Nos. 18-1323 & 18-1460

In the Supreme Court of the United States

JUNE MEDICAL SERVICES L.L.C., on behalf of its patients, physicians, and staff, d/b/a HOPE MEDICAL GROUP FOR WOMEN; JOHN DOE 1; JOHN DOE 2,

v.

DR. REBEKAH GEE, in her Official Capacity as Secretary of the Louisiana Department of Health,

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v.

JUNE MEDICAL SERVICES L.L.C., on behalf of its patients, physicians, and staff, d/b/a HOPE MEDICAL GROUP FOR WOMEN; JOHN DOE 1; JOHN DOE 2,

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

BRIEF *AMICI CURIAE* OF XXX MEMBERS OF CONGRESS IN SUPPORT OF RESPONDENT AND CROSS-PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici are __ Members of Congress, __ Senators and __ Congressmen. Collectively, they represent __ of the fifty States in the Union. A complete list of *Amici* Members is found in the Appendix to this brief.

Amici Members have a special interest in the correct interpretation, application, and enforcement of health and safety standards for elective abortion enacted by the People of the States they represent. Louisiana's Act 620 is a commonsense protection that is ubiquitous in outpatient medical practice, like hundreds of other basic medical regulations enacted by the States since the Court declared in *Planned Parenthood v. Casey* that "As with any medical procedure, the State may enact regulations to further the health or safety of a woman seeking an abortion." 505 U.S. 833, 878 (1992). *Amici* strongly urge the Court to uphold the decision below and reaffirm State authority to safeguard the lives and health of their citizens.

SUMMARY OF ARGUMENT

Amici will first address the question presented by Cross-Petitioner: whether "abortion providers [can] be presumed to 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

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[1] No party's counsel authored any part of this brief. No person other than *Amici* and their counsel contributed money intended to fund the preparation or submission of this brief. Counsel for all parties have filed blanket consents to the filing of *amicus* briefs in support of either or no party.

sue on their own behalf." Like abortion facilities in many States, Louisiana abortion clinics–including Petitioner–have a long history of health and safety violations, and Louisiana abortion doctors have a long history of professional disciplinary actions and substandard medical care. This history reveals that not only do Louisiana abortion providers lack the kind of "close" relationship ordinarily required for third-party standing, but also that there is an inherent conflict of interest between abortion providers and their patients regarding state health and safety regulations. Therefore, Petitioners cannot be presumed to enjoy a "close" relationship with their patients when it comes to legal challenges brought against the very laws the State intends for the protection of their patients' health and safety, and they should not be deemed to have third-party standing.

With regard to the Petitioner's question presented, *Amici* submit that while Fifth Circuit understandably struggled with the meaning of *Casey*'s "undue burden" standard, the court of appeals appropriately distinguished *Hellerstedt* on a record that reflected "greatly dissimilar" facts and a demonstrable absence of burden on abortion access due to the operation of Act 620.

Finally, *Amici* respectfully suggest that the court of appeals' struggle to define the appropriate "large fraction" or determine what "burden" on abortion access is "undue" illustrates the unworkability of the "right to abortion" found in *Roe v. Wade*, 410 U.S. 113 (1973) and the need for the Court to again take up the issue of whether *Roe* and *Casey* should be reconsidered and, if appropriate, overruled.

ARGUMENT

I. PETITIONERS LACK A "CLOSE" RELATIONSHIP WITH WOMEN SEEKING ABORTION AND SHOULD NOT BE PRESUMED TO HAVE THIRD-PARTY STANDING.

In *Singleton v. Wulff*, this Court concluded 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). Based on this generality, this Court and lower courts have assumed *carte blanche* that abortion providers have third-party standing on behalf of women seeking abortion without any meaningful, particularized analysis. *Cf. Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2322 (2016) (Thomas, J., dissenting) ("[A] plurality of this Court fashioned a blanket rule allowing third-party standing in abortion cases."). Since abortion providers routinely challenge State health and safety regulations designed to protect their patients, this presumption is at odds with this Court's third-party standing doctrine requiring a "close" relationship between the third party and the persons who possess the right. *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004).

When it comes to State health and safety regulations, there is an inherent conflict of interest between abortion providers and their patients. It is impossible for abortion clinics and doctors to share or represent the interests of their patients when they seek to *eliminate* the very regulations designed to protect their patients' health and safety.

Abortion providers routinely bring legal challenges against State health and safety

regulations, and Louisiana abortion clinics and doctors are no different.[2] These cases often involve the unsubstantiated claims that the health and safety regulations will close clinics or "force physicians in Louisiana to cease providing abortion services to women." *Okpalobi v. Foster*, 244 F.3d 405, 410 (5th Cir. 2001) (*en banc*). Yet despite these doomsday predictions, abortion clinics remain open and doctors continue to provide abortions when the regulations go into effect.[3]

Petitioners bring the current legal challenge against a backdrop of serious health and safety violations by Louisiana abortion clinics and professional disciplinary actions and substandard medical care by Louisiana abortion doctors. In fact, the Fifth Circuit found the history of health and safety code violations at Petitioner Hope Medical Group and Delta Clinic as well as "generally unsafe conditions and protection of rapists" to be "horrifying."[4] This history amply demonstrates that Petitioners do not have a "close" relationship with their patients and should not be deemed to possess third-party standing.

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[2] See, *e.g.*, *Choice Inc. v. Greenstein*, 691 F.3d 710 (5th Cir. 2012) (legal challenge by five Louisiana abortion clinics against licensing compliance standards); *Okpalobi v. Foster*, 244 F.3d 405 (5th Cir. 2001) (*en banc*) (legal challenge by five Louisiana abortion clinics and doctors against a law giving women a private tort remedy against abortion doctors for damages to both mother and unborn child during an abortion procedure).

[3] *See*, *e.g.*, *id.* at 410 (claiming that if Act 825 goes into effect, it will "eliminate abortions in Louisiana"); LA. REV. STAT. ANN. § 9:2800.12 (Act 825 currently in effect).

[4] *June Med. Servs., L.L.C. v. Gee*, 905 F.3d 787, 806, n56 (5th Cir. 2018).

A. Louisiana Abortion Clinics—Including Petitioner June Medical Services—Have a Long History of Serious Health and Safety Violations.

Louisiana abortion clinics have a slew of health and safety violations documented in Statements of Deficiencies (SOD) by the Louisiana Department of Health (LDH).[5] Below is a summary of some of the more egregious violations reported by LDH for the three Louisiana abortion clinics involved in this lawsuit–June Medical Services, Delta Clinic of Baton Rouge, and Women's Health Care Center.[6]

June Medical Services. Petitioner June Medical Services, doing business as Hope Medical Group for Women in Shreveport, is currently challenging Louisiana's admitting privileges requirement in this case, as well as a host of other Louisiana health and safety regulations in other cases.[7] June Medical has been cited for violating patient health and safety regulations, as well as

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[5] All of the LDH SODs cited in this Brief are public records received under Louisiana Public Records Law, LA. REV. STAT. ANN. 44:1 *et seq.*, and are on file with *Amici*'s counsel.

[6] For a fuller discussion of the history of abortion practice in Louisiana, see Brief Amicus Curiae of Ams United for Life in Support of Cross-Petitioner, *Gee v. June Med. Servs. L.L.C.*, No. 18-1460 (Vide 18-1323) (2019).

[7] See, *e.g.*, *June Med. Servs. L.L.C. v. Gee*, No. 17-404 (M.D. La. filed June 27, 2017) (challenging the entire out-patient abortion regulatory scheme, covering at least 26 abortion laws, including licensing, recordkeeping, and informed consent requirements); *June Med. Servs. L.L.C. v. Gee*, No. 16-444 (M.D. La. filed July 1, 2016) (challenging six health and safety laws, including board certification requirements).

failing to ensure proper physician credentialing and competency.[8]

Substandard patient care.

- 2010: Immediate Jeopardy[9] situation identified for failing to monitor each abortion patient's level of consciousness, respiratory status, and cardiovascular status during abortion procedures for patients receiving administration of intravenous (IV) medications and inhalation gas agents.[10]

- 2010: Failure to monitor the amount or length of time nitrous/oxygen gas was administered to abortion patients.[11]

- 2010: Failure to ensure that the physician performed and documented a physical examination on each abortion patient.[12]

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[8] Petitioner was cited by the Louisiana Department of Health for failing to ensure its physician had admitting privileges at a local hospital or a written transfer agreement with a physician with admitting privileges. LDH, SOD for Hope Medical 1-2 (Oct. 4, 2006).

[9] "Immediate Jeopardy" means "noncompliance has placed the health and safety of recipients in its care at risk for serious injury, serious harm, serious impairment or death. . . . [It] is the most serious deficiency type, and carries the most serious sanctions . . . ." Ctrs. for Medicare & Medicaid Servs., *State Operations Manual*, Appendix Q—Core Guidelines for Determining Immediate Jeopardy (Mar. 6, 2019).

[10] LDH, SOD for Hope Medical Group for Women ("Hope Medical") 4, 8–9 (Aug. 13, 2010).

[11] *Id*. at 8–12.

[12] *Id*. at 13.

- 2010: Failure to ensure that the physician verified a patient's menstrual, obstetrical, and medical history and questioned the patient about past complications with anesthesia prior to administering the anesthesia and performing the abortion.[13]

- 2012: Failure to ensure an abortion patient was medically stable upon discharge.[14]

- 2012: Failure to ensure all patients completed and signed consent forms for the abortion procedure conducted.[15]

Unsanitary, expired, missing, or improperly stored instruments, medications, and medical supplies.

- 2011: Failure to properly store and safeguard drugs and medication.[16]

- 2011: Failure to label the name or strength of stored medications and identify the patient's name, and the date and time the medication was prepared.[17]

- 2011: Failure to document date and time medications were compounded, properly store the medications, and identify the corresponding storage time limit.[18]

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[13] *Id.*
[14] LDH, SOD for Hope Medical 3 (July 25, 2012).
[15] *Id.* at 9.
[16] LDH, SOD for Hope Medical 7–8 (May 27, 2011).
[17] *Id.*
[18] LDH, SOD for Hope Medical 4–5 (Aug. 30, 2011).

- 2012: Failure to properly handle sterile instruments and items, including placing opened sterile trays for future patients in procedure room while procedures were ongoing.[19]

- 2012: Failure to properly clean and disinfect instruments after use in patient procedures.[20]

Missing facility licenses; unlicensed or uncredentialed medical staff providing patient care.

- 2005: Failure to ensure the clinic's Controlled Dangerous Substance (CDS) license was up to date.[21]

- 2009: Failure to ensure that laboratory technicians dispensing medication were licensed to do so.[22]

- 2010: Failure to ensure qualifications, training, and competency of staff administering IV medications and analgesic gases to patients.[23]

- 2010: Failure to have a qualified professional monitor a patient during the initiation and administration of inhalation gas agents and after the administration of IV medications.[24]

- 2011, 2012: Failure to ensure nurse had the competency, skills, and knowledge to compound

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[19] SOD for Hope Medical 11 (July 25, 2012).
[20] *Id*.
[21] LDH, SOD for Hope Medical 1–2 (Sept. 19, 2005).
[22] LDH, SOD for Hope Medical 1–2 (Sept. 3, 2009).
[23] SOD for Hope Medical 2–3 (Aug. 13, 2010).
[24] *Id.* at 4–5.

medication used by physicians in paracervical blocks.[25]

Delta Clinic of Baton Rouge. Delta Clinic of Baton Rouge has been cited repeatedly for violations of health and safety regulations.

Substandard patient care.

- 2009: Immediate Jeopardy situation identified for failing to follow standards of practice for administering conscience sedation by placing syringes in a non-sterile bag; failing to document medication, time, and dose; failing to monitor cardiac status; and failing to document start and end times of abortion procedures.[26]

- 2019: Immediate Jeopardy situation identified for failing to have emergency IV fluids available for surgical abortion patient experiencing heavy bleeding, which led to the patient being transferred to the hospital where she underwent a hysterectomy and bilateral salpingectomy.[27]

- 2007: Failure to ensure that the physician performed and documented a physical examination on each abortion patient.[28]

- 2009: Failure to monitor level of consciousness, respiratory status, and cardiac status during

[25] SOD for Hope Medical 1 (Aug. 30, 2011); SOD for Hope Medical 2 (July 25, 2012).
[26] LDH, SOD for Delta Clinic of Baton Rouge ("Delta Clinic") 6–9 (Dec. 7, 2009).
[27] LDH, SOD for Delta Clinic 6–14 (Mar. 29, 2019).
[28] LDH, SOD for Delta Clinic 1–3 (Oct. 9, 2007).

abortion procedure for patients receiving conscious sedation.[29]

- 2009: Failure to counsel abortion patients individually and privately.[30]

- 2011: Failure to obtain written notarized parental consent before performing abortion on minor patient.[31]

Unsanitary, expired, missing, or improperly stored instruments, medications, and medical supplies.

- 2019: Immediate Jeopardy situation identified when clinic did not have IV fluids available to stabilize patient who had surgical abortion complications and experienced heavy bleeding.[32]

- 2009: Failure to follow manufacturer's guidelines and properly decontaminate vaginal probes between patient use.[33]

- 2009: Failure to ensure single use IV fluid was used only once.[34]

- 2009: Failure to ensure pre-written, pre-signed prescriptions were patient-specific.[35]

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[29] SOD for Delta Clinic 5, 14–17 (Dec. 7, 2009).
[30] *Id.* at 5, 20–22.
[31] LDH, SOD for Delta Clinic 5–7 (Feb. 3, 2011).
[32] SOD for Delta Clinic 6–14 (Mar. 29, 2019).
[33] SOD for Delta Clinic 34 (Dec. 7, 2009).
[34] *Id.* at 34–35, 39–40.
[35] *Id.* at 40–41.

- 2009: Failure to maintain aseptic technique for syringes.[36]

- 2017: Failure to properly sterilize medical equipment.[37]

- 2009, 2013, 2018: Failure to ensure medical supplies and medications were not expired.[38]

- 2018: Failure to label and date syringes filled with lidocaine and epinephrine.[39]

- 2019: Failure to maintain sufficient supply of unexpired emergency medication for treating complications.[40]

Incomplete, inaccurate, and untimely patient medical records and state mandated reports.

- 2009, 2018: Failure to document name, time, route, dose, and/or rate of administration of conscience sedation medication and drugs for patients receiving paracervical blocks in patients' medical records.[41]

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[36] *Id.* at 9–11.
[37] LDH, SOD for Delta Clinic 37–41 (Jan. 25, 2017).
[38] SOD for Delta Clinic 29–30 (Dec. 7, 2009); LDH, SOD for Delta Clinic 1 (Jan. 9, 2013); LDH, SOD for Delta Clinic 37–38 (July 13, 2018).
[39] SOD for Delta Clinic 32–34 (July 13, 2018).
[40] SOD for Delta Clinic 14–16 (Mar. 29, 2019).
[41] SOD for Delta Clinic 11–14 (Dec. 7, 2009); SOD for Delta Clinic 22–29, 39–43 (July 13, 2018).

- 2009, 2011: Failure to follow mandatory reporting laws for carnal knowledge, incest, and rape of minors.[42]

- 2014: Failure to maintain accurate medical records on the correct age of the alleged father of the unborn child of a minor patient.[43]

- 2017, 2018: Failure to timely submit ITOP reports signed by physician.[44]

Women's Health Care Center. Women's Health Care Center, currently operating in New Orleans, has been cited repeatedly for health and safety violations.

Substandard patient care.

- 2004: Failure to follow up with patients regarding potential problems resulting from the use of an unsanitary instrument during abortion procedure.[45]

- 2013: Failure to ensure a patient, referring physician, or performing physician signed informed consent form for an abortion procedure.[46]

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[42] SOD for Delta Clinic 9, 18–20 (Dec. 7, 2009); SOD for Delta Clinic 2–5 (Feb. 3, 2011).
[43] LDH, SOD for Delta Clinic 3–4 (Apr. 1, 2014).
[44] SOD for Delta Clinic 10–14, 26–31 (Jan. 25, 2017); LDH, SOD for Delta Clinic 4–6, 10–12 (June 20, 2017); LDH, SOD for Delta Clinic 1–2 (July 11, 2018); SOD for Delta Clinic 30–31 (July 13, 2018).
[45] LDH, SOD for Women's Health Care Center ("Women's Health") 2, 6–7 (Aug. 5, 2004).
[46] LDH, SOD for Women's Health 1–2 (Nov. 7, 2013).

- 2015: Failure to document complication of a patient who experienced heavy vaginal bleeding eight days after her chemical abortion, was picked up by a clinic staff member and brought to the clinic, and was then subsequently transported by clinic staff to the hospital.[47]

- 2018: Failure to inform persons inquiring about abortion of Louisiana's website containing informed consent information about abortion—including abortion options and alternatives—during initial contact as required by law.[48]

Unsanitary, expired, missing, or improperly stored instruments, medications, and medical supplies.

- 2004: Failure to properly sterilize surgical equipment and instruments, including instruments used to enter the uterine cavity.[49]

- 2015: Failure to disinfect abdominal ultrasound probe.[50]

Missing facility licenses; unlicensed or uncredentialed medical staff providing patient care.

- 2012: Failure to provide nursing services under the direction of a registered nurse (RN) because the facility did not employ an RN.[51]

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[47] LDH, SOD for Women's Health 5–7 (Sept. 2, 2015).
[48] LDH, SOD for Women's Health 2–7 (June 19, 2018).
[49] SOD for Women's Health 2–6 (Aug. 5, 2004).
[50] SOD for Women's Health 11–13 (Sept. 2, 2015).
[51] LDH, SOD for Women's Health 1–2 (Nov. 14, 2012).

- 2010, 2015: Failure to properly evaluate licensed medical personnel and non-licensed staff for competency.[52]

- 2018: Failure to ensure the clinic medical director who procured/ordered a controlled dangerous substance (CDS) had a current CDS license.[53]

Leroy Brinkley, who operates both Delta Clinic of Baton Rouge and Women's Health Care Center, as well as other clinics in the past and in other States, has a history of reportedly unscrupulous business practices.

For example, Brinkley was held personally liable for Delta Clinic's $337,000 fine for violating the Federal Controlled Substances Act after the clinic failed to pay. See *United States v. Clinical Leasing Service, Inc.*, 982 F.2d 900 (5th Cir. 1992). He also employed the infamous Dr. Kermit Gosnell as an independent contractor at his Delaware clinic.[54] Brinkley would send women whom the Delaware clinic could not help (presumably because they were seeking a late-term abortion) across state lines to Gosnell's clinic in Pennsylvania.[55] Gosnell's clinic was "convicted for the first-degree murder of three infants who were born alive and for the manslaughter of a patient." *Hellerstedt*, 136 S. Ct. at 2343 (Alito, J., dissenting). When Brinkley was subpoenaed for

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[52] LDH, SOD for Women's Health 5 (Oct. 19, 2010); SOD for Women's Health 3–4 (Sept. 2, 2015).
[53] SOD for Women's Health 8–10 (June 19, 2018).
[54] Testimony of Leroy Brinkley, *In re Cnty. Investigating Grand Jury XXIII*, No. 000-9901-2010, at 9 (First Jud. Dist. of Pa. Ct. Com. Pl. Nov. 4, 2010).
[55] *Id.* at 42.

Gosnell's patient files, he only produced three files and could not explain what happened to the rest.[56]

All of the clinic violations reported in the LDH Statement of Deficiencies demonstrate that Louisiana abortion clinics do not share the same interests as their patients when it comes to health and safety, and as such cannot have the necessary "close" relationship for third-party standing.

B. Louisiana Abortion Doctors Have a Long History of Professional Disciplinary Actions and Substandard Medical Care.

Louisiana abortion doctors have been the subject of numerous professional disciplinary actions by the Louisiana State Board of Medical Examiners ("Board"). These actions reveal that past and current abortion doctors have engaged in unprofessional and unethical behavior and substandard medical care of their patients.[57] Five of these abortion doctors—some of whom have been involved in prior legal challenges against Louisiana health and safety laws—are discussed below.

Dr. Adrian J. Coleman was an abortion doctor at Delta Clinic. In 2008, his operative vaginal delivery (OVD) privileges at a medical facility were suspended at after an infant died during a delivery he performed. In 2009, his clinical privileges at another facility were suspended because he had an "unacceptably high number of absences from obstetrical deliveries, [did] not adequately evaluate and care for his patients in

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[56] *Id.* at 19–20.

[57] All Board disciplinary reports are judicially noticeable public documents available on the Board's website: https://secure.pharmacy.la.gov/Lookup/LicenseLookup.aspx. *See* Fed. R. Evid. 201.

the labor and delivery unit, and fail[ed] to document his patient care adequately and accurately."[58] As a result, in 2010, the Board placed Coleman's medical license on three years' probation and prohibited him from performing all OVD procedures until the Board determined that he was "competent to perform [them] safely and in accordance with the prevailing standards of medical practice."[59] Coleman died in 2011.

Dr. Ifeanyi Charles Anthony Okpalobi was involved in multiple legal challenges to Louisiana abortion health and safety laws, including a law that created a private tort remedy for women against abortion doctors for damages to both the mother and unborn child during an abortion procedure. See, *e.g.*, *Okpalobi*, 244 F.3d 405. During this legal challenge he was cited by the Board for failing to report multiple malpractice complaints and settlements.[60] This failure, coupled with allegations he "demonstrated professional and/or medical incompetency by his inability to provide timely and appropriate care to his patients, including . . . risk assessment, pre-natal and post-natal management, determination of uterine size and gestational age, and testing and evaluation related to abortion," resulted in a consent order in which Okpalobi agreed to a three-year probationary period on his medical license and to an indefinite prohibition on his obstetrical practice.[61] In 2012, Okpalobi was officially reprimanded for his repeated failures to meet Abortion Facility Licensing

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[58] *In the Matter of: Adrian Joseph Coleman*: No. 08-I-775, at 1 (La. Bd. Med. Exam'rs Mar. 15, 2010).
[59] *Id*. at 2–3.
[60] *In the Matter of: Ifeanyi Okpalobi*, No. 93-I-051-X (La. Bd. Med. Exam'rs Mar. 8, 1999).
[61] *Id*.

Standards and continued conduct indicative of a practice which "fail[ed] to satisfy the prevailing and usually accepted standards of medical practice."[62] He was required to receive Board approval for any intended medical practice.[63] Okpalobi died in 2018.

Dr. A. James Whitmore, III joined Okpalobi's challenge to Louisiana's abortion tort remedy law. *See Okpalobi*, 244 F.3d 405. Prior to this, Whitmore was involved in two deliveries of children in which his diagnoses and treatments were inappropriate and resulted in the birth of one child brain damaged, the death of one other child, and an inappropriate Caesarean section.[64] While working at Delta Clinic, Whitmore used instruments that were rusty, cracked, and unsterile; single-use instruments on multiple patients; and a sterilization solution that was infrequently changed and visibly unclean.[65] After one second trimester abortion he performed, the patient continued to have moderate bleeding, but the ambulance was not called for nearly three hours.[66] At the emergency room, they discovered she had a perforated uterus and a lacerated uterine artery, and it was necessary to perform a complete hysterectomy.[67] The Board found Whitmore guilty of unprofessional conduct and continuing or recurring medical practices which failed to satisfy accepted medical standards based on his "disregard of proper sanitary procedures, his rude and callous treatment of

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[62] *In the Matter of: Ifeanyi Charles Okpalobi*, No. 10-I-033, at 1 (La. Bd. Med. Exam'rs May 9, 2012).
[63] *Id*. at 3.
[64] *In the Matter of: A. James Whitmore*, No. 92-A-001, at 1 (La. Bd. Med. Exam'rs May 21, 1992).
[65] *In the Matter of: A. James Whitmore, III*, No. 00-A-021, at 2 (La. Bd. Med. Exam'rs Jan. 22, 2002).
[66] *Id*. at 3.
[67] *Id*.

his patients, his refusal to answer their questions, and his tardy recognition of the seriousness of the condition of [a] patient [that] endanger[ed] her life."[68] The Board had "grave reservations as to Whitmore's professional competency" and placed his medical license on immediate probation for an indefinite period.[69]

Dr. Victor Brown has been the subject of to many Board disciplinary actions. In 1989, after allegedly writing and issuing prescriptions for controlled substances to five patients without legitimate medical justification, Brown entered into a consent order placing his medical license on probation for three years and prohibiting him from prescribing, dispensing, or administering any Schedule II controlled substance for the duration of his medical career.[70] In 1997, a medical center suspended his surgical/invasive/endoscopic clinical privileges after an investigation revealed that his definition, evaluation, and treatment of infertility were inconsistent and not in keeping with generally recognized medical standards since he performed dilation and curettage on almost every patient even when not medically indicated or necessary.[71] In 2000, when the Board discovered that Brown had failed to report the loss of his privileges on three different medical license renewal applications, he agreed to a consent order placing his medical license on indefinite probation and a lifetime limitation on the practice of medicine in the field of obstetrics/gynecology.[72]

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[68] *Id*.
[69] *Id*.
[70] *In the Matter of: Victor Brown*, No. 89-A-035, at 2 (La. Bd. Med. Exam'rs Dec. 8, 1989).
[71] *In the Matter of: Victor Brown*, No. 99-I-035, at 1 (La. Bd. Med. Exam'rs Mar. 24, 2000).
[72] *Id*. at 4.

Specifically, he was not to perform any prenatal care in any surgical/invasive/endoscopic procedures, including dilations and curettages, dilations and evacuations, dilations and extractions, abortions, and vaginal or cesarean deliveries.[73] In 2005, Brown violated this consent order by engaging in and practicing medicine he was not authorized to practice. His license was again placed on indefinite probation and he was further restricted from performing cervical or vaginal biopsies and performing or interpreting any ultrasounds.[74] In 2007, Brown's medical license was revoked and cancelled for violating the terms of the 2005 consent order, unprofessional conduct, and professional and medical incompetency.[75]

Dr. Kevin Work has also been subjected to multiple disciplinary actions by the Board. In 2009, Work's medical license was placed on a one-year probation when a hospital suspended his clinical privileges after allegations he made "unwelcome and inappropriate sexual comments to a nurse" and finding he "failed to present to the delivery unit" six times.[76] In 2014, after Work allowed staff to use his name and electronic signature and engage in the practice of medicine, he agreed to a one-year probation on his medical license and a requirement that the Board approve any future practice of medicine.[77] In 2016, after again allowing unlicensed staff to practice

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[73] *Id*.
[74] *In the Matter of: Victor Brown*, No. 01-I-037, at 3 (La. Bd. Med. Exam'rs Aug. 15, 2005).
[75] *In the Matter of: Victor Brown*, No. 06-A-021, at 2, 5 (La. Bd. Med. Exam'rs Sept. 17, 2007).
[76] *In the Matter of: Kevin Govan Work*, No. 08-I-774, at 1–2 (La. Bd. Med. Exam'rs Mar. 16, 2009).
[77] *In the Matter of: Kevin Govan Work*, No. 13-I-014, at 1–3 (La. Bd. Med. Exam'rs Oct. 17, 2014).

medicine by performing ultrasounds and providing prenatal services, Dr. Work agreed to not practice medicine in *any* capacity for one year.[78] In 2017, his license was reinstated on a two-year probation requiring he only engage in the practice of medicine as approved by the Board and in a non-solo practitioner setting.[79] But in 2019, his medical license was again suspended pending resolution of claims relating to practicing at an abortion clinic without prior Board approval.[80] He was officially reprimanded and placed on probation for two years with the same restrictions as in 2017, with the addition that another physician be present any time he practices medicine and a covenant that "he will not practice in the area of abortion care" in Louisiana and "will not practice obstetrics in the State . . . other than diagnosing pregnancy and referring pregnant patients."[81] Work's medical license was reinstated without restriction on June 20, 2019.[82]

In sum, Louisiana abortion doctors' multiple professional disciplinary actions for substandard medical care and blatant disregard for their patients' health and safety—in addition to the numerous health and safety violations of Louisiana abortion clinics—demonstrate that abortion providers' interests are at odds with their patients' interests. As such, Petitioners do not have a "close" relationship with

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[78] *In the Matter of: Kevin Govan Work*, No. 15-A-009, at 3 (La. Bd. Med. Exam'rs Feb. 15, 2016).
[79] *In the Matter of: Kevin Govan Work*, No. 15-A-009, at 1–2 (La. Bd. Med. Exam'rs June 20, 2017).
[80] *In the Matter of: Kevin Govan Work*, No. 19-I-144 (La. Bd. Med. Exam'rs Feb. 26, 2019).
[81] *In the Matter of: Kevin Govan Work*, No. 2019-A-011, at 1–2 (La. Bd. Med. Exam'rs Apr. 15, 2019).
[82] *In the Matter of: Kevin Govan Work*, No. 2019-A-11 (La. Bd. Med. Exam'rs June 10, 2019).

their patients and should not be deemed to possess third-party standing to challenge health and safety laws on their behalf.

II. THE COURT OF APPEALS APPROPRIATELY APPLIED THE *CASEY* STANDARD AND DISTINGUISHED *HELLERSTEDT* TO UPHOLD LOUISIANA'S ACT 620.

As the Court of Appeals observed, "[*Hellerstedt*'s] analysis is rooted in *Casey*," which "requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer." 905 F.3d at 802, quoting *Casey*, 505 U.S. at 877. Parenthetically describing its decisional process as a "balancing," *Hellerstedt* states that "[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right." *Id.* at 802-03, quoting *Casey*, 505 U.S. at 878.[83]

While the court below concluded that "[t]here is no doubt that [*Hellerstedt*] imposes a balancing test," *id.* at 803, *Amici* agree with the Fifth Circuit that it cannot be regarded as a "pure" balancing test under which any burden, no matter how slight, invalidates the law. *Id.*; *see Hellerstedt*, at 2323, 2324 (Thomas, J.,

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[83] Where a legislature has "legitimate reasons" for acting, courts will not infer an impermissible purpose for the law. *McCleskey v. Kemp*, 481 U.S. 279, 298-99 (1987); *see Smith v. Doe*, 538 U.S. 84, 92 (2003) ("only the clearest proof will suffice to override" the "legislature's stated intent") (internal citation omitted). Here, as in *Mazurek v. Armstrong*, "[o]ne searches the Court of Appeals' opinion in vain for any mention of any evidence suggesting an unlawful motive on the part of the [Louisiana] Legislature." 520 U.S. 968, at 972 (1997). The "purpose" analysis should end there.

dissenting) (*Hellerstedt* "reimagine[d] the undue-burden standard" and created a "free-form balancing test"). "*Casey* expressly allows for the possibility that not every burden creates a 'substantial obstacle,'" and "even regulations with a minimal benefit are unconstitutional only where they present a substantial obstacle to abortion." *Gee,* 905 F.3d at 803. Conversely, "[a] minimal burden even on a large fraction of women does not undermine the right to abortion." *Id*.

Further, the court seems to have been correct in its view that *Hellerstedt* resurrected the *Casey* plurality's "large fraction" framework (at least for now). 905 F.3d at 802. Although the undue burden test remains too malleable and difficult in application, the large fraction component, properly applied, may help inject an objective quotient into the undue burden analysis that could shore up the standard against judicial subjectivity, whether based on political factors, personal judgments, or the like.[84] Objectivity is critical, especially for what has been called a "balancing test," to keep the hundreds of federal judges from invalidating abortion health and safety regulations based upon their own personal assessments of "burden" versus "benefit."

The Fifth Circuit agreed with the Eighth Circuit's elucidation of the undue burden/large fraction framework in *Planned Parenthood v. Jegley*. "In every other area of the law, a facial challenge requires plaintiffs to establish a provision's unconstitutionality in every conceivable application." 905 F.3d at 815,

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[84] Accord *Planned Parenthood v. Jegley*, 864 F.3d 953, 960 (8th Cir. 2017) ("We find that [the large fraction] standard is not entirely freewheeling and that we can and should define its outer boundaries.").

citing *United States v. Salerno*, 481 U.S. 739, 745 (1987) (plaintiffs bringing constitutional challenges "must show that no set of circumstances exists under which the [law] would be valid"). In the abortion context, however, plaintiffs are excused from that demanding standard and must show a substantial burden in only a large fraction of cases. *Id*. Thus, as the Eighth Circuit expressed it, "For [facial] challenges to abortion regulations… the Supreme Court has fashioned a different standard under which the plaintiff can prevail by demonstrating that 'in a large fraction of the cases in which [the law] is relevant, it will operate as a substantial obstacle to a woman's choice.'" *Gee*, 905 F.3d at 802, quoting *Jegley*, 864 F.3d at 958 (citing *Casey*, 505 U.S. at 895).

Here, as in *Hellerstedt*, the court treated the denominator of the "fraction" in question as all women seeking abortions because the statutes at issue encompass all types of abortions. "Accordingly, to sustain the facial invalidation of Act 620, we would have to find that it substantially burdens a large fraction of all women seeking abortions in Louisiana." *Id*. at 802. The circuit court correctly held that June Medical did not meet that standard.

The court began its application of *Hellerstedt* to the circumstances in Louisiana by observing that "the facts in the instant case are remarkably different from those that occasioned the invalidation of the Texas statute." 905 F.3d at 791; *cf*. *id*. ("Careful review of the record reveals stark differences between the record before us and that which the Court considered in [*Hellerstedt*];" *id*. at 803 (*Hellerstedt* involved "a substantially similar statute but greatly dissimilar facts and geography"). Ultimately, Act 620 "passes muster even under the stringent requirements of [*Hellerstedt*]." *Id*. at 791.

The appeals court distinguished *Hellerstedt* by observing that unlike Texas, Louisiana presented "some evidence" of a medical benefit in the challenged regulation and "far more detailed evidence of Act 620's impact on access to abortion." *Id.* at 805. As to the "benefit," the court displayed the appropriate deference to the State legislature consistent with the Court's pronouncement in *Gonzales v. Carhart* that States have "wide discretion" in passing health and safety legislation, even if "medical and scientific uncertainty" exists–a threshold of authority that outpatient emergency admission standards easily surmount. 550 U.S. 124, at 163 (2007). The practice of surgical abortion overwhelmingly occurs in outpatient clinical facilities,[85] and the widely accepted overall hospitalization rate following elective abortion (0.3% or one in three hundred patients) is similar to rates for other similar outpatient procedures such as liposuction, gastrointestinal endoscopy, colonoscopy, and upper endoscopy.[86] *See Gee*, at 805 (noting

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[85] TE LINDE'S OPERATIVE GYNECOLOGY 448 YEAR (reporting that 93% of abortions occur in free-standing clinics and 2% in physicians' offices); Rachel Jones and Jenna Jerman, *Abortion Incidence and Service Availability in the United States, 2011* Guttmacher Institute (2013) http://www.guttmacher.org/pubs/journals/psrh.46e0414.pdf.

[86] U.S. Dep't of Health & Human Servs., Ctrs. for Disease Control, National Health Statistics Reports: Ambulatory Surgery in the United States, 2006 (revised Sept. 4, 2009); Stanley Henshaw and Lawrence Finer, *The Accessibility of Abortion Services in the United States*, 35 PERSPECTIVES ON SEXUAL AND REPRODUCTIVE HEALTH 16 (2003) (stating hospitalization rate for abortion is 0.3%). *See Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583, 595 (5th Cir. 2014) (citing figure of

"[p]rocedures performed at [outpatient surgical centers] include upper and lower GI endoscopies, injections into the spinal cord, and orthopedic procedures"). For this reason, the National Abortion Federation and a leading outpatient surgery association have recommended that women choose a doctor who can admit them to a nearby hospital.[87]

The appeals court also found that the record regarding hospital credentialing in Louisiana is starkly different from that in *Hellerstedt*. Unlike Texas, "Louisiana was not attempting to target or single out abortion facilities. In fact, it was just the opposite—the purpose of the Act was to bring them 'into the same set of standards that apply to physicians providing similar types of services in [ASCs].'" *Id*. at 806. Act 620 "brings the requirements regarding outpatient abortion clinics into conformity

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210 emergency direct transfers from abortion centers to hospitals in Texas annually). However, because (as the panel noted), "most complications occur well after the surgery," 905 F.3d at 806, n56, this figure may be conservative. *Compare* U. Upadhyay, et al., *Incidence of Emergency Department Visits and Complications After Abortion*, 125 OBSTETRICS & GYNECOLOGY 175 (2015) (stating that one in 115 abortions resulted in an abortion related complication treated in an emergency room.

[87] *See Abbott*, *supra*, 748 F.3d at 595. *Cf.* American Association for Accreditation of Ambulatory Surgery Facilities, Inc. (AAASF) *Surgical Standards* 13.0, http://www.aaaasfsurveyors.org/asf_web/PDF%20FILES/ASC%20Standards%20and%20Checklist%20Version%2013.pdf at 13 (stating that every physician operating in an AAAASF accredited facility, must hold or demonstrate that they have held unrestricted hospital privileges in their specialty at an accredited and/or licensed acute care hospital within thirty (30) minutes of their accredited facility).

with the preexisting requirement that physicians at ambulatory surgical centers must have privileges at a hospital within the community." 48 La. Admin. Code § 4535(E)(1).

Additionally, unlike in *Hellerstedt*, Louisiana's emergency admission requirement "performs a real, and previously unaddressed, credentialing function that promotes the wellbeing of women seeking abortion." *Id.* at 806. This credentialing function arises from the fact that "hospitals perform more rigorous and intense background checks than do the clinics." *Id.* at 805. The appeals court noted that Doe 3, Petitioner's Chief Medical Officer, hired and trained other doctors to do abortions who were not OB/GYNs, including a radiologist and an ophthalmologist. *Id.* at 799. He was the only one to evaluate their credentials and admitted he neither performed background checks nor inquired into their previous training. *Id.* at 798. "The record shows that clinics, beyond ensuring that the provider has a current medical license, do not appear to undertake any review of a provider's competency. The clinics, unlike hospitals, do not even appear to perform criminal background checks." *Id.* at 805.

As to the "burden" side of the equation, the court below appropriately determined that "there is insufficient evidence to conclude that, had the doctors put forth a good faith effort to comply with Act 620, they would have been unable to obtain privileges." *Gee*, 905 F.3d at 807. "If the Act were to go into effect today, both Women's and Hope could remain open, though each would have only one qualified doctor. Delta would be the only clinic required to close, as its only Doctor, Doe 5, does not have admitting privileges within 30 miles." *Id.* at 810. However, that result cannot be attributed to the operation of Act 620 since

Doe 5 testified that he will be given qualifying privileges once he secures a covering doctor. *Id*. at 809.[88]

Because no clinics would close as a result of Act 620, there would be no increased strain on available facilities, since no clinic will have to absorb another's capacity. *Id.* at 812. And Act 620 will impose no substantial obstacle to abortion access as a result of increased driving distances. *Id*. at 791. Finally, Act 620 would impose, at most, an increase in volume of only 30% at just one abortion business. *Id*.

In seeking to determine what would constitute an "undue burden" imposed by Act 620, the Fifth Circuit struggled, perhaps understandably, with interpreting the "large fraction" component of the undue burden test. The court of appeals reflected that the Supreme Court "has not defined what constitutes a 'large fraction,' and the circuit courts have shed little light." *Id*. at 814. The Sixth Circuit determined that 12% was an insufficiently "large fraction," *Cincinnati Women's Servs. v. Taft*, 468 F.3d 361 at 373 (6th Cir. 2006), and other circuits have found that "a large fraction [exists only] when *practically all* of the affected women would face a *substantial* obstacle in obtaining an abortion."

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[88] The circuit court should be commended for clarifying that the actions and inactions of the Doe doctors and the independent actions and choices of third parties cannot be attributed to Louisiana. Here, "the vast majority [of Does] largely sat on their hands, assuming that they would not qualify. Their inaction severs the chain of causation." *Gee* 905 F.3d at 807. The court and parties agreed that the closures of two abortion centers were unrelated to Act 620. Additionally, the court of appeals properly held that the district court erred in factoring the strongly pro-life culture of Louisiana into its substantial burden analysis. *Id*. at 810, n60.

Gee, 905 F.3d at 814, quoting *Taft*, 468 F.3d at 373-74 (emphasis in *Gee*).[89]

In this case, the court noted, Does 2 and 3 would each need to perform an additional 550 procedures per year at one abortion center, which amounts to six extra abortions each day that Doe 3 currently works. "Using his testimony that he can perform six abortions an hour, that load would not result in a substantial increase in wait times. Common sense dictates that an hour cannot be a substantial burden." *Gee*, at 813. Nor does an increase in volume of thirty percent at one abortion center approach "practically all" women seeking abortions in Louisiana, and it cannot be deemed a large fraction for purposes of *Hellerstedt* or Act 620. *Id.* at 814. "To conclude otherwise eviscerates the restrictions on a successful facial challenge. *Id*. at 815."[90] The Fifth Circuit thus correctly concluded that "[i]nstead 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." *Id*.

III. *HELLERSTEDT* HAS AGGRAVATED THE ALREADY UNWORKABLE STANDARD SET OUT IN

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[89] *Accord Jegley*, 864 F.3d at 959, n8 ("We are skeptical that 4.8 to 6.0 percent is sufficient to qualify as a 'large fraction' of women seeking medication abortions in Arkansas.").

[90] This approach is also consistent with *Gonzalez*'s instruction that facial challenges are disfavored. *Gonzalez*, 550 U.S. at 167; *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008). A fraction of abortions at a small number of abortion centers—or just one abortion center—should not constitute grounds for a holding of facial invalidity. At most, it might constitute grounds for an as-applied challenge by that abortion business only, which it has not made here.

ROE AND *CASEY*, AND THE COURT SHOULD RECONSIDER THOSE PRECEDENTS.

As the discussion above amply demonstrates, the Court of Appeals labored to do the best it could with the vague and opaque "undue burden" standard on which the Court has relied since *Casey*. *Amici* respectfully suggest that the court's struggle–which is similar to many dozens of other courts' Herculean struggles in this area–illustrates the unworkability of the "right to abortion" found in *Roe* and the need for the Court to again take up the issue of whether *Roe* and *Casey* should be reconsidered and, if appropriate, overruled.

Stare decisis is not an "inexorable command," much less a constitutional principle. *Burnet v. Colorado Oil & Gas Co.*, 285 U.S. 393, 405 (1932) (Brandeis, J., dissenting). In *Casey*, the Court noted that *stare decisis* is a prudential and pragmatic judgment. 505 U.S. at 854. The Court has exercised that judgment to overrule precedent in more than 230 cases throughout its history.[91]

Roe remains a radically unsettled precedent forty-six years after it was decided. Two of the seven Justices who originally joined the *Roe* majority subsequently repudiated *Roe* in whole or in part,[92] and

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[91] Cong. Research Serv., *The Constitution of the United States: Analysis and Interpretation: Analysis of Cases Decided by the Supreme Court of the United States to June 26, 2013*, S. Doc. No. 112-9, at 2573-85 (2d Sess. 2013).

[92] *Thornburgh v. ACOG*, 476 U.S. 747, 782-85 (1986) (Burger, J., dissenting); John C. Jeffries, Jr., JUSTICE LEWIS F. POWELL JR.: A BIOGRAPHY 341 (1994) (referring to *Roe* and *Doe* as "the worst opinions I ever joined").

virtually every abortion decision has been closely divided.

Roe's jurisprudence has been haphazard from the beginning. *Roe* did not actually hold that abortion was a "fundamental" constitutional right, but only implied it.[93] This ambiguity was compounded by the Court's concluding "summary" of the *Roe* holding, which nowhere mentions abortion as a fundamental right, strict scrutiny analysis, or the need to "narrowly tailor" regulations. Instead, the Court only required that regulations be "reasonably relate[d]" to the State's interest and "tailored to the recognized state interests."[94] The cases decided between *Roe* and *Webster v. Reproductive Health Services*[95] in 1989 did not consistently treat abortion as a "fundamental right" and did not consistently apply strict scrutiny.[96]

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[93] See, *e.g., Roe*, 410 U.S. at 155.

[94] *Id*. at 164–65.

[95] 492 U.S. 490, 533 (1989).

[96] *See, e.g., Connecticut v. Menillo*, 423 U.S. 9 (1975) (no reference to any "fundamental right" or "strict scrutiny" in *per curiam* opinion); *Planned Parenthood of Cent. Missouri v. Danforth*, 428 U.S. 52 (1976) (failing to use any particular level of scrutiny); *id*. at 71 (noting "inconsisten[cy] with the standards enunciated in *Roe v. Wade*"); *Bellotti v. Baird*, 428 U.S. 132 (1976) (using "*unduly burdensome*" standard); *id*. at 147 (characterizing *Danforth* as holding that a law "is not unconstitutional unless it *unduly burdens* the right to seek an abortion"); *Beal v. Doe*, 432 U.S. 438, 466 (1977) (invoking the "*unduly burdensome*" standard); *Maher v. Roe*, 432 U.S. 464, 471 (1977) (the Court referred only indirectly to "a fundamental right" but then held "the District Court misconceived the nature and scope of 'the fundamental right recognized in *Roe*'"); *id*. at 470–71 ("the right protects the woman from *unduly burdensome* interference with her freedom"); *id*. at

Besides dictum in *Maher v. Roe*,[97] in the two decades between *Roe* and *Casey* the majority of the Court referred to abortion as a "fundamental right" only twice: *City of Akron v. Akron Center for Reproductive Health*,[98] and *Thornburgh v. ACOG*.[99] But even then the Court never expressly applied the "strict scrutiny-narrowly tailored" analysis. *Thornburgh* in 1986 is the last time that a majority of the Court referred to abortion as a "fundamental right"–and the Court overruled *Akron* and *Thornburgh* in *Casey*.[100]

473–74, (concluding that the regulation "does not impinge upon the fundamental right recognized in *Roe*"); *Colautti v. Franklin*, 439 U.S. 379, 396–97 (1979) (applying an "*unduly limit*" standard); *Bellotti v. Baird*, 443 U.S. 622, 640 (1979) (employing an "*undue burden*" standard without referencing a "fundamental right"); *Harris v. McRae*, 448 U.S. 297, 324–26 (1980) (applying a *rational basis test* for the Hyde Amendment); *H.L. v. Matheson*, 450 U.S. 398 (1981) (upholding the Utah parental notice law against a facial challenge, without reference to abortion as a "fundamental" right).

[97] 432 U.S. 464 (1997).

[98] 462 U.S. 416, 427 (1983).

[99] 476 U.S. 747, 772 (1986).

[100] 505 U.S. at 882. In *Akron*, Justice O'Connor pointed out that "[t]he Court and its individual Justices have repeatedly utilized the 'unduly burdensome' standard in abortion cases" between *Roe* and *Akron*. She noted that "the Court subsequent to *Doe [v. Bolton]* has expressly rejected the view that differential treatment of abortion requires invalidation of regulations" and that "[t]he Court has never required that state regulation that burdens the abortion decision be 'narrowly drawn' to express only the relevant state interest." *Id*. at 467 n11.

Finally, after two decades of inconsistency, the Court officially disavowed "fundamental right" status for abortion and strict scrutiny review in *Casey*, adopting instead an "undue burden" test.[101] But *Casey* did not settle the clarity of the "undue burden" standard. Consistency and predictability have continued to be undermined as federal courts have struggled to apply the *Roe/Casey* standard.[102] Immediately after *Casey*, the Court again changed the applicable standard and adopted a "large fraction" test in *Fargo Women's Health Organization v. Schafer*.[103] The lower federal courts had no better luck between *Fargo* and *Gonzales v. Carhart*[104] discerning what a "large fraction" of "relevant cases" meant.[105]

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[101] 505 U.S. at 871, 874–76.

[102] *See, e.g., Planned Parenthood v. Minnesota*, 910 F.2d 479 (8th Cir. 1990) (trying to determine standard of review after *Webster*); Paul Quast, Note, *Respecting Legislators and Rejecting Baselines: Rebalancing Casey*, 90 NOTRE DAME L. REV. 913 (2014) (citing cases); Sandra L. Tholen & Lisa Baird, *Con Law is as Con Law Does: A Survey of Planned Parenthood v. Casey in the State and Federal Courts*, 28 LOYOLA L. REV. 971 (1995) (citing cases).

[103] 507 U.S. 1013, 1014 (1993) (O'Connor, J., joined by Souter, J., concurring in denial of certiorari) ("[W]e made clear that a law restricting abortions constitutes an undue burden, and hence is invalid, if, 'in a large fraction of the cases in which (the law) is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion.'").

[104] 550 U.S. 124 (2007).

[105] Kevin Martin, *Stranger in a Strange Land: The Use of Overbreadth in Abortion Jurisprudence*, 99 COL. L. REV. 173 (1999); *Barnes v. Mississippi*, 992 F.2d 1335, 1337 (5th Cir. 1993) ("[P]assing on the constitutionality of state statutes regulating abortion after *Casey* has become neither less difficult nor more closely anchored to the Constitution."); *Planned Parenthood v. Wasden*, 376 F.3d

The "large fraction" test appeared to have been effectively abandoned in *Gonzales,* but was revived in *Hellerstedt* yet applied incoherently such that it would always result in invalidation of the State's interest and the State statute.[106] And the Court in *Hellerstedt* once again employed *Casey*'s "undue burden" test but adopted a "benefits-and-burdens balancing test" by which federal judges are required to assess the "medical justification" of abortion regulations.[107]

In short, *Roe*'s jurisprudence has been characterized by Delphic confusion and protean change. The Court struck down regulations in *Akron* and *Thornburgh* that were approved in *Casey*. The Court identified two primary state interests for abortion regulations in *Roe*, but recognized more in *Gonzales*.[108] It struck down limits on partial-birth abortion in *Stenberg v. Carhart*[109] that were approved in *Gonzales*. It rejected facial challenges in

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908, 920 n9 (9th Cir. 2004) (noting the "large fraction" standard has been labeled "unique"); cert den., 544 U.S. 948 (2005); *National Abortion Federation v. Gonzales*, 437 F.3d 278, 294 (2d Cir. 2006) (Walker, J.) ("As it stands now, however, the Supreme Court appears to have adopted the 'large fraction' standard (perhaps modified by *Stenberg v. Carhart*, 530 U.S. 914 (2000)] to mean a 'not-so-large-fraction' standard)….").

[106] 136 S. Ct. at 2343 n11 (Alito, J., dissenting) ("Under the Court's holding, we are supposed to use the same figure (women actually burdened) as both the numerator and the denominator. By my math, that fraction is always '1,' which is pretty large as fractions go.").

[107] *Id*. at 2324 (Thomas, J., dissenting).

[108] 550 U.S. at 157 (protecting the "reputation" of the medical community); id. at 159 ("ensuring so grave a choice is well informed").

[109] 530 U.S. 914 (2000).

Gonzales[110] that it then resurrected, *sua sponte*, in *Hellerstedt*.[111] The Court has repeatedly retreated from *Roe* in at least four cases, *Harris*, *Webster*, *Casey*, and *Gonzales*, recalibrating the standard of review and giving States more deference to enact health and safety regulations and partial prohibitions. As the Court retreated from *Roe* in those decisions, the States have moved forward to regulate abortion to the maximum extent allowed in protecting the "state interests" that *Roe, Casey* and *Gonzales* said the States could protect. These incessant retrenchments show that *Roe* has been substantially undermined by subsequent authority, a principal factor the Court considers in deciding whether to overrule precedent.[112] *Casey* obviously did not settle the abortion issue, and it is time for the Court to take it up again.

CONCLUSION

Amici respectfully submit that the judgment of the Court of Appeals should be affirmed, either on the ground that Petitioner Cross-Respondent lacks standing to challenge Louisiana's emergency admission law or on the ground that the Court of Appeals did not err in holding that the law does not impose an "undue burden" on access to abortion.

Respectfully submitted,

CATHERINE GLENN FOSTER

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[110] 550 U.S. at 167 ("[T]hese facial attacks should not have been entertained in the first instance….").
[111] 136 S. Ct. at 2340 (2016) (Alito, J., dissenting) ("No court would even think of reviving such a claim on its own.").
[112] *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 379 (2010) (Roberts, C.J., concurring).

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