No. 18-1323

IN THE

# Supreme Court of the United States

JUNE MEDICAL SERVICES L.L.C., ET AL.,

*Petitioners,*

v.

REBEKAH GEE, SECRETARY,
LOUISIANA DEPARTMENT OF HEALTH AND HOSPITALS,

*Respondent.*

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

## BRIEF OF *AMICUS CURIAE* LEGAL CENTER FOR DEFENSE OF LIFE IN SUPPORT OF RESPONDENT

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December 27, 2019

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

## QUESTION PRESENTED

Whether Louisiana's law requiring physicians who perform abortions to have admitting privileges at a local hospital is unconstitutional.

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## INTEREST OF *AMICUS CURIAE*[1]

Founded in 1989, *amicus curiae* Legal Center for Defense of Life ("Legal Center") is a nonprofit New Jersey corporation which provides *pro bono* services to women facing issues during pregnancy. The Legal Center seeks to ensure that pregnant women are accurately and completely informed of their rights and

[1] All the parties have filed blanket consents with this Court to allow the submission of this *amicus* brief. Pursuant to Rule 37.6, counsel for *amicus curiae* authored this brief in whole, no counsel for a party authored this brief in whole or in part, and no person or entity – other than *amicus*, its members, and its counsel – contributed monetarily to the preparation or submission of this brief.

of the medical and biological facts about their pregnancy, and the Legal Center seeks to ensure that women who are considering or undergoing abortion receive the same standard of care as any patient undergoing any other surgical procedure. The Legal Center has, for example, arranged for representation of the estate of a woman who died as a result of negligence during an abortion procedure.

*Amicus* Legal Center has a direct and vital interest in this case to defend the authority of States to limit the exploitation of women by the abortion industry.

## SUMMARY OF ARGUMENT

Abortion clinics lack a constitutional right, under the precedent of *Harris v. McRae*, to shift the costs of their complications onto the public. The mantra of "just call 911" or "just go to an ER" – at public expense because the abortionist is unavailable there – need not be allowed to continue in how abortion clinics handle their complications. Abortion clinics dodge the costs of their complications by refusing to be available and accountable for them. Louisiana sensibly curtailed this cost-shifting by requiring availability and accountability by the abortionist at a local hospital.

Economics teaches that businesses tend to "externalize" their costs. A United Nations-backed report, for example, estimated that producers externalize trillions of dollars in their costs in the form of environmental harm today.[2] Businesses in every industry externalize costs in their own ways. States

[2] https://news.un.org/en/story/2013/04/437122 (viewed Dec. 23, 2019).

may properly limit such externalization, as Louisiana Act 620 does by requiring abortionists to have admitting privileges at a hospital within 30 miles of the abortion. La. Rev. Stat. Ann. § 40:1061.10(A)(2)(a).

By eschewing medical staff privileges, abortionists evade the time, expense, and accountability associated with complications from their surgeries. An abortionist and his clinic thereby immunize themselves from the costs of being called to the hospital to deal with their complications. Hospital staff is kept in the dark about how someone caused the harm to patients, even when done repeatedly as in the case of Kermit Gosnell. If abortionists were on medical staffs, then there would be better assistance and accountability for the complications they cause.

Abortion clinics are businesses having revenues and expenses, and accounting profits or losses, just as other businesses do. The clinics pay their abortionists for their labor, and there is a supply-and-demand for this labor which depends on the compensation paid. The clinics do not have a constitutional right to cut corners or to use cheaper abortionists. The Louisiana requirement that abortionists be available on a nearby hospital staff means that he could spend time answering for complications from his procedures. Louisiana Act 620 may thereby increase the costs for abortion clinics, but that is not a constitutional defect.

Nothing in the Constitution impedes the authority of Louisiana to reduce cost-shifting by abortion clinics, and to increase availability and accountability for complications which they cause. The holding of *Harris v. McRae*, which rejected any constitutional right to taxpayer-funded abortion, governs here: there is no constitutional right to externalize the cost of abortion

by evading the time, expense, and accountability of dealing with complications.

## ARGUMENT

Without medical staff admitting privileges by their physicians, abortion clinics shift the costs of their complications onto the public. There is no constitutional right for any business to externalize its costs, or obtain cheap labor. Women in particular suffer from this externalization of costs and other cost-cutting by clinics, because the women as patients are then denied benefits such as malpractice insurance which physicians on medical staffs typically carry, as discussed further in Point I below.

Louisiana Act 620 discourages an abortion clinic from dumping its complications on hospitals and its physicians without any accountability for the clinic. This law comports with *Harris v. McRae*, and nothing in the *Whole Woman's Health v. Hellerstedt* decision prevents Louisiana from so acting. Indeed, this Court's ruling in *Hellerstedt* is distinguishable on multiple grounds, as explained in Point II below.

### I. There Is No Constitutional Right for Abortion Clinics to Externalize Their Costs.

Louisiana Act 620 requires abortion clinics to hire physicians who have local hospital medical staff privileges. This may increase the costs of abortion clinics. This may place a few new demands on the time of these physicians to go to the hospital to address complications that he caused.

Prior to Louisiana Act 620, abortion clinics evaded paying for these costs, and instead externalized them onto the public. Other physicians had to handle, at their own and public expense, complications arising from abortions. The abortionists and their clinics immunized themselves from any meaningful involvement or accountability by eschewing hospital medical staff privileges. The patient could not be taken or transferred to a hospital where the abortionist has medical staff privileges, because he did not have privileges ***anywhere*** local. The clinic thereby ensured that it would not be paying for complications, not even the expense of labor, and this improves the clinics' bottom line financially. But there is no constitutional right to any of this cost-shifting.

### A. The Complication Rate from Abortion is Significant, and Costly When It Occurs.

Complications from abortion may be infrequent, but they are costly and sometimes life-threatening when they do occur. "In the most comprehensive look yet at the safety of abortion, researchers at UC San Francisco have concluded that major complications are rare, occurring less than a quarter of a percent of the time [0.23%], ***about the same frequency as colonoscopies***."[3]

Major complications are defined by the study as requiring "hospital admission, surgery or a blood transfusion."[4] The decision below estimated the

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[3] https://www.ucsf.edu/news/2014/12/121781/major-complication-rate-after-abortion-extremely-low-study-shows (viewed Dec. 22, 2019, emphasis added).

[4] *Id.*

number of abortions in Louisiana to be about 10,000 annually (Pet. App. 55a), which is consistent with the figure of 9,920 abortions in Louisiana in 2017 published by the Guttmacher Institute.[5] Based on these data, there would be about 23 ***major*** complications from abortion in Louisiana annually. There may be far more complications from abortion in Louisiana: Petitioners and other clinics admitted that they did not even know how many complications they have caused by their abortions. (Respondent's Br. 11, containing numerous citations to the record)

Major complications are expensive. The average cost of a hospital admission is $22,543.[6] Some hospital admissions cost significantly more. It is easy to see why abortion clinics want to dodge these costs. But it is difficult to understand why there would be any constitutional obstacle to a state requiring abortionists to be available and cooperative in such follow-up care caused by their own complications.

Ambulances are regularly observed taking patients from abortion clinics to hospitals. For example, at the flagship Margaret Sanger Center Planned Parenthood in New York City, five women were sent directly to a nearby hospital from the clinic in less than two months in early 2019.[7] Louisiana Act 620 would ensure that when such emergencies happen, the abortionist can also go to the hospital in order to help treat the victim.

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[5] https://www.guttmacher.org/fact-sheet/state-facts-about-abortion-louisiana (viewed Dec. 22, 2019).

[6] https://www.beckershospitalreview.com/finance/average-cost-per-inpatient-admission-tops-22k.html (viewed Dec. 22, 2019).

[7] https://www.lifesitenews.com/news/5-women-sent-to-hospital-in-less-than-2-months-at-flagship-new-york-planned-parenthood (viewed Dec. 22, 2019).

The maternal mortality rate has increased significantly in the United States over the past quarter-century, despite decreasing in other developed nations over the same time period. "Death from childbirth is unusually common in America." *See* "Exceptionally deadly," *The Economist* (July 18, 2015).[8] The decreasing safety for pregnant women in the United States has made it "international outlier":

> Between 2003 and 2013 [the United States] was one of only eight countries, including Afghanistan and South Sudan, to see its maternal-death rate move in the wrong direction. American women are now more than three times as likely to die from pregnancy-related complications as their counterparts in Britain, the Czech Republic, Germany or Japan.

*Id.* Improper treatment of complications from a prior abortion is a risk factor in placenta previa, which can cause childbirth mortality. *See, e.g.*, Marianne S. Hendricks, Y. H. Chow, B. Bhagavath and Dr. Kuldip Singh, "Previous Cesarean Section and Abortion as Risk Factors for Developing Placenta Previa," 25 *Journal of Obstetrics and Gynaecology Research* 137 (April 1999).[9]

Just as the State can regulate colonoscopies to reduce the harm from its complications, which are infrequent but serious when they occur, the State may

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[8] http://www.economist.com/news/united-states/21657819-death-childbirth-unusually-common-america-exceptionally-deadly (viewed Dec. 22, 2019).

[9] http://onlinelibrary.wiley.com/doi/10.1111/j.1447-0756.1999.tb01136.x/abstract (viewed Dec. 22, 2019).

do likewise with respect to abortion which has an admittedly similar rate of major complications.

### B. Requiring Abortion Clinics to Pay for Their Negative Externalities is Constitutional.

Petitioners argue that clinics will go out of business if, in effect, they cannot externalize these costs. That may be true but it has no constitutional significance, any more than when a polluter which goes out of business because it is no longer allowed to externalize the costs of its pollution. There is no constitutional right for a business to externalize its costs.

"Insisting that landowners internalize the negative externalities of their conduct is a hallmark of responsible land-use policy, and we have long sustained such regulations against constitutional attack." *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 605 (2013) (citing *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926)). *Cf. NFIB v. Sebelius*, 567 U.S. 519, 593 (2012) (Ginsburg, Breyer, Sotomayor, Kagan, JJ., concurring in part) (upholding the constitutionality of the Patient Protection and Affordable Care Act because it reduces "cost-shifting" in connection with health insurance).

"Left unregulated, the emitting or upwind State reaps the benefits of the economic activity causing the pollution without bearing all the costs." *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 495 (2014) (Ginsburg, J.) (citing Revesz, *Federalism and Interstate Environmental Externalities*, 144 U. Pa. L. Rev. 2341, 2343 (1996)). *See also City of L.A. v. Alameda Books*, 535 U.S. 425, 446 (2002) (Kennedy, J., concurring) ("[M]any enterprises … cause

undesirable externalities. Factories, for example, may cause pollution, so a city may seek to reduce the cost of that externality by restricting factories to areas far from residential neighborhoods.").

The judicially created right to an abortion is not a right for the abortion industry to shift its full costs of complications onto the public. There is no right to a cheap abortion, an unsafe abortion, or an abortion for which complications are paid by the public. There is no right to an abortion without compliance with the same rules which apply to other surgeries performed outside of a hospital.

Simply put, abortion clinics do not have a constitutional right to run their businesses in way contrary to norms of medical practice. "The vast majority of family physician/general practitioners in direct patient care in an office based setting have hospital admission privileges in one or more hospitals." Clinton C, Schmittling G, Stern TL, Black RR, "Hospital privileges for family physicians: a national study of office based members of the American Academy of Family physicians," 13 *J. Fam. Pract*. 361 (Sept. 1981).[10] Abortion clinics have no right to externalize the costs of their own complications onto the public by evading hospital privileges commonly held by physicians in other clinics.

[10] http://www.ncbi.nlm.nih.gov/pubmed/7276846 (viewed Dec. 22, 2019).

### C. The Beneficial Effect of Requiring Malpractice Insurance Justifies Louisiana Act 620.

Hospitals typically require that physicians carry malpractice insurance as a condition of being on the medical staff, for the protection of patients who are injured by negligence. Bruce Japsen, "Doctors risk practicing without costly insurance; Some roll dice on huge lawsuit judgments rather than face certainty of huge malpractice bills," *Chicago Tribune* C1 (March 18, 2004) (observing that it is "a common requirement that doctors maintain malpractice coverage as a prerequisite for serving on staff" at a hospital).

By eschewing medical staff privileges, abortion clinics evade the costs of malpractice insurance, to the detriment of patients who have complications. Abortion clinics themselves usually do not require their abortionists to carry any malpractice insurance, in contrast with hospital requirements. *See, e.g.*, Eyal Press, "A Botched Operation," *The New Yorker* (Feb. 3, 2014) (an abortion victim's attorney discovered that the physician lacked malpractice insurance, despite his sworn statement affirming otherwise).[11]

## II. *Whole Women's Health v. Hellerstedt* Does Not Preclude Louisiana Act 620.

*Harris v. McRae* established that there is no constitutional right to taxpayer funding of abortion. 448 U.S. 297 (1980). By implication this includes complications from abortion. Economically, Louisiana Act 620 comports with *Harris v. McRae* by limiting the

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[11] http://www.newyorker.com/magazine/2014/02/03/a-botched-operation (viewed Dec. 26, 2019).

tendency of abortion clinics to shift the costs of their complications onto the public.

As held in *Harris v. McRae*:

> Although the liberty protected by the Due Process Clause affords protection against unwarranted government interference with freedom of choice in the context of certain personal decisions, ***it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom***. To hold otherwise would mark a drastic change in our understanding of the Constitution.

448 U.S. at 317-18 (emphasis added). Yet Petitioners seek a constitutional entitlement to avoid the costs associated with becoming available on a medical staff to handle complications from their own abortion services. There is no constitutional right under *Harris v. McRae* or any other precedent of this Court for a business to dodge its own costs this way.

This Court did not hold otherwise in *Whole Women's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). The decision by the majority there did not address whether the alleged closure of abortion clinics was due to the removal of an economic benefit to which the clinics had no constitutional entitlement. The decision emphasized the rate of complications without addressing the costs of those complications when they do occur. The majority decision there did not cite *Harris v. McRae*.

The primary argument by Petitioners here is that abortion clinics would close if Louisiana Act 620 went into effect. But Petitioners fail to meet their burden of proving the economic reasons for such closures, and

thus never satisfy their burden of showing a constitutional violation. Merely asserting that clinics will not stay open provides insufficient information as to the economics of their business. Under *Harris v. McRae,* there is no constitutional right for abortion clinics or abortionists to stay in business. 448 U.S. at 317-18. Likewise, there cannot be any right for abortion clinics to shift the cost of their complications.

In economic terms, Louisiana Act 620 requires abortion clinics to stop externalizing all of the costs of complications from their procedures. This law may add to abortion clinics' expenses, but does not implicate any constitutional rights. Under Louisiana Act 620, abortion clinics will no longer be able to use only the cheapest abortionists who lack medical staff privileges. Instead, abortion clinics will need to pay more for abortionists, and to bear some of the costs of their complications. If this causes abortion clinics to go out of business, then it would only because they lack revenue to offset those higher expenses. *Harris v. McRae* remains good law that revenue shortfalls for abortion clinics is not a constitutional issue.

Put another way, there is no constitutional right of an abortion clinic to stay in business when its revenue does not sustain its labor costs for hiring quality physicians as abortionists. Petitioners seek to bypass the well-established holding of *Harris v. McRae*, but nothing in *Hellerstedt* supports circumventing the longstanding principle that there is no constitutional right to force the public to support abortion, in this case by paying all the costs for complications.

*Hellerstedt* did not address the advantages of the self-enforcing mechanism in Louisiana Act 620, in contrast with the taxpayer-funded state inspection

process relied on in *Hellerstedt*. Under Louisiana Act 620, an abortion clinic can simply be required to report whether its abortionists have local hospital medical staff privileges, at no expense to the State or its taxpayers. Under the alternative approach relied upon in *Hellerstedt* in addressing the Kermit Gosnell issue, the majority endorsed an approach of costly state inspections of abortion facilities, which may not even catch substandard care. *Hellerstedt*, 136 S. Ct. at 2313-14. Such state inspections could only occur at taxpayer expense, a burden on taxpayers which *Harris v. McRae* does not require. *Hellerstedt* did not purport to overturn *Harris*, and laws which promote quality of care are not invalid because alternative approaches more costly to taxpayers are available.

Finally, there are significant differences between medical care in Louisiana and Texas. Louisiana has a much higher rate of infant mortality, at 7.1 per 1,000 childbirths, compared with only 5.9 per 1,000 in Texas.[12] Maternal mortality in Louisiana is also very high: 44.8 deaths per 100,000 live births, the fourth highest in the nation.[13] "You see areas of the country where access to a broad range of health care is either lacking or where great disparities exist," said Megan Donovan, a senior policy manager at the abortion industry-supported Guttmacher Institute.[14] Louisiana is also a much smaller state geographically than Texas, which renders the geographic-based population analysis in *Hellerstedt* inapplicable here.

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[12] https://www.nbcnews.com/health/womens-health/states-pushing-abortion-bans-have-higher-infant-mortality-rates-n1008481 (viewed Dec. 22, 2019).

[13] *Id.*

[14] *Id.*

136 S. Ct. at 2302, 2313 (emphasizing the existence in Texas of a large population "more than 200 miles from [an abortion] provider").

The "great disparities" in available medical care in the United States, as recognized by the abortion industry itself, prevents an automatic application of a ruling for a wealthy, vast state like Texas to apply automatically to a much smaller state which has a record of inadequate care for pregnant women, like Louisiana. The ruling in *Hellerstedt* with respect to Texas does not preclude the constitutionality of beneficial legislation in Louisiana, namely its Act 620.

## CONCLUSION

For the foregoing reasons and those stated by Respondent and other *amicus* briefs in support, the decision below by the court of appeals should be affirmed with respect to upholding Louisiana Act 620.

Respectfully submitted,

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Dated: December 27, 2019