs abortions. JA 272:1–19.

court, rejecting the Secretary's interpretation, refused to count Doe 2's privileges, finding that they do not qualify, Pet. App. 238a. The Fifth Circuit also rejected Louisiana's position regarding Doe 2's privileges. Pet. App. 43a–44a n.58.[11] Nevertheless, Hope and Women's Health indisputably each had a qualifying doctor at the time of trial.

d. Post-trial, the status of Louisiana's abortion doctors continues to change.

Does 1 and 3 still report performing abortions at Hope. Supp. App. 38–39. Although Plaintiffs claim Hope has a backup agreement with Doe 2, state abortion reports show Doe 2 has never reported an abortion there. Supp. App. 38.

In March 2018 Doe 2 became the medical director of Delta and began performing abortions there. Supp. App. 2, 38. He remained in that role until August 2019, when he was replaced as medical director and ceased reporting abortions. Supp. App. 2, 38. State records do not show any abortions by Doe 2 since that time. Supp. App. 39. However, public records show that he remains affiliated with both Delta and Women's Health. Supp. Sealed App. 2–3, 8, 16, 18.

Doe 5 performed abortions at Delta until March 2018, approximately when Doe 2 became medical director. Supp. App. 39. Doe 5 has not reported abortions since then, Supp. App. 39, but has applied for a

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[11] But see *June Med. Servs.* v. *Gee*, 814 F.3d 319, 327 (5th Cir.), *vacated,* 136 S. Ct. 1354 (2016)).

license to open a new abortion clinic, Supp. App. 2. Doe 6 continues to report abortions at Women's Health and occasionally at Delta. Supp. App. 39; Supp. Sealed App. 2–3, 10, 20.

Two doctors who were *not* abortion providers at the time of trial have since performed abortions. Dr. Doe S has reported abortions since January 2017 at Delta and Women's Health. Supp. App. 39; Supp. Sealed App. 3–4, 12, 22. And Dr. Doe W reported abortions in December 2018 and January 2019. Supp. App. 39; Supp. Sealed App. 4. The admitting privileges status of Does S and W is unknown.

B. Proceedings Below

On August 22, 2014—before Act 620 took effect—Hope, Bossier, Causeway, and Does 1 and 2 filed suit.[12] Plaintiffs alleged in the original and amended complaints that they sued "on behalf of [their] patients," *e.g.*, ROA.46, JA 16, claiming Act 620 is facially invalid because it imposes an "undue burden" on their patients' substantive due process right to choose an abortion. Plaintiffs have "emphatically" disavowed any as-applied challenge. Pet. App. 153a. Plaintiffs originally alleged Act 620 violates their own *procedural* due process rights, JA 27, but they did not

[12] Bossier and Causeway later dismissed their claims voluntarily. ROA.674. Delta, Women's Health, and Does 5 and 6 filed a separate challenge that was consolidated with Plaintiffs' lawsuit, but it was voluntarily dismissed as well. ROA.674; *June Med. Servs.* v. *Kliebert*, No. 3:14-cv-00525 (M.D. La.) (ECF 77).

pursue that claim and the lower courts did not reach it.

1. As in the Legislature, not a single abortion patient ever testified against Act 620. There is no evidence any woman would (1) prefer a doctor *without* admitting privileges, (2) prefer to forgo the protections Act 620 was intended to provide, or (3) consider her decision to obtain an abortion unduly burdened by Act 620.

Nevertheless, after a six-day bench trial, the district court preliminarily enjoined Act 620. ROA.3748–3859. The Fifth Circuit granted a stay February 24, 2016, allowing Act 620 to go fully into effect "for the first time." ROA.3942–3957; *June Med. Servs.*, 814 F.3d at 319. In so doing, the panel held the doctors had third-party standing to challenge Act 620 on their patients' behalf. *Id.* at 322. This Court vacated that stay eight days later. *June Med. Servs.* v. *Gee*, 136 S. Ct. 1354 (2016).

This Court decided *Whole Woman's Health* v. *Hellerstedt*, 136 S. Ct. at 2292, on June 27, 2016, declaring unconstitutional a Texas law that encompassed admitting privileges. The Fifth Circuit granted Louisiana's motion to remand, ROA.4081, and the district court permanently enjoined Act 620 on April 26, 2017. The district court found one purpose of Act 620 was to protect the health and safety of Louisiana abortion patients. Pet. App. 202a. It ultimately concluded, however, that Act 620 placed an undue burden on the decision to obtain an abortion.

2. Louisiana appealed and the Fifth Circuit reversed. The majority held that "the admitting-privileges requirement performs a real, and previously unaddressed, credentialing function that promotes the wellbeing of women seeking abortion." Pet. App. 39a. The majority then reasoned—based on a careful analysis of *Hellerstedt*—that (1) it is Plaintiffs' burden to establish that Act 620 *creates* an obstacle to abortion, *id.* at 40a, and (2) that if providers *can* obtain privileges, "no other burdens result" from Act 620, *id.*

The panel examined the doctors' efforts to obtain privileges and concluded—based on the evidence described above—that Does 2, 5, and 6 had failed to make good-faith efforts to obtain privileges. Pet. App. 42a–46a. If all the doctors had sought privileges in good faith, only Doe 1 *possibly* would not obtain them,[13] all three clinics would have doctors with admitting privileges, and *no* Louisiana clinic would close as a result of Act 620. Pet. App. 46a–49a. The district court had misunderstood what was required to show good-faith compliance efforts, and so its conclusions about the doctors' efforts were erroneous.

The panel next considered the effect on Louisiana abortion patients if Does 2, 5, and 6 obtained privileges by good-faith efforts. In such a circumstance, 70% of patients (those served by Delta and Women's Health) would not be affected at all. Pet. App. 55a–

[13] The Fifth Circuit observed it is "possible" Doe 1 could still obtain privileges if he resolves a "communication problem" with one hospital. Pet. App. 42a.

56a. Hope's patients *might* be affected if Doe 1 left practice, but Doe 2 and Doe 3 could make up the difference with at most an hour-long increase in patient wait times. Pet. App. 52a–53a. The court concluded: "Instead of demonstrating an undue burden on a large fraction of women, June Medical at most shows an insubstantial burden on a small fraction of women. That falls far short of a successful facial challenge." Pet. App. 58a.

Plaintiffs' petition for *en banc* review was denied over dissents. Pet. App. 104a–105a. The Fifth Circuit denied Plaintiffs' motion to stay the mandate, and Plaintiffs obtained a stay from this Court. Pet. App. 280a.

SUMMARY OF ARGUMENT

This Court should resolve this case on either of two grounds: Plaintiffs' lack of third-party standing to sue on behalf of their patients, or Plaintiffs' failure to prove that Act 620 on its face unduly burdens abortion.

Under this Court's Article III standing jurisprudence, it is axiomatic that the plaintiff bears the burden of proving standing and must carry that burden at *each stage* of the litigation *for each claim*. Likewise, courts are instructed to examine their jurisdiction at every stage of the litigation. Third-party standing cannot expand federal jurisdiction beyond its Article III limits. Limitations on third-party standing arise from the same considerations that limit standing un-

der Article III—which, in turn, are rooted in separation of powers. Those limitations apply to abortion providers as much as to any other litigant. "[A] plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975).

To overcome these deeply-rooted limitations on jurisdiction, a plaintiff must establish a "close" relationship with the third party, and a "hindrance" to the third party asserting her own rights. *Kowalski* v. *Tesmer*, 543 U.S. 125, 130 (2004). Plaintiffs cannot satisfy either requirement. Louisiana women can challenge abortion regulations if they wish to do so—as individual women have done in numerous other abortion cases across the country—and thus are not hindered. And the relationship between Plaintiffs and their patients is not only attenuated, but also riven with conflicts. Plaintiffs' desire to operate their clinics largely free from government oversight certainly poses at least a *potential* conflict with the paramount health and safety interests of their patients. Plaintiffs' attempt to stand in the shoes of their patients is inconsistent with longstanding, generally applicable principles of third-party standing.

The third-party standing issue is squarely presented here because the Fifth Circuit expressly addressed and passed upon that question at an earlier stage of the proceedings. In all events, though, challenges to third-party standing should not be forfeita-

ble, particularly where litigants seeking to facially invalidate state health and safety laws stand in the shoes of those the laws are designed to protect. This case aptly shows that facts relevant to jurisdiction may be developed at or after trial and might contradict bare jurisdictional allegations in the complaint.

On the merits, Plaintiffs claim *Hellerstedt* resolves this case as a matter of law and that its holdings dictate the answers to the critical *factual* questions in *this* case. *Hellerstedt*, however, rested on analysis of a factual record developed in Texas on an as-applied challenge and never purported to foreclose a different result on a different record in a different jurisdiction. *Hellerstedt* also preserved the rule of *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 U.S. 833 (1992), that only a law that actually creates a "substantial obstacle" to abortion fails the prevailing "undue burden" test. This Court should reject Plaintiffs' misinterpretations of *Hellerstedt* and clarify standards for abortion litigation.

Lacking legal support in *Hellerstedt*, Plaintiffs fault the Fifth Circuit's application of law to the facts. Those arguments are hardly suitable for this Court's review, and Plaintiffs can point to no error.

ARGUMENT

I. PLAINTIFFS CANNOT ASSERT THIRD-PARTY CLAIMS ON BEHALF OF WOMEN SEEKING ABORTIONS.

A federal plaintiff generally "must assert his own legal rights and interests, and cannot rest his claim

on the legal rights of third parties." *Kowalski*, 543 U.S. at 129. As this Court put it in *Heald* v. *District of Columbia*, "one who would strike down a state statute as violative of the federal Constitution must show that *he is within the class of persons with respect to whom the act is unconstitutional* and that the alleged unconstitutional feature injures him." 259 U.S. 114, 123 (1922) (emphasis added). Yet the Fifth Circuit—like many courts addressing challenges to abortion regulations—held that Plaintiffs have third-party standing to challenge Act 620 on behalf of their patients. That was error.

Applying ordinary rules of third-party standing to this case, Plaintiffs fail to meet their burden. Plaintiffs' substantive due process challenge to Act 620—the only claim they preserved—should be dismissed.

A. Third-Party Standing Is Properly Treated As A Component Of Article III Jurisdiction.

"The law of Art. III standing is built on a single basic idea—the idea of separation of powers." *Allen* v. *Wright*, 468 U.S. 737, 752 (1984), *abrogated on other grounds by Lexmark Int'l* v. *Static Control Components*, 572 U.S. 118 (2014). To establish Article III standing, a plaintiff must prove an injury-in-fact that is "concrete," "particularized," and "fairly traceable" to the action challenged. *Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540, 1548 (2016). To be "particularized," an injury "must affect the plaintiff in a personal and individual way." *Lujan* v. *Defs. of Wildlife*, 504 U.S. 555,

560 n.1 (1992); see also *Spokeo*, 136 S. Ct. at 1548 (collecting cases). Particularization inevitably concerns *who* has suffered the alleged injury giving rise to the claim. Because limitations on third-party standing reflect these core components of jurisdiction rooted in Article III, the propriety of third-party standing is part of that jurisdictional equation.

1. When a litigant asserts third-party standing, the alleged injury is particularized (if at all) in *someone else*. If the principal litigant does not show a sufficient connection to the specific injury of the allegedly aggrieved party, it follows that he does not present an injury sufficiently "particularized" to satisfy Article III. See *Spokeo*, 136 S. Ct. at 1548 (the question whether a litigant alleges a violation of "*his* statutory rights" versus "the statutory rights of other people … concern[s] particularization"); see also *Warth*, 422 U.S. at 502 ("Petitioners must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.").

Act 620 regulates *Plaintiffs*' conduct. So that gives them standing to raise claims arising from personal injuries—for example, the procedural due process claim Plaintiffs originally pleaded but abandoned. ROA.359. But standing "is not dispensed in gross," *Lewis* v. *Casey*, 518 U.S. 343, 358 n.6 (1996), so a litigant's own injury-in-fact cannot confer standing to raise claims arising solely from a different injury allegedly sustained by another. *Heald*, 259 U.S. at 123;

New York ex rel. Hatch v. *Reardon*, 204 U.S. 152, 160 (1907).

Limitations on third-party standing also go to whether there is a justiciable case or controversy involving the third party. This Court has recognized that "[t]he Art. III aspect of standing … reflects a due regard for the autonomy of those persons likely to be most directly affected by a judicial order." *Valley Forge Christian Coll.* v. *Ams. United for Separation of Church & State*, 454 U.S. 464, 473 (1982). Limitations on third-party standing implicate similar concerns, *e.g.*, "the avoidance of the adjudication of rights which those not before the Court may not wish to assert." *Duke Power* v. *Carolina Envtl. Study Grp.*, 438 U.S. 59, 80 (1978). If no woman seeking an abortion *wants* Act 620 enjoined, Plaintiffs' substantive due process claim—resting as it does on the alleged interests of Plaintiffs' female patients—does not present a live controversy at all. See *Hollingsworth* v. *Perry*, 570 U.S. 693, 705–708 (2013).

In the absence of abortion patients, moreover, the effects of a law like Act 620 may be speculative, rendering substantive due process claims unripe. *Tex.* v. *United States*, 523 U.S. 296, 300 (1998) (observing the unripeness of claims based on "contingent future event[] that may not occur as anticipated, or indeed may not occur at all"); *Ohio Forestry Ass'n* v. *Sierra Club*, 523 U.S. 726, 734 (1998). If not properly cabined, third-party litigation thus requires a court to opine on "issues which remain unfocused," lacking the "clash of adversary argument" that allows the court to

explore "every aspect of a multi-faced situation embracing conflicting and demanding interests." *United States* v. *Fruehauf*, 365 U.S. 146, 157 (1961). Particularly given that no one yet knows whether Act 620 will ever truly impede the ability of Louisiana women to obtain abortions, ripeness is a problem here as well.

2. This Court has sometimes characterized third-party standing as a question of prudential jurisdiction. *Warth*, 422 U.S. at 509; see also *Kowalski*, 543 U.S. at 129. But that characterization does not fully reflect how third-party standing relates to Article III.

This Court's more recent precedents governing prudential jurisdiction show why reframing third-party standing as a component of Article III is in order. In *Lexmark*, the Court held that "[s]tatutory" standing—sometimes called the "zone-of-interests" test—is not a standing doctrine at all but instead relates to whether the plaintiff has a cause of action. 572 U.S. at 127–128. *Lexmark* also recognized the "generalized grievance" doctrine—which concerns claims "seeking relief that no more directly and tangibly benefits [the plaintiff] than it does the public at large"—is not a prudential doctrine, but an Article III limitation on jurisdiction. *Id.* at 127 n.3 (quoting *Lujan*, 504 U.S. at 573–574). Third-party standing may now be the last prudential standing doctrine, and *Lexmark* expressly reserved the question of how it is best treated. *Id.* at 127 n.3.

An analogy between third-party standing and the "generalized grievance" doctrine—now rightly viewed

as arising from Article III—is instructive because both apply to cases where plaintiffs represent non-parties. In *Warth*, this Court explained how Article III requires that plaintiffs "allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent." 422 U.S. at 502. Furthermore, in *Whitmore* v. *Arkansas* this Court rejected a petitioner's standing as the "next friend" of a third party. 495 U.S. 149 (1990). The Court observed that "if there were no restriction on 'next friend' standing in federal courts, the litigant asserting only a generalized interest in constitutional governance could circumvent the jurisdictional limits of Art. III simply by assuming the mantle of 'next friend.'" *Id.* at 164. The same is true of third-party standing, which for similar reasons should be treated as a matter of Article III jurisdiction.

Prudential standing cannot vest a court with subject matter jurisdiction; therefore, it cannot *expand, replace, or substitute for* constitutional standing. Given its interrelation with case-or-controversy requirements, limitations on third-party standing are better understood as arising under Article III.

B. Whether Third-Party Standing Is Jurisdictional Or Prudential, Plaintiffs Challenging Abortion Regulations Should Be Held To The Same Standing Requirements As Other Litigants.

Whether jurisdictional or prudential, limitations on third-party standing are rigorous and difficult to satisfy—both because courts do not lightly assume that one party can assert someone else's rights and because directly affected parties are generally in a better position to develop a proper and informative record. Such concerns are especially salient where the exercise of jurisdiction displaces state sovereignty and intrudes upon the exercise of police powers in an area traditionally left to the States: health and safety regulations. The limitations on third-party standing apply to abortion providers no less than to any other litigant.

1. This Court has sought for years to bring clarity and precision to questions of federal jurisdiction. See, *e.g.*, *Lexmark*, 572 U.S. 118; *Clapper* v. *Amnesty Int'l USA*, 568 U.S. 398 (2013); *Lujan*, 504 U.S. 555. Decisions like *Kowalski* introduced that rigor to third-party standing. Under *Kowalski*, third-party standing requires proof of (1) "a 'close' relationship" between a plaintiff and supposedly represented third parties, and (2) a "'hindrance' to [the third parties'] ability to protect [their] own interests." 543 U.S. at 130. Plaintiffs must *prove* those elements as a factual matter, and must maintain standing throughout the pendency

of the case. See *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 9, 15 (2004) (holding third-party standing lacking based on facts raised after initial appellate decision); see also *In re Gee*, No. 19-30953 at 9–10 (5th Cir. Nov. 27, 2019) (Elrod, J., concurring).

The Court has neither defined precisely what constitutes a "hindrance" for purposes of third-party standing nor what makes a relationship "close." It has, however, established guiding principles.

a. No hindrance exists when the purportedly represented parties have proven capable of representing themselves before. Such a history "disprove[s]" any hindrance as a matter of law. *Kowalski*, 543 U.S. at 131–132; see also *Hodak* v. *City of St. Peters*, 535 F.3d 899, 904 (8th Cir. 2008) (collecting cases).

A hindrance also requires more than a showing that third parties face economic or other disadvantages. In *Kowalski* this Court rejected a claim of hindrance involving individuals who were not only indigent, but incarcerated. 543 U.S. 131–132. Lower courts have recognized poverty and similar disadvantages involve the "normal burdens of litigation," not true hindrances. *Am. Immigration Lawyers Ass'n* v. *Reno*, 199 F.3d 1352, 1364 (D.C. Cir. 2000); see also *Freilich* v. *Upper Chesapeake Health*, 313 F.3d 205, 215 (4th Cir. 2002).

b. As to closeness, a relationship cannot be "close" when a plaintiff's interests potentially conflict with the interests of the third party. See *Newdow*, 542 U.S. at 15 & n.7 (third-party standing vitiated by potential

conflict of interest); *Kowalski*, 543 U.S. at 135 (Thomas, J., concurring); see also *Amato* v. *Wilentz*, 952 F.2d 742, 753 (3d Cir. 1991). Such conflicts have been recognized when a litigant's financial interests conflict with the third party's interest in health and safety. *Gold Cross Ambulance & Transfer* v. *City of Kan. City*, 705 F.2d 1005, 1016 (8th Cir. 1983).[14]

Closeness of a relationship is evaluated case-by-case, not categorically. Sometimes parents have third-party standing to represent their children, *Prince* v. *Massachusetts*, 321 U.S. 158 (1944), but sometimes not, *Newdow*, 542 U.S. at 15 & n.7. Indeed, in a different context, this Court declined to assume parents have a close relationship with their children seeking abortions. *Hodgson* v. *Minn.*, 497 U.S. 417, 446 (1990).

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[14] That aligns with class actions, where a plaintiff whose interests conflict with the proposed class cannot be an adequate class representative. *Amchem Prods.* v. *Windsor*, 521 U.S. 591, 625 (1997) (adequacy inquiry under Rule 23(a)(4) uncovers conflicts of interest between named parties and the class) (citing *Gen. Tel. Co. of S.W.* v. *Falcon*, 457 U.S. 147, 157–158, n. 13 (1982)); see also Wright & Miller, 7A Fed. Prac. & Proc. Civ. § 1768 (3d ed.) ("It is axiomatic that a putative representative cannot adequately protect the class if the representative's interests are antagonistic to or in conflict with the objectives of those being represented."). This Court held long ago that an individual who wants a provision of law enforced cannot represent a class that includes individuals who do *not* want it enforced. *Hansberry* v. *Lee*, 311 U.S. 32, 44 (1940). The same rule disqualifies a class representative who sues to invalidate a law members of the class want. See *Peterson* v. *Okla. City Hous. Auth.*, 545 F.2d 1270, 1273 (10th Cir. 1976).

The same is true with lawyers and their clients. Compare *Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. 617 (1989) (third-party standing); *Dep't of Labor* v. *Triplett*, 494 U.S. 715 (1990) (same), with *Conn* v. *Gabbert*, 526 U.S. 286, 292 (1999) (no third-party standing). In short, there is no presumption of closeness. The facts of the relationship control, not the label attached to it.

2. Plaintiffs and the lower courts appear to assume abortion providers are guaranteed third-party standing to bring substantive due process claims on behalf of their patients. Indeed, the Fifth Circuit did so earlier in this case. *June Med. Servs.*, 814 F.3d at 322. But this Court's precedents do not create special *exemptions* for abortion providers, who must satisfy the same rigorous third-party standing requirements as other litigants. Any decisions to the contrary should be overruled or limited to their facts.

a. Outside abortion litigation, lower courts faithfully apply the analysis that decisions like *Kowalski* require. But those same courts routinely confer third-party standing on abortion providers without engaging in that analysis—sometimes without any analysis at all.[15] That dissonance results from the lingering ef-

[15] The Fifth Circuit even did so at an earlier stage in this case *June Med. Servs.*, 814 F.3d at 322; see also *Planned Parenthood of N. New Eng.* v. *Heed*, 390 F.3d 53, 56 n.2 (1st Cir. 2004), *vacated sub nom. Ayotte* v. *Planned Parenthood of N. New Eng.*, 546 U.S. 320 (2006); *Am. Coll. of Obstetricians & Gynecologists, Penn.*

fects of old cases that should be treated as wrongly decided or superseded by the developing third-party standing doctrine.

Several early cases brought by abortion providers do not reflect current doctrine. Some found third-party standing simply because the provider "is subject to potential criminal liability for failure to comply with the requirements" of the challenged law. See *City of Akron* v. *Akron Ctr. for Reprod. Health*, 462 U.S. 416, 440 n.30 (1983). That question goes to the doctor's Article III standing to raise claims on his own behalf, but not to the patient's relationship or any "hindrance" to the patient asserting her own rights. Other cases did not clearly distinguish between a doctor's third-party standing and his first-party standing to seek prospective "relief" from future prosecution. See,

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Section v. *Thornburgh*, 737 F.2d 283, 289 n.6 (3d Cir. 1984), *aff'd sub nom. Thornburgh* v. *Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1986); *Greenville Women's Clinic* v. *Bryant*, 222 F.3d 157, 194 n.16 (4th Cir. 2000); *Planned Parenthood of Greater Tex.*, 748 F.3d at 589; *Jackson Women's Health Org.* v. *Currier*, 760 F.3d 448 (5th Cir. 2014); *Women's Med. Prof'l Corp.* v. *Baird*, 438 F.3d 595 (6th Cir. 2006); *Planned Parenthood of Wis.* v. *Schimel*, 806 F.3d 908, 910–911 (7th Cir. 2015); *Comprehensive Health of Planned Parenthood Great Plains* v. *Hawley*, 903 F.3d 750, 757 n.7 (8th Cir. 2018); *Planned Parenthood of Idaho* v. *Wasden*, 376 F.3d 908, 917–918 (9th Cir. 2004); *Isaacson* v. *Horne*, 716 F.3d 1213, 1221 (9th Cir. 2013); *Planned Parenthood of Rocky Mountains Servs., Corp.* v. *Owens*, 287 F.3d 910 (10th Cir. 2002); *Planned Parenthood Ass'n of Atlanta Area,* v. *Miller*, 934 F.2d 1462, 1465 n.2 (11th Cir. 1991).

e.g., *Planned Parenthood of Cent. Mo.* v. *Danforth*, 428 U.S. 52, 62 (1976); *Doe* v. *Bolton*, 410 U.S. 179, 186, 188 (1973).

b. The clearest statement from this Court on third-party standing came from *Singleton* v. *Wulff*, where a plurality "conclude[d] that it generally is appropriate to allow a physician to assert the rights of women patients as against governmental interference with the abortion decision." 428 U.S. 106, 118 (1976).[16] That case involved a challenge to limits on state funding for abortions, *id.* at 108, where patients' and physicians' interests were apparently aligned. But that decision should not control the outcome where, as here, abortion providers challenge health protections designed to benefit their patients. *Wulff* is distinguishable on that ground. More fundamentally, although *Wulff*'s statement of the law on third-party standing resembles the *Kowalski* test, the Court's analysis is inconsistent with modern doctrine.

The *Wulff* plurality treated closeness as "patent" because a woman "cannot safely secure an abortion without the aid of a physician" and because the physician is "intimately involved" with the abortion decision. *Id.* at 117. The first rationale on its face shows *nothing* about the degree of closeness in any relationship. The second rationale is contradicted by the record in this case. See *infra* at 47–48. To the extent that

[16] No subsequent majority holding of this Court has ratified the plurality opinion in *Wulff* as a general proposition for abortion providers.

flawed analysis categorically established closeness, without necessity of factual support or opportunity to test it case-by-case, it is inconsistent with the modern rule.

As to hindrance, the *Wulff* plurality identified two potential obstacles to patients' capacity to directly challenge abortion laws: (1) a patient may be "chilled" by a desire to protect the privacy of her decision from the publicity of a lawsuit; and (2) "imminent mootness, at least in the technical sense, of any individual woman's claim." 428 U.S. at 117. But in the same paragraph, the Court recognized that those obstacles are insubstantial.

The plurality was wrong on the first point because, as it acknowledged, this Court had long let women challenge abortion regulations pseudonymously. *Id.* ("Suit may be brought under a pseudonym, as so frequently has been done."); see also *Bolton*, 410 U.S. at 184 ("[D]espite her pseudonym, we may accept as true, for this case, Mary Doe's existence and her pregnant state[.]") (citing *Roe* v. *Wade*, 410 U.S. 113 (1973)); *Doe No. 1* v. *Reed*, 697 F.3d 1235, 1245 n.3 (9th Cir. 2012).[17]

And the plurality was wrong on the second because, as it likewise acknowledged, this Court held in *Roe* that "[a] woman who is no longer pregnant may

[17] In this case, witnesses who sought confidentiality were permitted to proceed under pseudonyms and testified from behind screens. ROA.1651, JA 196. There is no reason that women who desire confidentiality could not be similarly protected.

nonetheless retain the right to litigate the point because it is capable of repetition yet evading review." *Wulff*, 428 U.S. at 117 (citing *Roe*, 410 U.S. at 124–125). Indeed, *Roe* applied that mootness exception to ensure that *individual women* would be able to litigate their claims. *Roe*, 410 U.S. at 124–125. It is no stretch to say *Wulff* "conceded that the traditional criteria for an exception to the third-party standing rule were not met." *Hellerstedt*, 136 S. Ct. at 2322–2323 (Thomas, J., dissenting).

The *Wulff* plurality excused those defects on the ground that "there seems little loss in terms of effective advocacy from allowing … assertion [of patients' rights] by a physician." 428 U.S. at 117–118. Even if that justified a failure to apply the third-party standing rules in that case, it certainly does not in a suit over health regulations. Allowing abortion providers to assert patient claims without a single patient in sight "deprives [the Court] of the information needed to resolve" other relevant issues, including "how many women [might be burdened by a law]; their proximity to open clinics; or their preferences as to where they obtain abortions, and from whom." *Hellerstedt*, 136 S. Ct. at 2323 (Thomas, J., dissenting). It also obscures whether a case or controversy exists between a State and the women it seeks to protect. See *supra* at 28–29.

None of this Court's prior cases, in short, should impede application of the ordinary rigorous standards of third-party standing to abortion providers.

C. Plaintiffs' Patients Are Not Hindered In Pursuing Their Own Rights.

The record contains no evidence Plaintiffs' patients are hindered from challenging Act 620. Plaintiffs can establish no hindrance as a matter of law.

1. Abortion litigation both before and since *Wulff* makes clear no hindrance exists. See *Kowalski*, 543 U.S. at 131–132; *supra* at 32. As Justice Thomas recently observed, "women seeking abortions have successfully and repeatedly asserted their own rights before this Court." *Hellerstedt*, 136 S. Ct. at 2323 & n.1 (Thomas, J., dissenting) (collecting numerous cases). If "Mary Doe," the pregnant plaintiff in *Roe*'s companion case, could challenge a statute requiring abortions be performed in a hospital, see *Bolton*, 410 U.S. at 184, there is no reason to presume that women are hindered from challenging an admitting-privileges requirement. Abortion patients today continue to challenge abortion regulations in their own names, see *McCormack* v. *Herzog*, 788 F.3d 1017 (9th Cir. 2015), or through legal guardians, see *Azar* v. *Garza*, 138 S. Ct. 1790 (2018).

Nor does any Louisiana-specific obstacle hinder women. Indeed, Louisiana women, including a pregnant minor, once brought a series of class actions challenging abortion regulations. See *Margaret S.* v. *Edwards*, 488 F. Supp. 181, 186 (E.D. La. 1980); *Margaret S.* v. *Treen*, 597 F. Supp. 636, 642–643 (E.D. La. 1984), *aff'd sub nom. Margaret S.* v. *Edwards*, 794 F.2d 994 (5th Cir. 1986). Given that history, none of

the theoretical hindrances Louisiana women might face—including poverty and other vulnerabilities—establishes a hindrance.

2. The potential hindrances in this case are insubstantial for other reasons as well. Indigency does not hinder women from pursuing their abortion-related rights. *Harris* v. *McRae*, 448 U.S. 297, 298 (1980). Indeed, the assumption that disadvantaged women are unable to speak for themselves—and in fact depend on sophisticated doctors seeking to sell them medical services to speak for them—*deprives* them of their voice. Vulnerabilities of abortion patients should make this Court *more* suspicious of self-appointed advocates purporting to represent them, especially in the context of challenges to laws designed to protect those patients. *Wash.* v. *Glucksberg*, 521 U.S. 702, 731–732 (1997) (discussing "the real risk of subtle coercion and undue influence" on "disadvantaged persons" who might be subject to "prejudice, negative and inaccurate stereotypes, and 'societal indifference'"); see also *Freilich*, 313 F.3d at 215 ("[W]e cannot simply assume that every disabled or chronically ill person is incapable of asserting his or her own claims.").

This case and others like it prove the point. Plaintiffs have been represented by counsel at a national nonprofit litigation center and three law firms of national reputation. See *June Med. Servs.* v. *Gee*, No. 3:16-cv-444 (M.D. La.) ("*June II*"); *June Med. Servs.* v. *Gee*, No. 3:17-cv-404 (M.D. La.) ("*June III*"). Plaintiffs' attorneys routinely claim fees under 42 U.S.C. § 1988 when they prevail. It is unconvincing speculation to

suggest that the significant resources available to clinics and doctors—not to mention the 27 groups of lawyers and law firms who filed amicus briefs in support of Plaintiffs—would not be available to women with individual claims. If those resources are available to Plaintiffs but not to individual women, it would only underscore that Plaintiffs' interests are not aligned with women seeking safe abortions from competent and ethical providers.

In short, the hindrance requirement is not met, and Plaintiffs thus lack standing.

D. Plaintiffs Cannot Establish Third-Party Standing In Light Of Conflicts Of Interest And An Insufficiently Close Relationship With Their Patients.

Hope and its contracted doctors lack the necessary close relationship with patients—most obviously, because of a serious conflict of interest. For that reason too, the generally applicable standards of third-party standing prevent Plaintiffs from suing on their patients' behalf.

1. The record illustrates several conflicts between Plaintiffs and their patients.

Abortion providers and their patients have an obvious conflict in the inevitable tradeoff between cost and safety. Women have an interest in ensuring their own health and safety when they choose to obtain an abortion. This Court's decisions recognize that interest *and* the State's ability to protect it. *Hellerstedt*,

136 S. Ct. at 2309; *Simopoulos* v. *Va.*, 462 U.S. 506 (1983); *Conn.* v. *Menillo*, 423 U.S. 9, 11 (1975) (*per curiam*); *Roe*, 410 U.S. at 150.

But Plaintiffs' interest is to reduce compliance costs and government oversight while providing as many abortions as possible. JA 243, JA 447–448. By challenging Act 620, Plaintiffs seek to *deny* their patients the standard of care other Louisiana surgical patients are guaranteed by law. La. Admin. Code § 48:4541(A), (B). No matter how much Act 620 furthers patient health and safety—a merits issue the parties contest—the conflict is plain. See *Gold Cross Ambulance*, 705 F.2d at 1016 (ambulance services lacked third-party standing to represent potential patients because the companies "are principally interested in operating their businesses profitably, while Kansas City-area residents are principally concerned with receiving high quality ambulance service at the lowest possible cost").

The conflict is not speculative, as it has manifested itself at least four distinct ways.

First, Plaintiffs (like other Louisiana abortion providers) consistently *ignore* their patients' interest in medical safety. Hope—where Does 1 and 2 practice, and Doe 3 is medical director—has repeatedly *threatened* its patients' safety, as documented by LDH's repeated citations of practices that threaten patient health, including the failure to maintain a proper hospital transfer agreement. *E.g.*, JA 65–67, JA 158–161, JA 165–167, JA 170, JA 209–210, JA 1105–1106.

The Fifth Circuit deemed those violations "unrelated" to the merits. Pet. App. 38a n.56. But they plainly relate to whether Plaintiffs should be allowed to speak on behalf of their patients on matters of health and safety. And the poor safety and compliance records of Louisiana abortion clinics underscore the State's need to ensure that abortion doctors themselves meet high professional standards through the hospital credentialing process. Because the proven public health problems are reasonably related to the State's rational basis for Act 620, they cannot be irrelevant. See *Gonzales* v. *Carhart*, 550 U.S. 124, 158 (2007); *Glucksberg*, 521 U.S. at 728, 735; *Williamson* v. *Lee Optical of Okla.*, 348 U.S. 483, 487–488 (1955).

Hope has also disregarded the very concern that Act 620 is designed to address: credentialing and qualifications of clinic staff, including doctors. Hope and other Louisiana abortion clinics do no meaningful credentialing review. JA 116–117, JA 119, JA 170, JA 246–250, JA 780–781. That failure puts patients at risk in the very ways that Act 620 would help prevent, no matter how common or serious the complications of abortion might be as a general proposition.[18] And that history casts a disturbing light on Plaintiffs' efforts to reduce health and safety protections.

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[18] Plaintiffs admit they could not show Louisiana-specific complication rates, so instead they rely on general statistics and anecdote, which are unreliable due to Plaintiffs' poor patient follow-up. See JA 130–131, JA 135–136, JA 447–448, ROA.14034 (92:7–22), JA 1342–1343 (80:3–82:12).

Plaintiffs' hostility to patient safety manifests in wide-ranging litigation efforts to tear down Louisiana's health and safety laws and shield patient-threatening misconduct from detection. For example, Hope and Does 1, 2, and 3 challenged a law Louisiana enacted while Act 620 was enjoined that would require abortion providers to be board-certified in family medicine or obstetrics and gynecology. See Compl. at 19–20, *June II* (ECF 1). Hope and Does 1 and 3 also brought a challenge against dozens of health and safety standards applicable to abortion clinics, see Am. Compl. at 17–22, *June III* (ECF 87), including the law authorizing licensing inspections that revealed the "horrifying" violations noted by the Fifth Circuit. *Id.* at 57–58; Pet. App. 38a n.56.

Second, Louisiana abortion doctors' attempts to sabotage their own privileges applications reveals a conflict with their patients' interest in obtaining abortions from qualified providers. As the Fifth Circuit concluded, "the vast majority [of active Louisiana abortion providers who lack privileges] largely sat on their hands, assuming that they would not qualify." Pet. App. 41a. "At least three hospitals have proven willing to extend privileges" to abortion providers, and "Doe 2, Doe 5, and Doe 6 could likely obtain privileges" if they made a good-faith effort. Pet. App. 46a.

The likeliest reason for the doctors' failure to make a good-faith effort is that they would have run the risk of *succeeding*, thereby undermining their claims that

Act 620 is unduly burdensome.[19] In so doing, they disregarded their patients' interests.

Third, Plaintiffs have taken litigation positions their patients never would have taken. In the lower courts, Louisiana consistently represented that Doe 2's "courtesy" privileges qualify him to provide abortions if Act 620 went into effect. *E.g.*, ROA.15980–15983. If Plaintiffs' patients have an interest in more doctors being available to perform abortions, and if Plaintiffs fairly represent that interest, then state approval of Doe 2's privileges is a positive development Plaintiffs should welcome.

But instead of accepting Louisiana's interpretation, Plaintiffs *attacked* it. Plaintiffs insisted Doe 2's privileges did *not* qualify and refused to rely on them if Act 620 went into effect. It is Doe 2's legal position, not Louisiana's, that limits his ability to provide abortions—to the detriment of his patients.

Doe 2's justification was that Louisiana could adopt a different interpretation of Act 620 in the future. JA 424:13–21. But if Doe 2 wishes to obtain clarity on interpretation of Act 620 or its application to his privileges, state law provides administrative and judicial remedies to do so. La. Rev. Stat. 49:961, 49:962, 49:963, 49:964, 49:965; La. Rev. Stat. 40:2175.6(G)–(H). He and Hope have so far elected not to pursue those remedies. Doe 2 and Hope's conduct shows they

[19] The sealed record contains evidence supporting that inference. JA 1452–1453.

are more interested in invalidating the law than serving patients.

Moreover, Doe 2 has not performed abortions since August *anywhere* in Louisiana. See *supra* at 19. If he retired, he now lacks standing altogether. But even if he is not retired, LDH is not preventing him from performing abortions in New Orleans. To the contrary, the Secretary's opinion binds the State. His fear that that the State might change its mind is unfounded.

Fourth, Plaintiffs have worked to prevent investigation and prosecution of lawbreaking that harms abortion patients. Earlier this year, in a deposition in the *June II* litigation, Doe 2 testified "Doe 5[] violates the standard of care for second-trimester abortions." See *In re Gee*, No. 19-30953 at 6 (Elrod, J., concurring). Doe 2's testimony also suggests he committed crimes in connection with his abortion practice, including failure to report the rape of a 14-year-old girl and knowingly performing an abortion on another minor without parental consent or a judicial bypass. *Id.* at 6–7.[20] Louisiana sought leave to disclose that information to law enforcement and professional disciplinary authorities, but the *June II* plaintiffs (Hope and

[20] Bossier, Doe 2's former clinic, destroyed its patient records. Dec. of Roneal Martin at ¶ 9, *Gee* v. *Bossier City Med. Suite*, No. 4:18-cv-00369 (E.D. Tex.) (ECF 11-2). That violated state law on retention of medical records, including records relative to girls 16 and under who obtained abortions. La. Rev. Stat. 40:1165.1; *id.* 40:1216.1; La. Admin. Code § 48:4413(E).

Does 1, 2, and 3) opposed, thus placing their own professional and litigation interests ahead of Louisiana women.

2. The record does not establish a "close" doctor-patient relationship between Plaintiffs and their patients.

Conflicts of interest aside, the relationship between Plaintiffs and their patients does not appear "close" in any sense. Closeness must be *proven*, not presumed. And no close relationship is remotely evident here. The record bears out Justice Powell's well-founded fear, expressed in his dissent in *Wulff*, that "the 'confidential' relationship" in abortion litigation "often is set in an assembly-line type abortion clinic," 428 U.S. at 130 n.7, that is inimical to any genuine "closeness" between doctor and patient.

Hope is only a business; it *cannot* enjoy a doctor-patient connection with patients. Nor is there evidence of real trust and communication between patients and Hope's doctors, who (like other Louisiana abortion providers) are hired by clinics on a fee-per-procedure basis to perform large volumes of brief procedures on sedated patients whom they never saw before and will never see again. JA 130–131, JA 207, JA 223, JA 286–287, JA 447–450, JA 784–785, ROA.10162, ROA.11481–11486.[21] If Doe 3 can perform 64 such procedures in a day and a half of work,

[21] Louisiana women may seek abortions from their primary-care doctors rather than from abortion clinics. See La. Rev. Stat.

JA 207, there is no basis to assume a "close" doctor-patient relationship exists.

Nor do Louisiana abortion patients appear to believe they have a close relationship with abortion providers. Patients generally do not come back for follow-up appointments. JA 130–131, JA 447–450. Many patients take pains to avoid further contact entirely. ROA.14034 (91:6–24).

Louisiana abortion providers do not even have a clear idea of how their patients fare after the abortions take place. JA 130–131, JA 135–136, JA 447–451, ROA.14034 (92:7–22), JA 1342–1343 (80:3–82:12). Evidence of real closeness, in short, is absent.

II. THIS COURT SHOULD ADDRESS PLAINTIFFS' STANDING.

This Court also granted certiorari to determine whether Plaintiffs' third-party standing can be waived or forfeited. Several considerations show that the issue is adequately presented for decision. Most important, because third-party standing is, at bottom, an Article III issue, it is a question of law that cannot be waived or forfeited, *DaimlerChrysler* v. *Cuno*, 547

40:1061.10(A)(1) (permitting obstetricians-gynecologists and family practice doctors to perform abortions); *id.* 40:2175.3(8), 40:2175.4 (authorizing doctors to perform small numbers of abortions without abortion clinic licensure). Act 620 still requires admitting privileges in such cases, and those doctors would at least be likely to have an ongoing personal relationship with pregnant mothers under their care. But no doctor has challenged Act 620 other than abortion clinics and their doctors.

U.S. 332, 340 (2006) ("We have 'an obligation to assure ourselves' of litigants' standing under Article III.") (quoting *Friends of Earth* v. *Laidlaw Env. Servs. (TOC)*, 528 U.S. 167, 180 (2000)). A holding to that effect will answer the preservation question and thereby resolve the conflict noted in the cross-petition. And, as explained below, if third-party standing were not jurisdictional, similar considerations would point to the same result.

But in any event, the issue was passed on below. When Louisiana sought a stay of the preliminary injunction, the Fifth Circuit panel granting the stay held that Plaintiffs have third-party standing. See *June Med. Servs.*, 814 F.3d at 322 (citing *Wulff*, 428 U.S. at 117–118; *Bolton*, 410 U.S. at 188)). The Court's "traditional rule ... precludes a grant of certiorari only when 'the question presented was not pressed or passed upon below.'" *United States* v. *Williams*, 504 U.S. 36, 41 (1992). Because "this rule operates (as it is phrased) in the disjunctive, ... review of an issue not pressed" is permitted "so long as it has been passed upon" in the court of appeals. *Id.* The question of third-party standing was passed upon below, and is thus squarely presented for this Court's review regardless of any alleged waiver or forfeiture.

A. Objections To Third-Party Standing May Not Be Waived Or Forfeited.

Just as Article III standing requirements "prevent the judicial process from being used to usurp the powers of the political branches," *Clapper*, 568 U.S. at 408,

so too do limitations on third-party standing by ensuring issues are properly framed and presented by a party with appropriate incentives to litigate the issue and give a fair presentation. *Kowalski*, 543 U.S. at 129. Thus even if limitations on third-party standing do not wholly arise from Article III, they are rooted in the same concerns. Restrictions on third-party standing represent an important limit on the Court's exercise of power in our federal system—including its exercise of jurisdiction over State sovereigns—that a litigating party should not be able to waive or forfeit.

In this case, for example, if Louisiana's objections are meritorious they concern not just the parties, but this Court's institutional role. Where a litigant asserting an absent party's rights may be conflicted or skewed in its litigation incentives, strong grounds exist to rule out third-party standing altogether. This Court has a role in ensuring that third parties' rights are not impaired by the representatives purporting to speak for them. See, *e.g.*, *Amchem*, 521 U.S. at 625. It is also bound to protect the sovereign interests of States. Those concerns are no less important on appeal than they are at the trial level and so should never be subject to waiver or forfeiture. See *Gonzalez* v. *United States*, 553 U.S. 242, 270 (2008) (Thomas, J., dissenting). Courts should ensure third-party standing is appropriate at any stage when doubts arise, even if no party raises the issue.

It would be artificial to apply waiver and forfeiture to objections to third-party standing because—as this case aptly illustrates—conflicts of interest between a

litigant and the supposedly represented third party can develop (or be further revealed) at any time. At very least, recent developments in *June II* provide additional evidence of conflicts of interest between Plaintiffs and their patients. See *supra* at 46–47. There is no reason to prevent a State, when defending the constitutionality of its laws, from directing a court to such conflicts whenever the facts warrant, especially where the same litigants are suing the same defendant and asserting the rights of those the attacked laws exist to protect.

This Court has already rejected third-party standing on the basis of facts introduced after an initial appellate decision. In *Newdow*, where a father claimed to represent his daughter's First Amendment rights, 542 U.S. at 8, the mother moved to intervene after the Ninth Circuit's decision, asserting that she had legal custody. *Id.* at 9. This Court noted that "the extent of the standing problem … was not apparent" until the mother's motion, *id.* at 13–14, but agreed that the facts suggested a conflict between the father and the daughter, which made third-party standing impossible. *Id.* at 15 & n.7.

Craig v. *Boren* implied that an objection to third-party standing might be waivable for reasons of judicial economy. 429 U.S. 190, 193 (1976). But that does not control here because Louisiana did not waive objections to third-party standing. In any event, considerations of judicial economy cut the other way here. Waiting for a first-party, post-enforcement challenge would be an appropriate exercise of prudence.

B. This Court Should Reach Plaintiffs' Third-Party Standing.

There is also no barrier to the Court's considering Louisiana's objections here as a matter of discretion. The lower court already passed on Plaintiffs' standing, *June Medical Services*, 814 F.3d at 322, so this Court may address it. *Williams*, 504 U.S. at 41.

Moreover, raising the issue below would have been futile. Months before Plaintiffs filed suit, the Fifth Circuit addressed the Texas hospital admitting privileges law that was eventually enjoined in *Hellerstedt*. *Planned Parenthood of Greater Tex.*, 748 F.3d 583. Texas argued that the abortion providers lacked third-party standing to challenge the admitting-privileges requirement, but the panel held "doctors who perform abortions share a sufficiently close relationship with their patients, and … a pregnant woman seeking to assert her right to abortion faces obvious hindrances in timely now bringing a lawsuit to fruition." *Id.* at 589. The panel acknowledged "the doctor's economic incentives regarding the performance of abortions may not always align with a woman's right to choose to have an abortion," but was "convinced that … no such conflict exists here[.]" *Id.* at 589 n.9.

Although the *merits* issues differ between the Texas and Louisiana cases, the standing issue is essentially identical. The Fifth Circuit thus resolved abortion providers' third-party standing to challenge an admitting-privileges law before this case began.

Louisiana was not required to present a futile argument below in order to present it to this Court. See *MedImmune* v. *Genentech*, 549 U.S. 118, 125 (2007); *Johnson* v. *United States*, 520 U.S. 461, 467–468 (1997). Louisiana accordingly raised the argument at the first time it made sense to do so: in its Conditional Cross-Petition.

III. PLAINTIFFS' INTERPRETATION OF *HELLERSTEDT* IS CONTRARY TO PRECEDENT AND UNWORKABLE.

The most straightforward way to resolve this case is to dismiss Plaintiffs' claims for lack of third-party standing, but Plaintiffs' arguments on the merits fare no better. Plaintiffs argue that the Fifth Circuit failed to follow the "fundamental rules of the road" in upholding Act 620. Pet. Br. 2. Yet it is Plaintiffs who seek a drastic departure from precedent.

This Court in *Hellerstedt* determined, after a searching factual review in an as-applied challenge, that the Texas admitting-privileges statute was unconstitutional. Plaintiffs would use that conclusion to *facially* invalidate all other similar statutes, regardless of facts specific to those providers or to the jurisdiction at issue—eliminating the factual inquiry the *Hellerstedt* Court found essential. Plaintiffs' interpretation of *Hellerstedt* also would effectively eliminate the longstanding "substantial obstacle" standard, and thus threaten most abortion regulations—including common-sense, generally applicable health standards—with near-automatic invalidation. Plaintiffs'

overreading of *Hellerstedt* is contrary to precedent and unworkable, and the Court should reject it.

A. Plaintiffs' Expansive Legal Theory Is Inconsistent With *Hellerstedt* And Other Cases.

Plaintiffs' argument is premised on the theory that *Hellerstedt* determined "generally established medical facts"—based partly on the extra-record claims of non-party *amici*—that control henceforth in all future cases. Pet. Br. 24. But this Court exists to resolve cases or controversies based on evidentiary records developed in lower courts, not to use "test cases" (Pet. Br. 22) to issue pronouncements about generalized scientific or medical issues that forever place those issues off-limits for legislatures and lower courts. Plaintiffs' reading of *Hellerstedt* is inconsistent with the judicial role as this Court has long understood it, and nothing in *Hellerstedt* or any other precedent supports their interpretation.

1. Hellerstedt *necessitates a fact-intensive analysis.*

Addressing the as-applied challenge in *Hellerstedt*, this Court held a Texas admitting-privilege requirement imposed an undue burden on the decision to obtain an abortion. 136 S. Ct. at 2310–2314. The Court expressly, and necessarily, tailored its opinion to the case's facts. The petitioners in that case had already brought an unsuccessful, pre-enforcement facial challenge to Texas's admitting-privileges statute. However, the Court took great pains to explain that it

could still grant facial relief on the petitioners' post-enforcement as-applied challenge because that claim depended on "new material facts." *Hellerstedt*, 136 S. Ct. at 2305; see also *id.* at 2306 (a statute's validity or invalidity depends on the "facts" and "conditions" to which it applies (quoting *Nashville, C. & St. L. Ry.* v. *Walters*, 294 U.S. 405, 415 (1935))).

a. *Hellerstedt* emphasized that the post-enforcement consequences of the Texas statute, whose concrete existence "ma[d]e all the difference" in establishing the unconstitutional burdens it imposed, "were *unknowable* before it went into effect." 136 S. Ct. at 2306 (emphasis added). Further, the Court concluded that it could grant unrequested facial relief because the post-enforcement "evidence show[ed]" the provision was unconstitutional on its face. *Id.* at 2307. The Court premised its determination of both the statute's unconstitutional effects and its facial invalidity on "concrete factual developments" flowing from the statute's enforcement. *Id.* at 2306.

Although Act 620 and the Texas law at issue in *Hellerstedt* both require admitting privileges for abortion providers, the laws themselves are different in two critical respects. First, Act 620 aligns Louisiana law with pre-existing regulations governing other venues for outpatient surgery. Second, Act 620 imposes far fewer obligations on abortion clinics and doctors, given that it does not subject abortion clinics to the full panoply of requirements applicable to ASCs. See *Hellerstedt*, 136 S. Ct. at 2300 (citing Tex. Health & Safety Code Ann. § 245.010(a)).

Plaintiffs correctly acknowledge that *Hellerstedt* hinged on analysis of the law's burdens "in Texas." Pet. Br. 25; see, *e.g.*, *Hellerstedt*, 136 S. Ct. at 2301–2302 (reviewing findings on "abortions reported in Texas," the number of "facilities in Texas," and the "geographical distribution" of facilities in the State) (quotation marks omitted). But they assert the Court's analysis of the Texas law's benefits was not "based … on Texas-specific facts." Pet. Br. 17. That is incorrect. The Court's analysis was explicitly directed at the district court's conclusion that "[t]he great weight of evidence demonstrates that, before the act's passage, abortion in Texas was extremely safe," 136 S. Ct. at 2311 (quotation marks omitted), and specifically relied on the way in which "[p]re-existing Texas law" regulated abortion facilities. *Id.* at 2314.

Given *Hellerstedt*'s expressly fact-based analysis, Plaintiffs' reliance on cases such as *Citizens United* v. *Federal Election Commission*, 558 U.S. 310 (2010), is misplaced. Pet. Br. 22–23. *Citizens United* held that the First Amendment barred the government from banning independent expenditures by corporations, but the Court's holding turned on legal analysis of the First Amendment and the government interests that could (or could not) justify restrictions on political speech. 558 U.S. at 348–357. The Court's subsequent summary reversal in *American Tradition Partnership* v. *Bullock* merely held that "Montana's arguments in support of the judgment below either were already rejected in *Citizens United*, or fail to meaningfully distinguish that case." 567 U.S. 516, 516–517 (2012) (*per*

curiam). Nothing in *Citizens United* or *Bullock* forecloses a litigant from relying on a specific evidentiary record to distinguish a decision of this Court that expressly turned on whether there was "adequate … factual support" to show that "the legislative change imposed an 'undue burden.'" *Hellerstedt*, 136 S. Ct. at 2310–2311.[22]

Other precedents addressing the scope of constitutional adjudication further undermine Plaintiffs' expansive reading of *Hellerstedt*. It is "axiomatic" that a "'statute may be invalid as applied to one state of facts and yet valid as applied to another.'" *Ayotte*, 546 U.S. at 329) (quoting *Dahnke-Walker*, 257 U.S. at 289). This is true even outside abortion regulation. *United States* v. *Carolene Prods.*, 304 U.S. 144, 153 (1938) (where constitutionality of a statute is "predicated upon the existence of a particular state of facts," different outcome possible under changed facts (quoted in *Hellerstedt*, 135 S. Ct. at 2306)). Although *Hellerstedt* concluded that the Texas admitting-privileges

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[22] *El Vocero de Puerto Rico* v. *Puerto Rico*, 508 U.S. 147 (1993) (*per curiam*), is no more helpful to Plaintiffs. There, the Court held that any factual differences between that case and *Press-Enterprise* v. *Superior Court of California*, 478 U.S. 1 (1986), were "insubstantial" and emphasized that the applicable legal standard "[did] not look to the particular practice of any one jurisdiction[.]" 508 U.S. at 149, 150. But the facts of a given jurisdiction *do* matter to abortion laws, and litigants may, of course, distinguish an earlier case based on factual differences that—like those at issue here—are quite substantial.

statute was facially unconstitutional based on its operation in Texas, weighing Act 620's concrete effects within Louisiana necessitates review of, quite literally, a different "state of facts."

Plaintiffs urge that "nothing in the Court's opinion [in *Hellerstedt*] suggests that … [it] expected this balance would be reversed in another state." *Id.* But absence of dicta is a poor rationale for jettisoning the fact-intensive review the Court has required for whether a State's regulations impose an undue burden within its *own* borders in light of its *own* regulatory structure and its *own* circumstances. Cf. *D.C.* v. *Heller*, 554 U.S. 570, 705 (2008) (Breyer, J., dissenting) ("[D]eference to legislative judgment [is] particularly appropriate … where the judgment has been made by a local legislature, with particular knowledge of local problems and insight into appropriate local solutions.").

b. Plaintiffs' position is not only contrary to this Court's precedent, but makes little sense. Facts vary from place to place and change from time to time. This Court's precedents do not rule out the possibility that another State, under other circumstances, could prove that its admitting privileges requirements improve credentialing and patient safety. This Court has long recognized that regulation of medicine is a "matter of local concern." *Hillsborough Cnty.* v. *Automated Med. Labs.*, 471 U.S. 707, 719 (1985). A State has "broad" police power "to establish and enforce standards of conduct within its borders relative to the health of everyone there." *Barsky* v. *Bd. of Regents of Univ. of*

N.Y., 347 U.S. 442, 449 (1954). Because States' circumstances vary, so do their regulations.

Nor does it make sense to foreclose future findings that competent abortion providers in other States, applying to other hospitals, *can* obtain admitting privileges. The possibility that one *Texas* doctor might have been denied admitting privileges for reasons unrelated to competency, *Hellerstedt*, 136 S. Ct. at 2313, cannot require the assumption that competent abortion doctors are (and always will be) unable to obtain privileges everywhere else in the country. Certainly where that possibility is flatly contradicted by a record showing no such problem exists in Louisiana, this Court should not permit arbitrary disregard of the facts.

Finally, nothing in the undue burden analysis obviates the case-specific need to establish causation—that is, to show that any burdens on constitutional rights were actually *caused* by the challenged government action. See *Harris*, 448 U.S. at 298 ("Although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation[.]"). Plaintiffs' constitutional claims remain subject to the "venerable principle" that intervening causes break a showing of causation. *Lexmark*, 572 U.S. at 132. Plaintiffs cite no authority requiring a court to disregard intervening causes, let alone intervening causes brought about by Plaintiffs themselves.

2. Hellerstedt *did not dispense with the requirement that plaintiffs prove a substantial obstacle to obtaining abortions.*

Plaintiffs also overread *Hellerstedt* by treating it as establishing a pure balancing test for the benefits and burdens of abortion regulation, under which only regulations justified by absolute medical necessity survive. Pet. Br. 45–49. Nothing in *Hellerstedt* holds, or even *suggests*, that courts may enjoin the enforcement of an abortion regulation absent proof of a substantial obstacle.

a. *Hellerstedt* is clear that the Court was simply applying "the standard … described in *Casey*." 136 S. Ct. at 2309. And ever since *Casey*, proof that a regulation places an "undue burden" on a woman's right to choose an abortion has hinged on the plaintiff's identifying a "substantial obstacle" to the abortion decision. See *Casey*, 505 U.S. at 877 (joint opinion). Not all burdens are great enough to constitute substantial obstacles: "The fact that a law which serves a valid purpose … has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it." *Id.* at 874; see also Pet. App. 31a. If an obstacle must be sufficiently "substantial" to be an unconstitutional undue burden, courts cannot evaluate abortion regulations merely by weighing benefits and burdens, and not all burdens are severe enough to potentially invalidate a law.

Casey itself is crystal clear that proof of a substantial obstacle is indispensable. In considering Pennsylvania's requirement that physicians must provide information relevant to a woman's informed consent, the Court explained: "[s]ince there is no evidence on this record that requiring a doctor to give the information as provided by the statute would amount in practical terms to a substantial obstacle to a woman seeking an abortion, we conclude that it is not an undue burden." *Casey*, 505 U.S. at 884–885. That is, without a substantial obstacle, there could be no undue burden, *full stop*.

This Court applied the *Casey* standard in *Mazurek* v. *Armstrong*, 520 U.S. 968 (1997), where the Court summarily vacated a preliminary injunction barring Montana from enforcing a law requiring that abortions be performed by physicians. In *Mazurek*, it was undisputed that the physician-only rule would not impose a substantial obstacle for women seeking abortions. See *id.* 971–972. That was effectively the end of the matter: Because there was no substantial obstacle, this Court held that the law could not be enjoined based solely on allegations of an improper legislative purpose. *Id.* at 972.

Nothing in *Hellerstedt* purported to eliminate *Casey*'s requirement of a substantial obstacle. Indeed, *the very first sentence* of the *Hellerstedt* majority reaffirmed that challengers to abortion laws must prove a "substantial obstacle." 136 S. Ct. at 2300 (quoting *Casey*) (emphasis omitted). *Hellerstedt* explicitly examined the record for substantial obstacles at every turn,

id. at 2309, 2312, 2313, 2316, 2318, 2320, and enjoined the Texas law only because it created such obstacles in Texas. See also *id.* at 2312 ("At the same time, … the admitting privileges requirement places a 'substantial obstacle in the path of a woman's choice.'" (quoting *Casey*, 505 U.S. at 877)), 2318 (separately finding both few benefits and a substantial obstacle).

More fundamentally, Plaintiffs' simple benefit-burden balancing test—under which "abortion restrictions must bring about benefits *sufficient* to outweigh the burdens they impose," Pet. Br. 46—would require proof of medical necessity to justify any burden on abortion. But that has never been the law, and both *Casey* and *Mazurek* foreclose Plaintiffs' argument. In *Mazurek*, for example, the plaintiffs argued that the physician-only requirement *must* have had an invidious purpose, since "'all health evidence contradicts the claim that there is any health basis for' the law." 520 U.S. at 973. But this Court disagreed, emphasizing that "this line of argument is squarely foreclosed by *Casey* itself." *Id.* In upholding the physician-only requirement at issue in *Casey*, the Court explained that "[o]ur cases reflect the fact that the Constitution gives the States broad latitude to decide that particular functions may be performed only by licensed professionals, *even if an objective assessment might suggest that those same tasks could be performed by others*." 505 U.S. at 885 (emphasis added). Both *Casey* and *Mazurek* are clear that an abortion regulation which poses no substantial obstacle cannot

be declared unconstitutional merely based on judicial second-guessing of the regulation's benefits.

Plaintiffs' demand for a showing of medical necessity, moreover, would effectively introduce the strict scrutiny this Court has rejected in abortion cases for nearly three decades. *Casey* expressly ruled out strict scrutiny for abortion regulations, recognizing that women's liberty interests must be reconciled with the State's "important and legitimate interest[s]" in protecting both women's health and potential life. 505 U.S. at 871 (quoting *Roe*, 410 U.S. at 162).

Apart from *Hellerstedt*, Plaintiffs rely on an analogy to voting law. Pet. Br. 47–48. But their authority, *Harper* v. *Virginia State Board of Elections*, 383 U.S. 663 (1966), is not on point. *Harper* did not "invalidate[] [a] poll tax because it conferred no legitimate benefit," Pet. Br. 47; it held that a restriction on the right to vote must relate to voter qualifications, even if it has other rational justifications. See *Crawford* v. *Marion Cnty. Election Bd.*, 553 U.S. 181, 189 (2008). Plaintiffs also overlook this Court's more recent decision in *Crawford*, which found that the possibility of voter fraud justified Indiana voting regulations even though "[t]he record contain[ed] no evidence of any such fraud actually occurring in Indiana at any time in its history." *Id.* at 194–196. Those cases support Louisiana's authority to address the problem of incompetent abortion providers with a solution rationally related to that problem, even if the consequences of that problem are not quantifiable.

b. Combined with Plaintiffs' emphasis on the purported safety of abortion, the pure balancing test urged by Plaintiffs would render abortion regulations unconstitutional almost automatically. If it were true that *Hellerstedt* categorically established abortion as "safe" (a strange proposition in and of itself), a stripped-down balancing test untethered from the showing of a substantial obstacle would *never* permit courts to uphold abortion regulations—the benefits would never outweigh even minor burdens of regulating a judicially-declared "safe" procedure.

Plaintiffs' approach flies in the face of decades of this Court's abortion precedents. The Court has regularly sustained abortion regulations, even in the event of "incidental" burdens that do not impose substantial obstacles. See, *e.g.*, *Casey*, 505 U.S. at 874 (upholding requirement that physicians provide informed-consent information); *Mazurek*, 520 U.S. at 971–972 (vacating injunction against requirement that abortions be performed by physicians only).

A pure balancing test in the absence of a substantial obstacle also threatens States' longstanding right to regulate abortion to ensure that the decision to have an abortion is "thoughtful and informed," *Casey*, 505 U.S. at 872, and "to express profound respect for the life of the unborn," *Gonzales*, 550 U.S. at 146 (quoting *Casey*, 505 U.S. at 877). *Casey* is instructive. That decision upheld Pennsylvania's informed-consent and 24-hour-waiting-period provisions by a seven-justice majority. 505 U.S. at 884–886. Yet it is doubtful that either provision could survive the pure

balancing test now advanced by the Plaintiffs. Both provisions unquestionably impose incidental burdens on abortion, and neither could be said to make abortion "safer" than it purportedly is already.

Plaintiffs' test would either excise States' interests in informed consent and respect for unborn life from the equation—a result *Casey* expressly rejected, *id.* at 871–872—or devalue those interests by forcing artificial, standardless weighing of respect for unborn life against alleged burdens on abortion. Asking whether a state interest in protecting fetal life or ensuring informed decisions about abortion outweighs any burdens on the abortion decision is like asking "whether a particular line is longer than a particular rock is heavy." *Bendix Autolite Corp.* v. *Midwesco Enters.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring in the judgment). Plaintiffs' test would be unworkable for every law it does not immediately level.

A concomitant result of Plaintiffs' test would be to squelch debate and legislative compromise on quintessential matters of state sovereignty, especially heavily contested questions on regulation of medical services and the ethical treatment of unborn life. The federalism problems inherent in such a move are immense. See *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat) 1, 203 (1824) (Marshall, C.J.) (health legislation "most advantageously exercised by the States themselves"). That, too, would be a stark departure from this Court's precedent within and outside the abortion context. *Roe* itself authorized States to regulate abortion to the

"maximum" of patient safety. 410 U.S. at 150. *Hellerstedt* affirmed that state interest. 136 S. Ct. at 2309. *Hellerstedt*, moreover, was an as-applied challenge that overturned a State's regulatory efforts *only* when those regulations, in their concrete effects, imposed a substantial obstacle on abortion.

In short, this Court has repeatedly emphasized the need for deference to state regulations designed to advance public health and safety. See, *e.g.*, *Metro. Life Ins.* v. *Mass.*, 471 U.S. 724, 756 (1985) (States traditionally afforded "great latitude under their police powers" to protect health through legislation (citing *Slaughter-House Cases*, 83 U.S. 36, 62 (1872))); *Graves* v. *State of Minn.*, 272 U.S. 425, 428 (1926) (public health concerns underlying licensing statute entitled to "[e]very presumption" of validity); *Kassel* v. *Consol. Freightways Corp. of Del.*, 450 U.S. 662, 670 (1981) (challenges to safety regulations must overcome "strong presumption of validity") (quoting *Bibb* v. *Navajo Freight Lines*, 359 U.S. 520, 524 (1959)). By contrast, Plaintiffs seek an inverted presumption against constitutionality for health and safety regulation of abortion, in which States bear the burden of showing that the benefits of their regulations outweigh the costs. That approach has nothing to recommend it and is inconsistent with this Court's precedents.

B. Plaintiffs' Interpretation of *Hellerstedt* Violates Other Important Legal Principles.

As explained above, nothing in *Hellerstedt* forecloses the use of State-specific proof to uphold an admitting-privileges requirement, nor does *Hellerstedt* jettison the requirement that the plaintiff prove a substantial obstacle to the decision to obtain an abortion. Those rules fit comfortably within *Hellerstedt* itself. However, to the extent (if at all) that *Hellerstedt* departed from earlier cases, the Court should return to the approach taken in *Casey* and *Mazurek*. To the extent *Hellerstedt* is irreconcilable with that approach, it should be overruled. See, *e.g.*, Br. of Texas as *Amicus Curiae.* But in any event, Plaintiffs' interpretation of *Hellerstedt* violates three additional bedrock principles of the Court's jurisprudence.

1. *Regulations of abortion procedures that do not impose a substantial obstacle are examined under a rational basis standard.*

Perhaps most important, Plaintiffs' position disregards the principle that state legislatures and medical boards have primary authority to set health and safety regulations and that courts must review their work with adequate deference to the core State role of protecting health and safety, just as courts do in all other areas of the law. *Automated Med. Labs.*, 471 U.S. at 719. To the extent *Hellerstedt* suggested otherwise in dicta, see 136 S. Ct. at 2310 (suggesting that courts, not legislatures, have primary responsibility for reviewing abortion regulations), the Court should

confirm that this is not an accurate statement of the law. Reiterating that principle would solve two problems illustrated by Plaintiffs' arguments.

First, Plaintiffs assert that *Hellerstedt* categorically disables Louisiana from extending a pre-existing admitting-privileges requirement for ASCs to abortion clinics. Yet public safety regulations are generally subject to rational basis review. *Casey*, 505 U.S. at 884; see also *Glucksberg*, 521 U.S. at 728; *Williamson*, 348 U.S. at 488. Plaintiffs' rule thus gives abortion clinics special exemptions from generally applicable health standards—an entirely backwards view, considering that abortion clinics serve vulnerable populations that may need special protections from incompetent or unscrupulous providers. *E.g.*, *Planned Parenthood Ass'n of Kan. City, Mo.* v. *Ashcroft*, 462 U.S. 476, 488 & n.12 (1983).

Second, Plaintiffs argue that *Hellerstedt* requires States to establish *sufficient* benefits to overcome an abortion regulation's alleged burdens, even when the burdens are not substantial. Pet. Br. 46. That turns the burden of proof for a facial challenge to a state law on its head. It is also a blatant invitation for judicial policymaking; at a minimum, deciding abortion cases under such a framework gives the *impression* of judicial legislation. In the long run, that interpretation of *Hellerstedt* (and *Casey* to the extent *Hellerstedt* applied it) increases the likelihood of litigation and threatens the perception of federal courts' institutional legitimacy.

The solution to both problems is to make clear that rational laws should be upheld, provided they do not impose a substantial obstacle on the decision to have an abortion—especially where, as here, those laws merely bring regulation of abortion in line with the regulation of other medical procedures. See *infra* at 87–89. Otherwise a balancing of benefits and burdens becomes a pure legislative policy judgment of the sort that courts are ill-equipped to make.

2. All facial challenges to abortion regulations should satisfy the Salerno *standard.*

Plaintiffs' position also ignores the general rule in constitutional litigation, under *United States* v. *Salerno*, that a law is facially unconstitutional only when it has *no* constitutional application. 481 U.S. 739, 745 (1987); see also *City of L.A., Cal.* v. *Patel*, 135 S. Ct. 2443, 2451 (2015) (Fourth Amendment); *Wash. State Grange* v. *Wash. State Republican Party*, 552 U.S. 442, 449 (2008) (First Amendment); *Reno* v. *Flores*, 507 U.S. 292, 301 (1993) (Due Process). Abortion cases have not been consistent in that regard. Sometimes courts apply the *Salerno* standard, and sometimes they find an abortion regulation facially unconstitutional when it burdens a "large fraction" of the women "for whom it is relevant." *Gonzales*, 550 U.S. at 167–168 (declining to resolve the open question) (citing *Ohio* v. *Akron Ctr. for Reprod. Health*, 497 U.S. 502, 514 (1990), and *Casey*, 505 U.S. at 895 (opinion of the Court)).

Although the Fifth Circuit understood *Hellerstedt* to establish the large-fraction formulation, Pet. App. 27a–28a, the question in fact remains open. *Hellerstedt*, 136 S. Ct. at 2343 n.11 (Alito, J., dissenting). Because the Court's conclusions in *Hellerstedt* implied *all* Texas women would be affected by clinic overcrowding, 136 S. Ct. at 2313, *Hellerstedt* would not have been a suitable case to resolve the question.

Here, the choice of standard would be dispositive. Because Doe 5 undisputedly obtained privileges sufficient to continue providing abortions at Women's Health in New Orleans (and, upon a good-faith effort, could likely obtain privileges sufficient to provide abortions at Delta in Baton Rouge), Pet. App. 45a–46a, the only women for whom Act 620 might be a factor are patients of Hope, where Doe 1 may be unable to obtain privileges. Pet. App. 55a–56a. But Hope only serves about 30% of the State's abortion patients and Doe 2 has unused capacity to satisfy demand. Under *Salerno*, that would be insufficient to justify Plaintiffs' facial challenge. In addition, requiring a showing that Act 620 be unconstitutional in all applications would be more in keeping with Act 620's text, which requires that any unconstitutional applications of the statute be severed from constitutional ones. See Act 620 § 3.

Ensuring that facial challenges to abortion statutes are reviewed under the *Salerno* standard would therefore be another straightforward way to resolve the merits as a matter of law.

3. A "substantial obstacle" means a near impossibility of obtaining an abortion.

Plaintiffs' position also misconstrues the "substantial obstacle" requirement. From its inception, *Casey*'s substantial-obstacle standard has been criticized on the ground that it depends on "judge[s'] subjective determinations" to supply any meaningful content and has, as predicted, "engender[ed] a variety of conflicting views." *Casey*, 505 U.S. at 965 (Rehnquist, C.J., dissenting); see also *id*. at 986 (Scalia, J., dissenting) (calling the standard "inherently manipulable and … hopelessly unworkable in practice"). This and other cases continue to demonstrate the challenge of applying the substantial-obstacle standard in a consistent, predictable way. See *Planned Parenthood of Ind. & Ky.* v. *Box*, No. 17-2428 at 4 (7th Cir. Oct. 30, 2019) (Easterbrook, J., joined by Sykes, J., dissenting from denial of rehearing *en banc*).

One way to make the substantial-obstacle standard less vulnerable to subjective manipulation is to reiterate that abortion regulations do not impose a substantial obstacle unless they make abortions nearly impossible to obtain for the relevant women (or all women, in a facial challenge), such that the abortion right exists in name only. Such a ruling would make clear that the *Casey* "substantial burden" inquiry is in line with earlier abortion decisions that enjoined only "absolute obstacles or severe limitations on the abortion decision." *Akron*, 462 U.S. at 464 (O'Connor, J., dissenting) (reviewing cases). More important, it

would provide much needed clarity and administrability to abortion jurisprudence.

Here again recognition of this principle would be dispositive, as it is undisputed that some Louisiana abortion doctors are able to obtain admitting privileges, and thus abortion would remain available in Louisiana notwithstanding the requirements of Act 620. Accordingly, the Court could easily uphold the decision below on that ground.

IV. UNDER ANY PLAUSIBLE READING OF *HELLERSTEDT*, THE FIFTH CIRCUIT CORRECTLY CONCLUDED ACT 620 WOULD NOT UNDULY BURDEN ABORTION.

Given Plaintiffs' failure to root their legal theories in a plausible reading of *Hellerstedt* and other governing law, their argument rests in the end on a plea for this Court to revisit the Fifth Circuit's painstaking review of the district court's factfinding. Reapplying the law to the facts is hardly ever a proper use of this Court's resources. See, *e.g.*, *N.L.R.B.* v. *Hendricks Cnty. Rural Elec. Membership Corp.*, 454 U.S. 170, 177 n.8 (1981); *Rudolph* v. *United States*, 370 U.S. 269, 269–270 (1962) (*per curiam*).

In any event, the Fifth Circuit correctly held that the district court erred in identifying an undue burden. This Court finds clear error even if "there is evidence to support" the district court's decision, when "on the entire evidence, [the Court] is left with the definite and firm conviction that a mistake has been committed." *United States* v. *U.S. Gypsum*, 333 U.S. 364,

395 (1948); see also *Easley* v. *Cromartie*, 532 U.S. 234, 257 (2001) (finding clear error despite "a modicum of evidence" supporting the district court). That standard is readily satisfied here, and this Court may affirm the Fifth Circuit on that basis as well.

A. The Fifth Circuit Did Not Err In Its Review Of The District Court's Evaluation Of Act 620's Burdens.

The Fifth Circuit held the district court erred in finding Plaintiffs proved Act 620 would create burdens on abortion in Louisiana. See Pet. App. 39a–53a. The panel's burden analysis recognized—correctly—that "everything turns on whether the privileges requirement actually would prevent [abortion providers] from practicing in Louisiana." Pet. App. 40a; see also Pet. App. 30a (emphasizing "the burden must still be substantial" even if there is some consideration of benefits). The record requires the conclusion—especially for purposes of this facial, pre-enforcement challenge—that abortion providers have sufficient opportunity to obtain privileges such that Act 620 is not facially a substantial obstacle to the abortion decision.

1. Louisiana abortion providers are able to obtain privileges under Act 620.

The only conclusion supported by the record is that Louisiana abortion providers *are* able to obtain qualifying admitting privileges. Doe 3 already had privileges at the outset of the case, and two more (Does 2 and 5) obtained privileges while the case was pending. Several abortion providers who lacked privileges

when Act 620 was enacted had privileges at other times in their careers. See *supra* at 13. All Louisiana abortion clinics are in metropolitan areas with multiple qualified hospitals.

Plaintiffs nonetheless argue that "explicit or implicit patient-minimum requirements" at Louisiana hospitals prevent abortion providers from obtaining privileges they would not use often. Pet. Br. 38. That is belied by the hospital bylaws in the record, which are explicit that minimum patient standards are *not* required. In particular, Plaintiffs fail to mention the category of "courtesy privileges" like those obtained by Does 2 and 5, a category of privileges that Louisiana hospitals provide for the benefit of doctors who need to admit and treat patients only rarely. That category of privileges appears tailor-made for Louisiana abortion providers. Plaintiffs' long list of hospital bylaw provisions that supposedly make privileges impossible actually includes both of the hospitals willing to give privileges to Doe 5. Pet. Br. 38 n.5; ROA.10309, ROA.10417.

Plaintiffs are also wrong that Does 1 and 2 were denied privileges for failure to meet minimum patient admissions. Pet. Br. 38–39. Doe 1 initially applied for privileges for his "addiction medicine" practice. JA 733. And Doe 2 failed to obtain privileges not because he was *unable* to submit documentation, but because he *refused* to do so. Pet. App. 14a; JA 1443–1446. Plaintiffs also point to Doe 6's decision to relinquish privileges when his patient admissions declined, Pet. Br. 39, a fact which says nothing about Doe 6's ability

to obtain courtesy privileges now. The fact that he had them previously cuts against Plaintiffs' claims, especially in a facial challenge to the law.

Given the proven ability of Louisiana abortion providers to obtain courtesy privileges, any theoretical barriers are beside the point. Pet. Br. 39. There is no basis to enjoin Act 620—especially in a pre-enforcement facial challenge—based on mere conjecture and possibilities that may not prevent any abortion provider from remaining in practice.

2. At least three Louisiana abortion providers failed to seek privileges in good faith.

The next question is whether Act 620 in fact reduces the number of Louisiana abortion providers to such an extent that it would result in a substantial obstacle or undue burden. The Fifth Circuit correctly found that—with the possible exception of Doe 1, whose competence to provide abortions is questionable to begin with—the district court erred in finding the law would cause a reduction in the number of providers.

As Plaintiffs note, several abortion providers testified Act 620 would prevent them from providing abortions. Pet. Br. 40 & n.6. But those conclusory assertions are contradicted by the doctors' other testimony and documents, which show that Does 2, 5, and 6 failed to seek privileges in good faith. The district court thus erred in ascribing those providers' compliance failures to Act 620 as opposed to the providers' own lack of diligence. *U.S. Gypsum*, 333 U.S. at 395.

As the Fifth Circuit explained, the doctors' inaction and delays in seeking privileges "sever[] the chain of causation" between Act 620 and any alleged burdens on the decision to obtain an abortion. Pet. App. 40a–41a. The Fifth Circuit's meticulous review of the record evidence was correct and should not be disturbed.

Doe 2. Doe 2 was doubly negligent in his efforts to obtain privileges in the Shreveport area. He did not apply to two hospitals—including refusing to apply to one hospital where he had privileges in the past and where Doe 3 is presently a provider merely because of the hospital's religious affiliation. Pet. App. 43a; Pet. App. 15a; JA 405–406.[23] And given the opportunity to obtain privileges at another hospital, his own e-mails show how he sabotaged his application. When asked to submit documentation showing his patient outcomes, he told the hospital to send someone to look at Bossier Clinic's records themselves. Pet. App. 14a; JA 1443–1446; see also Pet. App. 43a. He never documented providing any other response. Pet. App. 14a–15a.

Plaintiffs defend Doe 2's failure to apply to one Shreveport area hospital on the ground that "Doe 1

[23] Plaintiffs justify the doctors' failure to apply to more hospitals on the ground that "[n]on-administrative" denials of privileges would be reported to the NPDB. Pet. Br. 41 n.7. In fact only denials of privileges based on professional competence or conduct are reported. See 45 C.F.R. §§ 60.12, 60.3. Should any doctor feel aggrieved by denial of privileges, Louisiana hospitals provide due process protections pursuant to federal and state law. See *supra* at 14.

was rebuffed … for reasons that would equally apply to Doe 2." Pet. Br. 42. Even if the reasons Doe 1 did not obtain privileges were clear as a factual matter, Doe 2 is an obstetrician-gynecologist previously affiliated with the hospital while Doe 1 is an addiction medicine doctor who has never used his family practice residency. See *supra* at 18. The two are not remotely similarly situated.

In addition, Doe 2 obtained courtesy privileges in New Orleans, where he formerly provided abortions at Causeway. Those privileges entitle him to admit patients and refer them to other doctors for treatment. It was ambiguous whether that satisfied Act 620's requirement that privileges confer "the ability to admit a patient and to provide diagnostic and surgical services to such patient[.]" Pet. App. 287a. Then-Secretary Kliebert resolved the ambiguity in Doe 2's favor.[24] Her reasonable interpretation binds federal courts, which may not "instruct[] state officials on how to conform their conduct to state law." *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 106 (1984). Doe 2 thus may also perform abortions in New Orleans at Woman's Health.[25]

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[24] The Fifth Circuit panel mistakenly considered Act 620 to foreclose Secretary Kliebert's interpretation, Pet. App. 43 n.58, but the ambiguity is readily apparent.

[25] Public records indicate Doe 2 is affiliated with Women's Health in New Orleans, although records also show he has not performed an abortion anywhere in the State since August 2019. Supp. App. 38–39; Supp. Sealed App. 2–3, 16, 18.

Doe 5. It is undisputed that Doe 5 obtained privileges that permit him to continue performing abortions in New Orleans. Pet. App. 24a; Pet. App. 45a; ROA.14038 (108:18–25), ROA.14343, ROA.14347–14349. The only remaining condition for privileges in Baton Rouge was that Doe 5 identify a doctor willing to "cover" him on call. Pet. App. 17a. That condition is not difficult to satisfy. ROA.14154 (109:22–110:9) (Doe 4). Yet Doe 5 approached only one doctor and appears not to have made any further attempts. As the Fifth Circuit held, that cannot have been a good-faith effort. Pet. App. 45a.

Plaintiffs' only response is to speculate that Doe 5 "could never meet" other requirements for privileging at Woman's Hospital. Pet. Br. 42. But that contradicts Doe 5's own understanding that he "meet[s] all the qualifications" other than finding a covering doctor. Pet. App. 17a; JA 1334 (40:20–24). Aside from Plaintiffs' effort to rewrite Doe 5's testimony, no good-faith justification for Doe 5's failure to complete the privileging process appears in the record.

Doe 6. Doe 6 applied to only one of nine qualifying hospitals in the New Orleans area and did not apply to the hospital where Doe 5, his colleague at Women's Health, received courtesy privileges. Pet. App. 25a. The Fifth Circuit was correct to hold Doe 6 cannot establish good faith by such a weak effort.

3. No substantial obstacle would result if Doe 1 left practice as a result of Act 620.

The last step in the burden analysis, as the Fifth Circuit reasoned, is to consider what would happen to Hope if Doe 1 left practice. Plaintiffs claim that Hope would no longer be financially viable in that circumstance. Pet. Br. 13. But Hope does 3,000 abortions per year, Pet. App. 18a; JA 109, and Doe 3 can do 60 abortions a week on his current schedule of a day and a half of work. JA 207. Doe 3 thus could keep the clinic in operation at its current patient load all by himself, *without* changing his current schedule, if he chooses to do so.

If Doe 2—who was formerly the sole doctor at Bossier, who is already a backup doctor at Hope and whose capacity is now unused—obtains privileges within 30 miles of Hope through a good-faith effort, Hope could absorb Doe 1's departure even more easily. Plaintiffs observe the lack of "record evidence … that at this later stage in his career [Doe 2] would accept a position as a primary physician[.]" Pet. Br. 44. No such position would be necessary if Doe 2 were to assist Doe 3 at Hope. Plaintiffs omit disclosing that Doe 2 *has* served in such a role after Bossier closed, from March 2018 to August 2019, when he was medical director at Delta. Supp. App. 2.

Plaintiffs also fail to account for other doctors who have performed abortions at Louisiana clinics. Supp. App. 39. Although the privileges status of those doc-

tors is unknown, the ability of Louisiana abortion clinics to hire new doctors is thus a matter of public record.

The evidence therefore confirms the Fifth Circuit's reasoning that even if Act 620 causes Doe 1 to leave practice, no practical burdens on women's decision to obtain an abortion need result. See Pet. App. 50a–53a. Other providers could make up the difference without "a substantial increase in wait times." *Id.* And the additional number of abortions that would need to be performed by others to make up for those that had been performed by Doe 1 "does not begin to approach the capacity problem in [*Hellerstedt*] and is not a substantial burden." Pet. App. 52a.

B. The Fifth Circuit Did Not Err In Its Review Of The District Court's Evaluation Of Act 620's Benefits.

The panel further held that Act 620 provides at least a "minimal" health benefit to Louisiana women by "perform[ing] a real, and previously unaddressed, credentialing function that promotes the wellbeing of women seeking abortion." Pet. App. 38a–39a. Plaintiffs challenge that conclusion on various grounds, but none withstands scrutiny. Even if benefits are a relevant part of the undue burden analysis (especially given the absence of a substantial obstacle), the record adequately documents them here.

1. Act 620 improves credentialing.

Plaintiffs deny that admitting privileges improve credentialing of abortion doctors. But the vetting inquiry performed by hospitals can only help with credentialing because Louisiana abortion clinics perform *no* investigation of their own. It is not just that Hope fails to do a criminal background check. Pet. Br. 34. It fails to "undertake *any* review of a provider's competency" other than "ensuring that the provider has a current medical license[.]" Pet. App. 35a–36a (emphasis added); see *supra* at 8–9. The only way to make Louisiana abortion clinics evaluate physician competency during hiring is to compel them by law.

a. The record establishes that hospitals perform extensive credentialing that covers competency. See Pet. App. 35a; see *supra* at 11. Indeed, Plaintiffs admit that "[a]dmitting privileges are designed to verify a physician's competence[.]" Pet. Br. 19. Hospital doctors are also included in the National Provider Data Bank, which tracks physician malpractice and misconduct.[26] Conditioning abortion provider qualifica-

[26] Congress created the NPDB in the Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11101, *et seq.* This federally-operated database relies on hospital admitting privileges decisions as a source of data. Congress decided hospital admitting privileges decisions provided essential professional peer-review and thus immunized privileging decisions from antitrust liability. In that act, to address sub-par doctors moving from State to State, Congress expressly found that "[t]his nationwide problem

tions on hospital credentialing thus introduces verification of competency that would not otherwise exist and that Congress has embraced for three decades.

Plaintiffs question whether Act 620 fits the problem, claiming that credentialing by hospitals does not perfectly match the qualifications needed to safely perform abortions. Pet. Br. 19, 33. Plaintiffs narrowly define "the problem" as only protecting women who need hospitalization, yet credentialing has greater advantages for patients in light of clinics' lack of any vetting. Even if Act 620 is an imperfect answer, it is neither irrational nor unreasonable and lack of a perfect match does not render Louisiana's legislative solution unconstitutional. See *Bd. of Trs. of State Univ. of N.Y.* v. *Fox*, 492 U.S. 469, 480 (1989) (explaining that intermediate scrutiny only "require[s] the government goal to be substantial," and the fit "reasonable"). Given that Plaintiffs' own poor hiring practices make State supervision necessary, Plaintiffs cannot reasonably complain that the hospital credentialing process is an imperfect proxy.

Plaintiffs also see no credentialing reason why Act 620 should require privileges within 30 miles. Pet. Br. 33. That geographical requirement is consistent with the hospital privileging standards for ASCs and physician offices and establishes a reasonable link between a community and a medical practitioner working there. La. Admin. Code § 48:4541(A), (B); *id.*

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can be remedied through effective professional peer review." 42 U.S.C. §§ 11101(2)–(3).

§ 46:7309(A)(2); *id.* § 46:7303. At any rate, even if the geographic proximity requirements were not relevant to credentialing, it is at least relevant to transfers of patients, the law's other focus.

b. Plaintiffs next suggest that separate licensing processes and scope-of-practice restrictions provided by the Louisiana State Board of Medical Examiners ("LSBME") and other Louisiana laws make additional credentialing unnecessary. Pet. Br. 34–35 & n.3. Plaintiffs cite record evidence on the LSBME's role in licensing, but none of that evidence suggests LSBME licensing is a substitute for credentialing by medical institutions.

Plaintiffs' reliance on the LSBME also makes no sense: Although the LSBME generally requires that doctors operate within their scope of training and experience, it applies those requirements case by case either when asked, JA 615, or based on a complaint, La. Admin. Code § 46:9705. Act 620, in contrast, establishes generally applicable standards that LDH can review and enforce in connection with regular abortion clinic inspections. Besides, if the LSBME's processes were enough to ensure that doctors are competent and act within their scope of practice, then *hospitals* presumably would not need to vet physicians or evaluate their credentials for particular medical roles either. The fact that they *do* shows that responsible medical institutions do not rely on the LSBME alone.

Plaintiffs' reliance on LSBME oversight is also at odds with the fact that Hope and Does 1 and 3 are also

challenging Louisiana's physician-only requirement for abortion providers. See Am. Compl. at 31, *June III* (ECF 87). If successful, Hope would not have to hire doctors at all, and therefore its abortion providers would not be subject to LSBME licensing. So Hope and Does 1 and 3 are attempting to *escape* the oversight of the very body they claim offers sufficient protection to women—and ironically, *standing in those women's shoes*.

Plaintiffs further claim that privileging is unnecessary because they are now prohibited by law from hiring a radiologist or ophthalmologist to perform abortions again. Pet. Br. 34–35. But again, Plaintiffs are suing to enjoin the enforcement of that very law. See Am. Compl. at 31, *June III* (ECF 87). Plaintiffs claim, contrary to shocking evidence of malpractice in Louisiana, that concerns about other doctors performing abortions are "medically unwarranted." Pet. Br. 35. In so doing, they confirm the very indifference to qualifications during the hiring process that justifies establishment of Louisiana's legal framework.

c. That leaves Plaintiffs' general concern that Louisiana hospitals might deny privileges for reasons other than competency. But there is no competent, non-hearsay evidence in the record that they have done so as to any application submitted by a Louisiana abortion provider. Even if there were, the relevant question for the undue burden analysis is not whether a competent Louisiana abortion provider would get privileges *at each hospital to which he ap-*

plies, but whether a competent provider *can* get privileges and whether hospital privileging meaningfully distinguishes competent providers from incompetent ones. The record on those questions plainly favors the State. See *supra* at 11, 12–13, 16–18. To the extent Plaintiffs are concerned about unfair denials of privileges, they fail to explain why the due process protections of Louisiana's hospital privileging processes are inadequate. See *supra* at 14.

2. Act 620 improves safety.

The record also establishes that Act 620 improves safety. Although Plaintiffs argue that abortion is inherently "safe," Pet. Br. 26, that is rhetoric, not a statement of medical fact: Medical procedures like abortion are *never* risk-free, and their relative safety depends on whether they are performed by qualified, competent practitioners who use their skills and take precautions consistent with the standard of care.

As to the safety of abortion in Louisiana, moreover, Plaintiffs' rhetoric rests on speculation unjustified by evidence. Plaintiffs and other Louisiana abortion providers admitted at every turn that they have no idea what their own complication rates are. JA 130–131, JA 135–136, JA 447–448, ROA.14034 (92:7–22), JA 1342–1343 (80:3–82:12). What *is* evident is that Louisiana abortion clinics ignore the credentials of their doctors and employees, disregard basic safety standards, and place their patients in physical danger. See *supra* at 8–11.

Plaintiffs emphasize that direct hospital transfers from abortion clinics are unusual in Louisiana. Pet. Br. 26–27. Yet an abortion provider plainly should expect to handle them. Doe 3 and the Hope clinic administrator both testified to four such transfers, JA 114, JA 216, and Doe 1 was responsible for two, ROA.8145–8146, JA 768–769. Doe 2 testified to two transfers in the previous five years and between ten and twenty over the course of his career performing abortions. JA 400–404. Other providers attested to hospital transfers as well. ROA.14145 (Doe 4), ROA.3086 (Doe 6). At least one abortion patient has been transferred by ambulance from Delta Clinic to a Baton Rouge hospital in the months since the mandate in this case was stayed. See Spencer Soicher, *Woman suffers complications after having abortion, has to have emergency hysterectomy*, WAFB July 30, 2019 (available at https://tinyurl.com/deltaemergency). The question is not *if* a Louisiana abortion doctor's patients will need a direct hospital transfer, but *when*.

Plaintiffs' own actions confirm that such patients are better off when the doctor is prepared to admit and treat her himself. Doe 3, Hope's medical director, maintains and uses his privileges for patients in that very situation. ROA.12791, JA 216:14–23, JA 251:11–25, JA 252:1–13, JA 218:9–20. Given the choice between admitting a patient himself and simply calling ahead to the emergency room, he prefers the former. Plaintiffs' challenge to Act 620 would thus deprive Louisiana women of the standard of care that Doe 3 provides his own patients.

The Fifth Circuit found no proof that patient outcomes improve when the doctor is able to admit them to a hospital personally. Pet. Br. 32; Pet. App. 38a n.56. Yet requiring the State to prove that a given patient's health would have suffered had the doctor *not* admitted her, or that a patient transferred by ambulance would have done better if she *had* been admitted by the provider, is an unrealistic standard. Doe 3's conduct is proof enough that admitting privileges are preferable when a hospital transfer is necessary.

Besides, Plaintiffs assume that admitting privileges help *only* patients who need direct hospital transfers. But admitting privileges vet competency. Pet. Br. 19. And competency matters, in abortion procedures as in any other medical procedure. An underqualified abortion doctor might prescribe medication abortion to a patient for whom it is contraindicated. He might cause a latent complication that visibly harms the patient much later. Pet. App. 38a n.56 (Fifth Circuit noting that complications of surgical abortion often "occur well after the surgery"). He might fail to complete a surgical abortion, leaving dead tissue in his patient's uterus. It is Plaintiffs' burden to disprove the benefits of Louisiana's law (to the extent this information is relevant at all), and Plaintiffs have failed to do so.

3. Act 620 is consistent with other Louisiana laws.

Plaintiffs lastly deny that Act 620 brings abortion clinics into conformity with existing regulations. Pet.

Br. 35–37. This question does not deserve the attention Plaintiffs devote to it. Plaintiffs never brought an equal protection claim and abandoned their own procedural due process claim. If Act 620 rationally benefits abortion patients without creating a substantial obstacle to their decision, it survives a substantive due process challenge regardless of the law applicable to other clinical settings.

In any event, Plaintiffs overcomplicate Louisiana's straightforward effort to make privileges requirements for abortion consistent with procedures performed in ASCs. Texas did not require its ASC medical staff to have privileges, but Louisiana does. And unlike the Texas law in *Hellerstedt*, Act 620 does not make abortion clinics comply with all ASC regulations. Plaintiffs do not in fact question that Act 620 creates consistency in Louisiana between abortion clinics and ASCs with respect to privileges, but rather quibble with the precise medical logic of doing so. That consistency distinguishes this case from *Hellerstedt*. Pet. App. 37a–38a & n.55.

Plaintiffs further argue that abortion is better analogized to procedures performed in doctors' offices where privileges are not always required. Pet. Br. 36. But Louisiana abortion practice is characterized by underqualified doctors who chronically shortchange patient care and are careless with medications, record-keeping, and patient supervision. Clinics have also been negligent by underpreparing for emergencies. See *supra* at 11–12; see also Supp. App. at 10.

That history makes clear that Louisiana abortion providers do not provide appropriately for the procedures they perform. See ROA.11309 (describing factors an ethical provider considers in deciding where to perform a medical procedure). Regulating the *procedure* to ensure competency and emergency preparedness addresses the unique concerns that surround it.

There is no dispute, moreover, that abortions carry a risk of serious complications, some of which require direct hospital transfers. Procedures commonly performed by ethical doctors at ASCs also involve a risk of "infrequent but life threatening complications." ROA.11311, ROA.6983. Given that ASC patients are already protected with an admitting privileges requirement, it makes no sense to hold that Louisiana is constitutionally disabled from treating abortions similarly. Rather, the precise method of situating abortion practice with the broader framework of medical regulation is a policy matter for the State to resolve. *Gonzales*, 550 U.S. at 157; *Automated Med. Labs.*, 471 U.S. at 719; see also *Heller*, 554 U.S. at 705 (Breyer, J., dissenting).

* * *

The record in this case is extensive, and this Court need not staterepeat the Fifth Circuit's thorough analysis. The evidence is consistent with only one conclusion: Act 620 benefits patients. Plaintiffs failed to satisfy their burden of proving that it would facially create substantial obstacles for women seeking abortions.

CONCLUSION

This Court should direct that Plaintiffs' complaint be dismissed for lack of standing. Alternatively, the Fifth Circuit's decision upholding Act 620 should be affirmed for any of the reasons outlined above.

Respectfully submitted.

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